No. 18-70765

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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AMERICAN WHITEWATER; COLUMBIANA; CENTER FOR ENVIRONMENTAL LAW AND POLICY; SIERRA CLUB

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent,*

and

PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY,

*Intervenor-Respondent.*

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On Petition for Review of Orders of the Federal Energy Regulatory Commission

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# PETITIONERS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Regulations**

**Federal Energy Regulatory Commission Orders**

**Miscellaneous**

## JURISDICTIONAL STATEMENT

Petitioners American Whitewater *et al*. ("Petitioners") seek review of two orders issued by respondent Federal Energy Regulatory Commission ("FERC" or "Commission"). The first order, issued on September 20, 2017, granted intervenor-respondent Public Utility District No. 1 of Okanogan County ("Okanogan PUD") a "stay" of the deadline to commence construction of a new hydroelectric project works at Enloe Dam on the Similkameen River, near Oroville, Washington, and denied Petitioners' motion to intervene in that proceeding. Order Granting Stay and Denying Motion to Intervene (Sept. 20, 2017) ("Stay Order"); ER024.[1] The second order, issued on January 18, 2018, denied Petitioners' Request for Rehearing of the Stay Order. Order Denying Rehearing (Jan. 18, 2018) ("Rehearing Order"); ER011.

On March 16, 2018, Petitioners filed a timely petition for judicial review. 16 U.S.C. § 825*l*(b). This Court has jurisdiction under 16 U.S.C. § 825*l*(b).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether FERC may stay a single provision in a license to extend the deadline to commence construction of a hydroelectric project beyond the time explicitly allowed under the Federal Power Act.

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[1] Petitioners have submitted an Excerpts of Record, cited as "ER___" and an Addendum, cited as "AD___."

2. Whether FERC violated the Federal Power Act and its implementing regulations when it denied Petitioners' motion to intervene in the proceeding initiated by Okanogan PUD's request to further extend the deadline to commence construction stated in License Article 301.

## STATEMENT OF THE CASE

This case concerns the development and construction of a hydroelectric project on the Similkameen River in north central Washington. The project is proposed to be built at the existing Enloe Dam, which sits directly upstream from one of the region's most important spiritual, recreational, and ecological natural features, Similkameen Falls. As a result, the answer to the question underlying the issues in this matter—namely, whether FERC has the authority to allow the licensee to continue forward in its attempt to design and build a project that will impact the region for decades to come—will mark an important moment in determining the future of the Similkameen River and the community it supports.

Section 4 of the Federal Power Act authorizes FERC to issue licenses to construct hydroelectric projects. 16 U.S.C. § 797(e). Section 13 of the Federal Power Act provides that a licensee shall commence construction of a hydroelectric project within the time fixed in the license, which shall be no more than two years after its issuance. 16 U.S.C. § 806. FERC may extend the period to commence construction only once, and for a maximum of two years. *Id.* If the licensee does

not meet the original or extended deadline, Section 13 of the Federal Power Act mandates that the Commission "shall" terminate the license. *Id.*; *see also* 18 C.F.R. § 6.3 ("Licenses may be terminated by written order of the Commission not less than 90 days after notice thereof . . . if there is failure to commence actual construction of the project works within the time prescribed in the license, or as extended by the Commission.").

On July 9, 2013, FERC issued a license to Public Utility District No. 1 of Okanogan County ("Okanogan PUD") to commence construction of hydroelectric project works at Enloe Dam. *Pub. Util. Dist. No. 1 of Okanogan Cnty.*, 144 FERC ¶ 62,018 (July 9, 2013) (hereinafter the "License"). Article 301 of the license required Okanogan PUD to commence construction by July 9, 2015, and to complete construction within five years of issuance of the license. *Id.*

Okanogan PUD did not commence construction of the hydroelectric project by July 9, 2015. Stay Order, at 1-2; ER012-013. On March 19, 2015, Okanogan PUD requested a two-year extension of the deadline to commence construction, stating it needed more time to resolve pending litigation regarding state water rights, and because of conflicting internal and budgetary constraints. ER026. On July 31, 2015, FERC granted Okanogan PUD's request, extending the construction deadline to July 9, 2017. Stay Order, at 1-2; ER012-013.

Okanogan PUD did not commence construction by July 9, 2017. Instead, to avoid termination of the license under Section 13 of the Federal Power Act, Okanogan PUD sought to extend the deadline to commence construction for another two years beyond that allowed under the statute. *Pub. Util. Dist. No. 1 of Okanogan Cnty.*, (June 22, 2017) (Request for Stay of the Commencement and Completion of Construction Deadlines) ("Stay Req."); ER142.

Under the Federal Power Act, "[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission *after thirty days' public notice*." 16 U.S.C. § 799 (emphasis added). Pursuant to this provision, FERC has adopted regulations governing the process for license amendments, 18 C.F.R. §§ 4.200-202, which specifically apply to requests to "[e]xtend the time fixed in the license for commencement or completion of project works." 18 C.F.R. § 4.200(c). The regulations mandate that public notice of such application "shall be given at least 30 days prior to action upon the application" if the amendment will result in a "significant alteration of license." 18 C.F.R. § 4.202(a).

Despite the clear requirements for public notice of proposed amendments, FERC did not notify the public of Okanogan PUD's request to extend the deadline. Stay Order, at 3; ER014. Petitioners, however, having reviewed FERC's docket, submitted comments in opposition to the request, and promptly moved to intervene in the proceeding. *See American Rivers et al. Motion to Intervene* (August 2, 2017)

(whereby Petitioners American Whitewater and Columbiana moved to intervene); ER131, and *American Rivers et. al*, Comment on Okanogan PUD No. 1's Request for Stay and *Center for Environmental Law and Policy et. al*. Motion to Intervene (September 7, 2017) (whereby Petitioners Center for Environmental Law and Policy and Sierra Club moved to intervene); ER058. There, Petitioners made the case why FERC should deny the request for a stay, and instead should begin the process of terminating the License. ER138.

On September 20, 2017, FERC issued an order denying the motions to intervene and granting Okanogan PUD a "stay" of its deadline to commence construction under License Article 301. Stay Order, at 13; ER024. In doing so, rather than apply the rules of practice and procedure for proceedings codified at 18 C.F.R. § Part 385, including Rule 214 governing intervention, *id*. § 385.214, FERC relied on its "policy" against intervention in "post-licensing" proceedings. Stay Order, at 2-4; ER013-014. In order to grant the stay, FERC relied on Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, which allows an agency to "postpone the effective date of action taken by it … when justice so requires." Stay Order, at 9-13; ER020-024.

On October 20, 2017, Petitioners timely requested rehearing of FERC's order, challenging the issuance of the stay and denial of intervention. American Rivers *et al*. Request for Rehearing (Oct. 20, 2017); ER026. There, Petitioners

argued that FERC had misapplied the law and failed to address the significant impacts its decision would have on the Similkameen River and Petitioners' individual members. *See generally* ER031-050.

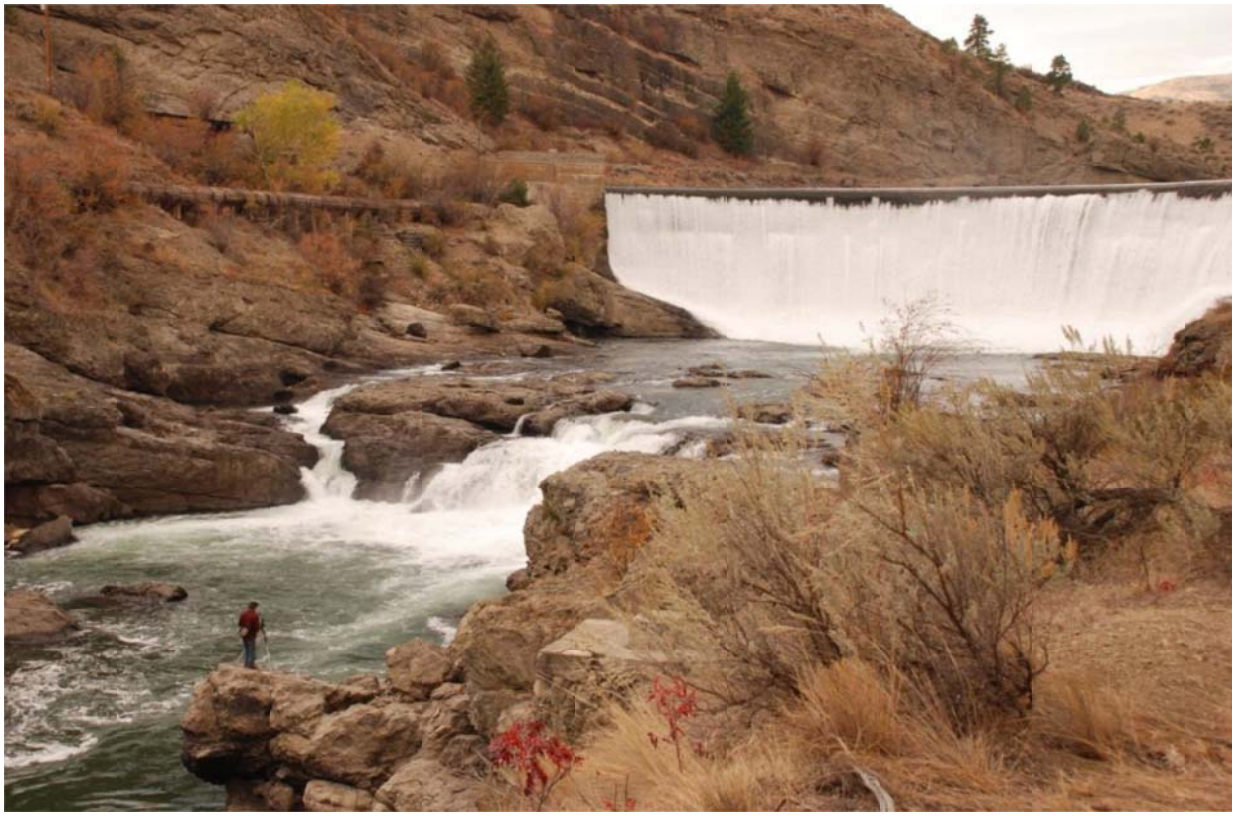
On January 18, 2018, FERC denied the request for rehearing. Rehearing Order, at 11; ER011. There, FERC changed its position the source of its purported authority to grant the stay, claiming newly that it was section 309 of the Federal Power Act. *Id.*, at 6; ER006. In addition, FERC expanded slightly on its "policy" of prohibiting intervention into "post-licensing" proceeding, asserting that it will only entertain intervention motions in such proceedings where application "entails a material change in the plan of project development or terms of the license, would adversely affect the rights of a property holder in a manner not contemplated by the license, or involves an appeal by an agency or entity specifically given a consultation role by the license article under which the compliance filing is made." *Id.*, at 2-3; ER002-003. Thus, according to FERC because the Okanogan PUD's request to stay the deadline to commence construction for an additional two years beyond the statutory maximum did not "effect (directly or indirectly) any material modification to the terms of the license," intervene by the public in the proceeding was not permitted. *Id*., at 4; ER004.

This petition followed.

## STATEMENT OF FACTS

In the early 2000s, Okanogan PUD began to study the feasibility of building electric generation facilities at Enloe Dam on the Similkameen River. Stay Req., at 2; ER143. It ultimately developed plans for a 9-megawatt facility using the existing dam and new generation facilities. *Id*. at 3; ER142. On August 22, 2008, Okanogan PUD applied to FERC for a license to construct hydroelectric facilities at Enloe Dam. *Pub. Util. Dist. No. 1 of Okanogan Cnty., Washington*, 144 FERC at ¶ 64,042 (July 9, 2013).

### A. The Similkameen River and Enloe Dam



ER092.

The Similkameen River originates in British Columbia and the North Cascades Mountains in Washington and flows 122 miles before joining the Okanogan River near Oroville, Washington. ER061. In 1922, Enloe Dam was constructed on the Similkameen River at river mile 8.8, which is approximately two miles south of the Canadian border. Stay Req. at 1; ER142. Enloe Dam is a 54-foot tall concrete structure impassable to fish. When it was first built, it was licensed by FERC's predecessor, the Federal Power Commission, and produced electricity for the local area. *Id.* Okanogan PUD acquired the project in 1945, and it continued producing electricity until 1958, when Bonneville Power Administration transmission lines reached the area and provided cheaper electricity. *Id*. Since then, the dam has been dormant.

Enloe Dam is immediately upstream of Similkameen Falls. This reach of the Similkameen River, and the Dam and the Falls in particular, are perhaps the "dominant landscape features in the Similkameen River corridor" and as a result the area attracts visitors from around Washington and beyond. ER0098. Indeed, the 20-foot high Similkameen Falls is a draw in its own right, ER097; *see* ER092 (photos of Similkameen Falls), and the area has become a regional attraction due to development of local and regional trail systems. ER099. Similkameen Falls also holds important spiritual and cultural significance. ER128 ("Similkameen Falls is one of the most important places" to the Lower Similkameen Indian Band). In

addition, the Similkameen River supports several iconic northwest fish species, such as Upper Columbia River steelhead, Chinook salmon, bull trout and Pacific lamprey. ER034; ER129.

### B. Water Right and Water Quality Certification

Okanogan PUD's license application stated that the PUD had obtained the right to divert 1,000 cubic feet per second (cfs) of water from the river behind the dam through the hydroelectric project. Early on in the development process the Okanogan PUD determined that it would need an additional 600 cfs of water from the Similkameen River to operate the Project economically. ER062. On June 8, 2010, Okanogan PUD applied to the Washington Department of Ecology ("Ecology") for a supplemental water right in that amount. *Id.*

Around the same time, on February 25, 2010, Okanogan PUD applied to Ecology for a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, which is a prerequisite to FERC's issuance of a license. *Id*. On July 13, 2012, Ecology issued the 401 Certification. *Id*. The 401 Certification required that Okanogan release minimum water flows in the amount of 10 cfs between mid-September and mid-July, and 30 cfs the rest of the year ("10/30 instream flow") to protect the aesthetic values of Similkameen Falls (*i.e*., to make sure water continuously flowed over the falls). *Id*.

