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MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

THE CLARK FORK COALITION, a non-profit organization, *et al.*

Petitioners,

vs.

JOHN TUBBS, in his official capacity as Director of The Montana Department of National Resources and Conservation, *et al.*,

State-Respondents,

MONTANA WELL DRILLERS ASSOC. et al.,

Intervenors.

Civ No. BDV-2010-874

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

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INTRODUCTION

In accordance with this Court's December 11, 2014, order, the Clark Fork Coalition respectfully submits this memorandum of law in support of its motion for attorneys' fees and costs. As per this Court's order, this memorandum only addresses the Clark Fork Coalition's entitlement to fees and costs under the private attorney general doctrine; it does not address the reasonableness of the amount of fees and costs sought.[1]

BACKGROUND

The Department of Natural Resources and Conservation (DNRC) narrowly defined "combined appropriation," ARM 36.12.101 (13), creating a loophole that allowed large consumptive water users to evade the Montana Water Use Act's permitting process, even in Montana's closed basins.

The Water Use Act requires permits for large appropriations of water, i.e. more than 35 gallons per minute (gpm) and 10 acre-feet per year (afy), § 85-2-306 (3)(a), MCA, including for "combined appropriations" that exceed the 10 afy threshold, regardless of flow rate. *Id.* The Montana legislature did not define "combined appropriation," but the Act's plain language, legislative history, and overall purpose evidences the legislature's intent: to ensure that large consumptive water users not be allowed to circumvent the Act's permitting requirements simply by drilling multiple wells for a single project or development. If the total amount of water appropriated from the same source for the same project, i.e., the "combined appropriation," exceeds 10 afy, then a permit is required. *Id.*

In 1987, and only three months after the Montana legislature inserted the

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[1]The Clark Fork Coalition has elected not to pursue an alternative claim for fees and costs in this matter under the Uniform Declaratory Judgment Act, §§ 27-8-311 and 27-8-313, MCA.

"combined appropriation" language into the Water Use Act (at DNRC's request), DNRC adopted an administrative rule defining "combined appropriation" consistent with legislative intent. Pursuant to DNRC's 1987 rule, two or more wells or developed springs need not be physically connected to be deemed a "combined appropriation":

> '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.'

AR 1-7 at 1, 2.

In 1993, without justification, DNRC significantly narrowed the definition to require that two or more wells or developed springs be "physically manifold" or plumbed together in order to qualify as a "combined appropriation":

> 'Combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system.

Rule 36.12.101 (13), ARM; AR 1-7 at 3.[2]

DNRC's 1993 rule created a massive exempt well loophole that allowed large consumptive water users, including extractive resource industries and large subdivisions, to bypass the Water Use Act's permitting requirements by drilling multiple, unconnected wells for a single project or development, even in Montana's closed basins. *See* AR 1-28

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[2] No public hearing on the 1993 rule was held and no public comment received. *See* AR 1-7 at 4. Nor did the DNRC explain why the new "physically manifold" requirement was necessary as required by MAPA, § 2-4-305, MCA. This issue was raised by the Rules Committee, *see* AR 1-7 at 4, but DNRC's response was merely that the 1987 definition "was too ambiguous and therefore difficult to administer." *Id.*

(photo). This is not what the Montana legislature intended. Nor is it consistent with the overall purpose and goal of the Water Use Act to provide for the administration, control, and management of Montana's waters in accordance with the Montana Constitution. *See* October 17, 2014 Order on Petition for Judicial Review (hereinafter "Order") at 5.

On November 30, 2009, to protect existing water rights holders and Montana's water resource, the Clark Fork Coalition formally petitioned DNRC to: (1) declare the current rule defining "combined appropriation" invalid; and (2) initiate rulemaking to amend the rule and bring it into conformance with the Water Use Act. AR 1-1. The Clark Fork Coalition's petition detailed why DNRC's rule was inconsistent with legislative intent, how it threatened petitioners' senior water rights and Montana's water resource, and why it undermined the Montana Constitution. *Id.* at 18-28.

