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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA	)	Subcase No. 91-7624
Case No. 49576	)	(St. Joe Wild and Scenic River claim)
	)	
	)	AFFIDAVIT OF ERIC JOHNSTON
	)	
	)	
	)	

**AFFIDAVIT OF ERIC JOHNSTON
ST. JOE WILD AND SCENIC RIVER CLAIM**

State of: OREGON
County of: MULTNOMAH

ERIC JOHNSTON, being first duly sworn upon oath, deposes and says:

I. Introduction.

1. Position. I am currently employed by the United States of America, Forest Service (Forest Service), as Assistant Director for Natural Resources for the Pacific Northwest Region of the Forest Service. Prior to my current position, I served as the Assistant Director of Renewable Resources Management for the Northern Region of the Forest Service, which includes the Idaho panhandle region including the Idaho Panhandle National Forest and the entirety of the St. Joe River basin. I have been employed by the Forest Service for 27 years. My past positions for the Forest Service have included: Assistant National Program Leader for Threatened and Endangered Species; District Staff Officer for Fish and Wildlife Resources on the Thorne Bay Ranger District in the Alaska Region of the Forest Service; District Fish Biologist on the Thorne Bay Ranger District; and Zone Fisheries Biologist on the Shasta Trinity National Forest in the Pacific Southwest Region of the Forest Service.

2. Duties. As part of my assigned duties and responsibilities as the Assistant Director of Renewable Resources Management for the Northern Region of the Forest Service, I worked on filing, defending, and protecting Forest Service water uses and water right claims necessary for the Forest Service to carry out its responsibility to administer National Forest System lands in the Northern Region, including water right claims the Forest Service filed in the Coeur d'Alene – Spokane River Basin Adjudication (CSRBA). I worked on and supervised the preparation of the Notice of Claim that was filed for the St. Joe Wild and Scenic River and

assigned Subcase No. 91-07624. I have reviewed and am familiar with the *Study Report* that served as the basis for inclusion of the St. Joe River into the Wild and Scenic Rivers System, as well as the *Management Plan* subsequently prepared by the Forest Service and the Forest Service's ongoing resource assessment of the St. Joe River, as discussed in section 17, below. I supervised and participated in the quantification of the St. Joe Wild and Scenic River claim. I was the principal Forest Service negotiator and agency and technical representative in the settlement negotiations that culminated in execution of the Stipulation and Joint Motion for Order Approving Stipulation (Stipulation) and the agreement by the parties to the proposed Partial Decree attached as Attachment 4 to that Stipulation (Partial Decree).

3. Purpose of Affidavit. I submit this affidavit to address the basis for each element of the Partial Decree, including the legal basis of the claimed water right and the quantity of water to be adjudicated.

4. Overview of St. Joe Wild and Scenic River claim and Partial Decree. The United States, on behalf of the U.S.D.A. Forest Service, claims a water right for instream flows for the segment of the St. Joe River which is designated as a component of the national Wild and Scenic River System. The designated section of the river consists of 66.3 river miles, extending from immediately above the confluence of the St. Joe River and the North Fork of the St. Joe River, upstream to the origin of the St. Joe River at St. Joe Lake. 16 U.S.C. § 1274(a)(23). *See* map, Attachment 5 to Stipulation at Exhibit A, depicting St. Joe Wild and Scenic River basin including the beginning point and ending point.

5. Legal basis for the claimed right. The United States asserts a federal reserved water right for the St. Joe Wild and Scenic River pursuant to the Wild and Scenic Rivers Act of 1968, Pub. L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et

seq.), and the National Parks and Recreation Act (St. Joe WSR Designation Act), Pub. L. 95-625, 92 Stat. 3467, Nov. 10, 1978 (codified as amended at 16 U.S.C. § 1274(a)(23)). The United States' entitlement to federal reserved water rights to fulfill the purposes of the Wild and Scenic Rivers Act was affirmed in *Potlatch Corp. v. United States*, 12 P.3d 1256, 1258-59 (2000).

II. Explanation of water right elements. This portion of this Affidavit addresses the basis for each element of the Partial Decree based on the elements identified in Idaho Code § 42-1409 (1)(a), (b), (c), (d), (f), (g), (h) and (k).

