IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA-06-0520

BITTERROOT RIVER PROTECTIVE ASSOCIATION, INC.,

Plaintiff and Appellant,

MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Involuntary Plaintiff and Appellant,

v.

BITTERROOT CONSERVATION DISTRICT, a political subdivision of the State of Montana,

Defendant and Respondent,

WALTER R. BABCOCK, ET. AL,

Intervenors - Third Party Plaintiffs and Respondents,

MARNELL CORRAO ASSOCIATES, INC.,

Intervenors - Third Party Plaintiff and Respondent,

v.

RAVALLI COUNTY COMMISSIONERS,

Third Party Defendants and Respondents.

ON APPEAL FROM THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, RAVALLI COUNTY, HON. TED MIZNER PRESIDING

BRIEF OF AMICUS CURIAE, SPORTSMEN'S GROUPS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

SPORTSMEN'S GROUPS v

INTRODUCTION 1

ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 9

Mitchell Slough is a "Natural Water Body" Under the Stream Access Law. 9

"Natural Water Body" Under the Stream Access Law Must Be Interpreted in Light of This Court's Holding in *Curran*. 9

Interpretation of "Surface Water" Must Include The Entire Phrase, "Natural Water Body," Rather Than Just the Word "Natural." 10

The Definition of "Natural Water Body" Must Give Effect to the Entire Statutory Scheme. 11

Surface Water Is Not "Diverted" Unless It Flows Through a Manmade Water Conveyance System. 11

Mitchell Slough is Not a Ditch. 13

There is No Causation Requirement in the Stream Access Law 15

All Waters in This State are Publicly Owned. 16

Private water rights are for use, not ownership. 17

Usufructary rights cannot be transformed into title. 17

There is No Conflict Between Public Recreational Use and Appropriation for Beneficial Uses on Mitchell Slough. 19

The Parties' Rights are Constitutionally Equivalent, and the Legislature Has Determined How Those Rights are to be Balanced. 19

The Only Right Potentially Infringed Herein Is the Public's Right to Recreate on Mitchell Slough. 20

Who Should Bear the Burden of Proof? 21

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases

In re Archer, 2006 MT 82, 332 Mont.,136 P.3d 11

City of Bozeman on Behalf of Dept. of Transp. of State of Mont. v. Vaniman (1994), 264 Mont., 860 P.2d 11

Herrin v. Sutherland (1925), 74 Mont. 587, 241 P. 328 16

Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d . . . 18,19

Lamprey v. State (Metcalf) (1893), 52 Minn., 53 N.W. 9

Mont. Coalition for Stream Access v. Curran (1984), 210 Mont.,682 P.2d . . . . passim

Mont. Coalition for Stream Access v. Hildreth (1984), 211 Mont.,684 P.2d . . . . passim

Mont. Contractors Ass'n, Inc. v. Dep't of Hwys. (1986), 220 Mont., 715 P.2d 11

Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099 19

Rock Crk. Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 17,19

Statutes

MONT. CODE. ANN. § 1-2-101 10,16

MONT. CODE. ANN. § 1-2-104 11

MONT. CODE. ANN. § 1-2-106 10

MONT. CODE. ANN. § 23-2-301 . . . . passim

MONT. CODE. ANN. § 23-2-302 3,4,8

MONT. CODE ANN. § 82-5-101(5) 18

Other Authorities

1972 Montana Constitution in Article IX, § 3. . . . . Passim

Mont. Const. Conv., at 1305 - 1334 *seriatim* (Vol. V) 20

SPORTSMEN'S GROUPS

The following organizations appear as Sportsmen's Groups herein:

Montana Wildlife Federation

Ravalli County Fish and Wildlife Association

Hellgate Hunters and Anglers

Big Sky Upland Bird Association

Helena Hunters and Anglers

Anaconda Sportsmen Inc.

Red Lodge Rod and Gun Club

Billings Rod and Gun Club

Dawson Rod and Gun Club

Gallatin Wildlife Association

Russell Country Sportsmen

Skyline Sportsmen Association

Montana River Action Network

INTRODUCTION

A perennially flowing stream runs through an historic side channel of a major river, carrying diverted water for irrigation, instream flows for fisheries and stock water, water from local springs, groundwater recharge, and return flows from irrigation throughout the entire basin. The channel has been significantly altered over the years, and the first quarter-mile of the 16-mile stream was dug by man. Water has always flowed year-round, even when irrigators are not diverting.

