



**EXHIBITS**

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered six exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit A1-A6.

**Applicant's Exhibit A1** is plastic comb bound copy of the transcript of the DEPOSITION OF RUSSELL LEVENS.

**Applicant's Exhibit A2** is an 11" x 17" map entitled "Site Map."

**Applicant's Exhibit A3** is an 11" x 17" map entitled "Thom Farms and Stevensen Ownership."

**Applicant's Exhibit A4** is an 11" x 17" map entitled "Judith River Basin Above Objectors."

**Applicant's Exhibit A5** is an 11" x 17" map entitled "Objector locations from Thom Farms."

**Applicant's Exhibit A6** is a one-page copy of a map entitled "Thom Farm Application 41S-3000871" upon which four springs are highlighted.

Objector Taylor offered three exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibits OTaylor 1-OTaylor 3.

**Objector's Exhibit OTAYLOR 1** is a one-page copy of a *DRAFT CERTIFICATE OF WATER RIGHT FOR PERFECTED PERMIT TO APPROPRIATE WATER.*

**Objector's Exhibit OTAYLOR 2** is a photograph.

**Objector's Exhibit OTAYLOR 3** is a photograph.

Objector Majerus offered twelve exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibits OMajerus 1-OMajerus 11 and OMajerus 2A.

**Objector's Exhibit OMAJERUS 1** is a one-page copy of a map showing sections and some green highlighting.

**Objector's Exhibit OMAJERUS 2** is one page with copies of two undated photographs.

**Objector's Exhibit OMAJERUS 2A** is one page with copies of two undated photographs.

**Objector's Exhibit OMAJERUS 3** is two pages with copies of two undated photographs. The pages differ only in that the second has the numbers "3" and "4" written on it with a yellow highlighter.

**Objector's Exhibit OMAJERUS 4** is two pages with copies of two undated photographs. The pages differ only in that the second has the numbers "3" and "4" written on it with a yellow highlighter.

**Objector's Exhibit OMAJERUS 5** is one-page copy of an August 13, 2003, photograph.

**Objector's Exhibit OMAJERUS 6** is a two-page copy of Mont. Code Ann. § 85-2-311.

**Objector's Exhibit OMAJERUS 7** is a two-page copy of *Report WRSR52, 06/09/00, Water Right Listing By Source Name By Priority Date.*

**Objector's Exhibit OMAJERUS 8** is one-page copy of an aerial photograph.

**Objector's Exhibit OMAJERUS 9** is a one-page copy of a Watson Irrigation Specialists, Inc. proposal.

**Objector's Exhibit OMAJERUS 10** is one page with copies of July 30, 2003, photographs.

**Objector's Exhibit OMAJERUS 11** is two-page copy of Andy Brummond's *Preliminary CRITERIA ASSESSMENT REVIEW.*

Objector Morris offered three exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibits OMorris 1-OMorris 3.

**Objector's Exhibit OMORRIS 1** is one page with copies of three photographs along with a handwritten portion entitled "Barley Samples 03."

**Objector's Exhibit OMORRIS 2** is one page with copies of three photographs.

**Objector's Exhibit OMORRIS 3** is one page with copies of four photographs.

**PRELIMINARY MATTERS**

Objector Edward Majerus objected on behalf of the interests of Majerus Family Trust which is listed as the water right owner of the family farm run by Edward's son Leo G. Majerus. Leo Majerus appeared at the hearing for the family farm and trust.

Objector Morris is a leaseholder of all or part of the holdings of Mary Hudson and Donald Hudson. Mr. Morris is not an attorney. Objection was sustained to Mr. Morris representing the Hudsons in the hearing. Objector Morris' participation in his own behalf based on the leaseholdings on the Hudson property was not affected by this ruling.

Objectors Mary Hudson, Donald Hudson, and Robert Barta did not appear at the hearing and are in default, their objections are dismissed, and they are no longer parties. However, the information contained in their Objections remain a part of the record.

