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DEPARTMENT OF
WATER RESOURCES

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**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

Consolidated Subcase No. 91-7755

**AVISTA'S RESPONSE IN OPPOSITION
TO UNITED STATES' MOTION TO
AMEND CLAIM NO. 95-16704**

COMES NOW the Avista Corporation ("Avista"), by and through its attorneys of record, McHugh Bromley PLLC, and hereby submits this response to the United States' December 14, 2023 *Motion to Amend Claims* as to claim no. 95-16704 (hereinafter "Amended Lake Claim"), joined by the Coeur d'Alene Tribe ("Tribe") on December 15, 2023 (collectively the "Motion"). The Amended Lake Claim, which seeks monthly elevations in Coeur d'Alene Lake, among other things, was previously denied by this Court in 2017, as affirmed by the Idaho Supreme Court in 2019. As will be explained, and based on the law of the case doctrine, the motion to amend claim no. 95-16704 cannot be granted.

I. INTRODUCTION

The original Lake Claim, no. 95-16707, was filed by the United States, as trustee on behalf of the Tribe, on January 31, 2014, then abstracted by the Idaho Department of Water

Resources with the Court on March 26, 2014 (“Original Lake Claim”). The Original Lake Claim sought monthly lake elevations at the USGS Coeur d’Alene Lake Gage near Tubbs Hill, Coeur d’Alene, Idaho (“Lake Gage”), with outflow rates at the USGS Post Falls Gage below Avista’s Post Falls Dam (“Post Falls Gage”), for a multitude of purposes of use with a time immemorial priority date.

On November 13, 2014, and in response to the Objection filed by the State of Idaho as to the Original Lake Claim, Avista filed a *Standard Form 2 Response to Objection* (“Avista Response”), making it a party to the subcase:

Avista is particularly concerned with any claim that may affect its ability to store water in a reservoir composed of the St. Joe, St. Maries, Coeur d’Alene and Spokane Rivers, Coeur d’Alene Lake and all connected and tributary waters (“Reservoir”) for use in generation of hydroelectric power at Post Falls Hydroelectric Development, Project No. 2545, as licensed by the Federal Energy Regulatory Commission (“FERC”) under the Federal Power Act.

Avista Response at 2.

During the entitlement phase of the litigation, the Original Lake Claim was expressly denied by the Court: “The United States seeks a federal reserved water right for sufficient flow of water into and out of Lake Coeur d’Alene to maintain lake levels at certain elevations. The Objectors protest this claim, and the Court finds it must be disallowed as a matter of law.” *Order on Motions for Summary Judgment* at 19 (May 3, 2017) (“MSJ Order”).

The Court’s decision was affirmed by the Idaho Supreme Court: “In 1871, the Tribe conveyed the mouth of the Lake to [Frederick] Post for the purpose of harnessing ‘water-power.’ Having conveyed this property and the ability to harness the ‘water-power,’ the Tribe conveyed any interest it may have had in maintaining the Lake’s level. Therefore, the lake level maintenance claim was correctly denied by the district court, as the formative circumstances do

not demonstrate that use was intended.” *In re CSRBA Subcase No. 91-7755*, 165 Idaho 517, 545, 448 P.3d 322, 350 (2019).

Because the Original Lake Claim was denied, and based on the law of the case doctrine, the *Motion* must fail because the Original Lake Claim cannot be amended.

II. ARGUMENT

The United States and Tribe move the Court to allow amendment of the Original Lake Claim for “good cause” based on Idaho Code § 42-1409A(3) and because “justice so requires” based on AO1 4(d)(2)(d). *Motion* at 4. AO1 incorporates the Idaho Civil Rules of Procedure. AO1 1(a). The “justice so requires” standard in AO1 is further incorporated into IRCP 15(a)(2). The decision to grant or deny an amendment to the pleadings is reviewed for an abuse of discretion. *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 753, 331 P.3d 491, 495 (2014). A proposed amendment which would not entitle the movant to the relief claimed is properly denied. *Payette Farms Co. v. Conter*, 103 Idaho 148, 150, 645 P.2d 888, 890 (1982); *Bissett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1297 (Ct. App. 1986).

