VOLUME NO. 37 OPINION NO. 15

SOIL AND WATER CONSERVATION - Conservation Districts, Natural Streambed and Land Preservation Act; PUBLIC LANDS - Natural Streambed and Land Preservation Act; INDIANS - Reservations, Natural Streambed and Land Preservation Act, REVISED CODES OF MONTANA, 1947 - Title 26, ch. 15.

HELD: 1. The Montana Natural Streambed and Land Preservation Act (sections 26-1510 through 26-1523, R.C.M. 1947) is not applicable to projects undertaken by the federal government either on or off federal lands unless the Congress consents to such regulation.

2. The Act is applicable to non-federal projects on federal lands unless a specific act of Congress preempts state regulation, or unless the state regulation inherently conflicts with applicable federal regulation. Preemption questions in such instances must be considered on a case-by-case basis as they arise.

3. The Act is applicable to private projects (as defined by section 26-1512, R.C.M. 1947) on state lands. State or local projects (as defined by section 26-1502, R.C.M. 1947) are regulated by the Fish and Game Commission under sections 26-1501 through 26-1509, R.C.M. 1947.

4. The Act does not apply to Indian projects within Indian reservations. The Act does apply to non-Indian projects on non-Indian lands within Indian reservations to the extent that the Act does not conflict with tribal self-government. Answers to such questions of conflict will have to be answered on a case-by-case basis as they arise.

24 March 1977

Valley County Conservation District
219 Second Avenue South
Glasgow, Montana 59230

Green Mountain Soil and Water
Conservation District
P.O. Box 461
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Gentlemen:

You have requested my opinion on the following question:

> Does the Montana Natural Streambed and Land Preservation Act of 1975 (Title 26, chapter 15, R.C.M. 1947) apply to projects constructed on state, federal or Indian Reservation lands?

The Natural Streambed and Land Preservation Act (sections 26-1510 through 26-1523, R.C.M. 1947) was enacted in 1975 to protect and preserve streams in Montana through local control. The Streambed Act provides for local approval of projects which physically alter or modify the bed and banks of a natural perennial flowing stream. The Streambed Act complements pre-existing statutes, sections 26-1501 through 26-1509, R.C.M. 1947, which empower the Fish and Game Commission to approve stream modification projects undertaken by an "agency of the state government, county, municipality, or other subdivision of the state of Montana." (Section 26-1502.) The Streambed Act, on the other hand, applies to projects undertaken by "any natural person, corporation, firm, partnerhip, association, or other legal entity" not covered by section 26-1502, quoted above.

The applicability of the Streambed Act to state, federal and reservation lands involves complex legal issues which are best addressed by considering each type of project separately.

1. Federally-construed projects on federal lands.
In the first place, it is doubtful that the Legislature intended for the Act to apply to projects constructed by the federal government. Such projects are clearly not covered by pre-existing statutes, which apply only to activities by state and local government entities (section 26-1502). As noted above, the Act itself applies to activities by "any natural person, corporation, firm, partnership, association or other legal entity." (Section 26-1512.) If the federal government is to be covered, it must be as an "other legal entity." The ejusdem generis rule of statutory construction, however, would lead to the conclusion that "other legal entity" refers back to entities similar to those already listed--natural persons, corporations, firms, partnerships and associations. Governmental entities in general would appear to be excluded. Further, the pre-existing statutes, which the Legislature clearly intended to cover governmental activities (even if only state government), do not cover federal activities. In fact, a specific directive was included (section 26-1508) requiring the Fish and Game Commission to "observe and report" on federal activities and to formally notify federal agencies of the State's objections to any project. If the State were exerting regulatory authority over the federal projects such a requirement would be entirely superfluous. If the Streambed Act itself were intended to regulate federal projects, the Legislature would have repealed section 26-1508 when the Act was enacted in 1975. This analysis leads to a conclusion that as an initial matter, the Legislature never intended to regulate federally-constructed projects whether they occur on federal or non-federal land.

Even if the Act were construed to apply to federally-constructed projects, it is doubtful that state regulation could be upheld as a matter of constitutional law. The federal Constitution and statutes are the supreme law of the land, state constitutions and statutes notwithstanding. (Constitution, Art. VI, cl.2.) It has long been held that the states have no power to retard, impede, burden or control the operations of laws enacted by Congress in execution of its constitutionally-delegated powers (McCulloch v. Maryland, 17 U.S. 315). See also, Arizona v. California,

283 U.S. 423, 451 (1930); Mann v. U.S., 347 F.2d 970, 975 (9th Cir. 1965). The importance to a state of its own law is immaterial if it conflicts with a federal law. (Free v. Bland, 369 U.S. 663, 666 (1962).) Congress can authorize state regulation of federal functions, but such authorization must be clear and unequivocal and cannot be implied. (Kentucky v. Ruckleshaus, 497 F.2d 1172 (6th Cir. 1974); Mayo v. U.S., 319 U.S. 441, 448 (1943).)

