

Greater Yellowstone Coalition, Inc., American Wildlands, Inc., Madison-Gallatin Chapter of Trout Unlimited, Gallatin Wildlife Assn., Montana River Action Network, Floating Outfitters Assn. of Montana, Northern Lights Trading Co., Inc., Barrel Mountaineering Ltd., Frenchworth, Inc., d/b/a Gallatin Riverguides, R.P. King and Co., Inc. d/b/a R.J.Cain and Company Outfitters v. DEQ, Mark Simonich, Big Sky Water and Sewer District

Cause No. DV-99-123, 18th Judicial District

Plaintiffs challenged the water discharge permit issued to the water and sewer district on grounds that there are significant cumulative water quality impacts and significant secondary impacts. Plaintiffs allege that an EIS should have been prepared. Plaintiffs also allege unlawful segmentation.

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# 72024

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Attorney for American Wildlands Inc.

MONTANA EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY

Cause No. DV-99-123

GREATER YELLOWSTONE  
COALITION INC., AMERICAN  
WILDLANDS, INC, MADISON-  
GALLATIN CHAPTER OF TROUT  
UNLIMITED, GALLATIN WILDLIFE  
ASSOCIATION, MONTANA RIVER  
ACTION NETWORK, FLOATING  
OUTFITTERS ASSOCIATION OF  
MONTANA, NORTHERN LIGHTS  
TRADING COMPANY INC., BARREL  
MOUNTAINEERING LTD.,  
FRENCHWORTH INC., R.P. KING INC  
DBA R.J. CAIN AND COMPANY  
OUTFITTERS,  
  
Plaintiffs,  
  
vs.  
  
MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY, MARK  
SIMONICH, BIG SKY WATER AND  
SEWER DISTRICT NO. 363,  
  
Defendants.

COMPLAINT

(4) SUMMONS ISSUED

1  
2  
3 **I. INTRODUCTION**

4 This action stems from the approval of an Environmental Assessment and the  
5 issuance of a Montana Pollution Discharge Elimination System (MPDES) permit that  
6 allows the Big Sky Sewer District to discharge treated sewage and wastewater into the  
7 Gallatin River. The Sewer District serves the resort community of Big Sky, Montana.  
8 Plaintiffs, all Montana conservation groups and local businesses, allege that the permit  
9 and accompanying Environmental Assessment violate the Montana Environmental Policy  
10 Act (MEPA), 75-1-101 *et. seq.* M.C.A. (1997) and its implementing regulations, A.R.M.  
11 17.4.601, and seek declaratory and injunctive relief pursuant to M.C.A. 27-8-101 *et seq.*  
12 (Montana Declaratory Judgment Act) and M.C.A. 27-19-101 *et. seq.* (statutes governing  
13 injunctions).

14 The basis for the complaint is that the two page checklist-format Environmental  
15 Assessment fails to adequately assess the cumulative impacts associated with sewage  
16 disposal problems stemming from the rapid and continuing growth of the area. The  
17 Department has failed to analyze the impacts of approving this project along with the  
18 impacts of groundwater contamination from existing septic, on-going and planned future  
19 developments and undocumented but serious existing contamination from the Big Sky  
20 Water and Sewer District's antiquated, leaking pipes and sewage lagoons.

21 **II. VENUE and PARTIES**

22 1. Venue is proper in this district because the subject matter of this action,  
23 the direct discharge of sewage into the Gallatin River based on the approved MPDES  
24 permit, is located in Gallatin County, Montana.

25 2. Plaintiff Greater Yellowstone Coalition Inc. is a Montana non-profit public  
26 benefit corporation pursuant to 35-2-101, *et. seq.*, and at all times pertinent hereto has  
27 had its principal operations in Gallatin County, Montana.

1           3.     Plaintiff Montana River Action Network Inc. is a non-profit statewide river  
2 watchdog organization committed to ensuring protection of in-stream flows, water  
3 quality, dam review, stream access and the integrity of Montana's water resources.

4           4.     Plaintiff Gallatin Wildlife Association is a non-profit fish and wildlife  
5 conservation organization representing concerned sportsmen and women in  
6 southwest Montana.

