

Environmental and Natural Resource Litigation Status
Dept. of Fish, Wildlife and Parks (DFWP) and the
Fish, Wildlife and Parks Commission (Commission)
March 9-10, 2016

State District Court cases:

Citizens for Balanced Use, et al. v. Maurier, Montana Seventeenth Judicial District, Blaine County, Cause No. DV-2012-1.

Plaintiffs challenged the “wild bison” status of quarantined bison out of Yellowstone National Park (YNP). The basis for their claim is found solely in the dicta language of the Montana Supreme Court decision issued in this case on another issue (see description below under Supreme Court Cases heading). The Department argued in its district court brief that Plaintiff’s claims are invalid for the following reasons: the language in the Supreme Court’s decision was incorrect and does not hold precedent in law, Plaintiffs failed to plead this matter in their original complaint and arguments, and the statute is clear that these are “wild bison.” The Court issued a decision in April 2014 ruling that YNP quarantined Yellowstone bison are wild bison.

Department of Fish, Wildlife & Parks v. Troy Wanken & Wanken Farms, 9th Judicial District, Toole County, DV-12-015.

The Department filed a Declaratory Judgment action to establish the right and scope of the administrative and public access to the Marias River Wildlife Management Area along the Lincoln Road. The Department received a partial summary judgment decision indicating that FWP has an express easement appurtenant for use of roads pursuant to a 1951 agreement. The court found that the Department has administrative access and access for short-term seasonal hunting, but that the easement “does not include unlimited public access for any purpose, including hunting and fishing.” The remaining issues in the case include further determination of the scope of the easement as well as claims by the Department that the Defendants blocked the road and counterclaims related to that same point. The case is set for a combined jury/non-jury trial in June of 2016.

Helena Hunters and Anglers (HHA) v. Maurier, MFWP, First Judicial District, Lewis & Clark County, BDV-2012-868.

Plaintiffs filed suit against the Department alleging that it violated statutory provisions to prevent species from being listed on the Endangered Species Act list. In addition, Plaintiffs argued that the Department failed to consider a Petition for rulemaking it submitted in 2012 to prohibit wolverines from being trapped while the U.S. Fish and Wildlife Service made its decision whether to place wolverine on the ESA list. In August 2014, Fish and Wildlife Service withdrew its proposed listing rule for wolverines as threatened under the ESA. As a result of that decision, this case was dismissed with prejudice in September 2014.

McGinnis Meadows Cattle & Guest Ranch LLC v. MFW; and Joe Maurier, its Director, 11th Judicial District, Flathead County, Cause No. DV-12-261D.

Plaintiff landowner filed suit in February 2012 against FWP alleging it failed to attach a radio-tracking collar to at least one wolf in each wolf pack near livestock as required by Mont. Code Ann.

§ 87-5-132(1), and associated administrative rules. FWP has actively attempted to track and attach radio tracking collars on wolves in active wolf packs but the elusive nature of wolves make it difficult. Plaintiff served first discovery requests shortly thereafter but has not prosecuted the case since. Due to Plaintiffs' failure to prosecute their case, in 2015 the Court dismissed the matter.

White vs Dickman et.al., Montana Twenty-First Judicial District, Ravalli County Cause No DV-15-88

Suit for Partition. A Stipulation in Lieu of A Rule 16(b) Scheduling Order was filed appointing appraisers for property to be divided by the parties. Appraisal reports are due soon. FWP currently leases a portion of the property to be divided and has the right of first refusal to purchase a portion of the property.

Montana Supreme Court cases:

Citizens for Balanced Use (CBU), v. Fish and Wildlife Commission, Montana Supreme Court, DA 14-0046.

The Plaintiffs filed a case in district court challenging the Fish and Wildlife Commission's (Commission) public notice and participation process as insufficient for its December 10, 2012 decision to close the wolf season in two small wolf management units outside Yellowstone National Park (YNP) near Gardiner. The Commission prevailed at the district court level because the case was moot. The fact that the 2013 legislature rendered it impossible for the situation to repeat because the Commission no longer had the authority to close units around YNP was the basis for the district court's decision. However, the district court awarded Plaintiffs attorneys fees and costs because they were able to get a preliminary injunction prior to the case becoming moot. FWP appealed the case to the Montana Supreme Court on the issue of attorneys' fees. The case was affirmed and remanded back to district court. A total of \$16,135.03 in attorneys' fees and costs were awarded to the Plaintiffs.

Citizens for Balanced Use, et al. v. Maurier, Montana Supreme Court, Montana Supreme Court, DA 12-0306.

Plaintiffs filed suit challenging the Departments movement of disease-free bison to Fort Peck and Fort Belknap Indian Reservations because the Department did not develop a management plan contemplated by Mont. Code Ann. §87-1-216(4)-(6). The Department did not apply this statute to the placement of bison upon Indian country because the language of the statute required only that a management plan be developed when placing bison on "private or public lands in Montana." The district court ruled against the Department and issued a preliminary injunction requiring the Department develop a management plan. The Department appealed the decision to the Supreme Court.

