MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY

UPPER MISSOURI WATERKEEPER, TANYA & TOBY DUNDAS, SALLY & BRADLEY DUNDAS, CAROLE & CHARLES PLYMALE, and CODY McDANIEL, Plaintiffs, v. BROADWATER COUNTY and the MONTANA DEPARTMENT OF NATURAL RESOURCES and CONSERVATION, Defendants, and 71 RANCH, LP, Intervenor.	Cause No.: BDV-2022-38 **ORDER**

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On August 26, 2022, Plaintiffs filed their Judicial Review and Declaratory Relief Complaint. On September 27, 2022, Broadwater County (County) filed its Answer. On October 19, 2022, the Montana Department of Natural Resources and Conservation (Montana) filed its Answer. On March 9, 2023, this Court granted 71 Ranch, LP's (71 Ranch) unopposed intervention motion. On March 22, 2023, 71 Ranch filed its Answer. On April 17, 2023, the County filed the parties' Notice of Agreement on the Stipulated Record. On April 28, 2023, the County filed a Notice of Filing Record on Appeal. On May 3, 2023, the County filed a Stipulation of Record[1].

On August 9, 2023, the Plaintiffs and the County moved for summary judgment. On August 23, 2023, the County moved to Strike "Plaintiffs' Unpled Legal Theories." The motions are fully briefed. On February 9, 2024, oral argument was held.

For the reasons stated below, the County's motions are **DENIED**, and the Plaintiffs' motion is **GRANTED, in part.**

REVIEW STANDARDS

Summary judgment should never be a substitute for trial when there is an issue of material fact. *McDonald v. Anderson*, 261 Mont. 268, 272, 862 P.2d 402 (1993). It is "an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys.*, 279 Mont. 279, 283, 927 P.2d 995 (1996). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing

[1] As to the "stipulated record," the Court notes a number of discrepancies in the extensive record. The County Planning Board meeting of April 25, 2022 was not recorded, and thus could not be reviewed. Because of the voluminous nature of the record, the Court requested an electronic copy of the record, but noticed that documents 4286 through 4341 were missing, and had to affirmatively request those documents. Additionally, the County cites documents with Bates stamps at least as high as 4430 even though the stipulated record ends at Bates stamp 4341. The parties, however, confirmed at the hearing that the stipulated record ended at 4341.

summary judgment. *Heiat v. Eastern Mont. College*, 275 Mont. 322, 327, 912 P.2d 787 (1996).

Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (*citing Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)).

Disputed issues of fact are considered material if they concern the elements of the claim or the defenses to such claim to an extent that requires resolution by the jury. *State Medical Oxygen & Supply v. American Medical Oxygen Co.*, 267 Mont. 340, 344, 883 P.2d 1241 (1994) (citation omitted). If the trial court determines that no genuine issue of material fact exists, it then must determine whether the moving party is entitled to judgment as a matter of law. *Willden v. Neumann*, 2008 MT 236, ¶ 13, 344 Mont. 407, 189 P.3d 610. It is universally recognized that "[t]he purpose of summary judgment is to encourage judicial economy through the elimination of any unnecessary trial." *Payne Realty & Hous. v. First Sec. Bank*, 256 Mont. 19, 24, 844 P.2d 90 (1992).

Moreover, here, "[the County's] decision, based on the record as a whole, must be sustained unless the decision being challenged is arbitrary, capricious, or unlawful." Mont. Code Ann. § 76-3-625(2)(c) (2021). Furthermore, the statute permits various interested parties, such as the Plaintiffs in this proceeding, to timely seek judicial review of "a decision of the governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision" or "any other final decision of the governing body regarding a subdivision." Mont. Code Ann. § 76-3-625(2)(a) (2021).

BACKGROUND

This case concerns 71 Ranch's proposed major subdivision located on the east side of Canyon Ferry Reservoir near Lower Confederate Creek, inside the administratively closed Upper Missouri River Basin. 71 Ranch's proposal would subdivide 442 acres over 4 phases of development into 39 residential, 2 commercial, and 1 open space lot. Each lot would be served by their own exempt well, septic, and stormwater system. The County's Commissioners reviewed the proposal and ultimately approved the preliminary plat application after several remands to the County's Planning Board. Montana reviewed the subdivision's proposed use of exempt wells and concluded that "the proposed appropriation does fit the current rules and laws pertaining to the filing of an exempt water right" for each of the 4 phases of development.

DISCUSSION

Plaintiffs argue the environmental assessment was deficient because the County failed to include available groundwater information and summaries of probable water resources impacts. They also contend the County's review of the primary criteria was inadequate. Plaintiffs further argue the County

improperly relied on DNRC's determination about the legal availability of water for the proposed subdivision. The County argues that it lacks jurisdiction to make such a water availability determination. Plaintiffs maintain that DNRC's exempt well approval is contrary to statute, administrative regulation, and case law. In this regard, DNRC argues that Plaintiffs seek an advisory opinion. Finally, the County seeks to strike material from Plaintiff's brief.

The Montana Subdivision and Platting Act (Act) requires the environmental assessment for major subdivisions to include:

> (i) a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information, and a description of the topography, vegetation, and wildlife use within the area of the proposed subdivision;
>
> (ii) a summary of the probable impacts of the proposed subdivision based on the criteria described in 76-3-608;
>
> (iii) a community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including education and busing; roads and maintenance; water, sewage, and solid waste facilities; and fire and police protection; and
>
> (iv) additional relevant and reasonable information related to the applicable regulatory criteria adopted under 76-3-501 as may be required by the governing body;

Mont. Code Ann. § 76-3-603(1)(a) (2021).

Mont. Code Ann. § 76-3-608 requires review of the primary criteria, namely "specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety." The Court

notes that statute does not require that the concerns be "documented" but rather "documentable," i.e. *capable* of being documented. At several hearings, it was clear that members of the Planning Board, County Commission, and at least three public members were under the impression that the Montana Association of Counties' attorney had advised the County that public comment could not be the basis for their decisions because it did not constitute "documented evidence" from a professional like an engineer or hydrogeologist. There is no such requirement in the law. The Court further notes that public comment is capable of and was documented by video recording and subsequent transcription.

Mont. Code Ann. § 76-3-501 requires local governing bodies to adopt subdivision regulations providing for, among other things:

> (f) the provision of adequate transportation, water, and drainage;
>
> (g) subject to the provisions of 76-3-511, the regulation of sanitary facilities;
>
> ....
>
> (i) the avoidance of subdivisions that would involve unnecessary environmental degradation and danger of injury to health, safety, or welfare by reason of natural hazard, including but not limited to fire and wildland fire, or the lack of water, drainage, access, transportation, or other public services or that would necessitate an excessive expenditure of public funds for the supply of the services.

Mont. Code Ann. § 76-3-501(1) (2021).

One issue to be resolved in this case is whether the County is required to determine whether the developer is legally entitled to appropriate water or whether it must merely determine that sufficient water is present. Some courts distinguish between the two by describing the factual existence, quantity,

and quality of water in terms of "adequacy" and the legal ability to appropriate water in terms of "availability." While this Court would prefer such a controlled vocabulary, the drafting of Montana's statutes precludes clearcut terminology in which "availability" concerns legal authority to appropriate and "adequacy" concerns factual existence or sufficiency. *See* Mont. Code Ann. § 76-3-622(1)(e) (2021) (requiring "evidence of adequate water availability"). To aid clarity, this Court uses the terms "factual existence" to distinguish the fact questions about the physical presence, quantity, and quality of water from the legal questions of entitlement to appropriate that water ("legal appropriability").

Motion to Strike

The County moved "to strike Plaintiffs' unpled legal theories proffered in their Response Brief to the County's summary judgment motion wherein they contend that the County has a legal duty to determine legal and physical water," alleging that arguments in section "C" of Plaintiffs' response are "tantamount to amending the complaint without notice or process," which "is precluded as it causes prejudice at this late stage of the case." Plaintiffs counter that this "argument was made in response to the County's argument that it had no independent obligation to ensure an adequate water supply exists for the subdivision at issue."

As a preliminary matter, the County puts the cart before the horse by engaging in a full analysis of whether amendment is prejudicial before analyzing whether Plaintiff's brief in response to its summary judgment motion is equivalent to amending a complaint. Plaintiffs are required to provide notice of their *claims*, but the County seems to believe that they are also required to disclose the *legal theory* behind their summary judgment response before the

motion is even filed.

More importantly, the County opened the door to this issue by arguing in its supporting brief: "The County is not vested with the authority to review water supply adequacy - that is vested in MDEQ [Montana Department of Environmental Quality]." In response, Plaintiffs included a section in their brief titled "THE COUNTY HAS AN INDEPENDENT OBLIGATION TO CONSIDER THE LEGAL AND PHYSICAL AVAILABILITY OF WATER," which cited numerous authorities indicating that the County is indeed tasked with reviewing water supply adequacy. Plaintiffs merely responded to the County's argument. It is baseless for the County to claim to be the victim of prejudice, while simultaneously seeking to strike an opposing party's substantive response to an issue the County raised in its own briefing. Accordingly, the Motion to Strike is **DENIED**.

Water Information - Mont. Code Ann. § 76-3-603(1)(a)(i) (Count I)

The County argues that the record contains the required groundwater information and all public comments regarding groundwater were taken into consideration. Plaintiffs argue that environmental assessment was inadequate because it failed to include available groundwater information or summaries of probable impacts to water resources.

As a preliminary matter the County argues "The [Act] does not require the County to search out groundwater information before conditionally preliminarily approving a subdivision." Plaintiffs counter that "[t]he requirement to ensure an [environmental assessment] includes 'available groundwater information' necessarily contemplates an affirmative duty on the County to gather and consider available studies and data on water supply and

offsite impacts as means to effectuate the statutory purposes of only approving subdivisions with 'adequate water supply.'"

The County is correct that the onus to provide the environmental assessment with groundwater information is on 71 Ranch, not the County. Mont. Code Ann. § 76-3-504(1)(b) (2021). Nevertheless, the Act's plain language unequivocally requires that 71 Ranch's submitted environmental assessment "must include" "available ground water information," impacts on "agriculture, agricultural water user facilities," and a community impact report containing on anticipated water needs of the subdivision. Thus, while the County is technically correct that the duty to provide the statutorily requires information lies with 71 Ranch, the County is incorrect in its implication that the County can approve a subdivision without that information. Regardless, it is irrelevant who must provide the information, what is relevant here is that if the information is lacking, the application is incomplete, and the proposal cannot be legally approved.

As previously indicated, the Act requires the environmental assessment for major subdivisions to include:

> (i) a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information, and a description of the topography, vegetation, and wildlife use within the area of the proposed subdivision;
>
> (ii) a summary of the probable impacts of the proposed subdivision based on the criteria described in 76-3-608;
>
> (iii) a community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including education and busing; roads and maintenance; water, sewage, and solid waste facilities; and fire and police protection; and

> (iv) additional relevant and reasonable information related to the applicable regulatory criteria adopted under 76-3-501 as may be required by the governing body.

Mont. Code Ann. § 76-3-603(1)(a) (2021.

The environmental assessment must include "a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information, and a description of the topography, vegetation, and wildlife use within the area of the proposed subdivision." The County argues that the "Subdivision application [BC PP 3878-4185] and Application Environmental Assessment [BC PP 3985-4003] contained the requisite groundwater information as described and required" by -603, and cites to sections of the environmental assessment:

"Depth to water table based on soil types. CB PP 3959-3964"

This is a United States Department of Agriculture soil survey. The only information about groundwater appears to be a measurement of its depth across various soils in the area, titled "Rating (centimeters)." BC PP 3962. All values are listed as ">200."

"Well locations for the Subdivision property. BC PP 3971-3981"

These are maps showing several miles around the area and the location of various wells. Each well's log report is included which lists the precise location, depth, construction, water levels, and geology.

"FIRM Maps. BC PP 3982-3984"

These are three mostly illegible maps from the National Flood Insurance Program indicating areas particularly susceptible to flooding.

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"Environmental Assessment Surface Water/Ground Water Information. BC PP 3987-3988"

1. SURFACE WATER
   a. **Any natural water systems such as streams, rivers, intermittent streams, lakes or marshes (also indicate the names and sizes of each).**
   There are no known streams, rivers, lakes, or marshes located on the subject property. The project site is located near Canyon Ferry Lake to the west and south, and Confederate Gulch to the southeast of the property.

   b. **Any artificial water systems such as canals, ditches, aqueducts, reservoirs and irrigation systems (also indicate the names, sizes and present uses of each).**
   There are no known artificial water systems located on the subject property. There are remnants of an old irrigation ditch traversing the south portion of the property, but are no longer used for irrigation purposes, as we understand.

   c. **Time when water is present (seasonally or all year)**
   There are no rivers, creeks, or streams on the property. We understand that surface water may be present during spring runoff and/or high rainfall events in the natural drainages located on-site where rainfall and/or runoff may concentrate for a short duration of time.

   d. **Any areas subject to flood hazard or in delineated 100-year floodplain.**
   The subject property is located outside of the FEMA mapped 100-year floodplain. See also Appendix of this report for letter from the Broadwater County Contract Floodplain Administrator, indicating the proposed project does not require a floodplain permit from Broadwater County.

   e. **Describe any existing or proposed streambank alteration from any proposed construction or modification of lake beds or stream channels. Provide information on location, extent, type and purpose of alteration and permits applied for.**
   This development is not proposing to alter stream banks, stream channels, or lake beds.

2. GROUNDWATER
   a. **The depth to water table and identify dates when depths were determined**
   Per the three (3) test wells that were drilled, groundwater was encountered between approximately 100-ft to 175-ft below ground surface, depending on location. Groundwater was also monitoring throughout the high water season (April – July, 2020) at several (twelve 12) test pits located in the southeast portion of the property, and no water was observed to the depth of those monitor wells (to a typical depth of 8+ ft below ground surface (bgs).

   As part of the planning and design of the subdivision, the Department of Environmental Quality (DEQ) is required to review and approve the proposed water, sanitary sewer, and storm drainage facilities. Each phase of the subdivision will be allocated 10 acre-feet per year. Each lot is proposed to have its own individual water supply well to provide for domestic consumption and irrigation demand, as limited for the Montana Department of Natural Resources and Conservation area is not anticipated to consist of excessive slopes, and each lot includes areas that are less than 15% slope (per the aforementioned DEM). Please see the attached MDEQ Site Plans which show topographic contours and designated slopes, which has been included in the Appendix of this report.

