

Exhibit Number: 1

The following exhibit is several assorted documents that exceeds the 10-page limit therefore it cannot be scanned. A small portion has been scanned to aid in your research for information. The exhibit is on file at the Montana Historical Society and can be viewed there.

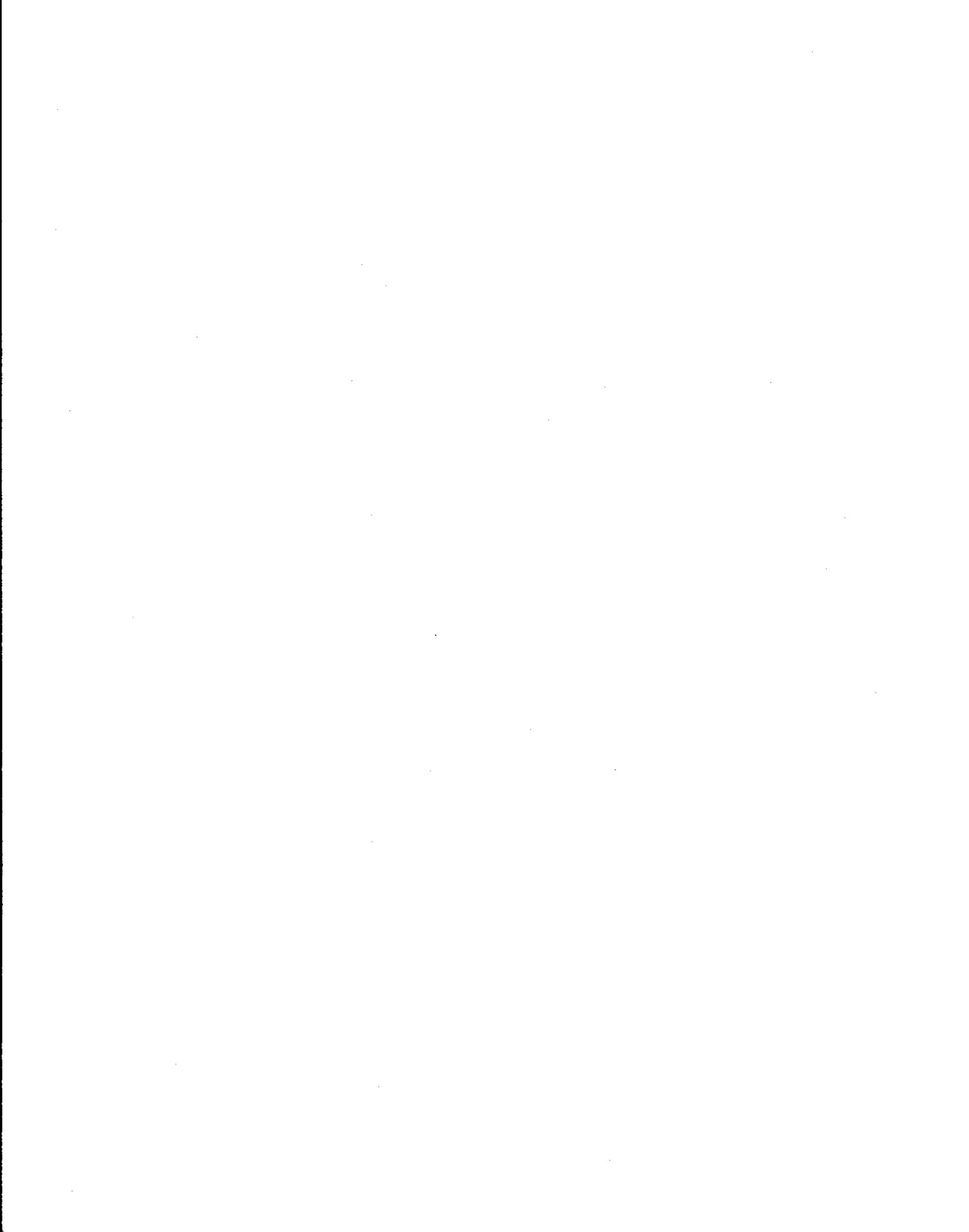


EXHIBIT 1
DATE 2.14.05
HB 360

HOUSE BILL 360

Chairman Peterson and members of the Natural Resources Committee, I am Verdell Jackson, HD 6, today I bring you HB360. Most of you were here last Friday. The major concern was the water rights priority system and making sure we treat every water user the same. Today, I am going to make the case that we should not treat everyone the same.

