

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 60551-g76G BY FAIRMONT HOT SPRINGS)

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has passed. Timely exceptions were received from the Applicant through its attorney of record, David L. Pengelly. After reviewing and fully considering the filed exceptions, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner contained in the February 25, 1988 Proposal for Decision, and incorporates them herein by reference.

RESPONSE TO EXCEPTIONS

The exception was filed to the proposed condition E requesting that it be modified. The Applicant suggests that instead of installing a measuring device within the water system that it instead keep records of the power usage of the pump which in turn could be converted to volume of water withdrawn. Applicant further states that adequate records can be kept for the Department's purposes under such a modification. While it is correct that the amount of water diverted via a pump can be calculated using the power useage information, it is not as simple as just keeping records of the power useage for a period of time. A measured or determined flow rate must also be known for an accurate volume to be calculated.

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Based on the Applicant's apparent willingness to keep such records and make the necessary determinations to be able to calculate the amount of water diverted, the Department hereby modifies condition E to the following:

This permit is subject to the condition that the Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. If the Department determines that such records are inadequate due to the method used to acquire them, it may require that a flow measuring device be installed within the water works system for more accurate records.

Based upon the Findings of Fact and Conclusions of Law and upon any modifications specified herein, and upon all files and records in this matter, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 60551-g76G is hereby granted to Fairmont Hot Springs to appropriate 450 gpm up to 233.8 acre-feet of water per year for supplemental sprinkler irrigation and up to 241.5 acre-feet of water per year for multiple domestic purposes.

The source of supply shall be groundwater diverted by means of a well and electric pump. The well shall be located in the NWSE of Section 2, Township 3 North, Range 10 West, Silver Bow County, Montana. The place of use for supplemental irrigation shall be 62.0 acres in the W2 of Section 2, 9.0 acres in the SE of Section 3 and 1.0 acre in the NENE of Section 10, all in Township 3 North, Range 10 West, Silver Bow County, for a total of 72.0 acres. The place

of use for the multiple domestic purpose shall be the W2 of Section 2, Township 3 North, Range 10 West. Water may be appropriated between January 1 and December 31 of each year for multiple domestic purposes and between April 1 and September 30 of each year for supplemental irrigation. The priority date is August 5, 1985 at 12:30 p.m.

This permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level of the well may be accurately measured.

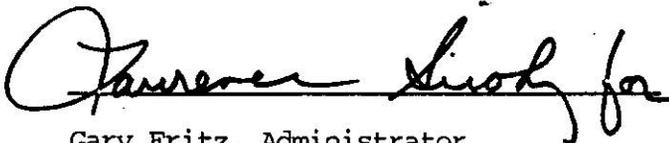
D. This permit is granted subject to the right of the Department to modify or revoke the permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA.

E. This permit is subject to the condition that the Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. If the department determines that such records are inadequate due to the method used to acquire them, it may require that a flow measuring device be installed within the water works system for more accurate records.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

Done this 15 day of April, 1988.



Gary Fritz, Administrator
Department of Natural Resources and
Conservation
1520 East 6th Ave
Helena, Montana 59620-2301
(406) 444-6605



Scott Compton, Hearing Examiner
Department of Natural Resources and
Conservation
1201 East Main
Bozeman, Montana 59715
(406) 586-3136

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 18th day of April, 1988, as follows:

Fairmont Hot Springs
Attn: R.K. Pitman
Anaconda, MT. 59711

Carl Hafer
6050 Porter
Butte, MT. 59701

T.J. Reynolds
Helena Field Manager
1520 East Sixth Avenue
Helena, MT. 59620-2301

David Pengelly
Knight, McClay & Masar
PO Box 8957
Missoula, MT. 59807

Nancy M. Peters

Nancy M. Peters
Administrative Clerk

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 60551-g76G BY FAIRMONT HOT SPRINGS)

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on January 25, 1988 in Anaconda, Montana.

The applicant in this matter, Fairmont Hot Springs, was represented by Counsel David Pengelly, and Dick Pitman, Water Operator and General Manager for Fairmont Hot Springs, appeared as a witness for applicant.

The objector, Carl Hafer, appeared personally without legal representation.

Mark Shapley, Hydrogeologist, Water Management Bureau, and Jim Beck, Engineering Specialist with the Helena Water Rights Field Office appeared as staff expert witnesses for the Department of Natural Resources and Conservation (hereafter, DNRC).

EXHIBITS

The applicant offered one exhibit to be entered into the record.

Applicants Exhibit 1 is a map compiled using an aerial photograph of Sections 2 and 3, Township 3 North, Range 10 West. The map indicates the location of Fairmont Hot Springs' motel, pool, golf course and the well involved. It also indicates the general location of the objector's well.

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The Applicants Exhibit 1 was accepted into the record without objection. The DNRC file was available at the hearing for all parties to review. No objections were made to any part of the file. The DNRC file was therefore made a part of the record in its entirety.

