

AGREEMENT CONCERNING RECREATIONAL SITES ON U.S. BUREAU OF LAND
MANAGEMENT (BLM) LANDS WITHIN OR ADJACENT TO THE POST FALLS
HYDROELECTRIC PROJECT, FERC NO. 12606

This Agreement concerning public recreation, land use and aesthetic resources, and specific recreational sites on lands administered by the U.S. Bureau of Land Management ("BLM") within or adjacent to the Post Falls Hydroelectric Project, FERC No. 12606, is made by BLM and Avista Corporation ("Avista") who are referred to collectively as "the Parties."

RECITALS

A. The existing Post Falls Hydroelectric Project ("Project") currently operates under a license issued by the Federal Energy Regulatory Commission ("Commission" or "FERC") on August 17, 1972, for the Spokane River Hydroelectric Project, FERC No. 2545 ("SR Project"), which expires on August 1, 2007. In April 2002, Avista requested the Commission to approve its use of the alternative licensing process (ALP) for relicensing the SR Project, and on June 14, 2002, the Commission issued its approval. The ALP is intended to facilitate participation and improve communication among interested parties and avoid unnecessary conflict. The BLM is participating in the ALP process and, as part of the process, collaborated with the various Recreation, Land Use, and Aesthetics Work Group ("RLUAWG") stakeholders and Avista to resolve issues pertaining to recreation, land use, and aesthetic resources at the Project. The Project includes the Post Falls development, which is located in Idaho and controls the top 7.5 feet of Coeur d'Alene Lake during the summer season. Public recreational sites on lands managed by the BLM provide public access to Project lands and waters. *See* Preliminary Draft Environmental Assessment ("PDEA") at 5-223.

B. The PDEA for Project relicensing notes that, at the recommendation of the land managers (including BLM, the U.S. Forest Service ("USFS"), Idaho and Washington agencies, and local cities and towns) and other stakeholders through the RLUAWG, Avista has included specific Recreation, Land Use, and Aesthetic Resource Measures in the Proposed Action. *See* PDEA at 5-233 to 5-239, 5-241 to 5-242, and 5-244 to 5-249 for recreation resources, and at 5-259 to 260 for public outreach. Under protection, mitigation and enhancement measures PF-REC-1, PF-REC-2, and PF-REC-4, *see* PDEA at B-61 to 76, Avista proposes to work with the various local, state and federal land and recreation managers to provide a variety of Project-related recreation, land use and aesthetic resource measures that will benefit the resource and significantly enhance public recreation opportunities associated with the Project.

C. The PDEA for Project relicensing notes that, at the recommendation of the above-referenced land managers and the RLUAWG, Avista has included specific Recreation Resource Measures in the Proposed Action. *See* PDEA at 5-237 to 5-238 and B-67. Under protection, mitigation and enhancement measure PF-REC-2, concerning recreational facilities at Coeur d'Alene Lake, Avista would contribute funds to and collaborate in the planning and design with BLM to develop or enhance water-based recreational facilities on Coeur d'Alene Lake and its tributaries. The goal of this measure is to provide reasonable public access to Project lands and waters. The measure would allow the BLM to improve existing access sites and increase

recreational opportunities by adding new facilities, as needed. Specifically, PF-REC-2 provides as follows concerning BLM-administered lands:

Cost-share facility improvements on U.S. Bureau of Land Management (BLM) recreation lands adjacent to or in the Project boundary. Enter into a separate agreement with BLM to supplement their related operation and maintenance costs.

More specifically, the Proposed Action provides that:

Avista will cooperate with the BLM to develop or enhance water-based recreational facilities on Coeur d'Alene Lake and its tributaries. Avista shall collaborate in the planning and design and provide funding in an amount not to exceed \$200,000 for project development (approximately 25 percent of the total project cost per the RLUAWG). Avista shall also enter into a separate agreement with the BLM to provide \$33,000 annually to supplement its costs for operation and maintenance.

D. The PDEA (see page 5-235) notes that Avista, the RLUAWG, and the land managers believe that Avista's Proposed Action to fund a portion of the capital and operation and maintenance costs recognizes the nexus between Project-related operations and that portion of the recreation sites that is within or provides access to the Project.

