IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No.: DA 15-0469

JACK AND BONNIE MARTINELL, HUSBAND AND WIFE; THOMAS AND HAZEL MCDOWALL, HUSBAND AND WIFE; THOMAS SHAFFREY; AND BARRETT AND KARI KAISER, HUSBAND AND WIFE,

PLAINTIFFS-APPELLANTS,

v.

BOARD OF COUNTY COMMISSIONERS OF CARBON COUNTY, THE GOVERNING BODY OF THE COUNTY OF CARBON, ACTING BY AND THROUGH JOHN GREWELL, JOHN PRINKKI, AND DOUG TUCKER; DOUG AND DENISE AISENBREY, HUSBAND AND WIFE; WILLIS AND THERESE HERDEN, HUSBAND AND WIFE; DUANE AND DENA HERGENRIDER, HUSBAND AND WIFE; KAREN HERGENRIDER; RUDOLPH HERGENRIDER; SHELLEY BAKICH LECHNER, AS PERSONAL REPRESENTATIVE OF THE MILOVAN BAKICH ESTATE; AND STEVEN AND MONICA THUESEN, HUSBAND AND WIFE,

DEFENDANTS-APPELLEES.

BRIEF OF APPELLEE
BOARD OF COUNTY COMMISSIONERS OF CARBON COUNTY

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I. STATEMENT OF THE ISSUE

1. Did the District Court properly dismiss Appellants' Complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), M.R.Civ.P.?

II. STATEMENT OF THE CASE

A. Nature of the Case

This matter is the appeal of the Twenty-Second Judicial District Court's decision to dismiss Plaintiffs/Appellants Jack and Bonnie Martinell, Thomas and Hazel McDowall, Thomas Shaffrey, and Barrett and Kari Kaiser's (jointly hereinafter, "Appellants") Complaint for Declaratory Judgment on Motion of Defendants Doug and Denise Aisenbrey, Willis and Therese Herden, Duane and Dena Hergenrider, Karen Hergenrider, Rudolph Hergenrider, Shelley Bakich Lechner, as personal representative of the Milovan Bakich estate, and Steven and Monica Thuesen (jointly hereinafter, "Neighbors") for failure to state a claim upon which relief may be granted by the Court pursuant to Rule 12(b)(6), M.R.Civ.P., wherein the Court found that Board of County Commissioners of Carbon County (hereinafter, "Commissioners") improperly waived resolution requirements predicating consideration of Appellants' Petition, making the decision void.

B. Statement of Facts

In 2009, the Commissioners adopted Resolution 2009-16, which sets forth procedural and substantive requirements for "Part One" zoning petitions. *See* Exhibit B to Appellants' Appendix.

On November 20, 2014, petitioners, including Appellants, submitted a "Part One" petition to create a "Silvertip Zoning District" (hereinafter, "Petition"). Order, Dkt. 35, at 3. The Commissioners considered the Petition on December 15, 2014, and entertained statements both for and against the proposed Silvertip Zoning District. Order at 2-3. After such discussion, at the urging of petitioners' counsel, the Commissioners adopted a resolution of intent to grant the Petition based on a finding of public interest and convenience, and determined to reconvene on January 15, 2015 to address protests and take further action on the resolution of intent. Order, Dkt. 35, at 4. Counsel for petitioners assured the Commission that they were in no way obligated to ultimately create the zoning district. *See* Appellants' Appendix D. To that end, Commissioners Grewell and Tucker articulated that their vote did not obligate them to ultimately endorse the creation of a Part One zoning District. *Id.*

On January 15, 2015, the Commissioners met to take final action on the Petition. At that hearing, the Commissioners noted that all parties had failed to

adhere to Resolution 2009-16. Also at that meeting, the Commissioners determined that compliance with the Resolution was not required, rescinded their earlier finding of public interest and convenience, and voted against the establishment of the proposed Silvertip Zoning District. Order, Dkt. 35, at pp. 4-5.

