

To: Water Policy Interim Committee

From: Krista Lee Evans on behalf of Senior Water Rights Coalition, Association of Gallatin Agricultural Irrigators

RE: Water Right Ownership Update Proposal

Date: March 10, 2020

Thank you for the opportunity to provide a proposal to address challenges with the current water right ownership update process. While the discussion began around the issue of geocodes and how they are being assigned to water rights and their use in the ownership update process the underlying issue is the ownership update process itself.

Outlined below is background information, a few examples, and recommended solutions.

Claims vs. New Appropriations (Court Pleading v. Administrative Rights)

The difference between a water right that is a claim and one that is a new appropriation is important in this discussion because it defines what entity can legally make changes to the abstract of the water right.

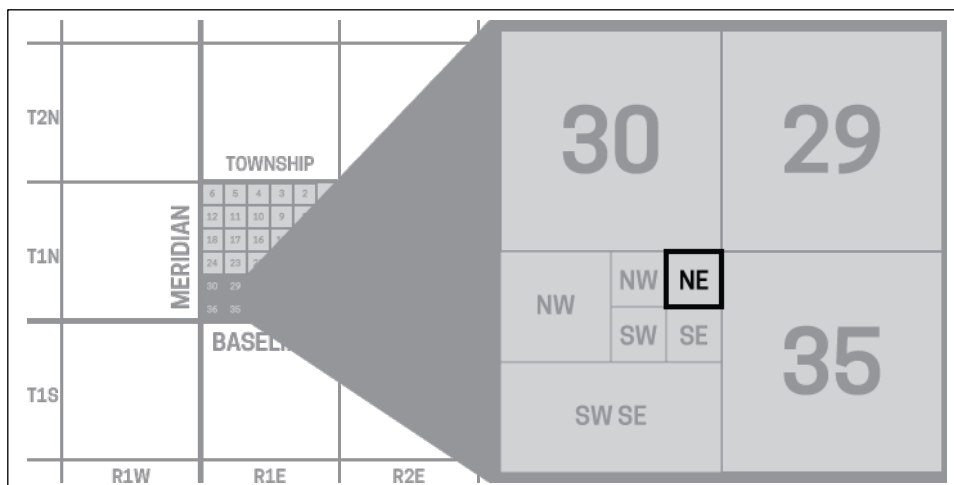
A claim is a legal pleading in front of the Water Court in the statewide litigation otherwise known as the adjudication. These claims are considered prima facie proof of their content – in other words they are assumed accurate as claimed. In the adjudication it is up to objectors to prove that all or a portion of the claim is not accurate. Because the claims are part of ongoing litigation the Montana Water Court plays a significant role. In addition, because these water rights are associated with ongoing litigation it is critical that any changes to the claim be reflected in the claim file so that all parties to the case have access to the most current information and details associated with the claim.

The MT Supreme Court has addressed water right ownership updates in the adjudication process in their Claim Examination Rules. In these rules the Supreme Court provided direction to DNRC and the Water Court on what must occur for ownership to be updated depending on the specific facts of the situation.

A new appropriation is for a water right that was put to use or perfected after July 1, 1973. These water rights are not part of the adjudication and therefore may be more amenable to adjustments being made through an administrative process.

