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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Protestant Nez Perce Tribe

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

IN THE MATTER OF APPLICATIONS	)	NEZ PERCE TRIBE'S RESPONSE
FOR PERMIT NOS. 77-14377, 77-14378,	)	TO PERPETUA RESOURCES'
77-14379, APPLICATIONS FOR TRANSFER	)	MOTION IN LIMINE
NOS. 85396, 85397, 85398, AND 85399,	)	
AND APPLICATION FOR EXCHANGE	)	
85538 IN THE NAME OF PERPETUA	)	
RESOURCES IDAHO, INC.	)	
	)	

On November 20, 2023, Perpetua Resources ("Perpetua") filed a motion in limine seeking to "limit and exclude Protestants witnesses related to fisheries." Perpetua asserted that Protestants' fisheries witness testimony would be duplicative and irrelevant and would likely cause the scheduled hearing to exceed its allotted five days. The Nez Perce Tribe ("Tribe") writes separately from the other Protestants in response. Perpetua's concerns are misplaced.

The Tribe, Save the South Fork ("SSFS"), and Idaho Conservation League ("ICL") (collectively "Protestants") provided Hearing Officer Cefalo and Perpetua with amended exhibit and witness lists on December 4, 2023, which identify who each Protestant intends to call to testify

at hearing. Protestants' amended witness list reduces the Tribe's fisheries witnesses to four and Protestants' total, combined witnesses to nine. In contrast, Perpetua's updated witness list, circulated December 1, 2023, contains 14 witnesses, many of whom *are* duplicative.

The Tribe has listed those witnesses that it deems reasonable and necessary to enable it to establish at hearing that, as an active fisheries manager in the headwaters of the East Fork South Fork Salmon River ("EFSFSR"), the Tribe has particular information for Hearing Officer Cefalo's consideration regarding how Perpetua's water right applications will affect the local public interest in aquatic resources, as defined by Idaho law.¹

I. LEGAL STANDARDS

Under Idaho law, the Director of the Idaho Department of Water Resources ("IDWR") must determine from the evidence presented whether applications for water rights will conflict with the local public interest, defined 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."² Water right protestants "bear the initial burden of coming forward with evidence for those factors relevant to [the local public interest] of which the protestant[s] can reasonably be expected to be more cognizant than the applicant."³ Should the Director of IDWR determine that the appropriation of water will conflict with the local public interest, the Director "may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions."⁴

¹ The Idaho legislature has declared that it is in the public interest "that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." I.C. § 42-1501.

² I.C. § 42-202B(3); *See also* I.C. § 42-203A(5).

³ IDAPA 37.03.08.040.04(b)(ii).

⁴ I.C. § 42-203A(5).

II. ARGUMENT

The Tribe plans to call as fisheries witnesses Joe Oatman, Wesley Keller, Ryan Kinzer, and Tom Bassista.

Joe Oatman is a Nez Perce Tribal member and the Deputy Manager/Harvest Division Director for the Tribe's Department of Fisheries Resources Management ("Fisheries Department"). Wesley Keller is the Project Leader for the Tribe's Fisheries Department's McCall Fisheries Watershed Project. Joe Oatman and Wesley Keller each have particular and complementary knowledge regarding the Tribe's fishery management activities, including in the headwaters of the EFSFSR where Perpetua's proposed points of diversion are located.

Ryan Kinzer is a Fisheries Scientist and Data Coordinator for the Tribe's Fisheries Department and co-author of the Tribe's expert fisheries reports. Mr. Kinzer can speak to his expert opinion in his and Mike Ackerman's expert reports regarding the effects of Perpetua's water right applications on local aquatic resources within the headwaters of the EFSFSR. Consistent with the Tribe's expert fisheries reports, Mr. Kinzer's testimony may include effects on Endangered Species Act ("ESA")-listed fish. While Perpetua takes issue with the Tribe seeking to offer testimony or evidence related to the ESA-listed status of fish in this state administrative hearing, the Director of IDWR has previously found that it is in the local public interest to recover fish species listed under the ESA.⁵ And, the Tribe has no intention of offering testimony to prove whether "take" will occur under the Endangered Species Act. Rather, the Tribe believes that ESA-listing is one of many factors relevant to the evaluation of the effect of Perpetua's water right applications on the local public interest, as defined by Idaho law.

⁵ In the Matter of the Application for Permit No. 74-16187 in the Name of Kurt W. Bird or Janet E. Bird, Order on Exceptions; Final Order, Before the Department of Water Resources of the State of Idaho, (May 21, 2020), pg. 29.

Tom Bassista is the Technical Assistance Program Coordinator-Aquatics for Idaho Fish and Game (“IDFG”). Mr. Bassista has been asked to testify to his personal knowledge regarding IDFG’s and the Idaho Office of Species Conservation’s (“OSC”) discussions and conclusions pertaining to Perpetua’s June 27, 2022, request that IDFG and OSC complete a technical assistance review of Perpetua’s water right applications, including Perpetua’s proposed condition.

Perpetua, on the other hand, provided an updated witness list on December 1, 2023, that includes 14 witnesses. Were Perpetua to call all 14 of the witnesses on its list, the hearing *would* likely exceed its allotted five days. Moreover, several of Perpetua’s witnesses are co-authors on the same expert reports. Given that Perpetua’s expert reports lack specific attribution information, allowing two or more experts to testify to the same expert report will cause unnecessary confusion with respect to who can speak to the expert opinions contained in each section of each report. In the interest of efficiency and clarity, the Tribe asks that Perpetua remove duplicative witnesses from its list. Perpetua should also streamline testimony at the hearing by voluntarily excluding testimony and exhibits related to its unapproved mine plans.⁶

III. CONCLUSION

For the reasons above, the Tribe requests that Hearing Officer Cefalo deny Perpetua’s motion to exclude any of the Tribe’s four fisheries witnesses from testifying at the hearing regarding how Perpetua’s water right applications will conflict with the Tribe’s local public interest in aquatic resources. The Tribe further requests, for clarity and efficiency, that Hearing Officer Cefalo limit Perpetua to one testifying expert per expert report and exclude testimony and exhibits related to Perpetua’s unapproved mine plans.

⁶ “In order to be able to assess a project’s impact on the public interest, the project’s design must be definite enough to reflect its impacts and implications.” *Shokal v. Dunn*, 109 Idaho 330, 339 (1985).

DATED this 4th day of December, 2023.

/s/ Michael A. Lopez
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Attorney for Nez Perce Tribe

/s/ Amanda W. Rogerson
Amanda W. Rogerson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December, 2023, I caused a true and correct copy of the foregoing document to be served by email, addressed to the following:

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