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

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

v.

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

v.

71 Ranch, LP,
Intervenor/Appellee.

On appeal from the Montana First Judicial District Court
Broadwater County
District Court Cause No. DV-2022-38
Honorable Judge Michael F. McMahon Presiding

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ISSUES PRESENTED

Did the District Court abuse its discretion when it concluded that Appellants are not entitled to attorney fees under: the Water Use Act's provision for attorney fees for permit applications, the Uniform Declaratory Judgments Act, or the private attorney general doctrine?

STATEMENT OF THE CASE

This case involves Appellants' claimed attorney fees arising from a challenge to a proposed phased subdivision, Horse Creek Hills, and its preliminary plat approval by Broadwater County and the proposed use of exempt wells under § 85-2-306, MCA. Appellants (Upper Missouri Waterkeeper, Tanya and Tobey Dundas, Sally and Bradley Dundas, Carole and Charles Plymale, and Cody McDaniel) successfully challenged Broadwater County's preliminary plat approval and obtained a judicial a declaration that the proposed use of exempt wells did not meet the statutory requirements and DNRC's determination otherwise was in error.

The District Court denied Appellants' attorney fee claims under three theories. It held that Appellants were not entitled to fees under: (1) the Water Use Act because the case did not involve an application for a permit or a change in appropriation right; (2) the Uniform Declaratory Judgments Act because defendants DNRC or the County did not "possess" anything sought by Appellants and there was not a basis for fees under the Act because the question was one of

statutory interpretation; and (3) the private attorney general doctrine because the matter did not vindicate constitutional interests.

STATEMENT OF FACTS

In August 2020, Broadwater County began its review of the proposed Horse Creek Hills subdivision preliminary plat application. The subdivision consisted of four separate development phases. BC CCF&C 0000235-0000236.[1] Each of the four subdivision applications contained a letter from DNRC dated February 2, 2020, evaluating the amount of water proposed in the applications and determining that the respective phases of the subdivision fit the current rules and laws pertaining to the filing of an exempt water right under § 85-2-306, MCA. BC DEQ 2332-2339 (also included in Dkt. No. 5, DNRC Answer Exhibits 1-4) ("predetermination letters"). This was DNRC's only involvement. The Broadwater County Commission approved the preliminary plat application with conditions on July 28, 2022. BC CCF&C 0000235-0000236.

Appellants brought this case under Montana Subdivision and Platting Act, Title 76, chapter 3, MCA, and the Montana Uniform Declaratory Judgments Act, §§ 27-8-311, and -313, MCA ("UDJA"), seeking review of the County's approval

[1] DNRC follows the County's citation method to the Administrative Record: BC, Initials for Subpart, and Bates Number. *See* Dkt. No. 21, Notice of Agreement on the Stipulated Record.

(Counts I and II) and a declaration that the County and DNRC's interpretation of the exempt well provision in § 85-2-306(3)(a)(iii), MCA, and ARM 36.12.101(12) as applied to the Horse Creek Hills subdivision preliminary plat application was erroneous and unlawful and that the use of exempt wells violates the Montana Constitution's prohibition on unreasonable depletion of water resources and mandate for a clean and healthful environment (Counts III and IV). Dkt. No. 1, Complaint, 26-27. Count III was the only count against DNRC.

Appellants and the County each filed motions for summary judgment. The District Court ultimately granted the Appellants summary judgment against the County on Counts I, II, and IV, holding that the County's decision to approve the Horse Creek Hills preliminary plat application violated the Montana Subdivision and Platting Act. Dkt. No. 63 ("MSJ Order"), 45, 53. The Court granted the Appellants partial summary judgment against DNRC on Count III, holding that DNRC's determination that each of the four project phases was entitled to a separate exempt well was in error. MSJ Order, 81. The Court held that all phases of the Horse Creek Hills subdivision are one combined appropriation for exempt well purposes. MSJ Order, 79. The Court declined to grant summary judgment to the Appellants on their "half-hearted" constitutional claim against DNRC. *Id*. The parties later stipulated to dismiss, with prejudice, the constitutional claims alleged against DNRC. Dkt. No. 90.

Appellants moved the District Court for attorney fees under three theories: the Water Use Act's provision for attorney fees for permit applications (§ 85-2-125, MCA); the UDJA (§ 27-8-313, MCA); and the private attorney general doctrine. The District Court determined that Appellants were not entitled to attorney fees under any of the three theories. Dkt. No. 83 ("Fees Order"). Appellants appeal the Fees Order.