6. Name and address of owner (I.C. § 42-1409 (1)(a)): Element 1 of the Partial Decree states that the owner of the right is:

UNITED STATES OF AMERICA, on behalf of the U.S.D.A. Forest Service
550 W. Fort Street MSC033
Boise, Idaho 83724

This federal reserved water right claimed pursuant to the Wild and Scenic Rivers Act and the St. Joe WSR Designation Act will be adjudicated in the name of the United States of America. As directed in the Forest Service Manual section 2541.22b, it is the responsibility of the Forest Service to prepare water right claims and to compile the necessary evidence to support them.

7. Source of water (I.C. § 42-1409 (1)(b)): Element 2 of the Partial Decree identifies the St. Joe Wild and Scenic River, tributary to Coeur d'Alene Lake, as the source of the water claimed.

8. Quantity of right (I.C. § 42-1409 (1)(c)(ii)): Element 3 of the Partial Decree identifies the quantification site for the water right as the St. Joe River immediately above its confluence with the North Fork of the St. Joe River at the specified legal description (¶ 3.a.(3)) (St. Joe above North Fork quantification site). The water right includes: (i) a base flow component (¶ 3.a.(1)), so that when the stream flow at the North Fork quantification site is less

than the identified high flow amount of 6,220 cubic feet per second (cfs), the United States' water right is for the flows identified for each semi-monthly time period as set forth in ¶ 3.a.(1) of the Partial Decree; and (ii) a high flow component (¶ 3.a.(2)), so that when the stream flow at the North Fork quantification site is equal to or greater than the identified high flow amount of 6,220 cfs, the United States' water right is for the stream flow up to 20,300 cfs. The water right also precludes any diversion of water out of the watershed of the St. Joe Wild and Scenic River Basin above the ending point (downstream terminus) of the designated reach (¶ 3.c.). The bases for these claimed quantities are addressed in Section III, below.

9. Priority date (I.C. § 42-1409 (1)(d)(ii)): Element 4 of the Partial Decree identifies the priority date of the water right as November 10, 1978—the date on which the St. Joe River was designated by Congress as a component of the national Wild and Scenic Rivers System by enactment of the St. Joe WSR Designation Act.

10. Point of diversion (I.C. § 42-1409 (1)(f)): Element 5 of the Partial Decree states that there is no diversion associated with the water right and identifies the locations of the beginning point and the ending point of the water right. The water right applies to the entire designated reach of the river designated as a component of the national Wild and Scenic Rivers System by the St. Joe WSR Act. The stream flow decreed will be used throughout the identified stream reach.

11. Purpose of use (I.C. § 42-1409 (1)(g)(ii)): Element 6 of the Partial Decree states that the purpose of the water right is to fulfill the purposes of the Wild and Scenic Rivers Act and the St. Joe WSR Designation Act. More specifically, the purpose of the water right is to protect instream flows in quantities sufficient to fulfill the purposes for which the St. Joe River was designated as a component of the national Wild and Scenic Rivers System. As addressed in

section 17, below, the *Study Report* that served as the basis for inclusion of the St. Joe River into the Wild and Scenic Rivers System, as well as the *Management Plan* subsequently prepared by the Forest Service and the Forest Service's ongoing resource assessment of the St. Joe River, identify fisheries, scenic values and recreation as water-dependent outstandingly remarkable values of the St. Joe Wild and Scenic River. The purpose of the water right includes protection of instream flows to preserve these values.

12. Period of use (I.C. § 42-1409 (1)(g)(ii)): Element 7 of the Partial Decree states that the period of use is January 1 to December 31. Water is necessary to fulfill the purpose of the reservation year-round and, consequently, the water right is to be adjudicated for year-round use.

13. Place of use (I.C. § 42-1409 (1)(h)(ii)): Element 8 of the Partial Decree states that this instream flow water right is used throughout the entire designated St. Joe Wild and Scenic River from the beginning point to the ending point. The federal reservation that created this federal reserved water right is identified in paragraph 10.a. of the Partial Decree as the Wild and Scenic River Act and the St. Joe WSR Designation Act.

14. Annual volume of consumptive use: Element 9 of the Partial Decree states that the instream flow water right is non-consumptive. The instream flows to be decreed for Wild and Scenic River purposes are completely non-consumptive (other than evaporation and evapotranspiration that may take place within the designated segment). No consumptive volumes are included in the Partial Decree. All natural flow remains available for appropriation and use downstream from the ending point of the water right.