Welcome to Mitchell Slough. If you've never seen it, imagine the Little Blackfoot River. They're about the same size in amount of water carried and width across. For as long as anyone can remember, the Mitchell has been fished, floated and hunted. Besides public access points, primarily from bridges, the Mitchell can be accessed from the Bitterroot River. The only recreational access at issue in this case is via public access; trespass across private lands has not been alleged.

Amici Sportsmen's Groups consist of a dozen organizations across the state of Montana, all formed for the purpose of promoting and protecting various forms of outdoor recreation.[1] Their concern is not just that the Mitchell might be closed to recreation, but that many streams, creeks, and rivers across Montana may follow suit as well. They are here to speak up for one of the constitutionally protected

[1] A full list of the organizations appearing as *amicus* herein is appended at v.

rights they regularly enjoy.

ISSUES PRESENTED FOR REVIEW

The legal question for this Court is whether manmade alterations which improve a streambed result in a "non-natural waterbody" under the Montana Stream Access Law. If the Court's answer is yes, then additional questions are raised: how many alterations transform a streambed into a ditch? Every river, stream, and creek in Montana has been and continues to be altered by man. May every water body therefore be closed to public recreational access?

This case raises the fundamental question of whether and when surface waters in this state can be considered "private," and therefore closed to public recreation. Public ownership of all Montana water was explicitly created by the 1972 Constitution in Article IX, § 3. This Court has interpreted the right broadly; even privately held title to a stream's bed and banks is irrelevant to the public's right of access for recreation. *Mont. Coalition for Stream Access v. Curran* (1984), 210 Mont. 38, 682 P.2d 163; *Mont. Coalition for Stream Access v. Hildreth* (1984), 211 Mont. 29, 684 P.2d 1088. In fact, the only criterion considered relevant by this Court as to whether surface waters can be used for recreation – without trespassing – is the susceptibility of the waters to public recreation. *Curran*, 210 Mont. at 53, 682 P.2d at 171. In other words, if it can be fished – without trespassing – then it

can be fished. If it can be floated, it can be floated. This provides very simple guidance to courts, agencies and conservation districts, requiring easily obtainable data of historical use.

In contrast, the lower court's inquiry into streambed alteration and historic flow data is time-consuming, ripe for scientific dispute, and unauthorized by the relevant statute. Moreover, it invites riparian landowners to invest sufficient time, money, and effort into the streams and creeks running through their property not just to improve irrigation flows and fisheries, but to convert public water into their own private resource. This outcome is unimaginable under the Montana Constitution, contrary to the governing statute, and must be reversed by this Court.

STATEMENT OF THE CASE

The Montana Legislature responded to *Curran* and *Hildreth* by enacting the Montana Stream Access Law, the interpretation of which governs the case herein. MONT. CODE ANN. §§ 23-2-301, 23-2-302. The Stream Access Law establishes that all surface waters are open to public recreation without regard to ownership of the bed and banks. MONT. CODE ANN. § 23-2-302(1). Surface water is defined as "a natural water body, its bed, and its banks up to the ordinary high-water mark." MONT. CODE ANN. § 23-2-301(12). The legislature did not define "natural water body." The public has the right to recreate in and on "surface waters," subject to

several narrowly drawn exceptions. MONT CODE. ANN. § 23-2-302.

The statute then enumerates situations in which a member of the public must obtain permission from a landowner prior to recreating in or on surface waters. MONT. CODE ANN. § 23-2-302(2). The exception relied upon by the District Court herein is subsection (2)(c): "the recreational use of waters *while diverted away from a natural water body* for beneficial use . . ." MONT. CODE ANN. § 23-2-302(2)(c) (emphasis added). Diverted water is defined as "diversion of surface water through a manmade water conveyance system." MONT. CODE ANN. § 23-2-301(6).

