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**MONTANA FIRST JUDICIAL DISTRICT, BROADWATER COUNTY**

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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. )

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Case No. BDV 2022-38

**BRIEF IN OPPOSITION  
TO MOTION TO STRIKE**

Defendant Broadwater County has filed a Motion to Strike “Unpled Legal Theories” from Plaintiffs’ Response to the County’s Motion for Summary Judgment. The County asserts that pleading this purported new legal theory “is tantamount to amending the complaint without notice.” (County Brief, p. 2) The County’s argument is without basis, and the motion should be denied.

In evaluating whether an issue was adequately alleged, the Montana Supreme Court has endorsed an expansive view. For example, in *Abstract & Title Company v. Smith Livestock*, 2006 MT 265, 334 Mont. 172, 146 P.3d 732, the Court explained,

A court may determine that a party has waived its right to assert a legal theory or factual issue where that **theory or issue is not specified in the pleadings** or pretrial order. However, the pretrial order should be liberally construed to permit any issues at the trial that are embraced within the language. Even where unspecified, the district court **may still allow a theory or issue to be introduced into the litigation where the theory or issue can be implied from the pleadings** or pretrial order.

*Id.*, ¶ 11 (citations omitted, emphasis added.)

Under these standards, Plaintiffs’ arguments are valid and cannot be struck. The County takes issue with the argument in Plaintiffs’ Response to its Motion for Summary Judgment under the C heading: that the County had an independent obligation to consider the legal and physical availability of water. 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: *i.e.*, that the County was not “vested with the authority to review water supply adequacy – that is vested in MDEQ.” (County Summary Judgment Br. at 13.) As Plaintiffs pointed out in their Response Brief, part of the consideration for approval of a

subdivision is that there must be “adequate water availability”. § 76-3-622 (e), MCA and § 76-3-608 (6), MCA.

Other than listing the section heading and arguing that this is a new argument, the County does nothing to explain its position. While it is clear that this “C” argument was a legitimate response to an argument made by the County, it is also an argument well within the ambit of the original Complaint and so, in any event, would not trigger the need to amend the Complaint. Moreover, contrary to the County's assertions, there is no unfair surprise or gamesmanship in Plaintiffs squarely responding to legal arguments raised by the County in defense of its decision-making.

The Complaint makes clear the County had an obligation to evaluate whether there was “adequate water supply”, and it provided facts supporting the allegation that it had failed to perform this necessary inquiry. Specifically, the Complaint first details the unlawful and flawed DNRC analysis. *See* Complaint ¶¶94-99. Based on these factual allegations, Plaintiffs brought their fourth cause of action, which pinpointed the arbitrary and capricious nature of Broadwater County's decision-making for the HCH subdivision. *Id.* ¶¶ 122-23. The Complaint specifically alleged that it was legal error, and arbitrary and capricious, for the County to rely “DNRC’s unlawful and erroneous interpretation of MCA § 85-2- 306(3)(iii) and ARM 36.12.101(12) to meet the requirements of the Subdivision and Platting Act.” *Id.*, ¶ 123. The thrust of this argument entails evaluation of the MSPA's purposes, the statutory commands regarding ensuring “adequate water supply”, and the facts of this case regard a closed administrative river basin and several unlawful exempt well authorization letters issued by DNRC for the HCH subdivision. While the County may take issue with the


Complaint's phrasing, Claim 4 puts the County's reliance on DNRC directly at issue. Thus, the arguments raised in Plaintiffs' Response to Broadwater County's Motion for Summary Judgment cannot be said to be "new" nor can it be reasonably argued that unfair notice or process has occurred. *See, e.g., Old Fashion Baptist Church v. Montana Department of Revenue*, 206 Mont. 451, 456-457, 671 P.2d 625 (Mont. 1983) (claims raised in pleadings can be decided by the Court).

Looking beyond the fourth cause of action, other factual allegations in the Complaint squarely address the County's flawed analysis. For instance, ¶ 21 discusses the provision of the Montana Subdivision and Platting Act (MSPA) authorizing regulations to avoid subdivisions where there's a lack of water. § 76-3-501 (1)(i), MCA. Impacts on agricultural water users and groundwater, which certainly would hinge on adequate water availability, are also plead throughout the Complaint. *See e.g.,* ¶¶ 24, 45, 50, 54, 57, 64, 68, 76-79, 101, 102, and 106.

Simply put, the County cannot argue that it had insufficient notice of this issue or that Plaintiffs have improperly articulated a new legal theory during an administrative record case involving competing motions for summary judgment. Moreover, in making the argument in question, Plaintiffs were legitimately responding to an argument made by the County – that it had no independent authority to ensure water availability for the subdivision. As a matter of equity much less law Plaintiffs are entitled to respond to the County's legal theories. For all these reasons the County's motion must be denied.

Dated this 6<sup>th</sup> day of September, 2023.

MORRISON SHERWOOD WILSON & DEOLA PLLP

By  \_\_\_\_\_  
Robert Farris-Olsen

## CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of September, 2023, a true copy of the foregoing document was served US Mail and email upon the following:

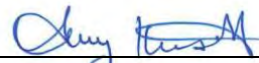
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By:



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