The Law of the Case Doctrine Prevents Amendment of the Original Lake Claim

The “law of the case doctrine is well established in Idaho.” *Berrett v. Clark Cnty. Sch. Dist. No. 161*, 165 Idaho 913, 921, 454 P.3d 555, 563 (2019). The doctrine requires:

[T]hat when an appellate court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. The underlying purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single, continuing lawsuit. In application, the doctrine functions like the doctrine of stare decisis.

Id. (internal citations omitted).

Under the law of the case doctrine, an issue that could have been, but was not, presented in a previous appeal, “is waived and will not be considered by an appellate court upon a second appeal in the same action.” *Dopp v. Idaho Comm'n of Pardons & Parole*, 144 Idaho 402, 407 fn. 3, 162 P.3d 781, 786 fn. 3 (Ct. App. 2007).

Here, the Original Lake Claim was filed in 2014 and put at issue through the Objection filed by the State of Idaho, among others, and the Avista Response. At trial in the entitlement phase, the Court denied the Lake Claim, *MSJ Order* at 19, as affirmed by the Supreme Court, *In re CSRBA* at 545, 448 P.3d at 350. The Original Lake Claim was therefore denied and the law of the case doctrine prevents its amendment.

In an attempt to avoid the preclusive effect of the law of the case doctrine, the United States argues:

Good cause exists to amend Claim No. 95-16704 to conform to the District Court and Idaho Supreme Court holdings. First, the Purpose of Use, Sec. 6, and the Quantity Reserved, Sec. 8, must be amended to conform to provide only for fishing, hunting, gathering, and cultural purposes. *See id.* at 349-50. Second the Quantity Reserved must be amended to remove the off-reservation outflow component of the claim. Finally, the Quantity Reserved must also be amended to include data collected since 2014, including the inflow data that will replace the outflow data as described below.

The amended claim uses interrelated methods of measurement: 1) Lake elevation; 2) Inflows; and 3) Volume. Because the Lake is generally managed by monitoring elevations, this measure provides a well-known means for administering the water right as it relates to the quantity of water necessary to fulfill the hunting, gathering, fishing, and cultural purposes of the Reservation. The United States recognizes that the Court denied “lake level maintenance” as a purpose for a water right. The United States is not asserting “lake level maintenance” as a *purpose* of the right. Rather, the claim uses lake elevation as one *measure* of the quantity of water necessary to meet the fishing, hunting, gathering, and cultural purposes of the Reservation. *See e.g.*, Case Nos. 95-2067, 95-9115, 95-9119 (all using Lake level elevation as a measure to achieve other water right purposes). The United States also claims the monthly inflows and volumes necessary [to] accomplish these same purposes.

US Memo ISO Motion at 17 (*italics in original*).

All asserted bases for amendment – (1) Lake elevation, (2) inflows, (3) volume, and (4) purpose of use – were either raised before or could have been raised and are now prevented by the law of the case doctrine.

First, Lake elevations were expressly made part of the Original Lake Claim and have been further incorporated into the Amended Lake Claim with only slight variations and using the Lake Gage, the same USGS gaging station that was used before:

Month	Original Lake Claim Elevation, Line 8 (local datum of 2100 feet plus gage height as measured by the USGS, site no. 1241550)	Amended Lake Claim Elevation, Line 8 (local datum of 2100 feet plus gage height as measured by the USGS, site no. 1241550)
January	2124.2	2124.6
February	2124.7	2124.9
March	2125.8	2126.0
April	2128.5	2129.4
May	2129.6	2129.6
June	2127.2	2128.4
July	2122.8	2123.6
August	2120.9	2121.1
September	2120.4	2120.5
October	2120.6	2120.9
November	2121.9	2122.7
December	2123.6	2124.6

The elevations at the Lake Gage have been available to all parties since the commencement of the CSRBA. Indeed, the United States correctly informs the Court that Lake

elevations from the Lake Gage are referenced in Avista's storage claim nos. 95-9115 and 95-9119. *US Memo ISO Motion* at 17. Therefore, the data has been available, understood, and cannot now be slightly adjusted by tenths of a foot to support elevations that were previously denied.

