

NANCY SWEENEY  
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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

TONGUE & YELLOWSTONE  
IRRIGATION DISTRICT;  
NORTHERN PLAINS RESOURCE  
COUNCIL; and MONTANA  
ENVIRONMENTAL  
INFORMATION CENTER, INC.,

Plaintiffs,

v.

MONTANA BOARD OF OIL AND  
GAS CONSERVATION,

Defendant,

and

FIDELITY EXPLORATION &  
PRODUCTION COMPANY,

Defendant-Intervenor.

Cause No. BDV-2003-579

**ORDER ON CROSS-MOTIONS  
FOR SUMMARY JUDGMENT**

**INDEXED**

**BACKGROUND**

This case was filed on October 6, 2003 and challenges the legality of a  
certain record of decision (ROD). Count 1 seeks a determination that certain actions of

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1 Defendant Montana Board of Oil and Gas Conservation (MBOGC) violated Article  
2 IX, section 3, of the Montana Constitution. Count 2 has since been dismissed. In its  
3 present posture, both parties have moved for summary judgment on Count 1.

4 This case involves the production of coal bed methane (CBM) gas in  
5 southeastern Montana. CBM gas is trapped in coal seams. With the production of the  
6 gas, a large amount of groundwater is released and pumped to the surface. It is the  
7 disposal of this groundwater that forms the issue in this case.

8 MBOGC regulates the development of state and fee natural gas resources  
9 under its jurisdiction. Defendant-Intervenor Fidelity Exploration & Production  
10 Company (Fidelity) is the largest producer of CBM in Montana. It holds leaseholds on  
11 137,000 acres of land. Further, Fidelity has invested approximately \$100 million in  
12 developing its CBM projects. (Icenogle Aff., ¶¶ 5, 6.) Plaintiff Northern Plains  
13 Resource Counsel (NPRC) is a non-profit corporation. Many of its members own  
14 property in southeastern Montana and are concerned about the impact of CBM  
15 development. Plaintiff Montana Environmental Information Center (MEIC) is a non-  
16 profit corporation whose members are concerned about environmental matters relating  
17 to the developments here under question. The Tongue and Yellowstone Irrigation  
18 District (T&Y) consists of approximately 300 irrigators located on the lower Tongue  
19 River.

20 A final environmental impact statement (EIS) focusing on the impacts of  
21 CBM exploration and development throughout the state was approved in 2003. That  
22 EIS estimated that approximately 58 billion cubic yards of water will be produced as a  
23 result of the development of CBM in southeastern Montana. There is no question that  
24 the area involved with the CBM projects here under consideration is arid. The EIS  
25 recognized the fact that groundwater in the area is extremely critical since 100 percent

1 of domestic water for residents in the area is from that source. (EIS, at 3-21.) Further,  
2 groundwater in the area constitutes the largest percentage of dependable stock water  
3 because it is not seasonable or affected by drought. (Id.)

4           After the EIS was adopted, MBOGC entered its ROD on  
5 March 26, 2003, adopting Alternative E of the EIS as the preferred alternative. It is  
6 undisputed that the ROD “does not include approval of any specific oil and gas  
7 exploration, production, or development activities.” (ROD, § 2.3.) According to the  
8 ROD, “[o]perators will be required to submit to the MBOGC a Project Plan of  
9 Development (POD) outlining the proposed environmentally responsible  
10 development of an area. . . .” (Id., § 2.2.2.) The PODs are to include a number of  
11 subplans, including a water management plan. (Id., § 2.2.5.) Further, produced water  
12 management plans and permits are to be approved by the MBOGC. (Id., § 2.2.7.) The  
13 MBOGC can permit the construction of CBM water impoundment under its current  
14 rules for oil and gas related earthen pits. (Id., § 2.2.8.) Further, any discharge of  
15 produced water into the surface water of the area would require a Montana Pollutant  
16 Discharge Elimination System (MPDES) permit or a non-significance review by the  
17 Montana Department of Environmental Quality (DEQ). (Id., § 2.2.9.) Further,  
18 mitigation measures or stipulations could be attached to the applications as determined  
19 appropriate by MBOGC. (Id., § 2.2.19.)

20           Under the preferred alternative adopted by the ROD (Alternative E),  
21 MBOGC would review and approve applications providing for the appropriate  
22 resource protection on a site-specific basis. (Id., § 4.1.5.) “Different management  
23 actions, such as discharge, impoundment, re-injection or beneficial use, would be  
24 applied to water produced by CBM.” (Id.)

