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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

|                               |   |                                    |
|-------------------------------|---|------------------------------------|
| IN THE MATTER OF APPLICATION  | ) | <b>PROTESTANTS’ JOINT RESPONSE</b> |
| FOR PERMIT NOS. 77-14378,     | ) | <b>IN OPPOSITION TO PERPETUA’S</b> |
| APPLICATIONS FOR TRANSFER     | ) | <b>MOTION TO SUPPLEMENT</b>        |
| NOS. 85396, 85397, AND 85398, | ) | <b>THE ADMINISTRATIVE RECORD</b>   |
| AND APPLICATION FOR EXCHANGE  | ) | <b>AND TO AMEND REQUESTED</b>      |
| 85538 IN THE NAME OF PERPETUA | ) | <b>RELIEF</b>                      |
| RESOURCES IDAHO, INC.         | ) |                                    |
| _____                         | ) |                                    |

**I. Introduction**

Protestants Nez Perce Tribe (“Tribe”), Save the South Fork Salmon, and Idaho Conservation League (“Protestants”) through undersigned counsel, pursuant to IDAPA 37.01.01.260.02.b, respectfully submit this response in opposition to Applicant Perpetua Resources Idaho, Inc.’s (“Perpetua” or “Applicant”) Motion to Supplement the Administrative Record and Amend Requested Relief filed on October 25, 2024 (“Motion”).

On May 23, 2024, Perpetua filed its Exceptions to Preliminary Order, to which Protestants responded on June 6, 2024. On July 26, 2024, Idaho Department of Water Resources

(“IDWR”) Director, Mathew Weaver, issued an order extending his deadline to issue a final order in the contested case hearing to November 1, 2024. Now, days before Director Weaver’s final order is due, Perpetua is seeking to supplement the record with the National Marine Fisheries Service’s (“NMFS”) October 7, 2024, issuance of its Endangered Species Act Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Essential Fish Habitat Response (“BiOp”) for the proposed Stibnite Gold Project (“Project”) and U.S. Department of the Army’s August 8, 2024, Memorandum For Record (“Memorandum For Record”) and to amend its requested relief. For the reasons provided below, Director Weaver should deny Perpetua’s last-minute Motion and issue a final decision upholding Officer Cefalo’s Preliminary Order.

## **II. Perpetua’s Motion to Supplement the Record and Amend its Requested Relief is Premature**

As with its Exceptions to Preliminary Order, Perpetua’s Motion seeks to prematurely fix a problem of Perpetua’s own making. Rather than wait until it finalized its mine plans and secured all necessary state and federal permits and authorizations, Perpetua rushed to secure water rights before its Project was fully authorized.<sup>1</sup> As a result, Perpetua, in its Petition for Reconsideration, Exceptions to Preliminary Order, and here, again, through its Motion, seeks to overturn conditions that Officer Cefalo based on Perpetua’s own testimony in the record regarding the company’s stated operational water needs. As noted in Protestants’ response to Perpetua’s Exceptions to Preliminary Order, Perpetua’s proper and most efficient course of action will be wait until it has a fully authorized final mine plan and its operational water needs are no longer speculative to file, if needed, an application for amendment of a permit with IDWR.<sup>2</sup>

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<sup>1</sup> Protestants’ Joint Response in Opposition to Perpetua Resources Exceptions to Preliminary Order at 3–5.

<sup>2</sup> *Id.* at 5, 47.

Indeed, the BiOp Perpetua now hopes to add to the record highlights the timing problem. The BiOp uses Perpetua's estimated water usage to describe the Project for purposes of evaluating surface and groundwater management effects to listed fish species and their habitat.<sup>3</sup> The BiOp also incorporates water right permit conditions found in Officer Cefalo's Preliminary Order in the Project description and to help ensure against jeopardy.<sup>4</sup> Should this information change, NMFS may need to reinitiate formal Endangered Species Act ("ESA") consultation regarding the Project and produce a revised BiOp.<sup>5</sup>

