Oregon's New Groundwater Application Process and Review of Current Water Right Issues:
Water Supply Challenges and Opportunities

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Davis Wright Tremaine LLP

Outline

- Updates to GW Rules (Robyn)
- Transfers – Deep Dive (Olivier)
- Improvement Processes (Robyn) – new bill/rules
- Case Law (Olivier)

Groundwater Challenges – Water Rights

- 2024 Groundwater Allocation Rule Changes
  - Purpose
  - Process
  - Revised thinking regarding connection to surface water
  - Updated rules
- What this means for the future

2024 Groundwater Allocation Rulemaking

- https://www.oregon.gov/owrd/programs/GWWL/GW/Pages/Groundwater-Rulemaking.aspx

- Meeting materials and summaries, recorded meetings, text for the iterations of proposed rules, final rules

Groundwater Challenges – Water Rights

- Objective: Update groundwater allocation rules to be more sustainable and protective of existing water users, both instream and out-of-stream.

Groundwater Allocation – Four Part test

1. The proposed used is allowed in the basin
2. Water is available
3. Other water rights will not be injured
4. Proposed use complies with the rules of the commission

Figure 1. Public Interest Presumption

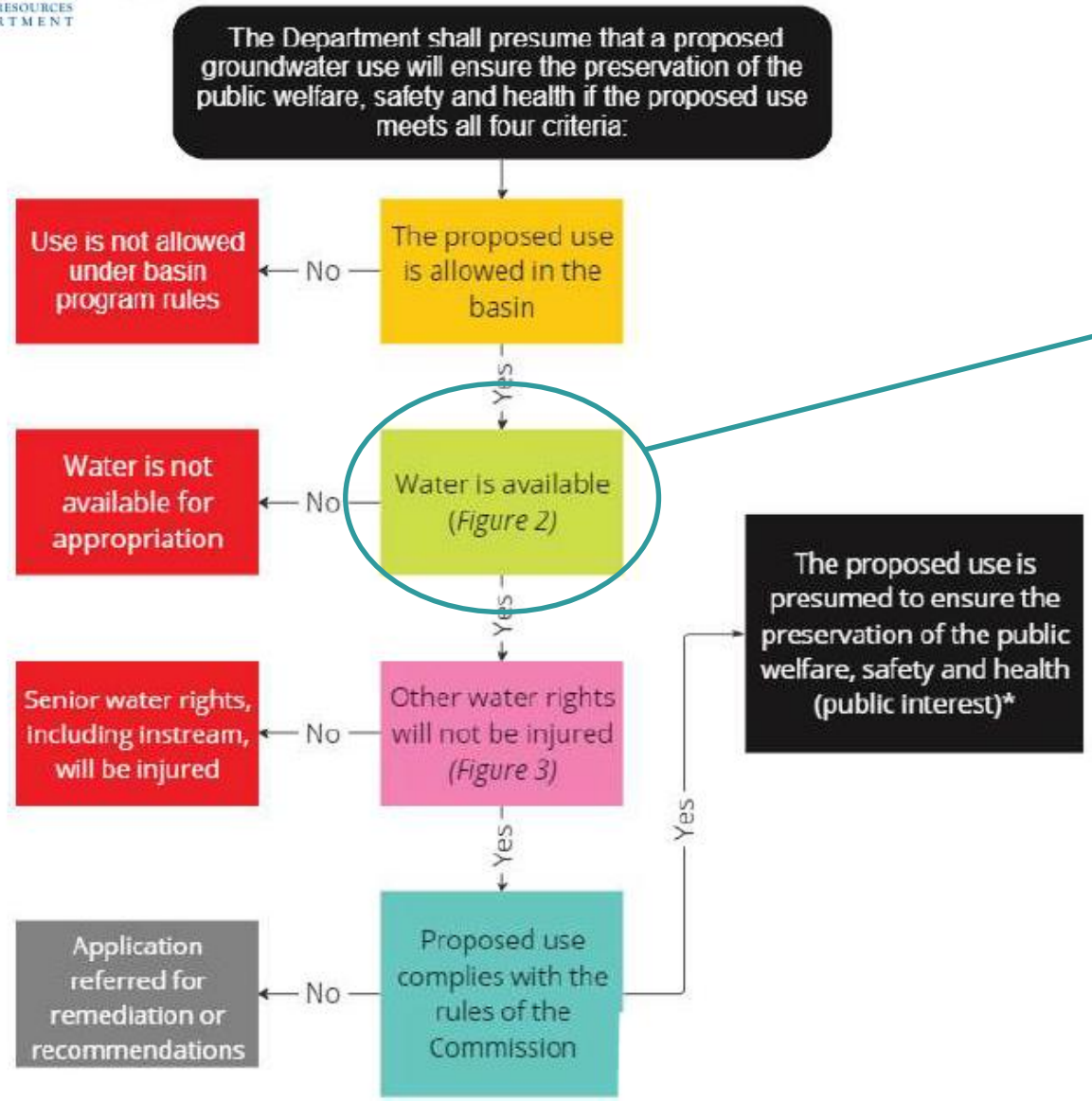
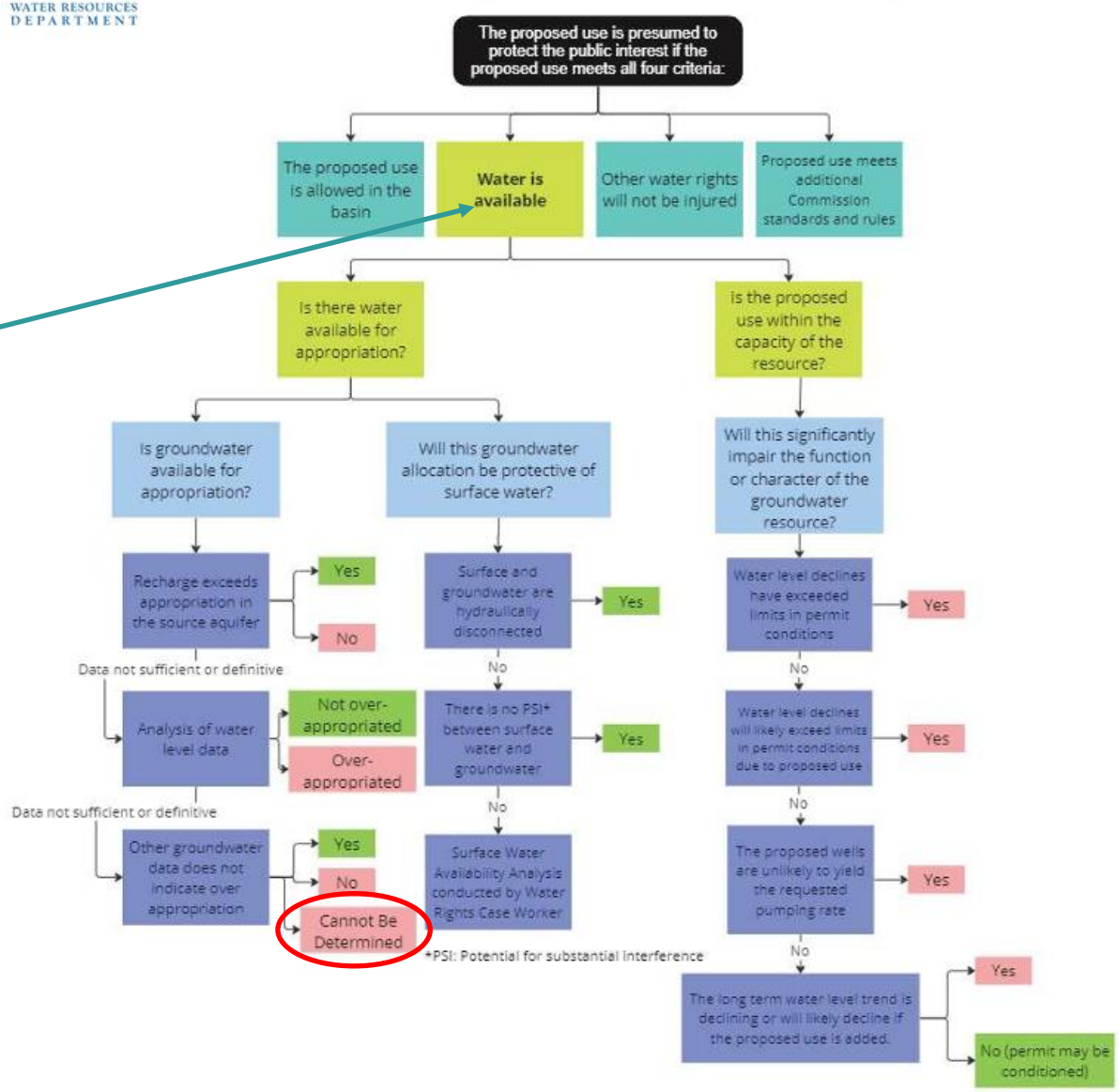
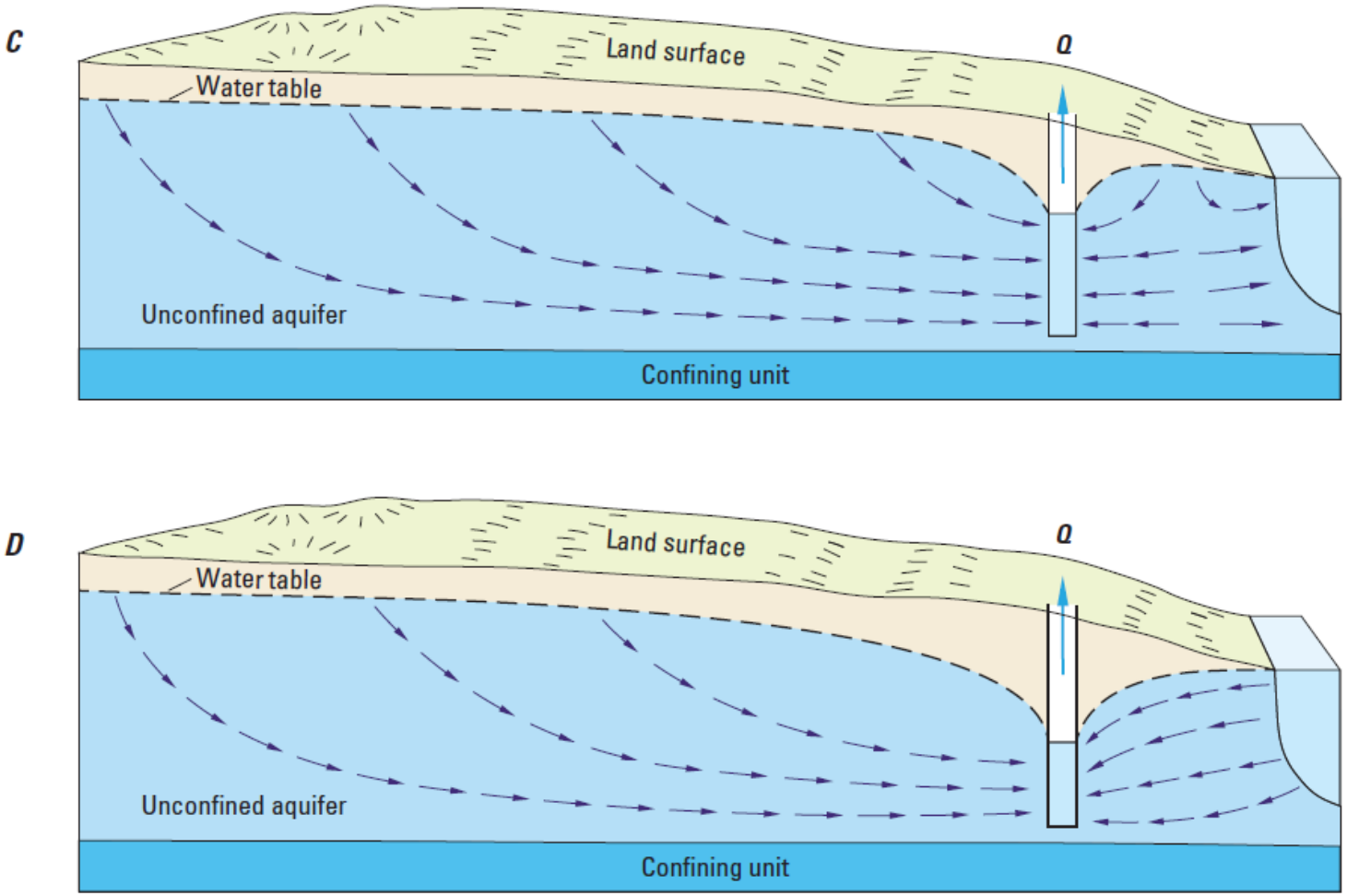