The Supreme Court issued a decision that overturned the district court decision and upheld the Departments' actions. The decision also indicated, in dicta, that there was a chance that these bison are not wildlife. Plaintiffs moved the district court to determine these quarantine bison not wildlife as a result. (See explanation of district court case above.)

Federal District Court cases:

Center for Biological Diversity v. Jewell, US District Court, District of Montana, CV 15-4-BU-SEH

Plaintiff environmental organizations challenged the US Fish and Wildlife Service's 2014 determination that listing of the Upper Missouri Distinct Population Segment of the arctic grayling is not warranted. State of Montana and FWP have intervened in support of USFWS. Plaintiffs moved to supplement the administrative record. Hearing on the motion was held by Judge Haddon on Jan. 12, 2016. Judge Haddon ruled in favor of Plaintiffs. Federal Defendant has now supplemented the record with a 2010 Upper Missouri arctic grayling population viability analysis. The following schedule is now in effect: Plaintiff's motion for summary judgment due Feb. 19, 2016; Defendant's combined opposition/cross-motion for summary judgment due April 15, 2016; Montana's combined opposition/cross-motion for summary judgment due April 22, 2016, Plaintiff's reply due May 27, Defendant's reply due June 24, Montana's reply due July 1.

Defenders of Wildlife v. US Army Corp of Engineers, US District Court, District of Montana, CV 15-00014-GF-BMM

Plaintiff sued Defendants Corps of Engineers, Bureau of Reclamation and US Fish and Wildlife Service under ESA, NEPA and other causes in a challenge to Defendants' decision to proceed with construction of a new irrigation diversion structure at Intake, MT. Judge Morris granted Plaintiff's motion for preliminary injunction on Sept. 4, 2015. The parties have now submitted, and Judge Morris has signed a Joint Stipulation to Stay Proceedings and Order. The Joint Stipulation calls for the Corps and Reclamation to conduct public scoping and complete a draft environmental impact statement by July 1, 2016. A Final EIS is to be completed by Dec. 31, 2016. Additional consultation with US Fish and Wildlife Service pursuant to Section 7(a)(2) of ESA will also be required prior to signing a record of decision.

Friends of the Wild Swan v. Vermillion, US District Court, District of Montana, Missoula Division, CV 13-66-M-DLC.

Plaintiffs filed suit in federal district court alleging that the Department is liable under the Endangered Species Act (ESA) for recreational trappers' incidental take of lynx. The Department and Commission settled the case in July of 2015. The settlement included some changes to the Commission's trapping regulations. The case was dismissed. The order dismissing the case was appealed by the Defendant-Intervenors (Montana Trappers Association, National Trappers Association, and individual trappers). Currently the appeal is stayed pending settlement discussions.

Defenders of Wildlife v. Jewell, US District Court, District of Montana, CV 14-246-M-DLC

Several Plaintiffs' environmental groups filed challenges to the US Fish and Wildlife Service's decision not to list wolverines as threatened under the ESA. Montana, along with Wyoming and Idaho, intervened on behalf of the Service to support the Service's decision. The case has been fully briefed and argument was heard in February 2016. The Court's decision is forthcoming.

Administrative Contested Case Proceedings

DFWP is involved in several contested case proceedings before DNRC. Periodically, DFWP objects to new applications for water use and applications for change of water use

that have the potential to adversely impact instream flow rights held by DFWP. DFWP typically is involved with about 10 DNRC contested case proceedings.

FWP v. Animals of Montana, Troy Hyde, permit holder, before the Department of Fish, Wildlife and Parks.

The Department delivered a notice of revocation of a roadside menagerie permit to Animals of Montana, Inc., and its owner, Troy Hyde, on December 28, 2015. The notice comes after 25 violations of statute and administrative rule were found involving the facility in 2015 alone. The violations include performing exhibitions without a permit; use of a weed whacker and hedge trimmer to persuade an uncontrollable tiger to move; inadequate, unlocked, unmarked, or overcrowded den boxes and cages; and unsanitary and inhumane housing of animals. Previous problems at the facility include numerous incidents of escaped wildlife, an Animals of Montana employee sustaining a broken arm from an attack by a brown bear, an employee being killed by a grizzly bear in an incident which was not immediately reported to officials, and convictions under the Endangered Species Act and Lacey Act for trafficking an unlawfully sold tiger across state lines. The Department has been monitoring the operations at the facility closely and has previously formally warned Animals of Montana that it needed to strictly adhere to the conditions of its permit or the permit would be revoked. Animals of Montana is challenging the proposed permit revocation through a request for an administrative hearing before the Department. No hearing date has been set in this case.

