



BEFORE THE FLATHEAD CONSERVATION DISTRICT BOARD OF SUPERVISORS

<p>IN THE MATTER OF THE DECLARATORY RULING BY THE FLATHEAD CONSERVATION DISTRICT</p> <p>RE: AMBLER PETITION REGARDING MCDONALD CREEK</p>	<p>VERIFICATION STATEMENT</p>
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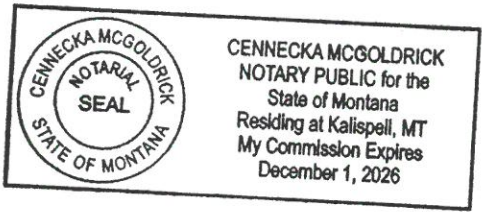
I, Camisha Sawtelle, being duly sworn, deposes and says that the attached data and/or information is true to the best of my knowledge.

[Signature]
Camisha Sawtelle

STATE OF Montana)
 :SS
County of Flathead)

On this 20th day of July, 2023, before me the undersigned, a Notary Public for the State aforesaid, personally appeared Camisha Sawtelle known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same.

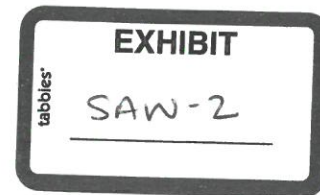
[Signature]
Print Name: Cennecka McGoldrick



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Flathead CD



Camisha Sawtelle
Attorney at Law



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JUL 20 2023

Flathead CD

Datsopoulos, MacDonald and Lind, P.C.
Trent N. Baker
Central Square Building
201 Main Street, Suite 201
Missoula, Montana 59802

Sent via Email and First Class Mail

July 3, 2023

RE: Response to June 9, 2023 Letter regarding the Ambler Petition for Declaratory Ruling

Dear Mr. Baker,

I am contacting you on behalf of the Flathead Conservation District ("FCD") in response to your June 9, 2023 letter regarding the scope of the declaratory ruling process as outlined in the Scheduling Order issued on May 31, 2023 by hearing officer Laurie Zeller.

Pursuant to complaints filed against the Amblers regarding work on property on McDonald Creek (located in Section 23, T 32 N, R 19 W, Flathead County Montana), the FCD Board followed the process outlined in the FCD's Adopted Rule 18. The FCD reviewed the complaints submitted, conducted a field investigation, and determined that activity had been initiated on a perennial-flowing stream without a valid 310 permit in violation of the Montana Natural Streambed and Land Preservation Act (MNSLPA). Following Rule 18, the FCD provided the Amblers a letter setting forth the results of the investigation, the course of action required to rectify the violation, and a deadline date for taking the corrective action.

The Amblers disagreed with the FCD's determination and, as allowed under MCA 75-7-125 and Rule 20 of the Adopted Rules, filed a Petition for Declaratory Ruling. In the Petition, the Amblers asked for a first hearing regarding FCD's jurisdiction over the Ambler's project. The Petition then requested a second hearing regarding the other decisions of the FCD Board, and requested adequate time to obtain data and information.

The Scheduling Order issued on May 31, 2023 clarified that the Declaratory Ruling will only address FCD jurisdiction over the Ambler property on McDonald Creek. In your June 9, 2023 letter, you requested that the FCD issue an amended Scheduling Order to include determining the appropriateness of the remedy ordered - removal of the structure. You also requested that the Amblers be allowed sufficient time to gather, analyze and present relevant information and data.

The FCD confirms the Scheduling Order as submitted on May 31, 2023. The FCD Board is constrained by Statute and the Adopted Rules. The Hearing Officer will consider information on how work on the Amblers' property may or may not meet jurisdictional definitions. Specifically, was there activity that resulted in a change in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks.

The declaratory ruling process is not the appropriate venue to challenge the course of action ordered to rectify a violation of the MNSLPA (here removing the home and restoring the stream bank).

The FCD Board relies on MCA 75-7-125(6) and Rule 20(7) in their support of the Hearing Officers' restriction on the scope of the declaratory ruling which states:

This rule may not be interpreted or construed to allow a person to petition for a declaratory ruling under this section for an administrative review of a decision of the supervisors to grant, deny, or condition a written consent for a project or a project undertaken during an emergency. Review of these decisions is exclusively provided for in 75-7-121, MCA, as it pertains to arbitration or judicial review.

Here, the Amblers are requesting the FCD apply the standards outlined in MCA 75-7-112(9) in the review of the Complaints. However, the FCD did not receive a 310 application for the proposed project. Rather they are operating within the constraints of the Complaint process as dictated by Rule 18. Arguably much of the same information presented in the determination of jurisdiction will duplicate the information presented in a future review of an application for a 310 permit.

