

ATTACHMENT C

13. Remarks:

This is a **Notice of Claim to a Water Right Acquired Under State Law** by Avista Corporation ("Avista") (formerly known as The Washington Water Power Company) to store water in those portions of a reservoir composed of St. Joe, St. Maries, Coeur d'Alene and Spokane Rivers, and Coeur d'Alene Lake and all connected and tributary waters over which a water right acquired under State law can be obtained ("Reservoir") for use in the generation of hydroelectric power at the Post Falls Hydroelectric Development (HED). The quantity of water claimed for storage is 164,400 acre feet ("af")¹ or, if larger, that volume calculated to be in the Reservoir when Coeur d'Alene Lake is at an elevation of 2126.5 feet above mean sea level ("msl") as measured by the USGS gage at Coeur d'Alene, Idaho. The water referenced above is stored with the use of three dams (including a powerhouse) located at Post Falls, Idaho. The location of Avista's storage is shown in **Exhibit C-1** (a copy of sheet 1A of 77 as part of Exhibit G for the Post Falls HED, Project No. 2545 as licensed by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act). **Exhibit C-2** (a copy of Sheet 1 of 77 of the Exhibit G drawings for Project No. 2545) shows the location of the dams and powerhouse. Avista's legal right to store waters in the Reservoir for use in electrical power generation is the subject matter of **Water Right Claim No. 95-9115 (Exhibit C-3)** attached hereto and incorporated by reference herein; and **Water Right Claim No. 95-9119** (attached hereto as **Exhibit C-4** and incorporated by reference herein).

The water right date of priority for this **Notice of Claim to a Water Right Acquired Under State Law**, is July 1, 1907 (the date the water was applied for the beneficial use of electrical power generation), and the source of water is those portions of St. Joe, St. Maries, Coeur d'Alene and Spokane Rivers, and Coeur d'Alene Lake and all connected and tributary waters over which a water right acquired under State law can be obtained.

The quantity of water claimed under **Water Right Claim No. 95-9115** for storage in the Reservoir for electrical power production was estimated to be 164,400 af when **Water Right Claim No. 95-9115** was filed. This sum was to represent the quantity of water stored in the Reservoir when Coeur d'Alene Lake was held at an elevation of 2126.5 feet above msl as measured by the USGS gage at Coeur d'Alene, Idaho. (The vertical datum for the USGS Coeur d'Alene, Idaho, gaging station is referenced to a USGS BM at the southeast corner of the former Merriam Building having an original elevation of 2157.404 feet above msl. This datum, minus 3.05 feet, equals North American Datum or National Geodetic Survey ("NGS").) This **Notice of Claim to a Water Right Acquired Under State Law** (as it was for Water Right Claim No. 95-9115) is for the storage of 164,400 af or, if larger, that volume calculated to be in the Reservoir when Coeur d'Alene Lake is at an elevation of 2126.5 feet above msl as measured by the gage referenced above.

¹ See **Attachment B** for further details as this amount includes storage within the Coeur d'Alene Reservation ("Reservation").

Beginning on or about May 1, 1941 and continuing to the present, Avista increased storage in the Reservoir by holding Coeur d'Alene Lake, through its operation of the Post Falls HED, at an elevation of 2128.0 feet above msl as measured by the USGS gage at Coeur d'Alene, Idaho. This increase in storage for electrical power generation was initially estimated to be 60,600 af² and was to represent the difference between storage in the Reservoir at Coeur d'Alene Lake elevation 2126.5 feet and 2128.0 feet above msl as measured by the USGS gage at Coeur d'Alene, Idaho. The additional acre feet of estimated storage is the subject matter of **Water Right Claim No. 95-9119**. The source of water for **Water Right Claim No. 95-9119** is the same as what is described above for **Water Right Claim No. 95-9115**.