FWP v. Bowman Administrative Contested Case

Alternative Livestock Revocation case. FWP agreed to withdraw enforcement actions against an alternative livestock facility for multiple violations in a settlement agreement during the course of an administrative proceeding that was begun in 2014. The license holder agreed to abandon its license, pay for Department costs, dispose of all alternative livestock elk after testing for chronic wasting disease, and ultimately, lower their fences, within an eight month period.

FWP v. Spoklie. Administrative Contested Case

Alternative Livestock Revocation case. A settlement where Licensee agreed to let alternative livestock license No 139 lapse and not make any effort to renew it which would accomplish License Revocation portion of the proceedings MDFWP had brought in 2016. As far as the fences are concerned, Licensee agreed to start tearing down the fences in the Spring 2016 and will continue to do so in a reasonably fast manner so that they are all down in a year.

DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT CHALLENGE AND REMEDIATION CASES IN ACTIVE LITIGATION: March, 2014, to February, 2016

MAJOR FACILITY SITING CASE

1. MEIC, Sierra Club, and National Wildlife Federation v. DEQ (State District Court, Rosebud County)--On October 4, 2012, the plaintiffs filed a petition challenging the Administrative Order on Consent entered into between PPL Montana and DEQ for assessment and cleanup of groundwater contaminated by the PPL Colstrip power plant. They petitioned the Court to declare that the order was not a valid enforcement action under Major Facility Siting Act and the Montana Water Quality Act. On February 20, 2013, the Court granted the Plaintiffs' motion to stay the proceeding until a related case in Lewis and Clark County was resolved. The Court found that there were overlapping issues in the two related cases that created a potential risk of unnecessary and piecemeal litigation. On May 31, 2013, the Helena district court granted DEQ's and PPLM's motions to dismiss. The Rosebud County case was then reinstated, and opposing motions for summary judgment are pending. The court will hear oral argument on February 22.

MINING CASES

1. MEIC et al. v. DEQ, Golden Sunlight, CURE (State District Court, Jefferson County)- In January of 2014, DEQ issued a record of decision approving expansion of Golden Sunlight's main pit (the Mineral Hill Pit) and the mining of a smaller nearby pit (North Area Pit). In regard to expansion of the Mineral Hill Pit, DEQ selected the Agency Modified Alternative that would leave the pit open so that a water collection system could be installed in the underground workings to maintain a hydrologic sink preventing acid mine drainage from leaving the site. In regard to the North Area Pit, DEQ selected also selected the Agency Modified Alternative that provided for the capture of acid mine drainage by two dewatering wells installed adjacent to the pit; the pit would remain open to maintain the option of installing an in-pit sump in the event that one or both of the dewatering wells failed. In April of 2014, MEIC filed a complaint in the District Court for Jefferson County, challenging the reclamation alternative selected by DEQ for the North Area Pit. MEIC asserted that the selected reclamation alternative, which did not require backfill of the North Area Pit, resulted in: (1) an as applied violation of the Montana Constitution requiring all lands disturbed by the taking of natural resources to be reclaimed, and (2) a violation of the reclamation criteria set forth in the Metal Mine Reclamation Act. The parties filed motions for summary judgment. On February 4, 2015, the District Court granted DEQ's and Golden Sunlight Mine's motions. The District Court determined that MEIC was precluded from asserting that the Montana Constitution or the MMRA required backfill of the North Area Pit under the doctrine of issue preclusion. The District Court determined that the issue had previously been litigated to MEIC's detriment in MEIC v. DEQ, DV-08-10896 (5th Dist. June 30,

2011). The District Court also determined that the reclamation alternative selected by DEQ complied with the Metal Mine Reclamation Act. MEIC appealed the decision to the Montana Supreme Court.

On April 1, 2015, MEIC appealed the Jefferson County District Court's grant of summary judgment in favor of DEQ discussed above to the Montana Supreme Court. MEIC asserted that: (1) MEIC should not be barred from bringing its statutory and constitutional claims under the doctrine of issue preclusion, (2) the MMRA implementing the reclamation provisions of the Montana Constitution should be interpreted as requiring selection of the most effective reclamation alternative, and (3) if the MMRA does not require the most effective reclamation, then the MMRA is unconstitutional as applied to DEQ's selection of the reclamation alternative for the North Area Pit. The Montana Supreme Court issued an opinion on January 12, 2016, affirming the District Court. The Montana Supreme Court determined that the District Court did not err in determining MEIC was precluded from relitigating the issue of whether the Montana Constitution or the MMRA requires land disturbed by the taking of natural resources to be fully reclaimed to its previous condition. The Montana Supreme Court also determined that DEQ made a reasoned decision in selecting the Agency Modified Alternative under the criteria set forth in the MMRA. The Agency Modified Alternative resulted in reclamation of the North Area Pit to a condition: (1) of structural stability that would not be a threat to public safety or the environment, (2) that affords some utility to humans or the environment, (3) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands, and (4) that mitigates or prevents undesirable offsite environmental impacts. The Montana Supreme Court also concluded that the Agency Modified Alternative provided better assurances against ground water contamination than if the reclamation alternative requiring backfill of the North Area Pit.

