Guthrie v. Department of Health and Environmental Sciences
9th Judicial District
Judge McPhillips
Decided 1979

Appealed to the Montana Supreme Court
Developers withdrew contested subdivision plat.

MEPA Issue Litigated: Should the agency have conducted a MEPA analysis (an EIS)?

Court Decision: No

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES' SUPPLEMENTARY TRIAL MEMORANDUM

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

A. B. GUTHRIE, JR., ALICE GLEASON, KENNETH GLEASON, and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, BOARD OF COUNTY COMMISSIONERS, TETON COUNTY, J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, Defendants.	No. 40471 DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES' SUPPLEMENTARY TRIAL MEMORANDUM

INTRODUCTION

The Department of Health and Environmental Sciences ("Department") reasserts arguments it made in opposition to the Plaintiffs' Motion for Summary Judgment. This memorandum will consider questions raised at trial which were not adequately reviewed on the motion for summary judgment.

This memorandum will consider the following issues:

1. Whether the Department's review of Arrowleaf West Subdivision constituted substantial compliance with the Sanitation in Subdivisions Act (Title 69, Chapter 50, R.C.M. 1947) and its implementing regulations (ARM 16-2.14(10)-S14340).

2. Whether the Department has violated the Montana Environmental Policy Act (Title 69, Chapter 65, R.C.M. 1947) by its threshold decision not to do an Environmental Impact Statement ("EIS").

3. Whether the Department has complied with the spirit of Article II, Section 8 of the 1972 Constitution of Montana.

DISCUSSION

1. DEPARTMENT REVIEW AND APPROVAL OF ARROWLEAF WEST SUBDIVISION SUBSTANTIALLY COMPLIED WITH THE SANITATION IN SUBDIVISION REGULATIONS AND DID NOT PREJUDICE THE RIGHTS OF ANY PLAINTIFFS IN THIS CASE.

The Plaintiffs have argued that the Court, in examining the Department's review and approval of Arrowleaf West Subdivision ("Arrowleaf West"), should apply the Sanitation in Subdivision regulations as amended in November, 1975, instead of the regulations as amended in 1973. The Department disagrees. Since the Department's review began in February 1975, and considerable correspondence and instruction emanated from the Department prior to November 1975, this Court should apply the 1973 regulations. Fundamental fairness to the applicants requires that they not be subject to a change in requirement once the Department has initiated its review.

Regardless of what rules the Court chooses to apply to this case, it should still find that the Department's review substantially complies with the letter and spirit of the Sanitation in Subdivisions Act and its implementing regulations, and uphold the Department's action.

Generally, an agency action will not be overturned by the Court on the basis of agency mistake except upon a showing of substantial prejudice to the complaining party. National Labor Relations Board v. Mattison Machine Works, 365 U.S. 123, 124 (1960). See also Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, (C.A.D.C. 1970). The Department readily concedes that it did not require strict compliance with its regulations. The law does not require strict compliance. Nonetheless, even if the Department was so obligated, the Plaintiffs have made no showing of how the Department's action would substantially prejudice their rights. The Plaintiffs have not proved that water pollution would be caused by the subdivision. The only proof given by Plaintiffs concerning the potential impact of the subdivision on groundwater was through Dr. Reichmath, who made only two visits to the site, performed no tests, and was unable to say that the subdivision would result in groundwater contamination.

Rather, the worst projection he made was that the subdivision waved many "red flags" at him in terms of potential problems. Thus, the Plaintiffs have failed to show how the Department's action would cause any harm to groundwater, let alone, harm to the Plaintiffs from groundwater contamination. Without such a showing, this Court cannot properly overturn the Department's approval based upon its review.

Notwithstanding the Plaintiffs' inability to prove any harm from the Department's review, the Department has no obligation to require an applicants strict compliance with rules designed to facilitate the Department's review of proposed subdivisions. A number of recent federal cases bear directly upon the Department's obligation. The most recent of these cases, Lyman v. U.S., 500 F.2d 1394 (1974), involved a suit by tenants of a private housing development against the Federal Price Commission. The Commission has determined that the development was exempt from Price Commission rent controls where the rents were adequately supervised by some other governing body. Among other things, the Plaintiffs alleged that the Price Commission had violated its own information regulations by making its decision without securing the necessary information from the local governing body, relying instead on a letter from the owner of the development that it was not "rent controlled housing" within the meaning of the regulations. Ruling in favor of the Price Commission, the Court said:

> "While there are numerous Supreme Court opinions to the effect that an agency cannot violate its own regulations where their underlying purpose is to protect personal liberties or interests, this is not such a case.
>
> The Commission can properly be excused under the rule of American Farm Lines v. Black Ball, 372 U.S. 532 (1970) from its 'failure to require strict compliance with its own rules.' As these were not 'rules . . . adopted to confer important procedural benefits upon individuals', the Price Commission was 'entitled to a measure of discretion'

'not reviewable except upon a showing of substantial prejudice to the complaining party, in administered rules' intended primarily to facilitate the development of relevant information for the commission's use in making its decision.' " Lyman v. U.S., 500 F.2d at 1396. (Emphasis added.)

In another case, Municipal Light Boards of Reading and Wakefield, Massachusetts v. F.P.C., 450 F.2d 1341 (C.A.D.C. 1971), where the Federal Power Commission was challenged on the basis of failure to abide by its own rules requiring the gathering of certain information, the Court said:

". . . They [the filing rules] are mere aids to the exercise of the agency's independent discretion, and in both language and purpose leave room for a doctrine of 'substantial' or 'reasonable' compliance." Municipal Light Boards, 450 F.2d at 1348.

See also Associated Press v. F.C.C., 448 F.2d 1095 (C.A.D.C. 1971); American Farm Lines v. Black Ball, 379 U.S. 532 (1970); Municipal Electric Utility Assn. of Alabama v. F.P.C., 485 F.2d 967 (C.A.D.C. 1973).

As in the cases cited above, the rules relied on by the Plaintiffs are "intended primarily to facilitate the development of relevant information" and are "mere aids to the exercise" of the Department's independent discretion. The Department's inquiry into the Arrowleaf West was diligent, and its imposition of safeguards and restrictions designed to address the problems raised by the Plaintiffs reflect the Department's sensitivity to its obligations to protect the surface and groundwater in the vicinity of Arrowleaf West.

Accordingly, this Court should rule that the Department's review of Arrowleaf West was adequate under the Sanitation in Subdivisions Act and implementing regulations, and this Court should uphold the Department's approval of Arrowleaf West.

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II. THE DEPARTMENT'S THRESHOLD DECISION NOT TO FILE AN ENVIRONMENTAL IMPACT STATEMENT IN ITS REVIEW OF ARROWLEAF WEST IN NO WAY VIOLATED THE MONTANA ENVIRONMENTAL POLICY ACT OR ITS IMPLEMENTING REGULATIONS.

The Plaintiffs have alleged that the Department is required to do an EIS on Arrowleaf West by the Montana Environmental Policy Act (MEPA)(Section 69-6501 et seq., R.C.M. 1947) and its implementing regulation (ARM 16-2.2(2)-P2000 to -P2080.

The Court should uphold the Department's determination that an EIS was not necessary. In reviewing the Department's action, the Court has the benefit of a long line of federal court decisions construing the National Environmental Policy Act (42 U.S.C.A. 4332 et seq.), upon which the Montana act was based. As a general rule, courts may look to decisions in the jurisdiction from which a statute was adopted in its efforts to construe the statute. State v. Colony Ranch, 137 Mont. 145, 151, 350 P.2d 841 (1960).

The fundamental questions which an agency must answer in deciding whether an EIS is needed on a particular project are (1) whether the proposed action constitutes a major state action, and (2) whether the proposed action will have a significant effect on the human environment. Hanley v. Mitchell, 460 F.2d 640, 644 (C.A.2 1972). Given the breadth of the language "significantly affecting the quality of the human environment," the determination of when an EIS is required is extremely subjective and, in any single situation, may provoke vastly different responses. Thus, it has generally been held that a court cannot substitute its judgment for that of the agency, Environmental Defense Fund v. Froelhke, 473 F.2d 346, 353 (C.A. 8 1972), or review the agency decision on its merits as to the desirability of the project. Hiram Clarke Civic Club Inc. v. Lynn, 476 F.2d 421, 428 (C.A. 5 1973). In fact, the courts should not determine whether a project will have a significant effect on the human environment, but rather whether the agency's decision was

arbitrary or capricious First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1381 (C.A. 7 1973) or reasonable City of Davis v. Coleman, 521 F.2d 661 (C.A. 9 1975). In order to facilitate such a review, the agency is required to compile a reviewable record of its decision not to do an EIS. Arizona Public Service Company v. FPC, 483 F.2d 1275, 1282 (C.A.D.C. 1973). Thus, the court should generally be limited to a review of the evidence before the agency at the time it made its decision. Faircrest Site Opposition Committee v. Levi, 418 F.Supp. 1099, 1103 (D.C. Ohio 1976), except in limited circumstances, in which the court may be allowed to bring in external evidence. Hiram Clarke Civic Club v. Lynn, 476 F.2d at 425.

Based upon the law described above, the court should review the Department's decision not to do an EIS based upon the record before the Department when it made its decision, and not upon any extrinsic evidence which the Plaintiffs have sought to introduce. In all likelihood the Plaintiffs will urge the court to base its decision on evidence that was not before the Department when it made its decision, citing those cases which support that position. MEPA does not require that any specific class of experts be consulted or that an agency consider all doucments possibly relevant to an issue. Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 232 (C.A. 7 1975). Any interpretation to the contrary would place a nearly intolerable burden upon the agency in arriving at its threshold decision. A PER is not intended to be an intensive environmental analysis. Rather, it is to provide an agency with some guidelines in determining whether an intensive analysis in the form of an EIS is necessary. Thus, the record from which the department made its decision should be the sole source of the Court's inquiry.

In that light, it is clear that, given the information the Department had before it at the time it made its decision not to

do an EIS, its decision was neither unreasonable nor arbitrary and capricious.

The Plaintiffs made a considerable effort, through the testimony of experts Dr. Charles Jonkel and Allen Schallenberger, attempting to show the impact that this subdivision would have on wildlife, particularly grizzly bears. Significantly, most of their research and conclusions from that research occurred subsequent to June 8, 1976, when the Department approved the subdivision. Further, the PER reflects the comments about Arrowleaf West received from Fish and Game Department, and the conclusions contained in matrix describing impacts which the Department drew from these comments. The PER was circulated to Fish and Game, and they apparently felt that the Department's assessment was accurate, for they offered no comment on the PER. Even Dr. Jonkel, who commented on the PER and testified that he found faul with Fish and Game's assessment, in his comment to the Department, neither indicated to the Department that its assessment of the impacts were inaccurate nor that he felt the Fish and Game assessment was inaccurate. Accordingly, based upon the record before the Department at the time it made its decision, its assessment of the impacts on wildlife, particularly the grizzly bear, were neither unreasonable nor arbitrary and capricious.

The Plaintiffs have offered the deposition of Dr. Thomas Power, apparently to impugn the format of the PER. The thrust of his testimony attacks what he characterized as the "economic analysis" of the PER. In that light, Dr. Power testified that it would take one man-week to compile an adequate economic analysis. That answer, by itself, demonstrates Dr. Power's misapprehension of the PER function. Currently, under MEPA, an agency must decide within 30 days of a completed application whether an EIS will be required. Section 69-6518(1), R.C.M. 1947.

If the Department sets aside 15 of those initial 30 days for public comment period, that leaves the Department with only 15 days in which to complete the PER. Assuming that the Department's technical writer, Mr. Ellerhoff, had the luxury of compiling information on a single project so that he could devote forty consecutive man-hours to it, then there would still be only a week left to review all the other potential impacts. It is obvious that Dr. Power misunderstands the scope and purpose of a PER. Thus, the bulk of his testimony is inapplicable to the issue of the PER's adequacy. In contrast, the Court should look at what the Department did in assessing economic impacts. The local sheriff and firechief were consulted about the impacts of the subdivision on those services. A member of the local school district was consulted concerning the impacts of the subdivision on schools. In addition, the Deaprtment had the benefit of the County Commissioners' pronouncement that the subdivision was in the public interest. Finally, the PER contained some common sense projections about the impact of the subdivision on jobs in the area. Again, the Plaintiffs have failed to show that the Department's assessment was either unreasonable or arbitrary and capricious in light of the record it had before it.

In summary, the Plaintiffs' allegations that an EIS is required must fall for lack of adequate proof that the Department's decision was either unreasonable or arbitrary and capricious.

III. THE DEPARTMENT'S REVIEW AND APPROVAL OF ARROWLEAF WEST COMPLIES WITH BOTH THE LETTER AND SPIRIT OF ARTICLE II, SECTION 8 OF THE 1972 CONSTITUTION OF MONTANA.

The Plaintiffs have alleged that the Department has failed in its obligation to involve the public in its review of Arrowleaf West. The primary suggestion seems to be that Al Keppner, in attending the Planning Board meeting of August 18, 1975, had an obligation to gather the names and addresses of everyone in attendance. That suggestion is ridiculous, in light of circumstances

surrounding the review.

First, Mr. Keppner was at the meeting at the behest of Mike Clasby, the Teton County Sanitarian. He did not attend because of any legal obligation to attend, but rather merely to make himself available to anyone who might have questions about the Department's review. In addition, he encouraged people to write to him should they feel that their comments were not being heard. Moreover, the evidence indicates that the one person who did call the Department and express interest received a copy of the PER and full consideration of her comments to the extent that the Department replied to her.

Never, at any time in this proceeding, has there been any evidence to show that the Department was trying to frustrate public involvement in this case or otherwise subvert the intent of Article II, Section 8. Additional arguments in the Department's brief on the motion for summary judgment indicate the full extent of the Department's attempts to involve the public. The Department's efforts have been conscientious and fully comply with the letter and spirit of Article II, Section 8 of the 1972 Constitution of Montana.

CONCLUSION

On the basis of the foregoing arguments and the arguments contained in the Department's brief opposing summary judgment, the Department respectfully urges this Court to uphold the Department's approval of the Arrowleaf West Subdivision and to uphold its determination that an environmental impact statement is not warranted.

DATED this 5th day of May, 1978.

MIKE GREELY, Attorney General
State of Montana

By Stan Bradshaw
STAN BRADSHAW
Special Assistant Attorney General
Department of Health and
Environmental Sciences
1400 Eleventh Ave., Helena, MT.

CERTIFICATION

I hereby certify that the instrument to which this certificate is attached is a true and correct copy of the original which I reviewed in the course of my review of the Arrowleaf West Subdivision.

WITNESS my hand and seal this 9th day of June, 1977.

Alfred P. Keppner
ALFRED P. KEPPNER

STATE OF MONTANA)
) ss:
County of Lewis and Clark)

On this 9th day of June, 1977, before me, a Notary Public for the State of Montana, personally appeared ALFRED P. KEPPNER, known to me to be the individual whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first hereinabove written.

Rianne Schultz
NOTARY PUBLIC for the State of Montana
Residing at Helena
My commission expires December 3, 1978

(SEAL)

STATE OF MONTANA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
CERTIFICATE OF SUBDIVISION PLAT APPROVAL
(Section 69-5001 through 69-5009, R.C.M. 1947)

To: County Clerk and Recorder
Teton County
Choteau, Montana

No. 50-75-11-80
E.S. S 76/768

THIS IS TO CERTIFY THAT the plans and supplemental information relating to individual water supply system and individual sewage disposal system for the subdivision known as Arrowleaf West located in Teton County, Montana, have been reviewed by personnel of the Subdivision Bureau, and,

THAT the documents and data required by Section 69-5001 through 69-5009, R.C.M. 1947 and the rules of the Department of Health and Environmental Sciences made and promulgated pursuant thereto have been submitted and found to be in compliance therewith, and,

THAT approval of the plat of said subdivision is made with the understanding that the following conditions shall be met:

THAT the lot sizes as indicated on the plat to be filed with the county clerk and recorder will not be further altered without approval, and,

THAT the lots shall be used for single-family dwellings, and,

THAT the individual water system will consist of a drilled well constructed in accordance with the criteria established in MAC 16-2.14(10)-S14340 to a minimum depth of 30 feet, and,

THAT the individual sewage disposal system will consist of a septic tank and subsurface drainfield of such size and capacity as set forth in MAC 16-2.14(10)-S14340, and,

THAT each subsurface drainfield shall have a minimum absorption area of 150 square feet per bedroom, and,

THAT the bottom of the drainfield shall be at least four feet above the water table, and,

THAT no sewage disposal system shall be constructed within 100 feet of the maximum high-water level of a 100 year flood of any stream, lake, watercourse, or irrigation ditch, and,

THAT plans for the proposed water and individual sewage systems will be reviewed and approved by the Teton County Health Department before construction is started, and,

THAT no structure requiring domestic water supply or a sewage disposal system shall be erected on Lot 12, and,

THAT the developer shall provide each purchaser of property with a copy of plat and said purchaser shall locate water and/or sewerage facilities in accordance therewith, and,

THAT instruments of transfer for this property shall contain reference to these conditions, and,

THAT departure from any criteria set forth in MAC 16-2.14(10)-S14340 when erecting a structure and appurtenant facilities in said subdivision is grounds for injunction by the Department of Health and Environmental Sciences.

YOU ARE REQUESTED to record this certificate by attaching it to the map or plat of said subdivision filed in your office as required by law.

DATED this 8th day of June, 1976.

Reviewed and Approved:

A. P. Keppner

A. P. Keppner, Soils Scientist

A.F. [illegible], S.P., F....P.
Acting Director

By: Edward W. Earle

Edward W. Earle, Chief
Subdivision Bureau
Environmental Sciences Division

Plaintiff's
Depo Exhibit
11

1

FORM No. 606 Rev 7-73

File No. _____

STATE OF MONTANA
Department of Natural Resources and Conservation

WHITE — DEPARTMENT
PINK — BUREAU
CANARY — WELL OWNER
GOLDENROD — DRILLER

WELL LOG REPORT

State law requires that this form be filed by the water well driller on any water well completed by him on and after July 1, 1973 within sixty (60) days after completion of the well.

1. WELL OWNER: Name Alfred Wiseman Address Choteau, Mont.

2. WELL LOCATION: County Teton SE¼SW¼NW¼, Sec. 34, Twp. 25 N-S, Rg. 8 E-W

3. PROPOSED USE: ✓ Domestic ___ Stock ___ Municipal ___ Industrial ___ Lawn and Garden ___ Irrigation ___ Other (*if other, specify*) _____

4. METHOD DRILLED: ___ Cable ___ Bored ✓ Forward Rotary ___ Reverse Rotary ___ Jetted ___ Other (*if other, specify*) _____

5. WELL CONSTRUCTION:
Diameter of hole 6¼ inches. Depth 38 ft.
Casing: ___ Steel ✓ Plastic ___ Concrete ___ Threaded ✓ Welded ___ Other (*if other, specify*) _____
Pipe Weight: Dia.: 4" From: +1 To: 38
160 lb/ft. Test inches ___ feet ___ feet
___ lb/ft. ___ inches ___ feet ___ feet
___ lb/ft. ___ inches ___ feet ___ feet
Was perforated pipe used? ✓ Yes ___ No
Length of pipe perforated 20 feet
Was casing left open end? ✓ Yes ___ No
Was a well screen installed? ___ Yes ✓ No
Material _____ Dia. ___ inches (*stainless steel, bronze, etc.*)
Perforation type: ___ slots ✓ holes
Size 3/8 set from 18 feet to 38 feet
Size ___ set from ___ feet to ___ feet
Size ___ set from ___ feet to ___ feet
Was a packer or seal used? ___ Yes ✓ No
If so, what material _____
Well type: ___ Straight screen ✓ Graveled
Was the well grouted? ___ Yes ___ No
To what depth? _____ feet
Material used in grouting _____
Well head completion: Pitless adapter ___
12" above grade ✓ Other _____
(*If other, specify*) _____
Was the well disinfected? ___ Yes ✓ No

6. WATER LEVEL:
Static water level 10 ft. below land surface
If flowing: closed-in pressure _____ psi
GPM flow _____ through _____ inch pipe
Controlled by: ___ Valve ___ Reducers ___ Other, *specify* _____

7. WELL TEST DATA: ✓ Pump ___ Bailer ___ Other (*If other, specify*) _____
Pumping level below land surface:
38 ft. after 2 hrs. pumping 3 gpm
___ ft. after ___ hrs. pumping ___ gpm

8. WELL LOG:

Depth (ft.) From	Depth (ft.) To	Formation
0	10	Loam & Boulders
10	13	Sandy Clay
13	36	Sand gravel & Boulders

(*Use separate sheet if necessary*)

9. DATE STARTED: 9/18/74

10. DATE COMPLETED: 9/19/74

11. WAS WELL PLUGGED OR ABANDONED? ___ Yes ✓ No
If so, how _____

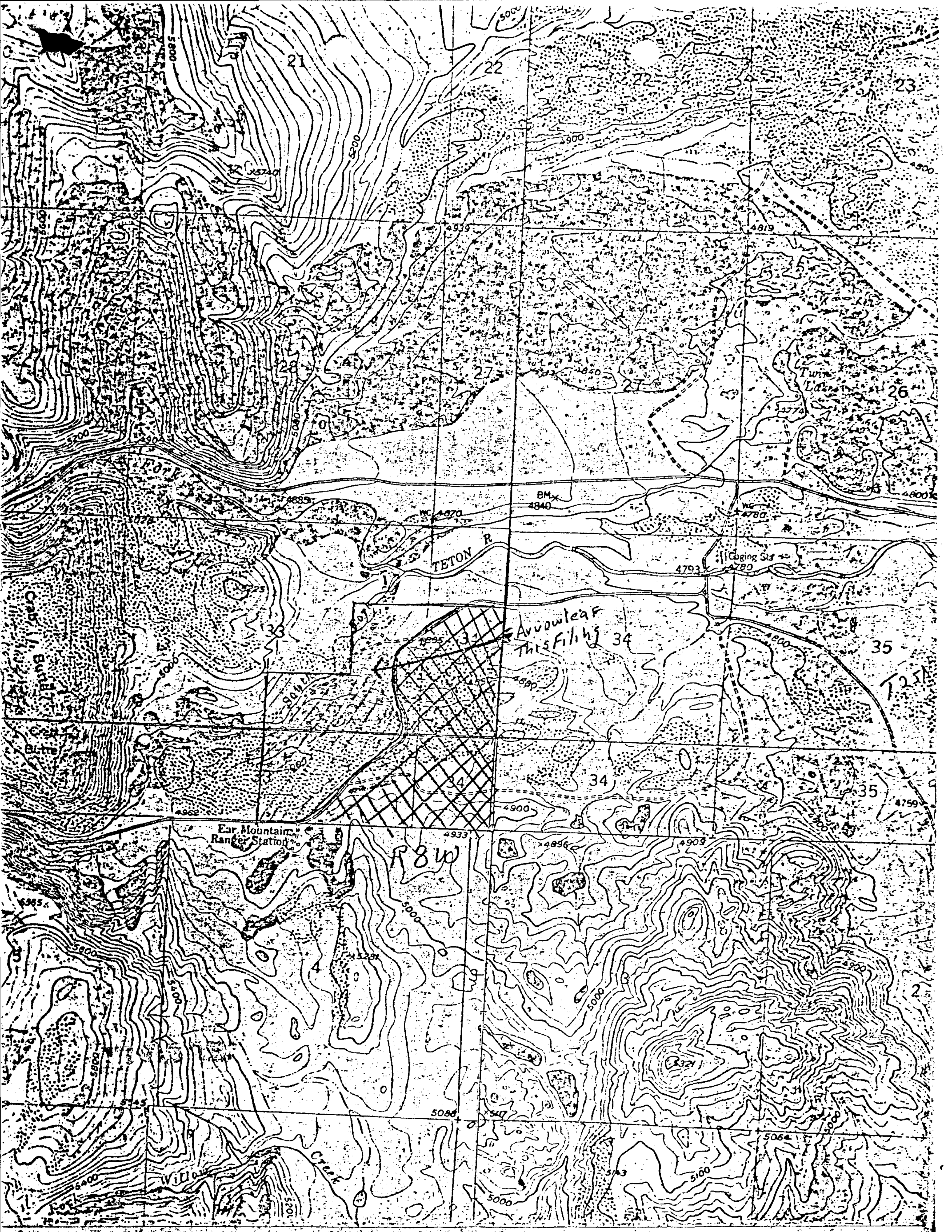
12. DRILLER'S CERTIFICATION:
This well was drilled under my jurisdiction and this report is true to the best of my knowledge.

Anderson Drlg 189
Driller's or Firm Name *License No.*

Box #645 Choteau, Mont.
Address

Raymond L. Anderson 9/20/74
Signed by *Date*

66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Twin Lakes
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Gaging Sta 4780
Arrowleaf This Filing
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TETON COUNTY

STATE OF MONTANA

CHOTEAU

59422

Statement re: Arrowleaf Question May 17, 1978

Having spent many hours in thought regarding the above question I respectfully submit the following:

After having served as County Commissioner of Teton County for over twenty years with not even a mention of court action I still wonder about the 5 such actions filed including the County Commissioners as part of the action in a period of approximately 2 years. I do not honestly believe that any one of these actions were called for and the Arrowleaf action is probably the biggest fiasco of all. I sincerely believe it is an insult to the court and our judicial system to be forced to become a part of such petty differences.

As far as I am concerned there is only one question to answer as to the Arrowleaf case. Is it right to subdivide or is it not right to do so? It is not a question of whether the County Commissioners followed the letter of the statutes in their procedure; whether the State Board of Health did the same; whether the development will interfere with the life style of one grizzly bear, a handful of deer or sheep; whether one tree too many will be cut; whether the land could be grazed by horses or cattle; whether the County may have to plow the road out one extra time per year; whether the developers stand to gain or lose on the venture; whether there are 2 people opposed to such development or 20; whether the County Planning Board fully fulfilled their obligations; whether the adjacent property owners approve or disapprove; or one of many, many more petty objections to this development. Actually, as I have stated, the question is, is it right or wrong?

As I have stated before it is not a matter of doing as I do but as I say, as far as the complainants are concerned. They claim their rights; but do not the rest of us have rights? I particularly mention the complainants Mr. & Mrs. Guthrie and Mr. & Mrs. Gleason. Any one of them would scream to high heaven if anyone attempted to restrict their individual pursuits but this is exactly what they are attempting to accomplish with this court action. They have both built in this same area and the Gleasons in particular cater to the public uses. No one has ever tried to restrict their activities. I could relate many instances of activities by these couples which parallel the very thing they object to. Again, do as I say not as I do.

The affect these types of actions have upon the Commissioners' office, the time spent and expense involved is excessive. I begin to wonder what we are here for: To make decisions we deem to be in the best interest and the desire of the majority only to have those decisions continually questioned; or to be a do-nothing board and just sit as figure heads. That would be the easy way out but there would be very little progress; and I do not believe that is the way the public desires for us to perform. If our hands are to be tied because a few disagree and someone can find one little error in our procedure which will accomplish the desire of these few, then I say our democratic form of government is in pretty sad shape. I certainly do not believe in dictatorship but our elected official process is certainly losing a lot of its effectiveness under these afore-mentioned conditions. I am not a complainer and will put forth my best to support and improve our system, but I do feel that present day

conditions are worthy of notice.

Arrowleaf is just one of many problems that has arisen because of these conditions. I am concerned, so feel I must express my concern. This probably should have been done in the courtroom but I do not have the ability to express myself before a group verbally. I would hope I do not give the sour grapes impression as I am not in that category whatsoever. Just deeply concerned.

Specifically, as to Arrowleaf, I would like to present the following reasons why I believe the developers are within their rights to proceed with the development.

1. At no time have they given any reason to cause me to believe they intend to abuse the privilege of ownership.

2. Neither has past experience given me any reason to believe that this particular development will be harmful to any extent, to the environment, wildlife, adjacent landowners, or cause any excessive increase in the demand for County-provided services, etc.

3. This parcel of land was for sale to anyone who desired to purchase it, with no restrictions on use, no zoning regulations in effect and no strings attached. As far as I know no one was denied the right to purchase.

4. It could have been purchased to be used as any of the following with no restrictions: dude or guest ranch with no limit as to number of customers or guests; motel-bar-supper club type business; horse ranch with no limit as to numbers; as a farming unit with no regulations; as a feed lot operation; as a hog farm (imagine that area with 1 - 2000 hogs utilizing the acreage); sawmill site, to name a few. There is nothing to prohibit the clearing of the area and cutting every last tree and bush.

5. There has been absolutely no proof that any harm may be caused by this particular subdivision or that any such thing may happen in the future. All statements made were presumption only.

6. All authentic, signed or verified objections to this development total less than 20. This is a very, very, small number compared to the numbers of people involved and interested in this area.

In summary, I certainly do not believe in the rape of our land, but right is right, and common sense must prevail. The time has come to either stand up and protect the use of this common sense as we see it, or submit to the wishes of the disident few and become a puppet board.

Sincerely submitted by:

Martin Shannon

Martin Shannon,
Teton County Commissioner

MS:dhb

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

MAY 19 1978

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * * * * *

A. B. GUTHRIE, JR.,; ALICE GUTHRIE; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants.	No. 40471

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for trial before the Court without a jury on April 12, 1978, the Plaintiffs appearing in person and represented by their attorneys, James H. Goetz and Gregory Curtis; the Defendant Montana Department of Health and Environmental Sciences appearing by its attorneys, Stan Bradshaw and Sandra Muckelston; Defendant Board of County Commissioners of Teton County appearing by its attorney, Charles Joslyn; and Defendants Crabtree, Crawford, and Jensen represented by their attorneys, Milton Wordal and Michael Anderson. Plaintiffs renewed their motion to amend the complaint; the motion was granted. At the end of the trial, April 18, 1978, parties were ordered to file proposed findings of fact and conclusions of law within thirty days.

Based upon the evidence heard and the papers and documents and exhibits filed, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Introductory

1. This action concerns a proposed subdivision called Arrowleaf West, located on the South Fork of the Teton River in Teton County, Montana. The Defendants J. R. Crabtree, James M. Crawford, and Robert W. Jensen, are the developers of the proposed subdivision.

2. The proposed subdivision covers approximately 149 acres and will subdivide the area into approximately 36 lots, ranging in size from 2.1 acres to 8.6 acres (Plaintiffs' Exhibit 11).

3. Plaintiff A. B. Guthrie, Jr., is a writer by profession who owns lands approximately one and a half miles east of the site of the proposed Arrowleaf West subdivision and who resides on said land; Plaintiffs Alice and Kenneth Gleason are the owners of a dude ranch located on the South Fork of the Teton River approximately one mile west of the site of the proposed subdivision; the Montana Wilderness Association is an organization whose primary goals are to foster creation and preservation of wilderness areas and to foster environmental goals generally.

4. The following persons were called as witnesses by the Plaintiffs: Margaret Adams (member of the Montana Wilderness Association [hereinafter called MWA]); Al Keppner (employee of the Montana Department of Health and Environmental Sciences [hereinafter called DHES]); A. B. Guthrie, Jr. (Plaintiff); Donald Reichmuth (civil engineer); Charles Jonkel (wildlife biologist, grizzly bear expert); Alan Schallenberger (wildlife biologist, grizzly bear expert); Ray Anderson (well driller); Robert W. Jensen (developer); Martin Shannon (Teton County Commissioner); Alice Gleason (Plaintiff); Thomas Ellerhof (employee of DHES); and the testimony by deposition of Thomas Power (economist) was introduced pursuant to Rule 32(A)(3) M.R.Civ.P. Defendant DHES called Alfred Keppner. Defendant Board of County

Commissioners, Teton County, called no witnesses. Defendant developers called Martin Shannon (Teton County Commissioner), James M. Crawford (developer), and Robert W. Jensen (developer).

