

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. )  
062593-g76H BY PAMELA R. SCHARBAUER ) FINAL ORDER  
DOING BUSINESS AS WESTERN MONTANA SPORTS )  
MEDICINE AND FITNESS CENTER )

\* \* \* \* \*

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, Thomas H. Boone. 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 October 14, 1988 Proposal for Decision, and incorporates them herein by reference.

The Applicant requested the alternative proposal to cancel Certificate of Water Right No. 065902-g76H and divert the full amount of the water under Permit No. 062593-g76H. The request was tied to some of the Applicant's proposed modifications. Because the modifications were not granted, the Applicant will again be offered two options, with the option to split the water use between the Permit and Certificate of Water Right No. 065902-g76H being the default option.

### RESPONSE TO EXCEPTIONS

The Applicant took exception to the land description for the location (point of diversion) of Well No. 1. The contention is that the well is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West; not the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West as specified in Findings of Fact 2 and 19. The land description for Well No. 1 was taken from the application which listed the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West for both wells. Additionally, the testimony of Bryan Smith (Applicant's witness) indicated both wells were in the description given in the application. Applicant's Exhibit 3, the only exhibit to show section corners in relation to the wells, shows Well No. 1 in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of the said section. During Mike McLane's testimony, he stated that both wells are located in the description given in the application. His testimony on this point was not contested by the Applicant.

The Applicant further requests that the place of use for irrigation should include areas outside of the place of use described in the Proposal for Decision. The place of use was described in the application and confirmed by Applicant's Exhibit 3 to be in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West. There was no evidence in the record indicating additional use or places of use.

The findings of the point of diversion and place of use were based on competent substantial evidence. The Applicant gave no indication of particular testimony or exhibits that were overlooked by the Hearing Examiner in making his decision on these issues.

The Applicant also seeks to have the volume for commercial use amended, pointing to E.P.A. manuals and industry standards as the basis for such a change. This information is not part of the hearing record. No attempt was made by the Applicant to make it a part of the record after both Mike McLane and the Hearing Examiner informed Mr. Boone at the hearing that the hearing testimony contradicted the application on the issue of volume.

The evidence in the file and the testimony at the hearing was specific about the volume to be used by the showers, bathroom, etc. (the water going into the drain field). Under direct examination by Mr. Boone, Mr. Smith testified, ". . . At the present time they're using approximately 6,000 gallons a day, a little less than that, actually. At full development when full membership is attained, they expect to be using about 6500 gallons a day." Additionally, a detailed breakdown of use in the file, entitled "DESIGN CRITERIA, 5 YEAR PROJECTION", shows a commercial use of less than 6500 gallons per day.

In connection with the whirlpool water use, the application's documentation and Mr. Smith's testimony again paint a clear picture. After Mr. Boone had asked Bryan Smith about the water used by the Fitness Center, Mr. Boone concluded that a discussion of the water going to the drain field included the coverage of all of the commercial use. That conclusion led to the following exchange.

Smith: . . . Also included in the commercial is the swimming pool use, and the swimming pool will be drained once a year for cleaning and filled back up, and at that time they will be requiring the full 130 gallons a minute until the pool is filled.

Boone: And how long does that take? Do you know approximately?

Smith: Approximately 24 hours.

Boone: That takes care of the commercial use that's intended?

Smith: Yes.

In the file a description of the commercial use is given which specifically indicates the whirlpool will be filled only once per year.

. . . In addition, the swimming pool and whirlpool will be filled with well water once a year. The volume of the swimming pool is 147,135 gallons and the volume of the whirlpool is 3,802 gallons. The two pools will be filled by means of a 2" pipe at 25 feet of head and approximately 100 gallons per minute for approximately 25 hours. . .

Minor corrections in the place of use and point of diversion may take place during the verification of this permit. Those changes, if required, will be allowed depending on whether the Applicant's developed water use is in substantial accordance with the permit. The intent of the Applicant in relation to the volume of commercial use is clear. The permit specifically limits the use for that purpose.

#### ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 062593-g76H is hereby granted to Pamela R. Scharbauer, doing business as Western Montana Sports Medicine and Fitness Center, to appropriate a total of 130 gallons per minute up to 3.5 acre-feet per year from January 1 to December 31, inclusive, of each year, as follows:

A. 33.4 gallons per minute up to zero (0) acre-feet per year from January 1 to December 31, inclusive, of each year, for commercial use in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.

B. 130 gallons per minute up to 3.5 acre-feet per year from April 15 to October 15, inclusive, of each year for new irrigation use on one acre in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.

C. 33.4 gallons per minute up to zero (0) acre-feet per year from April 15 to October 15, inclusive, of each year for supplemental irrigation on two acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.

The source of water shall be groundwater diverted by means of two wells, both located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County. The priority date of this permit is May 5, 1986 at 10:00 A.M.

This permit is subject to the following express terms, conditions, and limitations denoted A through H, inclusive, and listed below.

IN THE ALTERNATIVE, the Permittee may choose to request that Certificate of Water Right No. 065902-g76H be canceled. Then a permit will be issued for the full amount of the water use per the amended application and the hearing record. If the Permittee chooses to select this alternative, the permit will be the only instrument governing the diversion of water from the subject wells.

The permit would be granted to Pamela R. Scharbauer, doing business as Western Montana Sports Medicine and Fitness Center to appropriate a total of 130 gallons per minute up to 15.15 acre-feet per year from January 1 to December 31, inclusive, of each year, as follows:

A. 130 gallons per minute up to 8.15 acre-feet per year from January 1 to December 31, inclusive, of each year, for commercial use in the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.

B. 130 gallons per minute up to 7.0 acre-feet per year from April 15 to October 15, inclusive, of each year, for new irrigation use on three acres in the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.

The source of water shall be groundwater diverted by means of two wells, both located in the  $NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County. The priority date of this permit is May 5, 1986 at 10:00 A.M.

This Permit would be subject to the following express terms, conditions, and limitations denoted A through G, inclusive, and listed below.

The alternative permit will be issued if, and only if, the Permittee requests the Missoula Water Rights Bureau Field Office, P. O. Box 5004 (Holiday Village Professional Office, Suite 105), Missoula, Montana 59806 to cancel Certificate of Water Right No. 065902-g76H and requests the alternative Permit No. 062593-g76H within forty (40) days of the issuance of this Final Order.

## CONDITIONS

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 well 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 Section 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with Section 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 by November 30 of each year to the Water Rights Bureau Field Office, P. O. Box 5004, Missoula, MT 59806-5004. The records shall be submitted until the permit is verified pursuant to Section 85-2-315(1) MCA. As part of the verification, the Department shall notify the Permittee if records are to be kept from that time on or if the recordkeeping requirement is rescinded.

F. Until a Notice of Completion (Form 617) is filed for this permit, the Permittee shall submit a yearly report of the current number of members of the Western Montana Sports Medicine and Fitness Center. The report shall be submitted by November 30 of each year to the Water Rights Bureau Field Office, P. O. Box 5004, Missoula, MT 59806-5004.

G. The deadline for completion of this permit, and filing of the Notice of Completion of Permitted Water Development (Form 617) shall be November 30, 1993, verifying that the appropriation of water has been completed as permitted.

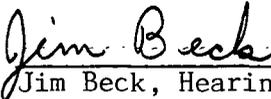
H. This permit is issued in conjunction with water right number C-065902-g76H. The combined appropriation as granted shall not exceed a total of 130 gallons per minute, up to 17.5 acre-feet per annum.

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 3 day of January, 1988<sup>9</sup>.

