

DA 22-0158

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 237

PFEIL ACQUISITIONS LLC,

Petitioner and Appellant,

v.

GALLATIN COUNTY CONSERVATION DISTRICT,

Respondent and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-21-88B
Honorable Rienne H. McElyea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Matthew W. Williams, Attorney at Law, Bozeman, Montana

For Appellee:

Caitlin Overland, Overland Legal Services PLLC, Kalispell, Montana

Submitted on Briefs: November 2, 2022

Decided: November 29, 2022

Filed:



Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Appellant Pfeil Acquisitions LLC (Pfeil) appeals the February 28, 2022 Order on Judicial Review of Declaratory Ruling of the Eighteenth Judicial District Court affirming the decision by the Board of Supervisors of the Gallatin Conservation District (GCD) that a certain waterway within property owned by Pfeil constitutes a “natural, perennial-flowing stream” under the Natural Streambed and Land Preservation Act of 1975, commonly known as the “310 Law.”

¶2 We affirm and restate the issues on appeal as follows:

Issue One: Did the District Court err in upholding GCD’s evaluation of the evidence in determining the status of the waterway on Pfeil’s property under the 310 Law and GCD’s Adopted Rule 21(5)?

Issue Two: Did the District Court err in upholding GCD’s declaratory ruling that the 310 Law applies to the waterway on Pfeil’s property?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 An island on the West Gallatin River contains a spring from which the waterway in question flows north and enters a 0.27-acre pond.¹ The 0.25-mile-long waterway transects the pond and continues until it discharges into the West Fork of the Gallatin River. Aerial imagery of the island shows at least two stream channels—one is the waterway in question; another is on the neighboring property to the west. Spoil piles line the length of the waterway in question.

¹ Facts restated from the District Court’s order and Gallatin Conservation District Board of Supervisor’s Findings of Fact. The waterway is located in the W1/SW1/4NW1/4 of Section 11, T3S, R4E in Tract 2, near Gallatin Gateway, Gallatin County, Montana.

¶4 In 1997, Gordon and Margarite Lehmann (“Lehmans”) bought property on the other side of the western border of Pfeil’s property. In October 2019, the Lehmans filed a complaint with GCD regarding the excavation of a stream-fed pond that Pfeil constructed on his property.² Pfeil had excavated sediment and rocky material from the pond to increase its depth and installed a flow control structure, known as an AgriDrain.

¶5 On December 19, 2019, GCD initiated an investigation of the complaint and determined it had jurisdiction over the activity because the pond was part of a natural perennial-flowing stream. On December 20, 2019, GCD sent Pfeil a letter detailing the nature of the Lehmans’ complaint and advising him to stop any further work until he obtained proper permitting.³ On May 21, 2020, Pfeil filed a Petition for Declaratory Ruling (Petition) to GCD to challenge GCD’s jurisdictional determination. The Petition outlined Pfeil’s assertion that the waterway constituted a ditch and was therefore beyond GCD’s jurisdiction.

¶6 On June 18, 2020, GCD accepted Pfeil’s Petition pursuant to its adopted rules and the 310 Law. On July 20, 2020, GCD appointed Jason Garber, Stream Permitting Coordinator, Conservation Districts Bureau, Department of Natural Resources and Conservation, as hearings officer. A scheduling order was issued that provided the public with the process for submitting information, and for presenting additional information at a

² A previous owner of the Pfeil property constructed a pond in the 1960s, but later filled it in, according to Richard Shockley, who provided a statement to GCD regarding the waterway.