DNRC's sister agency, the Montana Department of Fish Wildlife & Parks (FWP), supported the Clark Fork Coalition's petition. AR 1-37. FWP agreed that DNRC's 1993 rule was too narrow. *Id.* at 1-2. FWP also expressed concern about the rule's impacts to instream rights and surface flows. *Id.* The petition was also supported by Missoula County, the Mountain Water Company, the Brown Cattle Co., the Northern Plains Resource Council, Bozeman's City Engineer, the Stillwater Protective Association, the Tongue River Water Users' Association, Mary Jane Alstad, Trout Unlimited, and fourteen ranchers with senior water rights. *See* AR 1-30, 1-31, 1-33, 1-34, 1-35, 1-36, 1-39, 1-40, 1-41, 1-42, 1-43. Opposition to the petition came only from three groups that benefit financially from the 1993 rule: well drillers, realtors, and the building industry.[3]

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[3] On December 29, 2014, these three groups filed two separate notices of appeal of this Court's October 17, 2014, Order on Petition for Judicial Review. These notices of appeal are premature. A "judgment, even though entered, is not considered final for purposes of appeal under Rule 4(1)(a), M. R. App. P., until any necessary determination

On August 17, 2010, after briefing and a hearing, DNRC denied the Clark Fork Coalition's petition. AR 2-54. In a declaratory ruling, DNRC determined its 1993 rule was "consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et. seq, MCA." *Id.* at 6-7. On September 14, 2010, the Clark Fork Coalition filed a petition for judicial review challenging DNRC's declaratory ruling and requesting both declaratory and injunctive relief. Shortly thereafter, the Parties explored settlement and, on November 10, 2010, reached a stipulated agreement that was signed and approved by the Court. *See Stipulation and Order of Dismissal* (Nov. 10, 2010).

In the stipulated agreement, the Parties agreed that: (a) it was never the Montana legislature's intent to allow large consumptive water users utilizing multiple exempt wells to qualify for an exemption from the Act's permitting requirements; and (b) the current rule defining "combined appropriation" needed to be amended, broadened, and updated. DNRC agreed to complete rulemaking within 15 months. *Id.* at ¶ 1. DNRC also agreed that any new rule "will be broader than and not limited solely to wells or developed springs that are physically manifold or connected together," and committed to consider the cumulative impacts from multiple, un-connected wells. *Id.* at ¶ 2. In exchange, the Clark Fork Coalition agreed to dismiss this case (subject to terms and conditions) and waive all claims for attorneys' fees and costs. *Id.* at ¶¶ 5, 11.

On December 5, 2011, in response to House Bill 602 (HB 602), the Parties signed a modified agreement extending the deadline for completing rulemaking to July 1, 2013. HB 602 directed the Water Policy Interim Committee (WPIC) to study exempt wells in

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of the amount of costs and attorney fees awarded, or sanctions imposed, is made." Mont. R. Civ. P. 58(e)."The district court is not deprived of jurisdiction to enter its order on a timely motion for attorney fees, costs, or sanctions by the premature filing of a notice of appeal. A notice of appeal filed before the disposition of any such motions shall be treated as filed on the date of such entry." *Id.*

Montana and recommend policy direction and legislation. HB 602 also prohibited DNRC from adopting rules implementing exempt wells until October 1, 2012. On May 15, 2013, the Parties signed a second modified agreement extending the rulemaking deadline to "October 1, 2013, or as soon as practicable within the requirements of the Montana Administrative Procedure Act but by no later than December 31, 2013."

On August 22, 2013, and after meeting with stakeholders, DNRC proposed a new rule defining "combined appropriation." *See* Montana Administrative Register Notice 36-22-175, No. 16 (August 22, 2013). DNRC took public comment on the proposed rule and held a hearing. Of 346 comments, the vast majority (318) favored the rule. However, on November 11, 2013, after considering the comments, including a letter from WPIC expressing concern, DNRC withdrew the proposed rule. DNRC then revised the language and, on December 26, 2013, proposed a new rule for public comment. *See* Montana Administrative Register Notice 36-22-176, No. 24 (December 26, 2013).

