

VOLUME NO. 50

OPINION NO. 9

CONSERVATION DISTRICTS - authority to enact regulations to conserve and protect soils;

ENVIRONMENTAL QUALITY - release of pollutants from coal bed methane that may cause loss of soil structure and other soil and water erosion;

LAND USE - State Soil Conservation Districts: power to regulate under Title 76, chapter 15, part 7;

SOIL AND WATER CONSERVATION - Districts' scope of authority under the State Soil Conservation laws;

WATER AND WATERWAYS - Coal bed methane water extraction and impoundment;

MONTANA CODE ANNOTATED - Title 75, chapter 7, part 1; Title 76, chapter 15; part 1; sections 76-15-101, (3), -102, -701 to -707, -706, (1)(a), (b), (c), (d), (e), (2), -901 to -905; 82-11-173 to -175, (2)(d);

MONTANA LAWS OF 1937 - Chapters 72, 157;

OPINIONS OF THE ATTORNEY GENERAL—36 Op. Att'y Gen. No. 97 (1976); 39 Op. Att'y Gen. No. 2 (1981).

HELD: A Conservation District has authority under Mont. Code Ann. § 76-15-706 (2003) to implement land use regulations, following a referendum by the voters, in order to implement reasonable measures to conserve the soils, protect the soil structure from coal bed methane water, and conserve the water resources of the district.

August 31, 2004

Mr. Michael B. Hayworth
Rosebud County Attorney
County Courthouse
Post Office Box 69
Forsyth, Montana 59327-0069

Dear Mr. Hayworth:

You have requested my opinion on the following question:

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Does a conservation district's authority to implement Land Use Regulations include authority to implement regulations and requirements specific to coal bed methane wastewater operations?

Based on the following analysis, it is my opinion that a conservation district has authority under Mont. Code Ann. § 76-15-706 (2003) to implement land use regulations as part of their broad program to protect and conserve soils and water. Following a referendum by the voters, a district may implement reasonable measures that must be taken to prevent soil erosion and saline seep contamination from coal bed methane produced water impoundments during runoff events. Such land use regulations fulfill the purpose of conserving soil and soil resources of the state, protecting the soil structure from pollutants and conserving the water resources of the district, all of which fall within the delegated authority of the conservation district.

This question arose specifically because the Rosebud Conservation District has proposed a land use referendum ordinance pursuant to Mont. Code Ann. § 76-15-706(1)(e) and (2) that includes the following regulatory elements:

- Review of the anticipated effect of coal bed methane production on the watershed and Conservation District approval of a Conservation Plan prior to commencement of methane extraction operations;

- Mandatory performance bond (held by the District) to insure compliance with Reclamation Plans for reclaiming impoundment sites.

Mont. Code Ann. § 76-15-706 provides a Conservation District with clear authority to implement Land Use Regulations, and enumerates specific provisions for regulations which may be adopted under the provisions in subsections (a) (b) and (c). Your inquiry calls for statutory interpretation of whether subsection (e) of § 76-15-706 is sufficient to provide authority for the Conservation Districts to enact provisions to address wastewater from coal bed methane production as a conservation provision in the district.

Mont. Code Ann. § 76-15-706(1) states:

Contents of land use regulations. (1) The regulations to be adopted by the supervisors under the provisions of 76-15-701 through 76-15-707 may include:

- (a) provisions requiring the carrying out of necessary engineering operations, including the construction of water spreaders, terraces, terrace

outlets, check dams, dikes, ponds, ditches, fences, and other necessary structures;

(b) provisions requiring observance of particular methods of cultivation or grazing, including contour cultivating, contour furrowing, lister furrowing, sowing, planting, strip cropping, seeding, and planting of lands to water conserving and erosion preventing plants, trees, and grasses, forestation and reforestation;

(c) specifications of cropping and range programs and tillage and grazing practices to be observed;

(d) provisions requiring the retirement from cultivation of highly erosive areas or of areas on which erosion may not be adequately controlled if cultivation is carried on;

(e) provisions for such other means, measures, operations, and programs as may assist conservation of soil and water resources and prevent or control erosion in the district, having due regard to the legislative findings set forth in 76-15-101 and 76-15-102.

