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 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 COURT
BROADWATER COUNTY

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

INTRODUCTION

This case is about local and state governments' failures to follow unambiguous requirements of the Montana Subdivision and Platting Act (MSPA) and Water Use Act (WUA) in authorizing the Horse Creek Hills (HCH) major subdivision in rural Broadwater County, amidst an overwhelming agricultural neighborhood. Despite tremendous public opposition and a robust record illustrating a variety of significant, unresolved impacts on agricultural operations, agricultural water user facilities, the natural environment, wildlife and wildlife habitat, and public health and safety, Broadwater County approved the HCH preliminary plat without adequately evaluating mandatory MSPA criteria, and without assuring the sufficiency of the applicant's Environmental Analysis, including, in particular, evaluating the adequacy of proposed water supply. Similarly, the Department of Natural Resources and Conservation (DNRC) issued the HCH project several letters authorizing the use of five aggregated exempt groundwater withdrawals contrary to law and contrary to DNRC's own rules and guidance.

Substantial evidence did not support the County's approval decision, and the County failed to reasonably reconcile why it weighed certain evidence and alleged mitigation as more credible than conflicting evidence. Further, the County unreasonably approved the subdivision despite its refusal to consider the adequacy of the HCH's proposed water supply in light of record evidence detailing both a lack of legal water availability and probable offsite water depletion impacts. Taken as a whole the record demonstrates that the County and DNRC committed reversible legal errors and made decisions that were arbitrary and capricious.

ARGUMENT

I. THE COUNTY'S FAILURE TO ENSURE AN ADEQUATE EA AND TO CONSIDER AVAILABLE GROUNDWATER INFORMATION WAS UNLAWFUL, AND ARBITRARY AND CAPRICIOUS

Defendant Broadwater County and Defendant-Intervenor seek to characterize this case as being about sweeping policy change and novel standards of review beyond the ambit of this Court, when in reality Plaintiffs' claims have always been grounded in clear requirements of the MSPA, the record at-hand, and protecting the rights of neighboring landowners and the public. As detailed in their opening brief, Plaintiffs' first challenge the sufficiency, under § 76-3-603, MCA, of the HCH EA, particularly with regard to the requirement that an application be accompanied by "available groundwater information" and a summary of "probable impacts" based upon § 76-3-608, MCA

(Section 608) criteria. The EA did not include or provide any meaningful or substantive analysis of available groundwater information respective to off-site impacts.

The County argues that Plaintiffs' proffered list of the type of data reasonably required as being within "available groundwater information" (§ 76-3-603 (1)(a)(1), MCA) and "summaries of probable impacts" (§ 76-3-608 (1)(a)(ii), MCA) are not applicable and beyond the scope of the MSPA without reconciling the statutory language and caselaw from which such elements were drawn. In *Citizens for Responsible Development,* 2009 MT 182, ¶ 21, 351 Mont. 40, 208 P.3d 876, the Supreme Court found that a bare-bones subdivision EA that failed to contain summaries of probable impacts, including but not limited to "the location of the aquifer, the current health of the water bodies, or whether the aquifer and [adjoining surface water] interact" violated the procedural requirements of the MSPA. As in *Citizens*, here the developer submitted a substantial amount of information about its plans for development, but the issue remains whether "a summary of the probable impacts of the proposed subdivision" upon Section 608 criteria was provided. Similarly, in *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 56-57, 356 Mont. 41, 230 P.3d 808 the Supreme Court found a county preliminary plat approval unlawful for failure to provide "available groundwater information" as required under § 76-3-603 (1)(a), MCA, and arbitrary and capricious for failure to consider impacts to groundwater or surface water based on pollution created by the subdivision.

