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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS
FOR PERMIT 77-14377, 77-14378,
77-14379, APPLICATIONS FOR
TRANSFER 85396, 85397, 85398,
and 85399, AND APPLICATION FOR
EXCHANGE 85538 IN THE NAME OF
PERPETUA RESOURCES OF IDAHO,
INC.

**PERPETUA RESOURCES IDAHO,
INC.'S MOTION *IN LIMINE***

Pursuant to the June 30, 2023 Order Granting Motion to Extend Deadlines, Amended Notice of Hearing and Amended Scheduling Order and Rule 600 of the Department's Rules of Procedure, IDAPA 37.01.01.600, Perpetua Resource Idaho, Inc. ("Perpetua") moves to limit and exclude Protestants witnesses related to fisheries. This matter is currently set for a five-day hearing beginning on December 11, 2023.

On November 6, 2023, the Parties filed their exhibit and witness lists. Protestants' witness list identifies 15 witnesses in total. Of those, at least six are associated with the Nez Perce Tribe's fisheries department or identified as fisheries expert witnesses. *See* Nez Perce Tribe, Save the South Fork Salmon, and Idaho Conservation League's Witness and Exhibit List

at 2-3 (Nov. 6, 2023) (listing Emmit Taylor, Wes Keller, Joe Oatman, Ryan Kinser, and Michael Ackerman—all employees of the Nez Perce Tribe’s Department of Fisheries Resource Management—and Timothy Cochnauer, SSFS’s expert fisheries witness). Consistent with their large number of fishery witnesses, at least 30 of the Protestants’ exhibits relate to fishery resources. *See id.* at 6-12 (Exhibits 238-253, 301-314). Protestants apparently believe the December hearing ought to primarily be focused on fish as a function of federal law.

Protestants’ fisheries experts place most of their analysis of local impacts on Endangered Species Act (“ESA”) listed endangered or threatened fish species. Protestants’ experts imply that if the applications are granted Perpetua’s diversion of water will result in “take” of listed species or alter or destroy their designated critical habitat in violation of federal law. *See Ctr. for Biological Diversity v. BLM*, 833 F.3d 1136, 1141 (9th Cir. 2016). Of course, the question of whether “take” has or is occurring under Section 9 of the ESA is the purview of U.S. Fish and Wildlife Service, or the National Marine Fisheries Service, not the Idaho Department of Water Resources. *See id.*

Perpetua is currently in the process of obtaining multiple federal and state approvals that will limit any potential impacts from water withdrawals on fishery resources. The United States Fish and Wildlife Service and National Marine Fisheries Service are currently preparing a biological opinion, as required under the Endangered Species Act, to evaluate the potential impacts from the Stibnite Gold Project (“Project”) on ESA-listed fish. Perpetua anticipates that the biological opinion will require Perpetua to undertake certain measures to mitigate impacts to fishery resources from the Project. The United States Forest Service has issued a Supplemental Draft Environmental Impact Statement (“SDEIS”) that thoroughly evaluates impacts to fishery resources from the Project and a Final Environmental Impact Statement will inform any

additional measures Perpetua is required to undertake to protect fishery resources within the Project.

Perpetua recognizes that an evaluation of the public interest pursuant to I.C. § 42-203A(5) and the Water Appropriation Rules, IDAPA 37.03.08.025.01, includes an evaluation of impacts from the proposed diversion to fish and other wildlife resources. *See Shokal v. Dunn*, 109 Idaho 330, 338, 707 P.2d 441, 449 (1985). However, that is just one of many public interest factors under Idaho law that may be considered in determining whether to grant a water right. *See id.* There are at least three complications with Protestants calling multiple fisheries experts and using multiple fish-related exhibits to address just a single issue.

First, the potentially redundant presentations by Protestants' fisheries witnesses threaten to commandeer the hearing and be unduly repetitious. Protestants do not need multiple witnesses testifying to the same thing nor do they need to call multiple witnesses to each speak to only a small piece of Protestants' argument regarding a single issue. With a bit of planning and coordination, a single witness could be adequately prepared to address the complete scope of the Protestants' interests on this single issue. The Hearing Officer should not allow a parade of duplicative witnesses (and duplicative testimony and exhibits) to give undue weight to but one of many issues, especially when doing so can be avoided with more organization.

Second, Perpetua's concern is only magnified by the scheduled length of the hearing. The Parties have been allotted five days for Perpetua to present its case-in-chief, the Protestants to present theirs, and the presentation of any rebuttal evidence. Perpetua is committed to putting on its case as efficiently as possible in the time allotted but struggles to see how Protestants will be able to do the same—and not prejudice Perpetua by eating into its rebuttal time—if Protestants are allowed to put on multiple redundant witnesses and exhibits. If Protestants' multiple fisheries

experts are unable to present their testimony within the time allotted, the Parties run the risk of a continuance. This case has been pending since December 12, 2021. A continuance of the hearing because of Protestants' repetitive fisheries experts would just be more delay, unjust, and a waste of Department and party resources. The Hearing Officer should limit the number of fisheries experts and related exhibits so that the Parties are able stick within the time given.

Third, while Protestants are entitled to present evidence on what they perceive to be a negative impact on fisheries, the utility of such evidence is limited. Evidence regarding the potential take of endangered or threatened fish species (or alteration of their habitat) is irrelevant and is already the subject of different proceedings in front of different federal agencies. The Hearing Officer is not required to determine whether granting the water rights will result in a take of listed species or degrade habitat. This type of evidence is only useful to the extent that it assists the Hearing Officer in determining whether granting the water rights will be in the "public interest" as that term is narrowly defined by Idaho statute and rule. The Hearing Officer should exclude the use of such evidence for any other purpose, including any relation to the federal ESA.

Protestants' identification of at least six fisheries experts and at least 30 related exhibits is duplicative, risks causing further delay to this already protracted proceeding, and relates to issues fall under the jurisdiction of other federal agencies. Perpetua respectfully requests that the Hearing Officer limit Protestants' witnesses and evidence to Perpetua's water rights applications to prevent the presentation of unduly repetitious and cumulative evidence. Additionally, Perpetua requests that the Hearing Officer hold a pre-hearing conference to streamline the presentation of evidence at the hearing.

DATED: November 20, 2023

STOEL RIVES LLP

/s/ Wade C. Foster

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, true and correct copies of the foregoing document was served on the Parties by email:

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