

Carver v. Department of Fish, Wildlife and Parks and Flathead County  
Cause No. DV-10-667(B), 11th Judicial District, Flathead County

Plaintiff Dennis Carver owns property on Church Slough, a water body connected to the Flathead River. Mr. Carver petitioned the county to relocate a county road so his subdivision could be marketed as waterfront property. The county agreed on the condition that Carver provide for public access to the slough. Carver deeded a lot to the county and the county subsequently developed a county park/public water access with a concrete boat ramp. Carver alleges that the county agreed to water access that would only allow hand launching of small boats. Carver brings various causes of action against the county including negligent misrepresentation and regulatory taking. He brings two counts against FWP: 1) that FWP violated MEPA by issuing the county a Streambed Protection Act Permit (to develop the boat ramp) with an insufficient EA, 2) that FWP violated the Streambed Protection Act itself and section 23-1-110, MCA, which requires FWP to perform additional analysis when developing a state park or fishing access site.

1 Ken A. Kalvig  
Angela M. LeDuc  
2 Kalvig & LeDuc, P.C.  
1830 3rd Avenue East, Suite 301  
3 P. O. Box 1678  
Kalispell, MT 59903-0728  
4 Telephone: (406) 257-6001  
Facsimile: (406) 257-6082  
5

6 Attorneys for Petitioners

7 MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

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| 8 Dennis Carver, Lower Valley Properties, Inc.,<br>Plaintiffs,<br><br>9 vs.<br>10 Montana Department of Fish, Wildlife &<br>Parks, a division of the State of Montana,<br>Flathead County, a political subdivision of the<br>11 State of Montana<br>12 Defendants. | Cause No. DV-10-667(B)<br><br>Judge: Katherine B. Curtis<br><br><b><u>SECOND AMENDED COMPLAINT AND<br/>PETITION FOR REVIEW</u></b> |
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13 Plaintiffs/Petitioners, Dennis Carver and Lower Valley Properties, Inc. (collectively  
14 referred to as "Plaintiffs") hereby amend their complaint and petition for review pursuant to  
15 M.R.Civ.P. 15(a), and complain, allege and aver as follows:  
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17 1. Plaintiff Dennis Carver ("Carver") is a resident of Flathead County, Montana and  
owns and resides on Lot 9 of the River Vista Subdivision located in the  
18 NE $\frac{1}{4}$ , Sec. 36, T. 28N, R. 21W of Flathead County, Montana ("River Vista Subdivision"). A copy  
19 of the final plat of the River Vista Subdivision is attached hereto as Exhibit "A."  
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21 2. Plaintiff Lower Valley Properties, Inc. ("Lower Valley Properties") is a  
22 Corporation formed and existing under the laws of the State of Montana, and is the owner of  
23 Lots 1-8, 10 and 11 of the River Vista Subdivision.  
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1           3.     Carver and/or Lower Valley Properties' predecessors, Carver Investments,  
2     L.L.C., Goose Pit Gravel Company, L.L.C., and Mackinaw Estates, L.L.C., have assigned any  
3     and all rights, claims, and causes of action arising under the relevant facts hereto to Lower  
4     Valley Properties and Carver.

5           4.     Defendant, Flathead County, is and was at all times relevant hereto a body politic  
6     and corporate formed and acting under the laws of the State of Montana with a principal place of  
7     business located at 800 South Main, Kalispell, Montana.

8           5.     Defendant, Montana Department of Fish, Wildlife and Parks ("FWP") is and was  
9     at all times relevant hereto an agency of the State of Montana and public body corporate and  
10    politic organized in accordance with MCA Title 2, Chapter 15.

11          6.     Venue is proper in this court.

12          7.     This Court has jurisdiction to hear and decide this complaint.

13          8.     This Court has jurisdiction to hear and decide the petition for review pursuant to  
14    §2-4-702, MCA, et. seq.

15          9.     At all times relevant, the FWP was the reviewing agency within the context of  
16    §87-5-501, MCA and §23-1-110, MCA, that was responsible for making a decision relative to  
17    Flathead County's 124 Permit Application, and was duly authorized and empowered by the  
18    State of Montana to perform all duties and assume all responsibilities thereunder.

19          10.    The Plaintiffs assert claims against Flathead County in its capacity as a county  
20    insofar as liability is imputed to it under 42 U.S.C. §1983 for the actions of its employees  
21    operating within its various departments, including the Flathead County Parks and Recreation  
22    Department ("Parks Department") and the Flathead County Planning and Zoning Department  
23    ("Planning Department"), insofar as their unconstitutional acts and omissions implemented and  
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1 executed decisions officially adopted and promulgated by Flathead County's agents and  
2 employees.

3 11. The establishment of Counties and their Planning and Zoning Departments  
4 ("Planning Department"), and Parks and Recreation Departments ("Parks Department")  
5 operating in those Counties within the State of Montana originates and is premised upon  
6 Montana statutory law.

7 12. The powers and duties of Counties and their Planning Departments and Parks  
8 Departments operating within those Counties of the State of Montana originate in and are  
9 premised upon Montana statutory law.

10 13. On or around October 11, 2006, Carver Investments, L.L.C. submitted a  
11 preliminary plat application for the River Vista subdivision to the Flathead County Planning and  
12 Zoning Department. At that time, Carver Investments, L.L.C., an entity in which Carver is and  
13 was the sole member, was the record owner of that real property.

14 14. In and around the above-described time frame, Carver and Carver Investments  
15 were working with Flathead County to accomplish an abandonment and relocation of Wagner  
16 Lane. Wagner Lane was a county road near the edge of Carver Investments' property. The  
17 property, but not Wagner Lane, abutted Church Slough. For many years, members of the public  
18 would cross the private property located between Wagner Lane and Church Slough to access the  
19 water.

20 15. This "unofficial" access from Wagner Lane across private property consisted of a  
21 relatively steep embankment where users could access Church Slough only by foot. The top of  
22 the embankment was covered by trees, vegetation and shrubs, while the lower portion consisted  
23 largely of rocks and gravel. Since the access was primitive in nature, the extent of the public's  
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1 use was limited to hand-carrying small watercraft and icehouses down this embankment to the  
2 water.

3 16. The proposed relocation of Wagner Lane generated some controversy regarding  
4 the “unofficial” public access to Church Slough that occurred from the road.

5 17. Carver Investments proposed to create eleven large-sized lots, some of which  
6 border Church Slough, and initially proposed to provide cash-in-lieu of parkland. Carver  
7 Investments later agreed, instead of cash-in-lieu of parkland, to provide both a public park and  
8 legal fishing access to Church Slough (“River Vista park”) where none had previously existed.

9 18. Specifically, the Environmental Assessment (“River Vista EA”), excerpts of  
10 which are attached hereto as Exhibit “B,” stated:

11 The applicant proposes developing a 1.037 acre park and public access to  
12 Church Slough. The proposed park would provide five parking spaces for the  
13 public and a walking path down to the slough where one could launch a canoe  
or pull an ice fishing house out in the winter . . . .

14 See, Exhibit B, p. 16.

15 19. On December 26, 2006, the Planning Department issued its staff report. Finding  
16 of fact no. 18 states the proposed River Vista park “would provide five public parking spaces  
17 and a walking path down to the slough where one could launch a canoe or pull an ice fishing  
18 house out in the winter.” A copy of the Planning Department’s staff report is attached hereto as  
19 Exhibit “C.” See, Ex. C, p. 14.

20 20. The Planning Department’s recommended conditions of approval included  
21 several addressing the proposed River Vista park, the language of which was adopted by the  
22 Commissioners and is set forth in Paragraph 23 of this Complaint, below. None of the  
23 recommended conditions of approval indicated the park and water access would be greater than  
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1 or different from that proposed by Carver Investments.

2 21. During the subdivision process, Carver repeatedly communicated both his vision  
3 for River Vista park as a park and limited fishing access site and what he was willing to allow  
4 on River Vista park if he were to convey it to Flathead County. These communications were  
5 made to members of the public, representatives from special interest groups such as Flathead  
6 Wildlife, and to employees and agents of Flathead County.

