Docket Number: 25-1474

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN AMBLER and STACY AMBLER,
Plaintiffs,
v.
FLATHEAD CONSERVATION DISTRICT,
Defendant,
and
FRIENDS OF MONTANA STREAMS AND RIVERS,
Intervenors.

On appeal from the United States District Court
for the District of Montana
D.C. No. 9:23-cv-00151-KLD
(Honorable Kathleen L. DeSoto)

INTERVENOR/APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case is about protecting the integrity of Montana's natural streams, not just about land use or jurisdiction. It is about whether Montana can enforce the Natural Streambed and Land Preservation Act to prevent the piecemeal destruction of streambanks like those of McDonald Creek. Construction on or adjacent to these waterways – especially on private property within a national park – poses serious environmental risks including erosion, sedimentation and long-term hydrological damage downstream. These risks are precisely why the Act requires local review and permitting.

The District Court set aside these important concepts, and Montana's history of protecting it water resources, and found that Montana had no authority to regulate private property within Glacier National Park. As a result, inholders such as the Amblers are not subject to the stringent review process outlined in the Act. Without this protection, McDonald Creek, a tributary of the greater Flathead River watershed, is at risk because the National Park has done nothing. Absent this regulation, McDonald Creek is at risk of destabilization and increased flooding as happened in 1964 when houses floated downstream. So, this case is about more than jurisdiction, but also about ensuring Montana's waterways are protected.

For those reasons, and those outlined below, the District Court erred when it found that private inholdings within the external boundaries of Glacier National Park were not subject to Natural Streambed and Land Preservation Act.

JURISDICTIONAL STATEMENT

The District Court possessed jurisdiction under 28 U.S.C. § 2201 to issue a declaratory judgment regarding whether the United States has exclusive legislative jurisdiction over private inholdings within the Glacier National Park. *See also*, *Macomber v. Bose*, 401 F.2d 545 (9th Cir. 1968). Final judgment in favor of the Plaintiffs John and Stacey Ambler was entered on February 5, 2025. (ER-47.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The appeal is timely under Fed. R. App. P. 4(a)(1)(A). The final judgment entered by the District Court on February 5, 2025, is a final order that disposed of all of Plaintiffs' claims. (ER-47.)

STATEMENT OF ISSUES

Whether the United States of America has exclusive legislative jurisdiction over private inholdings within Glacier National Park.

ADDENDUM

Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules must be set forth verbatim with appropriate citations and are included in and addendum bound with this brief.

STATEMENT OF THE CASE

A. Procedural History.

This case stems out of a ruling from the Flathead Conservation District (FCD) which administers Montana's Natural Streambed and Land Preservation Act (the "Streambed Act" or "Streambed Law" at Mont. Code Ann. §§ 75-7-101, et. seq. (ER-1-42.) John and Stacy Ambler began to build a home on the banks of McDonald Creek on a private inholding in Glacier National Park. (ER-171, ¶ 13.). On November 13, 2023, the FCD issued a declaratory ruling pursuant to Mont. Code Ann. § 75-7-125. (ER-4.) In its ruling, FCD determined it had jurisdiction to enforce the Streambed Act, and that the Amblers had violated the Streambed Act by building without obtaining the appropriate permit. (ER-3-4.) FCD then ordered the Amblers to obtain a permit and tear down the structure. (ER-4.)

The Amblers timely appealed the decision to the United Stated District Court, for the District of Montana, Missoula Division, on December 12, 2023. (ER-4, ER-167-73.) FCD filed its response on January 8, 2024. (ER-160-66.) Intervenors, FMSR then filed a contested motion to intervene, which the District Court granted. (ER-5.) The parties then cross-moved for summary judgment, and after oral argument the District Court granted the Amblers' motion for summary judgment and denied Intervenors and FCD's cross motions on February 5, 2025. (ER-1-42.) Judgment was entered the same day (ER-47.)

B. Factual history.

1. The Streambed Act.

The Streambed Law was enacted in 1975 to protect and preserve Montana's "natural rivers and streams and the lands and property immediately adjacent to them within the state." Mont. Code Ann. § 75-7-102(2). It is meant "to prohibit unauthorized projects and, in so doing, to keep soil erosion and sedimentation to a minimum." *Id.* To that end, any project that may cause 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 must notify the local conservation district of their intent. Mont. Code Ann. § 75-7-111. After accepting notice of a project, the Conservation District will inspect the property. Mont. Code Ann. § 75-7-112. The inspection team will then make recommendations to the conservation district board, which may approve, deny or modify a proposed project. *Id.*

These statutes are incorporated into the FCD's own rules, which also provide a mechanism to review complaints about unpermitted projects. *See* FCD Rules, *generally*, https://flatheadcd.org/wp-content/uploads/Adopted-Rules-January-27-2020.pdf (Jan. 27, 2020). Those procedures are similar to the project procedures. Upon receiving a complaint, FCD notifies the alleged violator, and sets up an inspection of the property. FCD Rule 18. If an investigation confirms a violation, FCD will notify the violator of the action necessary to rectify the

violation, and a deadline by which corrective action must be taken. FCD Rule 18(3). If the violation is not rectified, the FCD may petition a district court for judicial enforcement. FCD Rule 19.