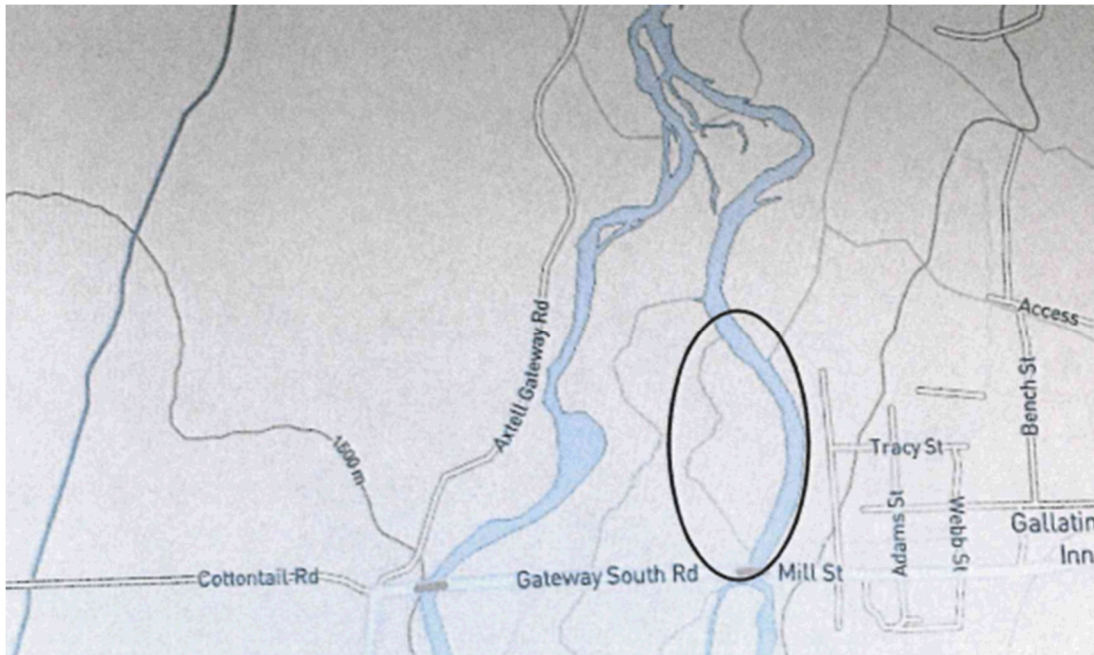
³ Pursuant to the 310 Law, a person intending to engage in a project to alter or modify the state of a natural, perennial-flowing stream must receive a permit from the applicable local conservation district. Section 75-7-103(5)(a), -111, MCA.

public hearing. On October 14, 2020, GCD held a hearing for the public to provide information relevant to the determination of whether the waterway and pond fell within the jurisdiction of GCD. Garber then prepared a recommendation for GCD, in which he concluded GCD had jurisdiction over the waterway and pond. A majority of the GCD Board voted to adopt Garber's recommendation, with nonsubstantive edits for clarification.⁴ Pfeil petitioned the District Court for judicial review of the Board's decision.

¶7 At the District Court's hearing on Pfeil's petition for judicial review, he presented evidence from a range of experts and sources. Pfeil relied heavily on surface water and hydraulics expert Dr. Michael Nicklin's testimony that the channel would not flow without someone regularly digging out the channel because of the permeability of the surrounding aquifer. Pfeil additionally relied on an affidavit from Ben Davis, the owner of Downstream Research, that supported his characterization of the waterway as a ditch that resulted from excavation—allegedly the same excavation that produced the spoil piles along the length of the waterway.

¶8 Other evidence offered at the hearing did not support Pfeil's characterization of the waterway as a ditch as opposed to a natural perennial-flowing stream. Margarite Lehmann testified that the stream on her property had for decades shared characteristics with the waterway in question. Ms. Lehmann supported her statement by referencing a U.S. Geological Survey (USGS) map, depicted below, that showed the stream on her property as well as the waterway on Pfeil's property.

⁴ Pfeil alleges that two supervisors improperly based their affirmative votes on policy considerations outside the scope of his case.



