IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause: DA 23-0542

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

v.

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

Defendants/Appellees,

v.

71 RANCH, LP,

Intervenor/Appellee

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# APPELLANT'S OPENING BRIEF

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On Appeal from the Montana First Judicial District Court
Broadwater County
District Court Cause No. BDV-2022-38
Honorable Michael McMahon, Presiding

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## STATEMENT OF ISSUES

1. Whether the Plaintiffs are entitled to their reasonable attorney fees and reasonable costs, under the Uniform Declaratory Judgment Act, private attorney general doctrine, and/or Montana Water Use Act, for successfully challenging a subdivision that violated requirements of the Montana Subdivision and Platting Act and the Water Use Act where such abuses were sanctioned by Broadwater County and for successfully challenging the Montana Department of Natural Resources and Conservation's continued state-wide application of the "exempt well law" contrary to plain statutory commands and binding precedent.

## STATEMENT OF THE CASE

This case concerns a July 11, 2022, decision[1] by Broadwater County (the "County") to grant preliminary plat approval for a subdivision that did not have access to legally available water and where the County failed to consider numerous environmental issues. And it involves the Montana Department of Natural Resources' (DNRC's) nearly decade-long failure to respect and adhere to this Court's explicit commands[2], freely allowing developers to obtain water in violation of the Montana Water Use Act (WUA).

[1] Memorialized with a written decision on July 28, 2022. (AR 3736-3755.)

[2] *See Clark Fork Coalition v. Tubbs*, 2017 MT 184, 388 Mont. 205, 399 P.3d 295.

The case began on August 26, 2022, when the Plaintiffs filed a complaint challenging the County's approval of the Horse Creek Hills Major Subdivision (the "Subdivision"). (Dkt. 1.) Plaintiffs brought three claims against the County, and one claim against DNRC. *Id.* On March 28, 2023, 71 Ranch, LP, the developer of the subdivision, moved to intervene, which motion was granted on March 9, 2023. (Dkts. 14, 15).

Thereafter, the County and Plaintiffs filed cross motions for summary judgment on August 9, 2023. (Dkts. 44-46). The County', Intervenors, and DNRC filed responses to the Plaintiffs cross-motions, and the Plaintiffs filed their responses to the County's motion for summary Judgment. (Dkts. 46.1-50). DNRC only addressed Count III, which was the claim against it. (Dkt. 50). The County and Intervenors addressed all counts in their response briefs. (Dkts. 48, 49). Briefing on summary judgment was completed September 13, 2023. (Dkts. 53, 54, 56). Plaintiffs filed two reply briefs, one combined brief in reply to the County and Intervenors' arguments, and one with respect to DNRC's arguments on Count III. *Id.* On February 9, 2024, Judge McMahon held an oral argument on the pending motions for summary judgment. (Dkt. 62.) And on February 14, 2024, he granted the Plaintiffs summary judgment with respect to each of their claims. (Dkt. 63.) In granting the Plaintiffs' motion for summary judgment on Count III, he agreed the

Plaintiffs were entitled to summary judgment in part but denied it as to the allegation of a constitutional violation. (Dkt. 63, p. 81).

Subsequently, on March 4, 2024, the Plaintiffs filed a motion for attorneys' fees. (Dkts. 69, 70). The County, DNRC, and Intervenors filed their responses by March 28, 2024, and the Plaintiffs filed their reply brief on April 15, 2024. (Dkts. 75, 76, 79, 80). The Court denied the request for attorney fees on June 11, 2024, and entered judgment on August 29, 2024. (Dkts. 83, 91). This appeal was then filed on September 11, 2024. (Dkt. 94).

## STATEMENT OF THE FACTS

This case started as a routine application for a major subdivision – Horse Creek Hills – near the shores of Canyon Ferry, in Broadwater County, Montana. The developer/applicant 71 Ranch, LP, sought approval of a 442-acres subdivision, to be built over four phases of development into 39 residential lots, 2 commercial lots and 1 open space lot. (Dkt. 63, p. 4). Each lot would be served by its own exempt well, septic and stormwater system. *Id.* But what should have been a run of the mill subdivision application process turned into a "kafkaesque" nightmare. (Dkt. 63, p. 27.)

Broadwater County began its review of the Horse Creek Hills in July 2020, after receiving an initial application from 71 Ranch LP. (Dkt. 1, ¶ 43.) Over the next two years, the County engaged in a "confusing procedural path" to review the

application. (Dkt. 63, p. 26.) It involved numerous reviews by the planning board and County Commission. *Id.* And on two separate occasions, the Commissioners sent it back to the planning board for further review. *Id*. During this process, the County failed to promptly provide documents, the applicant routinely supplemented its application to fill obvious omissions, and meetings were regularly rescheduled because important evidence and failure to provide adequate notice to interested parties. (Dkt. 63, pp. 26-27). The record of all of these meetings showed that the County "ben[t] over backward to allow 71 Ranch repeated opportunities to rectify admitted and obvious basic errors in the application . . ." (Dkt. 63, p. 27). And the process generated "thousands of documents and over thirty hours of meeting recordings." *Id.* Yet, despite all this time, work, and effort, the applicant still submitted a deficient application, and the County abused its discretion in approving the Subdivision. (Dkt. 63, pp. 82-85).