7 22. In fact, on January 26, 2007, Carver sent the Flathead County Commissioners a  
8 letter that outlined the details of his park proposal in exchange for the abandonment/relocation  
9 of Wagner Lane. In that letter, Dennis states that "no ramp is to be built . . ." as part of his  
10 parkland grant. A copy of this letter is attached as Exhibit "D."

11 23. On March 20, 2007, the Commissioners voted 2-1 to approve the River Vista  
12 preliminary plat application, and included the following conditions of approval:

- 13 13. The parkland and the 100-ft. setback/buffer along Church  
14 Slough are critical bank stabilization areas. Any alteration to  
15 the areas may need to go through Flathead County Floodplain  
16 Permit Process and the . . . 310 Permit Process.  
17 14. The subdivider shall convey a . . . public park, with a public  
18 access road and a fire tanker recharge access to Church Slough  
19 to Flathead County Parks . . . . No vegetation shall be removed  
20 from the area . . . .

21 A copy of the Commissioners approval letter with conditions and findings of fact is attached  
22 hereto as Exhibit "E." See, Ex. E, p. 3.

23 24. On March 20, 2007, the Commissioners adopted the following findings of fact:

- 24 18. The [EA] states that the applicant proposes to develop a 1.037  
acre park with public access to Church Slough. The proposed  
park would provide five (5) parking spaces for the public and a  
walking path down to the slough where one could launch a canoe  
or pull an ice fishing house out in the winter. The applicant has

1                   been in communications with Jed Fisher, of the Flathead County  
2                   Parks Department, who expressed an interest in accepting this  
3                   land as a county park to provide maintained access for the public  
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5                   19.     Public access to Church Slough is an important issue that should  
6                   be finalized prior to final plat applications. It shall be noted on  
7                   the face of the final plat that this park will provide public access  
8                   to Church Slough . . . .

9                   See, Ex. E, p. 11.

10                  25.     The Planning Department's staff report, and the Commissioners preliminary plat  
11                  approval did not express or indicate that the park and water access would be of a scope or scale  
12                  different from that proposed by Carver Investments and contained no references to the  
13                  construction of a boat ramp in the River Vista park, the construction of which would have been  
14                  in direct contravention of what Plaintiffs agreed to provide with respect to that land.

15                  26.     Throughout the River Vista Subdivision process described above, various  
16                  representatives of Flathead County, including Jed Fisher ("Fisher"), indicated that the County  
17                  would not construct an unrestricted boat ramp on the land donated by Plaintiffs and would keep  
18                  the scope and scale of the park limited to what was proposed by Carver Investments.

19                  27.     On April 19, 2007, Carver Investments and Goose Pit Gravel, L.L.C. deeded  
20                  1.776 acres of land to Flathead County as per its agreement to provide Flathead County with a  
21                  park as part of the River Vista subdivision approval. A copy of this deed is attached as Exhibit  
22                  "F."

23                  28.     The Commissioners approved the final plat on October 2, 2007.

24                  29.     On various occasions after the land was deeded to Flathead County, Fisher,  
again, represented to Carver that the County would honor its promise made to Carver to refrain  
from putting in a boat ramp that would allow unrestricted access to Church Slough and that it

1 would keep the scope and scale of the park limited to what Carver Investments proposed and  
2 Flathead County ratified during the River Vista subdivision approval process.

3 30. On February 28, 2009, Carver sent Fisher an email indicating he learned Flathead  
4 County was planning to construct a boat ramp in the River Vista park. He reiterated that he  
5 expressed concerns about this before and did not want more than minimal improvements. He  
6 also stated that he deeded Flathead County the River Vista park because he believed that entity  
7 would respect his intent and the understanding he reached with the entity. A copy of this e-mail  
8 is attached as Exhibit "G."

9 31. On May 4, 2009, the Parks Department held a "public hearing" regarding the  
10 boat ramp, where Carver attended and expressed his concerns.

11 32. On October 1, 2009, the Parks Department submitted its 124 Permit Application  
12 to FCPD ("124 Permit Application"), which also serves as the County's Floodplain  
13 Development Permit Application ("Floodplain Application") (collectively referred to as  
14 "Application"). The Application specifies the purpose is for a concrete boat ramp and turn-  
15 around area, and describes that vegetation will be removed, which, on its face, contradicts the  
16 conditions of approval set forth in the Commissioner's grant of preliminary plat. See, Ex. E., p.

17 3.

18 33. The Application also includes other omissions and inadequate answers. A copy  
19 of this 124 Permit Application/Floodplain Application, with its attachments is attached as  
20 Exhibit "H."

21 34. The boat ramp, as designed, would enable large watercraft of all sizes to access  
22 Church Slough, and there are no limits on watercraft size or horsepower included as part of the  
23 124 Permit Application.



1           35.     In February 2010, FWP, the state agency responsible for issuing 124 permits,  
2     prepared an Environmental Assessment (“124 Permit EA”) that acknowledges the boat ramp  
3     will increase boat use, shoreline erosion, noise, and could impact critical habitat or wildlife use.  
4     A copy of this EA is attached hereto as Exhibit “I.” See, Ex. I, pp. 4, 8-12,14,

5           36.     Despite these acknowledgements, the 124 Permit EA fails to discuss or  
6     adequately address or evaluate the impacts that the increased and expanded access will have on  
7     wildlife habitat and the natural and human environment, fails to discuss or adequately address or  
8     evaluate reasonable alternatives or ways to mitigate impacts on wildlife habitat and the natural  
9     and human environment, and fails to discuss or adequately address other required information,  
10    and speculates that the boat ramp will not have “significant impacts” on the human or physical  
11    environment. See, Ex. I, p. 15.

12          37.     The 124 Permit Hearing occurred on March 18, 2010. Carver attended and  
13    voiced his opposition to a grant of the same.

14          38.     FWP granted the 124 Permit on April 6, 2010.

15          39.     On April 9, 2010, the Planning Department granted the Parks Department a  
16    Floodplain Development Permit based on its October 1, 2009 application. A copy of this Permit  
17    grant is attached as Exhibit “J.”

18          40.     Carver and Lower Valley Properties own the land adjacent to and nearby the  
19    River Vista park.

20          41.     In and around the end of April and early May of 2010, Flathead County began  
21    work related to the boat ramp on the River Vista park. As part of this work, the overwhelming  
22    majority of the vegetation that covered the parkland has been torn out, which is in contravention  
23    of the Flathead County Commissioners’ conditions of subdivision approval for the park. See,

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1 Ex. E., p. 3.

2 42. The Parks Department refuses to implement any kind of permanent restrictions or  
3 limitations on watercraft that can access Church Slough using the boat ramp at issue, including  
4 the watercraft's size or horsepower, which will result in the park and water access being  
5 substantially different than that agreed to by Carver Investments and approved by the County  
6 Commissioners during the River Vista Subdivision process.

7 43. The Parks Department refuses to develop and manage the River Vista park in  
8 accordance with its intended use and scope as set forth by Plaintiffs and ratified by Flathead  
9 County as part of the River Vista Subdivision process.

10 44. The installation of the boat ramp and associated improvements has and will  
11 continue to devalue Plaintiffs' properties.

12 **COUNT I – PETITION FOR REVIEW OF FISH, WILDLIFE AND PARKS' 124**  
13 **PERMIT PURSUANT TO MONTANA'S ADMINISTRATIVE PROCEDURE ACT**  
14 **(§2-4-702, MCA)**

15 45. The allegations set forth in the preceding Paragraphs are realleged and  
16 incorporated as though fully set forth herein.

17 46. Plaintiffs are aggrieved and have standing to appeal FWP's issuance of the 124  
18 Permit under Montana's Administrative Procedure Act ("MAPA") and the Montana  
19 Environmental Protection Act ("MEPA"). No other administrative remedies are available to the  
20 Plaintiffs.

