IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 24-0542

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.

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

APPELLEE, 71 RANCH, LP'S, ANSWER BRIEF

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STATEMENT OF THE ISSUES

Whether the District Court correctly denied an award of attorney fees to Appellants under the Uniform Declaratory Judgment Act, the private attorney general doctrine, and/or the Montana Water Use Act.

STATEMENT OF THE CASE

Appellants brought suit against Broadwater County (the "County") and the Department of Natural Resources ("DNRC") in August, 2022. CR1. 71 Ranch, LP, ("71") sought to intervene on March 8, 2023, stating "both [71] and the current parties have commonality in the outcome of whether DNRC and/or the County correctly followed the approval process." *Uncontested Petition to Intervene*, 7, CR14. 71's petition was granted, and then 71 submitted its Answer. CR15-16. Therein, 71 submitted affirmative defenses which include: asserted damages (if any), including professional fees and costs, are attributable to the acts, errors, or omissions of others over whom 71 had no control; and that 71 had a right to rely upon DNRC guidelines and the approval process mandated and/or implemented by DNRC and/or the County. *71's Answer to Complaint*, 42, ¶¶6, 7, CR16.

Thereafter, 71's involvement has been limited in scope, and mainly confined to filing a motion for declaratory judgment requesting the Court's guidance as to whether or not "the Combined Appropriation Guidance ("Guidelines") established by the [DNRC] is valid and in conformance with Montana Law…." *71's Motion*

for Declaratory Judgment and Supporting Brief, 1-2, CR25. 71 submitted that motion specifically seeking clarification about whether 71 correctly relied upon the same as part of 71's application process. *71's Reply Brief*, 1-3, 7-8, CR35. The District Court declined to rule on that issue, stating such a ruling would be tantamount to an "advisory opinion." *Declaratory Motion Order*, 3, CR42.

Additionally, 71 was implicated by a limine motion brought by Appellants seeking to exclude a hybrid expert witness report disclosed by 71. *[Appellants'] Motion in Limine*, CR29. 71 asserted the hybrid witness information should be allowed because that person had not been hired for litigation purposes, the report information was partially contained with the record and/or would be relevant to the Court, and the hybrid witness' report contained neither opinions related to the issues nor legal conclusions. *71's Answer Brief to [Limine Motion]*, 9-11, CR34. The Court determined the proffered witness' report was not within the administrative record and would therefore not be considered. *Limine Motion Order*, 6-7, CR41. Subsequently, both Appellants and the County brought separate summary judgment motions. CR43; CR45. 71 did not file a summary judgment motion on its own behalf but did submit responses to both Appellants' and the County's summary judgment filings. CR48; CR49. This Court partially granted summary judgment in Appellants' favor, "except as to their half-hearted

constitutional claim." CR63, 81. Appellants then presented a motion seeking an award of attorney fees. CR69.

In Appellants' fees motion, Appellants argue they are entitled to attorney fees under the following theories: the private attorney general doctrine; Uniform Declaratory Judgment Act; and Montana Water Use Act. CR69, 2. Even though Appellants unclearly leveled any of their claimed fees against 71 specifically, and instead focused on the County and DNRC, 71 filed an answer brief in the event Appellants' motion was considered as seeking an award against 71, along with the County and DNRC. CR75. District Court Judge McMahon denied Appellants' motion for attorney fees on June 11, 2024 ("Fees Order"). CR83. On August 28, 2024, Appellants filed a stipulation to dismiss, with prejudice, Appellants' constitutional claims against DNRC, and "all remaining claims not specifically ruled upon in the prior orders (June 11, 2024, and February 14, 2024) …." *Stipulation to Dismiss*, 2, CR90. On September 11, 2024, Appellants submitted their notice appealing the lower court's Fees Order. CR94. At no point was injunctive relief sought by any party.

To summarize 71's procedural posture of this case, 71's only proactive filing (after intervention) was in its declaratory judgment motion seeking judicial clarification on DNRC's implementation and application of its own guidelines/rules. CR25. 71 was not an original party to this action and filed to

intervene over seven months after the Complaint was filed. CR1; CR14. Aside from the declaratory judgment motion, out of the nearly 100 filings made in this case, 71 had limited procedural involvement which was primarily contingent upon the actions/filings of Appellants, the County, and DNRC. *See 71's 12 Filings of Record:* CR14 (Petition to Intervene); CR16-17 (71's Answer); CR22 (Notice of Compliance); CR25 (Declaratory Judgment Motion); CR32 (Motion for Extension of Time); CR34 (Answer to Appellants' Motion in Limine); CR35 (Reply to Appellants' Brief Opposing 71's Declaratory Judgment); CR48 (Response to County's Summary Judgment Motion); CR49 (Response to Appellants' Summary Judgment Motion); CR75 (Response to Appellants' Motion for Attorney Fees); and CR85 (71's Answer Objecting to Appellants' Motion for Entry of Judgment).

STATEMENT OF THE FACTS

This case involves a challenge made by Appellants to the County's and DNRC's decision to approve the development and preliminary plat of Horse Creek Hills, a proposed subdivision in Broadwater County.[1] CR1. 71's proposed project would have subdivided 442 acres over four phases of development into 41 lots. 6, CR17; 4, CR63. In so doing, 71 relied upon DNRC Guidelines, and its corresponding Memo. *Declaratory Judgment Motion*, 6, CR25.