Second, the Original Lake Claim asked for outflow rates in cfs that were measured at the Post Falls Gage, *Original Lake Claim Line 8*, which were denied, and in its place the Amended Lake Claim substitutes inflow rates, also in cfs, *Amended Lake Claim, Line 8*. Both the original and amended Lake claims assert that they "do not seek to affect present licensed operations at Post Falls," but are instead filed to "address the possibility that the dam will be removed or altered." *Original Lake Claim, Line 10.a; Amended Lake Claim, Line 10.b*. Because both claims address dam removal or alteration, substituting inflows for outflows is a distinction without a difference, as basic hydrology dictates that water that enters the Lake must also leave. Indeed, the Court understood this simple concept when it held: "The United States seeks a federal reserved water right for sufficient flow of water into and out of Lake Coeur d'Alene to maintain lake levels at certain elevations. The Objectors protest this claim, and the Court finds it must be disallowed as a matter of law." *MSJ Order* at 19 (emphasis added).

Third, the Amended Lake Claim incorporates volumes, whereas the Original Lake Claim did not; however, volumes in the Lake have been available to the United States and Tribe since at least as early as 2009 when the Federal Energy Regulatory Commission relicensed Post Falls Dam to Avista; therefore, volumes were understood well before the Original Lake Claim was filed and cannot now be included due to waiver. *See* Dylan R. Hedden-Nicely, *The Coeur d'Alene Tribe's Claims in the Coeur d'Alene-Spokane River Basin Adjudication*, 51 fn. 42, THE

ADVOCATE, Vol. 57, No. 10 (Oct. 2014) (“The volume available between 2120 and 2128 feet is estimated to be approximately 275,000 acre-feet,⁴² which would be available for other uses.”).¹

Fourth, purposes of use that were claimed in the Original Lake Claim and Amended Lake Claim are as follows:

Original Lake Claim	Amended Lake Claim
Present and future uses, including but not limited to: <u>food</u> ; <u>fiber</u> ; transportation; recreation; religious, <u>cultural</u> , and ceremonial; <u>fish and wildlife habitat</u> ; lake level and wetland maintenance; water storage, power generation; and aesthetics – as a component of a water right necessary to fulfill the homeland purpose of the Coeur d’Alene Reservation pursuant to the documents references in Section 9 and provisions in Section 10, <i>infra</i> .	To provide <u>fish, wildlife, and plant habitat for fishing, hunting, gathering, and cultural uses</u> of the Tribe – as a component of a water right necessary to fulfill the homeland purpose of the Coeur d’Alene Reservation pursuant to the documents referenced in Section 9 and the provisions in Section 10, <i>infra</i> .

Original Lake Claim Line 6; Amended Lake Claim Line 6 (emphasis added).

Other than narrowing the purposes of use from the Original Lake Claim to the Amended Lake Claim, there is little difference between the purposes of use. Both this Court and the Supreme Court denied the Lake Claim for the myriad purposes of use that were claimed:

The district court denied the Tribe’s claim to maintain the level of the Coeur d’Alene Lake (the Lake) at a certain elevation based on a lake level maintenance claim. This determination was correct given the formation of the Reservation. Although Congress may have intended for the Tribe to use the Lake for those purposes listed above (indeed, *Idaho II* listed numerous uses of the Lake), it is difficult to conclude that the inclusion of a minority fraction of the entire Lake[] within the Reservation evidenced Congress’s intent to establish the Tribe as to entity empowered to control the overall level of the Lake.

In re CSRBA at 545, 448 P.3d at 350 (emphasis added).

¹ The Advocate is available here: <https://turtletalk.files.wordpress.com/2014/10/adv14oct.pdf> (last visited 1/16/2024).

Therefore, the purposes of use in the Amended Lake Claim were at issue before this Court and the Supreme Court, both of which denied the Original Lake Claim, meaning it cannot now be amended.

III. CONCLUSION

Based on the foregoing, the *Motion* should be denied because the law of the case doctrine prevents amendment of the Original Lake Claim, as it was disallowed by this Court on summary judgment in 2017, as affirmed by the Idaho Supreme Court in 2019.

DATED this 17th day of January, 2024.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2024, I served a true and correct copy of the foregoing document was served United States Mail, facsimile, and electronic mail, as indicated:

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