

# **Water Rights on State Trust Land**

Shawn Thomas

DNRC Forestry and Trust Lands Division Administrator



# Outline of Presentation

- Fundamentals of Montana water rights and how state trust land is involved
- Land Board responsibility and delegation of authority to DNRC
- Pre-and-post 1973 water rights
- Montana Supreme Court decisions
- Current and ongoing direction and practices



# Montana Water Rights

Per the Montana Constitution, all surface, underground, flood, and atmospheric waters located within Montana's boundaries are owned by the State and subject to appropriation for beneficial purposes as provided by law.

To obtain a lawful right to use water under Montana law, a user must:

1. Appropriate water by intentionally putting it to use,
2. Apply the water to a beneficial use,
3. Use it on a defined parcel of land or in a specific stream for instream flow purposes.

As a general rule, a water right becomes **appurtenant** to the land that it originally benefitted – the water right is connected to the land.



# Montana Water Rights

Montana, like other western states, has adopted the “**prior appropriation**” or “first in time, first in right” system.

The Montana Water Use Act (1973) established two water right processes:

- Pre-July 1, 1973 Adjudication: All pre-July 1, 1973, water rights are being adjudicated by the Montana Water Court.
- Post-July 1, 1973 Permitting: All post-July 1, 1973, new appropriations of water are permitted through the Water Resources Division of DNRC.



# Land Board Delegation of Authority

- The Land Board serves as a trustee with strict fiduciary duties, meaning it has a duty of undivided loyalty and must act in the best interest of the trust beneficiaries, such as Montana's public schools.
- On March 18, 1980, the Department of State Lands (the predecessor to DNRC) created a detailed plan for handling water rights claims in the statewide adjudication process.
- Following that, the Land Board unanimously directed the Department to pursue all water rights on state trust lands to protect and maximize the trust's value.



# State Trust Land Water Rights

- State water right ownership depends on where and how water was first used.
- Water rights on state trust land stay with the land and are trust assets; they can only be sold if the trust gets full market value.
- The Land Board and DNRC only claim the water right—not the equipment (like wells or pipelines) used with it.



# Department of State Lands v. Pettibone (1985)

- Montana Supreme Court ruled that water rights developed for state trust land belong to the State, not the lessee.
  - Lessee may be compensated for their investments in equipment or infrastructure.
- These state trust land water rights are trust assets and cannot be sold or separated from the land without full value to the trust.
- Protects school trust assets and ensures they benefit Montana's public schools.
- In April 1986, the Water Court ordered all remaining decrees to conform to the holding in Pettibone and provided a process for adjudicating trust land water rights through the objection process.



# MT Admin Rules 36.25.134 WATER RIGHTS

(1) If a water right is or has been developed on state land by the lessee or licensee for use on the leased or licensed land, such water right shall belong to the state. . . . Any water rights hereafter secured by the lessee and licensee on state lands shall be secured in the name of the state of Montana.





# What does the State have an ownership interest in?



Sole state ownership:

POD on state trust land, POU on state trust land only.  
POD off state trust land, POU on state trust land only.



Partial state ownership:

POD on state trust land, POU on state trust land only and private.  
POD off state trust land, POU on state trust land only and private.



# No State Ownership of Water Right

- Water rights developed, beneficially used and perfected on private property and then temporarily used on state trust lands (Kunnemann).
- Water rights developed and beneficially used on property before title vested in the State (after survey, federal approval, and admission of State to Union in 1889).



# Implementing Land Board & Supreme Court Direction

- Adjudication – Pre-1973 water rights
  - Over 250,000 pre-1973 water rights are being adjudicated before the Water Court across 85 basins.
  - State of Montana has asserted, on behalf of public schools and schoolchildren, an ownership interest in 9,842 water rights on state trust lands.
- Permitting – Post-1973 water rights
  - 2,300 water rights permits.



# Improper Process With Post-1973 Permitting

- In the early 2010s, DNRC found many post-1973 water rights used on state trust land, but with diversion points on private property and the State not listed as an owner.
  - There was no proper process for DNRC to claim ownership in these rights.
- Between 2014-2018, the State of Montana was added as co-owner to 141 post-1973 water rights without proper notice to property owners, depriving them of due process.



# House Bill 286 (2019), Water Rights and State Trust Land Leases

- House Bill 286 corrected this and accomplished three things:
  - Required DNRC to rescind State's name from post-July 1, 1973, water rights if State ownership was added without due process of law.
  - Provided pathways for the State to obtain an ownership interest in post-July 1, 1973 water rights.
  - Allowed for temporary use of a private water right on state trust land.