The authority of the Conservation Districts to regulate land use and water resources has been addressed in two previous opinions issued by the Attorney General. 36 Op. Att'y Gen. No. 97 (1976) held that state Conservation Districts have not been granted broad administrative powers that would authorize them to regulate state water, and more particularly that the Lakeshore Protection Act does not conflict with the statutory powers of Conservation Districts by conferring on local governmental entities, such as county commissioners, power to regulate projects potentially injurious to lakes. 39 Op. Att'y Gen. No. 2 (1981) further held that state Conservation District Supervisors do not have authority under The Natural Streambed and Land Preservation Act of 1975 (Title 75, ch. 7, pt. 1) to review the route of a proposed pipeline within the county at places other than stream crossings. Within that 1981 opinion, however, is recognition that the Supervisors may formulate regulations under Title 76, chapter 15, to address the issue of land use within their jurisdiction. Conservation District regulatory authority over the effects of coal bed methane impoundments on soil and water resources has not been addressed either in an Attorney General Opinion or by judicial determination.

Rosebud Conservation District's proposed Ordinance would be the first regulation of coal bed methane wastewater under a conservation district's land use regulation authority. Under current state law coal bed methane is the direct subject of two laws, The Coal Bed

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Methane Protection Act, Mont. Code Ann. § 76-15-901 to -905 (2003), and the Coal Bed Methane Production Offset Act, Mont. Code Ann § 82-11-173 to -175 (2003). The Coal Bed Methane Production Offset Act provides for ways in which water produced from CBM wells must be managed, one of which is “through other methods allowed by law.” Mont. Code Ann. § 82-11-175(2)(d). The proposed ordinance would provide another method of management of coal bed methane produced water consistent with the Coal Bed Methane Production Offset Act. The Coal Bed Methane Protection Act provides that conservation districts may establish procedures to compensate landowners or water right holders for damages, subject to approval of the Department of Natural Resources and Compensation. Such compensation would be available only after June 30, 2011. Neither act restricts the conservation districts’ authority to protect and conserve the water and soil from erosion and protect the soil structure of the land.

The environmental threats to soil and water conservation from the development of coal bed methane are generally recognized. The Conservation District more specifically identifies the potential for immediate and long-term adverse effects on soil structure and water conservation. While waters of the state are afforded protection under the Clean Water Act, and both soil and water are afforded protection from hazardous substances under both state and federal law, the conservation of water and protection from adverse effects on the soil structure remain largely unprotected by existing federal or state law. Rosebud Conservation District’s recognition of the regulatory void and consideration of an ordinance to conserve its soil, protect it from erosion and defend against the loss of critical soil structure are consistent with its land use regulation authority.

The Conservation Districts were born of the dust bowl of the 1930’s. Montana was among the first states to enact a law creating the conservation districts. See, Ch. 157, Laws of Montana 1937. During the next legislative session, Montana enacted a much more comprehensive bill as “The State Soil Conservation District Law,” Ch. 72, Laws of 1939, now Mont. Code Ann. § 76-15-101, *et seq.* (2003). Within the structure of the 1939 law was the declaration of the necessity of creating governmental subdivisions of the state to engage in conserving soil resources and preventing and controlling soil erosion that were eroding the farming base of the lands. The 1939 act further empowered the districts to adopt programs and regulations for the discontinuance of land-use practices contributing to soil wastage and soil erosion, and authorized the districts to adopt and carry out soil conserving land-use practices. The 1939 act also granted the Conservation Districts the power to enforce their programs and regulations.

Any regulation under the act must be proposed as an ordinance and submitted to the voters within the district. Mont. Code Ann. § 76-15-701. Rosebud Conservation District proposes to enact a regulation by submitting it to the qualified voters within the district.

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Additionally the purpose of the regulation is to conserve the water and soil within the district, thus keeping the land and water from being damaged, lost, or wasted. The ordinance, as proposed, appears to fall within the regulatory authority of the district over its soil and water conservation matters and further appears to comply with the statutorily required referendum process.

