

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UE-080416

DIRECT TESTIMONY OF

TONI E. PESSEMIER

REPRESENTING AVISTA CORPORATION

Revised 1/27/09

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**I. INTRODUCTION**

**Q. Please state your name, employer and business address.**

A. My name is Toni E. Pessemier. I am employed as the American Indian Relations Advisor by Avista Corporation located at 1411 East Mission Avenue, Spokane, Washington.

**Q. Would you briefly describe your educational and professional background?**

A. I received a Bachelor of Arts in Business Administration from Pacific University in 1986, and a Master of Business Administration degree from Eastern Washington University in 1995. I started working for Avista in 1988 as a Customer Service Representative. Since that time I have worked in various positions including Internal Auditor and Power Resource Engineer/Analyst. In 1993, I began my current position as Advisor to the Office of the President, American Indian Relations. My primary responsibilities involve the management and support of projects related to business operations or legal issues involving Tribes, maintaining corporate compliance with tribal-related regulations and settlements, and sustaining working relationships with regional American Indian Tribes.

**Q. What is the scope of your testimony in this proceeding?**

A. My testimony will provide an overview of the Coeur d'Alene Tribe's claims concerning compensation for storage of water on Coeur d'Alene Lake and subsequent settlement of these issues.<sup>1</sup> The testimony provides background data concerning the claims for past storage, compensation for future storage associated with the Spokane River Project FERC relicensing, settlement of these issues, and transmission rights of way on tribal lands.

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<sup>1</sup> Final execution of the settled documents and public disclosure of the terms will await final review of the settlement by the Department of Interior (DOI), which Avista currently believes will occur in March of 2008. Thereafter, unredacted versions of the testimony and exhibits pertaining to this issue will be filed with the Commission.

1           **Q.     Are you sponsoring any exhibits?**

2           A.     Yes. I am sponsoring Exhibit Nos.\_\_(TEP-2) (Map of Lake Coeur d'Alene and  
3 Post Falls Hydroelectric Project) and (TEP-3) (Memorandum Concerning Settlement of Claims  
4 with the Coeur d'Alene Tribe).

5           **Q.     What are the main issues concerning the Coeur d'Alene Tribe?**

6           A.     There are several legal issues concerning trespass and compensation for water  
7 storage for the Coeur d'Alene Tribe (CDA Tribe). The past trespass covers the period from 1907  
8 through 1981, during which the tribal ownership of the lower third of the lake was not known to  
9 the Company or any of its regulatory agencies. The second period covers 1981 through 2007,  
10 where compensation for storage is governed under the Federal Power Act, because the Post Falls  
11 Hydroelectric Development was added to the FERC Spokane River Project license in 1981. The  
12 third issue covers all aspects of the Spokane River Relicensing process, which includes future  
13 compensation for storage for the new license period. Finally, another key issue concerned  
14 Avista's transmission rights-of-way across tribal trust and fee lands.

15           **Q.     Would you please provide a brief overview of Lake Coeur d'Alene in relation**  
16 **to the Spokane River Hydroelectric Project?**

17           A.     Yes. Lake Coeur d'Alene has a minimum elevation of approximately 2,120.5 feet  
18 and normal summer elevation of 2,128.0 feet. Prior to 1941, the summer elevation was 2,126.5  
19 feet. The Post Falls Dam has controlled Coeur d'Alene Lake levels for five to seven months of  
20 the year since the project began operation in 1906. The lake is on free-flow conditions for the  
21 remaining months of the year. See Exhibit No.\_\_(TEP-2), consisting of a map of the CDA  
22 Lake and the location of Post Falls Dam in relation thereto.

23           **Q.     Please summarize the history of the dispute with the Coeur d'Alene Tribe.**

1           A.     Exhibit No. \_\_ (TEP-3) provides an in-depth history of the litigation and basis for  
2 settlement. As explained in this Exhibit, Avista believed that it had all necessary permits to store  
3 water on the lake for the Post Falls Project between 1907 and 1972. During this period, the State  
4 of Idaho exercised exclusive ownership of the lake and the use of the lake for storage by Avista  
5 was not challenged by any parties during this time.

6           The CDA Tribe first made a claim to partial ownership of the lake in 1973 when they  
7 sought to intervene in FERC proceedings concerning the license of the Spokane River Project. In  
8 1979, Avista stipulated to allow FERC to decide the issue, which resulted in a 1980 FERC  
9 decision that the State of Idaho owned the lake. This decision was reversed in 1983 which  
10 resulted in further appeals until 1988, when FERC ultimately determined that it did not have  
11 jurisdiction to resolve the lake ownership issue. No further action was taken on the matter until  
12 1992, when the CDA Tribe filed suit in federal court for ownership of the lake. The State of  
13 Idaho claimed immunity from suit and the case was ultimately dismissed.

14           In 1994, the ownership issue was taken up by the U.S. as Trustee for the Tribe. In 1998,  
15 the United States District Court for the District of Idaho determined that the CDA Tribe owns  
16 portions of the bed and banks of Lake Coeur d'Alene that are within the current boundaries of the  
17 Coeur d'Alene Reservation. The case eventually reached the U.S. Supreme Court, where a  
18 narrow 5-to-4 decision in 2001 established that the United States holds, in trust for the CDA  
19 Tribe, the portion of the lake that is located within the Reservation boundaries. This amounts to  
20 approximately the lower one-third of the lake. This ruling directly impacts the Company because  
21 Avista owns and operates the Post Falls Hydroelectric Generating Station (Post Falls), which  
22 controls the lake water level during portions of the year. The ruling resulted in the Company  
23 being liable for compensation to the CDA Tribe for water storage on reservation lands under

1 §10(e) of the Federal Power Act. The Company and the CDA Tribe subsequently engaged in  
2 ongoing discussions with respect to past and future compensation.

