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**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY**

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| BOSTWICK PROPERTIES, INC.,<br><br>Petitioner,<br><br>vs.<br><br>MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,<br><br>Respondent. | Cause No. DV-07-917AX<br>Hon. John C. Brown<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW AND WRIT OF MANDATE AND ORDER** |

## INTRODUCTION

Before this Court is an action for a writ of mandamus arising out of Montana's Water Use Act, MCA §§ 85-2-101 et seq. This Court held a show cause hearing in this matter on January 14, 2008 ("Show Cause Hearing"). Petitioner Bostwick Properties, Inc. ("Bostwick") appeared through its counsel, Brian Gallik, Trent Gardner and Matt Williams. Respondent Montana Department of Natural Resources and Conservation ("DNRC") appeared through its counsel, Ann Yates. Several water right holders and an amicus curaie group, through counsel, also appeared at the hearing for the purpose of seeking to intervene in this action. The Court permitted the amicus curaie group, through its counsel, David Weaver, to make a statement. The Court advised the parties that the Motion to Intervene, filed on January 11, 2008 by West Gallatin Canal Company, Montana River Action, Rosie Faust and Kent Brodie ("Motion to Intervene") was taken under advisement.

Also before this Court is Petitioner Bostwick Properties, Inc.'s ("Bostwick") *Amended, Ex Parte Application for Writ of Supervisory Control and/or Alternative Writ of Mandate, and/or*

*Alternative Writ of Prohibition, and/or Application For Immediate Review of Agency Action Under MCA§ 2-4-701 and For Temporary Restraining Order Pending Hearing on Application For Preliminary Injunction*, filed on February 8, 2008 ("Amended Application").

On February 11, 2008, before this Court had the opportunity to rule on the issues presented at the January 14, 2008 show cause hearing, this Court issued its *Order Re: Petitioner's Amended Application and Order Requiring Respondent's Answer*. Therein, this Court: 1) concluded that Bostwick's requests for supervisory control and temporary and preliminary injunctive relief, as presented in Bostwick's Amended Application, were moot; 2) reserved its rulings on Bostwick's requests for the issuance of a writ of prohibition and writ of mandate; and 3) ordered Respondent DNRC to file its Answer to Bostwick's requests for a writ of prohibition and writ of mandate, including a specific explanation as to why the DNRC believes Bostwick is not entitled to a contested case hearing, within 20 days. The DNRC fax-filed its response brief on March 3, 2008. Bostwick filed a reply brief on March 20, 2008[1].

These matters have been fully briefed and are ripe for adjudication. Based upon the affidavits, testimony and other evidence in the record, this Court now issues the following:

**FINDINGS OF FACT**

1. Bostwick is developing a subdivision called Lazy J South ("LJS"), located near Big Sky, Montana. Affidavit of Taylor, ¶ 2. Bostwick's President is James Taylor. *Id.* at ¶ 1. Bostwick is the applicant for the water permit subject to this action.

2. The DNRC is an administrative agency of the State of Montana, created under Title 2, chapter 15, part 33 of the Montana Code Annotated. § 85-2-102(10), MCA. Subject to and consistent with the limitations of law as promulgated by the Legislature, it is responsible for, among other things, the enforcement and administration of the statutes governing surface and groundwater, including the issuance of permits for groundwater. § 85-2-112(1), MCA (enforcement and administration); § 85-2-112(2), MCA (prescribe procedures and requirements "<u>not inconsistent</u> with

[1] The DNRC apparently objected to Bostwick filing a reply brief.

the requirements of this chapter") (emphasis added).

3. Bostwick obtained preliminary plat approval from Gallatin County for its Lazy J South (LJS) subdivision in February, 2005. Taylor Aff., ¶ 2. Bostwick seeks to develop a municipal water system for LJS. Trousil Affidavit, ¶ 1 & Exhibit A, attached thereto at 1.

4. Bostwick seeks to obtain water for its municipal system from a very deep aquifer, located approximately 1300 feet below the surface of the earth. Trousil Aff., ¶ 2 & Exhibit A, attached thereto at pp. 1 & 14. The aquifer consists of water in fractures in bedrock. *Id.* & Exhibit A at pp. 4-9. According to Bostwick's hydrologists, Bob Trousil and Dr. Michael Nicklin, bedrock aquifers are more difficult to assess, because the fractures are not by their nature homogenous, and consequently many of the analytical constructs available to hydrogeologists do not apply. Trousil Aff., ¶ 2 & Exhibit A, p. 4; Nicklin Aff., ¶ 3. Consequently, prior to submitting its Application for a permit from the DNRC, Bostwick's hydrologists devised an extensive testing program, both to assess the amounts of water available, and the effects of the use of this water on other appropriators. Trousil Aff., ¶ 2; Exhibit A to Trousil Aff., pp 16-24.

5. Prior to submitting an application for a water permit, Bostwick, through its hydrologists, tested the aquifer by drilling a well to an approximate depth of 1300 feet below the surface of the earth. Trousil Aff., ¶ 3 & Exhibit A attached thereto. The water encountered was at significantly high pressures. *Id.* After casing the well, Bostwick's consultants capped and sealed it. *Id.* The well cap was fitted with a pressure gauge in order to determine the actual pressure of the water when allowed to fully recover. *Id.* Bostwick installed pressure transducers to monitor water levels when the aquifer was pumped. *Id.* These instruments provided a continuous record of water level drawdown during pumping and recovery when the pumping ceases. *Id.* Bostwick's hydrologists tested the aquifer for 48 hours prior to pumping, monitored draw downs over 72 hours of pumping, and monitored for an additional 48 hours after pumping. *Id.* *See also* Exhibit A at pp. 16-24. In addition, Bostwick's experts monitored with transducers water levels in a number of additional groundwater wells and surface water sites. *Id.* These results were used to analyze aquifer

properties. *Id.*

6. Based on the data secured from the aquifer test described in Finding of Fact ("FOF") No. 5, Bostwick's hydrologist, Mr. Trousil, met with DNRC hydrogeologists Bill Uthman and Russell Levens on November 14, 2005, to solicit their input on the quality and extensiveness of the information secured by this aquifer test. Trousil Aff., ¶ 4.

7. On December 22, 2005, Bostwick filed its initial application with the DNRC for a permit to appropriate water from the above-described aquifer. *See id.,* ¶ 5; FOF No. 5.

8. After Bostwick filed its initial application with the DNRC on December 22, 2005, on April 3, 2006, the DNRC sent Bostwick and its hydrologists a letter identifying deficiencies in Bostwick's application. Trousil Aff., ¶ 6. Bostwick, through its experts, responded with additional information on April 27, 2006. *Id.*

9. On May 3, 2006, DNRC hydrogeologist Bill Uthman contacted Bostwick's hydrologist, Bob Trousil, regarding the technical hydrogeologic report Trousil prepared for the Bostwick application. *Id.*, ¶ 7. Mr. Trousil revised the format of the report based on Mr. Uthman's comments, and submitted it to the DNRC on June 20, 2006. *Id.*

10. On July 7, 2006, the DNRC terminated Bostwick's application, based on its belief that Bostwick had taken too long (over 90 days) to submit the application it deemed necessary. *Id.*, ¶ 8.

