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***Bitterroot River Protective Association, Inc. v.
Bitterroot Conservation District,
2008 MT 377, 346 Mont. 508, 198 P.3d 219***

Camisha Sawtelle

INTRODUCTION

*Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist.*¹ is a victory for stream access advocates in the state of Montana. The Montana Supreme Court divided the decision into two separate issues, 310 law and Montana stream access law and clarified that anglers can continue to fish on the waters of Mitchell Slough.

FACTUAL BACKGROUND

Mitchell Slough is located in the Bitterroot Valley between Hamilton, Montana, and Stevensville, Montana.² Water from the East Fork of the Bitterroot River flows into the Mitchell Slough, traveling approximately 16 miles before rejoining the Bitterroot River.³ For the last century, ditch companies and private irrigators have manipulated Mitchell Slough with canals, weirs and a headgate to ensure a steady supply of water for irrigation, stockwater, and fish and wildlife purposes.⁴ Similar to most rivers in the West, portions of Mitchell Slough have been rerouted, redirected and controlled by humans to the extent that the Slough does not follow its historic path.⁵ Although Mitchell Slough formed naturally, absent human manipulation, the channel would likely have migrated west, abandoning the current channel.⁶ Mitchell Slough has never run dry.⁷ And Mitchell Slough gains water through irrigation return flow and groundwater influences.⁸

PROCEDURAL BACKGROUND

The dispute over Mitchell Slough started in 1999, when the Bitterroot Conservation District (BCD) received an inquiry as to whether Montana law required a 310 permit to do work within the bank and bed of the slough.⁹ The Natural Streambed and Land Preservation Act of 1975, com-

1. 2008 MT 377, 346 Mont. 508, 198 P.3d 219 (hereinafter *Bitterroot River Protective Association II*).

2. *Id.* at ¶ 12.

3. *Id.*

4. *Id.*

5. *Id.* at ¶ 15.

6. *Id.* at ¶ 64.

7. *Id.* at ¶ 17.

8. *Id.* at ¶ 16.

9. *Id.* at ¶ 5.

monly known as the 310 Law, stems from of the Montana Constitution, which requires prevention of the depletion and degradation of the state's natural resources.¹⁰ To protect and preserve natural rivers and streams in their natural or existing state,¹¹ the 310 Law requires any person planning a physical alteration or modification of a stream to obtain approval from a local conservation district before initiating the proposed project.¹² The Bitterroot Conservation District was asked to determine if work on Mitchell Slough required a 310 permit. Permits had been issued on Mitchell Slough in the past.¹³ The answer to this question was contingent on determining if Mitchell Slough was a "natural perennial flowing stream" under the 310 Law.¹⁴ The phrase "natural, perennial-flowing stream," however, is not defined in the 310 Law. The Department of Natural Resources and Conservation (DNRC) regulations define the term as "a stream which, in the absence of diversion, impoundment, appropriation, or extreme drought flows continuously at all seasons of the year and during dry as well as wet years."¹⁵ The BCD unsuccessfully sought intervention from the DNRC, Department of Environmental Quality (DEQ) and Fish Wildlife and Parks (FWP) to determine the status of Mitchell Slough.¹⁶ After receiving no guidance, the BCD initiated its own administrative declaratory ruling process.¹⁷ Its authority to conduct this process was unsuccessfully challenged by the Bitterroot River Protective Association (BRPA) in *Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist.*¹⁸ The BCD administrative ruling process ultimately determined Mitchell Slough was not subject to the 310 permit requirement.¹⁹ Subsequently, the BRPA sought judicial review of the BCD decision in District Court.²⁰

DISTRICT COURT'S DECISION

The BRPA challenged the process employed by the BCD as well as the administrative decision.²¹ Additionally, the BRPA claimed the waters of Mitchell Slough were open to recreational access under the Montana Stream Access Law.²² Many parties were involved with the suit in different capacities, including landowners along the slough, Ravalli County, FWP,

10. Mont. Const. art. IX, § 1.

11. Mont. Code Ann. § 75-7-102(2) (2007).

12. *Bitterroot River Protective Association II*, ¶ 28.

13. *Id.* at ¶ 17.

14. *Id.*

15. Admin. R. Mont. § 36.2.402(7) (2008).

16. *Bitterroot River Protective Association II*, ¶ 17.

17. *Id.*

18. *Id.* at ¶ 6; *Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist.*, 2002 MT 66, 309 Mont. 207, 45 P.3d 24.