STANDARD OF REVIEW

The determination whether legal authority exists to award attorney fees is reviewed de novo. *Town of Kevin v. N. Cent. Montana Reg'l Water Auth*., 2024 MT 159, ¶ 6, 417 Mont. 325, 553 P.3d 392. An award of fees under the UDJA or the private attorney general doctrine is within the discretion of the district court and reviewed for an abuse of discretion. *Friends of Lake Five, Inc. v. Flathead Cnty. Comm'n*, 2024 MT 119, ¶ 16, 416 Mont. 525, 549 P.3d 1179 (UDJA); *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.* 2011 MT 51, ¶ 9, 359 Mont. 393, 251 P.3d 131 (*"BRPA III"*) (private attorney general doctrine). A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice. *In re Chamberlin*, 2011 MT 253, ¶ 10, 362 Mont. 226, 262 P.3d 1097 (quoting *In re Marriage of Kessler*, 2011 MT 54, ¶ 15, 359 Mont. 419, 251 P.3d 147).

ARGUMENT SUMMARY

The District Court did not abuse its discretion when it denied Appellants' attorney fees claim against DNRC. The Fees Order correctly reflects that the Water Use Act's attorney fee provision is inapplicable in this matter; that awards under the UDJA are the rare exception and that there was no basis for fees here; and the private attorney general doctrine was not appropriate because the case did not vindicate constitutional interests.

ARGUMENT

A. Legal Background

DNRC administers the Water Use Act (Title 85, chapter 2, MCA) which governs permitting of new uses and water right change authorizations. Under the Act, there can be no new appropriation of water unless the appropriator applies for and receives a permit from DNRC or satisfies an exception to the permit requirements for new appropriations under § 85-2-306, MCA. One exception to the permitting requirements, known as the "exempt well" exception, is for wells and developed springs that do not exceed 35 gallons per minute and 10 acre-feet per year. Section 85-2-306(3)(a)(iii), MCA. Combined appropriations, which are defined as those "from the same source by two or more wells or developed springs exceeding 10 acre-feet" do not qualify for the exception if, in the department's judgment, the purpose could have been accomplished by a single appropriation,

even if the individual wells on their own would not exceed the 10-acre-foot restriction. *Id.* To receive a groundwater certificate, the appropriator must file a notice of completion with DNRC after completing an exempt well. Section 85-2-306(3)(b), MCA. Unlike new permits, exempt wells do not receive a certificate of water right until the appropriator files a notice of completion. Section 85-2-306(3)(c), MCA.

The Department of Environmental Quality ("DEQ") and local county governments have the responsibility for subdivision review and approval. Title 76, chapters 3, 4, MCA. In order for subdivision applicants to meet the requirements for correct and complete subdivision applications under then-applicable DEQ regulations, applicants had to provide proof of an existing water right or provide a letter from DNRC that their proposed use in the subdivision project application meets an exception to water right permitting requirements. ARM 17.36.103(1)(s) (2020).[2] When requested by a subdivision applicant, DNRC evaluated the proposed water use of each project and whether, based upon the subdivision application proposal, the project required a permit or if it would qualify for an exception, pursuant to § 85-2-306(3), MCA. DNRC provided letters to the

[2] DEQ rule changes in 2023 moved this subsection to subsection (n). DEQ rule changes in 2024 eliminated the requirement entirely.

applicant stating whether the proposed appropriation fit the current applicable rules and laws pertaining to exempt wells.

Here, the Horse Creek Hills subdivision preliminary plat application materials provided to DNRC contained four separate subdivision applications, proposing four separate phases and plats for completion of four projects within the subdivision. BC DEQ 2332-2339. DNRC issued four letters for the four phases of the proposed development, acknowledging that each of the proposed appropriations fit within legal exemptions outlined in § 85-2-306(3)(a)(iii), MCA. *Id*. That was DNRC's only involvement. DNRC did not hold a contested case hearing, did not appear in the subdivision administrative proceedings, and did not issue a water right for the Horse Creek Hills subdivision.

The District Court disagreed with DNRC's determination on the phased subdivision applications and the determination regarding exempt wells and if the project constituted a combined appropriation. The Court held that all phases of the Horse Creek Hills subdivision constituted a single project for the purposes of a combined appropriation analysis, and DNRC should have evaluated it as such in evaluating the proposed water use utilizing exempt wells. MSJ Order, 79.

B. Attorney Fees

Montana follows the "American Rule" regarding attorney fees, meaning a party in a civil action is not entitled to fees absent a specific contractual or

statutory provision. *Matter of Dearborn Drainage Area*, 240 Mont. 39, 42, 783 P.2d 898, 899 (1989).

1. Appellants are not entitled to attorney fees against DNRC under the Water Use Act.

Appellants assert they are entitled to attorney fees under § 85-2-125, MCA, which allows attorney fees to the prevailing party on judicial review of a DNRC permit and change application decision. Even though DNRC did not grant a permit application, Appellants assert that because they challenged DNRC's "final" decision in relation to the requirements in § 85-2-306, MCA, then that qualifies as a permit application decision. Contrary to Appellants' arguments, the key factor for whether § 85-2-125, MCA, applies is not whether there is a final agency action, but whether there is even a proceeding that qualifies to invoke the statute. Nothing in this case would allow Appellants attorney fees under the statute.

