

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
LITIGATION SUMMARY (FEBRUARY 2014 – FEBRUARY 2016)

WATER RESOURCES LITIGATION

In the Matter Of Application No. 411-30025802 to Change Water Right No. 41L-72578 by City of Cut Bank, Cause No. DV-15-77, 9th Judicial District, Glacier County. Petition for Judicial Review filed by the Blackfeet Tribe challenging DNRC's jurisdiction to process and grant a change authorization for the place of storage for the City of Cut Bank's water reservation. This PJR is the result of a contested case hearing on the issue of jurisdiction following the 9th Judicial District Court's August 28, 2012, Order and Opinion remanding these proceeding to the DNRC in Cause No. DV-11-13. Following a contested case proceeding on remand, a Final Order determining DNRC had jurisdiction to process and grant the City's change application was issued on November 16, 2015. The Blackfeet Tribe filed a petition for judicial review on December 15, 2015. A briefing schedule has not been entered by the D.Ct.

In the Matter of Applications to Change Water Right No. 41H-30018777 by David and Cora Rall, Cause No. DV-08-704C, 18th Judicial District, Gallatin County. Amelia Kelly and Steve Kelly are intervenors. Petition for Judicial Review challenges DNRC's denial of an application for a change authorization for multiple water rights. Multiple motions were filed and are still pending and awaiting action of the Court. No scheduling order is in place and no briefing on the merits of the PJR has occurred.

Atlantis Water Solutions, LLC v. DNRC, BDV 2015 -486, 1st Judicial District, Lewis & Clark County. Petition for Judicial Review filed on July 1, 2015, challenging DNRC's denial of water marketing permit based upon the § 85-2-310(9), MCA, marketing criteria. This matter is currently being briefed and a hearing is scheduled for February 24, 2016.

Clark Fork Coalition, et. al v. DNRC, et. al, BDV– 2010- 874, 1st Judicial District, Lewis and Clark County. Petition for Judicial review challenging DNRC's declaratory ruling that the definition of "combined appropriation" contained in Admin. Rule M. 36.12.101(13)(1993), was valid and consistent with §85-2-306(3)(a)(iii), MCA. On October 17, 2014, D.Ct ruled that DNRC combined appropriation definition was invalid and reinstated DNRC's previous rule defining combined appropriation. The Montana Well Drillers, Montana Association of Realtors and Montana Building Industry Association appealed from the district court's order and that appeal is proceeding as Montana Supreme Court Case No. DA 14-0813. DNRC is not a party to that appeal.

On June 12, 2015, the D.Ct. ruled that the Clark Fork Coalition was entitled to attorney fees. Clark Fork Coalition claimed \$229,465.00 in attorney fees and costs. In October of 2015, the D.Ct. entered a Judgment and Consent Decree awarding CFC \$100,000.00 for attorney fees. Those fees are only payable if the D.Ct.'s October 17, 2014 is affirmed and the D.Ct.'s June 12, 2015 order granting attorney fees are affirmed on appeal.

In December of 2015, DNRC filed an appeal challenging the CFC's entitlement to attorney fees which is pending as Montana Supreme Court Case No. DA 15-0746. That appeal is currently stayed until 60 days after remittitur in Montana Supreme Court Case No. DA 14-0813.

Ranch Homeowners Association v. DNRC, et al, DV 14-186A, 18th Judicial District, Gallatin County. This matter was filed on March 15, 2014. Counts I through IV challenge Gallatin County's approval of the Springhill Reserve Major Subdivision on numerous grounds. Count V asserts that the DNRC's definition of "combined appropriation" is arbitrary, capricious, and not in accordance with the law. Count VI alleges that DEQ is required by statute and rule to place restrictions on the proposed subdivision. Plaintiffs have asserted entitlement to attorney fees. This matter was filed before the DNRC's rule defining "combined appropriation" was determined to be invalid by CFC v. DNRC and has been stayed until 30 days after resolution of Appeal in Montana Supreme Court Case No. DA 14-0813.

