Third Annual Water Law Conference for Eastern Washington

The Permit Exemption

By Peter G. Scott

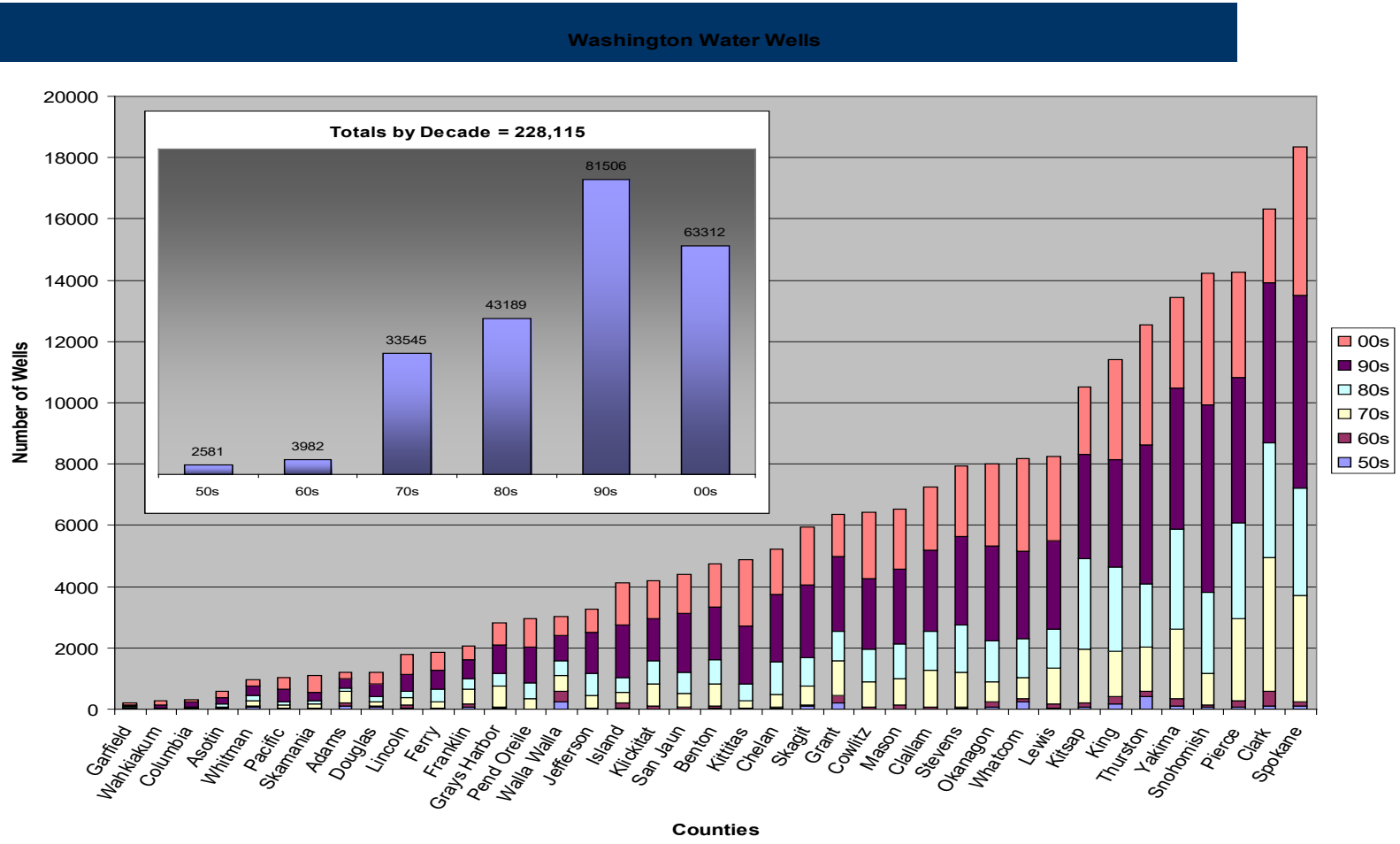
Setting the Stage

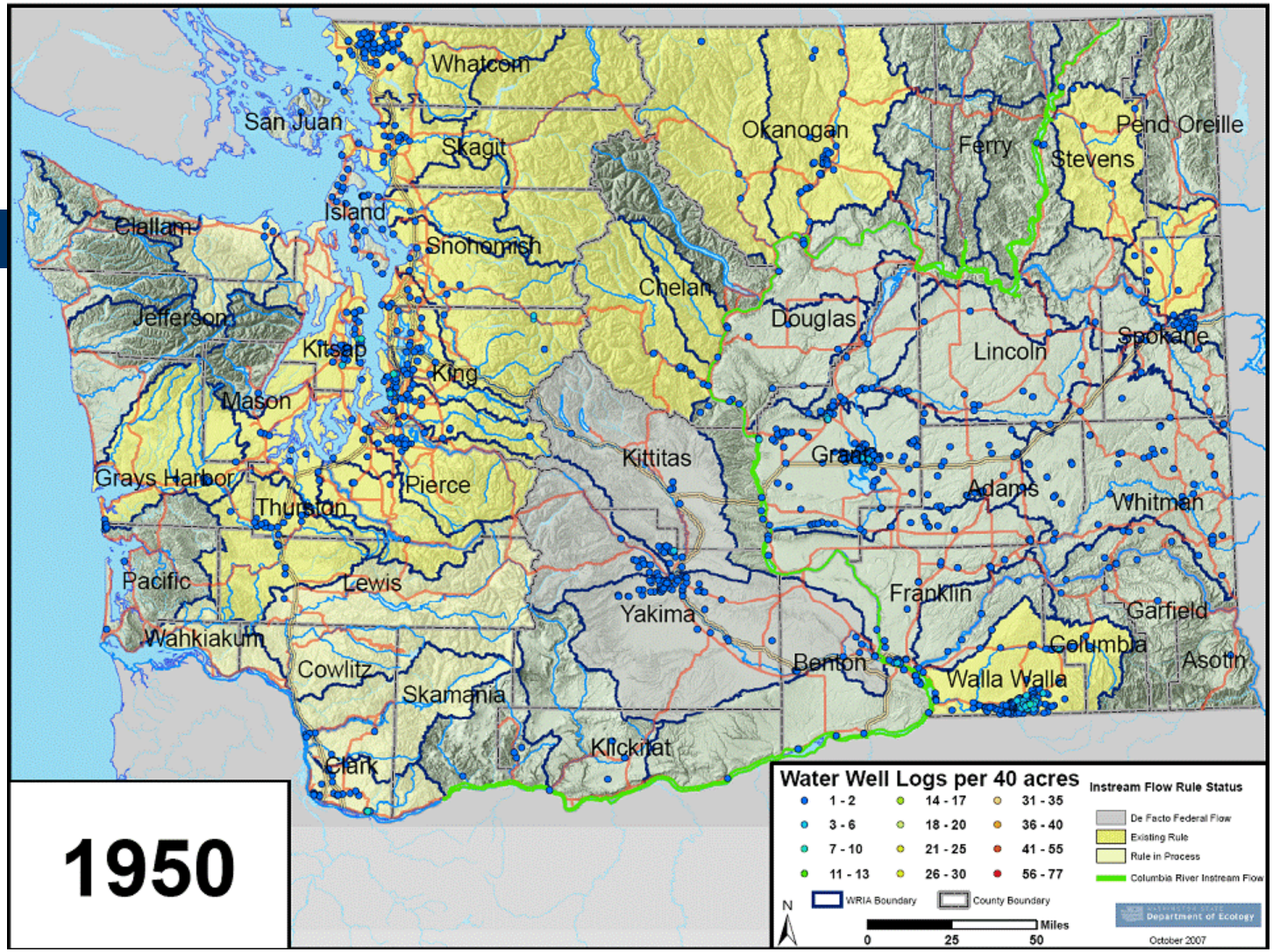
“The evolution of water law in Montana since territorial days in the last century has been lik th evolution of civilization; slow, occasional spurts of progress, and finally, rapid change that boggles the mind of even an ardent follower of the law.” - Ted Doney, Mont. Water Law Handbook (1981)

Setting the Stage (cont.)

- What is an exempt well statute?
  - A provision allowing for small appropriations of groundwater outside of the established permitting process.
  - In the words of Rep. Raybould “an exempt well is about two votes.”
- What is the problem?
  - Disconnect between administration of water rights and land use decisions.
  - Proliferation of exempt wells to support residential development.
  - Possible impact on senior rights.
  - *??? Water quality*

