

REDACTED

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UE-080416

REBUTTAL TESTIMONY OF
TONI E. PESSEMIER
REPRESENTING AVISTA CORPORATION

Revised 1/28/09

REBUTTAL TESTIMONY

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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. Have you previously filed direct testimony in this proceeding regarding the settlement of claims by the Coeur d'Alene Tribe ("Tribe")?

A. Yes, I have.

Q. What is the purpose of your rebuttal testimony?

A. I will address the recommendations of Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) and the Industrial Customers of Northwest Utilities (ICNU) witness Mr. Majoros to deny Avista cost recovery associated with payments to be made to the Tribe, for purposes of resolving claims for alleged trespass, as well as ongoing usage payments.

Q. Would you please summarize your rebuttal testimony with respect to this issue?

A. Yes. In short my testimony emphasizes the following points:

- Avista has not admitted to trespass, nor is it guilty of "past management mistakes".
- Ownership of Coeur d'Alene Lake ("Lake") was never conclusively determined until the U. S. Supreme Court issued a 5-4 ruling in 2001 that found for the Tribe.
- Even then, Avista reasonably believed that its' interests were protected by virtue of an earlier assignment of rights to operate the Post Falls dam site and the

1 issuance of a permit in 1909 to store water on several thousand acres of the Coeur
2 d' Alene Reservation ("Reservation") uplands.

3 • Ultimately, a settlement was reached through a protracted mediation process that
4 avoided potential exposure to claims that could have been in the billions of
5 dollars.

6 • The settlement resolves disputed issues regarding more than 100 years of
7 hydroelectric generation by Avista using Tribal lands, as well as up to 50 years in
8 to the future, and resolved a number of other critical issues pertaining to Avista's
9 relicensing efforts on the Spokane River as well as providing for water rights,
10 transmission rights-of-way, and other authorizations needed from the Tribe.

11 • As such, the settlement was prudent, and represents a reasonable and fair
12 compromise of disputed issues, and represents a legitimate cost of preserving a
13 valuable, low cost resource for the future benefit of our customers.

14 **Q. What is Mr. Majoros' recommendation?**

15 A. He is recommending an adjustment that would result in a \$0.5 million reduction
16 in the amortization expense associated with past trespass and a \$15.1 million reduction to electric
17 rate base, which, if approved, would cause the Company to suffer a substantial write-off of
18 prudently-incurred costs. Moreover, Mr. Felsenthal explains why a portion of Avista's
19 accumulated cost of removal cannot be otherwise used to offset the costs associated with the
20 settlement.

21 **Q. In his Direct Testimony at page 16, Mr. Majoros stated that he disagreed**
22 **with Avista's treatment of the Coeur d'Alene Tribe Settlement because, among other**

1 **things, ". . . Avista admitted to trespass, which is not prudent." Do you agree with this**
2 **assessment?**

3 A. No. Avista has not admitted to trespass. Mr. Majoros' statement reflects a
4 fundamental misunderstanding of the issues and the extremely complex history leading up to the
5 Tribe's claim, as well as of the circumstances surrounding the parties' ultimate resolution of this
6 issue. In 2001, the United States Supreme Court held that the United States, as Trustee for the
7 Tribe, and not the State of Idaho, owned the bed and banks of the Lake within the boundaries of
8 the Reservation. It was not until the legal process was concluded with the Supreme Court's
9 decision in 2001 that Avista definitively knew that it was, in fact, exposed to a trespass claim by
10 the Tribe.

11 Even after the Supreme Court's decision, as Avista and the Tribe entered into a unique
12 mediation process, Avista still had a reasonable basis on which to assert that its use of the Lake
13 was authorized, either through the rights it had previously obtained or by virtue of a permit
14 issued to Avista by the United States in 1909. As a result, during the mediation process in which
15 multiple, extensive briefs were submitted by the parties to the Honorable William Canby of the
16 United States Court of Appeals for the Ninth Circuit for advisory opinions on the issues of
17 liability and damages, Avista expressly denied that it was in trespass. However, given Judge
18 Canby's advisory opinions, as well as Avista's potential exposure to a significant verdict,
19 including prejudgment interest for its historical use of the bed and banks now held to be Tribal
20 lands, Avista determined that it would be prudent to address the trespass claim through a
21 comprehensive settlement agreement with the Tribe.