2. JTL Group dba Knife River v. DEQ, Missoula County (State District Court, Lewis and Clark County)--On June 17, 2010, JTL filed a declaratory judgment action in state district court in Helena requesting a judgment that it has a valid permit for its Fort Missoula gravel pit. DEQ filed a counterclaim in which it contends that JTL had mined outside its permit boundary and seeking cessation of the operation and payment of a penalty. JTL then stipulated that it will no longer mine gravel from the pit. The parties filed cross motions for summary judgment that were denied by the Court in an order dated June 26, 2013. The parties are attempting to settle this matter.

3. MEIC et al v. Stone-Manning (U.S. 9th Circuit Court of Appeals). On April 17, 2012, MEIC filed suit against DEQ in the U.S. District Court for Montana under the citizen suit provision of the Surface Mining Control and Reclamation Act, which is the federal act requiring coal mine reclamation. DEQ's strip mine reclamation program has been approved under the federal act, and DEQ regulates coal mining in Montana in lieu of federal regulation. The plaintiffs alleged that DEQ has engaged in a pattern and practice of approving coal mine permits without appropriately determining that the proposed mine plan was designed to prevent damage to the hydrologic balance outside the permit area for eleven permits approved since 1995 and petitioned the Court to enjoin issuance of new coal mine operating permits. Opper (predecessor to Stone-Manning) filed motions to dismiss the lawsuit, arguing that it violated the Eleventh Amendment prohibition

against suits against states in federal court. In an order dated January 22, 2013, Judge Christiansen issued an order dismissing the lawsuit on Eleventh Amendment grounds and because MEIC's claims against the state were not ripe for review. MEIC appealed the matter to the 9th Circuit. On September 11, 2014, the Court of Appeals affirmed Judge Christiansen's dismissal of the case.

SOLID WASTE CASE

1. The Ranch Homeowners Assoc., et al. v.; Gallatin County; John Tubbs, DNRC; and Tracy Stone-Manning, DEQ—This case was filed on March 4, 2014, in the Montana Eighteenth Judicial District Court, Gallatin County. At the time the Complaint was filed, Ranch HOA was challenging what it presumed would be the “inevitable approval” of the Springhill Reserve Major Subdivision (Springhill) under the Sanitation in Subdivisions Act. Ranch HOA asserts that certain water usage restrictions were necessary to ensure that both subdivisions had access to an adequate supply of ground water. The Court suspended the scheduling order and issued a stay of the case on April 16, 2015. The intent of staying the proceedings was to allow the Court time to address the issues between Ranch HOA and Gallatin County. Ranch HOA stated that it might be able to dismiss the counts that pertain to DEQ following resolution of its issues with Gallatin County. As of February 16, 2016, both the County and Ranch HOA still have motions pending before the Court.

SUPERFUND/HAZARDOUS WASTE CASES

1. Silver Bow Creek Headwaters Coalition v. State (State District Court, Silver Bow County)— This is a declaratory judgment action regarding the correct and legal name of the channel that is currently used as part of Butte/Silver Bow's storm water collection system running from below the Berkeley Pit down through Butte to Blacktail Creek. The Coalition sought a judgment that the “legal name” of that channel is “Silver Bow Creek” and sought to prohibit the State from using the term “Metro Storm Drain” when referring to the channel. On August 21, 2015, Judge Newman granted summary judgment for the plaintiffs.

2. Grimes v. Sieben Ranch Co., DEQ, Stimson Lumber, and Geographic Investments Group (State District Court, Lewis and Clark County)—This case was filed on November 9, 2010. The Grimes are the owners of land near the site of the waste repository for mine tailings from the Mike Horse Mine and other areas of the Upper Blackfoot Mining Complex. The Grimes' claim against DEQ alleges that the DEQ's construction of the repository on a site (selected by the by United States Forest Service) near the Grimes' property will so adversely affect their property value that it constitutes a “taking” of their property. The matter was settled by DEQ purchasing the portion of the Grimes' property that is nearest to the repository. DEQ ownership of the property during construction is useful for the project and the property can later be sold to recoupment most or all of the purchase price

UNDERGROUND STORAGE TANK CASE

1. Summers, et al. v. Short Stop Service Station, et. al. v. O'Day Management, Inc. et al.-- This consolidated lawsuit arises out of a petroleum release ("Release 4800") from an underground storage tank ("UST") that was discovered on October 27, 2010, at Frank's Short Stop Service Station ("Short Stop") in Miles City. The plaintiffs filed their original complaint in this action on June 4, 2012, and filed a companion case on June 5, 2013. The Court consolidated the two cases in July, 2013. Plaintiffs filed their First Amended Complaint on or about April 7, 2014. Plaintiffs in this case have asserted various claims, including negligence and products liability, against a number of defendants, including Frank Ngo, the owner of Short Stop, O'Day Management, Inc. ("O'Day"), the tank manufacturer, Marketing Specialties, Inc. and the Steel Tank Institute ("STI"). Frank Ngo and Short Stop have filed cross-claims against O'Day, STI, and Underwriters Laboratories, Inc. ("UL"), asserting various claims, including products liability and breach of warranty.