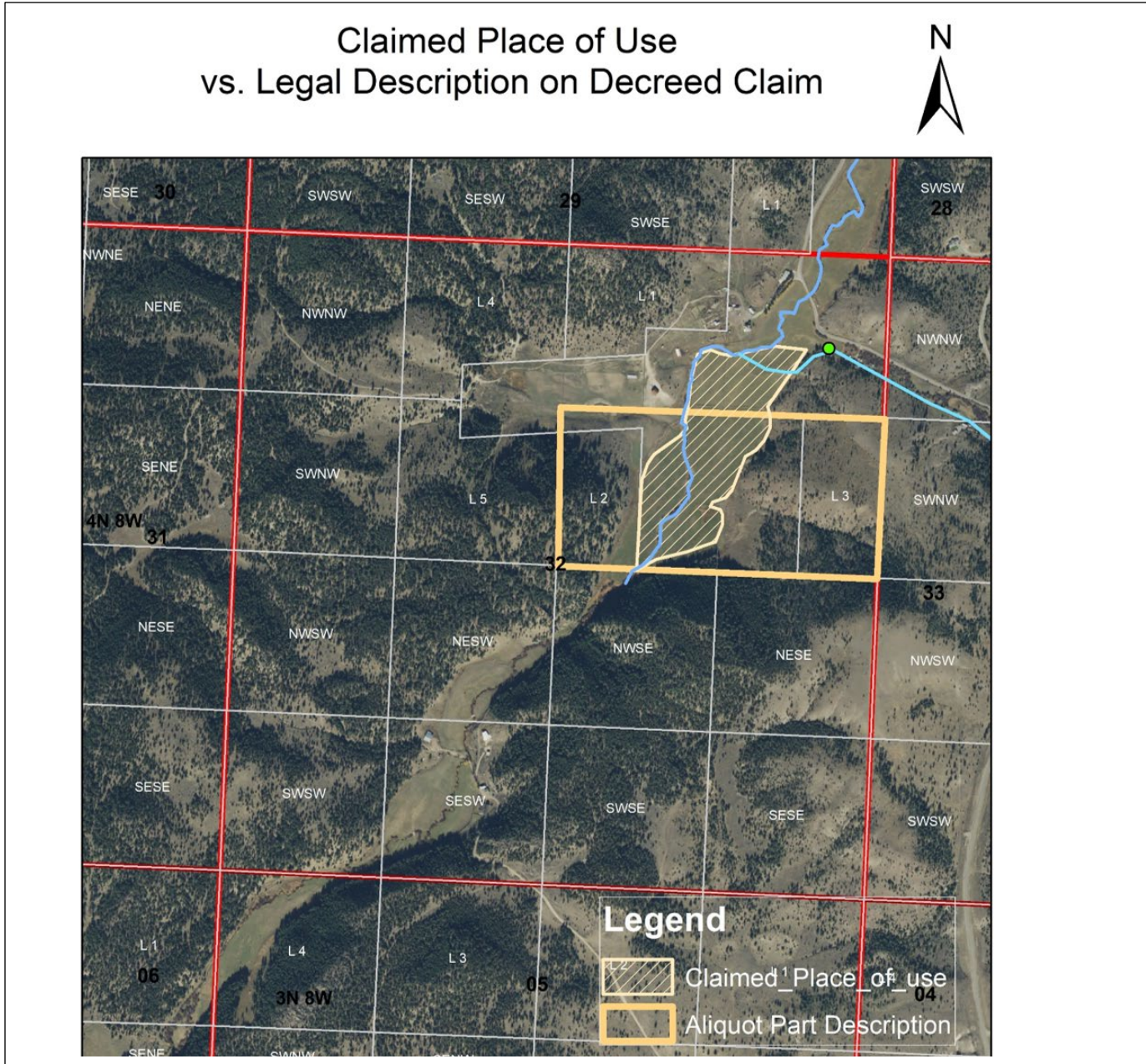
Aliquot Parts vs Maps

We hear the term “aliquot parts” used often in the discussion related to the description of water rights and their place of use. This is the system that is used to define a water rights place of use in words. An aliquot part is a unit of measurement defined as part of the Public Land Survey System (PLSS). An Aliquot Part describes a subsection of a larger land plot. These come in groups of four, defined by the cardinal directions so that one plot can be divided into the north-west, north-east, south-west, and south-east aliquots.



The water right place of use is defined using aliquot parts. As you can see in the photo the smallest aliquot parts is the ¼, ¼, ¼ section. The aliquot part description may not completely describe the place of use that was claimed. In the example below you can see (1) the portion of the abstract with the aliquot parts definition and (2) a map with the aliquot parts as they relate to the claimed place of use.

Place of Use:						
<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge County</u>
1	27.00		S2NE	32	4N	8W SILVER BOW
Total:	27.00					
Geocodes/Valid:		01-1289-32-1-01-25-0000 - Y				



The Players

The water right ownership process is impacted by multiple entities depending on the specific situation.

Water Right Owners

The water right owner (seller) is the entity responsible for defining and describing how or if water rights or a portion thereof transfer with the property sale. Water right owners have varying levels of experience in this process. Some water right owners conduct the transaction on their own, some hire attorneys, some hire realtors, some close through title and escrow companies. The water right owner, as the property owner, has the ultimate control in where the water goes and what is reflected in the deed.

Note: There are instances where the water right owner does not accurately reflect in the deed what their intentions were with the water. It is the water right owner's (seller's) responsibility to make sure the deed reflects what they intend. There are legal processes that can be followed to try to rectify the error but that is outside of the ownership update process responsibilities. Absent the direction in the recorded deed and/or chain of title DNRC should not be changing water right ownership in the database.

Department of Natural Resources and Conservation

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. (emphasis added)

To meet the requirements stated in the Montana Constitution the Montana Legislature assigned the duty of establishing and keeping a centralized record system to the Department of Natural Resources and Conservation.

85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted under **85-2-113**, subject to the powers and duties of the supreme court under **3-7-204**;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, claim of existing right, or other

document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

(5) upon request by any person, cooperate with, assist, and advise that person in matters pertaining to measuring water or filing claims of existing rights with a district court under this chapter;

(6) adopt rules necessary to reject, modify, or condition permit applications in highly appropriated basins or subbasins as provided in **85-2-319**. (emphasis added)

It is DNRC's responsibility, under directive of the legislature, to "keep" the centralized database. As recent as the 2019 session, DNRC has been appropriated funds for the purpose of updating and maintaining the database.

DNRC has been assisting the Water Court since the statewide adjudication began. The adjudication is the single largest Court case in Montana's history. Maintaining current ownership in the DNRC database is part of that assistance DNRC provides to the Water Court. HB39 (85-2-424 MCA) is an attempt to aide DNRC with the ownership records by creating an interface between DOR and DNRC. This exchange of data alerts DNRC when property ownership changes. The link is based on the location of the property. DOR uses unique 'geocodes' to describe property ownership. DNRC uses aliquot parts (quarter sections, section, township, range). To make this interface meaningful, DNRC assigned geocodes to nearly all private water rights in the state.

The issue in front of WPIC is how the geocodes are being used to add names or remove names from water right abstracts.

Note: There are instances where the ownership update form (608, 641, or 642) that is submitted to DNRC conflicts with the recorded deed and/or chain of title. Pursuant to 85-2-403, MCA if THE DEED IS SILENT --- THE WATER TRANSFERS WITH THE PROPERTY.

The DNRC provides direction on their website regarding ownership update forms. APPENDIX A

Provided the 608, 641, or 642 form is filed along with a recorded deed and/or chain of title it appears that the process is fairly well defined. However, the issues arise when an ownership update form IS NOT FILED and when or if DNRC relies solely on the geocode information from DOR or an ownership update is filed but there is no accompanying recorded deed or chain of title.

At issue are the circumstances where DNRC adds a new owner or removes an owner from a water right based SOLELY on information associated with the geocode from DOR. Examples will be provided later in the paper.

