

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

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<b>IN THE MATTER OF APPLICATION FOR</b>	)	
<b>BENEFICIAL WATER USE PERMIT NO.</b>	)	<b>FINAL ORDER</b>
<b>42M-30064191 BY ARNOLD THIEL</b>	)	

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Pursuant to the provisions of §§ 85-2-309 through 311, MCA (the Water Use Act); § 2-4-601, *et. seq.*, MCA (the contested case provisions of the Montana Administrative Procedure Act); and Admin. R. Mont. 36.12.201, *et. seq.*, a contested case hearing was held before the Department of Natural Resources and Conservation (Department) on September 10, 2013 in Sidney, Montana. The purpose of the contested case hearing was to hear objections to Application for Beneficial Water Use Permit No. 42M-30064191 by Arnold Thiel for which the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on April 8, 2013.

This Final Order must be read in conjunction with the April 8, 2013, Preliminary Determination to Grant which is hereby incorporated by reference.

**BACKGROUND**

Arnold Thiel drilled a well and began distributing groundwater for domestic use, and eventually sale, in 1981. After appropriating water for 31 years without a beneficial use permit, on October 9, 2012, Arnold Thiel, (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30064191 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 60 gallons per minute (GPM) and 23.20 acre feet per year (AF/yr) for the purpose of water marketing. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated December 14, 2012. The Applicant requested a 15-day extension to the 30-day priority date retention deadline, moving the deadline to January 28, 2013. The Applicant responded with information dated January 25, 2013. Additional deficiency response materials were submitted on January 28, 2013. The Application was determined to be correct and complete as of February 26, 2013. An Environmental Assessment for this Application was completed on March 21, 2013.

The Department issued a "Preliminary Determination to Grant Permit" on April 8, 2013, and published notice of that Determination on April 17, 2013, in the Sidney Herald and provided notice to interested individuals on April 16, 2013. The deadline for objections to be filed was May 31, 2013. The Application received one valid objection from Alan and Patricia Whitford (Objectors) on the criterion of adverse effect pursuant to § 85-2-308, MCA.

No valid objections were received regarding the following criteria under § 85-2-311, MCA: beneficial use, possessory interest, adequate diversion, legal availability, or physical availability.

The Department held a contested case hearing September 10, 2013 at which time the parties were provided with the opportunity to present evidence and testimony regarding Applicant's proposed use and Objector's objection related to the adverse affect criterion. § 85-2-308, MCA.

### **APPEARANCES**

Arnold Thiel appeared at the hearing, *pro se*. Testifying on behalf of the Applicant were: Arnold Thiel (Applicant), Charlene (Char) Cornelius (Applicant's daughter), Terrance Rohner (Central Water Conditioning), and Tom Osborne (Hydro Solutions, Inc., water consultant).

Objectors Alan and Patricia Whitford appeared at the hearing *pro se* and provided direct testimony and evidence on their objections.

DNRC Staff Expert Russell Levens, hydrogeologist (Levens), appeared at the hearing and provided testimony regarding his technical opinion in the matter.

### **FINDINGS OF FACT/CONCLUSIONS OF LAW**

#### **General Findings of Fact**

1. Application for Beneficial Water Use Permit No. 42M-30064191 in the name of Arnold Thiel, and signed by Arnold Thiel, was filed with the Department on October 9, 2012. (Department File)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding. (Department File)

3. The Applicant proposes to divert groundwater from a well (1410 ft) completed in the Fox Hills – Hell Creek aquifer. This well is located in the NESWSE of Section 14, T22N, R59E. The Applicant plans to appropriate by means of a pump, from January 1<sup>st</sup> through December 31<sup>st</sup> at 45.8 GPM up to 23.2 AF/yr.
4. The Applicant intends to sell water through bulk dispensary points as the place of use, located in the NESWSE of Section 14, T22N, R59E. The Applicant identified the service area as all sections of all townships of Roosevelt, Richland, Sheridan, Dawson, McCone, Valley and Prairie counties.
5. The water will primarily be sold to oil companies and oil field service companies for water to be used in oil well development and formation fracturing. Water is not expected to return to the source; therefore the consumptive use of the proposed diversion is 100%.
6. The preliminary determination proposed to grant the application for a permit to divert groundwater, by means of a pump, from January 1<sup>st</sup> through December 31<sup>st</sup> at 48.5 GPM up to 23.5 AF/yr, subject to conditions. For a more detailed description of the terms, analysis and conditions of the permit see PD to Grant.

### **General Conclusions of Law**

7. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in § 85-2-311, MCA. § 85-2-311, MCA, reads in pertinent part:

...the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(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 applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use[.]

(Criteria relating to water quality are not implicated by the instant Application)

8. After the Department issues a Preliminary Determination to Grant an Application, if valid objections are received on that application a hearing on the objections is held by the Department's Hearing Examiner. §§ 85-2-308 and 309, MCA. Only those criteria for which a valid objection has been filed are subject to the contested case hearing and the Hearing Examiner will summarily affirm the Department's determination on those criteria for which no valid objection has been filed. §85-2-309(1), MCA("If the department determines that an objection to an application . . . states a valid objection, it shall hold a contested case hearing . . . *on the objection . . .*")(emphasis provided).

9. Notice of the Application and Preliminary Determination to Grant was properly published and sent to known interested persons as required by § 85-2-307((2)(b), MCA. The Department received one valid objection regarding adverse effect. Accordingly, the criterion of adverse affect (§ 85-2-311(1)(b), MCA) is the only criterion at issue in this hearing. The following criteria are not at issue in this hearing – physical availability, legal availability, means of diversion, beneficial use, possessory interest, and water quality. See §§ 85-2-311(1)(a) and -311(1)(c - f), MCA. Therefore, the findings and conclusions on those criteria from the Preliminary Determination are hereby adopted and incorporated into this decision by reference.