Thus, the general rule is that if an activity is undertaken by the federal government it is not subject to state regulation or control unless Congress specifically invites that regulation and control.

2. Non-federal projects on federal lands. Projects undertaken by either state governmental entities (section 26-1502) or by "persons" as defined in section 26-1512 are subject to the Act (or the pre-existing statutes). With certain narrow exceptions not applicable here, state police power as exercised through the Act is not excluded from federal lands simply because of their federal ownership. It should be remembered, however, especially with regard to activities on federal land, that Federal law may be preemptive of state regulation. Just last year, the Supreme Court held (Kleppe v. New Mexico, 44 U.S.L.W. 4878, 4882 (1976)) that a state:

> [U]ndoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause (of Article IV of the Constitution)... . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause (of Article IV of the Constitution).

The mere existence of federal law does not necessarily preempt state regulation. The Supreme Court held in Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963):

> The test of whether both federal and state regulations may operate or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

Federal law should not be deemed preemptive of state regulation except for "persuasive reasons" such as a showing that compliance with both is a physical impossibility or where Congress evidences a clear intent to preempt state control (Id.) State law will fall only where it stands as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress." Perez v. Campbell, 402 U.S. 637, 649 (1971).

Thus the mere location of a non-federal project on federal land alone does not preempt state regulation under the Streambed Act. However, if there is a federal law with which the Streambed Act would conflict under the tests discussed above, then the state regulation must give way. It is not within the scope of this opinion to attempt to wade through the many federal laws which may apply to projects covered by the Streambed Act so as to raise a preemption question. If specific issues arise as to specific projects and federal laws, these can be addressed by separate opinions.

3. Non-federal activities on state-owned lands. This heading would encompass projects undertaken both by private individuals and by state governmental agencies. The latter are clearly covered by section 26-1502 which gives the Fish and Game Commission regulatory authority over activities conducted by an agency of "state government, county, municipality, or other subdivision of the state of Montana." Privately constructed projects on state lands are clearly regulated by the Streambed Act (26-1512(2)).

It may at times be difficult to determine whether a given project is state or private, since there may be state involvement in a private project. If an agency merely authorizes a project as by issuing a permit, lease or easement, the project is still private and is covered by the Streambed Act. If, however, the project is being directed and controlled by the agency for state or public benefit then it is a state project and comes within Fish and Game Commission jurisdiction.

4. Non-federal projects constructed within an Indian Reservation. The question of whether the Streambed Act applies within Indian reservations is a difficult and complex one, and any answers given herein may have to be modified since the law in this area is constantly being refined.

First, as to projects constructed by Indians within the reservation, the Streambed Act does not apply. It was recently held that local land use regulation is inapplicable to Indian use of Indian lands, even where Congress has granted the state civil jurisdiction over the reservation under "Public Law 280" (18 U.S.C., section 1162) (Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975).) See also, Bryan v. Itasca County, 44 U.S.L.W. 4832 (1976).

Regardless of whether the Streambed Act might be applied to Indian projects under Public Law 280 (25 U.S.C., sections 1321-1326) it is sufficient to note that the State of Montana has not acted thereunder to assume civil jurisdiction over any reservation.

Second, projects constructed by non-Indians on non-Indian land within a reservation may be regulated under the Streambed Act if the tribe does not regulate such activities itself. According to Williams v. Lee, 358 U.S. 217 (1959), a state may regulate on-reservation non-Indian activities up to the point that doing so would interfere with tribal self-government. This is a determination which will have to be made in individual instances depending upon the tribal ordinances involved.

THEREFORE, IT IS MY OPINION:

1. The Montana Natural Streambed and Land Preservation Act (sections 26-1510 through 26-1523, R.C.M. 1947) is not applicable to projects undertaken by the federal government either on or off federal lands unless the Congress consents to such regulation.

2. The Act is applicable to non-federal projects on federal lands unless a specific act of Congress preempts state regulation, or unless the state regulation inherently conflicts with applicable federal regulation. Preemption questions in such instances must be considered on a case-by-case basis as they arise.

3. The Act is applicable to private projects (as defined by section 26-1512, R.C.M. 1947) on state lands. State or local projects (as defined by section 26-1502, R.C.M. 1947) are regulated by the Fish and Game Commission under sections 26-1501 through 26-1509, R.C.M. 1947.

4. The Act does not apply to Indian projects within Indian reservations. The Act does apply to non-Indian projects on non-Indian lands within Indian reservations to the extent that the Act does not conflict with tribal self-government. Answers to such questions of conflict will have to be answered on a case-by-case basis as they arrive.

Very truly yours,

MIKE GREELY
Attorney General