CASE NO. 25-1479

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN AMBLER AND STACY AMBLER, Plaintiff-Appellee,
v.

FLATHEAD CONSERVATION DISTRICT, Defendant-Appellant.

On Appeal from the United States District Court for the District of Montana
United States District Court Case No. 9:23-cv-00151 -KLD

APPELLEES' OPENING BRIEF

Trent Baker
DATSOPOULOS, MACDONALD & LIND, P.C.
201 W. Main Street, Suite 201
Missoula, Montana 59802
Telephone: (406) 728-0810
Email: tbaker@dmllaw.com

Attorney for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

At issue in this case is whether the Flathead Conservation District (the "FCD"), a political subdivision of the State of Montana, can assert legislative jurisdiction over private property within Glacier National Park and enforce a state law enacted decades after Montana ceded exclusive legislative jurisdiction over all property within Glacier to the United States. The Ninth Circuit has already held that Montana's cession to the United States of exclusive legislative jurisdiction over "the territory embraced within the Glacier National Park" includes "privately owned lands within the described park boundaries." *Macomber v. Bose*, 401 F.2d 545, 547 (9th Cir. 1968), citing *Petersen v. United States*, 191 F.2d 154 (9th Cir), cert. denied sub nom. *State of California v. United States*, 342 U.S. 885, (1951). This Circuit has also decided that only state laws in effect at the time of cession are assimilated and enforceable as federal law within Glacier. *Macomber*, at 546, citing *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940). These rulings are in line with long-standing Supreme Court precedent and decisions from other circuits. Appellants present no compelling reason to disturb this body of settled law.

JURISDICTIONAL STATEMENT

Appellee agrees with the jurisdictional statement of Appellant.

STATEMENT OF ISSUES

Whether the District Court erred in holding that the United States has exclusive legislative jurisdiction over private inholdings within Glacier National Park.

Whether the District Court erred in holding that Montana's Natural Streambed and Land Preservation Act of 1975 does not apply to private inholdings within Glacier National Park.

ADDENDUM

Additional pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules are set forth verbatim with appropriate citations and are included in a supplemental addendum bound with this brief.

STATEMENT OF THE CASE

Glacier National Park was created by an act of Congress on May 11, 1910. 16 U.S.C. § 161, which described exterior boundaries of the Park. In 1911, the State of Montana ceded to the United States exclusive legislative jurisdiction over all land within Glacier National Park subject to only the specific reservations articulated in the ceding statute. Mont. Code Ann. § 2-1-205. In 1914, the United States accepted the cession of legislative jurisdiction over lands within Glacier National Park excepting the same reservations. 16 U.S.C. § 163.

Montana's Natural Streambed and Land Preservation Act of 1975 (the "Streambed Act"), was enacted in 1975 to prevent environmental degradation by protecting the bed and banks of streams from unauthorized alteration while also recognizing the needs of agricultural use and irrigation. Mont. Code. Ann. §§ 75-1- 101, 102. The Streambed Act is administered and enforced by Conservation Districts, entities organized in 1939 to protect farm and grazing land. See Mont. Code. Ann. § 76-15-101.

In 2019, John and Stacy Ambler (the "Amblers") purchased private property in Apgar Village near McDonald Creek in Glacier National Park after consulting with officials from Flathead County and Glacier National Park to determine if they would be allowed to construct a home on the property. SER 91–92. The Ambler property, the McDonald Creek drainage and Apgar Village are wholly within the boundaries of Glacier National Park. SER 91–92. Flathead County advised that it does not regulate construction on the Ambler property and no building permit was needed but the Amblers should check with Environmental Health regarding water and sewer systems. Glacier National Park was also aware of the Amblers' construction plans, did not require any permits and allowed the Amblers to connect to the Apgar Village water and sewer systems. SER 91–92.

The Amblers began building their home on McDonald Creek Drive, near other private homes and commercial establishments in Apgar Village and near

McDonald Creek at the outlet of Lake McDonald. After the Ambler home was completely framed in, the FCD, in response to citizen complaints, decided it has jurisdiction over the Ambler's property, that the Amblers violated Montana's Natural Streambed and Land Preservation Act of 1975 (the "Streambed Act"), and that they must remove their home and get a permit from the FCD for the removal. SER- 7-8.

The FCD is a political subdivision of the State of Montana, run by citizen board of supervisors elected by Flathead County residents, which permits development near streams elsewhere in Flathead County pursuant to the Streambed Act. SER-7. Some of citizens that complained to the FCD formed the Friends of Montana Streams and Rivers ("FMSR") to intervene in and litigate this case. The Amblers disputed the FCD decision and submitted to the FCD legal authority showing that the FCD does not have jurisdiction within Glacier National Park. They also submitted a site-specific environmental analysis showing that the Ambler home presents no substantial environmental risk to McDonald Creek. SER- 8.

The analysis was conducted by, Mike Sanctuary, an experienced environmental consultant who prepared and submitted to the FCD a Technical Memo SER-53-89, concluding that the Ambler home met the standard for issuance

of a permit under the Streambed Act and later summarized his conclusions in an affidavit:

a. the Ambler home is constructed outside of the ordinary high-water mark and the 100-year floodplain of McDonald Creek and construction did not alter the bed or banks of McDonald Creek;

b. the home will not disturb riparian and wetland vegetation or disrupt aquatic habitat; and

c. the home will not affect the direction or velocity of water flows in McDonald Creek or effect flows during flood events.