On August 10, 2012, several conservation organizations[2] challenged the 401 Certification to the Washington Pollution Control Hearings Board ("PCHB") on the grounds that the 10/30 instream flow would fail to protect aesthetic values or meet federally approved state water quality standards. ER062-063. The PCHB issued an amended final Order on August 30, 2013, holding there was insufficient evidence as to whether the 10/30 instream flows would adequately protect aesthetic values, and ordering an aesthetic flow study either by simulation or within three years of the completion of construction on the project using actual flows. ER063 (citing *Ctr. for Envtl. Law & Policy, et al. v. Ecology, PUD No. 1 of Okanogan County*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law & Final Order (As Amended Upon Reconsideration) (Aug. 30, 2013)).

On August 6, 2013, Ecology issued a Report on Examination for water right No. S4-35342 that included the same 10/30 instream flow requirement that the PCHB had held to be insufficiently supported in the appeal of the 401 Certification. *Id*. Several conservation organizations[3] appealed the water right, again to the PCHB. *Id*. The PCHB affirmed the water right, but amended the

[2] The organizations that appealed were Center for Environmental Law and Policy, American Whitewater, Columbiana, the Sierra Club, and North Cascades Conservation Council.

[3] Center for Environmental Law and Policy, American Whitewater, Columbia River Bioregional Educational Project, and North Cascades Conservation Council.

language to make it consistent with the Order on the 401 Certification appeal. *Id*. (citing *Ctr. for Envtl. Law & Policy, et al. v. Ecology, PUD No. 1 of Okanogan County*, PCHB No. 13-117 (Order on Motions for Summary Judgment) (June 24, 2014)). The amended order required that aesthetic flow conditions be further studied by actual flow manipulation or simulation, and that the water right be amended to reflect the results of that study. *Id*. The PCHB specified that some or all of the 600 cfs water right must be available to comply with the state's water quality standards. *Id*.

On July 24, 2014, the conservation organizations appealed the PCHB's decision on the water right to Thurston County Superior Court, which upheld Ecology's decision on April 3, 2015. *Id*. On April 24, 2015, the conservation organizations appealed and the Court of Appeals upheld Ecology's decision, but recognized that not completing the aesthetic study created uncertainty for the Project, stating that "the [aesthetic flow] study may indicate that there is no flow level that is protective of both the fishery resource and aesthetics, and Ecology may withdraw the water right permit." *Center for Environmental Law & Policy v. Ecology*, 196 Wn. App. 360, 372 n. 16, 383 P.3d 608 (2016).

On November 16, 2016, conservation organizations filed a Petition for Review directed to the Supreme Court of Washington. *Center for Environmental Law & Policy v. Ecology*, No. 74841-6-1, Petition for Review, filed November 16,

2016. On March 8, 2017, that Court declined to review the Court of Appeals' decision. *Center for Environmental Law & Policy v. Ecology*, No. 93844-0, Order Denying Petition for Review, filed March 8, 2017.

To date, Okanogan PUD has not conducted an aesthetic flow study, simulated or otherwise. As a result, there is no certainty with regard to whether Okanogan PUD will be able to use its full water right to operate the hydropower facility.

### C. The License, the Request for a Stay, and FERC's Orders.

On July 9, 2013, FERC issued a license to Okanogan PUD. *Pub. Util. Dist. No. 1 of Okanogan Cnty., Washington*, 144 FERC ¶ 64,042. Article 301 of the License requires the Okanogan PUD to commence construction within two years of the issuance date of the license, or by July 9, 2015.

On March 19, 2015, Okanogan PUD requested a two-year extension of the deadline to commence construction stated in License Article 301, stating it needed more time in order to resolve pending litigation about water rights, and because of conflicting internal and budgetary constraints. ER062. On July 31, 2015, FERC granted a two-year extension, requiring Okanogan PUD to commence construction of the project by July 9, 2017. *Id.*

On June 22, 2017, Okanogan PUD sought a "stay" of the deadlines in Article 301 of its license to commence construction. Stay Req., at 1; ER142. It

represented that litigation over water rights had "resulted in a lack of certainty as to its exact water rights. Determining the scope of the [PUD's] water rights is a pre-condition to completion of engineering design. Without final engineering designs in-hand, the [PUD] has been unable to plan and asses [*sic*] integral project facilities, preventing it from commencing construction." Stay Req. 5; ER147.

Before FERC acted on the request for the stay, because Okanogan PUD failed to meet the July 9, 2017, deadline to commence construction, on July 11, 2017, several conservation groups, including Petitioners, requested that FERC begin the process of terminating the license. American Rivers *et al*. Request to Terminate Okanogan PUD No. 1's FERC License and Comment on Request for Stay (July 11, 2017); ER130. There, the groups pointed out not only that Okanogan PUD had failed to commence construction, but that it had failed to take steps necessary to move the project towards construction, thus commencement of construction was not imminent. *Id.* ER139. In addition, the groups stated their opposition to the requested stay. *Id*.

On August 2, 2017, two of the Petitioners, American Whitewater and Columbiana, among others, moved to intervene in the stay proceeding. American Rivers *et al*. Motion to Intervene (Aug. 2, 2017) ER131. The groups also requested that FERC formally notice the Stay Motion. *Id*.

Subsequently, on September 7, 2017, a larger group of conservation organizations filed comments in response to Okanogan PUD's request to extend the deadline to commence construction. *See* ER058. The Center for Environmental Law and Policy and the Sierra Club moved to intervene concurrent with the filing of those comments. ER059. The groups argued against Okanogan PUD's request, citing the inconsistency of the request for a stay with the Federal Power Act, the PUD's failure to address the criteria for a stay, and the PUD's admissions that it could not operate the project as licensed economically and that it no longer needed the project to meet the regional demand for power. *See generally* ER061-082.

On September 20, 2017, FERC issued its Order granting the request to stay the construction deadlines. Stay Order, at 1; ER012. Acknowledging that "the Commission previously granted Okanogan PUD the maximum commencement of construction deadline permitted by the [Federal Power Act] . . . in the absence of a stay the Commission would be required to terminate Okanogan PUD's license." *Id.* at 9; ER020. FERC stated that it "reviews requests for stays under the standard established by the [APA]: a stay will be granted if the Commission finds that 'justice so requires.'" *Id.* at 9 (citing 5 U.S.C. § 705); ER020.

Petitioners filed a timely request for rehearing. ER026. There, the Conservation groups once again identified several significant new impacts that were not considered at the time of licensing, and which they believed should bear

on the Commission's determination of whether to stay the construction deadlines in the License, or begin the process to terminate the License. *See generally* ER044-050. Specifically, the groups provided information regarding the impacts of Enloe Dam on local salmon and steelhead. ER034. Indeed, according to the National Marine Fisheries Service ("NMFS"), Chinook salmon have been seen jumping at the foot of the Dam, above Enloe Falls. ER129. As a result, NMFS requested that FERC reinitiate consultation under the Endangered Species Act to address the project's potential impacts on federally-listed Upper Columbia River steelhead, which also are likely present. *Id*.

On January 18, 2018, FERC denied the request for rehearing. Rehearing Order, at 11; ER011. In its order, for the first time FERC asserted that it was not in fact Section 705 of the APA, but rather Section 309 of the Federal Power Act that provided the authority to stay the construction deadlines in the license. Rehearing Order, at 6; ER006. With respect to its decision to deny Petitioners the right to intervene, FERC cited to it "longstanding policy and practice has been to provide notice and allow an opportunity for intervention and rehearing with respect to only certain, limited types of post-licensing compliance filings." *Id.*, at 2; ER002. Relatedly, FERC again asserted that it need not apply it regulations governing license amendments because those rules do not apply to requests for stays of the terms and conditions of a license. *Id.*, at 4-5; ER 004-005.

## SUMMARY OF THE ARGUMENT

First, FERC unlawfully amended the license to grant a "stay" of construction deadlines beyond those permitted by the Federal Power Act. In the proceeding below, FERC pointed to two potential sources of authority to support its decision to grant a stay of the deadlines to commence construction, Section 309 of the Federal Power Act, 16 U.S.C. § 825h, and Section 705 of the APA, 5 U.S.C. § 705. Neither provision, however, provides the claimed authority. While Section 309 of the Federal Power Act does give FERC broad authority to manage the licensing of hydroelectric projects, that authority is not so sweeping as to allow the agency to override the specific Congressional mandate to terminate licenses where the licensee has failed to commence construction prescribed deadline. 16 U.S.C. § 806.

Section 705 of the APA, 5 U.S.C. § 705, in turn, simply is inapplicable here. Under that provision, Congress gave federal agencies the ability to "postpone the effective date of action taken by it, pending judicial review" when "justice so requires." *Id*. Here, the time to postpone the action in question, the issuance of a license, has long since passed and there is no pending litigation that would necessitate postponing the effective date of the License. Moreover, even if the remedy offered by Section 705 of the APA was still available, FERC failed to demonstrate that "justice" required it to act.

Second, FERC unlawfully denied Petitioners' motions to intervene in the proceeding to amend License Article 301. Denying Petitioners' motions to intervene FERC committed three basic errors. First, FERC failed to apply and follow its general rules and regulations governing its proceedings, thus its decision to deny Petitioners' motions for intervention was arbitrary and capricious, and not in accordance with law. Second, FERC failed to follow its regulations that specifically apply to proposed license amendments. Had FERC faithfully applied those regulations here, it would have provided public notice and solicited motions for intervention. Finally, FERC failed to abide by the letter and intent of the Federal Power Act and its implementing regulations that intervention should be permitted when it furthers the public interest. The proceeding here raised the question of whether FERC could allow the Okanogan PUD to continue on with this project under its current license. Given the significance of that decision, here the public interest would be best served by allowing the interested public to participate in that inquiry.

## STANDARD OF REVIEW

This Court reviews FERC's orders under the Administrative Procedure Act, which requires that a court set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *California ex rel. Harris v. F.E.R.C.*, 784 F.3d 1267, 1272 (9th Cir. 2015); 5 U.S.C. § 706. FERC's

findings of facts, "if supported by substantial evidence, shall be conclusive," 16 U.S.C. § 825*l*(b), but questions of law are reviewed de novo. *Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1194 (9th Cir. 1999).

**STANDING**

Petitioners have standing under Section 313(b) of the Federal Power Act because they are aggrieved by FERC's orders. *See* 16 U.S.C. § 825*l*(b) ("Any party to a proceeding under this chapter aggrieved by an order issued by the Commission" may seek judicial review of that decision); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970). To begin with, although under the Federal Power Act only a "party" to the proceeding below may seek judicial review, 16 U.S.C. § 825*l*(b), as this Court has noted "[i]t would be grossly unfair to deny judicial review to a petitioner objecting to an agency's refusal to grant party status on the basis that the petitioner lacks party status." *California Trout v. F.E.R.C.*, 572 F.3d 1003, 1013 n. 7 (2009) (quoting *Covelo Indian Cmty. v. F.E.R.C.*, 895 F.2d 581, 585 (9th Cir. 1990)). Because Petitioners seek, in part, review of FERC's denial of their request to intervene in the underlying proceeding before FERC, the Court should consider Petitioners a "party for the limited purpose of reviewing the agency's basis for denying party status." *Id.*

Next, the orders at issue are reviewable, final orders. In *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382 (9th Cir. 1985), this Court held that before it will consider

a challenge to an order under 16 U.S.C. § 825*l*, it must first be satisfied that 1) the order is final, 2) if unreviewed, the order "would inflict irreparable harm on the party seeking review," and 3) judicial review would not "invade the province reserved to the discretion of the agency." *Id.* at 1387-88. Here, the Stay Order and the Rehearing Order are final orders, because they are FERC's final word on its decisions to stay the deadlines for construction under the License and Petitioners' ability to participate in the proceeding around that decision. Second, FERC's decision to extend the deadlines for construction rather than beginning the process to terminate the License allows the project to be constructed and operate for the next several decades, which will cause Petitioners to continue to commit time and resources to address the project's impacts on their individual members' recreational, aesthetic, professional, and spiritual interests in the Similkameen River. *See, e.g.*, Declaration of Thomas O'Keefe, ¶ 7, AD015 ("O'Keefe Decl."). Further, FERC's decision to bar Petitioners from participating as parties to the underlying, and potentially any future, amendment proceeding has caused immediate irreparable effect on Petitioners and their individual members. *See, e.g.*, Declaration of Geraldine J. Gillespie, ¶¶ 8 and 9, AD039-040. Finally, as in *Steamboaters*, the Court's review of the "narrow legal questions" presented in this case will "not unduly invade the province of FERC." 759 F.2d at 1387-88.

In addition, Petitioners have both organizational and associational standing to bring this matter. Organizational standing requires a showing of "diversion of its resources and frustration of its mission." *Fair Housing Council v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (internal quotation marks omitted). Petitioners satisfy these requirements. Protecting the environment by advocating for the proper and lawful regulation of facilities that can dramatically affect our nation's rivers and streams, such as Enloe Dam, and advocating for the advancement of a free- flowing and healthy Similkameen River is a central component of each Petitioner's respective missions. O'keefe Decl. ¶ 3, AD013; Declaration of Patricia Rolfe, ¶ 3, AD019; Declaration of John Osborn, ¶4, AD022-023 ("Osborn Decl."); Declaration of Stuart Rick Gillespie, ¶2, AD029. FERC's failure to follow and enforce the law frustrates Petitioners' ability to achieve these missions, and will force Petitioners to divert time and resources from other important priorities. *See, e.g.*, O'Keefe Decl. ¶ 7, AD015. For these reasons, they have organizational standing to bring this action.

