

Department of Natural Resources and Conservation
 Litigation Report to EQC Interim Committee
 August 2011
Water Litigation

<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>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 was filed 9/30/008. 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. 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 Response to Kelly/Dreyer Motion filed 2/19/09 (admitting record incomplete) Rall Response to DNRC Motions to reconsider/intervene filed.</p>

	<p>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. Phillips recused. Judge Cybulski (Glendive) assigned. Request for status conference filed. Court ordered status report filed by parties; status report filed. Decisions on motions pending.</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>Decision in favor of Defendant on summary judgment; trial on salvage water pending. Scheduling conference set and then rescheduled for Nov. 19, 2009. Defendant motion for attorneys' fees filed; DNRC filed response and motion for stay of issue. Intervenor response and Defendant filed. Court reserved ruling on attorneys fees; stay is moot. Motion for Injunction filed by DNRC; Response received and reply filed week of 2/8/2010. Trial set for October 5-7, 2010. Injunction hearing set for June; motion to reset hearing; hearing reset to May 26, 2010; proposed findings submitted; decision on injunction pending. DNRC filed an application for Writ of Supervisory Control with the Supreme Court on March 30, 2010. Application for Writ denied April 6, 2010. Discovery complete. New judge – McKeon. Site visit complete. Trial postponed to May 2011. Notice of supplemental authority on Hohenlohe (previously cited extensively by Catlin) filed by DNRC. Response by Catlin (extensive reargument). Motion to Strike filed by DNRC. Catlin response to motion to Strike filed and DNRC Reply filed. Motion to strike granted. Motion for injunction summarily denied by McKeon. Rule 59(g) motion filed by DNRC to have denial decision include findings of fact and conclusions of law (Rule 52(a) M.R.Civ.P.) Motion briefed and pending. March 21, 2011 is the "deemed denied" date (Rule 59(d) M.R.Civ.P.; M.R.App.P. 4(5)). Motion denied and Court clearly sees denial as an interlocutory order. Decision not to appeal the order but to proceed with</p>

	<p>summary judgment.</p> <p>Summary judgment filed by DNRC March 3, 2011; by agreement, CRLP Answer brief April 25, DNRC Reply is due April 11, 2011. CRLP cross-motion for summary judgment filed March 14, 2011, DNRC Answer brief filed April 4, 2011, CRLP Reply due April 18, 2011. Trial and scheduling order vacated April 4, 2011 by the Court. Hearing on cross-motions for summary judgment was held May 5, 2011 at 10:00 a.m. in Meagher County. Motions are pending for decision. Trial date, if necessary, will be set after order on summary judgment motions.</p>
<p><u>Bostwick v. DNRC</u> Cause No. DV- 09-1196C, Eighteenth Judicial District, Gallatin County.</p>	<p>PJR on denial of permit. Answer filed January 22, 2010. Scheduling conference held May 11, 2010. Opening brief due June 11, 2010. DNRC response brief due July 16, 2010. Reply brief due August 6, 2010. Oral argument is August 30, 2010. Bostwick motions for filing extra-record material and over-length brief. Overlength brief permitted and extra-record evidence allowed. Opening Brief filed. DNRC response brief filed July 27, 2010. Reply brief due August 23, 2010. Oral argument held August 30, 2010. Proposed Order and Brief in Support of Judicial Notice of certain rights filed 9/10/10. Case submitted for decision. Motion for Supplemental Authority filed for TU Law Review Article. Article accepted over DNRC objection. Notice of Supplemental Authority of Westmont filed; no response from Bostwick. Notice of Supplemental Authority for Sitz filed; no response from Bostwick.</p>
<p><u>DNRC v. Neal Bouma and Harold Paulsen,</u> Cause No. CDV-10-1043, Montana Eight Judicial District, Cascade County (Neill).</p>	<p>Enforcement action filed for illegal on-stream ponds (no water right). Summons and Complaint sent to Defendants. Both defendants acknowledged service. Bouma Answer received 12-23-2010 and RFA's due January 24, 2011; Poulsen Answer by extension due January 14, 2011, no RFA's sent to Poulsen. Telephonic scheduling conference set for 3/9/11. Scheduling order issued. Discovery proceeding, deadline July 29, 2011. Summary Judgment motion filed by DNRC 8/9/2011. Defendant requested an extension of time to respond – 9/6/2011. Pretrial conference set for October 6, 2011.</p>
<p><u>In The Matter Of Application No. 411-30025802 To Change Water Right No. 41L-72578 by City of Cut Bank,</u> Cause No. DV-11-13, Ninth Judicial District Court, Glacier County</p>	<p>PJR on City of Cut Bank Change to change place of storage (reservoir) under water reservation. Notice appearance filed by DNRC. Scheduling order issued. Opening brief filed by Tribe. City of Cut Bank appeared and requested extension of time for filing for response brief. Extension granted until July 1, 2011 for filing of DNRC and City's briefs. DNRC and</p>