On April 9, 2014, O'Day filed a third party complaint against DEQ, the regulatory agency responsible for overseeing leak prevention, detection and remediation of petroleum releases from USTs in Montana, and Marketing Specialties, Inc., the UST service provider hired by Frank Ngo and Short Stop. O'Day claims that DEQ was negligent for failing to require Frank Ngo and Short Stop to properly monitor, oversee, operate and maintain the leak detection system and the UST from which Release 4800 occurred. L

On December 12, 2014, DEQ filed a cross-claim against Frank Ngo and Short Stop to recover the costs incurred by DEQ to remediate Release 4800. A mediation is scheduled for February 29, 2016.

WATER QUALITY CASES

1. Gateway Village, LLC v. DEQ and Gallatin Gateway County Water and Sewer District (State District Court, Gallatin County)—This complaint was filed on September 27, 2013. The plaintiff is challenging DEQ's issuance of a groundwater permit to the Gallatin Gateway County Water and Sewer District. The plaintiff is a land developer with land adjacent to the property served by the District. The complaint alleges that DEQ violated the nondegradation provisions of the Water Quality Act; authorized trespass of wastewater onto the plaintiff's land; violated Gateway Village's right to a clean and healthful environment; issued clearly erroneous findings in issuing the permit; and

violated unspecified water quality rules. On December 29, 2014, the judge ruled that DEQ's findings were erroneous, that DEQ authorized unlawful trespass of wastewater onto the plaintiff's land, that DEQ did not take the required hard look at nondegradation requirements, and that the plaintiff is not entitled to an award of attorney fees. DEQ appealed the trespass ruling to the Montana Supreme Court, and the plaintiff appealed the attorney fee ruling. On September 29, 2015, the Supreme Court overturned the trespass ruling and upheld the denial of attorney fees.

2. MEIC and Sierra Club v. DEQ and Western Energy Company--Plaintiffs filed a complaint in the First Judicial District Court, Lewis and Clark County, on December 21, 2012, challenging DEQ's issuance of an MPDES permit for Western Energy Company's Rosebud Coal Mine. The complaint alleges that: (1) DEQ unlawfully reclassified C3 waters as ephemeral; (2) the MPDES permit does not protect designated beneficial uses for the receiving waters; (3) the MPDES permit authorizes discharges to an impaired receiving water without a TMDL; and (4) the MPDES permit does not require adequate monitoring. The parties have fully briefed cross motions for summary judgment. Oral argument was held April 22, 2013, and the parties are awaiting a decision.

3. Bitterrooters for Planning, Inc., MEIC, and Bitterroot River Protective Ass'n v. DEQ--Plaintiffs filed a complaint in the First Judicial District Court, Lewis and Clark County, on June 24, 2014, challenging DEQ's issuance of a Montana Ground Water Pollution Control System (MGWPCS) permit for the planned Grantsdale Addition subdivision in Ravalli County. The complaint alleges that DEQ violated the WQA by issuing the permit because: 1.) the permit violated the state nondegradation policy related to nitrogen discharges; and 2.) DEQ failed to consider cumulative impacts as required under DEQ's nondegradation rules. The parties have fully briefed cross motions for summary judgment, oral argument was held on September 28, 2015, and the parties are awaiting a decision.

4. Bitterrooters for Planning, Inc., and Bitterroot River Protective Ass'n v. DEQ and Stephen Wanderer and Georgia Filcher--Plaintiffs filed a complaint in the First Judicial District Court, Lewis and Clark County, on January 14, 2015, challenging DEQ's issuance of a Montana Ground Water Pollution Control System (MGWPCS) permit for a planned "box store" in Ravalli County. The complaint alleges DEQ acted unlawfully by issuing the permit because: (1) the permit violates the WQA's nondegradation policy related to nitrogen discharges; (2) DEQ failed to consider cumulative impacts as required under DEQ's nondegradation rules, (3) DEQ violated MEPA by using a checklist EA to evaluate potential environmental impacts related to issuance of the Permit and by not considering impacts arising from the commercial development; and (4) DEQ violated plaintiffs' right to participate prior to final agency decision guaranteed by Article II, Section 8 and right to know guaranteed by Article II, Section 9 of the Montana Constitution by not requiring the permit applicant to reveal the commercial entity associated with the Permit. The parties have fully briefed cross motions for summary

judgment, oral argument was held on January 26, 2016, and the parties are awaiting a decision.