2. Glacier National Park's creation

On May 11, 1910, the U.S. Congress passed an act establishing Glacier National Park in Northwestern, Montana. 16 U.S.C. § 161; 61 P.L. 171, 36 Stat. 354, 61 Cong. Ch. 226 (May 11, 1910). It included dedicated lands south of the Canadian border, north of the Middle Fork of the Flathead River, East of the North Fork of the Flathead River, and West of the Blackfeet Indian Reservation. 16 U.S.C. § 161. Described land was "withdrawn from settlement, occupancy or disposal" and "set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States." *Id.* The Act expressly did not include certain preexisting private property inholdings: "nothing [in the Act] shall affect any valid existing claim, location or entry existing under the land laws of the United States [before May 11, 1910] or the rights of any such claimant, locator or entryman to the full use and enjoyment of his land." *Id* This act did not "purport to disturb Montana's sovereignty or political dominion." *Macomber v. Bose*, 401 F.2d 545, 546 (9th Cir. 1968).

The following year Montana ceded exclusive jurisdiction of those same lands, or those that "may hereafter be included," to the United States. Mont. Code

Ann. § 2-1-205. On August 22, 1914, Congress formally accepted the cession of jurisdiction "over the territory embraced within the Glacier National Park . . ." 16 U.S.C. § 163; 63 P.L. 177, 38 Stat. 699, 63 Cong. Ch. 264 (Aug. 22, 1914). This cession and acceptance, though, was a cession "of the specified jurisdiction over the land in question, but not of the land itself nor *of complete sovereignty over it*." *State ex rel. State Bd. of Equalization v. Glacier Park Co.*, 118 Mont. 205, 209, 164 P.2d 366, 368 (1945) (Emphasis added.) Montana retained sovereignty and jurisdiction to all lands where cession was not explicitly provided. Mont. Code Ann. § 2-1-102.

Upon accepting the cession, the Secretary of Interior was vested with certain powers and duties. The Secretary was directed "to make and publish such rules and regulations . . . for the management and care of the park and protection of the property therein." 63 P.L. 177, 38 Stat. 699, 63 Cong. Ch. 264. It was meant, *inter alia*, to protect from injury or spoliation of all mineral deposits "other than those legally located prior to the passage of the Act of May eleventh nineteen hundred and ten . . ." *Id.* Similarly, if a person violates a promulgated rule related to the protection of property and mineral interests "other than those legally located prior to the passage of the [May 11, 1910] Act" the person regulations would be subject to a $500 fine and up to six months imprisonment. *Id.* The exclusion of pre-

existing mineral interests further elucidated Congress' efforts to carve out pre-existing interests in real property from actual federal jurisdiction.

Thus, the August 22, 1914, acceptance of cession of jurisdiction only applied to those lands included in the May 11, 1910, Act, and not privately owned properties. *But see*, *Macomber*, 401 F.2d at 546-47 (discussed below).

3. History of the Ambler's property.

Two years prior to the creation of Glacier, in 1908, Charles Howe obtained title to a tract of land that included the Ambler Property via the 1862 homestead Act. (ER-2.) Over the years, Mr. Howe's property was split multiple times, and the land at issue now consists of 0.053[1] acres adjacent to McDonald Creek; this is the Ambler Property. (ER-2)

McDonald Creek is part of the larger Flathead River system. It originates on the Southern end of Lake McDonald and flows southerly until it flows into the Middle Fork of the Flathead River, which is a federally designated Wild and Scenic River. (ER-128, ¶ 32) Shortly after McDonald Creek exits Lake McDonald, it is joined by Apgar Creek, which creates a gravel bar directly across from the Amblers' property. (ER-129, ¶ 34.) This pushes McDonald Creek's flow eastward directly toward the Amblers' property. *Id.* McDonald Creek's banks are made up

[1] The District Court erred and noted the property was .53 acres, when in reality is it only .053. (ER-118.)

of gravel, sand and silt, which are easily moved by foot traffic. (ER-129, ¶ 35.) Some streambank protection is provided by vegetation, but that vegetation breaks off and slumps into the creek. *Id.* This bank structure is instable upstream, downstream and adjacent to the Amblers' property. *Id.*

These streambanks have historically permitted flooding on the Amblers' property. In 1964, for example, there was catastrophic flooding of Lower McDonald Creek due to heavy snowpack and warm spring rains. (ER-108-109, ¶¶ 7-10.) The rain on snow events caused McDonald Creek to flow backwards towards Lake McDonald, and flooded parts of Apgar. *Id.* The flood waters extended 25-50 feet to the east of McDonald Creek, including the area where the Amblers' new building is located. *Id.* In fact, a white house owned by a Ms. Powell was left "hanging" over the bank in this particular location. The property left after the flood, on which the Ambler's house is built, is only 0.053 acres. *Id.* To put this in perspective, the entire lot is approximately 2,300 square feet – small than the footprint of many houses. In 1964, another nearby property – a rental cabin – floated down stream to the Camas bridge where it had to be blasted apart. *Id.* Since then, flooding both major and minor has continued to be an issue on McDonald Creek. *Id.*

Nevertheless, the Amblers purchased the 0.053 acres in 2019. (ER-2). They quickly began construction. (ER-177, ¶ 13.) And they did so without obtaining a

permit from the FCD. (ER-3.) Prior to construction, the site was vegetated with a variety of trees and vegetation on the bank sloping towards McDonald Creek. (ER-133, ¶ 46.) Most of the trees and vegetation were removed to accommodate construction of a three-level, 2,178 square foot house, with two overhanging decks. (ER-133, ¶¶ 46-47.) The home is built into the bank that slopes towards McDonald Creek. (ER-133, ¶ 47.) To that end, the immediate bank of McDonald Creek was re-graded and a four-foot retaining wall was constructed, and boulders were placed within along the streambank. (ER-134, ¶ 48.)

