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August 25, 2009

TO: Environmental Quality Council (EQC) Members

FR: Todd Everts, EQC Staff Attorney

RE: EQC Administrative Rule Review Authority - Current Administrative Rules - Agency Litigations Updates

As a part of the EQC's statutory agency oversight responsibilities, the full EQC will receive an update at each meeting on the status of agency administrative rule-making activities. In addition, at the beginning of the Interim, I provide the Council with an update from each agency regarding the status of agency litigation. This memorandum contains the following:

1. An overview of the EQC's administrative rule oversight statutory authority.
2. An summary update on current agency administrative rulemaking adoption processes.
3. An update from each agency regarding the status of agency litigation.

EQC Administrative Rule Making Oversight Statutory Authority

The requirement that the EQC review administrative rules is found in 75-1-324(10), MCA.

The Montana Administrative Procedure Act (MAPA), Title 2, Chapter 4, MCA, governs how state agencies may adopt administrative rules. An administrative rule is a type of law that implements a law adopted by the Legislature or by initiative. If the law is repealed or changed, the administrative rule must be repealed or changed to conform. MAPA provides that:

- An agency must have specific authority in law to adopt rules (2-4-301, MCA).

- Notice of the proposed rule must be published in the Montana Administrative Register, which printed by the Secretary of State. The notice must comply with specific time lines and provision requirements. (2-4-302, MCA).
- Interested parties notified include the primary legislative sponsor of the bill that enacted the section of law authorizing the administrative rulemaking process. The purpose of the notification to the legislative sponsor is to obtain the legislator's comments, inform the legislator of the date by which each step of the rulemaking process must be completed, and provide the legislator with information about the time periods during which the legislator may comment on the proposed rules (2-4-302, MCA).
- An agency must consider all oral and written submissions respecting a proposed rule (2-4-305, MCA).
- A rule must include a citation to the specific grant of rulemaking authority and must be "reasonably necessary to effectuate the purpose of the statute " (2-4-305, MCA).

The provisions governing the Legislative review of rules is in Title 2, Ch. 4, parts 3 and 4, MCA (see Attachment #1). The EQC may:

- Request records for checking compliance with MAPA (2-4-402(2)(a), MCA).
- Submit written recommendations and participate in hearings on rule adoption (2-4-402(2)(b), MCA).
- Require that a hearing be held on rule adoption (2-4-402(2)(c), MCA).
- Institute or participate in legal proceedings relating to rules (2-4-402(2)(d), MCA).
- Review the incidence and conduct of administrative proceedings (2-4-402(2)(e), MCA).
- Commence a poll on an objection to a rule (2-4-403, MCA).
- Require an economic impact statement relating to the adoption of a rule (2-4-405).
- Object to a rule not adopted in conformance with MAPA (2-4-406, MCA).
- Recommend rule adoption or changes (2-4-411, MCA).

- Object to a proposed rule and require up to a 6-month delay in adoption (2-4-305(9) and 2-4-306(4) MCA).

Failure of a committee to object to a rule proceeding is not admissible in court.

The agency must report to the committee any judicial proceedings relating to the construction or interpretation of laws on committee review of rules and may report judicial proceedings relating to the agency's rules. (2-4-410, MCA).

Update on Current Agency Administrative Rule-Making Processes

Department of Environmental Quality

For electronic access to DEQ rule notices visit the following site:
<http://www.deq.state.mt.us/dir/legal/hearing.asp>

Notice of Proposed Rules With Upcoming Public Hearings:

Public Hearing Date	Where	Comment Due Date	Purpose
10:30 a.m. September 16, 2009	Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. September 24, 2009	Notice of Public Hearing on Proposed Amendment (Underground Storage Tanks - Underground Storage Tank Operation Requirements, Leak Detection, and License Renewal Training - MAR Notice No. 17-292)
10:30 a.m. September 23, 2009	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. September 24, 2009	Notice of Public Hearing on Proposed Amendment and Adoption (Hazardous Waste - Incorporation by Reference and Standardized Permits - MAR Notice No. 17-289)

Public Hearing Date	Where	Comment Due Date	Purpose
3:00 p.m. September 3, 2009	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. September 10, 2009	Notice of Public Hearing on Proposed Amendment, Adoption, and Repeal (Public Water and Sewage System Requirements - Plans for Public Water or Wastewater Systems, Treatment Requirements, Licenses, etc. - MAR Notice No. 17-291)
1:30 p.m. September 3, 2009	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. September 10, 2009	Notice of Public Hearing on Proposed Amendment (Water Quality - Permit Fees - MAR Notice No. 17-290)
10:00 a.m. November 4, 2009	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. November 23, 2009	Amended Notice of Public Hearing and Extension of Comment Period on Proposed Amendment, Adoption, and Repeal (Solid Waste - Licensing and Operation of Solid Waste Landfill Facilities - MAR Notice No. 17-284)
		5:00 p.m. November 20, 2009	Notice of Extension of Comment Period on Proposed Amendment (Water Quality -Outstanding Resource Water Designation for the Gallatin River - MAR Notice No. 17-276)

Proposed Rules Post Public Hearing But Pre Final Adoption

Public Hearing Date	Where	Comment Due Date	Purpose
9:00 a.m. July 24, 2009	Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. July 31, 2009	Notice of Public Hearing on Proposed Amendment and Adoption (Water Quality, Subdivisions/On-site Subsurface Wastewater Treatment, Public Water and Sewage Systems Requirements, CECRA Remediation - Department Circular DEQ-4 and Gray Water Reuse - MAR Notice No. 17-288)
1:45 p.m. July 27, 2009	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. August 3, 2009	Notice of Public Hearing on Proposed Amendment (Air Quality - Definitions, Permit Application Fees, Operation Fees, Open Burning Fees - MAR Notice No. 17-286)
NA	NA	July 23, 2009	No public hearing. Notice of Proposed Amendment (Solid Waste) - Pertaining to Definitions and Annual Operating License Requirements -MAR Notice No. 17-287
1:30 p.m. July 27, 2009	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. August 3, 2009	Notice of Public Hearing on Proposed Amendment (Air Quality - Incorporation by Reference of Current Federal Regulations and Other Materials into Air Quality Rules - MAR Notice No. 17-285)

Public Hearing Date	Where	Comment Due Date	Purpose
10:30 a.m. April 3, 2009	Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	5:00 p.m. April 17, 2009	Notice of Public Hearing on Proposed Amendment, Adoption and Repeal (Solid Waste - Licensing and Operation of Solid Waste Landfill Facilities - MAR Notice No. 17-284)

Department of Fish, Wildlife, and Parks

Notice of Proposed Rules With Upcoming Public Hearings:

Public Hearing Date	Where	Comment Due Date	Purpose
6:00 p.m. September 16, 2009	Red Lion Colonial Inn, 2301 Colonial Drive, Helena, Montana	September 28, 2009	Notice of Public Hearing on Proposed Amendment (Commercial Use Rules in Montana - MAR Notice No. 12-351)

Proposed Rules Post Public Hearing But Pre Final Adoption

Public Hearing Date	Where	Comment Due Date	Purpose
7:00 p.m. June 18, 2009	Region 2 Office, 3201 Spurgin Road, Missoula, Montana	July 2, 2009	Notice of Public Hearing on Proposed Amendment, Adoption, and Repeal regarding falconry regulations in Montana- MAR Notice No. 12-352)

Department of Natural Resources and Conservation

For electronic access to DNRC Rule Notices, visit the following site:
http://dnrc.mt.gov/About_Us/notices.asp

Notice of Proposed Rules With Upcoming Public Hearings:

None.

Proposed Rules Post Public Hearing But Pre Final Adoption

Public Hearing Date(s)	Where	Comment Due Date	Purpose
June 29, 2009	Fred Buck Conference Room at DNRC, 1424 Ninth Avenue, Helena, Montana	June 29, 2009	Proposed Amendment regarding Change of Application and Historic Use (MAR Notice No. 36-22-134)
August 11, 2009 August 12, 2009 August 13, 2009	Billings, Helena, Missoula	August 20, 2008	Amendment regarding guidelines for development within the wildland-urban interface. (MAR Notice No. 36-22-136)

Updates from Each Agency Regarding the Status of Agency Litigation

See Attachments #2, #3, #4, for the litigation updates from each agency.

