

BEFORE THE GALLATIN CONSERVATION DISTRICT BOARD OF SUPERVISORS

IN THE MATTER OF THE DECLARATORY RULING)	
BY THE GALLATIN CONSERVATION DISTRICT)	Findings of Fact,
RE: MATTER OF JURISDICTION OVER PFEIL SPRING)	Conclusions of Law, and
CREEK AND POND NEAR GALLATIN GATEWAY, MT)	Declaratory Ruling

FINDINGS OF FACT
Procedural Findings

- 1) The Gallatin Conservation District (GCD) is a duly organized conservation district and a political subdivision of state government in Gallatin County, Montana. Mont. Code Ann. § 76-15-215.
- 2) The Natural Streambed and Land Preservation Act of 1975 (the “Act” or 310 Law) is codified at Mont. Code Ann. §75-7-101, et seq. The rules implementing the Act are set out in the Administrative Rules of Montana 36.2.401 through 410 and the GCD’S rules, adopted 2019.
- 3) GCD is delegated the responsibility to administer the Act, including the authority to enter declaratory rulings regarding the applicability, interpretation, and implementation of the Act. Mont. Code Ann. § 75-7-125. This includes the authority to determine its jurisdiction under the Act.
- 4) Petitioners assert the waterway in question is a ditch, and therefore, the waterway and pond are not a natural, perennial flowing stream or river except the point of discharge where the waterway connects to the Gallatin River. It is not disputed that the Gallatin River is jurisdictional under the Act. Exhibit GCD-3(1).
- 5) Petitioners have submitted a petition requesting the GCD enter a declaratory ruling it has no jurisdiction over the waterway and pond under Act. Exhibit GCD-3(1).
- 6) Petitioners are directly affected persons because they own the property surrounding the waterway and pond in question and wish to develop the area around the ditch and pond as a campground. Exhibit GCD-3, Memorandum in support of petition of Pfeil Acquisitions LLC for declaratory ruling.
- 7) This declaratory ruling only applies to the waterway in the petition.
- 8) At its June 18, 2020 meeting, the GCD determined the issue to be of significant public interest. On July 20, 2020, GCD appointed Jason Garber, Stream Permitting Coordinator, Conservation Districts Bureau, Department of Natural Resources and Conservation, as hearings officer to assist with the declaratory ruling process and to make recommended findings of fact and conclusions of law. A scheduling order was issued to establish the process for interested persons to submit information, review information submitted, and present views and additional information at a public hearing. Exhibit GCD-4, (5).
- 9) Public notices were published in the Bozeman Daily Chronicle on 8/26/2020 and the Belgrade News on 7/30/2020 and 9/3/2020. A public hearing was conducted on October 14, 2020. Exhibits GCD-6, GCD-22, GCD-23, GCD-24.

Background

- 10) The GCD received a complaint from Gordon and Margarite Lehmann relative to the Act in October of 2019. The complaint centers around excavation that took place at the pond. The Lehmanns own property that abuts Petitioners’ property. The Lehmanns state they have owned their property since 1997 and they have been in the area of the property since the early 1980s. They state the property was used for cattle grazing and over the years the cattle created wallows in the spring

creek channel. A formally constructed pond was not present until Petitioners built one. Exhibit GCD-8.

- 11) Mike Rotar, a consultant retained by the GCD, viewed the site from the highway near the pond and was able to view material that had been excavated from the existing pond. Mr. Rotar also reviewed aerial photos of the area dating back to 1995 and provided the opinion to GCD that the waterway was likely jurisdictional. Exhibit GCD-9.
- 12) The GCD met on December 19, 2019 and determined that the activity was jurisdictional and that the activity was a violation of the Act. Exhibit GCD-10.
- 13) Petitioners were sent a letter dated December 20, 2019 that outlined the nature of the complaint received by the GCD. Petitioners were advised to cease and desist any further work until proper permitting could be obtained. Exhibit GCD-10.
- 14) At its February 20, 2020 meeting, with Petitioners present, the GCD discussed various options to bring the unpermitted activities into compliance with the Act. Exhibit GCD-16.
- 15) An application to bring the unpermitted activities into compliance was never submitted to the GCD board for review. Petitioners submitted a petition for declaratory ruling on July 29, 2019. Exhibit GCD-3.

