

RAÚL R. LABRADOR
Attorney General

SCOTT L. CAMPBELL
Deputy Attorney General
Chief, Energy Natural Resources Division

ANN N. YRIBAR (ISB #8406)
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8072

Attorneys for the Idaho Department of Fish and Game

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

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NOS. 77-14377, 77-	)	
14378, 77-14379, APPLICATIONS FOR	)	MOTION TO QUASH SUBPOENA
TRANSFER NOS. 85396, 85397, 85398,	)	
85399 AND APPLICATION FOR	)	
EXCHANGE NO. 85538 (PERPETUA	)	
RESOURCES IDAHO, INC.)	)	

Pursuant to IDAPA 37.01.01.523, the Idaho Department of Fish and Game (“IDFG”), by and through its counsel of record, hereby moves the Hearing Officer to quash a Subpoena for IDFG employee Tom Bassista to testify in his official capacity (Technical Assistance Program Coordinator-Aquatics, Technical Services Bureau) in the hearing scheduled for December 11–15, 2023 in the above-captioned matter. The subpoena was served on Mr. Bassista on or about 2:15 p.m. on December 4, 2023. It is IDFG’s understanding that the Nez Perce Tribe moved for this

subpoena on November 21, 2023, and that it was issued by the Hearing Officer on November 29, 2023.

The scope and nature of the testimony sought from Mr. Bassista at next week's hearing is unclear. He is to: "provide testimony under oath as a witness in the above-captioned matter." IDFG is not a party to this matter, and the Tribe has not made any showing as to why it is appropriate to compel, through a subpoena, expert testimony from an IDFG employee to support the Tribe's purposes. Any party to this matter who seeks to support its position by expert analysis has the burden of retaining the necessary experts.

Idaho civil case law and related procedural rules are consistent with granting IDFG's motion to quash. Civil discovery rules do not allow for depositions of opposing party experts when they are not expected to be called at trial. Idaho Rule of Civil Procedure Rule 26(b)(4)(D) is as follows:

Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

That protection is available to opposing party experts, and Idaho courts have not allowed such experts to be called by the opposing party during trial "unless a proper showing of exceptional circumstances is made." *See White v. Mock*, 140 Idaho 882 (2004) (citing a prior version of I.R.C.P. 26(b)). By extension, and as a matter of public policy, this reasoning should apply to state agency experts relative to proceedings in which the agency has not chosen to participate based on agency resources, priorities, and other governmental interests. The Tribe has had the opportunity to obtain facts and opinions on this subject by other means. IDFG documents related to the water rights application at issue have been available to the Nez Perce Tribe via requests to examine IDFG records under Idaho Public Records Law (*see* Idaho Code 74-101 *et seq.*).

To the extent the subpoena seeks factual testimony from Mr. Bassista, IDFG requests that the scope of the testimony be clearly limited to specific factual matters only. Mr. Bassista's official duties as Technical Assistance Program Coordinator-Aquatics provide coordination and communication support, which may involve communications of the agency on matters beyond his personal knowledge or expertise.

Should the hearing officer not fully grant IDFG's motion, the timeframe before the hearing is short, and would not provide sufficient time for IDFG to review the discovery in this matter. As such, IDFG requests an explanation of the factual topics to be discussed and an order from the Hearing Officer limiting questioning to the matters designated. IDFG also requests its deputy attorney general be allowed to appear during the hearing for the sole purpose of ensuring that any testimony elicited from Mr. Bassista is limited to factual inquiries only.

IDFG respectfully requests the Hearing Officer quash the Subpoena for Mr. Bassista. In the alternative, IDFG moves the Hearing Officer for an Order limiting the scope of Mr. Bassista's testimony to factual matters only and providing appropriate limits for his testimony.

DATED this 5th day of December, 2023.

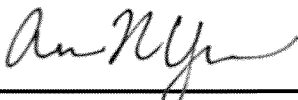


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December 2023, I caused to be served a true and correct copy of the foregoing MOTION TO QUASH SUBPOENA by transmitting a copy thereof in the manner listed below:

James Cefalo Idaho Department of Water Resources Eastern Region 900 N. Skyline Dr. Ste. A Idaho Falls ID 83402	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☒ Email to: james.cefalo@idwr.idaho.gov file@idwr.idaho.gov ☐ Facsimile: _____ ☐ Statehouse Mail
Elijah M. Watkins Wade C. Foster Stoel Rives LLP 101 S Capitol Blvd. Ste 1900 Boise ID 83702	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☒ Email to: elija.watkins@stoel.com wade.foster@stoel.com ☐ Facsimile: _____ ☐ Statehouse Mail
Idaho Conservation League PO Box 844 Boise ID 83701	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☒ Email to: mkellner@idahoconservation.org ☐ Facsimile: _____ ☐ Statehouse Mail
Julia S. Thrower Mountain Top Law PLLC 614 Thompson Ave. McCall ID 83638	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☒ Email to: jthrower@mtntoplw.com ☐ Facsimile: _____ ☐ Statehouse Mail



ANN N. YRIBAR
Deputy Attorney General