Attachment 1: Separate file

Trust Lands Litigation Report
for July 17, 2009

CASE NAME, COURT, & CAUSE NO. NATURE, IMPACT, STATUS

Minerals Management Bureau

<p>1. <u>Maxine UpDeGraff v. State of Montana</u>, Cause No. DV-04-57, Mont. 22nd Judic. Distr. Ct., Stillwater County</p>	<p>Quiet title action to island near Columbus, Montana. Settlement Agreement approved by November Land Board. Special "K" Ranch - a school for the developmentally-disabled has purchased UpDeGraff's land, and needs to resolve their title. I've sent them Dr. Breuninger's report and our summary judgment brief to show our claim to Rapids Island. I've spoken with Special K's Attorney, Allan Karrell about resolving this dispute informally. Mr. Karrell will present DNRC's Settlement proposal to the Special "K" Board of Directors to resolve this case. No programmatic consequences are expected.</p>
<p>2. <u>Clark Fork Pend'Oreille Coalition and Mark Gerlach v. Montana Board of Land Commissioners</u>, Cause No. BDV-99-445 Mont. 1st Judic. Distr. Ct., Lewis & Clark</p>	<p>Action challenging the validity of the Seven-up Pete mineral lease. Filed Motion to Dismiss. No programmatic consequences are expected.</p>
<p>3. <u>DNRC v. AABCO, et al</u>, Cause No DV-06- 52, Mont. 7th Judic. Distr. Ct., Richland County (Large number of defendants)</p>	<p>Quiet title action to riparian lands on the Missouri River near Sidney, Montana. Filed Motion and Order for Publication of Summons. Filed signed Acknowledgements of Service of Process. Filed State's First Set of Discovery Requests on the Answering Defendants to determine the basis for their defense. Filed Breuninger & Surveyor's affidavits. Filed Affidavit of Publication of Summons. Discovery Responses to Roth's First Set of Discovery Requests are due on July 29, 2009. We need to draft a motion for Summary Judgment. Discovery completed by August 1, 2009. All Motions filed by September 30, 2009. Need to finalize form of reciprocal disclaimers with Lyle Panasuk and Craig Hedin.</p>

	Mediation completed by December 18, 2009 Pre-trial conference on January 15, 2010. Trial on January 25, 2010. No programmatic consequences are expected.
4. <u>DEQ v. BNSF, et al. and DNRC</u> Cause No. BDV-2004-596 1 st Judic. Distr. Ct., Lewis & Clark County	Superfund Action on Reliance Oil Refinery. Consent Decree entered. Court issued dismissal for DNRC from the remainder of this action. Judgment issued against BNSF for joint & several liability and clean-up responsibility. No programmatic consequences are expected, but the potential liability posed is several million dollars.
5. Three Oil & Gas Royalty Audits	Devon, and Klabzuba. Need to draft Settlement Offer to Devon. Klabzuba audit should be sending a response. No programmatic consequences are expected.
6. Ranck Oil Request for Administrative Declaratory Ruling pursuant to Section 2- 4-501, MCA.	Ranck has requested an Administrative Declaratory Ruling and contested case hearing under MAPA. Need to issue Declaratory Ruling. No programmatic consequences are expected.
7. Saturday Sunday, LLC cancellation State of Mont. Metalliferous Lease No. 1980-07	Settlement Agreement breached. Sent Notice declaring breach of Settlement Agreement and Cancellation of Lease and opportunity for hearing. Need to issue Notice of Hearing and Notice of Appointment of Hearing Examiner. No programmatic consequences are expected.

Agriculture and Grazing Management Bureau

8. <u>Holiday Land & Livestock v. DNRC and Moe</u> , Cause No. CDV-99-18	Pleadings filed. Petition for review of improvements settlement and Constitutional takings claim for reservoir. No prosecution by Plaintiff after pleadings were filed. No programmatic consequences are expected.
9. Obtain easement from Stockman's Bank for Access to Tract "B" in Section 5, Twp 23 North, Range 60 East, MPM	Garth Sjue reports that the Easement is being processed. We've prepared the signed easement from the State, which has been signed by the Governor.
10. Matador Ranch v. Dragging "Y" fence dispute	Contested Case hearing and MAPA challenge in response to lease partition decision. Hearing Examiner offered proposed decision in favor of the

	Department. Case has been submitted to Director for filing of exceptions. No exceptions have been filed. Waiting on the Director to issue a final decision. This MAPA case will determine whether DNRC may allocate acreage between leases to accommodate the placement of a fence between two State grazing leases.
11. <u>Alaska Basin Grazing Association and Roger and Carrie Peters v. DNRC</u> , Cause No. ADV-20081151, Mont. 1st Judic. Distr. Ct., Lewis & Clark County, Montana	Action for judicial review of MEPA document prepared for Matador fence. Judge McCarter granted motion to dismiss on declaratory judgment Counts. Filed Answer to MEPA Count and filed Certified Administrative Record of the EA, and Motion and Brief for Summary Judgment. Hearing is tentatively scheduled for Aug. 27th, 2009 at 2:00 PM at Lewis & Clark County Courthouse. This case may determine the impact - if any - of the private property assessment act, the streambed preservation act, and obligations within Title 77, MCA, upon the placement of a grazing boundary fence.
12. <u>Grenz v. DNRC</u> , Cause No. DV-17-2008-2911, Mont. 16th Judic. Distr. Ct., Custer County, Montana	Petition for Judicial Review of lease improvement valuation. Case is submitted to the Court upon a motion for summary judgment. Trial Date set for September 10, 2009 at 10:00 AM in Jordan, MT. Proposed Findings must be submitted 10 days prior to trial or sanctions will be imposed. No programmatic consequences are expected.
13. Heitz Petition for Declaratory Ruling	Drafted Notice of Hearing and Notice of Appointment of Hearing Examiner. Jolyn E. Eggart is the Hearing Examiner. Kevin Chappell needs to review Notice of Hearing and Notice needs to be sent to Heitz.
14. Wade Jacobsen, Lease No. 6262, Lease Non-renewal	Reviewed file and drafted Notice of Non-renewal.
15. Gilmore Ranch, Lease No. 5222, Lease Non-renewal	Reviewed file and drafted Notice of Non-renewal.
16. Robert Turley Recreational Access Violation	Issued Notice of Hearing and Notice of Appointment of Hearing Examiner. File Administrative Questionnaire response by July 10, 2009.

17. Tommie Lee Scott	Issued Notice of Hearing and Notice of Appointment of Hearing Examiner. File Administrative Questionnaire response by July 10, 2009.
18. Montana Water Court	Due to the excessive number of water right cases (50+), all Trust Lands Management Division water right cases were transferred to Agency Legal Services for resolution.

Real Estate Management Bureau

19. <u>Only-a-mile, LLP v. State of Montana</u> , Cause DV-03-1016, Mont. 4 th Judic. Distr. Ct., Missoula County	This quiet title action will determine whether the Old Blanchard Road is a County road which provides access to a tract of state trust lands. The Plaintiff, Only-a-Mile, contends that the County road does not touch the state lands. Drafted Pre-Trial Order. Waiting on decision from District Court. No programmatic consequences are expected.
20. <u>DNRC v. Mitchell Taylor</u> , Cause No. DV-05-028, Mont. 17th Judic. Distr. Ct., Valley County	Recreational Use Violation for recovery of civil penalty. Default entered by Clerk of Court. Filed Status Report with District Court. Draft Writ of Execution.
21. REMB - Purchase Contracts and Title Review	Consult with REMB on an ongoing basis re: legal issues relating to sale and acquisition of real property.
22. <u>State of Montana, et al. v. John H. Anderson, et al.</u> , Cause No. DV-2008-15 Mont. 10th Judic. Distr. Ct., Judith Basin County	Quiet title Action in Judith Basin County to quiet title to lands sold near Hobson, Benchland, & Moccasin. Filed Complaint, and served summons and complaints upon known defendants. General Mills has not acknowledged Service of Process & we need to serve them through the Hennepin County Sheriff's office. Publishing Summons with Lewistown News-Argus. No programmatic consequences are expected.
23. <u>Weber v. Wellhouser</u> Cause No. DV-06-628B Mont. 18th Judic. Distr. Ct. Gallatin County	Quiet title to a tract of land in NW¼ of Section 36, T. 2 N., R. 2 E., MPM in Logan, Gallatin County, Montana. Filed Answer showing State's ownership. Plaintiff has inquired about leasing the property. No programmatic consequences expected.

24. Great Falls International Airport Authority, et al. v. State of Montana, et al., Cause No. CDV-08-1030, Mont. 8th Judicial Distr. Ct., Cascade County	Drafted legal memo, agenda item, and qualified disclaimer of interest for approval by the July Land Board.
25. Bear Canyon Road	Re-Drafted the Bear Canyon Road Settlement Agreement with Gallatin County and USFS. County and USFS still in disagreement as how to resolve their dispute.