Figure 2. Water Availability

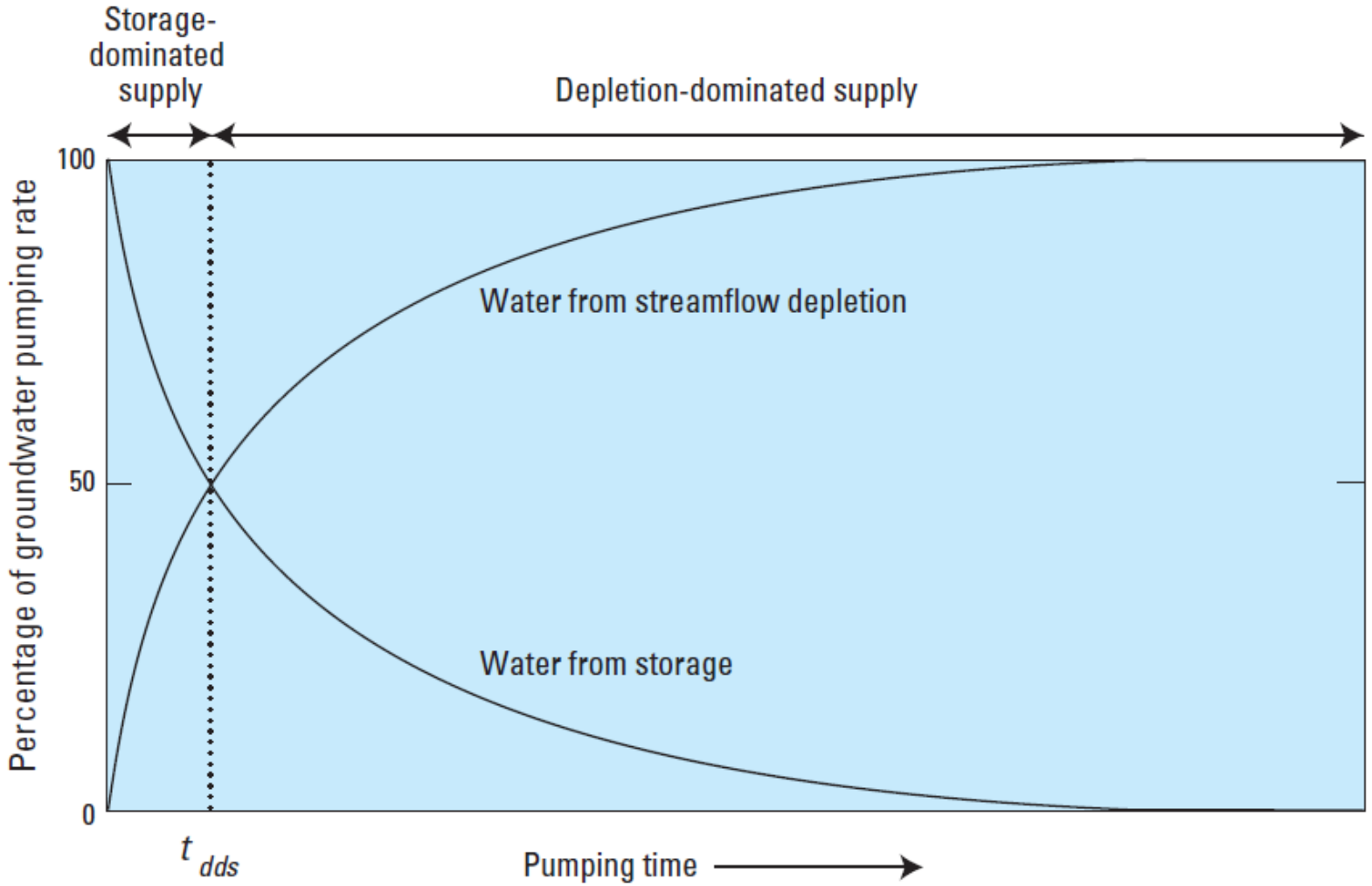


Groundwater Allocation - Background



Source: http://pubs.usgs.gov/circ/1376/; from OWRD RAC #1

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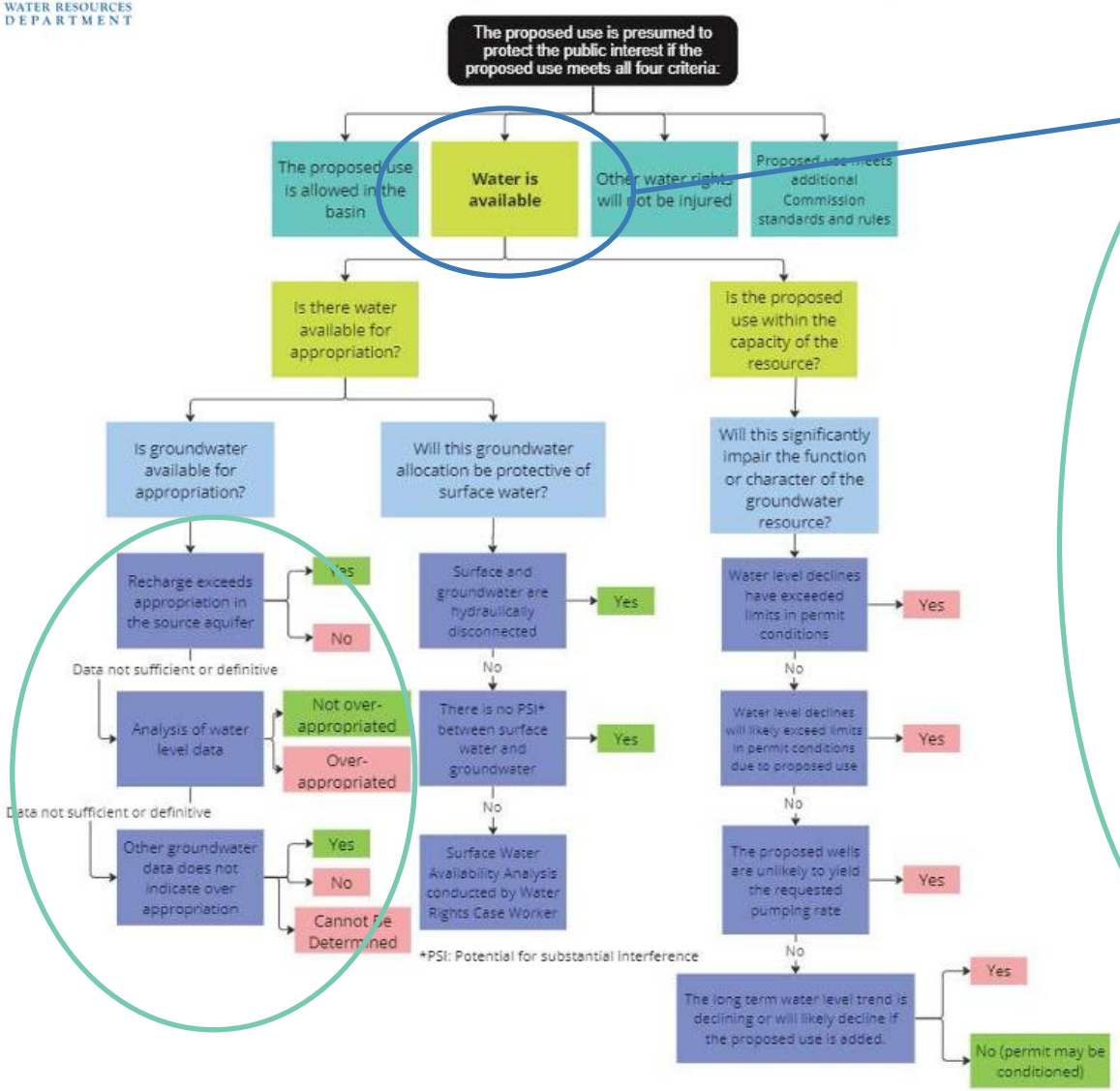
Groundwater Allocation - Background



Source: https://apps.wrd.state.or.us/apps/gis/gis_map_library/

OREGON WATER RESOURCES DEPARTMENT

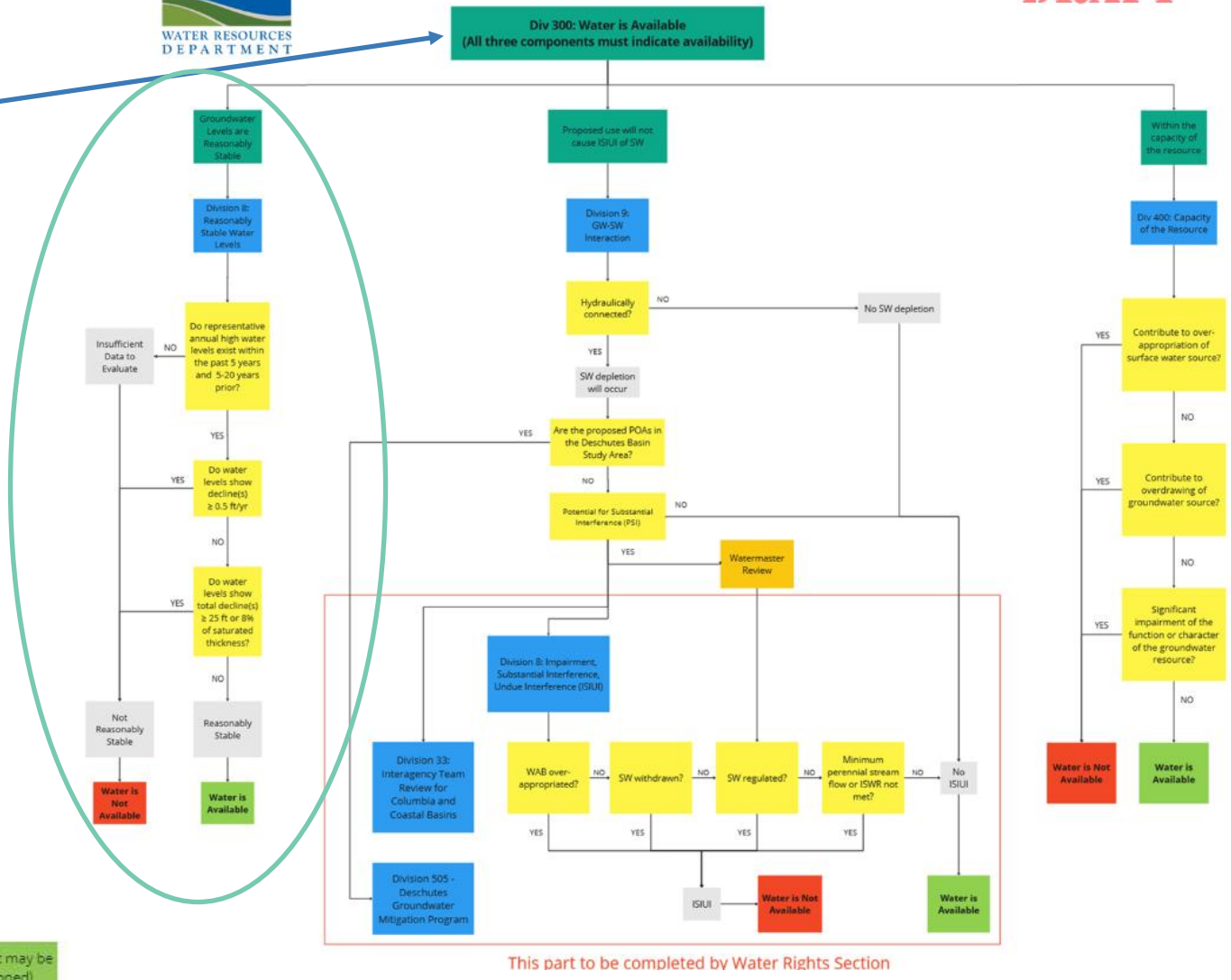
Figure 2. Water Availability



OREGON WATER RESOURCES DEPARTMENT

Figure X: Proposed (Ground)Water Availability (06/13/2023)

DRAFT



Groundwater Allocation – Water is Available

- OAR 690-008-0001 – Original Definitions
  - Declined Excessively (lowering water levels that cause a decline and inference with senior sw rights or withdrawn sw; lowering of annual high water level >50’ or >15% of saturated aquifer thickness)
  - Substantial or Undue Interference (cone of depression intersects sw or another well, contributing to reduction of sw so that senior users are impacted or instream right not satisifed)

Groundwater Allocation – Water is Available

- Revised OAR 690-008-0001 – Definition and Policy Statement
  - Includes “annual high water levels”
  - Adds “reasonably stable groundwater levels”

Groundwater Allocation – Water is Available

- Revised OAR 690-008-0001(9) – Reasonably Stable Groundwater Levels
  - Related to Annual High Water Level:
    - No decline or average rate of decline of 0.6 feet/year over any immediately preceding period with duration between 5 and 20 years. (Four measurements needed.)
    - Decline of less than 25 feet compared to reference level.
    - If no groundwater has been extracted, water levels presumed stable.
    - If not enough data available, groundwater NOT available.