TRUST LAND MANAGEMENT LITIGATION

Gallatin County v. State of Montana, Cause No. DV-12-707A, 18th Judicial District, Gallatin County. Complaint for Declaratory Judgment concerning the ownership and jurisdiction of the Bear Canyon Road upon State trust lands and a Tort Claim for intentional and negligent trespass. Gallatin County v. Montana has been consolidated with Kelley v. Bunker et al. and State of Montana, Cause No. DV-12-863B, Mont. Eighteenth Judicial District Court, Gallatin County (Complaint to quiet title to the Cooper Flume). There is a consolidated caption with a new case number: "12-707AX." Summary judgment has been briefed. All proceeding are stayed until April 6, 2016, to allow the parties to explore potential resolution of the case.

Salmond Ranch Co., Inc. v. Known Persons v. Montana DNRC and State Board of Land Commissioners, Cause No. DV-12-45, 9th Judicial District, Teton County. Quiet title action to determine whether there is a route of public access as granted by Frank Salmond across Sections 2, 3, and 10, in Township 23 North, Range 8 West, MPM, in Teton County, Montana. Resolved by Settlement Agreement approved by the Land Board on July 20, 2015. The Settlement Agreement resulted in Public Access to State land. DNRC agreed to reimburse Salmond Ranch up to \$15,000 for the construction of a new access road and parking area

Montrust v. State of Montana (Montrust III), Cause No. BDV-2012-39, 1st Judicial District, Lewis and Clark County. Constitutional challenge to SB 409, Rule "3B" rentals, and cabin site rental rates under SB 409. On April 5, 2012 the Court issued a Preliminary Injunction enjoining the implementation of SB 409 and the SB 409 administrative rules. The DNRC entered a settlement agreement to make rules and pay plaintiffs' attorney fees in the amount of \$152,859.08, which was approved by the Land Board on October 19, 2015.

Revocable Living Trust of Stip v. State of Montana, Cause No. 11-110, 7th Judicial District, Richland County. Quiet title action concerning three islands within a drilling and spacing unit composed of Sections 17 and 20 in Township 22 North, Range 59 East, MPM in Richland County, Montana. XTO is holding oil & gas royalties in suspense pending the outcome of this quiet title action to define the ownership of several parcels of land. A request for scheduling conference was filed on January 26, 2016.

Graham v. State, et al., DV-05-191C, 11th Judicial District, Flathead County. Quiet title action regarding artificially avulsed land in Whitefish River. Summary Judgment reversed by Supreme Court for evidentiary hearing. A bench trial was held in February 2014 after which the D.Ct. ruled in favor of Graham.

Public Lands/Water Access Association, Inc. v. Robbins, et al., Cause No. DV-14-2012-0085DK, Mont. 10th Judicial District, Fergus County. A Suit for Declaratory ruling on the legal status of Maybee Road in Fergus County, Montana. Received First Amended Complaint on August 20, 2015.

Dolphay v. DNRC, Cause No. DV-15-033, 12th Judicial District Court, Hill County. Complaint to enforce common boundary fencing. Additional fencing has been installed and case was voluntarily dismissed in July of 2015.

Pachek v. Montana, et. al, BDV-14-320, 8th Judicial District, Cascade County. Quiet title action filed on for property located in Cascade County. Dismissed without prejudice on October 29, 2014.

Doan v. Sunny Slope Grazing Association, BDV-2012-702, Mont. 1st Judic. Distr. Ct., Lewis and Clark County. Doan has resolved access issues with Sunny Slope. Doan has waived any monetary damages against the State of Montana. Dismissed with prejudice on April 13, 2015.

FORESTRY/FIRE MANAGEMENT LITIGATION

DNRC v. Timothy D. Ray, DV-04-57, Third Judicial District Court, Powell County. Streamside Management Zone fine of roughly \$50,000, affirmed by a hearing examiner. Complaint filed. Awaiting service of Complaint on Mr. Ray. Tim Ray has moved from Deer Lodge to Spokane or Idaho, and a decision will be made as to what further action will be taken.