In response, Appellants, representing some but not all petitioners, filed their Complaint for Declaratory Judgment in the Twenty Second Judicial District Court, seeking a determination that the Commissioners' actions were arbitrary and capricious by dint of their reliance on the purportedly unconstitutional citizen protest provisions of Mont. Code Ann. § 76-2-101(5) in denying the Petition. *See* Complaint, Dkt. 1.

In response, both Neighbors and Commissioners moved to dismiss the Complaint pursuant to Rule 12(b)(6), M.R.Civ.P. *See* Dkt. 23, 27, 31, 32, 33. The District Court agreed with an argument proffered by Neighbors that the Commissioners improperly waived the requirements of Resolution No. 2009-16 in deciding upon the Petition, to the substantial prejudice of Neighbors, making the decision void, and thus making the Complaint unreviewable for failure to state a claim upon which relief could be granted. *See* Order, Dkt. 35.

The instant appeal followed thereafter.

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C. Standard of Review

A District Court's determination that a complaint fails to state a claim upon which relief may be granted is a conclusion of law, which the Supreme Court reviews *de novo* to determine whether the court's conclusion of law is correct. *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997) (citations omitted).

A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true. *Dukes v. Sirius Const., Inc.*, 2003 MT 152, ¶ 11, 316 Mont. 226, 73 P.3d 781 (citation omitted)

III. SUMMARY OF ARGUMENT

The District Court found that the Commissioners improperly waived the requirements of Resolution No. 2009-16, causing substantial prejudice to Neighbors and rendering Commissioners' decision on the Petition arbitrary and capricious, and thus void. Appellants do not disagree that waiver can only occur if a party is not substantially prejudiced, and offer no reasons why they believe Neighbors were not substantially prejudiced. Accordingly, the District Court's dismissal must stand. If the Court determines otherwise, it should remand to the

District Court for consideration of alternate bases, or find that the alternate bases argued against by Appellant mandate dismissal for failure to state a claim upon which relief may be granted, as the Commissioners' decision is not reviewable, as zoning would not apply to agricultural lands in any case, and as the relief sought cannot be granted by the Court.

Appellants invite this Court to consider the merits of constitutional arguments not considered by the District Court, and not argued by the parties before the District Court. Such consideration would be entirely improper without District Court consideration, and in any case judicial economy favors the development of a record at the District Court before consideration of the issue by the Supreme Court. Moreover, short-circuiting the judicial process would set a bad precedent. Should the Court decide to entertain Appellants' request, Commissioners join in the arguments of Neighbors in opposition thereto.

IV. ARGUMENT

A. Appellants fail to offer any reason to reverse the District Court's finding that there was an impermissible waiver due to substantial prejudice

Appellants misstate the content and findings of the District Court's Order, claiming that the District Court found that "the Commissioners were powerless to waive the requirements of Resolution No. 2009-16." Brief at 19. In reality, the District Court found, *as Appellants had argued before it*, that the Commission *had*

waived compliance with Resolution No. 2009-16. *See* Order, Dkt. 35, at p. 8, ll. 18-19. That said, even with this finding, the District Court nonetheless found that the Complaint failed to state a basis upon which relief could be granted, because such waiver was impermissible in light of the fact that it caused substantial prejudice to neighbors, making any decision by the Commissioners arbitrary and capricious, and therefore void. Order, Dkt. 35, at pp. 8-11.

The very case relied on by Appellants supports the District Court's conclusion. *See American Farm Lines v. Black Ball Freight Serv.,* 397 U.S. 532, 539 (1970) (allowing waiver of procedural requirements provided such action will not cause "substantial prejudice" to any party.). The District Court found that the Commissioners had waived, and that Neighbors were substantially prejudiced by any waiver, making Commissioners' actions arbitrary and capricious, and therefore void. As a void decision, the District Court found that Appellants could not seek relief therefrom, making their claim fail for failure to state a claim upon which relief could be granted. Appellants implicitly accept that Neighbors were substantially prejudiced, as there is nothing in their briefing arguing that no such prejudice existed.

