

CONSERVATION DISTRICTS - Application of Streambed Act permit process to irrigator altering streambed to divert water;

NATURAL RESOURCES - Application of Streambed Act to irrigator altering streambed to divert water;

SOIL AND WATER CONSERVATION - Application of Streambed Act permit process to irrigator altering streambed to divert water;

WATER AND WATERWAYS - Application of Streambed Act permit process to irrigator altering streambed to divert water;

ADMINISTRATIVE RULES OF MONTANA - Sections 36.2.404 to 36.2.406;

MONTANA CODE ANNOTATED - Sections 75-7-102, 75-7-103, 75-7-113, 75-7-117, 75-7-122, 75-7-123;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 15 (1977), 39 Op. Att'y Gen. No. 2 (1981), 40 Op. Att'y Gen. No. 71 (1984).

HELD: In accordance with the Natural Streambed and Land Preservation Act of 1975, an irrigator must apply for a 310 permit before altering a stream channel to divert water.

19 May 1986

Ted L. Mizner
Powell County Attorney
Powell County Courthouse
Deer Lodge MT 59722

Dear Mr. Mizner:

You have requested my opinion on the following question:

Does the Natural Streambed and Land Preservation Act of 1975 require an irrigator to apply for a 310 permit before machinery is used to maintain or improve an earthen diversion dam?

This question evolved from earlier questions presented to you by the Deer Lodge Valley Conservation District. Their concerns stem from the expressed need to enter stream channels during periods of low water to capture flowing water for diversion through their headgates and into their ditches.

The Natural Streambed and Land Preservation Act of 1975, §§ 75-7-101 to 124, MCA (hereinafter Streambed Act), was enacted to protect and preserve rivers and adjacent lands and to minimize soil erosion and sedimentation. The Streambed Act established a permit process whereby individuals who intend to physically alter a stream or its bed and banks must present notice to the supervisors of the local conservation district. The supervisors review the proposed project and issue what is known as a "310 permit" for approved projects; Senate Bill 310 was the legislative source of the Streambed Act.

While the Streambed Act with its 310 permit process has been in effect for over a decade, there have been no reported judicial decisions construing its parameters. This situation exists despite the apparent controversy the Streambed Act evoked among ranching and irrigating interests during its consideration by the Legislature. As reflected in the minutes of the Senate and House committees on natural resources, ranchers and farmers objected in 1975 to a permit process that would regulate irrigators attempting to get water into their headgates during periods of low water. These concerns persist today, as your opinion request indicates.

The general statutory scheme of the Streambed Act has been addressed in prior opinions of the Attorney General. See 40 Op. Att'y Gen. No. 71 (1984); 39 Op. Att'y Gen. No. 2 at 9 (1981); 37 Op. Att'y Gen. No. 15 at 56 (1977). The keystone of the Streambed Act is its policy section, § 75-7-102, MCA:

Policy. It is the policy of the state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and in so doing to keep soil erosion and sedimentation to a minimum, except as may be necessary and appropriate after due consideration of all factors involved. Further, it is the policy of this state to recognize the needs of irrigation and agricultural use of the rivers and streams of the state of Montana and to protect the use of water for any useful or beneficial purpose as guaranteed by The Constitution of the State of Montana.

The second sentence of this policy paragraph which recognizes the "needs of irrigation" was added to Senate Bill 310 by an amendment shortly after the bill was referred to the Senate Committee on Natural Resources and Fish and Game. Senate Journal, 44th Sess., 506 (1975). This policy section is pivotal to the application of the permit process because a "project" for purposes of invoking the 310 review is defined with reference to that section:

"Project" means a physical alteration or modification of a stream in the state of Montana which results in a change in the state of the stream in contravention of 75-7-102.

§ 75-7-103(5), MCA.

The Legislature delegated rulemaking authority to the Board of Natural Resources and Conservation. § 75-7-117, MCA. The resulting rules appear at sections 36.2.401 to 406, ARM. Of importance to your inquiry is section 36.2.405, ARM, which details what actions constitute a project:

36.2.405 PROJECTS (1) Projects shall include the following within a project area:

- (a) channel changes;
- (b) new diversions;

- (c) riprap and other streambank protection projects;
- (d) jetties;
- (e) new dams and reservoirs;
- (f) commercial, industrial, and residential development.

(2) A district may add to this list of projects in its adopted rules setting standards and guidelines for projects.

Section 36.2.405, ARM, is qualified by section 36.2.406, ARM, which specifically exempts certain irrigation-related actions from the 310 permit application process:

36.2.406 EXCLUSIONS (1) The following shall not be projects, and thus no notice of proposed project may be required for:

(a) A water user or his agent to clean, maintain, or repair any diversion facility, canal, ditch, or lateral or to remove any obstruction from a stream channel which is interfering with the delivery of water under a valid existing water right or water use permit so long as the action does not alter the existing stream channel; and

(b) Removal of debris from a channel, provided that all material removed will be disposed of at some point outside the channel where it cannot again re-enter the channel and provided further that such removal does not constitute a project as listed in ARM 36.2.405.

Construing these two administrative rules together I find that an irrigator with a valid water right can work on an existing diversion facility or remove debris that is obstructing water delivery without applying for a 310 permit provided that (1) the action does not alter the existing stream channel and (2) removed debris is placed permanently outside the channel where it does not constitute a section 36.2.405, ARM, project such as a new diversion, riprap, jetty, or dam.

