

E-MAIL FILED

DEC 20 2013

Montana Water Court

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MONTANA WATER COURT – YELLOWSTONE DIVISION
TONGUE RIVER ABOVE AND INCLUDING HANGING WOMAN CREEK-BASIN 42B
and
TONGUE RIVER BELOW HANGING WOMAN CREEK-BASIN 42C

United States of America (USDI – Bureau of Indian Affairs) – General Objection to Basin 42B and 42C Preliminary Decrees)
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CASE 42B-1

**AVISTA CORPORATION
MOTION TO INTERVENE AND BRIEF IN SUPPORT
OF UNITED STATES MOTIONS**

I. MOTION

Avista Corporation, by and through its undersigned counsel, respectfully moves the Court for leave to intervene in this case for the purpose of joining the United States of America Motion for Order Requiring DNRC To Examine For Post-June 30, 1973 Nonuse And Motion for Water Court To Adjudicate Post-June 30, 1973 Abandonment in the Montana Adjudication ("United States Motions"). Avista Corporation is filing this motion in response to the Water Court Scheduling Order in Case 42B-1 dated October 31, 2013. Avista Corporation has not filed objections in Basin 42B or Basin 42C, and is seeking leave to intervene only for the purpose of addressing the issues raised by the United States Motions as they apply to the conduct of the Adjudication throughout Montana.

**AVISTA CORPORATION MOTION TO
INTERVENE AND BRIEF IN SUPPORT
OF UNITED STATES MOTIONS**

In support of its motion, Avista Corporation ("Avista") respectfully submits the following.

II. REASONS FOR INTERVENTION BY AVISTA

1. Avista is a utility company organized under the laws of the State of Washington, and is qualified to do business in the State of Montana. Avista generates, transmits, distributes and sells electric energy primarily in the states of Idaho and Washington. Prior to a corporate name change, Avista Corporation was known as The Washington Water Power Company.

2. Avista is a water rights claimant with respect to the use of water at hydroelectric generating facilities located on the lower Clark Fork River. The Noxon Rapids facility consists of a dam, powerhouse, reservoir and related facilities located wholly within Montana near Noxon, Montana. The reservoir behind the Noxon dam extends upstream to a point near Thompson Falls, Montana. Avista also owns and operates the Cabinet Gorge facility located on the Clark Fork River in Idaho and Montana. The dam and powerhouse associated with this facility are located in Idaho, immediately west of the Idaho-Montana border. More than 98% of the reservoir behind the dam is located in Sanders County, Montana, and extends upstream to the dam and powerhouse of the Noxon Rapids facility.

3. The Federal Energy Regulatory Commission issued a new license to Avista for the continued maintenance and operation of its 697 megawatt "Clark Fork Project" No. 2058 in 2000. The project encompasses Avista's two previously-licensed existing projects, the Cabinet Gorge Hydroelectric Project and the Noxon Rapids Hydroelectric Project.

4. The Clark Fork River originates in western Montana, and flows to Lake Pend Oreille. Lake Pend Oreille discharges its waters into the Pend Oreille River, which flows northward to Canada, where it joins the Columbia River. Except for the Kootenai River, most of the tributary waters west of the continental divide in Montana flow into the Clark Fork River, and hence flow through the Clark Fork Project.

5. Avista has obtained water rights pursuant to Montana law for its hydroelectric generation projects. The earliest priority date for its water rights is 1951. These rights were the subject of a hearing before this Court in 1986. *See* Findings of Fact, Conclusions of Law, and Order (Case 76N-46, August 21, 1986).

6. Additionally, Avista has a provisional permit issued by the DNRC with a priority date of November, 1974, pertaining to the addition of a turbine generator at the Noxon Dam.

7. Because it is a water user in western Montana, since 1986, Avista has appeared as either an objector or intervenor in numerous cases before this Court involving water right claims for the use of waters that flow in or into the Clark Fork River. Avista's objections in Water Court proceedings involving claims in the waters of the Clark Fork and its tributaries have largely been based upon "Issue Remarks" compiled and published by the DNRC.

8. As a water rights claimant, and party to numerous proceedings involving the adjudication of water rights in the Clark Fork River and its tributaries, Avista is directly interested in the United States Motions, as it would apply to all of Montana's waters, including the Clark Fork River and its tributaries.

