

1  
2 Laura S. Ziemer  
3 Patrick Byorth  
4 Trout Unlimited's Montana Water Project  
5 321 East Main Street, Suite 411  
6 Bozeman, Montana 59715  
7 (406) 522-7291 phone  
8 e-mail: [lziemer@tu.org](mailto:lziemer@tu.org)  
9 e-mail: [pbyorth@tu.org](mailto:pbyorth@tu.org)

10 IN THE WATER COURT OF THE STATE OF MONTANA  
11 YELLOWSTONE DIVISION  
12 TONGUE RIVER BASIN ABOVE AND INCLUDING HANGING WOMAN CREEK-  
13 BASIN(42B)  
14 TONGUE RIVER BASIN BELOW HANGING WOMAN CREEK-BASIN (42C)

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15 UNITED STATES OF AMERICA ) Case No.: 42B-1  
16 )  
17 GENERAL OBJECTIONS ) Trout Unlimited Amicus Curiae Brief in  
18 TO BASIN 42B AND 42C ) Support of the United States' General  
19 PRELIMINARY DECREES ) Objections on Post-1973 Abandonment  
20 )

21 Trout Unlimited respectfully submits this *amicus curiae* brief in support of the United  
22 States of America's (US) motion requesting that the Water Court adjudicate post-June 30,1973  
23 abandonment in Montana's adjudication, including directing the Montana Department of  
24 Natural Resources (DNRC) to examine all existing claims for non-use.  
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## INTRODUCTION

Trout Unlimited supports the US position that the Montana adjudication must be thorough, complete, and comport with its statutory authorizations. Not only does the Montana Water Code and the McCarran Amendment require that the adjudication comport with its statutory authorizations, but it is necessary for 21<sup>st</sup> century water management. The DNRC lacks the statutory authority---that the Water Court specifically has--to make determinations of non-use and abandonment during the DNRC's review of water right claims in a change-of-use proceeding. Indeed, the DNRC is statutorily prohibited from making determinations of abandonment until after the adjudication is final.

This means that the Water Court has before it a decision to take any one of three possible forks, each with its own implications for Montana's future water management. First, the Water Court could deny the US' motion and continue the status quo in which post-1973 abandonment is raised sporadically in the adjudication on objection. As considered in more detail below, taking this fork would place the burden of sorting out abandonment issues over the last 40 years on the DNRC's water right change process, and single out only those water right holders who choose to engage in the change process for post-1973 abandonment scrutiny. Taking the second fork would mean granting the US' motion and directing the DNRC to undertake a thorough review of water right claims for post-1973 abandonment. This would jeopardize meeting the legislatively-imposed adjudication benchmarks and require granting additional staff resources to the DNRC. A delay in bringing the adjudication to finality has its

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2 own implications for Montana's water administration, and this impact will have to be weighed  
3 against the water administration impacts of taking either of the other two forks.  
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5 The third possible fork to take would be to seek both a judicial determination and  
6 legislative directive that the Montana adjudication only adjudicates water right claims through  
7 1973. This would allow the adjudication to continue on its current path without disruption. But  
8 it raises the significant question of how and when water right claims would be reviewed for  
9 abandonment of all or a portion of their use over the past 40 years, and how water rights would  
10 be treated with regard to abandonment going forward. As this third fork would require  
11 amendment of the Water Court's current statutory authorization to review water right claims for  
12 post-1973 abandonment up until the entry of final decrees, it would be a good time to consider  
13 adding a forfeiture statute to Montana's Water Code. A forfeiture statute, providing that an  
14 adjudicated water right is simply forfeit after 10 or more years of nonuse, would eliminate the  
15 complexity of a legal determination of abandonment and put water users on notice of the  
16 consequences of extended nonuse.  
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19 If the Montana adjudication does not make a systematic inventory of wholly or partially  
20 abandoned water rights since 1973, then for the 40 plus years of the adjudication's duration  
21 there is little consequence or risk from nonuse. The risk to senior water right claims comes,  
22 however, after the adjudication is final. At this point, the DNRC will review only water right  
23 holders who elect to go through the water right change process for abandonment. Other than  
24 water users who apply for a change application, owners of adjudicated water rights that have not  
25 been used for up to 40 years or more could resume water use without scrutiny. This shifts the  
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2 significant burden of filing an action in district court and proving abandonment of their  
3 neighbor's water right to other senior water right holders. For these reasons, Trout Unlimited  
4 supports the US' motion, and urges the Water Court to "take the second fork" and work with the  
5 DNRC to review all water right claims for post-1973 abandonment in the interests of future  
6 Montana water administration.  
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10 **I. Trout Unlimited's Interests At Stake**

