

To: Members of the Senate Natural Resources Committee

Date: April 6, 2009

From: Representative Bill McChesney, HD 40, Sponsor, HB 575.

Re: HB 575-Providing a limited permitting program to allow that water produced in association with coal bed methane may be used for certain purposes; and other purposes.

Co-sponsors: Rep. Ankney, Rep. Augare, Rep. MacLaren, Rep. McNutt, Rep. Sesso, Sen. Bales, Sen. Keane, Sen. Lewis, Sen. Peterson, Rep. Stahl

Committee Members:

The purpose of HB 575 is to create a workable permitting system to allow the beneficial use of water that is brought to the surface pursuant to MBOGC authority in 85-2-510, MCA, in the process of producing coal bed methane. Once that water is on the surface, it has to be managed in one or a combination of the ways provided in 82-11-175, MCA.

One of those ways is beneficial use, which requires obtaining a beneficial use permit from the DNRC. This water is often usable for stock water, managed irrigation, domestic use, dust suppression, and other industrial uses. The jurisdiction of the DNRC to issue beneficial use permits for this water begins when the water has reached the surface of the earth, it is in a pipeline, pond, pit, or other means of containing or conveying the water, and someone wants to use some of it for a beneficial purpose. In that situation, it is available for appropriation. It does not have to be put to beneficial use, because it could be discharged to the river under a DEQ permit or managed in some other way allowed by 82-11-175, MCA. But this water can be used, and I think it should be used if that is possible.

That requires obtaining a Montana Water Use Act permit. But in mid-December 2008 a District Court Judge here in Helena issued a ruling that made that far more complicated and expensive. The court ruled that, notwithstanding the fact that the water is already on the surface and that under MBOGC regulation no beneficial use permit is needed to produce the water, if anyone wants to beneficially use it they MUST analyze the impacts on senior groundwater users before they can get a permit.

Doing that is a very time-consuming, expensive, complicated process---and it is unnecessary, because the water is going to be produced anyway and it is already on the surface and available for appropriation.

So, this bill clarifies the law so that such wasteful steps are not required. It does so by recognizing that the water is already on the surface in a pipeline, pond, pit, or other means of conveying or containing it, and that the source of the appropriation, therefore, is the pipeline, pond, pit, etc. But this bill also does more and it creates some sideboards. In that sense it is a limited answer to this situation, so that existing users of this water will not be harmed while the situation is further studied.

### **Limitations in HB 575**

--the permit is temporary. It lasts only so long as the gas is being withdrawn from the well.

--the permit has to go through the existing DNRC process, and the applicant has to pay an \$800.00 fee.

--this bill imposes **added** requirements not applicable to other permits under the existing DNRC process, including limiting the beneficial uses of this water to stock water, managed irrigation with no return flow to surface water, dust suppression and other industrial uses, and domestic use.

-- HB 575 caps the total amount of water that can be beneficially used from this source at 2,000 af annually.

In addition, this permitting program will sunset on June 30, 2011; and a study is provided to examine the effect on groundwater of the production of water in association with oil and gas and appropriate uses of such water.

Also, the bill explicitly recognizes that the permits issued under it do not alter or amend in any way any water compact entered by the State with a tribe, the United States, or another state.

This is a limited solution to an acute problem: there are six ranches and two coal mines that now rely on this water, and, under the District Court ruling, they will not be able to legally keep receiving this water unless this bill is enacted to change that law.

RECEIVED

DEC 16 2008

GOUGH, SWEENEY,  
JOHNSON & WATERMAN

NANCY SWEENEY  
CLERK DISTRICT COURT

2008 DEC 15 P 3:59

FILED  
BY L. DOWELL  
DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

NORTHERN PLAINS RESOURCE  
COUNCIL, INC., and TONGUE RIVER  
WATER USERS' ASSOCIATION,

Plaintiffs and Petitioners,

v.

MONTANA DEPARTMENT OF  
NATURAL RESOURCES AND  
CONSERVATION and FIDELITY  
EXPLORATION & PRODUCTION  
COMPANY,

Defendants and Respondents.

