IN THE SUPREME COURT OF THE STATE OF MONTANA
SURPREME COURT CAUSE NO. DA-22-0158

Pheil Acquisitions LLC

Petitioner/Appellant

v.

Gallatin County Conservation District

Defendant/Appellee

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighteenth Judicial District Court
Gallatin County, Montana, The Honorable Rienne McElyea Presiding

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Statement of Facts

Pfeil Acquisitions LLC ("Pfeil") owns approximately 16 acres consisting of Tracts 1 and 2 as depicted in Certificate of Survey 2901, all in Section 11, T3S, R4E. The lands are adjacent to Gallatin Gateway in Gallatin County, Montana. Exh. 3, affidavit of Pfeil[1] The lands are bordered on the eastern side by one of the channels of the Gallatin River. The other channel lies to the west of the lands. The Gallatin flows north in this area. *Id.*

Within these lands is a drain ditch. The ditch does not divert the waters of the Gallatin or any of its tributaries. Instead, the ditch arises within the lands owned by Pfeil, and collects seepage, springs, and other groundwater. Affidavits Pfeil, Davis . The ditch transects a small pond with a surface acreage of 0.27 acres. Id. The water from the ditch enters the pond, and then the overflow from the pond is collected by the ditch on the down-gradient side of the pond. All the waters in the ditch are ultimately discharged to the Gallatin River. *See* affidavits of Jeff Pfeil, Ben Davis, Ty Traxler.

[1] Exh. 3 is Pfeil's petition for declaratory relief. Attached to that petition are the affidavits of Jeff Pfeil, Ben Davis, and Ty Traxler. GCCD docketed the entire submission as a single exhibit.

Along the length of the entire ditch are spoil piles. *Id.*, Exh 33, FOF #19. Spoil piles are the product of the dirt removed to create the ditch, which are then deposited adjacent to the ditch bank. The ditch runs in a northerly direction immediately next to an inflection point in the height of the land. The depth of the ditch varies from three to five feet along it course. Affidavit Davis. Water in the ditch is not deeper than one foot anywhere along its course. Affidavit Davis ¶ 5. More typical depths of water are about four inches at the upper end of the ditch, and approximately six to eight inches of water toward the lower end. Affidavit Pfeil ¶7. The ditch accumulates groundwater as it courses north.

Dr. Michael Nicklin, a hydrogeologist with approximately 40 years experience primarily in the Gallatin valley, inspected the ditch. Based on his experience with the hydrogeology of these systems and aquifer tests with wells, he was confident that if the drain ditch was even two feet shallower than its present depth, there would be no continuous flow of water in the ditch. Dr. Nicklin explained that the aquifer in these areas is simply too permeable to induce lateral flow into ditches, without the significant gradient created by deep ditches. Exh. 31, page 21, lines 5-23.

Pfeil wanted to clean out his pond and increase its depth. He regularly maintains the entire channel. If he does not graze the land in any given year, grasses grow up in the channel and choke off the flow of water. Accordingly, in those years Pfeil must remove this obstructing vegetation in order to sustain a flow of water. Exhibit 31, p.18, line 1-8.

Photographs of the ditch are appended to the affidavit of Jeff Pfeil. Maps of the property and the ditch are appended to the affidavit of Ben Davis. Ty Traxler appends transects of the ditch to his affidavit showing the relative size of the spoil piles and the depth of the ditch.

Statement of the Case

This matter arises from a declaratory ruling entered by the Gallatin County Conservation District ("GCCD") under the provisions of "The Natural Stream bed and Land Preservation Act of 1975," MCA 75-7-101 *et. seq.* (the "Act").

Under the Act, a permit is required for a "project." A project "means a physical alteration or modification that results in a change in the state of a natural, perennial flowing stream or river, its bed or its immediate banks." MCA 75-7-103(5)(a). The Act then reemphasizes its

limited reach to only natural watercourses by separately defining a stream, for the purposes of MCA 75-7-103(5)(a), as "any natural, perennial-flowing stream or river, its bed, and its immediate banks MCA 75-7-103(6).

Where a person proposes a "project," he must apply for a permit with a conservation district, and that district is then accorded authority to approve, deny, or approve with conditions the specified work that affects the bed or banks of a natural stream. MCA 75 7-111, 75-7-112.

Upon a complaint of a neighbor of Pfeil to its efforts to restore its pond, the GCCD investigated, and made an assessment that Pfeil's ditch was within the District's jurisdiction.

Pursuant to MCA 75-7-125(2), persons directly affected by a decision by the District may petition the District for a declaratory ruling. Pfeil availed itself of this remedy by petitioning the GCCD for a declaratory ruling that its ditch was not a natural perennially flowing stream, and that maintenance of this ditch was not within the jurisdiction of the GCCD under the Act, except for any maintenance that was conducted at its point of discharge on the immediate bands of the Gallatin. (The Gallatin is clearly a natural perennially flowing stream, and work on its immediate banks is

covered by the Act regardless of whether it is prompted by work on a ditch.)

The District accepted the petition on June 18, 2020. Exh. 4. The District entered a Scheduling Order on July 20th. Exhibit 6. It required that persons submit documents supporting or opposing the petition on dates described therein. Testimonial submissions must be executed under oath. Exhibit 1 and 2. This directive was largely not complied with other than by Pfeil. The GCCD nonetheless used the filings in its recommended decision.

The Board appointed a hearings examiner from the Conservation Bureau of the Department of Natural Resources and Conservation to preside over the hearing and make a recommended decision. Exh. 5

A public hearing was held on October 14, 2020. Exh. 31 Notwithstanding the appointment of a hearings examiner, six members of the Board of Supervisors attended the hearing. Exh. 31, p. 2.

