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Environmental Considerations

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I. "Navigable" Waters and its Various Definitions and Impacts to Property

Navigability for Title

Under the Equal Footing Doctrine, "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable []or tidally influenced" and "[t]he United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591, 132 S.Ct. 1215, 1227-28 (2012). "Navigable" for navigability for title purposes are "public navigable rivers in law which are ***navigable in fact***" which means "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.*, 565 U.S. at 592, 132 S.Ct. at 1228, quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871) (emphasis added). The test articulated in *The Daniel Ball* is applied slightly differently for different sub-types of navigability. "Each application of [the *Daniel Ball*] test … is apt to uncover variations and refinements which require further elaboration." *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406, 61 S.Ct. 291, 299 (1940).

Navigability Implications: River Islands

In addition to the beds or rivers "navigable in fact" the State of Montana owns "all lands that at any time in the past constituted an island or part of an island in a navigable stream or lake." Mont. Code Ann. § 77-1-102(1)(b); *See also,* § 70-1-202: ("The state is the owner of: (1) all land below the water of a navigable lake or stream … (4) all property of which there is no other owner." Dynamic rivers complicate the analysis of ownership of river islands and banks. The code provides as follows:

- **§ 70-18-201. Alluvion or accretion – increase of bank.** "Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right-of-way over the bank."
- **§ 70-18-203. Islands formed in navigable stream**. "Islands and accumulations of land formed in the beds of streams which are navigable belong to the state if there is no title or prescription to the contrary."
- **§ 70-18-204. Island formed in nonnavigable stream**. "An island or accumulation of land formed in a stream which is not navigable belongs to the owner of the shore on that side where the island or accumulation is formed or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river."
- **§ 70-18-205. Island formed by division of stream**. "If a stream navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to such owner."
- **§ 70-18-206. Sudden change in river or stream**. [Applicable to water bodies "adjudicated as navigable for title purposes" and details the process for "affected owner(s) seeking title to" former river channels through the DNRC and State Land Board.]

If a channel around an island dries up, it is obviously no longer an island. *See,* the Montana Supreme Court's definition of accretion from *Mont. Dept. of State Lands v. Armstrong:* "Accretion occurs when a stream gradually and imperceptibly changes its course over a period of time, resulting in sedimentary deposits on one bank along the water line." 251 Mont. 235, 239 (1992). Thus, "the property boundary line shifts with the water line … [t]he riparian owner, absent exception or reservation, who owns land along the bank [which has accreted] retains land rights as long as the stream remains adjacent to the land." *Id.* Compare this to avulsion: "[a]vulsion occurs when a stream suddenly changes its channel and forms a new one … If avulsion moves a stream away from a landowner's property, the property boundary line remains where it had previously been." *Armstrong*, 251 Mont. at 238.

While "islands arising from the riverbed can also be enlarged by accretion and such accreted lands attach to the island" *Armstrong.* "Accretions belong to the land from which they began." *Id., citing Nielsen v. Stratbucker,* 325 N.W.2d 391 (1982). In *Armstrong*, the Court explained that in situations where an island attaches to the bank, the question becomes "whether a land form gains permanence prior to attaching to the riparian shore" because "[t]itle however, does not leap frog from the State to the riparian owner merely because a sandbar arising above the high water mark is also eventually attached to the riparian shore." *Id., citing Nielsen*. Because the geomorphologists established that there was "evidence of permanence prior to the islands ceasing to be surrounded by river channels at low water" the Court held "such tracts were

discernable islands prior to attaching to the adjoining lands and such islands and all accretions thereto are owned by the State of Montana."

Navigability Implications – "Montana's Public Trust Easement"

Notwithstanding the complications that accretion or avulsion may have upon riparian land ownership, in general, Montana riparian landowners own to the low water mark. *See*, Mont. Code Ann. § 70-16-201 ("Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.").