Cause No.: CDV-2007-425

**MEMORANDUM AND ORDER  
ON PETITION FOR JUDICIAL  
REVIEW**

Petitioners Northern Plains Resource Council, Inc. (Northern Plains), and Tongue River Water Users' Association (Water Users) have petitioned for judicial review of the final order issued May 31, 2007, by Respondent Montana Department of Natural Resources and Conservation (DNRC). The order granted Respondent Fidelity Exploration & Production Company (Fidelity) a beneficial water use permit to market in Montana the water Fidelity pumps from the ground during the production of coal bed methane gas. Following extensive briefing, the petition was heard October 10, 2008. Having fully considered the arguments

1 presented and having reviewed the applicable parts of the administrative record,  
2 the Court concludes that the final order should be reversed and the case remanded  
3 to DNRC for further proceedings.

4 **BACKGROUND**

5 Fidelity extracts coal bed methane gas from coal beds located in what  
6 is known as the CX Field in the Powder River Basin, Bighorn County, Montana.  
7 As part of the extraction, water is withdrawn from the ground along with the gas.  
8 The initial withdrawal of the water is regulated by the Montana Board of Oil and  
9 Gas Conservation, not DNRC. Section 85-2-510, MCA.

10 Pursuant to Section 85-2-311, MCA, Fidelity applied to DNRC for a  
11 beneficial water use permit to market water produced during the extraction  
12 process. The application sought to appropriate up to 3,863 acre-feet of water per  
13 year to market to potential users in Big Horn County. Fidelity also applied to  
14 appropriate up to 3,000 acre-feet of water per year for marketing in Wyoming.  
15 Northern Plains, the Water Users, and others objected to Fidelity's applications,  
16 and DNRC scheduled a contested case proceeding pursuant to the Montana  
17 Administrative Procedure Act, Section 2-4-601, *et seq.*, MCA.

18 On January 3, 2007, the hearing examiner issued his order on scope  
19 of issues for the hearing. He held that the water which Fidelity sought to put to  
20 beneficial use is not ground water and that the point of diversion is Fidelity's  
21 pipeline. He also ruled that Fidelity properly split what originally was one  
22 application into two applications. Finally, the hearing examiner declined to  
23 address Petitioners' constitutional arguments, explaining that he was without  
24 jurisdiction to consider those arguments.

25 ////

1 On May 31, 2007, DNRC issued its final order which granted the  
2 Montana application and denied the Wyoming application. Petitioners timely filed  
3 this action for judicial review of the decision granting the Montana application.  
4 Fidelity has petitioned for judicial review of the decision denying the Wyoming  
5 application, Cause No. CDV-2007-612, of this Court. This Memorandum and  
6 Order addresses only the Montana application.

7 STANDARD OF REVIEW

8 A district court's review of an administrative agency's final order is  
9 governed by the Montana Administrative Procedure Act. The standard of review  
10 is set forth in Section 2-4-704(2), MCA, which provides:

11 (2) The court may not substitute its judgment for that of the  
12 agency as to the weight of the evidence on questions of fact. The  
13 court may affirm the decision of the agency or remand the case for  
14 further proceedings. The court may reverse or modify the decision if  
15 substantial rights of the appellant have been prejudiced because:

14 (a) the administrative findings, inferences, conclusions, or  
15 decisions are:

15 (i) in violation of constitutional or statutory provisions;

16 (ii) in excess of the statutory authority of the agency;

17 (iii) made upon unlawful procedure;

18 (iv) affected by other error of law;

19 (v) clearly erroneous in view of the reliable, probative, and  
20 substantial evidence on the whole record;

21 (vi) arbitrary or capricious or characterized by abuse of  
22 discretion or clearly unwarranted exercise of discretion; or

23 (b) findings of fact, upon issues essential to the decision, were  
24 not made although requested.

25 A district court reviews a contested administrative decision "to determine whether  
findings of fact are clearly erroneous and whether the agency correctly interpreted  
the law." O'Neill v. Dep't of Revenue, 2002 MT 130, ¶ 10, 310 Mont. 148, ¶ 10,  
49 P.3d 43, ¶ 10.

////

////

1 precluding them from presenting any evidence on whether Fidelity's application  
2 would adversely affect their water rights.