Construction of the structure created numerous environmental concerns. Of particular import is the creation of impervious surfaces, which increase storm runoff into the McDonald Creek. (ER-135, ¶ 52.). Runoff would also occur from the roof and rain gutters, which would further erode the streambank and increase sedimentation, thereby decreasing water quality in McDonald Creek. (ER-135-37, ¶ 53.) Sedimentation would also result from increased foot traffic and lack of parking. *Id.* Construction and future use of the property could decrease water quality through additional garbage or debris entering the Creek, as evidenced by construction debris on the streambank during construction. *Id.* And, ultimately, the "house and retaining wall have the potential to impede natural stream processes during floods and seasonal high flows due to the position of" the building and retaining wall so close to McDonald Creek. *Id.*

Based on these concerns, and the lack of permitting, numerous complaints alleging violation of the Streambed Act were filed with the FCD. *Id.* In response, on February 27, 2023, a site inspection was conducted by the FCD, which confirmed the presence of a house on the Ambler Property being constructed on the immediate bank of the McDonald Creek. (ER-120, ¶ 5.) The inspection team determined the house was being constructed in violation of the Streambed Act and recommended, *inter alia*, its removal. *Id.* At the March 13, 2023, FCD meeting, the FCD Board accepted the inspection team's recommendations and determined a project had been initiated in violation of the Streambed Act. (ER-120-21, ¶ 5.) Subsequently, the Amblers requested a "declaratory ruling" from the FCD that the FCD did not have jurisdiction over the Amblers' property as a private inholding within the external boundaries of Glacier National Park. (ER-3-4.) The FCD held a public hearing on August 25, 2023, on the request for a declaratory ruling. (ER-4, 77-98.) And on November 13, 2023, the FCD ruled that it had jurisdiction over the Amblers' property and the home must be removed. (ER-4, 119-40.)

SUMMARY OF THE ARGUMENT

At the time of cession, Montana did not cede exclusive legislative jurisdiction over private inholding to the federal government. The plain language of the statutes reserved, at a minimum, concurrent legislative jurisdiction over those inholdings to the State of Montana. That concurrent jurisdiction is based on

the exclusion of private lands that were homesteaded prior to the creation of the park in 1910, including the Amblers' property. The District Court, and past court cases, misinterpreted this plain language exclusion to find that the exclusion only was meant to protect a homesteader's right to take title to the land.

Those conclusions are in conflict with subsequent congressional action. In 1946, for example, Congress authorized the Secretary of the Interior to obtain title to private property within the boundaries of the Park, but that such property was not subject to federal regulation until the title passed to the United States. This is consistent with National Park Service regulations that exclude inholdings from Park Service regulations. The District Court erred by concluding otherwise and relying on case law that did not address the cession statutes related to Glacier National Park.

The history of streambank preservation and protection further demonstrates that the Streambed Act is part of a long history of stream protection in Montana. That history dates back to at least 1897 when the state regulated the disposal of sawmill waste material into streams, as well as regulation of construction of wharves and docks within the waterways as late as 1909. Based on this long term regulation, the Streambed Act – like water rights and partition actions – is assimilated into federal law and may be enforced by the state or local government,

in this case the Flathead Conservation District. The District Court's conclusion to the contrary was, therefore, in error.

And finally, public policy and federalism concerns support a conclusion that Montana's Streambed Act applies to inholdings. Land use issues are traditionally left to States to regulate, even if the land at issue is wholly surrounded by federal land. It becomes even more important when there is no corollary federal regulation, or as here, the rules exclude regulation of inholdings. Absent such federal regulation, Montana law fills in the gaps to ensure that no area is left unregulated.

ARGUMENT

A. Standard of review.

The Ninth Circuit reviews de novo grants of declaratory relief. *Gayle Mfg. Co. v. Fed. Sav. & Loan Ins. Corp.*, 910 F.2d 574, 578 (9th Cir. 1990)

B. Montana did not cede exclusive legislative jurisdiction to the federal government to private inholdings within Glacier National Park that pre-dated the creation of the Park.

The District Court erred when it determined that the State ceded exclusive legislative jurisdiction over private inholdings to the federal government under the ceding statutes. (ER-8-18.)

1. The plain language of the ceding statutes demonstrate Montana retained legislative jurisdiction over private inholding.

The terms of cession guide whether the State ceded exclusive legislative jurisdiction to the United States. Mont. Code Ann. § 2-1-201. And based on those statutes the State of Montana did not cede exclusive jurisdiction to the federal government. Those statutes must be read in context and with a view to their place in the overall statutory scheme. *Parker Drilling Mgmt. Servs. v. Newton*, 139 S. Ct. 1881, 1888 (2019). And when terms are inconsistent or a phrase is unclear, the term or phrase should be "interpreted in light of the entire statute." *Id.*

The cession of Glacier National Park began in 1910, when the United States reserved and withdrew from "settlement, occupancy or disposal under the laws of the United States and dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States under the name of 'The Glacier National Park.'" 16 U.S.C. § 161 And it considered future persons who "shall locate or settle upon" the public lands within the Park to be trespassers. *Id.*; *see also* 16 U.S.C. 178 (specifically providing for regulation of land sold and conveyed to the Glacier Park Hotel Company). However, the reservation did not "affect any valid existing claim, location or entry existing under the laws of the United States." *Id.* This language, thus, makes clear that only the public lands were being reserved and withdrawn and constituted "the Glacier National Park."

Upon this reservation and withdrawal, the federal government did not immediately obtain exclusive jurisdiction from the State. To effectuate the land

transfer, and the transfer of jurisdiction, Montana ceded jurisdiction in 1911 as follows:

> **Glacier national park.** Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all the territory which is now or may hereafter be included in that tract of land in the state of Montana **set aside by the act of congress, approved May 11, 1910,** for the purposes of a national park, and known and designated as "The Glacier national park", saving, however, to the said state the right to serve civil or criminal process within the limits of the aforesaid park in any suits or prosecution for or on account of rights acquired, obligations incurred, or crimes committed in said state but outside of said park; and saving, further, to the state the right to tax persons and corporations, their franchises and property on the lands included in said park; provided, however, that jurisdiction shall not vest until the United States, through the proper officers, notifies the governor of this state that it assumes police or military jurisdiction over said park.

