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BEFORE THE MONTANA BOARD OF NATURAL
RESOURCES AND CONSERVATION

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IN THE MATTER OF WATER)
RESERVATION APPLICATION NOS.)
69903-41O 71895-41I 72578-41L)
70115-41F 71966-41S 71579-41T)
70117-41H 71997-41J 72580-41A)
70118-41H 71998-41S 72581-41I)
70119-41H 72153-41P 72582-41I)
70270-41B 72154-41K 72583-41P)
71537-41P 72155-41A 72584-41S)
71688-41L 72256-41P 72585-41M)
71889-41Q 72307-41Q 72586-41P)
71890-41K 72574-41O 72587-41G)
71891-41P 72575-41K 72588-40C)
71892-41G 72576-40E 73198-41I)
71893-41K 72577-41P 73199-41S)
71894-41I IN THE UPPER)
MISSOURI RIVER BASIN)

EXCEPTIONS TO THE
PROPOSAL FOR DECISION
AND BRIEF IN SUPPORT

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INTRODUCTION

The Department of Fish, Wildlife and Parks (DFWP) is submitting limited exceptions to the Proposal for Decision made to the Board of Natural Resources and Conservation (Board) by Peter Stanley, Hearing Examiner. DFWP is incorporating its arguments in support of its exceptions in this one pleading and will also provide support for the proposed order.

The DFWP, upon review of the Proposal for Decision, has concluded that the proposal sufficiently protects its interests, although the proposal does recommend approving over twice as many consumptive use projects for the conservation districts when compared to the proposed findings of DFWP. Because DFWP's interests in instream flows would be protected by a third priority that is senior to the priority granted to the conservation district projects that were recommended for approval, the analysis of the hearing examiner could be much more liberal in favor of finding the maximum number of conservation district projects that would meet the benefit-cost test of the public interest criterion. The DFWP does not object to this analysis because the proposal grants a priority for the fish, wildlife and recreation instream flows over water for the consumptive use projects. The DFWP will, in a following section of this brief, make more detailed arguments supporting, although qualifying its support of, the findings and order proposed by the hearing examiner.

The proposal does not grant in all cases the flows that DFWP requested for instream purposes. The proposal recommends reducing the flows in a number of streams. While not agreeing completely with the findings of the Hearings Examiner, DFWP recognizes that the streams selected for lower flows were those with lower resource values to be protected and, therefore, has determined not to object to their reduction and to support, with two limited exceptions, the Proposal for Decision as a complete, reasonable, and supported balancing of competing interests.

DFWP is excepting to one of the proposed conditions placed on the instream flows granted to DFWP and to part of another limiting condition.

EXCEPTION TO CONDITION 1 OF EXHIBIT C

DFWP makes an exception to proposed condition 1 of Exhibit C on the ground that the Board does not have the authority under its rules to impose this condition and that the condition would be unnecessarily burdensome and counterproductive. The proposed condition provides:

1. If the Board determines that new techniques have been developed that more suitably and accurately determine instream flow needs for the purposes of a reservation, it may require a reservant to submit revised estimates of instream flow needs based on these new techniques. After notice and hearing, the Board may modify instream flow reservations granted in the Order based on revised estimates.

This condition is applicable only to the instream flow reservations granted. No similar condition is proposed for consumptive use reservations, although a similar condition for the conservation districts would require revised estimates of diverted water whenever more efficient irrigation practices were developed.

The Board's rule, ARM 36.16.107B(3)(a), requires a finding "... that the methodologies and assumptions used to determine the requested amount are accurate and suitable". The Hearing Examiner found, in Finding of Fact number 391 for DFWP, that the "instream flow methods used by DFWP...are generally accurate and suitable" and, in Finding of Fact 409, "that the amount requested by DFWP as modified herein is needed to fulfill the purpose of the reservation." The Hearing Examiner has found as fact that the

instream reservations as proposed to be granted are based on instream flow methods that are accurate and suitable. The Hearing Examiner has made factual findings that the amount criterion has been met.

The amount criterion is based on "accurate and suitable" methodologies and assumptions. There is no requirement in the rule that the methodologies and assumptions must be the most accurate and suitable, only that they are accurate and suitable.

The Board must follow their own rules. Rule adopted under the Montana Administrative Procedures Act that implements a statute have the force of law. Section 2-4-102(11)(a), MCA. To require an instream flow applicant to present in the future presently unknown methods is to require adherence to standards outside the requirements of the Board's rules. The Board has no authority to make such a condition. DFWP has fully met the required showing for the instream flow amounts needed. Nothing more can be imposed on an applicant.

The DFWP has made an extraordinary effort to make instream flow determinations on the streams in a basin comprising approximately one-half the area of the state. Instream flow methods were applied to 281 stream reaches. There was no showing, factual finding, or evidence considered during the reservation proceeding that could lead to a conclusion there is any need or benefit in relying on future, unknown techniques. New techniques do not necessarily mean that smaller instream flows will be predicted for protecting the instream resources.

However, based on DFWP's experience in preparing its reservation applications, the use of a "new technique" will be time consuming and costly. It does not serve public policy to, in effect, continue to debate an issue already satisfactorily resolved. The impact on DFWP is potentially a significant and draining commitment of resources and money, all for no demonstrated purpose.

The Board has no authority to require this condition and the adoption of the condition would not serve public policy.

EXCEPTION TO A PORTION OF PROPOSED ORDER NUMBER 2 FOR DFWP

The DFWP makes an exception to that portion of proposed order number 2 for DFWP that does not allow DFWP to object to applications for changes of water use within a reach until certain monitoring information is developed. Proposed order number 2 (IV. Proposed Order, page 71, for DFWP) provides:

2. DFWP shall within two years of the date of the final order submit to the Board a list of monitoring sites and a method of determining the extent of the instream flow along the reach proportional to the monitoring sites. Until approval of this monitoring report the DFWP may not object to any changes of use by other users within a reach. (underlining added).

