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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR PERMIT 77-14378;
APPLICATIONS FOR TRANSFER
85396, 85397, 85398; AND
APPLICATION FOR EXCHANGE 85538
IN THE NAME OF PERPETUA
RESOURCES IDAHO, INC.

**STIPULATION AND JOINT MOTION
TO APPROVE SETTLEMENT AND
DISMISS PROTEST**

**STIPULATION AND JOINT MOTION TO APPROVE SETTLEMENT AND DISMISS
PROTESTS - 1**

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Applicant Perpetua Resources Idaho, Inc. (“Perpetua”) and Protestant U.S.D.A. Forest Service (“USFS”) (collectively, the “Parties”), pursuant to IDAPA 37.01.01.204, .260, .557, and .612, hereby stipulate and move the Idaho Department of Water Resources (“Department”) to approve the settlement in the above-captioned matter according to the terms and conditions set forth in this *Stipulation and Joint Motion to Approve Settlement and Dismiss Protest* (“Stipulation”).

The Parties hereby stipulate and agree as follows:

WHEREAS, the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, entered a Partial Decree for Federal Reserved Water Rights 75-13316 and 77-11941 Salmon Wild and Scenic River (“Partial Decree”), *In re SRBA*, Case No. 39576 (Nov. 16, 2004).

WHEREAS, the Partial Decree granted the United States water rights 75-13316 and 77-11941, which represent Federal Reserved Water Rights for the Salmon Wild and Scenic River between the mouth of the North Fork Salmon River and Long Tom Bar (collectively, the “Wild & Scenic Water Rights” or “W&SR Water Rights”).

WHEREAS, the Partial Decree entitles the United States to all flows up to 28,400 cubic feet per second (“cfs”) when the stream flow in the Salmon River at the Shoup gauge is greater than or equal to 13,600 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right), and the flows in the Salmon River set forth in Table 1, below, when the stream flow at the Shoup Gauge is less than 13,600 cfs:

Table 1: Wild and Scenic Water Rights Minimum Instream Flows

Period of Use	Discharge (cfs)	Period of Use	Discharge (cfs)
January 1-15	1440	July 1-15	4730
January 16-31	1450	July 16-31	2700
February 1-15	1500	August 1-15	1390
February 16-28(29)	1550	August 16-31	1240
March 1-15	1510	September 1-15	1200
March 16-31	1540	September 16-30	1400
April 1-15	1590	October 1-15	1570
April 16-30	2470	October 16-31	1700
May 1-15	3920	November 1-15	1820
May 16-31	7310	November 16-30	1730
June 1-15	9450	December 1-15	1600
June 16-30	7790	December 16-31	1510

WHEREAS, the minimum flows identified in the Decree and shown in Table 1 were established to protect the Outstandingly Remarkable Values (“ORVs”) throughout the Salmon Wild and Scenic River with a place of use defined as being “. . . throughout the designated Salmon Wild and Scenic River from the beginning point to the ending point . . .”

WHEREAS, the Wild and Scenic Water Rights are subordinate to senior water rights, and are subordinated to new water rights totaling up to 375 cubic feet per second (“cfs”) for consumptive uses but are not subordinated to new permitted storage uses.

WHEREAS, Perpetua submitted Application for Permit 77-14378 on November 18, 2021 seeking a diversion rate of 9.6 cfs for diversion to storage and industrial purposes and a storage volume of up to 600 acre-feet for industrial use and water quality protection.

WHEREAS, the sources of water Perpetua seeks to appropriate through Application 77-14378 are groundwater, East Fork South Fork Salmon River, (“EFSFSR”) and runoff.

WHEREAS, appropriation of water for industrial use proposed by the Applications falls within the subordination available to new water rights under the Wild and Scenic Water Rights.

WHEREAS, Perpetua’s proposed industrial use is therefore not subject to curtailment when stream flows in the Salmon River at the Shoup Gauge are less than the flows listed in the Decree.