11 Trout Unlimited (TU) represents over 3,400 conservation-minded anglers in Montana  
12 who care about the health of Montana's rivers. TU's members spend hundreds of hours  
13 restoring and protecting Montana's great trout streams, volunteering in the community, and  
14 sharing their passion for fly-fishing with young people, wounded veterans, and cancer  
15 survivors. Under the terms of Montana Code Annotated section 85-2-408, TU leases water  
16 rights held by irrigators and dedicated to an instream purpose to restore flows to dewatered  
17 streams. TU also has an interest in ensuring that the water right reservations for instream flow  
18 held by the Montana Department of Fish, Wildlife and Parks are protected from unlawful  
19 depletions. These state-held instream flow reservations and TU's leased, senior, instream water  
20 rights are vital to the health of Montana's fisheries, especially in times of water scarcity. As a  
21 result, TU is actively engaged in Montana's water administration and governance, and is a  
22 participant in the DNRC's water rights change process. TU has been both applicant and  
23 objector on water right changes, and has experienced first-hand the complexities and time-  
24 consuming nature of the water right change process. Adding burdens to this already-  
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2 burdensome process—namely the burden of being singled out for abandonment review by going  
3 through the change process—will make it even less likely that water rights holders will  
4 voluntarily engage in the change process.  
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7 **II. The McCarran Amendment Requires the Montana Adjudication to Comport with**  
8 **Its Statutory Authorizations.**

9 Trout Unlimited concurs with the US that Montana’s statewide adjudication must be  
10 thorough, complete, and comport with its statutory authorizations. As painstaking and time-  
11 consuming as reviewing claims for evidence of post-1973 non-use and abandonment might be,  
12 the adequacy, finality, and comprehensiveness of Montana’s statewide adjudication could be  
13 called into question for failure to abide by clear statutory directives to review claims for non-  
14 use. Failure to identify and adjudicate moribund water rights unused for the decades following  
15 claim filing deadlines jeopardizes not only the predictability of water availability enjoyed by  
16 senior water right owners under the prior appropriation doctrine but also renders federal, Indian,  
17 and state instream flow reservations ineffectual against revived abandoned water rights. *See the*  
18 *US Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion*  
19 *for Water Court to Adjudicate Post June 30, 1973 Abandonment in the Montana Adjudication*  
20 *and Brief in Support*, at 25-28.  
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24 As the US points out in its Motion and Brief, its waiver of sovereign immunity to states’  
25 general adjudication of water rights under the McCarran Amendment is predicated on whether  
26 the state-based adjudication is comprehensive enough to fully and fairly recognize federal  
27 reserved and Indian water rights alongside private and state claims. *Id.* at 26- 28. While the US

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2 thoroughly analyzed jurisprudence defining what a comprehensive state adjudication might look  
3 like, a more potent, but less defined bugbear in McCarran Amendment interpretation is what  
4 constitutes an “adequate” state-based water adjudication. *Arizona v. San Carlos Apache Tribe*  
5 *of Arizona*, 463 U.S. 545, 570 (1983). In *Arizona*, the Court held that federal court deference to  
6 nascent statewide adjudications in Arizona and Montana was proper under McCarran  
7 Amendment waiver of sovereign immunity “assuming that state adjudications are adequate to  
8 quantify the (Indian water) rights at issue ...” *id.* Yet, the Court refrained from elucidating any  
9 measure of adequacy. However, in his dissent Justice Stevens warned, “any state court decision  
10 alleged to abridge Indian water rights... can be expected to receive...a particularized and  
11 exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights  
12 from state encroachment.” *Id.* at 571 (*in J. Stevens, Dissent*). The Montana Supreme Court took  
13 notice of the risk of inadequate treatment of federal and Indian rights in the adjudication. *State*  
14 *e. rel Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 219 Mont.  
15 76, 95-96, 712 P.2d 754, 766 (1985). (where the court held that the Montana Water Use Act –  
16 and the statewide adjudication scheme – was adequate on its face to adjudicate federal and  
17 Indian water rights, but should the Act be inadequate as applied in the treatment of those rights,  
18 it would expect the federal courts to intervene with “exacting scrutiny.”) )  
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23 Failure to fully examine water rights for post-1973 non-use and to adjudicate abandoned  
24 water rights as such, in the interest of accelerating the pace of the adjudication, is likely to  
25 backfire. Avoiding a year or two of examining claims for post-1973 abandonment now may  
26 well result it in years of litigation in federal courts, Montana courts, and slowing administrative  
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3 change processes well into the future. The failure to apply Montana Water Use Act's statutory  
4 authority for DNRC to review claims for post-1973 nonuse and the authority of the Water Court  
5 to declare unused water rights abandoned may render the adjudication inadequate in the eyes of  
6 the federal courts and subject water right owners to prolonged uncertainty as their rights remain  
7 unresolved in spite of the issuance of final decrees.  
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10 **III. Twenty-First Century Water Management Requires the Montana Adjudication**  
11 **to Review Evenly All Water Right Claims for Abandonment Since 1973.**

