IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0596

JEFF GOTTLOB, ELAINE MITCHELL, JAMES CHILDRESS, and all other similarly situated,

Plaintiffs and Appellees,

v.

MICHAEL DesROSIER, RON RIDES AT THE DOOR, TOM McKAY, GALEN GALBREATH, and GLACIER COUNTY,

Defendants and Appellants.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana Ninth Judicial District Court, Glacier County
The Honorable Gregory G. Pinski, Presiding

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I. STATEMENT OF ISSUE FOR REVIEW

Did the District Court err as a matter of law in denying Glacier County's motion to dismiss this case for lack of subject matter jurisdiction?

II. STATEMENT OF THE CASE

This is the third time Glacier County ("County") has appeared in this Court in its ongoing dispute with certain County residents ("Taxpayers") who have paid property taxes under protest for various tax periods. Taxpayers allege that County violated the Montana Single Audit Act, Mont. Code Ann. §2-7-501 *et seq.* ("Single Audit Act"), and the Government Budget Act, Mont. Code Ann. §7-6-4001 *et seq.* ("Budget Act"), and these alleged violations resulted in illegal assessment of property taxes. Taxpayers also allege violation of Mont. Code Ann. §15-10-420, which provides the formula for local governments to calculate tax levies.

County filed a motion to dismiss the *Fourth Amended Complaint* as against County and the named County officials ("Individual Defendants" and, with County, the "County Defendants") in the current action for lack of subject matter jurisdiction ("Motion to Dismiss"). Document ("Doc.") 105. County argued that the District Court did not have subject matter jurisdiction of the case because the statutes on which Taxpayers rely do not expressly provide for enforcement actions

by private citizens, and that no private right of action under these statutes may be implied under the four-part test this Court has articulated and applied in several cases, including *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, 383 Mont. 346, 371 P.3d 446.

The District Court issued its Order Denying Glacier County's Motion to Dismiss Claims Against All County Defendants Pursuant to Rule 12(b)(1) ("Order") filed September 12, 2019. Doc. 130. The District Court ruled that it was not necessary to undertake the *Ibsen* analysis because Mont. Code Ann. §15-1-406 ("§15-1-406"), which allows an "aggrieved taxpayer" to bring a declaratory judgment action, expressly allows Taxpayers to pursue their claims. The District Court also found that provisions of legislation enacted in 2019, which allows taxpayers to bring actions under the Single Audit Act and Budget Act (collectively, the "Acts") following exhaustion of administrative review, supported Taxpayers' right to pursue their claims under these laws.

County filed a timely Notice of Appeal.[1]

This Court's decisions in the parties' prior appearances are pertinent to some of the legal issues in this appeal. Taxpayers filed their first tax protest action in

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[1] The *Fourth Amended Complaint* also alleges that the State of Montana ("State") has failed to address County's violations of state law to Taxpayers' satisfaction, and that the Single Audit Act is unconstitutional. Taxpayers' claims against the State were not subjects of the Motion to Dismiss and are not subjects of this appeal.

2015 ("2015 Action"), based primarily on alleged violations of the Acts revealed in a March 2015 audit of County's finances for fiscal years 2013 and 2014 ("2013-14 Audit"). They also sued the State for failure to enforce provisions of the Single Audit Act against County. The District Court dismissed the 2015 Action for lack of standing. This Court affirmed the District Court in *Mitchell v. Glacier County*, 2017 MT 258, 389 Mont. 122, 406 P.3d 427.[2]

While the *Mitchell* appeal was pending, Taxpayers filed the current action, alleging that County violated tax protest statutes when it liquidated the fund in which protest payments from the 2015 Action had been deposited. After the *Mitchell* decision, Taxpayers amended the Complaint in the current action a number of times, to include and augment their claims from the 2015 Action. The *Fourth Amended Complaint* is the last iteration.

The parties' second appearance before this Court concerned the District Court's issuance of a Writ of Mandate, which required County to accept property tax payments made under protest for the first half of fiscal year 2018 and notify all County taxpayers of their "right" to protest their taxes. Doc. 81. County petitioned for a writ of supervisory control, which this Court granted in *DesRosier*

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[2] As this Court noted in *Mitchell*, the District Court had ruled as well "that the legal provisions under which Taxpayers alleged injury—Article VIII, Section 12, of the Montana Constitution and the [Single Audit Act], *did not establish private rights* and did not grant Taxpayers the right to judicial relief." *Mitchell*, ¶45 (emphasis added).

v. Montana Ninth Judicial Dist. Court, No. OP 18-0721, 2019 WL 852178, at *1 (Mont. Feb. 19, 2019).

In addition to invalidating the District Court's Writ of Mandate, the *DesRosier* Court accepted County's argument that Taxpayers are not entitled to pay their entire tax bill under protest, as they had been doing since their protest began. This Court ruled that, "[a]bsent identification of the portion of the taxes they claim is unlawful, [Taxpayers] have no right under the protest statutes to protest the entire amount of their tax payments and thereby compel County to deposit all property tax revenue in a special protest fund" like the one liquidated during the pendency of *Mitchell*. *Id.* at *3.

III. STATEMENT OF FACTS

This case has never progressed to a hearing on the merits. The facts stated here are as alleged in the *Fourth Amended Complaint* ("4th Am. Compl."). Taxpayers filed their fourth amendment, in part, to address this Court's decision in *DesRosier* and "reduc[e] the amount of taxes which Plaintiffs protested in their prior pleadings." 4th Am. Compl., ¶¶11-12. They allege that "[a]t least since fiscal year 2012/2014 [sic], [County] has made expenditures and disbursements in excess of the amount of taxes it has authority to levy," in violation of §15-10-420. *Id.*, ¶15. Taxpayers "protest the difference between what Glacier County is

authorized to levy under §15-10-420, MCA and what Glacier County actually spends in excess of that authorized by §15-10-420, MCA." 4th Am. Compl., ¶16. The *Fourth Amended Complaint* also inserts alleged violation of this statute into a number of its prior allegations of violation of state laws by County Defendants.