City briefs filed. Tribe requested 10-day extension from July 15, 2011 to file reply. Reply brief filed. Hearing set for September 8, 2011.

COMPLETED CASES

<p><u>Lohmeier v. DNRC and Utility Solutions</u> Cause No. DA 07-0374</p>	<p>Department prevailed and district court reversed, 9/3/08.</p>
<p><u>Lohmeier v. DNRC and Utility Solutions</u>, Cause No. ADV-2006-454, First Judicial District</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 <i>1st Judicial District Court</i> <i>Petition for Judicial Review on Change</i></p>	<p>Petition for Judicial Review of change grant in Gallatin County for augmentation. AFFIRMED 11/10/08[attorneys fees denied]</p>
<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] Attorney fee hearing November 19 vacated. Motion to Strike pending; motion denied. Hearing held March 5, 2010. DNRC allowed to file supplemental brief on new authority cited at oral argument; petitioners filed response; DNRC will file reply. Decision issued denying private attorney general</p>

	<p>doctrine and allowing recovery under 85-2-125. Judgment entered. DNRC filed uncontested motion to amend judgment to clarify DNRC not liable for fees. Judgment so amended. Fidelity filed motion to alter judgment and decision pending. Settlement reached between NPRC/TRWUA and Fidelity; dismissal granted 11/10/10.</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] Attorney fee hearing November 19 vacated. Motion to Strike denied. Hearing held March 5, 2010. DNRC allowed to file supplemental brief on new authority cited at oral argument; petitioners filed response; DNRC will file reply. See above. Settlement reached between NPRC/TRWUA and Fidelity on attorneys fees; dismissal granted 11/10/10.</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>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-</p>

<p>Montana Supreme Court Case No. DA 09-0036</p>	<p>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 under 2-4-701</i></p> <p><u>DNRC v. Bostwick</u>, Montana Supreme Court Case No. DA-08-0248</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 mediation October 2, 2008; successful partial settlement. Response brief due Nov. 18. DNRC Reply due Dec. 2. Briefing complete. Oral Argument April 22 at 9:30. Case submitted.</p> <p>S.Ct. Reversed and remanded. Show cause hearing held and Final Decision issued. Permit denied.</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</u> Cause No. CDV-2008-740</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</p>

	granted. Settlement reached between US and petitioners. Case dismissed 5/09.
<u>Schwend v. DNRC, Montana Twenty-Second Judicial District</u>	<i>Pro Se</i> 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.
<u>In the Matter of Change Application No. 41S-30013940 by T Lazy T Ranch, Inc.;</u> DV-08-12, 10 th Judicial District Court (Swandal by substitution), Judith Basin County. Supreme Court Appeal – DA-09-0009	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. Appeal filed 1/06/09. Delay in obtaining record. DNRC Opening Brief filed 3/20/09. Response brief due 4/27/09. Briefing complete. DECISION AFFIRMED Application withdrawn. Proceeding terminated.
<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	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. Administrative Final Decision 12/09 – granted permit subject to mitigation.
<u>In the Matter of Beneficial Water Use Permit Application No. 41H-30021840 by Town of Manhattan,</u> Case No. DV-09-454A, Montana Eighteenth Judicial District Gallatin County, filed Jan. 7, 2010, received Jan. 8, 2010	Double D filed PJR on the permit conditions. Answer filed. Settlement submitted. Case dismissed April 5, 2010, with remand to DNRC to add two conditions (priority and place of use restatements of the law).
<u>Thomas Rue and Blackfoot Chapter of Trout Unlimited v. DNRC,</u> Cause No. BDV-2010-331,	PJR on denial of temporary instream flow change. Filed April 5 and served April 6, 2010. Answer filed May 13, 2010. Settlement submitted and case

