Montana's Water — Where is it? Who can use it? Who decides?

House Joint Resolution No. 4

and Other Water Policy Issues

"A river is more than an amenity, it is a treasure."
Justice Oliver Wendell Holmes
(Quoted by the Supreme Court in its decision in U.S. v. Republic Steel, 1960*)*

Report to the 59th Legislature of the State of Montana
Legislative Environmental Quality Council
December 2004

Montana's Water — Where is it? Who can use it? Who decides?

House Joint Resolution No. 4 and Other Water Policy Issues

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Table of Contents

1. Introduction — Environmental Quality Council Study — A Review of the Interim

The Environmental Quality Council (EQC) is a 17-member, bipartisan interim committee of the Montana Legislature. The 2003 Legislature, through House Joint Resolution No. 4 (HJR 4) (see Appendix A), asked the appropriate interim committee to investigate options for improving the supply and distribution of water in Montana and to evaluate the water storage policy of the state.

More specifically, HJR 4 requested that the appropriate interim committee address the following issues:

❶ evaluate the efficiency of water distribution systems;
❷ evaluate measures that promote the efficient use of water;
❸ evaluate return flow impacts;
❹ study water banking as a means to alleviate water shortages;
❺ investigate options for improving the supply and distribution of water in Montana, including the development of offstream storage facilities;
❻ evaluate the water storage policy established in section 85-1-703, MCA; and
❼ evaluate the effects of excessive fuel levels on federal and state timbered lands to determine the impacts of the use of available water by timber versus the amount of water release by a watershed into Montana watercourses.

HJR 4 also requested that the EQC prepare a report of its findings and conclusions and identify options and make recommendations, including legislation if appropriate, to the 59th Legislature.

To carry out the responsibilities assigned to them by House Joint Resolution No. 4, the EQC adopted a study work plan that outlined their tasks. The work plan provided direction to the EQC throughout the interim. The EQC assigned .75 FTE of the EQC's staff time to the study.

Nature and Scope of the EQC Water Quantity Study

Because of the time limitations of the interim, the EQC focused a majority of its water policy study on the adjudication program with informational updates on other water policy topics.

HJR 4 was extremely broad with respect to the number of issues that it asked the EQC to evaluate. Because of this large scope and in an effort to prioritize its workload, at its September 2003 meeting, the EQC heard from a panel of professionals involved in Montana's water resources. The panel was charged with identifying the primary water policy issues that they felt were facing Montana. The panel members were attorneys and staff who historically represent state government, hydropower, agricultural water users, fish and wildlife, recreation, and watershed groups. The panel members all felt that the one issue that needed to be addressed before the issues identified in HJR 4 could be adequately addressed is Montana's water adjudication. Therefore, the EQC chose to study the water adjudication program in addition to a few of the items that were requested to be studied in HJR 4. Because of the time limitations of the interim, the EQC focused a majority of its water policy study on the adjudication program with informational updates on other water policy topics.

Review of the Interim

To carry out the work plan that the EQC adopted, the EQC outlined the goals and tasks necessary to complete the study by September 15, 2004. The EQC made an effort to include an opportunity for public comment regarding the adjudication program in addition to any other issues that were not covered on each meeting's agenda. The EQC's study process throughout the interim is outlined below.

Environmental Quality Council Interim Study Process for Water Policy Issues

June 2003

- Identify water policy priorities.
- Generate draft study work plan tasks.
- Drought update.

October 2003

HJR 4: Water Management Study

- Review and discuss bibliography of water policy information.

- Identify areas where more information is needed.
- Discuss public input needs and methods for obtaining public input.
- Discuss when and where public input would be obtained.
- Identify primary water policy issues facing the state.
- Montana water law and the impacts on water policy issues identified in HJR 4.
- Identify specific issues for further study.

Total Maximum Daily Loads

- Review and discuss history of TMDL development in Montana.
- Identify areas where more information is needed.
- Review primary issues in court cases related to TMDLs.
- Discuss 303(d) list, how it is established, the 1996 list vs. subsequent lists, sufficient/credible data requirements.
- Update on TMDL progress for 2003.
- Review the TMDL schedule developed as a result of the court-imposed deadline.

January 2004

HJR 4: Water Management Study

- Review statutes and water policies from states in region regarding supply and distribution of water.
- Status of supply and distribution of water in Montana.
- Supply and distribution of water and the relationship with federal policies and programs.
- Review and evaluate the water storage policy contained in 85-1-703, MCA.
- Accuracy in the water adjudication process.
- Enforcement of water rights.
- Federal reserved water rights and their relationship with the adjudication process
- Review DNRC/EQC water rights handbook.
- Review website feedback form and discuss information received to date.

Coal Bed Methane Issues

- Review primary issues in litigation related to CBM development.
- Review and discuss water policy report from 2001-2002 interim regarding CBM issues.
- Discuss correlation between TMDLs and CBM water management.
- Update from Board of Oil and Gas on number of wells permitted and current CBM activity.
- Panel discussion regarding Montana/Wyoming issues.

Total Maximum Daily Loads

- Update on TMDL progress for 2004.
- Discussion regarding computer modeling as an approach to completing TMDLs.

March 2004

HJR 4: Water Management Study

- Review of progress related to specific issues identified in the workplan.
- Review work plan. Make changes if necessary.
- Discussion of feedback from website form.
- Water banking as a means to alleviate water shortages in Montana.
- Institutional objectors in water adjudication.
- Paying for water adjudication.
- Surface water and ground water connectivity.

TMDLs

- Update on TMDL progress for 2004.

May 2004

HJR 4: Water Management Study

- Review of progress related to specific issues identified in the workplan.
- Review workplan. Make changes if necessary.
- Discussion of feedback from website form.
- Discussion on the capture and use of flood waters.
- Water right permit and change process.
- Preliminary discussion on findings and conclusions.
- Identify specific areas of water policy statutes that need to be changed or modified (if any).
- Develop options (if any) for proposed legislation for decision at July meeting.

July 2004

HJR 4: Water Management Study

- Decision on whether or not to recommend changes or additions to water policy statutes.
- Discussion and preliminary decision on findings and recommendations.
- Review of draft report.
- Receive update from DNRC on Renewable Resource Grant and Loan Program.

Coal Bed Methane Issues

- Decision on whether or not to recommend changes or additions to CBM statutes.
- Discussion and preliminary decision on findings and recommendations regarding CBM.
- Review of draft report.

Total Maximum Daily Loads

- Decision on whether or not to recommend changes or additions to TMDL statutes.
- Discussion and preliminary decision on findings and recommendations regarding TMDLs.
- Review of draft report.

July 24 - August 22, 2004

- Last dates to revise and distribute draft reports and concepts for proposed legislation for public review and comment**.**

August 29, 2004

- Compile and distribute comments on draft documents to subcommittee members.

September 2004

- Final decision on content of proposed legislation, if any.
- Selection of bill sponsors. Development of strategy.
- Approval of report on water policy issues and HJR4.
- Approval of report on CBM activities during the interim.
- Approval of report on TMDL activities during the interim.

2. Findings and Recommendations

The EQC reviewed numerous in-depth papers throughout the interim related to the information described in their interim workplan. The detailed information for each element is provided in more detail in the remaining chapters of this report. In an effort to make it easier for readers to find the answers to their specific questions about the EQC's work, the chapter that addresses each finding and recommendation is cited.

Existing Information That Will Help the EQC and the Legislature Understand Water Quantity Issues in Montana (Chapter 3)

Finding:

❶ There is an extensive amount of information available regarding water quantity and quality. However, the information seems to be housed by different entities—federal, state, and private. There appears to be a lack of coordination on what information exists and where existing information is located.

Recommendations:

❶ State agencies and others should make every effort to keep each other informed regarding the types of information that are available including research, data, studies, papers, funding sources, and other pertinent information.

❷ Support the development and use of a web-based clearinghouse for water information.

Montana Water Law and the Impacts on Water Policy Issues Identified

Findings:

❶ The Montana Water Court plays a critical role in the facilitation of the water adjudication in a timely fashion.

❷ There is extensive case law that exists in Montana and surrounding western states regarding water resources and their allocation. The case law and the statutory interpretation by the judiciary plays a critical role in how water policy is developed and implemented in Montana.

Recommendation:

❶ Request that the Chief Water Judge complete development of the Water Court Rules of Procedure, including rules regarding to the use of the Court's on-motion authority, for submission to the Supreme Court by January 1, 2005.

Adjudication Process and Timelines (Chapter 4)

Finding:

❶ Montana's adjudication program has been operating for over 25 years. The purpose of the adjudication is to provide an accurate adjudication of all water rights that existed prior to 1973. A process that takes this long is unfair to the people of Montana and may adversely impact the accuracy of the end product. It is critical that the speed of the adjudication be increased.

Recommendations:

❶ Obtain a commitment from the DNRC, the Water Court, and the Reserved Water Rights Compact Commission that they will improve elements of the adjudication program that can be addressed and remedied in their respective parts of the program.

❷ Consider a variable beneficial use fee mechanism for the purpose of adequately funding Montana's water adjudication program.

Supply and Distribution of Water in Montana (Chapter 5)

Findings:

❶ Montana's water supply is primarily the result of snowpack and inflows.

❷ Montana is facing its sixth and in some areas seventh year of drought.

❸ Montana has historically been active in the development of water storage facilities.

❹ Federal policies are changing with regard to water storage facilities and the federal government's willingness to help fund these types of programs.

❺ The Governor is required by statute to report to each Legislature on the status of water storage in Montana.

❻ DNRC has an ongoing effort to identify opportunities and limitations for water storage in Montana.

❼ Efficiency of water use has pros and cons associated with it. For example, in some instances, more efficient use of irrigation water means less return flow and aquifer recharge.

Recommendations:

❶ Continue biennial reporting by the Governor.

❷ Continue DNRC effort of evaluating alternatives for additional storage in Montana.

Water Banking (Chapter 6)

Findings:

❶ Water banking is an alternative that works in some western states.

❷ Montana does not appear to have the physical structures available that would be needed for water banking to work well in Montana.

❸ There are existing water marketing alternatives currently available under Montana law; therefore, there is not a need for adding more.

Recommendation:

❶ Do not pursue water banking in Montana at this time.

Surface Water/Ground Water Connectivity (Chapter 7)

Findings:

❶ The surface water/ground water connectivity issue is complex and site-specific.

❷ There are programs that exist to map Montana's ground water resource so that it will be easier to determine the level of connectivity, if any, in a given area.

Recommendation:

❶ None.

Federal and Tribal Reserved Water Rights (Chapter 8)

Findings:

❶ The Montana Reserved Water Rights Compact Commission negotiates compacts with holders of reserved water rights on behalf of the State of Montana.

❷ Montana is faced with two options:

a. continue to negotiate reserved rights; or
b. enter into litigation for the settlement of the reserved water rights.

Recommendations:

❶ Continue to negotiate reserved water rights through the Montana Reserved Water Rights Compact Commission.

Water Adjudication (Chapter 9)

Findings:

❶ To complete the adjudication in 15 years, additional funding will be needed for the purpose of expediting claims examination by DNRC and for the Water Court for the purpose of handling the increased caseload.

❷ DNRC's water rights database is a work in progress that will be fully functional by January 1, 2005.

❸ Public access to water rights information and the usability of that information has been greatly enhanced through the Natural Resource Information System (NRIS) website.

❹ The Supreme Court Claims Examination Rules are working well for the purpose of identifying issues associated with claims

❺ Accuracy of the adjudication is very important.

❻ The Water Court needs to operate under rules that all clients of the Water Court understand and know exist.

❼ There are a limited number of basins currently being enforced. As this tool is used more in subsequent years, it will be easier to gauge whether the enforcement procedures work well.

❽ Basins that were reviewed by DNRC using the verification process prior to the development of the Supreme Court Claims Examination Rules are in need of reexamination.

❾ The Water Court needs to develop rules for the use of its on-motion authority. The Chief Water Judge has committed to the EQC that the rules will be submitted to the Supreme Court by January 1, 2005.

Recommendations:

❶ Consider a variable beneficial use fee mechanism for the purpose of adequately funding Montana's water adjudication program.

❷ Request that the Chief Water Judge complete development of the Water Court Rules of Procedure, including rules regarding to the use of the Court's on-motion authority, for submission to the Supreme Court by January 1, 2005.

❸ Monitor development of the water rights database. If it is not fully functional by January 1, 2005, as committed to by DNRC, request that a third party audit the database.

3. Existing Water Policy Information Available

Document	Date	Contact Information	Web Link
MT Nonpoint Source Management Plan	5/01	Carole Mackin 444-7425	http://www.deq.mt.gov/wqinfo/nonpoint/NonpointPlan.asp
Water Pollution Control State Revolving Fund Intended Use Plan and Project Priority List	7/04	Todd Teegarden 444-5324	http://www.deq.mt.gov/wqinfo/srf/WPCSRF/index.asp
TMDL fact sheet	2001	Carole Mackin	http://www.deq.mt.gov/wqinfo/TMDL/MTTMDLFactSheet.asp
Final Reports for Completed TMDLs	2004	Carole Mackin	http://www.deq.mt.gov/wqinfo/TMDL/finalReports.asp
MT 303(d) list	2002	Bob Barry 444-5342	http://nris.mt.gov/wis/environet/2002_303dhome.html
MT Stream Management Guide	1998	Bob Bukantis 444-5320	Not online but copies are available through DNRC or DEQ

Water Policy Information Available from DEQ, DNRC, and FWP

Document	Print or Update Date	Contact Information	Web Link
State Water Plan Development: A Revised Approach	January 1987	DNRC	None
Montana State Water Plan Handbook	January 1993	DNRC	None
State Water Plan Implementation Update	September 1993	DNRC	None

Document	Print or Update Date	Contact Information	Web Link
State Water Plan Evaluation – Decision Summary	November 1994	DNRC	None
Evaluation of the State Water Planning Process and Implementation	Developed August 2003	Rich Moy, Chief, Water Management DNRC	None
Issues In Water Management: An Evaluation of Montana's Water Policy	January 1981	DNRC	None
Liquid Assets: A Report to the 46th Legislature	March 1979	DNRC	None
Report of the Select Committee on Water Marketing, 49th Legislature	January 1985	EQC	None
Agricultural Water Use Efficiency, State Water Plan Subsection	1989	DNRC	None
Agricultural Water Use Efficiency, State Water Plan Issue Paper No. 3	May 20, 1988	DNRC	None
Instream Flow Protection – State Water Plan Subsection	1989	DNRC	None
Instream Flow Protection – State Water Plan Issue Paper No. 2	April 1988	DNRC	None
Federal Hydropower Licensing and State Water Rights – State Water Plan Subsection	1989	DNRC	None
Federal Hydropower Licensing and State Water Rights – State Water Plan Issue Paper No. 4	April 1988	DNRC	None

Document	Print or Update Date	Contact Information	Web Link
Water Information System – State Water Plan Subsection	1989	DNRC	None
Montana Information System – Issue Paper No. 1	April 15, 1988	DNRC	None
Water Storage – State Water Plan Subsection	1990	DNRC	None
Water Storage Regulations – Background Paper, State Water Plan	February 1990	DNRC	None
Water Storage In Montana, A Report to the 57th Montana Legislature	2001	DNRC (Rich Moy or Jesse Aber)	None
Water Storage In Montana, A Report to the 56th Montana Legislature	1999	DNRC (Rich Moy or Jesse Aber)	None
Water Storage In Montana, A Report to the 55th Montana Legislature	1997	DNRC (Rich Moy or Jesse Aber)	None
Water Storage In Montana, A Report to the 54th Montana Legislature	1995	DNRC (Rich Moy or Jesse Aber)	None
Water Storage In Montana, A Report to the 53rd Montana Legislature	1993	DNRC (Rich Moy or Jesse Aber)	None
Water Storage In Montana, A Report to the 52nd Montana Legislature	1991	DNRC (Rich Moy or Jesse Aber)	None
Montana Water Storage Status Report	January 1989	DNRC (Rich Moy)	None
State Water Conservation Projects	March 1977	DNRC (Rich Moy or Kevin Smith)	None

Document	Print or Update Date	Contact Information	Web Link
The Use of Water User Fees to Repay the Cost of Rehabilitating State Water Projects (required by SB 313 in 1991)	June 1992	DNRC	None
A Study: The Feasibility of Assessing Recreational User Fees to Repay Water Storage Project Costs	July 13, 1992	FWP	None
Reconnaissance Investigation of Damsites – Upper Clark Fork Drainage Basin, for Headwaters RC&D, by Aquoneering	June 1990	Headwaters RC&D	None
Drought Management – State Water Plan Subsection	1990	DNRC	None
The Montana Drought Response Plan	1995	DNRC	http://nris.mt.gov/drought/committee/DroughtP.pdf
Integrated Water Quality and Quantity Management – State Water Plan Subsection	1992	DNRC	None
Upper Clark Fork Basin Water Management Plan - State Water Plan Subsection	1994	DNRC	None
Montana Groundwater Plan – State Water Plan Subsection	1999	DNRC	http://www.dnrc.mt.gov/wrd/gw_plan.htm
Issues in Ground Water Management by Governor's Ground Water Advisory Council	January 1985	DNRC	None

Document	Print or Update Date	Contact Information	Web Link
Musselshell River Basin Water Management Study	June 1998	US BOR, DNRC, Upper Musselshell Water Users, Deadman's Basin Water Users (Rich Moy DNRC)	None
Clark Fork Basin Project: Status Report and Action Plan, Office of Governor, Howard Johnson & Carole Schmidt	December 1988	DNRC (Rich Moy)	None
Boundaries Carved In Water: An Analysis of River and Water Management in the Upper Missouri Basin		Northern Lights Institute	None
A Water Protection Strategy for Montana, by Wright Water Engineers, Frank J. Trelease, ESA & DNRC	September 1982	DNRC (Rich Moy)	None
Order of Board of Natural Resources Establishing Water Reservation (Yellowstone River)	December 1978	DNRC	None
Yellowstone River Basin Water Reservation Applications EIS, Vol I & II	December 1976	DNRC	None
Water Reservations and Water Availability in the Yellowstone River Basin	May 1982	DNRC	None

Document	Print or Update Date	Contact Information	Web Link
Lower Missouri River Basin – Final Order, Est. Water Reservations on the Lower Missouri River	December 1994	DNRC (Rich Moy / Larry Dolan)	None
Lower Missouri River Basin – Final EIS, Est. Water Reservations on the Lower Missouri River	August 1994	DNRC (Rich Moy / Larry Dolan)	None
Missouri River Basin – Final Order for Water Reservation Above Fort Peck Dam	July 1992	DNRC (Rich Moy / Larry Dolan)	None
Missouri River Basin - Final EIS for Water Reservation Above Fort Peck Dam	January 1992	DNRC (Rich Moy / Larry Dolan)	None
Upper Clark Fork Basin Water Reservation Applications — Final EIS	January 1991	DNRC (Rich Moy)	None
Water Right Claims Examination Rules Adopted by the Montana Supreme Court	January 1991	MT Water Court or DNRC (Jim Gilman)	None
Proposed Water Right Claim Examination Rules	April 2002	MT Water Court	www.lawlibrary.mt.gov /dscgi/ds.py//View/ Collection-5944
Adjudication Claims Examination Manual	May 1995 editions	DNRC (Jim Gilman)	http://www.dnrc.mt.gov /wrd/waterrights/claims_ examination_maual.htm
Adjudication Status Report	January 2003	DNRC (Jim Gilman)	ftp://ftp3.mt.gov/ DNRC/water_rt/adj_ix/ AdjStat.htm

Document	Print or Update Date	Contact Information	Web Link
Report of the Montana Water Adjudication Advisory Committee to the Montana Supreme Court & 55th Legislature	October 1996	MT Water Court	None
Evaluation of Montana's Water Rights Adjudication Process, Sunders, Snyder, Ross and Dickson, P.C.	September 30, 1988	Legislative Library	None
State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 219 Mont.76	1985	MT Law Library	http://www.lawlibrary.state.mt.us
In The Matter of Water Court Procedures Addressing Factual and Legal Issues Raised "On Motion" of the Water Court, Case No. WC-92-3	1993	MT Water Court	None
Joint Amicus Brief of DNRC and Attorney General on Water Court Procedures: In the Matter of Water Court Procedures Addressing Factual and Legal Issues Raised "On Motion" of the Water Court, Case No. WC-92-3	March 23, 1993	DNRC or Ag Office	None
Proposed Water Court "On Motion" Procedures, Office of Montana Attorney General	September 10, 2003	AG's office Ms Candace West	None
Water Rights in Montana	April 2004	DNRC, Legislative Services	http://www.dnrc.mt.gov/wrd/home.htm

Document	Print or Update Date	Contact Information	Web Link
Water Use In Montana – 1980	1982	DNRC	None
The Framework Report: A Comprehensive Water and Related Land Resources Plan for the State of Montana	October 1976	DNRC	None
Upper Missouri River Basin Level B Study Report and Environmental Impact Statement	March 1981	Missouri River Basin Commission	None
Report on the Yellowstone Basin and Adjacent Coal Area, Level B Study	May 1978	Missouri River Basin Commission	None
Clark Fork of the Columbia River Basin Cooperative Study	1977	USDA SCS & DNRC	None
Clark Fork of the Columbia River Basin Cooperative Study – Watershed Investigation Reports	1977	USDA SCS & DNRC	None
Flint Creek Return Flow Study, MBMG Open File Report 364	December 1997	DNRC, USBR, MBMG & USGS	None
DNRC Hearings Decision Index	1973-Present	DNRC	None
North Fork Blackfoot River Hydrologic Study	March 2001	DNRC	None

4. Chronology of Montana's Water Adjudication Process

The adjudication of water in Montana has been a topic of discussion and work for 25 years in varying forms and applications. The process has continued to evolve with input from individuals and entities who have experience with the system as water users, attorneys, tribes, judges, water masters, department personnel, and legislators. This document is an attempt to provide a chronology of how the adjudication process has evolved and to document where we've been in an effort to determine where we want to go with adjudication in the future. The chronology is fairly lengthy but will provide a good overview of how the process has progressed and some of the challenges it has faced over the years.

Chronology of Montana's Water Adjudication Process

1972	**1972 Montana Constitution. Article IX, section 3. Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use. (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law. (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records. **Convention Notes:** (1) New provision guaranteeing all existing rights to the use of water. (2) No change except in grammar. (3) New provision recognizing state ownership of all water subject to use and appropriation by its people. (4) New provision requiring Legislature to pass laws establishing a central records system so that records of water rights may be found in a single location as well as locally.

Pre-July 1973	**A person could gain a right to use water simply by putting the water to beneficial use.** Some efforts were made to document water use through filings in government offices or through District Court decrees, but no one knew for sure how many water rights were claimed or how much water was appropriated from Montana streams. Water rights put to beneficial use prior to July 1, 1973, are called "existing water rights".
July 1, 1973	**Water Use Act became effective.** After the effective date of this act, any person seeking to appropriate water or to change an existing right was required to obtain a permit from the Department of Natural Resources and Conservation (DNRC). DNRC was also directed to establish a centralized record system of existing rights and to begin proceedings to determine existing rights through the appropriate District Court. The first effort to accomplish this daunting task was in the Powder River Basin. After 6 years, completion of the first basin was not in sight.
1975	**Northern Cheyenne Tribe files lawsuit.** The Northern Cheyenne Tribe filed a lawsuit in the United States District Court to adjudicate water rights in the Tongue River and Rosebud Creek. The United States filed two more lawsuits in the United States District Court for the same purpose, in its own right and as fiduciary on behalf of the Northern Cheyenne and other reservation tribes. *[United States v. Adsit was consolidated with Northern Cheyenne v. Tongue River Water Users Assn., CV-75-20BLG (D.C. Mont.)] [Northern Cheyenne v. Adsit, 668 F. 2d 1080, 1082 (CA 9th 1982)]*
1977	**House Bill 809 and HJR 81.** In 1977, HB 809, calling for a General Revision of Laws Relating to Water Rights Adjudication, passed the House and was tabled in the Senate. HJR 81 was then passed to perform an interim study on determining existing water rights. *[House Joint Resolution 81, Laws of 1977]*
1978	**Subcommittee on Water Rights submitted its Determination of Existing Water Rights Report to the Legislature** and recommended a comprehensive statewide adjudication of water rights be processed through a state water court system.

1979	**The United States filed four more lawsuits** in United States District Court seeking a declaration of water rights on behalf of the United States and four additional tribes. *[United States v. Aageson, CV-79-21GF (D.C. Mont. 1979)*; *United States v. Aasheim, CV-79-40BLG (D.C. Mont. 1979); United States v. AMS Ranch, CV-79-22GF (D.C. Mont. 1979); United States v. Abell, CV-79-33M (D.C. Mont. 1979)]*
May 11, 1979	**Senate Bill 76 became effective.** SB76 set up the current process for adjudicating existing water rights. It divided Montana into four water divisions and called for four judges, commonly known as the Water Court, to adjudicate all existing water rights in a statewide proceeding. At the same time, the Reserved Water Rights Compact Commission was created to negotiate federal and Indian reserved water rights. *[Chapter 697, Laws of 1979]*
June 8, 1979	**Montana Supreme Court issued an Order requiring every person claiming ownership of an existing water right to file a claim with DNRC.** Claims not timely filed will be lost as the statutory conclusive presumption is that the water right is abandoned. *[Supreme Court Order No. 14833, dated June 8, 1979]*
November 29, 1979	**United States District Court dismisses all seven federal lawsuits.** Appeal is taken. *[Northern Cheyenne Tribe v. Tongue River Water Users Association; United States v. Tongue River Water Users Association; United States v. Big Horn Low Line Canal; United States v. Aageson; United States v. Aasheim; United States v. AMS Ranch; United States v. Abell, 484 F. Supp. 31 (D.C. Mont. 1979)]*
May 11, 1979 - April 30, 1982	**Claim filing period.** The original filing deadline was January 1, 1982. The Montana Supreme Court extended the deadline to April 30, 1982.
April 30, 1982	**Filing deadline.** 200,000+ claims were submitted. Timely filed statements of claims, by statute, are prima facie proof of their content. Prima facie proof means "a fact presumed to be true unless disproved by some evidence to the contrary".
February 22, 1982	**Ninth Circuit reversed the dismissal of the federal lawsuits.** *[Northern Cheyenne v. Adsit, 668 F. 2d 1080 (CA 9th 1982)]*

July 1, 1983	**U.S. Supreme Court reversed the Ninth Circuit and remanded the cases for further proceedings.** The U. S. Supreme Court left open for determination on remand whether the proper course in such cases is a stay of the federal suit or dismissal without prejudice. The Supreme Court stated that resort to the federal forum should remain available if warranted by a significant change of circumstances. *[Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983)]*
December 9, 1983	**On remand, the Ninth Circuit held that the question of jurisdiction under state law is one to be resolved by the state courts and that the question of adequacy of the state proceedings is to be decided by the state courts.** The federal proceedings were stayed until the state court proceedings were concluded. *[Northern Cheyenne v. Adsit, 721 F.2d 1187, 1188-1189 (CA 9th 1982)]*
April 30, 1982 - November 11, 1985	**Claims verified, decrees issued.** DNRC verified claims by using their field office employees to review claims and compare them against aerial photos and the water resources survey published from 1943 through 1972 for the pertinent county. If DNRC found a problem with a claim, such as a problem with the amount of water that was claimed as historically used in comparison to a standard flow rate of 17 gallons per minute per acre or a point of diversion that was incorrectly described when compared to the claimant's map, they could change the claimed information before the decree was issued by the Water Court. The claimant would then have to object if the claimant disagreed with the change. Approximately the first 20 basins were decreed this way.
June 18, 1985	**Pettibone decision** The Montana Supreme Court ruled that the state of Montana is the owner of water rights appurtenant to school trust lands, not the lessee. *[Department of State Lands v. Pettibone, 216 M 361, 702 P.2d 948]*
July 17, 1985	**Department of Fish, Wildlife, and Parks filed a writ of supervisory control against the Water Courts** with the Montana Supreme Court based on the following factors: • substantive errors in decreed water rights • procedural law errors in the Water Court adjudication process • accuracy and validity of decrees *[Montana Supreme Court Cause No. 85-345]*

December 18, 1985	**Montana Supreme Court ruled that the Water Court has the authority to adjudicate water right claims on all Indian reservations.** The Supreme Court further concluded that the Water Use Act is adequate on its face to adjudicate both Indian and federal reserved rights. A challenge could later be brought as to how the statutes were applied. *[State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 95, 712 P.2d 754 (1985)]*
1985	**Fort Peck Indian Reservation Compact.** Negotiations between the Compact Commission and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation were successfully concluded in 1985. The Compact was approved by the Water Court. Portions of the Compact are still awaiting Congressional approval. *[85-20-201, MCA]*
February 19, 1986	**Stipulation was signed by 22 attorneys as a result of the FWP challenge to the adjudication.** This stipulation helped separate the role of DNRC and the role of the Water Court. It provided that "the verification that was performed by DNRC shall be limited to a factual analysis of water right claims for accuracy and completeness and the identification of issues". Since DNRC could rarely change any water rights before they were decreed, it started filing thousands of objections to allegedly inaccurate water right claims as a general objector. *[Montana Supreme Court Cause Nos. 85-345, 85-468, 85-493]*
March 12, 1986	**Chief Water Judge sent a letter to DNRC stating that "the conception of the accurate and legally defensive adjudication is with this Court."** The DNRC withdrew thousands of objections in 1987 based on this representation. *[Letter from Water Court to DNRC, dated March 12, 1986, p. 2, and letter from DNRC to Water Court dated July 7, 1987]*
April 8, 1986	**Montana Supreme Court ruled that no matter how the water right is expressed in the decrees of the Water Court, either in flow rate or in acre feet or a combination thereof, such expression of amount is not the final determining factor. *Beneficial use* shall be the *basis*, the *measure,* and the *limit* of all rights to the use of water.** *[McDonald v. State, 220 Mont. 519, 530 (1986)]*
Spring 1986	**DNRC drafted a set of rules for claim examination.** DNRC intended to adopt the rules pursuant to the Montana Administrative Procedure Act (MAPA).

Summer 1986	**Water Court Orders were issued that directed DNRC to reexamine certain groups of claims (mostly commercial, mining, power generation, fish and wildlife) in 5 basins.** The basins were 43B, 76G, 41K, 41E, and 41H. *[Basin 43B File, Basin 76G File, Basin 41K File, Basin 41E File, Basin 41H File]*
July 23, 1986	**Water Court Order was issued prohibiting DNRC from adopting claim examination rules under MAPA.** *[Water Court MAPA File]*
August 7, 1986	**DNRC issued rules informally for public comment.**
August 8, 1986	**Water Court Order was issued that DNRC take no further action on the examination rules without express authorization of the Water Court.** *[Water Court MAPA File]*
August 20, 1986	**DNRC appealed the Water Court Orders to the Montana Supreme Court.**
September 26, 1986	**Based on a September 25, 1986, motion by DNRC, the Water Court ordered that the reexamination of 4 of the 5 basins it had initially ordered DNRC to reexamine be stopped.** The stay was requested on the grounds that: • the Orders are premature as no new verification or examination procedures have been adopted • the Orders are contrary to the Stipulation • the United State of America has not asked for reexamination by any procedure other than that set out in the Stipulation • the Orders to reexamine the basins pending the outcome of the MAPA litigation in the Supreme Court will result in the waste of judicial and administrative functions. The Water Court issued its stay Order "without conceding any of the allegations of this motion". *[76G Basin File, 41K Basin File, 41E Basin File, 41H Basin File]*
February 3, 1987	**Legislative Joint Appropriations Subcommittee on Natural Resources** cut $500,000 per year from the adjudication program budget.
March 31, 1987	**Decision issued by the Montana Supreme Court in *In re Department of Natural Resources & Conservation, 226 Mont. 221, 236, 740 P.2d 1096 (1987)*.** The decision: • affirmed the Water Court's Orders • declared that the Supreme Court itself would promulgate rules to cover water right claim examination • directed the Water Court and DNRC to submit draft rules

July 1, 1987	**Effective date of reduced adjudication program budget.** Staff was reduced from 37.72 FTE to 20 FTE for FY88 and FY89 with 13 FTE in regional offices.
July 7, 1987	**Supreme Court issued the Claim Examination Rules.** The effective date of the rules was July 15, 1987. Public comment was allowed to be submitted until March 15, 1988. Comments were received from: • Confederated Salish and Kootenai Tribes • Department of Fish, Wildlife, and Parks • Department of Natural Resources and Conservation • Montana Power Company • United States of America • Washington Water & Power • Montana Water Court *[Order Adopting Water Right Claim Examination Rules, Matter of Activities of the Department of Natural Resources & Conservation, Supreme Court Order No. 86-397, dated July 7, 1987]* As a result of the Supreme Court rules, DNRC puts "issue remarks" on any claim that they feel isn't accurate based on their research into the specific claim. Through the verification process that was used prior to the examination process, DNRC could put "gray area remarks" on claim abstracts. Gray area remarks did not cover the range of issues that the current issue remarks cover.
August 19, 1987	**Water Court ordered DNRC to report any substantial differences between the claim examination procedures and the verification manual for 5 basins (43Q, 41G, 40K, 40C, and 41C) .** DNRC and the Water Court were trying to make the change from the "verification" process, which happened before the Supreme Court MAPA decision, and the "examination" process, which is the current process for DNRC when reviewing claims.
Fall 1987	**Water Right Claim Examination Manual was drafted** to provide step-by-step procedures for DNRC staff to follow in implementing the Supreme Court Claim Examination Rules.
October 14, 1987	**Water Policy Committee of the Legislature hired a Denver law firm as consultants to study the adjudication in Montana and submit a report.** This report is often referred to as the "Ross Report" and is approximately 85 pages long with 180 pages of Appendices. The Water Policy Committee was part of the EQC.