Although the parties' briefing focuses predominantly on groundwater information, Plaintiffs' motion also attacks the adequacy of the required summaries of probable impacts to surface waters, which necessarily implicates consideration of the sufficiency of the environmental assessment's "description of every body or stream of surface water that may be affected by the proposed subdivision." Mont. Code Ann. § 76-3-603(1)(a)(i) (2021). Without information about the nature of these surface waters the County cannot possibly evaluate the impacts to them.

As concerned citizen Ms. Sullivan noted, "If you don't identify the issues you can't mitigate them." This section of the assessment cited by the County contains only the most basic information about surface waters. It merely states that the project is "located near Canyon Ferry Lake to the west and south, and Confederate Gulch to the southeast of the property." This paltry text does not describe either body of water, but merely mentions them by name. What is the nature of each? What sort of flow? How far is each from the project? Is Confederate Gulch perennial? Annual? The assessment does not even describe how these two nearby surface waters interact. It notes that "surface water may be present during spring runoff and/or high rainfall events in the natural drainages located on-site where rainfall and/or runoff may concentrate for short periods of time," but doesn't bother to mention to where these drainages drain. Into Confederate Gulch, or directly to Canyon Ferry Reservoir via the drainages to the west? The "description of the topography" required by statute might answer some of these questions, but that too was not provided. The only information on surface waters is their names and general ordinal direction relative to the project. Moreover, this section inadequately addresses the question posed by the statute. Subsections a, b, and c of the environmental assessment all speak to the absence

of streams, rivers, lakes, marshes, and artificial water systems "on the property" or "on the subject property." But the statute does not require information only about surface waters "on the subject property" but rather for "every body or stream of surface water that may be affected by the proposed subdivision."

Aside from a cursory mention of Canyon Ferry Lake and Confederate Gulch containing no analysis, the environmental assessment is confined to water on the project property, thereby excluding "every body or stream of surface water that may be affected by the proposed subdivision" which is not on the property, contrary to Mont. Code Ann. § 76-3-603(1)(a)(i) (2021).

The groundwater disclosures are similarly paltry. The only information is two sentences on the depth of water from three test wells and the absence of water in a series of test pits on the southeast area of the property. The subsequent paragraph does not contain groundwater information. Plaintiffs argue the assessment should include basic hydrological characteristics describing the nature of the aquifer, namely whether it is confined or not, whether it stores or transmits water, whether neighboring water uses draw from the same aquifer, and how nearby surface waters interact with the aquifer. The County counters that the statute does not require inclusion of this information, citing *Citizens for Responsible Dev. v. Bd. of Cnty. Comm'rs*, which states:

> However, while the review process is enhanced by additional information, and more information is surely better than less, the statutes do not impose upon an applicant the duty to satisfy a comprehensive 'wish list' of analytical reports and studies, but to provide the 'information that is sufficient to allow for the review of the proposed subdivision . . . .' Section 76-3-604(2)(c), MCA.

Citizens, 2009 MT 182, ¶ 19, 351 Mont. 40, 208 P.3d 876. In that case, the

district court concluded that "maps submitted by the Developer which identified the Clark Fork River and [...] information gleaned about the aquifer from test reports" satisfied the environmental assessment requirements. *Id.*, ¶ 21. The *Citizens* Court disagreed and reversed, because "the [environmental assessment] submitted in this case was inadequate," specifically the environmental assessment "did not describe the location of the aquifer, the current health of the water bodies, or whether the aquifer and the [nearby surface water] interact." *Id.* While "one report surmises that the added amount of stormwater drainage is negligible and will be adequately handled, there is no summary of what impact the wells and wastewater systems will have on the aquifer and the [nearby surface water]--whether there would likely be no impact, some acceptable impacts, or serious impacts." *Id.*

Here, the material cited by the County does not describe the location of the aquifer. Indeed, no aquifer is even mentioned. The health of the unidentified aquifer, Canyon Ferry Reservoir, and Confederate Gulch are likewise not covered. This omission is particularly troubling since the State officially designated both the Canyon Ferry sections of the Upper Missouri and Confederate Gulch as impaired (by ammonia and nitrogen respectively) under the section 303(d) of the federal Clean Water Act. The State certified to the federal government that these nearby waters are impaired by precisely the kinds of pollution that a new development would contribute to. This is exactly the kind of information that should be present in a "description of every body or stream of surface water that may be affected by the proposed subdivision." All of this was raised in detail by Plaintiffs during the comment process but appears to have been swept under the rug by 71 Ranch and, as we will see, the County too.

Moreover, there is no information about whether and how the unidentified aquifer interacts with Confederate Gulch and Canyon Ferry. So, while the County is correct that *Citizens* clarified that developers need not submit a comprehensive "wish list" of analytical reports and studies, the specific material that was missing in that case and which rendered its environmental assessment deficient is also missing from the environmental assessment in this case, a problem only compounded by omission of Montana's certification to the federal government that both nearby waters are impaired under the Clean Water Act.

"Environmental Assessment High Water Table. BC PP 3989"

> **3) High water table**
> As outlined above (Section 2 – Groundwater) the three (3) test wells that were drilled, groundwater was encountered between approximately 100-ft to 175-ft below ground surface, depending on location. Groundwater was also monitoring throughout the high water season (April – July, 2020) at several (twelve 12) test pits located in the southeast portion of the property, and no water was observed to the depth of those monitor wells (to a typical depth of 8+ ft below ground surface (bgs).
>
> The NRCS water features report does not indicate any potential for high ground water. Further, the 44 test pits performed on-site to a depth of at least 12-feet did not show any signs of high groundwater.

This material is functionally identical to the groundwater information provided in section "2.a." of the environmental assessment analyzed above.

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"Environmental Assessment Surface and Ground Water Contamination. BC PP 4002"

b. How would the subdivision affect surface and groundwater, soils, slopes, vegetation, historical or archaeological features within the subdivision or on adjacent land? Describe plans to protect these sites.

The subdivision is required to undergo review and approval through Department of Environmental Quality regarding impacts to surface water and groundwater related to storm drainage and sanitary sewer improvements. The subdivision will be required to meet current State standards and is not anticipated to negatively impact surface water or groundwater.

The roads have been aligned to generally minimize disturbance of areas with slopes greater than 15%, and it is anticipated that future lot development (homes, driveways, etc.) will take place on slopes less than 15%.

There may be impacts to the aforementioned native grasses during construction of the roadways as well as individual lot development. It is anticipated that areas of disturbance will be seeded or sodded to minimize erosion and reestablish vegetative cover prior to final stabilization.

As previously discussed, if any historical or archaeological features are encountered during the construction of the subdivision, the appropriate authorities will be contacted and construction activities will cease until the issue is resolved.

1) Would any Streambanks or lake shores be altered, streams rechanneled or any surface water contaminated from sewage treatment systems, run-off carrying sedimentation, or concentration of pesticides or fertilizers? (if so, all applicable County, State, and Federal laws must be abided by.)

There are no streambanks or lake shores located on the subject property, and therefore there are no alterations to streambanks or lake shores associated with the proposed subdivision. All wastewater treatment systems will be required to be reviewed and approved by the Department of Environmental Quality, and current state regulations will need to be meet. Therefore, we do not anticipate surface water contamination due to wastewater treatment systems. Storm drainage runoff will similarly be required to be reviewed and approved by the Department of Environmental Quality and meet current State standards.

Although this section concerns how the subdivision will affect surface and groundwater, plus conditions to protect both, the assessment does not even mention which waters could be affected, how they would be affected (dewatered, flooded, sewage, pesticides, sediment,...), how the effects

would be different for each body of water and makes no mention whatsoever about protection plans. Instead, it makes the conclusory statement that the project "is not anticipated to negatively impact surface or groundwater" because it "will be required to meet current State standards" and Montana Department of Environmental Quality (DEQ) must review and approve storm and sanitary sewers. To begin, the text does not even say that DEQ has approved the project or that DEQ does not anticipate negative impacts. Instead, it infers that DEQ is incapable of approving projects with negative impacts, therefore this anticipated approval by DEQ's *in the future* will have by then determined that no negative effects are expected. This is causal legerdemain. DEQ's possible future conclusions cannot be the basis for a finding *in the present given the current record* that there will be no negative impacts. In essence the County is saying "DEQ will review this." This, however, fails where the Legislature has placed an independent duty on the County to review the sufficiency of specific parts of a subdivision application, including "a summary of the probable impacts." Whether DEQ approves parts of the project, the County must review "a summary of the probable impacts of the proposed subdivision based on the criteria described in 76-3-608," Mont. Code Ann. § 76-3-603, including "the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety…," Mont. Code Ann. § 76-3-608(3)(a) (2021).

Certainly, any DEQ findings would be useful, even necessary, for consideration by the County, but the County is going much farther, effectively saying "DEQ will handle this question, so we don't have to consider it." The controlling statute says otherwise.

Furthermore, the environmental assessment itself states that DEQ will only review for impacts from "storm drainage and sanitary sewer" improvements. The statute outlining the scope of the County's review, however, is not limited to wastewater impacts but rather all "probable impacts" on waters that "may be affected." Since DEQ's review is limited to wastewater improvements, DEQ plainly does not review the impact of wells, which are not storm drainage or sanitary sewer improvements. The crux of this case is water wells and yet the County, in its effort to pass off its statutory responsibilities to DEQ, forgets that it must review *all* probable impacts of the projects, including the wastewater facilities that DEQ does review and the wells that DEQ does not review. Indeed, the County's Attorney specifically told the Commissioners, "the whole point of exempt wells, is that they're exempt from the DEQ Regulatory Process, that usually looks at those ground water impacts." (AR 2775). This was also pointed out by Ms. Sullivan, who at the Planning Board's April 5, 2022 meeting noted that the board had been misinformed at prior meetings that DEQ reviews the impact of wells on the aquifer. She went on to note that the importance of such review is heightened in closed basins. Ms. Sullivan further noted that the County should not pass off review on DEQ and DNRC where the statute requires County review. The County was aware at the time that DEQ does not review groundwater impacts. By arguing now that the County does not have to review groundwater impacts that it knows DEQ does not consider for exempt wells, the County is effectively arguing that there is no part of state government whatsoever that is charged with reviewing exempt well impacts on groundwater. This Court, and seemingly even the County's Attorney, disagree.

Stormwater and sewage drainage is mentioned, but only in

passing and no analysis is made of the nature or extent of its impacts. Yet despite this dearth of information and total lack of analysis, the assessment concludes that negative impacts from storm and sanitary wastewater are not anticipated. It is unclear how such a conclusion can be made based on virtually no information and after no analysis of that paltry data. Moreover, this material only speaks to the impact of wastewater on surface and ground waters. No analysis whatsoever is conducted on the impact of the wells themselves and whether they might negatively impact the aquifer, Canyon Ferry, or Confederate Gulch. The failure to include this basic hydrological information and analysis for such a large proposed residential development surrounded by active farming and mere yards from the shore of the state's largest reservoir is astonishing.

"New Information, Water Usage Summary and Offered Mitigation. BC CCN 0000293-297"

This material consists of five pages of calculations regarding "water availability" for the development through wells. It is located within the "ADDENDUM TO HORSE CREEK HILLS MAJOR SUBDIVISION STAFF REPORT," which is a memo from the County's Community Development Director to the Broadwater County Planning Board. The Court notes that previously the County had argued that statute "does not require the County to search out groundwater information before conditionally preliminarily approving a subdivision," yet here the County is pointing to its own report as proof of the disclosure of information that is supposed to be, as the County strenuously argued, provided by 71 Ranch. *See* Mont. Code Ann. § 76-3-504(1)(b) (2021) (regulations must "require the subdivider to submit to the governing body an environmental assessment as prescribed in 76-3-603"). The County wants to have

it both ways.

The only analysis merely states that water would be drawn from exempt wells preliminarily approved by DNRC. Four conditions are suggested: a hydrological survey, metered tracking in individual well use, tabulation of use, and a covenant restricting maximum irrigated area per lot. The County's memo to itself then concludes that "the impacts to Local Services as to water availability are mitigated." Implicit in this conclusion is the assumption that it is impossible for a compliant exempt well to impact water availability. Despite no analysis of what dozens of more wells would do to the aquifer, Confederate Gulch, or Canyon Ferry, the report nevertheless makes the superficial conclusion that exempt wells, as long as they are individually below the gallons per minute and acre feet limits, cannot impact on area water resources. Under DNRC's interpretation, *each phase* of the project is entitled to a combined appropriation of 10-acre feet per year allowing the appropriation of up to 40-acre feet or 13,030,000 gallons of water each year. The Court notes that during some of the final hearings 71 Ranch mentioned 50-acre feet of water, 40 for the homes and 10 for the commercial lot. This inconsistency and late disclosure do not aid citizen participation or the County's review process or this Court. Concluding that a possible draw of 13-16 million gallons per year will have no impact whatsoever on nearby water is the equivalent of claiming that a $13-16 million jackpot will have no affect your tax bill. It appears no one knows precisely how great the effects will be or where, but concluding there will be no effects at all is ludicrous, especially when there is already extensive evidence the aquifer is being dewatered (*infra*). Finally, a hydrological survey cannot mitigate much if it is conducted *after* the County has approved the project. Assuming for a

moment that such a survey indicated that there is not enough water in the aquifer to support current use and the project, that finding mitigates nothing if it is made after the project is already approved. A merely informational mitigation like a hydrological survey is only useful if conducted *before* ultimate approval/disapproval. Doing so after the fact is just box-ticking.

None of these record sections cited by the County contain the water information required by law.

Although local residents brought it up at hearings several times, no mention is made about extensive well drawdown testing performed in 2016 (before the County's recent drought) for the failed Avalanche Irrigation District. Indeed, the County's admission at the hearing that it was the public who brought this information to the County's attention, not the environmental assessment, show that the assessment did not contain this "available ground water information." The project had intended to drill deep wells on the east side of Canyon Ferry Reservoir that ostensibly would draw water only from the reservoir so as not to impact area wells. A high-production test well was sunk less than 10 miles north of the Horse Creek Hills site to test whether this assumption was correct. It was not. The test results revealed:

> The drawdown responses in two aquifer tests indicate leaky-confined conditions bearing out the typical conditions found in Tertiary-age sedimentary rocks. The result of aquifer confinement is a low storage coefficient and rapid propagation of drawdown away from the pumping well. The well lithology and aquifer testing data indicate the water producing intervals penetrated by the well are connected to the lake and that drawdown is expected to propagate up to two miles through the aquifer before the water levels stabilize and a new equilibrium is established.

