Guy Alsentzer
UPPER MISSOURI WATERKEEPER
24 S. Willson Ave, Ste. 6-7
Bozeman, MT 59715
Tel: (406) 570-2202
Guy@UpperMissouriWaterkeeper.org

David K. W. Wilson. Jr.
Robert Farris-Olsen
MORRISON SHERWOOD WILSON DEOLA, PLLP
401 North Last Chance Gulch
PO Box 557
Helena, MT 59624
Tel: (406) 442-3261
kwilson@mswdlaw.com
rfolsen@mswdlaw.com

Graham J. Coppes
FERGUSON AND COPPES, PLLC
PO Box 8359
Missoula, MT 59807
Tel: (406) 532-2664
grahamc@fergusonlawmt.com
Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT, 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, LLP Intervenor.	)))))))))))))))))))	Case No. BDV 2022-38 **REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNT III**

INTRODUCTION

Water is the lifeblood of Montana. Few, if any, issues are more important to Montanans than those concerning water. Here, the Horse Creek Hills Subdivision is asking the State of Montana for permission to use five times the amount of water allowed under the legal exemption from permitting. The Plaintiffs are made up of a diverse group of landowners and senior water users, each with substantial interest in preserving Montana's water resources and protecting their own senior property rights.

This case involves the saga of "exempt well" exploitation in Montana. More specifically, it involves the continued failure of the Department of Natural Resources and Conservation (DNRC) to manage this statutory creation in a manner reasonably consistent with its intent and purpose, while at the same time fulfilling the agency's constitutional function as the protector of Montana's water resources for present and future generations. Notably, this is not the first time DNRC has had to defend its interpretations of this issue in court. And this is not the first time that its interpretation is wrong.

What is clear from its Brief in Response is that DNRC will say anything to convince this Court that it is not *again* flouting precedent, statute, and rule. The agency contorts itself with circular logic and linguistic acrobatics to try and rationalize how it authorized a single subdivision to use five times (5x) the amount of water authorized in the Water Use Act. To that end, it somehow pretends that a single subdivision, being submitted as a single application for preliminary plat approval constitutes five (5) separate "projects", each entitled to fly under the radar of senior water users and the public interest through the newest iteration of DNRC's exempt well loophole. It uses logical fallacies to lead this Court down its path of errors. It points fingers at DEQ and the County to deflect from its own very real failures.

However, at the most basic level, DNRC's entire position can be distilled down into a single conviction which the agency asks this Court to adopt: there is no difference between authorizing groundwater water use under the exemption or with a permit. Its Brief makes this argument in no less than four different ways. However, nothing could be further from the truth.

The reality is that the exemption created by § 85-2-306, MCA is the antithesis of the permitting requirements enumerated § 85-2-311, and § 85-2-360, MCA and ARM 36.12.1703-1705. The exempt certificate process entails nothing more than the submission of a piece of paper and a check. A permit in a closed basin, on the other hand, requires aquifer testing, hydrologic reports, net depletion analysis, and proof of mitigation. It requires analysis of legal availability and adverse effects to individual senior water rights within the identified cone of depression that will result as a causal effect of long-term pumping.

Yet, DNRC fails to mention these drastic legal and scientific distinctions to the Court. For unknown reasons – although likely political – DNRC has not changed its tune from the last time the Montana Supreme Court reprimanded it for its erroneous judgment on this issue. Now, it is back with a new and different idea – an idea that is equally erroneous as a matter of law.

BACKGROUND

The Legislature passed the Water Use Act in 1973, which included a process to issue permits for any new water rights. Exempted from this new permitting scheme were "groundwater for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred (100) gallons a minute." Ch. 452, L. 1973. The appropriator needed only to file a notice of completion, which would subsequently issue a certificate of water right. This certificate included a priority date of the water right.

The 1987 Montana Legislature amended the Water Use Act to clarify that "a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit." Ch. 535, L. 1987. However, the Legislature did not define "combined appropriation." The Department did so three months later with a Rule that stated, "groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.'" This ostensibly meant individual wells as part of a single project or development would be considered a combined appropriation, sharing 10 acre-feet a year of water if a developer sought to avoid the permitting process.