The Rise of Exempt Wells - Wash

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Yakima
Garfield
Wahkiakum
Columbia
Benton
Asotin
Cowlitz
Walla Walla
Skamania
Klickitat
Clark
Water Well Logs per 40 acres
1 - 2
3 - 6
7 - 10
11 - 13
14 - 17
18 - 20
21 - 25
26 - 30
31 - 35
36 - 40
41 - 55
56 - 77
WRIA Boundary
County Boundary
Instream Flow Rule Status
De Facto Federal Flow
Existing Rule
Rule in Process
Columbia River Instream Flow
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Miles
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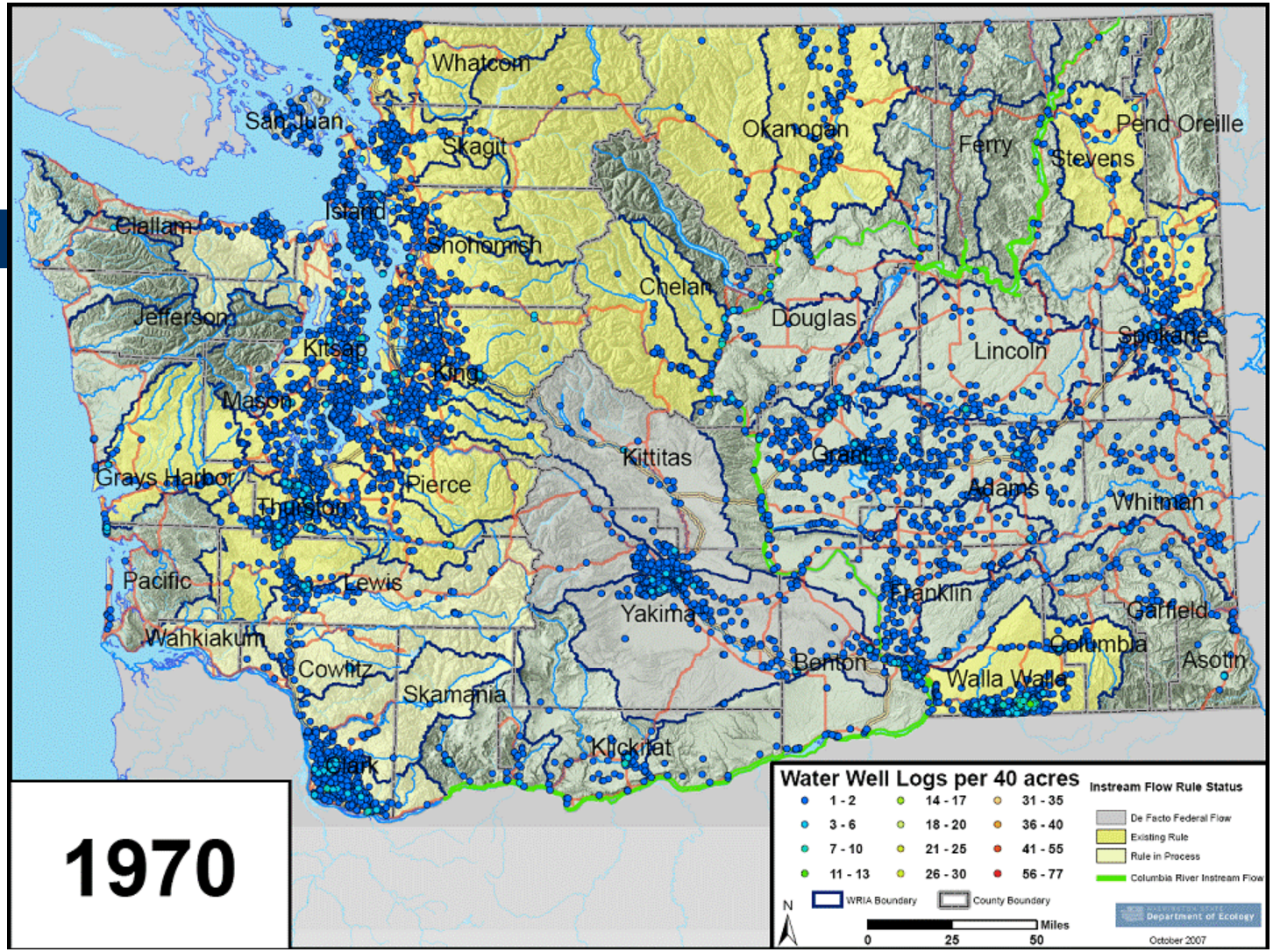
Department of Ecology
October 2007