One might think that "available groundwater information" would include this recent and geographically proximate study of relevant questions such as the drawdown impact of new wells. If nothing else, the study presents "evidence [the] aquifer is semi-confined," something decisionmakers should presumably be told in an environmental assessment. Is the geology of the Avalanche Irrigation District test well similar enough to this project that the conclusion about well drawdowns is applicable here, or is the geology so different as to render the Avalanche conclusions inapplicable? The Avalanche Irrigation District used higher production wells than would be used in this project (even assuming 5 combined appropriations at the exempt well limit) but only ran the wells for limited periods. Perhaps these two equate, perhaps they are incomparable. More importantly, the County is precluded from reviewing these issues if this "available groundwater information" is not included in the first place. A complete environmental assessment might answer or at least explore these questions. This one did not. The Avalanche Irrigation District revealed that important assumptions experts had made about the hydrogeology of the east side of Canyon Ferry reservoir were simply incorrect. To ignore entirely the data and concerns raised by that project's findings, corroborated by testimony of locals (*infra*), is a failure to review "available groundwater information."

As in *Citizens.*, the environmental assessment "did not provide 'a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information,' with 'a summary of the probable impacts of the proposed subdivision.' *Id.* As in *Citizens.*, the environmental assessment fails to describe "the location of the aquifer, the current health of the water bodies, or whether the

aquifer and the [nearby surface waters] interact." *Id.*, ¶ 21. The material the assessment did provide was "primarily directed at the testing requirements of § 76-3-622," *Id.*, which only requires "evidence of adequate water availability: (i) Obtained from well logs or testing of onsite or nearby wells; (ii) obtained from information contained in published hydrogeological reports; or (iii) as otherwise specified by rules adopted by the department of environmental quality pursuant to 76-4-104," Mont. Code Ann. § 76-3-622(1)(e) (2021). Furthermore, there was "no summary of what impact the wells and wastewater systems will have on the aquifer and the [nearby surface waters]—whether there would likely be no impact, some acceptable impacts, or serious impacts." *Id.*

Seemingly foreshadowing its deficiencies and superficial treatment of other issues, the third question on the first page of the subdivision application misstates one of the most contentious and important aspects of the subdivision proposal. Instead of accurately representing that the project will be served by individual wells, the application states that it will be served by "Individual surface water supply from spring." This is not an obscure question buried in some appendix. It is the first substantive question in the application and concerns an issue that quite clearly (as evidenced by this and prior exempt well litigation, attempts to legislate and make rules, and the public comment in this case) is highly contentions and obviously of the utmost importance. This was brought to 71 Ranch's attention at public meetings and was allegedly fixed, but the copies in the administrative record before the Court still indicate "Individual surface water supply from a spring." (3880, 4202). As multiple citizens reminded the County's Commission, the onus is on the developer to present a complete application. (County Commission Meeting, 15 Nov. 2021). The failure to

accurately state the source of water for the project, in response to the very first substantive question in the application, evinces the application's broader failures, as does the developer's unclear vacillation between claiming 40- and 50-acre feet.

Additionally, a Broadwater Conservation District member testified that it maintains a seasonal streamflow gauge at the lower end of Confederate Creek and offered that data to the County for review. Given the extensive testimony indicating dewatering of area ground and surfaces waters (*infra*) this is invaluable quantitative information for reviewing the potential impacts of this project. At a bare minimum, it was "available ground water information" that was affirmatively offered by one part of County government to another.

The environmental assessment is deficient in numerous ways, particularly the repeated failure to assess impacts to nearby landowners and water. The barest minimum of information is disclosed about nearby surface waters and basically nothing is disclosed about the aquifer which would supply the project. No mention is made of the health of these waters, despite them being officially classified by the State as impaired under the federal Clean Water Act. The interaction of these waters is ignored entirely, as is the impact of either new wells or sanitary and storm wastewater, which is pawned off on DEQ's future determination. The environmental assessment is abjectly deficient.

Furthermore, the law requires not only the statutorily designated information, but also that it be submitted with sufficient organization, clarity, and cohesiveness to allow not only the governing body to review the proposal but also to afford "reasonable opportunity for citizen participation in the

operation of the agencies." Mont. Const. Art. II, § 8, cited by *Citizens*, ¶ 23. In that case, the developer "submitted a significant amount of information which was not identified as part of the [environmental assessment]," sometimes long after its submission, some of which contained material relevant to but not *part of* the environmental assessment, "[t]hus, information which could be relevant to the [environmental assessment] is buried in documents created primarily for other purposes." *Citizens*, ¶ 20. On review, the *Citizens* Court found that the information provided "suffer[ed] from a lack of organization and clarity which results in confusion as to the interpretation and quality of the information provided." *Id.* "[F]ailure to provide [the required information] in a reasonably cohesive fashion, makes it difficult for the public to use the information," undermining Montanans' constitutional Rights to Know and to Participate. *Id.*, ¶ 24. It concluded that an environmental assessment can be deficient not only for failure to provide required information, but also "because much of the relevant information was not provided in a cohesive format." *Id.*, ¶ 25. As in *Citizens,* 71 Ranch submitted a significant amount of information on multiple occasions. Just as "it is not this Court's obligation to conduct legal research on behalf of a party or to develop legal analysis that might support a party's position," *State v. Cybulski*, 2009 MT 70, ¶ 13, 349 Mont. 429, 204 P.3d 7, it is equally not this Court's obligation to conduct factual investigation, *In re Marriage of Taylor*, 2016 MT 342, ¶ 14, 386 Mont. 44, 386 P.3d 599. Although the Court reviewed the extensive record, it is the parties' "responsibility to provide the court and [opposing parties] with adequate notice of what [the party is] contesting by stating the factual or legal basis or reason for his assertions." *Taylor*, ¶ 14. Accordingly, for the purposes of considering the sufficiency of the environmental

assessment's disclosures and County findings on water issues, the Court only discusses material specifically brought to the Court's attention by counsel. After all, if the Court cannot find the relevant material given the assistance of counsel and months of study then the material must be insufficiently clear, organized, and cohesive to provide a non-attorney with a "reasonable opportunity for citizen participation in the operation of the agencies."

As in *Citizens,* other parts of the voluminous record may contain material which is relevant to the required disclosures, but the mere technicality of including unclear but relevant information disorganized elsewhere in the various submissions is not sufficient. The law requires disclosure in part to allow citizens to know about their government's decisions so that they can participate in those decisions. If the Court cannot find the relevant information, even with the assistance of counsel's numerous citations to the record, it cannot be said that the disclosure has afforded the public a reasonable opportunity to participate. While it is possible that "information which could be relevant to the [environmental assessment] is buried in documents created primarily for other purposes," "failure to provide [the required information] in a reasonably cohesive fashion, makes it difficult for the public to use the information," undermining Montanans' constitutional Rights to Know and to Participate. *Citizens*, ¶¶ 20-24.

These concerns are amplified by the haphazard and confusing procedural path the County took to review this application, involving two separate instances of the Commission remanding the matter back to the Planning Board, alleged County failures to promptly provide documents to concerned citizens, routine supplementation of the application to fill obvious omissions, and the regular rescheduling of meetings based on failure to disclose

important evidence and failures to provide adequate notice to interested parties. Counsel for interested landowners, Rob Farris-Olsen pointed out the myriad errors, addendums, and remands had so jumbled the relevant applications and evidence that it would be best to start again fresh. The Court's review of the meetings shows the County bending over backward to allow 71 Ranch repeated opportunities to rectify admitted and obvious basic errors in the application for a project that allegedly began 5-6 years ago. The Court spent months reviewing thousands of documents and over thirty hours of meeting recordings which were dissected in detail and commented on by over a dozen briefs handled by ten attorneys. If the Court cannot find the necessary and relevant material given such overwhelming time and professional assistance then the material must be insufficiently clear, organized, and cohesive to provide the citizenry with a reasonable opportunity for citizen participation in the operation of the agencies. Indeed, the County's Kafkaesque procedure and the developer's Byzantine application which resulted from innumerable revisions to even basic facts leads the Court to conclude that the County's preliminary plat approval must be denied not only for the substantive failure mentioned above but also based on the procedural "failure to provide [the required information] in a reasonably cohesive fashion, [which] makes it difficult for the public to use the information."

Primary Review Criteria: Mont. Code Ann. § 76-3-608(3) (Counts I & II)

Plaintiffs argue that the County "failed to adequately evaluate § 608 criteria and failed to explain why the record supported approval of the subdivision despite identification of probable impacts and the inability to mitigate those impacts." The County counters that it "evaluated the applicable definition from the Broadwater County Subdivision Regulations, examined the

application, staff report, oral and written public comment which makes up the record for the subdivision, made findings which cite to the record to support the finding, examined whether the findings were consistent with the Broadwater County Growth Policy, and then, if needed for identified significant adverse impacts, imposed mitigating conditions which cite to the supporting statute or regulation."

"The basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter." Mont. Code Ann. § 76-3-608(1) (2021). One such requirement is that "A subdivision proposal must undergo review for the following primary criteria: … the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety…." Mont. Code Ann. § 76-3-608(3) (2021).

Agricultural Water User Facilities

"A subdivision proposal must undergo review for the following primary criteria: … the specific, documentable, and clearly defined impact on … agricultural water user facilities …." Mont. Code Ann. § 76-3-608(3) (2021).

Plaintiffs argue that the County ignored the impact of "aggregate consumptive use on offsite agricultural water use in the area." The County counters that the statute relates only to "agricultural water user facilities,"

not agricultural water use generally.

The statute is clearly limited to "agricultural water user *facilities,*" but that term is not defined by statute, or present elsewhere in the code. The County applied the definition from its subdivision regulations as "facilities which provide water for irrigation or stock watering to agricultural lands for the production of agricultural products. These facilities include, but are not limited to, ditches, head gates, pipes, and other water conveying facilities." The County found that "the area in the proposed subdivision" does not contain such facilities and concludes, "It is not anticipated that this proposed subdivision will interfere with any irrigation systems or any agricultural operations in the vicinity and is, therefore, in compliance" with land use goals.

The statute, however, does not limit the review of impacts on agricultural water user facilities to merely the property itself. It requires review of "agricultural water user facilities" which is not limited to the project property. The County cannot legally reach the conclusion that "agricultural operations in the vicinity" will not be interfered with if the County fails to even make factual findings about the existence and nature of those facilities.

Despite concluding that impacts on agricultural water user facilities were "not anticipated," the County opined that Conditions 10, 11, and 25 would mitigate the undescribed and unanticipated impacts. Condition 10 requires a hydrological survey and proof of adequate water, again, rather tardily. Condition 11 requires HOA metering of resident's water and reporting to DNRC. Troublingly, while discussing this condition several Board members seemed to agree that there was no enforcement of this condition for homeowners to report and that "if they don't they don't." A condition that the Board itself seemingly

admits will not do anything is suspect as mitigation. Condition 25 requires boundary fencing and a cattle underpass. None of these conditions relate whatsoever to "facilities," but 10 and 11 clearly relate to agricultural water use generally. A hydrological survey and metering would certainly relate to agricultural water uses generally, but the Court is unable to determine how they relate to agricultural water user *facilities*. The County's argument now in litigation that the statute is limited to water user *facilities* merely highlights a misunderstanding of the criteria when it mandated mitigation that has nothing to do with "facilities," but everything to do with agricultural water use generally. It is lost on the Court how boundary fencing (Condition 25) addresses either agricultural water use generally or facilities in particular, but does relate to agriculture generally.

The County made factual findings limited to agricultural water user facilities on the property itself but then expanded the scope of its conclusions to dismiss impacts to off-site facilities which were never even mentioned. It is arbitrary to reach conclusions on subjects about which there is no analysis or even findings.

Agriculture

"A subdivision proposal must undergo review for the following primary criteria: … the specific, documentable, and clearly defined impact on agriculture…." Mont. Code Ann. § 76-3-608(3).

The environmental assessment's "EFFECT ON AGRICULTURE" section begins "The subject property is currently a vacant piece of land." In response to the question of whether the project is "located on or near prime farmland or farmland of statewide importance," the assessment states

"the subject property consists of..." Like the deficient assessment related to water user facilities impact, the environmental assessment's discussion of agricultural impacts was arbitrarily limited to agricultural impacts to the subject property itself. This is not what the statute requires. The statute requires review of "the specific, documentable, and clearly defined impact on agriculture," not merely agriculture *on the property being developed*. Indeed, it makes little sense to only inquire into the impacts on the subject property. It should be obvious that farmland covered with a subdivision impacts the agricultural use of *that* land. What the statute requires is an inquiry into the impacts on *other nearby* agricultural land that may be affected.

The County concluded that the land "is not considered productive agricultural land" when considering the growth policy, (BC HM 0003738), even though the environmental assessment itself says that 32.1% is Prime Farmland if Irrigated, and another 12.8% is Farmland of Statewide Importance, (BC PP 0003993). This contradicts the statement at the second planning board meeting that 88% is not prime farmland, even if irrigated. (Planning Board Meeting, Sept. 29, 2021). Somehow the County determined that the land is not productive despite the proposal's own documents revealing that almost half the land is "prime" or "of statewide importance."

The assessment does acknowledge that "the overall properties to the northeast, east, and southeast may be used to some degree for agricultural purposes" but concludes that "Confederate Gulch would separate the proposed development from the areas that appear to be used primarily for agricultural purposes." The assessment's description of the measures taken "to ensure that the proposed subdivision will not conflict with nearby agricultural

operations" is fencing along the boundaries shared with public land, Confederate Gulch separating the agricultural users from the development, and covenants to keep residents' animals fenced.

Since agricultural water use in general was not considered above, it must be considered here since an impact on agricultural water use is plainly an impact on agriculture, water being integral to the raising of both of crops and stock. Indeed, the County Attorney specifically brought up the issue of exempt wells as a potential agricultural impact, raising the concern of numerous exempt wells having a "big cumulative impact on the water in that area." (AR 2774). He stated that this issue of the impact of exempt wells "requires, I think, legal analysis from us [the Broadwater County Attorney Office], to assist the Planning Board, because the whole point of exempt wells, is that they're exempt from the DEQ Regulatory Process, that usually looks at those ground water impacts." Thus, the County was told by its own attorney that exempt wells are a matter of concern and that the County should review the issue of their cumulative impact on groundwater because DEQ does not address groundwater concerns for exempt wells, leaving the issue to the County.

