MAJOR ISSUES

1. ACCESS ACROSS PRIVATE LAND/LANDOWNER APPROVAL

12. Q: May a representative of the conservation district enter onto private land to determine whether there is a violation of the 310 law?

A: Since the district is required by statute to enforce the provisions of the 310 law, its representatives may enter onto private land to do so. However, when the landowner refuses to let a representative of the district inspect for violations, it will be necessary to obtain a search warrant. The requirements for such a search warrant would be: (1) that Aprobable causeA must exist, and (2) that the search must be reasonable.≅ (Lewis & Clark County Attorney, June 21, 1979.)

51. Q: Does a district have the authority to issue a 310 permit to a downstream water user for repairs at his point of diversion, which is upon another=s private property?

A: The district has jurisdiction over a project located on a perennial stream, although it can make no determination regarding access across private property. However, the downstream water user has the authority under 85-2-414, MCA, to conduct water from or over the land of another for any beneficial use. The board of supervisors should recognize the right of the project applicant to enter onto the land for the repair. (DNRC, March 18, 1987)

55. Q: Does the 310 permit authorize a project without the landowner=s approval?

A: Obtaining authorization and access from the owner is solely the responsibility of the applicant. District approval of a project should not be construed as giving the applicant the right of access to the project site. (DNRC, July 20, 1988)

55. Q: Should the district require the landowner to sign the application for a 310 permit?

A: The 310 law itself does not require the landowner to sign or cosign a permit application. It follows that the district is not legally obligated to make sure that an applicant has the owner=s permission to start work on a project. While the district is not legally obligated to obtain a landowner=s signature on a SB 310 application, the district does have the discretion to require it when it seems useful. (DNRC, July 20, 1988)

70. Q: Does a 310 permit require landowner permission?

A: It is not the obligation of the conservation district to interpret easement or land ownership issues in granting or denying an application. Pursuant to the 310 law, the conservation district has a duty to proceed with the processing of the application. (DNRC, January 15, 1991)

84. Q: How does property ownership affect the duty of a conservation district to process a 310 application?

A: While a district may not refuse to process an application on the basis of land ownership, the district has some discretion in rejecting purely hypothetical or speculative projects if the applicant is unable to assert any legally colorable right or interest to proceed with the project. (November 7, 1994)

2. ANNUAL PLANS/MAINTENANCE OF STRUCTURES

13. Q: Is a 310 permit required for customary and historical maintenance of an existing diversion?

A: An irrigator, in maintaining a diversion dike, should limit the disruption of the streambed if the irrigator desires to forego obtaining a permit. Any activity that alters a streambed or bank requires approval from the conservation district. (DNRC, June 26, 1979)

48. Q: Does the 310 law require an irrigator to apply for a 310 permit before machinery is used to maintain or improve an earthen diversion dam?

A: In accordance with the 310 law, an irrigator must apply for a 310 permit before altering a stream channel to divert water. (Op. Att'y Gen. No.62, Vol. 41, May 19, 1986.)

55. Q: What is the meaning of the phrase, *historic maintenance*, as it appears in Section 75-7-103(5)(b), MCA? Does the operation of heavy equipment to construct or maintain a diversion require a 310 permit?

A: The construction of a diversion dike with heavy equipment requires either a permit or an approved plan of annual operation under the 310 law. Diversion works that alter the streambed require the submittal and approval of either a 310 permit or an annual plan of operation. When this work is performed within a designated floodplain or floodway, the construction additionally requires a permit from the responsible political subdivision. (Op. Att'y Gen. No.15, Vol. 42.)

The broader question of the meaning of *historic maintenance* is not easily answered. 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. (August 15, 1988.)

3. DOCKS, MARINAS, AND WHARVES

56. Q: Does the 310 law apply to boat docks?

A: The 310 law gives the district authority over boat docks only if they are on a river or stream or its immediate banks, and only insofar as the construction of the dock is a *project*, as defined by Section 75-7-103(5), MCA. District regulation of boat docks under the 310 law must be oriented toward erosion and sedimentation concerns, such as placement, length, and construction methods. The 310 law does not give the district authority to specify what type of structure may be built atop a boat dock. (DNRC, October 6, 1988)

60. Q: Would the 310 law apply to all or any portion of a marina development?

A: The policy of the 310 law is that Montana=s:

> *.....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, <u>except as may be necessary and appropriate after due consideration of all factors involved</u>.* (75-7-102, MCA, emphasis added)

It is clear from the above quoted policy that the legislature intended that the conservation district supervisors have the ability to look at all of the relevant facts affecting any development in the bed and banks of natural rivers and streams before authorizing a development. Although the supervisors do not have the jurisdiction to permit the entire channelization project, they do have the responsibility to review the entire project as it may affect that portion of the project that is a 310 *project*. (DNRC, February 12, 1989)

62. Q: Does Section 85-16-101, MCA, granting an individual a permit to build wharves and docks upon lands under water belonging to the state, exempt that individual from the 310 permit?

