

**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 (Missoula)  
No. 9:23-cv-00151 -KLD  
Hon. Kathleen Louise DeSoto, Magistrate Judge

---

**APPELLANT'S REPLY BRIEF**

---

Camisha Booth Sawtelle  
Sawtelle Law Firm PLLC  
PO Box 5117  
Whitefish, Montana 59937  
(406) 730-1399  
[camisha@sawlawmt.com](mailto:camisha@sawlawmt.com)  
*Attorney for Appellant Flathead  
Conservation District*

Date: September 17, 2025

Sawtelle Law Firm PLLC

/s/ Camisha Booth Sawtelle

*Attorney for Appellant Flathead  
Conservation District*

|  |     |
|--|-----|
| TABLE OF AUTHORITIES .....   | iii |
| I. INTRODUCTION AND SUMMARY OF THE ARGUMENT .....  | 1   |
| II. ARGUMENT .....   | 2   |
| A.    The Amblers’ conclusions regarding scientific analysis are innacurate<br>and misleading.....   | 2   |
| B.    The Streambed Act is a continuation of the basic scheme of stream<br>protection in effect at the time Glacier National Park was created..... | 3   |
| C.    The Streambed Act should apply where the National Park Service has<br>failed to regulate.....  | 9   |
| III. CONCLUSION .....  | 14  |
| Certificate of Compliance .....  | 16  |

## TABLE OF AUTHORITIES

### Statutes

|   |      |
|---|------|
| 16 U.S.C. § 162 .....   | 9    |
| 33 U.S.C. § 1344 .....  | 10   |
| 42 U.S.C. § 4321 .....  | 12   |
| Mont. Code Ann. § 75-7-101 <i>et seq.</i> .....                   | 1    |
| Mont. Code Ann. § 75-7-102 .....                                  | 7, 8 |
| Mont. Code Ann. § 75-7-103(5) .....                               | 3    |
| Mont. Code Ann. § 82-2-101 <i>et seq.</i> .....                   | 6, 7 |
| Revised Codes of Montana § 8797, Approved March 8, 1897 .....     | 6    |
| Revised Codes of Montana § 8798, Approved February 14, 1903 ..... | 6    |
| Revised Codes of Montana § 1985, Approved March 13, 1913 .....    | 6    |
| Revised Codes of Montana § 26-1501, 1963.....                     | 6    |
| Revised Codes of Montana § 26-1503, 1963.....                     | 6    |

### Regulations

|                                  |    |
|----------------------------------|----|
| 36 C.F.R § 7.3 (b) and (c) ..... | 10 |
|----------------------------------|----|

### Rules

|   |   |
|---|---|
| Administrative Rules of Montana 36.2.402..... | 3 |
|---|---|

**Cases**

*Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234 (2012). .....5, 8  
*James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940) .....4  
*Loper Bright Enters. v. Raimondo*. 603 US 369 (2024) .....13  
*Macomber v. Bose* 401 F.2d 545 (1968)..... 3, 4, 6 , 7  
*Paul v. United States*, 371 U.S. 245 (1963)..... 3, 4, 5, 7, 8

## I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The fundamental purpose of both the Montana Natural Streambed and Land Preservation Act of 1975 (“Streambed Act”), Mont. Code Ann. § 75-7-101 *et seq.* and U.S. National Park Service is resource protection for the public benefit. The Flathead Conservation District (“FCD”) is seeking a reversal of the District Court’s ruling and confirmation of jurisdiction to enforce the Streambed Act where the National Park Service has failed to regulate to prevent resource degradation.

John and Stacy Ambler (“Amblers”) built a 2,178 square foot house on a 2,309 square foot lot on the immediate bank of McDonald Creek, a perennial stream located in Glacier National Park. ER-91, ¶ 45 and 47. The Ambler property is entirely surrounded by public land. The immediate bank of McDonald Creek was excavated to place a retaining wall and building platform for the house. ER-92 ¶ 48. Vegetation was removed and the pad area was stabilized with a rock retaining wall directly adjacent to McDonald Creek ER-78 ¶ 5. Viewed from McDonald Creek, the house is an anomaly on an otherwise pristine stretch of stream. See photo SER-58. Based on non-compliance with the Streambed Act, FCD ordered the house removed and the streambank restored and revegetated. ER-78. ¶ 5. The Amblers dispute FCD has jurisdiction over their private inholding.