Yet, a mere six years later, the Department dramatically changed the definition of a "combined appropriation" to mean "groundwater developments, that are physically manifold into the same system." This meant only individual wells piped together in some sort of distribution system would be considered a combined appropriation. Thus, each well could enjoy 10 acre-feet a year of water.

While the reasons for the definition change are unclear, the results are stark:

- Well drillers dig thousands of wells using the permit exemption each year.
- The state water rights database includes more than 123,000 water rights certificates for exempt wells.
- Development in and near some Montana cities and towns continues to use the permit exemption.
- Use of the permit exemption may have negative long-term effects on water availability in certain areas of Montana.

<u>Exemption at 45: A Study of Ground Water Wells Exempt from Permitting</u>, Final report to the 66th Montana legislature, Water Policy Interim Committee, available at https://leg.mt.gov/content/Committees/Interim/2017-2018/Water-Policy/Meetings/ExemptWellReport-FINAL.pdf

Finally, in 2016, this issue made its way to the courts. The First Judicial District held that "Clearly, when the legislature inserted the term "combined appropriation" into the exempt well statute, the legislature was under the impression that the reference to "combined" did not require two wells to be physically connected." *Clark Fork Coalition v. DNRC*, Cause No. BDV-2010-874 (First Jud. Dist. Court, 2014). "This Court rules that the current definition of "combined appropriation" violates not only the spirit and legislative intent behind the Water Use Act, but that it also violates the legislative intent in the enactment of the exempt well statute." *Id.*

The District Court went on to expound upon the nature of the problem and how DNRC's interpretation was allowing the issue to occur and propagate:

> In obtaining a permit, an applicant or DNRC is required to provide notice of the application for permit, Montana Code Annotated § 85-2-307, and allow senior appropriators the opportunity to comment and take action to protect their established water rights. In addition, the general scheme requires that an applicant for a groundwater well permit in a closed basin must show that his

proposed well would not adversely affect existing surface users. Mont. Code Ann. § 85-2-360.

Under the general system, a permit cannot be issued until the applicant proves by a preponderance of the evidence that the water rights of existing senior appropriators will not be adversely affected. Mont. Code. Ann. § 85-2-311. However, under the exempt well regulation currently in effect, all of these salutatory purposes of the Water Use Act are avoided. For example, an exempt well could even be drilled in a closed basin without any need for a permit. With the current regulation, the burden is placed on a senior water appropriator to protect his rights from encroachment by exempt wells. This becomes especially difficult when there is no metering, reporting, or a verification of the use of all of the exempt wells that might be installed.

Under DNRC's current regulation, if one qualifies for an exempt well, all that individual needs to do is drill the well, create a well log report, and put the well to use within 60 days. Notice of completion is then sent to DNRC, and once that is done, DNRC automatically issues a certificate of right to the user. There is no requirement under the current administrative regulation that requires any determination of how the exempt well might affect existing water rights, even in a closed basin.

In the view of this Court, any exemption provided by DNRC, such as in its current definition of "combined appropriation," should be read narrowly so as not to defeat the overall purpose of the Water Use Act. The potential of the current definition of "combined appropriation" is not theoretical. As noted by DNRC's Water Management Bureau in February 2008:

This concern is elevated as exempt wells are being used for large, relatively dense subdivision developments 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 caused 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 basins during the next 20 years resulting in an

> additional 20,000 acre-feet per year of water consumed. (Admin. Rec. 1-14, at 1.)

Id. When the issue reached the Montana Supreme Court, it affirmed.

> As the District Court correctly observed, the 1993 rule allows an unlimited quantity of water to be appropriated from **780 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.

Clark Fork Coalition v. Tubbs, 2016 MT 229, ¶ 27, 384 Mont. 503, 380 P.3d 771 ("*CFC*").

ARGUMENT

(1) DNRC's Interpretation of the 1987 Rule, as applied to the Horse Creek Hills Subdivision Project, is erroneous as a matter of law.

