

Memorandum of Understanding--Post Falls Project Discharge Monitoring Plan Development and Data Review

Section 1. Parties

1.1 This Memorandum of Understanding (MOU) is entered into between and among the Idaho Department of Environmental Quality (IDEQ), the Washington Department of Ecology (WDOE), the Idaho Department of Fish and Game (IDFG), the Washington Department of Fish and Wildlife (WDFW) and the Coeur d'Alene Tribe (collectively, "Parties").

Section 2. Recitals

2.1. The current license for FERC Project 12606, held by Avista Corporation, requires a discharge at the Post Falls dam of at least 300 cubic feet per second (cfs) or the inflow to Lake Coeur d'Alene, whichever is less.

2.2. The Parties and other participants in the alternative licensing process concerning FERC Project 2545 considered, without any final agreement, increased discharges from the Post Falls dam to support water quality and beneficial uses in both Lake Coeur d'Alene and the Spokane River. These considerations and progress during the alternative licensing process toward agreement between the Parties and other participants regarding an increase in discharges were reflected in provisions of Avista's license application and FERC's 2007 Final Environmental Impact Statement (FEIS).

2.3. IDEQ's final Clean Water Act Section 401 Certification, attached hereto as Attachment A, requires increased discharge flows (500/600 cfs) and the development and implementation by Avista of a Monitoring Plan Regarding Discharge Flows (Monitoring Plan). These requirements were intended by IDEQ to be substantially consistent with the alternative licensing process, Avista's license application and FERC's FEIS.

Section 3. Purpose of the Agreement

3.1. The purpose of this MOU is to provide for coordination and cooperation between the Parties regarding (1) development and approval of the Monitoring Plan, (2) review and interpretation of data and reports generated by implementation of the Monitoring Plan, and appropriateness of the 500/600 cfs discharge flows required by IDEQ's 401 Certification or alternative discharge flows to support water quality and beneficial uses in both Lake Coeur d'Alene and the Spokane River.

3.2. Although the Parties expect that implementation of required 500/600 cfs discharges during low flow conditions will be infrequent, they intend to ensure by appropriate monitoring, review of monitoring data and consideration of any modification of the required 500/600 cfs that discharges adequately support water quality and beneficial uses both upstream and downstream of the Post Falls dam. It is in the spirit of that mutual intent that the coordination and cooperation between the Parties shall be pursued.

3.3. It is understood by the Parties that this document is a good faith expression of the intentions of the Parties based on trust and mutual respect, but is not a legally binding agreement and is not legally enforceable.

Section 4. Monitoring Plan Regarding Minimum Discharge

4.1. Avista is required by IDEQ's 401 Certification to develop and implement a Monitoring Plan to assess the required 500/600cfs discharge flows and higher discharge flows up to 700 cfs. Avista is required to consult with IDEQ in developing the Monitoring Plan and to obtain IDEQ approval within six month after issuance of a new license for FERC Project 2545. The purpose of the Monitoring Plan is, generally, to determine the relationship between discharge flows and water temperatures in the Spokane River downstream from Post Falls as they relate to fish and fish habitat, and specifically, to determine whether discharges from Post Falls dam at 500/600 cfs and higher discharge flows up to 700 cfs increase temperatures at selected locations in the Spokane River.

4.2. The Parties agree to coordinate and cooperate in IDEQ's consultation and approval of Avista's Monitoring Plan as follows:

A. Drafts of the Monitoring Plan and related correspondence exchanged between IDEQ and Avista shall be provided by IDEQ to each Party.

B. Participation in IDEQ meetings with Avista concerning development of the Monitoring Plan shall be open to all Parties.

C. The Parties shall, upon the request of any Party, meet in person or by phone, to discuss development of the Monitoring Plan.

D. All comments developed by the consensus of the Parties shall be included in IDEQ's comments to Avista concerning development of the Monitoring Plan. If the Parties agree by consensus that the Monitoring Plan should include monitoring locations not specifically required by IDEQ's 401 Certification, IDEQ's comments will include a request that Avista agree to include such monitoring locations. Comments of any Party not supported by consensus of the Parties shall be considered by IDEQ and attached to IDEQ's comments and identified appropriately.