Forest Management Bureau

28. <u>DNRC v. Zemple</u>	Reviewing facts of alleged timber trespass and preparing possible Complaint. No programmatic consequences are expected.
Top three Cases:	<ol style="list-style-type: none"> 1) <u>DNRC v. AABCO, et al</u>, Cause No DV-06-52, Mont. 7th Judic. Distr. Ct. (Judge Irigoien), Richland County; 2) <u>Alaska Basin Grazing Association and Roger and Carrie Peters v. DNRC</u>, Cause No. ADV-20081151, Mont. 1st Judic. Distr. Ct. (Judge McCarter), Lewis & Clark County, Montana and, 3) <u>Only-a-mile, LLP v. State of Montana</u>, Cause DV-03-1016, Mont. 4th Judic. Distr. Ct., Missoula County
Top three administrative tasks	<ol style="list-style-type: none"> 1) Assist Real Estate Management Bureau with Land Banking, Exchanges, Commercial Leases, and Easements. 2) Assist Minerals Management Bureau with Mineral royalty audits, leasing issues, and reviewing the ownership of tracts involving navigable waters. 3) Assist Ag & Grazing Management Bureau with lease assignments and cancellations and non-renewals.

DNRC Water Litigation Updated 7/13/09

<p><u>Gollaher v. DNRC and Pribyl</u> Cause No. CDV-05-770 <i>8th Judicial District Court (pending)</i></p>	<p>Petition for Judicial Review on Permit and Declaratory Judgment. The Department prevailed on the Petition for Judicial Review. A constitutional challenge to MCA §85-2-306 (stock pits) is still pending and not yet briefed. Rule 56 Motion on petition for Judicial Review appeal pending since summer 2006.</p>
<p><u>Northern Plains and Tongue River Water Users Association v. DNRC and Fidelity Exploration</u> DA – 07-0728</p>	<p>Appeal of dismissal of declaratory judgment in 1st Judicial District CDV-2007-037. Stayed pending CDV-2007-425. SCT reviewing stay.</p>
<p><u>Fidelity v. DNRC</u> <i>Federal Court</i></p>	<p>Fidelity – out-of-state water use statute violates U.S. commerce clause; stayed.</p>
<p><u>In the Matter of Change Application No. 41S-30013940 by T Lazy T Ranch, Inc.</u>; DV-08-12, 10th Judicial District Court (Swandal by substitution), Judith Basin County.</p> <p>Supreme Court Appeal – DA-09-0009</p>	<p>Petition for Judicial Review. Status: Judge Nels Swandal has assumed jurisdiction after Petitioner substituted Judge E. Wayne Phillips. DNRC filed a Motion to Dismiss based on (1) failure to exhaust administrative remedies, (2) failure to comply with §2-4-702(2) (b), MCA by stating the grounds for the review. Response to motion submitted 9/8/08. DNRC Reply filed. Oral argument 10/10/08 – cancelled (weather). Oral argument rescheduled for Oct. 31 – 10 min.; case remanded for T Lazy T to file exceptions (oral order from the bench). Motion for reconsideration filed; Response to Motion filed; Reply filed. Motion denied 12/18/08.</p> <p>Appeal filed 1/06/09. Delay in obtaining record. DNRC Opening Brief filed 3/20/09. Response brief due 4/27/09. Briefing complete.</p>
<p><u>Hohenlohe v. DNRC</u>, Cause No. BDV-2008-750, Montana First Judicial District, Lewis and Clark County</p>	<p>MAPA review of denial of change application on SOP. Answer filed October 14, 2008. TU filed for amicus. No briefing schedule yet. TU will focus on meaning of “consumptive use” in 85-2-408. Scheduling</p>

	<p>Conference 11/21/08. Opening Brief 1/20/09; Amicus 2/2/09; DNRC Response 3/2/09; Reply filed 4/9/09; (One-week extension). Oral Argument 5/12/09. Order reversing Department decision June 10, 2009. Judgment entered June 12, 2009. Appeal under discussion.</p>
<p><u>In the Matter of Applications to Change Water Right No. 41H-30004451 by Constance Cowett; No. 41H-2356200 by Charles and Amelia Kelly; No. 41H-30018777 by David and Cora Rall</u>, Cause No. DV-08-704C, Eighteenth Judicial District, Gallatin County <u>(Rall – Cusick)</u></p>	<p>Petition for Judicial Review, Application for Writ of Mandate and Request for Declaratory Judgment on denial of a change application to change water rights where DNRC had certified the water rights to the water court. Motion to Dismiss writ and declaratory judgment counts by DNRC will filed 9/30/08. Case assigned to Judge Phillips out of Lewistown. Revised petition filed without mandate and dec. action, although Bostwick raised in PJR. Answer filed Nov. 6.</p> <p>Judge ordered production of the record and Dept. responded record provided to Gallatin County. Department withdrew motion to dismiss in light of amended PJR and to make clear to Judge no decision necessary.</p> <p>Motion to Intervene as Defendant Pro Se (Dreyer/Kelly) filed 1/13/09. Granted 1/21/09</p> <p>Court: <i>Guidance on Party Status</i> – 1/21/09 Amelia Kelly Notice of Appearance/Intervene filed 1/28/09 DNRC Motion for Clarification filed 2/3/09 DNRC Motion for Joinder/Intervention filed 2/3/09 DNRC Motion to Limit Intervenor Participation filed 2/3/09 Kelly/Dreyer Motion to Hold DNRC in Contempt filed 2/6/09</p>

	<p>Response to Kelly/Dreyer Motion filed 2/19/09 (admitting record incomplete) Rall Response to DNRC Motions to reconsider/intervene filed. DNRC Reply to Responses filed 2/26/09 Court admitted Amelia Kelly and ordered response to DNRC motions (2 weeks) 4/2/09; Kelly response filed. DNRC request for recusal filed June 26, 2009. Rall opposed. Recused.</p>
<p><u>Montana DNRC v. Catlin Ranch LP,</u> Cause No. DV-08-30, Montana Fourteenth Judicial District, filed December 24, 2008.</p>	<p>Enforcement Action and Declaratory Judgment Action on illegal use of pivot under salvage. Summons mailed 12/31/08 for acknowledgement by Cusick. Judge Substituted; new Judge Swandel. Motion to Dismiss filed w/out brief and denied. Briefing Schedule set: simultaneous opening briefs due 5/22/09 and simultaneous response briefs due 7/17/09. Oral argument on 7/31/09 (10 minutes each).</p>
<p><u>Mountain Water Company v. DNRC,</u> Cause No. DV-09-589, Montana Fourth Judicial District Court Missoula County, filed May 7, 2009 (Deschamps) (Service acknowledged May 12/13)</p>	<p>PJJ and Complaint for Declaratory Judgment for termination of change application as not correct and complete. Motion to Dismiss on Declaratory Judgment will be filed, due June 19, 2009. Motion to substitute Judge filed. Motion to Dismiss Counts II through IV filed June 18, 2009. Answer to Counts I and V filed June 22, 2009. Discovery received 6/25/09 (on hold).</p>
<p><u>Town of Manhattan v. DNRC,</u> Case No. DV-09-453A, Montana Eighteenth Judicial District Gallatin County, filed May 6, 2009 received May 12, 2009</p>	<p>PJR on denial of Manhattan permit. Answer filed. Stipulated dismissal and remand to DNRC for additional hearing, Order June 12, 2009. New hearing July 17, 2009</p>

TORT CLAIMS

<p><u>Jonas dba Blacktail Mountain Ranch v. DNRC,</u> First Judicial District Cause No. BDV-2008-542</p>	<p>Tort Claim for malicious prosecution on DNRC water right permit enforcement – claim \$150,000. Motion for summary</p>
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<p>Montana Supreme Court Cause No. DA. 09-0150</p>	<p>judgment on immunity filed September 3, 2008. Briefing on SJ complete and oral argument held Nov. 3, 2008.</p> <p>Blacktail filed Motion to Amend Compliant 1/30/09.</p> <p>Court ordered SJ in Department favor 2/2/09 and denied Motion to Alter/Amend 2/20/09.</p> <p>Tort Claims filed a Response. Plaintiff replied. Motion denied by Court 2/20/09.</p> <p>Appeal filed. Mandatory mediation on May 19. Mediation failed. Opening Brief received.</p>
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COMPLETED CASES