In a letter dated March 24, 2003, Objector Fish, Wildlife and Parks withdrew its objection to this Application. The Objection is dismissed and further participation is not allowed. However, the information contained in its Objection remains a part of the record.

Applicant stated at the end of the hearing that they would accept 250 acre-feet of water for irrigation of 140 acres at the 550 gpm rate if it would mean the permit could be issued. It was not clear if this was an amendment of the application or an offering to the Objectors to allow them to withdraw their objection. No Objector agreed to issuance at the reduced volume. Therefore, I evaluated the criteria at the 320 acre-foot volume requested by Applicant in the prehearing documents, but I also looked at 250 acre-feet. The offer to reduce the requested volume was not accompanied with evidence or analysis at the reduced volume. Thus, if the 320 acre-foot request failed, there was nothing to show how the 250 acre-foot amendment would change things. I would caution the Parties that trying to amend immediately prior to or at hearing may not be fair to other Parties who come prepared to fight the application amount rather than the amended amount. It may cause

surprise to them to now have to look at a lesser amount, 250 acre-feet, which they were not prepared to do. It may not be fair to the Applicant because it may not accomplish the intent unless all the proof at the amended amount is also presented.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

### **FINDINGS OF FACT**

#### **General**

1. Application for Beneficial Water Use Permit 41S 30000871 in the name of Thom Farms, Inc., and signed by Mike Thom, President, was filed with the Department on February 11, 2002. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 550 gallons per minute (gpm) up to 320 acre-feet of water per year from groundwater. The water is to be diverted at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 13, Township 14 North, Range 15 East, Judith Basin County, Montana. The proposed means of diversion is a 12 acre-foot pit from which a pump withdraws water. The proposed use is irrigation of 180 acres. The proposed place of use is 152 acres in the E $\frac{1}{2}$ , of Section 13, and 28 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ , of Section 12, all in Township 14 North, Range 15 East, Judith Basin County, Montana. The proposed period of diversion and period of use is April 15 through October 15, inclusive, of each year. (Department file)

#### **Physical Availability**

4. Applicant performed a 115-hour pumping test at a flow rate of 880 gpm for 24 hours followed by 91 hours of pumping at 550 gpm to show water was physically available and evaluate the connection to Olsen Creek, a nearby perennial stream. Applicant submitted hydrologic or

other evidence to show water is physically available. (Department file, testimony of Dave Baldwin, Mike Thom)

5. Applicant excavated the pit and in June 2002 Applicant pumped the pit for 24 hours at 880 gpm followed immediately by 91 hours of pumping at 550 gpm. The pumping water level stabilized at the 550 gpm pumping rate. Applicant observed the sprinkler head discharge to determine the pump discharge did not decrease during the test, but did not actually measure the flow rate. The water level in the pit recovered in 4 days. Applicant in a separate test continuously ran the pump and sprinklers for nine days after which the water level recovered in four days. Evidence of season-long availability is not in the record. (Department file, testimony of Mike Thom, Dave Baldwin)

#### **Legal Availability**

6. Applicant observed no drawdown in the closest well to the pit 755 feet away, which Applicant owns, during the 115-hour pumping test. Applicant later pumped the pit for nine straight days and saw no impact on the well closest to the pit 755 feet away or to the five monitoring pits Applicant dug, that are north of the requested groundwater pit. Because there was no drawdown in any of the three wells monitored during the 115-hour pumping test Mr. Baldwin states there is no reliable way to project drawdown in area wells. Thus, there is no way to determine the potential area of impact from season-long pumping. There is evidence that the cone of depression is less than 755 feet after nine days of pumping, and will not affect existing legal demands on the aquifer within 755 feet. The season-long potential area of impact from withdrawals of 320 acre-feet or from 250 acre-feet is not known. (Department file, testimony of Mike Thom, Dave Baldwin)