As in their prior Complaints, Taxpayers assert that they have paid taxes "based on budgets that have not been lawfully created or adopted as prescribed by" Mont. Code Ann. §§7-6-4020, 4021, 4024, 4030, 4034, 4033, and 4041. 4th Am. Compl., ¶17(a). They allege that the 2013-14 Audit reveals that County "maintains cash reserves in excess of those prescribed by §§7-6-4034(2)(a) and (b)," and therefore "levies property taxes in excess of the limits authorized by §§15-10-420, 7-6-4034(2)(a) and (b), and 7-6-4034(1)." 4th Am. Compl., ¶17(b). They further allege that the 2013-14 Audit shows numerous violations of "budgeting law, fiscal auditing laws, governmental accounting laws, provisions for levying taxes, and laws prescribing the duties of county treasurers and clerks," citing Mont. Code Ann. §§7-6-4005, 7-6-4033 (deficit fund balance); §§7-6-609, 2-7-504, A.R.M. 2.4.401 and 411 (accounting standards); OMB Circular A-133 (federal funds); Governmental Accounting Standards Board Standard 31 (overstating cash and investments); Mont. Code Ann. §§7-6-4005, 7-6-4003 (budgetary laws); §§7-6-4005, 7-6-4033 (negative cash balances); §7-6-4034(2)

(exceeding cash reserve limit); and §7-6-207(1) (investments). 4th Am. Compl., ¶34.

The *Fourth Amended Complaint* alleges parallel claims based on County's alleged violations of the Acts revealed in an audit for fiscal years 2015 and 2016 (the "2015-16 Audit"). Taxpayers allege that County levies taxes in excess of limits set by Mont. Code Ann. §§15-10-420, 7-6-4034(2)(a) and (b), and 7-6-4034(1); has made expenditures in violation of §§15-10-420, 7-6-4021, 7-6-4030, 7-6-4033, 7-6-4034 , and 7-6-4035; allows negative cash balances in violation of §§7-6-4005(1) and 7-6-4033; failed to prepare and operate within a balanced budget, in violation of §7-6-4030(2); and failed to approve a final budget in violation of §7-6-4034(1). 4th Am. Compl., ¶¶17(c) and 35.

Taxpayers also claim that the Individual Defendants – County Commissioners and a past and current County Treasurer – have made disbursements or incurred obligations in violation of the budgets that were lawfully or unlawfully established, have approved negative cash balance budgets that exceed County's budget authority, are personally liable under §§7-6-4005, 4033, and 7-7-2101, and have "failed to acknowledge their personal responsibility for the negative cash balances." 4th Am. Compl., ¶¶36, 37. They charge that

County treasurers have failed to submit monthly cash reports and to "operate within their budgets." *Id.*, ¶38.

On the basis of these allegations, and other allegations scattered among the nine counts of the *Fourth Amended Complaint*, Taxpayers seek various remedies, including declaratory relief under §§15-1-406(1)(b), which applies specifically to taxation, and §27-8-101, Montana's Uniform Declaratory Judgment Act. They also request refund of "unlawfully or illegally imposed" property taxes. 4th Am. Compl., ¶68.

Count I is based on liquidation of the *Mitchell* protest fund while the appeal was pending. Taxpayers allege that liquidation violated Mont. Code Ann. §15-1-402, which governs deposit and retention of protest funds. Taxpayers also allege that liquidation of the fund violated their right to know and due process rights under the Montana Constitution. 4th Am. Compl., ¶¶53-56. The District Court already has granted partial summary judgment on Taxpayers' claim that liquidation violated this statute. Doc. 33.

Taxpayers also allege in Count 1 that the Individual Defendants are personally liable for liquidation of the protest fund. 4th Am. Compl., ¶63. Count 2 and Count 3 similarly seek to impose personal liability on the Individual Defendants for their alleged disbursements in violation of the Acts and their

fiduciary duties to the public respecting public funds. *Id.*, ¶¶63, 67, 75. Counts 1, 2, and 4 seek refund of protested taxes pursuant to Mont. Code Ann. §15-1-408. *Id.*, ¶¶64, 68, 79-80.

Count 5 alleges that the State has failed to enforce the Single Audit Act. Although it appears that Taxpayers' claims against the State, in whole or in part, violate the law of the case as ruled in *Mitchell*, County speaks for itself in this brief.

Count 6 requests class certification. 4th Am. Compl., ¶¶96-101.[3] Count 7 requests that the Court "treat this matter as a common fund for the purposes of assessing fees and costs." Prayer for Relief ("Prayer"), 14. Count 9 also seeks fees and costs, under the "private attorney general" doctrine. Prayer, 17.

Count 8, labeled "right to participate and right to know," alleges that County's liquidation of the protest fund from the 2015 Action and its failure "to account for public funds" and "properly budget the public fisc" violated Taxpayers' rights under the Budget Act. 4th Am. Compl., ¶¶105-107. Taxpayers seek declaratory relief and ask the District Court to "invalidate all [County] decisions that were made in violation of" these rights. Prayer, 15-16.

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[3] The District Court issued an order certifying a class under the first Amended Complaint. Doc. 46.

The Prayers for Relief also request that the Court appoint a financial receiver and a forensic auditor.[4] Prayer, 18-19.

Although this Court noted in *Mitchell* that Taxpayers "implicitly" acknowledged that that neither of the Acts "contains any express provision granting private rights of action to individuals in Taxpayers' position," the Court did not reach the question whether a private right of action could be implied, because of its decision that Plaintiffs had not established standing. *Mitchell*, ¶40.

In *DesRosier*, County "urge[d] the Court to declare that Taxpayers have no private right of action to maintain the underlying suit," but the Court "decline[d] to wade into the substantive challenges raised in Taxpayers' Second Amended Complaint or the County's defenses to their claims," expressing "no opinion on any of the matters at issue" other than the petition for writ of supervisory control. *DesRosier*, *2, *3.

The Motion to Dismiss placed the private right of action question squarely before the District Court and, now, this Court.

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[4] Taxpayers filed a Motion to Appoint a Financial Receiver and a Forensic Auditor for Glacier County ("Motion"), which the Court granted in part, requesting Taxpayers to submit an order for appointment of a receiver (but not a forensic auditor). Doc. 89; Doc. 134. No final order has issued. County intends to appeal the final order.