11. In early July of 2006, Mr. Trousil received additional comments from Mr. Uthman on Bostwick's technical hydrogeologic report. *Id.*, ¶ 9. Bostwick, through its hydrologists, responded to those comments on August 30, 2006. *Id.*

12. On November 8, 2006, Bostwick submitted to Mr. Uthman another draft of its technical hydrogeologic report. *Id.*, ¶ 10; Exhibit A to Trousil Aff.

13. On November 30, 2006, Bostwick filed another Application with the DNRC for a new water use permit to appropriate water from the same aquifer for the same use it had previously

proposed in the first application. *Id.*, ¶ 11.

14. On January 29, 2007, the DNRC sent Bostwick a letter identifying technical deficiencies with the application. *Id.*, ¶ 12. Bostwick submitted additional information addressing those deficiencies on February 2, 2007. *Id.*

15. Based on a phone conversation with the DNRC, Mr. Trousil provided a further explanation of technical issues under Bostwick's application on February 6, 2007. *Id.* at ¶ 13.

16. On February 13, 2007, the DNRC issued a document directing that public notice be given of Bostwick's application, thereby confirming that the application was "correct and complete." *Id.*, ¶ 14. When Mr. Trousil reviewed the file, however, he noticed comments from the DNRC that were inaccurate, so he advised the DNRC of its misapprehension of certain specifics in its proposed use on February 20, 2007. *Id.*

17. Notice of Bostwick's Application, pursuant to § 85-2-307, MCA, was published on February 20, 2007, providing an objection period of February 20, 2007 through March 22, 2007. Petition, ¶ 7.

18. Bostwick received two timely objections to its application --- from Department of Fish, Wildlife, and Parks ("FWP"), and from Montana Trout Unlimited ("TU"). *Id.*, ¶ 15. Both objections were based on concerns of potential depletions or reductions in flow to instream flow needs in the Gallatin that may arise from the proposed use. *Id.* Mr. Trousil worked with Bostwick's attorney to identify the data he had indicating that this was a very tightly confined groundwater system. *Id.* Bostwick settled the only objections to its application. *Id.*

19. Bostwick sent notice to the DNRC on May 17, 2007, via its attorney, Matthew Williams, that the objections were withdrawn and further requested that final processing of the Application be completed. Petition, ¶ 8.

20. On July 18, 2007, Mr. Trousil received a second "Application Review Form" from the DNRC. Trousil Aff., ¶ 16. While Mr. Trousil thought that the settlement of the objections had

resolved matters, at the direction of Bostwick's attorney, Mr. Trousil prepared additional analyses with Dr. Michael Nicklin relating to the groundwater system. *Id.* Attached as Exhibits B and C to Mr. Trousil's affidavit are the additional technical memoranda submitted by Mr. Trousil and Dr. Nicklin, to the DNRC relating to the groundwater system in July, 2007.

21. By the middle of August, 2007, more than 180 days had elapsed following the publication of Bostwick's application for a water right and the DNRC had taken no action on Bostwick's Application. Trousil Aff., ¶ 18; Taylor Aff. In addition, the DNRC did not extend the mandatory time limits by "not more than 60 days" although it had the authority to do so. Indeed, the DNRC admitted, through counsel, at the Show Cause Hearing that such notice should have been issued: "Should we have sent some sort of formal notice in the 60-day deadline? We should have." Partial Transcript of Proceedings, p. 15, lines 7-9. That notice would have required the DNRC to advise Bostwick of the reasons for the extension. § 85-2-310(1), MCA ("If the department orders the time extended . . . it shall service notice of the extension and the reasons for the extension . . . upon the applicant and each person who has filed an objection . . . .").

22. Based on the above evidence and findings, this Court finds that the DNRC failed to provide Bostwick the opportunity for a hearing within 180 days of the publication of the notice of application for Bostwick's water right as required by law. This Court further finds that the DNRC provided no formal notice of any objections to Bostwick or the objectors of its determination that additional time was needed, or the reason for that extension of time. *See also*, Partial Transcript of Proceedings, App. A., p. 25, lines 11-21.

23. At the Show Cause Hearing, the Department acknowledged that aside from its claim that the application was "complex," there were no other reasons why the Agency failed to act, and Bostwick was not responsible for any delay. *See* Partial Transcript of hearing, App. A, at pp. 25-26.

24. Since the time Bostwick filed its first application for this use on December 22, 2005, the DNRC has had all the data Bostwick secured on this aquifer, and its analysis of amounts of

water available from that aquifer, together with Bostwick's assessment of the effects of its proposed use on other appropriators. Trousil Aff., ¶ 18. While Bostwick's experts have explained to the DNRC their analysis in more detail from time to time, the substance of their opinions and the explanation of their methodology did not change. *Id.*

25. Based on the above evidence and findings, this Court finds that the 180 day deadline with respect to action on Bostwick's permit expired in August, 2007, despite requests from Bostwick that action be taken. *See* Taylor Affidavit, ¶ 6.

26. In November, 2007, Bostwick learned that the DNRC, on or about November 5, 2007, granted a water permit (Beneficial Water Use Permit 41h-30027281) for an underground well in the same basin for the Yellowstone Mountain Club. *See* Exhibit 2 to Bostwick's January 11, 2008 Brief. According to Dr. Nicklin, who reviewed the Yellowstone Club water permit file, as a hydrogeologic matter, there is no basis for distinguishing the proposed use for the Yellowstone Club and Bostwick, Nicklin Aff., ¶ 5.

27. On July 23, 2007, the Yellowstone Mountain Club, through counsel, sent a letter to the DNRC with documents evidencing the completion of the public notice portion of the Yellowstone Club's Application for a groundwater permit (Beneficial Water Use Permit 41h-30027281) on June 27, 2007. *See*, Exhibit 3 to Bostwick's Brief in Opposition to Motion to Quash; and Affidavit of Nicklin, Exhibit 4. The DNRC granted the Yellowstone Mountain Club's permit in November, 2007 – well within the statutory deadlines that apply to applications following publication of the required notice.

52. According to Dr. Nicklin, who reviewed the hydrogeologic information submitted with an Application for Beneficial Water Use Permit 41h-30027281 by the Yellowstone Mountain Club, together with an assessment of that information by the DNRC's hydrogeologist Russell Levens, the aquifers involved with Yellowstone Mountain Club's proposed appropriation are bedrock aquifers, meaning that the water available in the aquifer is found in various fractures and strata within bedrock. Exhibit 4 (Nicklin Aff.), ¶ 3. Dr. Nicklin testified that the analysis of these

types of aquifers virtually always has more uncertainty than other types of aquifers, because the water-bearing materials are not homogenous and consequently many of the hydrogeologic constructs can not be employed to meaningfully quantify their parameters. *Id.*

28. With respect to Bostwick and the Yellowstone Mountain Club's applications for groundwater, Dr. Nicklin further testified that it is a basic hydrogeologic principle that all groundwater is ultimately tributary to surface water. *Id.*, ¶ 4. He further testified that with fractured bedrock aquifers it can be virtually impossible to determine when, where, and at what rates such groundwater infiltrates surface streams. *Id.*

29. In Dr. Nicklin's opinion, based upon his experience, and his review of the Yellowstone Club Application, and his extensive work on Bostwick's Application, there is no basis for suggesting that the water within the bedrock aquifers that the Yellowstone Mountain Club intends to appropriate is less likely to flow into the Gallatin than the water within the bedrock aquifer that Bostwick intends to appropriate. *Id.*, at ¶ 5. In his expert opinion, as a hydrogeologic matter, there is no basis for distinguishing the proposed use for the Yellowstone Club and Bostwick.