<p><u>Lohmeier v. DNRC and Utility Solutions</u> Cause No. DA 07-0374</p> <p><u>Lohmeier v. DNRC and Utility Solutions</u>, Cause No. ADV-2006-454, First Judicial District</p>	<p>Department prevailed and district court reversed, 9/3/08.</p> <p>Utility Solutions filed for attorneys fees (27-8-313 MCA –relief dec action) from Lohmeier on Oct. 10, 2008. Case on attorneys fees stayed. Attorney fee petition withdrawn</p>
<p><u>Montana River Action Network, et al. v. DNRC, et al., and Black Bull Run Development, et al. (Intervenors)</u> CDV 2007-602; August 27, 2007 <i>1st Judicial District Court (Honzel)</i> <i>Lewis and Clark County</i></p>	<p>Petition for Judicial Review on permit and change in Gallatin County for permit for municipal use with augmentation AFFIRMED 11/10/08 [attorneys fees denied]</p>
<p><u>Faust et al. v. DNRC and Utility Solutions</u> Cause No. CDV-2007-47</p>	<p>Petition for Judicial Review of change grant in Gallatin County for augmentation. AFFIRMED 11/10/08[attorneys fees</p>

<p><i>1st Judicial District Court</i> <i>Petition for Judicial Review on Change</i></p>	denied]
<p><u>Faust v. DNRC and Utility Solutions</u> Cause No. CDV-2006-886 <i>1st Judicial District Court</i> <i>Petition for Judicial Review of Permit</i></p>	<p>Petition for Judicial Review of permit grant in Gallatin County for municipal use with augmentation. AFFIRMED 11/10/08[attorneys fees denied]</p>
<p><u>Northern Plains and Tongue River Water Users Association v. DNRC and Fidelity Exploration</u> Cause No. 2007-425 <i>1st Judicial District Court (2007)</i></p>	<p>Petition for Judicial Review by Northern Plains and Tongue River Water Users Association of Montana water marketing permit grant. This case involves the Department's final decision on the Fidelity Exploration CBM permit administrative case with constitutional CBM issues raised. DECISION REVERSED 12/15/08– CBM MUST BE CONSIDERED GROUND WATER. [attorneys fees pending]</p>
<p><u>Fidelity v. Northern Plains and Tongue River Water Users Association and DNRC and Fidelity Exploration</u> Cause No. CDV-2007-612 (transferred from 22nd Judicial District) <i>1st Judicial District Court</i></p>	<p>Petition for Judicial Review by Fidelity Exploration of Wyoming water marketing permit denial. DECISION REVERSED 12/15/08– CBM MUST BE CONSIDERED GROUND WATER [attorneys fees pending]</p>
<p><u>Constance Cowett v. DNRC and State of Montana,</u> Cause No. DV-08-703B, Eighteenth Judicial District</p>	<p>Petition for Judicial Review on denial of change; same proceeding as that underlying Rall, above. Petitioner moved for voluntary dismissal. Dismissed</p>
<p><u>In the Matter of the Horse Creek Petition for Controlled Ground Water Area No. 43C-30006730,</u> Cause No. BDV-2008-922, Montana First Judicial District.</p>	<p>Application for TRO/Preliminary injunction to stop expiration of Horse Creek Temporary CGWA. Show Cause hearing Nov. 5, 2008 at 9:00 am. Motion for Nunc Pro Tunc filed Nov. 5; Response filed; no Reply filed. TRO/Injunction Denied – HCTCGWA expired. 11/11/08. Petition for Judicial Review filed Nov. 5 in same docket; PJR Dismissed 1/6/09.</p>

<p><u>Ron and Vivian Drake, et al. v. DNRC</u> CDV 2008-480 <i>1st Judicial Dist. (Sherlock)</i> <i>Lewis and Clark County</i></p>	<p>PJR of DNRC's 4/25/08 Final Order allowing most of the temporary North Hills Controlled Ground Water Area (CGWA) to expire. Zone 2 is temporary and pending study. This is round 2 of the litigation. Petition for Judicial Review denied with expectations for cooperation.</p>
<p><u>Dee Deaterly v. DNRC, et al.</u> CDV 2007-186; March 9, 2007 <i>1st Judicial District Court (Honzel)</i> <i>Lewis and Clark County</i></p> <p>Montana Supreme Court Case No. DA 09-0036</p>	<p>Petition for Judicial Review of DNRC's Final Order denying permit application. Petitioner and DNRC entered into a stipulation to remand the matter back to DNRC for an evidentiary hearing; other Co-Respondents did not agree and case moved forward on judicial review. DNRC Response brief filed August 25, 2008; Oral Argument September 11, 2008. Case submitted for decision. AFFIRMED 11/12/08; Motion to Alter/Amend filed; Response filed; Reply filed. Decision affirmed again.</p> <p>Appeal filed. Mediation established. Mediation Statement filed 3/9/09; Mediation held. Appeal dismissed.</p>
<p><u>Open A. Ranch v. DNRC</u>, Montana First Judicial District (January 12, 2009)</p>	<p>Writ of Mandate filed to terminate Sitz permit application for not being correct and complete. Sitz Intervention filed.</p> <p>DNRC Motion to Dismiss filed 2/5/09; Extension to respond granted. Response filed 3/6/09. Reply filed 3/27/09. Oral argument 4/24/09. Writ dismissed 4/7/09 – MAPA is the remedy.</p>
<p><u>Bostwick v. DNRC</u> Cause No. DV-2007-917A <i>18th Judicial District Court</i> <i>Gallatin County</i> <i>Applications for Writs of Supervisory Control, Mandate, Prohibition and review</i> <i>under 2-4-701</i></p>	<p>Writ of Mandate issued requiring issuance of permit as approved at correct and complete stage; Attorney Fee ruling issued 9/9/08.</p> <p>Appeal filed; Motion to Dismiss denied; Appeal on writ and attorneys fees; opening brief filed October 9, 2008. Attorney fee</p>

<p><u>DNRC v. Bostwick, Montana Supreme Court Case No. DA-08-0248</u></p>	<p>mediation October 2, 2008; successful partial settlement. Response brief due Nov. 18. DNRC Reply due Dec. 2. Briefing complete.</p> <p>Oral Argument April 22 at 9:30. Case submitted.</p> <p>S.Ct. Reversed and remanded. Scheduling conference June 30, 2009 (Irvin).</p>
<p><u>Faust et al. v. DNRC and Utility Solutions</u> Cause No. CDV-2008-740 <i>1st Judicial District Court</i> <i>Petition for Judicial Review on Change</i></p> <p>Recaptioned: <u>Paul Shennum and Montana River Action Network v. DNRC and Utility Solutions Cause No. CDV-2008-740</u></p>	<p>Petition for Judicial Review of permit and change grant in Gallatin County for municipal use with augmentation. Amended Petition filed. Answer filed October 6, 2008. Case is stayed pending decisions in 886, 602 and 47. Certain parties withdrew from case as petitioners.</p> <p>Motion to Dismiss / Lift Stay filed by Utility Solutions 2/2/09 (basis Lohmeier). Extension granted. Settlement reached between US and petitioners. Case dismissed 5/09.</p>
<p><u>Schwend v. DNRC, Montana Twenty-Second Judicial District</u></p>	<p>Pro Se PJR; Request for briefing due 12/19; request for status conference and briefing filed 12/10/08. Briefing schedule: Opening Brief due 4/30/09. DNRC Response brief 5/22/09. Reply Brief due 6/5/09. Oral argument 6/23/09. Petitioner filed voluntary dismissal. Case dismissed.</p>

Attachment #3 DFWP Litigation Report

Environmental and Natural Resource Litigation Status
Dept. of Fish, Wildlife and Parks (DFWP) and the
Fish, Wildlife and Parks Commission (Commission)
August 25, 2009

State District Court Cases

Paulson v. Monsanto and DFWP:

10th Judicial District Ct., Fergus County, Cause No. DV-2004-08. Having settled with the plaintiffs (riparian landowners) by limiting plaintiff's recovery to no more than the maximum amount that can be recovered by plaintiffs under DFWP's interpretation of the Montana governmental liability laws, DFWP is now pursuing a crossclaim against Monsanto for the cleanup of PCBs in the stream and the hatchery. A trial date has been set for April of 2010. The matter may be settled prior to trial for a potentially substantial payment to DFWP. DFWP will be claiming cleanup costs of close to \$10 million.

Spoklie v. DFWP:

15th Judicial District Ct, Sheridan County, Cause No. 11013. Plaintiff alleges that I-143 (November 200 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 action has been taken by the court.

