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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

NEZ PERCE TRIBE,

Petitioner

v.

OREGON DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondent.

Case No.:

PETITION FOR JUDICIAL REVIEW OF
FINAL ADMINISTRATIVE ORDER
(ADMINISTRATIVE PROCEDURES
ACT—ORS 183.310, 183.480, 183.484)

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1.

Petitioner, NEZ PERCE TRIBE (“Tribe” or “Nez Perce”), brings this petition pursuant to ORS 183.484 for judicial review of the Oregon Department of Environmental Quality (“ODEQ”)’s May 24, 2019, order issuing a Clean Water Act (“CWA”) § 401 certification (“401 certification”) for Idaho Power Company (“Idaho Power”)’s Hells Canyon Complex Hydroelectric Project (“Project”), Federal Energy Regulatory Commission (“FERC”) Project No. 1971. The Project consists of three dams—Brownlee, Oxbow, and Hells Canyon—on the portion of the Snake River that flows through the southern end of Hells Canyon and within the exclusive aboriginal territory of the Tribe.

2.

The Project’s original, 50-year FERC license expired in 2005. The CWA requires that ODEQ and Idaho Department of Environmental Quality (“IDEQ”) certify that the Project will meet state water quality standards, by issuing 401 certifications, before FERC may issue what Idaho Power anticipates will be a new 30 to 50-year license for the Project.

3.

The Project has caused tremendous and irreparable injury to the culture, traditions, economy, and health of the Tribe and its citizens since its construction over six decades ago. The Project blocks fish passage and degrades habitat for culturally-significant, Nez Perce Treaty-reserved aquatic resources including salmon, steelhead, Pacific lamprey, bull trout, and white sturgeon. The Project generates highly toxic methylmercury that bioaccumulates in the Snake River’s aquatic food chain, rendering Treaty-reserved resources, such as white sturgeon,

1 unsafe for consumption. The Project also changes the Snake River’s thermal regimes by altering
2 water retention times, reducing shading within reaches, and changing water depths.

3
4 4.

5 The Tribe, as a co-manager of its Treaty-reserved resources, has long advocated for the
6 protection and restoration of all of its homeland’s native fish populations, including those
7 upstream, within, and downstream of the Project. ODEQ’s 401 certification does not provide
8 adequate protection.

9
10 5.

11 ODEQ’s 401 certification for the Project fails to require fish passage, as required by
12 ORS 509.585 and to protect Oregon’s “Fishing” and “Fish & Aquatic Life” beneficial uses.

13
14 6.

15 ODEQ’s 401 certification for the Project also fails to provide reasonable assurance that
16 the Project will not violate the state of Oregon’s water quality standards for
17 mercury/methylmercury and temperature, as required under Oregon law and the CWA. ODEQ’s
18 certification does not require that any action be taken during the life of the next license to
19 reduce Project’s production of methylmercury and erroneously relies on the possible
20 construction of a hypolimnetic pump (under Plan B) to ensure temperature standards are met.
21 Ensuring methylmercury and temperature standards will not be violated is vitally important for
22 protecting the Tribe’s Treaty-reserved fish resources and ensuring those resources may be safely
23 consumed. 33 U.S.C. § 1341; 40 C.F.R. § 121.2(a)(3); OAR 340-041-0007(10); OAR 340-041-
24 0033(1), (2), (3).

1 7.

2 For these reasons, ODEQ's May 24, 2019, 401 certification for the Project is legally
3 inadequate.

4 8.

5 ODEQ's flawed 401 certification, if not corrected to comply with Oregon law and the
6 CWA, will harm the Tribe's Treaty-reserved rights and resources in waters within the state of
7 Oregon affected by the Project and will have a significant impact on the health, welfare, and
8 culture of the Tribe for generations to come. The Tribe, accordingly, seeks an order from this
9 Court setting aside and remanding, for correction, ODEQ's 401 certification for the Project.
10
11

12 **PARTIES**

13 9.

14 Petitioner, NEZ PERCE TRIBE, is a federally-recognized Indian tribe with headquarters
15 at 100 Agency Road in Lapwai, Idaho, on the Nez Perce Reservation. The Tribe also maintains
16 offices off the Nez Perce Reservation in McCall, Grangeville, Orofino, and Powell, Idaho, and
17 Joseph, Oregon.
18

19 10.

