SENATE NATURAL RESOURCES
EXHIBIT NO. 3
DATE Feb. 11, 2009
BILL NO. SB 234

Senate Bill 234 (Jackson) is a bill intending to revise a statute passed in 1951 for the specific purpose of enabling the construction of the Cabinet Gorge Dam in Idaho and inserting reference to other subsequent dams and changing the purpose and intent of the original statute to jeopardize water rights of one company.

This bill is identical to one introduced (SB 471) during the past session and was tabled by the Senate Judiciary Committee. SB 324 is a "rifle shot" aimed specifically at Avista Corporation and would subordinate water rights associated with Avista's Noxon Rapids Project.

Look at the current statute which is attached. Please read this statute and let me read to you the heading for Senate Bill 9 which was introduced in January 1951:

'A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE IMPOUNDING AND RESTRAINING WITHIN THE STATE OF MONTANA THE WATERS OF THE CLARK FORK RIVER FOR A DISTRANCE NOT EXCEEDING TWENTY-FIVE MILES FROM THE IDAHO-MONTANA BOUNDARY LINE, BY A DAM OR DAMS 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, AND PROVIDING THAT THIS ACT SHALL TAKE EFFECT UPON ITS PASSAGE AND APPROVAL.'

85-1-122 was to enable the construction of the Cabinet Gorge Dam in record time to provide electricity for the Pacific Northwest and aluminum plants making materials for Americans in the Korean War effort.

The legislation was passed and I have copies from the Montana archives of the legislative history including the joint meeting of the Senate and House to hear from the President of Avista's predecessor Washington Water Power as to why they supported this bill which you see in current statute. WWP agreed to pay taxes in Montana which it does today for the Noxon Rapids Dam and its 15% interest in Colstrip Units 3 & 4 to the tune of nearly $4 million per year. In addition the company pays the state of Montana over $4 million per year for rentals in the Noxon project area.

The sponsor of this bill has taken a 1951 statute designed to resolve any differences with Montana for the siting of the hydroelectric facility and included an Avista Noxon Rapids Dam completed 8 years later, thus attempting to subordinate the water rights for the dam Avista's predecessor obtained prior to building the dam 50 years ago.

By its enactment of Section 85-1-122 in 1951, the legislature gave its express approval to the impoundment of water resulting from the Cabinet Gorge Dam in Idaho. The letter referred to by the bill's sponsor clearly showed that Montana needed to get in the game with other states so Montana could get an

allocation of water if and when an interstate compact were signed concerning the allocation of the waters in the Columbia River Basin. Was the statute currently on the books intended to include a future dam such as Noxon Rapids? No for two big reasons. First the statute passed as a result of Senate Bill 9 refers to a dam located in Idaho (read specific statute.) Second, it is clear that a future dam may have been contemplated in Montana including one at Noxon. If the legislature wanted to subordinate the water rights for the possible Noxon Dam it could have placed this in the bill. It did not.

Now 50 years later the sponsor is trying to shoehorn the Noxon Rapids Dam into a statute designed for an entirely different dam for the express purpose of subordinating the water rights of an existing dam whose water rights were obtained in Montana prior to construction of the dam in the late 1950s.

For the record the Noxon Rapids Dam, owned and operated by Avista Corporation are wholly located in Montana. Avista, through its predecessor obtained the right to impound and use water in accordance with Montana water law in the same manner as other water users. These water rights were confirmed in the new constitution and when the Water Use Act was passed in 1973 which required permits to be issued by DNRC for new water rights issues, Avista applied for and received a provisional water use permit in order for installation and use of another turbine generator at Noxon.

SB 324 emasculates the intent of Senate Bill 9, and singles out Avista's current water rights for subordination. It does this by amending the language of the section so that it applies to Noxon Rapids which is within 25 miles of the state boundary. There is only one company that fits this description. My client Avista.

In addition to the objections we raise here to the drafting of the bill which in essence is a take of our water rights it does other things. We think this creates an unconstitutional classification based upon the type of water right by creating a class with one member--- Avista. This flies directly in the face of both the 1889 constitution and the 1972 constitution which gave NO PRIORITY as between types of water uses---in Montana as you will hear from those testifying after me all types of water are considered equal in the eyes of Montana law. Therefore we challenge this classification of one and believe there is no rational basis or any basis in the Constitution for singling out Noxon Rapids.

Second by subordinating Avista's water right, SB 324 would violate the 1972 constitution which I stated earlier "confirms" existing Water Rights (Article IX Section 3) and requires compensation to be paid for a taking or damaging of property rights (Article II, Section 29. We think passage of this bill could be deemed a taking which cannot occur without adequately compensating the owner. This bill sets a dangerous precedent.

Finally by rewording Sec 85-1-122 it now would authorize an impoundment resulting from the Cabinet Gorge Dam and the Noxon Rapids Dam only "for a distance not exceeding 25 miles from the Idaho-Montana boundary line." The Noxon Rapids Dam is about 22 miles from the border, but most of its reservoir is more than 25 miles from the boundary line. The effect of this is SB 324 may revoke Avista's legal right to maintain the great majority of the Noxon Rapids reservoir is a taking of the first order.

This bill is dangerous and sends a terrible message. Avista is a good and thoughtful neighbor as is attested by the legislators who represent or have represented Sanders County in the Montana Legislature. Please vote no on Senate Bill 324.