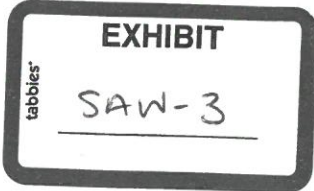
If, and only if, the FCD Board affirms its jurisdiction, the Board will review a valid (after-the-fact) 310 application from the Amblers and supporting documents with the same standards they apply to any other project they receive an application for as outlined in 75-7-112(9) and the Adopted Rules. If deemed necessary, the FCD will conduct an independent technical review to assess the project's compliance with statute and the Adopted Rules. If any applicant disagrees with a final decision of the FCD, MCA 75-7-121 controls the review process.

Please call or email to discuss potential solutions and with any questions regarding this matter.

Very truly yours,



CAMISHA SAWTELLE
Attorney at Law



BEFORE THE FLATHEAD CONSERVATION DISTRICT BOARD OF SUPERVISORS

IN THE MATTER OF THE DECLARATORY RULING BY THE FLATHEAD CONSERVATION DISTRICT

VERIFICATION STATEMENT

RE: AMBLER PETITION REGARDING MCDONALD CREEK

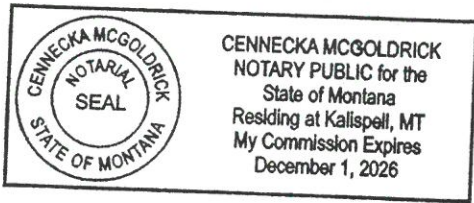
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Camisha Sawtelle

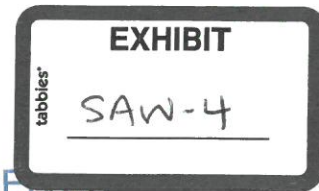
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Cennecka MCGoldrick
Print Name: Cennecka MCGoldrick



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Flathead CD



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Flathead CD

Flathead Conservation District
c/o Laurie Zeller, Hearing Officer
133 Interstate Lane
Kalispell, Montana 59901

July 20, 2023

RE: Rebuttal to June 20, 2023 Letter from Amblers regarding jurisdiction

Dear Ms. Zeller:

This letter is in rebuttal to the June 20, 2023 letter from Trent Baker on behalf of Stacy and John Ambler regarding the jurisdiction of the Flathead Conservation District (“FCD”) to enforce the Natural Streambed and Land Preservation Act (“the Act”). In that letter, the Amblers request the matter be dismissed based on their assertion that FCD has no jurisdiction over private property within the boundaries of Glacier National Park. The Amblers claim that their property, a private inholding within the boundaries of Glacier National Park, should be essentially unregulated. This problematic interpretation of state and federal laws is clearly not consistent with the public policy behind laws and regulations related to public land and waters.

Rather, the FCD has jurisdiction over the Ambler property because 1) the State of Montana reserved the right to enforce regulations promulgated by the departments in accordance with the laws of the state within the boundary of Glacier National Park; 2) the purpose of the Act is consistent with the purposes and objectives of the National Parks; and 3) the Ambler property is treated as any other private property in Montana.

Public Policy Creating National Parks Is Consistent With The Act And Other Laws Protecting Water Quality In The State Of Montana

The Amblers claim that state laws should not apply to federal lands and rely on *United States v. Unzeuta* to support their position. 281 U.S. 138 (1930). However, one of the holdings of *Unzeuta* is that when “a state cedes jurisdiction to the United States, the state may impose conditions that are not inconsistent with the carrying out of the purpose of the acquisition.” Here, the public policy creating Glacier National Park is consistent with the Act.

The purpose of the National Parks, including Glacier National Park, is to “conserve the scenery, natural and historic objects, and wildlife in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 US Code § 100101(a).

The purpose of the Act is to “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. Further, it is the policy of the state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects.” MCA § 75-7-102 (1) and (2).

The purpose of National Parks is consistent with the purpose of the Act. This public policy also is consistent with other laws requiring permits for work done on a stream:

- 124 Permit. Under the Stream Protection Act a government entity must obtain a 124 Permit from Montana Fish Wildlife and Parks prior to any work which may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries. MCA § 87-5-501 et seq.
- 404 Permit. Under the Clean Water Act a party must obtain a Section 404 permit from the Army Corps of Engineers before discharging any dredged or fill material into waters of the United States. This typically means that a permit must be obtained before construction or other work is performed in those areas. 33 US Code § 1344.
- 318 Permit. Any person agency, or entity, both public and private, initiating construction activity that will cause short term or temporary violations of state surface water quality standards for turbidity must obtain a permit from Montana Department of Environmental Quality.

The Amblers obtained **no** permits before initiating work on the banks of McDonald Creek. While some uncertainty as to which laws and regulations might apply to a private inholding within a national park is understandable, the conclusion that the property is unregulated and requires no permits is contrary to all public policy – state or federal. In fact, federal law specifically prohibits constructing or attempting to construct a building, or other structure, boat dock, road, trail, path, or other way, telephone line, telegraph line, power line, or any other private or public utility, upon across, over, through, or under any park areas, except in accordance with the provisions of a valid permit, contract, or other written agreement with the United States. 36 CFR § 5.7.