20 Since time immemorial, the Nez Perce people, the Nimiipuu, have occupied a
21 geographic area encompassing a large part of what is today Idaho, Oregon, Washington, and
22 Montana. The territory exclusively occupied by the Nez Perce—over 13 million acres—
23 stretched from the Bitterroot Mountains on the east, to the Blue Mountains of northeastern
24 Oregon and southeast Washington on the west.
25
26
27

1 11.

2 Nez Perce Tribal citizens actively maintain their connection to the land, water, and
3 resources of this vast geography. Seasonal rounds and migration patterns for cultural and
4 subsistence uses are carefully coordinated to take full advantage of the abundant fish, wildlife,
5 and available root crops. These annual cycles correspond not only to the unique resource needs
6 of the Nez Perce and the seasonal availability of their resources but also to the ceremonial
7 activities and social gatherings that occur throughout the year. The Nez Perce's intimate
8 knowledge and continuous use of their aboriginal homeland over millennia has created a unique
9 and reverential bond between people and place that defines Nez Perce culture and identity.
10
11

12 12.

13 In 1855, the Tribe negotiated a Treaty with the United States in which it reserved certain
14 rights necessary to maintaining its culture and way of life, including:

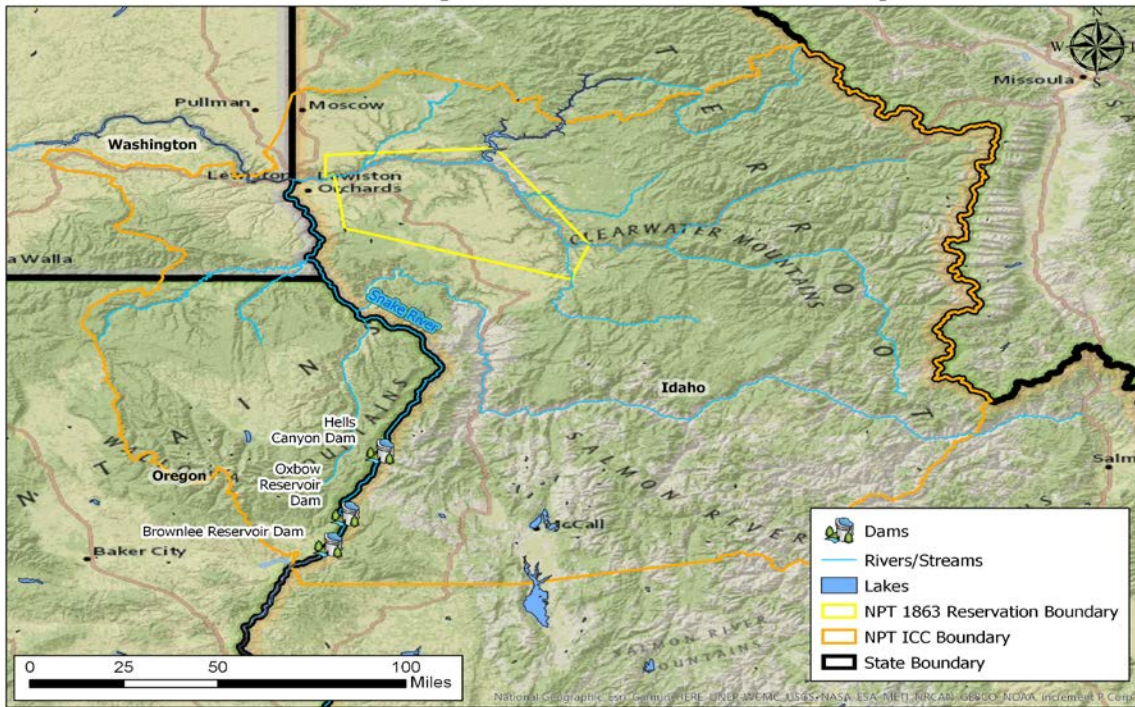
15 [T]he right of taking fish at all usual and accustomed places in common with citizens of
16 the Territory; and of erecting temporary buildings for curing, together with the privilege
17 of hunting, gathering roots and berries, and pasturing their horses and cattle upon open
18 and unclaimed land.
19

20 Treaty with the Nez Percés, June 11, 1855, Art. 3, 12 Stat. 957 (“1855 Treaty” or “Treaty”).
21

22 13.

