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MONTANA FIRST JUDICIAL DISTRICT, 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

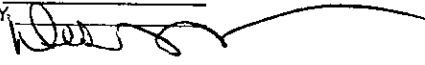
Case No. DV-2022-38

**COMPLAINT FOR JUDICIAL
REVIEW AND DECLARATORY
RELIEF**

COMES NOW Plaintiffs Upper Missouri Waterkeeper, Tanya and Toby Dundas, Sally
and Bradley Dundas, Carole and Charles Pymale, and Cody McDaniel through counsel, and in

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AUG 26 2022

CLERK Valerie J Hornsveld
DEPUTY 

support of their complaint seeking review of the July 28th, 2022, written decision of Broadwater County approving a preliminary plat for the Horse Creek Hills Subdivision (HCH subdivision) and the Department of Natural Resources and Conservation's failure to apply mandatory requirements of the Montana Water Use Act and prevent unreasonable depletion of water resources, seeking declaratory relief and other claims and causes of action, state and allege as follows:

INTRODUCTION

1. This case challenges decisionmaking by Broadwater County and the Montana Department of Natural Resources and Conservation (DNRC) that authorizes development of a new major subdivision in rural Broadwater County, within the administratively closed Upper Missouri River Basin.
2. Broadwater County's decision to approve Horse Creek Hills' preliminary plat on the basis of incomplete analyses and processes, and DNRC's legally flawed decision making, were therefore both arbitrary, capricious, and contrary to the MSPA and MWUA, respectively.

PARTIES, JURISDICTION, AND VENUE

3. Plaintiff Upper Missouri Waterkeeper (Waterkeeper) is a not-for-profit clean water advocacy and public education organization based in Bozeman, Montana, that aims to protect and restore fishable, swimmable, drinkable water and community health throughout the 25,000 square miles of Southwest and West-central Montana's Upper Missouri River Basin. Waterkeeper has a principal goal of assuring government decision making complies with and fully upholds local, state, and federal environmental laws and regulations designed to protect the environment and communities from pollution and degradation. Broadwater County and the HCH subdivision sit squarely within Waterkeeper's geographic focus.

4. Waterkeeper's members include residents living in Broadwater County, including properties adjacent to and nearby Horse Creek Hills. Members live, work, and recreate in and around the area that will be affected by the development of an unprecedented new major subdivision. Several of Waterkeeper's members are individual plaintiffs in this case, with properties contiguous to or surrounding the proposed HCH subdivision, with senior water rights that may be affected by the project, and whom rely on the agrarian landscape of Broadwater County for their livelihood and derive aesthetic benefit from the region's vibrant wildlife and its traditionally cool, clean water resources. Waterkeeper's members, including individual plaintiffs in this case, are among dozens of people who submitted comments to Broadwater County urging local government to gather best available science and thoroughly evaluate the many potentially significant impacts of a major new subdivision proposal. Waterkeeper's members' aesthetic, conservation, recreational, scientific, economic, and wildlife preservation interests have been, are being, and will continue to be adversely affected by Broadwater County's failure to gather available water resources information or adequately evaluate and disclose all the impacts of the proposed subdivision, and by the DNRC's failure to faithfully implement Montana water law.
5. Plaintiff Tanya and Toby Dundas own land approximately one-half mile north of the proposed subdivision along the east side of Lower Confederate Lane. They run cattle and utilize various water rights out of confederate gulch for irrigation.
6. Plaintiff Sally and Brad Dundas own land directly adjacent to the proposed subdivision and on the opposite side of Lower Confederate Lane. Confederate Gulch bisects their property. They possess water rights out of confederate gulch dating to May 31, 1883.

7. Plaintiff Cody McDaniel runs the McDaniel Ranch at 158 Lower Confederate lane, just north of the proposed subdivision. The McDaniel Ranch produces cattle and goats and relies on various water rights in or adjacent to confederate gulch for irrigation and stockwatering.
8. Plaintiff Carole and Charles Plymale operate a ranch to the south of the proposed subdivision and also possess longstanding water rights.
9. Individual Plaintiffs all live in the State of Montana, reside within Broadwater County, are adjacent to or surrounding property owners to the HCH Subdivision and/or own water rights and agricultural operations that may be affected by the decisionmaking at-issue, and have an interest in lawful governance and preserving the quality of their neighborhood. This action is brought on behalf of Plaintiffs and Waterkeeper members' behalf.
10. Defendant Broadwater County is a local government of the State of Montana. It regulates subdivision development through implementation of the Montana Subdivision and Platting Act.
11. Defendant Montana Department of Natural Resources and Conservation (DNRC) is an agency of the State of Montana. It regulates the use of ground and surface waters through the Montana Water Rights Act.
12. Jurisdiction is based on, *inter alia*, Article II, Section 3 and Article IX Sections 1 and 3, of the Montana Constitution; the Montana Subdivision and Platting Act, MCA § 76-3-601 *et seq.* and specifically MCA § 76-3-625; the Montana Water Rights Act MCA § 85-2-306 *et seq.*; and the Montana Declaratory Judgment Act, MCA §§ 27-8-201, 202.
13. Venue is proper in this district because the subdivision authorization at-issue was issued by Broadwater County and will occur in Broadwater County.