A: The 310 permit is required if the immediate banks or bed are disturbed. (DNRC, September 12, 1989)

77. Q: Should secondary impacts to the stream be a consideration in issuing a 310 permit?

A: In a situation where a boat dock is being constructed under the 310 law, the local conservation district has no legal obligation to consider the impacts on the stream from the potential commercial use of the dock. For example, the potential impacts that may occur, such as those resulting from wave action caused by the operation of boats using a dock, are not impacts that are to be considered in the determination of whether the conservation district should grant or deny a 310 permit for the construction of the dock. (DNRC, April 20, 1992)

4. EMERGENCIES

21. Q: What exclusions exist under the emergency provisions of the 310 law?

A: Two requirements must be met in order to come within the exclusion: (1) the action is necessary to safeguard life or property, and (2) the action is taken during periods of emergency. The answer to each of the requirements would be based on the facts of the situation.

The person who engages in the emergency activity does so at his or her own risk. If the activity is later found not to comply with the emergency provisions, that person would be in violation of the law and subject to its sanctions. (DNRC, January 16, 1981)

25. Q: When do the emergency provisions of the 310 law apply?

A: Section 75-7-113, MCA, provides that a permit is not necessary when the action is Anecessary to safeguard life or property, including growing crops, during periods of emergency.≅ As an example, there could be flooding and high water in May, causing considerable damage. Any work done during this time would probably come within the emergency provisions of the law. Let=s suppose the water then recedes and by the middle of June, is well within the banks and receding every day. Applying the emergency provisions when it is very clear that the stream is no longer posing any threat to life or property could be interpreted as a deliberate effort to circumvent the law. (DNRC, July 16, 1981)

33. Q: Is Exxon=s dredging the Yellowstone around its pump intake facilities exempt as an emergency?

A: Exxon is not entitled to claim that its actions are subject to the emergency exceptions in the law, when no emergency now exists. The effects of sediment accumulation on Exxon=s diversion facilities is fully predictable. (DNRC, April 3, 1984)

37. Q: Is the removal of beaver dams, excluded as Adebris removal,≅ extended to those situations where there is potential damage to property?

A: It appears from the statutes that, if there is a potential threat to public health or potential damage to property, the Department of Fish, Wildlife and Parks is in a position to act to protect the health and property of those people affected (87-1-224 and 25, MCA).

5. ENFORCEMENT

14. Q: Does the State of Montana have the authority to enforce the Natural Streambed and Land Preservation Act?

A: The act as enforced and administered is a proper and reasonable exercise of the police power when its purposes are balanced against the benefits to water quality, riparian area protection, and the health and well-being of others. The act as applied does not constitute a taking of private properties. (DNRC, August 9, 1979)

39. Q: Are CDs required to administer the 310 law?

A: The conservation district is responsible for the administration of the 310 law. Purposeful or negligent failure to carry out the mandate of the law subjects the district supervisors to both criminal and civil liability. (DNRC, May 29, 1985)

65. Q: Can a conservation district require that verbal complaints be substantiated in writing?

A: The conservation district can, but need not, require that verbal complaints be substantiated in writing. Further, although the board has no duty to file a complaint (with the county attorney), if only a verbal complaint is received, the board has a fiduciary duty to act by either investigating or forwarding the allegation to the county attorney. (DNRC, March 15, 1990)

81. Q: Can a conservation district force a permittee to finish an authorized project?

A: As a general matter, a conservation district cannot force a permittee to start or finish a project. However, if a permittee commences a project in compliance with the permit, but later abandons the project, leaving the stream in a condition that is in contravention of the act, the project is rendered unauthorized. The project then becomes a public nuisance and is subject to proceedings for immediate abatement. The permittee could be also subject to criminal and civil penalties. (DNRC, August 30, 1993)

6. FEDERAL, STATE, AND INDIAN LANDS

3. Q: Does the 310 law apply to projects on state or federal lands?

A: Projects conducted by a state agency on state land fall under the Stream Protection Act (SB 124) administered by the Department of Fish, Wildlife and Parks. Projects conducted by a private person or entity on state or federal lands are covered by the 310 law. (DNRC, February 17, 1976)

6. Q: Does the 310 law apply to projects on state forest lands?

A: Projects not conducted by or for a state agency, but solely by or for a private individual or entity, are covered by the 310 law. (DNRC, May 11, 1976)

8. Q: Does the 310 law apply to projects constructed on state, federal, or Indian reservation land?

A: <u>Indian reservation land</u>

The act applies to non-Indian projects on non-Indian lands within Indian reservations to the extent that the act does not conflict with tribal self-government. But the act does not apply to Indian projects within Indian reservations.

<u>State land</u>

The act applies to private projects on state lands, but does not apply to state projects on state lands.

<u>Federal land</u>

The act applies to non-federal projects on federal lands unless a specific act of Congress preempts state regulation. But the act does not apply to the federal government either on or off federal lands unless Congress consents to such regulation. (37 Op. Att'y Gen. 15, April 14, 1977)

30. Q: Do conservation districts have the authority to enforce the 310 law on Forest Service

land?