Section 85-2-125(1), MCA, reads: "(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." (Emphasis added). This provision applies to applications for new permits under § 85-2-311, MCA, and applications for change authorizations

pursuant to § 85-2-402, MCA.[3] New permit and change applications follow a defined statutory decision-making process and an administrative appeal process under the Water Use Act, both of which are absent in this matter.[4] The statute does not apply to water uses that are exempt from permitting as outlined in § 85-2-306, MCA—the very statute Appellants alleged DNRC violated. This matter involves DNRC's issuance of predetermination letters regarding exempt uses in the context of subdivision review, it does not involve an application for a permit for a new use or a change authorization.

Appellants are well aware that the permitting process is not at issue in this case. Appellants' asserted argument to the District Court was that by evaluating the Horse Creek Hills subdivision's proposed water use by phases, DNRC *bypassed* the permitting process under § 85-2-311, MCA. Dkt. No. 56, Pls' Reply Br. MSJ, 10-15. They argued that DNRC should have evaluated the proposed

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[3] The statute was last amended in 2011 to allow for attorney fee awards in change applications in addition to permit applications. S.B. 36, 62nd Leg., (Mont. 2011). The 2011 Legislature specifically addressed the applicability of the increased eligibility in section 3 of the bill as enacted: "[This act] applies to an application for a permit or a change in appropriation right filed on or after [the effective date of this act.]." *Id.*

[4] For example, §§ 85-2-311 and -402, MCA, describe the criteria for permit and change authorizations. Section 85-2-310, MCA, describes the specific steps involved with permit and change applications in front of DNRC. And §§ 85-2-308 and -309, MCA, describe the objections and administrative hearings process. None of these statutes are implicated in this proceeding.

water use as a combined appropriation, which would not meet the exempt well exception in § 85-2-306, MCA, and would have to go through the permit process. *Id.* (section titled "Utilizing the Exemption allowed the HCH Subdivision to Avoid Significant Water Resources Analysis Required for Permitting Water Rights in a Closed Basin"). Indeed, Count III does not seek judicial review of a DNRC permit decision pursuant to the Water Use Act (§ 85-2-309, MCA) or the judicial review provisions under the Montana Administrative Procedure Act (Title 2, chapter 4, part 7, MCA)—it seeks declaratory judgment pursuant to § 27-8-201, MCA. Dkt. No. 1, Complaint, 24.

In *Wilson v. DNRC*, Wilson sought to create a stock water reservoir which adversely affected his neighbor's own stock water reservoir. 199 Mont. 189, 191, 648 P.2d 766, 767 (1982). He did not apply for a permit before creating the impoundment. DNRC determined that he was in violation of the Water Use Act and must obtain a permit before appropriating water. *Id.* Before DNRC could act on his subsequent permit application, the neighbors obtained a separate injunction against Wilson and the Court awarded attorney fees and costs to the neighbors. *Id.* On appeal, Wilson argued that § 85-2-125, MCA, was not applicable because there was "no appeal, no final decision; there was not even a hearing by the DNRC regarding his application for a permit." 199 Mont. at 194, 648 P.2d at 768. The Court agreed and reversed the attorney fee award. *Id.* Like in *Wilson*, there has

not been a final decision by DNRC regarding a permit application and § 85-2-125, MCA, is not applicable.

Contrary to Appellants' imprecise assertions on appeal, DNRC has not issued a water right or final decision on a permit or change application. The District Court recognized this distinction. The Court stated that: "It is correct that DNRC has not taken a final action regarding the conferral of a water right." MSJ Order, 55. DNRC's predetermination letters only evaluated the amount of water proposed under the specific project for purposes of the Subdivision and Platting Act. The letters do not authorize or create water rights under the Water Use Act, this can only be accomplished through a DNRC permit pursuant to § 85-2-311, MCA, or a submission of a correct and complete notice of completion for an exempt well under § 85-2-306(3)(c), MCA.

The Court also recognized that this case does not involve DNRC's permitting process: "only subsequent to [the County's] approval and after the water is put to beneficial use does DNRC's independent water rights permitting process even begin." MSJ Order, 56. And "DNRC's exempt well decision as part of the subdivision approval process is distinct from DNRC's own subsequent water rights permitting process." Fees Order, 18. There was no application for a permit to DNRC and § 85-2-125, MCA, is inapplicable.