1950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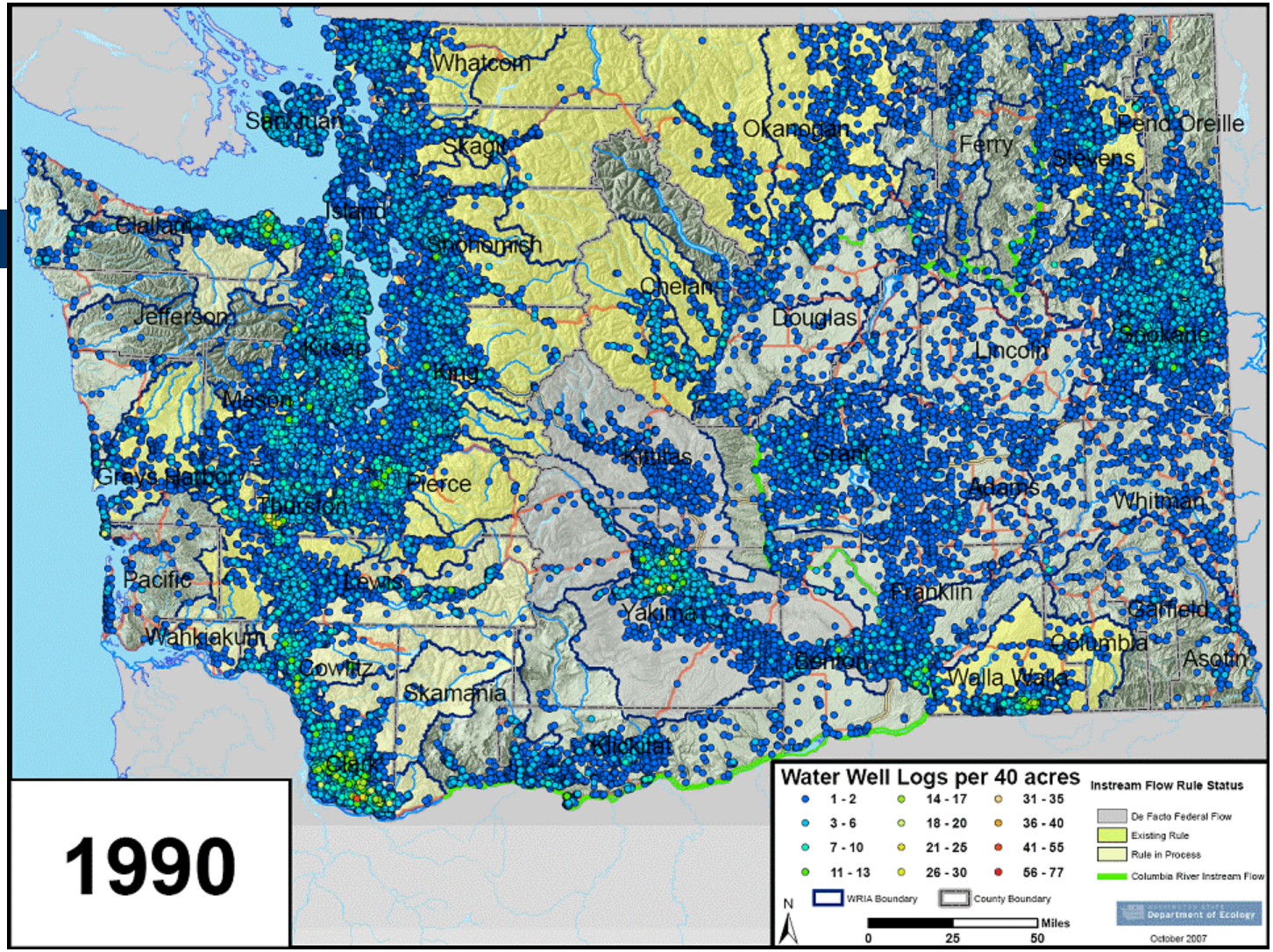
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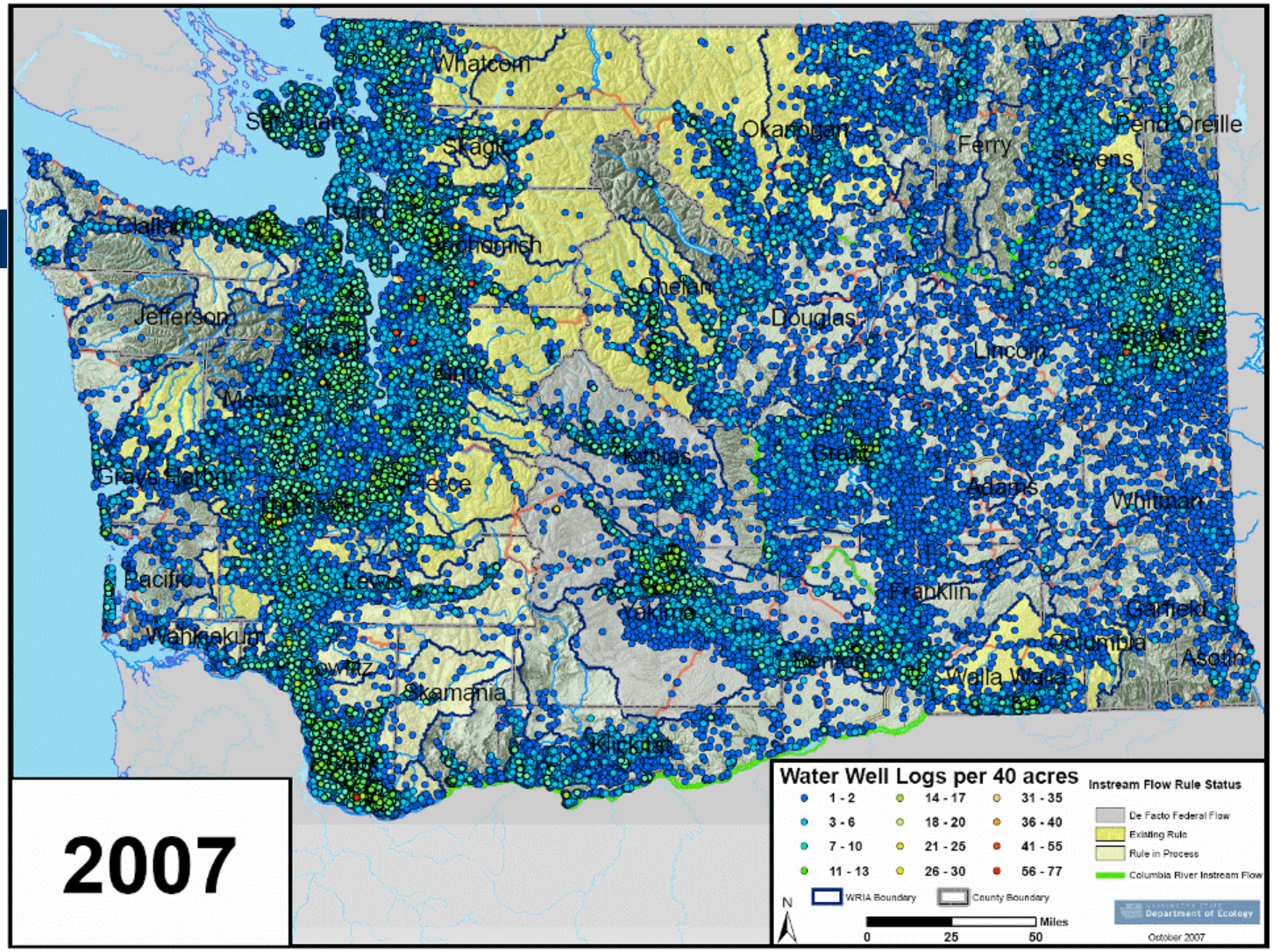
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