

FILED

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VALERIE J. HORNSVELD
Clerk
Deputy *Audrey Plymale*

**MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY**

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

Plaintiffs,

v.

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

Defendants,

and

71 RANCH, LP,

Intervenor.

Cause No.: BDV-2022-38

ORDER

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1 On August 26, 2022, Plaintiffs filed their Judicial Review and
 2 Declaratory Relief Complaint. On September 27, 2022, Broadwater County
 3 (County) filed its Answer. On October 19, 2022, the Montana Department of
 4 Natural Resources and Conservation (Montana) filed its Answer. On March 9,
 5 2023, this Court granted 71 Ranch, LP’s (71 Ranch) unopposed intervention
 6 motion. On March 22, 2023, 71 Ranch filed its Answer. On April 17, 2023, the
 7 County filed the parties’ Notice of Agreement on the Stipulated Record. On April
 8 28, 2023, the County filed a Notice of Filing Record on Appeal. On May 3, 2023,
 9 the County filed a Stipulation of Record¹.

10 On August 9, 2023, the Plaintiffs and the County moved for
 11 summary judgment. On August 23, 2023, the County moved to Strike “Plaintiffs’
 12 Unpled Legal Theories.” The motions are fully briefed. On February 9, 2024,
 13 oral argument was held.

14 For the reasons stated below, the County’s motions are **DENIED**,
 15 and the Plaintiffs’ motion is **GRANTED, in part**.

16 **REVIEW STANDARDS**

17 Summary judgment should never be a substitute for trial when
 18 there is an issue of material fact. *McDonald v. Anderson*, 261 Mont. 268, 272,
 19 862 P.2d 402 (1993). It is “an extreme remedy and should never be substituted
 20 for a trial if a material fact controversy exists.” *Clark v. Eagle Sys.*, 279 Mont.
 21 279, 283, 927 P.2d 995 (1996). All reasonable inferences that might be drawn
 22 from the offered evidence should be drawn in favor of the party opposing
 23

24 _____
 25 ¹ As to the “stipulated record,” the Court notes a number of discrepancies in the extensive record. The County Planning Board meeting of April 25, 2022 was not recorded, and thus could not be reviewed. Because of the voluminous nature of the record, the Court requested an electronic copy of the record, but noticed that documents 4286 through 4341 were missing, and had to affirmatively request those documents. Additionally, the County cites documents with Bates stamps at least as high as 4430 even though the stipulated record ends at Bates stamp 4341. The parties, however, confirmed at the hearing that the stipulated record ended at 4341.

1 summary judgment. *Heiat v. Eastern Mont. College*, 275 Mont. 322, 327, 912
2 P.2d 787 (1996).

3 Summary judgment is proper when no genuine issues of
4 material fact exist and the moving party is entitled to judgment as a matter of
5 law. Mont. R. Civ. P. 56(c)(3). It is appropriate when “the pleadings, the
6 discovery and disclosure materials on file, and any affidavits show that there is
7 no genuine issue as to any material fact and that the movant is entitled to
8 judgment as a matter of law.” Mont. R. Civ. P. 56(c)(3). The party moving for
9 summary judgment must establish the absence of any genuine issue of material
10 fact and the party is entitled to judgment as a matter of law. *Tin Cup County*
11 *Water &/or Sewer Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont.
12 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing
13 summary judgment must present affidavits or other testimony containing material
14 facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54
15 (*citing Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)).

16 Disputed issues of fact are considered material if they
17 concern the elements of the claim or the defenses to such claim to an extent that
18 requires resolution by the jury. *State Medical Oxygen & Supply v. American*
19 *Medical Oxygen Co.*, 267 Mont. 340, 344, 883 P.2d 1241 (1994) (citation
20 omitted). If the trial court determines that no genuine issue of material fact exists,
21 it then must determine whether the moving party is entitled to judgment as a
22 matter of law. *Willden v. Neumann*, 2008 MT 236, ¶ 13, 344 Mont. 407, 189 P.3d
23 610. It is universally recognized that “[t]he purpose of summary judgment is to
24 encourage judicial economy through the elimination of any unnecessary trial.”
25 *Payne Realty & Hous. v. First Sec. Bank*, 256 Mont. 19, 24, 844 P.2d 90 (1992).

1 Moreover, here, “[the County’s] decision, based on the
2 record as a whole, must be sustained unless the decision being challenged is
3 arbitrary, capricious, or unlawful.” Mont. Code Ann. § 76-3-625(2)(c) (2021).
4 Furthermore, the statute permits various interested parties, such as the Plaintiffs
5 in this proceeding, to timely seek judicial review of “a decision of the governing
6 body to approve, conditionally approve, or deny an application and preliminary
7 plat for a proposed subdivision” or “any other final decision of the governing
8 body regarding a subdivision.” Mont. Code Ann. § 76-3-625(2)(a) (2021).

9 **BACKGROUND**

10 This case concerns 71 Ranch’s proposed major subdivision
11 located on the east side of Canyon Ferry Reservoir near Lower Confederate
12 Creek, inside the administratively closed Upper Missouri River Basin. 71
13 Ranch’s proposal would subdivide 442 acres over 4 phases of development into
14 39 residential, 2 commercial, and 1 open space lot. Each lot would be served by
15 their own exempt well, septic, and stormwater system. The County’s
16 Commissioners reviewed the proposal and ultimately approved the preliminary
17 plat application after several remands to the County’s Planning Board. Montana
18 reviewed the subdivision’s proposed use of exempt wells and concluded that “the
19 proposed appropriation does fit the current rules and laws pertaining to the filing
20 of an exempt water right” for each of the 4 phases of development.

21 **DISCUSSION**

22 Plaintiffs argue the environmental assessment was deficient
23 because the County failed to include available groundwater information and
24 summaries of probable water resources impacts. They also contend the County’s
25 review of the primary criteria was inadequate. Plaintiffs further argue the County

1 improperly relied on DNRC’s determination about the legal availability of water
2 for the proposed subdivision. The County argues that it lacks jurisdiction to
3 make such a water availability determination. Plaintiffs maintain that DNRC’s
4 exempt well approval is contrary to statute, administrative regulation, and case
5 law. In this regard, DNRC argues that Plaintiffs seek an advisory opinion.
6 Finally, the County seeks to strike material from Plaintiff’s brief.

7 The Montana Subdivision and Platting Act (Act) requires
8 the environmental assessment for major subdivisions to include:

9 (i) a description of every body or stream of surface water that may be
10 affected by the proposed subdivision, together with available ground
11 water information, and a description of the topography, vegetation,
12 and wildlife use within the area of the proposed subdivision;

13 (ii) a summary of the probable impacts of the proposed subdivision
14 based on the criteria described in 76-3-608;

15 (iii) a community impact report containing a statement of anticipated
16 needs of the proposed subdivision for local services, including
17 education and busing; roads and maintenance; water, sewage, and
18 solid waste facilities; and fire and police protection; and

19 (iv) additional relevant and reasonable information related to the
20 applicable regulatory criteria adopted under 76-3-501 as may be
21 required by the governing body;

22 Mont. Code Ann. § 76-3-603(1)(a) (2021).

23 Mont. Code Ann. § 76-3-608 requires review of the primary
24 criteria, namely “specific, documentable, and clearly defined impact on
25 agriculture, agricultural water user facilities, local services, the natural
 environment, wildlife, wildlife habitat, and public health and safety.” The Court

1 notes that statute does not require that the concerns be “documented” but rather
2 “documentable,” i.e. *capable* of being documented. At several hearings, it was
3 clear that members of the Planning Board, County Commission, and at least three
4 public members were under the impression that the Montana Association of
5 Counties’ attorney had advised the County that public comment could not be the
6 basis for their decisions because it did not constitute “documented evidence”
7 from a professional like an engineer or hydrogeologist. There is no such
8 requirement in the law. The Court further notes that public comment is capable of
9 and was documented by video recording and subsequent transcription.

10 Mont. Code Ann. § 76-3-501 requires local governing
11 bodies to adopt subdivision regulations providing for, among other things:

12 (f) the provision of adequate transportation, water, and drainage;

13 (g) subject to the provisions of 76-3-511, the regulation of sanitary
14 facilities;

15

16 (i) the avoidance of subdivisions that would involve unnecessary
17 environmental degradation and danger of injury to health, safety, or
18 welfare by reason of natural hazard, including but not limited to fire
19 and wildland fire, or the lack of water, drainage, access,
20 transportation, or other public services or that would necessitate an
excessive expenditure of public funds for the supply of the services.

21 Mont. Code Ann. § 76-3-501(1) (2021).

22 One issue to be resolved in this case is whether the County
23 is required to determine whether the developer is legally entitled to appropriate
24 water or whether it must merely determine that sufficient water is present. Some
25 courts distinguish between the two by describing the factual existence, quantity,

1 and quality of water in terms of “adequacy” and the legal ability to appropriate
2 water in terms of “availability.” While this Court would prefer such a controlled
3 vocabulary, the drafting of Montana’s statutes precludes clearcut terminology in
4 which “availability” concerns legal authority to appropriate and “adequacy”
5 concerns factual existence or sufficiency. *See* Mont. Code Ann. § 76-3-622(1)(e)
6 (2021) (requiring “evidence of adequate water availability”). To aid clarity, this
7 Court uses the terms “factual existence” to distinguish the fact questions about
8 the physical presence, quantity, and quality of water from the legal questions of
9 entitlement to appropriate that water (“legal appropriability”).

10 **Motion to Strike**

11 The County moved “to strike Plaintiffs’ unpled legal theories
12 proffered in their Response Brief to the County’s summary judgment motion
13 wherein they contend that the County has a legal duty to determine legal and
14 physical water,” alleging that arguments in section “C” of Plaintiffs’ response are
15 “tantamount to amending the complaint without notice or process,” which “is
16 precluded as it causes prejudice at this late stage of the case.” Plaintiffs counter
17 that this “argument was made in response to the County’s argument that it had no
18 independent obligation to ensure an adequate water supply exists for the
19 subdivision at issue.”

20 As a preliminary matter, the County puts the cart before the
21 horse by engaging in a full analysis of whether amendment is prejudicial before
22 analyzing whether Plaintiff’s brief in response to its summary judgment motion is
23 equivalent to amending a complaint. Plaintiffs are required to provide notice of
24 their *claims*, but the County seems to believe that they are also required to
25 disclose the *legal theory* behind their summary judgment response before the

1 motion is even filed.

2 More importantly, the County opened the door to this issue
3 by arguing in its supporting brief: “The County is not vested with the authority to
4 review water supply adequacy - that is vested in MDEQ [Montana Department of
5 Environmental Quality].” In response, Plaintiffs included a section in their brief
6 titled “THE COUNTY HAS AN INDEPENDENT OBLIGATION TO
7 CONSIDER THE LEGAL AND PHYSICAL AVAILABILITY OF WATER,”
8 which cited numerous authorities indicating that the County is indeed tasked with
9 reviewing water supply adequacy. Plaintiffs merely responded to the County’s
10 argument. It is baseless for the County to claim to be the victim of prejudice,
11 while simultaneously seeking to strike an opposing party’s substantive response
12 to an issue the County raised in its own briefing. Accordingly, the Motion to
13 Strike is **DENIED**.

14 **Water Information - Mont. Code Ann. § 76-3-603(1)(a)(i) (Count I)**

15 The County argues that the record contains the required
16 groundwater information and all public comments regarding groundwater were
17 taken into consideration. Plaintiffs argue that environmental assessment was
18 inadequate because it failed to include available groundwater information or
19 summaries of probable impacts to water resources.

20 As a preliminary matter the County argues “The [Act] does
21 not require the County to search out groundwater information before
22 conditionally preliminarily approving a subdivision.” Plaintiffs counter that
23 “[t]he requirement to ensure an [environmental assessment] includes ‘available
24 groundwater information’ necessarily contemplates an affirmative duty on the
25 County to gather and consider available studies and data on water supply and

1 offsite impacts as means to effectuate the statutory purposes of only approving
2 subdivisions with ‘adequate water supply.’”

3 The County is correct that the onus to provide the
4 environmental assessment with groundwater information is on 71 Ranch, not the
5 County. Mont. Code Ann. § 76-3-504(1)(b) (2021). Nevertheless, the Act’s plain
6 language unequivocally requires that 71 Ranch’s submitted environmental
7 assessment “must include” “available ground water information,” impacts on
8 “agriculture, agricultural water user facilities,” and a community impact report
9 containing on anticipated water needs of the subdivision. Thus, while the County
10 is technically correct that the duty to provide the statutorily requires information
11 lies with 71 Ranch, the County is incorrect in its implication that the County can
12 approve a subdivision without that information. Regardless, it is irrelevant who
13 must provide the information, what is relevant here is that if the information is
14 lacking, the application is incomplete, and the proposal cannot be legally
15 approved.

16 As previously indicated, the Act requires the environmental
17 assessment for major subdivisions to include:

18 (i) a description of every body or stream of surface water that may be
19 affected by the proposed subdivision, together with available ground
20 water information, and a description of the topography, vegetation,
and wildlife use within the area of the proposed subdivision;

21 (ii) a summary of the probable impacts of the proposed subdivision
22 based on the criteria described in 76-3-608;

23 (iii) a community impact report containing a statement of anticipated
24 needs of the proposed subdivision for local services, including
25 education and busing; roads and maintenance; water, sewage, and
solid waste facilities; and fire and police protection; and

1 (iv) additional relevant and reasonable information related to the
2 applicable regulatory criteria adopted under 76-3-501 as may be
3 required by the governing body.

4 Mont. Code Ann. § 76-3-603(1)(a) (2021).

5 The environmental assessment must include “a description
6 of every body or stream of surface water that may be affected by the proposed
7 subdivision, together with available ground water information, and a description
8 of the topography, vegetation, and wildlife use within the area of the proposed
9 subdivision.” The County argues that the “Subdivision application [BC PP 3878-
10 4185] and Application Environmental Assessment [BC PP 3985-4003] contained
11 the requisite groundwater information as described and required” by -603, and
12 cites to sections of the environmental assessment:

13 **“Depth to water table based on soil types. CB PP 3959-3964”**

14 This is a United States Department of Agriculture soil
15 survey. The only information about groundwater appears to be a measurement of
16 its depth across various soils in the area, titled “Rating (centimeters).” BC PP
17 3962. All values are listed as “>200.”

18 **“Well locations for the Subdivision property. BC PP 3971-3981”**

19 These are maps showing several miles around the area and
20 the location of various wells. Each well’s log report is included which lists the
21 precise location, depth, construction, water levels, and geology.

22 **“FIRM Maps. BC PP 3982-3984”**

23 These are three mostly illegible maps from the National
24 Flood Insurance Program indicating areas particularly susceptible to flooding.

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1 **“Environmental Assessment Surface Water/Ground Water**
2 **Information. BC PP 3987-3988”**

3 **1. SURFACE WATER**

- 4 a. Any natural water systems such as streams, rivers, intermittent streams, lakes or marshes
5 (also indicate the names and sizes of each).

6 There are no known streams, rivers, lakes, or marshes located on the subject property. The
7 project site is located near Canyon Ferry Lake to the west and south, and Confederate Gulch to
8 the southeast of the property.

- 9 b. Any artificial water systems such as canals, ditches, aqueducts, reservoirs and irrigation
10 systems (also indicate the names, sizes and present uses of each).

11 There are no known artificial water systems located on the subject property. There are remnants
12 of an old irrigation ditch traversing the south portion of the property, but are no longer used for
13 irrigation purposes, as we understand.

- 14 c. Time when water is present (seasonally or all year)

15 There are no rivers, creeks, or streams on the property. We understand that surface water may be
16 present during spring runoff and/or high rainfall events in the natural drainages located on-site
17 where rainfall and/or runoff may concentrate for a short duration of time.

- 18 d. Any areas subject to flood hazard or in delineated 100-year floodplain.

19 The subject property is located outside of the FEMA mapped 100-year floodplain. See also
20 Appendix of this report for letter from the Broadwater County Contract Floodplain Administrator,
21 indicating the proposed project does not require a floodplain permit from Broadwater County.

- 22 e. Describe any existing or proposed streambank alteration from any proposed construction
23 or modification of lake beds or stream channels. Provide information on location, extent,
24 type and purpose of alteration and permits applied for.

25 This development is not proposing to alter stream banks, stream channels, or lake beds.

26 **2. GROUNDWATER**

- 27 a. The depth to water table and identify dates when depths were determined

28 Per the three (3) test wells that were drilled, groundwater was encountered between
29 approximately 100-ft to 175-ft below ground surface, depending on location. Groundwater was
30 also monitoring throughout the high water season (April – July, 2020) at several (twelve 12) test
31 pits located in the southeast portion of the property, and no water was observed to the depth of
32 those monitor wells (to a typical depth of 8+ ft below ground surface (bgs)).