In reaching these conclusions, the District Court evaluated the Defendants' and Intervenors' compliance with the Montana Subdivision and Platting Act (MSPA). The District Court's Order first found that the County violated two portions of the MSPA, §§ 76-3-603 and 76-3-608, MCA. These provisions require that the applicant submit an environmental assessment, that the county review the assessment, and that the County do its own independent review of the application. Section 76-3-603, MCA; § 76-3-608, MCA; *See, generally, Citizens for*

*Responsible Dev. v. Bd. of Cty. Comm'rs*, 2009 MT 182, 351 Mont. 40, 208 P.3d 876.

As part of that process, the MSPA requires that applicants identify probable impacts, and that local government identify specific, documentable, and clearly defined impacts. (Dkt. 63, pp. 9-10). Yet, neither 71 Ranch nor Broadwater County adequately performed their respective analyses, resulting in a defective and confusing decision-making process. (Dkt. 63, p. 46.) Instead, both 71 Ranch and Broadwater County relied on separate decision-making by the Department of Natural Resources and Conservation and the Department of Environmental Quality, ignoring overwhelming testimony from the public, from the Broadwater Conservation District, and from Montana Fish Wildlife and Parks identifying potentially devastating impacts from the proposed development. (Dkt. 63, pp. 17, 21, 23, 24, 39.) The District Court determined that Broadwater County's preliminary plat approval must be overturned "not only for the substantive failure[s...] but also based on the procedural 'failure to provide [the required information] in a reasonable cohesive fashion, [which] makes it difficult for the public to use the information.' " (Dkt. 63, p. 27.) The District Court also found that the "County's repeated omission of numerous specific, documentable, and clearly defined impacts to 'agriculture..., the natural environment, wildlife, wildlife habitat, and public health and safety[]' is to say the least, arbitrary and unlawful."

(Dkt. 63, p.45.) And the District Court made the precedential determination that "[a]lthough Mont. Code Ann. § 76-3-622(1) does not place an independent obligation on the County to review the factual existence and legal appropriability of sufficient water for a proposed project, Mont. Code Ann. § 76-3-601(1)(a)(iii) and 76-3-501(1) do." (Dkt 63, p. 53.)

Last but not least, the District Court addressed DNRCs dogged approval of developments relying on multiple "exempt wells" to meet their water needs, such that the total "combined appropriation" of the project was many times that allowed under the Water Use Act. (Dkt. 63, pp. 55-81.) The Court explained how "DNRC blatantly ignored a recent Supreme Court holding" on the issue of exempt wells, (Dkt. 63, p. 70), and through a "contortionist misreading of another agency's statutes rob[bed] the department of the power to administer the constitutionally mandated water laws the Legislature has entrusted to it." (Dkt. 63, p. 72.) The Court further chastised the agency, explaining that it should give the agency "pause" that its understanding of the law is surpassed by citizens "with no legal training" and it analogized DNRC to a "misbehaving child" "who knows how to say the right words to end the chastisement and yet immediately returns to the proscribed behavior once out of view." (Dkt. 63, p. 83.) Speaking without equivocation the District Court concluded, "[b]ecause exempt well law seems a particular challenge for DNRC, the Court endeavors to make the following

declaratory ruling absolutely clear: **There is no basis in law for DNRC to treat the four phases of 71 Ranch's subdivision project separately, a conclusion which is absolutely clear from statute, administrative rule, Montana Supreme Court precedent, and even DNRC's letters in this matter. Any and all phases of this project are one single combined appropriation.**" Dkt. 63, p. 79 (emphasis in original). Put simply "[t]he law was clear, yet Defendants and Intervenor blindly and arrogantly ignored it." (Dkt. 83, p. 65).

The aforementioned factual and legal conclusions reached by the District Court were not appealed by the Defendants or Intervenors. The District Court's findings of fact and conclusions law on summary judgment are therefore not appropriate for reconsideration here. *Town of Kevin v. N. Cent. Mont. Reg'l Water Auth.*, 2024 MT 159, ¶ 18, 417 Mont. 325, 553 P.3d 392; *Bucy v. Edward Jones & Co., L.P.*, 2019 MT 173, ¶ 23, 396 Mont. 408, 445 P.3d 812.

## STANDARD OF REVIEW

A district court's determination whether legal authority exists for an award of attorney fees is a conclusion of law, which this Court reviews for correctness. *Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶ 9, 388 Mont. 205, 399 P.3d 295. If legal authority exists, a district court's grant or denial of attorney fees is review for an abuse of discretion. *Town of Kevin*, ¶ 6, 417 Mont. 325, 553 P.3d 392. A district court abuses its discretion if it "acts arbitrarily without employment of

conscientious judgment or exceed the bounds of reason resulting in substantial injustice." *Houden v. Todd*, 2014 MT 113, ¶ 20, 375 Mont. 1, 324 P.3d 1157. An abuse of discretion also occurs when a district court commits legal error by, *inter alia*, applying improper legal standards. *Cf. Mattson v. Mont. Power Co.*, 2012 MT 318, ¶ 17, 368 Mont. 1, 291 P.3d 1209.