Waterway Description

- 16) The waterway is located in the W1/2SW1/4NW1/4 of Section 11, T3S, R4E in Tract 2, near Gallatin Gateway, Gallatin County, Montana. Exhibit GCD-3(1).
- 17) The waterway is located on a large island formed by a split flow in the West Gallatin River. From the spring source, the waterway flows north and enters a .27-acre pond. Flow passes through the pond and continues to a point at which it discharges into the West Fork of the Gallatin River. From the spring source, which originated approximately 150 feet from the West Fork of the Gallatin River, the waterway travels approximately .25 miles to its confluence with the river. Exhibit GCD-3. Exhibit 3(1-5) and Appendix A.
- 18) Flow within the entire reach of the spring creek is year-round. Exhibit GCD-15 (5).
- 19) Spoil piles are evident along the margins of the waterway. Exhibits GCD-3, GCD-25.
- 20) The pond has recently been altered by Petitioners to make it deeper and a flow control structure has been added at the pond outlet. Exhibits GCD-3.
- 21) Photos from both winter and summer indicate that flow within the waterway channel is continuous and year-round. GCD-3, GCD-20, IP-2.
- 22) Michael Nicklin, in his spoken testimony at the October 14th public hearing, indicated the flow rates in the channel entering the pond were estimated at between 100 and 150 gallons per minute by. Mr. Nicklin has visited the site and was testifying on behalf of Petitioners and indicated that he has experience in surface and ground water for over 40 years. Exhibit GCD-31 (21).
- 23) Buddy Drake who represents the Department of Fish Wild Parks on the 310 inspection team, also spoke of flow in the waterway as year round and that the flow rate picks up as the channel nears the confluence with the West Fork of the Gallatin River. GCD-15(5).
- 24) The Hearings Officer, Jason Garber, and the legal counsel for the District, Caitlin Overland, accompanied the Petitioners to the site following the October 14th public hearing, and witnessed flows in the channel that would be estimated at between 100 and 200 gallons per minute. Personal observation, Jason Garber.
- 25) Ms. Lehman noted the flow is characteristic of other spring fed waterways on the island in that the rate increases in a northerly direction. IP-1.
- 26) An affidavit provided by Ben Davis on behalf of Petitioners also characterizes the waterway as a ditch that picks up flows from groundwater and springs. Exhibit GCD-3.

Waterway Channel

- 27) Petitioners contend the waterway is a ditch and it was constructed primarily to drain groundwater from the property, though the associated flow is used as a water source for livestock. Exhibit GCD-3.
- 28) Petitioners assert 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.
- 29) Ben Davis stated the spoil piles are the result of the ditch being excavated. He also characterizes the dimensions of the ditch as 10 feet wide at the top and v-shaped, although the conveyance path varies from 2 to 9 feet wide and was historically excavated to a depth of 3 to 5 feet, with a present depth of no more than 1 foot. Exhibit GCD-3, Affidavit of Ben Davis.
- 30) Mr. Nicklin characterized the flow path as fairly linear, and that this would coincide with the ditch being purposed for draining water from the property. Exhibit GCD-31 (20).
- 31) The presence of spoils piles alone does not indicate the stream was an entirely man-made ditch. GCD-27(1). Petitioners allege the spoils piles are the result of excavation of the ditch. GCD-3 (Petitioners memo in support, page 4. Affidavit of Ty Traxler, page 1). However, naturally occurring springs may also be excavated for purposes of directing flow. GCD-25.
- 32) Rebuttal evidence provided by Buddy Drake points out that spoil piles and a linear flow path are often a result of clean out efforts to direct flow to ponds or for stock watering purposes. This observation is supported by the statement of Mr. Richard Shockley, adjoining landowner, who spoke to the former owners of Petitioners' property. Those prior owners confirmed they periodically cleaned the waterway in order to maintain flow. Exhibit GCD-25, IP-1.
- 33) Rebuttal evidence provided by Matt Johnson points out the spring may not have exhibited the flow features it currently does prior to being enhanced and excavated at some point in the past. Mr. Johnson also makes the observation the waterway is not straight but exhibits curvature and sinuosity like other spring flow sourced watercourses on the island. Exhibit GCD-19.
- 34) Rebuttal evidence presented by Ms. Lehman states the waterway exhibits classical sinuosity and that the flow path cannot be characterized as straight. She also points out the similarity in sinuosity to other spring waterways present on the island. Exhibits A-G in her statement illustrate her point. IP-2.
- 35) The GCD inspection team, in speaking about the channel associated with the complaint, noted the existence of a crossing that would indicate a channel, as well as an outflow channel that enters the Gallatin River. Exhibit GCD-9.
- 36) Imagery going back to 1995 shows the existence of a channel. Exhibit GCD-13. Imagery from 2014 clearly shows the channel and the pond. Exhibit GCD-13.
- 37) Information obtained from the team inspection imagery shows a channel dating back to at least 1981. Exhibit GCD-13.