The record demonstrates the EA here did not identify, and in many cases therefore failed to summarize, "probable impacts" on Section 608 criteria. AR 3987 There is no discussion of probable offsite dewatering impacts on Confederate Creek, or nearby residential or agricultural wells based on the subdivision's proposed use of 50 ac/ft/yr of proposed exempt groundwater. AR 3972-78, 3994-5 There is also no discussion of the probable impacts on rainbow trout or trout habitat in Confederate Creek, which is already seasonally dewatered, or how the impact of a new sprawling subdivision would inflict on known big game migration corridor and bedding/feeding/breeding grounds. AR 3995-6, 4233, 4080, 4312 There is no discussion or evaluation of probable impacts of dozens of new wastewater systems on downgradient receiving waters, despite those waters' existing impairment (unhealthy) status for the same pollutants that would be discharged AR 4233-37; instead, there is lip service given to forthcoming but separate agency analyses under differing statutes. AR 3995-6, 4243. Similarly, the EA is silent with respect to how anticipated population growth from a new subdivision

in a sparsely populated, agricultural landscape would "strain existing services and further erode the ability to provide local services to all residents". *Citizens,* ¶ 22.

As the Supreme Court has noted, an inadequate subdivision EA that fails to provide this information or fails to provide it in a reasonably cohesive fashion, makes it difficult for the public to use the information, undermines the validity of latter County decision-making, and is unlawful. *Citizens,* ¶ 25. Here, the record reflects Broadwater County's HCH preliminary plat consideration was, like *Citizens*, an incoherent process due to the insufficiency of the EA. The HCH EA failed to identify required information and, even with ongoing supplementation, failed to identify or summarize several significant, probable impacts. Based upon the record, Plaintiffs have demonstrated that Broadwater County's decision-making was unlawful based on an inadequate EA, including but not limited to the failure to provide "available groundwater information" such as a publicly available DNRC report examining groundwater depletion in the region AR 3674, 4308, or adequate summaries of "probable impacts" upon Section 608 criteria. Under the precedent of *Citizens*, Broadwater County's preliminary plat approval was procedurally defective, therefore unlawful, and should be voided.

II. THE COUNTY'S PRELIMINARY PLAT APPROVAL DID NOT COMPLY WITH § 76-3-608, MCA AND IS NOT SUPPORTED BY THE RECORD

Defendant and Defendant-Intervenor next dispute Plaintiffs' claim that its decision-making failed to adequately evaluate water impacts. They argue that the County cannot require water information more stringent than that required for an agency. *See* Br. Co. Resp. Br. at 5. The County's argument is misplaced, as the issue at-hand does not concern the stringency of overlapping requirements from different statutes. The issue is the County's failure to apply the MSPA and assure the adequacy and completeness of the EA, including a failure to include all available groundwater information and accurate summaries of probable impacts.

No one disputes that a DNRC groundwater study took place near the proposed HCH subdivision, and that this study evaluated and identified offsite drawdown impacts on the local aquifer. AR 4308 The County's attempt to distinguish specifics of the nearby DNRC groundwater study are irrelevant as the appropriate MSPA inquiry is first, did the County ensure available groundwater information was gathered, including that raised by public comment. Here, they did not, despite the plain mandate of Section 603, the unambiguous purposes of the MSPA in ensuring an "adequate water supply", and record evidence of a closed water rights basin and ample public

concern of well dewatering and offsite impacts. *See* AR 4286-88, 4291 (public comment pinpointing failure evaluate offsite water impacts on Section 608 criteria)

Second, the inquiry becomes whether the County evaluated the specific, documentable, and clearly defined impacts that the proposed subdivision water use could have based on Section 608 criteria, and whether its conclusions were based on - or contrary to - the record. If its findings were contrary to the record, at minimum the County needed to reasonably explain why it considered certain evidence more convincing than others to support its decision-making. Here, the County not only failed to reasonably explain why it could approve a subdivision reliant on five aggregated exempt wells contrary to the plain requirements of the MWUA (an issue brought up repeatedly by Plaintiffs, agency officials, and the public (AR 3060)), but also failed to explain how the required mitigation measures reasonably reconcile the record evidence of probable, and significant, off-site impacts to neighboring groundwater wells, agricultural water user facilities reliant on local groundwater, and adjoining or downgradient surface waters. *See* AR 4296, 4300, 4305, 4312 (public and agency official comments identifying failures of EA scope and analysis, especially as regards off-site water impacts)