33 As part of the planning and design of the subdivision, the Department of Environmental Quality
34 (DEQ) is required to review and approve the proposed water, sanitary sewer, and storm drainage
35 facilities. Each phase of the subdivision will be allocated 10 acre-feet per year. Each lot is
36 proposed to have its own individual water supply well to provide for domestic consumption and
37 irrigation demand, as limited for the Montana Department of Natural Resources and Conservation
38 area is not anticipated to consist of excessive slopes, and each lot includes areas that are less
39 than 15% slope (per the aforementioned DEM). Please see the attached MDEQ Site Plans
40 which show topographic contours and designated slopes, which has been included in the
41 Appendix of this report.

1 Although the parties’ briefing focuses predominantly on
2 groundwater information, Plaintiffs’ motion also attacks the adequacy of the
3 required summaries of probable impacts to surface waters, which necessarily
4 implicates consideration of the sufficiency of the environmental assessment’s
5 “description of every body or stream of surface water that may be affected by the
6 proposed subdivision.” Mont. Code Ann. § 76-3-603(1)(a)(i) (2021). Without
7 information about the nature of these surface waters the County cannot possibly
8 evaluate the impacts to them.

9 As concerned citizen Ms. Sullivan noted, “If you don’t
10 identify the issues you can’t mitigate them.” This section of the assessment cited
11 by the County contains only the most basic information about surface waters. It
12 merely states that the project is “located near Canyon Ferry Lake to the west and
13 south, and Confederate Gulch to the southeast of the property.” This paltry text
14 does not describe either body of water, but merely mentions them by name. What
15 is the nature of each? What sort of flow? How far is each from the project? Is
16 Confederate Gulch perennial? Annual? The assessment does not even describe
17 how these two nearby surface waters interact. It notes that “surface water may be
18 present during spring runoff and/or high rainfall events in the natural drainages
19 located on-site where rainfall and/or runoff may concentrate for short periods of
20 time,” but doesn’t bother to mention to where these drainages drain. Into
21 Confederate Gulch, or directly to Canyon Ferry Reservoir via the drainages to the
22 west? The “description of the topography” required by statute might answer some
23 of these questions, but that too was not provided. The only information on
24 surface waters is their names and general ordinal direction relative to the project.
25 Moreover, this section inadequately addresses the question posed by the statute.
Subsections a, b, and c of the environmental assessment all speak to the absence

1 of streams, rivers, lakes, marshes, and artificial water systems “on the property”
2 or “on the subject property.” But the statute does not require information only
3 about surface waters “on the subject property” but rather for “every body or
4 stream of surface water that may be affected by the proposed subdivision.”

5 Aside from a cursory mention of Canyon Ferry Lake and
6 Confederate Gulch containing no analysis, the environmental assessment is
7 confined to water on the project property, thereby excluding “every body or
8 stream of surface water that may be affected by the proposed subdivision” which
9 is not on the property, contrary to Mont. Code Ann. § 76-3-603(1)(a)(i) (2021).

10 The groundwater disclosures are similarly paltry. The only
11 information is two sentences on the depth of water from three test wells and the
12 absence of water in a series of test pits on the southeast area of the property. The
13 subsequent paragraph does not contain groundwater information. Plaintiffs argue
14 the assessment should include basic hydrological characteristics describing the
15 nature of the aquifer, namely whether it is confined or not, whether it stores or
16 transmits water, whether neighboring water uses draw from the same aquifer, and
17 how nearby surface waters interact with the aquifer. The County counters that the
18 statute does not require inclusion of this information, citing *Citizens for*
19 *Responsible Dev. v. Bd. of Cnty. Comm’rs*, which states:

20 However, while the review process is enhanced by additional
21 information, and more information is surely better than less, the
22 statutes do not impose upon an applicant the duty to satisfy a
23 comprehensive ‘wish list’ of analytical reports and studies, but to
24 provide the ‘information that is sufficient to allow for the review of
25 the proposed subdivision’ Section 76-3-604(2)(c), MCA.

Citizens, 2009 MT 182, ¶ 19, 351 Mont. 40, 208 P.3d 876. In that case, the

1 district court concluded that “maps submitted by the Developer which identified
2 the Clark Fork River and [...] information gleaned about the aquifer from test
3 reports” satisfied the environmental assessment requirements. *Id.*, ¶ 21. The
4 *Citizens* Court disagreed and reversed, because “the [environmental assessment]
5 submitted in this case was inadequate,” specifically the environmental
6 assessment “did not describe the location of the aquifer, the current health of the
7 water bodies, or whether the aquifer and the [nearby surface water] interact.” *Id.*
8 While “one report surmises that the added amount of stormwater drainage is
9 negligible and will be adequately handled, there is no summary of what impact
10 the wells and wastewater systems will have on the aquifer and the [nearby
11 surface water]--whether there would likely be no impact, some acceptable
12 impacts, or serious impacts.” *Id.*

13 Here, the material cited by the County does not describe the
14 location of the aquifer. Indeed, no aquifer is even mentioned. The health of the
15 unidentified aquifer, Canyon Ferry Reservoir, and Confederate Gulch are
16 likewise not covered. This omission is particularly troubling since the State
17 officially designated both the Canyon Ferry sections of the Upper Missouri and
18 Confederate Gulch as impaired (by ammonia and nitrogen respectively) under the
19 section 303(d) of the federal Clean Water Act. The State certified to the federal
20 government that these nearby waters are impaired by precisely the kinds of
21 pollution that a new development would contribute to. This is exactly the kind of
22 information that should be present in a “description of every body or stream of
23 surface water that may be affected by the proposed subdivision.” All of this was
24 raised in detail by Plaintiffs during the comment process but appears to have been
25 swept under the rug by 71 Ranch and, as we will see, the County too.

1 Moreover, there is no information about whether and how the unidentified
2 aquifer interacts with Confederate Gulch and Canyon Ferry. So, while the County
3 is correct that *Citizens* clarified that developers need not submit a comprehensive
4 “wish list” of analytical reports and studies, the specific material that was missing
5 in that case and which rendered its environmental assessment deficient is also
6 missing from the environmental assessment in this case, a problem only
7 compounded by omission of Montana’s certification to the federal government
8 that both nearby waters are impaired under the Clean Water Act.

9 **“Environmental Assessment High Water Table. BC PP 3989”**

10 **3) High water table**

11 As outlined above (Section 2 – Groundwater) the three (3) test wells that were drilled,
12 groundwater was encountered between approximately 100-ft to 175-ft below ground surface,
13 depending on location. Groundwater was also monitoring throughout the high water season
14 (April – July, 2020) at several (twelve 12) test pits located in the southeast portion of the
15 property, and no water was observed to the depth of those monitor wells (to a typical depth of
16 8+ ft below ground surface (bgs).

17 The NRCS water features report does not indicate any potential for high ground water.
18 Further, the 44 test pits performed on-site to a depth of at least 12-feet did not show any signs
19 of high groundwater.

20 This material is functionally identical to the groundwater
21 information provided in section “2.a.” of the environmental assessment analyzed
22 above.

23 ////

24 ////

25 ////

1 **“Environmental Assessment Surface and Ground Water**
2 **Contamination. BC PP 4002”**

- 3 **b. How would the subdivision affect surface and groundwater, soils, slopes, vegetation,**
4 **historical or archaeological features within the subdivision or on adjacent land? Describe**
5 **plans to protect these sites.**

6 The subdivision is required to undergo review and approval through Department of
7 Environmental Quality regarding impacts to surface water and groundwater related to storm
8 drainage and sanitary sewer improvements. The subdivision will be required to meet current
9 State standards and is not anticipated to negatively impact surface water or groundwater.

10 The roads have been aligned to generally minimize disturbance of areas with slopes greater than
11 15%, and it is anticipated that future lot development (homes, driveways, etc.) will take place on
12 slopes less than 15%.

13 There may be impacts to the aforementioned native grasses during construction of the roadways
14 as well as individual lot development. It is anticipated that areas of disturbance will be seeded or
15 sodded to minimize erosion and reestablish vegetative cover prior to final stabilization.

16 As previously discussed, if any historical or archaeological features are encountered during the
17 construction of the subdivision, the appropriate authorities will be contacted and construction
18 activities will cease until the issue is resolved.

- 19 **1) Would any Streambanks or lake shores be altered, streams rechanneled or any surface**
20 **water contaminated from sewage treatment systems, run-off carrying sedimentation, or**
21 **concentration of pesticides or fertilizers? (if so, all applicable County, State, and**
22 **Federal laws must be abided by.)**

23 There are no streambanks or lake shores located on the subject property, and therefore there
24 are no alterations to streambanks or lake shores associated with the proposed subdivision. All
25 wastewater treatment systems will be required to be reviewed and approved by the
Department of Environmental Quality, and current state regulations will need to be met.
Therefore, we do not anticipate surface water contamination due to wastewater treatment
systems. Storm drainage runoff will similarly be required to be reviewed and approved by
the Department of Environmental Quality and meet current State standards.

Although this section concerns how the subdivision will
affect surface and groundwater, plus conditions to protect both, the assessment
does not even mention which waters could be affected, how they would be
affected (dewatered, flooded, sewage, pesticides, sediment,...), how the effects

1 would be different for each body of water and makes no mention whatsoever
2 about protection plans. Instead, it makes the conclusory statement that the project
3 “is not anticipated to negatively impact surface or groundwater” because it “will
4 be required to meet current State standards” and Montana Department of
5 Environmental Quality (DEQ) must review and approve storm and sanitary
6 sewers. To begin, the text does not even say that DEQ has approved the project
7 or that DEQ does not anticipate negative impacts. Instead, it infers that DEQ is
8 incapable of approving projects with negative impacts, therefore this anticipated
9 approval by DEQ’s *in the future* will have by then determined that no negative
10 effects are expected. This is causal legerdemain. DEQ’s possible future
11 conclusions cannot be the basis for a finding *in the present given the current*
12 *record* that there will be no negative impacts. In essence the County is saying
13 “DEQ will review this.” This, however, fails where the Legislature has placed an
14 independent duty on the County to review the sufficiency of specific parts of a
15 subdivision application, including “a summary of the probable impacts.” Whether
16 DEQ approves parts of the project, the County must review “a summary of the
17 probable impacts of the proposed subdivision based on the criteria described in
18 76-3-608,” Mont. Code Ann. § 76-3-603, including “the specific, documentable,
19 and clearly defined impact on agriculture, agricultural water user facilities, local
20 services, the natural environment, wildlife, wildlife habitat, and public health and
21 safety....,” Mont. Code Ann. § 76-3-608(3)(a) (2021).

22 Certainly, any DEQ findings would be useful, even
23 necessary, for consideration by the County, but the County is going much farther,
24 effectively saying “DEQ will handle this question, so we don’t have to consider
25 it.” The controlling statute says otherwise.

1 Furthermore, the environmental assessment itself states that
2 DEQ will only review for impacts from “storm drainage and sanitary sewer”
3 improvements. The statute outlining the scope of the County’s review, however,
4 is not limited to wastewater impacts but rather all “probable impacts” on waters
5 that “may be affected.” Since DEQ’s review is limited to wastewater
6 improvements, DEQ plainly does not review the impact of wells, which are not
7 storm drainage or sanitary sewer improvements. The crux of this case is water
8 wells and yet the County, in its effort to pass off its statutory responsibilities to
9 DEQ, forgets that it must review *all* probable impacts of the projects, including
10 the wastewater facilities that DEQ does review and the wells that DEQ does not
11 review. Indeed, the County’s Attorney specifically told the Commissioners, “the
12 whole point of exempt wells, is that they’re exempt from the DEQ Regulatory
13 Process, that usually looks at those ground water impacts.” (AR 2775). This was
14 also pointed out by Ms. Sullivan, who at the Planning Board’s April 5, 2022
15 meeting noted that the board had been misinformed at prior meetings that DEQ
16 reviews the impact of wells on the aquifer. She went on to note that the
17 importance of such review is heightened in closed basins. Ms. Sullivan further
18 noted that the County should not pass off review on DEQ and DNRC where the
19 statute requires County review. The County was aware at the time that DEQ does
20 not review groundwater impacts. By arguing now that the County does not have
21 to review groundwater impacts that it knows DEQ does not consider for exempt
22 wells, the County is effectively arguing that there is no part of state government
23 whatsoever that is charged with reviewing exempt well impacts on groundwater.
24 This Court, and seemingly even the County’s Attorney, disagree.

25 Stormwater and sewage drainage is mentioned, but only in

1 passing and no analysis is made of the nature or extent of its impacts. Yet despite
2 this dearth of information and total lack of analysis, the assessment concludes
3 that negative impacts from storm and sanitary wastewater are not anticipated. It is
4 unclear how such a conclusion can be made based on virtually no information
5 and after no analysis of that paltry data. Moreover, this material only speaks to
6 the impact of wastewater on surface and ground waters. No analysis whatsoever
7 is conducted on the impact of the wells themselves and whether they might
8 negatively impact the aquifer, Canyon Ferry, or Confederate Gulch. The failure
9 to include this basic hydrological information and analysis for such a large
10 proposed residential development surrounded by active farming and mere yards
11 from the shore of the state’s largest reservoir is astonishing.

12 **“New Information, Water Usage Summary and Offered**
13 **Mitigation. BC CCN 0000293-297”**

14 This material consists of five pages of calculations regarding
15 “water availability” for the development through wells. It is located within the
16 “ADDENDUM TO HORSE CREEK HILLS MAJOR SUBDIVISION STAFF
17 REPORT,” which is a memo from the County’s Community Development
18 Director to the Broadwater County Planning Board. The Court notes that
19 previously the County had argued that statute “does not require the County to
20 search out groundwater information before conditionally preliminarily approving
21 a subdivision,” yet here the County is pointing to its own report as proof of the
22 disclosure of information that is supposed to be, as the County strenuously
23 argued, provided by 71 Ranch. *See* Mont. Code Ann. § 76-3-504(1)(b) (2021)
24 (regulations must “require the subdivider to submit to the governing body an
25 environmental assessment as prescribed in 76-3-603”). The County wants to have

1 it both ways.

2 The only analysis merely states that water would be drawn
3 from exempt wells preliminarily approved by DNRC. Four conditions are
4 suggested: a hydrological survey, metered tracking in individual well use,
5 tabulation of use, and a covenant restricting maximum irrigated area per lot. The
6 County's memo to itself then concludes that "the impacts to Local Services as to
7 water availability are mitigated." Implicit in this conclusion is the assumption
8 that it is impossible for a compliant exempt well to impact water availability.
9 Despite no analysis of what dozens of more wells would do to the aquifer,
10 Confederate Gulch, or Canyon Ferry, the report nevertheless makes the
11 superficial conclusion that exempt wells, as long as they are individually below
12 the gallons per minute and acre feet limits, cannot impact on area water
13 resources. Under DNRC's interpretation, *each phase* of the project is entitled to a
14 combined appropriation of 10-acre feet per year allowing the appropriation of up
15 to 40-acre feet or 13,030,000 gallons of water each year. The Court notes that
16 during some of the final hearings 71 Ranch mentioned 50-acre feet of water, 40
17 for the homes and 10 for the commercial lot. This inconsistency and late
18 disclosure do not aid citizen participation or the County's review process or this
19 Court. Concluding that a possible draw of 13-16 million gallons per year will
20 have no impact whatsoever on nearby water is the equivalent of claiming that a
21 \$13-16 million jackpot will have no affect your tax bill. It appears no one knows
22 precisely how great the effects will be or where, but concluding there will be no
23 effects at all is ludicrous, especially when there is already extensive evidence the
24 aquifer is being dewatered (*infra*). Finally, a hydrological survey cannot mitigate
25 much if it is conducted *after* the County has approved the project. Assuming for a

1 moment that such a survey indicated that there is not enough water in the aquifer
2 to support current use and the project, that finding mitigates nothing if it is made
3 after the project is already approved. A merely informational mitigation like a
4 hydrological survey is only useful if conducted *before* ultimate
5 approval/disapproval. Doing so after the fact is just box-ticking.

6 None of these record sections cited by the County contain
7 the water information required by law.

8 Although local residents brought it up at hearings several
9 times, no mention is made about extensive well drawdown testing performed in
10 2016 (before the County's recent drought) for the failed Avalanche Irrigation
11 District. Indeed, the County's admission at the hearing that it was the public who
12 brought this information to the County's attention, not the environmental
13 assessment, show that the assessment did not contain this "available ground
14 water information." The project had intended to drill deep wells on the east side
15 of Canyon Ferry Reservoir that ostensibly would draw water only from the
16 reservoir so as not to impact area wells. A high-production test well was sunk
17 less than 10 miles north of the Horse Creek Hills site to test whether this
18 assumption was correct. It was not. The test results revealed:

19 The drawdown responses in two aquifer tests indicate leaky-confined
20 conditions bearing out the typical conditions found in Tertiary-age
21 sedimentary rocks. The result of aquifer confinement is a low storage
22 coefficient and rapid propagation of drawdown away from the
23 pumping well. The well lithology and aquifer testing data indicate the
24 water producing intervals penetrated by the well are connected to the
25 lake and that drawdown is expected to propagate up to two miles
through the aquifer before the water levels stabilize and a new
equilibrium is established.

