

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

**Idaho Power Company  
Hells Canyon Complex Hydroelectric  
Project**

**Project No. 1971-079**

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**MOTION TO INTERVENE IN OPPOSITION AND MOTION TO DISMISS OF  
AMERICAN RIVERS, AMERICAN WHITEWATER, CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE, HELLS CANYON PRESERVATION COUNCIL, IDAHO  
RIVERS UNITED, PACIFIC RIVERS AND SNAKE RIVER WATERKEEPER IN  
REPOSE TO IDAHO POWER’S PETITION FOR A DECLARATORY ORDER FOR  
THE HELL’S CANYON COMPLEX HYDROELECTRIC PROJECT (P-1971-079)**

Pursuant to 18 C.F.R. § 385.214 and the Federal Energy Regulatory Commission’s (FERC or Commission) “Notice of Petition for Declaratory Relief,” eLibrary no. 20161130-3046, American Rivers, American Whitewater, California Sportfishing Protection Alliance, Hells Canyon Preservation Council, Idaho Rivers United, Pacific Rivers and Snake River Waterkeeper (collectively, Conservation Groups) hereby move to intervene in opposition to the “Petition of Idaho Power Company for Declaratory Order on Preemption and Request for Expedited Action” (Petition). Pursuant to 18 C.F.R. §385.212, Conservation Groups concurrently move for FERC to dismiss the Petition because: (1) there is no controversy related to Oregon Revised Statute (ORS) 509.585 for FERC to resolve; and (2) to the extent Idaho Power seeks to challenge the merits of Oregon Department of Environmental Quality’s (ODEQ) water quality certification<sup>1</sup> under section 401 of the federal Clean Water Act (CWA),<sup>2</sup> that challenge is premature and cannot be resolved by FERC.

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<sup>1</sup> Oregon Department of Environmental Quality, draft *Clean Water Act § 401 Certification Conditions For the Hells Canyon Complex Hydroelectric Project FERC No. P-1971*, available at <http://www.deq.state.or.us/wq/sec401cert/docs/hcwqcert.pdf>. A final 401 Certification has not yet been issued.

This filing outlines the background that is relevant to this filing, and then contains our Motion to Intervene (Part I) and Motion to Dismiss (Part Two).

### **BACKGROUND**

Idaho Power Company (Idaho Power or IPC) is currently seeking a new license for the Hells Canyon Complex Hydropower Project (FERC No. P-1971-079; hereinafter, Project) on the Snake River in Idaho and Oregon.<sup>3</sup> The original FERC project license expired in 2005, and the project has operated under annual licenses since that time pending the completion of the relicensing process.

The lower-most dam in the Project, Hells Canyon Dam, is a complete barrier to upstream fish passage. Idaho Power utilizes a trap at the base of Hells Canyon Dam that captures adult anadromous fish for use as broodstock in their hatchery mitigation program throughout the Basin.

On January 25, 2006, the State of Oregon's Department of Fish and Wildlife (ODFW) issued conditions pursuant to Federal Power Act (FPA) section 10(j), 16 U.S.C. § 803(j), recommending that the new license require the development of a fish passage plan, a fish passage committee, and eventual implementation of fish passage at all three project dams.<sup>4</sup> Throughout the relicensing process, many of the Conservation Groups have sought fish passage and reintroduction, particularly in those areas where habitat conditions can support spawning and rearing, such as Pine Creek.

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<sup>2</sup> 33 U.S.C. § 1341.

<sup>3</sup> Idaho Power Company, *Petition of Idaho Power Company for Declaratory Order on Preemption and Request for Expedited Action*, eLibrary no. 20161123-5200 (Nov. 23, 2016).

<sup>4</sup> ODFW, *Comments and 10(j) Recommended Terms and Conditions, Hells Canyon Hydropower Project, FERC No. 1971, Idaho Power Company*, e-Library no. 20060125-5029, pp. 28-42.