The location of the Amblers property within Glacier National Park does not preempt enforcement of the Act. The federal laws creating the parks do not preempt state regulation except for “pervasive reasons” such as showing that compliance with both is a physical impossibility or where Congress evidences a clear intent to preempt state control. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). State law will fall only where it stands as an obstacle to the “accomplishment and execution of the full purposes and objectives of Congress.” *Perez v. Campbell*, 402 U.S. 637, 639 (1971). The Montana Attorney General relied on U.S. Supreme Court holdings to conclude that the Act is applicable to non-federal projects on

federal land unless the state regulation inherently conflicts with applicable federal regulation. 37 *Montana Att’y Gen. Op.* 15 (1977). This opinion is consistent with a 1980 opinion interpreting MCA § 2-1-202 to conclude that a plumbers licensing law may be enforced on Malmstrom Air Force Base as to nonfederal entities so long as application of state law does not interfere with the U.S. government’s use of the property for military purposes. 38 A.G. Op. 64 (1980). Here enforcement of the Act is entirely consistent with the purpose of the National Parks and does not interfere with, but rather supports, the U.S. government’s use of the property.

Private Inholding

The Amblers argue that the Montana law ceding Glacier National Park expressly includes private lands within the Park, citing MCA § 2-1-205. This statute in its entirety reads:

Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all the territory which is now or may hereafter be included in that tract of land in the state of Montana set aside by the act of congress, approved May 11, 1910, for the purposes of a national park, and known and designated as "The Glacier national park", saving, however, to the said state the right to serve civil or criminal process within the limits of the aforesaid park in any suits or prosecution for or on account of rights acquired, obligations incurred, or crimes committed in said state but outside of said park; and saving, further, to the state the right to tax persons and corporations, their franchises and property on the lands included in said park; provided, however, that jurisdiction shall not vest until the United States, through the proper officers, notifies the governor of this state that it assumes police or military jurisdiction over said park.

Nowhere does this statute mention private inholdings. While accurate that State of Montana ceded jurisdiction of lands within the park, the statute is silent on the issue of private inholdings.

The Amblers also rely on *United States v. Petersen* and conclude that the United States’ exclusive jurisdiction extends to private property within the boundaries of the park. 91 F. Supp 209 (S.D. Cal. 1950). In *Petersen*, the issue was regulating the sale of liquor on privately owned lands within Kings Canyon National Park. The Court concluded that the United States had exclusive police jurisdiction over privately owned land because it was necessary in order to secure the benefits intended to be derived from the park. *Petersen* at 213. Here, the Act and FCD jurisdiction are necessary to secure the benefits intended to be derived from Glacier National Park.

The Rights Reserved By The State Of Montana Include The Act

Natural Streambed and Land Preservation Act was passed in 1975. Glacier National Park was created in 1911. Clearly enforcement of the Act was not specifically considered at the time of creation of the Park - Conservation Districts did not exist until 1939. However, the State of Montana reserved jurisdiction “in the enforcement of state laws relating to the duties of the department of livestock and the department of environmental quality and the enforcement of

any regulations promulgated by the departments in accordance with the laws of the state.” MCA § 2-1-202. The intent of this reservation is to allow Montana to enforce laws related to protecting natural resources including Conservation Districts through the Department of Natural Resources and Conservation. The FCD was correct in assuming jurisdiction over the project on McDonald Creek. It was the intention of the legislature to reserve the right to enforce regulations of all Departments of the State of Montana including the DNRC and thus the Conservation Districts.

FCD’s Determinations Are Consistent With The Act and Local Rules

The Amblers have been treated consistently to any other landowner initiating a project within the immediate banks of a perennial stream in Montana. FCD Board followed the process outlined in the FCD’s Adopted Rule 18 and reviewed the complaints submitted, conducted a field investigation, and determined that activity had been initiated on a perennial-flowing stream without a valid 310 permit in violation of the 310 Law. Following Rule 18, the FCD provided the Amblers a letter setting forth the results of the investigation, the course of action required to rectify the violation, and a deadline date for taking the corrective action.

The Amblers disagreed with the FCD’s determination and, as allowed under MCA §75-7-125 and Rule 20 of the Adopted Rules, filed a Petition for Declaratory Ruling. The Amblers have suggested that FCD should have applied the standards outlined in MCA 75-7-112(9) in the review of the Complaints. However, the FCD did not receive a 310 application for the proposed project. Rather they were operating within the constraints of the Complaint process as dictated by Rule 18. Arguably much of the same information presented in the determination of jurisdiction will duplicate the information presented in a future review of an application for a 310 permit. Once the jurisdictional issues are resolved, the FCD may consider a valid 310 permit with the same standards they apply to any other project they receive an application for as outlined in 75-7-112(9) and the Adopted Rules. If deemed necessary, the FCD will conduct an independent technical review to assess the project’s compliance with statute and the Adopted Rules. If any applicant (including the Amblers) disagrees with a final decision of the FCD, MCA 75-7-121 controls the review process.

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