7           5.     Plaintiff Floating Outfitters Association of Montana Inc. is a statewide  
8 business organization of professionally licensed outfitters serving fishing clients. The  
9 association is dedicated to clean water and healthy riverine environments.

10          6.     Plaintiff American Wildlands Inc., a non-profit corporation with over 2,500  
11 members is dedicated to the protection of our nation's wildlife, wildlands, forests and  
12 watersheds. It's main office is in Bozeman, Montana and the organization has been  
13 closely involved with issues pertaining to water quality.

14          7.     Plaintiff Gallatin Chapter of Trout Unlimited is a non-profit public interest  
15 organization, affiliated with the national Trout Unlimited organization, dedicated to  
16 protecting fisheries resources and clean water, throughout Montana, but with a special  
17 focus on the Gallatin River and environs.

18          8.     All statements in this paragraph apply to each of the named Plaintiffs in  
19 paragraphs 2 to 7. This action is brought on behalf of the above named organizations  
20 and their members. Members of each organization have and continue to use the  
21 Gallatin River and its tributaries, above, adjacent to and below the community of Big Sky  
22 for aesthetic and recreational pursuits, including but not limited to fishing, swimming,  
23 rafting, nature study and aesthetic enjoyment. Plaintiffs' members are thus directly and  
24 adversely affected by the proposed action of the Department, and will sustain actual  
25 injury if the proposed MPDES permit is put into effect without adequate environmental  
26 review and disclosure as alleged herein. Plaintiffs and their members have a further  
27

1 interest in participating in governmental decisions, in insuring that government decisions  
2 are fully informed, in disseminating relevant information about those decisions to its  
3 members and the general public, and in insuring that all laws and procedures are  
4 complied with. Those interests are directly and adversely affected by the failures of the  
5 Defendants as alleged herein.

6 9. Plaintiffs Barrel Mountaineering, LTD, a Bozeman-based Montana business  
7 corporation specializing in outdoor and mountaineering sports equipment, and Northern  
8 Lights Trading Company Inc., a Bozeman-based Montana business corporation  
9 specializing in mountain and river sports equipment, Frenchworth Inc., DBA Gallatin  
10 Riverguides, a guiding service located on the banks of the Gallatin and R.P. King Inc.  
11 dba R.J. Cain and Company Outfitters, a manufacturer of fly fishing equipment, are  
12 businesses located in Gallatin, Montana whose customers purchase products for  
13 recreational pursuits like kayaking, rafting, hiking, rock climbing and fly fishing for use  
14 on the Gallatin River. These business interests are dependent on the outstanding water  
15 quality of the upper Gallatin River and the recreational and aesthetic opportunities that  
16 the Gallatin River provides. These Plaintiffs have an economic interest in maintaining  
17 the water quality of the Gallatin River and its tributaries.

18 10. Defendant Montana Department of Environmental Quality (the  
19 Department) is an executive agency of the state of Montana, with overall responsibility  
20 for issuing MPDES permits, protecting the water quality of the state and complying with  
21 environmental laws in the process.

22 11. Defendant Mark Simonich is the head of the Department and is the  
23 government official ultimately responsible for approving the Big Sky Environmental  
24 Assessment and issuing the MPDES permit. He is sued in his official capacity.

25 12. Defendant Big Sky County Water and Sewer District #363 is a sewer and  
26 wastewater treatment district organized under the laws of Montana with its principle  
27

1 place of business located in Big Sky, Montana.

2 **III. GENERAL ALLEGATIONS**

3 **A. The Gallatin River and Environs**

4 13. The Gallatin River originates from the western edge of Yellowstone Park  
5 and adjacent mountain ranges. It flows north through a steep canyon bordered by the  
6 Madison and Gallatin mountains until it emerges in a broad valley north of Bozeman,  
7 eventually flowing to Three Forks, Montana where it merges with the Madison and  
8 Jefferson Rivers to form the Missouri River. The Gallatin River is a national treasure; a  
9 storehouse of clean water, a designated Blue Ribbon trout stream, a jewel situated  
10 amongst unspoiled scenery. Its pristine character made it a logical choice for filming  
11 many of the river scenes in the movie "A River Runs Through It."

