

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 33

LAND USE - Applicability of Natural Streambed and Land Preservation Act to irrigation districts;

WATER AND WATERWAYS - Applicability of Natural Streambed and Land Preservation Act to irrigation districts;

MONTANA CODE ANNOTATED - Title 75, chapter 7, part 1; Title 87, chapter 5, part 5; sections 75-7-102, 75-7-103(4), 75-7-103(5), 87-5-502, 87-5-506, 87-5-507;

MONTANA LAWS OF 1987 - Chapter 551, section 1;

OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 62 (1986), 40 Op. Att'y Gen. No. 71 (1984), 39 Op. Att'y Gen. No. 2 (1981), 37 Op. Att'y Gen. No. 15 (1977).

HELD: An irrigation district is a "person" within the meaning of section 75-7-103(4), MCA, of the Natural Streambed and Land Preservation Act.

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28 October 1987

Robert L. Deschamps III
Missoula County Attorney
Missoula County Courthouse
Missoula MT 59802

Dear Mr. Deschamps:

You have requested my opinion concerning the following question:

Is an irrigation district created pursuant to sections 85-7-101 to 308, MCA, or earlier codifications a "person" under section 75-7-103(4), MCA, of the Natural Streambed and Land Preservation Act?

I conclude that an irrigation district is a "person" under, and is subject to regulation by, the Natural Streambed and Land Preservation Act, §§ 75-7-101 to 124, MCA (Streambed Preservation Act).

The purpose and general scope of the Streambed Preservation Act have been discussed in several prior opinions and need not be reiterated at length here. 41 Op. Att'y Gen. No. 62 (1986); 40 Op. Att'y Gen. No. 71 at 285 (1984); 39 Op. Att'y Gen. No. 2 at 9 (1981); 37 Op. Att'y Gen. No. 15 at 56 (1977). The Act seeks to protect the State's streams and adjacent property from damage (§ 75-7-102, MCA) and it extends to any "project" undertaken by a "person." The latter term is defined in section 75-7-103(4), MCA, as meaning "any natural person, corporation, firm, partnership, association, or other legal entity not covered under 87-5-502." Section 87-5-502, MCA, in turn, is part of the Stream Protection Act, §§ 87-5-501 to 509, MCA, and requires any "agency of state government, county, municipality, or other subdivision of the state of Montana" to give notice to the Department of Fish, Wildlife, and Parks of all construction projects "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[.]" In 37 Op. Att'y Gen. No. 15 and 40 Op. Att'y Gen. No. 71, I held that the applicability of one statute or the other depended upon the entity controlling the involved project: If the entity is a public agency within the reach of section 87-5-502, MCA, the project is subject to the Stream Protection Act, and, if not, the Streambed Preservation Act governs. Because these acts have different notification and enforcement procedures, determination

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of which applies in a particular instance has practical and legal significance.

The definition of "person" in the Streambed Preservation Act makes unmistakably clear that it and the Stream Protection Act are intended to be complementary and that one applies when the other does not. Although under different circumstances the term "subdivision of the state of Montana" in section 87-5-502, MCA, might be deemed to include irrigation districts (Crow Creek Irrigation District v. Crittenden, 71 Mont. 66, 227 P. 63 (1924)), the Stream Protection Act expressly excludes from its regulatory scope "any irrigation district project or any other irrigation system." § 87-5-507, MCA. Sections 87-5-502 and 87-5-506, MCA, must be construed together, and it is accordingly anomalous to suggest that the term "subdivision of the state of Montana" in the former provision refers to an entity whose principal activity is specifically exempted from coverage. See Thaanum v. Bynum Irrigation District, 72 Mont. 221, 225, 232 P. 528, 530 (1925) ("[a] word or phrase may have different meanings as it is employed in different connections ... and the particular meaning to be attached to it in a given statute or constitutional provision is to be measured and controlled by the connection in which it is employed, the evident purpose of the act, and the subject to which it relates"). Since an irrigation district falls outside the purview of the Stream Protection Act, my earlier opinions compel the conclusion that such an entity is a "person" under the Streambed Preservation Act.

This conclusion, finally, is not only consonant with 41 Op. Att'y Gen. No. 62, which held that irrigators must comply with the Streambed Preservation Act when undertaking a "project" as defined in the 1985 codified version of section 75-7-103(5), MCA, but is also consistent with recent legislative amendments to that provision, which generally exclude from "project" status "customary and historic maintenance and repair of existing irrigation facilities[.]" 1987 Mont. Laws, ch. 551, § 1. By implication, therefore, other forms of modifications to irrigation systems do constitute a "project." While 41 Op. Att'y Gen. No. 62 dealt with an individual irrigator and not an irrigation district, there exists no basis in the language or purpose of the Streambed Preservation Act to distinguish between individuals and districts; irrespective of who undertakes a particular project, its effects and the legislatively-perceived need for oversight remain.

THEREFORE, IT IS MY OPINION:

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An irrigation district is a "person" within the meaning of section 75-7-103(4), MCA, of the Natural Streambed and Land Preservation Act.

Very truly yours,

MIKE GREELY
Attorney General