Findings of fact, conclusions of law, and a memorandum were entered by the Hearings Examiner on December 30th, 2000. Exh. 33.

That very same day of December 30th, District held a public hearing to act on Pfeil's petition. Exh. 32. No further evidence or argument was allowed.

The District determined, by a vote of four to one, to sustain authority over Pfeil's ditch as a natural perennially flowing stream.

In accordance with MCA 75-7-125(4), Pfeil filed its an appeal of the GCCD's ruling in the Eighteenth Judicial District. After briefing and argument, the lower court entered its order dismissing Pfeil's appeal on February 28th, 2022.

Issues Presented for Review

1. Whether the lower court erred by affirming the GCCD decision that a natural stream preexisted Pfeil's ditch without the district court conducting a careful and searching review of the whole record to identify adequate facts and a reasoned basis for the GCCD decision?

2. Whether the lower court erred by not determining that the GCCD improperly overlooked that it had the burden of proof on the issue of whether Pfeil's ditch was a natural perennial flowing stream?

3. Whether the lower court erred by affirming the GCCD decision that a natural perennially flowing stream existed within the meaning of the Act even

though water will not flow in the channel without continuing efforts to clean out grasses and debris?

4. Whether the lower court erred by affirming the GCCD decision where three of the Supervisors voting to assert jurisdiction identified reasons not provided for in the Act as their basis for their vote?

Standard of Review

Stalowy v. Flathead Conservation District, 2020 MT 155, 400 Mont. 266, 465 P.3d 1170, recently characterized the standard of review of a district's decision under the Act in the following fashion:

> [A] court may reverse or modify the District supervisors' declaratory ruling only if the substantial right of the appellant have been prejudiced because the ruling is: (1) arbitrary and capricious; (2) characterized by an abuse of discretion; (3) an error of law; or (4) in violation of constitutional or statutory provisions. Section 75-7-125(4)(a)-(d), MCA. This Court applies the same standard of review when reviewing a district court's decision to affirm the agency decision. *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219 (citations omitted).
>
> Under these standards, the courts' "inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *Clark Fork Coalition v. Mont. Dep't of Envtl. Quality,* 2008 MT 407, ¶ 27, 347 Mont. 197, 197 P.3d 482. "The courts do not substitute their judgment for that of the agency by determining whether its decision was correct. Rather, the Courts examine the decision to determine if it was made on sufficient information, or whether the decision was so at odds with the information gathered that it could be characterized as arbitrary or the product of caprice." *Clark Fork*

> *Coalition*, ¶ 27. A court cannot reverse a conservation district's decision merely "because the record contains inconsistent evidence or evidence which might support a different result." *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 69, 3`12 Mont. 52, 57 P.3d 836 (citation omitted). To find an agency decision was arbitrary and capricious, the party asserting error bears the burden to demonstrate that the District's decision was "random, unreasonable, or seemingly unmotivated based on the record." *City of Livingston v. Park Conservation Dist.* 2013 MT 234, ¶ 16, 371 Mont. 303, 307 P.3d 317 (*quoting Silva v. City of Columbia Falls*, 258 329, 335, 852 P.2d 671, 675 (1993)).

Stalowy, 2020 MT 155, ¶¶ 8, 9, 400 Mont. at 272, 465 P.3d at 1174.

The trial court appropriately noted that it is was powerless to substitute its judgment for that of the agency on questions of fact, and that no decision of a conservation district should be reversed simply because there is evidence in the record that would support a different result. *See* Order at pp 6-7. However, these standards do not license the lower court's approach of simply determining whether there is any evidence supporting the agency's actions.

The admonishment of *Clark Fork Coalition v. Mont. Dep't of Envtl. Quality,* 2008 MT 407, ¶ 27, 347 Mont. 197, 197 P.3d 482 to conduct a searching and careful review of the entire record demands more.

As explained in *Clark Fork*,

> In reviewing an agency decision to determine if it survives the arbitrary and capricious standard, we consider whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."*North Fork Pres. Assn. v. Dept. of State Lands*,238 Mont. 451,

> 465, 778 P.2d 862, 871(1989) (quoting *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861 (1989)). While our review of agency decisions is generally narrow, we will not "automatically defer to the agency `without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.'"*Friends of the Wild Swan v. DNRC*, 2000 MT 209, ¶ 28, 301 Mont. 1, ¶ 28, 6 P.3d 972, ¶ 28 (quoting *Marsh*, 490 U.S. at 378, 109 S. Ct. at 1861) (hereinafter *Friends of the Wild Swan I*).

The *Stalowy* Court's directive for searching and careful review reflects basic principles of administrative law. The legislature cannot consistently with separation of power principles delegate its legislative authority. As a result, the legislation must set forth policy and rules of decision that describe with reasonable clarity the limits of appropriate administrative action. *See State v. Mathis,* 2003 MT 112, ¶ 15, 315 Mont. 378, 68 P.3d 756. Likewise, it is evident that the authority of an agency is limited by the terms of the statutes delegating that authority. *Gwynn v. Town of Eureka*, 178 Mont 191, 193-194, 582 P.2d 1262, 1263 (1978); *Board of Barbers v. Big Sky College* 192 Mont. 159, 161-162, 626 P.2d 1269, 1270-1271 (1981) (Agency may not add criteria to determination not envisioned by legislature in delegation.)