¶9 Other witnesses provided similar evidence. Richard Shockley shared his view that the waterway was properly characterized as a stream—a conclusion he reached based on his 45 years of personal experiences on the property now owned by Pfeil, as well as from conversations with the previous owners of the Pfeil property. He estimated that the waterway had existed as a perennial-flowing stream for at least 60 years. He also noted that the waterway had been subject to decades of efforts by humans to manipulate its course, depth, and flow. Buddy Drake, a member of the 310 Inspection Team at the Department of Fish, Wildlife & Parks, provided evidence that drainage ditches, unlike the waterway in question, typically are constructed on low points in a field to draw water to higher elevations. He reported that manipulation of a waterway is not determinative as to whether a waterway is natural. According to Drake, people often dig out naturally occurring streams to direct their flow. In line with Drake’s evidence of a stream, the

Inspection Team from GCD obtained images showing a channel where the waterway flowed dating back to at least 1981.

¶10 GCD weighed evidence submitted in support of Pfeil’s Petition and gathered in response to the Lehmann’s complaint. GCD noted that “anthropogenic manipulation of the waterway [was] evident,” which justified them reviewing historic information to determine the proper characterization of the waterway. They interpreted the record as documenting that “[f]or at least 40 years” a channel existed on the Pfeil property. And, they concluded that the record favored the characterization of the waterway as a naturally occurring stream and that the spoil piles resulted from an effort to redirect that stream rather than from an effort to create and sustain a ditch.

¶11 The District Court upheld the decision by GCD to assert jurisdiction. The court concluded that GCD did not err in asserting jurisdiction because GCD made its decision after considering the totality of the circumstances contained within the submitted evidence and factual record. The court also determined that GCD’s assertion of jurisdiction fell within its statutory authority because this Court’s case law supports such jurisdiction even when a natural waterway is no longer purely natural. Finally, the court ruled that GCD did not abuse its discretion by acting in an arbitrary or capricious manner during its determination of jurisdiction and the declaratory ruling process because GCD conscientiously gathered facts and made conclusions of law supported by the evidence.

STANDARD OF REVIEW

¶12 A reviewing court may only reverse or modify a decision by the supervisors of a conservation district if the substantial rights of the appellant have been prejudiced because

the ruling violated constitutional or statutory provisions, exceeded the statutory authority of the supervisors, resulted from an error in law, or was the product of an abuse of the supervisors' discretion. Section 75-7-125(4)(a-d), MCA; *see City of Livingston v. Park Conservation Dist.*, 2013 MT 234, ¶ 10, 371 Mont. 303, 307 P.3d 317. A decision is arbitrary if it comes about seemingly at random or by chance or as a capricious and unreasonable act of will. It is capricious if it is the product of a sudden, impulsive, and seemingly unmotivated notion or action. *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993). Under this standard a court may not alter a decision merely because the record contains inconsistent evidence or evidence that might support a different result. *Kiely Const. v. City of Red Lodge*, 2002 MT 241, ¶ 69, 312 Mont. 52, 57 P.3d 836.

¶13 We apply the same standard to our review of a district court's decision to affirm a conservation district's decision. *See Stalow v. Flathead Conservation Dist.*, 2020 MT 155, ¶ 8, 400 Mont. 266, 465 P.3d 1170. The legal conclusions of a district court receive de novo review by this Court. *Stand Up Mont. v. Missoula Cnty. Pub. Schs.*, 2022 MT 153, ¶ 6, 409 Mont. 330, 514 P.3d 1062. This Court determines whether an agency's interpretation of the law is correct when reviewing its conclusions of law. *Stalow*, ¶ 10.

