

Definition of perennial streams: Background for discussion

About 50 years ago, Montana policy makers embarked on a process that would eventually overhaul regulation related to the state's waters and streams. Beginning with the Montana Stream Protection Act in 1963, the Montana Legislature subsequently passed major acts related to water quality, water use, and streambed protection.¹

While the Stream Protection Act created regulations for *government* actions – especially highway projects – in and around streams, the 1975 Natural Streambed and Land Preservation Act was passed to govern *private party* actions in and around streams. The Natural Streambed and Land Preservation Act of 1975 was passed “to provide for a policy of preserving the natural or existing shape, form and course of streams to activities of private persons or organizations; and in so doing to keep soil erosion and sedimentation to a minimum.”²

The act tasked the state's 58 conservation districts with an important permitting process – the 310 permit, named after the bill number for the act, Senate Bill 310. A 310 permit is necessary for any activity that alters or modifies the bed or banks of a perennially flowing stream. A conservation district's board of supervisors must scrutinize a project for potential erosion and sedimentation issues, while also protecting the use of water by irrigators or other agricultural users.

Conservation district regulatory power

A product of the drought-ridden 1920s and 1930s, conservation districts are comprised of local farmers, ranchers and residents, who focus on mostly voluntary projects to help local citizens conserve their soil, water and other renewable natural resources.³ The Montana Legislature created conservation districts in 1939. Conservation district projects may include non-point source pollution control demonstrations, stream restoration, recycling programs, and cooperation with the federal government for administration of federal conservation programs, like the Conservation Reserve Program or the Wildlife Habitat Incentives Program.⁴

While many other agencies are involved in decisions when a project impacts a stream – for example, the FWP issues SPA 124 permits for projects modifying the natural existing shape and form of any stream or its banks to protect fisheries, and the DEQ issues stormwater discharge permits for projects that discharge storm water into surface waters – conservation district's major regulatory authority is issuing hundreds of 310 permits annually across the state.

Definition of perennial

The definition of what is a perennial stream has routinely vexed legislators. The original language in the Natural Streambed and Land Preservation Act defined a stream as “any natural perennial flowing stream, or river, its bed and immediate banks.”⁵ Nearly 20 years later, the definitions have been amended to allow exemptions for “a stream or river that has been

¹ Tom Dickson, *Montana Outdoors*, 37-39 (May-June, 2013)

² Ch. 463, Laws of Montana (1975)

³ <http://dnrc.mt.gov/cardd/ConservationDistricts/WhatDistrictsDo.asp>

⁴ i.b.i.d.

⁵ Ch. 463, Laws of Montana (1975)

designated by district rule as not having significant aquatic and riparian attributes in need of protection or preservation...”⁶ During a House Natural Resources Committee hearing on a bill adding that language, Chairman Rep. Lorents Grosfield said he thought the definition of a stream “would be another area that should be reviewed.”⁷ Two bills in two recent sessions attempted that task. Neither House Bill 708 in 2007 nor Senate Bill 334 in 2013 passed.

Perhaps adding some confusion, two other parts of Montana law contain a definition of streams. The Montana Strip and Underground Mine Reclamation Act defines “ephemeral,” “intermittent,” and “perennial” streams⁸; Montana water law defines a “perennial flowing stream.”⁹ These definitions are not applicable to conservation districts or streambed protection.

Local flexibility

State law allows conservation district to adopt their own rules “setting minimum standards and guidelines” for the act.¹⁰ Conservation district advocates have said each conservation district uses fairly consistent definitions and rules, but “each district has exercised the option to cover streams from mouth to source depending on the character of the streams in their jurisdiction.” Conservation district supervisors have testified they like the flexibility in their rules; adding a definition in statute may unnecessary restrict or expand the scope of their authority. (Indeed, a 1995 bill allowing exceptions to what is defined as a perennial stream if a conservation district has deemed it “not having significant aquatic and riparian attributes,” did so to reduce a 310 permit workload that had more than doubled in the past 10 years.)¹¹

Although conservation district supervisors often rely on maps and other data to determine its jurisdiction and need for a 310 permit, it occasionally may be difficult to ascertain if a stream is perennial. For example, a stream that disappears underground yet reappears farther downstream may be deemed as “perennial” – and thus subject to the 310 permitting process.

Conservation district decisions are rarely appealed. For example, of 2,830 actions by the Missoula Conservation District related to the “310 law,” nine decisions have been contested through arbitration or have gone to district court.¹² Conservation Districts considered 1,377 permits in 2012; one of these was appealed.¹³ However in 2008, Montana Supreme Court overturned a conservation district determination on Mitchell Slough. The Supreme Court held that the slough is a “natural, perennial-flowing stream or river.”¹⁴

⁶ Ch. 426, Laws of Montana (1995)

⁷ Minutes from House Natural Resources committee (Feb. 13, 1995)

⁸ 82-4-203, MCA

⁹ 85-2-355, MCA

¹⁰ 75-7-117, MCA

¹¹ Testimony of Mike Volesky, executive director, Montana Association of Conservation Districts from minutes of House Natural Resources Committee (Feb. 13, 1995)

¹² Dec. 10, 2013 letter from Missoula Conservation District letter to Water Policy Interim Committee

¹³ 2012 annual report of Conservation Districts Bureau, DNRC

¹⁴ Bitterroot River Protective Association, Inc. v. Bitterroot Conservation District, 2008 MT 377, 346 M 507, 198 P3d 219