The Conservation Districts serve as the primary coordinators for pilot programs to conserve the soil and water and to provide feedback to the Environmental Protection Agency and to the Montana Department of Environmental Quality. Montana's Board of Oil and Gas has adopted general regulations for earthen pits and disposal of produced water that requires a permit prior to construction for any oil or gas production facility. Mont. Admin. R. 36.22.1226-1232 (1997). The Board also has authority to review water flood programs as the conditions may justify under A.R.M. 36.22.1232 and to require reclamation bonds under A.R.M. 36.22.1308. The Board of Oil and Gas rules are not specific to coal bed methane water production nor are they the sole authority to regulate floodwater, water impoundments or water discharges. The Conservation Districts are uniquely charged with the stewardship of the land and the conservation of water within the district. The Rosebud Conservation District is exercising stewardship by proposing regulation of impoundments of coal bed methane produced water to protect the soil structure and conserve water from potential effects of coal bed methane production water. Conservation district regulations may not conflict with state regulation; however, as a general rule, conservation districts may impose more stringent requirements based on local conditions. The conservation district's proposed regulation authority should be coordinated with the existing process and regulations by the Board of Oil and Gas and the Department of Environmental Quality.

In addressing your question, I must follow the well-established principle of statutory construction that "statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required." Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 173, 983 P.2d 363. The meaning of the Land Use Regulation statute is clear in its purpose and intent. It contains the enumerated provisions for engineering, construction, methods of cultivation or grazing, specifications, programs, as well as a provision for "other" areas of regulation. In this request, the Rosebud Conservation District's ordinance is proposed under subsection (e) of Mont. Code Ann. § 76-15-706, which reads:

. . . provisions for such other means, measures, operations, and programs as may assist conservation of soil and water resources and prevent or control erosion in the district, having due regard to the legislative findings set forth in 76-15-101 and 76-15-102.

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In Mont. Code Ann. § 76-15-101, the legislature made extensive findings regarding the need for soil conservation practices to defeat the effects of the dust bowl conditions of the 1930s. Among those findings, the legislature stated:

[T]o conserve soil resources and control and prevent soil erosion **and prevent floodwater and sediment damages and further the conservation, development, utilization, and disposal of water**, it is necessary that land use practices contributing to soil wastage and soil erosion be discouraged and discontinued and appropriate soil-conserving land use practices and works of improvement for flood prevention and the conservation, development, utilization, and disposal of water be adopted and carried out

Mont. Code Ann. § 76-15-101(3) (emphasis added). The legislature then stated “that **among the procedures** necessary for widespread adoption are” matters within the scope of the first four subsections of Mont. Code Ann. § 76-15-706(1). *Id.* Mont. Code Ann § 76-15-102 then provides:

It is hereby declared to be the policy of the legislature to provide for the conservation of soil and soil resources of this state, for the control and prevention of soil erosion, **for the prevention of floodwater and sediment damages, and for furthering the conservation, development, utilization, and disposal of water and thereby to preserve natural resources**, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this state.

(Emphasis added.)

Regulation of coal bed methane produced water and runoff is not expressly authorized under specific statutory provisions at (a) through (d), and your letter suggests that the authority to adopt “such other means . . . as may assist conservation of soil and water resources” provided in Mont. Code Ann. § 76-15-706(1)(e) should be read as being limited in some way by the specific provisions describing the district’s authority in subsections (a) through (d) of the statute. Since those other subsections make no mention of controlling runoff associated with oil and gas production (or, for that matter mineral production generally), you suggest that the proposed ordinance does not fall within the district’s authority.

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The doctrine of ejusdem generis, under which specific language in a statute is deemed to qualify more general catchall provisions, may not be used to defeat the intention of the legislature. Burke v. Sullivan, 127 Mont. 374, 378-79, 265 P.2d 203, 206-07 (1954), quoting 50 Am. Jur. 2d, Statutes, § 250 (doctrine “does not warrant a court in subverting or defeating the legislative will by confining the operation of the statute within narrower limits than intended by lawmakers.”) Mont. Code Ann. § 76-15-706(1) describes provisions that are within the discretion of the district in adopting regulations authorized by Mont. Code Ann. § 76-15-701. In subsection (1)(e) of the statute, the legislature has made it clear that the catchall provision was to be interpreted in light of the broad aims of the conservation district laws generally, requiring the district to have “due regard to the legislative findings set forth in 76-15-101 and 76-15-102.”