The pond

- 38) The pond is located in the channel approximately half-way between the spring source and the confluence with the river. It has been enlarged by Petitioners. Sediment and rocky material has been excavated to increase depth, and a flow control structure, known as an AgriDrain, has been installed. Exhibit GCD-3, Affidavit of Jeff Pfeil (2).
- 39) Mr. Shockley stated the previous landowner built a pond. Eddy Daniel, the son of the previous land owner told Mr. Shockley his father built a pond at the site of the current pond in the 1960s and

stocked it with fish, however his father decided to fill the pond and restore it to riparian floodplain pastureland. IP-1.

- 40) Petitioners hold a stock water right registered with the State of Montana. Exhibit GCD-3 (3).
- 41) Petitioners contend the pond has been historically used for watering livestock. Exhibit GCD-3, Affidavit of Jeff Pfeil (2).
- 42) The inspection team expressed concern about the work subject to the violation in Findings of Fact 10 that water quality could be affected downstream in the West Fork of the Gallatin River. In addition, light could penetrate the depth of the pond and create algae growth, and there was concern chemical application would be used to control it. A motion was passed by the GCD Board of Supervisors to entertain a 310 application for work done in the pond so the Board could discuss how the project could be brought into compliance with 310 law. Exhibit GCD-16.
- 43) Mike Rotar discussed some of the issues that could arise from the pond being developed. These include impacts to fisheries and thermal changes that could impact the river since the water flows through the pond into the West Fork of the Gallatin. Exhibit GCD-9.
- 44) The team inspection report recommends options for minimizing impacts. Exhibit GCD-9.
- 45) The GCD made the determination to take jurisdiction of the activity at its December 19, 2019 meeting. Exhibit GCD-13.

Conclusions of Law

- 1) The policy of the Act states 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).
- 2) The GCD has the authority to determine its jurisdiction under the Act. Mont. Code Ann. 75-7-125; *Bitterroot River Protection Association v. Bitterroot Conservation District*, 2002 MT 66, 309 Mont. 207, 45 P.3d 24. *Stalowy v. Flathead Conservation District*, 2020 MT 155, ¶ 12, 465 P.3d 1170.
- 3) Due notice and process were given in this matter. Findings of Fact 8 through 9.
- 4) A “stream” means any natural, perennial-flowing stream or river, its bed, and its immediate banks. Mont. Code Ann. § 75-7-103(6).
- 5) A “natural, perennial-flowing stream” is 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. Streams that dry up because of diversion, impoundments, appropriation, or extreme drought shall be considered to have continuous natural flows. ARM 36.2.402(7); ARM 36.2.407.
- 6) 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. Mont. Code Ann. § 75-7-103(5)(a).
- 7) In order for a stream to be covered under the Act, it must be a natural waterway and must contain natural flows. A stream contains natural flows when water feeds a natural channel from any ground water source, tributary, springs, or other natural source. The natural waterway must flow in a defined channel that is lacking terrestrial vegetation. GCD Rule 5(a)(b).
- 8) The waterway in question meets the definition contemplated in the Act, Administrative Rules of Montana and the GCD rules. Based on evidence from the record and the Findings of Fact. GCD Rule 7(a)(b).
- 9) For at least 40 years, the record shows a channel has existed which drains water from the spring to the West Fork of the Gallatin River.
- 10) The pond is located on a perennial spring creek that is tributary to the West Fork of the Gallatin River..