DNRC v. Lynn Davis, DV-11-1023, Missoula County. Fire suppression costs for two fires. DNRC settled on one of the fires and are receiving payment. Other fire issue is pending.

State of Montana, DNRC v. Robert Fitte, CDV 2014-503, First Judicial District, (Corral Fire), The Department filed a complaint under this Cause Number on June 23, 2014. This Complaint has not been served. The disposition of this matter is expected to be a dismissal by DNRC after having gained intervenor party status in a companion interpleader case.

Mountain West Farm Bureau Mutual Insurance Company v. Robert S. Fitte v. Intervenors (DNRC et al.), ADV-2013-240, First Judicial District, (Corral Fire interpleader action). DNRC is an intervening party for purposes of its statutory right to claim reimbursable costs for fire suppression. The balance of the intervenor party roster and unrepresented non-parties are casualty loss claimants. The present status is the recent appointment of a Special Master who will begin the process set out by the Court's January 25, 2016 Order. The pool of available funds is \$1.8 million less any common fund attorney's fees that may be awarded in the future in this case stemming from another suit now consolidated in this matter.

FEDERAL LITIGATION

Defenders of Wildlife, et al. v. United States, CV-15-14-GF-BMM, US District Court Montana. Challenge and request for injunction related to United States chosen alternative for pallid sturgeon passage at Intake Dam on Yellowstone River. DNRC co-filed an amicus brief in opposition to request for injunction. Injunction granted September 5, 2015.

Native Ecosystems Council, et al. v. Krueger, CV 14-00196-DLC, US Dist. Court Montana. Litigation arising out of the “Chessman Reservoir/Red Mountain Flume Project” in the Helena/Rimini area. DNRC co-filed an amicus brief related to the Project’s fire hazard-reduction component and in opposition to the plaintiff’s request for an injunction. Injunction denied.

Friends of the Wild Swan, et al. v. Austin et al., CV 11-125-M-DWM, US Dist. Court Montana (Friends of the Wild Swan, et al. v. Garcia et al., Ninth Cir. Court of Appeals No. 14-35463). Litigation arising out of the “Colt Summit Project” north of Seeley Lake. DNRC co-filed an amicus brief in both the district court and appellate proceedings related to the fire hazard-reduction component of the litigation.

Friends of the Wild Swan et al v. Jewell et al., CV-13-61-M-DWM, United State District Court for the District of Montana, Missoula. Friends of the Wild Swan and Montana Environmental Information Center filed a complaint for declaratory and injunctive relief against the US Fish and Wildlife Service on March 18, 2013. The Complaint challenged USFWS’ approval of the Habitat Conservation Plan prepared by the DNRC for forest management activities on state trust lands in western Montana, and the Service’s issuance of an incidental take permit for these activities. The case was resolved on summary judgment by Judge Molloy (in favor of the federal government and the state on all issues but one), after which all parties appealed to the Ninth Circuit Court of Appeals. The parties then entered into settlement discussions within the Ninth Circuit’s appellate settlement system and after several months of discussions, a settlement was reached. That settlement was approved by the Land Board in August 2015 and, as a part of the settlement, DNRC initiated rulemaking that will be completed no later than April 9, 2016.

ATTORNEY FEES/DAMAGES IN NATURAL RESOURCE RELATED LITIGATION FROM FEBRUARY 2006 – FEBRUARY 2016

Bostwick v. DNRC, DV-07-917a, 18th Judicial District, Gallatin County. In October of 2008 DNRC settled attorney fee and costs award of \$71,829.11 for \$10,000.00.

Montrust v. State of Montana (Montrust III), Cause No. BDV-2012-39, 1st Judicial District, Lewis and Clark County. The DNRC entered a settlement agreement to pay plaintiffs’ attorney fees in the amount of \$152,859.08, which was approved by the Land Board on October 19, 2015.

Weaver v. State, DV-02025 3rd Judicial District, Powell County. Jury verdict for \$730,000.00 related to negligent fire suppression on the Ryan Gulch Fire in 2000. Affirmed by the Montana Supreme Court in DA-12-0506.