

FILED

JUL 27 2023

VALERIE J. HORNSVELD
Clerk

Deputy *Audrey Plymale*

**MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY**

UPPER MISSOURI WATERKEEPER,
TANYA & TOBY DUNDAS, SALLY &
BRADLEY DUNDAS, CAROLE &
CHARLES PLYMALE, and CODY
McDANIEL,

Plaintiffs,

v.

BROADWATER COUNTY and the
MONTANA DEPARTMENT OF
NATURAL RESOURCES and
CONSERVATION,

Defendants,

and

71 RANCH, LP,

Intervenor.

Cause No.: BDV-2022-38

**ORDER PLAINTIFFS' LIMINE
MOTION**

1 Notwithstanding, however, rulings on *limine* motions are
2 provisional and “the trial judge may always change his mind during the course of
3 trial.” *BNSF Ry. v. Quad City Testing Lab., Inc.*, 2010 U.S. Dist. LEXIS 113888,
4 2010 WL 4337827 at *1 (D. Mont. 2010) (quoting *Ohler v. United States*,
5 529 U.S. 753, 758, n. 3 (2000). As such, a *limine* motion should not be used to
6 resolve factual disputes or weigh evidence. *Id.* In addition, evidence should only
7 be excluded before trial when it is shown that the evidence is “inadmissible on all
8 potential grounds.” *Id.* “Unless evidence meets this high standard, evidentiary
9 rulings should be deferred until trial so that questions of foundation, relevancy
10 and potential prejudice may be resolved in proper context.” *Id.* “This is because,
11 although rulings on motions *in limine* may save time, costs, effort and
12 preparation, a court is almost always better situated during the actual trial to
13 assess the value and utility of evidence.” *Id.*

14 Moreover, in this proceeding, this Court must determine whether
15 Broadwater County’s Horse Creek Hills Subdivision preliminary plat approval
16 was arbitrary, capricious, or unlawful based on the underlying administrative
17 record as a whole. See Mont. Code Ann. § 76-3-625(1)(c) 2021; see also, *MM&I,*
18 *LLC v. Bd. of Co. Commrs. of Gallatin Co.*, 2010 MT 274, ¶ 29, 358 Mont. 420,
19 246 P.3d 1020; *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 97,
20 312 Mont. 52, 57 P.3d 836 (since the proffered statements were not part of the
21 administrative record, they were not relevant, and the district court was correct in
22 not considering them).

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2 Under these cases, Mr. Fasting's reported [sic] is not admissible. Mr.
3 Fasting's report does just what the report did in *Citizens*. He states:
4 "It is our professional opinion that we satisfied all the requirements
5 of the county subdivision regulations to the point of Preliminary Plat
Approval, including DNRC." Ex. A, at p. 8.

6 The sole purpose of Mr. Fasting's expert disclosure and declaration is
7 to justify defendants' decision-making, by rehashing what should be
8 apparent from the administrative record. Therefore, Intervenor's
9 expert disclosure and attempt to bring post-decision conclusions
10 before this Court is inappropriate, contrary to Montana Supreme
Court precedent, and must be stricken.

11 71 Ranch contends, in relevant part, that:

12 Plaintiffs brought suit against DNRC and Broadwater County,
13 alleging the County failed to ensure an adequate environmental
14 assessment had been prepared, failed to perform adequate analysis as
15 required by Montana Code, and that these same entities applied an
16 unlawful interpretation of the law in approving the use of exempt
17 wells. Motion, 2, CR29; *Complaint*, CR1. Plaintiffs did not name 71
18 Ranch or bring claims against 71 Ranch/Horse Creek Hills
19 Subdivision, asserting any of its actions were wrongful and/or
20 contrary to law. The Report submitted by 71 Ranch does not touch
21 on or provide expert opinion about any of Plaintiffs' claims. Exhibit
22 1. The Report summarizes the subdivision process experienced by 71
Ranch, and while referencing the steps and process required of 71
Ranch/Horse Creek Hills Subdivision, it does not reach or make any
ultimate conclusions as to what the County and/or DNRC should
have done, or how it/they applied the law. *Id.*

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1 The Report is a summary of the administrative record and does not
2 contain new or unknown facts but condenses an extensive
3 administrative record into 8 pages, with attachments, about the
4 Project Background, the Phasing Plan, the preliminary plat
5 procedures, and the requirements set out by the County, DNRC,
6 and/or MDEQ. Some of these requirements were initiated during the
7 preliminary approval process and are on-going, such as the
8 hydrogeological, waste, and traffic evaluations. *Report*, 4-7. Again,
9 this is not new information, or post-decisional, but provides an
10 explanation of what has occurred and continues as part of this
11 project. This gives the Court an overall understanding of the
12 evidence, the administrative record, and the project itself.

13 This Court certainly recognizes that the Montana Supreme Court
14 has indicated in three limited circumstances, “extra-[administrative] record”
15 evidence may be considered by a reviewing district court. Specifically, “for
16 background information; for ascertaining whether the agency considered all the
17 relevant factors; or for ascertaining whether the agency fully explicated its course
18 of conduct or grounds of decision.” *Heffernan v. Missoula City Council*, 2011
19 MT 91, ¶ 66, 360 Mont. 207, 255 P.3d 80 (citing authority). Notwithstanding,
20 for purposes of Plaintiffs’ *limine* motion, this Court will follow *Kiely* by not
21 inserting what the Legislature omitted in Mont. Code Ann. § 76-3-625(1)(c). The
22 only relevant evidence which this Court may consider, under controlling
23 Montana law, is that which is contained in the administrative record. *Kiely*, ¶ 97.
24 The matter before the Court concerns whether Broadwater County’s Horse Creek
25 Hills Subdivision preliminary plat approval was arbitrary, capricious, or unlawful
based on the underlying administrative record as a whole. While Mr. Fasting is
certainly entitled to his opinion as to 71 Ranch’s actions relative to the
subdivision process, this Court respectfully declines Ranch 71’s invitation to

1 insert new review criteria in Mont. Code Ann. § 76-3-625(1)(c) or practice
2 judicial activism.

3 Accordingly, Plaintiffs' *limine* motion is **GRANTED**. In this
4 regard, **IT IS HEREBY ORDERED** that no party to this proceeding shall rely,
5 cite, utilize, argue and/or mention any evidence that is not contained in the
6 administrative record. In this regard, such evidence is not relevant to this Court's
7 determination in this proceeding.

8 **CONCLUSION**

9 For the above reasons, it is hereby **ORDERED, ADJUDGED** and
10 **DECREED** that Plaintiffs' *limine* motion is **GRANTED**.

11 **ORDERED** this 27th day of July 2023.

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15 MICHAEL F. McMAHON
16 District Court Judge

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