And, both Perpetua's operational water usage and BiOp could be affected by the Forest Service's final Record of Decision for the Project. In September of this year, the Forest Service released for administrative objection its draft Record of Decision and Final Environmental Impact Statement for Perpetua's Project; objections to the Forest Service's documents were due on October 21.<sup>6</sup> The Forest Service is now in the administrative objection period for the Project where it reviews objections and decides whether to address or resolve them by making changes to the Project's Final Environmental Impact Statement or to the proposed Project in the agency's Final Record of Decision.<sup>7</sup> Were the Forest Service to make changes to Perpetua's proposed Project in the Final Record of Decision as a result of its objection period, the changes could affect both Perpetua's operational water needs and the BiOp's analysis of Project effects on ESA-listed fish, causing NMFS to need to issue an amended BiOp. In sum, all of these authorizations are currently preliminary and interdependent. Perpetua should wait until they are

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<sup>3</sup> BiOp at 57.

<sup>4</sup> BiOp at 67, 359.

<sup>5</sup> 50 C.F.R. § 402.16 (requiring reinitiation of consultation if, *inter alia*, "the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion").

<sup>6</sup> See Environmental Impact Statements; Notice of Availability, 89 Fed. Reg. 72,841 (Sept. 6, 2024).

<sup>7</sup> 36 C.F.R. §§ 218.11, 218.12.

finalized to provide IDWR with complete and accurate information with which to evaluate its proposed changes.

Protestants also note that the U.S. Army Corps of Engineers' determination regarding Perpetua's Clean Water Act Section 404 Permit is also pending, as are Idaho-issued cyanidation and Idaho Pollutant Discharge and Elimination System permits. And, Perpetua acknowledges in its Memorandum in Support of Motion to Supplement the Administrative Record and to Amend Requested Relief ("Memo."), it will not complete final design work on its fishway until the Forest Service issues a final Record of Decision for the Project.<sup>8</sup>

Given the preliminary nature of many of Perpetua's Project approvals and designs and the fact that some approvals are still outstanding, now is not the time to allow Perpetua to reopen the record or to amend its requested relief. If Perpetua wants or needs to seek these or other changes to its water right conditions based on the outcomes of final federal project authorizations, it can do so by filing an amended application with IDWR once its Project is fully authorized and permitted.

### **III. Perpetua's Proposed Additions to the Administrative Record are Improper**

#### **A. Perpetua's Motion Cannot Be Granted Without the Testimony of Its Authors, Taken Under Oath, and Subject to Cross-Examination**

As Perpetua should know, but fails to acknowledge in its Motion, the Department of the Army's Memorandum For Record and the BiOP are considered expert reports that may only be admitted into the administrative record through the testimony of the authors, taken under oath, and subject to cross-examination.<sup>9</sup> Officer Cefalo emphasized this procedural due process requirement in his December 7, 2023, Order on Motions In Limine where he rejected Perpetua's

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<sup>8</sup> Memo. at 14.

<sup>9</sup> Idaho Code § 67-5242(3); Idaho Code § 67-5249; IDAPA 37.01.01.100.02; IDAPA 37.01.01.412.01.e.; IDAPA 37.01.01.650.01.

attempt to admit into the record the Forest Service’s Draft Supplemental Environmental Impact Statement (“SDEIS”) for the Project:

The primary question regarding the admissibility of the SDEIS is whether the SDEIS, prepared by the [Forest Service] in conjunction with its review of Perpetua's proposed project, should be considered an expert report, subject to pre-hearing disclosure and cross examination.

The SDEIS was prepared to, among other things, evaluate the effects of the diversions described in Perpetua's water right applications on fish and wildlife resources. Even though the SDEIS was not prepared for the contested cases before the Department, it was prepared for the specific project described in Perpetua's water right applications. The SDEIS is not a general technical report or scientific paper. It was prepared to evaluate and draw conclusions about the impacts of Perpetua's proposed development, including impacts to resources that fall within the Department's local public interest review criteria. . . .

