

2026 MONTANA WATER POLICY UPDATES

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SETTING THE STAGE FOR THE 2027 LEGISLATIVE SESSION

2025 Legislative Session

2025-2026 Water Policy Interim Committee

2023-2024 DNRC Comprehensive Water Review (CWR) Stakeholder Workgroup

2029 Biennium Governor's Budget



2027 MONTANA LEGISLATURE: WATER POLICY ISSUES

- ✓ Exempt wells and 85-2-306, MCA
- ✓ Role of the Judiciary and administration of decrees
- ✓ Permitting and change reforms
- ✓ Mitigation and leasing
- ✓ Water storage investments

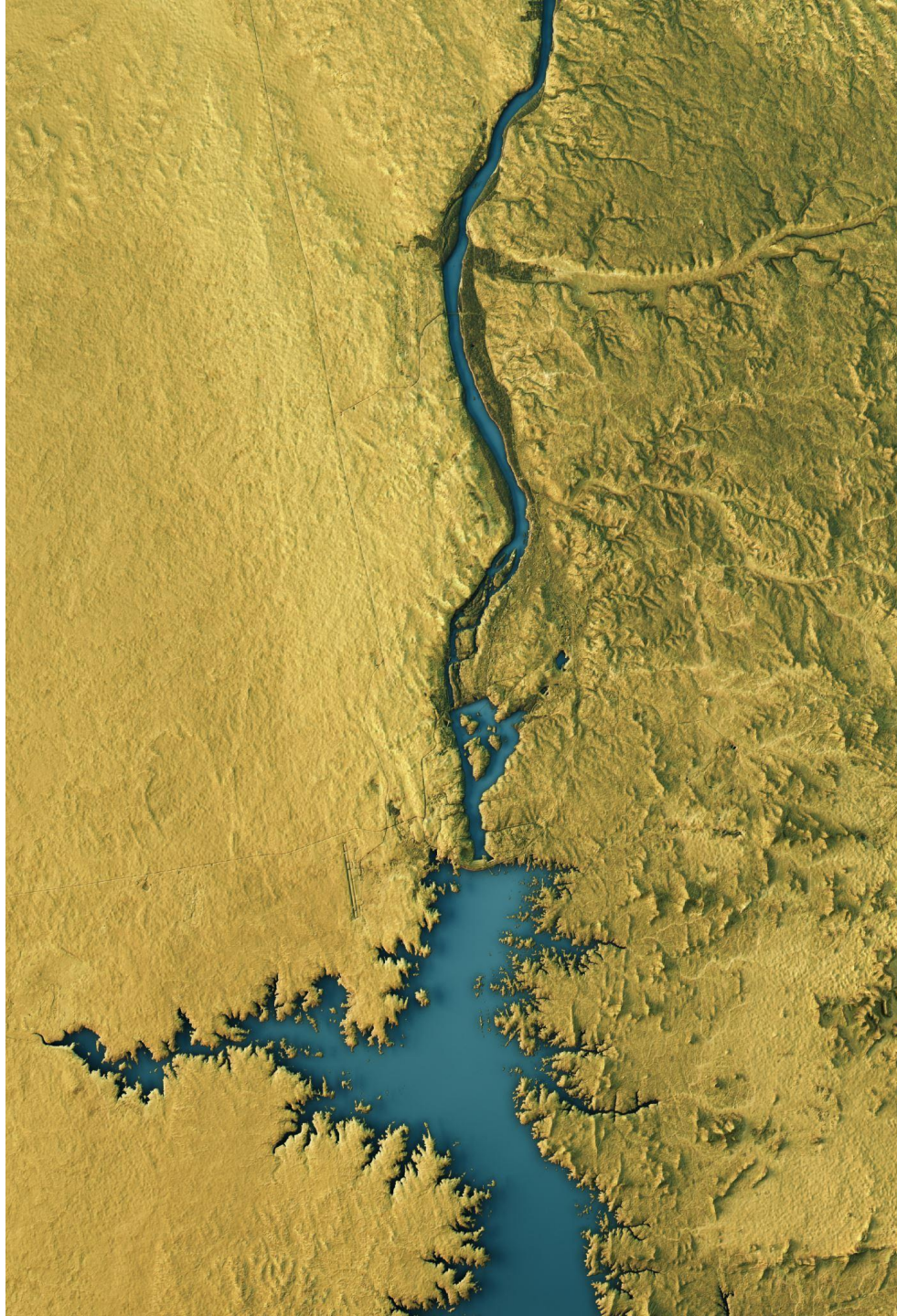
MONTANA WATER LAW 101

Water use in Montana is guided by the 1972 Montana Constitution (Art. IX, § 3) and the Montana Water Use Act that was passed in 1973 (Title 85, MCA)

- Prior Appropriation Doctrine – guiding principle of first in time, first in right
- Other principles at play (particularly for new permits and changes):
  - Legal and physical availability of water
  - Lack of adverse effect to other water users (for changes to water rights and new permits)
  - Consumptive vs. non-consumptive use

Montana Constitution recognized and affirmed all existing water rights (Art. IX, § 3)

- Required the development of a statewide, central database for all water rights
- Created the need to legally quantify all water rights that had already been granted, which we know as the statewide adjudication (1979 Water Adjudication Act) that is being completed by the Montana Water Court in Bozeman
- Also, recognized the need to grant new water rights through the Montana Water Use Act by the DNRC.
- Did not really conceptualize how those two processes would come together (HB441, 2025).



EXEMPT WELL VS PERMIT/CHANGE OF USE

Exempt wells are one of many (although most common) exceptions to the permitting process (85-2-306, MCA).

- Limited to up to10 AF per year (volume), and no more than 35 gpm per groundwater development (flow rate)
