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Date 2-11-05
HB 568

STATEMENT ON BEHALF OF AVISTA CORPORATION

Good Afternoon Mr. Chairman and Members of the Committee. My name is Tom Ebzery, and I am appearing on behalf of Avista Corporation to testify in opposition to House Bill 568. .

Avista Corporation has participated in the adjudication of existing water rights in Western Montana. It filed its claims of water rights in 1982 (as the Washington Water Power Company) with respect to its Clark Fork Project located on the Clark Fork River in Sanders County, Montana and Idaho, and the Water Court conducted an evidentiary hearing on Avista's water right claims nearly twenty years ago. Attorneys for DNRC were present at that hearing. We are confident that had there been major issues with the accuracy of Avista's claimed rights, those issues would have been brought to Avista's attention and the attention of the Water Court. As a result of testimony presented in that hearing, Water Judge Holter issued an order that quantified Avista's rights. Avista has also participated in the adjudication proceedings involving the Bitterroot River, which is a tributary of the Clark Fork River. These experiences form the basis of testimony. We urge that the Committee defeat this bill, because it is (1) unfair; (2) unnecessary and (3) duplicative.

1. HB 568 is unfair. The bill is fundamentally unfair, because it sets out a different arrangement for reviewing and adjudicating power generation rights than for any other type of water right. Power generation rights would be the only type of water right assigned by the bill to the Attorney General for handling. Water rights for mining, industry, chemical and petroleum refining, forestry, irrigation, domestic, stock watering and instream uses would remain subject to review and objection by the Department of Natural Resources and Conservation, and other water users. The law respecting these other types of claims would be unchanged, and., no matter how large or erroneous those other types of claims might be, they would remain subject to objection and adjudication in the current manner.

Under the proposed legislation, only power generation claims would be assigned to the chief law enforcement officer of Montana for objection. In this respect, the legislation assumes arbitrarily, and without evidence that there are likely to be more

issues in the adjudication with power generation rights than with other rights. This is not the case. We think it is unfair to single out power generation claims for special prosecution by the Attorney General.

2. The Bill is Unnecessary. Power generation rights, or rights associated with almost any type of dam, are far more easily verified than most other types of rights. For instance, the date when a dam or diversion is installed is a historical fact and usually easy to confirm as a matter of public record. The hydraulic capacity of a turbine generator is easy to measure. Once, a major power project or dam is installed, it is not moved. There are only infrequent ownership changes, which when they occur are usually clearly documented and well known. If a dam or power project is abandoned, that fact is easily established. It is simply not necessary to establish a special procedure for examining and handling power generation claims. If there is a problem with a hydroelectric claim, it will be easily identified, and disposed of in short order by the Water Court.

In the adjudication process, hydroelectric generation claims are not difficult to deal with especially when compared with other types of water rights, which are much more difficult for the Water Court to deal with. In Western Montana, the most difficult and time consuming Water Court cases have involved multiple subdivisions of land that have occurred over a century, changes in irrigation practices, and many transfers, sales and exchanges of water rights. These types of claims have given rise to most of the controversies that the Water Court has had to resolve. Historical paper rights for irrigation often conflict with current uses. New landowners often have little personal knowledge and few records of how their land and water were historically used. If errors creep into the adjudication, those errors are more likely to afflict obscure irrigation claims than are very public and prominent power generation projects. Rarely are hydroelectric power generation plants afflicted with the paper record problems associated with other types of claims. Hydroelectric facilities remain where they are for a very long time. It simply is unnecessary to carve out in the law special treatment for verifying and objecting to hydroelectric rights, because they are the easiest for DNRC, the Water Court or other water users to observe, if they are incorrect.

3. The Bill is duplicative. DNRC is already charged with technical responsibility for verifying and examining all claims. Under current law, it also has the

authority to enter objections. The department has historically shown a special interest in hydroelectric projects. For instance, DNRC was represented by its attorneys when the Water Court held its evidentiary hearing on Avista's (then the Washington Water Power Company) water rights. As well as DNRC, other resource management agencies, such as the Department of Environmental Quality and Fish, Wildlife and Parks, have had extensive involvement with Avista's projects and other hydroelectric projects. It is very likely that major errors in Avista's water rights claims would be detected and acted upon by DNRC, the Water Court, Montana's other resource agencies or by other water users.

The Attorney General's office has not historically had a role in the adjudication process. It is unnecessary to assign to the Attorney General's office a new responsibility. If this bill is passed, additional staff will have to be hired by the Attorney General, or staff will have to be assigned away from other responsibilities. This is simply not needed. Errors in power generation water rights will be readily detected in the existing water rights adjudication process and resolved without requiring the special involvement of the Attorney General.