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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-2022-38 **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Comes now, Plaintiffs, through counsel and submit the following brief in support of their motion for summary judgment.

INTRODUCTION

This case asks the Court to determine the bounds of a county's authority when decision-making fails to adhere to requirements of the Subdivision and Platting Act (MSPA) and a state agency's discretion to ignore its own statutory and regulatory mandates.

The Court must strive to effectuate the Legislature's intent by considering the central purpose of the MSPA. *State v. Mathis*, 2003 MT 112, § 27, 315 Mont. 378, 68 P.3d 756. That purpose is to protect the public interest and grant the *privilege* of subdivision development only after the public interest is protected. The MSPA was enacted to promote the "public health, safety, and general welfare by regulating the subdivision of land." Section 76-3-102(1), MCA. As such, the MSPA is entitled to "liberal construction with a view towards the accomplishment of its highly beneficent objectives." *State ex. Rel. Florence Carlton School Dist. V. Bd. Of County Commissioners of Ravalli County*, 180 Mont. 285, 291, 590 P.2d 602, 605, *citing Hall v. Union Light, heat & Power*, 53 F. Supp. 817, 818-19 (E.D. Ky. 1944); *Larson v. State*, 2019 MT 28, ¶ 29, 394 Mont. 167, 434 P.3d 241.

In addition to protecting the public health and safety, The MSPA ensures that development into rural areas of Montana minimizes damage to agriculture, the environment and existing rural land uses. Notably, the MSPA includes protections for water supply, private property rights, preservation of open space, and development in harmony with the natural environment. Section 76-3-102, MCA.

In relation to the apportionment of water to the proposed subdivision at issue in this case, the County incorrectly relied on the Department of Natural Resources and Conservation's unlawful interpretation of the Water Use Act (and its relevant permitting exemption) to authorize more than five times the statutory maximum for a new subdivision. Not only does this type of grossly negligent decision-making undermine the public's trust in its administrative agencies, but it also creates real-world harm for Montana citizens who have investment-backed expectations in senior water resources and the prior appropriation regime as a whole.

Relevant to this case, MCA § 85–2–306(3)(a)(iii), provides an exemption for groundwater appropriations considered de minimis; that is, those appropriations that do not exceed 35 gallons a minute and 10 acre-feet per year. However, the Applicant, Broadwater County, and DNRC all

unlawfully seek to expand this exemption to meet the apparent goal of unbridled residential development. For years, DNRC applied an erroneous interpretation of that language, allowing tens of thousands of wells to tap into Montana's limited ground water resources without any analysis of impacts to senior water users, or the resource itself. In theory, that practice should have come to a close in 2016 with the Montana Supreme Court's decision in *CFC v. Tubbs*, 2016 MT 229. Yet, this case proves it has not.

In spite of clear judicial instruction on this issue, for unknown reasons, DNRC continues its unlawful application of the exempt well rule. Tasked with managing Montana's most valued natural resource, it is imperative that DNRC act within the bounds of its authority, and this Court must ensure that it does so.

FACTS

Plaintiffs will reference undisputed facts from the filed administrative record, with reference to the AR pages, as needed in the Argument section below.

STANDARD OF REVIEW

In reviewing a government decision, Montana courts use a two-part test derived from *North Fork Pres. Ass'n v. Dep't of State Lands,* 238 Mont. 451, 459, 778 P.2d 862, 871 (1989). First the court examines whether the agency's application of the statute or regulation was lawful – within the bounds of the statutory language or a reasonable interpretation thereof. In reviewing whether a government body was appropriately interpreting a statute, the court looks first to the plain language. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶11, 344 Mont. 1, 185 P.3d 1003. While courts defer to an agency's interpretation of its rules, no deference is required to interpretations which violate the plain language of law, or spirit of regulation. *Clark Fork Coal. v. Mont. Dep't of Envtl. Quality* ("*CFC*"), 2008 MT 407, ¶20, 347 Mont. 197, 197 P.3d 482.

Even if an interpretation of a statute is lawful, the court also reviews the substance of the decision under the second part of the *North Fork* test to determine if the decision was "arbitrary and capricious." The touchstone inquiry is "whether the decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *North Fork*, 238 Mont. at 465, 778 P.2d at 871 (quoting *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 378 (1989); *see also CFC*, ¶¶ 20-27; *Citizens for Resp. Dev. v. Bd. of Cty. Com.*, 208 P.3d 876, ¶ 7, 2009 MT 182, 351 Mont. 40 (Mont. 2009). A governing body's decision-making will be upheld if substantial record evidence supports the decision and the governing body explains why it weighed

certain evidence as more credible than conflicting evidence, but decisions contrary to the record and which appear random, unreasonable are arbitrary and capricious. *See Hansen v. Granite County*, 2010 MT 107, ¶¶ 21, 40, 356 Mont. 269, 232 P.3d 409.