SER-44-46 and SER-8-9.

Mr. Sanctuary reviewed the other information and comments submitted to the FCD, and said the record did not include any other scientific analysis regarding the Ambler home and that none of the other information submitted to the FCD changed his conclusions. SER-38-39. The FCD ignored its lack of jurisdiction and the only site-specific scientific study to analyze potential risks of the Ambler home and again ordered its removal, prompting this lawsuit.

SUMMARY OF THE ARGUMENT

The federal government may acquire exclusive legislative jurisdiction over land within a state by the state's cession of jurisdiction, coupled with the federal government's acceptance of the cession. Montana ceded and the United States

accepted exclusive legislative jurisdiction over land within the boundaries of Glacier National Park. According to the plain language of the relevant statutes, Montana's cession included exclusive legislative jurisdiction over private inholdings within Glacier. This issue has already been conclusively decided by the Ninth Circuit.

In addition to legislative jurisdiction over lands within Glacier, the relevant statutes also address ownership of land within Glacier. The relevant statutes include disclaimer language that withdraws federal land within Glacier from further settlement or mining claims and recognizes that the withdrawal does not prejudice or affect land already privately owned or subject to such claims. This relates only to the ownership of that land and does not exempt it from the transfer of legislative jurisdiction from Montana to the United States.

Both public and private land within Glacier are regulated by the federal government, but different regulations apply to public versus private land within the Park. Later enacted federal statutes empowering the United States Secretary of the Interior to acquire private inholdings provide that when ownership changes from private to public, the land will become part of Glacier National Park and will be subject to regulations applicable to the public land comprising Glacier National Park. This does not preclude or conflict with federal legislative jurisdiction over

private land within the Park but merely recognizes that private land is subject to different federal regulations than the public land within the Park.

When a state cedes exclusive legislative jurisdiction over a federal enclave, only state laws existing at the time may be assimilated into federal law applicable to the enclave. There are exceptions to this rule which allow for assimilation of some later-enacted state laws, such as criminal laws and extensions of a regulatory scheme in effect at the time of cession, though none apply in this case. Montana's Streambed Act was enacted long after Montana ceded legislative jurisdiction over Glacier to the United States. It was not subject to any reservation of jurisdiction and it is not a criminal law or part of any "same basic scheme" of regulation in effect at the time of cession. Neither FCD nor FMSR argued below that any of these specific exceptions apply and they should not be allowed to do so on appeal. If these issues are considered on appeal, they should be reviewed under the plain error standard.

Federal statutes assimilate certain later-enacted state criminal laws. The Streambed Act is a regulatory law not a criminal law and no reservation, federal statute or regulation expressly incorporates the Streambed Act into federal law. The terms of Montana's cession did not reserve the right to regulate construction near streams or anything similar. Montana law at the time of cession did not include statutes similar to the Streambed Act, either in scope or purpose. The

Streambed Act is not a minor regulatory change or continuation of a similar regulatory scheme existing at the time of Glacier's cession.

The only scientific study conducted on the environmental effects of the Ambler home concludes that it is not causing environmental harm to McDonald Creek and is not likely to do so in future. Contrary to the assertions of FCD and FMSR, there is no regulatory void regarding environmental regulation in Glacier. Current federal law does regulate construction on private inholdings in Glacier and does protect its streams from environmental harm resulting from streamside development. That absence of a federal regulation just like the Montana Streambed Act is not akin to the absence of federal jurisdiction, nor is it a reason to disturb that jurisdiction or the settled body of law that supports it. Public policy, as articulated by the Ninth Circuit, favors exclusive federal jurisdiction over public and private land within Glacier National Park.

STANDARD OF REVIEW

Appellee agrees with the Appellant's statement of the standard of review, with the following exception or addition. Issues raised for the first time on appeal are reviewed for plain error. *United States v. Chan*, 82 F.3d 921, 923 (9th Cir. 1996). Under the plain error standard, "(1) there must be error, (2) the error must be plain (i.e., clear and obvious), and (3) the error must 'affect substantial rights.'" *Id.* quoting *United States v. Olano*, 507 U.S. 725, 732-36 (1993). This court will

find such error only where necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process. *United States v. Burt,* 76 F.3d 1064, 1067 (9th Cir. 1996).

ARGUMENT

A. The District Court correctly held that Montana's cession of exclusive legislative jurisdiction to the federal government included private inholdings within Glacier National Park.

It is not disputed that the federal government may acquire legislative jurisdiction over land within a state by the state's cession of jurisdiction, coupled with the federal government's acceptance of the cession. FMSR ER-8, FCD ER-23.[1] The legislative jurisdiction acquired by the federal government "may range from exclusive federal jurisdiction with no residual police power, to concurrent, or partial federal legislative jurisdiction, which may allow the State to exercise certain authority." *Kleppe v. New Mexico,* 426 U.S. 529, 542 (1976) (internal citations omitted). The terms of the cession determine the extent of federal legislative jurisdiction, and a state may reserve concurrent jurisdiction provided the reservation is consistent with the purpose for which the land was ceded. *United States v. Unzeuta*, 281 U.S. 138, 142 (1930); *Chicago, Rock Island & Pacific Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885).

[1] References to FMSR ER refer to the excerpts of record filed in Case No. 25-1474. References to FCD ER refer to the excerpts of record filed in Case No. 25-1479.