WHEREAS, Applications for Transfer 85396, 85397 and 85398; and Application for Exchange 85538 concern existing Water Rights Nos. 77-07285 77-07122, and 77-0293 which fall within the subordination available to existing water rights under the Wild & Scenic Water Rights.

WHEREAS, Perpetua's proposed diversions to storage under 77-14378 from the EFSFSR do not fall within the subordination and groundwater diversions to storage under 77-14378 may not fall within the subordination.

WHEREAS, proposed diversions to storage must be curtailed or mitigated when flows in the Salmon River downstream of the confluence with the South Fork of the Salmon River are less than the flows listed in the Decree.

WHEREAS, on August 19, 2022, the Hearing Officer issued an Interlocutory Order Deciding Questions of Law, holding that:

Diffused surface water, resulting from rainfall or snowmelt, may be captured or used by a landowner without a recorded water right before the water enters a natural stream or watercourse. ... The use of diffused surface water is not subject to curtailment by downstream water rights, even if the water captured would eventually flow into a natural channel.

WHEREAS, the source of water from runoff identified in Application 77-14378 is incident precipitation that will be captured before entering a natural channel.

WHEREAS, the Hearing Officer in this case has held that, under Idaho law, no water right is required to capture, store, and use such runoff and therefore such use will not impair the Wild and Scenic Water Rights.

WHEREAS, Perpetua has developed a mitigation plan, attached to its application, that proposes the non-diversion of 10.75 cfs of irrigation water under water rights Nos. 72-149, 150,

4031, 16273, 4032, 4033, and 4034 (“Jones Water Rights” or “mitigation water”) from the Salmon River and tributary Morgan Creek that are authorized for irrigation of 138.8 acres.

WHEREAS, the consumptive use reduction resulting from implementation of the mitigation plan is estimated to be 347 acre feet annually based on a reduction in irrigation consumption of 2.5 acre feet per acre.

WHEREAS, any potential impacts to the Salmon Wild and Scenic River resulting from Perpetua’s proposed diversions to storage would occur in the Salmon River reach from immediately below the mouth of the South Fork Salmon River downstream to Long Tom Bar.

WHEREAS, mitigation will occur during the irrigation season that is expected to enhance the Salmon Wild and Scenic River values by over-mitigation of Perpetua’s proposed annual diversions to storage in most years, augmenting streamflow and supporting water quality during the irrigation season and thereby benefiting fishery and recreational values.

WHEREAS, Perpetua and the USFS have agreed that the Point of Compliance for Salmon River flows for purposes of administering water rights granted by the Applications and for mitigation of potential impacts will be the Salmon River immediately below the mouth of the South Fork Salmon River to ensure maintenance of minimum stream flows throughout the Salmon Wild and Scenic River.

WHEREAS, for purposes of this Agreement, flows at the point of compliance shall be estimated as 121% of the preceding five-day average of the sum of mean daily discharges reported from the gauges located at Salmon River near Shoup (USGS 13307000), Middle Fork Salmon River at Mouth (USGS 103310199), South Fork Salmon River near Krassel Ranger Station (USGS 103310700), Johnson Creek at Yellow Pine ID (USGS 13313000), Sugar Creek near Stibnite, ID (USGS 13311450), and EFSF Salmon River above Sugar Creek near Stibnite,

STIPULATION AND JOINT MOTION TO APPROVE SETTLEMENT AND DISMISS PROTESTS - 5

ID (USGS 13311250) (collectively “stream flow gauges”). To calculate the five-day running average in the event that a listed gauge is not operational due to ice or other factors in the short-term, the average of the last reported preceding five-day mean daily discharges from the gauge will be used until the gauge becomes operational. If, for any reason, a gauge becomes inoperable for more than 5 consecutive days, the scaling factor for the ungauged watershed will be adjusted to account for the watershed area of the inoperable gauge until such time that the gauge becomes operable. In the event that a gauge is installed at the point of compliance, measured flows at the new gauge will be used instead of estimated flows upon completion of calibration of the new gauge.

WHEREAS, a 121% factor is utilized because only 83% of the watershed above the Point of Compliance is captured by the six listed gauges. The 121% factor estimates the total flow at the point of compliance, including flow contributions from the drainage area that is unaccounted for by the six listed gauges.