In addition, the Petitioners bring this action on behalf of their individual members, because FERC's actions are causing concrete injuries to individual members that can be redressed by a favorable decision from this Court. *Cf. Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 798 (9th Cir. 2001). Petitioners meet the three-part test for establishing associational standing.

First, the organizations filed this action to protect the Similkameen River, and thus their members' interests in the river. *See, e.g.*, Osborn Decl., ¶ 8, AD024. Second, this lawsuit does not require that any of Petitioners' individual members participation, because neither the claims asserted nor the relief sought requires individualized proof. Finally, Petitioners' individual members would have standing to sue in their own right because they have been injured by both FERC's failure to follow the process established under the Federal Power Act and its implementing regulations to terminate the license, and FERC's decision to deny Petitioners the right to participate in the decision making process as a party, and those injuries may be redressed by a favorable judicial decision. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003) (holding "an environmental plaintiff was surely harmed when agency action precluded" meaningful "public comment and participation," where such "procedural injury" is "tied to a substantive harm to the environment") (internal quotations omitted).

In this case, where FERC has violated a procedural duty, the injury-in-fact prong is measured by whether (a) the Commission violated procedural rules that (b) are designed to protect concrete interests of Petitioners' members, and (c) it is reasonably probable that the Commission's unlawful failure to act will threaten the concrete interests of Petitioners' members. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011). Here, FERC unquestionably violated the statutory

and regulatory requirements that require it to allow Petitioners to participate as parties in the underlying proceeding and by failing to begin the process to terminate the license at issue. *See* 16 U.S.C. §§ 799, 806; 18 C.F.R. §§ 4.200; 6.3; 385.714. These requirements, to allow meaningful public participation and to terminate licenses when the licensee fails to comply with the statutorily imposed deadlines, protect the concrete interests that Petitioners' members have in enjoying and protecting the Similkameen River the fish and wildlife it supports. Declaration of Joseph G. Enzensperger, ¶¶ 8-10, AD044-047. FERC's unlawful actions threaten the Petitioners' members use and enjoyment of the Similkameen River because it will allow the Okanogan PUD to continue to press forward with a project that will continue to impede the efforts to see the return of a free-flowing river, curtail recreational opportunities, harm the members aesthetic enjoyment of the area, and harm steelhead, salmon, and bull trout populations. *Id.*

## ARGUMENT

### A. FERC Unlawfully Extended the Period to Commence Construction.

Section 13 of the Federal Power Act requires a licensee to commence construction of a project within the time set in the license, which shall be no later than two years after it is issued. 16 U.S.C. § 806. It provides that FERC may

extend the original deadline, but "not longer than two additional years." *Id.*[4] Section 13 provides that if the licensee does not commence construction within the original or any extended deadline, FERC "shall" terminate the license. *Id.*

By June 20, 2017, it was clear that Okanogan PUD would not comply with the July 9, 2017 deadline to commence construction, which was the maximum time allotted under Federal Power Act Section 13. When faced with missing the deadline, Okanogan PUD filed a motion for a "stay" of the deadline in License Article 301. Stay Req., at 1; ER142.

In considering Okanogan PUD's motion, FERC stated that it "reviews requests for stays under the standard established by the Administrative Procedure Act: a stay will be granted if the Commission finds that 'justice so requires.'" Stay Order, at 9 (citing 5 U.S.C. § 705); ER020. FERC then discussed why it thought a stay of the license deadlines is appropriate under its interpretation of the APA's standards, and granted a stay of the deadlines. ER020-024.

After Petitioners sought rehearing and asserted that FERC's reliance on Section 705 of the APA was misplaced, FERC did an about-face. In its order denying rehearing, FERC asserted Petitioners had "misinterpret[ed]" its reliance on

[4] Then, after the licensee commences construction, Section 13 of the Federal Power Act authorizes FERC to extend the period "for the completion of construction carried on in good faith and with reasonable diligence" when it is "not incompatible with the public interests." *Id.*

Section 705, and stated that "[a]lthough we have cited section 705 as a secondary basis for issuing a stay, it is section 309 of the [Federal Power Act] that gives [FERC] an independent basis for granting stays of a project license." Rehearing Order, at 5 (citing 16 U.S.C. § 825h); ER005. Regardless, neither of FERC's two theories is correct.

### 1. Section 309 Does Not Give FERC Authority to Stay Deadlines Set under Section 13 of the Federal Power Act.

Section 309 of the Federal Power Act provides generally that FERC "shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act]." 16 U.S.C. § 825h. As FERC recently argued, this section "does not grant the Commission any broader authority than that provided by" the more specific provisions of the Federal Power Act. *TNA Merch. Projects, Inc. v. Fed. Energy Regulatory Comm'n*, 857 F.3d 354, 359 (D.C. Cir. 2017). By contrast, in the context of this case, FERC asserted that Section 309 gives it "broad authority to take actions necessary to carry out the act," and "that issuance of a stay of a project license under certain narrowly prescribed circumstances is well within this authority." Rehearing Order, at 6; ER006.

FERC's general authorities under Section 309 are specifically delimited by the deadlines set pursuant to Section 13 of the Act. As the D.C. Circuit has noted:

> While such 'necessary or appropriate' provisions [as in Section 309] do not have the same majesty and breadth in statutes as in a constitution, . . . they authorize an agency to use means of regulation not spelled out in detail, *provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.*

*Niagara Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153, 158 (1967) (emphasis added). Thus, where, as here, Congress has spoken directly on an issue, Section 309 does not provide FERC independent authority to act. *Boston Edison Co. v. F.E.R.C.*, 856 F.2d 361, 369-70 (1st Cir. 1988) (holding that Section 309 "merely augments whatever *existing* powers have been conferred on FERC by Congress, without itself comprising a source of *independent* authority to act") (emphases original).

Courts have repeatedly affirmed the limits of FERC's authority under Section 309. As an example, in *Hirschey v. F.E.R.C.*, 701 F.2d 215 (D.C. Cir. 1983), FERC tried to rely on Section 309 to vacate a licensing exemption *after* the deadline to revoke the exemption had run. *Id*. at 216-18. The D.C. Circuit held that "[t]he general authority under section 309 does not empower the FERC to vacate final and nonrenewable license exemptions. To imply such authority from section 309 would make a sham out of the carefully crafted license exemption regulations and render superfluous the *specific* revocation procedures in 18 C.F.R. § 4.106." *Id*. at 218 (emphasis in original).

Indeed, recently the D.C. Circuit held that, while Section 309 provides FERC sufficient authority to correct a mistake, FERC cannot use Section 309 "to supersede specific statutory strictures" that are articulated in other provisions of the Federal Power Act. *TNA Merch. Projects, Inc*, 857 F.3d at 359. There, the D.C. Circuit considered FERC's authority to remedy a previous order that misapplied the law. Specifically, FERC had mistakenly ordered Chehalis Power Generating, L.P. to refund a portion of the payments made by the Bonneville Power Administration. *Id.* FERC acknowledged its mistake, but took the position it lacked authority to allow Chehalis to recoup the illegitimate funds from Bonneville. In that context, FERC argued that Federal Power Act Section 309 did not provide it the authority to correct its error, because other provisions of the Act barred a refund. *Id.* The D.C. Circuit disagreed—finding that the question was not governed by the competing provisions of the Federal Power Act cited by FERC. *Id.* at 359 ("§ 201(f) and § 205, together, do not limit FERC's authority to order a *recoupment* where a non-jurisdictional entity improperly received a refund") (emphasis original). As a result, the D.C. Circuit held FERC could rely on its general authority under Section 309 to "remedy its errors," because doing so in that context "would not 'contravene any [other] terms of the Act.'" *Id.* (quoting *Niagara Mohawk*, 379 F.2d at 158).

Here, FERC cannot rely on Section 309 of the Federal Power Act to stay the deadlines to commence construction because to do so *would* contravene other provisions of the Act. Congress established clear time limits for commencing construction. 16 U.S.C. § 806. Again, in other contexts, FERC has acknowledged this, and has noted the consequences of a licensee missing these deadlines. When it denied a different licensee's request for a stay, FERC stated "we act in the context of our authorities and responsibilities under the [Federal Power Act] … [and] "Section 13 of the [Federal Power Act] *requires* us to terminate licenses for projects, such as those at issue, on which construction has not timely commenced." *Northumberland Hydro Partners, L.P. Adirondack Hydro Dev. Corp.*, 115 FERC ¶ 61,319, 62,139 (June 15, 2006) (emphasis added); *see also e.g.*, *Utilities Commission and City of Vanceburg, Kentucky*, 42 FERC ¶ 61,169 (1988) (denying a request to extend the deadlines to commence construction because such a "request is specifically prohibited by Section 13").

In sum, Congress left no room for FERC to apply the general grant of authority under Section 309 of the Act to extend those deadlines beyond what Congress prescribed. As a result, FERC's reliance on Section 309 of the Federal Power Act to extend the deadlines in the License and its refusal to begin the process of terminating the License was arbitrary and capricious and not in accordance with the law.

### 2. Section 705 of the APA Does not Give FERC Authority to Stay the License Deadline.

FERC is also incorrect that under Section 705 of the APA, it can unilaterally stay deadlines explicit in the Federal Power Act. *See* Stay Order, at 9; ER 020. Section 705 of the APA states:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. Section 705 allows an agency such as FERC to stay the effective date of an action while the validity of that action is adjudicated. But it does not give a federal agency free rein to alter or modify deadlines established in specific acts. Accordingly, FERC's reliance on Section 705 is unlawful for four reasons.

#### *a. FERC Cannot Stay a Compliance Date under Section 705.*

First, FERC's reliance is contrary to the plain meaning of Section 705. The "first step" in interpreting statutory language is to determine whether it has a "plain and unambiguous meaning." *W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 987 (9th Cir. 2010) (quotation omitted). If the statute is "unambiguous, the agency, like the courts, must follow Congress's express will." *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997). Here, Section

705 authorizes FERC to "postpone the effective date of action taken by it" under certain specific circumstances. 5 U.S.C. § 705.[5] But FERC concedes it did not postpone the effective date of the license. Stay Order, at 12; ER023. Instead, it issued a stay of "only Article 301, rather than the entire license, to encourage the licensee to continue project development during the term of the stay." *Id.*

Importantly, the effective date of a license is different from the dates for implementing certain license articles. Courts have made clear that there is a distinction between the effective date of a regulation and regulatory compliance dates. "Effective and compliance dates have distinct meanings." *Becerra v. United States Dep't of Interior*, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017). The effective date of a regulation is the date upon which it becomes enforceable and must be complied with. *See* Effective Date, Black's Law Dictionary (10th ed. 2014) (defining "effective date" as "the date on which a statute ... becomes enforceable or otherwise takes effect"). The effective date, the temporal point at which the regulatory status quo changes from old to new, is the relevant date for purposes of

[5] The APA defines "agency action" to include the "whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). "Order" is defined to mean the "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing," and "license," in turn "includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." *Id.* §§ 551(6) and (8).

Section 705. *See Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982) "In short, without an effective date a rule would be a nullity because it would never require adherence."). A compliance date, on the other hand, is the deadline by which a specific requirement must be completed. *Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995) ("The mandatory compliance date should not be misconstrued as the effective date of the revisions.").

Here, FERC sought to stay the deadline in only Article 301 of the License, which established the deadline for commencing construction. Stay Order, at 12 ("We are staying only Article 301, rather than the entire license . . .."); ER023. The construction deadline is a compliance deadline. Accordingly, it is impermissible for FERC to use Section 705 to postpone it. *Becerra*, 276 F.Supp.3d at 964 (holding that the defendant could not postpone the requirement to meet compliance dates because "[t]he plain language of the statute authorizes postponement of the effective date, not compliance dates") (internal quotations omitted).

*b. FERC Cannot Postpone What Already Happened.*

Assuming for the sake of argument that FERC attempted to exercise authority under Section 705 to postpone the effective date of the License, its actions nonetheless would have been time-barred. The "effective date" of the License was the first day of the month in which the order granting it was issued: July 1, 2013. *See Pub. Util. Dist. No. 1 of Okanogan Cnty., Washington*, 144 FERC

¶ 64,061 ("This license is issued to Public Utility District No. 1 of Okanogan County, Washington (licensee), for a period of 50 years, effective the first day of the month in which this order is issued, to construct, operate and maintain the Enloe Project."). FERC cannot "postpone" a deadline that had passed. "[O]ne can only postpone something that has not yet occurred." *Merriweather v. Sherwood*, 235 F. Supp. 2d 339, 342 (S.D. N.Y. 2002) (construing Prison Litigation Reform Act provision authorizing courts to "postpone the effective date of an automatic stay"). FERC's attempt to postpone the July 1, 2013, effective date of the license four years later is no more plausible than the example given by the court in *Merriweather*: "If a wedding occurs on September 2, one cannot 'postpone' the wedding until September 30 on September 5." *Id.*

The D.C. Circuit has rejected a similar attempt by another agency—the U.S. Environmental Protection Agency—to use Section 705 to "postpone the effective date" of an already-effective rule. In *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996), the D.C. Circuit held that Section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It does not permit an agency to suspend without notice and comment a promulgated rule." *Id*. (emphasis added).

Thus, the window of time to stay a license article under Section 705 ends when the license goes into effect. *See State v. United States Bureau of Land Mgmt.*,

277 F. Supp. 3d 1106, 1120 (N.D. Cal. 2017), *appeal dismissed sub nom. State by & through Becerra v. United States Bureau of Land Mgmt.*, No. 17-17456, 2018 WL 2735410 (9th Cir. Mar. 15, 2018). If this were not the case, issuance of a license would offer no predictability to the licensee about what was expected and when it must be completed, nor to the public that the terms and conditions in the license are enforceable. *Cf. Price v. Stevedoring Servs., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012) (en banc) (noting that the APA's rulemaking procedures are intended to provide "predictability to regulated parties"). Indeed, rejecting an agency's attempt to stay a rule's future compliance dates under a different legal authority, the Second Circuit reasoned that it was "inconceivable" that Congress would authorize agencies to amend or revoke their regulations without notice and comment until various compliance dates have passed, in part because it "would completely undermine any sense of certainty." *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004).