#### **Adverse Effect**

7. Applicant's groundwater pit obtains water from an alluvial gravel confined aquifer bounded by clay layers at 5-6 feet below ground surface and 19 feet below ground surface. These clay layers appear in

wells, developed springs, and monitoring pits one-third of a mile south, at least 2.5 miles north, and a mile west of Applicant's groundwater pit. Applicant dug nine monitoring pits on his property to observe effects of pumping the groundwater pit. The monitoring pits are all excavated into the same aquifer as the production pit, all have the upper and lower clay layers, and all do not penetrate the bottom clay layer. During the pumping tests, Applicant observed no impact to the water level in the monitoring pits. Applicant saw no impact in observed area pits or wells that could be used to project the cone of depression caused by long-term pumping of the aquifer. (Department file, testimony of Mike Thom, Doug Stevenson, Dave Baldwin)

8. Applicant dug an 11-foot deep hole immediately next to Olsen Creek which lies 190 feet from the groundwater pit. No water was exposed in the hole. Applicant installed a staff gauge in Olsen Creek at this point to measure any impacts on Olsen Creek flows by pumping water from the groundwater pit. The minor upward and downward fluctuations observed to streamflow are not believed by Applicant to be attributable to the groundwater pit pumping. However, there was no second staff gauge on Olsen Creek to confirm this belief. However, Applicant's downstream neighbor observed, but did not measure, the flows of Olsen Creek at their headgates on Olsen Creek during the time of the groundwater pit pumping test and saw no impacts to streamflows. There is no impact from pumping the groundwater pit on Olsen Creek immediately adjacent to the groundwater pit or downstream of the gauge within a 115-hour period. (Department file, testimony of Mike Thom, Doug Stevenson, Dave Baldwin)

9. Effect to down-gradient springs and surface water streamflows in the Ross Fork of the Judith River and the Judith River is alleged by Objectors. There are springs in the area that discharge along area stream channels. Specific springs as shown on area maps in the NW¼ of Section 13, Township 14 North, Range 15 East, and thought to be a potential aquifer discharge area, do not exist with an exiting

drainage channel. The appearance of a darker (wetter) area in this land description on the aerial photograph, suggesting a wetland area, is the result of high flow periods from a local high snow year according to witness Doug Stevenson. It is unclear if area springs and darker areas on the aerial photographs are aquifer discharge or irrigation return flows. Observation of down-gradient spring discharge indicate they were not affected by Applicant's 115-hour pumping test. The Objectors use the surface water for irrigation and stock water. The Ross Fork is located approximately 1 mile west of the groundwater pit, and flows northeasterly about 7 miles to its confluence with the Judith River. The Judith River then flows generally north to its confluence with the Missouri River. The water in the aquifer from which the groundwater pit takes water moves in a down-gradient direction to the alluvium of the Ross Fork and alluvium of the Judith River. It is not known how much the water in the aquifer contributes to the base flow of the Ross Fork or the Judith River. However, the groundwater pit is currently full and the Ross Fork is dry. Any reduction in flows to the Ross Fork or Judith River would be difficult to attribute to the applicant's pit through measurement. Here, the fact that any contribution can not be attributed to the applicant's pit through measurement is not important; because something is not measurable does not mean it is trivial. See *Postema v. Pollution Control Hearings Bd.*, 142 Wash.2d 68, 11 P.3d 726 Wash.(2000)(en banc)(there is no requirement that a direct and measurable impact on surface water be shown using standard stream measuring devices before an application for a groundwater permit may be denied). However, there is no effect from this diversion on the Ross Fork after the 115-hour pumping test because the cone of depression did not reach the well located 755 feet away during the 115-hour pumping test. Because the pumping water level stabilized during Applicant's pumping test, some source of water (increased aquifer recharge or decreased discharge) had to be supplying the water. The 115-hour pumping test did not identify that source. Applicant has not been using the water as

requested for season-long irrigation, yet the downstream surface water sources are dry. There is no evidence of adverse effect on Ross Creek or Judith River surface water rights caused by pumping this groundwater pit 115 hours. Objectors presented allegations and questions to the contrary, but no evidence contradicting Applicant's expert. The ability to exercise down-gradient water rights during season-long exercise of this pumping proposal is not known. The potential area of impact and the effects within that area of season-long pumping are not known. (Department file, testimony of Doug Stevenson, Dave Baldwin, Charles Taylor, Leo Majerus, Joe Simpson, David Morris, Russell Levens)