In this case, Montana ceded to the United States exclusive legislative jurisdiction "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," subject to certain exceptions including "the right to tax persons and corporations, their franchises and property on the lands included in said park." Mont. Code Ann. § 2-1-205.

The May 11, 1910 act of Congress referenced in Montana's cession described the exterior boundaries of the Park. 16 U.S.C. § 161. The United States accepted Montana's cession with the same exceptions and further provided that "[a]ll the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park." 16 U.S.C. § 163.

FCD and FMSR dispute that this cession included exclusive legislative jurisdiction over private property or inholdings within the exterior boundaries of Glacier National Park. However, the Ninth Circuit already decided that it does in a case specifically addressing federal versus state jurisdiction over inholdings in Glacier, and holding that Montana has ceded and the United States accepted exclusive legislative jurisdiction over "all privately owned lands within the described park boundaries." *Macomber*, 401 F.2d at 547. The District Court reiterated that holding after careful analysis of relevant statutes, caselaw and Ninth Circuit precedent. FCD ER-25-33, FMSR ER-10-18.

This issue was also extensively analyzed and clearly addressed in *United States v. Peterson*, 91 F. Supp. 209, 213 (S.D. Cal. 1950), affd., 191 F.2d 154 (9th Cir), holding that the United States' exclusive jurisdiction extended to private property within the boundaries of Kings Canyon National Park under the terms of the cession. The district court in *Peterson* considered whether state liquor laws applied in Wilsonia Village, a tract of privately owned land within the boundaries of Kings Canyon. *Id.* at 211. The court recognized that no state or federal law expressly mentioned Wilsonia Village or private property within the park, but the court reviewed the language of the California law ceding legislative jurisdiction to the United States and held that cession included private inholdings, and therefore the state liquor laws and license were inapplicable in Wilsonia Village. *Id.* at 213. The Ninth Circuit agreed, concluding that "California and the United States were intending by the statutes of cession and acceptance to accomplish unified policing of privately owned and public lands within the park boundaries for the public good in administering the National Park." *Petersen*, 191 F.2d at 156.

The relevant language of Montana's statute ceding Glacier National Park is almost identical to that considered by the court in the California statute ceding Kings Canyon. Both ceded exclusive jurisdiction to the United States, "over and within all the territory which is now or may hereafter be included in" the land set aside for purposes of the respective national parks. See Mont. Code Ann. § 2-1-

205 and *Petersen*, 191 F.2d at 156 n.1. The Ninth Circuit agreed in *Macomber*, citing *Petersen* in holding that "the territory embraced within the Glacier National Park . . . includes not only the public lands dedicated to park purposes by the United States but all privately owned lands within the described park boundaries." *Macomber*, at 547.

FCD and FSMR confuse the distinction between ownership and legislative jurisdiction when they argue that private land was excluded from the cession by disclaimer language in the 1910 Act stating "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. The appellee in *Macomber* made the same argument and the Ninth Circuit rejected it, stating that language in 16 USCS § 161 merely withdrew federal land within the described boundaries from further settlement and location but "did not purport to deal with United States jurisdiction." *Macomber*, 401 F.2d at 546, 547. *See also, McFarland v. Kempthorne*, 464 F.Supp.2d 1014, 1024 (D. Mont. 2006) (concluding that the clear intent of the disclaimer provision in § 161 "was to ensure that the creation of Glacier National Park did not extinguish existing homestead entries within the boundaries of the Park that had not yet been perfected"). The attempts by FCD and FSMR to distinguish

Macomber are unavailing as the decision is on point and directly disposes of their arguments.

Reliance on re *State ex rel. State Bd. of Equalization v. Glacier Park Co.*, 118 Mont. 205, 208, 164 P.2d 366, 368 (1945), is also a product of confusion between ownership and jurisdiction and that case does not conflict with the holding in *Macomber*. Privately owned land within Glacier was not ceded but legislative jurisdiction was, subject to reservations and assimilated provision of state law. The same confusion between jurisdiction and underpins the argument that 16 U.S.C. § 167a conflicts with the holding in *Macomber*. It does not. 16 U.S.C. § 167a(b) allows the Secretary of Interior to acquire ownership of non-federal or private land in Glacier and provides that land so acquired becomes part of the federal land making up Glacier National Park and subject to the regulations applicable to federal land in Glacier. This in no way precludes federal jurisdiction over private land within the Park but recognizes that the federal regulations applicable to federal and private land within Glacier are different.

Differing regulations between public and private lands within national parks are expressly recognized in 36 C.F.R. § 1.2(b), which provides:

> The regulations contained in parts 1 through 5, part 7, part 13, and part 14 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

For example, 36 C.F.R. § 5.7 does not refer to private property within national parks but generally prohibits construction on public land within national parks. Whereas, 36 C.F.R. § 7.3(b) specifically refers to "privately owned lands within Glacier National Park" and regulates commercial operations thereon, and 36 C.F.R. § 7.3(c) specifically regulates construction on "privately owned lands within Glacier National Park."

Other circuit courts concur with the holding in *Macomber* and recognize the distinction between ownership of land and legislative jurisdiction over that land. See *Free Enter. Canoe Renters Ass'n v. Watt*, 711 F.2d 852, 856 (8th Cir. 1983) (observing that the phrase "within the boundaries" "incorporate[s] federal, state, and private land, and . . . makes no distinction on the basis of ownership"); and *United States v. Stephenson*, 29 F.3d 162, 164 (4th Cir. 1995) (holding that the language "within the limits of said Park" refers to "the statutory boundaries of the Park established by Congress, not to property ownership lines").