The DFWP objects to the sentence of this condition that is indicated by the underlining. The Board does not have the authority to impose a condition that nullifies the reservation granted, even if the condition is only temporary.

The Board may approve, deny, or condition a requested reservation. ARM 36.16.107A(1). However, the very essence of a right to use water is the ability to protect that right. A holder

of a reservation, or any other appropriative right, would hold nothing if the right to protect the reservation or other right is denied. A reservation is an appropriative right under Section 85-2-102(1)(b), MCA, and is recognized in the Board's rules as a right protected by law. ARM 36.16.111. Therefore, the Board does not have the power to deny a reservation holder the ability to exercise the only essential element of a reservation, the ability to protect the water for a specific use, whether against changes that would adversely affect the reservation or against competing new uses. (See, Hearing Examiner's Memorandum with Proposed Order, p. 30.)

Even if DFWP is not allowed to object to changes, the Department of Natural Resources and Conservation (DNRC) may only approve a change in the use of a water right where the appropriator has proven the change will not adversely affect a reservation. See Section 85-2-402(2)(a), MCA. Thus, preventing DFWP from actively protecting its reservation does not mean an appropriator may make a change that will adversely affect an instream reservation of DFWP. Even though the prohibition on objecting to changes until approval of the required monitoring report is only temporary, the prohibition is beyond the authority of the Board and only shifts a greater burden to DNRC for a determination whether a proposed change would affect an instream reservation of DFWP. This prohibition should be removed and DFWP should be allowed to object to a proposed change based on any admissible and probative evidence that an instream reservation of DFWP will be adversely affected.

**NECESSARY QUALIFICATION ON THE ANALYSIS OF THE PUBLIC
INTEREST CRITERION FOR CONSERVATION DISTRICT PROJECTS**

The Hearing Examiner's analysis of the public interest criterion as applied to consumptive irrigation projects of the conservation districts needs an important qualification underscored. The benefit-cost factor of the public interest criterion as analyzed by the Hearings Examiner is complete only if the recreational value of the use of water is protected by a priority for the instream reservations of DFWP that is senior to or ahead of, the priority of the reservations for the irrigation projects of the conservation districts and BUREC.

In granting a reservation, the Board must find that the reservation would be in the public interest. Section 85-2-316(4)(a)(iv), MCA. The Board's rule implementing this statutory criterion, ARM 36.16.107B(4), requires the Board to find, in its judgment and discretion, that the reservation is in the public interest, based on a weighing and balancing of the factors listed in the rule, making a specific finding for each factor. The first factor, and the factor given the greatest attention in this proceeding, requires a weighing of the benefits and costs of each reservation application. See, ARM 36.16.107B(4)(a). To be in the public interest, the expected benefits should be reasonably likely to exceed the costs, with the analysis including all direct and indirect benefits and costs.

The Hearing Examiner recognized that the costs of the consumptive use of water in irrigation projects would include the value the water has for recreation. See, e.g., proposed Finding of Fact number 14 for Gallatin County CD, p. 3. However, the Hearing

Examiner did not consider the recreational value of the water consumed as a cost for the individual irrigation projects when determining whether the benefits of each project exceed the costs. The Hearing Examiner reasoned that, because the instream reservations of DFWP should have a priority senior to the BUREC's and conservation districts' reservations, the recreational value of the streams and rivers were protected by the relative priority. See, e.g., proposed Finding of Fact number 31 for Gallatin County, P. 5. Therefore, the benefit-cost analysis of the individual projects could be made without subtracting as a cost the recreational value of the water used in each irrigation project. As a consequence, benefits were calculated to exceed the costs for 129 projects.

The DFWP agrees that the Hearing Examiner's analysis is valid. However, if the instream reservations proposed to be granted to DFWP were not given priority as a group over the conservation district projects, then the optimal allocation of water, based on the benefit-cost analysis, would require that all benefits and costs be used in determining whether individual irrigation projects have net benefits greater than zero. The Board's rules would then require that the recreational value of the water be included in the benefit-cost calculation.

Proposed irrigation projects compete with instream uses for the same water. In a direct comparison between instream use and consumptive irrigation use of the same water, one use will have positive net economic benefits while the other competing use will

have the mirror negative net economic benefits. DFWP did this comparative analysis in its proposed Finding of Fact numbers 571 through 598. Only 10 irrigation projects have net benefits greater than the indirect costs to instream uses when the recreational value of the water is considered in the analysis. A complete benefit-cost test should also include lost hydropower production at impacted dams outside Montana. There is no economic reason for excluding this real economic loss if the complete analysis is required.

DFWP agrees with the Hearing Examiner that a full scale benefit-cost comparison, including all instream costs of water consumption, is not necessary to comply with the Board's rules if instream values are protected by their priority. DFWP does not object to this more liberal approach because its interests are protected by an earlier priority and because it is a reasonable public policy to allow more projects an opportunity to prove their future worth.

CONCLUSION

DFWP supports the proposed order of the Hearing Examiner with the exception of two conditions proposed for the instream reservations. While the proposed order does not grant DFWP all that it applied for and approves more irrigation projects than DFWP recommended, DFWP believes that the proposed order represents good public policy and is fully supported by the findings of fact made by the Hearing Examiner.

DATED: June 8th, 1992.

Department of Fish, Wildlife and Parks

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 1992, the Montana Department of Fish, Wildlife and Parks' (Department) filed the attached EXCEPTIONS TO THE PROPOSAL FOR DECISION AND BRIEF IN SUPPORT. A copy was served by hand-delivering the original and ten (10) true and accurate copies to:

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