23 The Project is geographically located within the Tribe’s homeland, within the area
24 adjudicated by the Indian Claims Commission to have been exclusively used and occupied by
25 the Tribe, *Nez Perce Tribe v. United States*, Docket #175, 18 Ind. Cl. Comm. 1, and within and
26 adjacent to an area in which the Tribe holds Treaty-reserved rights and resources.
27

Hells Canyon Dam Complex



14.

The Tribe has a significant interest in the Project because Nez Perce citizens continue to fish, hunt, gather, and pasture within and adjacent to the Project area, pursuant to the Tribe's Treaty-reserved rights.

15.

The Tribe, as co-manager of its Treaty-reserved fisheries resources, also has a significant interest in the Project, because the Tribe has spent considerable time and effort restoring and protecting its resources. The Nez Perce Tribe's Department of Fisheries Resources Management is one of the largest and most successful tribal fisheries programs in the United States. That Department is staffed by almost 200 employees, has an annual operating budget of over \$20 million, and works in the three-state area (north-central Idaho, northeastern

1 Oregon, and southeastern Washington) that corresponds to the Nez Perce homeland. The Tribe
2 has been instrumental in working to restore Columbia basin salmonids wisely, and in so doing,
3 protecting and enhancing the Tribe's Treaty-reserved rights and resources.
4

5 16.

6 The Tribe independently manages a state-of-the-art Tribal fish hatchery and a federal
7 hatchery, and co-manages an additional federal fish hatchery that is among the largest in the
8 country. The Tribe releases ten million salmon and steelhead annually from these and nine
9 acclimation sites it operates.
10

11 17.

12 The Tribe also aggressively pursues watershed restoration to ensure there is sufficient
13 habitat to support naturally spawning salmon and steelhead and their supplemented hatchery
14 counterparts. The Tribe's Research Division keeps track of juvenile migration and adult returns
15 in many Snake River basin rivers and streams and evaluates the effects of the Tribe's hatchery
16 supplementation efforts on wild origin returns. And, the Tribe also monitors Treaty harvest
17 (50% of the harvestable returns in the Snake River) and employs conservation officers to
18 enforce the regulations the Tribe has adopted to ensure fishing is consistent with the Tribe's
19 allocation and is responsive to the needs of Endangered Species Act-listed salmon and
20 steelhead.
21

22 18.

23 The Tribe has co-management responsibilities at Hells Canyon Dam for juvenile Snake
24 River spring Chinook and steelhead releases. The Tribe's spring Chinook and steelhead releases
25 are identified and agreed to in the *U.S. v. Oregon* Management Agreement (2018-2027 *United*
26
27

1 *States v. Oregon* Management Agreement, Civ. No. 3:68-cv-00513MO (D. Or), February 26,
2 2018, Dkt. 2607-1)¹ through the Annual Operations Plan process. The Tribe is deeply involved
3 in the details of how these fish are produced, released, and managed for harvest upon return to
4 the Snake River Basin. The Tribe's fall Chinook Acclimation Project at its Pittsburg Landing
5 facility, located 30 miles downstream of Hells Canyon Dam, also acclimates and releases
6 150,000 yearlings and 400,000 subyearling Snake River fall Chinook salmon annually.
7

8 19.

9 The Tribe worked with Idaho Power from 1998 to 2002 to evaluate how to rebuild
10 sturgeon populations in the Snake River between Lower Granite and Hells Canyon dams and
11 developed a sturgeon management plan from that work. The Tribe also collaborates with Idaho
12 Power and the U.S. Fish and Wildlife Service to conduct annual redd count surveys of Snake
13 River fall Chinook salmon in the Snake River and its principal tributaries.
14

15 20.

16 The Tribe is recognized by federal and state fisheries co-managers, land management
17 agencies, those entities involved in managing the Columbia River hydropower system, other
18 tribes, and the public for its indispensable role in the restoration of fisheries resources in the
19 Pacific Northwest.
20
21
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26 ¹ The *U.S. v. Oregon* Management Agreement was filed as an attachment to All Parties' Joint Motion and
27 Stipulated Order Approving 2018-2027 *United States v. Oregon* Management Agreement (Joint Mot., February 26,
2018, Dkt. 2607) and later approved by order of the Court (Order, May 21, 2018, Dkt. 2629).

1 21.

