

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



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December 13, 2019

Environmental Quality Council  
Legislative Environmental Policy Office  
State Capitol Building  
1301 East 6th Avenue, Room 171  
PO Box 201704  
Helena, Montana 59620-1704

To the Environmental Quality Council:

In accordance with Section 75-1-314, MCA, the Department of Natural Resources and Conservation submits the attached Litigation Report for your review. The report contains information specific to the legal division in the department with enforcement and compliance responsibilities.

Should you have any questions or comments, please contact our department at (406) 444-2074.

Sincerely,

A handwritten signature in blue ink, appearing to read "John E. Tubbs".

John E. Tubbs, Director  
Department of Natural Resources & Conservation

Enclosures

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TRUST LAND  
DIVISION  
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**DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION**  
**LITIGATION SUMMARY (DECEMBER 2018-2019)**

**WATER RESOURCES LITIGATION**

**Broken O Land & Livestock v. DNRC Water Court District (Judge Tucker)**, Petition for judicial review (PJR) of DNRC final order (Vogler) denying application to change a water right after show cause hearing. Order issued on 9/9/19 reversing DNRC Final Order. Appeal deadline is Jan. 3, 2020.

**City of Bozeman v. DNRC & Utility Solutions** 18<sup>th</sup> Judicial District-Gallatin County (Judge Rienne H. McElyea), PJR of DNRC final order (Vogler) granting application to change a water right by Utility Solutions after contested case hearing. Order issued affirming DNRC Final Order. Appeal deadline is Dec. 18, 2019.

**DeBuff v. DNRC Water Court District (Judge Steve Brown)**, PJR of DNRC final order (Vogler) denying application for a new beneficial water use permit after show cause hearing. Oral argument held Aug. 22, 2019; Order issued reversing DNRC Final Order. Appeal deadline sixty days after entry of judgment filed.

**Flathead Lakers et al v. DNRC and Montana Artesian Water Co.** 1<sup>st</sup> Judicial District - L&C County (Judge Seeley), PJR of DNRC final order (Vogler) granting beneficial water use permit after contested case hearing. Appeal filed by DNRC and Montana Artesian; in briefing (reply brief due Dec. 10, 2019).

**Water for Flathead's Future et al v. DNRC and DEQ** 11<sup>th</sup> Judicial District – Flathead County (Judge Eddy), Complaint alleging DNRC and DEQ did not comply with MEPA when issuing respective permits for Montana Artesian Water Co. Parties filed joint stipulation for stay pending appeal decision from Judge Seeley's order.

**Clark Fork Coalition, et al v. DNRC & RC Resources** 1<sup>st</sup> Judicial District – Lewis & Clark County (Judge Seeley), PJR of DNRC final order (Vogler) granting beneficial water use permit after contested case hearing. Reversed and remanded in April 2019; Appealed to MT Supreme Court; opening brief due December 4, 2019; motion for attorney fees (\$68,591) pending; judgment hasn't been entered and attorney fee claim not resolved.

**Clark Fork Coalition v. DNRC Water Court District (Judge Russell McElyea)**, PJR of DNRC final order (Vogler) granting in modified form an application to change a water right to instream flow (Racetrack). Reversed and remanded in April 10, 2019; settled attorney fees claim; next step is contested case hearing on objections.

**Willow Creek Water Users Association v. DNRC** 18<sup>th</sup> Judicial District – Gallatin County (Judge Holly Brown), Water Users attempting to gain ownership of project. Responded to WCWUA motion for enforcement of mediated agreement on 4/29/19. Parties submitted Proposed Findings of Fact, Conclusions of Law.

**Hamlin Construction v. State of Montana** 1<sup>st</sup> Judicial District Court – Lewis & Clark County (Judge Berger), multi-agency litigation involving flood plains in Red Fox subdivision. Parties filed motion to dismiss in April, 2019.

## **TRUST LANDS LITIGATION**

**State v. Greenfields Irrigation District** 1<sup>st</sup> Judicial District – Lewis & Clark County (Judge McMahon), State filed complaint against GID for unlawful charge for continued irrigation and threat to terminate water delivery to school trust land; GID filed counterclaim. Order granting DNRC's motion for summary judgment issued on Aug. 22, 2019; attempting to resolve remaining acres; further discovery.