Instead of focusing on the question of whether Neighbors were prejudiced, Appellants argue only that they are harmed by the District Court's decision. It

must be noted that the District Court's finding did not leave Appellants in the perilous position they claim—they have recourse, as the District Court specifically found that the Appellants could re-submit a valid application to the Commission, and appeal therefrom if a contrary decision was reached. Order, Dkt. 35, at 11. Appellants are thus not without redress. Appellants' unwillingness to take this course of action demonstrates that Part One zoning is not, in reality, the relief they seek.

B. Only one portion of the Neighbors' Rule 12(b)(6) Motion is at issue on appeal

As Appellants stated in their Notice of Appeal, Appellants "appeal . . . from the Order on Defendants' Motion to Dismiss, entered . . . on the 8th day of July 2015." That Order, in turn, dismissed Appellants' Complaint on the basis of one argument contained in the Neighbors' Motion to dismiss, without addressing the other bases for dismissal contained therein. *See* Order, Dkt. 35; Neighbors' *Motion to Dismiss for Failure to State a Claim Pursuant to M.R.Civ.P. 12(b)(6)*, Dkt. 27. The District Court did not rule on the Commissioners' Motion to Dismiss, as the Court found such argument moot in light of the dismissal on other grounds. *Order,* Dkt. 35.

Here, although Appellants include argument as to why they claim *some* of the bases for dismissal are inapposite, no argument is provided regarding other

bases for dismissal. *Compare* Brief of Appellants at pp. 29-34 (arguing against three alternate bases for dismissal raised by the Neighbors and Commissioners); Neighbors' *Motion to Dismiss for Failure to State a Claim Pursuant to M.R.Civ.P. 12(b)(6)*, Dkt. 27 (raising four alternate bases for dismissal, beyond that upon which the Court granted dismissal); Commissioners' *Motion to Dismiss Pursuant to Rule M.R.Civ.P. 12(b)(6) and Brief in Support*, Dkt. 23 (discussing ten bases for dismissal).

As this Court has stated time and again, a District Court's conclusion that a complaint fails to state a claim for which relief was available is a conclusion of law, which is reviewed by this Court to determine the correctness of that interpretation of the law. *Dukes, supra,* at ¶ 11 (citation omitted). Any issues not reached by the District Court should be remanded for further consideration. *See e.g. Kulko v. Davail, Inc.*, 2015 MT 340, _ Mont. _, _ P.3d _ (reversing district court motion to dismiss, and remanding case for further proceedings, including consideration of other pending motions); *Dukes, supra,* at ¶ 27 (remanding for consideration before District Court question of alternate basis for determination that claim was valid).

Here, although there were multiple alternate bases suggested by Neighbors and Commissioners for granting a Motion to Dismiss, the District Court ruled upon

only one basis, ignoring others and finding the Commissioners' Motion to Dismiss wholly moot as a result. *Order,* Dkt. 35. This Court may review that decision for soundness, but, in the event the Court determines that Neighbors' Rule 12 Motion was improperly granted, it should remand to the District Court for a determination regarding the alternate bases not previously considered. This is especially of import in this case, as the Appellants have not even argued against all bases for grant of dismissal proffered by Neighbors and Commissioners at the District Court.

C. If the Court considers alternate bases for dismissal argued against by Appellants, the Court should find dismissal warranted and necessary

Moreover, even if the Court were to consider the limited alternate bases argued against by Appellants, such bases would provide adequate alternate reason to grant the Commissioners' and Neighbors' Motions to Dismiss.

1. The zoning decision is not reviewable

    a. The Commissioners did not act arbitrarily or capriciously

At its most basic, Appellants' Complaint seeks declaratory rulings from the District Court regarding the propriety of the Commissioners' actions in relation to a zoning decision. However, the Commissioners' actions in denying a Part One zoning request is not reviewable. Mont. Code Ann. § 76-2-101 provides that, after receiving a valid petition, the "commissioners *may* create a planning and zoning

district." There is no mandate that the Commissioners "shall" or "must" create a district.

