

Environmental and Natural Resource Litigation Status
Dept. of Fish, Wildlife and Parks (DFWP) and the
Fish, Wildlife and Parks Commission (Commission)
August 31, 2011

State District Court Cases

Paulson v. Monsanto and DFWP

10th Judicial District Court, Fergus County, Cause No. DV-2004-08. DFWP, in the 60s and 70s painted Big Springs Trout Hatchery raceway walls and floors with PCB laden paint which eventually contaminated the hatchery as well as the Big Springs Creek with PCBs. DFWP was sued by riparian landowners downstream for personal injuries in the first phase of the lawsuit. DFWP settled with the landowners for \$700,000. Monsanto, the manufacturer of the paint, settled with the landowners as well. In the second phase of this lawsuit a settlement was made in DFWPs favor for \$5,000,000 with Monsanto in the cross claim made by DFWP for the contamination of raceway paint used at the Big Springs Trout hatchery with PCBs. DFWP is now remediating the hatchery and Big Springs Creek under the supervision of the EPA.

Spoklie v. DFWP

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

The Attorney General's Office has just recently renewed the motion for summary judgment with the district court to dismiss the entire case. The Attorney General is relying on a prior federal court decision and Montana Supreme Court decisions that have upheld I-143 against all constitutional challenges including the claim that I-143 is a taking without just compensation based on Montana's Constitution.

This is the last of the constitutional challenges to I-143. However, all of the constitutional issues have already been decided by superior courts and their decisions should be binding precedence.

Taleff and Walsh v. DFWP

8th Judicial District Ct., Cascade County, Cause No. DDV-06-0533. DFWP was gifted 10 acres on Lake Five for a fishing access site (FAS) by a woman in memory of her son. A group of landowners around Lake Five sued DFWP over the claimed failure of DFWP to involved the public in its decision to acquire and develop the FAS on Lake Five. District Court Judge Sandefur issued a preliminary injunction prohibiting the development of the Lake Five FAS pending the outcome of the litigation. In a settlement agreement, DFWP agreed to redo the decision process with proper public involvement. After an independent consultant prepared an EA considering all potential sites, DFWP

made a determination to develop the existing site and the adjoining landowners appealed the decision to the Director alleging that DFWP did not comply with the Good Neighbor Law among other things.

A Fishing Access Site is now being constructed at the Lake Five as originally planned after a settlement was reached with the adjoining landowners, who had objected under the Good Neighbor Law.

Nadeau, et al. v. DFWP and Flathead County

11th Judicial District, Flathead County, Cause No. DV-09-920C. Landowners adjacent to DFWP property built a rock blockade, yard, shed and placed an RV on the county road that accesses the DFWP property. Upon notice from Flathead County that the obstructions would be removed, the Landowners filed suit against Flathead County and named DFWP as well. Plaintiffs alleged that DFWP made an agreement to construct a replacement road across its property so that the currently used county road could be abandoned. DFWP answered that the “agreement” between DFWP and the Landowners was only a discussion and that there were many other conditions precedent, including environmental analysis, road design and road maintenance agreement, before a road could be further discussed. DFWP filed a summary judgment motion.

DFWP’s summary judgment motion was granted and public access has been restored to the site.

Park County Stockgrowers Ass’n vs. MDOL and MDFWP, et al.

Park County vs. State of Mont., FWP and DOL

6th Judicial District, Park County, Cause Nos. DV-11-77 and DV-11-78.

Park County Stockgrowers and Park County filed separate suits against the DFWP, DOL, Governor Schweitzer and Dr. Zalusky and against State of Montana, FWP, and DOL, respectively (collectively State Respondents). The suits were consolidated into one suit alleging that the State Respondents’ decision and decision-making process to expand the boundary of bison tolerance from the 2000 Interagency Bison Management Plan (IBMP) failed to comply with statutory duties, violated individual rights to a clean and healthful environment, created a nuisance, and violated MEPA when FWP and DOL failed to conduct an additional environmental analysis. A hearing is scheduled for October 26 and 27, 2011 on the merits of the case. Discovery is scheduled to be completed September 1, 2011.

Western Watershed et al. v. DFWP

18th Judicial District Ct., Gallatin County, Cause No DV-10-317A. Plaintiffs allege that DFWP breached its duty under the Montana Constitution’s “clean and healthful environment” provision as well as the Public Trust Doctrine when it exchanged 75% of the newborn bison crop for caring for the quarantined disease free bison DFWP initially acquired from Yellowstone National Park. The lawsuit is in the discovery stage and it is being determined whether there is any evidence outside the Administrative Record that is necessary for the court to make a decision.