Standing

5. Plaintiff Montana Wilderness Association is a non-profit corporation organized and operating under the laws of the state of Montana. It is dedicated to the promotion of wilderness areas and dedicated to advancing environmental causes generally. There are approximately 750 residents of the state of Montana who are members of the MWA and approximately seven of said members who reside in Teton County, Montana. Many members of the MWA, including Margaret Adams who testified on behalf of the Association, make substantial use of the general area around the proposed Arrowleaf West subdivision for recreational, aesthetic, and environmental purposes.

6. Plaintiff A. B. Guthrie, Jr., is a resident and a real property owner in Teton County, Montana, residing approximately one and one-half miles east of the proposed Arrowleaf West subdivision. Plaintiff Guthrie participated in the hearings of the Teton County Planning Board which considered the proposed Arrowleaf West subdivision and took a stand opposing the approval of the subdivision. Plaintiff Guthrie and his family engage in general recreational pursuits involving the land in the vicinity of the proposed Arrowleaf West subdivision. They take general aesthetic enjoyment from the area in which the proposed Arrowleaf West subdivision will be built. The family of A. B. Guthrie, Jr., engages in horseback riding, hiking, and fishing in the general area of the proposed subdivision. A. B. Guthrie, Jr., who is a professional writer, writes substantially about the people and land in the vicinity of the proposed subdivision. Because the writing of A. B. Guthrie, Jr., about the area and the people in

the vicinity of the proposed subdivision is based on the area in its present relatively nature state, his ability to write about the area will be severely affected if the proposed subdivision were allowed to go through.

7. Plaintiffs Kenneth and Alice Gleason are husband and wife, owning and operating a dude ranch approximately one mile to the west of the proposed Arrowleaf West subdivision in Teton County, Montana. The Gleasons earn their livelihood from the operation of the dude ranch, and they and their guests engage in general recreational pursuits such as hiking, riding, fishing, and hunting throughout the area in which the proposed Arrowleaf West subdivision is to be located. The economic interests of the Gleasons are dependent upon the general area of their ranch remaining aesthetically pleasing, sparsely populated, generally undeveloped, and well-populated with fish and wildlife.

8. If Arrowleaf West subdivision is not enjoined, all of the Plaintiffs, including many individual members of the MWA who use the general area in question, will be adversely affected in that the character of the locality for wildlife habitat, scenic qualities, and environmental values will be severely degraded. Moreover, if Arrowleaf West goes through, there will be substantial adverse impacts of a socio-economic nature in the area and the general character of the area for recreational pursuits will be degraded. Alice and Kenneth Gleason will be further adversely affected in that the suitability of the general area for the operation of their dude ranch will be eroded. Plaintiff A. B. Guthrie, Jr., will be further adversely affected in that his ability to write of the land and of its people will be impaired.

9. While members of the public generally have access to the public lands in the vicinity of the proposed subdivision and while some members of the general public use and enjoy the area

in ways similar to Plaintiffs, the above adverse effects to Plaintiffs are peculiar and unique and distinct from the members of the public generally in that the MWA and its members have demonstrated a unique and special interest in environmental protection and in enjoying the environment in an essentially undisturbed state and in that the Plaintiffs Gleasons and Guthrie reside and earn their livings in the vicinity of the proposed subdivision.

10. All of the Plaintiffs will suffer injury in fact if the proposed Arrowleaf West subdivision is allowed to go through.

11. All of the Plaintiffs are within the zones of interest to be protected by the environmental laws of Montana, including Article II, Section 3, of the Montana Constitution; the Montana Subdivision and Platting Act, Sections 11-3859 et seq., R.C.M.; the Sanitation and Subdivisions Act, Sections 69-5001 et seq., R.C.M.; and the Montana Environmental Policy Act, Sections 69-6501 et seq., R.C.M. (hereinafter called MEPA).

Issues Relating to Department of Health and Environmental Sciences:

a. DHES Subdivision Regulations

12. The Department of Health and Environmental Sciences of the state of Montana (hereinafter called DHES) is the agency charged with the duty of administering the Montana laws relating to sanitation in subdivisions and water pollution, Sections 69-5001 et seq., R.C.M.

13. The DHES has a mandate under Section 69-5005 R.C.M. to ensure, prior to approval of a proposed subdivision, that there is an adequate water supply (in terms of quality, quantity, and dependability); and that adequate provision is made for sewage and solid waste disposal. Under that section, DHES has adopted regulations, M.A.C. 16-2.14(10)-S14340. DHES adopted regulations

dealing with subdivision review in December, 1972. Those regulations have been amended at least three times since: November 4, 1973; November 3, 1975; and May 6, 1976. The last amendment, May 6, 1976, is not here pertinent because only minor changes were made. Nor is the period between the initial enactment of the regulations (December, 1972) and the date of the first amendment (November 4, 1973) here relevant because no review of the Arrowleaf West proposal took place in that period.

14. The formal application for removal of the sanitary restrictions from the Arrowleaf West subdivision (Form ES 91--Plaintiffs' Exhibit 12) was executed by the developers on January 6, 1976, filed by the developers with the DHES on January 13, 1976, and the review fee was paid by the developers to DHES on January 14, 1976.

15. By letter of January 12, 1976, Mike Clasby, County Sanitarian for Teton County, stated to an official of DHES the following: "At last here is the complete packet for Arrowleaf West Subdivision." (Emphasis added.) (Plaintiffs' Exhibit 20.)

16. By letter of March 11, 1976, Al Keppner, official of DHES, notified the developers that the application for removal of sanitary restrictions (Form ES 91) was complete (Defendants' Exhibit 71).

17. The DHES prepared a preliminary environmental review (Plaintiffs' Exhibit 11) during the spring of 1976 and circulated the document for review on May 7, 1976.

18. The DHES issued a certificate of subdivision plat approval to the developers of Arrowleaf West on June 8, 1976 (Plaintiffs' Exhibit 17).

19. Certain acts of review were undertaken by DHES and the County Sanitarian prior to the adoption of the second amendment to the DHES subdivision regulations (November 3, 1975). These acts include submission of percolation tests (2/25/75, Plaintiffs'

Exhibit 15); filing of a rough plat indicating location of certain percolation tests; the approval by DHES of the solid waste disposal plan of developers (Defendants' Exhibit 67); and a field inspection of the site by Al Keppner, official of DHES, on or about August 6, 1975.

20. The acts of review undertaken by the Teton County Sanitarian and the officials of DHES prior to enactment of new subdivision regulations by DHES on November 3, 1975, were of relative insignificance, and it is clear, as a matter of fact, that the information available to DHES regarding Arrowleaf West at the time the new subdivision regulations went into effect (November 3, 1975) was wholly insufficient to make a determination as to whether or not the sanitary restrictions should be removed.

21. The subdivision regulations adopted by DHES on November 3, 1975, are applicable to the review by DHES of the Arrowleaf West subdivision since the application of Arrowleaf West for removal of sanitary restrictions (Plaintiffs' Exhibit 12) was received by DHES after that date, since DHES clearly had insufficient information from the Arrowleaf West developers prior to that date upon which an informed decision could be made and since the overwhelming amount of review by DHES of the Arrowleaf West application, including preparation of the Preliminary Environmental Review, took place after November 3, 1975.

22. The Arrowleaf West subdivision contemplates use of individual wells and individual septic systems with drainfields for each lot.

23. The DHES, in its review of the Arrowleaf West subdivision, failed to follow its regulations on numerous points. These points are as follows (1975 regulations):

A. Section 16-2.14(10)-S14340(4) M.A.C. provides as follows:

(b) All subdivisions over 10 lots shall consider public water and sewer systems as alternatives. A preliminary engineering report with cost estimates of each alternate system shall be prepared by a registered professional engineer and presented with the subdivision application.

B. The testimony is undisputed that no preliminary engineering report with cost estimates prepared by a registered professional engineer for public water and sewer systems has been submitted by the Arrowleaf West developers to DHES.

C. M.A.C. 16-2.14(10)-S14340(2) provides that a suitable plat must be submitted by the developer to DHES along with its completed Form ES 91 and requires the following:

(b) The plat or plats must show the following:

(i) Total area.

(ii) Number of dwelling units.

(iii) Dimensions of individual lots.

(iv) Topography of area including drainage ways.

(v) Location by number of any soil tests or percolation tests.

(vi) Where individual sewage disposal systems are proposed, the area suitable for septic tank locations on each lot and the suitable area for the location of subsurface disposal system on each lot.

(vii) Where individual wells are proposed, the probable location of each well on the lot and the minimum distance from the septic tank, drainfield, and any proposed or existing sewer lines.

(viii) Location of public water and/or sewer lines for the development (if applicable).

(ix) Location of any stream, lakes, ponds, or irrigation districts in or near the development.

D. A substantial portion of the above-quoted regulation has not been followed by the DHES or the Arrowleaf West developers. Topography of the area was not presented except by a very summary USGS map which was so gross in scale as to be unusable. No drainage-ways were demonstrated in the information submitted to the DHES. The locations by number of the percolation tests were done so sloppily that the witness for DHES could not be sure which lots had percolation tests done on them and which had not. Areas suitable for septic tank locations on each lot and areas suitable for location of subsurface

disposal systems on each lot were not depicted. Probable locations of each well, together with the minimum distance from the septic tank and septic drainfield, were not depicted.

E. Section (6)(v) of the M.A.C. subdivision regulations provides as follows:

> If the groundwaters are within ten feet of the ground surface or if there is any reason to believe that the groundwater will be within ten feet of the ground surface during any time of the year, groundwater tests shall be provided to the depth of at least ten feet to determine the high groundwater during its period of occurrence. The department may require of the applicant to provide a year of groundwater testing.

F. The evidence is clear that at least some of the area covered by the Arrowleaf West subdivision proposal has groundwater that is within ten feet of the surface during certain times of the year.

G. The developers' application (Form ES 91, Plaintiffs' Exhibit 12) did not supply the requested information regarding the high and low elevations of groundwater.

H. Mr. Al Keppner, official of DHES, submitted an affidavit in the summary judgment proceedings had heretofore in the present action which indicated that he had observed the depths of groundwater by visually examining the soil borings on the site during his visual inspection of the site in August of 1975. Upon cross-examination, however, Mr. Keppner admitted that the said soil borings had not been drilled on the Arrowleaf West site at the time of his field inspection of August, 1975, nor had they been drilled on the Arrowleaf West site at the time he returned to the site in October of 1975. Therefore, it is clear that Mr. Keppner did not visually observe the depth of groundwater at the Arrowleaf West site by examining the soil borings.

I. Mr. Keppner testified that he made his calculations on depth of groundwater by examining the information submitted to him in writing regarding the soil borings. The evidence indicated that the soil borings were done approximately in December of 1975. Mr. Keppner admitted that the groundwater elevations would be likely to be low in December and that such elevations would not reflect the high groundwater levels which would be likely to occur in the spring of the year.

J. The DHES subdivision regulation dealing with water quality and availability are set forth in subsection 5 of M.A.C. 16-2.14(10)-S14340. That regulation provides as follows:

> (a) The location of the individual water supply sources shall be indicated on the plat with the report giving the following information:

(i) The location with reference to any sewage disposal devices.

(ii) Chemical quality of water, which shall include, as a minimum, the concentration of calcium, magnesium, sodium, bicarbonate, chloride, sulfate, nitrate, hardness and iron. The U. S. Environmental Protection Agency primary standards for drinking and such secondary standards for drinking water as may be adopted under Public Law 93-523, "Safe Drinking Water Act," will be utilized in judging the suitability of the supply for domestic usage.

(iii) Where individual sewage systems are utilized in addition to an individual water supply, a prediction and discussion of the effect of the sewage disposal system on water quality. References utilized for the prediction and discussion shall be provided. This requirement may be waived when the subdivision is a single lot or a one-family homesite but not for multiple-family dwellings (duplexes, condominiums, etc.).

K. Virtually all requirements of the above-quoted regulation were not followed by DHES in its review of Arrowleaf West. The locations of the individual water supply sources were not indicated on the plat, nor were the locations indicated with reference to any sewage disposal devises. The chemical quality of water was not assessed, nor were any of the specific chemical concentrations sampled. Indeed, there was no well drilled on Arrowleaf West at all, so there was no water available from that subdivision. Nor were the U. S. Environmental Protection Agency drinking water standards applied to water samples from neighboring areas. Also, there was no prediction and discussion of the effect of the sewage disposal system on water quality.

L. The DHES subdivision regulations also require that a well be drilled on the proposed subdivision to a minimum depth of twenty-five feet and that a report be submitted containing:

> A hydrogeological report prepared by a hydrogeologist or professional engineer which substantiates that there is an adequate quantity of water for domestic use. A description of the soil penetrated shall be provided as part of the report. (M.A.C. 16-2.14[10]-S14340[5][d][i][ii].)

M. This regulation was not followed because there was no well drilled on Arrowleaf West, much less a well drilled to the minimum depth of twenty-five feet. Nor was a hydrogeological report submitted

substantiating that there is an adequate quantity of water for domestic use.

N. Although the DHES subdivision regulations require that the topography be indicated on the plat and restrict installation of sewage devices on slopes of greater than 15%, the developers failed to indicate topography on the Arrowleaf West plat submitted to the DHES. Although a USGS map was submitted, the map is of such a scale that it is useless in determining which lots have grades of greater than 15%. It is clear from the evidence that some of the lots on the Arrowleaf West site have grades of greater than 15% and that there is insufficient area on some lots of grades of less than 15% within which to locate adequately sized septic drainfields.

O. Section M.A.C. 16-2.14(10)-S14340(6)(c)(iv) requires that at least one percolation test be done for each lot in a proposed subdivision. There are approximately 36 lots proposed for Arrowleaf West, yet there were only 16 percolation tests done (Plaintiffs' Exhibit 13C).

P. While the above M.A.C. regulation allows waiver of the requirement of one percolation test per lot, such waiver must be conditioned on the fact that the soils are "uniform throughout the subdivision." While Mr. Keppner purported, by letter of June 17, 1975 (Plaintiffs' Exhibit 22), to waive the requirement of one percolation test per lot, he did not at that time have soils boring information for Arrowleaf West and thus was incapable of concluding that the soils are "uniform" throughout the subdivision. Moreover, no data was supplied in connection with the request for a waiver of the percolation test requirement.

Q. The requirement of one percolation test per lot is a minimum requirement in that the Manual of Septic Tank Practice of the United States Department of Health, Education, and Welfare, documents upon which Mr. Keppner testified the DHES relied, indicates that "six or more [percolation] tests shall be made in separate test holes spaced uniformly over the proposed absorption field site" (p. 4).

R. Section M.A.C. 16-2.14(10)-S14340(12) provides that waivers of the DHES subdivision regulations may be granted in limited circumstances. That provision provides as follows:

> (a) Waivers as noted in this rule may be granted by the department upon submission of the necessary request along with sufficient data to substantiate the request.

S. Aside from the legal interpretation of this above-cited waiver provision, the record clearly indicates that, except with respect to the one percolation test per lot requirement, there were no waiver requests addressed to DHES with respect to any of the other DHES subdivison regulations cited

in this finding of fact (no. 23). Nor was "sufficient data to substantiate [a waiver] request" submitted to DHES in connection with any of the above-cite regulations.

24. Even if it were to be found that the amended subdivision regulations effective November 3, 1974, of DHES did not apply to the Arrowleaf West subdivision and that the earlier regulations adopted on November 4, 1973, apply, the DHES failed to comply with its earlier regulations in numerous respects. Its failure in compliance includes the following:

A. Section 16-2.14(10)-S14340, subsection 4(d) (1973 regulations), provided as follows:

> Water supply for individual lots shall include: (i) detailed drawings or descriptions of the sources of supply along with assurance that water can be provided for each site; (ii) details of construction of the water systems; (iii) method for protection of water supply from contamination....

B. The evidence indicates that there is no assurance that water can be provided for each site. In fact, the uncontradicted evidence indicates that the probability is to the contrary. Also, there is nothing in the file indicating methods for protection of water supply from contamination.

C. Subsection 6(d)(i) of the above-cited 1973 regulations provided as follows:

> Groundwater studies shall be made so that the maximum high groundwater elevation can be determined. If sufficient data is not on record for the area, groundwater tests shall be conducted over a period of one year prior to requesting approval of the subdivision or until a complete high-low cycle has been recorded.

D. No specific groundwater studies were made, and there was no specific finding on the maximum high groundwater elevation for the Arrowleaf West subdivision. The Arrowleaf West developers left unanswered the question dealing with high and low elevations of groundwater for the Arrowleaf West subdivision in their application for approval. (See Plaintiffs' Exhibit 12.) There were no tests conducted with respect to Arrowleaf West over the period of one year to determine the complete high-low cycle of groundwater.

E. Subsection 6(d)(ii)(iii) required at least one soil boring to determine soil profiles for

every five acres of a subdivision and required at least one absorption test [percolation test] per lot ("or if soil conditions indicate, a greater number may be required").

F. There are approximately 149 acres to be covered by Arrowleaf West. This means thirty soil borings should have been done. Only 16 soil borings were done for Arrowleaf West (Plaintiffs' Exhibit 13C).

G. There are 36 proposed lots in Arrowleaf West, but only 16 percolation tests were done (Plaintiffs' Exhibit 13C).

H. Since the above-cited 1973 DHES subdivision regulations are minimal requirements, waivers of them are unavailable.

25. There are substantial problems from a sewage disposal standpoint with the Arrowleaf West site as a site for a subdivision with approximately 36 lots. A number of the lots are too steep for safe and healthful use of individual septic tank drainfield systems. There is substantial bedrock on or near the surface of much of the Arrowleaf West site which makes many of the lots on the Arrowleaf West site unsuitable for individual septic tank drainfields. A number of lots in the Arrowleaf West site are on or near the floodplain near the South Fork of the Teton River and are located on alluvial gravels of extremely permeable nature, and the groundwater levels are near the surface, thus making said lots unsuitable for individual septic tank drainfields. The review by DHES of the Arrowleaf West site, apart from DHES's failure to abide by its own regulations, is wholly inadequate to ensure that there will be no public health and safety problems with sewage disposal. This failure to conduct adequate review is critical in light of the natural hazards and problems which exist at the Arrowleaf West site in relation to disposal of human sewage.

26. There are substantial problems associated with the Arrowleaf West site in terms of water availability and quality. No evidence was adduced of any water wells having been drilled on the Arrowleaf West site. There was evidence presented of

approximately four to five wells having been drilled in an area east of and adjacent to Arrowleaf West (referred to as Arrowleaf East). Of these wells drilled, one contained unpotable water, and another well indicated problems with potability of water in the spring of the year, whcih problem apparently is not as bad during the summer. Five test holes have been drilled in the Arrowleaf East site in search of water. Of the five test holes, two were dry, one had unpotable water, and the other two were inconclusive because drilling terminated because of a fear of losing drill bits because the walls of the drill holes were caving. Said two inconclusive holes resulted in no adequate and dependable indication that well water would be available.

27. The developers, although aware of the unpotable water found in the wells drilled on the Arrowleaf East site and although aware of the dry holes and unpotable water in the test holes drilled on the Arrowleaf East site, conveyed none of this information to the DHES or to officials of Teton County.

28. The DHES, throughout its review of the Arrowleaf West subdivision, was unaware of any well drilling in the general vicinity of Arrowleaf West which resulted in either dry holes or unpotable water because such information was not supplied to it by the developers.

29. The evidence indicates that it is substantially unlikely that adequate and potable well water will be found on each lot of Arrowleaf West.

b. DHES-MEPA Issues

30. The Montana Environmental Policy Act, section 59-6501 et seq. R.C.M. (hereinafter referred to as MEPA) requires that a state agency must do an environmental impact statement (hereinafter referred to as "EIS"), prior to taking any major action which could significantly affect the human environment.

31. The Montana Sanitation in Subdivisions Act specifically refers to the preparation of an EIS on subdivision applications and contemplates that an EIS will be prepared under MEPA where the impact of the subdivision will be major. Section 69-5005(3)(d) R.C.M. 1947.

32. Section 16-2.2(2)-P2020 (Rule III) M.A.C. is a regulation of DHES which deals with when the preparation of an EIS is necessary. Section 2 of that rule provides in part as follows:

> ...If the PER [preliminary environmental review] shows a potential significant effect on the human environment, an EIS shall be prepared on that action.

33. The subdivision and construction of Arrowleaf West will have a potential significant effect on the human environment.

34. Section 16.2.2(2)-P2020(3) also provides as follows:

> The following are actions which normally require the preparation of an EIS: (a) the action may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply; (b) the action may be either significantly growth inducing or inhibiting; or (c) the action may substantially alter environmental conditions in terms of quality or availability.

35. The subdivision and construction of Arrowleaf West will have significantly adverse effects on environmental attributes recognized as being endangered, fragile, and in severely short supply; specifically, the effects on the grizzly bear, spring grizzly habitat, and a corridor along the South Fork of the Teton River by which grizzly bears travel back and forth between the mountains and a swamp east of the Arrowleaf West area.

36. The grizzly bear has been placed on the threatened species list by the Federal Fish and Wildlife Service under the authority of the Federal Endangered Species Act. 16 U.S.C. 1531 et seq.

37. The area containing Arrowleaf West is within the boundaries of an area tentatively designated by the United States

Fish and Wildlife Service as critical grizzly bear habitat under the Federal Endangered Species Act.

38. There have been approximately three to four sightings of the Northern Rocky Mountain Wolf within an approximate ten-mile radius of the proposed subdivision. The Northern Rocky Mountain Wolf is listed as an endangered species under the Federal Endangered Species Act.

39. Other wildlife, such as mountain goats, elk, and deer, frequent the general area in the vicinity of Arrowleaf West subdivision.

40. If Arrowleaf West is subdivided and constructed as proposed, it will have a significantly adverse effect on the grizzly bear and its habitat, on the Northern Rocky Moutnain Wolf, and on the other wildlife which frequents the area of the proposed subdivision.

41. The area surrounding the Arrowleaf West subdivision is very sparsely populated. If Arrowleaf West is subdivided and developed as proposed, the effect will be a significantly growth-inducing effect and there will be a substantial change in the quality and nature of the lifestyles in the general area. If Arrowleaf West is subdivided and constructed as proposed, there will be a substantial alteration in environmental conditions in terms of quality and availability in the sense that wildlife values will be severely impacted, the essentially natural condition of the area as it presently exists will be severely degraded, and significant numbers of people will be attracted to the area along with four-wheel drive vehicles, snow machines, pets, and other aspects associated with more dense human development.

42. In light of the opposition to the Arrowleaf West subdivision expressed at the Teton County Planning Board meeting in August of 1975, it is clear that the proposed action of DHES to remove sanitary restrictions from Arrowleaf West was

controversial.

43. The removal of the sanitary restrictions on Arrowleaf West by DHES constitutes a major state action which will significantly affect the quality of the human environment; thus, DHES must do an EIS on its proposed action.

44. The DHES did not prepare an EIS on the Arrowleaf West subdivision; rather, DHES prepared a threshhold document referred to as a "Preliminary Environmental Review" (hereinafter PER) (Plaintiffs' Exhibit 11).

45. While the purpose of the Preliminary Environmental Review is to guide officials of DHES in their decision whether a full-blown EIS is necessary on a particular proposal, the format of the PER and the review undertaken in the Arrowleaf West PER are not adequate to allow the decision-maker to make a reasoned and non-arbitrary decision in that regard.

46. The evidence indicated that the PER (Plaintiffs' Exhibit 11) did not specifically address itself to the question whether the Arrowleaf West proposal would be "significantly growth inducing." The DHES regulations above-cited in No. 29 establish this criterion as one which must be specifically considered in the decision whether to prepare an EIS.

47. The evidence indicated that the PER (Plaintiffs' Exhibit 11) is not designed for a reader to draw a valid conclusion as to whether the area is a "fragile area." The DHES regulations above-cited in No. 29 establish this criterion as one which must be specifically considered in the decision whether to prepare an EIS.

48. The PER (Plaintiffs' Exhibit 11) was not circulated to the people in Teton County other than the developers and the Board of County Commissioners (see cover sheet on Plaintiffs' Exhibit 11).

49. Even though a number of residents of Teton County,

including Plaintiffs Alice Gleason and A. B. Guthrie, Jr., had protested the Arrowleaf West subdivision at a public meeting of the Teton County Planning Board in August of 1975, and even though an employee of DHES, Al Keppner, was present at such meeting and must have been aware of opposition by local citizens to Arrowleaf West, no attempt was made by DHES to circulate the PER to said protesters.

50. The PER (Plaintiffs' Exhibit 11) was circulated by DHES on May 7, 1976, with a cover letter which allowed the public fifteen days to submit comments. During said fifteen day circulation and comment period, no information was published concerning the Arrowleaf West PER in the local newspapers (the Choteau Acantha and the Fairfield Times) and no meeting of the Teton County Planning Board discussed the said PER (Plaintiffs' Exhibits 24 and 25).

51. Neither the Gleasons nor A. B. Guthrie, Jr., submitted timely comments on the DHES PER on Arrowleaf West because they were not aware at the time of the issuance of the PER.

52. No public hearings were held by DHES on the Arrowleaf West PER and no affirmative attempts were made to solicit comments on the said PER from the people of Teton County. This Court takes judicial notice that DHES has not adopted procedures under section 82-4228 R.C.M. for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public.

53. The procedures and policies of the DHES for reaching the threshhold determination under MEPA as to whether to do an EIS on a proposed action are not adequately designed to involve the public. MEPA specifically contemplates public involvement in the EIS process. Section 69-6504(b) R.C.M.

54. House Joint Resolution No. 73, passed on March 16, 1974, states that "full economic analysis has not typically accompanied

agency actions requiring environmental impact statements, thus creating a failure on the part of...state agencies to fully implement the Montana Environmental Policy Act."

55. The PER (Plaintiffs' Exhibit 11) prepared by DHES on the Arrowleaf West application contained virtually no economic analysis. By deposition, Dr. Thomas Power, economist, testified:

> The thing that I noticed most clearly about the preliminary environmental review is that it contains neither the data that would be necessary to carry out an economic analysis, nor does it contain any positive assertions or conclusions about the economic impact of the proposed subdivision. So there is neither the data nor the economic analysis, nor positive assertions of conclusions that might have followed from some economic analysis that was carried out, but not presented in the preliminary environmental review. (Deposition of Thomas Power, p. 12).

This testimony is uncontradicted in the record.

Teton County Commissioners issues

56. The Montana Subdivision and Platting Act, section 11-3859 et seq. R.C.M., requires that a governing body of a county must, prior to approval of a subdivision application, find that the subdivision as proposed is in the public interest and shall issue written findings of fact that weigh itemized criteria relating to the public interest.

57. The Board of County Commissioners of Teton County approved the final plat of the Arrowleaf West subdivision on July 22, 1976.

58. Prior to issuing the approval of the final plat of Arrowleaf West on July 22, 1976, the Board of County Commissioners held no public hearing on Arrowleaf West and issued no written findings of fact pursuant to 11-3866(4); nor did they make a specific written finding that the Arrowleaf West subdivision is in the public interest.

59. The present lawsuit was filed on or about August 24, 1976. Well after this lawsuit was filed, September 20, 1976, the Teton County Commissioners, at the request of the attorney for developers,

issued a resolution which purported to indicate that Arrowleaf West as proposed was in the public interest and which purported to make written findings in support of a finding that the subdivision was in the public interest and which purported to amend the minutes of a meeting held by the Board of Teton County Commissioners held on January 19, 1976 (Plaintiffs' Exhibit 2).

60. A public hearing was held on the Arrowleaf West subdivision proposal by the Teton County Planning Board in August 1975; however, no specific recommendations were made by the Teton County Planning Board to the Board of County Commissioners of Teton County; rather, the Teton County Planning Board took it upon itself to grant preliminary plat approval to the developers of Arrowleaf West (see letter of Teton County Planning Board, October 14, 1975) (Plaintiffs' Exhibit 7).

61. Teton County has adopted the Model Subdivision Regulations prepared by the Montana Department of Community Affairs.

62. While the Model Subdivision Regulations adopted by Teton County allow the Planning Board to conduct a subdivision hearing on behalf of the County Commissioners, the Planning Board must act in an advisory capacity only and must make recommendations to the governing body for approval, conditional approval, or disapproval (section II, A8) (Plaintiffs' Exhibit 4).

63. The letter of the Teton County Planning Board of October 14, 1975, to the developers of Arrowleaf West (Plaintiffs' Exhibit 4) did not purport to be a "recommendation" to the Teton County Commissioners. Rather it is on its face an official approval of the Arrowleaf West preliminary plat. At no time have recommendations on the preliminary plat of Arrowleaf West been submitted by the Teton County Planning Board to the Teton County Commissioners. Nor did any recommendations come within ten days of the hearing as required by the Teton County subdivision regulations. It is clear from the record that the Teton County Planning Board

took upon itself a role much greater than simply an "advisory" role in its review and approval of the Arrowleaf West preliminary plat.

64. The Board of County Commissioners of Teton County at no time granted "preliminary" plat approval to the Arrowleaf West developers, and, in fact, at no time has the Board of County Commissioners of Teton County taken the position that it, as a Board of County Commissioners, granted such preliminary plat approval. Rather, the only approval ever given to the Arrowleaf West subdivision by the Board of County Commissioners was the approval of the final plat on July 22, 1976.

65. While the Board of County Commissioners of Teton County makes the claim that its written findings of fact issued by resolution of September 20, 1976, simply set down in writing decisions and findings made at the meeting of January 19, 1976, of the Teton County Commissioners, its claim is not borne out by the evidence. One clear example which contradicts this claim of the Board of County Commissioners can be observed in finding f of the resolution of September 20, 1976. In that finding the Board of County Commissioners stated that the protective covenants are adequate to protect against environmental degradation. Upon cross-examination, Martin Shannon, Teton County Commissioner, testified that this was a specific reference to the protective covenants of Arrowleaf West. Upon further cross-examination, Martin Shannon flatly admitted that the Board of County Commissioners did not have the protective covenants of Arrowleaf West before them at their meeting of January 19, 1976. This statement is confirmed by Martin Shannon in deposition (Shannon deposition, p. 25). Thus, the purported finding by resolution of September 20, 1976, that the Arrowleaf West protective covenants were adequate to protect the environment would have been impossible on January 19, 1976, because the protective covenants were not

before the Commissioners at that time.

66. The attempt of the Teton County Commissioners to comply with the Montana Subdivision and Platting Act requirements after the fact, and after the present lawsuit had been filed, is self-serving and fraught with the possibility of errors or misstatements of fact. Procedural requirements of the Montana Subdivision and Platting Act were not complied with by the Teton County Commissioners in their approval of the Arrowleaf West subdivision.

