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DEPARTMENT OF
WATER RESOURCES

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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 ADDITIONAL**
) **DOCUMENTS REGARDING JOINT**
) **MOTION AND MEMORANDUM IN**
) **SUPPORT OF MOTION TO**
) **PARTICIPATE AND FOR AN ORDER**
) **CONSTRUING SF5S AS AMENDED**
) **CLAIMS/DIRECTOR'S REPORTS**
)
)

On October 12, 2023, the Court entered an Order allowing parties that participated in the October 11th hearing to submit "additional tables showing the elements at issue, and the *Claim*, *Director's Report*, and *SF5* language." Consistent with that Order, and related discussion at the

CERTIFICATE OF SERVICE

I certify that original copies of the UNITED STATES' AND COEUR D'ALENE TRIBE'S **ADDITIONAL DOCUMENTS REGARDING JOINT MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO PARTICIPATE AND FOR AN ORDER CONSTRUING SF5S AS AMENDED CLAIMS/DIRECTOR'S REPORTS** was sent via FedEx this 24th 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 24th 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 will be sent via electronic mail to the parties below on the 25th day of October, 2023.

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Daniel F. McCarl

Period of Use	01/1-12/31 (Storage for electrical power generation)	1/1 – 12/31 (Power Storage) 1/1 – 12/31 (Power from Storage)	05/01 – 04/30 (Power Storage) 09/02 – 04/30 (Power from Storage)	01/01 – 12/31 (Power Storage) 01/1 – 12/31 (Power from Storage)
	“Spring runoff in the Spokane/Coeur d’Alene basin reflects snowpack conditions, active precipitation, and temperature. <u>At this time of year, Post Falls Project is not controlling Coeur d’Alene Lake levels or Spokane River flows. Both lake levels and downstream river flows are controlled by the natural channel restriction below the outlet of Coeur d’Alene Lake. Avista initiates control at Post Falls HED once spring runoff flows recede to a practical level, Coeur d’Alene Lake is below elevation 2,128 ft., and diminished streamflows into Coeur d’Alene Lake are forecasted.”</u> 2014 Claim Form, Exhibit C-7, 4 of 7. (emphasis added).	“Control of the Spokane River is typically exercised in <u>late June or early July as the majority runoff from snowmelt into Lake Coeur d’Alene (‘Lake’)</u> is nearing its end. July 1, 1907 is therefore chosen as the priority date for CSRBA claim nos. 95-4518 and 95-9115 to best represent the moment in time when control of the Spokane River for power generation was achieved.” 2018 Claim Form, Narrative (emphasis added). “Over time, the variations in summer lake levels became less pronounced, and Avista maintained the summer Lake level near 2126.5 msl, after which time Avista would draft water in the Lake to generate power as well as to create capacity for expected winter and spring precipitation and runoff. Near the end of December or the first part of January, Avista operated the Project to freely pass the flow that is capable of passing through	“The period of use for power storage begins each year when the lake elevation stabilizes at or near 2128 feet above MSL following the spring runoff. The 2126.5 feet elevation is maintained until all of the water stored for power purposes under Right No. 95-9119 has been released each fall. The water stored under this right is then released for generating power. Storing water in Coeur d’Alene Lake under this right and Right No. 95-9119 is to maintain the surface elevation of the lake at or near 2128 feet above MSL from the time when the lake elevation stabilizes at or near 2128 feet above MSL after spring runoff until the first Tuesday after Labor Day.” (emphasis added) ⁱⁱⁱ	“Storage of water under this right and Right No. 95-9119 achieves, stabilizes, and maintains the lake elevation at or near 2128 feet as early as practicable each year until the first Tuesday after Labor Day. The water stored under this right is then released for generating power.” (emphasis added)

ENDNOTES

ⁱ In its Response, Avista points to this “if larger” language as supporting the “refill condition” that appears for the first time in the SF5. *See* Avista’s Response at 18 (citing to 2014 Storage Claim, Attachment B at 1, ¶ 4). As explained in the US and Tribe’s Consolidated Reply, the “if larger” provision contemplates that, if Avista’s claimed estimate of the amount of the fixed quantity of water required to raise the Lake (from 2,120.5 to 2,126.5 feet MSL in the case of 95-9115, and from 2,126.5 to 2,128 feet MSL in the case of 95-9119) proved wrong, the fixed quantity claimed would be revised (up or down) to a new fixed quantity to accurately reflect the actual volume of water required given the Lake’s bathymetry. *See* US and Tribe’s Consolidated Reply at 4. While the plain language of the “if larger” provision is clear, this reading of the provision is also supported by other parts of the record. *See, e.g.,* Avista’s 2014 Claim, 95-9115, at Exhibit C-7 at 2 of 7 (“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 feet above MSL creates a total storage capacity upon such Total Submerged Lands of approximately 266,692 acre feet of water. By this application Avista agrees, if acceptable to the Tribe: (a) that Avista shall work cooperatively with the Tribe during the term of this Permit to apply best scientific approaches mutually agreed upon by Avista and the Tribe to make reasonable calculations of total volume of water stored above Avista’s Post Fall 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. . . .”).

ⁱⁱ In its Response, Avista points to this “deemed satisfied” language as supporting the “refill condition” that appears for the first time in the SF5. *See* Avista Response at 18 (quoting 2018 DR). As explained in the US and Tribe’s Consolidated Reply, rather than a “refill condition,” the “deemed satisfied” provision is in fact a “less than one fill” condition - the right is “deemed satisfied” (i.e., Avista can no longer invoke the right to store water) when the target elevation has been achieved following spring runoff. *See* US and Tribe’s Consolidated Reply at 5.