December 1987	**Claim examination was started in 6 basins using the Claim Examination Rules.**
October 1987 - December 1987	**Water Court issued Orders denying the reexamination of Basins 40C, 41G, and 40K.** In the absence of a show of necessity and in view of the recent reduction in DNRC funding, the Court concluded that it could not justify the costs, in terms of time and money, that would be required to reexamine these basins. *[40C Basin File, 40K Basin File]*
January 4, 1988	**U.S. Government filed a Motion before the Water Court to have reexamination comparison reports prepared on all basins in all temporary preliminary and preliminary decrees and have reexamination conducted in those basins on which comparison reports had been written — 40C, 40K, 41C, 41G, and 43A.** Comparison reports addressed the difference between the verification and examination procedures. *[Water Court Order No. WC-88-1]*
May 10, 1988	**Water Court issued an Order and Memorandum denying the U.S. Government motion for reexamination and took the motion for comparison reports under advisement.** *[Water Court Order No. WC-88-1]*
September 30, 1988	**Consultant's report was submitted to the Water Policy Committee.** The report affirmed Montana's adjudication process and suggested legislative "fine-tuning". The report stated that a process of limiting changes to water rights to their historical use would be a way to catch inaccurate claims in the future. In defense of the accuracy of the adjudication, the report also stated that the Water Court would continue to call in flagged claims (those with gray area remarks) on its own motion. *["Ross Report", pages 56-57, 60-61]*

October 19, 1988	**Montana Supreme Court's first "Bean Lake" decision. *In Re Water Rights in Dearborn Drainage Area, 234 Mont. 331, 766 P.2d 228 (1988).*** The Supreme Court ruled "It is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute. The prevailing legal theory was that some form of diversion or capture was necessary for an appropriation even though some forms of nondiversionary water rights were given appropriation status. in this case the Water Court denied the appropriation water right claim ' because of the lack of diversion, intent, and notice.' Whatever the merits of the lack of diversion argument, the DFWP and the public could not have intended an appropriation where none was recognized by law, and for the same reason, adverse appropriators could not have had notice of such a claim. We therefore uphold the Water Court's decision that DFWP, for itself or for the public, had no appropriation right in Bean Lake, and no 'existing right' therein which is protected by Art. IX, Section 3(1) of the Montana Constitution." [See September 24, 2002 — Supreme Court overruled this decision]
May 10, 1989	**Water Court and DNRC jointly submitted proposed revisions to the Claim Examination Rules to the Montana Supreme Court.**
Spring 1989	**1989 Legislature increased the adjudication program budget by $150,000 per year for FY90 and FY91.** Staff was increased from 20 FTE to 27 FTE with 20 FTE in the regional offices.
July 13, 1989	**Montana Supreme Court issued the first Order amending the Claim Examination Rules**. The amended rules had an effective date of September 1, 1989. *[Montana Supreme Court Cause No. 86-397]*
July 17, 1989	**Water Court ruled that any claims for existing pre-1973 water rights not filed on or before the April 30, 1982, deadline were forfeited.** *[Order, Findings, Conclusions, and Memorandum, Water Court Case No. 43B-LC-1]*
September 1, 1989	**Department of Fish, Wildlife, and Parks was the only party to submit comments and objections to the September 1, 1989, version of the Claim Examination Rules.** DFWP's comments were overruled by the Montana Supreme Court on November 2, 1989.
March 29, 1990	**Judge W.W. Lessley dies after serving close to 11 years as the first Chief Water Judge of the Montana Water Court.**

May 14, 1990	**C. Bruce Loble is appointed Chief Water Judge by the Montana Supreme Court.**
December 18, 1990	**Montana Supreme Court issued the second Order amending the Claim Examination Rules.** The amended rules had an effective date of January 15, 1991. *[Second Order Amending Water Right Claim Examination Rules, Matter of Activities of the Department of Natural Resources & Conservation, Supreme Court Cause No. 86-397]*
May 6, 1992	**Montana Supreme Court affirms the July 17, 1989, decision by the Water Court that claims filed after the April 30, 1982, deadline are forfeited.** *In re Adjudication of Existing Yellowstone River Water Rights, 253 Mont. 167, 832 P.2d 1210 (1992)]*
September 1992	**Northern Cheyenne Indian Reservation Compact.** Negotiations between the Compact Commission and the Northern Cheyenne Tribe were successfully concluded and ratified by the Montana Legislature in 1991. The Water Court approved the Compact. The Northern Cheyenne Compact was ratified by Congress and signed into law in September 1992. *[85-20-301, MCA; Public Law 102-374]*
1993	**National Park Service Compacts for Yellowstone and Glacier Parks and the Big Hole Battlefield.** A reserved water rights compact with the National Park Service for Yellowstone and Glacier Parks and the Big Hole Battlefield was finalized and ratified by the Montana Legislature in 1993. The Compact is awaiting Water Court approval. The Compact does not require congressional approval. *[85-20-401, MCA]*
July 1, 1993	**Senate Bill 310 becomes effective.** SB310 provided for the conditional remission of the forfeiture of existing water rights caused by the failure to comply with the April 30, 1982, deadline. Water right claimants were given one more opportunity to file a water right claim in the general adjudication. The deadline for filing claims was July 1, 1996. *[Chapter 629, Laws of 1993]*
July 1, 1993	**1993 Legislature reduced adjudication staff from 27 to 23 FTE.** The regional office staff was reduced from 20 to 17 FTE, and the Helena central office staff decreased from 7 to 6 FTE.
November 1993	**Special legislative session reduced the adjudication budget and eliminated four regional office FTE.** There were now 13 FTE in the regional offices. The total program staff was reduced from 23 to 19 FTE.

1995	**Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Area Compact.** The 1995 Legislature ratified a compact for the remaining two Park Service units, Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Areas, completing Park Service negotiations for Montana. The Compact is awaiting Water Court approval. The Compact does not require congressional approval. *[85-20-401, MCA]*
February 8, 1995	**Water Court ruled that it has the right to call in claims.** This decision is often referred to as the "on-motion" decision that was written by Judge Loble. The "on-motion" decision provided that the Water Court had the authority to call in claims on its own motion and that there didn't have to be an objector to the claim for the Water Court to call it in. The Water Court did not say when or if it would call claims in "on motion", ruling it was in the Water Court's discretion to do so. *[In the Matter of the Water Court Procedures In Addressing Factual and Legal Issues Called In "On Motion of the Water Court", Water Court Case No. WC-92-3]*
April 13, 1995	**1995 Legislature formed an advisory committee.** The Legislature required the Chief Water Judge to appoint a committee to provide recommendations on methods to improve and expedite the water adjudication process. The work of this advisory committee resulted in legislation aimed at improving the process. *[3-7-103, MCA]*
April 13, 1995	**1995 Legislature removed DNRC's ability to serve as an "institutional objector" from statute.** In order to object to a claim, the objector must have "good cause shown", which means a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree. *[Chapter 421, Laws of 1995]*
July 13, 1995	**Rules for collecting processing fees for late claims were adopted.** For claims filed after April 30, 1982, and prior to July 1, 1993, a $150 processing fee was assessed. The Department was to send a billing invoice to the current late claim owner. The Department was to complete this mailing by June 30, 1996. A state agency filing a late claim had until July 30, 1997, to pay the processing fee to the Department.
October 6, 1995	**First late claim processing fee invoice notice was mailed.** DNRC received payment on 829 out of a total of 2,050 claims requiring a processing fee. 130 claims were withdrawn or it was determined that they had been filed in a timely manner and were not subject to the late claim status.

April 16, 1996	**Second late claim processing fee invoice was mailed.** DNRC received payment on 261 out of 1,091 claims that required a processing fee. 51 claims were withdrawn or it was determined that they had been filed in a timely manner and were not subject to the late claim status.
July 1, 1996	**Deadline for filing late claims.** Approximately 1,950 late claims were received by DNRC, bringing the total late claims filed between April 30, 1982, and July 1, 1996, to 4,986.
September 20, 1996	**Judge Loble appointed the members of the Water Adjudication Advisory Committee.** The members were: John Bloomquist, Wm. Russell McElyea, and R. Mark Josephson as attorney members and Barry Hedrich, Eugene Manley, and Vernon Westlake as water user members. Ex officio members included: James Dubois, Department of Justice; Harley Harris, Assistant Attorney General; Don MacIntyre, DNRC; and Albert Stone, Professor of Law Emeritus.

October 1, 1996	**Report of the Montana Water Adjudication Advisory Committee was presented to the Montana Supreme Court, the 55th Montana Legislature, the Governor of Montana, the Montana Water Court, and the Department of Natural Resources and Conservation.** The Committee recommended:
	‣ amendments to several statutes
	‣ that DNRC make greater use of direct claimant contact in its examination process; and
	‣ further study of:
	  ‣ how exempt claims should be treated in the adjudication;
	  ‣ how to tabulate all existing water rights, permits, and change authorizations in a final decree to serve as guidance to water commissioners;
	  ‣ whether there should be an institutional objector in the adjudication process; and
	  ‣ the impact subdivisions may be having on the adjudication process.

March 17, 1997	**DNRC began the process of revising the Supreme Court Claim Examination Rules.**

March 25, 1997	**Benton Lake and Black Coulee National Wildlife Refuges (NWR) Compact.** In 1996, a compact between the State and the USFWS was reached for both the Benton Lake and Black Coulee National Wildlife Refuges (NWR). The Compact was ratified by the 1997 Montana Legislature and was signed by Governor Marc Racicot on March 25, 1997. The Compact is in the Water Court process. *[85-20-701, MCA]* **Red Rock Lakes NWR Compact** A compact for Red Rock Lakes NWR was ratified by the Legislature and signed by the Governor. The Compact has gone through the final federal approval process and is awaiting Water Court approval. It does not require ratification by Congress. *[85-20-801, MCA]* Negotiations concerning the three remaining USFWS units are in progress: Bowdoin NWR Charles M. Russell/UL Bend NWR National Bison Range
April 14, 1997	**Rocky Boy Indian Reservation Compact** A Compact between the State and the Chippewa Cree Tribe of the Rocky Boy Indian Reservation was reached in early 1997. The Compact was ratified by the 1997 Montana Legislature and was signed by Governor Marc Racicot on April 14, 1997. The Compact was approved by the Water Court. The Compact has been ratified by the U.S. Congress. *[85-20-601, MCA; Public Law 106-163]*
April 15, 1997	**A list of suggested modifications to the Supreme Court Claim Examination Rules was sent to Judge Loble.**
August 29, 1997	**The Water Court issued an Order directing DNRC to reexamine 1,122 irrigation claims in the Judith River Basin.** The Order came as a result of DNRC's proposal to reexamine the irrigation claims so that the verification process is consistent within the basin. *[Basin 41S File]*
1997	**The Reserved Water Rights Compact with the Bureau of Land Management for both the Upper Missouri Wild and Scenic River and Bear Trap Canyon Public Recreation Site on the Madison River** was finalized in 1997. It does not require ratification by Congress. The Compact must be filed with the Water Court. *[85-20-501, MCA]*

1999	**Red Rock Lakes NWR Compact and amendments.** The U.S. Fish & Wildlife Service Compact for Red Rock Lakes, which was passed by the 1999 Legislature, required some amendments. The amendments correct errors found in a consumptive use chart within the Compact. The amendments were passed by the 2001 Legislature. They do not change the meaning of the original Compact agreed to by the U.S. Fish & Wildlife Service and the Compact Commission.
1999	**Crow Indian Reservation Compact.** A compact settlement between the Crow Tribe, the United States, and the Compact Commission passed a special session of the Legislature in 1999. One year later, a Streamflow Management Plan for the Bighorn River was approved by the parties. The Compact must go to Congress. *[85-20-901, MCA]*
1999	**House Bill 407 was introduced in the Legislature.** HB 407 did not pass the Legislature. The bill sought to require the Water Court to develop rules relating to: ▸ the Water Court's "on-motion" policy ▸ the Water Court's review of water right settlements ▸ the Water Court's use of DNRC personnel. The legislation was seen as not necessary when the Chief Water Judge committed to adopting rules to address the issues. *[Rep. Cindy Younkin, HB407 sponsor]*
September 22, 2000	**Judge Loble requested interested Water Court observers to submit comments on:** ▸ the Court's review of claims on its own motion; ▸ the Court's review of settlement documents; and ▸ the Court's use of the DNRC in postdecree assistance.
November 21, 2000	**Water Court rules meeting was held in Bozeman.** Questions were raised with regard to how the "on-motion" decision would be used by the Water Court and the success of "neighbors keeping neighbors honest" through the objection process. The Chief Water Judge stated in this meeting that "as a practical matter, people are not objecting to their neighbor's water rights". The Judge also stated the following with regard to the Water Court's use of its "on-motion" ability. "Frankly, when we went to the On Motion decision, we pulled back from all those on motions. We have taken the position that by and large, that's not our problem." *[Meeting on Water Court Rules Transcript, dated November 21, 2000, pages 23-24.]*

2001	**Fort Belknap Indian Reservation Compact.** A Compact between the State and the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation was ratified by the 2001 Montana Legislature and signed by Governor Judy Martz. Negotiations continue on a federal bill that must go to Congress. *[85-20-1001, MCA]*
July 18, 2002	**Water Court held a public meeting in Bozeman to consider the comments received regarding proposed Water Right Adjudication Rules**.
September 24, 2002	**Montana Supreme Court overruled its 1988 Bean Lake decision.** In its decision, the Court stated that the doctrine of prior appropriation does not require a physical diversion of water where no diversion is necessary to put the water to a beneficial use. Further, the Court held that fish, wildlife, and recreation uses are beneficial and that valid instream and in-lake appropriations existed prior to 1973 when the facts and circumstances indicate that notice of the appropriators intent had been given. *[In re Adjudication of Existing Water Rights, 311 Mont. 327, 55 P.3d 396 (2002)]*
November 14, 2002	**Chief Water Judge reconvened the Water Adjudication Advisory Committee.** The issues that were outlined were: ▸ how to make the adjudication process more efficient; ▸ consideration of post-1973 changes in the adjudication; ▸ accuracy of the adjudication; ▸ establish procedures for enforcement of Water Court decrees and the Court's "on motion" authority; ▸ status and treatment of nonfiled exempt claims; ▸ increase use of the Internet to disseminate adjudication information; and ▸ revision of the claim examination rules to address the 2002 Supreme Court decision on recreation, fish, and wildlife claims.
December 2003	Helena Central DNRC Office — 2.7 FTE Regional DNRC Offices — 9.8 FTE 2003 General Fund Budget for Adjudication (DNRC's portion) — $644,009

Status of State Adjudication as of May 1, 2004

Final Decrees	6 basins	16,354 total claims
Preliminary Decrees	11 basins/1 subbasin	23,262 total claims
Temporary Preliminary Decrees	36 basins/2 subbasins	89,809 total claims
Active examination by DNRC	4 basins completed	3,774 total claims
Active examination by DNRC	13 basins/29,477 claims done	39,840 total claims
To be examined by DNRC	15 basins	46,379 total claims
TOTALS	85 basins/3 subbasins	219,417 total claims

5. Supply and Distribution of Water in Montana

Water supply can be depicted in a number of different ways. Chapter 5 summarizes a power point presentation that was given to the EQC regarding supply and distribution in Montana.

- An acre-foot of water is the amount of water that would cover 1 acre to a depth of 1 foot or a football field to a depth of one foot.
- 15.5 million acre-feet of water enter Montana
- 27.6 million acre-feet of water originate in Montana
- 43.1 million acre-feet of water leave Montana

Average Annual Flow by Basin			
Basin	**Inflow into MT**	**Originating in MT**	**Outflow from MT**
Missouri River	1.0 million acre ft/year	6.4 million acre ft/year	7.4 million acre ft/year
Yellowstone River	6.2 million acre ft/year	3.0 million acre ft/year	9.2 million acre ft/year
Kootenai River	8.1 million acre ft/year	2.1 million acre ft/year	10.3 million acre ft/year
Clark Fork River	0.9 million acre ft/year	14.3 million acre ft/year	15.2 million acre ft/year

Montana is water-rich and water-poor. Precipitation varies from 8 to 14 inches per year in semi-arid Eastern Montana. Precipitation varies from 14 to 22 inches in the valleys, but can exceed 75 inches per year in the high mountains of Western Montana. According to national climatologists, the West appears to be warming, especially in the fall and winter seasons.

	Water Use (Diverted)		Water Use (Depletion - 1980 Numbers)	
Irrigation	15.4 million acre ft/year	97.6%	3.2 million ac ft/year	96.4%
Municipal	157,000 acre ft/year	1.0%	58,000 acre ft/year	1.7%
Thermoelectric	106,000 acre ft/year	0.7%	9,000 acre ft/year	0.3 %
Industry	63,000 acre ft/year	0.4%	9,000 acre ft/year	0.3 %
Livestock	28,000 acre ft/year	0.2%	28,000 acre ft/year	0.8 %
Rural Domestic	17,000 ac ft/year	0.1%	17,000 acre ft/year	0.5 %
Reservoir Evaporation			3.9 million acre ft/year	

Instream Water Uses in the Missouri River Basin

Hydropower Water Rights

Morony Dam 7.3 million acre ft/year

Fort Peck Dam 11.7 million acre ft/year (20,000 cfs for power generation)

Federal Bureau of Land Management Federally Reserved Water Rights

Wild and Scenic River Stretch 5.42 million acre ft/year

Instream Reservations - Department of Fish, Wildlife, and Parks

Downstream of Fort Peck Dam 3.75 million acre ft/year

Other Water Facts

- Montana has 67 reservoirs that store more than 5,000 acre-feet, totaling 38,533,000 million acre-feet/year.
- Montana's largest reservoir is Fort Peck at 19 million acre-feet.
- Triple Divide Peak in Glacier National Park sends water into three oceans: Atlantic, Pacific, and Arctic.

Water Development Era

- The first irrigation and hydropower projects in Montana were private. They were the Big Ditch in Billings in 1883 and Black Eagle Dam in 1890.
- Many of Montana Power Company's hydropower dams on the Missouri were built between 1883 and 1928 with large instream water rights for generating electricity.
- Over half of the privately owned projects were constructed before 1900.

Bureau of Reclamation

- The U.S. Congress realized that to settle the semi-arid West, water had to be stored in the spring and diverted to the land.
- Reclamation Services was created in 1902, which was the predecessor to the U.S. Bureau of Reclamation.
- Reclamation built numerous projects in Montana from 1907-1939 (e.g. Nelsen, 1915; Sherburne, 1921; Gibson, 1929; Fresno, 1939).
- These projects were vital for irrigated crop and cattle production.

Montana Water Conservation Board (MWCB)

- The MWCB was created in 1933 to build water storage projects.
- MWCB built 181 projects with 141 of these with storage of 438,014 acre-feet (the larger reservoirs include Tongue, Painted Rocks, Deadman's Basin, Hylite, Nevada Creek, Cooney, and East Fork of Rock Creek).
- The projects were funded:
  - 47% state appropriations
  - 33% federal grants
  - 20% federal loans that were reduced.
- The MWCB was dissolved in 1972 and became the State Water Projects Bureau of DNRC.

U.S. Soil Conservation Service (Natural Resources Conservation Service)

- SCS was created in 1935 to provide technical and financial assistance in the management of soil and water.
- SCS helped construct over 3,000 stock ponds and small irrigation reservoirs
- Projects funded under Public Law 566 were limited to 25,000 acre-feet (examples include Newlan Dam in the Smith River Basin and Willow Creek Dam in the Flint Creek drainage)
- The last storage project funded under this law was in 1980.
- Today, the NRCS's primary focus is on improving local and basinwide water management.

Era of Large Federal Storage Projects

- 1944 Flood Control Act (Missouri River Basin Pick-Sloan Program)
  - Projects built under this program include: Canyon Ferry Reservoir (1949), Tiber Dam (1952), Helena Valley Dam (1957), Clark Canyon Dam (1961), and Yellowtail Dam (1969).
  - Montana was entitled to 936,000 acres of new irrigation under the Pick-Sloan Program, but was only able to develop 45,000 acres.
  - All other Pick-Sloan irrigation projects have been deauthorized.
- Columbia Basin Projects include Hungry Horse (1948) and Libby Dam (1968).

Changing Federal Policy on Storage

- In the late 1960s, there was a strong perception in the U.S. Congress that the West had been reclaimed and there was no further need for more large federal water projects.
- Few new large federal projects have been built after 1970 in the West and none in Montana.
- By 1970, the federal focus was on implementing water conservation, improving water management, and addressing the deteriorating condition of existing federal facilities, water quality, and the environment.
- The Bureau of Reclamation initiated a new strategy in the summer of 2003 entitled "Water 2025".

Water 2025 — Preventing Crisis and Conflict in the West

- The Bureau has based the strategy on five realities in the West:
  - there is explosive population growth;
  - water shortages exist;
  - water shortages result in conflicts;
  - aging water facilities limit options; and
  - crisis management is not effective.
- $11 million has been allocated to implement this strategy.
- According to Water 2025, the Bureau of Reclamation will**:**
  - focus on water-starved areas of the country (i.e. especially population centers);
  - stretch or increase water supplies to satisfy the demands of growing populations and protecting the environment and strengthening regional, tribal, and local economies;
  - provide added environmental benefits to many watersheds, rivers, and streams;
  - minimize water crises in critical watersheds by improving the environment, and addressing the effects of drought; and

- provide a balanced, practical approach to water management for the next century.

Task Force Recommendations (these recommendations were acted upon as evidenced under the following headings)

- Montana will need to:
  - develop criteria for analyzing and comparing which water storage projects should receive funding;
  - create ways to finance new water storage projects;
  - establish a long-term commitment to the operation and maintenance of existing storage projects;
  - address the need to repair and rehabilitate existing water storage facilities;
  - consider expanding existing water storage projects;
  - consider reallocating storage uses; and
  - improve the accuracy, completeness, and accessibility of water storage data.

State Water Plan on Water Storage (1991)

- Water storage was broken down into three areas: policy, financing, and regulations.
- Each area was addressed by a committee consisting of 14-16 members representing elected officials, governments, and beneficiaries.
- Each committee worked for 12 months to understand the issues and to develop recommendations.
- There were a number of opportunities for public involvement.
- Based on their recommendations, a Water Storage Policy Act was introduced by Governor Stephens and passed in 1991.

Water Storage Act

- One comprehensive bill was introduced at the request of Governor Stephens.
- In determining the best solution for a particular water management problem, the state shall:
  - define the problem;
  - identify all options to solve the problem;
  - determine whether water is physically and legally available; and
  - select the option that is most technically, financially, economically, politically, legally, and environmentally feasible.
- The Governor's Report on Water Storage will be submitted to each legislative session. The report must contain:

- a list of water storage project priorities;
- an implementation strategy for each priority project that identifies the actions needed to develop the project; and
- a progress report on the development of the prioritized projects.

- DNRC is required to use 10 different criteria to prioritize projects.
- DNRC has submitted storage reports since 1993.
- A Water Storage Account was created (85-1-631, MCA). The account:
  - provides loans and grants for water storage ($500,000);
  - must be used in the following priority:
    - First: existing high-hazard dams that are unsafe;
    - Second: projects that improve or expand existing water storage; and
    - Third: planning and construction of new water storage projects.

2001 Water Storage Report

- Prioritized 11 projects for funding under the Renewable Resource Grant and Loan Program (RRGL). Ten of the projects are for rehabilitation.
- One new storage project is being studied in the Big Hole.
- Funding for these projects comes primarily from: RRGL, Toston hydropower earnings for state-owned projects, local water users, and NRCS.
- Examples of projects that are funded:
  - Lower Willow Creek in the Flint Creek Drainage obtained a $100,000 RRGL grant and $1,350,000 loan and $3 million from NRCS for construction.
  - State-owned Bair Dam obtained a $100,000 RRGL grant, $988,772 loan, and $1.3 million from hydropower earnings.

Rehabilitation of the St. Mary Federal Facilities

- The St. Mary Project is owned by the United States Department of Interior, Bureau of Reclamation.
- The St. Mary system includes the diversion dam on the St. Mary's River, large gravity siphons, and 35 miles of canal to the Milk River.
- This federal system is the lifeblood of the hi-line and provides irrigation, municipal, and recreational water to the entire Milk River Basin.
- The state has determined that the rehabilitation of the dam should be a high priority as the system is almost 100 years old and is in dire need of repair.
- St. Mary's water provides 90% of the flows in the Milk River during dry years and about 70% in average years.
- The cost to rehabilitate the system to its designed capacity of 850 cubic feet per second could be as high as $100 million.

- The US Bureau of Reclamation has said it does not have the funds and that rehabilitation is not a priority for the Bureau of Reclamation at this time.

Broadwater Hydropower Project

- The irrigation project was contructed by the MWCB in 1940.
- DNRC added hydropower to the project in 1989 with a rated capacity of 10 megawatts.
- Federal law (PURPA) requires that the power rate be set at the avoided costs — the cost to bring a new power facility online in 1989.
- A power purchase agreement went to Montana Power Company and extends to 2024. It is now held by Northwestern Energy.
- Average annual revenue—assuming average annual runoff, is $3.5 million.
- Allocation of revenue:
  - Operation and maintenance costs — $316,000 (9%)
  - Set aside for major repairs — $84,000 (2%)
  - Repay annual debt (P&I) on $26 million bond — $1,880,000 (54%)
  - Fund to earmarked account to rehabilitate state-owned projects — $1,220,000 (35%)

Use of Toston Power Revenue

- Past use of revenue:
  - Rehabilitate and enlarge Tongue River Dam (unsafe & high-hazard) — $47 million (state and federal contribution).
  - Emergency repairs on East Fork of Rock Creek Dam — $1.9 million.
  - Rehabilitate Bair Dam spillway and outlet structure — $2.4 million.
  - Rehabilitate Nevada Creek Dam — $2.6 million.
- Proposed future uses of revenue:
  - Continue to rehabilitate state-owned projects, including:
    - Willow Creek Dam
    - Flint Creek siphon
    - Ruby Dam
    - Painted Rocks Dam
    - Cataract Dam
    - North Fork of the Smith Dam
    - Frenchman Dam.
  - Pay remaining balance on Tongue River loan ($10 million).

Opportunities for New Storage

- Most good storage sites have already been built.
- Remaining sites will cost more to build and maintain.
- One major limitation is who pays the costs.
- USBR has water reservations for new offstream storage reservoirs in the Yellowstone Basin
  - Cedar Ridge, 121,800 acre-feet, located near Forsyth
  - Sunday Creek, 539,000 acre-feet, located north of Miles City
  - Buffalo Creek, 65,700 acre-feet, located in Yellowstone County.
- Stored water is available under contract from USBR in Yellowtail, Tiber, and Canyon Ferry Reservoirs and from Corps of Engineers at Fort Peck, but may not be available in Hungry Horse.
- Upper Clark Fork, Bitterroot, Blackfoot, and Upper Missouri Rivers are closed to new appropriation, but not for storage of high spring flows.
- Biggest limitation to new storage projects is the senior hydropower water rights, especially in the Clark Fork Basin (including Flathead) and Missouri River above Great Falls.
  - Avista's 50,000 cfs hydropower right at Noxon Dam on the Lower Clark Fork River with a 1950 and 1976 priority date.
  - PP&L Montana's 7,100 cfs hydropower water right at Holter Dam with a 1918 priority date.

The Balancing Act

- Over the past 100 years, Montana agriculture has done an excellent job of finding ways to develop available water supplies for irrigation.
- Today, many basins are fully appropriated and become dewatered, especially during drought periods.
- The value of keeping water instream for hydroelectric generation, recreation, fish and wildlife protection, and water quality dilution was not recognized until the 1970s.
- Providing this balance on preserving minimum instream flows and meeting existing water rights has become a challenge and will get more difficult.

Promoting Water Use Efficiency

- To improve efficiencies, the state must look at ways to reduce evapotranspiration rates while still protecting existing water users from adverse affects.
- Before implementing a change or new use to improve efficiency, it is important to understand the effects of the use on the surface and ground water hydrology and the effects on existing water users.

Water Banking

- Water banking can work in some Montana river basins and should be tried.
- DNRC and USBR would like to try it in the Milk River Basin associated with the USBR irrigation project.
  - USBR holds most of the water rights and issues water contracts to the irrigation districts.
  - An irrigation district or district water users can leave contract water in Fresno Reservoir that can be purchased by another irrigation district or water users.

Summary

- Most good storage sites have projects.
- The cost of new storage is high because of geotechnical, water availability, and/or environmental issues and higher construction costs.
- Many existing storage projects are old and need rehabilitation.
- Who pays? The federal government has not agreed to pay for new storage for many years; in fact, it is having a difficult time rehabilitating its own projects.
- Improving water efficiencies can happen, but the effects on the surface and ground water hydrology and on existing uses must be understood.
- Two new irrigation projects are in the planning stages:
  - West Crane: 8,100 acres of sugar beets, malting barley, and corn.
  - Project of 20,000 to 40,000 acres from Tiber Reservoir.

6. Water Banking — A General Description and Policy Issues

The term "water banking" is a term that is most often used when discussing water quantity, water availability, and water marketing. Often those discussing water banking have different thoughts about what a water bank is and how it would or should work. Montana does not have a law addressing water banks in Montana and how they work here. In fact, the state of Washington did a survey in 2003 and at that time only 9 of the 18 states west of the Mississippi River had water banking laws. A majority of these laws were implemented in the late 1990s and early in the 2000s. Some of the states that have implemented water banking laws, such as Colorado, Kansas, and New Mexico, are just getting to the point where the water banks are up and running. Each of these states has set up their water banking program differently, and they are having varying results on the amount of use they are experiencing. But, before we get too far into the discussion, let's talk about what water banking means. Since Montana doesn't have a specific water banking law, defining what water banking means in Montana would be one of the firsts tasks that would need to be undertaken.

The primary objective of a water bank is to bring together those holding legally valid water use entitlements interested in making the water available to those needing to obtain additional supplies of water for their uses.

What is Water Banking?

Lawrence J. MacDonnell summed it up well in his book "Water Banks: Untangling the Gordian Knot of Western Water". He stated that a water bank, in its most generalized sense, is "an institutional process specifically designed to facilitate the transfer of developed water to new uses. The primary objective of a water bank is to bring together those holding legally valid water use entitlements interested in making the water available to those needing to obtain additional supplies of water for their uses. Broadly speaking, a water bank is an intermediary. Like a broker, it seeks to bring together buyers and sellers. Unlike a broker, however, it is an institutionalized process with known procedures and with some kind of public sanction for its activities."

Types of Water Banks

- Trust water bank — A trust water bank generally means that a state entity is authorized by the legislature to hold water rights in trust for entities that want to lease, sell, or donate their water rights. Depending on how the authorizing legislation is crafted, one of the uses for which water rights could be held by the bank is for instream flow purposes to benefit such things as fisheries, water quality, recreation, or aesthetics. Water rights could be held for out-of-stream purposes as well. The options are endless, depending on the ingenuity of those crafting and enacting the legislation. The water leasing ability that is provided to Montana's Department of Fish, Wildlife, and Parks in 85-2-436, MCA, might qualify as a type of "trust water bank". The difference would be that FWP and the private property right holder negotiate the lease and there is no intermediary that actually serves as a "bank".

- Storage water bank — A storage water bank usually requires a facility that can hold additional water at certain times of the year. For example, Idaho has a storage water bank where water is stored in reservoirs and can be released as it is purchased. Idaho has a statewide bank, and in addition, there are three separate rental pools that essentially operate as separate banks. The Idaho Water Resource Board determines the rental rate for the bank and pools to lease water. In Washington, the U.S. Bureau of Reclamation (USBR) has operated a "water bank" in the Yakima Basin since 1905. In this example, the USBR operates the physical system and the accounting system as a unified whole."Deposits" into storage water banks are usually foregone deliveries that are allowed to stay behind the dam and are accounted for and released when users purchase or lease the water for their use.[1]

- Surface flow water bank — The surface flow water bank does not require a storage facility. The flow remains in the stream or river. An example of using surface flow is what the Montana Water Trust has done.[2] The Montana Legislature

[1]Clifford, Peggy. "Water Banking in Other States", Washington Department of Ecology, 2003, http://www.roundtableassociates.com/ywe/meetings.htm

[2]http://www.montanawatertrust.org/

provided for surface flow water marketing when it enacted 85-2-408, MCA, in 1995. This statutory provision allows for a temporary change authorization of a water right for instream flow purposes. Water right owners voluntarily agree to a temporary change in their right. A surface flow water bank could work with entities that have upgraded their irrigation works to a type of system that requires less water to irrigate the defined acreage. Therefore, there is extra water that they then lease or sell to another user who is interested in the water. The entities still have to apply for a "change" in their water right, in this case a temporary change since that is all that is allowed by law, and must meet the change criteria. However, if they go through the permitting requirements and the "extra" water is leased or sold, the water right is enforceable, with the same priority date as the historic use, down to the point of diversion. Obviously, it would be more advantageous to lease water from an entity that is further down the drainage with an early priority date. Again, Montana doesn't have the intermediary "bank" that holds the water on paper rather than in a physical structure. The way it is working in Montana right now, it is a contractual agreement between two entities. The way it is currently being done may be the best option; however, the statute terminates in 2005. It would be up to the Legislature to make a policy choice between the following four alternatives.

- Allow the statute to terminate in June 2005, removing the opportunity for this type of water marketing with entities other than FWP.
- Remove the termination date and allow this marketing process to continue as it operates today.
- Remove the limitation of allowing only a temporary change in the water right and allow it to be permanent.
- Examine the feasability of implementing a water banking structure and compare the risks and benefits associated with each approach.

- Ground water bank — Ground water banks are set up to protect or enhance the ground water aquifer. The Southern Nevada Water Authority maintains their ground water source through "artificial recharge". Water in the principal ground water aquifer normally originates from mountain snowpack. In the case of the Southern Nevada Groundwater Bank, treated water from Lake Mead is injected

directly into the aquifer by wells.[3] The Arizona Water Banking Agreement was approved in July 2001. It allows Nevada and other states to store unused and surplus Colorado River water in Arizona's ground water aquifer for future use.

- Others — the types of banks are numerous. One example beyond what has been provided here is Nevada's bank. They use surface water for ground water recharge to be withdrawn at a future date. The possibilities are endless. The most important element is setting up the bank with clear-cut guidelines so that entities that would like to use the bank can easily understand the process and procedures involved.

Effect on Water Rights

The effect on water rights is a policy decision that must be made by the Legislature. In Idaho, putting a water right or a portion of a water right into a bank provides a "safe haven" for the right. Therefore, the water right cannot be forfeited or considered abandoned. If the goal of a water banking program is to promote water marketing and to address water from a supply and demand approach, it would probably be necessary to provide some sort of a protection for the water right. If no protection was afforded, water users may not be as willing to enter into the agreements and participation in the program may be limited. The other option would be for the state to actually purchase the water right and store the water for some future use. The problem or challenge associated with this is how and where the water would be stored.

An additional concern with water rights is ensuring that there is no adverse impact to other water rights. How this would be addressed is again a policy decision and the alternatives would have to be evaluated and debated for their merits.

[3] http://www.snwa.com/html/resources_colrvr_nvbank.html

Use of Water Banking in Negotiating Federal and Tribal Reserved Water Rights

Various forms of water banks have been used throughout the nation when settling tribal reserved rights, including Montana. A brief description of each of these is included below.