FACTUAL BACKGROUND

A. The Horse Creek Hills Major Subdivision

14. Horse Creek Hills is a new major subdivision located on the eastern side of Canyon Ferry Reservoir, in Broadwater County, at Section 31, T9N, R2E.
15. The subdivision encompasses 442 acres that is presently vacant open-space, divided into 41 lots ranging in size from 5.35 ac to 31.77 ac.
16. The subdivision consists of four phases of development that will create a total of 39 residential lots, two commercial lots, and one open space lot. Lot 41 is designated as commercial and/or industrial use.
17. The proposed subdivision is surrounded by a mixture of state land, federal public land, and private land, all of which is presently open space and/or used in agricultural production.
18. Each lot will be served by on-site individual domestic wells, individual septic systems, and on-site stormwater facilities.
19. In addition, each phase of development authorized by Horse Creek Hills' preliminary plat is reliant on the use of an "exempt" groundwater withdrawal of 10 ac/ft year. The applicant also relies on a fifth exempt groundwater withdrawal of 10 ac/ft – year to support its > 20 ac commercial lot.
20. Horse Creek Hills is situated in the administratively closed Upper Missouri River Basin. The basin closure has the legal effect of precluding the DNRC from processing or granting new permits to appropriate surface water until final decrees have been issued for all water rights within this basin.

The Montana Subdivision and Platting Act

21. The Montana Subdivision and Platting Act (MSPA) provides authority to the Counties to, among other items, implement rules that "avoid[.] subdivisions that would involve

unnecessary environmental degradation and danger of injury to health, safety, or welfare...lack of water, drainage, access, transportation, or other public services..." MCA § 76-3-501.

22. The MSPA contains two levels of detailed review intended to ensure that potential adverse impacts from subdivision of land are properly identified before a decision, and to potentially mitigate those impacts.
23. First, the MSPA requires that the applicant provide a detailed application, including an environmental assessment (EA), as part of the application package. Among several items the EA for a major subdivision must provide available ground water information and a summary of probable impacts based on the criteria in MCA § 76-3-608.
24. Second, in reviewing a subdivision the County must itself evaluate many of the specific environmental and community impacts arising out of the proposal. A subdivision proposal must be reviewed for "the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety..." MCA § 76-3-608.
25. The MSPA allows the County to mitigate potential impacts and specifically recognizes that "in some instances the impacts of a proposed development may be deemed unmitigable and will preclude approval of the subdivision."

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The Montana Constitution and The Water Use Act

26. When Montana adopted a new constitution in 1972, the delegates and the citizens of Montana determined that "[t]he legislature shall provide adequate remedies for the protection

of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.” Mont. Const. Art. IX, § 1.

27. In accordance with that duty, in 1973, the Montana Legislature instituted the current water rights system by adopting the Montana Water Use Act, MCA § 85-1-101 *et seq.*
28. The Montana Water Use Act (“MWUA”) represents a comprehensive statutory scheme governing the conservation, development and administration of water resources in Montana. *See generally* MCA § 85-1-101.
29. Said another way, “[t]he state, in the exercise of its sovereign power, acting through the department of natural resources and conservation [“DNRC”], shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources.” MCA § 85-1-101(3).
30. In achieving these goals, DNRC is charged with balancing development against conservation and environmental/recreational water uses against diversionary ones. MCA § 85-1-101(4)-(5)
31. Ultimately, the legislature advised that “[t]he greatest economic benefit to the people of Montana can be secured only by the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state.” MCA § 85-1-101(8).
32. In order to meet these goals, the legislature mandated that DNRC administer a permitting system for all new water rights. As a basic premise, the MWUA requires those seeking new appropriations of water to apply to the DNRC for a permit. MCA § 85-2-301.
33. “The primary function of this permit based system is the protection of senior water rights from encroachment by prospective junior appropriators adversely affecting those rights.”

Clark Fork Coalition v. Tubbs, 2016 MT 229, ¶ 5, 384 Mont. 503, 380 P.3d 771 (“*CFC v. Tubbs*”).

