

**Water Planning and Growth and Exempt Wells**  
**Working Document for Discussion Purposes Only<sup>1</sup>**  
**Updated 2.23.2024**

**Problem Statement**

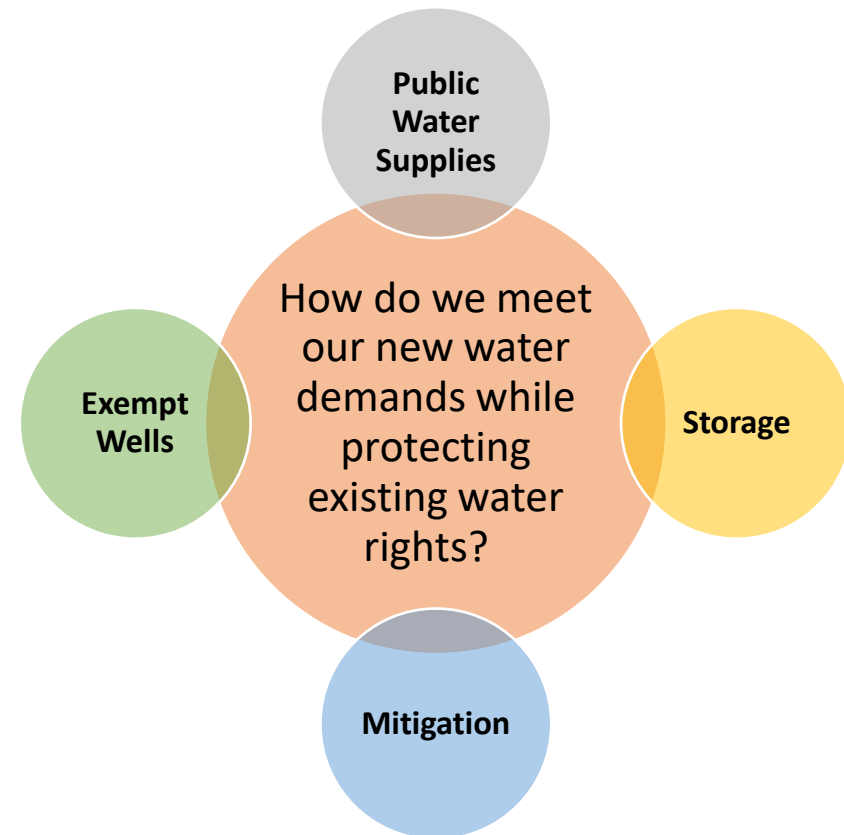
- Montana is challenged in our ability to meet new water demands, with a limited supply. We do not want to cause an adverse effect to existing water rights and watershed function/our water resources.

**Goals**

- Protect water resources existing water rights.
- Develop new-holistic policy solutions that address:
  - changing water needs
  - increase demand
  - decrease supply
  - changes in the timing of need and use
  - new and existing needs for water

**Values**

- Equity- equal access to process
- Fairness (recognizing prior appropriations)
- Consistency
- Transparency
- Timely
- Maintain culture/tradition of Montana & incorporate growth
- Coordination of multiple regulatory agency authorities



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<sup>1</sup> This document captures the problems, goals, values, and needs to frame the conversation around how Montana is going to meet its changing water needs. These problems, goals, values, and needs are not specific to a particular outcome or policy but will be used to assess the holistic suite of policy options that this group will be exploring and recommending. This document also captures the potential solutions developed by working group members to date.

