

**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 ON EXCEPTIONS;
FINAL ORDER**

BACKGROUND

On October 8, 2021, Perpetua Resources Idaho, Inc. (“Perpetua”), filed Application for Permit 77-14378 and Applications for Transfer 85396, 85397, and 85398 with the Idaho Department of Water Resources (“Department”). On November 15, 2021, Perpetua filed Application for Exchange 85538 and an amendment for Application 85398 with the Department. On November 18, 2021, Perpetua filed an amendment for Application 77-14378.¹ The Nez Perce Tribe, Save the South Fork Salmon, Inc. (“SSFS”), Idaho Conservation League, and USDA Forest Service² all filed protests against 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.³

On April 10, 2024, Hearing Officer James Cefalo issued a *Preliminary Order Approving Applications* (“*Preliminary Order*”) approving the Applications subject to the conditions stated on 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, in the *Order Denying Petition for Reconsideration* (“*Order Denying Reconsideration*”).

¹ In this order, Applications 77-14378 (as amended), 85396, 85397, 85398 (as amended), and 85538 are collectively referred to as the “Applications.”

² The USDA Forest Service’s protests were later resolved via settlement and an order approving the withdrawal of their protests was issued on April 17, 2023.

³ Exhibits 1a through 1h, 4, 5, 22, 23 (limited to pages 1-40 and 60-65), 25b, 26 (limited to pages 1-36 and 80-185), 27a, 29, 34, 46, 47, 58, 59, 60, 61, 63, 64, and 68 offered by Perpetua; Exhibits 201, 206, 238, 259, 260, 261, and 262 offered by the Nez Perce Tribe; and Exhibit 318 offered by SSFS were admitted into the record. Exhibits 18, 52, and 71 offered by Perpetua; and Exhibits 246, 277, 281, and 283 offered by the Nez Perce Tribe were excluded from the record. The Hearing Officer inadvertently did not list Exhibit 72 offered by Perpetua, and Exhibits 215, 216, 219, and 219A offered by the Nez Perce Tribe as admitted into the record in the *Preliminary Order*. However, the Director notes that Exhibits 72, 215, 216, 219, and 219A were admitted into the record during the hearing. Tr. 1189:19–1190:18.

On May 23, 2024, Perpetua filed *Perpetua Resources Idaho, Inc. 's Exceptions to Preliminary Order* (“*Exceptions*”) asking the Director to remove and amend specific conditions listed on the permit approvals. *Exceptions*, at 33–34.

On June 6, 2024, the Nez Perce Tribe, SSFS, and Idaho Conservation League (collectively “*Protestants*”) filed *Protestants' Joint Response in Opposition to Perpetua Resources' Exceptions to Preliminary Order* (“*Joint Response*”) asking the Director to deny Perpetua’s *Exceptions*, and affirm the Hearing Officer’s *Preliminary Order* and *Order Denying Reconsideration*. *Joint Response*, at 5, 47.

On July 26, 2024, the Director issued an *Order Extending Deadline to Issue Final Order* extending the deadline to issue a final order 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*”) 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 issued an *Amended Second Order Extending Deadline to Issue Final Order* (“*Amended Extension Order*”). The Director concluded Perpetua’s *Motion* should be “fully briefed, considered, and ruled on before issuing a final order on *Exceptions*.” *Amended Extension Order*, at 2. The Director extended the deadline to issue a final order on *Exceptions* to January 10, 2025. *Id.*

On November 7, 2024, Perpetua filed a *Reply in Support of Motion to Supplement the Administrative Record and to Amend Requested Relief* (“*Reply*”). Perpetua claimed 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 issued a *Third Order Extending Deadline to Issue Final Order* (“*Third Extension Order*”). The Director concluded good cause existed to fully address Perpetua’s *Motion*. *Third Extension Order*, at 2. The Director extended the deadline to issue a final order on *Exceptions* to January 24, 2025. *Id.*

The Director largely adopts the Hearing Officer’s findings of fact and conclusions of law in the *Preliminary Order*.

LEGAL STANDARD

Applications for permit are governed by Idaho Code § 42-203A(5). In deciding whether to approve, conditionally approve, or deny an application for permit, the Director must evaluate the evidence in the record to determine 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.” In evaluating whether the proposed application for permit meets the local public interest, the Director considers “[t]he direct effect the project will have on public water resources . . . including, but not limited to, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, [and] water quality.” IDAPA 37.03.08.045.01.e.i.

The applicant bears the burden of proof and persuasion for all the elements in Idaho Code § 42-203A(5), including the local public interest element. IDAPA 37.03.08.040.03.b. All parties are responsible for presenting evidence about any factor affecting the local public interest within their knowledge. *Id.* The Director has discretion in assessing the impacts to, and requirements for, the local public interest. *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985). If the Director conditionally approves an application for permit, the “[p]ermit conditions arising from a review of the local public interest should be based on specific information in the record, not speculation or assertions of indeterminate impacts.” *Order on Exceptions; Final Order*, at 28–29, *In the Matter of Application for Permit No. 74-16187 in the Name of Kurt W. Bird or Janet E. Bird* (Idaho Dep’t of Water Res. May 21, 2020) [hereinafter “*Bird Order*”] (citing *Hardy v. Higginson*, 123 Idaho 485, 491–92, 849 P.2d 946, 952–53 (1993)).