67. Section 11-3865 requires that "the subdivider shall submit with the final plat a certificate of a licensed title abstractor showing the names of the owners or record of the land to be subdivided and the names of lien holders or claimants of record against the land and the written consent to the subdivision by the owners of the land, if other than the subdivider, and any lien holders or claimants of record against the land." This was not complied with by Teton County or the subdividers of Arrowleaf West in connection with the Teton County approval of the Arrowleaf West subdivision; nor did the Board of County Commissioners qualify for a waiver of this provision by following subsection 2 of 11-3865 by having the County Attorney review instead of providing for a certificate of a licensed title abstractor.

68. Section 11-3863 R.C.M. provides that an environmental assessment shall accompany the preliminary plat and shall include:

> (b) Maps and tables showing soil types in the several parts of the proposed subdivision, and their suitability for any proposed developments in those several parts...."

69. The environmental assessment prepared by the developers of Arrowleaf West and submitted to Teton County in connection with requested review of the Arrowleaf West subdivision contained no maps and tables showing soil types in the several parts of the proposed subdivision and their suitability for any proposed developments in those several parts (Plaintiffs' Exhibit 3).

70. Although the Resolution of the Teton County Commissioners of September 20, 1976 (Plaintiffs' Exhibit 2), purports to approve the preliminary plat of Arrowleaf West and although the said Resolution purports simply to set down in writing the actual findings and conclusions made by the Teton County Commissioners in their meeting of June 19, 1976, Martin Shannon, Teton County Commissioner testified clearly that the Commissioners did not have a copy of the Arrowleaf West preliminary plat at their meeting of January 19, 1976. He also testified that they had not seen the Arrowleaf West preliminary plat prior to their meeting of January 19, 1976.

71. Although the County Commissioners of Teton County stated by Resolution of September 20, 1976 (Plaintiffs' Exhibit 2), that there was a need for the Arrowleaf West subdivision, it is clear from the record that they actually found a "demand" (i.e., that people would purchase lots on Arrowleaf West for recreational home sites) rather than a "need" for such subdivision.

72. There was substantial public opinion expressed at the Teton County Planning Board meeting held in August of 1975 in opposition to Arrowleaf West. There was virtually no public opinion expressed in support of the Arrowleaf West proposal, other than that by Robert Jensen, developer. The County Commissioners essentially disregarded this expressed public opinion and instead reached an independent speculative conclusion that much of the public supported Arrowleaf West in spite of the fact that there was virtually no expression of such support at the Teton County Planning Board meeting.

73. The Teton County Commissioners, in assessing the effect of Arrowleaf West on wildlife and wildlife habitat, disregarded expert input and substituted therefor their own speculations.

Estoppel

74. The Arrowleaf West developers do not have clean hands to assert an equitable estoppel position. Specifically, Robert Jensen, one of the Arrowleaf West developers, testified that he was aware of the evidence of unpotable water and dry test holes which resulted from well driller Ray Anderson's efforts on Arrowleaf East subdivision. Even though aware of this evidence of unpotable water and dry test holes, the developers submitted none of this information to either Teton County or DHES. Specifically, the environmental assessment prepared by Robert Jensen (Plaintiffs' Exhibit 3) contains no reference to these water problems. Developer Jensen's environmental assessment (p. 4) leads the reader to believe that there are no problems with water quality or water availability. The application to DHES for removal of sanitary restrictions on Arrowleaf West, Form ES 91 (Plaintiffs' Exhibit 12), contains the discussion on page 2 of proposed method of water supply. Again, there is simply no indication of any problem with water availability or water quality.

The conclusion is inescapable that the developers, or at least some of the developers, knew of the problems encountered in Arrowleaf East with both quality and availability of water and purposesly failed to supply this information either to the county or to the state authorities. In light of this, the developers lack clean hands to assert an equitable estoppel argument.

75. The final act of governmental approval of Arrowleaf West subdivision came on July 22, 1976, when the Teton County Board of Commissioners approved the final plat of Arrowleaf West. The present action was filed approximately one month later. The acts undertaken by the developers in the said one month period were minor and included some clearing by the

developers themselves of trees for contemplated roads, one advertisement in the Great Falls Tribune, some minor legal fees for preparation of buy-sell agreements, and certain final surveying costs that appear to have been incurred before July 22, 1976. No clear evidence was presented by the developers as to the exact size of the monetary sums expended, but such sums appear to have been in the neighborhood of five to six hundred dollars. The expenditure of such sums is inconsequential and insufficient to establish developers' position on equitable estoppel even if the developers had acted with clean hands.

Irreparable Injury

76. If the Arrowleaf West subdivision is allowed to proceed, Plaintiffs and individual members of the organizational Plaintiff will be irreparably injured by the resultant environmental degradation of the area in which the proposed subdivision is located.

77. The Plaintiffs have no adequate remedy at law or otherwise for the harm and damages that have been done and which are threatened by the developers with the approval of the Defendant Board of County Commissioners of Teton County and DHES.

From the foregoing Findings of Fact, the Court draws the following Conclusions of Law.

CONCLUSIONS OF LAW

Standing

1. A person has standing to bring a lawsuit if he suffers injury in fact; and is arguably within the zone of interest to be protected or regulated by the statutes the agencies allegedly have violated. Barlow v. Collins, 377 U.S. 159; Sierra Club v. Morton, 405 U.S. 727 (1972); Montana Wilderness Association, et al v. Board of Health & Environmental Sciences, et al., ____Mont.____ 33 St. Rptr. 711 (July 22, 1975), reversed in part ____Mont.____ 33 St. Rptr. 1320 (December 30, 1976). Benito Stewart, et al. v. Board of County Commissioners, Big Horn County, et al., ____Mont. ____, 34 St. Rptr. 1595 (December 30, 1977).

2. An organization has standing to bring a lawsuit if it establishes that its individual members suffer injury. Sierra Club v. Morton, supra.

3. "Injury in fact" includes adverse effect to aesthetic and environmental well-being. Sierra Club v. Morton, supra. (See generally fn. 9); Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608.

4. The Montana Constitution, Article II, Section 3, guarantees to all citizens the right to a clean environment. The Montana Environmental Policy Act (MEPA) recognizes that each person is entitled to a healthful environment. (Section 69-6503(b)).

5. A person is not deprived of standing simply because the injury is widespread and shared generally by many other members of the public. SCRAP v. United States, 93 SC 2405 (1973); Montana Wilderness Association, et al. v. Board of Health & Environmental Sciences, et al., supra (July 22, 1976).

6. All of the Plaintiffs, Gleasons, A.B. Guthrie, Jr., and

the Montana Wilderness Association have established standing to bring the present lawsuit in that they have established economic injury, aesthetic, scenic, environmental, and recreational injury, and in that this injury is injury in fact; and in that they are within the zones of interest to be protected by the environmental laws of the State of Montana.

Department of Health & Environmental Sciences (DHES)

7. DHES is mandated under Section 69-5005 R.C.M. to ensure, prior to approval of a proposed subdivision, that there is adequate water supply (in terms of quality, quantity, dependability); and that adequate provision is made for sewage and solid waste disposal.

8. Under the above statutory provision, DHES has adopted regulations. M.A.C. 16-2.14(10)-S14340.

9. DHES is bound by its own regulations. U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

10. The subdivision regulations of DHES which are applicable to the review of Arrowleaf West are those which went into effect on November 3, 1975, because those were the regulations which were in effect at the time the developers formally applied for removal of sanitary restrictions and because the overwhelming bulk of the review by DHES of the Arrowleaf West subdivision proposal occurred after these regulations went into effect on November 3, 1975.

11. The DHES subdivision regulations which went into effect on November 3, 1975, were not complied with in numerous significant respects and, because of this failure to comply with regulations, the DHES approval of the Arrowleaf West subdivision is legally deficient.

12. Even if the DHES subdivision regulations which were effective on November 4, 1973, governed the review of the Arrowleaf West proposal, the DHES review of Arrowleaf West is legally deficient because the 1973 regulations were not complied with

in significant and substantial respects.

13. The language of the DHES subdivision regulations of both 1973 and 1975 are mandatory. As such, DHES does not have discretion as to whether or not to apply its various subdivision regulations. (See Abshire v. School District #1, 124 Mont. 244, 220 P. 2d 1058 (1950)).

14. "Substantial compliance" with DHES subdivision regulations is not legally sufficient because such regulations are mandatory and since they set minimum public health and safety standards (see Barnes v. Transole Pipeline Co., 549 P. 2d 819 (Okla. 1976)). In any event, as a matter of law, it is clear that DHES did not even come close to "substantial compliance" with its subdivision regulations with respect to the review of the Arrowleaf West subdivision proposal.

15. M.A.C. 16-2.14(10)-S14340(12) provides a limited waiver provision as follows:

> (a) Waivers as noted in this rule may be granted by the Department upon submission of the necessary request along with sufficient data to substantiate the request.

It is a cardinal rule of statutory construction (applicable to regulations because they have the force of law) that a statute will not be interpreted so as to render other statutory provisions meaningless (see Section 93-401-15 RCM, 1947). Thus, all aspects of the provision must be given meaning. Thus the language "as noted in this rule" indicates that waivers will only be allowed where the specific subdivision regulations of DHES contemplate it (as for instance, in the regulation dealing with one perculation test per lot). As a matter of law, therefore, most of the DHES subdivision regulations which were not complied with in the DHES review of Arrowleaf West are not waivable. In any event, the above waiver provision can be used only where there is a specific request therefor and where data is supplied indicating that the waiver is warranted. As indicated above in the Findings,

virtually all of the regulations of the DHES which were not complied with were not the subject of specific waiver requests and no data or information was supplied which would serve as a basis for waiver of the application of the DHES regulations.

Because the DHES subdivision regulations are binding on the DHES, and because said regulations were not followed and not waived, the DHES review of Arrowleaf West which served as a basis for removing the sanitary restrictions was legally deficient and the actual removal of sanitary restrictions on Arrowleaf West was illegal.

DHES-MEPA Issues

16. The Montana Environmental Policy Act (MEPA), Section 69-6501 et seq. requires that a state agency must prepare an environmental impact statement prior to taking any action which could have a significant effect on the environment.

17. The Sanitation in Subdivisions Act specifically contemplates preparation of an environmental impact statement on major subdivisions. 69-5005(3)(d).

18. Section 16-2.2(2)-B2020 (Rule III M.A.C.) provides guidance as to when an environmental impact statement is warranted. If the preliminary study (PER) shows a potential significant effect on the human environment, an environmental impact statement will be prepared. Also, where the action may significantly effect environmental attributes recognized as being endangered, fragile, or in severely short supply, where the action may be significantly growth-inducing or may substantially alter environmental conditions in terms of quality or availability, an environmental impact statement must be prepared.

19. Since MEPA is based almost verbatim on the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4361, federal interpretations of NEPA are entitled to substantial weight in the Montana courts. State v. King Colony Ranch,

137 Mont. 145, Ancient Order of Hibernians v. Sparrow, 29 Mont. 132.

20. The federal courts have found that, where a project is controversial, an environmental impact statement must be prepared. Hanley v. Kleindienst, 471 F. 2d 823 (2nd Circuit, 1972). Since the federal interpretation is entitled to weight and since the DHES approval of Arrowleaf West was clearly controversial, the DHES, on these grounds alone, should have prepared a full EIS prior to removing the sanitary restrictions from Arrowleaf West.

21. In reaching the "threshold decision" as to whether or not to do a full EIS, an agency has an obligation to involve the public and seek public input. Hanley v. Kleindienst, supra.

22. Article II, Section 8 of the Montana Constitution provides that the members of the public have the right to expect governmental agencies to afford reasonable opportunities for public participation.

23. The failure of the DHES to circulate the preliminary environmental review to the relevant audience (people in Teton County) and the failure of DHES to take affirmative steps to involve the public in its decision-making violate MEPA, the above-cited Montana Constitutional provisions, and the obligation of DHES under Section 82-4228 RCM 1947.

24. House Joint Resolution 73 (approved by the Montana Legislature on March 16, 1974, resolved that "economic analysis shall accompany environmental impact statements as required (by law)...." That resolution further expressed the dissatisfaction of the Montana Legislature with the failure of Montana agencies to include economic analysis in their review of actions under MEPA. The failure of DHES to undertake economic analysis with respect to its review of Arrowleaf West is in violation of MEPA and the intent as expressed by House Joint Resolution 73.

25. The PER prepared by DHES on Arrowleaf West is legally

insufficient in that it structurally does not address the relevant questions such as whether the area to be subdivided is "fragile", whether the subdivision will be "significantly growth-inducing", and other relevant questions necessary to make a threshold determination as to whether a full EIS is necessary.

26. Because the Arrowleaf West subdivision will effect a fragile area and will endanger wildlife species that are threatened and in short supply, and will interfere with grizzly bear habitat and movement patterns, and because Arrowleaf West as proposed will be significantly growth-inducing, and because Arrowleaf West demonstrates at least a potential adverse impact on the environment of major consequence, the approval by DHES must be considered a major state action under MEPA. 16-2.2-P2020 (Rule III) M.A.C.

27. Because the action of DHES in approving Arrowleaf West was a major state action, the failure of DHES to do a full EIS on its action is in violation of MEPA. 69-6504(b) R.C.M.

28. Because DHES violated MEPA in reviewing and approving Arrowleaf West, the removal of the Arrowleaf West sanitary restrictions by DHES is in violation of the law and Plaintiffs are entitled to a mandatory injunction ordering reinstatement of the said sanitary restrictions.

Teton County Commissioners Issues

29. Section 11-3866(4) requires that County Commissioners, prior to approving a subdivision preliminary plat, must find that the subdivision is in the public interest and must issue written findings of fact that weigh the following criteria for public interest: (a) the basis of need for the subdivision; (b) expressed public opinion; (c) effects on agriculture; (d) effects on local services; (e) effects on taxation; (f) effects on the natural environment; (g) effects on wildlife and wildlife habitat: and (h) effects on public health and safety.

30. The approval of the Board of County Commissioners of

Teton County of the final plat of Arrowleaf West subdivision on July 22, 1976, was in violation of Section 11-3866(4) R.C.M. because no explicit finding that the Arrowleaf West subdivision was in the public interest was made and no written findings of fact weighing the above-cited criteria were made.

31. The Board of County Commissioners of Teton County cannot, after approval of the final plat of Arrowleaf West, go back and attempt to comply with the procedures of Section 11-3866(4) R.C.M. by a resolution which purports to apply retroactively. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

32. The resolution of the County Commissioners of Teton County of September 20, 1976 (Plaintiffs' Exhibit 2), which purports to approve the preliminary plat of Arrowleaf West, is legally deficient because it is undisputed that the Board of County Commissioners never examined the preliminary plat of Arrowleaf West.

33. While the Subdivision and Platting Act (section 11-3866[3]) allows an "authorized agent" (such as the Planning Board) to conduct subdivision hearings on behalf of the County Commissioners, such authorized agent must act in an advisory capacity only and such authorized agent must present recommendations on a subdivision to the County Commissioners not later than ten days after a public hearing had thereon. (See also Teton County Subdivision Regulations, Section IIA8.) In the present case, the Teton County Planning Board arrogated to itself the authority for approval of the preliminary plat of Arrowleaf West (Plaintiffs' Exhibit 7) and totally failed to make recommendations to the Board of County Commissioners of Teton County regarding the Arrowleaf West subdivision. This procedure was in violation of both the Montana Subdivision and Platting Act and the Teton County subdivision regulations.

34. The approval by the Teton County Commissioners of the Arrowleaf West final plat did not comply with Section 11-3865 R.C.M. because the subdividers did not submit with the final plat a certificate of a licensed title abstractor showing the information required in said section, nor did the Board of County Commissioners have the County Attorney review the said final plat in lieu of the submission of a certificate of a licensed title abstractor.

35. The environmental assessment prepared by developer Robert Jensen was legally deficient in that it did not comply with Section 11-3863(b) R.C.M. because no maps and tables showing soil types and their suitability for proposed development were supplied.

36. The evaluation of the Arrowleaf West proposal which the Teton County Commissioners claimed they undertook was legally deficient under Section 11-3866(4) R.C.M. because the Commissioners disregarded the expressed public opinion and instead made a speculative evaluation of public opinion on the subdivision regardless of whether such opinion was expressed or not. The purported evaluation made of the Arrowleaf West proposal by the Teton County Commissioners was further deficient under Section 11-3866(4) R.C.M. because the Teton County Commissioners did not examine need for the subdivision but instead examined demand. Also, since competent and valid information was supplied to the Teton County Commissioners on wildlife and wildlife habitat and since such information was disregarded, the purported evaluation by the Teton County Commissioners of Arrowleaf West was further invalid under the Montana Subdivision and Platting Act.

Estoppel

37. The doctrine of equitable estoppel generally does not apply to units of local government. See Municipal Corporation Law (Antieau):

> Courts have customarily ruled that estoppel will not be applied to prevent a local government from enforcing an ordinance enacted pursuant to the police power. Application of the rule in practice can be seen from a Maryland case where the court held the city was not estopped to demand and refuse a building permit for a theatre, even though a city official had assured the property owner that such a permit was not necessary and the citizen in reliance upon this assurance had invested over $25,000 in the construction of the theatre. (pp. 16A-14, 15.)

38. In limited circumstances, the doctrine of equitable estoppel is available in Montana. However, a party seeking to estop governmental action must proceed with clean hands. See Barker v. Town of Stevensville, 164 Mont. 375, 523 P. 2d 1388 (1974). In that case, the Court adopted the following approach:

> In cases of this kind there should be a balancing of the municipal corporation's unwarranted assumption of risk of liability for acts or statements of its agents or employees made in excess of their authority against the harm done to good faith, innocent and unknowledgeable third parties who act in reliance upon those representations. (P. 1391.) (Emphasis supplied.)

39. The doctrine of equitable estoppel is an affirmative defense; therefore, defendants who would assert the doctrine must bear the burden of the proof and come into the Court with clean hands. See Seifert v. Seifert, ____ Mont. ____, 568 P. 2d 155 (1977). He who seeks equity must do equity. Hall v. Lommasson, 113 Mont. 272, 124 P. 2d 694; Barbour v. Barbour, 134 Mont. 317, 330 P. 2d 1093. Developers' purposeful and obvious concealment of information relating to dry test well holes and unpotable water found in well drilling on the Arrowleaf East subdivision precludes them from invoking an equitable doctrine because said developers do not come into Court with clean hands. It is clear from the evidence that said developers are not innocent, good faith, and unknowledgeable third parties who have suffered because of their reliance on unwarranted governmental actions. Therefore, developers are barred from seeking equitable estoppel.

40. Even if the developers here approach the Court with clean hands, in order to qualify for equitable estoppel against a government agency, developers must demonstrate substantial loss resulting from governmental activity. See Barker v. Town of Stevensville, supra; State ex rel. Russell Center v. Missoula, 166 Mont. 375, 523 P. 2d 1388 (1974). In the present case, developers' proof was extremely vague on amounts claimed to have been lost. No receipts were introduced, no specific itemized figures were introduced, and only very general estimates of expenditures were introduced. Moreover, it was very unclear exactly when some of the expenditures claimed by developers were made. Some of the final surveying expenditures appear to have been made prior to July 22, 1976, when final County approval of Arrowleaf West subdivision was made. Therefore, such expenditures cannot be claimed to have been made in reliance on governmental approval. Since defendants who seek to invoke the doctrine have the burden of proof, and since the proof of expenditures in reliance on governmental approval was extremely vague and undocumented, and since, in any event, the amounts so expended appear from the record to have been nominal, Defendants cannot prevail on their claim of equitable estoppel.

Irreparable Injury

41. Plaintiffs will suffer irreparable injury if a mandatory injunction is not granted because development of this subdivision will proceed and will irreparably change the character of the land in question. Moreover, the Plaintiffs have no recourse at law or otherwise.

42. Plaintiffs are entitled to a mandatory injunction ordering DHES to reinstate the sanitary restrictions on Arrowleaf West and ordering the Teton County Commissioners to revoke their approval of the final plat of Arrowleaf West made on July 22, 1976.

43. Plaintiffs are entitled to a permanent injunction enjoining Defendants Crabtree, Crawford, and Jensen from proceeding with actions which would physically alter the character of the land involved in the Arrowleaf West subdivision and which would enjoin Defendants from selling or offering to sell parcels of land within said subdivision.

44. Plaintiffs are entitled to their costs in this action.

Respectfully submitted this 18th day of May, 1978.

GOETZ & MADDEN
P. O. Box 1322
Bozeman, Montana 59715

by _____
James H. Goetz,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 18th day of May 19 78.

GOETZ & MADDEN

By _____
P. O. Box 1322
Bozeman, Montana 59715

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (DEVELOPERS)

MAY 22 1978

Developers

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and, MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY, J.R. CRABTREE; JAMES M. CRAWFORD; and, ROBERT W. JENSEN, Defendants.	NO. 04071 PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW

This cause came on for trial April 12, 1978 on the complaint praying for permanent injunction restraining defendants CRABTREE, CRAWFORD, and JENSEN from proceeding with subdivision of the proposed Arrowleaf West development in Teton County, Montana and for mandatory injunction requiring defendant MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES to reinstate sanitary restrictions against the proposed subdivision. Testimony having been presented on behalf of all parties, and the Court being otherwise fully advised, and having considered all the admissible and credible evidence, and having disregarded all inadmissible evidence, the Court makes the following:

FINDINGS OF FACT

1. In August, 1971, defendants CRABTREE, CRAWFORD and JENSEN became the owners of 320 acres of land located in Teton County, more particularly described as land located in the East Half of Section 33 and the Northwest Quarter of Section 34, Township 25 North, Range 8 West, P.M.M. in Teton County, Montana. The site, known as Arrowleaf, was a former dude ranch, and lies in a relatively flat area west of and between the entrances to the

narrow canyons of the North and South Fork of the Teton River.

2. Arrowleaf is located in an area consisting of vast public lands to its west, comprising the Lewis and Clark National Forest and the Bob Marshall Wilderness Area. To its northeast is located the Teton Pass Ski and Recreational Area. Choteau, Montana is located 20 miles east of the subdivision site.

3. The proposed site is located among privately owned lands whose uses include ranching, dude ranching, residential sites, leased cabin sites, recreational skiing and snowmobiling, and including a commercial restaurant and lounge known as the Cow Track Lodge.

4. Extensive public use is made of the lands surrounding the area of the proposed subdivision, and a well-traveled county road bisects the Arrowleaf acreage and provides the principal access to the South Fork Canyon. Such public uses include camping, hiking, hunting, picnicking, snomobiling, and skiing.

5. Plaintiffs KENNETH and ALICE GLEASON are owners of property located west of the proposed Arrowleaf West subdivision, in the South Fork canyon. Their ranch, consisting of approximately 2100 acres, is known as the Circle 8, and is operated as a dude ranch for the recreational use of its guests. Prior to the purchase of Arrowleaf by CRABTREE, CRAWFORD and JENSEN, Mr. and Mrs. GLEASON had leased cabin lots on their property, and have also leased some cabin lots since the Arrowleaf purchase in 1971. Plaintiffs GLEASONS' access to their property has been by way of the county road which traverses the Arrowleaf site.

6. Plaintiff GUTHRIE resides in a prominent, barn-like residence, clearly visible from the county road, on a 160-acre tract approximately 1½ miles east of Arrowleaf.

7. In 1972, defendants CRABTREE, CRAWFORD and JENSEN began development of the 150 acres of the Arrowleaf site located east of the county road. The plat for Arrowleaf East, as it has become known, was approved by the Teton County Commissioner in 1972. The 40 lots located in Arrowleaf East have been sold to 26 families, and 8 residences have been constructed. Most of the purchasers of lots were residents of Teton County or surrounding areas, and the principal use has been as recreational, second homes.

8. No complaint concerning the nature of the usage of lots on Arrowleaf East nor their impact on plaintiffs GLEASON or GUTHRIE was expressed. Plaintiffs GLEASON pass by the Arrowleaf East site on the county road; Plaintiff GUTHRIE testified the development of the site was not noticeable from his /residence because of the screening effect of the trees located on the Arrowleaf site.

9. Plaintiff ALICE GLEASON was a member of the Teton County Planning Board during the time of its deliberations on the proposed Arrowleaf West subdivision preliminary plat. Plaintiff GUTHRIE was an active participant in the public hearings on the preliminary plat.

10. Plaintiff MONTANA WILDERNESS ASSOCIATION is an organization, a few of whose members reside in Teton County. The members' usage of the lands in the vicinity of the proposed subdivision is indistinguishable from that of the general public, and consists of hiking, camping, hunting and other recreational use. Although Plaintiffs GLEASONS and witnesses Charles Jonkel and Allen Shallenberger are members of Plaintiff MONTANA WILDERNESS ASSOCIATION, prior to its commencement of this action, the organization made no appearance before any of the deliberating agencies as an organization, nor was any action taken by any person claiming to be acting as

a spokesman or representative of the organization.

11. Defendant MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES, hereafter, DEPARTMENT, began its review of the preliminary plat of Arrowleaf West in February, 1975. Review by the DEPARTMENT began with the submission of a copy of a plat of Arrowleaf West indicating the location of percolation test holes made by Mr. Mike Clasby, district sanitarian for Teton County through the Office of Environmental Health. Defendants CRABTREE, CRAWFORD & JENSEN assisted Mr. Clasby in his testing and who, in turn, requested approval of the number of holes and their sufficiency of Mr. Al Keppner of the DEPARTMENT. (Exhibit 15.)

12. The DEPARTMENT indicated their satisfaction with the percolation tests and set the fee for review of the preliminary plat on June 17, 1975. (Exhibit 22)

13. Solid waste disposal plans received the acceptance of the local sanitary landfill,and approval of the DEPARTMENT was given March 25, 1975. (Exhibit 67)

14. An Application for Approval of Arrowleaf Preliminary Subdivision Plat, containing an environmental assessment prepared by defendants CRABTREE, CRAWFORD and JENSEN, was submitted to the Teton County Planning Board June 25, 1975. (Exhibit 3)

15. The Teton County Planning Board is a duly constituted county planning board and the designated agency of the defendant BOARD OF COUNTY COMMISSIONERS of TETON COUNTY, hereafter, COMMISSIONERS, for local review of proposed subdivision preliminary plats.

16. Notice of the public hearing to be held by the Planning Board on the preliminary plat of Arrowleaf West was published in the Choteau Acantha, a newspaper of general circulation in Teton County, on July 31, 1975. (Exhibit 74)

17. The owners of Arrowleaf West and each property owner of record immediately adjoining the land included in the plat were notified by the Planning Board by registered mail of the public hearing on the preliminary plat no less than 15 days prior to the date of the hearing. (Exhibit 75)

18. Opportunity for public participation in the deliberations of the Planning Board was provided by the public hearing to consider the preliminary plat of Arrowleaf West, at its meeting August 19, 1975. Comments were made in person and by correspondence, and expressed views of some in attendance concerning the need for the subdivision and its effects on agriculture, wildlife, environment and local services.

19. A representantive of defendant DEPARTMENT, Mr. Al Keppner, attended the public hearing on the preliminary plat and indicated persons desiring to make further comment could contact him. (Exhibit 58)

20. A copy of the minutes of the Planning Board public hearing of August 19, 1975 was received by the defendant COMMISSIONERS on September 2, 1975.

21. The Teton County Planning Board, by a vote of 9-2, Oct.5,1975 recommended approval of the preliminary plat of the Arrowleaf West subdivision be expressed to defendant COMMISSIONERS.

22. Defendants CRABTREE, CRAWFORD and JENSEN and COMMISSIONERS were informed of the Planning Board's decision by letter from the Planning Board chairman, Mr. Nauk dated October 14, 1975. (Exhibit 7)

23. Defendants CRABTREE, CRAWFORD and JENSEN submitted additional information to defendant DEPARTMENT on January 12, 1976, consisting principally of form ES-91, Information Regarding Water Supply, Sewage Disposal and Solid Waste Disposal for Realty Subdivisions. (Exhibit 12)

24. Information submitted with the ES-91 included well logs for drilled wells in the area, showing yield, drawdown and duration of test pumping, as well as a description of soils penetrated by the well driller, Mr. Ray Anderson. Information available to defendant DEPARTMENT substantiated there was an adequate quantity of water for domestic use.

25. Testimony at trial, although indicating unsuccessful water well drilling, did not contradict the fact that over 20 operating wells of adequate quantity had been drilled by Mr. Ray Anderson in the area of the proposed subdivision site. Defendant JENSEN testified to the willingness of himself and his partners to make appropriate adjustment if needed, to prospective purchasers to assure an adequate water supply.

26. Information available to defendant DEPARTMENT indicated that individual water supply systems could be constructed to provide water free from bacteriological contamination and of a satisfactory chemical quality. Testimony indicated water had been tested on Arrowleaf East, and had been found to be of satisfactory quality. Testimony was presented of a sulphur odor to water which, in one instance, was simply treated by sealing off sulphur shale as the source of the odor. In the remaining instance where a test drilling produced water with an odor, the location was abandoned in favor of an alternate location without any exploration of treatment to eliminate the unsatisfactory characteristics.

27. Information available to defendant DEPARTMENT indicated that water supply sources could be located as to be adequately protected from contamination from sewage disposal systems, that sewage disposal systems could be located so as not to be within 100 feet horizontal distance from the maximum high water level of a 100-year flood of any river, lake, stream, pond or flowing watercourse, and that there were suitable locations on each proposed lot where a minimum of four feet could be maintained between the bottom of a subsurface effluent disposal device and groundwater.

28. Testimony offered at trial by Dr. Donald Reichmuth although expressing concern for suitability of separation of sewage disposal from groundwater nevertheless revealed adequate building site locations. Regarding lots bordering along the South Fork of the Teton River, terrace locations within distances of concern were on lots which had much higher ground suitable for building away from the lowland terrace. For Lots 27 and 28, for which slope in excess of 15% was of concern, Dr. Reichmuth testified to a strip on each lot of 60-foot width wherein slope was within acceptable limitations. Lots 27 and 28 each have northern dimensions in excess of 400 feet, for a total suitable area of several thousand square feet in which drainfield, building and water supply source can be located.

29. A sufficient number of soil test borings and percolation tests were made to adequately demonstrate the absorptive ability of the soil throughout the site. Dr. Reichmuth testified to particular locations within some lots which he thought, were he to be a consulting engineer seeking to assure prospective purchasers of suitable lots, would require further testing. Dr. Reichmuth did not testify that the descriptions given, or the testimony that Mr. Clasby and Mr. Anderson thought there was good coverage of the proposed site, were in error. The method of soil test analysis by back-hoe excavation suggested by Dr. Reichmuth conflicted with expressed desire of the Arrowleaf owners to preserve the character of the area with as little disturbance as possible, and with the testimony of Mr. Keppner that the borings were an acceptable testing method under defendant DEPARTMENT'S procedure.

30. Soil and percolation tests were made under the supervision of persons knowledgeable in the field of soil science.

31. Plats or maps showing total area, number of dwelling units, dimensions of individual lots, topography, location of test

holes and borings, suitable location of subsurface sewage disposal systems, suitable location of water supply, and location of streams, lakes or ponds were submitted to the Department.

32. Information available to the DEPARTMENT indicated locations on each proposed lot where slope was less than 15%.

33. A typical lot layout was provided the DEPARTMENT which showed critical dimensions and distances, location of buildings with distances from road and property lines, locations of sewage disposal systems, and distances of sewage disposal systems from flowing water.