Taleff and Walsh v. DFWP:

8th Judicial District Ct., Cascade Cty., Cause No. DDV-060533. 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 involve 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.

Charlie Lincoln Estate:

9th Judicial District Ct., Toole County, Cause No. DP-07-012. Charlie Lincoln died and in his will left the Roman Catholic Bishop of Helena his ranch abutting the Marias River with DFWP having a "right of first refusal" if the ranch is sold. Two sisters are contesting the will. DFWP intervened. The two sisters withdrew their will contest before the scheduled hearing. The will contest was dismissed, the Bishop took the property

under the Will and DFWP exercised its right of first refusal and bought it from the Bishop.

Nadeau, et al. v. DFWP and Flathead Cty.:

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 is drafting a summary judgment motion.

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 and is subject to public recreational use under the stream access law. The Judgment was entered and currently the costs and fees remain the only issue to litigate. A hearing is schedule on both issued for September 8, 2009.

Richards v. Missoula Co. and FWP:

Plaintiffs application for subdivision was rejected by Missoula Co. Board of Commissioners. FWP R-2 staff had commented on potential impacts on wildlife. Plaintiff alleges improper involvement in process by FWP. FWP's summary judgment motion was granted by district court. Plaintiff has appealed to Montana Supreme Court.

Buhmann and Wallace v. State of Montana and Sportsmen for I-143, Montana Wildlife Federation:

Montana Supreme Court, Case No. 05-473. District Court Judge McCarter ruled that I-143 (November game farm initiative) did not result in an uncompensated taking of Buhmann and Wallace’s property. Both Buhmann and Wallace appealed to the Montana Supreme Court. The Montana Supreme Court decided, on December 31, 2008, that I-143 was not a taking of private property that required compensation by the State of Montana. The plaintiff has asked the United States Supreme Court to hear an appeal of the Montana decision. The U.S. Supreme Court has not yet decided whether to take the appeal.

Kafka and Bridgewater v. DFWP and State of Montana, And sportsement for I-143, Montana Wildlife Federation:

Montana Supreme Court, Case No. 05-146. District court Judge Rice ruled the enactment and enforcement of I-143 (November 2000 game farm initiative) was not an uncompensated taking of Kafka and Bridgewater’s property. Both Kafka and

Bridgewater appealed to the Montana Supreme Court. As in the Buhmann case above, the Montana Supreme Court decided, on December 31, 2008, that I-143 was not a taking of private property that required compensation by the State of Montana. The plaintiff have asked the U.S. Supreme Court to hear an appeal of the Montana decision. The U.S. Supreme Court has not yet decided whether to hear the appeal.

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 said 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 matter is now being briefed in the Supreme Court.

Montana Shooting Sports Ass'n v. DFWP:

Montana Supreme Court, Case No. DA-07-0311. Section 87-1-204, MCA prohibits DFWP employees from “coercing or influencing the political actions of any persons.” Plaintiffs brought suit alleging that the statute prohibits the DFWP from lobbying the Montana Legislature. The Supreme Court ruled that the statute does not prohibit DFWP employees from lobbying the Montana Legislature.

Federal District Court Cases

Grizzly Bear Delisting Cases:

Plaintiff environmental organizations filed two separate but very similar lawsuits (one in Idaho Federal Dist. Court, one in Montana Fed. Dist. Ct.) challenging U.S. Fish and Wildlife Service’s (FWS) decision to remove the grizzly bear from list of threatened species (under ESA) in the Greater Yellowstone area. The FWS established the Yellowstone area grizzlies as a distinct population segment. Plaintiffs allege misuse of DPS designation, improper analysis of “significant portion of range,” and that FWS improperly discounted threats to population associated with severe decline of whitebark pine and other food sources. FWS could be vulnerable to allegations regarding the distinct population segment designation because a federal district court in D.C. recently found that FWS had misapplied this ESA rule when it delisted the Great Lakes wolf population (Minnesota). Mandatory settlement conference failed to resolve the case. Decisions on summary judgment motions are pending in both courts.

Wolf Litigation and Federal Rule:

In February of 2008, the United States Fish and Wildlife Service issued a final rule delisting the northern Rocky Mountain gray wolf distinct population segment. 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 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 the 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 new comment on its old, proposed rule to delist the northern Rocky Mountain DPS. Therefore, upon USFWS' request, Judge Malloy vacated the rule, thereby returning the northern Rocky Mountain gray wolf DPS to the list of threatened and 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 has been 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 have been consolidated. On August 20, 2009, the Defenders of Wildlife group of Plaintiffs moved for a preliminary injunction to reinstate wolves as a listed species under the federal ESA. A hearing on the motion is scheduled for August 31, 2009.

Ninth Circuit Court of Appeals Cases

Roberts v. Hagener, et .al:

Ninth Circuit Court of Appeals, Cause No. 07-35197. This is an action brought under the 14th amendment to the U.S. Constitution challenging the validity of a DFWP regulation that prohibits non-members from big game hunting on the Indian reservations in Montana absent a state tribal cooperative agreement to govern it. Costs and attorneys fees have been requested. The Court ruled that the DFWP regulation did not violate the Constitution.

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. Objections are limited to water right claims that appear to be marshaled or significantly expanded since 1973.

Administrative Contested Case Proceedings

DFWP is involved in several contested case proceedings through the DNRC. Periodically, DFWP objects to new applications for water use and applications for change of water use that have the potential to impact instream flow rights held by DFWP. DFWP is currently involved with 10 DNRC contested case proceedings.

ATTACHMENT #4

DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT CHALLENGE AND REMEDIATION LITIGATION

July, 2007, to August, 2009

AIR QUALITY CASES

1. In the Matter of the Air Quality Permit for the Roundup Power Project--On February 18, 2003, the Montana Environmental Information Center (MEIC) and Environmental Defense (ED) requested a contested case hearing before the Board of Environmental Review to challenge the Department's decision to issue an air quality permit for the Roundup Power Project. The Board affirmed the Department's decision. The Petitioners petitioned for judicial review in state district court in Musselshell County; the district court affirmed the Board's decision; the petitioners appealed to the Montana Supreme Court; the Montana Supreme Court remanded the permit to the district court and Board of Environmental Review for re-evaluation under a different standard of review and for re-evaluation of visibility impacts in Class I areas. Upon relinquishment of the permit by Bull Mountain Development Co. and Bull Mountain's motion to dismiss for mootness, the Board dismissed the case as moot on October 2, 2007.

2. MEIC and Environmental Defense v. DEQ and Bull Mountain Development Co. No. 1, LLC, (State District Court, Musselshell County)--On August 6, 2003, the plaintiffs filed a district court action challenging the air quality permit for the Roundup Power Project under the Montana Environmental Policy Act (MEPA), the Montana constitutional right to a clean and healthful environment, and the Major Facility Siting Act (MFSA). The district court granted summary judgment for DEQ and Bull Mountain; and the Plaintiffs appealed to the Montana Supreme Court. Upon relinquishment of the permit by Bull Mountain, the Supreme Court dismissed the case on November 6, 2007.

3. In the Matter of the MACT Approval for the Air Quality Permit for the Roundup Power Project--On December 11, 2003, MEIC, ED, and Our Childrens' Earth Foundation requested a contested case hearing before the Board of Environmental Review to challenge the Department's maximum achievable control technology (MACT) determination for hazardous air pollutants to be emitted by the Roundup Power Project. After a contested case hearing, the Board affirmed the Department's decision; MEIC petitioned for judicial review in state district court in Musselshell County. Upon relinquishment of the permit by Bull Mountain Development and Bull Mountain's motion to dismiss for mootness, the Court dismissed the case in 2007.

4. In the Matter of the Air Quality Permit for the Roundup Power Project -- On December 6, 2005, MEIC requested a contested case hearing before the Board of Environmental Review to challenge the Department's decision to amend the permit to extend the deadline for commencement of construction. The Board's hearing examiner granted summary judgment in favor of MEIC; upon relinquishment of the permit by Bull Mountain Development Co. No. LLC, and Bull Mountain's motion to dismiss for mootness, the Board dismissed the case for mootness in September, 2007.