I want to take a few minutes and present the big picture of how we secure water rights from my viewpoint as a novice. On the one hand DNRC proclaims that all of the water in the river is appropriated and then on the other hand states that there may be water to appropriate at specific sites during a particular time. In fact the entire flow of the river was appropriated before Avista applied for 2 ½ times the average flow of the Clark Fork River. The number or volume of appropriations actually has little relevance to the actual amount of water that is available in the river because the same water is appropriated over and over as it goes down the river. How can a new water right application be considered if the river flow has been over appropriated 5 or 6 times? Since there is no data base that can correlate the relationship between appropriations and water depletion, applicants have to demonstrate that the application they are submitting will not have an adverse impact on their neighbors within a certain distance down river using the following statute: 85-2-401: quote: "as between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of stream flow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions." This statute works well because it requires data on local physical availability of water at the site of the application. Physical availability of water has little relationship to previous applications, but depends on water enhancement impacts such as water use return flow and ground water connectivity which can be observed and measured at the site. Almost all of the water used eventually gets back into the river after it has been used. Water flow data from the United States Geological Survey website shows no decline of water that can be attributed to human impact over the last 50 to 100 years on the Clark Fork or Missouri rivers. You have flow data on the Clark Fork in your packet and I now have it on the Missouri. I analyzed the river flow at Toston, Holter, Great Falls and Wolf point and I do not see decrease in the flow as a result of human impact.

This first in time, first in right principle works well when neighbors work together. Neighbors may even work together to share shortages during drought although the earlier

priority has a legal right to take all of the available water. Where the system breaks down is when we have the principle that whoever gets there first with the largest bucket can take it all. Avista who I do not consider a good neighbor has an aggregate water right which takes the entire flow of the river about 94 % of the time. Avista is applying the full power of their legal right in their objection to the Thompson Falls Con-gen plant: I quote from their objection: "Avista Corporation would not object to the issuance of permit, if the applicant agreed to cease diverting water at Avista's request at such times that flows at the Noxon Dam fall below 50,000cfs and Avista is utilizing all available water pursuant to its existing rights."

In reviewing the Thompson Falls Con-gen plant water right application, I found that I had used 4000 ac/ft per year as their request, Friday during testimony in this committee. It is 400 ac/ft. Also, as a side note, neither DNRC or the lawyer for the con-gen plant are aware of any illegal use of water or an attempt to do so. The Plant's application addressed adverse impact on Avista: The additional diversion of .56cfs calculates as .56 divided by 8986 (average of low flow month) and .56 divided by 57986 (average high flow month). The impact ranges from .006% to .00097%. I would have computed the impact against the 20,000cfs average at that gauging station which would give an impact of .0028%. When comparing 400 ac/ft to over 14.2 million acre feet that Avista utilizes, the impact is insignificant, especially considering that some of this water will enter the ground table and end up back in the river. The Park Service considers any water impact in the third digit after the decimal point as insignificant.

In summary, Avista's right as they are using it gives them 50,000 cfs 365 days a year although that quantity of water has never existed. 85-2-401 cannot be used to secure any water by anyone else because Avista is fulfilling its water right only 22 days a year on the average and not at all during some years. Legally, Avista and other power generation facilities that have water rights that equal or exceed the flow of the river control the water to the extent that they can stop new water rights whether they are agriculture, municipal, industrial or residential, even when it can be demonstrated that the water use had no affect on the water available at the dam. This can be done even though there is no shortage of water. Please support getting this bill to the House floor where its merits can be debated further. We are correcting an errors made many years ago before the court system does for us like they did in Idaho at a huge cost to everyone.

If we do not correct this problem, who will and if not now when.

HOUSE Bill 360 RETURNS WATER TO MONTANANS

By Representative Verdell Jackson, HD 6, Kalispell

Control of our Montana water is one of my priorities this term. I have analyzed the problems in the Clark Fork Drainage (includes Flathead) and the Missouri River. Water, one of our State's most valuable resources, is in extreme danger of being controlled by a few hydroelectric power corporations for their benefit, rather than the benefit of the citizens of Montana.

Our ability to determine development and growth throughout the state of Montana is at stake. Why? Because the Department of Natural Resources (DNRC) neglected to protect the use of Montana's water for its citizens. The power companies essentially have water rights that exceed the entire flow of our rivers. Since DNRC neglected to put restrictions on these claimed water rights, power companies have insisted that they have a year-round right to water use at their peak rate. Strict interpretation of "first in time, first in right" policy may give Avista and other companies the power to shut down people with junior water rights from using water up stream and stop the applications for new water right permits.