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

  
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Jim Beck, Hearing Examiner  
Department of Natural Resources and  
Conservation  
1520 East 6th Avenue  
Helena, MT 59620-2301  
(406) 444-6695

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 1<sup>st</sup> day of January, 1989, as follows:

Pamela R. Scharbauer  
Western Montana Sports  
Medicine & Fitness Center  
P.O. Box 5066  
Missoula, MT 59806

Bruce N. Allen  
5275 Forest Hill Lane  
Missoula, MT 59801

Laudie and Ethel Bray  
5150 U.S. Highway 93 S.  
Missoula, MT 59801

Jim Weatherly  
Sorenson Company  
P.O. Box 3418  
Missoula, MT 59806

Thomas H. Boone  
Boone, Karlberg & Haddon  
P.O. Box 9199  
Missoula, MT 59807-9199

Wayne H. and Lucinda Hightower  
5055 Forest Hills Lane  
Missoula, MT 59803

Carol J. Harmon  
4755 N. Wornath Road  
Missoula, MT 59801

Mike McLane, Field Manager  
Missoula Field Office  
P.O. Box 5004  
Missoula, MT 59806-5004

  
\_\_\_\_\_  
Irene V. LaBare  
Legal Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. )  
062593-g76H BY PAMELA R. SCHARBAUER ) PROPOSAL FOR DECISION  
DOING BUSINESS AS WESTERN MONTANA SPORTS)  
MEDICINE AND FITNESS CENTER )

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

The Applicant appeared through counsel Thomas H. Boone.

Bryan Smith of Sorenson & Co., consulting engineers, and Howard Newman, a hydrology consultant, appeared as witnesses for the Applicant.

Objectors Laudie and Ethel Bray, and Bruce N. Allen appeared on their own behalf.

Charles Bristow appeared as a witness for Objectors Laudie and Ethel Bray and on his own behalf as a late objector.

Mark Shapley, a hydrogeologist from the Department of Natural Resources and Conservation, and Mike McLane, field manager of the Missoula Water Rights Bureau Field Office, appeared as staff expert witnesses.

Objectors Carol J. Harmon, and Wayne H. and Lucinda W. Hightower did not appear at the hearing.

## EXHIBITS

The Applicant offered five exhibits, all of which were accepted for the record without objection.

Applicant's Exhibit 1 is a site plan (map) of the proposed place of use. The irrigated areas are outlined in green and brown while the building housing the fitness center is outlined in blue.

Applicant's Exhibit 2 is a copy of a map originally prepared by the Missoula Water Rights Bureau Field Office. The Western Montana Sports Medicine and Fitness Center (hereinafter referred to as "Fitness Center") wells and the wells of Objectors Harmon, Bray, Hightower, and Allen are highlighted. With Mr. Boone's permission, Mr. Bristow marked the location of his wells on the exhibit in red.

Applicant's Exhibit 3 is an enlargement of a U.S. Geological Survey map showing the well locations of the Applicant and Objectors Harmon, Bray, Hightower, and Allen. The location of the Fitness Center is also noted on the exhibit.

Applicant's Exhibit 4 shows the detailed location of the well which was test pumped and the monitored wells. The exhibit also shows the location of Highway 93 and the Big Flat Ditch.

Applicant's Exhibit 5 is a 47 page report by Howard Newman dated May 24, 1988.

At the close of the hearing Howard Newman, with the approval of counsel Thomas Boone, moved to keep the record open to submit data from Applicant's

Exhibit 5 in graphical form. After some discussion about the procedural problems with such an addition to the exhibit, Mr. Newman withdrew his motion.

The Objectors did not offer any exhibits for inclusion in the record.

Both of the exhibits offered by the Department were accepted for the record without objection.

Department's Exhibit 1 is a copy of Certificate of Water Right No. 065902-g76H and related file information. The exhibit contains a total of 15 pages.

Department's Exhibit 2 is the Department file for Application for Beneficial Water Use Permit No. 062593-g76H (hereinafter referred to as "file"). The file had been made available for review prior to and during 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 §85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 062593-g76H was duly filed with the Department of Natural Resources and Conservation on May 5,

1986 at 10:00 A.M. The application is for 130 gallons per minute up to 36 acre-feet per year for year-round commercial use and 12 acre-feet per year for the irrigation of four acres of lawn from April 15 to October 15, inclusive, of each year. The water is to be withdrawn from two groundwater wells located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 2, T12N, R20W, Missoula County.