12 14. The Gallatin River provides outstanding opportunities for recreation such  
13 as white water kayaking and rafting, fly fishing, and nature appreciation. It is the source  
14 of commercial rafting adventures and commercial fly fishing operations. The clean,  
15 clear waters of the Gallatin River provide recreational, aesthetic and spiritual benefits to  
16 thousands of people each year.

17 15. The reach of the Gallatin river above Spanish Creek to its headwaters,  
18 which includes the portion of the river that flows adjacent to Big Sky, is a largely  
19 undeveloped area, except for the Big Sky development. The purity of its water is  
20 reflected by the fact that it is one of the few remaining stretches of river within Montana  
21 that is not listed as impaired by the State of Montana and the Environmental Protection  
22 Agency under Section 303 of the federal Clean Water Act. The proposed discharge of  
23 sewage directly into the Gallatin occurs in this pristine stretch of the river.

24 16. The West Fork is a major tributary of the upper Gallatin. It drains the  
25 mountains and valley area encompassed by the Big Sky ski resort and surrounding  
26 communities. The West Fork and some of its tributaries are listed as impaired (i.e.  
27

1 | polluted) waters by EPA under Section 303 of the Clean Water Act because of excessive  
2 | siltation and suspended solids.

3 |         17. The hydro-geology of the West Fork basin is such that the area's  
4 | groundwater is susceptible to contamination from septic and leaking sewage pipes and  
5 | lagoons. The major surface drainage of the Big Sky area is the West Fork, which is a  
6 | tributary of the West Gallatin River. The geologic structure parallels the topographic  
7 | structure, meaning that the underground bedrock (shale) slopes towards the area's  
8 | watercourses. The ground water flows in the same direction as the surface water,  
9 | eventually reaching the Gallatin river. Most of the surface infiltration into subsurface  
10 | terrace deposits probably flows vertically to the underlying shale barrier, and then  
11 | laterally to drain into adjacent streams. The soils in the area are shallow, coarse and do  
12 | not provide a lot of nutrient removal capacity. An impervious shale barrier below the  
13 | soil layer pushes leaking sewage and waste water flow into streams.

14 |         18. The upper Gallatin, while providing an outstanding trout fishery, is  
15 | characterized by low biological productivity and cold water, making this stretch of the  
16 | river particularly susceptible to increased nutrient loading and other impacts of sewage  
17 | discharge. Nutrient loading can occur from direct discharge, such as that sanctioned by  
18 | the MPDES permit, and from indirect discharges from the hundreds of private septics in  
19 | the area, and leaking sewer pipes and lagoons operated by the District. Indirect  
20 | discharges occur as sewage percolates through soil layers into the water table,  
21 | contaminating groundwater which eventually merges with surface water.

#### 22 |         B. Big Sky's Sewage Disposal Problems

23 |         19. The community of Big Sky is an unincorporated community located in the  
24 | vicinity of the Big Sky Ski Resort. Prior to the development of the resort in the late  
25 | 1960's, the area consisted of a few homes and ranches. Assisted by a land exchange of  
26 | public lands, the resort purchased thousands of acres of private land to create the ski  
27 |

1 area and surrounding developments. Growth has been exponential; the community now  
2 has about 9,000 residents. The community has two parts, the "Mountain Village" area  
3 adjacent to the ski area, and the "Meadow Village" area several miles below the ski area.  
4 The lower portions of the community border the West Gallatin River. The West Fork  
5 flows through the lower portions of Big Sky and the Meadow Village. Several smaller  
6 streams drain into the West Fork. Though most of the development has occurred at the  
7 two village areas, residential development exists throughout the area.

8 20. The Big Sky Ski Resort is a nationally known destination ski area and year-  
9 round resort serving approximately 300,000 skier days per year. In addition to base  
10 facilities such as a lodge, hotels, restaurants, shops and so forth, there are hundreds of  
11 homes and condominiums units located in the vicinity of the resort. Gallatin County  
12 records show 458 septic permits issued from 1970 to date. Big Sky is an affluent  
13 community by Montana standards. A 1992 survey showed that nearly have the  
14 households had median incomes in excess of \$100,000.