While the previous iteration of this issue involved DNRC's erroneous promulgation of a rule to avoid the intent of the Water Use Act, this time the agency does so without issuing a rule. Said another way, there is no rule that allows DNRC to separate a single subdivision application into four or five distinct projects or phases to avoid the "combined appropriation" definition which was forcefully instated by Montana's courts. In reality, the reinstated 1987 Rule, now codified, says the opposite:

> 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."

ARM 36.12.101(12). (emphasis added). The Montana Supreme Court has held that an "administrative agency must comply with its own administrative rules." Mont. *Solid Waste Contrs. v. Mont. Dep't. of Pub. Serv. Reg.*, 2007 MT 154, ¶ 18, 338 Mont. 1, 161 P.3d 837. Similarly, Montana courts should apply the same principles in construing Administrative Rules as they do for interpretation of Statutes. *Bean v. State Bd. of Labor Appeals*, 270 Mont. 253, 257, 891 P.2d 516, 518–19 (1995). The proper interpretation is first to be determined according to the language therein. *Bean*, 270 Mont. at 257, 891 P.2d at 519. In other words, a court should interpret administrative regulations first according to their plain language. *Tuttle v. Department of Justice of State of Mont.*, 167 P.3d 864, 867, 338 Mont. 437, 441, 2007 MT 203, ¶ 17 (Mont. 2007).

However, even if this language could be considered ambiguous, a court should not defer to that interpretation if it is "plainly inconsistent" with the spirit of the rule. *Easy v. State of Mont. Dept. of Natural Resources and Conservation*, 752 P.2d 746, 748, 231 Mont. 306, 309 (Mont.,1988). The spirit of these rules is their unequivocal mandate: all exempt wells proposed for use by a single subdivision (or other project) must stay at or under a combined appropriation of 10 acre-feet.

Nevertheless, DNRC persists. To avoid this Court reviewing its flawed interpretation, it argues that "[t]he definition of 'combined appropriation' in DNRC rule is not at issue in this case, only the application of the exception." DNRC Br. at 3. The Pleadings in this case disagree. More specifically, Plaintiffs allege in their complaint that DNRC continues to unlawfully apply ARM 36.12.101(12) in the case at-hand. Comp. ¶¶ 36-42. Furthermore, Plaintiffs sought a declaration from this Court that DNRC's interpretation of this rule, as applied to the Horse Creek Hills Subdivision, was unlawful. *Id.* at ¶ 120.

To get out from under its legal errors involving application of the combined appropriation rule, DNRC argues that it really has no part in the subdivision process and any errors were not its fault. To that end, it argues the following:

- "DNRC is not authorized to review or approve proposed subdivisions." DNRC Br. at 4.
- "The Water Use Act was not implemented for the purpose of implementing, reviewing, and approving subdivisions." *Id.* at 7.
- "DNRC's predetermination letters do not authorize or create water rights and do not approve any aspect of the HCH subdivision." *Id.*
- The controversy giving rise to the proceeding is the County's approval of the HCH subdivision. *Id.*
- Any threatened result is due to the subdivision's approval and is not because of DNRC's exempt well predetermination. *Id.*

The problem with this entire line of reasoning is that it creates a practical and legal void, where no agency, employee, or applicant is reviewing the relevant information concerning water use and how that use may impact existing senior water rights.

By comparing the County's response brief with DNRC, it becomes clear that neither accepts responsibility for a water analysis. While the County says it is DNRC's job to analyze the legal availability of water, DNRC says "[t]he pre-determination letters do not evaluate the water needs for a project—this determination is made by DEQ and the reviewing local government. They do not evaluate the impacts of a project on the water resources—this determination is made by DEQ and the reviewing local government." DNRC Br. at 4.

This is a significant problem both for Plaintiffs and the people of Montana. When a developer submits an application to three different state agencies and not one of them analyzes the legal and physical availability of the proposed water use before a subdivision is given authorization to proceed, "[t]he errors of law and process undermine confidence in the agency's determinations." *Flathead Lakers Inc. v. Montana Dep't of Nat. Res. & Conservation,* 2023 MT 85, ¶ 56, 412 Mont. 225 530 P.3d 769.