Mont. Code Ann. § 2-1-205 (emphasis added). As the highlighted language makes clear, the extent of the cession was defined by the 1910 Act of Congress which, as noted above, excepted from its application any private inholdings.

Three years later, in 1914, the United States accepted cession of jurisdiction:

> Sole and exclusive jurisdiction is assumed by the United States over the territory embraced with the Glacier National Park, saving, however, to the State of Montana the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecution for or on account of rights acquired, obligations incurred, or crimes committed in said State but outside of said park, and saving, further, to the said State the right to tax persons and corporations, their franchises and property, on the lands included in said park. All the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Montana.

16 U.S.C § 163. Relying on this language, the District Court determined that the State had ceded exclusive legislative jurisdiction over *all* property within the external boundaries of Glacier National Park. (ER-13.)

That conclusion is in error. Glacier National Park, in its entirety, is included within Montana "by virtue of the state boundaries described in section 1 of the Organic Act of the Territory of Montana, recognized by section 1 of the Enabling Act, and again described by section 1 of Article I of the State Constitution." *State ex rel. State Bd. of Equalization v. Glacier Park Co.*, 118 Mont. 205, 208, 164 P.2d 366, 368 (1945). And while Montana ceded jurisdiction over Glacier National Park, it was not a cession "for the land itself nor of complete sovereignty over it." *Id.*, 118 Mont. at 209, 164 P.2d at 368. Thus, Montana has jurisdiction over reservations that were not part of the cession. *See James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937) (Federal ownership and use "without more do not withdraw the lands from the jurisdiction of the State.")

Relevant here, the United States reserved, and Montana ceded jurisdiction over, only specific land within Glacier National Park. As part of the transaction, the 1910 Act excluded "valid existing claims, locations or entry existing under the land laws of the United States [before May 11, 1910] or the rights of any such claimant, locator or entryman the full use and enjoyment of his land." 16 U.S.C. § 161. In 1911, Montana then ceded "exclusive jurisdiction" over all the land "over

and within all the territory, which is now or may be hereafter be included in that tract of land in the state of Montana set aside by the act of congress approved May 11, 1910." Mont. Code Ann. § 2-1-205. Because the 1910 Act *excluded* existing property owners, those lots were not "included in that tract of land" that was "set aside" by the 1910 Act. Thus, the United States was not entitled to exclusive jurisdiction over the private lands that existed prior to the creation of Glacier National Park. *See, e.g., Colorado v. Toll*, 268 U.S. 228, 230-31 (1925)

The August 22, 1914, Act, which accepted the cession, does not change this calculus. That Act accepted "exclusive jurisdiction over the territory embraced within **the Glacier National Park**" ceded by the State of Montana. 16 U.S.C. § 163 (emphasis added). This acceptance cannot be broader than the cession itself. U.S. Const. art. I, § 8, cl. 17 (exclusivity only over "all Places purchased by the *consent of the [State]*." (emphasis added)). Rather, the jurisdiction is guided by the "terms of the cession." *James*, 302 U.S. at 142. Those terms specifically exclude private land from the "territory" ceded as "the Glacier National Park", so any attempt to expand exclusive jurisdiction to those lands is inappropriate.

The District Court considered this argument but wrongly concluded that the purpose of the reservation was meant to ensure that the creation of the park did not extinguish existing homestead entries within the boundaries of the park. (ER-13 *citing Macomber*, 401 F.2d at 546-47 *and McFarland v. Kempthorne*, 464 F. Supp.

2d 1014, 1017 (D. Mont. Nov. 17, 2006).) But this is contrary to the plain language of the statutes, which only granted jurisdiction over the lands within "the Glacier National Park." And because private inholdings were specifically excluded from the definition of "the Glacier National Park," the federal government does not have exclusive legislative jurisdiction.

To the extent *Macomber* reached the opposite conclusion, it should be overturned. In *Macomber*, the Ninth Circuit considered whether it had judicial jurisdiction over a water rights dispute between two neighbors on private property within the external boundaries of Glacier National Park. The Court concluded it had judicial jurisdiction to consider the dispute. And, in *dicta,* it held that the "territory embraced with **the Glacier National Park**" granted the court jurisdiction over all privately owned land within the park boundaries. (Emphasis added.) But, as noted, this decision ignored the plain language of the statutes, which tie the definition of "The Glacier National Park" to only those properties then-owned by the state of Montana and not those privately owned "claims" or those near vesting.

Similarly, the district court's reliance on the *MacFarland* case is erroneous. There a private party with an inholding contested the Park's restriction on winter access to his property. One of his arguments was that 16 U.S.C. § 161 provided him with unrestricted access to his parcel. The court disagreed. But the decision

failed to discuss the import of the definition of "The Glacier National Park." Instead, the district court simply noted that the purpose of the exclusion was to protect "existing homestead entries within the boundaries of the Park that had not yet been perfected" and it allowed the perfection of those properties after the Park was created. *McFarland*, 464 F. Supp. 2d at 1024. That conclusion actually supports the notion that private property, or future homestead entries, were not part of "The Glacier National Park", as it does not in any way foreclose an interpretation of the complete language of the exception found in § 161 that supports application of the exception in the future to all "claims."

Accordingly, the District Court's reliance on *Macomber* and *MacFarland* was contrary to the plain language of the statutes at issue, and the Court erred in granting summary judgment to the Amblers.