A: Conservation districts do have the authority to issue or deny 310 permits on streams where they run through Forest Service land. Forest Service regulations provide for this, requiring compliance with state environmental protection laws as a condition Forest Service special use permits. (DNRC, February 9, 1984)

36. Q: Is the Department of State Lands (after July 1, 1995, Department of Natural Resources and Conservation) easement needed for irrigation structures on navigable rivers?

A: An easement or a temporary license is needed any time a structure is placed on or an activity takes place below the low water mark on the beds of a navigable river. Streambeds are treated like any other piece of state land: any time that an activity takes place on that land, it must be authorized, or it constitutes trespass. The easement can be acquired by contacting the nearest area office of the Department of State Lands (Department of Natural Resources and Conservation).
(DNRC, January 9, 1985)

44. Q: What is the relationship of the 1872 Federal Mining Law to the 310 law? Does the 310 law conflict with a miner=s statutory right to discover and develop mineral deposits on federal lands?

A: The 310 law is not preempted by the General Mining Law of 1872. State mining regulations designed to safeguard the environment are in harmony with express congressional policies. (DNRC, December 10, 1985)

46. Q: Are there problems with the working agreement to administer stream permitting activities jointly between Lake CD and the Salish and Kootenai Tribes?

A: The purpose of the agreement is to jointly administer the Tribes= and the district=s shared objective of streambed preservation. However, there are legal problems with both the district=s creation of a quasi-judicial joint board, and the district=s agreement to be bound, in issuing the permits, by the decisions of a third party.

Additionally, any agreement between a state political subdivision and a tribal government must be in compliance with the State-Tribal Cooperation Agreements Act, 18-11-101 et seq., MCA. This act, among others things, requires that the agreement be approved in advance by the attorney general of Montana.
(DNRC, February 20, 1986)

49. Q: What does the Forest Service believe its responsibilities are regarding Montana=s stream preservation laws?

A: The Montana 310 law (75-7-101 et seq., MCA), is not applicable to Forest Service lands. However, the Forest Service has entered into a AMemorandum of Understanding≅ with the Montana Department of Fish, Wildlife and Parks that will be applicable to all projects on National Forest lands that involve stream alteration. Consequently, under the voluntary terms of this agreement, Forest Service permit holders are required to apply to Department of Fish, Wildlife and Parks for approval of projects that may result in stream alteration on National Forest lands. (USFS, December 5, 1986)

52. Q: Does the 310 law apply to projects on Forest Service lands?

A: A Montana attorney general opinion (37 Op. Att'y. Gen.15) held that location of a non-federal project on federal land alone does not preempt state regulations under the 310 law. The attorney general noted in his holding that, if there is a federal law with which the 310 law conflicts, then the state regulation must give way.

The Office of the General Counsel (OGC) of the U.S. Department of Agriculture has issued an opinion that the 310 law was not applicable to Forest Service lands. However, until such time as the Forest Service or OGC documents the Apersuasive reasons≅ for preempting the 310 law, the conservation districts should follow the opinion of the Montana attorney general. (DNRC, September 22, 1987)

52. Q: May a conservation district enter into a Memorandum of Understanding (MOU) with the Forest Service?

A: Conservation districts may enter into Memorandums of Understanding whereby they work in conjunction with the Forest Service so that they do not duplicate each other=s efforts, but rather supplement the work of one another in issuing the necessary federal and state permits. The conservation district may not waive its jurisdiction if the Forest Service has a similar permitting process. (DNRC, September22, 1987)

57. Q: Does the 310 law apply to projects on Forest Service lands?

A: The pragmatic solution is to work toward the development of MOUs and put aside the legal issue of who has jurisdiction. (DNRC October 28, 1988)

7. JURISDICTION

10. Q: Do county commissioners have jurisdiction over streambeds or lakes other than as provided in the 310 law?

A: There are numerous grants of power to county commissioners by the state legislature, the most direct of which are found in the:

Lake Protection Act, Sec. 75-7-201 et seq., MCA
Bridges, Sec. 7-14-2204(1)(2), MCA, and Sec. 7-14-2203, MCA
Docks and Wharves, Sec. 7-14-2823, MCA
Eminent Domain, Sec. 70-30-102, MCA
Flood Control, Sec.76-5-1101 et seq., MCA

It would be difficult to provide an exhaustive list of each mention in the code of county commissioners= jurisdiction over lakebeds and streambeds.
(DNRC, February 6, 1978)

17. Q: Does the 310 law apply to projects that cause damage to a stream but were installed before the law was passed?

A: The law applies only to projects constructed from and after the effective date of the rules adopted by the local conservation district. The law would apply only to additions or repairs to that project. (DNRC, April 21, 1980)

23. Q: Does the conservation district have authority over the stream bank?

A: The conservation district has the authority to regulate activity within the mean high-water mark on both sides of a stream and the immediate banks. The immediate banks would in almost every instance include the area encompassing the mean high-water mark and then some. The immediate banks would include a reasonable distance from the stream, depending upon the topography of the site. (The term Aimmediate banks≅ is defined in 36.2.402, ARM, updated in January 1997.) (DNRC, April 8, 1981)

26. Q: Does the 310 law apply to restriction of downstream flow as a result of a fence or other structure placed across a streambed?