2 The Tribe is a “person” as defined in ORS 183.310(8) and has standing to bring this
3 action. Tribal citizens derive subsistence, recreational, aesthetic, scientific, commercial,
4 cultural, and spiritual benefits from the Snake River and its tributaries above, within, and below
5 the Project. The present and future enjoyment of Treaty-reserved resources including salmon,
6 steelhead, Pacific lamprey, bull trout, and white sturgeon by the Tribe and its citizens is, and
7 will continue to be, harmed by ODEQ’s final 401 certification order for the Project.
8

9 22.

10 Respondent, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, is the
11 state agency responsible for, among other duties, certifying, under § 401 of the CWA, that
12 federally-licensed hydroelectric projects with discharges originating in Oregon, including the
13 Project, do not violate Oregon water quality standards and other requirements of state law. 33
14 U.S.C. § 1341. Richard Whitman is the director of ODEQ.
15

16 **JURISDICTION AND VENUE**

17 23.

18 This Court has jurisdiction pursuant to ORS 183.310, 183.480, and 183.484.. Venue is
19 proper under ORS 183.484(1).
20

21 **APPLICABLE LEGAL REQUIREMENTS**

22 **A. Clean Water Act and “Reasonable Assurance”**

23 24.

24 The objective of the CWA is “to restore and maintain the chemical, physical, and
25 biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). To achieve this objective, an
26
27

1 applicant for a federal license for any activity that may result in a discharge into a navigable
2 water of the United States, including hydroelectric dams, must obtain a water quality
3 certification from the state in which the discharge will originate before FERC may issue a
4 license for the activity. 33 U.S.C. § 1341(a)(1). State-issued 401 certifications impose
5 limitations on activities that may result in a discharge to ensure such activities comply with state
6 water quality standards, including numerical criteria, narrative criteria, and designated uses. *Id.*
7 at 1341(d); 40 C.F.R. § 131.3.

8
9
10 25.

11 All 401 certifications must include a statement “that there is a reasonable assurance that
12 the activity [in question] will be conducted in a manner which will not violate applicable water
13 quality standards.” 40 C.F.R. § 121.2(a)(3). Congress gave states, through CWA § 401,
14 “authority to place any conditions on a water quality certification that are necessary to assure
15 that the applicant will comply with effluent limitations, water quality standards, [...] and with
16 ‘any appropriate requirements of state law.’” *PUD No. 1 of Jefferson Cty. v. Washington Dep’t.*
17 *of Ecology*, 511 U.S. 700, 712 (1994) (internal citation omitted); 33 U.S.C. § 1341(a)(d); 8
18 C.F.R. §4.34 (b)(5). Fish passage is an appropriate requirement of state law. *Am. Rivers, Inc. v.*
19 *F.E.R.C.*, 129 F.3d 99, 102 (2d Cir. 1997). State 401 certification conditions are incorporated
20 into any federal license. *PUD No. 1 of Jefferson Cty.*, at 708.

21
22
23 26.

24 CWA § 511(a)(3) provides that the CWA shall not be interpreted as “affecting or
25 impairing the provisions of any treaty of the United States.” 33 U.S.C. § 1371. This provision
26 applies to certifications issued under § 401 of the CWA. *City of Imperial Beach v. Int’l.*

1 *Boundary & Water Comm’n., United States Section*, 356 F. Supp. 3d 1006, 1015 (S.D. Cal.
2 2018) (“[§ 511(a)(3)] is a general provision applicable to the entirety of the CWA.” “Absent
3 application of any other canon of construction, ‘affect’ and ‘impair’ should be construed
4 broadly in favor of the sovereign.” *Id.* at 1016.
5

6 **B. Oregon’s Fish Passage Requirement**

7 27.

8 ORS 543.015(1), (2) provides: “[I]t is the policy of the State of Oregon [t]o protect the
9 natural resources of this state from possible adverse impacts caused by the use of the waters of
10 this state for the development of hydroelectric power” and to “permit siting of hydroelectric
11 projects subject to strict standards established to protect the natural resources of Oregon.”
12

13 28.