An amendment to the application was filed on November 19, 1987. The amendment only reduced the flow rate and volume amounts requested in the original application. The volume for commercial use was lowered to 21 acre-feet per year, and the volume for irrigation was lowered to seven acre-feet per year. (See Finding of Fact 20 for a clarification of the period of use.)

3. The pertinent portions of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on November 12 and 19, 1986.

4. Letters and signed forms in the file show that the objectors listed below withdrew their objections prior to the hearing.

- A. Cecilia S. VanAllen
- B. Nancy McBroom
- C. F. Dean and Virginia F. Mahrt
- D. Michael J. and Sandra J. Zarbolias
- E. Norm Roberts
- F. Otis Gilliland
- G. Edgar W. Lister

5. Charles Bristow appeared at the hearing as a "late objector", however, there is no written objection in the file, timely or untimely, from Mr. Bristow.

6. The source of water is groundwater.

7. Water will be withdrawn from the aquifer by means of two wells (identified as Well No. 1 and Well No. 3). Submersible pumps will be installed in each well to lift the water from the wells and pressurize the water which will be used for both the commercial and irrigation uses. The combined flow from both wells is conveyed to the Fitness Center by a four inch diameter polyvinyl chloride (PVC) pipe. (Testimony of Bryan Smith.)

8. Another well (Well No. 2) was drilled in June, 1986, but it did not produce enough water to warrant adding it on the system. Well No. 2 is not used, nor does the Fitness Center plan to use it, under this permit. (Testimony of Bryan Smith.)

9. Water for the Fitness Center's wells is drawn from a bedrock aquifer which receives some recharge from the Bitterroot River. Water will be available in Wells No. 1 and No. 3 in the amounts requested by the Applicant during the entire year as long as there is water in the Bitterroot River to supplement the aquifer. Wells to the west of the Fitness Center's wells (Objectors Harmon, Hightower, and Allen) will not be affected by pumping at the Fitness Center wells because they are recharged by water from the Blue Mountain/Hays Creek area. Hays Creek is a tributary to the Bitterroot River and flows into the river about a mile south of the Fitness Center wells.

Wells closer to the Fitness Center (Objectors Bray and Bristow) will not be significantly affected because of the recharge from the Bitterroot River and the distance between the Fitness Center's wells and the wells of the above-mentioned objectors. (Testimony of Howard Newman which was supported in a general way by the testimony of Mark Shapley.)

10. The Bitterroot River has only been dry (no surface flow) on one occasion, that being sometime during the 1930s. (Uncontested testimony of Howard Newman.)

11. At the Fitness Center irrigation water will be used to serve a total of three acres of lawn and shrubbery. (Applicant's Exhibit 1 and testimony of Bryan Smith.) The application requested the use of water to irrigate four acres, but a detailed map (Applicant's Exhibit 1) and Mr. Smith's testimony detailed three acres of irrigation use around the Fitness Center. The irrigation is provided by a lawn irrigation system that operates during times when the use does not compete with other uses supplied by the system. The volume requirements in the application were supplied to the designers by the "landscape people", who are landscape professionals employed by Sorenson & Co. (Testimony of Bryan Smith.)

12. The water for commercial use will be used for showers, bathrooms, a swimming pool, and a whirlpool. The shower and bathroom use will amount to 6500 gallons per day (7.28 acre-feet per year) when the Fitness Center reaches full membership. (Testimony of Bryan Smith with detailed support documentation in the file.) Additional water will be used to make a yearly

filling of the swimming pool and whirlpool and for make-up water at the facilities. (Mr. Smith made a point of the fact that the swimming pool was filled several times during testing of the facility, but only one fill per year was necessary now.) The swimming pool and whirlpool hold 187,200 gallons and 3802 gallons respectively. (Total fill volume of 0.59 acre-feet per year.) (The pool volume is from Bryan Smith's testimony about fill time and the whirlpool volume comes from information in the application provided by Kestler, Merci & Assoc.) The make-up water requirement is 250 gallons per day (0.28 acre-feet per year). (Kestler, Merci & Assoc.)