The same principles hold true here. Where Okanogan PUD is granted certain rights and privileges under a valid, operative license, the public is assured certain protections knowing the license must be followed. The system would break down if FERC could simply alter provisions of the license, such as granting a "stay" of deadlines in it, without following notice and comment procedures set forth in the Federal Power Act and its regulations. *See* 16 U.S.C. § 799 ("[l]icenses . . . may be

altered or surrendered only upon mutual agreement between the licensee and the Commission *after thirty days' public notice*") (emphasis added); 18 C.F.R. §§ 4.200-202 (establishing the process for amending licenses).

*c. FERC Cannot Use Section 705 to Stay an Action that is Not under Judicial Review.*

Under Section 705, agencies may postpone the effective date of a decision "pending judicial review." 5 U.S.C. § 705; *Bakersfield City Sch. Dist. v. Boyer*, 610 F.2d 621, 624 (9th Cir. 1979) ("The agency … may postpone or stay agency action pending such judicial review."). Congress intended Section 705 to "afford parties an adequate *judicial* remedy," H.R. Rep. No. 79-1980, at 277 (1946) (emphasis added), in order to "provide[] intermediate *judicial* relief … in order to make *judicial* review effective." S. Rep. No. 79-752, at 213(1945) (emphases added). There was no judicial review of the license pending when Okanogan PUD filed the motion for a stay, or when FERC granted it. Instead, FERC's rationale is that Okanogan PUD had been in litigation over the additional state water rights needed for the project, and that justified a delay in commencing construction. Rehearing Order, at 9; ER020.

However, FERC cannot rely on Section 705 to stay the deadline for commencement of construction on this basis, for two independent reasons. First, Section 705 is a basis to stay federal agency action pending judicial review. It is not a basis to stay the effectiveness of federal agency action already taken pending

judicial review of ancillary, non-federal agency action. Nonetheless, to justify its actions under Section 705, FERC cited its decision in *City of Seattle, Washington, Dep't of Lighting*, 12 FERC ¶ 61,010 (1980). There, the City's license *was* the subject of litigation, and FERC determined it did not have the authority to amend the license. *Id.* ¶ 61,022. "Section 13 [of the Federal Power Act] itself is not sufficiently flexible to accommodate the delays associated with the rehearing and judicial review of Seattle's license amendment." *Id.,* 12 FERC ¶ 61,023. As a result, FERC used Section 705 to "enable the courts to complete their review and to avoid a possible termination of the license." *Id*. FERC cannot reasonably assert the same authority here, because the litigation that supposedly delayed Okanogan PUD was not over the license itself. As a result, FERC erred in relying on Section 705.

Second, as noted, there was no judicial review of any action pending when Okanogan PUD sought or FERC granted the stay. Assuming that litigation over a related decision by a non-federal agency could be grounds for a federal agency to postpone the effective date of its action, then arguably, Okanogan PUD could have requested the stay at the time the license issued, when litigation over the 401 certification was pending. However, that litigation ended on March 8, 2017. *Center for Environmental Law & Policy v. Ecology*, 390 P.3d 348 (Wash. 2017). As a result, Okanogan PUD's decision to delay its request for a stay until after the

litigation had ended deprived FERC of authority to rely on Section 705. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33-34 (D. D.C. 2012) (a stay under section 705 "plainly must be tied to the underlying *pending* litigation") (emphasis added).

*d. FERC's Order Does Not Demonstrate Justice Requires a Stay.*

Assuming without conceding that FERC could rely on Section 705 to stay the effective date of a license, Section 705 nonetheless does not grant FERC unfettered discretion to issue a stay—the agency is limited to situations where "justice … requires" a stay. 5 U.S.C. § 705. If it grants a stay, FERC must provide support for its determination on the record. Here, the order granting the stay failed to apply the traditional four-part test for issuing one.

The standard for a "stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test." *Jackson*, 833 F.Supp.2d at 30. Congress confirmed this understanding in the legislative history of the APA when it equated agencies' and courts' authority to issue a stay. Congress stated that Section 705 "permits *either agencies or courts*, if the proper showing be made, to maintain the status quo …. The authority granted is equitable and should be used by *both agencies and courts* to *prevent irreparable injury or afford parties an adequate judicial remedy*." S. Rep. No. 79-752, at 213 (emphasis added); *see Jackson*, 833 F.Supp.2d at 31. Thus, in order to provide a stay, FERC must show that (1) the licensee is likely to succeed on the merits, (2) it

is likely to suffer irreparable harm in the absence of a stay, (3) the balance of equities tips in favor of a stay, and (4) a stay is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

FERC admits it did not apply this test when considering whether justice required the requested stay. Rehearing Order, at 6, n. 20; ER006. The failure to apply the proper test is grounds alone for vacating and remanding the decision to FERC. *Cf. Winter*, 555 U.S. at 33 (vacating a preliminary injunction issued under the wrong standard).

**B. FERC Unlawfully Denied Petitioners' Motion to Intervene.**

The Federal Power Act authorizes FERC to admit as a party to a proceeding "any . . . person whose participation in the proceeding may be in the public interest." 16 U.S.C. § 825g(a). To do so, Congress required FERC to adopt regulations designating how a party may participate in proceedings before the Commission. *Id.* (FERC may admit parties "in accordance with such rules and regulations as it may prescribe . . .."); *see also id.* § 825g(b) ("All . . . proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission . . .."). Pursuant to this authority, FERC has promulgated regulations to govern the practice and procedure of its proceedings, including intervention. 18 C.F.R. Part 385.

Under FERC's regulations, any "person" may file a motion to intervene. 18 C.F.R. § 385.214(a)(3).[6] A movant must demonstrate "a right to participate which is expressly conferred by statute or by Commission rule, order, or other action," "an interest which may be directly affected by the outcome of the proceeding," or that its "participation is in the public interest." *Id.* § 385.214(b)(2). A movant must state the position it will take if admitted as a party and the basis in fact and law for that position. *Id*. § 385.214(b)(1). "If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period." *Id.* § 385.214(c)(1).

Here, shortly after Okanogan PUD moved for a stay, Petitioners filed motions to intervene. ER059 and ER131. In response, FERC asserted that when it considered whether to grant the stay request, it was then engaged in a "post-licensing proceeding of the type in which we do not issue public notice or provide the opportunity to intervene," and that its "longstanding policy and practice . . . to provide notice and allow an opportunity for intervention and rehearing with respect to only certain, limited types of post-licensing compliance filings." Stay Order, at 3; ER014; Rehearing Order, at 2; ER002.

[6] "Person" is defined broadly to include "individual, partnership, corporation, association, joint stock company, public trust, an organized group of persons[,]" among others. 18 C.F.R. § 385.102(d).

In doing so, FERC made three independent errors by applying a "policy" to limit intervention in post-licensing proceedings. First, FERC failed to apply and follow its own regulations governing intervention. Second, even if FERC could limit intervention to those instances where it issues public notice—which is dubious—FERC erred by applying the wrong test as to whether public notice was required. Finally, under any test, FERC's ruling that intervention was not appropriate is arbitrary and capricious and not supported by substantial evidence.

### 1. FERC Failed to Comply with the Federal Power Act and its own Regulations when it Denied Petitioners' Motion to Intervene.

FERC's general rules for practice and procedure apply to all of its proceedings, except investigations. 18 C.F.R. § 385.101(a)&(b). Subpart B of these regulations, 18 C.F.R. §§ 201-218, establishes specific mechanisms for the various pleadings and events that may occur during a proceeding. *See* 18 C.F.R. § 385.201 ("This subpart applies to any pleading, tariff or rate filing, notice of tariff or rate examination, order to show cause, intervention, or summary disposition."). This section includes Rule 214, 18 C.F.R. § 385.214, which governs intervention in Commission proceedings. *See id*. § 385.201 ("This subpart applies to any . . .

intervention . . ..."). It is under this framework that the Court must judge FERC's treatment of Petitioners' motion to intervene.[7]

Agencies are bound by their legislative rules. *United States v. Nixon*, 418 U.S. 683, 695-96 (1974). There is no question that FERC has the authority to promulgate rules governing its proceedings. *See generally*, *California Trout*, 572 F.3d 1003. Having done so, however, it must comply with them. *Utahns for Better Transportation v. U.S. Dept. of Transportation*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.").

Under Rule 214 of the Commission's practice and procedure, 18 C.F.R. § 385.214, a timely motion to intervene that states the movant's interests in the proceeding and is not opposed within 15 days, is granted automatically without review by FERC. *Id*. § 385.214(c)(1). As FERC noted when it promulgated this rule, it creates a strong presumption in favor of public participation in its proceedings. *See* 47 Fed. Reg. 19,014, 19,017-18 (May 3, 1982) (when promulgating its procedural regulations, FERC noted that it allows "automatic" intervention in most cases, because "it is rare in Commission practice for a petition to intervene to be denied.").

[7] "Any person seeking to intervene to become a party . . . must file a motion," 18 C.F.R. § 385.214(a)(3), and motions may be filed "[a]t any time, unless otherwise provided." *Id*. § 385.212(a)(1).

Petitioners complied with the requirements of Rule 214 to qualify as parties automatically, as they filed a motion, in accordance with 18 C.F.R. §§ 385.214(a)(3) and 212, that met the required criteria under Rule 214(b), *id*. § 385.214(b), and no objections were lodged, *id*. § 385.214(c). However, Petitioners were unable to check the last box necessary for automatic intervention because, in FERC's view, their motion was not "timely." This is not because Petitioners sat on their rights—the opposite is true, as Petitioners alerted FERC of their interest in participating in the proceeding almost immediately after the motion for the stay was filed, and they filed their motions for intervention just weeks later. Rather, because FERC refused to issue a public notice of the motion for the stay, it then presumably—although FERC never expressly stated as much—treated Petitioners' motion as untimely. *Cf.* 18 C.F.R. § 385.210 ("Only those filings made within the time prescribed in the notice will be considered timely."); Stay Order, at 3 (explaining FERC's refusal to issue a public notice); ER014. As a result, Petitioners could become a party only if FERC acted on and granted their motions. 18 C.F.R. § 385.214(c)(2) ("if the motion is not timely, the movant becomes a party only when the motion is expressly granted.").

However, FERC's regulations provide no mechanism for considering unsolicited motions for intervention. By contrast, the regulations do address FERC's consideration of motions to intervene filed after the deadline established in

a public notice. 18 C.F.R. § 385.214(d) ("In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider" factors such as whether there was good cause for filing late and whether allowing the movant to participate would be in the public interest). No similar test has been developed for motions where the public interest is plainly implicated, but FERC chooses not to issue a public notice.

With this, FERC appears to have hidden the proverbial elephant in the mouse hole. Rather than addressing all motions to intervene under the standards established in Rule 214, FERC seeks to create a regulatory void under which it can effectively deny motions to intervene without *ever* considering the merits of the movant's participation. And that is precisely what FERC has done here. In the Stay Order, FERC denied the motion to intervene outright because the "proceeding is a post-licensing proceeding of the type in which [it] do[es] not issue public notice or provide the opportunity to intervene." Stay Order, at 3; ER014. It was only on reconsideration that FERC explained that this position was based on its "policy" of limiting interventions in post-licensing proceedings. Rehearing Order, at 2-3; ER002-003.

Here, FERC's use of its "policy" to preemptively prohibit intervention was arbitrary and capricious and not in accordance with law because applying the policy is inconsistent with the Federal Power Act and FERC's implementing

regulations. FERC's authority to control the participation of third parties in its proceedings is limited in two important ways. First, Congress specified that FERC may issue "rules and regulations" to accomplish this task, which FERC did by promulgating part 385. By contrast, its use of an additional "policy," not documented in any written policy statement (*see https://www.ferc.gov/legal/maj-ord-reg/policy-statements.asp*), that effectively supplants those regulations is inconsistent with the clear direction from Congress that FERC must establish *rules and regulations* related to admitting parties to its proceedings. 16 U.S.C. §§ 825g(a),(b). FERC's "policy" is neither.

Second, the Federal Power Act establishes the type of entities eligible to participate in FERC proceedings as parties, including "any other person whose participation in the proceeding may be in the public interest." 16 U.S.C. § 825g(a). Rather than implement this provision, FERC's policy instead establishes a class of *proceedings*—namely, post-licensing proceedings—for which it severely limits intervention, regardless of whether participation by other parties may in fact be in the public interest.

FERC's delineation of so-called "post-licensing" proceedings and its creation of special policies and procedures for such proceedings, is inconsistent with its regulations. Part 385 does not distinguish between pre- and post-licensing. 18 C.F.R. § 385.101 (FERC procedural rules apply generally to "[a]ny filing or

proceeding under this chapter."). Absent a controlling regulation specifying different procedures for pre- and post-licensing proceedings, the requirements of part 385, including those related to intervention control.[8] Here, this requires that FERC make a determination whether the motions to intervene should be granted under the standard established in the statute and regulations—namely, whether Petitioners' participation in the proceeding is in the public interest.

**2. FERC's Denial of Petitioner's Motion to Intervene was Not in Accordance with Law because FERC Failed to Comply with Its Regulation Governing License Amendments.**

Assuming, without conceding, that as FERC asserted, intervention is only permitted in proceedings where FERC provides public notice, FERC nonetheless erred in not providing public notice of Okanogan PUD's request to amend the construction deadline stated in Article 301. It was this error that denied the Petitioners an opportunity to gain party status through intervention in accordance with FERC's regulations.