Given this framework, it is not surprising that Montana insists that reviewing courts examine the entire record to assure that the determination is premised solely on factors made relevant by the legislative, and that the decision does not

otherwise reflect a clear error of judgment. *Clark Fork Coalition*, *supra*, ¶¶ 21, 27. While no court may substitute its judgment for that of the agency, it nonetheless must review the record and satisfy itself that that the agency has made a reasoned decision. *Friends of the Wild Swan v. DNRC*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972. *North Fork Preservation Ass'n v. Dept of State Lands*, 238 Mont. 451, 465, P.2d 862 (1982), relying upon *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989), again underscored that courts must ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and that anything short of that would make judicial review generally meaningless.

This Court recently confirmed again that reviewing courts must not shackle themselves to an accountant's ledger of credits and debits of evidence, but are charged with a thorough and searching inquiry of the entire record.

> In areas that require scientific expertise or are highly technical in nature, we will defer to the expertise of an agency. *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality* , 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493. However, while we acknowledge that this Court is "not comprised of hydrologists, geologists, or engineers, and that protecting the quality of Montana's water requires significant technical and scientific expertise beyond the grasp of the Court[,]" we have been entrusted with an inherent power to review administrative decisions and interpret the law, regardless of the subject of an appeal. *Mont. Envtl. Info. Ctr.* , ¶ 20. As such, we will not afford unfettered deference to agency decisions without a thorough and careful review of the administrative record and defer only to "consistent, rational, and well-supported agency decision-making." *Mont. Envtl. Info. Ctr.* , ¶ 26. This requires that an agency " 'cogently explain why it has exercised its discretion in a given manner.' " *Mont. Envtl. Info. Ctr.* , ¶ 97 (quoting *Nat'l*

Parks Conservation Ass'n v. United States EPA , 788 F.3d 1134, 1142 (9th Cir. 2015)).Further, we will consider whether an agency decision was based on a consideration of all relevant factors. *Clark Fork Coal. v. Mont. Dep't of Envtl. Quality* , 2008 MT 407, ¶ 21, 347 Mont.197, 197 P.3d 482. *Debuff v. Department of Natural Resources,* 2021 MT 68, ¶24, 403 Mont. 403, 416-417, 482 P.3d 1183, 1191

The *Debuff* Court affirmed a decision of the Water Court that factual determinations of the Department of Natural Resources were arbitrary and capricious, because the record did not contain any coherent discussion of the reasoning that led to those factual findings. Clearly erroneous findings can manifest through failure to consider all relevant factors or by basing a decision on a clearly erroneous judgment. (citation omitted). *Debuff*, *supra*, 403 Mont. 422, 482 P.3d 1195

This requirement of reasoned explanations for agency action is a fundamental element governing the appropriate review of agencies and lower tribunals. *In Montana Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 US 29, 103 S.Ct. 2856, 77 L.Ed. 2d 443 (1983), the Court noted

> The Department of Transportation accepts the applicability of the "arbitrary and capricious" standard. It argues that under this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. We do not disagree with [463 U.S. 29, 43] this formulation.9 The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a

> "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, at 285; *Citizens to Preserve Overton Park v. Volpe, supra,* at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 463 US at 42.

The lower court's review of merely identifying any evidence to support the District's decision preempts the analysis required to show that the District decision was an arbitrary and capricious or otherwise an abuse of discretion, and that it was premised on only those factors relevant to the criteria entrusted to the District under the statute. A decision that does not identify adequate facts to support a conclusion using a reasoned discussion is arbitrary and capricious or otherwise an abuse of discretion within the meaning of MCA 75-7-125(4). *Debuff v. DNRC,* supra.

"When reviewing conclusions of law, this Court determines whether the agency's interpretation of the law is correct." *Stalowy v. Flathead Conservation Dist.,* 2020 MT 155, ¶10, 400 Mont. 266 at 272, 465 P.3d 1170 at 1174 (Citing *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.* , 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219..."

Summary of Argument

The watercourse on Pfeil's land is a ditch created to drain some of the groundwater and springs on his land. There are spoil piles along its entire length.

The lower court correctly understood that ditches are not subject to the Act. However, the lower court erred by affirming a GCCD decision that determined that the ditch replaced a natural spring creek.

It is the duty of a reviewing court to conduct a careful and thorough review of the entire record to determine whether there are adequate facts to sustain a board's determination. This inquiry necessarily evaluates the reasoning of the board, and how they applied the principles made relevant by the statute that they are charged with administering to make its determination.

The lower court simply asked the question of whether there was any evidence to support GCCD's decision. This is not enough.

Pfeil showed the District that his ditch is unchanged since the earliest aerial photographs in 1945. Dr, Michael Nicklin, a highly respected hydrogeologist with over 40 years experience, inspected the ditch and noted that if the three to five foot depth was even two feet shallower, the hydrogeology would not support any flow down the ditch.

Against this testimony, the lower court relied upon hearsay from a predecessor of Pfeil's, who apparently called it a spring creek. Significantly, this person also noted that this predecessor had to repeatedly clean out the ditch in order to sustain any flow for even stock.

Likewise, the lower court inappropriately relied upon a witness who believes that the district has jurisdiction even if it is a ditch, as it has perennial flows. In any event, he says that he thinks the ditch was put in to redirect flows, although there is no sign anywhere of any other channel.

Finally, the lower court relied upon the submissions of a neighbor and her characterization of another spring creek near Pheil's property. However, this other "spring creek" also has spoil piles along it, and this witness noted that farmers and ranchers commonly dug out "spring creeks" to sustain flows. She doesn't know whether there was a spring creek prior to Pheil's ditch, and explained you would need the affidavit of the person who dug it to establish that.

These facts are simply not enough to sustain the District's burden of proof. Because the District may not act unless Pheil's ditch is a natural perennially flowing stream, it is the District that must show that it is more likely than not the a spring creek preceded the construction of the ditch.