EXCEPTIONS

Perpetua asks the Director to remove or modify several conditions imposed by the Hearing Officer in the *Preliminary Order* “because, individually, they are not supported by evidence in the record, are duplicative, and have limited benefit to the public interest.”⁴ *Exceptions*, at 9. After careful consideration of the record, the Director concludes Conditions 9, 10, 13, and 14 of the Applications should be approved, as conditioned by the Hearing Officer in the *Preliminary Order* and the simultaneously issued permit, transfer, and exchange approvals. The Director also concludes there is sufficient evidence in the record to modify the point of compliance in Condition 15 for the Applications as set forth in this order.

⁴ For purposes of this order, the conditions will be discussed in numerical order according to the condition numbers used on Water Right Permit No. 77-14378.

I. Condition 9 is supported by substantial evidence in the record and meets the local public interest because it minimizes project impacts on fish passage and habitat for ESA-listed species.

Perpetua asks the Director to remove Condition 9 from the applicable Application approvals. *Exceptions*, at 16. Condition 9 states: “The diversion of water directly from the EFSFSR, located in the NESE, Section 3, T18N R09E, shall not exceed a maximum diversion rate of 4.50 cfs.” Permit No. 77-14378, at 4.

Perpetua first argues Condition 9 should be removed because the Hearing Officer fails to “explain how imposing Condition 9, and limiting the surface water intake to 4.5 cfs, has any connection to fish passage or other public interest factors.” *Exceptions*, at 13. Perpetua claims the Hearing Officer incorrectly relied on the “design documents and statements in the record related to the size of the surface water intake” to be “evidence of the effect of surface water diversions” on fish passage and local public interest instead of evidence related to the Stibnite Gold Project (“SGP”) design. *Id.*

The Hearing Officer relied on substantial evidence in the record to impose Condition 9 based on technical reports, hearing testimony, and ground water modeling provided by Perpetua. *Preliminary Order*, at 4–5, 17; *Order Denying Reconsideration*, at 8–9. For example, Perpetua’s Fishway Operations and Management Plan demonstrates Perpetua’s intention to limit its maximum surface water diversions from the East Fork South Fork Salmon River (“EFSFSR”) to 4.5 cfs. Ex. 34, at 124, 139. The 4.5 cfs maximum limit is further established in a McMillen Jacobs Associates (“MJA”) technical report, which states Perpetua intends to construct a pond that will be supplemented with “as much as 4.5 cfs of raw water from the EFSFSR.” Ex. 47, at 2. Furthermore, hearing testimony confirmed that modeling showed a peak diversion rate of 4.5 cfs from freshwater sources to supply the mill. Tr. 139:4–10. The hearing testimony also confirmed the point of diversion for the EFSFSR would be unable to handle more than 4.5 cfs, the modeling established that Perpetua would not need to divert more than 4.5 cfs, and Perpetua would not have a use for the 9.6 cfs that was requested. Tr. 538:11–539:2.

In addition, Perpetua argues that the “unexpected imposition of a 4.5 cfs diversion limitation at the intake . . . changes the facts underlying Perpetua’s expert testimony and applications, related to managing diversion demand to meet Perpetua’s water needs.” *Exceptions*, at 15–16. It is unclear how the 4.5 cfs diversion limit “changes the facts underlying Perpetua’s expert testimony and applications” given that Perpetua’s own expert testimony and exhibits reflect that the project was designed to divert a maximum of 4.5 cfs. If Perpetua had intended to operate at a higher diversion rate, the testimony and exhibits presented at hearing should have reflected the higher diversion rate.

Finally, Perpetua argues that Condition 9 “creates a perverse scenario” where Perpetua’s diversion potential is limited in times of high water, which will force them to divert more water in times of low water to meet production goals. *Exceptions*, at 14–15. While the Director can understand why it would be beneficial for Perpetua to divert more water during high flow times and less water during low flow times, the agency is

constrained to make decisions based on the record presented. I.C. § 67-5249. As discussed above, Perpetua's own expert testimony and exhibits reflect that the project was designed to divert a maximum of 4.5 cfs. Since the 4.5 cfs is supported by substantial evidence in the record, the Director will not revise the condition. If Perpetua wants to divert more surface water during high flow time periods, then Perpetua would need to apply for a permit for additional diversions during high flow times and provide sufficient evidence demonstrating the need for additional diversions. Because the testimony and other technical memorandum support imposing a 4.5 cfs maximum withdrawal rate from the EFSFSR, Condition 9 is supported by the evidence in the record.