On August 31, 2007, FERC staff issued the Final Environmental Impact Statement (FEIS) for relicensing the Project.<sup>5</sup> The Draft Environmental Impact Statement (DEIS) recommended a phased investigation of fish passage options. However, due to concerns with water quality upstream of the Project and with objections from local stakeholders, FERC staff did not recommend fish passage measures in the FEIS for inclusion in the new Project license.<sup>6</sup>

On November 23, 2016, Idaho Power filed a Petition<sup>7</sup> requesting that FERC issue a Declaratory Order determining that, under the Supremacy Clause of the U.S. Constitution, Part I of the FPA preempts the fish passage provisions found within Oregon Revised Statute 509.585 (titled “Fish Passage Required for Artificial Obstructions”), and that it do so “no later than February 1, 2017.” On November 30, 2016, FERC issued a Notice of Petition for Declaratory Order and solicited motions to intervene or protest.<sup>8</sup>

On December 14, 2016, two weeks after Idaho Power filed the Petition, the State of Oregon’s Department of Environmental Quality (ODEQ) published a *draft* water quality certification under authority of federal CWA section 401(a), 33 U.S.C. § 1341(a).<sup>9</sup> ODEQ’s draft certification specifies that Idaho Power shall develop and implement a fish passage plan to evaluate reintroduction of anadromous fish upstream of Hells Canyon Dam and shall implement

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<sup>5</sup> Federal Energy Regulatory Commission, *Final Environmental Impact Statement for Hydropower License: Hells Canyon Hydroelectric Project, FERC Project No. 1971-0179*, August 2007. See e-library no. 20070831-4002.

<sup>6</sup> FERC, *FEIS*, pp. 661-664.

<sup>7</sup> Idaho Power Company, *Petition of Idaho Power Company for Declaratory Order on Preemption and Request for Expedited Action*, eLibrary no. 20161123-5200 (Nov. 23, 2016).

<sup>8</sup> FERC, *Notice of Petition for a Declaratory Order*, November 23, 2016. See eLibrary no. 20161130-3046.

<sup>9</sup> ODEQ, draft *Clean Water Act § 401 Certification Conditions For the Hells Canyon Complex Hydroelectric Project FERC No. P-1971*), available at <http://www.deq.state.or.us/wq/sec401cert/docs/hcwqcert.pdf>

fish passage to and from Pine Creek, an Oregon tributary Hells Canyon Reservoir, no later than fourteen years after license issuance.<sup>10</sup>

On December 14, 2016, the Idaho Department of Environmental Quality (IDEQ) also published a *draft* water quality certification under CWA section 401(a).<sup>11</sup> IDEQ’s draft certification states that Idaho Power “shall take no action that may result in reintroduction or establishing spawning populations of any fish species in Idaho waters in the absence of consultation with, and the express approval of the State of Idaho, in accordance with Idaho Code sections 67-818(5) and 67-6302 and the Idaho State Water Plan Policy 2B.”<sup>12</sup>

**PART ONE**  
**MOTION TO INTERVENE**

**I. STATEMENTS OF INTEREST**

**American Rivers**, a not-for-profit corporation headquartered in Washington, DC, is the nation’s leading river conservation organization. American Rivers protects wild rivers, restores damaged rivers, and conserves clean water for people and nature. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts, on-the-ground projects, and an annual America’s Most Endangered Rivers® campaign. American Rivers has offices across the country and more than 200,000 members, supporters, and volunteers. Many of American Rivers’ members live, work, and recreate within the Snake River

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<sup>10</sup> Oregon Draft Certification, pp. 18-23.

<sup>11</sup> IDEQ, *Draft § 401 Water Quality Certification, Hells Canyon Complex Project No. 1971-179* December 14, 2016, available at <http://deq.idaho.gov/news-public-comments-events/public-comment-opportunities/draft-401-certification-idaho-power-company-hells-canyon-complex-project/>

<sup>12</sup> Idaho Draft Certification, p. 21.

Basin. American Rivers is a party to the relicensing proceeding of the Hells Canyon Complex<sup>13</sup> and has participated in the proceeding since 2001. Additionally, American Rivers has an organizational interest in FERC's implementation of the FPA and related hydropower licensing laws, including the Clean Water Act. American Rivers has participated in numerous proceedings before FERC to assure that the FPA is administered in a manner that protects and restores natural resources impacted by hydropower projects.

**American Whitewater** is a national non-profit 501(c)(3) river conservation organization founded in 1954 with over 5,600 members and 100 local-based affiliate clubs, representing whitewater paddlers across the nation. American Whitewater's mission is to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely. As a conservation-oriented paddling organization, American Whitewater has had an interest in the Hells Canyon Complex relicensing since the late 1990's, submitted comments during scoping, and intervened and submitted comments during the DEIS period.<sup>14</sup> American Whitewater members reside in proximity to the Snake River and Hells Canyon, and enjoy this multi-day whitewater trip that is rich with geological, ecological, historical and scenic wonders. A significant percentage of our members also travel from throughout the region and across the country to recreate here. Therefore, American Whitewater has an interest in the outcome of this proceeding.

