

FACT SHEET 3: Are Stream Setbacks Legal? How do they Impact Private Property Rights?



A variety of issues have arisen at the local government level regarding the legality of stream setback regulations. One of the most common arguments raised is that stream protection provisions are a “takings” of private property by the government. Additionally, there have been questions raised about whether these provisions are allowed in subdivision or floodplain regulations. This fact sheet tries to sort through some of the legal issues surrounding stream setbacks, including what lawsuits have been filed in Montana over stream protection measures.

3.1. Are stream setback regulations considered a “takings” of private property by the government? Shouldn’t a city or county adopting setbacks be required to purchase lands affected by these regulations?

The simple answer to both of these questions is ‘no.’ Stream setback regulations have been in place in Montana since 1985, when Choteau County first adopted regulations to protect the Missouri River corridor, as well as other streams in the county. Since that time numerous other local governments have adopted setbacks as part of subdivision regulations or zoning, including Madison County (1994), Missoula County (1995), the City of Missoula (1995), Park County (2000), Powell County (approximately 2000), City of Bozeman (2002), Meagher County (2003), Gallatin County (2005), Lake County (2005), Lewis & Clark County (2005), Cascade County (2007), City of Whitefish (2008), and Flathead County (2009). **To date, no lawsuits have challenged any of these regulations.** In fact, the only lawsuit that challenged the validity of stream setback regulations occurred in Big Horn County. However, that lawsuit successfully challenged the process that the county used to adopt their regulations, and not the regulations themselves (see question # 3.3 below).

Since the inception of land use planning, the courts have developed thresholds for determining whether a particular land use regulation is a legitimate exercise of the “police power” inherent in our government’s authority to protect public health, safety, and welfare. The following standards have emerged from a history of court decisions to guide local governments in determining the validity of regulations.

- The regulation in question must have been adopted in accordance with the applicable enabling statute.
- The regulation must be reasonably related to, and must actually further, public health, safety, or general welfare.
- The regulation must not unreasonably discriminate between similarly situated lands.
- The regulation must not be arbitrary or capricious either on its face or as applied to a particular property. It should go no further than is required to achieve its legitimate objective, and, in the case of zoning and subdivision regulations, must conform to an adopted Growth Policy.

- The regulation must not have the effect of excluding entire racial, minority, or economic groups from the jurisdiction.
- The regulation must not be considered to be an unconstitutional “taking” of property. The most commonly applied “takings” test is whether the regulation denies a landowner of all economically viable use of property without compensation.

In addition to the above guidelines, regulations should contain a process by which local governments consider the concerns of citizens affected by a regulation before final decisions are made. Appeal and variance processes should be included in the regulations to address due process rights for citizens.

The Community Technical Assistance Program within the Montana Department of Commerce’s Community Development Division is currently working on a ‘takings’ primer. For more information about this product, contact Kelly Casillas, Legal Counsel: 406-841-2727, kcasillas@mt.gov.

3.2. Have there been any lawsuits in Montana based on local government stream protection regulations? If so, what was the outcome?

There have been two lawsuits decided in Montana with some basis in stream protection issues. One lawsuit addressed technical issues on how stream setback regulations were adopted (Big Horn County) and one addressed setbacks for septic systems from the floodplain. Both lawsuits are described below.

Farley v. Big Horn County (2003), 22nd Judicial District Court of Montana, 2003 ML 2582; Mont. Dist. LEXUS 2464

This case involved adoption of stream setbacks provisions in interim zoning regulations. In 2002, the Growth Policy adopted by Big Horn County included construction setbacks of 300 feet from the ordinary high water mark of all perennial streams. On Oct. 17, 2002, after two public hearings, the Big Horn County Commissioners adopted interim zoning regulations that stated, “no new structures, including mobile homes and recreational vehicles, and no roads or driveways, may be placed within 300 feet of the ordinary high water mark of the perennial rivers and streams in the areas under the jurisdiction of Big Horn County” for a period of one year. These interim regulations were enacted to avoid a rush of construction projects aimed at beating permanent regulations. Shortly after County Commissioners adopted the interim regulations, a lawsuit was filed against the County over the regulations on a procedural issue.

Montana law allows counties to adopt interim zoning. What the court ruled in *Farley v. Big Horn County*, however, was that the public meeting notice for the interim zoning regulations was inadequate and it “failed to meet the

Perennial—Not a Common Term?

The public meeting notice for Big Horn County’s interim zoning regulations stated that the Board of County Commission would meet in regular session, “for the purpose of adopting interim regulations with regard to 300’ [feet] no build zone on any perennial waterways within Big Horn County.” The court’s decision to throw out the regulations in *Farley v. Big Horn County* was based on the fact that “perennial” was not defined in the public notice. Specifically the court wrote, “The term *perennial*, when used to describe a type of waterway, without further context or definition, may lead persons of common intelligence to necessarily guess at its intended meaning...The Board’s public announcement failed to define the term *perennial* or describe with particularity the affected streams and adjacent areas potentially subject to the Resolution. As a consequence, interested and affected landowners are left to guess as to whether streams running through their property could be considered perennial and therefore subject to the Resolution. Without adequate notice of the impending action, all affected landowners were denied due process of law.”

required standard for due process.” As a result, the interim zoning regulations were declared “null and void.” This lawsuit was decided in August 2003. Since then, Big Horn County Commissioners have chosen not to formerly take up regulations for stream setbacks again.

