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STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINDINGS OF FACT, CONCLUSIONS
FILED BY WESTMORELAND RESOURCES) OF LAW AND ORDER
APPLICATION NO. 10-g42KJ)

The proposed findings of fact, conclusions of law and order
in this matter, issued March 20, 1974, are hereby adopted as the
final findings of fact, conclusions of law and order.

Done this 10th day of May, 1974.

Orvin Ferris
Administrator, Water Resources Division

CASE # 10

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STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT FILED
BY WESTMORELAND RESOURCES, APPLI-
CATION NO. 10-g42KJ

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Pursuant to the provisions of the Montana Water Use Act, Section 89-865 et seq., R.C.M. 1947, after due notice, a public hearing was held January 14, 1974, at the Bighorn County Courthouse, Hardin, Montana, for the purpose of hearing objections to the above-named application for beneficial water use permit. The applicant appeared and was represented by Bruce L. Ennis, Esq. of Billings, Montana. The objectors Bruce M. and Dorothy V. Cady and John R. Redding, all of Sarpy Creek, Hysham, Montana, appeared in their own behalf. All parties presented testimony and documentary evidence, and all parties were given the opportunity to cross-examine opposing witnesses.

As a preliminary matter, the applicant presented some ten documents into evidence at the hearing. Since a proper explanation and foundation were laid for each during the hearing, all were tentatively admitted into evidence subject to the objectors' right to examine them and submit written objections. On January 21, 1974, Mr. and Mrs. Cady submitted written objections to applicant's exhibits 3, 4 and 10. On January 24, 1974, Bruce L. Ennis, Attorney for applicant, submitted a written reply to the objections. The objections raised by the January 21 letter do not warrant an exclusion of any of the tendered exhibits, but they do present arguments which were considered when evaluating the weight to be given the evidence objected to.

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Similarly, the objectors offered at hearing, and afterward in a more lengthy form, a letter from Mr. Roy Guess, a consulting geologist, of Casper, Wyoming, concerning the use of underground water for industrial purposes. Applicant objected to the admission of this letter at hearing and later again in writing on the basis of hearsay for which no proper foundation had been laid. Once again, this objection does not warrant the exclusion of the tendered evidence, but was considered when evaluating the weight of the evidence.

Unlike an ordinary court action, hearsay evidence should normally be admissible in administrative proceedings unless it is shown to have no foundation whatsoever, or is otherwise too unreliable for proper consideration. All objections to the reliability of such evidence should be raised, however, and will go to the weight to be given to it. It was not the intent of the legislature in providing for administrative hearings in the Water Use Act to create a procedural trap for the objector or applicant who cannot afford an attorney, or who does not feel that he needs to be represented by one.

All other objections whether raised at hearing or afterward are hereby overruled.

PROPOSED FINDINGS OF FACT

1. On July 11, 1973, Westmoreland Resources of Hardin, Montana, filed with the Montana Department of Natural Resources and Conservation an application for beneficial water use permit for a well to be drilled to the Lakota or Mission Canyon formation in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 26, Township 1N, range 37E, Big Horn County, Montana. The application proposed an appropriation for industrial purposes of 161 acre feet per annum, or .2228 cubic feet per second from a depth of 6100 to 8100 feet. The appropriated water was to be used for sewage treatment, dust control, fire protection, reclamation sprinkling and drinking.

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2. On July 27, 1973, an interim permit was issued to Westmoreland Resources to begin construction on the subject well.
3. On October 9, 1973, John R. Redding, Sarpy Creek, Hysham, Montana, filed an objection to Westmoreland's application. Mr. Redding's objection stated that his primary concern was for possible degradation and/or depletion of existing water resources adjacent to the well. He requested scientific studies to assure that present water supplies will not be affected.
4. On October 16, 1973, Bruce M. and Dorothy V. Cady of Sarpy Route, Hysham, Montana, filed an objection to Westmoreland's application. The Cadys raised a number of objections to the well including the possible depletion and degradation of existing water sources in the area of the well.
5. All the objectors own land adjacent to the site of the proposed mine, in conjunction with which the subject well is to be used.
6. All objectors have existing rights in well, spring and surface waters in the area adjacent to the proposed mine site. These rights are currently being used for domestic, stockwater and irrigation purposes. The objectors' wells range in approximate depth from 8 to 200 feet, with the majority being much more shallow than 200 feet.
7. The aquifers tapped by these and other relatively shallow wells in the area are the alluvium along Sarpy and East Sarpy Creeks, the Rosebud-McKay and Robinson coal beds, and deeper sandstone beds associated with the Tullock Member of the Fort Union formation.
8. The subject well was drilled to a depth of 7948 feet to the Madison limestone in the Mission Canyon formation. The well is cased for its entire depth, and the only means of water entering it is through a series of perforations in the casing between 7650 and 7696 feet, and again between 7772 and 7850 feet. The well currently produces an artesian flow of 45 gallons of water per minute.

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9. The Mission Canyon formation from which this well draws its water is relatively flat at a depth of over 7000 feet throughout the area under consideration. The formation outcrops and has its recharge area in the Bighorn Mountains, the Pryor Mountains and the Black Hills.
10. There is no direct communication between the deep Mission Canyon formation and the relatively shallow aquifers from which the objectors' wells draw water. There was some evidence of faulting in the general area of the subject well, but there was no evidence of Mission Canyon-surface communication. There was evidence that at least two springs in the area may come from unspecified relatively deep aquifers. One of these springs flows approximately 300 gallons per minute, and a spring on Mr. Cady's property is very warm water and never freezes. Neither was shown to be fed from the Mission Canyon formation.
11. The applicant's appropriation of water from the Mission Canyon formation will have no effect upon the quantity of water from objectors' relatively shallow wells since the aquifers for these wells are not charged by the Mission Canyon formation water.
12. The subject well will have no effect upon the quantity of water from objectors' existing surface water rights.
13. The subject well will have no effect upon the quantity of water from objectors' existing springs.
14. Further future deep wells such as that drilled by applicant might result in a sufficient depletion of the water in the Mission Canyon formation to cause a diminution of the flow of the springs, if any, which are fed directly by Mission Canyon water. There is insufficient evidence at this time to determine whether such springs exist.
15. Any possible degradation of the quality of existing surface, well and spring waters as a result of applicant's proposed uses of the water from

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the subject well will be adequately prevented by the collection in a settling pond of all runoff waters from the proposed mining area.

PROPOSED CONCLUSIONS OF LAW

1. There are sufficient unappropriated waters in Mission Canyon formation to satisfy applicant's proposed appropriation.
2. Applicant's use of water from the subject well will not adversely affect any of the objectors' existing water rights.
3. There was insufficient evidence presented to warrant a modification or denial of applicant's well.
4. The only issues properly before the hearing concerned the well which was the subject of application No. 10-g42KJ. Because of the statutory delegation of authority among state agencies, questions of the effect of proposed strip mining in the Sarpy Creek area upon objectors' existing water rights have no bearing upon this application for a deep well.

PROPOSED ORDER

IT IS THEREFORE ORDERED that application for beneficial water use permit No. 10-g42KJ be granted.

NOTICE: As provided by the Montana Administrative Procedure Act, this is a proposed order and will become final when accepted by the Administrator of the Water Resources Division, Montana Department of Natural Resources and Conservation. Written exceptions to the proposed order shall be filed with the Administrator within 10 days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided, if requested, to file briefs and make oral argument before the Administrator.

March 20, 1974
DATE

Allen B. Chronister

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Hearing Examiner