The Hearing Officer also concluded Condition 9 serves the local public interest in the EFSFSR watershed to protect aquatic resources, fish passage, habitat for ESA-listed species, and the water quality of the watershed. *Preliminary Order*, at 20, 24. It is self-evident that limiting diversions from a stream will help conserve aquatic resources and help minimize impacts on fish passage, habitat, and water quality. The burden of persuasion regarding the local public interest criteria is on the applicant. The Hearing Officer concluded that, based on the information presented at hearing regarding the project design, Perpetua met its burden. Again, if Perpetua had intended to operate at a higher diversion rate, the testimony and exhibits should have reflected the higher diversion rate so the Hearing Officer could have considered whether a higher diversion rate is in the local public interest. The Director agrees that limiting the diversion of water from the EFSFSR to 4.5 cfs is consistent with the local public interest.

Therefore, the Director agrees with the Hearing Officer's conclusion and imposition of Condition 9 because it is supported by substantial evidence in the record, and it is in the local public interest.

II. Condition 10 is supported by substantial evidence in the record and meets the local public interest because it maintains sufficient streamflow to protect ESA-listed species and their habitat.

Perpetua asks the Director to remove Condition 10 from the applicable Application approvals. *Exceptions*, at 25. Condition 10 states: "The thirteen industrial supply wells located in Section 15, T18N, R09E, shall not exceed a combined monthly diversion volume of 31 acre-feet." Permit No. 77-14378, at 4.

Perpetua argues Condition 10 should be removed because it is duplicative of Condition 15, and it is unnecessary to limit the diversion volume to 31 acre-feet per month to protect the local public interest. *Exceptions*, at 24. Perpetua claims the Hearing Officer misinterpreted the facts regarding the necessary streamflow to protect the ESA-listed species and their habitat in Meadow Creek. *Id.* at 24–25.

The Hearing Officer relied on substantial evidence in the record to impose Condition 10 based on technical reports, hearing testimony, and ground water modeling provided by Perpetua. *Preliminary Order*, at 10; *Order Denying Reconsideration*, at 2–4. Perpetua's Site-Wide Water Balance Model evaluated the impacts of excessive ground water pumping

on the unlined section of Meadow Creek. Ex. 27a, at 76. The model considered future conditions and supported implementing a monthly diversion volume limit on ground water pumping to reduce the impacts on the streamflow of Meadow Creek. *Id.*; Tr. 260:1–8, 261:4–15. Perpetua’s Hydrologic Site Model concluded that a 0.5 cfs⁵ ground water pumping rate is the “maximum pumping rate for the water supply well system.” Ex. 25b, at 44. Further, Perpetua’s model established that 0.5 cfs is “an amount [of water] that could be withdrawn without adverse impacts on Meadow Creek.” Ex. 27a, at 76. If Perpetua intended to have a higher diversion rate that varies “dependent on stream flows, the well field capacity, and various other influences,” Tr. 260:6–8, Perpetua should have presented evidence of modeling that established a higher pumping rate would not adversely impact Meadow Creek. Despite Perpetua’s intention to not have a 0.5 cfs limitation, *Exceptions*, at 24–25, the evidence in the record established that imposing a 0.5 cfs ground water pumping rate from the industrial supply wells near the unlined section of Meadow Creek would not adversely impact the streamflow of Meadow Creek, Ex. 27a, at 76; Tr. 260:9–261:3. Because the testimony and Perpetua’s modeling support imposing a 31 acre-feet monthly diversion volume limit, Condition 10 is supported by the evidence in the record.

The Hearing Officer also concluded Condition 10 serves the local public interest because imposing the monthly diversion volume limit protects ESA-listed species and their corresponding habitat against adverse impacts to stream flows in Meadow Creek caused by over pumping. *Order Denying Reconsideration*, at 3. Meadow Creek provides critical habitat for ESA-listed species. Ex. 201, at 5; Tr. 1085:13–1086:18. Because the industrial supply wells will be sourced near the unlined section of Meadow Creek, there is an expected one-to-one impact on streamflow caused by ground water pumping. Ex. 206, at 14. Any reduction in stream flow results in a corresponding reduction to critical habitat. Ex. 201, at 5 (“For example, removing 1 cfs from a stream with 10 cfs of discharge would result in an estimated 10% reduction of available habitat.”). However, Perpetua’s predictive modeling indicated that a 0.5 cfs ground water pumping rate would protect the streamflow in Meadow Creek. Ex. 27a, at 76; Tr. 259:15–261:15. By preserving the streamflow and corresponding ESA-listed species critical habitat, Condition 10 is in the local public interest.

Therefore, the Director agrees with the Hearing Officer’s conclusion and imposition of Condition 10 because it is supported by substantial evidence in the record, and it is in the local public interest.

III. Condition 13 is supported by substantial evidence in the record and meets the local public interest because it protects fish passage.

