

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

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 IDAHO, INC.

ORDER DENYING MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD WITHOUT HOLDING A HEARING AND TO AMEND REQUESTED RELIEF

BACKGROUND

Between October 8, 2021, and November 15, 2021, Perpetua Resources Idaho, Inc. (“Perpetua”) filed multiple applications with the Idaho Department of Water Resources (“Department”)—Permit 77-14378 (amended), Transfer 85396, 85397, and 85398 (amended), and Exchange 85538 (collectively, the “Applications”). The Nez Perce Tribe, Save the South Fork Salmon, Inc. (“SSFS”), and Idaho Conservation League (collectively “Protestants”)¹ protested the Applications.

The Department conducted an administrative hearing from December 11, 2023, to December 15, 2023. Exhibits offered by Perpetua, the Nez Perce Tribe, and SSFS were admitted into the record.

On April 10, 2024, Hearing Officer James Cefalo issued a *Preliminary Order Approving Applications* (“*Preliminary Order*”) approving the Applications subject to the conditions included in the simultaneously issued permit, transfer, and exchange approvals. *Preliminary Order*, at 30. Perpetua subsequently filed a *Petition for Reconsideration of the Preliminary Order*, which was denied by the Hearing Officer on May 9, 2024.

On May 23, 2024, Perpetua timely filed *Perpetua Resources Idaho, Inc.’s Exceptions to Preliminary Order* (“*Exceptions*”) asking the Director to remove and amend certain conditions listed on the permit approvals. *Exceptions*, at 33–34. The *Exceptions* were opposed by the Protestants.

On July 26, 2024, the Director extended the deadline to issue a final order on *Exceptions* to November 1, 2024.

On October 25, 2024, Perpetua filed a *Motion to Supplement the Administrative Record and to Amend Requested Relief* (“*Motion*”) concurrently with a memorandum in support (“*Memorandum*”). In its *Motion*, Perpetua asks the Director to supplement the administrative record with: (1) an United States Department of the Army Memorandum (“*Army Memo*”) issued on August 8, 2024, discussing the Stibnite Gold Project’s (“SGP”)

¹ The USDA Forest Service also protested, but its protests were later resolved via settlement. An order approving the withdrawal of their protests was issued on April 17, 2023.

impact on national security; and (2) the Endangered Species Act Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation Management Act Essential Fish Habitat Response (“BiOp”) for the SGP issued on October 7, 2024, by the National Marine Fisheries Service (“NMFS”). *Motion*, at 1. In addition to the request to supplement the record, Perpetua seeks to amend its requested relief in its *Exceptions* to be consistent with the BiOp. *Id.* at 2.

On October 31, 2024, the Department received the *Protestants’ Joint Response in Opposition to Perpetua’s Motion to Supplement the Administrative Record and to Amend Requested Relief* (“*Joint Response*”). The response asks the Director to strike Perpetua’s *Motion* and/or deny the *Motion* and not take the filings into consideration when deciding the *Exceptions*. *Joint Response*, at 2, 18.

On November 4, 2024, the Director extended the deadline to issue a final order on *Exceptions* to January 10, 2025. The Director concluded Perpetua’s *Motion* should be “fully briefed, considered, and ruled on before issuing a final order on *Exceptions*.” *Am. 2d Order Extend. Deadline to Issue Final Order*, at 2.

On November 7, 2024, Perpetua filed a *Reply in Support of Motion to Supplement the Administrative Record and to Amend Requested Relief* (“*Reply*”). Perpetua claims the *Motion* is timely, and the Director should admit the BiOp and the Army Memo into the record. *Reply*, at 5–6.

On January 10, 2025, the Director extended the deadline to issue a final order on *Exceptions* to January 24, 2025. The Director concluded good cause existed to first fully address Perpetua’s *Motion*. *Third Order Extend. Deadline to Issue Final Order*, at 2.

ANALYSIS

I. The Director denies Perpetua’s request to supplement the record with the Army Memo and the BiOp because the Director will not supplement the record without a hearing.