## SUMMARY OF ARGUMENT

Appellants resoundingly established that the County, Intervenors, and DNRC all failed to comply with Montana law including the Montana Subdivision and Platting Act and Montana Water Use Act (WSA). Unequivocally, this ruling resulted in dramatic policy effects throughout the state. In ruling against defendants, the District Court spent 85 pages highlighting each and every failure - failures that were repeatedly made clear throughout the multiyear process by the citizens of Broadwater County, the Appellants, and counsel for the Appellants. Nevertheless, the District Court denied the Appellants their attorney fees under three theories: the Uniform Declaratory Judgments Act, the Private Attorney General Doctrine, and the Water Use Act. Each denial was in error.

The District Court first erred when it denied the Appellants request for fees under the Uniform Declaratory Judgement Act (UDJA.) In denying fees, the District Court concluded that the equities tipped strongly in favor of the Appellants, but that fees were inappropriate because the County, DNRC, and

Intervenors did not "possess" anything that the Appellants sought. It wrongly concluded that this Court strictly construes the possession element, and, as a result, the Appellants could not recover fees. This Court, though, has never strictly construed that the defendants must possess something that the plaintiff wants in order to recover under the UDJA. Instead, it has approved fee awards on multiple occasions when a plaintiff has voided local government decision, such as here. Accordingly, the District Court should have done the same here, and awarded fees. Its decision not to was an abuse of discretion.

The District Court next erred when it did not award fees under the Private Attorney General Doctrine (PAGD). Much like the UDJA, the District Court found that the equities strongly favored awarding fees, but then denied the request. The denial under the PAGD was based on the Court's determination that the Appellants had not established that their success vindicated important constitutional interests. In reaching that conclusion, though, the Court did not analyze or discuss, in any way, the Appellants' fundamental Right to Know or Participate. In doing so, the District Court ignored that its 85-page opinion regularly explained how the County's absurd decision-making process made it nearly impossible for the Appellants to exercise these rights. Similarly, the District Court spent significant effort explaining how the DNRC's actions were harmful to the environment under Art. IX, § 1and directly contrary to the Constitution's expressed mandate that

DNRC "administer, control and regulate" water rights that are conclusively protected by Art. IX, § 3. Thus, in bringing the suit, Appellants vindicated the fundamental right to a clean and healthful environment and the fundamental rights of senior water users across the state. Yet, the District Court improperly discounted these constitutional rights for fee purposes. Ultimately, if state-wide vindication of numerous constitutional rights against government determined to abuse them (let alone in bad faith), it is hard to imagine a situation where such an award would be proper. As recognized, it is critical that citizens be able to defend themselves against this type of government error and obviously they must be able to retain competent counsel to do so. Therefore, the District Court's decision to deny fees under the Private Attorney General Doctrine was an abuse of discretion.

Last, but not least, DNRC's multi-decade effort to undermine the Water Use Act is here on full display and was well documented by the District Court. The District Court further detailed that but for the "finality" of DNRC's water permitting decision (i.e. that no permit was necessary) no authorization of the preliminary plat could have occurred. And the District Court further found that without authorization of the preliminary plat, no pumping for the subdivision would occur. Thus, the District Court thoroughly laid out how DNRC made a "final permitting decision" and how Plaintiffs' successfully appealed that decision,

yet held that the plain language of the § 85-2-125(1), MCA precluded the same. This too was an abuse of discretion.

Appellants are entitled to fees because they successfully prevailed against Broadwater County and the DNRC, and their allied Intervenor, on issues of land use and water law of statewide importance. The District Court properly held these parties to account with startling clarity, yet faltered in its final task: awarding fees to those who have earned them by undertaking a critical legal challenge on behalf of all.

## ARGUMENT

Appellants sought an award of attorney's fees and costs under the Uniform Declaratory Judgment Act, the "private attorney general" doctrine (PAGD), and the Montana Water Use Act. (Dkts. 64, 65.) Despite the District Court's repeated rebukes to the Defendants and Intervenor, and despite finding "strong equitable considerations in their (Appellants') favor" the District Court failed to award fees. (Dkt. 83, pp. 67-68). Throughout its fees order, the District Court highlighted the "overwhelming" equitable considerations supporting an award of fees:

- Strong equitable considerations weight heavily towards an award of fees under the UDJA (Dkt. 83, p. 9)

- Strong equitable considerations in favor of a fee award under the UDJA (Dkt. 83, p. 20)

- Here the equities do not weigh against an award of fees; if anything, they weigh in favor of fees. (Dkt. 83, p. 65)

- Having found these "other equitable considerations" overwhelmingly [in support of Plaintiffs]. . . (Dkt. 83, p. 65)

- Despite the same strong equitable considerations in [Plaintiffs'] favor. . . (Dkt. 83, p. 67)

These equitable considerations and the legal error outlined below justify reversing the District Court' denial of fees under the UDJA and the PAGD. The Court also abused its discretion when it denied fees under the WUA.

### A. The District Court Abused its Discretion and Committed Legal Error When it Failed to Award Attorney Fees under the Uniform Declaratory Judgments Act.