The primary function of Montana's permit-based water allocation system is the protection of senior water rights from encroachment by prospective junior appropriators adversely affecting those rights. *CFC*, ¶¶ 5-6; § 85–2–101(4), MCA. In order to effectuate this purpose, the Water Use Act (through 85-2-311) imposes both substantive and

procedural protections for water users. The statute plainly states that the Department shall issue a permit only if an applicant proves that the water rights of a prior appropriator will not be adversely affected. 85-2-311(1)(b), MCA.

This provision is born out of the fundamental precept of the prior appropriation doctrine: timing. She who first acquires a right to water is entitled to her full appropriation, limited by needs and facilities, before subsequent right holders may maximize their rights. *Kelly v. Teton Prairie LLC*, 384 Mont. 174, 376 P.3d 143 (2016). This maxim is the most well-known and most well-established of all principles in Montana water law. The law is established so that a new user cannot divert large volumes of water while forcing multi-generational Montana farmers and ranchers to absorb the resulting impact and the future burden to affirmatively prove their injuries when they inevitably materialize.

Nevertheless, the Department abandoned its obligations to protect prior appropriators when it "evaluated the phases as separate projects", each of which is allegedly entitled to a new full exempt 10 ac/ft/yr. In order to make this square peg of facts fit into the round hole of Montana law, DNRC incorrectly asserts that Horse Creek Hills is not one subdivision, submitted in one application, but in fact four. DNRC Br. at 2 and 5.[1] Yet, the administrative record speaks for itself. See AR 3878 (original Preliminary Plat Application) and AR 4202 (Supplemental Preliminary Platt Application and EA). It is undisputed that the Applicant proposed a single preliminary plat application that contained 4 phases of development. AR 4090-91. (DNRC referencing the project as an individual project "to split an existing ±435 acre tract, into individual lots in four phases.") Thus, the County received a traditional (single) Preliminary Plat Application. There is no record support for DNRC's new position that the applicant submitted four subdivision applications.

[1] ("Each of the four subdivision applications contained a letter from DNRC dated February 2, 2020, evaluating the amount of water proposed in the application and determining that respective phase of the subdivision fit the current rules and laws pertaining to the filing of an exempt water right under § 85-2-306, MCA.") DRNC Br. at 2. ("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 DEQ's review and by subdivision application rules.") DNRC Br. at 5.

What the record does support, however, is that the applicant submitted each phase of the proposed phased plan of development to DNRC and requested the agency letters in question. Thus, DNRC received four nearly identical requests for confirmation of how to proceed in regard to water use for the subdivision. Again, it is unclear what DNRC thought each of these "phases" related to, if not a single project. However, it does not really matter what the agency thought, because it is DNRC's interpretation and application of its 1987 Rule to the HCH Subdivision that is erroneous as a matter of law.

If the statute and rule were not enough, DNRC's own published "guidance" from March 23, 2022, on this issue contradicts its exact position in this case. There, DNRC proclaims that:

> **any subdivision of land** as defined under 76–4–102 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 that all exempt Wells proposed for the subdivision will stay at or under a combined appropriation of 10 acre feet**.

See Exhibit A.

This is a reasonable interpretation of the 1987 Rule. In contrast, given the procedural history, precedent, and plain language of its own administrative rule, DNRC's position in the case at hand that "[it] considered each of the four phases a distinct project" is not reasonable. The plain language of ARM 36. 12. 101(12) does not provide the Department with discretion to treat a single subdivision's respective phases as each entitled to an exempt groundwater appropriation. Pursuant to *Whitehall Wind, LLC v. Montana Public Service Com'n*, the Department must comply with its own regulations. 2010 MT 2, ¶ 24, 355 Mont. 15, 223 P.3d 907; its failure to faithfully apply its own rules was legal error, arbitrary and capricious.

(2) Utilizing the Exemption allowed the HCH Subdivision to Avoid Significant Water Resources Analysis Required for Permitting Water Rights in a Closed Basin.

Perhaps most egregious is DNRC's argument to this Court that "if DNRC determined the applicant needed to obtain a permit, or if it met an exemption to permitting requirements as it did here, the result is the same...." *DNRC Br.* at 2. Going further, the

agency argues again that "[w]hether DNRC concludes that a subdivision applicant must obtain a permit or whether it meets a permit exemption, the result is ultimately the same…" *Id.* at 6. This position is telling of the agency's indifference to its obligation to enforce the permitting exception, and its systemic belief that using the exempt well development loophole to circumvent water rights permitting is a legitimate water management practice. Regardless of what DNRC's counsel says, the Water Use Act paints a very different picture.