It is apparent that the legislature intended this statute to be a forward-looking provision designed to provide flexibility to address changing conditions over time. In my opinion, the legislature did not intend that the listing in Mont. Code Ann. § 76-15-706(1)(a) through (d) of measures that are “among the procedures” that are necessary to protect soil and water limited the flexibility of conservation districts to devise means, consistent with the overall objective of conserving soil and water, to control the adverse effects of CBM runoff--a specific threat to soil and water not within the contemplation of the legislature in 1939.

Any regulations proposed by a conservation district under Title 76, chapter 15, part 7, may be adopted for such means, measures, operations, and programs as may assist a conservation district in the conservation of soil and water resources. Conserving the water and soils from saline seeps and blowing salts appears to be fully contemplated within the purpose for which conservation districts were formed--and any ordinance enacted which adopts means, measures, operations or programs that assist in preventing the saline seeps and blowing salts that would destroy the soil structure and make the water unusable for irrigating the lands is clearly within the purpose and authority of the district.

Under this analysis, subsection (e) provides for any other means to assist in the conservation of soil and water resources and prevent or control erosion in the district. That the erosion may include high Sodium Absorption Ratio (SAR) water and destruction of the soil structure essential for the farm land base provides legal justification for the ordinance. The Ninth Circuit Court of Appeals recently addressed the very concern that served as the impetus for this proposed regulation. The Court stated:

Farmers who use water from the Tongue River for irrigation are concerned with the “saltiness” and high SAR of CBM water because of the potential

hazards these characteristics pose to soil structure. High [**5] SAR water, such as CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water. The Montana Department of Environmental Quality (MDEQ), in a Final Environmental Impact Statement analyzing coal bed methane extraction, warns that “clayey” soil, like that in the Tongue River Valley, is vulnerable to damage from high SAR water. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereinafter “Montana FEIS”), Soils Appendix SOI-1, available at www.deq.state.mt.us/CoalBedMethane/finaeis.asp. Fidelity’s soil expert concluded that “the SAR of CBM water creates a permeability hazard and precludes its use for irrigation without mixing, treatment or addition of soil amendments.” The MDEQ cautioned that unregulated discharge of CBM water would cause “[s]urface water quality in some watersheds [to] be slightly to severely degraded, resulting in restricted downstream use of some waters.” *Id.*, 4-72. Some of the CBM water, however, is used by Fidelity’s grazing lessee, CX Ranch, in livestock watering [**6] ponds and stock tanks.

Northern Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155, 1158 (9th Cir., 2003).

Here, the Rosebud Conservation District is proposing the ordinance to conserve both the soil and water because the risk is not merely to surface water quality, but to the capacity of soil to produce crops or grasses. The risk goes to the heart of the conservation districts’ role in the management of the resources in Montana. The Rosebud Conservation District has proposed an ordinance that addresses an issue of water and soil conservation that is of paramount concern within the district. They have proposed its enactment properly under the restrictions in the Conservation Districts Land Use Regulations statutes. In doing so, the Conservation District is addressing a subject that is within its authority to regulate--the conservation of its water and soil. Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. 2B Sutherland Statutory Construction, § 55.04 (6th ed. 2000).

Whether that authority extends to authority to require a bond is beyond the scope of this review of the district’s regulatory authority. Additionally, this opinion makes no determination of the validity of the proposed ordinance itself, but merely reviews the

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authority of the Conservation District to regulate the coal bed methane wastewater operations as it would regulate other runoff or erosion.

THEREFORE, IT IS MY OPINION:

A Conservation District has authority under Mont. Code. Ann. § 76-15-706 (2003) to implement land use regulations, following a referendum by the voters, in order to implement reasonable measures to conserve the soils, protect the soil structure from coal bed methane water, and conserve the water resources of the district.

Very truly yours,

MIKE McGRATH
Attorney General

mm/cfw/jym