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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. 65936-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 March 4, 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system that it instead keep records of the power usage of the pump which in turn could be converted to volume of water withdrawn.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.

**CASE #**

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. 65936-g76G is hereby granted to Fairmont Hot Springs to appropriate 180 gpm up to 144.5 acre-feet of water per year for geothermal heating and recreational use.

The source of supply shall be groundwater diverted by means of a well and electric pump. The well shall be located in the SENESW of Section 2, Township 3 North, Range 10 West, Silver Bow County, Montana. The place of use of the water shall be located in the SENW and SWSWNE of Section 2, Township 3 North, Range 10 West. The water may be appropriated during the period October 1 through April 1, inclusive of each year. The priority date is May 13, 1987 at 11:32 a.m.

**CASE #**

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.

**CASE #**

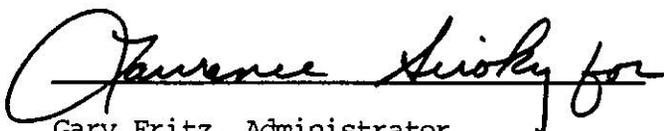
E. This permit is subject to the condition that the Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. If the Department determines that such records are inadequate due to 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.

F. This permit is issued in conjunction with Water Right No. W090746-76G for a combined appropriation not to exceed 320 acre-feet per annum. During the period of appropriation of this permit, October 1 to April 1 of each year, only one of the rights may be used. Water may not be diverted from both the well and hot spring sources simultaneously.

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

**CASE #**

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 18<sup>th</sup> 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

**CASE #**

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. 65936-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.

Applicant's 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.

**CASE #**

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 geothermal heating and recreational purposes. It is proposed that naturally heated groundwater be used to heat buildings and a swimming pool. The heated water will be pumped into an existing piping system for distribution on the resort grounds. The heating needs of the resort have previously been met through use of existing water rights from the Gregson Hot Spring. Warmer water from the proposed well will be used to replace the use of the hot spring during the colder winter months.

Mr. Carl Hafer had originally filed an objection expressing concern that the proposed appropriation would have an adverse affect to his domestic water right. During the initial proceedings of this hearing Mr. Hafer subsequently withdrew his objection, stating that he no longer wished to proceed with any action against the proposed appropriation.

The hearing continued for the Applicant to present evidence or testimony in regard to meeting the criteria for issuance of a permit.

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. 65936-g76G was duly filed with the Department of Natural Resources and Conservation on May 13, 1987 at 11:32 a.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 6/17/1987.
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 180 gpm up to 289.0 acre-feet of water per year for geothermal heating and recreation. The point of diversion is to be in the SENESW Section 2, Township 3 North, Range 10 West, Silver Bow County, Montana. The place of use is to be in the SENW and SWSWNE of Section 2, Township 3 North, Range 10 West. The period of use of the water is to be from October 1 through April 1 of each year.

6. The application requests 289.0 acre-feet of water diverted at a rate of 180 gpm. The volume of 289.0 acre-feet can not physically be diverted at that flow rate in the period of time requested. The volume of water for the uses applied for are not cumulative but are rather a continuous use of the same water throughout the system. After the hot water is circulated through the various heat transfer systems it is then run into the swimming pool. For this reason the Public Notice and Notice of Hearing listed a corrected volume of 144.5 acre-feet for the application. While the record does not reflect that the Applicant requested the change to the volume amount be made, it is implied that Applicant agreed to the change as the processing of the application has proceeded using the lower volume amount since the public notice stage with no objection.

7. The water will be pumped into a pipe distribution system to heat various facilities at the resort and then run to the swimming pool. After use, the water is to be discharged into a existing lagoon.

8. The amount of water applied for appears reasonable for the uses intended. This source is intended to replace another hot water source, Gregson Hot Spring, during the colder winter months, which has been filed as Statement of Claim No. W090746-76G for 200 gpm up to 320 acre-feet per year. The proposed well supplies warmer water which can be of additional benefit for heating purposes.