21 47. Pursuant to §2-4-702, MCA, et. seq., this court may conduct a judicial review of  
22 an agency decision when the decision is contested, the appellant has been aggrieved by the final  
23 decision, and where there are no other administrative remedies available within the agency.

24 48. Section 2-4-704(2), MCA enables a court to reverse an agency decision if

1 substantial rights of the appellant have been prejudiced because:

- 2 (a) the administrative findings, inferences, conclusions, or decisions are: (i) in  
3 violation of constitutional or statutory provisions; (ii) in excess of statutory  
4 authority of the agency; (iii) made upon unlawful procedure; (iv) affected by  
5 other error of law; (v) clearly erroneous in view of the reliable, probative,  
6 and substantial evidence on the whole record; (vi) arbitrary or capricious or  
7 characterized by abuse of discretion or clearly unwarranted exercise of  
8 discretion; or (b) findings of fact, upon issues essential to the decision, were  
9 not made although requested.

10 49. MEPA does not have a contested hearing provision, but both MAPA (§2-4-  
11 702(2)(d) and MEPA require an aggrieved party to file a petition for review with the District  
12 Court on a final agency decision involving MEPA, and MEPA claims must be heard by this  
13 Court at a hearing in accordance with the provisions of §75-1-201(3), et. seq. MCA.

14 50. The Flathead County's Parks Department unlawfully pursued a 124 Permit in  
15 contravention of its representations to Carver that it would refrain from constructing a ramp that  
16 would enable unlimited access to Church Slough and the subdivision approval conditions that  
17 prohibited the removal of vegetation in the River Vista park.

18 51. As part of the 124 Permit process, FWP's 124 Permit EA cited to, relied on, and  
19 needed to address the provisions of the Montana Environmental Protection Act (§75-1-201,  
20 MCA, et. seq.) ("MEPA"), and accordingly, needed to address and abide by the Administrative  
21 Regulations associated with MEPA, including but not limited to ARM 12.2.430 through 432.

22 52. FWP violated MEPA and associated ARMs by disregarding or failing to  
23 adequately address or evaluate specific criteria in its 124 Permit EA that must be evaluated as  
24 required by these aforementioned laws and regulations.

53. FWP failed to adequately address and evaluate the criteria it set forth in its own  
checklist contained in the EA.

1           54.    FWP's grant of a 124 Permit using a legally deficient and inadequate 124 Permit  
2 EA was arbitrary and capricious, and/or constituted an abuse or unwarranted exercise of its  
3 discretion, and affected by error of law.

4           55.    FWP's grant of a 124 Permit based on an application submitted by the County  
5 that violated the law was clearly affected by error of law, was arbitrary and capricious, and/or  
6 constituted an abuse or unwarranted exercise of its discretion.

7           56.    Carver, individually and on behalf of Lower Valley Properties contested the boat  
8 ramp as proposed via his attendance at public hearings and through written and verbal comment  
9 presented to Flathead County and FWP.

10          57.    By granting the 124 Permit based on a legally deficient 124 Permit EA and an  
11 application submitted in contravention of Flathead County's representations made to Plaintiffs  
12 and the limitations set forth in the preliminary plat approval, FWP's actions violated the  
13 substantial rights of Plaintiffs.

14          58.    Plaintiffs have and will incur actual and substantial damages as a direct and  
15 proximate cause of FWP's 124 Permit grant to the Parks Department.

16                   **COUNT II –VIOLATIONS OF §23-1-110, MCA (IMPROVEMENT OR**  
17                   **DEVELOPMENT OF STATE PARKS AND FISHING ACCESS SITES) AND THE**  
18                   **MONTANA STREAMBED PROTECTION ACT**

19          59.    The allegations set forth in the preceding Paragraphs are realleged and  
20 incorporated as though fully set forth herein.

21          60.    As part of the 124 Permit process, FWP's 124 Permit EA cited to, relied on, and  
22 needed to address specific criteria set forth in §23-1-110, MCA and, accordingly, needed to  
23 address and abide by the Montana Administrative Regulations ("ARM") associated with §23-1-  
24 110, MCA, including but not limited to ARM §12.8.604.

1           61.     FWP violated §23-1-110, MCA and associated ARMs by disregarding or failing  
2 to adequately address or evaluate specific criteria in its 124 Permit EA that must be evaluated as  
3 required by these aforementioned laws and regulations.

4           62.     FWP's issuance of the 124 Permit violated the provisions of the Montana Stream  
5 Protection Act (§87-5-501, et. seq., MCA).

6           63.     Plaintiffs have and will incur actual and substantial damages as a direct and  
7 proximate cause of FWP's 124 Permit grant to the Parks Department in contravention of the  
8 laws of the State of Montana.

9           **COUNT III - FLATHEAD COUNTY'S ISSUANCE OF FLOODPLAIN PERMIT**  
10           **#FDP-09-26 VIOLATES FLOODPLAIN AND FLOODWAY MANAGEMENT**  
11           **REGULATIONS**

12           64.     The allegations set forth in the Paragraphs are realleged and incorporated as  
13 though fully set forth herein.

14           65.     Plaintiffs are aggrieved and have standing to appeal Flathead County's issuance  
15 of the Floodplain Development Permit.

16           66.     Flathead County's Parks Department unlawfully pursued a Floodplain  
17 Development Permit in contravention of its representations made to Plaintiffs that it would  
18 refrain from constructing a ramp that would enable unlimited access to Church Slough.

19           67.     The information required by Flathead County in its Floodplain Application  
20 forms, is authorized by and in accordance with the Flathead County Floodplain and Floodway  
21 Management Regulations via authority through Title 76, Chapter 5, MCA.

22           68.     The Parks Department's Floodplain Application is incomplete and inadequate in  
23 that it, among other things: 1) fails to answer all of the Application's questions; 2) fails to  
24 provide adequate answers to some of the Application's questions; and, 3) fails to provide

1 information mandated by the Floodplain Application, including a map that contains all of the  
2 information required in Section 2. See, Exhibit J.

3 69. Flathead County's grant of a Floodplain Development Permit to the Flathead  
4 County Parks Department using a legally deficient and inadequate Floodplain Development  
5 Application violated its Floodplain and Floodway Management Regulations, and was arbitrary  
6 and capricious, and was otherwise in contravention of the laws of the State of Montana and the  
7 Flathead County Floodplain and Floodway Management Regulations.

8 70. Carver, individually and on behalf of Lower Valley Properties contested the boat  
9 ramp proposed that is the subject of the Floodplain Development Permit.

10 71. By granting the Floodplain Development Permit based on a legally deficient  
11 Floodplain Application and in contravention to the Parks Department's representations to  
12 Plaintiffs, Flathead County's actions have violated the law and the substantial rights of  
13 Plaintiffs.

14 72. Plaintiffs have and will incur actual and substantial damages as a direct and  
15 proximate cause of Flathead County's Floodplain Development Permit grant to the Parks  
16 Department.

17 WHEREFORE, based on Counts I through III, above, Plaintiffs demand judgment as  
18 follows:

- 19 a. For an order reversing or voiding FWP's issuance of a 124 Permit to the  
20 Flathead County Parks Department for the River Vista park boat ramp and  
21 turnaround area as proposed;
- 22 b. For an order reversing or voiding Flathead County's issuance of a Floodplain  
23 Development Permit #FDP-09-26 for the River Vista park boat-ramp and  
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turnaround area;

c. Damages in an amount to be determined at trial;

d. Costs and attorney's fees to the extent allowed by law or equity; and,

e. For such other and further relief as this Honorable Court deems meet and just.

**COUNT IV – 42 U.S.C. §1983 REGULATORY TAKING (FLATHEAD COUNTY)**

73. The allegations set forth in the preceding Paragraphs are realleged and incorporated as though fully set forth herein.