The lower court otherwise made the same error of law as the GCCD. There is no dispute that the channel will not flow water unless it is regularly maintained. As Mr. Pheil explains, he needs to get stock on his land every summer to crop the grasses down, else vegetation grows from the bed and banks of his ditch and chokes off all the flow.

Channels that are dependent upon the continuing intercession of man in order to sustain flows are not "natural" streams.

Finally, two of the Supervisors erred in voting to sustain jurisdiction by premising their vote on factors that are irrelevant under the Act. One of these supervisors decided that the water in Pfeil's ditch arose through seepage from the Gallatin, and that this was enough to sustain his authority. The other supervisor decided that it was important to regulate work on Pfeil's ditch to protect the Gallatin River. These factors have nothing to do with the question of whether Pheil's ditch is a natural stream.

ARGUMENT

The GCCD Decision Lacked Adequate Facts To Support a Reasoned Assertion of Jurisdiction

The district court accepted that spoil piles exist along the entire length of the watercourse on Pfeil's land, and that these piles indicated that the watercourse is a ditch. Order at p. 3. The district court further acknowledged that GCCD has no authority over ditches. Order at p. 8. Accordingly, the court determined that the authority of GCCD under Act depended exclusively upon whether Pfeil's ditch replaced a natural stream. *Id.* The court erred in merely itemizing claims that could be construed to support a displacement of a natural stream by a ditch, instead of conducting a careful and searching inquiry of the entire record in order to determine whether the GCCD's decision was made upon sufficient information that gives a reasoned effect to only those principles relevant to the reach of the Act. *See* Standard of Review, *supra*.

Under the Act, a permit from a conservation district is required by persons proposing a "project." A project "means a physical alteration or modification that results in a change in the state of a natural, perennial flowing stream or river, its bed or its immediate banks." MCA 75-7-103(5)(a). The Act then emphasizes its limited reach to only natural watercourses by separately defining a stream as "any

natural, perennial-flowing stream or river, its bed, and its immediate banks...." MCA 75-7-103(6).

This emphasis on natural streams is reaffimed in the Department of Natural Resources and Conservation's ("DNRC") administrative rules, and in the rules adopted by the GCCD to implement the 310 requirements. See ARM 36.2.407 (Act and rules apply to natural perennial-flowing stream or portions thereof.); *see* GCCD Rule 4(2) (Regulated activity means physical alteration or modification of natural stream); Rule 4(21) (Stream means natural perennial flowing stream.); Rule 5(2) (Rules apply to natural perennial-flowing stream.)[2]

Indeed, the GCCD affirmatively declares that ditches are not within its authority. "Artificial or man-made waterways that have been constructed for the purposes of conveying water for any purpose are not considered a natural waterway." Rule 5(5)(a)(iv). The District insists that its authority does "not apply to ditches, intermittent streams, or wetlands not associated with the bed or immediate banks of a stream." Rule 5(4).

Pfeil's ditch does not divert the waters of the Gallatin or any of its tributaries. Instead, the ditch arises within the lands owned by Pfeil, and collects seepage, springs, and other groundwater. Exh. 3, Affidavits of Davis, Pfeil.

[2] The GCCD Rules are reproduced as Exhibit 7 in the record.

Exh. 33, FOF 28. The ditch flows in a northerly direction, ultimately discharging into the Gallatin River.

Along the length of the ditch are spoil piles. Exhibit 3, Affidavits Traxler and Pfeil, Exh. 33, FOF #18. Spoil piles are the product of the dirt removed to create the ditch, which are then deposited on the ditch bank. The depth of the ditch varies along its reach from three to five feet. The depth of water in the ditch is never more than one foot at any point, affidavit of Davis, Exh. 33, FOF 29, and it is typically about four inches deep at the upper end, and six to eight inches at the lower end. Exh. 3 Affidavit Pfeil. An exhibit to the affidavit of Ty Traxler reflects a transect at identified nodes of the ditch, and underscores the substantial size of the spoil piles in relation to the ditch. Exh. 3.

No witness observed a channel on Pfeil's land prior to the drain ditch. GCCD notes that aerial imagery show the ditch as far back as 1981. Exh. 33, FOF 37 This finding overlooks the testimony of Ben Davis in his affidavit attached to the petition. *See* Exhibit 3. Mr. Davis reviewed all the aerial photographs of the property starting in 1945. In each of the four photographs, he saw the same ditch and the same pond in the same places they are today.

Pfeil likewise engaged his consultants to examine maps of his property, as the District's rules counsel that USGS maps and Water Resource Survey maps

published by the State of Montana are relevant sources of information in assessing the character of a waterway. Rule 5(6). None of these maps depict any stream on Pfeil's lands. *See* Affidavits of Traxler, ¶8; Davis, ¶ 8, Exhibit 3.[3]

Dr. Michael Nicklin inspected the ditch. Dr. Nicklin is a hydrogeologist, with some 40 years of experience, primarily in the Gallatin Valley. Exh. 33, FOF 22 Based upon his experience and aquifer tests of the hydrogeology in similar areas in Gallatin County, he knew that in the event that the drain ditch was even two feet shallower, one would see no continuous flow of water within it. Exh. 31, page 21, lines 5-23. Dr. Nicklin explained that these groundwater systems are simply too permeable to sustain flows without substantial gradients into relatively deep ditches where those ditches are substantially parallel to the gradient defined by the drainage, as is true of Pfeil's ditch. *Id.* In other words, unless the gradient to the ditch is relatively steep, the groundwater will continue move north.

This permeability of the aquifer is the reason that there is not more than a foot of water in the ditch, notwithstanding the fact that the ditch is 3-5 feet deep. Accordingly, the record shows a ditch created by man that would not flow water absent the intervention of man.