ⁱⁱⁱ The periods of use identified in the 2018 Director’s Recommendation reflect the periods of use as they are described in the exhibits and attachments accompanying the claim forms, which universally describe the period for storage as beginning after spring runoff.

^{iv} Note that this language appears under “Quantity” in the SF5 even though it speaks directly to purpose of use and revises language (in the adjacent column in the table above) from the 2018 DR, which used the phrase “to” rather than “and to,” and which appeared in the purpose of use section. The effect of replacing “to” with “and to” is to make maintaining the Lake at a fixed elevation a purpose of the water right separate and apart from storage for hydropower generation.

Additional Comment. As discussed at the hearing regarding the United States’ and Tribe’s Joint Motion, in addition to the individual elements, the Court should be careful to also consider and account for the combined effect of the multiple changes made in the SF5s (e.g., the new, unlimited “refill condition” is tied to the right’s expanded purpose and period of use to allow for year-round lake level maintenance). Before the SF5s, the Avista storage rights would have allowed for storage beginning in June and July, after spring runoff, as needed to achieve a Lake elevation of 2128 feet MSL, with that water released to generate hydropower after Labor Day, returning the Lake to its natural condition. The rights were for limited storage, for a limited time, to generate hydropower. Now, by virtue of the changes made in the SF5, Avista seeks to use the rights to maintain the Lake elevation at 2128 feet MSL year-round, separate and apart from hydropower generation. None of the documents in the record support this interpretation of 95-9115 and 95-9119.

Period of Use	01/1-12/31 (Storage for electrical power generation) “Spring runoff in the Spokane/Coeur d’Alene basin reflects snowpack conditions, active precipitation, and temperature. <u>At this time of year, Post Falls Project is not controlling Coeur d’Alene Lake levels or Spokane River flows. Both lake levels and downstream river flows are controlled by the natural channel restriction below the outlet of Coeur d’Alene Lake. Avista initiates control at Post Falls HED once spring runoff flows recede to a practical level, Coeur d’Alene Lake is below elevation 2,128 ft., and diminished streamflows into Coeur d’Alene Lake are forecasted.”</u> 2014 Claim Form, Exhibit C-7, 4 of 7. (emphasis added).	1/1 – 12/31 (Power Storage) 1/1 – 12/31 (Power from Storage) “Control of the Spokane River is typically exercised in <u>late June or early July as the majority runoff from snowmelt into Lake Coeur d’Alene (‘Lake’)</u> is nearing its end. July 1, 1907 is therefore chosen as the priority date for CSRBA claim nos. 95-4518 and 95-9115 to <u>best represent the moment in time when control of the Spokane River for power generation was achieved.”</u> 2018 Claim Form, Narrative (emphasis added). “Over time, the variations in summer lake levels became less pronounced, and Avista maintained the summer Lake level near 2126.5 msl, after which time Avista would draft water in the Lake to generate power as well as to create capacity for expected winter and spring precipitation and runoff. Near the end of December or the first part of January, Avista operated the Project to freely pass the flow that is capable of passing through	05/01 – 10/31 (Power Storage) 09/02 – 10/31 (Power from Storage) “The period of use for power storage begins each year when the lake elevation stabilizes at or near 2128 feet above MSL following the spring runoff. The releasing of water from storage under this right begins the first Tuesday after Labor Day of each year. The release of stored water for power generation continues as required until a lake elevation of 2126.5 feet above MSL is achieved. Storing water in Coeur d’Alene Lake under this right and Right No. 95-9115 is to maintain the surface elevation of the lake at or near 2128 feet above MSL from the time when the lake elevation stabilizes at or near 2128 feet above MSL following spring runoff until the first Tuesday after Labor Day.” (emphasis added)ⁱⁱⁱ	01/01 – 12/31 (Power Storage) 01/1 – 12/31 (Power from Storage) “Storage of water under this right and Right No. 95-9115 achieves, stabilizes, and maintains the lake elevation at or near 2128 feet as early as practicable each year until the first Tuesday after Labor Day. The water stored under this right is then released for generating power.” (emphasis added)
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End Notes

ⁱ The quantity of water for the Governor's Right has always been interpreted to allow the State only to prevent others from modifying lake levels, not mandate any elevation. *See*, Joint Memorandum at 10-12; 23 ("the *in situ* right allowed the State to prevent others . . . from causing the Lake to be held above 2128 feet or below 2120.5 feet. So long as lake level is between those two points, the water right as claimed based on the 1927 License is satisfied.").

ⁱⁱ The Purpose of Use element has never included language providing for lake level maintenance. Instead, consistent with the historical interpretation discussed above, the license provided that the purpose of use is "*preservation* of said water in said lake for Scenic Beauty, health, and recreation purposes" A purpose of use for "lake level maintenance," particularly when coupled with the language allowing the State to maintain the "*near* natural condition" of the Lake can easily be misinterpreted to allow the State to demand a particular elevation between 2118 and 2130, which is an expansion of that formerly non-consumptive purpose of use. Joint Consolidated Reply at 8-9 (explaining why the plain language of the SF5 is not consistent with the State's arguments in briefing and why the term "near natural" takes on a new meaning in the SF5 compared to the director's report). *See also*, n. 2, *supra*; Joint Memorandum at 10-12 (explaining the history underlying the purpose of water license no. 16641).

ⁱⁱⁱ A water right with an "aesthetic" purpose is consistent with the original purpose of the license acquired by the State, which was to "preserve" the lake for a variety of non-consumptive purposes. *See*, Joint Memorandum at 22; Joint Consolidated Reply at 9.

^{iv} *See*, n. 2, *supra*, Joint Memorandum at 22-24 (explaining why a purpose of use to "maintain" lake level is an inconsistent expansion from the original "aesthetic" purpose of use recommended by the Director); Joint Consolidated Reply at 8-9 (same).