2. The plain language reading of 16 U.S.C. §§ 161, 163 and Mont. Code Ann. 2-1-203, is supported by subsequent actions of Congress and the Park Service.

Subsequent congressional action also confirms that inholdings were not subject to the jurisdiction of the United States. In 1946, for example, Congress enacted Public Law 695, which provided a mechanism for the Secretary of Interior to acquire non-federal lands within the "authorized boundaries" of Glacier National Park. 16 U.S.C. § 167a(b); 79 P.L. 695, 60 Stat. 949, 79 Cong. Ch. 915 (Aug. 8, 1946). Thereunder, the Secretary was authorized to exchange non-Federal

property for federal property. *Id.* However, any property acquired by the Secretary would not "become a part of Glacier National Park and . . . s*ubject to all the laws applicable to such area*" until the Secretary accepted title to the non-federal property. *Id.* (emphasis added.)

Similarly, National Park Service regulations indicate that the Park Service has no jurisdiction over private lands within the external boundaries of Glacier. 36 C.F.R § 1.2(b) excludes jurisdiction over non-federal lands in the Park System, except as specifically noted. In other words, the United States may have concurrent jurisdiction with the state over non-federal inholdings, but the Park Service does not believe it has exclusive jurisdiction. *See, e.g.*, *Defs. of Wildlife v. Everson*, 984 F.3d 918, 944-47 (10th Cir. 2020) (finding no jurisdiction over hunting on inholdings).

The language of the 1946 Act sets forth a Congressional understanding of the extent that Montana ceded jurisdiction over inholding. By using the phrase "authorized boundaries" Congress demonstrated its understanding that the reservation and cession did not cede jurisdiction over all private land within the Park. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume Congress is aware of existing law when it passes legislation."). More tellingly, Congress acknowledged that the non-federal property within Glacier was not "part of Glacier National Park" until the Secretary accepted title. And, only upon acceptance would

the "laws applicable" to Glacier National Park become effective on the property. The incorporation of the land into the Park and subjection to federal law would have been unnecessary had the United States already possessed exclusive jurisdiction. *Wilshire Oil Co. v. Costello*, 348 F.2d 241, 243 (9th Cir. 1965).

The District Court wrongfully distinguished § 167a by claiming that it only applied to the Secretary obtaining "title to private inholdings, but it does not address the federal government's legislative jurisdiction." (ER-16.) But that interpretation, again, ignores the plain language of the statute. Section 167a(b) specifically exempts private inholdings from Park regulation until they become part of the "The Glacier National Park." The District Court's reading would render that provision unnecessary because those lands would already be subject to Park regulation. Because Congress does not pass meaningless legislation, jurisdiction over non-federal lands in the Park remains at least co-extensive with the State, until such a time as the Park acquires the land. Any other reading would turn 16 U.S.C. § 167a "into an inkblot." *See, e.g., Sturgeon v. Frost*, 587 U.S. 28, 51 (2019).

In support of its contrary conclusion the District Court relies on *Macomber* and *Free Enterprises Canoe Renters Association v. Watt* ("*Canoe Renters*"), 711 F.2d 852, 856 (8th Cir. 1983). (ER-17.) But *Macomber* does not discuss the

interplay between §§ 161, 163 and 167, a fact that the District Court does not address.

And *Canoe Renters* concerns the property clause, not the enclave clause. In *Canoe Renters* the question was whether the Park Service could regulate canoe rental businesses that rented canoes used on the Ozark National Scenic Riverways, but which businesses never entered onto federally owned property. *Canoe Renters*, 711 F.2d at 855-56. In upholding the regulation, the Court explained that under the Property Clause of the U.S. Constitution, the United States had the authority to regulate "conduct on or off public land that would threaten the designated purpose of federal lands." *Id.*, 711 F.2d at 856.

In that sense, *Canoe Renters* is easily distinguishable. The District Court, here, did not consider the property clause. But had it done so, it should have concluded that the Park Service chose not to exercise its Property Clause Powers by excluding private inholdings from general park regulations. 36 C.F.R § 1.2(b). If on the other hand, the Park wanted to regulate those inholdings, as it did the non-federal property in *Canoe Renters*, it could have done so. Absent the exercise of property clause powers, there is a void that can be filled by state law.

In all, the plain language of § 167a(b) demonstrates that Congress did not intend to regulate private property within the external boundaries of the Park

unless and until title transferred to the United States and it became part of "The Glacier National Park."

3. *Macomber* and the other cases relied on by the District Court do not controvert the fact that Montana retains jurisdiction over the Amblers property.

The cases cited by the District Court and the Amblers undercut the plain language of the statutes.

With respect to *Macomber*, it should be overturned to the extent that it can be construed as granting the United States Government exclusive legislative jurisdiction over private inholdings. As explained, the ruling is contradicted by the plain language of the statute. Moreover, though, *Macomber* demonstrates that private property rights within the park can be regulated by State law. Therein, the ultimate dispute was one based on state law – which party was entitled to use a privately held water right within the boundaries of the Park. *Macomber,* 401 F.2d at 545. The *Macomber* Court did not analyze these facts but simply found that it had jurisdiction to hear the case. So, the ultimate determination of which party had rights to the water was based on state law. In that light, *Macomber* supports the conclusion that the state may regulate private property rights – i.e. water rights – on inholdings.[2]

[2]This conclusion was supported in 2022, in *Howard v. Todd*, where the district court applied state law to determine how to partition private properties within the boundaries of the Park. *Howard v. Todd*, 2022 U.S. Dist. LEXIS 65012, at *8-9

In reaching its conclusion, the *Macomber* Court, like the District Court, here, relied on *Petersen v. United States*, 191 F.2d 154, 156 (9th Cir. 1951), to conclude that exclusive jurisdiction rests with the federal government. That reliance was misplaced. *Peterson* concerned whether the appellants could obtain a federal permit to sell intoxicating liquors within a national park. The Secretary of Interior denied the request, so the appellants obtained a permit from the state. The Secretary then notified the appellants that the federal government did not recognize the state's authority to permit the selling of liquor. In other words, there was a direct conflict between the state and federal government, and the Ninth Circuit found that the state must yield to the federal law to ensure a uniform policy of regulation.