12 The hallmark of twenty-first century water management is the transfer of water from one  
13 use to another. The future portends growing water demand and increasing water scarcity.  
14 Transfers of water rights from one use to another are among the only feasible ways to meet the  
15 needs of new water uses without harming senior water rights. Montana's integration of ground  
16 and surface water rights has served to heighten the recognition that there are few "new" sources  
17 of water, as most new groundwater pumping requires mitigation water from a senior surface  
18 water right to offset surface water depletions. This puts a premium on the DNRC's process to  
19 authorize a change-in-use for Montana water rights. Failure to address post-1973 abandonment  
20 in the adjudication will place this burden on the DNRC change process. This will single out  
21 only those water users who go through to the change process for abandonment review over the  
22 past 40 years, to the detriment of future water management and administration.  
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3 **A. The Change Process is Costly, Time-Consuming, and Uncertain.**

4 The difficulty and time-consuming nature of the water right change process is in tension  
5 with the demands of 21<sup>st</sup>-century water management. Water users are generally reluctant to  
6 submit their water right claims to the scrutiny of the DNRC in the change process. Moreover,  
7 the high cost of shepherding a water right through the change process, coupled with the  
8 uncertainty of the outcome, creates a high barrier to engaging in the DNRC's change process for  
9 water users. If abandonment over the last 40 years or more is not addressed during the  
10 adjudication, then only water users that elect to apply for a change-in-use authorization from the  
11 DNRC will be subject to abandonment scrutiny. The inequity of only having some—but not  
12 other--water users subject to abandonment scrutiny further burdens the change process.  
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16 **B. The DNRC Is Not Currently Reviewing Existing Rights for Abandonment.**

17 During the pendency of the adjudication, the DNRC is not reviewing water right claims  
18 for abandonment during the change process. There is good reason for this. DNRC is not  
19 specifically authorized by statute to look at post-1973 abandonment of water right claims,  
20 whereas the Water Court is. Indeed, Section 85-2-404(5) *withholds* explicit authority for the  
21 DNRC to apply the statutory presumption of abandonment after ten years of non-use until *after*  
22 the adjudication is final. *See*, Mont. Code Ann. § 85-2-404(5). Section 85-2-404(2) provides  
23 that if an appropriator “ceases to use all or part of his appropriation right . . . for a period of 10  
24 successive years . . . then there shall be a prima facie presumption that the appropriator has  
25 abandoned his right for the part not used.” Subsection 5 states that this presumption of  
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2 abandonment for a period of ten years of nonuse found in subsection 2 does “not apply to  
3 existing rights until they have been finally determined in accordance with part 2 of this  
4 chapter,” meaning until the adjudication is done. *See* Mont. Code Ann. § 85-2-404(5). Under  
5 this statutory scheme, the DNRC lacks specific statutory authority to review water right claims  
6 for abandonment until the adjudication is final.  
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10 **C. Leaving Post-1973 Abandonment Review to the DNRC’s Change Process Would**  
11 **Burden the Change Process.**