# HB 286, New Pathways for Water Rights on State Trust Land

- Upheld by the Montana Supreme Court in March of 2022.
  - The State rescinded its name from the 141 previously identified water rights.
  - Additionally rescinded the State from 28 water rights (169 total).
- State can now gain ownership of certain water rights through a court decision or a deed.
- Lessees can use private water rights temporarily on state trust land, without State claiming ownership.
  - DNRC created process for lessees to use private rights temporarily on state trust land without losing ownership.



# Schutter v. Board of Land Commissioners (2024)

- Montana Supreme Court ruled that the State of Montana holds an ownership interest in the portion of the water right that benefits state trust land, even when the well and point of diversion are on private land.
  - Relied heavily on the *Pettibone* precedent.
- Decision upheld longstanding constitutional and statutory protections for State Trust Lands.



# Current Land Board Guidance and Practices

- Since May 2024, DNRC must get Land Board approval before claiming state ownership in a water right with a diversion on private land and use on state trust land.
- DNRC has followed this rule, bringing 19 water rights to the Land Board so far.
- The Land Board process is to add transparency. The Water Court is the official legal process that determines water right ownership.





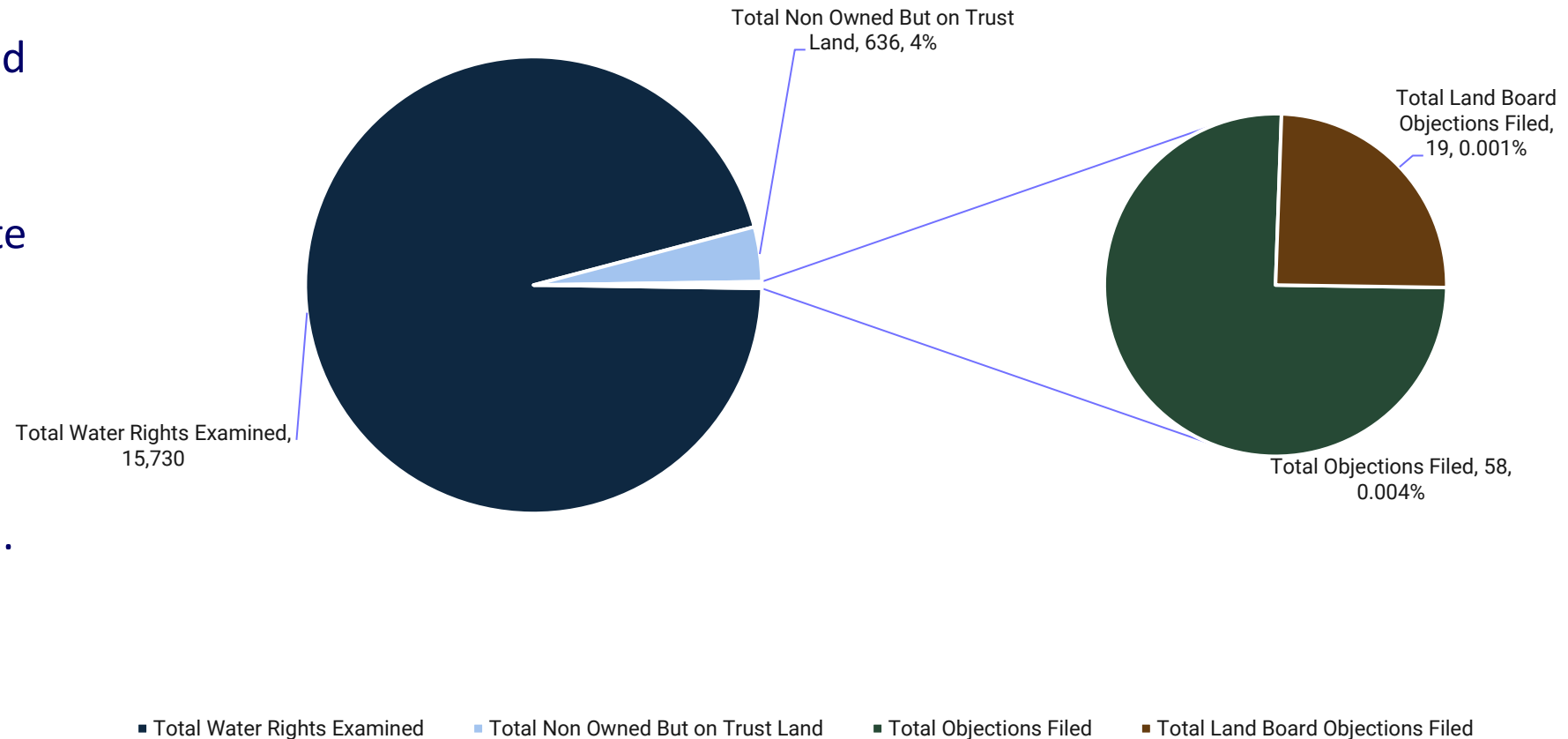
# Current Land Board Guidance and Practices