The court below analyzed this case by first determining that Mitchell Slough is "no longer" a natural water body. Opinion & Order at 5. The court found that the slough had once been natural, but has since been so altered by nature and man that it would not flow but for man's intervention. The channels of the river have migrated, the court found, and neither Mitchell Slough (nor the East Channel of the Bitterroot River) would have water in them were it not for the "massive amounts of channel work" that have been accomplished. *Id.* at 6. Moreover, "the channel itself is so changed that it can no longer be considered a natural channel even though some portions of the channel are still in identifiable historic locations." *Id.*

The court then says, "Plaintiffs have argued that man's manipulations can

not change a natural channel into a manmade ditch *and the Court agrees.*" *Id*. at 6-7 (emphasis added). This statement is immediately followed by, "However, it is clear in this case that it is only as a result of man's manipulations that the Mitchell maintains any appearance at all of a natural channel." *Id*. at 7. This suggests that the court did *not* conclude that the Mitchell is a ditch, but rather that the slough's original character had been so significantly altered by man that it can no longer be considered "natural." In other words, the lower court found that Mitchell Slough is a non-natural non-ditch. Although the court was attempting to reach a legal conclusion about whether the water in Mitchell Slough is "surface water" as that term is defined in the statute, its findings do not comport with the statute and therefore do not truly answer the legal question presented.

To further muddy the conceptual waters, the lower court then discussed the water in Mitchell Slough. *Id.* at 7-9. It noted that there is no dispute that the "vast majority" of water in the Mitchell is "diverted" water, which it says "is not natural water." *Id.* at 7. The phrase "natural water" is not found in the Constitution, the Stream Access Law, or in any case law found by Sportsmen's Groups. It appears the court means by the phrase "natural water" water that has *never* been "diverted."

The court acknowledges that any determination of how much water is "diverted" and how much is "natural" is "highly speculative," and refuses to

consider return irrigation flows in its determination of whether the water in the Mitchell is "diverted water" that can be closed to public recreational access, or, presumably, "natural" water that must be open to recreational access. *Id.* at 7-8. It criticizes Plaintiffs' proposition that return flows should be considered part of the natural, or undiverted, flow, stating that case law dealing with water rights is inapposite to a case brought under the Stream Access Law. *Id.* at 7-8.

Finally, the court places the burden of proof – that the Mitchell is a natural water body, and that the water in it is undiverted and "uninfluenced by diverted water" – upon the Plaintiffs, and holds them to a standard of a "clear preponderance of the evidence." This standard seems to mix the "clear and convincing" standard with the "preponderance of the evidence" standard, the former being a significantly higher standard than the latter. In other words, the lower court created an unusually high standard, relied upon facts that have no legal significance, and placed the burden on the party who is protecting its constitutional right.

SUMMARY OF ARGUMENT

What should the court have done instead? *Amici* Sportsmen's Groups contend that the findings of fact simply do not support the court's legal conclusion. Even if all of the lower court's findings of fact stand, the legal conclusion must still

be that Mitchell Slough is a natural water body under the Stream Access Law, and is not excepted from access under the diverted water exception.

Sportsmen's Groups contend the following:

(1) Mitchell Slough must be either a natural water body or a ditch. It cannot be both, and it cannot be neither. In the absence of a statutory definition, usual definitions should apply, and in this case the statute provides illustrative examples to assist in the interpretation. A natural water body is one created by natural processes, whereas a ditch is created by man. No other choices are provided by the Legislature.

(2) The term "natural water body" in the Stream Access Law must further be interpreted within the context of the Stream Access Law, which must include the guidance of *Curran* and *Hildreth*. Those cases teach that the only relevant criterion for purposes of public recreational access is the water's susceptibility to recreational use. Facts regarding a stream's alteration, no matter how significant, are nowhere mentioned in the case law or the statutes, and must be deemed irrelevant under the stream access law. As the lower court observed, a natural water body cannot be transformed into a ditch, no matter how much work is put into it.

(3) The "diverted water" exception in MCA 23-2-302(2)(c) must be read in

conjunction with the "diverted water" definition at MCA § 23-2-301(6). In other words, the water must not only be "diverted," it must be diverted *"through a manmade water conveyance system*." The court agreed with Plaintiffs that no amount of human intervention could transform a natural water body into a ditch, in which case Mitchell Slough is *not* a ditch. As such, it is of no legal significance that it conveys appropriated or diverted water. Thus, the diverted water exception does not and cannot apply to Mitchell Slough, because Mitchell Slough is not a "manmade water conveyance."

(4) Unless the nonconsumptive use of surface water for public recreation interferes with consumptive uses of water for application to a beneficial use, the two constitutional rights are not in conflict. Landowners are simply seeking to close surface waters to recreational use. In other words, they are asking this Court to diminish the constitutionally protected rights of Plaintiffs without asserting any infringement of Landowners' right to use water. Sportsmen's Groups contend that the burden of proof should therefore be borne by the party seeking to diminish constitutionally protected rights.