5. In the Matter of Thompson River Co-Gen, LLC, Air Quality Permit No. 3175-04--On September 3, 2006, the Clark Fork Coalition, Women's Voices for the Earth, and Citizens Awareness Network requested a contested case hearing before the Board of Environmental Review to challenge modification of the permit to change emission limits and control technology requirements. Several months after the petition was filed, the petitioners moved for leave to amend their Petition to add a new claim. The Board denied the motion, but remanded the permit to the Department for further evaluation of best available control technology (BACT) during non-steady state operation. The Petitioners petitioned district court for judicial review of the Board's decision denying their motion to amend, and the district court affirmed the Board's decision. The Petitioners appealed to the Montana Supreme Court, and a decision of the court is pending. On remand of the BACT issue, the Department reissued the permit modification, with new conditions, and this permit modification was not appealed.

6. In the Matter of the Appeal by Southern Montana Electric Generation and Transmission Cooperative - Highwood Generating Station, Regarding Air Quality Permit # 3423-00--On May 24, 2007, Southern Montana Electric (SME) requested a contested case hearing before the Board of Environmental Review to challenge conditions in its air quality permit related to condensable particulate matter (PM); the case has been stayed pending finalization by the U.S. Environmental Protection Agency of a final testing method for condensable PM. SME has now filed with DEQ a request that the permit be revoked.

7. In the Matter of Southern Montana Electric Generation and Transmission Cooperative (SME) - Highwood Generating Station (HGS), Air Quality Permit # 3423-00--On May 29, 2007, MEIC and Citizens for Clean Energy requested a contested case hearing before the Board of Environmental Review to challenge issuance of an air quality permit for the HGS. The Board granted summary judgment in favor of DEQ on the Petitioners' claim that BACT was required for carbon dioxide (CO₂) emissions. After a contested case hearing, the Board remanded the permit to the Department for a BACT determination specific to fine particulate matter (PM-2.5). The petitioners petitioned district court for review of the decision regarding CO₂, and that review is pending state district court in Cascade County. SME has now filed with DEQ a request that the permit be revoked.

8. In the Matter of Southern Montana Electric (SME) Generation and Transmission Cooperative - Highwood Generating Station, Air Quality Permit # 3423-01--On November 5, 2008, MEIC and Citizens for Clean Energy requested a contested case hearing before the Board of Environmental Review to challenge the Department's PM-2.5 BACT determination on remand. SME requested a stay pending the Department's decision regarding SME's application for an air quality permit for a natural gas plant, and the Board's hearing examiner granted the stay. SME has now filed with DEQ a request that the permit be revoked.

9. MEIC, Citizens for Clean Energy, Sierra Club, and National Parks Conservation Association v. DEQ (State District Court, Lewis and Clark County)--On March 30, 2009,

the Plaintiffs filed a complaint for declaratory relief in district court requesting a declaratory judgment that the air quality permit for the SME HGS expired for failure to commence construction by the deadline in the permit. DEQ filed a motion to dismiss. The plaintiffs filed a motion for substitution of the judge. Re-assignment of the case to another judge and DEQ's motion to dismiss are pending. SME has now filed with DEQ a request that the permit be revoked.

MAJOR FACILITY SITING CASE:

1. In the Matter of the MATL Transmission Line--In October of 2008, DEQ issued a certificate of compliance to Montana Alberta Ltd. (MATL) under the Montana Major Facility Siting Act. The certificate authorized the construction of a transmission line from Great Falls to the Canadian border north of Shelby. Three landowners appealed the issuance of the certificate. NaturEner USA, a wind farm developer that had purchased capacity to ship power on the transmission line, was allowed to intervene. The three landowners asserted that the transmission line's impact on farmers was not adequately studied, that the location of the transmission line did not meet the applicable location criteria, and that the transmission line did not meet the minimum impact standard set forth in ARM 17.20.1607. More specifically, the diagonal crossing of farm land was at issue. MATL reached settlements with the landowners and the appeals were dismissed on March 6, 2009.

MINING CASES

1. Cabinet Resource Group v. DEQ, Revett, Genesis (State District Court, Lincoln County)-- In January of 2007, Cabinet Resource Group, Inc., (Cabinet) filed a complaint against DEQ regarding the Troy Mine, asserting that the reclamation plan for the Troy Mine was inadequate. It alleged that (1) the permit for the Troy Mine should be suspended or revoked under the Metal Mine Reclamation Act; (2) DEQ violated its statutory duty to enforce the Metal Mine Reclamation Act by allowing the mine to continue to operate; and (3) the provision in the Montana Constitution requiring the reclamation of all lands disturbed by mining was being violated. At the time the complaint was filed, DEQ was reviewing an application to amend the reclamation plan and was preparing an environmental assessment. In January of 2008, Cabinet requested the Court to suspend the scheduling order and vacate the trial date pending DEQ's completion of the environmental assessment. Cabinet acknowledged that completion of the environmental review may render moot the issues raised in its complaint. The lawsuit remains suspended pending completion of the environmental assessment. Field work was completed this summer on two studies required by DEQ to be included in the environmental assessment. These studies pertained to (1) copper attenuation in the tailings impoundment; and (2) the hydrologic balance at the mine site.

2. Seven-Up Pete Joint Venture, et al. v. Schweitzer, Opper (Federal District Court, Montana)--On April 11, 2006, Judge Lovell issued an order dismissing the remaining counts (other counts had been dismissed earlier) of the Joint Venture's lawsuit against the State of Montana alleging a taking of property and interference with contract by passage of I-137, which banned open pit mining of gold using cyanide processing. The federal case had been stayed while a nearly identical case was litigated in state district court and the Montana Supreme Court, which held against the Joint Venture. The rationale for Judge Lovell's dismissal was that the 11th Amendment bars suits for retroactive monetary damages against states in federal court unless the state or Congress has waived the state's sovereign immunity. He found that there had been no waiver of Montana's sovereign immunity for these claims. The Ninth Circuit upheld Judge Lovell's decision, and in October of 2008 the United States Supreme Court refused to grant the plaintiffs' petition for writ of certiorari (review).

3. Cameron Springs LLC v. DEQ et al. (State District Court, Lewis and Clark County)--This was an action for a writ of mandamus to compel DEQ to issue an opencut mining permit for a proposed gravel pit in Gallatin County for which the statutory application review period had expired but for which DEQ had not prepared an environmental assessment pursuant to MEPA. DEQ had determined that the applications were acceptable under the Opencut Mining Act. Several Gallatin County residents intervened. In May of 2008, Judge Sherlock issued the writ, and DEQ issued the permit several days later. The residents appealed to the Montana Supreme Court, but they later dismissed their appeal.

4. Spanish Peaks, Inc. v. DEQ (State District Court, Lewis and Clark County)--This was an action for a writ of mandamus to compel DEQ to issue an opencut mining permit for a proposed gravel pit in Gallatin County for which the statutory application review period had expired but for which DEQ had not prepared an environmental assessment pursuant to MEPA. DEQ had determined that the applications were acceptable under the Opencut Mining Act. In May of 2008, the court issued the writ, and DEQ issued the permit several days later.

5. NOG, Inc. v. DEQ (State District Court, Lewis and Clark County)--This was an action for a writ of mandamus to compel DEQ to issue an opencut mining permit for a proposed gravel pit in Gallatin County for which the statutory application review period had expired but for which DEQ had not prepared an environmental assessment pursuant to MEPA. DEQ had determined that the applications were acceptable under the Opencut Mining Act. In May of 2008, the court issued the writ, and DEQ issued the permit several days later.

6. TMC v. DEQ (State District Court, Lewis and Clark County)--This was an action for a writ of mandamus to compel DEQ to issue two opencut mining permits and a permit amendment for gravel pits in Gallatin County for which the statutory review period had expired but for which DEQ had not prepared an environmental assessment pursuant to MEPA. This action was pending when Gallatin County adopted an emergency zoning ordinance requiring opencut operators to obtain conditional use permits. Gallatin County

then withdrew the previous certification of zoning compliance that was on file with DEQ, which is a prerequisite for issuance of a permit. In May of 2008, the court issued a writ ordering DEQ to issue one permit because DEQ had determined that the permit application was acceptable under the Opencut Mining Act prior to the enactment of the emergency zoning. DEQ issued the permit amendment. For the other applications, DEQ had not made an acceptability determination. The court issued a writ ordering DEQ to make those determinations forthwith. DEQ then issued notices that the applications for the other pits were unacceptable.

7. Knife River v. DEQ (State District Court, Lewis and Clark County)--This was a writ of mandamus ordering DEQ to issue the permit for Knife River's application for an opencut permit for the proposed Lolo Pit near Missoula. DEQ had prepared and circulated an EA, but the final EA had not been issued. DEQ contended that the application was not acceptable under the Opencut Mining Act and that it therefore did not have a duty to issue the permit. Knife River contended that DEQ had determined the application to be acceptable. While the case was pending, Missoula County adopted an emergency zoning ordinance that would require Knife River to obtain a conditional use permit in order to mine. Missoula County also withdrew the previous certification of zoning compliance. In August of 2008, the court then dismissed the action because Knife River was not in compliance with local zoning.

