

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 106

CONSERVATION DISTRICTS - Application of Streambed Act permit process to irrigator constructing diversion dike;
LAND USE - Application of floodplain and floodway management statutes to irrigator constructing diversion dike;

NATURAL RESOURCES - Application of Streambed Act and floodplain and floodway management statutes to irrigator constructing diversion dike;

SOIL AND WATER CONSERVATION - Application of Streambed Act permit process to irrigator constructing diversion dike;

WATER AND WATERWAYS - Application of Streambed Act and floodplain and floodway management statutes to irrigator constructing diversion dike;

MONTANA CODE ANNOTATED - Sections 75-7-103(5)(b), 76-5-101, 76-5-103(1), 76-5-404, 76-5-404(3)(b);

OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 62 (1986).

HELD: The construction of a diversion dike with heavy equipment requires either a 310 permit or an approved operation plan under the Natural Streambed and Land Preservation Act of 1975. When this work is performed within a designated floodplain or floodway, the construction additionally requires a permit from the responsible political subdivision.

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15 August 1988

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

On August 2, 1988, you wrote this office requesting an opinion on the following question:

What are the meanings of the phrases "historic maintenance" and "maintenance of an obstruction" as they appear in the Natural Streambed and Land Preservation Act of 1975 and the floodplain and floodway management statutes, respectively?

Your concerns arise out of two recent diversion operations in which local ditch companies have used heavy equipment to construct earthen dikes in an attempt to divert water from the low water level of the Clark Fork toward their headgates. In one instance the ditch company has constructed a 125-foot dike that is claimed to be an extension of a dike that previously existed during a period of low water. Neither company has applied for either a 310 permit or a floodplain permit. You have essentially asked whether this practice would constitute a permissible maintenance of a diversion structure.

This question may be answered in part by reference to a previously issued opinion of this office. In 41 Op. Att'y Gen. No. 62 (1986) I was asked by the Powell County Attorney whether the Natural Streambed and Land Preservation Act of 1975 (hereinafter Streambed Act) required an irrigator to apply for a 310 permit before machinery could be used to maintain or improve an earthen diversion dam. My response to that question was that a 310 permit application was required.

Following the issuance of my opinion, the Legislature in 1987 amended the Streambed Act to provide a process whereby irrigators who customarily clean and maintain their streambed diversions may avoid the annual burden of a 310 permit application. The amendment language provides:

Project does not include customary and historic maintenance and repair of existing irrigation facilities:

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(i) that do not significantly alter or modify the stream in contravention of 75-7-102; or

(ii) for which a plan of annual operation has been submitted to and approved by the district. The plan is subject to future review and approval by the district at its option. Any modification to the plan must have prior approval of the district.

§ 75-7-103(5)(b), MCA. Thus, large-scale diversion works which significantly alter the streambed require the submittal and approval of an operation plan. Diversion work that alters the streambed and is conducted in the absence of an approved operation plan constitutes a project which requires a 310 permit.

The broader question of the meaning of "historic maintenance" is not easily answered. While the Legislature in 1987 contemplated grandfathering the status quo practice of irrigators maintaining their diversions on an annual basis, the statute and its legislative history are silent as to the exact parameters of historic maintenance. The determination of what maintenance would qualify for management by an operation plan is best made on a case-by-case basis by the local conservation district, as the matter is largely factual in nature.

My 1986 opinion did not address the application of the floodplain and floodway management statutes, §§ 76-5-101 to 406, MCA. These provisions are directed generally at preventing and alleviating flooding threats to life, health, and property. § 76-5-101, MCA. As such, the floodplain statutes act independently of the Streambed Act; compliance or noncompliance with one act does not obviate the need for compliance with the other act. Included in the statutory proscriptions for a designated floodplain or floodway is the permitless construction of an artificial obstruction, § 76-5-404, MCA. An artificial obstruction is defined as follows:

"Artificial obstruction" means any obstruction which is not a natural obstruction and includes any dam, wall, riprap, embankment, levee, dike, pile, abutment, projection, revetment, excavation, channel rectification, bridge, conduit, culvert, building, refuse, automobile body, fill, or other analogous structure or matter in, along, across, or projecting into any floodplain or floodway which may impede, retard, or change the direction of the flow of water, either in

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itself or by catching or collecting debris carried by the water, or that is placed where the natural flow of the water would carry the same downstream to the damage or detriment of either life or property.

§ 76-5-103(1), MCA. Certain exemptions are provided in the statutes including "maintenance of an obstruction." § 76-5-404(3)(b), MCA. Apparently the ditch companies responsible for the recent diversion work contend that their projects constitute maintenance of prior obstructions.

The new construction and creation of earthen dikes cannot be equated with the clear meaning of "maintenance of an obstruction." Webster's New Twentieth Century Dictionary, at page 1087, defines maintenance as "upkeep, support, defense." Implicit in this definition is the notion that the obstruction be existing; the diversion work here, though, has created an obstruction where, prior to such work, none existed. High water levels routinely erode minor diversion obstructions that have been historically used by the irrigators of our state. The Streambed Act as amended in 1987 now provides an operation plan process for maintaining those historic diversions outside the 310 permit process. However, the floodplain and floodway management statutes do not recognize a similar process and, regardless, the extended diversion dikes on the Clark Fork represent new construction that enlarges rather than maintains prior obstructions.

THEREFORE, IT IS MY OPINION:

The construction of a diversion dike with heavy equipment requires either a 310 permit or an approved operation plan under the Natural Streambed and Land Preservation Act of 1975. When this work is performed within a designated floodplain or floodway, the construction additionally requires a permit from the responsible political subdivision.

Very truly yours,

MIKE GREELY
Attorney General