

Supreme Court Decisions Regarding Water Policy Issues -- Staff Summary

April 22, 2002

for the Coal Bed Methane/Water Policy Subcommittee of the Environmental Quality
Council

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Bitterroot River Protection Association, Inc. v. Bitterroot Conservation District

Decided April 4, 2002

2002 MT 66

Background

The Bitterroot Conservation District (BCD) is the authorized conservation district for Ravalli County. In its role as a conservation district, the BCD is responsible for issuing permits to any person who plans to alter or modify a stream in Ravalli County, pursuant to the Natural Streambed and Land Preservation Act of 1975, often referred to as the "310 law". Over the years, BCD has issued a number of permits for a body of water called the Mitchell Slough.

In 1995, a portage permit was requested from the BCD for the Mitchell Slough. Because of this portage request, a question arose concerning the designation of the Mitchell Slough as a perennial-flowing stream. If it was not a perennial-flowing stream then it would not be subject to the Natural Streambed and Land Preservation Act of 1975 (Streambed Preservation Act) and would thus be outside the jurisdiction of the BCD. After unsuccessfully attempting to have the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, and the Department of Environmental Quality determine whether the Mitchell Slough was a "natural perennial-flowing stream", the BCD decided to use a public hearing process to make this determination.

The Bitterroot Protective Association (BRPA) sought an alternate writ of prohibition to stop the BCD from determining the status of the Mitchell Slough. The District Court denied the BRPA's writ of prohibition. A writ of prohibition serves to stop an entity exercising judicial functions from acting when the proceedings are beyond its jurisdiction.

Issue

May the Bitterroot Conservation District make the initial determination of whether the Mitchell Slough is a "natural perennial-flowing stream"?

Findings

In order to grant the BRPA's request for a writ of prohibition, the Supreme Court would have to conclude that the BCD's decision to determine whether the Mitchell Slough is a

stream was clearly outside its authority. The Supreme Court could not reach that conclusion.

The Streambed Preservation Act does not specifically authorize conservation districts with the power to classify bodies of water as streams. In fact, the Act does not authorize any specific entity to exercise this power. The Act, and its associated rules, do give the BCD the authority to delist streams that do not have "significant aquatic and riparian attributes in need of protection or preservation", 75-7-103(6), MCA. Therefore, the BCD has the authority to make the determination of what bodies of water lie outside its jurisdiction. The Court stated "if a district court or other entity were to decide that the Mitchell Slough is a stream, the BCD could essentially veto this determination by designating the Mitchell slough as not having 'significant aquatic or riparian attributes.' Having the same entity decide what is a stream and conversely decide what is not a stream is more logical than having a district court or other entity decide the former and the BCD decide the latter."

There were also issues raised regarding the relationship between the determination of the Mitchell Slough as a perennial stream and if BCD decided it was not a perennial stream, would that mean that it is automatically considered a ditch with regard to the Stream Access Law, 23-2-301, MCA. The court felt that while the BCD's decision on the Mitchell Slough's status as a stream is potentially significant, the decision, regardless of its outcome, does not necessarily determine whether the Mitchell Slough is a ditch under the Stream Access Act. These are instead two separate factual inquiries.

Once the BCD has determined the status of the Mitchell Slough, nothing in the Court's opinion prevents the BRPA from seeking judicial review of the BCD's declaratory rulings. The Court **denied** the BRPA's petition for a writ of prohibition.