While the SDEIS was not prepared specifically for the contested cases before the Department, to the extent Perpetua seeks to offer the SDEIS as a technical analysis of the effects of its proposed project, the reports are subject to the expert report disclosure deadlines and can only be admitted into the record through the testimony of the authors, who would be subject to cross-examination. Without testimony laying the foundation for the creation of the SDEIS and the reasoning and analysis contained therein, the SDEIS has very little probative value. Further, admitting the SDEIS without allowing the opposing parties to cross-examine its authors would violate principles of procedural due process. For these reasons, the SDEIS . . . must be excluded from the administrative record.<sup>10</sup>

Perpetua cites to *In re Application for Transfer No. 5639 In the Name of K&W Dairy*, 2003 Ida. ENV LEXIS 8 (Feb. 3, 2003) for the proposition that motions to supplement the record “are recognized in practice.” The Director’s order in that matter, however, expressly directed the

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<sup>10</sup> Order on Motions in Limine (Dec. 7, 2023), at 3.

hearing officer on remand to provide the protestants “a reasonable time to review the the supplementary evidence” and to “conduct an additional hearing . . . allowing the protestants to cross-examine witnesses who helped develop the supplementary evidence.”<sup>11</sup>

Like the SDEIS that Officer Cefalo excluded, the BiOp and Memorandum For Record were prepared specifically to evaluate and draw conclusions regarding the effects of the Project, including effects to resources that fall within IDWR’s public interest criteria and, therefore, should be considered expert reports that may only be admitted in the record through testimony, under oath, and subject to cross-examination.

**B. Supplemental Hearing Is Not Needed Because Perpetua Is Seeking to Add Documents to the Administrative Record That Contain No New Information and Therefore are of No Probative Value**

While Perpetua would need to introduce its proffered documents via hearing, the Director need not remand these proceedings for a hearing. The documents Perpetua appended to its Memo. simply fail to provide information of probative value that IDWR should or needs to consider when issuing the company’s final water rights. The Memorandum For Record does not contain any information or analysis not already in the administrative record that would assist Director Weaver with reviewing Officer Cefalo’s Preliminary Order and issuing a final decision. Further, the BiOp does not support the amendments Perpetua has requested.

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<sup>11</sup> *In re Application for Transfer No. 5639 In the Name of K&W Dairy*, 2003 Ida. ENV LEXIS 8 (Feb. 3, 2003) at 2.

## 1. The Memorandum For Record Should Not Be Added to the Administrative Record

The Memorandum For Record provides no information of probative value to IDWR's public interest analysis of the Perpetua's water right applications that is not already in the administrative record.<sup>12</sup> It should be excluded.

Perpetua's Memo. fundamentally misrepresents the content and audience for the Memorandum For Record. Contrary to Perpetua's assertions, the Memorandum For Record at no point explains the state of U.S. antimony stockpiles, claims that the Project is "crucial to the United States' national defense," or provides "the Army's official position on the importance of the [Project] to national security."<sup>13</sup> Rather, the Memorandum simply lays out certain facts for the U.S. Army's own internal records—about the use of antimony in munitions, the supply chain for antimony, the potential for the Project to supply some military grade antimony sulfide in the future, and Department of Defense's funding support for "environmental and engineering studies" related to permitting for the Project.

It is not surprising that the Memorandum does not express the Department of the Army's support for Perpetua's Project. As noted above, its "Memorandum For Record" is not intended to be a public document and any public support by the Department of the Army for the Project would inappropriately prejudice the permitting process still underway by one of the U.S. Army's "Direct Reporting Units,"<sup>14</sup> the Army Corps of Engineers ("Army Corps"). The Army Corps, which is responsible for issuing permits for the discharge of dredged or fill material pursuant to

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<sup>12</sup> Idaho Code § 67-5251(1) ("The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds . . ."); Perpetua cites *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008), purportedly for the proposition that the Memorandum For Record is directly relevant to evaluating the public interest in the Project. *Winter* is a U.S. Supreme Court case regarding whether the federal case law standard for obtaining a preliminary injunction has been met. Although the case dealt with balancing the public interest with respect to U.S. Navy active sonar testing, it provides IDWR with no useful information with respect to the "local public interest" under Idaho law, or when it is appropriate to supplement an administrative record.