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<sup>13</sup> American Rivers, *Motion to Intervene and Protest of American Rivers*, January 15, 2004. See e-Library no. 20040115-5026.

<sup>14</sup> American Whitewater, *Motion to Intervene*, September 12, 2006. See eLibrary No. 20060912-5052. DEIS comment citation. American Whitewater, *Comments on the Draft Environmental Impact Statement*, November 3, 2006. See eLibrary No. 20061103-5041.

**California Sportfishing Protection Alliance** (CSPA) is a 501(c)(3) nonprofit, public benefit fishery conservation organization incorporated under the laws of the State of California in 1983 to protect, restore, and enhance fishery resources and their aquatic ecosystems. CSPA works to ensure that public fishery resources are conserved to enable public sport fishing activity. As an alliance, CSPA represents more than five hundred members. CSPA is a member of the steering committee of the national Hydropower Reform Coalition and has worked over the past three decades to improve hydropower licensing in substance and in process. Over the past decade, CSPA has sought to clarify jurisdictional and procedural issues and disputes in multiple hydropower licensing and associated water quality certification proceedings.

**Hells Canyon Preservation Council** (HCPC) is a regional non-profit 501(c)(3) river and public lands conservation organization founded in 1967 to stop damming of the Snake River in Hells Canyon. HCPC won that campaign in 1975 when Congress designated the Hells Canyon National Recreation Area (HCNRA). The Act prohibited additional dams and set aside 1,000 square miles of protected wild lands surrounding the great gorge. Since then, HCPC has expanded its territory well beyond the boundaries of Hells Canyon. Today, HCPC advocates for connected wildlife corridors, free-flowing rivers, and environmentally respectful forest and grazing management practices throughout the Greater Hells Canyon Region, from the Seven Devils Mountains in Idaho to the Blue Mountains in Oregon and Washington. HCPC provides a voice for these amazing wildlands, rivers, and the native fishes, animals and plants that depend on them to thrive. HCPC has more than 1,000 members, the majority of whom live in the Pacific Northwest and have deep personal connections to and recreate within the Snake River and Hells Canyon Region. HCPC's mission is to connect, protect, and restore the wild lands, waters, native

species and habitats of the Greater Hells Canyon Region, ensuring a legacy of healthy ecosystems for future generations.

**Idaho Rivers United** (IRU) has been Idaho's leading environmental voice for the protection and restoration of Idaho's rivers and streams for over 25 years. IRU has a membership base of over 3,000 and represents our members, supporters and many other citizens from across the nation who look to IRU to safeguard their interests. IRU has been involved in the Hells Canyon relicensing process for over 13 years. During the scoping, DEIS and FEIS periods, IRU was an intervener and commenter.<sup>15</sup> IRU is a 501(c)(3) non-profit corporation registered in the state of Idaho.

**Pacific Rivers** is a 501(c)(3) non-profit corporation registered in Oregon. The mission of Pacific Rivers is to protect and restore the watershed ecosystems of the West to ensure river health, biodiversity and clean water for present and future generations. Pacific Rivers has been involved in Clean Water Act section 401 permitting process of the Hells Canyon Complex for several years. The goal of Pacific Rivers in the Hells Canyon proceedings is to ensure the water quality impacts caused by the Hells Canyon Complex are adequately mitigated in order to support aquatic ecosystems and anadromous and resident fish populations.

**Snake River Waterkeeper** is a 501(c)(3) non-profit corporation registered in Idaho. Snake River Waterkeeper's mission is to use science and law to protect, restore, and sustain waters of the Snake River Basin. Snake River Waterkeeper monitors water quality, investigates citizen concerns, and enforces environmental laws with the goal of swimmable, fishable, and drinkable water Basin-wide. Participation in the Hells Canyon relicensing and associated water

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<sup>15</sup> Idaho Rivers United, *Motion to Intervene and Protest*, January 15, 2004. eLibrary No. 20040115-5052 (Jan. 15, 2004).

quality certification proceedings are part of Snake River Waterkeeper's efforts to improve water quality in the Snake River, increase fish habitat and natural reproduction, and restore native fish populations throughout the Snake River Basin.