#### **Adequacy of Appropriation Works**

10. Applicant has a pump capable of pumping 550 gpm and sprinkler irrigation wheel lines which were used to distribute the water pumped during the various tests. Using wheel lines to apply the irrigation water will require eight days to cover the requested place of use. Applicant proposes to use 550 gpm micro pivot irrigation systems to irrigate the same acreage because the same acreage can be irrigated in two or three days instead of eight. The means of diversion, construction, and operation are adequate. (Department file, testimony of Mike Thom)

#### **Beneficial Use**

11. Applicant intends to rotate hay, barley, winter wheat, and summer fallow on the place of use as ranch management dictates. The amount requested is reasonable for the climatic area and type of crop intended. (Department file, testimony of Mike Thom)

#### **Possessory Interest**

12. Applicant is the owner of the property which has been designated in the Application as the place of use. (Department file)

### Water Quality Issues

13. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

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

### CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **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; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected 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; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; 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; and, if raised in a valid objection, the water quality of a prior appropriator

will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

3. The Applicant has not proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested, during the entire requested period of appropriation. Evidence of season-long availability is not in the record. Conditional issuance to supplement the record with measurements to confirm season-long availability were considered by the Hearing Examiner as a possible option. However, such measurements would come after permit issuance. Applicant's burden of a preponderance of the evidence must be met **prior** to issuance of any permit rather than after the fact. If the burden is not met, the Water Use Act requires the status quo be maintained. The Montana Supreme Court clearly recognized "the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights." *Montana Power Co. v. Carey*, 211 Mont. 91, 685 P.2d 336 (1984). Therefore, where applicants cannot prove the statutory criteria of the Water Use Act by a preponderance of the evidence, the legislative imperative to maintain the status quo for senior water right holders from encroachment will be furthered. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact Nos. 4, 5.

4. The Applicant has not proven that water can reasonably be considered legally available. Conditions to determine the area of season-long impact were considered by the Hearing Examiner so the effects on appropriators within that area could be evaluated. Objectors presented little evidence to show water is not legally available from this groundwater source. However, geologic publications suggest the terrace gravel aquifers discharge to streams (like Ross Fork and Judith River) where the aquifer is cut by the stream channels. The water source for the springs along the stream channels

could also be irrigation return flows from above the upper clay layer. Here, the source of the springs has not been verified. Objectors have been without water in recent years, but decreased flows could be the result of basin-wide factors including the current drought. Applicant's groundwater pit is full and apparently unaffected by these factors. Applicant has provided evidence that groundwater from the aquifer does contribute to the Judith River alluvium, but it is unknown how much is contributed to surface flows of the Objectors' water rights and how they would be affected by use of this proposal. Applicant's pumping test did not provide adequate information to project the season-long cone of depression from pumping the pit. There is some information indicating the area of potential impact will not extend to other nearby appropriators. But, this conclusion is not supported by test data applied to a reliable distance-drawdown analysis method. Applicant's conclusions need confirmation. Applicant's burden of a preponderance of the evidence must be met **prior** to issuance of any permit rather than after the fact, and permits cannot be granted on mere speculation. Here, one is left wondering what the potential area of impact is from the proposed season-long pumping. When the burden of proof is not met, the Water Use Act requires the status quo be maintained as previously described (See Conclusion of Law No. 3 above). Therefore, where applicants cannot prove the statutory criteria of the Water Use Act by a preponderance of the evidence, the legislative imperative to maintain the status quo for senior water right holders from encroachment will be furthered. Statements were made suggesting that Applicant's proposed appropriation may be part of a cumulative depletion effect that may be gradual and ongoing. With regard to the proposed appropriation, Objectors provided little evidence that the proposed groundwater appropriation will adversely affect their surface water rights. However, until Applicant has made a prima facie case of proving the criteria, the burden of production does not shift to the Objectors to provide proof the proposal will adversely affect them.