<sup>13</sup> Memo. at 2-3, 7.

<sup>14</sup> See U.S. Army, *Understanding the Army's Structure*, <https://www.army.mil/organization/>.

section 404 of the Clean Water Act, has yet to issue a decision regarding the issuance of a 404 dredge and fill permit for the Project.

Perpetua provided ample testimony and evidence at hearing relevant to IDWR's public interest analysis of its mine plans that echoes or mirrors that information found in the Department of Army's Memorandum.<sup>15</sup> Protestants note for the record that this testimony and evidence included Perpetua's acknowledgement that it "will only be producing an antimony concentrate that will be shipped off"<sup>16</sup> and "would likely be shipped to facilities outside of the United States for smelting and refining because there are currently no such facilities operating in the United States with capacity for refining antimony sulfide concentrate."<sup>17</sup> Perpetua's testimony and evidence also acknowledged that the practicality of commercial production of antimony is dependent on price. "Depending on the price to be received for any minerals produced, Perpetua Resources may determine that it is impractical to commence or continue commercial production."<sup>18</sup>

## **2. The BiOp Should Not Be Added to the Administrative Record**

Protestants do not oppose the inclusion of the BiOp in IDWR's administrative record because of the document's substance. The BiOp bases its surface water and groundwater analysis on the same proposed plan of operations and water needs Perpetua used when applying for its water right permits,<sup>19</sup> and incorporates Officer Cefalo's conditions as terms and conditions Perpetua must follow.<sup>20</sup> In these respects, the BiOp underscores the soundness of the Preliminary Order and the conditions it sets.

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<sup>15</sup> Transcript of December 11-15, 2023, hearing, attached as Exhibit A to the Declaration of Michael A. Lopez filed on January 31, 2024 ("Tr.") Haslam Test, Tr. at 15, 22-24, 26, 55, 75, 94-96, 112-13; *See also* Hr'g Ex. 22, 23, 59.

<sup>16</sup> Haslam Test., Tr. at 94.

<sup>17</sup> Hr'g Ex. 22 at 3-32. *See* Protestant Save the South Fork Salmon, Inc. testimony at Tr. at 878-79.

<sup>18</sup> Hr'g Ex. 59 at 16.

<sup>19</sup> BiOp at 67.

<sup>20</sup> BiOp at 359.



Rather, Protestants oppose inclusion of the BiOp in IDWR's administrative record because Perpetua misrepresents the BiOp's import to IDWR. Specifically, Protestants take issue with Perpetua's representations about the Interested Agency Review Board ("IARB") referenced in the BiOp.

If approved as part of the Forest Service's final Record of Decision, the IARB will consist of representatives from state and federal permitting agencies (including IDWR) and Valley County, Idaho, and will "provide oversight for the Project's environmental-related activities including adaptive management."<sup>21</sup> The BiOp includes as a term and condition the requirement that "Perpetua and the USFS shall work with the IARB to review annual water quantity monitoring results to ensure that operations are adjusted, as needed to be consistent with the effects analysis and extent of take provided in this opinion."<sup>22</sup>

While Perpetua's characterization of the IARB is not particularly clear, the company portrays the Board as suited to making decisions concerning its water right permits and conditions. Perpetua offers the IARB as a solution to its complaint that "[t]he Hearing Officer's preliminary order contains no procedures for adjusting, if necessary, the water rights granted by the Department to address any design changes required by the IARB."<sup>23</sup>

To Protestants' knowledge, based on the BiOp, the IARB will provide input on mine operations.<sup>24</sup> There is no indication that the IARB will have any sort of binding authority, or the structure, processes, or directive to accomplish what Perpetua seeks, which would be to make substantive decisions regarding, and alterations to, Perpetua's water right permits.

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<sup>21</sup> BiOp at 162.

<sup>22</sup> BiOp at 359.

<sup>23</sup> Memo. at 10.

<sup>24</sup> See, e.g., BiOp at 162 (placing the term "approval" in quotation marks), 175 (discussing IARB "input").