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[3] The district court noted that other parties submitted maps showing a stream. At p. 3-4 These maps are from the USGS Groundwater Inventory, which depicts some 850,000 wells, drains, springs, tunnels, and like developments. They don't show natural drainages. https://waterdata.usgs.gov/nwis/gw

Against the obvious import of spoil piles and what they necessarily indicate, the district court sustained GCCD based on the assertions of three individuals.

First, like the GCCD, the district court noted that Richard Schokley reported hearsay from one of Pfel's predecessors in interest. According to this hearsay, these individuals regarded the ditch as a spring creek. *See* Order at p.4. Mr. Schickley did describe fishing at the confluence of the ditch with the Gallatin, or in the pond developed for fish. Exh. IP-1. Finally, Mr. Schockley acknowledged that the these predecessors periodically and continually had to clean out the ditch to sustain enough flow for stockwater. *Id.* , Order at p. 4

Mr Drake does not believe the ditch was constructed to drain the lands. Instead, Mr. Drake believes that this is an instance in which the spring and/or ditch were dug to direct the flow of water. Order at p. 4, Exh. 25.

Finally, the District Court noted that a Ms. Lehman said that Pfeil's drain ditch had a sinuosity similar to other "spring creeks" in the area. Order at pp 3-4.

A careful and searching review of this evidence, however, cannot sustain a finding that there was a natural spring creek that predated any drain ditch on Pfeil's lands. "Proof is the establishment of a fact by evidence," MCA 26-1-101(4), and the speculation shrouding the District's determination cannot answer to that threshold.

We can't know what Pfeil's predecessors in interest meant by characterizing the ditch as a natural spring creek. Perhaps, like Ms. Lehman, they mean that the water in the ditch arose naturally without any "floodgate or head gate" creating the accumulation. Exh. IP 2, p 3. However, this does not mean that the resulting flow makes a natural stream.

Mr. Drake makes a similar error. He advises Mr. Pfeil that it is irrelevant whether the channel is a natural stream or a ditch, as Mr. Drake believes that once a continuous flow arises in that watercourse, it is subject to the Act. Exh. 31, p. 18, 23-25; p. 19, 1-2; see also Exh. 25, p.2 ("If a spring flows perennially in a channel, the channel is jurisdictional.")

There is no evidence of any other channel of Pfeil's lands from which Pfeils' drain ditch redirected water in accordance with Mr. Drake's claims, and as Mr. Drake's claims renounce the fundamental distinction made in the Act between ditches and streams, there is nothing in those claims to sustain the District's burden of proof. Moreover, Mr. Drake's claims of what he has seen on other lands and at other times does not prove that there was a natural spring on Pfeil's lands prior to his ditch.

Finally, the District Court determined that the GCCD otherwise appropriately relied upon Ms. Lehman's reference to another spring creek in the

general area. See Order at pp. 3-4. A careful and searching review of the record, however, shows that the reference cannot support the crushing weight of sustaining the District's action.

Ms. Lehman says that this other "spring creek" has the same channeling and banks as Pfeil's ditch. IP-2, p. 2 last paragraph. Banks with spoil piles indicate ditches, not natural drainages. As Ms Lehman further explains, "(s)poils from farmers and ranchers from improving a water course are not uncommon on spring creeks. They cannot be used as a verification of a ditch or a spring creek. If left alone cattle will trample a spring creek area forming wallows, small mounds and wetlands." IP-2, p.2 third paragraph. In other words, without digging out a ditch, the asserted spring creek will not sustain itself.

Ms. Leman additionally notes that if Pfeil's ditch was filled in, it would not flow, as "it's very flat terrain and it would take a long time-----like decades and decades---- for Mother Nature to finally dig a little course for a spring creek." Exhibit 31`, p. 23. She says that farmers and ranchers cleaned out "spring creeks," as otherwise "it was much more of a wetland." *Id.*

This sort of testimony from a person with no expertise in hydrogeology cannot refute Dr. Nicklin, as otherwise suggested by the district court. See Order at p. 4. Ms Lehman is right that it would have been a wetland. Wetlands,

however, are expressly excluded by the GCCD as being within its jurisdiction. Rule 5(4).

Ms. Lehman is additionally right that the ditch was installed to drain water from these lands. She is wrong that anything would have otherwise have occurred, even after decades and decades, as the permeability of the groundwater system on Pfeil's lands simply will not allow channels with beds and banks to form absent the intervention of man.

A careful and searching review of the record shows that the GCCD had no adequate facts to sustain its declaration of jurisdiction. The GCCD's decision is therefore arbitrary and capricious and an abuse of discretion. This Court should reverse the District Court

The District Court Erred in Applying the Burden of Proof

Pfeil does not have the burden of proof on its petition. Under the Act, the District has jurisdiction only over natural streams, as projects are defined as physical modifications of natural streams. *See discussion, supra.* Accordingly, the District must affirmatively find that it is more likely than not that a natural stream exists in order to exercise any authority.

This principle is expressed in GCCD Rule 21(5). "The hearings officer and the supervisors shall consider information provided by the petitioning party to be persuasive unless the information is overcome by a preponderance of all available information at the hearing"

While both the district court and the GCCD purported to recognize this allocation of the burden of proof, it is otherwise apparent that it was misapplied. See Order at p. 5.

There is no evidence in the record that affirmatively shows that there was a natural spring creek that Pfeil's ditch deepened or redirected.

Ms. Lehman, relied upon by the District Court and the GCCD to sustain jurisdiction testifies that " I don't think you can say what would have happened that somebody----unless you have the person's affidavit who dug it, that it was dug for------and not already a spring creek that had a channel." Exhibit 31, p. 23.