13. There is no evidence in the record of planned uses or developments of groundwater in the area for which a permit has been issued or for which water has been reserved.

14. Objectors Laudie and Ethel Bray posed the issue of groundwater contamination from the Fitness Center's septic system in their objection. Mr. Smith responded to cross examination questions on the subject by stating that the septic system met [Montana] Department of Health [and Environmental Sciences] standards. The system is designed to handle the projected 6500 gallons per day from the showers and bathrooms.

A separate disposal system will be used for the swimming pool and whirlpool disposal water. This water will also infiltrate into the surrounding soils and be purified as it flows through the porous media. The water disposed of through infiltration will not contaminate the local groundwater. (Testimony of Bryan Smith.)

15. A Notice of Completion of Ground-Water Development No. 065902-g76H was received from the Applicant on August 3, 1987. The source shown on the Notice of Completion is the same two wells (Wells No. 1 and 3) that are the source for this application. The resultant Certificate of Water Right is for 96.6 gallons per minute up to 14 acre-feet per year. Nine acre-feet per year is for commercial use and five acre-feet per year is for irrigation on two acres. The two acres of irrigation use shown on the Certificate is within the place of use shown on the application. Which two acres out of the three acres mentioned in Finding of Fact 11, was not clear from the Certificate of Water Right. (Testimony of Mike McLane and Department's Exhibit 1.)

A flow restrictor, limiting the flow from the wells to 96.6 gallons per minute has been installed by the applicant. The flow restrictor was inspected and approved by personnel from the Missoula Water Rights Bureau Field Office. (Testimony of Mike McLane.)

16. The initial Application for Beneficial Water Use Permit was made at 10:00 A.M. on May 5, 1986. The amendment, amending flows and volumes downward, was filed on November 19, 1987. A note in the file indicates the application priority date is November 19, 1987. When the amended application was made, the Field Office believed it was the Applicant's intent to have it "tie back" to the original filing. (File and testimony of Mike McLane.)

17. The Fitness Center is now being used, but not at its full capacity. It may take up to five years before the full capacity is reached. The commercial water use will grow as the membership and use of the Fitness Center increases. (Testimony of Bryan Smith.)

18. The peak water demand of the Fitness Center will be 130 gallons per minute when full membership is reached. When the demand exceeds the capacity of the pump in one well, the pump in the other well starts and both pumps will operate. Adding the discharges of the pumps operating singularly indicates a total discharge of 200 gallons per minute, 90 gallons per minute from Well No. 1 and 110 gallons per minute from Well No. 3. (Testimony of Bryan Smith.) The combined aquifer withdrawal with both pumps operating is unknown, because pipe friction losses would change with the combined flow. However, the two pumps will supply at least the full 130 gallon per minute demand of the Fitness Center. (Testimony of Bryan Smith.)

19. The application amendment shows the diversion location (Item 3) as being in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County. Item 4 of the same application indicates that a permit is requested for two wells. Both wells (No. 1 and No. 3) have been located in the land description stated above. (Testimony of Mike McLane.)

20. The application amendment requests a period of use of January 5 to October 15 for new irrigation and does not specify a period of use for supplemental irrigation. Both Certificate of Water Right No. 065902-g76H and the original application show a period of use from April 15 to October 15 for irrigation. Testimony at the hearing indicated the January 5 beginning date for irrigation is a typographical error, and the correct date should be April 15.

21. After hearing the testimony of the Applicant's and Department's witnesses, Objectors Laudie and Ethel Bray, and Bruce Allen withdrew their objections. They were the only timely objectors to appear at the hearing.

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 priority date (date of receipt by the Department) for this application is May 5, 1986 at 10:00 A.M. (See Findings of Fact 2 and 16 and related Conclusion of Law 12.)

5. The proposed uses of water, irrigation and commercial use, are beneficial uses of water. (See §85-2-102(2) MCA.)

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 7 and 11.)