1 One might think that “available groundwater information”
2 would include this recent and geographically proximate study of relevant
3 questions such as the drawdown impact of new wells. If nothing else, the study
4 presents “evidence [the] aquifer is semi-confined,” something decisionmakers
5 should presumably be told in an environmental assessment. Is the geology of the
6 Avalanche Irrigation District test well similar enough to this project that the
7 conclusion about well drawdowns is applicable here, or is the geology so
8 different as to render the Avalanche conclusions inapplicable? The Avalanche
9 Irrigation District used higher production wells than would be used in this project
10 (even assuming 5 combined appropriations at the exempt well limit) but only ran
11 the wells for limited periods. Perhaps these two equate, perhaps they are
12 incomparable. More importantly, the County is precluded from reviewing these
13 issues if this “available groundwater information” is not included in the first
14 place. A complete environmental assessment might answer or at least explore
15 these questions. This one did not. The Avalanche Irrigation District revealed that
16 important assumptions experts had made about the hydrogeology of the east side
17 of Canyon Ferry reservoir were simply incorrect. To ignore entirely the data and
18 concerns raised by that project’s findings, corroborated by testimony of locals
19 (*infra*), is a failure to review “available groundwater information.”

20 As in *Citizens.*, the environmental assessment “did not
21 provide ‘a description of every body or stream of surface water that may be
22 affected by the proposed subdivision, together with available ground water
23 information,’ with ‘a summary of the probable impacts of the proposed
24 subdivision.’ *Id.* As in *Citizens.*, the environmental assessment fails to describe
25 “the location of the aquifer, the current health of the water bodies, or whether the

1 aquifer and the [nearby surface waters] interact.” *Id.*, ¶ 21. The material the
2 assessment did provide was “primarily directed at the testing requirements of §
3 76-3-622,” *Id.*, which only requires “evidence of adequate water availability: (i)
4 Obtained from well logs or testing of onsite or nearby wells; (ii) obtained from
5 information contained in published hydrogeological reports; or (iii) as otherwise
6 specified by rules adopted by the department of environmental quality pursuant
7 to 76-4-104,” Mont. Code Ann. § 76-3-622(1)(e) (2021). Furthermore, there was
8 “no summary of what impact the wells and wastewater systems will have on the
9 aquifer and the [nearby surface waters]—whether there would likely be no
10 impact, some acceptable impacts, or serious impacts.” *Id.*

11 Seemingly foreshadowing its deficiencies and superficial
12 treatment of other issues, the third question on the first page of the subdivision
13 application misstates one of the most contentious and important aspects of the
14 subdivision proposal. Instead of accurately representing that the project will be
15 served by individual wells, the application states that it will be served by
16 “Individual surface water supply from spring.” This is not an obscure question
17 buried in some appendix. It is the first substantive question in the application and
18 concerns an issue that quite clearly (as evidenced by this and prior exempt well
19 litigation, attempts to legislate and make rules, and the public comment in this
20 case) is highly contentious and obviously of the utmost importance. This was
21 brought to 71 Ranch’s attention at public meetings and was allegedly fixed, but
22 the copies in the administrative record before the Court still indicate “Individual
23 surface water supply from a spring.” (3880, 4202). As multiple citizens reminded
24 the County’s Commission, the onus is on the developer to present a complete
25 application. (County Commission Meeting, 15 Nov. 2021). The failure to

1 accurately state the source of water for the project, in response to the very first
2 substantive question in the application, evinces the application's broader failures,
3 as does the developer's unclear vacillation between claiming 40- and 50-acre
4 feet.

5 Additionally, a Broadwater Conservation District member
6 testified that it maintains a seasonal streamflow gauge at the lower end of
7 Confederate Creek and offered that data to the County for review. Given the
8 extensive testimony indicating dewatering of area ground and surface waters
9 (*infra*) this is invaluable quantitative information for reviewing the potential
10 impacts of this project. At a bare minimum, it was "available ground water
11 information" that was affirmatively offered by one part of County government to
12 another.

13 The environmental assessment is deficient in numerous
14 ways, particularly the repeated failure to assess impacts to nearby landowners
15 and water. The barest minimum of information is disclosed about nearby surface
16 waters and basically nothing is disclosed about the aquifer which would supply
17 the project. No mention is made of the health of these waters, despite them being
18 officially classified by the State as impaired under the federal Clean Water Act.
19 The interaction of these waters is ignored entirely, as is the impact of either new
20 wells or sanitary and storm wastewater, which is pawned off on DEQ's future
21 determination. The environmental assessment is abjectly deficient.

22 Furthermore, the law requires not only the statutorily
23 designated information, but also that it be submitted with sufficient organization,
24 clarity, and cohesiveness to allow not only the governing body to review the
25 proposal but also to afford "reasonable opportunity for citizen participation in the

1 operation of the agencies.” Mont. Const. Art. II, § 8, cited by *Citizens*, ¶ 23. In
2 that case, the developer “submitted a significant amount of information which
3 was not identified as part of the [environmental assessment],” sometimes long
4 after its submission, some of which contained material relevant to but not *part of*
5 the environmental assessment, “[t]hus, information which could be relevant to
6 the [environmental assessment] is buried in documents created primarily for
7 other purposes.” *Citizens*, ¶ 20. On review, the *Citizens* Court found that the
8 information provided “suffer[ed] from a lack of organization and clarity which
9 results in confusion as to the interpretation and quality of the information
10 provided.” *Id.* “[F]ailure to provide [the required information] in a reasonably
11 cohesive fashion, makes it difficult for the public to use the information,”
12 undermining Montanans’ constitutional Rights to Know and to Participate. *Id.*, ¶
13 24. It concluded that an environmental assessment can be deficient not only for
14 failure to provide required information, but also “because much of the relevant
15 information was not provided in a cohesive format.” *Id.*, ¶ 25. As in *Citizens*, 71
16 Ranch submitted a significant amount of information on multiple occasions. Just
17 as “it is not this Court's obligation to conduct legal research on behalf of a party
18 or to develop legal analysis that might support a party's position,” *State v.*
19 *Cybulski*, 2009 MT 70, ¶ 13, 349 Mont. 429, 204 P.3d 7, it is equally not this
20 Court’s obligation to conduct factual investigation, *In re Marriage of Taylor*,
21 2016 MT 342, ¶ 14, 386 Mont. 44, 386 P.3d 599. Although the Court reviewed
22 the extensive record, it is the parties’ “responsibility to provide the court and
23 [opposing parties] with adequate notice of what [the party is] contesting by
24 stating the factual or legal basis or reason for his assertions.” *Taylor*, ¶ 14.
25 Accordingly, for the purposes of considering the sufficiency of the environmental

1 assessment's disclosures and County findings on water issues, the Court only
2 discusses material specifically brought to the Court's attention by counsel. After
3 all, if the Court cannot find the relevant material given the assistance of counsel
4 and months of study then the material must be insufficiently clear, organized, and
5 cohesive to provide a non-attorney with a "reasonable opportunity for citizen
6 participation in the operation of the agencies."

7 As in *Citizens*, other parts of the voluminous record may
8 contain material which is relevant to the required disclosures, but the mere
9 technicality of including unclear but relevant information disorganized elsewhere
10 in the various submissions is not sufficient. The law requires disclosure in part to
11 allow citizens to know about their government's decisions so that they can
12 participate in those decisions. If the Court cannot find the relevant information,
13 even with the assistance of counsel's numerous citations to the record, it cannot
14 be said that the disclosure has afforded the public a reasonable opportunity to
15 participate. While it is possible that "information which could be relevant to the
16 [environmental assessment] is buried in documents created primarily for other
17 purposes," "failure to provide [the required information] in a reasonably cohesive
18 fashion, makes it difficult for the public to use the information," undermining
19 Montanans' constitutional Rights to Know and to Participate. *Citizens*, ¶¶ 20-24.

20 These concerns are amplified by the haphazard and
21 confusing procedural path the County took to review this application, involving
22 two separate instances of the Commission remanding the matter back to the
23 Planning Board, alleged County failures to promptly provide documents to
24 concerned citizens, routine supplementation of the application to fill obvious
25 omissions, and the regular rescheduling of meetings based on failure to disclose

1 important evidence and failures to provide adequate notice to interested parties.
2 Counsel for interested landowners, Rob Farris-Olsen pointed out the myriad
3 errors, addendums, and remands had so jumbled the relevant applications and
4 evidence that it would be best to start again fresh. The Court's review of the
5 meetings shows the County bending over backward to allow 71 Ranch repeated
6 opportunities to rectify admitted and obvious basic errors in the application for a
7 project that allegedly began 5-6 years ago. The Court spent months reviewing
8 thousands of documents and over thirty hours of meeting recordings which were
9 dissected in detail and commented on by over a dozen briefs handled by ten
10 attorneys. If the Court cannot find the necessary and relevant material given such
11 overwhelming time and professional assistance then the material must be
12 insufficiently clear, organized, and cohesive to provide the citizenry with a
13 reasonable opportunity for citizen participation in the operation of the agencies.
14 Indeed, the County's Kafkaesque procedure and the developer's Byzantine
15 application which resulted from innumerable revisions to even basic facts leads
16 the Court to conclude that the County's preliminary plat approval must be denied
17 not only for the substantive failure mentioned above but also based on the
18 procedural "failure to provide [the required information] in a reasonably cohesive
19 fashion, [which] makes it difficult for the public to use the information."

20 **Primary Review Criteria: Mont. Code Ann. § 76-3-608(3) (Counts I & II)**

21 Plaintiffs argue that the County "failed to adequately
22 evaluate § 608 criteria and failed to explain why the record supported approval of
23 the subdivision despite identification of probable impacts and the inability to
24 mitigate those impacts." The County counters that it "evaluated the applicable
25 definition from the Broadwater County Subdivision Regulations, examined the

1 application, staff report, oral and written public comment which makes up the
2 record for the subdivision, made findings which cite to the record to support the
3 finding, examined whether the findings were consistent with the Broadwater
4 County Growth Policy, and then, if needed for identified significant adverse
5 impacts, imposed mitigating conditions which cite to the supporting statute or
6 regulation.”

7 “The basis for the governing body’s decision to approve,
8 conditionally approve, or deny a proposed subdivision is whether the subdivision
9 application, preliminary plat, applicable environmental assessment, public
10 hearing, planning board recommendations, or additional information
11 demonstrates that development of the proposed subdivision meets the
12 requirements of this chapter.” Mont. Code Ann. § 76-3-608(1) (2021). One such
13 requirement is that “A subdivision proposal must undergo review for the
14 following primary criteria: ... the specific, documentable, and clearly defined
15 impact on agriculture, agricultural water user facilities, local services, the natural
16 environment, wildlife, wildlife habitat, and public health and safety....” Mont.
17 Code Ann. § 76-3-608(3) (2021).

18 **Agricultural Water User Facilities**

19 “A subdivision proposal must undergo review for the
20 following primary criteria: ... the specific, documentable, and clearly defined
21 impact on ... agricultural water user facilities” Mont. Code Ann. § 76-3-
22 608(3) (2021).

23 Plaintiffs argue that the County ignored the impact of
24 “aggregate consumptive use on offsite agricultural water use in the area.” The
25 County counters that the statute relates only to “agricultural water user facilities,”

1 not agricultural water use generally.

2 The statute is clearly limited to “agricultural water user
3 *facilities*,” but that term is not defined by statute, or present elsewhere in the
4 code. The County applied the definition from its subdivision regulations as
5 “facilities which provide water for irrigation or stock watering to agricultural
6 lands for the production of agricultural products. These facilities include, but are
7 not limited to, ditches, head gates, pipes, and other water conveying facilities.”
8 The County found that “the area in the proposed subdivision” does not contain
9 such facilities and concludes, “It is not anticipated that this proposed subdivision
10 will interfere with any irrigation systems or any agricultural operations in the
11 vicinity and is, therefore, in compliance” with land use goals.

12 The statute, however, does not limit the review of impacts
13 on agricultural water user facilities to merely the property itself. It requires
14 review of “agricultural water user facilities” which is not limited to the project
15 property. The County cannot legally reach the conclusion that “agricultural
16 operations in the vicinity” will not be interfered with if the County fails to even
17 make factual findings about the existence and nature of those facilities.

18 Despite concluding that impacts on agricultural water user
19 facilities were “not anticipated,” the County opined that Conditions 10, 11, and
20 25 would mitigate the undescribed and unanticipated impacts. Condition 10
21 requires a hydrological survey and proof of adequate water, again, rather tardily.
22 Condition 11 requires HOA metering of resident’s water and reporting to DNRC.
23 Troublingly, while discussing this condition several Board members seemed to
24 agree that there was no enforcement of this condition for homeowners to report
25 and that “if they don’t they don’t.” A condition that the Board itself seemingly

1 admits will not do anything is suspect as mitigation. Condition 25 requires
2 boundary fencing and a cattle underpass. None of these conditions relate
3 whatsoever to “facilities,” but 10 and 11 clearly relate to agricultural water use
4 generally. A hydrological survey and metering would certainly relate to
5 agricultural water uses generally, but the Court is unable to determine how they
6 relate to agricultural water user *facilities*. The County’s argument now in
7 litigation that the statute is limited to water user *facilities* merely highlights a
8 misunderstanding of the criteria when it mandated mitigation that has nothing to
9 do with “facilities,” but everything to do with agricultural water use generally. It
10 is lost on the Court how boundary fencing (Condition 25) addresses either
11 agricultural water use generally or facilities in particular, but does relate to
12 agriculture generally.

13 The County made factual findings limited to agricultural
14 water user facilities on the property itself but then expanded the scope of its
15 conclusions to dismiss impacts to off-site facilities which were never even
16 mentioned. It is arbitrary to reach conclusions on subjects about which there is no
17 analysis or even findings.

18 **Agriculture**

19 “A subdivision proposal must undergo review for the
20 following primary criteria: ... the specific, documentable, and clearly defined
21 impact on agriculture....” Mont. Code Ann. § 76-3-608(3).

22 The environmental assessment’s “EFFECT ON
23 AGRICULTURE” section begins “The subject property is currently a vacant
24 piece of land.” In response to the question of whether the project is “located on or
25 near prime farmland or farmland of statewide importance,” the assessment states

1 “the subject property consists of...” Like the deficient assessment related to
2 water user facilities impact, the environmental assessment’s discussion of
3 agricultural impacts was arbitrarily limited to agricultural impacts to the subject
4 property itself. This is not what the statute requires. The statute requires review
5 of “the specific, documentable, and clearly defined impact on agriculture,” not
6 merely agriculture *on the property being developed*. Indeed, it makes little sense
7 to only inquire into the impacts on the subject property. It should be obvious that
8 farmland covered with a subdivision impacts the agricultural use of *that* land.
9 What the statute requires is an inquiry into the impacts on *other nearby*
10 agricultural land that may be affected.

11 The County concluded that the land “is not considered
12 productive agricultural land” when considering the growth policy, (BC HM
13 0003738), even though the environmental assessment itself says that 32.1% is
14 Prime Farmland if Irrigated, and another 12.8% is Farmland of Statewide
15 Importance, (BC PP 0003993). This contradicts the statement at the second
16 planning board meeting that 88% is not prime farmland, even if irrigated.
17 (Planning Board Meeting, Sept. 29, 2021). Somehow the County determined that
18 the land is not productive despite the proposal’s own documents revealing that
19 almost half the land is “prime” or “of statewide importance.”

20 The assessment does acknowledge that “the overall
21 properties to the northeast, east, and southeast may be used to some degree for
22 agricultural purposes” but concludes that “Confederate Gulch would separate the
23 proposed development from the areas that appear to be used primarily for
24 agricultural purposes.” The assessment’s description of the measures taken “to
25 ensure that the proposed subdivision will not conflict with nearby agricultural

1 operations” is fencing along the boundaries shared with public land, Confederate
2 Gulch separating the agricultural users from the development, and covenants to
3 keep residents’ animals fenced.

4 Since agricultural water use in general was not considered
5 above, it must be considered here since an impact on agricultural water use is
6 plainly an impact on agriculture, water being integral to the raising of both of
7 crops and stock. Indeed, the County Attorney specifically brought up the issue of
8 exempt wells as a potential agricultural impact, raising the concern of numerous
9 exempt wells having a “big cumulative impact on the water in that area.” (AR
10 2774). He stated that this issue of the impact of exempt wells “requires, I think,
11 legal analysis from us [the Broadwater County Attorney Office], to assist the
12 Planning Board, because the whole point of exempt wells, is that they're exempt
13 from the DEQ Regulatory Process, that usually looks at those ground water
14 impacts.” Thus, the County was told by its own attorney that exempt wells are a
15 matter of concern and that the County should review the issue of their cumulative
16 impact on groundwater because DEQ does not address groundwater concerns for
17 exempt wells, leaving the issue to the County.