1. SOLUTION: EXCEPTIONS TO THE PERMITTING PROCESS (CHALLENGE/PROBLEM, FOCUS, AND STATEWIDE AREAS)

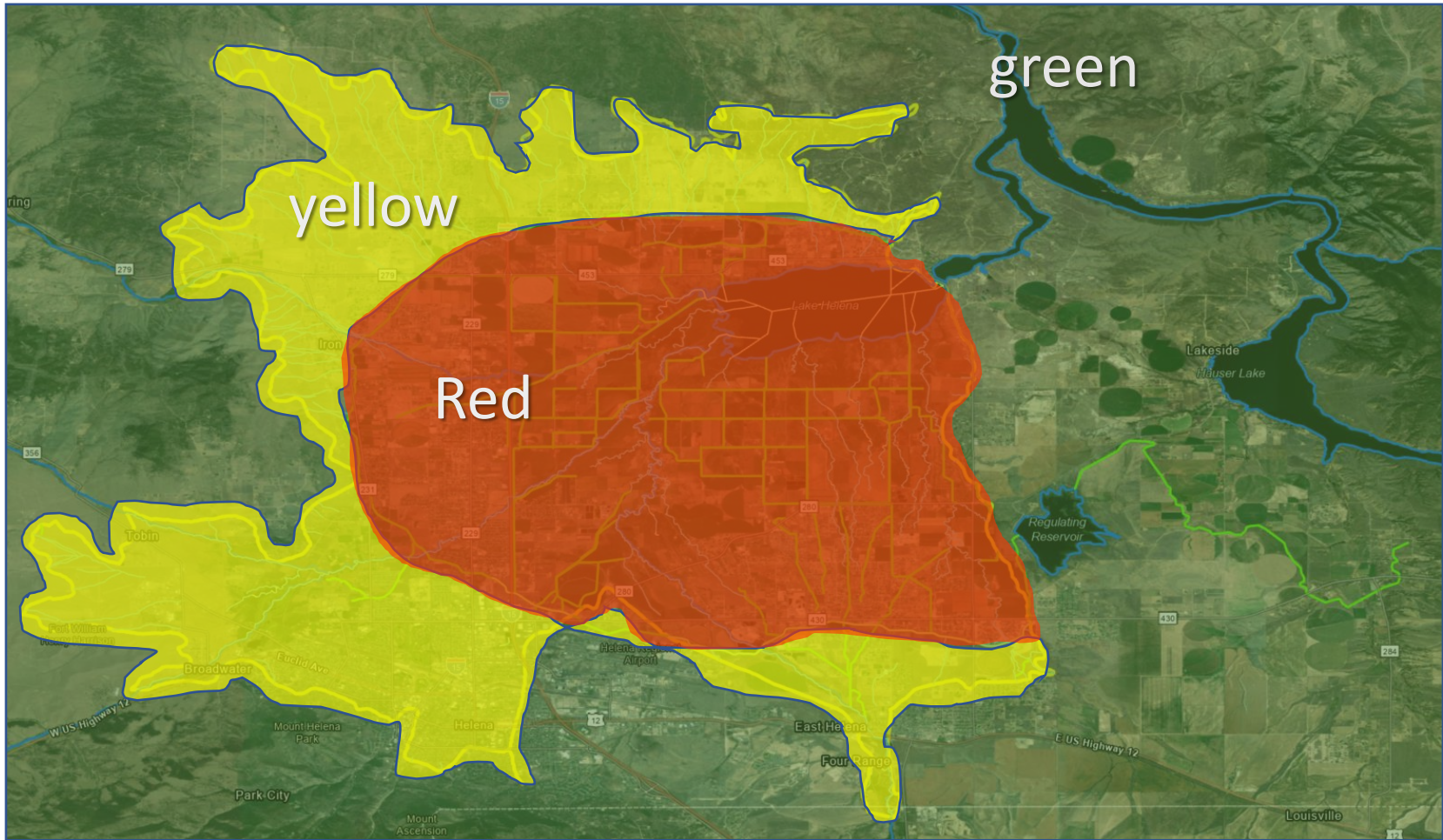


Figure 1: Example of non-focus, focus, and challenge/problem areas

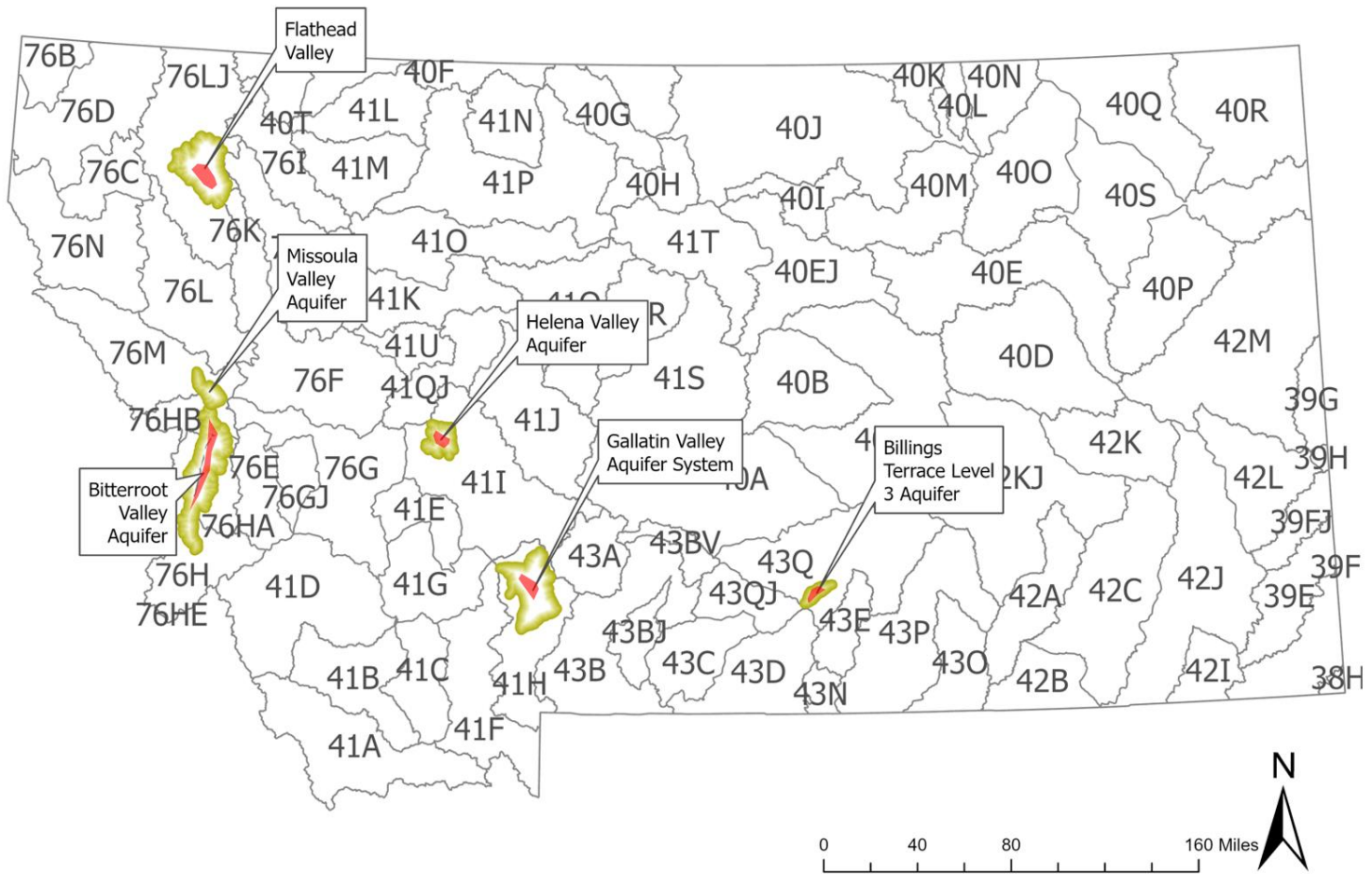


Figure 2: Location of focus areas

## Critical GW Areas (Red)- CGWA (existing problem)

1. Metering & measurement requirements
  - Everything new water right is metered (replacement wells do need to be metered)
  - Coordination with cities and counties for metering
  - **Action:** define what are the data that needs to be included to be helpful
    - Timing and what is needed
    - Ways to automate to reduce costs
    - Wells- transducer data to tell water level (help people to make decisions)
  - **Action:** public access in the database, new data, responsible, maintained, usable
  - **Action:** mechanism to notification when certain thresholds are close to exceedance.
  - **Action:** implementation data earlier so there is not a glut
2. No new exempt wells & GW development, must permitting process or hook up to public water and sewer (Yes- to all other exceptions (e.g., fire))
  - This does not apply to replacement wells.
  - Concern for how is this going to work for stock needs- are there any policy tools that are available? **Action:** thoughts
  - Size of the parcel consideration **action:** thoughts
3. Exigent circumstances:
  - **Action:** define what type of exigent circumstances should be included
    - Have the exigent circumstances be place defined & limited (not a statewide policy)
    - Court ordered divisions of land
    - City looking to annex, but eminent domain challenges (is this in the public right away)
    - Impossible to get mitigation
    - Don't want to create a different exception
4. Enforcement requirements
  - DNRC money to do this- what does it look like? Resource limited. Burden shift to litigate.
  - Does this mean that we are shutting people off?
  - **Action:** define