[1] No final plat approval has been/was approved and/or is pending.

Accordingly, 71 sought guidance from the lower court about the validity of those DNRC Guidelines and Memo, and brought a motion before the District Court for a judicial determination/declaration, as to whether the DNRC Guidelines (and corresponding Memo) conform with Montana Law and the Montana Water Use Act, and whether DNRC correctly and appropriately adhered to the Montana Legislature's directive and intent and Montana Law. *Id*., 12. The lower court declined to weigh in on 71's request, stating that "such a requested ruling on the Guidelines would simply amount to an advisory opinion", and that, moreover, the "DNRC Guidelines do not have the independent force and effect of substantive law." *Declaratory Motion Order*, 3, CR42.

71 also followed the County's mandates, and after several remands to the County's Planning Board (wherein 71 supplemented its application and information at the County's direction), the County's Commissioners issued the written Preliminary Plat Approval for the subdivision on July 28, 2022. *County's Answer*, 11, CR4; Order, 4, CR63. Appellant's Complaint alleged that the County's decision to approve the preliminary plat was based on incomplete analysis and process in contravention of the Montana Water Use Act and the Montana Subdivision and Platting Act. *Complaint*, 2, CR1.

Appellants argued, among other issues, the County performed a deficient environmental assessment and an inadequate review of the development

application, asserting the County improperly relied on DNRC's determination about the legal availability of water. Order, 4-5, CR63. Further, Appellants argued that DNRC's exempt well approval is contrary to statute, administrative regulation, and case law. *Id*., 5. In submitting answers to the Complaint, 71 highlighted its good faith belief that it complied with DNRC regulations/allowances, that it followed the "applicable procedure for approval of its preliminary plat application", and that 71's "application process is on-going and still subject to MDEQ review for water supply evaluation and/or limitations." *71's Answer to Complaint*, 7, 10-13, ¶¶19, 32, 34-38, CR16.

Appellants filed for summary judgment, based on the uncontested record, which was partially granted by the District Court.[2] CR45; CR46; and CR63. In its summary judgment order, the District Court concluded the County's decision to approve 71's preliminary plat was arbitrary, capricious, and unlawful, and that DNRC's determination that each of the proposed development phases were entitled to a separate combined appropriation exempt well was in error. Order, 82, 85, CR63. The lower court further stated that DNRC "simply ignored" the *CFC* opinion through "faulty agency guidance that has no force of law." *Id*., 84.

[2] The lower court declined to grant summary judgment in Appellants' favor, "as to their half-hearted constitutional claim." Order, 81, CR63.

Nowhere in the summary judgment "Conclusion" does the District Court directly fault 71. *Id.*, 82-85.

Appellants subsequently withdrew their Constitutional claims, with prejudice, and also filed a motion seeking an award of attorney fees. CR90; CR63. 71 submitted an objection to the fees, even though 71 was unable to ascertain whether any of the claimed fees by Appellants were leveled against it, because nowhere in Appellants' initial motion did Appellants seek relief specifically against 71. CR64; *71's Fees Motion Response*, 3, CR75. Appellants' arguments focused on the County and DNRC. CR64. DNRC and the County also objected. CR79; CR76. After a lengthy and encompassing analysis, Appellants' fees request was denied. CR83. That Fees Order is the only subject of this appeal. CR94.

STANDARDS OF REVIEW

This Court reviews for correctness a lower court's conclusion regarding the existence of legal authority to award attorney fees, and if such authority exists, then review of the granting or denial of such fees is for an abuse of discretion. *JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, Inc.*, 2021 MT 204, ¶18, 493 P.3d 340 (citations omitted); *City of Helena v. Svee*, 2014 MT 311, ¶7, 377 Mont. 158, 339 P.3d 32 (citations omitted); and *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶42, 354 Mont. 50, 221 P.3d 1230 (citations omitted). An abuse of discretion occurs when the district court acts arbitrarily without

conscientious judgment or exceeds the bounds of reason. *Harmon v. Fiscus Realty, Inc*., 2011 MT 232, ¶7, 362 Mont. 135, 261 P.3d 1031 (internal quotations omitted) (citation omitted).

SUMMARY OF THE ARGUMENT

Appellants seek review of the Montana First Judicial District Court's Fees Order, which denied Appellant's motion for attorney fees, where Appellants claimed such an award was warranted under the Uniform Declaratory Judgment Act ("UDJA"), the Montana Water Use Act ("MWUA"), and the private attorney general doctrine ("PAGD"). The District Court did not abuse its discretion when it denied such relief, issuing a 68-page analysis of the law and its conclusions, firmly establishing a more than adequate basis for its denial; as such, this Court should affirm the Fees Order finding the law was correctly applied (and, if not, then any such error was harmless), and no abuse of discretion occurred. Additionally, even if error by the lower court were found, fees should not be assessed against 71 because none of the theories promulgated by Appellants support such an award.

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ARGUMENT

I. Private Attorney General Doctrine:

The District Court did not abuse its discretion when it denied awarding Appellants fees under the private attorney general doctrine because this matter did not vindicate constitutional interests.