Summary judgment should be rendered if the pleadings, discovery, and materials on file, 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. *Baumgart v. State*, 2014 MT 194, ¶13, 376 Mont. 1, 332 P.3d 225 (citing M.R. Civ. P. 56(c)(3). "Summary judgment is particularly appropriate where, as here, review is on the administrative record." *Montana v. EPA*, 941 F. Supp. 945, 956 (D. Mont. 1996), aff'd, 137 F.3d 1135 (9th Cir. 1998); *Park County Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 (affirming MEPA case on summary judgment).

ARGUMENT

A. BROADWATER COUNTY'S ACTIONS VIOLATED THE MSPA (COUNT I & II)

Local governing bodies, like the County here, must adopt subdivision regulations that implement the MSPA. In furtherance of these purposes, the MSPA requires a developer submit an Environmental Assessment (EA) with detailed information. Section 76-3-504(1)(b), MCA; § 76-4-603, MCA. The governing body reviews the adequacy of the information to ensure compliance with the act and county regulations. Section 76-3-604, MCA. After receiving the information, a hearing must be held, and the governing body must approve, conditionally approve, or disapprove the subdivision. Section 76-3-608, MCA. In reaching its decision, the governing body "*shall consider* all relevant evidence relating to the public health, safety, and welfare, including the environmental assessment." *Id.* (emphasis added). The governing body's decision is memorialized in a written findings of fact that weights the criteria in § 76-3-608(3), MCA. A written decision may be challenged in court, and may be voided if it is unlawful, arbitrary and capricious, it was inappropriately made and the Court can void the approval. Section 76-3-608(10), MCA.

Based on these standards, the County's decision for the Horse Creek Hills major subdivision was unlawful, arbitrary and capricious because the EA was facially deficient and the county did not adequately address the criteria under § 76-3-608, MCA.

1. BROADWATER COUNTY'S APPROVAL OF THE HCH SUBDIVISION WAS UNLAWFUL, ARBITRARY AND CAPRICIOUS BECAUSE THE EA FAILED TO INCLUDE AVAILABLE GROUNDWATER INFORMATION OR SUMMARIES OF PROBABLE WATER RESOURCE IMPACTS IN VIOLATION OF § 76-3-603, MCA (COUNT I)

As part of the HCH subdivision process, the applicant was required to submit an environmental assessment (EA). Section 76-3-504(1)(b), MCA. Relevant here, the EA had to include:

> (a) 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;
> (b) *a summary of the probable impacts* of the proposed subdivision based on the criteria described in 76-3-608; and
> (c) 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
> (d) additional relevant and reasonable information related to the applicable regulatory criteria adopted under 76-3-501 as may be required by the governing body;

Section 76-3-603(a) (major subdivision requirements) (emphasis added).

In complementary fashion, the EA must summarize the "specific, documentable, and clearly defined impact [of the subdivision] on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety. . ." Sections 76-3-603(1)(b), 76-3-608(3)(a), MCA. The EA thus serves a vital role of compiling a list of impacts upon the community, which the public can then consider and respond to, and which informs subsequent decision-maker review and action. Plainly, the MSPA requires complete and coherent data compilation to provide "information that is sufficient to allow for the review of the proposed subdivision..." MCA § 76-3-604(2)(c).

Despite these clear standards, the EA, here, does not include any meaningful or substantive analysis of available groundwater information. The original EA provides two sentences describing groundwater. Those sentences indicate groundwater encountered at 100 to 175 below surface, and an opinion as to the unlikelihood of high groundwater. AR 3987. It did not describe the nature of the groundwater aquifer lying underneath the proposed subdivision in terms of its basic hydrologic characteristics, including whether it was confined or unconfined, what the transmissivity or storativity is for the relevant aquifer (and how those relate to regional groundwater gradient and flow), and ultimately, whether adjacent landowners' wells and existing water uses are completed in and draw water from the same source aquifer, or whether and to what extent nearby surface waters interact with and are recharged by the same aquifer. *See* AR 3994 (conclusory finding of

no probable offsite water impacts to agricultural water facilities); AR 3994-5 (conclusory finding of no probable impact on adjacent surface water Confederate Gulch or its trout fishery); AR 3995-6 (conclusory finding of no probably impact on adjacent groundwater wells or streams); AR 4002 (conclusory finding of no probably impacts on natural environment based on future, separate agency review). The EA also had no information on the actual flow rates for adjacent Confederate Creek. AR 4312 (FWP Biologist noting "streamflow information appears absent from the subdivision review process."). Without more, the EA and therefore the approval of the subdivision, was unlawful because they failed to examine how the subdivision will affect groundwater and surface water resources in the immediate vicinity of the proposal. *Citizens for Resp. Dev.*, ¶ 21 (EA requires information about the location of an aquifer, current health of surrounding water bodies, and groundwater-surface water connectivity).