15. Other provisions necessary for definition or administration of water right (I.C. § 42-1409 (1)(h)(ii); I.C. § 42-1409 (1)(k)): Element 10.a. of the Partial Decree provides

that this is a federal reserved water right established pursuant to the Wild and Scenic River Act and the St. Joe WSR Designation Act. Element 10.b. of the Partial Decree identifies the subordinations that have been agreed to under the terms of the Stipulation and to which the adjudicated federal water right will be subject, as further addressed in section 24, below. These additional provisions are necessary to define the unique characteristics of this federal reserved water right and to describe the rights and uses to which this federal reserved water right is subordinated in order to provide for proper administration of this water right and other existing and future water rights.

III. Quantification of water right. This portion of this Affidavit addresses the manner in which the water right described in the Partial Decree was quantified.

16. Basis of quantification. The quantification of the water right described in the Partial Decree involved a four-step process. First, the Forest Service identified the outstandingly remarkable values for which the St. Joe Wild and Scenic River was designated as a component of the national Wild and Scenic Rivers System and determined the water-dependent values for which necessary flows should be quantified. Second, the Forest Service developed hydrologic data for the St. Joe River. Third, the Forest Service identified the flows necessary to protect these selected water-dependent outstandingly remarkable values. Fourth, the Forest Service integrated the identified flows into a water right claim and ultimately the Partial Decree. The analyses involved in each of these four steps are described below.

17. Identification of outstandingly remarkable values. To be included in the national Wild and Scenic Rivers Act System, a river must “possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” 16 U.S.C. § 1271. The St. Joe WSR Designation Act does not state the outstandingly remarkable

values of the St. Joe River. However, the *St. Joe River Wild and Scenic Study Report and Final Environmental Impact Statement* (U.S.D.A. Forest Service 1976) (*Study Report*), conducted at the direction of Congress in the WSRA and that served as the basis for inclusion of the St. Joe River into the Wild and Scenic Rivers System, describes the river's "outstanding features," including scenic, geologic, threatened or endangered species, and history and historical sites. The *St. Joe Wild & Scenic River Development & Management Plan* (U.S.D.A. Forest Service 1976) (*Management Plan*), is more explicit in identifying the "primary values" of the St. Joe Wild and Scenic River as including its wildlife, fisheries, recreation, visual quality, and water quality values. See also 46 Fed. Reg. 21796-01 (April 14, 1981); 46 Fed. Reg. 25664 (May 8, 1981) (noting these same "primary values"). The Forest Service's ongoing resource assessment of the St. Joe River confirms that the primary values of fisheries, visual quality (scenery), and recreation constitute water-dependent outstandingly remarkable values of the St. Joe Wild and Scenic River. The Forest Service therefore quantified the water right based on its calculation of the flows necessary to protect the water-dependent outstandingly remarkable fisheries and recreational values of the St. Joe River. The Forest Service concluded that the flows that protect the fisheries and recreational values of the St. Joe River will also preserve the outstandingly remarkable scenic values of the river.

18. Hydrology. In order to protect the entire designated reach of the St. Joe Wild and Scenic River, the Forest Service quantified the claim at the ending point (downstream terminus) of the designated segment, *i.e.*, at a point just above the St. Joe River's confluence with the North Fork of the St. Joe River (North Fork quantification site). See map, Attachment 5 to Stipulation at Exhibit A. Because there is no existing stream gage at the North Fork quantification site, the Forest Service interpolated the hydrologic data at the North Fork quantification site based on

correlation of basin area and measured flows at the upstream Red Ives gage and the Calder gage located further downstream on the St. Joe River. (The Stipulation provides that, prior to seeking enforcement of the St. Joe Wild and Scenic River water right through the curtailment of diversions upstream from the ending point of the St. Joe Wild and Scenic River, the United States will install and maintain a stream gage at the North Fork quantification site acceptable to the Idaho Department of Water Resources). The relatively short period of record at Red Ives was adjusted to reflect long term stream flow characteristics based on United States Geological Survey (USGS) publications and an unpublished paper by the retired Forest Service statistician who developed the methodology previously used for similar extrapolations for the SRBA Wild and Scenic Rivers (Consolidated Subcase No. 75-13316 (encompassing Subcases 75-13316, 77-11941, 77-13844, 78-11961, 81-10472, 81-10513 and 81-10625)).