Petersen and *Macomber* are well reasoned, rely on a settled body of law and are controlling in this case. Neither FCD nor FSMR present any compelling reason to overturn those cases or reverse the decision of the District Court in this case.

B. The District Court correctly held that Montana's Streambed Act does not apply to private inholdings within Glacier National Park.

The District Court thoroughly analyzed this issue and correctly held that the Streambed Act does not apply to the Ambler property because it did not exist at the time of cession, has not been assimilated and Montana does not have concurrent jurisdiction to enforce the Act on private inholdings within the Park. FCD ER-33-54, FMSR ER-18-39.

1. The Streambed Act is not applicable because it did not exist at the time Glacier National Park was ceded and was not subject to a specific exception.

When there is a question of jurisdiction over land ceded by a state, courts look to the plain language of the cession to determine the extent of federal versus state jurisdiction. *United States v. Unzeuta*, 281 U.S. at 142 (the terms of the cession, "to the extent that they may lawfully be prescribed, determine the extent of the federal jurisdiction"). A "cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended." *Chi., R. I. & P. R. Co.*, 114 U.S. at 545-46 (1885); *Unzeuta*, 281 U.S. at 142 ("when, in such cases, a state cedes jurisdiction to the United States, the state may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition").

Montana law is the same. Mont. Code Ann. § 2-1-102 ("The sovereignty and jurisdiction of this state extend to all places within its boundaries as established by the constitution, excepting such places as are under the exclusive

jurisdiction of the United States"); Mont. Code Ann. § 2-1-201 ("The extent of the jurisdiction of this state over places that have been or may be ceded to, purchased, or condemned by the United States is qualified by the terms of such cession or the laws under which such purchase or condemnation has been or may be made"); and see *State ex rel. Parker v. District Court of Eighth Judicial Dist*., 147 Mont. 151, 153, 410 P.2d 459, 460 (1966); *State v. Rindal*, 146 Mont. 64, 69, 404 P.2d 327, 330 (1965).

In addition to conditions or jurisdiction reserved as a part of the cession, state law in effect at the time of the cession is assimilated as federal law and continues in force in the federal enclave so long as the state law does not conflict with "federal policy." *Parker Drilling Mgmt. Servs. v. Newton*, 587 U.S. 601, 602 (2019) citing *Paul v. United States*, 371 U. S. 245, 269 (1963). "Going forward, state law presumptively does not apply to the enclave. *Parker Drilling*, at 602-603, citing *James Stewart*, 309 U.S. at 100 ("future statutes of the state are not a part of the body of laws in the ceded area").

The Ninth Circuit specifically applied the rule from *James Stewart* to Glacier National Park. *Macomber*, 401 F.2d at 546 (internal citations omitted). The District Court acknowledged this rule (FCD ER-37-38, FMSR ER-22-23.), and carefully discussed the Supreme Court's exceptions to the rule that only state laws in effect at the time of cession are effective in the ceded area:

> 1) where Congress has, by statute, provided a different rule; 2) where the state explicitly retained the right to legislate over specific matters at the time of cession; and 3) where minor regulatory changes modify laws existing at the time of cession.

Allison v. Boeing Laser Tech. Servs., 689 F.3d 1234, 1237 (10th Cir. 2012).

Neither the FCD nor FMSR argue that the second exception applies. But FCD and FMSR now contend that the first exception applies because the Streambed Act includes a criminal penalty and is therefor assimilated pursuant to federal statute. This exception does not apply, as set forth in Section 2, below. FCD and FMSR also now assert that certain Montana laws enacted prior cession are part of the regulatory scheme embodied by the Streambed Act. This too is incorrect, as discussed in Section 3, below.

Neither the FCD nor FMSR "expressly invoked a specific exception but rather argues generally that when the United States accepted the cession as to Glacier National Park, it assimilated all pre-existing and future state law, including the later-enacted Streambed Act." FCD ER-37, FMSR ER-22. During the summary judgment hearing, the District Court inquired as to whether there was historical regulation of stream banks in Montana at the time of cession and FMSR admitted that none were cited in the briefs and it could not point to any specific law. FCD ER-111-112, FMSR ER-101-102.

Issues not presented to the District Court generally cannot be raised for the first time on appeal. *Chan,* 82 F.3d at 923. Because FCD and FMSR failed to

raise or argue the specific exceptions below, they should not be allowed to do so here. To the extent those arguments are allowed, they should be reviewed under the plain error standard set forth above.

2. The Streambed Act is not assimilated because it is a regulatory law not a criminal law.

The FCD and FMSR assert that the Streambed Act applies in Glacier because the Act includes a penalty for violation and thus was assimilated as criminal law or under the acceptance statute, 16 U.S.C. § 163, and 16 U.S.C. § 169. FCD Opening Brief, p. 23-24; FSMR Opening Brief, p. 39, n.7.[2] The District Court recognized that these federal statutes were partially repealed and incorporated into the Assimilative Crimes Act ("ACA"), 18 U.S.C. § 13, the purpose of which is to subject "persons on federal lands to federal prosecution in federal court for violations of criminal statutes of the state in which the federal lands are located." *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982); FCD ER-42, FMSR ER-27.