## **II. GROUNDS FOR INTERVENTION**

As described above, several of the Conservation Groups represent members who use and enjoy the Snake River, and others have participated and/or intervened in the relicensing of the Hells Canyon Project. In addition, the Conservation Groups collectively have broad organizational interests in the instant Petition. First, Conservation Groups have participated and intervened in numerous hydropower proceedings in Idaho, Oregon and other states across the country in order to assure that the FPA is administered to protect and restore natural resources. Conservation Groups have advocated for fish passage as a mechanism to achieve such protection and restoration where the record shows passage is feasible and would provide measurable benefit.

Further, many of the Conservation Groups also have a longstanding interest in hydropower licensing procedure and a history of advocacy relating to these issues as they relate to restoring and conserving healthy rivers and the communities that rely on them. Conservation Groups have a strong interest in defending those procedures that protect the public interest and the integrity of the FERC hydropower licensing process, the latter of which includes ensuring that states are able to properly exercise their authority to protect waters under section 401 of the CWA.

No other parties to this proceeding will be able to adequately protect the interests outlined above. Accordingly, the Conservation Groups have a direct and substantial interest in the



outcome of this proceeding, and our intervention in this proceeding is in the public interest as required by 18 C.F.R. § 385.214(b)(2)(iii).

Several of the Conservation Groups have coordinated their strategies and filings in the Hells Canyon Project relicensing to date, and all will endeavor to do the same in this proceeding. Thus, the inclusion of all the Conservation Groups as parties will not interfere with the efficient conduct of this proceeding.

Conservation Groups respectfully request that FERC grant this motion to intervene and add the following individuals to the official service list maintained by the Secretary for this proceeding:

Wendy D. McDermott  
Director, Rivers of Puget Sound and Columbia Basin  
American Rivers  
P.O. Box 1234  
Bellingham, WA 98227  
[wmcdermott@americanrivers.org](mailto:wmcdermott@americanrivers.org)

Thomas O'Keefe  
Pacific Northwest Stewardship Director  
American Whitewater  
3537 NE 87th St.  
Seattle, WA 98115-3639  
[okeefe@americanwhitewater.org](mailto:okeefe@americanwhitewater.org)

Chris Shutes  
FERC Projects Director  
California Sportfishing Protection Alliance  
1608 Francisco Street  
Berkeley, CA 94703  
[blancapaloma@msn.com](mailto:blancapaloma@msn.com)

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Darilyn Parry Brown  
Executive Director  
Hells Canyon Preservation Council  
105 Fir Street, Suite 327  
PO Box 2768  
La Grande, Oregon 97850  
[darilyn@hellscanyon.org](mailto:darilyn@hellscanyon.org)

Kevin Lewis  
Executive Director  
Idaho Rivers United  
P.O. Box 633  
Boise, ID 83701  
[kevin@idahorivers.org](mailto:kevin@idahorivers.org)

Greg Haller  
Conservation Director  
Pacific Rivers  
317 SW Alder  
Suite 900  
Portland, OR 97204  
[greg@pacificrivers.org](mailto:greg@pacificrivers.org)

F.S. Buck Ryan  
Executive Director  
Snake River Waterkeeper  
2123 N. 16th St.  
Boise, ID 83702  
[buck@snakeriverwaterkeeper.org](mailto:buck@snakeriverwaterkeeper.org)

**PART TWO**  
**MOTION TO DISMISS**

As stated above, Conservation Groups move for FERC to dismiss the Petition because:

(1) there is no controversy related to ORS 509.585<sup>16</sup> for FERC to resolve; and (2) to the extent

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<sup>16</sup> ORS 509.585 (titled “Fish Passage Required for Artificial Obstructions”) provides in Section (1) that it is the policy of the state of Oregon to provide upstream and downstream fish passage past artificial obstructions so that native migratory fish can achieve access to and from their historical habitat. Section (4) of the Statute requires that any person seeking to renew a permit to operate a facility that contains such an obstruction first obtain approval of a plan to provide such passage, or else obtain a waiver. Section (11) of the Statute provides an exception if application of the statute would be pre-empted by the FPA.