1 **Q. Mr. Majoros argued in his testimony at page 16 that Avista’s proposal would**
2 **require ratepayers to bear losses caused by past management mistakes, such as trespassing,**
3 **not paying usage charges, and failure to conduct title searches and surveys. Do you agree**
4 **with this assessment?**

5 A. No. It is important to understand that the Tribe’s claim of trespass could only be
6 made if it was ultimately determined that the United States, as Trustee for the Tribe, and not the
7 State of Idaho, owned the bed and banks of the Lake within the Reservation boundaries; that was
8 not decided until 2001 by the U.S. Supreme Court. On this issue, Avista was caught in the
9 middle of the controversy amongst the United States, the Tribe and the State of Idaho, and had
10 no legal standing to bring a prior action to determine ownership of the Lake.

11 The Tribe first raised the Lake ownership concept in 1973; however, it could not
12 prosecute an action against Idaho to resolve the ownership issue in federal court because of
13 Idaho’s sovereign immunity; and Idaho could not bring an action against the Tribe to resolve the
14 issue because of the Tribe’s sovereign immunity. The only party that had legal standing to
15 resolve the issue was the United States. Inexplicably, the United States waited until 1994, 104
16 years after Idaho became a state, to bring an action against Idaho in federal court to determine
17 Lake ownership.

18 In 2001, the United States Supreme Court determined, in a deeply divided 5-4 ruling, that
19 the United States, as Trustee for the Tribe, owned the bed and banks of the Lake within the
20 Reservation boundaries. However, it is important to note that four dissenting Supreme Court
21 Justices, including Chief Justice Rhenquist, concluded that the “decisions of this Court going
22 back more than 150 years establish [*Idaho’s* ownership of the Lake] beyond a shadow of a

1 doubt.” If one other Justice had agreed, the Tribe could not have pursued a claim of trespass
2 against Avista.

3 Avista made sound management decisions over the years. If Avista’s management had
4 agreed to either compensate the Tribe for trespass or pay usage charges prior to the United States
5 Supreme Court’s ruling, it could have been criticized for imprudently making payments before
6 the ownership issue was resolved. With respect to Mr. Majoros’ testimony that Avista failed to
7 conduct title searches and surveys, such searches and surveys led to the conclusion that the State
8 of Idaho, not the Tribe, owned the Lake. Moreover, a challenge to Idaho’s ownership of the Lake
9 ultimately had to be decided by the Courts and that process was not concluded until 2001.

10 **Q. Have you prepared a simplified timeline of some of the major events or**
11 **milestones that you will be discussing in your testimony?**

12 A. Yes. That is included as my Exhibit No. ____ (TEP-5).

13 **Q. Mr. Majoros suggests at pages 16 and 17 of his testimony that Avista's**
14 **treatment of the settlement constitutes "retroactive ratemaking" by requiring ratepayers**
15 **to pay for past management mistakes. Do you agree with this assessment?**

16 A. No. First, the settlement expenditures represent a legitimate cost of operation to
17 preserve a valuable generation asset in the form of the Spokane River hydroelectric projects.
18 Moreover, it could not have been anticipated or calculated previously and does not constitute
19 "retroactive ratemaking." It is only with the advent of the settlement with the Tribe that the
20 obligation has become established, and this general rate case provided the first opportunity for
21 review and recovery of the costs associated with this obligation.

1 Mr. Majoros is simply incorrect in his underlying factual assumptions. For example, Mr.
2 Majoros contends at page 16 that Avista's treatment of the settlement would "require ratepayers
3 to bear losses caused by past management mistakes, such as trespassing, not paying usage
4 charges, and failure to conduct title searches and surveys." As discussed more fully above, the
5 events and circumstances that culminated in Avista's settlement of the Tribe's claims cannot be
6 attributed to "past management mistakes." The history of the dispute reveals just the opposite:
7 that Avista reasonably believed that it possessed all necessary rights to store water on the Lake.
8 After the Tribe announced its claim to the Lake in the early 1970's, Avista found itself in the
9 middle of a dispute between three sovereign entities—the United States, the Tribe and Idaho—
10 over their competing claims to the Lake. Although Avista attempted to resolve the issue before
11 FERC, it had no legal pathway to resolve the issue, particularly after FERC eventually declined
12 jurisdiction in 1988. Likewise, with ownership of the Lake still unknown, Avista could neither
13 have anticipated, calculated nor acted to satisfy an unproven obligation to the Tribe, much less
14 attempt to include such a speculative obligation within its rates. Avista utilized the available
15 facts to make proper management decisions.

