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 Respondents,

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, THE MONTANA COUNCIL OF TROUT UNLIMITED

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I. DESCRIPTION OF AMICUS CURIAE AND STATEMENT OF INTEREST

The Montana Council of Trout Unlimited ("MTU") is a Montana non-profit corporation comprised of approximately 3,000 members organized into 12 chapters around the state. MTU's mission is to conserve, protect, and restore Montana's coldwater fisheries and the habitats that support them. MTU is an exempt charitable organization under section 501(c)(3) of the Internal Revenue Code, and an affiliate of the national organization Trout Unlimited.

MTU members were instrumental in passing the Montana Natural Land and Streambed Preservation Act of 1975 (commonly called "the 310 Law" after its original designation as Senate Bill 310). Over the past two decades MTU and its chapters, working in partnership with private landowners, have undertaken numerous stream restoration projects under the jurisdiction of the 310 Law. In addition, they have been involved in countless other 310 projects by providing comments to local conservation districts, landowners, and the Department of Fish, Wildlife and Parks.

MTU believes the District Court's ruling on Counts I and II raises serious concerns for the future application of the 310 Law to streams

throughout the state. MTU is particularly concerned because this interpretation has been adopted at the request of parties who do not appear to be primarily concerned about the "burden" of obtaining 310 permits at all, but rather appear much more interested in using the BCD's decision to bolster their parallel claim that they may exclude the recreating public from the stream channels at issue under the Stream Access Law.[1]

II. BACKGROUND

A. The 310 Law

In 1975, the 310 Law was brought to the 44th session of the Montana legislature by a coalition of ranchers, conservationists, and other citizens who were convinced Montana's rivers needed protection. *See* excerpts of legislative history, attached as Exhibit 1, at 45, 49[2] Their specific concern was an increasing number of ill-advised stream relocation and armoring projects that, in the words of one proponent, had taken his boyhood trout stream and "changed it to a glorified irrigation ditch." *Id.* at 38. Their solution was to replace the old Montana Stream Preservation Act with a new law requiring landowners to obtain permits before altering the bed or banks of streams.

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[1] MTU takes no position whatsoever on the merits of the parties' claims regarding the application of the Stream Access Law to Mitchell Slough.

[2] A complete copy of the legislative history appears in the record as BCD Exhibit 5.

Although much of the impetus for the new law came from the conservation community, an express purpose of the bill was to prevent soil erosion and sedimentation that threaten the availability of water for *all* beneficial uses, including irrigation. *See id.* at 7. Indeed, no fewer than six individual ranchers, as well as the Montana Stockgrowers Association and the Montana State Grange, spoke in favor of the bill. *Id.* at 37, 47. As Peter Jackson of Madison County stated:

> We depend on our streams for irrigation. Some method must be developed where the ranching industry must have a way to protect Montana's water in all circumstances.

Id. at 7. Accordingly, an express purpose of the 310 Law is to protect the use of water for any useful or beneficial purpose as guaranteed by the Constitution of the State of Montana. Mont. Code Ann. § 75-7-102(2).

Among the primary evils the 310 Law was intended to address were the rampant straightening and relocation of Montana's streams, which had already been altered to an alarming degree. In its committee report on the bill, the Environmental Quality Council noted that many miles of rivers such as the Big Hole, Ruby, and Jefferson had been straightened and relocated. Exhibit 1, attached, at 21. The drafters of the 310 Law understood that such alterations had taken place, and that altered streams, although degraded, still retained natural values worthy of protection. Thus, they stated that the

express policy of the law is that "natural rivers and streams . . . be protected and preserved to be available in their natural *or existing* state . . . ." Mont. Code Ann. § 75-7-102(2) (emphasis added).

In practice, the operation of the 310 Law is relatively straightforward. Anyone proposing to alter the bed or banks of any channel of any natural perennial stream must apply for a permit from the local conservation district, a body of locally-elected officials serving in a volunteer capacity. Mont. Code Ann. §§ 75-7-111 & -112; A.R.M. §36-2-407. The conservation district assembles a review team, including a representative from the Department of Fish, Wildlife and Parks ("FWP"), to review the application and visit the project site. §75-7-112(1) through (3). The team members submit written recommendations to the conservation district, which may approve, deny, or modify the requested permit. §75-7-112(4) through (11). The Montana Attorney General has held, the burden the 310 permit process imposes on landowners is a light one. *See* 41 Op. Atty Gen. Mont. No. 62.