19. *Bitterroot River Protective Association II*, ¶ 6.

20. *Id.* at ¶ 7.

21. *Id.*

22. *Id.* at ¶ 8.

conservation groups, sportsmen groups, stockgrowers and irrigation companies.²³

The District Court affirmed the BDC's 310 Law determination and the process used. In a separate proceeding the court considered the status of Mitchell Slough as a "natural water body" under the Stream Access Law. Lacking a definition in the Act, the District Court applied a Webster's Dictionary definition of "natural" as "arising from; in accordance with what is found in nature; not artificial or manufactured."²⁴ The District Court held that Mitchell Slough, though once natural, had been changed into an irrigation ditch or canal through physical manipulations by landowners over the years.²⁵ Thus, the court concluded Mitchell Slough was not subject to public recreational use under the Stream Access Law.²⁶ BRPA appealed the District Court's decision.

MONTANA SUPREME COURT DECISION

The Montana Supreme Court addressed the 310 issue and the Stream Access Law issues separately. Looking first at the 310 issue, the Court considered the BRPA argument alleging that though adequate notice was given, the "method of affording" public participation was fundamentally unfair.²⁷ The Court rejected this argument and concluded that BCD had provided a "reasonable opportunity for citizen participation" as required by Article II, Section 8 of the Montana Constitution, and affirmed the District Court in upholding the process of 310 determination.²⁸

The court next considered the determination by the BCD that Mitchell Slough is not a "natural perennial flowing stream," subject to 310 permitting. The District Court stated "natural" was something that was "not artificial" and required absence of any "man-made manipulation."²⁹ The Supreme Court considered comprehensive and compelling scientific and technical evidence regarding the nature and status of Mitchell Slough and noted that experts can convincingly argue for or against the proposition that the Slough as "natural."³⁰ In addition, the court noted the reality that "virtually all of Montana's waters have been altered or manipulated by man."³¹ Finally, the court looked at the 310 Law's originally stated purpose to protect streams in their "natural or existing" state in order to implement the Constitutional directive to prevent the "depletion and degradation of natural re-

23. *Id.* at ¶ 9.

24. *Id.* at ¶ 66.

25. *Id.* at ¶ 64.

26. *Id.* at ¶ 8.

27. *Id.* at ¶ 21.

28. *Id.* at ¶ 26.

29. *Id.* at ¶ 30.

30. *Id.* at ¶ 33.

31. *Id.* at ¶ 35.

sources.”³² The language “existing state” along with the purpose of preventing further degradation together led the Supreme Court to find Mitchell Slough qualified as a natural perennial stream under the 310 Law, thus requiring a 310 permit to alter the stream bed. The District Court decision was reversed.

Next, the court considered the District Court’s conclusion that Mitchell Slough was not subject to public recreational use under the Stream Access Law. This decision was also contingent upon the definition of “natural” stream. The Stream Access Law uses a different definition for designating a body of water than the 310 Law.³³ The Stream Access Law comes from Article IX, Section 3(3) of the Montana Constitution, which states:

*All surface waters, 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.*³⁴

The Court interpreted this provision to mean that all surface waters of the State, that are capable of recreational use, may be used by the public, regardless of streambed or bank ownership.³⁵ The Court clarified the extent of this provision and previous court decisions interpreting the provision with the Stream Access Law in 1985.³⁶ This law codified the public’s right to use the navigable waters of the state.³⁷ The Stream Access Law has been modified to balance constitutionally protected property rights with the right to beneficial use of the waters of the state.³⁸ This tension between the constitutional right to privacy and Montanans’ right to access was a critical element of the landowner’s argument against access in this case.³⁹ However, the Court noted its task was primarily one of statutory interpretation, and the application of the specific elements of the Stream Access Law to the specific facts present.⁴⁰ Specifically, the court needed to determine if the District Court erred in determining Mitchell Slough was not a natural body of water and thus not subject to public recreational access.⁴¹

The Court considered three elements of the Stream Access Law to determine if Mitchell Slough is subject to recreational use.⁴² These elements, as applied to Mitchell Slough, were: 1) is the slough a natural water body;

32. *Id.* at ¶ 40.

33. *Id.* at ¶ 49.

34. Mont. Const. art. IX, § 3(3).

35. *Mont. Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 53, 682 P.2d 163, 171 (1984).

36. Mont. Code Ann. § 23-2-302 (2007).

37. *Bitterroot River Protective Association II*, ¶ 51.