With **Water Right Claim No. 95-9115**, **Water Right Claim No. 95-9119**, and this **Notice of Claim of Water Right Acquired Under State Law**, Avista claims water rights to store water for electrical power production in the Reservoir, up to an elevation of 2128.0 feet above msl (the presumed ordinary high water mark of Coeur d'Alene Lake) as measured by the USGS gage at Coeur d'Alene, Idaho.³ Prior to 2006, based upon the data then known, the quantity of water believed to be in storage when Coeur d'Alene Lake is held at an elevation of 2128.0 feet above msl was estimated to be 225,000 af. However, with the development of new measuring technology, the cumulative quantity of water stored outside and inside the Reservation when Coeur d'Alene Lake is held at elevation 2128.0 feet has been calculated by both Avista and the Coeur d'Alene Tribe ("Tribe") to be in excess of 225,000 af. Notwithstanding the actual determination of acre-feet, Avista claims water rights to store water up to an elevation of 2128 feet above msl as measured by the USGS gage at Coeur d'Alene, Idaho.

As referenced in **Attachment B**, in 2001, the United States Supreme Court ruled that the lands underlying Coeur d'Alene Lake and its tributaries within the current boundaries of the Reservation are owned by the United States as Trustee for the Tribe. As a result, part of the water Avista stores on submerged lands is on portions of Coeur d'Alene Lake and its tributaries owned by the United States in trust for the Tribe.

For the water Avista stores for power generation on those portions of Coeur d'Alene Lake and its tributaries located within the boundaries of the Reservation, Avista submitted to the Tribe an Application for Tribal Water Storage/Use Permit (**Exhibit C-7** attached hereto). The Tribe subsequently issued a **Water Storage/Use Permit** to Avista (**Exhibit C-8** attached hereto). Said **Water Storage/Use Permit** was incorporated into a Judgment entered in the United States District Court for the District of Idaho (See, **Exhibit C-9** attached hereto).

Prior to obtaining a Water Storage/Use Permit from the Tribe, during Avista's work in connection with its Project No. 2545 FERC relicensing efforts, Avista had studies

² See **Attachment B** for further details as this amount includes storage within the Reservation.

³ The use of the stored water for electrical power production at the Post Falls HED is the subject matter of **Water Right Claim No. 95-4518 (Exhibit C-5)** and **Water License No. 95-08003 (Exhibit C-6)**. Both Exhibits are attached hereto and incorporated by reference herein.

conducted, using new technology, to better quantify the total volume of water it stores for power generation when it holds Coeur d'Alene Lake at an elevation of 2128.0 feet above msl, as measured by the USGS gage at Coeur d'Alene, Idaho. Based upon the studies and new technology, the cumulative volume of water stored outside and inside the Reservation was calculated to be 266,692 af.

In the **Water Storage/Use Permit** Avista received from the Tribe, paragraph 5 states:

5. As of 2005, the Tribe estimates that Avista's storage of water above the dams at its Post Falls HED at 2,128 feet above MSL creates a total storage capacity upon submerged lands within the Reservation and upon submerged lands of Coeur d'Alene Lake outside the Reservation ("Total Submerged Lands") of approximately 284,471 acre feet of water. As of 2006, Avista estimates that its storage of water above its Post Falls HED at 2,128 above MSL creates a total storage capacity upon such Total Submerged Lands of approximately 266,692 acre feet of water. Pursuant to the Tribe's retained sovereignty over submerged lands and waters within the Reservation and consistent with Section 4 of Avista's Application for this Water Storage/Use Permit, dated December 16, 2008: (a) Avista and the Tribe shall work cooperatively during the term of this Permit to apply best scientific approaches mutually agreed upon by Avista and the Tribe to make reasonable calculations of the total volume of water stored above Avista's Post Falls dams at 2,126.5 and 2,128 feet above MSL, respectively, as well as the total volume of water stored on submerged lands within the current Reservation boundaries at those elevations; (b) Avista and the Tribe shall each pay their respective costs of these cooperative efforts; (c) pending further cooperative measurement efforts, Avista and the Tribe shall use the mean between their respective existing estimates, or 275,581.5 acre feet, as the best available measurement of storage volume above Avista's Post Falls dams upon the Total Submerged Lands at 2,128 feet above MSL; and (d) these cooperative efforts shall include the preparation of a map or maps clearly identifying, by section, township, and range, the location of water being stored on submerged lands within the Reservation.