3           The water at issue is "industrial waste" or an unwanted by-product of  
4 the extraction process. N. Plains Res. Council v. Fid. Exploration & Dev. Co.,  
5 325 F.3d 1155, 1160-61 (9th Cir. 2003). Fidelity does not have a water right for  
6 the water. However, it must manage the disposal of the water in accordance with  
7 Section 82-11-175, MCA.

8           Fidelity's application states that the source of the water is developed  
9 water from coal bed methane gas production in the CX Field. According to the  
10 application, the point of diversion is Fidelity's centralized water management  
11 system which consists of wells, pipelines, pumping stations, and storage facilities.

12           In his January 3, 2007 order, the hearing examiner refers to the water  
13 as "water developed through CBM development." He states that Fidelity's  
14 application is for an appropriation of water from its pipeline.

15           The Court is not sure what Fidelity means by developed water.  
16 Developed water is not a term used in the constitution or in any of the statutes  
17 cited to the Court. As found by the Ninth Circuit, the water is simply an unwanted  
18 by-product which is drawn from the ground during the production of coal bed  
19 methane gas.

20           The CX Field is large, covering all of two townships, thirty-three  
21 sections in a third township, and a half section in a fourth township. At the time of  
22 the application, Fidelity operated 437 wells in the CX Field and had plans to bring  
23 into production 250-300 new wells per year. While Fidelity identifies its CX Field  
24 pipeline system as the point of diversion, the water is brought to the pipeline from  
25 the ground through the wells. Thus, the water only gets to the pipeline because it

1 is pumped from the ground which is the source of the water and the point of  
2 diversion.

3           Section 85-2-501(4), MCA, defines ground water as "any water that is  
4 beneath the ground surface." Each of the statutes cited by the hearing examiner  
5 relates to ground water. Section 85-2-306(2)(b), MCA, provides that ground water  
6 within a controlled ground water area may be appropriated only "according to the  
7 requirements of an order issued pursuant to 85-2-507." Section 85-2-507, MCA,  
8 addresses orders establishing or modifying controlled ground water areas.

9           Section 85-2-510, MCA, provides that in a controlled ground water  
10 area, water which is produced entirely as a result of oil and/or gas withdrawals is  
11 "under the prior jurisdiction of the board of oil and gas conservation." Prior  
12 jurisdiction does not mean exclusive jurisdiction. Moreover, the statute does not  
13 lead to an inference, much less to a conclusion of law, that the water which is  
14 pumped from the ground in the course of extracting coal bed methane gas,  
15 automatically becomes something different than ground water for purposes of  
16 appropriation. The source of the water is still the ground and the point of diversion  
17 is the ground.

18           Finally, Section 82-11-175(2), MCA, provides in part: "Ground water  
19 produced in association with a coal bed methane well must be managed in any of  
20 the following ways: (a) used as irrigation or stock water or for other beneficial  
21 uses in compliance with Title 85, chapter 2, part 3." Title 85, chapter 2, part 3 is  
22 the section of the code dealing with appropriations, permits, and certificates of  
23 water rights.

24           Based on these statutes, the Court concludes that what Fidelity  
25 applied to appropriate was ground water, not pipeline water. If the legislature

1 intended something different it could have said so, but did not.

2 For the foregoing reasons,

3 **IT IS ORDERED** that the final order of the Montana Department of  
4 Natural Resources and Conservation issued May 31, 2007 IS REVERSED, and the  
5 beneficial water use permit granted to Fidelity Exploration & Production Company  
6 IS DECLARED VOID. The matter IS REMANDED to the Montana Department  
7 of Natural Resources and Conservation for further proceedings.

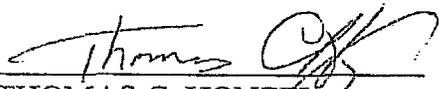
8 DATED 15<sup>th</sup> day of December 2008.