- Fort Belknap Compact—Montana

The Fort Belknap-Montana Compact provides for the Milk River Watershed Improvement Trusts - Establishment of Water Bank.[4] The purpose of the section is to establish a water bank for implementation in years of significant short-term water shortage—extreme drought periods. The Compact provides for the establishment of the bank and includes what is required of the Bureau of Reclamation in estimating a potential shortage in the upcoming year, publication of notice of the availability of grants to purchase water for the purpose of alleviating a shortage, pricing alternatives and requirements, how the banked water can be allocated, and a clause providing that the water bank established in the Compact is not intended to preclude a more comprehensive water marketing system within the Milk River Basin.

- Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 — Nevada[5]

In this settlement, the Secretary of the Interior, in consultation with the state of Nevada and the operator of the Newlands Project, is authorized to use and enter into agreements to allow water right holders to use Newlands Project facilities in Nevada, where the facilities are not otherwise committed or required to fulfill project purposes or other federal obligations, for supplying carryover storage of irrigation and other water for drought protection and other purposes, consistent with the expansion of authorized purposes and the Truckee River diversions that are addressed earlier in the settlement. The use of the banked water has to be consistent with and subject to applicable state laws.

[4]85-20-1001, MCA, Fort Belknap-Montana Compact, Article IV, C, 8.

[5]Nevada Public Law 101-618 [S.3084], November 16, 1990, Section 209(d) Water Bank

- 1990 Fort Hall Indian Water Rights Agreement — Shoshone -Bannock Water Bank — Idaho

This agreement allows the tribes to create a water bank pursuant to Idaho law in order to rent, as prescribed in the agreement, all or any part of the water accruing to the federal contract storage rights for any beneficial use outside the Reservation that is not used on Indian lands or exchanged pursuant to the agreement. There are requirements that storage water from certain reservoirs has to be rented and delivered to certain basins.

Other Issues Associated with Water Banking

- Geographic location

In developing a water banking program, one of the primary issues to decide is the geographic area to which the bank will apply. Other states' laws vary from banks covering the entire state to banks operating on a basin and subbasin level.

- Timeframe

A policy that would also need to be decided is when a water bank can be activated. Is it a water bank that lasts year around, during the growing season, or only during times of extreme drought? The use of water banks in drought times is reflected above in the tribal reserved rights agreements. California also has a bank that is specific to drought times. Other states have banks that are active all of the time.

- Management of the banked water

How will the bank be managed? The first year that the bank operated in California, it purchased water based on early estimates of demand. However, after the bank made commitments to purchase the water, the weather changed and more rain fell than was estimated. Therefore, demand for the banked water was reduced. The bank was unable to resell all the water it had purchased and as a result changed its procedures. Upfront deposits and contractual commitments from buyers are required prior to contracting to purchase water on their behalf. Water that is acquired by the bank from voluntary sellers is allocated to buyers based on a supply and demand relationship. Leases are usually

purchased from the bank in bulk packages by large water purveyors.[6] The risks associated with different management schemes would need to assessed prior to deciding on one particular approach. It would be up to the Legislature to determine who makes the decision regarding how a bank operates, how it is managed, who can take part, etc.

- Market-based philosophy

Is the market-based philosophy appropriate to addressing Montana's water resource? The market approach is based primarily on the belief that the water will go to the highest and best use of the water because, based on the supply and demand scenario, the highest and best use will be wiling to pay the most for the water. There are examples throughout the United States and the world of using the market-based philosophy when addressing a finite resource such as water.

Summary

It is easy to see, even from the limited amount of information provided above, that water banking can become quite complex. An important question to ask when looking at how water marketing works in Montana is whether or not Montana needs water banking. Are the current processes that have been established for marketing water adequate? Is an intermediary, such as a water bank, necessary or are there other approaches to water marketing that might work as well or better? The water banking philosophy might work on certain basins or subbasins but who decides which basins and how do they decide? Are entities that are involved in water marketing asking for water banking in a certain area? All of these issues have to enter into any discussion about water banking in Montana.

[6]Clifford, Peggy. "Water Banking in Other States", Washington Department of Ecology, 2003, http://www.roundtableassociates.com/ywe/meetings.htm

7. Surface Water /Ground Water Connectivity

The statutory guidance related to surface water/ground water connectivity is contained in Title 85, chapter 2, Surface Water and Ground Water. The issue has emerged recently with regards to closed basins. However, the discussion of whether or not ground water and surface water are connected and to what extent they are connected applies to all areas of Montana, whether the basin is closed or not. One reason that it may be in the forefront in closed basins is because of the fact that 85-2-336, 85-2-341, and 85-2-343, MCA, provide exemptions to the basin closure requirements for the particular basin or basins that the statutes address. In a closed basin, DNRC is not allowed to process or grant an application for a permit to appropriate water or for a reservation to reserve water within the basin until the final decrees have been issued in accordance with Montana law. However, this restriction does not apply to an application for a permit to appropriate ground water. Ground water is defined for these sections as meaning " water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water" (emphasis added). The determination of whether or not the ground water is connected to the surface water has a direct impact on whether or not the permit can even be processed by DNRC. It is imperative that DNRC accurately determine if ground water and surface water are directly and immediately connected. The Smith River lawsuit addresses this very issue. The Smith River lawsuit is discussed in greater detail later in this report.

"The meaning of 'immediately or directly connected to surface water' is interpreted by DNRC to imply a physical capture of surface water by inducing streambed infiltration. To assess whether the source of water for a proposed appropriation is ground water, an applicant must determine whether the source aquifer is hydraulically connected to surface water and whether the proposed well creates sufficient draw down beneath a stream to induce infiltration through the streambed."[7]

[7]Department of Natural Resources and Conservation Proposal for Decision in In the matter of the application for beneficial water use permit number 41H-30003523 and the application for change number 41H-30000806 by Montana Golf Enterprises, LLC, page 16, November 19, 2003.

The determination of whether or not the ground water is connected to the surface water has a direct impact on whether or not the permit can even be processed by DNRC.

Relationship with Water Rights and Burden of Proof

The connectivity or lack thereof is of significant importance when discussing potential impacts on surface water rights. Pursuant to 85-2-311, MCA, it is up to the applicant for a new water right permit to prove that there will be no adverse impacts on other existing water right holders if a new water right is granted. Section 85-2-402(2)(a), MCA, applies the same requirement before a change in a water right can be approved. If there is an impact, then the permit or change cannot be granted by DNRC.

Based on the above information, DNRC has to evaluate any change application or new water right application based on the potential for adverse effects on other water right holders. If the application for a new permit is for a well, DNRC has to determine that this new well wouldn't have an adverse impact—not only on other wells, but also on surface water rights. If the determination regarding the interaction between surface water and ground water is not adequate, a new ground water right can be issued for a well that may adversely affect existing surface water rights. If this does in fact happen, the burden would then shift to the existing water right holder to prove that the new water right is affecting the preexisting right. There are, of course, costs associated with being the party responsible for the burden of proof.

Administrative Cases

There are two recent administrative cases that are pertinent to this discussion. Each case is briefly outlined, and information is provided on the status of each case and the potential future actions. Administrative cases are those cases that are being addressed through the DNRC hearing process and are not in the judicial arena at this point.

- **In the matter of the application for beneficial water use permit number 41H-30003523 and the application for change number 41H-30000806 by Montana Golf Enterprises, LLC (Montana Golf)**

The Montana Golf case involves a property owner that submitted a permit application for the appropriation of ground water through a well. The property owner and DNRC both agreed that there was, to some extent, an immediate and direct effect on surface water. However, the property owner offered to mitigate this impact by "augmentation". To augment the water that would be lost to the surface water, the property owner submitted a change of water right permit. The property owner planned to remove a certain number of acres from irrigation, leaving the water in the stream, thus offsetting any loss of water caused by the ground water well. An interpretation of this decision by the DNRC hearing examiner wasn't whether or not the surface water and ground water were connected but whether or not the amount of acreage to be taken out of irrigation was enough to offset the impacts caused by the well. The DNRC hearings examiner therefore recommended in the proposal for decision that the water use permit be denied.

This case was terminated when Montana Golf withdrew its application.

- **In the matter of application for beneficial water use permit No. 41H-11548700 by PC Development (PC Development)**

In the PC Development case, DNRC denied the application because the applicant failed to prove by a preponderance of evidence that water is legally available and no adverse effect would occur to prior appropriators. The applicant raised a procedural exception to the hearings process and also asserted the adequacy of the applicant's aquifer testing, methodology, and analysis and presented some additional legal arguments that the hearings officer was failing to follow previous hearings orders in his interpretation of the law. This case did not specifically address surface water/ground water connectivity. The primary issue argued in this case was whether the aquifer tests that were done were sufficient to prove legal availability and no adverse effect to other water right holders. This case has not been appealed.

Court Cases

- **Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, First Judicial District, 2003 ML 3725 (2003)**

This case is the "Smith River case" that has been in the newspapers and that is leading the charge with regard to the interpretation of what "direct and immediate" connection of surface water and ground water means. This discussion refers only to the issues that are directly related to surface water/ground water connectivity. The petitioners also addressed other issues relating to rule development and due process in their complaint.

In this case, Trout Unlimited (TU) filed a petition for a Writ of Mandate. A Writ of Mandate is an order issued from a court requiring the performance of a specified act for which legal duty exists or where the law gives authority to have the act done.[8] In addressing the legal standard that must be followed, the District Court provided the following information. The Montana Supreme Court scrutinizes the relevant statutory wording to find a clear legal duty. Where a statute is sufficiently specific, a clear legal duty will be found to exist. Huttinga v. Pringle, 205 Mont. 482, 668 P.2d 1068 (1983). An additional requirement for mandamus relief is that there is no speedy or adequate remedy in the ordinary course of law. State ex rel. Konen v. City of Butte, 144 Mont. 95, 394 P.2d 753 (1964).

TU asked the Court to order DNRC to cease processing ground water applications until it first determines whether or not the water is immediately or directly connected to surface water. The first step that the District Court had to take was to identify a clear legal duty on the part of DNRC with respect to the determination of ground water/surface water connectivity. TU asserted that DNRC has a clear legal duty to determine specifically that the subject water in the applications is ground water before processing the applications. Since the Smith River is within a closed basin, only ground water claims can be processed by DNRC. If DNRC determined that the proposed wells were immediately or directly connected to the surface water, DNRC couldn't process the claims.

[8]Black's Law Dictionary, 5th Edition, and section 27-26-102, MCA.

According to the Court, there is no question that DNRC has a clear legal duty to comply with the statutes that place a limit on DNRC's actions if there is a connection between the surface water and ground water. The Legislature did not say how ground water connectivity is to be determined, nor did it place the burden of proof on anyone. These procedures were left to the agency to promulgate. It appears that DNRC requires applicants for water rights in the Upper Smith River Basin to prove that the ground water they intend to pump is not "immediately or directly" connected to surface water. DNRC has required the applicant to make that showing through a "cone of depression" test. There was evidence presented in the case regarding whether or not DNRC follows this procedure at all times or if it is not addressed until after a permit has been issued and the concern is raised through the objection process.

The Court stated, "If DNRC in fact does not make a finding that the requested ground water use satisfies section 85-2-342, MCA, mandamus would lie to compel the agency to make that determination before issuing a permit. However, the Court does not have enough evidence at this time to determine if DNRC in fact circumvents its duty to determine if the applicant's water use is ground water under the statute." (emphasis added)

Therefore, this case doesn't do a lot with regard to answering whether or not surface water and ground water are connected in this particular area. It simply found that there wasn't enough evidence to determine if DNRC was following the law or not. DNRC and TU are scheduled to meet for a court-ordered mediation between TU and DNRC and the Intervenors. If a settlement cannot be reached, this issue is set for hearing on October 25 on the declaratory judgment issue of whether DNRC's "immediately or directly connected to surface water" test is legally adequate.

Appendix B provides a copy of the detailed ground water/surface water power point presentation that was made to the EQC by the Montana Bureau of Mines and Geology.[9]

[9]Public comment regarding the surface water/ground water connectivity presentation and information that was received by EQC is included in Appendix C. This public comment showed concern that there was a certain amount of information that was not presented to the EQC in the presentation reflected in Appendix B. There were fundamental hydrologic principals that were not addressed. In fairness to the presenter, staff asked the presenter to simply discuss ground water/surface water connectivity with regard to determining how they are connected in a certain instance.

8. Federal and Tribal Reserved Water Rights

The Reserved Water Rights Compact Commission was created in 1979 by Senate Bill 76 (Chapter 697, Laws of 1979), which also created the Water Court. At the time, the federal government was involved in litigating on behalf of the seven reservations for their federal reserved water rights. The Commission was created in response to uncertainty about how, and in what court, the adjudication would proceed. The Commission is a division of DNRC and is administratively attached to the Department for budget purposes. The Commission's only mandate is to negotiate an equitable apportionment and division of the waters of the state between the tribes that are claiming those waters (as well as nontribal federal users) and nontribal state water users. The Commission is not separate from the adjudication process but is integral to it, and the outcome of the entire statewide adjudication process is critical to the work of the Commission. Montana is the only state with a Compact Commission. Some other western states are involved in negotiation with the tribes and the federal government through their attorneys general or natural resources departments. Montana's process has been successful because negotiations are conducted in the context of litigation—if a tribe or federal entity chooses not to negotiate, then their reserved water rights will be litigated by the Attorney General, on behalf of the state, in Montana's Water Court. The procedures the Commission follows are clearly spelled out in statute. The first step is to negotiate an initial settlement between the three involved parties—the state, the claimant of the reserved water right, and, if the claimant is an Indian tribe, the federal government as trustee for the tribe. Once the initial settlement is reached, and it can take many years, the compact is then ratified by the Legislature and becomes a part of the Montana statutes. Water compacts involving tribal settlements then go to Congress because of necessary authorizations and appropriations for projects or improvements. The final step in the process occurs when

The Compact Commission's only mandate is to negotiate an equitable apportionment and division of the waters of the state between the tribes that are claiming those waters (as well as nontribal federal users) and nontribal state water users.

the compact is filed with the Water Court and is published as a decree in that water basin. At that time, the 6-month objection period begins.

The Water Court has statutory authority to approve or disapprove a compact but not to amend one, and approval is based on a consent decree standard. A consent decree standard is one where all parties consent to the decree and the decree conforms to applicable law. To date, the Legislature has approved five tribal and several federal water compacts. The Northern Cheyenne and the Rocky Boy Compacts have gone through the entire process, and the Fort Peck Compact is in front of Congress because of concerns of downstream states over water marketing provisions, although other provisions are operational and have been approved by the Interior and Justice Departments. The Crow and Fort Belknap Compacts have been approved by the Legislature but are still waiting for federal approval and necessary legislation. The Blackfeet Compact, which is still under negotiation, will be of critical importance because of the St. Mary Project located at the headwaters of the Milk River. The water moving through the St. Mary Project is so crucial to the entire Milk River Basin that there is language included in the Fort Belknap Compact that if the St. Mary Project is not maintained to current standards, then the entire Fort Belknap Compact is void. The Confederated Salish/Kootenai Compact is also still under negotiation and is of a high priority because of the permitting freeze in place on the Flathead Reservation. The Tribes brought water rights cases before the Montana Supreme Court and won, and the Supreme Court placed a moratorium on new water rights permits until the water rights are quantified. Because of this pressure, the Commission has put a great deal of work into the development of interim plans, which the tribes have agreed to discuss, and is ready to enter into a contract with a mediator to aid the negotiations. The mediator will conduct a case assessment by discussing issues and concerns with the parties involved and will provide an honest assessment of the possibility of settlement.

Negotiations are still underway for various federal Fish & Wildlife compacts, as well as a compact with the Forest Service, which the Commission hopes to bring to the 2005 Legislature for ratification.

Commission staff made a presentation to the EQC during the 2003-2004 interim. In that discussion, the Commission said that they would not make a decision between using litigation or negotiation without a thorough discussion among many different people

because the litigation process is long and expensive. The Commission had reached that decision to move forward with litigation once before. In 1990, the Blackfeet Tribe passed a resolution stating that water right negotiations were not in the Tribe's best interests and the Commission held a special meeting and decided to certify the case to the Water Court, at which time the federal entity (Justice) had 6 months to file the tribal claims in the Water Court. Just before the expiration of the 6-month period, the Tribe changed its mind and decided to negotiate. That case is still before the Water Court, and the Commission files a yearly extension with the Water Court as long as negotiations are continuing.

The yearly budget of the Commission is about $650,000 and approximately $7.5 to $8 million had been spent over the 20-year life of the Commission.

A federal reserved water right is created when the federal government reserves land for an Indian tribe, thereby impliedly reserving enough water to fulfill the purposes of the reservation. The federal reserved water rights doctrine was decided in 1908, but it wasn't until the 1960s that questions arose as to what that means in terms of quantity. A federal reserved water right does not lapse from lack of utilization.

Litigation vs. Negotiation

The Attorney General's Office has not prepared a budget for any proposed litigation, and this summary of potential costs of undertaking litigation is not prepared with any particular water right, any federal enclave, or any tribal water rights as its focus. This summary is prepared at the request of the legislative interim committee solely for the purpose of reviewing and comparing approximate litigation costs to the costs that may be associated with negotiating reserved water rights in Montana.

In reviewing the numerous costs that the state may face if it becomes necessary to pursue litigation to resolve claims of reserved water rights in Montana, the Attorney General's Office reviewed some historic costs associated with other comprehensive resource litigation including the Natural Resource Damage Litigation, Montana v. ARCO, and historic expenditures related to litigation in In re the Adjudication of the Blackfeet Tribe Reserved Water Rights, WC-91-1. The remaining projections of possible costs to undertake litigation relative to reserved water rights are based upon the expenditures that

were made in adjacent states to litigate the reserved water rights belonging to the United States Forest Service.

Historic costs that have been associated with natural resource/water resource litigation, include the following expenditures:

Montana v. ARCO

Between 1989 and 1994, the State of Montana expended $8,157,036 for pursuing damages for injuries to natural resources in the Clark Fork River Basin from Atlantic Richfield Corporation. Of that amount, $5,392,800 was expended for consultants (experts) on the scientific assessment along with the legal fees to support the analysis of injuries and damages. The Department of Fish, Wildlife, and Parks expended an additional $242,504 in direct support of the assessment of damages to those resources. In addition, since the Natural Resource Damage Program needed to borrow the funds from the Board of Investments to pursue the litigation, it also accrued and paid $1,118,135 in interest.

Since the time of the partial settlement when all of the above costs were recovered from ARCO as a part of that agreement, the State of Montana has incurred additional annual expenses pursuing the remaining three claims against ARCO that were left unresolved in the settlement in 1996.

1995 Supplemental	$ 675,000
1997 Biennium:	$2,359,857
1999 Biennium:	$1,492,000
2001 Biennium:	$1,650,000
2003 Biennium:	$ 523,816

When the 1995 through 2003 expenditures of $6,700,673 are added to the previous $8,157,036 spent through 1994, the total cost of the ARCO litigation to date is $14,857,709.

In Re Blackfeet Tribal Reserved Water Rights

A study of the historic basis of the tribal water, along with a study of potential irrigable acres on the Blackfeet Reservation was partially undertaken beginning in 1992 in preparation for litigation. While the studies were never completed, the State of Montana expended funds through the Attorney General's Office for consultants to develop the studies in the following amounts:

1992	$107,027
1993	$151,778
1994	$147,070
1995	$ 30,763
1996	$ 3,023
1997	$ 9,014
1998	$ 17,243

The total expenditures of $465,922 did not result in the completion of the studies, which are at this point in time only partially complete, likely stale, and would need further work. Nor did the expenditures and studies result in resolution of the litigation. The litigation with the Blackfeet is currently stayed pending negotiations.

Future Litigation of Any Tribal or Other Federal Reserved Water Claim — Some Projections

In a draft analysis of some of the costs that may be associated with litigating any one of the outstanding tribal or other federal reserved water rights, one should expect to include the following categories of expenses:

Soils studies

Hydrology studies

Engineering

Fisheries

Historical Research

Legal Research

State Claims Review

Legal Defenses and Motions

Discovery Costs

Expert Witnesses (including studies, expert disclosures, depositions, and testimony)

Technical Support (data collection, electronic presentation, maps, charts, GIS plots)

Travel Expenses

Support Staff and Services

Trial Costs

Additional DNRC and Water Court Staff FTEs and services.

Based on a comparison of other complex natural resource litigation, the cost for litigating even one tribal or federal reserved water right will likely be in the range of $5 million to $8.6 million.

Comparison With Other States' Adjudication Litigation

Forest Service Claims

The State of Idaho spent approximately $3 million dollars on objections and development of objections and scientific studies for the Forest Service Claims on the Snake River Adjudication. The Forest Service claims never went to trial, but were ultimately withdrawn by the USFS.

The State of Colorado spent approximately $2 million dollars on objections and development of objections and scientific studies for the Forest Service Claims in one of their seven Water Court Districts.

9. Montana's Water Adjudication Program

Montana Constitution

The Article IX, section 3, of the Montana Constitution provides the following:

> **Section 3. Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
>
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
>
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

The McCarran Amendment

Because of the sovereign immunity of the United States, rights to the use of water claimed by the federal establishment under state law or federal law could not be adjudicated in state water right proceedings unless representatives of the United States waived the federal immunity to state court action and voluntarily subjected those rights to the jurisdiction of the state courts. As might be expected, no representative of the United States or of tribes claiming Winters doctrine rights was ever willing to voluntarily subject the claims to a state adjudication process.[10]

[10]"Evaluation of Montana's Water Rights Adjudication Process" Saunders, Snyder, Ross & Dickson, P.C., September 30, 1988, p. 43-44.

Because of this issue, a state that had any federally reserved water rights was not able to have a complete adjudication because there was no way that the state process could identify and quantify federal claims.

In 1952, the McCarran Amendment was passed in Congress. The McCarran Amendment effectively told the United States representatives that if the United States was properly noticed and invited into state proceedings and if those proceedings were "for the adjudication of rights to the use of water of a river system or source", the federal and tribal claims to water could be included in and addressed in state adjudication proceedings.

Water Adjudication Process

The Department of Natural Resources and Conservation is responsible for all claims examination. What this means is that all of the claims that were filed pursuant to statutory direction so that they could be included in the adjudication program and quantified are examined by a DNRC staff person. The Montana Supreme Court has developed rules for this examination process that must be followed by DNRC personnel. If a DNRC staff person finds an "issue" associated with a claim, it is documented on the claim through an "issue remark". These issue remarks are governed by the Supreme Court Claims Examination Rules, and the evidence necessary to overcome these issue remarks is also included in the Supreme Court Claims Examination Rules. Once the examination is complete, DNRC has additional duties that include helping the Water Court with postdecree assistance, enforcement information, etc.

The Montana Water Court is the entity through which all pre-1973 water rights claims must pass before they can be adjudicated and eventually decreed. The Water Court works with DNRC and water users to identify opportunities for addressing conflicting information between the claims examination process and what the claimant actually claimed as a water right. The Court is responsible for decreeing all water rights in a basin and in Montana. It must take into account the historic beneficial use of the water that is the actual water right. In the event there are issue remarks remaining on claims and the claimant has not addressed them or the claim was not subject to an objection by another

water user, the Water Court can call the claim in on its own motion to address the issues identified by DNRC as worthy of closer evaluation.

On Motion of the Court

Montana's water adjudication process includes a concept known as "on motion of the Water Court" or more commonly called "on motion". In legal terms, the Court is really raising an issue "sua sponte", which according to Black's Law Dictionary means "of his or its own will or motion; voluntarily; without prompting or suggestion". Because this is an important element of the water adjudication process, it is important that the public, legislators, and water users understand what "on motion" means and how it works.

"On motion" means that a court calls in some factual or legal issue on its own motion rather than addressing the issue only because it was raised by the plaintiff or defendant in a case or not addressing the issue because it was not raised by the plaintiff or defendant in a case. The more case-specific example of "on motion of the Water Court" is described below.

The authority of the Water Court to call water right claims in on its own motion is an important element in the adjudication process.

The authority of the Water Court to call water right claims in on its own motion is an important element in the adjudication process. A decision issued by the Chief Water Judge in 1995 that found that the Water Court does have this authority plays an important role. Prior to this decision, it was not clear whether or not the Water Court could even exercise an "on-motion" policy.

Under the normal adjudication process as outlined in Montana law, a claim comes before the Water Court when an entity with an ownership interest in a water right that is affected by the claim in question objects to the claim. The objection could be based on numerous different points. However, objections are generally based on "issue remarks" or "gray area remarks" that are added to the claims by DNRC through the verification or examination process. Prior to the change to the examination process and the development of the Supreme Court Water Right Claim Examination Rules, DNRC verified claims and added "gray area remarks" to claims if there was a question. Under current law, DNRC is

responsible for examining every claim and putting issue remarks on any claim that does not seem to be accurate based on DNRC's research. The examination process and resulting issue remarks are done according to the Water Right Claim Examination Rules adopted by the Supreme Court.

If no one objects to a claim that has an issue remark on it and the Water Court does not call the claim in on its own motion, what happens to the issue remark? Is it acceptable for the issue remarks to stay on claims? If the issue remarks stay on claims does that mean that Montana's adjudication process isn't providing accurate decrees? Are the issue remarks that remain on claims going to provide an opportunity for downstream states or other interests to challenge the accuracy of Montana's water adjudication? There are players on each side of the questions outlined above. It is up to the EQC to decide if the current process is working and will result in an adjudication that is accurate enough. The most important question to ask is "what is accurate"? Until that question is answered, there is no way to determine if changes need to be made to meet an "accurate" standard.

Chief Water Judge Loble wrote a Memorandum decision to address whether or not the Water Court has the authority to call in factual and legal issues on its own motion. In *In the Matter of the Water Court Procedures in Addressing Factual and Legal Issues Called in "On Motion" of the Water Court*, Case No. WC-92-3 (1995), Judge Loble found that the Water Court does have the authority. Now, the question becomes how or if the Water Court will exercise this authority. In the "on-motion" decision, Judge Loble provided the following guidance on how he views the Water Court exercising its "on-motion" authority.

The Judge stated that "as a result of this 'on motion' review the Court concludes that its primary focus should be on resolving objections in an effort to prepare decrees that are enforceable by the district courts. The Court will continue to review claims and call them in on its own motion when it appears appropriate to do so. However, not every claim containing a DNRC issue remark will be called in. The Court will concentrate on calling in those claims where the probability of determining accuracy is highest, where the claimants are most willing to assist the Court and when it appears most cost effective to do so. The Court will continue to utilize DNRC regional office technical expertise."

It is clear based on the above information that the Court feels that addressing objections should take precedence over calling in claims on its own motion. However, there are

currently no rules governing the implementation of an "on-motion" policy, so it is not clear in what instances or if the Court will use its authority. The "Ross Report" to the Legislature in 1988 based its findings in part on the representation made to it by former Chief Water Judge W.W. Lessley that the Water Court would call all gray area remarks in on the Court's own motion. In a meeting in November of 2001, Chief Water Judge Loble said that the Water Court had pulled back from calling claims in on its own motion.

The ultimate questions in Montana's adjudication now are: If water users do not object to water right claims with issue remarks that highlight potential inaccuracies, the Water Court does not call those claims in on its own motion for resolution, and there is not some other process developed to address issue remarks, will Montana have an accurate enough adjudication for the proper enforcement of water rights according to those decrees and will Montana's adjudication be able to withstand potential challenges?

The Chief Water Judge serves at the pleasure of the Chief Justice of the Supreme Court. The Judge oversees the entire adjudication process and has the authority to direct DNRC's work areas and prioritize basins for examination. There are water masters that work with the Judge. These masters work in specific basins and develop the basic decree and submit it to the Judge for his approval and decision.

Prioritization of Basins and Subbasins

In an effort to accomplish a statewide adjudication of existing water rights in a timely manner, the Legislature has provided mechanisms for the Legislature, DNRC, the District Courts, and the Water Court to prioritize the adjudication workload. The certification process was referred to at the January EQC meeting with regard to getting highly contentious situations adjudicated. In reviewing these sections of law, critical questions that might be considered include:

(1) Are these various processes being implemented?

(2) If it not — why not? If yes, how is it working?

(3) Will prioritization be more important to the process if funding is not the primary limiting factor in the program?

(4) If prioritization is important, are these options the best way to move through the basins and subbasins in a timely manner?

The full text of the statutory provisions are provided below.

85-2-218. Process and criteria for designating priority basins or subbasins. (1) The water judges and the department, in performing their functions in the adjudication process, shall give priority to basins or subbasins designated each biennium by the legislature. Basins or subbasins must be designated according to the following criteria:

(a) recurring water shortages within the basin or subbasin have resulted in urgent water rights controversies that require adjudication to determine relative rights;

(b) federal or Indian reserved rights are nearing determination, either by compact or adjudication, thus making adjudication of other rights in the basin or subbasin important for timely issuance of preliminary or final decrees;

(c) the basin or subbasin's location would help ensure efficient use of department and water court resources; and

(d) the adjudication process in the basin or subbasin is nearing the issuance of a decree.

(2) The water judge may designate a basin for priority adjudication upon petition of 100 or more persons who have filed claims within the basin, or he may designate a subbasin for priority adjudication upon petition of a majority of persons who have filed claims within the subbasin. The basin or subbasin shall receive priority, however, only if it meets one or more of the criteria in subsection (1).

(3) If adjudication work in one or more of the priority basins or subbasins has been completed or has been suspended for good cause, the water judge may select other basins or subbasins for priority adjudication, based on the criteria in subsection (1). (emphasis added)

85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit or change approval under 85-2-402 states a valid objection, it shall hold a contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections, after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). The department may consolidate hearings if more than one objection is filed to an application. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322. (emphasis added)

85-2-321. Milk River basin -- suspension of action on permits -- proposal -- priority in adjudication process. (1) (a) In order to balance the need for the continued development of Montana's water and for protection of existing rights in the Milk River basin, the department may suspend action on a class of applications or may close a source in the basin and refuse to accept a class of applications, or both, for a permit under this part to appropriate from that source in the basin.

(b) Suspension or closure, or both, may only be proposed by the department.

(c) The proposal must state the source in the basin and class of applications for which suspension or closure, or both, is being proposed and any of the following allegations:

(i) that the frequency of occurrence of unappropriated waters is such that:

(A) any new appropriation from the source for the class of applications will adversely affect the rights of a prior appropriation from the source; or

(B) any new appropriation from the source for the class of applications will interfere unreasonably with another planned use or development for which a permit has been given or for which water has been reserved pursuant to this part in the source; or

(ii) that significant disputes or enforcement problems regarding priority of rights or amounts or duration of water in use by appropriators are in progress or will arise.

(2) After April 8, 1985, the chief water judge shall make issuance of a temporary preliminary decree in the Milk River basin the highest priority in the adjudication of existing water rights pursuant to Title 85, chapter 2, part 2. (emphasis added)

85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle that first in time is first in right.

(2) (a) A district court may order the distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the matter has been adjudicated under the procedure set forth in subsection (2)(b).

(b) When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, **any party to the controversy** may petition the district court to certify the matter to the chief water judge. If a

certification request is made, the district court shall certify to the chief water judge the determination of the existing rights that are involved in the controversy according to part 2 of this chapter. The district court from which relief is sought shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights certified to the water judge. Certified controversies must be given priority over all other adjudication matters. After determination of the matters certified, the water judge shall return the decision to the district court with a tabulation or list of the existing rights and their relative priorities.

(3) A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the district court. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy must be appended to the final decree, and a copy must be filed with the department. The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

(4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities.

(5) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter may appeal a determination made pursuant to subsection (2). (emphasis added).

Decree Phase

Once all of the claims in a basin have (1) been examined, (2) been noticed per the public notice requirements in statute, (3) had any objections addressed, and (4) had any additional information that the Judge needs provided, the basin is decreed. Once a basin reaches this point, the decree can be enforced. In Montana there are various levels of decrees.

Types of Decrees

- Temporary preliminary decree (TPD) — issued in basins containing federal reserved water rights where a compact has not been concluded. TPDs contain all rights other than reserved rights being negotiated. In these basins, a preliminary decree will be issued as a second step in the process and will include all rights in the temporary preliminary decree along with all reserved rights in the basin.

- Preliminary decree — this is the first decree issued in basins that do not contain any federal reserved rights.

- Final decree — After all objections have been resolved, the Water Judge issues a final decree. On the basis of the final decree, DNRC will issue a Certificate of Water Right to each person decreed an existing water right.

Enforcement

Once a decree has been issued, the basin can be enforced. Pursuant to statute, 15% of the water users must petition the District Court for enforcement of the decree or the District Court can do it on its own volition. The enforcement is handled under the District Court's purview. The Court will hire a water commissioner who is paid by the water users based on the amount of water that they use during the season. The commissioner is responsible for ensuring that, based on the decree, the water users are allocated their water fairly and in order of priority date.

Section 85-2-406(4), MCA provides the following:

> (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities.

10. Funding Montana's Water Adjudication Program

Historical Funding for Montana's Water Adjudication Program

Since Montana's statewide water adjudication effort was begun, funding has varied both in amount and source. The funding levels and their sources since 1974 are provided in Appendix D. In brief, the three sources for funding have been the water rights account and adjudication account, the general fund, and the state special revenue fund (resource indemnity trust, renewable resource development, renewable resources grants/loans, local impact, reclamation and development).

The funding provided to DNRC and the Water Court has varied from $313,118 as the low point in 1980 to just over $1.6 million in 1985 as the high point. The average funding for the DNRC and the Water Court from 1980-2003 is just over $1.2 million per year. Montana has spent a total of $37,471,120 on adjudicating water rights.

Future Funding for Water Adjudication in Montana

The EQC determined that if the adjudication process is going to be sped up and made more accurate it will require additional funding. The EQC asked DNRC, the Water Court, and the Montana Reserved Water Rights Compact Commission how much revenue they would need, in addition to what they currently receive from general fund and state special revenue sources, to complete the adjudication through the first decree phase in 15 years. The Compact Commission stated that they could meet their needs with the current funding level. Therefore, there is no additional funding contemplated for the Compact Commission in the EQC's deliberations.

The Water Court and DNRC provided their best estimate, and this information is provided in the table below. The table is broken out in the appropriate timespans. The Compact Commission expires in 2009 per statutory guidance, therefore, the numbers for subsequent years do not include funding for the Compact Commission.