E. The Parties shall consult prior to IDEQ approval of the Monitoring Plan. Within five working days of such consultation any Party may object to IDEQ's proposed approval and invoke the dispute resolution process provided in Section 6 and IDEQ shall not approve the Monitoring Plan until the conclusion of the dispute resolution process.

Section 5. Data Development, Review, and Decision Making

5.1. Avista is required by IDEQ's 401 Certification to provide annual monitoring data and, after five years of monitoring, a 5-Year Report of Findings, to IDEQ.

5.2. The Parties agree to coordinate and cooperate in review of Avista's annual monitoring data and 5-Year Report of Findings as follows:

A. Avista's annual monitoring data and 5-Year Report of Findings shall be provided by IDEQ to each Party and made available to the public.

B. The Parties shall meet, upon the request of any Party, during the first five years in the event Avista's annual monitoring data includes two years of data under "low flow" conditions (when the reduced flow of 500 cfs is required) and the data suggests that evaluation of the appropriate required discharges is warranted prior to completion of five years of monitoring and release of the 5-Year Report of Findings by Avista. In such event the Parties will proceed as provided in 5.2.C.i-iii below.

C. The Parties shall convene within 30 days after Avista's release of the 5-Year Report of Findings. The purpose of the meeting shall be to reach a consensus decision, if possible, regarding the appropriate required discharges from the Post Falls Project to support water quality and beneficial uses. Depending on the data analysis and review, the Parties shall proceed as follows:

i. If the Parties determine by consensus that the data support the conclusion that the 500/600 discharges required by IDEQ's 401 Certification supports water quality and beneficial uses, IDEQ shall notify Avista to continue implementation of the required 500/600 discharges.

ii. If the Parties determine by consensus that the data support the conclusion that the required 500/600 discharge should be modified to an alternative required discharge flow up to 700 cfs to support water quality and beneficial uses, and agree by consensus on the modification required, IDEQ shall make a final determination in accordance with 5.2.D. below and notify Avista of the required modification.

iii. If the Parties are unable to reach consensus in accordance with 5.2.C.i or ii above, IDEQ shall notify Avista to continue implementation of the required 500/600 discharges unless IDEQ determines that the data support the conclusion that the required 500/600 discharges should be modified to an alternative required discharge flow up to 700 cfs to support water quality and beneficial uses. IDEQ's determination shall be in writing and shall be based on substantial evidence that the alternative required discharge flow significantly improves or avoids harm to water quality and beneficial uses. Prior to making a final determination and notification to Avista in accordance with the public notice and comment procedures of 5.2.D below, IDEQ shall consult with the Parties. Within five working days of such consultation any Party may object to IDEQ's proposed determination and invoke the dispute resolution process provided in Section 6 below and IDEQ shall not make a final determination and notification to Avista until the conclusion of the dispute resolution process.

iv. If the Parties determine by consensus that data are insufficient to make a determination regarding the required discharges, IDEQ shall notify Avista to extend the monitoring period until at least two years of data under "low-flow" conditions (when the reduced flow of 500 cfs is being implemented) have been collected. If the Parties are unable to reach consensus regarding extension of monitoring, IDEQ shall consider the input of each Party in determining whether to notify Avista to extend the monitoring period. Any additional data and supplemental reports shall be considered by the Parties as provided above.

D. Prior to any final determination by IDEQ and notification to Avista of a modification as provided in 5.2.C. ii or iii above, IDEQ shall give public notice of its proposed determination and provide for and consider public comment.

Section 6. Dispute Resolution

6.1. In the event any Party invokes dispute resolution as provided in Sections 4.2.E or 5.2.C.iii above, the Parties shall proceed as follows:

A. Within two weeks of invoking dispute resolution, the objecting Party shall provide its position in writing to each other Party.

B. Staff representatives of the Parties shall meet and seek to resolve the dispute by consensus within two weeks of receiving the objecting Party's written position.