Perpetua asks the Director to supplement the administrative record with the Army Memo and the BiOp. *Memorandum*, at 1, 17. Perpetua states that “[a]lthough the [Department’s procedural rules] do not explicitly provide for motions to supplement the record, such motions are recognized in practice.” *Id.* at 5. The Director denies Perpetua’s request because the Director will not exercise his authority to supplement the administrative record in the manner requested by Perpetua.

The Director must consider the evidence in the record in evaluating a contested application for permit. I.C. § 42-203A(5). The Idaho Administrative Procedure Act (“APA”) governs contested case proceedings before state agencies. I.C. § 67-5240. In a contested case, an agency must maintain an official agency record. I.C. § 67-5249(1). The agency record “constitutes the exclusive basis for agency action in contested cases” and must include:

- (a) all notices of proceedings, pleadings, motions, briefs, petitions, and intermediate rulings;
- (b) evidence received or considered;
- (c) a statement of matters officially noticed;
- (d) offers of proof and objections and rulings thereon;
- (e) the record prepared by the presiding officer . . . ;
- (f) staff memoranda or data submitted to the presiding officer or the agency head in connection with the consideration of the proceeding; and
- (g) any recommended order, preliminary order, final order, or order on reconsideration.

I.C. § 67-5249(2)–(3). The hearing officer develops the record at a hearing by ensuring “there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary,” and “afford[ing] all parties the opportunity to respond and present evidence and argument on all issues involved” I.C. § 67-5242(3)(a)–(b).

After the hearing, the hearing officer prepares a preliminary order² based on the evidence admitted into the agency record. I.C. § 67-5243(1)(b). A party to a contested case may “file exceptions to the preliminary order” with the Director. I.C. § 67-5245(5). On exceptions, the Director shall: “(a) Issue a final order in writing . . . ; (b) Remand the matter for additional hearings; or (c) Hold additional hearings.” I.C. § 67-5245(6). The Director’s final order must include “[a] reasoned statement in support of the decision” and findings of fact that “must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” I.C. § 67-5248(1)(a), (2).

Here, Perpetua asks the Director to supplement the record with the Army Memo and the BiOp. *Memorandum*, at 5. Significantly, Perpetua does not ask the Director to remand the matter for additional hearings or to hold additional hearings to consider whether the Army Memo and the BiOp should be added to the record as authorized under Idaho Code § 67-5245(6). Perpetua simply asks the Director to supplement the record with these materials. At first, it appeared that this failure to request a hearing may have been an oversight on Perpetua’s part. But after reading the entire *Motion* and *Memorandum* carefully, it appears that Perpetua intentionally drafted its motion narrowly to avoid any request for a hearing. Accordingly, the Director will consider the motion as drafted and filed by Perpetua.

The Director will not exercise his authority to supplement the record without a hearing. The Director must base his decision in a contested case “exclusively on the evidence in the record of the contested case.” I.C. § 67-5248(2). The APA provides procedural standards the Department must follow in preparing the agency record to base its decision on in a contested case. I.C. § 67-5242(3). These standards include allowing an

² Idaho Code § 67-5243(1)(a) also permits the hearing officer to issue a recommended order, but that process is not discussed in this order because that did not occur in this matter.

opportunity for parties to participate in the hearing process by offering proof and objections, giving testimony, and allowing cross-examination of witnesses. *Id.* These opportunities to participate in a hearing ensure due process is afforded and that each party is heard and their presented evidence is considered. See *Scott v. Home Depot USA, Inc.*, No. 50660, 2024 WL 5194712, at *7 (Idaho Dec. 23, 2024) (“The fundamental requisite of due process of law is the opportunity to be heard.”) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); see also *Chambers v. Kootenai Cnty. Bd. of Com’rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1993) (“[T]he opportunity to present and rebut evidence, which is inferred from the right to notice and specific findings of fact, is an element of due process. . . . The deviations by the commissioners from the record as established by the hearing examiner . . . evidence that due process safeguards were not satisfied.”) (internal citations omitted). A hearing giving the parties the opportunity to fully explain how the BiOp is or is not applicable to this proceeding would ensure that the record on this issue is fully developed and would give all parties the opportunity to be heard on the issue. The Director declines Perpetua’s request to supplement the record without a hearing.