Years	Program Element	Current (general fund and state special revenue)	Additional Needed (would be generated through fee)	Total Per Year	Total Revenue Needed for Timespan
2006-2009	DNRC	$644,009	$1,519,100	$2,163,109	
	(on-motion cost)		$472,500	$472,500	
	Water Court	$653,454	$220,651	$874,105	
	(on-motion cost)		$196,039	$196,039	
	Compact Commission	$709,946	$0	$709,946	4 yrs
Total		**$2,007,409**	**$2,408,290**	**$4,415,669**	**$17,662,796**
2010-2015	DNRC	$644,009	$1,519,100	$2,163,109	
	(on-motion cost)		$472,500	$472,500	
	Water Court	$653,454	$220,651	$874,105	
	(on-motion cost)		$196,039	$196,039	6 yrs
Total		**$1,297,463**	**$2,408,290**	**$3,705,753**	**$22,234,518**
2017-2020	DNRC (postdecree assistance to the Water Court)	$644,009	$0	$644,009	
	(on-motion cost)		$472,500	$472,500	
	Water Court	$653,454	$220,651	$874,105	

	(on-motion cost)		$196,039	$196,039	5 yrs
Total		**$1,297,463**	**$889,190**	**$2,186,653**	**$10,933,265**
Fee Administrative Costs (fee collected every other year at a cost of $150,000/collection)					**$750,000**
Total Estimated Cost for 15-year completion					**$51,580,579**
Total Estimated Cost for completion at current pace and cost					**$51,012,522**[11]

Because this is a complex issue, a water adjudication funding work group was established. The work group members were Senator Wheat, chair, Senator Story, Representative Barrett, and Mr. Ebzery. The work group met two times in Bozeman to hear public comment and discuss alternatives. They also held numerous conference calls that were attended by the public. The result of these meetings was a graduated flat fee funding proposal. The work group submitted this proposal to the full EQC for their consideration at the September EQC meeting. The fee matrix and bill draft are included in Appendix E.

In its deliberations, the work group made it clear that they did not want to put additional revenue into a system if there were problems. One of the issues identified as a concern was the fact that issue remarks remain on claims into the decree phases. In an effort to try to get all of these issue remarks cleared up and addressed, the EQC and the work group asked the Water Court to identify how much funding would be necessary to implement an on-motion policy that ensured that all claims across all basins were treated equally. The Water Court agreed to complete on-motion rules and have them submitted

[11]This estimate is reflected in 2004 dollars and was arrived at by using the current funding levels and multiplying it by 3 years for the Compact Commission, 33 years for DNRC plus 5 years at the rate that will be required for postdecree assistance, and 38 years for the Water Court (assuming it will take the Water Court 5 years to finish after DNRC has completed the examination process). This estimate of costs at current pace and funding assumes that a more aggressive on-motion policy would not be adopted. If one is adopted the cost will increase and the amount of time required will increase.

to the Supreme Court by January 1, 2005. The costs of implementing an on-motion policy are reflected in the above chart and were considered when determining the amount of revenue that would be needed to complete the adjudication through the first decree phase in 15 years.

Comparison With Adjudication in Idaho

As a comparison, the State of Idaho, which began its adjudication of the Snake River Basin in 1980, has spent a total of $67,818,700, not quite double what Montana has spent. Idaho has funded its adjudication through the adjudication fund (Snake River Basin Adjudication (SRBA) account) and the general fund. Prior to 1997, the program was primarily funded by filing fees. After 1997, the adjudication program has been primarily funded by general fund appropriations. The shift was the result of a U.S. Supreme Court case, United States v. Idaho, ex rel. Director, Idaho Department of Water Resources, 508 U.S. 1 (1993). This case is very pertinent when discussing funding of an adjudication program and whether the United States can be assessed a fee. This decision provided: "While we therefore accept the proposition that the critical language of the second sentence of the McCarran Amendment submits the United States generally to state adjective law, as well as to state substantive law of water rights, we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to exact here. The cases mentioned above dealing with waivers of sovereign immunity as to monetary exactions from the United States in litigation show that we have been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for them. We hold that the language of the second sentence making 'the State laws' applicable to the United States in comprehensive water right adjudications is not sufficiently specific to meet this requirement." The result of this decision was that Idaho could no longer collect filing fees from the United States, and therefore the funds were not available in the SRBA account to pay for the adjudication and the general fund picked up the slack.

The major differences between Idaho and Montana are the following:

❶ Timeline

a. Idaho expects to be finished with the claims examination portion by 2005 and through the courts by 2010 at the latest—total time to complete adjudication—25 years.

b. Montana started in 1974, and at current funding levels, expects to be finished with claims examination by 2033, finished with court process by ? —total time to complete adjudication—at least 60 years.

❷ Cost (the dollar amounts have not been adjusted to take into account inflation and other factors)

c. Total cost for Idaho (estimate) = $80 million

d. Total cost for Montana (estimated by doubling what has been spent over the last 30 years) = $75 million

❸ Conclusion

e. Montana will take an additional 35 years for a $5 million savings—assuming a correlation exists between funding and timeliness of the adjudication.

Allocation of Funds Between DNRC and the Water Court

Historically, a majority of the funding has been directed toward DNRC. This would make sense when considering the adjudication process. The claims examination process has to be completed before the basin can come before the Water Court for its examination. Once the claims examination process is completed, it may be wise to shift funding from DNRC to the Water Court to be able to complete decrees and enter the enforcement stage, hopefully arriving at final decrees within a reasonable timeframe. However, when moving the emphasis of funding from DNRC to the Water Court, it would be imperative to recognize the level and amount of assistance that DNRC provides to the Water Court through the court process and the enforcement process. Without DNRC expertise, it may slow down the Court's ability to complete decrees. Section 85-2-243(2), MCA, provides that "Department assistance to a water judge must be without cost to the judicial districts wholly or partly within the affected water division. Expenses incurred by the department under subsection (1) must be paid from the money appropriated to it for the adjudication program by the legislature to carry out its function under subsection (1) and when that appropriation is expended then the department is no longer required to provide further assistance. " (emphasis added)

The other issue to consider with staffing levels is whether or not DNRC shifts FTEs from the adjudication effort to other areas of need within DNRC. If there is concern that this might happen, it would be within the Legislature's authority to provide that FTEs that are

allocated to DNRC for the purpose of the adjudication program may not be reallocated to other areas of DNRC.

Types of Funding Structures in Other States

Idaho

A fairly detailed summary of how Idaho funds its program has been provided above. One reason for providing such detail on Idaho is because it seems that Idaho is very well-respected for its ability to move through the adjudication process and to have a completion date in sight. Other states, including Montana, seem to be known for the amount of time it is taking them to get the adjudication of state rights completed. Montana's Reserved Water Rights Compact Commission has served as a model and example in other states for inexpensive settlement of reserved water rights. Therefore, it might serve Montana well to pat ourselves on the back for being foresighted and having enough ingenuity to develop the Compact Commission to address the federal and tribal reserved rights within Montana and learn from Idaho's experiences and practices with regard to state-based rights.

As shown in the Idaho chart, their adjudication process is funded through the SRBA account and the general fund. Their statutory language is contained in section 42-1414, Idaho Code. "Fees for filing notice of claims with the director". This section contains a fee schedule for filing claims. The fees are due by a time certain and are different based on the beneficial use to which the water is applied. However, as time passes, the amount of funds available in a "filing fee" account are dwindling. Much like other states, Idaho will probably have to turn more and more to the state general fund to cover the costs of the adjudication.

Arizona

Arizona pays for its adjudication through filing fees and through the general fund. When discussing Arizona, it is important to note that they are not doing a statewide adjudication. They are conducting their adjudication using a basin-by-basin approach. They are working on two basins right now. One basin is funded entirely by filing fees. For the other basin, because it is extremely small and there aren't very many claimants to provide funding through the payment of fees, a general fund appropriation of $20,000 is being used in addition to the filing fees. Arizona's staff consists of two people, one special master and one additional staff person. Arizona's fee structure is established in sections

45-254 and 45-255, Arizona Revised Statutes. The fee for filing a statement of claim by an individual is $20. The fee for filing a claim for a corporation, a municipal corporation, the state or any political subdivision, an association, or a partnership is 2 cents for every acre-foot of water claimed or $20, whichever is greater. A claim is not considered by the court unless all fees have been fully paid.

Oregon

Oregon relies exclusively on general fund appropriations to fund its adjudication of the Klamath River Basin. Revenue in the Water Resources Department (WRD) budget only covers about one-half to two-thirds of the revenue required, forcing the adjudication process to seek additional WRD funds from savings in other programs. Current fiscal year revenue amounts to approximately $700,000, leaving a shortfall of between $550,000 to $650,000.

Montana

Montana's adjudication program was initially funded with filing fees and general fund money. However, the money from the filing fees was expended and the program now relies primarily on the general fund and on the state special revenue fund. There were four divisions outlined in Montana. The divisions were the Yellowstone, the Clark Fork, the Upper Missouri, and the Lower Missouri. The filing fee was $40 per claim, and it could not exceed more than $480 in a division. So if a claimant had more than 12 claims within the Yellowstone Division, the claimant only had to pay $480. The fee was a flat rate and had no correlation with the amount of water claimed.

Montana also allowed for the filing of late claims. The filing fee associated with a late claim was a bit more. The fee was still $40 for filing, but there was an additional $150 fee for processing.

Funding Alternatives for Montana

The EQC looked at alternatives to address the need for increased funding in the water adjudication program. The EQC discussed a variable rate fee based on flow rate and volume but eventually decided on a flat fee that will be paid by every entity that holds a legal water right in Montana. The EQC proposal is attached in Appendix E.

11. Other Water Policy Issues Before the Environmental Quality Council

Total Maximum Daily Loads

The EQC had numerous updates from the Department of Environmental Quality (DEQ) regarding the total maximum daily load (TMDL) program. The primary area of discussion was the schedule completing TMDLs.

In the 2003 session, House Bill 89 amended 75-5-703, MCA, by delaying the date by which all TMDLs in Montana have to be completed from 2007 to 2012. However, the Environmental Protection Agency (EPA) is operating under a court order in Montana to have TMDLs completed on all streams that were listed on the 1996 303(d) impaired streams list. Therefore, the statutory deadline and the court-imposed deadline for completion of the TMDLs are no longer the same. This deadline is currently in litigation.

Since the DEQ and EPA are working in cooperation on TMDLs in Montana, DEQ will be forced to comply with any decisions that EPA makes with regard to how TMDLs will be completed. It is not yet apparent when the deadline for completion will be—2007 or 2012. Once the court makes its decision on this matter, the EPA and DEQ have committed to the EQC that they will provide guidelines on how TMDLs will be completed in the future.

At the October EQC meeting, DEQ informed EQC that they are planning to do more "in-house" or "modeling" for the development of TMDLs for streams on the 303(d) list in Montana. The DEQ stated that this was being done in an effort to increase the efficiency and decrease the amount of time it takes to complete a TMDL. In the discussion regarding TMDLs in the Senate Natural Resource Committee in the 2003 session, it was suggested by legislators that DEQ look into using a modeling approach to develop the TMDLs in a more timely fashion.

Section 75-5-703, MCA, provides direction to DEQ on the development and implementation of TMDLs. The portions that are pertinent to a discussion regarding the

use of modeling and whether or not current statutory authority allows DEQ to use this approach are outlined below.

75-5-703. Development and implementation of total maximum daily loads. (1) The department shall, in consultation with local conservation districts and watershed advisory groups, develop total maximum daily loads or TMDLs for threatened or impaired water bodies or segments of water bodies in order of the priority ranking established by the department under 75-5-702. Each TMDL must be established at a level that will achieve compliance with applicable water quality standards and must include a reasonable margin of safety that takes into account any lack of knowledge concerning the relationship between the TMDL and water quality standards. The department shall consider applicable guidance from the federal environmental protection agency, as well as the environmental, economic, and social costs and benefits of developing and implementing a TMDL.

(2) In establishing TMDLs under subsection (1), the department may establish waste load allocations for point sources and may establish load allocations for nonpoint sources, as set forth in subsection (8), and may allow for effluent trading. The department shall, in consultation with local conservation districts and watershed advisory groups, develop reasonable land, soil, and water conservation practices specifically recognizing established practices and programs for nonpoint sources.

(3) Within 15 years from May 5, 1997, the department shall develop TMDLs for all water bodies on the list of waters that are threatened or impaired, as that list read on May 5, 1997. This provision does not apply to water bodies that are subsequently added or removed from the list according to the provisions of 75-5-702. The department shall establish a schedule for completing the TMDLs within the 15-year period established by this subsection. The schedule must also provide a reasonable timeframe for TMDL development for impaired and threatened water bodies that are listed subsequent to May 5, 1997, and are prioritized as set forth in 75-5-702.

(4) The department shall provide guidance for TMDL development on any threatened or impaired water body, regardless of its priority ranking, if the necessary funding and resources from sources outside the department are available to develop the TMDL and to monitor the

effectiveness of implementation efforts. The department shall review the TMDL and either approve or disapprove the TMDL. If the TMDL is approved by the department, the department shall ensure implementation of the TMDL according to the provisions of subsections (6) through (8).

(5) For water bodies listed under 75-5-702, the department shall provide assistance and support to landowners, local conservation districts, and watershed advisory groups for interim measures that may restore water quality and remove the need to establish a TMDL, such as informational programs regarding control of nonpoint source pollution and voluntary measures designed to correct impairments. When a source implements voluntary measures to reduce pollutants prior to development of a TMDL, those measures, whether or not reflected in subsequently issued waste discharge permits, must be recognized in development of the TMDL in a way that gives credit for the pollution reduction efforts.

(6) After development of a TMDL and upon approval of the TMDL, the department shall:

(a) incorporate the TMDL into its current continuing planning process;

(b) incorporate the waste load allocation developed for point sources during the TMDL process into appropriate water discharge permits; and

(c) assist and inform landowners regarding the application of a voluntary program of reasonable land, soil, and water conservation practices developed pursuant to subsection (2).

(7) Once the control measures identified in subsection (6) have been implemented, the department shall, in consultation with the statewide TMDL advisory group, develop a monitoring program to assess the waters that are subject to the TMDL to determine whether compliance with water quality standards has been attained for a particular water body or whether the water body is no longer threatened. The monitoring program must be designed based on the specific impairments or pollution sources. The department's monitoring program must include long-term monitoring efforts for the analysis of the effectiveness of the control measures developed.

(8) The department shall support a voluntary program of reasonable land, soil, and water conservation practices to achieve compliance with water quality standards for nonpoint source activities for water bodies that are subject to a TMDL developed and implemented pursuant to this section.

(9) If the monitoring program provided under subsection (7) demonstrates that the TMDL is not achieving compliance with applicable water quality standards within 5 years after approval of a TMDL, the department shall conduct a formal evaluation of progress in restoring water quality and the status of reasonable land, soil, and water conservation practice implementation to determine if:

(a) the implementation of a new or improved phase of voluntary reasonable land, soil, and water conservation practice is necessary;

(b) water quality is improving but a specified time is needed for compliance with water quality standards; or

(c) revisions to the TMDL are necessary to achieve applicable water quality standards.

(10) Pending completion of a TMDL on a water body listed pursuant to 75-5-702:

(a) point source discharges to a listed water body may commence or continue, provided that:

(i) the discharge is in conformance with a discharge permit that reflects, in the manner and to the extent applicable for the particular discharge, the provisions of 75-5-303;

(ii) the discharge will not cause a decline in water quality for parameters by which the water body is impaired; and

(iii) minimum treatment requirements adopted pursuant to 75-5-305 are met;

(b) the issuance of a discharge permit may not be precluded because a TMDL is pending;

(c) new or expanded nonpoint source activities affecting a listed water body may commence and continue if those activities are conducted in accordance with reasonable land, soil, and water conservation practices;

(d) for existing nonpoint source activities, the department shall continue to use educational nonpoint source control programs and voluntary measures as provided in subsections (5) and (6).

(11) This section may not be construed to prevent a person from filing an application or petition under 75-5-302, 75-5-310, or 75-5-312. *(emphasis added)*

The DEQ informed the EQC that it does not feel that statutory changes need to be made to allow them to use a modeling approach. They feel that they are still within the guidelines of the statute, but are simply using a different approach.

Coal Bed Methane

The EQC spent a limited amount of time on coal bed methane (CBM) this interim. The two areas that it focused on were Montana/Wyoming issues and litigation.

At its January meeting, the EQC heard a Montana/Wyoming issues panel discussion. The panel consisted of the Montana DEQ director, the Montana Board of Oil and Gas Conservation, a private landowner on the Tongue River, an industry representative, and a Wyoming DEQ staff person. Please see the January 2004 meeting minutes for a summary of the discussion.

In 2004 there were 11 different lawsuits filed with regard to CBM development in Montana. The EQC was kept informed with regard to the status of each of these lawsuits. A copy of a summary of the lawsuits can be obtained in the March 2004 meeting minutes.

Appendix A

2003 Montana Legislature

HOUSE JOINT RESOLUTION NO. 4

INTRODUCED BY LANGE

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY TO INVESTIGATE OPTIONS FOR IMPROVING THE SUPPLY AND DISTRIBUTION OF WATER IN MONTANA AND TO EVALUATE THE WATER STORAGE POLICY ESTABLISHED IN SECTION 85-1-703, MCA; AND REQUIRING THAT THE FINAL RESULTS OF THE STUDY BE REPORTED TO THE 59TH LEGISLATURE AND THE MONTANA CONGRESSIONAL DELEGATION.

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY TO INVESTIGATE OPTIONS FOR IMPROVING THE SUPPLY AND DISTRIBUTION OF WATER IN MONTANA AND TO EVALUATE THE WATER STORAGE POLICY ESTABLISHED IN SECTION 85-1-703, MCA; AND REQUIRING THAT THE FINAL RESULTS OF THE STUDY BE REPORTED TO THE 59TH LEGISLATURE AND THE MONTANA CONGRESSIONAL DELEGATION.

WHEREAS, section 85-1-101, MCA, establishes the state's policies for water resources; and

WHEREAS, section 85-1-101(2), MCA, provides "The public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens"; and

WHEREAS, section 85-1-101(6), MCA, states "The public interest requires the construction, operation, and maintenance of a system of works for the conservation, development, storage, distribution, and utilization of water, which construction, operation, and maintenance is a single object and is in all respects for the welfare and benefit of the people of the state"; and

WHEREAS, Montana has experienced severe drought and significant floods; and

WHEREAS, the state has an opportunity and a responsibility to take proactive measures to mitigate the impacts of drought and floods by storing surplus water and promoting efficiency; and

WHEREAS, section 85-2-105, MCA, requires the Environmental Quality Council to advise the Legislature on the adequacy of the state's water policy.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate an appropriate interim committee, pursuant to section 5-5-217, MCA, or direct sufficient staff resources to:

(1) evaluate the efficiency of water distribution systems;

(2) evaluate measures that promote the efficient use of water;

(3) evaluate return flow impacts;

(4) study water banking as a means to alleviate water shortages;

(5) investigate options for improving the supply and distribution of water in Montana, including the development of offstream storage facilities;

(6) evaluate the water storage policy established in section 85-1-703, MCA; and

(7) evaluate the effects of excessive fuel levels on federal and state timbered lands to determine the impacts of the use of available water by timber versus the amount of water release by a watershed into Montana watercourses.

BE IT FURTHER RESOLVED, that the study be conducted with the participation and involvement of investors and developers and persons interested in or affected by water management, including landowners, conservation districts, the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, industries, utilities, recreational water users, agricultural water users, and others.

BE IT FURTHER RESOLVED, that the study consider ways to encourage participation by the private sector, tribal governments, and the federal government in improving the supply and distribution of water in Montana.

BE IT FURTHER RESOLVED, that, if the study is assigned to staff, any findings or conclusions be presented to and reviewed by an appropriate committee designated by the Legislative Council.

BE IT FURTHER RESOLVED, that all aspects of the study, including presentation and review requirements, be concluded prior to September 15, 2004.

BE IT FURTHER RESOLVED, that the final results of the study, including any findings, conclusions, comments, or recommendations of the appropriate committee, be reported to the 59th Legislature and the Montana Congressional Delegation.

- END -

Appendix B

The Basic Science of Ground-Water/Surface-Water Hydrology

"The science of hydrology would be relatively simple if water were unable to penetrate below the earth's surface." Harold Thomas

John LaFave

Montana Ground-Water Assessment Program
Montana Bureau of Mines and Geology
Montana Tech of The University of Montana
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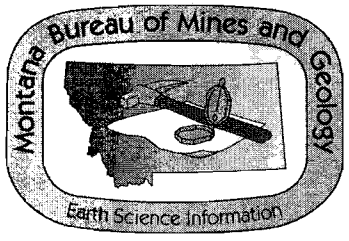
(406) 496-4306



Presented to Environmental Quality Council
Helena
March 10, 2004

The ground water environment is hidden, it is difficult to visualize the occurrence and movement of ground water, this can hinder our ability to deal with ground-water related problems.

- **The purpose of this presentation is to :**
  - **Introduce some basic concepts regarding the occurrence and movement of ground water, and how ground water and surface water interact or are interrelated.**
  - **Describe how wells interact with the ground-water system, how they work, how we use data from wells (our window to the subsurface) to delineate ground-water flow directions and assess or predict the impact of wells on the ground-water / surface water system.**
  - **Illustrate some of the concepts presented with Montana examples.**

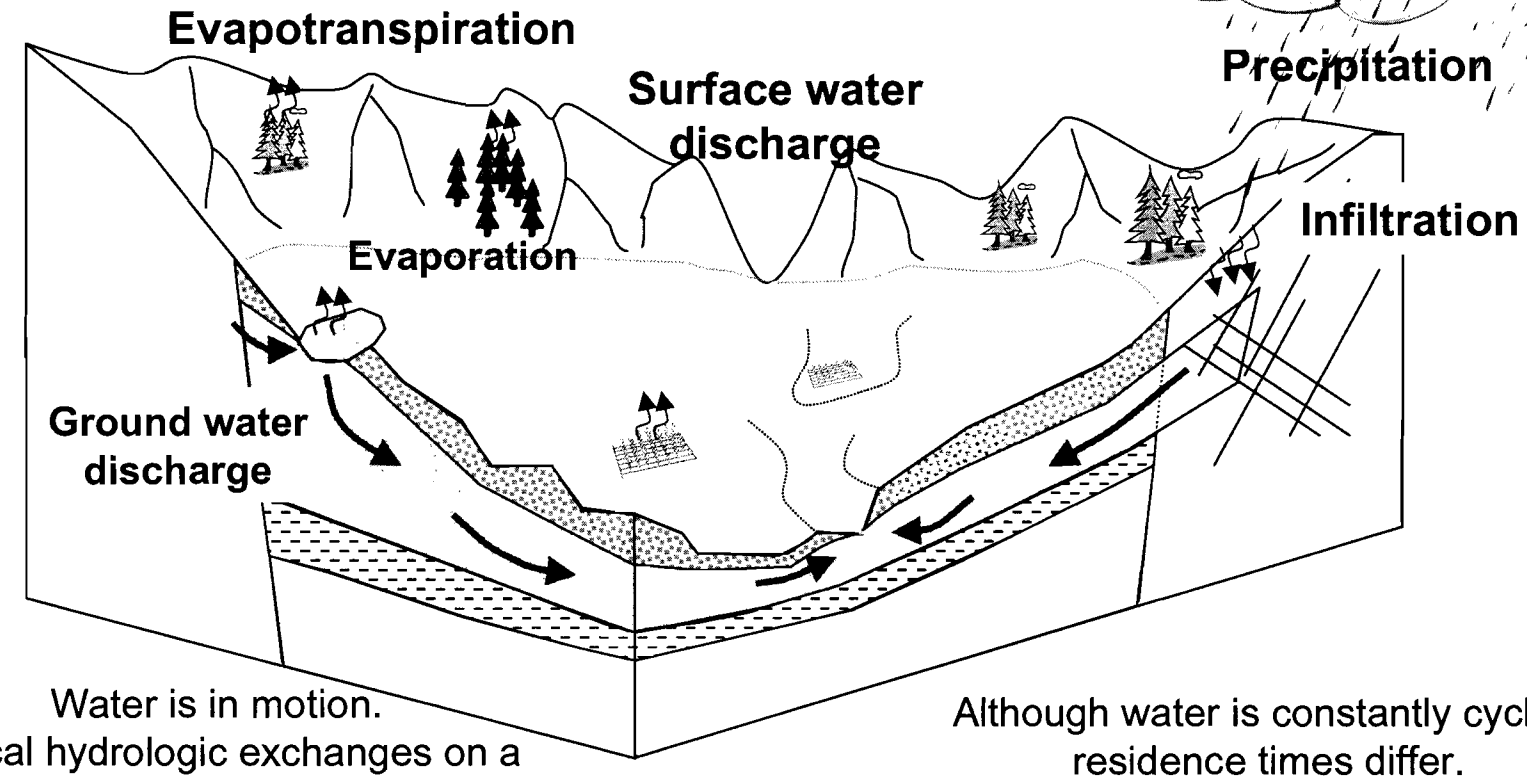
Essential Definitions

- **Aquifer:**
  - A permeable geologic unit that can **transmit** and **store** significant quantities of water.
- **Transmissivity:**
  - Capacity of the aquifer to transmit water
- **Storativity:**
  - Capacity of an aquifer to take in and release water

Aquifers store and transmit water.
Quantifying the transmissivity and storativity,
allows one to use ground-water flow equations to
predict how an aquifer will respond to different stresses.

Water Cycle: Basin Scale

Hydrologic cycle: the endless circulation of water between the atmosphere, the land surface and the ocean. The notion of the hydrologic cycle provides a framework for understanding the occurrence and distribution of water on the earth.

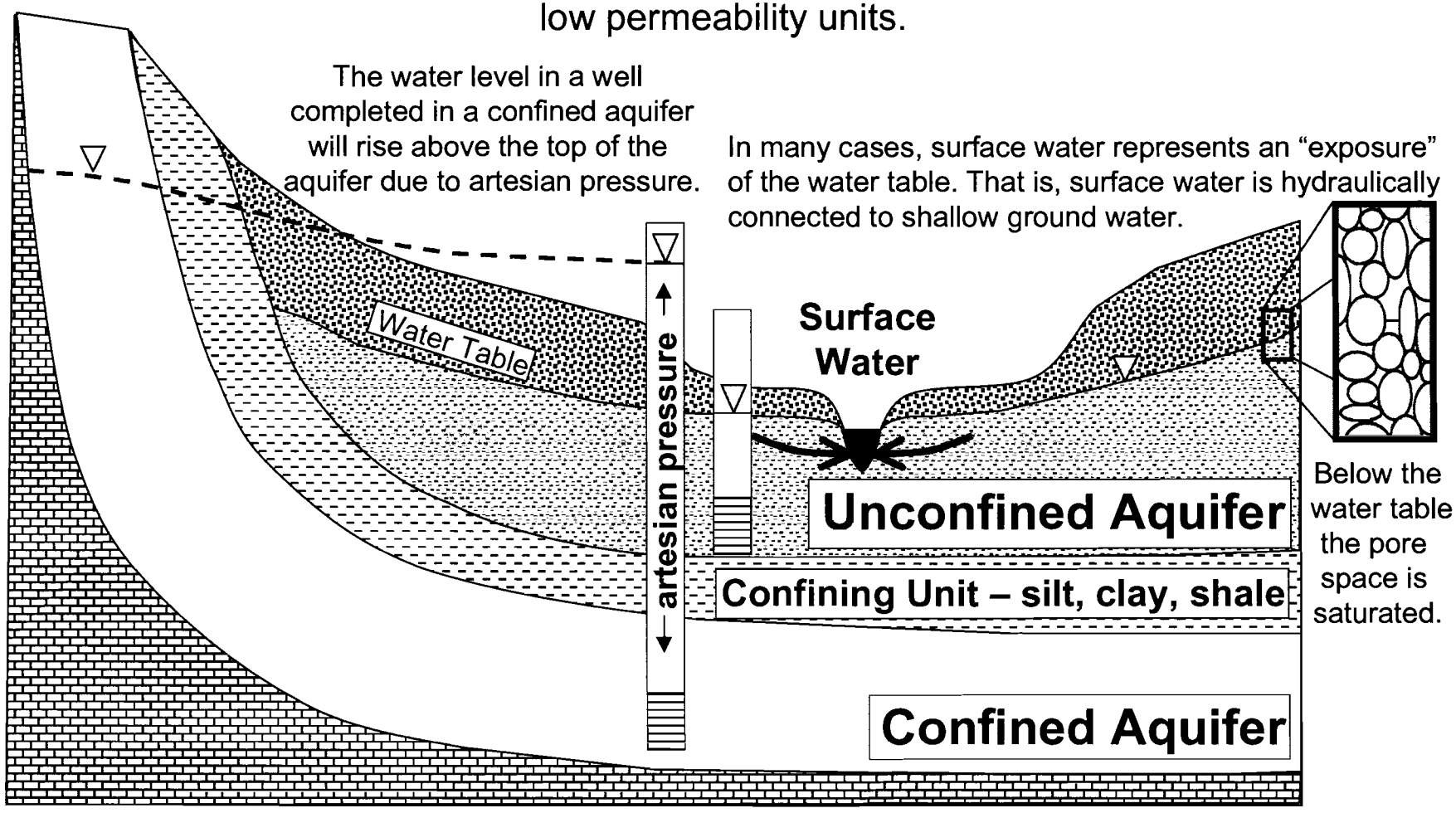


Water is in motion.
Critical hydrologic exchanges on a typical Montana basin scale include: precipitation, infiltration, surface runoff, evaporation and transpiration

Although water is constantly cycling residence times differ.
Water is in the atmosphere for 1-2 weeks, streams for ~ 2 weeks, the ground water system for 2 weeks to 10,000 years.

Ground Water, Aquifers and Confining Units

Ground water makes up 95 % of the world's useable fresh water. Ground water occurs in unconfined (water table) or confined aquifers. The water table marks the upper surface in an unconfined aquifer. Confined aquifers are bounded by low permeability units.

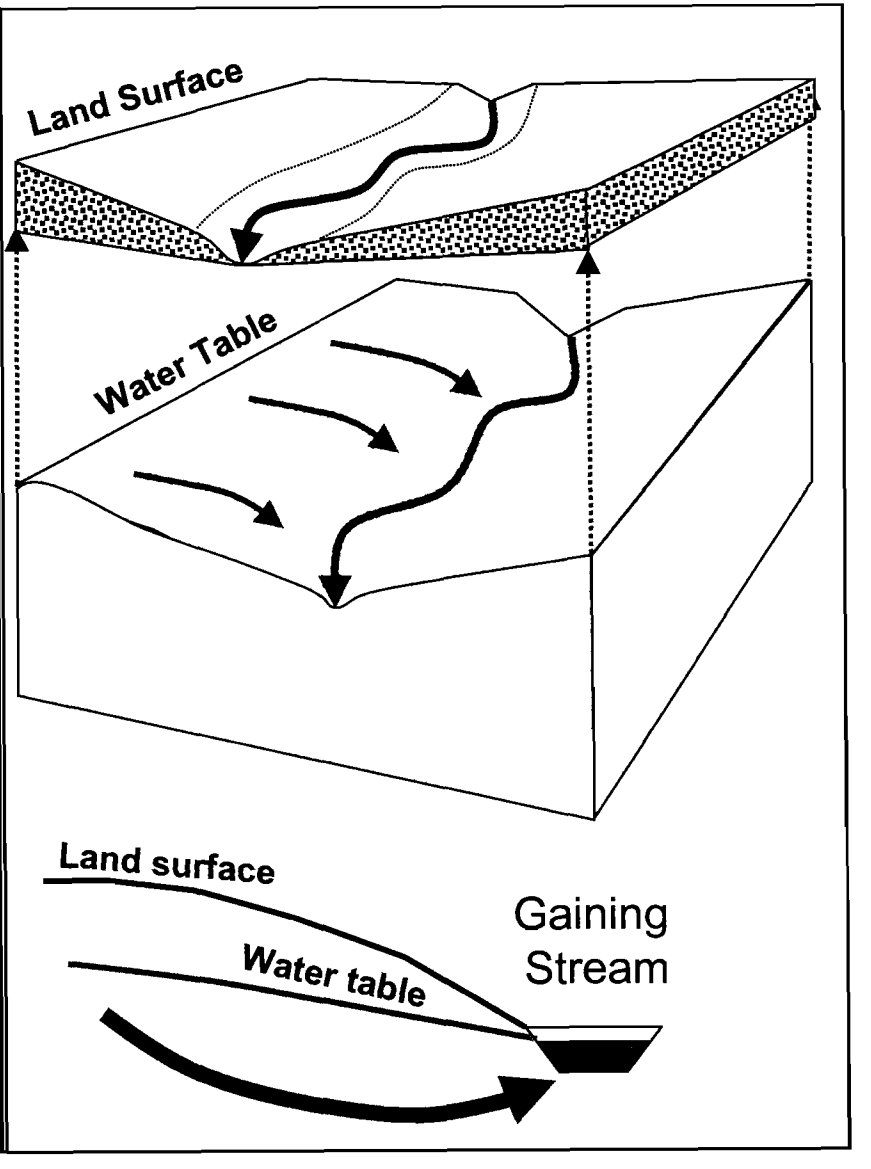


The water table

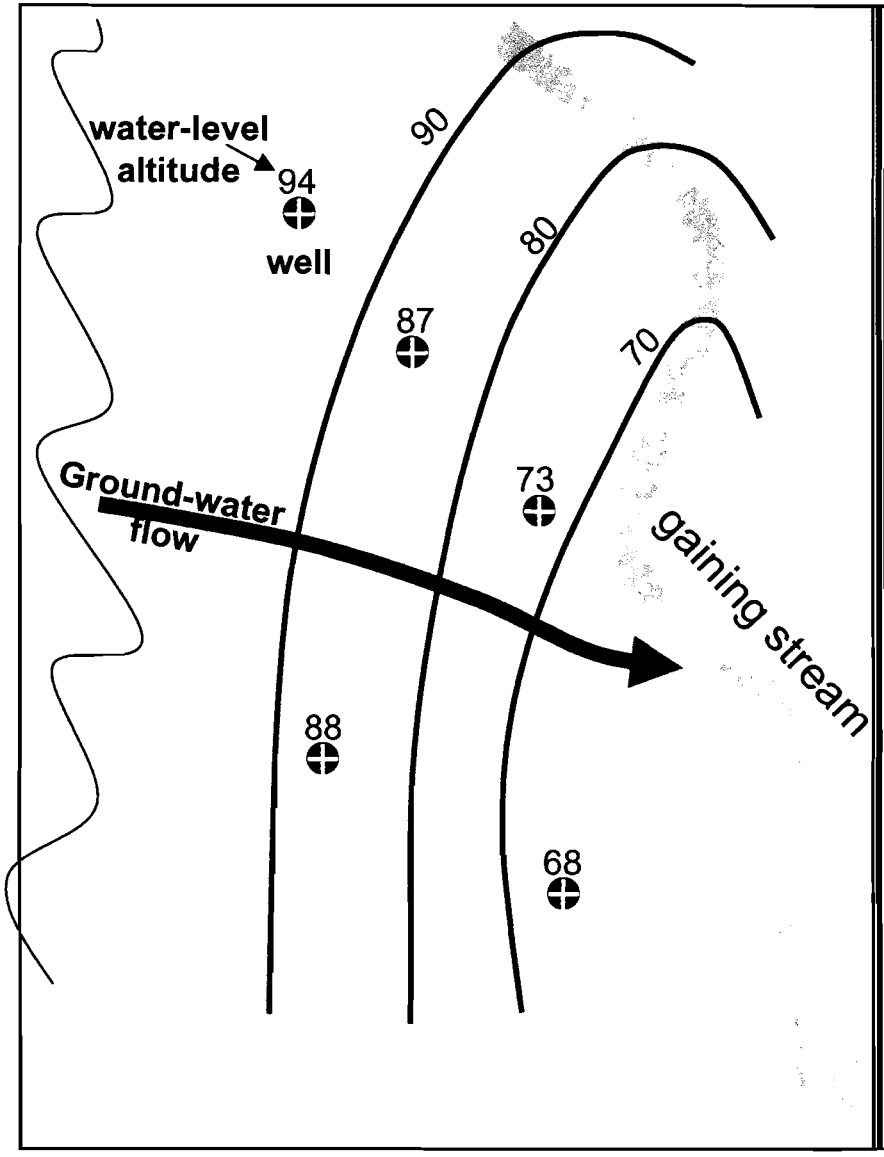
The **water table** is typically a subdued representation of the land surface. The depth to the water table will vary, it is usually near the land surface close to streams or in topographically low areas.