IV. STANDARD OF REVIEW

A district court's ruling on a motion to dismiss a claim for lack of subject matter jurisdiction presents a question of law that this Court reviews de novo, for correctness. *Comm'r of Political Practices for State ex rel. Motl v. Bannan*, 2015 MT 220, ¶7, 380 Mont. 194, 354 P.3d 601 (citation omitted); *Missoula City Bd. of Adjustment*, 2007 MT 299, ¶9, 340 Mont. 56, 172 P.3d 1232 (citation omitted). Denial of such a motion "is reviewable prior to final judgment," pursuant to M.R.App.P. 6(3)(c). *Missoula City Bd. of Adjustment*, ¶9. "The inquiry is whether the complaint states facts that, if true, would grant the district court subject matter jurisdiction." *Comm'r of Political Practices*, ¶7 (citations and internal quotation marks omitted).

V. SUMMARY OF ARGUMENT

The District Court's reliance on §15-1-406 as authority for Taxpayers to pursue their claims against County is misplaced. The statute allows an "aggrieved taxpayer" to obtain judgment declaring that "a tax authorized by the state or one of its subdivisions was illegally or unlawfully imposed or exceeded the taxing authority of the entity imposing the tax." The *Fourth Amended Complaint* far exceeds the statute's scope. Its allegations and prayers for relief request that the District Court enforce the cited provisions of the Acts and §15-10-420 against

County and determine the amount of property taxes County Defendants should have imposed absent the alleged violations.

The Acts are regulated by the Department of Administration ("Department"). At the time this case was filed, the Legislature did not contemplate that Montana courts should enforce these laws at the behest of private citizens. Although the Legislature enacted legislation in 2019 that expressly provides for private right of action under the Acts, subject to exhaustion of administrative remedies, see SB0302, 66th Leg. ("SB302"), the new law does not apply to this action. Nor does it authorize courts to determine the amount of property taxes a local government entity should have levied, or to "invalidate" past actions of local governments, as the District Court must do if this action proceeds. No express right of action has been created for enforcement of §15-10-420, which is regulated by the Department of Revenue ("DOR").

The District Court should have analyzed all of these laws under the rubric set out in *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, *infra*, which applies when a plaintiff claims "the right to bring a private action to enforce a statute that primarily was intended to be regulated by a governing agency." *Ibsen*, ¶31. "[A] party is not entitled to obtain private enforcement of a regulatory statute that is not intended by the legislature to be enforceable by private parties." *Ibsen*, ¶41.

Application of the *Ibsen* analysis establishes that a private right of action may not be pursued under the statutes on which Taxpayers rely.

County argued below that the Legislature's express provision of a private right of action in SB 302 demonstrates that it did not intend private enforcement of the Acts as they existed when this case was filed. The District Court found that SB 302 merely "provides an alternative means of challenging compliance with the [Acts]," in addition to §15-1-406. This conclusion reflects the court's misplaced reliance on the savings and retroactivity clauses of SB 302, and was incorrect as a matter of law.

Section 15-1-406 does not displace the *Ibsen* analysis. This Court implicitly recognized as much in *Mitchell*, in which Taxpayers also sought declaratory relief. Two recent cases (*Larson v. State by & through Stapleton, infra*, and *Strauser v. RJC, Inc., infra*), in which this Court addressed both the *Ibsen* analysis and requests for declaratory relief, confirm this principle. Nothing in the tax declaratory judgment statute authorizes the District Court to determine the amount of taxes Taxpayers would have paid but for the alleged violations by County Defendants.

The allegations that County Defendants breached fiduciary duties owed to Taxpayers or impaired their constitutional rights are wholly entwined with the

alleged violations of the Acts and Mont. Code Ann. §15-1-420 ("§15-1-420"). The District Court should have dismissed these claims, as well as procedural claims that also depend on the alleged violations or on implication of a private right of action under these laws.

The District Court does not have the power to adjudicate this controversy, because Taxpayers may not enforce the Acts and §15-10-420 in a private action. An aggrieved taxpayer's ability to obtain a declaratory judgment does not authorize judicial determination of the amount of property taxes a local government entity should have imposed. The District Court erred in denying County's Motion to Dismiss.

VI. ARGUMENT

A. TAXPAYERS INAPPROPRIATELY SEEK PRIVATE ENFORCEMENT OF THE ACTS AND SECTION 15-1-420, INCLUDING JUDICIAL DETERMINATION OF THEIR PROPERTY TAXES.

The District Court avoided the question whether Taxpayers could pursue a private right of action under the Acts or §15-1-420, concluding that §15-1-406 authorizes Taxpayers' action. This legal conclusion misapprehends the nature of Taxpayers' claims.

Section 15-1-406(1) provides that "[a]n aggrieved taxpayer may bring a declaratory judgment action in the district court seeking a declaration that . . . (b) a tax authorized by the state or one of its subdivisions was illegally or unlawfully imposed or exceeded the taxing authority of the entity imposing the tax." If the taxpayer has paid taxes under protest, as here, Mont. Code Ann. §15-1-408 governs refund of such taxes, or setoff against future tax liabilities.

Although styled primarily as a request for myriad forms of declaratory relief and refund of protested taxes, the *Fourth Amended Complaint* far exceeds the scope of this statute. Fundamentally, its allegations, counts, and prayers for relief distill into a request that the District Court enforce these laws, not only by declaring that County Defendants have violated them, but also by determining the amount of taxes County should have levied from 2015 to the present, in order to reimburse Taxpayers for the difference between this amount and the taxes actually levied.

This Court's decision in *DesRosier* would require the District Court to determine this difference, because it recognizes that Taxpayers have not contended, and cannot contend, that their injury is measured by their entire tax bill. In response to *DesRosier*, Taxpayers filed a Motion to amend their tax protest amount to a percentage of their over-all property tax bill. Doc. 87. County

objected that Taxpayers could not articulate a theory or explanation of what amount of their taxes should be protested. Doc. 96. The District Court ordered the parties to meet and confer to see if they could stipulate to a proper protested tax amount. Doc. 115. When the parties could not agree to a stipulated amount, the District Court ordered the "protest amount as the difference between the current tax assessment and the fiscal year 2012 tax assessment." Doc. 132. If the interim amount determined by the District Court for protest is upheld, under Taxpayers' theory, the protested amount would need to be refunded, whether County or Individual Defendants, or both, are allegedly liable for this refund.

