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DEPUTY

1 Robert B. Allison, District Judge
Department No. 2
2 Flathead County Justice Center
920 South Main Street, Suite 310
3 Kalispell, Montana 59901
4 Telephone: (406) 758-5906

5 MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

6 COMMUNITY ASSOCIATION FOR)
7 NORTH SHORE CONSERVATION, INC.,)
8 a Montana nonprofit mutual benefit)
corporation,)
9 Plaintiff,)
vs.)
10)
11 FLATHEAD COUNTY and its BOARD OF)
COUNTY COMMISSIONERS, a political)
12 subdivision of the State Montana,)
13)
Defendant.)
14 and)
15)
16 JOLENE DUGAN,)
Intervenor.)

Cause No. DV-15-121B
ORDER AND RATIONALE ON
PENDING MOTIONS

17 This matter is before the Court on Intervenor's motion *in limine*, Intervenor's motion for
18 partial summary judgment, Intervenor's motion to determine Plaintiff's standing, Intervenor's
19 motion for summary judgment on statute of limitations, Intervenor's motion on consideration of
20 wetlands, Intervenor's second motions *in limine*, Intervenor's motion to compel, Defendant's
21 motion for summary judgment, Intervenor's motion *in limine* re: record, Defendant's motion to
22 strike, Plaintiff's motion for summary judgment, Intervenor's objections to documents in
23 Plaintiff's appendix, Plaintiff's request to waive settlement conference, Intervenor's application
24 for an order of contempt against Plaintiff, Defendant's objection to Plaintiff's statement of
25 background information and motion to strike, Plaintiff's motion to compel discovery, Plaintiff's
26 motion for additional time, Intervenor's motion to strike and Intervenor's 2nd motion to strike
27 and objection. On the basis of said motions, supporting and opposition memoranda and oral
28 argument, the Court, being fully advised in the premises, makes the following:

ORDER

IT IS HEREBY ORDERED that Intervenor's motion for partial summary judgment is DENIED.

1
2 IT IS FURTHER ORDERED that Intervenor's motion to determine Plaintiff's standing
3 is DENIED.

4 IT IS FURTHER ORDERED that Intervenor's Motion for summary judgment on statute
5 of limitations and Defendant's motion for summary judgment on the statute of limitations are
6 DENIED.

7 IT IS FURTHER ORDERED that Intervenor's motion on consideration of wetlands is
8 DENIED.

9 IT IS FURTHER ORDERED that Plaintiff's motion to waive settlement conference
10 requirement is GRANTED.

11 IT IS FURTHER ORDERED that Plaintiff's motion to compel discovery is DENIED.

12 IT IS FURTHER ORDERED that Defendant's motions to Strike and Intervenor's
13 motions *in limine*, objections to evidence, motions to compel, and motions to strike are
14 DENIED.

15 IT IS FURTHER ORDERED that Intervenor's motion for contempt is DENIED.

16 IT IS FURTHER ORDERED that Plaintiff's motion for additional time is moot.

17
18 IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment as to
19 violation of the Lakeshore Protection Act as discussed in the following Rationale is GRANTED.

20 IT IS FURTHER ORDERED that the Lakeshore Construction Permit issued is invalid
21 and void *ab initio*.

22 IT IS FURTHER ORDERED that the portion of Flathead Lake lakeshore at issue must
23 be restored to its natural condition.

24
25 RATIONALE
26

27
28 This matter is a complaint and petition for judicial review under the Lakeshore
Protection Act, Section 75-7-201, *et seq.*, MCA. Plaintiff seeks a judicial determination that the