30. This Court accepts Dr. Nicklin's testimony in full.

31. On December 7, 2007, more than **280 days** after publication of Bostwick's notice of its Application, Bostwick initiated this present action by filing an Application For Alternative Writ of Mandate.

32. On December 11, 2007, this Court issued an Alternative Writ of Mandate, directing the DNRC to show cause why the permit should not be issued to Bostwick, and setting the Show Cause Hearing for January 14, 2008.

33. On December 17, 2007, the DNRC rendered its Statement of Opinion denying

Bostwick's application for a water permit. *See* Exhibit C to DNRC's Motion to Quash, dated December 24, 2007.

34. On December 24, 2007, the DNRC filed a motion to quash the Alternative Writ, dismiss the writ and vacate the Show Cause Hearing. DNRC contended in its motion that the Alternative Writ of Mandate, in light of DNRC's December 17, 2007 Statement of Opinion denying Bostwick's application, is moot. On January 11, 2007 Bostwick filed it Brief in Opposition, together with the Affidavits of Mr. Trousil, Dr. Nicklin and supplied the Court with evidence regarding the Department's approval of the Yellowstone Club's groundwater application.

35. The DNRC's issuance of the December 17, 2007 Statement of Opinion was the first time Bostwick learned that the DNRC did not agree with its assessment of the impacts of this use on Gallatin River appropriators. Trousil Aff. ¶ 18. The DNRC filed this Statement, even though objections were timely filed against the application.

36. A basis for the DNRC's objection was the alleged failure of Bostwick to "prove by a preponderance of the evidence that there is no connection between the proposed appropriation and the West Fork of the West Gallatin River and the West Gallatin River and that depletions to the Rivers would not occur." This objection is contrary, however, to the DNRC's Finding of Fact, made <u>less than 2 months earlier</u>, with respect to the Yellowstone Club's Application for a ground water permit, located in the same closed basin and in the same type of fractured geologic formation. *See* Permit Application to Criteria Assessment for Yellowstone Mountain Club's permit application, dated November 5, 2007, attached as Exhibit 2 to Bostwick's January 11, 2007 Brief in Opposition.

37. This Court held the Show Cause Hearing on January 14, 2008.

38. Several water right holders and an amicus curiae group sought to intervene in this

action in various capacities. This Court allowed the participation of the amicus group at the Show Cause Hearing and took the Motion to Intervene under advisement.

39. Based on FOF ¶¶ 17-19, this Court finds that none of these entities, whom seek to intervene, filed objections to Bostwick's permit within the time allowed by law.

40. Any factual findings contained in the following Conclusions of Law are hereby incorporated herein.

Based on the foregoing Findings of Fact, the Court draws the following Conclusions of Law:

## III.

## CONCLUSIONS OF LAW

1. Any Conclusions of Law contained in the foregoing Findings of Fact are hereby incorporated herein.

2. The procedure adopted by the Legislature for appropriations of water, including groundwater, is set forth in Title 85, Chapter 2, Part 3 of the Montana Code Annotated.

3. Section 85-2-302, MCA, sets forth the requirements for applications for a water permit. An applicant for a water permit "shall submit a correct and complete application." § 85-2-302(4), MCA. The DNRC determines whether and an application is "correct and complete." § 85-2-302, MCA (The department "shall adopt rules that are necessary to determine whether or not an application is correct and complete . . . .").

4. By statute, "correct and complete" means that the information required to be submitted conforms to the standard of *substantial credible information* and that all of the necessary parts of the form requiring the information have been filled in with the required information." § 85-2-102(8), MCA (emphasis added).

5. The term "substantial credible information is, in turn, defined by statute as follows: "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information." § 85-2-102(22), MCA (emphasis added).

6. The rules governing the DNRC's determination of whether an application is "correct and complete" are based upon the same statutory factors used by the DNRC in deciding whether to ultimately issue a water permit. *See* § 85-2-302(2), MCA ("The department shall adopt rules that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit under this part.").

7. The "provisions applicable to the issuance of a permit," which are also used as a basis for determining whether an application is "correct and complete," are found in § 85-2-311, MCA. This statute, titled "criteria for issuance of a permit," provides as follows:

> (1) [E]xcept as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:
>
> (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
>
> (ii) water can be reasonably considered legally available . . . in the amount requested based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
>
> (A) identification of physical water availability;
>
> (B) identification of existing legal demands on the source of supply through the area of potential impact by the proposed use;
>
> (C) analysis of the evidence on physically water availability and the existing legal demands including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
>
> (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit or a state water reservation will not be adversely

affected. . . .

(c) The proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest in the property . . . .

(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 permit holder to satisfy effluent limitations of a permit . . . will not be adversely affected.

§ 85-2-311(1), MCA (referred to herein as the "311 criteria"). *See also*, § 85-2-342, MCA (regarding basin closure issues).

8. Thus, before the DNRC makes a determination that an application is "correct and complete," it must find, after consideration of the same factors used to ultimately issue a permit, that the application contains "substantial probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested" – i.e. issuance of the requested permit. (emphasis added).

9. The statutes impose deadlines by which the DNRC must act on applications. First, the DNRC has **180 days** to review an application in connect with the Section 311 criteria and determine if the application is "correct and complete." § 85-2-302(5), MCA. If the DNRC does not notify the applicant of any defects within 180 days of submission, the application "**must be treated as a correct and complete application.**" § 85-2-302(5), MCA (emphasis added).

10. If the DNRC determines that the application is defective, it must advise the applicant of the defect(s), and the applicant has certain time periods by which it must correct or complete the application. § 85-2-302(6), MCA. An application not corrected or completed within 90 days from the date of notification of the defects is terminated. § 85-2-302(7), MCA.

11. Once the DNRC determines that an application is "correct and complete," in light

of the Section 311 criteria, it "shall prepare a notice containing the facts pertinent to the application and shall publish notice" in a newspaper of general circulation in the area of the source." § 85-2-307(1)(a), MCA. It "shall also serve the notice by first-class mail . . ." upon prior appropriators who may be affected by the proposed appropriation; purchasers under a contract for deed that may be affected by the application; and any public agency that has reserved waters in the source under § 85-2-316, MCA. § 85-2-307(1)(b), MCA. That notice must state that by a date certain (not less than 15 days or more than 60 days after the date of publication) persons may file with the DNRC written objections to the application. § 85-2-307(3), MCA.

12. Following publication of notice of the application, the agency's subsequent actions, and the deadlines for those actions, are governed by whether objections are filed against the application.

13. Upon expiration of the maximum 60 day deadline for filing objections, and *if no objections have been filed against the application*, but the DNRC believes the application should be denied, or approved in a modified form, the DNRC has 60 days from the deadline for filing objections (or a total of 120 days after publication of notice of the application) to file and serve upon the applicant its "statement of opinion," together with its reasons why the application should be denied or modified. *See* MCA §§ 85-2-310(1) & (3). In making this decision, the DNRC relies upon the same statute used to determine that the application was "correct and complete."