Taxpayers' request that the District Court "invalidate" all County decisions allegedly made in violation of their rights also is a blatant demand for enforcement of laws that are administered and enforced by executive action, whether under the Single Audit Act or the Budget Act. Both Acts are administered by the Department. For example, the Single Audit Act provides that the Department "shall prescribe by rule the general methods and details of accounting for the receipt and disbursement of all money belonging to local government entities and

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shall establish in those offices general methods and details of accounting." Mont. Code Ann. §2-7-504(1).[5]

A related provision of the Budget Act requires the Department to "prescribe for all local governments" the following:

> (a) general methods and details of accounting in accordance with generally accepted accounting principles as provided in 2-7-504;
>
> (b) uniform internal and interim reporting systems as part of the uniform reporting systems provided for in 2-7-503;
>
> (c) the form of the annual financial report as provided in 2-7-503; and
>
> (d) general methods and details of accounting for the annual financial report as provided in 2-7-513.

Mont. Code Ann. §7-6-611(1).

The Budget Act also establishes Department oversight of other statutes on which Taxpayers base their claims. See, e.g., Mont. Code Ann. §7-6-4003 (submission of budgets and statement of tax levies to Department); §7-6-4004 (budget must conform to fund structure prescribed by Department); §7-6-4005 (limiting expenditures to total appropriations for a fund); §7-6-4034

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[5] One of the associated regulations, A.R.M. 2.4.411, incorporates various accounting standards and federal laws and regulations, including the Governmental Accounting Standards Board Standards and OMB Circular cited in the *Fourth Amended Complaint*.

(determination of tax levy needed for each fund); and §7-6-4036(1) (fixing of tax levy).

Most of Taxpayers' claims are based on alleged violations of the Budget Act as reported in audits required by the Single Audit Act. The Single Audit Act has a mechanism for addressing any "deficiencies or recommendations contained in the audit report." It requires "the governing bodies of each audited local government entity" to "review the contents and within 30 days" to "submit to the [D]epartment a corrective action plan detailing what action or actions they plan to take" on deficiencies or recommendations. Mont. Code Ann. §2-7-515(1). The local government entity must inform the Department "that noted deficiencies or recommendations for improvement have been acted upon by adoption as recommended, adoption with modification, or rejection." Mont. Code Ann. §2-7-515(2). County is required to "adopt measures to correct the report findings and submit a copy of the corrective action plan" to the Department. Ultimately, "[f]ailure to resolve findings or implement corrective measures must result in the withholding of financial assistance in accordance with rules adopted by the department pending resolution or compliance." Mont. Code Ann. §2-7-515(3).

Although Taxpayers cite three statutes in their attempt to assess personal liability against the Individual Defendants, only one of them, Mont. Code Ann. §7-

6-4005, provides for individual liability, and only when the official makes "a disbursement or an expenditure or incur[s] an obligation in excess of total appropriations for a fund." This statute is part of the Budget Act, and is administered by the Department.

The new addition to Taxpayers' arsenal, §15-10-420, limits the mill levy a governmental unit may impose, to an amount "sufficient to generate the amount of property taxes actually assessed in the prior year plus one-half of the average rate of inflation for the prior 3 years." Mont. Code Ann. §15-10-420(1)(a). Subsection (c) provides for DOR to "calculate one-half of the average rate of inflation for the prior 3 years" by reference to the Consumer Price Index ("CPI"). The *Fourth Amended Complaint* requests that Taxpayers be allowed to protest, and ultimately recover, the difference between the amount they paid in a given tax year, and the amount that would result from the §15-10-420 calculation. 4th Am. Compl., ¶16.

The *Fourth Amended Complaint* purports to calculate the "average rate of inflation" by reference to overall increases in County's budget in 2015, 2016, and 2017, rather than the CPI. 4th Am. Compl., ¶13. Taxpayers filed a motion to fix the tax protest percentage for 2018 under this formula. Doc. 87. The Court rejected their approach, and entered an order allowing Taxpayers to protest the amount by which their property taxes increased between 2012 and 2018. Doc.

132. The approved protested tax amount makes no reference to why taxes increase, e.g., valuation.

While the District Court solved the immediate problem of setting a protest amount for 2018 that is less than a given Taxpayer's entire tax bill, neither the increase from year to year nor the mill levy calculation in §15-10-420 is the correct measure of taxes "illegally" assessed under the statute or the Acts. Taxpayers erroneously presuppose that each dollar of increase is attributable to violations of these laws. Section 15-10-420(2) itself contemplates that other factors will affect the levy calculation, including the addition of "newly taxable property" in the governmental unit, "additional levies authorized by the voters," §15-10-420(2), school district levies, §15-10-420(5)(a), "decrease in reimbursements," §15-10-420(7), and mills that may be imposed under other statutes, as calculated by DOR "on a statewide basis," §15-10-420(8).

The provisions of §15-10-420 are incorporated into the Budget Act. Mont. Code Ann. §7-6-4036(2) (tax levy fixed by local government "is subject to 15-10-420"). DOR's Property Assessment Division "is responsible for the equitable valuation of all taxable real and personal property for property tax purposes and for the administration of property tax laws, including exemptions." A.R.M. 42.1.101(1)(e). Section 15-10-420(11) provides that the DOR "may adopt rules to

implement this section." Thus, in asking the District Court to determine the upper limit of property taxes as calculated pursuant to §15-10-420, Taxpayers expect the Court to coordinate the roles of two different agencies of the executive branch.

There is no question but that Taxpayers seek private enforcement of the Acts and §15-10-420, rather than a declaratory judgment that their taxes were imposed illegally. Indeed, according to Taxpayers, County Defendants' violations of the Acts are set out, chapter and verse, in the 2013-2014 Audit and the 2015-2016 Audit. The need for judicial declaration would appear to be superfluous.

In taking on Taxpayers' request to determine the amount of property taxes County should have levied, the District Court would move beyond a declaration of illegality to a determination of matters the Legislature has entrusted to the Department and the DOR, in their oversight of local government. Even when the Legislature granted some private rights of action in SB 302, it did not authorize the courts to make such a determination. Section 4, codified as Mont. Code Ann. §2-7-523 (Single Audit Act), authorizes declaratory relief, appointment of a receiver, or "compelling a mandatory duty" of the State, local government, or government official. Section 6, codified as Mont. Code Ann. §7-6-4037 (Budget Act), authorizes the same relief. Significantly, Taxpayers cannot bring such action under either Act unless they first present their claims to the Department, the

Department has reviewed them, and then may proceed only if the Department finds "sufficient evidence of the violations." Mont. Code Ann. §§2-7-524 and 7-6-4038(4)(b). More specifically, "[a] complainant must receive a written determination from the department under subsection (3)(c) or (4)(b) before proceeding to district court . . ." Mont. Code Ann. §§2-7-524(5) and §7-6-4038(5).