34. Each proposed lot contains sufficient area of acceptable slope upon which a building, water supply and sewage disposal system can be constructed satisfying adequate separation, setback from property lines, slope and depth to groundwater. Although Dr. Reichmuth's approach to analysis was one of second-guessing the DEPARTMENT'S work he was unwilling to conclude that proposed lots did not contain suitable area for building site, water well and sewage disposal systems.

35. Information submitted by Defendants CRABTREE, CRAWFORD and JENSEN was offered in response to DEPARTMENT direction, and in reliance on expressed satisfaction with the sufficiency of the information. Mr. Keppner field-checked information submitted to the DEPARTMENT.

36. A Preliminary Environmental Review was prepared on May 7th, 1976 by the DEPARTMENT to determine whether the action might significantly affect the quality of the human environment. (Exhibit 11).

37. The Preliminary Environmental Review was circulated to members of the public for their comment on the proposed subdivision. The circulation included the Montana Wilderness Association, Teton County Planning Board, Choteau Acantha, and others who requested

their names be placed on the mailing list for PERs. Mary Sexton, whose family owns property in the vicinity of the proposed subdivision, asked to be on the mailing list, and her response was received by the DEPARTMENT within the period for comment. Dr. Charles Jonkel, who did not request to be placed on the mailing list, received a copy of the Preliminary Environmental Review because of the DEPARTMENT'S belief he would be an interested person.

38. The PER is a public document and may be inspected upon request by any member of the public or representative of governmental agency.

39. The PER considered the impact of the proposed subdivision on environmental resources which were limited, unique, fragile or endangered. The impact was determined to be unknown.

40. For the period 1970 to 1976, thirteen observations of grizzly bear were reported within a five mile radius of the proposed subdivision Although grizzlies are classified as a "threatened species" for federal purposes, Dr. Charles Jonkel testified that sufficient data will likely cause the grizzly bear for Montana to be removed from the list of "threatened species." Intensive study of the area commenced after initiation of the present suit. Despite intensive efforts, items such as critical habitat and threshold levels of disturbances caused by the proposed subdivision are still undefined. The state of Montana permits hunting of the grizzly bear in the vicinity of the proposed subdivision. No other animals classified as "threatened" or "endangered" were made known to the DEPARTMENT or COMMISSIONERS to exist on or near the proposed subdivision site at the time the PER was circulated.

42. The principal habitat for game animals is the Bob Marshall Wilderness, Lewis & Clark National Forest, Deer Mountain Game Range and other public lands. The impact of Arrowleaf East on animals such as the mule deer has indicated the development has not significantly impacted on wild life species.

43. The proposed subdivision does not significantly affect environmental attributes recognized as being endangered, fragile or in severely short supply.

44. Although the PER contains no specifically-referenced section concerning whether the proposed subdivision is "significantly growth inducing," sufficient data was provided the DEPARTMENT regarding that concern, and the testimony presented at trial did not reflect that the subdivision is either significantly growth inducing or inhibiting.

45. Sufficient information was available to the DEPARTMENT upon which a decision could be made whether the proposed subdivision would substantially alter environmental conditions in terms of quality or availability, and the negative determination by the DEPARTMENT was substantiated by the evidence. The subdivision was conceived as an area suitable for persons of modest means to build recreational cabin sites on private land proximately located adjacent to vast public wilderness areas. Defendants, CRABTREE, CRAWFORD & JENSEN have retained lots for their personal recreational residences, and experience with the Arrowleaf East subdivision reflects both its nature as a site for recreational homesite while demonstrating responsibility in protecting environmental quality.

46. The DEPARTMENT utilized a systematic, interdisciplinary approach which integrated other governmental agencies, such as the Department of Fish and Game, Department of Community Affairs, Department of Anthropology of the University of Montana, Montana Bureau of Mines and Geology, plus public input.

47. The DEPARTMENT considered unquantified environmental amenities and values such as aesthetics, demands on environmental resources, historical and archeological sites, and extensive potential impacts on human population and their use of the area, as evidenced by the PER, in addition to economic and technical

information.

48. A lifting of sanitary restrictions on the proposed subdivision is not a major state action significantly affecting the quality of the human environment.

49. The MONTANA WILDERNESS ASSOCIATION submitted no comment to the DEPARTMENT'S PER.

50. The DEPARTMENT approved the plat of the proposed subdivision on June 8th, 1976 by conditionally lifting sanitary restrictions for the subdivision.

51. The approval of the Department contained the following conditions:

a) THAT the lot sizes as indicated on the plat to be filed with the County Clerk and Recorder will not be further altered without approval, and,

b) THAT the lots shall be used for single family dwellings, and,

c) THAT the individual water system will consist of a drilled well constructed in accordance with the criteria established in MAC 16-2.14(10)-S14340 to a minimum depth of 30 feet, and,

d) THAT the individual sewage disposal system will consist of a septic tank and subsurface drainfield of such size and capacity as set forth in MAC 16-2.14(10)-S14340, and,

e) THAT each subsurface drainfield shall have a mimimum absorption area of 160 square feet per bedroom, and,

f) THAT the bottom of the drainfield shall be at least four feet above the water table, and,

g) THAT no sewage disposal system shall be constructed within 100 feet of the maximum highwater level of a 100 year flood of any stream, lake, watercourse, or irrigation ditch, and,

h) THAT plans for the proposed water and individual sewage systems will be reviewed and approved by the Teton County Health Department before construction is started, and,

i) THAT no structure requiring domestic water supply or a sewage disposal system shall be erected on Lot 12, and,

j) THAT the developer shall provide each purchaser of property with a copy of plat and said purchaser shall locate water and/or sewage facilities in accordance therewith, and,

k) THAT instruments of transfer for this property shall contain reference to these conditions, and,

l) THAT departure from any criteria set forth in MAC 16-2.14 (10)-S14340 when erecting a structure and appurtenant facilities in said subdivision is grounds for injunction by the Department of Health and Environmental Sciences.

52. No proceedings for administrative review of the Department's decision were instituted within thirty days of the final decision of the Department of Health's removal of sanitary restrictions for the proposed subdivision. No complaint alleging a violation of the Sanitation in Subdivisions Act was made to the DEPARTMENT prior to the institution of this action.

53. A composite plat of Arrowleaf East & West was made for the Teton County Commissioners at their request and reviewed by them in December, 1975.

54. The Board of County Commissioners met on January 19, 1976 and considered plats of Arrowleaf West, the environmental assessment, public hearing, planning board recommendations and other information concerning the effect of the subdivision on the public interest.

55. The County Commissioners considered and discussed statutory criteria for weighing the public interest, and made oral findings concerning the following:

a) the basis of the need for the subdivision;

b) expressed public opinion;

c) effects on agriculture;

d) effects on local services;

e) effects on taxation;

f) effects on the natural environment;

g) effects on wildlife and wildlife habitat, and

h) effects on the public health and safety.

56. The COMMISSIONERS approved the preliminary plat on January 19th, 1976.

57. On September 20th, 1976 the COMMISSIONERS caused their findings and approval of the preliminary plat to be reduced to writing.

58. No complaint of a violation of the Subdivision and Platting Act was made to the Teton County Attorney prior to the institution of this action.

59. The DEPARTMENT'S and COMMISSIONERS' findings, conclusions or decisions were not:

a) in violation of constitutional or statutory provisions,

b) in excess of the statutory authority of the agency,

c) made upon unlawful procedure,

d) affected by other error of law,

e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record,

f) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion, nor were findings of fact upon issues essential to its decision not made although requested nor were findings of fact upon the issues essential to their decision refused although requested.

60. In addition to the conditions imposed by the DEPARTMENT'S approval, lots proposed for sale in the subdivision are subject to protective covenants which:

a) limit use to residential purposes only;

b) restrict construction to one residence per lot;

c) prohibit further division of lots;

d) prohibit individual sewage disposal systems which are not located, constructed or equipped in accordance with the standards and requirements of the Department of Health & Environmental Sciences in effect on the date such system is constructed or which are located, constructed or equipped in such a manner as to pollute the water of any stream, spring or other source of water;

e) require tract owners to attempt to preserve the natural beauty of the site and its surroundings, prohibiting unnecessary removal of trees, and construction of residences so as to reasonably blend with the landscape, and requiring fences be constructed so as to be consonant with and blend with the ecology and natural beauty of the area;

f) require the approval of an architectural control committee;

g) impose penalties of actions to restrain violations of any covenant, to recover damages or impose a civil penalty of $1000. (Exhibit 62).

61. The experience with the effect of the restrictive covenants on the nature of the residences built on Arrowleaf East has been that residences have been screened from view and blend in with the natural forestation on the site.

62. The restrictive covenants apply to both Arrowleaf East and West and were of record with the Clerk and Recorder of Teton County at the time of approval of the Arrowleaf East plat in 1972.

63. The COMMISSIONERS gave approval of the final plat on July 22, 1976.

64. Defendants' actions will not irreparably injure the environment, wildlife in the area, recreational interests or aesthetic enjoyment of the area.

65. Defendants CRABTREE, CRAWFORD & JENSEN altered their positions in reliance that their submissions and approvals by the DEPARTMENT and COMMISSIONERS were in conformity with the information

requested. Defendants CRABTREE, CRAWFORD & JENSEN undertook actions in hiring surveyors, civil engineers, advertising, and had undertaken to enter into contracts for sales of lots and had received earnest money deposits from six prospective purchasers. Additionally defendants personally made improvements in the narrow road access to the individual lots so that such access would minimize the unnecessary removal of trees.

66. The actions of defendants CRABTREE, CRAWFORD & JENSEN and their actions will not irreparably injure the environment, wildlife in the area, recreational interests, or aesthetic enjoyment of the area. Plaintiffs GLEASON will not be adversely affected nor would plaintiff GUTHRIE. Plaintiff GLEASON testified that the proposed subdivision site could not be seen from their dude ranch. Plaintiff GUTHRIE testified that the present Arrowleaf East subdivision was not offensive.

67. Based on the evidence any departure by the DEPARTMENT from its information-gathering procedures is not prejudicial to plaintiffs or the public.

68. The court incorporates Findings of Fact which may be included in its Conclusions of Law by reference. From the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW:

1. Plaintiffs have shown no injury to a property or civil right distinguishable from the public generally, and therefore, have no standing to sue for injunction.

2. Plaintiffs have failed to exhaust available administrative remedies for correction of either the DEPARTMENT or COMMISSIONERS' actions and have no standing. Specific failings include:

a. Failure to make complaint under the Sanitation in Subdivisions Act, Section 69-5007;

b. Failure to compel compliance with the Subdivision

and Platting Act, Section 11-3867;

c. Failure to petition for review within 30 days after service of a final decision of the agency, Section 82-4216, and it is hereby expressly decreed that the action of the DEPARTMENT in lifting sanitary restrictions and the actions of COMMISSIONERS in granting final plat approval are final decisions.

3. Plaintiffs' claims are barred by estoppel.

4. Plaintiffs' claims are barred by laches.

5. Plaintiffs' claim is moot, because necessary approvals of both the DEPARTMENT and COMMISSIONERS were properly granted.

Notwithstanding any of the above, each of which constitute an independent and sufficient ground for dismissal of Plaintiffs' Complaint, the Court further concludes that relief by injunction is an improper remedy for each of the following reasons:

6. The DEPARTMENT'S and COMMISSIONERS' approval of the proposed Arrowleaf West subdivision does not result in irreparable harm to Plaintiffs.

7. Plaintiffs have not shown threatened irreparable injury becuase the DEPARTMENT and COMMISSIONERS acted properly, and because Plaintiffs have adequate remedies at law.

The Court further concludes:

8. The DEPARTMENT and COMMISSIONERS have adequately provided for reasonable opportunity for citizen participation prior to their final decisions withing the requirements of Article II, Section 8, 1972 Montana Constitution.

9. The applicable administrative regulations concerning the lifting of sanitary restrictions and approval of water and sewer facilities in subdivisions are those adopted September 21, 1973 and made effective November 11, 1973.

10. Lifting sanitary restrictions on the proposed Arrowleaf

subdivision is not a "major action of state government significantly affecting the quality of the human environment."

11. The Montana Environmental Policy Act and its implementing regulations do not require an environmental impact statement be filed for the proposed Arrowleaf West subdivision.

12. The DEPARTMENT has not acted arbitrarily or capriciously or in any way abused its discretion in reaching its determination that no impact statement need be prepared.

13. The DEPARTMENT'S regulatory function is in the prescribed areas of water supply, sewage and solid waste disposal, and any failure to prepare an impact statement has nothing to do with the authority of the COMMISSIONERS to approve subdivision development locally.

14. The approval of the preliminary and final plats of Arrowleaf West by the COMMISSIONERS complies with the requirements of the Subdivision and Platting Act.

15. Necessary approvals of the DEPARTMENT and COMMISSIONERS were legally granted.

16. The DEPARTMENT and COMMISSIONERS have substantially complied with their regulations, and departure, if any, from a prescribed procedure constitutes harmless error.

17. Based on the evidence, any departure from the information-gathering procedures of either the DEPARTMENT or COMMISSIONERS is not prejudicial to Plaintiffs or the public.

18. The actions of the DEPARTMENT and COMMISSIONERS have fulfilled the purposes of the Sanitation in Subdivisions Act and the Subdivision and Platting Act, and the approvals thus given are proper.

Because of all of the foregoing, the Court futher finds:

19. The temporary injunction in this matter was issued without notice, and is hereby dissolved, and Defendants are entitled to their costs of application for dissolving the

injunction in an amount of one hundred dollars ($100).

20. The Court adopts by reference any Conclusions which may be designated as Findings of Fact.

From the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court enters its JUDGMENT as follows:

1. That the Temporary Restraining Order issued August 24, 1976 is hereby dissolved;

2. That Plaintiffs' request for permanent injunction enjoining and restraining defendants CRABTREE, CRAWFORD and JENSEN is hereby denied;

3. That Plaintiffs' request for mandatory injunction ordering the reinstatement of the DEPARTMENT'S sanitary restrictions is hereby denied;

4. That Plaintiffs' request for mandatory injunction withdrawing the COMMISSIONERS' approval of the Arrowleaf West plat is hereby denied;

5. That defendants are hereby awarded costs in the amount of one hundred dollars ($100) as and for the costs of application to dissolve the restraining order;

6. That defendants are awarded their costs herein incurred.

DATED this _____ day of _____, 1978.

_____

R.D. McPHILLIPS, DISTRICT JUDGE

CERTIFICATE OF SERVICE BY MAIL

I, Michael B. Anderson, one of the attorneys for Defendants J.R. CRABTREE, JAMES M. CRAWFORD and ROBERT W. JENSEN, hereby certify that the foregoing PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW was duly served upon opposing counsel by depositing a copy of the same in the U.S. mail, addressed to them at the following addresses:

James H. Goetz
P.O. Box 1322
Bozeman, Montana 59715

Gregory L. Curtis
P.O. Box 70
Choteau, Montana 59422

Peter M. Meloy
Horsky Block Building
Helena, Montana 59601

Charles M. Joslyn
Teton County Attorney
Choteau, Montana 59422

Stan Bradshaw
Legal Division, Montana Department
of Health & Environmental Sciences
9th and Roberts
Helena, Montana 59601

Dated this 19th day of May, 1978.

Original Signed by
Michael B. Anderson

MICHAEL B. ANDERSON
CHURCH, HARRIS, JOHNSON & WILLIAMS
P.O. Box 1645
Great Falls, Montana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 1978, I mailed a true and correct copy of DEFENDANT, BOARD OF COUNTY COMMISSIONERS, PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW and DEFENDANT, BOARD OF COUNTY COMMISSIONERS, BRIEF, postage prepaid, to:

Church, Harris, Johnson & Williams
P.O. Box 1645
Great Falls, Montana 59403

James H. Goetz
P.O. Box 1322
Bozeman, Montana 59715

Stan Bradshaw
Department of Health and Environmental Sciences
Legal Division
1400 11th Avenue
Helena, Montana 59601

/s/ Laura Jaconetty
LAURA JACONETTY
Secretary to Charles M. Joslyn

DEFENDANT BRIEF

MAY 22 1978

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE

COUNTY OF TETON

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs	FILE NO. 40471
-vs-	DEFENDANT, BOARDOF COUNTY COMMISSIONERS, BRIEF
MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants	

****

The Court has heretofore indicated that the issues in this case have been thoroughly briefed. However, there are now some aspects of this case which came about at the trial, and therefore necessitate some comment.

All of the testimony on damages was either speculative or did not prove any damages that are recognized under the law. It has been very apparent all through this case that the parties have dwelled at length upon what the law is, with no thought of why it is or the purpose behind it. Surely the subdivision law is not meant to grant rights to some to prevent the exercise of property rights by others. The statement of purpose in the subdivision act, section 11-3860 R.C.M. 1947, does not indicate that the act is to be used to prohibit subdivisions. The manifest use of the law as sought by the plaintiffs is best expressed by the following quotation from newspaper columnist, Sydney Harris:

> "There is a vast difference between the 'environmentalist' who wants to maintain the integrity of the land and the purity of the water for everyone's enjoyment, and the other kind, who simply wants to protect his own privileged area of possession from those who seek the same amenities."

After the trial of this case, it is readily apparent that plaintiffs are of the latter kind.

The testimony regarding the Wilderness Society is that the testifying member feels the public land or lands adjacent to Arrowleaf should be their exclusive domain and kept for the uses they desire. Apparently they claim

some indefinable right that is better or higher than that of the public, and they can determine their priority of use for recreation which somehow differs from that of the public. It is also interesting to note that somehow their kind of recreation is compatible with the grizzly bears in the area, whereas the use by others is not. The Wilderness Society did not prove any damage to the Society or to any member that would outweigh the rights of the subdivision owners or that were related to the actions of the Defendants.

Plaintiff Guthrie's claim of damage presents a rather unique and obtuse theory, which, if accepted, could amount to an appropriation of all of Montana, since he has written about the Big Sky. I respect Plaintiff Guthrie for his writing, and I do not intend to disparage him by my remarks. Nevertheless, we must be realistic. If his theory were accepted, an artist who has painted the area could claim the exclusive use of all the mountains. To state such a proposition is to refute it.

Likewise, the Gleasons have not shown any rights that have been violated.

The claim of injuries should be examined in light of the subdivision law. Subdivisions are not evil or wrong. Therefore, a subdivision itself is neutral. The arguments of Plaintiffs which are aimed at the acts of the Defendants are really concerned with the subdivision and its location. All of the testimony on injuries that would be suffered from the subdivision do not have anything to do with the legality or illegality of the subdivision, but rather just the subdivision itself. That is, the alleged injuries would result, regardless. Therefore, the acts in approving the subdivision are not properly in issue because the alleged harm does not flow from the approval of the subdivision. Plaintiffs' position would be similar to a party who has been injured by a driver suing the County Treasurer for issuing the driver a license. This brings about another aspect of this argument. It is still the law that this is not a proper case for an injunction. We have cited Holz v. Babcock, 143 Mont 341, 390 P2d 801 on this. That is still good law and should be followed, especially from the standpoint of the practicality of allowing just anyone to sue public officials without any responsibility for the consequences. Even in those

cases where injunctions can be used against the public officers, the Plaintiffs have a direct interest, such as a taxpayer being affected by a tax. In those cases, there is a direct relationship between the official action and the alleged harm. In this case there is none.

At this point, I refer the court to a statement attached, which is made a part hereof, because this writer feels that it is legitimate argument and this writer adopts the same in toto.

Section 93-4204.1 R.C.M. 1947 indicates that the legislature requires a showing of injury to the Plaintiffs, which injury is distinguishable from an injury to the public generally. Plaintiffs have glossed over the injury aspect of this case by a blatant claim that they alleged and demonstrated damage to themselves different from that sustained by the public generally. Yet, that has not been demonstrated. On the contrary, their claims resolve down to environmental damages. Their rights in the environment are not greater than yours or mine. They would have the court believe that they have some special claim to the area or the environment, but whose environment is involved? Surely Plaintiffs do not have any greater environmental claims than the public in general. This is especially applicable to the Wilderness Association.

In this case, being one in equity, the Court should weigh the equities of the parties. Surely our concept of the ownership of property and the right to dispose of it should be considered in balancing the equities between the parties. Otherwise, we are beginning a journey down a very dangerous road, leading to the obliteration of any rights in property. It can best be summarized by the rhetorical question, "Does my neighbor's environmental rights include a right in a shade tree on my property so that my neighbor may enjoin me from cutting down my tree?"

/s/ Charles M. Joslyn
CHARLES M. JOSLYN
Teton County Attorney
Attorney for Defendant, Board of County Commissioners, Teton County

lose on the venture; whether there are 2 people opposed to such development or 20; whether the County Planning Board fully fulfilled their obligations; whether the adjacent property owners approve or disapprove; or one of many, many more petty objections to this development. Actually, as I have stated, the question is, is it right or wrong?

As I have stated before it is not a matter of doing as I do but as I say

DEFENDANT, BOARD OF COUNTY COMMISSIONERS, PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

MAY 22 1978

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE

COUNTY OF TETON

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs -vs- MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants **********	FILE NO. 40471 DEFENDANT, BOARD OF COUNTY COMMISSIONERS, PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW

The Defendants, Board of County Commissioners, submit the following proposed findings of facts and conclusions of law in regard to that portion of this case that involves the Defendants.

I.

That on June 30, 1975, an application for approval of the Arrowleaf West preliminary subdivision plat was made to the Teton County Planning Board by Robert W. Jensen, one of the partners in the subdivision.

II.

On July 1st, 1975, the Teton County Planning Board published a notice of a public hearing on a preliminary plat for the Arrowleaf West subdivision. The hearing notice was for a hearing to be held on the 19th day of August, 1975, at the courtroom in the Courthouse at Choteau, Montana, at 7:30 P.M.

III.

The Teton County Planning Board caused a notice of the said hearing to be mailed by registered letter to certain people, including landowners in the area of the proposed subdivision.

IV.

On August 19, 1975, at 7:30 P.M. in the courtroom in the Teton County courthouse, the Planning Board held a hearing on the proposed subdivision known as Arrowleaf West.

V.

After the planning board hearing, the planning board, by way of a letter from the secretary of the board, John R. Nauck, sent a letter to the applicants and the Teton County Board of County Commissioners on October 14, 1975, that the planning board approved the preliminary plat for the subdivision at the planning board meeting of October 7, 1975.

VI.

On January 19, 1976, the Board of County Commissioners of Teton County considered the approval of Arrowleaf West subdivision. Although the board did not make written findings at that time, the board considered the criteria set forth in section 11-3866(4) R.C.M. 1947.

VII.

On September 20, 1976, the Board of County Commissioners made and entered written findings which weighed the criteria set forth in section 11-3866(4) R.C.M. 1947 and ordered that the minutes of the meeting of January 19, 1976 be amended to approve the preliminary plat of Arrowleaf West subdivision. The amendment and findings were made at the request of the counsel for the Defendants Jensen, Crabtree and Crawford.

VIII.

In regard to the action of the Board of County Commissioners, Teton County, the Plaintiffs' complaint alleges:

> "19. The Board of County Commissioners of Teton County gave approval to the proposed Arrowleaf West Subdivision or or about July 22, 1976, without holding the required public hearing, without giving the required notice of public hearing, and without making the required finding that the subdivision would be in the public interest after considering statutory criteria.
>
> 20. The approval given by the Board of County Commissioners of Teton County to the plat of the Arrowleaf West Subdivision, as above-described, was in violation of the Montana Subdivision and Platting Act and specifically in violation of the provisions of Section 11-3866, Revised Codes of Montana, -1947."

IX

The Plaintiffs' complaint does not contain any allegations of facts which would claim that the actions of the Defendant Board in respect to Arrowleaf West were fraudulent or so arbitrary as to amount to a clear and manifest abuse of discretion.

X.

There was no evidence introduced to show that the actions of the Defendant Board brought about any irreparable injury to the Plaintiffs, to the Montana Wilderness Association or the individual members of the Wilderness Association.

XI.

The Plaintiffs did not introduce evidence which would show that any alleged injuries they would suffer are distinguishable from any injuries to the public generally.

XII.

There is no evidence to show that the actions of the Defendant Board are a cause of the damages as alleged in the complaint.

XIII.

That, although thePlaintiffs Guthrie and Gleasons appeared at the hearing of the Teton County Planning Board on August 19, 1975, they did not raise any question about any lack of notice of the hearing or any authority of the Planning Board to hold a hearing on behalf of the Defendant Board of County Commissioners of Teton County. The Montana Wilderness Society did not appear at the public hearing.

XIV.

The Plaintiff, Mrs. Gleason, was a member of the Teton County Planning Board and voted against the approval of the subdivision at the Planning Board level.

CONCLUSIONS OF LAW

I.

Section 11-3866 R.C.M. 1947 requires that a governing body or its authorized agent or agency hold a public hearing on a preliminary plat. The hearing by the Teton County Planning Board on the Arrowleaf West subdivision met the requirement of the section.

II.

The Teton County Planning Board is the authorized agent or agency for the governing body, the Teton County Board of County Commissioners.

III.

That the prerequisite notices of the hearing were given as required by section 11-3866 R.C.M. 1947.

IV.

That the only issues properly raised by Plaintiffs' complaint in respect to the Defendant Board of County Commissioners is whether or not a public hearing was held as required by law on the preliminary plat of Arrowleaf West subdivision after the required notice. The Defendants objected to any evidence beyond the scope of the complaint. The Plaintiffs sought to go beyond the scope of the complaint in regard to the basis for the Defendant Board's approval of the subdivision. The objection is well founded and the Court has not considered any of the evidence.

V.

That had Plaintiffs taken issue with the method the Defendant Board used in weighing the criteria or failing to weigh the criteria set forth in section 11-3866 R.C.M. 1947 the Court concludes that the proper procedure would have been for Plaintiffs to allege and prove that the Defendant, Board's actions were fraudulent or so arbitrary as to amount to a clear and manifest abuse of discretion. State ex rel Bowler v. Board of Commissioners of Daniels Co., 106 Mont 251, 76 P2d 648.

VI.

The Court cannot conclude as a matter of law that the Defendant Board's actions in approving Arrowleaf West subdivision were contrary to the law. The courts are without power to interfere with the discretionary actions of a board within the board's authority. State ex rel Bowler v. Board of Commissioners of Daniels Co., supra. The actions of the Board of County Commissioners in approving the Arrowleaf West subdivision were within the discretion of the Board as a matter of law.

VII.

The Defendant Board has legal authority to amend its minutes and the Board's Amendment of September 20, 1976, to the minutes of January 19, 1976, is within the power and authority of the Board and is in all respects proper.

VIII.

Section 11-3866 (2) R.C.M. 1947, requires a governing body to approve, conditionally approve or reject a preliminary plat within sixty (60) days of its presentation unless the subdivider consents to an extension of the review period. Subsection (4) of section 11-3866 is unclear on any time limit for the issuance of written findings of fact. The Court concludes that a subdivider can consent to any extension of time for the review process by the County governing body. In this case, the time involved was not contrary to section 11-3866(2).

IX.

The Plaintiff's argument is with the effects of subdivision, regardless of the legality of the approval. The Plaintiffs' testimony on the effects of the subdivision on plaintiffs has to do with the subdivision, regardless of the procedure involved in the approval of the subdivision by the governing body of Teton County. Therefore, the court cannot conclude that plaintiffs have suffered damages or injury as a result of the Defendants' actions. The court concludes that plaintiffs have not demonstrated irreparable harm.

X.

Section 93-4204.1 R.C.M. 1947 evidences to the Court an intent by the legislature that members of a citizens group must show an injury which is distinguishable from an injury to the public generally to obtain injunctive relief. The Court concludes that the Plaintiff Montana Wilderness Society, did not meet this burden. The Court cannot conclude that any injury would be suffered by the Montana Wilderness Society or its members that is distinguishable from an injury to the public generally. The general public has the same rights in the area as that of Plaintiffs.

The Court concludes that Plaintiffs' request for an injunction should be denied.

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Department of Health and Environmental Sciences
STATE OF MONTANA HELENA, MONTANA 59601

John S. Anderson, M.D.
DIRECTOR

Arthur C. Knight, M.D.
Director

May 20, 1978

Nina Greyn
Clerk of the District Court
Teton County Courthouse
Choteau, Montana 59422

RE: CAUSE NO. 40471

Dear Nina:

Enclosed you will find the proposed Findings of Fact and Conclusions of Law of the Department of Health and Environmental Sciences; the Department's Supplementary Trial Memorandum; and Bulletin 332, April 1969. I would appreciate your bringing them to the attention of Judge McPhillips at your earliest convenience.

Thank you for your time and attention.

Sincerely,

Sandra R. Muckelston
Chief Counsel
Department of Health and
Environmental Sciences
1400 Eleventh Avenue
Helena, Montana 59601

ENCL.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY, J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants.	No. 40471 DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been tried by the Court, sitting without a jury, the Court does hereby Find the Facts and states separately its Conclusions of Law thereon, and directs the entry of appropriate Judgment, as follows:

FINDINGS OF FACT

1. Plaintiff, A. B. Guthrie, Jr., is a real property owner and resident of Teton County, Montana.

2. Plaintiffs, Alice and Kenneth Gleason, own and operate a dude ranch approximately one mile to the west of proposed Arrowleaf West Subdivision in Teton County, Montana.

3. Plaintiff, Montana Wilderness Association, is a non-profit corporation organized and operating under the laws of the State of Montana, dedicated to the promotion of wilderness areas and the advancement of environmental causes generally.

4. That the Montana Department of Health and Environmental Sciences and the State of Montana ("Department") is the agency charged with the duty of administering Montana laws relating to sanitation in subdivisions and water pollution, Sections 69-5001, et seq., R.C.M. 1947.

5. That Arrowleaf West Subdivision is a proposed subdivision located in Teton County, Montana, in the east one-half of Section 33, the northwest quarter of Section 34, Township 25 North, Range 8 West, M.P.M., containing approximately 149.25 acres and is proposed to be divided into approximately 37 lots of between approximately two acres

to approximately 8.6 acres. The general location of the proposed subdivision is approximately 24 miles northwest of Choteau, Montana.

6. That on or about February 22, 1975, the Department of Health and Environmental Sciences received the initial application of the Defendants Jensen, Crawford and Crabtree.

7. That Al Keppner, an employee of the Department of Health and Environmental Sciences who was involved in the review of the Arrowleaf West subdivision, attended the Teton City-County Planning Board meeting August 18, 1975 and by statement at the meeting encouraged individuals who felt their words about Arrowleaf West were not getting through to write to him.

8. That in a letter dated October 14, 1975, John R. Nauck, secretary of the Teton City-County Planning Board, indicated to Defendant Jensen that the Arrowleaf West Preliminary Plat was approved by the Teton City-County Planning Board subject to the conditions set forth in the September 2, 1975 minutes of the Board and subject to the approval of the E.S. 91 form by the state Department of Health and Environmental Sciences.

9. That on or about January 13, 1976, the Department of Health and Environmental Sciences received the E.S. 91 form of the Defendants Jensen, Crawford and Crabtree.

10. That on or about May 7, 1976, the Department of Health and Environmental Sciences completed and circulated copies of the Department's preliminary environmental review on the Arrowleaf West subdivision to interested members of the public, including the Teton City-County Planning Board, of which Alice Gleason, one of the Plaintiffs, was a member; Tom Horobik, president of the Montana Wilderness Association which is another Plaintiff in this action; Charles Jonkel, a witness for the Plaintiffs in this action; and Mary Sexton, who owns property near the proposed subdivision.