**Criteria and Studies** **Action:** DNRC define

### Temporary CGW Areas (Yellow) –85-2-506 (6) (potential problem- high density of exempt wells & projected growth)

1. Metering & measurement requirements
2. Study
3. Could turn to red or green based on studies
4. Reduce the amount of appropriation
5. Incentive packages
  - Funding for Public Water and Sewer
  - Funding storage
  - Mitigation

### Statewide (green)

1. New water rights metering & measurement requirements
  - What is the return on investment? Don't want to miss the opportunity to be proactive.
  - The criteria for metering and measurement can look different for red vs green
  - **Action:** See above for needs associated with metering and measurement needs
2. Status quo for exempt wells
  - Address phased development loophole and combined appropriation challenges (HCH will help shape)
3. DNRC standards: consider reducing volumes down to what is reasonable and necessary for all water uses (e.g., 1AF/household) (apply everywhere) (DNRC rule change)
  - **Action:**
4. Enforcement requirements

### Questions:

- When does DNRC vs local petition; Correct and complete petition; who does the science?
  - o **Action:** requirement for DNRC to do the science to help local water users.
- When does DNRC have to adopt rules, don't let politics get involved?

- **Action:** Statutory change for when the criteria are met, DNRC must adopt CGWA
- Could establish these CGWAs for the five focus areas in statute
  - **Action:** define
- Does 85-2-506 and 508 need to change?
  - **Action:** To be aligned with quantity?
- Timing:
  - Want to start with the five first; DNRC do this with existing law today.
  - Focus on the red- decide how big to go to the yellow.
  - Other parts of the state- local petition process & DNRC
- Science:
  - Devil is in the details on the data needed for the CGWAs
  - Criteria is going to be important
- Burden shifting problem-
  - Water users' responsibility to prove that the developer is causing harm (statewide/green)- who is responsible to collect the data?
- Concern that we set areas just based on legal availability limitations. Should only be looking at GW physical availability. Would like to change what hydropower water rights are entitled to.
  - TU decision on conjunctive management
  - Only looking at physical availability would lead to protracted litigation
- Use Temporary CGWAs (6)(e) as a tool for funding
  - Use for studies and funding; unlock pots of money – storage, study, planning.



## 2. SOLUTION: PUBLIC WATER SUPPLIES (IN FOCUS/PROBLEM AREAS)

### Context:

- Developers are incentivized to use more centralized services (public water and sewer) over individual wells and septic systems.
- Types of PWS: Municipal & County water and sewer
- Addresses both water quality and quantity
- Where: “Focus areas- problem areas”

### 2.1 Policy changes:

- **Action:** Brian, Ryan, Nate, Spencer (met on 1/5/24; next steps- summary of discussion; present ideas to main working group in February)
  - Change 85-2-402 or new statute (2025) and rule change (e.g., 36.12.1902)
- **How to make it easier for cities to grow into their water rights and systems? (statewide challenge)**
  - Hooking into the system is already the developer’s first choice – barriers like service areas, DEQ public water supply restrictions, limitations in wet water, make it difficult for municipalities to actually add subdivisions to the system
- **Water available (DNRC) challenges for municipalities and large water systems-**
  - Ability for cities to grow into the water decreed or permitted and not have incremental changes needed.
  - When cities need more water
    - Some public water systems do not have any additional supply, how to deal with this?
    - Adverse effect at the basin scale and irrigation conversion (consumptive use); What is historic use for a municipality for a change?
    - Mitigation Challenge: for the city to serve the development, mitigation plan is not working, HCU- location requirements mitigation, mitigation standards are too high. (zone of impacts?)
  - Policies related to irrigation salvage water prevent municipalities from getting the benefit of implementing efficiencies
    - Service areas/water rights need volume limitations. Ability to annex
    - Cut out going through change application or municipal service areas to be recognized.
    - The adverse effect analysis when the area is expanded by pipe
    - Determination when you don’t have to go through a change

### 2.2 Measurement:

- **Action:** SWG needs to further define this
- Requirement for water measurement for any municipal system