74. Plaintiffs assert claims of violation of the Takings Clause of the Fifth Amendment of the United States Constitution as secured by 42 U.S.C. §1983 and Article II, Section 29 of the Montana Constitution against Flathead County for the actions of its Parks Department. Flathead County's decision to move forward with the installation of a boat ramp and other improvements was done arbitrarily and in violation of its representations to Plaintiffs, and its actions have denied Plaintiffs, in all practical effects, beneficial and economic use of their property.

75. As a direct result of Flathead County's actions, the value of Plaintiffs' properties have been vitiated.

76. Plaintiffs have incurred and will in the future continue to incur a substantial loss of revenue and other financial harm arising out of Flathead County's illegal, wrongful, and unconstitutional actions and omissions, including the loss of proceeds from the sale of residential property, carrying costs, and other financial burdens and costs which Plaintiffs could not reasonably have expected given the circumstances upon which the parkland was deeded and the representations of Flathead County that, if it were to own the park, it would do so in accordance with the limited use Plaintiffs set forth during the River Vista Subdivision approval

1 process and would not install an unrestricted boat ramp.

2 WHEREFORE, based on Count IV, above, Plaintiffs demand judgment against the  
3 Defendant Flathead County for:

- 4 a. Compensatory Damages;
- 5 b. Costs;
- 6 c. Interest;
- 7 d. Expenses;
- 8 e. Attorneys' fees pursuant to 42 U.S.C. §1988; and,
- 9 f. For such other and further relief as this Court deems meet and just.

10 **COUNT V – NEGLIGENT MISREPRESENTATION (FLATHEAD COUNTY)**

11 77. The allegations set forth in the preceding Paragraphs are realleged and  
12 incorporated as though fully set forth herein.

13 78. By affirming Plaintiffs' intent for the River Vista park in its public documents,  
14 and by assuring Plaintiffs that it would not install a unrestricted access boat ramp on the land  
15 Plaintiffs were considering donating to Flathead County, Flathead County made material factual  
16 representations.

17 79. Flathead County's action taken to construct the boat ramp as designed and  
18 proposed and to install the additional improvements establish that its representations were  
19 untrue and made without any reasonable grounds for believing them to be true.

20 80. Flathead County's representations were made with the intent to induce Plaintiffs  
21 to rely on it, because, had Flathead County indicated that it was, in fact, planning to construct  
22 the boat ramp at issue, more than 5 parking spaces, a permanent bathroom and multitudes of  
23 picnic tables, Plaintiffs would not have been willing to provide it with an unrestricted deed.



1           81. Plaintiffs were not aware of the falsity of Flathead County's representations and  
2 were justified in relying upon Flathead County's representations.

3           82. Plaintiffs have and will sustain damages resulting from their reliance on Flathead  
4 County's representations.

5                           **COUNT VI – EQUITABLE ESTOPPEL (FLATHEAD COUNTY)**

6           83. The allegations set forth in the Paragraphs are realleged and incorporated as  
7 though fully set forth herein.

8           84. Flathead County's representations about the nature of the River Vista park and  
9 the access contained therein were made in order to induce Plaintiffs to deed the property to it,  
10 and the County's subsequent action to construct the boat ramp and other improvements shows  
11 that its conduct amounted to a representation or concealment of material facts.

12           85. Flathead County knew that it would not or may not honor Plaintiffs' wishes and  
13 abide by its representations relating to the boat ramp and associated improvements, or the  
14 circumstances were such that knowledge of the same should necessarily be imputed to Flathead  
15 County.

16           86. The truth concerning Flathead County's intent and plans for improvements on the  
17 River Vista public access were unknown to Plaintiffs.

18           87. Flathead County conducted itself in a manner that shows it intended and expected  
19 Plaintiffs to rely on its actions and representation, and Plaintiffs, in fact, relied upon Flathead  
20 County's representations regarding how it would improve and manage the River Vista park.

21           88. Flathead County's actions led Plaintiffs to agree to provide Flathead County with  
22 an unrestricted deed to the River Vista park.

23           89. Flathead County's installation of an unrestricted boat ramp access to Church  
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1 Slough on the River Vista park has devalued Plaintiffs' properties, and the further installation of  
2 the planned improvements will continue to devalue the Plaintiffs' properties, all of which have  
3 caused or will cause Plaintiffs other damages, the nature and extent of which have not yet been  
4 assessed, and which will be determined at trial.

5 **COUNT VII- PROMISSORY ESTOPPEL (FLATHEAD COUNTY)**

6 90. The allegations set forth in the preceding Paragraphs are realleged and  
7 incorporated as though fully set forth herein.

8 91. Flathead County's acceptance of the River Vista park based on Plaintiffs'  
9 stipulations that the County maintain it as a limited fishing access site and refrain from installing  
10 a large boat ramp and more than five parking spaces and other improvements constitutes a clear  
11 and unambiguous promise.

12 92. Plaintiffs reasonably and foreseeably relied on Flathead County's promise, and,  
13 as a result of Flathead County's actions, Plaintiffs have been and will continue to be injured by  
14 the reliance.

15 WHEREFORE, with respect to Counts V through VII set forth above, Plaintiffs pray  
16 for relief as follows:

- 17 a. Damages in an amount to be determined at trial;  
18 b. Costs;  
19 c. Interest;  
20 d. Expenses;  
21 e. Attorneys' fees to the extent allowed by law or equity;  
22 f. Emotional distress damages; and  
23 g. For such other and further relief as this Court deems meet and just.  
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**COUNT VIII- §27-19-101, et. seq., MCA PERMANENT INJUNCTION  
(FLATHEAD COUNTY)**

93. The allegations contained in the preceding Paragraphs above are realleged and incorporated as though fully set forth herein.

94. Flathead County’s actions, specifically, the construction of the boat ramp, and the current or impending construction and installation of eight parking spaces, permanent bathroom facility and unlimited picnic tables, all have or will continue to result in substantial and irreparable harm to Plaintiffs.

95. Quantification of pecuniary damages caused by Defendant Flathead County’s actions would not afford adequate relief or may be difficult or impossible to fully demonstrate and prove, and may result in a multiplicity of judicial proceedings unless Defendant Flathead County is specifically enjoined from its actions and activity.

WHEREFORE, with respect to Count VIII set forth above, Plaintiffs pray for relief as follows:

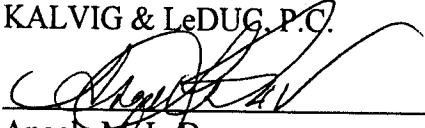
- a. That Defendant Flathead County be permanently enjoined from constructing or installing improvements on the River Vista park that exceed the type and scope of use for the land set forth by Plaintiffs and adopted and ratified by Flathead County during the River Vista Subdivision approval process;
- b. That Defendant Flathead County be permanently enjoined from allowing or permitting any public use or activity that exceeds the type or scope of use for the land set forth by Plaintiffs and adopted and ratified by Flathead County during the River Vista Subdivision approval process;
- c. That any improvements already in place that exceed the type and scope of use

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for the land set forth by Plaintiffs and adopted and ratified by Flathead County during the River Vista Subdivision approval process be removed;

- d. Attorneys' fees and costs to the extent allowed by law or equity; and,
- e. For such other and further relief as this Court deems meet and just.

DATED this 11<sup>th</sup> day of January, 2011

KALVIG & LeDUC, P.C.  
  
 \_\_\_\_\_  
 Angela M. LeDuc  
 Attorneys for Plaintiffs

Exhibits:

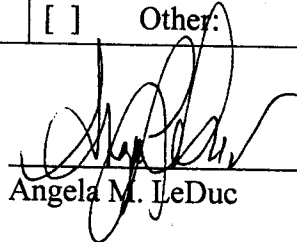
- A. Final plat map of the River Vista Subdivision;
- B. Carver Investments, L.L.C.'s River Vista Environmental Assessment;
- C. Planning Department's Staff Report;
- D. January 26, 2007 letter from Carver to the County Commissioners;
- E. Commissioners' River Vista approval letter w/conditions & findings of fact;
- F. River Vista park deed to Flathead County;
- G. February 28, 2009 e-mail from Carver to Fisher;
- H. 124 Permit Application/Floodplain Application;
- I. FWP 124 Permit Environmental Assessment; and
- J. Flathead County's Floodplain Development Permit Grant.