On January 9, 2014, the Environmental Quality Council (EQC) objected—without justification—to DNRC's second proposed rule. Under the Montana Administrative Procedure Act, the EQC only has the ability to delay (not cancel or derail) DNRC's rulemaking obligations under the stipulated agreement, *see* §§ 2-4-305(9), 2-4-306(4)(c) MCA. In response to EQC's objection, DNRC withdrew the proposed rule and cancelled a hearing scheduled for January 23, 2014. In a January 21, 2014 letter and e-mail, DNRC informed the Clark Fork Coalition that it would no longer pursue rulemaking to define "combined appropriation." In other words, after three years of delays, DNRC chose to walk away from the stipulated agreement.

On February 12, 2014, the Clark Fork Coalition sent DNRC a letter regarding non-compliance with the stipulated agreement. After meeting with DNRC, the Clark Fork Coalition filed an unopposed motion to withdraw the stipulated agreement and re-

open this case, which this Court granted. The Parties then briefed the petition for judicial review on the merits. A hearing was held on September 23, 2014.

On October 17, 2014, this Court issued an order in the Clark Fork Coalition's favor. This Court: (a) declared that DNRC's rule defining "combined appropriation" conflicts with the Water Use Act and invalidated the rule; (b) ordered, pending further action of DNRC, the reinstatement of DNRC's 1987 rule defining the term; and (c) ordered DNRC to conduct future rulemaking consistent with the Court's order.

On November 6, 2014, judgment in the Clark Fork Coalition's favor was entered in this case and a 14-day deadline for any motions for attorneys' fees, costs, and other related nontaxable expense was set (deadlines for filing briefs in support and opposition to the motion were to be set by the scheduling clerk). On November 19, 2014, the Clark Fork Coalition filed a motion for attorneys' fees and costs. On December 11, 2014, this Court issued an order setting deadlines for filing briefs in support and in opposition to the Clark Fork Coalition's motion. This Court limited briefing to the initial issue of whether the Clark Fork Coalition is entitled to attorneys' fees and costs in this matter.

ARGUMENT

I. The Clark Fork Coalition is entitled to an award of reasonable attorneys' fees and costs under the private attorney general doctrine.

The Clark Fork Coalition respectfully requests an award of reasonable attorneys' fees and costs under the private attorney general doctrine. The Montana Supreme Court adopted the private attorney general doctrine as an "equitable exception" to the "American Rule" that litigants generally bear their own fees and costs absent a specific contractual or statutory provision. *Montanans for the Responsible Use of the School Trust v. Montana ("Montrust")*, 1999 MT 263, ¶ 67, 296 Mont. 402, 989 P.2d 800 (adopting the private attorney general doctrine and test set forth in *Serrano v. Priest*

(1977), 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303).

As the Montana Supreme Court has explained, the private attorney general doctrine applies "when the government fails to properly enforce interests which are significant to its citizens." *Montrust*, ¶ 64 (citation omitted); *see also W. Tradition P'ship v. Att'y Gen. of Mont.*, 2012 MT 271, ¶ 13, 367 Mont. 112, 291 P.3d 545 (same). In "the complex society in which we live it frequently occurs that citizens in great numbers and across the broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts." *Serrano*, 569 P.2d at 1313. Although there are government offices and institutions "whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative." *Id.* "Because the issues involved in such litigation are often extremely complex and their presentation time-consuming and costly, the availability of representation of such public interests by private attorneys acting pro bono publico is limited." *Id.*

The private attorney general doctrine, therefore, exists to award "substantial attorneys fees to those public-interest litigants and their attorneys (whether private attorneys acting pro bono publico or members of 'public interest' law firms) who are successful in such cases, to the end that support may be provided for the representation of interests of similar character in future litigation." *Id.*; *see also Montrust*, ¶ 67 (adopting the reasoning and private attorney general theory set forth in *Serrano*).