### 2.3 Water Quality & Quantity permitting Incentives:

- **Action:** DEQ/DNRC review & generate ideas
  - i. (likely rule/Statute change; low hanging fruit & 2027 session)
- **Flow rate and volume quality (DEQ):**

- i. Permitting review, subdivision review process, concurrent review
- ii. Statute- have to have discharge permit in hand for a water right permit
- iii. Timing of permitting between DNRC and DEQ. Requirement for developers meet with DNRC and DEQ prior to preliminary plat approval (county planning); help developers understand the water quality/quantity planning (is this a county requirement).
- iv. Mitigation plan and DEQ changes amount of water treated; larger flow rate needed for entire system; discharge for mitigation, then the nutrient water quality std changes, then no longer have mitigation and discharge will have to be taken out of river
- v. There are infrastructure needs to divert, treat and transmit that water to end users. E.g., treatment plan capacity limitation. Need additional sources of supply to meet the capacity needs.
- vi. Disconnect between water rights permits and water quality std. change method of effluent treatment, land apply, water right does not allow them to do that (communication between DNRC and DEQ on limitations of wastewater use).

#### 2.4 Funding incentives:

- **ACTION:** Kelly, Mark, Clayton, Anna develop funding package (funding/statute change 2025)
- Cost of hooking up to PWS for the developer, passed on to end users, affordability challenges.
  - Impact fees – paid to municipalities for capacity expanding improvements (e.g., master plans, water mains, sewer collection pipes, stormwater)
  - Local/developer share of infrastructure cost- cost of extending water and sewer to development to meet minimum standards
    - Late comer fees- if developer does extensions in a place or at a size that serves future development
  - Pay your way for water fee- Municipality runs out of water, cost to get it (water right in hand or cost to get more)
    - Infrastructure to serv municipalities
  - Updates to growth/cities plans (municipality bears cost)
- Sources of funds that can be used to offset/structured approach for developers to rely upon
  - Special improvement districts- you build streets, water and sewer, parks, creates a district around this development, people who by that property, that cost is on their property tax. can impact fees be rolled into these?
  - Special purpose districts- for improvement in services, generally city wide, not generally counties, set up an assessment fee. Create city wide districts. Pays for infrastructure.
  - Tax increment financing – urban/industrial develop districts. Tax snapshot of the tax value, any increase in taxes goes to the district for ~15 years, then do a bond for big infrastructure improvement. Specific to urban renewal district.
  - Targeted economic district- generally in counties,
  - Influx from state government- new program influx of HB2 (e.g., 355), MCEP- difficult for big communities to get.
  - Board of investments- impact fee loan program, buy down interest rate on developer’s capitol to make affordable house pencil out
  - Bonding and levee by cities for infrastructure



### 3. SOLUTION: WATER STORAGE & REGIONAL WATER STORAGE (FOCUS AREAS/STATEWIDE)

#### Context:

- Stop blowing water out of the bottom; we need to keep water from leaving the state enhancing availability
- Implementation-State Water projects 2.0 to take this on.
- Suite of storage tools:
  - Opportunity to store high spring flow water; different color of water
  - Groundwater, aquifer recharge, Storage and Recovery
    - Recharge aquifer using surface water in priority to fill a mitigation bank serving a defined geographic area
    - Aquifer storage and recovery model - class 3 injection well - meets standards (WA state does this)
  - New storage
    - Not new big projects.
    - Old model of relying on feds to spearhead large projects untenable now due to magnitude of environmental assessments and other roadblocks (this needs to be a funding consideration/awareness)
  - Small scale storage, such as former gravel pits, Impoundments
  - Building on existing storage; first priority to increase functionality of existing facilities.
  - Rainwater harvesting
  - Use exiting storage & contracting:
    - Regional storage
    - Contracting for existing storage (Federal and State). Opportunity for DNRC to pre-load contracting out of canyon ferry for use
  - Natural storage:
    - Wetlands and undeveloped or agricultural riparian areas where floodwaters can spread out and recharge aquifers
    - Flooding easements. Allow flooding to occur and reimburse.
  - Pre-capture water
    - on big projects so we are not paying to pipe back upstream (policy question)
  - Ditches:
    - Ditch companies selling shares to HOAs or subdivisions
    - Incentivizing ditch companies and irrigators to keep water flowing through (leaky) ditches that recharge “man-made” aquifers such as West Billings
    - Infiltration gallery - Irrigator takes an acre, digs a pit. Some lined, some not. Staying out of ground water.