There was extensive testimony indicating that groundwater in the area is already impaired. Local resident Jan Finn correctly noted that "water quantity is an unmitigable harm." If there is no longer sufficient water in the aquifer to support the appropriations of senior water rights holders, that it is, the water is gone. There is not a second chance. Local resident Toby Dundas noted that Confederate Creek already goes underground on his property for part of the year. Local resident Drew Hettinger gave poetically chilling testimony about the declining ground and surface water in the area. He recounted how

decades ago, Confederate Creek would run dry from the hottest part of the summer until archery season began. Over the years, the creek has dried up earlier and returned later, such that this year it did not reappear aboveground until after archery season had concluded. Ten years ago, Mr. Hettinger's well could supply two sprinklers and a shower simultaneously. Two years ago, it could only handle one sprinkler if running the shower. This year, he had to choose one or the other, and even a toilet flush at midsummer could not be supplied by his well. After delivering this evidence that local surface and groundwater is impaired, Mr. Hettinger advised the County "There's a reason Upper Missouri is a closed basin." If the County had doubts about this testimony or was under the mistaken impression that only professional opinions and not public comment could not affect their decision, this could have been resolved by reference to the Confederate Creek streamflow data that the County's own conservation district offered. This was not done.

The County did mandate Condition 25, which requires fencing of the boundary with State land and a cattle underpass, but the sufficiency of that mitigation simply cannot be reviewed if the underlying concern it ostensibly addresses is not even discussed. As Ms. Sullivan so aptly noted, "If you don't identify the issues you can't mitigate them." If in responding to a spill of water someone says, "Don't worry, I have a towel!" one cannot be assured that the situation has been adequately mitigated without knowing whether the spill was a cup, a gallon, or a cistern, and whether the spill was in the front yard, in the kitchen, or on a laptop computer. The nature and extent of the concerns must be understood before one can begin to review impacts and the appropriateness and sufficiency of mitigation efforts. Similarly, without

discussing the specific, documentable, and clearly defined impacts of dramatically increased traffic on a rural road, the County's conclusion that the impact is mitigated by condition 25 is arbitrary. While the factual question of whether such impacts are sufficient to reject the proposal (and whether mitigation adequately addresses those concerns) is within the County's power, failing to review specifically documented impacts raised by impacted neighbors and the County Attorney is not. But the County's findings on this issue failed to mention the specific concern of the cumulative impact of exempt wells that was raised before the County by its own attorney and Plaintiffs. Again, the County may weigh evidence as it wishes but here it simply ignored entirely the specific issue which it has a statutory duty to review.

While it appears the County adequately addressed the traffic concerns of agricultural producers through fencing and a livestock underpass, the County erred in arbitrarily approving the preliminary plat after ignoring entirely the specific, documentable, clearly defined impact of exempt wells that was raised numerous times by citizens and even its attorney.

Natural Environment

"A subdivision proposal must undergo review for the following primary criteria: … the specific, documentable, and clearly defined impact on … the natural environment …." Mont. Code Ann. § 76-3-608(3) (2021).

Plaintiffs argue that the County failed to examine the "impact of 42 new additional septic systems" instead relying on DEQ to review them. The County counters that Plaintiffs are trying to "impose a higher standard" than required by law, because sanitation review for lots smaller than 20

acres is DEQ's responsibility.

As a preliminary matter, it appears the County attempts to distinguish its official definition of natural environment ("physical conditions which exist within a given area, including land, air, water, mineral, flora, fauna, sound, light, and objects of historical and aesthetic significance") from what it characterizes as 'natural resources' such as "oil, gas, gravel, timber, etc." The existence of natural resources, however, is a "physical condition which exists within a given area." Timber *is* flora. Moreover, the only definition of mineral the Court could find under Montana law, albeit under the Uniform Unclaimed Property Act, states that "'Mineral' means gas; oil; … gravel…." Mont. Code Ann. § 70-9-802(9) (2021). "Physical conditions which exist within a given area" is an extremely broad definition, and readily applies to every object the County attempts to exclude.

The obvious deficiency is that the environmental assessment does not even address the natural environment whatsoever. Each of the other primary review criteria receives an underlined, bold, all-caps heading followed by a section dedicated to those criteria. There is no such section for the natural environment. This criterion appears to have been omitted entirely from the environmental assessment. If such -603 criteria is missing, it is impossible for the County to properly review that criterion under -608. Thus, it is somewhat surprising that the County's discussion of natural resources is more robust than the other criteria despite the environmental assessment failing entirely to address this issue. It is rather odd for the County to essentially do 71 Ranch's job and make conclusions about the projects impact to the natural environment when 71 Ranch's own environmental assessment fails to do so. There is discussion of

native vegetation, critical species, and weed management; however, the County's discussion of seismic activity and earthquake planning again suggests that it failed to understand what must be reviewed and for whose benefit:

> The property is located within the Intermountain Seismic Belt that extends through western Montana and frequently produces small earthquakes and has previously developed some major earthquakes. Property damage and risk can be minimized with construction techniques and earthquake planning. To mitigate any potential negative impacts with future home site locations, the Subdivider's representative recommends specific geotechnical investigations be performed by future lot owners, in order to review soil conditions on each property and provide appropriate recommendations.

Such studies and recommendations are surely wise, maybe even necessary, for the development of safe communities, but their inclusion here exposes the County's misunderstanding of the -608 criteria and the nature of the County's review. The County is supposed to review the primary criteria for the proposed project's impact on the natural environment, not for the natural environment's impact on the proposed project. It would be remarkable for the subdivision to affect seismicity, not the other way around. Indeed, the environmental assessment places such concerns where they belong, under impacts to public health and safety. They are curiously absent from that section of the County's findings. Given the anemic analysis of other primary review criteria, the inclusion of this irrelevant material evinces the County's inverted understanding of the review process which results in the County doing the developer's job for them where the developer has failed.

Most troubling though, is the total absence of analysis on wastewater discharge and nitrogenous pollution. Both nearby bodies of water are

already impaired by nitrogenous pollution. This concern was raised in both a letter to the County as well as by concerned citizens' lawyer at a Commission hearing. The project's own engineering report, however, used DEQ drain field guidance to expressly exclude consideration of bodies of water more than 1,000 feet away. This may be appropriate for DEQ's limited sanitation review, but the County's adoption of this 'standard' excludes from consideration all impacts to water as long as they are not within 999 feet. It is arbitrary to adopt a different agency's unrelated guidance on the distinct and circumscribed issued of sanitation drain field review and shoehorn it into a completely different area of law. Doing so arbitrarily limits the scope of the County's independent duty to perform a much broader review than DEQ does (*i.e.*, not limited to impacts within 1,000 feet), contrary to -608. The record contains concerns about nitrogenous pollution to nearby waters, yet the County does not discuss those concerns and the environmental assessment neglects the natural environment entirely. Again, the County can weigh evidence as it sees fit, but it may not ignore "specific, documentable, and clearly defined impact[s]," particularly when the County appears to be doing 71 Ranch's job of proving the sufficiency of the project.

Wildlife & Habitat

"A subdivision proposal must undergo review for the following primary criteria: … the specific, documentable, and clearly defined impact on … wildlife, wildlife habitat …." Mont. Code Ann. § 76-3-608(3) (2021). The County defines this criterion as "animals that are not domesticated or tamed as well as the place or area where wildlife naturally lives and travels through."

The environmental assessment states that Montana Department of Fish, Wildlife, and Parks ("FWP") identified Confederate Gulch as "an important spawning stream for rainbow trout," that the general area "is used by antelope, mule deer, white tailed deer, elk, game birds, and non-game bird," and that the lower end of Confederate Gulch closest to the project "provides habitat for moose, mountain lions, and black bears" in addition to the previously mentioned species. As mitigation for impacts, the environmental assessment proposes fenced gardens, wildlife-proof trash disposal, and prohibitions on boundary fencing that is not wildlife friendly.

The County's findings reiterate the environmental assessment and add that the "Long Billed Curlew, a ground nesting bird, has been observed on the property of the proposed subdivision." The County further notes that "Hunter and homeowner conflicts could arise due to hunting taking place on State of Montana lands directly adjacent to the north boundary" of the project. Again, the County misunderstands the nature of what is being reviewed and for whose benefit. The County is supposed to review for impacts to "wildlife, wildlife habitat," not for the impacts that hunting such wildlife will have on future residents and hunters. Indeed, the environmental assessment contains a question, presumably from the County, about whether the project is "likely to displace wildlife in a way that will create problems for adjacent landowners." While this is certainly relevant to public safety, it manifestly has nothing to do with impacts *to* wildlife, but rather *from* wildlife. In fact, the environmental assessment spends more time discussing concerns about the impact of displaced wildlife on owners and neighbors than it spends discussing the project's impact to wildlife and habitat. Concerned citizen Bill Waldron even pointed out this

inverted analysis at one of the Commission's meetings. The County demonstrates a pattern of either not understanding the nature and purpose of its review or of subverting the review by inverting the analysis, thereby ignoring the impacts it must review.

The environmental assessment and County findings both omit the input of FWP fisheries biologist Ron Spoon, who noted that Lower Confederate Creek is a "high quality fishery" but is "nearly dewatered about 4 miles above the project during summer, but groundwater recharges the lower few miles to provide good conditions for fish. Any anticipated groundwater depletion in this area would impact aquatic life in lower Confederate Creek," and noted that "non-development of [the lot closest to Confederate Creek] would potentially reduce risk of groundwater depletion and/or disturbances to streamside areas." He offered "streamflow and fishery data" collected on Confederate Creek near the project by professional hydrologist Jim Beck, of the Broadwater County Conservation District. This material is consistent with Mr. Dundas and Mr. Hettinger's testimony about impaired groundwater. The dewatering of this aquifer, about which virtually nothing has been disclosed, is precisely the concern raised by Plaintiffs regarding the introduction of dozens of new exempt wells to the area that are *only* reviewed by the County as part of this process. The entire point of the County's review is to determine the scope and acceptability of impacts from the project. And yet here the County specifically avoided mentioning (let alone reviewing) one of the most important concerns, raised zealously and consistently by Plaintiffs, that allowing dozens of exempt wells in an area which recharges a dewatered "important spawning stream for rainbow trout" will impact aquatic life.

Only by arbitrarily ignoring entirely the impacts raised by both Plaintiffs and FWP is the County able to conclude that "impacts on wildlife habitat will be negligible." Again, the County may weigh impacts, but may not ignore them.

Public Health & Safety

A subdivision proposal must undergo review for the following primary criteria: … the specific, documentable, and clearly defined impact on … public health and safety …." Mont. Code Ann. § 76-3-608(3) (2021).

The environmental assessment addresses well tests for sufficient water, siting outside the flood plain, a lack of manmade hazardous activity nearby or part of the project, and the presence of some large predatory wildlife in the area.

The County's definition of public health and safety:

> Considers the prevailing healthful, sanitary condition of well-being for the community at large. Conditions that relate to public health and safety include but are not limited to disease control and prevention; emergency services; environmental health; flooding; fire or wildfire hazards; rockfalls or landslides; unstable soils; steep slopes and other natural hazards; high voltage lines or high-pressure gas lines; and air or vehicular traffic safety hazards.

The County's findings on this impact are presented in three subsections: water supply, wastewater, and stormwater. The water supply findings state that "Each phase of the phased development will have a combined estimated total domestic volume of use of 10-acre feet/year. The use of these exempt wells is subject to review and approval by the DNRC and DEQ." The wastewater findings state that each lot will have its own septic/drainfield system

and "The DEQ will issue a determination of non-significant impacts in a Certificate of Subdivision Approval." The stormwater finding states that natural drainages on the west of the project will be protected by tailored lot line selection and "Each individual lot will have a stormwater pond which will be reviewed and approved by DEQ and/or the Broadwater County Sanitarian." The findings conclude that the project is not subject to natural or man-made hazards in the area.

What is missing is any review of the "the specific, documentable, and clearly defined impact on ... public health and safety," that were repeatedly raised by a variety of people about "vehicular traffic safety hazards." At least two individual Plaintiffs raised concerns about the impact of the project would have on traffic safety, particularly given the area's propensity to develop snow drifts shortly after being plowed. (AR 3669). Broadwater County's Public Works Supervisor expressed concerns about traffic. (AR 2627). The developer estimated 3.2 average trips per day per lot, (AR 3692), while the County Growth Plan assumes "8 vehicle trips per day per lot," (AR 68). In a 42-lot subdivision, this assumption reduces the estimated total daily trips from 336 to 134, a 60% reduction. Commissioners Randolph and Delger both questioned the assumption of 3.2 trips per lot per day. (AR 3692). 71 Ranch's representative responded that it was derived from Montana Department of Transportation data for highway use over the last 30 years. Commissioner Delger expressed extreme skepticism about this method, "What is the world does 30 years of traffic data even equate to the amount of traffic on Lower Confederate and Lower Duck Creek?" He stated that 30 years ago you would be lucky to be able to drive down the road, but that "In the last five years, the traffic's probably multiplied by 10,

20 times," so that the developer was in effect "taking a five-year average and dispersing it over 30 years," which he characterized as "a hell of a formula." This concern about inaccurate assumptions regarding traffic volume was expressed by the public as well.

The public, county employees, and at least one Commissioner also expressed skepticism about 71 Ranch's assumptions about what route traffic would take to get from the subdivision to Highway 284, north over Lower Confederate Road or south and east over Lower Duck Creek Road. 71 Ranch estimated 16% of access would be via Lower Duck Creek Road and 84% would be via Lower Confederate Road. The project intends to use gravel roads, and 71 Ranch's breakdown of traffic routes conveniently places the estimate usage of Lower Confederate Road just below the total trips threshold which would require paving. The County's Public Works Supervisor characterized these assumptions "a red flag." The Public Works Supervisor expressed that even 71 Ranch's conservative estimates of traffic use on Lower Confederate Gulch Road, when combined with actual the extensive recreational traffic he measured in the summer, would push the road over the threshold for needing paving or "the county would struggle to keep that a passable road."