In Montana, courts weigh four factors in deciding whether to grant private attorney general fees: (1) the strength or societal importance of the public policy

vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; (3) the number of people standing to benefit from the decision; and (4) whether an award of fees would be unjust under the circumstances. *Bitterroot River Protective Assoc. v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶ 20, 49 359 Mont. 393, 251 P.3d 131. Whether a party satisfies these factors is within the district court's discretion. *Montrust*, ¶ 68; *see also Hernandez v. Bd. of County Comm'rs*, 2008 MT 251, ¶ 30, 345 Mont. 1, 189 P. 3d 638 (same); *Bitterroot*, ¶ 10 (same). In this case, all four factors favor the Clark Fork Coalition.

A. Protecting Montana's water resource and senior water rights are public policies of great importance enshrined in the Montana Constitution and protected by the Water Use Act.

The first factor is the strength or societal importance of the public policy vindicated by the litigation. *Bitterroot*, ¶ 20 (citations omitted). The courts have cautioned that this first factor "not become for courts assessments of the relative strength or weakness of public policies furthered by their decisions . . . a role closely approaching that of the legislative function." *Id.* at ¶ 23 (citing *Serrano*, 569 P.2d at 1314 and *Montrust*, ¶ 16) (quotations omitted). For this reason, the Montana Supreme Court has adopted the California Supreme Court's rationale in *Serrano* and only awards private attorney general fees "in litigation vindicating constitutional interests." *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085 (citing *Montrust*, ¶ 66).

Notably, however, a case need not involve a constitutional challenge in order to vindicate constitutional interests and justify an award of private attorney general fees. *Bitterroot*, ¶ 25. On the contrary, cases involving issues of statutory interpretation—like this case—qualify for an award of private attorney general fees where constitutional concerns are "integrated into the rationale underlying the decision." *Bitterroot*, ¶ 25; *see also Serrano*, 569 P.2d at 1315 (private attorney general fees are proper where the public

policy advanced by the litigation is grounded in the constitution). Indeed, since *Serrano*, the private attorney general doctrine has evolved to vindicate important statutory as well as constitutional interests, including natural resource protections provided by state law. *See Braude v. Automobile Club of Southern Cal.*, 178 Cal. App. 3d 994, 1010-12, 223 Cal. Rptr. 914 (5th Dist. 1986). The court's reasoning in *Braude* is persuasive: "The [private attorney general] doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." *Id.* at 1010.

For example, in *Bitterroot*—a case of statutory interpretation—the Montana Supreme Court deemed an award of private attorney general fees appropriate because the statute at issue implemented constitutional provisions; the Court's interpretation of the statute was premised on its constitutional purpose; and constitutional concerns were integrated into the Court's rationale. *Id.* at ¶¶ 21-25. The same is true here.

The permitting and exempt well provisions at issue in this case implement Article IX of the Montana Constitution, as this Court recognized. *See* Order at 5. Article IX provides, in section 1, that the state shall "maintain and improve a clean and healthful environment in Montana" and prevent the "unreasonable depletion and degradation of natural resources"; in section 3(3), that Montana's waters, in all their varied forms, belong to the citizens of the State; in section 3(1), that "existing rights" in the use of water should be protected; and, in section 3(4), that the legislature shall "provide for the administration, control, and regulation" of Montana's water.

The permitting provisions at issue in this case provide for the "administration, control, and regulation" of water, per Article IX, section 3(4), by making newly acquired

rights "definite, certain, and public in record." *See* Order at 7 (quoting Albert B. Stone, *Montana Water Rights - A New Opportunity*, 34 Mont. L. Rev. 57, 72 (1973) (hereinafter "Stone")). The permitting provisions also protect existing uses and safeguard Montana's water resource, per Article IX, sections 1, 3(1), and 3(3), including by requiring DNRC to consider the "311 criteria" (e.g., the physical and legal availability of water, current demands on the water source, and adverse impacts to existing rights). § 85-2-311, MCA; *see also* § 85-2-360, MCA (requirements for permits in closed basins).