**DNRC v. Avista** 1<sup>st</sup> Judicial District – Lewis & Clark County (Judge Menahan), Declaratory action filed to resolve dispute over “most favored nations clause” and Avista rental obligations. Avista filed counterclaim which DNRC responded to on April 18, 2019. DNRC requested scheduling conference with the Court.

**Bar K Ranch v. DNRC et al** Federal District, Great Falls Division (Brian Morris), Bar K ranch has filed a federal quiet title action against BLM, FWS, DFWP, and DNRC for allegedly public/county roads passing through various parcels in Madison County which provide Ranch and public recreation access. DNRC has two affected sections thirty-six through which disputed roads pass. Complaint served on AG April 18. State's deadline to respond is May 9. Currently gathering info on affected DNRC lands and coordinating with DFWP, which has a WMA within the disputed area and many parcels affected.

**Norman v. DNRC/Land Board et al** Federal District, Great Falls (Brian Morris), Marias River quiet title case. Private landowner sued to obtain title to riverbed. Sued Feds and State. Joint motion to stay filed and granted.

**DNRC/Land Board v. CHS** 1<sup>st</sup> Judicial District Court – Lewis & Clark County (Judge Seeley), State filed a suit to resolve check issues and compel lessee compliance. Matter resolved, awaiting receipt of check from court,

**PLWAA v. DNRC et al** 10<sup>th</sup> Judicial District Court – Fergus County (Judge Gilbert), PLWAA filed a suit to determine if Mabee Road is public. After five day trial, court determined that the road was not public.

**Save Our Gallatin Front v. Montana Board of Land Commissioners and DNRC** 18<sup>th</sup> Judicial District, Gallatin County (Judge Rienne H. McElyea), Plaintiffs challenged the Land

Board and the DNRC's proposal to conduct the Limestone West Timber Sale Project in the Limestone Creek drainage south of Bozeman unless and until Defendants adopted a lawful approach to the auctioning of a conservation license alternative to the timber sale. The District Court denied Plaintiff's motion for a temporary restraining order and preliminary injunction. Defendants were allowed to complete the auction currently underway and open all bids on March 5, 2019.

**Advocates for State Trust Lands v. Montana** 1<sup>st</sup> Judicial District Court – Lewis and Clark County (Judge McMahon) Plaintiffs filed a suit asking that SB 286 – that relates to water rights on state trust lands -- be deemed unconstitutional.

## FORESTRY DIVISION

**Native Ecosystems Council and Alliance for the Wild Rockies v. Erickson, et al.**, Cause No. 9:17-cv-00053-DLC, US Dist. Court Montana. Appealed to 9<sup>th</sup> Circuit. Litigation over the **Smith Shields** Forest Health Project on the Custer-Gallatin NF challenging the categorical exclusion for landscape-scale insect and disease designations for Montana under Section 602(d) of the Healthy Forest and Restoration Act (HFRA) of 2003 (16 U.S.C. 6591a). Amicus brief filed in support of project. Project affirmed in district court. Appealed to 9<sup>th</sup> Circuit which denied injunction. The Ninth Circuit heard oral arguments by the parties on November 8, 2019.

**Alliance for the Wild Rockies v. Savage**, Cause No. 15-cv-35589-RCF; 16-cv-00054-DLC. Appealed to the 9<sup>th</sup> Circuit. Litigation over the **East Reservoir** Project on the Kootenai NF challenging compliance with grizzly bear and road requirements in the Forest Plan. Amicus brief filed in support of project. Forest Service is completing further analysis. Plaintiffs awarded \$163,233.53 in attorney's fees on July 22, 2019.

**Native Ecosystems Council, et al. v. Marten**, Cause No.: 17-cv-00047-M-DLC-JCL; 18-cv-35653. US Dist. Ct., Montana. Appealed to 9<sup>th</sup> Circuit. Litigation over the **Telegraph** Project on the Helena NF. Amicus brief filed which supported the federal government's Motion for Summary Judgment. Through the Forests in Focus Initiative, DNRC contributed \$125,000 to the installation of the Golden Anchor Bridge which will provide safe travel along one of the critical haul routes of the Telegraph project. The bridge replacement project helped restore the Little Blackfoot floodplain and improve recreation opportunities for the public. Project is adjacent to Tenmile - South Helena project and the outcome of this case could have implications on the Tenmile South Project. Order on 7-19-19: referred to the court's mediation unit to explore resolution through mediation. Mediation was unsuccessful and it was returned to the 9th Circuit panel for a decision on September 24, 2019.