A re-submitted EA in June of 2021 did little to improve the paucity of data concerning probable subdivision impacts to water resources. *See* AR 4202; AR 4229 (identification of downgradient surface water in Confederate Gulch and Canyon Ferry, but no analysis of probably impacts); AR 4233-37 (identification of FWP fisheries letter and summary of proposed water use, but no summary of probable dewatering impacts on Confederate Gulch, impacts on trout fishery, or impacts on adjacent agricultural water use). Rather, the EA's identification of groundwater related solely to tests examining aquifer conditions on-site pursuant to criteria under MCA § 76-3-622. AR 3995-6 (establishing minimum of 3x test wells for purposes of sanitation review); AR 4243 (conclusory statements of compliance with state agency standards without analysis of probable impacts). This re-submitted EA, therefore, suffers from the same defects as the original, and is therefore unlawful. *Citizens for Resp. Dev.*, ¶ 21

Not only was the EA devoid of analytical hydrologic and hydrogeologic information, but it did not discuss the probable impacts on existing water uses. The EA provided well logs for the proposed HCH subdivision, AR 3972-78, but it did not provide available data concerning offsite impacts, even when its own test wells produced only 10-20 gpm. AR 3995. Because the EA does not discuss probable water impacts – likely because there was no information gathered regarding groundwater, or groundwater-surface water interaction –the EA was insufficient.

Similarly, the EA is deficient because it does not adequately describe the impacts to Confederate Creek – which is adjacent to the property. The applicant was aware that Confederate Creek is an "important spawning stream for rainbow trout," AR 4233, and it was aware that the

Montana Fish, Wildlife & Parks regional fisheries biologist opined that "any anticipated groundwater depletion in this area would impact aquatic life in lower Confederate Creek." AR 4080. And, a 2016 evaluation of groundwater impacts in regards to a proposed irrigation district located north of the HCH major subdivision (hereinafter the DNRC Groundwater Report) found groundwater pumping likely to result in dewatering impacts up to 2 miles away. AR 3674, 4308. Put simply, it is probable that the HCH subdivision will negatively impact Confederate Creek, and its trout fishery, but the EA only notes that the water use will be negligible. The applicant, though, had no way to know the impact because it is never examined the location, type, or flow of the aquifer. The conclusion of negligible surface water impacts is also inaccurate because the developer had no streamflow data in the EA. AR 4312 (FWP Biologist noting "streamflow information appears absent from the subdivision review process.").

Here, the EA failed to examine "all available groundwater" information, including the aforementioned agency reports and opinions indicating the subdivision's proposed water use was likely to incite impacts to nearby wells and surface water. In short, the failure to provide all available groundwater information, including probable offsite impacts, or EA summaries of Section 608 criteria that failed to meaningfully evaluate whether there would be "no impacts, some acceptable impacts, or serious impacts", demonstrates the EA violated the plain requirements of MCA § 76-3-603. *See Citizens*, ¶ 21. The County's failure to ensure an adequate EA was unlawful. *Aspen Trails*, ¶56-8; *Citizens*, ¶ 26.

The failings of the EA, alone, justify voiding the subdivision approval. The Montana Supreme Court has done so in two analogous cases: *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 56, 356 Mont. 41, 230 P.3d 808, and *Citizens for Resp. Dev.*,[1] ¶21. In *Aspen Trails* the Montana Supreme Court found a subdivision EA's failure to consider groundwater data and a U.S.G.S. report on shallow groundwater a violation of the MSPA's requirement to include "all available information" regarding groundwater. Similarly, in *Citizens for Resp. Dev.* , the Montana Supreme Court found the MSPA was violated when the applicant's EA did not describe the location of the aquifer, condition of proximate surface water, or whether the aquifer and nearby surface water interact.

[1] In *Aspen Trails*, the Court affirmed the voiding of the approval as arbitrary and capricious, and in *Citizens*, the Court voided it as unlawful.

Because the HCH EA possesses similar fatal flaws found unlawful in *Aspen Trails* and *Citizens*, the County's approval must be vacated.

2. BROADWATER COUNTY'S DECISION-MAKING VIOLATED § 76-3-608, MCA AND IS NOT SUPPORTED BY THE RECORD

Separate from the requirement that an EA gather available data and summarize probable impacts is the independent duty placed on local government to evaluate "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." Section 76-3-608(3)(a), MCA. Broadwater County's decision-making on the HCH subdivision 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. These flaws render the County's preliminary plat approval unlawful, arbitrary and capricious.

Agricultural Impacts

Adjacent landowner-Plaintiffs, the Dundases, and neighboring landowner-Plaintiffs the MacDaniels and Plymales, all use their properties for agricultural purposes, including cattle ranching and/or food crops. AR 519, 2472, AR 2478-80, 2648. Ranching and farming operations regularly use the only unimproved, public roadways in the region - Lower Confederate Road and Lower Duck Creek Road - in the course of operations, including needing to cross the road to access stock water and range and to move agricultural machinery. AR 2774, 3680 (transcript, testimony to existing agricultural uses on neighboring properties) These uses squarely fall within the County's definition of agriculture, AR 3737, yet neither the EA nor the Preliminary Plat Approval & Commission Findings examined the specific, documentable, and clearly defined impact(s) of placing a new major subdivision directly amidst existing ranching and farming operations. *See* AR 3993-4, (incorrect identification of adjacent lands as vacant and/or nominal agricultural use; AR 3737 (Commission Findings of Fact).