7. There is water physically available in the source of supply to supply the full amount requested by the Applicant, throughout the period which the Applicant seeks to appropriate it. The proposed use will not adversely affect the objectors ability to divert water with their wells. (See Findings of Fact 9 and 10.)

8. The only adverse affect cited by the objectors was contamination from the waste water discharged by the Fitness Center. According to the project engineer for the Fitness Center, the wastewater disposal system was approved by the Montana Department of Health and Environmental Sciences (DHES). (See Finding of Fact 14.) The DHES has the responsibility for the proper design standards for wastewater treatment facilities. Approval of the facility by the DHES indicates that the facility is adequate and will not cause groundwater pollution problems. The swimming pool and whirlpool water disposal system will not cause groundwater contamination. (See Finding of Fact 14.)

9. 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 13.)

10. Section 85-2-312(1) MCA states, in part, "The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application..." The applicant, through her design engineer, provided detailed and documented information about the proposed water use. The total projected commercial use is 8.15 acre-feet per year. (The total of the volumes given in Finding of Fact 12.) This is less than the 9.0 acre-feet per year of commercial use granted by Certificate of Water Right No. 065902-g76H. A permit for additional volume for commercial use is not necessary since the Certificate of Water Right allows the diversion of a sufficient volume of water for all of the contemplated commercial needs.

Certificate of Water Right No. 065902-g76H shows five acre-feet per year for the irrigation of two acres. The application amendment, which was submitted after the Certificate of Water Right was issued, shows zero volume for supplemental irrigation on two acres (presumably the same two acres mentioned in the Certificate of Water Right). This implies that the applicant saw no need for an additional volume of water for the land irrigated under Certificate of Water Right No. 065902-g76H.

For the three acres of land to be irrigated (see Finding of Fact 11), two acres are covered under the Certificate of Water Right. Water for an additional acre needs to be supplied under this application. The proportionate volume of use for one acre of **new** irrigation is 3.5 acre-feet per year (half of the volume [7.0 acre-feet per year] requested for two acres of new irrigation in the application.)

11. The withdrawal of water could, at times, exceed 130 gallons per minute. (See Finding of Fact 18.) Unless the withdrawal is limited by the system or by a flow limiter to 130 gallons per minute, an additional permit should be obtained to cover the excess flow not covered by this application. (See Sec. 85-2-302 and 85-2-312(1) MCA.) This permit does not authorize the diversion of more than 130 gallons per minute and any volume accumulated as a result of a flow greater than 130 gallons per minute will not go toward the perfection of this permit. See In the Matter of Application for Beneficial Water Use Permit No. 021673-s41H by Bill Erwin (Proposal for Decision, October 10, 1985; Final Order, December 31, 1986).

12. The priority date of this application is May 5, 1986 at 10:00 A.M. The amendment to the application was made to reflect the necessary modifications in light of Certificate of Water Right No. 065902-g76H. The amendments were all for lesser amounts of withdrawal and for the same diversion and use locations, so no other water users were prejudiced. Any mention of another priority date in the file is a clerical error, apparently stemming from an incomplete review of the file. (See Finding of Fact 16.)

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. 062593-g76H is hereby granted to Pamela R. Scharbauer, doing business as Western Montana Sports Medicine and Fitness Center, to appropriate a total of 130 gallons per

minute up to 3.5 acre-feet per year from January 1 to December 31, inclusive, of each year, as follows:

- A. 33.4 gallons per minute up to zero (0) acre-feet per year from January 1 to December 31, inclusive, of each year, for commercial use in the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.
- B. 130 gallons per minute up to 3.5 acre-feet per year from April 15 to October 15, inclusive, of each year for new irrigation use on one acre in the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.
- C. 33.4 gallons per minute up to zero (0) acre-feet per year from April 15 to October 15, inclusive, of each year for supplemental irrigation on two acres in the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.

The source of water shall be groundwater diverted by means of two wells, both located in the  $NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County. The priority date of this permit is May 5, 1986 at 10:00 A.M.

This permit is issued with the following express terms, conditions, and limitations denoted A through H, inclusive, and listed below.