[8] While FERC can adopt different *regulations* for different proceedings, to replace the general regulations they must contain rules on the process that will be followed. *See* 18 C.F.R. § 385.101(b)(2) ("If any provision of this part is inconsistent with any provision of another part of this chapter, the provision of this part is inapplicable and the provision of the other part governs to the extent of the inconsistency."). Thus, this provision does not allow FERC to rely on a *policy* regarding post-licensing proceedings to supersede the generally applicable, and controlling, regulations. Moreover, to the extent that there are regulations that apply here, namely 18 C.F.R. §§ 4.200-202, as discussed below, FERC has failed to comply with the procedures identified there.

Under the Federal Power Act, "[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission *after thirty days' public notice*." 16 U.S.C. § 799 (emphasis added). FERC has adopted regulations governing the amendments of licenses, and the process for obtaining such an amendment. 18 C.F.R. §§ 4.200-202. The regulations apply to requests to "[e]xtend the time fixed in the license for commencement or completion of project works." *Id*. § 4.200(c). The regulations mandate that public notice of such application "shall be given at least 30 days prior to action upon the application" if the amendment will result in a "significant alteration of license pursuant to section 6 of the Act, 16 U.S.C. 799." *Id*. § 4.202(a). Where FERC is required to provide public notice of a proposed license amendment, it must allow for intervention by interested stakeholders. *See id*. § 385.210 (any notice of an "application" "will establish the dates for filing interventions and protests.").

Despite this clear mandate to allow the public to participate in license amendment decisions, and corresponding regulations establishing when and how that participation should occur, FERC failed to provide the required notice and opportunity to intervene here. The Stay Order states that FERC did not issue notice or entertain intervention because "Okanogan PUD requests only a stay of Article 301 of its license and does not seek to change the project authorized or the terms and conditions of its license. Therefore, consistent with our practice regarding

requests for stay, a public notice is not required." Stay Order, at 7; ER018. FERC's "practice" with regard to post-licensing proceedings is to provide notice of filings that:

> entail[] a material change in the plan of project development or terms of the license, would adversely affect the rights of a property holder in a manner not contemplated by the license, or involves an appeal by an agency or entity specifically given a consultation role by the license article under which the compliance filing is made.

Rehearing Order, at 2-3; ER002-003. Accordingly, "[f]or other filings that simply involve compliance with the terms of the license, without changing the license requirements or affecting property rights in a manner not contemplated by the license, public notice of the filing would not be required, and there would be no opportunity to intervene and seek rehearing with respect to the filing." *City of Tacoma, Washington,* 109 FERC ¶ 61,318, 62518 (Dec. 21, 2004).

This rationale is untenable. Elsewhere, according to FERC, "*all* revisions to a license, no matter how small, are by definition amendments, although the procedural and substantive requirements will vary according to the nature of the amendment." *Consumers Energy Co. & the Detroit Edison Co.*, 87 FERC ¶ 61,150, 61,619 (May 4, 1999) (emphasis added). Here, Okanogan PUD's "request for a stay" seeks an amendment to License Article 301, which explicitly states the deadline to commence construction: "*Start of Construction*. The licensee *shall* commence construction of the project works within two years from the issuance

date of the license and shall complete construction of the project within five years from the issuance date of the license." *Pub. Util. Dist. No. 1 of Okanogan Cnty., Washington*, 144 FERC ¶ 62018, 64063 (July 9, 2013) (emphasis added). There is no rational explanation for FERC's assertion that its extension of the deadline to commence construction of the project did not "change the license requirements," and thus should not be treated as an amendment. 18 C.F.R. § 4.200(c).

As a result, if FERC chose to entertain the Okanogan PUD's request at all, it was required to treat the motion as an application for amendment, and follow the procedures in 18 C.F.R. §§ 4.200-202. These procedures require public notice and the opportunity for intervention. *Id.* § 4.202(a); *id*. § 385.210; *see also* 16 U.S.C. § 799. Under these regulations, FERC is required to determine whether the proposed amendment would result in a "significant alteration of license pursuant to section 6 of the Act, 16 U.S.C. 799." *Id.* § 4.202(a). FERC did not apply that standard here, and instead applied a different standard; one that is in the Federal Power Act or its implementing regulations. This "policy," which FERC used here to limit intervention in post-licensing proceedings, sets an unreasonably high bar for intervention by the public in post-license proceedings that, regardless of FERC's terminology, effect license amendments.

First, according to FERC it was not applying this policy under or to interpret the standard established in 18 C.F.R. § 4.202. In fact, FERC made clear that it was

not applying 18 C.F.R. § 4.202 in this case. Rehearing Order, at 5; ER005. As a result, FERC cannot now claim that this is simply how it applied the applicable rule. Instead, FERC was applying a different, un-promulgated test to determine when intervention was allowed.

Indeed, even if FERC were now to argue that its policy actually applies the regulations governing license amendments, its argument would fail because the policy is inconsistent with applicable law. Under the policy, no extension of time, no matter how long (or what statutory provision it violates) will rise to the level of a material change warranting intervention. That is, according to FERC, "requests for extensions of time of compliance deadlines contained in a license, including requests to extend the commencement and completion of construction deadlines, are not material changes to the license and do not require the issuance of public notice or an opportunity to intervene." ER003. This blanket assertion is inconsistent with the statute, *see* 16 U.S.C. §§ 799, 806, and implementing regulations, 18 C.F.R. § 4.200, which are expressly applicable to requests for extensions of time to begin or finish construction.

Finally, by applying the standard of review as developed through its policy, FERC has considered factors not present in the underlying statute or its regulations. This is precisely the type of arbitrary and capricious action courts have prevented FERC from engaging in. For example, in *Green Island Power Auth. v.*

*F.E.R.C.*, 577 F.3d 148 (2d Cir. 2009), the Second Circuit found that FERC considered inappropriate factors and applied the wrong regulations in denying a motion to intervene. *Id*. at 163. There, Erie Boulevard Hydropower, L.P. ("Erie") asked FERC to consider an amended application to relicense its hydropower project and to add additional generation facilities, amendments which ultimately were proposed in an Offer of Settlement. *Id.* at 152. Although FERC issued a public notice on the Offer of Settlement, it did not solicit motions to intervene. Around the same time, Green Island Power Authority applied for a preliminary permit to study a proposed hydropower project downstream from Erie's facility and moved to intervene in the proceeding based on Erie's amended relicensing application. FERC denied Green Island's motion to intervene, treating it as untimely. *Id.* at 155.

Green Island challenged that decision, asserting that FERC failed to provide the required public notice and opportunity to intervene with regard to an amended license application. The Second Circuit agreed, ruling that FERC committed two errors. First, when determining whether Erie had "materially amend[ed]" its application, such that public notice was required in 18 C.F.R. § 16.9(b)(3), FERC was required to determine if the proposal constituted a "fundamental and significant change" to the license application. *Green Island*, 577 F.3d at 163 (quoting 18 C.F.R. § 4.35(f)(1)). However, as the Second Circuit noted, "FERC did

not address this question. Rather, FERC relied on two grounds—that (1) settlement agreements generally supplement rather than supersede license applications, and (2) the Offer of Settlement did not 'significantly affect interests in a manner not contemplated by the original application'—that have no bearing on the analysis." *Id.* In addition, the Second Circuit faulted FERC for relying on an exception to the public notice requirement in a related, but inapplicable, regulation. *Id.* ("FERC's third reason for not soliciting motions to intervene in 2005—that the Offer of Settlement fell under one of the exceptions in 18 C.F.R. § 4.35(e)—similarly was improper."). The Second Circuit remanded the decision to FERC to determine, applying the appropriate standards and regulations, if public notice was required. And "[i]f it was, then FERC must consider Green Island's motion to intervene in the relicensing proceedings as timely filed and analyze it accordingly." *Id.* at 168.

The Second Circuit's analysis is instructive, and the result should be the same here. FERC's regulations on license amendments are clear. Public notice is required when a "significant alteration" is proposed. Instead of applying this test here, FERC imposed a new, higher burden that considered factors not articulated in, and indeed inconsistent with, the regulations. As a result, this Court should remand the decision to FERC so that it may apply the proper test, and then evaluate whether to allow Petitioners to intervene in that proceeding.

#### 3. FERC's Decision to Deny Intervention Is Not Supported by Substantial Evidence.

Under any test, FERC's decision to deny Petitioners' motion to intervene in this instance was unlawful. Section 313(b) of the Federal Power Act provides that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 16 U.S.C. § 825l(b); *Muckleshoot Indian Tribe v. Federal Energy Regulatory Comm'n*, 993 F.2d 1428, 1430 (9th Cir. 1993) (reviewing the Commission's factual findings for substantial evidence). "Substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008) (quoting *Bear Lake Watch, Inc. v. F.E.R.C.*, 324 F.3d 1071, 1076 (9th Cir. 2003)). "[F]or a court to fulfill its function under the appropriate standard of review . . . 'an agency must provide a reasoned explanation for its actions and articulate with some clarity the standards that governed its decision.'" *NW Resource Info. Ctr., Inc. v. NW Power Planning Council*, 35 F.3d 1371, 1385 (9th Cir. 1994) (quoting *Moon v. U.S. Dep't of Labor*, 727 F.2d 1315, 1318 (D.C. Cir. 1984)).

Here, FERC offered no justification or reason, let alone substantial evidence, supporting its conclusion that extending the construction deadline beyond the statutorily mandated maximum is not a substantial, or material, change to the license. In fact, Petitioners submit that there can be no more important change to a license, and therefore FERC must allow intervention in this type of proceeding.

As discussed in detail above, Congress established clear and any specific deadlines for the commencement of construction of licensed hydroelectric projects. In addition, Congress prescribed what must happen when the licensee misses the deadline. As a result, the question before the Commission is not simply how the project will be developed, but whether it will be developed at all. No change to the project, big or small, will be more consequential than that.

Here, FERC failed to provide any explanation as to why this is not the case. FERC's two main points to support its conclusion illuminate the absence of any logical explanation. First, FERC notes that the "Okanogan PUD did not request to change any of the projects [sic] physical features." Rehearing Order, at 4; ER004. Again, while this is technically true, the motion for a stay in a very real sense addresses a change to *all* of the project's features because, absent the stay, none of them would be built.

Second, FERC suggests the motion does not require public notice because it did not "effect (directly or indirectly) any material modification to the terms of the license, as the duration of the stay is limited, and the timing of commencement and completion of project construction were always subject to delay without triggering public notice requirements." *Id.* at 4. FERC's contention that the "limited" duration of the extension is immaterial is both unsupportable given that it is unlawful under the Federal Power Act, and is wholly inconsistent with FERC's typical treatment

of statutory deadlines. *Cf. Cameron LNG LLC*, 148 FERC ¶ 61,073 (2014) (rejecting a rehearing request because it was filed twenty-five seconds past the deadline, under the rehearing provision under the Natural Gas Act); *Appalachian Power Co.*, 133 FERC ¶ 61,135, 61,636 (Nov. 12, 2010) ("Because the 30-day rehearing deadline is statutory based, it cannot be extended, and the request for rehearing filed by petitioners must be rejected as untimely."). FERC's latter point justifying the lack of public notice because the deadlines could be moved without public notice is circular at best, and inconsistent with the Federal Power Act, 16 U.S.C. § 799 ("[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission *after thirty days' public notice*") (emphasis added), and FERC's own regulations, 18 C.F.R. § 4.202, at worst.

## Conclusion

For the foregoing reasons, Petitioners respectfully request that this Court declare that FERC violated the Federal Power Act when it stayed the deadlines to commence construction in Section 301 of the License, and FERC's decision to deny Petitioners' motions to intervene was arbitrary and capricious and not in accordance with the Federal Power Act and its implementing regulations. In addition, Petitioners request that this Court vacate FERC's orders and remand to FERC for further action under the Federal Power Act.

Respectfully submitted this 10th of August 2018.

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## STATEMENT OF RELATED CASES

Petitioners are unaware of any related cases.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(A), the undersigned counsel of record hereby certifies that this opening brief is proportionally spaced, has a typeface of 14 points, and contains 12,381 words.

/s/ Andrew M. Hawley
Andrew M. Hawley

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 10, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Andrew M. Hawley
Andrew M. Hawley

# Addendum
# Table of Contents

## Statutes



## Regulations



## Declarations

**Administrative Procedure Act, Section 705**
**5 U.S.C. § 705**
**Relief pending review**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings

**Administrative Procedure Act, Section 706**
**5 U.S.C. § 706**
**Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**Federal Power Act, Section 6**
**16 U.S.C. § 799**
**License; duration, conditions, revocation, alteration, or surrender**

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

**Federal Power Act, Section 13**
**16 U.S.C. § 806.**
**Time limit for construction of project works; extension of time; termination or revocation of licenses for delay**

The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the

district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title.

**Federal Power Act, Section 308**
**16 U.S.C. § 825g**
**Hearings; rules of procedure**

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

**Federal Power Act, Section 309**
**16 U.S.C. § 825h.**
**Administrative powers of Commission; rules, regulations, and orders**

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons

or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

**Federal Power Act, Section 313**
**16 U.S.C. § 825*l***
**Review of orders**

(a) Application for rehearing; time periods; modification of order
Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review
Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole

or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

**18 C.F.R. § 4.200**
**Applicability**

This part applies to any application for amendment of a license, if the applicant seeks to:

(a) Make a change in the physical features of the project or its boundary, or make an addition, betterment, abandonment, or conversion, of such character as to constitute an alteration of the license;

(b) Make a change in the plans for the project under license; or

(c) Extend the time fixed in the license for commencement or completion of project works.

**18 C.F.R. § 4.201**
**Contents of application**

An application for amendment of a license for a water power project must contain the following information in the form specified.

(a) Initial statement.

Before the Federal Energy Regulatory Commission
Application for Amendment of License

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for an amendment of license for the [name of project] water power project.