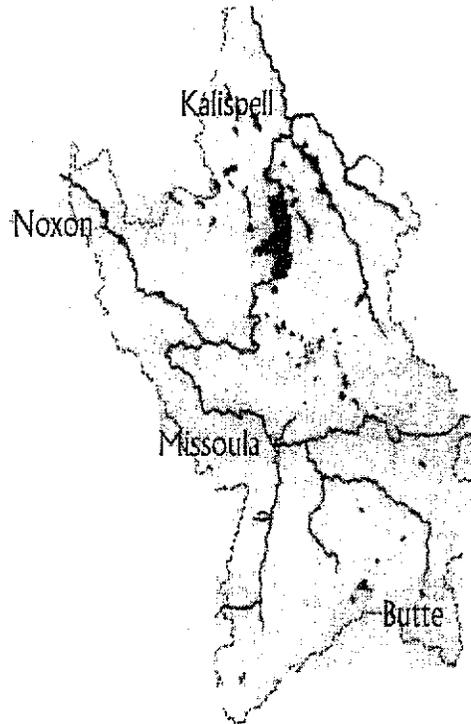
Because of the shortage they have created, they could even sell water contracts up stream. They then can use that same water which they have sold to generate electricity when it eventually reaches the dam. I do not believe that this type of speculation was the intent of their non-consumptive hydropower water rights when they were issued.

For example, in spite of the fact that I had provided data showing that consumptive use of the Clark Fork River over the last 45 years by humans -- our friends and neighbors -- has had no measurable impact on the water available to Avista to generate electricity, Avista in June of 2004 contested a new water right application by the Thompson Fall Cogeneration Plant and tried unsuccessfully to add a basin closure to all new water rights (surface and ground water) to the Clark Fork River Water Management Plan.

Avista's aggressive behavior, my service on the task force that developed the Clark Fork River Water Management Plan, and the state's past oversights have led me to conclude that deficiencies in Montana's statutes regarding power generation water rights must be clarified or corrected. I therefore have asked for the preparation of a bill draft providing that power generation water rights are subordinate in priority date to all other water rights in Montana. Similar instances of hydropower water rights challenging other potential users can be found east of the Rockies where new applications are being contested.

Hence, this is a statewide issue that demands attention of all citizens and legislators. See web site: vjackmt.tripod.com, E-mail: verdellmt@yahoo.com, Message: 444-4800.

CLARK FORK RIVER BASIN



Regarding LC 1832: _____

Water rights issues threaten to stop economic development in the watershed of the Clark Fork River and have implications statewide. A lasting solution will require legislative action. In this letter, I will explain some issues and present a solution. While I see this as a statewide problem, my analysis details problems in the Clark Fork Drainage; these same problems are paralleled by similar problems in eastern Montana as well.

WATER SUPPLY PARADOX In the course of my four years of service on the legislatively funded task force that is addressing the Clark Fork Basin Water Management Plan, I have encountered a paradox with profound implications for domestic, economic and natural resource water use policy in Montana. On the one hand, there is no long term decline or practical shortage of water in the Clark Fork Basin's watershed -- even during droughts we can and do irrigate our fields, supply water to our homes, schools, and industries, generate billions of kilowatt hours of electricity through hydropower dams, and still send vast quantities of fresh water to the mighty Columbia River. On the other hand, because of an inexplicable and possibly inaccurate interpretation of water rights by power generation facilities, there may be a legal shortage of water that threatens to stop economic development in Western Montana.

BACKGROUND The Clark Fork drains 22,000 square miles of Montana, discharging an annual average of approximately 20,000 cubic feet per second (13 billion gallons per day) of water at our border with Idaho. Dams to harness the river's power were built at Thompson Falls and Polson by Montana Power early in the twentieth century, and, after World War II, by Washington Water Power (now Avista) at Noxon Rapids and just over the border in Idaho at Cabinet Gorge. Avista's dams are big. At Noxon Rapids, the turbines can handle 50,000 cfs (32.3 billion gallons per day), a level of stream flow that is reached and even exceeded only during the spring run off, which peaks near the beginning of June. Stream flows during the rest of the year are much lower, so running the generators at Noxon Rapids at full power is possible only for short periods.

February 20, 1951, Washington Water Power (Avista) filed a notice of appropriation for a water right of 35,000 cfs with a priority date of 1951. WWP refilled a Statement of Claim in 1982 within the Montana Department of Natural Resources (DNRC) claim filing period to identify existing claims. They claimed a flow that is almost double the 20,000 cfs annual average flow of the Clark Fork River. Avista added generation capacity in 1959, claiming a water right with that priority date and in 1974 requested and was granted an additional permit, all to take advantage of high river flows. The 1974 Permit capped the cumulative Avista hydropower water rights flow rate at 50,000 cfs but added no additional water volume. Avista ended up with a water right of 50,000 cfs. The 50,000 cfs is the peak capacity of the Noxon Rapids dam, but Avista advocates they are allowed to generate at that flow during any time within their period of use. It appears, and Avista claims, that the water right is for 50,000 cfs for 24 hours a day, 365 days a year; which is 36 million acre feet per year, two and one half times the amount of average yearly flow of the Clark Fork River (14 million acre feet per year). Even when the claim was decreed by the Water Court in the 76N Temporary Preliminary Decree, which lacked a total claimed volume and a general year-around, flow through, non-consumptive use standard was applied and a volume of 29,248,264 acre-feet was calculated. The highest yearly volume of water on record was 21 million acre feet in 1997. (The United States Geological Survey (USGS) has been measuring river flows for 92 years). The Clark Fork River exceeds 50,000 cfs only 22 days a year on the average.