B. NO PRIVATE RIGHT OF ACTION MAY BE IMPLIED UNDER THESE LAWS.

"Whether a statute creates by implication a private cause of action presents a matter of statutory construction." *Faust v. Util. Sols., LLC*, 2007 MT 326, ¶24, 340 Mont. 183, 173 P.3d 1183 (citation omitted). This Court has adopted a four-part test, which Taxpayers cannot satisfy, to determine if they have "the right to bring a private action to enforce a statute that primarily was intended to be regulated by a governing agency." *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 206 MT 111, ¶31, 383 Mont. 346, 371 P.3d 446:

> In our review, we first noted that the CLA did not expressly authorize a private right of action, nor did the legislative history indicate an intent to expressly grant or deny such a right. *Wombold*, ¶ 34. We then considered the following factors to determine if the statute implied such a right: (1) is the interpretation [allowing a private right of action] consistent with the statute as a whole; (2) does the interpretation reflect the intent of the legislature considering the statute's plain language; (3) is the interpretation reasonable so as to avoid absurd results; and (4)

has the agency charged with the administration of the statute placed a construction on the statute. *Wombold*, ¶ 35.

Ibsen, ¶ 32.

1. Allowing a private right of action to Taxpayers is not consistent with the applicable statutes as a whole.

Implication of a private right of action must be "consistent with the statute as a whole." *Ibsen*, ¶47 (citation omitted). The plaintiff in *Ibsen* alleged that the defendant health insurance companies charged premiums to medical providers in excess of those allowed by the Unfair Trade Practices Act ("UTPA"). This Court found that private enforcement of the UTPA sections on which *Ibsen* relied would be inconsistent with provisions that "charge the Commissioner [of Insurance] with [enforcement] and provide it with the authority to investigate alleged violations of the Code, conduct hearings, impose fines, and issue cease and desist orders." §*Ibsen*, ¶47;[6] see also *Fossen v. Caring for Montanans, Inc.*, 993 F.Supp.2d 1254, 1259 (D. Mont. 2014), aff'd, 617 F. App'x 737 (9th Cir. 2015) (cited in *Ibsen*, finding that enforcement provisions precluded implication of a private right of action).

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[6] The Court also relied on provisions of UTPA that allow private rights of action in prescribed circumstances. §*Ibsen*, ¶47.

Similarly, this Court recently found that implication of a private right of action would not be consistent with Montana's version of the Retail Installment Sales Act ("RISA") at issue in *Somers v. Cherry Creek Dev., Inc.*, 2019 MT 101, 395 Mont. 389, 439 P.3d 128. The Court noted that the purpose of the statute was "to establish an administrative process through which to protect retail buyers." There, as here, the statute authorized the Department to adopt rules, investigate alleged violations, and sanction violations. *Somers*, ¶12.

In *Lyman Creek, LLC v. City of Bozeman*, 2019 MT 243, ¶18, 397 Mont. 365, 450 P.3d 872, this Court found that enforcement provisions of the Montana Water Use Act, which authorized only the Department of Natural Resources and Conservation, the attorney general, or county attorneys to seek judicial enforcement, made private enforcement inconsistent with the Act as a whole.

Implication of a private right of action would be inconsistent with the detailed provisions for Department oversight and enforcement of the Acts, and DOR's responsibility for administration of property tax laws.

2. The interpretation made by Taxpayers does not reflect the intent of the legislature considering the statute's plain language.

The second *Ibsen* factor is "whether the interpretation allowing for a private right of action reflects the intent of the legislature considering the statute's plain

language." *Ibsen*, ¶45 (citation omitted). The key inquiry is whether the law is a remedial statute that grants rights to an identifiable class of persons, which would imply that the Legislature intended the class to enforce those rights. *Somers*, ¶14; *Wombold v. Assocs. Fin. Servs. Co. of Montana*,[7] 2004 MT 397, ¶37, 325 Mont. 290, 104 P.3d 1080 ("legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce" them).

Here, the Acts as they apply to this case do not grant rights to identifiable classes of citizens. These Acts create a system for the State to oversee accounting and budget functions of local governmental entities consistently throughout the State. Section 15-10-420 provides a mechanism for the DOR to determine the upper limit of tax levies, subject to many provisions in addition to the mathematical formula in subsection (1)(a) of that statute.

The purposes of the Single Audit Act include "ensur[ing] constituent interests by determining that compliance with all appropriate statutes and regulations is accomplished" and "ensur[ing] that local government entities accomplish, with economy and efficiency, the duties and responsibilities of the entities in accordance with the legal requirements imposed and the desires of the

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[7] *Wombold* was overruled, in part, on other grounds by *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶37, 338 Mont. 423, 166 P.3d 451.

public." Mont. Code Ann. §2-7-502(1)(c), (d) and (f) (emphasis added). These provisions indicate that the legislature intended that the Department have responsibility to enforce the Single Audit Act for the benefit of the public, with intervention of law enforcement officials where appropriate.

Enactment of SB 302 altered the Acts to provide for limited private enforcement only after administrative review, but this enactment does not nullify the *Ibsen* analysis. The *Somers* Court applied the same analysis to RISA although it had been amended in 2017 to provide for private enforcement. *Somers*, ¶13, citing Mont. Code Ann. §31-2-203(4).

The enactment of SB 302 in fact bolsters County's argument that the Legislature did not intend for private enforcement of the Acts as they apply to this case. If the Legislature believed there already was a private right of action under these laws, it would not have needed to create one in 2019. Even in doing so, the Legislature recognized the Department's role by making administrative review a prerequisite to filing suit.

"[W]hen it acts, the legislature is presumed to have full knowledge of existing laws, and is presumed to have intended to change those laws." *Stewart v. Region II Child & Family Servs.*, 242 Mont. 88, 99, 788 P.2d 913, 920 (1990). The *Stewart* Court found that amendment of Montana's minimum wage laws to

include employees already covered by the Fair Labor Standards Act showed that the prior version of Montana's wage law did not include such employees. *Id.* at 99-100, 788 P.2d at 920-21. Applying the same principle, a federal court found that an amendment providing specifically for a private right of action precluded "reading an implied right of action" into the pre-amendment statute, in *Schlessinger v. Valspar Corp.*, 817 F. Supp.2d 100, 10405 (E.D.N.Y. 2011).