16 **Q. You referenced the dispute between the United States, as Trustee for the**
17 **Tribe, and the State of Idaho concerning ownership of the bed and banks of the Lake**
18 **within the Reservation boundaries. Please provide more detail about the controversy.**

19 A. In 1873, the Tribe agreed to relinquish to the United States all claims to its
20 aboriginal lands outside the bounds of a specified reservation that included part of the Coeur
21 d'Alene River and virtually all of the Lake. Although the agreement required congressional
22 approval, President Grant, nevertheless, set the land aside in an 1873 Executive Order.

1 However, when Congress neither ratified the agreement nor compensated the Tribe, the Tribe
2 petitioned the United States to enter into a treaty and Congress authorized negotiations. In 1887,
3 through negotiations, the Tribe agreed to cede its rights to all land except that within the
4 Executive Order Reservation. Still, Congress did not ratify the agreement. Instead, responding
5 to a growing desire to open up for homesteaders portions of the Reservation, Congress
6 authorized negotiations that produced a new agreement in 1889, in which the Tribe agreed to
7 cede the Reservation's northern portion, including approximately two-thirds of the Lake. The
8 agreement specifically provided that it would not be effective until ratified by Congress. In
9 1890, the Senate passed a bill ratifying the 1887 and 1889 agreements. However, while that bill
10 was pending in the House of Representatives, Congress passed the Idaho Statehood Act,
11 admitting Idaho to the Union on July 1, 1890. Thereafter, in 1891, Congress ratified the 1887
12 and 1889 agreements.

13 This sequence of events proved critical in light of the legal doctrine known as "equal
14 footing." In order to allow new States to enter the Union on an "equal footing" with the original
15 13 States, the United States is deemed to hold lands under navigable waters in trust for the
16 ultimate benefit of future States. This is viewed as an incident of the State's sovereignty, and as
17 a consequence the disposal of submerged lands during the territorial period of a State will not be
18 upheld unless Congress definitively declared its intent to dispose of such lands prior to the State's
19 admission into the Union. In the case of the Lake, although the Executive branch had expressed
20 an intent to reserve certain lands to the Tribe through the 1887 and 1889 treaties, Congress did
21 not ratify those treaties until 1891—several months *after* it had admitted Idaho to the Union.
22 Thus, for more than a century, it was generally believed that when Idaho became a State, Idaho

1 had acquired ownership of the submerged lands of the entire Lake as an incident of its admission
2 into the Union.

3 **Q. When was this issue regarding Lake ownership finally resolved?**

4 A. The issue surrounding ownership of the Lake was not resolved until the United
5 States Supreme Court's 2001 decision in Idaho v. United States, 533 U.S. 262 (2001). In that
6 decision, the Supreme Court held that the post-statehood ratification of the 1887 and 1889
7 treaties demonstrated Congressional intent to reserve the submerged lands of the Lake for the
8 benefit of the Tribe. Notably, the Court was sharply divided over this conclusion. As previously
9 mentioned, four of the Supreme Court Justices (Chief Justice Rhenquist, Justice Scalia, Justice
10 Kennedy and Justice Thomas), found instead that Idaho's ownership of the submerged lands of
11 the Lake had been established "beyond a shadow of a doubt." According to these Justices, at the
12 time of Idaho's admission into the Union, regardless of the intent of the Executive branch,
13 Congress had not expressed a clear intent to dispose of the submerged lands of the Lake, and as a
14 consequence they passed to Idaho under the equal footing doctrine. Nevertheless, the majority of
15 the Justices ruled otherwise and the Tribe was now able to make a claim of trespass against
16 Avista.