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### CERTIFICATE OF SERVICE

I, Angela M. LeDuc, one of the attorneys of the law firm of KALVIG & LEDUC, P.C., do hereby certify that on the 11<sup>th</sup> day of January, 2011, I served a true and correct copy of the foregoing document upon the person(s) named below, at the address set out below, either by mailing, hand delivery, or Federal Express, in a properly addressed envelope, postage prepaid, or by telecopying a true and correct copy of said document.

|  |  |
|--|--|
| Gregory L. Bonilla<br>MACo Legal Services<br>2717-F Skyway Drive<br>Helena, MT 59602-1213  | <input checked="" type="checkbox"/> U.S. Mail (first class postage)<br><input type="checkbox"/> Federal Express<br><input type="checkbox"/> Hand-Delivery<br><input type="checkbox"/> Telefacsimile<br><input type="checkbox"/> Other: |
| William A. Schenk, Agency Counsel and<br>Special Assistant Attorney General<br>State of Montana, Department of Fish,<br>Wildlife and Parks<br>1420 E. Sixth Ave.<br>PO Box 200701<br>Helena, MT 59620-0701 | <input checked="" type="checkbox"/> U.S. Mail (first class postage)<br><input type="checkbox"/> Federal Express<br><input type="checkbox"/> Hand-Delivery<br><input type="checkbox"/> Telefacsimile<br><input type="checkbox"/> Other: |
| Peter A. Steele, Deputy County Attorney<br>Flathead County Attorney's Office<br>P.O. Box 1516<br>Kalispell, MT 59903-1516  | <input checked="" type="checkbox"/> U.S. Mail (first class postage)<br><input type="checkbox"/> Federal Express<br><input type="checkbox"/> Hand-Delivery<br><input type="checkbox"/> Telefacsimile<br><input type="checkbox"/> Other: |

  
\_\_\_\_\_  
Angela M. LeDuc

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ORDER AND RATIONALE ON JUDICIAL REVIEW OF 124 PERMIT

CLERK OF DISTRICT COURT  
2013 JAN -7 AM 10:41  
FILED  
BY \_\_\_\_\_ DEPUTY *JB*

1 KATHERINE R. CURTIS  
2 District Judge, Department No. 2  
3 Flathead County Justice Center  
4 920 South Main Street  
5 Kalispell, Montana 59901  
6 (406) 758-5906

7 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE  
8 STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

9 \* \* \* \* \*

10 DENNIS CARVER and LOWER )  
11 VALLEY PROPERTIES, )  
12 )  
13 Plaintiffs, )  
14 vs. )  
15 MONTANA DEPARTMENT OF FISH, )  
16 WILDLIFE & PARKS, a division )  
17 of the State of Montana, )  
18 FLATHEAD COUNTY, a political )  
19 Subdivision of the State of )  
20 Montana, )  
21 Defendants. )

Cause No. DV-10-667(B)

ORDER AND RATIONALE  
ON JUDICIAL REVIEW  
OF 124 PERMIT

21 THIS CAUSE is before the Court on Plaintiffs' petition for  
22 judicial review of the determination by Defendant Montana  
23 Department of Fish, Wildlife and Parks to issue a permit to the  
24 Flathead County Parks Department to construct a concrete boat  
25 ramp; and the Court having fully considered the petition, and  
26 supporting and opposition memoranda, affidavits and reports, and  
27 the parties having waived a hearing; and the Court thus being  
28 fully advised; Now therefore:

IT IS HEREBY ORDERED that Plaintiffs' petition for judicial  
review contesting the 124 permit under the Stream Protection Act  
issued by Montana Department of Fish, Wildlife & Parks be and  
the same hereby is GRANTED IN PART to the extent that this  
matter is hereby REMANDED to the department for further

1 consideration of the application in light of the evidence and  
2 rationale set forth below.

3 IT IS FURTHER ORDERED that Plaintiffs' petition for  
4 judicial review seeking to void the 124 permit be and the same  
5 hereby is DENIED pending further consideration of the  
6 application by the department.

#### 7 RATIONALE

8 This lawsuit arises from a dispute over development of a  
9 fishing access site located on property now owned by Flathead  
10 County. Plaintiff Dennis Carver, in the course of planning a  
11 housing development at Church Slough, arranged with Flathead  
12 County to carve out from the development and deed to the County  
13 a parcel of land to be used as a fishing access site. This was  
14 in exchange for the County abandoning a county road (Wagner  
15 Lane) which otherwise would run through the development. The  
16 deeded access was meant to replace a former site that was not  
17 formally maintained as such, and was fairly primitive in nature.  
18 The former site had been accessed by parking on Wagner Lane and  
19 walking across private property; once Wagner Lane was closed to  
20 the public and the land adjoining the primitive site absorbed by  
21 Carver's project, public access was problematic. After Carver  
22 deeded the property to the County, the County Parks Department  
23 applied to the Montana Department of Fish, Wildlife & Parks  
24 (hereafter FWP) for a permit to create a larger, designated-  
25 access site, with a concrete boat ramp, 5-8 parking spots, and  
26 turn-around. The department granted the permit, known as a 124  
27 permit, which resulted in construction of the concrete ramp,  
28 thereby allowing the launching of larger motor boats, ski-doo's,  
etc. Carver contends that the permit was granted without  
adequate consideration of the application and failure on the  
part of the department to follow its own rules. As a result,  
Carver contends the permit should be voided. In contrast, the  
department asks the Court, if it is inclined to void the permit,  
to instead identify evidence which it may not have considered  
and remand the issue to the department.

#### 24 I. Standard of Review

25 Plaintiff's second amended complaint contains two claims  
26 against Department of Fish, Wildlife & Parks. Count I at issue  
27 herein is for judicial review of the agency's decision pursuant  
28 to §2-4-702, MCA. Plaintiffs contend that FWP failed to  
adequately address and evaluate specific criteria under which  
projects such as the one at issue are considered.



1 It is well settled that judicial review of a FWP  
2 determination to issue a permit is governed by §2-4-702, MCA.  
3 There, the Court may affirm the decision of the agency or remand  
4 the case to the agency for further proceedings based on the  
5 Court's determinations. The Court may reverse or modify the  
6 decision if it finds that substantial rights of the appellant  
7 have been prejudiced because: "(a) the administrative findings,  
8 inferences, conclusions, or decisions are:

- 9 . . .  
10 (iii) made upon unlawful procedure;  
11 (iv) affected by other error of law;  
12 (v) clearly erroneous in view of the reliable, probative,  
13 and substantial evidence on the whole record;  
14 (vi) arbitrary or capricious or characterized by abuse of  
15 discretion or clearly unwarranted exercise of discretion. .  
16 . . ."

17 Section 2-4-704(2)(a). Petitioner Carver urges the Court to  
18 require FWP to prepare an EIS based on the more thorough  
19 assessment he contends is necessary. In the meantime, Carver  
20 contends the Court is empowered with the authority to reverse  
21 the FWP decision to issue the 124 permit.

22 In Carver's initial brief on judicial review, he sets out  
23 the various statutory and administrative rules which govern  
24 applications and analysis for streamside permits. Those rules  
25 will be discussed below as necessary. Carver contends that  
26 based on numerous areas of error, omission or insufficient  
27 review, FWP acted unlawfully as well as arbitrarily and  
28 capriciously when it issued the 124 permit. Rather than set  
forth in a laundry list the issues on which Carver relies, the  
Court will address the meritorious arguments in the following  
discussion. The dispositive question, of course, is whether the  
FWP findings and decisions are supported by substantial credible  
evidence. Section 75-1-201, MCA (emphasis added).