5. Clark Fork Coalition, Missoula Valley Water Quality District, Missoula City/County Health Board & Confederated Salish and Kootenai Tribes (“CSKT”) v. DEQ (State District Court, Lewis and Clark County)--In October 2014, Plaintiffs filed suit seeking to declare DEQ’s March 2014 issuance of an MPDES permit to M2Green Redevelopment, LLC (“M2Green”) void. Plaintiffs alleged DEQ violated state and federal law in renewing the MPDES permit at the former Smurfit Stone Container Corporation’s paper mill site in Frenchtown. Although the MPDES permit issued to M2Green authorized a discharge with a greatly reduced pollutant load to the Clark Fork River and no longer authorized a paper mill discharge, Plaintiffs alleged that DEQ was required to begin permit termination proceedings in May of 2011 (when the Smurfit Stone Container Site was sold to M2Green). Plaintiffs also argued that M2Green’s plans to redevelop the site were too speculative and therefore DEQ’s decision to issue the permit was arbitrary and capricious. Finally, Plaintiffs argued that DEQ had failed to provide direct notice of the draft permit to CSKT and that the MPDES Permit should be declared void for that reason. The parties filed cross motions for summary judgment motions in 2015 and the District Court heard oral argument on these motions December 16, 2015. The matter is therefore submitted for decision.

ADMINISTRATIVE CASES

During this period, there were pending before the Board of Environmental Review 17 administrative cases challenging DEQ permitting actions. Eight of these actions challenged DEQ’s issuance of a permit, two challenged DEQ’s refusal to issue a permit or permit amendment, one challenged DEQ’s revocation of a permit, and six challenged permit conditions imposed by DEQ.

Attorney Fee Settlements Paid or to be Paid by DEQ

MEIC et al. v DEQ, Golden Sunlight Mines, Inc.--\$95,000.00

Cameron Springs, LLC v. DEQ, Opper—\$22,676.74

Three Way Mining, Inc. v. DEQ, Opper--\$9,394.00

NOG, LLC v. DEQ, Opper--\$9,584.39

Spanish Peaks Sand and Gravel, Inc. v. DEQ, Opper--\$14,754.24

Clark Fork Coalition et al. v. DEQ--\$13,000

McDonald v. DEQ--\$64,754.27

Silver Bow Creek Headwaters Coalition v. State of Montana--\$170,739.76

In the Matter of Amendment No. 3 to the Mining Permit for Bull Mountain Coal Mine--\$30,000

Monetary Settlements of Lawsuits and Claims Paid from March, 2006, to February, 2016*

Goldin, Reclamation Services Corp. v. DEQ, Spectrum Engineering--\$525,000

Chalinor v. DEQ--\$20,000

Liberty Cove, Inc. v. DEQ--\$100,000

McDonald v. DEQ--\$20,458.96

Red Cliff Estates Homeowners Association, et al. v. DEQ, et al.--\$2,500

Claim of Pablo Sewer District—\$18,107.27

*Does not include wrongful discharge or motor vehicle accident claims.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
LITIGATION SUMMARY (FEBRUARY 2014 – FEBRUARY 2016)

WATER RESOURCES LITIGATION

In the Matter Of Application No. 411-30025802 to Change Water Right No. 41L-72578 by City of Cut Bank, Cause No. DV-15-77, 9th Judicial District, Glacier County. Petition for Judicial Review filed by the Blackfeet Tribe challenging DNRC's jurisdiction to process and grant a change authorization for the place of storage for the City of Cut Bank's water reservation. This PJR is the result of a contested case hearing on the issue of jurisdiction following the 9th Judicial District Court's August 28, 2012, Order and Opinion remanding these proceeding to the DNRC in Cause No. DV-11-13. Following a contested case proceeding on remand, a Final Order determining DNRC had jurisdiction to process and grant the City's change application was issued on November 16, 2015. The Blackfeet Tribe filed a petition for judicial review on December 15, 2015. A briefing schedule has not been entered by the D.Ct.

In the Matter of Applications to Change Water Right No. 41H-30018777 by David and Cora Rall, Cause No. DV-08-704C, 18th Judicial District, Gallatin County. Amelia Kelly and Steve Kelly are intervenors. Petition for Judicial Review challenges DNRC's denial of an application for a change authorization for multiple water rights. Multiple motions were filed and are still pending and awaiting action of the Court. No scheduling order is in place and no briefing on the merits of the PJR has occurred.

Atlantis Water Solutions, LLC v. DNRC, BDV 2015 -486, 1st Judicial District, Lewis & Clark County. Petition for Judicial Review filed on July 1, 2015, challenging DNRC's denial of water marketing permit based upon the § 85-2-310(9), MCA, marketing criteria. This matter is currently being briefed and a hearing is scheduled for February 24, 2016.

Clark Fork Coalition, et. al v. DNRC, et. al, BDV– 2010- 874, 1st Judicial District, Lewis and Clark County. Petition for Judicial review challenging DNRC's declaratory ruling that the definition of "combined appropriation" contained in Admin. Rule M. 36.12.101(13)(1993), was valid and consistent with §85-2-306(3)(a)(iii), MCA. On October 17, 2014, D.Ct ruled that DNRC combined appropriation definition was invalid and reinstated DNRC's previous rule defining combined appropriation. The Montana Well Drillers, Montana Association of Realtors and Montana Building Industry Association appealed from the district court's order and that appeal is proceeding as Montana Supreme Court Case No. DA 14-0813. DNRC is not a party to that appeal.