DISCUSSION

¶14 *Issue One: Did the District Court err in upholding GCD's evaluation of the evidence in determining the status of the waterway on Pfeil's property under the 310 Law and GCD's Adopted Rule 21(5)?*

¶15 Pfeil argues that the District Court erred by upholding the process used by GCD to decide his case, which allegedly included GCD reliance on hearsay, irrelevant policy considerations, and anecdotal evidence. According to Pfeil, Mr. Shockley's summary of

how prior owners had characterized the waterway was hearsay that should not have informed GCD's determination. He characterizes other evidence as "wholly inconsistent with a 'natural stream'" based on GCD's Adopted Rule 5(a)(i).⁵ Pfeil also takes issue with the supervisors considering the effect of the waterway on the Gallatin River—a policy matter he regarded as distinct and unrelated to the question of jurisdiction. Additionally, Pfeil asserts that GCD allocated too much weight to testimony from the Lehmanns and other laypersons given that an expert, Dr. Nicklin, offered a contrasting take. Finally, Pfeil faults GCD for failing to follow its Adopted Rule 21(5) by not considering the information he provided to be persuasive—he reasons that the "preponderance of all available information at the hearing" did not contravene his information thereby triggering the application of the rule.⁶

¶16 GCD contends that the supervisors properly reviewed a record full of conflicting characterizations of the waterway and reasonably reconciled that information in reaching its conclusion. They defend favoring some information—such as evidence from neighbors and nearby residents of their historical interaction with the waterway in question—over

⁵ GCD's Adopted Rule 5 states that for a "stream to be covered under [the Natural Streambed and Land Preservation Act], it must (a) be a natural waterway [that, among other conditions,] (i) flow[s] in a defined channel that is lacking terrestrial vegetation." This Rule appears to conflict with this Court's precedent that a conservation district, when considering whether a waterway falls under the 310 Law, must base its decision on the "totality of the circumstances demonstrated by the factual record." *Bitterroot River Protective Assoc. v. Bitterroot Conservation District*, 2008 MT 377, ¶ 40, 346 Mont. 507, 198 P.3d 219 [*Bitterroot II*].

⁶ In considering evidence during a declaratory ruling, "the hearing officer and supervisors shall consider information provided by the petitioning party to be persuasive unless the information is overcome by a preponderance of all available information presented at the hearing." Adopted Rule 21(5).

other information—such as opinion testimony provided by Pfeil. GCD regards this process of comparing information prior to assigning weight to that information as an indication that GCD carefully weighed the evidence in the record. Additionally, GCD points out that supervisors have the authority to weigh the entirety of the record, which included the effect of the project on the Gallatin River given that Pfeil had introduced that concern into the record.⁷ They claim that the absence of any evidence as to “how, when [sic], where, why and when the alleged ditch was first dug” made it reasonable for GCD to rely on evidence that the waterway originally flowed as a natural stream that humans manipulated over several decades.

¶17 GCD argues it complied with Adopted Rule 21(5) during its process because they “determined the more persuasive evidence showed a naturally occurring stream existed and had been manipulated[.]” According to GCD, Pfeil erred by interpreting Adopted Rule 21(5) as requiring GCD to “show that when the ditch was constructed, there was an existing stream along the course and direction of the ditch at that time.” GCD challenges Pfeil’s interpretation of Adopted Rule 21(5) given that no source of evidence specified when the alleged ditch was originally dug. Because GCD determined that the more persuasive evidence (including the existence of a similar waterway on the Lehmann property) was on the side of the waterway constituting a naturally occurring stream, they argue that GCD had no obligation to identify a specific date upon which the ditch was dug.

⁷ As summarized in the Findings of Fact made by the GCD’s Board of Supervisors, Pfeil asserted that the waterway “does not divert water from the Gallatin River or any of its tributaries and that the waterway picks up flows from seepage springs and other groundwater.” Exhibit GCD-3, Affidavit of Jeff Pfeil.

¶18 A conservation district, when considering whether a river or a portion of it falls under the 310 Law, must base its decision on the “totality of the circumstances demonstrated by the factual record.” *Bitterroot II*, ¶ 40. This determination should not be based upon “technical definitions” that “would be inconsistent with our State’s legal principles.” *Bitterroot II*, ¶ 34. The “nature of the channel” itself is an important consideration. *Bitterroot II*, ¶ 42.