Public comment persistently identified the HCH major subdivision location as contrary to the prevailing agricultural surrounding land uses, contrary to goals of the 2003 Growth Policy encouraging growth near preferred (more urbanized) areas, and a risk to farming/ranching practices crossing and using the singular public roadways available. AR 58-59 The County Commission's own Findings of Fact likewise confirm that the subdivision is not in compliance with the Growth Policy but fails to identify - much less discuss - the stark conflict between a

proposed major subdivision and rural agricultural ranching and farming land uses. AR 3737-8. The failure to examine the "specific, documentable, and clearly defined impact" of a new major subdivision on existing agricultural land uses was a procedural violation of § 76-3-608, MCA. This failure was exacerbated by the County's failure to reconcile the subdivision's incongruity with the Growth Plan or public testimony of likely adverse impacts to agricultural operations by neighboring landowners. While conditions of approval included 'right to farm' covenants, the County offered no reasonable mitigation capable of preventing impacts related to a major new subdivision and unknown commercial lot uses from hindering existing agricultural operations.

In *Hansen v. Granite Cnty.*, 2010 MT 107, ¶ 33, 356 Mont. 269, 232 P.3d 409, a County denial of a preliminary plat due to a proposed subdivision's negative impacts on existing agricultural operations was upheld because the subdivision would create un-mitigable impacts on adjacent agricultural land uses. Here, instead of a reasoned discussion of whether the HCH subdivision was approvable given the prevailing land uses and testimony of negative impacts on existing agricultural operations, the record demonstrates a predetermined County conclusion that agricultural impacts were somehow less persuasive and per se mitigable.

The County gave short shrift to agricultural impacts, itself a procedural violation of § 76-3-608, MCA, and unreasonably concluded conditions of required fencing and right to farm covenants mitigated agricultural impacts contrary to the record before it. AR 236-37.

Agricultural Water Use Impacts

The subdivision proposes the use of five aggregated exempt groundwater withdrawals of 10 ac/ft each, yet neither the applicant's EA, the County's staff reports, or the Commission decision approving the subdivision evaluated the "specific, documentable, and clearly defined" impacts of this aggregate consumptive use on offsite agricultural water use in the area. Existing agricultural operations, including neighboring landowner-Plaintiffs the Dundases, the MacDaniels, and the Plymales, use and rely on the local aquifer or adjacent Confederate Creek for their ranching and/or farming operations.

Plaintiff Tanya and Toby Dundas own land approximately one-half mile north of the proposed subdivision along the east side of Lower Confederate Lane. They run cattle and utilize various water rights out of confederate gulch for irrigation. Plaintiff Sally and Brad Dundas own land directly adjacent to the proposed subdivision and on the opposite side of Lower Confederate Lane. Confederate Gulch bisects their property. They possess water rights out of confederate gulch

dating to May 31, 1883. Plaintiff Cody McDaniel runs the McDaniel Ranch at 158 Lower Confederate lane, just north of the proposed subdivision. The McDaniel Ranch produces cattle and goats and relies on various water rights in or adjacent to confederate gulch for irrigation and stock watering. Plaintiff Carole and Charles Plymale operate a ranch to the south of the proposed subdivision off Duck Creek and also possess longstanding senior water rights.

Public comment expressed documentable concern with HCH's aggregate water consumption and potential offsite dewatering impacts based upon: personal experiences of wells running dry; of experienced dips in seasonal groundwater well productivity; commonly-understood groundwater connectivity to adjacent Confederate Gulch and that waterway's seasonal dewatering; proven offsite dewatering impacts from the proposed Avalanche Gulch Irrigation District test pumping to the north; and based on knowledge that the Upper Missouri River Basin is a closed river basin for the purposes of new appropriations. AR 4308-4311 (AGID study) A County staff report summarizing public comments regarding the HCH subdivision confirms full-awareness of identified, particularized concerns with probable offsite water impacts, yet the record doesn't reflect a thoughtful evaluation of impacts. AR 3060-67.

The August 2020 EA is silent on identifying or examining probable offsite impacts to agricultural water user facilities. The second, revised June 2021 EA makes the conclusory statement “no anticipated negative impacts, interference with irrigation systems and facilities of any adjacent farm or Ranch Operations, nor any diminishing availability or quality of water”, and referenced informal letters provided to the applicant by Defendant DNRC, allegedly allowing 5 aggregated exempt wells for the subdivision. AR 4236-7, 4243. Despite the claim of no impact, there is no analysis or discussion of the evidentiary basis for such a conclusion.