Appellants first sought attorney's fees and costs under the Uniform Declaratory Judgment Act. §§ 27-8-311 and § 27-8-313, MCA. While attorney's fees may not be warranted in every "garden variety" declaratory judgment action, *Western Tradition P'ship v. AG of Montana,* 2012 MT 271, ¶ 17, 367 Mont. 112, 291 P.3d 545, this is no garden variety declaratory judgment action. Rather, this case fundamentally changed subdivision permitting and stopped rampant and escalating illegal groundwater pumping across the State of Montana. (Dkt. 83, pp. 62-63).

To determine whether fees are appropriate, a district court must make a threshold determination that equitable considerations support an award of attorney fees. *Friends of Lake Five*, *Inc. v. Flathead Cnty. Comm'n*, 2024 MT 119, ¶ 37, 416 Mont. 525, 549 P.3d 1179. After considering the equities, the court applies the

"tangible parameters test." *Town of Kevin v. N. Cent. Mont. Reg'l Water Auth.*, 2024 MT 159, ¶ 16, 417 Mont. 325, 553 P.3d 392. That test provides a non-exhaustive set of parameters to consider whether an award of fees is appropriate. *Id.* Those non-exhaustive factors include whether (1) the defendant "possesses" what the plaintiff sought in the declaratory relief action; (2) it is necessary to seek a declaration showing that the plaintiffs are entitled to the relief sought; and (3) the declaratory relief sought was necessary to change the status quo. *Id.*

First, and perhaps most importantly, the District Court wrongly concluded that the "Montana Supreme Court construes the possession factor strictly." (Dkt. 83, p. 14.) This Court, though, has never construed the possession factor "strictly." In fact, this Court has often noted that the "tangible parameters test" is non-exhaustive and does not "define the exclusive circumstances justifying an award of attorney fees as necessary or proper." *Town of Kevin*, ¶ 16; *City of Helena v. Svee*, 2014 MT 311, ¶ 24, 377 Mont. 158, 339 P.3d 32; *Trustees of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 42, 315 Mont. 210, 69 P.3d 663. Thus, the District Court's legal conclusion that possession is strictly construed was in error.

This error is highlighted by two Montana Supreme Court cases that came down about the same time that the District Court denied the Appellants' fee request. First, in *Friends of Lake Five*, the Plaintiffs challenged a Major Land Use Application, by which a developer sought a major change in land use and zoning

review by Flathead County. *Id.*, ¶ 3. Flathead County had granted the application, and the plaintiffs brought a declaratory judgment action to void the zoning approval. The district court voided the approval and on appeal, this Court affirmed. *Id.*, ¶ 26. In its opinion, this Court makes no mention of the "possession" factor. *Id.*, ¶ 38, Instead, it simply affirmed the District Court's award of fees because the district court "provided an adequate basis for its threshold determination that equitable considerations supported an award of attorney fees on the record before it." *Id.*, ¶ 38.

A month later, the Court affirmed another award of attorney fees in a non-insurance declaratory judgment action in the *Town of Kevin*. There, the Town of Kevin sought a declaration that it was not part of the North Central Montana Regional Water Authority (the Authority). *Town of Kevin*, ¶ 4. At the district court, the Town obtained the declaration it sought and requested fees under the UDJA, which the district court awarded. *Id.*, ¶ 8. In upholding the fee award, this Court noted that the tangible parameters test was non-exclusive and went through those factors. In doing so, it noted that the Authority possessed what the Town desired: "recognizing the Town as not a member." *Id.*, ¶ 19. That was sufficient to satisfy the "possession" element. *Id.*

Even in a frequently cited UDJA case where an award of fees was upheld, *Svee*, this Court implicitly found that "possession" was not strictly construed. *Id.*, ¶

23. The *Svee* case concerned homeowners who had installed wooden shingles on their home in violation of city code. *Id.*, ¶¶ 2-4. The City sued the Svees to enforce the Code, and they brought a counterclaim for declaratory judgment, seeking a declaration that the code was invalid. The Svees prevailed at the District Court. However, there the district court denied fees, much like the District Court here, by determining the first prong of the tangible parameters test could not be met because there was no insurer and because, according to the District Court, the Svees did not have to pursue the declaratory judgment action to obtain the relief they wanted – they just had to defend against the City's action. *Id.*, ¶ 23. In reversing, this Court explained that even in non-insurance cases, the tangible parameters test only provides guidance. *Id.*, ¶ 24. In doing so, this Court essentially ruled that the Plaintiff had satisfied the first element. *Id.*, ¶ 24.

Nevertheless, here, the District Court based the denial of UDJA fee recovery in this case explicitly on the finding that no defendant "possessed" anything sought by Plaintiffs. Dkt. 83, p. 20. This was error, and like each of the Supreme Court's recent cases, fees are appropriate here. As in *Lake Five*, Plaintiffs here reversed a county land-use decision not involving possession of any particular tangible "thing" besides a permit. *See also*, *Svee*, ¶ 24. And, alternatively, consistent with *Town of Kevin*, Appellants here meet the looser definition of "possession" because they desired a formal determination that the subdivision decision-making process

and ultimate approval, as well as DNRC's approval of the exempt wells, was unlawful. This Court should, therefore, reverse the District Court's legal conclusion that the "possession" element of UDJA fee criteria is strictly construed and the District Court's finding otherwise constituted an abuse of discretion.