Supervisor White endorsed the assertion of jurisdiction, because Pfeil did not provide a photograph of the area without the ditch. Exhibit 34, p. 2. As the burden of proof requires one to assume that there was no natural stream prior to the construction of the ditch and pond, Supervisor's White comment reflects that a misapprehension of the burden of proof informed

his vote to sustain jurisdiction.[4] The District otherwise criticizes Pfeil for not providing "evidence as to when the "ditch" was originally excavated or who conducted those activities." Exh. 33, Memorandum, at p. 10. Again, it is the burden of the GCCD to show that when the ditch was dug, it replaced a natural stream.

Throughout the course of its findings, the District's unarticulated assumption is that since everyone concedes that there are springs on Pfeil's lands, it follows that there must have been a spring creek channel, even prior to the construction of the drain ditch.[5] This is simply not the case.

The DNRC defines what is everywhere regarded as a spring. "'Spring' means a hydrologic occurrence of water involving the natural flow of water originating from beneath the land surface and arising to the surface of the ground." ARM 36.12.101(70). The DNRC further explains in this rule how it treats springs under its water right authorities. "A developed spring is groundwater if some physical alteration of its natural state occurs at its point of discharge from the ground, such as simple excavation, cement encasement, or rock cribbing. An

[4] Commissioner White may have been confused by the Examiner's factual finding that there is imagery of the ditch and pond back to 1981. In fact, as shown above, aerial imagery shows the same things one sees today from the first aerial photos in 1945. See Exhibit 3, Affidavit Ben Davis. One would have to be surprisingly fortunate to find a photograph of the area even prior to 1945.

[5] Pfeil presumes that this is what the District characterizes as its "conflicting narrative.": See Memorandum at p. 13.

undeveloped spring is surface water if no development occurs at its point of discharge and the appropriation is made from the waters flowing on the surface of the ground." *Id.*

Regardless of whether it is surface water or groundwater, springs by themselves do not mean that they inevitably form channels with beds and banks. Indeed, this is why the DNRC describes them as simply waters arising to the surface of the ground. Whether or not they form channels depends upon the gradient, the amount of water, and the local geology and hydrogeology.

Pfeil did what he could do identify the characteristics of the land prior to the construction of the ditch. It presented aerial photographs from 1945 showing that everything then looks the same as it does now. *See* Exh. 3, affidavit Davis. However, it is the District's burden to show that when the ditch was constructed, there was an existing stream along the course and direction of the ditch at the time. There is no competent evidence at all that any such natural stream existed.

Watercourses That Do Not Sustain a Flow of Water Without the Continuing Intercession of People Are Not Natural Streams

Pheil's ditch cannot sustain a flow unless he gets a grazing lease that allows stock to graze the beds and banks annually. As Mr. Pfeil explains, he grazes his lands every year, because otherwise grasses grow from the beds and

banks of his ditch and choke the capacity of the ditch to sustain water flows. Exhibit 31, p.18, line 1-8.

Mr. Schokley, one of Pfeil's neighbors, noted that Pfeil's predecessor had to repeatedly clean out the ditch in order to sustain flow for stockwater. Exh. 33, FOF 32.

This evidence is simply wholly inconsistent with a "natural stream" under the Act. . Under GCCD Rule 5(i), natural waterways subject to the Act must flow in a defined channel lacking terrestrial vegetation. Grasses that flourish and choke off water flows are renounce any "natural stream." The District has identified no evidence that shows that the ditch will continue to flow water without such active management.

The district court determined that these continuing efforts to sustain flows were simply manipulations that otherwise do not disqualify a water course from natural stream status based on *Bitterroot River Protective Association, Inc. v. Bitterroot Conservation District*, 2008 MT 377, 346 Mont. 508, 198 P.3d 319.

In *Bitterroot River*, the Court addressed the issue of whether Mitchell Slough was a naturally occurring stream. The Court noted that the Slough had always existed, although parts of its original course and direction had been altered over time. In addition, the Court noted that the Slough exhibited headgates and

diversions, and indeed diversions from the Bitterroot upgradient of the Slough had prompted return flows to that Slough that substantially increased its yield. None of these factors disqualified this source as a naturally perennially flowing stream.

As the Court noted, a "natural" stream cannot mean a pristine stream unaffected by man, because virtually all of Montana's waters have been altered or manipulated by man in at least some respect. At ¶ 35. Notwithstanding these changes, the purpose of the Act was to preserve the shape, form, and course of the stream as it existed on the effective date of the Act. See ¶¶ 37, 40.

Pfeil's ditch raises the question that is wholly the inverse of what this Court addressed in *Bitterroot*. The question is not whether a watercourse is a perennially flowing natural stream where various parts of that drainage have been altered by man. The questions is whether a watercourse is a perennially flowing natural stream where those flows are arrested by natural processes in a way that will preempt continuing flows without intervention by man.

Neither *Stalowy v. Flathead Conservation District*, 2020 MT 155, 400 Mont. 266, 465 P.3d 1170 nor *Fortner v. Broadwater Conservation District*, 2021 MT 240, ___Mont.____, ____P.3d____, license turning *Bitterroot* on its head in a way that characterizes watercourses as natural stream even where they won't flow water without the constant efforts of man.

In *Stalowy* and *Fortner*, the issue was whether an entire natural stream remained within the jurisdiction of a conservation district where intervening sections had dried up either as a result of upstream diversions and water use, or by other actions man. This Court determined that this did not disqualify the stream as a natural stream subject to the Act. Where there is no perennial flow in a segment of a stream because of the actions of man, the entire stream remains subject to the authority of conservation districts. The rule could not be otherwise without abandoning such natural drainages and the natural geomorphic processes that created them by an insistence that there is no way back from the acts of man that at least temporarily have suspended them.