3 **Q. Please describe the process that ultimately led to a settlement of this matter.**

4 A. Avista and the Tribe agreed to a mediation process before commencing with  
5 litigation. A unique process was used that involved a blending of traditional litigation elements  
6 along with mediated settlement negotiations. The services of John Bickerman, a mediator from  
7 Washington, D.C., were retained by the parties to oversee and facilitate settlement discussions.  
8 The Honorable Judge William Canby of the U.S. Ninth Circuit Court of Appeals for the Ninth  
9 Circuit was retained to provide the parties with non-binding advisory opinions regarding liability  
10 and damages. The mediation process took several years and resulted in a large volume of data  
11 collection and analysis. The negotiated settlement comprehensively addressed and resolved the  
12 Tribe's claims of trespass, §10(e) charges, transmission line rights of way, and many of the  
13 Tribe's issues also associated with the Spokane River Relicensing process.

14 **Q. What was determined during the settlement?**

Confidential per Protective Order in UE-080416 & UG-080417.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

The methodology  
21 for determining damages owed to the Tribe was also reviewed through Judge Canby and the  
22 amounts of those damages were then determined through additional mediation and negotiations.  
23 The financial components of the settlement covered compensation for trespass, §10(e) charges,

1 transmission rights of way, water rights permit, and satisfaction of §4(e) conditions with a new  
2 FERC license for the Spokane River Project

3 **Q. What are the terms of the settlement agreement?**

4 A. There are several areas covered under the terms of the settlement agreement:

5 • Regarding compensation for trespass, the settlement includes the payment of \$25 million  
6 in 2008, \$10 million in 2009 and \$4 million in 2010 for resolution of the past trespass and  
7 §10(e) charges. The future §10(e) payments are \$400,000 flat annual payments for the  
8 first 20 years of the license and \$700,000 flat annual payments for the remaining 30 years  
9 of the license.

10 • There was an agreement by the Tribe to indemnify, defend and hold Avista harmless from  
11 any and all liability, judgment, loss, cost, and expense resulting from any and all claims  
12 of any kind or nature that may be asserted by the United States, or any governmental  
13 department, agency or officer thereof, arising out of or related to or in any way connected  
14 with the use or occupancy by Avista of the bed and banks of the Lake and the St. Joe  
15 River lying within the boundaries of the reservation.

16 • The Tribe granted Avista transmission line rights of way across tribal trust and fee land  
17 for a time period correlated with the term of a new Spokane River Project FERC license  
18 for a single payment of \$32,000.

19 • The Tribe issued a water permit and agreed that the settlement payments will satisfy any  
20 future tax claims for water storage.

21 • §4(e) conditions for relicensing the Spokane River Project would be satisfied through  
22 payments of \$10 million in the first year, \$2 million per year for the next eight years, \$1.5  
23 million for the next 16 years and two million per year for the remainder of the 50-year

1 FERC license into a resources restoration fund to implement provisions of the §4(e)  
2 conditions. Company Witness Howard will provide more information in his testimony  
3 concerning the settlement with the CDA Tribe as it relates to relicensing.

- 4 • A master agreement would be filed under a joint petition in Federal District Court seeking  
5 a consent judgment to maintain the continuing jurisdiction of the Federal District Court to  
6 enforce the terms of the settlement.
- 7 • Finally, there is a reservation of claims and defenses in the event the Tribe makes a claim  
8 to ownership of the northern two-thirds of the Lake and Heyburn State Park.

9 **Q. Why did the Company choose to settle the case at this time rather than**  
10 **proceed with litigation?**

11 A. As explained in the Memorandum attached to my testimony as Exhibit No. \_\_ (TEP-3):

- 12 • The settlement presents a full and final resolution of the Tribe's claim to trespass and  
13 §10(e) annual charges regarding Avista's use of the lake as a reservoir from 1907 to the  
14 present and through the term of a new FERC license for the Post Falls hydroelectric  
15 development (HED). As such, the settlement presents a full and final resolution of  
16 disputed issues regarding more than 100 years of hydroelectric generation by Avista  
17 utilizing Tribal lands, as well as up to 50 years in the future;
- 18 • The settlement eliminates Avista's potential exposure to a significant verdict for its  
19 historical use of that portion of the lake located within the Reservation;
- 20 • The settlement also resolves a number of critical issues pertaining to Avista's application  
21 with FERC to relicense the Post Falls HED, including the imposition of conditions under  
22 §4(e). The dispute between Avista and the Tribe over §4(e) conditions has been lengthy,

1 involved, and contentious, resulting in protracted and expensive regulatory and legal  
2 proceedings;

3 • Finally, the settlement provides for water rights, rights of way and other authorizations  
4 necessary from the Tribe. In this respect, the settlement provides certainty to Avista.

5 Accordingly, the settlement does not give either party all of the outcomes that might be obtained  
6 or desired under various scenarios, including the possibility of successful litigation in federal  
7 court. However, this must be weighed against the likelihood that formal litigation could last  
8 decades, could potentially subject Avista to significant past damages; and could render operation  
9 of the Post Falls HED impracticable. Therefore, considering the risks of litigation, together with  
10 the potential exposure and other considerations involved, the settlement reflects a reasonable  
11 compromise, and a fair accommodation, to the interests of Avista and its customers. Upon  
12 execution of the final agreement by the parties, a copy of the settlement will be submitted to the  
13 Commission. Company witness Ms. Andrews discusses the impact of the settlement in the  
14 Company's request in this case.

15 **Q. Does this conclude your pre-filed direct testimony?**

16 **A. Yes it does.**