The County's Public Works Supervisor said that use of Lower Duck Creek Road "would be only during fair weather," since the Count "does not provide any snow plowing in that area" and would be "completely closed off until the Bureau of Rec was able to get out there. " Commissioner Folkvord echoed "I just don't see people using Lower Duck Creek. Unless it's, there was an emergency access for some reason, they needed to get out. Uh, that would probably be really the only reason I could see them using Lower Duck

Creek." (AR 3698) Ultimately, the Commission concluded that there was no realistic use of Lower Duck Creek Road to access the subdivision, but it appears that the proposal still indicates 16% of traffic using it.

The Public Works Supervisor's "largest concern from a safety standpoint on the roadway, though, is in the winter and plowing."

> If we do have a heavy snowstorm, uh, enough to where it... there are several spots in there that, that have frequent drifting. It may become impassable, and then the residents there would be stuck with one road in, one road out down Lower Confederate, which is the county road.
>
> Currently, it's not one of our tier one roads. It's not a mail route. It's not a bus route. It is one of our lower priority roads for both maintenance and snow removal, as well.

The Broadwater County Sheriff expressed multiple concerns. (AR 4074). He noted that the project is 25 miles from law enforcement and emergency medical assistance, and 10 miles from volunteer fire. He indicated that 5 of these miles are "dirt road which in the winter is not plowed until the County can get to it. There has been many times that road is blown in and not passable," and that Highway 284 "is the last to be plowed by the state." The Sheriff further expressed concern about "the high flow of traffic from vehicles... [which] will become a problem." The Sheriff was clear that he did not oppose the project but reiterated "numerous concerns that take into consideration the safety of my citizens, their families, their friends and their property," and a desire "that these concerns be considered in future planning."

While the County's findings on "Impacts on Local Services" contains a subsection on "Roads and Traffic," the only concern addressed there is a further traffic study about whether the increased use of Lower Confederate

Gulch Road would necessitate paving.

Additionally, the Court notes that at the November 30, 2021 planning board meeting, 71 Ranch's counsel raised dangers of the County requiring the developer to contribute money to upgrade Lower Confederate and/or Lower Duck Creek Roads. Counsel presented the story of *Christison v. Lewis and Clark County Comm.*, BDV-2006-348, 2011 Mont. Dist. LEXIS 5 as a cautionary tale about a County's overzealous demands for payment to upgrade a road turning into a substantial judgement against the County. Counsel represented that the crux of the Court's decision was that total or *even proportionate* payment demanded by the county had no nexus with the supposed impacts of the subdivision, costing the county $700,000. What 71 Ranch's counsel neglected to mention is that in *Christison*, the "County admits it will not use the assessment to improve the portion of the road in question or any part of Lake Helena Drive." *Christison*, at 13. Those facts are entirely distinguishable from this case where the entire discussion on proportionate share related to upgrading the road that subdivision residents would use. All discussion in the case at bar about road-based impact fees has been centered on using those impact funds to improve the affected road(s). This is not similar to *Christison* where the Court pointed out that "the County could keep the subdividers assessment and use it, for example, to buy new playground equipment in Augusta." *Christison*, at 9. 71 Ranch's counsel represented *Christison* to be a limitation on the County's ability to levy impact fees for *off-site* road improvements. It was not, it struck impact fees that *had no relation to the project whatsoever* because the fees collected were not dedicated to improvements that would mitigate the development's impacts. *Christison* is not applicable to this case as represented by

71 Ranch.

It appears that the traffic concerns not addressed by fencing and the livestock underpass have narrowed to the volume to traffic on Confederate Creek Road, for which an additional traffic study was ordered to understand whether paving will be needed. The County likely should have noted that Highway 284 is the last highway to be plowed by the State, Lower Confederate Road is a low priority road for County plowing, and Lower Duck Creek Road is not plowed by the County, and only sporadically by the Bureau of Reclamation, leaving it frequently impassable in the winter due to snow drifts. Additionally, summer weather brings so much recreational use of Lower Confederate Road that, combined with even conservative traffic estimates for subdivision, would make the County "struggle to keep that a passable road." None of these concerns are mentioned let alone reviewed in the County's Public Health & Safety findings, even though that subject expressly includes "vehicular traffic safety hazards." The County was told of these concerns by nearby residents, the county's own public works employee, the Sheriff, and even expressed by two County Commissioners. Omission of these specific, documentable, and clearly defined impacts from the County's findings is troubling, but the Court cannot say that the County arbitrarily failed to review this issue and require relevant mitigation.

Counts I & II Summary

The County's repeated omission of numerous specific, documentable, and clearly defined impacts to "agriculture..., the natural environment, wildlife, wildlife habitat, and public health and safety", raised by citizens, County employees, and even Commissioners themselves is to say the

least, arbitrary and unlawful.

If this were not bad enough, some of the most specific, documentable, and clearly defined impacts raised by Ms. Sullivan (AR 4286-4307) and FWP (AR 4312-4314) were not even provided in the digitized administrative record this Court was required to review among the thousands of pages. Only after the Court noticed a gap in the record and made a request to counsel was the court provided with the AR 4286-4341. This is only 55 pages in a record of more than 4,000, barely more than 1%. But those missing pages coincidentally contain the most cogent criticisms which lay bare many of the problems with and questions left unanswered by the deficient environmental assessment. When the Court finds that the County did not consider, as it appears from the record, numerous specific, documentable, and clearly defined impacts, the conclusion looks all the more negative when the most compelling material pointing out specifically to the County the proposal's deficiencies was absent from the electronic record provided to the Court. Ignoring numerous specific, documentable, and clearly defined impacts is arbitrary and unlawful when statute requires that the County review them.

As a matter of law, Plaintiffs are entitled to summary judgment on Counts I and II.

County Reliance on DNRC Decision (Count IV)

The County argues that it lacks standing to determine legal appropriability of water for the subdivision, which is within the jurisdiction of DNRC under the Montana Water Use Act. Plaintiffs counter that the County has an independent obligation to consider not only the factual existence but also legal appropriability of water and argues that the County's reliance on DNRC's

decision was in error.

> [T]he subdivider shall submit to the governing body or to the agent or agency designated by the governing body the information listed in this section for proposed subdivisions that will include new water supply or wastewater facilities. The information must include:
>
> ....
>
> (e) for new water supply systems, unless cisterns are proposed, evidence of adequate water availability:
>
> (i) obtained from well logs or testing of onsite or nearby wells;
>
> (ii) obtained from information contained in published hydrogeological reports; or
>
> (iii) as otherwise specified by rules adopted by the department of environmental quality pursuant to 76-4-104.

Mont. Code Ann. § 76-3-622(1) (2021). *See* also Mont. Code Ann. § 76-3-608(6) (allowing conditional approval based on water information disclosed pursuant to Mont. Code Ann. § 76-3-622). Subsections (i) and (ii) both unequivocally relate to the factual existence of water. Well logs, testing of wells, and hydrological reports offer no insights into the legal availability of water. Subsection (iii) concerns administrative rules adopted under Mont. Code Ann. § 76-4-104. That statute is found within the part concerning "*Sanitation in Subdivisions*" which lists as its public policy goal "to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water." Mont. Code Ann. § 76-4-101. Quality and potability concern the physical properties of water, not whether it is legally appropriable. The specific subjects upon which the Legislature requires rules to be promulgated also concern the factual existence of water, adequate volume of water, and protection of water

quality, but not legal appropriability:

> (a) ... (ii) total number of proposed units and structures requiring facilities for water supply or sewage disposal;
>
> (b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;
>
> (c) evidence concerning the potability of the proposed water supply for the subdivision;
>
> (d) adequate evidence that a sewage disposal facility is sufficient in terms of capacity and dependability;
>
> (e) standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways, except that the rules must provide a basis for not requiring storm water review under this part for parcels 5 acres and larger on which the total impervious area does not and will not exceed 5%. Nothing in this section relieves any person of the duty to comply with the requirements of Title 75, chapter 5, or rules adopted pursuant to Title 75, chapter 5.
>
> (f) standards and technical procedures applicable to sanitary sewer plans and designs, including soil testing and site design standards for on-lot sewage disposal systems when applicable;
>
> (g) standards and technical procedures applicable to water systems;
>
> (h) standards and technical procedures applicable to solid waste disposal;
>
> (i) adequate evidence that a proposed drainfield mixing zone and a proposed well isolation zone are located wholly within the boundaries of the proposed subdivision where the proposed drainfield or well is located or that an easement or, for public land, other authorization has

been obtained from the landowner to place the proposed drainfield mixing zone or proposed well isolation zone outside the boundaries of the proposed subdivision where the proposed drainfield or proposed well is located.

(i) A proposed drainfield mixing zone or a proposed well isolation zone for an individual water system well that is a minimum of 50 feet inside the subdivision boundary may extend outside the boundaries of the subdivision onto adjoining land that is dedicated for use as a right-of-way for roads, railroads, or utilities.

(ii) This subsection (6)(i) does not apply to the divisions provided for in 76-3-207 except those under 76-3-207(1)(b). Nothing in this section is intended to prohibit the extension, construction, or reconstruction of or other improvements to a public sewage system within a well isolation zone that extends onto land that is dedicated for use as a right-of-way for roads, railroads, or utilities.

(j) criteria for granting waivers and deviations from the standards and technical procedures adopted under subsections (6)(e) through (6)(i);

(k) evidence to establish that, if a public water supply system or a public sewage system is proposed, provision has been made for the system and, if other methods of water supply or sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations that are in effect at the time of submission of the subdivision application under this chapter. Evidence that the systems will comply with local laws and regulations must be in the form of a certification from the local health department as provided by department rule.

(l) evidence to demonstrate that appropriate easements, covenants, agreements, and management entities have been established to ensure the protection of human health and state waters and to ensure the long-term operation and maintenance of water supply, storm water drainage, and sewage disposal facilities;

> (m) eligibility requirements for municipalities and county water and/or sewer districts to qualify as a certifying authority under the provisions of 76-4-127.

Mont. Code Ann. § 76-4-104(6) (2021).

Section 76-4-104(6) involves whether there is enough water, whether it is clean, whether other waters' cleanliness will be affected, and whether the water systems are adequately designed. All focus on the physical presence and properties of water, not whether the water is legally appropriable. Indeed, "[t]he rules and standards [under Mont. Code Ann. § 76-4-104] must be related to: (a) size of lots; (b) contour of land; (c) porosity of soil; (d) ground water level; (e) distance from lakes, streams, and wells; (f) type and construction of private water and sewage facilities; and (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife." Mont. Code Ann. § 76-4-104(2) (2021). The Legislature did not authorize the promulgation of rules under this part related to legal appropriability of water but confined its grant of rulemaking authority to regulations regarding the factual existence and properties of water. Thus, no subsection of Mont. Code Ann. § 76-3-622(1)(e) requires evidence of legally appropriable water.

Plaintiffs cite to *Whatcom Cnty. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wash. 2d 648, 381 P.3d 1 (2016) arguing that it is an analogous case in which the Washington Supreme Court determined that counties have an obligation to determine legal water availability independent of state agency obligations to do the same. The Washington Supreme Court determined that Washington statute "places an independent responsibility to ensure water

availability on counties, not on [the state agency]." Id., ¶ 21. It concluded that RCW 19.27.097(1); RCW 58.17.110 placed an obligation "on counties to ensure that water is legally available before issuing a building permit." *Id.*, fn 13. The first statute, RCW 19.27.097(1), requires that building permit applicants "provide evidence of an adequate water supply for the intended use." The second, RCW 58.17.110, requires the local legislative body determine if appropriate provisions are made for, "the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds...." *Whatcom* is of extremely limited utility since it analyzes another state's statutes. Additionally, just a few years after the decision was issued the Washington Legislature overruled the *Whatcom* decision entirely by amending both RCW 19.27.097(1) and 58.17.110, the two footnoted statues upon which *Whatcom*'s reasoning was based. To both statutes was added the following new subsection: "Any permit-exempt groundwater withdrawal authorized under RCW 90.44.050 associated with a water well constructed in accordance with the provisions of chapter 18.104 RCW before the effective date of this section is deemed to be evidence of adequate water supply under this section." Rev. Code Wash. § 19.27.097(5) and § 58.17.110(4) (identical text). Exempt wells in Washington are now deemed to have sufficient water supply and the county is not under an independent obligation to evaluate the adequacy of water for the development. Thus, even assuming that *Whatcom*'s interpretation of Washington law is of utility in Montana, the reasoning on which that Court relied was expressly overridden by the Washington Legislature shortly thereafter. Montana Code Annotated § 76-3-622(1) does not place an independent

obligation on the County to determine the legal availability of water. *Whatcom* is not precedent in Montana, and the Washington Legislature swiftly overruled the basis of that decision.

Community Impact Report & Mandatory Local Subdivision Regulations

Nevertheless, neither party briefed the adequacy of the project under Mont. Code Ann. § 76-3-603(1)(a)(iii) and (iv). Subsection (iii) requires a "community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including … water." Mont. Code Ann. § 76-3-603(1)(a)(iii). Subsection (iv) requires inclusion of "additional relevant and reasonable information related to the applicable regulatory criteria adopted under 76-3-501 as may be required by the governing body." That statute requires that local governing bodies "shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for: …. (f) the provision of adequate … water…; [and] (i) the avoidance of subdivisions that would involve unnecessary environmental degradation and danger of injury to health, safety, or welfare by reason of natural hazard, including but not limited to … lack of water…." Mont. Code Ann. § 76-3-501(1) (2021). The verb "provision," defined by Merriam-Webster as "to supply with needed materials" plainly concerns the appropriation of water.

It is axiomatic that (1) the needs of a subdivision include both the factual existence of sufficient water and the legal right to appropriate that water, (2) one cannot "provision" water that does not exist in fact or to which one does not hold a right to appropriate, and (3) a subdivision that does not have *both* water in fact and a right to appropriate it suffers from a "lack of water."

Statute requires the County to pass regulations that reasonably provide for the "provision of adequate water" for the development and the avoidance of developments that "lack water." Thus, while Mont. Code Ann. § 76-3-622(1) does not place an independent obligation on the County to determine the legal appropriability of water, Mont. Code Ann. § 76-3-603(1)(a)(iii) and 76-3-501(1) do. The County's refusal to analyze the factual existence *and* legal appropriability of water for a proposed subdivision abrogates its statutory duty to "adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for... the provision of adequate... water... [and] the avoidance of subdivisions that would... lack of water."

