

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

3 * * * * *

4 STATE OF MONTANA, ex rel., THE)
5 MONTANA POWER COMPANY, PUGET)
6 SOUND POWER AND LIGHT COMPANY,)
7 PORTLAND GENERAL ELECTRIC)
8 COMPANY, PACIFIC POWER & LIGHT)
9 COMPANY and WASHINGTON WATER)
10 POWER COMPANY,)

11 Relators-)
12 Plaintiffs,)

No. 49348

13 vs.)

14 THE BOARD OF NATURAL RESOURCES)
15 AND CONSERVATION OF THE STATE)
16 OF MONTANA, and its members,)
17 GORDON HOLTE, Chairman, CECIL)
18 WEEDING, WILLIAM SHIELDS, ANN)
19 MARY DUSSAULT, CHARLES HASH,)
20 LAND LINDBERGH, RICHARD)
21 SPALDING and NORTHERN PLAINS)
22 RESOURCE COUNCIL,)

23 Respondents-)
24 Defendants.)

25 FINDINGS OF FACT AND CONCLUSIONS OF LAW

26 The Petition for Writ of Prohibition filed by the Relators
27 came on for hearing on June 15, 1983 before the Honorable
28 Thomas A. Olson, District Judge, sitting without a jury. The
29 Relators were represented by John L. Peterson and Edward Bartlett,
30 the Respondent, The Board of Natural Resources and Conservation,
31 was represented by J. Steven Brown, and the Respondent, Northern
32 Plains Resource Council, was represented by James A. Patten.
33 After the presentation of evidence and oral argument, and after
34 the receipt of briefs and proposed Findings of Fact and Conclu-
35 sions of Law, the court took the matter under advisement. The
36 court, being duly advised as to the evidence and law, makes the
37 following Findings of Fact and Conclusions of Law:

38 FINDINGS OF FACT

39 1. The Relators, The Montana Power Company, Puget Sound

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CLERK OF DISTRICT COURT
BY REBECCA SMIGG

1 Power and Light Company, Portland General Electric Company,
2 Pacific Power & Light Company, and Washington Water Power Company
3 are corporations duly organized and existing under the respective
4 laws of Montana, Oregon and Washington and each are qualified to
5 do business within the state of Montana.

6 2. The Relator, The Montana Power Company, has its
7 principal place of business in the county of Butte-Silver Bow,
8 Montana and each of the Relators is engaged in the generation of
9 electrical energy. On July 22, 1976, the Relators were issued
10 a Certificate of Environmental Compatibility and Public Need
11 for the construction and operation of coal fire generating plants
12 known as Colstrip Units 3 and 4 near Colstrip, Montana, all in
13 accordance with the Montana Major Facilities Siting Act,
14 Section 75-20-101, et seq., Montana Code Annotated.

15 3. The Certificate also includes Findings of Fact and
16 Conclusions of Law entered on November 21, 1975 by the Montana
17 Board of Health and Environmental Sciences.

18 4. The decision of the Board of Natural Resources and the
19 Board of Health were reviewed on appeal by this District Court
20 in Cause No. 40462, from which a decision was appealed to the
21 Montana Supreme Court.

22 5. The Montana Supreme Court rendered its decision on
23 April 10, 1979 in 181 Mont. 500, 594 P.2d 297, and the court takes
24 judicial notice of said appeal and decision.

25 6. It is conceded by all parties to this action that at
26 the time that hearings were conducted in connection with the
27 application for the Certificate, no detailed plans were available
28 and the Board of Natural Resources and Board of Health received
29 testimony concerning proposed construction of coal fire generating
30 plants based upon conceptual plans and ideas. One of the elements
31 involved in the conceptual plan was the construction of a waste
32 disposal pond known as an effluent holding pond or sludge pond

1 for the purpose of receiving and storing waste waters from the
2 boilers and air pollution control systems of Colstrip Units 3 and
3 4.

4 7. After extensive hearings, the Board of Natural Resources
5 adopted the following Findings of Fact:

6 "61. That seepage from the waste disposal
7 ponds will be minimal and will be
8 collected by wells and returned to
the ponds. (McMillan, BH 43, 6185-
6191, 6194; App. Ex. 175.)

9 64. That the effluents emanating from
10 Colstrip 1-4 are not anticipated to
11 impair the quality of the ground and
12 surface water of the area and will
13 not violate applicable standards,
14 however careful monitoring of seepage
and complete sealing of sludge ponds
will ensure the water quality of the
area is not degraded. (BHES - Findings
XXXV - XXXIX.)

15 68. That neither withdrawal of the water
16 from the Yellowstone River under the
17 conditions prescribed by the BHES,
18 nor the minimum seepage from the
19 ponds will have any effect on the
20 plants, animals, wildlife, fish or
vegetation in the areas directly
and indirectly effected by such
withdrawals. (Dunkle, BH 29,
3824-3826 Willems, BH 38, 5157;
Botz, BH 39, 5229-5231; Martin,
NR 45, 9055, Exhibit "A".)

