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RECEIVED

Oct 31, 2023

DEPARTMENT OF
 WATER RESOURCES

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

In Re CSRBA

Case No. 49576

Subcase Nos. 95-2067, 95-9115 & 95-9119

**AVISTA’S RESPONSE TO UNITED
 STATES’ AND COEUR D’ALENE
 TRIBE’S ADDITIONAL DOCUMENTS**

COMES NOW the Avista Corporation (“Avista”), by and through its counsel of record, Chris M. Bromley, McHugh Bromley, PLLC, and hereby responds to the *United States’ and Coeur d’Alene Tribe’s Additional Documents* (October 25, 2023) (“Additional Documents”).

I. INTRODUCTION

On October 25, 2023, Avista filed its *Explanation of Tables Requested by Special Master Bilyeu* in which it set out, in tabular format with a one-page explanation, how Avista filed its claims to subcase nos. 95-9115 and 95-9119 in the Coeur d’Alene-Spokane River Basin Adjudication (“CSRBA”), how those claims were described by the Director of the Idaho Department of Water Resources (“IDWR”) in the *Director’s Report*, and ultimately settled by the actual parties to the above-captioned subcases through SF5s. Avista stands behind its prior filings and will address a few points made by the Coeur d’Alene Tribe (“Tribe”) and United States in the “endnotes” to the *Additional Documents*.

II. ARGUMENT

“Deemed Satisfied”

The United States and Tribe purport that the phrase “deemed satisfied” in the *Director’s Report* “is in fact a ‘less than one fill’ condition.” *Additional Documents, Endnote No. ii* (emphasis added). Avista has never asked for anything more or less than its complete beneficial use, making the idea that Avista has asked for a “less than one fill” baseless conjecture. Moreover, the Quantity element was squarely put at issue by Avista when it filed its timely Objection, with the Tribe and United States failing to respond:

D. I object to the following elements or general provision as recommended in the Director’s Report. (Please check the appropriate box(es)).

3. ☒ **Quantity**
Should be: As claimed, see line E. below.

The failure of the United States and Tribe to respond cannot be used to undermine the SF5s. *State v. US*, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000) hereinafter “*Minidoka Nat’l Wildlife Refuge*”) (failure to respond renders a challenge untimely).

“Period of Use”

The United States and Tribe inaccurately state that the truncated Period of Use described in the *Director’s Report* is based on Avista’s claims. *Additional Documents, Endnote No. iii*. First, Avista clearly claimed a year-round Period of Use, 01/01 – 12/31, as demonstrated in the *Notice of Claim to a Water Rights Acquired Under State Law, Subcase No. 95-9119*:

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE COEUR D'ALENE-SPOKANE RIVER
BASIN WATER SYSTEM

CIVIL CASE NUMBER: 49576

Ident. Number 95-9119

Date Received: 1-29-2014

Receipt No: CO98250

Received By: CS

Claim amount: \$50.00

NOTICE OF CLAIM
TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

Please type or print clearly

1. Name of Claimant(s) Avista Corporation (f/k/a The Washington Water Power Company) Phone (509) 489-0500

6. Water is claimed for the following purposes:

	(both dates are inclusive MM-DD)	(cfs)	(acre feet)
For <u>Storage for electrical power generation</u> purposes from <u>01/01</u> to <u>12/31</u> amount _____ or <u>60,600 af*</u>			
For _____ purposes from _____ to _____ amount _____ or _____			
For _____ purposes from _____ to _____ amount _____ or _____			

See also Notice of Claim to a Water Rights Acquired Under State Law, Subcase No. 95-9115.

Second, Avista filed a timely objection to the Period of Use element, making it abundantly clear that Period of Use was at issue:

D. I object to the following elements or general provision as recommended in the Director's Report. (Please check the appropriate box(es)).

8. ☒ **Period of Year**
Should be: As claimed, 1/1 - 12/31. See line E, below.

Given the claim and objection, it is disingenuous for the United States and Tribe to argue that a Period of Use for something other than year-round was contemplated, could have been expected, and a response should have been timely filed in order to participate. *Minidoka Nat'l Wildlife Refuge.*

"Additional Comment"

The United States and Tribe contend the SF5s allows for "new, unlimited 'refill' [and] Avista seeks to use the rights to maintain the Lake elevation at 2128 feet MSL year-round, separate and apart from hydropower generators. None of the documents in the record support

this interpretation of 95-9115 and 95-9119.” *Additional Documents, Additional Comment*. To be clear, Avista has never asked for an unlimited water right to maintain a year-round elevation of 2128’ and the SF5s do not support the assertion.

As explained in the SF5s, the refill – which is fully subordinated and based on the claims and *Director’s Report* – is limited to the volume necessary to achieve and maintain 2128’ for purposes of generating power during a certain time of year:

QUANTITY:

The quantity identified is to achieve a water surface elevation of at or near 2128 feet and to generate power from storage. A volume of water in addition to the volume described above may be stored in a single year if the additional volume is necessary for the purpose of stabilizing and maintaining the elevation of Coeur d’Alene Lake at or near 2128 feet.

....

PURPOSE AND PERIOD OF USE:

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.

The above language ensures that Avista can only maintain the elevation of the Lake “at or near 2128” from a date in the late spring/early summer (“as early as practicable”) to the first Tuesday after Labor Day; meaning Avista cannot maintain an elevation of 2128’ any other time of the year. The use of 1/1 – 12/31 as the Period of Use ensures that when hydrologic conditions happen during those other times of the year – rain, Chinook winds, and rain-on-snow events are not atypical in the Inland Northwest – then when the Lake elevation rises and water is stored, but 2128’ is not maintained through operations at Post Falls Dam, Avista will remain in compliance with its water rights.

III. CONCLUSION

In conclusion, the Tribe's and United States' attempt to become party to the above-captioned subcases should be denied for lack of standing, as untimely, and for the reason that the SF5s have not expanded the subcases. Lastly, the Court should note that the SF5s were not drafted at the whim of the parties; rather, they were formulated in conjunction with IDWR, as indicated in the signature pages. IDWR is the Court's technical expert, understands AO1, understands the concept of expansion, agreed with the SF5s, and said concurrence should be afforded weight by the Court when assessing the accusations made by the United States and Tribe.

DATED this 31st day of October, 2023.

MCHUGH BROMLEY, PLLC



Chris M. Bromley
Attorneys for Avista Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2023, I served a true and correct copy of the foregoing document was served as indicated:

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