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**IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS**

In Re the CSRBA

Case No. 49576

) Subcase Nos. 95-9115, 95-9119 and 95-
) 2067
)
) **UNITED STATES' AND COEUR**
) **D'ALENE TRIBE'S JOINT RESPONSE**
) **TO AVISTA'S MOTION TO STRIKE**
) **EXHIBIT 4 AND EXHIBIT 5**
) **ATTACHED TO THE AFFIDAVIT OF**
) **VANESSA BOYD WILLARD AND**
) **REQUEST FOR THE COURT TO**
) **TAKE JUDICIAL NOTICE OF ITS**
) **FILES IN SUBCASE NOS. 95-9115**
) **AND 95-9119**

The United States of America ("United States") and Coeur d'Alene Tribe ("Tribe") file
this Response to Avista Corporation's ("Avista's") *Motion to Strike Exhibit 4 and Exhibit 5*

Attached to the Affidavit of Vanessa Boyd Willard and Request for the Court to Take Judicial Notice of its files in Subcase Nos. 95-9115 and 95-9119.

BACKGROUND

On September 7, 2023, the United States and the Coeur d'Alene Tribe ("Tribe") filed a *Joint Motion to Participate and For an Order Construing SF5s as Amended Claims/Director's Reports* in Subcase Nos. 95-9115, 95-9119 and 95-2067. The Joint Motion was accompanied by a *Joint Memorandum* in support of the Motion as well as the *Affidavit of Vanessa Boyd Willard* ("Willard Affidavit") (collectively, the "Joint Motion"). Exhibit 4 of the *Willard Affidavit* is a copy of Avista's Notice of Claim form in 95-9115, with a date received of January 29, 2014, exclusive of exhibits and attachments ("Avista's 2014 Claim Form"). Exhibit 5 of the Willard Affidavit is a copy of Avista's Amended Notice of Claim form in 95-9119, stamped received on July 25, 2018, inclusive of all attachments (namely, a map and narrative).

On October 3, 2023, Avista and the State of Idaho ("State") each filed a Response to the United States' and Tribe's Joint Motion ("Avista's Response" and the "State's Response," respectively).

RESPONSE TO AVISTA'S MOTION TO STRIKE

1. **The United States and Tribe do not oppose Avista's request that the Court strike Exhibits 4 and 5 from the Willard Affidavit.**

The United States and Tribe do not oppose Avista's request that the Court strike Exhibits 4 and 5 from the *Willard Affidavit*. Exhibits 4 and 5 are each cited only once in the United States' and Tribe's Joint Motion, and those citations were in error, and pertain to material found in Exhibits 7 and 8 of the *Willard Affidavit*, the Director's Recommendations for 95-9115 and 95-

9119. *See* Joint Motion at 12. Additionally, Avista’s 2014 Claim Forms and 2018 Amended Claim Forms are among the documents in the record in Case Nos. 95-9115 and 95-9119,¹ which the Court may consult and inspect for itself, including in light of the added context provided in Avista’s Motion to Strike. But consulting the record is not the same as requesting the Court to take judicial notice of particular facts as discussed below.

2. The Court should deny Avista’s request that it take judicial notice of the full record before the Court in 95-9115 and 95-9119.

The Court should not take judicial notice lightly, as innocuous as it may sound. The standard for judicial notice is laid out in I.R.E. 201, which authorizes judicial notice of “facts that [are] not subject to reasonable dispute because it (1) is generally known . . . ; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” *See* I.R.E. 201(b). In other words, Avista’s motion is requesting this Court to assume everything in its water rights backfile are “facts that [are] not subject to reasonable dispute.” However, as the briefing in this case has demonstrated, there is significant disagreement by the parties as to the scope and meaning of various documents contained in the backfiles for water right claim nos. 95-9115, 95-9119 and 95-2067. Furthermore, the facts in the backfile are not “generally known” as the rule envisions, nor can they be readily determined

¹ In January 2014, Avista filed Notices of Claim in Subcase Nos. 95-9115 and 95-9119 (“2014 Claims”). In July 2018, Avista filed Amended Notices of claim in Subcase Nos. 95-9115 and 95-9119 (“2018 Amended Claims”). Days after Avista filed its 2018 Amended Claims, IDWR published its Director’s Recommendations for the two claims (“Director’s Recommendations.”). On September 1, 2023, Avista filed SF5s in 95-9115 and 95-9119.

from sources whose accuracy cannot be questioned, making judicial notice of the entire backfile inappropriate in this case.

Moreover, judicial notice of the record in 95-9115 and 95-9119 is not appropriate here because Avista has not met the “specificity burden” associated with the judicial notice doctrine. In particular, Avista has not pointed to any “specific adjudicative facts” within the record in 95-9115 and 95-9119 that it asks the Court to take notice of. *See Bass v. Esslinger*, 525 P.3d 737, 743 (Idaho 2023) (“Similar to *Rome v. State* [431 P.3d 242 (Idaho 2018)], the specificity burden has not been met here. It is not enough to simply claim that documents are relevant; the party requesting judicial notice must articulate the specific adjudicative facts to be taken notice of and reference to an entire case file is not sufficient.”). Avista does not point to any specific facts within “the Court’s files in subcase nos. 95-9115 and 95-9119,” including the claim forms, that it views as adjudicative facts. The Court cannot simply take judicial notice of the entire record in 95-9115 and 95-9119, but only facts within that record that meet the other criteria for judicial notice, including relevance.

Additionally, although none of the documents in the record contemplate the water rights as they are set forth in the SF5s (i.e., the SF5s are an expansion relative to all of the documents in the record in Subcase Nos. 95-9115 and 95-9119), the Court may ultimately need to reach the question of which specific documents in the record it should compare against the SF5 for purposes of determining whether the SF5s expand the water rights (e.g., Avista’s claim forms, the Director’s Recommendations). A determination that all documents in the record are relevant to the application of Rule 4 at this time would be premature.

For these reasons, Avista's request that the Court take judicial notice of the full record in Case Nos. 95-9115 and 95-9119 should be denied.

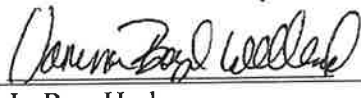
DATED this 6th day of October, 2023.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I certify that original copies of the UNITED STATES' AND COEUR D'ALENE TRIBE'S JOINT RESPONSE TO AVISTA'S MOTION TO STRIKE EXHIBIT 4 AND 5 ATTACHED TO THE AFFIDAVIT OF VANESSA BOYD WILLARD AND REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE OF ITS FILES IN SUBCASE NOS. 95-9115 AND 95-9119 was sent via FedEx this 6th day of October, 2023 to:

Clerk of the District Court
Coeur d'Alene-Spokane River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83303-2707
Fax: 208.736.2121

I certify that true and correct copies of the documents listed above were sent via U.S. Post to the party listed below on this 6th day of October, 2023.

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0010

I certify that true and correct copies of the documents listed above were sent via electronic mail to the parties below on this 6th day of October, 2023.

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Vanessa Boyd Willard

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