In Montana, permits for groundwater are intentionally difficult to obtain. See generally § 85-2-311, MCA. They are even more difficult to obtain in basins where the legislature or the agency has determined the basin to be "over-allocated", "closing" it to new appropriations. See generally, § 85-2-360, MCA. However, in either instance, the statutory criteria and the evidence necessary to prove them build on one another from the bottom up. The foundation of any groundwater permit application is the aquifer test. This test is a scientific process (conducted by trained hydrologists) that forms the evidentiary basis by which an applicant seeks to prove the three primary statutory components of a groundwater permit: (1) physical availability; (2) legal availability and (3) adverse effect. These criteria are required both by Statute (85-2-311(1)(a)-(b), MCA) and regulations (ARM 36.12.1703-1706). An Applicant's aquifer test is then used to determine if all of these criteria can be met. However, when the exemption is used – as is the case here – none of this occurs. There is no scientific evidence produced and the agency conducts no analysis of the impacts of the new appropriation. See generally DNRC Br. More specifically, by reviewing what *does* occur in a permitting process, it becomes clear what does not when an "exempt well" is used.

Legal availability – which is the heart of any permitting analysis – is determined by assessing the physical supply of water that is not already legally allocated to senior water rights holders. For both surface water and groundwater permit applications to be granted, there must be a preponderance of evidence showing that water is legally available in the source which will supply water to the permit. For groundwater applications, this includes the

additional requirement that water be legally available in any surface water source that could be depleted by the groundwater well.[2]

Similar to the statutory provisions for physical availability, the Department has promulgated rules to implement the legislature's command. ARM 36.12.1704 and 1705 both carry out 85-2-311's mandate that applicants prove water is legally available throughout the area of potential impact. More specifically, ARM 36.12.1704 (2) states that

> "the department will identify the existing legal demands on the source of supply and those waters to which it is tributary and which the department determines may be affected by the proposed appropriation. **(a) For groundwater appropriations, this <u>shall</u> include identification of existing legal demands for <u>any</u> surface water source that <u>could</u> be depleted** as a result of the groundwater appropriation."

ARM 36.12.1705 states that

> To determine if water is legally available, the department will compare the physical water supply at the proposed point of diversion and the legal demands within the area of potential impact.
>
> (2) For groundwater appropriations, in addition to (1) the department will compare the physical water supply for **<u>any surface water source in which water flow could be reduced by any amount</u>** as a result of the groundwater appropriation and the legal demands within the area of potential impact.

(Emphasis added.)

The plain language of these regulations directs the Department to analyze groundwater applications differently than applications for surface water. The regulations demand that the Department identify and compare water rights on any and all surface water

[2] Per statute, legal availability is determined using an analysis involving the following factors: (A) identification of physical water availability; (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water. 85-2-311, MCA(a)(2)(A)-(C), *Bostwick Properties, Inc. v. Montana Dep't of Nat. Res. & Conservation*, 2009 MT 181, ¶ 5, 351 Mont. 26, 29, 208 P.3d 868, 870.

sources that could be impacted by an applicant's pumping. Even in the smallest magnitude, no *de minimums* exception is provided.

Thus, the explicit intent of these regulations is to determine if the water that will be drawn to a new groundwater well ("in any amount") is already appropriated. Applied to this case, the crux of the traditional groundwater permitting inquiry would be to determine whether Horse Creek Hills' proposed pumping of gallons 16.25 million gallons-per-year[3], will pull water that is already in use by Plaintiffs' senior appropriations, or someone else. The plain language of the Department's regulations makes clear that this analysis must include both surface water sources and groundwater sources. These regulations put into practice Montana law's recognition that surface water and ground water are connected and susceptible to "pre-stream capture."