17 **Q. Prior to the Supreme Court's decision in 2001, what steps did Idaho, itself,
18 undertake to demonstrate that it owned, and was exercising exclusive control over, the
19 Lake after it was admitted into the Union in 1890?**

20 A. Consistent with its belief that it owned the bed and banks of the entire Lake,
21 during the 111 years between its entry into the Union and the Supreme Court's 2001 decision in
22 Idaho v. United States, Idaho consistently claimed exclusive ownership, and exercised

1 unchallenged control, over the entire Lake, including that portion within the Reservation. For
2 example, in 1927, Idaho enacted specific statutory provisions concerning its control over the
3 entire Lake. *See, e.g.*, Idaho Code §67-4304; Idaho Code §67-4305. As the United States
4 Supreme Court later summarized these provisions:

5 There are specific statutory provisions concerning Lake Coeur d'Alene. The Lake
6 is held in trust by the Governor for the people of the State of Idaho. The
7 "preservation of [Lake Coeur d'Alene] for scenic beauty, health, recreation,
8 transportation and commercial purposes [being] necessary and desirable for all the
9 inhabitants of the state is hereby declared to be a beneficial use of such water."
10 Idaho Code § 67-4304 (1989). The "lands belonging to the state of Idaho between
11 the ordinary high and low water mark at [Lake Coeur d'Alene] . . . are hereby
12 declared to be devoted to a public use in connection with the preservation of said
13 lake[e] in [its] present condition as a health resort and recreation place for the
14 inhabitants of the state." Idaho Code §67-4305 (Supp. 1996)

15
16 Similarly, over the subsequent decades, Idaho actively regulated the use and development of the
17 Lake. Encroachment permits for the Lake were obtainable exclusively through the Idaho
18 Navigable Waters Office. Water right appropriations were regulated by the Idaho Department of
19 Water Resources. Policing of the Lake was accomplished using State of Idaho resources.
20 Therefore, when Avista developed plans to run an electrical line across the bed of the St. Joe
21 River (a tributary of the Lake within the Reservation), it was required to obtain an easement for
22 the line from Idaho. Significantly, that easement specifically recited Idaho's ownership of the
23 submerged lands since statehood.

24 In summary, given the control of the Lake exercised by Idaho and the lack of control
25 exercised by the United States, it was reasonable for Avista and others to believe that ownership
26 of the Lake passed to Idaho when it was admitted into the Union in 1890.

27 **Q. Did the United States claim ownership of that portion of the Lake within the**
28 **Reservation boundaries at any time between 1890 and 1973?**

1 A. No. The United States, as Trustee for the Tribe, repeatedly acknowledged Idaho's
2 ownership of the entire Lake, at least up until the Tribe first asserted a competing claim in the
3 early 1970s.

4 Ultimately, the United States did not assert a claim to the bed and banks of the Lake until
5 it sought to intervene in the Federal Energy Regulatory Commission (“FERC”) proceedings on
6 behalf of the Tribe in the early 1970s. Even then, DOI did not notify Idaho of its claim until
7 1991 and did not commence proceedings against Idaho to quiet title to that part of the Lake
8 within the boundaries of the Reservation until 1994—more than a century after Idaho obtained
9 Statehood, and more than two decades after the Tribe first determined that it may have a
10 potential claim to ownership of the Lake.

11 **Q. Explain the circumstances leading up to the Tribe first asserting a claim of**
12 **ownership to the Lake.**

13 A. The Tribe's claim to ownership of the entire Lake was not announced until the
14 early 1970s—more than 60 years after Avista first began using the Lake as a reservoir during
15 certain parts of the year.

16 On October 4, 1977, the Tribe's long-time attorney, Robert Dellwo, appeared on behalf of
17 the Coeur d'Alene Tribe before FERC to discuss issues surrounding whether the Post Falls
18 hydroelectric developments should be licensed. At that time, the question was raised by the
19 Administrative Law Judge as to why the Tribe had waited until 1973 to first assert its Lake
20 ownership claim. In response, Mr. Dellwo indicated that the Tribe had only then, through the
21 research of his office, developed such claim.