9. The proposed means of diversion, construction and operation appear adequate. The well was constructed under the auspices of Montana Bureau of Mines personnel, who are commonly relied upon as professionals in this field. The water and delivery system have been in use for three winter seasons with no apparent major deficiencies.

10. 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 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 effect on the large surface water system involved in the reservation process.

11. Testimony of Mr. Shapley and information in his report indicate that the proposed appropriation would be no additional burden on the geothermal aquifer since this proposed use of the well would replace the use of the hot spring water during the colder winter months. The geothermal aquifer system leaks up into the overlying valley fill aquifer as a source of recharge. There should be no change in the geothermal system's pressure head and thus little or no effect as a supply to the valley aquifer.

Mr. Pitman also testified that the use of water from the well will replace the use of the spring and that the hot spring natural flow is diminished but does not stop entirely during the time the well is being pumped.

12. The well proposed to be used to appropriate the hot water is approximately 600 feet in depth. The well is cased with steel to a depth of 455 feet. Below this depth the well is not cased in the reported fractured bedrock. This effectively seals out any overlying valley fill aquifer waters from the well so that only hot water is encountered and pumped.

13. A timely objection was filed by Mr. Carl Hafer in regard to the objection. Mr. Hafer has a water right from a 65 foot deep well developed within the valley alluvial aquifer. Mr. Hafer withdrew his objection at the beginning of the hearing.

**CASE #**

14. There is no evidence in the record of any other appropriations from the geothermal aquifer source other than the Applicants existing rights.

15. This proposed use of the hot water from the well has in fact been occurring for the past three winter seasons. Mr. Pitman stated that there have been no problems in pumping the desired amounts of water from the well.

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;

**CASE #**

- (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, geothermal heating and recreation, are beneficial uses of water. See MCA 85-2-102 (2) & (14).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 5 & 9.)

6. The proposed uses 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 10.)

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. All evidence presented, in the form of direct testimony and a hydrologic report, indicate that the productivity of the geothermal aquifer should not be affected and that sufficient water should be available for appropriation as proposed. (See Finding of Fact 11 & 15.)

8. As there is no evidence of existing water rights, other than the applicants, utilizing the geothermal aquifer as a source (see Finding of Fact 13 & 14), and as it further does not appear that there will be any effect on connected aquifers (see Finding of Fact 11), it is hereby concluded that existing water rights will not be adversely affected by the proposed appropriation.

9. As it is Applicants' stated intent to divert and use water pursuant hereto in lieu of water diverted pursuant to claimed Water Right No. 90746-76G between October 1 and April 1, each year, and as this Permit is issued upon proof commensurate with such intent, i.e., Applicant has presented no evidence of a new beneficial use justifying diversion of more water than is claimed, nor has it shown that more water is available for appropriation, the Permit must be issued in conjunction with the Claim so that the combined appropriation under Permit and Claim does not exceed the claimed amount.

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. 65936-g76G is hereby granted to Fairmont Hot Springs to appropriate 180 gpm up to 144.5 acre-feet of water per year for geothermal heating and recreational use.

The source of supply shall be groundwater diverted by means of a well and electric pump. The well shall be located in the SENESW of Section 2, Township 3 North, Range 10 West, Silver Bow County, Montana. The place of use of the water

shall be located in the SENW and SWSWNE of Section 2, Township 3 North, Range 10 West. The water may be appropriated during the period October 1 through April 1, inclusive of each year. The priority date is May 13, 1987 at 11:32 a.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.

**CASE #**

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.

F. This permit is issued in conjunction with Water Right No. W090746-76G for a combined appropriation not to exceed 320 acre-feet per annum. During the period of appropriation of this permit, October 1 to April 1 of each year, only one of the rights may be used. Water may not be diverted from both the well and hot spring sources simultaneously.

**CASE #**

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.

**CASE #**

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 4 day of March, 1988.

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

**CASE #**

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 #**