34. Consistent with this purpose, the Act imposes both substantive and procedural protections for water right users. Substantively, before the issuance of a new water appropriation, the Act requires that a prospective junior appropriator show that water is legally and physically available, the proposed use of water is for a beneficial use, and the new appropriation will not adversely affect existing water rights of senior prior appropriators. MCA § 85–2–311(1)–(2). Procedurally, a prospective junior appropriator must provide notice, through the DNRC, to senior users who may be affected by the proposed appropriation and must permit senior users an opportunity to object to the prospective water right. MCA § 85–2–307. If objections do arise from senior users, the DNRC must hold a contested hearing on the objections. MCA § 85–2–309.
35. Senior users are afforded even more protection in highly appropriated basins in Montana that have been closed from further surface water appropriations. In these “closed basins,” where water claims often exceed water availability, the DNRC may not issue new surface water permits. MCA § 85–2–360(1)–(3). The DNRC may consider groundwater permits, but the process for obtaining a groundwater permit in a closed basin is demanding. In addition to the general requirements for obtaining a permit, the appropriator must commission a hydrogeological report to determine if the proposed appropriation could result in a net depletion of surface water. MCA § 85–2–360(2). If the report indicates a hydrogeological connection between surface water and groundwater, then the appropriator must show that there will be no net depletion of water. MCA § 85–2–360(3)(b).

36. However, the MWUA provides certain exemptions to this rigorous permitting process. MCA § 85-2-306(1)-(9). If an appropriation qualifies for an exemption, none of the permitting procedures under the Act constrain the proposed appropriation.
37. Relevant to this case, MCA § 85-2-306(3)(a)(iii), provides an exemption for groundwater appropriations considered *de minimis*; that is, those appropriations that do not exceed 35 gallons a minute and 10 acre-feet per year.
38. In 1987, the Legislature incorporated the term “combined appropriation” into the *de minimis* groundwater exemption. MCA § 85-2-306(3)(a)(iii). The current version of that statute reads “[o]utside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring: ... (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, 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.”
39. Shortly after the incorporation of the “combined appropriation” language into the statute, the DNRC promulgated ARM 36.12.101.
40. For years, DNRC applied an unlawful and erroneous interpretation of that language, allowing tens of thousands of wells to tap into Montana’s limited ground water resources without any analysis of impacts to senior water users, or the resource. In theory, that practice should have come to a close in 2016 with the Montana Supreme Court’s decision in *CFC v. Tubbs*, 2016 MT 229. There, the Court held DNRC’s application of the “exempt” groundwater statute unlawful and reinstituted DNRC’s 1987 Rule on Combined Appropriation, which stands unchanged in the ARM today.

41. In pertinent part, the current version of that rule states “ ‘combined appropriation’ means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department’s judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a ‘combined appropriation.’ They can be separate developed springs or wells to 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 appropriation.”
42. In spite of clear judicial instruction on this issue, for unknown reasons, DNRC continues its unlawful application of this rule here.

Broadwater County’s Flawed Review Process

43. Broadwater County began its review of the Horse Creek Hills subdivision after receiving an initial application dated July 20, 2020.
44. The Broadwater County Planning Board (Planning Board) held a first public hearing regarding the Horse Creek Hills proposed major subdivision on September 29, 2021. Members of the public, including Waterkeeper members, attended this meeting and expressed concerns that the public did not possess sufficient details on Horse Creek Hills to make informed comments. The Planning Board did not make any findings or take any action regarding the subdivision at this meeting.
45. In response to public requests for more detail on Horse Creek Hills and a corollary public hearing, the Planning Board held a second public hearing regarding Horse Creek Hills on

October 27, 2021. Numerous Waterkeeper members, including Plaintiffs, provided comments in opposition to the proposed subdivision at the October 27, 2021, meeting. Key critical comments made by the public, including plaintiffs, on October 27, 2021, included: concerns about the application's incomplete identification of potential impacts, a lack of groundwater information and consideration of impacts on agricultural land use, and impacts to water rights, public safety, the environment, wildlife, and wildlife habitat.

46. At the October 27, 2021, hearing the Planning Board recommended denial of the preliminary plat application to the Broadwater County Commission citing concerns about incomplete information and impacts to road access, safety, neighboring properties, and to agricultural operations.
47. On November 1, 2021, the Broadwater County Commission considered Horse Creek Hills and the Planning Board's recommendation of denying the preliminary plat application. Members of the public, including Plaintiffs, attended this meeting and provided comments in opposition to Horse Creek Hills citing both an incomplete record and failures to adequately assess the subdivision's potential impacts.
48. On November 9, 2021, Broadwater County Attorney Swanson called a meeting of the Broadwater County Planning Board for the purposes of recommending the Planning Board reconsider and approve the Horse Creek Hills preliminary plat application due to concerns that a County denial would be legally challenged by the applicant and that previous grounds for recommending denial were improper.
49. On November 15, 2021, the Broadwater County Commission held a public meeting. At this meeting the Commission remanded the Horse Creek Hills preliminary plat application back to the Planning Board for reconsideration within 30-days. Members of the public, including

plaintiffs, provided comments in opposition to the subdivision proposal citing continued failures to obtain relevant information and inadequate impact analyses.

