

AGREEMENT CONCERNING RECREATIONAL SITES ON LANDS OWNED OR ADMINISTERED BY THE IDAHO DEPARTMENT OF PARKS AND RECREATION, OR BY THE IDAHO DEPARTMENT OF FISH AND GAME WITHIN OR ADJACENT TO THE POST FALLS HYDROELECTRIC PROJECT

This Agreement concerning public recreation, land use, aesthetic resources, and specific recreational sites on lands owned or administered by the Idaho Department of Parks and Recreation ("IDPR") or by the Idaho Department of Fish and Game ("IDFG") within or adjacent to the Post Falls Hydroelectric Development, licensed by the Federal Energy Regulatory Commission ("FERC" or "Commission") is made by IDPR, IDFG, and Avista Corporation ("Avista") who are referred to collectively as "the Parties."

RECITALS

- A. Avista is the licensee for the Spokane River Hydroelectric Project No. 2545 ("SR Project"), which currently encompasses four hydroelectric developments in Washington and the Post Falls Hydroelectric Development ("Project") in Idaho. The FERC license for the SR Project expired on August 1, 2007, and FERC issued an annual license for such project. On July 28, 2005, Avista submitted to FERC an application for a new license for the Project (designated Project No. 12606) and an application for a new license for the other developments of the SR Project (designated as Project No. 2545).
- B. The Project is located in Idaho and regulates the upper 7.5 feet of Coeur d'Alene Lake during the summer season. Public recreational sites on lands owned by IDFG and on lands owned or administered by IDPR provide public access to Project lands and waters. See Preliminary Draft Environmental Assessment ("PDEA") Section 5.10 beginning on page 5-223 and Final Environmental Impact Statement ("FEIS") Section 3.3.8 Recreation Resources beginning on page 3-362. The PDEA and the FEIS are on file with Avista, IDPR, IDFG, and FERC.
- C. In April 2002, Avista requested that the Commission approve its use of the alternative licensing process ("ALP") for relicensing the SR Project. On June 14, 2002, the Commission issued its approval to use the ALP for relicensing the SR Project. The ALP was intended to facilitate participation and improve communication among interested parties and avoid unnecessary conflict. The IDPR and IDFG participated in the ALP 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 associated with the Project.
- D. The PDEA for the Project notes that, at the recommendation of the land and recreation managers (including IDPR and IDFG), United States Bureau of Land Management ("BLM"), United States Forest Service, 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 5-258 to -260 for public outreach. Under protection, mitigation, and enhancement (“PME”) measures PF-REC-1¹, PF-REC-2², and PF-REC-4³, 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. “In comments on the Draft Environmental Impact Statement (“DEIS”), various parties, including IDFG, National Park Service, IDPR, and BLM, stated that they supported Avista’s proposed recreation measures.” FEIS, page 3-382.

- E. Under protection, mitigation and enhancement measure PF-REC-2, concerning recreational facilities at Coeur d’Alene Lake, Avista would contribute funds to, and collaborate with, IDPR and IDFG in the planning, design, and development or enhancement of 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 IDPR and IDFG to improve existing access sites and enhance recreational opportunities as needed.
- F. The PDEA (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 for the development or enhancement of water-based recreational facilities on Coeur d’Alene Lake and its tributaries recognizes the nexus between Project-related operations and those portions of the recreation sites that are within or provide public access to the Project.
- G. The Parties recognize that FERC will ultimately determine whether it is in the public interest to incorporate PF-REC-2 into a new FERC license that will replace the license issued by FERC on August 17, 1972 (“New FERC License”). While the Parties have requested that FERC include PF-REC-2, or a substantially similar provision acceptable to Avista, IDPR, and IDFG in the New FERC 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 Avista, IDPR, and IDFG in the New FERC License for the Project. FERC has determined in the FEIS that some of Avista’s proposed “site developments could (1) meet the projected demand for recreational opportunities, including trails; (2) provide barrier-free recreational facilities and public access by redesigning and reconstructing existing facilities, including boat

¹ The purpose of PF-REC-1 is to provide a framework for Avista to implement the recreational site improvements described in the Coeur d’Alene Lake Recreation PME (PF-REC-2) and coordinate management of recreational resources on or adjacent to the Project with the various land managers.