<p>Montana First Judicial District, Lewis and Clark County</p>	<p>dismissed by Order 8/4/10. Judgment entered 8/25/10. Need to correct error in legal description. Corrected judgment entered.</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. Scheduling 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 filed. Opening Brief filed. Response brief filed January 22, 2010. TU/MWT and Montana Farm Bureau Federation granted leave to file amicus briefs. Reply Brief filed Feb. 5, 2010. Oral argument held April 7, 2010.</p> <p>Decision issued September 21, 2010. Reversed and remanded to DNRC to issue as applied for or hold hearing on amount to be authorized for change. SCT re-affirmed certain change law tenets including ability of DNRC to look at historic use of rights and return flow, and DNRC ability to put a volume on changes. DNRC reprimanded for requiring analysis beyond that necessary under the particular instream flow facts of the case (return flow).</p>
<p><u>Clark Fork Coalition et al v. Mary Sexton and DNRC</u>, Cause No. BDV-2010-874, Montana First Judicial District, Lewis and Clark County</p>	<p>Petition for Declaratory and Injunctive Relief – appears to be PJR, on DNRC Declaratory Ruling on ARM on “combined appropriation” under small well exception in 85-2-306. Filed September 14, 2010. Settlement submitted (agree to rulemaking, essentially as previously proposed). Well Drillers intervened. Case dismissed November 11, 2010.</p>
<p><u>Hayes Creek Homeowners Association v. DNRC</u>, Cause No. DV-10-96, Montana Fourth Judicial District filed January 27, 2010.</p>	<p>Application for Writ of Mandate and TRO to stop processing of permit application within Hayes Creek CGWA. TRO granted and expired. Hearing held; no TRO or injunction. DNRC appears to be dismissed from case. Amended complaint filed (w/procedural issues). Skergan/Helmer filed motion to dismiss denied. Proceeding continuing without DNRC. Case summarily dismissed from the bench with prejudice, order 11/23/10.</p>
<p><u>Northern Plains and Tongue River Water Users Association v. DNRC and Fidelity Exploration</u></p>	<p>Appeal of dismissal of declaratory judgment in 1st Judicial District CDV-2007-037. Stayed pending</p>

<p>DA – 07-0728</p>	<p>CDV-2007-425. Appeal dismissed.</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. Tongue River Water Users filed to intervene 1/2010. Case voluntarily dismissed 2011.</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.</p>	<p>PJR 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). Motion to Dismiss Counts other than PJR filed and denied. Amended discovery received June 8, 2010. Discovery response filed. Motion to Dismiss denied. Amended Answer filed. Schedule set. Plaintiffs Opening Brief due October 1, 2010; DNRC Response filed. Plaintiff Reply due November 30, 2010. Discovery served on Mountain Water. Motion for protective order (on historic use information) filed by Mountain Water. DNRC responded; reply filed. DNRC requested oral argument on PJR. Protective order denied 12/10. MTN Water wanted a stay and DNRC agreed. Joint motion for stay filed. Stay granted until May 1, 2011. Mountain Water initiated voluntary dismissal and the Department did not object. Case dismissed 6/3/2011.</p>
<p><u>Westmont Developers v. DNRC</u>, Cause No. CDV-2009-823, Montana First Judicial District, Lewis and Clark County.</p>	<p>PJR on permit denial in Bitterroot Basin. (“de minimis” depletion of 205 AF challenge). DNRC Answer filed. Opening Brief filed Feb. 19, 2010. Response brief and request for oral argument filed March 24, 2010. Reply brief filed April 23, 2010. Oral argument postponed at request of Westmont. Oral argument held December 2, 2010; case submitted for decision.</p> <p>Decision AFFIRMED for Department 6/13/11.</p>
<p><u>Sitz Ranch Management Partnership v. DNRC</u>, Cause No. 10-13390, Fifth Judicial District, filed January 12, 2010.</p>	<p>PJR on permit denial (depletion Beaverhead River). Answer filed. Schedule issued. Opening brief due August 20, 2010. DNRC Response due September 24, 2010. Sitz Reply due October 8, 2010. Hearing held November 8, 2010. Case submitted; decision pending. Notice of Supplemental Authority of Westmont filed; Sitz objected and DNRC replied.</p> <p>PJR Denied and Department decision affirmed in its entirety 7/26/2011.</p>