Carver v. DFWP and Flathead County

11th Judicial District, Flathead County, Cause No. DV-10-667(B). DFWP was sued by a man who donated land to Flathead County for public access on a Flathead River slough called Church Slough. Carver sued the County alleging that it violated an agreement to limit public access to walk-in access when it built a boat ramp on the site. Carver sued FWP alleging that it violated MEPA by not drafting an adequate environmental assessment before issuing a 124 permit to the County for building the boat ramp. The case has been submitted to the court on a motion for judgment on the pleadings by FWP and is progressing through the scheduling order.

Montana Supreme Court Cases

Bitterroot River Protective Association and DFWP vs. Bitterroot Conservation District and Babcock, et al (Mitchell Slough):

In a 7-0 decision, the Montana Supreme Court held that Mitchell Slough is a part of the Bitterroot River under the SB 310 law (Natural Streambed and Land Preservation Act) for alterations to its bed and banks and is subject to public recreational use under the stream access law. A judgment was entered by the district court and currently the costs and fees remain the only issue to litigate. A hearing was held on September 8, 2009.

The District Court required the parties to mediate the amount of costs to be paid to DFWP. The agreement was signed by all parties but DFWP has yet to be paid. Attorney's fees were awarded to Bitterroot River Protective Association under the private attorney general theory. The BRPA has now been paid attorney fees.

Richards v. Missoula Co. and FWP:

Plaintiff's application for a subdivision was rejected by the Missoula County Board of Commissioners. DFWP's Region 2 staff had commented on potential impacts on wildlife. Plaintiff alleged improper involvement in the process by DFWP. DFWP's summary judgment motion was granted by the district court and Missoula County's motion for summary judgment was also granted. The plaintiff appealed to Montana Supreme Court.

The Montana Supreme Court, in a December 31, 2009 decision, affirmed the District Court of the Fourth Judicial District's ruling that the District Court did not abuse its discretion in granting summary judgments in favor of Missoula County and DFWP.

Montana Shooting Sports Ass'n. v DFWP:

DFWP is required by Title IV-D of the Social Security Act to collect the last four digits of the Social Security numbers of all applications for fishing, hunting, and trapping licenses. Plaintiffs have brought suit alleging that the collection of the last four digits is a violation of the Montana constitutional right of privacy and heritage to hunt. After a 2 day trial, the District Court ruled in favor of FWP holding that the Montana constitutional provision on the right of privacy did not prohibit the collection of such numbers. The plaintiff appealed the District Court decision to the Montana Supreme Court.

The Supreme Court held that the Montana Constitution did not prohibit DFWP from collecting the last four digits of hunting, fishing, and trapping license applicants' Social Security numbers.

Federal District Court Cases

Grizzly Bear Delisting Cases:

Plaintiff environmental organizations filed two separate but very similar lawsuits (one in Idaho Federal District Court and one in Montana Federal District Court) challenging the U.S. Fish and Wildlife Service's (USFWS) decision to remove the grizzly bear population in the Greater Yellowstone Area from the federal Endangered Species Act list of threatened species. The USFWS established the Greater Yellowstone Area grizzlies as a distinct population segment. A mandatory settlement conference failed to resolve the case.

Judge Molloy, Montana Federal District Court, ruled on September 21, 2009 that the delisting rule violated the Endangered Species Act because there were inadequate regulatory mechanisms for the Greater Yellowstone Area grizzly DPS if delisted and because the record did not support the USFWS's conclusion that declines in white bark pines would not harm grizzly bears. He did, however, hold the rule was valid regarding two other issues raised by the plaintiffs. He supported the conclusion that the genetic diversity and population size were sufficient for delisting and that the available habitat in the Greater Yellowstone Area was a significant portion of the range of the Greater Yellowstone Area grizzly DPS.

This adverse decision was appealed to the 9th Circuit by the federal defendants and the States of Montana and Idaho and the National Wildlife Federation. The lawsuit before the Idaho Federal District Court has been stayed pending the appeal to the 9th Circuit in the Montana case.

Wolf Litigation Summary and Congressional Delisting.

In February of 2008, the United States Fish and Wildlife Service (USFWS) issued a final rule delisting the Northern Rocky Mountain gray wolf distinct population segment (DPS). Several environmental groups challenged the USFWS decision in federal district court in Montana and requested an injunction. In July, Judge Malloy granted the plaintiffs' motion for preliminary injunction and reinstated Endangered Species Act (ESA) protection for wolves. Judge Malloy issued the injunction because he determined the plaintiffs were likely to win on the merits of at least two of three ESA claims and because he determined the plaintiffs were able to show a possibility of irreparable harm to wolves as a species.

Based on Judge Malloy's order stating that the Plaintiffs were likely to prevail on at least two of their claims, the USFWS decided its best course was to vacate the final delisting rule and get public comment on a new proposed rule to delist the Northern Rocky Mountain gray wolf DPS. Therefore, upon USFWS' request, Judge Malloy vacated the

rule, thereby returning the Northern Rocky Mountain gray wolf DPS to the list of endangered species.