Perpetua argues that the Director has supplemented the administrative record in other administrative cases. *Memorandum*, at 5. Perpetua states the Director previously “grant[ed] a motion to supplement [the] administrative record” in *In re Application for Transfer No. 5639 in the Name of K&W Dairy, Order of Remand to Hearing Officer* (Feb. 3, 2003) (hereinafter *K&W Order*). *Id.* Perpetua also claims the Director “remand[ed] to [the] Hearing Officer for supplementation of record” in *In re Application for Permit No. 63-32573, in the Name of the City of Eagle, Order Denying Petition for Reconsideration and Clarification* (April 12, 2012) (hereinafter *Eagle Reconsideration Order*). *Id.* Those cases are distinguishable from the situation presented here.

First, in *K&W*, the Director did not grant a motion to supplement the administrative record and then supplement the record without a hearing. The Director stayed the entry of a final order on exceptions and remanded the matter to the hearing officer to conduct an additional hearing to consider whether proposed supplementary evidence should be admitted to the record. *K&W Order*, at 2 (proposing to include an engineering manure management plan, a letter from the chief bureau of dairying of the Idaho Department of Agriculture, and two individual affidavits). The Director ordered the hearing officer to issue an amended preliminary order following an additional hearing “and after consideration of the supplementary evidence submitted.” *Id.* at 3. Here, Perpetua is not asking the Director to remand the matter to the hearing officer as was done in *K&W*, but Perpetua is asking to supplement the record with additional evidence without holding a hearing.³

Second, in the *City of Eagle* matter, the Director issued a final order in 2010 concluding that M3 Eagle could not hold a water right permit for reasonably anticipated future needs (“RAFN”) because it did not qualify as a municipal provider. *In re Application for Permit No. 63-32573, in the Name of the City of Eagle, Second Amended Final Order*, at 2

³ Perpetua also argues that Idaho Code § 67-5276(1)(a) allows for the supplementation of the record when “there are ‘good reasons for failure to present [additional evidence] in the proceeding before the agency.’” *Memorandum*, at 6. However, this statute does not authorize supplementation of a record by an agency without a hearing on the evidence.

(Mar. 9, 2012) [hereinafter *Eagle Final Order*] (superseding and replacing the amended final order dated Jan. 25, 2010). M3 Eagle subsequently filed a petition for judicial review, and amidst the judicial review proceedings, the Department and M3 Eagle entered a stipulation with the district court to dismiss the judicial review action and remand the matter to the Department to conduct a hearing to consider additional evidence to assign M3 Eagle’s water right permit to the City of Eagle. *Id.* at 3. On remand, the protestants filed a motion for reconsideration of the *Eagle Final Order* claiming the Department could not negotiate settlement while amidst judicial review proceedings. *Eagle Reconsideration Order*, at 1. The Director denied the protestants motion for reconsideration and clarified that the purpose of the stipulated remand was to give the City of Eagle an opportunity to provide evidence at a hearing to prove it is a municipal provider with RAFN so M3 Eagle’s water right permit could be assigned to the City of Eagle. *Id.* at 2–3.

In both *K&W* and the *City of Eagle*, the Director did not simply supplement the record with the requested evidence. Instead, the Director remanded the matters for additional hearings to consider whether the supplemental evidence *could* be added to the record based on the testimony offered at the hearing. The cases are distinguishable and do not support Perpetua’s motion.

Perpetua also asks the Director to take judicial notice of the BiOp. *Memorandum*, at 8 (citing nonbinding authority from the Ninth Circuit and Eastern District of California caselaw claiming that courts have taken judicial notice of BiOps). Perpetua argues that “no additional hearing is required” to take notice of the BiOp. *Reply* at 6. Perpetua does not cite any Idaho authority to support its argument. In this case, even if the Director has the authority to take judicial notice while the matter is pending before him on exceptions, the Director would not take judicial notice of the BiOp but would remand the matter back to the hearing officer for additional development of the record as authorized under Idaho Code § 67-5245(6). Because Perpetua requests that the BiOp be judicially noticed without a hearing, the Director denies Perpetua’s request.

