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

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IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N-30010429 BY THOMPSON RIVER LUMBER COMPANY	))))))	**FINAL ORDER**

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BACKGROUND

The Proposal for Decision (PFD) in this matter was entered on March 30, 2006. Applicant Thompson River Lumber (TRL) filed timely exceptions and brief to the PFD on April 18, 2006. TRL requested an oral argument hearing. Objector Avista Corporation (Avista) filed a response in opposition to the exceptions filed by TRL on May 1, 2006. Oral argument on the exceptions was held on August 8, 2006. Presenting argument at the oral argument were John Bloomquist for applicant TRL and R. Blair Strong for objector Avista.

The PFD recommended denial of Application No. 76N-30010429 because the Hearing Examiner found that the applicant did not prove that water can reasonably be considered legally available and that applicant did not prove that the water rights of prior appropriators under existing water rights, certificates, permits or state reservations will not be adversely affected.

STANDARD OF REVIEW

> Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order: reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at

the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Applicant's Exceptions

Applicant argues that the Hearing Examiner's Proposal for Decision was in error because:

1) Objector, Avista, does not have "existing" Montana water rights totaling 50,000 c.f.s.

2) Objector, Avista, does not use all the flows of the Clark Fork River up to 50,000 c.f.s. at Noxon Rapids Dam to "generate electricity and/or refill the reservoir" behind Noxon Rapids Dam.

3) the evidence regarding whether 250 gpm would be available at Noxon Rapids Dam at Avista's point of diversion was miscomprehended.

4) the record demonstrates Avista does not use all river flow up to 50,000 c.f.s., for power generation, refilling, storage, or evaporation purposes.

5) Conclusion of Law No. 5 misstates the record evidence, miscomprehends the evidence, and applies a test for legal availability not in effect under the Montana Water Use Act.

6) Conclusion of Law No. 6 misstates the record evidence, miscomprehends the evidence, and misapplies the test for adverse effect under Montana law.

7) the proposed order denying the permit application is not supported by the record evidence, misapplies or miscomprehends the evidence, and erroneously applies Montana law and the Water Use Act.

Objectors Response

Avista responds that the PFD, whether modified or not as to minor points, is fully supported by the record and the law in proposing to deny TRL's application.

Exception 1. Legal Availability – Finding of Fact No. 8

TRL argues that the Hearing Examiner erred in finding that Avista has "existing" water rights in the amount of 50,000 c.f.s. TRL argues that Avista has existing water right claims for 40,400 c.f.s. based on their pre-1973 claim filing. TRL relies on the definition of "existing right" or "existing water right" as defined in Mont. Code Ann. § 85-2-102(10). However, the criteria for issuance of a permit under Mont. Code Ann. § 85-2-311(a)(ii)(B) provides that the analysis for determining legal availability includes "identification of existing legal demands on the source of

supply." "Legal demands" clearly include Beneficial Water Use Permits issued by the Department. To argue otherwise is to conclude that the permits issued by the Department do not represent a valid, legal water right, which is certainly not the case. Mont. Code Ann. § 85-2-301 (a person may not appropriate water except as provided in this chapter). The Hearing Examiner in this matter properly considered both Avista's pre-1973 claims and Avista's July 3, 1976 Permit to Appropriate Water which specifically states:

> The waters appropriated shall be diverted at a rate of not to exceed 15,000 cubic feet per second, making a total appropriation on the Clark Fork River of 50,000 cubic feet per second.

The PFD correctly reflects that the legal demand placed on the river by Avista's existing water appropriations is at least 50,000 c.f.s. Finding of Fact No. 8 will not be modified or rejected based upon this exception.

Exception 2. Legal Availability – Finding of Fact No. 8

TRL next argues that Avista does not use all of the flows of the Clark Fork River up to 50,000 c.f.s. at Noxon Rapids Dam to "generate electricity and/or refill the reservoir" behind Noxon Rapids Dam, as the Hearing Examiner found.

