

BEFORE THE BOARD OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
RESERVATION OF WATER NO. 9931-r)
BY THE MONTANA DEPARTMENT OF STATE)
LANDS)

FINDINGS OF FACT AND CON-
CLUSIONS OF LAW OF APPLI-
CATION NO. 9931-r

The above-entitled matter came on regularly for hearing starting on or about August 10, 1977, in Billings, Montana, before the Montana Board of Natural Resources and Conservation and its duly appointed Hearing Examiner, James Driscoll. The Applicant appeared by and through its counsel of record, John Norht and David Woodgerd. The Montana Department of Natural Resources and Conservation appeared by and through its counsel of record, Richard Gordon. The Montana Department of Health and Environmental Sciences appeared by and through its counsel of record, Mona Jamison. The Montana Department of Fish and Game appeared by and through its counsel of record, F. Woodside Wright and Clayton Herron. The fourteen applicant conservation districts appeared by and through their counsel of record, Gary Spaeth. Utah International, Inc., appeared by and through its counsel of record, Urban Roth. The Montana Power Company appeared by and through its counsel of record, Robert Woodahl. Intake Water Company appeared by and through its counsel of record, Henry Loble. Trout Unlimited and the Federation of Fly Fishermen appeared by and through their counsel of record, James Goetz. Witnesses were duly sworn, and oral and documentary evidence was introduced.

The Board, having read and fully considered the complete record, makes the following Findings of Fact and Conclusions of Law relating to the Montana Department of State Lands, Application No. 9931-r:

FINDINGS OF FACT

1. The Montana Department of State Lands has applied for a reservation of 21,429 acre-feet of water per year (af/y) with a maximum diversionary flow rate of 143.64 cubic feet per second (cfs) in order to provide water for full-service irrigation of 7,143 acres in Park, Sweet Grass, Carbon, Big Horn, Yellowstone, Treasure, Rosebud, Custer, Prairie, Dawson, and Richland counties. Proposed diversions are from the Yellowstone, Powder, Tongue, and Big Horn rivers and small tributaries of the Yellowstone River (Montana Department of State Lands, Application No. 9931-r, pp. 3 through 5).

Findings Related to the Purpose of the Reservation (89-890(3)(a)).

2. The purpose of this reservation is to ensure that water will be available for the expansion of irrigation on land managed by the Montana Department of State Lands (Montana Department of State Lands, Application No. 9931-r, p. 1).

3. It is established to the satisfaction of the Board that a purpose of the reservation has been shown (Finding 2).

Findings Related to the Need for the Reservation (89-890(3)(b)).

4. A reservation of water is needed because it will secure a priority date for future development that is earlier than the priority dates such developments would have if permits were obtained immediately before construction or use began (Draft EIS, Vol. I, p. 1).

5. A reservation of water is needed because there is competition for water in the Yellowstone Basin which may affect the ability of the Applicant to obtain a water right by permit in the future (Montana Department of State Lands, Application No. 9931-r, p. 1).

6. The Resource Development Bureau of the Department of State Lands fully intends to develop all the irrigable school trust land in the Yellowstone River Basin which is suitable for full service irrigation (Tr. Vol. 3, pp. 36-37).

7. Under the current budget limitations, it will take a number of years to develop the irrigable school trust land in the Yellowstone River Basin (Tr. Vol. 3, pp. 36-37).

8. Application for Reservation No. 9931-r is needed to insure the availability of water in the Yellowstone River Basin to develop school trust lands which cannot be developed in the near future due to the above budget limitations (Tr. Vol. 3, p. 48).

9. It is established to the satisfaction of the Board that the need for a reservation of water in some amount has been shown (Findings 4 and 5).
Findings Related to the Amount of Water Necessary for the Purpose of the Reservation (89-890(3)(c)).

10. This Application requests water for 39 separate projects which are identified by project numbers (Montana Department of State Lands, Application No. 9931-r, pp. 3 through 5).

11. Although no significant irrigation development can occur in the Tongue River Subbasin unless new storage is developed, the Department of State Lands requested a reservation for four projects that would use the Tongue River Reservoir (Draft EIS, Vol. II, p. 244; and Department of State Lands Application, p. 3).

12. However, no significant additional irrigation development can occur in the Tongue River Subbasin unless new storage is developed (Draft EIS, Vol. II, p. 244).

13. The Department of State Lands has not addressed itself to any plans for storage in the Tongue River Subbasin.

14. The Montana Department of Natural Resources and Conservation has applied for a reservation of all the unappropriated water in the Tongue River in order to provide such needed storage to all existing and potential water users in the Tongue River Subbasin by enlarging the Department's existing and presently

fully committed Tongue River Reservoir storage facility (Draft Addendum EIS, p. 15).

15. A major purpose of the Montana Department of Natural Resources and Conservation reservation is to provide the storage necessary for additional irrigation water in the Tongue River Subbasin (Draft Addendum EIS, p. 15).