9

10

11

12

  
THOMAS C. HONZEL  
District Court Judge

13

pcs: Jack R. Tuholske  
Brenda Lindlief Hall  
Jon Metropoulos/Dana L. Hupp  
Donald D. MacIntyre  
Anne W. Yates/Candace F. West  
Fred W. Robinson

17

18

d/TCH/Northern Plains Resource v. DNRC & Fidelity CDV-07-425

19

20

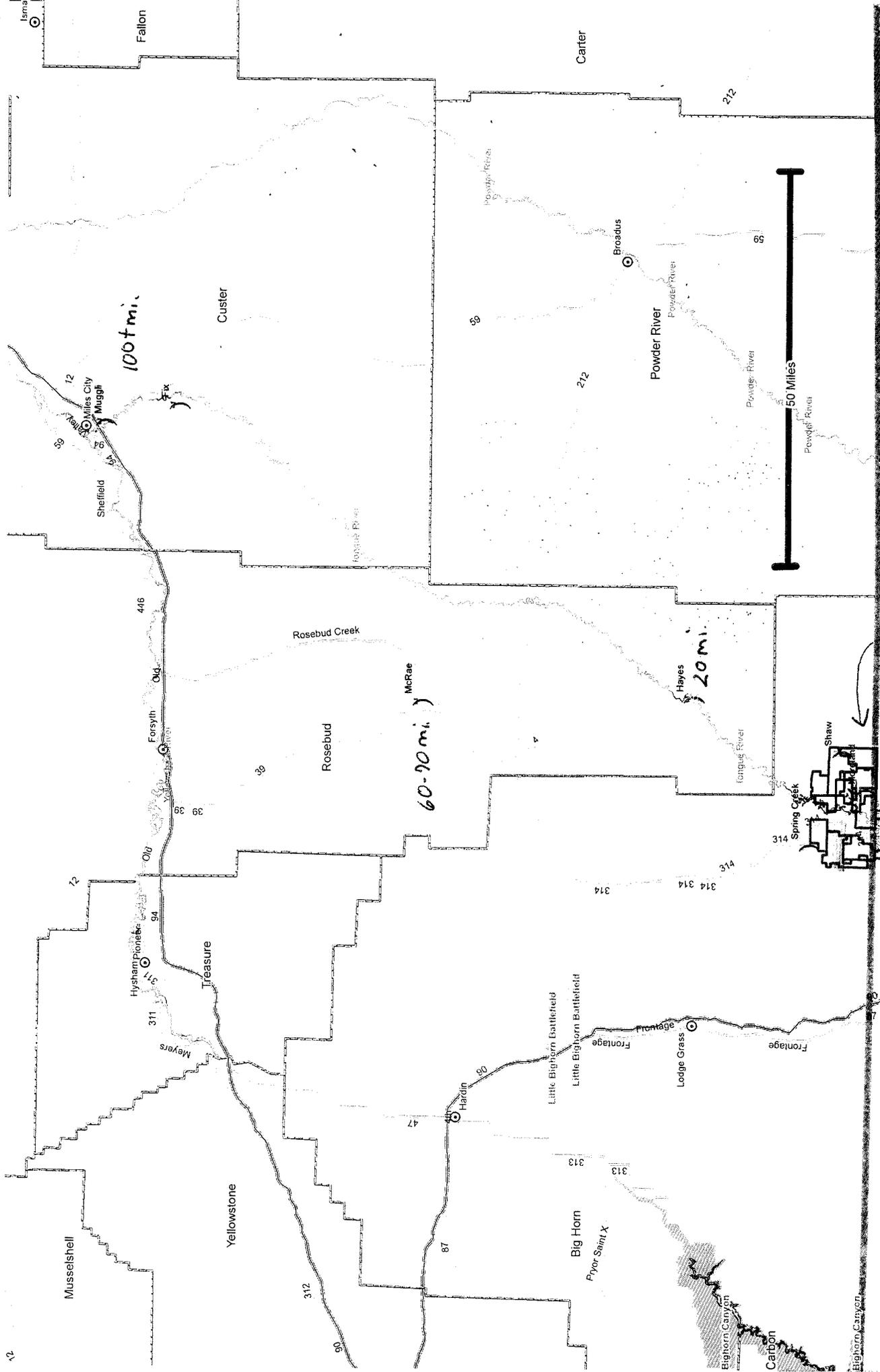
21

22

23

24

25



CBM Development  
And all water use here