The legal separation of groundwater and surface water in Montana ended with the Court's decision in *Montana Trout Unlimited v. DNRC* 2006 MT 72, 331 Mont. 483, 133 P.3d 224. In that case, the Court held that the Department violated Basin Closure Law by failing to consider pre-stream capture of tributary groundwater when it issued regulations concerning groundwater permits in over-appropriated basins. *Id.* In so holding, the Court found the following explanation compelling:

> [G]roundwater pumping produces two separate components that contribute to total streamflow depletion:
>
> The first component, [pre-stream] groundwater capture, is interception of groundwater flow tributary to the stream, that ultimately reduces the hydraulic gradient near the stream and baseflow to the stream. Streamflow depletion from groundwater capture usually continues after pumping ends and may require long periods of time to recover. The second component, induced streambed infiltration, usually has less impact on streamflow depletion, and its effects dissipate soon after pumping ends.
>
> As evidenced by DNRC's own hydrogeologist, not only does the pre-stream capture of tributary groundwater have an impact on surface flows, it has a more significant and longer lasting impact than does induced infiltration.

[3] 10 acre-feet equals approximately 3.25 million gallons.

Id., at ¶ 41. In essence, pre-stream capture occurs when a well diverts underground water that would have otherwise been destined to become part of a surface stream's flow.

Although *Trout Unlimited* involved the Department's interpretation of the Basin Closure Law "as demonstrated by *Boone Trust* and *Blackburn and Theodor*, the principles regarding connectivity and legal availability are the same in both closed and open basins." *In The Matter of Beneficial Use Application No. 30001476*, COL 30. Thus, where a proposed groundwater appropriation will deplete surface water, an applicant must analyze legal availability and adverse effect for both ground water and surface water even if the hydrologic connection is attenuated and the depletion small. *Bostwick v. DNRC* (*Bostwick II*) 2013 MT 48, ¶¶ 32-41, 369 Mont. 150, 296 P.3d 1154.

This line of cases and the well-established principle of pre-stream capture highlight the deficiencies in the Department's legal availability analysis in the case at hand. Simply put, by allowing Horse Creek Hills to rely on the exemption for the entirety of its proposed water use, the Department failed to consider how senior water rights could be affected by the subdivision project. The agency's overly simplistic view of the duty to identify legally available water runs afoul of the underlying purpose behind the Water Use Act, the Montana Supreme Court's holding in *Clark Fork Coalition v. Tubbs*, *Trout Unlimited*, previous agency orders, and the Administrative Rules of Montana.

To make matters worse, the DNRC's application of aggregated, exempt groundwater appropriations leaves Plaintiffs and other senior water users without recourse. The issue of exempting HCH's water use is two-fold. In failing to analyze the legal availability of this water, the Department has not only failed to adequately calculate the adverse impacts to all prior appropriators, but also failed to create a plan should a senior appropriator "make a call."

Even if Plaintiffs make a call for water on HCH's junior rights, and even if HCH honors that call – which they most likely will – cessation of use does not address the interconnection of surface and groundwater rights. The Department has previously denied similar groundwater applications when the applicant proposed to "turn off the well pump"

as its plan to ensure rights were satisfied. Application No. 76D-30071039 by Indian Springs Ranch Water & Sewer LLC, Final Order at 16 (DNRC 2016). In that case, DNRC found that this "plan does not prevent surface water rights of prior appropriators [on the surface water source] from being adversely [a]ffected because surface water depletions will continue after the well is shut off." Id. Here, any call for water by Plaintiffs will be equally as defective. The pre-stream capture process will continue if and when HCH ever agrees to shut off its pumps.

Ultimately, what this all means is that by allowing Horse Creek Hills to proceed with its subdivision using five times (5x) the legislatively authorized exempt amount, DNRC has circumvented the entire administrative process which exists and is designed to look at a new proposed use of water, scientifically analyze its hydrologic interactions at the site, and legally determine its impacts on existing senior rights. This Court need not defer to DNRC's errors of law and process.

(3) Plaintiffs Present Ripe Constitutional Claim.

