



Comprehensive Water Review

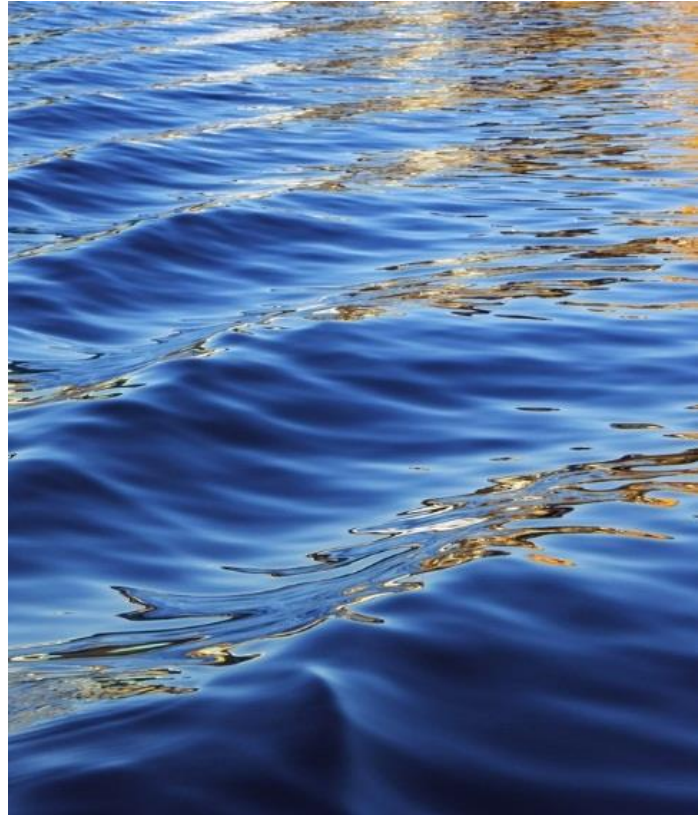
8.19.2024





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

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

Bill Summary:

- **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**).

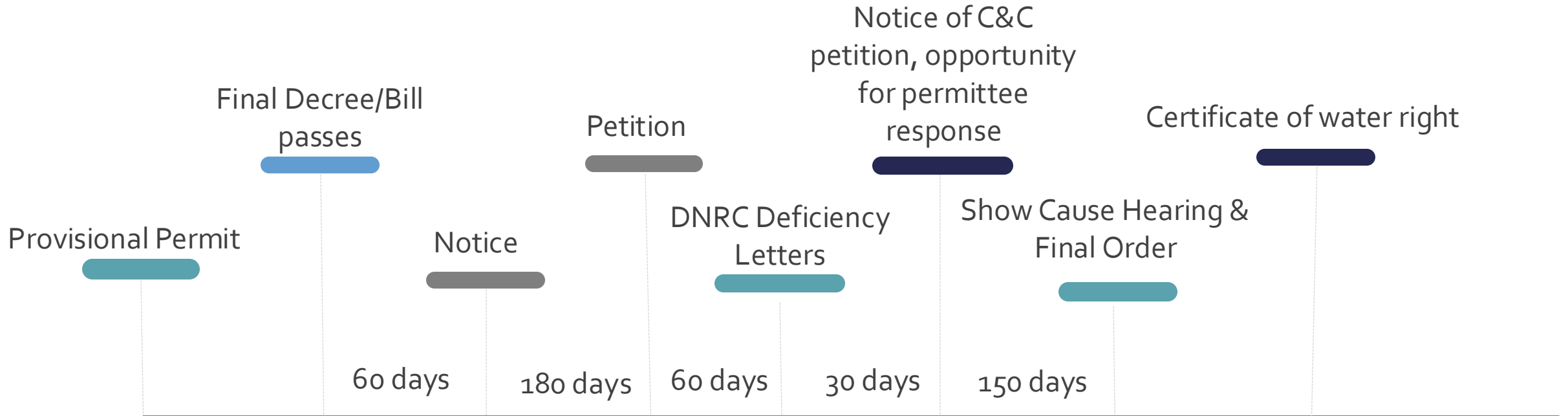
Bill 2: Provisional Permits and Changes Reconciliation

Update:

- Still working on what process looks like to allow verification of change prior to FD but not issue certificate until after FD
- If an existing water right was not modified by FD or if provisional permit was not modified under 313, and there is a change on the right, probably don't need to notice those water right owners of the change reconciliation process because there will be no need to reconcile their changes.

