

1-1-2009

## **Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 2008 MT 377, 346 Mont. 507, 198 P.3d 219**

Ryan McLane

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

### **Custom Citation**

Ryan McLane, Court Report, Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 2008 MT 377, 346 Mont. 507, 198 P.3d 219, 12 U. Denv. Water L. Rev. 513 (2009).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

The Secretary of Agriculture denied Frick Farm's petition for administrative review, and the Kansas District Court affirmed the DWR order. The district court reasoned that DWR correctly interpreted and applied the law when terminating the water right. Additionally, the district court found that the verified report of nonuse constituted substantial evidence supporting DWR's ruling. Upon appeal to the Kansas Court of Appeals, the court affirmed the district court's ruling terminating the water right.

Frick Farm argued that its water right is equivalent to a property right that the State could not terminate without first proving every element of the water right's forfeiture. However, the court held that the State, which created the property right to the water, can place conditions on the retention of that right. Specifically, the court cited the Water Appropriation Act as explicitly granting the State authority to terminate any owner's water right if the owner fails to make beneficial use of the water for 5 successive years, and is also unable to provide due and sufficient cause for the nonuse. Debes and Frick Farm failed to make beneficial use of the water right and did not provide sufficient cause for nonuse. Furthermore, because DWR's letters gave Frick Farm sufficient notice and DWR held an abandonment hearing pursuant to statutory procedures, the court held that the state did not violate Frick Farm's due process in terminating its water rights.

Frick Farm also argued that DWR relied exclusively on the verified report and did not support its forfeiture claim with additional evidence. The court, however, agreed with DWR's argument that the verified report was prima facie evidence of nonuse that, if uncontradicted, was sufficient to sustain a verdict. The court reasoned that after DWR presents a verified report, the owner of the water right has the burden to show either lawful and beneficial use of the water or due and sufficient cause for its nonuse. Because Frick Farm established neither of these elements, the court held that substantial evidence existed to support the termination of Frick Farm's water right.

The court affirmed the DWR's order terminating Frick Farm's water right because DWR followed the relevant statutory procedures, did not violate Frick Farm's due process rights, and presented substantial evidence of Frick Farm's forfeiture.

*Michael Eden*

## MONTANA

**Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 2008 MT 377, 346 Mont. 507, 198 P.3d 219** (holding that the Montana Natural Streambed and Land Preservation Act applies to Mitchell Slough because it meets the definition of a "natural, perennial flowing stream," and the Montana Stream Access Law applies to Mitchell Slough because it meets the definition of a "natural water body").

The Bitterroot River runs through Ravalli County in southwestern Montana. Roughly paralleling the Bitterroot River on its eastern side is a body of water called Mitchell Slough. Mitchell Slough splits off from the Bitterroot River, carrying a large portion of the river's flow, which runs down the watercourse and subsequently empties the remnant water back into the Bitterroot River ten miles downstream.

Mitchell Slough shares attributes of both a natural stream and of a man-made diversion off the Bitterroot River. Some historic documents refer to Mitchell Slough, or portions of the Mitchell Slough, as the Right Fork of the St. Mary's Fork of the Bitterroot River. Mitchell Slough flows continuously year-round, with a large portion of the flow coming from the Bitterroot River diversion, with no documentation of it ever running dry. Additionally, Mitchell Slough acts as a natural channel, supporting a riparian ecosystems and a resident fishery. However, the Mitchell Slough also has a long documentable history of use as a canal. A headgate existed on the Bitterroot River as early as 1915 to control diversions into Mitchell Slough. Furthermore, many secondary diversion structures re-divert Bitterroot River water out of Mitchell Slough at various locales and irrigate around 4,300 acres.

In 1999, the Bitterroot Conservation District ("BCD") began a determination of whether Mitchell Slough was a natural, perennially flowing stream under the Natural Streambed and Land Preservation Act ("310 Law"). The 310 Law forbids any activity that alters or modifies the bed or banks of a "natural, perennial flowing stream" without a permit issued from a local conservation district like the BCD. The BCD subsequently found that Mitchell Slough was not a natural water body under the language of the 310 Law, and therefore activities on the Slough do not require 310 Law permits.

The Bitterroot River Protective Association ("BRPA") sought judicial review of the BCD's 310 Law decision, alleging the BCD erred in its determination of Mitchell Slough as a non-natural stream. Other parties to the BRPA suit also alleged that the public had access to the waters of the Mitchell Slough under The Montana Stream Access Law ("SAL"), which allows public access and recreation on "natural water bodies." A group of landowners along Mitchell Slough ("Landowners"), however, intervened seeking a declaration that the slough was not subject to SAL. BRPA in response successfully moved for joinder of the Montana Department of Fish Wildlife and Parks ("FWP") as an involuntary plaintiff. Therefore, under the SAL question BRPA and FWP argued against Landowners, seeking a determination that Mitchell Slough exists as a natural water body within the meaning of the SAL.