While Navigability for title is governed by federal law, "[n]avigability for use is a matter governed by state law." *Mont. Coalition for Stream Access, Inc. v. Curran,* 210 Mont. 38, 51, 682 P.2d 163, 170 (1984). Relying on Mont. Const. Art. 9, § 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law[]") the *Curran* Court held:

> "In essence, the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public. **The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant**. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters. … under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. …. We add the cautionary note that **nothing herein contained in this opinion shall be construed as granting the public the right to enter upon or cross over private property to reach the State-owned waters** hereby held available for recreational purposes. The limit to the public's right to use these waters is, under normal circumstances, the high water mark of the waters. … we hold that **the public has a right to use the state-owned waters to the point of the high water mark except to the extent of barriers in the waters**. In case of barriers, **the public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights**."

210 Mont. at 52-55, 682 P.2d at 170-72, citing *Gibson v. Kelly,* 15 Mont. 417, 39 P. 517 (1895).

Thus, *Curran* expanded the scope of the public's rights on "navigable" waters from the "angler's statute" codified earlier at Mont. Code Ann. § 87-2-305, which provides: "Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof of the state of Montana and all rivers, sloughs, and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose." However, the Montana Supreme Court has been true to the constraints it imposed in *Curran* related to crossing private lands to get to public waters. *See Public Lands Access Ass'n v. Bd. Of Cnty. Com'rs of Madison County*, 373 Mont. 277, 299 (2014) (finding that the county's use of a bridge over private land gave public access in surface waters adjacent to private land – "I]t is settled law in Montana that the public may use the beds of non-navigable rivers, up to the high water mark … Our precedent makes manifestly clear that this public use does not constitute a compensable taking of private property: No title passes with the use right."); *Ryan v. Harrison & Harrison Farms L.L.L.P*., 306 Mont. 534 (2001) (nonciteable opinion) (plaintiff could not cross private property to access man-made lake).

In short, the area between the high-water mark and the low-water mark are subject to "Montana's public trust easement." *Ash v. Merlette*, ¶ 10. The following statutes provide further guidance:

- **§ 23-2-301. Definitions.**

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, that totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other artificial obstacle to the natural flow of water.

(7) "Lake" means a body of water where the surface water is retained by either natural or artificial means and the natural flow of water is substantially impeded.

(8) "Occupied dwelling" means a building used for a human dwelling at least once a year.

(9) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks.

(10) "Recreational use" means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise

prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses.

- **§ 23-2-302. Recreational use permitted – limitations – exceptions.**

(1) Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

(2) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the landowner: (a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water; (b) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural watercourse; (c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access; (d) big game hunting; (e) overnight camping unless it is necessary for the enjoyment of the surface water and the campsite is not within sight of any occupied dwelling or the campsite is more than 500 yards from any occupied dwelling, whichever is less; (f) the placement or creation of any permanent duck blind, boat moorage, or any other permanent object; (g) the placement or creation of any seasonal object, such as a duck blind or boat moorage, unless necessary for the enjoyment of that particular surface water and unless the seasonal objects are placed out of sight of any occupied dwelling or more than 500 yards from any occupied dwelling, whichever is less; (h) use of a streambed as a right-of-way for any purpose when water is not flowing in the streambed.

Navigability for Federal Jurisdictional Purposes – Clean Water Act

Unlike the strict test for navigability in fact, "congressional authority over the waters of this Nation does not depend on a stream's 'navigability.'" *Kaiser Aetna,* 444 U.S. at 174, 100 S.Ct. at 389-90. Rather, "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or indeed, water, is involved." *Id*., 444 U.S. at 174, 100 S.Ct. at 390. "Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable water of the United States.'" *Id*. The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC 1251(a). Relevant to environmental considerations in Montana, the CWA prohibits discharges of "pollutants" to "navigable waters" from "point sources" without a permit.

"Pollutants"	***"Navigable Waters"***	***"Point Sources"***
"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water" and "disease causing agents." 33 USC 1362(6), (13).	"the waters of the United States, including the territorial seas" 33 USC 1362(7).	"any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater dischargers and return flows from irrigated agriculture." 33 USC 1362(14).