This Court interpreted the permitting provisions of the Act as animated by its constitutional purposes. For example, the Court detailed the "salutary purposes" of §§ 85-2-311, MCA, 85-2-360, MCA, and 85-2-302, MCA, and grounded those purposes in the constitutional protections for existing rights and the public interest. Order at 5-7 (citing Article IX, section 3). In turn, the Court narrowly interpreted the exempt well statute, § 85-2-306(3)(a), so as to avoid defeating these purposes. Order at 7.

This Court's invalidation of DNRC's narrow definition—and thus its vindication of public policies established by the Montana Constitution—has great societal importance: it protects not just the Clark Fork Coalition but all water rights holders in Montana and Montana's precious water resource. Prior to the Court's order, there was no mechanism in place to protect senior water rights holders from encroachment, or Montana's water resource from depletion, by exempt wells. Order at 6, 10 (citing AR 1-13 at 1); *see also* AR 1-17 (discussing impacts of subdivision using exempt wells on existing rights); AR 1-20 (same).

This concern was "elevated as exempt wells [were] being used for large, relatively dense subdivision development in closed basins." Order at 8 (citing AR 1-14 at 1). Indeed, under DNRC's 1993 rule, assuming the current pace of growth continued,

30,000 new exempt wells could have been added in closed basins during the next 20 years, and 70,000 new exempt wells could have been added in the next 45 years. AR 1-14 at 1; *see also* AR 1-37 at 3-4 (describing major subdivision for 130 homes near Manhattan, Montana, utilizing exempt wells); AR 1-30 at 9 (describing impacts from Hyalite Creek subdivision); AR 1-20 at ¶ 4 (describing impacts to existing rights from sixty-five unit subdivision using exempt wells); AR -23 (same).

DNRC's 1993 rule arbitrarily required one large well to go through permitting, while exempting multiple smaller wells with the same impact to the aquifer. *See* AR 1-12 at 4 (DNRC's rule created a loophole with "manifestly absurd results"). As DNRC admits, "100 individual wells serving a subdivision will have the same magnitude of depletion as one or more larger non-exempt wells for a public water system serving the same number of households from the same aquifer at that location." Ex. 1-14 at 2 (emphasis added). "Net depletion in both cases depends on the amount of water consumed and aquifer conditions," not on the physical design of the well system or whether wells are connected. *Id.* FWP's experience is also instructive. According to FWP, a major water rights holder with instream flow reservations on 372 river segments, "exempt wells have the same potential for adverse effect to [FWP's] instream water rights as permitted wells." AR 1-37 at 2. Both "diminish surface flow." *Id.*; *see also* AR 1-14 at 3 (Gallatin River flow depleted by exempt wells).

This Court's order closed the exempt well loophole and thus vindicated important constitutional interests by protecting Montana's precious water resource from undue degradation and depletion and protecting existing water rights holders, especially in closed basins. This case, therefore, is similar to *Bitterroot* and falls within the parameters of the private attorney general doctrine.

B. Private enforcement against DNRC was necessary and the burden of that enforcement on the Clark Fork Coalition was great.

The second factor is the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff. *Bitterroot*, ¶ 20. Where, as in this case, "a private suit is brought against a government agency or official, the necessity of private enforcement is often obvious." *Comm. to Defend Reproductive Rights v. A Free Pregnancy Ctr.* (1991) 229 Cal. App. 3d 633, 639.

The important public constitutional interests at issue in this case would not have been vindicated without the Clark Fork Coalition's private enforcement action. As the record reveals, DNRC resisted the necessary changes to its narrow definition of "combined appropriation" at every step of the way. The Clark Fork Coalition gave DNRC ample opportunity to fix the problem *prior* filing this civil action. DNRC refused to make the change at the administrative level—after reviewing the Clark Fork Coalition's formal petition—because it deemed the rule consistent with the Water Use Act. Very little to no rationale was provided by DNRC even though the Clark Fork Coalition provided detailed arguments and evidence (including the complete legislative and rulemaking history) to DNRC and even though the petition received overwhelming support from members of the public, including DNRC's sister agency, FWP.