Appellants assert that the District Court "somehow understood" that "there is nothing 'pre-' about DNRC's determination" and it is a final decision which allows for attorney fees under § 85-2-125, MCA. Appellants' Opening Br., 30. The District Court's Fees Order points out that Appellants presented the same selective and incomplete quote in their briefing, and it was rejected. Fees Order, 4. The Court explained that while the request and predetermination letters related to exempt wells, "it was not an application for a permit (even under the definitions that consider exemptions as permit) but was expressly for the proposed DEQ review 'in accordance with ARM 17.36.103(1)(s).'" The Court stated that DNRC's letters, "as the Court went to great pains to make clear," were not a final decision of DNRC on an application for a permit but were a final decision in a "distinct process for different agencies and subdivisions of the State." Fees Order, 5. The Fees Order was consistent with the MSJ Order where the Court explained that it evaluated DNRC's letters in the context of the Subdivision and Platting Act, which is a legally distinct process conducted by different agencies for different purposes. MSJ Order, 55-58.

Despite Appellants' misplaced characterization that there was a final water rights decision in this case, there was not. A non-final determination that a proposed use is exempt from permitting requirements cannot be used to expand the

specific statutory provisions under § 85-2-125, MCA, authorizing attorney fees only in judicial review of a permit or change proceeding.

2. Appellants are not entitled to attorney fees against DNRC under the Uniform Declaratory Judgments Act.

The District Court correctly determined that Appellants are not entitled to fees against DNRC under the UDJA. The Court properly exercised its discretion when it concluded that Appellants did not show that DNRC, the County, or the Horse Creek Hills subdivision applicant, 71 Ranch, "possessed" anything sought by Appellants, which is a consideration in determining the necessity of an award under § 27-8-313, MCA. The Court noted that Appellants simply sought opposite conclusions than the ones made by DNRC and the County. Fees Order, 20. It concluded that for purposes of statutory interpretation, which was the issue specific to DNRC, it would stretch the boundaries of interpreting the tangible parameters test to conclude that DNRC possessed anything Appellants sought. Fees Order, 14. On appeal, Appellants again do not explain what DNRC possesses that would make an award under the UDJA necessary and proper as required by § 27-8-313, MCA.

An attorney fee award under the UDJA is a narrow exception to the American Rule and is awarded infrequently. The Court has recognized "equitable exceptions" to the American Rule, but construe them narrowly, "lest they swallow the rule." *City of Helena v. Svee*, 2014 MT 311, ¶ 18, 377 Mont. 158, 339 P.3d 32

(quoting *Jacobsen v. Allstate Ins. Co.,* 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649); *Trustees of Indiana University v. Buxbaum,* 2003 MT 97, ¶ 19, 315 Mont. 210, 69 P.3d 663. In order to avoid "eviscerating the American Rule," the reach of § 27-8-313, MCA, is "narrow." *Montana Immigrant Just. All. v. Bullock*, 2016 MT 104, ¶ 48, 383 Mont. 318, 371 P.3d 430 (quoting *Western Tradition P'ship v. Att'y Gen. of Mont.,* 2012 MT 271, ¶ 11, 367 Mont. 112, 291 P.3d 545) (internal quotations omitted).

As the District Court noted, "[a]n award of attorney fees in a declaratory action is a rarity." *Beebe v. Bd. of Dirs. of the Bridger Creek Subdivision Cmty. Ass'n*, 2015 MT 183, ¶ 27, 379 Mont. 484, 352 P.3d 1094. The availability of attorney fees is not "automatically presumed" and fees are not warranted in normal declaratory judgment actions. *Citizens for a Better Flathead v. Bd. of Cnty. Commissioners of Flathead Cnty.*, 2016 MT 325, ¶¶ 61-62, 385 Mont. 505, 386 P.3d 567. An award of fees under the UDJA is the exception, rather than the rule. *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 75, 374 Mont. 229, 328 P.3d 586.

The threshold question for an award of attorney fees under the UDJA is whether "equitable considerations" support such an award. *Hughes v. Ahlgren*, 2011 MT 189, ¶ 13, 361 Mont. 319, 258 P.3d 439. If the court determines that equities support an award, then it will proceed to determine whether the award is

"necessary and proper." *Id.*; *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 43, 354 Mont. 50, 221 P.3d 1230; *Martin v. SAIF Corp.,* 2007 MT 234, ¶ 22, 339 Mont. 167, 167 P.3d 916; *Buxbaum,* ¶ 41. To determine whether attorney fees qualify as "necessary and proper," the court applies the "tangible parameters" guidelines adopted in *Buxbaum*. *Hughes*, ¶ 13; *Martin*, ¶ 23. The test is non-exclusive and 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. *Town of Kevin v. N. Cent. Montana Reg'l Water Auth.*, ¶ 16 (citations omitted).

