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.	)	**PRELIMINARY ORDER APPROVING APPLICATIONS**

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. USDA Forest Service ("USFS"), Nez Perce Tribe ("NP Tribe"), Save the South Fork Salmon, Inc. ("SSFS"), and Idaho Conservation League ("ICL") filed separate protests against all five applications.

On August 19, 2022, the hearing officer for the Department issued an *Interlocutory Order Deciding Questions of Law* ("Interlocutory Order") specific to Application 77-14378. The Interlocutory Order rejected one of the water sources proposed on Application 77-14378 but did not change the quantity of water sought or the other water sources described in the application.

On March 1, 2023, Perpetua and the USFS filed a *Stipulation and Joint Motion to Approve Settlement and Dismiss Protest* ("Stipulation"). The Stipulation set forth the terms and conditions that would resolve the protests filed by the USFS and asked the hearing officer to issue an order approving the settlement and confirming that certain water right conditions would be included on any approvals issued by the Department. On April 17, 2023, the hearing officer issued an *Order Approving Settlement and Confirming Withdrawal of Protests*.

Pursuant to Rule 555 of the Department's Rules of Procedure (IDAPA 37.01.01), the Department consolidated Applications 77-14378, 85396, 85397, 85398, and 85538 with Applications for Permit 77-14377 and 77-14379 and Application for Transfer 85399 for hearing. The Department conducted an administrative hearing for these consolidated cases on December 11-15, 2023, in Boise. Perpetua was represented by attorneys Elijah Watkins and Wade Foster, NP Tribe was represented by attorneys Michael Lopez and Amanda Rogerson, and SSFS and ICL were represented by attorney Julia Thrower.

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 NP Tribe; Exhibit 318 offered by

SSFS; and Exhibits 72 and 219A designated by the hearing officer through official notice were admitted into the record. Exhibits 18, 52, and 71 offered by Perpetua; and Exhibits 246, 277, 281, and 283 offered by NP Tribe were excluded from the record.

Perpetua called Alan Haslam, Terry Scanlan, Dan Stanaway, Gene Bosley, Doug Durbin, Paul Leonard, and Rob Richardson; ICL called John Robison; SSFS called Fred Coriell; and NP Tribe called Wes Keller, Betsy Semmens, Kendra Kaiser, and Ryan Kinzer as witnesses. Ted McManus, Kyle Smith, Rich Wensel, Dan Ostermiller, Zak Sears, Gary Brown, Michael Gibson, and Nick Kunath testified as public witnesses. Consistent with Rule 651 of the Department's Rules of Procedure (IDAPA 37.01.01), after the hearing the parties used a private company, K & K Reporting, to prepare a transcript of the hearing.

The hearing officer allowed the parties to file post-hearing briefs. On January 31, 2024, Perpetua filed *Perpetua Resources Idaho, Inc.'s Post Hearing Brief* ("Perpetua Brief") and NP Tribe, SSFS and ICL filed *Protestants' Joint Post-Hearing Brief* ("Protestants' Brief").

After carefully considering the evidence in the administrative record and the arguments made by the parties, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Perpetua proposes to develop a mining project, known as the Stibnite Gold Project ("SGP"), in Valley County. Ex. 22 at 10.[1] Perpetua proposes to extract gold, silver, and antimony at the SGP. *Id.*

2. The project site includes private land owned by Perpetua and land that is held by the USFS. Ex. 22 at 16. Perpetua is currently seeking an approved plan of operations from the USFS. Ex. 22.

3. Perpetua projects that it will take approximately three years to construct the infrastructure and facilities needed to commence mining. Ex. 29 at 68; Ex. 22 at 36. Active mining will last approximately twelve years, followed by three years of additional ore processing. *Id.* The SGP will be comprised of three open pit mines, a mill site, various industrial buildings, a worker housing facility, and a tailings storage facility ("TSF"). Ex. 22.

4. The open pit mining areas will include two existing pits, the Yellow Pine Pit and the West End Pit, which are remnants of previous mining activities at the site, and one new open pit, the Hangar Flats Pit. Ex. 22 at 36-37. Ore mined at the open pits will be hauled to the proposed on-site ore processing facility or stored at the SGP in stockpiles. *Id.* at 38-39. In addition to ore mined at the open pits, Perpetua will reprocess legacy tailings from past mining activities at the SGP site. *Id.* at 41-42. Tailings from the ore processing facility will be pumped in a slurry to the TSF for permanent storage. Ex. 27a at 31-32.

[1] All references to page numbers in this order indicate the page of the exhibit pdf not necessarily the page number shown on the document.

5. In Application 77-14378, Perpetua proposes to divert up to 9.60 cubic feet per second ("cfs") from ground water wells or from the East Fork of the South Fork Salmon River ("EFSFSR"). Ex. 1g at 1.

6. The proposed point of diversion from the EFSFSR is a pump station ("River Pump") to be constructed in the NESE of Section 3, T18N, R09E. Ex. 1g at 13-15.

7. The proposed points of diversion from ground water include thirteen industrial supply wells, thirty-seven dewatering wells, three diversions of ground water from open pits, and two diversions of ground water through underground drains. Ex. 1g at 13-15. These ground water points of diversion are located within Sections 2, 3, 11, 14, 15, and 22, T18N, R09E. *Id.*

8. The proposed industrial place of use in Application 77-14378 is the industrial and mining areas of the SGP ("industrial/mining POU") and encompasses portions of Sections 2, 3, 10, 11, 14, 15, 16, 17, 20, 21, 22, and 28, T18N, R09E, and Sections 34 and 35, T19N, R09E. Ex. 1g at 14.

9. In Application 85396, Perpetua proposes to change the point of diversion and place of use for water right 77-7122. Ex. 1a at 7.

10. Water right 77-7122 bears a priority date of April 16, 1981, and authorizes the diversion of 0.33 cfs and 7.1 acre-feet per year from the EFSFSR for mining storage. Ex. 1a at 10.

11. The proposed point of diversion for Application 85396 is the River Pump. Ex. 1a at 2-6, 13. The proposed place of use for mining storage is the TSF. *Id.* The TSF will serve as a reservoir and a storage facility for processed mining tailings. Ex. 27a at 31-32. Water stored in the TSF will be used for industrial and mining purposes throughout the SGP area. *Id.* The proposed place of use for mining from storage is the industrial/mining POU. Ex. 1a.

12. In Application 85397, Perpetua proposes to change the point of diversion and place of use for and add points of diversion to water right 77-7285. Ex. 1c at 2.

13. Water right 77-7285 bears a priority date of November 7, 1988, and authorizes the diversion of 0.50 cfs and 30.2 acre-feet per year from ground water for mining. Ex. 1c at 11. 9.0 acre-feet of the 30.2 acre-feet authorized under the right may be diverted for mining storage. *Id.*

14. The proposed points of diversion for Application 85397 are the thirteen industrial supply wells described in Application 77-14378. Ex. 1c at 8. These wells will be located in Section 15, T18N, R09E. *Id.* The proposed place of use for mining storage is two contact water detention ponds in Section 15, T18N, R09E. *Id.* at 14. The proposed place of use for mining and mining from storage is the industrial/mining POU. *Id.*

15. In Application 85398, Perpetua proposes to change the place of use for water right 77-7293. Ex. 1e at 2.

16. Water right 77-7293 bears a priority date of April 19, 1989, and authorizes the diversion of 0.25 cfs and 20 acre-feet per year from an Unnamed Stream (known locally as Hennessey Creek) for mining use. Ex. 1e at 10.

17. The proposed place of use for Application 85398 is the industrial/mining POU. Ex. 1e at 13.

18. In Application 85538, Perpetua proposes to change the point of diversion for water right 77-7293 from Hennessey Creek to the EFSFSR, at a location upstream of the confluence of Hennessey Creek and the EFSFSR. Ex. 1d at 4. Application 85538 is an application for exchange because the proposed point of diversion is upstream of the confluence.

19. The proposed point of diversion for Application 85538 is the River Pump and is located approximately 2,000 feet upstream of the confluence of Hennessey Creek and the EFSFSR. Ex. 1d at 4.

20. Currently, Hennessey Creek is diverted around the Yellow Pine Pit and injected into the EFSFSR near the confluence of EFSFSR and Sugar Creek. *See* Ex. 25b at 85 (map depicting current streamflow path of Hennessey Creek).