<p><u>Town of Manhattan v. DNRC</u>, Case No. DV-09-872c, Montana Eighteenth Judicial District Gallatin County, filed September 11, 2009 received September 14, 2009</p>	<p>PJR on termination of municipal change application for failure to be correct and complete. It is also a challenge to rules on historic use for municipalities within the PJR. DNRC Answer filed. Opening Brief received Jan. 29, 2010; DNRC Brief filed; Reply Brief filed. Oral argument in Bozeman held April 9, 2010. Parties filed proposed orders May 14, 2010. Motion to Strike one of Manhattan's proposed orders filed by DNRC.</p> <p>PJR Denied and decision of Department affirmed in its entirety August 17, 2011.</p>
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TORT CLAIMS

<p><u>Jonas dba Blacktail Mountain Ranch v. DNRC</u>, First Judicial District Cause No. BDV-2008-542</p> <p>Montana Supreme Court Cause No. DA. 09-0150</p>	<p>Tort Claim for malicious prosecution on DNRC water right permit enforcement – claim \$150,000. Motion for summary 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.</p> <p>District Court decision upheld on grounds of probable cause. Rehearing denied.</p>
<p><u>Long v. DNRC, CDV-2009-107, 1st Judicial Dist. Court, Judge Seeley</u></p>	<p>Wrongful (Constructive) Discharge violation of FMLA and retaliation. Tort Claims represents the DNRC.</p> <p>Employee resigned in the early hours in February of 2008, filed suit in February 2009.</p> <p>Trial date, October 28, 2012 Discovery in progress.</p>

Minerals Management Bureau

Graham v. State, et al., DV-05-191C,
Eleventh Judicial District Court, Flathead
County.

Quiet title action regarding
artificially avulsed land in Whitefish
River. Reversed by Supreme Court
for evidentiary hearing. Plaintiff
filed Renewed Motion for Summary
Judgment seeking DNRC's dismissal
from litigation. Brief in Opposition
filed. Motions still pending.

Settlement conference took place on
March 29, 2010. No settlement
reached. Will prepare for
evidentiary hearing, which will take
place sometime during the court's
trial term beginning May 18, 2010.

Judge Lympus issued order on July
7, 2011 in which he denied Graham
and Rygg's Renewed Motion for
Summary or in Alternative Motion
to Dismiss DNRC from litigation,
and granted MDOT's Motion to
Amend Third Party Complaint to
join two additional parties. The
Amended Complaint is due July 22,
2011.

Clark Fork Pend'Oreille Coalition and
Mark Gerlach v. Montana Board of
Land Commissioners, Cause No. BDV-
99-445 Mont. 1st Judic. Distr. Ct., Lewis
& Clark

DNRC v. AABCO, et al, Cause No DV-
06- 52, Mont. 7th Judic. Distr. Ct.,
Richland County
(Large number of defendants)

Action challenging the validity of
the Seven-up Pete mineral lease.
Filed Motion to Dismiss. **No
programmatic consequences are
expected.**

Quiet title action to riparian lands
on the Missouri River near Sidney,
Montana. Filed Motion and brief for
Summary Judgment and Reply
Brief. Filed proposed Settlements
with Wilson and Arendt with the
Land Board.

Court granted the State's motion for summary judgment, holding that the islands were held by the State for the public trust, and conditioning the judgment with the requirement that the State reimburse any property tax payments received with interest at the rate of 10% per year.

Filed Motion to Amend Judgment under Rule 59(g), M.R.Civ.P. to seek costs of quiet title litigation under Section 25-10-201, MCA, and challenge the Court's jurisdiction to require reimbursement of taxes and improvement value with interest.

Filed answer brief to Defendant's motions to alter or amend judgment under Rules 52(b), 59(g), and 60(b)

The Rule 59(g) is deemed denied if the Court does not rule by July 18th, 2011. Need to file Notice of Entry of Judgment and Appeal or request Writ of Prohibition, or seek further adjudication of un-resolved facts if there is no ruling by July 18th.

Requested Telephone Status and Scheduling Conference from Court to resolve outstanding factual findings on taxes, improvements, and interest.

No programmatic consequences are expected.

Audit Findings issued to Devon. Need to hold informal conference.