21 71. That observation wells will be con-
22 structed around the sludge ponds to
23 ensure that any seepage from the
24 ponds will not exceed the estimated
25 minimum amounts around the rim and
through the foundation of the dam.
(McMillan, BH 43, 6191-6194,
Exhibit "A".)

26 88. That waste materials from scrubber
27 units and boilers will be conveyed
28 to sealed ash disposal ponds and
29 eventually dried and the disposal
30 ponds reclaimed. (Labrie, BH 20,
2065-2628, BH 21, 2731-2733;
Grimm, BH 12, 1701-1702, Berube,
BH 22, 2831-2838, 2860-2861,
BH 45, 6474-6475, 6527-6530;
App. Ex. 50A, 51.)

31 89. That all effluents from seepage from
32 the waste disposal ponds have been
analyzed (Northern Plains Resource

1 Council Exhibit 3A; Grimm, BH 44,
2 6370-6376), and to insure no adverse
3 effects on the area the waste dis-
posal ponds will be sealed and
monitoring wells installed.

4 91. That the disposal ponds will not
5 impair the quality of the ground
6 or surface water of the area or
7 violate any applicable standards.
8 (Berube, BH 22, 2831-2839; McMillan,
9 BH 43, 6178-6234; Botz, BH 39,
10 5223-5227; Willems, BH 38, 5157-
11 5158.)"

12 8. In addition, the Board of Natural Resources adopted in
13 full Findings of Fact made by the Board of Health. The following
14 finding was made by the Board of Health concerning the sealing
15 of the sludge pond:

16 "XXXIX

17 The various ponds which will be used for
18 storage of water in the evaporation and
19 disposal of water and waste materials
20 emanating from Colstrip Units 1-4 will
21 have seepage not anticipated to impair
22 the quality of the ground water in the
23 area. (Northern Plains Ex. 2, 3A;
24 22-2831-2839; Grimm 44-6370-6376."

25 9. The Board of Health adopted the following Conclusion:

26 "6. All ponds, surge ponds, settling ponds
27 and impoundments shall be properly
28 sealed. They shall be monitored for
29 seepage, including the installation of
30 test wells to determine the extent of
31 ground water pollution and the neces-
32 sities of corrections therefor."

10. Included in the evidence considered by the Board of
Health and the Board of Natural Resources was Exhibit "B" which
was a memorandum concerning preliminary estimates of seepage
losses from the ponds made by C.R. Farrell on June 17, 1975.
Concerning the holding ponds in question, located in Sections
5 and 6, the Farrell memorandum estimated seepage at the north-
west section of the pond to be 19 gallons per minute, the flow
under the dam to be 50 gallons per minute and flow in the
northeast section of the pond to be 35 gallons per minute for a

1 total of 104 gallons per minute.

2 11. The internal Bechtel memorandum prepared by Farrell,
3 Exhibit "B" at this hearing, was received in evidence at the
4 Board of Health hearing. The Board of Natural Resources adopted,
5 as a condition in its Conclusions, the following:

6 "12(d). That the sludge pond or ponds shall
7 be completely sealed. If the con-
8 ventional means such as compaction
9 and bentonite application do not
10 seal the pond(s), as indicated by
11 monitoring wells the applicants
12 shall install and operate, then
extreme measures even up to com-
plete sealing by a plastic membrane
shall be taken."
(The emphasis appears in the
Certificate.)

13 12. Daniel T. Berube, assistant vice-president for the
14 Colstrip division, testified that the latest estimate, based on
15 the construction underway and the design using cells or sub-
16 divisions in the pond, was seepage of 50 gallons per minute at
17 the pond and 20 gallons per minute at the Montana Power property
18 line.

19 13. All of the technical experts who testified at the
20 hearing on the Petition for Writ of Prohibition, including Dr.
21 Ronald Reichmuth, called as an expert by Northern Plains
22 Resource Council, admitted that given the size of the project and
23 the state of the art in controlling seepage, that "zero seepage"
24 was not technically possible nor feasible, and that the primary
25 question, from an engineering standpoint, was the selection of
26 the best combination of techniques to control the seepage to a
27 minimum.

28 14. Condition 12(d) of the Board of Natural Resources and
29 condition 6 of the Board of Health requires the Relators to install
30 a monitoring system around the pond so that wells can continually
31 monitor the seepage from the pond after the operation of Colstrip
32 Units 3 and 4 is underway.

1 15. A plain reading of condition 12(d) of the Board of
2 Natural Resources indicates that the Relators are not expected to
3 install extreme measures in the pond to control seepage unless
4 the monitoring wells detect seepage, in which case "extreme
5 measures" are to be undertaken to seal the ponds with the plastic
6 membrane technique being the last resort. Construction at
7 Colstrip Units 3 and 4 has progressed to a significant point
8 with the sum of \$1,231,800,000.00 having been expended to date on
9 construction of the plants out of a planned expenditure of
10 \$1.7 billion. Construction began in September of 1979 with
11 Colstrip Unit 3 planned for initial operation in October of 1983
12 and Colstrip Unit 4 in operation in July of 1985.