21. During the period when the Yellow Pine Pit is actively mined, Perpetua will pipe Hennessey Creek around the mining area and will inject the water into the EFSFSR upstream of the River Pump. Ex. 22 at 63; Ex. 25b at 18-35. After the Yellow Pine Pit area is reclaimed, Hennessey Creek will flow into the EFSFSR near its historic confluence with the EFSFSR. *Id.*

22. The following table summarizes Perpetua's industrial and mining applications:

Application	Water Right	Source	Diversion Rate (cfs)
77-14378	77-14378	Ground Water / EFSFSR	9.60
85396	77-7122	EFSFSR	0.33
85397	77-7285	Ground Water	0.50
85398 / 85538	77-7293	Unnamed Stream (Hennessey Cr.)	0.25
		Total:	**10.68**

23. Although the water rights, in combination, could be used to divert up to 10.68 cfs, Perpetua seeks a maximum diversion rate of 9.60 cfs for industrial, diversion to storage, and mining use. Ex. 61 at 3. The 9.60 cfs could be diverted from the EFSFSR, ground water, or both sources at the same time.

24. The peak water demand for industrial and mining use at the SGP will be 9.60 cfs. Ex. 1g at 48-58. This number represents the combined individual water demands associated with the SGP: 4.5 cfs for ore processing at the mill, 0.7 cfs for dust control, 0.1 cfs for drilling activities and 4.3 cfs for dewatering. *Id.* Even though these individual demands will likely not occur simultaneously, there are operational circumstances that may require Perpetua to divert the full 9.60 cfs. *Id.*; Scanlan Test., Tr. at 138-141.

25. Perpetua proposes to capture and store up to 600 acre-feet per year for industrial use under Application 77-14378. Ex. 1g at 55-57. This volume is comprised of the initial fill of the TSF and storage in the contact water detention ponds, with an approximate 35 percent contingency to account for variation in precipitation. *Id.*

26. The River Pump will have a capacity of approximately 4.5 cfs. Ex. 34 at 124, 139 (describing "maximum withdrawal rate" from the EFSFSR as 4.5 cfs); Ex. 47 at 2 ("Perpetua intends to supplement the site water balance with as much as 4.5 cfs of raw water from the EFSFSR.").

27. The EFSFSR will supply more of the annual water demand for the SGP in the early years of the project. Bosley Test., Tr. at 391-393. In later years, contact water, dewatered ground water, and effluent from the TSF will supply most of the annual water demands. *Id.*

28. "The most significant [SGP] water use will be for ore processing during operations, which accounts for 97 percent of the total water usage for the life of the project and includes tailings management." Ex. 26 at 84. "The primary source of water to be used in the ore processing circuit will be water recycled from the TSF." *Id.* "During normal operations, it is anticipated that, on average, approximately 80 percent . . . of the water used for ore processing will be reclaim[ed] water while the remaining 20 percent will [come from freshwater sources]." *Id.*

29. "The EFSFSR is designated critical habitat for Chinook salmon, steelhead, bull trout, and westslope cutthroat trout, all of which are listed as threatened, endangered, or sensitive." Ex. 259 at 9 (citations and scientific names of species omitted). The SGP site includes stream reaches that are designated as critical habitat for Chinook salmon, steelhead, and bull trout. Ex. 29 at 19-20.

30. The National Marine Fisheries Service ("NMFS") prioritizes actions for recovering ESA-listed species in the Salmon River drainage. These actions include removing fish passage barriers, eliminating impacts from legacy mining activities, and restoring degraded habitat. Leonard Test., Tr. at 655.

31. The Yellow Pine Pit was first mined and excavated in the 1930s. Ex. 29 at 38-39. As the Yellow Pine Pit was actively mined, the EFSFSR was routed around the pit. *Id.* When the site was abandoned in the late 1950s, the EFSFSR was allowed to flow over an unreclaimed high wall of the pit, forming a steep cascade, creating a complete barrier for upstream fish passage, and isolating the upstream populations of bull trout and westslope cutthroat trout. *Id.* The Yellow Pine Pit continues to be a complete barrier for upstream fish passage. *Id.*

32. The EFSFSR above the Yellow Pine Pit, including Meadow Creek up to an existing fish passage barrier (located upstream of the confluence with Blowout Creek) is adequate spawning habitat for Chinook salmon. Kinzer Test., Tr. at 1086, 1163.

33. Beginning in about 2000, the NP Tribe has operated a program to transplant Chinook salmon above the Yellow Pine Pit. Keller Test., Tr. at 921-22. Transplanted fish are released into Meadow Creek. *Id.* There are isolated populations of bull trout and westslope

cutthroat trout in the EFSFSR and its tributaries above the Yellow Pine Pit. Leonard Test., Tr. at 633.

34. During the construction phase of the SGP, Perpetua proposes to route the EFSFSR around the Yellow Pine Pit through an engineered stream channel and fishway tunnel to provide volitional fish passage to the upper reaches of the EFSFSR and to allow additional mining at the Yellow Pine Pit. Ex. 22 at 61-62 (map of proposed tunnel); Ex. 46 at 4; Ex. 29 at 19. The stream channel and fishway tunnel will be approximately 0.9 miles long. Ex. 22 at 62.

35. Volitional fish passage is the preferred means for ESA-listed species to access the available habitat in the upper reaches of the EFSFSR. Kinzer Test., Tr. at 1180-81.

36. The administrative record includes a 2022 Design Manual from NMFS that "provides criteria and additional guidelines for the design and operation of facilities at barriers to fish migration and water intakes in California, Washington, Oregon, and Idaho." Ex. 246 at 17. These guidelines are intended to "create safe passage routes for adult and juvenile salmonids in rivers and streams and through reservoirs, restore habitat connectivity within watersheds, and enhance salmonid population productivity." *Id.*

37. Although the NMFS design criteria "are not universally appliable and should not replace site specific recommendations," they are nevertheless "based on decades of experience developing, testing, operating fish passage systems and rel[y] on the best available scientific information." Ex. 246 at 17.

38. According to the 2022 Design Manual from NMFS, "[t]he maximum hydraulic drop between fish ladder pools should be 1 foot or less" and "[f]ishway overflow weirs should be designed to provide at least 1 foot (+/- 0.1 foot) of flow depth over the weir crest." Ex. 246 at 68.

39. The proposed fishway will be a fish ladder comprised of a series of pools and weirs. Ex. 34 at 35-36. The weirs are spaced to maintain no greater than a one-foot hydraulic drop between pools. *Id.*; Ex. 47 at 6.

40. Perpetua hired an engineering firm, McMillan Jacobs Associates ("MJA") to design the stream channel and fishway tunnel and to prepare a hydraulic model to "investigate the lowest possible tunnel fishway flow that satisfies established fish passage design criteria." Ex. 47 at 3.

41. Using design standards from NMFS, MJA evaluated flow rates that would avoid flow velocities greater than 6.6 feet per second (the burst speed of bull trout) and avoid water depths less than one foot (the minimum flow depth for adult Chinook salmon passage). Ex. 46 at 5-7; Ex. 47 at 3-4. Based on literature from NMFS, MJA also maintained a minimum weir length of 15 inches. Ex. 47 at 3. MJA reached the following conclusions:

> [A flow rate of 7.25 cfs in the fishway] will meet the minimum flow depth of 1 ft as well as the other design criteria such as velocity and hydraulic drop. Lower flow

> rates will meet velocity and hydraulic drop criteria, but will have less than 1 foot of depth over the weir.

Id. at 12.

> Results of the [computational fluid dynamics] simulations indicate that a flow rate of 7.25 [cfs] (6.89 to 7.61 [cfs], ±5% confidence level) is required to achieve a 1-foot weir flow depth over a 15-inch-wide weir; lower flows will result in flow depths not meeting the 1-foot criterion. Results also indicate that a flow rate of 18.97 [cfs] (18.02 to 19.92 [cfs], ±5% confidence level) is required to achieve a 2-foot weir flow depth. In both of these cases, the average velocity over the weir is expected to be less than 6.6 [feet per second], which satisfies fish passage criteria for maximum velocity.

Id. at 15.

42. At a flow rate of 5.00 cfs, the fishway would provide a weir depth of 0.72 feet, an average velocity of 5.8 feet per second, and a hydraulic drop of 0.64 feet. Ex. 47 at 15. This would be sufficient for safe passage of bull trout, steelhead, and westslope cutthroat trout. *Id.*

43. The spawning season for adult Chinook salmon in the EFSFSR is between June 30 and September 30. Ex. 219 at 3. If Perpetua maintains a flow rate of 7.25 cfs in the fishway between June 30 and September 30 and a flow rate of 5.00 cfs during the rest of the year, the fishway will provide safe, timely, and effective passage for Chinook salmon, steelhead, bull trout, and westslope cutthroat trout.

44. The stream channel and fishway tunnel was also designed to pass the 500-year flood flow for the EFSFSR. Ex. 47 at 2.

45. In approximately Year 10 of the mining activities, the stream channel and fishway tunnel will be replaced by a restored stream channel through the reclaimed Yellow Pine Pit area. Ex. 22 at 86-88; Ex. 29 at 19. The restored stream channel will preserve fish passage to the upper reaches of the EFSFSR. *Id.*

46. In June 2022, Perpetua sent a written request to the Idaho Department of Fish & Game ("IDFG") and the Idaho Governor's Office of Species Conservation ("OSC"), seeking "a technical assistance review of Perpetua's water rights application [77-14378]." Ex. 206 at 3.