Idaho Power seeks to challenge the merits of ODEQ’s federal CWA section 401<sup>17</sup> water quality certification, that challenge is premature and cannot be resolved by FERC. Conservation Groups also support Oregon’s Motion to Dismiss, filed on December 23, 2016.<sup>18</sup>

**I. ARGUMENT**

**A. There Is No Controversy For FERC To Resolve.**

Idaho Power argues that a declaratory order clarifying the supremacy of the FPA is necessary because “Oregon is now re-asserting that ORS 509.585 allows it to unilaterally impose both fish passage and reintroduction.”<sup>19</sup>

Under the Administrative Procedures Act (APA), FERC, “in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>20</sup>

Contrary to Idaho Power’s assertion, Oregon has not cited ORS 509.585 or any other state law as the basis for recommending or requiring conditions for fish passage or reintroduction as part of the new license. The Oregon agencies involved in the licensing have all relied on other authorities as the basis for their recommendations for the Project. In making its fish and wildlife recommendations under FPA section 10(j), ODFW relied on FPA Section 10(j) exclusively.<sup>21</sup>

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<sup>17</sup> 33 U.S.C. § 1341.

<sup>18</sup> ODFW, *Motion to Dismiss and Protest*, December 23, 2016. See eLibrary no. 20161223-5234 (Dec. 23, 2016).

<sup>19</sup> Idaho Power Company, *Petition*, p. 11.

<sup>20</sup> 5 U.S.C. §554(e). See also *Continental Oil Co. v. F.P.C.*, 285 F.2d 527 (5th Cir. 1961) (court has no jurisdiction to reverse Commission’s refusal to issue a declaratory order); *United Gas Pipe Line Co. v. F.P.C.*, 203 F.2d 78 (5th Cir. 1953).

<sup>21</sup> ODFW, *Comments and 10(j) Recommended Terms and Conditions, Hells Canyon Hydropower Project, FERC No. 1971, Idaho Power Company*, e-Library no. 20060125-5029. Conservation Groups note that under FPA section 10(j)(2), FERC has discretion not to adopt a recommendation of a state fish and wildlife agency if it finds that the recommendation would be inconsistent with FPA Part I. 16 U.S.C. § 803(j)(2).

Similarly, ODEQ relied on federal law, specifically CWA section 401, as the basis for its draft water quality certification.<sup>22</sup> Finally, the Oregon Water Resources Department, in issuing its draft water right, does not rely on ORS 509.585 as the basis for any condition.<sup>23</sup>

As ODFW stated in its December 23, 2016 *Motion to Dismiss and Protest*: “Simply put, ORS 509.585 plays no role in IPC’s relicensing.”<sup>24</sup>

Given that Oregon has not sought to use ORS 509.585 to impose any fish passage or reintroduction requirements, Idaho Power has raised no controversy or uncertainty for FERC to resolve. Petitioner’s requested relief (a declaration by FERC that ORS 509.585 is federally pre-empted) would therefore solve no practical issue or legal controversy, and is therefore wholly inappropriate.

**B. Any Challenge to the Merits of ODEQ’s Water Quality Certification is Premature and Cannot Be Resolved by FERC.**

Idaho Power’s Petition appears to be a preemptive, collateral attack on ODEQ’s authority to require any fish passage conditions as part of its CWA section 401 water quality certification. As described below, this challenge is premature as ODEQ has not yet issued a final water quality certification. Also, any challenge to the merits of the water quality certification once finalized properly lies in state court, and is beyond FERC’s jurisdiction to resolve.

**1. Any Challenge to ODEQ’s Water Quality Certification Is Premature.**

Neither Oregon nor Idaho has issued a final Section 401 water quality certification for the Project. Both states recently issued *draft* certifications for the Hells Canyon Project and are

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<sup>22</sup> See Oregon Draft Certification, *supra* note 10.

<sup>23</sup> Oregon Water Resources Department, *Draft Proposed Final Order: Idaho Power Company’s Hells Canyon Hydroelectric Project Reauthorizing HE 161, 188 & 189, FERC P-1971*, 2016.

<sup>24</sup> ODFW, *Motion to Dismiss*, p. 2. For further discussion, see also pp. 5 and 6.

currently accepting public comment. It remains unclear when final certifications will be issued. While there may be a conflict once final certifications are issued, no conflict currently exists because neither state has made a final decision on the substance of its respective certification. The Petition asks the Commission to issue an advisory opinion in advance of the deadline for public comment on the draft certifications. At this time there is no dispute and there is no certainty that there will be a future dispute.