"Under section 402 of the [CWA], an NPDES permit is required where a point source discharges a pollutant to 'waters of the United States'" and "section 404 requires a permit before dredged or fill material may be discharged to 'waters of the United States'" subject to some regulatory exemptions. 88 Fed. Reg 3010 (Jan. 18, 2023).

See the following statutory and regulatory exempt activities and exceptions from permitting at https://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section-404-Exemptions/.

The definition of "WOTUS" is important because it determines which types of water bodies on any particular property are subject to the Clean Water Act's restrictions. In short, the geographic scope of the CWA reaches well beyond waters that are "navigable in fact." Below is a brief timeline of the evolution of the definition:

- ✓ ***U.S. v. Riverside Bayview Homes, Inc*. 474 U.S. 121 (1985):**

Adjacent wetlands are "inseparably bound up" with adjacent waters, and because "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source" the Court concluded that Congress's definition of "waters of the United States" be interpreted broadly. 474 U.S. at 132-34. Thus, wetlands adjacent to navigable waters included because adjacent wetlands impact the quality of "lakes, rivers, and streams" even when the water in the adjacent wetlands would not reach the navigable water year-round.

- ✓ **1988 "Migratory Bird Rule"**

Following *Riverside Bayview Homes*, the EPA promulgated the 'migratory bird rule' in 1988. 53 Fed. Reg. 20764 (June 6, 1988). The 1988 Rule provided that WOTUS include waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties; or which are or

would be used as habitat by other migratory birds which cross State lines; or which are or would be used as habitat for endangered species; or used to irrigate crops sold in interstate commerce." 53 Fed. Reg. 20765.

- ✓ ***Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC")**

The use of "isolated" non-navigable intrastate ponds by migratory birds is *not* a sufficient basis for CWA jurisdiction. The Court in SWANCC narrowed the scope of which waterbodies qualify as navigable, holding that the CWA does not "extend to ponds that are not adjacent to open water" and only those waters which are "practically navigable" are navigable. 531 U.S. at 168. Importantly, the Court explained: "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." 531 U.S. at 172.

- ✓ ***Rapanos v. U.S.*, 547 U.S. 715 (2006)** (plurality opinion):

Justice Scalia	Justice Kennedy
WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes . . . [and] only those wetlands with a continuous surface connection" to such bodies of water. *Id*. at 733. While Scalia's interpretation was not as widely applied as Kennedy's, the EPA and Army Corps under the Trump Administration promulgated a set of rules that largely followed Scalia's interpretation.	To constitute a WOTUS, "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. at 759. Wetlands possess the 'significant nexus' if the wetlands "either alone or in combination with similarly situated lands in the region, significantly alter the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"' *Id.* at 780. *U.S. v. Gerke*, 464 F.3d 723 (7th Cir. 2006), *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), and *US v. Robison*, 505 F.3d 1208 (11th Cir. 2007) all applied Kennedy's significant nexus test.

- ✓ **2015 Rule under the Obama Administration**

In 2015, the EPA and Army Corps under the Obama Administration set forth the following categories of jurisdictional waters under the "Clean Water Rule." 80 Fed. Reg. 37,054 at -57 (June 29, 2015): **(1) Traditional Navigable Waters; (2) Interstate Waters; (3) Territorial Seas; (4) Impoundments of Jurisdictional Waters; (5) "Tributaries"** which are "waters that are characterized by the presence of physical indicators of flow—bed and banks and ordinary high water mark—and that contribute flow directly or indirectly to a traditional navigable water,

an interstate water, or the territorial seas[;]" **(6) "Adjacent" Waters** which are "bordering, contiguous, or **neighboring[1],** including waters separated from other ''waters of the United States'' by constructed dikes or barriers, natural river berms, beach dunes and the like" or "connect segments of, or are at the head of, a stream or river" and include "wetlands, ponds, lakes, oxbows, impoundments, and similar water features" and **(7) "Case-Specific Significant Nexus" Waters.**