¶19 A conservation district does not abuse its discretion by assigning little weight to evidence that has not been previously established as resolving the issue in dispute. In *City of Livingston*, the City of Livingston argued that the applicable conservation district abused its discretion by ignoring several documents in the record that referred to the contested waterway as a “ditch.” *City of Livingston*, ¶ 15. However, the City failed to show that any of its references to a ditch “arose in the context in which a decision-maker decided the contested issue[.]” *City of Livingston*, ¶ 15. We held that the conservation district therefore did not abuse its discretion by regarding those references as marginally relevant to its resolution of the issue. *City of Livingston*, ¶ 15.

¶20 Here, the District Court concluded that GCD had no obligation to regard Pfeil’s proffered evidence as conclusive in determining the status of the waterway. Though Pfeil claims that his expert’s opinion deserved more weight from GCD, the fact that evidence is provided by an expert does not impose an obligation on a court to regard that evidence as incontrovertible—even when weighed against opinions provided by lay witnesses. The court did not err in deciding that GCD did not abuse its discretion by evaluating conflicting evidence and subsequently assigning different weight to that evidence.

¶21 A conservation district does not abuse its discretion where it reaches a decision supported by substantial evidence even when other decisions may have been appropriate. *See Silva*, 258 Mont. at 335-36, 852 P.2d at 675-76. In *Silva*, a police commission reviewed conflicting pieces of evidence pertaining to the effective date of certain benefits owed to an officer. *Silva*, 258 Mont. at 335, 852 P.2d at 675. The commission received a medical statement in June 1990, which indicated that that the officer would not be able to return to his position. *Silva*, 258 Mont. at 335, 852 P.2d at 675. However, a doctor later delivered a statement suggesting that as of January 1989, the officer could not have returned and, thus, was entitled to an earlier effective date for the benefits in question. *Silva*, 258 Mont. at 335, 852 P.2d at 675. The commission set the effective date as June 1990, based on what the officer characterized as “a total lack of record support[.]” *Silva*, 258 Mont. at 334, 852 P.2d at 675. This Court acknowledged that the evidence conflicted but nonetheless upheld the commission’s decision based on the substantial evidence supporting the commission’s decision. *Silva*, 258 Mont. at 335, 852 P.2d at 675.

¶22 Here, the District Court did not identify the fact that the conservation district and Pfeil assigned different weights to conflicting evidence as an indication that GCD abused its discretion. The court was aware that Pfeil, for example, argues that the opinion of an expert such as Dr. Nicklin should receive much greater weight than anecdotal evidence from individuals who have decades-long personal experience with the waterway. The court also acknowledged that GCD heavily weighed the detailed evidence relayed by several neighbors and visitors. The court did not err in determining that these sources provided

substantial evidence in support of GCD's conclusion, and that the conclusion was therefore not the result of an abuse of discretion by GCD.

¶23 The District Court's decision to affirm GCD's resolution of this case aligns with Montana Water Court cases such as *Claimant: Gene J. Knight*, 2018 Mont. Water LEXIS 4. In that case, the Water Court upheld a Water Master's findings despite that Master placing more weight on lay witness testimony "reflecting actual knowledge" of the property in question than expert testimony "of limited value." *Knight*, 2018 Mont. Water LEXIS at *9. Similarly, in *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, this Court determined that the Chief Water Judge correctly regarded an expert's testimony as "unreliable" in a case where the facts could support several conclusions. 2014 MT 167, ¶ 46, 375 Mont. 327, 328 P.3d 644. The credibility of witnesses and the weight of their testimony are matters for the district court to determine. *Hidden Hollow Ranch v. Fields*, 2004 MT 153, ¶ 41, 321 Mont. 505, 92 P.3d 1185. A witness may possess several impressive credentials but nevertheless fail to persuade the district court when that court is presented with conflicting evidence.