11. That the Department of Health and Environmental Sciences

did not refuse to circulate the preliminary environmental review to any parties who requested a copy.

12. That the preliminary environmental review indicated among other information:

* * * * * * * * * * * * *

Terrestrial and Aquatic Life and Habitats:

Judging from comments made by a State Department of Fish and Game official, the impact of the development on wildlife ranges from moderate to major.

Harley Yeager, Region 4 information officer for the Fish and Game Department, Great Falls, said the subdivision is in mule deer winter range and adjacent to an important Rocky Mountain bighorn sheep wintering area.

" . . . Late fall, winter and spring use of the development and surrounding area may have a detrimental effect on the migratory habits of these animals," he wrote. Additionally, Yeager said the development lies within an area occasionally used by black bears and "less frequently" used by grizzly bears. The federal government has classified grizzly bears as being a threatened species in the lower 48 states.

". . . Grizzly use probably occurs during the spring after hibernation ceases," he wrote. "Prospective cabin builders should be made aware of the bears' 'trespassing' habits and the possibility of man-bear confrontations."

The state official suggested that if the development is approved, a department fisheries biologist stationed in Choteau be one of the persons consulted to help design the river crossing to the lots on the west side of the South Fork of the Teton River.

Yeager said an inspection of the site revealed that utility poles are in or near the river channel. " . . . This should be moved out of the floodplain to eliminate loss of the line due to flooding and to keep machinery out of the river channel," he said.

Neither the river nor Arrowleaf Lake, a small seasonal body of water, are significant fisheries. In the past three years both the lake and the river have been dry. The water level in both fluctuates with the seasons.

Water Quality, Quantity and Distributions:

Five wells have been developed on the 320 acres. This was deemed adequate evidence that a water supply is available.

Soil Quality, Stability and Moisture and Geology:

Soil profile test holes and percolation tests indicate the soils are suitable for on-site sewage disposal. Care must be exercised in locating drainfields on Lots 20 through 24 and Lots 26 through 30 in order to avoid the steeper slopes.

Vegetation Cover, Quantity and Quality:

Yeager differed with the developer concerning the status of the flora. The developer contended there was no "critical" plant communities in the proposed development, Yeager thought there was.

". . . The present native plant community of the proposed subdivision is a limber pine type with junipers, silver-

berry and buffaloberry and other shrubs," Yeager said. "Preservation of this plant community is needed to maintain ecological stability of the Arrowleaf area. Mule deer utilize the limber pine types for food and shelter when deep snows drive them down from nearby higher elevations. Therefore, development of the Arrowleaf West subdivision will eliminate a portion of the mule deer winter range." The developer claimed the impact of the development will be minimized by the use of existing roads and adopting restrictive covenants which will discourage the destruction of the flora.

* * * * * * * * * * * * *

Unique, Endangered, Fragile or Limited Environmental Resources: The developer contends that since the development is designed mainly for "weekend recreational use" the impact on wildlife will be minimal. According to the developers, the steps which will be taken to control development will produce a setting which will not seriously disturb the use of winter range.
The Department of Fish and Game disagrees. It's impossible to speculate as to whether the subdivision will be fully developed and to what degree. However, if the subdivision is completely developed and occupancy is held to recreational use, the influence of man will still be strong enough to force wildlife to seek quieter, more undisturbed surroundings. But this process has probably started since the first phase of the development has been approved for several years.

* * * * * * * * * * * * *

Access to and Quality of Recreational and Wilderness Activities: The area offers a variety of recreational opportunities. In addition to easy access to federal forest lands, outdoor enthusiasts will be close to the Bob Marshall Wilderness area, two dude ranches, and for those interested in winter sports, the Teton Pass winter sports area is nearby.
The proposed development will increase the recreational use of the area, but due to the vast amount of public land, the impact will likely be moderate.

13. That the Department of Health and Environmental Sciences did not receive comments on the preliminary environmental review from the Montana Wilderness Association or members of the Teton City-County Planning Board.

14. That, among the comments on the preliminary environmental review received by the Department of Health and Environmental Sciences, a comment from Charles Jonkel dated May 20, 1976, indicated that the authors of the letter had no intimate knowledge of grizzly bears in the area of the subdivision; identified Allen Schallenberger as a source to be contacted if the preliminary environmental review was modified; and indicated that the question of what levels of

human concentration in grizzly habitat becomes a threat to the grizzly's welfare had not yet been resolved.

15. That Charles Jonkel, who later testified that the Fish and Game assessment contained in the Department's preliminary environmental review was inaccurate, failed to point out that inaccuracy in his letter to the Department dated May 20, 1976.

16. That testimony of Allen Schallenberger indicated he was living in the mountains during May 1976 and therefore was not accessible to the Department of Health and Environmental Sciences.

17. That Schallenberger's testimony indicated grizzly bears can be hunted in northwest Montana under a permit system.

18. That, after issuance of the preliminary environmental review, the Department of Health and Environmental Sciences did not receive further comment from the Fish and Game Department.

19. That, on the basis of the preliminary environmental review and the comments on the preliminary environmental review received by the Department of Health and Environmental Sciences, the Department determined that an environmental impact statement was not necessary under the Montana Environmental Policy Act (Section 69-6501 et seq., R.C.M. 1947) for the Arrowleaf West subdivision prior to the lifting of sanitary restrictions.

20. That, in the review of the Arrowleaf West subdivision, the Department of Health and Environmental Sciences considered among other information the following: completed form E.S. 91; a final plat which contained a description of the total acreage of the subdivision and the dimensions of lots located within the subdivision; a plat of the proposed subdivision which contained sixteen (16) soil boring descriptions and locations, and eighteen (18) percolation test descriptions and locations; a USGS topographical map indicating the location of the proposed subdivision; well log reports from wells in the Arrowleaf East subdivision; a typical lot layout; the developers' environmental assessment; and

proposed restrictive covenants.

21. That the Department of Health and Environmental Sciences during the course of its review of the Arrowleaf West subdivision conducted a field investigation of the site of the subdivision in August 1975 to determine among other matters the degree of slopes.

22. That on February 25, 1975, Mike Clasby, R.S., District Sanitarian, indicated by letter to the Department of Health and Environmental Sciences that the eighteen percolation tests gave a good cross-section of the area.

23. That the testimony of Defendant Crawford indicated that the water used for the percolation tests was hauled in a tank trailer.

24. That in a letter dated January 12, 1976, Mike Clasby indicated that, in addition to the eighteen percolation holes measured, other holes had been dug but in most cases they could not get to them with the truck and trailer combination.

25. That the slowest drawdown rate of the eighteen percolation tests (with sixteen results) was one inch per thirty minutes.

26. That the sixteen soil boring tests on the site of the Arrowleaf West subdivision were conducted by Mike Clasby to a depth of ten feet and groundwater was not encountered in any of the tests.

27. That on January 12, 1976, Mike Clasby indicated by letter to the Department of Health and Environmental Sciences that the test borings, although there were not one per five acres, appeared to him to be a very good cross-section of the Arrowleaf West subdivision.

28. That the well logs from the Arrowleaf East subdivision, previously approved by the Department of Health and Environmental Sciences, indicated that potable water in adequate quantities had been found in the area.

29. That Ray Anderson, a well driller, admitted in his

testimony that he could not state potable water would be unavailable on any of the lots in the Arrowleaf West subdivision.

30. That the Department of Health and Environmental Sciences, on or about June 8, 1976, issued a certificate approving the plat, plans and specifications of the Arrowleaf West subdivision, and removing sanitary restrictions from the Arrowleaf West subdivision on the basis of the following conditions:

> THAT the lots sizes as indicated on the plat to be filed with the county clerk and recorder will not be further altered without approval, and,
>
> THAT the lots shall be used for single-family dwellings, and,
>
> THAT the individual water system will consist of a drilled well constructed in accordance with the criteria established in MAC 16-2.14(10)-S14340 to a minimum depth of 30 feet, and,
>
> THAT the individual sewage disposal systems will consist of a septic tank and subsurface drainfield of such size and capacity as set forth in MAC 16-2.14(10)-S14340, and,
>
> THAT each subsurface drainfield shall have a minimum absorption area of 160 square feet per bedroom, and,
>
> THAT the bottom of the drainfield shall be at least four feet above the water table, and,
>
> THAT no sewage disposal system shall be constructed within 100 feet of the maximum highwater level of a 100 year flood of any stream, lake, watercourse, or irrigation ditch, and,
>
> THAT plans for the proposed water and individual sewage systems will be reviewed and approved by the Teton County Health Department before construction is started, and,
>
> THAT no structure requiring domestic water supply or a sewage disposal system shall be erected on Lot 12, and,
>
> THAT the developer shall provide each purchaser of property with a copy of plat and said purchaser shall locate water and/or sewerage facilities in accordance therewith, and,
>
> THAT instruments of transfer for this property shall contain reference to these conditions, and,
>
> THAT departure from any criteria set forth in MAC 16-2.14(10)-S14340 [sic] when erecting a structure and appurtenant facilities in said subdivision is grounds for injunction by the Department of Health and Environmental Sciences.

31. That testimony of Dr. Donald R. Reichmuth indicated he made only two visits to the site of the Arrowleaf West subdivision,

did not perform any chemical analysis of soil or subsurface water, did not perform a soil profile analysis, and did not perform any percolation tests, groundwater tests, or any other subsurface investigation.

32. That Dr. Reichmuth was unable to state that the subdivision would result in groundwater contamination.

33. That Reichmuth's testimony did not preclude availability of an adequate area on each lot in the Arrowleaf West subdivision for location of a septic tank system and drainfield which met the requirements of the rules promulgated pursuant to the Sanitation in Subdivisions Act.

34. That Al Keppner testified that lift stations can be utilized in sewage disposal systems and such utilization is not prohibited by the Sanitation in Subdivisions Act and rules promulgated pursuant thereto.

35. That the conditions placed on the Arrowleaf West subdivision by the Department of Health and Environmental Sciences in its certificate provided that individual water and sewage disposal systems installed in the subdivision must meet the requirements of the Sanitation in Subdivision rules, and must be reviewed and approved by the Teton County Health Department before construction of the systems.

36. That the requirement of each subsurface drainfield's absorption area stated in the Department's certificate exceeded the minimum requirements of Bulletin 332, April 1969, Table III for the slowest absorption rate of the eighteen percolation tests.

CONCLUSIONS OF LAW

I. That all findings of fact stated above which may be stated as conclusions of law are incorporated into these conclusions of law by this section.

II. That the action of the Department of Health and Environ-

mental Sciences in reviewing, approving, and lifting the sanitary restrictions from the Arrowleaf West subdivision were in compliance with the Sanitation in Subdivisions Act, Section 69-5001 et seq., R.C.M. 1947, and its implementing rules.

III. That the Arrowleaf West subdivision will not injure the Plaintiffs in any of the following particulars:

(1) water pollution;

(2) loss of aesthetic values;

(3) loss of recreational values;

(4) damage to the area for the suitability of the operation of a dude ranch; or

(5) other economic, personal, and aesthetic consequences of the Arrowleaf West subdivision.

IV. That the review, approval and lifting of sanitary restrictions from the Arrowleaf West subdivision by the Department of Health and Environmental Sciences complied with the requirements of the Montana Environmental Policy Act, Section 69-6501 et seq. R.C.M. 1947.

V. That the decision of the Department of Health and Environmental Sciences that an environmental impact statement was not required is reasonable and consistent with the Montana Environmental Policy Act and its implementing rules.

VI. That the action of the Department of Health and Environmental Sciences in reviewing, approving, and lifting the sanitary restrictions from the Arrowleaf West subdivision is not a major state action significantly affecting the quality of the human environment.

VII. That the review and approval by the Department of Health and Environmental Sciences of the Arrowleaf West subdivision complies in both spirit and letter with the requirements of Article II, Section 8 of the 1972 Constitution of Montana.

VIII. That the Arrowleaf West subdivision will not cause the

Plaintiffs to suffer irreparable injury and damage.

IX. That the Plaintiffs have failed to prove harm or damage by the Defendant Department of Health and Environmental Sciences in its approval of the Arrowleaf West subdivision.

X. That the evidence before this court and the law warrant judgment generally in favor of the Defendants and against the Plaintiffs.

Respectfully submitted this 20th day of May 1978.

Sandra R. Muckelston

Sandra R. Muckelston
Special Assistant Attorney General
Department of Health and Environmental Sciences
1400 Eleventh Avenue
Helena, Montana 59601

This is to certify that the foregoing was duly served upon opposing counsel of record by depositing a copy in the U. S. mail addressed to him (them) this 20th day of May, 1978.

S R Muckelston

SUPPLEMENTAL MEMORANDUM OF LAW

MAY 22 1978

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

A.B. GUTHRIE, JR.; ALICE GLEASON: KENNETH GLEASON; and, MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY, J.R. CRABTREE, JAMES M. CRAWFORD, and, ROBERT W. JENSEN, Defendants.	NO. 04071 SUPPLEMENTAL MEMORANDUM OF LAW

This brief is supplementary of the Brief in Opposition to Plaintiffs' Motion for Summary Judgment previously submitted by Defendants CRABTREE, CRAWFORD and JENSEN on June 12, 1977.

I. ISSUES PRESENTED:

A. Whether the Department of Health & Environmental Sciences substantially complied with its rules and regulations;

B. Whether the decision of the Department of Health & Environmental Sciences not to prepare an environmental impact statement is subject to court review.

II. SUBSTANTIAL COMPLIANCE.

Plaintiffs have urged the Court to apply the "Accardi doctrine," as first announced in U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) for the proposition that an agency is obligated to follow its regulations, and that agency action taken in violation of procedure should be overturned even where following proper procedures would have led to the same result. Accardi involved a habeas corpus petition by an alien whose deportation was ordered by the Board of Immigration Appeals and whose petition alleged the Attorney General dictated

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ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

that Board's decision contrary to a regulation charging the Board to exercise discretion.

Accardi has been distinguished by the case of American Farm Lines v. Black Ball Freight, 397 U.S. 532 (1970). That case questioned whether the ICC was mandated to require strict compliance with its rules asking that certain information be set forth in statements filed in support of applications for temporary operating authority. The court held that the rules were intended to facilitate the development of relevant information for the Commission's use in deciding applications, and was not a case where the rules confered important procedural benefits upon individuals or where an agency was required to exercise independent discretion. The Court further held:

> ... there is no reason to exempt this case from the general principle that "it is always withing the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party. id., p. 539.

Counsel submit the Black Ball case is controlling here, where the Department of Health's regulations were intended to implement Section 69-5005's directive to adopt "reasonable" rules to implement the Sanitation in Subdivisions Act. Notably absent is proof that departures substantially prejudiced the Plaintiffs' rights or failed to provide the Department the necessary information upon which to base its decision.

III. MEPA THRESHOLD DETERMINATIONS.

The decision to prepare an Environmental Impact Statement is discretionary with the Department. The emerging federal standard for judicial review of that type of decision is the "arbitrary and capricious" standard, represented by Hanly v. Kleindeinst, 471 F. 2d. 823 (2d. Cir, 1972) wherein the court

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will not substitute its judgment for that of an agency unless the agency decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The PER process employed by the Department was designed to create an adequate administrative record to allow a court to determine whether the agency had given due protection to environmental concerns. The approach allows effective judicial scrutiny, but allows the agency leeway to apply the law to factual contexts in which they possess expertise. In no way can the review employed by the Department in Arrowleaf be said to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

RESPECTFULLY SUBMITTED this 19th day of May, 1978.

CHURCH, HARRIS, JOHNSON & WILLIAMS

Original Signed by
Michael B. Anderson

BY _____
MICHAEL B. ANDERSON

P.O. BOX 1645
Great Falls, Montana 59403
Attorneys for Defendants,
J.R. Crabtree, James M.
Crawford, and Robert W.
Jensen

Certificate of Service

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 19 day of May, 19 78

Church, Harris, Johnson & Williams

By _____
302 Northwestern Bank Building
P. O. Box 1645 — Great Falls, MT 59403

CHURCH, HARRIS,
JOHNSON & WILLIAMS
ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

PLAINTIFFS' MOTION TO STRIKE OR TO QUASH

MAY 23 1978

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE

COUNTY OF TETON

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, vs. MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; AND ROBERT W. JENSEN, Defendants.	FILE NO. 40471 PLAINTIFFS' MOTION TO STRIKE OR TO QUASH

COME NOW Plaintiffs, by and through their attorney, James H. Goetz, and move the Court for an order striking or quashing the attachment to the brief of Teton County attorney Charles M. Joslyn, dated May 19, 1978. The attached statement to the brief of said Charles M. Joslyn purports to be a written statement of Teton County Commissioner, Martin Shannon, dated May 17, 1978. The thrust of said written statement is that the challenged subdivision, Arrowleaf West, should be approved. The statement is obviously not evidence. Mr. Shannon had his opportunity to testify in open Court and indeed did testify. Plaintiffs, of course, have the right to cross examine Mr. Shannon based on his testimony. Any consideration of a supplemental written statement by Mr. Shannon cannot be made part of the record as evidence and would obviously be improper. Consideration of the statement by the Court at this time would, among other things, deprive Plaintiffs of their right to cross examine. Moreover, the statement is obviously incompetent for lack of foundation and lack of competency on the part of the witness to draw conclusions that

he does. The statement includes rampant hearsay.

Mr. Joslyn purports to attach the statement as part of his brief. The statement is improper as a legal brief. It submits to the Court no law or no case analysis. Instead, it is simply a policy statement, in the nature of evidence, reflecting Mr. Shannon's views as to why he thinks Arrowleaf West should be approved (and presumably, why he thinks this Court should deny Plaintiffs relief).

This novel attempt to influence the Court's judgment by submitting matters in the nature of evidence which are clearly not part of the record, is highly objectionable. For this reason Plaintiffs respectfully move the Court to strike or quash the statement of Teton County Commissioner Martin Shannon and further request that the Court not consider such statement in its deliberations relating to the present matter.

Respectfully submitted this 22nd day of May, 1978.

James H. Goetz, Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 1978, I mailed a true and correct copy of Plaintiffs MOTION TO STRIKE OR TO QUASH, postage prepaid, to:

Charles M. Joslyn, Esq.
Teton County Attorney
County Courthouse
Choteau, Mt. 59422

Stan Bradshaw, Esq.
Legal Division, Montana Dept.
of Health & Environmental Sciences
9th and Roberts
Helena, Montana 59601

Michael Anderson, Esq.
Milton Wordal, Esq.
Church, Harris, Johnson & Williams
P. O. Box 1645
Great Falls, Montana 59403

Gregory L. Curtis, Esq.
P. O. Box 1322
Choteau, Montana 59422

DATED this 22nd day of May, 1978.

Ann M. Halliday

ANN M. HALLIDAY
Secretary to Mr. Goetz

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FEB 9 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * * * * * * * * * * * No. 40471

A. B. GUTHRIE, JR.; ALICE GUTHRIE; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * * * * * * * * * * * * * *

This action came on regularly for trial before the Court without a jury on April 12, 1978, the Plaintiffs appearing in person and represented by their attorneys, James H. Goetz and Gregory Curtis; the Defendant Montana Department of Health and Environmental Sciences appearing by its attorneys, Stan Bradshaw and Sandra Muckelston; Defendant Board of County Commissioners of Teton County appearing by its attorney, Charles Joslyn; and Defendants Crabtree, Crawford, and Jensen represented by their attorneys, Milton Wordal and Michael Anderson. Plaintiffs renewed their motion to amend the complaint; the motion was granted. At the end of the trial, April 18, 1978, parties were ordered to file proposed findings of fact and conclusions of law within thirty (30) days.

Based upon the evidence heard and the papers and documents and exhibits filed, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff, A. B. GUTHRIE, JR., is a real property owner and resident of Teton County, Montana.

2. Plaintiffs, ALICE and KENNETH GLEASON, own and operate a dude ranch approximately one (1) mile to the west of proposed

Arrowleaf West Subdivision in Teton County, Montana.

3. Plaintiff, MONTANA WILDERNESS ASSOCIATION, is a non-profit corporation organized and operating under the laws of the State of Montana, dedicated to the promotion of wilderness areas and the advancement of environmental causes generally.

4. The MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES and the State of Montana ("Department") is the agency charged with the duty of administering Montana laws relating to sanitation in subdivisions and water pollution, Sections 69-5001, et seq., R.C.M. 1947. The Department has a mandate under R.C.M. 1947, Section 69-5005 to ensure, prior to approval of a proposed subdivision, that there is an adequate water supply (in terms of qualify, quantity, and dependability); and that adequate provision is made for sewage and solid waste disposal. Under that section, the Department adopted regulations, M.A.C. 16-2.14(10)-S14340. The Department adopted regulations dealing with subdivision review in December, 1972. Those regulations have been amended at least three (3) times since: November 4, 1973; November 3, 1975; and May 6, 1976. The last amendment, May 6, 1976, is not here pertinent because only minor changes were made. Nor is the period between the initial enactment of the regulations (December, 1972) and the date of the first amendment (November 4, 1973) here relevant because no review of the Arrowleaf West proposal took place in that period.

5. Arrowleaf West Subdivision is a proposed subdivision located in Teton County, Montana, in the east one-half of Section 33, the northwest quarter of Section 34, Township 25 North, Range 8 West, M.P.M., containing approximately 149.25 acres and is proposed to be divided into approximately thirty-seven (37) lots of between approximately two (2) acres to approximately 8.6 acres. The general location of the proposed subdivision is approximately twenty-four (24) miles northwest of Choteau, Montana. The

Arrowleaf West subdivision contemplates use of individual wells and individual septic systems with drainfields for each lot.

6. On or about February 22, 1975, the Department received the initial application of the Defendants Jensen, Crawford and Crabtree.

7. The formal application for removal of the sanitary restrictions from the Arrowleaf West subdivision (Form ES 91--Plaintiff's Exhibit #12) was executed by the developers on January 6, 1976, filed by the developers with the Department on January 13, 1976, and the review fee was paid by the developers to the Department on January 14, 1976.

8. The Department during the course of its review of the Arrowleaf West subdivision conducted and filed an investigation of the site of the subdivision in August, 1975, to determine among other matters the degree of slopes.

9. The slowest drawdown rate of the eighteen (18) percolation tests (with sixteen /16/ results) was one (1) inch per thirty (30) minutes.

10. The sixteen (16) soil boring tests on the site of the Arrowleaf West subdivision were conducted by Mike Clasby to a depth of ten (10) feet and groundwater was not encountered in any of the tests.

11. The developers, although aware of the unpotable water found in the wells drilled on the Arrowleaf East site and although aware of the dry holes and unpotable water in the test holes drilled on the Arrowleaf East site, conveyed none of this information to the Department or to officials of Teton County.

12. The Department, throughout its review of the Arrowleaf West subdivision, was unaware of any well drilling in the general vicinity of Arrowleaf West which resulted in either dry holes or unpotable water because such information was not supplied to it by the developers. However, Ray Anderson, a well driller, testified

that he did not know that potable water would not be available on any of the lots in Arrowleaf West.

13. On or about May 7, 1976, the Department completed and circulated copies of the Department's preliminary environmental review on the Arrowleaf West subdivision to interested members of the public.

14. The preliminary environmental review indicated the following:

a) That the subdivision may have a detrimental effect upon several species of animals, including grizzly bears and bighorn sheep.

b) That the five (5) wells developed on the 320 acres were deemed adequate evidence that a water supply is available.

c) That soil profile test holes and percolation tests indicate the soils are suitable for on-site sewage disposal and that care must be exercised in locating drainfields on Lots 20 through 24 annd Lots 26 through 30 in order to avoid the steeper slopes.

d) That the proposed development will increase the recreational use of the area, but due to the vast amount of public land, the impact will likely be moderate.

15. After issuance of the preliminary environmental review, the Department did not receive further comment from the Fish and Game Department.

16. Section 16-2.2(2)-P2020 (Rule III) M.A.C. is a regulation of the Department which deals with the necessity of preparation of an Environmental Impact Statement. Section 2 of that rule provides in part as follows:

> ...If the preliminary environmental review shows a potential significant effect of the human environment, an Environmental Impact Statement shall be prepared on that action.

17. Section 16.2.2(2)-P2020(3) also provides as follows:

The following are actions which normally require the preparation of an EIS: (a) the action may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply; (b) the action may be either signficantly growthy inducing or inhibiting; or (c) the action may substantially alter environmental conditions in terms of quality or availability.

18. On the basis of the preliminary environmental review and the comments on the preliminary environmental review received by the Department, the Department determined that an environmental impact statement was not necessary under the Montana Environmental Policy Act (Section 69-6501 et seq., R.C.M. 1947) for the Arrowleaf West subdivision prior to the lifting of sanitary restrictions.

19. The Department, in its review of the Arrowleaf West subdivision, failed to follow its regulations on numerous points, as follows:

a) Section 16-2.14(10)-S14340(4) M.A.C. requires that a preliminary engineering report with cost estimates be prepared for all subdivisions over 10 lots. No such report was prepared.

b) Section 16-2.14(10)-S14340(2) requires that a suitable plat be submitted by the developer to the Department, showing topography, drainage ways, location of sewage disposal systems and septic tanks. None of these were depicted in the plat approved by the Department.

c) Section 16-2.14(10)-S14340(6)(v) requires that groundwater tests be made if there is any reason to believe that groundwater will be within ten (10) feet of the ground surface. While some of Arrowleaf West is within ten (10) feet of the surface, the developers' application (Form ES 91, Plaintiffs' Exhibit #12) did not supply the requested information about the high and low elevations of groundwater. Furthermore, Mr. Al Keppner, an official of the Department, testified that the soil borings done in December of 1975 would not reflect the high groundwater levels which would be likely to occur in the Spring of the year.

d) Section 16-2.14(10)-S14340(5) requires that the report on individual water supply sources include location, chemical quality, and the effect of the sewage disposal system on water supply (the last of which may be waived if subdivision is not for multiple-family dwellings). None of this information was included in the Department's report.

e) Section 16-2.14(10)-S14340(5)(d) requires that a well of at least twenty-five (25) feet be drilled on

each subdivision, and that a hydrogeological report be prepared by an engineer verifying that there is an adequate quantity of water. No well was drilled on Arrowleaf West, nor was a report submitted.

f) Section 16-2.14(10)-S14340(6)(c)(iv) requires that at least one percolation test be done for each lot in a proposed subdivision. There are approximately 36 lots proposed for Arrowleaf West, yet there were only sixteen (16) percolation tests done (Plaintiffs' Exhibit #13C). However, Keppner apparently waived this requirement in a letter of June 17, 1975 (Plaintiffs' Exhibit #22).

20. That the Department of Health and Environmental Sciences, on or about June 8, 1976, issued a certificate approving the plat, plans and specifications of the Arrowleaf West subdivision, and removing sanitary restrictions from the Arrowleaf West subdivision on the basis of the following conditions:

THAT the lots sizes as indicated on the plat to be filed with the county clerk and recorder will not be further altered without approval, and,

THAT the lots shall be used for single-family dwellings, and,

THAT the individual water system will consist of a drilled well constructed in accordance with the criteria established in MAC 16-2.14(10)-S14340 to a minimum of 30 feet, and,

THAT the individual sewage disposal systems will consist of a septic tank and subsurface drainfield of such size and capacity as set forth in MAC 16-2.14(10)-S14340, and,

THAT each subsurface drainfield shall have a minimum absorption area of 160 square feet per bedroom, and,

THAT the bottom of the drainfield shall be at least four (4) feet above the water table, and,

THAT no sewage disposal system shall be constructed within 100 feet of the maximum highwater level of a 100 year flood of any stream, lake, watercourse, or irrigation ditch, and,

THAT plans for the proposed water and individual sewage systems will be reviewed and approved by the Teton County Health Department before construction is started, and,

THAT no structure requiring domestic water supply or a sewage disposal system shall be erected on Lot 12, and,

THAT the developer shall provide each purchaser of property with a copy of plat and said purchaser shall locate water and/or sewage facilities in accordance

therewith, and,

THAT instruments of transfer for this property shall contain reference to these conditions, and,

THAT departure from any criteria set forth in MAC 16-2.14(10)-S14340 /sic/ when erecting a structure and appurtenant facilities in said subdivision is grounds for injunction by the Department of Health and Environmental Sciences.

21. That testimony of Dr. Donald R. Reichmuth indicated he made only two (2) visits to the site of the Arrowleaf West subdivision, did not perform any chemical analysis of soil or subsurface water, did not perform a soil profile analysis, and did not perform any percolation tests, groundwater tests, or any other subsurface investigation.

22. That Dr. Reichmuth was unable to state that the subdivision would result in groundwater contamination.

23. That Reichmuth's testimony did not preclude availability of an adequate area on each lot in the Arrowleaf West subdivision for location of a septic tank system and drainfield which met the requirements of the rules promulgated pursuant to the Sanitation in Subdivisions Act.

24. That Al Keppner testified that lift stations can be utilized in sewage disposal systems and such utilization is not prohibited by the Sanitation in Subdivisions Act and rules promulgated pursuant thereto.

25. That the conditions placed on the Arrowleaf West subdivision by the Department of Health and Environmental Sciences in its certificate provided that individual water and sewage disposal systems installed in the subdivision must meet the requirements of the Sanitation in Subdivision rules, and must be reviewed and approved by the Teton County Health Department before construction of the systems.

26. That the requirement of each subsurface drainfield's absorption area stated in the Department's certificate exceeded

the minimum requirements of Bulletin 332, April 1969, Table III for the slowest absorption rate of the eighteen percolation tests.

27. The area containing Arrowleaf West is within the boundaries of an area tentatively designated by the United States Fish and Wildlife Service as critical grizzly bear habitat under the Federal Endangered Species Act.

28. There have been approximately three (3) to four (4) sightings of the Northern Rocky Mountain Wolf within an approximate ten (10) mile radius of the proposed subdivision. The Northern Rocky Mountain Wolf is listed as an endangered species under the Federal Endangered Species Act.

29. Other wildlife, such as mountain goats, elk, and deer, frequent the general area in the vicinity of Arrowleaf West subdivision.

30. There is no evidence to show that the actions of the Teton County Commissioners brought about any irreparable injury to the plaintiffs, to the Montana Wilderness Association or individual members of the Wilderness Association. Plaintiffs failed to show the damages, if any, are distinguishable from any injuries to the public generally.

31. On June 30, 1975, an application for approval of the Arrowleaf West preliminary subdivision plat was made to the Teton County Planning Board by Robert W. Jensen, one of the partners in the subdivision.

32. On July 1, 1975, the Teton County Planning Board published a notice of a public hearing on a preliminary plat for the Arrowleaf West subdivision. The hearing notice was for a hearing to be held on the 19th day of August, 1975, at the Courtroom in Choteau, Montana, at 7:30 o'clock P.M.

33. The Teton County Planning Board caused a notice of the said hearing to be mailed by registered letter to certain people, including landowners in the area of the proposed subdivision.

34. That, although the Plaintiffs Guthrie and Gleason appeared at the hearing of the Teton County Planning Board on August 19, 1975, they did not raise any question about any lack of notice of the hearing or any authority of the Planning Board to hold a hearing on behalf of the Defendant Board of County Commissioners of Teton County. The Montana Wilderness Society did not appear at the public hearing.