- Water users file a notice of intent prior to drilling well or developing a spring; once the water is put to beneficial use, they file a notice of completion with the Department (priority date). There is no public notice to other water users or ability to object.

Permitting process for new water right (85-2-302 and 311, MCA), or change of use authorization (85-2-402, MCA).

- Requires the application for a permit or change of use where strict technical and legal criteria (legal and physical availability, no adverse effect to other water users, adequacy of diversion, possessory interest, et al) must be met before issuance of a permit/change.
- Requires public notice and opportunity for other parties to file an objection.

WHAT ABOUT COMBINED APPROPRIATION

85-2-306(3)(a), MCA: "*(iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit;*"

Combined appropriation requirement was added to the statute in 1987, and it was meant to catch appropriations that are not *de minimus* and could have a cumulative impact

Clark Fork Coalition v Tubbs (2016): purpose of combined appropriation was to ensure only a *de minimus* amount of water could be lawfully appropriated without going through the rigors of the permitting process.

Case law has established that this is NOT about groundwater physical availability, this is the impact of groundwater connected to surface water and associated impact to senior surface water rights and the legal and statutory requirements of appropriation.

The court (district and supreme court) has held multiple times that every drop matters. No where in law does it say that *de minimus* does not matter.

✓ *Trout Unlimited v. DNRC 2006 MT 72.*

- Held that DNRC must manage groundwater and surface water conjunctively in permitting decisions. HB831 was passed by the legislature in response (2007), establishing mitigation as a tool in permitting.