¶24 The District Court also did not err by concluding that GCD Adopted Rule 21(5) does not alter this analysis. As stated above, the court did not act arbitrarily or capriciously nor in a manner prejudicial to Pfeil when it affirmed GCD's evaluation of all of the evidence in reaching its decision that a naturally occurring stream existed and that human manipulation of that stream did not alter its natural status. It follows that the court did not err when it determined that GCD did not abuse its discretion in determining that the more

persuasive evidence supported the assertion of jurisdiction. As such, the court was not obligated to consider as persuasive the evidence in favor of Pfeil under Adopted Rule 21(5).

¶25 *Issue Two: Did the District Court err in upholding GCD’s declaratory ruling that the 310 Law applies to the waterway on Pfeil’s property?*

¶26 Pfeil claims that the District Court erred by affirming GCD’s decision that “the ditch replaced a natural spring creek.” He contends that a natural perennial-flowing stream cannot exist on his property given the hydrology of the land—a conclusion reached by Dr. Nicklin. Pfeil argues that he presented sufficient evidence to show that since at least 1945 a ditch, not a stream, existed on his property. Furthermore, he asserts that absent his continuing efforts to clear grasses from the beds and banks of “his ditch,” no water would flow in the channel, which necessarily means that the waterway cannot be defined as a stream.

¶27 The District Court referred to *Bitterroot II* to support its conclusion that manipulation of a natural perennial-flowing stream does not remove a stream from GCD’s jurisdiction. Furthermore, the court concluded that a conservation district may assert jurisdiction under the 310 Law over a waterway even if human-based manipulation rendered the waterway “no longer purely natural.”

¶28 In *Bitterroot II*, we reviewed a district court’s affirmation of a conservation district’s determination that a slough was not a stream under the 310 Law. *Bitterroot II*, ¶ 1. The record indicated that portions of the slough had been “rerouted, redirected, and controlled by humans” to such an extent that the slough no longer followed its natural path. *Bitterroot II*, ¶ 15. As a result of the unnatural elevation of the slough and related manipulations,

“[p]eriodic maintenance,” including cleaning out sediment, was required to maintain the watercourse. *Bitterroot II*, ¶ 15. The conservation district and district court concluded that human intervention maintained the slough, which meant that the slough could no longer qualify as a stream under the 310 Law. *Bitterroot II*, ¶ 17. According to the court, the term “natural” in the 310 Law meant that the waterway was free from “any man-made manipulation[.]” *Bitterroot II*, ¶ 30. We declared that the court’s narrow reading and the conclusions that followed from that reading resulted in “errors of law.” *Bitterroot II*, ¶ 34.

¶29 Here, the District Court did not err in deciding the conservation district properly concluded that a waterway need not remain “purely natural” to still fall within its jurisdiction under the 310 Law. Even where “extensive manipulations by man” are required to maintain the course and flow of a waterway, this Court cautioned against the application of “unworkably narrow” definitions that would render a waterway unnatural and, therefore, beyond the reach of the 310 Law. *Bitterroot II*, ¶¶ 35-36. Evidence from neighbors, previous owners, and various government investigators and inspectors as well as historical images all reinforced the conclusion by GCD, upheld by the District Court, that the waterway on the Pfeil property was natural, though subsequently manipulated. The court did not err in upholding GCD’s interpretation of the law and use of substantial evidence to apply that law in favor of jurisdiction.

CONCLUSION

¶30 The District Court did not err in concluding that GCD did not abuse its discretion in evaluating the entirety of the record, including historical evidence, when deciding whether the waterway on the Pfeil property fell within the conservation district’s jurisdiction.

¶31 The District Court did not err in upholding GCD's determination that, despite manipulations by humans, substantial evidence supported its conclusion that the waterway constituted a natural perennial-flowing stream as set forth in the 310 Law.

¶32 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ INGRID GUSTAFSON

/S/ JIM RICE