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**MEMORANDUM**

**TO:** Environmental Quality Counsel Funding Workgroup  
**FROM:** R. Blair Strong  
**DATE:** June 7, 2004  
**RE:** Outline of Remarks of R. Blair Strong

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I thank the Chairman and the members of the committee for the opportunity to share with you some personal observations respecting the conduct of the adjudication of existing water rights in Montana.

My name is Blair Strong, and I was born and raised here in the Gallatin Valley. After service in the United States Army, I returned to Montana to attend the University of Law School in Missoula, and I have been engaged in the private practice of the law in Spokane, Washington, since 1984. Since that time, I have represented Avista Corporation before the Water Court in various matters related to the adjudication of existing water rights. My observations follow from my personal involvement from this processes on behalf of my client.

**I. BACKGROUND INFORMATION OF AVISTA CORPORATION**

Avista Corporation is an energy company engaged in the generation, transmission and distribution of energy, as well as other energy-related businesses. It used to be known as the Washington Water Power Company. It is headquartered in Spokane. It is a regulated utility company and serves nearly 325,000 electric customers in eastern Washington and northern Idaho. The electric service that it delivers to its customers is regulated by the public utility commissions in Idaho and Washington, as well as the Federal Energy Regulatory Commission. It owns and operates under federal license the Clark Fork Project which has hydroelectric generating facilities on the Clark Fork River in Idaho and Montana.

**II. COMMENTS ABOUT FUNDING AN ACCELERATED ADJUDICATION**

Thank you for the opportunity to present comments respecting the proposed funding proposal contained in the white paper prepared by the Environmental Policy Office. My comments are summarized below:

**A. Because conduct of an accurate adjudication benefits the whole state, an accelerated adjudication program should be funded from the general fund, and not allocated**

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exclusively to water right claimants. The white paper prepared by the Environmental Policy Office ("White Paper") proposes costs of an accelerated adjudication program be recovered from water right claimants. However, there are many other potential beneficiaries of from an accurate adjudication, from whom it is unlikely that fees could be collected, for instance, federal agencies, recreational users, water quality agencies, and Indian Tribes. An accurate adjudication will give certainty to future, as well as present owners of land, and enable more knowledgeable resource decisions regarding a scarce resource. The adjudication has a public interest in a broadest sense, and costs should be assessed broadly, not narrowly as proposed in the White Paper. The White Paper wrongly assumes that the only beneficiaries of the adjudication are water right claimants, and that their benefit is proportional to the size of their right as measured in flow rates and volumes. These assumptions are clearly wrong.

B. The majority of claims involved in the adjudication and the corresponding time spent by the Water Court and DNRC are related to consumptive use claims during the growing season. These are the claims that are most complex and difficult to untangle, involve many contested issues of fact, require the most claims examination by DNRC, and are most likely to benefit from an accelerated adjudication.

C. The difficulty of resolving contested claims is not proportional to their size. Often the smaller claims are the most contentious. Funding an accelerated adjudication by fees based upon volumes and flow rates, as proposed in the White Paper, wrongly fails to take into account what classes of claims actually cause the Water Court and the DNRC the most work. If all or a part of the costs of adjudication are allocated to water rights claims, it clearly would be more equitable to allocate costs of an accelerated adjudication program to those classes of claims that cause the costs.

D. Hydroelectric generation claims associated with privately owned hydroelectric projects consume relatively little time and attention in the adjudication proceeding. It is easy to measure hydroelectric rights, and determine their priority date. Hydroelectric structures do not move or change their use of water, and hydroelectric rights are infrequently transferred or changed. Therefore, hydroelectric rights do not consume nearly the time and attention given by the Water Court and the DNRC to other types of claims. It is not because of hydroelectric claims that the adjudication is time consuming. It would be clearly inequitable to allocate to non-federal hydroelectric generation the single largest share of the costs of an accelerated adjudication process, when hydroelectric claims can be verified and adjudicated in a very short period of time without much difficulty.

E. Because the White Paper allocates on the basis of seasonal flows and volumes, it over-allocates costs to year-around claims and under-allocates costs to water right claims associated with the growing season. The vast majority of water right litigation is concerned with competing uses of water during the growing season. There are few competing uses of surface water during the middle of winter. Yet, the White Paper allocates fees to seasonal users based upon the lesser of a flow rate or seasonal volume, while allocating to year around users based on a year around flow or volume. That this has the effect of shifting costs from seasonal water claims to year around claims, even though it is primarily the conflicts among water users during the growing season that necessitate an adjudication in the first instance. An example of

this distortion is that White Paper allocates irrigation only 17% of the costs of the adjudication based on flow rate, while stock water claims are allocated 24%. At least in the Bitterroot, few would seriously contend that stock water uses deplete the resource by one quarter, are the cause of many water right disputes or consume 1/4 of the time and attention of the Water Court. This is just one example that the formula utilized in the White Paper shifts costs from the time intensive and hotly contested seasonal irrigation uses to year-around uses.