On June 12, 2015, the D.Ct. ruled that the Clark Fork Coalition was entitled to attorney fees. Clark Fork Coalition claimed \$229,465.00 in attorney fees and costs. In October of 2015, the D.Ct. entered a Judgment and Consent Decree awarding CFC \$100,000.00 for attorney fees. Those fees are only payable if the D.Ct.'s October 17, 2014 is affirmed and the D.Ct.'s June 12, 2015 order granting attorney fees are affirmed on appeal.

In December of 2015, DNRC filed an appeal challenging the CFC's entitlement to attorney fees which is pending as Montana Supreme Court Case No. DA 15-0746. That appeal is currently stayed until 60 days after remittitur in Montana Supreme Court Case No. DA 14-0813.

Ranch Homeowners Association v. DNRC, et al, DV 14-186A, 18th Judicial District, Gallatin County. This matter was filed on March 15, 2014. Counts I through IV challenge Gallatin County's approval of the Springhill Reserve Major Subdivision on numerous grounds. Count V asserts that the DNRC's definition of "combined appropriation" is arbitrary, capricious, and not in accordance with the law. Count VI alleges that DEQ is required by statute and rule to place restrictions on the proposed subdivision. Plaintiffs have asserted entitlement to attorney fees. This matter was filed before the DNRC's rule defining "combined appropriation" was determined to be invalid by CFC v. DNRC and has been stayed until 30 days after resolution of Appeal in Montana Supreme Court Case No. DA 14-0813.

TRUST LAND MANAGEMENT LITIGATION

Gallatin County v. State of Montana, Cause No. DV-12-707A, 18th Judicial District, Gallatin County. Complaint for Declaratory Judgment concerning the ownership and jurisdiction of the Bear Canyon Road upon State trust lands and a Tort Claim for intentional and negligent trespass. Gallatin County v. Montana has been consolidated with Kelley v. Bunker et al. and State of Montana, Cause No. DV-12-863B, Mont. Eighteenth Judicial District Court, Gallatin County (Complaint to quiet title to the Cooper Flume). There is a consolidated caption with a new case number: "12-707AX." Summary judgment has been briefed. All proceeding are stayed until April 6, 2016, to allow the parties to explore potential resolution of the case.

Salmond Ranch Co., Inc. v. Known Persons v. Montana DNRC and State Board of Land Commissioners, Cause No. DV-12-45, 9th Judicial District, Teton County. Quiet title action to determine whether there is a route of public access as granted by Frank Salmond across Sections 2, 3, and 10, in Township 23 North, Range 8 West, MPM, in Teton County, Montana. Resolved by Settlement Agreement approved by the Land Board on July 20, 2015. The Settlement Agreement resulted in Public Access to State land. DNRC agreed to reimburse Salmond Ranch up to \$15,000 for the construction of a new access road and parking area

Montrust v. State of Montana (Montrust III), Cause No. BDV-2012-39, 1st Judicial District, Lewis and Clark County. Constitutional challenge to SB 409, Rule "3B" rentals, and cabin site rental rates under SB 409. On April 5, 2012 the Court issued a Preliminary Injunction enjoining the implementation of SB 409 and the SB 409 administrative rules. The DNRC entered a settlement agreement to make rules and pay plaintiffs' attorney fees in the amount of \$152,859.08, which was approved by the Land Board on October 19, 2015.

Revocable Living Trust of Stip v. State of Montana, Cause No. 11-110, 7th Judicial District, Richland County. Quiet title action concerning three islands within a drilling and spacing unit composed of Sections 17 and 20 in Township 22 North, Range 59 East, MPM in Richland County, Montana. XTO is holding oil & gas royalties in suspense pending the outcome of this quiet title action to define the ownership of several parcels of land. A request for scheduling conference was filed on January 26, 2016.

Graham v. State, et al., DV-05-191C, 11th Judicial District, Flathead County. Quiet title action regarding artificially avulsed land in Whitefish River. Summary Judgment reversed by Supreme Court for evidentiary hearing. A bench trial was held in February 2014 after which the D.Ct. ruled in favor of Graham.

Public Lands/Water Access Association, Inc. v. Robbins, et al., Cause No. DV-14-2012-0085DK, Mont. 10th Judicial District, Fergus County. A Suit for Declaratory ruling on the legal status of Maybee Road in Fergus County, Montana. Received First Amended Complaint on August 20, 2015.

Dolphay v. DNRC, Cause No. DV-15-033, 12th Judicial District Court, Hill County. Complaint to enforce common boundary fencing. Additional fencing has been installed and case was voluntarily dismissed in July of 2015.