A: If the placing of a fence or other structure does not in and of itself constitute a physical alteration or modification of a stream, then no 310 approval is required. However, if the intent of the owner when building the fence or other obstruction is to catch debris, or if the owner maintains the obstruction in such a manner as to manifest such an intent, then the activity may be construed as a project.
(DNRC, April 21, 1982)

33. Q: Who has jurisdiction over streams in an area not included within a conservation district boundary?

A: In the area not within or a part of any conservation district, the grazing district is the responsible agency. Where there is no grazing district, the board of county commissioners is the responsible agency for enforcing the 310 law.
(DNRC, May 16, 1984)

40. Q: Is SB 310 permitting authority concurrent with federal 404 permitting legislation?

A: In the case of the SB 310 and Section 404 permitting processes, the basic purposes of the state statute and the federal legislation are aimed at similar objectives: streambed protection and pollution control. State regulatory authority under the 310 law may be by federal regulatory authority where dredge and fill activities involve the navigability of interstate waters, but only to the extent necessary to protect the dominant federal interest in navigation. (DNRC, August 12, 1985)

50. Q: Does the 310 law apply to excavation on the river bank above the 100-year floodplain?

A: The 310 law applies not only to streams, but also to lands immediately adjacent to them. Although this excavation (a proposed gravel pit) does not reach the river high-water mark, it is a 310 project because it is immediately adjacent to the river and could result in alteration of the river=s natural or existing state. (DNRC, January 4, 1987)

51. Q: Who has supervision over water distribution controversies?

A: Under Section 85-2-406, MCA, the district court has supervision of water distribution among all appropriators. (DNRC, March 18, 1987)

63. Q: Does the 310 law apply to the Clark Fork River Reclamation Demonstration Study, a government-sponsored project?

A: A review of the information supplied indicates that both the field study and the demonstration project are being directed and controlled by governmental entities. Consequently, the activity is subject to the jurisdiction of the Department of Fish, Wildlife and Parks. (DNRC, February 27, 1990)

64. Q: Does the 310 law apply to state agency projects?

A: It is clear that any project undertaken by a state or local governmental entity is not subject to the 310 law even if private contractors undertake the project for the governmental entity. These activities are regulated pursuant to the Stream Protection Act. (DNRC, February 27, 1990)

79. Q: Does the 310 law pertain to Montana Power Company=s work on the Thompson Falls Dam, since it is subject to Federal Energy Regulatory Commission (FERC) rules?

A: No, because the Federal Power Act controls over state law. Local laws are not applicable to federal projects unless Congress consents to such regulation.

(DNRC, July 5, 1993)

81. Q: If a person holds title to land under the river, oxbow, or stream, can the person build on the land? Is the answer the same if the river has moved?

A: A person may build on land to which the person holds title. Holding title to land does not relieve a person from the responsibility of complying with all applicable laws, including the 310 law, however. If a river has moved and the Aold river bed≅ is no longer considered to fall within the jurisdiction of the act, a 310 permit would not be required. (DNRC, August 30, 1993)

81. Q: Can a conservation district regulate anything on a stream that might cause water degradation, but is not necessarily related to a streambed under the 310 law?

A: If a Aproject≅ that is not necessarily related to the streambed causes water degradation in such a manner as to change the state of the stream in contravention of state policy, the conservation district should assert jurisdiction under the 310 law. (DNRC, August 30, 1993)

81. Q: Does the 310 law apply to lawns and yards that are near streams, but do not reach the bank of the river?

A: The key to determining what activities require a permit is to answer the question: *Does the activity physically alter or modify the state of the stream in contravention of the policy of the act?* If the activity does, it qualifies as a project and requires review under the 310 law. (DNRC, August 30, 1993)

81. Q: Does the conservation district have jurisdiction over man-made ditches?

A: Man-made ditches are not covered under the act. Only when a project on a ditch constitutes a 310 project is a permit required. (DNRC, August 30, 1993)

81. Q: Do conservation districts have jurisdiction on private projects on wild and scenic rivers?

A: There are varying classifications of wild and scenic rivers. A conservation district should assert its jurisdiction over any AprojectA on a wild and scenic river unless the federal agency charged with the administration of that component of the National Wild and Scenic Rivers System shows that Congress has specifically acted to preempt state regulation. (DNRC, August 30, 1993)

86. Q: May the district deny or approve with modifications excavation projects based on the assessments of other state or federal agencies?