The developer submitted yet another, third, revised subdivision application containing new information in late November 2021, including among other items the substantive change of water source for the subdivision from "spring" to "wells." AR 3012. The County Staff report accompanying the third application contained the first discussion of a proposed use of 50 ac/ft/yr water use although, like the preceding EAs, there remained zero analysis of the "specific, documentable, and clearly defined impact" of probable offsite impacts to agricultural water use. AR 3018-21, 3040. So too the Commission's Findings of Fact in support of preliminary plat approval also fail to examine specific, probable water impacts documented in public comment of any kind, including agricultural water use, despite reliance on the very same EAs which failed to

provide the statutorily-required analyses under Section 608. AR0235-254, 244. The County incorrectly deemed water information concerning on-site sanitation requirements a surrogate for identification and analysis of Section 608 impacts under the MSPA. *See criteria at* AR3022/3, *contra to* MCA § 76-3-608(3). Required conditions of approval, such as requiring water meters on new residences or a future groundwater study after preliminary plat approval, do not fulfill the County's statutory duty to ensure the EA, and its own review, adequately identified and assessed specific, documentable, and clearly defined water impacts before decision-making. This duty exists independent of DNRC's alleged allowance of 5 exempt wells. *See Whatcom Cty. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 381 P.3d 1 (2016) (county has an independent duty to determine legal availability of water despite agency exempt well guidance).

Natural Resource Impacts

Compounding the County's failure to examine offsite water impacts were unfounded conclusions that DEQ reviewed subdivisions to assess possible offsite water resource impacts. The County Sanitarian opined that DEQ reviewed offsite water impacts, when in fact the agency only reviews on-site water supply under the separate criteria of the Sanitation Act, a fact confirmed by members of the Planning Board and confirmed by the DEQ application documents themselves. AR 2868-9; 3068; 3022 (on-site sanitation information only).

Plaintiffs and the public expressed concern that the subdivision's wastewater discharge analysis showed septic pollution from the subdivision would flow through groundwater to Confederate Gulch and/or Canyon Ferry, both of which remain impaired at law for nitrogenous pollution, the same pollutants that would be discharged by dozens of new subdivision homes and commercial lots. AR 590-603 Applicant data submissions to DEQ, only provided to the public in the third, late November 2021 additional information hearing, show that concentrations of nitrogen at the end of mixing zones was estimated at approximately 3 mg/L, whereas numeric nutrient criteria for degradation in Confederate Gulch was 10x lower, at .3 mg/L, and Canyon Ferry remains impaired for ammonia (a nitrogenous compound) and fails to adequately provide for aquatic life, suggesting new pollution discharges could exacerbate existing surface water impairment. AR 3060 (summarized public comment); 3077 (estimated wastewater concentrations). While the applicant's Non-Degradation application to DEQ identified proposed wastewater septic systems, it also applied agency guidance to exempt review of potential downgradient surface water impacts. AR 3077-78. Thus, no cumulative impacts analysis was performed of what offsite impact could occur

in downgradient surface water from 42 new individual septic systems, despite those waters' impairment for the same compounds which would be discharged by the HCH subdivision.

The County's decision-making failed to examine the specific, documentable, and clearly defined impact of 42 new additional septic systems on natural resources, instead unlawfully assigning its independent duty to assess probable impacts to a different governmental body. The County's failure to review natural resource impacts, or to provide a reasonable basis for their dismissal, was unlawful, arbitrary and capricious. *See* MCA § 76-3-608(3)(a); *Aspen Trails*, ¶ 57.

Wildlife and Wildlife Habitat Impacts

So too both the EAs, and County decision-making, inaccurately characterized and failed to adequately evaluate impacts to wildlife and wildlife habitat as required by Section 608 criteria. The HCH subdivision is situated in a known wildlife corridor for big game. Montana FWP commented that the area is "seasonal or year-round habitat for antelope, mule deer, white-tailed deer and elk," and provides habitat for game birds and non-game birds and wildlife, all of which "would be negatively impacted to one degree or another if the proposed subdivision is developed in the area." AR 4082-3. FWP's fisheries biologist opined that "[a]ny anticipated groundwater depletion in this area would impact aquatic life in lower Confederate Creek," which is a "high-quality fishery and important spawning stream for rainbow trout." AR 4080. Further, both FWP biologist and Conservation District reference the nature of Confederate Gulch's lower reaches, which adjoin the HCH subdivision property, as gaining flow from groundwater, a relationship that would likely be affected by new groundwater demands of the subdivision, and thereby further degrade conditions in Confederate Gulch. AR 4318, 4321. Public testimony also corroborated widespread wildlife, and use of the area as habitat, both in and adjacent to the subdivision property. AR 2642-2650, 4236, 3667-8

The EAs fail to identify or assess the impacts likely to occur to wildlife if this development occurs, making myopic distinctions between the subdivision parcel itself as opposed to wildlife and habitat in the area, and ultimately making conclusory statements about no significant impact contrary to the record. AR 3994-5, 4233-37. Broadwater County staff reports also arbitrarily downplay the impact of a new major subdivision on wildlife, contradicting the opinions of wildlife professionals, inaccurately stating that big game "occasionally utilize" the region and "the property is not known to be part of any big game wintering range...[or] migration route," and wholesale omitting any discussion of dewatering impacts on Confederate Gulch and its fishery habitat. AR

242-43 (no mention of fish whatsoever).[2] The County's findings and preliminary plat approval document references these expert reports, yet unreasonably concluded wildlife impacts "will be negligible" contrary to the plain language of FWP's letters and public comment. AR 242-3, 4080, 4082-3.