8. Helena Sand and Gravel v. DEQ (State District Court, Lewis and Clark County)--This was an action for a writ of mandamus to require DEQ to issue the permit for a proposed gravel pit near East Helena. While the case was pending, DEQ issued the permit, and in June of 2008 the court dismissed the case as moot.

9. Brekke and Gryder v. DEQ, Spanish Peaks, Cameron Springs (State District Court, Gallatin County)--This was a challenge filed to opencut permits DEQ issued to Cameron Springs and Spanish Peaks pursuant to the orders described above. The basis of the complaints was that issuance of the permits without an EA violated MEPA and the constitutional rights to participate and to a clean and healthful environment. The case was ultimately dismissed on stipulation of the parties in October of 2008.

10. Appeal of Eastgate Water and Sewer District--This was an administrative appeal filed with the Board of Environmental Review in July of 2008 to challenge the opencut permit that DEQ issued to Helena Sand and Gravel for its East Helena pit. The grounds for the appeal were that DEQ violated public participation requirements by allowing Helena Sand and Gravel to amend its permit application after the close of the public comment period on the application without providing an additional comment period. The case was ultimately dismissed by stipulation of the parties.

11. Eastgate Water and Sewer District v. DEQ (State District Court, Lewis and Clark County)--This was a challenge, filed in July, 2008, to the opencut permit that DEQ issued to Helena Sand and Gravel for its East Helena pit. The grounds for the appeal were that DEQ violated MEPA by issuing an inadequate EA and by failing to prepare an EIS. The case was ultimately dismissed by stipulation of the parties.

12. MEIC v. DEQ, Golden Sunlight, CURE (State District Court, Jefferson County)-- In August of 2007, DEQ issued a record of decision selecting the underground sump alternative for reclamation of the open pit at the Golden Sunlight Mine. This reclamation alternative would leave the pit open so that a water collection system could be installed in the underground workings to maintain a hydrologic sink preventing acid mine drainage from leaving the site. Analysis conducted in the environmental review determined that any reclamation alternative that partially backfilled the pit with waste material would not be sufficient to protect ground water and surface water quality. In January of 2008, a number of plaintiffs filed a complaint in the District Court for Lewis and Clark County challenging the Record of Decision. Venue was subsequently changed to the District Court for Jefferson County, where the mine is located. The plaintiffs have filed a motion for summary judgment. They assert that reclamation is only achieved if the open pit is partially backfilled and then revegetated. On that basis, they argue that partially backfilling the pit is required by the Montana Constitution, which requires that all land disturbed by the taking of natural resources be reclaimed. They also assert that the reclamation criteria set forth in the MMRA require partial backfill of the pit. Golden Sunlight also filed a motion for summary judgment, asserting that the reclamation criteria set forth in the MMRA are constitutional because the Montana Constitution does not require backfill of the pit. It also asserts that the reclamation criteria do not require backfill of the pit.

SUPERFUND/HAZARDOUS WASTE CASES

1. Flying J Petroleum v. BER, DEQ (State District Court, Glacier County)--On January 7, Judge McKinnon of Cut Bank upheld the Board of Environmental Review's holding that DEQ had the authority to require corrective action at the Flying J facility at Cut Bank issuance of a permit under the Montana Hazardous Waste Act by permit rather than administrative order. Also, the judge held that Hearing Officer Katherine Orr's participation in the Board's deliberations regarding the proposed decision she had prepared for the Board was not improper.

2. State of Montana v. BNSF Railway Company (Federal Court for Montana)--This is an action for cleanup of the Livingston Railyard. Cleanup has been occurring under a partial consent decree that was entered in 1990. On December 20, 2007, BNSF filed a motion with the federal district court for an injunction of the state court proceedings in the case of The City of Livingston, et al. v. BNSF Railway Company, et al., which was filed Sept. 27, 2007). (See below.) BNSF asked the court to issue an injunction to prevent the state court from litigating a claim which, it alleged, would interfere with the federal court's jurisdiction over the Livingston rail yard remediation. On January 3, 2008, DEQ filed a response brief with the court. The plaintiffs in the state court case intervened. On April 30, 2008, the magistrate judge issued an order denying the injunction, which was adopted by the court on July 8, 2008. BNSF appealed this denial to the Ninth Circuit Court of Appeals. On August 5, 2009, oral argument was held on the issue. The Ninth Circuit has not yet issued an opinion.

Also, on August 5, 2009, BNSF filed a Petition for Review in this case of the DEQ Director's decision resolving a dispute between DEQ and BNSF regarding indoor air mitigation requirements. BNSF contended that DEQ improperly required the mitigation, and the Director, under the dispute resolution provision of the 1990 Modified Partial Consent Decree between DEQ and BNSF, affirmed the DEQ's action. This matter is ongoing.

3. City of Livingston et al. v. BNSF (State District Court, Park County)--This is a tort action filed in 2007 by the City of Livingston and a number of individuals seeking damages for contamination from the Livingston Railyard. On December 19, 2007, BNSF filed a Third-Party Complaint for Declaratory Judgment against the State in this action. BNSF sought a judgment that the Consent Decree entered in federal court provided for, directed and governed the remediation and restoration of the Livingston Facility, and that the plaintiffs cannot recover investigation, assessment, remediation, or restoration costs or damages relating to alleged contamination in and around the City of Livingston. On January 25, 2008, DEQ filed a Motion to Dismiss BNSF's Third-Party Complaint under Rule 12(b)(1) and 12(b)(6). On March 4, 2008, BNSF voluntarily dismissed its complaint.

Also, on December 19, 2007, BNSF filed a motion to join the State of Montana necessary party. BNSF based its motion for joinder upon permission provisions in Section 75-10-706(3), MCA. On February 1, 2008, DEQ filed a response opposing BNSF's joinder motion, and on February 13, 2008, the court denied BNSF's motion.

4. Dave and Jeannie Burley v. BNSF, Diana and Kenneth Merideth v. BNSF, and Dana Nelson v. BNSF (Federal District Court, Montana)--These are three tort cases filed in 2008 for damages for contamination from the Livingston Railyard. On August 4, 2008, BNSF filed a Motion to join the State of Montana as a defendant in the above three federal cases as a necessary party to the litigation. BNSF based its Motion for Joinder upon the fact that the State owns the ground water beneath the Plaintiffs' land. On August 21, 2008, DEQ filed a response opposing joinder on several bases, the primary basis being that sovereign immunity under the Eleventh Amendment bars the State's involuntary joinder. On October 10, 2008, the federal district court denied BNSF's motion for joinder on the basis of the Eleventh Amendment.

5. State of Montana v. Arco (Federal District Court, Montana)--In 2006, Montana reached a settlement with Arco for payment of present and future remediation for the Clark Fork River. The amount of the settlement is \$83.3 million plus interest. The settlement became final in October 2008, when Judge Haddon approved it. The settlement provides that one-half of principal and interest must be paid to the Department within 90 days after approval and the other half must be paid one year later. Interest has been accruing since 2006 and was approximately \$13 million at the time of approval.

6. DEQ v. BNSF, Kalispell Pole and Timber, DNRC, et al. (State District Court, Lewis and Clark County)--DEQ filed the lawsuit under the state superfund law against seven parties seeking cleanup of the KRY Site near Kalispell (comprised of the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil facilities). The KRY Site is primarily

contaminated from wood-treating, refinery, and railroad operations. DEQ settled with six of the parties and secured a partial summary judgment for the Kalispell Pole and Timber facility against BNSF. In March 2008, DEQ and BNSF went to trial on the outstanding issues and DEQ ultimately obtained a judgment against BNSF requiring the company to conduct cleanup at the entire site. The court recently completed ruling on post-trial motions.

7. BNSF v. DEQ (State District Court, Lewis and Clark County)--In 2008, DEQ issued a record of decision selecting a final remedy for the KRY site. BNSF filed judicial review petition challenging the record of decision in state district court in Kalispell. DEQ moved to change venue to Lewis and Clark County, and the Flathead County court granted the motion. BNSF has appealed that ruling to the Montana Supreme Court.