See *In re Application for Change of Appropriation of Water Rights for Royston*, 249 M 425, 816 P2d 1054 (1991)("The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence.") See generally *Montana Rail Link v. Byard*, 260 Mont. 331, 860 P.2d 121 (1993)(once a prima facie case is made by a plaintiff, the burden of production, although not the burden of persuasion, shifts to other party). Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact No. 6.

5. The Applicant has not proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. The adverse effect criterion requires evaluation of 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. Here, Applicant projected no impact to other rights based upon the 115-hour pumping test, so provided no additional plan to show senior uses could be satisfied if the proposed use were exercised. Without knowing the season-long area of potential impact (cone of depression), and the extent of the drawdown distant from Applicant's groundwater pumping, who will be affected and how is not known. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 7, 8, 9.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact No. 10.

7. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 11.

8. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact No. 12.

9. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See, Finding of Fact No. 13.

10. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Here, Applicant has not proven by a preponderance of the evidence that the criteria for issuance of a permit were met, even with conditioning of the permit. Applicant's consultant says there is no Department standard for conduction of pumping tests and that such tests should be conducted in the most cost-efficient manner to save the client unnecessary costs. Cost efficiency cannot replace collection of sufficient data to prove the statutory requirements, including lack of adverse effect on other water users. Here, because there was no drawdown in any of the monitoring wells, Applicant stated there was no reliable method to estimate drawdown at nearby wells as a result of a full season of pumping, and thus prove lack of adverse effect. Therefore, Applicant must come up with a way to estimate drawdown as a result of a full season of pumping, and thereby prove lack of adverse effect, or fail in providing required proof. Mont. Code Ann. § 85-2-312. See Conclusions of Law Nos. 3, 4, 5 above.

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

**PROPOSED ORDER**

Application for Beneficial Water Use Permit 40S 30000871 by Thom Farms, Inc., is **DENIED**.

**NOTICE**

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by November 25, 2003, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by December 15, 2003, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 5<sup>th</sup> day of November, 2003.

/Original signed by Charles F Brasen/

Charles F Brasen  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 5<sup>th</sup> day of November, 2003, by first class United States mail.

THOM FARMS INC  
PO BOX 173  
MOORE MT 59464

DAVID T MORRIS  
RR2 BOX 2272  
LEWISTOWN MT 59457

HARLEY R HARRIS  
LUXAN AND MURFITT PLLP  
PO BOX 1144  
HELENA MT 59624-1144

EDWARD J MAJERUS  
909 6<sup>TH</sup> AVE S  
LEWISTOWN MT 59457

DAVID M. SCHMIDT  
WATER RIGHTS SOLUTIONS, INC.  
303 CLARKE STREET  
HELENA MT 59601

ROBERT H BARTA  
RT 2 #2241  
LEWISTOWN MT 59457

MARY HUDSON  
2111 N 17<sup>TH</sup> ST  
BOISE ID 83702

ANDY BRUMMOND, WRS  
SCOTT IRVIN, RM  
DNRC REGIONAL OFFICE  
613 NE MAIN SUITE E  
LEWISTOWN MT 59457-2020

CHARLES R TAYLOR  
PO BOX 131  
MOORE MT 59464

CURT MARTIN CHIEF  
DNRC WATER RIGHTS BUREAU  
PO BOX 201601  
HELENA MT 59620

DONALD W HUDSON  
3532 COLUMBUS AVE S  
MINNEAPOLIS MN 55407

JOE & ELIZABETH SIMPSON  
RR#2 BOX 2277  
LEWISTOWN MT 59457

/Original signed by Susan H Russell/

Susan H. Russell  
Administrative Support