Forest Service hydrologists determined semi-monthly and high flow claim quantities based on the 20% exceedance, 1.5-year and 100-year flood frequency discharges from the interpolated hydrologic data for the North Fork quantification site. The interpolation methodology and flood frequency calculations are based on USGS methodologies. An “exceedance discharge” is the flow that is exceeded the stated percentage of the time (therefore, the lower the exceedance value, the higher the flow). The 20% exceedance discharge constitutes the relatively high flow that is exceeded only 20% of the time for each semi-monthly period. A “flood frequency discharge” (sometimes referred to as a “recurrence interval flow”) is the high flow that recurs on average each stated time duration (the longer the stated duration, the higher the flow). The 1.5-year flow constitutes the high flow that recurs on average every year and a half and that roughly corresponds to the bank-full discharge; the 100-year flood frequency discharge constitutes the very high flow that recurs on average every 100 years.

19. Quantification of flows necessary to protect fisheries values. The Forest Service incorporated two components into its quantification of the flows necessary to protect the fisheries values of the St. Joe Wild and Scenic River: (1) the fish habitat base flow; and (2) the aquatic habitat maintenance flow.

20. Fish habitat base flow. The fish habitat base flow component is based on identifying the minimum flow necessary to provide sufficient flow velocity and depth for selected aquatic species to complete their life cycles. The fish habitat base flow component is the minimum flow necessary to provide instantaneous habitat flow protection for the aquatic resource.

There were no available site-specific analyses of fish habitat base flow requirements for the St. Joe River. The Forest Service therefore quantified the flows necessary to satisfy the fish habitat base flow component based on consideration of the flows identified as necessary to meet this component for the six Wild and Scenic Rivers adjudicated in the SRBA referenced in section 18, above, and extrapolation of those flows to the St. Joe. Those SRBA investigations included intensive fish habitat base flow analyses carried out over a number of years using the Instream Flow Incremental Methodology (a collection of computer models and analytical procedures designed to predict changes in fish habitat from incremental flow changes), as well as one of its major elements, the Physical Habitat Simulation System (a computer modeling system that calculates the amount of microhabitat available for different life states at different flow levels for a target species). The Forest Service compared and related the results of those analyses to the hydrology of the St. Joe River. Based on that analysis, and after settlement discussions with objectors, the Forest Service determined that the 20% exceedance discharges, *i.e.*, the flows in

each semi-monthly period that are exceeded 20% of the time, would provide the necessary instantaneous habitat flow protection.

21. Aquatic habitat maintenance flow. The aquatic habitat maintenance component considers both aquatic habitat maintenance and riparian ecosystem maintenance. The aquatic habitat maintenance component ensures sufficient transport of bedload sediment through the stream reach to preserve the stream channel with a bed of coarse gravel largely clear of sand and dirt. The riparian ecosystem maintenance component ensures flows sufficient to maintain the riparian ecosystems within the river.

The aquatic habitat maintenance flow was quantified as the 1.5 year recurrence interval flow, *i.e.*, the high flow that recurs on average every year and a half. Studies have established that this flow level—calculated at the North Fork quantification site to be 6,220 cubic feet per second (cfs)—is a good surrogate for bank-full flow, *i.e.*, the flow that overtops the river bank and inundates the adjacent flood plain. This flow level has been established to be the most efficient flow for transporting bedload sediment and maintaining channel structure. Based on discussions with the State and other objectors, and their interest in capping the aquatic habitat maintenance flow at a level above which flows may be destructive and achieving consistency with the SRBA Wild and Scenic Rivers settlement, the Forest Service concluded that setting the upper limit of the aquatic habitat maintenance flow at the 100-year flood flow of 20,300 cfs would not impede the objective of transporting bedload sediment through the designated reach and maintaining channel structure. The aquatic habitat maintenance flow was therefore quantified as the 1.5-year recurrence interval flow of 6,220 cfs, up to but not including flows at or above the 100-year flood flow of 20,300 cfs.

The flows necessary to meet the fish habitat base flow, aquatic habitat maintenance flow, and recreation components of the water right encompass a wide range of flows, including bank-full flows that periodically overtop the river bank and inundate riparian ecosystems adjacent to the river. These flows were determined to provide sufficient water to protect the riparian ecosystem and a separate quantification of riparian maintenance flows was therefore not deemed to be necessary.

22. Recreation flow. The quantification of the flows necessary to protect the recreational values of the St. Joe is based upon protection of flows necessary to protect the outstanding boating values of the St. Joe. The Forest Service analyzed the flow preferences of recreational users, including results from an American Whitewater survey of users. Participants in that survey provided information on the timing, reaches of stream utilized, and preferred flows for kayaking and rafting. The primary recreation season was determined to encompass the period April through July. Based on the Forest Service's analysis, including consideration of these survey results, and after settlement discussions with the State and other objectors, the Forest Service determined that the 20% exceedance discharges, *i.e.*, the flows in each semi-monthly period that are exceeded 20% of the time, would provide the necessary flows to satisfy the full range of recreational boating experiences.

