

SIGNIFICANT DNRC ADMINISTRATIVE HEARING DECISIONS:

http://dnrc.mt.gov/wrd/water_rts/hearing_info/significant_hearingdecisions/default.asp

Of the decisions listed, the following are probably of the most interest for purposes of this matter:

Thompson River Lumber Co., Application No. 76N-30010429. Hearing Examiner denied Applicant's permit application, finding that Avista Corp. would be adversely affected. A reduction of 250 gpm above Avista's point of diversion is a loss of 250 gpm to Avista's water right of 50,000 cfs at times when the flow of the Clark Fork River is below 50,000 cfs. Cumulatively, this is 400 acre-feet per year, a loss which is detectable by Avista.

Fidelity Exploration, Application Nos. 42B-30011045; 42B-30014358: Denied Wyoming Application because Applicant did not show it was not in the public welfare to ship water produced from coal bed methane development to Wyoming from Montana. The Montana Application for marketing of water produced from coal bed methane wells in Montana, for uses such as irrigation, stock and industrial, was granted.

Montana Golf, Application Nos. 41H-30003523, 41H-30000806: Ground water change application in the Upper Missouri Basin. Applicant proposed to use water that was used on retired acres to replace surface water lost as a result of pumping groundwater. Hearing Examiner issued a proposal to deny the application, which was subsequently withdrawn.

Zoot Properties LLC, Application No. 41H-11546900:

- This decision was appealed to the district court. (*See summary below Faust v. DNRC, et al.*, 1ST Judicial District, Cause No. BDV-05-443).

PENDING COURT CASES:

Rosalee Faust v. DNRC & Zoot, 1ST Judicial District , Cause No. BDV-05-443
Issues on appeal:

- Wittich Law Firm brought appeal of permits for 6 wells.
- Judge Sherlock upheld DNRC granting of 3 nonconsumptive cooling wells; recently upheld DNRC denial of 3 other wells because they were immediately or directly connected to surface water & could therefore not be processed.
- Presently pending: Attorney fees being sought by Wittich Law Firm for its clients claiming to be the prevailing party against both Utility Solutions and DNRC.

Montana River Action Network and Rosalee Faust v. DNRC, 1st Judicial District, Cause No. CDV-2007-47

Issues on appeal:

- Appeal brought by Wittich Law Firm.
- Augmentation is not a beneficial use of water under the Montana Water Use Act.
- Montana Water Use Act does not allow augmentation to mitigate adverse effects to prior appropriators.
- Upper Missouri River Basin closure (§85-2-342, MCA) does not allow augmentation.
- DNRC augmentation rules are invalid and beyond DNRC statutory authority.
- DNRC should have done an EIS on cumulative effects in the ecosystem of granting changes to allow augmentation for adverse effects to other appropriators.

Rosalee Faust v. DNRC, 1st Judicial District, Cause No. CDV-2006-886

- DNRC moved to stay the proceedings pending resolution of James Lohmeier, Sandy McManus and Rosalee Faust v. DNRC, Cause No. ADV-2006-454, currently pending in the 1st Judicial District on the issue of DNRC's amendment to remove "municipal use" from definitions in rule (Mont. Admin. R. 36.12.101(39)).

Issues on appeal:

- DNRC wrongfully processed and granted permits to Utility Solutions within the Missouri River Basin closure under the exceptions for "municipal use." §§ 85-2-342, 343, MCA. (This issue includes wrongful amendment to delete "municipal use" from definitions in rule).
- DNRC wrongfully granted permits to Utility Solutions conditioned to avoid adverse effect by requiring that water be supplied from another source to offset any effects to surface water (Gallatin River) from the ground water permits.
- DNRC should have done an EIS on cumulative effects in the ecosystem of granting permits under the "municipal use" basin closure exception and allowing augmentation for adverse effects to other appropriators.

Lohmeier et al. v. DNRC, 1ST Judicial District , Cause No. ADV-2006-454

- Lawsuit by the Wittich Law Firm challenging DNRC's repeal of its former "municipal uses" definition found at Mont. Admin. R. 36.12.101(39).
- Judge McCarter's ruling that the definition should be reinstated will likely be appealed to the Montana Supreme Court.

Treeline Springs LLC v. DNRC, 5th Judicial District, Madison County, Cause No. DV-29-2007-18

Issues on Appeal:

- Lawsuit filed in February 2007 by Williams & Jent Law Firm.
- DNRC improperly turned down the permit application due to the stated “municipal uses” purpose for a golf course.
- DNRC determined the use was “irrigation” and therefore the application could not be processed under the Upper Missouri River Basin Closure.
- Applicant has requested that the matter be stayed until it determines how best to proceed as a result of HB 831.

SIGNIFICANT POST-1973 CASES:

While there are many water law cases, the following cases are likely going to be the most significant for purposes of this matter:

Bitterroot River Protective Ass’n, Inc. v. Siebel, et al., 326 Mont. 241, 108 P.3d 518 (2005): Alleged amendments to original water appropriation applications were so significant that they constituted new applications; therefore, the amendments did not relate back to the original applications and were thus prohibited by sub-basin closure.

Montana Trout Unlimited, et al. v. DNRC, et al., 331 Mont 483, 133 P.3d 224 (2006). This decision further defines what conditions an application for ground water may be processed under the Upper Missouri River Basin closure under §§ 85-2-342, 343, MCA. The dispute primarily involved the interpretation of “immediately or directly connected to surface water.”

MPC v. Carey, 211 Mont 91, 685 P.2d 226 (1984): DNRC has authority to grant conditional use permits under § 85-2-312, MCA, when restrictions are necessary to protect the rights of prior appropriators or are used to impose time limits to perfect a water right under the permit.

Castillo v. Kunnemann, 197 Mont. 190, 642 P.2d 1019 (1982): Since the passage of the Water Use Act in 1973, water users have to obtain a change of use authorization from the DNRC before they change their water right. § 85-2-301, MCA. In this case, the grantor owned two water and ditch rights and conveyed only one to grantee; it was found that the grantor *impliedly reserved* other water and ditch rights. § 28-3-702, MCA.

In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston, 249 Mont. 425, 816 P.2d 1054 (1991): The only significance of the adoption of the Water Use Act in 1973 was to shift the burden of proof from the water users claiming adverse effect *after* a change had already taken place to the proponent of the change

before the change takes place. DNRC approval would be required before the change took place. §§ 84-2-301, 402, MCA.

Axtell v. MS Consulting, 288 Mont. 150, 955 P2d 1362 (1998): The following dicta is important in this case: “Finally, in 1973, the Montana Legislature passed the Water Use Act (the Act), abolishing the doctrine of prior appropriation and creating a new system of adjudicating water rights.”