18 There was extensive testimony indicating that groundwater
19 in the area is already impaired. Local resident Jan Finn correctly noted that
20 “water quantity is an unmitigable harm.” If there is no longer sufficient water in
21 the aquifer to support the appropriations of senior water rights holders, that it is,
22 the water is gone. There is not a second chance. Local resident Toby Dundas
23 noted that Confederate Creek already goes underground on his property for part
24 of the year. Local resident Drew Hettinger gave poetically chilling testimony
25 about the declining ground and surface water in the area. He recounted how

1 decades ago, Confederate Creek would run dry from the hottest part of the
2 summer until archery season began. Over the years, the creek has dried up earlier
3 and returned later, such that this year it did not reappear aboveground until after
4 archery season had concluded. Ten years ago, Mr. Hettinger's well could supply
5 two sprinklers and a shower simultaneously. Two years ago, it could only handle
6 one sprinkler if running the shower. This year, he had to choose one or the other,
7 and even a toilet flush at midsummer could not be supplied by his well. After
8 delivering this evidence that local surface and groundwater is impaired, Mr.
9 Hettinger advised the County "There's a reason Upper Missouri is a closed
10 basin." If the County had doubts about this testimony or was under the mistaken
11 impression that only professional opinions and not public comment could not
12 affect their decision, this could have been resolved by reference to the
13 Confederate Creek streamflow data that the County's own conservation district
14 offered. This was not done.

15 The County did mandate Condition 25, which requires
16 fencing of the boundary with State land and a cattle underpass, but the
17 sufficiency of that mitigation simply cannot be reviewed if the underlying
18 concern it ostensibly addresses is not even discussed. As Ms. Sullivan so aptly
19 noted, "If you don't identify the issues you can't mitigate them." If in responding
20 to a spill of water someone says, "Don't worry, I have a towel!" one cannot be
21 assured that the situation has been adequately mitigated without knowing
22 whether the spill was a cup, a gallon, or a cistern, and whether the spill was in the
23 front yard, in the kitchen, or on a laptop computer. The nature and extent of the
24 concerns must be understood before one can begin to review impacts and the
25 appropriateness and sufficiency of mitigation efforts. Similarly, without

1 discussing the specific, documentable, and clearly defined impacts of
2 dramatically increased traffic on a rural road, the County's conclusion that the
3 impact is mitigated by condition 25 is arbitrary. While the factual question of
4 whether such impacts are sufficient to reject the proposal (and whether mitigation
5 adequately addresses those concerns) is within the County's power, failing to
6 review specifically documented impacts raised by impacted neighbors and the
7 County Attorney is not. But the County's findings on this issue failed to mention
8 the specific concern of the cumulative impact of exempt wells that was raised
9 before the County by its own attorney and Plaintiffs. Again, the County may
10 weigh evidence as it wishes but here it simply ignored entirely the specific issue
11 which it has a statutory duty to review.

12 While it appears the County adequately addressed the traffic
13 concerns of agricultural producers through fencing and a livestock underpass, the
14 County erred in arbitrarily approving the preliminary plat after ignoring entirely
15 the specific, documentable, clearly defined impact of exempt wells that was
16 raised numerous times by citizens and even its attorney.

17 **Natural Environment**

18 “A subdivision proposal must undergo review for the
19 following primary criteria: ... the specific, documentable, and clearly defined
20 impact on ... the natural environment” Mont. Code Ann. § 76-3-608(3)
21 (2021).

22 Plaintiffs argue that the County failed to examine the
23 “impact of 42 new additional septic systems” instead relying on DEQ to review
24 them. The County counters that Plaintiffs are trying to “impose a higher
25 standard” than required by law, because sanitation review for lots smaller than 20

1 acres is DEQ's responsibility.

2 As a preliminary matter, it appears the County attempts to
3 distinguish its official definition of natural environment ("physical conditions
4 which exist within a given area, including land, air, water, mineral, flora, fauna,
5 sound, light, and objects of historical and aesthetic significance") from what it
6 characterizes as 'natural resources' such as "oil, gas, gravel, timber, etc." The
7 existence of natural resources, however, is a "physical condition which exists
8 within a given area." Timber *is* flora. Moreover, the only definition of mineral
9 the Court could find under Montana law, albeit under the Uniform Unclaimed
10 Property Act, states that "'Mineral' means gas; oil; ... gravel...." Mont. Code
11 Ann. § 70-9-802(9) (2021). "Physical conditions which exist within a given
12 area" is an extremely broad definition, and readily applies to every object the
13 County attempts to exclude.

14 The obvious deficiency is that the environmental assessment
15 does not even address the natural environment whatsoever. Each of the other
16 primary review criteria receives an underlined, bold, all-caps heading followed
17 by a section dedicated to those criteria. There is no such section for the natural
18 environment. This criterion appears to have been omitted entirely from the
19 environmental assessment. If such -603 criteria is missing, it is impossible for the
20 County to properly review that criterion under -608. Thus, it is somewhat
21 surprising that the County's discussion of natural resources is more robust than
22 the other criteria despite the environmental assessment failing entirely to address
23 this issue. It is rather odd for the County to essentially do 71 Ranch's job and
24 make conclusions about the projects impact to the natural environment when 71
25 Ranch's own environmental assessment fails to do so. There is discussion of

1 native vegetation, critical species, and weed management; however, the County's
2 discussion of seismic activity and earthquake planning again suggests that it
3 failed to understand what must be reviewed and for whose benefit:

4 The property is located within the Intermountain Seismic Belt that
5 extends through western Montana and frequently produces small
6 earthquakes and has previously developed some major earthquakes.
7 Property damage and risk can be minimized with construction
8 techniques and earthquake planning. To mitigate any potential
9 negative impacts with future home site locations, the Subdivider's
10 representative recommends specific geotechnical investigations be
11 performed by future lot owners, in order to review soil conditions on
12 each property and provide appropriate recommendations.

13 Such studies and recommendations are surely wise, maybe
14 even necessary, for the development of safe communities, but their inclusion here
15 exposes the County's misunderstanding of the -608 criteria and the nature of the
16 County's review. The County is supposed to review the primary criteria for the
17 proposed project's impact on the natural environment, not for the natural
18 environment's impact on the proposed project. It would be remarkable for the
19 subdivision to affect seismicity, not the other way around. Indeed, the
20 environmental assessment places such concerns where they belong, under
21 impacts to public health and safety. They are curiously absent from that section
22 of the County's findings. Given the anemic analysis of other primary review
23 criteria, the inclusion of this irrelevant material evinces the County's inverted
24 understanding of the review process which results in the County doing the
25 developer's job for them where the developer has failed.

Most troubling though, is the total absence of analysis on
wastewater discharge and nitrogenous pollution. Both nearby bodies of water are

1 already impaired by nitrogenous pollution. This concern was raised in both a
2 letter to the County as well as by concerned citizens' lawyer at a Commission
3 hearing. The project's own engineering report, however, used DEQ drain field
4 guidance to expressly exclude consideration of bodies of water more than 1,000
5 feet away. This may be appropriate for DEQ's limited sanitation review, but the
6 County's adoption of this 'standard' excludes from consideration all impacts to
7 water as long as they are not within 999 feet. It is arbitrary to adopt a different
8 agency's unrelated guidance on the distinct and circumscribed issued of
9 sanitation drain field review and shoehorn it into a completely different area of
10 law. Doing so arbitrarily limits the scope of the County's independent duty to
11 perform a much broader review than DEQ does (*i.e.*, not limited to impacts
12 within 1,000 feet), contrary to -608. The record contains concerns about
13 nitrogenous pollution to nearby waters, yet the County does not discuss those
14 concerns and the environmental assessment neglects the natural environment
15 entirely. Again, the County can weigh evidence as it sees fit, but it may not
16 ignore "specific, documentable, and clearly defined impact[s]," particularly when
17 the County appears to be doing 71 Ranch's job of proving the sufficiency of the
18 project.

19 **Wildlife & Habitat**

20 "A subdivision proposal must undergo review for the
21 following primary criteria: ... the specific, documentable, and clearly defined
22 impact on ... wildlife, wildlife habitat" Mont. Code Ann. § 76-3-608(3)
23 (2021). The County defines this criterion as "animals that are not domesticated or
24 tamed as well as the place or area where wildlife naturally lives and travels
25 through."

1 The environmental assessment states that Montana
2 Department of Fish, Wildlife, and Parks (“FWP”) identified Confederate Gulch
3 as “an important spawning stream for rainbow trout,” that the general area “is
4 used by antelope, mule deer, white tailed deer, elk, game birds, and non-game
5 bird,” and that the lower end of Confederate Gulch closest to the project
6 “provides habitat for moose, mountain lions, and black bears” in addition to the
7 previously mentioned species. As mitigation for impacts, the environmental
8 assessment proposes fenced gardens, wildlife-proof trash disposal, and
9 prohibitions on boundary fencing that is not wildlife friendly.

10 The County’s findings reiterate the environmental
11 assessment and add that the “Long Billed Curlew, a ground nesting bird, has been
12 observed on the property of the proposed subdivision.” The County further notes
13 that “Hunter and homeowner conflicts could arise due to hunting taking place on
14 State of Montana lands directly adjacent to the north boundary” of the project.
15 Again, the County misunderstands the nature of what is being reviewed and for
16 whose benefit. The County is supposed to review for impacts to “wildlife,
17 wildlife habitat,” not for the impacts that hunting such wildlife will have on
18 future residents and hunters. Indeed, the environmental assessment contains a
19 question, presumably from the County, about whether the project is “likely to
20 displace wildlife in a way that will create problems for adjacent landowners.”
21 While this is certainly relevant to public safety, it manifestly has nothing to do
22 with impacts *to* wildlife, but rather *from* wildlife. In fact, the environmental
23 assessment spends more time discussing concerns about the impact of displaced
24 wildlife on owners and neighbors than it spends discussing the project’s impact
25 to wildlife and habitat. Concerned citizen Bill Waldron even pointed out this

1 inverted analysis at one of the Commission’s meetings. The County demonstrates
2 a pattern of either not understanding the nature and purpose of its review or of
3 subverting the review by inverting the analysis, thereby ignoring the impacts it
4 must review.

5 The environmental assessment and County findings both
6 omit the input of FWP fisheries biologist Ron Spoon, who noted that Lower
7 Confederate Creek is a “high quality fishery” but is “nearly dewatered about 4
8 miles above the project during summer, but groundwater recharges the lower few
9 miles to provide good conditions for fish. Any anticipated groundwater depletion
10 in this area would impact aquatic life in lower Confederate Creek,” and noted
11 that “non-development of [the lot closest to Confederate Creek] would
12 potentially reduce risk of groundwater depletion and/or disturbances to
13 streamside areas.” He offered “streamflow and fishery data” collected on
14 Confederate Creek near the project by professional hydrologist Jim Beck, of the
15 Broadwater County Conservation District. This material is consistent with Mr.
16 Dundas and Mr. Hettinger’s testimony about impaired groundwater. The
17 dewatering of this aquifer, about which virtually nothing has been disclosed, is
18 precisely the concern raised by Plaintiffs regarding the introduction of dozens of
19 new exempt wells to the area that are *only* reviewed by the County as part of this
20 process. The entire point of the County’s review is to determine the scope and
21 acceptability of impacts from the project. And yet here the County specifically
22 avoided mentioning (let alone reviewing) one of the most important concerns,
23 raised zealously and consistently by Plaintiffs, that allowing dozens of exempt
24 wells in an area which recharges a dewatered “important spawning stream for
25 rainbow trout” will impact aquatic life.

1 Only by arbitrarily ignoring entirely the impacts raised by
2 both Plaintiffs and FWP is the County able to conclude that “impacts on wildlife
3 habitat will be negligible.” Again, the County may weigh impacts, but may not
4 ignore them.

5 **Public Health & Safety**

6 A subdivision proposal must undergo review for the
7 following primary criteria: ... the specific, documentable, and clearly defined
8 impact on ... public health and safety” Mont. Code Ann. § 76-3-608(3)
9 (2021).

10 The environmental assessment addresses well tests for
11 sufficient water, siting outside the flood plain, a lack of manmade hazardous
12 activity nearby or part of the project, and the presence of some large predatory
13 wildlife in the area.

14 The County’s definition of public health and safety:

15 Considers the prevailing healthful, sanitary condition of well-being
16 for the community at large. Conditions that relate to public health and
17 safety include but are not limited to disease control and prevention;
18 emergency services; environmental health; flooding; fire or wildfire
19 hazards; rockfalls or landslides; unstable soils; steep slopes and other
20 natural hazards; high voltage lines or high-pressure gas lines; and air
21 or vehicular traffic safety hazards.

22 The County’s findings on this impact are presented in three
23 subsections: water supply, wastewater, and stormwater. The water supply
24 findings state that “Each phase of the phased development will have a combined
25 estimated total domestic volume of use of 10-acre feet/year. The use of these
exempt wells is subject to review and approval by the DNRC and DEQ.” The
wastewater findings state that each lot will have its own septic/drainfield system

1 and “The DEQ will issue a determination of non-significant impacts in a
2 Certificate of Subdivision Approval.” The stormwater finding states that natural
3 drainages on the west of the project will be protected by tailored lot line selection
4 and “Each individual lot will have a stormwater pond which will be reviewed and
5 approved by DEQ and/or the Broadwater County Sanitarian.” The findings
6 conclude that the project is not subject to natural or man-made hazards in the
7 area.

8 What is missing is any review of the “the specific,
9 documentable, and clearly defined impact on ... public health and safety,” that
10 were repeatedly raised by a variety of people about “vehicular traffic safety
11 hazards.” At least two individual Plaintiffs raised concerns about the impact of
12 the project would have on traffic safety, particularly given the area’s propensity
13 to develop snow drifts shortly after being plowed. (AR 3669). Broadwater
14 County’s Public Works Supervisor expressed concerns about traffic. (AR 2627).
15 The developer estimated 3.2 average trips per day per lot, (AR 3692), while the
16 County Growth Plan assumes “8 vehicle trips per day per lot,” (AR 68). In a 42-
17 lot subdivision, this assumption reduces the estimated total daily trips from 336
18 to 134, a 60% reduction. Commissioners Randolph and Delger both questioned
19 the assumption of 3.2 trips per lot per day. (AR 3692). 71 Ranch’s representative
20 responded that it was derived from Montana Department of Transportation data
21 for highway use over the last 30 years. Commissioner Delger expressed extreme
22 skepticism about this method, “What is the world does 30 years of traffic data
23 even equate to the amount of traffic on Lower Confederate and Lower Duck
24 Creek?” He stated that 30 years ago you would be lucky to be able to drive down
25 the road, but that “In the last five years, the traffic’s probably multiplied by 10,

1 20 times,” so that the developer was in effect “taking a five-year average and
2 dispersing it over 30 years,” which he characterized as “a hell of a formula.” This
3 concern about inaccurate assumptions regarding traffic volume was expressed by
4 the public as well.

5 The public, county employees, and at least one
6 Commissioner also expressed skepticism about 71 Ranch’s assumptions about
7 what route traffic would take to get from the subdivision to Highway 284, north
8 over Lower Confederate Road or south and east over Lower Duck Creek Road.
9 71 Ranch estimated 16% of access would be via Lower Duck Creek Road and
10 84% would be via Lower Confederate Road. The project intends to use gravel
11 roads, and 71 Ranch’s breakdown of traffic routes conveniently places the
12 estimate usage of Lower Confederate Road just below the total trips threshold
13 which would require paving. The County’s Public Works Supervisor
14 characterized these assumptions “a red flag.” The Public Works Supervisor
15 expressed that even 71 Ranch’s conservative estimates of traffic use on Lower
16 Confederate Gulch Road, when combined with actual the extensive recreational
17 traffic he measured in the summer, would push the road over the threshold for
18 needing paving or “the county would struggle to keep that a passable road.”

19 The County’s Public Works Supervisor said that use of
20 Lower Duck Creek Road “would be only during fair weather,” since the Count
21 “does not provide any snow plowing in that area” and would be “completely
22 closed off until the Bureau of Rec was able to get out there. ” Commissioner
23 Folkvord echoed “I just don’t see people using Lower Duck Creek. Unless it’s,
24 there was an emergency access for some reason, they needed to get out. Uh, that
25 would probably be really the only reason I could see them using Lower Duck

1 Creek.” (AR 3698) Ultimately, the Commission concluded that there was no
2 realistic use of Lower Duck Creek Road to access the subdivision, but it appears
3 that the proposal still indicates 16% of traffic using it.

4 The Public Works Supervisor’s “largest concern from a
5 safety standpoint on the roadway, though, is in the winter and plowing.”

6 If we do have a heavy snowstorm, uh, enough to where it... there are
7 several spots in there that, that have frequent drifting. It may become
8 impassable, and then the residents there would be stuck with one road
9 in, one road out down Lower Confederate, which is the county road.