Gravity is the driving force behind ground-water movement. Therefore, ground-water flows down the slope of the water table surface.

Where the water table surrounding a stream is at a higher level than the stream, ground water will flow toward and feed the stream. The discharge increases down stream hence the term **gaining stream**, it gains water from ground water



Ground-water flow associated with a gaining stream



The depth to water and the configuration of the water table are determined by measuring water levels in wells.

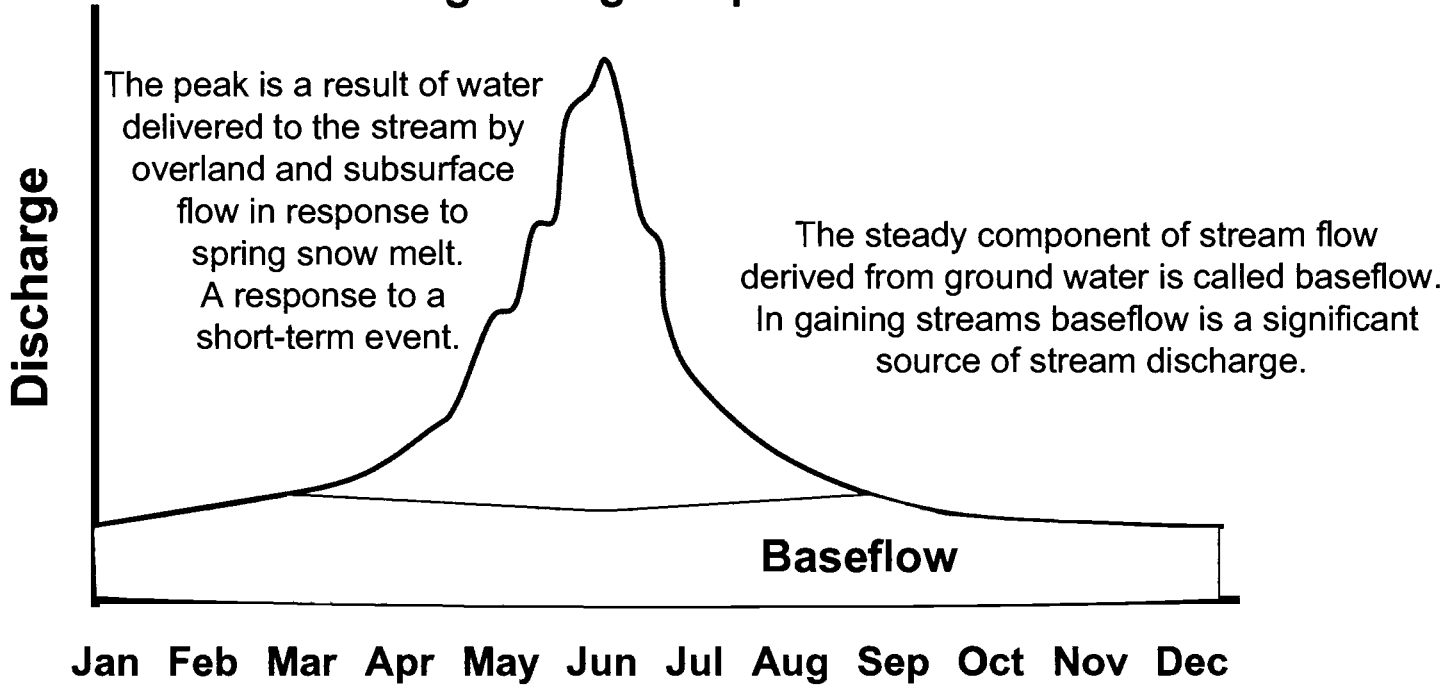
Contoured water-level altitudes can define the position and orientation of the water table.

Ground-water will flow from higher to lower altitude, perpendicular to the contour lines.

NOTE: Ground water flows, but it flows slowly. In streams water can move on the order of miles per day. Ground-water movement on the order of 1 ft per day is extraordinarily fast.

Seasonal Stream-Flow Hydrograph

Stream flow varies on a seasonal basis. A stream hydrograph is a measure of discharge at a given point as a function of time



- **Major portion of flow ultimately derived from baseflow**
  - **On average, ground water accounts for 40 - 50 % of annual flow**
  - **In dry periods, ground water contributes almost all flow**

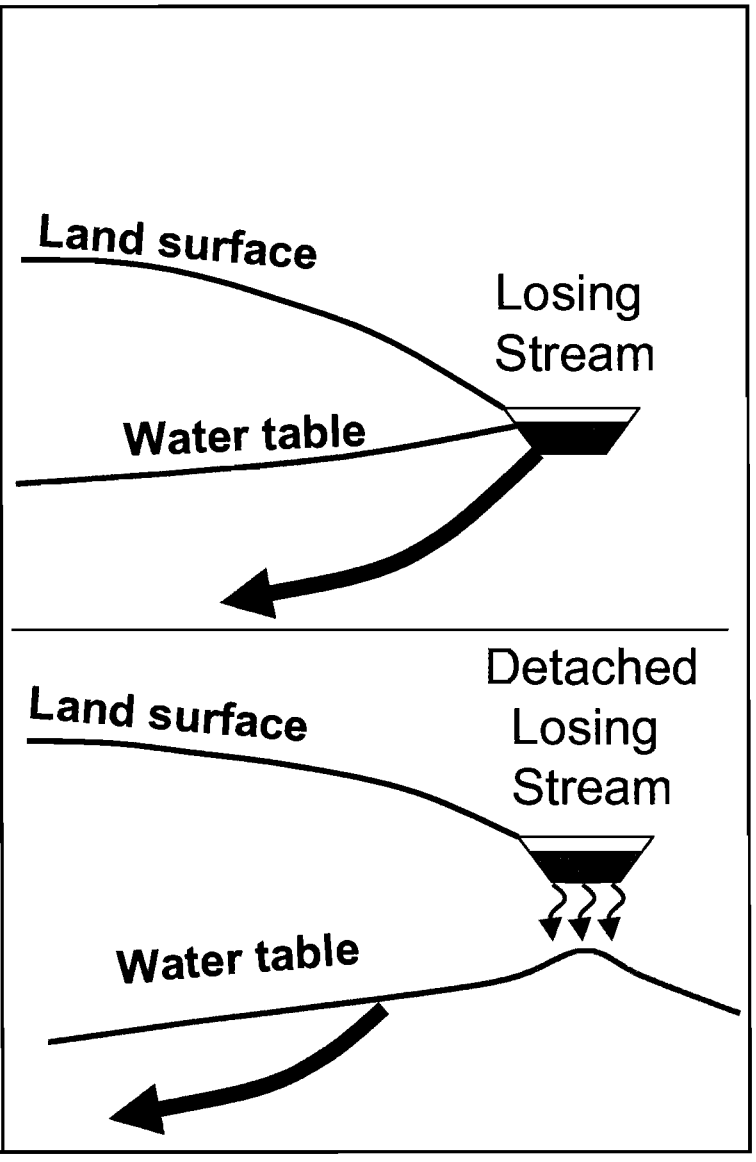
Ground-water flow associated with a losing stream

Not all streams are gaining

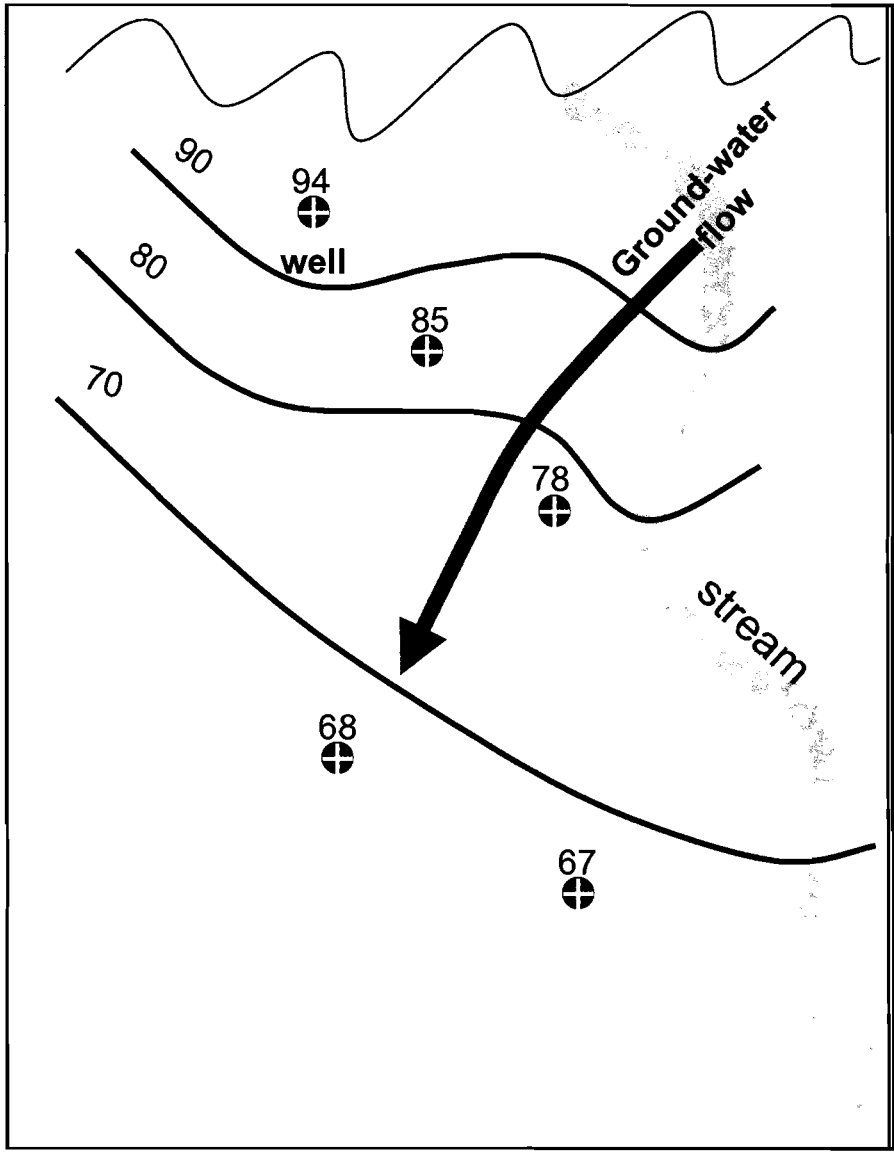
In some settings water can flow from a stream into the subsurface.

Where the water altitude in the stream is higher than the adjacent water table, There is a potential for a **losing stream**.

Losing streams can be directly connected to the water table or detached.



Ground-water flow associated with a losing stream



Ground-water flow adjacent to a losing stream will be away from the stream.

The flow direction will be reflected in the water table contours that decrease in altitude away from the stream

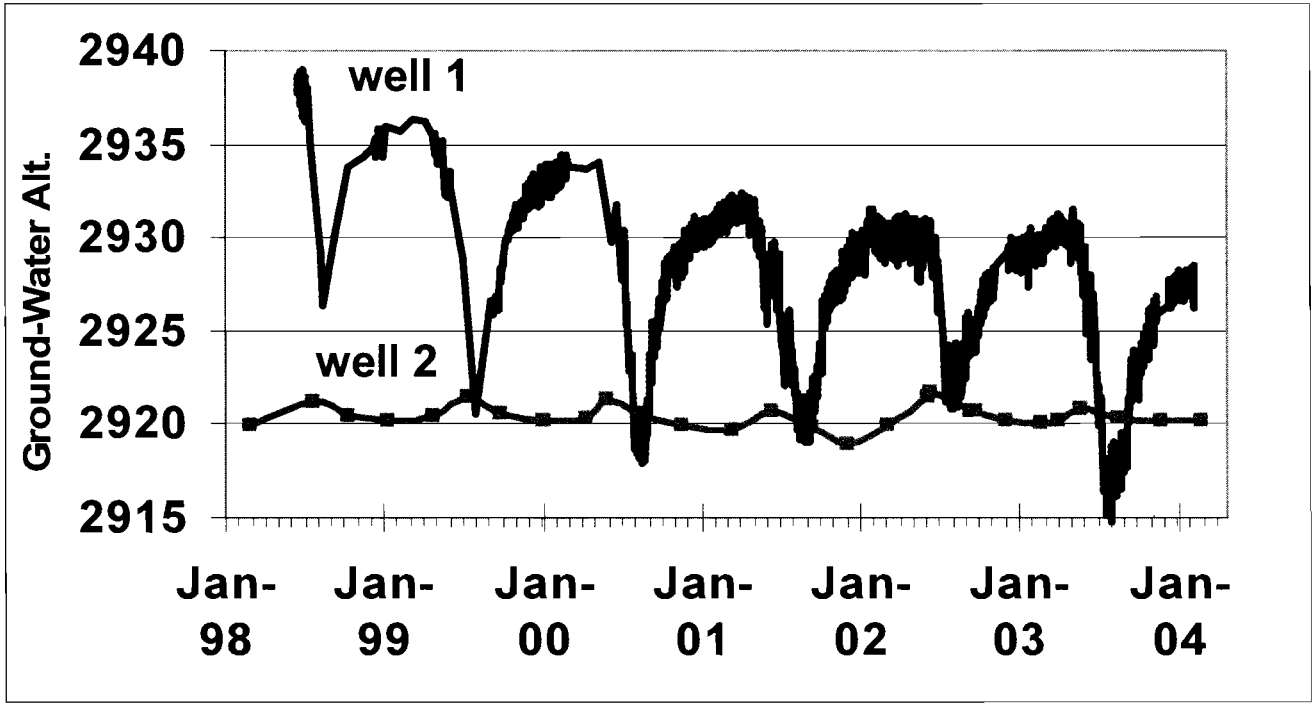
Ground-Water Hydrograph:

Ground-Water level measurements vs. time

The water table is not static. It rises and falls in response to inputs and outflows from the aquifer. Changes in water level reflect changes in aquifer storage or pressure over time.

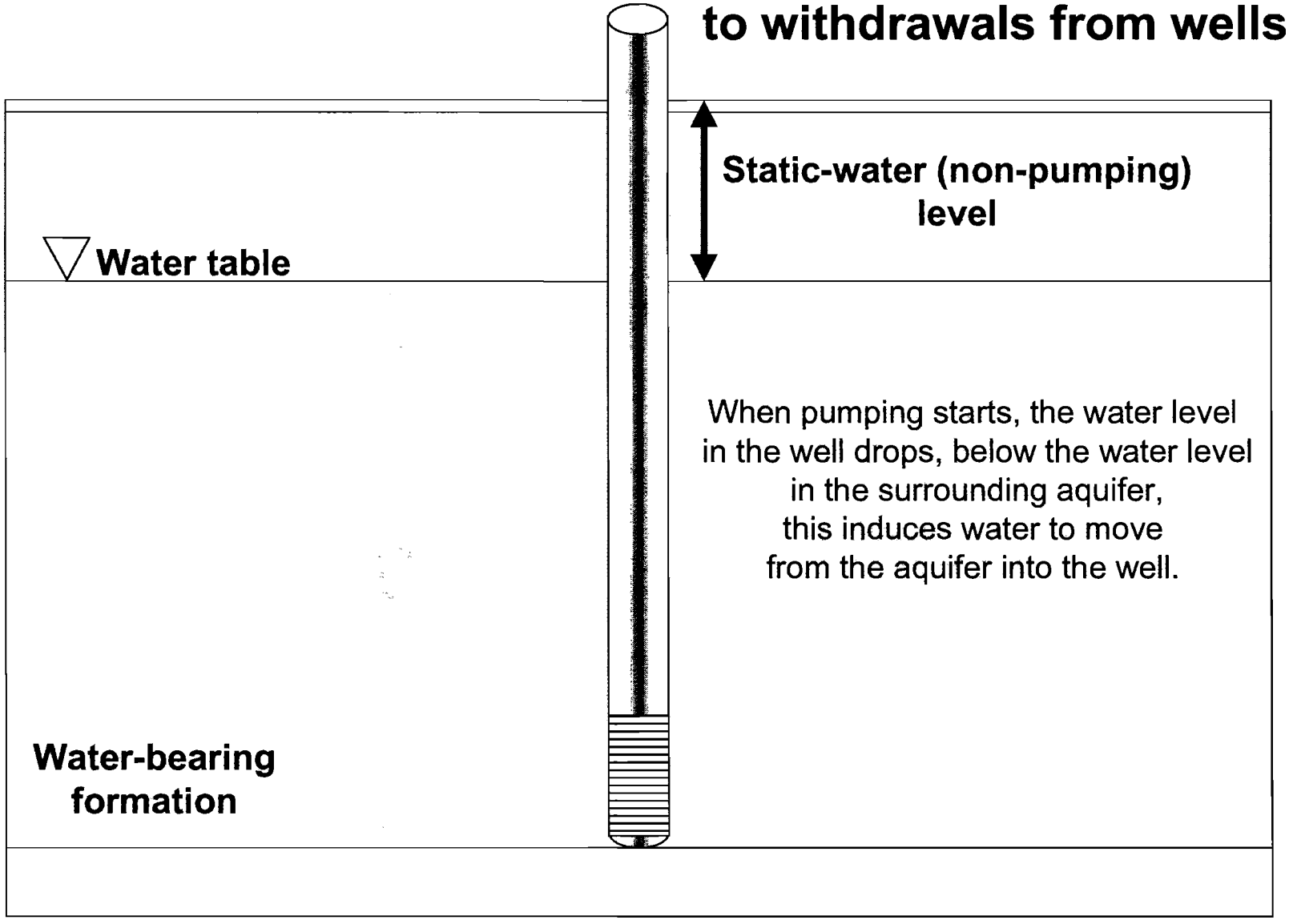
The water-level data can be compared to other factors such as climate to better understand how the aquifer works.

Each water-level measurement adds knowledge of how the aquifer works, but because climatic and other factors operate on periods of years to decades, water-level records must be of similar duration to be most effective.

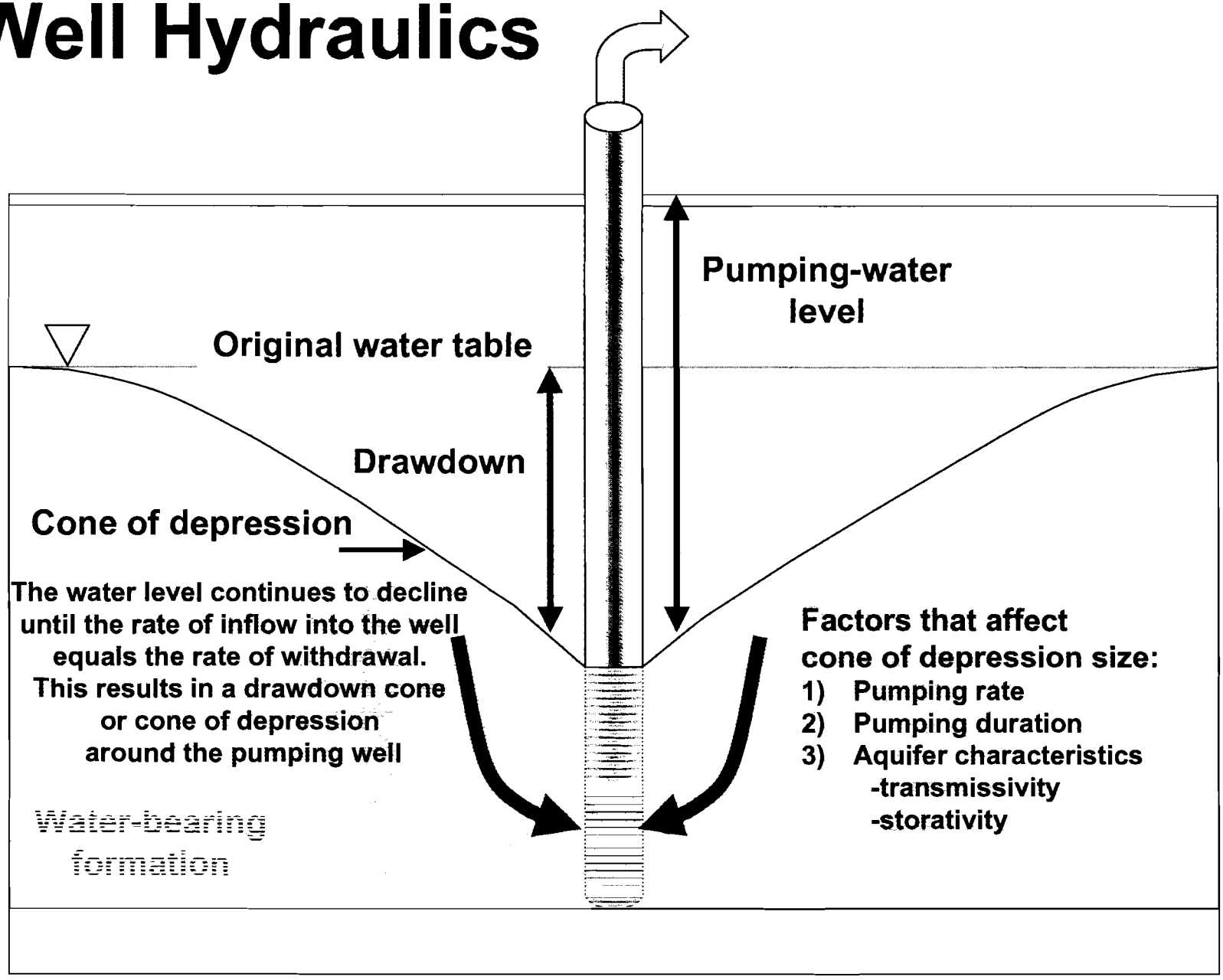


Well Hydraulics

How do aquifers respond to withdrawals from wells?

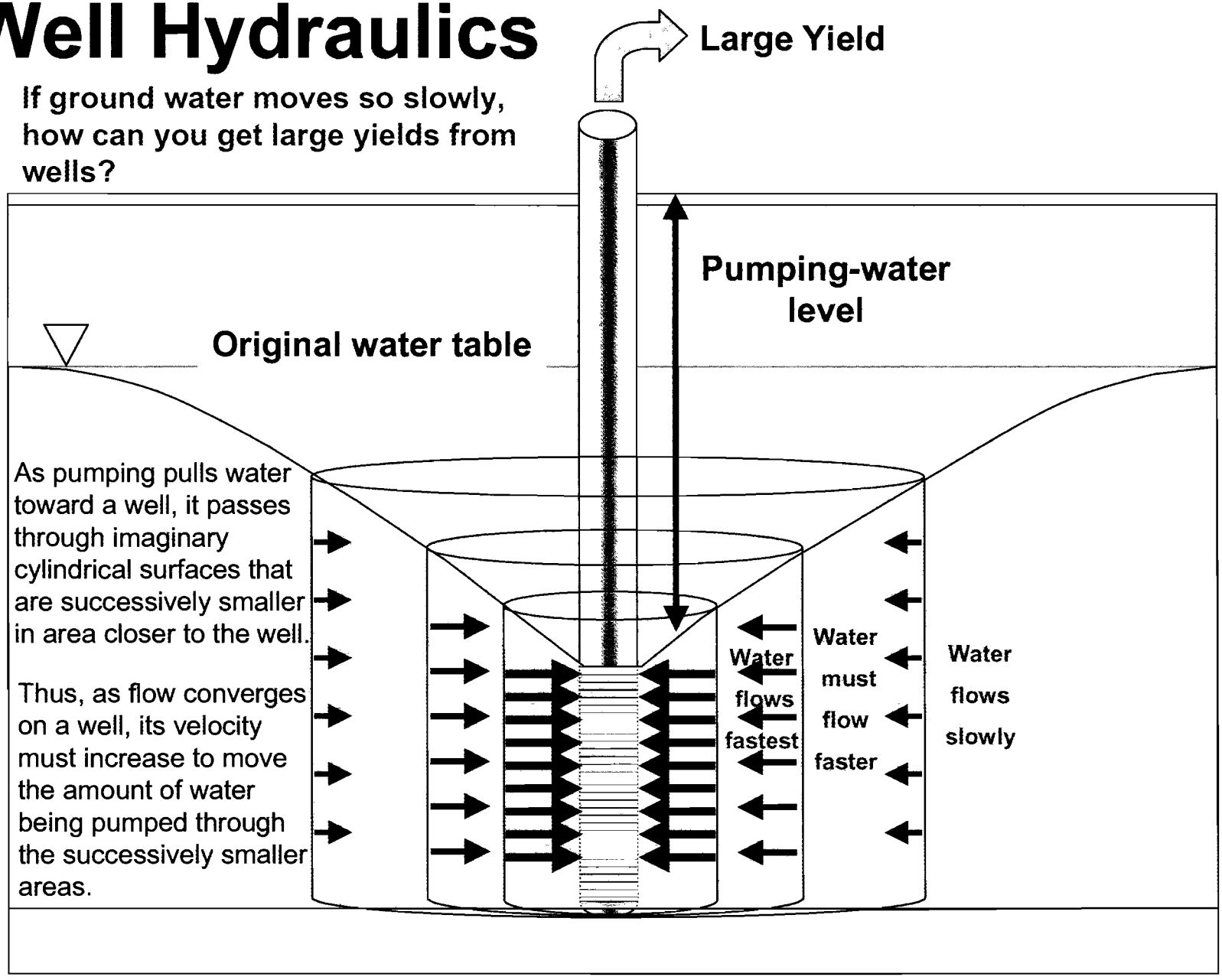


Well Hydraulics

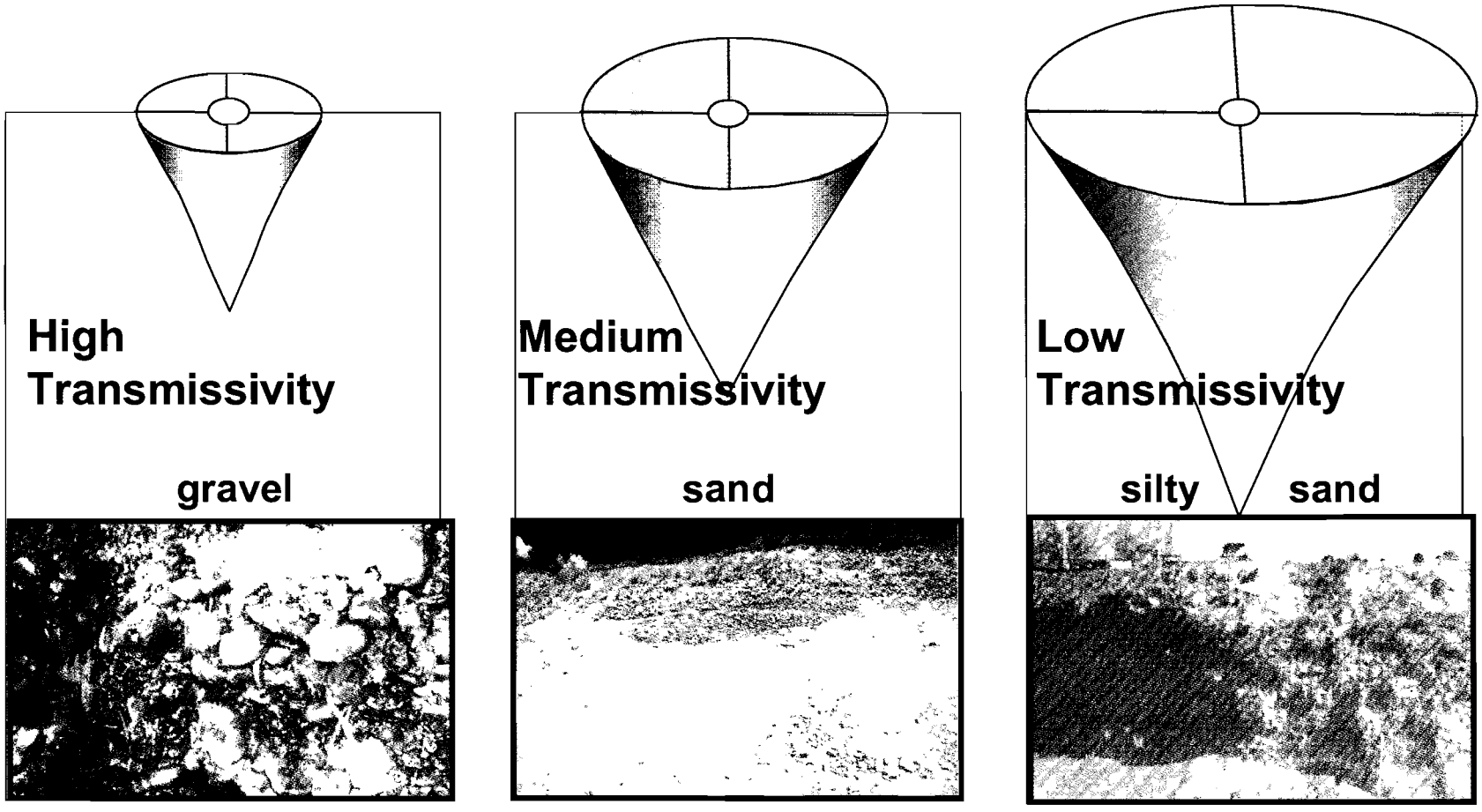


Well Hydraulics

If ground water moves so slowly, how can you get large yields from wells?

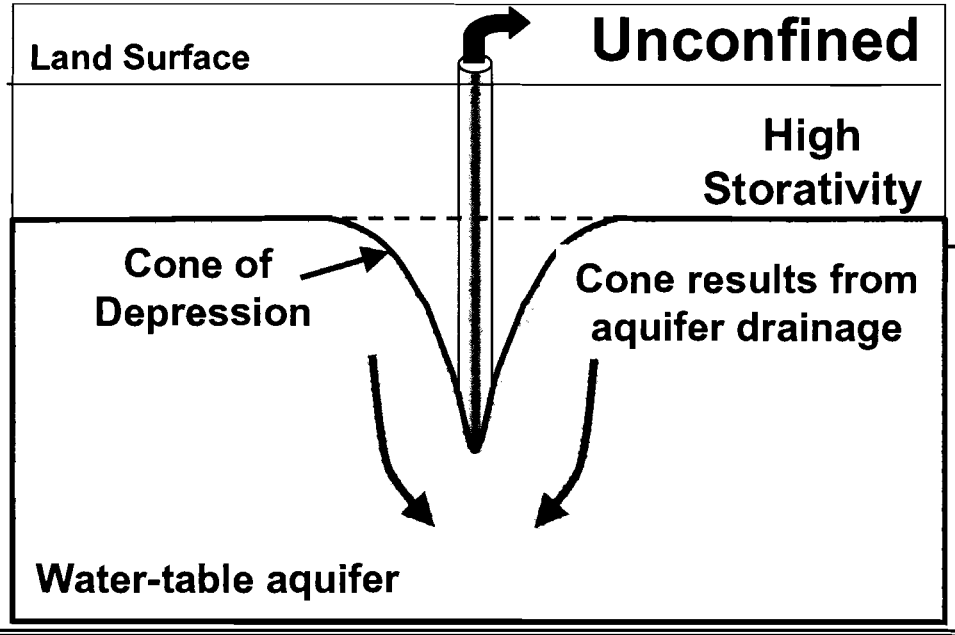


The geologic framework is a critical piece of information needed to assess the impact of a pumping well



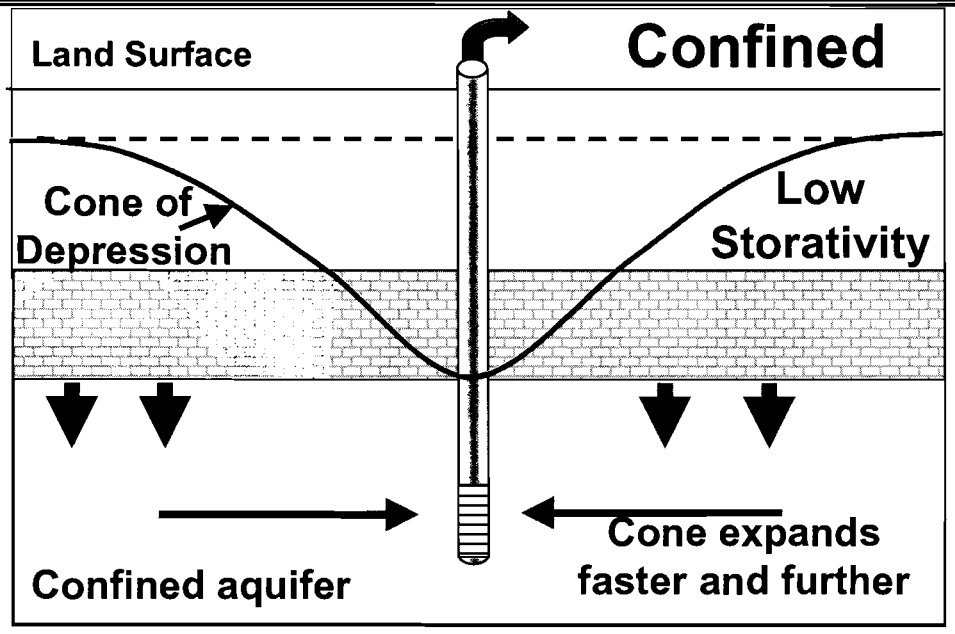
The more transmissive the aquifer, the smaller the cone of depression, all other things being equal. The size of the cone is a reflection of how much work it takes to move water to the well. It takes less work to push water through a coarse gravel than a silty sand.