These principles do not apply to Pfeil's ditch. The "shape, form, and course" of the ditch, *see Bitterroot, supra*, cannot remain as the geomorphology directs, because no water will flow down the channel. The lower court and GCCD correctly read *Bitterroot* as standing for the principal that human manipulation of a drainage does not disqualify the source as a natural stream. Order at. 8 However, this has nothing to do with human manipulation required to sustain any flow of water in the channel.

The Act limits the jurisdiction of conservation districts to a " natural, perennial flowing stream or river, its bed or its immediate banks." MCA 75-7-103(5)(a). An interpretation that renders any section of a statute superfluous or

that does not give effect to all the words employed must be resisted. *Montana Trout Unlimited v. DNRC*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224. In all events, the interpretation of a statute must account for all of a statute's text and structure. MCA § 1-2-106; *DEQ v. BNSF Ry. Co.*, 2010 MT 267, ¶ 56, 358 Mont. 368, 246 P.3d 1037.

Characterizing a watercourse as a natural perennial stream where there is no flow unless man continually cleans the bed and banks of vegetation effectively excises the word "natural" from the statute, and turns the entire Act on its head. Indeed, it raises the question of whether the drainage becomes and loses its status as a natural stream depending upon whether the landowner allows water flows to persist by his maintenance activities.

Supervisor Schutter of the GCCD explained his dissenting vote with the common sense observation that one does not have to clean out natural streams in order to sustain flows. Exh. 34, p. 2.

Under Rule 5(5)(a)(1), for a watercourse to be a natural channel, that waterway "must flow in a defined channel that is lacking in terrestrial vegetation." Grasses are terrestrial vegetation, and if that channel is to continue to flow water even at its present depth, one needs to continually crop or remove them.

Conservation districts are bound by their own rules. *North Fork Preservation Ass'n v. Dept. of State Lands*, 238 Mont. 451, 7768 P.2d 862 (1989).

GCCD, and now the district court, have committed an error of law in their construction of the Act. Both the GCCD and the district court treated necessary ongoing maintenance on Pfeil's ditch as acts of man similar to headgates, diversions, and redirection of portions of Mitchel Slough in *Bitterroot*. This Court's preservation of the status of a natural perennially flowing stream from the effects of man cannot be read as a principle that creates natural perennially flowing streams that persevere only though the continuing intercession of man.

This Court does not defer to either agencies or courts in its interpretation of law, and accordingly the Court should reverse the GCCD and the District.

Nonetheless, the fact that the ditch is unable to sustain any flow of water without the repeated intercession of man also informs the district court's failure to conduct a careful and searching review of the record. There is no dispute that the ditch varies in depth from three to five feet along its length. Not more than one foot of the ditch is inundated with water, and the typical depths are about four inches in the upper reach, and six to eight inches in the lower reach. *See discussion, supra.* The depth of the ditch naturally induced some added discharge of groundwater into the ditch.

Accordingly, it just beggars belief to suggest that there was any natural channel that somehow cut its own watercourse prior to the ditch. The ditch won't flow now without repeated efforts to sustain flows, and accordingly there is no reason to suppose it flowed naturally with less water. The District's failure to explain this paradox underscores that its decision was arbitrary and capricious.

The Lower Court Errored In Not Addressing GCCD's Disregard of Statutory Terms in Favor of Policy Considerations

The District's decision reflects its belief that it is entitled to determine whether Pfeil's ditch is a watercourse based on its view of the policy considerations implicit in regulating Pfeil's maintenance of his ditch and pond. There is no authority that supports this position. The lower court did not address the issue.

In Findings of Fact 42 and 43, Exhibit 33, the District noted concerns it has with the pond on the Gallatin River. Pfeil assumes that this concern is with any thermal effects on the Gallatin that arise from his pond. The Hearings Examiner's Memorandum, Exhibit 33, p. 11, unabashedly insists that the effects of pond maintenance on the Gallatin is germane to the character of Pfeil's ditch, even

though the pond is 660 feet away from the mainstem of the Gallatin. Affidavit of Davis. [6]

None of these considerations has anything to do with whether the maintenance of Pfeil's pond or ditch, other than at that point where it discharges into the Gallatin at the immediate banks of the Gallatin, reflects work on the bed or banks of a natural stream. The District simply ignored the statute in favor of its own views of what should be regulated.

Policy considerations cannot license a studied disregard of statutory terms. Otherwise, the delegation of authority to the District lacks standards, and therefore abridges Montana's separation of power principles. *Douglas v. Judge*, 174 Mont. 32, 568 P.2d 530 (1977) (Where statute limits funding to "worthwhile" projects, it is unconstitutional as there are no standards other than subjective judgments of what is worthwhile.); *see also, In the Matter of Savings and Loan Activities*, 182 Mont. 361, 597 P.2d 84 (1979) (Violation of separation of powers to delegate legislative authority where there are no ascertainable standards or guidelines.)

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[6] All land uses in a drainage basin can affect rivers and streams, as is underscored by the water quality provisions governing nonpoint sources of pollution. Nonpoint sources of pollution arise from other than discrete outfalls into rivers and streams, 33 USC 1362(14), and may arise seemingly arcane acts of land management that affect the quality of water seeping to groundwater through that land. *See* 40 CFR 130.6(4)

Moreover, making the reach of the Act turn on whatever three supervisors think should be regulated offends due process. A fundamental limitation on the construction of any statute that contemplates civil and/or criminal penalties for its violation, *see* MCA 75-7-123, is the constitutional requirement that governmental authority cannot be exercised in a fashion where an ordinary reasonable person would not be aware that his conduct transgresses the asserted standard. Stated another way, statutes cannot be read as regulating activities where people would be forced to guess at how much and in what manner streams may be altered without requisite authority.