Received contracts from Ranck only for sales to Affiliates. No contracts were received that showed an arm's-

Devon Gas Royalty Audit

Ranck Gas Royalty Audit

	<p>length sale to a third-party purchaser.</p> <p>The Department will wait to file a MAPA action for a contested case proceeding to resolve the royalty audit, after it has issued and resolved an administrative declaratory ruling.</p>
<p><u>Ranck Oil, Inc. v. Montana DNRC</u>, Cause No. BDV-2010-240, Montana 1st Judicial District Court, Lewis and Clark County</p>	<p>Ranck has filed a Petition for Judicial Declaratory Ruling requesting an interpretation of its obligation to pay royalties.</p> <p>Court issued ruling remanding case back to DNRC for declaratory ruling on how to calculate royalties. Administrative Declaratory Ruling was issued on August 4, 2011. Ranck has 30 days to Petition for Review – September 6, 2011.</p>
<p><u>Northern Plains Resource Council, et al. v. State Board of Land Commissioners</u>, DV-38-2010-2480, Mont. 16th Judicial District Court, Powder River County</p>	<p>Constitutional Challenge to Otter Creek Coal leases and “duplicate MEPA” exemption under Section 77-1-121, MCA.</p> <p>Case consolidated with MEIC et. al v. State.</p> <p>Stipulated facts have been submitted.</p> <p>Received Plaintiffs’ Motion for Summary Judgment</p> <p>May 13, 2011 – Motion to Amend Pleadings</p> <p>May 13, 2011 – Stipulated Facts to be submitted</p> <p>June 29, 2011- Plaintiffs’ motions for summary judgment and briefs</p> <p>July 29, 2011- Defendants’ cross-motions for summary judgment and briefs in support of cross motions and opposition to plaintiffs’</p>

summary judgment motions have been submitted

August 18, 2011- Plaintiffs' reply briefs

September 7, 2011- Defendants' reply briefs.

Sept. 27, 2011 at 10:00 AM – Oral Argument of the motions in Broadus, MT District Court.

Filed brief in support of Motion for Summary Judgment

Reviewed first draft of reports on two drilling and spacing units. Ray Breuninger, our expert witness is providing technical review of each drilling and spacing unit.

Reviewed Communitization Agreements and determined that DNRC's statement of undivided interest is binding upon the Operator for the following wells:

- 1) The Haffner 11X-18 Well, which is subject to a Communitization Agreement in Sections 18 and 19, Twp. 22 North, Rge 59 East;
- 2) The Darlene 41X-20 Well, which is subject to a Communitization Agreement in Sections 17 and 20, Twp. 22 North, Rge. 59 East; and
- 3) The Lorenz 14X-16 Well, which is subject to a Communitization Agreement in Sections 9 and 16, Twp. 22 North, Rge. 59 East.

Appointed Hearing Examiner and a notice of hearing has been issued. Stipulated Facts submitted.

14 Interpleader Actions to be filed by XTO on the Yellowstone River.

Somont Oil, Inc. Request for Administrative Hearing on the validity of the Department's imposition of well

payment damages on oil & gas leases

Motion and brief submitted.
Filed Answer brief.
May 13, 2011 – Last day to file cross-motions for summary judgment.
May 27, 2011 – Last day to file response briefs for summary judgment.
Telephonic oral argument has been conducted and case is submitted for proposed decision by hearing examiner.

Agriculture and Grazing Management Bureau

Holiday Land & Livestock v. DNRC and Moe, 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.**

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.

MLIC Asset Holdings, LLC v. Bitterroot Trails, LLC, et al., Cause No. DV-09-1191, Mont. 4th Judic. Distr. Ct., Missoula County

Suit by Creditor to recover collateral from Debtor, including State grazing license No. 30603082. Filed Answer on November 17, 2009. Judgment issued which recognizes the Land Board’s discretion to approve of any person purchasing the grazing license at the Sheriff’s sale.

AXA v. Shallenberger, Cause No. DV-17-2010-5, Mont. 16th Judicial District Court, Garfield County

Suit by Creditor to recover collateral from Debtor, including State grazing leases. Judgment issued which recognizes the Land Board’s discretion to approve of

<u>Kemp v. Selman</u> , Cause No. DV-09-082, Mont. 7 th Judic. Distr. Ct., Dawson County

the future grazing lessee.
Suit by land purchaser seeking specific performance of alleged contract to assign State grazing lease No. 1689 and to quiet title to State grazing lease. Filed Answer on November 10, 2009.
Spoke with Mediator concerning possible resolution of case.