The ACA "incorporates into federal law only the *criminal* laws of the jurisdiction within which the enclave exists; it is, itself, a penal statute." *United States v. Best*, 573 F.2d 1095, 1098 (9th Cir. 1978) (emphasis in original), *citing United States v. Sharpnack*, 355 U.S. 286, 291-93 (1958). The ACA does not

[2] References to FMSR Opening Brief refer to Doc. 7.1 filed in Case No. 25-1474. References to FCD Opening Brief refer to Doc. 5.1 filed in Case No. 25-1479.

incorporate state regulatory laws that include penalties, because that would allow a state to "enforce its regulatory system on the federal jurisdiction by making criminal any failure to comply with those regulations." *United States v. Carlson*, 900 F.2d 1346, 1348 (9th Cir. 1990), citing *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977).

The FCD's position that the use of the word "offense" in 16 U.S.C. § 163 assimilated civil as well as criminal law is untenable because it would require wholesale assimilation of all Montana regulatory statutes containing penalties for violations. It would also allow the State to enforce its entire regulatory system in Glacier just by adding such penalties. Such a result would be unworkable and improper as discussed in *Carlson, supra*.

Whether the Streambed Act is assimilated into federal law depends on whether it is either regulatory or prohibitory in nature. *Id.* The Act is regulatory rather than prohibitory because the primary intent of the Act is not to prohibit construction near streams, but to regulate or license it. See *Marcyes*, 557 F.2d at 1364. The Act provides for permitting construction near streams, subject to regulation, so it must be classified as civil or regulatory. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987). The Act is not criminal or prohibitory even if it is enforceable by criminal as well as civil means. See *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 306 (9th Cir. 1993).

Because the Streambed Act is regulatory, not a criminal or penal statute, it is not assimilated into federal law.

3. The Streambed Act is not part of a basic scheme of regulation existing at the time of cession.

The District Court correctly determined that the Streambed Act was not part of any "same basic scheme" of Montana regulations existing at the time of cession. FCD ER-39-41, FMSR ER-24-26. State regulations enacted after cession may only apply "if the same basic scheme" has been in effect since the time of the cession. *Paul*, 371 U.S. at 269 (finding that California law controlled milk prices at the time of cession and "the basic state law authorizing such control has been in effect since" the cession).

The application of the exception in *Paul* was carefully examined by the Tenth Circuit in *Allison*, *supra*. At issue in *Allison* was whether causes of action derived from current New Mexico employment law arose from the same basic scheme as New Mexico's at will employment law in effect at the time of cession. *Allison*, 689 F.3d at 1243. The Tenth Circuit found that *Paul*, "suggests a narrow interpretation" where "the price adjustment was part of the application of the program, not a change in its design," and was "a far stretch from the existence of some general state rule such as the 'law of contracts' or even the 'law of employment' that would effectively reserve the power of future state judicial or legislative bodies to impose new substantive law in those fields." *Id*. The Tenth

Circuit concluded that *Paul* could not support such an "infinitely malleable" approach to federal enclave law. *Id*.

The Tenth Circuit found that the weight of authority supported its interpretation of *Paul*, citing a Ninth Circuit case as one example. *Id*. at 1240, citing *Cooper v. S. Cal. Edison Co.*, 170 F. App'x 496, 498 (9th Cir. 2006) (unpublished) ("[C]laims of intentional and negligent infliction of emotional distress and retaliation" are "barred by the federal enclave doctrine" because they had not been recognized in California prior to cession of Camp Pendleton.) (other citations omitted). See also *Olig v. Xanterra Parks & Resorts, Inc*., 2013 U.S. Dist. LEXIS 106637, 2013 WL 3936904, at *5 (D. Mont. July 30, 2013) (holding that Montana's Wrongful Discharge from Employment Act did not apply in Yellowstone National Park because it was enacted long after Montana's cession of jurisdiction which reserved "only concurrent jurisdiction for the execution of process, civil and criminal, lawfully issued by the courts of the state").

The FCD now argues generally that Montana had laws protecting streams at the time of cession and specifically refers to an 1897 Act "which outlines fines and jailtime for depositing debris from sawmills into streams." FCD Opening Brief, p. 22-23, citing Revised Codes of Montana ("RCM") § 8797 (1907, passed March 8, 1897). FMSR asserts RCM § 8797 and RCM Chapter 35, § 1985 (1915 Supplement) are "the same basic scheme" as the Streambed Act. FMSR Opening

Brief, p. 37-38. However, RCM § 8797 and § 1985 are directed only at owners of sawmills and regulate only the dumping of sawmill debris in or near streams, and its purpose is not stated. This law does not regulate construction of any kind or regulate alteration of stream beds or banks in any way.

It is unclear from FMSR's brief and appendix to which law "RCM Chapter 35, § 1" refers, but the pages of its appendix identified in its brief includes a law identified as Chapter 38, Section 1, that allows any landowner along navigable waters in Montana to build docks or wharves so long as they do not impede navigation by watercraft. This law is only intended to protect navigation, not the bed or banks of streams, stream function or the environment. Further, this law remains on the books in Montana and is not a part of the Streambed Act. See Mont. Code Ann. §§ 85-16-101 et seq. None of the remaining laws now referenced by the FCD or FMSR predate Glacier's cession, so are not relevant to the issue of whether the same basic regulatory scheme of the Streambed Act existed at the time of Glacier's cession.