E. Section 4(e) of the Federal Power Act ("FPA"), 16 U.S.C. § 797(e), provides the Secretary of the Interior authority to impose conditions on licenses issued by FERC for hydropower projects located on "reservations" under the Secretary's supervision. Section 4(e) provides that licenses "shall be subject to and contain such conditions as the Secretary ... shall deem necessary for the adequate protection and utilization of such reservations." As part of the relicensing process, BLM has indicated that it manages lands within the Project boundary and that those lands constitute a "reservation". Avista has noted uncertainty regarding whether such lands are owned by the federal government (see below) and whether such lands constitute a "reservation".

F. By letter of December 21, 2005, FERC requested that Avista provide certain information to help FERC fully understand the land ownership within the Project's boundaries. FERC noted that Avista had stated "there is uncertainty regarding the status of federal ownership within the Post Falls HED project boundary" and FERC asked Avista to elaborate on this matter after consultation with the BLM and USFS. In response, Avista advised FERC that the uncertainty is tied to land ownership on Coeur D'Alene Lake. *See March 21, 2006 letter from Avista to FERC at 14*. The location of the Ordinary High Water Mark and its relationship to land ownership has been raised in litigation. *See Erickson v State of Idaho*, 970 P.2d 1 (1998).

G. Because Avista has followed the recommendation of the BLM and other interested parties by including PF-REC-2 in the Proposed Action, BLM does not find it necessary to separately seek to impose a section 4(e) condition containing the terms of PF-REC-2. The Parties recognize, however, that it is up to FERC to determine whether it is in the public interest

to incorporate PF-REC-2 into a new license. While the Parties intend for and will request that FERC include PF-REC-2, or a substantially similar provision acceptable to the BLM, in any new license issued for the Project, this Agreement also seeks to address the potential situation in which FERC does not include PF-REC-2, or a substantially similar provision acceptable to the BLM, in a new license for the Project.

H. Avista and BLM concur that public recreational sites that are within or adjacent to the Project boundary provide public access to Project lands and waters and that it is desirable for Avista to enhance opportunities for recreationists and mitigate the demand on public fiscal resources through agreeing to cost-share facility improvements for recreational sites on BLM-administered lands adjacent to or within the Project boundary. BLM lands and/or resources are directly affected by PF-REC-1 and PF-REC-4, and BLM fully supports them as currently written.

NOW, THEREFORE, the Parties agree as follows:

1. If a new license for the Project does not include the provisions below or substantially similar provisions acceptable to BLM, Avista agrees to enter into a separate cost-share Agreement with BLM pursuant to 43 U.S.C. 1737 within 120 days of the issuance of the license that includes the following provisions:

A. Avista shall collaborate in the planning and design of project development on BLM lands to be determined by BLM, and shall pay 25% of the construction cost of such development, not to exceed \$200,000.00. This financial commitment toward project development shall expire ten years after the issuance of the new project license.

B. Avista shall provide \$33,000 annually to BLM for the term of the new license to use toward BLM's costs for operation and maintenance of recreation facilities within or adjacent to the Project boundary, with the first such annual payment to be made within one year from the issuance date of the new FERC license; provided, however, that until the recreation development referenced above (1.A.) is completed, the annual payment shall only be \$28,000. The sums in A and B above are stated in 2007 dollars and shall be adjusted yearly in accordance with the Consumer Price Index for all Urban Consumers (US City Averages, All Items, Not Seasonally Adjusted).

2. In consideration for Avista's commitment in this Agreement to cost-sharing regarding recreational development, whether through the relicensing process or separate cost-share agreement, BLM shall not seek to have the Secretary impose a FPA Section 4(e) condition concerning the subject of PF-REC-2. In the event BLM or the Secretary does submit to FERC any preliminary or modified FPA Section 4(e) condition pertaining to lands managed by BLM within the Project boundary concerning the subject of PF-REC-2, this Agreement shall terminate automatically.

3. The Parties agree that PF-REC-2 and this Agreement are in the public interest. The contribution of money and services by Avista will assist with management and protection of public lands providing recreational access to the Project. The Parties recognize that the above will serve the public's recreational needs while avoiding potentially expensive and time-

consuming administrative processes and litigation. The Parties agree to the above in consideration of the certainty that this Agreement provides and the avoidance of potential costs and delays.