² The purpose of PF-REC-2 is for Avista to assist and provide financial support in the development of, and ongoing operation and maintenance of, numerous specific recreation facilities associated with Coeur d’Alene Lake.

³ The purpose of PF-REC-4 is for Avista to assist in public education of recreational users through Interpretive and Educational Programs about the Project and related recreation opportunities; natural resource management activities; cultural heritage; public safety concerns; and relevant laws and regulations.

ramps; and (3) provide for public health and safety needs by replacing infrastructure (e.g., restrooms and roads)." (FEIS, page 3-383).

- H. Avista, IDPR, and IDFG 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 recreation and to mitigate the demand on public fiscal resources by agreeing to cost-share facility improvements for recreational sites on IDPR-owned or administered lands and IDFG-owned lands within or adjacent to the Project boundary. IDPR and IDFG lands and/or resources are directly affected by PF-REC-1 and PF-REC-4, and IDPR and IDFG fully support them as currently written.

NOW, THEREFORE, the Parties agree as follows:

1. The Parties have entered into this Agreement to resolve, as to IDPR and IDFG, all recreation and aesthetic issues regarding relicensing of the Project. The Parties agree that the protection, mitigation, and enhancement measures set forth in PF-REC-2 and the terms of this Agreement are fair and reasonable and in the public interest. The contribution of money and services by Avista will assist with management and protection of lands owned or administered by IDPR and IDFG providing recreational access to the Project. The Parties recognize that PF-REC-2 and this Agreement will serve the public's recreational needs while avoiding potentially expensive and time-consuming administrative processes and litigation. In addition, the Parties have entered into this Agreement to avoid delay in implementation of the PF-REC-2 protection, mitigation, and enhancement measures.
2. The Parties will request that FERC accept and incorporate, without material modification, as license articles in the New FERC License, all of the measures set forth in Sections 4 and 5 of this Agreement. The Parties agree that Avista's performance of its obligations under this Agreement will resolve its recreation related obligations as to IDPR and IDFG related to relicensing of the Project.
3. 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. This Agreement shall not be offered in evidence or cited as precedent by any Party to this Agreement in an administrative, judicial, or other adjudicative proceedings, except in a proceeding to establish the existence of, or to enforce or implement, this Agreement. This Section 3 shall survive any termination of this Agreement.
4. The Parties agree that Avista's funding obligations relative to conducting the agreed-upon recreation projects including, but not limited to, planning, permitting, construction, and operation and maintenance costs associated with this Agreement are included in the funding referenced below. The funding provided by Avista shall be used to pay Avista, IDPR, IDFG, other recreation management entities, or any contractor thereto to implement the agreed-upon recreation projects, as agreed to by the Parties. Avista's

administrative costs to implement this Agreement will be part of Avista's internal overall costs for license implementation and compliance, and are not included in the funding commitments set forth in this Agreement.

- a. Avista shall collaborate with IDPR in the planning, design and construction of recreation project development on IDPR owned or administered lands, and shall pay the agreed upon amounts of such developments as specifically identified in Section 5 below. Avista shall collaborate with IDFG in the planning, design and construction of recreation project development on IDFG owned lands, and shall pay the agreed upon amounts of such developments as specifically identified in Section 5 below. The project development funding amounts specified in Section 5 below, excluding the annual funding commitments set forth in Sections 5.b., 5.c., and 5.d. for operation and maintenance of specific recreation facilities, are based upon the RLUAWG's cost estimates and reflect an estimated twenty-five percent of project costs. This funding commitment toward recreation project development, excluding the annual funding commitments set forth in Sections 5.b., 5.c., and 5.d. below, shall be effective upon Avista's acceptance of the New FERC License and shall expire ten years after the acceptance of the New FERC License in accordance with and as specified in PF-REC-1, including the provision for funds not expended within ten years after acceptance of the New License, *See* PDEA at page B-62. The dates upon which Avista shall provide the funding for the developments specifically identified in Section 5 below shall be mutually agreed upon by Avista and IDPR, or Avista and IDFG as appropriate.
 - b. Avista shall provide annual operation and maintenance costs, not to exceed the agreed upon amount for such operation and maintenance costs specifically identified in Sections 5.b., 5.c., and 5.d. below, to IDPR and other recreation management entities, for the term of the New FERC License, and for any annual licenses issued subsequent thereto, with the first such annual payment to be made within one year from the date Avista accepts the New FERC License.
 - c. The sums referenced in Sections 4.a. and 4.b. above and Section 5 below are stated in 2007 dollars and shall be adjusted yearly in accordance with the Consumer Price Index for all Urban Consumers (U.S. City Averages, all items, not seasonally adjusted). If the publication of such Consumer Price Index is discontinued, the Parties shall select an appropriate alternative index to achieve a similar economic effect.
 - d. Avista, IDPR, or IDFG will obtain all necessary permits and approvals for the agreed-upon Coeur d'Alene Lake recreation projects and will coordinate their implementation with the implementation of any Historic Properties Management Plan required by the New FERC License. Nothing herein obligates Avista to obtain any permits which are preempted by the Federal Power Act.
5. Avista agrees to provide the following upon its acceptance of the New FERC License:

a. IDPR Boat Ramp Extensions

Avista will cooperate with IDPR to extend two motorboat ramps to accommodate recreation use on Coeur d'Alene Lake during the period of time that Avista does not regulate Coeur d'Alene Lake levels ("off-season use"). The specific boat ramps include those located at Chatcolet and Rocky Point in Heyburn State Park. Avista and IDPR shall collaborate in the planning, design, and funding for the projects. Avista shall provide funding, in an amount not to exceed \$20,000 (approximately \$10,000 for each ramp), for both boat ramp extension projects.

b. Abandoned Dock/Debris Removal Associated with Higgens Point, Heyburn and Mowry State Parks

Avista will cooperate with IDPR, the other recreation management entities on Coeur d'Alene Lake, and private landowners to remove debris, such as abandoned docks and other human-made structures from the Project, including Higgens Point and Heyburn and Mowry State Parks. This project will be conducted over a two-year period to accommodate debris removal during the spring runoff season. Avista shall provide funding for Project-wide debris removal, in amounts not to exceed \$40,000 a year, during the first 2 years after it accepts the New FERC License and \$6,000 annually for the term of the New FERC License thereafter and for any annual licenses issued subsequent thereto.

c. Higgens Point

Avista will cooperate with IDPR to construct a breakwater for the boat-launch area and to stabilize the shoreline that is eroding due to wind fetch and reconstruct the docks at the boat-in-only sites at Higgens Point. Avista and IDPR shall collaborate in the planning, design, and funding for the projects. Avista shall provide funding, in amounts not to exceed \$100,000 for project development and thereafter, \$10,000 annually for the term of the New FERC License, and for any annual licenses issued subsequent thereto, to supplement the costs for operation and maintenance of the facilities.

d. Mowry State Park

Avista shall, pursuant to this Agreement and a separate settlement agreement with Kootenai County Parks and Waterways ("County"), provide funding to IDPR and/or to the County for mooring buoys and to supplement IDPR's and/or the County's annual costs for operation and maintenance of Mowry State Park. Avista and IDPR shall collaborate in the planning, design, and funding required by this Section 5.d. The aggregate amount that Avista shall provide to IDPR under this Agreement and/or to the County under a separate agreement shall not exceed: (1) \$1,500 for redevelopment (approximately 25 percent of the total project cost as estimated by the RLUAWG); and (2) \$3,500 annually to supplement the costs for operation and maintenance of the facilities for the term of the New FERC License, and for any annual licenses issued subsequent thereto.

e. Trail of the Coeur d'Alenes, Trail Spur (Oasis)

Avista will cooperate with IDPR to develop an oasis along the Trail of the Coeur d'Alenes in Heyburn State Park that will accommodate use by individuals with disabilities. The oasis may include interpretive displays depicting the Park, tribal history, the lake and/or wildlife and other amenities such as picnic tables or park benches. Avista shall provide funding, in an amount not to exceed \$15,000 for project development.

