

Water ruling: Kalispell lawmaker sees a silver lining

By
JIM MANN The Daily Inter Lake

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HELENA - For years, state Sen. Verdell Jackson, R-Kalispell, has been pursuing a quixotic campaign against Avista Corp. and its dominating water rights in the Clark Fork Basin.

He pursued legislative combat with the Spokane-based power company two years ago, and again during the current legislative session, both times to no avail.

Jackson now thinks his ideas will get more attention and support after the state's recent affirmation of Avista's water rights.

In December, the Department of Natural Resources and Conservation denied the Thompson River Lumber Co. a new water right, deciding that "Avista will be adversely affected by diminished flows in the amount of the applicant's proposed diversion on the days where flows do not exceed 50,000 cubic feet per second."

The lumber company was seeking a minuscule one half of a cubic foot of water per second. The upshot is: All new water-rights applications in the basin, including the Flathead River basin, will face the same standard.

"The Thompson Falls case established a precedent," Jackson said. "The state calculated what constituted a precedent."

It is precisely the scenario that Jackson has predicted and attempted to head off in the Legislature. Jackson contends that Avista presents a long-term, looming threat over water use in the Clark Fork basin, because of its enormous 50,000 cfs water right at Noxon Rapids Dam.

"Their water right is 2 1/2 times the average flow on the river, and they're claiming all of it," Jackson said.

Jackson proposed four bills during the current session, generally aimed at subordinating hydropower generation water rights to domestic and irrigation water rights. All of them died in committee.

One of the bills focused on a state law passed in 1951 that gave domestic and irrigation uses priority over Avista's Cabinet Gorge Dam in Idaho.

Jackson recently discovered a speech that former Montana Gov. John Bonner delivered just after the law was passed, in which Bonner said the law was intended to safeguard Montana water above Cabinet Gorge and any subsequent dams on the river, including the Noxon Rapids Dam that was built after Cabinet Gorge.

But Jackson's position on the intent behind the law got a cool reception from the Department of Natural Resources and Conservation.

Tim Hall, an attorney with the department, told the Inter Lake recently that the 1951 law is unambiguous.

"It talks about a dam, in the state of Idaho, and everything is in reference to that one dam," Hall said.

He added that the intent of Gov. Bonner's supporting statement likely would be irrelevant in court.

That kind of defensive posturing has frustrated Jackson for years. He contends that the DNRC and the Legislature should be advocating aggressively for the protection of Montana water rights.

He cites the Montana Constitution, which states that Montana owns all of the water within its borders for the use of its people. And he cites state statutes, including one that says, "the development and utilization of water resources and the efficient, economic distribution thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for domestic, industrial, agricultural and other beneficial uses."

So how does Avista prevail in the Montana Legislature, in Senate committees controlled by Democrats, over Jackson's populist legislation?

Jackson said the power company dispatched as many as three attorneys to hearings on the bills. It is clear, he said, that any challenge to Avista's water rights likely would be contested.

He said his colleagues in the Legislature have regarded his legislation as "complex and far-reaching" with uncertain long-term impacts.

"My response to that is, I would welcome a lawsuit," he said. "It's the state's responsibility to defend the use of water by Montanans."

With the situation that has developed in the Clark Fork Basin, he says, "the sooner we get this in court, the better."

Jackson is confident that the state ultimately would prevail. During the past nine years, he has amassed a huge file on the issue.

He has crunched Clark Fork River flow data going back 90 years. And from that research he concludes that Avista would not succeed in arguing that it had suffered a "taking" if its water rights were subordinated or reduced.

He points to his spread sheets, showing that the average flow on the Clark Fork River at Plains has not changed during the past 90 years. It has averaged 20,000 cubic feet per second, despite enormous population growth and increased water consumption.

The unchanged flows largely are due to "return flows" from groundwater to the river system, Jackson said.

"But the DNRC doesn't consider return flows" in accounting for how much water is available, Jackson said. "They only account for the amount of water that's been appropriated."

Jackson predicts that in the next legislative session, water rights in the Clark Fork Basin will be a priority "because there are going to be a lot of people who will suffer financial loss because they can't get water."

Reporter Jim Mann may be reached at 758-4407 or by e-mail at

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