

Environmental and Natural Resource Litigation Status
Dept. of Fish, Wildlife and Parks (DFWP) and the
Fish, Wildlife and Parks Commission (Commission)
August 17, 2007

State District Court Cases

Bowman v. Montana Department of Fish, Wildlife and Parks, 10th Judicial District Court, Fergus County, Cause No. DV 02-115. Plaintiffs allege that I-143 (November 2000 game farm initiative) violated their constitutional rights and is a taking of property without just compensation. The district court granted DFWP's motion to dismiss and then dismissed the case with prejudice when the plaintiff failed to amend his complaint.

Charlie Lincoln Estate, 9th Judicial District Court, Toole County, Cause No DP-07-012. Charlie Lincoln died and in his will left the Roman Catholic Bishop of Helena his ranch abutting the Marias River with DFWP having a "right of first refusal" if the ranch is sold. Two sisters are contesting the will. DFWP has intervened. A hearing on the will contest has been set for February 10, 2008.

Fourtner v. Broadwater Conservation District, 1st Judicial District Court, Lewis and Clark County, Cause No. DV-2004-46. This litigation resolved a dispute on whether the Broadwater County Conservation District has jurisdiction over the upper portion of Confederate Creek. The Court allowed DFWP to intervene and held that the Conservation District was correct in finding the upper portions of Confederate Creek was historically a continuously flowing stream and thus a natural perennial flowing stream that was diverted by human activity and that Fourtner's mining activity must be authorized by a 310 permit from the District. No appeal was filed.

FWP v. Bart Rice, 1st Judicial District Court, Lewis and Clark County, Cause No. ADV-2006-736. A Declaratory Judgment Action by DFWP asking the district court to interpret a gift agreement which specified the authority of Bart Rice, attorney for the donor, Elizabeth O. Taylor. DFWP asserted that Mr. Rice's authority is limited to consultation and is not a veto power. The matter was settled by an agreement to dismiss the action on the condition that Bart Rice withdraw as the attorney for Ms. Taylor's Estate.

Mesaros v. DFWP, 8th Judicial District Court, Cascade County, Cause No. BDV 03-1119. Plaintiff alleges that I-143 (November 2000 game farm initiative) violates their constitutional rights and is a taking of property without just compensation. Complaint not yet served. Plaintiff is apparently waiting for the Montana Supreme Court to rule on the game farm takings cases now before the Court.

Montana Sports Shooting Ass'n. v. DFWP, 4th Judicial District Court, Missoula County, Cause No. DV-06-094. DFWP is required by Title IV-D of the Social Security Act to collect the last four digits of the Social Security Numbers of all applicants for fishing, hunting, and trapping licenses. Plaintiffs have brought suit alleging that the collection of said four digits is a violation of the Montana Constitutional right of privacy and heritage

to hunt. The parties have briefed a Plaintiffs' Motion for Summary Judgment and have filed a pretrial order and are awaiting a decision of the District Court to either rule on the motion for summary judgment or set a trial date.

Montana Outfitter and Guides Association v. Fish, Wildlife and Parks Commission, 1st Judicial District Ct., Lewis and Clark County, Cause No. CDV-2006-195. The Montana Outfitter and Guides Association (MOGA) petitioned the district court to void the 2006 mountain lion hunting season in Region 2, alleging that the Fish, Wildlife and Parks Commission had violated the public's constitutional and statutory right to participate and right know. On October 27, 2007, Judge Honzel ruled that the Commission did not violate the public's right to participate in governmental decisions and to observe the deliberations of public bodies. MOGA's petition was denied.

Paulson v. Monsanto and DFWP, 10th Judicial District Ct., Fergus County, Cause No. DV-2004-08. DFWP is a defendant in a class action lawsuit by real property owners abutting Big Spring Creek (Lewistown) as a result of an alleged PCB contamination. Initially, the amended complaint was filed in state district court, removed to federal district court, then remanded to state district court. Judge Krueger has certified the class. Discovery is ongoing. DFWP has partially settled with the plaintiffs by limiting plaintiff's recovery to no more than the maximum amount that can be recovered by plaintiffs under DFWP's interpretation of the Montana governmental liability laws. A trial date has been set for March of 2008. DFWP's position is that the ongoing cleanup under the direction of EPA should be completed prior to a trial and may ask the district court to set a later trial date. Monsanto, on July 6, 2007, removed the case to federal district court in Great Falls for the second time. (See related write up under Federal District Court Cases).

Royal Tine Ranch v. Montana, 11th Judicial District Ct., Flathead County, Cause No. DV-02-606(C). The plaintiffs claim that I-143 (November 2000 game farm initiative) takes their property without just compensation in violation of the U.S. and Montana Constitutions. The issue was submitted to the district court in Flathead County on cross-motions for summary judgment in September of 2004.