Figure 2. Water Availability

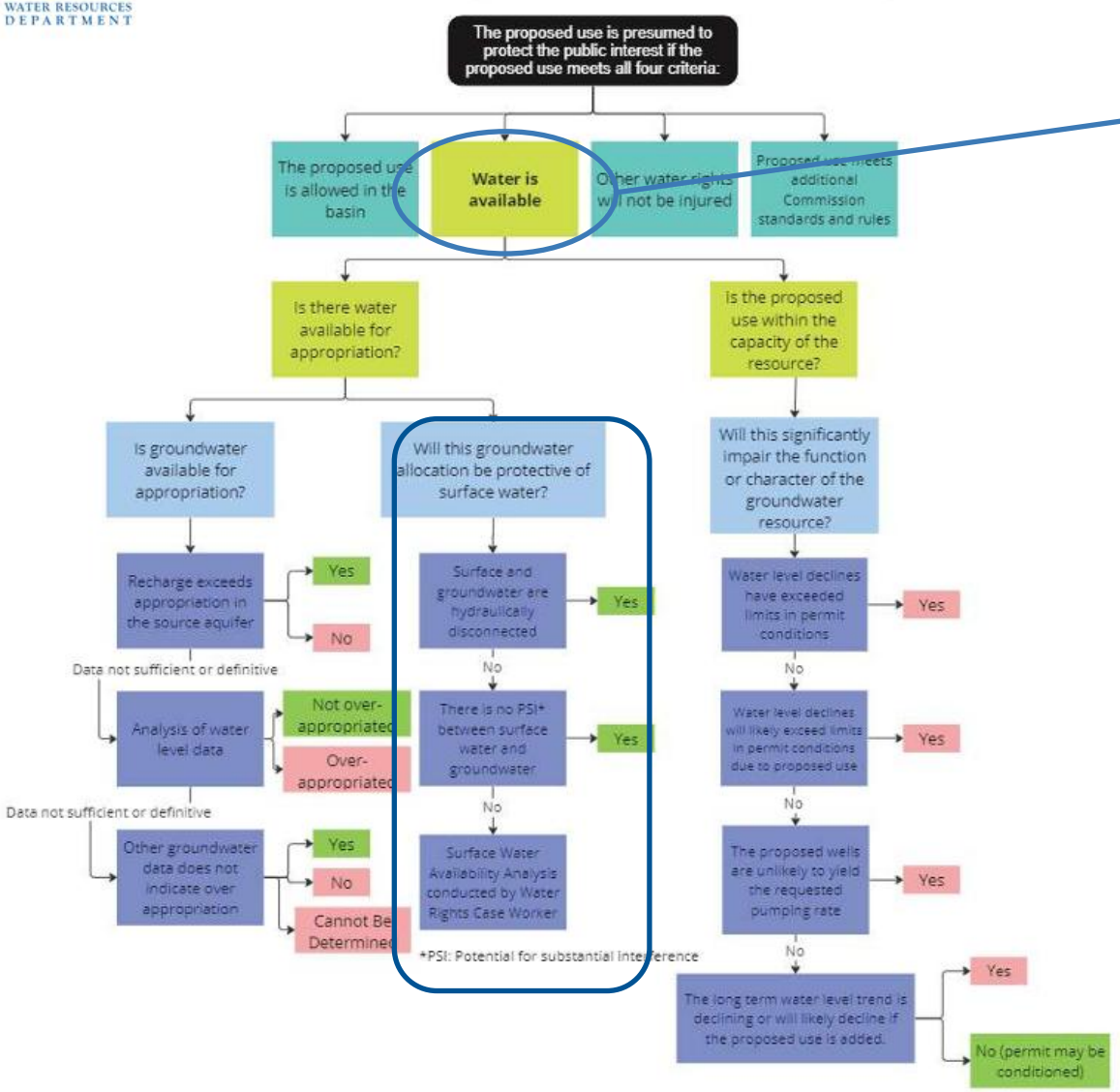
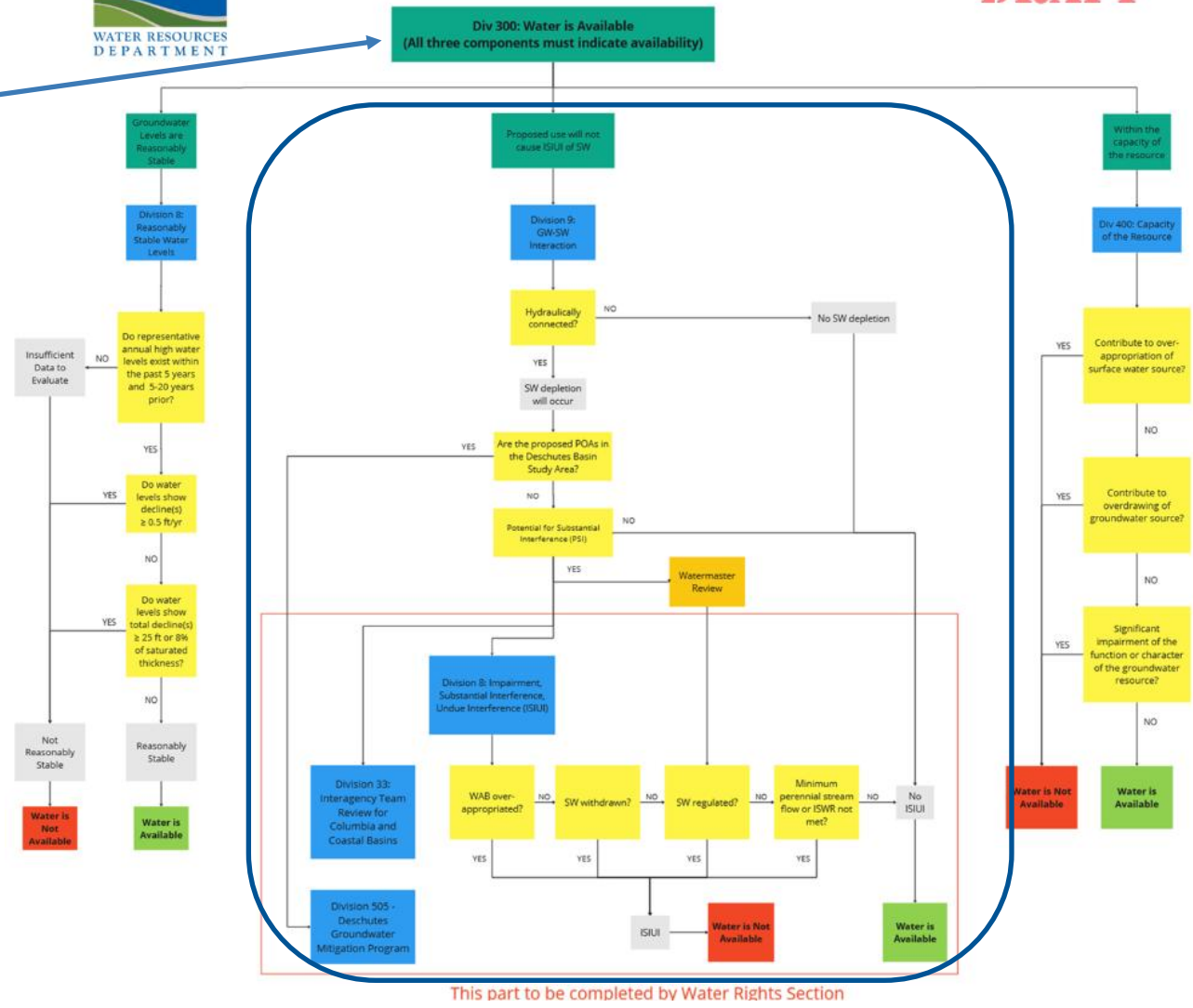