**III. ARGUMENT IN FAVOR OF
AVISTA'S MOTION TO INTERVENE AND
SUPPORT FOR UNITED STATES MOTIONS**

A. Avista Corporation has a vital interest in a fair and complete adjudication.

Avista's interest in the waters of the Clark Fork River and its tributaries stems from its water rights located on the lower Clark Fork River. This circumstance of geography means that Avista is potentially concerned with the adjudication of water rights on all the waters that are upstream of its facilities. All water users who claim rights on the lower part of a waterway are similarly situated to one extent or another with respect to the adjudication of upstream and tributary waters. Although the Montana Adjudication necessarily implicates water users who have claims on the same creek, ditch or reservoir, or who are direct neighbors, many other water users have more remote relationships that are governed by the hydrological links between water flows in the river system. Additionally, as a public utility, Avista Corporation is charged with an obligation of taking prudent and reasonable steps to protect utility property, both by applicable state laws and under the terms of its license to operate the Clark Fork Project issued by the Federal Energy Regulation Commission.

Avista is not interested in having rightful water right claims invalidated or diminished, and has not initiated an independent investigation into the water right claims of others. Avista is concerned that the Adjudication be conducted fairly and efficiently and result in reasonably accurate decrees that reflect the actual historical beneficial use of water, or non-use of water. If the Adjudication fails to reach this goal, then like other water users, Avista will face probable expenses and distractions associated with adjudications initiated by the United States and Indian tribes in federal court, as well as possible state-court actions.

Because evidence of beneficial use and non-use or abandonment, are critical features of water rights that directly affect all water right claimants, DNRC examination rules should provide for a systematic review of evidence of abandonment, and Court procedures should allow for consideration of evidence of post-June 30, 1973 non-use.

B. Failure to adequately address post-1973 abandonment of historical rights in the Adjudication will result in piecemeal lawsuits and cause additional litigation.

Montana's earliest water rights adjudication statute dates from 1885. Mont. Laws, 1885, Sections 11 and 12. However, the 1885 law did not contemplate the final adjudication of streams or water sheds:

[I]t merely provided for isolated lawsuits between particular water users over their individual rights and isolated parts of streams. The statute resulted only in piecemeal litigation, often repetitive and among the same neighbors, over and over again, disputing one another's claims.

Mont. Water Law for the 1980's, p. 4. (Albert W. Stone, 1981).

The response of the Montana legislature in enacting Senate Bill #76 was motivated in part by a desire to avoid incomplete, repetitive and piecemeal litigation. Illustrative of piecemeal litigation that would have ensued, absent a comprehensive adjudication through the Montana Water Court is the fact that by 1979, three lawsuits had all ready been filed by the United States, and the United States had prepared and was about to file four more lawsuits, all in the federal courts, to adjudicate federal and Indian rights in Montana waters. *Id.* at p. 5-6. The Adjudication was intended to put to rest actual and potential disputes about historically acquired water rights that would have been the subject of a multitude of overlapping, duplicative and continuing proceedings in federal and state venues. As part of the Adjudication, the legislature intended that the Water Court had the duty to address "the adjudication of total or partial abandonment of

existing water rights occurring at any time before the entry of the final decree." *See* MCA § 3-7-501(4).

The passage of several decades since the Adjudication commenced increases the likelihood of further piecemeal litigation. Absent a comprehensive approach to determining abandonment issues, water users may be compelled to initiate proceedings in various venues, such as actions brought in state district courts, or proceedings before DNRC, or federal court, to settle whether claims were abandoned during the pendency of the Adjudication. Even claimants whose face allegations of post-June 30, 1973 abandonment may have an incentive to seek legal relief outside of the Adjudication in order to bring some finality to their water rights.

Piecemeal litigation concerning the determination of historical water rights that will result if abandonment issues are not resolved is clearly not contemplated by Montana law. The legislature has spoken to this issue in stating that:

The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

MCA § 3-7-501(4).

C. Water users rely upon the DNRC review to identify problematic claims and the Water Court rules to allow for resolution of issues raised by the DNRC examination. If the DNRC examination does not include an examination of evidence of post-June 30, 1973 abandonment, water users will be prejudiced.