Montana follows the American Rule, which states generally each party pays its own fees and the prevailing party is not entitled to an award from the non-prevailing party. *Community Ass'n for North Shore Conservation, Inc. v. Flathead County*, 2019 MT 147, ¶47, 396 Mont. 194, 445 P.3d 1195 (citation omitted). Montana has, however, recognized "limited equitable exceptions…" which are narrowly construed, and include the PAGD. *Id*., ¶¶47-48 (citations omitted). The Montana Supreme Court has clarified that the PAGD may be used "sparingly" in situations where "the government, for some reason, fails to properly enforce [Constitutional] interests" of public significance, and enumerated factors to be considered when determining whether an award under the PAGD is warranted. *Id*., ¶48 (internal quotations omitted) (citations omitted).

Fees have been declined under the PAGD in situations where the underlying decision was "statute-based" and accordingly did not vindicate constitutional interests. *Id*., ¶50 (citing *Clark Fork Coalition v. Tubbs*, 2017 MT 184, ¶23, 388 Mont. 205, 399 P.3d 295) (citations omitted). The underlying first appeal of the *Clark Fork* case, which was a 2016 decision this Court labeled "*Clark Fork I*",

dealt with the Clark Fork Coalition ("CFC") questioning the validity of a DNRC rule related to exemptions from permitting groundwater appropriations, which the court invalidated. *Clark Fork*, 2017 MT 184, ¶1. The CFC, as the prevailing party, then sought fees under the PAGD, which the lower court granted, and the Supreme Court reversed. *Id*., ¶¶1-2. In so doing, the Supreme Court reasoned that the PAGD exception does not apply when the holding is statute-based, pointing out that in *Clark Fork I*, the Court had held the DNRC definition of "combined appropriation" was inconsistent with the stated purpose of the MWUA. *Id*., ¶¶19, 21, 23 (internal quotations omitted) (citations omitted). Thus, the underlying issue was one of statutory interpretation, and not whether the DNRC rule "implicated or conflicted with any constitutional provisions…and the [CFC] did not litigate 'important public policies…grounded in Montana's Constitution.'" *Id*., ¶22 (citations omitted). The Court further stated that even though the MWUA "implements the mandates of Article IX, Section 3, of the Montana Constitution, the [DNRC's] rule is a step removed" [3], and if the Court were to adopt CFC's argument that "water rights are an important constitutional interest, [then] virtually any case challenging the [DNRC's] administration of the Act could subject the

[3] The Montana Constitution provides for the protection of existing water rights and water resources and requires the legislature to administer and regulate those water rights within this State.

agency to a potential fee award." *Id*. The Court therefore reversed the lower court's fees award. *Id*., ¶¶23, 24.

In the matter before this Court, Appellants' claims for relief addressed Section 76-3-603, Mont. Code Ann., and ARM 36.12.101(12) against the County and DNRC. *Complaint*, ¶¶100-123, CR1. Appellants mirrored these arguments in their summary judgment motion, which was partially granted by the lower court. *Appellants' Motion for Summary Judgment*, CR45; Order, CR63. Distilling the summary judgment decision down indicates the court found DNRC's interpretation of the law to be incorrect and that the County's implementation of the law and the preliminary subdivision approval was in error. Order, 82-85, CR63. While mandates of Article IX, Section 3, of the Montana Constitution are implemented and considered, the underlying summary judgment order is statute-based and rule-based; as such, the sparingly utilized PAGD exception for a fees award should not apply because constitutional interests are not clearly implicated. The lower court was correct with this conclusion. *Id.*, 67.

Additionally, to the extent Appellants argue compelling constitutional interests, they dismissed their constitutional claims, with prejudice. CR90; *see State v. Dist. Ct. of Fifteenth Jud. Dist. In & For Musselshell Cnty.* (Mont. 1931), 300 P. 235, 237 (confirming that a voluntary dismissal is a waiver of all previous

errors and cannot form the basis of an appeal). The lower court also found those claims by Appellants to be half-hearted. CR63, 81.

Notwithstanding the foregoing, the lower court further provided extensive analysis of case law and also the factors a court reviews when faced with a PAGD fees claim. Fees Order, 21-67, CR83. The first prong, dealing with the societal importance of the public policy vindicated, is limited to those matters which sufficiently implicate constitutional interests, and which are integrated into the underlying decision. *Id*., 58-60 (citations omitted). The lower court correctly stated:

> Although this suit concerns both statute and administrative rule, it does not consider whether they conflict (implicitly or explicitly) with the Constitution, but rather whether DNRC and the County's interpretation of law is correct, specifically under *Clark Fork II*. If striking down a rule which abrogates the constitutionally mandated Water Use Act does not sufficiently vindicate constitutional interests, then mere interpretation of that rule certainly does not. *See Clark Fork II*. **This Court's review of the County and DNRC's interpretation of exempt well law is too attenuated to award fees as the rule in question does not directly implement constitutional provisions, but rather is a step removed**…. *Id*., 60 (emphasis added).

As to the remaining prongs, the lower court expressed that this was a necessary action, and that the benefit of the summary judgment order would apply to "all Montanans by reinstituting a lawful interpretation of an exception that would otherwise swallow the statutory rule…." *Id*., 62-63. The court went further and indicated that equities weigh in favor of fees, going so far as to state that

DNRC, the County, and 71 "ignored" the concerns expressed by Appellants and the law. *Id.*, 65. The court did not address bad faith, but did conclude this matter is "presumably 'garden variety.'" *Id*., 65, 66. (71 further addresses the concept of "garden variety" herein under its UDJA argument.)