Pachek v. Montana, et. al, BDV-14-320, 8th Judicial District, Cascade County. Quiet title action filed on for property located in Cascade County. Dismissed without prejudice on October 29, 2014.

Doan v. Sunny Slope Grazing Association, BDV-2012-702, Mont. 1st Judic. Distr. Ct., Lewis and Clark County. Doan has resolved access issues with Sunny Slope. Doan has waived any monetary damages against the State of Montana. Dismissed with prejudice on April 13, 2015.

FORESTRY/FIRE MANAGEMENT LITIGATION

DNRC v. Timothy D. Ray, DV-04-57, Third Judicial District Court, Powell County. Streamside Management Zone fine of roughly \$50,000, affirmed by a hearing examiner. Complaint filed. Awaiting service of Complaint on Mr. Ray. Tim Ray has moved from Deer Lodge to Spokane or Idaho, and a decision will be made as to what further action will be taken.

DNRC v. Lynn Davis, DV-11-1023, Missoula County. Fire suppression costs for two fires. DNRC settled on one of the fires and are receiving payment. Other fire issue is pending.

State of Montana, DNRC v. Robert Fitte, CDV 2014-503, First Judicial District, (Corral Fire), The Department filed a complaint under this Cause Number on June 23, 2014. This Complaint has not been served. The disposition of this matter is expected to be a dismissal by DNRC after having gained intervenor party status in a companion interpleader case.

Mountain West Farm Bureau Mutual Insurance Company v. Robert S. Fitte v. Intervenors (DNRC et al.), ADV-2013-240, First Judicial District, (Corral Fire interpleader action). DNRC is an intervening party for purposes of its statutory right to claim reimbursable costs for fire suppression. The balance of the intervenor party roster and unrepresented non-parties are casualty loss claimants. The present status is the recent appointment of a Special Master who will begin the process set out by the Court's January 25, 2016 Order. The pool of available funds is \$1.8 million less any common fund attorney's fees that may be awarded in the future in this case stemming from another suit now consolidated in this matter.

FEDERAL LITIGATION

Defenders of Wildlife, et al. v. United States, CV-15-14-GF-BMM, US District Court Montana. Challenge and request for injunction related to United States chosen alternative for pallid sturgeon passage at Intake Dam on Yellowstone River. DNRC co-filed an amicus brief in opposition to request for injunction. Injunction granted September 5, 2015.

Native Ecosystems Council, et al. v. Krueger, CV 14-00196-DLC, US Dist. Court Montana. Litigation arising out of the “Chessman Reservoir/Red Mountain Flume Project” in the Helena/Rimini area. DNRC co-filed an amicus brief related to the Project’s fire hazard-reduction component and in opposition to the plaintiff’s request for an injunction. Injunction denied.

Friends of the Wild Swan, et al. v. Austin et al., CV 11-125-M-DWM, US Dist. Court Montana (Friends of the Wild Swan, et al. v. Garcia et al., Ninth Cir. Court of Appeals No. 14-35463). Litigation arising out of the “Colt Summit Project” north of Seeley Lake. DNRC co-filed an amicus brief in both the district court and appellate proceedings related to the fire hazard-reduction component of the litigation.

Friends of the Wild Swan et al v. Jewell et al., CV-13-61-M-DWM, United State District Court for the District of Montana, Missoula. Friends of the Wild Swan and Montana Environmental Information Center filed a complaint for declaratory and injunctive relief against the US Fish and Wildlife Service on March 18, 2013. The Complaint challenged USFWS’ approval of the Habitat Conservation Plan prepared by the DNRC for forest management activities on state trust lands in western Montana, and the Service’s issuance of an incidental take permit for these activities. The case was resolved on summary judgment by Judge Molloy (in favor of the federal government and the state on all issues but one), after which all parties appealed to the Ninth Circuit Court of Appeals. The parties then entered into settlement discussions within the Ninth Circuit’s appellate settlement system and after several months of discussions, a settlement was reached. That settlement was approved by the Land Board in August 2015 and, as a part of the settlement, DNRC initiated rulemaking that will be completed no later than April 9, 2016.

ATTORNEY FEES/DAMAGES IN NATURAL RESOURCE RELATED LITIGATION FROM FEBRUARY 2006 – FEBRUARY 2016

Bostwick v. DNRC, DV-07-917a, 18th Judicial District, Gallatin County. In October of 2008 DNRC settled attorney fee and costs award of \$71,829.11 for \$10,000.00.

Montrust v. State of Montana (Montrust III), Cause No. BDV-2012-39, 1st Judicial District, Lewis and Clark County. The DNRC entered a settlement agreement to pay plaintiffs’ attorney fees in the amount of \$152,859.08, which was approved by the Land Board on October 19, 2015.

Weaver v. State, DV-02025 3rd Judicial District, Powell County. Jury verdict for \$730,000.00 related to negligent fire suppression on the Ryan Gulch Fire in 2000. Affirmed by the Montana Supreme Court in DA-12-0506.