Perpetua asks the Director to remove Condition 13 from the applicable Application approvals. *Exceptions*, at 27. Condition 13 states: “From June 30 to September 30, no water shall be diverted under this right unless there is at least 7.25 cfs passing the river pump point of diversion on the EFSFSR in the NESE, Section 3, T18N, R09E.” Permit No. 77-14378, at 4.

⁵ A 0.5 cfs rate equates to 31 acre-feet combined monthly diversion limit. *Order Denying Reconsideration*, at 2.

Perpetua argues Condition 13 should be removed because the evidence established that the minimum depth required for fish passage over the weirs is 0.92 feet which can be achieved by maintaining 6.6 cfs over the river pump point of diversion from June 30 to September 30. *Exceptions*, at 28, 30.

The Hearing Officer relied on substantial evidence in the record to impose Condition 13 based on technical reports, hearing testimony, and modeling provided by Perpetua. *Preliminary Order*, at 6–7; *Order Denying Reconsideration*, at 4–5. A MJA technical memorandum concluded that a 15-inch weir notch width requires a 7.25 cfs flow rate to ensure a minimum flow depth of one foot to accommodate for fish passage. Ex. 47, at 12, 15; *see also* Ex. 219, at 9 (“Results of the [computational fluid dynamics] simulations indicate that a flow rate of 7.25 cfs is required to achieve a 1-foot weir flow depth over a 15-inch-wide weir.”). Chinook salmon require a minimum 15-inch weir width to ensure fish passage. Ex. 47 at 3; Tr. 380:25–381:1. And maintaining a one-foot minimum flow depth over a 15-inch weir ensures fish passage will continue at low flow conditions. Ex. 47, at 12, 15. Other weir widths were not adopted because the evidence did not substantiate or explain the need to impose other weir width conditions. *Order Denying Reconsideration*, at 5; Tr. 381:3–5. Because the technical memorandum and the hearing testimony support the Hearing Officer’s conclusion that maintaining a 7.25 cfs flow rate over a 15-inch weir width protects fish passage, Condition 13 is supported evidence in the record.

The Hearing Officer also concluded Condition 13 serves the local public interest because imposing a 7.25 cfs flow rate protects the necessary flow to ensure fish passage. *Preliminary Order*, at 7. Although the MJA technical memorandum concludes that “[l]ower flow rates will meet velocity and hydraulic drop criteria,” a 7.25 cfs rate is still needed to meet the one-foot depth criteria over the 15-inch weir width to maintain fish passage. Ex. 47, at 12, 15. Condition 13 supports the local public interest by requiring a flow rate of 7.25 cfs to maintain a minimum flow depth of one foot, ensuring fish passage over the 15-inch-wide weir.

Therefore, the Director agrees with the Hearing Officer’s conclusion and imposition of Condition 13 because it is supported by substantial evidence in the record, and it is in the local public interest.

IV. Condition 14 is supported by substantial evidence in the record and meets the local public interest because it protects fish passage.

Perpetua asks the Director to remove Condition 14 from the applicable Application approvals. *Exceptions*, at 28. Condition 14 states: “From October 1 to June 29, no water shall be diverted under this right unless there is at least 5.00 cfs passing the river pump point of diversion on the EFSFSR in the NESE, Section 3, T18N, R09E.” Permit No. 77-14378, at 4.

Perpetua argues Condition 14 should be removed because it “is contrary to evidence in the record, [does] not provide significant additional protections for fish passage beyond Condition 12, and unnecessarily limit[s] Perpetua’s ability to utilize its water rights.” *Exceptions*, at 28. Specifically, Perpetua claims Condition 14 is unnecessary because the Hearing Officer inappropriately relied on only a single day’s data, which demonstrated that

Perpetua's diversions could reduce streamflow to below 5.0 cfs if only Condition 12 was in place. *Id.* at 31–32.

The Hearing Officer relied on substantial evidence in the record to impose Condition 14 based on technical reports, hearing testimony, and modeling provided by Perpetua. *Preliminary Order*, at 7, 22; *Order Denying Reconsideration*, at 6–8. Perpetua's Fisheries and Aquatic Resources Mitigation Plan establishes that the migration and spawning period for adult steelhead occurs in the SGP area from March through May. Ex. 29, at 33–34. In addition, Perpetua's memorandum to the Governor's Office of Energy and Mineral Resources concluded that the minimum depth for bull trout and steelhead needed was 0.7 feet. Ex. 219, at 8. Adult steelhead and bull trout require the highest flows during the time of year that Condition 14 is in place. *Compare* Ex. 29, at 33–34, *and* Ex. 219, at 8, *with* Permit No. 77-14378, at 4. The MJA technical memorandum established that 5.0 cfs "leads to a weir flow depth of 0.72 feet" which is the lowest flow needed to ensure fish passage for bull trout and adult steelhead. Ex. 47, at 15; Ex. 219, at 10.