(2) The exact name, business address, and telephone number of the applicant are:

(3) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate, see 16 U.S.C. 796], licensee for the water power project, designated as Project No. _____ in the records of the Federal Energy Regulatory Commission, issued on the _____ day of _____, 19__.

(4) The amendments of license proposed and the reason(s) why the proposed changes are necessary, are: [Give a statement or description]

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes are: [provide citation and brief identification of the nature of each requirement.]

(ii) The steps which the applicant has taken or plans to take to comply with each of the laws cited above are: [provide brief description for each law.]

(b) Required exhibits for capacity related amendments. Any application to amend a license for a hydropower project that involves additional capacity not previously authorized, and that would increase the actual or proposed total installed capacity

of the project, would result in an increase in the maximum hydraulic capacity of the project of 15 percent or more, and would result in an increase in the installed name-plate capacity of 2 megawatts or more, must contain the following exhibits, or revisions or additions to any exhibits on file, commensurate with the scope of the licensed project:

(1) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.41 of this chapter;

(2) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 1.5 MW or less—Exhibits E, F, and G under § 4.61 of this chapter;

(3) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 5 MW or less, but more than 1.5 MW—Exhibits F and G under § 4.61 of this chapter, and Exhibit E under § 4.41 of this chapter;

(4) For amendment of a license for a water power project that, at the time the application for amendment is filed, has been constructed, and is proposed to have a total installed generating capacity of 5 MW or less—Exhibit E, F and G under § 4.61 of this chapter;

(5) For amendment of a license for a water power project that, at the time the application is filed, has been constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.51 of this chapter.

(c) Required exhibits for non-capacity related amendments. Any application to amend a license for a water power project that would not be a capacity related amendment as described in paragraph (b) of this section must contain those exhibits that require revision in light of the nature of the proposed amendments.

(d) Consultation and waiver.

(1) If an applicant for license amendment under this subpart believes that any exhibit required under paragraph (b) of this section is inappropriate with respect to the particular amendment of license sought by the applicant, a petition for waiver of the requirement to submit such exhibit may be submitted to the Commission under § 385.207 of this chapter, after consultation with the Commission's Division of Hydropower Compliance and Administration.

(2) A licensee wishing to file an application for amendment of license under this section may seek advice from the Commission staff regarding which exhibits(s) must be submitted and whether the proposed amendment is consistent with the scope of the existing licensed project.

**18 C.F.R. § 4.202**
**Alteration and extension of license**

(a) If it is determined that approval of the application for amendment of license would constitute a significant alteration of license pursuant to section 6 of the Act, 16 U.S.C. 799, public notice of such application shall be given at least 30 days prior to action upon the application.

(b) Any application for extension of time fixed in the license for commencement or completion of construction of project works must be filed with the Commission not less than three months prior to the date or dates so fixed.

**18 C.F.R. § 385.101**
**§ 385.101 Applicability (Rule 101)**

(a) General rules. Except as provided in paragraph (b) of this section, this part applies to:

(1) Any filing or proceeding under this chapter; and

(2) Any oil pipeline filing or proceeding under this chapter or 49 CFR Chapter X and replaces the Interstate Commerce Commission General Rules of Practice (49 CFR part 1100) with respect to any oil pipeline filing or proceeding.

(b) Exceptions.

(1) This part does not apply to investigations under part 1b of this chapter.

(2) If any provision of this part is inconsistent with any provision of another part of this chapter, the provision of this part is inapplicable and the provision of the other part governs to the extent of the inconsistency.

(3) If any provision of this part is inconsistent with any provision of 49 CFR Chapter X that is not otherwise replaced by this part or Commission rule or order, the provision of this part is inapplicable and the provision of 49 CFR Chapter X governs to the extent of the inconsistency.

(c) Transitional provisions.

(1) This part applies to any filing submitted on or after and to any proceeding pending on or initiated after, August 26, 1982.

(2) A decisional authority may, in the interest of justice:

(i) Apply the appropriate provisions of the prior Rules of Practice and Procedure (18 CFR part 1) to any filing submitted after, or to any proceeding or part of a proceeding pending on August 26, 1982;

(ii) Apply the provisions of this part to any filing submitted, or any proceeding or part of a proceeding initiated, after April 28, 1982 but before August 26, 1982.

(d) [Reserved]

(e) Waiver. To the extent permitted by law, the Commission may, for good cause, waive any provision of this part or prescribe any alternative procedures that it determines to be appropriate.

**18 C.F.R. § 385.201**
**Applicability (Rule 201)**

This subpart applies to any pleading, tariff or rate filing, notice of tariff or rate examination, order to show cause, intervention, or summary disposition.

**18 C.F.R. § 385.210**
**Method of notice; dates established in notice (Rule 210)**

(a) Method. When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) Dates for filing interventions and protests. A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

**18 C.F.R. § 385.212**
**Motions (Rule 212)**

(a) General rule. A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) Written and oral motions. Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) Contents. A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

**18 C.F.R. § 385.214**
**Intervention (Rule 214)**

(a) Filing.

(1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) Contents of motion.

(1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.
(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:
(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;
(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:
(A) Consumer,
(B) Customer,
(C) Competitor, or
(D) Security holder of a party; or
(iii) The movant's participation is in the public interest.
(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) Grant of party status.
(1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.
(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) Grant of late intervention.
(1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:
(i) The movant had good cause for failing to file the motion within the time prescribed;
(ii) Any disruption of the proceeding might result from permitting intervention;
(iii) The movant's interest is not adequately represented by other parties in the proceeding;
(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and
(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

Declaration of Thomas O'Keefe in Support of Petitioners' Opening Brief

1. My name is Thomas O'Keefe. I am over 18 years of age. I am a member of and the Pacific Northwest Stewardship Director of American Whitewater.

2. In my position as Stewardship Director, I have the primary responsibility for representing the interest of our membership in carrying out our mission to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely.

3. American Whitewater is a national non-profit 501(c)(3) river conservation organization founded in 1954. With approximately 6,000 members and 100 local-based affiliate clubs, the organization represents tens of thousands of whitewater paddlers across the nation. American Whitewater has members who reside in Washington, some of whom are a short drive from the Similkameen River. As a conservation-oriented paddling organization with an interest in protecting flows, American Whitewater has actively participated in the licensing process for the Enloe Hydroelectric Project.

4. American Whitewater has had a long-standing interest in license conditions for federally-licensed hydropower projects and my own experience in this field dated dates to 1995. In 2005 I was hired by American Whitewater to represent the interest of the organization in hydropower licensing proceedings in the Pacific Northwest. Among my responsibilities in these proceedings, I evaluate study plans

for aesthetic and recreational flows, review and comment on the results of such studies, and participate in the development of protection, mitigation, and enhancement measures.

5. American Whitewater has played an active role in the FERC licensing process for the Enloe Hydroelectric Project. For example, on February 5, 2008, I submitted timely comments to Dan Boettger, Okanogan PUD on the District's Draft License Application on behalf of American Whitewater that were filed with FERC. On October 31, 2008, American Whitewater and others submitted formal comments and study requests on the Project with FERC. On November 4, 2008, I filed a formal motion to intervene in the Enloe FERC proceeding on behalf of American Whitewater. On February 26, 2010, American Whitewater and others submitted preliminary comments and recommendations on the Enloe Project. On June 8, 2011, American Whitewater and others submitted comments on the Draft Environmental Assessment prepared for the Enloe Hydroelectric Project.

6. At issue in this litigation is FERC's compliance with the law regarding its licensing of a hydroelectric project that will continue to degrade the Similkameen River. In this case American Whitewater, on behalf of itself and its members, is challenging FERC's failure to comply with the law, by denying American Whitewater the ability to participate in the process to amend the license and by failing to comply with the requirements of the Federal Power Act and terminate the

license based on the Okanogan PUD's failure to commence construction in a timely manner. These failures have injured, and will continue to injure, American Whitewater's members by allowing an environmentally harmful project to continue on, impacting the river and its fish, and diminishing their use and enjoyment of the area. American Whitewater members have an interest in and a right to use and enjoy the Similkameen River for paddlesports and aesthetic enjoyment.

7. American Whitewater's organizational interests are being, and will be, adversely affected by FERC's actions as alleged in this lawsuit. FERC's failure to allow the conservation groups to intervene in this proceeding and its failure to terminate the Okanogan PUD's license injures American Whitewater's mission to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely. FERC's failure has, and will continue to, injure American Whitewater's organizational interests in addressing the harm caused by the proposed project and the negative environmental impact that are and will continue to result. American Whitewater is being prohibited from advocating on behalf of its members, ensuring FERC is following the law, and holding FERC accountable when it refuses to do so. As a result, American Whitewater will be forced to continue to work to counteract the impacts of this project, and to spend additional time and resources intervening (or at least attempting to intervene) in further FERC

proceeding on this project. FERC has admitted as much when in denying American Whitewater's motion to intervene it claimed intervention may be likely on future amendments to the license. Participating in such future proceedings will take time and resources American Whitewater would not have to commit to this effort had FERC simply followed the law here.

8. I have visited the Similkameen River on at least 3 occasions. I have significant recreational, aesthetic, professional and spiritual interests in the river. The waterfall downstream of Enloe Dam is a powerful and awe-inspiring place and a unique landscape feature in Washington State. The energy of this place is something I personally enjoy experiencing along with the members of our organization that I represent. The river is a destination for me when I am traveling in this area of the state and construction of a hydropower project will cause irreparable to this unique resource.

9. I regularly travel to the Okanogan Valley at least 2-3 times a year and will continue to do so in the future. On these trips, the opportunity to experience and enjoy the Similkameen River, and specifically the waterfall that would be impacted by this project, is a primary attraction that I enjoy with friends and family.

10. My interests have been, and will continue to be harmed by FERC's actions and inactions regarding the proposed project at Enloe Falls.

11. Despite the harm this project is causing river and my interests, FERC appears to be willing to ignore the clear requirements of the law to allow the project to continue. By denying the requests of groups, such as American Whitewater, the ability to participate in the decision-making process on whether the license should be terminated, FERC has harmed my interest by preventing American Whitewater from having timely notice of the information necessary to understand the impacts of the project, and from having the ability to challenge FERC's decisions that do not comply with the law.

12. If FERC is allowed to ignore the requirements of the Federal Power Act and its own regulations my interests will be harmed by the immediate and irreparable harm that will come to river and the fish species in the Similkameen River. Specifically, the project will significantly diminish the aesthetic qualities of the Similkameen River in the gorge downstream of the Enloe Dam. [

13. By requiring FERC to comply with the law, allowing American Whitewater to participate in the ongoing proceedings on the project on my behalf and beginning the process to terminate the license, the Court can stop the ongoing and irreparable harm to my interests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of August, 2018 at Seattle, Washington.

Thomas O'Keefe, PhD

Declaration of Patricia Rolfe in Support of Petitioners' Opening Brief

1. My name is Patricia Rolfe. I am over 18 years of age. I am a member of and the Executive Director of Center for Environmental Law & Policy (CELP).

2. Center for Environmental Law & Policy is a membership-based, non-profit corporation that serves as Washington's foremost public interest water resource advocacy organization. CELP has numerous members in Okanogan County and the surrounding areas who use the Similkameen River and its environs for recreation and aesthetic enjoyment.

3. CELP's mission is to protect and restore the quantity of water flowing in Washington's freshwater resources, i.e. its rivers and aquifers, to ensure protection of public values in those waters, including drinking water supply, fish and wildlife habitat, water quality, recreational use, and aesthetic enjoyment of scenic values.

4. CELP accomplishes its mission by advocating for responsible allocation of water rights, either by permit or permit-exempt processes, and acting to promote adoption and protection of instream flow rules to protect the public values described above.

5. Since becoming a non-profit corporation in 1995, CELP has served as a leading advocate for science-based management and sustainable use of both the state's surface water and groundwater resources.

6. Specifically, CELP has spent time and resources advocating to protect the Similkameen River. This work has including a long history engaging on, and when necessary litigating over, the impacts from Enloe Dam and the proposed hydroelectric project at issue here.

7. CELP has continued this work most recently by advocating for the termination of the license for the proposed hydroelectric project, as required by law because of the Okanogan PUD's failure to commence construction in a timely manner. As part of that effort, CELP sought to intervene in the proceeding before the Federal Energy Regulatory Commission (FERC) over the PUD's request to stay the construction deadlines. Because FERC has not acted to terminate the license, and indeed did precisely the opposite by staying the construction deadlines, and denied CELP's motion to intervene in that proceeding, CELP was left with no choice but to join the instant suit. In doing so CELP, on behalf of itself and its members, is challenging FERC's failure to comply with the law. This is necessary because FERC's actions have injured, and will continue to injure, CELP's members by allowing an environmentally harmful project to continue on, impacting the river and its fish, and diminishing their use and enjoyment of the area.

8. In addition, CELP's organizational interests are being, and will be, adversely affected by FERC's actions as alleged in this lawsuit. FERC's failure to allow the

conservation groups to intervene this proceeding and its failure to terminate the Okanogan PUD's license injures our mission to protect and restore the quantity of water flowing in Washington's freshwater resources, and the Similkameen River in particular. Specifically, FERC's actions are prohibiting CELP from effectively advocating on behalf of its members, ensuring FERC is following the law, and holding FERC accountable when it refuses to do so. As a result, CELP will be forced to continue to work to counteract the impacts of this project, and to spend additional time and resources intervening (or at least attempting to intervene) in further FERC proceeding on this project. Participating in such future proceedings will take time and resources CELP would not have to commit to this effort had FERC simply followed the law here.

9. By requiring FERC to comply with the law, allowing CELP to participate in the ongoing proceedings on the project on my behalf and beginning the process to terminate the license, the Court can stop the ongoing and irreparable harm to my interests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9_day of August, 2018 at Seattle, Washington.

