

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

IN THE MATTER OF APPLICATION FOR)
RESERVATION OF WATER NO. 9933-r)
BY THE MONTANA DEPARTMENT OF STATE)
LANDS)

FINDINGS OF FACT AND CON-
CLUSIONS OF LAW OF APPLI-
CATION NO. 9933-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 North 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, 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. 9933-r:

FINDINGS OF FACT

1. The Montana Department of State Lands has applied for a reservation of 30,898 acre-feet of water per year (af/y) with a maximum diversionary flow rate of 218.03 cubic feet per second (cfs) in order to irrigate 10,875.62 acres of land which adjoin and are part of irrigation projects for which conservation districts have also requested a reservation of water (Montana Department of State Lands, Application 9933-r, p. 1).

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. 9933-r, p. 2).

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. 9933-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. 9933-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. The Department of State Lands has requested a water reservation of 4,618 acre-feet per year from the Powder River to be used to irrigate 1,508 acres (Department of State Lands, Application 9933-r).

11. No significant additional irrigation development can occur in the Powder Subbasin unless storage is developed (Draft EIS, Vol. II, p. 248).

12. The Montana Department of State Lands has submitted no plans for development of the needed storage for the Powder River Subbasin.

13. Because of the lack of storage and because of no future plans for storage a reservation for 4,618 acre-feet per year from the Powder River will not be granted to the Department of State Lands (Draft EIS, Vol. II, p. 248).

14. The Department of State Lands has requested a water reservation of 390 acre-feet per year from the Tongue River to be used to irrigate 130 acres (Department of State Lands, Application No. 9933-r).

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

16. The Montana Department of State Lands has submitted no plans for development of the needed storage for the Tongue River Subbasin (Draft EIS, Vol. II, p. 248).

17. The Montana Department of Natural Resources and Conservation has been granted a reservation which would develop storage for all of the unappropriated water in the Tongue River in order to effectively store and manage the increased reservoir capacity that would be realized by enlarging the existing Tongue River facility (Board Finding 56, Application 9942-r42C).

18. A condition of the Department of Natural Resources water reservation of 450,000 acre-feet per year of water from the Tongue River is that part of the reservation be used to meet the request of the Department of State Lands in Application 9933-r for 390 acre-feet per year for 130 acres from the Tongue River (Board Finding 56 for Application 9942-r42C).

19. Application No. 9933-r requires diversion facilities which will be constructed according to the plans of the Conservation Districts and the rules and regulations adopted by the Board of Land Commissioners (Application No. 9933-r, pp. 2 through 4).

20. 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 (Application No. 9933-r).

21. Since the school trust lands in Application No. 9933-r will be included in projects developed by the Conservation Districts, information as to soil classification and economic feasibility is contained in the Conservation District Applications and is not repeated in this Application (Testimony of Randall Biehl).

22. It is established to the satisfaction of the Board that 25,889.73 af/y with a maximum diversionary flow rate of 185.2 cfs is the amount of water necessary for irrigating 9,236 acres from water of the Yellowstone River.

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

23. New irrigation will increase income in the region, both for the farmers that will install the systems and for the businesses that will enjoy increased sales resulting from the increase in agricultural income. New irrigation will increase both the number of on-farm and off-farm jobs (Draft EIS, Vol. I, p. 156).

24. Application No. 9933-r is in the public interest because it will benefit agriculture and the general economy of the state (Application No. 9933-r, p. 2).

25. Application No. 9933-r is in the public interest because it will allow the development of State of Montana school trust land in the Yellowstone River Basin which will increase revenues to schools of Montana (Application No. 9933-r, p.

26. A reservation of 25,889.78 af/y and a maximum flow rate of 185.2 cfs for irrigating 9,236 acres is in the public interest because it is reasonable to expect that the Montana Department of State Lands will put this water to beneficial use (Montana Department of State Lands, Application No. 9933-r).

27. It is established to the satisfaction of the Board that the reservation of 25,889.78 af/y and a maximum flow rate of 185.2 cfs for irrigation of 9,236 acres is in the public interest and that there will be progress toward completion of the facility and accomplishment of the purpose of the reservation with reasonable diligence in accordance with an established plan (Findings 8 through 20).

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.