Aquifer Storage



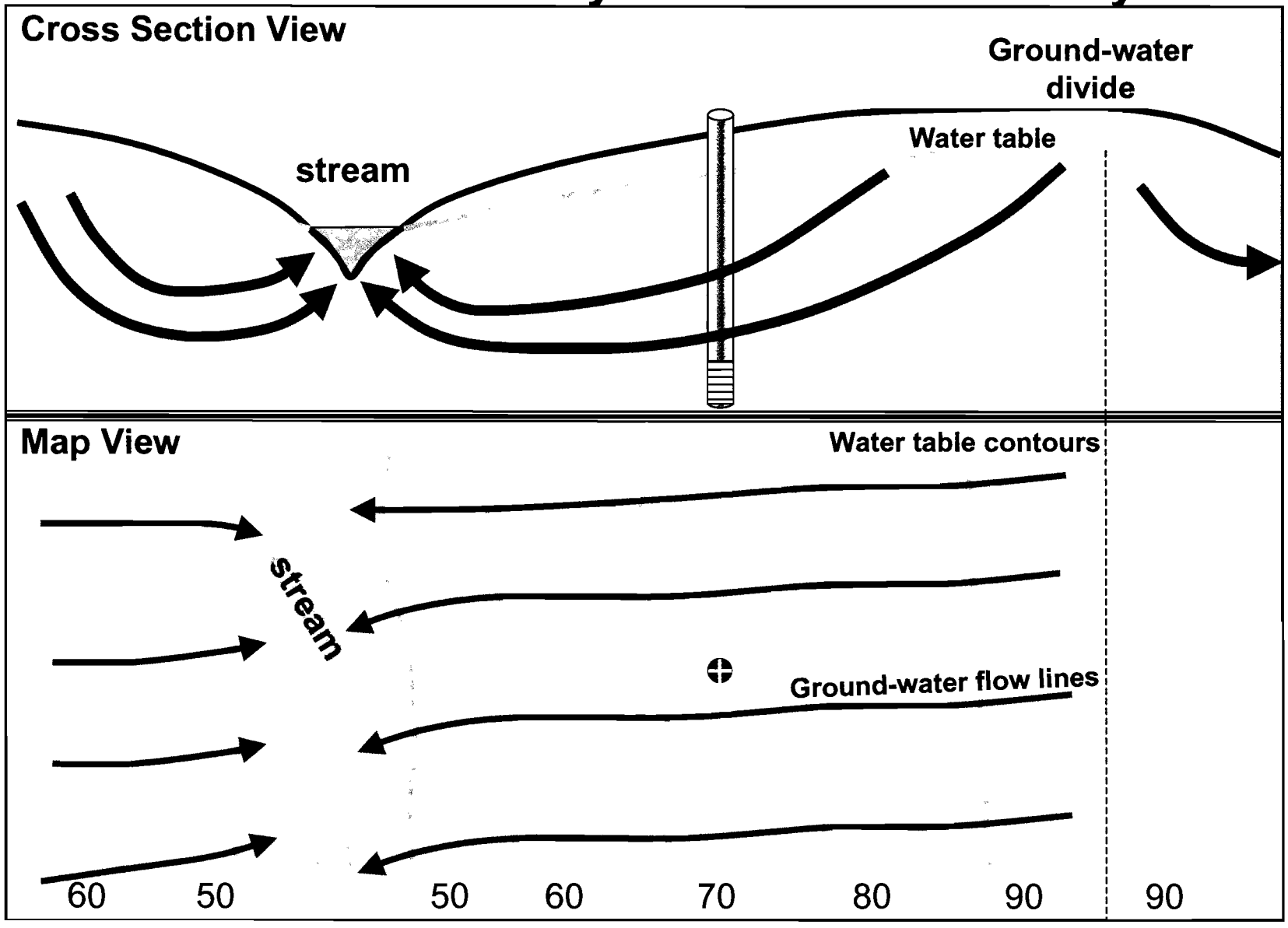
Storativity affects size and rate of cone development.
There is a big difference between unconfined (water table) and confined aquifers.

In unconfined aquifers water is released from storage by draining the aquifer; expansion of the cone of depression is relatively slow and the cone is relatively small.

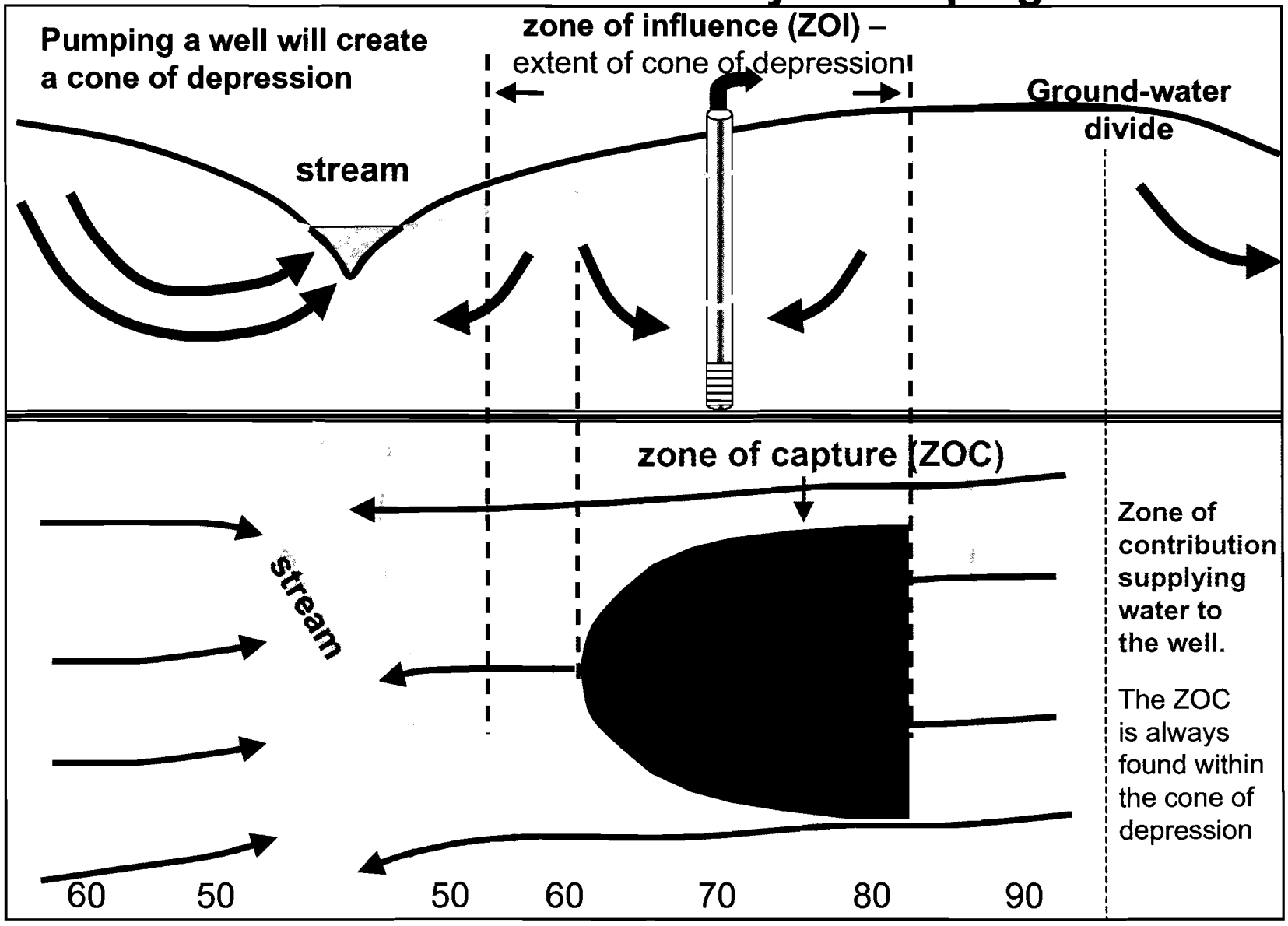


In confined aquifers, pumping decreases the artesian pressure. Water is released by compacting or squeezing the aquifer, expansion of the cone is relatively fast, and the cone may expand over large areas.

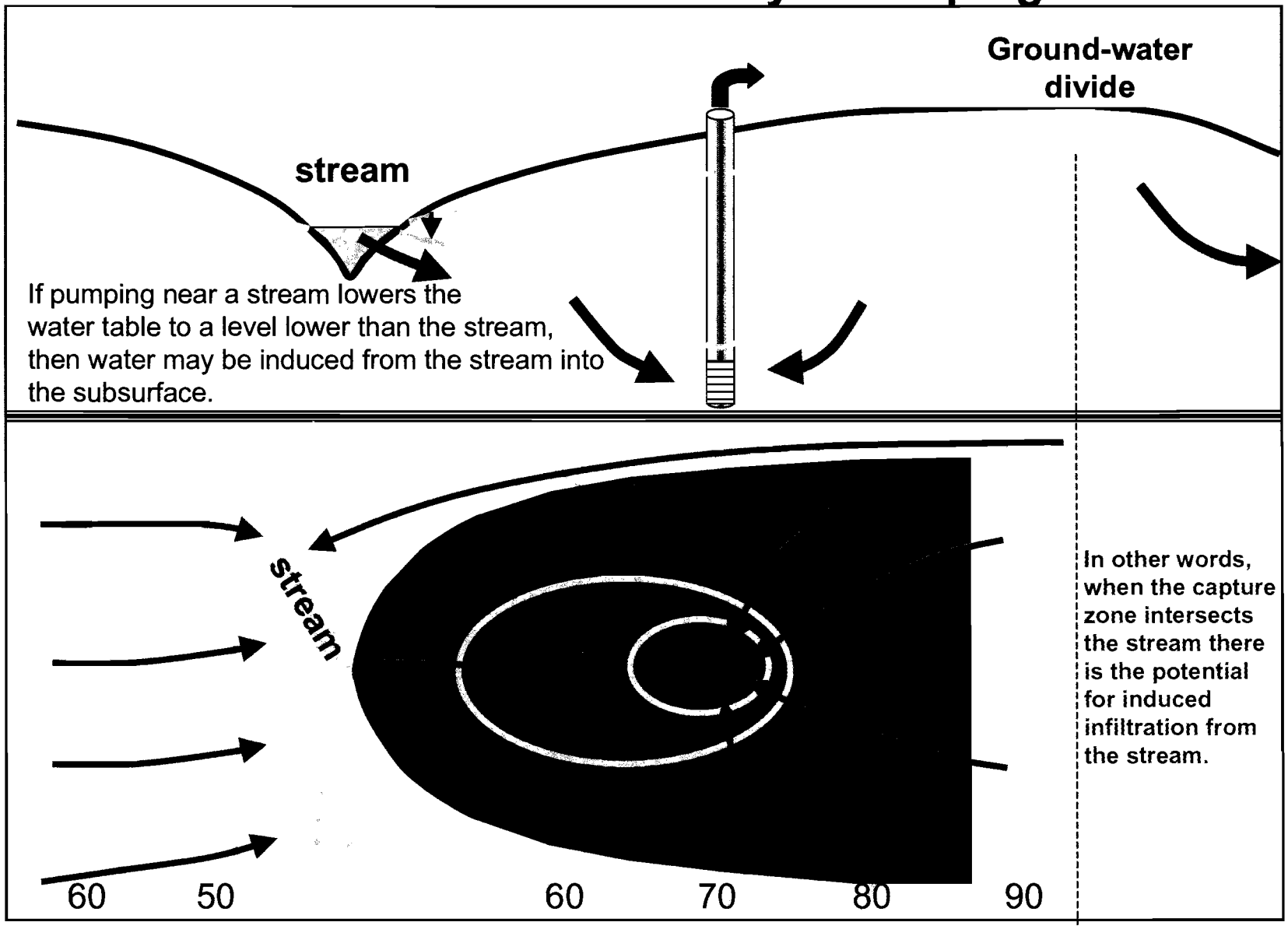
Ground-Water Flow System in a Stream Valley



Ground-Water Flow Affected by a Pumping Well

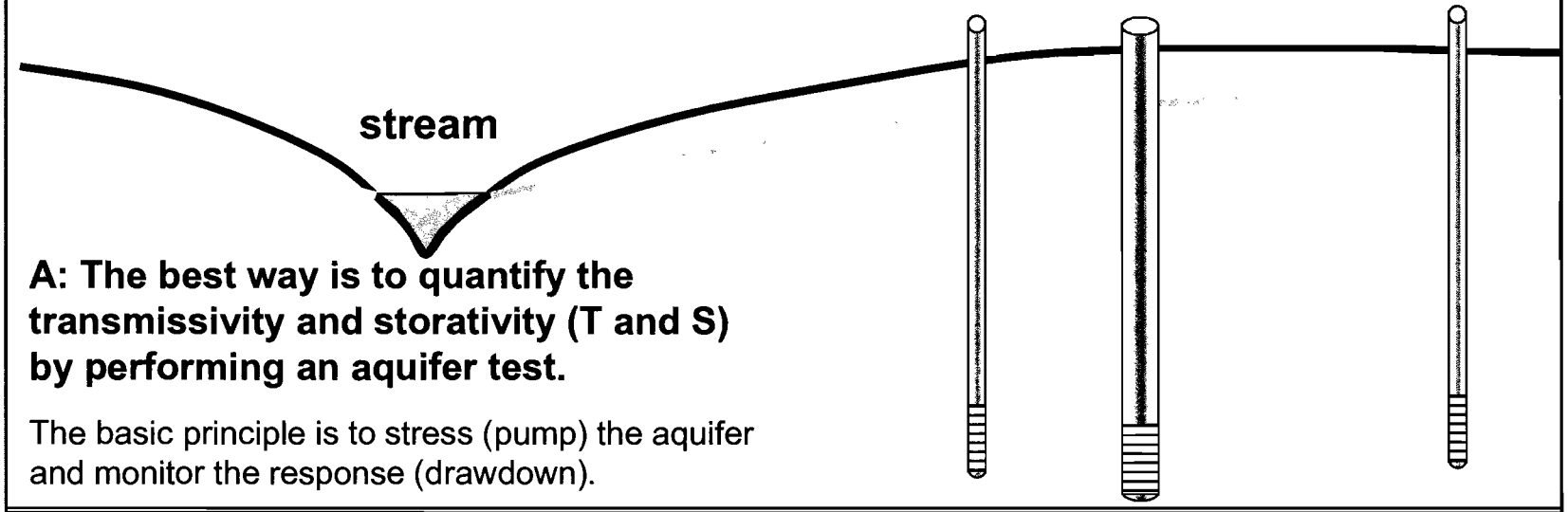


Ground-Water Flow Affected by a Pumping Well



Aquifer Test: Quantifying the Hydraulic Characteristics

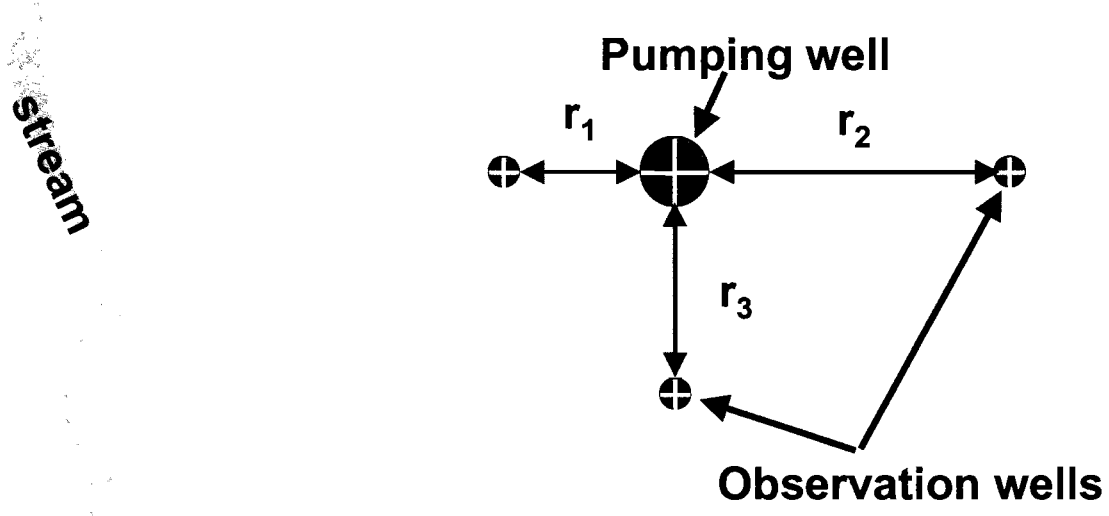
Q: Is there a way to predict if the capture zone will intersect the stream?



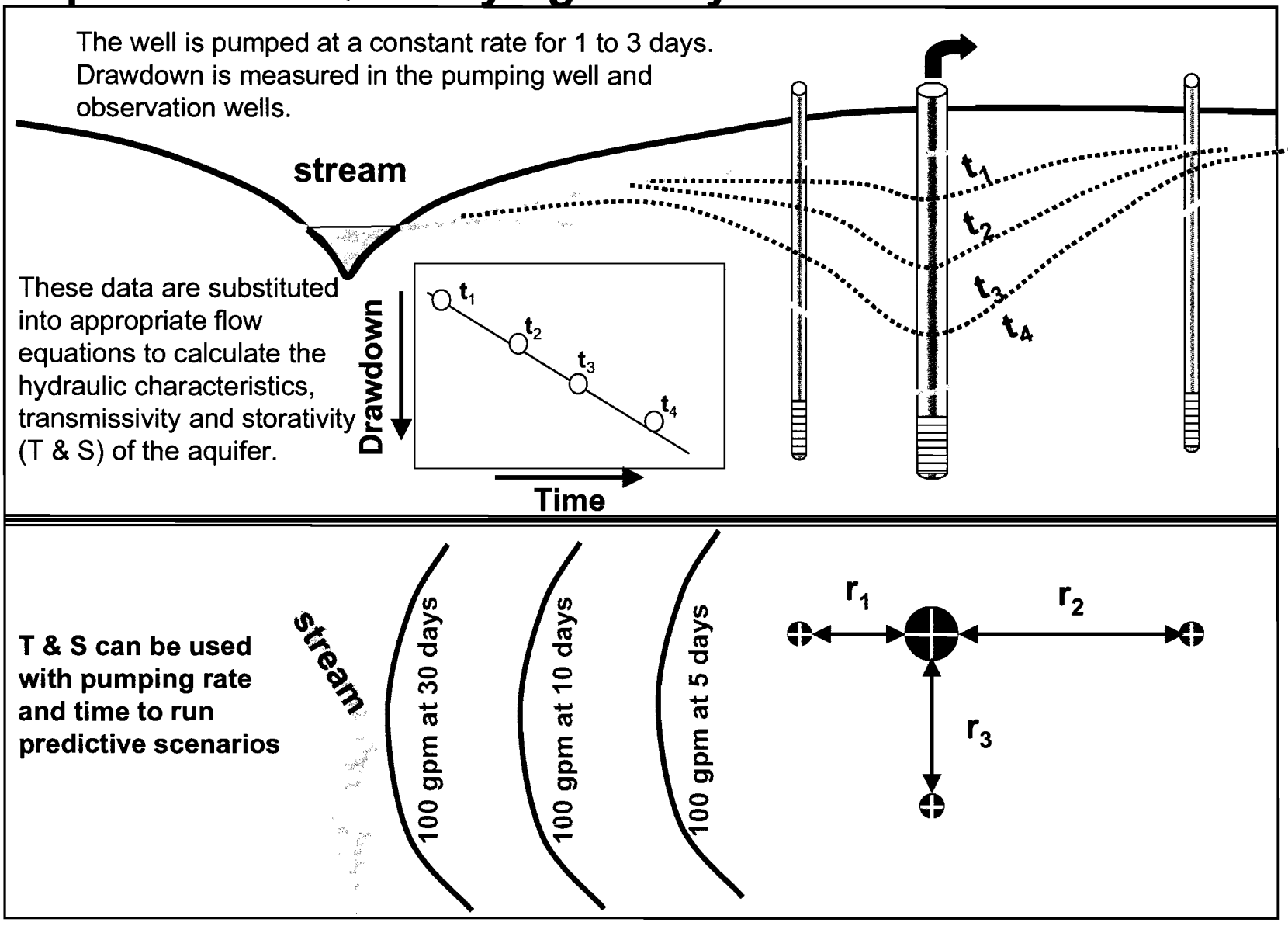
A: The best way is to quantify the transmissivity and storativity (T and S) by performing an aquifer test.

The basic principle is to stress (pump) the aquifer and monitor the response (drawdown).

The basic procedure requires a pumping well and at least one observation well at a known distance away. If there is a concern about impact to nearby surface water bodies, an observation well should be located between the pumping well and the surface water.



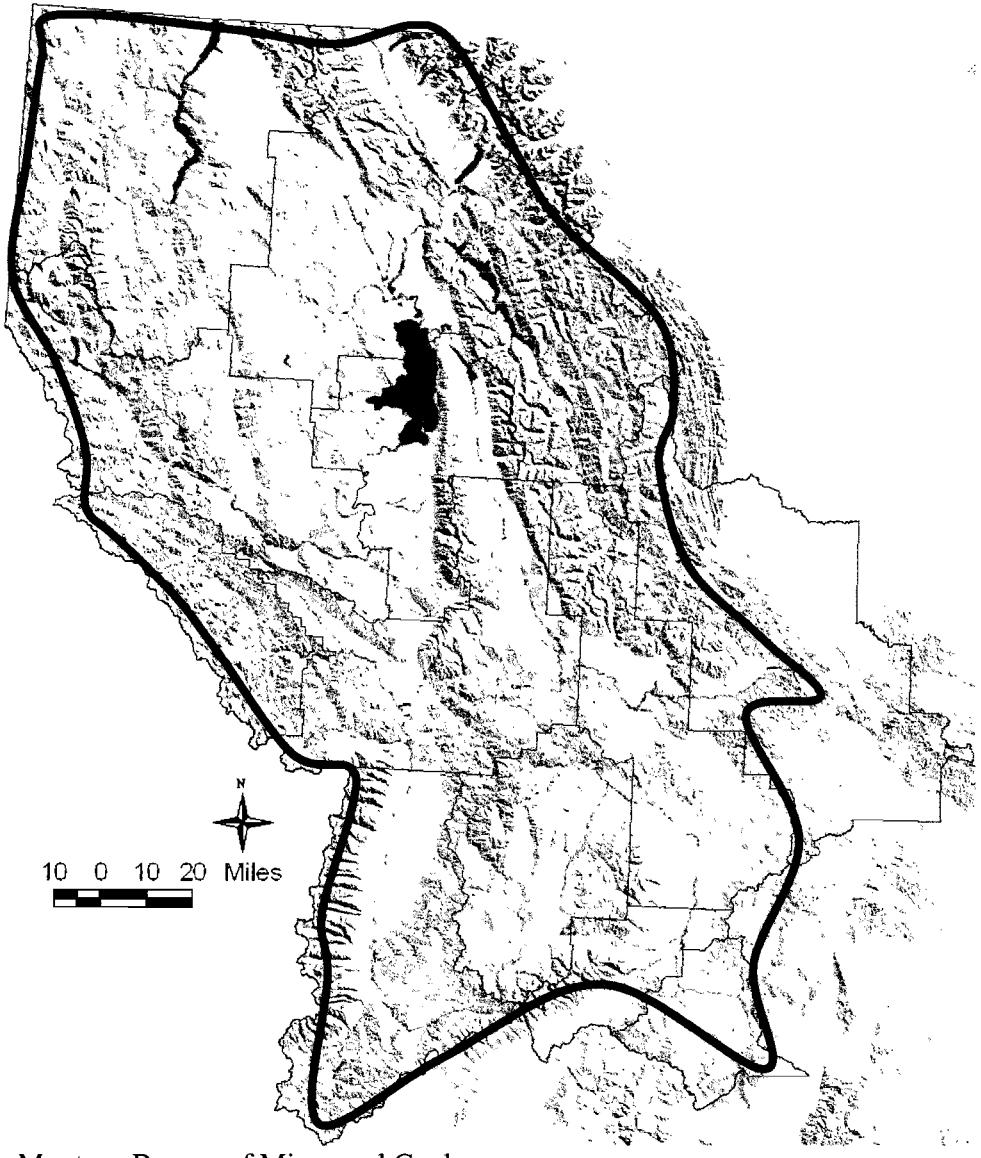
Aquifer Test: Quantifying the Hydraulic Characteristics



Quick Review

- Water is transferred between the atmosphere, the earth's surface, and below ground
- Shallow ground water and surface water are typically interconnected
- Understanding the ground-water system requires data from wells:
  - Long-term monitoring
  - Spatial data
  - Aquifer test data
- Remainder of presentation will focus on some western Montana examples

Northwestern Montana



Series of Intermontane Basins.

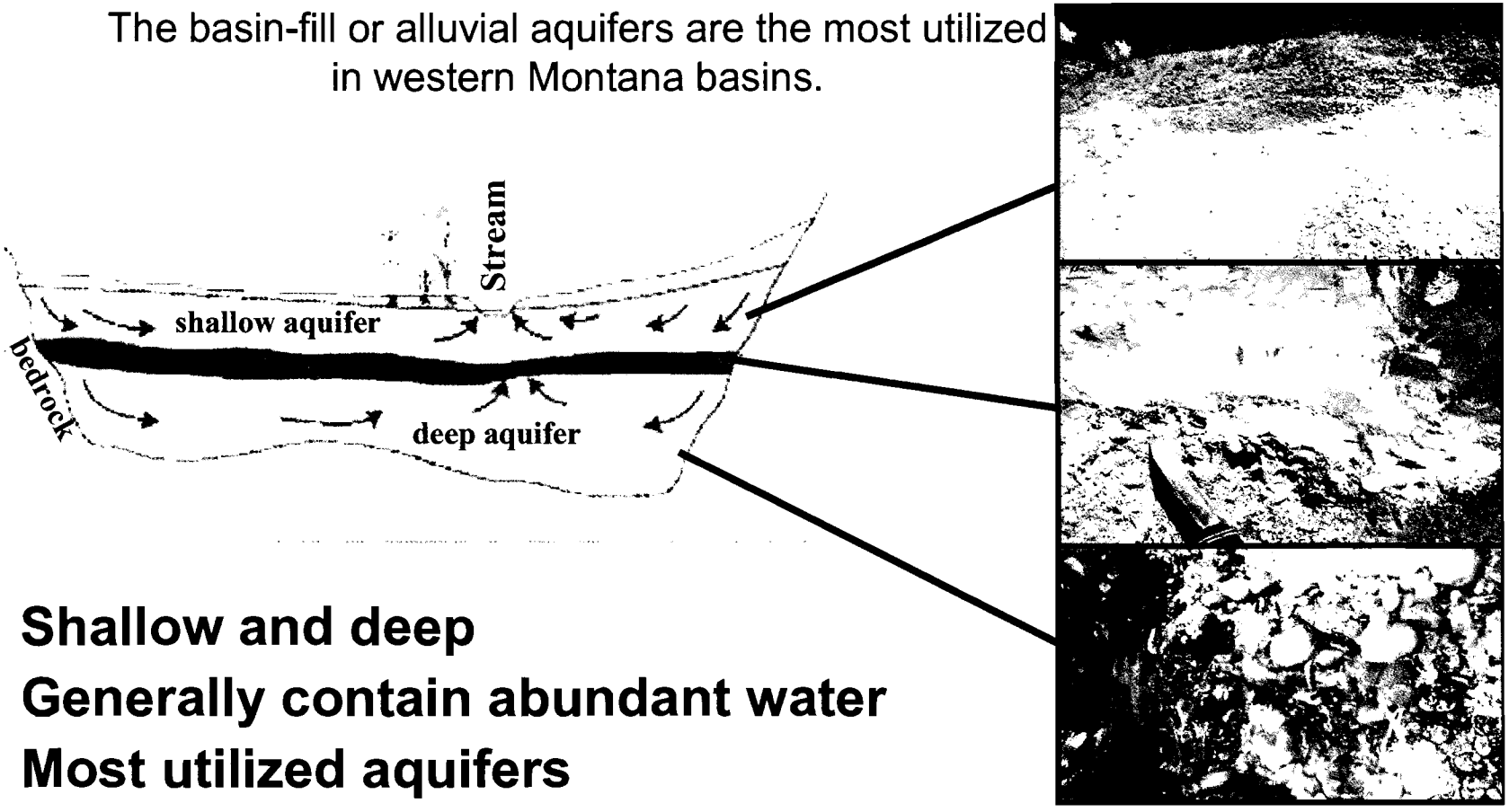
- The basins are structurally down dropped relative to the surrounding mountains.

-Mountains composed of "bedrock"

-Basins are filled with unconsolidated "basin fill" or "alluvium"

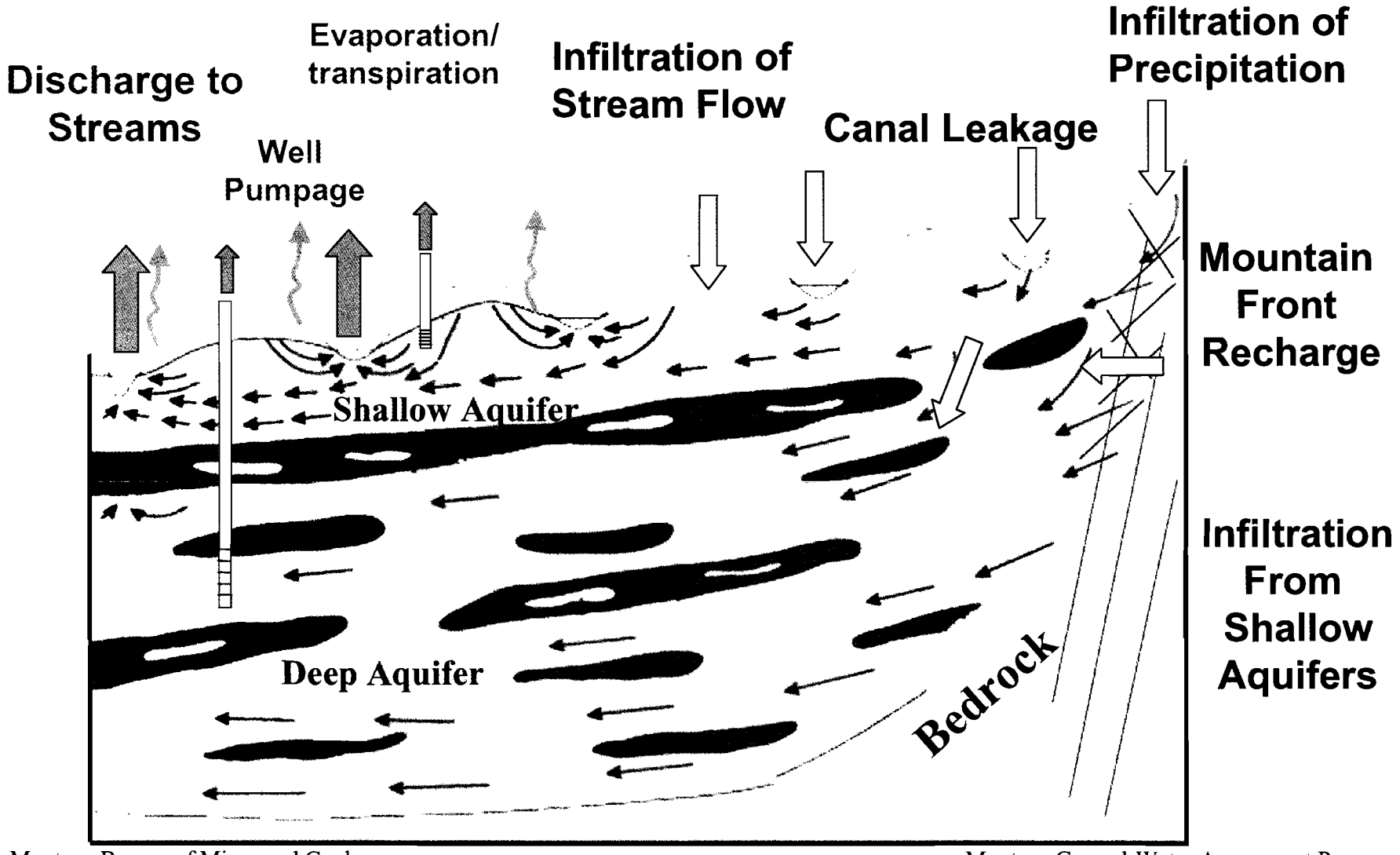
Alluvial Aquifers

The basin-fill or alluvial aquifers are the most utilized in western Montana basins.