A: Yes, subject to several provisions. First, the project must result in an impact to the stream. Second, the sources must be reliable, and there must be some basis for believing the assessment is reasonably accurate. Third, such assessments must be used consistently. (DNRC, July 17, 1995)

86. Q: May the district approve or modify or deny a project, based on cumulative effects?

A: Yes. In fact, it could be argued that failure to do so would violate the district's statutory duty. Knowing the district can use the concept of cumulative impact to deny a permit, the question arises as to why and when to deny the first application. Using the example of boat docks, how does the district decide that 49 docks within two miles are permissible, but 50 are not? Ideally, a conservation district would establish a universally accepted limit on docks, based on a reasonable aesthetic or physical standard. Unless specific standards are adopted by the district, taking cumulative impacts into account will remain a matter of subjectivity. (DNRC, July 17, 1995)

87. Q: Can a conservation district limit the number of boat docks, ramps, or other similar projects constructed on a stretch of river or stream?

A: Though conservation districts can use cumulative impacts of such projects to limit the number constructed on a river, the 310 law should not be used as a Azoning≅ tool. Conservation districts, however, have the authority to adopt land use ordinances that could regulate this activity and this may be the preferable avenue to address development along rivers. The regulations would require a vote of the people in the area affected. (DNRC, July 19, 1995)

90. Q: Can the county commissioners delegate authority to issue 310s for projects that are not within the district's boundaries.

A: The authority to approve, deny, or modify a project (the actual permitting decision) cannot be delegated. However, the 310 law permits the processing and investigatory functions (team inspections and recommendations) to be delegated. (DNRC, October 18, 1995)

8. LIABILITY

41. Q: What is the conservation district's liability under the 310 law?

A: Liability may arise in the conservation district, and perhaps the supervisors themselves, from non-action in regard to the mandatory duties imposed by the 310 law. However, once the board acts on the permit (if done within the scope of official authority and without willfulness, maliciousness, or gross negligence), the quasi-

judicial nature of the permitting process shields the district and the supervisors from liability. (DNRC, August 12, 1985)

59. Q: What constitutes a conflict of interest?

A: The supervisor should abstain when voting would result in his or her economic benefit, and do so Adirectly≅ and Asubstantially.≅ In each case, in deciding whether to disqualify themselves, supervisors will have to use their best judgment as to whether their economic interests are tainting their vote. (DNRC, January 24, 1989)

68. Q: Can 310 permits be issued without the participation of the Department of Fish, Wildlife and Parks?

A: The 310 permitting process requires DFWP notification and participation. Permits issued without DFWP participation are void, and conservation district supervisors could be subject to civil and criminal liability and removal from office. (DNRC, September 11, 1990)

81. Q: What are the points of law determining liability for negligence?

A: The essential elements in establishing actionable negligence are duty, breach, and injury. Injury, alone, does not establish negligence for which the law imposes liability. (DNRC, August 30, 1993)

81. Q: If a potential buyer of stream or river frontage asks a conservation district whether a particular bank is stable, and the conservation district has information indicating there is a stability problem, can the conservation district refuse to give out the information or refuse to give an opinion? If so, is the conservation district liable for not giving out the information, or is it liable for giving out information that is wrong?

A: The district is not required to give opinions about whether a bank stability problem exists. To protect against negligence, the district should simply give information requested without giving an opinion as to what inferences or conclusions should be drawn from the information. (DNRC, August 30, 1993)

81. Q: Should a district use a hold-harmless clause in 310 permits?

A: It is appropriate to put individuals on notice of the risk the applicant is assuming by pursuing work under the permit. It is not appropriate to enter into a hold-harmless agreement to relieve the district from its own fault or wrong. The following is an example of an appropriate notice:

The permittee is hereby notified that any financial outlay or work invested

in a project pursuant to this authorization is at the permittee=s risk. The issuance of this authorization does not reduce the permittee=s liability for damage caused by development of the authorized project. Nor does the conservation district in issuing this authorization in any way acknowledge liability for damage caused by the permittee=s development of the authorized project. (DNRC,August 30, 1993)

81. Q: If an arbitration panel issues authorization for a project, is the permittee liable for damages if injury results to another person or property?

A: Regardless of whether the 310 permit is issued by the supervisors or by an arbitration panel, a permittee is liable for its negligent acts. (DNRC, August 30, 1993)

81. Q: If a conservation district issues a 310 permit and the project fails, resulting in injury, is the conservation district liable?

A: As a general rule of law, a conservation district will not be liable if it approves a project that fails and results in injury to a third person. (DNRC, August 30, 1993)

83. Q: Can a conservation district enter into a liability agreement upon issuing a 310 permit?

A: The conservation district cannot require the execution of liability agreements in processing 310 permits. The district may put the following notice in a 310 permit:

The issuance of this 310 permit by the _____ Conservation District shall not reduce the permittee=s liability for damages caused by the permittee=s exercise of this permit nor does the Conservation District, in issuing this 310 permit, in any way acknowledge liability for damage caused by the permittee=s project. (DNRC, September 26, 1994)

84. Q: If a conservation district approves a 310 project with knowledge that a project is not adequate and it fails, causing injury, is the conservation district liable?

A: In a case where the conservation district has actual knowledge that the project will fail and it acts, approving the project, the conservation district opens the door to the allegation that such action is not reasonable conduct. It is my opinion that a conservation district should never approve a project if it knows that the structures associated with the facility will fail and that failure will result in injury to persons or property. (DNRC, November 7, 1994)

84. Q: Is it appropriate to put a notice on a properly issued 310 permit informing the permittee of the risk being assumed?