**F. Montana should seek federal funding for a significant portion of the costs of the adjudication.** It would be inequitable to adopt a fee system that mandates that all funding for the adjudication come from non-federal water users when the largest single user of water in Montana is the federal government. The federal government has extensive claims to the use of water for its forests, fish and wildlife, and as trustee for Indian rights. Federal agencies, such as Bonneville Power Administration, and the Environmental Protection Agency, have an enormous influence over the management of Montana's water resources for purposes within and without Montana. In part, because the federal government filed an action to adjudicate federal water rights in federal court, the legislature initiated its own adjudication so that federal agencies and tribes would be required by the federal McCarran Amendment of 1952 to participate in an adjudication in state court. And, the federal government owns and operates numerous hydroelectric projects, including Libby, Hungry Horse, Canyon Ferry, Fort Peck, and Yellowtail. Therefore, federal funding should be sought for a significant portion of the cost of the adjudication. Absent such funding, the costs incurred for protection of federal interests should be paid from general funds, and not narrowly allocated to non-federal water right users.

**G. There are many unresolved issues associated with administration of a fee per claim.** The Bitterroot exemplifies a situation where there are many multiple owners of water claims resulting from rapid subdivision and radically changing water use patterns. Additionally, there are many people buying land with water rights on contract that are not yet recorded in the DNRC computer system. This raises many issues. (1) Would a fee be assessed against a claim, or against individual persons who own a part of a right? (2) How would a fee be assessed when not all owners are recorded in the DNRC record system? (3) Would the fee be a personal obligation of the water right claimant, or would it be a lien upon the land associated with the water right? (4) Would additional fees be collected when there was a transfer or division of a water right? (5) What would be the sanction for failing to pay a fee, and who would enforce the sanction? (6) If only one part-owner of a water right paid a fee, would that person have a superior right over and against his joint owner who failed to pay the fee? (7) Would post 1973 water permit holders and applicants be required to pay fees for the adjudication? (8) Would a claimant who had his right reduced as a result of a Water Court hearing have the right to a refund of his fee? (9) Would a five dollar minimum fee for small claims even cover the cost of processing an assessment, including mailing costs, preparation of invoices, follow up and collection, if required?

**H. A \$15 per fee per claim is unlikely to encourage water right owners in the Bitterroot to reduce their claimed irrigated acreages.** In the Bitterroot, there are increasing numbers of small land owners with suburban sized lots, or five, ten and twenty acre parcels, who want their water rights for esthetic purposes and recreational farming, or to enhance the value of

their land for resale purposes. It seems unlikely that their behavior will be affected much by a variable fee that allows them to shave five or six dollars off a fifteen or twenty dollar fee, as suggested in the White Paper. For the very large land owners who are settling in the Bitterroot and elsewhere in Western Montana for esthetic and life style reasons, I doubt that the \$100 fee per claim would be a major issue.

**I. Where local conditions require that the adjudication be accelerated, then a cost based formula should be devised that allocates the cost of the accelerated adjudication to that local area.** Local conditions may vary considerably. Some basins have already received satisfactory temporary preliminary or preliminary decrees. In other areas, water right claimants may be content with the current progress of the adjudication toward a decree, or may desire to see Indian and federal reserved water rights issues near resolution before adjudication of non-federal rights is accelerated. Some basins may have a requirement for more immediate adjudication. A cost based system should take into account these geographical differences. All water claimants should not be required to help fund a state-wide acceleration of the adjudication process when there is no necessity to uniformly accelerate the adjudication. Allocating costs to water claimants in areas where there have been preliminary decrees issued in order to accelerate adjudication activities in other areas is another clear example of where the white paper proposes to unfairly tax some water right claimants in order to benefit others.

**J. The quality of the adjudication should not be sacrificed for the sake of speed.** Maintaining the accuracy of the adjudication is more important than the pace of the adjudication. An adjudication completed without attention to accuracy may be worse than useless, even if finished quickly.

**K. Existing DNRC systems and may not be able to cope with a greatly accelerated adjudication.** DNRC has experienced problems in the past associated with its information systems. (For instance, Avista's objection in 1984 was prompted by a computer error in the DNRC system.) And, experience in the Bitterroot is that DNRC records often fail to reflect the rapidly changing current ownerships of claimed rights. Issues arising from the quality of the record keeping of the adjudication need to be resolved, before the pace of the adjudication significantly increases.

**L. Absent a plan for recording, enforcing and administering water rights, accelerating the adjudication may not accomplish your goals.** Because of the rate of change in water uses, particularly in the Bitterroot, if an accelerated adjudication is to be useful, then there is going to have to be an improved system for requiring water use transfers and changes, and enforcing water rights. There are many land transactions, where water transfers and changes of use are not filed. Absent an effective enforcement system to enforce water transfer laws and to enforce the rights on the streams and ditches, it is unlikely that merely accelerating the Water court at significant cost to water right claimants and tax payers will have a beneficial affect.