50. On November 30, 2021, the Planning Board held a meeting to discuss the remanded Horse Creek Hills preliminary plat application. At this meeting the Broadwater County Sanitarian stated that the Montana Department of Environmental Quality would perform a review of the subdivision's use of individual wells and off-site impacts to the aquifer, after which the Planning Board deemed potential groundwater impacts of the subdivision mitigated and no longer grounds for objection. At this meeting it was also revealed by the applicant that at least one of the subdivision's proposed commercial lots would include a gas station and convenience store, items not previously disclosed in the Subdivision's EA. Members of the public, including plaintiffs, provided public comment in opposition to Horse Creek Hills citing continued failures to obtain relevant information and inadequate impact analyses. The Planning Board thereafter determined the preliminary plat application did not contain sufficient information to make a recommendation and sent the application back to the Broadwater County Commission without a decision on the basis of inadequate information.
51. The Horse Creek Hills developer also submitted a second, amended preliminary plat application with the County in late 2021. One key substantive change in the second application was the proposed type of water supplies for the subdivision: the original application proposed a designated water supply as "individual surface water supply from spring", whereas the amended application designated water supplies from "individual wells." As the Applicant did not state it would be applying for a water right permit under the MWUA, the "individual wells" proposed as the water supply can only be obtained under the permitting exemption found in MCA § 85-2-306. This, in turn, directly implicates the law of

combined appropriations under “exempt” groundwater wells as established by the Montana Supreme Court in *CFC v. Tubbs*.

52. A second key change concerned the timed phasing of the project and the newly-disclosed intent to construct a gas station and convenience store on at least one of the commercial lots.
53. A Broadwater County Planning Board meeting was held on December 14, 2021, where the Horse Creek Hills application was discussed. Minutes from this meeting reflect Planning Board member Dallas Diehl’s communications with Montana DEQ Subdivision Bureau Chief Kevin Smith. Mr. Diehl asserted – contrary to the Broadwater County Sanitarian’s statements on November 30, 2021 – that DEQ would not review offsite water impacts of subdivision wells during its review of a preliminary plat application.
54. By letter dated December 15, 2021, the Broadwater County Conservation District submitted a letter to the Broadwater County Commission expressing concerns about the Horse Creek Hills subdivision’s potential impacts on water quantity, water quality, public health, safety and welfare, and concerns about incomplete information gathering or analysis. For these reasons the Broadwater County Conservation District recommended the Commission deny the application as then presented.
55. A December 21, 2021 Broadwater County Commissioner meeting was scheduled to address the Horse Creek Hills preliminary plat application, but the action item was removed from the agenda by notice given on December 17, 2021.
56. On January 14, 2022, the Deputy County Attorney for Broadwater County sent a letter to the County Commission identifying new record information on Horse Creek Hills preliminary plat application and suggested the Commission remand the matter to the Planning Board for reconsideration.

57. On January 19, 2022, the Broadwater County Commission met and considered the Horse Creek Hills preliminary plat application. Members of the public, including plaintiffs, provided public comment in opposition to Horse Creek Hills citing continued failures to obtain relevant information and inadequate impacts analyses. The Commission again remanded the Horse Creek Hills application and new information to the Planning Board for reconsideration.
58. On February 11, 2022, a third Planning Board hearing was scheduled to reconsider the Horse Creek Hills subdivision for March 2, 2022. This meeting was later canceled on March 2, 2022.
59. A Broadwater County Staff Report on Horse Creek Hills dated February 17, 2022 identified new information salient to Horse Creek Hills' application that would be the sole grounds of discussion and public comment at the forthcoming March 2, 2022 hearing. The new information includes a Cultural Resource Study dated November 7, 2021, an Amended Subdivision Application dated November 29, 2021, a Phasing Plan dated November 29, 2021, a Weed Plan dated January 26, 2022, a Water Usage Summary dated November 29, 2021, and materials separately sent by the Applicant to DEQ in support of the subdivision dated June 2020.
60. The Planning Board held a public hearing at which it considered and took public comments on the Horse Creek Hills preliminary plat application on April 5, 2022. Members of the public, including plaintiffs, provided public comment in opposition to Horse Creek Hills citing continued failures to obtain relevant information and inadequate impacts analyses. No decision was made on the preliminary plat application at this meeting.