13 16. After securing the Certificate, the Relators executed
14 contracts for the construction of the sludge pond at an
15 approximate cost of \$31.2 million for the purpose of constructing
16 a "slurry wall" around the perimeter of the sludge ponds
17 consisting of 352 acres. In addition, Relators have implemented
18 two additional construction techniques requested by the Department
19 of Natural Resources which include bentonite packing and under-
20 drain piping in some 48 to 70 acres of the pond site. Relators
21 have constructed a monitoring well system which will be
22 augmented by further wells for the purpose of monitoring all
23 seepage from the pond pursuant to condition 12(d) and condition 6.

24 17. On March 6, 1983, Mr. Wallace McRae of Northern Plains
25 Resource Council filed an affidavit with the Department of
26 Natural Resources alleging the Relators were in violation of
27 condition 12(d) of the Colstrip 3 and 4 Certificates and that the
28 affidavit was filed under Section 75-20-404, MCA, of the Major
29 Facilities Siting Act. Mr. McRae alleged the Bechtel design in
30 behalf of the Relators violated the "completely sealed" require-
31 ment of condition 12(d).

32 18. Section 75-20-404, MCA, of the Major Facility Siting

1 Act reads as follows:

2 "(1) A resident of this state with know-
3 ledge that a requirement of this chapter
4 or a rule adopted under it is not being
5 enforced by a public officer or employee
6 whose duty it is to enforce the require-
7 ment or rule may bring the failure to
8 enforce to the attention of the public
9 officer or employee by a written statement
under oath that shall state the specific
facts of the failure to enforce the
requirement or rule. Knowingly making
false statements or charges in the
affidavit subjects the affiant to
penalties prescribed under the law of
perjury.

10 (2) If the public officer or employee
11 neglects or refuses for an unreasonable
12 time after receipt of the statement to
13 enforce the requirement or rule, the
14 resident may bring an action of mandamus
15 in district court of the first judicial
16 district of this state, in and for the
17 county of Lewis and Clark. If the court
18 finds that a requirement of this chapter
19 or a rule adopted under it is not being
20 enforced, the court may order the public
21 officer or employee whose duty it is to
22 enforce the requirement or rule to perform
23 his duties. If he fails to do so, the
24 public officer or employee shall be held
25 in contempt of court and is subject to
26 the penalties provided by law."

19
20 19. In response to the McRae affidavit, the Department of
21 Natural Resources conducted an examination of the design for the
22 sludge ponds and recommended that drain tiles and a bentonite
23 layer in a 70 acre sandstone area should be added. Relators
24 have agreed to make the changes recommended by the Department.

25 20. On May 7, 1983, the Board of Natural Resources
26 conducted an informal discussion into the matter and made a
27 preliminary finding that condition 12(d) was being violated.

28 21. Thereafter, the Board established contested case hearing
29 procedure to determine whether condition 12(d) was being
30 violated and whether the Certificate should be suspended. The
31 hearing is now scheduled for June 30, July 1 and 2, 1983 in
32 Forsyth, Montana.

CONCLUSIONS OF LAW

1
2 1. The Board of Natural Resources has jurisdiction to
3 monitor the construction of Colstrip Units 3 and 4, under the
4 Certificate issued July 22, 1976, to determine whether such
5 construction is in conformity with the terms and conditions
6 of the Certificate. (Section 75-20-201, MCA)

7 2. The Certificate, under condition 12(d), requires that
8 the sludge pond in Sections 5 and 6 be completely sealed. If
9 conventional means such as compaction and bentonite do not seal
10 the pond(s) as indicated by the monitoring wells, the Board
11 can force Relators to undertake extreme measures even up to
12 complete sealing by use of a plastic membrane.

13 3. The clear meaning of condition 12(d), taken in the
14 context of the Board's findings that some seepage was expected
15 (see BNR findings numbers 61, 64, 68, 71 and 89 and BHES finding
16 XXXIX), is that the pond as constructed for Relators may leak
17 in small amounts but if the leakage is detected by the monitoring
18 wells, the Relators will have to resort to more stringent
19 measures, up to and including the installation of a plastic
20 liner.

21 4. The Board, while it can monitor the construction of
22 Units 3 and 4, is without jurisdiction to now find that
23 condition 12(d) has been violated before the pond has been
24 completed and the seepage tested through the monitoring wells.

25 5. The Board may exercise its monitoring function in
26 any way that does not have the effect of threatening revocation
27 of the Certificate before the Relators have been given the
28 opportunity to meet and satisfy the conditions and terms of the
29 Certificate.

30 6. If the Board believes that condition 12(d) is
31 unworkable or impracticable, it may consider revision of the
32 same through any lawful or statutory means at its disposal.

1 7. A writ of prohibition shall lie against the Board and
2 its individual members from conducting a contested hearing on
3 compliance with condition 12(d) of the Certificate, scheduled
4 for Forsyth, Montana on June 30, July 1 and 2, 1983.

5 DATED this 29th day of June, 1983.

6

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Thomas A. Olson

Thomas A. Olson
District Judge

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12 cc: John L. Peterson
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