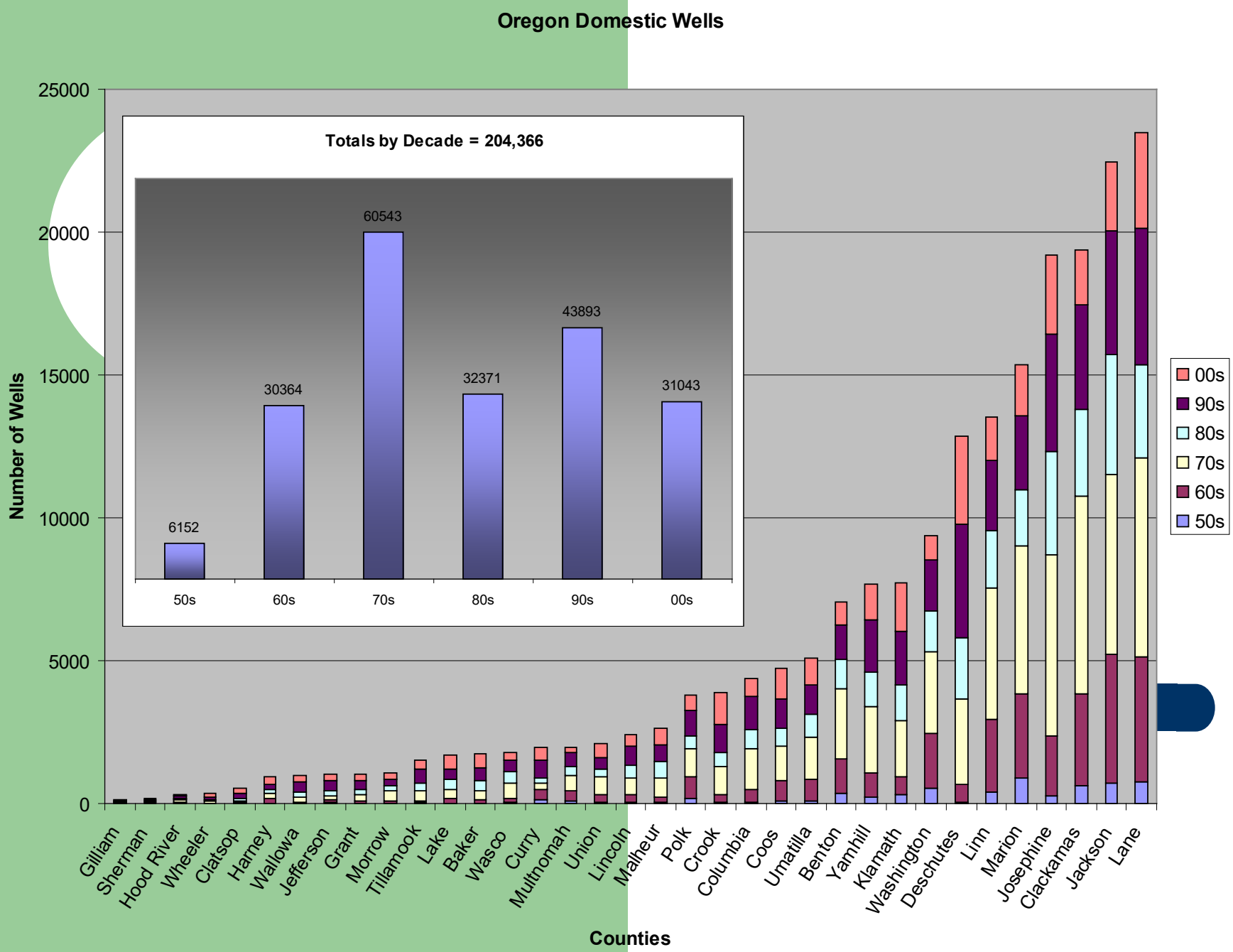
Oregon Domestic Wells
Totals by Decade = 204,366
6152
30364
60543
32371
43893
31043
50s
60s
70s
80s
90s
00s
Number of Wells
25000
20000
15000
10000
5000
0
Counties
Gilliam
Sherman