C. If the dispute remains unresolved, DEQ's North Idaho Regional Administrator, WDOE's Eastern Regional Director, IDFG's Panhandle Regional Supervisor, WDFW's Region 1 Regional Director, and the Coeur d'Alene Tribe's Water Resources Program Manager shall confer in person or by phone and seek to resolve the dispute by consensus within two weeks of the meeting of their staff representatives.

D. If the dispute remains unresolved, the Directors of the agency Parties and the Lake Management Department Director of the Coeur d'Alene Tribe, shall confer in person or by phone and seek to resolve the dispute by consensus within two weeks of the meeting of their management representatives.

E. If the Parties are unable to resolve the dispute, IDEQ may proceed with its final action and any Party may withdraw from this MOU and exercise any available administrative or civil remedies.

Section 7. Withdrawal and Termination

The Parties enter into this MOU for the purpose of coordination and cooperation in implementation of the discharge flows and related conditions of IDEQ's Clean Water Act Section 401 Certification. In the event that IDEQ seeks to make any material changes to those conditions outside the processes of this MOU, IDEQ shall notify and consult with the other Parties in an effort to reach agreement on how to proceed. If unanimous agreement on how to proceed is not reached, any Party may withdraw from this MOU.

Section 8. General Provisions

8.1 Entire Agreement. All previous communications between and among the Parties, either orally or in writing, with reference to the subject of this MOU, is superseded by the provisions of this MOU and, once executed, this MOU constitutes the entire agreement among the Parties relating to minimum flows at the Post Falls dam.

8.2. No Third-Party Beneficiaries. Without limiting the rights of the public pursuant to applicable law, this MOU shall not create any right or interest in the public, or any member of the public. The duties, obligations, and responsibilities of the Parties with respect to third parties shall remain as imposed under applicable law. The Parties may, individually or jointly, seek

input from independent experts or interested entities, such as other Tribes, federal governmental agencies, local governments, conservation groups, and other interested entities or individuals.

8.3. No Waiver of Authority. Nothing in this Agreement shall preclude any Party from exercising their respective authorities, duties or rights under any state, federal or tribal law.

Section 9. Notice and Communication

For purposes of implementing this Agreement, the Parties agree that the following individuals shall be designated as the primary contact persons, and all reports and written notices shall be sent to these individuals at the email and street addresses listed below. Notification of changes of contact persons shall be made in writing and delivered to all other contact persons.

IDEQ: Thomas Herron
Water Quality Manager
DEQ Coeur d'Alene Regional Office
2110 Ironwood Parkway,
Coeur d'Alene, ID 83814
208-769-1422
208-769-1404 (fax)
Thomas.Herron@deq.idaho.gov

WDOE David T. Knight
Watershed TMDL Unit Supervisor
Washington State Department of Ecology
Eastern Regional Office
4601 N. Monroe
Spokane, WA 99205
509-329-3590
509-329-3570 (fax)
Dkni461@ecy.wa.gov

IDFG Regional Fishery Manager
Idaho Department of Fish and Game Regional Office
2885 Kathleen Avenue
Coeur d'Alene, ID 83815
208-769-1414
208-769-1418 (fax)

WDFW Doug Robison
Washington State Department of Fish and Wildlife
2315 Discovery Place
Spokane Valley, WA 99216-1566
509-892-1001 ext. 322
509-921-2440 (fax)
robisdrl@dfw.wa.gov

Coeur d'Alene Tribe Phil Cernera
Lake Management Director
Coeur d'Alene Tribe
P.O. Box 408/850 A St.
Plummer, ID 83851
208-686-6008
208-686-7221 (fax)
philc@cdatribe-nsn.gov

Section 10. Signatures

10.1. Authority to Sign. Each signatory to this MOU certifies that he or she is authorized to execute this MOU and to bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

10.2. Signing in Counterparts. This MOU may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all the counterparts had signed the same instrument.

Dated this 10th day of October, 2008.