While 71 agrees with the court's ultimate conclusion, 71 questions the court's analysis related to equities. In this regard, the lower court was correct in not awarding fees, especially as pertains to 71. All claims for relief brought by Appellants were directed against the County and/or DNRC. CR1. Appellants presented no causes of action against 71, which could have been done once 71 filed its Answer. CR16. As referenced above herein and shown by the lower court record, 71's involvement was focused on seeking Court clarification about the DNRC Guidelines and Memo, rules, and applicable law, as 71 reasonably, and in good faith, relied upon the same when it formulated its subdivision application. 71 presented no causes of action against any of the other parties in this matter; 71 mainly asserted (as an affirmative defense) that it "had a right to rely upon the DNRC guidelines and the approval process mandated and/or implemented by Defendants." *71's Answer*, ¶7, 42, CR16.

71 is not a state agency or entity, and whose actions in the application process, and this case, have been neither frivolous nor made in bad faith. *See* §25-10-711, Mont. Code Ann.; and *Clark Fork*, 2017 MT 184, ¶29 (concurrence

opinion). For the lower court to state that 71 ignored the law is wholly unsupported by the facts or the lower court record. 71 was the applicant using the process, procedures, and guidelines in existence for years (and relied upon by a number of other successful applicants) of which 71 had zero involvement as to their development and/or implementation. 71 is essentially placed in a "damned if you do, damned if you don't" position in that if 71 fails to follow the mandates and requirements of DNRC and the County (and other governmental agencies), then any application by 71 would be denied for failing to follow the same, and yet by following that same process, the lower court essentially accuses 71 of ignoring the law. Up until the lower court's summary judgment order, there was no legal authority to indicate the then-existing process, guidelines, and/or law was being implemented in error.

If fees were assessed against 71, that would mean 71 is unjustly and inequitably punished for its detrimental reliance upon the mandated laws, rules, and process it followed, all of which was preliminarily accepted by the County and DNRC. 71 should be afforded the same constitutional right to rely on the law, upon which Appellants reference in relation to clean air and water; namely, the legislature is charged with the "administration, control, and regulation of water rights", and per the Montana Constitution, all waters of this State are "for the use

of its people and are subject to appropriation for beneficial uses as provided by law." Article IX, Sec. 3, (3), (4), Mont. Const.

Up until the lower court's summary judgment order, the legal authority and process adhered to by 71 was in place and utilized for years. Accordingly, 71 relied upon the constitutional mandate and terms, and should not be subject to an award of possible fees and/or costs associated with complying and relying upon the same. In a nutshell, 71 did what was requested of it by the government, working under the impression and reasonable belief that the governmental mandates and approval were in sufficient adherence with all laws required to properly and legally obtain preliminary plat approval. As an applicant, 71 was in a disparate power imbalance, relying on the government and the process it mandated. Accordingly, the PAGD should not apply to 71 or be grounds to award fees against it in Appellants' favor.

Additionally, the number of people standing to benefit from the summary judgment decision must be questioned from the standpoint that this is a district court order addressing a preliminary plat approval in Broadwater County. The summary judgment order is not statewide law. That order is not on appeal and is therefore not authority which will bind any other court in this State. *See e.g., Goetz v. Harrison* (Mont. 1969), 153 Mont. 403, 405, 457 P.2d 911, 912 (where

the Court affirmed the hierarchical nature of Montana's court system, affirming its supervisory control over district courts).

Notwithstanding the foregoing arguments, Appellants' failure to show any vindication of constitutional interests is dispositive, and the satisfaction of this element alone does not entitle Appellants to fees under the PAGD. *See Clark Fork*, 2017 MT 184, ¶23 (citing *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶21, 325 Mont. 70, 103 P.3d 1085 and *Baxter v. State*, 2009 MT 449, ¶47, 354 Mont. 234, 224 P.3d 1211). This Court has previously declined to address the remaining elements in PAGD cases when the constitutional factor is not satisfied. *Id*. Consequently, because the issues of the underlying case were statute-based and without vindication of important constitutional interests related to the protection and access of Montana's waters, the lower court did not abuse its discretion in denying Appellants attorney fees under the PAGD.

II. **Declaratory Judgment**:

The District Court did not abuse its discretion when it denied awarding Appellants fees under the Uniform Declaratory Judgment Act, and Appellants have failed to meet and/or establish the prerequisites needed for such an award against 71.

The threshold question for an award of attorney fees under the UDJA is whether equities support an award. *City of Helena v. Svee*, 2014 MT 311, ¶20, 377 Mont. 158, 339 P.3d 32 (internal quotations omitted) (citation omitted). If equities are found to be in favor of an award, then the analysis shifts to the "tangible

parameters test", which this Court adopted from Ohio because of the nebulous language of "necessary or proper." *Town of Kevin v. N. Cent. Montana Reg'l Water Auth.*, 2024 MT 159, ¶16, 417 Mont. 325, 553 P.3d 392 (citing to *Svee*, ¶22; and *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶¶42-45, 315 Mont. 210, 69 P.3d 663) (referring to additional relief under the UDJA for fees being allowed when the same are necessary and proper). While not exhaustive, the *Town of Kevin* Court listed factors to be considered when analyzing tangible parameters. *Id.*, (citations omitted). In this regard, the Court stated: the "test often considers whether (1) the defendant possesses what the plaintiff sought in the declaratory relief action; (2) it is necessary to seek a declaration showing the plaintiffs are entitled to the relief sought; and (3) the declaratory relief sought was necessary to change the status quo." *Id.*, (citations omitted).