On both matters, 310 Law as well as SAL, the District Court ruled that Mitchell Slough was not a "natural" stream. The district court ruled that 310 Law intended a natural, perennially flowing stream to mean one "in the absence of man-made manipulation." It similarly

found that under SAL, a natural water body is one that is not “artificial or manufactured.” Under both definitions, the district court ruled that, due to the headgate on the Bitterroot River and man-made channel work, Mitchell Slough existed as a man-made entity. Under the respective decisions, 310 Law did not protect Mitchell Slough from alteration of bed or banks without a permit, and SAL did not protect public recreational access and enjoyment of the Mitchell Slough waters. The BCRP appealed to the Montana Supreme Court, and the court considered issues related to both the 310 Law and the SAL.

First, the court looked to whether the district court erred in upholding that Mitchell Slough did not qualify as a natural perennial flowing stream under 310 Law. The court noted that the 310 Law lacked a definition of “natural, perennial-flowing stream.” Therefore the court looked to the purpose of the 310 Law. Since the title of the law purports to “preserv[e] the natural or existing shape, form and course of streams,” the court held that it contemplated protection of water bodies even if those waters were no longer purely “natural.” In such circumstances, the court ruled that important factors to consider include: whether portions of flow in the water body occur naturally, whether the banks and channel retain a natural character, and whether the water body occurred naturally but currently exists with extensive man-made modifications. Since Mitchell Slough contains some naturally occurring flow, not originating from the diversion of the Bitterroot River, and since natural channel characteristics exist, the 310 Law intended to protect the water body as it existed, even with extensive man-made modifications.

Following this line of reasoning, the court determined that the district court erred in its interpretation of “natural.” The court pointed out that if it were to adopt the district court’s definition of “natural,” the 310 Law would not even apply to the Bitterroot River because the river does not flow in absence of man-made manipulation. The court concluded that limiting the 310 Law’s applicability to “flows which have never been diverted, impounded, or appropriated” would be unreasonably narrow. Therefore, the district court erred in upholding the BCD’s declaratory ruling on Mitchell Slough as a matter of law. Furthermore, the purpose of the 310 Law protects Mitchell Slough as a natural perennial flowing stream.

Next, the court looked to whether the district court erred in finding that Mitchell Slough did not qualify as a natural water body under SAL. The court noted that analysis under SAL of a “natural water body” was separate and distinct from the 310 Law analysis of a “natural, perennial-flowing stream.” As such, the court’s findings regarding 310 Law had no bearing on Mitchell Slough’s status under SAL. Under SAL, the court identified three issues regarding Mitchell Slough’s qualifications for public recreational use: (1) whether Mitchell Slough could capably support recreational use; (2) whether Mitchell Slough

qualified as a “natural water body;” and (3) whether Mitchell Slough qualified as not merely a diversion of water “away from a natural water body -- one of the SAL’s exceptions.”

Under the SAL analysis, the court first addressed Mitchell Slough’s capacity for recreational use. It highlighted a history of hunting, boating, and fishing, with testimony establishing extensive fishing on Mitchell Slough as early as 1928. It held Mitchell Slough was capable of recreational use. Next, the court addressed whether Mitchell Slough qualified as a natural body of water under SAL. In review of the facts, the court highlighted evidence suggesting that Mitchell Slough once existed as a channel of the Bitterroot River. It also highlighted that Mitchell Slough included tributary groundwater, various surface water additions, and irrigation waste and return flows. In doing so, the court noted that although the Mitchell Slough is a diversion, the history and character of Mitchell Slough qualify it as a natural body of water under SAL. The court then discussed the final element, whether Mitchell Slough existed as a mere diversion from a natural body of water, which would preclude it from public access under SAL. Because of the same facts that indicate that Mitchell Slough qualifies as a natural body of water, the court held that this SAL exception did not apply to Mitchell Slough. Under the three elements of SAL, the court found that Mitchell Slough qualified for public access.

The court stated that, although the district court defined natural as “uninfluenced by man in any way,” a more appropriate analysis would focus “on how and to what extent man has impacted the waterway.” Under such an analysis, the Mitchell Slough existed as a natural body of water, not merely as a diversion. As such, the court held that SAL applied, allowing public access to Mitchell Slough. The court noted, however, that this ruling does not allow unfettered public access across private lands.

The court reversed and remanded for a judgment in favor of BCRP under 310 Law, and a judgment in favor of BCRP and FWP under SAL.

*Ryan McLane*

## NEBRASKA

**Bihuniak v. Roberta Corrigan Farm, 757 N.W.2d 725 (Neb. Ct. App. 2008)** (holding that a lower landowner was not entitled to injunctive relief against an upper landowner, who caused increased amounts of surface water to drain onto the lower landowner’s land, because the upper landowner behaved reasonably and without negligence).

Marilyn Bihuniak and other owners of a quarter section of farmland in Buffalo County (jointly, “Bihuniak”) filed a complaint against Roberta Corrigan Farm and other owners (“Corrigans”) of land south of Bihuniak’s land. Bihuniak alleged that improvements Corrigans made to their land to construct a hardware store caused greater amounts of diffused surface water to drain onto Bihuniak’s lower land,