For example, Perpetua states that “IDWR will be included in the IARB process, which will need to be followed under the terms of the BiOp[.]”<sup>25</sup> But it is not clear what role IDWR will play on the Board, whether IDWR will be required to participate in all Board processes, or even what the “IARB process” will entail. Likewise, the BiOp provides no assurance that, as Perpetua claims, “the IARB will enable the IDWR to ensure that the water rights granted for the SGP remain consistent with the Department’s objectives and the requirements of Idaho law.”<sup>26</sup> At bottom, the BiOp does not support Perpetua’s characterization of the IARB. Perpetua has not provided a reason to add the BiOp to the administrative record.

Yet even if the BiOp were added to the record, Perpetua faces a far larger problem. As discussed in more detail below, the Director cannot grant the associated relief Perpetua’s requests with respect to Conditions 9, 11, 13, and 14 because doing so would impermissibly abdicate authority to the IARB that has been designated, by Idaho law, exclusively to the IDWR Director.

#### **IV. Perpetua’s Requested Amendments to its Permit Conditions 9, 11, 13, 14, and 15 Are Improper**

##### **A. Perpetua’s requested amendments to Conditions 9, 11, 13, and 14 would illegally delegate the Director’s statutorily-assigned authority and bypass Idaho water laws and regulations**

The Director cannot provide the relief Perpetua seeks with respect to Conditions 9, 11, 13, and 14 because Perpetua is requesting an illegal delegation of authority to the IARB and an exemption from the requirements of state water law and the Water Appropriation Rules that IDWR is responsible for administering.

Perpetua in its Memo. “requests that if the IARB approves alternative maximum diversion rates, alternative minimum flow conditions, or other alternatives from those set forth in

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<sup>25</sup> Memo. at 14.

<sup>26</sup> Memo. at 10.

the Hearing Officer’s preliminary order, those approved conditions will automatically supersede Conditions 9, 13, and 14.”<sup>27</sup> To effectuate its request, Perpetua proposes a new condition providing an “alternative compliance demonstration”:

*Condition 9, Condition 13, and Condition 14 shall remain in effect until such time, if any, that the Interested Agency Review Board, provided for by the Biological Opinion issued by the National Marine Fisheries Service, approves alternative diversion rates or minimum flow conditions, or other applicable conditions, at which time Condition 9, Condition 13, and Condition 14 will cease. The water right holder shall provide advance written notice to the Department of any project design changes that may affect Conditions 9, 13, or 14 that the water right holder presents to the Interested Agency Review Board for review.*<sup>28</sup>

Perpetua also seeks to modify Condition 11 by adding to it the the italicized text below:

The approval of this permit is in the local public interest based on the elements and actions described in the Modified Plan of Restoration and Operations, dated October 15, 2021. If the final plan of operations approved by the U.S. Forest Service differs substantially from the Modified Plan of Restoration and Operations, [*without such changes being approved by the Interested Agency Review Board*], the permit holder shall file an application for amendment, updating the elements of the permit to reflect the final plan of operations and asking the Department to re-evaluate the local public interest of the project.<sup>29</sup>

Neither change would be legal. The Director cannot abdicate his or her statutorily-delegated authority to amend water right permits—let alone to what appears to be a non-binding advisory board created by a federal agency without any apparent “approval” authority.

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<sup>27</sup> Memo. at 15.

<sup>28</sup> Memo. at 16 (emphasis added).

<sup>29</sup> Memo. at 16 (brackets and italicization in original).

The Idaho Statutes' chapter on water appropriation begins with the command that “[a]ll rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of [Title 42, Chapter 2] and not otherwise.”<sup>30</sup> It continues:

This title delegates to the department of water resources *exclusive authority* over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.<sup>31</sup>

Among the requirements of Title 42, Chapter 2 and its regulations are those for amending permits and applications for permits not yet issued.<sup>32</sup> They safeguard the public interest and due process by providing, among other things:

- The right to protest water rights applications and amendments.<sup>33</sup>
- Rules governing protests, including hearing proceedings and the development of the administrative record.<sup>34</sup>
- A definition of the “local public interest,” and requirements for considering the local public interest.<sup>35</sup>
- The right to judicial review.<sup>36</sup>

Perpetua’s new, proposed condition seeks to allow an inter-agency review board (a board containing both state and federal agencies, as well as a county) to amend its water right application or permit in direct contravention of the Idaho legislature’s delegation of exclusive

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<sup>30</sup> Idaho Code § 42-201(1).