12 Review of post-1973 abandonment of water rights will have to wait until the  
13 adjudication is final, unless the US motion is granted to direct the DNRC to examine all claims  
14 for post-1973 abandonment; or, unless the legislature acts to amend Mont. Code Ann. § 3-7-  
15 501(4), and dictates that the Water Court is to adjudicate rights only up through 1973. If  
16 neither of these come to pass, then review of water right claims for post-1973 abandonment will  
17 be postponed until after the Montana adjudication is final, some 40 or more years after 1973.  
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19 In this event, there will be no comprehensive vehicle to review all water right claims  
20 evenly for their use over the previous 40 years. Rather, post-adjudication review of a water  
21 right for abandonment will likely arise in either one of two ways. One way may be that a  
22 neighboring water user will file an action in Montana district court, alleging injury from the  
23 resumption of an abandoned water right. In this event, there will be a question of whether an  
24 allegation of abandonment can be brought for non-use during the pendency of the adjudication,  
25 since that issue may be *res judicata*. Because the Water Court is statutorily authorized to  
26 review water right claims for post-1973 abandonment in the adjudication, then a final decree  
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2 may well be considered to be the final Water Court ruling on the matter and be conclusive on  
3 the issue of abandonment up to the date of the final decree. This would bar as *res judicata* a  
4 subsequent action involving a claim of post-1973 abandonment that relied on non-use during  
5 the pendency of the adjudication.  
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7         The second--and more likely--way that post-1973 abandonment could come up after a  
8 final adjudication decree would be in a review of a water right by the DNRC in an application  
9 for a change-of-use in a water right. As described above, the DNRC change process is already a  
10 burdensome process for applicants, the agency, and for objectors. Adding a review for post-  
11 1973 abandonment of water rights on top of an already-burdensome process will further  
12 complicate the agency's role in processing the change application. It will also add to the  
13 expense and time-consuming nature of preparing a change-in-use application if one of the steps  
14 that will have to be taken is to compile the evidence of consistent, historic use during the last 4-  
15 or-more years. This means that only those water right owners who elect to go through the  
16 change process will be scrutinized by the DNRC for post-1973 abandonment. This will  
17 significantly add to the disincentives for water right holders to go through a change process. It  
18 also selectively penalizes those water right holders that go through the change process, as they  
19 are likely to be the only water right owners that are subject to post-1973 abandonment review.  
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24         **D. The Current Review of Claims for Post-1973 Abandonment is Piece-Meal and**  
25         **Sporadic.**

26         Currently, only if another water user objects to a water right claim on the basis of its  
27 nonuse is a water right claim reviewed for post-1973 abandonment in Montana's adjudication.

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2 This necessarily means that such Water Court review for post-1973 abandonment is sporadic at  
3 best. In addition, since the deadline for objections has passed in many basins, the opportunity to  
4 object to a neighbor's water right claim on the basis of abandonment may well have passed  
5 before the allegation of abandonment was ripe, or the period of non-use was long enough to  
6 presume abandonment of the underlying water right claim. Similarly, it is rare for a neighbor to  
7 file an action in district court claiming abandonment of a water right claim. As a result, review  
8 of claims for post-1973 abandonment is sporadic and piece-meal.  
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11 Unless the US motion is granted, the adjudication is likely to adjudicate water right  
12 claims--or portions of water right claims--that have not been put to beneficial use for one or  
13 more decades since 1973. Such "zombie" water rights could come back to life after the final  
14 adjudication and cause injury to senior water rights , federal and Indian rights, or state instream  
15 flow reservations. Moreover, a court may well determine that a final decree in the adjudication  
16 is *res judicata* against an action filed in district court claiming post-1973 abandonment of a  
17 water right. Senior water users injured by adjudicated, "zombie" water rights resuming active  
18 water use would face a high bar to obtain relief, if indeed, any relief would be available.  
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22 **E. Efficient, Fair, and Comprehensive Water Management Requires Even-Handed**  
23 **Review of Water Right Claims for Post-1973 Abandonment.**

24 From the perspective of Montana's water rights administration, a thorough and even-  
25 handed review of all water right claims for post-1973 nonuse and abandonment is the best  
26 policy. This is the best outcome in terms of supporting Montana's future water management for  
27 at least three reasons. First, a comprehensive, consistent review of post-1973 abandonment of

28 Trout Unlimited Amicus Curiae Brief in Support of the United States' General Objections on  
Post-1973 Abandonment - 11