The District Court rejected County's argument based on SB 302, citing the savings and retroactivity provisions of the new law as evidence that it has no effect on rights that already existed when the law was enacted. The savings clause provides that SB 302 "does not affect rights and duties that matured" prior to May 2, 2019 or "proceedings that were begun" before that date. Section 9. Section 12 provides that the enactment "applies retroactively . . . to local government actions and duties required under [this act] occurring on or after July 1, 2018."

The District Court's ruling begs the question whether a private right of action could have been implied under the Acts at the time this action was filed. If no private right of action could have been implied at that time, no private action may be applied for purposes of this action. The very fact of enactment of SB 302 – and what that fact says about legislative intent – is what matters.

3. Taxpayers' interpretation of the relevant statutes would result in absurd results.

The third prong of the *Ibsen* test is whether implication of a private right of action "is reasonable so as to avoid absurd results." *Ibsen*, ¶48 (citation omitted). The legislature intended centralized enforcement of the subject laws solely by the Department and the DOR prior to enactment of SB 302. This was not an absurd result, but instead was intended to ensure consistent and informed oversight. See *Somers*, ¶17 (in absence of remedial purpose, refusal to imply a private right of action is not an absurd result). Even in SB 302, the legislature required administrative review of prospective claims of violations of the Acts, ameliorating the danger of unfounded actions. Finally, nothing in SB 302 provides or suggests that the legislature intends private enforcement of §15-10-420, even now.

4. Neither Department nor DOR has placed a construction on the subject statutes.

The fourth and final *Ibsen* factor "is whether the agency charged with the administration of the statute has placed a construction on the statute." *Ibsen*, ¶49 (citation omitted). County is not aware of a position on this issue as expressed by either the Department or DOR, but notes that the agencies' promulgation of rules under these laws is consistent with their responsibility to enforce these laws.

In summary, application of the *Ibsen* factors demonstrates that no private right of action may be implied under the Acts as applicable to this case, or under §15-10-420. The District Court erred in failing to perform this analysis, whether because of its conclusion that SB 302 did not alter anything in the Acts or its conclusion, addressed below, that the tax declaratory judgment statute renders the analysis superfluous.

C. SECTION 15-1-406 DOES NOT SUPPLANT THE *IBSEN* ANALYSIS.

In *Mitchell*, this Court observed that Taxpayers in the 2015 Action "implicitly acknowledge" that neither of the Acts "contains any express provision granting private rights of action to individuals in Taxpayers' position." *Mitchell*, ¶40. Taxpayers also requested declaratory relief in the 2015 Action. *Mitchell*, ¶¶41-42 (rejecting claims under Montana's Declaratory Judgment Act, as well, for lack of standing). The *Mitchell* Court thus recognized, implicitly, that existence of a statute authorizing declaratory relief does not displace the private right of action analysis. This principle is borne out explicitly in two recent cases in which the Court conducted the *Ibsen* analysis in declaratory judgment actions.

Plaintiffs in *Larson v. State By & Through Stapleton*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241, requested a declaratory judgment that the Secretary of

State's certification of petitions requesting that Green Party candidates be included on primary ballots violated Mont. Code Ann. §13-10-601(2) because signatures on a number of the petitions were invalid. They also sought injunctive relief preventing the Secretary from giving effect to the certification. *Larson*, ¶1. After an evidentiary hearing, the District Court determined that signatures from a number of legislative districts were invalid, and issued an injunction requiring the Secretary to remove the Green Party from the primary ballots. *Larson*, ¶¶12-13. The Secretary argued on appeal that plaintiffs could not seek private enforcement of the statute because the Legislature had made provision for a registered voter in any county to challenge a petition's validity ("per-voter challenge") and for a county election administrator to refer suspected fraud respecting a petition to the county attorney for prosecution. *Larson*, ¶¶20-26.

This Court conducted the four-part analysis from *Ibsen* and its predecessors to determine whether plaintiffs could enforce Mont. Code Ann. §13-10-601(2). *Larson*, ¶29. The Court first found that the statute had a "beneficent or remedial purpose," like the statute considered in *Wombold*. It went on to rule that neither the per-voter challenge nor the county administrator's ability to seek criminal prosecution was sufficient to remedy the Secretary's certification of invalid petitions from throughout the state, which would have allowed a party that did not

comply with the statute to place a candidate on statewide ballots. *Larson*, ¶¶29-31.

The Court also pointed to a statute specifically providing for injunctive relief in "any action brought under the election laws of this state." *Larson*, ¶32 (citation omitted; emphasis in original). These factors led to the Court's determination that implication of a private right of action was consistent with the statutory scheme and with legislative intent as reflected in the provisions discussed. *Larson*, ¶¶31-32.

Concluding its discussion of the first two *Ibsen* factors, the Court found that, when the Legislature enacted the statute, it also was "well aware of the previously enacted Montana Uniform Declaratory Judgments Act (MUDJA)," which provides "a legal vehicle to obtain" a declaration of rights and also provides for injunctive relief as a supplemental remedy. The Court found that MUDJA supported its conclusion that the Legislature intended private enforcement of the primary petition statute. *Larson*, ¶¶33.

Larson illustrates that, while the availability of declaratory judgment may be a factor in determining whether there is a private remedy for violation of a particular statute, it does not foreclose consideration of other *Ibsen* factors. The District Court erred in refusing to consider all of these factors.

At the same time, *Larson* does not require this Court to rule that the tax declaratory judgment statute authorizes private enforcement of the Acts or §15-10-420. Unlike the statute considered in *Larson*, these laws provide for comprehensive enforcement, including the Department's ability to require counties to submit corrective action plans and to withhold financial assistance if the counties do not implement corrective measures. Mont. Code Ann. §2-7-515(3). SB 302 did not abrogate this authority; it merely authorizes citizens to bring action in prescribed circumstances, and only after review by the Department. Just as the Legislature was aware of the MUDJA when it enacted the statute at issue in *Larson*, it also was aware of the tax declaratory judgment statute when it enacted SB 302. Nevertheless, the Legislature found it necessary to provide specifically for private enforcement of the Acts.

