

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

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IN THE MATTER OF APPLICATION FOR	)	FINDINGS OF FACT AND CON-
RESERVATION OF WATER NO. 9940-r43B	)	CLUSIONS OF LAW OF APPLI-
BY THE CITY OF LIVINGSTON	)	CATION NO. 9940-r43B

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The above-entitled matter came on regularly for hearing starting on or about August 8, 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, Robert Jovick. 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. The U.S. Department of the Interior appeared by and through its counsel of record, Thomas Gai. The City of Billings appeared by and through its counsel of record, Calvin Calton. The Montana Power Company appeared by and through its counsel of record, Robert Woodahl. The Intake Water Company appeared by and through its counsel of record, Henry Loble. Utah International Inc., appeared by and through its counsel of record, Urban Roth. The Montana Wildlife Federation appeared by and through its counsel of

record, William L. Madden. 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 City of Livingston, Application No. 9940-r43B:

FINDINGS OF FACT

1. The City of Livingston has applied for a reservation of 15,060 acre-feet of water per year (af/y) with a maximum diversionary flow rate of 20.8 cubic feet per second (cfs) from the Yellowstone River to be used for municipal water supply purposes for the year 2007 (Application No. 9940-r43B).

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

2. The purpose of the reservation is to ensure water availability and an adequate streamflow for the future needs of the City of Livingston and adjacent areas (City of Livingston, narrative attachment submitted with Application 9940-r43B, pp. 2 and 3, Tr. Vol. 1, Cross of A. T. Kersich, p. 73).

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 developments that is earlier than the priority dates such developments would have if permits were obtained immediately before construction or use began (Draft EIS, Vol. 1, p. 1).

5. Because of the increased demands for water from agriculture and industry, a reservation of water is needed to insure growth of the City of Livingston (City of Livingston, Tr. Vol. I, Cross of Kersich, p. 73).

6. A reservation of water is needed. The validity of the City of Livingston's existing filed appropriations has not been proven (Tr. Vol. 1, Cross of Kersich, p. 54).

7. A reservation of water is needed. The Yellowstone River water is the only practical source of municipal water available to the City of Livingston (Tr. Vol. 1, Cross of Kersich, p. 75).

8. A reservation of water is needed. A reservation would be an assurance that the City of Livingston would have an adequate quantity of water available from the Yellowstone River for its municipal water supply (City of Livingston, narrative attachment submitted with Application No. 9940-r43B, p. 3).

9. The City of Livingston will need an increased water supply in the future.

10. The City of Livingston can expect an increased population with associated increased water needs (City of Livingston, narrative attachment submitted with Application No. 9940-r43B, p. 2).

11. The City of Livingston may adopt a metropolitan water system serving areas adjacent to the area presently served (Tr. Vol. 1, Cross of Kersich, p. 73).

12. Industrial development which would rely upon the City of Livingston for water supply is possible (Tr. Vol. 1, Cross of Kersich, p. 72).

13. It is established to the satisfaction of the Board that the need for a reservation of water has been shown (Findings 4 through 8).

Findings Related to Amount of Water Necessary for the Purpose of the Reservation 89-390(3)(c)

14. The urban population in Park County in 1970 was 6,883 (Draft EIS, Vol. 1, p. 101).

15. The estimated water use for the year 1970 was 1,930 af/y (Draft EIS, Vol. I, p. 101).

16. The amount of the City of Livingston's reservation request is based on a design population projection of 35,000 to 40,000 in the year 2007 (Tr. Vol. 1, following p. 38, Testimony of Kersich, p. 11; City of Livingston, narrative attachment submitted with Application No. 9940-r43B, p. 2).

17. The population projection is speculative (Tr. Vol. 1, Cross of Kersich, pp. 58 and 59).

18. The total amount of water applied for is liberal and may include some excessive or speculative portion (Tr. Vol. 1, Cross of Kersich, p. 65).

19. The Department of Natural Resources has estimated that the population of Livingston in the year 2007 will be 11,600 (Finding of Fact 19, Department of Natural Resources).

20. The Department of Natural Resources population estimate is conservative and not supported by evidence.

21. A reasonable population estimate of the City of Livingston for the year 2007 is 23,000 people.

22. The average per capita water use rate in Montana is well over 200 gpcd, the Montana average projected by Continental Resources is 267 gpcd, and the EPA inventory form for the City of Livingston indicates 237 gpcd (Tr. Vol. 1, Cross of Kersich, pp. 60, 61 and 62, respectively).

23. The gallons per capita per day water use rate of 500 gallons per annual water use request is a liberal estimate of projected needs (Tr. Vol. 1, Cross of Kersich, p. 61).

24. Based on the average use rates listed in Findings 22 and 23, 250 gpcd is a reasonable average use rate for the City of Livingston for the year 2007.

25. With a population of 23,000 and an average use rate of 250 gallons per capita per day, the City of Livingston will need 6,440 acre-feet per year of water for the year 2007.

26. A reservation that would provide sufficient water to meet the City of Livingston's projected requirements to the year 2007 is the difference between the projected requirements in 2007 (6,440 af/y) and the existing water usage (1,930 af/y).

27. It is established to the satisfaction of the Board that the amount of water necessary for the purpose of the reservation to the year 2007 is 4,510 acre-feet per year.

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

28. Municipal water use is recognized beneficial use of water under Montana law (City of Livingston, narrative submitted with Application No. 9940-r43B, p. 3).

29. Adoption of a reservation for the City of Livingston would have a negligible environmental impact (Draft EIS, Vol. I, pp. 173 and 174).

30. Adoption of a reservation for the City of Livingston would result in return flows to the Yellowstone River of approximately 80 percent of the flow diverted by the City of Livingston (Tr. Vol. 1, Redirect of Kersich, p. 81).

31. Adoption of a reservation for the City of Livingston would not reduce the flow of the Yellowstone River significantly (Finding 30).

32. Adoption of a reservation for the City of Livingston would provide economic benefits and contribute to community planning and orderly growth and development (City of Livingston, narrative submitted with Application No. 9940-r43B, p. 3).

33. It is established to the satisfaction of the Board that the reservation of 4,510 af/y from the Yellowstone River for the City of Livingston for municipal water supply use is in the public interest, and that there will be progress toward accomplishment of the purpose of the reservation with reasonable diligence in accordance with an established plan (Findings 1 and 28 through 32; City of Livingston, Application No. 9940-r43B).

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, City of Livingston, is a political subdivision of the State of Montana and as such is entitled to apply to reserve waters within the State of Montana in accordance with 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.