15 21. Big Sky continues to grow at an accelerated rate. Under construction at  
16 the ski area is a new hotel/condominium/convention center, one of the largest  
17 commercial structures in the state of Montana. It will discharge its waste to the  
18 District's sewer system. Additional condominiums and private homes on private septic  
19 are under construction or have already been permitted by County sanitation authorities.  
20 Gallatin County has permitted 458 septic to date and Madison County has permitted 22  
21 private septic since 1991. The Diamond Hitch subdivision on the north flank of the  
22 resort is also undergoing construction at this time.

23 22. An entirely new private resort, the Yellowstone Club, is also undergoing  
24 development on private land adjacent to Big Sky. According to Madison County records,  
25 there are a total of 864 permitted residential lots and units within the Yellowstone Club.  
26 Some of these will be on private septic and a portion will be served by a new



1 community sewage system. Another development, Lone Moose Meadows, has also been  
2 approved. It will have its own sewage treatment system that will be operated by the  
3 District. Both of these developments are in the same overall watershed as Big Sky; their  
4 effluent discharges will become part of the cumulative impacts of development within the  
5 community.

6 23. Residential and commercial growth generates sewage and waste water  
7 which, if not properly treated and disposed of can pollute ground and surface water in  
8 several ways. Fecal coliform can be present in such wastes at levels indicative of  
9 bacterial threats to human health. Increased concentrations of nitrogen and phosphorus  
10 are found in waste water and sewage and can adversely impact the aquatic health and  
11 aesthetic values of riverine ecosystems such as the Gallatin by serving as nutrients that  
12 promote algal growth. Waste water also can produce increased Biological Oxygen  
13 Demand (BOD) and Total Suspended Solids (TSS) which also degrade water quality.  
14 Pollution from sewage discharge can also affect aquatic organisms that form a key part of  
15 the riverine food chain, ultimately affecting fish.

16 24. The District serves the sewage and waste water disposal needs of part of  
17 the Big Sky community. The District collects sewage and waste water in the Mountain  
18 Village and Meadow Village and pipes it to treatment lagoons. The District currently  
19 serves about 2,508 Single family Equivalent (SFE) hookups that generate 100 millions of  
20 gallons of sewage and waste water per year. The system is legally obligated to handle up  
21 to 7926 SFEs. The system does not serve the private septic systems for residences, nor  
22 will it serve the planned additional residential development discussed above.

23 25. The District maintains sewage lagoons in the Meadows as its primary  
24 wastewater treatment facility. The lagoons, as well as the collection system of pipes  
25 running from the Mountain Village developments to the Meadow Village became a  
26 source of chronic, serious water pollution by the late 1980's. The collection system was  
27

1 poorly constructed and sealed, resulting in numerous chronic leaks and infiltration  
2 throughout the system. The lagoon themselves were not properly lined and leaked as  
3 well. A private consultant hired by the District to assess its sewage disposal system  
4 determined that there is significant leakage in the sewage collection system. The amount  
5 of raw sewage that leaks directly into the water table is not known.

6 26. Big Sky's developers have long represented to the public and other  
7 government agencies that direct discharge of sewage effluent into the Gallatin River  
8 would never be necessary. In an Environmental Report released in 1971, Big Sky of  
9 Montana Inc. stated at page 8 that "The sewage system treatment facility will in effect be  
10 a closed system that will not result in any deterioration of the quality of groundwater or  
11 stream flow." The District's application for an MPDES permit is a breach of their  
12 promise to the community not to discharge directly into the river.

13 27. In 1991 the Department, through its predecessor the Montana Department  
14 of Health and Environmental Sciences, instituted an investigation of the sewage lagoons  
15 based on bacterial contamination associated with human waste. The Department  
16 determined that sewage from the lagoons was contaminating groundwater which in turn  
17 was being discharged into the south fork of the West Fork of the Gallatin River. The  
18 pollution problem resulting from the District's inadequate sewage disposal system thus  
19 caused a threat to human health and water quality.