35. On August 9, 1975, at 7:30 o'clock P.M. in the Courtroom in the Teton County Courthouse, the Planning Board held a hearing on the proposed subdivision known as Arrowleaf West, during which there was a substantial amount of public disapproval of the subdivision.

36. In a letter dated October 14, 1975, John R. Nauck, secretary of the Teton City-County Planning Board, indicated to Defendant Jensen that the Arrowleaf West Preliminary Plat was approved by the Teton City-County Planning Board subject to the conditions set forth in the September 2, 1975 minutes of the Board and subject to the approval of the ES 91 form by the Department.

37. The Montana Subdivision and Platting Act, Section 11-3859 et seq. R.C.M. 1947, requires that a governing body of a county must, prior to approval of a subdivision application, find that the subdivisior as proposed is in the public interest and shall issue written findings of fact that weigh itemized criteria relating to the public interest. On January 19, 1976, the Board of County Commissioners of Teton County considered the approval of Arrowleaf West subdivision and did not make written findings of fact at that time, although the evidence indicates the Board did consider the criteria set out in Section 11-3866(4), R.C.M. 1947.

38. On September 20, 1976, the Board of County Commissioners, Teton County, made and entered written findings which weighed the criteria set forth in Section 11-3866(4), R.C.M. 1947, and ordered

that the minutes of the meeting of January 19, 1976, be amended to approve the preliminary plat of Arrowleaf West subdivision.

From the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. That all findings of fact stated above which may be stated as conclusions of law are incorporated into these conclusions of law by this section.

2. That the action of the Department of Health and Environmental Sciences in reviewing, approving, and lifting the sanitary restrictions from the Arrowleaf West subdivision were in compliance with the Sanitation in Subdivisions Act, Section 69-5001 et seq. R.C.M. 1947, and its implementing rules.

3. That the Arrowleaf West subdivision will not injure the plaintiffs in any of the following particulars:

(1) water pollution;

(2) loss of aesthetic values;

(3) loss of recreational values;

(4) damage to the area for the suitability of the operation of a dude ranch; or

(5) other economic, personal, and aesthetic consequences of the Arrowleaf West subdivision.

4. That the review, approval and lifting of sanitary restrictions from the Arrowleaf West subdivision by the Department of Health and Environmental Sciences complied with the requirements of the Montana Environmental Policy Act, Section 69-6501 et seq. R.C.M. 1947.

5. That the decision of the Department of Health and Environmental Sciences that an environmental impact statement was not required is reasonable and consistent with the Montana Environmental Policy Act and its implementing rules.

6. That the action of the Department of Health and

Environmental Sciences in reviewing, approving, and lifting the sanitary restrictions from the Arrowleaf West subdivision is not a major state action significantly affecting the quality of the human environment.

7. That the review and approval by the Department of Health and Environmental Sciences of the Arrowleaf West subdivision complies in both spirit and letter with the requirements of Article II, Section 8 of the 1972 Constitution of Montana.

8. That the Arrowleaf West subdivision will not cause the Plaintiffs to suffer irreparable injury and damage.

9. That the Plaintiffs have failed to prove harm or damage by the Defendant Department of Health and Environmental Sciences in its approval of the Arrowleaf West subdivision.

10. That the evidence before this Court and the law warrant judgment generally in favor of the Defendants and against the Plaintiffs.

11. Section 11-3866, R.C.M. 1947, requires that a governing body or its authorized agent or agency hold a public hearing on a preliminary plat. The hearing by the Teton County Planning Board on the Arrowleaf West subdivision met the requirement of the section.

12. The Teton County Planning Board is the authorized agent or agency for the governing body, the Teton County Board of County Commissioners.

13. That the prerequisite notices of the hearing were given as required by Section 11-3866, R.C.M. 1947.

14. That the only issues properly raised by Plaintiffs' complaint in respect to the Defendant Board of County Commissioners is whether or not a public hearing was held as required by law on the preliminary plat of Arrowleaf West subdivision after the required notice. The Defendants objected to any evidence beyond the scope of the complaint. The Plaintiffs sought to go beyond the

scope of the complaint in regard to the basis for the Defendant Board's approval of the subdivision. The objection is well founded and the Court ought not consider any of the evidence beyond the scope of the complaint.

15. That had Plaintiffs taken issue with the method the Defendant Board used in weighing the criteria set forth in Section 11-3866, R.C.M. 1947, the Court concludes that the proper procedure would have been for Plaintiffs to allege and prove that the Defendant Board's actions were fraudulent or so arbitrary as to amount to a clear and manifest abuse of discretion. State ex rel Bowler v. Board of Commissioners of Daniels County, 106 Mont. 251, 76 P.2d 648.

16. The Court cannot conclude as a matter of law that the Defendant Board's actions in approving Arrowleaf West subdivision were contrary to the law. The courts are without power to interfere with the discretionary actions of a board within the board's authortiy. State ex rel Bowler v. Board of Commissioners of Daniels County, supra. The actions of the Board of County Commissioners in approving the Arrowleaf West subdivision were within the discretion of the Board as a matter of law.

17. The Defendant Board has legal authority to amend its minutes and the Board's Amendment of September 20, 1976, to the minutes of January 19, 1976, is within the power and authority of the Board and is in all respects proper.

18. Section 11-3866 (2), R.C.M. 1947, requires a governing body to approve, conditionally approve or reject a preliminary plat within sixty (60) days of its presentation unless the subdivider consents to an extension of the review period. Subsection (4) of Section 11-3866 is unclear on any time limit for the issuance of written findings of fact. The Court concludes that a subdivider can consent to any extension of time for the review process by the County governing body. In this case, the time

involved was not contrary to Section 11-3866 (2).

19. The Plaintiff's argument is with the effects of subdivision, regardless of the legality of the approval. The Plaintiff's testimony on the effects of the subdivision on Plaintiffs has to do with the subdivision, regardless of the procedure involved in the approval of the subdivision by the governing body of Teton County. Therefore, the Court cannot conclude the Plaintiffs have suffered damages or injury as a result of the Defendants' actions. The Court concludes that Plaintiffs have not demonstrated irreparable harm.

20. Section 93-4204.1, R.C.M. 1947, evidences to the Court an intent by the legislature that members of a citizens group must show an injury which is distinguishable from an injury to the public generally to obtain injunctive relief. The Court concludes that the Plaintiff Montana Wilderness Society, did not meet this burden. The Court cannot conclude that any injury would be suffered by the Montana Wilderness Society or its members that is distinguishable from an injury to the public generally. The general public has the same rights in the area as that of Plaintiffs.

The Court concludes that Plaintiffs' request for an injunction should be denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 5th day of February, 1979.

R. D. McPHILLIPS, DISTRICT JUDGE

MOTION FOR INJUNCTION PENDING APPEAL

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

****

A. B. GUTHRIE, JR.; ALICE GUTHRIE; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCOATION, Plaintiffs, v. MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD: and ROBERT W. JENSEN, Defendants.	No. 40471

MOTION FOR INJUNCTION PENDING APPEAL

COME NOW, James H. Goetz and Gregory Curtis, attorneys for Plaintiffs, and respectfully move, pursuant to Rule 40, Montana Rules of Appellate Procedure and Rule 62(c), Montana Rules of Civil Procedure, for an injunction pending appeal, to enjoin Defendants, their employees, agents and assigns, from selling or disposing or otherwise conveying parcels of land in the subdivision which is the subject of this action, or taking any other action which would physically disturb the land, trees, water system or other physical attributes of the area which is the subject of this action.

Movants respectfully request that no bond or other security be required for this injunction pending appeal, and note, in this connection, that none was required during the pendency of the temporary restraining order in the District Court.

Movants also commit themselves to process the present appeal in an expeditious manner. With the presentation of this motion, Plaintiffs are simultaneously filing their Notice of Appeal and are ordering a copy of the transcript.

Respectfully submitted this 17th day of Feb., 1979.

GOETZ & MADDEN
P.O. Box 1322
Bozeman, Montana 59715

By: James H. Goetz
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 19th day of Dec 19 79.

GOETZ & MADDEN
By
P. O. Box 1322
Bozeman, Montana 59715

NOTICE OF APPEAL

FEB 26 1979

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE STATE OF MONTANA
FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

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.55

A. B. GUTHRIE, JR.; et al., Plaintiffs, v. MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, et al., Defendants.	NOTICE OF APPEAL District Court #40471

Notice is hereby given that A. B. Guthrie, Jr., et al., Plaintiffs above-named, hereby appeal to the Supreme Court of the State of Montana from the Final Order and Judgement and Findings of Fact and Conclusions of Law entered in this action on the 7th day of February, 1979.

Dated this 19th day of February, 1979.

GOETZ & MADDEN
P.O. Box 1322
Bozeman, Montana 59715

James H. Goetz
Attorney for A. B. Guthrie, Jr.

FILED
Feb. 21, 1979
Maria Gropper
CLERK
By Karen Brown
DEPUTY CLERK

NOTICE OF ENTRY OF JUDGMENT

FEB 16 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE

STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

A. B. Guthrie, Jr; Alice Gleason;
Kenneth Gleason; and Montana
Wilderness Association,
Plaintiffs,

-vs-

Montana Department of Health and
Environmental Sciences; Board of
County Commissioners, Teton County,
J. R. Crabtree; James M. Crawford;
and Robert W. Jensen,
Defendants.

NO. 7118

* * * * * * * * * * * * * * * * * *

NOTICE OF ENTRY OF JUDGMENT

* * * * * * * * * * * * * * * * * *

Pursuant to Rule 77 (d), Montana Rules of Civil Procedure, notice is hereby given that judgment has been rendered and filed in the Office of the Clerk of District Court, Teton County, on the 6th day of February, 1979.

A copy of the judgment rendered and filed has and is attached to this Notice

DONE this 15th day of February, 1979.

Nina Gregori

CLERK OF COURT
Ninth Judicial District
Teton County
State of Montana

By _____
Deputy Clerk

copies to: Larry Juelfs
Teton County Attorney
Choteau, Montana 59422

Steven G. Brown
Department of Health
9th and Roberts
Helena, Montana 59601

Peter Meloy
HorskyBlock Building
Helena, Montana 59601

James Goetz
Attorney at Law
Box 1322
Bozeman, Montana 59715

Gregory Curtis
Attorney at Law
Murphy & Curtis
Choteau, Montana 59422

Mike Anderson
Church, Harris, Johnson & Williams
P. O. Box 1645
Great Falls, Montana 59401

Charles M. Joslyn
Attorney at Law
Choteau, Montana 59422

ORDER

FEB 26 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

****

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, PLAINTIFFS,

No. 40471

VS.

ORDER

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, DEFENDANTS.

****

Upon the motion of the Plaintiffs, and upon due consideration, it is ordered that the motion of Plaintiffs for injunction pending appeal is granted and that no bond shall be required of Plaintiffs. Defendants, their employees, agents and assigns, are hereby enjoined, during the pendency of the appeal of this matter from selling, disposing or otherwise conveying any parcels of land located in the subdivision which is the subject of this action. Defendants, their employees, agents and assigns, are further enjoined from taking any action which would physically disrupt the environment, including the land, water, and trees in the area within the boundaries of the subdivision which is the subject of this action.

It is further hereby ordered that the above-named defendants show cause in the above entitled court on March 6, 1979, at 10:30 o'clock a. m. or as soon thereafter as counsel can be heard, why the injunction hereby imposed shall not continue until the determination of this matter by the Montana Supreme Court.

It is also further ordered that a copy of the Notice of Appeal and a copy of this Order be served on the above-named

LAW OFFICES
LEO H. MURPHY
GREGORY L. CURTIS
LARSON BUILDING
CHOTEAU MONTANA

defendants at least seven (7) days before the time fixed herein for showing cause.

Dated February 21, 1979.

R. D. McPHILLIPS
DISTRICT JUDGE

STATE
PUBLISHING CO.
HELENA, MONT.

NOTICE OF HEARING ON MOTION

MAR 5 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J.R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, Defendants.	NO. 40471

NOTICE OF HEARING ON MOTION

TO: James H. Goetz, P.O. Box 1322, Bozeman, Montana 59715; Gregory L. Curtis, P.O. Box 70, Choteau, Montana 59422; Peter M. Meloy, Horsky Block Bldg, Helena, Montana 59601

PLEASE TAKE NOTICE that the undersigned will bring Defendant MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES' motion to amend findings of fact and conclusions of law and motion to strike parts of the court's supplemental memorandum on for hearing before this court on the 12th day of March, 1979 at the hour of 9:30 o'clock A.M., or as soon thereafter as counsel may be heard.

Dated this 4th day of March, 1979.

CHURCH, HARRIS, JOHNSON, & WILLIAMS

BY: Original Signed by Michael B. Anderson
MICHAEL B. ANDERSON
302 Northwestern Bank Building
P.O. Box 1645
Great Falls, Montana 59403

Attorneys for Defendants J.R. Crabtree, James M. Crawford, and Robert W. Jensen

CERTIFICATE OF SERVICE BY MAILING

I, MICHAEL B. ANDERSON, one of the attorneys for Defendants J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, do hereby certify that on the 4th day of March, 1979, I served a copy of the above NOTICE OF HEARING ON MOTION by depositing the same in the United States mails addressed as above.

Original Signed by Michael B. Anderson
MICHAEL B. ANDERSON

CHURCH, HARRIS, JOHNSON & WILLIAMS
ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

MAR 7 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

****

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, PLAINTIFFS,

VS.

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, DEFENDANTS.

MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

40471
& 7118 TETON

****

THE COURT SHOULD GRANT THE PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL:-

If the injunction pending appeal is not granted, the plaintiffs will suffer irreparable injury in that if the Arrowleaf West Subdivision is allowed to proceed, plaintiffs and individual members of the organizational plaintiff will be irreparably injured by the resulting environmental degradation of the area in which the proposed subdivision is located.

Each of the plaintiffs has variously presented to the court, economic, social, esthetic, recreational, and environmental impacts which will suffer if the Arrowleaf West Subdivision is allowed to be developed.

If Arrowleaf West Subdivision is not enjoined, all of the Plaintiffs, including many individual members of the MWA who use the general area in question, will be adversely affected in that the character of the locality for wildlife habitat, scenic qualities, and environmental values will be severely degraded. Moreover, if Arrowleaf West goes through, there will be substantial adverse effects of a social-economic nature in the area and the general character of the area for recreational purposes will be degraded.

MURPHY & CURTIS
LAW OFFICE
LARSON BUILDING
CHOTEAU MONTANA

The plaintiffs have no adequate remedy at law or otherwise for the harm and damages that have been done and which are threatened by the developers with the approval of the defendants Board of County Commissioners of Teton County and the Department of Health and Environmental Sciences (DHES).

All of the plaintiffs are within the zones of interest to be protected by the environmental laws of Montana, including Article 2, Section 3, of the 1972 Montana Constitution, which provides:

> "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, and enjoying and defending their lives and liberties, acquiring, possession and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

The subdivision and construction of Arrowleaf West will have significant adverse effects on environmental attributes recognized as being in danger, fragile, and in severely short supply; specifically, the effects on the grizzly bear, spring grizzly habitat, and the corridor along the south fork of the Teton River by which grizzly bears travel back and forth between the mountains and the swamp east of the Arrowleaf West area. The grizzly bear has been placed on the threatened species list by the Federal Fish and Wildlife Service.

Furthermore, the area containing Arrowleaf West is within the boundaries of an area tentatively designated by the United States Fish and Wildlife Service as critical grizzly habitat. There have been approximately three to four sightings of the Northern Rocky Mountain Wolf within an approximate ten-mile radius of the proposed subdivision. Other wildlife, such as mountain goats, elk and deer frequent the general area. If Arrowleaf West is subdivided and

developed as proposed, the effect would be significantly growth-inducing and there will be a substantial change in the quality of the nature of the lifestyles in the general area. There will be a substantial alteration in environmental conditions in terms of quality and availability and the sense of wildlife values will be severely impacted. The essentially natural condition of the area at the present will be severely degraded, and significant numbers of people will be attracted to the area along with four wheel drive vehicles, snow machines, pets and other aspects associated with more dense human development.

Furthermore, there are significant issues involved in this action to be reviewed upon appeal. Do the plaintiffs have standing to bring this action? Is DHES bound by its own regulations and mandated to insure, prior to approval of a proposed subdivision, that there is adequate water supply (in terms of quality, quantity, dependability) and that adequate provisions made for sewage and solid waste disposals? Is the DHES's approval of the Arrowleaf West Subdivision legally deficient for failure to comply in numerous significant respects with its own regulations? Are the DHES regulations of both 1973 and 1975 mandatory upon the agency so that substantial compliance with its regulations is not legally sufficient? Should the DHES have prepared a full environmental impact statement prior to removing the sanitary restrictions from Arrowleaf West? Did the defendant governmental agencies fail to afford reasonable opportunities for public participation as required by Article II, Section 8 of the 1972 Montana Constitution? Was the approval of the Board of County Commissioners of Teton County in violation of 11-3866(4) R.C.M., 1947, because no explicit finding that the Arrowleaf West Subdivision was in the public interest was made and no written findings

of fact weighing the statutory criteria were made? Is the resolution of the County Commissioners of Teton County purporting to approve the preliminary plat of Arrowleaf West legally insufficient because the board never examined the preliminary plat of Arrowleaf West? Was substitution of the Teton County Planning Board approval of the preliminary plat of Arrowleaf West in place of the Board of County Commissioners of Teton County Commissioners' approval in violation of both the Montana Subdivision and Planning Act and the Teton County Subdivision regulations?

Section 27-19-201, MCA, provides an injunction may be granted to prevent great or irreparable injury to the plaintiff or respecting acts tending to make the judgment ineffectual.

Should the injunction pending appeal be denied, any resolution of these and the other issues in this case by the Montana Supreme Court in favor of the plaintiffs will be meaningless and ineffectual.

Plaintiffs will suffer irreparable injury because development of the subdivision will proceed and will irreparably change the character of the land in question. The plaintiffs have no recourse at law or otherwise.

March 6, 1979

MURPHY & CURTIS

BY: Original signed by ~~Gregory L. Curtis~~

ATTORNEY FOR PLAINTIFFS

BOX 70
CHOTEAU, MONTANA 59422

STATE PUBLISHING CO. HELENA, MONT.

MEMO SUPPORTING NOMINAL BOND OR THE ESTABLISHMENT OF NO BOND PENDING APPEAL

MAR 7 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

****

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCATION, PLAINTIFFS,

vs.

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY, J.R . CRABTREE, and ROBERT W. JENSEN, DEFENDANTS.

MEMO SUPPORTING NOMINAL BOND OR THE ESTABLISHMENT OF NO BOND PENDING APPEAL

****

THE COURT SHOULD NOT SET A BOND FOR THE INJUNCTION PENDING APPEAL

Plaintiffs request in their motion that no bond or other security be required for the injunction pending appeal. Arrowleaf West involves tens of thousands of dollars. Plaintiffs are private citizens and a non-profit environmental organization who seek adjudication and vindication of their rights.

Although the matter of a bond with respect to the maintenance of injunctive relief pending appeal in Montana courts is not firmly established, federal courts have consistently interpreted Rule 65(c) of the Federal Rules of Civil Procedure as requiring only nominal bonds in cases brought under the National Environmental Protection Act.

In NRDC v. Morton, 33 F.Supp. 169 (D.C. Dist. 1971), the court ordered a bond of $100 instead of $750,000 for the first month and $2,500,000 for each month thereafter, as requested by the government. The court noted "(t)he requirement of more than a nominal amount as security would ...stifle the intent of the Act, since these three 'concerned private organizations' would be precluded from obtaining judicial

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review of the defendant's actions."

In EDF, Inc. v. Corps of Engineers of U.S. Army, 331 F.Supp 925 (D.C. 1971), a preliminary injunction enjoining the construction of a dam required plaintiff to post only a $1.00 bond.

The thrust of the argument for the exercise of judicial discretion under Rule 65(c) in such cases was summarized by two federal courts as follows:

> (The court) cannot accept the proposition that Rule 65(c) was intended to raise virtually insuperable financial barriers insulating the agency's decision from effective judicial scrutiny." Powelton Civic Home Owners Assocation v. Department of HUD, 284 F. Supp. 809 (A.C.Pa. 1968).
>
> Public policy ...mandates that parties in fact adversely affected by improper administration of programs ... be strongly encouraged to correct such errors .... The injunctive standards of probability of success at trial, irreparable injury and balance of the equities provide protection against frivolous actions." Bass v. Richardson, 448 F. Supp. 478 (D.N.Y. 1971).

It is by now commonplace that plaintiffs in NEPA actions are entitled to injunctive relief upon posting a minimal bond if the plaintiffs establish a prima facie case that they may win on the merits. The folowing cases are illustrative. In Wilderness Society v. Hinkel, 325 F.Supp. 422 (D.D.C. 1970) a preliminary injunction was granted against the issuance of right-of-way and special use permits for the Trans-Alaska Pipeline upon posting a bond of $100. In Scherr v. Vople, 336 F. Supp. 886 (W.D. Wis. 1971) an injunction was granted prohibiting a sixteen mile highway project without any security at all. In Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925 (D.D.C. 1971) a twenty-seven mile river channelization project was enjoined upon posting of a $1.00 bond. In Thompson v. Fugate 347 F. Supp. 120 (E.D.Va. 1971) a preliminary injunction was granted against the issuance of a

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special use permit for the Mineral Ski Resort without any discussion of a bond. Subsequently the case was reversed on other grounds. The Cross-Florida Barge Canal, a project which was one-third completed at the time suit was brought was enjoined upon posting a $1.00 bond. Environmental Defense Fund, Inc. v. Corp of Engineers, 325 F. Supp. 729 (D.D.C. 1971). Imposition of a $4.5 million bond for an injunction against construction of a major addition to the San Francisco Airport, on NEPA grounds, was held to be improper and the court ordered bond set at $1,000, in Friends of The Earth v. Brinegar, 518 F. 2d 322, (9th Cir. 1975). In Natural Resources Defense Council v. Grant, 355 F.Supp. 280 (E.D.N.C. 1973), after previously requiring a bond of $75,000 for an injunction against a river channelization project until preparation of an EIS, where damages to private landowners and to the government for delay were shown to amount to $139,000, the court fixed bond at $100. In Natural Resources Defense Council,Inc. v. Morton 337 F.Supp. 167 (D.C.D.C. 1971), the government requested that plaintiff be required to post bond of $750,000 for the first month, to be increased to $2,500,00 per month thereafter for an injunction against off-shore drilling on NEPA grounds, and the court set bond at $100.

A $1.00 bond was required for an injunction stopping construction of a flood control and river channelization project involving potential damage from delay amounting to as much as $498,000 per year, in State ex rel Baxley v. Corps of Engineers, 411 F.Supp. 1271 (N.D.Ala. 1976). The court stated that it was -

> unwilling to close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing to review governmental action.

In West Virginia Highlands Conservancy v. Island Creek Coal Co. 441 F. 2d 232 (4th Cir. 1971) a non-profit, historic, scenic and natural preservation organization with over two hundred members sought to enjoining a private company from conducting mining, timber cutting or road building operations on certain federal forest lands without an EIS in compliance with NEPA. The District Court issued a preliminary injunction and set bond at $100, and on appeal the Court of Appeals held that the District Court had not abused its discretion.

In this connection, it should be noted that no security was required in this action during the pendency of the temporary restraining order in the District Court proceedings. Furthermore, the Plaintiffs commit themselves to process the present appeal in an expeditious manner. At the time the plaintiffs moved for this injunction pending appeal, they also filed their Notice of Appeal and ordered transcripts for the District Court proceedings.

It is respectfully submitted that the Court should grant the Plaintiffs' motion for an injunction pending appeal and that no bond or other security be required.

Dated: March 6, 1979

/s/ Gregory L. Curtis

Attorney for Plaintiffs

MURPHY & CURTIS
BOX 70
CHOTEAU, MONTANA 59422

MEMORANDUM

MAR 14 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

A. B. GUTHRIE, JR.; ALICE GUTHRIE; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, PLAINTIFFS,	)	NO. 40471
VS.	)	MEMORANDUM
MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, DEFENDANTS.	)	

STATEMENT OF THE CASE

"Findings of Fact and Conclusions of Law" filed by the District Court on February 6, 1979, state:

"The Court concludes that Plaintiffs' request for an injunction should be denied.

LET JUDGMENT BE ENTERED ACCORDINGLY."

DEFENDANTS' ARGUMENT

The Defendants argue that the Court's Findings, Conclusions, and directive to let judgment enter accordingly do not constitute a "judgment" within the meaning of Rule 54, M. R. Civ. P., which defines a judgment as the "final determination of the rights of the parties". Absent entry of a proper judgment, the Defendants contend, the Plaintiffs' Notice of Appeal is premature and the Motion for Injunction Pending Appeal should be denied. In support of this argument, the Defendants cite several Montana cases for the proposition that findings of fact and conclusions of law are not a judgment or order, but merely a statement by the court upon which a subsequent judgment or order will be premised.

A Proper and Appealable Judgment or Order Was Entered.

Rule 58, M. R. Civ. P. states:

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"When the court directs * * * that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of that direction * * *."

Although denominated "Findings of Fact and Conclusions of Law", the District Court clearly denied the Plaintiffs' request for an injunction and so directed the Clerk of Court. Under Rule 58, the Clerk properly entered judgment and issued the Notice of Entry of Judgment.

The Court's conclusion denying the injunction and directive to the clerk to enter judgment, in a substantive sense, constitute a final determination of the rights of the parties. Rule 1, M. R. App. Civ. P., permits an appeal from a "final judgment" or an order dissolving an injunction or refusing to grant an injunction. The Court's conclusion that the injunction should be denied and directive to the clerk to enter judgment accordingly was an order refusing to grant an injunction within the meaning of Rule 1. The Plaintiff's can, therefore, properly enter an appeal. Under the provision of Rule 58, no subsequent order or judgment need be rendered to effect a final determination.

In essence, the Defendants are arguing that no proper judgment was entered merely because the word "Judgment" or "Order" was not typed above the Court's conclusion denying the injunction and directive to the clerk. This argument places form over substance. Rule 60, M. R. Civ. P., provides:

> "Clerical mistakes in judgments, orders or other parts of the record, and in pleadings, and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

Furthermore, Rule 61, M. R. Civ. P., states:

> "* * * no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or

otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Should the Defendants prevail in their argument, the only result will be additional delay in the action. If the findings, conclusions, and directive of the Court are viewed only as a statement preliminary to entry of a judgment or order, the status quo of the proceeding has not been affected thereby, and the temporary restraining order remains in effect until such time as a subsequent judgment or order is entered. At that time, the Plaintiffs will have to file another Notice of Appeal. The Court should acknowledge its conclusion and directive denying the injunction as an order, and ignore the inconsequential happenstance that they were not immediately preceded by the typing of "Judgment" or "Order". Doing so will not adversely affect the substantial rights of the Defendants.

The Defendants rely heavily upon the case of State ex rel. Reser v. District Court, 163 P. 1149 for the proposition that findings of fact and conclusions of law do not constitute a judgment. In that case, the district court judge filed findings and conclusion, and the clerk of court thereafter entered a judgment at variance with the findings and conclusions upon motion of counsel. The Supreme Court noted that the clerk acted "* * * without any order or direction from the Court or any further action by the judge thereof * * *". Reser at p. 1150. The Supreme Court added, "The proper functions of the clerk touching the entry of judgment are purely ministerial, and their valid exercise requires a judgment which has been actually pronounced by the court, not necessarily written or signed, or else a judgment pronounced by the law as a necessary consequence of the facts established

* * *" Reser at p. 1151.

In this case, there was an express written directive to the clerk to enter a judgment in accordance with the Court's conclusion that the injunction should be denied. No discretion was left in the clerk of court.

Does the District Court have Jurisdiction to Determine That An Appealable Judgment or Order Was Entered?

In Bryant Development Association v. Dagel, 531 P.2d 1319, 1320, the Montana Supreme Court reiterated:

> "* * * jurisdiction passes from the district court to this court upon service and filing of the notice of appeal* * *"

In State ex rel. O'Grady v. District Court, 202 P. 575, 576, the Supreme Court stated:

> "* * * Appeal has been taken to this court by the service and filing of notice and filing the required undertaking (Section 7100, Rev. Codes), and therefore, to all intents and purposes, the action in which the judgment appealed from, and the judgment itself, was no longer in the court below, but automatically was removed here and the lower court thereby divested of jurisdiction over it. The court below and the appellate court cannot exercise jurisdiction at the same time over the same judgment * * * ".

The Plaintiffs have filed and served a Notice of Appeal and the required undertaking upon appeal. Any determination of whether a proper appeal has been taken must be made by the Supreme Court itself, since jurisdiction at this time has passed from the District Court.

In summary, the language of the Court concluding that the injunction should be denied and directing the clerk of

court to enter judgment accordingly, constitutes a judgment or order, not a finding of fact or conclusion of law. The Defendants have room to argue otherwise only because the Court's conclusion and directive were not immediately preceded by the typed word "Judgment" or "Order".

This omission is a matter of form only and does not affect the substantial rights of the Defendants. The Court should conclude that a proper and appealable judgment or order was entered pursuant to Rule 58.

Should the Court rule in favor of the Defendants on this issue, the Plaintiffs request that their motion for an injunction pending appeal be considered a motion for injunction pending entry of final judgment in order to preserve the status quo prior to filing and service of a second notice of appeal. Should the Court decide that it lacks jurisdiction to make a ruling or take action to clarify or rehabilitate the record, the Plaintiffs consent that their notice of appeal be deemed withdrawn. Provided, however, that following the decision of the Court and entry of a judgment or order denominated as such, or other action, if any, the Plaintiffs shall have and enjoy all of the rights of appeal set forth in law, as though the first notice of appeal had never been served and withdrawn. Should the Court determine that a proper and appealable judgment or order was entered, the Plaintiffs reaffirm their motion for an injunction pending appeal.

Scope of Injunction Requested on Appeal.

The Plaintiffs disavow any intention to expand the scope of the injunction requested on appeal beyond that prayed for in the pleadings and provided for in the temporary restraining order granted during the proceedings in the District Court. The Plaintiffs are willing to modify the

injunction requested on appeal to resolve any ambiguity in this respect.

Have the Plaintiffs Made a Showing of Irreparable Injury?

Although the Court has determined in its findings of fact and conclusions of law that the Plaintiffs will suffer no irreparable injury should the injunction against the Defendants be denied, the issue is substantial. The character of the land cannot be restored and the socio-economic consequences of development cannot be reversed after the fact. The injunction pending appeal is needed to preserve the efficacy of Supreme Court review should the ultimate decision on the merits favor the Plaintiffs.

CONCLUSIONS

For the above reasons, the Plaintiffs' Motion for Injunction Pending Appeal should be granted.

DATED: March 12, 1979

MURPHY & CURTIS

BY: _____
GREGORY L. CURTIS
ATTORNEYS FOR PLAINTIFFS

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AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Arrowleaf

APR 2 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * * * * * * * * * * * No. 7118

A. B. GUTHRIE, JR.; ALICE GUTHRIE; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants.	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * * * * * * * * * * * * * * *

This action came on regularly for trial before the Court without a jury on April 12, 1978, the Plaintiffs appearing in person and represented by their attorneys, James H. Goetz and Gregory Curtis; the Defendant Montana Department of Health and Environmental Sciences appearing by its attorneys, Stan Bradshaw and Sandra Muckelston; Defendant Board of County Commissioners of Teton County appearing by its attorney, Charles Joslyn; and Defendants Crabtree, Crawford, and Jensen represented by their attorneys, Milton Wordal and Michael Anderson. Plaintiffs renewed their motion to amend the complaint; the motion was granted. At the end of the trial, April 18, 1978, parties were ordered to file proposed findings of fact and conclusions of law within thirty (30) days.