The Amblers assert there is no compelling reason to disrupt a settled area of law. FCD is not asking for a disruption of any area of law. Rather, FCD is seeking correction of the application of settled law and upholding of existing case law. Follow the precedent in *Macomber* and other settled law, Federal Courts have jurisdiction to determine that state law that existed in the same basic scheme at the time of cession should be applied. Although the National Park Service has the duty to regulate to protect resources, they have abdicated that duty and existing state law must apply.

## II. ARGUMENT

### **A. The Amblers' conclusions regarding scientific analysis are inaccurate and misleading.**

The Amblers tout the environmental analysis conducted by Confluence Consulting and the dubious conclusion the Ambler home presents no substantial environmental risk to McDonald Creek. Although outside the scope of what this Court is being asked to determine, it is important to clarify the lack of a technical analysis refuting the report by the Amblers' consultant does not equate to a lack of environmental risk.<sup>1</sup> No technical analysis was required to reach the obvious

---

<sup>1</sup> FCD clarifies that Mike Sanctuary's reliance on the ordinary high water mark in his analysis is misplaced. The Streambed Act does not outright prohibit development or work on streams. Rather, the Streambed Act requires due consideration and review of any proposed project before implementation. A project

conclusion that excavation of the bank of McDonald Creek was considered a project and thus required a permit under the Streambed Act. FCD strictly adhered to their complaint protocol in addressing this blatant violation of the Streambed Act. Additional analysis may have been conducted if deemed necessary and, more critically, if an application had been submitted for review. Instead, the Amblers initiated litigation regarding jurisdictional issues which paused any further environmental analysis.

**B. The Streambed Act is continuation of the basic scheme of stream protection in effect at the time Glacier National Park was created.**

The District Court concluded that only state law in effect at the time of cession applies to the ceded area (here Glacier National Park), with three exceptions. Applicable here is the basic scheme exception to the general rule that only state law in effect at the time of cession applies to the ceded area in Glacier National Park. *Paul v. United States*, 371 U.S. 245, 269 (1963). Stream protection laws existed in Montana at the time of cession and are assimilated as federal law. Following the precedent in *Macomber*, where the Federal Court assumed

---

is defined broadly by the Streambed Act as “a physical alteration or modification that results in a change in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks.” § 75-7-103(5), M.C.A. The term “immediate banks” is defined in the Administrative Rules of Montana as the area above the mean high water mark and directly adjacent to a stream which when disturbed will physically alter or modify the state of a stream. A.R.M. 36.2.402. Under these definitions, the Amblers’ excavation of a streambank and building a home qualifies as a project and required an application for a permit prior to commencing work.

jurisdiction and applied state water law to a private inholding in Glacier National Park, the Streambed Act applies to the Ambler property. *Macomber v. Bose* 401 F.2d 545 (1968).

In *Paul* the Supreme Court considered whether state regulations controlling milk prices in effect prior to cession of the federal enclave could be updated by administrative rules or legislation enacted later. *Paul* involved the price of milk at military commissaries (federal enclaves) and whether a California regulation of milk price applied. The Court concluded that “if there were price control of milk at the time of the acquisition and the same basic scheme has been in effect since that time, we fail to see why the current one, albeit in the form of different regulations, would not reach those purchases and sales of milk on the federal enclave.” *Paul v. United States*, 371 U.S. 245, 269. The Court went on to conclude “the Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred.” *Paul*, 371 U.S. 245, 265, Citing *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99-100.

The basic scheme exception presented in *Paul* should be applied to the Streambed Act, because stream protection laws have been in effect in Montana since before the time of cession.