(5) Sportsmen's Groups therefore request that the Court remand this case with instructions to enter judgment for Plaintiffs on the grounds that Mitchell

Slough is a "natural water body" for purposes of the Stream Access Law, and does not fall under the "diverted water" exception.

ARGUMENT

I. MITCHELL SLOUGH IS A "NATURAL WATER BODY" UNDER THE STREAM ACCESS LAW.

A. "Natural Water Body" Under the Stream Access Law Must Be Interpreted in Light of This Court's Holding in *Curran*.

This Court has interpreted the public's right to recreate on surface waters as a right not dependent on commercial navigability of the waters, nor ownership of the bed and banks. *See Mont. Coalition for Stream Access, Inc. v. Curran* (1984), 210 Mont. 38, 51-53, 682 P.2d 163, 169-170; *Mont. Coalition for Stream Access v. Hildreth* (1984), 211 Mont. 29, 35-37, 684 P.2d 1088, 1091-1092. In finding that the true test for recreational access is "navigability for recreation," this Court quoted at length from an 1893 Minnesota case, *Lamprey v. State* (Metcalf) (1893), 52 Minn. 181, 53 N.W. 1139, 1143. The Court emphasized the following part of the quote:

> To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated..."

Curran, 210 Mont. at 50-51, 682 P.2d at 169. Certainly this quote is as true today

as it was in 1984, or 1893. To affirm the lower court's interpretation of "natural water body" and allow private landowners to restrict recreational access to Mitchell Slough is to essentially "hand over all these [streams] to private ownership." It most certainly would be "a great wrong upon the public for all time."

B. Interpretation of "Surface Water" Must Include The Entire Phrase, "Natural Water Body," Rather Than Just the Word "Natural."

The role of the court in interpreting statutes is to "ascertain and declare" what is contained therein, not inserting what has been omitted nor omitting what has been included. MONT. CODE ANN. § 1-2-101. Where there are several provisions, the court is to adopt a construction that will "give effect to all." *Id.* Words and phrases used in Montana statutes are to be construed according to their context, and the approved usage of the language. MONT. CODE ANN. § 1-2-106. The requirement that the Court interpret statutes in context has also been described as "harmonizing statutes relating to the same subject, giving effect to each." *Mont. Contractors Ass'n, Inc. v. Dep't of Hwys.* (1986), 220 Mont. 392, 395, 715 P.2d 1056, 1058.

In addition, "When a statute is equally susceptible of two interpretations, one in favor of natural rights and the other against it, the former is to be adopted." MONT. CODE. ANN. § 1-2-104. "Natural rights" have been interpreted as

constitutional rights. *See, e.g., In re Archer*, 2006 MT 82, 82, 332 Mont. 1, 7, 136 P.3d 563, 567; *City of Bozeman on Behalf of Dept. of Transp. of State of Mont. v. Vaniman* (1994), 264 Mont. 76, 76, 860 P.2d 790, 791. Thus, where a statute is implemented so as to give effect to particular rights enumerated in the state constitution, it must be interpreted if at all possible so as to favor the underlying constitutional rights.

The lower court used the dictionary definition of "natural" in analyzing whether Mitchell Slough is a natural water body, finding that it means "arising from; in accordance with what is found in nature; not artificial or manufactured." Opinion & Order at 4. As applied by the court, it appears to mean "pristine," or "untouched." This narrow definition fails to harmonize the various provisions of the Stream Access Law, and diminishes rather than favors the underlying constitutional rights protected therein. Because it is possible to define "natural water body" in a way that gives effect to the entirety of the statute as well as the underlying constitutional rights, that interpretation is preferred.

C. The Definition of "Natural Water Body" Must Give Effect to the Entire Statutory Scheme.

1. *Surface Water Is Not "Diverted" Unless It Flows Through a Manmade Water Conveyance System.*

Although the Legislature did not define "natural water body," it did define

"diverted away from a natural water body," which says that diverted water must be diverted "through a manmade water conveyance. *See* MONT. CODE ANN. § 23-2-301(6). This suggests that the alternative to water that flows through a manmade water conveyance is water that flows through a "natural water body." In other words, the statute envisions two situations: one in which water is flowing through a manmade water conveyance and one in which water is flowing through a natural water body.

