

04/20/18
53
R. Blair Strong
Ramlow & Rudbach, PLLP
542 Central Avenue
Whitefish, MT 59937
(406) 862-7503
rbs@ramlowrudbach.com

E-MAIL FILED
APR 20 2018
Montana Water Court

MONTANA WATER COURT – CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC BASIN (BASIN 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

**AVISTA CORPORATION MOTION TO INTERVENE AND BRIEF
IN SUPPORT OF PETITION FOR EXTENSION OF STAY IN
BASINS 76L AND 76LJ**

I. MOTION

Avista Corporation, by and through its undersigned counsel, respectfully moves the Court for leave to intervene in this matter for the purpose of joining the Petition of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation To Extend the Stay of all Proceedings to Adjudicate Water Rights Claims in Basins 76L and 76LJ (“Petition”). Avista Corporation has not filed objections in Basin 76L or Basin 76LJ, and is seeking leave to intervene at this time only for the purpose of addressing the issues raised by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (“CSKT”) in their Petition.

In support of its motion, Avista Corporation (“Avista”) respectfully states the following.

II. REASONS FOR INTERVENTION

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.

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 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 enumerated in a hearing before this Court. *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 Department of Natural Resources and Conservation 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 Montana, since 1986 Avista has appeared as a claimant, objector and 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.

8. As a water rights user, Avista may be affected by the adjudication of CSKT water rights claims and objections. The CSKT-Montana Water Rights Compact resolves most, if not all, of the possible CSKT water right claims and objections and provides a great deal of certainty respecting the nature and quantity of water rights that may be asserted by the CSKT.

III. ARGUMENT

A. Avista Corporation has a vital interest in the successful completion of a fair, complete, and efficient adjudication.

Avista is concerned that the adjudication be conducted fairly, efficiently and result in reasonably accurate decrees that reflect the actual historical beneficial use of water, or non-use of water. However, Avista knows from experience that the adjudication process can take decades, and tax the resources of all parties who are involved.

Possible CSKT claims and objections, if pushed to resolution absent the Compact, will likely result in extensive litigation involving the waters of both Western and Eastern Montana, and will implicate the rights of thousands of other water claimants whose rights may be affected by the outcomes of these cases. Avista does not know the extent of its possible involvement in cases resulting from CSKT claims and objections, because it is impossible to know, absent a

review of such claims and objections after they are filed and published, the possible implications for other water users. But, it is safe to assume that Avista, like other water rights holders, would confront uncertainty and probable additional expenses and distractions associated with an adjudication of CSKT rights and objections, absent the Compact.

B. The Compact avoids unnecessary litigation and contentious uncertainty.

The Compact provides a high degree of certainty to thousands of water rights claimants in Montana respecting the nature and quantity of CSKT water right claims, without the necessity of time-consuming and contentious litigation. The advantages of the Compact for the State of Montana and its water users were recognized when the legislature adopted the Compact (Compact codified at Mont. Stat. Anno. 85-20-1901). Much of the certainty provided by the Compact will be lost if the CSKT are compelled to file their claims and objections and their adjudication proceeds along a litigation path.

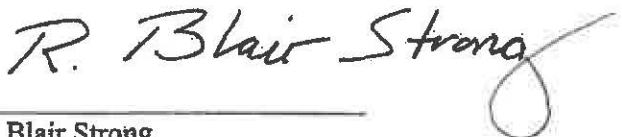
IV. CONCLUSION

The Court has an opportunity in granting the Petition to recognize the judicial economy and decreased litigant costs that will likely stem from the Compact. If a further stay is not issued to allow the Congress to continue its review of the Compact, then it is likely that the CSKT claims, objections and related controversies will occasion needless litigation, unnecessary uncertainty and additional expense to all parties.

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

Respectfully submitted this 20th day of April, 2018.

RAMLOW & RUDBACH, PLLP

By: 

R. Blair Strong
Attorney for Avista Corporation

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:

John Carter
Donald J. Decker
Rhonda R. Swaney
Tribal Attorneys
Confederated Salish & Kootenai Tribes
P.O. Box 278
Pablo, MT 59855

David Harder, Assistant Section Chief
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, CO 80202

Duane Mecham
U.S. Department of Interior
Bureau of Indian Affairs
805 SW Broadway, Suite 600
Portland, OR 97205

Melissa Schlichting
Office of the Montana Attorney General
Justice Building, Third Floor
215 North Sanders
Helena, MT 59620-1401

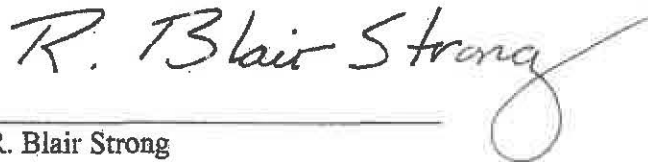
Jocko Irrigation District
Boone Cole
PO Box 639
St. Ignatius, MT 59865

Mission Irrigation District
Ray Swenson
PO Box 639
St. Ignatius, MT 59865

Flathead Irrigation District
Paul Guenzler
PO Box 639
St. Ignatius, MT 59865

Colleen Coyle, Esq
141 Discovery Drive, Suite 215
Bozeman, MT 59718

DATED this 20th day of April, 2018.



R. Blair Strong