61. Another Planning Board Meeting was held on April 25, 2022, where Horse Creek Hills was discussed. Members of the public, including plaintiffs, provided public comment in opposition to Horse Creek Hills citing continued failures to obtain relevant information and inadequate impacts analyses. The County Planning Department provided the Planning Board and public a response to comments document regarding recent public comment and concerns on Horse Creek Hills. The hearing was later stopped that evening and rescheduled due to information technology problems limiting online public participation.
62. A May 23, 2022, public hearing on Horse Creek Hills was set, but then canceled during the afternoon of May 23, 2022, due to the County's failure to post notice of the meeting electronically.
63. A rescheduled Planning Board hearing on Horse Creek Hills was held on June 21, 2022. Members of the public, including plaintiffs, provided public comment in opposition to Horse Creek Hills citing continued failures to obtain relevant information and inadequate impacts analyses. At the end of the meeting the Planning Board voted to approve suggested conditions of approval for the HCH subdivision and send to the County Commission.
64. A Broadwater County Commission meeting was held on July 5, 2022 concerning the Horse Creek Hills preliminary plat application. Members of the public, including plaintiffs, provided public comment in opposition to Horse Creek Hills citing continued failures to obtain relevant information and inadequate impacts analyses.
65. The July 5, 2022, meeting of the Broadwater County Commission and consideration of the Horse Creek Hills preliminary plat application was carried over to a July 11, 2022 meeting. On July 11, 2022, the Broadwater County Commission approved the Horse Creek Hills preliminary plat application. A written approval was issued on July 28, 2022.

A. Failure to Gather Available Groundwater Information

66. Preliminary plat application materials and the environmental assessment (EA) prepared in support of the Horse Creek Hills major subdivision failed to include available groundwater information.
67. The subdivision's EA and subsequent November 29, 2021 'Water Use Summary' addendum noted the proposed use of 41 individual water supply wells and five aggregated exempt groundwater withdrawals of 10 ac/ft each. Application materials also noted the presence of Confederate Creek adjacent to the subdivision's southerly border, contained several boreholes identifying depth to groundwater and pumping tests, and proposed the use of water meters within the subdivision to track water usage.
68. Montana FWP Fisheries Biologist Ron Spoon provided public comment in 2019 and on July 5, 2022, both expressing concerns about the cumulative water resource impacts of the Subdivision on nearby Confederate Creek, and specifically identifying available groundwater and surface water data indicating likely hydrologic connectivity between local groundwater and Confederate Creek.
69. Upon information and belief Plaintiffs aver that the Department of Natural Resources and Conservation and/or Montana Bureau of Mines and Geology have salient studies regarding groundwater in the Canyon Ferry region applicable to the HCH subdivision.
70. Horse Creek Hills' application, its EA, and Broadwater County's approval of the preliminary plat are silent, however, with respect to baseline information concerning seasonal fluctuations in the water table or the likelihood of groundwater underlying the subdivision to be hydrologically connected to – and thereby capable of affecting – flows in adjacent Confederate Creek.

B. Agricultural Impacts

71. The EA states that “there are no anticipated negative impacts...with...ranch operations...[and] [t]here is no interference with movement of livestock or farm machinery” but provides no documentation or analysis to support these statements.
72. Public comment persistently identified the applicant and County’s failure to identify and analyze the unprecedented nature of a developing such a major subdivision in this wholly rural, agricultural landscape.
73. Public comment identified the inaccurate EA characterization of contiguous private lands as “vacant in nature”, “based on aerial imagery,” with the admission that these lands “may be used to some degree for agricultural purposes.” However, surrounding landowners each use their lands for livestock and/or agricultural production.
74. Public comment identified the concern that anticipated new traffic pressure from the major subdivision on Lower Confederate and Lower Duck Creek roads and Highway 284 could negatively affect existing free range cattle practices, negatively affect existing farm machinery operation on and across county roads, and affect ranch management practices including but not limited to horseback riding and the use of valuable ranch working dogs. Local and adjacent ranching citizens specifically identified concerns about impatient drivers and the likelihood of poor driving habits from drivers unaccustomed to rural Montana roadways and the potential of spooking, stampeding, or injuring cattle operations.
75. The applicant’s EA, County staff reports, and County written approval authorizing the HCH preliminary plat are silent as to these public comments and identified impacts on agriculture.