10 Currently, it's not one of our tier one roads. It's not a mail route. It's
11 not a bus route. It is one of our lower priority roads for both
12 maintenance and snow removal, as well.

13 The Broadwater County Sheriff expressed multiple
14 concerns. (AR 4074). He noted that the project is 25 miles from law enforcement
15 and emergency medical assistance, and 10 miles from volunteer fire. He
16 indicated that 5 of these miles are “dirt road which in the winter is not plowed
17 until the County can get to it. There has been many times that road is blown in
18 and not passable,” and that Highway 284 “is the last to be plowed by the state.”
19 The Sheriff further expressed concern about “the high flow of traffic from
20 vehicles... [which] will become a problem.” The Sheriff was clear that he did not
21 oppose the project but reiterated “numerous concerns that take into consideration
22 the safety of my citizens, their families, their friends and their property,” and a
23 desire “that these concerns be considered in future planning.”

24 While the County’s findings on “Impacts on Local Services”
25 contains a subsection on “Roads and Traffic,” the only concern addressed there is
a further traffic study about whether the increased use of Lower Confederate

1 Gulch Road would necessitate paving.

2 Additionally, the Court notes that at the November 30, 2021
3 planning board meeting, 71 Ranch’s counsel raised dangers of the County
4 requiring the developer to contribute money to upgrade Lower Confederate
5 and/or Lower Duck Creek Roads. Counsel presented the story of *Christison v.*
6 *Lewis and Clark County Comm.*, BDV-2006-348, 2011 Mont. Dist. LEXIS 5 as a
7 cautionary tale about a County’s overzealous demands for payment to upgrade a
8 road turning into a substantial judgement against the County. Counsel
9 represented that the crux of the Court’s decision was that total or *even*
10 *proportionate* payment demanded by the county had no nexus with the supposed
11 impacts of the subdivision, costing the county \$700,000. What 71 Ranch’s
12 counsel neglected to mention is that in *Christison*, the “County admits it will not
13 use the assessment to improve the portion of the road in question or any part of
14 Lake Helena Drive.” *Christison*, at 13. Those facts are entirely distinguishable
15 from this case where the entire discussion on proportionate share related to
16 upgrading the road that subdivision residents would use. All discussion in the
17 case at bar about road-based impact fees has been centered on using those impact
18 funds to improve the affected road(s). This is not similar to *Christison* where the
19 Court pointed out that “the County could keep the subdividers assessment and
20 use it, for example, to buy new playground equipment in Augusta.” *Christison*, at
21 9. 71 Ranch’s counsel represented *Christison* to be a limitation on the County’s
22 ability to levy impact fees for *off-site* road improvements. It was not, it struck
23 impact fees that *had no relation to the project whatsoever* because the fees
24 collected were not dedicated to improvements that would mitigate the
25 development’s impacts. *Christison* is not applicable to this case as represented by

1 71 Ranch.

2 It appears that the traffic concerns not addressed by fencing
3 and the livestock underpass have narrowed to the volume to traffic on
4 Confederate Creek Road, for which an additional traffic study was ordered to
5 understand whether paving will be needed. The County likely should have noted
6 that Highway 284 is the last highway to be plowed by the State, Lower
7 Confederate Road is a low priority road for County plowing, and Lower Duck
8 Creek Road is not plowed by the County, and only sporadically by the Bureau of
9 Reclamation, leaving it frequently impassable in the winter due to snow drifts.
10 Additionally, summer weather brings so much recreational use of Lower
11 Confederate Road that, combined with even conservative traffic estimates for
12 subdivision, would make the County “struggle to keep that a passable road.”
13 None of these concerns are mentioned let alone reviewed in the County’s Public
14 Health & Safety findings, even though that subject expressly includes “vehicular
15 traffic safety hazards.” The County was told of these concerns by nearby
16 residents, the county’s own public works employee, the Sheriff, and even
17 expressed by two County Commissioners. Omission of these specific,
18 documentable, and clearly defined impacts from the County’s findings is
19 troubling, but the Court cannot say that the County arbitrarily failed to review
20 this issue and require relevant mitigation.

21 **Counts I & II Summary**

22 The County’s repeated omission of numerous specific,
23 documentable, and clearly defined impacts to “agriculture..., the natural
24 environment, wildlife, wildlife habitat, and public health and safety”, raised by
25 citizens, County employees, and even Commissioners themselves is to say the

1 least, arbitrary and unlawful.

2 If this were not bad enough, some of the most specific,
3 documentable, and clearly defined impacts raised by Ms. Sullivan (AR 4286-
4 4307) and FWP (AR 4312-4314) were not even provided in the digitized
5 administrative record this Court was required to review among the thousands of
6 pages. Only after the Court noticed a gap in the record and made a request to
7 counsel was the court provided with the AR 4286-4341. This is only 55 pages in
8 a record of more than 4,000, barely more than 1%. But those missing pages
9 coincidentally contain the most cogent criticisms which lay bare many of the
10 problems with and questions left unanswered by the deficient environmental
11 assessment. When the Court finds that the County did not consider, as it appears
12 from the record, numerous specific, documentable, and clearly defined impacts,
13 the conclusion looks all the more negative when the most compelling material
14 pointing out specifically to the County the proposal's deficiencies was absent
15 from the electronic record provided to the Court. Ignoring numerous specific,
16 documentable, and clearly defined impacts is arbitrary and unlawful when statute
17 requires that the County review them.

18 As a matter of law, Plaintiffs are entitled to summary
19 judgment on Counts I and II.

20 **County Reliance on DNRC Decision (Count IV)**

21 The County argues that it lacks standing to determine legal
22 appropriability of water for the subdivision, which is within the jurisdiction of
23 DNRC under the Montana Water Use Act. Plaintiffs counter that the County has
24 an independent obligation to consider not only the factual existence but also legal
25 appropriability of water and argues that the County's reliance on DNRC's

1 decision was in error.

2 [T]he subdivider shall submit to the governing body or to the agent or
3 agency designated by the governing body the information listed in this
4 section for proposed subdivisions that will include new water supply
or wastewater facilities. The information must include:

5

6 (e) for new water supply systems, unless cisterns are proposed,
evidence of adequate water availability:

7 (i) obtained from well logs or testing of onsite or nearby wells;

8 (ii) obtained from information contained in published
9 hydrogeological reports; or

10 (iii) as otherwise specified by rules adopted by the department
11 of environmental quality pursuant to 76-4-104.
12

13 Mont. Code Ann. § 76-3-622(1) (2021). *See also* Mont. Code Ann. § 76-3-608(6)
14 (allowing conditional approval based on water information disclosed pursuant to
15 Mont. Code Ann. § 76-3-622). Subsections (i) and (ii) both unequivocally relate
16 to the factual existence of water. Well logs, testing of wells, and hydrological
17 reports offer no insights into the legal availability of water. Subsection (iii)
18 concerns administrative rules adopted under Mont. Code Ann. § 76-4-104. That
19 statute is found within the part concerning “*Sanitation in Subdivisions*” which
20 lists as its public policy goal “to protect the quality and potability of water for
21 public water supplies and domestic uses and to protect the quality of water.”
22 Mont. Code Ann. § 76-4-101. Quality and potability concern the physical
23 properties of water, not whether it is legally appropriable. The specific subjects
24 upon which the Legislature requires rules to be promulgated also concern the
25 factual existence of water, adequate volume of water, and protection of water

1 quality, but not legal appropriability:

2 (a) ... (ii) total number of proposed units and structures requiring
3 facilities for water supply or sewage disposal;

4 (b) adequate evidence that a water supply that is sufficient in terms of
5 quality, quantity, and dependability will be available to ensure an
6 adequate supply of water for the type of subdivision proposed;

7 (c) evidence concerning the potability of the proposed water supply
8 for the subdivision;

9 (d) adequate evidence that a sewage disposal facility is sufficient in
10 terms of capacity and dependability;

11 (e) standards and technical procedures applicable to storm drainage
12 plans and related designs, in order to ensure proper drainage ways,
13 except that the rules must provide a basis for not requiring storm
14 water review under this part for parcels 5 acres and larger on which
15 the total impervious area does not and will not exceed 5%. Nothing in
16 this section relieves any person of the duty to comply with the
17 requirements of Title 75, chapter 5, or rules adopted pursuant to Title
18 75, chapter 5.

19 (f) standards and technical procedures applicable to sanitary sewer
20 plans and designs, including soil testing and site design standards for
21 on-lot sewage disposal systems when applicable;

22 (g) standards and technical procedures applicable to water systems;

23 (h) standards and technical procedures applicable to solid waste
24 disposal;

25 (i) adequate evidence that a proposed drainfield mixing zone and a
proposed well isolation zone are located wholly within the boundaries
of the proposed subdivision where the proposed drainfield or well is
located or that an easement or, for public land, other authorization has

1 been obtained from the landowner to place the proposed drainfield
2 mixing zone or proposed well isolation zone outside the boundaries of
3 the proposed subdivision where the proposed drainfield or proposed
4 well is located.

5 (i) A proposed drainfield mixing zone or a proposed well isolation
6 zone for an individual water system well that is a minimum of 50
7 feet inside the subdivision boundary may extend outside the
8 boundaries of the subdivision onto adjoining land that is dedicated
9 for use as a right-of-way for roads, railroads, or utilities.

10 (ii) This subsection (6)(i) does not apply to the divisions provided
11 for in 76-3-207 except those under 76-3-207(1)(b). Nothing in this
12 section is intended to prohibit the extension, construction, or
13 reconstruction of or other improvements to a public sewage system
14 within a well isolation zone that extends onto land that is dedicated
15 for use as a right-of-way for roads, railroads, or utilities.

16 (j) criteria for granting waivers and deviations from the standards and
17 technical procedures adopted under subsections (6)(e) through (6)(i);

18 (k) evidence to establish that, if a public water supply system or a
19 public sewage system is proposed, provision has been made for the
20 system and, if other methods of water supply or sewage disposal are
21 proposed, evidence that the systems will comply with state and local
22 laws and regulations that are in effect at the time of submission of the
23 subdivision application under this chapter. Evidence that the systems
24 will comply with local laws and regulations must be in the form of a
25 certification from the local health department as provided by
department rule.

(l) evidence to demonstrate that appropriate easements, covenants,
agreements, and management entities have been established to ensure
the protection of human health and state waters and to ensure the
long-term operation and maintenance of water supply, storm water
drainage, and sewage disposal facilities;

1 (m) eligibility requirements for municipalities and county water
2 and/or sewer districts to qualify as a certifying authority under the
3 provisions of 76-4-127.

4 Mont. Code Ann. § 76-4-104(6) (2021).

5 Section 76-4-104(6) involves whether there is enough water,
6 whether it is clean, whether other waters' cleanliness will be affected, and
7 whether the water systems are adequately designed. All focus on the physical
8 presence and properties of water, not whether the water is legally appropriable.
9 Indeed, "[t]he rules and standards [under Mont. Code Ann. § 76-4-104] must be
10 related to: (a) size of lots; (b) contour of land; (c) porosity of soil; (d) ground
11 water level; (e) distance from lakes, streams, and wells; (f) type and construction
12 of private water and sewage facilities; and (g) other factors affecting public
13 health and the quality of water for uses relating to agriculture, industry,
14 recreation, and wildlife." Mont. Code Ann. § 76-4-104(2) (2021). The
15 Legislature did not authorize the promulgation of rules under this part related to
16 legal appropriability of water but confined its grant of rulemaking authority to
17 regulations regarding the factual existence and properties of water. Thus, no
18 subsection of Mont. Code Ann. § 76-3-622(1)(e) requires evidence of legally
19 appropriable water.

20 Plaintiffs cite to *Whatcom Cnty. v. W. Wash. Growth Mgmt.*
21 *Hr'gs Bd.*, 186 Wash. 2d 648, 381 P.3d 1 (2016) arguing that it is an analogous
22 case in which the Washington Supreme Court determined that counties have an
23 obligation to determine legal water availability independent of state agency
24 obligations to do the same. The Washington Supreme Court determined that
25 Washington statute "places an independent responsibility to ensure water

1 availability on counties, not on [the state agency].” *Id.*, ¶ 21. It concluded that
2 RCW 19.27.097(1); RCW 58.17.110 placed an obligation “on counties to ensure
3 that water is legally available before issuing a building permit.” *Id.*, fn 13. The
4 first statute, RCW 19.27.097(1), requires that building permit applicants “provide
5 evidence of an adequate water supply for the intended use.” The second, RCW
6 58.17.110, requires the local legislative body determine if appropriate provisions
7 are made for, “the public health, safety, and general welfare, for open spaces,
8 drainage ways, streets or roads, alleys, other public ways, transit stops, potable
9 water supplies, sanitary wastes, parks and recreation, playgrounds, schools and
10 schoolgrounds...” *Whatcom* is of extremely limited utility since it analyzes
11 another state’s statutes. Additionally, just a few years after the decision was
12 issued the Washington Legislature overruled the *Whatcom* decision entirely by
13 amending both RCW 19.27.097(1) and 58.17.110, the two footnoted statutes upon
14 which *Whatcom*’s reasoning was based. To both statutes was added the following
15 new subsection: “Any permit-exempt groundwater withdrawal authorized under
16 RCW 90.44.050 associated with a water well constructed in accordance with the
17 provisions of chapter 18.104 RCW before the effective date of this section is
18 deemed to be evidence of adequate water supply under this section.” Rev. Code
19 Wash. § 19.27.097(5) and § 58.17.110(4) (identical text). Exempt wells in
20 Washington are now deemed to have sufficient water supply and the county is
21 not under an independent obligation to evaluate the adequacy of water for the
22 development. Thus, even assuming that *Whatcom*’s interpretation of Washington
23 law is of utility in Montana, the reasoning on which that Court relied was
24 expressly overridden by the Washington Legislature shortly thereafter.
25 Montana Code Annotated § 76-3-622(1) does not place an independent

1 obligation on the County to determine the legal availability of water. *Whatcom* is
2 not precedent in Montana, and the Washington Legislature swiftly overruled the
3 basis of that decision.

4 **Community Impact Report & Mandatory Local Subdivision** 5 **Regulations**

6 Nevertheless, neither party briefed the adequacy of the
7 project under Mont. Code Ann. § 76-3-603(1)(a)(iii) and (iv). Subsection (iii)
8 requires a “community impact report containing a statement of anticipated needs
9 of the proposed subdivision for local services, including ... water.” Mont. Code
10 Ann. § 76-3-603(1)(a)(iii). Subsection (iv) requires inclusion of “additional
11 relevant and reasonable information related to the applicable regulatory criteria
12 adopted under 76-3-501 as may be required by the governing body.” That statute
13 requires that local governing bodies “shall adopt and provide for the enforcement
14 and administration of subdivision regulations reasonably providing for: (f) the
15 provision of adequate ... water...; [and] (i) the avoidance of subdivisions that
16 would involve unnecessary environmental degradation and danger of injury to
17 health, safety, or welfare by reason of natural hazard, including but not limited to
18 ... lack of water....” Mont. Code Ann. § 76-3-501(1) (2021). The verb
19 “provision,” defined by Merriam-Webster as “to supply with needed materials”
20 plainly concerns the appropriation of water.

21 It is axiomatic that (1) the needs of a subdivision include
22 both the factual existence of sufficient water and the legal right to appropriate
23 that water, (2) one cannot “provision” water that does not exist in fact or to which
24 one does not hold a right to appropriate, and (3) a subdivision that does not have
25 *both* water in fact and a right to appropriate it suffers from a “lack of water.”

1 Statute requires the County to pass regulations that reasonably provide for the
2 “provision of adequate water” for the development and the avoidance of
3 developments that “lack water.” Thus, while Mont. Code Ann. § 76-3-622(1)
4 does not place an independent obligation on the County to determine the legal
5 appropriability of water, Mont. Code Ann. § 76-3-603(1)(a)(iii) and 76-3-501(1)
6 do. The County’s refusal to analyze the factual existence *and* legal
7 appropriability of water for a proposed subdivision abrogates its statutory duty to
8 “adopt and provide for the enforcement and administration of subdivision
9 regulations reasonably providing for... the provision of adequate... water...
10 [and] the avoidance of subdivisions that would... lack of water.”

11 Indeed, at a County Commission meeting, Mr. Swanson
12 stated that this issue of the impact of exempt wells “requires, I think, legal
13 analysis from us [the Broadwater County Attorney Office], to assist the Planning
14 Board...” It is hard for the County to disclaim its obligation to perform such
15 legal review when the County’s Attorney promised it as part of what he
16 considered a necessary part of the subdivision review process. While the parties
17 attempt to draw clean lines that limit the County to factual inquiry and DNRC to
18 legal inquiry, statute demands a messier process which places some legal analysis
19 on the County and blends some facts into DNRC’s analysis. *See* Mont. Code
20 Ann. § 85-2-311(1)(a)(3).