The County attempts to explain, after the fact, why the DNRC groundwater study was not applicable and could be disregarded, *see* Br. Co. Resp. Br. at 8, but the record reflects such an evaluation was never made by the County as part of its decision-making prior to approval of the HCH preliminary plat. This argument by the County is also an unlawful *post-hac* rationalization. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 65-66, 306 Mont. 207, 255 P.3d 80 ("Review of the governing body's action is generally limited to the record before the governing body at the time of the decision."). The same is true of the County's reference (*see* Br. Co. Resp. Br. at 8) to DEQ correspondence regarding evaluation of groundwater pursuant to its separate sanitation duties; the contents of that correspondence constitutes evidence plainly outside the record. In any event, the correspondence illustrates that DEQ examines the availability of water for on-site purposes but does not evaluate potential impacts off-site on Section 608 criteria.

The County also argues it did not need to evaluate such impacts based on its interpretation of the MSPA as only requiring the consideration of water data identified under MCA § 76-3-622. That section of the MSPA, however, concerns evaluation of <u>on-site</u> water and sanitation information respective to evaluating the suitability of "new water supply and wastewater facilities" for the proposed site. *See* MCA § 76-3-622(1)(a). In turn, Section 622 criteria do not replace the corollary

duty to evaluate the "specific, documentable, and clearly defined" impacts of the subdivision under Section 608. *See* § 76-3-608(3)(a), MCA. The County's myopic interpretation of the purposes and utilities of these different sections of the MSPA reflects a flawed legal approach that, ultimately, influenced the legal error of both failing to assure an adequate EA and summary of probable impacts, and a stilted analysis of Section 608 criteria. In particular, the County gives short shrift to probable and potentially significant off-site groundwater depletion and water pollution impacts that are cognizable vis-a-vis "agricultural water user facilities," "natural environment," and "wildlife and wildlife habitat" criteria of Section 608.

The County's Response Brief offers the novel assertion that the totality of its preliminary plat decision-making process constitutes evidence that it lawfully, and reasonably, complied with Section 608 and the obligation to examine "specific, documentable, and clearly defined" impacts. The record, however, does not support the County's assertion, nor do the exhaustive record excerpts included in its briefing. Tellingly, the County does not cite any caselaw in support of its argument that a *lengthy* review process constitutes either adequate analysis or lawful decision-making. As provided in Plaintiffs' opening brief, Broadwater County failed to adequately evaluate Section 608 criteria, and failed to explain why the record supported preliminary plat approval - despite identification of significant impacts and record evidence of the inability to mitigate those impacts - both contrary to its decision-making. Doing so was arbitrary, capricious, and unlawful.

Agricultural Impacts

In its Response, the County first argues that the significance of the HCH subdivision is minimal as compared to larger plats proposed elsewhere in the state. This assertion is a logical fallacy in that it misrepresents the unambiguous evaluative process required by law, which is the consideration of a subdivision and documentation of its specific, documentable, and clearly defined impacts, not its comparison to other subdivisions. For HCH, it is entirely relevant - and well documented in the record - that the subdivision is unprecedented in the type of land use within the region, and significant in terms of the incompatibility of documentable subdivision impacts off-site, particularly on neighboring agricultural land uses. Notably, the County asserts that it adequately considered agricultural impacts, but its consideration of impacts failed to identify - or evaluate - the agricultural traffic and livestock mortality issues raised by the public. AR 2472, 2473, 2474, 2479 (public comment, including from Plaintiffs' McDaniels, Plymales, and Dundases re: significant agricultural impacts).

