

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

*December 18, 2017*

*State District Court cases:*

**Flowers v Montana Board of Personnel Appeals, FWP**, First Judicial District, Lewis and Clark County, No. BDV 2017-306

This case involves a challenge to the remedy issued by Board of Personnel Appeals (BOPA) to FWP. The BOPA remedy required FWP to place an employee into a position that had already been awarded to another employee. Flowers challenged the BOPA decision as outside BOPA authority. The matter is currently being briefed and an oral argument was requested but not yet scheduled.

*Montana Supreme Court cases:*

**Trap Free Montana Public Lands v. FWP**, Montana Supreme Court, DA-17-0586

Ethics complaint with the Commissioner of Political Practices, alleging FWP violated the state ethics code when a third-party, the Montana Trappers' Association, used FWP equipment while advocating against I-169, an initiative in the signature-gathering phase at the time, which would have banned trapping on public land in Montana. MTA had used the equipment for education and outreach for nearly 20 years without problem. In its complaint, Trap Free alleged FWP had violated a provision of the state ethics code which prohibited a "public employee" from using state equipment for political advocacy. Following a day-long hearing in October 2016, the COPP found FWP had violated the ethics code even though no FWP employee authorized MTA's use of the equipment for advocacy or knew MTA intended to use it in conjunction with its advocacy. Instead, the COPP concluded FWP "knew or should have known" MTA would use the equipment to advocate against I-169. Following the decision, FWP appealed to the First Judicial District, Lewis & Clark County. Judge Michael McMahon reversed the COPP's decision, saying the COPP's "departure from the plain language of the statute is clear, conspicuous, and brazen." Trap Free has appealed the decision to the Montana Supreme Court. Trap Free's opening brief is due in January.

**Smith v. FWP & United States of America, Department of Agriculture**, Montana Supreme Court, DA 17-0566.

This is a direct appeal of a water rights adjudication case. The case was contesting the Smiths' ability to use water for their mining operations. FWP and the United States believed the claims were not owned by the Smiths, the claims were located on Forest Service land, and that they had been abandoned. The water court disagreed and ruled in favor of the Smiths. The United States appealed the case.

*Federal District Court cases:*

**Defenders of Wildlife v. Jewell, US District Court, District of Montana, CV 14-246-M-DLC** Several Plaintiffs' environmental groups filed challenges to the US Fish and Wildlife Service's decision not to list wolverines as threatened under the ESA. Montana, along with Wyoming and Idaho, intervened on behalf of the Service to support the Service's decision. Argument was heard in February 2016 and the Court issued its decision against the Service in April 2016. The Court remanded the decision back to the Service for additional consideration of the impacts of climate change resulting in decreased snowpack on the success of wolverine denning. The Court also instructed the Service to more fully assess the genetic diversity of wolverines in the Northern Rockies DPS. The Service and states elected not to appeal.

**Center for Biological Diversity v. Zinke, No. 16-35866**, United States Court of Appeals for the Ninth Circuit.

Plaintiff environmental organizations challenged the US Fish and Wildlife Service's 2014 determination that listing of the Upper Missouri Distinct Population Segment of the arctic grayling is not warranted. (US District Court, District of Montana, CV 15-4-BU-SHE). State of Montana and FWP have intervened in support of USFWS. Judge Haddon ruled in favor of Defendants and Plaintiffs appealed to the Ninth Circuit Court. Briefing at the Ninth Circuit is complete. Oral argument is scheduled in Seattle for Feb. 8, 2017.

**Friends of the Wild Swan v. Vermillion**, US District Court, District of Montana, Missoula Division, CV 13-66-M-DLC.

Plaintiffs filed suit in federal district court alleging that the Department is liable under the Endangered Species Act (ESA) for recreational trappers' incidental take of lynx. The Department and Commission settled the case in July of 2015. The settlement included some changes to the Commission's trapping regulations. The case was dismissed. The order dismissing the case was appealed by the Defendant-Interveners (Montana Trappers Association, National Trappers Association, and individual trappers). The appeal was dismissed by the 9<sup>th</sup> Circuit. Plaintiffs have indicated an intent to file for attorney fees against FWP.

*Administrative Contested Case Proceedings*

**FWP v. Animals of Montana, Troy Hyde, permit holder**, before the Department of Fish, Wildlife and Parks.

The Department delivered a notice of revocation of a roadside menagerie permit to Animals of Montana, Inc., and its owner, Troy Hyde, on December 28, 2015. The notice comes after 25 violations of statute and administrative rule were found involving the facility in 2015 alone. The violations include performing exhibitions without a permit; use of a weed whacker and hedge trimmer to persuade an uncontrollable tiger to move; inadequate, unlocked, unmarked, or overcrowded den boxes and cages; and unsanitary and inhumane housing of animals. Previous problems at the facility include numerous incidents of escaped wildlife, an Animals of Montana employee sustaining a broken arm from an attack by a brown bear, an employee being killed by a grizzly bear in an incident which was not immediately reported to officials, and convictions under the Endangered Species Act and Lacey Act for trafficking an unlawfully sold tiger across

state lines. The Department has been monitoring the operations at the facility closely and has previously formally warned Animals of Montana that it needed to strictly adhere to the conditions of its permit or the permit would be revoked. Animals of Montana challenged the proposed permit revocation through a request for an administrative hearing before the Department. The hearing officer found that Animals of Montana had violated statute and conditions of its permit and revoked the permit. Animals of Montana appealed the case to the Director. Oral argument is set for January 23.

***Montana Water Court cases:***

DFWP is involved in several cases before the Montana Water Court. When the Water Court releases preliminary decrees, DFWP may object to water right claims in which claimed flow rates, volume, acres irrigated or other attributes appear to exceed actual historic use. Current cases include 41B-265 (East Bench Irrigation District) and 42M-177 (Great Northern Properties).

***310 Arbitration:***

**In Re Flathead Conservation District Permit #FL2017025.**

FWP requested arbitration of Flathead Conservation District's grant of a Natural Streambed and Land Preservation Act of 1975 ("310") permit for construction of a home, shop and access road in close proximity to the Flathead River. Arbitration took place December 14, 2017 in Kalispell. FWP presented testimony and evidence that the approved project would result in the construction of a house over the immediate bank of the Flathead River in violation of Conservation District rules. The Arbitration panel's decision on whether to uphold or deny the District's decision to grant the permit is due by January 14, 2018.