Indeed, at a County Commission meeting, Mr. Swanson stated that this issue of the impact of exempt wells "requires, I think, legal analysis from us [the Broadwater County Attorney Office], to assist the Planning Board...." It is hard for the County to disclaim its obligation to perform such legal review when the County's Attorney promised it as part of what he considered a necessary part of the subdivision review process. While the parties attempt to draw clean lines that limit the County to factual inquiry and DNRC to legal inquiry, statute demands a messier process which places some legal analysis on the County and blends some facts into DNRC's analysis. *See* Mont. Code Ann. § 85-2-311(1)(a)(3).

Although Mont. Code Ann. § 76-3-622(1) does not place an independent obligation on the County to review the factual existence and legal appropriability of sufficient water for a proposed project, Mont. Code Ann. § 76-3-603(1)(a)(iii) and 76-3-501(1) do. The County's failure to do so was contrary to statute. Accordingly, Plaintiffs are entitled as a matter of law to summary

judgment as to Count IV.

DNRC's Decision (Count III)

Plaintiffs argue that they are entitled to a judicial declaration that the DNRC's interpretation of Mont. Code Ann. § 85-2-306(3)(iii) and Mont. Admin. R. 36.12.101(12) is erroneous. Specifically, DNRC's determination that the project would be entitled to a combined appropriation exempt well for each of the project's four phases. DNRC counters that it applied the law correctly and that Plaintiffs seek an advisory opinion. The County's argument that it has no obligation to review water rights was addressed above.

71 Ranch argues "The *Clark Fork* case was not decided by this Court (Judge Sherlock) on summary judgment, but was issued after an evidentiary hearing." This is factually incorrect and legally oxymoronic. *Clark Fork.*, like this case, came to the Court as a judicial review petition. Such petitions involve legal review strictly limited to the record below. There is rarely a reason for an evidentiary hearing because it is error to consider material outside record. Mont. Code Ann. § 2-4-704(1) (2021) (review "must be confined to the record."). Only in very limited circumstances is new evidence accepted. *Id.* ("In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court."). Consequently, judicial review petitions only very rarely involve evidentiary hearings. There is no mention in either the *Clark Fork* lower court decision or the Supreme Court opinion about an evidentiary hearing. The only substantive hearing the Court held was oral argument on the petition on September 9, 2014. There was no evidentiary hearing in District Court during *Clark Fork* as 71 Ranch misstates.

/////

Standing

DNRC argues Plaintiffs' attacks on its 'predetermination' letters are premature because DNRC's issuance of a water right does not occur until after a well has been drilled and the water is put to beneficial use, therefore no final action was taken by DNRC. It is correct that DNRC has not taken a final action regarding the conferral of a water right, however, DNRC's brief makes much of the distinction between its duties permitting water rights and the County's distinct duties regarding subdivision review.

Although the subdivision review rules in Mont. Admin. R. 17.36.103 are primarily directed at approvals from the County and DEQ, DNRC has an express role in this stage of the subdivision review process which requires:

> ...if the proposed water supply is from wells or springs, or is
>
> relocating an existing multiple-user water supply, a letter from the Department of Natural Resources and Conservation stating that the water supply:
>
> (i) is, or is not, located in a controlled groundwater area; and
>
> (ii) is either exempt from water rights permitting requirements or has a water right, as defined in 85-2-102, MCA;

DNRC itself argues that this subdivision review process is distinct from DNRC's post-subdivision-approval, post-drilling, post-beneficial use issuance of a water right. Thus, issuing what it calls 'predetermination' letters was DNRC's final action in what DNRC itself admits is a legally distinct process conducted by different parts of government for different purposes. It is DNRC's legal duty at this stage of this process (subdivision review) to determine if the

proposed wells are "either exempt from water rights permitting requirements or [have] a water right." The first thing that DNRC needs to do in this process, determining entitlement to an exempt well, is also the last action DNRC takes in this process. There is nothing "pre-" about this determination which DNRC admits is distinct from its subsequent unrelated duties regarding issuance of a water right. Indeed, the first sentence of the letter makes clear that it was issued not as an interim step in DNRC's water rights permitting process but rather as DNRC's final determination "for the proposed DEQ review in accordance with ARM 17.36.103(1)(s)." Certainly, DNRC has not taken a final action on subdivision approval, because (as the letter says) it is not a DNRC process and all DNRC is required to do in this distinct process is provide its determination so that the County can make its final action on the application. Only subsequent to this approval and after the water is put to beneficial use does DNRC's independent water rights permitting process even begins, as it strenuously argued. As DNRC argued at the hearing:

> The only piece of evidence from the record considered by DNRC were these four letters from the applicant's engineer saying, "These are four separate projects in front of DEQ. Here are the parameters." And DNRC responded, "Here is what you told us. Here is all the information we have based on this. Here is the --" saying, "You qualify for an exempt well." And that was DNRC's involvement. There was no more -- that was it. That's all DNRC's record.

This is clearly distinct from DNRC's water rights adjudication process, yet DNRC tries to have it both ways, arguing that no final DNRC water rights determination has happened even though the beginning of that review is obviously predicated on the prior, independent approval of the subdivision by the County under review in

this matter.

DNRC argues that the determination letters only apply to the project at the time of the letter, and DEQ required submission of "additional information regarding the cumulative impact of the proposed developments on the aquifer." This is a red herring. For one, DNRC's determination is a *legal* one about entitlement to an exempt well based on statutory and administrative rule criteria. It does not matter what *factual* material DEQ solicits regarding the cumulative impact to the aquifer, an issue for which DNRC has vehemently disclaimed any role. The Legislature's decision to spread the regulatory burden across two state agencies and a local government, each with distinct roles in a multi-stage process, creates complexities. Thus, it does not matter what *factual* material DEQ requests regarding its *factual* determination of water existence which is entirely distinct from DNRC's *legal* determination of *legal* appropriability, as DNRC has repeatedly argued.

Equally facile is DNRC's standing argument that "no appropriation of water has occurred." Obviously, no appropriation has occurred because a prerequisite to such appropriation is approval of the subdivision which is predicated on DNRC's determination that "the water supply.... is either exempt from water rights permitting requirements or has a water right." Plaintiffs are not challenging DNRC issuance of a water right but rather DNRC's sole and final act in the distinct County review process which is a condition precedent to even beginning the water rights permitting process. These are sequential acts which are predicated on each other but which DNRC itself has strenuously argued are entirely separate processes conducted independently by distinct parts of government.

Under DNRC's analysis, even if Plaintiffs are correct that DNRC improperly determined the subdivision was entitled to use exempt wells, DNRC would have the entire subdivision review process be completed, wells drilled, and water pumped before Plaintiffs would have standing. This is ridiculous, for "[t]he law neither does nor requires idle acts." Mont. Code Ann. § 1-3-223 (2021). If DNRC's application of exempt well law was a necessary part of the County review process and DNRC's interpretation of that law is erroneous it follows that DNRC's conclusion cannot stand. There is nothing advisory about voiding a government act.

Furthermore, the Legislature specifically extended standing to challenge applications and preliminary plats after the Montana Supreme Court found otherwise. *Contrast* Mont. Code Ann. § 76-3-625(2) (amended in 2021 to allow challenge of preliminary plat matters) with *City of Kalispell v. Flathead County*, 260 Mont. 258, 859 P.2d 458 (1993) (concluding that because there was no mechanism for judicial review of a conditioned approval of a preliminary subdivision plat in the Subdivision and Platting Act, the County Commissioner's decision was not appealable). Since DNRC's determination is an integral part of that preliminary approval process, it follows that DNRC's decision is reviewable. To conclude the opposite would allow DNRC's characterization of its own actions to trump the statutory standing specifically conferred by the Legislature.

Water Law & Prior Appropriation

For several thousand years of Western history water law generally gave property owners the right to use water that their property abutted, from the Justinian codification of Roman law, through the Napoleonic Code, into English Common Law, and thence to the establishment of "the basic doctrines of

American [riparian] water law." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 745 (1950). But as American settlers expanded west of the 100th Meridian they encountered climes vastly drier than those of Europe and the American East. While generous to Montana with "the grandeur of our mountains, [and] the vastness of our rolling plains," God was rather more restrained with this State's and the West's water resources. "Then in the mountains of California there developed a combination of circumstances unprecedented in the long and litigious history of running water. Its effects on water laws were also unprecedented," gold was discovered. *Id.* Where in the East, water had been drawn at or near its site of use because of its abundance, miners in the West were often forced to divert water from its source to the alluvial mining claims they were working. Suddenly scare water with multiple claimants needed to be moved long distances first to placer mining fields, then later to fields of crops and livestock. The Courts obliged. *Irwin v. Phillips*, 5 Cal. 140, 146 (1855) ("Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development.") This doctrine of prior appropriation is the basis of all water law in every Mountain West state, including Montana's for well over a century. *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900).

Prior appropriation was codified in Montana's first Constitution. 1889 Mont. Const. Art. III, § 15. ("The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or

other beneficial use and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.") Our current Constitution recognizes those prior appropriation rights and mandates that "[t]he legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." Mont. Const., Art. IX § 3(4).

In the first legislative session after the 1972 Constitutional Convention, the Legislature passed the Water Use Act to satisfy the aforementioned constitutional mandate. Mont. Code Ann. § 85-2-101 (2021). ("Pursuant to Article IX of the Montana constitution;" "A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights.") The Act serves as the exclusive authority governing water appropriation in Montana and institutes a permitting system. Mont. Code Ann. § 85-2-301(1) (2021). "The primary function of this permit[-]based system is the protection of senior water rights from encroachment by prospective junior appropriators adversely affecting those rights." *Clark Fork*, ¶ 5. Prospective permitees must prove by a preponderance of the evidence that water is "physically available," and prevail in an "analysis of the evidence on physical water availability and the existing legal demands of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the demands existing legal demands of water rights on the supply of water." Mont. Code Ann.

§ 85-2-311(1)(a) (2021). One condition to DNRC issuing a permit is that "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected" by the new appropriation. Mont. Code Ann. § 85-2-311(1)(b) (2021). The standard is not that that the impacts *probably* won't adversely affect senior water rights holders but rather that their rights "*will not* be adversely affected." (emphasis added). The applicant must prove to DNRC by an evidentiary preponderance that water is "physically available" and "can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested...." Mont. Code Ann. § 85-2-311(1)(a) (2021).

As an aside, this Court must note that as of the writing of this order, LEXIS's version of Mont. Code Ann. § 85-2-311(1)(a)(ii) is inaccurate. House Bill 136 (2021) amended the phrase "existing legal demands" to "existing legal demands of water users" in three locations. This is accurately reflected in the 2021 Session Laws, Volume II. The Legislative LAWS system's version of the Code reflects this amendment as well. However, LEXIS's version[2] of the code reads "demands existing legal demands of water rights" in all areas where the phrase was amended even though LEXIS's amendment notes reflect the true changes to the code: "The 2021 amendment by ch. 317 substituted "existing legal demands of water rights" for "existing legal demands" in (1)(a)(ii)(B), twice in (1)(a)(ii)(C), and (3)(b)(i); and substituted "legal demands of water rights" for "demands" in (3)(b)(i) and (4)(c)(iv)."

Exempt Wells

The Legislature has created an exception to the permit requirement:

[2] The Court contacted LEXIS to try to rectify this error.

> Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring: .... (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit;....

Mont. Code Ann. § 85-2-306(3) (2021).

The term "combined appropriation" is not defined by the Water Use Act; therefore, it fell to DNRC to define the term. Unfortunately, DNRC

> has taken contradictory positions regarding the meaning of the term. Specifically, within a period of six years, the DNRC promulgated consecutive rules with conflicting interpretations as to whether groundwater developments must be physically connected to constitute a "combined appropriation." Initially, in 1987, three months after the Legislature adopted the "combined appropriation" language, the DNRC promulgated Admin. R. M. 36.12.101(7) (1987), which provided that "[g]roundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.'" However, in 1993, the DNRC reversed its position and adopted the current administrative rule, Admin. R. M. 36.12.101(13), which states that the term "combined appropriation" means "groundwater developments, that are physically manifold into the same system."

Clark Fork, ¶¶ 2-3.

Adding insult to injury,

> No public hearing on this rule change adding a physical connectivity requirement was held and no public comments were received. The DNRC similarly did not provide a statement as to why the change from the 1987 rule was necessary as the DNRC was required to do

> pursuant to § 2-4-305, MCA. The DNRC responded to an inquiry by the Administrative Rules Committee that the 1987 definition of "combined appropriation" was "too ambiguous and therefore difficult to administer."

Id., n.2.

Clark Fork

In 2009, a group of senior water rights holders challenged DNRC's combined appropriation definition. Its hearing examiner rejected the challenge, but "acknowledged, however, that the administrative rule had caused the proliferation of exempt appropriations in a way that was not anticipated by the Legislature." *Clark Fork*, ¶ 15. Clearly mindful of the problems behind the rule, the hearing officer ordered DNRC to "initiate proposed rulemaking to repeal the 1993 rule and adopt a new administrative rule that would align more closely with legislative intent." *Clark Fork*, ¶ 15. In the 14 years since the problem was flagged by its own hearing examiner DNRC has not amended the rule.

The water rights holders petitioned for judicial review of DNRC's decision. In an unequivocal decision, this Court invalidated the 1993 rule, concluding that it conflicted with the plain language, general purpose, and legislative history of the Water Use Act, and reinstated the 1987 rule. The Court noted that the Montana Department of Fish, Wildlife, and Parks believed that DNRC's interpretation "defies logic" and was "inconsistent with the plain meaning of the statute." The Court further noted DNRC Water Management Bureau's statements about the looming problems with its interpretation of combined appropriation as early as 2008:

> This concern is elevated as exempt wells are being used for large, relatively dense subdivision development in closed basins. Exempt wells are not reviewed by DNRC and are not subject to public

> notice. In contrast, permitted wells are reviewed by DNRC, and water users and the public are noticed and given an opportunity to object. Impacts cause by permitted wells are required to be identified and, if these impacts cause adverse effect to water users, must be offset through mitigation plans or aquifer recharge plans. Impacts caused by exempt wells are often offset during times of water shortages by curtailment of junior surface water right users. Even if administration or enforcement of exempt wells in priority existed, curtailment of exempt wells could be ineffective because of the delayed effect on stream flows and, therefore a call may not benefit senior water users.
>
> ....
>
> At current rates of development, approximately 30,000 new exempt wells could be added in closed basis during the next 20 years resulting in an additional 20,000 acre-feet per year of water consumed.

Order on Pet. For Jud. Rev., *Clark Fork Coalition v. Tubbs*, BDV-2010-874.