Public Health & Safety Impacts

A much-debated issue of public concern was the diversity of health and safety issues implicated by a new 42 lot subdivision, including 2 commercial lots with zero details on their intended uses, amidst an overwhelmingly rural setting. AR 235, 3879-80. Importantly, the applicant routinely failed to identify the proposed use of the commercial lots. *See, e.g.*, AR 2631, 3648. At one point, they proposed a convenience store gas station, but by the end of the hearings, they were proposing a non-public commercial establishment – perhaps storage units – or anything with less than 24 employees. AR 3648. However, absent some more concrete information on proposed commercial use, the County could not adequately evaluate impacts. For example, if the facility employed 24 employees, that generates significantly more vehicle trips per day than a facility with 1 employee. Similarly, if the commercial lots provided goods or services to the neighboring residential areas, that would generate more traffic than a storage facility, or if gas services were provided entail more safety issues. For all these reasons, the County could not meaningfully evaluate probably impacts to public health and safety, or nearby agriculture operations. In any event, the dearth of information means that the Commission was acting blindly, and unreasonably.

The County's approval of the preliminary plat was also arbitrary and capricious because of traffic issues. AR 239. For example, the County's 2003 Growth Plan identifies that each lot will generate 8 vehicle trips per day, AR 68, 3669, but the applicant relied on significantly fewer at 3.2 trips per day. AR 3692. The public also raised concerns about the number of trips per day, as did the Public Works director. AR 2627, 3669. The County's findings do not provide a justification for this deviation. AR 239. The Applicants estimates were also only applicable during fair weather. AR 2627, 3669. One of the sole access roads – Lower Duck Creek Road – is owned and maintained by the Bureau of Reclamation, which is responsible for plowing. AR 2627. BoR apparently does

[2] This omission is particularly concerning in light of public comment regarding depleted ground and surface water. AR 3681-83. And FWP advised that Confederate Creek was already at 2 CFS when it needed 5 CFS. AR 3658-59.

not plow quickly, and so the road often closes during winter months, implicating public safety. *Id.*, AR 3669. Roads also cover quickly with snow drifts and prevents access. AR 3669. More concerns were raised with respect to the other, major access road – Lower Confederate Gulch. AR 3669. Namely, that Lower Confederate Gulch Road is narrow, with blind hills, and how it connects to Highway 284 because of the angle and a hill blocking views of oncoming traffic from the north. *Id.* The County's written decision does not account for or reconcile these documentable concerns, and is therefore arbitrary and capricious.

Summary

The record does not provide reasonable explanations of why the County weighed certain evidence as more credible than other evidence as regards dismissing concerns of probable offsite water impacts to agricultural users, particularly when substantial evidence supported the contention that the subdivision was likely to incite some unquantified impacts on nearby groundwater and surface water. Neither does the record provide a reasoned basis for dismissing wildlife, wildlife habitat, or natural resource impacts, including the use of dozens of septic systems and offsite impacts on surface water. When confronted with evidence of how groundwater pumping can create negative dewatering miles distant the County not only failed to provide reasons why such probable impacts were immaterial, but also relied on DNRC letters of water availability irrelevant to the required determination of specific, documentable, and clearly defined impacts that proposed water use would have offsite. Lastly, the lengthy administrative record demonstrates overwhelming public concern about diverse public health and safety impacts, including in particular exponentially increased traffic, rural roads, and speculative commercial uses of land, particularized concerns the County unreasonably presumed mitigatable contrary to the record.

The MSPA recognizes that "in some instances the impacts of a proposed development may be deemed unmitigable and will preclude approval of the subdivision." Incumbent in making such an important determination is the governing body's duty to ensure the compilation of adequate information, and analysis of specific, documentable, and clearly defined impacts. Where, as here, a County fails to ensure identification of probable issues, or to adequately analyze a variety of probable impacts and makes decisions contrary to the record, its decision-making is unlawful, arbitrary and capricious. *See supra, Aspen Trails*, ¶¶ 56-57; *Citizens*, ¶ 26.

B. DNRC UNLAWFULLY SANCTIONED NEW SUBDIVISION WATER USE CONTRARY TO LAW (COUNT III)

On February 4, 2020, the DNRC issued four water right review letters to the applicant, one for each phase of the proposed subdivision. Each letter is nearly identical and advised the applicant, "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." AR 4090-97. These letters triggered a cascade of errors – namely, the applicant proposed to rely on five exempt wells to provide 50 af/yr to the subdivision. AR 3886. This culminated in the County approving the application, and explaining, "Each phase of the phased development will have a combined estimated total domestic volume use of 10-acre feet/year]." AR 244. This interpretation is legally incorrect, and DNRC's interpretation was wrong. While courts defer to an agency's interpretation of its rules, no deference is required to interpretations which violate the plain language of law, or spirit of regulation. *Clark Fork Coal. v. Mont. Dep't of Envtl. Quality* ("*CFC*"), 2008 MT 407, ¶20, 347 Mont. 197, 197 P.3d 482.