In contrast, here, the Park has chosen *not to* regulate construction on private inholdings, or adjacent to streams, 36 C.F.R. 1.2(b), ER-137, ¶ 4, so there is no "conflict" with federal law or federal permitting systems. And there is no law analogous to 16 U.S.C. § 167a(b), excluding private lands from Park regulation. *See*, 16 U.S.C. §§ 80-80h; *see also* 36 C.F.R. § 5.2 (prohibiting the sale of alcohol

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(D. Mont. Apr. 7, 2022) The District Court also relied on *Olig v. Xanterra Parks & Resorts, Inc.,* but there, the claims arose in Yellowstone Park because the plaintiff was an employee of a concessionaire "operating on [a] federal enclave[e]" *Olig v. Xanterra Parks & Resorts, Inc.*, 2013 U.S. Dist. LEXIS 106637, at *7-8 (D. Mont. July 30, 2013). That is not the case here; the actions at issue were conducted on wholly owned private property.

in Glacier or Kings Canyon without a federal permit). So, *Peterson*, is of little support for the District Court's decision.

The same is true of the bulk of the cases cited by the District Court and relied on by the Amblers. In *United States v. Unzuenta*, 281 U.S. 138 (1930), the issue was whether a person indicted for a murder on a train running through a military reservation was subject to state or federal prosecution. The Supreme Court found that the state had ceded exclusive jurisdiction to the right of way, and that it would be impracticable for the State to attempt to police the right of way. It further noted that rights of way may be fully compatible with the use of the land as a military reservation. "While the grant of the right of way to the railroad company contemplated a permanent use, this does not alter the fact that the maintenance of the jurisdiction of the United States over the right of way, as being within the reservation, might be necessary in order to secure the benefits intended to be derived from the reservation." *Id.*, 281 U.S. at 146.

Arlington Hotel Company v. Fant, 278 U.S 439 (1929), is likewise inapposite. The issue there was whether a hotel built on federal land, but leased by a hotel company, was subject to an Arkansas law relieving innkeepers from liability to their guests for loss by fire. The U.S. Supreme Court found the law inapplicable because the property was owned by the United States, and the law was inconsistent with the purpose of the Park. In reaching that conclusion, the Supreme

Court did not have reason to consider any impact on private inholdings, as opposed to leased property.

In contrast to *Arlington* and *Unzuenta*, the exercise of concurrent jurisdiction, here, is practicable and is consistent with the purposes of the Glacier National Park. The purpose of that National park system is "conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.". 54 U.S.C. § 10010. Similarly, the main purpose of Glacier National Park is to preserve in its natural state for the use and enjoyment of all people. 16 U.S.C. §§ 161, 162; *see also* 36 C.F.R. § 1.1(b). And the purpose of the Streambed Act is to ensure and continue the protection of aquatic and adjacent land resources. Mont. Code Ann. § 75-7-102. And because the Glacier National Park regulations do not regulate construction on inholdings, there is nothing inconsistent with allowing the state to do so. Moreover, to allow different regulation of a stream and streambanks only a few hundred feet apart would undermine to goal of "secur[ing] the great public benefits intended to be derived from the dedicated area." *Peterson*, 191 F.2d at 156.

Despite the clear need for regulation, the District Court relied on *Howard v. Comm'rs of Sinking Fund*, 344 U.S. 624, 626-27(1953) to conclude that even the

absence of conflicting federal law state law could not fill the void. (ER-31-34.) In *Howard*, the Court was presented with two issues: (1) whether a city could annex a portion of a federal enclave; and (2) whether the state could impose an income tax on employees within the enclave. The *Howard* Court found that both annexation and taxation were proper. In addressing annexation, the Court explained that a state could conform its boundaries to its own plan "so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States." *Id.* As to taxation, the Court found that the state could tax employees on the enclave based on a federal law known as the Buck Act. *Id.*, 344 U.S. at 627-28.

Relying on this second reasoning, the District Court, here, wrongly determined that *Howard* did not stand for the proposition that non-conflicting state law filled the gaps in federal law. In so concluding, the district court reasoned that *Howard* was only about taxes specifically authorized by federal law. This conclusion, though, ignored the first rationale from the *Howard* Court that annexation was allowed "so long as there was no interference with the jurisdiction asserted by the Federal Government. *Id.*, 344 U.S. at 627. This holding was in addition to the power to tax, so the District Court's sole reliance on the taxation provision in order to distinguish *Howard* was inappropriate. *See also*; *Kelly v. Lockhead Martin Services Group,* 25 F. Supp. 2d (D.P.R. 1998). Any other interpretation would undermine the environmental protections that the Glacier

National Park Act, the National Parks Organic Act, and the Streambed Act seek to implement. It would leave a regulatory void.

And finally, in *Yellowstone Park Transportation Co. v. Gallatin County*, 31 F.2d 644 (9th Cir. 1929), the Court considered whether Gallatin County could tax personal property located within the Yellowstone National Park. The Ninth Circuit determined that Gallatin County could not tax the personal property because the cession did not reserve the right to taxation. Nowhere does the decision discuss the regulation of privately owned real property within the external boundaries of the park. The only property at issue was *personal* property located, or used, on Park owned property. To that end, the ruling provides little guidance when the land at issue, here, is private real property located within the boundaries of Glacier National Park.