Note: The geocode's purpose is not to define a water right – the geocode's role is a parcel identifier for property tax purposes.

Montana Department of Revenue

The Montana Department of Revenue provides the "data dumps" to DNRC that provides DNRC with notice that there has been a property transaction associated with specific geocodes.

Montana Water Court

The Montana Water Court is involved with ownership updates when they issue an order through the adjudication process changing ownership. In these instances, the Court sends DNRC an updated water right abstract with the place

of use being defined via aliquot parts. The Water Court does not always provide a map to assist DNRC in distinguishing which owners are associated with which parcels of the water right abstract.

DNRC updates the water rights database pursuant to the court's order. Below is an example of a "marked up" abstract provided to DNRC from the Water Court. On page 2 there are 3 new ID numbers added by the court. Details on which owners are associated with each of the parcels is not included. There are 13 "potential" owners within the aliquot part descriptions supplied.

September 10, 2019

Page 1 of 3
Post Decree Abstract

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

RIVER
BASIN

Water Right Number: STATEMENT OF CLAIM

Version: 2 - POST DECREE **KEEP THIS VERSION**
Status: ACTIVE

Owners:

JOSHUA
[REDACTED]

DAVID
[REDACTED]

~~STACY~~
[REDACTED]

FLOYD
[REDACTED]

SHELLI
[REDACTED]

CYNTHIA
[REDACTED]

~~LARRY~~
[REDACTED]

ANDREW
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Add water users:

#1

#5

#3 and:

Be
[REDACTED]
[REDACTED]

OWNERSHIP UPDATE PROCESSED TO ADD NEW OWNERS. THE WATER
RIGHT MAY BE SPLIT INTO SEPARATE WATER RIGHTS UPON REQUEST OF
THE OWNERS.

Priority Date: 1852

Type of Historical Right: DECREE

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 9.34 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE
AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE

Climatic Area: 3 - MODERATE

Maximum Acres: ~~285.14~~ 391.93

Source Name: [REDACTED] RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		SWSWSE	7			

Period of Diversion: APRIL 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: [REDACTED]

Period of Use: APRIL 1 TO OCTOBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	21.00 18.00		SWNENW	31			
2	24.00 30.00		SENEW	31			
3	30.00 22.00	2	SWNW	31			
4	33.70 40.00		NESW	31			
5	34.47	3	NWSW	31			
6	10.00		NWSESW	31			
7	10.00		SWSESW	31			
8	33.20 34.58	4	SWSW	31			
9	5.24		SWSWNE	8			
10	38.30 39.88	3	NENW	8			
11	28.00 34.97	4	NWNW	8			
12	40.00		SENEW	8			
13	22.30 23.88	5	SWNW	8			
14	7.40		NWSE	8			
15	36.80 33.00		NESW	8			
16	13.55	6	NWWSW	8			

Total: ~~285.14~~ 391.93

Remarks:

add:	ID	Acres	Qtr Sec	Sec	Twp	Rge	County
	17	9.23	NESESW	6			
	18	2.21	SESESW	6			
	19	5.06	W2SWSE	6			

Montana Supreme Court

If the water right whose ownership is being updated is a claim in the water adjudication the Montana Supreme Court rules provide clear direction on when and how DNRC can update the ownership on these claims and when they should be sent to the Water Court. The Supreme Court Rules were last updated in 2006 which was prior to the passage of HB 39 in 2008. The pertinent Supreme Court Rules are in APPENDIX B.

The DNRC claims examination is conducted pursuant to the Claim Examination Manual. This manual was last updated in 2013 which was after the passage of HB 39. There may be conflicts or confusion between the Supreme Court rules and Claim Examination Manual as it relates to geocodes and their application. The pertinent parts of the Claim Examination Manual are in APPENDIX C.

Application of Geocodes in Ownership Updates

HB 39 (2007) was passed after the billing associated with HB 22 (2005) had over 40% returned mail. Ownership records were not being updated by sellers as required by law. This caused concern because one of the uses of the DNRC database is to provide the mailing list for public notice in the adjudication in the Water Court. Part of due process is receiving notice of pending litigation that involves your property right. Without accurate ownership records there was concern about whether proper public notice was occurring.

HB 39 allowed DNRC to use geocodes (parcel identifiers in the MT Department of Revenue) as a means to:

- (1) Determine that an ownership transfer of real property occurred; and
- (2) Provide a more automated process for updating ownership records.

HB 49 (2017) made it clear that a seller could file an ownership update form and associated recorded deed as a means of updating water right ownership records.

IF the property seller, the water right owner, the place of use, and the geocode match up 100% use of the geocode is a simple and easy mechanism for updating the ownership records. Challenges in the system occur when the claimed place of use overlaps multiple land ownerships and multiple geocodes. DNRC takes steps to ensure that the water right ownership is updated accurately but there are errors. There are incorrect owners being added to water rights, there are water right owners being removed from water rights who shouldn't be, and ownership is being updated if the owner of the water right is not the seller. DNRC has multiple policies related to ownership updates. DNRC's detailed policy as well as a summary provided to WPIC are in APPENDIX D.

If DNRC has received a fee then there are two paths forward:

- (1) If a deed was not provided, DNRC waits for information from the Department of Revenue. If they don't attach the deed then the fee log sheet serves as the ownership update description.
- (2) If a deed is provided, DNRC processes the ownership update immediately.