Spoklie v. Montana Department of Fish, Wildlife and Parks, 15th Judicial District Ct., Sheridan County, Cause No. 11013. Plaintiff alleges that I-143 (November 2000 game farm initiative) violates their constitutional rights and is a taking of property without just compensation. The case has been certified as a class action. DFWP, represented by the Attorney General, has filed and briefed on November 2002 a motion for partial summary judgment on the violation of constitutional rights issues. No action has been taken by the court.

State of Montana, Department of Fish, Wildlife and Parks v. Dan Saunders and Ted Franklin, 21st Judicial District Ct., Ravalli Co., Cause No. DV-07-50. DFWP is a plaintiff in a declaratory judgment action against defendants who closed a road used by the public to access the Poker Joe Fishing Access Site in Ravalli County. DFWP reached an interim settlement with defendants that restored public access to the site (and avoided

the need for a preliminary injunction) in exchange for increased site management activities. The parties are progressing in negotiations toward a permanent settlement.

Taleff and Walsh v. DFWP, 8th Judicial District Ct., Cascade County, Cause No. DDV-06-533. DFWP was gifted 10 acres on Lake Five for a fishing access site (FAS) by a woman in memory of her son. A group of landowners around Lake Five sued DFWP over the claimed failure of DFWP to involve the public in its decision to acquire and develop the FAS on Lake Five. District Court Judge Sandefur issued a preliminary injunction prohibiting the development of the Lake Five FAS pending the outcome of the litigation. In a settlement agreement, DFWP agreed to redo the decision process with proper public involvement. DFWP is currently contacting realtors and others to determine if there are alternate sites in northwest Montana that should be considered in the EA process. In the near future, a list of potential sites will be forwarded to an independent consultant who will prepare a new EA considering all potential sites. That EA will be made available for public review and comment in late summer and DFWP will then make a determination on which site to develop.

Warwood v. Norman Bypass Trust et al., 18th Judicial District Ct., Gallatin County, Cause No. DV-04-230. Plaintiffs David and Nancy Warwood sued neighboring landowners claiming a prescriptive easement over their property. DFWP holds a conservation easement on one of the defendant's land and thus intervened as a defendant to protect its interest in the conservation easement. DFWP and other defendants settled the case with the plaintiffs on September 15, 2006, prior to trial. The settlement was for a restrictive easement that protects DFWP's conservation easement.

Montana Supreme Court Cases

Bitterroot River Protective Association v. Bitterroot Conservation District, 21st Judicial District Ct., Ravalli Co., Cause No. DV03-476/1. DFWP is an involuntary plaintiff in the part of the case addressing whether Mitchell Slough is a manmade irrigation ditch or a stream subject to the right of access by the public. District Court Judge Mizner ruled that Mitchell Slough is a ditch and not subject to stream access. Both plaintiffs, the Bitterroot River Protective Association and DFWP, appealed the district court decision to the Montana Supreme Court, Cause No. DA-06-0520. All briefing was completed on March 12, 2007.

Buhmann and Wallace v. State of Montana and Sportsmen for I-143, Montana Wildlife Federation, Montana Supreme Court, Case No. 05-473. District Court Judge McCarter ruled that I-143 (November 2000 game farm initiative) did not result in an uncompensated taking of Buhmann and Wallace's property. Both Buhmann and Wallace have appealed to the Montana Supreme Court. Briefing has been completed, oral argument was held on September 13, 2006, and the case was then submitted to the Montana Supreme Court for its decision.

Hilston v. State of Montana, Montana Supreme Court, Case No. DA 06-0188. Timothy Hilston was killed by a grizzly bear while elk hunting in the Blackfoot-Clearwater

Wildlife Management Area. The estate and wife of Mr. Hilston sued the state claiming the state was liable for negligent grizzly bear management. The district court granted the state's motion for summary judgment. The Montana Supreme Court upheld the district court ruling that under Montana's Recreational Use Statute, § 70-16-302, MCA, grizzly bears are a "condition of the property" and therefore, the state owed no duty to protect Mr. Hilston from the grizzly bear attack.

Kafka and Bridgewater v. MDFWP and State of Montana, and Sportsmen for I-143, Montana Wildlife Federation, Montana Supreme Court, Case No. 05-146. District Court Judge Rice ruled the enactment and enforcement of I-143 (November 2000 game farm initiative) was not an uncompensated taking of Kafka and Bridgewater's property. Both Kafka and Bridgewater appealed to the Montana Supreme Court. Briefing has been completed, oral argument was held on September 13, 2006, and the case was then submitted to the Montana Supreme Court for its decision.

