

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

IN THE MATTER OF APPLICATION FOR)
RESERVATION OF WATER NO. 12333-r43P)
BY THE UNITED STATES BUREAU OF)
RECLAMATION)

) FINDINGS OF FACT AND CON-
) CLUSIONS OF LAW OF APPLI-
) CATION NO. 12333-r43P
)

The above-entitled matter came on regularly for hearing on or about August 31, 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, Thomas Gai. 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. 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 U.S. Bureau of Reclamation, Application No. 12333-r43P, for use on the Hardin Unit:

FINDINGS OF FACT

1. The U.S. Bureau of Reclamation has applied for the reservation of 131,700 acre-feet of water per year (af/y) with a maximum diversionary flow rate of 862 cubic feet per second (cfs) from the Bighorn River in order to provide a full supply of irrigation water for 42,000 acres and a partial supply of 950 acres for use on the Hardin Unit (Tr. Vol. 18, following p. 179, Testimony of Derwood Mercer, p. 2).

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

2. The purpose of the reservation request is to ensure that water will be available for irrigation on the Hardin Unit (U.S. Bureau of Reclamation, Application No. 12333-r43P).

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

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

4. Congressional authorization of the allocation of water stored by Yellowtail Dam set aside stored water for use on the Hardin Unit (Tr. Vol. 19, Cross of Mercer, pp. 66 and 67).

5. Water is presently available from Yellowtail Reservoir for use on the Hardin Unit (Tr. Vol. 19, Cross of Mercer, p. 67).

6. There is no evidence on the record to show that water may not be available in the future from Yellowtail Dam for use on the Hardin Unit (Tr. Vol. 19, Cross of Mercer, p. 67).

7. The reservation request is essentially duplicative of water already set aside and available for use without the reservation (Tr. Vol. 19, Cross of Mercer, p. 66 and 67).

8. It has not been established to the satisfaction of the Board that the Applicant has shown that there is a need for this reservation (Findings 4 through 7).

9. Although the Board has not been satisfied that there is a need for a water reservation as applied for, the Board does recognize the existing water rights of the Bureau of Reclamation on the Big Horn River in the Hardin Unit.

10. The Board of Natural Resources encourages the Bureau of Reclamation to develop and implement its existing water rights on the Big Horn River in the Hardin Unit.

Findings Related to the Amount of Water Necessary for the Purpose of the Reservation (89-890(3)(c)).

11. It has not been established to the satisfaction of the Board that any amount of water is necessary for the purpose of a reservation for which there is no need (Finding 8).

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

12. It has not been established to the satisfaction of the Board that it is in the public interest to grant a reservation for which there is no need (Finding 8).

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, the U.S. Bureau of Reclamation, is an agency of the United States 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 the 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, a pertinent criterion for the adoption of an order reserving water as delineated in Section 89-890(3)(b), R.C.M. 1947, has not been met, to wit: it has not been established to the satisfaction of the Board that need has been shown for the reservation.

6. Based upon the above Findings of Fact, a pertinent criterion for the adoption of an order reserving water as delineated in Section 89-890(3)(c), R.C.M. 1947, has not been met, to wit: it has not been established to the satisfaction of the Board that any water should be reserved for the U.S. Bureau of Reclamation Hardin Unit Project.

7. Based upon the above Findings of Fact, a pertinent criterion for the adoption of an order reserving water as delineated at Section 89-890(3)(d), R.C.M. 1947, has not been met, to wit: it has not been established to the satisfaction of the Board that the reservation is in the public interest.

8. 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.

DENIALS

The following Applications, having been reviewed by the Board of Natural Resources and all testimony and evidence having been considered, are hereby ordered denied:

(a) The Applications for Reservations of Water Nos. 12334-0 -r through 12334- -r by the Applicant, United States Bureau of Land Management, for instream water reservations on the Boulder River, Upper Deer Creek, Lower Deer Creek, Bridger Creek, Stillwater Creek, Clarks Fork River, Sage Creek, Bluewater Creek and the Powder River, Bear Creek and Cottonwood Creek.

(b) Application for Reservation of Water No. 9947-r42M by the North Custer Conservation District for full-service irrigation with 78,140 af/y from the Powder River is ordered denied.

(c) Application for Reservation of Water No. 9943-r by the Applicant, Powder River Conservation District, for full-service irrigation of 75,560 af/y from the Powder River is ordered denied.

(d) Application for Reservation of Water No. 12,334-03-r by the Applicant, United States Bureau of Land Management, for 1,098 acre-feet of water per year from the Powder River is ordered denied.

(e) Application for Reservation of Water No. 12,334-03-r by the Applicant, United States Bureau of Land Management, for 200 cfs of water for instream use of the Powder River is ordered denied.

(f) Application for Reservation of Water No. 12,333-r by the Applicant, United States Bureau of Reclamation, for 131,700 af/y of water from the Big Horn River is ordered denied.

(g) Application for Reservation of Water No. 9942-r43Q by the Applicant, Huntley Irrigation Project, is ordered denied.