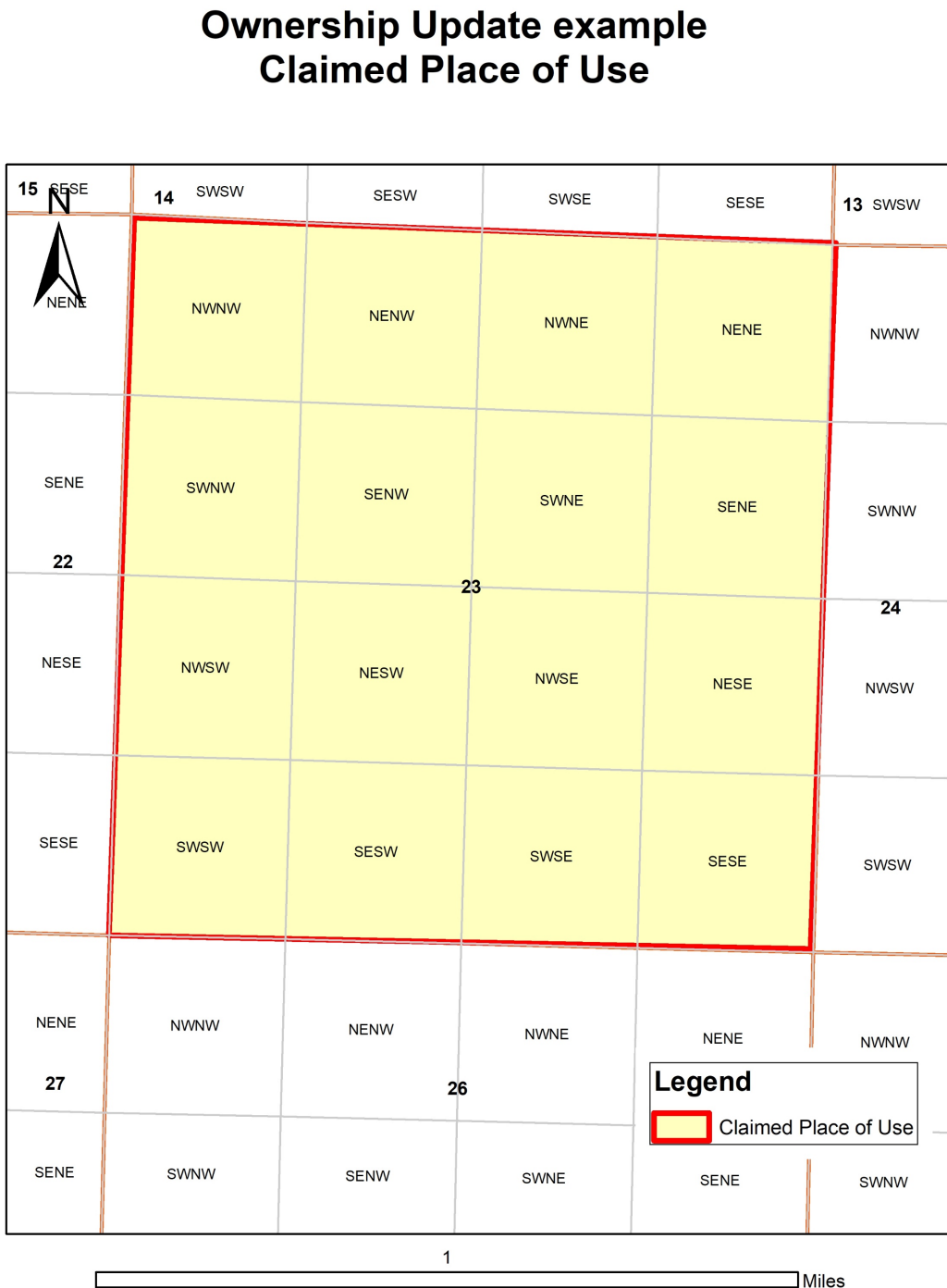
The Issues

- 1) What is appropriate "written consent"?
- 2) Ownership Updates being processed by DNRC when the water right owner in the database does not match the seller. Statute doesn't provide for a requirement of chain title but only discusses a deed in certain instances, DNRC does not require that the seller provide a chain of title.
- 3) Sellers not providing the appropriate ownership update form (608 vs 641-split) or providing an ownership update form that does not distinguish which portion(s) of a water right the new owner will acquire.
- 4) Owners being added to water right abstracts based on geocode intersection with aliquot parts and no chain of title to support the DNRC decision on ownership.

- 5) Owners being removed from water right abstracts based on incorrect geocodes or incorrect decrees and no chain of title to support the DNRC decision on ownership.
- 6) Information that was used by DNRC to determine ownership is not retained in the claim file.
- 7) Letters being sent to “potential” owners based on a geocode overlap with aliquot part can be misleading to the reader.
- 8) Information being supplied to DNRC from the Water Court without an associated map and/or detail regarding ownership allocations.
- 9) A portion of property is sold but the water right is not “split” or “divided”.