Montana Sports Shooting Ass'n v. DFWP, Montana Supreme Court, Case No. DA-07-0311. Section 87-1-204, MCA prohibits DFWP employees from "coercing or influencing the political actions of any person." Plaintiffs brought suit alleging that the statute prohibits the DFWP from lobbying the Montana Legislature. The District Court of the Fourth Judicial District, Missoula County refused Plaintiff's Motion for Summary Judgment and ruled that the statute does not prohibit DFWP employees from lobbying the Montana Legislature. The District Court's order has been appealed to the Montana Supreme Court. The case is presently being briefed.

Thompson v. Mack Long, FWP Regional Director, Montana Supreme Court, Case No. 05-194. Thompson, a landowner in Ravalli County, brought a mandamus action to require DFWP to issue a letter declaring his property "critical elk habitat" so that he could attempt to block a neighboring subdivision. Mack Long, Regional Supervisor refused to issue such a letter because there were not biological facts to support such a conclusion. The Supreme Court affirmed the District Court and held that there was no "clear legal duty" that required DFWP to issue such a letter and that a writ of mandamus was inappropriate.

Federal District Court Cases

Center for Biological Diversity et al. v. Ralph Morgenweck, Regional Director, U.S. Fish and Wildlife Service et al., Federal District Court, Colorado, Civil Action No. 04-F-0108 (OES). Plaintiff environmental groups filed suit against the U.S. Fish and Wildlife Service (USFWS) challenging their determination that the Yellowstone Cutthroat Trout was not warranted for listing under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* DFWP moved to participate as *amicus curiae* and was denied, along with other state movants, Wyoming and Idaho, status to participate. DFWP continues to monitor the case.

Center For Biological Diversity, and Western Watershed Service vs. U.S. Fish and Wildlife Service, Gail Norton, Secretary of the Interior, and Steven A. Williams,

Director, U.S. Fish and Wildlife Service, Federal District Court, D.C. Circuit, Case No. CV 03-1110 (JDB). Plaintiff environmental groups filed suit against the U.S. Fish and Wildlife Service (USFWS) for its failure to emergency-list the Montana fluvial arctic grayling under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* and by failing to make an adequate "12-month finding" on the status of the grayling. DFWP moved to participate as *amicus curiae* and was granted permission and filed its *amicus* brief. The parties settled the matter wherein USFWS agreed to issue a new finding in early 2007. On April 24, 2007, the USFWS issued a finding that listing the grayling is not warranted and withdrew the grayling from the candidate list.

Paulson v. Monsanto and DFWP, Federal District Court, Montana, Cause No. CV-07-74-GF-SEH. Defendant Monsanto removed the case from the State 10th Judicial District, Fergus County on July 6, 2007. The case is a class action of property owners abutting Big Spring Creek (Lewistown) as a result of an alleged PCB contamination. DFWP's partial settlement with the plaintiffs for no more than the maximum amount that can be recovered by plaintiffs under DFWP's interpretation of the Montana governmental liability laws is now in jeopardy because if the case is successfully removed to federal district court, plaintiffs are claiming their bargain with DFWP will be void. The plaintiffs are contesting the removal and asking that the case be remanded back to state district court. DFWP is also contesting the removal on the grounds that the case does not involve a federal question and the DFWP has a right, under the 11th amendment, to have the case tried in state court.

Western Water Project v. Servheen, Federal District Court, Idaho, Cause No. 07-CV-243. The plaintiffs filed a lawsuit on June 4, 2007 claiming that the U.S. Fish and Wildlife Service (USFS) violated the federal Endangered Species Act by designating a Yellowstone grizzly bear distinct population segment (DPS) and then removing the Yellowstone grizzly bear DPS from the list of threatened species. DFWP is preparing a motion to intervene as a party to help defend the USFWS's delisting decision.

Ninth Circuit Court of Appeals

Roberts v Hagner, et. al, Ninth Circuit Court of Appeals, Cause No. 07-35197. This is an action brought under the 14th amendment to the U.S. Constitution challenging the validity of a DFWP regulation that prohibits non-members from big game hunting on the Indian reservations in Montana absent a state tribal cooperative agreement to govern it. Costs and attorneys fees have been requested. The District Court granted summary judgment to the state but the Plaintiff, represented by interest group attorneys Mountain States Legal Foundation from Colorado, appealed.

Administrative Contested Case Proceedings and Water Court

DFWP is involved in several contested case proceedings through the DNRC. Periodically, DFWP objects to new applications for water use and applications for change of water use. DFWP is currently involved with 13 DNRC contested case proceedings and a number of cases at the Montana Water Court.