Figure X: Proposed (Ground)Water Availability (06/13/2023)

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Groundwater Allocation – Connection to Surface Water

- Prior OAR 690-009-0040 – Determination of Hydraulic Connection and Potential for Substantial Interference
  - Confined vs unconfined
  - Unconfined wells <0.25-miles assumed to be hydraulically connected
  - PSI assumed when wells <0.25-mile from sw; rate >5 cfs, rate >1% minimum perennial streamflow or instream water right or the 80% exceedance, stream depletion (at 30 days) >25% of rate (for wells <1 mile from sw).

Groundwater Allocation – Connection to Surface Water

- Revised OAR 690-009-0040
- Hydraulic connection and PSI shall be determined by the Department. The determinations shall be based upon the application of generally accepted hydrogeologic principals using best available information.
  - Tools include published literature; information includes well reports, aquifer test data, studies, models, etc.

Groundwater Allocation Rules – What it Means

- New applications are reviewed with updated criteria
- Any basin that doesn't have sw availability will not have gw availability, unless the aquifer is not connected (CRBG)

Strategies for Developing “New” Water

- Allocation of Conserved Water
- Transfers

Allocation of Conserved Water

- OAR 690-018
- Allows water right holder to move a portion of "conserved water" to a new place of use
- Examples:
  - Wheel lines to pivots
  - Drip irrigation





Conserved Water Math

PRE-PROJECT DESCRIPTION								
			Column A Water Right of Record				Column B System Capacity	
			Rate		Duty		Rate	Duty
Originating Water Right #	Priority	Acres	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Maximum CFS	Maximum AF
1234	1992	40	0.5	1/80	120	3.0	1.5	120
5678	1995	80	1	1/80	240	3.0	1.5	240
Totals		120	1.5	1/80	360	3.0	1.5	360

Conserved Water Description											
		Column A				Column B				Column C	
		Table 1 – Smaller of A or B				Needed				Conserved Water	
		Rate		Duty		Rate		Duty		Rate	Duty
Originating Certificate	Priority	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Maximum CFS	Maximum AF
1234	1992	0.5	0.0125	120	3.0	0.28	0.007	20	0.5	0.22	20
5678	1995	1	0.0125	240	3.0	0.56	0.007	40	0.5	0.44	40
Totals		1.5		360		0.84	0.014	60		0.66	300

Conserved Water Math

Conserved Water Description											
		Column A				Column B				Column C	
		Table 1 – Smaller of A or B				Needed				Conserved Water	
		Rate		Duty		Rate		Duty		Rate	Duty
Originating Certificate	Priority	Max CFS	CFS/AC	Max AF	AF/AC	Max CFS	CFS/AC	Max AF	AF/AC	Max CFS	Max AF
1234	1992	0.5	0.0125	120	3.0	0.28	0.007	20	0.5	0.22	20
5678	1995	1	0.0125	240	3.0	0.56	0.007	40	0.5	0.44	40
Totals		1.5		360		0.84	0.014	60		0.66	300

Conserved Water Allocation								
State's Portion			Applicant's Portion			Conserved Water		
Percentage *	Maximum Rate (CFS)	Maximum Duty (AF)	Percentage	Maximum Rate (CFS)	Maximum Duty (AF)	Percentage	Maximum Rate (CFS)	Maximum Duty (AF)
25%	0.165	75	75%	0.495	225	100%	0.66	300

Transfers

- Transfers are now primary means to obtain access to water due to:
  - Lack of water available for new appropriations
  - Increased mitigation requirements for portion of all of a water use
- What's a transfer?
  - Administrative process that changes the point of diversion/appropriation, the place of use, or the type of use, while preserving the priority date of the water right.

Transfers

- Transfers cannot change the source of a water right, enlarge the water right, or injure existing water rights.
- Under ORS 540.530(1)(a): “If, after hearing or examination, the Water Resources Commission finds that a proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed.”