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.
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Real Estate Management Bureau

REMB – Purchase Contracts and Title Review
<u>Weber v. Wellhouser</u> Cause No. DV-06-628B Mont. 18 th Judic. Distr. Ct. Gallatin County
Bear Canyon Road

Consult with REMB on an ongoing basis re: legal issues relating to sale and acquisition of real property.
Quiet title to a tract of land in NW ¹ / ₄ 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 programmatically consequences are expected.
The Bear Canyon Road Settlement Agreement with Gallatin County and USFS has been approved by the State Land Board. USFS and Gallatin County are proceeding under the interim agreement to complete the Travel Plan and to prepare for the abandonment of the County Road.
Reviewed revisions of draft

	<p>easements previously sent to the County and USFS.</p> <p>We need to execute the Settlement Agreement when the USFS and County are ready to do so.</p> <p>Need to draft a Complaint to quiet title to the Cooper Flume, and seek accommodation for re-location of the Bear Canyon Road, and Land Board Agenda item. The quiet title action is necessary to either remove the Cooper Flume as an encumbrance from the State's title because it was void when it was issued, or to request that the Court judicially re-locate the intersection of the Bear Canyon road and the cooper flume. Obtaining litigation guarantee from local title company to ascertain necessary parties to name in litigation.</p>
Cabin Site Leases	Draft and review rules to implement cabin site rental rates under SB 409.

Cases listed in red have been wholly transferred to Agency Legal Services Bureau at the Department of Justice.

Forestry Division

Fire and Aviation Management Bureau

<p>Weaver v. State, Cause No. DV-02-25, Mont. 3rd Judicial District Court, Granite County.</p>	<p>Negligent fire-suppression claim. Bill Gianoulias has retained Gary Graham, of Garlington, Lohn and Robinson, to defend the suit. With Gary's retirement, Bob Sheridan and Elena Zlotnick are now leading the defense. No action by the Plaintiffs in nearly seven years. Motion to Amend Complaint has been filed. Court has granted the Motion; the Amended</p>
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	Complaint and Answer to Amended Complaint have been filed. Depositions of five of the Incident Management Team are being scheduled, likely in Atlanta. Scheduling Order deadlines have all been extended at the request of the Weavers' counsel.
<u>DNRC v. Lynn Davis</u> , DV-11-1026, Fourth Judicial District, Missoula County.	Complaint filed against Lynn Davis for fire suppression costs in Red Quill and Wolf Ridge fires.

Forestry Assistance Bureau

<u>DNRC v. Timothy D. Ray</u> , DV-04-57, Third Judicial District Court, Powell County.	SMZ fine of roughly \$50,000 that a hearing examiner affirmed. Complaint filed. Awaiting service of Complaint on Mr. Ray. Tim Ray has moved from Deer Lodge to Spokane, so a decision will be made as to what further action will be taken. Note: informed that Tim Ray has moved to Idaho and has begun operating again – and owns equipment.
<u>DNRC v. Crowder Lumber, Inc.</u> , DV-2003-76, Tenth Judicial District Court, Fergus County.	Default entered. Need to file default with Dept. of Revenue for possible collection of any tax refunds.

Trust Lands Management

<u>Ranck Oil, Inc. v. Montana DNRC</u> , Cause No. BDV-2010-240, Montana 1 st Judicial District Court, Lewis and Clark County	Declaratory Ruling issued 8/4/11.
<u>Wild Eagle Mountain Ranch, et al. v. DNRC</u> , Cause No. DV-2010-09, Mont. Sixth Judicial District Court, Sweetgrass County	Cross motions for summary judgment fully briefed as of 7/27/11.
TXO interpleader	File review.
Jansky Contested Case Hearing	Assigned hearings examiner for Jansky

	<p>hearing. Telephonic oral arguments conducted 6.16.11.</p>
<p>Bailey cabin site lease</p>	<p>In 2010, the Department notified cabin site lessees of an increase to cabin site lease fees to reflect increases in valuation. Lessees were given the option to either sign a supplemental lease agreement or to continue under the existing lease agreement based on the 2009 appraised value (a substantially higher rate).</p> <p>Lessee opted to sign the supplemental lease agreement, and returned what looked like the supplemental lease agreement the department had issued on an identical shade of paper. The department signed the supplemental agreement and returned it to the lessee.</p> <p>Unbeknownst to the Department, the lessee had “amended” the agreement to provide that the lease fee would be calculated per the original 2003 agreement due to “option 2 incurring an increase that is so high that it is unaffordable in the current economy.”</p> <p>The Department’s options at this point are to claim that Lessee’s actions constitute “constructive fraud” under 28-2-406, or to claim that the lease agreement signed by the Department is in violation of the Department’s own administrative rules.</p> <p>Drafted memo analyzing fraud and contractual basis to rescind. Department will send letter and amended SLA to Bailey pointing out our right of cancellation and stating Department’s intention to rescind the “modified” SLA.</p>

Letter, settlement agreement, and new SLA have been mailed to Ms Bailey.