C. At the time of cession, Montana regulated construction adjacent to streambanks. Accordingly, the laws were assimilated at the time of cession.

The District Court next erred in finding that the Streambed Act was not assimilated into Federal law. Upon accepting Montana's cession of Glacier National Park, the United States assimilated Montana's laws into federal law for the purpose of regulating the park. *Macomber*, 401 F.2d at 546. Contrary to the ruling in *Macomber,* this assimilation included not just pre-existing law, but also

future state law. *See* 63 P.L. 177, 38 Stat. 699, 63 Cong. Ch. 264 (Aug. 22, 1914)[3] (incorporating state law for any offenses at "the time of the commission of the offense."); *Howard v. Todd*, 2022 U.S. Dist. LEXIS 65012, at *8 n.2 (D. Mont. Apr. 7, 2022) (under *Macomber* State law was assimilated until "changed by Congress.") The assimilation included any laws that were not covered by federal law. *See*, *e.g.* 63 P.L. 177, 38 Stat. 699, 63 Cong. Ch. 264 (Aug. 22, 1914; *Howard*, 2022 U.S. Dist. LEXIS 65012, at *8 n. 2. Assimilation was necessary to ensure "that no area however small will be left without a developed legal system for private rights." *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940); *Lake v. Ohana Military Cmtys., LLC*, 14 F.4th 993, 1002-1003 (9th Cir. 2021). Once assimilation happens, state law becomes enforceable in a federal court. *Howard*, 2022 U.S. Dist. LEXIS 65012, at *8 n. 2; *see also*, *Howard v. Comm'rs of Sinking Fund*, 344 U.S. 624, 626-27 (1953).

For example, in the Montana *Howard* case, the parties sought to partition an inholding within Glacier. District Judge Molloy determined that he had *jurisdiction* over the action because it was within the Park boundary. He then proceeded to partition the property *pursuant to Montana law*, concluding that *Macomber*

[3] This law was originally codified as 16 U.S.C. § 169 but was repealed in 1948 pursuant to 80 P.L. 773, 62 Stat. 869, 80 Cong. Ch. 646 (June 25, 1948) and partially reincorporated at 18 U.S.C. § 13, 80 P.L. 772, 62 Stat. 683, 80 Cong. Ch. 645 (June 25, 1948).

allowed his jurisdiction, but it also recognized that state law was assimilated until changed by congress. *Howard*, 2022 U.S. Dist. LEXIS 65012, at *8 n.2. Absent state law, there would be no mechanism to partition the property in *Howard*.

The same is true here, federal regulations and law provide no direct corollary to the Streambed Act. *See*, e.g., 16 U.S.C. §§ 160 et seq.; 36 C.F.R. §§ 1.1 et seq, 2.1 et seq., 5.1 et seq., 7.3. In fact, the regulations confirm that the United States has, at most, concurrent jurisdiction over inholdings. 36 C.F.R. § 1.2(b) excludes the regulation of non-federal property within a park, including the regulation of construction of buildings, *see* 36 C.F.R. § 5.7. Thus, there is a "regulatory void" unless state law applies.

Past practices within the Park also confirm that FCD has jurisdiction over not just inholdings but also projects on Park land. In 2019, for example, the Flathead Electric Cooperative wanted to do directional boring to install utilities on property owned by Glacier National Park – i.e. not private inholdings – and it obtained three separate Streambed Act permits from the FCD to conduct the work under various streambeds. By requiring these permits *even on Park land* it demonstrates that that the Park Service assumed Montana law was assimilated into federal law. (ER-38, at fn. 10.)

Based on the foregoing, the state law is assimilated into federal law. Doing so, here, means that the Natural Streambed and Land Preservation Act is

incorporated into federal law. So, if the Streambed Act is incorporated, it would still require the Amblers to go through the FCD to construct their home. Put another way, assimilation does not affect the FCD's jurisdiction.

The District Court rejected this argument and concluded that only future criminal laws were incorporated or assimilated into federal law or those laws that were recent variations of past state laws. This became clear at the hearing on summary judgment, when the District Court distinguished the present case from *Macomber* and *Todd* by asserting that "it would not be extraordinary for the federal court to then adjudicate the water rights and easements because there was a body of law on both water rights and easements prior to the creation of Glacier National Park." (ER-76, lns. 3-8.). This logic allowed the District Court to justify what happened in *Macomber* and *Todd*, while claiming there was no analogous situation with respect to the Streambed Act.

But the regulation of construction in waterways, and the prevention of contamination of waterways have similarly been previously regulated in Montana. In 1897, for example, Montana law prohibited any person who operated a sawmill from dumping, dropping, carting or depositing sawdust, bark, shavings, oil ashes, cinders or debris "in or near any such stream, pond, lake or river." *See*, Revised

Codes of Montana ("R.C.M."), § 8797 (1907) (section passed in 1897).[4] Violating this prohibition subjected the offender to a fine or imprisonment. *Id*. And by 1909, the State regulated building between the high and low water marks on "lands under state water." R.C.M. Chapter 35, § 1 (1915 Supplement.)[5] Further iterations of this type of stream protection surfaced in 1965 when the Montana Legislature passed the Stream Preservation Act, which prohibited public use which "may obstruct, damage, diminish, destroy, change, modify or vary the natural existing shape and form of any stream or its banks. . ." R.C.M. §§ 26-1501 et. seq. (1965).[6] And finally, in 1975, Montana adopted the Streambed Act in order to protect and preserve streams and rivers in their natural state, and in doing so, "to keep soil erosion and sedimentation to a minimum." Mont. Code Ann. § 75-7-102(2).

