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MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY

UPPER MISSOURI WATERKEEPER, TANYA & TOBY DUDNAS, SALLY & BRADLEY DUNDAS, CAROLE & CHARLES PLYMALE, and CODY McDANIEL, Plaintiffs, vs. BROADWATER COUNTY and the MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, Defendants, and 71 Ranch, LP, Intervenor.	Cause No: DV-2002-38 **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE**

I. INTRODUCTION

Plaintiffs have filed a Motion in Limine to exclude the testimony or involvement, post-decision, of Intervenor 71 Ranch, LP's expert, Mark Fasting. In their response to Plaintiffs' Motion in Limine, Intervenor 71 Ranch, LP, focuses more on the nature of Mr. Fasting's testimony – whether he's a retained expert or a hybrid expert – than on the *timing* of his involvement here. As will be demonstrated with this brief, the use of Mr. Fasting's testimony or report here, after the County's approval of the subdivision at issue, is precluded by well-established case law.

II. ARGUMENT

As the United States Supreme Court has stated, "The focal point for judicial review is the administrative record already in existence, 'not some new record made initially in the reviewing court.'" *Asarco, Inc. v. U.S.* EPA, 616 F.2d 1153, 1159 (9th Cir. 1980) (quoting *Camp v.* Pitts, 411 U.S. 138, 142 (1973). That foundational principle has been adopted by the Montana Supreme Court. *See Heffernan v. Missoula,* 2011 MT 91, 360 Mont. 207, 255 P.3d 80, ¶ 66: "Review of the governing body's action is generally limited to the record before the governing body at the time of its decision." *See also Skyline Sportsmen's Ass'n. v. Bd. of Land Commr's.,* 286 Mont. 108, 951 P.2d 29 (1997).

71 Ranch, LP, argues first that because Mr. Fasting is a hybrid, as opposed to a retained expert, the case of *Norris v. Fritz,* 2012 MT 27, 364 Mont. 63, 270 P.3d 79, controls. *Norris*, however, is easily distinguishable. It was a medical malpractice action which went to a jury. Such civil trial litigation operates under completely different set of rules than administrative record review cases such as this. The same applies to the other case cited by 71 Ranch, LP,

Wenger v. State Farm, 2021 MT 37, 403 Mont. 210, 483 P.3d 480, which was also a case that went before a jury. In contrast:

> In an appeal brought under §76-3-625(2), MCA, the standard of review to be applied by the district court and this Court is whether **the record** establishes that the governing body acted arbitrarily, capriciously, or unlawfully. *Kiely Constr. LLC v. City of Red Lodge*, 2002 MT 241, ¶69, 312 Mont. 52, 57 P.3d 836; *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶31, 356 Mont. 41, 230 P.3d 808.

Heffernan, ¶ 65, emphasis added.

Unlike in a jury trial, in such record review cases, extra-record evidence is strictly limited to three circumstances: for background information; for ascertaining whether the agency considered all relevant factors; or for ascertaining whether the agency fully explicated its course of conduct or grounds for decision. *Id.,* ¶ 66. That the "background information" exception is limited to the agency whose decision is being challenged, not by a third party such as the applicant, is made clear by the leading case of *ASARCO v. U.S. EPA,* 616 F.2d 1153 (9th Cir. 1980):

> The Court contemplated that any additional material should be explanatory in nature, **such as requiring the involved administrative officials to demonstrate the basis for their action**. A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency's decision, but on **whether the process employed by the agency** to reach its decision took into consideration all the relevant factors.

616 F.2d at 1159, emphasis added.

Counsel is unaware of a situation where *the applicant* is allowed to weigh in after a decision with testimony to support the agency's decision or the quality of the application.

Factually, 71 Ranch, LP, makes contradictory claims. They argue that the report "does not provide any expert opinion about the validity of the approval process itself." Response Brief, p. 6. But they acknowledge that "the Report expresses the opinion that the requirements related to the subdivision application were followed", while claiming that such a conclusion is not an

opinion on the legality of the application. Response Brief, p. 5. Elsewhere they argue that while "the Report concludes with an opinion that AEIS has complied with the County and/or DNRC requirements", that is not a "legal conclusion" on the legality of the subdivision. Response Brief, p. 8. Plaintiffs would beg to differ – whether the subdivision application requirements (i.e., legal requirements) were met is clearly a legal opinion, one not allowed in the case of *Citizens for a Better Flathead v. Board of Commissioners of Flathead County,* 2016 MT 256, ¶ 18, 385 Mont. 156, 381 P.3d 555.

71 Ranch, LP, further undercuts its argument by asserting that the Report "states an opinion that any such requirements (imposed by the County or DNRC) were, and have been adhered to", and then stating "(t)his conclusion is obvious because the record speaks for itself." Response Brief, p. 6. In other words, there is no need for Mr. Fasting's additional *post hoc* testimony because his involvement throughout the process, on behalf of the applicant, is already documented as part of the record. And that is the record that this Court's review is confined to *per Heffernan*, not Mr. Fasting's after the fact summary of or description of, that record.

Montana case law further confirms that the *timing* of extra-record evidence is just as critical as the content and source of it. For instance, in *Kiely Construction v. City of Red Lodge,* 2002 MT 241, 312 Mont. 52, 57 P.3d 836, ¶ 97, the Court disallowed "after the fact opinions of individual council members" because they were '"**post-decision'** statements, which were not properly part of the record." Emphasis added. The Court reached a similar result in *MM&I, LLC v. Bd. of County Commissioners,* 2010 MT 274, 358 Mont. 420, 246 P.3d 1029, ¶ 27. The logic for allowing only very narrow exceptions to the rule that the record "closes" when the decision is made was underscored by the 9th Circuit in *Lands Council v. Powell,* 395 F/3d 1019, 1030 (9th Cir. 2005:

> The scope of these exceptions permitted by our precedent is constrained, so that the exception does not undermine the general rule. Were the [courts] routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the [courts] would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making.

Here, again, 71 Ranch, LP, undermines its own argument, in response to *Kiely* and *MM&I, LLC,* by first arguing that the Report "asserts AEIS has followed the requirements presented to Horse Creek Hills Subdivision by the applicable government agencies", but then saying that this information is "supported by the record". Response, p. 10. Again, if it's in the record already, then there's no need for the Court to consider anything further from the expert. Mr. Fasting's report as such was not in front of the Commissioners when they made their decision, and therefore it should not be considered by the Court here.

III. CONCLUSION

Mr. Fasting concluded his Report by stating: "It is our professional opinion that we satisfied all the requirements of the county subdivision regulations to the point of Preliminary Plat Approval, including DNRC." That is an opinion on the ultimate legal issue here, pure and simple, and as such, his report should be disallowed. Based on the authority cited above, Plaintiffs respectfully request that Mr. Fasting's expert disclosure be stricken and not considered by the Court at summary judgment, or at trial.

Dated this 19th day of July 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July 2023, a true copy of the foregoing document was served on the following persons by the following means:

X U.S. Mail
X Electronic delivery (without waiving mail service)

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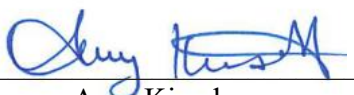
By: 
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