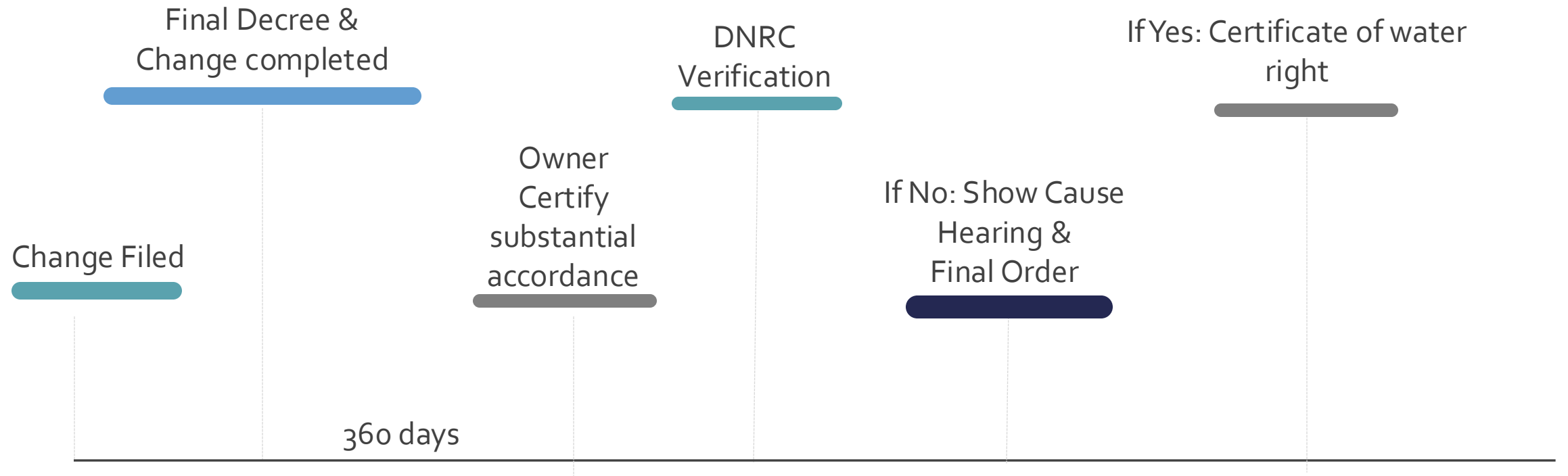
Provisional Permits

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 on Claims Version

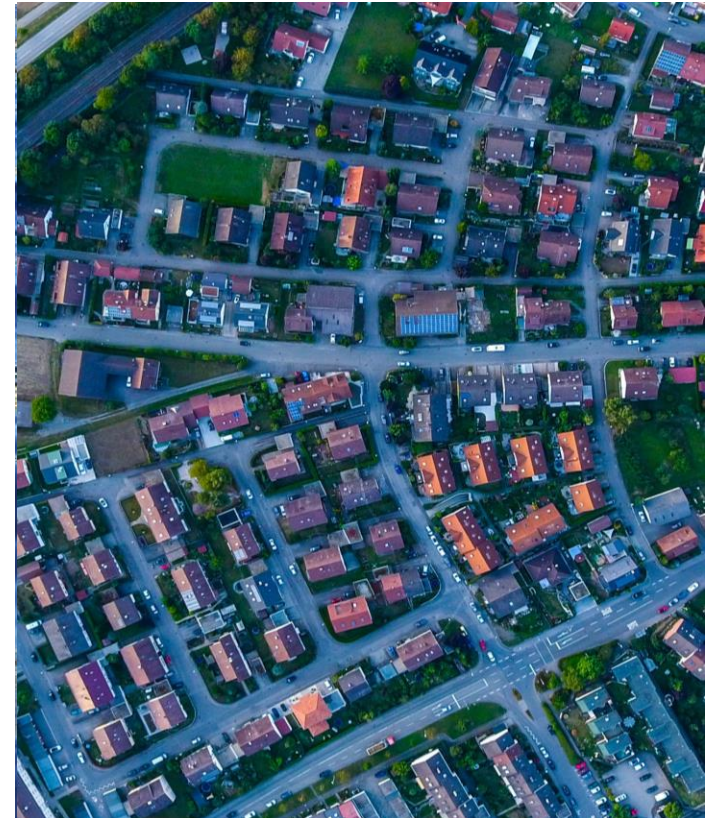
1. Accordance with the terms of the application
2. Accordance with the final decree