McElwain v. County of Flathead (1991), Montana Supreme Court, No. 90-377

This case involved septic system laws in Flathead County. Mary McElwain purchased 14 acres of property along the Flathead River in 1979. At the time of the purchase, Flathead County’s septic regulations (adopted in 1975) had a setback requirement of 100 feet from the Flathead River. McElwain planned to eventually build a home 200 feet from the bank of Flathead River. On August 6, 1984, Flathead County adopted a new septic system regulation, which required a 100-foot setback between the septic system drainfield and the floodplain. On August 23, 1984, McElwain applied for a permit for her retirement home. Flathead County denied her permit based on the fact that the drainfield would not have a setback of 100 feet from the floodplain. She was also denied a variance. McElwain, after exhausting her administrative appeals, filed a lawsuit against Flathead County asserting that the new law diminished the value of her land. This lawsuit eventually reached the Montana Supreme Court, which decided that even though her property was reduced in value from \$75,000 to \$25,000, the new Flathead County septic system regulation was not a regulatory taking. The new septic system law was ruled to be substantially related to the legitimate state interest of protecting public health and safety—“keeping sewage out of the river.” The Montana Supreme Court also held that the public interest involved outweighed the encroachment upon the landowner’s property.

3.3. Are cities and counties allowed to include stream setbacks in their subdivision regulations?

Yes. As indicated above, several Montana cities and counties have adopted setbacks in their subdivision regulations (see question #3.1). None of these regulations have been challenged as “illegal.” If you have questions about the applicability of stream setbacks in subdivision regulations, contact the Community Technical Assistance Program in the Community Development Division within the Montana Department of Commerce:

- Legal Counsel: Kelly Casillas, 406-841-2727, kcasillas@mt.gov
- Program Manager: Jerry Grebenc, 406-841-2598, jgrebenc@mt.gov

3.4. Are counties allowed to prohibit subdivisions within the 100-year floodplain?

Yes. Several Montana counties prohibit subdivisions within the floodplain, including Cascade, Flathead, and Ravalli Counties. Putting a subdivision too close to a river or stream has real consequences. It can ruin people’s homes and the local government can actually be liable for doing so:

Missoula County has an instructive example of why it is important and financially prudent to keep subdivisions out of the floodplain. In 1992, Missoula County approved a 92-lot subdivision west of Missoula along lower Grant Creek. The subdivision was located outside the 100-year floodplain boundary on FEMA Flood Insurance Rate Maps. In 1997, during runoff calculated to be less than a 10-year flood, water submerged some of the lots, yards, basements, and the sewage treatment system of this subdivision. As a result, 16 homeowners and the homeowners association filed a lawsuit against the property developer, the developer’s engineer, local real estate agents, and Missoula County. A negotiated settlement paid \$2.3 million to the homeowners. Because of the lawsuit, in 2001 the MT Dept of Natural Resources and Conservation commissioned a study for this site. That study showed that 45 of the homes in the subdivision were in the regulatory floodway. How did this happen? Because Grant Creek’s natural meanders

had been eliminated, and the creek channelized, the intensity of flooding substantially increased in the subdivision area. It appears that the only feasible way to resolve this problem is to restore 5 miles of Grant Creek, including its riparian vegetation and floodplain—a project that will likely cost millions of dollars—and just got started in 2008.

As explained above, development activity along streams can divert flood waters onto other properties. It can also reduce the size of natural stream channels; narrow the natural floodplain; fill essential flood water storage space; and alter water velocities. These changes are often made with little or no regard for how these changes affect other people and property in the floodplain or elsewhere in the watershed. Because of these problems, in 2000 the Association of State Floodplain Managers developed a “no adverse impact” approach or goal for local and state governments. (see <<http://www.floods.org/index.asp?menuID=349&firstlevelmenuID=187&siteID=1>>). This program is designed to help manage floodplains to control flood and erosion losses, as well as insure that new development does not increase flood risks and losses.

If you have questions about the applicability of stream setbacks in floodplain regulations, contact the Community Technical Assistance Program in the Community Development Division within the Montana Department of Commerce:

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3.5. Why did the Montana Legislature reject setbacks legislation at the state level? Since legislation failed at the Montana Legislature, doesn't that prohibit local governments from attempting to adopt stream setbacks?

Statewide legislation was attempted at three sessions of the Montana Legislature (2005, 2007, and 2009) to set up a consistent system of streamside protections across the state. According to the Realtors and builders, state legislators rejected statewide setbacks because they thought the ‘setbacks decision’ should be made at the local government level—and not at the state level. Unlike most county regulations, the state legislation has recently only addressed setbacks on rivers (not streams) because many rivers in Montana cross jurisdictional lines. Because unwise riverside development in upstream counties can have profound impacts on property in downstream counties, a consistent minimum state policy on rivers makes sense. Although this legislation failed to pass, it does not affect the right of local governments to adopt stream setbacks at the local level.

If you have questions about the applicability of stream setbacks in subdivision regulations, contact the Community Technical Assistance Program in the Community Development Division within the Montana Department of Commerce:

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