The associations of well drillers, realtors, and the building industry appealed the decision, but DNRC did not. The *Clark Fork* Court upheld both the striking down of the 1993 rule and the reinstatement of the 1987 rule which stands to this day. Since DNRC's actions and arguments consistently evince either an unfamiliarity with or hostility to this controlling case law, the Court will quote the Montana Supreme Court's decision extensively to be abundantly clear:

> Based upon the plain language of the statute, it is evident that the intent of the Legislature in enacting subsection (3)(a)(iii) was to ensure that, when appropriating from the same source, only a de minimis quantity of water, determined by the Legislature to be 10 acre-feet per year, could be lawfully appropriated without going through the rigors of the permitting process. An exception to the exemption for quantities exceeding 10 acre-feet per year, regardless of flow rate and number of wells or developed springs utilized for the appropriation, protects other water rights utilizing the same water

> source. This is consistent with the purpose of the Act as a remedial statute designed to strictly adhere to the prior appropriation doctrine and to provide for the "administration, control, and regulation of water rights . . . and confirm all existing water rights . . . ." We have explained that "the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights." This fundamental purpose is reflected throughout the Act and many of the subsections of the Act begin with a policy declaration stating that the protection of senior water rights and the prior appropriation doctrine is the Act's core purpose. *See*, e.g., § 85-1-101(4), MCA (the Act's purpose is to "protect existing uses"); § 85-2-101(4), MCA (it is "a purpose of this chapter to recognize and confirm all existing rights"); § 85-2-101(4), MCA (the purpose of permitting is to "provide enforceable legal protection for existing rights"). Accordingly, based upon the plain language of the statute and the stated purpose of the Act, we conclude that **"combined appropriation" refers to the total amount or maximum quantity of water that may be appropriated without a permit** and not to the manner in which wells or developed springs may be physically connected.

Clark Fork, ¶ 24 (emphasis added).

The 1993 rule defined "combined appropriation" as requiring that

> "the ground water developments" be "physically manifold into the same system." First, there is no language anywhere in the Act which suggests that wells or developed springs must be physically manifold or connected in order to be deemed a "combined appropriation." We therefore conclude, without any difficulty, that the 1993 rule engrafted an additional requirement on the statute and must be deemed invalid if: (1) it is contradictory or inconsistent with the statute, or (2) adds a requirement not envisioned by the Legislature.
>
> As the District Court correctly observed, the 1993 rule allows an unlimited quantity of water to be appropriated from the same source

> as long as the ground water developments are not physically manifold or connected. The 1993 rule, therefore, unquestionably expands the exemption by limiting the number of appropriations which must be excepted, rendering meaningless the underlying limit on volume or quantity of 10 acre-feet per year from the same source. That portion of § 85-2-306(3)(a)(iii), MCA, allowing for an exemption—a well or developed spring appropriating no more than 35 gallons per minute and 10 acre-feet per year—has no qualifying language relating to the same source. However, the exception to the exemption does; that is, **regardless of flow rate and the number of wells or developed springs no combined quantity of water may exceed 10 acre-feet when it is from the same source.** The 1993 rule directly contradicts this plain language by adding a connectivity requirement to the wells or developed springs, effectively swallowing up the underlying exception that the Legislature created.
>
> We conclude that the 1993 rule was inconsistent with the plain language of § 85-2-306(3)(a)(iii), MCA, and that it engrafted an additional requirement on the exempt well statute that wells or developed springs be "physically manifold into the same system." By narrowing the exception to only those wells or developed springs physically connected, the 1993 rule expanded the narrow exemption to the permitting process provided by § 85-2-306(3)(a)(iii), MCA, and was inconsistent with the stated statutory purpose of the Act.

Clark Fork, ¶¶ 26-28.

The 1993 rule was "invalid since its inception." *Id.*, ¶ 41. In 2023, Rep. Casey Knudsen's HB 642 attempted to remove the statutory limit on exempt wells by excising the statutory language relied on by the *Clark Fork* Court, just like the Washington Legislature's bill which overruled *Whatcom*. (striking from 85-2-306 "except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit"). Unlike in Washington, HB 642

died in committee.

To review, the "evident" intent of the Legislature was to limit exempt well appropriation to "only a *de minimis* quantity of water, determined by the Legislature to be 10 acre-feet per year." The term combined appropriation refers to the "total amount or maximum quantity of water that may be appropriated without a permit …." There was "no language anywhere in the Act" to suggest that systems need be manifold or connected in order to be deemed a combined appropriation. The *Clark Fork* Court concluded "without any difficulty" that DNRC "unquestionably" expanded the exemption beyond its authority in a manner that "directly contradicts [the statute's] plain language." Thus, DNRC went out of its way, and contrary to the plain language of the statute, to promulgate a rule without notice which allowed appropriators "to avoid the permitting process for an infinite number of appropriations from the same source—with each appropriation consuming up to 10 acre-feet per year—so long as the appropriator does not physically connect the groundwater developments." *Clark Fork*, ¶ 11. In a stroke and without public comment, DNRC effectively abolished the statutory limits on the use of exempt wells. The statute is clear, the Supreme Court has interpreted it unequivocally, but unlike *Whatcom* the Montana Legislature did not amend the statute upon which *Clark Fork* is based.

DNRC 'Pre'-Determination Letters

On February 4, 2020, DNRC issued four letters to "evaluate the amount of water proposed under the current project." The letters' second sentence acknowledges that "The proposed project is to split an existing +435-acre tract, into individual lots in four phases." Each letter concerned a different

phase of the project. The letters are effectively identical other than the project's phase. Each stated, "The purpose of this letter is to respond to your request for DNRC review of water right permit exceptions under MCA 85-2-306(3)(a)(iii) [exempt well statute] for the proposed DEQ review in accordance with ARM 17.36.103(1)(s)." The letter also accurately restates the law on exempt wells post-*Clark Fork Coal.*:

> In *Clark Fork Coalition, et. al. v. DNRC*, et. al., 2016 MT 229, 384 Mont. 503, 380 P.3d 771, the Montana Supreme Court concluded that the definition of "combined appropriation" in Admin. R. Mont. 36.12.101(13) was invalid. The Court reinstated the Department's 1987 Rule defining "combined appropriation" as: "An appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."
>
> Under this Rule, the Department interprets subdivisions that are pending before the Department of Environmental Quality for approval on October 17, 2014 or filed after that date to be a single project that can be accomplished by a single appropriation. Consequently all wells in such a subdivision will be considered a "combined appropriation" for the purposes of Mont. Code Ann. 85-2-306. The only exception to this interpretation is that a subdivision which has received preliminary plat approval prior to October 17, 2014 will not be considered a project under the "combined appropriation" 1987 Rule; individual lots will still be evaluated under the 1987 Rule at the time of an

application to the Department. 2015 Mont. Laws §1, Ch. 221.

(emphasis added).

The letters then each inexplicably conclude, contrary to the letter's own explanation of the law, that:

> Based on the information received January 31, 2020, the proposed appropriation does fit the current rules and laws pertaining to the filing of an exempt water right using a DNRC Form 602, Notice of Completion of Groundwater Development. The proposed appropriation is considered a combined appropriation because the proposed split of the 435 acre tract has not been approved or recorded with Broadwater County prior to October 17, 2014.

If one such letter had been issued it would be accurate to state that "proposed appropriation is considered a combined appropriation because the proposed split of the 435-acre tract has not been approved or recorded with Broadwater County prior to October 17, 2014." Notwithstanding, however, by issuing four such letters, DNRC determined, contrary to its own accurate restatement of *Clark Fork Coal.* in the letters, that the project was entitled to a combined exempt well appropriation for *each* phase of the project. The letters themselves lay out the Montana Supreme Court's holding on exempt wells:

> Groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined

appropriation."

DNRC blatantly ignores a recent Supreme Court holding, which the letter demonstrates that DNRC understands, to conclude that each of the four phases of one larger project are entitled to exempt wells. This is contrary to the administrative rule, statute, the rulings of this and the Montana Supreme Court, and perhaps most troubling, DNRC's own restatement of law in the letters.

It is difficult to tell why DNRC's letters reach a conclusion so contrary to its own contents, but DNRC's guidance, referenced repeatedly to the County by 71 Ranch's counsel, offers a possible reason. In the wake of *Clark Fork*, DNRC produced guidance on the changes to the definition of combined appropriation. It stated:

> The CFC decision concluded that the Department's rule defining "combined appropriation" of "exempt" wells as "an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system," was inconsistent with applicable law and therefore invalid.

The guidance then outlines four scenarios which, in DNRC's judgment, are "combined appropriations of two or more wells from a same source aquifer that may not exceed 10 AF."

1) Any two or more exempt wells that are physically manifold together are considered a combined appropriation in all cases, regardless of ownership. Physically manifold includes any storage shared between multiple groundwater developments.

2) Any lots less than 20 acres in size in existence or part of a subdivision application submitted on or prior to October 17, 2014, are grandfathered in under HB 168 so only exempt wells that are physically manifold together are considered a combined appropriation.

3) For lots that are greater than or equal to 20 acres, either in existence prior to October 17, 2014 or created after that date, any wells within 1,320 feet of one another on a lot are considered to be a combined appropriation. If there are any lots that are 20+ acres in the new arrangement, those lots will not be considered part of the subdivision, will not be reviewed by DNRC, and will not be required to share the 10 AF limit for the subdivision.

4) Any subdivision of land as defined under 76-4-102 (see definition above) created after October 17, 2014, or for which a subdivision application was submitted to DEQ after that date, is considered a combined appropriation that must receive a pre-determination from DNRC determining that all exempt wells proposed for the subdivision will stay at/under a combined appropriation of 10 AF.

At numerous hearings 71 Ranch's counsel told the County that water law allows an exempt well on any property under 20 acres and an exempt well every 1,320 feet on parcels 20 acres or larger, as described in example 3 above. While this is an accurate restatement of DNRC guidance, that guidance is wrong, and regardless, "Policy memos are not law." *Clark Fork Coal. v. Mont. Dep't of Natural Res. & Conservation*, 2019 Mont. Water LEXIS 5; *In re Grain Land Coop Cases*, 978 F. Supp. 1267, 1277 (D. Minn. 1997) ("Agency statements of guidance are not law."). Review of the Commissioners final hearing on the matter reveals that at least the Commission Chair understood exempt well law to allow 10-acre feet *per phase*, as he was told by 71 Ranch, contrary to testimony of Vicki Sullivan and an attorney for concerned citizens attorney who both testified that this interpretation was incorrect and circumvented the statutory limits on exempt wells.

DNRC justifies limiting its review to lots smaller than 20

acres by taking the text of HB 168 (2015), which grandfathered in exempt wells for any existing and pending "project, development, or subdivision," and blending it with the statutory definition of 'subdivision' for DEQ review, which only applies to parcels smaller than 20 acres. But the law is not a game of jumble where agencies can simply rearrange and hybridize unrelated provisions of the code. For one, the first words of the statute defining subdivision states "As used in this part." The "part" to which it refers is Title 76, Ch. 4, Part 1 *"Sanitation in Subdivisions"*. Exempt well law is in an entirely different part of an entirely different chapter of an entirely different title. There is a place in the Montana code for universal definitions to be used code-wide (Title 1, Ch. 1, Part 2 *General Definisions of Terms Used in Code*) and the Legislature did not place this definition there. The definition cited by DNRC has nothing to do with exempt wells or DNRC. Furthermore, even if it did, HB 168 is plainly not limited only to subdivisions but also applies to "projects" and "developments" and DNRC points to no language that these terms are limited to lots smaller than 20 acres. More importantly, the only limitation in HB 168 on DNRC's jurisdiction over exempt wells is temporal. The statute limits the *Clark Fork* ruling to future proposals, but there is nothing in the bill that could be construed to limit DNRC's review based on lot size. DNRC "engraft[s] an additional requirement on the statute" by excluding review of parcels 20 acres or larger. Yet again, DNRC's contortionist misreading of another agency's statutes robs the department of the power to administer the constitutionally mandated water laws the Legislature has entrusted to it.

Plaintiffs argue that the subdivision's proposed appropriation violates the Montana Constitution's explicit prohibition on

unreasonable depletion of water resources and mandate to assure a clean and healthful environment. They fail, however, to cite to a provision of the Constitution or demonstrate any analysis as to how the unnamed provision was violated by DNRC. Montana Constitution's demands that that the "legislature shall provide the administration, control, and regulation of water rights." Mont. Const., Art. IX § 3(4). The Legislature provided that constitutionally mandated administration through the Water Use Act, which begins "Pursuant to Article IX of the Montana constitution," and which states "A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights." Mont. Code Ann. § 85-2-101. This Court, both in *Clark Fork Coal.* and in this case, vindicated those rights which concerned the conservation or appropriation of billions of gallons of water which are constitutionally defined as the "property of the state for the use of its people," Mont. Const., Art. IX § 3. Nevertheless, Supreme Court precedent is clear that striking down a rule which abrogates the constitutionally mandated Water Use Act does not vindicate constitutional interests. *Clark Fork Coalition v. Tubbs*, 2017 MT 184, 388 Mont. 205, 399 P.3d 295.

DNRC argues, "These 'predetermination' letters are merely an informational step taken by a subdivision application in preparing a subdivision application for review by DEQ and the reviewing local government who still must analyze the subdivision in their review, regardless of how the subdivision will obtain its water right." The Court does not know what a "merely informational step" is, and notes that all manner of legal requirements, from

environmental assessments, to pre-sentence investigations, to campaign finance disclosures, could be equally easily (and inaccurately) be dismissed as "merely informational steps" in criminal sentencing or campaign law enforcement. They are not. They are integral requirements pursuant to administrative regulations which legally require that the 'mere information' "must be submitted to the reviewing authority as part of an application." Admin. R. Mont. 17.36.103(1). An explicit legal requirement to disclose whether the subdivision has a legal right to water which is necessary for development is more than "merely informational." It is a condition precedent.

DNRC makes inconsistent attempts to explain why it evaluated each phase of the project separately because of "limited information" and separate applications:

> In this case, the HCH subdivision preliminary plat application materials provided to DNRC contained four separate subdivision applications, proposing four separate phases and plats for completion of four projects within the subdivision. DNRC evaluated the phases as separate projects because they were separate applications submitted to the County and DEQ pursuant to the County and DEQs' review and by subdivision application rules. *See* ARM 17.36.103 (describing necessary contents for subdivision applications). DNRC issued letters which evaluated the amount of water proposed and determined that each distinct subdivision phase met the applicable rules and laws relating to the filing of an exempt well water right. Section 85-2-306, MCA.
>
> ....
>
> Based on the limited information available to DNRC at the time each predetermination letter was issued, DNRC considered each of the four phases a distinct project.