"When a board of county commissioners exercises power within the limits of the statute granting it and with sound discretion, such exercise is not subject to review by the courts." *Sorenson v. Board of County Comm'rs of Teton County*, 176 Mont. 232, 236, 577 P.2d 394, 396 (1978), *citing Read v. Stephens*, 121 Mont. 508, 512, 513, 193 P.2d 626 (1948). Thus, absent a failure to exercise discretion—in other words, an action that was arbitrary and capricious—a board of commissioners' actions are not subject to review.

Two of Appellants' three bases for their argument that the Commissioners' actions were arbitrary and capricious is their view that (1) the Commissioners' relied[1] on claimed-unconstitutional provisions, and (2) if that were the case, the Commissioners ignored their constitutional right to a clean and healthful environment. *See* Complaint at ¶¶ 57-60; 68-72. Of course, statutes are presumed to be constitutional. *Reesor v. Montana State Fund*, 2004 MT 370, ¶ 6, 325 Mont. 1, 103 P.3d 1019 (citation omitted). A county may only act consistently with state law. Mont. Code Ann. § 7-1-113. As the Court has previously held, "it is . . . not the County Commissioners' function to ignore the plain provisions of a duly

[1] This fact is in dispute; that said, in the context of a 12(b)(6) Motion, Commissioners respect that all facts are taken as true. *See* Standard of Review, *supra*.

enacted statute." *Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201, ¶ 25, 311 Mont. 194, 53 P.3d 1268. In a similar vein, the Court has held that "[a]bsent a successful constitutional challenge to [a] statute, it is our duty to apply the statute according to its terms." *State v. Weaver*, 198 MT 167, ¶ 68, 290 Mont. 58, 964 P.2d 713.

Even taking all of Appellants' statements in their Complaint as true, that is exactly what they allege the Commission did here—according to Appellants, the Commissioners relied upon a duly enacted statute, the protest provision, which had not been found unconstitutional, to deny Appellants' Petition. *See* Complaint, Dkt. 1. This action simply cannot give rise to a complaint that such action was arbitrary or capricious, and without such a basis the Court had no power to review the Commissioners' actions, and as such Counts I and III of the Complaint should have been dismissed for failure to state a claim upon which relief could be granted.

The remaining cause of action, Appellants' Second Cause, should likewise be dismissed. In that cause of action, Appellants allege that the Commissioners acted arbitrarily and capriciously in failing to articulate a rationale—beyond the protest provision—for withdrawal of their previous finding of public interest. *See* Complaint ¶¶ 61-66. As described above, it would be wholly appropriate for the Commissioners to rely upon a duly enacted statute. As such, their determination to

withdraw a finding on such basis (if that is, indeed, the case) could not be arbitrary and capricious, and no further rationale would be necessary. As such, Count II should likewise have been dismissed for failure to state a claim upon which relief could be granted, as the facts alleged by Appellants amply demonstrate that the Commissioners' actions were not arbitrary and capricious, and thus were not subject to Court review.

b. As a legislative act, the Commissioners' decision is not reviewable

In addition, the Commissioners' decisions related to Appellants' Petition are not reviewable as they are legislative acts. Mont. Code Ann. § 2-9-111(2) establishes that "a governmental entity is immune from suit for a legislative act or omission, or any member or staff of the legislative body, engaged in legislative acts." A "governmental entity" includes counties and local governmental entities. Mont. Code Ann. § 2-9-111(1)(a). Zoning actions are legislative in character. *Phillips v. City of Whitefish,* 2014 MT 186, ¶ 41, 375 Mont. 456, 330 P.3d 442; *see also, e.g. Plains Grains Ltd. Partnership v. Board of County Comm'rs of Cascade County,* 2010 MT 155, ¶ 21, 357 Mont. 61, 238 P.3d 332 ("zoning designations are legislative acts"); *North 93 Neighbors, Inc. v. Board of County Comm'rs of Flathead County,* 2006 MT 132,¶ 18, 332 Mont. 327, 137 P.3d 557 ("Amending a growth policy or a zoning designation constitutes a legislative act.").