Upon reaching that conclusion, this Court should also remand "for proceedings to determine the amount of fees to be awarded." *Svee*, ¶ 27. To reiterate, none of the Defendants, nor the Intervenor, appealed any of the District Court's conclusions with respect to the other equitable factors to be considered in awarding fees. Thus, fees are warranted based on the overwhelming equitable factors. (Dkt. 83, p. 67.)

### B. The District Court Erred when it Refused to Award Attorney Fees under the Private Attorney General Doctrine.

At the District Court, Appellants requested, alternatively, an award of reasonable attorneys' fees under the Private Attorney General Doctrine (PAGD). Montana courts generally follow the American Rule when considering attorney fee award determinations — in which "a party in a civil action is generally not entitled to fees absent a specific contractual or statutory provision." *Matter of Dearborn Drainage Area*, 240 Mont. 39, 41, 782 P. 2d 898 (1989) (citing *In Re Marriage of Hereford*, 223 Mont. 31, 723 P.2d 960 (1986)). But for at least twenty-five years, the PAGD has been recognized as an equitable exception to this rule. *See e.g., Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶

20, 359 Mont. 393, 251 P.3d 131 *(BRPA III)*[3]; *Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Com'rs*, 1999 MT 263, ¶ 62, 296 Mont. 402, 989 P.2d 800 (*Montrust*).

The PAGD "is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *Matter of Dearborn Drainage Area*, 240 Mont. at 43, 782 P.2d at 900. The doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental policies embodied in constitutional or statutory provisions . . . without some mechanism authorizing the award of attorney fees private actions to enforce such important public policies will as a practical matter frequently be infeasible." *Families Unafraid to Uphold Rural El Dorado Cnty. v. Bd. of Supervisors*, 94 Cal. Rptr. 2d 205, 209 (Cal. 3d App. Ct. Mar. 29, 2000) overruled on other grounds *Conservatorship of Whitley*, 241 P.3d 840, 854

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[3] In *BRPA III,* the Montana Court awarded fees under the PAGD because of Plaintiff's success on the merits of the Mitchell Slough litigation. *BRPA II* was the merits decision finding Mitchell Slough a natural water body and not a ditch, thus subject to public recreational access and the 310 Law. *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.,* 2008 MT 377, 346 Mont. 507, 198 P.3d 219 (*BRPA II*). *BRPA I* was a procedural challenge to the Conservation District's authority to address the status of a water body. *See Bitterroot River Protection Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, 309 Mont. 207, 45 P.3d 24 . (*BRPA I*),

(2010).[4] The PAGD "acts as an incentive for the pursuit of public interest-related litigation that might otherwise have been too costly to bring." *Families Unafraid to Uphold Rural El Dorado Cnty,* 94 Cal. Rptr. 2d at 209 (citations omitted). "Where suit is brought against governmental agencies and officials [as here], the necessity of private enforcement is obvious. In such situations private citizens alone must 'guard the guardians' and the disparity in legal resources is likely to be greatest." *Id*. at 210 (internal citations and quotations omitted; alteration in original).

In Montana, an award of attorney fees under the PAGD is based upon the court's analysis of four factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision, and (4) whether an award of fees would be unjust under the circumstances. *BRPA III*, ¶ 20. Whether a party satisfies these factors is within the district court's discretion. *Montrust*, ¶ 68; *see also Hernandez v. Bd. of County Comm'rs*, 2008 MT 251, ¶ 30, 345 Mont. 1, 189 P.3d 638 (same); *BRPA III* ¶ 10 (same). In this case, all four factors favor Plaintiffs' request for reasonable attorneys' fees under the PAGD. But a court may abuse its discretion

[4] In *Montrust*, the Montana Supreme Court adopted the PAGD as it has been applied in California courts. *Montrust*, ¶ 66 (referencing *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303 (1977)). Accordingly, California courts' enunciation of the doctrine is persuasive to its application in Montana. *Id.*

when it fails to award fees under the PAGD when the government engages in "obviously unlawful" decision making through "willful disregard of constitutional obligations". *Forward Mont. v. State*, 2024 MT 19, ¶ 20, 415 Mont. 101, ___ P.3d ____.

Instead of addressing these factors simply, the District Court, here, took great lengths to explain what it viewed as the confusing, inconsistent, and at times conflicting opinions by this Court concerning the propriety of awarding fees under the PAGD. Out of that discussion, the District Court tried to apply the rulings from those cases coalesced into the *Serrano* or *Montrust* factors: (1) the strength or societal importance of the constitutional interests vindicated by the litigation; (2) the necessity for private enforcement and magnitude of the resultant burden; (3) the number of people standing to benefit from the decision; (4) equities and bad faith of the defendants; and, (5) whether the case was a "garden variety case." (Dkt. 83, pp. 56-67.) In analyzing those factors, the District Court determined that factors two through four militated in favor of fees, but because the case did not "sufficiently" vindicate constitutional interests, fees were not appropriate under the PAGD. (Dkt. 83, p. 67-68.)