STATEMENT OF THE CASE

Application has been made to appropriate groundwater for supplemental irrigation and multiple domestic purposes. More specifically, the water is proposed to be used to supplement the irrigation of the golf course and for the general needs of the Fairmont Hot Springs Resort. The water will be pumped into a storage tank along with waters of other appropriative rights the resort holds. After the water is pumped into the storage tank it can then be released into the resorts central water system for use where and when the need arises.

The Applicant has expressed that without this source of water the resort has an inadequate supply of water during the summer for its irrigation needs. According to the Applicant the water is also needed to back up the present domestic supply during high use periods that occur throughout the year.

The Objector has expressed concerns that his interests be protected in the event that some potential adverse affect should occur to his well water supply. While not specifically alleging that there is no water available from this aquifer source to be appropriated, he is concerned with the potential problem of procuring remedial action should some effects occur. The Objector also expressed concern over water quality changes to his source of supply.

The Objector's water right has been identified as No. E60671-g41G. This water supplies the year around domestic needs of a duplex structure that the Objector owns and rents.

The Objector's well is located approximately 1,800 feet southeast of the proposed well.

The DNRC has prepared a hydrogeologic analysis of the proposed uses of the groundwater and any possible adverse affect they might cause. This report has been included as part of the DNRC file and all affected parties had received a copy for review prior to the hearing.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA Section 85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in Section 85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 60551-g76G was duly filed with the Department of Natural Resources and Conservation on August 5, 1985 at 12:30 p.m.

3. The pertinent portions of the Application were published in the Montana Standard, a newspaper of general circulation in the area of the source, on 9/25/1985 and 10/2/1985.

4. The source of water for the proposed appropriation is groundwater, to be diverted by means of a well and electric pump.

5. The Application was made to obtain a permit for the use of 450 gpm up to 475.3 acre-feet of water per year for supplemental irrigation and multiple domestic purposes. The point of diversion is to be in the NWSEW of Section 2, Township 3 North, Range 10 West, Silver Bow County, Montana. The place of use for the multiple domestic is identified as the W2 of Section 2, Township 3 North, Range 10 West, Silver Bow County, Montana. The supplemental irrigation use is to be on a total of 72.0 acres identified as 62.0 acres in the W2 of Section 2; 9.0 acres in the SE 1/4 of Section 3; and 1.0 acre in the NENENE of Section 10, all in Township 3 North, Range 10 West, Silver Bow County, Montana.

The water will be pumped into a 0.77 acre-foot storage tank, located in the NENWNE of Section 10, Township 03 North, Range 10 West, by means of a 50 horsepower submersible electric pump from a 318 feet deep well that was drilled for these purposes in August of 1985. Water will then be released into a central water system for use as the varying needs arise. The period of use for the irrigation is to be April 1 to September 30, inclusive of each year and the multiple domestic use of water will be from January 1 to December 31 of each year.

6. The applicants intended uses of the water are for supplemental irrigation and multiple domestic purposes.

7. The amounts of water applied for are reasonable for the uses contemplated in the application. The volume of water to be used for irrigation (3.247 acre-feet per acre) is within reasonable parameters for turf irrigation in the particular climatic area. As a supplemental source of water for the existing irrigation system, it is most probable that the total volume will not be called upon in most years but will be a backup for extremely dry years. The amount requested for multiple domestic use is also reasonable and within guidelines the DNRC typically recognizes.

8. The proposed means of diversion, construction and operation appear adequate. Various state regulations determine minimum standards that need to be met for safety purposes for public uses of water such as applied for.

9. The record does not reflect any planned uses or developments for which a permit has been issued or for which water has been reserved that would be unreasonably interfered with. While the Clark Fork River system presently is involved in a water reservation process, there was no indication that this proposed appropriation of groundwater would have any affect on the large surface water system involved in the reservation process.

10. The issue of water availability was addressed mainly through a report the DNRC prepared and testimony of Mark Shapley, Hydrogeologist for the DNRC. Though the report was prepared by a DNRC staff member (Brian Harrison) who is no longer with the DNRC and could not be present at the hearing, its analytical value remains undiminished. Mr. Shapley participated in the taking of the test data for the report and testified that he reviewed the report thoroughly and would have proceeded similarly. He also felt he could address any aspect of the report confidently.

An aspect of the report that was pointed out and discussed was the total flow rate used in the analysis. A total flow rate of 800 gpm was used in the calculations when in fact a flow of 900 gpm is closer to what the total diversion rate would be with the use of the existing permitted wells and this proposed additional well. Mr. Shapley testified that the flow rate used in such calculations has a direct relationship to the amount of drawdown. Thus, if the diversion rate is increased by a factor of 12.5%, as in this case, the drawdown at any particular location from the pumping wells would also increase by the same percentage. The main affect this has on the report results is that the drawdown contour lines in figure four of the report would be labeled '5.625 feet' and '3.375 feet' instead of '5 feet' and '3 feet', respectively. This in turn changes the total amount of potential drawdown, from all the wells as discussed on page six of the report, in the Objector's well from "less than four feet" to something "less than four and one-half feet".