DNRC also refused to make changes to its narrow definition of "combined appropriation" after reaching a stipulated agreement to do so with the Clark Fork Coalition. As discussed *supra*, after three years of delay and modifications to the stipulated agreement, DNRC decided to walk away in response to an objection from the EQC. The Clark Fork Coalition was therefore compelled to withdraw the stipulated agreement, re-open the case, and brief the matter on the merits. This litigation, therefore, was absolutely necessary to vindicate the public policies protected by the Montana

Constitution discussed above.

Moreover, as will be evidenced by Clark Fork Coalition's time sheets (if this Court determines the Clark Fork Coalition is entitled to an award of fees and costs), pursuing this matter over the last six years imposed a heavy burden on the Clark Fork Coalition and its public-interest attorneys at the Western Environmental Law Center. Work on this matter required: (a) researching and understanding how exempt wells are being used in Montana and how DNRC's narrow definition of "combined appropriation" creates a loophole for large consumptive water users; (b) extensive research on the legislative and rulemaking history of the Water Use Act and the term "combined appropriation"; (c) meeting with various organizations, stakeholders, and individuals working on water issues in Montana; (d) reviewing the best available science and reports on the subject and making arrangements to hire an expert; (e) drafting a formal petition to DNRC and compiling over twenty exhibits to build an administrative record; (f) briefing and arguing the matter at the administrative level; (g) attending numerous WPIC hearings and meetings to monitor compliance and updates to the obligations included in the stipulated agreement; (h) modifying the stipulated agreement (on two occasions) and corresponding and meeting with DNRC regarding such modifications; and (i) briefing and arguing this matter at the district court level. This was an extremely time consuming, costly, but necessary undertaking.

C. All Montanans benefit from this Court's order.

The third factor is the number of people standing to benefit from the decision. As discussed *supra*, this Court's order benefits existing water rights holders and all Montanans who use, enjoy, and rely on our waters (both surface and ground) by requiring water permits (and thus application of the Water Use Act's "311 criteria") for all large consumptive water uses.

All new appropriations of water regardless of the design of the well system—including 50, 100, and 200 lot subdivisions—that exceed the 10 afy threshold must now go through permitting to ensure water is both physically and legally available. This change will benefit all Montanans by ensuring our water resources are protected, conserved, and properly managed. *See* §§ 85-1-101, 85-2-101, MCA. This is especially important in Montana's closed basins, including the Flathead, Teton, Bitterroot, Upper Clark Fork, Upper Missouri, and Jefferson and Madison basins, where water is already over appropriated.

The Court's order, for example, protects farmers, ranchers, and homeowners with longstanding senior water rights. All new water users utilizing multiple wells for the same project or development must now: (1) provide notice of their permit applications, so that existing users have an opportunity to comment and take action to protect their rights; and (2) prove by a preponderance of the evidence that their proposed uses will not adversely affect existing rights. Order at 6 (citing §§ 85-2-307, MCA, 85-2-311, MCA). These procedural safeguards, which now apply to all large consumptive users (regardless of whether they are using one single or multiple unconnected wells), ensure that existing rights are proactively and sufficiently protected from harm. This is important, because without it, existing water rights holders are left with little to no options to protect and defend their existing rights.[4]

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[4] DNRC does not have the power to ask juniors to stop using water. AR 1-11 at 20. Nor can a senior rights holder seek relief from the water commissioners. *See id.*; AR 1-14 at 1. Senior rights holders could technically file a court action against junior users utilizing exempt wells but doing so against dozens or hundreds of users in a subdivision is impractical, time consuming, and expensive. As recognized by one court, a senior rights holder should not "have to suffer actual impairment [from exempt wells]. . . It will do little good for [the senior water rights holder] . . . to sit idly and wait for actual impairment. When the water is gone it will be too late." AR 1-9 at ¶ 21; *see also* AR 1-11

The Court's order also benefits municipal water providers and the city residents they serve, including Mountain Water Company and Missoula residents. As articulated by Mountain Water, prior to the court's decision, the Missoula aquifer was being punctured by innumerable "free" exempt wells without any oversight. *See* Mountain Water Company's Response at 5. Meanwhile, if Mountain Water wished to develop a new well or move an existing well, it faced tens or hundreds of thousands of dollars in costs—costs that would be passed on to the Missoula community. *See id.* at 4, 6. By closing the exempt well loophole created by DNRC's narrow definition of "combined appropriation," the Court's order ensures: (1) that the true costs of new wells are internalized by those drilling the wells, not externalized to the community; and (2) that large water withdrawals are on record, thus giving municipal providers a clear picture of the available water in the aquifer, and allowing the provider to plan for future growth. *See id.* at 6.