The regulatory scheme of the Streambed Act is unlike either of the foregoing laws. The Act's stated purpose is to prevent environmental degradation by protecting the bed and banks of streams from unauthorized alteration while also recognizing the needs of irrigation and agricultural use. Mont. Code. Ann. § 75-1-102. The Act serves different purposes and regulates different people and

industries than the laws refenced by Appellants. The Act accomplishes this purpose through a complex set of laws and rules enforced by Conservation Districts, entities which did not exist when Glacier was ceded but were organized in 1939 to protect farm and grazing land. See Mont. Code. Ann. § 76-15-101.

The Streambed Act is not merely a "part of the application" of these old laws and is more than even a "change in design" that goes beyond the narrow interpretation of *Paul*. See *Allison*, *supra*, at 1243. Rather, the arguments of FCD and FMSR would allow the State of Montana to continuously impose on the National Park Service to enforce new substantive laws in Glacier, so long as they generally relate to construction or streams. This is the "infinitely malleable" approach *Allison* cautions against.

The FCD and FMSR argue that *Macomber* and *Howard v. Todd*, 2022 U.S. Dist. LEXIS 65012, 2022 WL 1044972 (D. Mont. Apr. 7, 2022), support their position because they apply Montana partition and water law that postdate Glacier's cession. FCD Opening Brief, p. 13-14, and FMSR Opening Brief, p. 30. This is not correct.

The application of Montana's partition law was not at issue in *Howard v. Todd* and was only briefly addressed in a footnote. *Howard*, at *3 n. 2. However, Montana's partition law was in effect since the time of the cession because it dates back to 1867. See Mont. Code. Ann. § 70-29-101. Montana's Uniform Partition of

Heirs Property Act was enacted in 2013 but modified only certain aspects of Montana partition law to address challenges that arise with inherited property, but the Heirs Property Act expressly retains provisions of pre-existing partition law that are not inconsistent with the Heirs Property Act. Mont. Code. Ann. § 70-29-403. So the Heirs Property Act is part of the same regulatory scheme that was in place at the time of cession and *Howard v. Todd* does not support the positions of Appellants.

The FCD argues that *Macomber* supports application of the Streambed Act because it the Ninth Circuit remanded the case to the District Court to adjudicate the parties' dispute under state water and easement law. FCD Opening Brief, p. 13-14. However, *Macomber* recognized the assimilation of state law existing at the time of Glacier's cession. *Macomber*, at 546 ("state law theretofore applicable within the area was assimilated as federal law.") citing *James Stewart*, *supra*. Montana law governing water rights and easements existed at the time of Glacier's cession.

According the Montana Department of Natural Resources and Conservation: "Filed rights are water rights that were filed with local county Clerk and Recorder's offices under an optional system that was first statutorily recognized in 1885 and that continued until July 1, 1973, the effective date of the Montana Water Use

Act."[3] Montana law governing easements for irrigation and water use were first enacted in 1895 and existed at the time of cession. See, e.g. Mont. Code. Ann. § 70-17-101. So, there is a body of relevant Montana water and easement law that existed at the time cession and is subject to assimilation under the rule relied upon in *Macomber*. Whether specific Montana laws governing water rights and related easements existed at the time of Glacier's cession was not at issue in *Macomber* and neither FCD nor FMSR presented evidence or argument to the contrary. *Macomber* does not support the positions of FCD or FMSR.

4. The Streambed Act is not subject to concurrent jurisdiction in Glacier and preemption analysis does not apply.

The District Court properly concluded that there is no concurrent state jurisdiction over private inholdings in Glacier and preemption analysis does not apply in this case. FCD ER-41-55, FMSR ER-26-40.

FCD and FMSR both assert that because the purposes of Glacier National Park and the Streambed Act are not in conflict there should be concurrent jurisdiction and Streambed Act should apply. FCD Opening Brief, 25-28; FMSR Opening Brief, 29-34. However, that is not the law as it relates to Glacier or other federal enclaves where the state has ceded exclusive jurisdiction to the United States.

[3] Available at https://dnrc.mt.gov/Water-Resources/Water-Rights/Understanding-Water-Rights/ (last accessed July 23, 2025)

When there is a question of jurisdiction within state ceded land, courts look to the plain language of the cession to determine the extent of federal versus state jurisdiction. *United States v. Unzeuta*, at 142 (the terms of the cession, "to the extent that they may lawfully be prescribed, determine the extent of the federal jurisdiction"). At the time of an express act ceding land from a state to the federal government the state may, as a condition to the cession, reserve concurrent jurisdiction so long as the reservation is consistent with the purpose of the cession. A "cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended." *Chicago, Rock Island & Pacific Ry. Co.*, 114 U.S. at 545-46; *Unzeuta*, 281 U.S. at 142 ("when, in such cases, a state cedes jurisdiction to the United States, the state may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition").

However, neither the state nor its political subdivisions can later impose conditions not contemplated by the parties at the time of the cession. The Supreme Court in *Unzeuta* recognized that, "after this jurisdiction had been accepted by the United States, it could not be recaptured by the action of the State alone, and hence that an act of the legislature of Nebraska, passed in 1889, seeking to amend the act of cession was not effective…" *Unzeuta*, 281 U.S. at 143 (emphasis added).