The record also does not provide evidence that the County reconciled how its proposed mitigation measures would alleviate significant impacts on neighboring agricultural properties based upon ample concerns expressed in public comment. Ironically, the County makes the conclusory statement that it cannot deny a subdivision based on its non-conforming land use and significant effects without recognizing the primary take-away of *Hansen v. Granite Cnty*, 2010 MT 107, 356 Mont. 269, 232 P.3d 409. The salient point in *Hansen* was that a County *can* deny subdivisions that present irreconcilable, significant impacts. *See also* § 76-3-608(5), MCA. The record and public comment demonstrate the belief of nearly every entity, except the Broadwater County Commission, that the HCH subdivision should be denied based on a diversity of documentable, significant impacts. The County's failure to reasonably reconcile a record divorced from its findings and mitigation measures represents arbitrary and capricious decision-making.

Agricultural Water User Facilities Impacts

In this section the County and Intervenor's primary defense is that Plaintiffs' diction choices render its claims specious or incorrect. The root issue of this Section 608 criterion, however, is that the County could not lawfully evaluate the "specific, documentable, and clearly defined" impact of HCH on agricultural water user facilities without considering its consumptive use of water. Logically, if a subdivision's aggregate use of 50 ac/ft/yr of groundwater from an aquifer dewaters neighboring wells that supply stock water, or irrigation water, there would be a significant impact on said agricultural water user facilities. The EA's analysis focused solely on actual water infrastructure on the subdivision site, and the County's evaluation likewise only considered on-site water use and the lack of any existing water user infrastructure. Those narrow evaluations wholly fail to consider probable, and likely, off-site impacts to water availability vis-a-vis groundwater dewatering, impacts that would present by rendering nearby agricultural water user facilities inoperable due to dewatered wells.

While the County failed to evaluate water availability impacts as it relates to agricultural water user facilities, ironically, the County's growth policy does so by recognizing the purpose of designing development so as "to avoid diminishing...*adjacent* agricultural water usage." *See* Co's Reply Br. at 12; AR 58. Clearly, the concepts of proposed water use, water availability, and off-site water depletion, is implicit in a reasonable evaluation of impacts to agricultural water user facilities. The record reflects the County failed to meaningfully evaluate such off-site impacts. Moreover, despite its vigorous protestation in briefing, the record reflects the County took and categorized

ample public comment concerning potential dewatering impacts of the subdivision off-site as impacts to agricultural water user facilities. AR 3060; 2469-2490 (Oct 2021 public comments); 2642-46 (Nov 1, 2021, Comm. Mtg); 2794-97 (Nov. 15, 2021, comments & Co Commission remand to Planning Bd); 2951-4 (Jan 19, 2022, comments, and remand to Planning Bd with new information). The County's failure to evaluate probable off-site impacts to agricultural water user facilities based on documentable groundwater dewatering, particularly when raised in comments by the public, FWP, and the Conservation District, and shown in the DNRC groundwater study, was arbitrary and capricious.

Natural Environment Impacts

The County's linguistic gymnastics do not change the record before this Court, which shows the County failed to adequately evaluate off-site natural environment impacts. While the County alleges that DEQ does consider off-site water pollution or depletion impacts, such argument is a red herring as Plaintiffs' primary allegation is that the MSPA requires *the County* itself to evaluate Section 608 impacts at the preliminary plat stage, not to wholesale punt such duties to other entities, at future times. The time and place for consideration of impacts to natural resources is the preliminary plat stage. MCA § 76-3-608. Furthermore, as noted *supra* this Court should not and cannot consider the extra-record evidence of resource agency communications provided by the County in its briefing that are not part of the record.

The County misrepresents Plaintiffs' arguments as regards probable off-site water pollution impacts. The issue is not, as the County asserts, whether the County has authority to impose sanitary restrictions, or restrictions more or less stringent than DEQ regulations. Neither is this case about whether the County can enforce additional, speculative conditions on various water resources. Rather, Plaintiffs have clearly and consistently alleged that the County's decision-making is flawed based on its stunted consideration of off-site water resource impacts, including a failure to consider the "specific, documentable, and clearly defined impact" of adding dozens of new septic systems to nearby Confederate Creek or Canyon Ferry, including the potential to exacerbate existing pollution challenges in those surface waters. *See* Pls.' Op. Br. at 11. Likewise, Plaintiffs have consistently identified the County's failure to evaluate the off-site dewatering impacts on Confederate Creek or adjacent private wells as fatal flaws in its natural environment evaluation. *See* Pls. Op. Br. at 12.

