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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 MOTION FOR
 CLARIFICATION**

COMES NOW the Avista Corporation (“Avista”), by and through its counsel of record, Chris M. Bromley, McHugh Bromley, PLLC, and hereby moves the Court, pursuant to Idaho Rule of Civil Procedure 7(b), to clarify its January 30, 2024 *Order on Standard Form 5s* (“Order on SF5s”) regarding what appears to have been an inadvertent omission to rule on whether the Standard Form 5s (“SF5s”) in subcase nos. 95-9115 and 95-9119 (“Storage Claims”) correctly added Coeur d’Alene Lake (“Lake”) to the Source element.

FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2014, Avista filed the Storage Claims with the Idaho Department of Water Resources (“IDWR”) for storage of water in the Lake to maintain the elevation of the Lake at 2126.5’ and 2128’ above sea level for purposes of generating hydroelectricity. Line 3 of the Storage Claims listed the Source as the Spokane River (“River”), Lake, and connected tributaries:

3. Source of water supply (Check one) Ground Water () or Other (X) Those portions of the 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 under State law can be acquired.

IWTRS, Storage Claims, Line 3; Avista Response to Joint Motion and Memo at 17; see also Avista's Explanation of Tables Requested by Special Master Bilyeu (Oct. 25, 2023).

Neither the United States nor the Coeur d'Alene Tribe ("Tribe") filed objections to the Storage Claims and did not attempt to take part in the above-captioned subcases until September 7, 2023: "The U.S. and Tribe did not participate in the subcases for over four years after the Objection and Response deadlines." *Order on SF5s* at 4.

On August 1, 2018, IDWR issued its *Director's Report* for the Storage Claims in which the Source was described as the River:

SOURCE:

SPokane River

TRIBUTARY: COLUMBIA RIVER

IWTRS, Storage Claims Director's Report; Avista Response to Joint Motion and Memo at 17; see also Avista's Explanation of Tables Requested by Special Master Bilyeu (Oct. 25, 2023).

On September 1, 2023, Avista, along with parties to the above-captioned subcases entered into SF5s, as concurred with by IDWR, to resolve the Storage Claims. Pertinent to the instant Motion, the SF5s included both the Lake and the River as the Source:

SOURCE:

COEUR D'ALENE LAKE

TRIBUTARY: SPOKANE RIVER

SPokane River

TRIBUTARY: COLUMBIA RIVER

SF5s; Avista Response to Joint Motion and Memo at 18; see also Avista's Explanation of Tables Requested by Special Master Bilyeu (Oct. 25, 2023).

On September 7, 2023, the United States and the Tribe filed pleadings opposing the SF5s, arguing the Source was impermissibly incorporated.

After responsive pleadings were filed, the Court took the matter under advisement and issued its *Order on SF5s* in which it stated that certain language in the "Refill Component,"

Order on SF5s at 4,¹ and the Purpose of Use element, *id.* at 6,² expanded the Storage Claims, yet the Storage Claims were not expanded as to Period of Use, *id.* at 7. When addressing that the Period of Use element was not an expansion, the Court included the Source element in the same subject heading, with the *Order on SF5s* then not addressing whether the addition of the Lake constituted an expansion. *Id.* at 7 (the subject heading reads: “**D. Period of Use & Source**”) (bold in original).

ARGUMENT

The *Order on SF5s* listed Source in the same subject heading as Period of Use. In the subject heading addressing Period of Use and Source, the Court stated: “The test for whether a Standard Form 5 is an expansion is whether it goes beyond what was in the Claim or Director’s Report.” *Id.* at 8 (emphasis added). In determining that there was not an expansion to the Period of Use element, the Court stated: “[B]oth the Period of Use in the *Claims* and the Period of Use in the *SF5s* cover every day of the year. . . . Thus, there has been no expansion of the Period of Use.” *Id.* (emphasis added).

Applying the same “test” to the Source element, the Lake was listed as a Source in both the Storage Claims and the *SF5s*:

3. Source of water supply (Check one) Ground Water () or Other (X) Those portions of the 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 under State law can be acquired.

IWTRS, Storage Claims, Line 3; Avista Response to Joint Motion and Memo at 17; see also Avista’s Explanation of Tables Requested by Special Master Bilyeu (Oct. 25, 2023).

¹ The Court held “the language in the *Claims* apparently refers to a one-time adjustment of the total quantity within the parameters stated to reach the elevation of 2128 feet.” *Order on SF5s* at 6.

² The Court held that if the word “and” was omitted from the Purpose of Use element there would not be an expansion: “The addition of the conjunction and to changes this element by adding a purpose of use that would be independent of power generation. If the language change was inadvertent, the parties could remove the word and. If the language change was intentional, adding an independent purpose of use expands the Purpose of Use and requires Docket Sheet notice.” *Order on SF5s* at 7 (emphasis in original).

SOURCE: COEUR D'ALENE LAKE
SPOKANE RIVER

TRIBUTARY: SPOKANE RIVER
TRIBUTARY: COLUMBIA RIVER

SF5s; Avista Response to Joint Motion and Memo at 18; see also Avista's Explanation of Tables Requested by Special Master Bilyeu (Oct. 25, 2023).

Consistent with the record and the analysis of the Period of Use element, the inclusion of the Lake in the SF5s should not constitute an expansion because it was part of the Storage Claims.

CONCLUSION

Based on the foregoing, Avista respectfully moves the Court clarify its *Order on SF5s* to explain if the Lake, which was claimed, was correctly incorporated into the SF5s for subcase nos. 95-9115 and 95-9119.

DATED this 12th day of February, 2024.

MCHUGH BROMLEY, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2024, I served a true and correct copy of the foregoing document was filed by facsimile and served by United States Mail electronic mail as indicated:

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