Contrary to Idaho Power's assertions,<sup>25</sup> it is not yet known how the Commission will treat the issue of fish passage in the new license. In addition, as noted by ODFW, FERC staff's analysis and recommendations in the FEIS are now almost a decade old and do not reflect new information, specifically that Idaho Power "has substantially changed its proposed action to include a 'watershed-scale restoration approach' to address the thermal impact of the Project that will provide other water quality benefits ..."<sup>26</sup> Further, Commission staff has not yet considered the Snake River Stewardship Program and NMFS's 2016 Draft Snake River Spring/Summer Chinook and Steelhead Recovery Plan, both of which are relevant to the "phased" approach to fish passage described in the FEIS.<sup>27</sup>

**2. Any Challenge to the Merits of the Water Quality Certification Lies in State Court.**

To the extent Idaho Power seeks to challenge ODEQ's authority to require fish passage measures as part of any water quality certification it issues under CWA section 401, that challenge lies in state court.

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<sup>25</sup> Idaho Power Company, *Petition*, pp. 8-11.

<sup>26</sup> ODFW, *Motion to Dismiss* at p. 11.

<sup>27</sup> *Id.*, pp. 11-13.

Under CWA section 401,<sup>28</sup> FERC may license a hydropower project only if the state where the project discharges certifies that the project will comply with applicable water quality standards, or waives certification by failing to act within one year on an application for certification. FERC must include in the license any conditions the state requires in order to certify the project without modification.<sup>29</sup>

The state where the project is located must assure compliance with the CWA water quality standards before issuing a water quality certification. Depending on water quality standards in individual states, the water quality certification can establish different types of conditions, such as a minimum flow schedule, fish passage requirement, or creation of a recreational facility for enhanced access.<sup>30</sup> Again, FERC may not amend or delete a certification condition.<sup>31</sup> A licensee (or other participant) may challenge an objectionable certification only in state court.<sup>32</sup>

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<sup>28</sup> 33 U.S.C. § 1341(a)(1).

<sup>29</sup> *American Rivers, Inc. v. FERC*, 129 F.3d 99, 110-11 (2nd Cir. 1997) (*American Rivers*) (“While the Commission may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, the Commission does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.”)

<sup>30</sup> *American Rivers*, 129 F.3d at 105; *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 713–15 (1994) (“Pursuant to § 401(d) the State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the State “shall set forth any ... limitations ... necessary to assure that [the applicant] will comply with any ... limitations under [§ 303] ... and with any other appropriate requirement of State law.”); *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 375 (2006) (state conditioned certification on measures to allow passage for migratory fish and eels).

<sup>31</sup> *American Rivers*, 129 F.3d at 110-11.

<sup>32</sup> *Id.* at 102. *See also* 40 C.F.R. § 124.55(e); *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) (“if a party seeks to challenge a state certification issued pursuant to section 401, it must do so through the state courts.”); and *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

**CONCLUSION**

The Commission should dismiss the Petition. It addresses no practical issue and there is no actual controversy for the Commission to resolve. Declaratory relief is not appropriate in the absence of actual controversy. The Petition does not escape the central jurisdictional issue that the source of a fish passage prescription by the State of Oregon will be pursuant to Section 401 of the federal CWA, which is not subject to preemption by the FPA. The Commission is not the appropriate entity to settle a dispute relating to the merits of a state's exercise of Section 401 authority.

Respectfully submitted this 30th day of December 2016.



Wendy D. McDermott  
Director, Rivers of Puget Sound  
and Columbia Basin  
American Rivers



Thomas O'Keefe  
Pacific Northwest Stewardship Director  
American Whitewater



Chris Shutes  
FERC Projects Director  
California Sportfishing Protection Alliance



Darilyn Parry Brown  
Executive Director  
Hells Canyon Preservation Council



Kevin Lewis  
Executive Director  
Idaho Rivers United



Greg Haller  
Conservation Director  
Pacific Rivers

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/s/ F.S. Buck Ryan  
F.S. Buck Ryan  
Executive Director  
Snake River Waterkeeper



**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

**Idaho Power Company  
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**Project No. 1971-079**

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**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day caused the foregoing **American Rivers, American Whitewater, California Sportfishing Protection Alliance, Hells Canyon Preservation Council, Idaho Rivers United, Pacific Rivers and Snake River Waterkeeper's Motion to Intervene and Motion to Dismiss Idaho Power's Petition for a Declaratory Order on the Hells Canyon Complex Hydroelectric Project (P-1971-079)** to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 30th day of December 2016.



Megan Hooker  
American Whitewater

*Conservation Groups' Motions to Intervene and Dismiss  
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