8. W.R. Grace Bankruptcy (Federal Bankruptcy Court, Delaware)--DEQ settled the portion of claim for cleanup costs under the federal superfund act against W.R. Grace at the Libby Asbestos Site for \$5,167,000. Under the settlement, that money will have to be used for specific cleanup actions at the Libby Site. The settlement has been approved by the Bankruptcy Court, and the money will be paid when the plan of reorganization is approved.

9. Asarco Bankruptcy (Federal Bankruptcy Court, Texas)--DEQ has settled its claims for the following amounts, plus interest:

- Upper Blackfoot Mining Complex--\$36 million
- Barker Hughesville Mining District NPL Site--\$7.1 million
- Iron Mountain Mine--\$1.7 million.

The Upper Blackfoot money will be deposited in a joint DEQ/Montana Department of Justice account to pay for remediation (the DEQ function) and restoration (the DOJ function). The majority of the money is for remediation. The other amounts come solely to DEQ for remediation. In addition, ASARCO is placing certain ASARCO-owned properties and certain funds into custodial trusts to provide for cleanup of those properties. The trusts would use the funds to conduct the cleanups on those properties or will reimburse DEQ's costs in cleaning up the properties. The properties and amounts are:

- Upper Blackfoot Mining Complex--\$10 million
- Black Pine/Combination Mine--\$17.5 million
- Iron Mountain Mine--\$1.9 million

These settlements have been approved by the Bankruptcy Court. They will be paid when the plan of reorganization is finally approved.

10. Flying J Bankruptcy (Federal Bankruptcy Court, Delaware)--DEQ filed a proof of claim for approximately \$50 million in claims, which includes \$30 million for the Tank Hill facility (CECFRA) in Cut Bank, \$9 million for the Diamond Asphalt Refinery (CECRA) near Chinook, and an \$8 million contingent claim under the hazardous waste statutes for future financial assurance obligations at the Cut Bank Refinery.

UNDERGROUND STORAGE TANK CASES

1. Petroleum Tank Release Compensation Board v. Crumley's, Inc.--In this case, the Board prosecuted subrogation claims against insurance companies that had insured persons whom the Board compensated for cleanup cost of petroleum releases. The insurance companies raised various defenses. On June 3, 2008, the Montana Supreme Court held that: (1) the Board may pursue subrogation claims; (2) the Board may recover its administrative costs and attorney fees, as well as amounts paid to the insured; and (3) that petroleum contamination is "pollution" under insurance contracts.

2. Petroleum Tank Release Compensation Board v. Federated Service Ins. Co. et al--On June 3, 2008, the Montana Supreme Court held that the 8-year statute of limitations on the Board's subrogation claims against insurance companies for reimbursement of cleanup costs begins to run when the insured can file a claim for its cleanup costs, not when the insurance company denies a claim or when the Board makes a payment.

3. Petroleum Tank Release Compensation Board v. Empire Fire & Marine Insurance--On June 4, 2008, the Montana Supreme Court made a ruling on subrogation claims to its ruling in the Federated Service case the previous day.

4. Town Pump, Inc. v. Petroleum Tank Release Compensation Board, DEQ (State District Court, Lewis and Clark County)--In January, 2008, the Montana Supreme Court upheld the Petroleum Tank Release Compensation Board's denial of Town Pump's application for reimbursement for a 2002 leak at its Dillon facility. Town Pump did not immediately notify DEQ of the leak. This was a requirement for eligibility in 2002, but it was not after 2003 amendments to the statute. Town Pump applied for reimbursement after the 2003 statute took effect, and argued that the application should be processed under the 2003 law.

5. Cascade County v. DEQ (State District Court, Lewis and Clark County)--Last December Cascade County filed a petition for writ of mandamus in district court in Cascade County. In the petition, Cascade County alleges that it has had at least six different underground storage tank releases at its county shop site, and it requests the court to issue a writ ordering DEQ to assign separate release numbers for each release, so that it can obtain more reimbursement from the Petroleum Tank Release Compensation Board. In 2006, DEQ refused to assign separate release numbers based on its one release policy. DEQ moved to change venue for the case to Lewis and Clark County. The Cascade County district court granted the motion. The case is now in the discovery phase.

WATER QUALITY CASES

1. Northern Cheyenne Tribe, Northern Plains Resource Council, Tongue River Water Users v. DEQ, Opper, and Fidelity Exploration and Production (State District Court, Big Horn County)--In this case, the Tribe challenges the permit and permit renewal recently issued to Fidelity for discharges of CBM water on the Tongue. The alleged errors are:

failure to imposed technology-based treatment limitations, violation of non-degradation requirements because the existing significance threshold for EC and SAR are allegedly unlawful, violation of the right to a clean and healthful environment, abuse of discretion (issuance of permits while new nondegradation rule pending), failure to conduct adequate alternatives analysis under MEPA, failure to prepare EIS, and inappropriate reliance on invalid programmatic EIS. The district court held for DEQ. The plaintiffs have appealed to the Montana Supreme Court.

2. Diamond Cross Properties v. State of Montana, DEQ, BOGC, DNRC, and Powder River Gas (State District Court, Big Horn County)--The plaintiff, a property owner, sought a declaratory judgment that 82-11-175, MCA, is unconstitutional because it allows coal bed methane water to be pumped from the ground and discharged to surface water without first appropriating the water for a beneficial use. It alleged that this violates its property right and its right to a clean and healthful environment and fails to protect the environmental life support system and prevent unreasonable depletion of natural resources, all in violation of the Montana Constitution. Diamond Cross requested a temporary restraining order and preliminary injunction prohibiting DEQ and the other agencies from issuing, authorizing, or enforcing any orders, permits or licenses which allow the removal of groundwater from under its property. Tongue River Water Users and Northern Plains Resouce Council intervened on behalf of the plaintiff. The district court ruled in favor of the State on July 14, 2008, and no appeal was filed.

3. Clark Fork Coalition, Earthworks, TU, and Rock Creek Alliance v. DEQ, Revett, and RC Resources (State District Court, Lewis and Clark County)--Complaint was filed on June 8, 2008, challenging DEQ's decision to allow Revett to use DEQ's general construction storm water permit rather than requiring an individual discharge permit for construction activities at the Rock Creek Mine. DEQ has answered the complaint, and no further action has occurred in the case.

4. Pennaco Energy, Marathon Oil, Nance Petroleum, and Yates Petroleum v. BER, DEQ (State District Court, Big Horn County)--The plaintiffs challenged both the water quality standards set for electrical conductivity (EC) and sodium adsorption ratio (SAR) set by the Board of Environmental Review in 2003, and the nondegradation threshold the Board of Environmental Review established in 2006. In Count I, they alleged that the standards lack sound scientific justification because they are lower than background during the irrigation season, because they are lower than necessary to protect uses due to the Board's use of inaccurate soils data, and because the tributary standards are higher than necessary to achieve compliance with the standards in the Tongue and Powder mainstems. In Count II, they alleged that adoption of the 2003 standards violates HB 521, which prohibits adoption of rules that are more stringent than federal regulations or guidelines unless certain findings are made. In Count III, they alleged that the 2006 adoption of the nondegradation threshold was arbitrary and capricious because the Board did not address its 2003 conclusion that the threshold for EC and SAR should not be set as the Board set it in 2006. In Count IV, they alleged that the 2006 adoption of the nondegradation threshold violated the authorizing statute, which requires that nondegradation thresholds equate significance with potential for harm. In Count V, they alleged that the 2006

adoption of the nondegradation threshold violated HB 521. In Count VI, they alleged that the 2006 adoption of the nondegradation threshold is invalid because the Board did not prepare an EIS. On October 17, 2007, the district court issued an order ruling on the parties' cross-motions for summary judgment. The district court held in favor of BER and DEQ on all counts. Plaintiffs filed an appeal. The Supreme Court affirmed the district court's decision in an opinion filed on December 16, 2008.

5. Pennaco Energy, Inc. et al v. U.S. Environmental Protection Agency (Federal District Court, Wyoming)--Petitioners Pennaco Energy, the State of Wyoming, Marathon Oil, Devon Energy Production, and St. Mary Land & Exploration Co. filed complaints in the federal district court of Wyoming challenging EPA's approval of water quality standards and nondegradation thresholds for electrical conductivity and sodium adsorption ratio adopted by the Montana Board of Environmental Review of Environmental Review in 2003 and 2006 for streams located in southeastern Montana. The State of Montana and Tongue River Water Users intervened on behalf of EPA. Cross-motions for summary judgment were filed and the court heard oral argument on the motions on July 9 and 10, 2009. The court has not ruled on the motions.