14. The statutory authority for an agency's statement of opinion, 85-2-310(3), MCA, states that the DNRC may issue a statement of opinion only if no objections are filed against the application:

> ***If an objection is not filed*** against the application, but the department is of the opinion that the application should be denied or approved in a modified form, or upon terms, conditions or limitations specified by it, *the department shall prepare a statement of its opinion and its reasons for the opinion. . . .*

*Id.* (Emphasis added). As such, the applicable statutes do not grant the DNRC authority to issue a statement of opinion if objections are timely filed.

15. If no objections are filed, and the DNRC is thereby authorized by law to prepare a statement of opinion and its reasons for the opinion, and determines a statement of opinion is appropriate, § 85-2-310(1), MCA, requires that the DNRC prepare and serve upon the applicant its statement of opinion, and the reasons for that opinion, within 120 days after the last notice of application was published (i.e. 60 days after the deadline for receipt of objections to the permit):

> Action on application for permit . . . . **(1) The department shall grant, deny, or condition an application for a permit** or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and **within 180 days** if a hearing is held or objections have been received.

(Emphasis added).

16. If objections are timely filed, the DNRC's statutory authority is governed by a different statute. Upon the filing of a "correct and complete" objection, the DNRC "shall hold a contested case hearing . . . on the objection within 60 days from the date set by the department for the filing of objections . . ." § 85-2-309(1), MCA, unless the applicant and objector(s) settle the objection(s) outside of litigation.

17. Whatever route the application takes through the foregoing process – objection or no objection -- the DNRC must ultimately decide, *within the time allowed by law*, whether the permit should issue. To that end, the DRNC bases its decision on the same statutory factors used to determine that the application is "correct and complete" – §§ 85-2-311, and -343, MCA.

18. The statute makes clear that the agency "shall" take "action on [the] application for permit" within 120 days of notice of publication of the application if no objections are filed and within 180 days if objections are filed. If the DNRC determines that the application is "extraordinary," it has the authority to extend the foregoing deadlines "*[b]y not more than 60 days* . . . ."

> Action on application for permit . . . . **(1) The department shall grant, deny, or condition an application for a permit** or change in appropriation right in whole

> or in part within 120 days after the last date of publication of the notice of application if no objections have been received and **within 180 days** if a hearing is held or objections have been received. However, in either case [objections or no objections] the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended ***by not more than 60 days upon order of the department***. If the department orders the time extended, it shall serve notice of the extension and the reasons for the extension by first class mail upon the applicant and each person who has filed an objection . . . .

§ 85-2-310(1), MCA (emphasis added).

19. Finally, any permit issued as a result of this process is provisional and junior in time to all prior water rights. This is true regardless of whether the prior appropriators choose to exercise their statutory right to file an objection to the application. Those existing senior water right holders have specific statutory remedies against the junior water right holder for interference with their water, if it occurs. *See*, § 85-2-312(1)(a), MCA ("A permit must be issued subject to existing rights and any final determination of those rights made under this chapter"); § 85-2-401(1), MCA ("As between appropriators, the first in time is the first in right").

20. Moreover, the statutes at issue recognize that "[a] permit issued prior to a final determination of existing water rights is provisional and is subject to that final determination. Upon petition, the amount of the appropriation granted in a provisional permit must be reduced, modified, or revoked by the department following a show cause hearing in which it is determined that reduction, modification or revocation is necessary to protect and guarantee existing water rights determined in the final decree in the affected basin or subbasin." § 85-2-313, MCA.

21. Any action or inaction of the DNRC that results in the confirmation of a new water use permit cannot affect the rights of more senior users. Under § 85-2-401, MCA, the priority date of any new water use permit is the date upon which the application is filed, and the fundamental rule remains first in time, first in right. Moreover, the rule of priority is now an incident to the property rights arising in appropriations, *see Mettler v. Ames Realty* (1921), 61 Mont. 152, 201 P. 702, and all existing appropriations in Montana are expressly "recognized and confirmed" by the Montana Constitution. Mont. Const. Art. IX, Sec. 3(1). Finally, the Legislature confirmed this

understanding by directing that any new water use permit be issued subject to all existing water rights and to any final determination of such rights as provided by Montana law. § 85-2-310, MCA. The priority of first in time, first in right, system of water allocation presumes that water demands will exceed water supplies, and the authority to administer water rights to secure a senior's rights to available flow is delegated by the Legislature to the district courts in Montana. § 85-2-406, MCA.

22. The purpose of the writ of mandate is to "compel the performance of an act which the law requires as a duty resulting from an office." *Intake Water Co. v. Board of Natural Resources & Conservation* (1982), 197 Mont. 482, 487, 645 P.2d 383, 386. Specifically:

> It may be issued by the supreme court or the district court or any judge of the district court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office. . . .

§ 27-26-102, MCA. A writ will issue where there has been a showing that a clear legal duty exists and there is no speedy or adequate remedy in the ordinary course of law. *Cain v. Department of Health* (1978), 177 Mont. 448, 582 P.2d 332; *see also Common Cause v. Argenbright* (1996), 276 Mont. 382, 390, 917 P.2d 425, 430.

23. Mandamus will also lie where an administrative agency acts arbitrarily. *Paradise Rainbows v. Fish and Game Commission* (1966), 148 Mont. 412, 421 P.2d 717. In *Paradise Rainbows*, the Court explained that, despite the general rule that mandamus is available only to compel performance of a duty not involving discretion, some situations involving even discretionary actions warrant mandamus:

> But even where discretion is involved, if there has been such an abuse as to amount to no exercise of discretion at all, mandamus will lie to compel the proper exercise of the powers granted.

148 Mont. at 417, 421 P.2d at 720 (quoting *Skaggs Drug Centers v. Mont. Liquor Control Board* (1965), 146 Mont. 115, 124, 404 P.2d 511, 516).

24. "Arbitrary or capricious action by an administrative board is an abuse of discretion." *Id.* (citing *State ex re. Sanders v. Hill* (1963), 141 Mont. 558, 381 P.2d 475).

**25.** When applying and enforcing the Water Use Act, the DNRC, like all other state agencies, can act only as authorized by the statutes enacted by the Legislature. *Emery v. State* (1997), 286 Mont. 376, 385, 950 P.2d 764, 769; *Bick v. State Dept. of Justice* (1986), 224 Mont. 455, 457, 730 P.2d 418, 420); *State ex. rel. State Tax Appeal Board v. Montana Board of Personnel Appeals* (1979), 181 Mont. 366, 371, 593 P.2d 747, 749.

26. The DNRC made a determination, following months of study and interaction with Bostwick, that Bostwick's application was "correct and complete" under the Section 311 criteria used for issuance of permits. Having made that determination, and upon receipt of objections to the application, the applicable statute **plainly and unambiguously states that the DNRC shall take action on the permit within 180 days of publication of notice of the application:**

> **Action on application . . . . The department shall grant, deny, or condition an application** for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and **within 180 days** if a hearing is held or objections have been received.