1 Defendant, in granting a permit authorizing the construction of a 481 foot vehicular bridge
2 extending from the Shore of Flathead Lake to an island, violated the Lakeshore Protection Act
3 and the Flathead County Lake and Lakeshore Protection Regulations. Plaintiff seeks revocation
4 of the permit and restoration of the lake. Plaintiff's amended complaint and petition for judicial
5 review sets forth ten causes of action for: 1) violation of the Lakeshore Protection Act and
6 Regulations; 2) a cause of action for violation of public participation law; 3) a further violation
7 of the Lakeshore Protection Regulations; 4) a further violation of the Lakeshore Protection Act
8 and Regulations; 5) further violation of Lakeshore Protection Act and Regulations; 6) failure to
9 follow Lakeshore Protection Regulations; 7) failure to follow Lakeshore Regulations; 8) a writ
10 of mandamus; 9) injunctive relief and 10) damages including attorney's fees and costs pursuant
11 to the writ of mandamus and the private attorney general doctrine. The Court denied the
12 application for writ of mandamus and since work on the bridge is complete, the preliminary
13 injunction claim now is moot. Plaintiff has filed a motion for additional time that is also now
14 moot.

15 The parties initially treated the matter as a lawsuit rather than a judicial review. The
16 Court has vacated the non-jury scheduling order governing this case in order to proceed in a
17 proper procedural manner. In a judicial review the district court acts in an appellate capacity.
18 That being said, motions for summary judgment are an appropriate mechanism for deciding the
19 legal questions in a judicial review as there are no issues of fact to be determined.

20 **Intervenor's motion for partial summary judgment**

21 Intervenor moves for partial summary judgment on the issue that Intervenor owns the
22 land between the lakeshore and what is referred to as the island. Plaintiff objects to the motion
23 and argues that the motion seeks a ruling on an issue that is not relevant to and has no bearing on
24 any claim asserted by the Plaintiff.

25 The question of who owns the lakebed is irrelevant to the issues presented in this case.
26 The permitting provisions of the Lakeshore Protection Act apply to construction within the
27 protection zone without regard to ownership; anyone who seeks to do construction in the zone
28 must obtain a permit. Therefore, there is no justiciable controversy regarding ownership of the
land and the Court will not enter what would constitute an advisory ruling.

29 **Intervenor's motion for partial summary judgment on standing**

30 Intervenor has raised the issue of standing. The Lakeshore Protection Act grants standing
31 to a governing body or interested persons. In this case the complaint is brought by an interested
32 party. Plaintiff is an organization, a non-profit corporation. Organizations have standing if the
33 members have standing. *Heffernan v. Missoula City Council*, 2011 MT 91, 360 Mont. 207, 255
34 P.3d 80. The inquiry to determine standing in an action premised on the violation of
35 constitutional or statutory rights is simply "whether the constitutional or statutory provision can
36 be understood as granting persons in the plaintiff's position a right to judicial relief. [Citation
37 omitted]" *Schockly v. Cascade County*, 2014 MT 281, P 16, 376 Mont. 493, 336 P.3d 375.
38 Plaintiff can assert standing on the basis of the Lakeshore Protection Act. Based upon the

1 discovery responses of individual members of the Plaintiff organization, there is no genuine
2 issue of material fact that the Lakeshore Protection Act grants persons in the individual
3 members' positions a right to judicial relief. The individual members are residents of the state
4 who use and enjoy the lake, live in close proximity and recreate on it. "[C]onservation and
5 protection of these lakes is important to the continued value of lakeshore property as well as to
6 the state's residents and visitors who use and enjoy the lakes." Section 75-7-201, MCA.
7 Plaintiff constitutes an interested person and has standing to assert a claim under the Lakeshore
8 Protection Act.

9
10 **Intervenor's Motion for partial summary judgment on the statute of limitations and**
11 **Defendant's motion for summary judgment**

12 Both Intervenor and Defendant move for summary judgment that the statute of
13 limitations on a review of the commissioner's permit decision under the Lakeshore Protection
14 Act has run. The Lakeshore Protection Act does not set forth a statute of limitations. Lakeshore
15 construction permits are valid for one year. Intervenor's one year Lakeshore Protection Zone
16 permit was renewed by the County five times. The fourth renewal was granted three weeks
17 before this lawsuit was filed. The applicable statute of limitation would begin to run anew upon
18 each renewal of the permit. Even applying the statute of limitations that Defendant and
19 Intervenor assert should be applied, Section 27-2-211(1)(c), MCA, which provides for a 2 year
20 statute of limitations, the statute of limitations has not run.