The County simply has no rational explanation as to why the record is silent on its stilted evaluation of those criteria, which were amply identified by public comment, except to argue that each governmental agency, and local government, is an independent silo of authority, all of which ostensibly operate separate from each other. Of course, this is not the programmatic effect of the MSPA, the Sanitation Act, the WUA, or the WQA in considering new subdivisions. Rather, the starting point for subdivision decision-making is a coherent and complete assessment of probable impacts in an EA, and then a probing, evaluative process analyzing those impacts to determine whether a project can in-fact be approved by local government. After that Go/No Go inflection point, related duties of state resource agencies come into play. Here, the record reflects an unreasonable County conclusion, divorced from concerns in the record of documentable and probable off-site water resource impacts, that any impact can be mitigated by some future analysis before the final plat stage, by separate review of impacts, by a different government authority. Such a process stands in opposition to the MSPA's plain requirement for the County - not other entities - to meaningfully identify and evaluate impacts at the preliminary plat stage under §76-3-608, MCA.

Wildlife and Wildlife Habitat Impacts

The County failed to consider, or provide a reasonable explanation for disregarding, ample public comment and expert agency comment identifying significant impacts on wildlife and wildlife habitat. AR 3060; 2469-2490; 2642. Regarding wildlife and wildlife habitat, the EA was incomplete and contrary to record evidence, itself a procedural violation. AR 3994-5, 4233-37. Second, the County's findings of negligible impact represent conclusory statements contrary to the record, the heart of arbitrary and capricious decision-making. The County Findings state that "impacts on wildlife habitat will be negligible based upon the surrounding land uses", yet fail to reconcile record evidence and public comment, including FWP letters (AR 40820-3), stating widespread, existing use of surrounding lands for wildlife and habitat. AR 243; 2642-50; 4236; 3667-8. Indeed, contrary to the County's assertions, nearly every piece of gathered evidence concerning wildlife and wildlife impacts, indicated HCH would negatively affect big game wildlife corridor, habitat, and, in particular, likely exacerbates already depleted low flow conditions in Confederate Creek, essential habitat for spawning rainbow trout. AR 4080; 4318, 4321. The record does not reflect a reasoned process whereby the County determined some information provided by the applicant in support of a "negligible impact" finding more

persuasive than public or expert agency comments to the contrary. Identifying an impact and proposing mitigation based on conclusory statements is unreasonable, random, and without basis in fact.

Furthermore, the allegation that the public and agencies will have opportunity to comment at each phase of development for HCH is without basis. The MSPA's preliminary plat stage is the place and time at which the statute requires the evaluative process of determining whether a subdivision can - or should - be authorized, based in large part of a meaningful evaluation of impacts to the surrounding environs. The efficacy of this process, however, is tied to the veracity and completeness of Section 603/608 analyses. Where, as here, the County failed to ensure an adequate EA was compiled and made decisions contrary to the record before it without reasonable explanation, it acts unlawfully, and its decision is arbitrary and capricious.

Public Health and Safety Impacts

As with its other arguments, the County states in conclusory fashion that the traffic issues are not significant and can be resolved with the proposed conditions. *See* Br. Co. Resp. Br. at 16-18. This argument, though, ignores the bulk of the issues raised in public comment and in Plaintiffs' opening brief.

First, the County claims that because there is no zoning, it need not consider the use of the two commercial lots. Even assuming that's true, though, the County's analysis in considering the impacts fails to consider the myriad of possibilities. As the County recognizes in its brief, the use of the property is not limited, but what that means is that the impacts to public health and safety could be insignificant or significant. The County fails to provide any analysis in its decision regarding the potential diversity of impacts. As such, it cannot be said that the County evaluated the specific, documentable, and clearly defined impacts.