More than a century ago, Montana lawmakers started seeing the need for a regulated system of water rights. The use and reuse of water by many parties, the complexity of a water right, was a recipe for confusion and disagreement without a centralized system. The 1972 Montana Constitution charged the legislature with creating a system to administer, control and regulate water rights through a centralized system of records, which is now codified as the Water Use Act (WUA). A permit system administered by the Department of Natural Resources and Conservation (DNRC) was created within the Water Use Act of 1973. This statutory scheme governs both access to and use of surface and ground water by private citizens and corporate entities.

The Montana Water Use Act ("MWUA") represents a comprehensive statutory scheme governing the conservation, development and administration of water resources in Montana. *See generally* MCA § 85-1-101. Said another way, "[t]he state, in the exercise of its sovereign power, acting through the department of natural resources and conservation ["DNRC"], shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources." MCA § 85-1-101(3). In achieving these goals, DNRC is charged with balancing development against conservation and environmental/recreational water uses against diversionary ones. MCA § 85-1-101(4)-(5).

Ultimately, the legislature advised that "[t]he greatest economic benefit to the people of Montana can be secured only by the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state." MCA § 85-1-

101(8). In order to meet these goals, the legislature mandated that DNRC administer a permitting system for all new water rights. As a basic premise, the MWUA requires those seeking new appropriations of water to apply to the DNRC for a permit. MCA § 85–2–301.

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. *Clark For Coalition. V. Tubbs*, 2016 MT 229, ¶¶ 5-6, 384 Mont. 503, 506–07, 380 P.3d 771, 774–75,Section 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, 376 P.3d 143, 384 Mont. 174 (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.

However, there is one notable exception to the permitting requirements imposed by §85-2-311, MCA: ground water wells with a total combined appropriation diverting less than 35 gallons per minute (gpm) and up to 10 acre feet per year (afy) are exempt. Said another way, a person is not required to apply for a permit to develop a well or a groundwater spring when the total use and diversion of water from that well will be less that 35 gallons a minute as a flow rate and will not exceed 10 acre-feet per year as a volume. See generally § 85-2-306, MCA. In pertinent part, MCA, 85-2-306 states,

> "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: 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…"

Thus, in limited circumstances, the WUA allows for groundwater appropriations without a permit. However, that exemption is limited by statutory flow rate and volume calculations (as long as the well "is 35 gallons a minute or less and does not exceed 10 acre-feet a year). Those calculations are in turn further modified by the statute's expressed reference to a "combined appropriation." ("*except that a combined appropriation from the same source by two or more wells or developed springs exceed 10 acre-feet, regardless of the flow rate, requires a permit.*" § 85-2-306, MCA (emphasis added)). What this all means has been the subject of much litigation in this state. *See generally Clark Fork Coalition v. Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771. As a result, the issue is now well-settled law.

Previously, a combined appropriations exemption was utilized as a loop hole by developers to avoid the much more stringent permitting process. More specifically, Prior to 2014 (the year the Montana Supreme Court announced *Clark Fork Coalition v. Tubbs*), individuals or developers could drill as many of these "exempt wells" as they wanted, as long as the wells were not physically connected. And, drill they did. This practice arose out of the DNRC's interpretation of the term "combined appropriation" as used in the Water Use Act.

The legislature did not define "combined appropriation," but left it up to DNRC to define. At issue in *CFC v. Tubbs* was the DNRC's then-existing administrative rule defining this term. That rule stated that two or more wells had to be physically connected ("manifolded") together in order for DNRC to consider it a combined appropriation, thereby limiting the groundwater diversions to 35 gpm or 10 AF. However, in 2014 Montana's courts reversed this trend by requiring the DNRC return to its old interpretation of the term "combined appropriation", which is the trigger for the exemption. *Clark Fork Coalition, et al v. Tubbs* Cause No BDV-2010-874 (issued October 17, 2014). There, the court held that "DNRC's Administrative Rule 36.12.101(13) conflicts with the general purpose of Montana's Water use Act and specifically with Montana Code Annotated § 85-2-306, which allows for certain exemptions. Such being the case, the Court hereby INVALIDATES that rule." *Id.* at 13. In the CFC decision, the Supreme Court upheld the District Court opining that DNRC's interpretation of the statute was in error and that wells did not have to be physically manifold together to be considered a combined appropriation. See generally 2016 MT 229.

Taken together, § 85-2-306(3)(iii), MCA, ARM 36.12.101(12), and the Montana Supreme Court's decision in *CFC v. Tubbs*, create unambiguous law in Montana on the issue at hand:

"[b]ased 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 minimus 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." CFC v. Tubbs, 2016 MT 229, ¶ 24.

Following that decision, DNRC produced a memorandum providing informal guidance to the public on how it would interpret the law, until such time as it promulgated a new rule on the subject. Yet, no new rule has been promulgated and thus, the 1987 rule reinstated by the Montana Supreme Court and the Court's interpretation of that rule remain in effect today.