Avista has relied upon the Issue Remarks compiled by DNRC as the basis for its objections, because DNRC is the expert agency in Montana charged with the responsibility of examining claims, as well as being the agency charged with issuing permits for post-1973 water

uses of water in Montana. DNRC is also the entity most likely to have a comprehensive and accurate compilation of information respecting the uses of Montana's waters. DNRC is the custodian of records concerning historic water right claims and new provisional water right permits.

Avista has not assembled all the information, or retained a large staff of experts and water use specialists in order to be an expert agency with respect to all the water uses in Western Montana, nor would it be practical to do so. Like other water right claimants, Avista has relied upon the processes established by the legislature, the Water Court and DNRC to review historic water rights and identify problems associated with water right claims. All water right users who rely upon the DNRC for its thorough reviews and expertise will be adversely affected if the DNRC examination fails to systematically review for information indicating non-use and abandonment.

Moreover, participants in the Adjudication rely on the Court to provide fair procedures so that relevant information will be considered. Currently, periods of time are prescribed for each basin during which parties may file objections, counter-objections and interventions. If parties are limited by the objection deadlines, and are not alerted to evidence of non-use or abandonment through DNRC examination reports, with the opportunity to bring that evidence before the Court, parties' due process rights will be injured.

Even if parties receive or develop additional evidence that demonstrates that particular claims were abandoned during the Adjudication, it is unclear how this evidence would be brought to the attention of the Water Court after the normal period for filing objections other than through a barrage of motions or out-of-time objections filed immediately before final

decrees are issued. Disruptions to the orderly conduct of the Adjudication may be avoided if the Court establishes a process that has the DNRC review claims for evidence of post-1973 abandonment, and allows claimants and objectors to evaluate that evidence at an earlier stage of the proceedings prior to issuance of final decrees.

D. The Court has the opportunity in this action to regularize procedures with respect to review of post-1973 abandonment in a manner that will result in an economy of effort for the Water Court and for water users.

As a relatively large water user on the lower Clark Fork River, Avista is acutely aware of the difficulties of monitoring and/or participating in all proceedings that may affect its rights. Therefore, it has relied upon the work of DNRC. DNRC's work is a benefit to all, but particularly to small water users who have few resources and who must rely on the DNRC to earmark problematic claims.

Also, Avista's experience in many Water Court cases is that the DNRC reviews have often simplified the issues, encouraged settlement discussions, diminished the necessity for expensive civil discovery, and shortened the hearing process that would occur in the absence of DNRC review. By directing the DNRC to include in its examination evidence of non-use and to alert others with issue remarks of potential non-use of abandonment, the Court would minimize the likelihood of inefficient and ad hoc proceedings. Improvised and reactive litigation is likely be far more time-intensive and expensive to the Court and to the parties to the Adjudication than dealing with forfeiture issues in a forward looking manner.

E. All water users will be prejudiced if the adjudication fails to meet federal law standards with respect to federal reserved rights and Indian water rights.

The United States correctly points out that federal participation in the Adjudication is pursuant to the conditional waiver of sovereign immunity commonly known as the McCarran Amendment (43 U.S.C. § 666(a)(1)). The United States also points out that a failure to address post-1973 abandonment undermines the fair implementation of Indian reserved rights settlements and decrees. *See* United States' Motions at p. 28-31.

One can imagine that an adjudication in federal court will necessitate a duplicative and expensive re-litigation of issues already dealt with by this Court and compel the participation of water users who desire to protect their rights. Nothing would be more wasteful and illogical if Montana water users were compelled to follow or participate in further adjudication proceedings in federal court, or elsewhere, because the Montana Adjudication failed to meet McCarran Amendment standards.

III. CONCLUSION

The Court has an opportunity in this proceeding to establish regularized processes for dealing with abandonment issues that assures the adequacy of the Adjudication from a federal law point-of-view, and avoids Montana's water users from being exposed to duplicative and unnecessarily expensive adjudications in the federal courts, piecemeal litigation and uncertain costs of legally dealing with claims that have been abandoned.

For reasons stated herein, Avista's motion to intervene in support of the United States Motions should be granted, and the United States Motions should be granted.

Respectfully submitted this 20th day of December, 2013.

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing document to be sent by U.S. Mail, postage prepaid, addressed to *parties involved* in case 42B-1:

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DATED this 20th day of December, 2013.

/s/ R. Blair Strong

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