- ✓ **2020 Rule under the Trump Administration**

In 2020, the EPA and Army Corps under the Trump Administration repealed the 2015 "Clean Water Rule" and promulgated the "Navigational Waters Protection Rule" (NWPR) which became effective on June 22, 2020. 85 Fed. Reg. 22,250-01. The new rule limited WOTUS to "relatively permanent flowing and standing waterbodies that are traditional navigable waters[2] in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters." 85 Fed. Reg. 22,273.

Wetlands *included* in the 2020 rule:	Wetlands *not* included in the 2020 rule
Wetlands that are "inundated by flooding from a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water in a typical year." 85 Fed. Reg. 22,280. And, "wetlands separated from jurisdictional waters *only* by a natural berm, bank, dune, or other similar natural feature *are* adjacent wetlands. These natural features are indicators of a sufficient hydrologic surface connection between the jurisdictional water	"Jurisdiction of wetland[s are] severed when, in a typical year, an artificial feature does not allow for a direct hydrologic surface connection between the wetland and the jurisdictional water, or the wetland is not inundated by flooding from a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water." 85 Fed. Reg. 22,279-80. Additionally, "[p]hysically remote isolated wetlands … [t]hat do not abut, are separated by more than a natural berm from, are not inundated by flooding in a typical year from,

[1]"Neighboring" waters under the 2015 rule were: "Waters located in whole or in part within…

1. 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary
2. the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary
3. 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes."

[2] "Traditional navigable waters" are "all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 85 Fed. Reg. 22,281, citing 33 CFR 328.3(a)(1), originally coming from *The Daniel Ball*, 77 U.S (10 Wall.) 557 (1870). The rule notes that the "summary articulated by the Supreme Court in [*PPL*] 2012 generally reflects the basic structure of the longstanding jurisdictional test for 'traditional navigable waters.'" 85 Fed. Reg. 22,281.

and the wetland[.]" 85 Fed. Reg. 22,280.	and do not have a direct hydrologic surface connection in a typical year to a jurisdictional non-wetland water[] are not adjacent wetlands under the final rule." 85 Fed. Reg. 22,280.

The NWPR was vacated in August 2021 by the U.S. District Court for Arizona, after which the agencies implement the pre-2015 regulatory framework. *See, Pascua Yaqui Tribe v. EPA*, 557 F.Supp.3d 949 (D. Ariz. 2021).

- ✓ **2023 Rule under the Biden Administration** (which will be revised/repealed post-*Sackett*, discussed *infra*)

In 2023, the EPA and Army Corps under the Biden Administration repealed the 2020 Rule and promulgated a revised definition of "Waters of the United States" at 88 Fed. Reg. 3004 (Jan. 18, 2023). Generally, "[w]hen upstream waters significantly affect the integrity of waters for which the Federal interest is indisputable – the traditional navigable waters, the territorial seas, and interstate waters – this rule ensures that Clean Water Act programs apply to protect those … waters." 88 Fed. Reg. 3005. Thus, the following waters were "WOTUS" under the 2023 rule:

(1) "Paragraph (a)(1) Waters" - "traditional navigable waters, the territorial seas, and interstate waters ('paragraph (a)(1) waters');"
(2) "Paragraph (a)(2) Impoundments" - "impoundments of 'waters of the United States'"
(3) "Jurisdictional Tributaries" – "tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard[3] of the significant nexus standard[4];"
(4) "Jurisdictional Adjacent Wetlands" – "wetlands adjacent to paragraph (a)(1) waters, wetlands to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard, and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard;"
(5) "Paragraph (a)(5) Waters" – "intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard."

[3] The rule provides that "[t]he 'relatively permanent standard' refers to the test to identify relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters." 88 Fed. Reg. 3006.