4. This Agreement establishes no principle or precedent with regard to any issue in any other pending or future licensing proceeding. By entering into this Agreement, no Party shall be deemed to have made any admission or waived any contention of law or fact.

5. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement and shall not authorize any non-party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations, and responsibilities of the Parties with respect to third parties shall remain as imposed under applicable law. Nothing in this Agreement shall require the obligation of federal funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1519. This Agreement shall apply to and be binding on the Parties and their successors and assigns. This Agreement may be amended through the mutual written agreement of Avista and BLM.

In witness whereof the Parties hereto execute this Agreement as of the last date set forth below:



License Manager, Avista Corp.
Director Environmental Affairs

Date: 6/29/06



Coeur d'Alene District Manager
USDI, Bureau of Land Management

Date: 6/23/06

COST SHARE AGREEMENT

The Parties to this Cost Share Agreement ("Agreement") are **Avista Corporation** ("Avista") and the **U.S. Bureau of Land Management (the "BLM")** who are also referred to separately as a "Party", or collectively as "Parties".

WHEREAS, FERC issued a new 50-year license dated June 18, 2009 ("License") for the Spokane River Project FERC No. 2545-091 ("Project"). The Project is comprised of the Post Falls, Upper Falls, Monroe Street, Nine Mile and Long Lake Hydroelectric Developments. The Post Falls Hydroelectric Development ("HED") includes Coeur d'Alene Lake, the Upper Spokane River and portions of the Coeur d'Alene, St. Joe and St. Maries Rivers in Idaho.

WHEREAS, Avista and the BLM executed an "Agreement Concerning Recreational Sites on U.S. Bureau of Land Management (BLM) Lands Within or Adjacent to the Post Falls Hydroelectric Project, FERC No. 12606" dated June 26, 2006 (the "Recreational Agreement"), concerning public recreation, land use, aesthetic resources and specific recreational sites and lands administered by the BLM;

WHEREAS, the Post Falls HED is no longer referred to separately as FERC Project No. 12606, but is instead included in the License for the Spokane River Project FERC No. 2545-091;

WHEREAS, under the terms of the Recreation Agreement, the BLM and Avista intend to provide reasonable public access to the Post Falls HED's lands and waters. Additionally, the Recreational Agreement allows the BLM to improve existing access sites and increase recreational opportunities by adding or improving facilities through certain cost share measures between the BLM and Avista which are detailed in this Agreement;

NOW THEREFORE, in consideration of the covenants herein, the parties agree as follows:

1. Scope of Agreement

- 1.1 Avista shall consult, collaborate and work with the BLM in the planning and design of certain BLM owned water-based public recreational sites on Coeur d'Alene Lake and its tributaries located in or adjacent to the Project, as determined by the BLM that enhance or improve access to recreation sites and that are administered by the BLM ("BLM Access Sites"). Avista shall also pay the BLM twenty five percent (25%) of the actual and documented construction cost, not to exceed a total of \$200,000, for a new BLM recreation site on Coeur d'Alene Lake. This financial commitment shall expire on June 18, 2019.
- 1.2 In addition, Avista shall pay to the BLM \$28,000 annually to supplement BLM's operations and maintenance costs related to BLM Access Sites. Upon completion of the new BLM recreation facility on Coeur d'Alene Lake, Avista's annual operations and maintenance contribution shall increase to \$33,000 annually for the remainder of the Term of this Agreement (as defined in Section 2, below). The annual operations and maintenance payments shall be made on or before the first (1st) day of January for each calendar year during the Term of this Agreement. All dollars are stated in 2007 U.S. dollars and shall be adjusted annually, on the anniversary date of this Agreement in accordance with the Consumer Price Index for all Urban Consumers (US City Averages, All Items, not Seasonally Adjusted).
- 1.3 Throughout the term of the License, the BLM shall not seek to have the Secretary of the Interior impose any Federal Power Act ("FPA") Section 4(e) condition concerning the subject of the PDEA, as further defined in the Recreational Agreement. In the event that the BLM or the Secretary of the Interior does submit to FERC any preliminary or modified FPA Section 4(e) condition pertaining to lands managed by the BLM within or adjacent to the Project boundary concerning the subject of PF-REC-2, this Agreement shall terminate immediately and automatically. In that event, Avista's obligation to pay any additional fees (construction, operations or maintenance) and provide additional services shall immediately terminate and no further payment of any kind shall be required by Avista.