20 28. In 1993, a Compliance Order was issued to the Rural Improvement District  
21 No. 305 and to the Board of Trustees of Rural Improvement District No. 305 regarding  
22 the disposal of sewage through the Big Sky Sewage System in and near Big Sky,  
23 Montana. (Compliance Order, 1993). This Compliance Order was a direct result of the  
24 contamination of ground water from leaking sewer lagoons into State ground waters in  
25 1991. (Compliance Order at 4-5). Ground water samples taken from monitoring wells  
26 underneath or immediately adjacent to the Big Sky Sewage System treatment and  
27

1 disposal facility in 1987, 1988 and 1989 showed elevated levels of nitrates plus nitrites as  
2 N in the ground water.

3 29. Despite knowledge of the leakage and ground water pollution, the District  
4 failed to undertake significant construction improvements to prevent excessive seepage of  
5 sewage from the Big Sky Sewage System treatment and disposal facility and resultant  
6 contamination of State ground waters. (Compliance Order at 5). It was also found that  
7 contaminated groundwater was discharging to the South Fork of the West Fork of the  
8 Gallatin River. (David O. Baldwin, Hydrogeologic and Hydrochemical Investigation of  
9 the Big Sky Area, 1996, p. 2).

10 30. The Compliance Order issued by the Department of Health and  
11 Environmental Sciences (now the Department of Environmental Quality) required the  
12 District to submit an Interim Action Work Plan to the Department that must describe  
13 measures to be implemented immediately to enhance water conservation, improve  
14 treatment, and reduce inflow and infiltration into the Big Sky Sewage System.  
15 (Compliance Order at 9). In addition, the Compliance Order required the District to  
16 submit a Long-Term Compliance Work Plan to the Department for review. "The Long-  
17 Term Plan must be designed and implemented to ensure that the Big Sky Sewage System  
18 achieves compliance with the Water Quality Act (Title 75, Chapter 5, MCA) and Public  
19 Supply Act (Title 75, Chapter 6, MCA).

20 31. As a result of its investigation, the Department issued a Compliance Order  
21 against the District requiring it to identify sewage infiltration and inflow problems and  
22 correct them. The District was also required to develop a long term plan to address  
23 wastewater disposal problems. The Department also imposed a moratorium on new  
24 hookups from residential and commercial developments.

25 32. The likely pollution of groundwater from the Big Sky development and the  
26 resulting contamination of the Gallatin River has been documented by the Department.  
27

1 | Water samples from springs on the west side of the Gallatin, which drain from the Big  
2 | Sky area, show nitrogen concentrations of 12 parts per million (ppm), while those on the  
3 | east side of the River contain only 1 ppm. The overall amount of nitrogen that is  
4 | measured in the Gallatin was increased from .01 ppm in the 1970's to .04 ppm today.

5 |       33. Other studies have confirmed on-going pollution of ground and surface  
6 | water in the Big Sky Area. A 1996 report prepared for the Department entitled  
7 | "Hydrogeologic and Hydrochemical Investigation of the Big Sky Area" (Baldwin)  
8 | provided data that showed thirty percent of the surface water samples taken in 1995-1996  
9 | exceed DEQs own target levels for nitrogen. (P. 43) The soluble nitrogen target level was  
10 | met or exceeded in 177 of 258, or 69% of the samples analyzed during the District's  
11 | surface water sampling program. (Baldwin p. 44). Total phosphorus target level was  
12 | exceeded in 7 of 34 (21%) of the samples collected. (Id.)

13 |       34. The Department is aware of the need to conduct hydrological studies and  
14 | assess cumulative and secondary impacts of sewage disposal activities. The Department  
15 | has requested bids for a three phase study. Phase III requires the District to assess  
16 | cumulative impacts, rate areas of high vulnerability to groundwater pollution, make  
17 | population projections and sewage disposal needs and recommend a monitoring program  
18 | to insure pollution does not occur. To date only the data for Phase I has been collected.  
19 | The Department has failed to require the completion of all three phases of the study  
20 | before issuing the MPDES permit.

21 |       35. The Montana Department of Fish Wildlife and Parks also recognizes the  
22 | existing pollution problem and cumulative impacts caused by the private septic. The  
23 | agency stated in its comments dated November 2, 1998 that "[O]n site septic have  
24 | contributed to nutrient loads in both streams."