Next, the County's decision, and its brief, fail to address the County's deviation from the Growth Policy. As noted, the Growth policy has an expected 8 vehicle trips per day per lot, but the applicant only used 3.2 trips per day. The County's decision fails to evaluate or explain why this difference is logical. This is particularly problematic given the dangerous situation that already exists on the road. One commentator described driving the existing roads as a "death-defying experience." AR 2649.

Perhaps more troubling is the County's failure to evaluate access and maintenance of Lower Duck Creek Road, which is owned by the Bureau of Reclamation (BoR). Numerous persons

commented that BoR does not plow the road in winter thereby causing it to close. The Sherriff and Public Works Director each provided specific concerns to the Commission regarding already dangerous driving conditions, particularly during winter conditions. AR 2622, 2628. Despite local officials' universal concern about how new suburban development pressure, including exponential more road pressure from unknown prospective commercial lot uses, the County's findings and decision has no analysis or evaluation of these potential impacts. Proposed mitigation measures – such as a traffic study and removing blind corners – do not address the common road closures during winter, events that significantly complicate emergency personnel access given the two sole access points to HCH. As such, the County has no knowledge of these or other public health or safety impacts.

Because the County failed to evaluate the specific, documentable, and clearly defined impacts to public health and safety related to traffic, its decision was arbitrary and capricious.

III. The County failed to determine if an adequate water supply exists.

The County first claims that "[t]he Subdivision is not conditioned on the use of exempt wells." Br. Co. Resp. Br. at 18. This is patently false, misleading, and disingenuous. The county was only provided with one potential source of water from the subdivision, and only analyzed one source of water for the subdivision - groundwater via exempt wells. AR 3012, 3987, 3994-5, 4236-7. Although it was not a condition imposed by the county, adequate water supply is a required analysis for the issuance of a preliminary plat.

The County additionally claims it has no jurisdiction under the MWUA, and no responsibility to determine whether water is or can be made “legally available” for the proposed subdivision. Br. Co. Resp. Br. at 18. The County's arguments are contrary to the plain language of the MSPA and ignore the fact that the applicant provided it the proposed source of water for the subdivision - several exempt wells. The County was required to evaluate the proposed HCH subdivision's impacts under Section 608 criteria, necessarily including what impacts may arise from the proposed use of groundwater and information provided under Section 622. In turn, to meaningfully understand and evaluate impacts, a county must make preliminary determinations, including whether the Applicant has the ability (both legally and physically) to use wells to divert groundwater in the first place.

It is undisputed that the water basin at issue in this application is the subject of a “legislative closure.” More specifically, soon after the Water Use Act was passed, it became clear that there were significantly more adjudicated and legitimate non-adjudicated claims to water than there was

available water. *Montana Trout Unlimited v. Montana Dept. of Nat. Resources and Conservation*, 2006 MT 72, ¶ 9, 331 Mont. 483, 133 P.3d 224. The legislature responded to this crisis by enacting a moratorium on new applications in the over-appropriated basins, including the Upper Missouri River basin, encompassing the drainage area of the Missouri River and its tributaries above Morony Dam. Sections 85–2–342 and –343, MCA. The relevant Basin Closure Law provides that DNRC may not "process or grant an application for a permit to appropriate water … within the upper Missouri River basin until the final decrees have been issued…." Section 85–2–343, MCA.

There are, however, several limited exceptions to the general ban on DNRC processing or granting applications. New groundwater applications that meet rigorous hydrologic study and aquifer mitigation plan requirements represent one of the exceptions. Section 85–2–343(2)(a), MCA. The only other relevant exception - and the one sought to be utilized by the applicant in the case at hand - is "(c) an application for a permit to appropriate water for: (i) domestic use … pursuant to 85-2-306. § 85-2-343, MCA.