Appellants only focus on the "possession" piece of the tangible parameters test.[5] The District Court determined that although there were equitable considerations to support an award, ultimately it could not determine "if or who 'possesses' anything in an action seeking a declaration that a State agency's

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[5] Appellants' assertion that the Appellees did not appeal any of the other factors and the resulting scope of the remand is misplaced. Appellants' Opening Br., 16. For purposes of cross-appeal, an issue is not "separate and distinct" from issues raised by the appellant if the respondent: (1) was the prevailing party below; (2) responsively raised the issue on appeal in defense of the judgment at issue; and (3) previously raised the issue below regardless of whether relied on, rejected, or considered in the lower court decision. *Nasca v. Hull*, 2004 MT 306, ¶¶ 17-18, 323 Mont. 484, 100 P.3d 997 (quoting *City of Missoula v. Robertson*, 2000 MT 52, ¶ 20, 298 Mont. 419, 998 P.2d 144). The tangible parameters test is non-dispositive and non-exclusive, and an award considers all elements. They are not separate and distinct issues.

interpretation of the law is incorrect." Fees Order, 13. The District Court found that while DNRC possesses the authority to interpret and apply the Water Use Act, Appellants were not seeking that authority, they were seeking a different exempt well decision. *Id.* The Court also recognized that that Appellants themselves did not argue that DNRC or the County possessed anything they sought, besides a different decision. *Id.*, 14. It stated that it would stretch the "boundaries of interpretation to conclude that any party 'possesses' anything in an action seeking a declaration concerning statutory interpretation." *Id*.

Appellants argue that the District Court erred by construing the possession element "strictly" but that is a red herring. The District Court recognized multiple times that the test is non-exclusive. Fees Order, 10-12. The Court also interpreted the test as being non-dispositive. Fees Order, 11, 13 (Recognizing the *Buxbaum* guidance as factors giving courts guidance, not dispositive elements of a rule). The Court found equitable considerations supported an award, recognized the tangible parameters test was both non-exclusive and non-dispositive, and still determined, in the aggregate, that there was not a basis for fees under the UDJA. Fees Order, 20.

Appellants assert that two recent decisions involving fee awards under the UDJA demonstrate that the District Court erred. Both are inapposite. They first point to *Friends of Lake Five, Inc. v. Flathead Cnty. Comm'n*. The case involved a

zoning decision that was predicated on restrictive covenants and easement disputes between adjacent landowners. Friends of Lake Five sought a declaration against the County for issuing a Major Land Use Permit to the landowner. Friends also sought a permanent injunction against the landowner enjoining any future construction or commercial use, consistent with the restrictive covenants. *Friends of Lake Five*, ¶ 34. The Court upheld the district court's voiding of the permit but also upheld the injunction against the landowner. *Id.*, ¶ 38.

Appellants characterize the case as a zoning dispute, but the UDJA award at issue on appeal was not specific to zoning approval from the County, it was specific to a permanent injunction against the landowner. *Id.*, ¶ 38. Possession was not at issue in this case, it was focused on equitable considerations and the legal authority for an award. *Id.*, ¶¶ 37-38. The appeal regarding attorney fees was focused on whether the district court erred in *who* it awarded fees against. *Friends of Lake Five*, ¶ 39. Fees were ultimately awarded against the County and the landowner because their claims were so intertwined. The landowner appealed and argued that it was not liable for attorney fees under the UDJA because the basis for attorney fees was against the County. But the Court held that "the necessity of obtaining a permanent injunction against use of [landowner property] for commercial purposes was specific to [landowner]." *Id.*, ¶ 38.

Friends of Lake Five does not address the possession element, does not involve agency statutory interpretation, and does not support a finding that the District Court abused its discretion in this case when declining to award attorney fees.

Appellants also point to *Town of Kevin v. N. Cent. Montana Reg'l Water Auth.* In *Town of Kevin*, the Town obtained a declaration that the Town was not a part of the North Central Montana Regional Water Authority. *Id.*, ¶ 24. The question on appeal was whether there was legal authority to even award attorney fees between government subdivisions and focused on equitable considerations and bad faith arguments. *Id.*, ¶¶ 9, 16, 20. The case supports the District Court's conclusion here that the tangible parameters test is non-exclusive. *Id.*, ¶ 16. The Court recognized that there was no dispute that the Authority had what the Town desired: only the Authority could recognize that the Town was not a member. *Id.*, ¶ 19. Like in *Friends of Five Lake*, the possession element (though not in dispute in *Town of Kevin*) was tied to a specific party.

Appellants state that they meet the definition of possession because they desired a formal determination that the subdivision decision-making process and ultimate approval, as well as DNRC's "approval"[6] of exempt wells, was unlawful.

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[6] As the District Court repeatedly recognized, DNRC cannot issue a water right until a notice of completion of groundwater development is filed. Section 85-2-306(3)(b), MCA; *see* MSJ Order, 55-58.

Appellants' Opening Br., 15. But that does not rise to the level of possession at issue in *Town of Kevin.* By obtaining the declaration that the Town was not part of the Authority, the Town and the Authority both had tangible results: the Authority lost a member, and the Town was no longer a member. The same tangible results are not present in issues of statutory interpretation.