## 23 II. Criteria for Consideration of Application for 124 Permit

24 FWP's consideration of a 124 permit application is bound by  
25 a number of statutory and regulatory provisions. The Stream  
26 Protection Act prohibits a state or governmental agency from,  
27 *inter alia*, constructing any project which "**may or will**  
28 obstruct, damage, diminish, destroy, change, modify or vary the  
natural existing shape and form of any stream or its banks"  
without first giving notice to FWP with detailed plans and  
specifications "as soon as preliminary plans are completed but

1 not less than 60 days" before the project is to begin. Section  
2 87-5-502, MCA. At that point, the department is to examine and  
3 investigate the plans and determine whether the project will  
4 "adversely affect any fish or game habitat." Sections 87-5-503,  
5 504.

6 ARM 12.8.604, delineates specific elements which the  
7 department is to consider when reviewing any fishing access site  
8 development. The administrative regulations require that the  
9 report on the project include consideration of the impacts of  
10 the project on the physical and human environment and whether  
11 the project complies with the Montana Environmental Policy Act  
12 (MEPA). 12.8.604((1)(b),(c) ARM. If FWP, in its evaluation,  
13 determines that the project will significantly affect the human  
14 environment, MEPA requires the department to prepare the more  
15 extensive review under an EIS. 12.2.430, ARM.

16 If it appears following review that the proposed project  
17 will affect fish or game habitat, the department is to provide  
18 to the applicant recommendations or alternate plans to  
19 ameliorate or eliminate the adverse effect. §87-5-504.  
20 Statutorily, FWP has 30 days after receiving the proposed plans  
21 to advise the applicant whether the construction will adversely  
22 affect fish or game habitat; here, Mark Deleray on behalf of FWP  
23 acknowledges that his investigation took longer than 30 days  
24 with no objection by the County.

25 In addition to the statutory and regulatory criteria, the  
26 Montana Supreme Court has articulated criteria which the agency  
27 and the Court must consider in evaluating projects such as this:

28 An agency must take a "hard look" at the environmental  
impacts of a given project or proposal. Implicit in  
the requirement that an agency take a hard look at the  
environmental consequences of its actions is the  
obligation to make an adequate compilation of relevant  
information, to analyze it reasonably, and to consider  
all pertinent data. . . . [W]hile a court is not to  
substitute its judgment for that of the agency, the  
agency must examine the relevant data and articulate a  
satisfactory explanation for its action, including a  
rational connection between the facts found and the  
choice made. In other words, the Court looks closely  
at whether the agency has taken a hard look at the  
question presented. The Court does not take a hard  
look itself but requires that the agency does so. The  
Court focuses on the validity and appropriateness of

1 the administrative decision making process without  
2 intense scrutiny of the decision itself. In this way,  
3 the Court examines the elements of the decision  
4 without interfering with the administrative authority  
5 over the decision itself.

6 Clark Fork Coalition v. Mont. Dep't of Env'tl. Quality, 2008 MT  
7 407, P 47, 347 Mont. 197, 211, 197 P.3d 482.

8 In the course of Carver's applications for his subdivision,  
9 FWP submitted its comments on the application, contending that  
10 the environment of the slough was fragile and needed to be  
11 protected. FWP raised concerns over removal of riparian bushes  
12 and increased boat use affecting the bank of the slough.  
13 Following the initial approvals of Carver's subdivision  
14 applications, and as part of the County's abandonment of Wagner  
15 Lane, Carver proposed that he set aside a 1-acre lot and deed  
16 same to the County in order to replace the prior, non-designated  
17 public access. As noted above, the prior access was primitive,  
18 with no designated parking. In the course of the discussions to  
19 create the public access, Carver appeared at all public hearings  
20 as well as any discussions with County officials. Carver urged  
21 the County to maintain the primitive nature of access to the  
22 water, but he would provide the lot for truck and trailer  
23 parking as well as room for turn-around. Instead, in 2009,  
24 Flathead County Parks department submitted an application to FWP  
25 to build a concrete boat ramp, 5-8 parking spots and a turn-  
26 around.

27 FWP's review of the 124 permit application resulted first  
28 in the agency's determination that it only need prepare an  
environmental assessment (EA), as opposed to an environmental  
impact statement (EIS). This led to FWP considering the  
County's application and proposal by way of a checklist  
analysis.

### 29 III. Specifications of Error

#### 30 **A. Unlawful, Arbitrary or Capricious**

31 There are numerous cases in which the courts have defined  
32 unlawful, arbitrary or capricious in judicial review cases. The  
33 following discussion describes the analysis applicable to this  
34 case:

35 [T]he standard of review to be applied by the district  
36 court and [the reviewing court] is whether the record

1 establishes that the governing body acted arbitrarily,  
2 capriciously, or unlawfully. The governing body's  
3 action is unlawful if it fails to comply with the  
4 requirements of applicable statutes. The governing  
5 body's action is arbitrary and capricious if it came  
6 about seemingly at random or by chance, or as an  
7 impulsive and unreasonable act of will. In making this  
determination, the reviewing court must consider  
whether the governing body's decision was based on a  
consideration of the relevant factors and whether  
there has been a clear error of judgment.

8 Heffernan v. Missoula City Council, 2011 MT 91, P 65, 360 Mont.  
9 207, 233, 255 P.3d 80 (internal citations omitted).

10 Also pertinent hereto, Carver urges the Court to consider  
11 evidence from his two experts, Roger Noble and Joe Elliott. FWP  
12 objects, contending that such evidence was not before it when it  
13 considered the project. The Court notes that the reports from  
14 Noble and Elliott are in-depth and contain facts and evidence  
15 which were available to FWP at all times. Consideration of  
16 matters which were not before FWP is, in this case, necessary in  
17 order for the Court to determine what FWP should have but did  
18 not consider. In deciding whether a lower court erred in  
19 holding that the agency acted properly in making its decision,  
20 the Montana Supreme Court has stated that the standard of review  
21 for an informal agency decision is whether the agency's decision  
was arbitrary, capricious, or unlawful and that **"unless the  
reviewing court looks beyond the record to determine what  
matters the agency should have considered, it is impossible for  
the court to determine whether the agency took into  
consideration all relevant factors in reaching its decision."**  
Skyline Sportsmen's Ass'n v. Bd. of Land Comm'rs, 286 Mont. 108,  
113, 951 P.2d 29 (1997) (emphasis added).

22 Carver raises numerous areas in which he contends the  
23 application, the analysis and the process by which FWP conducted  
24 its review of the 124 application were deficient and justify  
25 either rescission of the permit or preparation of an EIS.  
Without repeating every area of deficiency, the Court will focus  
on the most apparent and egregious errors.

26 **B. Failure to Evaluate Secondary and Cumulative Impacts**

27 ARM 12.2.432(3) sets out in detail the contents of the  
28 environmental assessment which an agency must prepare prior to  
permitting a project. Carver focuses on the requirement that

1 the agency evaluate cumulative and secondary impacts of the  
2 project and consider in a detailed analysis impacts which are  
3 potentially significant, which by regulation include:  
4 terrestrial and aquatic life and habitats; water quality;  
5 geology; soil quality, stability and moisture; vegetation cover;  
6 air quality; and unique, endangered, fragile or limited  
7 environmental resources. Cumulative impact is defined as the  
8 collective impact on the environment when considered in  
9 conjunction with other past and present actions. ARM  
10 12.2.429(7). Secondary impact is defined as further impact to  
11 the environment that may be "stimulated or induced by or  
12 otherwise result from a direct impact of the action." ARM  
13 12.2.429(18).

9 Relying on the reports and studies by Roger Noble, senior  
10 hydrologist, and Joe Elliott, Ph.D., Carver contends that FWP  
11 failed to consider the cumulative and secondary impacts of the  
12 following: boat wakes resulting from establishing the concrete  
13 boat ramp; impact on air quality not only from high-powered  
14 boats but from road dust due to increased use by vehicles towing  
15 boat trailers; erosion of bank soil, leading to removal of  
16 subsurface plant cover as well as undercutting of the bank  
17 vegetation by the increased wave action resulting in increased  
18 suspended sediment, as well as loss of property by erosion;  
19 invasive water species (which is presently the focus of county-  
20 wide boat checks); and impact on nesting eagles and other  
21 wildlife, including increased human garbage drawing grizzlies  
22 and other animals in light of other evidence showing the area to  
23 be a corridor of wildlife transportation.