<sup>31</sup> Idaho Code § 42-201(7) (emphasis added).

<sup>32</sup> Idaho Code § 42-211; *see also* IDAPA 37.03.08.035.04 (providing procedures for amending applications for permit that apply when “the applicant intends to change the purpose of use, period of use, amount of diversion, point of diversion, place or use, or make other substantial changes”).

<sup>33</sup> Idaho Code §§ 42-211 & 42-203A(4).

<sup>34</sup> Idaho Code §§ 42-211 & 42-203A(5); IDAPA 37.01.01.000 *et seq.*

<sup>35</sup> Idaho Code §§ 42-203A(5) & 42-202B(3).

<sup>36</sup> Idaho Code §§ 42-211 & 42-1701A(4).

authority to IDWR and in a manner that bypasses the procedure set forth by the Idaho Code and IDAPA.

The proposed change to Condition 11 would likewise illegally exempt Perpetua's water rights applications from state laws and regulations by purportedly allowing the IARB to determine that Perpetua need not apply for an application for amendment.

Perpetua makes two arguments for the Director's authority to impose these conditions, neither of which have merit.

First, Perpetua claims "[t]he Department's recently adopted updates to the Water Appropriation Rules, IDAPA 37.03.08, specifically authorize the Director to 'give due regard to expertise of other state and federal regulatory agencies charged with assessing' local public-interest factors."<sup>37</sup> This selective quote is misleading. IDAPA 37.03.08 does not allow the Director to delegate his or her authority; it speaks only to the Director's *consideration* of regulatory agency expertise and makes clear that "the Director has independent responsibility for the overall assessment and balancing of factors weighing in the local public interest[.]"<sup>38</sup>

Second, Perpetua claims its "requested relief is also consistent with IDWR's recently updated Water Appropriation Rules, which specifically allow the Director to condition an application on compliance with orders, rules, requirements, and authorizations issued by state or federal regulatory agencies with jurisdiction over the subject matter relevant to the local public interest."<sup>39</sup>

Again, it is not at all clear whether the IARB will issue "orders, rules, requirements, [or] authorizations" as contemplated by the cited rule or how such orders, rules, requirements,

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<sup>37</sup> Memo. at 11–12 (quoting IDAPA 37.03.08.045.e.iii).

<sup>38</sup> IDAPA 37.03.08.045.e.iii.

<sup>39</sup> Memo. at 14 (citing IDAPA 37.03.08.045.01.e.iv).

authorizations would interact with the member agencies' independent jurisdiction and authority.<sup>40</sup> Perpetua mentions an "IARB process" and its benefit to "efficiency" without detail and the BiOp does not elaborate.<sup>41</sup> But the bigger problem remains: Perpetua's proposed conditions would not "condition approval" on compliance with regulatory agency requirements. The proposed conditions would delegate the Director's authority to evaluate the local public interest criteria and amend conditions to a multi-entity review board, bypassing statutory and regulatory requirements.

### **B. Perpetua's Requested Amendment to Condition 15 Is Not Supported by Evidence in the Administrative Record**

Officer Cefalo's Condition 15 is intended to protect ESA-listed fish habitat in Meadow Creek from water withdrawals associated with Perpetua's mining activity, including Perpetua's proposed ground water diversions.<sup>42</sup> Officer Cefalo found that base flows in Meadow Creek during low to average years are between 2.0 and 3.0 cfs and that Perpetua's proposed ground water diversions would have a one-to-one impact on surface water in Meadow Creek.<sup>43</sup> As a result of these findings, Officer Cefalo included Condition 15 in his Preliminary Order to maintain minimum habitat for ESA-listed fish. Condition 15 states:

During all times when the right holder is diverting ground water under this right from any of the wells in Section 15, T18N, R09E, the right holder shall ensure a flow of at least 3.0 cfs in Meadow Creek *from the existing fish passage barrier located above the*

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<sup>40</sup> IDAPA 37.03.08.045.01.e.iv.