The 310 Law protects fundamental constitutional rights enjoyed by the citizens of Montana. In addition to fulfilling the state's duty to preserve the availability of water for all beneficial uses under Article IX, § 2 of the Montana Constitution, it is expressly intended to protect the Article II and Article IX rights to a clean and healthful environment. Mont. Code Ann. §

75-7-102(1). Thus, it is beyond dispute that questions involving the scope and application of the 310 Law implicate constitutional rights, and the law must be interpreted and applied with these rights in mind.

B. The Bitterroot and Other Rivers of Western Montana

The Bitterroot River between Darby and Lolo, like many reaches of other rivers throughout western Montana, does not have a single channel, but rather consists of an interconnected system of multiple channels. *See generally* David Gaeuman, "Historical Channel Changes and Processes of the Central Bitterroot River, Ravalli County, Montana" (University of Montana 1997) at 25-27. These various types of channels do not stay static over time. In many cases, what are now secondary channels were once main channels of the river, and may become so again as the river migrates back and forth across its floodplain. *Id.* at 27-33. The Bitterroot has long been known for a tendency to shift its main flow abruptly between channels in this fashion. *See generally* Kenn D. Cartier and Robert R. Curry, "Erosion and Stream Channel Stability in the Bitterroot River Watershed, Southwestern Montana" (University of Montana 1980).

The Bitterroot is hardly the only river in western Montana to exhibit an interconnected and evolving system of multiple channels. Other examples abound, including the lower Big Hole River in the area of Twin

Bridges, the Jefferson River, the Madison River above Ennis Lake, and portions of the Yellowstone River.

All of the above rivers have been profoundly changed by over a century of large-scale land use and irrigation practices. For example, the Bitterroot was one of the earliest river systems that European settlers developed for irrigation. *See* "Reconnaissance Construction Report on Water Control, Use and Disposal, Bitterroot Drainage Basin" (USDA April 1947) at 3 & Table C1. Its earliest water right dates to 1853, and large-scale irrigation began in the 1880s. *Id.* By 1947, approximately 104,000 acres in the valley had come under irrigation – 29,000 acres via diversions on the main river, and 75,000 acres via diversions from a myriad tributary streams – with total annual diversions estimated at 481,000 acre feet. *Id.* at 10, 28.

The diversion of such a massive quantity of water has drastically altered the hydrology, morphology, and overall ecology of river basins throughout the West. *See generally* "Water in the West: Challenge for the Next Century" (report of the Western Water Policy Review Advisory Commission, June 1998) at 2 - 12-13. A recent Congressional report summarized the "typical path of western water" prior to European settlement as follows:

> Runoff flowed slowly from undisturbed watersheds with a larger proportion passing underground. Groundwater filled porous valley

> soils, assuring a more reliable flow. Channels were common, scoured near boulders and fallen logs; bottoms were of diverse particle sizes; and beaver, common then, added structure through damming and other activities. Riparian vegetation was extensive, from forest to shrub and marshlands. Summer water temperatures were moderate due to shading by plants and in summer/winter alike by extensive ground and surface water exchange. Damaging floods and droughts were actually less frequent and violent, buffered by vegetated slopes, spongy flood plains, and complex, current-retarding channels. In short, there was more permanent water, habitats were more complex, and extreme conditions were less frequent.

Id. at 2-12 (quoting W.L. Minckley, "Sustainability of Western Native Fish Resources," *Aquatic Ecosystems Symposium* at 65-78 (National Technical Information Service 1997). The rivers of western Montana have certainly not been immune to such impacts.

C. Mitchell Slough

The briefing in the District Court contains a good deal of argument over the historical evidence describing the physical nature of Mitchell Slough[3] as far back as 1872. MTU will not delve into the intricacies of these arguments, but instead will set forth what appear to be the salient points of agreement. First, there appears to be no dispute that with the exception of the quarter-mile portion below Tucker Headgate, Mitchell Slough flows in a

[3] MTU's use of this name is deliberate. MTU's membership reports that the name "Mitchell Slough" has been in use in the Bitterroot Valley for as long as anyone can remember, and the Olive Wood decree documents its use at least as early as 1928. *See* Wood decree BRPA Exh. 23D, finding of fact No. 3. In contrast, the earliest use of the name "Mitchell Ditch" appears to date from the 1996 formation of a ditch company by several of the Landowners.