Perpetua also argues that the Idaho Department of Fish and Game ("IDFG") and the Governor's Office of Species Conservation ("OSC") did not suggest that a condition in addition to Condition 12 was necessary. *Exceptions*, at 28. The IDFG and the OSC supplied the Hearing Officer with suggested example permit conditions to ensure fish passage throughout all times of the year. Ex. 206, at 1; *see also* Ex. 219A (updated letter from ISFG and OSC with the same condition). One such suggestion stated: "Surface water diversions and infrastructure will not at any time impede the passage of any life stage of Chinook Salmon, Steelhead, Bull Trout, or Cutthroat Trout from the confluence of the EFSFSR and Sugar Creek upstream past the Point of Diversion." Ex. 206, at 1. This language is simply an example of conditional language. It is also extremely broad language. If the Hearing Officer adopted that conditional language, it could have imposed more broad-sweeping restrictions on Perpetua than the existing Condition 14 language. Instead, pursuant to the Department's authority to impose conditional language on permits, *see* Idaho Code § 42-203A(5), the Hearing Officer proposed narrower conditional language to protect fish passage based on the evidence in the record, *Order Denying Reconsideration*, at 7 (citing Ex. 219, at 8). Notably, the evidence the Hearing Officer relied on was a memorandum drafted by Perpetua that agreed a 5.0 cfs flow rate was necessary to ensure bull trout and steelhead passage. Ex. 219, at 10.

The Hearing Officer also concluded Condition 14 serves the local public interest because imposing a 5.0 cfs flow rate will ensure fish passage based on the local hydrology and fish species migrating and spawning patterns. *Preliminary Order*, at 7. Based on the technical data available in the record, Condition 14 serves the local public interest of imposing a 5.0 cfs flow rate to ensure fish passage during the relevant time of year.

Therefore, the Director agrees with the Hearing Officer's conclusion and imposition of Condition 14 because the evidence is sufficient to support a 5.0 cfs minimum flow rate to ensure fish passage during the relevant time of year.

V. There is substantial evidence in the record to support imposing an upper end median base flow rate of 3.0 cfs in Meadow Creek, but the Director will move the point of compliance to the IPDES outfall location.

Perpetua asks the Director to modify Condition 15 in the applicable Application approvals. *Exceptions*, at 22. 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 confluence of Meadow Creek and Blowout Creek⁶ to the confluence of Meadow Creek and EFSFSR.” Permit No. 77-14378, at 4.

First, Perpetua argues that “there is no evidence in the record to support a finding that a flow of 3.0 cfs is necessary to protect the public interest in Meadow Creek.” *Exceptions*, at 17. Second, Perpetua argues that using the existing fish passage barrier along Meadow Creek as the starting point of compliance is unsupported by the evidence. *Id.* at 19.

A. The evidence in the record supports imposing an upper end median base flow rate of 3.0 cfs in Meadow Creek.

Perpetua cites an administrative order and claims that a condition cannot be imposed if the matter lacks specific evidence to demonstrate the required streamflow. *Id.* at 18 (citing *Bird Order*, at 31) (“In the absence of target flows or specific data identifying the streamflow needed to provide optimum fish habitat in the upper Lemhi River, it would not be appropriate to impose a bypass flow condition for the upper Lemhi River . . .”).

The Department has discretion to impose a quantifiable bypass flow condition that is based on substantial evidence in the record. *See Hardy*, 123 Idaho at 491–92, 849 P.2d at 952–53 (determining it would be “difficult if not impossible to measure and satisfy” a condition without a “quantifiable measure of variance stated within the condition”). The Director may consider technical information about “flow characterization studies or instream flow recommendations” to impose a bypass flow condition. *Bird Order*, at 31.

The Hearing Officer relied on substantial evidence in the record to impose the 3.0 cfs baseflow portion of Condition 15 based on technical reports, hearing testimony, and modeling provided by Perpetua. *Preliminary Order*, at 9; *Order Denying Reconsideration*, at 2–4. Perpetua’s Hydrologic Site Model specifically analyzes the impacts to “hydrologic conditions, surface water, groundwater, at the site with and without the Stibnite Gold Project” based on Perpetua’s refined restoration and operation plan. Tr. 212:9–17 (referencing the purpose of Ex. 25b). In its plan, Perpetua proposes to add twelve industrial supply wells and several dewatering wells along Meadow Creek. Ex. 25b, at 24. Perpetua proposes to line and reconstruct portions of Meadow Creek and a portion of its tributary, Blowout Creek. *Id.*; Tr. 270:4–12. A portion of Meadow Creek upstream of the Blowout Creek-Meadow Creek confluence will remain unlined. Ex. 25b, at 24. Ground water pumping “in absence of that liner would have [a] direct connection to surface water.” Tr. 260:15–25, 270:13–19. For instance, ground water pumping from the industrial supply wells

⁶ Blowout Creek is another name for the East Fork Meadow Creek. Tr. 257:4–6.

near the unlined section of Meadow Creek causes an expected one-to-one impact on streamflow in Meadow Creek. Ex. 206, at 14.