25 |       36. Neither the Department nor the District have analyzed the extent of  
26 | cumulative impacts of groundwater pollution from leakage from the existing sewage  
27 |

1 system, chronic pollution from existing septics, or from currently permitted or planned  
2 future developments. The District is still in the process of conducting a hydrological  
3 assessment of the current system and its impacts on ground and surface waters. The  
4 District is also obligated to propose a long-term solution and prepare an environmental  
5 impact statement regarding its sewage problems, which the District has failed to complete  
6 at this time. The assessment was not complete at the time the EA was approved, nor  
7 has the District committed to a date by which to begin preparing an Environmental  
8 Impact Statement. The Department has characterized the completion of the study as  
9 "progressing slowly" though it has refused to take its own steps to complete a cumulative  
10 impacts study.

11 37. Further evidence that cumulative impacts resulting from nutrient loading are  
12 already occurring is the appearance of algal mats, documented by the Department of  
13 Fish Wildlife and Parks, in both the West Fork and West Gallatin River.

14 C. Big Sky Environmental Assessment and MPDES Process

15 38. In 1998 the Sewer District began the process of applying for an MPDES  
16 permit to allow it to discharge sewage and wastewater into the Gallatin River.

17 39. On January 15, 1999, the Montana Department of Environmental Quality  
18 (hereafter Department) issued a Montana Pollution Discharge Elimination System  
19 (MPDES) Permit to the Big Sky Water and Sewer District. The permit is denoted  
20 permit number: MT-0030384. The permit was issued pursuant to 75-5-101 et seq. and  
21 ARM title 17 Chapter 30 Subchapters 5, 6, 7, and 13. The permit will become effective  
22 on April 1, 1999 and will expire on September 30, 2003.

23 40. The MPDES permit allows the Big Sky Water and Sewer District to dump as  
24 much as 15,000,000 gallons of treated sewage into the Gallatin River from March to June  
25 each year.

26 41. The Department is required to comply with MEPA by preparing an  
27

1 environmental review document to address the impacts of the MPDES permit. The  
2 Department decided to prepare an Environmental Assessment instead of a full  
3 Environmental Impact Statement. For the environmental assessment, the Department  
4 prepared what is known as a Checklist EA. The Checklist EA is two pages in length and  
5 contains a checklist of the impacts of the proposed action. On the basis of the Checklist  
6 EA, the Department determined that the impacts from issuing the permit were not  
7 significant and the Department further determined it would not prepare a Environmental  
8 Impact Statement (EIS). As part of the potential impact on the physical environment,  
9 the Department determined the there would be no impact on terrestrial or aquatic life,  
10 water quality, geology, vegetation, aesthetics, and so forth. In addition, the Department  
11 determined that there would be no cumulative and secondary impacts.

12 42. The Checklist EA analyzed just two alternatives: issuing the permit as  
13 requested by Big Sky, or taking no action ( The No Action Alternative). The No Action  
14 Alternative is required by statute and regulation. The Department did not evaluate in  
15 the Environmental Assessment other alternatives for sewage treatment and disposal that  
16 did not involve a direct discharge to the Gallatin River. The EA did not evaluate and  
17 disclose all cumulative or secondary impacts associated with sewage disposal in the Big  
18 Sky community.

19 43. The Sewer District is in the process of preparing a final long term plan for  
20 its sewage disposal needs. The District released in September, 1998, a report prepared  
21 by its consultants entitled " Long Term Compliance Work Plan for Wastewater  
22 Treatment and Disposal." The report was not prepared as a MEPA document. The  
23 report is not an Environmental Assessment or an Environmental Impact Statement. The  
24 report did not consider alternatives through the MEPA process, nor did it consider all of  
25 the secondary impacts and cumulative impacts associated with Big Sky's sewage disposal  
26 problems and the proposed action.

1           44. The Department issued a Public Notice on August 12, 1998 informing the  
2 public of the Department's intention to issue a MPDES permit to Big Sky and to  
3 conduct a public hearing. Two public meetings were held. Plaintiff organizations and  
4 their members attended the public meetings and expressed concerns about the issues  
5 raised in this complaint. In addition, Plaintiff organizations submitted written comments  
6 to the Department. Through its participation at the public hearing and in its written  
7 comments, Plaintiffs presented the basic information and issues that are the subject of  
8 this lawsuit.