Hood River
Wheeler
Clatsop
Harney
Wallowa
Jefferson
Grant
Morrow
Tillamook
Lake
Baker
Wasco
Curry
Multnomah
Union
Lincoln
Malheur
Polk
Crook
Columbia
Coos
Umatilla
Benton
Yamhill
Klamath
Washington
Deschutes
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Marion
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Clackamas
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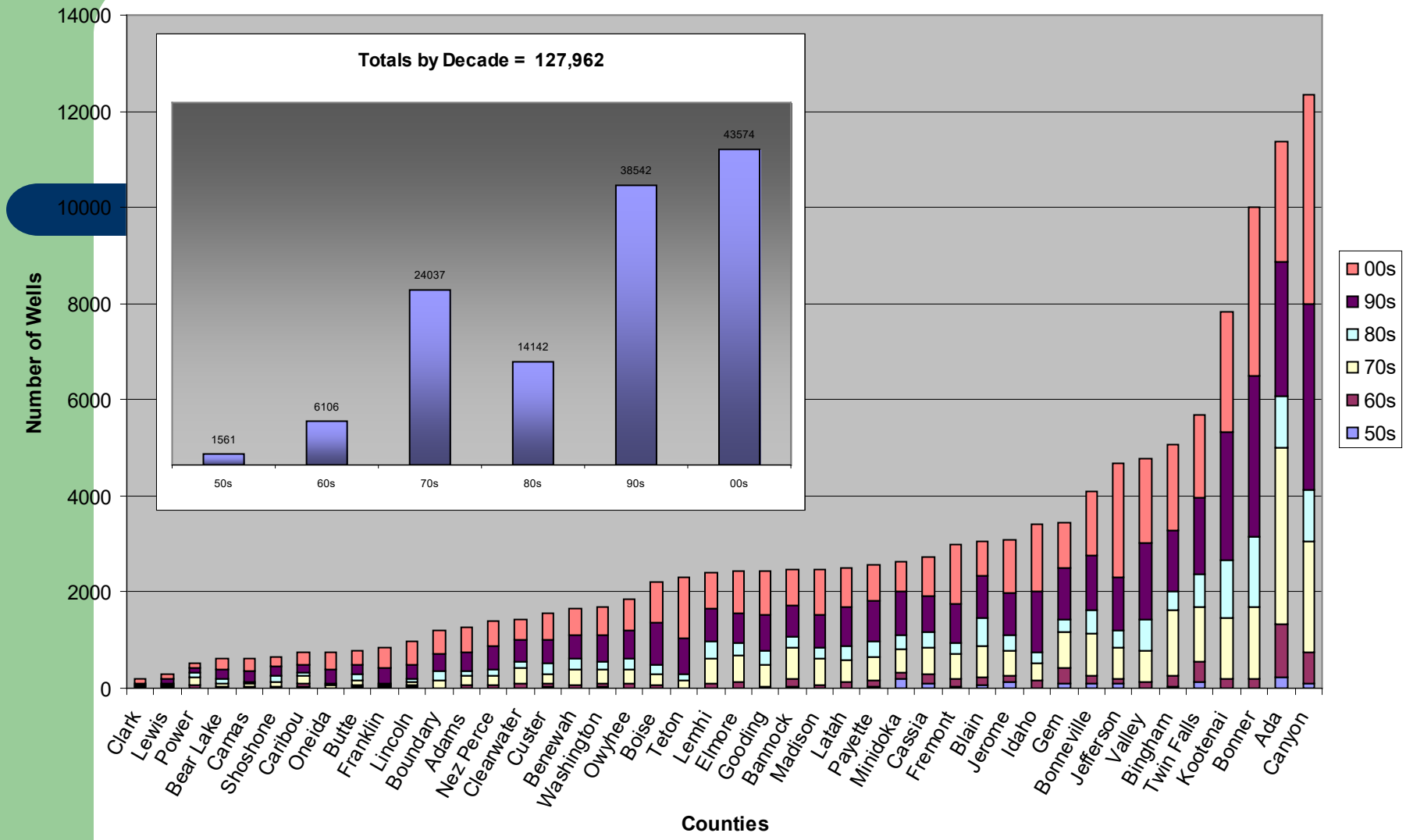
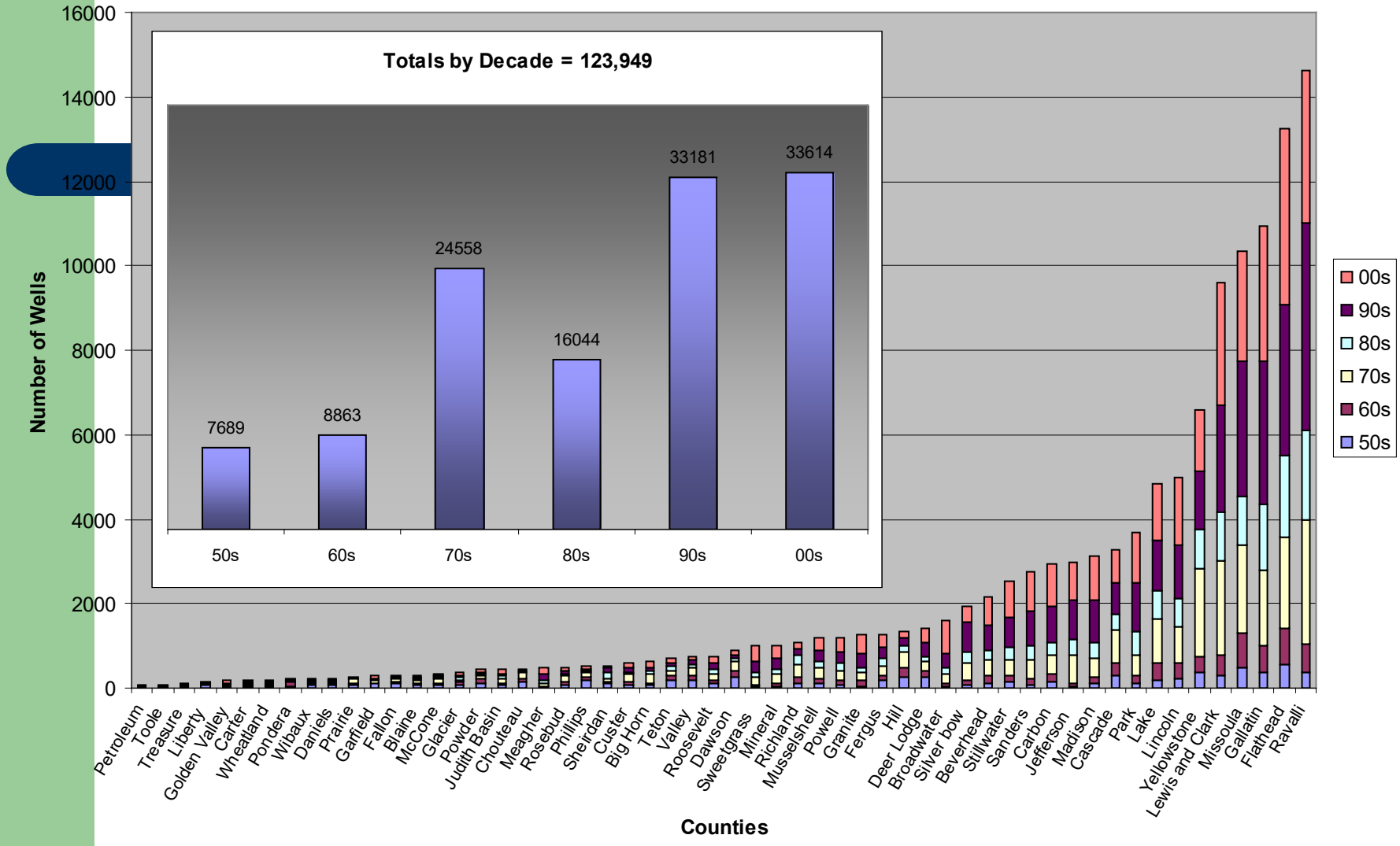
50s