Transfers

- Due diligence prior to application:
  - Right must have been used over the past 5 years or otherwise not be subject to forfeiture.
  - Current user must be ready, willing and able to use the full amount of water under the right.
  - Transfer cannot enlarge the right or injure other rights

Transfers

- No enlargement
  - OAR 690-380-0100: expansion of a water right including but not limited to greater rate or duty of water per acre, increase of irrigated acreage, diverting more water at the new POD/POA than legally available at the original POD/POA
- No injury
  - OAR 690-380-0100: result in another, existing water right not receiving previously available water to which it is legally entitled

Transfers

- *Bridge Creek Ranch, LLC v. OWRD*:
  - *Clarified that storage water rights are transferable and qualify as "water use[s] subject to transfer" under Oregon statutes.*

Transfers

- 2025 Legislative Session
  - SB 427: prevent diminishment of streamflow
  - HB 3501: prevent consideration of public interest
  - SB 1153 introduced a variety of concepts for transfers, including consideration of effects on instream habitat and water quality, tribal consultation, and authority to condition transfers.

Transfers

- SB 1153:
  - Transfer does not "[r]esult in a loss of in-stream habitat for sensitive, threatened or endangered aquatic species in stream reaches not protected by an existing water right" or "[c]ontribute to water quality impairment in water quality limited streams"
  - OWRD must provide "an opportunity for tribes to opt in to reviewing water right transfer applications in specific counties."
  - OWRD may condition transfer with water use or water level measurement and reporting, or the installation of fish screening or by-pass devices (would apply to the whole water right)

Transfers

- SB 1153 “Big Table” from mid-April to early-June including representatives from governor’s office, ag, municipal, and environmental groups, and the Confederated Tribes of Warm Springs.
- Goal to reach consensus on potential amendments to SB 1153

Transfers

- SB 1153 Big Table:
  - Fairly quick consensus supporting tribal consultation concept
  - No consensus on other parts, including effects of transfers on instream values and potential level of environmental review

Transfers

- SB 1153 Big Table resulted in adoption of -10 amendment:
  - More limited consideration of environmental review for transfers and exempted municipal water rights
  - Adopting tribal consultation process for transfer applications
  - Granting OWRD authority to condition transfers

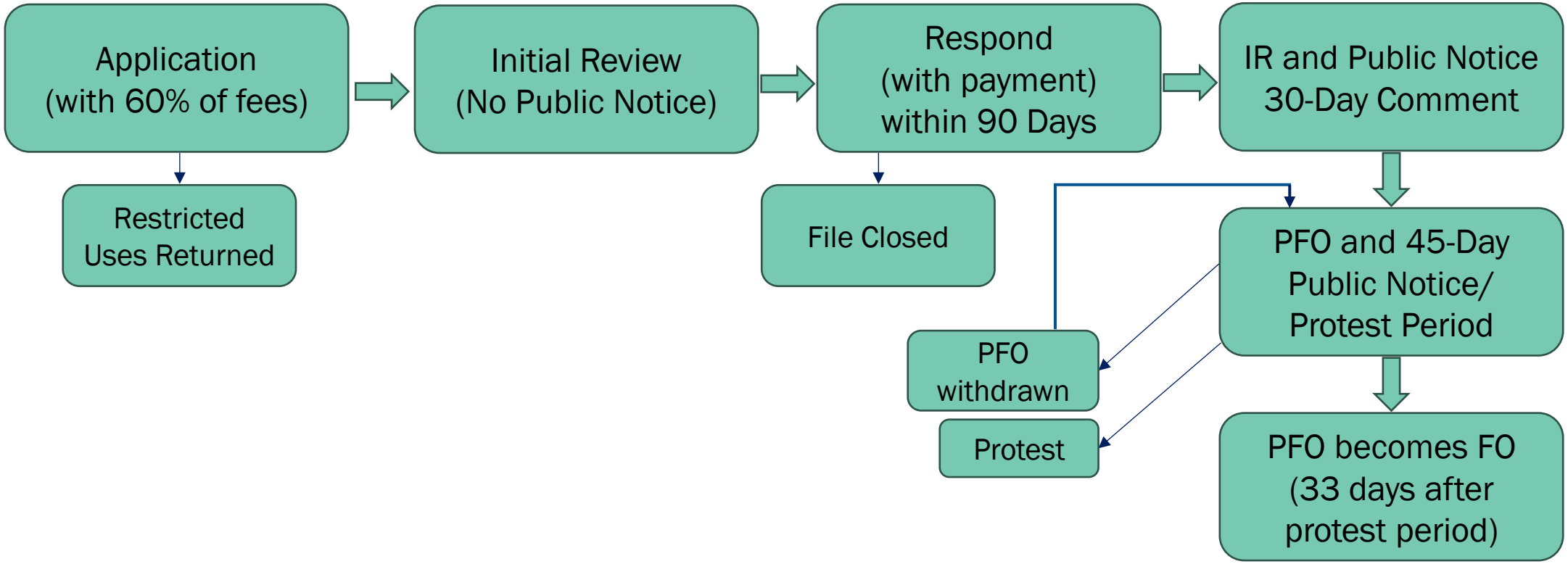
Transfers

- SB 1153: a proposed minority report (MR11) was submitted proposing to replace the bill with a proposed economic study, effectively killing the bill.
- Transfer fight likely to come back in 2027.