38. *Id.*

39. Mont. Const. art. II, § 3, and art. IX, § 7.

40. *Bitterroot River Protective Association II*, ¶ 52.

41. *Id.* at ¶ 63.

42. *Id.* at ¶ 67.

2) is it capable of recreational use; and 3) is it diverted away from a natural water body through a manmade conveyance system—one of the Stream Access Law's exceptions.⁴³

The Court easily dealt with the recreational use requirement, as there has been a long history of recreational use of Mitchell Slough. In fact, fishing groups' interest in the case came from the desire to have continued access to this quality fishing area.⁴⁴ The issue of naturalness was much more difficult to determine. Many of the same experts from the 310 issue were relied on to determine whether the Slough was natural. Again, the Court considered the purpose of the law. The Court also acknowledged the fact that virtually all streams have been impacted by humans in some form or another and thus under a technical or scientific definition of natural, recreational access under the Stream Access Law could be drastically limited.⁴⁵ The Court emphasized that determining naturalness is a fact dependent process and thus looked at the available historical record of Mitchell Slough in making their decision.⁴⁶ Looking at the totality of the circumstances, the Court determined that Mitchell Slough was a natural channel.⁴⁷ The Court rejected the landowner's argument that the slough met the exception of a "manmade water conveyance system."⁴⁸ Although Mitchell Slough has clearly been improved by people over years, the record shows that the channel existed in a natural state before human manipulation occurred.⁴⁹ The Court also noted that Mitchell Slough flows year-round. If it were simply an irrigation ditch, there would likely be little or no water flow outside of irrigation season.⁵⁰ Thus the Court concluded that Mitchell Slough is subject to stream access and public recreation under the Montana Stream Access Law.⁵¹

ANALYSIS

Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist. was a huge victory for stream access advocates in Montana. The right to recreational access is an important right to many Montanans and it is uniquely protected by statute to ensure, "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters."⁵² The language of the statute conflicts with

43. *Id.*

44. *Id.*

45. *Id.* at ¶ 72.

46. *Id.* at ¶¶ 74-76.

47. *Id.* at ¶ 77.

48. Mont. Code Ann. § 23-2-301(6).

49. *Bitterroot River Protective Association II*, ¶ 79.

50. *Id.* at ¶ 82.

51. *Id.* at ¶ 85.

52. Mont. Code Ann. § 23-3-302.

property rights which are equally important to Montanans and are likewise protected in the Montana constitution:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.⁵³

Landowners along Mitchell Slough argued recreational use and stream access by the public at large infringed upon their constitutionally ensured property rights. Mitchell Slough landowners also utilized Article IX Section 7 of the Montana Constitution which ensures the opportunity to harvest wild fish and wild game animals but specifically "does not create a right to trespass on private property."⁵⁴ The Montana Supreme Court acknowledged the tension around this issue and each party's emphasis on the respective sections of the law.⁵⁵ Yet the Court avoided the impossible pronouncement of which rights trump and instead focused on interpretations of the statutes based on the specific facts given. The majority of the opinion addresses the status and history of use of the stream. The analysis suggests that, although *Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist.* is helpful to future river access cases, each will need to be determined on a case by case, fact by fact, basis. The Court appropriately avoids the larger issue of which set of rights, property or river access, are more important. This is a value judgment and is not the appropriate role of the courts. The Court instead applies the available tools, the historical record and technical experts, to determine that in this case, Mitchell Slough is natural and thus both the Stream Access Law and 310 Laws apply.

CONCLUSION

Overall, the decision in *Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist.* is a victory for stream access advocates in Montana. As a result of this decision, fisherfolk can continue to enjoy the quality fishing on Mitchell Slough. Montana's Stream Access Law and 310 Law were utilized to define this particular body of water as natural, thus ensuring that this surface water can continue to be used for recreational purposes. Further, Montana's hunting and fishing heritage will remain protected. However, *Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist.* is

53. Mont. Const. art. IX, § 3.

54. Mont. Const. art. IX, § 7.

55. *Bitterroot River Protective Association II*, ¶ 50.

not a blanket loss for landowners wishing to restrict access to streams. Recreational users are still prohibited from crossing private property to access streams. Landowners are still entitled to the peaceful enjoyment of their property. The Montana Supreme Court acknowledged the tension between recreational use and the equally important right to privacy. This decision does not create a right to trespass on private property. Future determinations of “natural” bodies of water will continue to be considered on a case by case basis.