9           45. The Montana Environmental Policy Act (MEPA) requires that state agencies  
10 prepare a "detailed statement" (known as an Environmental Impact Statement or EIS)  
11 for actions that significantly affect the human environment. 75-1-201 M.C.A. (1991). The  
12 provisions implement the constitutional provision for maintenance of a clean and  
13 healthful environment, Article IX, Section 1, Mont. Const. (1972).

14           46. In its detailed statement, the state agency must address:

15           (A) the environmental impacts of the proposed action;

16           (B) adverse affects that cannot be avoided;

17           (C) alternatives to the proposed action;

18           (D) the relationship between local short term uses and the maintenance and  
19 enhancement of the long-term productivity; and

20           (E) irreversible commitments of resources if the project is implemented.

21 75-1-201 (1)(b)(iii) (A) through (E).

22           47. The Defendant has adopted regulations that outline its procedures for  
23 compliance with MEPA. A.R.M. 17.4.601 et seq. Under these regulations, the  
24 Department may, under certain circumstances, prepare an Environmental Assessment  
25 (EA) instead of a full EIS. A.R.M. 17.4.607. An EA may be more concise than an EIS,  
26 but still must analyze all of the environmental impacts of the proposed action. A.R.M.  
27

1 17.4.609. Here the Department elected to prepare an EA.

2 48. Plaintiffs do not have further administrative remedies available to them.

3 COUNT I

4 49. All previous statements are realleged as if set forth in full.

5 50. An EA must discuss the cumulative impacts of the proposed action which  
6 are defined as "collective impacts on the human environment of the proposed action  
7 when considered with other past and present actions related to the proposed action by  
8 location and generic type. Related future actions must also be considered when these  
9 actions are under concurrent consideration by any state agency through preimpact  
10 statement studies, separate impact statement evaluation or permit processing  
11 procedures." A.R.M. 17.4.603 (7); See also A.R.M. 17.4.609 (3) (d). (EA must include  
12 discussion of cumulative impacts.).

13 51. The Big Sky MPDES permit constitutes state action triggering an obligation  
14 on the part of the Department to comply with MEPA and analyze all cumulative impacts  
15 before it issues a permit to the District. As alleged herein there are cumulative impacts  
16 to ground and surface water associated with the issuance of the Big Sky MPDES permit,  
17 because of the accumulation from many sources of untreated and treated sewage in the  
18 groundwater, which eventually reaches the surface water of the Gallatin River and its  
19 tributaries. This sewage impacts the water quality and riverine ecosystems of the  
20 Gallatin and its tributaries, affecting algal growth, benthic organisms and ultimately fish  
21 populations. These cumulative impacts are presently evidenced by elevated levels of  
22 nitrogen and phosphorus, as well as increased BOD and fecal coliform in the ground and  
23 surface waters at issue. These cumulative impacts are caused by governmental actions  
24 approving additional past, present and future sewage-causing activities, including but not  
25 limited to:

26 A. The proposed action allowing discharge into the Gallatin River of treated



1 sewage that still contains elevated levels of nitrogen and phosphorus;

2 B. the past issuance of septic permits for 458 residences (which are related by  
3 location and generic type in that both are for sewage disposal in the Big Sky  
4 community);

5 C. currently approved residential development for an additional 864 residences  
6 which will have septic systems or a community sewage system at the Yellowstone Club  
7 development, plus on-going development of the Diamond Hitch subdivision, Lone Moose  
8 Meadows and other developments (which are related by location and generic type in that  
9 they result in additional sewage disposal in the Big Sky community, and have community  
10 sewage systems under consideration by governmental agencies);

11 D. past groundwater pollution from leakage from the existing sewage lagoons and  
12 pipes operated by the District, such leaks being documented but of unknown amount;

13 E. past and current groundwater pollution from spraying sewage on the golf  
14 course that leaches into the water table;

15 F. increased pollution from other contemplated land disposal methods such as  
16 increased golf course spraying and snow-making with sewage laden water that are  
17 proposed by the District to meet its legal obligation to dispose of up to 210 million  
18 gallons of sewage per year by the year 2020 based on existing obligations for service of  
19 over 7,926 SFEs.