The Supreme Court, in *Arlington Hotel Company v. Fant,* 278 U.S. 439, 445 (1929), addressed a privately owned hotel located in Hot Springs National Park in Arkansas. The hotel burned down and its owners sought protection under a later-enacted Arkansas law relieving innkeepers from liability to their guests for losses from fires. *Id.* at 445 – 46. However, the Court again held that because the state law was enacted after cession, it did not apply. *Id.* at 446.

The Ninth Circuit addressed state versus federal jurisdiction as to the portion of Yellowstone National Park located in Montana, finding that Yellowstone's cession statute, unlike Glacier's, did not reserve to the State of Montana the right to tax people or property within the park. *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F.2d 644 (9th Cir. 1929). The court rejected Gallatin County's attempt to impose taxes on a private company operating in Yellowstone, because the State did not reserve that right at the time of the cession and could not later extend its jurisdiction to impose taxes in the park, stating: "[i]n other words, after the date of cession, the ceded territory was as much without the jurisdiction of the state making the cession as was any other foreign territory, except in so far as jurisdiction was expressly reserved." *Id.*, at 645 (citing *Arlington*, *supra*) (emphasis added).

The *Unzeuta*, *Arlington* and *Yellowstone* cases, *supra*, make it clear that preemption analysis does not apply in the context of express state and federal laws

ceding and accepting jurisdiction over lands within national parks. None of these cases support FCD's or FMSR's assertion of concurrent jurisdiction or application of state laws enacted after cession, so long as they do not conflict with applicable federal law. FMSR's attempts to distinguish these cases are ineffective. *Unzeuta* recognized that exclusive federal jurisdiction in an enclave necessarily extended to land over which a permanent right of way was granted to the private railroad. *Unzeuta*, 281 U.S. at 146. This is similar to and supports the exclusive federal jurisdiction over private property in this case.

Arlington also involved a privately owned hotel in a national park and the Supreme court rejected application of the Arkansas law immunizing innkeepers from their guests fire losses, not because the law was inconsistent with park purposes, but because it was enacted after cession. *Arlington,* 279 U.S. at 446. Similarly, the holding in *Yellowstone* was not dependent upon the type of property being taxed, but on the failure of the state to reserve the power to tax at the time it ceded exclusive jurisdiction. *Yellowstone,* 31 F.2d at 645.

Montana simply did not reserve concurrent jurisdiction for purposes of environmental regulations in its cession of Glacier. If Montana wanted to reserve concurrent jurisdiction over Glacier it could have done so as it did so with other lands in which jurisdiction was ceded to the United States. See Mont. Code. Ann. § 2-1-202 (ceding jurisdiction over lands purchased by the United States and

reserving concurrent jurisdiction to enforce state laws relating to the department of environmental quality and the enforcement of any regulation promulgated by the department in accordance with the laws of the state; and see Mont. Code Ann. § 2-1-202 (reserving concurrent jurisdiction over certain lands ceded to the United States for national park purposes).

FCD and FMSR argue that under *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 625 (1953), later-enacted state laws apply in federal enclaves so long as they do not conflict with federal law or policy. The District Court properly addressed and disposed of this argument. FCD ER-46-49, FMSR ER-31-34. The Tenth Circuit carefully analyzed and rejected a plaintiff's argument that under *Howard*, "all state laws that do not conflict with federal law or policy are applicable on federal enclaves." *Allison*, 689 F.3d at 1239. The *Allison* court found that nothing in *Howard* suggested the Supreme Court was retreating from the rule that only state laws in effect at the time of the cession apply, and to accept the plaintiff's argument it "would have to conclude that *Howard* swallowed most of federal enclave law." *Id*.

Subsequent Supreme Court cases have confirmed that Howard did not change federal enclave law. "In any event, the Supreme Court unambiguously affirmed the general rule that we look to the date of cession to determine which state laws apply to the federal enclave in *Paul*, decided a decade after *Howard*. *Id.*

The Supreme Court more recently affirmed the general rule in *Parker Drilling,* 587 U.S. at 602-03, citing *Paul* and *James Stewart, supra*.

Next, FCD argues that the Streambed Act should apply in Glacier because it is not preempted by any conflicting federal law. FCD Opening Brief, p. 25-28. FCD and FMSR repeatedly argue that there are no federal regulations governing construction on private inholdings or along streams in Glacier National Park. FCD and FMSR are wrong on both points, as confirmed by the District Court. FCD ER-49-52, FMSR ER-34-37.

Preemption analysis based on the Supremacy Clause of the United States Constitution, Article VI, clause 2, is applicable to where there is concurrent jurisdiction or other situations where state and federal regulations may both apply but conflict. As stated by the District Court:

> [T]he *Yellowstone*, *Unzeuta*, and *Arlington Hotel* line of cases make clear that a preemption analysis does not apply where, as here, the state has ceded, and the federal government has accepted, exclusive legislative jurisdiction over the land at issue. A conflict preemption analysis is generally appropriate where there are competing state and federal laws or regulations, and it is necessary to determine which law takes precedence. *See e.g. Parker Drilling*, 587 U.S. at 610 (conflict preemption analysis applies "only where the overlapping, dual jurisdiction of the Federal and State Governments makes it necessary to decide which law takes precedence"). That is not the situation here.

FCD ER-54, FMSR ER-39.

C. Public policy and federalism concerns do not support overturning settled law governing the United States' exclusive legislative jurisdiction over private inholdings within Glacier National Park.