The Hearing Examiner found, and the record supports, that "Avista uses the flows of the Clark Fork River up to 50,000 cfs at the Noxon Rapids Dam to generate electricity *and/or refill the reservoir* behind the Noxon rapids Dam to maintain elevation head" (emphasis supplied). This implies that the operation of Noxon Rapids Dam is not solely a "run of the river" dam, but includes a component of storage and storage use to generate electricity. TRL's assertion that "Avista does not continuously utilize all flow in the Clark Fork River up to 50,000 cfs to generate electricity, and Noxon Rapids Dam has limited storage capacity" falls short in that Avista has the right to replenish any used storage through their water right(s).

The PFD and the evidence relied upon by the Hearing Examiner supports Finding of Fact No. 8 and it will not be modified or rejected based upon this exception.

Exception 3. Adverse Effect – Finding of Fact No. 10

TRL asserts that the Hearing Examiner miscomprehended the evidence regarding whether 250 gpm would be available at Noxon Rapids Dam at Avista's point of diversion. The argument appears to be that TRL's use of 250 gpm is not measurable or detectable at Avista's point of diversion.

The evidence in the record is uncontroverted that a reduction of 250 gpm above Avista's

point of diversion is a loss of 250 gpm to Avista's water right of 50,000 cfs at times when the flow of the Clark Fork River is below 50,000 cfs. The evidence also supports a conclusion that cumulatively, a loss of 250 gpm (400 acre-feet per year) could be detected by Avista. The burden is on the applicant to prove no adverse effect. Applicant did not prove that the effect of the proposed use on Avista's use/generation of electricity could not be measured.

The PFD and the evidence relied upon by the Hearing Examiner supports Finding of Fact No. 10 and it will not be modified or rejected based upon this exception.

Exception 4. Adverse Effect – Finding of Fact No. 11

TRL argues that Finding of Fact No. 11 is in error because the Hearing Examiner found that Avista uses all river flow up to 50,000 cfs for power generation, refilling, storage, or evaporation purposes; that the only water not used for power generation is "evaporation" from the reservoir, or that is spilled when flows exceed 50,000 cfs; that Avista has water rights in the amount of 50,000 cfs for power generation, reservoir storage, and release for power generation and re-regulation of flow in the Clark Fork River; that Avista cannot exercise their "full right"; that water is spilled without use by Avista at its Noxon Rapids generating facility only 16-24 days on average each year; and that Avista will not be able to fully exercise its water rights when flows are less than 50,000 cfs.

The Hearing Examiner correctly found from the testimony that each of the above statements is based upon competent substantial evidence. Finding of Fact No. 11 in the PFD will not be modified or rejected based upon this exception.

Exception 5. Legal Availability – Conclusion of Law No. 5

TRL asserts that the entire Conclusion of Law No. 5 misstates the record evidence, miscomprehends the evidence, and applies a test for legal availability no in effect under the Montana Water Use Act. TRL focuses once again on Avista's court decreed water right and attempts to argue that under that right alone there would be water legally available for TRL. However, as discussed above, Avista's rights to the Clark Fork River include both the court decreed water right and their permit from the DNRC. In addition, TRL focuses only on the power generation aspect of Avista's rights and ignores the storage and other components necessarily included in order for Avista to operate their power generation facilities . I find this argument without merit. TRL next argues that the Hearing Examiner applied an outdated, inapplicable standard to "legal availability." The Hearing Examiner, in Conclusion No. 5, states that the TRL has proven that water is only available at times the flows at Noxon Rapids Dam

exceed 50,000 cfs which is only on average 16-24 days per year and that TRL has not shown that at least in some years that calls for water would be made on them. These two measures of "legal availability" stem from decisions of the DNRC made prior to the current language of § 85-2-311. (In the Matter of Application 41B-074154 by Johnson, PFD (1990) and In the Matter of Application No. 81705-g76F by Hanson, PFD (1992). The current language of § 85-2-311(1)(a)(ii) states that the applicant must prove that "water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested . . ." It is apparent that the Hearing Examiner, using previous interpretations of "legally available," determined that TRL's use of water for only 16-24 days per year without a call being made upon them, when they have applied for a permit to appropriate for 365 days per year (approximately 7% of the period of use for the requested appropriation), is not reasonably available during the period in which TRL has requested.

