

VOLUME NO. 40

OPINION NO. 71

BRIDGES - Stream protection reporting requirements on public projects;
HEALTH AND ENVIRONMENT - Stream protection reporting requirements on public projects, work bridges;
PUBLIC PROJECTS - Stream protection reporting requirements, work bridges;
SOIL AND WATER CONSERVATION - Stream protection reporting requirements on public projects, work bridges;
MONTANA CODE ANNOTATED - Title 75, chapter 7, part 1; Title 87, chapter 5, part 5;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 15 (1977).

HELD: In accordance with the Stream Protection Act, the Department of Highways must notify the Department of Fish, Wildlife, and Parks of the construction of work bridges by private contractors on state highway projects when such bridges may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream, its banks or tributaries.

26 September 1984

Gary J. Wicks, Director
Montana Department of Highways
Highway Building
2701 Prospect
Helena MT 59620

Dear Mr. Wicks:

You have requested my opinion on the following question:

Is a highway contractor who constructs and maintains a work bridge governed by the provisions of the Stream Protection Act or the Natural Streambed and Land Preservation Act of 1975?

According to your letter, work bridges are temporary structures built by highway contractors during the course of construction of a highway project. The decision of whether to install work bridges is made at the discretion of the private contractor and may not be reflected on construction plans prepared by the Department of Highways.

The Natural Streambed and Land Preservation Act of 1975, §§ 75-7-101 to 124, MCA, was enacted to protect and preserve natural rivers and adjacent lands and to minimize soil erosion and sedimentation. See § 75-7-102, MCA. The act requires that "[a] person planning to engage in a project shall present written notice of the project to the supervisors before any portion of the project takes place." § 75-7-111(1), MCA. The act defines "person" as "any natural person, corporation, firm, partnership, association, or other legal entity not covered under 87-5-502." § 75-7-103(4), MCA. The term "supervisors" refers to conservation district boards of supervisors, grass conservation district directors, or boards of county commissioners. § 75-7-103(7), MCA. The Stream Protection Act, §§ 87-5-501 to 509, MCA, imposes reporting requirements on State agencies and political subdivisions undertaking construction projects which may affect streams:

An agency of state government, county, municipality, or other subdivision of the state of Montana, hereafter called applicant, shall not construct, modify, operate, maintain, or fail to maintain any construction project or hydraulic project which may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries by any type or form of construction without first causing notice of such planned construction to be served upon the department on forms furnished by the department as soon as preliminary plans are completed but not less than 60 days prior to commencement of final plans for construction. Such notice shall include detailed plans and specifications of so much of said project as may or will affect any such stream in any manner specified above.

§ 87-5-502, MCA. The term "department" means the Department of Fish, Wildlife, and Parks.

The relationship of the Stream Protection Act and the Natural Streambed and Land Preservation Act was considered in 37 Op. Att'y Gen. No. 15 at 60 (1977), which states:

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 [under the Stream Protection Act].

The construction and maintenance of highways are the responsibilities of the State of Montana, through the Department of Highways, and of state political subdivisions. The building of a highway over a stream is a construction project conducted by the State or a political subdivision within the meaning of section

87-5-502, MCA. The Stream Protection Act requires that notice include "detailed plans and specifications of so much of said project as may or will" vary the natural existing shape and form of any stream or its banks. If the erection of work bridges may have such an effect, the Department of Fish, Wildlife, and Parks must accordingly be notified by the Department of Highways of the bridges' intended use.

The language and purpose of the acts support the holding in 37 Op. Att'y Gen. No. 15 that the private or public nature of a project determines which act applies. Although the two acts have similar objectives and control similar activities, the Stream Protection Act was enacted to regulate projects undertaken by governmental entities, and the Natural Streambed and Land Preservation Act was enacted to control projects not subject to the Stream Protection Act. See § 75-7-103(4), MCA. Consequently, because highway projects are governmental undertakings, all activities in such a project which may impact upon a stream are within the jurisdiction of the Department of Fish, Wildlife, and Parks under the Stream Protection Act, including activities such as temporary work bridges erected at a private contractor's discretion and not reflected on the Department of Highways' construction plans.

THEREFORE, IT IS MY OPINION:

In accordance with the Stream Protection Act, the Department of Highways must notify the Department of Fish, Wildlife, and Parks of the construction of work bridges by private contractors on state highway projects when such bridges may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream, its banks or tributaries.

Very truly yours,

MIKE GREELY
Attorney General