In addressing the equities question, the lower court looked at whether the parties were similarly situated and concluded they are not, stating the case involves local residents and an environmental non-profit "against the combined…resources of DNRC, Broadwater County, and (as Plaintiffs characterize it) a 'litigant with both a history in Montana courtrooms, the chambers of the legislature, and in the halls of state agencies.'" Fees Order, 8, CR83. Nowhere in the lower court record, aside from Appellants' assertions about 71 made in their fees motion reply brief (so 71 had no opportunity to counter or defend, and to which 71 specifically called

out and objected to occurring in its fees answer brief), are these actual facts in evidence about 71. *Appellants' Fees Reply Brief*, 12, CR80; *71's Fees Motion Response*, 3, 7-8, CR75. As such, 71 submits it was improper for the lower court to include such allegations as part of its analysis related to whether the litigants are similarly situated. This is akin to the lower court characterizing Appellant, Upper Missouri Waterkeeper, as merely one non-profit, when a cursory search of that organization shows it is part of an international organization, and has been party to a number of lawsuits before this Court. *See* Non-Profit Clean Water Organization & Charity | Waterkeeper; The Waterkeeper Alliance - Upper Missouri Waterkeeper®; *DNRC's Response to Fees Motion*, 4, CR79 (wherein DNRC lists some example cases to which Upper Missouri Waterkeeper is a party).

The lower court then went on to discuss tangible parameters and "possession of what movant seeks." Fees Order, 11-14, CR83. In its analysis, the District Court stated:

> [I]t still is not clear what DNRC, the County, or 71 Ranch 'possessed' which [Appellants] sought. Certainly, DNRC possesses the authority to interpret and apply the Water Use Act, but [Appellants] are not seeking DNRC's authority, they are seeking a different exempt well decision. Likewise, the County possessed the authority to rule on the preliminary plat, but [Appellants] are seeking a different preliminary plat determination. Finally, 71 Ranch possesses the land and authority to file for subdivision, but [Appellants] are not seeking the land or authority over its use. *Id*., 13.

The lower court then concluded "that it would be stretching the boundaries of interpretation to conclude that any party 'possesses' anything in an action seeking a declaration concerning statutory interpretation." *Id*., 14.

In relation to necessity, the District Court concluded that Appellants' suit was not necessary to prove the invalidity of a final plat, but was to invalidate the preliminary plat approval. *Id*., 19. 71 questions this conclusion from the standpoint that while the summary judgment order had the effect of invalidating the preliminary approval, it did not negate 71's ability to re-submit/request other approval. A declaratory judgment action at the preliminary plat stage was not necessary, as Appellants certainly had the option to wait and file for declaratory judgment in the event of final plat approval, which had not, and has not, occurred. As such, 71 submits that the element of "necessity" in relation to an award of fees under the UDJA has not been met.

As to whether the current action was needed to change the status quo, Appellants sought to change the "status quo" of the existing preliminary approval of 71's application. 71 calls the necessity of Appellants' action into question and reasserts its arguments herein which distinguish a preliminary plat (as exists in this case) from a final plat, and also highlights that DNRC had not issued actual permits at this stage. *See* §76-3-103(6) and (13), Mont. Code Ann. Additionally, in seeking to change the preliminary approval, Appellants brought suit against

DNRC and the County, not 71. CR1. This makes sense as 71 has no authority to grant, deny, or otherwise alter the issued preliminary approval, which rests solely in the hands of the subject governmental entities. Accordingly, 71 neither had, nor possesses, the authority to enable Appellants to change the "status quo."

Appellants may try to argue 71 could have withdrawn its application, but that should be of no import because up until the District Court issued its summary judgment order finding fault, there was nothing legal to indicate that 71's actions were in error. This is further supported by 71's own motion seeking input from the lower court about the DNRC Guidelines and corresponding Memo, upon which the District Court declined to rule. CR25; CR42. As such, 71 submits it possessed nothing with which Appellants required, or that such action by Appellants fell within the definition of being necessary for purposes of awarding UDJA fees.

In regard to whether this case is a "garden variety" declaratory judgment action, Appellants claim it is not, and that the summary judgment order "fundamentally changed subdivision permitting and stopped rampant…illegal…pumping across…Montana." In response, 71 refers again to the underlying order not being a binding decision on any other court in this State. The lower court found that the actions of DNRC and the County under this set of facts was erroneous. That order is not on appeal with this Court, and, as such, is neither under review for correctness nor a citable opinion which conveys binding authority

outside of Broadwater County. The subdivision laws remain, and the *CFC* case has not been overturned.

Additionally, this Court recently weighed in on the State's water regulatory system, stating that "whether this regulatory system is ideal or preferrable is a determination for the Legislature to make…. It remains, as far as this case is concerned, the Legislature's prerogative to review and, if necessary, revise the MWUA or the larger regulatory structure." *Montana Trout Unlimited, et al. v. DNRC and Tintina Montana, Inc.*, 2025 MT 1, ¶41, 2025 WL 16774. 71 asks this Court to apply the same logic to the matter at hand.