21 Although Mont. Code Ann. § 76-3-622(1) does not place an
22 independent obligation on the County to review the factual existence and legal
23 appropriability of sufficient water for a proposed project, Mont. Code Ann. § 76-
24 3-603(1)(a)(iii) and 76-3-501(1) do. The County’s failure to do so was contrary
25 to statute. Accordingly, Plaintiffs are entitled as a matter of law to summary

1 judgment as to Count IV.

2 **DNRC's Decision (Count III)**

3 Plaintiffs argue that they are entitled to a judicial declaration
4 that the DNRC's interpretation of Mont. Code Ann. § 85-2-306(3)(iii) and Mont.
5 Admin. R. 36.12.101(12) is erroneous. Specifically, DNRC's determination that
6 the project would be entitled to a combined appropriation exempt well for each of
7 the project's four phases. DNRC counters that it applied the law correctly and
8 that Plaintiffs seek an advisory opinion. The County's argument that it has no
9 obligation to review water rights was addressed above.

10 71 Ranch argues "The *Clark Fork* case was not decided by
11 this Court (Judge Sherlock) on summary judgment, but was issued after an
12 evidentiary hearing." This is factually incorrect and legally oxymoronic. *Clark*
13 *Fork.*, like this case, came to the Court as a judicial review petition. Such
14 petitions involve legal review strictly limited to the record below. There is rarely
15 a reason for an evidentiary hearing because it is error to consider material outside
16 record. Mont. Code Ann. § 2-4-704(1) (2021) (review "must be confined to the
17 record."). Only in very limited circumstances is new evidence accepted. *Id.* ("In
18 cases of alleged irregularities in procedure before the agency not shown in the
19 record, proof of the irregularities may be taken in the court."). Consequently,
20 judicial review petitions only very rarely involve evidentiary hearings. There is
21 no mention in either the *Clark Fork* lower court decision or the Supreme Court
22 opinion about an evidentiary hearing. The only substantive hearing the Court
23 held was oral argument on the petition on September 9, 2014. There was no
24 evidentiary hearing in District Court during *Clark Fork* as 71 Ranch misstates.

25 ////

1 **Standing**

2 DNRC argues Plaintiffs’ attacks on its ‘predetermination’
3 letters are premature because DNRC’s issuance of a water right does not occur
4 until after a well has been drilled and the water is put to beneficial use, therefore
5 no final action was taken by DNRC. It is correct that DNRC has not taken a final
6 action regarding the conferral of a water right, however, DNRC’s brief makes
7 much of the distinction between its duties permitting water rights and the
8 County’s distinct duties regarding subdivision review.

9 Although the subdivision review rules in Mont. Admin. R.
10 17.36.103 are primarily directed at approvals from the County and DEQ, DNRC
11 has an express role in this stage of the subdivision review process which requires:

12 ...if the proposed water supply is from wells or springs, or is

13 relocating an existing multiple-user water supply, a letter from the
14 Department of Natural Resources and Conservation stating that the
15 water supply:

16 (i) is, or is not, located in a controlled groundwater area; and

17 (ii) is either exempt from water rights permitting requirements or
18 has a water right, as defined in 85-2-102, MCA;

19
20 DNRC itself argues that this subdivision review process is
21 distinct from DNRC’s post-subdivision-approval, post-drilling, post-beneficial
22 use issuance of a water right. Thus, issuing what it calls ‘predetermination’ letters
23 was DNRC’s final action in what DNRC itself admits is a legally distinct process
24 conducted by different parts of government for different purposes. It is DNRC’s
25 legal duty at this stage of this process (subdivision review) to determine if the

1 proposed wells are “either exempt from water rights permitting requirements or
2 [have] a water right.” The first thing that DNRC needs to do in this process,
3 determining entitlement to an exempt well, is also the last action DNRC takes in
4 this process. There is nothing “pre-” about this determination which DNRC
5 admits is distinct from its subsequent unrelated duties regarding issuance of a
6 water right. Indeed, the first sentence of the letter makes clear that it was issued
7 not as an interim step in DNRC’s water rights permitting process but rather as
8 DNRC’s final determination “for the proposed DEQ review in accordance with
9 ARM 17.36.103(1)(s).” Certainly, DNRC has not taken a final action on
10 subdivision approval, because (as the letter says) it is not a DNRC process and all
11 DNRC is required to do in this distinct process is provide its determination so
12 that the County can make its final action on the application. Only subsequent to
13 this approval and after the water is put to beneficial use does DNRC’s
14 independent water rights permitting process even begins, as it strenuously
15 argued. As DNRC argued at the hearing:

16 The only piece of evidence from the record considered by DNRC
17 were these four letters from the applicant's engineer saying, "These
18 are four separate projects in front of DEQ. Here are the parameters."
19 And DNRC responded, "Here is what you told us. Here is all the
20 information we have based on this. Here is the --" saying, "You
21 qualify for an exempt well." And that was DNRC's involvement.
22 There was no more -- that was it. That's all DNRC's record.

23 This is clearly distinct from DNRC’s water rights adjudication process, yet DNRC
24 tries to have it both ways, arguing that no final DNRC water rights determination
25 has happened even though the beginning of that review is obviously predicated on
the prior, independent approval of the subdivision by the County under review in

1 this matter.

2 DNRC argues that the determination letters only apply to the
3 project at the time of the letter, and DEQ required submission of “additional
4 information regarding the cumulative impact of the proposed developments on
5 the aquifer.” This is a red herring. For one, DNRC’s determination is a *legal* one
6 about entitlement to an exempt well based on statutory and administrative rule
7 criteria. It does not matter what *factual* material DEQ solicits regarding the
8 cumulative impact to the aquifer, an issue for which DNRC has vehemently
9 disclaimed any role. The Legislature’s decision to spread the regulatory burden
10 across two state agencies and a local government, each with distinct roles in a
11 multi-stage process, creates complexities. Thus, it does not matter what *factual*
12 material DEQ requests regarding its *factual* determination of water existence
13 which is entirely distinct from DNRC’s *legal* determination of *legal*
14 appropriability, as DNRC has repeatedly argued.

15 Equally facile is DNRC’s standing argument that “no
16 appropriation of water has occurred.” Obviously, no appropriation has occurred
17 because a prerequisite to such appropriation is approval of the subdivision which
18 is predicated on DNRC’s determination that “the water supply.... is either
19 exempt from water rights permitting requirements or has a water right.” Plaintiffs
20 are not challenging DNRC issuance of a water right but rather DNRC’s sole and
21 final act in the distinct County review process which is a condition precedent to
22 even beginning the water rights permitting process. These are sequential acts
23 which are predicated on each other but which DNRC itself has strenuously
24 argued are entirely separate processes conducted independently by distinct parts
25 of government.

1 Under DNRC’s analysis, even if Plaintiffs are correct that
2 DNRC improperly determined the subdivision was entitled to use exempt wells,
3 DNRC would have the entire subdivision review process be completed, wells
4 drilled, and water pumped before Plaintiffs would have standing. This is
5 ridiculous, for “[t]he law neither does nor requires idle acts.” Mont. Code Ann. §
6 1-3-223 (2021). If DNRC’s application of exempt well law was a necessary part
7 of the County review process and DNRC’s interpretation of that law is erroneous
8 it follows that DNRC’s conclusion cannot stand. There is nothing advisory about
9 voiding a government act.

10 Furthermore, the Legislature specifically extended standing
11 to challenge applications and preliminary plats after the Montana Supreme Court
12 found otherwise. *Contrast* Mont. Code Ann. § 76-3-625(2) (amended in 2021 to
13 allow challenge of preliminary plat matters) with *City of Kalispell v. Flathead*
14 *County*, 260 Mont. 258, 859 P.2d 458 (1993) (concluding that because there was
15 no mechanism for judicial review of a conditioned approval of a preliminary
16 subdivision plat in the Subdivision and Platting Act, the County Commissioner's
17 decision was not appealable). Since DNRC’s determination is an integral part of
18 that preliminary approval process, it follows that DNRC’s decision is reviewable.
19 To conclude the opposite would allow DNRC’s characterization of its own
20 actions to trump the statutory standing specifically conferred by the Legislature.

21 **Water Law & Prior Appropriation**

22 For several thousand years of Western history water law
23 generally gave property owners the right to use water that their property abutted,
24 from the Justinian codification of Roman law, through the Napoleonic Code, into
25 English Common Law, and thence to the establishment of “the basic doctrines of

1 American [riparian] water law.” *United States v. Gerlach Live Stock Co.*, 339
2 U.S. 725, 745 (1950). But as American settlers expanded west of the 100th
3 Meridian they encountered climes vastly drier than those of Europe and the
4 American East. While generous to Montana with “the grandeur of our mountains,
5 [and] the vastness of our rolling plains,” God was rather more restrained with this
6 State’s and the West’s water resources. “Then in the mountains of California
7 there developed a combination of circumstances unprecedented in the long and
8 litigious history of running water. Its effects on water laws were also
9 unprecedented,” gold was discovered. *Id.* Where in the East, water had been
10 drawn at or near its site of use because of its abundance, miners in the West were
11 often forced to divert water from its source to the alluvial mining claims they
12 were working. Suddenly scarce water with multiple claimants needed to be moved
13 long distances first to placer mining fields, then later to fields of crops and
14 livestock. The Courts obliged. *Irwin v. Phillips*, 5 Cal. 140, 146 (1855) (“Among
15 these the most important are the rights of miners to be protected in the possession
16 of their selected localities, and the rights of those who, by prior appropriation,
17 have taken the waters from their natural beds, and by costly artificial works have
18 conducted them for miles over mountains and ravines, to supply the necessities of
19 gold diggers, and without which the most important interests of the mineral
20 region would remain without development.”) This doctrine of prior appropriation
21 is the basis of all water law in every Mountain West state, including Montana’s
22 for well over a century. *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900).

23 Prior appropriation was codified in Montana’s first
24 Constitution. 1889 Mont. Const. Art. III, § 15. (“The use of all water now
25 appropriated, or that may hereafter be appropriated for sale, rental, distribution or

1 other beneficial use and the right of way over the lands of others, for all ditches,
2 drains, flumes, canals and aqueducts, necessarily used in connection therewith, as
3 well as the sites for reservoirs necessary for collecting and storing the same, shall
4 be held to be a public use.”) Our current Constitution recognizes those prior
5 appropriation rights and mandates that “[t]he legislature shall provide for the
6 administration, control, and regulation of water rights and shall establish a system
7 of centralized records, in addition to the present system of local records.” Mont.
8 Const., Art. IX § 3(4).

9 In the first legislative session after the 1972 Constitutional
10 Convention, the Legislature passed the Water Use Act to satisfy the
11 aforementioned constitutional mandate. Mont. Code Ann. § 85-2-101 (2021).
12 (“Pursuant to Article IX of the Montana constitution;” “A purpose of this chapter
13 is to implement Article IX, section 3(4), of the Montana constitution, which
14 requires that the legislature provide for the administration, control, and regulation
15 of water rights and establish a system of centralized records of all water rights.”)
16 The Act serves as the exclusive authority governing water appropriation in
17 Montana and institutes a permitting system. Mont. Code Ann. § 85-2-301(1)
18 (2021). “The primary function of this permit[-]based system is the protection of
19 senior water rights from encroachment by prospective junior appropriators
20 adversely affecting those rights.” *Clark Fork*, ¶ 5. Prospective permittees must
21 prove by a preponderance of the evidence that water is “physically available,”
22 and prevail in an “analysis of the evidence on physical water availability and the
23 existing legal demands of water rights, including but not limited to a comparison
24 of the physical water supply at the proposed point of diversion with the demands
25 existing legal demands of water rights on the supply of water.” Mont. Code Ann.

1 § 85-2-311(1)(a) (2021). One condition to DNRC issuing a permit is that “the
2 water rights of a prior appropriator under an existing water right, a certificate, a
3 permit, or a state water reservation will not be adversely affected” by the new
4 appropriation. Mont. Code Ann. § 85-2-311(1)(b) (2021). The standard is not that
5 that the impacts *probably* won’t adversely affect senior water rights holders but
6 rather that their rights “*will not* be adversely affected.” (emphasis added). The
7 applicant must prove to DNRC by an evidentiary preponderance that water is
8 “physically available” and “can reasonably be considered legally available during
9 the period in which the applicant seeks to appropriate, in the amount
10 requested....” Mont. Code Ann. § 85-2-311(1)(a) (2021).

11 As an aside, this Court must note that as of the writing of
12 this order, LEXIS’s version of Mont. Code Ann. § 85-2-311(1)(a)(ii) is
13 inaccurate. House Bill 136 (2021) amended the phrase “existing legal demands”
14 to “existing legal demands of water users” in three locations. This is accurately
15 reflected in the 2021 Session Laws, Volume II. The Legislative LAWS system’s
16 version of the Code reflects this amendment as well. However, LEXIS’s version²
17 of the code reads “demands existing legal demands of water rights” in all areas
18 where the phrase was amended even though LEXIS’s amendment notes reflect
19 the true changes to the code: “The 2021 amendment by ch. 317 substituted
20 “existing legal demands of water rights” for “existing legal demands” in
21 (1)(a)(ii)(B), twice in (1)(a)(ii)(C), and (3)(b)(i); and substituted “legal demands
22 of water rights” for “demands” in (3)(b)(i) and (4)(c)(iv).”

23 Exempt Wells

24 The Legislature has created an exception to the permit
25 requirement:

² The Court contacted LEXIS to try to rectify this error.

1 Outside the boundaries of a controlled ground water area, a permit is
2 not required before appropriating ground water by means of a well or
3 developed spring: (iii) when the appropriation is outside a stream
4 depletion zone, is 35 gallons a minute or less, and does not exceed 10
5 acre-feet a year, except that a combined appropriation from the same
6 source by two or more wells or developed springs exceeding 10 acre-
7 feet, regardless of the flow rate, requires a permit;....

8 Mont. Code Ann. § 85-2-306(3) (2021).

9 The term "combined appropriation" is not defined by the
10 Water Use Act; therefore, it fell to DNRC to define the term. Unfortunately,
11 DNRC

12 has taken contradictory positions regarding the meaning of the term.
13 Specifically, within a period of six years, the DNRC promulgated
14 consecutive rules with conflicting interpretations as to whether
15 groundwater developments must be physically connected to constitute
16 a "combined appropriation." Initially, in 1987, three months after the
17 Legislature adopted the "combined appropriation" language, the
18 DNRC promulgated Admin. R. M. 36.12.101(7) (1987), which
19 provided that "[g]roundwater developments need not be physically
20 connected nor have a common distribution system to be considered a
21 'combined appropriation.'" However, in 1993, the DNRC reversed its
22 position and adopted the current administrative rule, Admin. R. M.
23 36.12.101(13), which states that the term "combined appropriation"
24 means "groundwater developments, that are physically manifold into
25 the same system."

Clark Fork, ¶¶ 2-3.

Adding insult to injury,

No public hearing on this rule change adding a physical connectivity
requirement was held and no public comments were received. The
DNRC similarly did not provide a statement as to why the change
from the 1987 rule was necessary as the DNRC was required to do

1 pursuant to § 2-4-305, MCA. The DNRC responded to an inquiry by
2 the Administrative Rules Committee that the 1987 definition of
3 "combined appropriation" was "too ambiguous and therefore difficult
4 to administer."

5 *Id.*, n.2.

6 ***Clark Fork***

7 In 2009, a group of senior water rights holders challenged
8 DNRC's combined appropriation definition. Its hearing examiner rejected the
9 challenge, but "acknowledged, however, that the administrative rule had caused
10 the proliferation of exempt appropriations in a way that was not anticipated by
11 the Legislature." *Clark Fork*, ¶ 15. Clearly mindful of the problems behind the
12 rule, the hearing officer ordered DNRC to "initiate proposed rulemaking to repeal
13 the 1993 rule and adopt a new administrative rule that would align more closely
14 with legislative intent." *Clark Fork*, ¶ 15. In the 14 years since the problem was
15 flagged by its own hearing examiner DNRC has not amended the rule.

16 The water rights holders petitioned for judicial review of DNRC's decision. In an
17 unequivocal decision, this Court invalidated the 1993 rule, concluding that it
18 conflicted with the plain language, general purpose, and legislative history of the
19 Water Use Act, and reinstated the 1987 rule. The Court noted that the Montana
20 Department of Fish, Wildlife, and Parks believed that DNRC's interpretation
21 "defies logic" and was "inconsistent with the plain meaning of the statute." The
22 Court further noted DNRC Water Management Bureau's statements about the
23 looming problems with its interpretation of combined appropriation as early as
24 2008:

25 This concern is elevated as exempt wells are being used for large,
relatively dense subdivision development in closed basins.
Exempt wells are not reviewed by DNRC and are not subject to public

1 notice. In contrast, permitted wells are reviewed by DNRC, and water
2 users and the public are noticed and given an opportunity to object.
3 Impacts cause by permitted wells are required to be identified and, if
4 these impacts cause adverse effect to water users, must be offset
5 through mitigation plans or aquifer recharge plans. Impacts caused by
6 exempt wells are often offset during times of water shortages by
7 curtailment of junior surface water right users. Even if administration
8 or enforcement of exempt wells in priority existed, curtailment of
9 exempt wells could be ineffective because of the delayed effect on
10 stream flows and, therefore a call may not benefit senior water users.