The nature of the DNRC predetermination letters further establishes why the necessity portion of the tangible parameters test is not satisfied. The Court concluded that a justiciable controversy existed as to DNRC's predetermination letters only in the context of ARM 17.36.103 and § 76-3-625, MCA. MSJ Order, 54-58. DNRC's "predetermination letters" were only implicated in the preliminary plat decision pursuant to DEQ's Subdivision and Platting Act rules, not the Water Use Act. Fees Order, 16; MSJ Order, 54-58. Appellants do not dispute the Court's conclusion that the necessity of the litigation was predicated on Appellants' statutory right pursuant to § 76-3-625(2), MCA, to challenge the County's preliminary plat approval. Fees Order, 19. As such, the Court's necessity determination does not implicate DNRC.

Further, this litigation does not alter the status quo with respect to Horse Creek Hills' water rights or DNRC's role in water rights permitting. The Court recognized that the predetermination letters were not a condition precedent to obtaining a water right permit or binding on DNRC. Fees Order, 18. Although the

Court's MSJ Order chastised DNRC's erroneous interpretation of law, it does not change the fact that the DNRC's letter did not authorize water use or convey a water right.[7] Exempt wells, by statute, only receive a groundwater certificate of water right after the well is drilled and put to beneficial use. Section 85-2-306(3), MCA. No wells have been drilled, no water put to beneficial use, and no certificate of water right issued for any phase of HCH.

As to the Water Use Act, this litigation did not alter the status quo. There was not a water right for the Horse Creek Hills subdivision when the Complaint was filed. There was not a water right for the Horse Creek Hills subdivision when the litigation concluded. The MSJ Order does not, however, preclude an applicant for Horse Creek Hills from obtaining a water right in the future. The Horse Creek Hills subdivision could obtain a water right through a new permit under § 85-2-311, MCA, or change an existing water right to meet its purposes under § 85-2-402, MCA. The subdivision can potentially still obtain an "exempt well" for 10 acre-feet, but it must be within the combined appropriation definition and parameters as directed by the District Court and defined by ARM 36.12.101(12) and § 85-2-306, MCA. The District Court held that DNRC erred when it treated

[7] For example, if DNRC had incorrectly stated in a predetermination letter that the Horse Creek Hills subdivision already had a water right adequate to serve each phase of the subdivision, fulfilling ARM 17.36.103(s)(2020), that erroneous statement would not create a property interest or otherwise entitle Horse Creek Hills to a water right.

the four phases of the specific subdivision separately instead of as a combined appropriation. The District Court's MSJ Order does not change the status quo regarding statutory options for obtaining a new water right or utilizing an exempt well under the Water Use Act.

Ultimately, the test under the UDJA attorney fee awards is whether the District Court abused its discretion in its determination. The District Court's opinion was thorough and does not demonstrate that it acted "arbitrarily without employment of conscientious judgment" or "so exceeded the bounds of reason as to work a substantial injustice." *In re Chamberlin*, ¶ 10. Appellants do not point to where the District Court acted with such abuse of discretion, they just disagree with how it exercised its discretion specifically to the possession element. Though the Court based analysis on the possession element in the tangible parameters test, it recognized that the test was non-exclusive and non-dispositive, and still determined that attorney fees were not appropriate in the aggregate. Fees Order, 20.

An award of fees under the UDJA is the rare exception, rather than the rule, and Appellants do not explain why this case is the exception and why the District Court abused its discretion in not determining so. Declaratory judgment actions involve equitable considerations, but to rise to the level of attorney fees being necessary and proper under § 27-8-313, MCA, then they must be properly

supported. The District Court did not abuse its discretion when it denied fees under the UDJA and should be upheld.

3. Appellants are not entitled to attorney fees against DNRC under the private attorney general doctrine.

Appellants finally assert that the District Court erred when it determined that "because the case did not 'sufficiently' vindicate constitutional interests, fees were not appropriate under the [private attorney general doctrine]." Appellants' Opening Br., 19. The District Court did not err in that regard as explained below, but more importantly, the constitutional claims necessary for an award under the private attorney general doctrine have been dismissed and are not properly on appeal.

After the Fees Order denying attorney fees, Appellants moved for entry of judgment. Dkt. No. 84, Mtn. for Entry of Judgment. The District Court denied the motion because its summary judgment order did not fully resolve all claims, specifically, the Appellants' constitutional claims. The Court noted that:

> Count 3 of Plaintiffs' petition seeks "a declaration that the major Horse Creek Hills subdivision's use of 41 individual wells and five aggregated exempt groundwater withdrawals of 10 ac/ft-year violates the Montana Constitution's explicit prohibition on unreasonable depletion of water resources and mandate to assure a clean and healthful environment…." While the Court declined to grant Plaintiffs' summary judgment on this constitutional prong of Count 3, (Order, 72-72), the claim also has not been dismissed by the Court or Plaintiffs. This claim, to date, remains unadjudicated. Moreover, the Court respectfully declines Plaintiffs' invitation that the Court, *sua sponte*, dismiss this "halfhearted" constitutional claim.