This Court also addressed the distinction between the *Ibsen* analysis and declaratory judgment in *Strauser v. RJC Inv., Inc.*, 2019 MT 163, 396 Mont. 348, 445 P.3d 803. The plaintiff in *Strauser*, like the plaintiff in *Somers*, sought private enforcement of Retail Installment Sales Act ("RISA"). This Court confirmed its decision in *Somers* that the statute in effect at the time of the alleged violation did not provide for private enforcement. *Strauser*, ¶¶6-8. The Court allowed the plaintiff to seek declaratory judgment under MUDJA, however, because she

alleged that she already had paid substantial fees that RISA did not allow and should not be required to incur additional fees without judicial determination of their legitimacy. *Strauser*, ¶13.

The *Strauser* Court found that declaratory judgment on this issue would not conflict with the Department's ability to enforce RISA, because it simply would clarify whether this plaintiff was required to continue to pay the challenged fees. *Strauser*, ¶16. The *Fourth Amended Complaint*, by contrast, seeks far broader relief in the guise of declaratory judgment, and would interfere with the functions of the Department and DOR.

Taxpayers' request that the District Court determine the amount of property taxes County should have charged in the absence of the alleged violations would require complicated analysis of property tax increases for each year encompassed by the litigation. If the action is allowed to proceed, the District Court must determine how much of any particular Taxpayer's tax increase should be attributed to alleged violations of the Acts, as opposed to other factors, such as changes in the assessed valuation of a particular Taxpayer's property.

Declaratory judgment "is not intended 'to determine controversial issues of fact.'" *Strauser*, ¶16, quoting *Tarlton v. Kaufman*, 2008 MT 462, ¶33, 348 Mont. 178, 199 P.3d 263. The *Tarlton* Court affirmed a District Court's dismissal of the

plaintiffs' request for declaratory judgment that their neighbors' fence was a "spite fence," finding that the question "involves numerous disputed questions of fact." *Tarlton*, ¶¶31, 35 (citation and some internal quotation marks omitted).

Declaratory judgment also is not intended to determine disputed issues of fact as to causation. *Teeter v. Mid-Century Ins. Co.*, 2017 MT 292, ¶14, 389 Mont. 407, 406 P.3d 464. In making a *Ridley* analysis, the *Teeter* court found that declaratory judgment was "an inappropriate method" to determine whether liability of a defendant for an accident is "reasonably clear" and whether it is "reasonably clear that a medical expense is causally related to the accident." *Teeter*, ¶¶15, 18 (citing *Ridley v. Guar. Nat. Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997)).

In ruling that §15-1-406(1), the tax declaratory judgment statute, gives Taxpayers the right to pursue this action, the District Court relied on *Jefferson v. Big Horn Cty.*, 2000 MT 163, 300 Mont. 284, 4 P.3d 26. Doc. 130, Order at 4. The question in *Jefferson* was a County's ability "to impose and collect real property taxes on land owned in fee simple by enrolled members of the Crow Tribe and located within the boundaries of the Crow Reservation." *Jefferson*, ¶4. Like Taxpayers, the plaintiffs sought declaratory relief under §15-1-406 and a refund of improperly imposed taxes under §15-1-408.

Jefferson presented a straightforward legal question. In the event of declaratory judgment, the relief was an either/or proposition. The *Jefferson* Court found that the taxes were illegal in their entirety and should be refunded in their entirety. *Jefferson*, ¶17. Nothing in *Jefferson* authorizes judicial intervention into a complex system of accounting, auditing, budgeting, and taxation regulated by the Department and DOR, under statutes that do not provide expressly for a private right of action and do not meet criteria for implication of one.

There also is a crucial difference between the tax declaratory judgment statute and MUDJA. MUDJA authorizes a party to "have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Mont. Code Ann. §27-8-202. Under MUDJA, declaratory relief may be granted "whether or not further relief is or could be claimed." Mont. Code Ann. §27-8-201.

The tax statute does not authorize declaratory relief "whether or not further relief is or could be claimed." Instead, it authorizes a declaration that a particular tax is "illegally or unlawfully" imposed, requires the taxpayer to pay taxes under protest as a condition to bringing the action, and contemplates that the relief requested will be the refund of the protested taxes, under §15-1-408(1). Mont.

Code Ann. §15-1-406. Here, in order to return any taxes to Taxpayers, the District Court would have to determine the amount of taxes they should have paid.

In *Mitchell*, this Court observed that Taxpayers "have not made concrete allegations that County squandered a specific amount of money that it would need to recoup through increased property taxes." *Mitchell*, ¶36. Although Taxpayers allege in the current action that their taxes have increased as a result of the alleged violations—in an attempt to show a concrete injury—they still have not identified "a specific amount of money" that County allegedly "squandered." Section 15-1-406 does not authorize the District Court to make this determination.

D. TAXPAYERS' REMAINING CLAIMS SHOULD HAVE BEEN DISMISSED BECAUSE THEY RELY ON THEIR CLAIMS UNDER THE ACTS AND SECTION 15-10-420.

The claims in the *Fourth Amended Complaint* that are not based directly on alleged violations of the Acts and/or §15-10-420, are inextricably linked with the alleged violations of these laws. The District Court did not address any of these related claims in its Order. They should have been dismissed along with the claims under the Acts and §15-10-420.

In Count 1, Taxpayers claim that liquidation of the protest fund from the 2015 Action violated their constitutional rights as well as tax protest laws. There is no corresponding prayer for relief respecting the alleged constitutional

violations. In any case, tax protest payments from the 2015 Action were in the amount of all property taxes billed to Taxpayers, made under the practice this Court disapproved in *DesRosier*. Any relief granted under Count 1 would be measured by the difference between this amount and what Taxpayers would have paid but for the alleged violations of the Acts and §15-10-420. This determination is beyond the powers of the District Court.

Count 2 is based solely on alleged violation of the Budget Act and §15-10-420. Count 3 alleges breach of fiduciary duties by the Individual Defendants, but is based on the same conduct alleged in Count 2. Count 4 seeks a refund of taxes paid, or offset of future taxes, based on the same violations alleged against the Individual Defendants.

Count 8 asserts that County Defendants violated the Montana Constitution by liquidating the protest fund from the 2015 Action and otherwise failing to budget or account for public funds; however, the conduct on which the constitutional violations are based is violation of the Budget Act.

Taxpayers' request for appointment of a financial receiver and forensic auditor seeks to "assure compliance with budgeting and expenditure laws," and thus is premised on violations of the Acts as well.