21 **Intervenor's motion for partial summary judgment on consideration of wetlands**

22 Intervenor moves the Court for partial summary judgment determining the County acted
23 properly in not considering any alleged wetlands existing beyond the area 20 feet above the
24 median high water mark. Intervenor argues that the Lakeshore Protection Act does not have
25 jurisdiction over such wetlands.

26 Defendant and Plaintiff both object to the motion. Intervenor is incorrect about the
27 jurisdictional authority of the Lakeshore Protection Act. Pursuant to the Lakeshore Protection
28 Act Regulations, the lakeshore protection zone includes wetlands adjacent to a lake. *Regs.*
Chapt. 6, Definitions, at p. 45. The Court cannot find as a matter of law that the Lakeshore
Protection Act does not have jurisdictional authority over adjacent wetlands or that the County
was correct not to consider alleged wetlands adjacent to the lake.

29 **Motions in limine, motions to strike, motions to compel**

30 Also pending before the Court are numerous motions *in limine*, motions to strike,
31 objections to evidence and discovery motions filed by Intervenor which are listed specifically in
32 the introductory paragraph. There are also two motions to strike filed by Defendant and a
33 motion to compel discovery filed by Plaintiff. These motions have no effect or impact on the
34 judicial review claim. The boundaries of judicial review are narrow and well-defined. Judicial
35 review is based upon the record of the governmental entity making the decision to be reviewed.

1 There is no discovery permitted and the Court must confine its review to the record. The parties
2 have stipulated to the record.

3 The Court announced at the oral argument on Plaintiff's motion for summary judgment
4 that henceforth the matter would be treated as a judicial review. Although Plaintiff argues that
5 under certain circumstances the Court may accept evidence outside the administrative record to
6 determine what matters should have been considered, the Court did not find that this was
7 necessary. With the sole exception of the discovery responses of individual members of the
8 Plaintiff organization for the purpose of establishing standing, the Court has not considered
9 anything outside the stipulated record, the regulations and the applicable statutes in conducting
10 its judicial review. That being the case, the Court will not spend its limited time on these
11 motions and they are all summarily denied. If any of the motions are related to any remaining
12 claims any party may renew them.

13 **Intervenor's motion for contempt**

14 Intervenor seeks to have the Court find Plaintiff's counsel in contempt of court for
15 disobeying the Court's order denying him leave to file an over-length brief. The Court denied
16 Plaintiff's motion to file an over-length brief and required Plaintiff to keep its brief to 25 pages.
17 Technically, Plaintiff complied with this Order and filed a 25 and ¼ page brief in support of its
18 motion for summary judgment. However, Plaintiff also filed an additional 25 and ¼ page
19 document styled "Statement of Factual Background Information & Uncontroverted Facts." The
20 Court did not read or rely upon the unsolicited Statement of Background Information and is not
21 inclined to find Plaintiff's counsel in contempt for being somewhat verbose and overzealous.
22 The motion is denied.

23 **Plaintiff's motion for summary judgment**

24 Plaintiff moves for summary judgment on the issue of violation of the Lakeshore
25 Protection Act. Not addressed in Plaintiff's motion for summary judgment are Plaintiff's claims
26 for violation of the public participation law and the claim for attorney fees under the private
27 attorney general doctrine.

28 The purpose of the Lakeshore Protection Act is to recognize the importance of
Montana's lakes for their scenic, recreational, environmental and other values and to protect
them. Section 75-7-201, MCA. Flathead County's Lakeshore Regulations adopted pursuant to
the Lakeshore Protection Act recognize that protection and conservation of lakes and lakeshores
is of utmost importance. *Regs.*, Section 1.3. The Lakeshore Protection Act provides that a
district court may hear and decide "a petition of an interested person for review of a final action
of a governing body upon an application for a permit" Section 75-7-215(2), MCA. The
Court may also hear "a complaint and petition of a governing body or an interested person for an
order to restore a lake to its previous condition or to enjoin further work in a lake ..." Section
75-7-215(1), MCA. Both of these subsections are at issue here. There is very little guidance for
this Court in interpreting the Lakeshore Protection Act. The Montana Supreme Court has not
construed the Act. The Court must, therefore, extrapolate from the Montana Supreme Court's
interpretation of similar statutes.