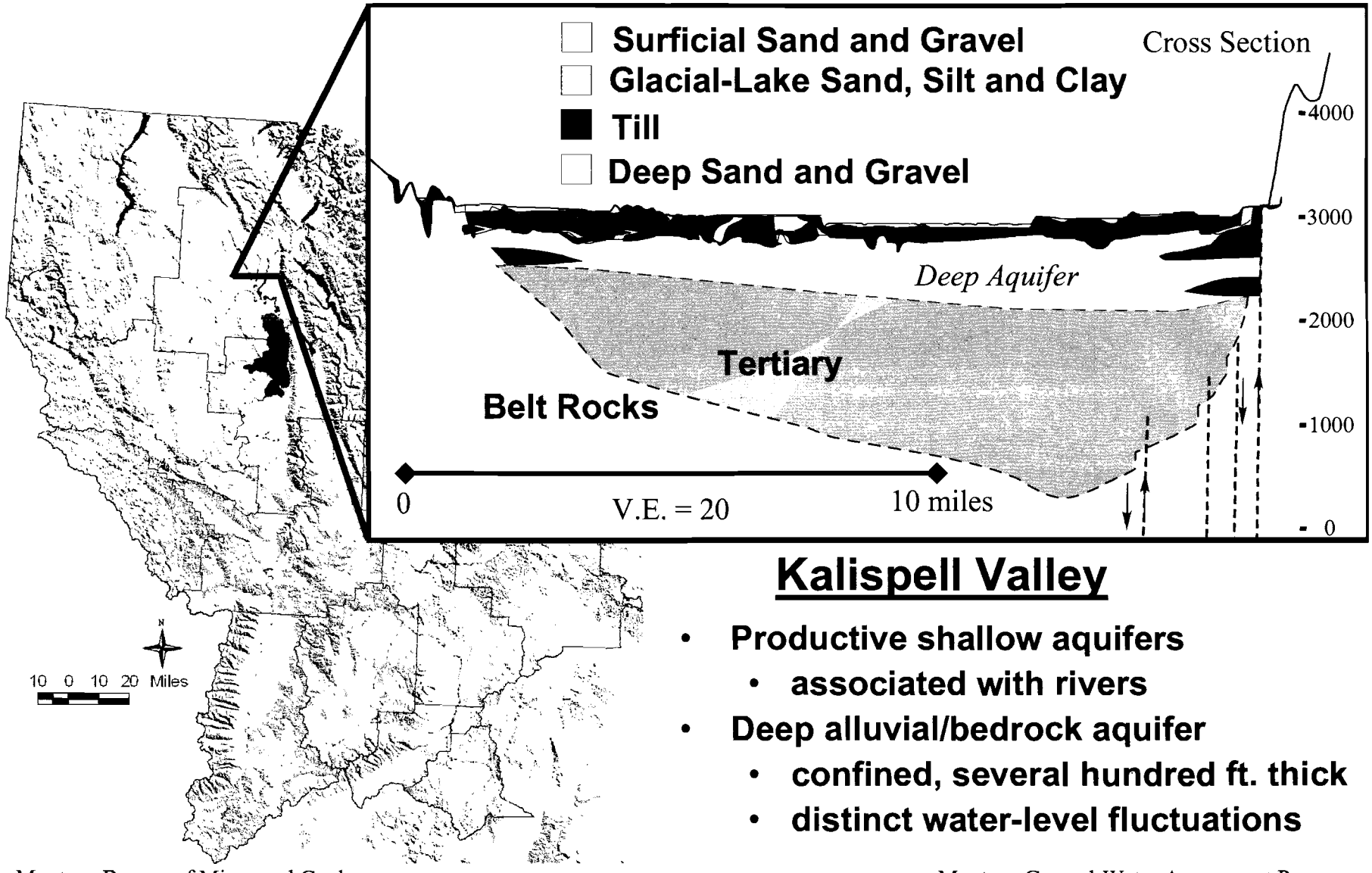


- **Shallow and deep**
- **Generally contain abundant water**
- **Most utilized aquifers**
- **Shallow: hydraulically connected to streams**
- **Deep: confined or "artesian"**

Where Does the Water Come From (Recharge) … and Go To (Discharge)?



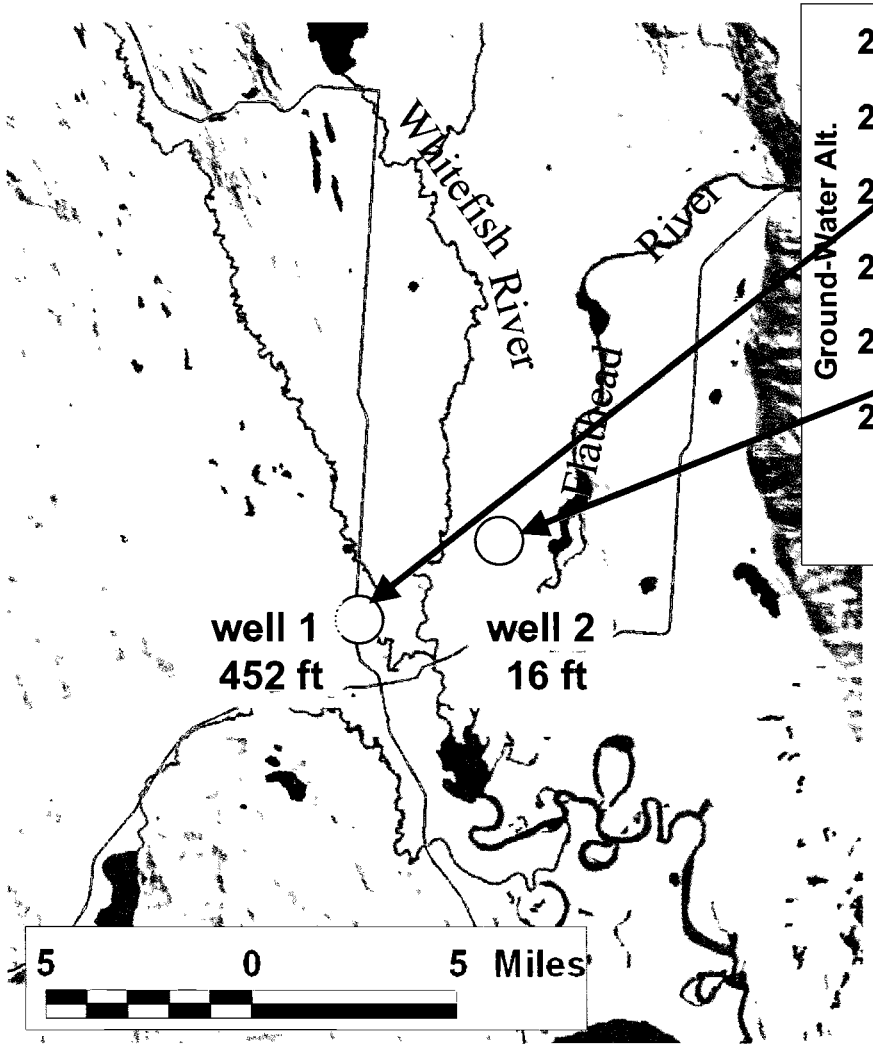
Not All Basins Are Created Equal

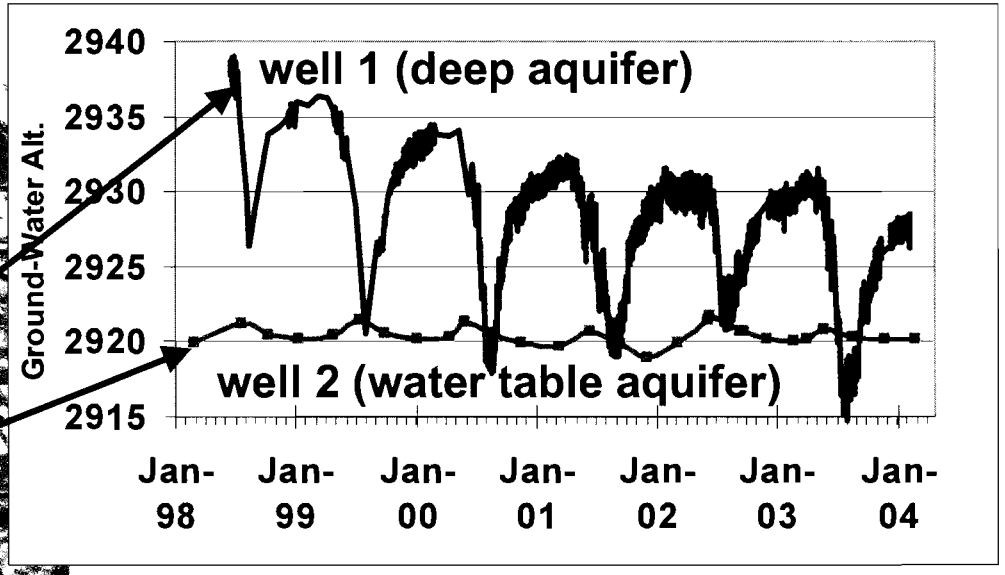


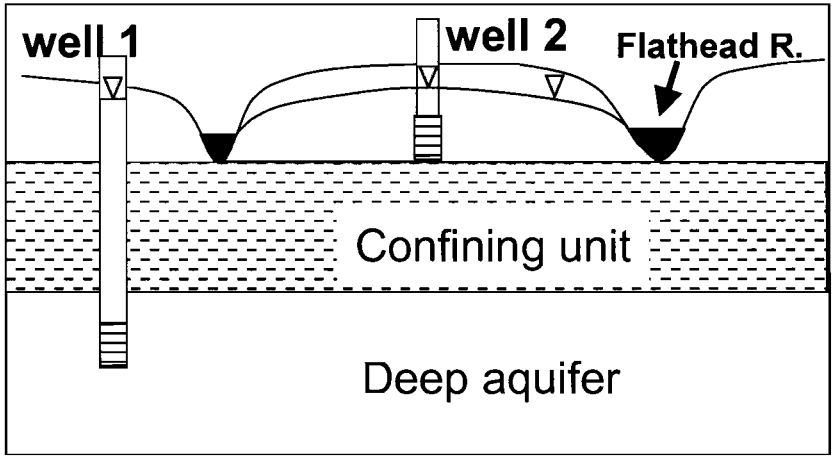
Kalispell Valley

- Productive shallow aquifers
  - associated with rivers
- Deep alluvial/bedrock aquifer
  - confined, several hundred ft. thick
  - distinct water-level fluctuations

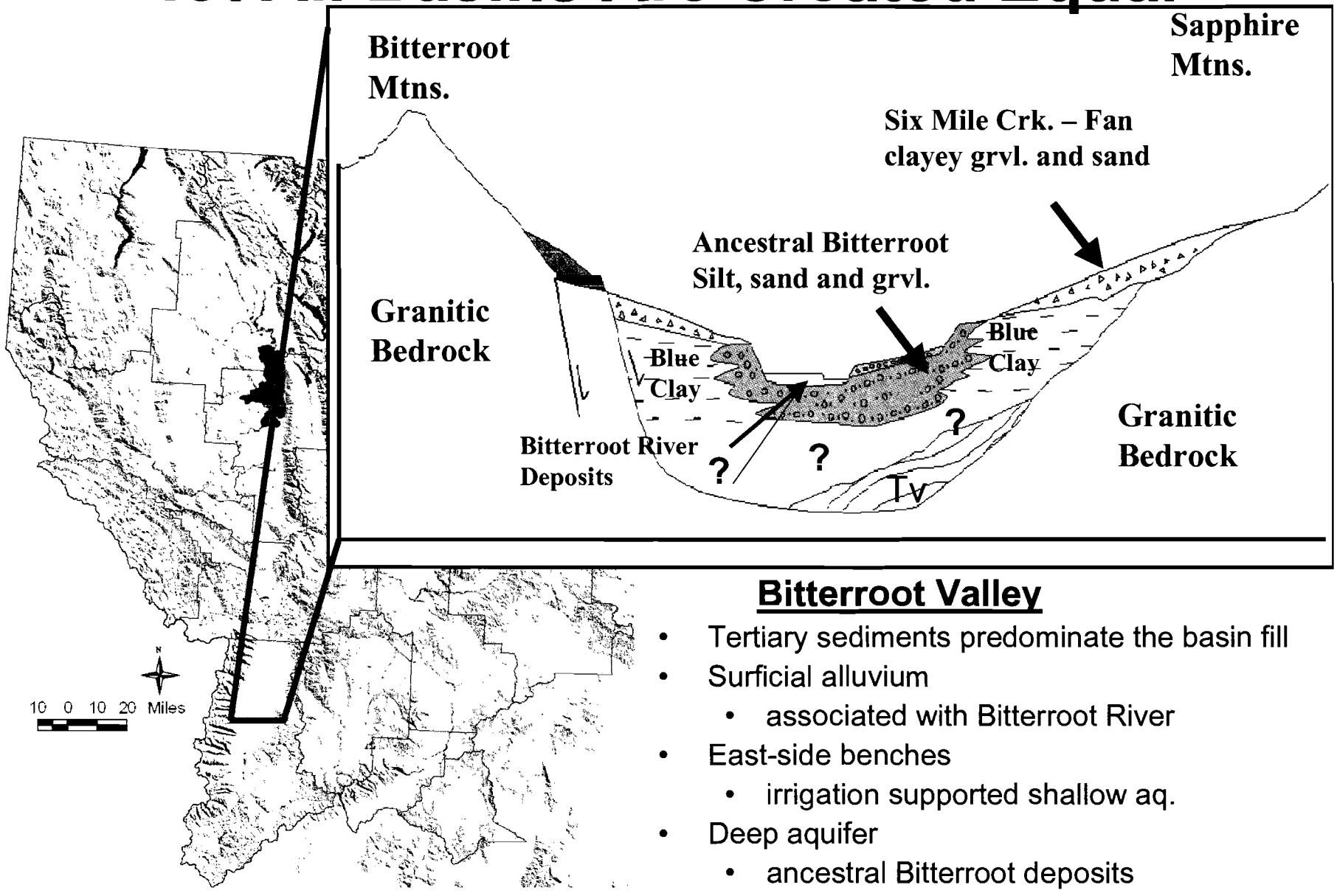
Kalispell Valley







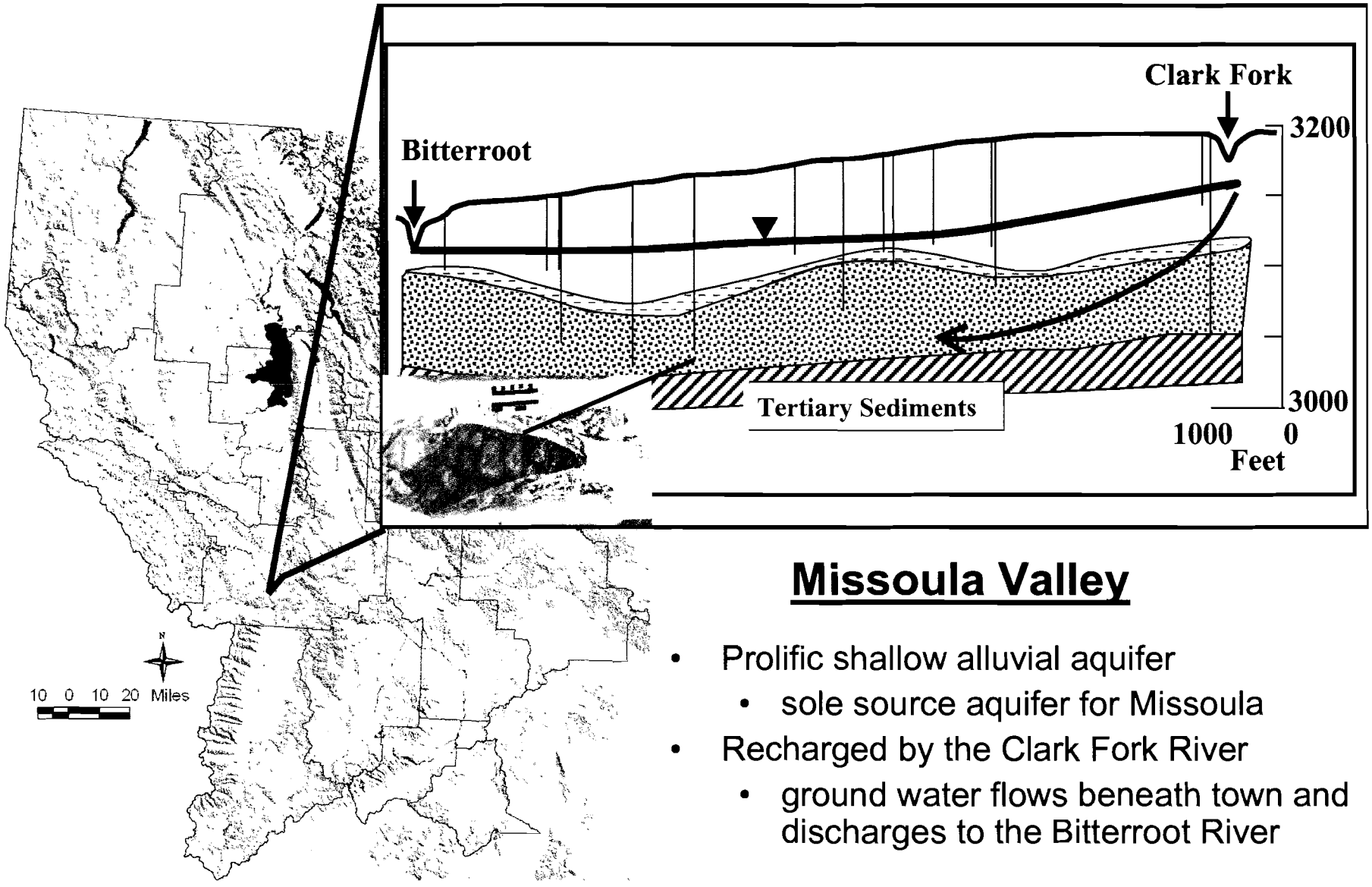
Not All Basins Are Created Equal



Bitterroot Valley

- Tertiary sediments predominate the basin fill
- Surficial alluvium
  - associated with Bitterroot River
- East-side benches
  - irrigation supported shallow aq.
- Deep aquifer
  - ancestral Bitterroot deposits

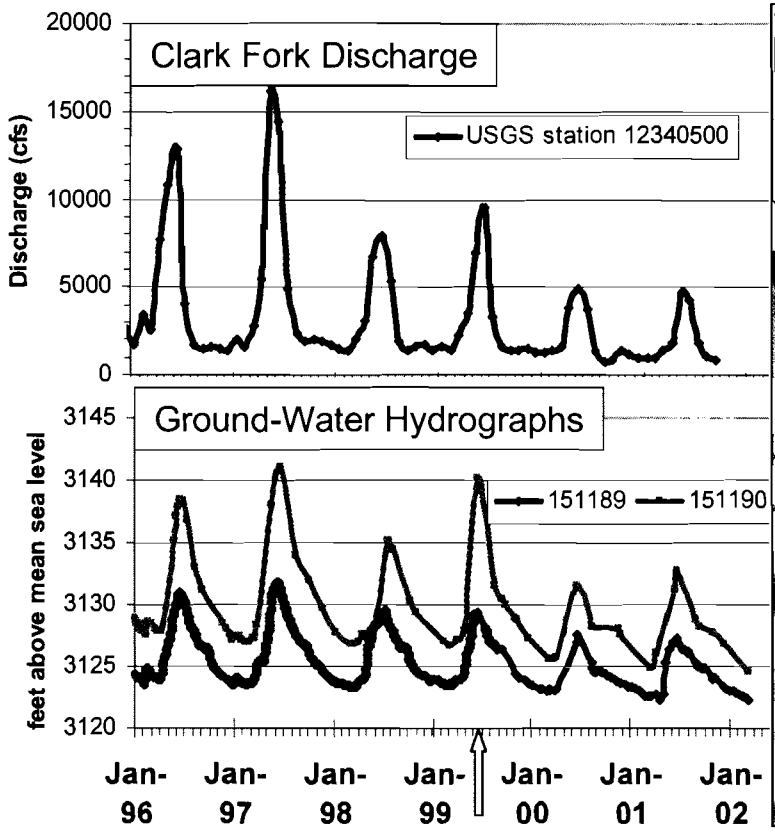
Not All Basins Are Created Equal



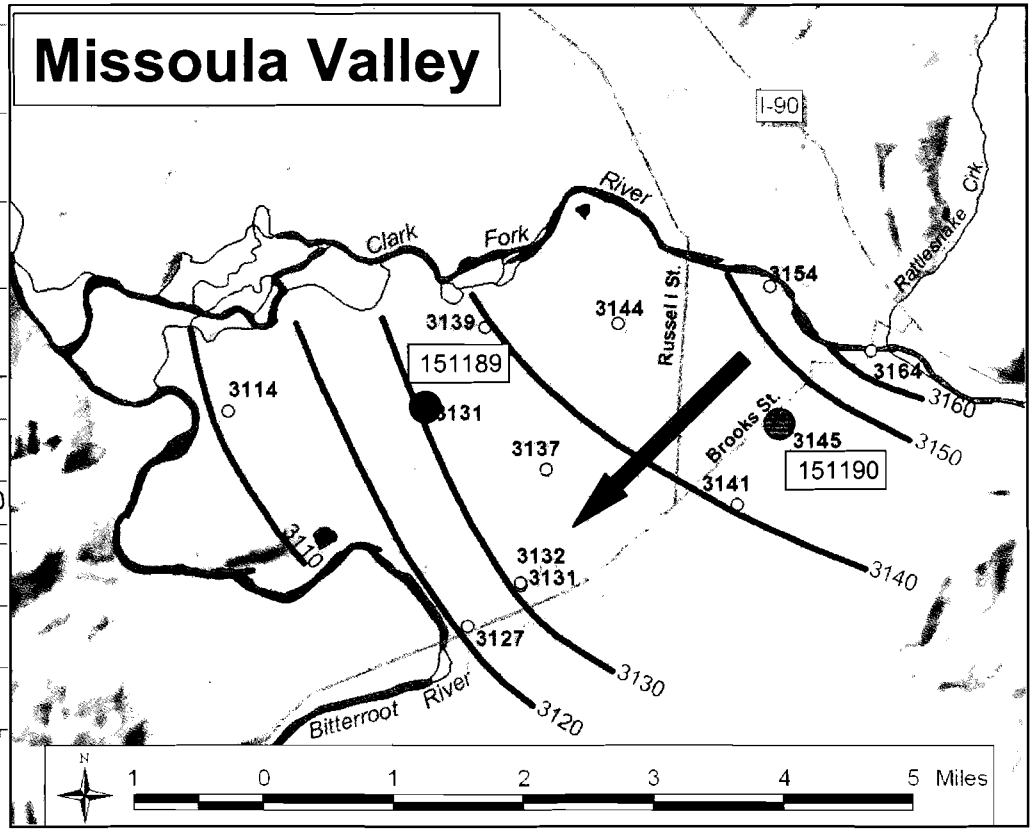
Missoula Valley

- Prolific shallow alluvial aquifer
  - sole source aquifer for Missoula
- Recharged by the Clark Fork River
  - ground water flows beneath town and discharges to the Bitterroot River

Ground Water\Surface Water Interaction



The relationship between surface-water discharge and ground-water levels highlights the connection between ground water and surface water.



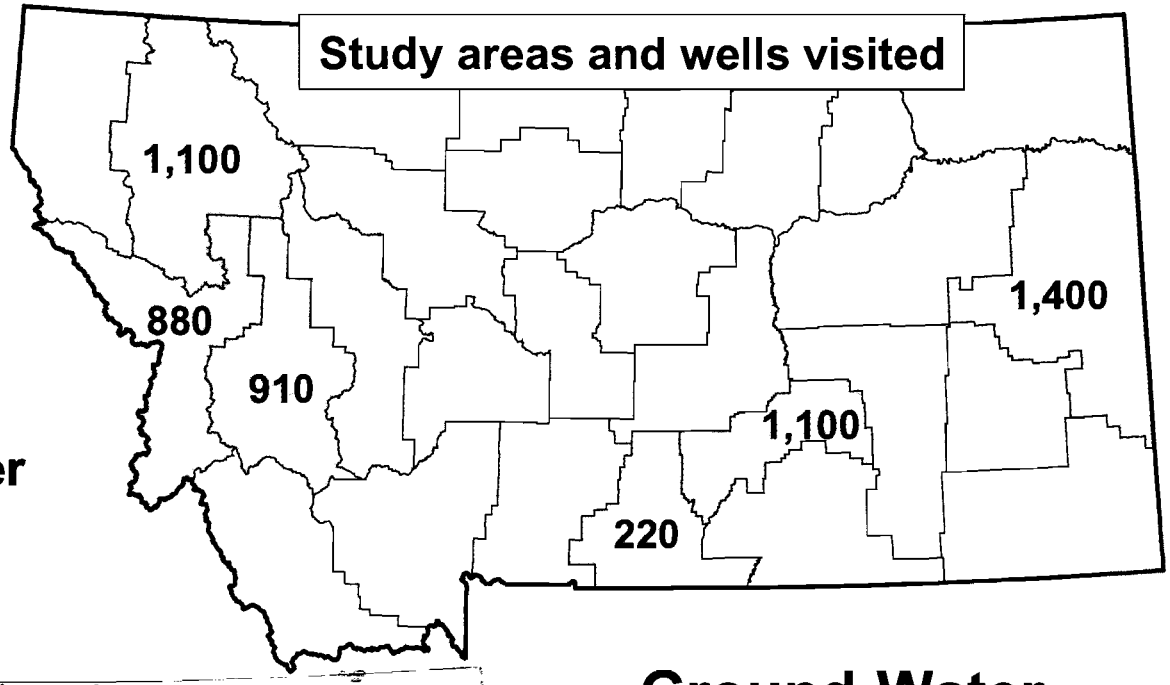
The water table contours reflect the losing and gaining natures of the Clark Fork and Bitterroot Rivers.

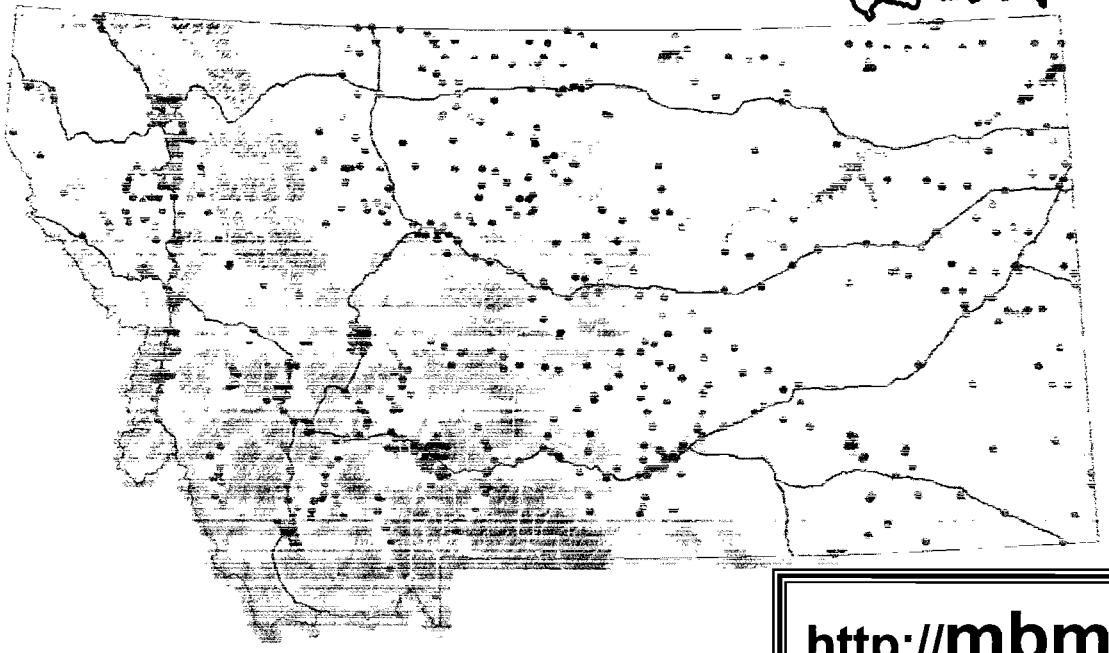
Summary

- **To understand ground-water/surface-water interactions:**
  1) **Hydrogeologic Framework**
     - **variation in sediment types**
     - **distribution of different aquifers**
     - **sources of recharge/discharge**
  2) **Ground-Water level information**
     - **spatial: assess ground-water flow**
     - **temporal: assess long and short-term storage changes**
  3) **Hydraulic Characteristics**
     - **aquifer test (T & S)**
       - **evaluate predictive scenarios**

Ground-Water Characterization Areas

provides the basic framework for more detailed ground-water evaluations





Ground-Water Monitoring Network

850 wells state wide that are used to monitor water levels and water quality for the long term.

http://mbmggwic.mtech.edu

Contact Information:

Ground-Water Information Center:
http://mbmggwic.mtech.edu/

Montana Bureau of Mines and Geology:
http://www.mbmg.mtech.edu/

John LaFave
(406) 496-4306
jlafave@mtech.edu

Appendix C

Evans, Krista Lee

From: Hall, Tim
Sent: Tuesday, June 08, 2004 1:22 PM
To: Evans, Krista Lee
Cc: Smith, Kevin (DNRC)
Subject: FW: Draft Report comments

Krista,

Here are some corrections for your draft, "Montana's Water, etc." from Anne Yates, one of our attorneys who is familiar with the Tongue River Dam and Toston. Tim

-----Original Message-----
From: Yates, Anne
Sent: Tuesday, June 08, 2004 11:55 AM
To: Hall, Tim
Subject: Draft Report comments

Corrections on EQC's report should be made on page 38,

- half way down under, Toston Revenues, Past Uses, First Line, - the total 47 million includes federal and state funds and should be corrected to just include state funds. the state dis not contribute 47 million to tongue river rehab.
- future uses of Toston revenues, last line - Tongue River "Loan" not "Bond"

The University of Montana

Department of Geology
The University of Montana
Missoula, Montana 59812-1296
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Senator Walter McNutt, Chair
Environmental Quality Council
P.O. Box 201704
Helena, MT 59620-1704

June 29, 2004

Re: "*Montana's Water – Where is it? Who can use it? Who decides*"? (EQC 5/26/04)

Dear Chairman McNutt:

As leaders in Montana's hydrologic science community, we commend the Environmental Quality Council for tackling the difficult topic of water distribution in Montana. As you know, the goal of managing a limited resource with unlimited demands at times can seem elusive, if not altogether daunting. To help guide the Legislature along its path toward sustainable water management, we feel compelled to comment upon the subject draft report.

Sound water-management policies strive to achieve sustainable water use by balancing the water budget. Simply put, this means balancing outflows from a basin with inflows to and changes in water storage in that basin. With virtually no control over inflows, policy makers are left to manage outflows and storage, which, in Montana's hydrologic basins, consist primarily of streamflow, evapotranspiration, and reservoir storage. Any increase in one necessarily causes a decrease in the other. For example, an increase in evapotranspiration—say, by increasing the acreage of irrigated land—will decrease streamflow and may also lower the water table.

Your juxtaposition of water diversion and depletion rates (p. 34) indicates that EQC recognizes the importance of depletion, or evapotranspiration, in balancing the water budget. It is only by reducing depletion – not necessarily diversions – that water can actually be saved. EQC clearly recognizes that water-use efficiency improvements alone will not solve problems of overallocation. As the report states, "efficiency of water use has pros and cons associated with it. For example, in some instances, more efficient use of irrigation water means less return flows and aquifer recharge" (p. 10). EQC astutely concludes that "the state must look at ways to reduce evapo-transpiration [sic] rates while still protecting existing water users from adverse affects [sic]" (p. 39).

EQC's treatment of the interconnection between ground water and surface water (Appendix B), in contrast, appears to ignore basic water-balance principles. By focusing on the size and shape of the cone of depression caused by ground-water pumping (a useful concept for tracking contaminant migration, but not for calculating streamflow depletion), EQC fails to recognize that ground-water pumping reduces flow in a hydraulically connected stream. Most of the streams in Montana are hydraulically

connected to ground water in underlying aquifers. It is ground water, in fact, that provides the baseflow that keeps streams flowing year-round, even when direct runoff from precipitation or snowmelt has stopped. When an aquifer and a stream are hydraulically connected, any consumptive use of groundwater in the basin -- regardless of whether a well's cone of depression reaches a stream -- impacts streamflow. The amount of streamflow reduction equals the amount of ground water consumed.

Thus, at the Statewide or the basin scale, it is not true that "the surface water – ground water connectivity issue is complex and site specific" (p. 10). This report finding effectively shifts responsibility for managing ground-water/surface-water interactions away from the Legislature and back to scientists to "determine the level of connectivity, if any, in a given area" (p. 10). We want to make it clear that ground water in Montana's basin aquifers is hydraulically connected to surface water, and that ground-water depletion rates cannot increase without depleting streamflow.

This important principle is the basis for water augmentation policies successfully implemented in other western states. If water in a basin is fully allocated, then applicants for new uses of either ground water or surface water must "augment", or replace, their proposed depletions by retiring other, existing water rights of equal or greater depletion rates. This judicious approach allows for economic development without adversely affecting existing water users. An explicit legal framework for water-right augmentation would encourage and facilitate its practice in Montana.

We thank you for this opportunity to comment on your draft report. Should you wish to discuss this letter or any other hydrologic concerns, please do not hesitate to contact any of us.

Respectfully signed,

William W. Woessner, Ph.D.
Professor of Geology/Hydrogeology
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American Geological Institute
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Willis D. Weight, Ph.D., P.E.
Professor of Geological
Engineering and Head of the
Hydrogeology Program
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Butte, MT
(406) 496-4329

39 Swift Water Drive
Bozeman, MT
59715-8787

26 June 2004

Senator Walter McNutt, Chair
Environmental Quality Council
P.O. Box 201704
Helena, MT 59620-1704

Dear Chairman McNutt,

I am an associate professor of geology and have taught hydrology at Montana State University for 28 years. The views expressed below are my views and do not reflect the views of my employer.

I am writing specifically about Joint Resolution 4. The EQC has correctly recognized the importance of the water budget in hydrologic systems. There is no question that ground water is connected to surface water and there is no question that ground water cannot flow unless there is discharge usually to a stream or to evapotranspiration. The primary question that Appendix B raises is how to identify immediate and direct connection to surface water. While it is ultimately true that any ground water removed from the flow system and evapotranspired to the atmosphere is lost to the discharge area, what is unclear is when and where that effect will be felt. This determination can be quite complex and may well extend beyond analysis of cones of depression from pump tests. The effect of withdrawal and consumption of ground water on a stream may occur far from the withdrawal at a time distant in the future in some cases, and directly adjacent to the river and very soon in other cases. The problem under current law is to determine when the impact will be felt and where the impact will occur. Montana water should be managed as a system not at a point in either space or time.

One approach that does not appear to be in Joint Resolution 4 is water-right replacement where flow reduction due to ground-water withdrawal is replaced by retiring another right to beneficial use. Even this approach will be fraught with controversy because the timing and location of the benefit of the use retired will need to be understood (back to immediate and direct connection to the surface water). I urge you to incorporate water-right replacement as a topic for study in your resolution.

I have severe reservations regarding item 7 in Joint Resolution 4. The implication is that Montana might cut trees and shrubs to reduce evapotranspiration and thus increase stream flow. This approach has been researched elsewhere (I am familiar with Arizona and Colorado experiments). While this approach does produce a short term increase in flow, the increase is often short lived because some type of vegetation regenerates and transpiration rises to pre-treatment levels relatively quickly. The ecosystem cost of this approach is higher than the benefit in my opinion, and does not have the permanence of a retired water right. I think item 7 should be deleted or at least that water augmentation in general be the topic of study. In current form, item 7 is a forest clearing-fire-suppression study under the guise of water conservation.