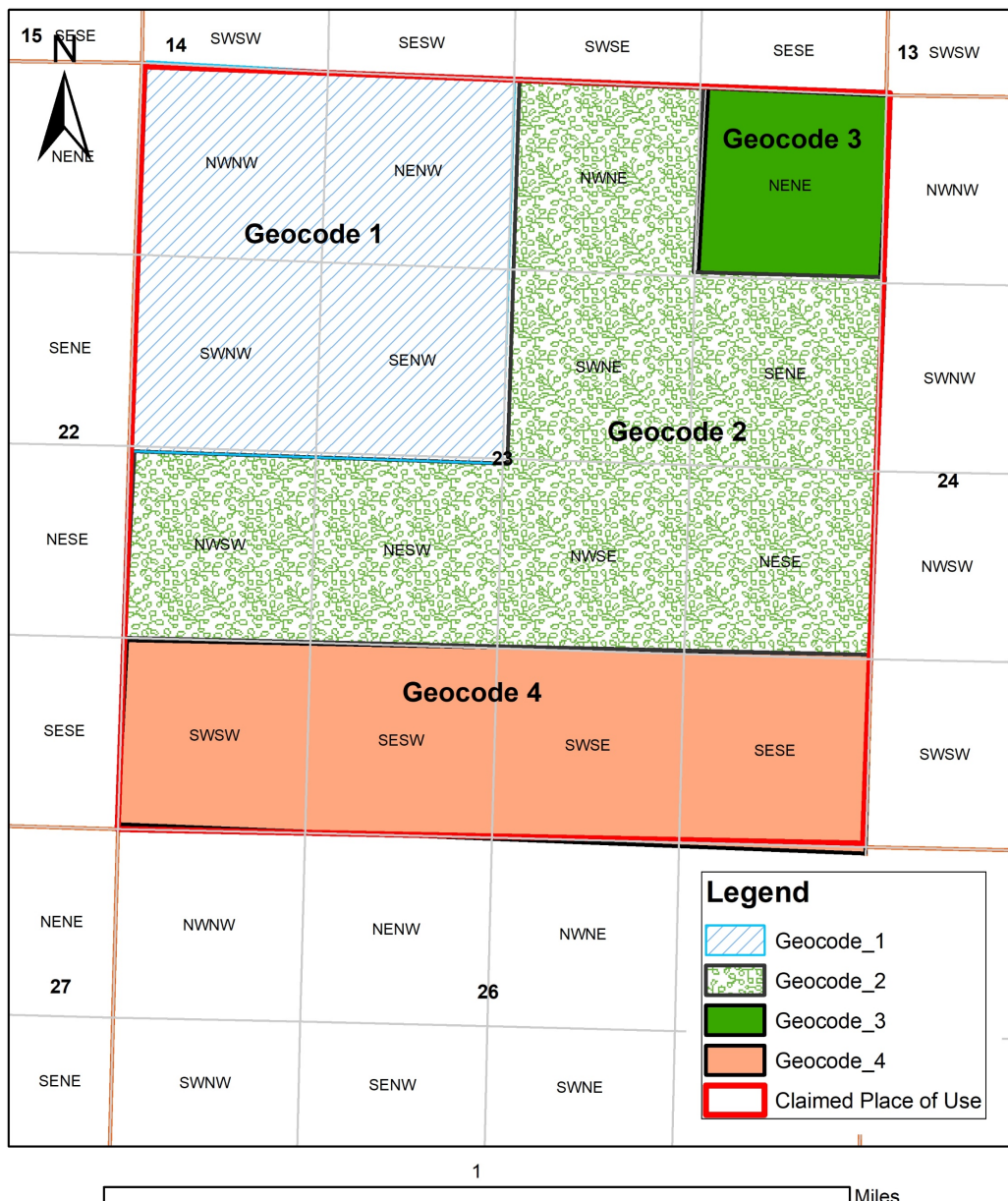
OWNERSHIP UPDATE EXAMPLE 1 – Inaccurate geocode assignment -- temporary preliminary decree

Claimant (OWNER A) files a stockwater claim for the entire section. The claim has gone through verification and re-examination and is decreed for the entire section. Even though the claimed place of use (and the map associated with the claim) was the entire section, the water resources survey and ownership records from that time reflect the NW1/4 as the place of use and the property owned by the claimant. This is the portion of the property that is still owned by the claimant.



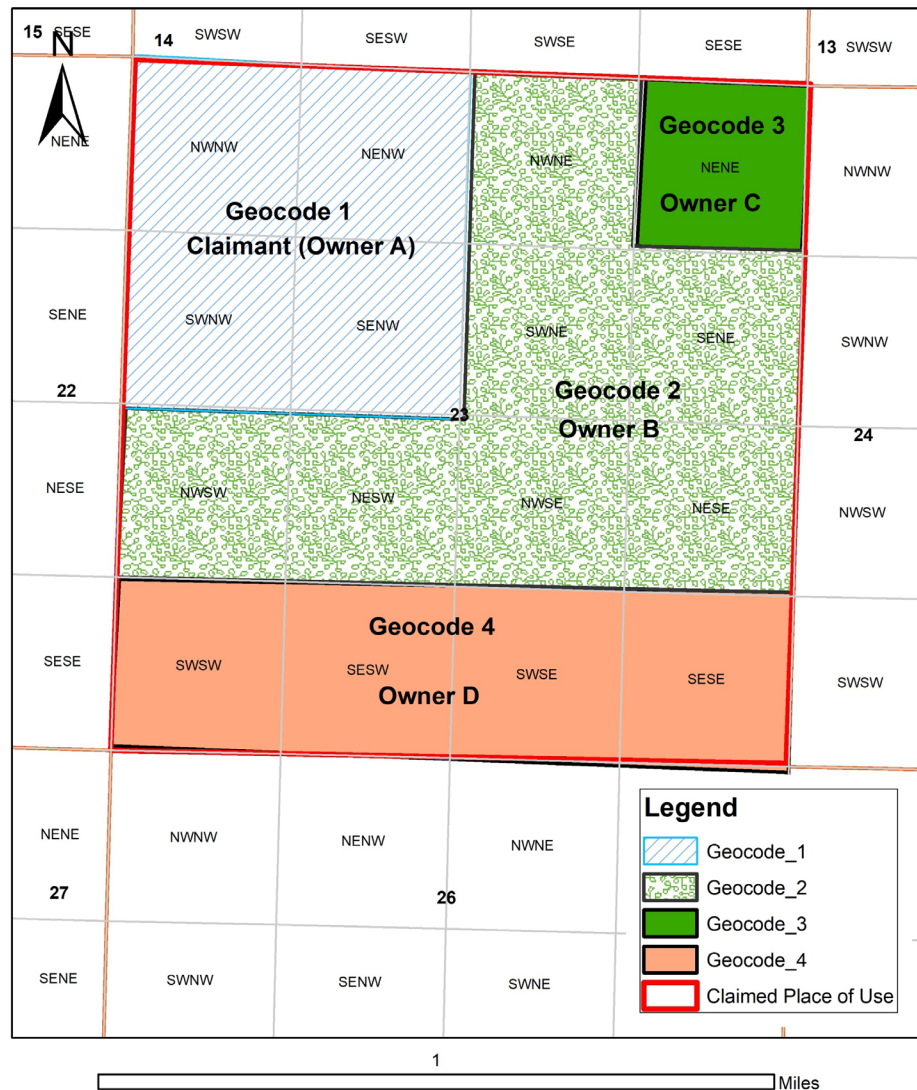
DNRC has assigned 2 geocodes for this water right (#2 and #4) as shown on the following map. The original claimant still owns Geocode 1. Note: Two geocodes are left off the claim. Department of Revenue shows 4 geocodes cover this section. The claim file does not have any supporting documentation to explain how DNRC arrived at the ownership decision.