In the alternative, the permittee may choose to request that Certificate of Water Right No. 065902-g76H be canceled. Then a permit will be issued for the full amount of the water use per the amended application and the hearing record. (See Findings of Fact 2 and 12.) The Applicant's testimony

concerning the project was based on the amended volume and the Objectors who attended the hearing withdrew their objections based, in part, on the Applicant's testimony. Therefore, the amount of water granted would have to be the amounts specified in the amended application. (See Finding of Fact 2.) If the permittee chooses to pursue this alternative, the permit (which has an earlier priority date than the certificate) will be the only instrument governing the diversion of water from the subject wells.

The permit would be granted to Pamela R. Scharbauer, doing business as Western Montana Sports Medicine and Fitness Center to appropriate a total of 130 gallons per minute up to 15.15 acre-feet per year from January 1 to December 31, inclusive, of each year, as follows:

- A. 130 gallons per minute up to 8.15 acre-feet per year from January 1 to December 31, inclusive, of each year, for commercial use in the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.
- B. 130 gallons per minute up to 7.0 acre-feet per year from April 15 to October 15, inclusive, of each year, for new irrigation use on three acres in the  $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County.

The source of water shall be groundwater diverted by means of two wells, both located in the  $NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$  Section 2, Township 12 North, Range 20 West, Missoula County. The priority date of this permit is May 5, 1986 at 10:00 A.M.

This permit would be issued with the following express terms, conditions, and limitations denoted A through G, inclusive, and listed below.

The alternative permit will be issued if, and only if, the permittee requests the Missoula Water Rights Bureau Field Office, P. O. Box 5004 (Holiday Village Professional Office, Suite 105), Missoula, Montana 59806 to cancel Certificate of Water Right No. 065902-g76H and requests the alternative Permit No. 062593-g76H within forty (40) days of the issuance of the final order.

#### CONDITIONS

- 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 well 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 by November 30 of each year to the Water Rights Bureau Field Office, P. O. Box 5004, Missoula, MT 59806-5004. The records shall be submitted until the permit is verified pursuant to §85-2-315(1) MCA. As part of the verification, the Department shall notify the permittee if records are to be kept from that time on or if the record keeping requirement is rescinded.
- F. Until a Notice of Completion (Form 617) is filed for this permit, the Permittee shall submit a yearly report of the current number of members of the Western Montana Sports Medicine and Fitness Center. The report shall be submitted by November 30 of each year to the Water Rights Bureau Field Office, P. O. Box 5004, Missoula, MT 59806-5004.

- G. The deadline for completion of this permit, and filing of the Notice of Completion of Permitted Water Development (Form 617) shall be November 30, 1993, verifying that the appropriation of water has been completed as permitted.
- H. This permit is issued in conjunction with water right number C-065902-g76H. The combined appropriation as granted shall not exceed a total of 130 gallons per minute, up to 17.5 acre-feet per annum.

#### 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 Avenue, 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.

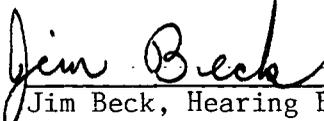
Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be

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 new 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 14<sup>th</sup> day of October, 1988.

  
Jim Beck, Hearing Examiner  
Department of Natural Resources and  
Conservation  
1520 East Sixth Avenue  
Helena, MT 59620-2301  
(406) 444-6695

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 14<sup>th</sup> day of October, 1988, as follows:

Pamela R. Scharbauer  
Western Montana Sports Medicine and Fitness Center  
PO Box 5066  
Missoula MT 59806

Thomas H. Boone  
Boone, Karlberg & Hadden  
Suite 301, Central Square  
201 Main  
Missoula MT 59802

Wayne H. and Lucinda W. Hightower  
5055 Forest Hills Ln  
Missoula MT 59803

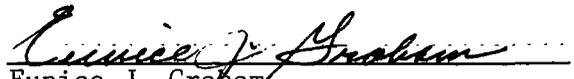
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Eunice J. Graham