§ 85-2-310(1), MCA (emphasis added).

27. That same statute clearly states that "the time may be extended by not more than 60 days upon order of the department.." *Id.* (Emphasis added). If the DNRC orders the time extended, "it shall serve notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308." *Id.* This later notice requirement comports with fundamental notions of due process, which requires notice and opportunity to be heard.

28. It is this Court's duty to construe the applicable statute "as it is written," and "not to insert what has been omitted." *Miller v. Eighteenth Judicial District Court*, 2007 MT 149, ¶¶ 39-40, 337 Mont. 488, ¶¶ 39-40, 162 P.3d 121, ¶¶ 39-40 (use of term "shall" concerning death

penalty notice indicated that notice and timing requirements are mandatory, not discretionary or permissive) (citing *Matter of the Estate of Magelssen* (1979), 182 Mont. 372, 378, 597 P.2d 90, 94 (1979) and § 1-2-101, MCA). In *State v. Kroll*, 2004 MT 203, ¶ 17, 322 Mont. 294, ¶ 17, 95 P.3d 717, ¶ 17, the Montana Supreme Court stated that "[w]here the plain language of the statute is clear and unambiguous, no further interpretation is required." Likewise, in *State ex. rel. Palmer v. Hart* (1982), 201 Mont. 526, 530, 655 P.2d 965, 967, the Court stated that "[w]here the language of the statute is plan, unambiguous, direct, and certain, the statute speaks for itself."

29. The language of the statute at issue plainly and unambiguously states that the DNRC "shall" take certain, defined action within 180 days following the publication of notice of the pending application. As a general rule, use of the word "shall," as opposed to "may" or "should," reflects a mandatory requirement, not a discretionary or permissive one. *See, e.g. Miller,* ¶ 39.

30. While the term "shall" is mandatory, *Miller, supra; ISC Distributors, Inc. v. Trevor* (1995), 273 Mont. 185, 201, 903 P.2d 170, 179, the Court must still determine whether such a statute is "directory" or "mandatory." *Matter of ANS* (1992), 252 Mont. 279, 282, 828 P.2d 1357, 1359. To this end, the Court also considers that the additional language of the same statute, allowing a limited extension of time by unilateral Order of the DNRC, is clearly mandatory, in that it states, that the time for action on the permit "may be extended <u>by not more than 60 days</u> upon order of the department." MCA § 85-2-310(1) (emphasis added). That language, also mandatory ("not more than"), is also plain, direct and unambiguous.

31. *Sutherland on Statutory Construction*, § 57.19 at p. 47 observes: "[I]f the time period is provided to safeguard someone's rights, [the statute] is mandatory, and the agency cannot perform its official duty after the time requirement has passed."

32. Similarly, in *Matter of ANS*, the Montana Supreme Court quoted with approval, the Wyoming Supreme Court's discussion in *Wyoming State Treasurer v. City of Casper* (Wyo. 1976), 551 P.2d 687:

> It is a universal holding that a statute specifying a time within which a public officer is to perform an official regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered as a limitation of the power of the officer.

(Emphasis added).

33. The Court concludes, as a matter of law, that the foregoing statutory language is part of carefully crafted statutes meant to provide for the orderly review and processing of applications, protect an applicant's due process rights, and establishes a mandatory deadline by which the DNRC must act, once it determines that an application to "correct and complete." The statute speaks in plain and unambiguous terms, making clear that the designation of time is a limitation on the power of the agency to act. Accordingly, this Court concludes the statute is mandatory. The Court further concludes that once the agency makes a determination that an application is "correct and complete," in light of the same criteria used to ultimately issue a permit, the statutes are intended to protect applicants by providing for the orderly administration of water use applications. *See Carey v. DNRC*, No. 43556 (1st Judicial Dist. Ct., Lewis and Clark Co.) at p. 2, ¶ 5 ("[t]he purpose of the time periods is primarily of the protection of the applicant . . . ." [T]he time period specified is to ensure that the application is acted upon reasonably quickly and it creates a cause of action for the applicants to enforce the Department's duty"). Senior appropriators have multiple statutory protections with respect to their water rights, including their ability to file objections to the requested permit and participate in any settlement negotiations or hearing if the matter is not settled, which is in addition to the various legal protections of their prior appropriated right.

34. The statute thus imposes clear, unambiguous, mandatory legal duties that are binding upon the DNRC in its treatment of applications, namely:

a. Once an application is deemed "correct and complete," after up to six (6) months of review, the DNRC "SHALL" **grant, deny, or condition an application** within 180 days if objections are filed;

b. If DNRC cannot comply with the time period imposed by law, it can extend that deadline "BY NOT MORE THAN

> 60 DAYS" and if it so orders, it must serve notice of the extension and the reasons for the extension.

35. Nothing in the plain language of the statute suggests that institutional delay, general complexity of the application, or any other reason offered by the DNRC in its defense, supplants the requirement that the agency grant, deny, or condition the application within the time periods established by law, after the DNRC has determined that the application is correct and complete, based upon the same standards used to grant, deny or condition the permit. The statute clearly states that the DNRC "**shall** grant, deny, or condition an application" within 180 days. If the Legislature did not want the time limit to be mandatory, it would not have used the term "shall," it would have said "should try to" or some variation of suggestive language.

36. Importantly, the Legislature recently enacted a requirement that **if the DNRC fails to determine whether an application is correct and complete within the 180 day period allowed by law, that the application is deemed correct and complete**. *See* § 85-2-302(5), MCA. The Court notes that prior to the passage of this legislation, the statute with respect to the time period applicable to the DNRC's "correct and complete determination" did not contain any deadlines, or language granting the agency "not more than" a set period of time to act.[2] Because the time limits set out in § 85-2-310, MCA, are triggered by public notice of the application, the DNRC's inaction at the "correct and complete" stage frustrated the applicant's right to expeditious review. This amendment to § 85-2-302, MCA, fortify a legislative intent that the DNRC must act expeditiously, within the time required by law, and failure to do so results in the approval, as a matter of law, of the requested action.

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[2] For example, the 1997 version of 85-2-302 contained deadlines at all, stating in relevant part: "[T]he department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. . . ." *See* Exhibit B.

37. Finally, the Court notes that several district court decisions out of the First Judicial District, Lewis and Clark County, are consistent with this analysis.

38. *Carey v. DNRC*, No. 43556, (1st Judicial Dist. Lewis and Clark County, June 27, 1979) does not compel a different result. *Carey* concerned a petition for writ of prohibition filed by objectors to an application. *Carey* expressly observed, that the "purpose of the time periods [in Section 85-2-310] is primarily of the protection of the applicant, and in furtherance of the stated purpose of the Act, i.e., for the protection, preservation and future beneficial use and development of Montana's water for the state and its citizens. . . ." *Id.* at p. 2. "[T]he time period specified is to ensure that the application is acted upon reasonably quickly and it creates a cause of action for the applicants to enforce the Department's duty."