19 In determining whether or not impacts are significant, the  
20 pertinent criteria include the severity, duration, geographic  
21 extent, and frequency of occurrence of the impact, the  
22 probability that the impact will occur, the quantity and quality  
23 of each environmental resource or value that would be affected,  
24 and the importance to the state and society of each  
25 environmental resource or value that would be affected.  
26 12.2.431, ARM. FWP determined that the project had minimal  
27 environmental impact and, thus, there was no need to prepare an  
28 EIS.

25 Roger Noble submitted his expert report (doc. #69), in  
26 which he details the specific areas where, in his opinion, FWP  
27 failed to adequately address the application. In addition, Mr.  
28 Noble points to the various other permits which the County must  
obtain in order to build the boat ramp and access, i.e., 404  
permit, 318 permit and the navigable rivers land use license or

1 easement. Mr. Noble's review of the permit applications and the  
2 appropriate agency's findings and determination (or lack  
thereof) are set forth in his report.

3 Mr. Mark Deleray, a fisheries biologist with FWP, submitted  
4 two affidavits. (Doc. #91 and #111.) In Mr. Deleray's second  
5 affidavit, he outlines the steps he took regarding the 124  
6 permit application by Flathead County, which concluded that the  
7 project exhibited no significant adverse impact to fish and game  
8 habitat. Mr. Deleray asserts that he considered the  
requirements of 124 permits and conducted an adequate MEPA  
analysis.

9 FWP's contention that the Noble and Elliott reports simply  
10 reflect disagreement with FWP's conclusions is not entirely  
11 accurate. Although a checklist environmental assessment is  
12 provided for in ARM 12.2.432, the above list of secondary and  
13 cumulative impacts noted by Noble and Elliott make clear that  
14 the analysis should have been more thorough and should have  
15 addressed these impacts which were more likely than not to occur  
16 as a result of the concrete boat ramp. The Court finds and  
17 concludes that the Noble and Elliott reports and affidavits  
18 contain "relevant information" and "pertinent data" that  
19 directly pertain to the determination of the significance of  
20 cumulative and secondary impacts from the County project and  
21 should have been, but were not, considered by FWP. Clark Fork  
Coalition, supra. For example, with regard to the impacts of  
22 boat wakes, including shore erosion, from larger boats launched  
23 via the concrete boat ramp, FWP describes this as "a valid  
24 concern," but nevertheless lists the impact as minor, and  
25 concludes that the impact "cannot be addressed" in the  
26 permitting process, since FWP "has jurisdiction only over  
27 construction of the boat ramp." (AR 22.) FWP determined that,  
28 if the problem develops, the FWP Commission and Flathead County  
could restrict boats launching at the site. (AR 22, 26, 28.)

Both Noble and Elliott consider this impact as potentially  
significant, and opine that it should have been considered as  
part of a cumulative impacts analysis. Noble points out the  
susceptibility of the soils in the area to erosion and the  
Flathead Conservation District's report setting forth a  
methodology to estimate boat-wake-induced erosion. None of this  
information or data was referenced in FWP's EA. Noble and  
Elliott conclude that a traffic study should have been completed  
as a part of the analysis of the permit application.

1 The Court will not determine how FWP should have analyzed  
2 the potential erosion impacts from boat wakes, but it had a  
3 clear mandate to determine "the probability that the impact  
4 [would] occur" in determining its significance. ARM  
5 12.2.431(1)(b). There is no determination of probability in the  
6 EA. In fact, FWP itself describes its determination in the  
7 following equivocal terms: "possible erosion from boat wakes is  
8 a secondary effect that could happen, and may cause erosion."  
9 (FWP response, doc. #89, at 11.) It further seems clear that  
10 FWP could not have analyzed "the severity, duration, geographic  
11 extent, and frequency of occurrence of th[is] impact," ARM  
12 12.2.431(1)(b), if it did not even determine whether the impact  
13 was likely to occur. FWP seems to justify its superficial  
14 analysis of possible impacts from increased boat use by noting  
15 that the area is currently used by boaters who own property on  
16 the slough or who enter the slough from the river. However,  
17 this ignores the requirement that cumulative impacts from the  
18 project be considered. ARM 12.2.429(7).

19 Another related issue that was not adequately analyzed by  
20 FWP was the impacts on critical wildlife habitat from the likely  
21 increased boat usage encouraged by construction of a concrete  
22 ramp. In the EA, FWP's overriding conclusion was: "If the  
23 proposal increases boating use and leads to unacceptable  
24 disturbance of fish or wildlife species, boating, fishing, and  
25 hunting regulations could be implemented to mitigate impacts."  
26 (AR 27.) Therefore, any impacts on fish and wildlife were  
27 considered minor and capable of mitigation. FWP acknowledged  
28 that boating use levels in the Flathead River had doubled from  
29 2002 to February 2010 but, again, there was no determination of  
30 the probability of this impact on an acknowledged fish and  
31 wildlife habitat or the cumulative impacts from the project in  
32 conjunction with already existing boating uses in the slough.

33 Indeed, when Carver's subdivision was under consideration,  
34 FWP commented: "FWP believes the habitat and public values of  
35 Church Slough are extremely significant, rare on a landscape  
36 scale, and at risk of being degraded by growth. . . . This is .  
37 . . . one of the best birding places in the valley . . . ." FWP  
38 opined at that time that the County site might not even ever be  
39 developed "because of the possible impacts a developed site  
40 might have on the water quality, safety, and habitat values of  
41 the slough." (Ex. A to Carver affidavit (doc. #73), authored by  
42 Mark Deleray and Tom Litchfield, wildlife biologist.)

43 FWP's subsequent EA lists all such "possible impacts" as  
44 minor or non-existent, and gives no explanation for this shift,

1 despite its responsibility to provide "a statement of reasons  
2 why potential impacts . . . are nonsignificant," and to  
3 "articulate a . . . rational connection between the facts found  
4 and the choice made." Clark Fork Coalition, supra at P 47-48.  
5 In its response brief, FWP argues that these earlier comments  
6 are irrelevant to its permit process, and that the Court should  
7 consider that the subdivision was created, with seven,  
8 unrestricted waterfront lots, that Carver received a permit to  
9 modify his shoreline, and that "many boats were launched and  
operated from [the previous] primitive site . . . ." (Response,  
supra, at 19-20.) Given FWP's responsibility to analyze  
cumulative effects, it seems crystal clear that these facts  
should have lead to an enhanced critique of the project's  
impacts, rather than what appears to be an absolute about-face.

10 FWP's explanation in the EA concerning the "valid concern"  
11 from increased boat use that FWP had either non-existent or  
12 limited ability to consider the potential impacts from increased  
13 boat uses is a mystery to the Court. The suggestion from Carver  
14 and his experts is not that FWP, in connection with the permit  
15 process, impose a restriction on the size or number of boats  
16 that can be launched. On the other hand, FWP clearly has the  
17 authority, as it argues in its response brief, to make  
18 recommendations or propose alternate plans to the applicant to  
19 "eliminate or diminish" any adverse effects to a fish or game  
20 habitat. Sections 87-5-504, 505, MCA; ARM 12.2.429(2)(a). If  
21 FWP had complied with its mandate to actually determine whether  
22 or not increased boating use would potentially deteriorate the  
23 habitat, there is no reason why it could not have made  
24 recommendations about the project to the County in an effort to  
25 alleviate the impact. The public draft EA states: "FWP would  
26 approve [the proposed project] with or without modifications to  
27 reduce impacts to fish and wildlife habitat. Additional  
28 mitigation activities may be identified during the review  
process and be included in the permit to Flathead County and the  
Record of Decision." (AR 21.) FWP's after-the-fact insistence  
that it could not really do anything about the concern of  
increased boat usage is simply not credible. Its approach, to  
just permit the project, including the concrete boat ramp,  
anyway, and then, if deterioration occurs, impose boating,  
fishing and/or hunting restrictions seems contrary to the entire  
analytical framework set up in the Stream Protection Act.