1
2 The first issue to be determined is to establish the standard of review. The Defendant and
3 Intervenor propose two different standards of review, the Plaintiff yet another. The Plaintiff
4 proposes that the proper standard of review is the arbitrary and capricious standard. Defendant
5 argues that the proper standard of review is based upon Section 7-1-2104, MCA, which provides
6 that a county's powers can only be exercised by the board of county commissioners or by agents
and officers acting under their authority or the authority of law. Section 7-1-2104, MCA, does
not set forth a standard of review

7 Because the Lakeshore Protection Act does not contain a standard of review, the Court
8 must look to analogous judicial review procedures. The statute providing for review of the final
9 decision of the commissioners cross references MAPA. The cross reference gives guidance on
10 the proper standard of review. MAPA makes frequent reference to permitting decision
11 challenges pursuant to Title 75 which contains the Lakeshore Protection Act permitting statutes.
12 *E.g.*, Section 2-4-702, 2-4-704, MCA. The Court can look to the provisions of MAPA to
determine the appropriate standard of review. The proper standard of review which applies to
this judicial review is the standard applied to an appeal from an order of the administrative
agency, the arbitrary and capricious standard. Section 2-4-704(2)(a)(vi), MCA.

13 The arbitrary and capricious standard may be found in the Montana Administrative
14 Procedure Act (MAPA). The standard is also the standard set forth in several statutes which
15 provide for challenges to land use decisions such as zoning decisions. Defendant and Intervenor
16 argue that the standard applies only to agencies of state government, it does not apply to units of
17 a local government and that the arbitrary and capricious standard is not appropriate. Intervenor
18 and Defendant rely upon two cases for this proposition, *Sourdough Protective Association, Inc.*
19 *v. Board of County Commissioners of Gallatin County* (1992), 253 Mont. 325, 833 P.2d 207 and
20 *City of Kalispell v. Flathead County and Flathead County Board of County Commissioners*
21 (1993), 260 Mont. 258, 859 P.2d 458. The *Sourdough* and *City of Kalispell* cases hold that if
22 there is no statutory mechanism to challenge a decision of a government body, then the court
cannot create one and MAPA does not provide one. This holding does not apply here as the
Lakeshore Protection Act creates a cause of action to challenge the issuance of a permit. One of
the cases, *City of Kalispell*, has been superseded by the passage of a statute creating a
mechanism for challenging the decision of a Board of County Commissioners on preliminary
plats, Section 76-3-625, MCA. The standard of review set forth in the statute is the arbitrary and
capricious standard.

23 It is true that a unit of local government is not an agency, but that does not mean the
24 arbitrary and capricious standard cannot be applied to judicial review of the decisions of units of
25 local government. The Montana Supreme Court decision in *Aspen Trails Ranch, LLC v.*
26 *Simmons*, 2010 MT , 356 Mont. 41, 230 P.3d 808, involved a decision of the county
27 commissioners under the subdivision act, the arbitrary and capricious standard was applied and
28 the term "governing body" and "agency" were used interchangeably.

1 The Court finds that the arbitrary and capricious standard is the proper standard to apply
2 to the permitting decision of the commissioners. The Montana Supreme Court has defined the
arbitrary and capricious standard as follows:

3 The standard for determining whether a decision was arbitrary or capricious is
4 whether the decision appears "random, unreasonable or seemingly unmotivated,
5 based on the existing record." *Hobble Diamond Ranch*, ¶ 24. Reversal is not
6 warranted simply due to the existence of inconsistent evidence or evidence which
7 might support a different result. *Hobble Diamond Ranch*, ¶ 24. The reviewing
8 court must determine whether the agency considered the relevant information, or
9 if the decision "was so at odds with that information that it could be characterized
10 as arbitrary or the product of caprice." *N. Fork Preservation Assn. v. Dept. of St.
Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1981). Such a review is limited,
and we cannot substitute our judgment for that of the agency by determining
whether or not the decision was "correct." *N. Fork Preservation Assn.*, 238 Mont.
at 465, 778 P.2d at 871.