A: Although, in the absence of negligence, the conservation district may not generally be held liable, it is appropriate for a conservation district to place a notice on a 310 permit. (DNRC, November 7, 1994)

9. MISCELLANEOUS

1. Q: Can a CD adopt a rule that adds the word *knowingly* before the word *violates* in Section 75-7-124, MCA?

   A: A conservation district cannot adopt a rule that a violation of the act does not occur unless a person or entity *knowingly* violates the act, since that would in effect be changing the law. Such a rule would limit the coverage of the act as to violations. (DNRC, January 6, 1976)

5. Q: Can a conservation district refuse to administer or enforce the 310 law if it requires an expenditure that would require the conservation district to exceed its statutory levy authority?

   A: Section 1-2-112, MCA, does not authorize conservation districts to refuse to administer the 310 law for the following reasons:

      1. Conservation districts are not *local government units* as the term is used in Section 1-2-112, MCA.

      2. The 310 law does not, per se, require the expenditure of additional funds exceeding the statutory levy authority of districts.

      3. The expenditure of additional funds, if any, is incidental to the main purpose of the act. (DNRC, April 19, 1976)

9. Q: Can a CD condition a project permit by requiring proof of compliance with other state law?

   A: The supervisors should act on all project applications and not delay action on a permit request until all other state permits have been obtained. (DNRC, August 15, 1977)

16. Q: Can conservation district employees issue an approval of a project plan?

   A: The board of supervisors, not its employees or designees, must approve proposed projects (except in the limited case where an arbitration panel renders a final decision). Supervisors who are not carrying out their responsibilities, or who improperly delegate such responsibilities, may be subject to prosecution. (DNRC, November 28,1979)

18. Q: If an arbitration panel=s decision requires modifications or alterations from the original plan, how are costs associated with the modifications or alterations assigned?

A: Section 75-7-112, MCA, provides for a final decision to be made by an arbitration panel when any member of the team making the initial recommendation to the supervisors disagrees with the supervisors= final decision on the proposed project.

Section 75-7-116, MCA, appears to provide for the sharing of costs between the applicant and the public if the arbitration panel=s decision requires a modification of the proposed project as approved by the board of supervisors. There appear to have been no cases yet in which this section of the 310 law has been applied. (DNRC, July 2, 1980.)

24. Q: Who has ownership of the stream channels and responsibility for bank stabilization?

A: The State of Montana owns the streambeds of navigable lakes or streams, below the low-water level. Where the body of water is not navigable, the owner of land bounded by that body owns the bed to the midpoint. Many larger creeks would come within the definition of *navigable*.

There is no theory under which the State of Montana would be responsible for stabilizing the banks of a stream. Even an adjacent landowner is not responsible for stabilizing the banks of a stream, though it may be to his or her advantage to do so in order that his or her land does not wash away. (DNRC, July 16, 1981)

27. Q: What constitutes a *310 permit*?

A: The *310 permit* is not a permit per se; rather, it is a decision of the supervisors approving or modifying a plan to physically alter a stream. The process established by the legislature requires that the entire record of decision be used in defining the plan to be implemented. The record of decision would include the application, operational plan, board action, etc. (DNRC, June 1, 1983)

29. Q: Can a conservation district require a surety bond for placer mining activity?

A: The 310 law has the broad general goal of allowing conservation districts to do whatever is necessary, within the guidelines set by the Board of Natural Resources and Conservation, to protect natural streams and rivers and adjacent property, and the requirement of a surety bond from those seeking a 310 permit would serve that goal and be within a district=s powers. Such a requirement should be included in a conservation district=s rules. (DNRC, November 20, 1983)

31. Q: Can a conservation district change its 310 rules to require surety bonds?

A: Any rule change must be adopted according to 75-7-117, MCA, by resolution only "after a public hearing.≅ Notice of the rule change should be given at least 30 days in advance of the meeting, in the form of two paid notices in a paper of general circulation in the district. The meeting should provide an opportunity for discussion before the actual change or amendment. [Note: Notice requirements changed in January 1997. See 36.2.401 through 36.2.410, ARM, or CD local rules.]

Any surety bond would have to be conditioned on proper reclamation of the project and conformance with any conditions placed on the permit by the supervisors. (DNRC, March 21, 1984)

34. Q: How does the 310 law apply to the removal of beaver dams?

A: Beaver dams may be excluded from the 310 law in situations where beaver dams are endangering the public health (87-1-224, MCA) or interfering with water rights (75-7-104, MCA). Removal of debris interfering with water rights is not considered a project, but beaver dams are <u>not debris</u> unless they interfere with a structure, and therefore are not automatically excluded. Anyone planning to engage in a project (i.e., remove a beaver dam) is required to give proper notice to the supervisors. [Note: Exceptions for debris removal no longer exist in the *Administrative Rules of Montana.* (DNRC, March 23, 1984)

38. Q: Is it legal for the county to delegate floodplain management permit duties to the CD, and can the CD assume this responsibility?