FWP's stance in this case is similar to the facts presented  
in the case of Clark Fork Coalition v. Montana DEQ, supra. In  
that case, Montana DEQ had permitted the discharge of water into  
the Clark Ford River from Rock Creek Mine, deeming the discharge



1 nonsignificant. DEQ declined to consider, independent of the  
2 applicant's proposal, that the discharge would not be able to be  
3 stopped and that perpetual treatment of the water would be  
4 required, long after the mine had closed and the applicant gone  
5 from the area. The Montana Supreme Court found DEQ's  
6 interpretation of the regulation that it could not independently  
7 consider the relevant facts "inconsistent with the spirit of the  
8 rule and contrary to the wording" of the statute and the rule.  
9 2008 MT at P 40. In the instant case, FWP's position that it  
10 has either non-existent or limited ability to consider the  
11 potential impacts from increased boat uses is inconsistent with  
12 the content and spirit of the statutes and rules.

13 As noted above, the department suggests that the Court  
14 identify evidence which it may not have considered and which  
15 should be considered on remand to the department. It is not the  
16 Court's intention to suggest that all the issues identified in  
17 the Noble and Elliott affidavits and reports support a finding  
18 of "potentially significant." It appears to the Court, as  
19 discussed above, that the most significant evidence not  
20 adequately considered or addressed by FWP pertains to the  
21 potential impacts of an increase in the size and quantity of  
22 boats and personal watercraft engendered by the construction of  
23 a concrete boat ramp and turn-around. However, clearly FWP  
24 should analyze all the evidence presented by Noble and Elliott  
25 to determine if it affects the environmental assessment.

### 17 **C. Failure to Consider Reasonable Alternatives**

18 A particularly egregious omission on the part of the County  
19 in its application and on the part of FWP in considering the  
20 application is both entities' complete failure to consider "a  
21 description and analysis of reasonable alternatives...whenever  
22 alternatives are reasonably available and prudent to consider."  
23 §75-1-201, MCA; ARM 12.2.432. In its application, the County  
24 parks department claimed that its only alternative was "no  
25 action" which it claimed might result in lawsuits due to loss of  
26 the prior access at the primitive site.

27 FWP claimed that since the County submitted the proposed  
28 action and a "no action" alternative, it was not required nor  
would it have been appropriate for it to consider any other  
alternative. Specifically, FWP argues that "it was not prudent  
to consider an alternative in the EA such as a carry in access,  
when DFWP received a permit application with a specific design,"  
and that "it was not reasonable for DFWP to impose another  
alternative on the County." (Response, doc. #89, at 18.)

1 However, this explanation is entirely inconsistent with FWP's  
2 recitation of its responsibilities under the Stream Protection  
Act:

3 DFWP may reject the applicant's project design, but if it  
4 does, it is obligated to help the applicant improve it.  
5 [Section 87-5-504, MCA.] . . . If the department notifies  
6 the applicant that such construction will adversely affect  
7 any fish or game habitat, it shall accompany such notice  
with recommendations or alternative plans which will  
eliminate or diminish such adverse effect. Id.

8 (Response, doc. #89, at 3.)

9 The historical manner in which the prior, primitive access  
10 was used is raised in connection with this issue and, actually,  
11 has pervaded all aspects of development on Church Slough since  
12 Carver first proposed his subdivision. Although as demonstrated  
13 in connection with the injunctive proceedings herein, it is  
14 difficult to determine exactly what the historic usage was, it  
clearly was not a designated-access site, and the area was  
significantly smaller and more limited than a concrete boat  
ramp, 5-8 parking spots, and a turn-around area.

15 Before the County parks department began the permit  
16 application, Mr. Carver discussed the access site with parks  
17 department staff as well as with the County Attorney's office  
18 and the planning office and staff. It is clear that all  
19 involved with the development of the County site were aware of  
20 Carver's intention to maintain the more primitive and limited  
21 access, with the new site providing "substantially the same"  
22 access as the former site. (Affidavit of Joe C. Elliott,  
23 appendix C, portions of Flathead County records.) In fact, at  
24 one point, legal counsel for the County opined that Carver's  
25 proposal for a "'drive-to-the-slough-put-in'" would be a "good  
26 solution" and provide "substantially the same access."  
27 (Flathead County's motion in limine (doc. no. 85), exhibits B  
28 and C.) Although it appears there was nothing binding on the  
County or FWP to accept Carver's proposed alternative, it cannot  
be said that this proposal was not a reasonably available and  
prudent alternative. FWP's only explanation for not even  
addressing this alternative, that it was not prudent to consider  
a carry-in access because the County submitted a permit  
application with a specific design was, again, "inconsistent  
with the spirit of [ARM 12.2.432] and contrary to the wording"  
of the rule and Section 87-5-504, MCA. Clark Fork Coalition,  
supra, 2008 MT at P 40. "[W]hen an agency . . . does not

1 exercise its discretion it abuses its discretion," Clark Fork  
2 Coalition, supra at P 43, resulting in an arbitrary and  
3 capricious decision that cannot be upheld.

4 **D. Failure to Prepare an EIS**

5 Although the parties addressed other areas of the  
6 application and FWP's cursory review, the Court has determined  
7 on the basis of the findings above that the decision to grant  
8 the 124 permit did not take into account all relevant evidence  
9 and is not supported by an adequate environmental review. The  
County and FWP must re-analyze the project in light of the  
additional factual and evidentiary information in the Noble and  
Elliott reports.

10 Carver contends that an EIS should have been prepared  
11 rather than the cursory EA checklist. FWP responds that it  
12 could not prepare an EIS because it had only 30 days in which to  
13 advise the County parks department whether the project would  
14 impact fish or wildlife habitat. Yet Mark Deleray also reported  
15 that his investigation and analysis took longer than 30 days; in  
fact, it took FWP 5 months to prepare the EA, and 7 months to  
notify the County of its decision that there was "no adverse  
effect" of the project.

16 The Court is unable to determine at this time whether or  
17 not an EIS should be prepared. Pursuant to ARM 12.2.431, FWP  
18 must first determine the significance of impacts, including the  
19 cumulative impacts, employing the criteria discussed above. "An  
20 EIS is required if an impact has a significant adverse effect .  
21 . . ." Therefore, FWP must first properly assess the  
22 significance of impacts identified by Noble and Elliott. If it  
23 finds that any impact is significantly adverse, it must then  
proceed with an EIS. Given FWP's concerns about this area  
expressed as far back as 2007, it seems doubtful that a complete  
analysis of all available information will lead to the  
conclusion that the project is "a routine action with limited  
environmental impact . . . ." ARM 12.2.432(2).

24 IV. Conclusion

25 The decision of FWP fails to comply with the requirements  
26 of applicable statutes and regulations; additionally, there are  
27 facts and evidence which the applicant and FWP failed to  
28 consider but which have now been presented to the Court.  
Therefore, the matter must be remanded for consideration under  
the additional evidence and a full review of all reasonable and

1 prudent alternatives, pursuant to Section 75-1-201(6), MCA.  
2 Further, while the Court is not directing FWP to prepare an EIS,  
3 it is clear that a more comprehensive analysis must be  
4 undertaken, or the permit will be unsupportable. FWP is to take  
5 a "hard look" at the project and consider all pertinent data and  
6 relevant factors.

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DATED this 4<sup>th</sup> day of January, 2013.

*Katherine R. Curtis*  
Katherine R. Curtis  
District Judge

cc: Ken Kalvig/Angela M. LeDuc, Attorneys at Law  
Hammer, Hewitt, Jacobs and Quinn, Attorneys at Law  
Flathead County Attorney  
William A. Schenk, FWP Legal Counsel

1/4/13

*Planner: emailed  
lmb*