WHEREAS, the USFS is satisfied that the estimation of flows at the Point of Compliance as described above will ensure that its water rights for the Salmon Wild and Scenic River, which protect the ORVs associated with the Salmon Wild and Scenic River, will be adequately protected downstream from Perpetua’s points of diversion.

WHEREAS, the Parties acknowledge that the accuracy of the stream flow gauges are such that actual changes in streamflows from diversions to storage or Perpetua’s mitigation plan are within the measurement uncertainty of the gauges, but that impairment of the W&SR Water Rights will be avoided by reason of Perpetua’s mitigation plan and compliance with this Settlement Agreement. and

WHEREAS, the Parties acknowledge that senior water rights, and subordinations in the Partial Decree, could reduce the entitlement to flows under the W&SR Act Water Rights below the flows that are protected by this Agreement.

NOW, THEREFORE, the Parties hereby stipulate and agree that the following conditions (“Conditions”) shall be included in any permit and subsequent license issued under Application 77-14378:

Condition No. 1. Perpetua will implement the mitigation plan attached to its application, with mitigation water available from April 1 to October 31.

Condition No. 2. When the minimum instream flows of the W&SR Water Right are not being met at the point of compliance between November 1 and March 31, Perpetua will curtail diversions to storage for Water Rights Nos. 77-14378, 77-07122, and 77-07285.

Condition No. 3. Diversions to storage during the period from April 1 to October 31, at times when minimum instream flows of the W&SR Water Right are not being met at the Point of Compliance will not exceed the mitigation water-rights that are in priority pursuant to the mitigation plan as follows:

- a. Diversions to storage under Water rights Nos. 77-14378, 77-07122, and 77-07285 will not exceed 10.75 cfs; and
- b. Perpetua will maintain an annual cumulative accounting of the volume of water diverted to storage under Water Rights Nos. 77-14378, 77-07122, and 77-07285 when flows at the point of compliance are at or below the minimum instream flows of the W&SR Water Right during the period from April 1 to October 31. If the cumulative accounting reaches 347-acre feet during the annual period, Perpetua will curtail diversions to storage for Water Rights Nos. 77-14378, 77-07122, and 77-07285 when W&SR flows are not being met at the Point of Compliance for the remainder of the period in that year.

The Parties further stipulate and agree in consideration for the benefits provided by this Settlement Agreement the USFS will not make a delivery call against Perpetua for diversion to storage when Perpetua is in compliance with Condition Numbers 1 through 3 herein.

The Parties further stipulate and agree that diversion, use, and/or storage of water in connection with any permit and subsequent license issued under Application 77-14378 and for approval of Applications for Transfer 85396, 85937 and 85398 and Exchange 85538 shall be subject to the terms and conditions of this Stipulation, which shall be binding upon the Parties hereto, and their heirs, successors, and assigns.

The Parties move the Department, Pursuant to IDAPA 37.01.01.612, for an order (“Order”) approving this Settlement and confirming that the Conditions shall be included by the Department in any permit and subsequent license issued under the Applications.

The protests to the Applications filed by the USFS shall be deemed withdrawn upon the issuance of a final Order stating that the Conditions are approved and shall be included by the Department in any permit and subsequent license issued under the Applications. Provided, however, the USFS reserves the right to participate further should the Department elect not to include the conditions set forth above. Such withdrawal of protests shall be with prejudice.

The Parties respectfully request the entry of an Order approving the stipulated terms and conditions set forth herein, including without limitation the Conditions. Each Party shall bear its own costs, expenses, and attorney fees in connection with the above-captioned matter.

DATED: March 1, 2023.

STOEL RIVES LLP



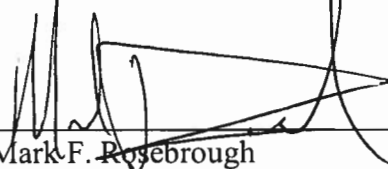
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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2023, true and correct copies of the foregoing document was served on the parties by Email:

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