11 *Core-Mark Int'l, Inc. v. Montana Board of Livestock*, 2014 MT 197, P 38, 376 Mont. 25,
12 329 P.3d 1278.

13 Plaintiff makes a further argument that the commissioners should have applied
14 the "hard look" standard that is applied in cases involving evaluation of environmental
15 impacts. *Clark Fork Coalition v. Mont. Dept. of Env. Qual.*, 2008 MT 407, 347 Mont.
16 197, 197 P.3d 482. The Court finds that it does not need to reach the issue of whether
the hard look standard applies, as application of the arbitrary and capricious standard is
dispositive of the permit decision.

17 Defendant does not argue that commissioners carefully considered the impact of this
18 project on the Lake, instead it makes technical arguments like offering up a standard of review
19 that is not a standard of review and would essentially give the County *carte blanche* if a law
20 grants them authority to make a decision. Defendant argues that the statutory considerations
21 like water quality, habitat, and visual impact are considerations for the promulgating regulations
22 for the Lakeshore Protection Act; they are not criteria the board must consider in making its
23 decision. This is an argument which ignores that the County must apply the regulations in
24 making its decision. "Every governing body having jurisdiction over an area containing a lake
25 shall adopt regulations in the **form of criteria for the issuance or denial of permits for work in
26 lakes.**" (Emphasis added), Section 75-7-207, MCA. The Intervenor argues that the six criteria
27 were properly considered.

28 The Court finds upon a review of the record, the regulations and the applicable statutes
that the commissioners' review of the criteria and the determination made by the commissioners
was arbitrary and capricious.

The application for the permit provides the following information: "NATURE OF
PROPOSED WORK: ... Construct a 481 ft. long, 16 ft. wide access bridge from the shore to the
island built with steel pilings and concrete decking. The deck will be built with the steel pilings

1 and synthetic wood decking. All construction done when lake is down...No adverse impacts
2 construction done when lake is down using inert materials.” The application contains no
3 information regarding what the use will be of the bridge or where the connecting roads will be.
4 A vehicular bridge is useless without connecting roads and if the bridge is in the lakeshore
5 protection zone any connecting road will at least in part be in the Lakeshore Protection Zone.
6 Without this information it is not possible to consider the impact of the project. The
7 commissioners erred by accepting an incomplete application.

8 The Lakeshore Protection Act provides for three processing alternatives. The summary
9 processing alternative may be used when the project will have minimal or insignificant impact
10 on the lake. The planning board recommended and the commissioners applied the summary
11 processing alternative. The regulations require that “[t]he governing body shall review the
12 application, other information and the planning staff findings and recommendations in order to
13 determine whether the proposed project will have a minimal or insignificant impact on the lake.”
14 *Regs.* Section 3.3A. It is hard to see how a 481 foot long and 16 foot wide vehicular bridge can
15 be properly considered as insignificant or having minimal impact. The planning board
16 recommendation for summary review was based upon misinterpretation of rules from the
17 regulations as discussed further below. Because the summary review procedure was applied the
18 project was not referred to that planning board for a detailed review of the applicable criteria.
19 Because the determination to apply summary review was based upon an incomplete application
20 and misinterpretation of rules, the determination was arbitrary and capricious.

21 The commissioners did not consider all of the necessary impacts of the project. In particular
22 there was no consideration of the visual impact of the project. Section 75-7-208(5), MCA
23 requires that the governing body must consider the visual impact of the project; it cannot
24 delegate this to the planning board. The statute provides: “The regulations shall favor issuance
25 if the proposed work will not during either its construction or its utilization: ... (5) create a
26 visual impact discordant with natural scenic values, as determined by the local governing body,
27 where such values form the predominant landscape elements.” Intervenor argues that a comment
28 made by Commissioner DuPont satisfied this requirement. However, based upon a review of
the transcript of the commissioners meeting in which they made the permit decision,
Commissioner Dupont’s comment does not actually address the visual impact of the project.
Commissioner Dupont states: “the fifth criteria ...um...creating a visual impact discordant with
natural scenic values can only be determined by the governing body which is the
board...um...ah...the proposed project has the potential to alter the characteristics of the
shoreline” The commissioner goes on to discuss the natural shoreline and historic access to
the island. This does not constitute a consideration of the visual impact of the project as
contemplated by the statute and regulations. The visual impact of the structure and its
construction was not addressed. This failure alone renders the commissioner’s decision
arbitrary and capricious.