In this regard, while the lower court found error in what DNRC and the County did, the summary judgment order analyzing and finding the same is not before this Court, and to the extent there are wider reaching implications related to subdivision law and exempt well permitting, those are the Legislature's prerogative to review and, if found necessary, revise. That type of over-arching application did not take place with the present local order, and to argue, at this point, that the Legislature will act in the future based on the same is purely speculative and unpersuasive.

Case law shows that while a district court has discretion to award attorney fees under the UDJA, such awards in declaratory judgment actions are rarely upheld by this Court. *See JRN Holdings, LLC, v. Dearborn Meadows Land*

Owners Ass'n, et al., 2021 MT 204, ¶¶62-63, 405 Mont. 200, 493 P.3d 340; *Mont. Immigrant Justice Alliance v. Bullock*, 2016 MT 104, ¶¶50-53, 383 Mont. 318, 371 P.3d 430; *Beebe v. Brd. of Directors of the Bridger Creek Subdivision Community Ass'n*, 2015 MT 183, ¶¶27, 30, 379 Mont. 484, 352 P.3d 1094 (specifically stating, "An award of attorney's fees in a declaratory action is a rarity…") (internal citations omitted); and *Hughes v. Ahlgren*, 2011 MT 189, ¶¶16, 21-22, 361 Mont. 319, 258 P.3d 439 (noting that equities generally do not support an award of fees, referencing an analysis of whether the parties are similarly situated and whether the parties genuinely dispute their rights).

An award of attorney fees under the UDJA is only appropriate after the court has made the required equitable considerations to support such an award. *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶45, 354 Mont. 50, 221 P.3d 1230 (citation omitted); Section 27-8-313, Mont. Code Ann. As such, the threshold determination for an attorney fees award is whether the equities support the same, at which point (if the equitable component is shown), the analysis shifts to whether such an award is necessary and proper under the "tangible parameters" test. *Mungas*, ¶43 (citations omitted). Additionally, while Section 27-8-313, Mont. Code Ann., "may provide a statutory basis for awarding attorney fees, it [is] also recognized that simply because a party filed an action seeking a declaratory

judgment it is not automatically presumed that an award of attorney fees is necessary and proper." *Id.*, ¶44 (citations omitted).

As evidenced by Appellants' Complaint and their fees motion, Appellants brought no claims or causes of action against 71 under the UDJA. CR1; CR69. Additionally, in their fees motion, Appellants made no showing or arguments against and/or specifically referencing 71 related to the equitable considerations which must occur to support an award, or an analysis of the "tangible parameters" test to determine whether an award is necessary and proper against 71. *Supra*. All such claims by Appellants, in relation to fees under the UDJA, are made against the County and DNRC. *Fees Motion*, 4-6, CR69; *Fees Reply Brief*, 6, CR75 (wherein Appellants themselves state DNRC and the County should be liable). As such, an award of fees and/or costs against 71 pursuant to the UDJA is neither warranted nor established, and was correctly denied by the District Court.

Furthermore, and as argued in 71's fees answer brief, any supplementation by Appellants to their initial fees filing should not be allowed and/or considered as the same applies to 71, because this deprives 71 of the opportunity to respond and defend, as Appellants have provided no such analysis in their initial motion. *Supra*. Accordingly, any additional/new allegations pertaining to 71 set forth by Appellants in their fees reply brief and/or appeal filings should be wholly ignored as not being properly before this Court on appeal.

The lower court record shows Appellants did not accurately plead or claim the UDJA against 71 in its original fees motion, and supplied none of the required analysis, as pertains to 71, thereunder for an award of fees against 71. Any such arguments Appellants now try to make against 71 are unsupported by their original filing and should not be allowed. To do otherwise would be wholly inequitable to 71, as the good faith participant in not only the application process, but also this case. Even without these dispositive facts, the lower court properly concluded that fees under the UDJA were not warranted. CR83. In this regard, despite the District Court determining the equitable considerations to be in Appellants' favor (which 71 questions), it concluded that fees were not awardable "because neither Defendants nor [71] 'possessed' anything sought by [Appellants], who merely wanted different legal conclusions." *Id*., 67. This should be upheld.

The grant of attorney fees under the UDJA is within the "discretionary province" of district courts. *Renville v. Farmers Ins. Exch*., 2004 MT 366, ¶20, 324 Mont. 509, 105 P.3d 280 (citations omitted). When a lower court provides an adequate basis, as occurred here, for its determination related to whether an award of fees under the UDJA is warranted, then this Court will support the same. *See Friends of Lake Five, Inc., et al. v. Flathead Co. Commission, et al*., 2024 MT 119, ¶38, 416 Mont. 525, 549 P.3d 1179 (where the award of fees by the lower court was upheld). In the event, however, this Court feels otherwise, the ultimate

conclusion reached by the District Court should still apply to deny fees and uphold the myriad of cases which show an award of fees under the UDJA is still a rarity, and any exception to the same should not pertain to this matter.

III. Montana Water Use Act:

The District Court did not abuse its discretion when it denied awarding Appellants fees under the Montana Water Use Act because 71's application was brought into question at the preliminary stage, no appropriation had actually taken place and no water had actually been utilized, and injunctive relief was not sought under the MWUA.