### 3.1 Policy changes (statewide):

- vii. How do we address ownership/allocation of new and existing stored water? Want all use type to access and use storage. GW ownership is more difficult. Other states have statutory provisions on control of GW (e.g., Colorado)
  - i. **Action:** [Aquifer Storage Dominion and Control colorado.docx](#)
- viii. DNRC SWP challenges: Need to explore limitation in federal law, SWP limitations for the type of uses. Want to have broad access for users. Don't want to impact agriculture reliance on storage, but opportunities to expand. Are the statutes what we want today?
  - i. **Action:** DNRC is reviewing SWP limitations.
- ix. Service area limitations for storage and when a change is required.
  - i. **Action:** DNRC will provide information document
- x. Natural storage (e.g., BDA), control of GW source? Who owns that water? Do you have to file a changes?
  - i. **Action:** DNRC: [Stream Wetland Restoration Water Right Guidance - Final - 04-2016.pdf](#)
  - ii. **Future action:** is a policy change needed?
- xi. Policy options to transfer federal contracts to the state for mitigation (hungry horse, Canyon ferry) existing transferred to the state for mitigation or take on the facility.
  - i. Can the state approach federal facilities for contracting for mitigation?
  - ii. Transfer federal facilities to the state? *Reframe to federal sharing of water for mitigation*
  - iii. **Action:** *is this something the working group wants to focus on? Not likely for the working group. Is this a conversation between the state and the feds; not likely something for this working group; what legal purposes does federally stored water have?*
- xii.
- xiii. Existing storage policy does not allow secondary use of a water right (e.g., irrigation) as storage (e.g., for an infiltration gallery). Review the marketing for mitigation; mitigation; water for sale statutes (see below)
  - i. E.g., Irrigation districts/ditch companies ability to store water; Is it ok to let them skip the change process for water storage?
  - ii. **Action:** *what is the action here? Not a priority for 2025 session*
- xiv. Do we need policy to allow for off stream bucket to hold for a period of time for later use (e.g., a bulge in the system)
  - i. Should you have to go through the change to do this? Should it be easier to do this? Don't have the Historic use analysis?
  - ii. SWP vs User associations vs private vs Municipality (don't need a change for tank).
  - iii. **Action:** *what is the action here? Not a priority for 2025 – analysis needed – who will be impacted?*
- xv. Basin closure and ability to create storage- high spring flow exceptions
  - i. High spring flows availability in the focus areas and closed basins; major rivers
  - ii. Legal availability analysis for storage and new water. Trigger flows/exceedance probabilities used

*Science experiment; collecting data that would allow capture of high spring flows and under what conditions without adverse effect on other water users; what can we actually capture?; subworking group would like to continue discussion about data collection; goes back to measurement discussion  
good data needed for valid conversation - not for this legislative session*

- xvi. Other states have a storage water substitute provision (between storage facilities, and between types of rights); trans basin swaps. You need a working measurement and reporting system first
  - i. **Action:** future action? *Subworking group - Not sure what this is...Ryan?*
- xvii. Definition of aquifer recharge: Drought plan “DNRC should use its Comprehensive Water Review process to explore broadening the definition of “aquifer recharge” (§ 85-2-102(3), MCA) to clearly authorize recharge as a standalone use, outside of mitigation or marketing for mitigation.”
- xviii. Additional definitions needed: Dept policy on contracting language for marketing for mitigation – contract law – you can’t contract to yourself; does the contract language apply to marketing for mitigation?
  - i. **Action:** *who is on first? Julie and Nate*