The examples of diverted water articulated in the statute, which are not exclusive, are irrigation ditches, industrial, domestic or municipal water systems, flood control channels, and hydropower inlet and discharge facilities. *Id.* Each of these have in common, of course, the fact that they are manmade. The fact that the water itself has been appropriated is not a legally significant fact. The statute does not suggest that water flowing in a natural streambed is "diverted" simply because somewhere down the line, an appropriator intends to divert it and apply it for beneficial use. Many if not most Montana rivers and streams carry water that someone has a valid claim to use. In fact, the water in Montana's rivers and streams is used by numerous appropriators, again and again. The fact that our surface waters are destined for multiple applications to beneficial uses does not make them "diverted" for purposes of the Stream Access Law.

The Legislature implies that the conveyance mechanism alone is the legally important difference between "diverted water" and "surface waters." Quite simply, diverted water flows "through a manmade water conveyance system." MONT. CODE ANN. § 23-2-301(6). Thus, when water is diverted into the Union or Etna ditches from Mitchell Slough, it is "diverted." Under the Stream Access Law, such water is not open to recreational use unless the landowner permits access. Until water is so diverted, it is "surface water" open to public recreational use. The extent to which a streambed may have been manipulated or affected by man is irrelevant, because no amount of manipulation can transform a natural streambed into a ditch. This interpretation not only gives effect to the definitions of "diverted water" and "surface waters," it also gives effect to the underlying purpose of Article IX, § 3.

2. *Mitchell Slough is Not a Ditch.*

In spite of its holding that Mitchell Slough is not open to public recreational access because it is a non-natural water body with diverted water flowing through it, the lower court did *not* find that Mitchell Slough is a ditch. It stated explicitly that the Mitchell follows a natural streambed, and that no amount of work can transform a natural water body into a ditch, thereby implying that the Mitchell is not a ditch. Opinion at 6-7. Sportsmen's Groups agree with this conclusion, as it is supported by both the facts and the applicable law.

The conclusion that the Mitchell is not a ditch is supported by the statutory definition of diverted water. A ditch is one of the Legislature's stated examples of a "manmade water conveyance system." Because the district court found that the Mitchell was created by natural processes, it is not (except for the first quarter-mile) man<u>made</u>. It is man-influenced, man-managed, and man-changed – but none of those concepts exist in the Stream Access Law. A natural water body in the statute is contrasted with a manmade water conveyance system. Two distinct types of water bodies are envisioned by the statute, whereas the lower court's ruling creates a third type somewhere in between. This hybrid water body, according to the lower court, may have been created by nature and look like a stream, but be so influenced by man and so filled with appropriated water that it is no longer open to public recreational access. This reasoning is unsupported by case law, statute, or the Constitution.

The district court was troubled by the fact that the Bitterroot River has migrated west, away from Mitchell Slough, and that water would perhaps not flow in the slough but for man's intervention. These facts form the basis for the court's holding that the Mitchell is not a natural water body. Opinion at 5-7. But this proposition is purely speculative. It is undisputed that water flows year-round in Mitchell Slough, and has always done so. Landowners' expert Bruce Anderson

stated as much in his report. *See* Report of Bruce Anderson, ER , at 4 ¶ 1 ("'potential' natural baseflow cannot be measured directly by this study (or any other) due to historic and on-going human influence on the landscape.") Thus, any hypotheses about what the situation might be like had history progressed differently are merely that – hypotheses – and cannot form the factual basis for the court's holding.

The Stream Access Law is not a law about abstract concepts of ownership; it is a law addressing the very practical aspects of when surface water is open to public recreational use. Whether there might have been more water or could have been less water simply doesn't factor into this equation. Similarly, whether a streambed has been massively manipulated or not, unless it is a manmade ditch, it is open for public recreational use.

3. *There is No Causation Requirement in the Stream Access Law.*

The lower court also introduced a concept not found in the statute, the Montana Constitution, *Curran,* or *Hildreth*. Its finding that Mitchell Slough would not flow *but for* man's intervention is a finding of causation – and nowhere in Montana's law regarding public recreational access can this concept be found. This violates a fundamental rule of statutory construction: the court's role is to interpret statutes as they are written, and importantly, *not to insert what has been omitted.*

MONT. CODE ANN. § 1-2-101.

Whether water flows "naturally," i.e., without man's intervention, or due to manipulations of the streambed by man, the water within the streambed is water owned by the state of Montana for the use of its people. Moving dirt so as to increase the flow of water cannot change the ownership of that water.