series of channels that were formed by flowing water from the Bitterroot River system. *See* BCD Ruling at 7, ¶ 21; *see also* BCD Ex. 26 (BRPA Ex. 18) (1997 DNRC report describing Mitchell Slough as "a low gradient meandering channel that resembles a stream more than a ditch…"). If one compares the 1872 GLO map with the most recent USGS quadrangle map, the channel of the present-day Mitchell Slough lines up remarkably well with channels existing in 1872. *See* BCD Ex. 27 (BCD Ex 34A); *compare* BCD Exhibit 44. In the area above the town of Victor, the 1872 map shows what is now Mitchell Slough to have been just that – a slough with water flowing in it. Below Victor, Mitchell Slough appears to have been a main channel of the Bitterroot. At some point since 1872, the river appears to have abandoned the lower Slough as a main channel – either because of natural or man-made causes, or both – although it has continued to flow perennially as a system of secondary channels.[4] Mitchell Slough's channels are sinuous in the manner of natural channels, except in relatively short sections where it has been straightened like most other Montana streams. The Bitterroot Conservation District ("BCD") found that Mitchell Slough

[4] The BCD and District Court found that the river abandoned this channel "500 to 1000 years ago," as it moved to the west, citing the report of the Landowners' expert Barry Dutton. BCD ruling at 7, ¶ 22; Dist, Court ruling at 5, 10. Actually, Dutton said no such thing. What he actually stated was that the channel was abandoned "at some time *within* the past 500 to 1,000 years." Dutton Report, BCD Ex. 26, (BRPA Ex. 17) at 3. This is consistent with the notion that it was abandoned at some time since 1872.

flows in "a historic natural channel" – albeit one that has been relocated and manipulated in places. BCD ruling at 7, ¶¶ 21 & 23; *id.* at 8, ¶ 29; Dist. Ct. ruling at 10.

Second, it is clear that parts of Mitchell Slough have been used as a conduit for irrigation water since at least 1915, when a dam was constructed to divert water from the main Bitterroot into the upper Slough. *See* Olive Wood decree (BRPA Exh. 23D). Some time after 1928 someone replaced that structure with the present Tucker headgate just upstream, and dug a short length of channel to connect the headgate to the upper Slough. BCD Ruling at 7, ¶ 21. Mitchell Slough is far from the only side channel in western Montana to have a headgate at its upstream end, and to be used by irrigators to transport water.

Third, it is undisputed that Mitchell Slough has flowed perennially since at least 1872. No one has ever seen it dry up, even when the Tucker Headgate is shut off, except for the upper 1/4-mile manmade channel that connects the headgate to the natural channel. This is primarily because of large infiltrations of groundwater, which provide a steady source of inflow to Mitchell Slough. BCD ruling at 5-13, ¶¶ 15, 23, 24-27, 35-36, 38-39.

III. ARGUMENT

A. The District Court and BCD Erroneously Applied the Phrase "Absence of Diversion."

1. The District Court's interpretation of the phrase "absence of diversion" is directly contrary to the legislative history of the regulation in which that phrase appears.

The 310 Law applies to "any natural, perennial-flowing stream or river." Mont. Code Ann. § 75-7-103(6). The regulations implementing the 310 Law further define a "natural perennial stream" 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.

A.R.M. 36.2.402(7). There is absolutely no question of the intent behind this regulation. The legislative history explains its purpose as follows:

> Natural perennial flowing streams in their existing state sometimes streams dry up because of diversion, impoundment, and extreme drought. Conservation districts currently administer the act on streams that would flow perennially if it were not for man-made causes.

1997 Montana Administrative Register at 52 (January 16, 1997). This intent is further supported by a separate section setting forth the scope of 310 jurisdiction: "A district may consider a stream to flow perennially *if it dries up periodically* due to man-made causes, or extreme drought." ARM § 36.2.407 (emphasis added). Both of these regulations are squarely in line

with the legislative policy of the 310 Law that "natural rivers and streams . . . are to be protected and preserved to be available in their natural *or existing* state." Mont. Code Ann. § 75-7-102(2) (emphasis added).