47. Perpetua's request for a technical review by IDFG and OSC included a memo, dated June 27, 2022, which set forth a proposed water right condition intended to "minimize impacts to fish and aquatic habitat in the EFSFSR drainage." *Id.* at 9. The memo stated Perpetua's commitment to "operate in a manner that ensures sufficient fish passage between the EFSFSR POD [River Pump] and Sugar Creek." *Id.* The memo also noted that Perpetua and its consultant planned to update the design of the fishway and conduct additional analyses of the updated design but confirmed that any adjustments to the fishway would be constrained by the one-foot depth requirement to accommodate passage for adult Chinook salmon. *Id.* at 13.

48. Perpetua proposes the following water right condition as a voluntary restriction on its diversions:

> Net diversions from EFSFSR and groundwater under water rights 77-7122, 77-7285, 77-7293, and 77-14378 shall not cause more than 20 percent depletion to the unimpaired streamflow in the EFSFSR below its confluence with Sugar Creek when unimpaired streamflow is less than 25 cfs. For purposes of this condition:
>
> a) Percent depletion is equal to net diversion divided by unimpaired streamflow.
>
> b) Net diversion is the sum of groundwater and EFSFSR diversions minus discharge of treated water to the EFSFSR and its tributaries.
>
> c) Unimpaired streamflow is defined as the gaged flow at Sugar Creek (USGS 13311450), plus the gaged flow at EFSFSR above Sugar Creek (USGS 13311250), plus the net diversion from EFSFSR and groundwater under water rights 77-7122, 77-7285, 77-7293, and 77-14378.
>
> d) Calculations shall be based on running 3-day averages of net diversion and gaged stream flows.

Ex. 206 at 9; *Perpetua Brief* at 31.

49. "[IDFG's] mission is to preserve, protect, perpetuate, and manage Idaho's fish and wildlife resources for the public interest." Ex. 206 at 1 (citation omitted).

50. "[OSC] is dedicated to planning, coordinating, and implementing the State's actions to preserve, protect, and restore species listed as candidate, threatened, or endangered under the Endangered Species Act of 1973, while considering Idaho's economic vitality and values." Ex. 206 at 1 (citation omitted).

51. On August 2, 2022, IDFG and OSC sent a joint letter to Perpetua stating that the "fishery and aquatic habitat protection measures" proposed by Perpetua, including the proposed condition restricting diversions during low flow periods, "will likely protect fisheries and aquatic habitat in the EFSFSR." Ex. 206 at 1. The letter also recommended that IDWR adopt additional water right conditions for water right 77-14378 that "would ensure fish passage at the [SGP]." *Id.* IDFG and OSC proposed the following water right condition:

> 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 [River Pump].

Id.

52. The administrative record includes a summary of daily stream flow rates for the EFSFSR at USGS Gage No. 13311250 (EFSF Salmon River above Sugar Creek near Stibnite, ID) from January 2012 to October 2023. Ex. 261. Based on these flow records, the lowest flows in the EFSFSR occur from November to February. *Id.* The lowest average daily flow for that twelve-year period is approximately 10 cfs. *Id.*

53. Perpetua hired Rio Applied Science and Engineering ("Rio ASE") to evaluate the effects of Perpetua's diversions on stream flow and fish passage in the EFSFSR from the proposed stream channel and fishway tunnel outlet to the confluence of the EFSFSR and Sugar Creek, a distance of approximately 1,700 feet. Ex. 219 at 33.

54. Rio ASE developed a hydraulic model using 2009 Light Detection and Ranging (LiDAR) data and topographic and bathymetric data collected by Rio ASE in 2021 and 2022. Ex. 219 at 35.

55. "Fish passage is typically evaluated at 5% (high flow) and 95% (low flow) exceedance flows." Ex. 219 at 35. "Passage is typically inhibited or prohibited at high flow because maximum swim velocity is exceeded and at low flow because flow depth is too low." *Id.*

56. "At the reach-scale (evaluating all cross sections within the reach of interest) average conditions show that the flow depth is greater than minimum depth criteria at all species-specific 95% exceedance flows for existing and proposed conditions." Ex. 219 at 44. "Also, average reach conditions indicate the channel width meeting minimum depth criteria for existing and proposed conditions is greater than 32% and 26%, respectively, meeting requirements of a minimum 10% of the wetted width, as historically required by NMFS." *Id.*

57. At the cross-section scale, Perpetua's proposed diversions would increase the number of cross sections that are out of compliance with minimum standards for fish passage. Ex 219 at 44-45.

58. Under existing flow conditions, many of the cross sections evaluated by Rio ASE already do not meet the depth and velocity criteria for fish passage through man-made hydraulic structures. Ex. 219 at 44-48. Despite these existing stream channel conditions, Chinook salmon, steelhead, bull trout, and westslope cutthroat trout have successfully traversed the EFSFSR reach between the confluence with Sugar Creek and the Yellow Pine Pit. *Id.* at 47.

59. Meadow Creek is a tributary to the EFSFSR. Ex. 63 at 11. The confluence of Meadow Creek and the EFSFSR is in the middle of the SGP. *Id.* Base flows in Meadow Creek range between 2.0 cfs and 3.0 cfs in low to average water years. Ex. 201 at 5.

60. In its analysis of the effects of ground water diversions on surface water streams, Perpetua assumed that ground water diversions have a one-to-one impact on surface water streams within the boundaries of the SGP. Ex. 206 at 14.

61. Additional mining at the Yellow Pine Pit and the West End Pit and new mining at the Hangar Flats Pit will require the excavated areas to be dewatered. Application 77-14378

proposes to divert ground water in and around the open pits, at dozens of well sites, to dewater the pits and facilitate mining activities. Ex. 1g.

62. When the Hangar Flats Pit area is dewatered, the ground water pumping would result in significant depletions to Meadow Creek. Stanaway Test.

63. To prevent Meadow Creek from being affected by the dewatering of the Hangar Flats Pit, Perpetua proposes to construct a new channel for Meadow Creek and to line the channel to prevent communication with the ground water table. Ex. 25b at 24 (map depicting the section of Meadow Creek to be reconstructed and lined). The reconstructed and lined section of Meadow Creek would be constructed in a way that maintains all the existing functions of the stream channel. Stanaway Test., Tr. at 259.

64. Even with a liner in Meadow Creek, Perpetua acknowledges that ground water pumping in the Meadow Creek drainage will reduce the streamflow in the creek. Ex. 63 at 20-21.

65. During operations, Perpetua proposes to divert ground water from thirteen supply wells in Section 15, T18N, R09E for industrial use. Ex. 25b at 44. These wells are in the Meadow Creek drainage. Ex. 63 at 11.

66. The cone of depression created by pumping ground water for industrial use or for dewatering could extend to areas of Meadow Creek upstream of the lined section. Stanaway Test., Tr. at 259-261. To attenuate the effects of ground water pumping on areas outside of the lined section, Perpetua proposes to limit its industrial production wells around Meadow Creek to an average monthly diversion rate of 0.5 cfs. *Id.*; Ex. 27a at 76. ("0.5 cfs was determined from the groundwater flow model . . . as an amount that could be withdrawn without adverse impacts on Meadow Creek."). An average monthly diversion rate of 0.5 cfs equates to a volume of approximately 31 acre-feet per month.

67. Depending on its industrial water demands, Perpetua may have to treat water pumped for dewatering purposes and release the treated water into existing stream channels. Perpetua proposes to inject the treated dewatering water into Meadow Creek above the confluence with Blowout Creek. Ex. 25b at 31 (map showing SGP at full build out) and 45.

68. The TSF will be constructed in the Meadow Creek drainage. Ex. 25b at 24. In addition to lining a lower section of Meadow Creek, Perpetua proposes to construct lined man-made stream channels to convey Meadow Creek and its tributaries around the TSF, during times when the TSF is actively used for tailings storage. *Id.* During the closure and reclamation phase of the SGP, Perpetua will line the top of the TSF and restore the Meadow Creek stream channel over the top of the TSF. Ex. 22 at 61, 89; Ex. 27a at 31-32; Ex. 29 at 69.

69. Although dewatering activities may have some effect on flows in Sugar Creek, Perpetua does not propose to divert any water directly from Sugar Creek. Ex. 25b at 54-55 (map of modeling results showing ground water pumping impacts propagating to Sugar Creek).

70. The SGP site is currently a source of water contamination for the EFSFSR watershed. Ex. 259 at 9-11. Tailings and spent ore from previous mining activities on the site are uncontained. *Id.* As water flows through the project site, these legacy tailings release arsenic, antimony, and mercury into the water, contaminating the EFSFSR and its tributaries. *Id.* at 18; Ex. 23 at 28-29. Two of the primary sources of contamination are the Bradley Tailings Pile and the HECLA Heap. Haslam Test.; Ex. 259 at 9-11.

71. Perpetua has been monitoring water quality at the SGP site since at least 2011. Ex. 259 at 9; Durbin Test. Current water quality conditions at the SGP site exceed the Idaho water quality limits for antimony, arsenic, mercury, and temperature. Ex. 259 at 9; Ex. 58 at 2; Durbin Test. Water samples confirm that the concentrations of dissolved antimony and dissolved arsenic exceed human-health based criterion. Ex. 259 at 9.

72. "[D]ecades of mining activity that largely pre-dated state and federal regulatory guidelines, standards and oversight left the [SGP] area in need of repair and a legacy of millions of tons of unlined tailings, blocked fish passage and conditions degrading water quality." Ex. 72 (2018 Joint Resolution of the Idaho House of Representatives).

73. "The [SGP] area, in the headwaters of the EFSFSR, was intermittently mined for most of the 20th century." Ex. 259 at 24. "[D]ecades after mining ceased, water quality in the area continues to be impaired." *Id.*

74. Perpetua has already removed 300,000 tons of tailings and waste rock from the riparian areas of the SGP site to improve water quality. Haslam Test., Tr. at 76-77.

75. Perpetua proposes to reprocess the Bradley Tailings Pile and the HECLA Heap to extract additional minerals. Ex. 22 at 41. The reprocessed material will be stored in the TSF, designed as a fully contained tailings storage facility, to prevent the tailings from contacting water in the hydrologic cycle. *Id.*

76. In addition to surface water contamination at the SGP site, ground water at the SGP site is contaminated because of legacy mining impacts.

77. During low flow periods, the base flow in the EFSFSR is primarily supported by ground water. Durbin Test. "The highest concentrations of both dissolved arsenic and dissolved antimony occur[ ] during low-flow periods (July -March), suggesting the constituents are present in groundwater." Ex. 259 at 9. Concentrations of contaminants during the low-flow period would be static. Durbin Test. Diversion of surface water during the low flow period would not change the contaminant concentration. *Id.*

78. Any ground water pumped for dewatering purposes is considered contact water. Bosley Test, Tr. at 437-38. If Perpetua pumps ground water to dewater the land in and around the open pits and discharges the water into existing streams, Perpetua must first treat the water to remove the contaminants before injecting the water into streams. Diversion and treatment of excess dewatering will result in water quality improvements for the EFSFSR watershed.

79. "Given the importance of the EFSFSR (and the [South Fork Salmon River] downstream) as critical habitat for Chinook salmon, steelhead, bull trout, and westslope cutthroat trout, the remediation of the Stibnite mining area is a priority for many government and non-government organizations." Ex. 259 at 25.

80. Summer water temperatures "frequently exceed[ ] water temperature criteria related to salmonid spawning and (or) bull trout." Ex. 259 at 15 (citation omitted). "Exceedances occur[ ] June-September, but [are] most common in July and August." *Id.*

81. Between 2011 and 2023, water temperatures in Meadow Creek and the EFSFSR above Meadow Creek remained below the "maximum optimum temperature among the species and life stages of interest." Ex. 201 at 16, Figure 4. Although temperatures were higher in the EFSFSR between the confluence with Meadow Creek and the confluence with Sugar Creek, the temperatures did not reach the threshold where physiological stress and eventual mortality occurs. *Id.*

82. The SGP, if implemented as described in the proposed plan of operations, will improve stream temperatures for aquatic species relative to baseline conditions during and after operations. Ex. 58 at 5. The River Pump is located at the entrance to the stream channel and fishway tunnel to minimize the effect of diversions at the River Pump on water temperature.

83. Perpetua proposes to convey streams around or pipe streams through all areas disturbed by mining activities to avoid contact with and contamination of the water. Ex. 26 at 98. Streams that are piped, including the 0.9-mile stream channel and fishway tunnel, will prevent some water temperature increases. Stream channel sections that are reconstructed or restored by Perpetua will also prevent temperature increases once the planted vegetation is tall enough to provide shade. Durbin Test.

84. Blowout Creek, also known as East Fork Meadow Creek, is a tributary of Meadow Creek. Ex. 29 at 18. In 1965, a reservoir dam on Blowout Creek failed, introducing a large amount of sediment into the EFSFSR watershed. *Id.* at 69-70. Since that time, Blowout Creek has continued to erode the banks of the creek channel and is "one of the largest sources of fine sediment for the EFSFSR." Id. at 69; Richardson Test., Tr. at 729.

85. As part of its operations, Perpetua will "stabilize and repair" Blowout Creek by constructing grade controls and a coarse rock drain system. Ex. 22 at 64-65. This will raise the ground water levels, significantly reduce current erosion, and prevent future erosion. *Id.*

86. USFS holds water rights 75-13316 and 77-11941, which constitute the federal reserved water rights for the Salmon Wild and Scenic River between the mouth of the North Fork Salmon River and Long Tom Bar. Ex. 4 at 2.

87. Water rights 75-13316 and 77-11941 bear a priority date of July 23, 1980, and entitle the USFS to all flows in the Salmon River, up to 28,400 cfs, when the stream flow in the river is greater than or equal to 13,600 cfs. Ex. 4 at 2. The rights also establish the wild and scenic flow rates (when the stream flow is less than 13,600 cfs) in two-week increments throughout the year. *Id.*

88. Water rights 75-13316 and 77-11941 are subordinated to certain future water uses, including industrial uses, but are not subordinated to future water rights for storage use. Ex. 4 at 3. Perpetua's proposal to divert water to storage under Application 77-14378 would therefore be subject to water rights 75-13316 and 77-11941. *Id.* at 3-4.

89. To mitigate the impacts of its industrial, mining and storage diversions on water rights 75-13316 and 77-11941, Perpetua prepared a Mitigation Plan, dated May 18, 2021, which proposes to hold water rights 72-149, 72-150, and 72-16273 from Morgan Creek and water rights 72-4031, 72-4032, 72-4033, and 72-4034 from the Salmon River unused for the duration of the project. Mitigation water will be available under the Mitigation Plan between April 1 and October 31.

90. The Stipulation resolving the protests of the USFS set forth three conditions to be added to water right 77-14378, Transfers 85396, 85397, and 85398, and Exchange 85538, if they were approved:

> Condition 1: Perpetua will implement the mitigation plan attached to its application, with mitigation water available from April 1 to October 31.
>
> Condition 2: When the minimum instream flows of the W&SR [wild and scenic river] Water Right are not being met at the point of compliance between November 1 and March 31, Perpetua will curtail diversions to storage for Water Rights Nos. 77-14378, 77-07122, and 77-07285.
>
> Condition 3: Diversions to storage during the period from April 1 to October 31, at times when minimum instream flows of the W&SR Water Right are not being met at the Point of Compliance will not exceed the mitigation water-rights that are in priority pursuant to the mitigation plan as follows:
>
> > a. Diversions to storage under Water rights Nos. 77-14378, 77-07122, and 77-07285 will not exceed 10.75 cfs; and
> >
> > b. Perpetua will maintain an annual cumulative accounting of the volume of water diverted to storage under Water Rights Nos. 77-14378, 77-07122, and 77-07285 when flows at the point of compliance are at or below the minimum instream flows of the W&SR Water Right during the period from April 1 to October 31. If the cumulative accounting reaches 347-acre feet during the annual period, Perpetua will curtail diversions to storage for Water Rights Nos. 77-14378, 77-07122, and 77-07285 when W&SR flows are not being met at the Point of Compliance for the remainder of the period in that year.

Ex. 4 at 7.

91. The "Point of Compliance" described in the Stipulation and its proposed conditions is "the Salmon River immediately below the mouth of the South Fork Salmon River." Ex. 4 at 5. Flow in the Salmon River at the Point of Compliance will be calculated using a formula described in the Stipulation. *Id.* at 5-6.

92. The Idaho Water Resource Board holds water right 77-14190 which establishes a minimum stream flow on the EFSFSR. Water right 77-14190 bears a priority date of April 1, 2005, and would be senior to water right 77-14378. However, water right 77-14190 states that the right the right is subordinate to all future DCMI [domestic, commercial, municipal, and industrial] uses.

93. Perpetua is actively pursuing other permits required by state and federal agencies. Bosley Test., Tr. at 389-390; *see also* Ex. 26 at 17-19 (summarizing the permits required to construct and operate the SGP).

94. The initial cost of the SGP is $1.265 billion. Ex. 59 at 1. Perpetua is a publicly traded company with a strong shareholder base and will use a combination of financing options to fund the initial construction and operation of the SGP. *Id.* In addition to traditional funding sources, Perpetua has been awarded grants from the U.S. Department of Defense to offset some of the cost of environmental and engineering studies. Ex. 59 at 67.

95. The public witnesses described the recreational activities occurring in the EFSFSR watershed. People who live in the area and people from outside of the watershed hike, fish, camp, kayak, and ski in the basin. EFSFSR is still a wild river with relatively few man-made alterations to streamflow. The public lands surrounding the river allow the public to access the river more easily.

96. Public witnesses expressed concerns that the diversions at the SGP will reduce flows in the EFSFSR, negatively affecting water quality, fish habitat, and recreational opportunities within the basin.

RELEVANT STATUTES

Idaho Code § 42-203A(5) sets forth the criteria used to evaluate applications for permit and states, in pertinent part:

> In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the

> watershed or local area where the source of water originates; the director of the department of water resources 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.

Idaho Code § 42-222(1) sets forth the criteria used to evaluate changes to water rights (applications for transfer) and states, in pertinent part:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-202B sets forth the definition for "local public interest":

> "Local public interest" is 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.

Idaho Code § 42-240 sets forth the criteria used to evaluate applications to exchange water and states, in pertinent part:

> The director shall examine all the evidence and available information and shall approve the exchange in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the exchange does not constitute an enlargement in use of the original right or rights, the exchange is consistent with the conservation of water resources within the state of Idaho, the exchange is in the local public interest as defined in section 42-202B, Idaho Code, and the exchange will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.

ANALYSIS

The criteria used to evaluate applications for permit are somewhat different than those used to evaluate applications for transfer and applications for exchange. The criteria used to evaluate applications for permit are set forth in Idaho Code § 42-203A(5) and the Department's Water Appropriation Rules (IDAPA 37.03.08). The criteria used to evaluate applications for transfer are set forth in Idaho Code § 42-222(1). The criteria used to evaluate applications for

exchange are set forth in Idaho Code § 42-240 and are nearly identical to the evaluation criteria for transfer applications. Therefore, this order contains one section evaluating Application 77-14378 and a separate section evaluating Applications 85396, 85397, 85398, and 85538.

I. Evaluation of Application 77-14378

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used for determining whether a proposed use of water will reduce the quantity of water under an existing water right:

> A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:
>
> i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
>
> ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or
>
> iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.
>
> iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

IDAPA 37.03.08.045.01.a.

Although the Idaho Water Resource Board holds water right 77-14190, which would be senior to water right 77-14378, the right is subordinate to future industrial uses. The wild and scenic water rights held by the USFS, 75-13316 and 77-11941, are also subordinate to future industrial uses but are not subordinate to future storage uses. Therefore, diversions to storage under water right 77-14378 could reduce the quantity of water available to satisfy water rights 75-13316 and 77-11941. Perpetua filed a mitigation plan with Application 77-14378 to mitigate any impact to water rights 75-13316 and 77-11941. The USFS withdrew its protest against Application 77-14378 based on the mitigation plan and other provisions of the Stipulation. USFS confirmed that these provisions, if followed, will adequately protect its senior rights. The hearing officer agrees with that assessment as reflected in the *Order Approving Settlement and Confirming Withdrawal of Protests*. The record does not contain reference to, and the hearing

officer is not aware of, any other water rights that could be affected by the diversion from the EFSFSR or ground water as proposed in Application 77-14378.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible . . . ." IDAPA 37.03.08.45.01.b.

Based on stream flow data in the record, the lowest average daily flow for the EFSFSR near the River Pump between 2012 and 2023 was approximately 10.0 cfs. The low flow period occurs in the winter months (Nov-Feb). Even if ground water diversions have an immediate and direct effect on flows in the EFSFSR, the average daily minimum flow still exceeds the total diversion rate sought by Perpetua. Perpetua has agreed to conditions that would limit its diversion rate during low flow periods. In its Stipulation with the USFS, Perpetua agreed to suspend its diversion to storage between November 1 and March 31 if the USFS wild and scenic water rights are not satisfied. Further, Perpetua proposes to limit its diversion from the EFSFSR at the River Pump to 4.5 cfs.

In addition to the diversion limits set forth in the Stipulation, Perpetua proposes to limit its depletion in the EFSFSR basin to no more than 20% of the total unimpaired stream flow in the basin just below the confluence of the EFSFSR and Sugar Creek during times when the unimpaired stream flow at that location is less than 25 cfs. Also, to preserve fish passage through the stream channel and fishway tunnel, Perpetua may not divert water under its industrial and mining water rights unless there is at least 7.25 cfs flowing through the fishway between June 30 and September 30 and at least 5.0 cfs flowing through the fishway between October 1 and June 29. These additional limitations are described in greater detail in the local public interest analysis below.

As a result of the low flow diversion limits, there may be times when Perpetua would have to scale back ore processing due to a lack of water. Bosley Test, Tr. at 542-48. The delayed production could be made up, however, when streamflow increases. *Id.* Perpetua will also be able to buffer water supply fluctuations with water from its storage facilities, including the TSF reservoir and contact storage ponds. Further, once the TSF is operational, much of the water used for ore processing will come from the TSF. Perpetua has demonstrated that water will be available for an adequate time interval and in sufficient quantities to make the project economically feasible.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for delay or speculative purposes. "The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land

in state or federal ownership, has filed all applications for a right-of-way." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

The proposed points of diversion and place of use for Application 77-14378 include property that is held by the USFS. Perpetua is actively seeking an approved plan of operations from the USFS to construct and operate the SGP. The documents submitted by Perpetua to the USFS include detailed descriptions of the ground water wells, River Pump, and industrial facilities identified in Application 77-14378. Perpetua is actively pursuing the permits required from state and federal agencies to operate the SGP. Perpetua has demonstrated that the applications were filed in good faith and not for delay or speculative purposes.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.45.01.d.ii. Perpetua has demonstrated that it is reasonably probable that funding is or will be available for project construction.

Local Public Interest

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under Idaho Code § 42-203A(5)(a). Local public interest is 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." Idaho Code § 42-202B(3).

Rule 45.01.e of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether a project conflicts with the local public interest. The current Water Appropriation Rules were adopted in the 1980s and have not been substantively changed since then. These rules were based on a now-obsolete, broader understanding of local public interest. Idaho Code § 42-202B(3) was adopted in 1996. The version of Rule 45.01.e in effect at the time of the administrative hearing (December 2023) is not consistent with Idaho Code § 42-202B(3) or judicial decisions interpreting that section.

In 2023, the Department initiated rulemaking to amend its Water Appropriation Rules. As part of the amendment process, Rule 45.01.e was updated to reflect the current definition of "local public interest" set forth in Idaho Code § 42-202B(3) and judicial decisions applying that section. The hearing officer finds that Proposed Rule 45.01.e from the revised Water Appropriation Rules provides an accurate summary of the current statutory definition and caselaw surrounding the local public interest review. Proposed Rule 45.01.e states:

Local public interest criteria. The Director will consider the following in determining whether the project will conflict with the local public interest:

i. The direct effect the project will have on public water resources that are of interest to people in the local area directly affected by the proposed water use including, but not limited to, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality, and the effect of such use on the availability of water for alternative water uses that might be made within a reasonable time; and

ii. Whether the proposed water use is consistent with Idaho's policy of securing the maximum use and benefit from the public water resources.

iii. Although the Director has independent responsibility for the overall assessment and balancing of factors weighing on the local public interest, the Director will give due regard to expertise of other state and federal regulatory agencies charged with assessing individual issues under Subparagraphs 045.01.e.i. and ii., recognizing that it is not the primary job of the Department to protect all aspects of the health and welfare of Idaho's citizens and visitors.

iv. The Director may condition approval of an application on compliance with orders, rules, requirements, and authorizations issued or to be issued by state and federal regulatory agencies with jurisdiction over subject matter relevant to the local public interest.

v. The Director will deny an application that conflicts with the local public interest unless the project can be approved with conditions to resolve the local public interest conflict.

Idaho Code § 42-203A "places upon the Director [of the Department] the affirmative duty to assess and protect the public interest." *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985). "The relevant elements [of the local public interest] and their relative weights will vary with local needs, circumstances, and interests." *Id.* 109 Idaho at 339, 707 P.2d at 450. "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to [the Department's] sound discretion." *Id.* Permit conditions arising from the local public interest review should be based on specific information in the record, not on speculation or assertions of indeterminate impacts. *See Hardy v. Higginson*, 123 Idaho 485, 491, 849 P.2d 946, 952 (1993) (case remanded to Department because of insufficient evidence in the record to support permit conditions addressing local public interest issues).

The Protestants argue that the Department's local public interest review should be limited to evaluating the direct effects of the proposed diversions. *Protestants' Brief* at 16 ("Perpetua's claims of improving existing environmental conditions, especially with respect to water quality and fish and wildlife migrations, populations and habitat are not directly related to proposed water withdrawals and are not proposed as part of the water right applications to mitigate potential impacts to the public interest." (footnotes and quotations marks omitted)). The Protestants promote an interpretation of Idaho Code § 42-202B(3) that is too narrow. Section

42-202B(3) states that local public interest includes the "effects of [the proposed water use] on the public water resource." The proposed water use is broader than just the diversion of water. It includes the areas where water is used and the areas where a proposed project would interact with the public water resource. Proposed Rule 45.01.e, quoted above, establishes a project-wide application of the local public interest review. It requires the Department to evaluate the effect "the project" will have on public water resources, not just the diversion of water.

The Protestants correctly note that there are elements of the SGP that may fall outside of the jurisdiction of the Department. For example, the Department might not have the authority to require Perpetua to construct a stream channel and fishway tunnel around the Yellow Pine Pit. Nor can the Department require Perpetua to reclaim the Yellow Pine Pit and restore a stream channel for the EFSFSR over the Yellow Pine Pit once the area is reclaimed. A potential lack of jurisdiction, however, does not mean that the Department cannot consider these important effects on the public water resource in its review of the local public interest. The Department must consider the project as it is currently proposed and all interactions between the proposed project and the public water resource. If there are substantial differences between the project as it is currently proposed and the final plan of operations approved by USFS, the Department may have to re-evaluate the local public interest. This circumstance is adequately addressed by the following approval condition:

> 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, 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.

There are many local public interest factors to consider in the EFSFSR watershed. It is in the local public interest to protect the aquatic resources, habitat, recreational opportunities, and aesthetic values of the watershed. It is also in the local public interest to protect, preserve, and restore ESA-listed species in the watershed. It is also in the local public interest to protect and improve water quality in the watershed.

There are many local public interest factors directly related to the SGP. First, it is in the local public interest to improve water quality in the EFSFSR drainage through the clean-up and safe storage of legacy tailings at the SGP site. Perpetua proposes to re-process the Bradley Tailings Pile and HECLA Heap as part of its mining efforts. The reprocessing and safe storage of those legacy tailings would be accomplished with water diverted under water right 77-14378. The effects of such use on the public water resource would include not only the direct effects of diverting water, but also the indirect effects of removing a significant source of contamination from the EFSFSR watershed. After the tailings are reprocessed, the waste material will be stored in the TSF, which will be constructed in a way to prevent future contact with water in the hydrologic cycle.

Second, it is in the local public interest to improve water quality in the EFSFSR drainage by remediating the effects of the failed dam in the Blowout Creek drainage. Perpetua's remediation work on Blowout Creek will eliminate the greatest source of sediment in the EFSFSR drainage.

Third, it is in the local public interest to restore volitional fish passage to the upper reaches of the EFSFSR. The Yellow Pine Pit constitutes a complete barrier to upstream fish passage, impeding volitional fish passage to miles of suitable habitat for ESA-listed species. Removing fish passage barriers is one of the primary goals of NMFS in the Salmon River basin. To restore fish passage around the Yellow Pine Pit, Perpetua proposes to construct a 0.9-mile stream channel and fishway tunnel. The fishway is only effective at restoring fish passage if water flows through the fishway are sufficient to facilitate passage. IDFG and OSC requested that the Department condition its water right approvals to ensure that "[s]urface water diversions and infrastructure [at the SGP] 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 [River Pump]." Ex. 206 at 1. Infrastructure at the SGP would include the proposed fishway.

Fish Passage

To preserve flows in the fishway and in the EFSFSR between the fishway and the confluence of EFSFSR and Sugar Creek, Perpetua proposes the following condition, limiting its depletion effects on the EFSFSR below the confluence of EFSFSR and Sugar Creek:

> Proposed 20% Condition: Net diversions from EFSFSR and groundwater under Water Rights 77-7122, 77-7285, 77-7293, and 77-14378 shall not cause more than 20 percent depletion to the unimpaired streamflow in the EFSFSR below its confluence with Sugar Creek when unimpaired streamflow is less than 25 cfs. For purposes of this condition:
>
> a. Percent depletion is equal to net diversion divided by unimpaired streamflow.
>
> b. Net diversion is the sum of groundwater and EFSFSR diversions minus discharge of treated water to the EFSFSR and its tributaries.
>
> c. Unimpaired streamflow is defined as the gauged flow at Sugar Creek (USGS 13311450), plus the gauged flow at EFSFSR above Sugar Creek (USGS 13311250), plus the net diversion from EFSFSR and groundwater under Water Rights 77-7122, 77-7285, 77-7293, and 77-14378.
>
> d. Calculations shall be based on running three-day averages of net diversion and gauged stream flows.

Ex. 206 at 9.

IDFG and OSC confirmed that the condition proposed by Perpetua "will likely protect fisheries and aquatic habitat in the EFSFSR." IDFG and OSC also recommended adopting

additional conditions to ensure fish passage at the SGP, particularly on the EFSFSR from the River Pump to the confluence with Sugar Creek. Consistent with Proposed Rule 45.01.e.iii, the hearing officer "will give due regard to expertise of other state and federal regulatory agencies charged with assessing individual [local public interest] issues." Part of the mission of IDFG and OSC is to protect, preserve, and restore ESA-listed species.

Evidence in the record confirms that Perpetua's proposed condition, alone, is not sufficient to preserve fish passage in the fishway under all flow scenarios. To adequately preserve fish passage through the fishway under all flow scenarios, two additional limits are required. To maintain sufficient flow in the fishway during the period of the year when adult Chinook salmon are migrating upstream (June 30 – September 30), Perpetua must pass a flow of at least 7.25 cfs. At other times of the year (October 1 – June 29), Perpetua must pass a flow of at least 5.00 cfs to facilitate unimpeded fish passage for other fish species.

In its initial evaluation of the proposed fishway, Perpetua determined that a flow rate of 7.25 cfs was needed to maintain a depth of one foot over the weirs. This water depth was identified in the NMFS fishway design manual as the depth needed for safe passage for adult Chinook salmon. At hearing and in its post-hearing brief, Perpetua argued that, rather than using the NMFS standards for man-made fish passage structures, flow depths in the fishway should be evaluated using a document produced by the California Department of Fish and Wildlife Instream Flow Program titled *Standard Operating Procedure for Critical Riffle Analysis for Fish Passage in California* ("CDFW Standards"). Ex. 238. The CDFW Standards recommend a flow depth of 0.9 feet for safe passage for adult Chinook salmon. This depth could be achieved with a flow rate of 6.60 cfs in the fishway.

Perpetua's arguments related to the CDFW Standards are not persuasive. The CDFW Standards state: "Fish passage criteria cited in this document are specific to California and should not be extrapolated beyond the state borders." Ex. 238 at 6. Further, the CDFW Standards state: "This [document] applies only to wadeable streams having low gradient riffles with less than 4% gradient and substrates dominated by gravel and cobble." *Id.* Most importantly, the CDFW Standards state: "[T]his procedure is not applicable to culverts, weirs, bedrock ledges, or anticlines with associated drops." *Id.* at 7.

Ultimately, whether Perpetua is required to maintain a bypass flow of 6.60 cfs or 7.25 cfs through the fishway between June 30 and September 30 is largely inconsequential. When the unimpaired streamflow in the EFSFSR below Sugar Creek drops below 25 cfs, Perpetua's 20% condition, in most years, would be the primary limiting factor in determining the amount Perpetua could deplete from the EFSFSR.

Exhibit 261 summarizes the daily stream flow for USGS Gage No. 13311250 (EFSFSR above Sugar Creek near Stibnite, ID) from 2012 to 2023. Exhibit 262 summarizes the daily stream flow for USGS Gage No. 13311450 (Sugar Creek near Stibnite, ID) from 2014 to 2023. Using the daily streamflow data from Exhibits 261 and 262, it is possible to evaluate how Perpetua's 20% condition and the 7.25 cfs bypass flow condition would be applied in an average year. According to one of Perpetua's technical reports, 2016 represents an average water year in the EFSFSR basin. Ex. 63 at 20. The following table sets forth the daily data for USGS Gages 13311250 and 13311450 for a select number of days between June 30, 2016, and September 30,

2016. The table shows the amount of water that Perpetua could deplete from the EFSFSR above the point of quantification under the 20% condition and under the 7.25 cfs bypass condition and shows which condition acts as the limiting factor for depletion.[2]

Date	USGS Gage #13311250 EFSFSR (cfs)	USGS Gage #13311450 Sugar Cr (cfs)	Total Flow (EFSFSR + Sugar Cr) (cfs)	Depletion Allowed under 20% Condition (cfs)	Depletion Allowed under 7.25 cfs Bypass Flow Condition (cfs)	Limiting Condition
6/30/2016	32.68	24.53	57.21	9.60	9.60	Neither
7/7/2016	24.13	21.31	45.44	9.60	9.60	Neither
7/14/2016	26.82	19.01	45.83	9.60	9.60	Neither
7/21/2016	20.53	15.21	35.74	9.60	9.60	Neither
7/28/2016	17.69	13.45	31.14	9.60	9.60	Neither
8/4/2016	15.74	11.88	27.62	9.60	8.49	Bypass
8/11/2016	14.94	10.96	25.90	9.60	7.69	Bypass
8/18/2016	13.54	9.82	23.36	4.67	6.29	20%
8/25/2016	12.85	9.12	21.97	4.39	5.60	20%
9/1/2016	12.01	8.38	20.39	4.08	4.76	20%
9/8/2016	12.32	8.38	20.70	4.14	5.07	20%
9/15/2016	13.17	8.58	21.75	4.35	5.92	20%
9/22/2016	13.94	8.96	22.90	4.58	6.69	20%
9/29/2016	11.40	7.76	19.16	3.83	4.15	20%

See Exs. 261 and 262.

As shown in the table, when the total unimpaired streamflow is high, Perpetua would be able to divert (and consume) the full 9.60 cfs proposed in its applications without any limitation. Once the total unimpaired streamflow drops below 25 cfs, however, the 20% condition becomes the greatest limiting factor for diversion rate. There is a transition period where the bypass flow condition would limit diversions more than the 20% condition. In 2016, this occurred when total unimpaired streamflow was between 25 and 30 cfs. This transition period came at the end of the high flow period, meaning Perpetua's storage facilities would be full, reducing Perpetua's demand for freshwater from EFSFSR or ground water and limiting the effect of the bypass flow condition on Perpetua's operations.

The hearing officer is not persuaded that the CDFW Standards for critical riffles in natural streams should be used to determine the proper bypass flow for the fishway. Evidence in the record supports maintaining a minimum depth of 1.0 feet over the fishway weirs between June 30 and September 30, the period when adult Chinook salmon would be passing upstream through the fishway. The record supports a minimum bypass flow of 7.25 cfs between June 30 and September 30 to maintain a one-foot depth over the fishway weirs. The record contains hundreds of pages of analysis and testimony arguing about whether 0.9 feet (6.6 cfs) or 1.0 feet

[2] The 20% condition proposed by Perpetua describes three-day averaging for stream flow and diversions. Even though the table does not apply three-day averaging, it is still effective in showing the relationship between the 20% condition and the 7.25 cfs bypass flow condition under various flow rates.

(7.25 cfs) is the appropriate bypass flow for preserving fish passage in the fishway. Ultimately, the arguments are of little consequence because Perpetua's 20% condition serves as the primary limiting factor for industrial diversions in an average water year, not the bypass flow conditions.

Ground Water Diversions near Meadow Creek

Idaho Code § 42-228 states: "The excavation and opening of wells and the withdrawal of water therefrom for the sole purpose of improving or preserving the utility of land by draining them shall not be forbidden or governed by this act . . . ." Therefore, Perpetua would not need a water right to pump ground water to dewater the Yellow Pine Pit, the West End Pit, or the Hangar Flats Pit, as long as Perpetua did not use the water for some other purpose. Perpetua proposes to use the ground water pumped for dewatering, at times, for industrial purposes.

The primary area of concern for ground water pumping affecting stream flow is in the Meadow Creek drainage. Meadow Creek provides habitat for ESA-listed species. Perpetua asserts that the reconstructed and lined Meadow Creek channel will be insulated from the effects of ground water pumping in the Meadow Creek and Hangar Flats area. The hearing officer declines to include a condition on the permit requiring Perpetua to construct a new Meadow Creek channel with a liner. Alterations of stream channels are governed by Chapter 38, Title 42, Idaho Code. Any proposal to change the location of or composition of the Meadow Creek channel must go through the application process described in Chapter 38. Rather than dictating how Meadow Creek channel should be reconstructed, the approval of Permit 77-14378 should instead restrict ground water pumping in the Meadow Creek drainage if the stream flow in Meadow Creek is not preserved. This is accomplished with the following condition:

> 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 Creek to the confluence of Meadow Creek and EFSFSR.

Summary

The Department has broad discretion to weigh and balance competing local public interest factors. In other words, the local public interest review is not a zero-impact setting. Some local public interest factors may be affected to allow other local public interest factors to be accomplished. A hearing officer for the Department must weigh all local public interest factors and the technical information in the record to determine whether the proposed permit can be approved with conditions to protect the local public interest.

In this case, the short-term and long-term benefits to water quality and fish passage resulting from the SGP outweigh any short-term impacts on fish habitat or fish passage resulting from mining activities at the SGP and the associated water diversions. Further, water right conditions, supported by technical information in the record, can be added to the permit to minimize project impacts on fish passage and fish habitat for ESA-listed species. The following conditions should be added to water right 77-14378:

1. The diversion of water directly from the East Fork of the South Fork Salmon River (EFSFSR), located in the NESE, Section 3, T18N, R09E, shall not exceed a maximum diversion rate of 4.50 cfs.

2. The thirteen industrial supply wells located in Section 15, T18N, R09E, shall not exceed a combined monthly diversion volume of 31 acre-feet.

3. 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, 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.

4. Net diversions from the EFSFSR and ground water under water rights 77-7122, 77-7285, 77-7293, and 77-14378 shall not cause more than twenty percent depletion to the unimpaired streamflow in the EFSFSR below its confluence with Sugar Creek when the unimpaired streamflow is less than 25 cfs. For purposes of this condition:

a. Percent depletion is equal to net diversion divided by unimpaired streamflow.

b. Net diversion is the sum of ground water and EFSFSR diversions minus the discharge of treated water to the EFSFSR and its tributaries.

c. Unimpaired streamflow is defined as the gauged flow at Sugar Creek (USGS Gage #13311450) plus the gauged flow at EFSFSR above Sugar Creek (USGS Gage #13311250) plus the net diversion from EFSFSR and ground water under water rights 77-7122, 77-7285, 77-7293, and 77-14378.

d. Calculations shall be based on three-day trailing averages of net diversions and gauged stream flows.

5. 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.

6. 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.

7. 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 Creek to the confluence of Meadow Creek and EFSFSR.

8. On or before March 1st each year, the right holder shall provide the Department with an annual report summarizing the diversion amounts and flow rates for the previous calendar year. The annual report shall include the following information: (1) the daily diversion rates for the river pump and ground water diversions (industrial supply, dewatering, open pit, underdrain); (2) daily streamflow rates for (a) Meadow Creek just above the confluence with Blowout Creek, (b) Meadow Creek just above the confluence with EFSFSR, and (c) EFSFSR at the entrance to the fishway tunnel downstream of the river pump on the EFSFSR; (3) an analysis of how the right holder complied with the USFS Stipulation and mitigation plan; and (4) an analysis of how the right holder satisfied the conditions of approval for this water right.

Conservation of Water Resources

Perpetua proposes to divert contact water and recycled water to satisfy most of its water demands for ore processing. Perpetua's water management plan relies heavily on contact water captured for water quality purposes and recycled water, minimizing the diversions from ground water and the EFSFSR. Perpetua has demonstrated that the water uses proposed in Application 77-14378 are consistent with the conservation of water resources within the state of Idaho.

II. Evaluation of Applications 85396, 85397, 85398, and 85538

Injury to Existing Water Rights

Water rights 77-7122, 77-7285, and 77-7293 are existing rights at the SGP and authorize mining and storage use at the site. Water right 77-14190 bears a priority date of April 1, 2005, and is junior to water rights 77-7122, 77-7285, and 77-7293. The changes proposed in Applications 85396, 85397, 85398, and 85538 will not significantly alter the effects of the diversion of water rights 77-7122, 77-7285, and 77-7293 on flows in the EFSFSR. Therefore, water right 77-14190 will not be affected by the proposed changes.

Water rights 77-7122, 77-7285, and 77-7293 are junior to water rights 75-13316 and 77-11941 held by the USFS for wild and scenic flows on the Salmon River. Water rights 77-7122, 77-7285, and 77-7293 are included in the mitigation plan set forth in the Stipulation between Perpetua and the USFS described above. Therefore, any impacts to water rights 75-13316 and 77-11941 are offset or prevented through the Stipulation and its associated mitigation plan. The record does not contain reference to, and the hearing officer is not aware of, any other water rights that could be affected by the changes proposed in Applications 85396, 85397, 85398, or 85538.

Enlargement in Use

The changes proposed in Applications 85396, 85397, 85398, and 85538 will not result in an enlargement in the use of water rights 77-7122, 77-7285, or 77-7293. Water right 77-7122 already authorizes the diversion of water from the EFSFSR for mining storage. Water right 77-7285 already authorizes the diversion of ground water for mining and mining storage. Water

right 77-7293 already authorizes the diversion of water from an Unnamed Stream (Hennessey Creek) for mining. These rights will continue to be used in the amounts and for the purposes stated in the water rights. The record does not contain clear and convincing evidence that any of the water rights, or portions thereof, have been lost and forfeited through non-use. All annual volume limits listed on the rights will be retained and carried forward in the transfer approvals.

Local Public Interest

The same local public interest factors evaluated under Application 77-14378 apply to the evaluation of Applications 85396, 85397, 85398, and 85538. If conditions are adopted addressing local public interest factors, Perpetua has demonstrated that the changes proposed in Applications 85396, 85397, 85398, and 85538 are in the local public interest.

Conservation of Water Resources

The evaluation of conservation of water resources for Applications 85396, 85397, 85398, and 85538 is identical to the evaluation for Application 77-14378. Perpetua has demonstrated that the changes described in Applications 85396, 85397, 85398, and 85538 are consistent with the conservation of water resources within the state of Idaho.

III. Arguments from the Protestants

Climate Change

The NP Tribe, through its experts Kendra Kaiser and Ryan Kinzer, contends that "Perpetua's assessment of the effect of their proposed water rights on surface water and groundwater does not sufficiently evaluate or take into account future climate change conditions." Ex. 215 at 2. Kaiser argues that it is improper for Perpetua to use historical stream flow data to evaluate the effects of its diversions rather than using projected stream flow conditions based on climate change models. Ex. 215 at 5-7. According to Kinzer: "In the Pacific Northwest, summer months are anticipated to become progressively more stressful for salmonids as stream temperatures increase with warming air temperatures due to climate change, which is likely to shift and reduce suitable habitat for many species and increase the extinction risk for Snake River ESA-listed species." Ex. 201 at 15 (citations omitted).

Neither Idaho Code § 42-203A(5) nor Idaho Code § 42-222(1) nor the Department's Water Appropriation Rules (IDAPA 37.03.08) include climate change as a review criteria. Those provisions do not require applicants to perform studies or offer analyses of how the water supply may change in the future because of climate change. In the absence of clear statutory authority, the hearing officer declines to consider climate change in the evaluation of applications for permit or applications for transfer. Under the current statutes and rules, an applicant must only address the relevant evaluation criteria in terms of existing stream flows and existing diversions.

Quantity of Water

The Protestants argue that "Perpetua, through their expert reports and testimony, has not shown they need the full amount of water requested." *Protestants' Brief* at 17. The Protestants also argue that water right 77-14378 should be limited to an average monthly diversion rate or an average annual diversion rate, which would be significantly less than the 9.60 cfs proposed by Perpetua. *Id.* These arguments reflect a lack of understanding of water rights and water right elements.

Many water rights in Idaho list diversion rates that are only met during short periods of time, either because of limited water supply or because the peak water demand is of a short duration. Municipal rights, for example, often include diversion rates based on the peak summer demand. Similarly, an industrial right may include a diversion rate that reflects the amount of water needed to flush out a system a couple of times per year. The fact that a diversion rate may only be realized infrequently does not make the diversion rate unnecessary or illegitimate.

Through its exhibits, expert reports, and expert testimony, Perpetua established that the peak water demand for industrial use at the SGP would be 9.60 cfs. This number represents the combined individual demands associated with the SGP. Perpetua admits that diverting the full 9.60 cfs may be rare, depending on operational circumstances. This does not negate the fact that the proposed diversion rate is supported by evidence in the record.

Modeling

Throughout their post-hearing brief, the Protestants identify areas where, they argue, Perpetua should have conducted streamflow modeling or should have conducted additional modeling. The Department's processes for reviewing applications for permit or transfer are substantially different than the evaluation process used by the USFS under the National Environmental Protection Act. Idaho Code §§ 42-203A(5) and 42-222(1) do not require an applicant to create hydraulic or stream flow models. Further, the processes described in Idaho Code §§ 42-203A(5) and 42-222(1) are not iterative. An applicant must satisfy its burden of proof at hearing by providing sufficient evidence addressing the statutory review criteria. After an administrative hearing has concluded, applications are either approved, denied, or approved with limiting conditions. The Department does not request additional analysis, models, or reports from an applicant.

Perpetua's Proposed 20% Condition

As noted above, Perpetua proposes a condition that would limit the amount of water that could be consumed (depleted) at the SGP during low flow periods. Perpetua proposes to limit its diversions to deplete the EFSFSR (below the confluence with Sugar Creek) by no more than 20% of the total unimpaired flow in the stream during low flow periods. The point of quantification is a calculated value, representing the flow in the EFSFSR below the confluence with Sugar Creek. The Protestants argue that this point of quantification "obscures water withdrawal effects on the EFSFSR above its confluence with Sugar Creek." *Protestants' Brief* at 40. The hearing officer agrees. Perpetua contends that the dewatering activities around the Yellow Pine Pit mine will influence flows in Sugar Creek, so the point of quantification must be

below Sugar Creek. *Perpetua Brief* at 15. Perpetua's contention is not persuasive, however, because the depletion impacts to Sugar Creek are relatively small (when compared to the overall depletion impacts of the SGP) and do not occur until late in the project. Perpetua's proposed condition and the associated point of quantification mask the actual effects of Perpetua's diversions on the EFSFSR above Sugar Creek.

The Protestants contend that the proposed condition "does not ensure those upstream EFSFSR flows are adequately protected when flows downstream at the point of quantification drop below 25 cfs." *Protestants' Brief* at 41. The hearing officer agrees. Consistent with the comments from IDFG and OSC, and to avoid impacts to local public interest factors, this order adopts additional diversion limits as described above. First, the River Pump is limited to a maximum diversion rate of 4.50 cfs. Second, Perpetua must maintain a minimum bypass flow of 7.25 cfs downstream of its River Pump from June 30 to September 30 and a minimum bypass flow of 5.00 cfs at all other times of the year. These additional diversion limits adequately protect fish passage through the tunnel fishway and support fish passage in the reach between the fishway outlet and the confluence of EFSFSR and Sugar Creek.

Other Local Public Interest Arguments

As described in the local public interest review for Application 77-14378, the hearing officer has weighed and balanced the local public interest factors in this case and has determined that conditions should be included on the permit and transfer approvals to protect local public interest values in aquatic habitat and fish passage for ESA-listed species in the EFSFSR watershed. These local public interest conditions render many of the arguments advanced by the Protestants moot. For example, the Protestants argue that Perpetua's diversions from the EFSFSR basin will cause the fishway to drop below safe fish passage levels during low flows in August and September. The condition to require a minimum bypass flow that will preserve fish passage during critical times for adult Chinook salmon addresses this concern. If streamflow drops below the minimum flow needed for safe fish passage, Perpetua's must curtail its diversions. Protestants also raise a concern that ground water pumping in the Meadow Creek drainage would dewater Meadow Creek entirely. The condition requiring Perpetua to maintain a flow of 3.0 cfs in Meadow Creek at all times when the Perpetua wells are in operation addresses this concern.

The application review processes described in Idaho Code §§ 42-203A and 42-222(1) can sometimes create a unique challenge for protestants. A hearing officer does not weigh and balance the local public interest factors until after the hearing. Therefore, protestants do not know at hearing whether the hearing officer will adopt conditions to reduce impacts to local public interest factors. Without this knowledge, protestants must make arguments based on the authority sought on the face of an application. In this case, much of the evidence provided by the Protestants was based on the full diversion rate sought by Perpetua and does not account for the diversion limits adopted through this order.

CONCLUSIONS OF LAW

Perpetua has demonstrated that Application 77-14378 will not reduce the quantity of water under existing water rights, that the water supply is sufficient to satisfy the proposed uses,

that the application was made in good faith and not for speculative purposes, that it has sufficient financial resources to complete the proposed project, and that the proposed uses are consistent with the conservation of water resources within the state of Idaho and are in the local public interest. Perpetua has also demonstrated that the changes proposed in Applications 85396, 85397, 85398, and 85538 will not injure other water rights, will not enlarge the use of water rights 77-7122, 77-7285, or 77-7293, that the changes are consistent with the conservation of water resources within the state of Idaho and are in the local public interest. Therefore, Applications 77-14378, 85396, 85397, 85398, and 85538 should be approved.

ORDER

IT IS HEREBY ORDERED that Applications 77-14378, 85396, 85397, 85398, and 85538 filed in the name of Perpetua are APPROVED subject to the conditions set forth in the approval documents issued in conjunction with this order.

Dated this 10th day of April 2024.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April 2024, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the following:

Documents: Preliminary Order Approving Applications
Permit 77-14378
Transfer Approvals 85396, 85397, 85398
Exchange Approval 85538

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EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing 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. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.