- 11) The GCD conducts the declaratory ruling process if a party challenges the jurisdiction of the GCD as to the nature of a stream as perennial and files a petition. The purposes of the declaratory ruling process is to gather information to make a determination as to jurisdiction. The GCD may review water rights records, stream flow and hydrologic data and interviews with area residents and professionals. The GCD is not limited in the types of information it may gather. The GCD may hold a public hearing to gather information relative to the designation of a natural, perennial-flowing stream if it deems the matter is of significant public interest. GCD Rule 20, GCD Rule 21.
- 12) The GCD used the declaratory ruling process to determine whether the spring creek and pond are a natural, perennial-flowing stream. Mont. Code Ann. § 75-7-125; GCD Rule 20 and GCD Rule 21.
- 13) In entering its conclusions of law the GCD must be concerned with the application of our State's legal principles underlying the 310 Law. *Bitterroot River Protective Association v. Bitterroot Conservation District*, 2008 MT 377, ¶ 34, 346 Mont. 508, 198 P.3d 219 (*BRPA II*): *Stalowy*, ¶ 22. The 310 Law contemplated protection of the "existing shape, form and course" of waters, even if those waters were no longer purely "natural." *BRPA II*, at ¶ 37.
- 14) Given the nature of the 310 Law and the policy and implementing rules, the 310 Law cannot be given unreasonably narrow constructions because water is a state resource. *BRPA II*, at ¶ 34.
- 15) In rendering a determination under the 310 Law in a declaratory ruling matter the supervisors must consider the totality of the circumstances demonstrated by the factual record. *BRPA II* at ¶ 40; *City of Livingston v. Park Conservation District*, 371 Mont. 303, ¶ 13, 307 P.3d 317. *Stalowy*, ¶ 22.
- 16) While there is information in the record that could support a different result, a conservation district should reasonably reconcile the information, including references in the historic record, when considering the status of a stream or project under the 310 Law. *City of Livingston* at ¶ 16.
- 17) Given the policy of the Act and given the totality of information in the record a reasonable reconciliation of the information supports a determination that:
- 18) While the record contains information the waterway has been manipulated anthropogenically, it is apparent a bed and bank are present.
 - a. Since anthropogenic manipulation of the waterway is evident, it is necessary to consider historic information in rendering a determination given the Act's policy to protect streams in their natural or existing state. *BRPA II* at ¶43.
 - b. Flow is year-round from a natural source.
 - c. The waterway is a "natural, perennial-flowing stream."
 - d. GCD has jurisdiction of the spring creek and pond.

Declaratory Ruling

Based upon the review and analysis of the totality of circumstances presented in the entire record, IT IS HEREBY DETERMINED the spring creek and pond located on the Pfeil property, W1/2SW1/4NW1/4 of Section 11, T3S, R4E in Tract 2, Gallatin County, Montana , is subject to the Gallatin Conservation District's jurisdiction under the Natural Streambed and Land Preservation Act of 1975.

HEARING OFFICER MEMORANDUM

I. Introduction

a. Process

This matter was conducted as a declaratory ruling pursuant to Mont. Code Ann. § 75-7-125(2); GCD Rule 20. The matter before the Gallatin Conservation District (GCD) was not a contested case under the Montana Administrative Procedure Act. Mont. Code Ann. § 75-7-125(3); GCD Rule 20(6). The proceeding was conducted in a manner to permit and encourage any interested person to participate. Notice and opportunity to be heard in this matter were given. GCD Rule 20 and Mont. Code Ann. § 2-3-101, et seq. (public participation statutes). The GCD received verified information prior to the public hearing and received verified oral and documentary information at a public hearing conducted on October 14, 2020, in Bozeman, Montana. Findings of Fact 1-9.