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C. Agricultural Water User Impacts

76. HCH would entail the use of 41 individual wells, 41 individual septic systems, and five aggregated exempt groundwater withdrawals of 10 ac/ft each, yet neither the applicant's EA or the County's staff reports or the Commission decision approving the subdivision evaluate the direct, indirect, or cumulative impacts of the subdivision on the local aquifer, the water table, or adjacent Confederate Creek.
77. The County failed to evaluate the potential impact of the subdivision's water usage on contiguous and nearby agricultural operations dependent on long-established water rights in both local groundwater and Confederate Creek.
78. The County's failure to assure HCH's application materials possessed 'available groundwater information' compounds the County's legal error in failing to identify, much less evaluate, potential agricultural water user impacts, and undermines the validity of all proposed mitigation.
79. The County similarly failed to evaluate the potential for surface or groundwater pollution impacts related to the creation of 41 new septic systems, of which at least one will support a commercial development project, on neighboring agricultural land. Plaintiffs rely on water rights in local groundwater and/or Confederate Creek for both irrigation and stock purposes, yet the County did not assess whether and to what extent water pollution degradation from a major new subdivision could affect agricultural water uses.

D. Natural Environment Impacts

80. The Subdivision's use of dozens of new individual septic systems, including septic systems capable of treating wastes from a commercial lot containing a convenience store and gas station, pose potentially significant water quality impacts on the natural environment.

81. Septic systems are not designed to actively remove nutrients, and nutrient pollution from septic systems is a well-known contributing factor to water degradation across the state of Montana.
82. The DEQ subdivision packet belatedly provided to the County and public in early 2022, after submittal of the EA, indicates septic drain fields and water supply wells in close proximity. HCH's application materials failed to identify, and the County failed to evaluate, the potential negative impacts, including in particular cumulative impacts, created by the addition of new sources of nutrient pollution into local groundwater, potential impacts on Confederate Creek, or potential impacts on downgradient Canyon Ferry, a waterway already classified by the DEQ as impaired for nitrogenous pollution. The County's lack of analysis concerning potential water pollution impacts is exacerbated by the County's continued failure to investigate local hydrology and use such findings to evaluate impacts on the natural environment.
83. So too the applicant's subdivision materials reflect a stilted analysis of stormwater pollution impacts on the natural environment. The County failed to evaluate the effects of subdivision stormwater nonpoint pollution, which could carry fertilizers, pesticides, herbicides, and other household materials into local groundwater or affect surface water quality in Confederate Creek, instead impermissibly relegating such review to state natural resource agencies.

E. Wildlife & Wildlife Habitat Impacts

84. The HCH subdivision is situated in a known wildlife corridor for big game. Montana FWP commented on the HCH application on December 3, 2019, stating that the area is "seasonal or year-round habitat for antelope, mule deer, white-tailed deer and elk," and provides habitat for game birds and non-game birds and wildlife. FWP's Adam Grove went on to say "all the

aforementioned species would be negatively impacted to one degree or another if the proposed subdivision is developed in the area.”

85. Montana FWP’s regional fisheries biologist Ron Spoon also commented on the proximity of the subdivision to Confederate Creek, an important spawning stream for rainbow trout, and opined on potentially significant water resource impacts of new consumptive water use by a subdivision. “Any anticipated groundwater depletion in this area would impact aquatic life in lower Confederate Creek.”
86. HCH’s application materials fail to clearly identify or assess the impacts likely to occur to wildlife if this development occurs. Broadwater County staff reports also arbitrarily downplay the impact of a new major subdivision on wildlife, contradicting the opinions of wildlife professionals, inaccurately stating that big game “occasionally utilize” the region and “the property is not known to be part of any big game wintering range...[or] migration route.
87. Broadwater County failed to adequately evaluate the effects of the subdivision on wildlife or wildlife habitat, contrary to requirements of the MSPA.

F. Public Health & Safety - Roads, Safety, & Fire

88. HCH’s application relies on a road study in which a low road count data was obtained between February 18-23, 2020, a time that local roads receive minimal travel. This data was further used in calculating the applicant’s contribution to the county road fund.
89. At a November 2021 meeting on HCH, the County Public Works Director expressed skepticism on the accuracy of the subdivision’s road data due to the timing and professional knowledge of the roads’ use. He noted a likely increase in traffic due to both residential and commercial development, and the need to pave for safety standards. He also noted Goose

Bay and Lower Confederate roads are low priority for winter maintenance, and that these roads are sporadically closed to winter travel.