D. All Waters in This State are Publicly Owned.

The 1972 Constitution separated title to the bed and banks from title to surface water. Previously, water in streams or rivers that were not navigable in fact was owned by the person who owned title to the bed and banks. *See, e.g., Herrin v. Sutherland* (1925), 74 Mont. 587, 241 P. 328 (holding that defendant trespassed when he waded up Fall Creek to fish, having accessed the creek from the Missouri). The lower court's decision herein returns us to the days of *Herrin,* with riparian landowners able to exclude fishermen, boaters, and hunters – and not because they own the bed and banks, but rather because they have managed, manipulated and otherwise changed the natural streambed. Nothing like this was ever contemplated by the Framers or the Legislature.

The Constitution explicitly provides for state ownership of all water, whether surface, underground or atmospheric, for use by the public; in other words, the State owns the water in trust for the people. MONT. CONST. Art. IX, § 3; *Curran*,

210 Mont. at 52, 682 P.2d at 170. This constitutionally mandated ownership scheme means that "privately owned water" does not exist in Montana.

1. *Private water rights are for use, not ownership.*

Water rights holders have the right to use water for beneficial purposes, as allowed by the relevant legislative scheme. Water rights are usufructary; private individuals are granted the right to use a public resource for private uses. This concept predates the Montana Constitution; it was part of Roman civil law as well as English common law. *See, e.g., Rock Crk. Ditch & Flume Co. v. Miller* (1933), 93 Mont. 248, 17 P.2d 1074, 1076-1077 (quoting Justinian and Blackstone). Once irrigators have used the water, they have to give it back. After water leaves an appropriator's control, it rejoins the public resource, subject to further appropriation. The Legislature has recognized that "water is a resource that is subject to use and reuse, such as through return flows . . . ." MONT. CODE ANN. § 82-5-101(5).

2. *Usufructary rights cannot be transformed into title.*

In observing that this is not a water-rights case, and concluding that the *Hidden Hollow* rationale does not apply, the lower court overlooked the textual and factual interplay between public ownership of water for the use of the people, and private rights to use that water consumptively. Opinion at 8 (referring to *Hidden*

Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185). The point is not how water is appropriated, but rather that once water has been applied for a beneficial use, and leaves the control of the irrigator, it immediately returns to public ownership.

Thus, the water that rancher A applies to his crops returns to surface water, or the aquifer, or evaporates. *Wherever it goes*, regardless of what happens to it, it immediately becomes public water. From a water-rights perspective, this is essential, for once applied and returned, the water is again subject to beneficial use. Water in this state is used again and again and again. It is public, then used privately, then public, then used privately. This is the point of the language in *Hidden Hollow,* which was quoted from two earlier cases. *Hidden Hollow*, 2004 MT 153 ¶ 31, 321 Mont. at 514-515, 92 P.3d 1185 at 1192 (quoting *Popham v. Holloron* (1929), 84 Mont. 442, 275 P. 1099, and *Rock Creek Ditch & Flume Co. v. Miller* (1933), 93 Mont. 248, 17 P.2d 1074). As water moves from one appropriator's control to the next, leaving one manmade conveyance on its way to another, it returns to the public domain. While there, it is available for both further appropriation and public recreational use.

The District Court concluded that private individuals can put so much "sweat equity" into a streambed that they earn the right to exclude the public. The right to

exclude the public from property is a fundamental right of private property – but Landowners have no such right. It is irrelevant whether they own title to the bed and banks, for this Court has already held that such title does not interfere with the public's right to recreate on state waters. *Curran*, 210 Mont. at 56, 682 P.2d at 172. It is impossible for them to own title to the water, for no one other than the state is empowered to own water. MONT. CONST. Art. IX § 3. The District Court's holding transforms narrow usufructary water rights into property rights with an exclusive right of possession. This is a legal impossibility, necessitating reversal of the District Court's decision.

II. THERE IS NO CONFLICT BETWEEN PUBLIC RECREATIONAL USE AND APPROPRIATION FOR BENEFICIAL USES ON MITCHELL SLOUGH.

A. The Parties' Rights are Constitutionally Equivalent, and the Legislature Has Determined How Those Rights are to be Balanced.