The analysis was prepared assuming a constant maximum pumping rate from all the wells in the system up to the maximum volume requested. This assumption was made so that the calculations represent a 'worst case' situation that most likely will not arise. The interpretation and summary contained in the report imply that any potential increase in drawdown in the Objector's well from the additional proposed appropriation will be small, in the order of two feet, under the 'worst case' scenario.

The report also states that the results of the aquifer testing indicate that the aquifer is relatively productive. Drawdown in the proposed well during the testing was measured at about 12 feet. This is small in relation to the total depth of the well (318 ft). This is interpreted to mean that water is available in the amounts requested and with little affect to present users of the source of supply.

11. The Objector questioned whether such an analysis, as prepared using data from a twenty four hour aquifer pump test, was really able to indicate what may occur over years of actual use. Mr. Shapley testified that such testing was acceptable and standard in the hydrologic field for determination of unknown aquifer characteristics. Once these aquifer characteristics have been determined using the actual test data then, analytical solutions are used to predict the possible long term drawdown effects for specific pumping schemes. The computer program used in this case for the calculations is commercially available and used commonly for such analysis.

12. The Objector has an existing water right of an earlier priority date to the application herein from the same source of supply. The use has been identified as domestic purposes located on a parcel of land adjacent to Applicant's golf course.

13. The Objector's concern is that the increase in pumping from the groundwater source has the potential of lowering the water level in his well and thereby affecting his ability to divert water for his established uses.

14. Objector's well is 65 feet deep. Other than one static water level measurement taken prior to the pump test (26.85 feet below land surface), no information was presented on actual static or pumping water levels in Objector's well. Objector did state that he has not had any problems to date with water availability from his well.

15. The well in this application has been in operation for at least two years, specifically during high water use periods which corresponds to the summer irrigation season. Applicant indicated they have had no problems in pumping water from the well. During this period of operation the Objector has also had no problems acquiring water from his well. This indicates that if there has been any lowering of the water level it has not been detrimental to the Objector and he has had no reason to call on the Applicant for water.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant:

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed uses of water, irrigation and multiple domestic, are beneficial uses of water. See MCA 85-2-102 (2).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 5 & 8.)

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. (See Finding of Fact 9.)

7. There are unappropriated waters available for applicants proposed uses in the amounts the applicant seeks to appropriate throughout those periods proposed for use of the water. (See Findings of Fact 10 & 15.)

8. The applicant's proposed appropriation will not result in any adverse affect to the water right of the objector. The report prepared by the DNRC indicates that under the 'worst case' scenario, the maximum additional drawdown that would occur in the Objector's well is in the order of an additional two feet which will not adversely effect Objectors water right. (See Findings of Fact 10,14 & 15.)

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 60551-g76G is hereby granted to Fairmont Hot Springs to appropriate 450 gpm up to 233.8 acre-feet of water per year for supplemental sprinkler irrigation and up to 241.5 acre-feet of water per year for multiple domestic purposes.

The source of supply shall be groundwater diverted by means of a well and electric pump. The well shall be located in the NWSEW of Section 2, Township 3 North, Range 10 West, Silver Bow County, Montana. The place of use for supplemental irrigation shall be 62.0 acres in the W2 of Section 2, 9.0 acres in the SE of Section 3 and 1.0 acre in the NENE of Section 10, all in Township 3 North, Range 10 West, Silver Bow County, for a total of 72.0 acres. The place of use for the multiple domestic purpose shall be the W2 of Section 2, Township 3 North, Range 10 West. Water may be appropriated between January 1 and December 31 of each year for multiple domestic purposes and between April 1 and September 30 of each year for supplemental irrigation. The priority date is August 5, 1985 at 12:30 p.m.

This permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. This permit is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level of the well may be accurately measured.

D. This permit is granted subject to the right of the Department to modify or revoke the permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA.

E. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA 2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Done this 25 day of February, 1988.

Scott Compton

Scott Compton, Hearing Examiner
Department of Natural Resources and
Conservation
1201 East Main
Bozeman, Montana 59715
(406) 586-3136

USE # 60551

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 9th day of March, 1988, as follows:

Fairmont Hot Springs
Attn R. K Pitman
Anaconda, MT 59711

Carl Hafer
6050 Porter
Butte, MT 59701

T. J. Reynolds
Helena Field Manager
1520 East Sixth Avenue
Helena, MT 59620-2301

Susan Howard
Susan Howard
Hearings Reporter

CASE # 60551