Even though the county is *not* the decision-maker with respect to permit applications submitted via the MWUA, the County *is* required to understand and apply the plain language of the MWUA in the performance of its obligations under the MSPA. The plain language of the MSPA requires evaluation of "adequate water availability". *See* §§ 76-3-102(4); 76-3-622(1)(e). Notably, § 76-3-622(1)(e), MCA, does not include any limiting terms such as "physical" or "legal". Nor is the term "adequate water availability" defined. Thus, the County's interpretation limiting water availability to only physical availability adds language to the statute so that it would read "adequate physical water availability" instead of simply "adequate water availability." Because the term is not defined, the Court should look to its common meaning. *State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806. Meriam Webster defines 'available' to mean "present or ready for immediate use, accessible, or obtainable." https://www.merriam-webster.com/dictionary/available (last accessed August 31, 2023).

Based on its hyper-limited definition, the County transformed its obligations to evaluate the developer's proposed water use from one of substance, to a hollow shell. This Court should not adopt such a myopic interpretation of the MSPA's review process, particularly because doing so evades meaningful consideration of the proposed water supply's "adequacy" and undermines consideration of documentable impacts on Section 608 criteria off-site, outcomes contrary to the statute's unambiguous framework. Montana courts will not interpret a statute beyond its plain language if the

language is clear and unambiguous. *Mont. Sports Shooting Ass'n. v. State,* 2008 Mont. 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003; *State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288.

On the flip side of this coin, the Basin Closure Law (which includes all of Broadwater County) makes clear that the only way a subdivision applicant in Broadwater County can get water for a project is if they meet the strict closed-basin water permitting requirements, or through the limited application of the exemption described in § 85-2-306, MCA. The County should be aware of both the rigors of permitting and the limitation of the available exemption. The County should know that no application for groundwater under the exemption can exceed 10 AF. This requisite knowledge is echoed in DEQ's administrative regulations on Subdivision Application and Review which states that if the project will use groundwater wells, the county must send it a determination that the water supply "is either exempt from water rates permitting requirements or has a water right …" ARM 17.36.103.

In this respect, the County argues that it can wholly rely on the judgment and analysis of DNRC in its "pre-determination letters" that there is "adequate water availability" for the project. However, the County was not allowed to rely on DNRC's analysis because it was an erroneous interpretation of the MWUA. ("Reliance which is based on an erroneous interpretation of the law is not reasonable reliance."). *La Can. Flintridge Dev. Corp. v. Dep't of Transp.*, 166 Cal. App. 3d 206, 222 (1985).

Even absent the significant history of litigation which has surrounded this topic, the current iteration of statues and rules which govern this topic are crystal clear.

> 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, <u>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</u>

§ 85-2-306, MCA

> 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)

Read together, these statements of Montana law are unambiguous. However, 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,

> 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**.

Although it is wholly unclear *why* the agency has done an about-face on its "guidance", it should have been obvious to the County that the HCH application contained a proposed water supply well beyond the limits of Montana law. This is the exact reason that county staff have access to a legal department through the County Attorney's office. When a Montana agency makes an egregiously erroneous decision relevant to MSPA decision-making, county planning and their attorneys have the obligation to reject, not rely, on such information. Moreover, pursuant to the MSPA it is the obligation of local government to review the independent water availability criteria for all subdivisions, including an analysis of whether adequate water supply is available by way of an existing water right, a permit, or an exemption.

Here, it is undisputed that DNRC issued HCH letters, each one pretending that each phase of the subdivision would occur in a legal and physical vacuum – i.e., that each "phase" of the subdivision project is somehow a unique and independent "combined appropriation." AR 4236-7, 4243. More specifically, each one of these letters describes each phase of the subdivision as entitled to 10 acre-feet of water, thereby meeting the project's proposed need. Thus, the subdivision application - as one project, being proposed to the county at one time - reflected a request to use aggregated "exempt" volumes of water, contrary to unambiguous status of Montana law. In order to grant this application, the County had to turn a blind eye to Montana's clear prohibition on the volume of groundwater use proposed, thereby failing to - itself - evaluate the adequacy of the proposed water source in the context of its Section 603/608/622 duties. Even worse, when this information was presented to the Commission, the County ignored it, omitting mention, or evaluation of the "availability" of the water under Montana's comprehensive statutory scheme governing the same.