In 1951, Montana's legislature enacted 85-1-122 (Montana Code Annotated):

"The waters of the Clark Fork River may be impounded or restrained within the state of Montana for a distance not exceeding 25 miles from the Idaho-Montana boundary line by a dam [the Cabinet Gorge Dam] located on said river in the state of Idaho and constructed by any person, firm, partnership or corporation authorized to do business in the state of Montana. **Any present or future appropriation of water in the watershed in the state of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam.**"

Because Noxon dam is located within the aforesaid 25 mile impoundment authorized by 85-1-122 MCA, it therefore stands to reason that conditions placed upon the Cabinet Gorge dam may also apply to the Noxon Rapids dam.

PROBLEM Since DNRC neglected to put restrictions or other detail on Avista's claimed water rights, Avista has insisted that they have a year-around right to water use at 50,000cfs and when they are not getting that amount they can:

1. Make a call on the junior water users (those who have received a water right after 1951). There are about 26,000 surface water rights in the Basin of which 8,000 are junior to Avista's most senior right and **about one third of the junior water rights are municipal.**
2. Contest applications for new water rights (surface and ground water).
3. Lobby the State Legislature to close the entire Clark Fork River Basin to new water rights (extends from the Flathead to Butte).

The USGS stream flow data were available to both the State of Montana and Washington Water Power (Avista) at the time of the Noxon dam's design, construction and upgrades. The data clearly documented the river's limits. It was reasonable and desirable that Avista be given the right to run all the water that reaches their dam through their turbines as run-of-the-river hydro generation. However, their water claim seems to have no restrictions and is much greater than the historical flow of the river. In strict first in time, first in right, policy, this situation may give Avista the power to stop people with junior water rights (after 1951) from using water up stream, stop the applications for new water rights permits, and then because of the shortage they have created indirectly sell through water contracts water up stream. They then can use that same water which they have sold to generate electricity when it eventually reaches the dam. This type of speculation was not the intent of their non-consumptive hydropower water rights when they were issued.

SOLUTIONS In 2001, I carried HB397 which funded the Clark Fork River Management Plan which has just been completed and is available through the DNRC web site: www.dnrc.state.mt.us/clarkfrkbasincover.htm. Avista Corporation agreed to participate in the development of the plan instead of seeking a basin closure to new surface water rights during the 2001 session. It is much better for their public image if they can attain their goals through a public process rather than direct confrontation. In spite of the fact that I had provided data (analysis attached) showing that consumptive use of the river over the last 45 years by humans -- our friends and neighbors -- has had no measurable impact on the water available to Avista to generate electricity, Avista in June of 2004 contested a new water right application by the Thompson Fall Cogeneration Plant and tried unsuccessfully to add a basin closure to all new water rights (surface and ground water) to the Clark Fork River Management Plan.

Avista's disappointing behavior, my service on the task force, and the state's past oversights have led me to conclude that deficiencies in Montana's statutes regarding power generation water rights must be clarified or corrected. I therefore have asked for the preparation of a bill draft providing that power generation water rights are subordinate in priority date to all other water rights in Montana. In the case of Avista, this action will have no adverse impact on Avista's capacity to generate electricity because water depletion by humans is so small in comparison to the 14.2 million acre feet of average

flow of the Clark Fork that it presently cannot be measured. In fact, the average flow of the Clark Fork River for the 45 years before Avista's dams were built was 13.9 million acre feet; for the 45 years after the dams were built, the average was 14.7 million acre feet (USGS data). This is an increase of about 800,000 acre feet. Avista will also have the flexibility to figure out how they can use the approximately 671 thousand acre feet of water to generate electricity they are now spilling each year.

Similar instances of hydropower water rights challenging other potential users can be found on the east of the Rockies, where new applications are being contested. Hence, this is a state wide issue that demands attention of all legislators. One of our State's most valuable resources is in danger of being controlled by a few corporations for their benefit, rather than the benefit of the citizens of the state. Our ability to promote development and growth throughout the state of Montana is at stake.

I invite you to join with me in moving this legislation. We have a responsibility to correct past mistakes and use water to the best benefit of all of the citizens of Montana as stated in our Constitution and state law. Power generation non consumptive water rights should make use of the water available in the river when it reaches the dam and nothing more.

Sincerely,

Rep. Verdell Jackson
555 Wagner Lane
Kalispell, MT 59901

CLARK FORK RIVER BASIN