S/ Patricia Rolfe

Declaration of John Osborn in Support of Petitioners' Opening Brief

1. My name is John Osborn. I am over 18 years of age. I am a member of and the coordinator of the Columbia River Future Project of the Sierra Club--Washington State Chapter. I am also a member of the Center for Environmental Law and Policy.

2. In my position with the Sierra Club to oversee the development and implementation of strategies to protect and restore the waters of the Columbia River with a focus on Washington State. I provide regular updates on Enloe Dam and the Similkameen River to organizational elements within the Sierra Club including the Upper Columbia River Group based in Spokane, and the Washington State Chapter's Water and Salmon Committee.

3. I have been a member of the Center for Environmental Law & Policy (CELP) for twenty years. From 2007 until 2016, I served as President of the Board of Directors. I continue to provide support for this organization, including public outreach and web support. This work includes efforts to protect and restore the Similkameen River.

4. The Sierra Club is America's largest and most influential grassroots environmental organization, with more than 3 million members and supporters. In addition to helping people from all backgrounds explore nature and our outdoor heritage, the Sierra Club works to promote clean energy, safeguard the health of

our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and legal action.

5. The Center for Environmental Law & Policy is a membership-based Washington nonprofit corporation with a mission to protect, preserve and restore Washington's water through education, policy reform, agency advocacy, and public interest litigation. CELP has worked on Enloe Dam and Similkameen River issues for approximately ten years, including litigation over Okanogan PUD's 401 Certification and water rights for the Enloe Project.

6. Sierra Club and CELP members visit, use and enjoy the Similkameen River and Falls, the Pacific Northwest and Similkameen River Trails, and the general area where the Enloe Dam is located and will be adversely affected if the Similkameen River is dewatered below the dam.

7. In the 1990s I organized and led a Sierra Club Outing to Enloe Dam that included river advocates from Spokane. Later, I visited the dam and lower Similkameen River on several occasions, including Palmer Lake, to photograph. I used these photographs to accompany articles I wrote for Sierra Club newsletters. For CELP, I also built webpages on the lower Similkameen River that included Enloe Dam and the Similkameen River. During legal challenges pertaining to Enloe Dam, I have drafted news releases for Sierra Club, CELP, and other river

advocacy organizations, and communicated with reporters to encourage them to report on the Similkameen River and Enloe Dam.

8. This litigation centers on FERC's compliance with the law regarding its licensing of a hydroelectric project that will degrade the Similkameen River. Sierra Club and CELP joined this litigation, on behalf of the organizations and their members, to challenge FERC's failure to comply with the law, by denying Sierra Club and CELP the right to participate in the process on the amendment of the license to extend the construction deadlines and by failing to comply with the requirements of the Federal Power Act and terminate the license based on the Okanogan PUD's failure to meet the current construction deadlines. These failures have injured, and will continue to injure, Sierra Club's and CELP's members by allowing an environmentally harmful project to continue, negatively impacting the river and its fish, and diminishing their use and enjoyment of the area.

9. Sierra Club and CELP members have an interest in and in fact regularly use and enjoy the Similkameen River, fishing, and enjoying the aesthetic beauty of the Similkameen River and Similkameen Falls below Enloe Dam.

10. The Sierra Club's and CELP's organizational interests are being, and will be, adversely affected by FERC's actions as alleged in this lawsuit. FERC's failure to allow the Sierra Club and CELP to intervene in the underlying proceeding. It's failure to terminate the Okanogan PUD's license injures Sierra

Club's mission to safeguard the health of our communities, protect wildlife, and preserve our remaining wild places; and CELP's mission to protect, preserve and restore Washington's waters. FERC's failure has, and will continue to, injure the Sierra Club's and CELP's organizational interests in addressing the harm caused by the proposed project and the negative environmental impact that are and will continue to result.

11. As it stands, the Sierra Club and CELP are prohibited from advocating on behalf of its members, ensuring FERC is following the law, and holding FERC accountable when it refuses to do so. As a result, we will be forced to continue to work to counteract the impacts of this project, and to spend additional time and resources intervening (or at least attempting to intervene) in further FERC proceeding on this project. FERC has admitted as much when in denying the motion to intervene it claimed intervention may be likely on future amendments to the license. Participating in such future proceedings will take time and resources Sierra Club and CELP would not have to commit to this effort had FERC simply followed the law here.

12. I have visited the Similkameen River on three occasions. I have significant recreational, aesthetic, professional and spiritual interests in the river. Each time I go to the river I am struck by how awe-inspiring it is, and am deeply troubled by Enloe Dam as a century-old cement plug, blocking the river's life including

migrating fish. My spouse and I particularly enjoy viewing waterfalls and visited Similkameen Falls directly below Enloe Dam to view and appreciate the beauty and power of the river at that spot. We also visited Palmer Lake, upstream of Enloe Dam, and feel frustrated and offended that anadromous fish have been extirpated from the Lake and further upstream because Enloe Dam blocks fish passage. Enloe Dam has caused significant damage to the Similkameen River watershed ecosystem, and this harms me and all Sierra Club and CELP members who value this river not only for aesthetic and recreational purposes, but who understand it is a key river for restoring Upper Columbia Basin salmon, and for addressing climate-change impacts on salmon.

13. I will be returning to the Similkameen River in November to visit the river and plan another Sierra Club Outing in 2019.

14. My interests have been, and will continue to be harmed by FERC's actions and inactions regarding the proposed project at Enloe Falls.

15. Despite the harm this project is causing river and my interests, FERC appears to be willing to ignore the clear requirements of the law to allow the project to continue. By denying the requests of groups, such as Sierra Club and CELP, the ability to participate in the decision-making process on whether the license should be terminated, FERC has harmed my interest by preventing Sierra Club from having timely notice of the information necessary to understand the

impacts of the project, and from having the ability to challenge FERC's decisions that do not comply with the law.

16. If FERC is allowed to ignore the requirements of the Federal Power Act and its own regulations my interests will be harmed by the immediate and irreparable harm that will come to river and the fish species in the Similkameen River. Proceeding forward with this project will significantly dewater a section of the Similkameen River below Enloe Dam, including Similkameen Falls, and prevent me from enjoying the beauty and power of Similkameen Falls; will foreclose the option of removing Enloe Dam and restoring fish passage to the Similkameen River, and prevent me from enjoying the salmon that could use these waters and Puget Sound orcas that depend on Columbia River salmon and are now starving to death.

17. By requiring FERC to comply with the law, allowing Sierra Club and CELP to participate in the ongoing proceedings on the project on my behalf and beginning the process to terminate the license, the Court can stop the ongoing and irreparable harm to my interests.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 30th day of July, 2018 at Vashon, Washington.

_____

John Osborn

Declaration of Stuart Rick Gillespie In Support of Petitioners' Opening Brief

1. My name is Stuart Rick Gillespie. I am over 18 years old and am a member of and the Vice President/Treasurer of Columbiana (also known as Columbia River Bioregional Education Project).

2. The mission of Columbiana is to promote a context of economic and social development that sustains the health, beauty, and structure of the native ecosystems of the Intermountain Northwest. Since 1978, Columbiana, known then as Okanogan Natural News, has engaged in public education and advocacy on behalf of the Similkameen and Okanogan Rivers. We had been publishing a regional newspaper, Okanogan Natural News, that was engaged in public education and advocacy of rivers and forests in the watersheds of Okanogan and Similkameen Rivers watersheds. We incorporated as Columbia River Bioregional Education Project (aka Columbiana) in 1986.

3. Columbiana's members recreate on and enjoy the Similkameen River.

4. Columbiana actively participated in the licensing process for the Enloe Hydroelectric Project. Specifically, Columbiana filed comments in 2009 on the Application, and on the draft Environmental Assessment. Columbiana participated by filing public comments on two previous license applications submitted by the Okanogan County PUD (OPUD). Members of Columbiana, as ratepayers, have attended OPUD Public Meetings during the

past ten years, commenting on the flawed economics of electrifying Enloe Dam, the blockage of multiple use of Similkameen River flows from fish passage and public boating, the desecration of Similkameen Falls as a sacred site of local Indigenous People by diverting its flows around the falls, and dewatering the falls aesthetics important to the public. Columbiana has held several Similkameen Sunday gatherings for the public at Similkameen Falls with prayers by Indigenous Elders that the river be returned to its free-flow nature. Afterwards, we have gathered in Tonasket at the Community Cultural Center where we shared a salmon meal and listened to indigenous and public members express their feelings that the Similkameen River needs to be a free-flowing river whose resources are available to all fauna and flora. Columbiana has helped plan several Salmon Ceremonies on the Similkameen River with members of the Upper and Lower Similkameen Indian Bands, the Okanagan Nation Alliance, and Colville Confederate Tribes honoring our ancestors and praying for the salmon's return.

5. Columbiana also litigated various aspects of the permits the District requires to operate the Project. For example, the Pollution Control Hearings Board passed judgment on a case regarding the Instream Flow needs of the Similkameen River and what should be required to be left in the "by-pass" reach —the pool between the base of the dam and flow over Similkameen Falls. Columbiana also appealed the decision by the Project Review

Committee of Washington State Capital Projects Advisory Review Board in granting approval of the OPUD application to use Design-Build Process on Enloe Hydroelectric Project.

6. The underlying issue in the instant litigation is whether FERC should continue to allow the Okanogan PUD move towards the development of a hydroelectric project that will continue to degrade the Similkameen River. FERC's failure to comply with the law, by denying Columbiana the ability to participate in this process and by failing to comply with the requirements of the Federal Power Act, has injured, and will continue to injure, Columbiana members and the general public by allowing an environmentally harmful project to continue on, impacting the river and its fish, and diminishing their use and enjoyment of the area. Columbiana members and the general public have an interest in and a right to use and enjoy the Similkameen River for boating, rafting, fishing, hiking, sightseeing, birding, wildlife view, and other recreational pursuits.

7. Columbiana's organizational interests are being, and will be, adversely affected by FERC's actions as alleged in this lawsuit. FERC's failure to allow the conservation groups to intervene this proceeding and its failure to terminate the Okanogan PUD's license injures Columbiana's mission of protecting and restoring the health, beauty, and structure of the native ecosystems of the Intermountain Northwest. FERC's failure has, and will

continue to, injure Columbiana's organizational interests in addressing the harm caused by the proposed project and the negative environmental impact that are and will continue to result. Columbiana is being prohibited from advocating on behalf of its members and members of the public, ensuring that FERC follows the law, and holding FERC accountable when it refuses to do so. As a result, Columbiana will be forced to continue to work to counteract the impacts of this project, and to spend additional time and resources intervening (or at least attempting to intervene) in further FERC proceeding on this project. This is time and resources Columbiana would not have to commit to this effort had FERC not violated the law as alleged in this suit.

8. I have lived near the Similkameen River for 39 years, and I have significant recreational, aesthetic, and spiritual interests in the river. My interests have been, and will continue to be harmed by FERC's actions and inactions regarding the proposed project at Enloe Falls. I regularly visit and use the Similkameen River for a variety of recreational, aesthetic, and spiritual reasons. I have helped Columbiana bring groups and individuals to Enloe Dam to explain to them how OPUD's electrification of the dam will negatively impact Similkameen Falls by dewatering it, prevent threatened migrating fish from reaching locked up habitat above the dam, effect fishing at the falls by restricting access, and turning a traditional spiritual quest

location into an industrial park. I have spent time at the falls and dam in different seasons observing and videotaping salmonids jumping at the falls, gaining access above the falls and jumping at the spillway of the dam. I have been to the falls with my Indigenous brothers and sisters, offering prayers and thanks for the solitude Nature has provided us in this refreshing setting. Electrifying Enloe Dam will turn the area into an industrial site preventing access and destroy its spiritual offerings to all.

9. During my regular visits to the river, my interests have been harmed and will continue to be harmed by the proposed project, which is impacting the river and fish who depend upon it. I have visited the falls area numerous times over the years in all seasons. I've walked and bicycled the Similkameen Trail on the west side of the river leading up to the falls several times, watching the salmon in pools below the falls resting for their ascent of the falls. Driving down the Shankers Bend access road to the falls has provided me with access to the falls from the east side of the river. From this vantage point I've been able to walk down to the falls area where I have observed salmon in pools below the old powerhouse, watched them jumping at all sides of the falls. I have taken videos of salmon at the falls trying to discover how they are able to ascend the falls at different flows. There is a natural notch in the falls on the right side looking down river where I have pictures of salmon attempting to gain entry into the plunge pool below Enloe Dam.

Joseph Enzensperger and I have taken numerous video clips of salmon, who have gained access to the plunge pool between Enloe Dam and the falls, jumping at the spillway of Enloe Dam. I have used the falls area as a place to observe its natural energy as a refuge, to meditate on its aesthetic beauty and recharge my energies. I have participated with members of Lower & Upper Similkameen Indian Bands, Okanagan Nation Alliance, Colville Confederate Tribes, and the general public in Salmon Ceremonies honoring our ancestors and praying for the health and return of the salmon to the Similkameen River watershed.

10. Despite what to me is the obvious harm this project is causing to the river and its fish, FERC appears to be willing to ignore the clear requirements of the law to allow the project to continue. Compounding these errors, FERC has denied the requests of groups, such as Columbiana, the ability to participate in the decision making process on whether the license should be terminated. By doing so, FERC has harmed my interest by preventing Columbiana from having timely notice of the information necessary to understand the impacts of the project, and from having the ability to challenge FERC's decisions that do not comply with the law.

11. If FERC is allowed to ignore the requirements of the Federal Power Act and its own regulations my interests will be harmed by the immediate and irreparable harm that will come to river and the fish species in the

Similkameen River. Clearly, my recreational and aesthetic interests are and will continue to be immediately and irreparably harmed by the continued development of the project at Enloe Dam, which will continue to block fish passage, use of the river for boating and fishing, and will increase the risk of harm to salmon and steelhead below the dam.