A quorum of GCD Supervisors attended the public hearing and reviewed the verified information. GCD Rule 21.3. The Hearing Officer filed recommended findings of fact and conclusions of law. GCD Rule 21(3). After a review and discussion of the verified information, the Hearing Officer's recommended findings of fact and conclusions of law, the GCD entered its findings of fact, conclusions of law and declaratory ruling. Only those Supervisors present during the hearing participated in the decision. GCD Rule 21(6). The declaratory ruling, consisting of findings of fact and conclusions of law, was made by a concurrence of a majority of the Board. GCD Rule 21(6).

b. Law

In the exercise of its authority to determine the status of a water body under the Montana Streambed and Land Preservation Act of 1975 ("310 Law" or "Act") the GCD is guided by the 310 Law, implementing rules, and case law. In reviewing the information in the record the Hearing Officer, in making his recommendations, and the Supervisors in making their determinations, are guided by five principles arising out of case law:

1. A conservation district has the right to initially determine its jurisdiction under the 310 Law. *Bitterroot River Protective Association v. Bitterroot Conservation District*, 2002 MT 66, at ¶ 21, 309 Mont. 207, 45 P.3d 24 (commonly referred to as *BRPA I*).
2. The policy of the Act states natural rivers and streams and the lands and property immediately adjacent to them are to be protected and preserved to be available in their natural or existing state. Mont. Code Ann. § 75-7-102(2). Given the nature of the 310 Law and the policy and implementing rules, the 310 Law cannot be given unreasonably narrow constructions because water is a state resource. *Bitterroot River Protective Association v. Bitterroot Conservation District*, 2008 MT 377, ¶ 34, 346 Mont. 508, 198 P.3d 219 (*BRPA II*). The extent of man's impact on the waterway must be considered in line with the Act's stated purpose to protect streams in their "natural or existing" state to implement the constitution's directive to prevent the "depletion and degradation of natural resources." *Id.* at 40.
3. In entering a declaratory ruling a conservation district must be concerned with the application of our State's legal principles underlying the 310 Law. *BRPA II* at ¶ 34. The 310 Law contemplated protection of the "existing shape, form and course" of waters, even if those waters were no longer purely "natural." *Id.* at ¶ 37.
4. In rendering a determination under the 310 Law in a declaratory ruling, the supervisors must consider the totality of the circumstances demonstrated by the factual record. *BRPA II* at ¶¶ 40, 47; *City of Livingston v. Park Conservation District*, 371 Mont. 303, ¶ 13, 307 P.3d 317. Stated differently, no party's information is persuasive; rather a determination must be made upon a consideration of all the available information presented by all the parties.
5. While there will likely be information in the record that could support a different result, a conservation district should reasonably reconcile the information, including references in the historic record, when considering the status of a stream or project under the 310 Law. *City of Livingston* at ¶ 16. In other words, a reasonable reconciliation of conflicting information must be made to accomplish the goals of the Constitution and the 310 Law. At issue is how these legal principles apply to the waterway and pond as described in Petitioners' Petition for Declaratory Ruling.

A "stream" is defined by the 310 Law as a "natural, perennial-flowing stream or river, its bed, and its immediate banks..." Mont. Code Ann. § 75-7-103(6). The phrase "natural, perennial-flowing stream" is not further defined in the 310 Law. A Department of Natural Resources and Conservation (DNRC) rule implementing the 310 Law defines the term 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." Admin. R. M. 36.2.402(7). The GCD adopted rules concerning the determination of the applicability of its rules. GCD Rule 4(21) definition of "stream" means any natural or perennial-flowing stream, or river, its bed and immediate banks, and its channels, and includes the entire stream from its mouth to its source even if portions go dry periodically. GCD Rule 5(5)(b) requires

the waterway contain continuous natural flows which may be from any ground water source, tributary, springs, or other natural source.

The jurisdiction of the GCD does not extend to “ditches, intermittent streams or wetlands not associated with the bed or immediate banks of a stream.” GCD Rule 5(4). “Ditch” is not further defined. GCD Rule 5(5)(a) provides for a water body to be covered under the 310 Law a stream must be a natural waterway. GCD Rule 5(5)(a)(ii) provides that natural streams that have been re-channeled for road construction, flood control, irrigation, or other public works are considered natural waterways. In line with the policy underlying the Act, man’s manipulation of a natural stream does not automatically remove it from the GCD’s jurisdiction.

In assessing jurisdiction in the declaratory ruling process, the GCD may, but is not limited to, the following evidence for consideration: USGS maps; Water Resource Surveys; Water rights records; landowner and resident interviews; hydrology reports; on-site evaluation to gather information on geomorphology, vegetation, insects, past human activity; historical information; aerial photos; stream flow data or; any other relevant information. GCD Rule 5(6). These are examples of the types of information to be considered but each category is not a factor requiring explicit findings. *Stalowy v. Flathead Conservation District*, 2020 MT 155, ¶ 16, 400 Mont. 266, 465 P.3d 1170.