Put simply, the Streambed Act, like partition and water law, is simply a new iteration of the same sorts of legal protections and requirements found in the early 1900s, before cession. *Paul v. United States*, 371 U.S. 245, 269, (1963) (new iteration of law based on "the same basic scheme" in effect the time of cession" are

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[4] *See Addendum* 37. A copy of the revised codes of 1907 is available at: https://archive.org/details/revisedcodesofmo02unse/page/n3/mode/2up) (last accessed May 27, 2025.)

[5] *See Addendum* 38-39. A copy of the 1915 supplement is available at: http://archive.org/details/1915supplementto00unse/page/n3/mode/2up (last accessed May 27, 2025.)

[6] *See Addendum* 41-43. An electronic copy is available at: https://archive.org/details/1965rcmsupplv1t11200unse/page/302/mode/2up (last accessed May 17, 2025.)

applicable in their current form.); *Del Fierro v. DynCorp Int'l LLC*, 2021 U.S. Dist. LEXIS 15599, at *7-8 (C.D. Cal. Jan. 27, 2021) Thus, just as with *Macomber* and *Todd*, the State has jurisdiction to regulate construction adjacent to or within a waterway.[7] This assures that "no area however small will be left without a developed legal system" necessary to protect the integrity of the federal enclave. *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940).

D. Public policy and federalism concerns support a reading of the cession statutes that gives Montana authority to regulate private property within Glacier National Park.

Absent the application of state law to inholdings, property owners like the Amblers will be subject to nominal regulation by the Park Service. As noted, Park Service regulations generally do not apply to non-federal lands within a National Park. *United States v. Town of Lincoln Zoning Bd. of Appeals*, 2014 U.S. Dist. LEXIS 99330, at *35-39 (D. Mass. July 22, 2014).

Those inapplicable regulations include 36 C.F.R. § 5.7, which regulates the construction of buildings. It provides "Constructing or attempting to construct a building, or other structure . . . upon across, over, through, or under any park areas, except in accordance with the provisions of a valid permit, contract, or other written agreement with the United States, is prohibited." 36 C.F.R. § 5.7; *See also*,

[7] The Streambed Act also provides a criminal penalty for failure to comply with its requirements. Mont. Code Ann. § 75-7-123(1)(a), so to the extent future criminal law is incorporated the Streambed Act was assimilated into federal law.

Town of Lincoln Zoning Bd. of Appeals, 2014 U.S. Dist. LEXIS 99330, at *35-39. In other words, there is no regulation of construction on non-federal "park areas" unless state law applies.

Reading this provision out of the regulations and statute, would undermine one of the purposes of the public lands and the purpose of Glacier National Park. Glacier was created as a public park for the enjoyment of all people. 16 U.S.C. § 161. To encourage preservation of the Park's natural state, the Secretary of Interior is empowered to obtain private holdings within the boundaries of the Park and no additional homes are allowed to be built. 16 U.S.C. §§ 164, 162a. To allow unchecked development on private inholdings would be contrary to these provisions and endanger the preservation of the natural state of the Park.

Moreover, based on federalism concerns, allowing state regulation of inholdings is the most logical result. Land use policy and regulation are issues that are traditionally significant to states. *Nat'l Parks Conservation Ass'n v. Lower Providence Twp.*, 608 F. Supp. 2d 637, 650 (E.D. Pa. 2009). That interest is significant even when the land at issue is wholly surrounded federal land. *Id.* This is particularly true here, where the water from McDonald Creek, a short distance downstream from the Ambler property, flows out of Glacier National Park, into the Flathead River, and eventually into the Clark Fork River. The Streambed Act provides the exact kind of regulatory scheme that can protect entire streams,

instead of piecemeal protection. Mont. Code Ann. § 75-7-112(9)(b)(iii) (requiring evaluation of impacts upstream and downstream from the proposed project.)

The State also has an interest in ensuring all Montana landowners are treated equally. It would be odd, indeed, for example, to require a homeowner a short distance downstream from the Park to obtain a Streambed Act permit but allow upstream users within the Park to interfere with the flow of McDonald Creek without any regulation. Similarly, it is inconsistent to consider non-permitted activities nuisances on non-federal land outside of the park, while allowing them to go unabated within the boundaries of the park. In order to have an effective regulatory system over inholdings, then, the United States cannot have exclusive jurisdiction over every aspect of private property development within the Park. The Parks' regulations even recognize that county and state regulations related to the health of the water system must be consistent between inholdings and private land outside the park. *See, e.g.*, § 7.3(c). And by ensuring that all privately owned properties are subject to the same regulation, the State can ensure that it is upholding its responsibility to provide Montanans with a clean and healthy environment. Mont. Const. Art. II, § 3.

CONCLUSION

Based on the foregoing brief, Friends of Montana Streams and Rivers respectfully requests that this Court reverse the District Court's order holding that

the FCD did not have jurisdiction over the Ambler property and hold that FCD does have jurisdiction to enforce the Streambed Act on the Amblers' private inholding within Glacier National Park.

STATEMENT OF RELATED CASES

Ambler, et al. v. Flathead Conservation District, et al., 25-1479. This appeal is the companion appeal filed by the Defendant, Flathead Conservation District, and arises out of the same summary judgment order by the District Court.

DATED this 28th day of May, 2025.

By: /s/ Robert Farris-Olsen
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Mac Time New Roman 14-point font.

DATED this 28th day of May, 2025.

By: /s/ Robert Farris-Olsen
Robert Farris-Olsen

CERTIFICATE OF SERVICE

I hereby certify that on 28th day of May, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED this 28th day of May, 2025.

By: /s/ Robert Farris-Olsen
Robert Farris-Olsen