The Amblers rely on the Tenth Circuit’s decision in *Allison v. Boeing Laser Tech. Servs.* and application of *Paul* to support their position that the common scheme exception should not apply. 689 F.3d 1234 (2012). 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 creation of the Kirkland Air Force Base. *Allison*, 689 F.3d at 1243. The court rejected the argument that the causes of action *Allison* raised were incremental changes to an existing regulatory scheme. Rather they were substantial new incursions into a field that was previously unregulated, or, if at all, regulated very lightly. *Id.* The common scheme exception was rejected and New Mexico did not have jurisdiction to enforce this element of state law a on the federal enclave.

Unlike *Allison*, the Streambed Act is not a “wholesale adoption and application of a new body of substantive state employment and tort law where none previously existed.” *Id.* The Streambed Act is the natural progression of resource protection as stream degradation in Montana became more prevalent.

FCD concedes that the Streambed Law in its current form was not in existence at the time of cession. However, contrary to the Amblers’ claims, a basic

regulatory scheme protecting water quality in Montana existed in 1910. The regulatory framework has progressed since the late 1800's when the Montana legislature was contemplating stream degradation by saw mills and imposed fines and jailtime for depositing debris into streams. Revised Codes of Montana ("RCM") § 8797, Approved March 8, 1897. Addendum 25. This early stream protection law was expanded and restated 5 years later. RCM § 8798, Approved February 14, 1903. Addendum 25. The same basic scheme was followed in a 1913 Montana law restricting the deposits of foreign substances in or near streams or lakes. RCM § 1985, Approved March 13, 1913. Addendum 28. The basic scheme of stream protection is further exemplified in the 1965 act declaring the policy of the State of Montana, "that its fish and wildlife resources and particularly its fishing waters within the state are to be protected and preserved to the end that they are be available for all time, without change, in their natural existing state." RCM § 26-1501, 1963. Addendum 30. The stated policy of this 1965 law closely resembles the policy of the Streambed Act. The 1965 laws specifically regulate construction projects on streams. RCM § 26-1503, 1965. Addendum 30. The Streambed Act, passed in 1975, is the natural extension of this line of laws protecting Montana streams.

The development of the Streambed Act is directly analogous to Montana Water Use Act (which became effective in 1973) applied in the *Macomber*

decision. Mont. Code Ann. § 82-2-101 *et seq.* Prior to passage of the Water Use Act, Montana was guided by the prior appropriation doctrine. The first in time, first in right system is rooted in the California gold rush and the system developed by miners staking claims and subsequently diverting a stream to operate the claim. As explained in a guide issued by Montana Legislature’s Water Policy Interim Committee in 2018:

In Montana, many early users sought legal protections for their rights by filing a claim at the county courthouse. Others simply put the water to use. In some cases, district courts issued decrees on who was entitled to what amount of water in times of scarcity.<sup>2</sup>

This disjointed water rights process – with all its discrepancies and conflicts – resulted in the Montana Legislature passing the Water Use Act in 1973. The Water Use Act, which follows the basic scheme of the prior appropriation doctrine, was applied to a dispute over water use on a private inholding in Glacier National Park in *Macomber*.

Similarly, the disjointed system for stream protection resulted in the Montana Legislature passing the Streambed Act in 1975 enforcing the policy of the State of Montana that “its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to

---

<sup>2</sup> Available at <https://archive.legmt.gov/content/Publications/Environmental/2018-water-rights-handbook-final.pdf>, p. 5 (last accessed September 5, 2025)

be available in their natural or existing state and to prohibit unauthorized projects and, in so doing, to keep soil erosion and sedimentation to a minimum.” Mont. Code Ann. § 75-7-102. Legislators in 1897 did not contemplate the need for regulation of individual property owners excavating streambanks to build second homes. Sawmill owners were the culprits of stream degradation in the late 1800s, thus were regulated under the same basic scheme and with the same goal as Montana’s Streambed Act.