[4] "The 'significant nexus standard' refers to the test to identify waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters – i.e. the paragraph (a)(1) waters." 88 Fed. Reg. 3006.

88 Fed. Reg. 3005-06.

- ✓ ***Sackett v. EPA*, No. 21-254, Slip Op. 598 U.S. ____ (May 25, 2023)**

Sackett's "WOTUS", according to the EPA, was a wetland "adjacent to" or neighboring an unnamed tributary which was situated on the other side of a 30' road, which feeds into a non-navigable creek, which feeds into Priest Lake. The 9th Circuit agreed with the EPA, concluding that wetlands with an ecologically significant nexus to a traditional navigable water (i.e. Priest Lake) are WOTUS. In other words, the 9th Circuit applied the "significant nexus" standard. The Supreme Court of the United States, however, reversed and held that adjacent wetlands are only WOTUS if the adjacent body of water is a WOTUS (i.e. a relatively permanent body of water connected to a traditional interstate navigable water) and has a continuous surface connection with that water. In other words, it is difficult to determine where the WOTUS water ends and the wetland begins. The Supreme Court criticized the 2023 Rule which included "intrastate lakes and ponds, streams or wetlands" that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters. Syllabus, *3, quoting 88 Fed. Reg. 3006, 3143. Finding a 'significant nexus' however, "continues to require consideration of a list of open-ended factors." *Id*. Instead, the Court held that "the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" Slip Op. *14.

> "Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read 'navigable' out of the statute, holding that it at least shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'… The EPA argues that 'waters' is 'naturally read to encompass wetlands' because the 'presence of water is universally regarded as the most basic feature of wetlands.' But that reading proves too much. Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as 'waters.' This argument is also tough to square with *SWANCC*, which held that the Act does not cover isolated ponds. … Finally, … [i]t is hard to see how the State's role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water. … But what wetlands does the CWA regulate? Section 1344(g)(1) cannot answer that question alone because it is not the operative provision that defines the Act's reach. … because the adjacent wetlands in § 1344(g)(1) are 'included' within 'the waters of the United States,' **these wetlands must qualify as 'waters of the United States' in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA**."

Slip Op. *15-19 (internal citations and quotations omitted). The Court also disposed of the 'significant nexus' test: "the meaning of 'waters' is more limited than the EPA believes … And,

in any event, the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it." Slip Op. *24. Further, EPA's expansive interpretation resulted in due process concerns for landowners facing severe criminal sanctions for violations of the CWA (which need not be intentional, and may only be negligent): "the boundary between a 'significant' and an insignificant nexus is far from clear … the test introduces another vague concept – 'similarly situated' waters – and then assesses the aggregate effect of that group based on a variety of open-ended factors that evolve as scientific understandings change. This freewheeling inquiry provides little notice to landowners of their obligations under the CWA." Slip Op. *24-25.

A final rule implementing *Sackett* was issued on August 29, 2023, and will be published in the Federal Register soon. The pre-publication version is available online at https://www.epa.gov/wotus/amendments-2023-rule.

If you or your client is engaging activity in Montana near water or involving water (regardless of it being a "WOTUS") there are other types of permits that *may* be required for that activity:

- **MPDES Permits** which regulate discharges into state surface waters (administered by the Montana Department of Environmental Quality ("DEQ"). See, MCA Title 75, Chapters 5 and 6 and DEQ's website.
- **310 Permits** which seek to protect "natural rivers and streams and the lands immediately adjacent to them" from "unauthorized projects … to keep soil erosion and sedimentation to a minimum[.]" See, "The Natural Streambed and Land Preservation Act of 1975" codified at MCA Title 75, Chapter 7, Part 1. County Conservation Districts administer the 310 Act.
- **Beneficial Water Use Permits** for new uses of water. The Montana Department of Natural Resources and Conservation ("DNRC") administers permits for post-1973 water rights and change applications of existing (a.k.a. pre-1973) water rights under the Montana Water Use Act. See, MCA Title 85, Chapter 2, Part 3 and DNRC's website.

