

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 2

LAND USE - Soil Conservation Districts: limitations on power to regulate under Streambed Preservation Act;  
SOIL AND WATER CONSERVATION - Districts: scope of authority under Streambed Preservation Act;  
WATER AND WATERWAYS - Streams: projects subject to regulation under Streambed Preservation Act;  
MONTANA CODE ANNOTATED - Sections 75-7-102, 75-7-103(5), 75-7-103(6), 75-7-112, 76-15-701.

HELD: The Natural Streambed and Land Preservation Act of 1975 does not give a local conservation district the power to review the impact of a proposed pipeline on the land between stream crossings or to condition approval of the project on its effect on the intervening land.

19 January 1981

Robert L. Deschamps, III  
Missoula County Attorney  
Missoula County Courthouse  
Missoula, Montana 59801

Dear Mr. Deschamps:

You have requested my opinion on the following question:

Can a local soil conservation district consider the impact of a proposed pipeline on the land between stream crossings?

According to your inquiry, the Missoula County Soil Conservation District is currently reviewing proposed stream crossing projects for a pipeline through a portion of the county. The pipeline, of course, will cross not only the streams themselves, but also the land between the streams. The district supervisors have received numerous protests from landowners whose property lies directly in the contemplated pipeline route between the stream crossings, but is not actually adjacent to any perennial streams. The landowners argue that approval of the stream crossings necessarily amounts to approval of the route between the streams. Therefore, they contend, the supervisors must consider the effect of the pipeline on the intervening land when

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deciding whether to approve the stream crossings. In 1975 the Montana Legislature passed the Natural Streambed and Land Preservation Act as part of the state's policy to protect and preserve rivers, streams, and adjacent property in their natural or existing states. Under the Act, local conservation districts are given the authority to review and grant permits for proposed "projects" involving streams within their respective jurisdictions, with the purpose of keeping soil erosion and sedimentation to a minimum. §§ 75-7-102, 75-7-112, MCA. The "projects" covered by the Act are defined as physical alterations or modifications of perennial-flowing streams or rivers and their beds and immediate banks. § 75-7-103(5), (6), MCA.

The scope of the Natural Streambed and Land Preservation Act is further defined in the minimum standards and guidelines established by the Board of Natural Resources and Conservation and incorporated in rules adopted by the Missoula County Soil Conservation District. The regulations contain a list of the factors that are to be considered by a conservation district in its review of a proposal. ARM § 36.2.404. Projects are described in terms of structures and development within a "project area," which includes the area within the mean high water mark on both sides of a stream and the immediate banks of the stream. ARM §§ 36.2.404(2), 36.2.405.

Under both the Natural Streambed and Land Preservation Act itself and the regulations implementing the Act, the scope of the projects subject to review and approval by a conservation district has been limited to those actually located at the site of a stream and the immediately adjacent property. Therefore, although the proposed pipeline through Missoula County will necessarily cross the land between stream crossings as well as the streams themselves, it is only those portions of the pipeline at the stream crossings that the district supervisors have the power to approve or disapprove pursuant to the Natural Streambed and Land Preservation Act.

This interpretation is strengthened by the fact that the Legislature has specifically given conservation district supervisors the authority to regulate the use of the land within the district in a different section of the codes. Section 76-15-701(1), MCA, provides that the district supervisors may "formulate regulations

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governing the use of lands within the district in the interest of conserving soil and water resources and controlling erosion." Thus, the districts are authorized to address the same concerns about land use in their jurisdictions through regulations as they are about stream projects through the review system established by the Natural Streambed and Land Preservation Act.

THEREFORE, IT IS MY OPINION:

The Natural Streambed and Land Preservation Act of 1975 does not give a local conservation district the power to review the impact of a proposed pipeline on the land between stream crossings or to condition approval of the project on its effect on the intervening land.

Very truly yours,

MIKE GREELY  
Attorney General