Dkt. No. 88, 2.

Subsequently, the parties stipulated to dismiss, with prejudice, the constitutional claims alleged against DNRC that the Court referenced. Dkt. No. 90. The District Court then entered judgment. Dkt. No. 91.

Awards under the private attorney general doctrine are only proper where the litigation "directly implements" constitutional provisions. *Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶ 22, 388 Mont. 205, 212, 399 P.3d 295, 300 ("*Clark Fork II*"). The constitutional claims against DNRC have been dismissed and were previously rejected by the District Court. MSJ Order, 81 (Granting summary judgment on Count III to Appellants except as to their constitutional claim against DNRC). The constitutional claims have not been preserved, are not at issue, and this Court should not entertain Appellants' argument.

If this Court does determine that Appellants' argument regarding the private attorney general doctrine is procedurally proper, Appellants still do not meet their burden to show they are entitled to fees under it. The private attorney general doctrine is a narrow exception to the American Rule. *Matter of Dearborn Drainage Area*, 240 Mont. at 42, 783 P.2d at 899. It is "sparingly" invoked and is only utilized in litigation vindicating compelling constitutional interests, not in cases decided on statutory or administrative grounds. *Clark Fork II*, ¶¶ 15-16 (citing *Western Tradition P'ship.*, ¶ 13).

In the absence of a clear nexus between the public policy being vindicated and compelling constitutional interests, private attorney general fees must be denied. *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085. If a holding is statute-based, it does not warrant attorney fees under the private attorney general doctrine. *Baxter v. State,* 2009 MT 449, ¶ 51, 354 Mont. 234, 224 P.3d 1211 ("The private attorney general doctrine, however, applies only when constitutional interests are vindicated. Our holding today is statute-based. Therefore, without the vindication of constitutional interests, an award of fees under the private attorney general doctrine is not warranted."). Even though a statute's policies may be grounded in the Constitution, rules and statutes are a "step removed" from directly vindicating constitutional interests. *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cnty.*, 2019 MT 147, ¶ 52, 396 Mont. 194, 445 P.3d 1195; *Clark Fork II*, ¶ 22.

In *Clark Fork I*, the Court determined that DNRC's rule regarding combined appropriations conflicted with the statute on exempt wells, § 85-2-306, MCA. *Clark Fork Coal. v. Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771 ("*Clark Fork I"*). The Court declined to award attorney fees on appeal. *Clark Fork II*, ¶ 24. The Court found that although the Water Use Act itself implements the mandates of Article IX, Section 3, of the Montana Constitution, that is not enough to meet the private attorney general doctrine's requirement that the action

vindicates constitutionally protected interests. *Clark Fork II*, ¶ 22. It held that "because the decision in the underlying case was 'statute-based,'" as is the case here, the petitioner was not entitled to fees under the private attorney general doctrine. *Id.*

Similarly, in *Cmty. Ass'n for N. Shore Conservation*, the Court affirmed overturning a county commission's approval of a bridge construction permit but declined to award attorney fees under the private attorney general doctrine. The Court held that while the statutes at issue in the litigation were grounded in constitutional provisions, the litigation centered on the statutes, regulations, and the board's application of the regulations to the permit at issue. *Id*., ¶ 52. The regulations and application of the regulations and statutes were "one step removed" from the constitutional provisions, so the private attorney general doctrine was not appropriate because the case did not vindicate constitutional interests. *Id.*, ¶ 53.

Just as in *Clark Fork II* and *Cmty. Ass'n for N. Shore Conservation*, this case does not "directly implement constitutional provisions," but centers upon DNRC's interpretation and implementation of the Montana Water Use Act and associated administrative rules. There was no argument that the statutes or rules involved conflicted with the Constitution, it was a question of whether DNRC and the

County's interpretation of law was correct.[8] The Court ultimately held that DNRC's interpretation of the exempt well provisions in ARM 36.12.101(12) and § 85-2-306, MCA, was incorrect. MSJ Order, 79 (Concluding that there was no basis for DNRC to treat the four phases of the project as separate projects for purposes of a combined appropriation analysis.). The Court based this determination on statute, prior decisions, and rule regarding what constitutes a combined appropriation. *Id.*, 78-79. As in *Clark Fork I* and *II*, "there were no constitutional concerns 'integrated into the rationale.'" *Clark Fork II*, ¶ 22 (quoting *BRPA III*, ¶ 25).

This case is distinguishable from *BRPA III* for the same reasons the Court distinguished *Clark Fork II* from *BRPA III.* In *BRPA III*, the Court upheld attorney fees under the private attorney general doctrine because of the "constitutional underpinnings" of the "underlying litigation" in the prior case. *Clark Fork II*, ¶ 17 (citing *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2008 MT 377, 346 Mont. 507, 198 P.3d 219) ("*BRPA II*"). At issue in *BRPA II* was the validity of two statutes: the Streambed and Land Preservation Act (the "310 Law") and the Stream Access Law. *BRPA II*, ¶¶ 1-4. The Court's interpretation of the 310 Law "was expressly premised upon its constitutional purpose." *BRPA III*, ¶ 23.