f. Chatcolet Campground, Heyburn State Park

Avista will cooperate with IDPR to reconstruct the pedestrian trail from the Chatcolet Campground to the Trail of the Coeur d'Alenes and install a sealed-vault toilet near the existing flush toilets which are drained and locked in the winter to prevent freezing. The existing toilets are located adjacent to the Trail of the Coeur d'Alenes in the lowest part of the Chatcolet campground to accommodate off-season trail use. Avista and IDPR shall collaborate in the planning, design, and funding for the projects. Avista shall provide funding, in an amount not to exceed \$8,000 for project development.

g. Hawley's Landing, Heyburn State Park

Avista will cooperate with IDPR to extend the boat docks at Hawley's Landing to accommodate "off-season" use. Avista and IDPR shall collaborate in the planning, design, and funding for the project. Avista shall provide funding, in an amount not to exceed \$4,000 for project development.

h. Plummer Point and Rocky Point, Heyburn State Park

Avista will cooperate with IDPR to provide sand at Plummer Point and Rocky Point swimming beaches in Heyburn State Park. Avista and IDPR shall collaborate in the planning, design, and funding for the projects. Avista shall provide funding, in an amount not to exceed \$2,000 for placing sand on the two beaches.

i. Future Recreation Projects

Avista will consult with IDPR and the other recreation management entities on Coeur d'Alene Lake in the planning and development of new and/or reconstructed recreation projects after the projects identified in the PF-REC-2 Coeur d'Alene Lake Recreation PME measure are completed. Avista shall provide funding, in an amount not to exceed \$60,000 annually after the projects identified in PF-REC-2 are completed, for the construction of new and/or reconstruction of additional recreation projects on or adjacent to the Project waters upstream of the Post Falls Hydroelectric Development. Avista shall provide funding, in an amount not to exceed \$60,000 annually for the term of the New FERC License, and for any annual licenses issued subsequently thereto.

j. IDFG Boat Ramp Extensions

Avista will cooperate with IDFG to extend the Anderson Lake and Lofts Bay motorboat ramps to accommodate recreation use on Coeur d'Alene Lake during the period of time that Avista does not regulate Coeur d'Alene Lake levels ("off-season use"). Avista and IDFG shall collaborate in the planning, design, and funding for the projects. Avista shall provide funding, in an amount not to exceed \$20,000 (approximately \$10,000 for each ramp), for the boat ramp extension projects. Funding may be used to extend other boat ramps in lieu of the Anderson Lake and Lofts Bay boat ramps if Avista and IDFG mutually agree that funding other boat ramps would better accommodate off-season recreation use on Coeur d'Alene Lake.

6. General Provisions

a. Entire Contract

This Agreement contains all covenants, stipulations and provisions agreed to by the Parties. No agent or representative of any Party has authority to make, and the Parties shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein. No changes, amendments or modifications of the terms hereof shall be valid unless reduced to writing and signed by the Parties as an amendment to this Agreement.

b. Resolving Disputes

- i. In the event that any dispute arises among the Parties as to the interpretation of and/or compliance by any Party with the obligations of this Agreement, the Parties agree to engage in good faith negotiations for a period of at least ninety (90) days in an effort to resolve the dispute.
- ii. No Party shall seek relief in any forum for noncompliance with this Agreement unless and until the requirements of Section 6.b.i. shall have been met. If dispute resolution is not successful, any Party may seek judicial, administrative or other enforcement of the terms of this Agreement, which terms shall be specifically enforceable under all applicable laws governing agreements of this type.
- iii. If any action is brought by any Party to enforce the provisions of this Agreement, the prevailing Party, in such action, shall be entitled to reasonable attorney fees and court costs as determined by the court.

c. Governing Law

The New FERC License and any other terms of this Agreement over which a federal agency has jurisdiction shall be governed, construed, and enforced in

accordance with the statutory and regulatory authorities of such agency. This Agreement shall otherwise be governed and construed under the laws of the State of Idaho. By executing this Agreement, no state agency or officer is consenting to the jurisdiction of a federal court unless such jurisdiction otherwise exists nor shall this Agreement be construed as a waiver of the State's immunity to suit under the Eleventh Amendment of the United States Constitution.