11

12 At current rates of development, approximately 30,000 new exempt
13 wells could be added in closed basis during the next 20 years resulting
14 in an additional 20,000 acre-feet per year of water consumed.

15 Order on Pet. For Jud. Rev., *Clark Fork Coalition v. Tubbs*, BDV-2010-874.

16 The associations of well drillers, realtors, and the building
17 industry appealed the decision, but DNRC did not. The *Clark Fork* Court upheld
18 both the striking down of the 1993 rule and the reinstatement of the 1987 rule
19 which stands to this day. Since DNRC's actions and arguments consistently
20 evince either an unfamiliarity with or hostility to this controlling case law, the
21 Court will quote the Montana Supreme Court's decision extensively to be
22 abundantly clear:

23 Based upon the plain language of the statute, it is evident that the
24 intent of the Legislature in enacting subsection (3)(a)(iii) was to
25 ensure that, when appropriating from the same source, only a de
minimis quantity of water, determined by the Legislature to be 10
acre-feet per year, could be lawfully appropriated without going
through the rigors of the permitting process. An exception to the
exemption for quantities exceeding 10 acre-feet per year, regardless of
flow rate and number of wells or developed springs utilized for the
appropriation, protects other water rights utilizing the same water

1 source. This is consistent with the purpose of the Act as a remedial
2 statute designed to strictly adhere to the prior appropriation doctrine
3 and to provide for the "administration, control, and regulation of water
4 rights . . . and confirm all existing water rights" We have
5 explained that "the Water Use Act was designed to protect senior
6 water rights holders from encroachment by junior appropriators
7 adversely affecting those senior rights." This fundamental purpose is
8 reflected throughout the Act and many of the subsections of the Act
9 begin with a policy declaration stating that the protection of senior
10 water rights and the prior appropriation doctrine is the Act's core
11 purpose. See, e.g., § 85-1-101(4), MCA (the Act's purpose is to
12 "protect existing uses"); § 85-2-101(4), MCA (it is "a purpose of this
13 chapter to recognize and confirm all existing rights"); § 85-2-101(4),
14 MCA (the purpose of permitting is to "provide enforceable legal
15 protection for existing rights"). Accordingly, based upon the plain
16 language of the statute and the stated purpose of the Act, we conclude
17 that "**combined appropriation**" **refers to the total amount or**
18 **maximum quantity of water that may be appropriated without a**
19 **permit** and not to the manner in which wells or developed springs
20 may be physically connected.

21 *Clark Fork*, ¶ 24 (emphasis added).

22 The 1993 rule defined "combined appropriation" as
23 requiring that

24 "the ground water developments" be "physically manifold into the
25 same system." First, there is no language anywhere in the Act which
suggests that wells or developed springs must be physically manifold
or connected in order to be deemed a "combined appropriation." We
therefore conclude, without any difficulty, that the 1993 rule engrafted
an additional requirement on the statute and must be deemed invalid
if: (1) it is contradictory or inconsistent with the statute, or (2) adds a
requirement not envisioned by the Legislature.

As the District Court correctly observed, the 1993 rule allows an
unlimited quantity of water to be appropriated from the same source

1 as long as the ground water developments are not physically manifold
2 or connected. The 1993 rule, therefore, unquestionably expands the
3 exemption by limiting the number of appropriations which must be
4 excepted, rendering meaningless the underlying limit on volume or
5 quantity of 10 acre-feet per year from the same source. That portion of
6 § 85-2-306(3)(a)(iii), MCA, allowing for an exemption—a well or
7 developed spring appropriating no more than 35 gallons per minute
8 and 10 acre-feet per year—has no qualifying language relating to the
9 same source. However, the exception to the exemption does; that is,
10 **regardless of flow rate and the number of wells or developed**
11 **springs no combined quantity of water may exceed 10 acre-feet**
12 **when it is from the same source.** The 1993 rule directly contradicts
13 this plain language by adding a connectivity requirement to the wells
14 or developed springs, effectively swallowing up the underlying
15 exception that the Legislature created.

16 We conclude that the 1993 rule was inconsistent with the plain
17 language of § 85-2-306(3)(a)(iii), MCA, and that it engrafted an
18 additional requirement on the exempt well statute that wells or
19 developed springs be "physically manifold into the same system." By
20 narrowing the exception to only those wells or developed springs
21 physically connected, the 1993 rule expanded the narrow exemption
22 to the permitting process provided by § 85-2-306(3)(a)(iii), MCA, and
23 was inconsistent with the stated statutory purpose of the Act.

24 *Clark Fork*, ¶¶ 26-28.

25 The 1993 rule was "invalid since its inception." *Id.*, ¶ 41. In
2023, Rep. Casey Knudsen's HB 642 attempted to remove the statutory limit on
exempt wells by excising the statutory language relied on by the *Clark Fork*
Court, just like the Washington Legislature's bill which overruled *Whatcom*.
(striking from 85-2-306 "except that a combined appropriation from the same
source by two or more wells or developed springs exceeding 10 acre-feet,
regardless of the flow rate, requires a permit"). Unlike in Washington, HB 642

1 died in committee.

2 To review, the “evident” intent of the Legislature was to
3 limit exempt well appropriation to “only a *de minimis* quantity of water,
4 determined by the Legislature to be 10 acre-feet per year.” The term combined
5 appropriation refers to the “total amount or maximum quantity of water that may
6 be appropriated without a permit” There was “no language anywhere in the
7 Act” to suggest that systems need be manifold or connected in order to be
8 deemed a combined appropriation. The *Clark Fork* Court concluded “without any
9 difficulty” that DNRC “unquestionably” expanded the exemption beyond its
10 authority in a manner that “directly contradicts [the statute’s] plain language.”
11 Thus, DNRC went out of its way, and contrary to the plain language of the
12 statute, to promulgate a rule without notice which allowed appropriators “to
13 avoid the permitting process for an infinite number of appropriations from the
14 same source—with each appropriation consuming up to 10 acre-feet per year—so
15 long as the appropriator does not physically connect the groundwater
16 developments.” *Clark Fork*, ¶ 11. In a stroke and without public comment,
17 DNRC effectively abolished the statutory limits on the use of exempt wells. The
18 statute is clear, the Supreme Court has interpreted it unequivocally, but unlike
19 *Whatcom* the Montana Legislature did not amend the statute upon which *Clark*
20 *Fork* is based.

21 **DNRC ‘Pre’-Determination Letters**

22 On February 4, 2020, DNRC issued four letters to “evaluate
23 the amount of water proposed under the current project.” The letters’ second
24 sentence acknowledges that “The proposed project is to split an existing +435-
25 acre tract, into individual lots in four phases.” Each letter concerned a different

1 phase of the project. The letters are effectively identical other than the project's
2 phase. Each stated, "The purpose of this letter is to respond to your request for
3 DNRC review of water right permit exceptions under MCA 85-2-306(3)(a)(iii)
4 [exempt well statute] for the proposed DEQ review in accordance with ARM
5 17.36.103(1)(s)." The letter also accurately restates the law on exempt wells post-
6 *Clark Fork Coal.*:

7 In *Clark Fork Coalition, et. al. v. DNRC, et. al.*, 2016 MT 229, 384
8 Mont. 503, 380 P.3d 771, the Montana Supreme Court concluded that
9 the definition of "combined appropriation" in Admin. R. Mont.
10 36.12.101(13) was invalid. The Court reinstated the Department's
11 1987 Rule defining "combined appropriation" as: "An appropriation
12 of water from the same source aquifer by means of two or more
13 groundwater developments, the purpose of which, in the department's
14 judgment, could have been accomplished by a single appropriation.
15 Groundwater developments need not be physically connected nor
16 have a common distribution system to be considered a "combined
17 appropriation." They can be separate developed springs or wells to
18 separate parts of a project or development. Such wells and springs
19 need not be developed simultaneously. They can be developed
20 gradually or in increments. The amount of water appropriated from
21 the entire project or development from these groundwater
22 developments in the same source aquifer is the "combined
23 appropriation."

19 Under this Rule, the Department interprets subdivisions that are
20 pending before the Department of Environmental Quality for approval
21 on October 17, 2014 or filed after that date to be a single project that
22 can be accomplished by a single appropriation. Consequently all wells
23 in such a subdivision will be considered a "combined appropriation"
24 for the purposes of Mont. Code Ann. 85-2-306. The only exception to
25 this interpretation is that a subdivision which has received preliminary
plat approval prior to October 17, 2014 will not be considered a
project under the "combined appropriation" 1987 Rule; individual lots
will still be evaluated under the 1987 Rule at the time of an

1 application to the Department. 2015 Mont. Laws §1, Ch. 221.

2
3 (emphasis added).

4 The letters then each inexplicably conclude, contrary to the
5 letter's own explanation of the law, that:

6 Based on the information received January 31, 2020, the proposed
7 appropriation does fit the current rules and laws pertaining to the
8 filing of an exempt water right using a DNRC Form 602, Notice of
9 Completion of Groundwater Development. The proposed
10 appropriation is considered a combined appropriation because the
11 proposed split of the 435 acre tract has not been approved or recorded
12 with Broadwater County prior to October 17, 2014.

13 If one such letter had been issued it would be accurate to
14 state that "proposed appropriation is considered a combined appropriation
15 because the proposed split of the 435-acre tract has not been approved or
16 recorded with Broadwater County prior to October 17, 2014." Notwithstanding,
17 however, by issuing four such letters, DNRC determined, contrary to its own
18 accurate restatement of *Clark Fork Coal.* in the letters, that the project was
19 entitled to a combined exempt well appropriation for *each* phase of the project.
20 The letters themselves lay out the Montana Supreme Court's holding on exempt
21 wells:

22 Groundwater developments need not be physically connected nor
23 have a common distribution system to be considered a 'combined
24 appropriation.' They can be separate developed springs or wells to
25 separate parts of a project or development. Such wells and springs
need not be developed simultaneously. They can be developed
gradually or in increments. The amount of water appropriated from
the entire project or development from these groundwater
developments in the same source aquifer is the "combined

1 appropriation."

2 DNRC blatantly ignores a recent Supreme Court holding,
3 which the letter demonstrates that DNRC understands, to conclude that each of
4 the four phases of one larger project are entitled to exempt wells. This is contrary
5 to the administrative rule, statute, the rulings of this and the Montana Supreme
6 Court, and perhaps most troubling, DNRC's own restatement of law in the letters.

7 It is difficult to tell why DNRC's letters reach a conclusion
8 so contrary to its own contents, but DNRC's guidance, referenced repeatedly to
9 the County by 71 Ranch's counsel, offers a possible reason. In the wake of *Clark*
10 *Fork*, DNRC produced guidance on the changes to the definition of combined
11 appropriation. It stated:

12 The CFC decision concluded that the Department's rule defining
13 "combined appropriation" of "exempt" wells as "an appropriation of
14 water from the same source aquifer by two or more groundwater
15 developments, that are physically manifold into the same system,"
was inconsistent with applicable law and therefore invalid.

16 The guidance then outlines four scenarios which, in DNRC's
17 judgment, are "combined appropriations of two or more wells from a same
18 source aquifer that may not exceed 10 AF."

- 19 1) Any two or more exempt wells that are physically manifold
20 together are considered a combined appropriation in all cases,
21 regardless of ownership. Physically manifold includes any storage
22 shared between multiple groundwater developments.
- 23 2) Any lots less than 20 acres in size in existence or part of a
24 subdivision application submitted on or prior to October 17, 2014,
25 are grandfathered in under HB 168 so only exempt wells that are
physically manifold together are considered a combined
appropriation.

1
2 3) For lots that are greater than or equal to 20 acres, either in
3 existence prior to October 17, 2014 or created after that date, any
4 wells within 1,320 feet of one another on a lot are considered to be
5 a combined appropriation. If there are any lots that are 20+ acres in
6 the new arrangement, those lots will not be considered part of the
7 subdivision, will not be reviewed by DNRC, and will not be
8 required to share the 10 AF limit for the subdivision.

9 4) Any subdivision of land as defined under 76-4-102 (see definition
10 above) created after October 17, 2014, or for which a subdivision
11 application was submitted to DEQ after that date, is considered a
12 combined appropriation that must receive a pre-determination from
13 DNRC determining that all exempt wells proposed for the
14 subdivision will stay at/under a combined appropriation of 10 AF.

15 At numerous hearings 71 Ranch's counsel told the County
16 that water law allows an exempt well on any property under 20 acres and an
17 exempt well every 1,320 feet on parcels 20 acres or larger, as described in
18 example 3 above. While this is an accurate restatement of DNRC guidance, that
19 guidance is wrong, and regardless, "Policy memos are not law." *Clark Fork*
20 *Coal. v. Mont. Dep't of Natural Res. & Conservation*, 2019 Mont. Water LEXIS
21 5; *In re Grain Land Coop Cases*, 978 F. Supp. 1267, 1277 (D. Minn. 1997)
22 ("Agency statements of guidance are not law."). Review of the Commissioners
23 final hearing on the matter reveals that at least the Commission Chair understood
24 exempt well law to allow 10-acre feet *per phase*, as he was told by 71 Ranch,
25 contrary to testimony of Vicki Sullivan and an attorney for concerned citizens
attorney who both testified that this interpretation was incorrect and
circumvented the statutory limits on exempt wells.

DNRC justifies limiting its review to lots smaller than 20

1 unreasonable depletion of water resources and mandate to assure a clean and
2 healthful environment. They fail, however, to cite to a provision of the
3 Constitution or demonstrate any analysis as to how the unnamed provision was
4 violated by DNRC. Montana Constitution's demands that that the "legislature
5 shall provide the administration, control, and regulation of water rights." Mont.
6 Const., Art. IX § 3(4). The Legislature provided that constitutionally mandated
7 administration through the Water Use Act, which begins "Pursuant to Article IX
8 of the Montana constitution," and which states "A purpose of this chapter is to
9 implement Article IX, section 3(4), of the Montana constitution, which requires
10 that the legislature provide for the administration, control, and regulation of water
11 rights and establish a system of centralized records of all water rights." Mont.
12 Code Ann. § 85-2-101. This Court, both in *Clark Fork Coal.* and in this case,
13 vindicated those rights which concerned the conservation or appropriation of
14 billions of gallons of water which are constitutionally defined as the "property of
15 the state for the use of its people," Mont. Const., Art. IX § 3. Nevertheless,
16 Supreme Court precedent is clear that striking down a rule which abrogates the
17 constitutionally mandated Water Use Act does not vindicate constitutional
18 interests. *Clark Fork Coalition v. Tubbs*, 2017 MT 184, 388 Mont. 205, 399 P.3d
19 295.

20 DNRC argues, "These 'predetermination' letters are merely
21 an informational step taken by a subdivision application in preparing a
22 subdivision application for review by DEQ and the reviewing local government
23 who still must analyze the subdivision in their review, regardless of how the
24 subdivision will obtain its water right." The Court does not know what a "merely
25 informational step" is, and notes that all manner of legal requirements, from

1 environmental assessments, to pre-sentence investigations, to campaign finance
2 disclosures, could be equally easily (and inaccurately) be dismissed as “merely
3 informational steps” in criminal sentencing or campaign law enforcement. They
4 are not. They are integral requirements pursuant to administrative regulations
5 which legally require that the ‘mere information’ “must be submitted to the
6 reviewing authority as part of an application.” Admin. R. Mont. 17.36.103(1). An
7 explicit legal requirement to disclose whether the subdivision has a legal right to
8 water which is necessary for development is more than “merely informational.” It
9 is a condition precedent.

10 DNRC makes inconsistent attempts to explain why it
11 evaluated each phase of the project separately because of “limited information”
12 and separate applications:

13 In this case, the HCH subdivision preliminary plat application
14 materials provided to DNRC contained four separate subdivision
15 applications, proposing four separate phases and plats for completion
16 of four projects within the subdivision. DNRC evaluated the phases as
17 separate projects because they were separate applications submitted to
18 the County and DEQ pursuant to the County and DEQs' review and
19 by subdivision application rules. *See* ARM 17.36.103 (describing
20 necessary contents for subdivision applications). DNRC issued letters
21 which evaluated the amount of water proposed and determined that
22 each distinct subdivision phase met the applicable rules and laws
23 relating to the filing of an exempt well water right. Section 85-2-306,
24 MCA.

25

Based on the limited information available to DNRC at the time each
predetermination letter was issued, DNRC considered each of the four
phases a distinct project.