Based upon the evidence heard and the papers and documents and exhibits filed, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff, A. B. GUTHRIE, JR., is a real property owner and resident of Teton County, Montana.

2. Plaintiffs, ALICE and KENNETH GLEASON, own and operate a dude ranch approximately one (1) mile to the west of proposed

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Filed: R. D. Phillips March 29, 1979

Arrowleaf West Subdivision in Teton County, Montana.

3. Plaintiff, MONTANA WILDERNESS ASSOCIATION, is a non-profit corporation organized and operating under the laws of the State of Montana, dedicated to the promotion of wilderness areas and the advancement of environmental causes generally.

4. The MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES and the State of Montana ("Department") is the agency charged with the duty of administering Montana laws relating to sanitation in subdivisions and water pollution, Sections 69-5001, et seq., R.C.M. 1947. The Department has a mandate under R.C.M. 1947, Section 69-5005 to ensure, prior to approval of a proposed subdivision, that there is an adequate water supply (in terms of quality, quantity, and dependability); and that adequate provision is made for sewage and solid waste disposal. Under that section, the Department adopted regulations, M.A.C. 16-2.14(10)-S14340. The Department adopted regulations dealing with subdivision review in December, 1972. Those regulations have been amended at least three (3) times since: November 4, 1973; November 3, 1975; and May 6, 1976. The last amendment, May 6, 1976, is not here pertinent because only minor changes were made. Nor is the period between the initial enactment of the regulations (December, 1972) and the date of the first amendment (November 4, 1973) here relevant because no review of the Arrowleaf West proposal took place in that period.

5. Arrowleaf West Subdivision is a proposed subdivision located in Teton County, Montana, in the east one-half of Section 33, the northwest quarter of Section 34, Township 25 North, Range 8 West, M.P.M., containing approximately 149.25 acres and is proposed to be divided into approximately thirty-seven (37) lots of between approximately two (2) acres to approximately 8.6 acres. The general location of the proposed subdivision is approximately twenty-four (24) miles northwest of Choteau, Montana. The

Arrowleaf West subdivision contemplates use of individual wells and individual septic systems with drainfields for each lot.

6. On or about February 22, 1975, the Department received the initial application of the Defendants Jensen, Crawford and Crabtree.

7. The formal application for removal of the sanitary restrictions from the Arrowleaf West subdivision (Form ES 91--Plaintiff's Exhibit #12) was executed by the developers on January 6, 1976, filed by the developers with the Department on January 13, 1976, and the review fee was paid by the developers to the Department on January 14, 1976.

8. The Department, in its review of the Arrowleaf West subdivision, failed to require strict compliance with its regulations on numerous points as follows:

a) Section 16-2.14(10)-S14340(4) M.A.C. requires that a preliminary engineering report with cost estimates be prepared for all subdivisions over 10 lots. No such report was prepared.

b) Section 16-2.14(10)-S14340(2) requires that a suitable plat be submitted by the developer to the Department, showing topography, drainage ways, location of sewage disposal systems and septic tanks. None of these were depicted in the plat approved by the Department.

c) Section 16-2.14(10)-S14340(6)(v) requires that groundwater tests be made if there is any reason to believe that groundwater will be within ten (10) feet of the ground surface. While some of Arrowleaf West is within ten (10) feet of the surface, the developers' application (Form ES 91, Plaintiffs' Exhibit #12) did not supply the requested information about the high and low elevations of groundwater. Furthermore, Mr. Al Keppner, an official of the Department, testified that the soil borings done in December of 1975 would not reflect the high groundwater levels which would be likely to occur in the spring of the year.

d) Section 16-2.14(10)-S14340(5)(d) requires that a well of at least twenty-five (25) feet be drilled on each subdivision, and that a hydrogeological report be prepared by an engineer verifying that there is an adequate quantity of water. No well was drilled on Arrowleaf West, nor was a report submitted.

e) Section 16-2.14(10)-S14340(6)(c)(iv) requires that at least one percolation test be done for each lot in a proposed subdivision. There are approximately 36 lots

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proposed for Arrowleaf West, yet there were only sixteen (16) percolation tests done (Plaintiffs' Exhibit #13C). However, Keppner apparently waived this requirement in a letter of June 17, 1975 (Plaintiffs' Exhibit #22).

9. The Department during the course of its review of the Arrowleaf West subdivision conducted and filed an investigation of the site of the subdivision in August, 1975, to determine among other matters the degree of slopes.

10. The slowest drawdown rate of the eighteen (18) percolation tests (with sixteen /16/ results) was one (1) inch per thirty (30) minutes.

11. The sixteen (16) soil boring tests on the site of the Arrowleaf West subdivision were conducted by Mike Clasby to a depth of ten (10) feet and groundwater was not encountered in any of the tests.

12. The developers, although aware of the unpotable water found in the wells drilled on the Arrowleaf East site and although aware of the dry holes and unpotable water in the test holes drilled on the Arrowleaf East site, conveyed none of this information to the Department or to officials of Teton County.

13. The Department, throughout its review of the Arrowleaf West subdivision, was unaware of any well drilling in the general vicinity of Arrowleaf West which resulted in either dry holes or unpotable water because such information was not supplied to it by the developers. However, Ray Anderson, a well driller, testified that he did not know that potable water would not be available on any of the lots in Arrowleaf West.

14. The well logs from Arrowleaf East subdivision, previously approved by the Department, indicated that potable water in adequate quantities had been found in the area.

15. On or about May 7, 1976, the Department completed and circulated copies of the Department's preliminary environmental review on the Arrowleaf West subdivision to interested members of

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the public.

16. The preliminary environmental review indicated the following:

a) That the subdivision may have a detrimental effect on the migratory habits of mule deer and bighorn sheep.

b) That the five (5) wells developed on the 320 acres were deemed adequate evidence that a water supply is available.

c) That soil profile test holes and percolation tests indicate the soils are suitable for on-site sewage disposal and that care must be exercised in locating drainfields on Lots 20 through 24 and Lots 26 through 30 in order to avoid the steeper slopes.

d) That the proposed development will increase the recreational use of the area, but due to the vast amount of public land, the impact will likely be moderate.

17. After issuance of the preliminary environmental review, the Department did not receive further comment from the Fish and Game Department.

18. Section 16-2.2(2)-P2020 (Rule III) M.A.C. is a regulation of the Department which deals with the necessity of preparation of an Environmental Impact Statement. Section 2 of that rule provides in part as follows:

> ...If the preliminary environmental review shows a potential significant effect on the human environment, an Environmental Impact Statement shall be prepared on that action.

19. Section 16-2.2(2)-P2020(3) also provides as follows:

> The following are actions which normally require the preparation of an EIS: (a) the action may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply; (b) the action may be either significantly growth inducing or inhibiting; or (c) the action may substantially alter environmental conditions in terms of quality or availability.

20. On the basis of the preliminary environmental review and the comments on the preliminary environmental review received by the Department, the Department determined that an environmental

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impact statement was not necessary under the Montana Environmental Policy Act (Section 69-6501 et seq., R.C.M. 1947) for the Arrowleaf West subdivision prior to the lifting of sanitary restrictions.

21. That, on or before June 6, 1976, the Department issued a certificate which approved the plat, plans and specifications of the Arrowleaf West subdivision and removed sanitary restrictions from the subdivision, and the certificate contained the following conditions which were imposed by the Department to protect the quality of water in the vicinity of the subdivision:

> THAT the lots sizes as indicated on the plat to be filed with the county clerk and recorder will not be further altered without approval, and,
>
> THAT the lots shall be used for single-family dwellings, and,
>
> THAT the individual water system will consist of a drilled well constructed in accordance with the criteria established in MAC 16-2.14(10)-S14340 to a minimum of 30 feet, and,
>
> THAT the individual sewage disposal systems will consist of a septic tank and subsurface drainfield of such size and capacity as set forth in MAC 16-2.14(10)-S14340, and,
>
> THAT each subsurface drainfield shall have a minimum absorption area of 160 square feet per bedroom, and,
>
> THAT the bottom of the drainfield shall be at least four (4) feet above the water table, and,
>
> THAT no sewage disposal system shall be constructed within 100 feet of the maximum highwater level of a 100 year flood of any stream, lake, watercourse, or irrigation ditch, and,
>
> THAT plans for the proposed water and individual sewage systems will be reviewed and approved by the Teton County Health Department before construction is started, and,
>
> THAT no structure requiring domestic water supply or a sewage disposal system shall be erected on Lot 12, and,
>
> THAT the developer shall provide each purchaser of property with a copy of plat and said purchaser shall locate water and/or sewage facilities in accordance therewith, and,
>
> THAT instruments of transfer for this property shall contain reference to these conditions, and,
>
> THAT departure from any criteria set forth in MAC

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16-2.14(10)-S14340 /sic/ when erecting a structure and appurtenant facilities in said subdivision is grounds for injunction by the Department of Health and Environmental Sciences.

22. That testimony of Dr. Donald R. Reichmuth indicated he made only two (2) visits to the site of the Arrowleaf West subdivision, did not perform any chemical analysis of soil or subsurface water, did not perform a soil profile analysis, and did not perform any percolation tests, groundwater tests, or any other subsurface investigation.

23. That Dr. Reichmuth was unable to state that the subdivision would result in groundwater contamination.

24. That Reichmuth's testimony did not preclude availability of an adequate area on each lot in the Arrowleaf West subdivision for location of a septic tank system and drainfield which met the requirements of the rules promulgated pursuant to the Sanitation in Subdivisions Act.

25. That Al Keppner testified that lift stations can be utilized in sewage disposal systems and such utilization is not prohibited by the Sanitation in Subdivisions Act and rules promulgated pursuant thereto.

26. That the conditions placed on the Arrowleaf West subdivision by the Department of Health and Environmental Sciences in its certificate provided that individual water and sewage disposal systems installed in the subdivision must meet the requirements of the Sanitation in Subdivision rules, and must be reviewed and approved by the Teton County Health Department before construction of the systems.

27. That the requirement of each subsurface drainfield's absorption area stated in the Department's certificate exceeded the minimum requirements of Bulletin 332, April 1969, Table III for the slowest absorption rate of the eighteen percolation tests.

28. The area containing Arrowleaf West is within the

boundaries of an area tentatively designated by the United States Fish and Wildlife Service as critical grizzly bear habitat under the Federal Endangered Species Act.

29. There have been approximately three (3) to four (4) sightings of the Northern Rocky Mountain Wolf within an approximate ten (10) mile radius of the proposed subdivision. The Northern Rocky Mountain Wolf is listed as an endangered species under the Federal Endangered Species Act.

30. Other wildlife, such as mountain goats, elk, and deer, frequent the general area in the vicinity of Arrowleaf West subdivision.

31. There is no evidence to show that the actions of the Teton County Commissioners brought about any irreparable injury to the plaintiffs, to the Montana Wilderness Association or individual members of the Wilderness Association. Plaintiffs failed to show the damages, if any, are distinguishable from any injuries to the public generally.

32. On June 30, 1975, an application for approval of the Arrowleaf West preliminary subdivision plat was made to the Teton County Planning Board by Robert W. Jensen, one of the partners in the subdivision.

33. On July 1, 1975, the Teton County Planning Board published a notice of a public hearing on a preliminary plat for the Arrowleaf West subdivision. The hearing notice was for a hearing to be held on the 19th day of August, 1975, at the Courtroom in Choteau, Montana, at 7:30 o'clock P.M.

34. The Teton County Planning Board caused a notice of the said hearing to be mailed by registered letter to certain people, including landowners in the area of the proposed subdivision.

35. That, although the Plaintiffs Guthrie and Gleason appeared at the hearing of the Teton County Planning Board on

August 19, 1975, they did not raise any question about any lack of notice of the hearing or any authority of the Planning Board to hold a hearing on behalf of the Defendant Board of County Commissioners of Teton County. The Montana Wilderness Society did not appear at the public hearing.

36. On August 9, 1975, at 7:30 o'clock P.M. in the Courtroom in the Teton County Courthouse, the Planning Board held a hearing on the proposed subdivision known as Arrowleaf West, during which there was a substantial amount of public disapproval of the subdivision.

37. In a letter dated October 14, 1975, John R. Nauck, secretary of the Teton City-County Planning Board, indicated to Defendant Jensen that the Arrowleaf West Preliminary Plat was approved by the Teton City-County Planning Board subject to the conditions set forth in the September 2, 1975 minutes of the Board and subject to the approval of the ES 91 form by the Department.

38. The Montana Subdivision and Platting Act, Section 11-3859 et seq. R.C.M. 1947, requires that a governing body of a county must, prior to approval of a subdivision application, find that the subdivision as proposed is in the public interest and shall issue written findings of fact that weigh itemized criteria relating to the public interest. On January 19, 1976, the Board of County Commissioners of Teton County considered the approval of Arrowleaf West subdivision and did not make written findings of fact at that time, although the evidence indicates the Board did consider the criteria set out in Section 11-3866(4), R.C.M. 1947.

39. On September 20, 1976, the Board of County Commissioners, Teton County, made and entered written findings which weighed the criteria set forth in Section 11-3866(4), R.C.M. 1947, and ordered that the minutes of the meeting of January 19, 1976, be amended to

approve the preliminary plat of Arrowleaf West subdivision.

From the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. That all findings of fact stated above which may be stated as conclusions of law are incorporated into these conclusions of law by this section.

2. That the rules implementing the Sanitation in Subdivision Act, Section 69-5001 et seq. R.C.M. 1947, are aids to the exercise of the independent discretion of the Department of Health and Environmental Sciences and, in both language and purpose, permit the Department to require substantial compliance.

3. That the action of the Department of Health and Environmental Sciences in reviewing, approving and lifting the sanitary restrictions from the Arrowleaf West subdivision, and in imposing conditions to protect water quality was in compliance with the Sanitation in Subdivision Act, Section 69-5001 et seq. R.C.M. 1947, and its implementing rules.

4. That the Arrowleaf West subdivision will not injure the plaintiffs in any of the following particulars:

(1) water pollution;

(2) loss of aesthetic values;

(3) loss of recreational values;

(4) damage to the area for the suitability of the operation of a dude ranch; or

(5) other economic, personal, and aesthetic consequences of the Arrowleaf West subdivision.

5. That the review, approval and lifting of sanitary restrictions from the Arrowleaf West subdivision by the Department of Health and Environmental Sciences complied with the requirements of the Montana Environmental Policy Act, Section 69-6501 et seq. R.C.M., 1947.

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6. That the decision of the Department of Health and Environmental Sciences that an environmental impact statement was not required is reasonable and consistent with the Montana Environmental Policy Act and its implementing rules.

7. That the action of the Department of Health and Environmental Sciences in reviewing, approving, and lifting the sanitary restrictions from the Arrowleaf West subdivision is not a major state action significantly affecting the quality of the human environment.

8. That the review and approval by the Department of Health and Environmental Sciences of the Arrowleaf West subdivision complies in both spirit and letter with the requirements of Article II, Section 8, of the 1972 Constitution of Montana.

9. That the Arrowleaf West subdivision will not cause the Plaintiffs to suffer irreparable injury and damage.

10. That the Plaintiffs have failed to prove harm or damage by the Defendant Department of Health and Environmental Sciences in its approval of the Arrowleaf West subdivision.

11. That the evidence before this Court and the law warrant judgment generally in favor of the Defendants and against the Plaintiffs.

12. Section 11-3866, R.C.M. 1947, requires that a governing body or its authorized agent or agency hold a public hearing on a preliminary plat. The hearing by the Teton County Planning Board on the Arrowleaf West subdivision met the requirement of the section.

13. The Teton County Planning Board is the authorized agent or agency for the governing body, the Teton County Board of County Commissioners.

14. That the prerequisite notices of the hearing were given as required by Section 11-3866, R.C.M. 1947.

15. That the only issues properly raised by Plaintiffs' complaint in respect to the Defendant Board of County Commissioners

is whether or not a public hearing was held as required by law on the preliminary plat of Arrowleaf West subdivision after the required notice. The Defendants objected to any evidence beyond the scope of the complaint. The Plaintiffs sought to go beyond the scope of the complaint in regard to the basis for the Defendant Board's approval of the subdivision. The objection is well founded and the Court ought not consider any of the evidence beyond the scope of the complaint.

16. That had Plaintiffs taken issue with the method the Defendant Board used in weighing the criteria set forth in Section 11-3866, R.C.M. 1947, the Court concludes that the proper procedure would have been for Plaintiffs to allege and prove that the Defendant Board's actions were fraudulent or so arbitrary as to amount to a clear and manifest abuse of discretion. State ex rel Bowler v. Board of Commissioners of Daniels County, 106 Mont. 251, 76 P.2d 648.

17. The Court cannot conclude as a matter of law that the Defendant Board's actions in approving Arrowleaf West subdivision were contrary to the law. The courts are without power to interfere with the discretionary actions of a board within the board's authority. State ex rel Bowler v. Board of Commissioners of Daniels County, supra. The actions of the Board of County Commissioners in approving the Arrowleaf West subdivision were within the discretion of the Board as a matter of law.

18. The Defendant Board has legal authority to amend its minutes and the Board's Amendment of September 20, 1976, to the minutes of January 19, 1976, is within the power and authority of the Board and is in all respects proper.

19. Section 11-3866(2), R.C.M. 1947, requires a governing body to approve, conditionally approve or reject a preliminary plat within sixty (60) days of its presentation unless the subdivider consents to an extension of the review period.

Subsection (4) of Section 11-3866 is unclear on any time limit for the issuance of written findings of fact. The Court concludes that a subdivider can consent to any extension of time for the review process by the County governing body. In this case, the time involved was not contrary to Section 11-3866(2).

20. The Plaintiff's argument is with the effects of subdivision, regardless of the legality of the approval. The Plaintiff's testimony on the effects of the subdivision on Plaintiffs has to do with the subdivision, regardless of the procedure involved in the approval of the subdivision by the governing body of Teton County. Therefore, the Court cannot conclude the Plaintiffs have suffered damages or injury as a result of the Defendants' actions. The Court concludes that Plainiffs have not demonstrated irreparable harm.

21. Section 93-4204.1, R.C.M. 1947, evidences to the Court an intent by the legislature that members of a citizens group must show an injury which is distinguishable from an injury to the public generally to obtain injunctive relief. The Court concludes that the Plaintiff Montana Wilderness Society, did not meet this burden. The Court cannot conclude that any injury would be suffered by the Montana Wilderness Society or its members that is distinguishable from an injury to the public generally. The general public has the same rights in the area as that of Plaintiffs.

The Court concludes that Plaintiffs' request for an injunction should be denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 29th day of March, 1979.

R. D. McPHILLIPS, DISTRICT JUDGE

JUDGMENT

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * * * * * * * * * * * * * * No. 7118

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,

Plaintiffs,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,

Defendants.

4 COMPARED

J U D G M E N T

* * * * * * * * * * * * * * * * * *

The Court having made Findings of Fact and Conclusions of Law herein and having directed that a Judgment be entered herein in accordance therewith;

Good cause shown:

IT IS ORDERED that plaintiffs' request for an injunction herein be and the same is hereby denied.

DATED this 29th day of March, 1979.

R. D. McPHILLIPS, DISTRICT JUDGE

Filed March 29, 1979
R. D. McPhillips
DISTRICT JUDGE

JUDGEMENT BOOK
VOL. 8 PAGE 324

FILED
March 29, 1979
Nina Bleyer
CLERK
By Kara Brown
DEPUTY CLERK

MEMORANDUM

APR 2 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * * * * * * * * * * * * * No. 7118

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; ROBERT M. CRAWFORD; and ROBERT W. JENSEN, Defendants.	MEMORANDUM

* * * * * * * * * * * * * * * * *

There is confusion as to whether a judgment has actually been entered in this case. To eliminate the confusion the Court has entered a document that denied the request for a permanent injunction. Counsel for defendants ought to file a new notice of appeal to be certain their appeal is protected. See Rule 59(9), M.C.A. Then, the matter can be deemed submitted without further arguments.

The next question will be: What type of an injunction pending an appeal ought to be granted? Obviously, the ocassional sale, the type not covered by the Montana Subdivision Act, ought not be restrained. Nor should a sale of the entire premises in one block. Nor should plaintiffs be restrained from leasing the premises for grazing purposes or camping. The injunction, if any, granted pending the appeal, ought not exceed the scope of the injunction requested in the complaint. Counsel shall submit to the Court proposed injunctions pending the appeal no later than

Filed R. D. Phillips
March 29, 1979

April 5, 1979.

The last question is the amount of bond pending the appeal. Plaintiffs have already posted a FIVE HUNDRED DOLLAR ($500.00) bond. Mr. Jensen has testified they have offered the property for sale for $300,000.00, but the offer has not been accepted. Further offers for individual lots have been made to the developers in the amount of $64,250.00. Perhaps a bond in the amount of FIVE HUNDRED DOLLARS ($500.00) is nominal, but on the other hand, the developers do not plan further sales or development until the appeal is finished.

Counsel has until April 5, 1979, to file objections to the amount of bond.

DATED this 29th day of March, 1979.

R. D. McPHILLIPS, DISTRICT JUDGE

ORDER

APR 2 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * * * * * * * * * * * * * No. 7118

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,

Plaintiffs,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,

Defendants.

O R D E R

* * * * * * * * * * * * * * * * *

Good cause shown,

IT IS ORDERED that defendant's motion to strike certain language from the Court's supplemental memorandum herein be and the same is hereby granted.

DATED this 29th day of March, 1979.

R. D. McPHILLIPS, DISTRICT JUDGE

Filed: March 29, 1979
R. D. McPhillips
DISTRICT JUDGE

ft 4/3/80

M E M O

TO: Arrowleaf West Subdivision, Part III

FROM: Sandi Muckelston

RE: Telephone Conversations With Various Parties on March 19, 1980

9:00 a.m. - Returned numerous calls to Jim Goetz and discussed the Department's response to his letter dated March 10, 1980. I told Jim that as far as the Department was concerned, the utilization of previously accumulated data and the review of hypothetical futuristic application for certification of the Sanitation in Subdivisions Act has no relevancy, in my opinion, to the determination of whether or not the case of A.B. Guthrie, Jr. et al. vs. the Department of Health et al. is moot. The subdivision plat upon which the case was premised has been vacated as he indicated in his letter. Since his case in controversy rested upon the Department's review and action regarding the subdivision noted in that plat, it seems clear that the vacation of the plat negates any further action that the Department could possibly take in regard to the application for subdivision approval. Furthermore, it seems highly inequitable that he would request the Department to refuse to use data that had been accumulated in this matter that may be quite relevant to a future application if the Department determines that the data is valid and satisfies the requirements of the Sanitation in Subdivisions Act and the rules implementing that act. Requiring the Department to make such an agreement to begin from scratch, in fact, contradicts the typical criticism of applicants who believe the state requires immense duplication in its review efforts. He indicated that he understood the Department's position. In fact, he admitted that his sole purpose in making the request was to keep the case alive for review by the Montana Supreme Court. My response was that it was not legitimate on the part of a governmental agency funded by taxpayers' funds to engage in or negotiate the advancement of his own personal preference.

I also indicated that the Court should not undertake the review of a hypothetical futuristic case or controversy and, in my judgment, had no jurisdiction to undertake such a review. His response was it aided judicial economy. I responded that judicial economy is not served if an application is never filed in the future in relation to the land previously described as

Arrowleaf West Subdivision.

He brought up the issue of costs and indicated that there had not been timely filing of a bill of costs in District Court. I responded that the Department had not reviewed that situation; however, their position on it would certainly be influenced by his advancement of an appeal in this case regarding issues that we thought were specious.

He indicated that he would review the file following our conversation, make his final decision on whether or not he thought the case was moot, and would notify me within the next few days of his conclusion.

9:10 a.m. - Called Ed Casne and reported the substance of my conversation with Jim Goetz. I indicated to Ed that I had told Jim that if he were to voluntarily dismiss the appeal, we would probably resolve to his satisfaction the issue of the costs of the proceeding. Ed told me he had no problem with us dropping the bill of costs if Goetz, in fact, does dismiss the appeal.

11:15 a.m. - Contacted the Clerk and Recorder of Teton County who indicated to me that her suggested procedure in relation to a vacated plat and in relation to the certificate of approval of that plat would be to stamp the certificate of approval with a statement such as: "Plat Vacated - Certificate Invalid." She also indicated during the course of our conversation that another plat regarding the land in the former Arrowleaf West Subdivision had been filed. I asked her and she agreed to send me the Petition for Vacation, the Resolution of the County Commissioners granting the Petition, and the most recently filed-filed plat.

jw

JAMES H. GOETZ
WILLIAM L. MADDEN, JR.

P.O. BOX 1322
AREA CODE 406
TELEPHONE 587-0618

GOETZ & MADDEN
ATTORNEYS AT LAW
522 WEST MAIN STREET
BOZEMAN, MONTANA 59715

Stanley Attorneys

APR 5 1979

April 3, 1979

Honorable R. D. McPhillips,
District Judge
Toole County Courthouse
Shelby, Montana 59474

Re: A.B. Guthrie, Jr., et al v. Montana Department of Health and Environmental Sciences, et al No. 40471

Dear Judge McPhillips:

In compliance with your Order of March 29, 1979, I have redrafted a proposed Order for an Injunction Pending Appeal. In doing so I have attempted to limit the application of the injunction to the issues raised by the Complaint and to meet the meaning of your Order of March 19, 1979.

Please note that I have placed an alternative section at the end of the Order whereby the injunction is granted either with no bond or with nominal bond in the amount to be specified by you.

In further compliance with your Order I am also sending to the Clerk of the Court a new Notice of Appeal in order to protect our Appeal on this matter.

Thank you for your patient cooperation on this matter.

Sincerely,

James H. Goetz
Attorney for Plaintiffs

JHG/pam

cc: Stan Bradshaw
Greg Curtis
Larry Juelfs
Michael Anderson

DATED this 4th day of April, 1979.

CHURCH, HARRIS, JOHNSON & WILLIAMS

BY: _____
MICHAEL B. ANDERSON
302 Northwestern Bank Building
P. O. Box 1645
Great Falls, Montana 59403

Attorneys for Defendants
CRABTREE, CRAWFORD & JENSEN

Certificate of Service

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 5th day of April 1979

Church, Harris, Johnson & Williams

By _____
302 Northwestern Bank Building
P. O. Box 1645 - Great Falls, MT 59403

OBJECTIONS TO BOND PENDING APPEAL

IN THE DISTRICT COURT OF THE NINTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF TETON

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs,	NO. 40471 OBJECTIONS TO BOND PENDING APPEAL
vs.	
MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; and J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, Defendants.	

COME NOW defendants J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, and object to the proposed bond pending appeal recommended in the Memorandum of this Court dated March 29, 1979.

The bond currently posted before the Court is only security for defendants' costs on appeal under Rule 6 of Montana Rules of Appellate Civil Procedure. No bond is presently posted as an undertaking to secure defendants' for damages caused by the stay of entry of judgment of the District Court. At the hearing on the motion for injunction pending appeal on March 6, 1979, defendant ROBERT M. JENSEN testified that the value of the property was estimated at $300,000; provided, that the property could be sold in its subdivided state. The attached Affidavit of Mr. Jensen indicates that the defendants have received a bona fide offer of $200,000 for the property in its present state. Bond in an amount no less than this difference in value of the land of $100,000 is requested by defendants. Accordingly, defendants object to bond in any lesser amount.

CHURCH, HARRIS, JOHNSON & WILLIAMS
ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

OBJECTIONS TO INJUNCTION PENDING APPEAL

IN THE DISTRICT COURT OF THE NINTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF TETON

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs,	:	NO. 40471
vs.	:	DEFENDANT J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN'S OBJECTIONS TO INJUNCTION PENDING APPEAL
MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; and J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, Defendants.	:	

COME NOW DEFENDANTS J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, and move the Court for its Order that there be no injunction pending appeal.

The grounds for this motion are that these defendants have been enjoined from proceeding with final development and sale of lots from Arrowleaf West since the temporary restraining order was issued by Judge Bennett at the commencement of plaintiffs' suit on August 24 , 1977. Although this Court has now denied the injunction requested, no Order granting these defendants their costs pursuant to Sections 25-10-101 and 102, M.C.A. and without granting defendants' their costs pursuant to Section 27-19-406. ,M.C.A. on dissolution of a temporary restraining order.

Having suffered such an extended period of unlawful restraint, these defendants should be free to pursue the completion and sale of their project free from further interference and in accordance with the plat approved by the Teton County Commissioners, the

CHURCH, HARRIS, JOHNSON & WILLIAMS
ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

Department of Health and Environmental Sciences, and this Court.

Defendants contemplate no further significant construction incorporation of the Arrowleaf West Subdivision site--the roads are virtually complete. The public is amply protected from any harm resulting from installation of sanitary facilities by reason of the conditions imposed in the Department of Health's approval.

In the alternative, and only if the Court grants an injunction pending appeal, such injunction should be limited strictly to development and sale or lease of lots in reliance on the subdivision plat in question which was the subject of plaintiffs' complaint. Defendants have received plaintiffs' proposed injunction pending appeal, and take issue with a broad injunction from subdividing the land in that such breadth would prohibit resubmitting the proposed subdivision plat or another proposed plat for approval in accordance with the regulations. Defendants should be free from limitation or burden from any injunction not dependent upon the plat previously filed or the certificate previously lifting sanitary restrictions. Any enumeration of approved activities other than those dependent upon the subject matter of the lawsuit would serve only to restrict the rights of defendants with the lawful and proper use of their land. The injunction proposed by defendants would certainly include, as an example, resurvey of the property by way of replat requiring new subdivision approval, division of the land in a manner which is not forbidden by or governed by the provisions of the Subdivision and Platting Act and the Sanitation and Subdivisions Act, plus individual use such as farming, ranching, or leasing.

The injunction, if any, should be as follows:

> That defendants J. R. Crabtree, James M. Crawford and Robert W. Jensen be enjoined pending plaintiffs' appeal from this Court's judgment dated March 29, 1979, from any substantial alteration of the Arrowleaf West subdivision site or from sale or lease of lots encompassed by, subdivision of land dependent

CHURCH, HARRIS, JOHNSON & WILLIAMS
ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

upon or in furtherance of the subdivision as depicted in the plat filed July 22, 1976 in the records of the Clerk and Recorder of Teton County.

Nothing in this Order shall be construed to limit any use or disposition of this land by defendants Crabtree, Crawford and Jensen which would be permissible if said plat and the related Certificate of the Department of Health lifting sanitary restrictions had not been approved and filed, including, but not limited to, vacating said plat and voluntary withdrawal of said Certificate.

Respectfully submitted this 4th day of April, 1979.