d. Notice and Communication

- i. All written notices to be given pursuant to this Agreement shall be mailed by first class mail, or overnight express service, postage prepaid, to each Party at the addresses listed below or such subsequent address as a Party shall identify. Notices shall be deemed to be given five (5) business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.
- ii. For purposes of implementing this Agreement, the Parties agree to inform each other of their designated contact persons, their addresses and telephone numbers. All written notices shall be posted to these individuals at their addresses. Notification of changes in the contact persons must be made in writing and delivered to all other contact persons.

e. Availability of Funds

Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of Idaho. The Parties acknowledge that IDPR and IDFG shall not be required under this Agreement to expend any appropriated funds unless and until an authorized official of IDPR or IDFG affirmatively acts to commit such expenditures, as evidenced in writing.

f. No Third-Party Beneficiaries

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.

g. Successors and Assigns

Unless or until terminated pursuant to the terms of this Agreement, this Agreement shall apply to and be binding on the Parties and their successors and assigns.

h. Failure to Perform Due to Force Majeure

No Party shall be liable to any other Party for breach of this Agreement as a result of a failure to perform, or for delay in performance of, any provision of this Agreement if such performance is delayed or prevented by force majeure. The term "force majeure" means any cause reasonably beyond the affected Party's control, whether unforeseen, foreseen, foreseeable, or unforeseeable, and without the fault or negligence of the affected Party. Force majeure may include, but is not limited to, natural events, labor or civil disruption, breakdown or failure of Project works resulting from events beyond Avista's control, orders of any court or agency having jurisdiction over the Party's actions, or delay in issuance of any required permit. Increased cost for the performance of any term of this Agreement or change in market conditions for the sale of electricity shall not be deemed to constitute force majeure, provided that Avista shall not be obligated to perform measures in excess of the commitments specified in this Agreement. The Party whose performance is affected by force majeure shall notify the other Parties in writing within seven days after becoming aware of any event that such affected Party contends constitutes force majeure. Such notice shall identify the event causing the delay or anticipated delay, estimate the anticipated length of delay, state the measures taken or to be taken to minimize the delay, and estimate the timetable for implementation of the measures. The affected Party shall make all reasonable efforts to promptly resume performance of this Agreement and, when able, to resume performance of its obligations and give the other Parties written notice to that effect.

i. No Partnership

Except as otherwise expressly set forth herein, this Agreement does not, and shall not be deemed to, make any Party the agent for, or partner of, any other Party.

j. Indemnification

Each Party shall, to the extent permitted by law, indemnify, defend and save harmless the other Party, its officers, agents, and employees from and against any and all liability, claims, damages, losses, expenses, actions, attorneys' fees and suits whatsoever caused by or arising out of the indemnifying party's negligent or wrongful performance, acts or omissions under this Agreement or the indemnifying party's failure to comply with any state or federal statute, law, regulation or rule; provided, however, that the Parties agree to and acknowledge the following:

- i. IDPR and IDFG are governmental entities and this section 6.j. shall in no way or manner be construed so as to bind or obligate the State of Idaho to unlawfully expend funds beyond the term of any particular appropriation of funds by the State Legislature as may exist from time to time.

ii. IDPR and IDFG are state governmental entities and are subject to state law restrictions concerning actions it may take to accept liability, including the Idaho Tort Claims Act, Idaho Code §§ 6-901, *et seq.*

iii. The Parties agree that an ultimate determination of liability is a precondition to payment of reasonable litigation expenses, including reasonable attorney fees.

k. Severability

If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, and to this end, the provisions of this Agreement are declared to be severable.

l. Independent Relationship

This is an agreement to provide funding to IDPR and IDFG as discussed herein. Avista, IDPR, and IDFG are independent contracting parties. No Party, nor any subcontractor of the Parties, is authorized to act as an agent, employee or representative of the other Party for any purpose.

7. Effective Date

This Agreement is effective as of the day that the last Party executes the Agreement.

8. Signature Clause

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

Avista Corporation

Idaho Department of Parks & Recreation

Signature: Satt Mann

Signature: Robert L. Meinen
Robert L. Meinen

Title: President / CEO

Title: Director

Date: 3-28-08

Date: 3/17/08