- April 2025, the Land Board requires early, direct notice to private water right owners when their rights are up for review or possible objection.
- DNRC followed this by calling 18 water right owners in Basin 76G before seeking Board approval.
- The Land Board now requires DNRC to send 90-day written notice to water right owners if their right is on the Board's agenda.
  - To date, the DNRC has fully complied with this motion and provided 90 day written notice to five water right owners.
- Since early 2024, DNRC files for implied rights (not co-ownership), so the State is listed only for the part used on state trust land—not on the private landowner's portion.



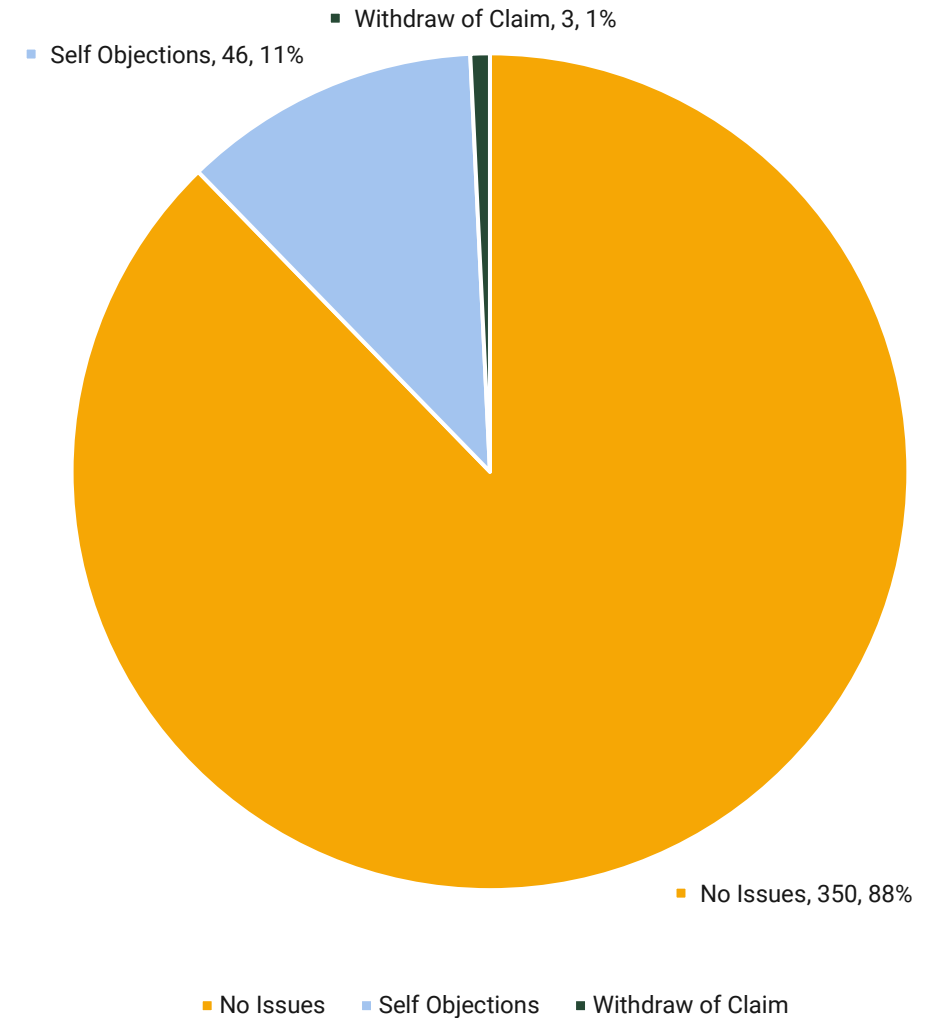
# Adjudication of Water Rights on State Trust Land with no State Ownership

- DNRC has fully examined 12 basins with 15,730 water rights.
- 636 water rights on state trust land but with no State ownership.
- 19 objections to Land Board since May 2024.
- 58 total objections filed.
- 193 statements of non-interest filed.