II. The National Historic Preservation Act ("NHPA")

The NHPA was passed in 1966 to "encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and [] assist State and local governments, Indian tribes and Native organizations, and the National Trust to expand and accelerate their historic preservation programs and activities." 54 U.S.C. § 300101. The NHPA is triggered when federal projects, or work that is federally funded, impact historic structures or sites. *See*, "National Historic Preservation Act," *National Park Service*, National Historic Preservation Act - Historic Preservation (U.S. National Park Service) (nps.gov). The law created an advisory council and the National Register of Historic Places that officially listed buildings, structures, districts, objects, and archaeological sites with historical significance. *Id.*

The NHPA is primarily a procedural statute. "A close statutory analog to NHPA is the National Environmental Policy Act ('NEPA'). *San Carlos Apache Tribe v. U.S.*, 417 F.3d 1091 (9th Cir. 2005); *see also United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993) ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment."). The Act does not provide for suits by private individuals. *San Carlos Apache Tribe v. U.S.*, 417 F.3d at 1099. As the NHPA does not provide an independent basis for review, actions brought under the Act are governed by the Administrative Procedure Act ("**APA**"). *See Mont. Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127 (D. Mont. 2004) (BLM sale of oil-and-gas leases to energy company). This obviously implies that remedies are not available through NHPA, but only through the APA. *San Carlos Apache Tribe v. U.S.*, 417 F.3d at 1099.

Once it is determined that the government action is an undertaking[5], the regulations promulgated under the NHPA require the federal agency to: "make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F .R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse[6], 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9(c)." See, *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800 (9th Cir. 1999). The NHPA process must be completed before the NEPA process is concluded with either a categorical exclusion, environmental assessment, or environmental impact statement. In short, any undertaking on federal land, using federal funds, or requiring federal permits must comply with the NHPA. Any project on State Land must comply with Montana's Antiquity Act via Montana's State Historic Preservation Office.

a. Montana's State Historic Preservation Office ("SHPO")

Montana's SHPO ensures that Federal and state projects "consider the effects of their work on cultural resources" pursuant to Montana's Antiquities Act (Mont. Code Ann. §§ 22-3-421, et seq.) and the NHPA. *See*, Montana Historical Society Webpage regarding "Consulting with Montana SHPO" available at https://mhs.mt.gov/Shpo/Archaeology/ConsultingWith. Montana's

[5] "Undertaking" "means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including – (1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 54 U.S.C. § 300320.

[6] Relevant regulations have defined an undertaking having an adverse effect on a historic site when it "may alter characteristics of the property that may qualify the property for inclusion in the National Register ... [such as] alteration to features of a property's location, setting, or use[.]" 36 C.F.R. § 800.9(a); *see also* 36 C.F.R. **§** 800.2(*o*). "Adverse" effect may be found when the undertaking may diminish the integrity of the property's location, setting, feeling, or association. 36 C.F.R. § 800.9(b). This includes physical destruction, the introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting and transferring the property. *Id.*

SHPO recently released a 2023 Consultation Guide for this purpose, available online at https://mhs.mt.gov/Shpo/docs/ConsultingWith/MTSHPO_ConsultationGuide2023.pdf.

Generally, projects, activities, or programs funded by the federal government or projects on state-owned property which are deemed "heritage properties" (defined as "any district, site, building, structure, or object located upon or beneath the earth or under water that is significant in American history, architecture, archaeology, or culture." *See,* Mont. Code Ann. § 22-3-421(4)) require consultation with SHPO. Montana's Antiquities Act applies to projects on state-owned property only. However, the Montana Environmental Policy Act ("MEPA") could require additional review via permitting, licensing, or reclamation applications on non-state-owned lands. If the undertaking will occur within the boundaries of a reservation in Montana, consultation with the Tribal Historic Preservation Office(s) ("THPO") is required. SHPO provides the following step-by-step process in their latest edition of the Handbook:

1. **Step 1: Consult with SHPO and other applicable agencies and parties:**

- Define the "Undertaking," the area(s) potentially affected by the project, and the parties involved;
- File a search request with SHPO – a.k.a. a "File Search" on the Montana Cultural Records Database for the presence or absence of documented historic, archaeological, or Traditional Cultural Property sites;
- SHPO will reveal the results of the File Search and make recommendations regarding a need to conduct any further investigation to identify historic properties.