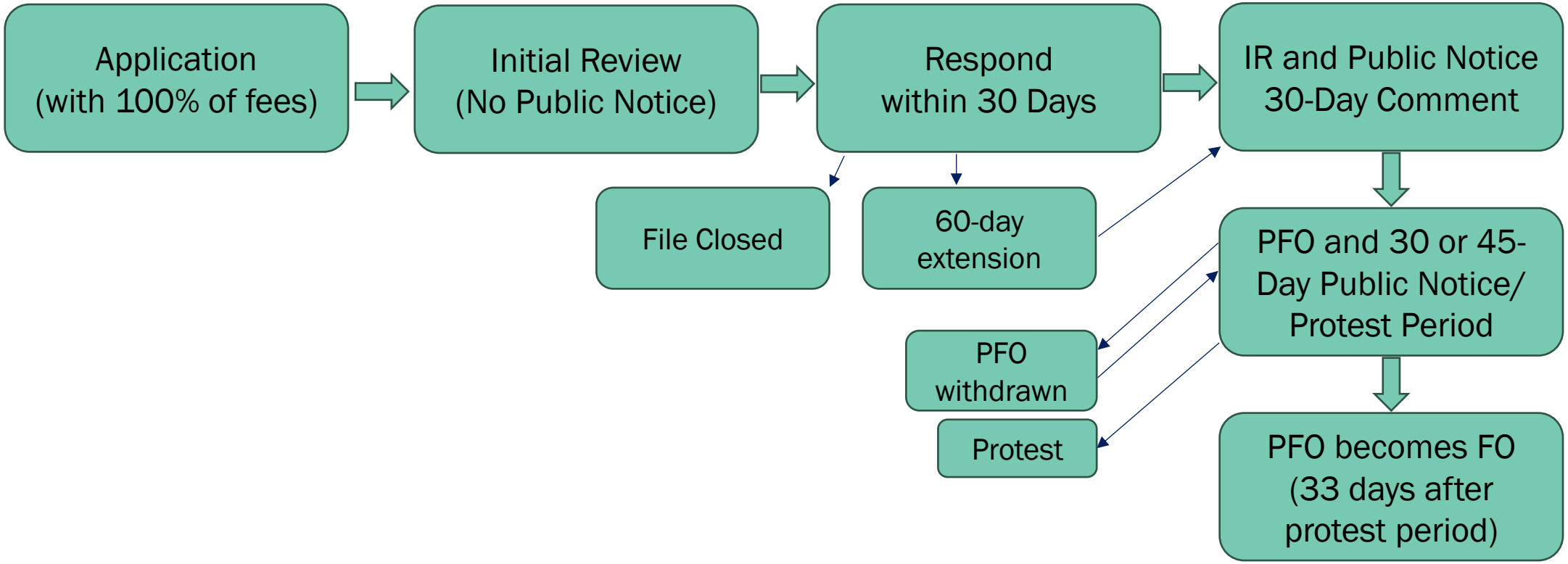
Water Right Updates

- 2025 Water Right Process Improvements
  - Standardize and streamline processes for multiple transactions
    - Water Right Permits, Permanent Transfers, Groundwater Registration Modifications, Permit Amendments, Allocation of Conserved Water
  - Public Notice Updates
  - Electronic Documentation/Communication
  - Extensions of Time
  - Pump Tests
  - Revisions to 12 OAR Divisions; 1 new Division created

Water Right Permit Application Process



Permanent Transfers/Groundwater Registration Modifications Process



Acronym Soup

- DPD = IR
- PD = PFO
- PFO → FO (after 33 days)

Changes to Extensions

- All new non-municipal permits will now have seven years (up from five) to complete construction and beneficially apply water.
- After that seven-year period, options for securing an extension are as follows:
- **Municipal extensions**: no changes to the existing extensions allowances
- **Quasi-municipal**: one-time extension up to 20 years
- **Group domestic and group domestic expanded**: one-time extension up to 10 years
- **All other permits**: one-time extension up to seven years, only for special cases (starting in June). Otherwise, a two-year extension (from FO) ***may*** be possible

Mapping Changes (OAR 690-305)

- Each POA/POD must have lat/long (decimal degree with ≥5 decimals) and datum
  - April 1, 2029 – digital file with coordinate system and geospatial features, unless waived
- "Even" scale (up to 1":1,320')
- Direction of flow on water courses
- Muni – show (but don't label) quarter-quarters
- Supplemental: show underlying primary (location and ID)
- (no mylar!)

Other

- COBU not processed without pump test
- Electronic submissions (credit card payment coming…)

Water Right Case Law

- *East Valley Water District v. Oregon Water Resources Comm'n*
  - Long procedural history leading to Supreme Court decision remanding contested case to OWRC
  - Must consider all seven public interest factors in making decision
  - Commission on remand again denied the application with final order issued on April 7, 2026, with 60 days to appeal.

EVWD v. OWRC

- *Potential implications:*
  - Single public interest factor can outweigh all others in public interest analysis?
  - Instream water rights elevated above others?
  - Water quality considerations now part of the review process v. previous focus on water quantity:
    - "To summarize, a **water** right confers not just the right to a quantity of **water**, but also the right to continue the specified beneficial use of that **water**. In other words, the nature or purpose of the use stated in a **water**-right certificate is a distinct, integral aspect of a **water** right entitled to protection."

Water Right Case Law

- *Upper Crooked River Conservationists, et al. v. OWRD*
  - BOR filed Application S-89128 for the right to use stored water for fish and wildlife purposes. UPRC argued that this should be considered under the Instream Water Rights Act because it is akin to an instream water right.
  - County court found that OWRD properly processes this as a secondary water right to use stored water.
  - Court also found that OWRD failed to follow the process set forth in ORS 537.150 and 537.153(2) after receiving comments that raised public interest issues.

Water Right Case Law

- *Hanson v. Yamhill County and Red Hills Farm*, LUBA No. 224-065, Final Order Jan. 2025
  - Hanson appealed a LUCS issued to OWRD by Yamhill County. Red Hills Farm had applied to OWRD for a permit to store 40 AF of surface water in a reservoir and a dam to be constructed on the property.
  - LUBA agreed with the County that the impoundment was a “farm use” allowed outright and not subject to conditional review criteria.

Water Right Case Law

- Klamath Basin litigation update
  - Administrative phase started back in 1997.
  - ACFFOD was issued in 2014
  - Various Orders issued between 2017 and 2023.
  - Review of Claim 622 and *Walton* claims ongoing.
  - Next would be exceptions to pre-1909 claims, exceptions to "Case 003", exceptions to federal reserved claims and tribal claims, and issuance of a final decree (2030?).

Water Quality Case Law

- *PacifiCorp v. DEQ,* Oregon Court of Appeals (2025)
  - CWA requires states to set TMDL (maximum amount of pollutant allowed to enter waterbody) for each pollutant of any water body identified as not meeting applicable water quality standards (WQS).
  - DEQ established a TMDL for temperature in Upper Klamath and Lost River Subbasins (CA-OR border) using CA's standards, which are more stringent.
  - PacifiCorp challenged the use of CA WQS, and Marion County Circuit Court and Court of Appeals agreed, concluding that DEQ had not adopted CA WQS and could not apply those standards.

Questions?



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