A: The conservation district may rightfully assume the administration of floodplain management within the banks of the stream. The single permitting process should provide an efficient review of the project. However, the conservation district will assume greater responsibility in meeting the stringent requirements of floodplain administration. (DNRC, April 16, 1985)

47. Q: Can tires be used as riprap?

A: It appears that tires can be used for bank stabilization under certain circumstances if approved by the board of supervisors; however, DNRC and DFWP believe other materials would be more suitable. (DNRC, April 25, 1986)

69. Q: Does the Montana Environmental Policy Act (MEPA), requiring environmental reviews, apply to the projects covered by the 310 law?

A: The Montana Environmental Policy Act (MEPA) is limited to the actions of state agencies. Until such time as MEPA is amended to include political subdivisions, local government entities like conservation districts are not required to follow the

environmental review criteria that state agencies follow in permitting development. (DNRC, October 15, 1990)

81. Q: What are the definitions of *reconstruct, repair,* and *restore* as used in the implementation of the 310 law?

A: The 310 law does not assign any peculiar meaning to the terms, and therefore ordinary definitions apply.

1) *AReconstruct≅* means *to construct again, to rebuild, to remodel, to reform again, or to restore again the thing that was destroyed.*

2) *"Repair≅* means *to mend, remedy, restore, renovate, or to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.*

3) *ARestore≅* means *to renew, rebuild, or put back into existence or use, or to bring back to or put back into former or original state.*
(DNRC, August 30, 1993)

81. Q: How does a conservation district handle a Agrandfathered≅ project that has been destroyed?

86: A: The 310 law does not contain a specific "grandfather clause" for projects. Time is not a factor in determining whether a permit is required for a project built prior to the implementation of the 310 law. The issue is always whether the rebuilding, reconstruction, or repair work constitutes a "project." (DNRC, August 30, 1993)

86: Q: Must a district adhere to its earlier classification of Anon-projects≅ in the consideration of similar applications, despite new information?

A: No. The district cannot be bound to perpetuate a faulty decision simply on the theory that to do otherwise would be inconsistent. (DNRC, July 17, 1995)

93. Q: May a conservation district continue to issue a 310 permit for the same project if the project has not been constructed because of the inability of the applicant to obtain other permits?

A: Yes. Each application should be evaluated on its own merit, regardless of the number of times an individual applies for the same project. When a CD is aware of the reason for the delay (for example, inability to secure other permits), the CD may use this information to establish time frames for completion. (DNRC, November 25, 1996)

94. Q: Can the conservation district require a placer miner to secure a bond in addition to the bond required by the Department of Environmental Quality (DEQ) under the mine reclamation law, small miner's exemption?

A: The issue is not whether the district can require a bond in addition to a bond required by DEQ. When a conservation district requires a small miner to provide a bond, the issue is whether a small miner's bond can be required by DEQ. The general answer is that it cannot. A conservation district can require a bond for placer mining operations. The bond required by the conservation district is neither limited by a $5,000 cap, nor is it discretionary on the part of a small miner to provide the bond. MCA, 82-4-305 (1995), does not limit jurisdiction of the conservation district under the 310 law. (DNRC, July 15, 1996)

95. Q: May a conservation district place a permit application on hold at the request of a person who is not the applicant?

A: Although CDs can place appropriate conditions on a permit, nothing in the 310 law allows a CD to suspend a 310 permit. (DNRC, August 21, 1996)

96. Q: Are conservation districts required to enforce compliance with professional engineering statutes in conjunction with the 310 law?

A: No. (DNRC, February 12, 1997)

98. Q: Can a conservation district accept a 310 permit application if the applicant doesn't want to sign the arbitration agreement?

A: No. MCA, 75-7-111(3), states that an arbitration agreement must be signed at the time of filing a notice of the proposed project (310 application). If an applicant has a significant problem with a specific section of the arbitration agreement, a CD can negotiate to try to come to an acceptable agreement, but an arbitration agreement must be signed. (DNRC, February 12, 1997)

10. PERENNIAL STREAMS

7. Q: Does the 310 law apply to an old river bed?

A: The act and the rules thereunder apply only to natural, perennial-flowing streams that are actually in existence. An old river bed, in my opinion, does not constitute a natural, perennial-flowing stream, and therefore the act does not apply. (DNRC, May 26, 1976)

74. Q: Can an intermittent drainage be considered a perennial stream?

A: The 310 law does not apply to intermittent streams. The 310 law clearly applies to perennial-flowing streams. (DNRC, July 18, 1991)

75. Q: Can Green Mountain CD apply the 310 law to reservoirs?

A: The Green Mountain CD can reasonably justify the amendment of its rules to include reservoirs. Legislative clarification should be sought to quell any questions or concerns. (DNRC, January 27, 1992)

78. Q: Should a conservation district use U.S. Geological Survey (USGS) topo maps as the determining facts in designating streams as perennial or intermittent?