Here, the Commissioners are statutorily empowered with the discretionary legislative authority to establish Part One zoning districts. Mont. Code Ann. § 76-2-101. As Appellants allege in their Complaint, the Commissioners utilized their legislative discretion, based on public input, to deny Appellants' Petition. Because such action was legislative in nature, no suit can be brought against the Commissioners in relation thereto, and dismissal for failure to state a cognizable claim against Commissioners would be mandated.

2. The Part One Zoning Sought is Prohibited by Statute

Appellants' agricultural land is exempt from Part One zoning, making the relief sought by Appellants in their Complaint futile—the Court could not in any case grant the relief actually sought by Appellants. Mont. Code Ann. § 76-2-109 provides, in whole: "No planning district or recommendations adopted under this part shall regulate lands used for grazing, horticulture, agriculture, or the growing of timber." By their own admission, Appellants are seeking to regulate agricultural lands to "protect their health, property values, rural lifestyle, farming and ranching traditions, water and soil, and public infrastructure through reasonable regulation of oil and gas production" Appellants' Brief at 32, Complaint at ¶¶ 4, 31. Because agricultural lands are not regulated under Mont. Code Ann. § 76-2-101, the zoning sought by Petitioners, including Appellants, could not, even if their Petition were

granted, and even if the zoning commission voted to enact Part One zoning, provide any protections to their admittedly agricultural land.

3. The Court cannot order the ultimate relief sought by Appellants

Appellants concede that the relief they seek would not necessarily be granted by any zoning rules ultimately enacted, making their entire Complaint moot. Specifically, Appellants stated that they seek "to protect their land and livelihoods from the deleterious impacts of oil and gas drilling, including the particularly harmful impacts of hydraulic fracking." Complaint at ¶ 1. If Part One zoning is undertaken, the Commissioners are directed merely to create and appoint a seven person planning and zoning commission. Mont. Code Ann. § 76-2-101(1). This Commission is required to "make and adopt a development plan for the physical and economic development of the planning and zoning district" for the purposes of "furthering health, safety, and welfare of the people of the county." Mont. Code Ann. § 76-2-104(1). There is no statutory requirement that the commission incorporate the petitioning landowners' concerns into the development pattern. As such, there is absolutely no way that the Court can grant the relief Appellants ultimately seek. Instead, even if the Court or District Court granted all relief sought by Appellants in their Complaint, such relief would not necessarily result in zoning to address impacts of oil and gas drilling.

D. Constitutional issues are not ripe for consideration

Appellants ask the Court to determine the constitutionality of § 76-2-101(5), Mont. Code Ann., which is included as part of their Complaint, and which issue was not reached by the District Court, "in the interests of justice and judicial economy." Appellants' Brief at 9. The Court should not make such a determination, however, as the District Court has not ruled on the issue—in fact, the Appellees/Defendants have not at this point even answered Appellant's Complaint, making the issue unripe.

Appellants were Plaintiffs in the underlying action, meaning that they chose what course of action to take. While, in certain circumstances, a party may petition the Supreme Court for a declaratory ruling regarding constitutionality of a statute[2]—that is not the course Appellants chose. Instead, they chose to file a case before the District Court. What Appellants are seeking in asking this Court to rule on constitutional issues, in essence, is a *de facto* writ of supervisory control. Supervisory control of a District Court

> is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:

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[2] *Confederated Salish & Kootenai Tribes v. Clinch*, 1999 MT 342, ¶¶ 1, 6-9, 297 Mont. 448, 992 P.2d 244.

> (a) The other court is proceeding under a mistake of law and is causing a gross injustice;
> (b) Constitutional issues of state-wide importance are involved;
> (c) The other court has granted or denied a motion for substitution of a judge in a criminal case.

M.R.App.P. 14(3).

Here, Appellants have not argued that these factors exist in this case—instead, they have pointed only to "judicial economy" and "justice." Appellants' Brief at 9. Parties are required on appeal to present a reasoned argument to advance their positions, supported by citations to appropriate authority, and when a party fails to do so, the court does not consider such unsupported issues or arguments. *In re Marriage of McMahon,* 2002 MT 198, ¶ 6, 311 Mont. 175, 53 P.3d 1266. It is not the court's job to conduct legal research on appellant's behalf, to guess as to his precise position, or to develop legal analysis that may lend support to his position. *Johansen v. State, Dept. of Natural Resources and Conservation,* 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653 (citation omitted). As such, Appellants have failed to present any reason why the Court should or could consider the constitutional arguments proffered.