Therefore, without further analysis, I conclude that the Streambed Act and its promulgated rules require irrigators to apply for a 310 permit before machinery is

used to maintain an earthen diversion dam. Unquestionably, machinery, particularly a tractor, bulldozer, or other blade-equipped vehicle, when used for maintenance will alter a stream channel to some extent.

Arguably certain types of work on a diversion structure would have only minimal effect on a stream channel and would therefore be outside the scope of alterations that invoke the 310 permit process. However, the Streambed Act as enacted does not contain an exemption for minor alterations. All alterations, however slight, are subject to the permit process. The Legislature in 1975 considered statutory alternatives that would have created an express exclusion for minor alterations, but rejected these proposals. For example, the definition of "project" in Senate Bill 310 was temporarily amended during the session to exclude "minor alterations necessary for the use and protection of adjacent lands." Senate Journal, 44th Sess., 586 (1975). At the same time, section 11 of the bill (presently codified as § 75-7-117, MCA) was amended to direct the supervisors to promulgate "exclusions for minor alterations of streams such as installation of culverts, bridges, machinery crossings, snagging and other similar minor alterations and modifications within their districts." *Id.* at 587. Furthermore, during deliberations before the House Committee on Natural Resources, it was proposed that "irrigation headgates and diversions" be considered an exclusion as a minor alteration for purposes of rulemaking. See Explanation of Amendments to Senate Bill No. 310, Hearings on Senate Bill 310 before the House Committee on Natural Resources, 44th Sess. (1975) (statement of Conrad Fredricks, Sweet Grass County Preservation Association). All of the above proposals were ultimately rejected by the Legislature. The bill as enacted did not differentiate between major and minor alterations.

For the guidance of the Deer Lodge Valley Conservation District, I will briefly address other types of diversion projects. Where a diversion structure is something other than an earthen dam, such that neither streambed material nor heavy equipment is used in maintenance, then it may be possible to maintain such a structure without altering the stream channel. In those situations, an irrigator would not be required to apply for a 310 permit. Such activities are within the

exclusions to the permit process contemplated by section 36.2.406(1), ARM.

Low water conditions during summer months may require an irrigator to channel existing stream flows toward a diversion intake. Since any such channelization would of necessity alter the stream channel, 310 review is invoked. The review process is critical during such periods of water shortage as increased sedimentation could have a profound effect on the preservation of the fish and aquatic habitat.

Emergency actions to protect growing crops are anticipated by the Streambed Act. Section 75-7-113(1), MCA, states:

The provisions of this part do not apply to those actions which are necessary to safeguard life or property, including growing crops, during periods of emergency. The person responsible for a project under this section shall notify the supervisors in writing within 15 days of the action taken as a result of an emergency.

Further subsections of the Streambed Act provide for review of the emergency project including a determination of whether a more permanent solution exists to the problem. Of importance to your inquiry is that, during a period of emergency, a permitless and immediate response may be made and the irrigator or landowner will be protected from the sanctions of the Streambed Act including its declaration of public nuisance. See §§ 75-7-122, 75-7-123, MCA.

My opinion that all planned alterations of a stream channel are subject to 310 review should not be unduly burdensome to the responsible irrigator. Under the Streambed Act an individual is not forever barred from altering a stream channel to facilitate a diversion. While the individual must submit a planned project to 310 review, that process does not prohibit all alterations. The promulgated rules require, inter alia, that proposed projects be "justified" and that the amount of stream channel alteration be "minimized." § 36.2.404, ARM. Furthermore, irrigators have been bound by common law prohibitions on stream alterations

that preceded statutory permit systems such as our 310 process:

It is the established rule ... that the ordinary or natural course of water cannot lawfully be changed for the benefit of one person or class of persons to the injury of another. Accordingly, one who changes the course of a stream must do so in such manner as not to injure, or unduly interfere with the rights of, the adjoining proprietor, either above, below, or on the opposite side of the stream.

78 Am. Jur. 2d Waters § 11 (1975). See also Ward v. Kidd, 392 P.2d 183 (Idaho 1964) (dam constructed by upstream owner with caterpillar tractor during period of low water constituted private nuisance which downstream owner, a prior appropriator, had right to abate); Weeks v. McKay, 382 P.2d 788 (Idaho 1963) (maintenance of a dam during a dry year that interfered with the natural flow of the water properly enjoined). While the cited authority and decisions are not controlling in Montana they do illustrate common law principles that preceded our Streambed Act. See Faucett v. Dewey Lumber Co., 82 Mont. 250, 266 P. 646 (1928) (statutory definition of nuisance that includes unlawful obstruction or use of water is but a crystallization of common law long recognized by the courts); Chessman v. Hale, 31 Mont. 577, 79 P. 254 (1905) (the use of water by an upstream appropriator in Grizzly Gulch such that it infringes upon the rights and fouls the water of a downstream appropriator in Last Chance Gulch constitutes a nuisance, both at common law and under section 4550, Civ. C. 1895).

THEREFORE, IT IS MY OPINION:

In accordance with the Natural Streambed and Land Preservation Act of 1975, an irrigator must apply for a 310 permit before altering a stream channel to divert water.

Very truly yours,

MIKE GREELY
Attorney General