The 310 Law is one of “a comprehensive set of laws” enacted by the Legislature to “accomplish the goals of the constitution,” including Article IX, section 1, which requires legislative provision of remedies to prevent “depletion and degradation of natural resources.” *BRPA II* at ¶28. Under the 310 Law Montana’s “natural rivers and streams and the lands and property immediately adjacent to them” are to be “protected and preserved to be available in their natural or existing state.” *Id.* To fulfill this public purpose, the 310 Law requires any person planning a physical alteration or modification of a stream to obtain approval from the conservation district before initiating the proposed project. *Id.*

The Montana Supreme Court has instructed the Act cannot be given unreasonably narrow constructions because water is a state resource, even if the resource has seen extensive, man-impacted conditions. *BRPA II*, at ¶ 46. Consequently, in its deliberations the GCD Supervisors have entered findings of fact and conclusions of law that give due consideration to the underlying policy of the 310 Law.

The GCD must look at the totality of circumstances in light of the State's legal principles underlying the 310 Law, by reviewing the whole record to determine the overall character of the waterway. *BRPA II* at ¶40. In Montana, courts have embraced the totality of circumstances test in both criminal and civil cases, ranging from suppression of evidence cases (for example, *State v. Gilder*, 1999 MT 207, 985 P.2d 147, 295 Mont. 483) to determination of constructive discharge claims (*Martinell v. Montana Power Co.*, 268 Mont. 292, 886 P.2d 421, (1994)) to the sale of water rights (*Doig v. Cascaddan*, 282 Mont. 105, 935 P.2d 268, (1997)). Like *BRPA II*, the cases do not establish a bright-line rule as to what constitutes the totality of circumstances. The cases disclose the test refers to a method of analysis where decisions are based on all available information. In other words, the courts or, as in this matter, the Board of Supervisors, must focus on all the relevant information rather than one factor.

II. Parties' positions

a. Information provided to argue the waterway and pond are not jurisdictional

The Petition for Declaratory Ruling and materials supplied by Pfeil Acquisitions LLC state their position the waterway is not jurisdictional because it is a "ditch" which collects groundwater and conveys it in a northerly fashion through Petitioners' property. GCD-3(2). Petitioners contend the GCD only has jurisdiction over the point where the "ditch" discharges into the Gallatin River, which is unquestionably jurisdictional. Petitioners contend the "ditch" was constructed to drain water underneath the Pfeil property and that "by incising the ditch into the land, water accumulated in the Ditch directly from groundwater or from groundwater that expressed itself as springs." GCD-3(2).

Petitioners do not provide evidence as to when the “ditch” was originally excavated or who conducted those activities. Photographic evidence dating back to 1981 shows the presence of channelization. GCD-27(1). Petitioners also point to the presence of spoils piles and lack of sinuosity to argue the waterway and pond were man-made and not subject to jurisdiction. Findings of Fact 27-31.

Petitioners’ admit the ditch flows year-round because of seepage, groundwater and springs which exist above and below the pond, and in the pond itself. GCD-3 (affidavit of Pfeil). Pursuant to GCD Rule 5(5)(b)(ii), “water feeding a natural channel from any ground water source, tributary, springs, seeps or other natural source shall be considered part of the natural flow.” Petitioners also note the Gallatin River is jurisdictional and the point of the “ditch” discharge into the River is subject to jurisdiction.

Therefore, Petitioners admit the waterway is fed by springs and seepage and flows year-round. Petitioners also apparently admit the alleged ditch is tributary to the Gallatin River. The only apparent contention is thus whether the channelization is man-made such that it removes the waterway from the jurisdiction of the GCD. In *BRPA II*, the Montana Supreme Court determined a stream may still fall under a conservation district’s jurisdiction even if no longer purely “natural.” ¶ 37. The Board of Supervisors thus must review the evidence and the totality of the circumstances to determine whether the waterway is sufficiently natural to be jurisdictional.

b. Information provided the waterway and pond are jurisdictional

Multiple parties provided information in the record to contend the waterway and pond are a natural-perennial flowing stream subject to jurisdiction. In contrast to Petitioners’ position the waterway is an entirely man-made ditch, historical evidence provided indicates the existence of a naturally occurring perennial stream prior to Pfeil’s ownership of the land. IP-1. (Findings of Fact 31-37). Channelization has been evident for decades. The presence of spoil piles does indicate some excavation but does not provide definitive proof of the absence of such a channel prior to such excavation.