<sup>41</sup> Memo. at 14. It is likewise unclear whether IDWR will be required to participate in the IARB, or what its role on the Board or in the "IARB process" will be.

<sup>42</sup> Preliminary Order Approving Applications, In the Matter of Application for Permit 77-14378 And Applications For Transfer 85396, 85397, and 85398, And Application For Exchange 85538 In the Name of Perpetua Resources at 4-5, 9 - 10.

<sup>43</sup> Preliminary Order Approving Applications, In the Matter of Application for Permit 77-14378 And Applications For Transfer 85396, 85397, and 85398, And Application For Exchange 85538 In the Name of Perpetua Resources at 9-10.

*confluence of Meadow Creek and Blowout Creek to the confluence of Meadow Creek and EFSFSR.*<sup>44</sup>

Perpetua now claims in its Memorandum in Support of its Motion that the point of compliance for NMFS’s reasonable and prudent measure (“RPM”) 2(e)(i), found in its BiOp, differs from that found in Condition 15. According to Perpetua, instead of setting the point of compliance for Condition 15 above the fish passage barrier as Officer Cefalo did in his Preliminary Order, NMFS “moved the compliance point below the confluence of Meadow Creek and Blowout Creek<sup>45</sup> in RPM 2(e)(i). Protestants do not agree that the BiOp moves the compliance point for Condition 15. The BiOp provides that “[f]low in Meadow Creek will not be reduced below 3.0 cfs between the confluence of Meadow and Blowout Creeks and the confluence of Meadow Creek and the EFSFSR.”<sup>46</sup> The BiOp does not explicitly move the compliance point for Condition 15, let alone “below” the confluence point as Perpetua claims.<sup>47</sup>

Perpetua next asserts that “[h]aving two compliance monitoring locations[—one imposed by IDWR and one by NOAA—]in close proximity to one another would impose an unnecessary operational and compliance burden.” Assuming, for sake of argument, that Perpetua is correct that IDWR and NMFS are imposing different points of compliance for the same flow condition in Meadow Creek, Perpetua’s representation with respect to the burden such a scenario places on the company is disingenuous. Amending Condition 15 to move the upstream boundary from the fish passage barrier to the confluence of Meadow and Blowout creeks would not reduce the

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<sup>44</sup> Preliminary Order Approving Applications, In the Matter of Application for Permit 77-14378 And Applications For Transfer 85396, 85397, and 85398, And Application For Exchange 85538 In the Name of Perpetua Resources at 24 (emphasis added).

<sup>45</sup> Memo. at 12.

<sup>46</sup> BiOp at 359.

<sup>47</sup> NMFS generally agreed with and duplicated the conditions Officer Cefalo imposed in his Preliminary Order, stating, “minimum flows, stipulated in the water rights conditions, should protect fish passage within and downstream from the project area.” BiOp at 334. It is, therefore, entirely reasonable to infer that their intention in promulgating RPM measure 2(e)(i) was to also track with Condition 15 as written in Officer Cefalo’s Preliminary Order.

company's monitoring and compliance burden. If Perpetua were to monitor flow at the partial fish passage barrier, as IDWR's Condition 15 requires, all parties could be assured that 3.0 cfs remains instream at the confluence of Meadow Creek and Blowout Creek, assuming Perpetua did not remove any water from Meadow Creek between the two points. Justifying an amendment to Condition 15 based on monitoring and compliance burden, therefore, ignores the public interest in ensuring bull trout have sufficient water to pass the partial fish barrier on Meadow Creek.