Fundamentally, the MSPA mandate that applicants prove "adequate water availability" must necessarily encompass both physical and legal availability. Interpreting this statute otherwise renders an absurd result: the County's water adequacy analysis is meaningless. "Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Gannett Satellite Info. Network, Inc. v. State, Dep't of Revenue*, 2009 MT 5, ¶ 19, 348 Mont. 333, 338, 201 P.3d 132, 136.

As a first step, the County should have looked at whether water was physically available in an amount needed to sustain the project. If the answer to that question is yes, then the County must determine if that water is available as a matter of law, because if not, then a subdivision applicant cannot - in any meaningful way - meet its threshold evidentiary burden. Similarly, the County was bound to assess how use of such water could result in specific, documentable, and clearly defined impacts on Section 608 criteria. These are the inquiries and evaluations incumbent on local government under the MSPA. These are also the evaluations the County failed to perform. And these are the missing evaluations and findings persistently identified in public comments in the administrative record for HCH.

The importance of legal and physical water availability is not lost on the legislature, who made such clear in the MWUA when it only allows issuance of a water right permit when water is both physically and legally available. § 85-2-311, MCA[1] While these analyses then do have overlap between the MSPA and MWUA, they are in response to different requests from the state: one requesting a right to divide and develop land, and the other requesting the right to divert water. Both statutory systems require analysis, albeit in different ways. While the MWUA requires proving legal availability in closed basins by way of the results of an aquifer test, hydrogeologic studies, and a mitigation plan, the MSPA requires that counties identify whether the record reflects a water right has been granted under those requirements, or whether an applicant has legal access to a water source in some other way – i.e., through municipal connection, or a groundwater system that meets legal exemption from permitting.

Importantly, other western prior appropriation law states have applied this common-sense interpretation of "adequate" water supply to respective applications of land use law. *See Silver v.*

[1] Section 85-2-311, MCA, also demonstrates that when the legislature desires to distinguish between legal and physical availability it can do so. Yet it chose not to make this distinction in § 76-3-622, MCA, and this Court should not do so either.

Pueblo Del Sol Water Co., 423 P.3d 348, 353 (Ariz. 2018) (the term "adequate water supply" encompasses both physical and legal availability.); *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). These states offer instructive and persuasive examples of how Montana courts should interpret our analogous laws in the face of pervasive water scarcity challenges and unprecedented development pressure so that we can meet Montana's water policy goals. *See* Mont. Code Ann. § 85-1-101.

In sum, Montana law requires the County to evaluate proposed water supply respective to on-site and off-site impacts, and determine if an adequate water supply exists. Here, the County failed to evaluate whether proposed water is legally available for the subdivision on-site, or how that proposed use could have documentable impacts off-site. The County's failure to do so renders its decision arbitrary, capricious and/or unlawful.

Plaintiffs will file a separate, forthcoming Reply Brief responsive to Defendant DNRC's Response as provided by the M.R.C.P.

Dated this 1st day of September 2023.

Robert Farris-Olsen
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September 2023, a true copy of the foregoing document was served on the following persons by the following means:

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

Attorneys for Broadwater County

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

Tara M. DePuy
ATTORNEY AT LAW, PLLC
P.O. Box 222
Livingston, MT 59047
attorney@riverworks.net

Attorneys for DNRC

Brian Barmblett / Molly Kelly
DNRC
P.O. Box 201601
Helena, MT 59620-1601
bbramblett@mt.gov
molly.kelly2@mt.gov

Attorneys for 71 Ranch, LP, Intervenor

Vuko J. Voyich
ANDERSON & VOYICH
Attorneys at Law, PLLC
104 East Callender, Suites 2 & 3
P.O. Box 1409
Livingston, MT 59047-1409
office@andersonandvoyich.com

Collen A. Coyle
COYLE LAW FIRM, PLLC
141 Discovery Drive, Suite 215
P.O. Box 1326
Bozeman, MT 59771-1326
coylelawpllc@gmail.com

By 
Casey Lynne