Sincerely,

Stephan G. Custer, Ph.D.

DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

JUDY MARTZ
GOVERNOR

DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684

STATE OF MONTANA

WATER RESOURCES DIVISION (406) 444-6601
TELEFAX NUMBERS (406) 444-0533 / (406) 444-5918
http://www.dnrc.state.mt.us/wrd/home.htm

48 NORTH LAST CHANCE GULCH
PO BOX 201601
HELENA, MONTANA 59620-1601

TO: Krista Lee Evans
Legislative Environmental Policy Office

FROM: Jack Stults, Administrator
Water Resources Division

DATE: June 30, 2004

RE: Comments on Draft Report

The report is impressive. You have researched, compiled, and written out a large amount of information on many of the critical concerns facing Montana today. This will be helpful to a wide array of people involved in working to continually improve how we manage water in Montana.

You have asked for comments. I have a few recommendations for changes to the text, a few suggestions for minor edits, and have noticed a few of the inevitable typos. In this memorandum I provide the recommendations. I have attached a copy of the draft report on which I have noted the minor edits and errors.

Recommendations:

Page 19 – Add an entry in the matrix for the DNRC Hearings Decisions Index from 1973 to Present accessible at http://www.dnrc.state.mt.us/wrd/home.htm.

Page 33 – Clarify that budget figure is for DNRC only, and not Water Court and RWRCC, too.

Page 36 – At "Task Force Recommendations" it is not clear that these were in the past and have been acted on as evidenced under the following headings.

Page 38 - Under "Rehabilitation of St. Mary..." Add a first bullet stating that the project is owned by the US Department of the Interior, Bureau of Reclamation.

Page 38 – In third bullet under "Rehabilitation...": "...that the rehabilitation of the dam ~~is~~ should be a high priority..."

Page 38 – In last bullet under "Rehabilitation...": "...it does not have the funds, ~~but is willing to assist the state~~ and that rehabilitation is not a priority for the BOR at this time.

Page 39 – Under "Opportunities..." in second bullet" Remaining sites will cost more to build and maintain". Also say "Biggest" at two separate bullet points: can't have two superlatives.

Page 39 – Under "The Balancing Act" second bullet: "Today, many ~~new~~ basins are ~~over~~ fully appropriated and become dewatered...". Like it or not, prior appropriation law like Montana's 1973 Water Use Act allows the complete appropriation of streams, so legally there is no such thing as over appropriation. What we have is the need to incorporate into the system protections for "newer" societal priorities. This is true throughout the prior appropriation states. Montana is working with some success through state reserved water rights, leasing statutes, and Bean Lake III to make that incorporation. We have a long way to go, and in getting there the policy choice has been to avoid invocation of the public trust doctrine. The term "over appropriation" is a public trust concept. We need to discipline ourselves to clarify our thinking. Being more precise in our terms is a good way to do this.

Page 39 – Under "The Balancing Act" last bullet: "...rights was become a challenge and will ~~only~~ get ~~worse~~ more difficult."

Page 42 – Under "Effect on water rights": The big issue is not fear of abandonment. That is easy to solve and has been in every place that has banks. The big issue is how to ensure no adverse effect to other water rights. The "fixes" to this range from ignoring it, to letting a local "bless" the banks transactions, to more rigorous reviews that are virtually a change authorization review.

Page 46 – Fourth paragraph "According to the court...": It is very important to state that the court also found that the DNRC has the discretion under the law to establish a test and that the DNRC has the discretion on what that test should be, so long as it is not arbitrary. The court said it did not have enough evidence to determine whether our test is not arbitrary. In the Settlement accepted by the court for the first part of the case, it is concluded that DNRC does has a policy and is following that policy.

Pages 46 & 47 – The last two paragraphs of this section are now moot. They should be deleted.

Page 56 – Under "Enforcement": A Water Court decree must meet statutory criteria to be enforceable. See 85-2-406(4).

Page 56 – "Chapter X", first sentence of second paragraph: "..., which is for ~~adjudication~~ negotiation of reserved rights."

Thank you again for both the quantity and quality of the information in this report. You have provided a valuable service to the work we are all doing to improve the management of water in our state. I hope these comments are helpful. Naturally, if you have any questions (especially in deciphering my notations on the attached copy of the draft) or think I can help in any way, please don't hesitate to contact me.

Attachment: Copy of draft report with notations

Appendix D

September, 2003 DNRC

MONTANA ADJUDICATION PROGRAM EXPENDITURES SINCE 1974

Fiscal	DNRC			WATER COURT			COMPACT COMMISSION			
Year	WRA	GF	SSRF	WRA	GF	SSRF	WRA	GF	SSRF	TOTAL
1974-80		974,784								974,784
1980	310,409	0	0	2,709	0	0	29,106	0	0	342,224
1981	667,103	0	0	4,694	0	0	157,832	0	0	829,629
1982	1,084,504	0	0	105,087	0	0	140,260	0	0	1,329,851
1983	552,291	500,865	0	0	192,398	0	0	178,659	0	1,424,213
1984	1,382	1,150,557	0	0	229,039	0	0	40,723	129,592	1,551,293
1985	0	515,203	736,960	0	364,103	0	0	197,292	0	1,813,558
1986	1,471	984,549	81,990	406,883	0	0	0	65,501	136,331	1,676,725
1987	66,354	496,424	358,936	420,656	0	0	0	50,592	129,440	1,522,402
1988	0	549,221	0	400,328	0	0	0	124,367	85,597	1,159,513
1989	0	517,688	0	0	0	393,465	0	112,534	112,532	1,136,219
1990	22,130	620,756	43,926	0	0	429,267	0	112,816	180,383	1,409,278
1991	1	760,619	2	0	0	448,029	0	132,269	229,309	1,570,229
1992	0	741,692	384	0	0	495,641	0	133,548	269,306	1,640,571
1993	0	584,395	66,301	0	0	553,979	0	132,142	308,636	1,645,453
1994	0	457,232	70,982	0	0	541,156	0	0	474,406	1,543,776
1995	47,691	486,830	190,182	0	0	521,501	0	5,448	486,895	1,738,547
1996	22,189	706,567	0	0	0	529,385	0	218,307	289,717	1,766,165
1997	72,106	681,561	0	0	0	567,259	0	212,710	286,819	1,820,455
1998	166,584	557,590	78,773	0	0	573,298	0	199,193	371,447	1,946,885
1999	90,802	457,953	65,334			551,807		210,181	377,723	1,753,800
2000	68,802	596,076	0			593,378		644,379	0	1,902,635
2001	49,777	569,771	0			627,869	0	661,548	0	1,908,965
2002	4,508	610,015	22,279	0	0	665,013		729,510		2,031,325
2003		644,009		0	0	653,454	0	709,946	0	2,007,409
TOTAL	3,228,104	13,189,573	1,716,049	1,340,357	785,540	8,144,501	327,198	4,871,665	3,868,133	37,471,120

WRA - Water Rights Account and Adjudication Account (water right filing fees)

GF - General Fund

SSRF - State Special Revenue Fund (Resource Indemnity Trust, Renewable Resource Development, Renewable Resources Grants/Loans, Local Impact, Reclamation And Development)

Note: The Water Court and Compact Commission provided the above expenditure numbers for their area of the table.

Note: As of October 1, 1982, a total of 200,578 claims had been filed and a total of $3,706,422 had been received in fees. This amounts to an average of $18.47 per claim.

Appendix E. Adjudication Funding Bill Draft

Unofficial Draft Copy
As of: October 19, 2004 (1:09pm)

LC0395

**** Bill No. ****

Introduced By **********

By Request of the Environmental Quality Council

A Bill for an Act entitled: "An Act providing the findings and purpose of implementing a water adjudication fee; providing benchmarks and action, including elimination of the fee, that must be taken if benchmarks are not met by the department; requiring the reexamination of irrigation claims in basins that were verified; defining what owner means in terms of the water adjudication fee; establishing a water adjudication fee schedule; providing that the fee does not apply to federal water rights and Indian reserved and aboriginal claims to water; providing that the department of revenue collect the fee on behalf of the department; requiring the department to assign any unpaid fees to the department of revenue for collection; providing that a lien may be placed on a water right if the fee is not paid after collection efforts; establishing a water adjudication account; establishing a statutory appropriation; providing that the fee cannot be assessed once $31 million has been deposited in the adjudication account; requiring the department and the water court to report to the environmental quality council and the applicable legislative appropriations subcommittees; providing he basis for requiring examination of irrigation claims in verified basins; providing rulemaking authority; providing a contingent voidness; amending sections 15-1-216, 17-7-502, 85-2-231, and 85-

2-237, MCA; providing an effective date; and providing a termination date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Findings -- purpose.** (1) Montana's water is critical to economic development and economic stability to its citizens. It is critical that Montana's water rights be adjudicated and quantified in a timely and accurate manner.

(2) The department and the water court must be accountable to the water users of Montana and are responsible for completing the adjudication in a timely and accurate manner.

(3) The completion of Montana's water adjudication is critical to the future of our state. Water users that filed their water right claims, pursuant to law, have the right to have their water rights quantified and made part of a decree. As water use and demands for water increase it is critical that water users have the option of enforcing their decree as a tool to help manage water in their area.

(4) The department's process for evaluating claims was changed from a verification process to an examination process. The examination process is conducted pursuant to rules adopted by the Montana Supreme Court. For those basins that were verified rather than examined, it is absolutely necessary that the irrigation claims be reexamined using rules approved by the

Supreme Court.

(5) The purpose of [sections 1 through 10] is to generate revenue to adequately fund Montana's water adjudication program to:

(a) complete claims examination and the initial decree phase;

(b) reexamine all irrigation claims in basins that were verified and were not subject to the Supreme Court examination rules; and

(c) ensure that the product of the adjudication is accurate decrees.

(6) With adequate funding, it is realistic and feasible for the department to complete claims examination and reexamination of verified basins by June 30, 2015. It is also realistic and feasible for the Water Court to issue a preliminary or temporary preliminary decree by June 30, 2020 for all basins in Montana.

(7) It is critical to preserve the trust that the water users of Montana have placed in the Legislature by ensuring that the revenue generated by the water adjudication fee established in [section 5] is only used for the purpose of adjudicating Montana's water rights.

NEW SECTION. **Section 2. Benchmarks and action taken if not met.** (1) The completion of initial claims examination is of a higher priority than reexamination of claims that were subject to the verification process unless the Chief Water Judge issues an

order making reexamination a higher priority as provided in subsection (3)(b).

(2) There are approximately 57,000 water right claims that were filed pursuant to 85-2-212 that must be examined. There are approximately 18,800 irrigation claims that were verified that must be reexamined using the Supreme Court Examination rules.

(3)(a) The water court shall prioritize basins for the purpose of claims examination and reexamination by the department.

(b) The Chief Water Judge has the authority to order that reexamination be completed for a certain basin in a higher priority than claims examination. If the Chief Water Judge issues an order requiring the department to reexamine claims rather than examining claims, the number of claims that were reexamined must be counted against the amount of claims that the department is required to examine for that period.

(4)(a) The biennial cumulative benchmarks that are provided in subsection (4)(b) must be met. If the benchmarks are not met the fee contained in [section 5] attached to a water right for the purpose of funding the adjudication may not be assessed the following even numbered year. All claims must be examined by June 30, 2015.

(b)

Date	Total Number of Claims Examined	Total Number of Claims Reexamined
December 31, 2006	10,000	0

December 31, 2008	30,650	0
December 31, 2010	51,300	0
December 31, 2012	57,000	7,140
June 30, 2015		18,800

NEW SECTION. **Section 3. Definitions.** For the purposes of [sections 1 through 10] the following definitions apply:

(1) "calculated volume" means the feasible volume given the flow rate and period of use;

(2) "person" means an individual, corporation, partnership, association, firm, or other legal entity.

(3) "water right" means a legal right to the beneficial use of water as recorded in the centralized water recording system by a water court decree, provisional permit, ground water certificate, filed exempt right, Powder River declaration, statement of claim, stockwater permit, temporary provisional permit, 1962 to 1973 groundwater filings as recorded with DNRC, or water reservation.

NEW SECTION. **Section 4. Owner.** (1) For the purposes of giving notice or imposing a fee as provided for in [section 5], owner means the first enumerated entity on a water right.

(2) The first enumerated entity is responsible for collecting the proportionate share of any fee from the other entities enumerated on the water right.

NEW SECTION. **Section 5. Water adjudication fee schedule -- exceptions.** (1)(a) Except as provided in subsection (1)(c), a water adjudication fee is authorized and directed to be imposed by the department of revenue on all water rights as defined in [section 3].

(b) Except as provided in [section 2], [section 7], subsection (1)(c) of this section, and subsection (5) of this section, an owner shall pay a biennial fee for the purpose of funding Montana's water adjudication based on the schedule in subsections (4) through (6).

(c) The water adjudication fee may not be imposed on federal water rights and tribal reserved and aboriginal water rights.

(2) The water adjudication fee is due on January 31 of even numbered years. The penalty and interest provisions contained in 15-1-216 apply to late payments of the fee.

(3)(a) Subject to subsection (3)(b), the department of revenue may withhold revenue equal to the actual cost of collecting the water adjudication fee.

(b) The department of revenue may not withhold more than 5% of the revenue generated.

(4) An owner for the following purposes shall pay according to a graduated scale. The number of water rights for which a fee must be paid on a per purpose basis is capped at 20 water rights per person per graduated level.

(a) The fee schedule for a commercial water right with a

claimed or calculated volume that is:

(i) 0 acre feet to 100 acre feet, $20;

(ii) greater than 100 acre feet and less than or equal to 5000 acre feet, $1000; and

(iii) greater than 5000 acre feet, $2000.

(b) The fee schedule for an industrial water right with a claimed or calculated volume that is:

(i) 0 acre feet to 1000 acre feet, $20;

(ii) greater than 1000 acre feet and less than or equal to 4000 acre feet, $1000; and

(iii) greater than 4000 acre feet, $2000.

(c) The fee schedule for a mining water right with a claimed or calculated volume that is:

(i) 0 acre feet to 1000 acre feet, $20;

(ii) greater than 1000 acre feet and less than or equal to 4000 acre feet, $1000; and

(iii) greater than 4000 acre feet, $2000.

(d) The fee schedule for a municipal water right with a claimed or calculated volume that is:

(i) 0 acre feet to 1000 acre feet, $20;

(ii) greater than 1000 acre feet and less than or equal to 4000 acre feet, $1000; and

(iii) greater than 4000 acre feet, $2000.

(e) The fee schedule for a power generation water right, both consumptive and non-consumptive, with a claimed or calculated volume that is:

(i) 0 acre feet to 100,000 acre feet, $20;

(ii) greater than 100,000 acre feet and less than or equal to 1,000,000 acre feet, $1000; and

(iii) greater than 1,000,000 acre feet, $2000.

(5) The fee schedule for an instream flow water right or an instream flow water reservation, except those used for the purposes identified in subsection (3), with a claimed or calculated volume that is:

(a) 0 acre feet to 50,000 acre feet, $20;

(b) greater than 50,000 acre feet and less than or equal to 1,000,000 acre feet, $1000; and

(c) greater than 1,000,000 acre feet, $2000.

(6) The fee schedule for an irrigation water right or irrigation claim that is part of an irrigation district, ditch company, canal company, irrigation project, water user's association, or other organized group with the purpose of allocating irrigation water is $20 per user with the fee capped at 40 users. The fee must be paid by the user. If an irrigation district, ditch company, or water user's association has more than 40 users the fee may not exceed $800 and must be split equally among the users.

(7) The fee schedule for all water rights that are not subject to subsections (4) through (6) is $20. The fee is capped at 20 water rights per person for purposes that are not addressed in subsections (4) through (6).

(8) The fee schedule applies to all water rights on record

with the department that are not withdrawn, terminated, or otherwise abandoned.

(9) A person may file an administrative appeal with the department to contest the total amount of the fee assessed against them or a fee imposed based on incorrect ownership records.

(10) Fees authorized in this section may not be assessed after June 30, 2014.

NEW SECTION. **Section 6. Debt collection.** If the owner of a water right does not pay the fee after receiving an initial bill statement and one reminder bill statement:

(1) the department shall turn over this debt to the department of revenue for collection pursuant to Title 17 chapter 4.

(2) if efforts to collect the debt are not successful, the department of revenue may file a lien against the water right in the county where the water is put to beneficial use.

NEW SECTION. **Section 7. Water adjudication account.** (1) There is a water adjudication account within the state special revenue fund created in 17-2-102.

(2) (a) For the period beginning July 1, 2005 and ending June 20, 2015, there is statutorily appropriated to the department and the Water Court, as provided in 17-7-502, up to $2.6 million, plus the HJR2 approved inflation factor, each

fiscal year from the water adjudication account for the sole purpose of funding the water adjudication program.

(b) For the period beginning July 1, 2015 and ending June 20, 2020, there is statutorily appropriated to the department and the Water Court, as provided in 17-7-502, up to $1.0 million, plus the HJR2 approved inflation factor, each fiscal year from the water adjudication account for the sole purpose of funding the water adjudication program.

(3)(a) Subject to subsection (3)(b), the total amount of revenue deposited in the account from the fee provided for in [section 5] may not exceed $31 million.

(b) If federal funds are appropriated for the purposes of [sections 1 through 10], the maximum amount that can be deposited in the account must be reduced by the amount of federal funds appropriated.

(c) Once revenue generated from the fees provided for in [section 5] and any federal revenue appropriations have reached $31 million the fee may no longer be assessed.

(4) Interest earnings on the account must be deposited in the account.

(5) Excess revenue remaining in the account on June 30, 2020 must be transferred to the water rights account provided for in 85-2-318.

NEW SECTION. **Section 8. Reporting requirements.** The department and the water court shall:

(1) provide reports to the environmental quality council at each meeting during a legislative interim on:

(a) the progress of the adjudication; and

(b) the total revenue generated by the fee in [section 5] and deposited in the account provided for in [section 7].

(2) include a status report on the adjudication in their presentation to the applicable appropriations subcommittees during each legislative session.

(3) provide a budget that outlines how each of the entities will be funded in the next biennium including general fund, state special revenue funds, and the statutorily appropriated fee revenue.

NEW SECTION. **Section 9. Examination of irrigation claims in verified basins.** (1) The department shall examine all irrigation claims in basins that were verified rather than examined.

(2) Only irrigation claims are subject to the reexamination requirements because:

(a) a majority of claims in the verified basins are irrigation claims;

(b) when the Supreme Court examination rules were adopted irrigation claims were subject to the biggest change from the verification procedure;

(c) in general the irrigation claims claim the largest amount of water in a basin.

NEW SECTION. **Section 10. Rulemaking authority.** The department may adopt rules for the purpose of implementing [sections 1 through 10].

Section 11. Section 15-1-216, MCA, is amended to read:

"15-1-216. Uniform penalty and interest assessments for violation of tax provisions -- applicability -- exceptions. (1) (a) A person who fails to file a required tax return or other report with the department by the due date, including any extension of time, of the return or report must be assessed a late filing penalty of $50 or the amount of the tax due, whichever is less.

(b) A person who purposely fails to file a required return, statement, or other report must be assessed an additional late filing penalty of $200 or the amount of the tax due, whichever is less.

(c) A person who fails to pay a tax when due must be assessed a late payment penalty of 1.5% a month or fraction of a month on the unpaid tax. The penalty may not exceed 18% of the tax due.

(d) A person who purposely fails to pay a tax when due must be assessed an additional penalty equal to 25% of the tax due or $200, whichever is less, plus interest as provided in subsection (2).

(2) Interest on taxes not paid when due must be assessed at

the rate of 12% a year, accrued at 1% a month or fraction of a month, on the unpaid tax. Interest on delinquent taxes and on deficiency assessments is computed from the original due date of the return until the tax is paid.

(3) (a) Except as provided in subsection (3)(b), this section applies to taxes, fees, and other assessments imposed under Titles 15 and 16, and [section 5].

(b) This section does not apply to:

(i) property taxes;

(ii) gasoline and vehicle fuel taxes collected by the department of transportation pursuant to Title 15, chapter 70; or

(iii) taxes, fees, and other assessments subject to other penalty or interest charges as provided by law."

{*Internal References to 15-1-216:*

15-1-217 x	*15-24-921 x*	*15-30-142 x*	*15-30-142 x*
15-30-209 x	*15-30-209 x*	*15-30-323x*	*15-30-323 x*
15-30-323 x	*15-31-510 x*	*15-31-543 x*	*15-31-545 x*
15-35-105x	*15-35-112 x*	*15-35-113 x*	*15-36-311 x*
15-36-313x	*15-36-314 x*	*15-36-315x*	*15-37-105 x*
15-37-108x	*15-37-109 x*	*15-37-114 x*	*15-37-115x*
15-37-205 x	*15-37-210 x*	*15-37-211 x*	*15-38-107 x*
15-38-107x	*15-38-107x*	*15-50-309 x*	*15-50-309x*
15-51-103x	*15-51-109 x*	*15-51-110x*	*15-51-111x*
15-51-111 x	*15-53-147 x*	*15-53-147x*	*15-59-106 x*
15-59-106 x	*15-59-112 x*	*15-59-113 x*	*15-60-204 x*
15-60-208 x	*15-65-115 x*	*15-65-115 x*	*15-65-115 x*
15-65-116 x	*15-66-204 x*	*15-66-208 x*	*15-67-204 x*
15-67-208x	*15-68-514 x*	*15-68-517x*	*15-68-525x*
15-72-112 x	*15-72-112x*	*15-72-112 x*	*15-72-114 x*
15-72-114 x	*15-72-116 x*	*16-1-403 x*	*16-1-409 x*
16-1-411 x	*16-11-143 x*	*16-11-203x*	*75-2-220x*
75-2-220 x	*75-5-516x*	*80-2-230x*	*87-2-903x* }

Section 12. Section 17-7-502, MCA, is amended to read:

"17-7-502. Statutory appropriations -- definition --

requisites for validity. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations: 2-15-151; 2-17-105; 5-13-403; 10-3-203; 10-3-310; 10-3-312; 10-3-314; 10-4-301; 15-1-111; 15-1-113; 15-1-121; 15-23-706; 15-35-108; 15-36-332; 15-37-117; 15-38-202; 15-65-121; 15-70-101; 16-11-404; 17-3-106; 17-3-212; 17-3-222; 17-3-241; 17-6-101; 17-7-304; 18-11-112; 19-3-319; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506; 19-20-604; 20-8-107; 20-9-534; 20-9-622; 20-26-1503; 22-3-1004; 23-5-306; 23-5-409; 23-5-612; 23-5-631; 23-7-301; 23-7-402; 37-43-204; 37-51-501; 39-71-503; 42-2-105; 44-12-206; 44-13-102; 50-4-623; 53-1-109; 53-6-703; 53-24-108; 53-24-206; 61-3-415; 69-3-870; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 77-2-362; 80-2-222; 80-4-416; 80-5-510; 80-11-518; 82-11-161; [section 7]; 87-1-513; 90-3-1003; 90-6-710; and 90-9-306.

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for the payments. (In subsection (3): pursuant to Ch. 422, L. 1997, the inclusion of 15-1-111 terminates on July 1, 2008, which is the date that section is repealed; pursuant to sec. 10, Ch. 360, L. 1999, the inclusion of 19-20-604 terminates when the amortization period for the teachers' retirement system's unfunded liability is 10 years or less; pursuant to sec. 4, Ch. 497, L. 1999, the inclusion of 15-38-202 terminates July 1, 2014; pursuant to sec. 10(2), Ch. 10, Sp. L. May 2000, and secs. 2 and 5, Ch. 481, L. 2003, the inclusion of 90-6-710 terminates June 30, 2005; pursuant to sec. 10(2), Ch. 10, Sp. L. May 2000, and secs. 3 and 6, Ch. 481, L. 2003, the inclusion of 15-35-108 terminates June 30, 2010; and pursuant to sec. 135, Ch. 114, L. 2003, the inclusion of 2-15-151 terminates June 30, 2005.)"

{*Internal References to 17-7-502:*

2-15-151 x	*2-17-105x*	*5-13-403 x*	*10-3-203 x*
10-3-310 x	*10-3-312 x*	*10-3-312x*	*10-3-314 x*
10-4-301 x	*15-1-111x*	*15-1-113 x*	*15-1-121x*
15-23-706 x	*15-35-108 x*	*15-35-108x*	*15-36-332x*

15-37-117 x	*15-38-202 x*	*15-38-202x*	*15-65-121 x*
15-65-121 x	*15-70-101 x*	*16-11-404 x*	*17-1-508 x*
17-3-106x	*17-3-212 x*	*17-3-222 x*	*17-3-241x*
17-6-101x	*17-7-304 x*	*17-7-501 x*	*18-11-112 x*
19-3-319 x	*19-9-702 x*	*19-13-604x*	*19-17-301x*
19-18-512 x	*19-19-305 x*	*19-19-506x*	*19-20-604 x*
20-8-107 x	*20-9-534x*	*20-9-622 x*	*20-26-1503 x*
22-3-1004 x	*23-5-306 x*	*23-5-409 x*	*23-5-612 x*
23-5-631x	*23-7-301 x*	*23-7-402x*	*37-43-204 x*
37-51-501 x	*39-71-503x*	*42-2-105 x*	*44-12-206 x*
44-13-102 x	*50-4-623x*	*53-1-109 x*	*53-6-703 x*
53-24-108x	*53-24-108 x*	*53-24-206x*	*61-3-415 x*
69-3-870 x	*75-1-1101 x*	*75-5-1108x*	*75-6-214 x*
75-10-622 x	*75-11-313 x*	*77-2-362x*	*80-2-222 x*
80-4-416x	*80-5-510 x*	*80-11-518 x*	*82-11-161 x*
87-1-513x	*90-3-1003 x*	*90-6-710x*	*90-9-306 x*}

Section 13. Section 85-2-231, MCA, is amended to read:

"85-2-231. Temporary preliminary and preliminary decree. (1) A water judge may issue a temporary preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary decree is necessary for the orderly adjudication or administration of water rights.

(2) (a) The water judge shall issue a preliminary decree. The preliminary decree must be based on:

(i) the statements of claim before the water judge;

(ii) the data submitted by the department;

(iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

(iv) any additional data obtained by the water judge.

(b) The preliminary decree must be issued within 90 days

after the close of the special filing period set out in 85-2-702(3) or as soon after the close of that period as is reasonably feasible.

(c) The water judge may issue an interlocutory decree if an interlocutory decree is otherwise necessary for the orderly administration of water rights.

(3) A temporary preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, or any claim or group of claims at a time different from the issuance of other temporary preliminary decrees.

(4) The temporary preliminary decree or preliminary decree must contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234.

(5) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not satisfied, the water judge may recommit the report to the master with instructions or modify the report and issue the preliminary decree.

(6) The department shall examine all irrigation claims in basins that were verified rather than examined. The objection and hearing provisions of Title 85, chapter 2, part 2 apply to

these claims."

{*Internal References to 85-2-231:*
3-7-211x *3-7-212 x* *3-7-311x* *85-2-141x*
85-2-141x *85-2-233x* *85-2-702x*}

Section 14. Section 85-2-237, MCA, is amended to read:

"85-2-237. Reopening and review of decrees. (1) After July 1, 1996, the water judges shall by order reopen and review, within the limits set forth by the procedures described in this section, all preliminary or final decrees:

(a) that have been issued but have not been noticed throughout the water divisions; ~~or~~

(b) for basins for which claims have been filed under 85-2-221(3)~~.~~; or

(c) for basins that were verified and not examined.

(2) (a) Each order must state that the water judge will reopen the decree or decrees and, upon a hearing, review the water court's determination of any claim in the decree or decrees if an objection to the claim has been filed for the purpose of protecting rights to the use of water from sources:

(i) within the basin for which the decree was entered; or

(ii) in other basins that are hydrologically connected to sources within the basin for which the decree was entered.

(b) A person may not raise an objection to a matter in a reopened decree if the person was a party to the matter when the matter was previously litigated and resolved as the result of the previous objection process, unless the objection is allowed for

any of the following reasons:

(i) mistake, inadvertence, surprise, or excusable neglect;

(ii) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), Montana Rules of Civil Procedure;

(iii) fraud, misrepresentation, or other misconduct of an adverse party;

(iv) the judgment is void;

(v) any other reason justifying relief from the operation of the judgment.

(c) The objection must be made in accordance with the procedure for filing objections under 85-2-233.

(3) The water judges shall serve notice by mail of the entry of the order providing for the reopening and review of a decree or decrees to the department and to the persons entitled to receive service of notice under 85-2-232(1).

(4) Notice of the reopening and review of a preliminary or final decree must also be published at least once each week for 3 consecutive weeks in at least three newspapers of general circulation that cover the water division or divisions in which the decreed basin is located.

(5) No objection may cause a reopening and review of a claim unless the objection is filed with the appropriate water court within 180 days after the issuance of the order under subsection (1). This period of time may, for good cause shown, be extended by the water judge for up to two 90-day periods if an

application for extension is made within the original 180-day period or any extension of it.

(6) The water judge shall provide notice to the claimant of any timely objection to the claim and, after further reasonable notice to the claimant, the objector or objectors, and other interested persons, set the matter for hearing. The water judge may conduct individual or consolidated hearings, and any hearing must be conducted according to the Montana Rules of Civil Procedure. On an order of the water judge, a hearing may be conducted by a water master, who shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

(7) The water judge shall, on the basis of any hearing held on the matter, take action as warranted from the evidence, including dismissal of the objection or modification of the portion of the decree describing the contested claim.

(8) An order or decree modifying a previously issued final decree as a result of procedures described in this section may be appealed in the same manner as provided for an appeal taken from a final order of a district court.

(9) An order or decree modifying a previously issued preliminary decree as a result of procedures described in this section may be appealed under 85-2-235 when the preliminary decree has been made a final decree.

(10) An order requiring the department to examine a basin that was initially verified shall be limited to only the

irrigation claims in the basin."

{*Internal References to 85-2-237:*
85-20-901x *85-20-901x* *85-20-901x* *85-20-901x*
85-20-901x *85-20-901x*}

NEW SECTION. **Section 15. {standard} Codification instruction.** [Sections 1 through 10] are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions of Title 85, chapter 2, part 2, apply to [sections 1 through 10].

NEW SECTION. **Section 16. Contingent voidness.** If at least $2 million is not line item appropriated in any fiscal year from state sources other than the water adjudication account in [section 7] per year, for the purposes of funding Montana's water adjudication program, then [this act] is void.

NEW SECTION. **Section 17. {standard} Effective date.** [This act] is effective July 1, 2005.

NEW SECTION. **Section 18. {standard} Termination.** [This act] terminates June 30, 2020.

- END -

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Appendix E. Adjudication Funding Fee Matrix

Purpose Current as of ---- 10/18/04	Fee Type	Graduation Scale based on Volume or flat fee with 20 water rights max.	# of Water Rights	Fee Rate per WR/Yr	Revenue Generated	Total by Purpose	% of Revenue Generated
Owners with less than 20 water rights	Flat	$10 per water right per year	182985	10	$ 1,829,850.00	$ 1,829,850.00	58.64%
Owners with more than 20 water rights	Flat	Cap of $200 per year (# of owners)	2164	200	$ 432,800.00	$ 432,800.00	13.87%
Commercial	Graduated	0 ac ft -100 ac ft	3847	10	$ 38,470.00		
		>100 ac ft - 5000 ac ft	341	500	$ 170,500.00		
		> 5000 ac ft	27	1000	$ 27,000.00	$ 235,970.00	7.56%
Industrial	Graduated	0-1000 ac ft	773	10	$ 7,730.00		
		>1000 ac ft - 4000 ac ft	64	500	$ 32,000.00		
		> 4000 ac ft	25	1000	$ 25,000.00	$ 64,730.00	2.07%
Mining	Graduated	0-1000 ac ft	1070	10	$ 10,700.00		
		>1000 ac ft - 4000 ac ft	208	500	$ 104,000.00		
		> 4000 ac ft	88	1000	$ 88,000.00	$ 202,700.00	6.50%
Municipal	Graduated	0-1000 ac ft	956	10	$ 9,560.00		
		>1000 ac ft - 4000 ac ft	134	500	$ 67,000.00		
		>4000 ac ft	43	1000	$ 43,000.00	$ 119,560.00	3.83%
Power Generation	Graduated	0 - 100,000 ac ft	246	10	$ 2,460.00		
		>100,000 ac ft - 999,999 ac ft	18	500	$ 9,000.00		
		> 999,999 ac ft	27	1000	$ 27,000.00	$ 38,460.00	1.23%
Instream Flow *	Graduated	0 - 50,000 ac ft	508	10	$ 5,080.00		
*this category is not capped at 20 Rights per owner		>50,000 ac ft - 1,000,000 ac ft	76	500	$ 38,000.00		
		>1,000,000 ac ft	7	1000	$ 7,000.00	$ 55,160.00	1.77%
Irrigation Districts	Flat		218	400	$ 87,200.00	$ 87,200.00	2.79%
*Fee is per user with a cap of $400 per irrigation district or ditch company **These #s assume that all meet the cap of 40 users ***May not include all of the federal projects							
Instream Flow Res. (FWP)	Graduated	0-50,000 ac ft	67	10	$ 670.00		
Yellowstone		>50,000 ac ft - 1,000,000 ac ft	16	500	$ 8,000.00		
		> 1,000,000 ac ft	6	1000	$ 6,000.00		
Lower Missouri		0-50,000 ac ft	19	10	$ 190.00		
		>50,000 ac ft - 1,000,000 ac ft	0	500	$ -		
		> 1,000,000 ac ft	2	1000	$ 2,000.00		
Upper Missouri		0-50,000 ac ft	254	10	$ 2,540.00		
		>50,000 ac ft - 1,000,000 ac ft	38	500	$ 19,000.00		
		> 1,000,000 ac ft	7	1000	$ 7,000.00		

TOTAL FWP						$ 46,070.00	1.48%
Instream Flow Res. (DEQ)	Graduated	0 - 50,000 ac ft	0	10	$ -		
Yellowstone		>50,000 ac ft - 1,000,000 ac ft	0	500	$ -		
		> 1,000,000 ac ft	4	1000	$ 4,000.00		
Upper Missouri		0-50,000 ac ft	0	10	$ -		
		>50,000 ac ft - 1,000,000 ac ft	0	500	$ -		
		> 1,000,000 ac ft	4	1000	$ 4,000.00		
Total DEQ						$ 8,000.00	0.26%
Total Revenue Generated						**$ 3,120,500.00**	100.00%