Onership Update Example Claimed Place of Use Geocodes 2 & 4 Assigned to Water Right



Department of Revenue records show 4 different owners, one for each geocode. Owner A, in DOR records, corresponds to the claimant.

Onership Update Example Claimed Place of Use Geocodes 2 & 4 Assigned to Water Right



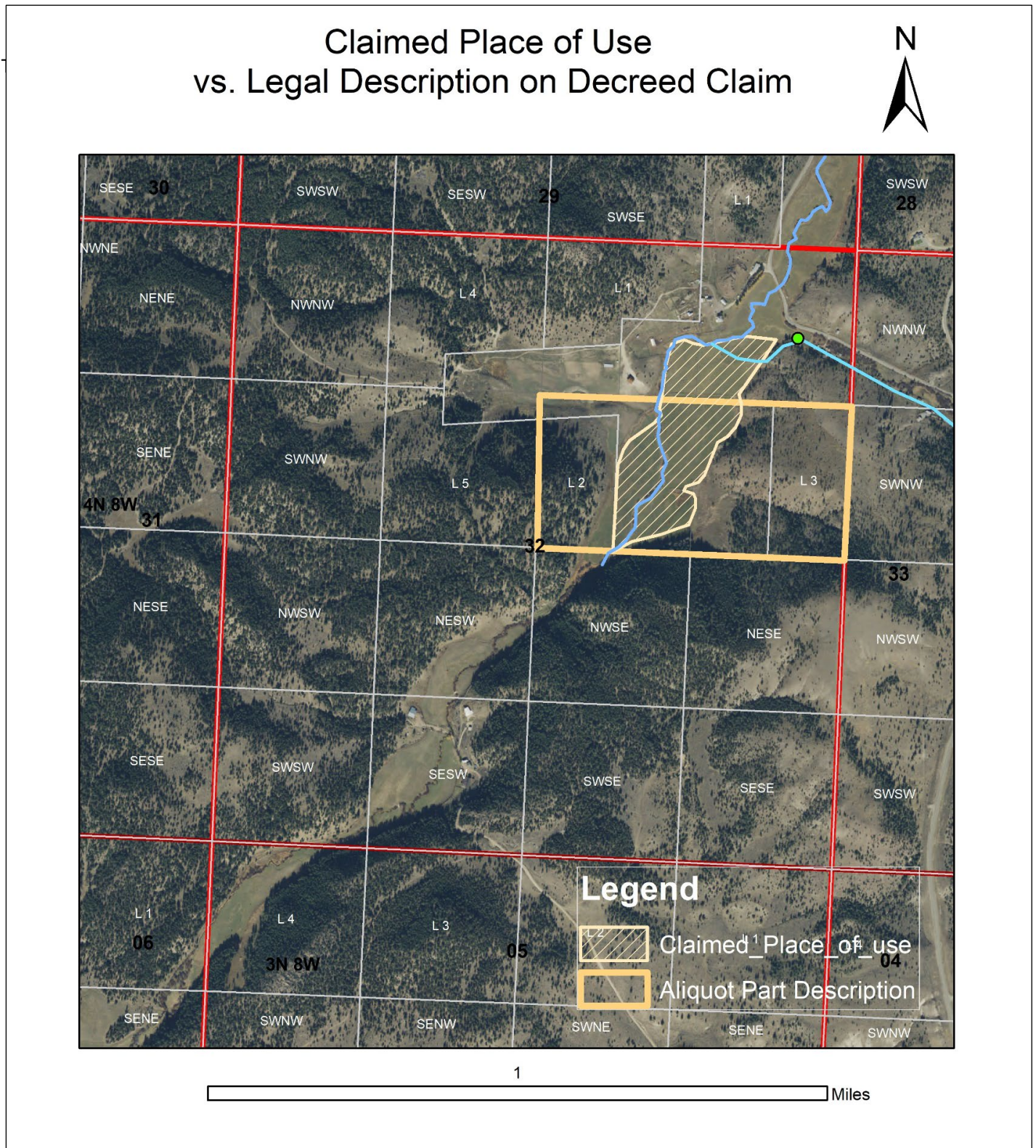
Issues

- No Geocode is assigned to the claimant/owner of the water right.
- The current water right abstract lists the claimant and owner D as the owners. Owner D was added per a DOR update for Geocode 4
- If the claimant sells their property, because there is no associated Geocode assigned for their property to this water right, the buyer would not be placed on the water right.
- The claimant (Owner A) filed an objection to their own claim in the water adjudication based on ownership. Owner D will be required to participate in the court process.