**Native Ecosystem Council & Alliance for the Wild Rockies v. Marten**, Cause No. 18-cv-00087-DLC. US Dist. Court Montana. Litigation over **North Hebgen** Multiple Resource Project on the Custer-Gallatin NF. Declaration from Germann and Arno. Project is enjoined. Forest Service motioned to withdraw complaint.

**Native Ecosystem Council & Alliance for the Wild Rockies v. Marten, et al.**, Cause No. 17-cv-00153-DWM. US District Court Montana. Appealed to 9<sup>th</sup> Circuit. Litigation over **Moose Creek** Vegetation Project on Helena-Lewis & Clark NF (Farm Bill CE). Amicus brief filed in support of project. Summary judgement in favor of the Forest Service. 9<sup>th</sup> Circuit denied request for injunction. Ninth Circuit heard oral arguments from the parties on November 8, 2019. Amicus in support of FS, American Forest Resource Council (AFRC), was given time to provide additional insight from their brief to the interest of the panel of judges.

Also Tracking (Shared Stewardship Implications):

**Alliance for the Wild Rockies v. Marten**, Cause No. 19-cv-00102-DLC. US Dist. Court Montana. Litigation over **Willow Creek** Project on the Helena-Lewis & Clark NF (Farm Bill CE). Designated Insect and Disease Priority Areas.

**Alliance for Wild Rockies & Native Ecosystem Council v. Marten**. Cause No. 19-cv-00092-DWM. US Dist. Court Montana. Litigation over **North Bridger** Project on Custer Gallatin NF (Farm Bill CE). Designated Insect and Disease Priority Areas.

**Helena Hunters and Anglers Assoc. v. Marten**, Cause No. 19-cv-00047-DLC. US Dist. Court Montana. Litigation over **Tenmile- South Helena** Project on Helena-Lewis & Clark NF. NFMA/NEPA/HFRA/Roadless Rule violations. The Montana Attorney General filed its Brief in Support of Motion for Summary Judgment on November 15, 2019. Sonya and Hoyt signed Declarations that were attached to the Brief. DNRC will file its Amicus Brief no later than January 17, 2020.

**Alliance for Wild Rockies v. Marten**, Cause No. 19-cv-00106. US Dist. Court Montana. Litigation over **Tenmile-South Helena** Project on Helena-Lewis & Clark NF. NFMA/NEPA/HFRA/Roadless Rule violations. Consolidated with the HHAA case, Cause No. 19-cv-00047-DLC.

**Native Ecosystem Council v. Marten**. Cause No. 19-cv-35084. US District Court Montana. Appealed to 9<sup>th</sup> Circuit. Litigation over **Johnny Crow** Project on Helena-Lewis & Clark NF. NFMA/NEPA violations. Amicus brief files by Broadwater & Jefferson Counties and Tri-County Fire Working Group, Elkhorn Restoration Committee.

**Swan View Coalition v. Berhardt**, Cause No. 19-cv-00060-DWM, US Dist. Ct. Montana. Litigation over **Flathead Forest Plan Revision**. ESA/NEPA violations.

**Wild Earth guardians v. Weber**, Cause No. 19-cv-00056-DWM, District Ct Montana. Litigation over **Flathead Forest Plan Revision** NFM/NEPA/ESA/Travel Management Rule violations.

**Alliance for the Wild Rockies v. Probert, et al.** , Cause No.18.00067-DWM. US Dist. Ct. Montana District. Litigation over **Pilgrim II** Project on Kootenai NF. Requires re-initiation of

consultation & preparation of a SEIS. NOI followed from AWR and NEC was filed with intent to sue on other projects on the Kootenai and Lolo NF's connected with FWS consultation with 2011 Access Amendment to Kootenai Forest Plan.

**Alliance for Wild Rockies v. Savage.** Cause No. 9-cv-00160-DWM.; 19-cv-35035. US District Court Montana. Appealed to 9<sup>th</sup> Circuit. Litigation over **Miller West Fisher** Project on Kootenai NF. Order on 6-13-19: Emergency motion for injunction denied. ESA/NEPA/NFMA violations.

**Native Ecosystem Council and Alliance for Wild Rockies v. Marten,** Cause No. 17-cv-00021. US District Court Montana. Litigation over **Stonewall** Project on Helena-Lewis & Clark NF. Supplemental EIS has been prepared and through Objections, awaiting a decision. ESA/NEPA/NFMA violations.