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1 Plaintiffs' primary claim is that the ROD is unconstitutional insofar as it  
2 allows the wasting of water in violation of the Montana Constitution's provisions in  
3 Article IX, section 3(3). That section provides: "[a]ll surface, underground, flood, and  
4 atmospheric waters within the boundaries of the state are the property of the state for  
5 the use of its people and are subject to appropriation for beneficial uses as provided by  
6 law." Plaintiffs also suggest in their complaint that two statutes are implicated.

7 Section 85-2-505(1)(e), MCA, states:

8 (1) No ground water may be wasted. The department shall require  
9 all wells producing waters that contaminate other waters to be plugged or  
10 capped. It shall also require all flowing wells to be so capped or  
11 equipped with valves that the flow of water can be stopped when the  
12 water is not being put to beneficial use. Likewise, both flowing and  
13 nonflowing wells must be so constructed and maintained as to prevent  
14 the waste, contamination, or pollution of ground water through leaky  
15 casings, pipes, fittings, valves, or pumps either above or below the land  
16 surface. However, in the following cases the withdrawal or use of  
17 ground water may not be construed as waste under this part:

18 (e) the management, discharge, or reinjection of ground water  
19 produced in association with a coal bed methane well in accordance with  
20 82-11-175(2)(b) through (2)(d).

21 (Emphasis added.) Section 82-11-175(2), MCA, states:

22 Ground water produced in association with a coal bed methane  
23 well must be managed in any of the following ways:

24 (a) used as irrigation or stock water or for other beneficial uses in  
25 compliance with Title 85, chapter 2, part 3;

(b) reinjected to an acceptable subsurface strata or aquifer  
pursuant to applicable law;

(c) discharged to the surface or surface waters subject to the  
permit requirements of Title 75, chapter 5; or

(d) managed through other methods allowed by law.

According to Plaintiffs, these statutes are unconstitutional as they are applied in this  
case. Plaintiffs also suggest that there is an equal protection problem created by the  
aforementioned statutes.

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1 constitution, but not as a fundamental right. Further, there should be a balancing of the  
2 rights infringed and the governmental interest to be served by the infringement. This  
3 level of scrutiny to be adopted by the Court will require MBOGC to demonstrate that  
4 its classification is reasonable and that its interests in classifying is more important than  
5 the people's interest in obtaining constitutionally significant benefits. *Mont. Env't'l*  
6 *Info. Ctr. v. Dep't of Env't'l Quality*, 1999 MT 248, ¶¶ 57, 58, 296 Mont. 207, 988 P.2d  
7 1236.

8           Similar questions were before District Court Judge Blair Jones in  
9 *Diamond Cross Props. v. State*, 2008 Mont. Dist. LEXIS 180 (Mont. 22nd J. Dist. Ct.,  
10 July 14, 2008). In *Diamond Cross*, Judge Jones had two questions. First, he addressed  
11 whether Article IX, section 3(3), of the Montana Constitution and the policy provisions  
12 of the 1973 Water Use Act, Section 85-1-101, MCA, require that CBM-produced  
13 water be put to a beneficial use. In reviewing the constitutional provision and the  
14 policy considerations of the Water Use Act (WUA), Judge Jones held that water  
15 resources in Montana must be put to optimum beneficial use and not wasted. *Id.* at 14.  
16 Judge Jones held that the disposal of large quantities of CBM-produced groundwater  
17 must serve a statutorily defined beneficial use. *Id.* Judge Jones also noted that  
18 disposal of CBM groundwater in a manner without recognized benefit from the water  
19 does not pass constitutional muster. *Id.* at 24.

20           The second question addressed by Judge Jones in *Diamond Cross* was  
21 whether Section 85-2-505(1)(e), MCA, in conjunction with Section 82-11-175(2)(c)-  
22 (d), MCA, provide for the beneficial disposition of CBM-produced groundwater. In  
23 construing these statutes, Judge Jones balanced the fundamental environmental rights  
24 espoused by the plaintiffs versus the property rights of the lessees that were also in  
25 play. Judge Jones found:

1 Section 85-2-505(1)(e), MCA, provides that the management, discharge  
2 or re-injection of ground water produced in association with coal bed  
3 methane production does not constitute waste. Read in conjunction with  
4 the Court's construction of § 82-11-175, MCA, i.e. that CBM ground  
5 water must be statutorily managed in ways serving acknowledged  
6 beneficial purposes, such management, discharge, or reinjection does  
7 not, in fact, constitute waste. Therefore, § 85-2-505(1)(e), MCA does  
8 not violate Article IX, § 3(3) of the Montana Constitution nor does it  
9 conflict with the express policy of the [Water Use Act].