In this **Notice of Claim to a Water Right Acquired Under State Law** to store water, Avista has not attempted to differentiate between the volume of water stored on the submerged lands within the Reservation and the volume of water stored on the submerged lands outside the Reservation.

The basis for Avista's Notice of Claim to a Water Right Acquired Under State Law filed herein, to store water in the Reservoir for power production by holding Coeur d'Alene Lake up to an elevation of 2126.5 feet above msl as measured by the USGS gage in Coeur d'Alene, Idaho, includes, without limitation, the following:

1. Avista installed new dams in the three channels in that part of the Spokane River located at Post Falls, Idaho. The dams were completed in 1906 and, on or about July 1, 1907, Avista began storing water in the Reservoir for electrical power production by holding Coeur d'Alene Lake up to an elevation of 2126.5 feet above msl as measured by the USGS gage in Coeur d'Alene, Idaho. Accordingly, Avista's water right claim is established by the diversion and application of water to beneficial use (the generation of electricity). A claim to such a right, with a priority date of July 1, 1907, was previously submitted to the State of Idaho, Department of Water Resources and the claim was published. (See, **Exhibit C-3**) Avista has used this water right since 1907;
2. Avista's water right claim is also predicated on the legal principle that, as a utility company, it has the right to fill completely with water the bed of a natural stream, channel or lake up to the ordinary high water mark for the purpose of producing electric power from water power. (See, Idaho Constitution, Article 15 §3; Idaho Code §§42-105, 42-801, 52-108; and Griffeth v. Utah Power Company, 226 F.2d 661 (9th Cir. 1955); see, also, Gary Appel, et al. v. Washington Water Power, Case No. 24822 in District Court, First Judicial District, State of Idaho, County of Shoshone.) (**Exhibit C-10**) Conclusion of Law No. IX signed on February 27, 1989 by Judge Magnuson in Gary Appel, et al. v. Washington Water Power, supra, which dealt with Coeur d'Alene Lake and its tributaries, states in pertinent part "the law of Idaho grants an electrical utility the right to fill completely with water the bed of a natural stream, channel or lake up to the ordinary high water mark for the purpose of producing electric power from water power.";
3. Avista's water right claim is also predicated upon a grant by the State of Idaho through a settlement agreement and Judgment entered in Templin's Resort and Conference Center, et al. v. Louisiana-Pacific Corporation, et al., Cause No. 66937, in the First Judicial District of the State of Idaho in and for the County of Kootenai. (See, **Exhibits C-11 and C-12**) The Settlement Agreement (**Exhibit C-11**), which was incorporated into a Judgment entered by Judge Magnuson on March 10, 1989, states in pertinent part:
 8. The State of Idaho, through the Board of Land Commissioners pursuant to Title 1, Chapter 38 of the Idaho Code and the rules and regulations adopted pursuant thereto, grants and confirms to The Washington Water Power Company [Avista], a corporation organized under the laws of the Territory and State of Washington which is qualified to do and is doing business in the State of Idaho, an easement for the perpetual right to occupy and use the following described parcel:

that part of the Spokane River lying below the natural or ordinary high water mark under natural conditions lying within the area described in the Post Patent lying west of the west boundary of the east half (E1/2) of the east half (E1/2) of the southwest quarter (SW1/4) of Section 3, Township 50 North, Range 5 West B.M. in Kootenai County, Idaho, (hereinafter called the "Line of Navigation") and east of the west boundary of the area described in the Post Patent, together with water rights and other rights appurtenant thereto