For Idaho Department of Environmental Quality



Toni Hardesty, Director

Dated this _____ day of _____, 2008.

For Washington Department of Ecology

Jay J. Manning, Director

Section 10. Signatures

10.1. Authority to Sign. Each signatory to this MOU certifies that he or she is authorized to execute this MOU and to bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

10.2. Signing in Counterparts. This MOU may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all the counterparts had signed the same instrument.

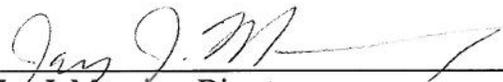
Dated this _____ day of _____, 2008.

For Idaho Department of Environmental Quality

Toni Hardesty, Director

Dated this _____ day of _____, 2008.

For Washington Department of Ecology



Jay J. Manning, Director

Dated this 9 day of October, 2008.

For the Idaho Department of Fish and Game



Cal Groen, Director

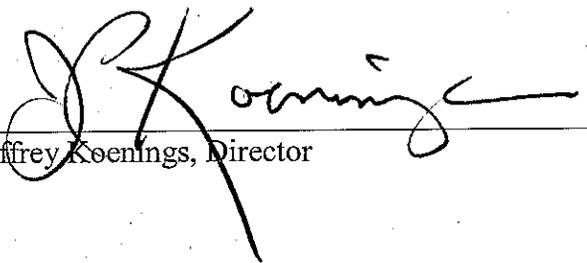
Dated this _____ day of _____, 2008.

For the Idaho Department of Fish and Game

Cal Groen, Director

Dated this 31st day of October, 2008.

For the Washington Department of Fish and Wildlife



Jeffrey Koenings, Director

Dated this _____ day of _____, 2008.

For the Coeur d'Alene Tribe

Phillip Cernera, Lake Management Director

Dated this _____ day of _____, 2008.

For the Idaho Department of Fish and Game

Cal Groen, Director

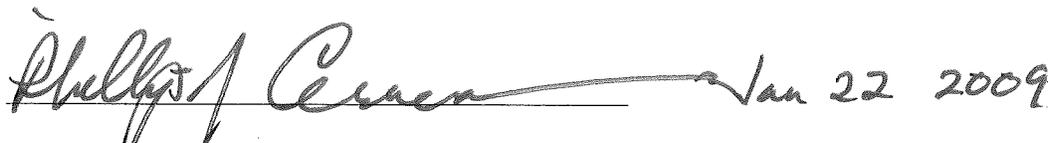
Dated this _____ day of _____, 2008.

For the Washington Department of Fish and Wildlife

Jeffrey Koenings, Director

Dated this _____ day of _____, 2008.

For the Coeur d'Alene Tribe



Phillip Cerera, Lake Management Director

APPENDIX A

I. LAKE LEVELS AND DISCHARGE FLOWS

A. Discharge Flows.

1. Avista's operational target or goal shall be to achieve and then maintain the Lake at full-pool elevation at or near 2,128 feet ("summer full-pool elevation") as early as practicable each year and maintain the Lake elevation at or near 2,128 feet until the Tuesday after Labor Day. After such time, Avista shall initiate draw down of the Lake to an elevation no lower than 2,120 feet 6 inches ("fall draw down"). Lake elevations are to be determined using the USGS gage 12415500 (Coeur d'Alene Lake at Coeur d'Alene, or "Tubbs Hill" gage).

2. Avista shall achieve and maintain the summer full-pool elevation in a manner that is consistent with the Upper Spokane River Rainbow Trout Spawning and Fry Emergence Monitoring and Protection Plan (2004).

3. Beginning June 7 of each year, Avista shall maintain a minimum discharge of 600 cfs from the Project, as measured at the USGS gage 12419000 (Spokane River at Post Falls).

4. Should the lake elevation fall below 2,127 feet 9 inches during July, August, or September prior to the Tuesday following Labor Day ("low flow conditions"), Avista shall reduce the discharge from the Project to 500 cfs, and maintain the discharge at 500 cfs until fall draw down, unless operating for purposes of the monitoring program described in Section B.2. below.