The planning board and commissioners misinterpreted rules. They determined that the
bridge was not a road or roadway. The Lakeshore Protection Regulations prohibit roads and
driveways in the Lakeshore Protection Zone except to serve boat ramps. *Regs.* Section 2.8M. In
the planning directors’ memo to the file he states that: “[t]he purpose of the structure is to allow
vehicular access from one part of the piece of private property across open water of Flathead

1 Lake to another piece of the same property.” The director determined that the bridge was not a
2 road on the basis that: “[i]t is reasonable to interpret that this is not a road or roadway per-se
3 because it is entirely on private property and does not provide access to any other property or
4 any existing public road.” This reasoning is nonsensical. The bridge is a vehicular bridge, 481
5 feet long and 16 feet wide. It is in essence an elevated roadway over water or an obstruction. A
6 bridge which supports vehicular traffic does not exist without a roadway. Given that the
7 regulations preclude roads and have no specific section addressing bridges in the Lakeshore
8 Protection Zone, the Act would seem to not even contemplate the construction of bridges in the
9 Lakeshore Protection Zone. The misinterpretation of the definition of road to not include a
10 vehicular bridge is arbitrary and capricious.

11 Plaintiff contends that the commissioners committed several more errors and in its
12 amended complaint sets forth six separate causes of action for each alleged violation. The Court
13 finds that the above errors individually and collectively demonstrate that the final decision of the
14 commissioners in approving the Lakeshore construction permit was arbitrary and capricious.
15 The Court, for the reasons set forth below in determining whether to remand or order restoration
16 of the lakeshore and because addressing each error alleged by Plaintiff is unnecessary as there is
17 no separate relief for each cause of action alleging violation of the Lakeshore Protection Act,
18 shall consider that there is but a single cause of action for violation of the Lakeshore Protection
19 Act with multiple grounds.

20 The Court notes that Intervenor submitted an application seeking to amend the original
21 permit. The application and commissioners response is part of the stipulated record. The
22 application sought to add cross bracing, a guard rail, decorative statues to the bridge abutments
23 and lighting. The commissioners wrote in a letter denying the amendment that: “it was
24 determined that the proposed project would materially diminish water quality, materially
25 diminish wildlife habitat, interfere with navigation or other lawful recreation, create a visual
26 impact discordant with natural scenic values and alter the characteristics of the shoreline.” The
27 Court is at a loss how basically cosmetic additions to a 481 foot bridge can cause these impacts,
28 but the bridge itself does not.

The Court must now determine the proper course of action, whether to remand the matter
or void the permit and order restoration of the lakeshore. At this juncture the Court must address
the document filed by Intervenor styled as “Notice of Events Making this Case Moot.” This
document and the amendments to the Lakeshore Protection Act Regulations it describes is an
attempt to usurp the authority of the Court and to bypass the checks and balances that are the
foundation of the three branch form of government. The Lakeshore Protection Regulation
amendments adopted by passage of Resolution 1551 B on July 25, 2016 by the Flathead County
Commissioners read as follows:

2.7 NON-CONFORMING BUILDINGS, STRUCTURES, AND USES

A. There may be a change in ownership of management of an existing non-
conforming building, structure or use, provided there is no change in the nature
or character of such non-conforming building, structure or use.

1 B. A non-conforming building structure or use may be maintained, repaired or
2 replaced as long as the dimension, location and historical use remains the same.
(Requires a permit)

3 The amendments also added a definition of non-conforming use:

4 CHAPTER 6 – DEFINITIONS

5 NON-CONFORMING BUILDING STRUCTURE OR USE: Any building or
6 structure or use of land lawfully constructed or occupied at the time of passage of
7 these regulations or any previous regulations, but which no longer conforms to
8 the regulations. Any building, structure or use which has received an approved
variance from these regulations or any previous regulations are considered legal
and conforming.