In reaching its conclusion, the District Court also determined that DNRC's interpretation of the Water Use Act was too attenuated from the constitution to

implicate constitutional rights. (Dkt. 83, p. 59.) This conclusion constituted an abuse of discretion.

In their request for fees under the PAGD, the Appellants argued that they vindicated multiple constitutional interests including Rights to Know and Participate, Mont. Const. Art. II, §§ 8, 9, and the fundamental right to a clean and healthful environment, Art. II, § 3, as implemented through Article IX, Sections 1 and 3. (Dkt. 70, pp. 11-13; Dkt. 80, pp. 8-10.). The District Court, though, ignored its own discussion on how Defendants' actions in this case implicated the Right to Know and Participate and constitutional rights effectuated by the MSPA (*see generally* Dkt. 63, pp. 24-27), and instead focused solely on the Defendants' and Intervenor's arguments regarding exempt wells. Doing so was an abuse of discretion.

With respect to the Right to Know and Participate, both are found within Article II of the Montana Constitution. Mont. Const. Art. II, §§ 8, 9. So too, the right to a clean and healthful environment is enshrined in Mont. Const. Art. II, § 3. As such, these are fundamental rights subject to the highest levels of protection. *Nelson v. City of Billings*, 2018 MT 36, ¶ 13, 390 Mont. 290, 412 P.3d 1058 (right to know); *MEIC v. Dept. of Envtl. Quality,* 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 (clean and healthful); *State v. Tapson*, 2001 MT 292, ¶ 15, 307 Mont. 428, 41 P.3d 305 (Article II rights are fundamental rights). By bringing this

suit, and succeeding, Plaintiffs vindicated important statutory requirements that "directly implemented constitutional provisions." *BRPA III,* ¶ 23.

Beginning with fundamental rights to meaningful public participation and to know, the District Court took pains to describe the record in this case as voluminous and disorganized, and to criticize the County's haphazard and confusing procedural path to reviewing the subdivision application. (Dkt. 63, p. 26.) The District Court summarized these problems as follows:

> These concerns are amplified by the haphazard and confusing procedural path the County took to review this application, involving two separate instances of the Commission remanding the matter back to the Planning Board, alleged County failures to promptly provide documents to concerned citizens, routine supplementation of the application to fill obvious omissions, and the regular rescheduling of meetings based on failure to disclose important evidence and failures to provide notice to interested parties.
>
> (Dkt. 63, pp. 26-27.)

And the application materials were "insufficiently clear, organized and cohesive" to the extent that the Appellants did not have a "reasonable opportunity for citizen participation." *Id.* The County's "Kafkaesque procedure and the developer's Byzantine application" (*Id.,* p. 27) made it difficult for the public to use the information, and "undermine[d] Montanans' constitutional rights to Know and Participate." (*Id.,* p. 26, citing *Citizens for Resp. Dev. v. Bd. of Cnty. Comm'rs,* 2009 MT 182, , ¶¶ 20-24, 351 Mont. 40, 208 P.3d 876.).

Despite this clear conflict with the fundamental Rights to Know and Participate, the clear grounding of the District Court's decision in the Supreme Court's finding of the same in *Citizens for Resp. Dev.*, and the fact that the Appellants' raised these rights, the District Court did not analyze these constitutional interests. Because these concerns are "integrated into the rationale underlying the decision," the District Court abused its discretion in denying fees. *See, e.g.*, *BRPA III*, ¶ 20.

As regards the right to a clean and healthful environment, the District Court found that, despite the proposed subdivision's explicit reliance on groundwater for both water supplies and wastewater disposal, the environmental assessment contained "only the most basic information about surface waters," (Dkt. 63, p.12), "did not describe how [groundwater and surface water] interact", (*Id.*), and "does not describe the location of the aquifer. Indeed, no aquifer is even mentioned. The health of the unidentified aquifer, Canyon Ferry Reservoir, and Confederate Gulch are likewise not covered." (Dkt. 63, p.14). "This omission is particularly troubling since the State officially designated both the Canyon Ferry sections of the Upper Missouri and Confederate Gulch as impaired (by ammonia and nitrogen respectively [and] certified to the federal government that these nearby waters are impaired by precisely the kinds of pollution that a new development would

contribute to." *Id.* Of course, the Montana Constitution does not require that dead fish float in rivers for its far-sighted protections to be invoked. *MEIC*, ¶ 77.

Appellants raised the evaluative process laid forth by the MSPA as reasonable means of protecting their rights to a clean and healthful environment, and the District Court itself found Broadwater County's defective decision-making process threatened to inflict potentially significant harm onto the environment. (Dkt. 63, p. 35 ("the environmental assessment does not even address the natural environment"); Dkt 63, p. 36 ("the total absence of analysis on wastewater discharge and nitrogenous pollution."); Dkt. 63, p. 39 ("the County avoided mentioning (let alone reviewing) . . . dozens of exempt wells in the area which recharges a dewatered 'important spawning stream for rainbow trout.''); Dkt. 63, p. 84. However, the District Court did not consider, much less reconcile, why Plaintiffs' successful vindication of their rights did not weigh strongly in favor of an award of fees under the PAGD. Thus, its conclusion that the Appellants environmental constitutional interests were not vindicated was an abuse of discretion.