16. With the expansion of the existing state-owned multipurpose reservoir on the Tongue River, there will be sufficient storage for the amount of water requested from the Tongue River by the Department of State Lands in Application 9931-r.

17. The Department of Natural Resources has been granted a reservation for storage of 450,000 acre-feet per year of water from the Tongue River subject to the condition that part of the reservation be used to meet the request of the Department of State Lands in Application 9931-r for 1,431 acre-feet per year from the Tongue River (Board Findings of Fact - Department of Natural Resources and Conservation 56).

18. Projects 6, 7, and 8 of the Department of State Lands Application were withdrawn by the Department of State Lands from the Application (Department of State Lands Finding of Fact 17).

19. Project 6, 7, and 8 were projects that needed water from the Powder River.

20. There is no need for a water reservation from the Powder River for the Department of State Lands in Application 9931-r.

21. Seven tracts (project nos. 9, 11, 12, 18, 19, 27 and 42) of the Department of State Lands Application have less than a one-to-one cost benefit ratio and are not economically feasible (Department of State Lands Application, 9931-r).

22. Of the 39 projects which were finally identified by the Department of State Lands as being projects in need of water reservations, only 27 can be considered as economically feasible and not part of the Tongue River Subbasin (Findings 16, 17 and 21).

23. The payment capacity consists of total revenue minus all costs, except irrigation water costs, and is the maximum amount an investor could pay for irrigation water while maintaining a profitable operation (Montana Department of State Lands, Application No. 9931-r, p. 8).

24. For all projects in this Application, the payment capacity for the investments required by the Montana Department of State Lands is \$46.32 per acre and the payment capacity for the investments required by the lessees of state lands is \$57.76 per acre (Montana Department of State Lands, Application No. 9931-r, p. 10).

25. Projects 10, 13 through 17, 20, through 26, and 29 through 41 are economically feasible and have an adequate water supply. It is reasonable that the Montana Department of State Lands will irrigate all the projects proposed in the Application which are economically feasible and for which water is available. Such projects total 4,286 acres and need 12,858 af/y with a maximum diversionary flow rate of 86.11 cfs (Montana Department of State Lands, Application No. 9931-r; Findings 7 through 18).

26. The Department's plan is to begin construction of the projects in the near future but it cannot complete construction for a number of years since it is funded on a yearly basis and receives enough money in a single year to construct only a few projects. The Department intends to develop all the projects by the year 2000. The target date which has been set is December, 2000 (Application No. 9931-r).

27. It is established to the satisfaction of the Board that 12,858 af/y and a maximum diversionary flow rate of 86.11 cfs is the amount of water necessary for the purpose of the reservation to the year 2000 from the Yellowstone and Big Horn Rivers.

28. It is further established by the Board that a condition of the reservation of water granted to the Department of Natural Resources is that part of the reservation is to be used to meet the request of the Department of State Lands

reservation request in Application 9931-r for 1,431 acre-feet per year from the Tongue River Reservoir.

Findings Related to the Public Interest (89-890(3)(d)).

29. A reservation of 12,858 af/y and a maximum diversionary flow rate of 86.11 cfs is in the public interest because it is reasonable to expect that the Montana Department of State Lands will put the water to beneficial use from the Yellowstone and Big Horn Rivers (Application No. 9931-r).

30. The Resource Development Bureau's budget allows only a limited number of projects to be completed each year on a state-wide basis (Tr. Vol. 3, p. 36-37).

31. It is established to the satisfaction of the Board that the reservation of 12,858 af/y and a maximum diversionary flow rate of 86.11 cfs is in the public interest and that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan (Findings 29 and 30).

CONCLUSIONS OF LAW

1. Chapter 8, Title 89, R.C.M. 1947, and in particular, Section 89-890, R.C.M. 1947, authorize the adoption by the Montana Board of Natural Resources and Conservation of orders reserving water to qualified applicants for reservation of water.

2. If ordered adopted, a reservation must be ordered adopted in accordance with Chapter 8, Title 89, R.C.M. 1947, and any rules adopted thereunder.

3. The Applicant, Montana Department of State Lands, is an agency of the State of Montana and as such is entitled to apply to reserve waters within the State of Montana in accordance with Section 89-890, R.C.M. 1947, and any rules adopted thereunder.

4. All pertinent statutes and rules of the State of Montana have been adhered to in review of this reservation application, both by the Montana Department of Natural Resources and Conservation and by the Montana Board of Natural Resources and Conservation.

5. Based upon the above Findings of Fact, and specifically based upon any condition, limitation, or modification of the full application appearing in said Findings, all pertinent criteria delineated in Section 89-890, R.C.M. 1947, and any rules adopted thereunder providing for the adoption of an order reserving water have been met.

6. Nothing found herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything found herein have bearing on the status of claimed water rights of any other party except in relation to those rights herein newly applied for, to the extent necessary to reach a conclusion herein.