### 3.2 Funding Incentives

- xix. **ACTION:** (Clayton, APS, Mark) informal conversation with WPIC members on funding proposal and needs and how to move forward and participate on the WPIC panel
- xx. **Action:** DNRC Pull other states on their funding models and support of feasibility studies
  - i. Conversation around what are efforts that should be for grants, loans, incentives for private entities, direct appropriation?
- xxi. Feasibility:
  - i. Identify opportunity potential: new storage generally, previous studies, trust lands, SWP for new storage & building on existing storage
  - ii. Identify the barriers to implementation: land use, land availability, physical/operational constraints around existing storage, legal/policy constraints; Water physical and legal availability analysis needed.
  - iii. High spring flow analysis is needed in key drainages.
- xxii. Pilots
  - i. Pilot- Ditch companies for feasibility to do aquifer recharge with irrigation
  - ii. Aquifer studies – No full aquifer studies have been completed for 5 focus aquifers; however, numerous partial aquifer studies exist as a starting point
  - iii. Potential Groundwater Storage locations need to be identified
- xxiii. Studies & science needed
  - i. SWAMP (MBMG), DNRC funding for data and information

- ii. Science around when and how you create groundwater storage, what quantity is available for extraction and when and where it may show up.
  - iii. Missing technical expertise to implement ASR.
- xxiv. Existing facilities
  - i. SWP existing infrastructure Need stable funding and FTE for existing storage facilities DNRC State Water Project
  - ii. Funding for private facilities to maintain what we have
- xxv. Infrastructure:
  - i. Funding for new and building on infrastructure

## 4. SOLUTION: MITIGATION

### Challenge:

- Access to mitigation water is a challenge
- Having mitigation plans that can demonstrate that are effective, not creating adverse effect, timing, location, amount, and priority date requirements are too high of a bar.
- **Action:** ?

### Solutions:

- 2023 Stakeholder Working Group focus:
  - Potential change to "Aquifer recharge" in MCA 85-2-102 to include groundwater; definition of mitigation
  - Reviewing policy manuals for clarity and updates (DNRC and Julie)
- Beyond 2025:
- There are a suite of options: Julie spreadsheet: [List of mitigation statutes rules etc.xlsx](#)
- Policy changes and address the policy gaps on time/location/amount/priority of adverse effect & mitigation requirements
  - Defining geographic extents for mitigation zones given GW/SW interactions
  - As under adverse effect, are instances where more flexibility in timing and location needed?
  - Challenges with changing seasonal irrigation rights to year-round municipal
  - Reliable solution for other people, surface water mitigation, going through change process to do that isn't going to be practical
- Policy changes for marketing for mitigation
  - Strike contract language.
  - Cannot market to yourself
  - Divert water when in priority and put it in the ground "Prospective" mitigation (contrast with reactive)
- Create a bank of water for future permits to draw from for mitigation
  - Water users need the ability to object - guarantee or insurance that you get that water back if you share the water amount with neighbor on your off year
- Data and science:
  - Water measurement requirements for mitigation.
  - Need to know who is in priority on any given date.
  - Build on the depletion analysis discussions from last SWG
- DNRC depletion & return flow analysis
  - Building on the last SWG technical conversation

## 5. Parking Lot (on hold)

- Change process: Historic consumptive use conversation; wet water vs paper water. Do we want to change it? Land use has changed, but that water still sit on the books. Nonuse? How can use that water, without haircut.
  - i. Remote sensing to get a better consumptive number
  - ii. Look-back period change?
  - iii. Need for accurate wet water use on paper
  - iv. Calculation of consumed water (Remote sensing)
- Are there things in the policy basket that agriculture/conservation wants to see move forward?
  - i. Leasing
- Adverse effect definition.
  - i. Return flows that takes current use into consideration
  - ii. Are instances where more flexibility in timing and location needed?
  - iii. Waiver of adverse effect. look at other state models.
- Enforcement
  - i. What policy questions are being asked here on illegal use vs. Commissioners powers via statute?
- Transfer water from historic ag to municipal uses. Challenging in closed basins
- Legal and physical availability
- How do you go through the change process
- Claims that don't have a decreed volume - without using historic consumptive use
- Going through change, is doing something different. Other users on that source aren't changing anything. Consumptive use analysis
- **Enforcement of property rights**
  - i. 'unties' DNRC's hands
  - ii. Advancing science of small storage
  - iii. Working with individual producers who have access, or using state land
  - iv. Reframe from few massive structures to many small ones
- **Bring Back Waiver of Adverse Effect and Temporary Leasing Statute**
  - i. Need to get information out to people who don't understand the limitations of exempt wells
- **Education & Outreach**
- **Weather modification**
  - i. Feasibility study just contracted with NCAR; next step would be a potential pilot project if feasibility modeling demonstrates promise in MT