1 Fifteen years later, the Tribe's new attorney, Raymond C. Givens, reaffirmed the recency
2 of the Tribe's claim to the submerged lands of the Lake. On August 31, 1992, Givens wrote to
3 Thomas L. Sansonetti, a DOI Solicitor, for the purpose of prompting the United States to
4 intervene in proceedings that had been filed by the Tribe against Idaho and subsequently
5 dismissed by United States District Court Judge Ryan. In that letter, Givens noted that, although
6 DOI had requested that Department of Justice "take the legal action necessary to establish the
7 Tribe's ownership," the "Department of Justice has done nothing."

8 Although the Tribe urged the United States to bring an action against Idaho for ownership
9 of the entire Lake, including that portion outside the Reservation boundaries, the United States
10 determined that the breadth of such a claim was not supported by the facts and, therefore, only
11 brought a quiet title action as to that portion of the Lake within the Reservation boundaries.

12 **Q. Assuming that Avista could have predicted the Supreme Court's decision to**
13 **quiet title to the Lake in favor of the Tribe, did it still have reason to believe that it was not**
14 **liable to the Tribe for trespass?**

15 A. Yes. While the Tribe's claim to ownership of the Lake became known in the early
16 1970's, the question of ownership did not present the only issue with respect to Avista's use of
17 the Lake as a reservoir. Rather, the two following additional historical events were believed to
18 justify Avista's use of the Lake, irrespective of whether the Tribe owned the Lake: (1) the
19 transfer of rights from the Tribe to Frederick Post, and from Frederick Post to Avista, authorizing
20 the use of the Post Falls dam site for water power purposes; and (2) the United States' issuance of
21 a permit to Avista in 1909 to inundate certain Reservation uplands. In light of these events,
22 Avista reasonably believed that it had all necessary rights to store water on the Lake for a portion

1 of the year, irrespective of whether the United States, as Trustee for the Tribe, or Idaho were
2 ultimately determined to own the submerged lands of the Lake itself.

3 **Q. What rights were transferred from Frederick Post?**

4 A. In 1871, Frederick Post, an early settler in what is now Post Falls, Idaho, purchased
5 from the Tribe certain lands along the Spokane River at what is now known as Post Falls, Idaho,
6 for the purpose of developing water power. In accordance with this agreement, by 1879 Post had
7 completed construction of a dam at the site which reached the approximate height of 2,119.6 above
8 mean sea level and, according to Secretary of the Interior Garfield, had already caused water to
9 overflow upon Reservation land for at least a part of the year.

10 On September 16, 1889, Chief Andrew Seltice, on behalf of the Tribe, consented to the use
11 of the Post Falls site for the development of water power. Through the Act of March 3, 1891, the
12 agreement between the Tribe and Post was ratified by Congress and, in 1894, the United States
13 issued a Patent granting the Post Falls site to "Post, his heirs and assigns forever." Thereafter,
14 Avista entered into a series of transactions which, by 1904, effectively transferred Post's ownership
15 of the Post Falls site to Avista, together with his right to use and develop the same for water power
16 purposes. By virtue of these transactions, Avista acquired all rights vested in Post.

17 **Q. Explain the circumstances surrounding the 1909 Permit Avista received from**
18 **the United States.**

19 A. Following its acquisition of the rights granted to Frederick Post, Avista installed
20 new dams in the three channels at Post Falls. These dams were completed in 1906. Although the
21 new dams had a greater discharge capacity than the old dams, they were constructed with control
22 gates that allowed water to be held up to an elevation of 2126.5' during the summer months and

1 gradually released "as the low-water season advances." In 1907, when Avista began holding
2 the Lake level at 2126.5' during parts of the year, a controversy arose with property owners north
3 of the Reservation along the Lake and the Coeur d'Alene River. The property owners, many of
4 whom were ranchers and farmers, argued that creating a reservoir by holding the Lake level at
5 2126.5' damaged rich agricultural property. Accordingly, Avista undertook surveys of the lands
6 below an elevation of 2128'. Although Avista believed that it had the legal right to overflow
7 uplands because of its successorship to the grant of water-power privileges acquired by Post, it
8 sought to obtain peace by purchasing overflow easements from affected property owners.
9 Consequently, over the next several years, Avista purchased easement rights to overflow
10 approximately 3,000 upland acres and was involved in several condemnation actions.