CHURCH, HARRIS, JOHNSON & WILLIAMS

BY: Michael B. Anderson
MICHAEL B. ANDERSON
302 Northwestern Bank Building
P. O. Box 1645
Great Falls, Montana 59403

Attorneys for Defendants

Certificate of Service

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 5th day of April 19 79

Church, Harris, Johnson & Williams

By Michael B. Anderson
302 Northwestern Bank Building
P. O. Box 1645 - Great Falls, MT 59403

CHURCH, HARRIS, JOHNSON & WILLIAMS
ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

INJUNCTION PENDING APPEAL

APR 5 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * * * *

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,

Plaintiffs,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J.R. CRABTREE; ROBERT M. CRAWFORD; and ROBERT W. JENSEN,

Defendants.

No. 40471

INJUNCTION PENDING APPEAL

Plaintiffs have filed their Notice of Appeal in this action, and have moved for an injunction pending appeal.

Upon due considerations, plaintiffs' motion for injunction pending appeal is granted. All defendants, their agents, employees and assigns shall, during the pending of the appeal of this matter be enjoined from subdividing the land which is in question in this action. By "subdividing" this Court means that action cannot be taken to create or effectuate a "subdivision" within the meaning of subdivision as defined in Sec. 76-3-103 (15) M.C.A. Defendants are not enjoined from making an occasional sale or other division of land, so long as such division of land is exempted from the application of the Montana Subdivision and Platting Act, Sec. 76-3-101 et. seq. M.C.A. Nothing herein shall be construed to deny defendants or their assigns the right to lease said land or camp on it or to sell it outright in one parcel.

Defendants, their employees, agents and assigns, are further enjoined from selling subdivided lots (within the meaning

of subdivision as set forth in the Montana Subdivision and Platting Act and from taking actions to modify physically the character of the land, water courses, trees, vegetation and other natural attributes of the said land in connection with or contemplation of subdivision of the said land.

This injunction shall be in effect during the pendency of the appeal.

(No bond shall be required of Plaintiffs.) (A nomimal bond of $_____shall be required to posted by Plaintiffs.)

DATED this _____ day of April, 1979.

_____
R. D. McPhillips, District Judge

RE-NOTICE OF APPEAL

JAMES H. GOETZ
WILLIAM L. MADDEN, JR.

P.O. BOX 1322
AREA CODE 406
TELEPHONE 587-0618

GOETZ & MADDEN
ATTORNEYS AT LAW
522 WEST MAIN STREET
BOZEMAN, MONTANA 59715

April 5, 1979

APR 6 1979

Nina Greyn, Clerk
District Court
Teton County
Choteau, Montana

Dear Miss Greyn:

Re: No. 40471

Please file the enclosed Notice of Appeal in the above entitled matter. Also enclosed for filing is a copy of Plaintiffs proposed Order for Injunction Pending Appeal. Thank you for your trouble in this matter.

Sincerely,

James H. Goetz

JHG/pam
enclosure

cc: Stan Bradshaw
Greg Curtis
Larry Juelfs
Michael Anderson

NOTICE OF APPEAL TO THE SUPREME COURT OF THE STATE OF MONTANA FROM A JUDGMENT OR ORDER OF THE DISTRICT COURT

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

* * * * * * *

A.B. GUTHRIE, JR.; et al,

Plaintiffs,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, et al,

Defendants.

Re-Notice of Appeal District Court No. 40471

Notice is hereby given that A.B. Guthrie, Jr., et al, Plaintiffs above-named, hereby renew the Notice of Appeal previously filed in this action on February 14, 1979 to the Supreme Court of the State of Montana from the final Order and Judgment and Findings of Fact and Conclusion of Law entered in this action on the 5th and 7th days of February, 1979, and from the Amended Findings of Fact and Conclusions of Law entered by the District Court on March 29, 1979 and from the District Court's Order of March 29, 1975 denying injunctive relief to the Plaintiffs and from any judgment filed or to filed pursuant to said Orders.

DATED this 5th day of April, 1979.

GOETZ & MADDEN
P.O. Box 1322
522 W. Main
Bozeman, Montana 59715

James H. Goetz, Attorney for Plaintiffs

AFFIDAVIT

APR 6 1979

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs, vs. MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; and J. R. CRABTREE, JAMES M. CRAWFORD, and ROBERT W. JENSEN, Defendants.	NO. 40471 AFFIDAVIT

Certificate of Service
This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 5th day of April 1979
Church, Harris, Johnson & Williams
By Michael P. Anderson
302 Northwestern Bank Building
P.O. Box 1645 - Great Falls, MT 59403

STATE OF MONTANA)
: ss.
County of Teton)

ROBERT W. JENSEN, being first duly sworn, on oath deposes and says;

1. That he is one of the defendants in the above-captioned cause;

2. That the defendants have recently received a bona fide offer of $200,000 for the purchase of the Arrowleaf West subdivision site for purposes other than subdivision;

3. That he has previously testified that the value of the Arrowleaf West subdivision site as subdivided land is no less than $300,000.

DATED this 5 day of April, 1979.

S/ Robert W. Jensen
ROBERT W. JENSEN

SUBSCRIBED & SWORN to before me this 5 day of April, 1979.

(NOTARIAL SEAL)

S/ Robert L. Woodahl
Notary Public for the State of Montana.
Residing at: Choteau, Mt
My Commission expires: _____

CHURCH, HARRIS, JOHNSON & WILLIAMS
ATTORNEYS AT LAW
NORTHWESTERN BANK BLDG.
GREAT FALLS, MONTANA

NOTICE OF ENTRY OF JUDGMENT

File Subdiv Arrowleaf

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE

STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

APR 13 1979

A.B. Guthrie, Jr.; Alice Gleason; Kenneth Gleason; and Montana Wilderness Association,
Plaintiffs,

-vs-

NO. 7118

-76-

Montana Department of Health and Environmental Sciences; Board of County Commissioners; Teton County; J.R. Crabtree; James M. Crawford; and Robert W. Jensen,
Defendants.

FILED
April 12, 1979
Nina Stapel
CLERK
By Karen Brown
DEPUTY CLERK

* * * * * * * * * * * * * * * * * *

NOTICE OF ENTRY OF JUDGMENT

* * * * * * * * * * * * * * * * * *

Pursuant to Rule 77 (d), Montana Rules of Civil Procedure, notice is hereby given that judgment has been rendered and filed in the Office of the Clerk of District Court, Teton County, on the 29th day of March, 1979.

A copy of the Judgment rendered and filed has and is attached to this Notice.

DONE this 12th day of April, 1979.

Nina Stapel
CLERK OF COURT
Ninth Judicial District
Teton County
State of Montana
By Karen Brown
Deputy Clerk

Copies To: Larry Juelfs
Teton County Attorney
Choteau, Montana 59422

Steven G. Brown
Department of Health
9th and Roberts
Helena, Montana 59601

Peter Meloy
Horsky Block Building
Helena, Montana 59601

James Goetz
Attorney At Law
Box 1322
Bozeman, Montana 59715

Gregory Curtis
Attorney At Law
Murphy & Curtis
Choteau, Montana 59422

Mike Anderson
Church, Harris, Johnson &Williams
Box 1645
Great Falls, Mt. 59401

Stan Bradshaw
Legal Division
Depart. of Health
9th and Roberts
Helena, Montana 59601

INJUNCTION PENDING APPEAL

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

MAY 17 1979

* * * * * * * * * *

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,

Plaintiffs,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J.R. CRABTREE; ROBERT M. CRAWFORD; and ROBERT W. JENSEN,

Defendants.

No. 40471

#7118

FILED
May 2, 1979
Marie L. Stapel
CLERK
Karen Brown
DEPUTY CLERK

INJUNCTION PENDING APPEAL

Plaintiffs have filed their Notice of Appeal in this action, and have moved for an injunction pending appeal.

Upon due considerations, plaintiffs' motion for injunction pending appeal is granted. All defendants, their agents, employees and assigns shall, during the pending of the appeal of this matter be enjoined from subdividing the land which is in question in this action. By "subdividing" this Court means that action cannot be taken to create or effectuate a "subdivision" within the meaning of subdivision as defined in Sec. 76-3-103 (15) M.C.A. Defendants are not enjoined from making an occasional sale or other division of land, so long as such division of land is exempted from the application of the Montana Subdivision and Platting Act, Sec. 76-3-101 et. seq. M.C.A. Nothing herein shall be construed to deny defendants or their assigns the right to lease said land or camp on it or to sell it outright in one parcel.

Defendants, their employees, agents and assigns, are further enjoined from selling subdivided lots (within the meaning

of subdivision as set forth in the Montana Subdivision and Platting Act and from taking actions to modify physically the character of the land, water courses, trees, vegetation and other natural attributes of the said land in connection with or contemplation of subdivision of the said land.

This injunction shall be in effect during the pendency of the appeal.

(No bond shall be required of Plaintiffs.) (A nomimal bond of $ 100 shall be required to posted by Plaintiffs.)

DATED this 30th day of April, 1979.

R. D. McPhillips, District Judge

STATE OF MONTANA
COUNTY OF TETON. } SS.

I hereby certify that the instrument to which this certificate is affixed is a true correct and compared copy of the original on file in the office of the Clerk of the District Court.

Witness my hand and the seal of the District Court of Teton County this 16th day of May, 1979

Nina Stapel
Clerk of Court, Teton County, Montana

By _____
Deputy Clerk

NOTICE FOR EXTENSION TO TRANSMIT RECORD

JAMES H. GOETZ
WILLIAM L. MADDEN, JR.

P.O. BOX 1322
AREA CODE 406
TELEPHONE 587-0618

GOETZ & MADDEN
ATTORNEYS AT LAW
522 WEST MAIN STREET
BOZEMAN, MONTANA 59715

May 21, 1979

MAY 2 2 1979

Honorable Thomas Kearney, Clerk
Montana Supreme Court
State Capitol
Helena, Montana 59601

Re: A. B. Guthrie, Jr. et al. vs. Montana Department of Health and Environmental Sciences et al. On appeal from the District Court of the Ninth Judicial District in and for the County of Teton. Teton County No. 40471.

Dear Mr. Kearney:

I am counsel for Plaintiffs-Appellants in this matter which is being appealed from the Ninth Judicial District in Teton County. I was just informed last week that the court reporter would be unable to have the transcription of the trial done within the 40 days allocated for transmission of the record. Since I was notified too late to get a timely motion into the District Court, I am filing this motion with the Montana Supreme Court in compliance with Rule 10 M. R. App. Civ. P. Please bring this motion to the attention of the Court.

Thank you for your cooperation on this matter.

Sincerely,

GOETZ & MADDEN

James H. Goetz

JHG:ble
cc: Michael B. Anderson
Stan Bradshaw
Larry Juelfs
Greg Curtis

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,
Plaintiffs and Appellants

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,
Defendants and Respondents.

No. 14816

Motion for Extension to Transmit Record

Ninth Judicial District (Teton County) No. 40471

* *

COMES NOW the Plaintiffs-Appellants, by and through their counsel of record, and move the court for an order granting them an additional 90 days, until the 21st day of August, 1979, to transmit the record on appeal to the Supreme Court.

This motion is made pursuant to Rule 10 of the M. R. App. Civ. P. The reason this motion is not made to the District Court, is that more than 40 days have elapsed since the filing of the Notice of Appeal. Therefore, under Rule 10(c) M. R. App. Civ. P., this motion is addressed to the Montana Supreme Court.

The ground for this motion is that, it is impossible, due to causes beyond the control of Plaintiffs, for the record to be transmitted within the statutory period of 40 days since the Notice of Appeal. This is because the court reporter has notified Plaintiffs that he is unable to have the transcript of the trial prepared within said 40 days. Said court reporter states that he will need at least the additional 90 days within which to prepare the transcript. Plaintiffs were only notified of such inability to complete the transcript during the week previous to this motion.

Wherefore, Plaintiffs respectfully submit that there is good cause for the extension of time within which to prepare the transcript and submit the record to the Montana Supreme Court.

Dated this 21st day of May, 1979.

GOETZ & MADDEN
P. O. Box 1322
Bozeman, Montana 59715

By: _____
James H. Goetz

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of May, 1979 a copy of the foregoing Motion for Extension to Transmit Record was mailed, postage prepaid, addressed as follows to the attorney of record for Defendants and Respondents: Michael B. Anderson of Church, Harris, Johnson and Williams, Box 1645, Great Falls, Montana 59401; Stan Bradshaw, Legal Division, Department of Health, 9th and Roberts, Helena, Montana 59601; and Larry Juelfs, Teton County Attorney, Choteau, Montana 59422.

_____

ORDER

ORIGINAL

MAY 2 9 1979

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,
Plaintiff and Appellants

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,
Defendants and Respondants.

No. 14816

O R D E R

Ninth Judicial District
(Teton County) No. 40471

* *

Upon Motion of Plaintiffs-Appellants filed pursuant to Rule 10 M. R. App. Civ. P., and good cause appearing therefore, the Motion to Extend the time within which to file the record in the Montana Supreme Court is granted.

Plaintiffs-Appellants shall have to and including the 21st day of August, 1979 in which to file the record on appeal.

DATED this 22nd day of May, 1979.

Bradley J. Haswell
Chief Justice

FILED
MAY 22 1979
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONANA

* *

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs and Appellants -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants and Respondents.	No._____ Motion for Extension to Transmit Record Ninth Judicial District (Teton County) No. 4047[illegible]

* *

COMES NOW the Plaintiffs-Appellants, by and through their counsel of record, and move the court for an order granting them an additional 90 days, until the 21st day of August, 1979, to transmit the record on appeal to the Supreme Court.

This motion is made pursuant to Rule 10 of the M. R. App. Civ. P. The reason this motion is not made to the District Court, is that more than 40 days have elapsed since the filing of the Notice of Appeal. Therefore, under Rule 10(c) M. R. App. Civ. P., this motion is addressed to the Montana Supreme Court.

The ground for this motion is that, it is impossible, due to causes beyond the control of Plaintiffs, for the record to be transmitted within the statutory period of 40 days since the Notice of Appeal. This is because the court reporter has notified Plaintiffs that he is unable to have the transcript of the trial prepared within said 40 days. Said court reporter states that he will need at least the additional 90 days within which to prepare the transcript. Plaintiffs were only notified of such inability to complete the transcript during the week previous to this motion.

Wherefore, Plaintiffs respectfully submit that there is good cause for the extension of time within which to prepare the transcript and submit the record to the Montana Supreme Court.

Dated this 21st day of May, 1979.

GOETZ & MADDEN
P. O. Box 1322
Bozeman, Montana 59715

By: _____
James H. Goetz

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of May, 1979 a copy of the foregoing Motion for Extension to Transmit Record was mailed, postage prepaid, addressed as follows to the attorney of record for Defendants and Respondents: Michael B. Anderson of Church, Harris, Johnson and Williams, Box 1645, Great Falls, Montana 59401; Stan Bradshaw, Legal Division, Department of Health, 9th and Roberts, Helena, Montana 59601; and Larry Juelfs, Teton County Attorney, Choteau, Montana 59422.

_____

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * * * * *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION; Plaintiffs and Appellants, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants and Respondants.	)	No. 14816

AUG 2 3 1979

ORDER

Upon Motion of Plaintiffs-Appellants, and good cause appearing therefore, the Motion to Extend the time in which to file the record with the Montana Supreme Court is granted.

Plaintiffs-Appeallants shall have to and including the 20th day of October, 1979, in which to file the record on appeal.

DATED this 21 day of August, 1979.

Frank I. Haswell
Chief Justice

FILED
AUG 21 1979
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs and Appellants, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT WL JENSEN, Defendants and Respondents.	AUG 21 1979 No. 14816

MOTION FOR EXTENSION TO TRANSMIT RECORD

COMES NOW the Plaintiffs-Appellants, by and through their counsel of record, and move the Court for an order granting them an additional sixty (60) days, until the 20th day of October, 1979, to transmit the record on appeal to the Supreme Court.

This Motion is made pursuant to Rule 10 of the M.R. App. Civ. P. The ground for this motion is that, it is impossible, due to causes beyond the control of Plaintiffs, for the record to be transmitted within the statutory period of forty (40) days since the notice of appeal, or within the ninety (90) day extension period heretofore granted through the 21st day of August, 1979. Such extension was granted by the order of the Court on May 22, 1979. This is because the Court Reporter has notified Plaintiffs that he is unable to have the transcript of the trial prepared by August 21, 1979. Plaintiff's counsel, since August 2nd, 1979, has made diligent attempts to contact said Court Reporter by telephone. Approximately ten (10) attempts were made between August 2nd, 1979 and August 20th, 1979 to contact said Court Reporter. None of the attempts were successful. He finally reached said Court Reporter on August 20th, 1979. He

was informed that the Court Reporter was approximately half finished with the transcript and that the said Court Reporter requested an extension of another sixty (60) days within which to prepare the transcript. An affidavit was requested by counsel of said Court Reporter, Bill May. Bill May indicated that he would prepare an affidavit and send it directly to the Montana Supreme Court in view of the lateness of the request.

Wherefore, on the basis of the present motion, and on the basis of the affidavit to be sent to the Supreme Court directly by said Court Reporter, Bill May, Plaintiffs-Appellants respectfully submit that there is good cause for the extension of time within which to prepare the transcript and submit the record to the Montana Supreme Court.

DATED this 20th day of August, 1979.

GOETZ & MADDEN
P.O. Box 1322
Bozeman, Montana 59715

By: James H. Goetz

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of August, 1979, a copy of the foregoing Motion for Extension to Transmit Record was mailed, postage prepaid, addressed as follows to the attorney of record for Defendants and Respondents: Michael B. Anderson of Church, Harris, Johnson and Williams, Box 1645, Great Falls, Montana 59401; Stan Bradshaw, Legal Division, Department of Health, 9th and Roberts, Helena, Montana 59601; and Larry Juelfs, Teton County Attorney, Choteau, Montana 59422.

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

A. B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiff and Appellants -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants and Respondants.	No._____ O R D E R Ninth Judicial District (Teton County) No. 40471

* *

Upon Motion of Plaintiffs-Appellants filed pursuant to Rule 10 M. R. App. Civ. P., and good cause appearing therefore, the Motion to Extend the time within which to file the record in the Montana Supreme Court is granted.

Plaintiffs-Appellants shall have to and including the 21st day of August, 1979 in which to file the record on appeal.

DATED this____day of_____, 1979.

_____
Justice

AFFIDAVIT

IN THE SUPREME COURT OF THE STATE OF MONTANA

A. B. GUTHRIE, JR., ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,

Plaintiffs & Appellants,

-vs-

MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; ROBERT W. JENSEN,

Defendants & Respondents.

AFFIDAVIT:

STATE OF MONTANA,)
County of Pondera) ss.

W. J. MAY, being first duly sworn under oath, deposes and says:

That he is the Official Court Reporter for the Ninth Judicial District of the State of Montana, in and for the Counties of Teton, Glacier, Pondera, and Toole;

That he is currently preparing the Transcript on Appeal in the above entitled cause. That the transcript record is voluminous and will total approximately 700 pages. That because of the press of official duties in the four counties of the Ninth Judicial District and a busy fall court schedule he has not been able to complete the record on appeal to date and will not be able to do so within the time extended for preparation and transmittal of the record on appeal, which time will expire October 20, 1979;

That because of a heavy jury calendar scheduled in the Ninth Judicial District for the months of October, November, and December, 1979, affiant deems it necessary that the time for preparation and transmittal of the Transcript on Appeal be extended to December 20, 1979;

That this affidavit is made in good faith to protect the interest of the appellant herein; that affiant will diligently pursue preparation of said record and fully utilize the time extended to accomplish fully completing the record on appeal.

W. J. May

SUBSCRIBED and sworn to before me this 12th day of October, 1979.

Sarah M. Rowe

Sarah M. Rowe
Notary Public for the State of Montana,
residing at Conrad, Montana;
My Commission expires October 2, 1980.

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * * * * *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,

Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,

Defendants and Respondents.

No. 14816

OCT 16 1979

MOTION FOR EXTENSION TO TRANSMIT RECORD

COMES NOW the Plaintiffs-Appellants, by and through their counsel of record, and move the Court for an order granting them an additional sixty (60) days, until the 20th day of December, 1979, to transmit the record on appeal to the Supreme Court.

This Motion is made pursuant to Rule 10 of the M.R. App. Civ. P. The ground for this motion is that, it is impossible, due to causes beyond the control of Plaintiffs, for the record to be transmitted within the statutory period of forty (40) days since the notice of appeal, or within the one hundred fifty (150) day extension periods heretofore granted through the 20th day of October, 1979. Such extension was granted by the order of the Court on May 22, 1979. Second extension was granted by the order of the Court on August 21, 1979. The present motion is necessary because the Court Reporter has notified Plaintiffs that he is unable to have the transcript of the trial prepared by October 20, 1979. The Affidavit of Court Reporter Bill May in support of this Motion is attached hereto.

Wherefore, on the basis of the present motion, and on the basis of the affidavit of said Court Reporter, Bill May,

Plaintiffs-Appellants respectfully submit that there is good cause for the extension of time within which to prepare the transcript and submit the record to the Montana Supreme Court.

DATED this 15th day of October, 1979.

GOETZ & MADDEN
P.O. Box 1322
Bozeman, Montana 59715

By: James H. Goetz

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of October, 1979, a copy of the foregoing Motion for Extension to Transmit Record was mailed, postage prepaid, addressed as follows to the attorney of record for Defendants and Respondents: Michael B. Anderson of Church, Harris, Johnson and Williams, Box 1645, Great Falls, Montana 59401; Stan Bradshaw, Legal Division, Department of Health, 9th and Roberts, Helena, Montana 59601; and Larry Juelfs, Teton County Attorney, Choteau, Montana 59422.

ORDER

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION;

Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,

Defendants and Respondents.

No. 14816

OCT 17 1979

ORDER

Upon Motion of Plaintiffs-Appellants filed pursuant to Rule 10 M.R. App.Civ.P., and good cause appearing therefore, the Motion to Extend the time within which to file the record in the Montana Supreme Court is granted.

Plaintiffs-Appellants shall have to and including the 20th day of December, 1979 in which to file the record on appeal.

DATED this 17th day of October, 1979.

Frank I. Haswell

Chief Justice

FILED

OCT 17 1979

Thomas J. Kearney

CLERK OF SUPREME COURT
STATE OF MONTANA

AFFIDAVIT

IN THE SUPREME COURT OF THE STATE OF MONTANA

A. B. GUTHRIE, JR., ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,

Plaintiffs & Appellants,

-vs-

MONTANA DEPARTMENT OF HEALTH & ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS, TETON COUNTY; J. R. CRABTREE; JAMES M. CRAWFORD; ROBERT W. JENSEN,

Defendants & Respondents.

AFFIDAVIT:

STATE OF MONTANA,)
County of Pondera) ss.

W. J. MAY, being first duly sworn under oath, deposes and says:

That he is the Official Court Reporter for the Ninth Judicial District of the State of Montana, in and for the Counties of Teton, Glacier, Pondera, and Toole;

That he is currently preparing the Transcript on Appeal in the above entitled cause. That the transcript record is voluminous and will total approximately 800 pages of testimony; that because of the press of official duties in the four counties of the Ninth Judicial District and a heavy jury calendar affiant has not been able to complete the record on appeal to date, and will not be able to do so within the time extended for preparation and transmittal of the appeal record, which time will expire on or about December 20, 1979;

That because of the jury cases, equity cases, and law and motion days scheduled in the four counties of the Ninth Judicial District for December, 1979 through February, 1980, affiant deems it necessary that the time for preparation and transmittal of the appeal record be extended to February 15, 1980;

That this affidavit is made in good faith to protect the interest of the appellant herein; that affiant will diligently pursue preparation of said record and fully utilize the time extended to accomplish completing the record on appeal.

W. J. May

Subscribed and sworn to before me this 11th day of December, 1979.

Sarah M. Rowe

Sarah M. Rowe
Notary Public for State of Montana,
residing at Conrad, Montana;
My Commission expires October 2, 1980.

DEC 17 1979

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION,	)	
Plaintiffs and Appellants,	)	No. 14816
-vs-	)	
MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,	)	
Defendants and Respondents.	)	

MOTION FOR EXTENSION TO TRANSMIT RECORD

COMES NOW the Plaintiffs-Appellants, by and through their counsel of record, and move the Court for an order granting them an additional sixty (60) days, until the 15th day of February, 1980, to transmit the record on appeal to the Supreme Court.

This Motion is made pursuant to Rule 10 of the M.R. App. Civ. P. The ground for this motion is that, it is impossible, due to causes beyond the control of Plaintiffs, for the record to be transmitted within the statutory period of forty (40) days since the notice of appeal or within the two hundred ten (210) day extension periods heretofore granted through the 20th day of December, 1979. An extension was granted by the order of the Court on May 22, 1979. An second extension was granted by the order of the Court on August 21, 1979. An third extension was granted by the order of the Court on October 17, 1979. The present motion is necessary because the Court Reporter has notifed Plaintiffs that he is unable to have the transcript of the trial prepared by December 20, 1979. The Affidavit of Court Reporter Bill May in support of this Motion is attached hereto.

Wherefore, on the basis of the present motion, and on

the basis of the affidavit of said Court Reporter, Bill May, Plaintiffs-Appellants respectfully submit there is good cause for the extension of time within which to prepare the transcript and submit the record to the Montana Supreme Court.

DATED this 14th day of December, 1979.

GOETZ & MADDEN
P.O. Box 1322
Bozeman, Montana 59715

By: James H. Goetz

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of December, 1979, a copy of the foregoing Motion for Extension to Transmit Record was mailed, postage prepaid, addressed as follows to the attorney of record for Defendants and Respondents: Michael B. Anderson of Church, Harris, Johnson and Williams, Box 1645, Great Falls, Montana 59401; Stan Bradshaw, Legal Division, Department of Health, 9th and Roberts, Helena, Montana 59601; and Larry Juelfs, Teton County Attorney, Choteau, Montana 59422.

James H. Goetz

ORDER

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION;

Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN,

Defendants and Respondents.

No. 14816

DEC 1 0 1979

ORDER

Upon Motion of Plaintiffs-Appellants filed pursuant to Rule 10 M.R. App. Civ. P., and good cause appearing therefore, the Motion to Extend the time within which to file the record in the Montana Supreme Court is granted.

Plaintiffs-Appellants shall have to and including the 15th day of February, 1980, in which to file the record on appeal.

DATED this 17th day of December, 1979.

Frank I. Haswell
Chief Justice

FILED
DEC 17 1979
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

ORDER

FEB 25 1980

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs and Appellants, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants and Respondents.	No. 14816

ORDER

Upon petition of Appellants, and good cause appearing therefor, it is hereby ordered that proceedings in this appeal be stayed until March 20, 1980.

DATED this 19th day of February, 1980.

Frank I. Haswell

Frank Haswell
Chief Justice

FILED
FEB 25 1980
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

FEB 21 1980

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * *

A.B. GUTHRIE, JR.; ALICE GLEASON; KENNETH GLEASON; and MONTANA WILDERNESS ASSOCIATION, Plaintiffs and Appellants, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; BOARD OF COUNTY COMMISSIONERS; TETON COUNTY; J.R. CRABTREE; JAMES M. CRAWFORD; and ROBERT W. JENSEN, Defendants and Respondents.	No. 14816

MOTION FOR STAY

COMES NOW James H. Goetz, attorney for Plaintiffs-Appellants, and moves the Honorable Court, pursuant to the Montana Rules of Appellate Procedure, for a stay of thirty (30) days in the above-titled proceedings. The basis for this motion is as follows:

1. The present action involves an attempt by Plaintiffs to enjoin the Defendants from proceeding with a subdivision in Teton County. Specifically, a mandatory injunction was sought against the County Defendants seeking a reversal of their grant of approval to the permanent plat tendered by the developers; and a mandatory injunction against the State Department of Health was sought to reinstate the sanitary restrictions on the property in question; and a prohibitory injunction was sought against the developers from proceeding with the subdivision.

2. After trial, the District Court rendered judgment against the Plaintiffs in February, 1979.

3. Thereafter, Plaintiffs filed a timely notice of appeal, and were granted an injunction pending appeal on the condition that they post $1,000.00 bond. The bond has been posted.

4. The Plaintiffs filed a timely request for preparation of the transcript and the appeal has since been pending.

5. Plaintiffs-Appellants have had to seek approximately four (4) extensions of time on this

appeal because the court reporter has been unable to finish preparation of the transcript. The most recent extension of time for filing the record is to February 20, 1980.

6. Appellants' attorney has recently been informed that the Defendant-developers have petitioned Teton County to vacate their contested subdivision plat and that the county has granted the petition to vacate.

7. It appearing to Plaintiffs' attorney that the lawsuit may now be moot, Plaintiffs attorney, contacted the court reporter and requested that he stop preparation of the transcript pending a decision on whether to continue with the appeal.

8. Appellants' attorney has not yet fully decided whether the appeal is moot. He is in the process of contacting attorneys for Respondents to solicit their views on this issue.

For this reason, Appellants respectfully request a thirty (30) day stay of proceedings on this appeal pending their deciding whether to seek a voluntary dismissal of this appeal on the grounds of mootness.

DATED this 19th day of February, 1980.

GOETZ & MADDEN
P.O. Box 1322
Bozeman, Montana 59715

By: _____
James H. Goetz
Attorney for Appellants

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 14th day of Feb 19 80

GOETZ & MADDEN

By _____
P.O. Box 1322
Bozeman, Montana 59715

JAMES H. GOETZ
WILLIAM L. MADDEN, JR.

P.O. BOX 1322
AREA CODE 406
TELEPHONE 587-0618

GOETZ & MADDEN
ATTORNEYS AT LAW
522 WEST MAIN STREET
BOZEMAN, MONTANA 59715

MAR 12 1980

March 10, 1980

Sandra Muckleston, Chief
Legal Division
Department of Health and Environmental
Sciences
1400 11 Avenue
Helena, Montana 59601

Re: A.B. Guthrie, Jr. et al. v. Montana Department of Health and Environmental Sciences et al. (Teton County Cause No. 40471)

Dear Sandra:

The County Commissioners of Teton County have, in accordance with the request of the developers, vacated the subdivision plat for the Arrowleaf West Subdivison. It therefore appears that this case may be moot. However, I am not totally clear on the status of the sanitary restrictions in this circumstance. It is my judgment that the sanitary restrictions are automatically re-imposed on the property once the plat is vacated. However, is it the case that the Subdivision Bureau of the Department of Health and Environmental Sciences will start from scratch in the event a new subdivision proposal comes in or in the event that the developers attempt an occasional sale route? If the Subdivision Bureau starts from scratch, then I believe the case is moot. If, however, the Subdivision Bureau relies on the fact it has previously studied the area and relies on the previous information and data accumulated, then I believe the case is not moot. I believe this because, as you know, a significant part of our case was based on the contention that the Subdivision Bureau did not adequately perform its required duties.

If you can write back to me and assure me that the Subdivision Bureau will start completely from scratch in any new review of a proposed subdivision or occasional sale for the area encompassed by the Arrowleaf West Subdivision proposal, then I will move to dismiss the appeal as moot.

Incidently, it is my position that each party should bear its own costs in this action. As I recall, there was no bill of costs filed in the District Court in any event. Please let me know also if this is agreeable to you in the event we move voluntarily to dismiss the appeal.

Best regards,

JHG/pam

James H. Goetz

Information on schools, highways, lakes would have to be redone

Effects on game, wildlife, fish ~~would~~ be won't be redone

Perm Soil profile tests, or perc tests won't be required if meet requirements of present Rules

doesn't want to agree to starting from scratch