### **Adverse Effect Findings of Fact**

10. Whitfords' water right is on file with the Department as Ground Water Certificate 42M 89834 00. This water right has a priority date of May 27, 1994 at 10:45 AM, from a groundwater well, 1480 feet deep in the Fox Hills – Hell Creek Aquifer, with a flow rate of 13 GPM and a total

volume of 1.79 AF/yr. The water is used for domestic, stock, and lawn and garden. The Whitfords' well is approximately 1100 FT from the Thiel well.

11. The Thiel well is approximately 1410 feet deep in the Fox Hills – Hell Creek Aquifer and is currently operated under interim permit 42M 30064191, with a priority date of 10:45 AM October 12, 2012. The well is currently permitted for water marketing, although from testimony it appears to service a number of domestic households as well.

12. In July of 2012 the Whitfords' well pump wiring failed. After replacing the wiring the well pump went dry. Whitfords estimated that the original pump level was approximately 100 feet.

13. Whitfords attribute the wiring failure to declining water levels in their well, but evidence of the cause of Whitfords' well pump failure was inconclusive. Whitfords lowered their well pump 100 feet, and have had no problems since. (Testimony of Alan Whitford)

14. Whitfords allege that the Applicant's proposed permitted use will cause a decrease in the static water level of their well.

15. Applicant has operated the Thiel well since 1981. The requested diversion rate, the diversion rate of the interim permit, and the historical diversion rate are the same. (Testimony of Arnold Thiel, Tom Osborne)

16. The predicted maximum drawdown of the Whitford well caused by Thiel's proposed well is 12.4 ft over a five year period. This leaves an available water column of approximately 1413 ft. (Department File)

17. The Thiel well was in production for over 25 years prior to the aquifer test and resultant adverse effect analysis.

18. Due to the 25 year production history, any drawdown caused by the Thiel well has already occurred. (Testimony of Tom Osborne)

19. Whitfords produced no evidence of a causal relationship between the Thiel Application and their well pump failure.

20. Based upon the above evidence, I find that the maximum drawdown of the Objectors' well caused by Applicant's proposed well is 12.4 ft over a five year period, which has already occurred. I further find that the Objectors failed to establish a causal connection between the reduction in the static water level in their well and the failure of their pump to Applicant's

groundwater use. These findings are further supported by the evidence that since the Objectors replaced and lowered their pump, they have had adequate water supply in spite of Applicant's water withdrawal in the amount applied for during that period of time. Accordingly, as conditioned in the Preliminary Determination to Grant, I find that the Applicant's proposed use will be controlled in a manner that ensures prior appropriators will be satisfied and that the Objectors can reasonably exercise their water right.

21. The Whitfords also raised concerns regarding the potential for water to be marketed and taken out of state, and the adequacy and security of diversion works. The Whitfords' concerns on these matters are more properly couched in the form of a water use complaint, rather than an objection to the permit application based upon alleged adverse effect. Regardless, the Preliminary Determination to Grant is subject to conditions requiring the depot to be controlled in a manner that ensures only water users with contracts acquire water and prohibiting the transport of water outside of the State of Montana. These conditions are sufficient to satisfy the permit criteria.

#### **Adverse Effect Conclusions of Law**

22. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users).

23. As between appropriators, priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right. § 85-2-401(1), MCA; *In the Matter of Application for Beneficial Water Use Permit No. 72498-G76L by Cross*, Proposal for Decision, Pgs. 9-10 (Adopted by Final Order 1991)(“To hold that an appropriator is entitled to maintain a shallow pumping depth or artesian flow against subsequent appropriators would allow a single appropriator or a limited number of

appropriators to control an entire aquifer simply to make their own means of diversion easier. Both case law and statutes prevent such a result”).

24. Uncontradicted expert testimony showing that the proposed appropriation will cause no significant drawdown in either applicant’s or any of the surrounding objectors wells is sufficient to prove § 85-2-311(1)(b). In the Matter of Application for Beneficial Water Use Permit No. 49371-g43Q by MacDonald, DNRC Final Order (1983).

25. The Department’s analysis in the Preliminary Determination to Grant, in combination with the testimony of Tom Osborne, supports the conclusion that the Applicant has proven by a preponderance of the evidence that the water rights of prior appropriators, including Objectors’ Ground Water Certificate 42M 89834 00, will not be adversely affected by the proposed appropriation. (Findings of Fact 15-19)

### **FINAL ORDER**

Subject to the terms, analysis, and conditions enumerated in the Preliminary Determination to Grant and this Final Order, the Department determines that Application for Beneficial Water Use Permit No. **42M-30064191** should be **GRANTED**.

The Permit will be subject to the following conditions, limitations or restrictions as enumerated in the Preliminary Determination to Grant:

1. THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31<sup>st</sup> OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE GLASGOW WATER RESOURCES UNIT OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
2. WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY LANGUAGE INCLUDED IN THE CONTRACT AND BY SIGNS POSTED AT THE DEPOT.
3. ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.

**NOTICE**

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 15<sup>th</sup> day of November 2013.

/Original signed by Martin L Balukas/

Martin L. Balukas, Hearing Examiner  
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and Conservation  
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**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 15<sup>th</sup> day of November 2013 by first class United States mail.

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