Therefore, the Director denies Perpetua’s request to supplement the record with the Army Memo and the BiOp because the Director will not exercise his authority to supplement the record in the manner requested by Perpetua.

II. The record cannot be supplemented with the Army Memo because the Army Memo falls outside the narrow scope of Idaho’s local public interest definition.

Perpetua argues that the Army Memo should be supplemented to the record because it is “directly relevant to evaluating the public interest,” and the antimony produced from the SGP will contribute to the national security interests of the United States. *Memorandum*, at 6–7 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008) (“evaluating public interest in maintaining national security”)). Even if Perpetua had requested that the matter be remanded for additional hearing to supplement the record with the Army Memo, the request must be denied because the Army Memo falls outside the narrow scope of Idaho’s local public interest test.

In deciding whether to approve, conditionally approve, or deny an application for permit, the Director must evaluate whether the application for permit meets the statutory factors listed in Idaho Code § 42-203A(5)(a)–(g). One of the factors the Director must consider is whether an application for permit will “conflict with the local public interest as defined in section 42-202B, Idaho Code” I.C. § 42-203A(5)(e). Idaho Code § 42-202B(3) defines local public interest “as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.”

Prior to 2003, the phrase “local public interest” was defined broadly as “the affairs of the people in the area directly affected by the proposed use.” 1978 Idaho Sess. Laws 306. However, in 2003, the Legislature amended the local public interest definition with the intent of narrowing the scope of the “local public interest.” The Legislature modified the definition because “[i]n recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public’s water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose p[ur]pose [sic] has nothing to do with those issues.” Statement of Purpose, H.B. 284, 57th Legislature, 1st Reg. Sess. (Idaho 2003). The legislative history for the 2003 amendment states, in relevant part:

This legislation clarifies the scope of the “local public interest” review in water right applications, transfers and water supply bank transactions. . . . The “local public interest” should be construed to ensure the greatest possible benefit from the public waters is achieved; however, it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the EPHA. . . .

Id.

Here, the Army Memo does not fit within the local public interest as defined by Idaho law. Instead of citing and applying Idaho law defining the local public interest, Perpetua cites to a federal case that relies on federal law. *Memorandum*, at 6. That authority is not relevant to this administrative proceeding. Simply stating that the SGP is a matter of public interest because it impacts national security does not establish how the Army Memo meets the narrow scope of Idaho’s local public interest definition. Similar to the example of the manufacturing plant’s impact on air quality discussed in the 2003 Statement of Purpose, the impact the SGP has on natural security is not within the local public interest definition because it is not an effect of the diversion of water but rather a secondary effect of the proposed water use. Therefore, because the Army Memo is outside the narrow scope of

Idaho's local public interest analysis, it is not appropriate to supplement the record with the Army Memo.

III. The Director will not modify the Hearing Officer's conditions in the manner requested by Perpetua.

Perpetua asks the Director to supplement the record with the BiOp for two primary reasons: (1) to modify the point of compliance in Condition 15 based on the BiOp's imposed mitigation measures; and (2) to modify Conditions 9, 11, 13, and 14 to include conditional language that allows certain elements of the proposed permits to be modified based on outcomes issued by the BiOp-created interested agency review board ("IARB"). *Memorandum*, at 12, 16. In the simultaneously issued *Final Order on Exceptions*, the Director modifies the point of compliance consistent with Perpetua's request, so it appears Perpetua's concern regarding Condition 15 is resolved. With regard to modifying Conditions 9, 11, 13 and 14, even if Perpetua had requested that the matter be remanded for additional hearing to supplement the record with the BiOp, the Director would not rely on the BiOp to modify the Hearing Officer's conditions as requested by Perpetua because modifying Conditions 9, 11, 13, and 14 in the manner requested by Perpetua is an unacceptable delegation of the Director's authority. Perpetua states that the purpose of the IARB is to review the design, monitoring, and environmental plans and to provide input on "adaptive management measures" to minimize the impacts of the SGP. *Id.* at 10 (citing Ex. B at 182, 380). Perpetua states that the IARB "will include representatives from the IDWR, NMFS, Idaho Department of Environmental Quality ("IDEQ"), USFWS, U.S. Environmental Protection Agency, Valley County, and the Forest Service." *Id.* Based on the IARB's proposed role, Perpetua asks the Director to add a condition to the applicable Applications where Conditions 9, 13, and 14 will remain in effect until such time the IARB "approves alternative diversion rates or minimum flow conditions, or other applicable conditions, at which time [Conditions 9, 13, and 14] will cease." *Id.* at 16. Even if the Director were to supplement the record with the BiOp, the Director would not approve the type of conditions proposed by Perpetua.