11 On January 25, 1909, Avista filed an application with DOI, pursuant to the Act of
12 February 15, 1901, requesting permission to overflow to an elevation of 2128' above sea level,
13 certain Reservation uplands consisting of approximately 6,240 acres. On February 2, 1909, DOI
14 granted Avista a permit that ". . . shall continue indefinitely and until revoked for good cause by
15 the Secretary of the Interior."

16 Although the scope of the 1909 Permit was to allow Avista to overflow approximately
17 6,240 acres of Reservation uplands and did not address Avista's use of the Lake as a reservoir, it
18 was made clear during the Permit proceedings that Avista was using the Lake as a reservoir for a
19 portion of the year. Avista did not request a permit to store water in the Lake, and the United
20 States did not request that such a permit be obtained, because both believed, at that time, that the
21 entire Lake was owned by Idaho.

1 **Q. You earlier testified that Avista had no ability to have the ownership of the**
2 **Lake decided by the Court. Please explain why that was the case.**

3 A. As I previously stated, the Tribe first announced its claim to the Lake in 1973
4 when it sought to intervene in FERC proceedings. At that time, Avista expressed concerns to
5 FERC over whether it had jurisdiction to resolve the Lake ownership issue, especially since
6 Idaho was not a party to the proceedings. The Tribe later expressed similar concerns when, in a
7 1977 letter to the Bureau of Indian Affairs ("BIA"), it stated that the Tribe's claim to title will
8 "never be resolved" except through a quiet title action against Idaho by the United States, and
9 urged BIA to forward its litigation request to the Department of Justice "for immediate legal
10 action." If the United States had acted then on the Tribe's request, the Lake ownership issue
11 could have been resolved as early as 1980. Instead, the United States did not commence
12 litigation to quiet title to the Lake until 1994.

13 Although having serious questions as to the jurisdiction of FERC to determine title to the
14 Lake, in 1979, Avista attempted to facilitate resolution of the Lake ownership dispute by
15 stipulating to allow FERC to resolve the issue. Following the stipulation, in 1980, an
16 Administrative Law Judge in the FERC proceeding ruled that Idaho owned the Lake. The ruling
17 was later reversed and, in 1983, FERC ruled in favor of the Tribe and the United States. The
18 decision was then appealed to the D.C. Circuit. However, during the pendency of the appeal,
19 FERC requested that the case be remanded to it for further consideration. FERC then waited
20 until 1988 before ruling that it lacked jurisdiction to determine title to the Lake.

21 Following FERC's declination of jurisdiction, the only party in a position to initiate an
22 action to resolve the Lake ownership issue was the United States.

1 In 1991, the Tribe and the United States formally notified Idaho of their claim to the Lake
2 and sought to negotiate the issue. In response, the Idaho Land Board emphatically declared that
3 it would not negotiate over the ownership of the Lake. As a press aide to Governor Andrus
4 explained, "[t]he public owns the beds, streams and navigable waterways of Idaho. That was the
5 Land Board's position in 1890 and it was the Land Board's position in 1991." Even with this
6 response from Idaho, the United States took no action and, as a consequence, the Tribe initiated
7 suit in 1992 on its own and in federal court, to quiet title to the Lake. In considering the issue,
8 United States District Court Judge Harold Ryan concluded that the Tribe's claims were barred
9 because of Idaho's sovereign immunity defense under the Eleventh Amendment, and also stated
10 *in dicta* ". . . the court finds that the State of Idaho has been in rightful possession of all of the
11 lands and waters at issue in this case since it entered the Union in 1890. . . ." Coeur d'Alene I,
12 798 F. Supp. at 1452.

13 During this time period, Avista had no control over the course of proceedings, and lacked
14 standing to take independent action to seek resolution of the ownership dispute.

15 In 1994, the United States finally commenced proceedings against Idaho in federal court
16 to quiet title to the Lake. This action, which spanned approximately 7 years, culminated in the
17 2001 Supreme Court decision.