39. More recently, Honorable Jeffrey Sherlock issued an Order granting a gravel pit owner's application for a writ of mandate. *Cameron Springs, LLC v. Montana Department of Environmental Quality*, Cause No. BDV-2008-325, Order (1st Judicial Dist. Lewis and Clark County, April 23, 2008). Petitioner Cameron Springs, LLC applied for an opencut permit to operate a gravel pit and, in compliance with the requirements of the Montana Department of Environmental Quality ("DEQ"), submitted all application documents required under Section 82-4-432(1) and (2), MCA by December 2007. The DEQ found the Petitioner's application acceptable on January 30, 2008, however, the DEQ had taken no further action. Judge Sherlock agreed with Petitioner that Montana statutes required the issuance of the writ of mandate against the DEQ, requiring the DEQ to issue an opencut permit to the Petitioner:

> . . . the Court concludes that Petitioner is entitled to the performance of a clear legal duty by the Department. Section 82-4-432(4)(a), MCA, provides that the Department shall, within thirty days, review the application, inspect the proposed site, and notify applicant whether or not the department believes that the application is acceptable. Section 82-4-432(4)(c), MCA, allows an extension of the thirty-day review period. Here, no extension of the review was sought.

> The operative statute here is Section 82-4-432(4)(d), MCA, which provides: "If the application is acceptable, the department shall issue a permit to the operator that entitles the operator to engage in the opencut operation on the land described in the application." (Emphasis added.)

*See* Order, p. 1, 3-4. Judge Sherlock, while sympathetically acknowledging that the DEQ is "overworked and understaffed" and faced with unrealistic statutory deadlines, found no authority to allow "these practical difficulties to override the [DEQ's] statutory obligation to issue a permit once it is [sic] found an application to be acceptable." *See* Order, p. 5. Thus, Judge Sherlock concluded that "there is a clear legal duty to issue the permit," and the Petitioner had no speedy or adequate remedy available in the ordinary course of law. *See id.*, pp. 5-6.

40. Judge Dorothy McCarter followed suit in *NOG, LLC v. Montana Department of Environmental Quality*, Cause No. BDV-2008-373, Order (1st Judicial Dist. Lewis and Clark County, May 1, 2008). The Petitioners in *NOG* were also applicants for opencut mining permits to operate gravel pits, to whom the DEQ had failed to issue permits – thus presenting nearly identical operative facts as those at issue in *Cameron Springs*. Adopting in full Judge Sherlock's analysis in *Cameron Springs, supra*, Judge Dorothy McCarter in *NOG* granted the petitions for writ of mandamus and ordered the DEQ to issue the mining permits. *See Order*, pp. 3-5.

41. Although the statute at issue in Judge Sherlock and Judge McCarter's Orders concerns permits for opencut mining and thus is different, in subject matter, from the statutes governing groundwater permits at issue in this case, the above-described cases are on point and applicable here. Just as Judge Sherlock concluded in *Cameron Springs*, where an agency is faced with a legislative mandate that it "shall" take required action on an agency-issued permit, the petitioner is entitled to the performance of a clear legal duty by that agency. As such, the agency is charged with a statutory obligation to issue a permit once the agency has deemed the application to be acceptable. *See Cameron Springs, supra*; *see also NOG, supra*. This rule applies with equal force to Bostwick's application, in light of the mandatory language of § 85-2-310(1), MCA, in conjunction with § 85-2-302(5), MCA.

42. In sum, this Court concludes as a matter of law that § 85-2-310(1), MCA, is mandatory. This Court further concludes that the DNRC had a clear legal duty to take action on Bostwick's application within 180 days of the date of publication of notice of the application, as objections were filed against it. *Carey, supra; see also Cameron Springs, supra; see also NOG, supra*. If the DNRC required more time, the law specifically granted the agency an extension of "not more than 60 days" with the requirement that it serve notice of the reason for the extension upon the applicant and objectors. The DNRC's inaction and failure to comply with the plain and unambiguous terms of the statute is in violation of a clear legal duty.

43. This Court also rejects the DNRC's claim that Bostwick's application is moot because the DNRC issued its statement of opinion, following the issuance of the writ in this case, thereby denying Bostwick's application. This Court bases this conclusion on two grounds.

44. First, the Court agrees with Bostwick that the DNRC has not issued a decision, as required by law. Instead, it issued (months after the statutory time limits passed) a statement of opinion. That statement is not the same as a decision. Instead, that statement is the type of opinion required by § 85-2-310(3), MCA, which is authorized only when no objections are filed against the application (which was not the case here). Moreover, the statute expressly contemplates that the factual matters contained in that statement of opinion must be resolved in a hearing.

45. Second, because objections were timely filed against this application, the DNRC had no authority to issue a statement of opinion. The DNRC's statutory authority to issue such an opinion arises, under the plain language of the statute, only if no objections are filed against the application:

> ***If an objection is not filed*** against the application, but the department is of the opinion that the application should be denied or approved in a modified form, or upon terms, conditions or limitations specified by it, *the department shall prepare a statement of its opinion and its reasons for the opinion. . . .*

§ 85-2-310(3), MCA (emphasis added).

46. State agencies may act only as authorized by the statutes enacted by the Legislature. *Emery v. State* (1997), 286 Mont. 376, 385, 950 P.2d 764, 769; *Bick v. State Dept. of Justice* (1986), 224 Mont. 455, 457, 730 P.2d 418, 420); *State ex. rel. State Tax Appeal Board v. Montana Board of Personnel Appeals* (1979), 181 Mont. 366, 371, 593 P.2d 747, 749 ("This Court has made clear administrative agencies are bound by the terms of the statutes or regulations granting them their powers and are required to act accordingly"); *accord,* Koch, *supra* ("[h]ence agencies have only such authority as is delegated by the Legislature. From this we drive a basic concept that an agency cannot act outside its delegated authority").

47. The plain, unambiguous language of the statute at issue grants the DNRC the authority to issue a statement of opinion, denying or otherwise modifying a permit, only "[i]f an objection is not filed against the application. . . ." § 85-2-310(3), MCA. There is no contrary authority authorizing the DNRC to ignore this statute, or that grants the DNRC discretion, thus permitting the DNRC to file a statement of opinion denying or modifying an application when timely objections have been filed against the application.

48. Here, as set forth above in FOF ¶¶ 17-19, two timely objections to Bostwick's application were filed. As a result, the DNRC had no authority to issue a statement of opinion denying the application. Any other construction ignores the plain language of the statute, requires this Court to (improperly) insert language that is not included in the statute, grants the agency authority that was not delegated to it by the Legislature, and leads to absurd results. This Court concludes that the DNRC's statement of opinion is beyond the authority delegated it by the Legislature and therefore unlawful.

49. In addition, even if no objections had been filed, and therefore the DNRC had the authority to issue the statement of opinion, the DNRC failed to prepare and serve the statement of opinion within 120 days following the last date of notice of publication, as required by law (or "no later than 60 days" thereafter, upon agency order, that must be accompanied by notice to the applicant of the reasons for the delay). *See* § 85-2-310(3), MCA.

50. The Court also rejects the DNRC's argument that Bostwick did not meet the statutory criteria for issuance of permit. The DNRC determined, following over one (1) year of study and review of data, analysis and other technical data, including additional data supplied at its request, that Bostwick's application was "correct and complete."

51. As stated, "correct and complete" is a statutorily defined term:

> "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

§ 85-2-102(8), MCA (emphasis added). The term "substantial credible information is, in turn, defined by statute as follows:

> "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

*Id.*, subsection (22) (emphasis added).