The Legislature enacted the Montana Water Use Act ("MWUA") to unify the state's water rights system in recognition of the rights and responsibilities under Montana's Constitution. §85-2-101, Mont. Code Ann. The statutory framework instructs how to obtain, administer, and adjudicate water rights. *Id.* Generally, this requires a water rights seeker to apply for a permit from DNRC. §85-2-301, Mont. Code Ann. The Act contains exemptions from permitting for certain new groundwater appropriations. §85-2-306, Mont. Code Ann. In part, the relevant exemption applies to groundwater appropriations outside of stream depletion zones that do not exceed 35 gallons per minute (gpm), and 10 acre-feet per year (apy). §85-2-306(3)(a)(iii), Mont. Code Ann.

In 1987, the Legislature added an exception, that a "combined appropriation from the same source by two or more wells" would not fall under the exemption. §85-2-306(3)(a)(iii), Mont. Code Ann. In response to this caveat, DNRC

promulgated regulations clarifying that a "combined appropriation" does not need to be "physically connected nor have a common distribution system." 36.12.101(7), Admin. R. M. (1987). DNRC stated that a "combined appropriation" exists when multiple appropriations could have been accomplished in a single appropriation, that there may be separate parts of a project or development, and do not need to be developed simultaneously. *Id.*

In 1993, DNRC replaced the definition of "combined appropriation" with "two or more groundwater developments, that are physically manifold into the same system." 36.12.101(13), Admin. R. M. (1993). This allowed any number of appropriations from the same project to draw from a single water source. *The Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶11, 384 Mont. 503, 380 P.3d 771. Later, the Montana Supreme Court upheld the reinstatement of the 1987 rule. *Id*., ¶46.

In 2015, the Legislature defined "combined appropriation" to guide DNRC in how to apply the *CFC* decision for past and future permitting. H.B. 168, 64th, Leg., Ch. 221 (Mont. 2015). The Legislature allowed the 1993 Rule to remain in effect for applicants who applied before and up to the issuance of the District Court's Order. *Id.* Applications submitted after the Order were required to use the 1987 Rule. *Id.*

The language of the 1987 Rule, and its definition of "combined appropriation", remains the same since the *CFC* decision was issued. 36.12.101(12), Admin. R. M. The Section 85-2-306(3)(a)(iii), Mont. Code Ann., exemption also remains in the Act, as it was when the *CFC* decision was issued. Following the *CFC* ruling, DNRC created a guidance document which explains the judgment in relation to what is accomplishable by an appropriator, and updated its guidance, to ensure clarity, on what DNRC considers to be combined appropriation. *Declaratory Judgment Motion*, 6, Exhibit IR-2 attached thereto (Kerri Strasheim, DNRC Regional Manager, Email, 3/25/2022), CR25. DNRC's guidance is contained in its "Combined Appropriation Guidance", updated March 23, 2022 ("Guidelines"), and its "Combined Appropriation Guidance – Updates for Consistency", dated March 23, 2022 ("Memo"). *Id*., Exhibit IR-3 (Guidelines), and Exhibit IR-4 (Memo) attached thereto. 71 relied upon these Guidelines and Memo when it submitted its application for the proposed Horse Creek Hills project. *Id*., 6.

Appellants assert they are entitled to attorney fees pursuant to Section 85-2-125, Mont. Code Ann., of the MWUA which provides:

> **85-2-125. Recovery of costs and attorney fees by prevailing party.** (1) If 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.

> (2) The party obtaining injunctive relief in an action to enforce a water right must be awarded reasonable costs and attorney fees. For the purposes of this section, "enforce a water right" means an action by a party with a water right to enjoin the use of water by a person that does not have a water right.

As correctly determined by the lower court, this Code Section does not apply to the present case. Order, 67, CR63. In this regard, Appellants contend the four DNRC letters are permits, and that Appellants are enforcing a water right because they are enjoining 71's use of water. CR64. This is not a correct application of Section 85-2-125, Mont. Code Ann., and mischaracterizes the lower court record.[4] DNRC's letters clearly state they are not permits or certificates. *71's Fees Answer*, 9-11, CR75 (Exhibit IR-1 attached thereto; *See also* CR5 (attachment to *DNRC's Answer to Fees Motion*). More specifically, each correspondence states: "[t]his letter does not serve as a pre-approval for a water right nor does it provide a pre-approval to utilize up to 10AF of water in the future. This letter only evaluates the amount of water proposed under the current project." *Id*. The letters each specify the purpose of the same is to respond to 71's request for "DNRC review of water right permit exceptions under MCA 85-2-306(3)(a)(iii) for the proposed DEQ review in accordance with ARM 17.36.103(1)(s)." *Id*. (referencing DNRC guidance).

[4] The lower court record shows no injunctive relief was sought and/or granted.

Water right permits are addressed in Section 85-2-302, Mont. Code Ann. No application for an actual permit has been submitted by 71 to DNRC. In this case, if 71 moves forward with a future development, 71 could obtain physical water for the project in multiple ways; for example, through one or more public water supply wells. CR75. Any decision DNRC might make on such a future permit application could be subject to administrative proceedings under MAPA and judicial review, which could include fees. §85-2-125, Mont. Code Ann. That is not the status of this matter. DNRC's letters address the exceptions listed in Section 85-2-306, Mont. Code Ann. There is no attorney's fees provision associated with Section 85-2-306, Mont. Code Ann. The provisions in Section 85-2-125, Mont. Code Ann., do not apply to the facts of this case at this stage.