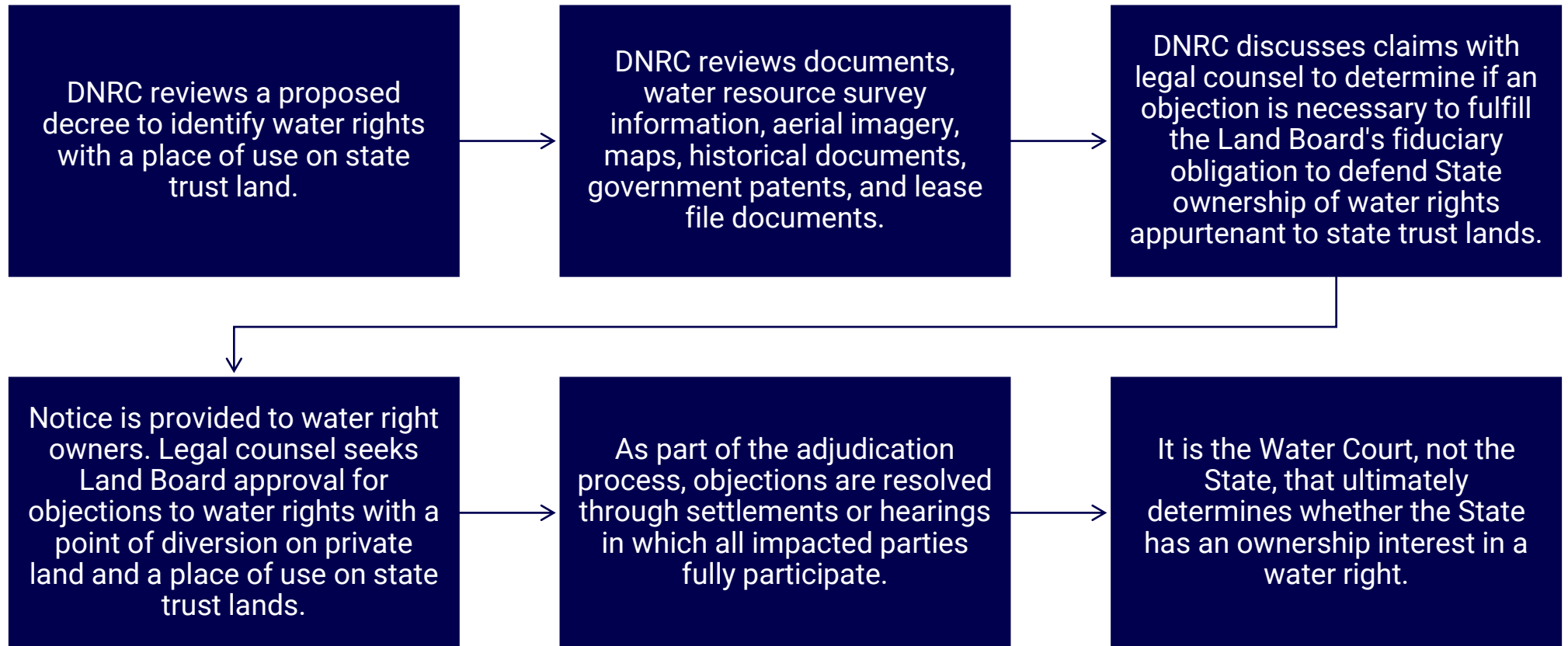


# State-Owned Water Rights Examinations

- In the same 12 basins the State is an owner of 399 water rights.
- 85% of water rights were found to have no issues.
- 11% of objections were self-objections to correct legal land descriptions, an error in the claim file, or scriveners' errors.
- 1% of state-owned water rights filed for withdraw of claim.



# Due Process & Transparency Are Built Into The Process



# New Appropriations

- DNRC regularly receives requests for new appropriations and water projects on state trust land.
  - Staff are well educated and have conversations with lessees that meet project goals and explain different pathways that could include:
    - Temporary use authorization of an existing water right.
    - New water right development in which the State may or may not have an ownership interest.



# Moving Forward

- The DNRC is committed to fulfilling its fiduciary obligation regarding water rights on state trust land while following all governing statute, rule, and guidance.
- The adjudication process is still ongoing with eight decrees scheduled to be released in 2025 and 18 to be released in 2026.
- Following completion of adjudication, DNRC will evaluate post-1973 water rights to determine whether to assert ownership as provided by HB 286.