2. Term and Termination

- 2.1 This Agreement shall be effective as of the date it is fully executed by both Parties and continue until the earlier of the termination or expiration of the License dated June 18, 2009 or as provided in Section 1.3 ("Term").
- 2.2 Upon termination of this Agreement, Avista's obligation to pay construction and annual operations and maintenance fees shall cease.

3. **Limitations**

- 3.1 The BLM assumes the entire risk, including quality, performance, scheduling and usefulness of construction, operations and maintenance related to all BLM Access Sites and the new BLM recreation site on Coeur d'Alene Lake for which Avista funds will be expended. NEITHER PARTY SHALL BE LIABLE FOR SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, INDIRECT OR CONSEQUENTIAL DAMAGES, WHETHER BASED ON CONTRACT, TORT OR OTHERWISE, RESULTING FROM EITHER PARTY'S PERFORMANCE OR NON-PERFORMANCE OF AN OBLIGATION IMPOSED ON IT BY THIS AGREEMENT, WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY. AVISTA'S TOTAL LIABILITY FOR ANY DAMAGE RELATED TO THIS AGREEMENT SHALL NOT EXCEED THE AMOUNTS REQUIRED TO BE PAID TO THE BLM UNDER THIS AGREEMENT.

4. **General**

- 4.1 The Parties agree that this Agreement is in the public interest and that the contribution of money and services by Avista will assist with management and protection of public lands providing recreational access to the Project. The Parties recognize that in agreeing to the terms of this Agreement, the publics' recreational needs will be served and potentially expensive and time consuming administration and litigation will be avoided.
- 4.2 This Agreement establishes no principle or precedent with regard to any issue in any other pending or future Project licensing proceeding. By entering into this Agreement, neither Party shall be deemed to have made any admission or waived any contention of law or fact.
- 4.3 Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third party beneficiary of this Agreement and shall not authorize any non-party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations and responsibilities of the Parties with respect to third parties shall remain as imposed under applicable law. Nothing in this Agreement shall require the obligation of federal funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§1341-1519. This Agreement shall apply to and be binding on the Parties and their successors and assigns. This Agreement may be amended through the mutual written agreement of Avista and the BLM only.
- 4.4 This Agreement constitutes the entire and final agreement between the BLM and Avista with respect to the requirements specified in the Recreation Agreement related to a separate cost saving agreement, and replaces and supersedes any and all other arrangements, written or oral, regarding the subject matter specified herein.
- 4.5 Any modification of this Agreement shall be in writing and shall be executed by the Parties.
- 4.6 Notices provided under the terms of this Agreement shall be in writing and transmitted by overnight delivery or First Class U.S. Mail to a Party's designated representative at the address set forth below.

Notices to the BLM shall be addressed to:

Name: Brian White - Outdoor Recreation Planner
Address: 3815 Schreiber Way
Coeur d'Alene ID 83815

Notices to Avista shall be addressed to:

Legal Department
Avista Corporation
1411 E Mission Ave, MSC-23
Spokane, WA 99202-1902

- 4.7 This Agreement may be signed in separate counterparts. The effective date of this Agreement shall be the date, or the later of the dates, upon which it is signed by both Parties.

4.8. The signatories hereto represent that they have been authorized to enter into this Agreement on behalf of the Party for whom they sign.

IN WITNESS WHEREOF, the Parties have executed this Agreement, which shall be effective on the date it has been fully executed by both Parties.

Avista Corporation

BY: *Bruce F Howard*
(Signature)
BRUCE F HOWARD
(Printed Name)
DIRECTOR, ENV. AFFAIRS
(Title)
10.23.09
(Date)

The U.S. Bureau of Land Management

BY: *Eric R Thomson*
(Signature)
Eric R. Thomson
(Printed Name)
Field Manager
(Title)
10/15/09
(Date)