DNRC first argues that it considered the phases separately
“because they were separate applications submitted to the County and DEQ,” but

1 later claims DNRC itself “considered each of the four phases a distinct project.”
2 So, who made the call, DNRC, the County, DEQ? DNRC refers to “four separate
3 subdivision applications” and “limited information available to DNRC at the time
4 each predetermination letter was issued” as though DNRC did not know this was
5 one project split into four phases. However, all four determination letters were
6 issued on the same day by the same employee to the same recipient. The
7 language of each letter is identical except for the “Re:” line stating a different
8 phase of the development and including calculations for slightly different lot
9 sizes. The second sentence of each letter states: “The proposed project is to split
10 an existing ±435-acre tract, into individual lots in four phases.” The fact that the
11 four phases were part of one project was not “limited information” as evidenced
12 by the letters themselves. DNRC is effectively arguing that it did what it did
13 because it was not aware of facts that are mentioned in DNRC’s own letter.
14 Nevertheless, DNRC doubled down at the hearing, citing “confusion between
15 projects and phases.” But the application said, “The proposed project is to split an
16 existing ±435-acre tract, into individual lots in four phases.” The word “project”
17 is singular. “The” is the definite article which indicates a singular noun. It is clear
18 from the letter that DNRC understood this to be one project, which it is. DNRC
19 cannot issue 4 functionally identical letters to the same developer on the same
20 day which each state that the “proposed project [consists of] four phases,” title
21 the letters

22 “Horse Creek Hills Subdivision, Phase 1 Broadwater County, HRO
23 20-4,”

24 “Horse Creek Hills Subdivision, Phase 2 Broadwater County, HRO
25 20-4,”

1 “Horse Creek Hills Subdivision, Phase 3 Broadwater County, HRO
2 20-4,”

3 “Horse Creek Hills Subdivision, Phase 4 Broadwater County, HRO
4 20-4,”

5 and argue with a straight face that it did not understand that this was one project
6 and only “considered each of the four phases a distinct project” “based on the
7 limited information available to DNRC at the time each predetermination letter
8 was issued.” (emphasis added). At the hearing, DNRC further defended its
9 decision by saying that it is just following the information in the letter:

10 “The only piece of evidence from the record considered by DNRC were these
11 four letters from the applicant's engineer saying, ‘These are four separate projects
12 in front of DEQ. Here are the parameters.’” That is incorrect. As show above,
13 DNRC treated this as *separate* projects even though the letters themselves said
14 that it was one project in 4 phases. Furthermore, DNRC allowing such a loophole
15 based on nothing more than 71 Ranch’s phasing plan manifestly violates
16 DNRC’s own rule that it use *its* judgment, *i.e.* not the developers, when
17 determining combined appropriations. Mont. Admin. R. 36.12.101(12)
18 (“‘Combined appropriation’ means an appropriation of water from the same
19 source aquifer by two or more groundwater developments, the purpose of which,
20 *in the department's judgment*, could have been accomplished by a single
21 appropriation.”) (emphasis added). Just like the County, DNRC insists on doing
22 71 Ranch’s job.

23 DNRC also argues that it “evaluated the phases as separate
24 projects because they were separate applications submitted to the County and
25 DEQ pursuant to the County and DEQs' review and by subdivision application

1 rules. *See* ARM 17.36.103.” As a preliminary matter, there is nothing in Mont.
2 Admin. R. which requires multi-phase projects to be submitted as separate
3 applications. Indeed, from Montana Supreme Court precedent to administrative
4 law to DNRC’s own letters, the blackletter law is clear that multiphase
5 developments are one combined appropriation with no qualifiers. *Clark Fork*, ¶
6 24 (“‘combined appropriation’ refers to the total amount or maximum quantity of
7 water that may be appropriated without a permit,” *i.e.* not the total amount per
8 well or per phase of development); Admin. R. Mont. 36.12.101(12)
9 (“Groundwater developments need not be physically connected nor have a
10 common distribution system to be considered a ‘combined appropriation.’ They
11 can be separate developed springs or wells to separate parts of a project or
12 development. Such wells and springs need not be developed simultaneously.
13 They can be developed gradually or in increments. The amount of water
14 appropriated from the entire project or development from these groundwater
15 developments in the same source aquifer is the ‘combined appropriation.’”);
16 DNRC exempt well review letters (“Groundwater developments need not be
17 physically connected nor have a common distribution system to be considered a
18 ‘combined appropriation.’ They can be separate developed springs or wells to
19 separate parts of a project or development. Such wells and springs need not be
20 developed simultaneously. They can be developed gradually or in increments.
21 The amount of water appropriated from the entire project or development from
22 these groundwater developments in the same source aquifer is the ‘combined
23 appropriation.’ Under this Rule, the Department interprets subdivisions that are
24 pending before the Department of Environmental Quality for approval on
25 October 17, 2014 or filed after that date to be a single project that can be

1 accomplished by a single appropriation.”).

2 DNRC’s own rule wisely does not allow the developer to
3 determine which appropriations are combined but rather requires the department
4 to exercise its own judgment over whether multiple appropriations could be
5 accomplished by a single appropriation. Mont. Admin. R. 36.12.101(12)
6 (“‘Combined appropriation’ means an appropriation of water from the same
7 source aquifer by two or more groundwater developments, the purpose of which,
8 in the department's judgment, could have been accomplished by a single
9 appropriation.”) Once again DNRC cedes its authority even when contrary to its
10 own rules. Indeed, since applications are submitted by the developer, DNRC’s
11 interpretation here would allow developers to circumvent exempt well limitations
12 easily and unilaterally by simply slicing any project into phases each small
13 enough to fall under the exempt well ceiling for aggregate acre-feet. It would be
14 procedurally onerous, but nothing in statute prevents a developer from splitting a
15 project into a separate phase for each home. Mont. Code Ann. § 76-3-617. The
16 Montana Supreme Court recognized that DNRC’s 1993 rule “allows an
17 appropriator to avoid the permitting process for an infinite number of
18 appropriations from the same source—with each appropriation consuming up to
19 10 acre-feet per year—so long as the appropriator does not physically connect the
20 groundwater developments.” *Clark Fork*, ¶ 11. Likewise, DNRC’s current
21 application of the law allows projects with an infinite number of exempt wells so
22 long as they are developed in small enough sequential phases, a decision
23 DNRC’s interpretation places entirely in the hands of the developer. Yet again,
24 the dogged efforts of concerned citizen Ms. Sullivan precisely raised this
25 problem before the Planning Board on April 5, 2022. It should give DNRC pause

1 that citizens with seemingly no legal training appear to have a better grasp of the
2 exempt wells limits than DNRC, the agency charged with administering the
3 Water Use Act. As in *Clark Fork*, DNRC has once again unnecessarily hobbled
4 its enforcement of the Water Use Act, this time by tortuously misreading its own
5 rules and ignoring Supreme Court precedent.

6 DNRC says “[t]here is no dispute that DNRCs' regulatory
7 definition of combined appropriation is consistent with § 85-2-306.” This is only
8 true because this Court (Judge Sherlock) reinstated the 1987 rule in litigation that
9 DNRC lost. The correctness of that definition is irrelevant when DNRC goes out
10 of its way to ignore the plain language it promulgated and continues to apply the
11 prior definition which allowed uncontrolled development of limited water
12 resources, and which was struck down by the Supreme Court.

13 Because exempt well law seems a particular challenge for
14 DNRC, the Court endeavors to make the following declaratory ruling absolutely
15 clear:

16 **There is no basis in law for DNRC to treat the four phases of 71**
17 **Ranch’s subdivision project separately, a conclusion which is**
18 **absolutely clear from statute, administrative rule, Montana**
19 **Supreme Court precedent, and even DNRC’s letters in this**
20 **matter. Any and all phases of this project are one single combined**
21 **appropriation.**

22 At one of the final hearings, 71 Ranch’s counsel for
23 acknowledged the contentious nature of exempt wells but stated that
24 disagreement with DNRC’s guidance is a “policy issue” that should be brought
25 up in “appropriate forums” such as “the Legislature and administrative hearings.”
At the hearing, 71 Ranch’s counsel reiterated that this dispute is not the

1 appropriate place for opponents of this project to contest DNRC's (incorrect)
2 interpretation of exempt well law. This evinces a fundamental misunderstanding
3 of agency guidance, administrative law, and the Montana Constitution. A statute
4 must be promulgated according to the process defined by Montana's
5 Constitution. Administrative rules must be promulgated according to the
6 processes defined by MAPA. Both processes have integrated mechanisms to
7 assure citizens' constitutional rights to know and participate in our democratic
8 system, through elections and public comment respectively. Agency legal
9 guidance has no such process. It is simply written by agency employees with
10 absolutely no mechanism for public participation or even notice that it is being
11 drafted. This is why "Policy memos are not law." *Clark Fork Coal. v. Mont.*
12 *Dep't of Natural Res. & Conservation*, 2019 Mont. Water LEXIS 5, *17. 71
13 Ranch implies that the County hearings were the wrong place for the public to
14 express its unhappiness with DNRC's blatantly unlawful application of exempt
15 well law even though the legal interpretation 71 Ranch relies on was neither
16 enacted by the Legislature nor promulgated pursuant to MAPA. It is 71 Ranch
17 and similarly situated developers who need to go through the Legislative or
18 rulemaking process if they want to vitiate the statutory and administrative rule
19 limits on exempt wells.

20 Finally, the Court notes that DNRC's guidance also appears
21 to state that it awards water rights beyond those which have been put to
22 beneficial use:

23 All subdivisions using exempt wells will be required to allocate the
24 full 10 AF of volume across the subdivision for planning purposes
25 (though lot owners will not be required to perfect the full volume
allocated as part of the review). If there is unallocated water, DNRC

1 will split the unallocated portion evenly amongst the lots. DNRC will
2 outline volumes requested by the applicant for each purpose in the
3 pre-determination letter.

4 This would appear contrary to the requirement that the water
5 actually be put to beneficial use, an element which is “of paramount importance”
6 in prior appropriation water law since the State’s earliest decisions. *Allen v.*
7 *Petrick*, 69 Mont. 373, 376-77, 222 P. 451, 452 (1924) (“The quantity of water
8 ... actually and economically applied to a beneficial use. If comparison between
9 the principles regulating the appropriation and use of water is permissible it may
10 be said that the principle of beneficial use is the one of paramount importance.”);
11 *Power v. Switzer*, 21 Mont. 523, 529, 55 P. 32, 35 (1898) (“right to the use of
12 running water flowing in the creeks must be for some useful or beneficial
13 purpose....”); *Toohy*, 24 Mont. at 17-18, 60 P. at 397 (1900) (“The policy of the
14 law is to prevent a person from acquiring exclusive control of a stream, or any
15 part thereof, not for present and actual beneficial use, but for mere future
16 speculative profit or advantage, a right to the use of water is a possessory one,
17 that may be obtained by actual appropriation and diversion, perfected by
18 application of the water so appropriated to a beneficial use then present or
19 contemplated, and made before appropriation and use by another.”); *Smith v.*
20 *Duff*, 39 Mont. 382, 385, 102 P. 984, 984 (1909) (“To constitute a valid
21 appropriation of water, three elements must always exist: third, an application
22 of it within a reasonable time, to some beneficial industry.”)

23 Accordingly, Plaintiffs are entitled to summary judgment as
24 a matter of law relative to Count III except as to their half-hearted constitutional
25 claim.

1 **CONCLUSION**

2 There is no merit to the County’s motion to strike. The
3 environmental assessment includes only the barest information about water
4 resources; omits necessary information about waters’ health and interaction; fails
5 to consider the impact of exempt wells; and arbitrarily limits its analysis to only
6 the property itself and not neighboring landowners and waters. The County failed
7 to review numerous specific, documentable, and clearly defined impacts to
8 “agriculture..., the natural environment, wildlife, wildlife habitat, and public
9 health and safety” raised by citizens, employees, and even Commissioners.
10 Although ultimate entitlement to an exempt well is determined by DNRC, the
11 County’s failure to analyze the factual existence *and* legal appropriability of
12 water for a proposed subdivision abrogates its statutory duty to “adopt and
13 provide for the enforcement and administration of subdivision regulations
14 reasonably providing for... the provision of adequate... water... [and] the
15 avoidance of subdivisions that would... lack of water.” The County’s decision,
16 based on the record as a whole is arbitrary, capricious, and unlawful. DNRC’s
17 determination that each of the four project phases was entitled to a separate
18 combined appropriation exempt well was in error, ignores extensive recent legal
19 authority, and renders meaningless the statutory limits on the exempt wells.

20 While the Constitution mandates “control... of water
21 rights,” which the Legislature charges DNRC to “enforce and administer”
22 through the Water Use Act, under DNRC’s interpretation nothing controls the
23 development of exempt wells except the development phases arbitrarily chosen
24 by developers. An infinite number of wells may be drilled regardless of
25 water resource impact or the senior water rights holders who are entitled to

1 protection. “[U]ncontrolled development of a valuable natural resource
2 contradicts the spirit and purpose underlying the Water Use Act.” *Mont. Power*
3 *Co. v. Carey*, 211 Mont. 91, 96, 685 P.2d 336, 339 (1984). It seems DNRC’s
4 appetite to abrogate the Water Use Act is limitless, even in the face of contrary
5 authority ranging from the Montana Supreme Court to DNRC’s own rules.
6 Indeed, DNRC’s own documents evince an understanding of the *Clark Fork*
7 holding, even if the department flagrantly ignores it in practice. DNRC gives the
8 distinct impression of a misbehaving child who knows how to say the right words
9 to end the chastisement and yet immediately returns to the proscribed behavior
10 once out of view. This Court is fearful that in another ten years a district court
11 will be reviewing the propriety of DNRC approving multiple applications for
12 ‘completely distinct’ projects below the combined appropriation limit which are
13 ‘coincidentally’ sited next to each other and being built by the same developer
14 through shell subsidiaries.

15 The economic impetus to develop land is overwhelming and
16 relentless. If there is going to be any check on uncontrolled development of
17 Montana’s limited water resources it will have to come from DNRC which is
18 statutorily charged with fulfilling Montanans’ constitutional right to “control, and
19 regulation of water rights,” Mont. Const., Art. IX § 3, a duty DNRC has
20 manifestly avoided or undermined for over a decade to the detriment of our
21 waters, environment, and senior water rights holders whose protection is the
22 “core purpose” of the Water Rights Act. *Clark Fork*, ¶ 24. It is DNRC’s duty to
23 enforce the Water Use Act, not undermine it. Mont. Code Ann. § 85-2-112
24 (2021). And yet in replacing the 1987 rule, without notice to the public, DNRC
25 vitiated broad swaths of the Water Use Act it is charged with

1 administering and in doing so allowed the (ongoing) appropriation of millions if
2 not billions of gallons of water that under our laws should have been left in
3 aquifers for the benefit of senior water rights holders. This should have stopped
4 once *Clark Fork* was handed down, but it appears that DNRC has simply ignored
5 that opinion though faulty agency guidance that has no force of law. Imploring
6 the developers to reconsider the project, one concerned citizen reminded the
7 audience that “to whom much is given, much is expected.” The same could be
8 said of DNRC.

9 DNRC itself has “acknowledged the concerns of senior
10 users that the cumulative effects of these exempt appropriations are having a
11 significant impact in terms of reducing groundwater levels and surface water
12 flows and that the cumulative impact of the appropriations may be harming
13 senior water users' existing rights.” *Clark Fork Coal.*, ¶ 13. In 2016, DNRC
14 estimated the existence of 113,000 exempt appropriations, with an additional
15 3,000 added each year, and as many as 78,000 more by 2020. *Id.* Thus, if DNRC
16 is to be believed, Montana had at least 128,000 and perhaps as many as 191,000
17 exempt wells by 2020, before the influx of new residents during the early
18 COVID years. With DNRC going out of its way for decades to conclude that
19 such wells are virtually never combined appropriations, each well is entitled to
20 appropriate 10-acre feet per year, totaling 1.2-to-1.9-million-acre feet, or 417-622
21 billion gallons of water each and every year. Each additional year adding 3,000
22 exempt wells entitles their owners to an additional 9 billion gallons of water each
23 year. At this rate, in less than 50 years exempt wells will be entitled to draw a
24 trillion gallons of water each and every year. While each exempt well might
25 appropriate “only a *de minimis* quantity of water,” *Clark Fork*, ¶ 24, they are

1 starting to add up.

2 **ORDER**

3 For the above reasons, it is hereby **ORDERED, ADJUDGED** and
4 **DECREED** that:

- 5 1. The County's Motion to Strike is **DENIED**;
- 6 2. The County's Summary Judgment Motion is **DENIED**; and
- 7 3. Plaintiffs' Summary Judgment Motion is **GRANTED**, in
8 part; and
- 9 4. Based on the record as a whole, Broadwater County's
10 decision to approve 71 Ranch's Preliminary Plat Application
11 was arbitrary, capricious and/or or unlawful. Mont. Code
12 Ann. § 76-3-625(2)(c) (2021).

13 **ORDERED** this 14th day of February 2024.

14
15 Michael McMahon
16 MICHAEL F. McMAHON
17 District Court Judge

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