In relation to the public interest, the District Court found that the facts in the case at hand are "dramatically similar" to *BRPA III* – "the only time that the Montana Supreme Court has upheld a district court's award of fees under the doctrine." Dkt. 83, p. 57. However, here, just like in *BRPA III*, Plaintiffs acted as

the sole defender of Montana's constitutionally enshrined "private and public water rights" – a role it was forced to undertake when the government would not. *Id.* Indeed, "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Mont. Const. art. IX, § 3. Similarly, the Constitution decalares that the "administration, control, and regulation of water rights" in Montana are under the singular purview and protection of DNRC – the agency that the District Court found was robbing the public of its rights.

Notably, in its adjudication of the merits of Plaintiffs' claims, the District Court repeatedly cited to these provisions of the Constitution for its reasoning. The Court took time to explain the constitutionally based-public interest in the issue,

> The economic impetus to develop land is overwhelming and relentless. If there is going to be any check on uncontrolled development of Montana's limited water resources it will have to come from DNRC which is statutorily charged with fulfilling Montanans' constitutional right to "control, and regulation of water rights," Mont. Const., Art. XI § 3, a duty DNRC has manifestly avoided or undermined for over a decade to the detriment of our waters, environment, and senior water rights holders whose protection is the "core purpose" of the Water Rights Act. Clark Fork, 9 24. It is DNRC's duty to enforce the Water Use Act, not undermine it. Mont. Code Ann. § 85-2-112 (2021).

In spite of these eloquent findings, the District Court abused its discretion when it relied on *Clark Fork* in denying fees here. While this matter shares certain similarities with *Clark Fork* (*i.e.* DNRC's abusive interpretation of a statute), here

the facts are far more egregious. DNRC's repugnance to and defiance of our constitutionally based water allocation system is documented in detail as are the profoundly harmful effects, both on the State who holds those waters in trust and on private usufructuary interests that are constitutionally "recognized and confirmed." Mont. Const. art. IX, § 3. Montana's Constitution is vindicated where a small group of citizens challenge the State's decision to allow "an infinite number of wells to be drilled regardless of water resource impact of the senior water rights holders who are entitled to protection." Dkt. 63, p. 82. More specifically, the District Court found that DNRC "allowed the (ongoing) appropriation of millions if not billions of gallons of water that under our laws should have been left in aquifers for the benefit of senior water rights holders." Dkt. 63, p. 84.

If this decision and this case does not vindicate the expressed constitutional interest of the citizenry in its waters, it is hard to imagine how going forward any decision ever could. While this Court has previously narrowed the PAGD to require "vindication of constitutional interests," such was, in fact, the case here. In the words of the District Court,

> water is so scarce and valuable in Montana that its control is mandated by our very Constitution. Such control was subverted by DNRC's erroneous application of exempt well law, turning an exception for some wells into a loophole allowing limitless wells. It appears this Court's order will benefit all Montanans by reinstituting a lawful interpretation of an exception that would otherwise swallow the

> statutory rule which satisfies the constitutional mandate that the State's waters must be controlled.

Dkt. 83, p. 63.

Ultimately, then, fees are appropriate under the PAGD because this matter involved significant, and fundamental, constitutional interests related to the right to know, the right to participate, the right to a clean and healthful environment, and the rights of citizens to have DNRC administer, control and regulate water use in accordance with the law. Beyond that, the District Court found that the remaining factors all weighed in favor of an award of fees under the PAGD.

The Court's decision denying fees under the PAGD was reversible legal error, and an abuse of discretion.

### C. The District Court's Refusal to Award Fees Under the Water Use Act was error.

At the core of this lawsuit is Plaintiffs' as applied and facial final challenge to DNRC's final decision in relation to its interpretation of the permitting requirements enumerated in § 85-2-306, MCA, of the Water Use Act. As a result, Plaintiffs moved the District Court for fees pursuant to § 85-2-125, MCA, which states in pertinent part "[i]f a final decision of the department on an application for a permit or a change in appropriation right is appealed to district court, the district court may award the prevailing party reasonable costs and attorney fees." The Water Use Act further defines the word "permit" to mean "the permit to

appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314." § 85-2-102(20), MCA. Thus, by its plain language, the Water Use Act defines any permission granted under the authority of § 85-2-306, MCA as a "permit."

As the basis for its request, Plaintiffs reasoned (and the District Court agreed) that DNRC's issuance of pre-authorization letters – letters which on their face state 71 Ranch's entitlement to specific allocations of water – set in motion a chain of events that would inevitably lead to the diversion of water under a "permit" issued pursuant to DNRC's interpretation of the § 85-2-306, MCA. In its merits ruling, the District Court described in detail the "finality" with which DNRC's "decision" led this matter to be ripe for adjudication:

> DNRC argues that the determination letters only apply to the project at the time of the letter, and DEQ required submission of "additional information regarding the cumulative impact of the proposed developments on the aquifer." This is a red herring. For one, DNRC's determination is a legal one about entitlement to an exempt well based on statutory and administrative rule criteria. It does not matter what factual material DEQ solicits regarding the cumulative impact to the aquifer, an issue for which DNRC has vehemently disclaimed any role. The Legislature's decision to spread the regulatory burden across two state agencies and a local government, each with distinct roles in a multi-stage process, creates complexities. Thus, it does not matter what factual material DEQ requests regarding its factual determination of water existence which is entirely distinct from DNRC's legal determination of legal appropriability, as DNRC has repeatedly argued.
>
> Equally facile is DNRC's standing argument that "no appropriation of water has occurred." Obviously, no appropriation has occurred because a prerequisite to such appropriation is approval of the

> subdivision which is predicated on DNRC's determination that "the water supply is either exempt from water rights permitting requirements or has a water right."
>
> . . . .
>
> Under DNRC's analysis, even if Plaintiffs are correct that DNRC improperly determined the subdivision was entitled to use exempt wells,
> DNRC would have the entire subdivision review process be completed, wells drilled, and water pumped before Plaintiffs would have standing. **This is ridiculous, for "[t]he law neither does nor requires idle acts." Mont. Code Ann. § 1-3-223 (2021). If DNRC's application of exempt well law was a necessary part of the County review process and DNRC's interpretation of that law is erroneous it follows that DNRC's conclusion cannot stand.**

Dkt. 83, p. 57-58 (emphasis added).

In spite of this thorough explanation of the interplay between the subdivision approval and water rights permitting process issue, in ruling on Plaintiffs' request for fees under the Water Use Act, the District Court abused its discretion by failing to apply the statutory definition of the word "permit" and its own analysis and conclusion as to the "finality" of DNRC's "permitting decision."

First, the District Court correctly found that DNRC's legal conclusion that a given water use is exempt, is itself a "permitting decision" under § 85-2-306, MCA. Dkt. 83, p. 5. (The Court's Order "has the *effect* of preventing issuance of exempt well permits for the project…."(emphasis in original).) Yet, the District Court abused its discretion by failing to apply its own findings on the other relevant legal issue: finality. Thus, while the District Court correctly determined

DNRC's actions here constitute a "permitting decision" it erred by finding that this decision was not "final" under the facts established in the record. More specifically the District Court failed to apply its own analysis to the issue of finality, falling into the exact segmentation pitfall it decried DNRC for asserting.

Quite clearly, the District Court found that DNRC's legal "decision" that 71 Ranch was not required to obtain a permit was "final" because that act alone would result in the irretrievable commitment of natural resources and conveyed unto 71 Ranch the irrevocable entitlement that comes with approval of its preliminary plat. As early as 1979, In *Northern Plains Resource Counsel v. Board of Natural Resources and Conservation*, this Court held that "[a]n agency decision is final "when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." 181 Mont. 500, 518, 94 P.2d 297, 307 (1979).

This in turn, mirrors what the United States Supreme Court has said about this exact same issue. In *Bennett v. Spear*, the Court stated what is now the widely cited test. 520 U.S. 154, 177–78 (1997). As a general matter, two conditions must be satisfied for an agency action to be "final": First, the action must mark the "consummation" of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. *Id.* And second, the action must be one by

which "rights or obligations have been determined," or from which "legal consequences will flow." *Id.*

Here, the District Court properly found that DNRC made permitting decisions in relation to applicability of the Water Use Act's exemption from permitting as applied to the Horse Creek Hills subdivision. That decisions, born out through the agency's pre-determination letters, was in fact the "consummation" of the agency's decision making process on that issue and thus statutory exemption allowed the County and DEQ to authorize the preliminary play for the proposed subdivision. That decision, in turn, authorized 71 Ranch to begin pumping groundwater in violation of the law.

Following its pre-authorization decision, DNRC had no legal latitude to – and in fact would have been acting arbitrarily if it tried to – revoke that authorization from 71 Ranch at a later date. DNRC's permitting decision was final because it authorized the subdivision to move forward and advised the applicant that pumping could lawfully begin. Thus, the District Court somehow understood, but nevertheless conflated the critical issue:

> There is nothing 'pre-' about this determination which DNRC admits is distinct from its subsequent unrelated duties regarding issuance of a water right. Indeed, the first sentence of the letter makes clear that it was issued not as an interim step in DNRC's water rights permitting process but rather as DNRC's final determination. . ..

Dkt. 63, p. 56.

Yet in ruling against fees under the Water Use Act, the Court said the opposite:

> The entire premise of the Court's ruling on this issue is that DNRC's permitting process has not even begun, let alone resulted in a final determination. Indeed, had the Court concluded that the letters were part of NRC's water rights permitting process then Plaintiffs would not have had standing to bring these claims against DNRC since its process had not culminated in a final decision on water rights permitting (because it had not even begun).
>
> DNRC's letters were not "a final decision of the department on an application for a permit or a change in appropriation,"

Dkt. 83, p. 5.

Therefore, the District Court abused its discretion when it found Plaintiffs are not entitled to their reasonable attorney's fees pursuant to § 85-2-125(1), MCA, because the exemption decisions were "final decisions".

## CONCLUSION

For the foregoing reasons, the Appellants respectfully request that the Court reverse the District Court and award them their reasonable attorney's fees.

DATED this 25th day of November, 2024.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2008 for Mac is **7,473**, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

DATED this 25th day of November, 2024.

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