As mentioned *supra*, FWP, which has 106 instream "Murphy Rights" on twelve Montana streams and instream flow reservations on 372 stream segments in the Yellowstone, Missouri, and Lower Missouri drainages, also benefits from this Court's order. AR 1-37. These instream rights safeguard Montana's blue-ribbon trout streams for all citizens of Montana. AR 1-30 at 4. Even small additional depletions in these streams can have dramatic impacts on temperature-sensitive trout. AR 1-11 at 17. The Court's order ensures that large consumptive users masquerading as small rural uses do not damage Montana's trout streams, a protection which in turn benefits all Montanans.

The Court's order not only safeguards existing rights; it also protects the public's interest in Montana's waters, which are a public resource. Montana's Constitution

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at 20 ("a person cannot see the point of no return [in terms of impacts] until that point has passed.").

provides: "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Article IX, section 3. Accordingly, the public interest in Montana's waters should be taken into account "each time a prospective user seeks to have a part of this property of the state committed to his use." Order at 7 (quoting Stone). The Court's order does this by ensuring that the public's interest in Montana's waters (both quality and quantity) are considered each time a large consumptive user seeks to appropriate our waters. In order to obtain a water permit, the applicant must demonstrate that water is physically available, § 85-2-311(1)(a)(i), MCA, and that water quality will not be damaged, § 85-2-311(f)-(h), MCA. This "look before you leap" approach benefits all Montanans.

Finally, the Court's order closing the exempt well loophole will also benefit all Montanans by encouraging smart growth throughout the State. There is now incentive to place new projects and developments where: (1) water is both legally and physically available; (2) where water can be legally purchased from willing sellers; or (3) where use of public water systems is available. *See* AR 1-16 at 2 (public water systems are more cost-effective in the long run, and the savings benefit homeowners, as well as developers); AR 1-12 at 2-3 (DNRC's old definition of "combined appropriation" created a loophole that told the market to develop lands away from public water systems by making developments that rely upon exempt wells essentially free and fast).

Some have suggested that closing the exempt well loophole and requiring water permits for large consumptive water uses like subdivisions would prevent or stifle growth and development in Montana. This is incorrect. The Court's order, which effectively closed the exempt well loophole, allows the Water Use Act's permitting process to do its job, i.e., to identify likely future water conflicts and incentivize

developers to take proactive steps to avoid those conflicts. New water users arriving in already stressed basins, for instance, would be spurred to think flexibly about sourcing their water by purchasing existing water rights from willing sellers, developing community water projects, or tapping into preexisting municipal water systems. Meanwhile, land adjacent to existing public water systems or land that already has sufficient water availability would be properly valued and targeted for development.

In sum, this Court's order closing the exempt well loophole and requiring permits for all large consumptive water uses (regardless of whether or not the wells used to appropriate the water are "physically manifold" together) supports the wise development and conservation of our waters, which benefits all Montanans. *See* §§ 85-1-101, 85-2-101, MCA.

D. Ordering DNRC to pay the Clark Fork Coalition's fees for bringing a case that vindicated important public policies, benefitted all Montanans, and ensured state agency compliance with state law, is not unjust.

The fourth factor is whether it is equitable to require payment of fees under the circumstances of the case. *Bitterroot*, ¶ 20 (citing *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576). Here, the Clark Fork Coalition is only seeking reimbursement for fees and costs from DNRC—a state agency entrusted with managing our water resources—for non-compliance with an important provision of state law. The Clark Fork Coalition is not seeking reimbursement from Respondent-Intervenors which, arguably, would be unjust given their limited role (up to this point) in this case.