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2 water right claims in the Montana adjudication ensures that the adjudication is accurate and  
3 robust with regard to this issue. It also ensures that the Montana adjudication comports with its  
4 statutory authorizations. Such a consistent and robust review of water right claims in the  
5 adjudication would prevent the withdrawal of the United States' waiver of sovereign immunity  
6 granted under the McCarran Amendment in the 11<sup>th</sup> hour of the adjudication, based on failure to  
7 review water right claims for abandonment since 1973.  
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10 Second, such a thorough and even-handed review of all water right claims for post-1973  
11 nonuse and abandonment would also put water right holders on an even footing as the  
12 adjudication comes to a close. All water right claims would have been subject to the same  
13 scrutiny with regard to nonuse by DNRC claims examination, and the Water Court would be  
14 applying the same legal standard for making the determination of abandonment. This provides  
15 the necessary "level playing field" for future water management oversight by the DNRC, and  
16 district courts enforcing the final adjudication decrees. It will lessen the barriers to transferring  
17 water from one use to another use, and promote effective water right management by the  
18 DNRC.  
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21 Third, an even-handed review of all water right claims for post-1973 nonuse and  
22 abandonment would prevent singling out only those water users who elect to apply for a  
23 change-in-use authorization from the DNRC for post-adjudication abandonment scrutiny.  
24 Without the thorough review of all claims for post-1973 abandonment in the adjudication, water  
25 users that elect to go through the change-in-use process would be the only ones that would be  
26 subject to a searching review for nonuse or abandonment of all or part of their adjudicated water  
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2 right. This would burden the DNRC's change process, and create a disincentive for water users  
3 to engage with this already-burdensome process. Effective administration and enforcement of  
4 adjudicated water rights depends on water users going through the change-in-use process.  
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6 Taking action now to prevent burdening this process and prevent heightening the  
7 reluctance of water users to apply for a change-in-use will pay dividends in future water  
8 management. Although it is admittedly an expensive investment to review all claims in the  
9 adjudication for post-1973 nonuse and abandonment, the return on that investment is well worth  
10 the cost. It will pay dividends in future water management and enforcement. There is also a  
11 high cost to failing to perform the abandonment review now. Montana will pay this cost many  
12 times over as Montana grapples with future water management that depends heavily on  
13 transferring water from one use to another.  
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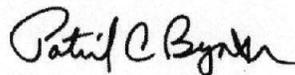
#### 16 CONCLUSION

17 For the reasons set forth above, Trout Unlimited supports the United States of America's  
18 motion requesting that the Water Court adjudicate post-June 30, 1973 abandonment in  
19 Montana's adjudication, and that the Water Court direct the Montana Department of Natural  
20 Resources (DNRC) to examine all existing claims for non-use.  
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22 Dated this 19th day of December, 2013.

23 Respectfully submitted,

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Laura Ziemer  
Counsel for *Amicus curiae* Trout Unlimited

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Patrick Byorth

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4 CERTIFICATE OF SERVICE

5 I certify that a copy of the attached *Motion to File Amicus Curiae and Trout Unlimited's Amicus*  
6 *Curiae Brief* was served upon the following persons electronically via email on the 19<sup>th</sup> of  
7 December, 2013.

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11 \_\_\_\_\_  
12 Laura Ziemer

13 *Counsel of Record*

14 Susan L. Schneider  
15 U.S. Department of Justice  
16 Environment & Natural Resources Division,  
17 Indian Resources Section  
18 999 18 th Street South Terrace, Suite 370,  
19 Denver, CO 80202  
20 (303) 844-1348  
21 susan.schneider@usdoj.gov

roselyn.rennie@sol.doi.gov

22 James J. DuBois  
23 U.S. Department of Justice  
24 Environment & Natural Resources Division  
25 999 18 th Street South Terrace, Suite 370,  
26 Denver, CO 80202  
27 (303) 844-1375  
28 james.dubois@usdoj.gov

Roselyn Rennie  
Office of the Solicitor  
2021 4th Ave North, Suite 112  
Billings, MT 59101  
(406) 247-7545

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John Chaffin  
Office of Field Solicitor  
US Office of the Interior  
316 North 26th Street  
Billings, MT 59101  
john.chaffin@sol.doi.gov

Patrick Barry  
U.S. Department of Justice  
Indian Resources Section, ENRD  
PO Box 7611  
Ben Franklin Station  
Washington, DC 20044-7611  
(202) 305-0269  
patrick.barry@usdoj.gov

Jeanne S. Whiteing  
Attorney at Law  
1628 5th Street  
Boulder, CO 80302  
(303) 444-2549  
jwhiteing@whiteinglaw.com

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Hertha Lund  
Breeann M. Johnson  
Lund Law PLLC  
502 South 19th Ave, Ste. 102  
Bozeman, MT 59718  
lund@lund-law.com

Nathan A. Espeland  
Espeland Law Office, PLLC  
PO Box 1470  
Columbus, MT 59019  
(406) 322-9877  
espelandnathan@gmail.com

Pamela S. West  
Environment & Natural Resources Division  
U.S. Department of Justice  
PO Box 7611  
Washington , D.C. 20044-7611  
(202) 305-0457  
pamela.west@usdoj.gov