52. This Court concludes that the DNRC, after study of this application, determined that it contained probable, believable facts sufficient to support a reasonably legal theory upon which the DNRC should proceed with the issuance of the permit. In reaching this conclusion, this Court takes judicial notice of the provisional nature of permits issued under the Act and the protections afforded by law to prior appropriators. This Court also notes that senior water right holders can file objections to a permit if it is concerned about agency action, or inaction.

53. Therefore, this Court concludes that the DNRC must act within 180 days, or 240 days, if it so orders, to act on a correct and complete application. This Court now considers the consequences of the DNRC's failure to act within the time required by law.

54. The statute at issue contains, similar to the rules at issue in *Miller*, ¶ 44, a "categorical time prescription." Such time prescriptions are "inflexible" or "rigid" – but nonjurisdictional-claim-processing rules." *Id.* (internal citations omitted). Unlike subject matter

jurisdiction, which can never be forfeited or waived, "[a] claim-processing rule, 'even if unalterable on a party's application, can nonetheless be forfeited in the party asserting the rule waits too long to raise the point.'" *Id.* (internal quotation omitted).

55. Here, the Court finds that the DNRC's failure to comply with the statutory deadlines does not create a "jurisdictional defect" but, instead, "assure[s] relief to an applicant who properly raised it, but does not compel the same result if the applicant forfeits it." *Miller*, ¶ 46 (internal citation omitted); *see also Carey, supra.* Stated another way, § 85-2-310, MCA, is "unalterable" on an applicant's motion but can be forfeited if the applicant "waits too long to raise the point."

56. Here, under the above factual circumstances, Bostwick did not "wait[] too long to raise the point." *See Miller*, ¶ 46. Bostwick submitted its application in 2006. The DNRC applied the 311 permit issuance criteria, under § 85-2-311, MCA, and issued its determination that the application was "correct and complete" in February 2007. Objections were then filed. The DNRC then had up to 180 days to issue, deny or condition the permit, or on its own request, obtain "not more then 60 [more] days" to issue, deny or condition the application. § 85-2-310(1), MCA. Both dates passed without the required action by the agency. Under these limited circumstances, this Court concludes, as a matter of law, that Bostwick properly and timely raised the statute's procedural safeguard and the provisional permit for a new water right, that is junior in time to the prior appropriated rights, is properly issued.

57. This consequence, resulting in the issuance of a provisional permit, is also consistent with the District Court's Orders in *Cameron Springs, LLC, supra*, and *NOG, supra.*

58. This result does not result in hardship to prior appropriators. Indeed, as this Court has found and concluded above, the law specifically protects the rights of all prior water right holders.

59. In this case, the DNRC, after extensive review and analysis of the data, found that the information submitted by Bostwick in support of its Application for a water use permit (the "action requested by the person providing the information") consisted of "probable, believable facts sufficient to support a reasonable legal theory upon which the [DNRC]" should issue the requested

permit. Stated another way, the DNRC found that Bostwick's application for a beneficial use permit was supported by "substantial credible information" which provided a sufficient factual and legal basis to **grant** the permit.

60. This Court concludes, as a matter of law, that the finding of "correct and complete" is a substantive decision, made only after careful review and analysis of an application and supporting technical data. As set forth above, Bostwick filed two applications, and performed a year and a half of work with the DNRC, before the DNRC issued that critical finding. Moreover, after the DNRC made that finding, it continued its dialogue with the Applicant, following up on certain issues set forth in the Application, a process that continued for another six months.

61. This Court concludes that in this case, the DNRC found, after a careful, through, and systematic analysis, that Bostwick's Application contained the substantial and credible information necessary to "proceed with the action requested by the person providing the information" – specifically, the issuance of a beneficial use permit as requested by Bostwick. Thereafter, and notwithstanding the fact that it had been studying and analyzing this specific Application for over a year and a half, the DNRC offered no contrary opinion during the statutorily mandated 180 days applicable to the Agency and general public to lodge objections to the Application. Even though objections to the Application were filed by Trout Unlimited (TU) and the Department of Fish, Wildlife and Parks ("DFWP"), the DNRC still did not file any objections to the Application.

62. Finally, this Court rejects the DNRC's argument that it lacks sufficient time or resources to discharge its duties. The evidence is clear that the DNRC reviewed and studied the application for over one year before determining the Application "correct and complete." Regardless, any "practical difficulties" the DNRC faces, due to insufficient resources, the tremendous number of applications to process, or otherwise, do not "override the [DEQ's] statutory obligation to issue a permit once it is [sic] found an application to be acceptable." *See Cameron Springs*, Order, p. 5.

63. Moreover, the DNRC's handling of the Yellowstone Club application, within the time allowed by law, evidences its ability to discharge its duties properly, even with similarly "complex" applications. *See* FOF, ¶¶ 26-30.

64. Although the above findings and conclusions provide sufficient grounds for this Court's issuance of a Writ, additional grounds are rooted in the DNRC's arbitrary actions with respect to the handling of Bostwick's application, when compared to the DNRC's handling of the Yellowstone Mountain Club's application. Specifically, the DNRC acted arbitrarily in refusing to approve Bostwick's Application, which is directly contrary to the DNRC's approval of Yellowstone Mountain Club's Application. The DNRC's arbitrary and capricious conduct is both substantive and procedural.

65. As discussed above, Bostwick and the Yellowstone Mountain Club's Applications are within the same closed basin and both located within fractured bedrock aquifers. According to the expert testimony of Dr. Nicklin, which this Court has accepted in full, it is fundamental that all groundwater is ultimately tributary to surface water. Thus, the aquifer from which the Yellowstone Club obtains its water is, like Bostwick's, tributary to surface water and, therefore, as a hydrogeologic matter, there is no basis for distinguishing the two applications. Nevertheless, the DNRC granted the Yellowstone Mountain Club's application (within the time allowed by law), but denied Bostwick's application for the same reason: theoretical impact to surface water. In the case of the Yellowstone Mountain Club, the DNRC found the impact to be uncertain and unknown and granted the permit. On the other hand, the same agency made the same substantive finding in denying Bostwick's application as a basis for denying the permit. The failure of the DNRC to act consistently is arbitrary and capricious. *See* FOF, ¶¶ 26-30; *see Paradise Rainbows*, 148 Mont. at 417, 421 P.2d at 720.

66. Having concluded that the foregoing statutes are mandatory and not directory, and that DNRC has abused its discretion, this Court concludes that the only action for the DNRC left to perform is the ministerial action of granting the permit. *See Montana Trout Unlimited v. Montana*

*Department of Natural Resources,* 2006 MT 72, ¶ 15, 331 Mont. 483, ¶ 15, 133 P.3d 224, ¶ 15 ("[m]inisterial acts can be compelled by mandamus. . . ."). The difference between ministerial and discretionary acts is clear:

> Where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.

*Id.* (quoting *State v. Cooney* (1936), 102 Mont. 521, 529, 59 P.2d 48, 53).