**M. There may be water adjudication issues more pressing than non-federal water right claims.** In particular, no matter how much you attempt to accelerate the adjudication of non-federal rights, the Water Court can not issue a final decree until federal reserved and Indian rights are quantified. The extent and nature of these rights, particularly as they relate to off-

reservation waters, is not yet fully known in Western Montana. I urge you to carefully consider whether it is desirable to accelerate the adjudication of non-federal rights in the absence of a better understanding of what these federally related rights may be.

### **III. BACKGROUND INFORMATION REGARDING AVISTA'S WATER RIGHT**

A. The 1973 Water Use Act, divided water rights into two classes: (1) those rights that are obtained by permit from the DNRC after July 1, 1973, and (2) those rights that were obtained under Montana law as it existed prior to July 1, 1973.

B. In 1981, Avista (then known as Washington Water Power Company) filed "Statements of Existing Water Rights", as required by all persons who were claiming pre-1973 surface water rights.

C. In March, 1984, the Water Court sent to Avista a notice that a *Temporary Preliminary Decree* had been issued for surface water right claims on the Clark Fork River below the confluence of the Flathead River (Basin 76N-46). Because the abstract incorrectly recorded some of the volumes pertaining to Avista's storage claims, in February 1984, Avista filed objections to its own claims.

D. Montana Power Company intervened in proceedings concerning Avista's water right, because of Montana Power's concern that the Water Court should set forth in its decrees reservoir storage rights, as well as flow rates and volumes. Because of this common issue which affected all of Montana Power's hydro projects, both Montana Power and the DNRC participated in subsequent proceedings dealing with Avista's rights.

E. Water Judge Robert Holter issued an order in August, 1986, setting forth Avista's water rights and modifying the Temporary Preliminary Decree. The Water Court has not yet published a Preliminary Decree for the lower Clark Fork River reflecting the changes resulting from the hearing.

### **IV. WHY DID AVISTA FILE OBJECTIONS IN THE BITTERROOT?**

A. *There appeared to be problems with DNRC verification of claims.* In 1987, the United States and the Confederated Salish and Kootenai tribes filed complaints with the Water Court respecting the adequacy of the adjudication and the verification of water rights conducted by the DNRC. Claims in many basins in Montana, including the lower Clark Fork River, had been examined by DNRC pursuant to a claim verification manual that was developed under the direction of the first Chief Water Judge, W.W. Lessley.

The Montana Supreme Court had asserted jurisdiction over the adjudication, and had promulgated verification rules for the DNRC to follow, which replaced those adopted by the Water Court. The Tribes, the United States, Avista and others were recommending to the Water

Court that those basins that had been reviewed by the DNRC under the old rules should be reviewed again under the new rules, because of discrepancies between the new rules and the old.

Avista and Montana Power commissioned Hydrometrics, Consulting Scientists and Engineers, to evaluate the adjudication process by looking at the results of the adjudication in the Swan River and Rock Creek tributaries of the Clark Fork River. Hydrometrics concluded that there were major problems associated with the conduct of the DNRC verifications of the claims, and wide variations, unsupported by field examination, of flow rates and usages for irrigation.

**B. Avista was uncertain how the Water Court and DNRC would apply the new claims examination rules.** Avista and Montana Power determined to file objections to water claims in the next large sub-basin to be reviewed by the DNRC. Therefore, in 1992, after the Water Court issued its first set of decrees in the Bitterroot basin, Avista and The Montana Power Company filed joint objections to numerous claims. Avista relied upon the Claims Examination conducted by DNRC in determining what claims to object to. Avista did not object to all claims, and excluded stock water claims and most irrigation claims less than 10 acres. Although, Montana Power withdrew from the adjudication process shortly before it sold its utility assets, Avista subsequently has continued to participate in the adjudication of the Bitterroot basin and cooperated with other participants in the process.

**C. Avista has been an active participant in collaborative processes regarding water quantity and quality issues In Western Montana.** For instance, Avista was instrumental in the Upper Clark Fork River Basin Steering Committee, which worked toward the development of a Upper Clark Fork basin management water plan, and has participated in the Clark Fork Basin Water Management Task Force established by the legislature, which includes representatives from interests throughout the Clark Fork basin. Avista also instituted a collaborative process resulting in the issuance of a new fifty year license for the operation of the Clark Fork Project. Avista, Montana, Idaho, local governments, tribes, federal agencies and public interest groups executed a settlement agreement that was hailed as a positive alternative to the traditional contested case method of resolving applications. Avista believes that the Water Court adjudication process should facilitate collaborative and voluntary settlements of contested issues when possible.