The Amblers claim that the Streambed Act “serves different purposes and regulates different people and industries than the laws referenced by Appellants.” Appellees’ Opening Brief, 27-28. The Amblers fail to offer any alternate purpose for a law which outlines fines and jailtime for depositing debris from sawmills into streams. Protecting water resources is precisely what these early laws were intended to do. As Montana developed, Montanans realized the need for additional protection. Just as the Water Use Act is a logical extension of the prior appropriation system, the Streambed Act is a logical extension of the early stream protection laws.

This basic scheme exception to the rule that state regulations enacted prior to cession apply to federal enclaves is bolstered by the fact that resource protection is at the very core of the creation of our National Parks and enacting the Streambed Act. This is not the situation in any of the cases cited by the Amblers. Unlike *Paul*,

where the issue was regulating the price of milk on military commissaries – federal enclaves in California; or *Allison*, where the issue was the application of state employment law on Kirkland Air Force Base – a federal enclave in New Mexico; the federal enclave at issue here is Glacier National Park – an enclave created to protect the resources within its boundaries for all citizens. The Streambed Act, which continues the basic scheme of laws in existence at the time of cession has the same purpose as the enclave it is applied to – protecting resources for all citizens.

**C. The Streambed Act should apply where the National Park Service has failed to regulate.**

“The National Park Service has not promulgated any federal regulations governing construction on streambanks on private inholdings in Glacier National Park.” District Court Order. ER-37.

Regulations related to private inholdings in National Parks in general are extremely limited. The comprehensive set of laws and rules administered by the Conservation Districts, which are the logical extension following the basic scheme of stream protection in effect in 1910, protects streams and prevents unconstrained construction on the immediate banks of streams in Montana.

The District Court noted that pursuant to 16 U.S.C. § 162 the Secretary of the Interior should promulgate rules for the care, protection, management, and

improvement of the Park. ER-35. The District Court then outlined the two regulations specific to Glacier National Park that specifically apply to inholdings, which the Amblers reassert in their opening brief. ER-35-36, Appellees' Opening Brief, 37. Those regulations are 36 C.F.R. § 7.3(b) which regulates health and sanitary laws at eating, drinking and lodging establishments; and 36 C.F.R. § 7.3(c) which regulates water supply and sewage disposal systems and defers to the standards prescribed by state and county laws and regulations. The Ambler house (a second home) is not an eating, drinking or lodging establishment - § 7.3(b) does not apply. Rather than support the exclusive federal jurisdiction, § 7.3(c) demonstrates effective concurrent federal and local jurisdiction by deferring to the state and county environmental regulations. Other than these two regulations (which are irrelevant to the issue on the Ambler property), the National Park Service does not regulate activity on private inholdings in Glacier National Park.

The Amblers suggest the Streambed Law is not necessary on private inholdings as federal laws such as the Clean Water Act ("CWA") regulate construction on or near streams, specifically Section 404 of the CWA. 33 U.S.C. § 1344. Appellees' Opening Brief, 37-38. Section 404 of the CWA is administered by US Army Corps of Engineers ("USACE") and regulates fill in jurisdictional streams and wetlands under the CWA. FCD agrees that the Amblers should have

applied for a permit under § 404 of the CWA and allowed the USACE to determine if a 404 permit was required.

There is a developed system in Montana to ensure that the CWA, the Streambed Law and all other water protection laws are adhered to. That system is the Joint Application for Proposed Work in Montana's Streams, Wetlands, Floodplains, and Other Water Bodies ("Joint Application"). The Joint Application is a standardized application to apply for all local, state, or federal permits. It is available on FCD website and is required to be submitted prior to initiating any project that may impact stream health.<sup>3</sup> In one application the Amblers could have applied for any necessary permit prior to initiating their project. This includes a 310 permit through the Conservation District, a 124 Permit through the Montana Department of Fish Wildlife and Parks, a 318 Permit through the Montana Department of Environmental Quality, A Navigable Rivers License through the Montana Department of Natural Resources and Conservation, a 404 Permit through the USACE, and a floodplain Permit through the local Floodplain administrator. The Amblers failed to apply for or obtain ANY permits. This Joint Application would have allowed professionals to review the proposed project plan, to consider alternatives to the proposed plan, and to review resource benefits and