67. The DNRC made a decision that Bostwick's Application was "correct and complete" - meaning that the DNRC has already found that Bostwick's Application met the Section 311 criteria. Once the DNRC deemed the Application "correct and complete," it had, as a matter of law, 180 days to conduct a hearing on the objections, and if the objections were resolved, to issue the permit. Objections were lodged and resolved and the Agency had no authority to issue a statement of opinion denying the application. By clear statutory mandate, the only remaining option is the ministerial action of granting the permit.

68. The evidence is clear that prior to publication, the DNRC conducts an extensive, systematic review of the application, makes requests for information from the Applicant, studies the new information, conducts additional analysis and interacts with the Applicant, before reaching a determination that it is "correct and complete." With respect to Bostwick's Application, this process lasted over 15 months. This finding of "correct and complete" is a certification by the DNRC that Bostwick's Application consists of "substantial credible information" that the Application meets the section 311 criteria. This finding, in turn, provides a sufficient factual and legal basis to **GRANT** the permit where, as here, the agency failed to act within the time mandated by law. The DNRC made this finding with respect to Bostwick's Application <u>after more than one (1) year of review and analysis of the original information submitted by Bostwick, and supplemental information requested by the DNRC based upon its</u>

review. This was the only official statement from the DNRC with respect to the Application within the statutorily mandated timeframes.

69. In sum, contrary to the DNRC's position, the only official, and authorized, position taken by the DNRC with respect to the Application is that it was "correct and complete" and contained "probable, believable facts sufficient to support a reasonable legal theory upon which the [DNRC] should proceed with the action requested by the person . . ." – i.e., the granting of a beneficial use permit. The granting of the permit is subject to the prior established rights of senior appropriators.

70. The Court thus concludes, as a matter of law, that the DNRC has a clear legal duty to grant Bostwick's permit. "Shall" means "shall." DNRC found the Application "correct and complete." The only decision which gives credence to the controlling statutes and protects Bostwick's rights is issuing the writ requiring the DNRC to grant the permit.

71. The Court also concludes that the second requirement for issuance of a writ of mandate – "there is no speedy or adequate remedy in the ordinary course of law" – is met. *Intake Water Co., supra.*

72. The DNRC contends that Bostwick has a remedy by going through the administrative appeals process and challenging the factual findings found in the DNRC's statement of opinion. This argument ignores the fact that the DNRC had no authority to issue the statement of opinion in this case, upon the filing of the objections. Further, the DNRC did so on December 17, 2007 – AFTER this Court issued its writ against the DNRC and setting the Show Cause Hearing.

73. The writ of mandate is required because: (1) the Agency determined the application is correct and complete, under the 311 criteria; (2) legal notice was published with respect to this application; (3) objections were timely filed; and (4) those objections were resolved. Bostwick successfully completed the required process, including resolution of all timely objections, to

obtain the water right. the DNRC is without jurisdiction or authority to raise the issues found in its statement of opinion.

74. In *Montana Trout Unlimited,* the Supreme Court rejected the same argument the DNRC makes here. In that case, the DNRC argued that a writ of mandate should not issue because Trout Unlimited did not exhaust its administrative remedies. Trout Unlimited countered that it should not have to exhaust administrative remedies, arguing about a decision that the DNRC did not even have authority to make. The Supreme Court agreed with Trout Unlimited. *Id.*, ¶ 22.

75. The Court acknowledged the general exhaustion requirement, but explained that it would "not require exhaustion of administrative remedies, however, when resort to an administrative remedy would be futile." *Id.*, ¶ 20 (citing *DeVoe v. Department of Revenue* (1993), 263 Mont. 100, 115, 866 P.2d 228, 238 and § 1-3-223, MCA). The Court concluded that it could not "ignore the plain statutory language prohibiting the DNRC from processing such applications," and, accordingly, ruled that it would "not require Trout Unlimited or other objectors to participate in agency proceedings that the Legislature expressly prohibits." *Id.*

76. The same reasoning applies here. The Legislature does not authorize the issuance of a statement of opinion if objections are filed. Yet, the DNRC would require Bostwick to proceed through the entire administrative proceedings, arguing about findings the DNRC had no authority to make, before Bostwick could have its day in court regarding the DNRC's complete disregard for the controlling statutes. *Trout Unlimited* forbids such a result because resort to the administrative process is futile as a result of the DNRC's failure to act within the time allowed by law.

77. Accordingly, Bostwick has no other speedy or adequate remedy. Mandamus is required and the DNRC is ordered to issue the permit as requested by Bostwick.

78. Based on the above findings and conclusions, this Court further concludes that the issues addressed in Bostwick's Amended Application, filed on February 8, 2008, are MOOT.

79. Furthermore, based on the above finding and conclusions, this Court concludes that the pending Motion to Intervene should be DENIED. As discussed above, none of the entities seeking intervention filed a timely objection to Bostwick's application for a permit. *See* FOF ¶¶ 17-19, 38-39. As such, the movants' request is not timely, *see, c.f. Estate of Schwenke v. Becktold* (1992), 252 Mont. 127, 827 P.2d 808, 811 (internal citation omitted), and they have not established a direct, substantial, legally-protectable interest in this case. *See, c.f. Adoption of C.C.L.B.*, 2001 MT 66, ¶ 12, 302 Mont. 22, ¶ 12, 22 P.3d 646, ¶ 12 (internal citation omitted).

80. Based on the above findings and conclusions, this Court grants Bostwick's request for an award of its reasonable attorneys fees and costs, pursuant to § 27-26-402, MCA. *Kelleher v. Board of Soc. Work Exam'r & Licensed Prof'l Counselors* (1997), 283 Mont. 188, 192, 939 P.2d 1003, 1006 (a party who is successful in obtaining a writ of mandamus is entitled to damages, which under § 27-26-402, MCA, may include attorney fees and costs) (citing *Kadillak v. Department of State Lands* (1982), 198 Mont. 70, 74, 643 P.2d 1178, 1181).

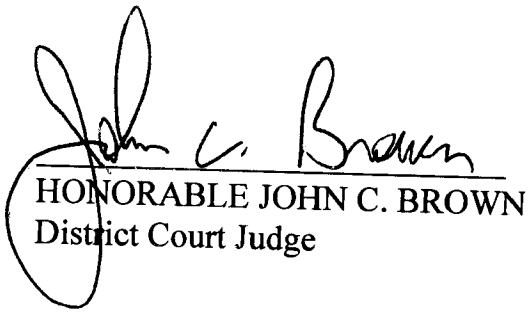
**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters the following Order:

1. The DNRC's Motion to Quash is DENIED;
2. Bostwick's Motion for Issuance of an Alternative Writ of Mandate is GRANTED. The DNRC is hereby Ordered to immediately issue the Water Use Permit determined by the agency to be "correct and complete" in the form and in the amount as requested by Bostwick;
3. The Court orders that Bostwick be awarded its reasonable attorneys fees and costs incurred in bringing this action. A hearing on the amount of fees is costs is scheduled for July 28, 2008 at the hour of 10:00 am.
4. The Motion to Intervene is DENIED.

The length of the hearing shall not exceed two (2) hours.

DATED this 12th day of May, 2008.



HONORABLE JOHN C. BROWN
District Court Judge

cc: Matt Williams
Brian Gallik/Trent Gardner
Anne Yates/Candace West
David Weaver
Hertha Lund

5/13/08