DNRC lastly argues that Plaintiffs have not adequately plead a cognizable constitutional claim, relying primarily on *Clark Fork Coal. v. Mont. Dep't. of Nat. Res. & Cons.*, 2021 MT 44, 403 Mont. 225, 481 P.3d 198. *See* DRNC Resp. Br. at 8-9. As discussed below DNRC's arguments all fail, *Clark Fork Coal* is distinguishable, and this Court can – and should – determine and declare that the agency's application of its exempt well authority to the Horse Creek Hills subdivision squarely implicates the Constitution's explicit prohibition against unreasonable depletion of water resources and mandate to assure a clean and healthful environment.

As exhaustively detailed in Plaintiffs' opening brief and *supra,* DNRC's actions in this case were contrary to the unambiguous language of § 85-2-306(3)(iii) MCA, to the agency's own rule at ARM 36.12.101(12), and to its exempt well guidance document. The legislature enacted the MWUA for the specific purpose of implementing and fulfilling its constitutional duties under Article IX, Section 3, including "appropriation for beneficial uses as provided by law". Mont. Const. Art. IX, Sec. 3. *See also* MCA §§ 85-2-101(1)-(3). Despite being supplemental to the foregoing explicit purposes, Article IX, Section 1 also provides that the

legislature shall provide adequate remedies to prevent "unreasonable depletion and degradation of natural resources." The Pleadings of this case and Undisputed Facts show that DNRC issued several exempt well approval letters to the HCH subdivision, functionally authorizing the applicant to submit a preliminary plat application to Broadwater County reliant solely on water supply via aggregated exempt groundwater appropriations in excess of 10 ac/ft/yr, from the same source, in an administratively closed basin, without undergoing the default water rights permitting process.

The consequence of DNRC's actions was Broadwater County's reliance on the agency's sign-off on aggregated exempt groundwater wells for a new subdivision, and subsequent issuance of a preliminary plat, without any entity examining the local aquifer, existing water rights to such water, or potential off-site impacts to both existing water rights or nearby surface water. The agency's authorization thus deprived Plaintiffs of "adequate remedies" to both protect senior water rights and to assure no "unreasonable depletion" of water resources, and likewise substantially interfered with Plaintiffs' fundamental rights under Art. IX, Sec. 1 and Sec. 3. *Wadsworth v. State,* 275 Mont. 287, 302, 911 P.2d 1173-74 (1996).

DNRC may not infringe on these rights except as permissible under strict scrutiny. *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs,* 2012 MT 234, ¶ 18, 366 Mont. 399, 288 P.3d 169. Plaintiffs request the court determine, as a matter of law, whether DNRC's actions, as applied in this case, substantially interfere with their fundamental rights. *Wadsworth*, 275 Mont. at 295-98, 911 P.2d at 1170-71. Contrary to DNRC's Response, the Pleadings and administrative record show the agency actions substantially interfered with their protected rights, and strict scrutiny requires the Court to narrowly evaluate the agency action to determine whether it was performed in a manner that imposes the least possible restrictions on constitutional rights, ensure government application is narrowly tailored, and furthers a compelling State interest. *See*, *e.g., McElwain v. County of Flathead*, 248 Mont. 231, 236-39, 811 P.2d 1267, 1271-72 (1990). Here, the Court should find that DNRC's actions do not survive strict scrutiny, and determine that by acting unlawfully, arbitrarily, and capriciously in administering the MWUA and functionally allowing a new subdivision to use

aggregated exempt wells likely to incite off-site dewatering and diminution of senior water rights, the agency violated the prohibition against "unreasonable depletion" and the mandate to "assure a clean and healthful environment." Doing so is all the more important as DNRC's decision-making in this case removed the ostensible remedy under the WUA of objecting to a proposed appropriation.

DNRC argues that *Clark Fork Coal. v. DNRC* is binding precedent that precludes Plaintiffs' constitutional argument. However, *Clark Fork Coal.* is distinguishable on several grounds. First, that case addressed the question of whether "§ 85-2-311(2), MCA, violates Article II, Section 3, and Article IX, Section 1, of the Montana Constitution (right to clean and healthful environment) as applied to Objectors' MWQA nondegradation objections to the proposed MWUA beneficial use permit." *Clark Fork Coal.*, ¶ 45. There, the Court held that the "limited scope or manner of MWQA nondegradation review under the MWUA provided by § 85-2-311(1)(g) and (2), MCA, does not substantially interfere with Objectors' fundamental right to a clean and healthful environment..." *Id.* at ¶ 61. Here, the question before the Court does not concern the nexus between the WUA and the WQA.