✓ *Bostwick Properties, Inc v. DNRC 2013 MT 48.*

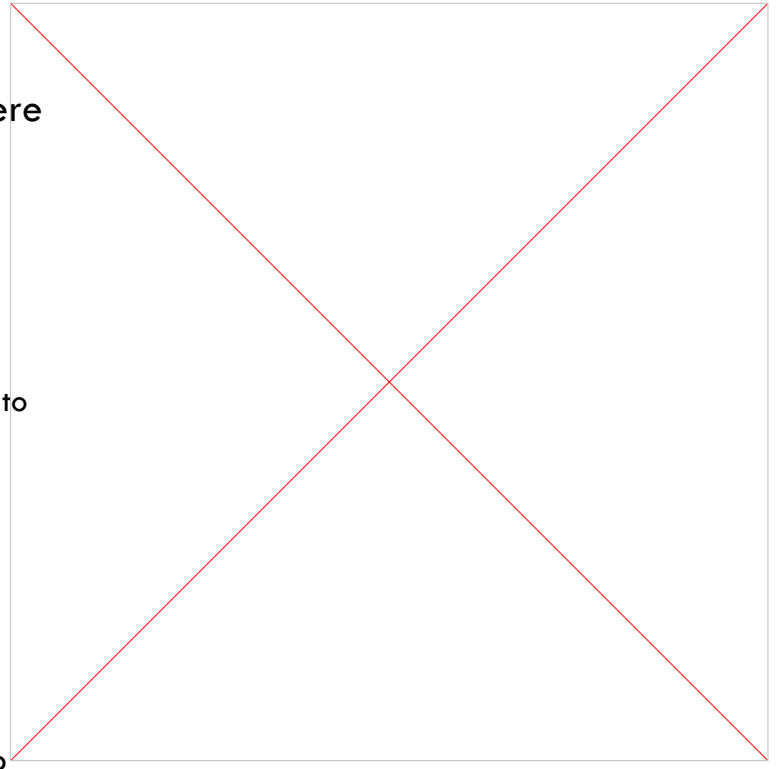
- Generally held that even de minimus and attenuated effect matters and can cause adverse effect (again related to groundwater permits in closed basins).

✓ *Clark Fork Coalition v. Tubbs 2016 MT 229.*

- Struck down previous administrative rule defining combined appropriations only as those that are physically manifold. Spoke to legislative intent as only de minimus and "narrow" exception to permitting that protects senior rights.
- The court held that the exempt well exception was a "narrow" exception to the permitting process.

✓ *Upper Missouri Waterkeeper v. Broadwater County, MT DNRC 2025 MT 137.*

- "While each exempt well might appropriate 'only a *de minimus* quantity of water,' they are starting to add up" (p 84).
- The court criticized DNRC for "blatantly ignoring" the *Clark Fork* holding related to "narrow" exception.



EXEMPT WELL CASE LAW IN MONTANA

2025 LEGISLATURE: EXEMPT WELLS AND 85-2-306, MCA

Once again, water policy debate in the legislature was headlined by debates over future growth and water demand, and specifically the role the exempt well, under 85-2-306, MCA, should play in meeting those future needs.

- ✓ HB 681 – created a new notice of intent process prior to development of well or spring where combined appropriation is reviewed early in the process. Passed and signed into law.
- ✘ HB704 – a modification of CWR workgroup bill draft that did not include groundwater closures. Died on House floor.
- ✘ SB358 – bill from CWR workgroup that created legislative groundwater closures, amended controlled groundwater area statute (85-2-506, MCA), codified factors in combined appropriation, revised combined appropriation for subdivisions. Died on Senate floor.
- ✘ SB436 – codified a definition of combined appropriation in 85-2-102, MCA. Died in House Natural Resources.

Data presented as part of SB358(2025) discussion:

Basin	How over appropriated?	Highest point concentration (exempt wells/mi^2)	Number of exempt wells in basin	How much water do these exempt wells use? (Total permitted AF)	Consumptive Use (AF) based on legal demand	Cumulative Net Depletion to Surface Water (cfs) Consumptive use as a constant rate net depletion
Gallatin	Gallatin Basin: over appropriated every month of the year. In the late summer and fall, it is over appropriated by about 2,300 CFS each month. That means there are 2,300 CFS of water rights that are not being satisfied or roughly 630% over appropriated.	220	9,337 exempt wells	23,067 AF/yr Double the volume of Hylite (~10, 184AF)	10,748 AF/yr About the same volume as Hylite Reservoir (10,184AF)	14.9 cfs This is about 3.6% of baseflow in Gallatin River.
Helena:	Helena Basin: This one is looked at as the combination of Ten Mile Creek and Prickly Pear Creek. They are both over appropriated for every month of the year. The largest over appropriation occurs during the summer months. The creeks are about 250 CFS over appropriated during the summer. During the month of August, when the creek is 255 CFS over appropriated, only 27 CFS is physically available, thus, the creeks are roughly 1,000% over appropriated.	280	5,507 exempt wells	13,986 AF/yr	6,581 AF/yr About the same as 2/3 the volume of the Helena Valley Regulating Reservoir. (10,451 AF)	9.1 cfs Helena is closed because Missouri River is over appropriated As a % of baseflow, Helena is only 0.3% of Missouri River. However, Ten Mile Creek within Helena basin goes dry every year. Prickly pear is close to dry.
Missoula:	Missoula Area: Groundwater use in the Missoula area depletes either the Bitterroot River, or the Clark Fork River, or both. As noted, the Bitterroot is over appropriated by roughly 300%. The Clark Fork River appears to have a lot of water near Missoula; however, it is all legally claimed by numerous downstream users, mainly large hydroelectric plants. The Lower Clark Fork River is over appropriated every month of the year, sometimes by more than 600%.	249	4,205 exempt wells	12,797 AF/yr	5,580 AF/yr	7.7 cfs Missoula is closed because lower Clark Fork and Bitterroot River are both over appropriated As a % of baseflow, Missoula is 0.6% of Clark Fork baseflow.
Bitterroot	Bitterroot Basin: over appropriated for 10 of 12 months of the year. The basin is particularly over appropriated in the spring and fall during times of low flow. That time of the year, the Bitterroot River is over appropriated by about 1,050 CFS to 1,150 CFS; or roughly 330%. Meaning, the cumulative total of surface water rights is more than 3 times the flow rate of the river.	266	13,953 exempt wells	37,983 AF/yr 5,000AF more than the total volume of Painted Rocks (32,362AF)	18,230 AF/yr About ½ the volume of Lake Como (38,500).	25.2 cfs; 3.3% of baseflow in Bitterroot R.

[1] Consumptive use assumptions: Domestic -10%; Lawn/garden/irrigation – 70%; stock – 100%

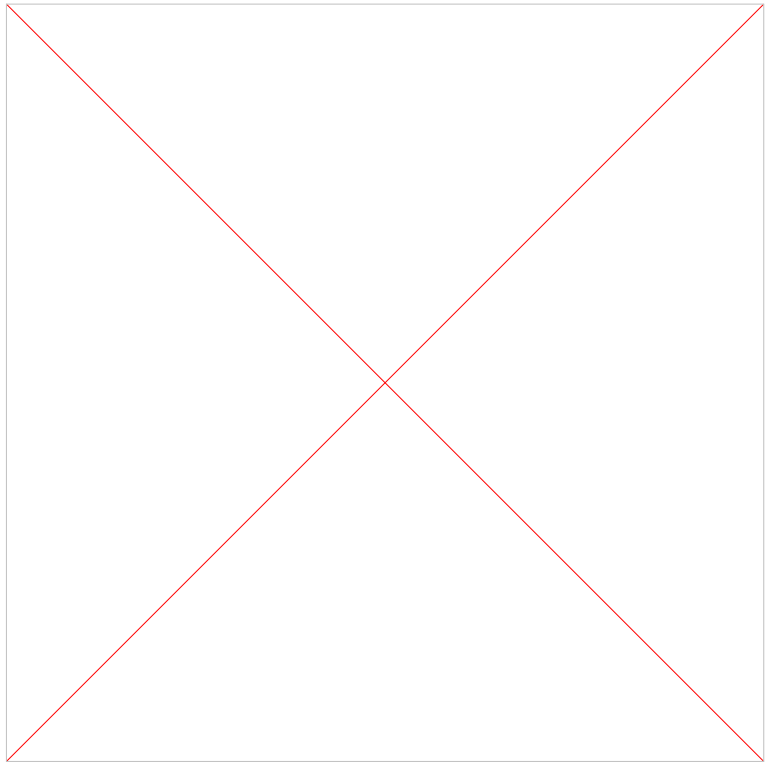
[2] Conservatively low estimates as water right records with missing data were not included in the tally