Naturally occurring streams may also be excavated for purposes of maintaining flow. GCD-25, IP-1. (Findings of Fact 31-37).

The preponderance of the information presented rebuts the presumption Petitioners' evidence is persuasive. GCD Rule 21(5). Petitioners have not provided evidence as to the creation of what they deem a ditch. Despite Petitioners' conflicting narrative, the bulk of the evidence in the record supports the conclusion the shape and course of the waterway for the past 40 years has been a spring creek channel fed by seepage and springs with sinuosity present in a similar fashion as to other local spring creeks. The presence of spoil piles does not mean a ditch was dug. Rather, it is likely a previously existing spring creek was excavated. Moreover, the policy underlying the Act compels the GCD to protect streams in their natural or *existing* state. Despite man's manipulation the conservation district must assert jurisdiction to protect the waterway as it exists now.

c. Impact of activities on waterway as a "project" on the West Fork of the Gallatin River.

Petitioners also argue since the "ditch" is not in close proximity to the West Fork of the Gallatin River, the GCD cannot regulate activities on the ditch even if they impact the West Fork of the Gallatin River. Petitioners state: "construing lands immediately adjacent to the stream channel as all those lands the physical modification of which may cause unspecified change in the state of stream does not identify any intelligible principles under which people can determine which land use practices are subject to the requirements of the 310 permit." GCD-3 (memorandum, page 8). While proximity to the West Fork of the Gallatin River does factor into the GCD's consideration, the Supervisors role here is to the assess the jurisdiction of the waterway itself not a specific project which may impact the West Fork of the Gallatin River.

However, the definition of a "project" does not require it to be *on* a natural perennial stream, only that the activity "results in the change in the state of *a* natural, perennial-flowing stream or river, its bed or immediate banks." GCD Rule 4(20) (emphasis added). The Board can consider the

interconnected nature of waterbodies for purposes of determining jurisdiction and whether an activity is a “project.” *Stalowy*, ¶¶ 27, 30-31. While the pond and spring creek within the confines of Petitioners’ property are jurisdictional independent of adjacent waterways, the Board may also consider the impacts on the West Fork of the Gallatin River from any proposed future activities to assess whether it meets the definition of “project” for which a permit is required.

In this declaratory ruling the function of the GCD is to determine whether the spring creek and pond are themselves jurisdictional as a natural, perennial-flowing stream. Whether an activity on the spring creek and pond are a “project” subject to permitting requirements may also hinge on the potential impacts to the West Fork of the Gallatin River. In both these circumstances the Board must look toward the policies underlying the 310 law that streams are to be protected in their natural or existing shape to prevent degradation of a state resource.

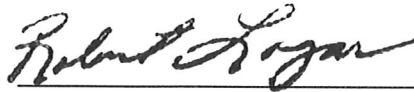
CONCLUSION

Based on the totality of the circumstances and the review of the record in this proceeding, and reconciliation of conflicting information, the spring creek and pond identified in the Petition for Declaratory Ruling, located in the W1/2SW1/4NW1/4 of Section 11, T3S, R4E in Tract 2, near Gallatin Gateway, Gallatin County, Montana, are a natural perennial flowing stream subject to the jurisdiction of the GCD under the Act.

NOTICE

This Declaratory Ruling may be appealed by an aggrieved person in accordance with the Montana Streambed and Land Preservation Act by filing a petition for judicial review in the appropriate district court within 30 days of the date of service of this Order. The GCD does not provide for a rehearing in this matter for purpose of an appeal of this Order. Copies of a petition for judicial review must be promptly served upon the GCD and upon all persons appearing in this declaratory ruling matter, or their respective legal counsel.

Dated this 30 day of December, 2020.



Bob Logar, Chair
Board of Supervisors
Gallatin Conservation District

Copies: Parties of Record
Jason Garber
Caitlin Overland
Laurie Zeller