Here, the BCD and the District Court ignored this plain legislative history, and construed the phrase "absence of diversion" to refer to diversions *into* a stream as well as out of a stream. Based on this interpretation, they held that even though Mitchell Slough has always flowed perennially, waters diverted into it cannot be counted when determining whether it is a "natural" perennial stream. The BCD and District Court then went a step further, and ruled that any *groundwater* flowing in Mitchell Slough is not "natural" if it consists of irrigation return flow. Dist. Ct. Op. at 7-8; BCD Ruling at 10-11, ¶¶ 8-9. They reasoned that such water is only present in the Slough because it has been diverted from the main river or tributaries at some point upstream, has been placed on a field, and has made its way to the Slough as groundwater seepage. *Id.* Although this still left 10-16 cfs of "natural" groundwater in the Slough unaccounted for, the court and BCD found that if all irrigation were somehow to cease, this 10-16 cfs would not be enough to prevent the channel from filling in with sediment and cease flowing. Dist. Ct. Op. at 9 - 11; BCD Ruling at 9, ¶ ¶ 39-40.

This interpretation cannot be sustained. It is a bedrock rule of statutory interpretation that where a statute or regulation is ambiguous, a reviewing court is to look to its legislative history to resolve the ambiguity. Here, the phrase "absence of diversion" is ambiguous – it can be construed to refer to diversions of water out of a stream, or into a stream, or both. Despite this, the District Court ignored the legislative history, and instead ruled as a matter of "logic" that the phrase must refer both to diversions into and out of a stream. Dist. Ct. Op. at 7-8. In other words, the District Court simply substituted its own logic for the logic expressed by the expert agency that authored the rule. This was legal error.

2. The District Court's interpretation is contrary to the 310 Rule's policy of preserving natural streams in their natural "or existing" condition.

It is another bedrock principle of interpretation that a regulation be interpreted consistently with the express purpose of the authorizing statute. Here, the policy of the 310 law is that "natural rivers and streams . . . are to be protected and preserved to be available in their natural *or existing* state . . . ." Mont. Code Ann. § 75-7-102(2) (emphasis added). The 1872 GLO map establishes that prior to the arrival of large-scale irrigation in the Bitterroot Valley, Mitchell Slough was a natural stream. Although humans have subsequently moved portions of the stream and diverted water into and out

of it, Mitchell Slough in its current condition retains significant aquatic and riparian attributes in need of protection. *See* ARM 36.2.407; BCD Ex. 26 (BRPA Ex. 8J) (FWP report on the fishery in Mitchell Slough). It is the policy of the 310 Law to preserve the stream in this existing state, so that it remains available to support these beneficial uses. Mont. Code Ann. § 75-7-102(2). The District Court's interpretation of § 36.2.402(7) to exclude water diverted into the stream violates this policy.

3. The District Court's ruling is based on wholly unrealistic definitions of "natural" and "diverted" water that threaten to place most waters of the state outside the protection of the 310 Law.

In support of its ruling that groundwater return flows from irrigation are not to be considered "natural" flow, the District Court adopted a definition of "natural" that the Farm Bureau's counsel took from a dictionary. Dist. Ct Op. at 8. Following this definition, the court concluded that water may only be considered to be "natural" if it has *never* been subjected to "*any* man-made manipulation" whatsoever, "including diversion, impoundment or appropriation." *Id.* (emphasis added).

There are several problems with this argument. The first is that for all practical purposes, no such water exists. As discussed in the background section, *supra*, in most Montana river basins huge volumes of the available water – hundreds of thousands or millions of acre feet – are captured, stored,

diverted, used, released, and used again. In the Bitterroot Valley, for example, the entire flow of many tributaries is diverted and used during the mid-summer season. *See* BCD Ruling at 8, ¶ 31. During the late summer season, a large proportion of the flow of the Bitterroot River consists of impounded water from Painted Rocks Reservoir that is released under a lease agreement to provide instream flow, and a large portion of the remaining water in the river certainly comes from irrigation return flow. There is a good chance that even if these waters could somehow be measured and discounted, the Bitterroot itself – a Class I navigable river and one of the state's most important fisheries – would not be a natural perennial stream under the District Court's definition.

Second, assuming these hypothetical virgin unappropriated, unimpounded, undiverted waters exist, it is literally impossible in the real world to identify and quantify them. Again, the influence of a century of modern irrigation practices on the hydrology of Montana's rivers cannot be overstated. In order to find a body of water to be a natural perennial stream, the District Court's definition requires a conservation district to magically turn back the clock to pre-Columbian times before any irrigation development took place, and speculate about what streamflows would look like under conditions that no living person has ever seen. This is impossible.