23. Integration of identified flows into claim form and Partial Decree. The St. Joe Wild and Scenic river claim, and ultimately the Partial Decree, was developed by combining the fisheries base flows, the aquatic habitat maintenance high flows, and the recreation flows. The water right described in the Partial Decree includes: (i) a base flow component, selected as the 20% exceedance discharge for each semi-monthly period, to provide the fish habitat base flow and the recreation flow; and (ii) an aquatic habitat maintenance component to maintain

physical aquatic habitat in the long term. The base flow component is expressed such that when the stream flow is less than the identified threshold amount of 6,220 cfs, the United States' water right is for the flows identified for each semi-monthly period. The aquatic habitat maintenance component is expressed as a "trigger," such that when the stream flow is equal to or greater than the identified threshold amount of 6,220 cfs, the United States' water right is for all stream flows, up to but not including flows at or above the 100-year flood flow of 20,300 cfs. The water right also precludes any diversion of water out of the watershed of the St. Joe Wild and Scenic River Basin above the ending point (downstream terminus) of the designated reach. This provision is intended to provide additional protection of aquatic habitat maintenance flows.

24. Subordinations included in Partial Decree. As set forth in paragraph 10.b. of the Partial Decree, the federal reserved water right for the St. Joe Wild and Scenic River will be subordinate to: (1) existing claims, permit applications, and permits to the extent ultimately decreed, permitted, or licensed; (2) de minimis domestic and stockwater uses; (3) appropriations for mining purposes on private lands within the basin, up to a total combined diversion of 5.0 cfs; and (4) use of water to carry out forest practices and for dust abatement, up to a total annual volume of 0.2 acre-feet per square mile on state and private forest land within the basin. The Forest Service has concluded that, given the location of private lands in the basin on steep timber lands, these subordinations will not significantly diminish the flows in the St. Joe Wild & Scenic River.

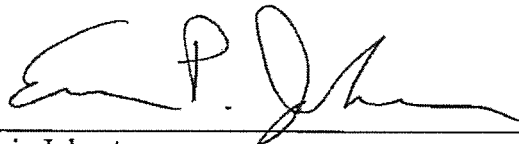
25. Clarification that instream flow water right for St. Joe Wild and Scenic River does not prohibit the use of water for non-consumptive hydroelectric generation purposes. The Partial Decree (§ 10.c.) clarifies that the water right does not prohibit the use of water by the owners of private lands in the basin for "non-consumptive, run-of-the-river"

purposes within or along tributary streams to generate electricity to serve their private residences (all as defined in the Stipulation). The Stipulation (§ 4) similarly provides that the United States will not object to applications for water right permits for these small non-consumptive hydropower units located outside of the Wild and Scenic River boundary (the one-half mile corridor delineated on the map at Attachment 5 to the Stipulation). The Stipulation limits these small hydropower units, *inter alia*, to those that return the diverted water to its original water source, do not cause a depletion of the flow, and are of a capacity of no more than 10 kilowatts.

26. Water right described in Partial Decree protects fisheries and recreational values. Based on my understanding of the Wild and Scenic Rivers Act and the St. Joe WSR Designation Act and the outstandingly remarkable fisheries and recreational values of the St. Joe River, I conclude that the flows identified in the Partial Decree, taking into account the small depletions likely to occur under the subordinations provided for in paragraph 10.b. of the Partial Decree, provide a sufficient variety, frequency and quantity of flows to protect the outstandingly remarkable fisheries and recreational values that Congress sought to protect by adding the St. Joe River into the national Wild and Scenic Rivers System.

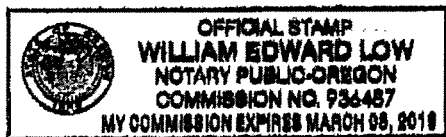
27. Further affiant sayeth naught.

Dated this 2 day of June, 2016.



Eric Johnston

SUBSCRIBED and SWORN to me this 2 day of June, 2016.



William Edward Low

NOTARY PUBLIC FOR: Oregon

Residing at: Wallowa County, Oregon

My Commission Expires: March 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, I served a true and correct copy of the foregoing *Affidavit of Eric Johnston* upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

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