A: USGS maps can be used as a guideline in determining whether a stream is perennial. However, USGS maps should not be considered as conclusive authority, especially if a conservation district has other, more conclusive information relative to whether a stream is perennial or intermittent. (DNRC, April 26, 1993)

81. Q: Is the section of river controlled by a dam part of the reservoir, river, or lake?

A: A conservation district should exercise jurisdiction over the area defined by the Aexisting≅ state of the river. A project under the 310 law, as a general rule, includes activities on the section of a river that is controlled by an artificial obstruction such as a dam. Determinations must be made based on the facts - Does the project impact the area within the existing state of the stream or river? (DNRC, August 30, 1993)

11. RESPONSIBILITY FOR COMPLYING WITH THE 310 LAW

2. Q: Does the 310 law apply to projects built with federal funds on private land?

A: Yes, if a project is constructed at the landowner=s request, is on his land, and is owned by him when the project is complete. Even though the project is funded with federal funds or sponsored by the conservation district, the private landowner is still the person engaging in the project. The landowner would apply for the 310 permit. (DNRC, January 8, 1976)

26. Q: Who is responsible for making corrections after a land sale?

A: Any person who initiates a project without complying with the 310 law is responsible for correcting the action. The violator does not escape these sanctions by selling the property. Nevertheless, a buyer may be held responsible to cure the violation as of the day the buyer was made aware of the violation and refused to act. (DNRC, April 21, 1982)

26. Q: Who has the responsibility for compliance with the 310 law, the landowner or the lessee?

A: The act provides that the person *planning to engage in a project* (75-7-111, MCA) and *the person who initiates a project* (75-7-123, MCA) are responsible for compliance with the 310 law. For instance, if the lessee is acting at the request or order of the owner, the owner may be held responsible; if the lessee is acting on his or her own volition, the lessee is responsible. (DNRC, April 21, 1982)

43. Q: Who is responsible for a violation - the owner, tenant, or contractor?

A: The criminal penalties of the 310 law apply to any person engaged in altering a streambed without the consent of the district supervisors. This section is not limited to the 310 applicant, the landowner, or to persons benefited by the project. Thus, a contractor engaged in unauthorized streambed work appears to be criminally liable. (DNRC, October 28, 1985)

80. Q: Does work in a stream in response to a court order require a 310 permit?

A: The presence of a court order does not relieve the individual doing the work from obtaining a permit. However, there may be circumstances where a court order supersedes state law. Each situation should be reviewed to determine the applicability of the 310 law. (DNRC, August 18, 1993)

85. Q: Does the 310 law apply to irrigation districts?

A: Yes, an irrigation district is considered a Aperson≅ under the 310 law. (DNRC, March 7, 1995)

88. Q: Does the 310 law apply to Superfund projects carried out under the Comprehensive Environmental Response Liability Act (CERCLA)?

A: No. CERCLA preempts local permitting requirements. (DNRC, September 10, 1995)

97. Q: Is a rural improvement district required to obtain a 310 permit when it is involved in activities that alter or impact streams or stream banks?

A: A rural improvement district is a public entity and falls within the provisions of the Stream Protection Act administered by the Department of Fish, Wildlife, and Parks. (DNRC, December 6, 1998)

12. RIGHTS OF THE PUBLIC – ACCESS TO RECORDS, NOTICE, AND PARTICIPATION

15. Q: Are 310 applications open to the public?

    A: Yes. Conservation districts are political subdivisions of the state (76-15-103(4), MCA). Documents in conservation district possession, such as applications received under the 310 law, are public documents (2-6-201, MCA, and 2-6-202, MCA). Therefore, a conservation district must allow public inspection of its files of applications received under the Natural Streambed and Land Preservation Act of 1975. (October 5, 1979)

18. Q: Does the CD need to give public notice and allow public participation in CD meetings?

    A: Yes. The board of supervisors of a conservation district must provide notice to the public, and allow public participation in any meeting held to discuss and make decisions on proposed projects to alter streambeds, if such proposals are of Asignificant public interest.≅ (DNRC, July 2, 1980)

19. Q: Can the CD publicly disclose the name, address, and telephone number on a 310 violation form?

    A: Nondisclosure is appropriate only if the district: (1) determines that a matter of privacy is involved, (2) weighs the demands of that privacy and the merits of publicly disclosing the information, and (3) finds that the demand of individual privacy clearly outweighs the demand of public disclosure. All requests for violation form records must be in writing and be specific. Any grants or denials of access by the district must also be in writing and specifically state the reasons therefor. (DNRC, July 21, 1980)

26. Q: What are the public=s rights of access to violation complaints?

    A: The 310 law does not require that an individual providing information as to a violation of the law disclose his or her identity. If the conservation district does not want to put itself in the position of having to balance the Apublic right to know≅ and the Aprotection of individual privacy≅ provisions in the Montana Constitution, the conservation district should not require persons providing information to furnish their names or identities. A person voluntarily providing his or her identity waives the right to privacy, and the district should have no problem in allowing such information to be open to public inspection. (DNRC, April 21, 1982)