Drafted "reminder" letter, sent 6/30 by Bob Sandman. Bailey has until 7/15 to respond before State takes legal action (cancellation) of her lease.

Bailey responded that she intends to sell property, Bob Sandman has drafted and will send a letter outlining her options for payment to bring lease into compliance or cancellation.

Bailey has initiated cancellation paperwork. Drafted notice letter to Countrywide Bank care of their attorney. Awaiting comments from Bob Sandman. Will mail next week.

Agriculture and Grazing Management Bureau

<p><u>Only a Mile, LLP v. State of Montana</u>, Cause DV-03-1016, Mont. 4th Judic. Distr. Ct., Missoula County</p>
<p><u>DNRC v. Applegate</u>, Cause No. DV-04-12677, Mont. 5th Judicial District Court, Beaverhead County.</p>
<p><u>DNRC v. Weinstein</u>, Cause No. DV-04-079A, Mont. 11th Judicial District Court, Flathead County.</p>
<p><u>Deborah Stewart-Hunt v. State DNRC and Land Board</u>, DV-05-1125, Missoula County.</p>

<p>Supreme Court appeal ruled in DNRC's favor. Negotiating terms of easement with Jack Mulcare and Elizabeth Stone.</p>
<p>Default judgment entered. Will contact the Department of Revenue to institute process to have any tax refunds garnished.</p>
<p>Default judgment entered. Will contact the Department of Revenue to institute process to have any tax refunds garnished.</p>
<p>Petition for Judicial Review. Settlement reached. The Petition for Judicial Review has been stayed pending the carrying out of the terms of the settlement agreement. Work on the lease site to be conducted in early April, which will allow for completion of settlement</p>

Recreation use violations

agreement, including the sale of the improvements and assignment of the lease. I have filed a status report with Judge Larson. Deborah Stewart-Hunt has sold the improvements and assigned the lease. Court has issued Order Placing File in Closed Status. Will file Motion to Dismiss with Prejudice with a supporting affidavit indicating that a case and controversy no longer exists due to lease assignment and sale of improvements.

Several rec use violations that will be filed in district court (Turley, Taylor, Scott).

<u>Forest Management Bureau</u>
Habitat Conservation Plan

A draft Implementation Agreement needed for the HCP and Incidental Take Permit. This is the document that memorializes and incorporates by reference the Incidental Take Permit (“ITP”) and HCP. The HCP team would ideally like to be able to, before the HCP is implemented and the ITP is issued, determine the precise Forest Management Rules in need of amendment, make the amendments, initiate the MAPA process, and have the rules amended prior to the issuance of the ITP. One possibility is that DNRC will not, in the end, proceed with an ITP, and the Bureau would like to be able to use the knowledge the Forest Management Bureau acquires during the HCP process to amend the Rules and

	<p>build in added conservation measures into the Bureau's timber-sale program.</p> <p>New species list most likely includes the grizzly bear, lynx and the aquatic species (bull trout and cutthroat trout). Fisher, wolverine, bald eagle and wolf still being considered for inclusion. Flammulated owl, pileated woodpecker, black backed woodpecker and northern goshawk have been removed from list.</p> <p>Internal discussions continue regarding the efficacy of the negotiated conservation strategies and the best manner to proceed. A public process begins on October 3, 2005 during which comments will be heard from various interested parties. Those comments will further shape the development of alternatives.</p>
Sheets Timber Permit	A timber permit in the SLO on which there has been a default on roughly \$17,000 owed. The permittee has filed for bankruptcy SLO wants to pursue the amount owed.
<u>DNRC v. Stan Kuipers</u> , DV-2011-72, Tenth Judicial District, Fergus County	Breach of timber sale contract Complaint filed in Fergus County. Complaint served on August 8. Answer due on August 29.