20 52. The Big Sky MPDES EA is inadequate because it fails to analyze and  
21 disclose to the public the cumulative impacts of the proposed action such as past, present  
22 and future sewage and wastewater disposal impacts described above. The EA fails to  
23 consider the relevant factors and readily ascertainable information about existing  
24 groundwater pollution, and past, present and foreseeable future residential and  
25 commercial development that will contribute to ground and surface water pollution. The  
26 EA fails to provide a rationale explanation as to why these impacts are not cumulative  
27

1 impacts that need to be addressed under MEPA. The EA is therefore arbitrary,  
2 capricious and an abuse of discretion and in violation of the requirements of MEPA.

3 53. The Department is also required to analyze secondary impacts of the  
4 proposed action, which include its growth inducing impacts. 17.4.603 (18); 17.4.609  
5 A.R.M. The EA is inadequate, arbitrary and capricious for failing to analyze the  
6 secondary impacts of the proposed action, which according to the Department was  
7 necessary to facilitate the District's obligation to meet future growth of the area.

8 COUNT II

9 54. Plaintiffs reallege all previous statements as if set forth in full.

10 55. The Department prepared a checklist EA for the Big Sky MPDES permit.  
11 A checklist EA is authorized "[For a routine action with limited environmental impacts]"  
12 A.R.M. 17.4.609.

13 56. The Big Sky MPDES permit is not a routine action with limited  
14 environmental impacts, has significant cumulative and secondary impacts and has  
15 engendered significant public controversy. It is the first direct discharge allowed into the  
16 upper Gallatin River. The checklist EA fails to consider all relevant information and  
17 fails to analyze and disclose to the public the impacts of the project and the rationale for  
18 determining they are not significant. The checklist EA fails to fully analyze and disclose  
19 a reasonable range of alternatives to the proposed action, even though such alternatives  
20 are available and known to the agency. The use of the checklist EA in this case is  
21 arbitrary, capricious and an abuse of discretion and in violation of the requirements of  
22 MEPA for the reasons stated herein.

23 COUNT III

24 57. Plaintiffs reallege all previous paragraphs as if set forth in full.

25 58. The District and the Department acknowledge that direct discharge of  
26 sewage into the Gallatin River is not necessary at this time. The District and the  
27

1 Department acknowledge that a complete hydrological assessment of the sewage disposal  
2 situation along with preparation of an environmental impact statement on the long-term  
3 compliance plan is necessary and will occur before the present MPDES permit is even  
4 used, though the permit was issued and provides a right to a direct discharge into the  
5 Gallatin..

6 59. The Department has a duty as trustee for the water quality of the state's  
7 waters under Montana's water quality laws, 75-5-101 *et seq.* and the Montana  
8 Constitution to protect the state's water quality and to insure that its decisions are  
9 rational and in the public interest.

10 60. The selection of the preferred alternative in the EA and the failure of the  
11 Department to require a complete cumulative and secondary impacts analysis prior to  
12 allowing direct discharge into the Gallatin River beginning on April 1, 1999 under the  
13 facts as alleged herein is unnecessary, arbitrary, capricious, and abuse of discretion.

14 WHEREFORE PLAINTIFF PRAYS FOR RELIEF AS FOLLOWS:

15 1. For a declaratory judgment declaring the Big Sky MPDES EA inadequate  
16 under the Montana Environmental Policy Act and/or implementing regulations for the  
17 reasons set forth herein.

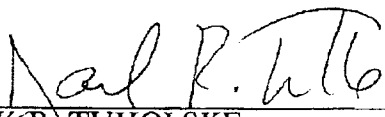
18 2. For a declaratory judgment that the issuance of the MPDES permit at this  
19 time for the reasons set forth herein is arbitrary, capricious and an abuse of discretion;


20 3. That the Defendants MPDES permit be set aside and Defendants be  
21 permanently enjoined from discharging into the Gallatin River until such time as the  
22 Department prepares an environmental review document that complies with the  
23 Montana Environmental Policy Act.

24 4. For Plaintiffs' costs, attorney fees and any and all other such relief as the  
25 court deems just and proper.

26 DATED this 15<sup>th</sup> day of March, 1999.

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JACK R. TUHOLSKE  
Attorney for the Plaintiffs

  
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JUDI BRAWER  
Attorney for American Wildlands