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[8] Appellants themselves allege as much in Count III against DNRC and again in their brief in support of motion for summary judgment. Dkt. No. 1, Complaint, 24-26; Dkt. No. 46, Pl. Brief in Support of MSJ, 14-19.

Moreover, *both* parties offered "extensive constitutionally-based arguments" regarding the Stream Access Law. *BRPA III*, ¶ 24 (citing *BRPA II*, ¶ 50). Thus, the Court determined that "constitutional concerns were integrated into the rationale underlying the decision" and both statutes "directly implemented constitutional provisions." *Id*. ¶¶ 23, 25; *see Clark Fork II*, ¶ 18 (discussing *BRPA II* and *III*).

Unlike in *BRPA*, the Appellants here did not make extensive constitutional arguments. While Appellants made broad references to constitutional provisions, they failed to do so with specificity. The District Court determined that "[Plaintiffs] fail, however, to cite to a provision of the Constitution or demonstrate any analysis as to how the unnamed provision was violated by DNRC." MSJ Order, 73. The Court ultimately denied summary judgment on Appellants' "half-hearted constitutional claim." MSJ Order, 81.

Appellants argue that the District Court abused its discretion by not considering its Right to Know and Participate arguments. Appellants' Opening Br., 20. These arguments exclusively relate to the County, not DNRC. Appellants' arguments on appeal regarding the right to a clean and healthful environment provisions also seem to only apply to the County as the entity implementing the

Montana Subdivision and Platting Act.[9] *Id.*, 20-23; Mont. Const. art. II, § 3; Mont. Const. art. IX, §§ 1, 3.

The District Court did not abuse its discretion when it determined that this matter "did not vindicate constitutional interests" in order to invoke the private attorney general doctrine. Fees Order, 67; s*ee also* MSJ Order, 73. Thus, because Appellants' arguments have rested squarely upon § 85-2-306(3)(a)(iii), MCA, the Court's rationale was based on administrative rules and statutes, this is a "statute-based" decision and, like *Clark Fork II*, Appellants are not entitled to fees under the private attorney general doctrine. *Clark Fork II*, ¶ 23; *Baxter*, ¶ 47.

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[9] It is not clear if, on appeal, Appellants' assert they vindicated Article IX, Section 1 specific to DNRC. With respect to Article IX, Section 1's clean and healthful environment provision, this Court has held that the Water Use Act was not enacted for the primary purpose of implementing, satisfying, or tailoring it to the environmental protection duty under Article II, Section 3, and Article IX, Section 1 Montana Constitution. *Clark Fork Coal. v. DNRC*, 2021 MT 44, ¶¶ 41, 42, n. 66, 403 Mont. 225, 481 P.3d 198. Contrary to Appellants' assertion to the District Court, the Court has concluded that Water Use Act is not designed to implement Article IX, Section 1's directive against unreasonable depletion and degradation of natural resources. *Id.* The Court determined that the legislature enacted the Water Use Act for the "specific purpose of implementing and fulfilling its separate duty under Article IX, Section 3 (in re state ownership of Montana waters and state 'administration, control, and regulation of water rights' under a centralized water rights administration and records system)." *Id.*, ¶ 50. Appellants did not assert constitutional arguments regarding Article IX, Section 3 until their reply to DNRC's response to Appellants' MSJ. Dkt. No. 56, Pl's Reply in Support of MSJ for Count III, 17.

In the private attorney general doctrine analysis, failure to vindicate a compelling constitutional interest is dispositive and the Court need not address whether the remaining factors are satisfied. *Cmty. Ass'n for N. Shore Conservation, Inc.*, ¶ 53 ("failure to show the litigation vindicated constitutional interests is dispositive and, therefore, we do not address whether the remaining factors of the private attorney general doctrine were satisfied") (citing *Clark Fork II*, ¶ 23). Appellants' focus on the remaining factors is misplaced. Appellants are not entitled to attorney fees under the private attorney general doctrine.

CONCLUSION

The District Court did not abuse its discretion when it declined to award attorney fees. Section 85-2-125, MCA, is inapplicable as the case did not involve a new water right permit application; there is no basis for fees under the UDJA; and compelling constitutional interests have not been vindicated to the level required to invoke the private attorney general doctrine. DNRC respectfully requests this Court affirm the District Court's Fees Order denying attorney fees.

DATED this 27th day of January, 2025.

/s/ Molly M. Kelly
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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 6,864 words, excluding the table of contents, table of authorities, certificate of compliance, and certificate of service.

DATED this 27th day of January, 2025.

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