The FCD and FMSR argue that public policy favors application of state law to fill a regulatory void left under federal law. FCD Opening Brief, p. 8; FMSR Opening Brief, p. 32. This argument is largely based on the erroneous assertion that federal regulations do not apply to construction on private inholdings. In fact, there are federal regulations that govern construction on private inholdings in Glacier and construction near streams. The District Court referenced a number of these regulations. FCD ER-49-52, FMSR ER-34-37.

Some of these regulations are specific to Glacier, including a statutory directive for the Secretary of the Interior to promulgate rules for the care, protection, management, and improvement of the Park. 16 U.S.C. § 162. Those regulations may be specifically written to be applicable on non-federally owned lands and waters. 36 C.F.R. § 1.2(b). Two of these regulations apply on their face to non-federally owned land. One provides that no eating, drinking, or lodging establishment "may be operated on any privately owned lands within Glacier National Park" without a permit from the park Superintendent, which will be issued only after a determination that the premises comply with state and county health and sanitary laws that "would apply to the premises if the privately owned lands were not subject to the jurisdiction of the United States." 36 C.F.R. § 7.3(b).

Another that expressly applies to "privately owned lands within Glacier National Park" provides that "any building or structure intended for human

habitation, or use," like the Ambler's home, must be "served by water supply and sewage disposal systems that comply with the standards prescribed by State and county laws and regulations applicable in the county within whose exterior boundaries such building is located." 36 C.F.R. § 7.3(c), (c)(1)(i).

In September 2024, the National Park Service ("NPS") advised the Amblers by letter that in 2025 it will begin issuing revocable permits for all commercial lodging operating on privately owned land within the park pursuant to 36 C.F.R. § 7.3(b). SER-3-5, and that, pursuant to 36 C.F.R. § 7.3(c), "a permit from the NPS is required to construct, rebuild, or alter any water supply or sewage disposal system on privately owned land within the park." SER-3-5.. The foregoing regulations would be superfluous if Montana's cession of Glacier had not included private inholdings.

The federal government regulates navigable waters in national parks up to ordinary high water mark. 36 C.F.R. § 1.2(a)(3). Federal laws and regulations that are not specific to Glacier are also effective in the Park. 16 U.S.C. § 163. One example of federal regulation that protects streams and regulates construction in or near streams is the Clean Water Act ("CWA"), and specifically § 404 of the CWA. 33 U.S.C. § 1344. The CWA regulates discharges of pollutants into the waters of the United States and water quality standards. Section 404 of the CWA regulates construction along waterways by regulating the discharge of dredged and fill

material into waters of the United States, including streams and adjacent wetlands. It is simply inaccurate to say that federal law does not regulate construction on private inholdings within Glacier or that it does not provide for the environmental protection of streams or regulate construction near streams.

Federal law may not currently provide a direct corollary to the Streambed Act but 16 U.S.C. § 162 provides a mechanism for further rulemaking and the FCD and FMSR can participate in rulemaking directly and through their congressional representative and senators. FCD ER-91-92, FMSR ER-81-82. Neither public policy nor an absence of a federal corollary to a state regulation requires state control of private inholdings within Glacier. The District Court correctly recognized that FCD and FMSR "do not cite any legal authority suggesting that public policy concerns alone provide a legal basis for the Court to conclude that Montana has concurrent legislative jurisdiction to enforce state law on private inholding." FCD ER-53, FMSR ER-38.

On the contrary, this Circuit has found that public policy favors federal legislative jurisdiction over both federal and private lands within national parks. "California and the United States were intending by the statutes of cession and acceptance to accomplish unified policing of privately owned and public lands within the park boundaries for the public good in administering the National Park." *Petersen*, 191 F.2d at 156. "[C]essions of jurisdiction, motivated by the comity

between sovereigns, have been found to be lawful and proper for the reason that they are necessary in order to secure the great public benefits intended to be derived from the dedicated areas." *Id*., citing *Unzeuta* and *Arlington Hotel*, *supra*

The Ambler property is just one of many private inholdings in Apgar Village and elsewhere in Glacier National Park. Private and commercial activities occurring on inholdings can have varying impacts the purpose and operations of the Park, which is one of the reasons this Circuit recognized that inholdings should be "federally regulated in the interest of the public in enjoining the beauties and advantages of the dedicated areas." *Id.*, at 157. This demonstrates why it is important that United States maintain legislative jurisdiction over these properties, as opposed to a patchwork of regulation, enforcement and resulting confusion that could occur under the positions advocated by FCD and FMSR.

CONCLUSION

Based on the foregoing brief, the Amblers respectfully requests that this Court affirm the District Court's order holding that the FCD does not have jurisdiction over the Ambler's private inholding within Glacier National Park and that Natural Streambed and Land Preservation Act of 1975 does not apply to the Amblers' property.

STATEMENT OF RELATED CASES

The Amblers agree with the Appellant's statement of related cases.

DATED this 28 day of July, 2025.

By: /s/ Trent Baker
Trent Baker
Datsopoulos, MacDonald & Lind, PC
Attorneys for Appellee

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 8051 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 28 day of July, 2025.

By: /s/ Trent Baker
Trent Baker

CERTIFICATE OF SERVICE

I hereby certify that on 28 day of July, 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 28 day of July, 2025.

By: /s/ Trent Baker
Trent Baker