Perpetua argues the Department should adopt its proposed conditions because the Department regularly conditions permits to comply with other agency requirements. *Reply*, at 8 (referencing conditions the Department imposes requiring compliance with the Department's own well drilling and dam safety rules, other state agency water quality standards rules, and third-party agreements). The difference is that in those conditions, the Director does not delegate to some other entity or agency the authority to modify elements of a water right. Perpetua's request goes well beyond the standard conditions the Department has historically imposed. Even if the Director could approve a water right with variable elements, the Director will not exercise his discretion to approve a condition that allows another entity to set "alternative diversion rates or minimum flows conditions, or other applicable conditions." The Director will not exercise his discretion in a manner proposed by Perpetua because it would be an abdication of the Director's authority over the appropriation of Idaho's waters. *See* I.C. § 42-201(7) ("[Title 42] delegates to the [Department] exclusive authority over the appropriation of the public surface and ground waters of the state.").

Perpetua also asks to modify Condition 11 to require IARB approval of substantial changes to its plan of operations since such changes potentially require an application for amendment under the existing Condition 11. *Memorandum*, at 16. Perpetua suggests that if the BiOp is not supplemented and the Director does not condition the water rights based on the IARB approval, Perpetua will eventually need to burden the Department with applications to amend the permit based on the outcomes of the IARB review and approval process. *Reply*, at 8. Perpetua claims that supplementing the BiOp now would ensure that “permitting [is] completed efficiently, without unnecessary delay or duplication.” *Memorandum*, at 17. The Director finds that it is not an administrative burden on the Department to receive applications to amend water right permits because the Department is specifically authorized to consider such applications. *See* I.C. § 42-211 (“Whenever a permit has been issued . . . and the permit holder desires to change the . . . uses of the water, he shall file an application for amendment . . .”).

Therefore, the Director denies Perpetua’s request to amend the relief requested in its *Exceptions* because its request is based on information in the BiOp that is not being admitted into the record.

ORDER

IT IS HEREBY ORDERED that Perpetua’s *Motion to Supplement the Administrative Record and to Amend Requested Relief* is DENIED.

DATED this 24th day of January 2025.

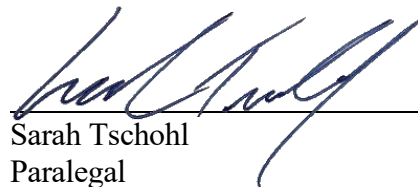


MATHEW WEAVER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Sarah Tschohl
Paralegal

**EXPLANATORY INFORMATION TO ACCOMPANY A
FINAL ORDER**

(To be used in connection with actions when a hearing was **not** held)

The accompanying document is a "Final Order" issued by the Idaho Department of Water Resources ("Department") pursuant to Idaho Code § 67-5246.

PETITION FOR RECONSIDERATION

(See Idaho Code § 67-5246(4))

Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The presiding officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

REQUEST FOR HEARING

(See Idaho Code § 42-1701A(3))

Unless the right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to Idaho Code § 42-1701A(3). A written petition to the Director contesting this final order and requesting a hearing must be filed with the Department by any aggrieved person **within fifteen (15) days after service of this final order.**

CERTIFICATE OF SERVICE

(See IDAPA 37.01.01.053, 37.01.01.202)

All documents filed with the Department in connection with a petition for reconsideration or a request for hearing of this final order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 53 and 202.