In addition, Perpetua's Hydrologic Model Report expects streamflow impacts to Meadow Creek when Hangar Flats pit is dewatered. Ex. 25b, at 71. However, Perpetua intends to discharge treated water to Meadow Creek via the Idaho Pollutant Discharge Elimination System ("IPDES") outfall as a mitigation measure for streamflow impacts caused by Hangar Flats dewatering. *Id.* at 45. The expected treatment outfall location is along Meadow Creek upstream of the Meadow Creek-Blowout Creek confluence. *Id.* at 16.

Similar to the Director's conclusions in the *Bird Order*, Perpetua's Hydrologic Model Report acts as a flow characterization study that concluded streamflow impacts will be expected in the SGP area along Meadow Creek due to ground water pumping and Hangar Flats pit dewatering. Ex. 25b, at 45, 53–54. Because Meadow Creek will experience impacts to streamflow, the Hearing Officer appropriately exercised discretion in imposing a baseflow requirement to Condition 15. Now, the Director must consider whether there is substantial evidence in the record to support the imposition of the 3.0 cfs baseflow portion of Condition 15.

The Nez Perce Tribe's Fisheries Expert Report includes relevant information about the baseflow needed to protect ESA-listed species and their critical habitat. *See generally* Ex. 201. This report characterizes the typical flows needed to support ESA-listed species and their habitat within Meadow Creek using a "3-day mean of daily averages for monthly 95%, 50% (median), [and] 5% exceedance" flows. Ex. 201, at 6. Where 95% exceedance flows represent low streamflow conditions, 50% exceedance flows represent median/average streamflow conditions, and 5% exceedance flows represent high streamflow conditions. *Id.* at 6, 9; Tr. 1090:23–1091:1. This report concluded that fish typically require median streamflow conditions for successful upstream passage. Ex. 201, at 11–12. It is reasonable to use median flow conditions because high flow and low flow conditions are too variable and inconsistent. For instance, fish passage is inhibited or prohibited at low streamflow conditions because the flow depth is too low for fish passage. Ex. 219, at 35. On the other hand, fish passage is also inhibited or prohibited at high streamflow conditions because the water velocity is too high for fish to move upstream. *Id.* Meadow Creek median baseflows range from approximately 2.0 cfs to 3.0 cfs throughout the year excluding April through July, which are higher flows due to peak snowmelt runoff months. Ex. 201, at 6. A 3.0 cfs flow rate is the upper end of the median base flow. *Id.*

The evidence in the record supports applying a minimum streamflow condition to protect ESA-listed species located in the Meadow Creek watershed that may expect adverse impacts to streamflow caused by pit dewatering and ground water pumping. The Director acknowledges that the Meadow Creek watershed may not be "pristine habitat" for ESA-listed species due to legacy mine tailings and sediment leaking into the watershed. *Exceptions*, at 18 (citing Ex. 29, at 26). However, ESA-listed species are still present in the Meadow Creek watershed. Ex. 29, at 20. Because these fish are present in the watershed, it is in the local public interest to require a minimum baseflow condition to support fish survival and reduce even further habitat degradation from streamflow reductions caused by

ground water pumping and pit dewatering. Perpetua proposes the Director modify Condition 15 to establish monthly minimum flow rates along Meadow Creek based on low flow conditions (95% exceedance flows) because a 3.0 cfs base flow rate would require Perpetua to augment the flows in Meadow Creek. *Exceptions*, at 17–18, 22. The Director finds that Perpetua did not adequately meet its burden in proving its requested low flow conditions (95% exceedance) are sufficient to support fish passage. On the contrary, the Director finds that the fisheries report adequately supports the imposition of a median baseflow to protect fish passage. In reviewing the 3-day rolling averages at the USGS gage site and considering Perpetua’s intent to augment streamflow with treated water at the IPDES outfall location, the Director is exercising his discretion to impose the upper end of the median baseflows (i.e., 3.0 cfs).

The Director agrees with the Hearing Officer’s conclusion and imposition of the 3.0 cfs baseflow portion of Condition 15 because the evidence is sufficient to support imposing a baseflow condition to ensure fish passage in Meadow Creek, and it is in the local public interest to protect the ESA-listed species.

B. The Director will modify Condition 15 and establish the minimum flow compliance reach from the IPDES outfall to the confluence of Meadow Creek and the EFSFSR.

Perpetua argues that Condition 15’s current point of compliance at the partial fish passage barrier is unsupported by the evidence in the record. *Exceptions*, at 17. Perpetua argues that the point of compliance should be moved to the IPDES outfall location because the location is certain and will exist throughout the project life, whereas the fish passage barrier is not certain and will be removed in year 18 of the mining project. *Exceptions*, at 20–21.

Condition 15 currently describes a compliance reach for maintaining a 3.0 cfs baseflow rate between the partial fish passage barrier on Meadow Creek to the Meadow Creek-EFSFSR confluence. *Order Denying Reconsideration*, at 3. The existing fish passage barrier is a constructed gradient riffle located on Meadow Creek upstream of the Blowout Creek-Meadow Creek confluence. Tr. 726:2–7. The only evidence in the record identifying the location of the existing fish passage barrier “is a map of the entire SGP site showing the barrier as a large square.”⁷ *Exceptions*, at 20 (citing Ex. 63, at 11). The map identifies the fish passage barrier as a complete passage barrier. Ex. 63, at 11. However, hearing testimony clarified that it is a partial barrier, and the map contained a typo. Tr. 726:2–7.

Perpetua proposes to move the point of compliance to the proposed IPDES outfall. *Exceptions*, at 24. Perpetua claims it cannot comply with Condition 15 at the fish passage barrier because the IPDES outfall was designed to augment the surface water with treated discharge in periods when natural flows fall below the required baseflow. *Id.* at 20–21. Perpetua’s modeling and plans identify the location of the IPDES outfall on Meadow Creek upstream of the Blowout

⁷ It is not clear what evidence the Hearing Officer relied on when he concluded the fish passage barrier is 700 feet upstream of the Blowout Creek-Meadow Creek confluence. *Order Denying Reconsideration*, at 3. However, the map clearly demonstrates the fish passage barrier is upstream of the confluence. Ex. 63, at 11. It is likely the 700-foot estimation originated from the distance shown on the lining and reconstruction of Meadow Creek map. *See Order Denying Reconsideration*, at 3 (citing Ex. 25b, at 24).

Creek-Meadow Creek confluence.⁸ See, e.g., Ex. 26, at 94; Ex. 25b, at 16; Ex. 27a, at 21; Tr. 438:13–19. The mapping in the record indicates that the fish passage barrier and the IPDES outfall are close in proximity. Compare Ex. 63, at 11 (locating the fish passage barrier), with Ex. 26, at 94 (locating the IPDES outfall). Based on the Hearing Officer and Perpetua’s estimations, the distance between the existing partial fish passage barrier and the IPDES outfall is 300 feet. See *Order Denying Reconsideration*, at 3; *Exceptions*, at 24.

Perpetua will undertake mitigation measures to avoid incidental take of the ESA-listed species within the Meadow Creek watershed caused by depletions in surface water flow from the Hangar Flats pit dewatering and ground water pumping. Ex. 29, at 15. One mitigation measure identified in Perpetua’s Fisheries and Aquatic Resources Mitigation Plan includes lining and reconstructing Meadow Creek “to prevent excessive seepage loss to the dewatered Hangar Flats pit or the surrounding dewatering wells.” Ex. 29, at 69; Ex. 25b, at 22 (mapping of the reconstructed Meadow Creek); Ex. 63, at 19 (describing the lining and reconstruction procedures). Another mitigation measure identified in Perpetua’s Hydrological Site Model includes supplementing the surface water flows by discharging treated water “into Meadow Creek at the beginning of the restored section upstream of Blowout Creek as a mitigation measure for potential stream impacts due to Hangar Flats dewatering.” Ex. 25b, at 45. This treated water discharge location is the proposed IPDES outfall location. Ex. 25b, at 14–16; Ex. 26, at 94; Tr. 438:13–19.

Early iterations of Perpetua’s SGP planning included “unsatisfactory flow reductions in Meadow Creek” due to ground water pumping, however, the IPDES outfall became the approach to minimize the impacts to the surface water flows. Ex. 25b, at 14. Taking its mitigation measures into consideration, Perpetua conducted a streamflow analysis comparing the impacts to Meadow Creek under the proposed plan and under a no action alternative. *Id.* at 56. One of the locations for the streamflow analysis was modeled just “above the restored lined section of Meadow Creek that is just downstream of the TSF and TSF buttress.” *Id.* at 56–57 (mapping the location of the modeling analysis at the same area of the fish passage barrier and the IPDES outfall). Although pit dewatering and ground water pumping near the unlined portion of Meadow Creek will decrease surface water flows as established above, the modeling concluded that treated water discharge at the outfall “mitigates baseflow depletions during the peak dewatering period (mine years 4 through 6).” *Id.* at 56.

The Meadow Creek watershed contains critical habitat for Chinook salmon and bull trout. Ex. 34, at 21–22. Due to the evidence presented at hearing, the Director finds that Perpetua met its burden in proving that using the IPDES outfall as the point of compliance will meet the local public interest. The Director finds sufficient evidence in the record to support imposing the point of compliance at the IPDES outfall location along Meadow Creek because its treated outflows will support a 3.0 cfs baseflow to protect the ESA-listed species present in the Meadow Creek watershed.

⁸ Perpetua indicates that the proposed IPDES outfall is located approximately 100 yards (i.e., 300 feet) downstream of the existing fish passage barrier. *Exceptions*, at 24. This would equate to approximately 400 feet upstream of the Blowout Creek-Meadow Creek confluence. It is likely the 100-yard estimation originated from estimating distance on the mapping showing the location of the IPDES outfall. Ex. 26, at 94; Ex. 25b, at 16; Ex. 27a, at 21.

Therefore, the Director will adopt the Hearing Officer's conclusion and imposition of the 3.0 cfs requirement of Condition 15, but will modify the compliance reach in Condition 15 to require Perpetua to maintain a flow of at least 3.0 cfs in Meadow Creek from the IPDES outfall to the confluence of Meadow Creek and the EFSFSR.

CONCLUSIONS OF LAW

Conditions 9, 10, 13, and 14 are supported by sufficient evidence and are in the local public interest. Based on the above discussion, the Director concludes the findings of fact and the conclusions of law contained in the Hearing Officer's *Preliminary Order Approving Application* and *Order Denying Petition for Reconsideration* as it pertains to Conditions, 9, 10, 13, and 14 should be adopted as final.

The Director concludes that there is sufficient evidence in the record to support imposing the part of Condition 15 that requires the 3.0 cfs minimum baseflow rate in Meadow Creek. The Director concludes that a 3.0 cfs minimum baseflow rate is in the local public interest to protect the ESA-listed species that are present in the Meadow Creek watershed.

The Director concludes that requiring Perpetua to start maintaining a 3.0 cfs flow rate at the partial fish passage barrier along Meadow Creek upstream of the Meadow Creek and Blowout Creek confluence was not supported by the evidence in the record. Instead, the Director concludes that there is sufficient evidence in the record to support requiring Perpetua to maintain at least 3.0 cfs of flow in Meadow Creek from the IPDES outfall location down to the confluence of Meadow Creek and the EFSFSR. The Director concludes that requiring a minimum flow compliance reach between the IPDES outfall location and the Meadow Creek and EFSFSR confluence is in the local public interest to protect the ESA-listed species that are present in the Meadow Creek watershed.

Condition 15 applies to Water Right No. 77-7285⁹ and Water Right No. 77-14378. The Director concludes Condition 15 will now read:

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 IPDES outfall located in the NW ¼ of the SE ¼ Section 15, T18N, R9E to the confluence of Meadow Creek and the EFSFSR.

ORDER

IT IS HEREBY ORDERED that the Director adopts and incorporates into this order the Hearing Officer's *Preliminary Order Approving Application* and *Order Denying Petition for Reconsideration* as it relates to Conditions 9, 10, 13, and 14.

⁹ Condition 12 on this permit reflects this conditional language.

IT IS FURTHER ORDERED that the Director adopts the following language for Condition 15 on Water Right Permit Nos. 77-7285 and 77-14378:

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 IPDES outfall located in the NW ¼ of the SE ¼ Section 15, T18N, R9E to the confluence of Meadow Creek and the EFSFSR.

IT IS FURTHER ORDERED that *Perpetua Resources Idaho, Inc.'s Exceptions to Preliminary Order* is DENIED as to Conditions 9, 10, 13, and 14, and PARTIALLY GRANTED as to Condition 15.

DATED this 24th day of January 2025.

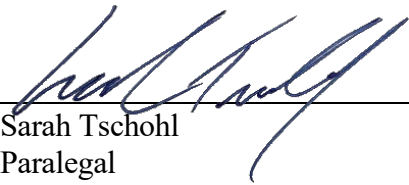


MATHEW WEAVER
Director

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:

<p>Kevin Beaton Wade Foster STOEL RIVES LLP 101 S Capitol Boulevard, Ste 1900 Boise, ID 83702 kevin.beaton@stoel.com wade.foster@stoel.com <i>Attorneys for Perpetua Resources Idaho, Inc.</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Michael A. Lopez NEZ PERCE TRIBE Office of Legal Counsel PO Box 305 Lapwai, ID 83540 mlopez@nezperce.org Amanda W. Rogerson WRIGHT ROGERSON PLLC PO Box 2321 Boise, ID 83701 amanda@wrightrogerson.com <i>Attorneys for Nez Perce Tribe</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Julia S. Thrower MOUNTAIN TOP LAW PLLC 614 Thompson Ave. McCall, ID 83638 jthrower@mtntoplw.com <i>Attorney for Save the South Fork Salmon, Inc. and Idaho Conservation League</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>



Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

The accompanying document is a "Final Order" issued by the Idaho Department of Water Resources ("Department") pursuant to Idaho Code § 67-5246. Unless a different date is stated in the final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration as further described below:

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.

APPEAL TO DISTRICT COURT

(See Idaho Code §§ 67-5270 through 67-5279)

Within twenty-eight (28) days after: (a) the service date of this final order, (b) the service date of a denial of a petition for reconsideration of this final order, or (c) the failure within twenty-one (21) days of the presiding officer to act on a petition for reconsideration of this final order, any party may file a petition for judicial review of this final order with a district court. The filing of an appeal to a district court does not in itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

(See IDAPA 37.01.01.053, 37.01.01.202; I.R.C.P. 84)

All documents filed with or served on the Department in connection with a petition for reconsideration or an appeal of this final order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 53 and 202, or Idaho Rule of Civil Procedure 84.