90. Broadwater Sheriff Meehan expressed "concerns" regarding the HCH subdivision related to public health and safety based on the significant change in land use from rural agricultural to a proposed major subdivision and commercial lots.
91. The development of commercial lots including a gas station, commercial fuel storage, and a convenience store poses potential safety and fire control impacts on the local community. The applicant's EA fails to identify or provide details qualifying or quantifying the proposed commercial uses, and does not adequately analyze how new residential and commercial uses impact emergency services in a very rural and overwhelmingly agricultural area.
92. The addition of 39 residential and 2 commercial lots, including a gas station and convenience store, creates a high potential for substantially increased traffic volume over existing roads. The application fails to consider increased traffic volume impacts from transitory vehicles being drawn to a gas station/convenience store which would be, notably, the only such commercial offering on the eastern shores of Canyon Ferry between the reservoir's northern border and the community of Townsend at its southern terminus.
93. The County failed to adequately assess potential traffic impacts or related public safety concerns related to increased traffic or prospective emergency services on gravel county roads with twists, blind curves, no lighting, which are heavily used by agricultural producers, and which are consistently affected by Montana's harsh weather conditions.

DNRC's Issuance of Four 602 Letters

94. The Montana Department of Natural Resources and Conservation provided the developer of Horse Creek Hills with four letters evaluating the proposed use of exempt groundwater

withdrawals of 10 ac/ft for each phase of development. The DNRC's letters confirmed the Department's interpretation that "the proposed appropriation does fit the current rules and laws pertaining to the filing of an exempt water right using a DNRC Form 602, Notice of Completion of Groundwater Development."

95. Each of the four DNRC letters issued to HCH determined that respective phases of the new major subdivision could rely on a 10 ac/ft-year exempt groundwater withdrawal.
96. HCH relied on DNRC's 602 Letters in its preliminary plat application to Broadwater County, and Broadwater County relied on DNRC's four 602 Letters as grounds for finding expressed concerns regarding the subdivision's water supply impacts mitigated.
97. HCH's application materials also indicate the developer's intent to rely on a fifth (5th) 10 ac/ft-yr exempt well specific to the proposed commercial lot.
98. DNRC's actions incited a negative domino effect on Broadwater County decisionmaking for HCH, resulting ultimately in the approval of a preliminary plat for HCH that failed to include the required analysis of impacts on water resources.
99. The DNRC's actions represent the unlawful exercise of agency discretion and were arbitrary, capricious, and contrary to law.

FIRST CLAIM FOR RELIEF - BROADWATER COUNTY
(Violation of MCA § 76-3-603, Failure to Gather Available Groundwater Information)

100. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.
101. An environmental assessment accompanying an application for subdivision preliminary plat authorization must include, among other items, "a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available

ground water information, and a description of the topography, vegetation, and wildlife use within the area of the proposed subdivision.” MCA § 76-3-603.

102. The environmental analysis accompanying the preliminary plat application for the Horse Creek Hills subdivision failed to contain “available ground water information”, including but not limited to existing natural resource agency reports concerning water resources within the Canyon Ferry region and the likelihood of hydrologic connectivity between local groundwater underlying the project area and adjacent Confederate Creek.

103. Broadwater County failed to assure the environmental analysis for Horse Creek Hills contained all required information, and in particular contained ‘available ground water information’, and in so doing violated the plain language of MCA § 76-3-603(a)(i) and was arbitrary, capricious, and contrary to law.

SECOND CLAIM FOR RELIEF - BROADWATER COUNTY
(Violation of MCA § 76-3-608, Failure to Perform Required Analyses)

104. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

105. Broadwater County considered the Horse Creek Hills preliminary plat application for over one year, during which time the County received an unprecedented volume of public comment in opposition due to the diversity of potentially significant impacts the project raised.

106. The County held more than a half-dozen public meetings at which members of the public, including plaintiffs, raised concerns about inadequate compilation of data, inadequate impact analyses, and concerns about the project’s potential impacts on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety.

107. Broadwater County issued a written approval of Horse Creek Hills preliminary plat on July 28, 2022.

108. As set forth herein, Broadwater County's decision-making process and decision approving the Horse Creek Hills Preliminary Plat failed to take a hard look at the specific, documentable, and clearly defined potential impacts on agriculture, agricultural water user facilities, the natural environment, wildlife, wildlife habitat, and public health and safety.

109. Broadwater County's failure to perform mandated analyses of potential impacts of the Horse Creek Hills subdivision violates MCA § 76-3-608(3)(a), and was arbitrary, capricious, and contrary to law.

THIRD CLAIM FOR RELIEF - DNRC
(Declaratory Judgment, § 27-8-201, *et seq.*, MCA)

110. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

111. Horse Creek Hills relies on 46 individual wells (41 for each lot and 5 for the subdivision itself), each of which is proposed to utilize the statutory exemption from the permitting requirements of the MWUA.