---

<sup>3</sup> Available at <https://flatheadcd.org/310-stream-permits/forms-applications/> (last accessed September 10, 2025)

potential impacts of the proposed project. The Joint Application requires all applicants to consider changes to erosion, sedimentation, and turbidity; impacts to fish and aquatic habitat; impacts to wetlands and riparian habitat; impacts to potential flooding; potential changes to water flow or to the bed and banks of the waterbody; and impacts to existing vegetation including a plan for revegetation and weed control. Experts in each of the agencies listed above would have reviewed the application, determined if any of the above-mentioned permits were required, offered alternatives, and determined if the proposed project was allowed. By failing to submit a Joint Application, the Amblers bypassed review from concurrent jurisdictions and evaded input from experts on their construction project on the immediate bank of McDonald Creek.

By failing to apply for any permits, the Amblers also avoided analysis under the National Environmental Policy Act (“NEPA”) 42 U.S.C. § 4321 *et seq.* which compels federal agencies to evaluate the environmental impacts of actions and consider alternatives before undertaking projects. If a NEPA analysis had been completed, the Park Service would have developed resource protection measures to minimize adverse environmental impacts. Options would have been considered to allow an acceptable level of impact. The public would have had the opportunity to provide input on the proposed project. Instead, the Amblers built a house with no

input. The public, outraged by the construction on the immediate bank of McDonald Creek, filed complaints with FCD. ER-78.

The federal government has essentially abdicated their duty by failing to make and publish rules and regulations adequate for the care, protection and management of the resource on private inholdings in Glacier National Park. If, as the District Court held, the State of Montana is preempted from protecting their interests, the resource is not protected. This is in direct conflict with the public policy creating national parks. Due to failure of the federal government to regulate, existing state law has and should continue to protect the health of the resource. It is the role of this Court to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. *Loper Bright Enters. v. Raimondo*. 603 U.S. 369, 371 (2024).

The District Court's interpretation of the cession statutes ignores the will of Congress in the creation of the national parks. The agency (here the National Park Service) has abdicated their duties to protect the resource as required by statute. The agency has failed to engage in reasoned decision-making and has failed to regulate construction on private inholdings in Glacier National Park. Given that regulatory void, the Streambed Act, which is a continuation of the basic scheme of laws in effect at the time of cession, must apply.

If Congress had passed laws or the National Park Service had implemented rules protecting streambeds, those regulations may preempt state law. Resource protection was undoubtedly contemplated at the time of cession - in fact it is the very reason national parks were created. The parks service's failure to adequately regulate cannot result in the unregulated construction on the immediate banks of streams in Glacier National Park. This court must exercise independent judgment and conclude FCD has jurisdiction to enforce the Streambed Act on private inholdings in Glacier National Park.

### **III. CONCLUSION**

For the foregoing reasons and those stated above and those stated in Appellant's Opening Brief, the District Court's decision should be reversed and this court should hold that Flathead Conservation District has jurisdiction to enforce the Montana Natural Streambed and Land Preservation Act on a private inholding within Glacier National Park.

Date: September 17, 2025

Sawtelle Law Firm PLLC

/s/ Camisha Booth Sawtelle

*Attorney for Appellant Flathead  
Conservation District*

**CERTIFICATE OF COMPLIANCE**

**9th Cir. Case Number(s)** D.C. No. 9:23-cv-151-KLD

I am the attorney representing the Flathead Conservation District.

This brief contains 3,218 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(a). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

**Signature** /s/ Camisha Booth Sawtelle **Date** September 17, 2025

## CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2025, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the 9<sup>th</sup> Circuit by using the appellate online filing system.

**Signature** /s/ Camisha Booth Sawtelle **Date** September 17, 2025