Requiring DNRC to pay private attorney general fees in this case is not unjust. As discussed *supra*, the Clark Fork Coalition gave DNRC ample opportunity to fix the problem. Instead of going straight to the courthouse, the Clark Fork Coalition submitted a formal petition to DNRC detailing why its narrow definition of "combined appropriation" conflicted with the Water Use Act and needed to be amended. The Clark

Fork Coalition also provided DNRC a complete copy of the Water Use Act's legislative history, *see* AR 1-8, and DNRC's rulemaking history, *see* AR 1-7. DNRC denied the petition. After filing this civil action, the Clark Fork Coalition entered into a stipulated agreement giving DNRC a reasonable amount of time to bring its narrow definition into compliance with the Water Use Act. The Clark Fork Coalition even agreed to waive all claims for attorneys fees and costs in the stipulated agreement. But after three years of extensions, DNRC abandoned the stipulated agreement, compelling the Clark Fork Coalition to re-open the case. DNRC chose to arbitrarily defend its 1993 rule defining "combined appropriation" even though the agency was aware that the rule was too narrow to meet the purpose of the Water Use Act.

When viewed in this context, it is not unjust to award the Clark Fork Coalition private attorney general fees. In this case, as in *Bitterroot* and *Montrust,* the Clark Fork Coalition "successfully litigated issues of importance to all Montanans and incurred significant legal costs." *Montrust,* ¶ 69. To deny reasonable attorneys' fees and force the Clark Fork Coalition to bear the cost of vindicating the public interest would "ignore recognized principles" and result in "substantial injustice." *Id.* (citation omitted).

Indeed, unlike the situation in *Dearborn Drainage Area*, 240 Mont. 39, 782 P. 2d 898 (1989), this case is not an "ordinary water rights dispute" where DNRC complied with its statutory mandate and represented the public's interest, which the Clark Fork Coalition agrees would make the payment of attorneys' fees unjust, *see id.* 240 Mont. at 43, 782 P.2d at 900. Instead, in this case, DNRC violated its statutory duty under the Water Use Act to protect existing rights and abandoned the public interest by narrowly defining "combined appropriation" and aggressively defending the definition in court (even though DNRC knew the definition was too narrow).

This case also differs from *Finke*, *American Cancer Society*, and *Western*

Tradition Partnership, all of which involved the defense of separate, legislative enactments. In *Finke*, for example, the plaintiffs sought private attorney general fees against Yellowstone County for the unconstitutional actions of the Montana legislature, which the court appropriately deemed "unjust." *Finke*, ¶ 10. Likewise, in *Western Tradition Parternship*, the plaintiffs sought private attorney general fees against the State for defending a statute "with deep roots" in Montana history, *see W. Tradition P'ship*, ¶ 20. This case is very different.

Here, the Clark Fork Coalition is seeking reimbursement for reasonable attorneys' fees and costs from DNRC not for the actions of others (the Montana legislature) but for its own actions, i.e., for adopting and defending a rule that undermined the Montana Water Use Act. DNRC could have fixed the problem during the administrative process or complied with the stipulated agreement it reached with the Clark Fork Coaliton after the case was filed. Instead, DNRC denied the petition, walked away from the stipulated agreement, and chose to aggressively defend its narrow definition of "combined appropriation" even though it was well aware the definition was too narrow to serve the purposes of the Water Use Act. *See Stipulation and Order of Dismissal* (Nov. 10, 2010). Given these unique circumstances, it is equitable to award the Clark Fork Coalition private attorney general fees.

CONCLUSION

For the forgoing reasons, the Clark Fork Coalition respectfully requests this Court issue an order: (a) declaring the Clark Fork Coalition is entitled to an award of reasonable attorneys' fees and costs in this matter under the private attorney general doctrine; and (b) setting a briefing schedule for resolving the reasonableness of the amount of attorneys' fees and costs sought in this case.

Respectfully submitted this 23rd day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2015, I sent, via U.S. Mail, a copy of this filing to all of counsel of record in this matter.

Laura King