Further, the cases cited by Appellants, *Northern Plains Resource Council v. Board of National Resources and Conservation* and *Bennett v. Spear*, actually support 71's position, and the lower court's conclusion. *Northern Plains* (Mont. 1979), 181 Mont. 500, 594 P.2d 297; *Bennett*, 520 U.S. 154 (1997). In this regard, Appellants cite to these cases as defining when an agency decision is "final", with the test being that the agency action must be the consummation of the decision-making process, and not be tentative or interlocutory in nature, and must also be one where the rights or obligations have been determined. *Northern Plains*, 181 Mont. at 518, 594 P.2d at 307; *Bennett*, 520 U.S. at 177-178. In the case at bar, it

is undisputed that a preliminary plat approval was called into question, not a final plat. The DNRC letters only evaluated the amount of water which was being proposed, and DNRC issued no permits or authorization for actual water use. Additional steps by 71, and more governmental review and approval, would have been required, which further supports the preliminary plat approval was just that, "preliminary", and interlocutory in nature.

Appellants' assertion that preliminary plat approvals are inherently final and irrevocable is inaccurate. Under Montana law, a "preliminary plat" is defined differently from a "final plat." §76-3-103(6) and (13), Mont. Code Ann. According to Section 76-3-610(1), Mont. Code Ann., the approval of a preliminary plat is valid for a one to three-year period, and that period may be extended one time at the request of the subdivider. Further, the Code Section states, "the governing body and its subdivisions may not impose any additional conditions as a prerequisite to a *final plat approval*…." §76-3-610(2), Mont. Code Ann (emphasis added). A final plat may only be approved if "it conforms to the conditions of approval set forth on the preliminary plat…", again differentiating preliminary plats and final plats. §76-3-611(1)(a), Mont. Code Ann. What is more, the governing body must prepare a written statement that identifies which conditions apply to the preliminary plat approval, and these conditions "must be satisfied

before the final plat may be approved." §76-3-620(1)(f), Mont. Code Ann (emphasis added).

These statutory provisions demonstrate that a governing body is not obligated to grant extensions, and a final plat approval is provisional upon satisfaction of the conditions stated in the preliminary plat approval. As such, the conditional nature of a preliminary plat approval inherently implies the approval is not final. Montana case law also supports this interpretation. Notably, in *Kiely Const., L.L.C. v. City of Red Lodge*, the court emphasized that the city retained discretion to deny final approval if the conditions were not satisfied. *Kiely*, 2002 MT 241, ¶42, 312 Mont. 52, 57 P.3d 836. Together, statutory and case law establish that until certain conditions of the preliminary plat are met, a governing body is not obligated to grant final plat approval. This accordingly also shows that the definition and test established in *Northern Plains* and *Bennett*, as cited by Appellants, are not met and those cases are non-supportive of Appellants' arguments in relation to the MWUA.

Additionally, the MWUA does not support an award of fees where no appropriation of water has occurred. This case is not an action to "enforce a water right." No wells exist other than test wells on the proposed subdivision property. *71's Fees Answer*, 10, CR75. 71's subdivision application challenged in this case was in the preliminary plat stage. Individual property wells would not be drilled to

appropriate water until after final plat approval, which would not be granted unless all conditions were met, including the completion of a hydrogeologic study to determine whether water is available to support the subdivision and to determine whether the proposed water use by the subdivision would adversely impact neighboring wells. *Id*., 10-11. Because this case was brought at the preliminary plat stage, no water has been utilized and could not be actually appropriated until after final plat approval. *Id*. This was correctly recognized by the lower court when it declined to award fees to Appellants under the MWUA. Fees Order, 67, CR83. As such, attorney's fees and/or costs are not supported by MWUA in this matter and the lower court's denial of the same should be upheld.

Furthermore, Appellants have neither plead nor been granted injunctive relief, and, as such, subsection 2 of Section 85-2-125, Mont. Code Ann., is equally inapplicable and unsupportive of an award of fees and/or costs against 71 under the MWUA, again supporting the District Court's denial of fees.

CONCLUSION

Even if this Court finds the District Court abused its discretion by denying an award of fees under any of the proffered theories, this Court should still uphold such a denial in relation to 71 for the reasons set forth herein. Additionally, 71 should not be jointly and severally liable for the actions of DNRC and the County, which 71 reasonably and in good faith relied upon throughout the application

process. *See Animal Foundation of Great Falls v. Mont. 8th Judicial Dist. Crt.*, 2011 MT 289, ¶27, 362 Mont. 485, 265 P.3d 659. Any apportionment of fees should also not apply to 71, because its involvement in the present litigation has been minimal, as argued herein and shown by the lower court record. *See TCH Builders & Remodeling v. Elements of Constructions, Inc*., 2019 MT 71, ¶20, 395 Mont. 187, 437 P.3d 1035 (citations omitted) (stating courts are to evaluate the attorney effort expended on multiple claims when allocating fees applicable to each claim and base such an award accordingly).

For the above reasons and supporting authority, 71 respectfully seeks an order affirming the District Court's Fees Order which denies Appellants' attorney fees motion. In the event error is found, then 71 respectfully asks this Court to determine the same to be harmless error and/or not error as to the denial of fees against 71.

Respectfully submitted this 24th day of January, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this Appellee's Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material, and the word count calculated by Microsoft Word for Windows is 7,653 words, excluding the table of contents, table of authorities, certificate of compliance, and certificate of service.

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