10 *Id.* at 20-21. Judge Jones also noted “[t]o the extent that MBOGC exercises regulatory  
11 authority over the production, use, or disposal of CBM-produced ground water, it must  
12 do so in compliance with constitutional mandate and the Court’s construction of the  
13 relevant statutes that require management of CBM-produced ground water for  
14 beneficial purposes.” *Id.* at 22.

15 Plaintiffs do not challenge several of the methods of managing  
16 groundwater produced and associated with CBM pursuant to Section 82-11-175(2),  
17 MCA. For example, Plaintiffs do not object to the use of such water for stock watering  
18 or reinjection. Other beneficial uses of produced water are wildlife habitat and dust  
19 suppression on various mining and other activities.

#### 20 **Managed Irrigation/Land Application**

21 According to Plaintiffs, sixteen PODs have been approved pursuant to  
22 the ROD. (Pls.’ Summ. J. Exs., Ex. 2.) Exhibit 2 is a document prepared by Plaintiffs  
23 that shows the water disposal methods they feel are allowable on each of the projects.  
24 Under the Castle Rock and the Deitz projects, Plaintiffs suggest that land application is  
25 being used for disposal of the CBM-produced groundwater. According to Plaintiffs,  
26 what they call land application will be merely dumping the produced water on the  
27 surface to dispose of it.

28 In reading the exhibits presented to the Court, the Court does not see  
29 where anyone has approved dumping produced water on the ground as a disposal

1 technique. The Court has received the affidavit of Kevin Harvey, a soil scientist.  
2 According to Harvey, “[m]anaged irrigation is substantially different from land  
3 application disposal in several ways.” (Harvey Aff., ¶ 21.) He notes that managed  
4 irrigation as practiced by Fidelity is used to grow a forage crop while protecting soil  
5 conditions. (Id., ¶ 22.) In contrast, land application simply applies wastewater to the  
6 surface with the goal of disposing of the water within the soil system. (Id., ¶ 23.)  
7 According to the legislature, the use of water for irrigation is a beneficial use. See  
8 Section 85-2-102(4)(a), MCA.

9           To use CBM-produced water for managed irrigation would require a  
10 beneficial use permit from the Department of Natural Resource and Conservation  
11 (DNRC). However, DNRC is not a participant in this action and, thus, it would be  
12 unfair to judge what that agency has done or not done without its presence in the  
13 lawsuit. It appears that DNRC has already determined that Fidelity’s proposed use of  
14 water for managed irrigation is a beneficial use of water. (MBOGC & Fidelity’s Joint  
15 Combined Br. Opp’n Pls.’ Mot. Summ. J. & Supp. of Cross-Mot. Summ. J., Ex. D (*In*  
16 *the matter of Application for Beneficial Water Use Permits No. 42B-30011045 and*  
17 *42B-30014358*, Proposal for Decision)). The conclusion of that decision was:

18           Fidelity’s managed irrigation program is a process of using water  
19 produced through coal bed methane development to irrigate crops in an  
20 intensively managed manner. Managed irrigation is a form of irrigation  
21 which uses water which may not have been suitable for irrigation by  
22 employing scientific and agronomic practices to utilize that water to  
23 grow crops without damaging the crop or soil resources.

24 (Id., at 14-15.) In the proceeding before the DNRC, Plaintiff NPRC was a party and  
25 did not bring a judicial challenge to DRNC’s conclusion that managed irrigation is a  
beneficial use as a matter of law.

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1 Plaintiffs have not shown the Court that what they term “land  
2 application” is actually occurring. Rather, there seems to be confusion between land  
3 application and managed irrigation. The Court concludes that managed irrigation, as  
4 already approved by DNRC, is a beneficial use and is not violative of the Montana  
5 Constitution or any statutory provision.

6 **MPDES Permits**

7 It appears that some of the CBM-produced water is discharged into  
8 various other bodies of surface water. Direct discharge of untreated groundwater is  
9 done pursuant to a permit issued by the Montana Department of Environmental Quality  
10 pursuant to a MPDES permit. It is unquestioned that the discharge of produced water  
11 into surface streams in the area increases the water available to other users. There is  
12 no evidence, on the other hand, that the water of the Tongue River, for example, is  
13 polluted and unusable.