5. Avista shall at all times operate the project to meet the required flows set forth in this certification. Avista shall be deemed in compliance with this condition so long as any short-term deviations are within 25 cfs of the required flows if, at the same time, daily mean flows are within 10 cfs of the required flows. In addition, Avista may deviate from the required flows as a result of the circumstances beyond Avista's reasonable control described in Section VI.B. of this certification. Within seven (7) days of any deviation resulting from such circumstances, Avista shall notify IDEQ of the deviation and the circumstances that caused the deviation.

B. Monitoring Plan Regarding Discharge Flows.

1. Avista shall, after issuance of a New License, develop, in consultation with IDEQ, a Monitoring Plan that includes the elements described below. The Monitoring Plan shall be submitted to IDEQ for approval within six months after issuance of a New License. The purpose of the Monitoring Plan is to evaluate data and assumptions upon which the required discharge flows are based.

The Monitoring Plan shall address the relationship between discharge flows and water temperature in the Spokane River. The Monitoring Plan shall provide for five (5) years of monitoring. The Monitoring Plan shall include a Quality Assurance Control Project Plan ("QAPP"). The QAPP shall include (a) appropriate protocols for flow and temperature measurements, (b) flow monitoring conducted continually from July 1st through September 30th at the following locations, or at alternative locations agreed to by IDEQ and Avista: Spokane River at Post Falls (USGS 12419000), Spokane River at Greenacres (USGS 12420500) and Spokane River at Spokane, WA (USGS 12422500), and (c) a description of the manner in which Avista shall, in accordance with the requirements set forth in Section B.2., incrementally increase and monitor discharges during low flow conditions. The QAPP shall be consistent with applicable Idaho water quality law. Upon approval, the Monitoring Plan shall be implemented in accordance with the QAPP for a period of five (5) years, unless IDEQ determines that five (5) full years of monitoring are not necessary.

2. In order to monitor the effects of alternative discharge flows during low flow conditions when the reduction to 500 cfs would otherwise be required by Section I.A.4. of this certification, Avista shall, in accordance with the approved Monitoring Plan, incrementally increase and monitor flows up to 700 cfs during low flow conditions. Avista shall not, however, increase discharge flows above 600 cfs except upon prior notification to, and approval by, IDEQ.

C. Data Review Decision Making.

1. Avista shall provide all raw temperature and flow data collected to IDEQ as soon as practicable after September 30 each year. At the end of the five (5) years, or earlier, if monitoring is terminated by IDEQ, Avista shall submit a report of findings to IDEQ.

2. IDEQ intends to review the annual data and report of findings in coordination and consultation with the Idaho Department of Fish and Game, Washington Department of Ecology, Washington Department of Fish and Wildlife and the Coeur d'Alene Tribe. In addition, prior to making a final decision regarding whether discharge operations require modification, IDEQ shall provide for public notice and an opportunity for comment. After such coordination and consultation, IDEQ shall proceed as follows:

a. Should IDEQ determine the data supports the discharge operations required by Section I.A., Avista shall continue to operate the Project in accordance with Section I.A., except that Avista will no longer be required to implement the alternative discharge flows in Section I.B.2. of this certification. Avista shall notify FERC of IDEQ's decision.

b. Should IDEQ determine that the discharge operations set forth in Section I.A. require modification; IDEQ shall notify Avista of the

required modification and Avista shall thereafter operate the Post Falls facility in compliance with the required modified discharge operations. Avista shall notify FERC of the modification in operations.

c. Should IDEQ determine that data are insufficient to make a determination regarding the discharge operations, Avista shall extend the period of data collection until at least two (2) years of data under "low-flow" conditions (when the reduced flow of 500 cfs is implemented) have been collected. Any additional data will be submitted to IDEQ as soon as practicable after September 30 each year. Within ninety (90) days of acquiring the two (2) years of such data, Avista shall submit a supplemental report to IDEQ. IDEQ shall review the supplemental report and data as provided in Section C.2. above and make a determination regarding discharge operations. Avista shall notify FERC of IDEQ's decision.