Planning, growth and exempt wells

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



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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

Bill 3: Waiver of adverse effect

Bill Summary:

- 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
- Legal availability and adverse effect are separate criteria and are evaluated differently. Adverse effect waiver is effectively limited to use in changes because it does not allow us to disregard issues with legal availability
- Groundwater in closed basins 85-2-360(3)(b): dept can't consider net depletion as AE to right that has a waiver
 - Doesn't mean we don't look at that right for legal availability-creates potential that we say no AE but there could still a legal availability issue and we would deny the permit/require mitigation.

Bill 3: Waiver of adverse effect decision points

Decision points:

1. Recommendation was made that for decree enforcement and administration purposes, the waiver form should be attached to the water right record in WRIS, effect the title of the water right to the extent the waiver effectively subordinates to the permit, and the waiver must attach to the water right title and transfer to new owners.
2. How far does the waiver go? Does it prevent someone from making call in the future if they waive AE on a right?
3. Is it the intent of the SWG to have this bill allow someone to waive a right from being part of the legal availability criteria analysis?

Bill 4: Streamline Change

Bill Summary:

- Breaks out existing exceptions to full change process from 85-2-402 into new section (mirrors what 306 does with permits)
- 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
- Creates exception for adding stock tanks to stockwater right
- Creates simplified process for expanding POU (service area) for municipalities and county water/sewer districts
- Allows for objections to replacement wells, replacement POD, municipal POU, Stock tanks

Bill 4: Streamline Change

Decision points:

1. Everyone comfortable with **stock tanks**?
2. **Replacement wells**: proximity requirement 50' vs something else
3. **Municipal change**: concern about the potential for an increase in consumptive use.
 - Option 2 limits expanded POU to unperfected permits or water reservations. Neither of these should have consumptive use limitations applied to them.
4. **Municipal change**: should municipalities get to expand their POU if they are not annexing?
5. **Replacement Well, Replacement POD, Stock tanks, Municipal change**: How does DNRC analyze adverse effect if objection received for application under streamlined change
 - As drafted, DNRC doesn't analyze: Up to water right owner to defend if objection received and it goes to a contested case hearing ([New Section](8)(b))
 - Goal of sideboards in each section is that they should be enough to ensure no adverse effects
 - This is consistent with current exceptions to change process in -402 (replacement POD), -306 (stockwater permit), -102(7)(b) (change in irrigation method) doesn't even allow for objections
6. **Irrigation**: Should there be an irrigation exception following the same limitations/parameters as cities?

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



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Exempt Wells

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



Bill 5: Coordination and notice of intent for exempt wells

Bill summary:

1. Provide for coordination between DNRC, DEQ, and County when someone is subdividing land or removing sanitary restrictions from a parcel
2. Provide clarity on each agency's role and authority
3. Provide for water rights notice to potential buyers through recorded documents (title search)
4. Create a Notice of Intent to Appropriate for exempt wells
 - Process not changing, just the timing
 - Allows certainty before investment of infrastructure (subdivision, individual well, stock)

Bill 5: Coordination and notice of intent for exempt wells

Decision points:

1. Water right application process and when should a subdivision be approved by local government?
 - 76-3-608 (6)(b)(i): This language means that a subdivision that plans to apply for a permit (and, most likely, a mitigation change application) must have this process completely done before they can even start the subdivision process.
2. 76-3-608 (6)(b)(ii): What is DNRC determining when it makes a determination of adequate water rights or approval of intent to appropriate?
 - Water rights match water needs of the planned development. Determination is made when request received under [New Section] Proof of adequate water rights pursuant to Sanitation and Platting act.
3. 76-3-622(1)(f): when is it appropriate for a request to be submitted to DNRC?
4. Other issues raised about county processes
5. Notice of intent: concerns?