14 This issue was dealt with in the *Diamond Cross* decision, where it was  
15 held:

16 To the extent that discharge of CBM produced ground water to the  
17 surface or to surface waters following compliance with water quality  
18 standards under Title 75, chapter 5 of the Montana Code can serve a  
19 beneficial purpose for surface owners or downstream users, such use  
could be deemed beneficial and, therefore, in compliance with Article  
IX, Section 3(3) of the Montana Constitution and the policy expressed by  
the Legislature relative to the State’s ground water resources.

20 *Diamond Cross*, at 20. In addition, the Court notes that the agency issuing the  
21 MDPDES permits (DEQ) is not a party to this case.

22 This Court rejects Plaintiffs’ suggestion, under the facts presented, that  
23 the discharge of CBM-produced water to surface waters pursuant to a MPDES permit  
24 issued by DEQ violates the Montana Constitution or any statutory provision.

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1   **Evaporation Pits, a/k/a Impoundments**

2           It is true that the ROD, itself, does not mention the words “evaporation  
3 pits.” Instead, the ROD, at page 2, paragraph 8, speaks of “water impoundments.”  
4 MBOGC suggests that such impoundments are used in most oil and gas operations.  
5 However, as noted in *Diamond Cross*, the disposition of CBM-produced groundwater  
6 is distinguishable from familiar dispositions of excess water because the quantity of  
7 water that is produced in the CBM process dwarfs the amount of water disposed of in  
8 ordinary industrial operations. *Diamond Cross*, at 16. Certainly some impoundments  
9 constitute beneficial uses when they are used for stock watering, wildlife habitat, dust  
10 suppression, or other uses that will be mentioned below. Section 85-2-101(3), MCA,  
11 encourages the development of facilities that store and conserve waters for beneficial  
12 use.

13           Fidelity uses two storage reservoirs and two ponds in connection with its  
14 Montana operations — Reservoir 34E-3490, Connor Reservoir 12-3490, Mesa Pond  
15 23-0299, and CX24 Battery 33-2499 Emergency Overflow Pond. (*See generally*  
16 *Icenogle Aff.*, ¶¶ 13-18.) The ponds and reservoirs, according to Icenogle, are used  
17 for backup storage, pH stabilization, suspended solid precipitation prior to discharge to  
18 the Tongue River, and stock watering. Nothing in the information presented to this  
19 Court shows that any of the Fidelity ponds or reservoirs are used for evaporation.

20           However, Plaintiffs’ Exhibit 10 is a ROD by the MBOGC dealing with a  
21 project known as the Waddle Creek Coal Bed Natural Gas Project (Waddle Creek  
22 ROD). The Waddle Creek ROD was approved by MBOGC on April 1, 2008 and  
23 approved 32 wells. The Waddle Creek ROD also entails the following actions: “[f]our  
24 evaporation pits, two each on Waddle Creek POD and Fork’s Ranch POD, will be  
25 utilized on state lands for water management. All pits will be lined and off channel.

1 Four evaporators will be located in each evaporation pond to increase evaporation  
2 rates.” (Pls.’ Summ. J. Exs, Ex. 10, at 1.) Thus, there is no question that MBOGC has  
3 approved disposal of CBM-produced water by means of evaporation. This Court has  
4 no choice but to conclude that such use is not beneficial and, therefore, a waste of one  
5 of Montana’s natural resources.

6 Defendants suggest that since the original ROD does not approve any  
7 particular water disposal plan, this Court should not act. They further suggest that a  
8 better procedure would be to have Plaintiffs challenge individual projects one at a  
9 time. However, in the view of this Court, such a process would waste considerable  
10 time for the parties and the Court. There are literally hundreds of wells that are  
11 contemplated to be drilled or have been drilled searching for CBM. The Court sees no  
12 reason why it cannot address the issue of evaporation pits in this proceeding.