9 Intervenor argues that if the structure, the bridge, was legally in existence as it was here on July
10 25, 2016 then the structure can remain and is legal. Intervenor then argues that by applying
11 these amended “grandfather” regulations retroactively, the use of the bridge was legal and there
is no cause of action for events prior to the enactment of the grandfather clause. There are so
12 many problems with this logic that the Court hardly knows where to begin. This is circular
reasoning which is a logical fallacy. Intervenor begins with what she wants to end with. The
13 statement: [t]hus, if the structure was legally in existence as here....” is an assumption that the
bridge is legal. Intervenor’s Notice, p. 2. Intervenor then, based upon the premise of legality,
14 applies the “grandfather” regulation and concludes that “the structure can remain and is legal.”
Intervenor’s Notice p. 2. The premise of legality is improper. While it is true that the bridge was
15 built with a permit, that does not necessarily mean that the permit was properly issued and the
structure legal. If the Lakeshore Protection Act simply required a permit, then providing
16 requirements for issuance of a permit and the means to challenge the decision to issue a permit
would be meaningless. The Court will not interpret the Lakeshore Protection Act so that a
17 critical portion of the Act, the judicial review provision, is rendered meaningless. The permit
must be properly issued. The structure is only legal if constructed with a properly issued permit.
18
19

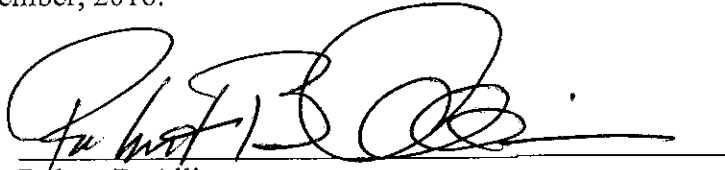
20 Intervenor also misconstrues the purpose of a “grandfather” clause. The purpose of a
grandfather clause is to prevent newly enacted laws from rendering lawful things already in
21 existence unlawful or non-conforming. It is new law that renders the structure non-conforming;
the structure must have been lawful under the old law. This matter is not an instance of a new
22 law rendering a lawful structure already in existence unlawful. What Intervenor and the
commissioners who amended the regulations are attempting to do is to pass a new law that
23 makes an existing unlawful structure lawful. The bridge cannot be defined as a non-conforming
structure because a non-conforming structure is one which is lawfully in existence. If the permit
24 was not properly issued the bridge was not legally in existence on July 25, 2016. No grandfather
clause works to turn an unlawful existing structure into a lawful structure. Nor does the
25 grandfather clause work retroactively to render Plaintiff’s petition for judicial review moot.
26

27 Intervenor also contends in her Notice that Plaintiff’s claim is moot because it is not
28 timely because it was brought “years after the permit was issued but also years after the death of
the commissioner who expressed his knowledge of the area.” The claim was brought within the

1 statute of limitations and therefore Plaintiff is entitled to its day in Court. This is a nation of
2 laws, not men. A Lakeshore Construction Permit application must be assessed pursuant to the
3 applicable laws, it should not be granted on the basis that an individual making the
determination "has knowledge of the area."

4 The ultimate effect of the Notice of Making Moot and the amended Lakeshore Protection
5 Regulations is to deprive the Court of the option of remanding the permit decision to the
6 Flathead County Commissioners to conduct a proper permit review. The commissioners have
7 shown the Court their hand and any remand would be meaningless. Thus, the Court has no
8 option but to declare the permit invalid and void *ab initio* and because the bridge was built
without a permit, the remaining remedy is removal of the bridge and restoration of the lakeshore
to its natural state pursuant to Section 75-7-205, and 75-7-215(1), MCA.

9 DATED this 16th day of September, 2016.



Robert B. Allison
District Judge

14 cc: Donald R. Murray, Attorney at Law
15 Richard De Jana, Attorney at Law
16 Tara R. Fugina, Deputy Flathead County Attorney