Indeed, one of the Landowners' experts made precisely this point in his expert report offered at the trial on Count IV of this case:

> Stated otherwise, potential "natural" baseflow cannot be measured directly by this study (or any other) due to historic and on-going human influence on the landscape. Similarly, potential "natural" conductivity of natural vs. irrigation influenced groundwater discharge could not be measured directly due to extensive irrigation influence throughout the valley. Thus, all measurements necessarily represent a human-altered and artificial condition.

Expert Report of Bruce Anderson, Exhibit K of Intervenors Babcock, et al. at 4.

Third, the District Court's interpretation unreasonably discounts irrigation return flows that *add* to a stream's flow when considering whether it is naturally perennial, while failing to take into account the multitude of human activities that may have *reduced* the stream's flow since pre-settlement times. One of the most profound impacts that large-scale water development has had on natural ecosystems is changes to groundwater flow regimes. *See* Minckley, *supra*. Although irrigation practices can increase groundwater inflow to a stream by creating return flows from cropland, they can also decrease such inflows by diverting streams that formerly recharged groundwater aquifers. *Id.* Here, for example, the BCD expressly found that "[e]xtensive water development in the Mitchell catchment over the last 130 years has severed the connections of tributaries in this area to the Bitterroot

River and Mitchell [Slough]." BCD Ruling at 8, ¶ 31. But the BCD made no attempt to quantify the amount of natural flow that Mitchell Slough may have lost as a result of this water development, and to add that flow into its calculation of whether the Slough would be perennial under "natural" conditions.

Finally, human activities have altered "natural" conditions in ways that have nothing to do with diversion, impoundment, or drought, but that can have a significant influence on whether a stream flows perennially. One of these is sediment. The Bitterroot River system has experienced a massive increase in sediment in the last century as a result of large-scale land uses such as grazing. *See* Cartier and Curry, *supra*, at 31. This increased sedimentation has had an effect on the evolution of the Bitterroot River channel system. *Id.* Nowhere does the District Court's approach require any analysis to compensate for these unnatural effects.

In sum, the result of the District Court's approach has been to focus exclusively on ways in which human activities have increased Mitchell Slough's flows over the last 130 years – and deduct those from its estimate of "natural" flow – while showing no interest whatsoever in making corresponding adjustments for human activities that may have *decreased* the Slough's flows in the last 130 years. This one-sided approach cannot be

reconciled with the 310 Law's policy of preserving natural streams in their natural "or existing" condition.

4. The Court should adopt the long-established approach of Montana water law, which recognizes that return flows are "natural" water once they return to a natural channel.

There is an obvious way to avoid the inherent inconsistency between the District Court's definition of "natural" water and the 310 Law's policy of preserving streams in their natural or existing state. Montana water law has long considered irrigation return flows to be "natural" water once they return to a natural watercourse. In *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074 (1933), this Court held that:

> Where vagrant, fugitive waters have reached a *natural channel*, and thus have lost their original character as seepage, percolating, surface, or waste waters, they serve to constitute part of the watercourse, and are subject to appropriation.

Id. at 261, 17 P.2d at 1077; *see also Hidden Hollow Ranch v. Fields*, 2004 MT 153 ¶ 31, 321 Mont. 505, 92 P.3d 1185 (2004) (same).

The District Court held these cases do not apply because the BCD found Mitchell Slough is not a natural watercourse. Dist. Ct. Op. at 9 (citing *Hidden Hollow Ranch, supra*). This was simple error. Both *Rock Creek Ditch Co.* and *Hidden Hollow Ranch* expressly use the term natural *channel* – not "watercourse" – to denote when return flows regain their status as natural water. Here, the BCD found that Mitchell Slough does flow in a

"historic natural channel, referred to herein as the Mitchell." BCD Ruling at 7, ¶ 21. Therefore, return flows that reach this channel should be considered natural water for purposes of the 310 Law. Once again, this approach is fully consistent with the policy of preserving natural streams in their natural "or existing" state.

The above approach is likewise consistent with another fundamental purpose of the 310 Law – to preserve the availability of Montana's publicly-owned waters for appropriation for beneficial use. Mont. Code Ann. § 75-7-102(2). As discussed in section II.A, *supra*, this was one of the primary reasons agricultural interests backed the 310 Law in 1975. As a matter of policy, it makes sense that return flows should be protected by the 310 Law when they return to a natural channel, because at that point they are available for beneficial use, and at that point their suitability for use is threatened by the dangers of sedimentation and erosion, the dangers the 310 Law is designed to prevent. *Rock Creek Ditch Co.,* 93 Mont. at 261, 17 P.2d at 1077; *Hidden Hollow Ranch*, 2004 MT 153 ¶ 31; Mont. Code Ann. 75-7-102(2).