Finally, IDWR's administrative record for Perpetua's water right applications does not support IDWR moving Condition 15's point of compliance from the fish passage barrier to the confluence of Meadow and Blowout creeks. As Protestants explained at length in their response to Perpetua's Exceptions to Preliminary Order, flow reductions in Meadow Creek could harm fish.<sup>48</sup> And, the Tribe provided evidence at hearing that it was important to maintain flows in Meadow Creek to the partial fish passage barrier because bull trout can make it past the barrier.<sup>49</sup> Were IDWR to move Condition 15's point of compliance downstream to the confluence of Meadow and Blowout Creeks, Perpetua could allow flows in the section of Meadow Creek between the fish passage barrier and the confluence with Blowout Creek to get very low or even dry up. Were this to happen, it could prevent bull trout from utilizing the full extent of their habitat in Meadow Creek.

Perpetua has repeatedly tried to move the point of compliance for Condition 15. In its April 24, 2024, Petition for Reconsideration Perpetua proposed, among other changes, that IDWR amend Condition 15 to move its compliance point to the "IPDES outfall" located "less than 100 yards downstream of the existing fish passage barrier."<sup>50</sup> Perpetua renewed this request

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<sup>48</sup> Protestants' Joint Response in Opposition to Perpetua Resources' Exceptions to Preliminary Order at 17-19.

<sup>49</sup> Keller Test., Tr. at 902-903; Protestants' Joint Response in Opposition to Perpetua Resources' Exceptions to Preliminary Order at 29.

<sup>50</sup> Perpetua Motion for Reconsideration at 3, 6.



in its Exceptions to Preliminary Order.<sup>51</sup> In response, to Perpetua's Petition for Reconsideration Officer Cefalo stated:

As noted in the Preliminary Order, when weighing the local public interest factors for an application or set of applications, the Department considers all the interactions between the proposed project and the public water resource. *Preliminary Order* at 19-20. The proposed project will have a significant impact on the hydrology of the Meadow Creek watershed. Perpetua proposes to line and reconstruct the main channel of Meadow Creek from the confluence with Blowout Creek to the confluence with EFSFSR. Ex. 25b at 24 (map depicting alterations). In addition, Perpetua proposes to reconstruct and line more than four linear miles of Meadow Creek and its tributaries upstream of the confluence with Blowout Creek, to route water around the tailing storage facility. *Id.* Further, Perpetua proposes to construct twelve new industrial supply wells and several dewatering wells to divert ground water from the Meadow Creek watershed. *Id.* All these actions could affect the flow in Meadow Creek, which currently provides habitat for ESA-listed species.<sup>52</sup>

Officer Cefalo went on to emphasize that Condition 15 “is intended to protect local public interest values in the entire Meadow Creek watershed”<sup>53</sup> and to point out that for both Conditions 10 and 15 he “relied on technical evidence offered by Perpetua” and to conclude that because “Conditions 10 and 15 are based on credible technical evidence in the record, Perpetua's proposal to remove Condition 10<sup>54</sup> and modify Condition 15 should be denied.”<sup>55</sup> For the same reasons, Perpetua's attempt to again move the point of compliance for Condition 15 should again be denied.

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<sup>51</sup> Perpetua Resources Idaho, Inc.'s Exceptions to Preliminary Order at 4, 16-17, 19-21.

<sup>52</sup> Order Denying Petition for Reconsideration at 3 (emphasis in the original).

<sup>53</sup> Order Denying Petition for Reconsideration at 4.

<sup>54</sup> Protestants agree with Perpetua that Condition 10 should remain unchanged. *See* Memo. at 13.

<sup>55</sup> Order Denying Petition for Reconsideration at 4.

## V. Conclusion

For the foregoing reasons, Protestants respectfully request that Director Weaver strike Perpetua's Motion and Memorandum in Support of its Motion or otherwise not consider it in deciding Perpetua's Petition for Reconsideration.

DATED: October 31, 2024.

/s/ Michael A. Lopez \_\_\_\_\_

Michael A. Lopez  
*Attorney for Nez Perce Tribe*

/s/ Amanda W. Rogerson  
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*Attorney for Nez Perce Tribe*

/s/ Julia S. Thrower  
Julia S. Thrower  
*Attorney for Save the South Fork Salmon,  
Inc. and Idaho Conservation League*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2024, I caused a true and correct copy of the foregoing document to be served by email, addressed to the following:

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