112. DNRC determined that the developer could acquire "exempt" water rights for 41 individual wells on each lot because these 41 individual wells did not constitute a single "combined appropriation" under § 85-2-306(3), MCA and ARM 36.12.101(12).

113. In addition, DNRC determined that the subdivider's phased development plans did not constitute a single 'combined appropriation' under § 85-2-306(3), MCA, and ARM 36.12.101(12).

114. Based on DNRC's interpretation, the subdividers are entitled to 460 acre-feet of water from the same source aquifer, from 46 individual wells for this single subdivision project.

115. Plaintiffs asserted numerous times at the various public hearings that the meaning of 'combined appropriation' did not allow for multiple exempt wells in one project.
116. In fact, DNRC's own internal guidance on this issue contradicts its stance here.
117. While an exemption exists in statute at MCA § 85-2-306(3)(iii), DNRC issued an unlawful and erroneous interpretation of that provision to Horse Creek Hills having full knowledge that doing so was contrary to law.
118. DNRC's interpretation also constitutes an unlawful and erroneous interpretation of ARM 36.12.101(12).
119. Taken together, § 85-2-306(3)(iii), MCA, ARM 36.12.101(12), and the Montana Supreme Court's decision in *CFC v. Tubbs*, create unambiguous law in Montana on the issue at hand: "[b]ased upon the plain language of the statute, it is evident that the intent of the Legislature in enacting subsection (3)(a)(iii) was to ensure that, when appropriating from the same source, only a *de minimus 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." *CFC v. Tubbs*, 2016 MT 229, ¶ 24.
120. Pursuant to MCA § 27-8-201, *et seq.*, Plaintiffs seek and are entitled to a declaration that the DNRC's interpretation of MCA § 85-2-306(3)(iii) and ARM 36.12.101(12) as-applied to the Horse Creek Hills Subdivision is erroneous and unlawful.
121. Finally, pursuant to §§ 27-8-201, *et seq.*, MCA, Plaintiffs seek and are entitled to a declaration that the major Horse Creek Hills subdivision's use of 41 individual wells and five aggregated exempt groundwater withdrawals of 10 ac/ft-year violates the Montana Constitution's explicit prohibition on unreasonable depletion of water resources and mandate

to assure a clean and healthful environment, violates the Montana Water Use Act, and violates the agency's combined appropriations regulations at ARM 36.12.101(12).

FOURTH CLAIM FOR RELIEF - BROADWATER COOUNTY
(Declaratory Judgment, § 27-8-201, *et seq.*, MCA)

122. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

123. Pursuant to MCA § 27-8-201, *et seq.*, Plaintiffs seek and are entitled to a declaration that the County's reliance on DNRC's unlawful and erroneous interpretation of MCA § 85-2-306(3)(iii) and ARM 36.12.101(12) to meet the requirements of the Subdivision and Platting Act and ultimately approve the Horse Creek Hills Major Subdivision constitutes legal error and was arbitrary and capricious.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray for relief against Defendants as follows:

- A. For an order declaring void *ab initio* Broadwater County's approval of Horse Creek Hills' preliminary plat and remanding for reconsideration in light of its lawful mandates;
- B. For a determination and declaration that Broadwater County's approval of the Horse Creek Hills' preliminary plat was illegal and violates the Montana Subdivision and Platting Act as set forth herein;
- C. For a determination and declaration that the Department of Natural Resources and Conservation's approval of 46 residential and aggregated exempt groundwater wells of 10 ac/ft-year to be used by the Horse Creek Hills Major Subdivision violates the Montana Constitution's explicit prohibition on unreasonable depletion of water resources.
- D. For a determination and declaration that the Department of Natural Resources and Conservation's approval of 46 individual, aggregated exempt groundwater wells of 10

ac/ft-year to be used by the Horse Creek Hills Major Subdivision violates the Montana Water Use Act MCA at § 85-2-306, MCA and ARM 36.12.101(12);

E. For a determination and declaration that Broadwater County's reliance on DNRC's erroneous interpretation of the Water Use Act was arbitrary, capricious, and an abuse of discretion.

F. Award Plaintiffs their reasonable attorneys' fees and expenses under the Private Attorney General Theory, MCA § 27-26-402, the Uniform Declaratory Judgments Act under MCA § 27-8-313, and/or as otherwise provided by law;

G. For costs of suit; and

H. For such relief as this Court deems equitable and just.

Respectfully submitted on this 26th of August 2022.

MORRISON SHERWOOD WILSON DEOLA, PLLP

A handwritten signature in black ink, appearing to read 'R. F. Olsen', is written over a horizontal line.

Robert Farris-Olsen
Attorney for Plaintiffs