The state is the sole owner of water. It owns water in trust for its people, who have a right to use those waters for recreational purposes. In addition, water may be withdrawn from the public domain and applied to beneficial uses, which may be private or public. Thus, both the public and water-rights holders have usufructary rights in water, which are recognized in Article IX, section 3 of the Montana Constitution. They are equivalent rights, with no intention evidenced by the Framers to elevate one over the other. In fact, the text of the Constitution as well as

the transcripts of the convention reveal a desire to fully respect *both* the right of individuals to withdraw water for beneficial uses *and* the right of the public to fish, hunt, and boat on state waters. VERBATIM TRANS., *Mont. Const. Conv.*, at 1305 - 1334 *seriatim* (Vol. V).

How, then, is the Court to balance these two rights? This question is answered by the Stream Access Law. The Legislature determined that the line should be drawn at the level of the water conveyance system – if it is manmade, the water is in the exclusive possession of the appropriator, who may exclude the public. If not, the public has the right to recreate. This line-drawing is a function rightly exercised by the Legislature, deserving of ample deference by this Court. To move that line as the lower court did is not only an incorrect interpretation of the statute, but an infringement of legislative power.

B. The Only Right Potentially Infringed Herein Is the Public's Right to Recreate on Mitchell Slough.

This case actually presents a very narrow question: Who is legally entitled to exert control over Mitchell Slough? Specifically, may Landowners prohibit the public from standing on a bridge and fishing, or wading up the Slough from the Bitterroot River to hunt or fish?

There are no allegations of trespass. Landowners have not argued that public

recreational use is infringing on their right to appropriate water for beneficial uses. There is no evidence that the public's historical or current use of the Mitchell has caused environmental degradation, water pollution, or reduced flows. Irrigators are able to divert and apply all the water to which they are entitled. Ranchers are able to water their stock. What in the world is the problem?

In the absence of facts alleging infringement of Landowners' water rights, there is no real dispute. There is simply a desire to exclude the public from recreating on surface waters. Put another way, Landowners desire to infringe upon the constitutionally protected rights of the public.

C. Who Should Bear the Burden of Proof?

The fact that the right to recreate is protected by the Constitution does not mean that the Constitution provides the answer to the resolution. When the Legislature has acted, as it has here, the Court need look no further. Nonetheless, it points to another error made by the lower court. Plaintiffs were required to bear the burden of proof that Mitchell Slough is a "surface water" that is not "diverted from a natural water body." Sportsmen's Groups assert that this burden was incorrectly allocated. Instead, Sportsmen's Groups contend that the burden of proof should be borne by the party seeking to diminish the opposing party's constitutional right. If there is a true conflict between recreational use and water rights, the Court will

have to determine the proper allocation of the burden of proof. But that case is not presented here. Landowners should carry the burden of proving that Mitchell Slough is not surface water open to recreational use.

CONCLUSION

For all the foregoing reasons, Sportsmen's Groups respectfully request that the Court reverse the lower court's decision and remand with instructions to enter judgment for the Plaintiffs.

DATED this ____ day of November, 2006.

____

Elizabeth A. Brennan
Attorney for Sportsmen's Groups[2]

[2] A full list of the organizations appearing as *amicus* herein is appended at v.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 17 of the Montana Rules of Appellate Procedure, as modified by Order dated June 14, 1999, I certify that this amicus brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; the word count calculated by Word Perfect 11 is 4980; and the brief does not average more than 280 words per page excluding Certificate of Service and Certificate of Compliance.

Dated this ___ day of November, 2006.

____
Elizabeth A. Brennan

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this ____ day of November, 2006 upon the following by first class mail postage prepaid:

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IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA-06-0520

BITTERROOT RIVER PROTECTIVE ASSOCIATION, INC.,

Plaintiff and Appellant,

MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Involuntary Plaintiff and Appellant,

v.

BITTERROOT CONSERVATION DISTRICT, a political subdivision of the State of Montana,

Defendant and Respondent,

WALTER R. BABCOCK, ET. AL,

Intervenors - Third Party Plaintiffs and Respondents,

MARNELL CORRAO ASSOCIATES, INC.,

Intervenors - Third Party Plaintiff and Respondent,

v.

RAVALLI COUNTY COMMISSIONERS,

Third Party Defendants and Respondents.

ON APPEAL FROM THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, RAVALLI COUNTY, HON. TED MIZNER PRESIDING

BRIEF OF AMICUS CURIAE, SPORTSMEN'S GROUPS

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