for the purpose of constructing, reconstructing, operating and maintaining the Post Falls Development (including, without limit, dams, powerhouse, turbines and generators, all electrical facilities, reservoir on the Spokane River and waters tributary thereto, which reservoir results from holding the elevation of Lake Coeur d'Alene at and below 2,128 feet above mean sea level as measured by the Lake Coeur d'Alene USGS water gage, and all other equipment and facilities used in connection with the Post Falls Development) in accordance with the laws of the United States and the State of Idaho. Said easement shall remain in effects so long as WWP [Avista] has a valid federal license or right to operate the Post Falls Development. WWP [Avista] may, as a condition of this easement, regulate or restrict public access to the bed of the Spokane River in the area described in the Post Patent lying west of the Line of Navigation as may be needed to protect the public health, safety and welfare. This easement does not limit or otherwise effect WWP's [Avista's] construction, reconstruction, operation or maintenance of its Post Falls Development.

9. The State of Idaho has not and shall not impose any charge or fee with respect to WWP's [Avista's] construction, reconstruction, operation or maintenance of WWP's [Avista's] Post Falls Development as described in this Agreement and as described in the application to the Federal Energy Regulatory Commission (FERC) to amend the license for Project No. 2545 to include the Post Falls Development and as described in the FERC order for Project No. 2545 (See 16 FERC ¶62095). The application

to amend the license included exhibits which were submitted to and/or approved by the FERC.

10. The State of Idaho acknowledges that WWP's [Avista's] construction and operation of its Post Falls Development has improved the navigability and the public's access to, and usage of, the Spokane River, Coeur d'Alene Lake, the Coeur d'Alene River, the St. Joe River, and the St. Maries River and other connected and tributary waters. The State of Idaho acknowledges that this settlement is clearly in the public interest and is consistent with the Public Trust Doctrine as set forth in Kootenai Environment Alliance v. Panhandle Yacht Club, 105 Idaho 622 (1983) and other applicable law.

11. The Land Board acknowledges and shall not object to WWP's [Avista's] right to construct, reconstruct, operate, and maintain the Post Falls Development and all of the structures and facilities associated therewith, **including the right to control the water surface elevation of the Spokane River upstream from the Post Falls Development and to regulate, maintain and control the water surface elevation of Coeur d'Alene Lake at and below 2128 feet above mean sea level as measured by the United States Geological Survey water gage at Coeur d'Alene Lake, which is referenced to the U.S.G.S., B.M., at the SE corner of the former Merriam Building having an original elevation of 2157.404 (datum shown minus 3.05 feet equals NGS).** Such regulation and control of the water surface elevation on Lake Coeur d'Alene affects the water surface elevation of connected and tributary waters, including the Coeur d'Alene River, the St. Joe River, the St. Maries River and other connected and tributary waters. The State of Idaho retains such authority as it may have to review and regulate WWP's [Avista's] activities. [emphasis added]

12. WWP [Avista] shall continue to have the right to construct those facilities within the area described by the Post Patent lying between the west boundary of the Post Patent and the west boundary of the southeast quarter of Section 3, Township 50 North, Range 5 West B.M., as may be necessary or appropriate in connection with the operation of the Post Falls Development considering such factors as public safety, prudent utility operations, and the protection of WWP's [Avista's] property. Such facilities

may include, without limitation, log booms and apparatus for the collection and removal of floating debris, safety lines to prevent members of the public and property from going through the spillgates located at the dams, and other similar facilities. The State of Idaho retains such authority as it may have to review and regulate WWP' [Avista's] activities.

4. Avista's water right claim is also predicated on Idaho Code Section 5-206 which allows an owner of a dam to obtain a nonexclusive prescriptive overflow easement over real property that has been inundated or overflowed by the operation of a dam for at least part of a year for any consecutive five (5) year period. Accordingly, if the ordinary high water mark of Coeur d'Alene Lake is less than 2126.5 feet above msl, Avista has a prescriptive overflow easement to store water on private property to elevation 2126.5 and above.
5. Avista reserves the right to supplement the basis for its **Notice of Claim to a Water Right Acquired Under State Law** filed herein.