Comment on a new USFWS proposed rule closed November 28, 2008. The USFWS adopted a new rule delisting wolves in Idaho and Montana, but not in Wyoming, on April 2, 2009.

The new delisting rule was challenged in federal district court in Montana by a group of environmental organizations (*Defenders of Wildlife v. Salazar*) and by the Greater Yellowstone Coalition (*Greater Yellowstone Coalition v. Salazar*). The two cases were consolidated. On August 20, 2009, the Defenders of Wildlife group of plaintiffs moved for a preliminary injunction to prevent wolf hunts in Montana and Idaho. A hearing on the motion was held on August 31, 2009. The District Court denied the motion for a preliminary injunction on September 8, 2009, ruling that the plaintiffs failed to show a likelihood of irreparable harm to the wolf population. Wolf hunts were then held in Montana in the fall of 2009 and Idaho in the fall and winter of 2009-2010. In Montana, a total of 72 wolves were killed out of a quota of 75.

The case was then briefed by the parties and oral arguments were held before the court in June, 2010 and Judge Molloy decided the case in early August of 2010. He ruled that because the Northern Rocky Mountain gray wolf population was not treated the same throughout its range, i.e. it was delisted everywhere except Wyoming where it remained listed, the delisting rule violated the ESA and was void. As a consequence he did not rule on the three other issues which are the adequacy of the regulatory mechanisms, population recovery size, and connectivity and genetic exchange. The decision has been appealed to the 9th Circuit.

During the appeal, the Department of Interior and USFWS reached a settlement with approximately 3/4 of the plaintiffs for a delisting under agreed conditions. However, the district court needed to stay its decision to accommodate a settlement in the 9th circuit. Judge Molloy declined to approve the settlement on the grounds that not all the plaintiff parties agreed to the settlement and that the settlement would still result in an unlawful delisting.

Next, Congress on April 15, 2011 delisted the gray wolf by directing the USFWS to readopt its delisting rule and insulated the rule from compliance with any other laws or rules and declaring by law that the newly adopted rule would not be subject to judicial review. This act of Congress was challenged by two groups of plaintiffs as unconstitutional. Judge Molloy, on August 3, 2011, reluctantly found that this act of Congress was constitutional and not in violation of the doctrine of separation of powers between the legislative and judicial branches. This rule has been appealed to the 9th Circuit by two groups of plaintiffs.

Ninth Circuit Court of Appeals Cases

Wolf Delisting Rule Case:

The federal defendants and the intervenor-defendants, including Montana, appealed the federal district court's decision that the 2009 rule delisting the Northern Rocky Mountain gray wolf DPS everywhere except Wyoming where it remained listed listed was in violation of the ESA. The case was referred to the 9th Circuit's mediation program because of the potential for settlement. See the federal district court write up describing the unsuccessful settlement. The next decision is likely to be whether the appeal should continue or should be dismissed as moot based on the Congressional delisting. This decision will depend on the result of the appeal to the 9th Circuit of the Congressional delisting case.

Congressional Delisting Case:

The Alliance for the Wild Rockies, Friends of the Clearwater, and Wildearth Guardians have appealed the federal district court's decision that the act of Congress affirming the delisting rule for the Northern Rocky Mountains gray wolf DPS was constitutional. The appeal was filed August 8, 2011. The other group of plaintiffs, Center for Biological Diversity, Cascadia Wildlands, and Western Watersheds Project also filed an appeal on August 11, 2011.

The Alliance for the Wild Rockies group of plaintiffs made an emergency motion on August 13, 2011 requesting an injunction to halt the planned wolf hunts in Montana and Idaho. The federal defendants filed a brief opposing an injunction. Montana filed an amicus brief opposing the injunction on the grounds that the wolf hunt would not irreparably harm the wolf population in Montana.

The 9th Circuit on August 25, 2011 denied the motion for an injunction; therefore, the wolf management hunts in Montana and Idaho will take place. The 9th Circuit also set an expedited briefing schedule leading to a hearing before the panel in November.

Grizzly Bear Delisting Case

The federal defendants, USFWS and U.S. Department of Interior, Montana, Idaho, National Wildlife Federation, and Safari Club International appealed the Montana Federal District Court's decision that vacated the delisting of the Greater Yellowstone Area grizzly DPS. Briefing has been completed and a hearing before the 9th Circuit was held on March 8, 2011. The case is submitted for a decision by the 9th Circuit.

Water Court Cases

For many years, DFWP has participated in proceedings at the Montana Water Court. Historically, DFWP has limited its objections to mining claims and its own water rights. Recently, however, DFWP has objected to irrigation water rights in basins with high fishery and recreational values, including the Big Hole and Middle Missouri river basins. Objections are limited to water right claims that appear to be significantly expanded since 1973.

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.