Even more so, the Court has long held that it will not consider constitutional questions "unless they are necessarily involved or necessary to the decision." *State ex rel. Douglas v. District Court of Eleventh Judicial Dist.*, 161 Mont. 525, 529,

507 P.2d 1055, 1057 (1973); *see also State ex rel. Krutzfeldt v. Dist. Court of Thirteenth Judicial Dist.*, 163 Mont. 164, 169, 515 P.2d 1312, 1314-15 ("this Court will not decide upon the constitutionality of legislative enactments unless it is absolutely essential to the disposition of the case."). This is the appeal of an Order dismissing Appellant's Complaint for failure to state a claim upon which relief may be granted. *See* Order, Dkt. 35. No constitutional issues were considered by the District Court—in fact, the District Court went out of its way to explain that it was not reaching constitutional issues. *Id.* at pp. 10-11. As such, the Court should not entertain any constitutional arguments made by Appellants as unripe and unnecessary to a decision on the appeal before the Court.

Moreover, judicial economy does not weigh in favor of this Court considering the matter. Instead, the most expeditious course of action would be that of the usual course of action—allow the District Court to develop a record, and if necessary, send that record to this Court for review. Such action is especially appropriate here where Commissioners and Neighbors have not even had opportunity to answer Appellants' Complaint, let alone provide briefing as to the propriety of considering constitutional issues in relation to this particular case, or arguments as to the constitutionality of the statute in any case. As such, if the Court first determines that Appellants' Complaint should not have been dismissed,

the Court should then remand the matter for further proceedings before the District Court. To prematurely entertain Appellants' unripe constitutional argument would encourage other parties to also seek untimely and advisory opinions from this Court, discouraging judicial economy and setting bad precedent.

E. Joinder with Neighbors

In the event the Court determines to consider the constitutional question raised by Appellants and not considered by the District Court, Commissioners join in the argument of Neighbors in relation to such question, namely Sections I, III and IV of Neighbors' Response, as if fully set forth herein.

V. CONCLUSION

The District Court's Order should be upheld, as the finding of substantial prejudice to Neighbors is not countered by Appellants. Should the Court decide otherwise, however, the Court should find that the alternate bases of appeal argued against by Appellants provide ample reason for dismissal, or that such bases and additional bases not argued against by Appellants should be considered by the District Court.

The Court should decline Appellants' invitation to consider constitutional questions not argued before or considered by the District Court, as such consideration is not mandated in order for the Court to consider the appeal of the

Motion to dismiss, and as such consideration would not promote the judicial economy, and would set bad precedent. If the Court determines to consider such issues, the Commissioners join with the arguments in support of a finding of constitutionally proffered by Neighbors.

DATED this 19th day of January, 2016.

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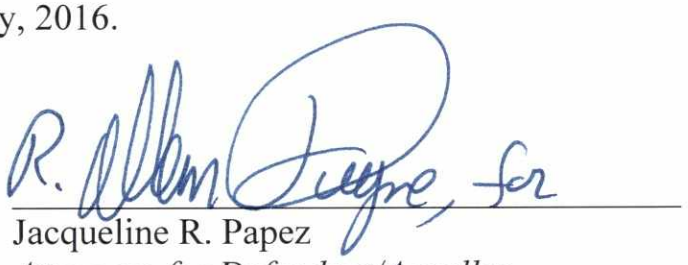
CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *Brief of Appellee Board of County Commissioners of Carbon County* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2013, is not more than 10,000 words, excluding Certificate of Compliance and Certificate of Service.

DATED this 19th day of January, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2016, a true and correct copy of the foregoing *Brief of Appellee Board of County Commissioners of Carbon County* was duly served, via First Class U.S. Mail, postage prepaid, on the attorneys of record addressed as follows:

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