Rather, this case specifically entails DNRC's subversion of the WUA's permitting process and expansive interpretation of the exempt groundwater well loophole, the effect of which is to authorize "appropriations for beneficial use" **contrary** to law. *See* Mont. Const. Art. IX, Sec. 3(3). Further, DNRC's actions set off a chain of events likely to incite potentially significant off-site water resource impacts, including but not limited to dewatering of already challenged surface water and nearby senior water rights. These consequences represent "unreasonable depletion" of a natural resource, without any "adequate remedy" aside from the instant litigation. *See also* Mont. Const. Art. IX, Sec.1(3).

Contrary to DNRC's arguments, the Supreme Court has not squarely placed the WUA in isolation from other fundamental environmental rights in every circumstance. In fact, the Court has consistently stated: Reading Article II, Section 3, and Article IX, Section 1 in tandem, any failure by the legislature to provide adequate remedies for advance environmental review and protection before government approval of activities with potential for significant environmental degradation is a violation of the fundamental right to a clean

and healthful environment. *See Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶¶ 18-34,89, 402 Mont. 168, 477 P.3d 288 (holding *inter alia* that elimination of MEPA permit stay/invalidation remedy pending adequate MEPA review facially violated Article II, Section 3, and Article IX, Section 1, of the Montana Constitution); *Clark Fork Coal.* ¶ 47.

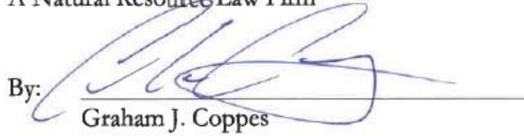
In sum, the MWUA possesses "distinct constitutional purpose" which DNRC's actions in this case have materially and substantially infringed upon, and this Court is not precluded from considering the merits of Plaintiffs' constitutional arguments by any Supreme Court precedent. *Clark Fork Coal.*, ¶ 58. A fundamental question at-play in this case – the lawfulness of DNRC authorizing likely depletion of groundwater and off-site dewatering of neighboring surface water and/or senior water rights contrary to the WUA – directly implicates the constitutional prohibition against "unreasonable depletion" of natural resources and "appropriations for beneficial use as provided by law", and cannot be wholly resolved without consideration of Plaintiffs' constitutional rights. *See* Art. IX, Sec. 1, 3 respectively. The constitutional avoidance doctrine is not a blanket prohibition, but an evaluative process. *See Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338 Mont. 259, 165 P.3d 1073. In cases, such as the one at-hand, where whole relief requires evaluation of constitution mandates the court can – and should – determine the merits.

CONCLUSION

This case is fundamentally about the rule of law. The Petitioners ask this Court to require the Department to follow the law. Tasked with managing Montana's most valued natural resource, it is imperative the Department act within the bounds of its authority. In this case, the Department repeatedly neglected long-established principles of legal precedent and sound science. Within the record before it, the Court will find that Department failed to apply the plain language of the Water Use Act and the Administrative Rules of Montana. These laws were written to encapsulate Montana law's recognition that surface water and groundwater are connected and are susceptible to adverse effects from new and junior uses. The law demands precaution when issuing new uses of water. Yet, DNRC seems to be

waiting for the water to run out before it abandons ship. This Court should not allow such foolish and erroneous decision-making in relation to Montana's most precious resource.

Respectfully submitted this 7th day of September, 2023



CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2023, a true copy of the foregoing document was served US Mail and email upon the following:

Susan B. Swimley
SWIMLEY LAW
1807 W. Dickerson, Unit B
Bozeman, MT 59715
swimley@swimleylaw.com

Tara M. DePuy
P.O. Box 222
Livingston, MT 59047
attorney@riverwork.net

Vuko Voyich
ANDERSON & VOYICH
P.O. Box 1409
Livingston, MT 59047
office@andersonandvoyich.com

Collen Coyle
COYLE LAW FIRM, PLLC
P.O. Box 1326
Bozeman, MT 59771
coylelawpllc@gmail.com

By: