

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

IN THE MATTER OF APPLICATIONS FOR)	
PERMIT 77-14377, 77-14378, AND 77-14379,)	ORDER ON MOTIONS
APPLICATIONS FOR TRANSFER 85396)	<i>IN LIMINE</i>
85397, 85398, AND 85399 AND APPLICATION)	
FOR EXCHANGE 85538 IN THE NAME OF)	
<u>PERPETUA RESOURCES IDAHO, INC.)</u>	

On June 30, 2023, the hearing officer for the Idaho Department of Water Resources (“Department”) issued an *Order Granting Motion to Extend Deadlines, Amended Notice of Hearing and Amended Scheduling Order*, setting these consolidated contested cases for hearing on December 11-15, 2023. According to the amended scheduling order, the parties were required to file and exchange expert reports on or before August 28, 2023. This deadline was extended to September 11, 2023, through an *Order Granting Motion to Extend Deadline for Expert Reports*, issued on August 25, 2023. The amended scheduling order also established November 20, 2023, as the deadline for filing motions *in limine*.

On November 20, 2023, Applicant Perpetua Resources Idaho, Inc. (“Perpetua”) filed *Perpetua Resources Idaho, Inc.’s Motion in Limine* (“Perpetua’s Motion”), seeking an order from the hearing officer to “limit and exclude Protestants witnesses related to fisheries.” *Perpetua’s Motion* at 1.

Also on November 20, 2023, Protestant Nez Perce Tribe (“Tribe”) filed *Nez Perce Tribe’s Motion in Limine* (“Tribe’s Motion”), seeking an order to exclude “exhibits, testimony, or other evidence that relies on: 1) the U.S. Forest Service’s draft analysis and conclusions regarding the [proposed project’s] effects on fish, contained in its October 28, 2022, SDEIS, as [] inadmissible hearsay or irrelevant and prejudicial; and 2) the watershed condition indicators and intrinsic potential model scientific analyses contained in the SDEIS’s Appendix J that do not shed light on the effect of Perpetua’s water right applications on aquatic habitat.” *Tribe’s Motion* at 13.

On December 4, 2023, Perpetua filed *Perpetua Resources Idaho, Inc.’s Response to Nez Perce Tribe’s Motion in Limine* (“Perpetua’s Response”), the Tribe filed *Nez Perce Tribe’s Response to Perpetua Resources’ Motion in Limine*, and protestants Save the South Fork Salmon, Inc. and Idaho Conservation League filed *Save the South Fork Salmon and Idaho Conservation League’s Response to Perpetua Resources Idaho, Inc.’s Motion in Limine*.

On December 6, 2023, the Department conducted a status conference. During the conference, Perpetua and the Tribe confirmed that they did not intend to file a reply brief pursuant to Rule 220.02.c of the Department’s Rules of Procedure (IDAPA 37.01.01).

Analysis of Perpetua's Motion

Perpetua's Motion appears to be a general request for the hearing officer to apply the Department's admissibility criteria for evidence, found in Rule 600 of the Department's Rules of Procedure (IDAPA 37.01.01). Rule 600 states:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any resulting order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute, rule or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37.01.01.600

Perpetua does not identify any specific exhibits, or portions thereof, to exclude from the administrative record. Perpetua acknowledges that the Department is required to evaluate whether the proposed water use will conflict with the local public interest, which "includes an evaluation of impacts from the proposed diversion to fish and other wildlife resources." *Perpetua's Motion* at 3. Perpetua states a concern that the expert witnesses and exhibits identified by the protestants will be unduly repetitious, will cause unwarranted delay in the proceeding, and will introduce topics outside of the scope of the Department's review. *Id.* at 3-4.

To the extent Perpetua seeks confirmation that the admissibility criteria set forth in Rule 600 govern this proceeding, that proposition is confirmed. The hearing officer will apply Rule 600 to the evidence offered by all parties. In the interest of efficiency, the hearing officer may exclude evidence that is unduly repetitious. To the extent Perpetua is asking the hearing officer to broadly exclude a certain subject matter or type of evidence, Perpetua's Motion lacks the specificity necessary to support such an exclusion.

Analysis of the Tribe's Motion

Except for very limited circumstances, the Idaho Rules of Evidence do not apply to contested cases before the Department. *See* Rules 51 and 600, IDAPA 37.01.01. The admissibility of evidence in a contested case before the Department is governed by Rule 600 of the Department's Rules of Procedure (IDAPA 37.01.01), quoted in its entirety above. The hearing officer may exclude evidence that is "irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege" IDAPA 37.01.01.600. "All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs." *Id.*

The Tribe asks the hearing officer to exclude a Supplemental Draft Environmental Impact Statement (“SDEIS”) prepared by the United States Forest Service (“USFS”) from the administrative record and to exclude certain references to the SDEIS found in Perpetua’s expert reports. Most of the arguments raised in the Tribe’s Motion rely on the Idaho Rules of Evidence or case law applying said rules. Admissibility of evidence in this proceeding is not governed by the Idaho Rules of Evidence. Therefore, the Tribe’s arguments under the Idaho Rules of Evidence are not persuasive and will not be restated or analyzed in this order.

The hearing officer may require, and in this case has required, that expert reports be exchanged prior to the hearing. IDAPA 37.01.01.526. Expert reports are a form of prepared testimony. *Id.* All testimony presented at the hearing must be given under oath. IDAPA 37.01.01.558. For that reason, an expert who prepares an expert report is required to testify at hearing, to lay the foundation for their report and to stand for cross examination on statements made in the report or made during direct examination. *See* IDAPA 37.01.01.156.

The *Order Granting Motion to Extend Deadline for Expert Reports* established September 11, 2023, as the deadline for filing expert reports. The primary question regarding the admissibility of the SDEIS is whether the SDEIS, prepared by the USFS in conjunction with its review of Perpetua’s proposed project, should be considered an expert report, subject to pre-hearing disclosure and cross examination.

The SDEIS was prepared to, among other things, evaluate the effects of the diversions described in Perpetua’s water right applications on fish and wildlife resources. Even though the SDEIS was not prepared for the contested cases before the Department, it was prepared for the specific project described in Perpetua’s water right applications. The SDEIS is not a general technical report or scientific paper. It was prepared to evaluate and draw conclusions about the impacts of Perpetua’s proposed development, including impacts to resources that fall within the Department’s local public interest review criteria. Perpetua acknowledges that the SDEIS “consists of over 1,000 pages of current, detailed analysis evaluating the environmental impacts of the project.” *Perpetua’s Response* at 4.

While the SDEIS was not prepared specifically for the contested cases before the Department, to the extent Perpetua seeks to offer the SDEIS as a technical analysis of the effects of its proposed project, the reports are subject to the expert report disclosure deadlines and can only be admitted into the record through the testimony of the authors, who would be subject to cross-examination. Without testimony laying the foundation for the creation of the SDEIS and the reasoning and analysis contained therein, the SDEIS has very little probative value. Further, admitting the SDEIS without allowing the opposing parties to cross-examine its authors would violate principles of procedural due process. For these reasons, the SDEIS and all its appendices (Exhibits 39a through 39s and Exhibit 40) must be excluded from the administrative record.

Perpetua asserts that “the perspectives of the lead Federal action agency on the current environmental architecture of the Project would be extremely valuable to consider” *Perpetua’s Response* at 9. That assertion is likely correct. Perpetua, however, did not identify the SDEIS as an expert report or identify any of the USFS agents as witnesses to share their valuable perspectives under oath and to be subject to cross-examination by the opposing parties.

The Tribe also asks the hearing officer to exclude references to the SDEIS in the reports prepared by Perpetua's experts. The hearing officer has reviewed the sections of the exhibits identified by the Tribe and finds that they do not create confusion. All references to the SDEIS or its appendices are properly cited. There is no confusion as to what conclusions are from the SDEIS and what conclusions are from Perpetua's experts. Further, Perpetua's experts are allowed to consider the data and information contained in the SDEIS or other technical reports when forming their opinions. Direct quotations or restatements of conclusions from the SDEIS will not be supported by testimony from USFS employees at hearing and will thus be assigned the proper weight by the hearing officer. Therefore, references to, direct quotations of, or summaries of the SDEIS or its appendices will not be parsed or redacted from the Perpetua expert reports if the reports are offered for admission during the hearing.

ORDER

IT IS HEREBY ORDERED that the Motions *in Limine* filed by Perpetua and the Tribe are GRANTED. The hearing officer will rely on Rule 600 of the Department's Rules of Procedure to evaluate the admissibility of testimony and exhibits and may exclude evidence that is unduly repetitious. The SDEIS and its appendices, prepared by the USFS, are expert reports and should have been disclosed by the September 11, 2023, deadline. Further, the SDEIS and its appendices require an expert witness to lay the foundation for the report and to be subject to cross examination. Perpetua has not identified any USFS agents as expert witnesses in this case. Therefore, the SDEIS and its appendices (Exhibits 39a through 39s and Exhibit 40) are excluded from the administrative record. References to the SDEIS and its appendices will not be excluded or redacted from Perpetua's expert reports. Further, Perpetua's expert witnesses and the protestants' expert witnesses may refer to the SDEIS and its appendices and describe data or information they relied on in forming their expert opinions.

This order is an interlocutory order, issued pursuant to Rule 710 of the Department's Rules of Procedure (IDAPA 37.01.01).

Dated this 7th day of December 2023.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December 2023, true and correct copies of the documents described below were served only by email to the following:

Document Served: Order on Motions in Limine

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