- Owner D was not reflected as the owner of the water right in the database and should not have been added. Owner D essentially got a “bonus” water right that they now will have to go to the Water Court over.

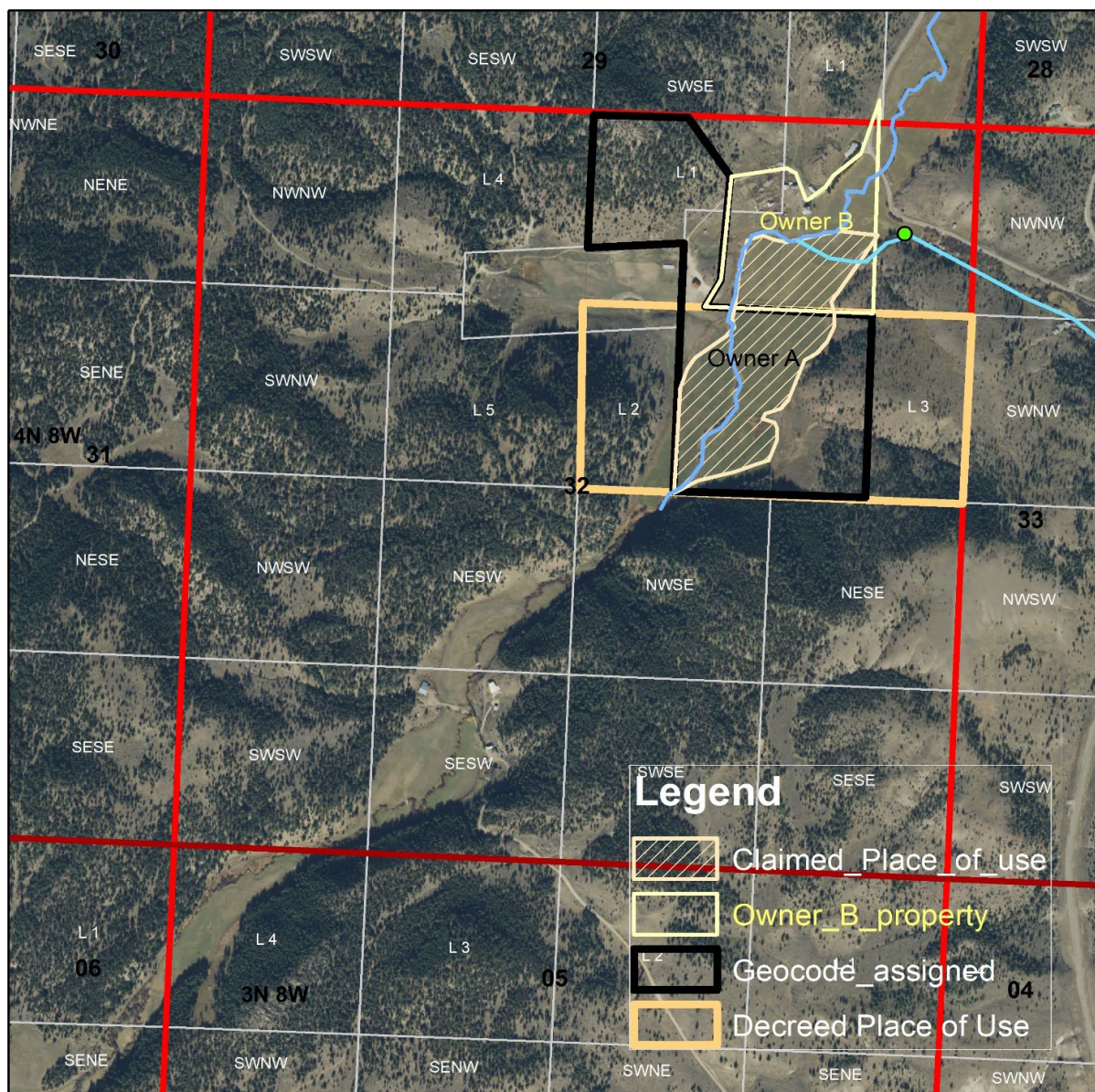
OWNERSHIP UPDATES – EXAMPLE 2

This example falls in a historic mining area. The aliquot parts often get broken up around the mining surveys. In this example the NE quarter does not appear (it is broken into lots), and there are numerous government lots. The following map shows the claimed place of use (the S2NE) for an irrigation claim and the aliquot parts as described on the DNRC verification and ultimately the 1985 Water Court decree. This decree is subject to re-examination. However, the re-examination, pursuant to Court Order, will not include the place of use. The end result is that the ownership doesn't accurately reflect the claim map.



Pursuant to a DOR update, DNRC transfers the entire ownership of this water right to Owner A. A few years later, Owner B purchases a portion of the claimants property, the original homestead, the property immediately north of Owner A. Again, DOR sends the update to DNRC. However, this time DNRC refuses to process the ownership update as the geocode for Owner B does not intersect the decreed place of use. This isn't a final decree and there is question as to why the property now owned by Owner B was not included in the decree. Is it reasonable to expect the ownership update process to address issues like this? If it can't then how does the water right owner get it fixed? The following map shows the properties.

Claimed Place of Use vs. Legal Description on Decreed Claim Geocode assigned



Options for resolution

1. DNRC sends a memo to the court, with an unknown outcome.
2. Owner B waits for the re-examination and subsequent decree to file an objection.
3. Owner B attempts to file a Motion to Amend the claim (which they are not listed as an owner).
4. Owner B gets a quit claim deed from Owner A for a portion of the water right.