The Hearing Examiner's use of the *Johnson* and *Hanson* methodology is not clearly erroneous and comports with the current statutory language requiring an "analysis of the evidence on physical water availability and the existing legal demands." Conclusion of Law No. 5 will not be modified or rejected based upon this exception.

Exception No. 6 – Adverse Effect – Conclusion of Law No. 6

TRL asserts that the entire conclusion of law misstates the record evidence, miscomprehends the evidence, and misapplies the test for adverse effect under Montana Law. TRL first argues that Conclusion of Law No. 6 must be reversed based upon the underlying Finding of Fact No.'s 10 and11 being in error. As previously discussed, I have rejected those arguments. TRL next argues that objector Avista is not entitled to "maintenance of stream conditions provided Avista may reasonably exercise its power generation and storage rights under any changed conditions." In support of this statement TRL cites M.C.A. § 85-2-401(1). However, § 85-2-401(1) relates to changes in appropriations, not to the granting of a new appropriation or permit as evidenced by the language of that section stating "As between appropriators . . ." The Hearing Examiner plainly believed that, based upon the evidence before him, that the applicant did not prove by a preponderance of the evidence that there would be no adverse affect by the proposed appropriation. In addition, TRL argues that the Hearing Examiner did not properly consider TRL's proposed use of ground water as an alternative source of water to ameliorate any adverse impacts caused by the proposed appropriation. The Hearing Examiner again found, based upon the evidence, that even with TRL's plan to switch to their ground water source during certain times when downstream water users were being

adversely affected or when Avista made a call on the river, failed to prove by a preponderance of the evidence that no adverse effect would occur. I find nothing in the record to compel me to modify or reject the Hearing Examiner's Conclusion of Law No. 6.

Exception No. 7 – Proposed Order

TRL asserts that the proposed order denying the permit application is not supported by the record evidence, misapplies or miscomprehends the evidence, and erroneously applies Montana law the and Water Use Act. TRL requests that the proposed order be set aside, and the permit application granted as supported by the record. TRL does not specifically argue this exception in their filing of exceptions. DNRC rule A.R.M. 36.12.229 provides that "[e]xceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies . . ." TRL has made the argument(s) upon which this exception is taken in the context of the previous six exceptions addressed in this order. As discussed under the six exceptions above, this exception is without merit.

Based on the record in this matter, the Department makes the following:

ORDER

The Department hereby adopts and incorporates by reference, without modifications, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Application for Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company is **DENIED**.

NOTICE

This final order may be appealed by a party 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 proceedings 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 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 21st day of December, 2006.

/Original Signed by David A. Vogler/
David A. Vogler
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL DECISION IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N-30010429 BY THOMPSON RIVER LUMBER CO. was served upon all parties listed below on this 21st day of December, 2006, by first class United States mail.

CHRISTOPHER B SWARTLEY
210 E PINE ST STE 200
PO BOX 8957
MISSOULA MT 59807-8957

JOHN E BLOOMQUIST ESQ
DONEY CROWLEY BLOOMQUIST PAYNE
44 W 6TH AVE
PO BOX 1185
HELENA MT 59624

R BLAIR STRONG ESQ
PAIN HAMBLEN COFFIN BROOKE & MILLER
717 W SPRAGUE AVE STE 1200
SPOKANE WA 99201

Cc:
DNRC WATER RESOURCES
KALISPELL REGIONAL OFFICE
109 COOPERATIVE WAY STE 110
KALISPELL MT 59901-2387

/Original Signed by David A. Vogler/
David A. Vogler
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601