Bill 6: Exempt wells

Concepts:

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, bill statewide.

Bill 6: Exempt Wells

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

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 would fall under this category because 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

Comparison table

Acreage	Up to acre-foot			
	Two Path Option (not subdividing)	Two Path Option (subdividing)	Spacing Guidance	Post HCH- Combined Appropriation
30 acre	10 AF	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
640 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

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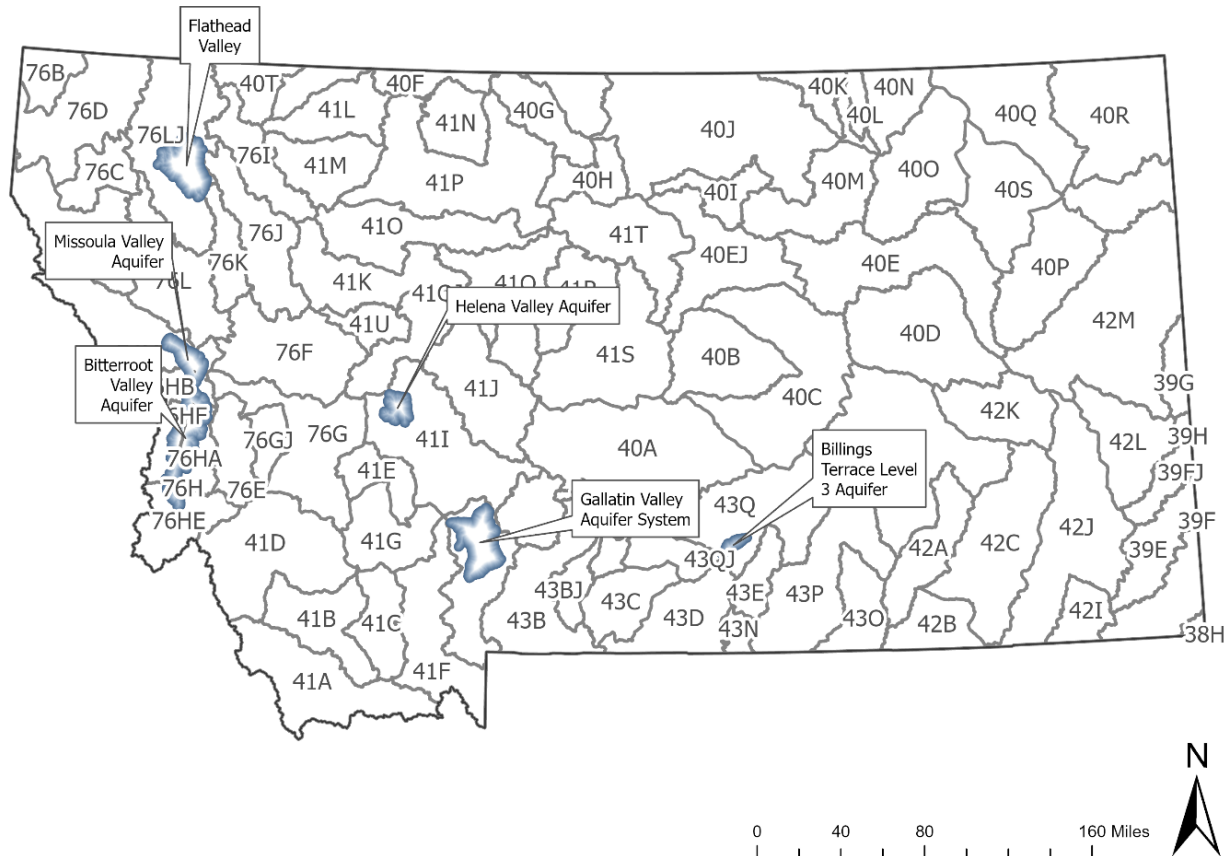
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10 AF, what does that mean?