2. **Step 2: Identify the Historic Properties and Determine Eligibility for Listing**

- Survey the site. This cannot be done when snow obscures the ground surface.
- Define the Site Type: (Pre-Contact Sites (pre-1500); Historic Sites (post-contact, 1500-1975); Districts (a collection or combination of sites with shared historic context); Archaeological Sites; Architectural Sites; Traditional Cultural Properties (places eligible for listing on the National Register because of their association with cultural practices or beliefs of a living community that are rooted in that community's history and are important to maintaining the continuing cultural identity of the community); Paleontological Resources)
- Request a Smithsonian Number
- Evaluate site eligibility for the National Register of Historic Places (until a site is formally determined not eligible for listing, it must be treated as though it were eligible). To be eligible for listing, the property must be "significant" i.e. it "must represent a significant part of the history, architecture, archaeology, engineering, or culture or an area, and it must have the characteristics that make it a good representative of properties

associated with that aspect of the past." Handbook, p. 34. The following criteria indicate the relative "Significance" of a site:

Association with events that have made a significant contribution to the broad patterns of our history: Examples of properties significant under Criterion A include: the site of a battle, a hilltop associated in oral historical accounts with the founding of a Native Nation or society, a trail associated with western migration, or a downtown building representing a town's growth as the commercial focus of the area, a stone circle site contributing to patterns of precontact landscape use.

Association with the lives of persons significant to our past: Examples of properties significant under Criterion B include: the home of an important labor organizer, the studio of a significant artist, or the business headquarters of an important industrialist.

Embodiment of the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction: Examples of properties significant under Criterion C include: a house or commercial building representing a significant style of architecture, a designed park associated with a particular landscape design philosophy, a bridge or dam representing engineering or technological advances, or the only remaining example of a standard design type.

Yielded, or may be likely to yield, information important to prehistory or history. Examples of properties significant under Criterion D include: an archaeological site with sufficient material remains to test a hypothesis, corroborate current research, or reconstruct the sequence of archaeological cultures. An irrigation system significant for the information it will yield toward early engineering practices may be eligible even though it is now filled in and no longer retains the appearance of an open canal.

- ➔ If determined to be NOT ELIGIBLE for listing, SHPO will provide a "No Historic Properties Affected" documentation in its report, and the NHPA Section 106 process is concluded, the project proceeds as previously planned.[7]
- ➔ If UNRESOLVED, additional testing, field work, surveying, and consultation will be required.
- ➔ IF UNRESOLVED AND SHPO DISAGREES WITH THE FEDERAL AGENCIES, the Keeper of the National Register of Historic Places will make a final decision regarding eligibility.
- ➔ If ELIGIBLE for listing, the effect of the undertaking must minimize the effect on the historic properties via Step 3. *NOTE:* properties determined to be eligible are not actually

[7] SHPO's findings during consultation may be appealed to the Director of the Montana Historical Society or District Court. *See*, Mont. Code Ann. § 22-3-429.

listed in the Register but must be treated as though they were. To be listed in the Register, there is a separate nomination and review process involving the Montana Historic Preservation Review Board and the National Park Service.

3. **Step 3: Effect Determinations**: Determine if the Undertaking will have effects on the Historic Properties (either "No Historic Properties Affected" or "No Adverse Effect" or "Adverse Effect").

4. **Step 4: Resolve the Adverse Effects.**

ANY QUESTIONS, PLEASE CONTACT:

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