18 **Q. Please describe the mediation process the Tribe and Avista engaged in to**
19 **resolve the Tribe's claims.**

20 A. The mediation process was unique, involving a blend of traditional litigation
21 elements and mediated settlement negotiations. To oversee and facilitate settlement discussions
22 between the parties, John Bickerman, a Washington D.C. mediator, was retained by the parties.

1 In addition, the Honorable Judge William Canby of the United States Court of Appeals for the
2 Ninth Circuit—a nationally renowned expert in the area of Indian law—was appointed to
3 participate in the process to provide the parties with non-binding advisory opinions on the issues
4 of liability and damages.

5 The mediation process lasted several years. It involved the collection, exchange and
6 detailed analysis of more than 20,000 pages of historical records and documents; required
7 extensive reports from numerous experts; resulted in the submission of hundreds of pages of
8 briefing and legal analysis before Judge Canby; and incorporated numerous meetings and
9 negotiations between the parties. After Judge Canby provided his non-binding advisory opinion,
10 the parties mediation efforts culminated in a negotiated settlement that comprehensively
11 addresses and resolves the Tribe's claims of trespass and Federal Power Act (“FPA”) §10(e)
12 charges, together with issues pertaining to Avista's pending application for a new FERC license
13 for the Post Falls hydroelectric development and rights-of-way across Tribal Trust Lands.

14 **Q. What were the monetary amounts of the Tribe’s trespass and §10(e) claims?**

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

[REDACTED]

[REDACTED]

Q. What are the terms of the settlement agreement regarding trespass and §10(e) payments?

A. As I stated in my direct testimony, the settlement provides for the payment of \$25 million in 2008, \$10 million in 2009 and \$4 million in 2010 for resolution of the past trespass and §10(e) charges. The future 10(e) payments are \$400,000 flat annual payments for the first 20 years of the license and \$700,000 flat annual payments for the remaining years of the license.

Q. Does the settlement with the Tribe also resolve various rights-of-way issues?

A. Yes. The settlement provides that for a payment of \$32,000, the Tribe will consent to BIA granting Avista a 50-year right-of-way to maintain its existing transmission lines across Tribal Trust Lands.

[REDACTED]

[REDACTED]

[REDACTED]

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10 [REDACTED]

11 **Q. What are the other terms of the settlement agreement?**

12 A. These terms are covered in my direct testimony. In summary, the settlement
13 agreement also resolves §4(e) mandatory conditions associated with the FERC relicensing of the
14 Spokane River Project, Tribal taxation and the issuance of a Tribal water permit.

15 **Q. What are the favorable aspects of the settlement with the Tribe?**

16 A. The settlement presents a full and final resolution of the Tribe's claim to trespass
17 and §10(e) annual charges regarding Avista's use of the Lake as a reservoir from 1907 to the
18 present and through the term of a new FERC license for the Post Falls HED. As such, the
19 settlement resolves disputed issues regarding more than 100 years of hydroelectric generation by
20 Avista utilizing Tribal lands, as well as up to 50 years in the future. In addition, the settlement
21 eliminates Avista's potential exposure to a significant verdict for its historical use of that portion
22 of the Lake located within the Reservation.

1 The settlement also resolves a number of critical issues pertaining to Avista's application
2 with FERC to relicense the Post Falls HED, including the imposition of mandatory conditions
3 under §4(e). The dispute over §4(e) conditions has been lengthy, involved, and contentious,
4 resulting in protracted and expensive regulatory and legal proceedings. Finally, the settlement
5 provides for water rights, rights-of-way and other authorizations needed from the Tribe.

6 In the final analysis, the settlement does not give either party all the outcomes that might
7 be obtained or desired under various scenarios, including the possibility of successful litigation
8 in federal court. However, this must be weighed against the likelihood that formal litigation
9 could last decades, could potentially subject Avista to a significant amount in past damages; and
10 could render future operation of the Post Falls HED impracticable. Therefore, considering the
11 risks of litigation, together with the potential exposure and other considerations involved, the
12 settlement allows Avista's continued operation of the Post Falls HED, which preserves a
13 valuable, low cost resource and reflects a reasonable and fair compromise, and a legitimate cost
14 of present and future operations.

15

16 **Q. Does this conclude your rebuttal testimony?**

17 A. Yes.