Plaintiffs allege that the DNRC implementation of the exempt well statute (85-2-306(3)(a)(iii), MCA) violates the following provisions of the Montana Constitution:

- *Article II, § 3 (providing, in part, for the right to acquire, possess, and protect property) and Article IX, § 3 (requiring the Legislature to, among other things, "provide for the administration, control, and regulation of water rights")*
- *Article II, § 4 (providing for equal protection)*
- *Article II, § 17 (providing for due process of law)*
- *Article II, § § 8 and 9 (providing for the right to know and to participate)*

Conservation plaintiffs filed amended complaint asserting additional constitutional violations:

- *Article II, § 3, and Article IX § 1 (providing for the right to a clean and healthful environment and providing for adequate remedies to prevent depletion and degradation of natural resources)*



2023 CONSTITUTIONAL CHALLENGE – *MONTANA LEAGUE OF CITIES AND TOWNS, ET AL V. STATE OF MONTANA AND MONTANA DNRC*



2025-2026 WATER POLICY INTERIM COMMITTEE

- Major topics of the interim
- Members of committee

2025-26 WPIC MEMBERS

- Sen. E. Wylie Galt (R-Martinsdale), Chair
- Rep. Jill Cohenour (D-East Helena), Vice Chair

- Sen. Bruce “Butch” Gillespie (R-Ethridge)
- Sen. Bob Phalen (R-Glendive)
- Sen. Willis Curdy (D-Missoula)
- Rep. Russ Miner (R-Stockett)
- Rep. Jamie Islay (D-Livingston)
- Rep. Tracy Sharp (R-Polson)
- Rep. Tom Millett (R-Marion)

MAJOR TOPICS AND DISCUSSION

- Exempt well policy – continue discussion from SB358, review Idaho legislation, other policy models, et al
- Water reuse study (HJ74)
- Water rights and enforcement
- Water storage (continuation of past work)
- Endocrine disrupting chemicals and water quality (HJ44)
- Tracking federal changes that affect water (i.e., federal USGS funding)
- State Land Board and water rights
- Monitor issues related to CSKT water compact
- Data centers and water use
- Revise “Water Rights in Montana Handbook”



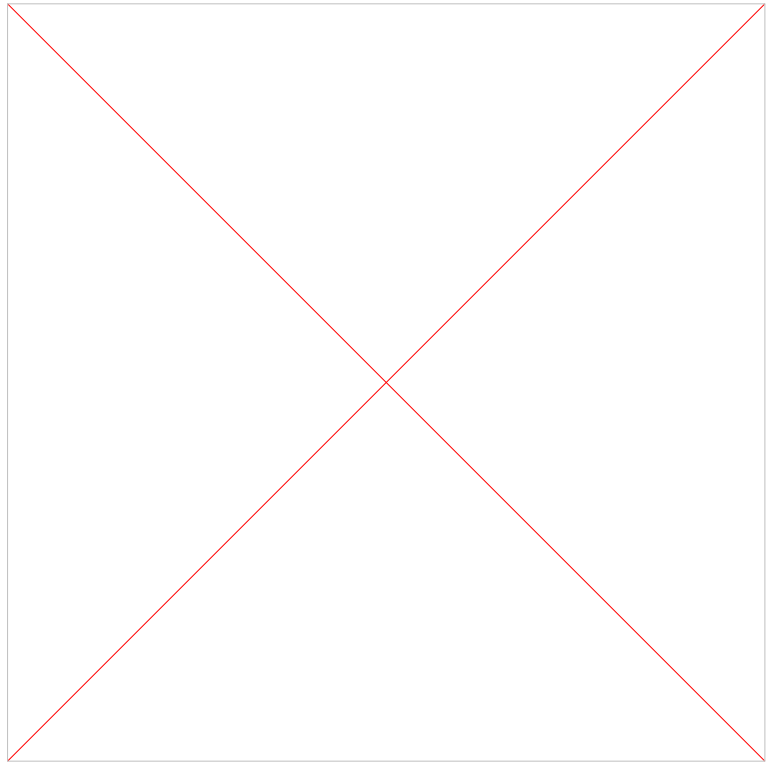
LEGISLATIVE PROPOSALS ON EXEMPT WELLS

How do we move forward given past legislative attempts, current legal landscape and challenges?

WPIC AND STAKEHOLDER EXEMPT WELL FRAMEWORK

Stakeholders (Montana Stockgrowers, Montana Trout Unlimited, Hospitality and Development Association) worked collaboratively to propose an exempt well bill framework that the committee is working from over the next three meetings. The goals of the framework are:

- Create a simple, easy to understand, and implementable bill.
- Don't expand the current exception to the permit process.
- Standardize the combined appropriation analysis to improve consistency in implementation
- Account for large scale cumulative impacts of multiple exceptions, limit the consumptive use.
- Incentivize a tie into public water and sewer systems, shared systems.
- Use lessons learned from other states, notably Idaho that just passed an overall of their exempt well process.



BASICS OF PROPOSAL

Protecting over-appropriated areas with controlled groundwater areas

- Does not legislatively close designate areas, relies on existing statute (85-2-506 and 508, MCA)

Outside the boundaries of a permanent Controlled Ground Water Area (CGWA):

- *<20-acre parcel = up to 0.5 AF per tract of record and 35 gpm per GW development for <u>any use type</u>*
- *>20-acre parcel = up to 1 AF per tract of record and 35 gpm per GW development for <u>any use type</u>*
- *> 160-acre parcel and additional 5 AF for <u>stock only</u>*

Inside the boundaries of a permanent Controlled Ground Water Area (CGWA):

- *<20-acre parcel = up to 0.5 AF per tract of record and 35 gpm per GW development for <u>in home domestic and stock only</u>. Other uses of the exception, within the volume and flow limitation, are allowed with mitigation.*
- *>20-acre parcel = up to 1 AF per tract of record and 35 gpm per GW development for <u>in home domestic and stock only</u>. Other uses of the exception, within the volume and flow limitation, are allowed with mitigation.*
- *> 160-acre parcel and additional 2.5 AF for <u>stock only</u>*

OTHER ELEMENTS OF PROPOSAL

Promote municipal tie-in and high-density development	• Requiring tie-in within existing boundaries of municipal or county water and sewer district water and sewer service areas where there is water pr reservations available. • Utilize mitigation water, where available and reasonable cost, to offset new exceptions that result in net depletions that could cause adverse effect.
Metering, reporting, and enforcement	• Metering and reporting to DNRC on all new exceptions using wells and developed springs. • Streamlined process for ensuring compliance (85-2-381, MCA), penalties for non-compliance
Grandfathering provisions for subdivisions caught in HCH limbo	• Must utilize grandfather clause before 2032 to file your Notice of Completion (NOC).
Notice to water users	• Issue notification to other water users using the Water Rights Notification Tool (WRNT) when NOI is received and issuance of Groundwater Development Certificate.

OTHER WATER POLICY UPDATES

- 2025 Legislation Session updates
- Interim work and topics of priority (see WPIC slide)
- 2027 Legislature issue forecast



PERMITTING AND CHANGE REFORMS (2025 SESSION)

✓ HB74 – revises the requirement for a valid water right (as defined in 85-2-102) needed in private fishpond licensure application (FWP process)

✓ HB432 – creates a stand-alone exception statute to the change process for stock tanks, replacement wells and points of diversions, adjustments in municipal service area boundaries. Provides for notice and objection processes.

✓ HB580 – provides that voluntary reductions or cessation of water use in compliance with a drought plan cannot be used as sole evidence in abandonment proceeding **

✓ HB681 – revises both the Water Use Act and the Platting Act to create a notice of intent for new exempt wells to be filed prior to drilling well, still requires notice of completion (Section 7).

✓ SB178 – provides for temporary water leasing (reinstates previous sunset of statute, with modifications) of consumptive volume of water right for no more than 40 days, provides for notice and objection process.

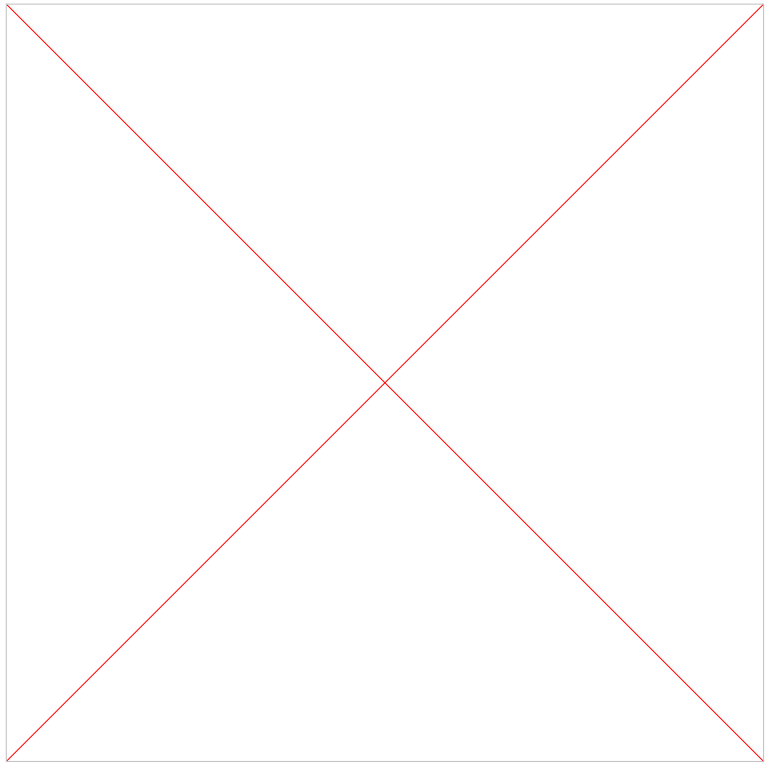
✓ SB190 – allows for waiver of adverse effect in permitting and change processes (reinstates previous sunset of statute)

✓ HB 441 – provides for statutory process to integrate provisional permits and changes into final decrees upon completion of adjudication in basins.

✓ HB775 – removes the sunset on petitions for judicial review related to DNRC decisions to district court or the Montana Water Court.

✘ HB886 – provided for the continuation of specialized water division court for administration of final decrees after adjudication. Died on House floor.

✘ SB186 – provided for administration of final decrees by district courts upon completion of adjudication, functional sunset of water court following adjudication . Died on Senate floor.



ROLE OF THE JUDICIARY AND ADMINISTRATION OF DECREES

WATER STORAGE INVESTMENTS (2025 SESSION)



As a result of work in prior interims and the CWR, the legislature considered legislation to transform the state's investment into water storage in the state.

HB924: created a new investment account (i.e., trust) to generate interest revenue for the use of enhancing water storage in Montana (Section 15).

- 90% of interest revenue goes to DNRC state water projects account (85-2-631, MCA)
- 10% of interest revenue available for pilot projects for new water storage (surface, underground, or natural water storage) through Reclamation and Development Grants (DNRC) and dam inspections.

HB932: reformed the allocation of recreational marijuana revenues received by Montana FWP, which included a new allocation to DNRC state water projects.

- $4 million per FY available to DNRC for reimbursement of state water project costs (Section 2(2)(b)).

TOPICS AHEAD IN 2027 LEGISLATURE

- Mitigation work group proposed reforms
  - What can mitigation be used for (beyond net depletion for groundwater permits in closed basins)
  - Timing and location precision
- Water storage, continued work ahead
  - Building on investments, implementation
  - Use of stored water, beneficial use
- Salvaged water and conserved water statutes
  - Use of conserved water, mitigation banks
- Flexibility in meeting new demands with limited and changing water supply
  - Temporary leasing updates
  - Municipal water use
- Water enforcement statute clean up
  - Roles and responsibilities
- Role of the judiciary
  - Is there a future role for the Water Court post-statewide adjudication?
  - Administration of final decrees, conflicts



HEALTHY RIVERS & WILD TROUT

MONTANA TROUT UNLIMITED

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JESTIONS?

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