12. By requiring FERC to comply with the law, allowing Columbiana to participate in the ongoing proceedings on the project on my behalf, and beginning the process to terminate the license the Court can prevent the ongoing and immediate and irreparable harm to my interests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of August, 2018 at Oroville, Washington.

Stuart Rick Gillespie

Stuart Rick Gillespie

Declaration of Geraldine Jeré Gillespie In Support of Petitioners' Opening Brief

1. My name is Geraldine Jeré Gillespie. I am over 18 years old and am a member of and the President of Columbiana (also known as Columbia River Bioregional Education Project).
2. The mission of Columbiana is to promote a context of economic and social development that sustains the health, beauty, and structure of the native ecosystems of the Intermountain Northwest. Since 1978, Columbiana , known then as Okanogan Natural News, has engaged in public education and advocacy on behalf of the Similkameen and Okanogan Rivers. Other Columbiana board member covered other parts of the bio-region.
3. Columbiana's members recreate on and enjoy the Similkameen River.
4. Columbiana actively participated in the licensing process for the Enloe Hydroelectric Project. Specifically, Columbiana filed comments in 2009 on the Application, and on the draft Environmental Assessment. Members of Columbiana, as ratepayers, have attended Okanogan PUD (OPUD) Public Meetings during the past ten years, commenting on the economics of electrifying Enloe Dam, the blockage of Similkameen River flows from fish passage, and public boating, the desecration of Similkameen Falls as a sacred site of local Indigenous People by diverting its flows around the falls, and dewatering the falls aesthetics, important to the public. Columbiana has held several Similkameen Sunday gatherings for the public at Similkameen Falls

with prayers by Indigenous Elders that the river be returned to its natural free-flow. Afterwards, we have gathered in Tonasket at the Community Cultural Center where we shared a salmon meal and listened to indigenous and public members express their feelings that the Similkameen River needs to be a free flowing river whose resources are available to all fauna and flora. Columbiana has helped plan several Salmon Ceremonies on the Similkameen River with members of the Upper and Lower Similkameen Indian Bands, the Okanagan Nation Alliance, and Colville Confederate Tribes honoring our ancestors and praying for the salmon's return.

5. Columbiana also litigated various aspects of the permits the District requires to operate the Project. For example, the Pollution Control Hearings Board passed judgment on a case regarding the Instream Flow needs of the Similkameen River and what should be required to be left in the "by-pass" reach —the pool between the base of the dam and flow over Similkameen Falls. Columbiana also appealed the decision by the Project Review Committee of Washington State Capital Projects Advisory Review Board in granting approval of the OPUD application to use Design-Build Process on Enloe Hydroelectric Project.

6. The underlying issue in the instant litigation is whether FERC should continue to allow the Okanogan PUD to move towards the development of a hydroelectric project that will continue to degrade the Similkameen River.

FERC's failure to comply with the law, by denying Columbiana the ability to participate in this process and by failing to comply with the requirements of the Federal Power Act, has injured, and will continue to injure, members of Columbiana and the general public by allowing an environmentally harmful project to continue on, impacting the river and its fish, and diminishing their use and enjoyment of the area. Columbiana members have an interest in and a right to use and enjoy the Similkameen River for boating, rafting, fishing, hiking, sightseeing, birding, wildlife view, and other recreational pursuits.

7. Columbiana's organizational interests are being, and will be, adversely affected by FERC's actions as alleged in this lawsuit. FERC's failure to allow the conservation groups to intervene in this proceeding and its failure to terminate the Okanogan PUD's license injures Columbiana's mission of protecting and restoring the health, beauty, and structure of the native ecosystems of the Intermountain Northwest. FERC's failure has, and will continue to, injure Columbiana's organizational interests in addressing the harm caused by the proposed project and the negative environmental impact that are and will continue to result. Columbiana is being prohibited from advocating on behalf of its members, ensuring FERC is following the law, and holding FERC accountable when it refuses to do so. As a result, Columbiana will be forced to continue to work to counteract the impacts of this project, and to spend additional time and resources intervening (or at least attempting to intervene)

in further FERC proceeding on this project. This is time and resources Columbiana would not have to commit to this effort had FERC not violated the law as alleged in this suit.

8. I have lived near the Similkameen River for 44 years, and I have significant recreational, aesthetic, and spiritual interests in the river. My interests have been, and will continue to be harmed by FERC's actions and inactions regarding the proposed project at Similkameen Falls. I regularly visit and use the Similkameen River for a variety of recreational, aesthetic, and spiritual reasons. For example, a friend used to make a donation each year for our work in removing Enloe Dam from the Similkameen River. After he passed, I took his ashes, as he requested, and cast them into the canyon just below the dam where the ashes came to rest on the roots of a large fir in the canyon. Later I published a poem about his memorial at Enloe Dam on my Facebook page which our friends appreciated.

9. During my regular visits to the river, my interests have been harmed and will continue to be harmed by the proposed project, which is impacting the river and fish who depend upon it. Despite what to me is the obvious harm this project is causing to the river and its fish, FERC appears to be willing to ignore the clear requirements of the law to allow the project to continue. Compounding these errors, FERC has denied the requests of groups, such as Columbiana, to participate in the decision making process on whether the

license should be terminated. By doing so, FERC has harmed my interest by preventing Columbiana from having timely notice of the information necessary to understand the impacts of the project, and from having the ability to challenge FERC's decisions that do not comply with the law.

10. If FERC is allowed to ignore the requirements of the Federal Power Act and its own regulations, my interests will be harmed by the immediate and irreparable harm that will come to the river and the fish species in the Similkameen River. Clearly, my recreational and aesthetic interests are and will continue to be immediately and irreparably harmed by the continued development of the project at Enloe Dam, which will continue to block fish passage and will increase the risk of harm to salmon and steelhead below the dam.

11. By requiring FERC to comply with the law, allowing Columbiana to participate in the ongoing proceedings on the project on my behalf, and beginning the process to terminate the license, the Court can prevent the ongoing and immediate and irreparable harm to my interests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of August, 2018 at Oroville, Washington.

Geraldine Jeré Gillespie

Geraldine Jeré Gillespie

Declaration of Joseph G. Enzensperger, IV in Support of Petitioners' Opening Brief

1. My name is Joseph G. Enzensperger, IV. I am over 18 years old and am a member of and Secretary of Columbiana (also known as Columbia River Bioregional Education Project).

2. The mission of Columbiana is to promote a context of economic and social development that sustains the health, beauty, and structure of the native ecosystems of the Intermountain Northwest. Since 1978, Columbiana known then as Okanogan Natural News, has engaged in public education and advocacy on behalf of the Similkameen and Okanogan Rivers.

3. Columbiana's members recreate on and enjoy the Similkameen River.

4. Columbiana actively participated in the licensing process for the Enloe Hydroelectric Project. Specifically, Columbiana filed comments in 2009 on the Application, and on the draft Environmental Assessment. Columbiana participated by filing public comments on the previous two license applications submitted by the Okanogan County PUD (OPUD). Members of Columbiana, as ratepayers, have attended OPUD Public Meetings during the past ten years, commenting on the flawed economics of electrifying Enloe Dam, the blockage of multiple uses of the Similkameen River for fish passage and public paddling /boating. This project is a desecration of Similkameen Falls which is a sacred site for local Indigenous People,

particularly the Lower Similkameen Indian Band. Further, the diverting of the river's flows around the falls, dewatering the falls and 330 feet of river bed will ruin the visual and spiritual aesthetics important to the public. Columbiana has held several "Similkameen Sunday" gatherings for the public at Similkameen Falls with prayers by Indigenous Elders calling for the return of the river to its natural flow prior to 1900 when hydropower production came to Similkameen River valley. After leaving the river, we gathered in Tonasket at the Community Cultural Center where we shared a salmon meal and listened to indigenous and public members express their belief that the Similkameen River should be a free-flowing river whose resources are available to all fauna and flora. Columbiana has helped plan several Salmon Ceremonies on the Similkameen River with members of the Upper and Lower Similkameen Indian Bands, the Okanagan Nation Alliance, and Colville Confederate Tribes.

5. Columbiana also litigated various aspects of the permits the District requires to operate the Project. We challenged OPUD's plan of 10/30 cubic feet per second (cfs) minimum flows over Enloe Dam and the reach of the river between the dam, and Similkameen (Coyote) Falls during low water operation. Our case was presented before the Pollution Control Hearing Board (PCHB) of the Washington State Department of Ecology. The PCHB

agreed with our claim that aesthetic flows should be higher than 10/30 cfs and the PCHB found the project needed to be studied over its first three years of operations to determine what flows must be maintained for aesthetics. Columbiana also appealed the decision by the Project Review Committee of Washington State Capital Projects Advisory Review Board in granting approval of the OPUD application to use Design-Build Process on Enloe Hydroelectric Project.

6. The underlying issue in the instant litigation is whether Federal Energy Regulatory Commission (FERC) should continue to allow the OPUD to move towards the development of a hydroelectric project that will continue to degrade the Similkameen River. FERC's failure to comply with the law, by denying Columbiana the ability to participate in this process, and by failing to comply with the requirements of the Federal Power Act, has injured, and will continue to injure, Columbiana members by allowing an environmentally harmful project to continue, impacting the river and its fish, and diminishing their use and enjoyment of the area. Columbiana members have an interest in and a right to use and enjoy the Similkameen River for boating, rafting, fishing, hiking, sightseeing, birding, wildlife view, and other recreational pursuits.

7. Columbiana's organizational interests are being, and will be, adversely affected by FERC's actions as alleged in this lawsuit. FERC's failure to allow the conservation groups to intervene this proceeding and its failure to terminate the OPUD's license injures Columbiana's mission of protecting and restoring the health, beauty, and structure of the native ecosystems of the Intermountain Northwest. FERC's failure has, and will continue to, injure Columbiana's organizational interests in addressing the harm caused by the proposed project and the negative environmental impact that are and will continue to result. Columbiana is being prohibited from advocating on behalf of its members, ensuring FERC is following the law, and holding FERC accountable when it refuses to do so. As a result, Columbiana will be forced to continue to work to counteract the impacts of this project, and to spend additional time and resources intervening (or at least attempting to intervene) in further FERC proceeding on this project. These are time and resources Columbiana would not have to commit to this effort had FERC not violated the law as alleged in this suit.

8. I have lived near the Similkameen River for 40 years, and I have significant recreation, fishing, aesthetic, and spiritual interests in the river. My interests have been, and will continue to be harmed by FERC's actions and inactions regarding the proposed project at Enloe Dam. I regularly visit and use the

Similkameen River for recreation, fishing, aesthetic beauty, and spiritual retreat. In this arid desert landscape the cold rushing green waters of the Similkameen River pouring down through its cut rock canyons is truly an oasis in the dry heat of the Okanogan. Its pools support Steelhead, Chinook Salmon, native Rainbow Trout, Bull trout, and before the dam was constructed, Pacific lamprey—three of these are federally listed endangered or threatened species. The birdlife is incredible at Similkameen Falls. I have regularly observed Bald Eagles, Osprey, Golden Eagles, Common Mergansers, King Fishers, Mallards, Blue Heron and Canadian Geese. Many nest in the surrounding area. Aesthetically it is one of the most beautiful places in the Okanogan. Unfortunately the OPUD used visual assessments from the road a half a mile away to describe the visual and aesthetic values of the site in their FERC license application. The cool mists, the sound of the rushing waters and the rocks and boulders combine to create a favorite place to meditate, pray and connect with the natural world. This site should be enshrined and protected for all generations to come.

9. My interests have been harmed and will continue to be harmed by the proposed project, which will impact the river and fish that depend upon it. Similkameen Falls and the river below it are among the finest Salmon and Steelhead waters in the Okanogan. Many fishermen drive hundreds of miles

from cities like Spokane, Colville and Seattle to fish these waters. During the salmon season (July-August), Summer Chinook salmon can be seen jumping at the base of Enloe Dam, pushing to spawn up river. I have confirmed these sighting with many local fisherman and I have spent hours videotaping salmonids attempting to scale the spillway of Enloe Dam during July. I have also videotaped and photographed the flows of the river at many different times of the year. As a fisherman I understand the importance of re-opening the 350 miles of potential habitat river and stream spawning gravels that lie above Enloe Dam. Three threatened or endangered species, Upper Columbia River Steelhead, Bull trout and Pacific lamprey—would benefit from 350 miles of new habitat. With all the eastern tributaries of the Columbia River blocked by large dams without fish passage, the re-opening of the Similkameen River's upstream habitats, locked behind Enloe Dam for over 100 years, is vital to the recovery of these species.

10. Despite what to me is the obvious harm this project is causing to the river and its fish, FERC appears to be willing to ignore the clear requirements of the law to allow the project to continue. Compounding these errors, FERC has denied the requests of groups, such as Columbiana, the ability to participate in the decision making process which would determine whether the license should be terminated. By doing so, FERC has harmed my

interest by preventing Columbiana from having timely notice of the information necessary to understand the impacts of the project, and from having the ability to challenge FERC's decisions that do not comply with the law.

11. If FERC is allowed to ignore the requirements of the Federal Power Act and its own regulations, my interests will be harmed by the immediate and irreparable harm that will come to river and the fish species that inhabit the Similkameen. First, my recreational and aesthetic interests are and will continue to be immediately and irreparably harmed by the continued development of the project at Enloe Dam. The project will continue to block fish passage and will increase the risk of harm to salmon, steelhead and other aquatic species below the dam, creating diminished water flows and higher water temperatures.

12. By requiring FERC to comply with the law, allowing Columbiana to participate in the ongoing proceedings on the project on my behalf, and beginning the process to terminate the license the Court can prevent the ongoing and immediate and irreparable harm to my interests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of August , 2018 at Oroville, Washington.

Joseph G. Enzensperger IV