- 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 $\frac{1}{4}$ 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

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

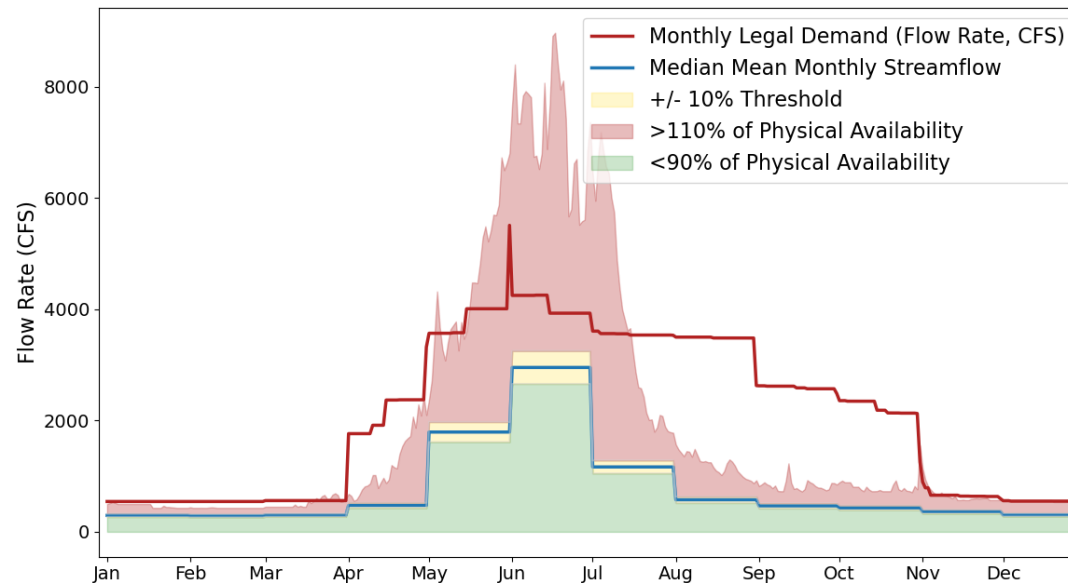
Criteria 1: Groundwater Physical Availability

	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	<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

	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 <i>within 10% above or below</i> the physical availability for any month	Legal demand of surface water on connected sources <i>exceeds 10%</i> 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.

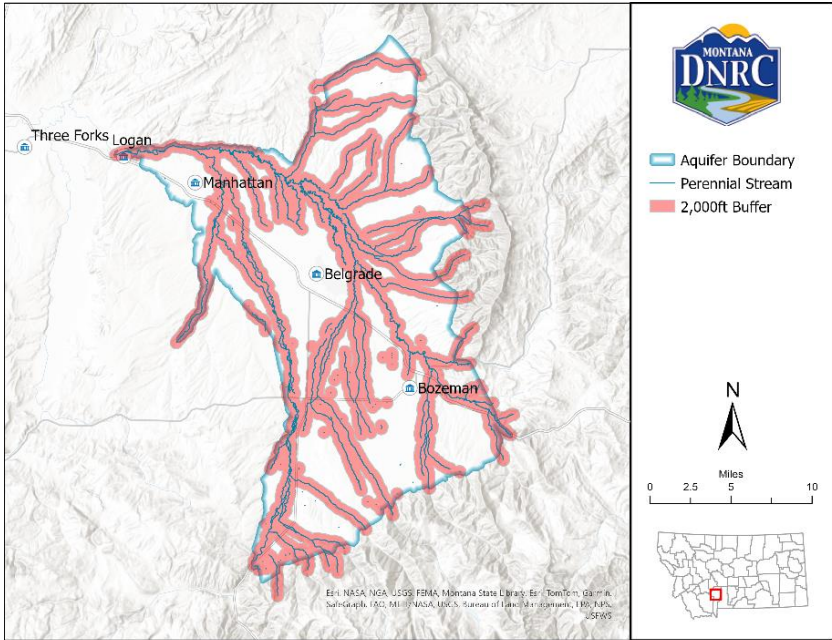
DNRC Boundary recommendation

Options were:

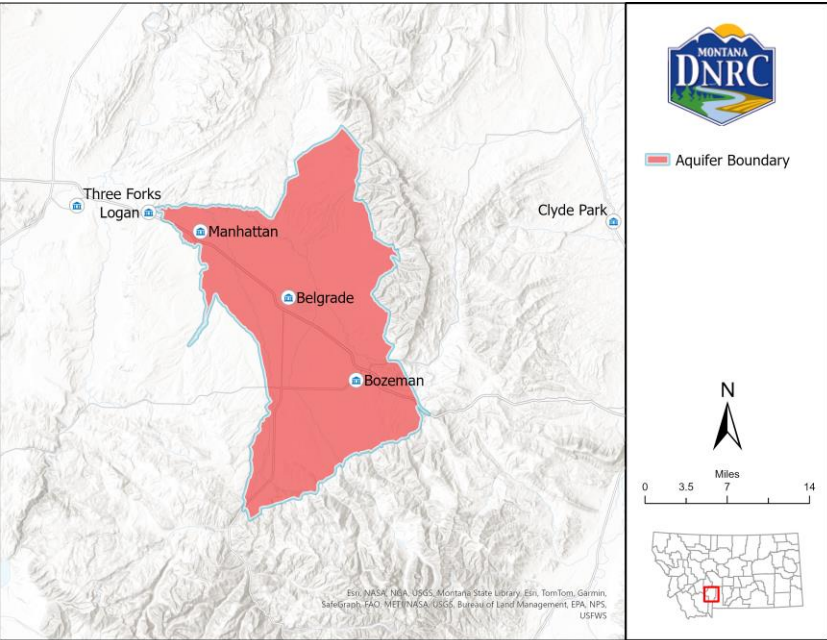
- 1.) Stream buffer (Oregon approach)
- 2.) Aquifer boundary (Idaho approach)
- 3.) Large watershed scale (Colorado approach)

Aquifer boundary approach is DNRC's recommendation.

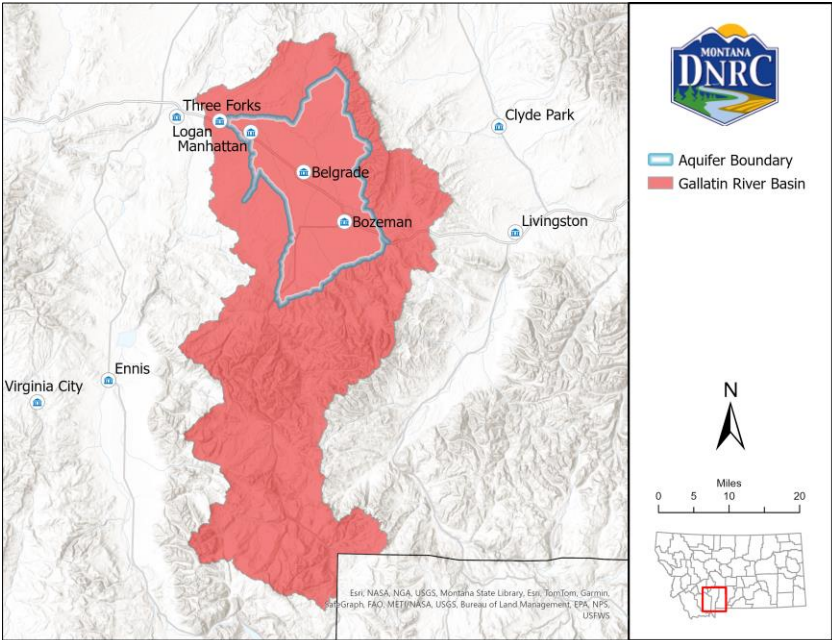
- Definable to the mapped alluvial aquifer
- Fairly rapid (time) connection to connected surface waters
- Vertical connection should be considered in a multi-layered area like Bitterroot and Flathead



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.