The remaining counts against County Defendants are procedural,[8] and also should have been dismissed with the substantive counts. Dismissal of the claims in Counts 1 through 4 and 8 render the request for class certification in Count 6 and the "common fund" request in Count 7 moot. *Fossen v. Caring For Montanans, Inc.*, 993 F. Supp.2d 1254, 1269 (D. Mont. 2014), aff'd, 617 F. App'x 737 (9th Cir. 2015) (dismissing counts for class certification and common fund given finding of no private right of action). Count 9 also should be dismissed, because Plaintiffs are not entitled to attorney fees under the private attorney general doctrine where there is not a private right of action. *Faust*, ¶31 ("claim for attorney fees under the private attorney general doctrine must fail in light of our determination that no private right of action exists") (citation omitted). See, also, *Mitchell,* ¶41 wherein this Court found the private attorney general doctrine is not a cause of action.

E. THE CASE AGAINST COUNTY DEFENDANTS SHOULD HAVE BEEN DISMISSED UNDER RULE 12(b)(1).

Subject matter jurisdiction "is the power to hear and adjudicate a particular type of controversy" or "a particular class of cases or proceedings." *Harrington v.*

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[8] Count 5 is a substantive count, which asserts that the State has a duty to enforce the Acts, and includes claims against County Defendants for violations of the Montana Constitution. 4th Am. Compl., ¶¶81-94. The only corresponding prayer for relief requests declaration that the Single Audit Act is unconstitutional, and must be defended by the State. 4th Am. Compl. at 36, Prayer for Relief 12.

Energy W. Inc., 2015 MT 233, ¶13, 380 Mont. 298, 356 P.3d 441; *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶57, 345 Mont. 12, 192 P.3d 186. If "a court determines that it lacks subject matter jurisdiction, it must dismiss the action." *In re Estate of Big Spring*, 2011 MT 109, ¶23, 360 Mont. 370, 255 P.3d 121. "The inquiry is whether the complaint states facts that, if true, would grant the district court subject matter jurisdiction." *Comm'r of Political Practices*, *supra*, ¶7 (citations and internal quotation marks omitted).

Accepting as true the factual allegations of the *Fourth Amended Complaint*, the pleading does not present a controversy that the District Court has the power to adjudicate. There is no private right of action for enforcement of the Acts or §15-1-420. The declaratory judgment available to an "aggrieved taxpayer" might allow the District Court to determine whether County Defendants violated these laws, but not to determine the amount of taxes that Taxpayers should have paid but for the alleged violations. There is no point to a declaratory judgment action in these circumstances. Adjudication of the *Fourth Amended Complaint* would require the District Court to exercise duties and powers that the Legislature has conferred only on the Department and DOR. Even when the Legislature provided for a limited private right of action under the Acts, it did not provide for judicial

determination of the taxes a local government should have imposed absent the violations alleged by Taxpayers.

Although this Court has not had occasion to hold that the absence of a private right of action is cause for dismissal under M.R.Civ.P. 12(b)(1),[9] it has recognized the principle implicitly. The district court in *Herrmann v. Wolf Point Sch. Dist.*, 2004 MT 10, ¶6, 319 Mont. 231, 84 P.3d 20, had dismissed a case on grounds that the plaintiffs could not pursue a private right of action under the Davis-Bacon Act ("DBA") for a contractor's failure to pay prevailing wages as required by the DBA, finding that the statute prescribed their remedies. This Court did not disapprove of the district court's analysis linking the questions of subject matter jurisdiction and private rights of action, instead finding that the DBA did not apply because there were no federal parties to the contract in question, and allowing the workers to pursue state law remedies. *Herrmann*, ¶15.

Federal courts applying the federal counterpart of Rule 12(b)(1) also have concluded that a court lacks subject matter jurisdiction if the statute on which the claim is based does not provide a private right of action to the plaintiff. See, e.g., *Buntin v. City of Boston*, 857 F.3d 69, 70 (1st Cir. 2017) (holding that action under

[9] In several of the cases cited above, the issue came before this Court after a District Court's dismissal under M.R.Civ.P. 12(b)(6). *See, e.g., Lyman*, ¶6; *Faust*, ¶11.

42 U.S.C. §1981 must be dismissed for lack of subject matter jurisdiction because the statute "does not provide an implied private right of action"); *Jackson v. Spencer*, 313 F.Supp.3d 302, 308 (D.D.C. 2018) (dismissing claim under the Military Whistleblower Protection Act because "the statute does not 'provide . . . any private cause of action, express or implied'") (citation omitted).

"[E]very statutory violation or noncompliance by another does not afford a private right of action to every party adversely affected thereby." *Larson*, ¶27 (citations omitted). The District Court's reliance on §15-1-406 and *Jefferson* was misplaced. The District Court should have conducted an *Ibsen* analysis, concluded that there is no private right of action under the Acts or §15-10-420, and dismissed all claims against County Defendants in the *Fourth Amended Complaint*.

VII. CONCLUSION

When a District Court erroneously denies a motion to dismiss for lack of subject matter jurisdiction under M.R.Civ.P. 12(b)(1), this Court reverses and remands the case to the District Court for further proceedings consistent with its opinion. *In re Estate of Haugen*, 2008 MT 304, ¶13, 346 Mont. 1, 192 P.3d 1132; *Agri W. v. Koyama Farms, Inc.*, 281 Mont. 167, 174, 933 P.2d 808, 813 (1997). County Defendants request that this Court reverse the Order denying the Motion

to Dismiss, and remand this case to the District Court with instructions to enter an order dismissing Taxpayers' claims against County Defendants with prejudice.

Respectfully submitted this 31st day of December, 2019.

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CERTIFICATE OF COMPLIANCE

I, Kirk D. Evenson, one of the attorneys for Appellants, hereby certify that:

(1) Said APPELLANTS' OPENING BRIEF, filed herewith has a line spacing of 2.0, except for footnotes and quoted, indented material, which have a line spacing of 1.0;

(2) Said APPELLANTS' OPENING BRIEF, is proportionately spaced and uses a 14 point Times New Roman typeface; and

(3) Said APPELLANTS' OPENING BRIEF, has a word count of 8,867 as counted by WordPerfect X9 for Windows, not averaging more than 280 words per page, not including the Table of Contents and Table of Authorities.

DATED this 31st day of December, 2019.

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INDEX TO APPENDIX

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