DNRC first argues that it considered the phases separately "because they were separate applications submitted to the County and DEQ," but

later claims DNRC itself "considered each of the four phases a distinct project." So, who made the call, DNRC, the County, DEQ? DNRC refers to "four separate subdivision applications" and "limited information available to DNRC at the time each predetermination letter was issued" as though DNRC did not know this was one project split into four phases. However, all four determination letters were issued on the same day by the same employee to the same recipient. The language of each letter is identical except for the "Re:" line stating a different phase of the development and including calculations for slightly different lot sizes. The second sentence of each letter states: "The proposed project is to split an existing ±435-acre tract, into individual lots in four phases." The fact that the four phases were part of one project was not "limited information" as evidenced by the letters themselves. DNRC is effectively arguing that it did what it did because it was not aware of facts that are mentioned in DNRC's own letter. Nevertheless, DNRC doubled down at the hearing, citing "confusion between projects and phases." But the application said, "The proposed project is to split an existing ±435-acre tract, into individual lots in four phases." The word "project" is singular. "The" is the definite article which indicates a singular noun. It is clear from the letter that DNRC understood this to be one project, which it is. DNRC cannot issue 4 functionally identical letters to the same developer on the same day which each state that the "proposed project [consists of] four phases," title the letters

> "Horse Creek Hills Subdivision, Phase 1 Broadwater County, HRO 20-4,"
>
> "Horse Creek Hills Subdivision, Phase 2 Broadwater County, HRO 20-4,"

"Horse Creek Hills Subdivision, Phase 3 Broadwater County, HRO 20-4,"

"Horse Creek Hills Subdivision, Phase 4 Broadwater County, HRO 20-4,"

and argue with a straight face that it did not understand that this was one project and only "considered each of the four phases a distinct project" "based on the limited information available to DNRC at the time each predetermination letter was issued." (emphasis added). At the hearing, DNRC further defended its decision by saying that it is just following the information in the letter: "The only piece of evidence from the record considered by DNRC were these four letters from the applicant's engineer saying, 'These are four separate projects in front of DEQ. Here are the parameters.'" That is incorrect. As show above, DNRC treated this as *separate* projects even though the letters themselves said that it was one project in 4 phases. Furthermore, DNRC allowing such a loophole based on nothing more than 71 Ranch's phasing plan manifestly violates DNRC's own rule that it use *its* judgment, *i.e.* not the developers, when determining combined appropriations. Mont. Admin. R. 36.12.101(12) ("'Combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, *in the department's judgment*, could have been accomplished by a single appropriation.") (emphasis added). Just like the County, DNRC insists on doing 71 Ranch's job.

DNRC also argues that it "evaluated the phases as separate projects because they were separate applications submitted to the County and DEQ pursuant to the County and DEQs' review and by subdivision application

rules. *See* ARM 17.36.103." As a preliminary matter, there is nothing in Mont. Admin. R. which requires multi-phase projects to be submitted as separate applications. Indeed, from Montana Supreme Court precedent to administrative law to DNRC's own letters, the blackletter law is clear that multiphase developments are one combined appropriation with no qualifiers. *Clark Fork*, ¶ 24 ("'combined appropriation' refers to the total amount or maximum quantity of water that may be appropriated without a permit," *i.e.* not the total amount per well or per phase of development); Admin. R. Mont. 36.12.101(12) ("Groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the 'combined appropriation.'"); DNRC exempt well review letters ("Groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the 'combined appropriation.' Under this Rule, the Department interprets subdivisions that are pending before the Department of Environmental Quality for approval on October 17, 2014 or filed after that date to be a single project that can be

accomplished by a single appropriation.").

DNRC's own rule wisely does not allow the developer to determine which appropriations are combined but rather requires the department to exercise its own judgment over whether multiple appropriations could be accomplished by a single appropriation. Mont. Admin. R. 36.12.101(12) ("'Combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation.") Once again DNRC cedes its authority even when contrary to its own rules. Indeed, since applications are submitted by the developer, DNRC's interpretation here would allow developers to circumvent exempt well limitations easily and unilaterally by simply slicing any project into phases each small enough to fall under the exempt well ceiling for aggregate acre-feet. It would be procedurally onerous, but nothing in statute prevents a developer from splitting a project into a separate phase for each home. Mont. Code Ann. § 76-3-617.The Montana Supreme Court recognized that DNRC's 1993 rule "allows an appropriator to avoid the permitting process for an infinite number of appropriations from the same source—with each appropriation consuming up to 10 acre-feet per year—so long as the appropriator does not physically connect the groundwater developments." *Clark Fork*, ¶ 11. Likewise, DNRC's current application of the law allows projects with an infinite number of exempt wells so long as they are developed in small enough sequential phases, a decision DNRC's interpretation places entirely in the hands of the developer. Yet again, the dogged efforts of concerned citizen Ms. Sullivan precisely raised this problem before the Planning Board on April 5, 2022. It should give DNRC pause

that citizens with seemingly no legal training appear to have a better grasp of the exempt wells limits than DNRC, the agency charged with administering the Water Use Act. As in *Clark Fork.*, DNRC has once again unnecessarily hobbled its enforcement of the Water Use Act, this time by tortuously misreading its own rules and ignoring Supreme Court precedent.

DNRC says "[t]here is no dispute that DNRCs' regulatory definition of combined appropriation is consistent with § 85-2-306." This is only true because this Court (Judge Sherlock) reinstated the 1987 rule in litigation that DNRC lost. The correctness of that definition is irrelevant when DNRC goes out of its way to ignore the plain language it promulgated and continues to apply the prior definition which allowed uncontrolled development of limited water resources, and which was struck down by the Supreme Court.

Because exempt well law seems a particular challenge for DNRC, the Court endeavors to make the following declaratory ruling absolutely clear:

> **There is no basis in law for DNRC to treat the four phases of 71 Ranch's subdivision project separately, a conclusion which is absolutely clear from statute, administrative rule, Montana Supreme Court precedent, and even DNRC's letters in this matter. Any and all phases of this project are one single combined appropriation.**

At one of the final hearings, 71 Ranch's counsel for acknowledged the contentious nature of exempt wells but stated that disagreement with DNRC's guidance is a "policy issue" that should be brought up in "appropriate forums" such as "the Legislature and administrative hearings." At the hearing, 71 Ranch's counsel reiterated that this dispute is not the

appropriate place for opponents of this project to contest DNRC's (incorrect) interpretation of exempt well law. This evinces a fundamental misunderstanding of agency guidance, administrative law, and the Montana Constitution. A statute must be promulgated according to the process defined by Montana's Constitution. Administrative rules must be promulgated according to the processes defined by MAPA. Both processes have integrated mechanisms to assure citizens' constitutional rights to know and participate in our democratic system, through elections and public comment respectively. Agency legal guidance has no such process. It is simply written by agency employees with absolutely no mechanism for public participation or even notice that it is being drafted. This is why "Policy memos are not law." *Clark Fork Coal. v. Mont. Dep't of Natural Res. & Conservation*, 2019 Mont. Water LEXIS 5, *17. 71 Ranch implies that the County hearings were the wrong place for the public to express its unhappiness with DNRC's blatantly unlawful application of exempt well law even though the legal interpretation 71 Ranch relies on was neither enacted by the Legislature nor promulgated pursuant to MAPA. It is 71 Ranch and similarly situated developers who need to go through the Legislative or rulemaking process if they want to vitiate the statutory and administrative rule limits on exempt wells.

Finally, the Court notes that DNRC's guidance also appears to state that it awards water rights beyond those which have been put to beneficial use:

> All subdivisions using exempt wells will be required to allocate the full 10 AF of volume across the subdivision for planning purposes (though lot owners will not be required to perfect the full volume allocated as part of the review). If there is unallocated water, DNRC

> will split the unallocated portion evenly amongst the lots. DNRC will outline volumes requested by the applicant for each purpose in the pre-determination letter.

This would appear contrary to the requirement that the water actually be put to beneficial use, an element which is "of paramount importance" in prior appropriation water law since the State's earliest decisions. *Allen v. Petrick*, 69 Mont. 373, 376-77, 222 P. 451, 452 (1924) ("The quantity of water ... actually and economically applied to a beneficial use. If comparison between the principles regulating the appropriation and use of water is permissible it may be said that the principle of beneficial use is the one of paramount importance."); *Power v. Switzer*, 21 Mont. 523, 529, 55 P. 32, 35 (1898) ("right to the use of running water flowing in the creeks must be for some useful or beneficial purpose...."); *Toohey*, 24 Mont. at 17-18, 60 P. at 397 (1900) ("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, ... a right to the use of water is a possessory one, that may be obtained by actual appropriation and diversion, perfected by application of the water so appropriated to a beneficial use then present or contemplated, and made before appropriation and use by another."); *Smith v. Duff*, 39 Mont. 382, 385, 102 P. 984, 984 (1909) ("To constitute a valid appropriation of water, three elements must always exist: .... third, an application of it within a reasonable time, to some beneficial industry.")

Accordingly, Plaintiffs are entitled to summary judgment as a matter of law relative to Count III except as to their half-hearted constitutional claim.

CONCLUSION

There is no merit to the County's motion to strike. The environmental assessment includes only the barest information about water resources; omits necessary information about waters' health and interaction; fails to consider the impact of exempt wells; and arbitrarily limits its analysis to only the property itself and not neighboring landowners and waters. The County failed to review numerous specific, documentable, and clearly defined impacts to "agriculture..., the natural environment, wildlife, wildlife habitat, and public health and safety" raised by citizens, employees, and even Commissioners. Although ultimate entitlement to an exempt well is determined by DNRC, the County's failure to analyze the factual existence *and* legal appropriability of water for a proposed subdivision abrogates its statutory duty to "adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for... the provision of adequate... water... [and] the avoidance of subdivisions that would... lack of water." The County's decision, based on the record as a whole is arbitrary, capricious, and unlawful. DNRC's determination that each of the four project phases was entitled to a separate combined appropriation exempt well was in error, ignores extensive recent legal authority, and renders meaningless the statutory limits on the exempt wells.

While the Constitution mandates "control... of water rights," which the Legislature charges DNRC to "enforce and administer" through the Water Use Act, under DNRC's interpretation nothing controls the development of exempt wells except the development phases arbitrarily chosen by developers. An infinite number of wells may be drilled regardless of water resource impact or the senior water rights holders who are entitled to

protection. "[U]ncontrolled development of a valuable natural resource contradicts the spirit and purpose underlying the Water Use Act." *Mont. Power Co. v. Carey*, 211 Mont. 91, 96, 685 P.2d 336, 339 (1984). It seems DNRC's appetite to abrogate the Water Use Act is limitless, even in the face of contrary authority ranging from the Montana Supreme Court to DNRC's own rules. Indeed, DNRC's own documents evince an understanding of the *Clark Fork* holding, even if the department flagrantly ignores it in practice. DNRC gives the distinct impression of a misbehaving child who knows how to say the right words to end the chastisement and yet immediate returns to the proscribed behavior once out of view. This Court is fearful that in another ten years a district court will be reviewing the propriety of DNRC approving multiple applications for 'completely distinct' projects below the combined appropriation limit which are 'coincidentally' sited next to each other and being built by the same developer through shell subsidiaries.

The economic impetus to develop land is overwhelming and relentless. If there is going to be any check on uncontrolled development of Montana's limited water resources it will have to come from DNRC which is statutorily charged with fulfilling Montanans' constitutional right to "control, and regulation of water rights," Mont. Const., Art. IX § 3, a duty DNRC has manifestly avoided or undermined for over a decade to the detriment of our waters, environment, and senior water rights holders whose protection is the "core purpose" of the Water Rights Act. *Clark Fork*, ¶ 24. It is DNRC's duty to enforce the Water Use Act, not undermine it. Mont. Code Ann. § 85-2-112 (2021). And yet in replacing the 1987 rule, without notice to the public, DNRC vitiated broad swaths of the Water Use Act it is charged with

administering and in doing so allowed the (ongoing) appropriation of millions if not billions of gallons of water that under our laws should have been left in aquifers for the benefit of senior water rights holders. This should have stopped once *Clark Fork* was handed down, but it appears that DNRC has simply ignored that opinion though faulty agency guidance that has no force of law. Imploring the developers to reconsider the project, one concerned citizen reminded the audience that "to whom much is given, much is expected." The same could be said of DNRC.

DNRC itself has "acknowledged the concerns of senior users that the cumulative effects of these exempt appropriations are having a significant impact in terms of reducing groundwater levels and surface water flows and that the cumulative impact of the appropriations may be harming senior water users' existing rights." *Clark Fork Coal.*, ¶ 13. In 2016, DNRC estimated the existence of 113,000 exempt appropriations, with an additional 3,000 added each year, and as many as 78,000 more by 2020. *Id.* Thus, if DNRC is to be believed, Montana had at least 128,000 and perhaps as many as 191,000 exempt wells by 2020, before the influx of new residents during the early COVID years. With DNRC going out of its way for decades to conclude that such wells are virtually never combined appropriations, each well is entitled to appropriate 10-acre feet per year, totaling 1.2-to-1.9-million-acre feet, or 417-622 *billion* gallons of water each and every year. Each additional year adding 3,000 exempt wells entitles their owners to an additional 9 billion gallons of water each year. At this rate, in less than 50 years exempt wells will be entitled to draw a *trillion* gallons of water each and every year. While each exempt well might appropriate "only a *de minimis* quantity of water," *Clark Fork*, ¶ 24, they are

starting to add up.

ORDER

For the above reasons, it is hereby **ORDERED, ADJUDGED** and **DECREED** that:

1. The County's Motion to Strike is **DENIED;**
2. The County's Summary Judgment Motion is **DENIED**; and
3. Plaintiffs' Summary Judgment Motion is **GRANTED**, in part; and
4. Based on the record as a whole, Broadwater County's decision to approve 71 Ranch's Preliminary Plat Application was arbitrary, capricious and/or or unlawful. Mont. Code Ann. § 76-3-625(2)(c) (2021).

ORDERED this 14th day of February 2024.

Michael McMahon
MICHAEL F. McMAHON
District Court Judge

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