Problems/Potential Solutions To Water Right Ownership Challenges

- 1) **What is appropriate written consent?**
 - a. Proposed Solution: Written consent means chain of title.
- 2) **Ownership Updates being processed by DNRC when the water right owner in the database does not match the seller. Statute doesn't provide for a requirement of chain title but only discusses a deed in certain instances, DNRC does not require that the seller provide a chain of title.**
 - a. Proposed Solution: If the water right owner and the seller are not the same entity then a chain of title must be provided before the ownership update can occur.
- 3) **Sellers not providing the appropriate ownership update form (608 vs 641-split) or providing an ownership update form that does not distinguish which portion(s) of a water right the new owner will acquire.**
 - a. Proposed Solution: If the entire property isn't sold then this would mean that the seller and the buyer would be listed as owners. There is no feasible way for DNRC to allocate what amount of water goes with the buyer if it isn't defined by the seller.
 - b. Proposed Solution: One option would be to require a water right split if the entire property/water right isn't sold.
 - i. Should this be required or not? What are the consequences?
 - ii. Will be necessary to recognize that all is still contingent on the adjudication and final decree.
 - iii. There are consequences to this option in that this will likely slow down the process.
 - iv. Decreed water rights go to the Water Court for final resolution
 - v. MT Supreme Court Rule 38(b) 2. Provides: When the ownership update denotes a conveyance of a portion of the water right to a new owner:

The water right may be split by the department upon written authorization of all of the claimants.

- vi. MT Supreme Court Rule 38(c) 2. Provides:

When a water right ownership update is filed after the printing of the decree, the department will notify both the buyer, the seller, and the water court. If the right is being split, the reviewer should prepare a memorandum detailing the split to be made and send the memorandum and claim file(s) to the water court to implement the split.

- vii. Based on the Supreme Court rules it appears that ALL splits (in basins other than 76L and 76LJ) must go through the Water Court for finalization. All other basins have at least one decree printed.

- 4) **Owners being added to water right abstracts based on geocode intersection with aliquot parts and no chain of title to support the DNRC decision on ownership.**
 - a. Proposed Solution: If an entity responds to the post card stating they do own a portion of the water right – require that entity to provide chain of title to prove that ownership interest.
 - i. One option would be to require a water right split if the entire property/water right isn't sold.
 - ii. Will be necessary to recognize that all is still contingent on the adjudication and final decree.
- 5) **Owners being removed from water right abstracts based on incorrect geocodes or incorrect decrees and no chain of title to support the DNRC decision on ownership.**
 - a. Proposed Solution: Owners are not removed from water right abstract unless a chain of title shows the entity is no longer an owner.
 - b. If there is a conflict between what has been decreed and chain of title, DNRC has no authority or mechanism to address this issue. The conflict must be addressed by the Water Court.

- 6) **Information that was used by DNRC to determine ownership is not retained in the claim file.**
 - a. Proposed Solution: DNRC keeps all records, maps, research that is used to determine ownership in the claim file.
- 7) **Letters being sent to “potential” owners based on a geocode overlap with aliquot part can be misleading to the reader.**
 - a. Proposed Solution: DNRC revise the letter to better describe the situation and not reference Department of Revenue records.
- 8) **Information being supplied to DNRC from the Water Court without an associated map and/or detail regarding ownership allocations.**
 - a. Proposed Solution: Require the Water Court to provide a map along with a marked up abstract when submitting the result of a court order to DNRC.
- 9) **A portion of property is sold but the water right is not “split” or “divided” and the seller/buyer don’t understand co-ownership.**
 - a. A silent deed conveys all appurtenances, as used on the property that is sold. Lacking any mention in the deed, the right would be a divided interest because the water went with the land that was divided off. This should be the default. If the buyer and seller want the water to be co-owned they need to make it clear in the deed and fill out the forms to reflect their intention. Without direction from the deed and associated forms, it is a significant challenge for DNRC to allocate the water.
 - b. Splits and use of the water may be based on a divided or undivided portion of the flow. It all depends on the method of conveyance of the water. Pending final decree, the place of use is a moving target – thus so are the portions of the split. This is why splits are sent to the water court for processing if the decree has been issued.
 - c. If the seller/buyer do not want a split and want to co-own the water right this needs to be made clear in the deed.
 - d. Educate sellers that if the water right is not split or divided that the buyer will be reflected on their water right as a co-owner.
 - e. Require the seller to file a 641 to show the split and how the water is allocated between parcels unless they want to be a co-owner with the buyer and the deed reflects this pending completion of the adjudication.
 - f. Will be necessary to recognize that all is still contingent on the adjudication and final decree.
- 10) Amend 85-2-424, MCA to provide for the submission of a RECORDED deed
- 11) Amend 85-2-424 MCA to provide for a “correct and complete” form being submitted.
- 12) DNRC/Water Court develop rules and process that identify how errors related to ownership on abstracts can be rectified.
 - a. This would likely require additional resource needs for the Department and the Water Court.
- 13) Request that the Water Court outline a policy for addressing errors in claims that are identified by DNRC and submitted to the Court (i.e. wrong township or range).
 - a. If there is a conflict between what has been decreed and chain of title, DNRC has no authority or mechanism to address this issue. The conflict must be addressed by the Water Court.
- 14) Request a Legislative Audit of the underlying processes associated with ownership updates, DNRC database, and Water Court platform requirements.
- 15) Request that DNRC update the 1993 Ownership Update Policy (APPENDIX E) to facilitate consistency between employees and regional offices.