B. The Process By Which Mitchell Slough Has Been Removed From the Jurisdiction of the 310 Law is Deficient.

Montana's conservation districts have a very full plate. In addition to administering the 310 Law, they are charged with a host of other tasks,

including conducting public education on resource conservation, sponsoring stream restoration projects, helping administer federal conservation programs such as the Farm Bill, demonstrating conservation techniques to the public, and leading community-led rural development efforts through the RC&D program, to name a few. Most of this work is accomplished through volunteer, part-time board members, who are certainly among the most dedicated and public-minded citizens in the state.

What conservation districts do not have is a great deal of staff, funding, or other resources. Although help is sometimes available – from DNRC, from the Montana Association of Conservation Districts, and in the case of 310 projects, from FWP – there is a limit to what these agencies can provide. In the present case, for example, when the BCD was first saddled with the task of determining the status of Mitchell Slough, there was initial talk of hiring a professional hydrologist to provide technical assistance with this task, but that notion appears to have been abandoned early on.

Although conservation districts do not have a great deal of money or hired staff, the same is certainly not true of many riparian landowners. More and more people of means are buying land along Montana streams. As this case amply illustrates, such landowners are often highly motivated to prove the streams on their property are exempt from public laws, and can afford to

spend tens or hundreds of thousands of dollars hiring paid experts to selectively gather and present information that supports their case. In a normal, functional adversarial system, the danger of bias in the information these parties submit would be counterbalanced by technical information from the opposing side, and by a neutral factfinder with the time, resources, and technical support necessary to analyze both sides and render a decision.

That is not what happened here. Instead, the Landowners were able to overwhelm the BCD with hundreds of pages of testimony and reports from a team of over half a dozen highly-paid consultants. Not a single expert testified on behalf of the public interest in protecting the natural attributes of Mitchell Slough. The effect of this inequality is readily apparent in the record. To take the most obvious example, the District Court supported its holding that return flows should not be considered part of the "natural" flow of a stream by stating that "every expert that offered an opinion as to the status of the Mitchell under the applicable law . . . excluded water both diverted into as well as out of the Mitchell." Dist. Ct. Op, at 8. What the Court failed to mention, of course, was that "every expert" who testified before the BCD was in the employ of the Landowners.

Article IX of the Montana Constitution provides that the state must provide "adequate remedies for the protection of the environmental life

support system from degradation." Mont. Const. Art. IX, §1(3). The natural aquatic and riparian attributes that the 310 Law protects are undeniably a crucial component of that environmental life support system – particularly in an arid state like Montana. It is difficult to conclude that the present system of determining whether a water is protected by the 310 Law – which allows focused, well-funded special interests to dominate the process – is an adequate remedy for protecting these resources from degradation.

The state could remedy this situation in several ways. For example, it could direct more funding to conservation districts to hire technical expertise. Similarly, the state could direct FWP to conduct independent studies to challenge those provided by landowners seeking to remove a stream from 310 jurisdiction. Or the state could remove natural perennial stream determinations from conservation districts altogether, and place them in the hands of a full-time professional agency such as DNRC or FWP. Unfortunately, it would fall to the legislature to implement any of these measures. Although this Court is empowered to enforce the state constitution, it cannot force the legislature to employ any particular means of complying with its mandates.

Since the Court must accept the current framework of determining 310 jurisdiction as a given, it must devise a way to ensure that public

stream protection law. This result cannot be squared with either the 310 Law or the Montana Constitution. This Court should reverse the District Court's ruling.

Respectfully submitted this 15th day of November, 2006.

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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 Microsoft Word is 4986; and the brief does not average more than 280 words per page excluding Certificate of Service and Certificate of Compliance.

Dated this 15th day of November, 2006.

Matthew O. Clifford

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 14th day of November, 2006 upon the following by first class mail postage prepaid:

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RAVALLI COUNTY COMMISSIONERS,

Third Party Defendants and Respondents.

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

THE MONTANA COUNCIL OF TROUT UNLIMITED CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the *Revised Brief of Amicus Curiae The Montana Council of Trout Unlimited* has been served on this 15th day of November, 2006 upon the following by first class mail postage prepaid:

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