The United States and Montana Supreme Courts have held that "[i]t is a basic principle of due process that an enactment is void for vagueness if the prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *State v. Dugan,* 2013 MT 38, 369 Mont. 39, 303 P.3d 755. (""It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *O'Shaughnessy,* 216 Mont. at 440, 704 P.2d at 1025; *Grayned,* 408 U.S. at 108, 92 S. Ct. at 2298).

The District may read the statutory terms of the Act in light of the statutory goals of the Act, but the Act is not so infinitely supple as to

legitimize District action on the asserted basis that the maintenance of Pfeil's pond and ditch implicates flows in the Gallatin.

The District Court did not address this mismatch between the reasoning set forth in the Order and the statutory confines of conservation jurisdiction. This lacuna is error, because two of the Supervisors expressly bottomed their assertion of jurisdiction on their views of what should be regulated.

Supervisor Sherwin voted to assert jurisdiction because of the "proximity" of work on Pfeil's ponds to the Gallatin. The "area is subject to oversight due to the proximity to the Gallatin River." even apparently at 660 feet of remove. Exhibit 34, p. 2

Supervisor Mike H voted to assert jurisdiction because he believes that the groundwater system that infiltrates Pfeil's ditch is fed by the Gallatin River. *Id.*

These votes are premised upon matters that are irrelevant to the jurisdiction of the GCCD. The question of whether Pfeil proposes a project turns on whether he proposes to physically alter the beds or banks of a natural perennially flowing stream, and the answer to this question cannot turn on a supervisor's impression of the effects of that alteration on downstream water sources, or upon where the water in the channel arises.

Conclusion

The District Court erred in sustaining the GCCD's assertion of jurisdiction. A careful and thorough review of the entire record shows that there are inadequate facts to sustain GCCD's burden to establish that Pfeil's ditch simply replaced a preexisting spring creek. There is no reasoned explanation of GCCD's decision in light of the evidence it was ostensibly bottomed upon.

Even if there was such a preexisting channel, it wouldn't have flowed water perennially, as required by the Act. It is apparent that this is so because Pfiel's ditch, while being substantially deeper than any such preexisting channel with significantly more water, won't flow water unless he constantly intervenes to remove grasses that would otherwise choke off all flow. The lower court and GCCD's committed an error of law in treating a channel that won't flow water with the continuing intercession of man as a natural perennially flowing stream.

Pfeil understands that Montana's "310 " law must work with nonlawyers at the helm, and that accordingly legal distinctions may not be well expressed. GCCD found Pfeil's application "controversial," although those concerns were misplaced. It is true that there was a significant amount of comment to the GCCD. *See* Exh. 19. However, these comments related to features of Pfeil's planned

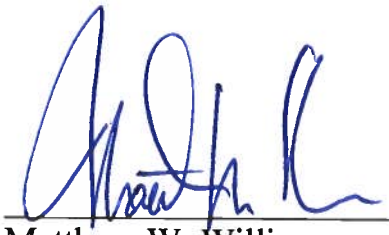
glamping project, and it is apparent that the public did not understand that Pfeil's ditch has nothing to do with his land use application with Gallatin County.

However, it is just in "controversial" contexts that the need for a rule of law is amplified. Supervisor White asserted jurisdiction because he misapprehended that Pfeil had the burden of proof. Supervisor Sherwin voted to assert jurisdiction because of the "proximity" of work on Pfeil's ponds to the Gallatin. Supervisor Mike H voted to assert jurisdiction because he believes that the groundwater system that infiltrates Pfeil's ditch is fed by the Gallatin River. Thus, three of the four Supervisors voting to assert jurisdiction did so for reasons not provided for in the Act.

Ordinarily, these sorts of errors would result in a reversal and remand with directions to not consider the tainted factors. Likewise, the absence of a reasoned basis for a decision would also prompt a reversal and remand for the preparation of a decision that answers to the omission.

However, there is no salvaging any jurisdiction after this Court reverses the lower court and the GCCD conclusion that the constant intervention of man to sustain flows is not incompatible with a natural perennially flowing stream Accordingly, this Court should reverse and remand with directions to sustain the petition.

Respectfully submitted this 11th day of July, 2022.



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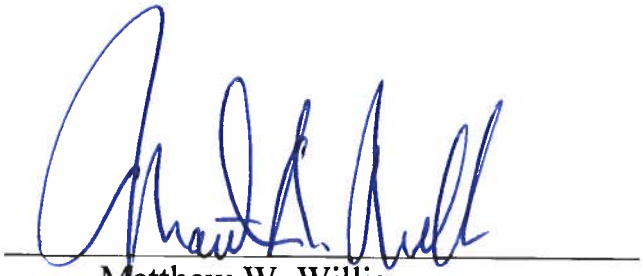

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I certify that I have on this 11th day of July, 2022, served a true and accurate copy of the Opening Brief of Pfeil Acquisitions LLC on the following by email:

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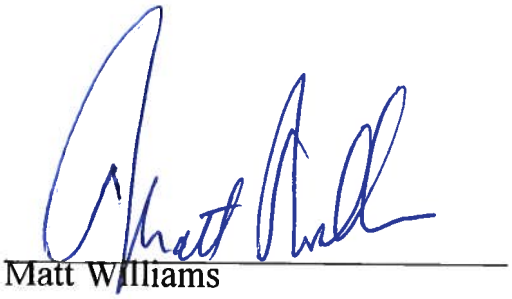

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I, Matthew W. Williams, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-11-2022:

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