Idaho Domestic Wells



Montana Domestic Wells



Conjunctive Management - Idaho

- Musser v. Higginson, 125 Idaho 392, 394, 871 P.2d 809, 811 (1994), abrogated by Rincover v. State, Dep't of Fin., Sec. Bureau, 132 Idaho 547, 976 P.2d 473 (1999) (director denied request to conjunctively administer ground and surface water unless determined appropriate).

- In re SRBA Case No. 39576, 127 Idaho 688, 689, 905 P.2d 89, 90 (1995) (denied suit for declarative relief concerning conjunctive management because IDWR could not be joined in Snake River Basin Adjudication).

- A & B Irr. Dist. v. Idaho Conservation League, 131 Idaho 411, 423, 958 P.2d 568, 580 (1997) conjunctive management order must be vacated and remanded for an evidentiary hearing to determine factually whether it is necessary to efficiently administer decree.

Conjunctive Management - Idaho

In *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) upheld constitutionality of Conjunctive Management Rules (CMRs)

- CMRs are facially valid exercise of the agency's authority to manage hydraulically connected surface and groundwater even though the hydrologic connection may be complex and delayed.
- Mitigation plans to offset impacts are lawful and consistent with Idaho law.
- CMRs do not violate due process, because affected users are entitled to notice and an opportunity to participate in administrative proceedings

MEMORANDUM DECISION ON PETITION TO COMMENCE COEUR D'ALENE-SPOKANE RIVER BASIN GENERAL ADJUDICATION, Case No: 49576 (Nov. 12, 2008)

- Water court concluded that deferral procedure for *de minimis* domestic and stockwater claims is within the terms of the McCarran Amendment
- Decision was certified by the Water Court under Rule 54(b) I.R.C.P. for interlocutory review.
- Order can be viewed at: http://www.idwr.idaho.gov/water/North_Id_Adju/

Conjunctive Management – Wash.

Ken Slattery, Defining and Delineation of Water Sources (2007)

> "Ecology finds itself in a transition period where its historic management efforts have been primarily associated with surface water rights. In the future, the need to manage groundwater will increase. In many basins, Ecology will need to manage surface water and groundwater together."

https://appswr.ecology.wa.gov/docs/WaterRights/wrwebpdf/pol_2010.pdf

Whatcom Cnty. v. Hirst, 186 Wn.2d 648, 381 P.3d 1 (2016) (Counties must consider minimum flows when issuing building permits, even for developments relying on permit-exempt wells. Wash. Rev. Code Ann. §§ 19.27.097(1), 58.17.110).

Conjunctive Management – Mont.

Montana Trout Unlimited v. Montana Dep't of Nat. Res. & Conservation, 331 Mont. 483, 495–96, 133 P.3d 224, 232 (2006)

The legislature provided an exception to the Basin Closure Law for groundwater, provided it is not “immediately or directly connected to” the Upper Missouri River's surface flow.

DNRC's interpretation of the Basin Closure Law conflicts with the statute. . . It recognizes only ***immediate*** connections to surface flow caused by induced infiltration and ignores the less immediate, ***but no less direct***, impact of the prestream capture of tributary groundwater.

What is Scott Talking About!

MCA 85-2-311. Criteria for issuance of permit. (1) . . . the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) water is physically available . . . , (b) the water rights of a prior appropriator . . . will not be adversely affected, (c) means of diversion. . . are adequate; (d) proposed use is beneficial; (e) the applicant has a possessory interest . . . in the property where the water is to be put to beneficial use . . .”

(f) ***the water quality of a prior appropriator will not be adversely affected***;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to **75-5-301**(1); and

(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

“Fully” Conjunctive Management

RCW 90.03.005 It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes ***in sufficient quantity and quality*** to protect instream and natural values

RCW 90.03.255 *notes* *“*The purpose of this act is to foster the improvement in the water supplies available to meet the needs of the state. It is the goal of this act to strengthen the state's economy while maintaining and ***improving the overall quality of the state's environment***." [1997 c 360 s 1.]

RCW 90.44.400 (1) This legislation [act] is enacted for the purpose of identifying groundwater management procedures that are consistent with both local needs and state water resource policies and management objectives***; including the protection of water quality, assurance of quantity, and efficient management of water resources to meet future needs***.

“Fully” Conjunctive Management

The GMA requires that comprehensive plans *“shall* provide for *protection* of the quality ... of groundwater used for public water supplies.” RCW 36.70A.070(1). It is a *goal* of the GMA to “[p]rotect the environment and *enhance* the state's high quality of life, including air and water quality.” RCW 36.70A.020(10)

Whatcom Cnty. v. Hirst, 186 Wn.2d 648, 689, 381 P.3d 1, 19 (2016) “In *Swinomish Indian Tribal Community* when we held that the term “protect” does not impose a duty on counties to “enhance” water quality under RCW 36.70A.172(1). 161 Wash.2d at 428, 166 P.3d 1198.

MT Permit Exemption

Pending facial and (??) applied challenge to constitutionality of permit exemption.

https://mtleague.org/news municipalities-farmers-ranchers-landowners-and conservation-groups-unite-to-protect-montana-water-rights-in-challenge-to-exempt-well-loophole

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Attorney for Plaintiff Clark Fork Coalition

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA LEAGUE OF CITIES AND TOWNS, ASSOCIATION OF GALLATIN AGRICULTURAL IRRIGATORS, CLARK FORK COALITION, KEVIN AND KATRIN CHANDLER,	Cause No. A DV-25-2025-0000710-DK **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** Presiding Judge: Hon. Mike Menahan

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