13 One of the considerations this Court is to look at in determining if a case  
14 is ripe for review is the extent of hardship that will be suffered by the parties if the  
15 Court withholds review. *Havre Daily News v. City of Havre*, 2006 MT 215, ¶ 20, 333  
16 Mont. 331, 142 P.3d 864. It appears that the Waddle Creek ROD shown on Plaintiffs’  
17 exhibit 10 was approved by MBOGC. Further, as is evidenced above, the source of  
18 this approval was ultimately the original ROD that this Court mentioned earlier. This  
19 Court has also extensively quoted from *Diamond Cross*, wherein it was specifically  
20 stated that “the Montana Constitution and relevant statutes require management of  
21 CBM ground water for beneficial purposes. . . . Disposal of CBM ground water in a  
22 manner without any recognized benefit from the water does not pass constitutional  
23 muster.” *Diamond Cross*, at 23-24. No party to this action has presented any  
24 beneficial use that might be gained from causing water to evaporate and be lost from  
25 any and all beneficial use.

1 Defendants suggest that the public trust doctrine applies only to the  
2 recreational use of surface water. This Court rejects that contention. The  
3 constitutional provision specifically refers to all waters of the state. Further, the  
4 *Diamond Cross* decision clearly recognizes that the groundwater produced pursuant to  
5 CBM practices must be put to a beneficial use and not be wasted.

6 Thus, this Court concludes that the ROD, although it does not authorize  
7 any specific project, does form the basis of subsequent actions of MBOGC, such as the  
8 Waddle Creek ROD. Insofar as the original ROD authorizes, although not explicitly,  
9 evaporation pits, this Court declares it to be unconstitutional in violation of Article IX,  
10 section 3(3), of the Montana Constitution. The original ROD is apparently being  
11 interpreted by MBOGC to allow the construction of evaporation pits with devices  
12 called evaporators, whose purpose appears to be to waste CBM-produced water  
13 without any beneficial use of that water.

#### 14 **Equal Protection**

15 Plaintiffs also set forth an equal protection argument, suggesting that the  
16 activities of MBOGC deny them equal protection pursuant to Article II, section 4, of  
17 the Montana Constitution. They suggest there are two classes created. One class is  
18 those water users who must get a permit from the DNRC for beneficial uses of water,  
19 and the other class is CBM producers who do not need a permit to produce and waste  
20 water.

21 This Court will reject Plaintiffs' equal protection argument. Plaintiffs'  
22 argument presupposes that the disposal of all CBM-produced water is a waste and is  
23 not subject to administrative regulation. However, as noted above, permits are  
24 required for managed irrigation and for MPDES discharge permits. Further, the Court

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1 is unconvinced that the disposition of CBM-produced water, except as to evaporation  
2 pits, is a waste of that water.

3 Plaintiffs further suggest that the statutes mentioned above, Sections 82-  
4 11-175(2)(c)-(d) and 85-2-505(1)(e), MCA, are unconstitutional as applied in this case.  
5 This Court disagrees. First, the same question was brought up in *Diamond Cross*, and  
6 no unconstitutional application of the statutes was found in that case. In addition, here,  
7 there is no indication that the statutes were applied in the creation of the ROD.

8 **ORDER**

9 Under the facts presented:

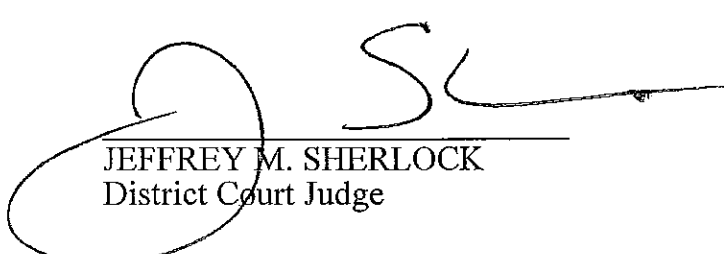
10 1. The Court will grant summary judgment to Defendants and finds  
11 that the ROD is not in violation of Article IX, section (3)3, of the Montana  
12 Constitution, except insofar as it has been deemed to authorize evaporation pits.

13 2. This Court finds that Sections 82-11-175(2)(c)-(d) and 85-2-  
14 505(1)(e) are not being unconstitutionally applied in this case.

15 3. The Court also finds that there is no violation of the constitution's  
16 equal protection provision in this case.

17 IT IS SO ORDERED.

18 DATED this 5 day of March 2010.

19  
20  
21   
22 JEFFREY M. SHERLOCK  
23 District Court Judge

24 pcs: Jack R. Tuholske  
25 Sarah K. McMillan  
Norman C. Peterson  
Jon Metropoulos/Dana L. Hupp

T/JMS/t&y irrigation v bd of oil & gas ord mot sj.wpd