Presently, a "combined appropriation" is defined as:

> ... 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. 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.*

Admin. R. Mont. 36.12.101(12) (emphasis added).

Consistent with this definition, DNRC issued a guidance document defining a combined appropriation in relation to a subdivision. *See* DNRC, *Combined Appropriation Guidance*, http://dnrc.mt.gov/divisions/water/water-rights/docs/new-appropriations/Combined_ Appropriation Guidance (Feb. 16, 2016). Specifically, for any subdivision, such as the one here, the total appropriation for all subdivided lots is capped at 10 AF. Read together, these provisions create a clear framework that subdivisions are entitled to a *single exempt appropriation* with a total maximum depletion of 10 AF per year. DNRC's letters – at issue in this case – specifically lay out this exact interpretation, stating

> 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 would 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. . . .

AR 4090-91.

The County and applicant attempt to evade this limitation on exempt wells by phasing the development. But nothing in the statutory or regulatory framework permits a subdivision to avoid the exempt well issue simply by phasing. As explained in the definition of combined appropriation, as long as the water is from the same source, the "wells and springs need not be developed simultaneously. *They can be developed gradually or in increments*." Admin. R. Mont. 36.12.101(12) (emphasis added.)

Here, that means that the subdivision is only entitled to a total of 10 AF of exempt well water, and not the 50 AF proposed. As a result, the subdivision will require a water right to provide legal access to water. Without that water right, the subdivision has no legal right to use more than 10 AF in total.

Accordingly, Plaintiffs are entitled to a declaration that DNRC's interpretation of MCA § 85-2-306(3)(iii) and ARM 36.12.101(12) as-applied to the Horse Creek Hills Subdivision is erroneous and unlawful. So too, Plaintiffs are entitled to a declaration that DNRC's authorization of HCH's use of five aggregated exempt groundwater withdrawals of 10 ac/ft-year violated the Montana Constitution's explicit prohibition on unreasonable depletion of water resources and mandate to assure a clean and healthful environment, violates the Montana Water Use Act, and violates the agency's combined appropriations regulations at ARM 36.12.101(12).

C. BROADWATER COUNTY'S RELIANCE ON DNRC'S DECISION-MAKING WAS LEGAL ERROR, ARBITRARY AND CAPRICIOUS (COUNT IV)

The MSPA recognizes that "in some instances the impacts of a proposed development may be deemed unmitigable and will preclude approval of the subdivision." Section 76-3-608(5)(a). That is the situation here – there is not an evidentiary record supporting additional residences and unknown commercial development in a rural, agrarian region with finite water resources.

As part of the MSPA, the County as required to evaluate the availability of water for the proposed subdivision. *See* §§ 76-3-501(f), (i), MCA; § 76-3-504, MCA; § 76-3-604(8)(b), MCA. The Growth Policy mirrors this requirement. AR 0050 at ¶ 24. The County identified this requirement in its discussion of public health and safety in the Findings of Fact; however, instead of performing the requisite analysis - or requiring the developer to do so before its decision-making

- it instead relied on the developer and DNRC's proposed use of multiple exempt wells. AR 245, AR 4000. In doing so, the County assumed that water was legally available through the proposed exempt wells. As noted above, however, the DNRC and the developer's application of WUA was legally incorrect. This issue was brought to the Commission's attention through public comment. AR 559-572. The Commission ignored these comments and found that adequate water was legally available. AR 244. This erroneous legal conclusion rendered its approval unlawful, arbitrary and capricious.

Moreover, the County was not allowed to rely on DNRC's analysis because it was an erroneous interpretation of the WUA. *La Can. Flintridge Dev. Corp. v. Dep't of Transp.*, 166 Cal. App. 3d 206, 222 (1985) ("Reliance which is based on an erroneous interpretation of the law is not reasonable reliance."). A brief review of DNRC's guidance demonstrates that reliance was improper. It was also inconsistent with DNRC's 2016 exempt well guidance that provides all "exempt wells for the subdivision will stay at/under a combined appropriation of 10 AF." The 2023 guidance further clarified that "any subdivision of land . . . created after October 17, 2013, . . . *is considered a combined appropriation*." *See*, DNRC Combined Appropriation Guidance (Feb. 16, 2016) (A copy of the guidance is attached to DNRC's response to motion for declaratory judgment). In other words, aside from the February 4, 2020, letters, DNRC correctly explained that a subdivision constitutes a combined appropriation. Without water, the approval was arbitrary and capricious, and an abuse of discretion.

Accordingly, there is no legally available and adequate water supply because the proposed aggregated exempt wells are not allowed, and the basin is administratively closed – meaning the applicant cannot obtain a new water right. The County committed reversible legal error in finding otherwise. Plaintiffs are, therefore, entitled to judgment as a matter of law on Count IV.

Dated this 28th day of July, 2023.

MORRISON SHERWOOD WILSON & DEOLA PLLP

By 

Robert Farris-Olsen

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2023, a true copy of the foregoing document was served US Mail and email upon the following:

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