14 ORS 509.585(1) provides: “It is the policy of the State of Oregon to provide for
15 upstream and downstream passage for native migratory fish” and “fish passage is required in all
16 waters of this state in which native migratory fish are currently or have historically been
17 present.” Fish passage is required unless an artificial obstruction meets one of the following
18 specific exemptions outlined in the statute:
19

- 20 ● ORS 509.585(5) authorizes the Oregon Department of Fish and Wildlife
21 (“ODFW”) and the person owning or operating the artificial obstruction to
22 “negotiate the terms and conditions of fish passage *or alternatives to fish*
23 *passage.*” (Emphasis added).
24
25
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27

1 (a) The court may affirm, reverse or remand the order. If the court finds that the agency
2 has erroneously interpreted a provision of law and that a correct interpretation compels a
3 particular action, it shall:

4 (A) Set aside or modify the order; or

5 (B) Remand the case to the agency for further action under a correct
6 interpretation of the provision of law.
7

8 (b) The court shall remand the order to the agency if it finds the agency's exercise of
9 discretion to be:

10 (A) Outside the range of discretion delegated to the agency by law;

11 [...]

12 (C) Otherwise in violation of a constitutional or statutory provision.
13

14 (c) The court shall set aside or remand the order if it finds that the order is not supported
15 by substantial evidence in the record. Substantial evidence exists to support a finding of
16 fact when the record, viewed as a whole, would permit a reasonable person to make that
17 finding.
18

19 **FACTS**

20 **A. Tribe's Long and Extensive Involvement in the Project's Relicensing.**

21 30.

22 The Project was built between 1958 and 1967 and is owned and operated by Idaho
23 Power, which is the chief operating subsidiary of holding company IDACORP Inc. FERC's
24

1 original license for the Project expired in 2005. Since then, Idaho Power has been operating the
2 Project under annual licenses issued by FERC.

3
4 31.

5 For over two decades, the Tribe has been actively involved in FERC's relicensing
6 proceedings for the Project. The Tribe has consistently advocated for the adoption of 401
7 certifications for the Project that are protective of the Tribe's Treaty-reserved rights and
8 resources due to the central role water quality plays in the protection of the Tribe's Treaty-
9 reserved fish resources and in the health and welfare of the Tribe's citizens who exercise the
10 Tribe's Treaty-reserved rights in Oregon waters.

11
12 32.

13 The Tribe has repeatedly requested that ODEQ comprehensively and definitively
14 address, in its 401 certification for the Project, fish passage and methylmercury production at
15 the Project, along with the Project's effect on downriver temperatures. The Tribe has made
16 these requests in comments on ODEQ's draft 401 certifications for the Project and in various
17 other forums over the years. The Tribe has also been actively involved in regional
18 intergovernmental water quality discussions and has had direct conversations with Idaho Power
19 regarding the Project's impacts on the Tribe's Treaty-reserved resources.

20
21 **B. The Project's Obstruction of Fish Passage**

22
23 33.

24 Historically, over one million adult anadromous Pacific salmon and steelhead spawned and
25 reared in the Snake River and its tributaries upstream from Hells Canyon Dam, in eastern
26 Oregon, southern Idaho, and Wyoming.

1
2 34.

3 The completed Project blocked anadromous fish migration and production in the Snake
4 River basin, extirpating native, anadromous fish species—including fall and spring Chinook
5 salmon, summer steelhead, and Pacific lamprey—from a large portion of their historic range in
6 the Snake River and its tributaries, including the Pine, Powder, Burnt, Owyhee, and Malheur
7 river basins in Oregon.
8

9
10 35.

11 In addition to preventing native, anadromous fish species from migrating to historic
12 spawning, rearing, and holding habitat, the Project also isolates other native migratory fish
13 species populations above, within, and below the Project, including Endangered Species Act-
14 listed bull trout, state sensitive redband trout, mountain whitefish, and white sturgeon. These
15 species have relied on migration to complete their life cycle for millennia and have, historically,
16 used the mainstem Snake River above, within, and below Project's dams for rearing and as a
17 migration corridor. The isolation imposed on these species by the Project has fragmented
18 populations and habitat and reduced anadromous and resident fish abundance within some
19 segments. Predation and the presence of non-native fish species in Project reservoirs has also
20 decreased resident fish production and increased mortality.
21

22
23 36.

24 Because the Project has eliminated numerous anadromous and resident, there are fewer
25 fish harvest opportunities for Nez Perce Tribal citizens and sport anglers in Oregon. The Tribe
26 is particularly concerned about the significant impact that the Project's lack of fish passage has
27

1 on the Tribe’s Treaty-reserved rights and resources and on Oregon’s “Fishing” and “Fish &
2 Aquatic Life” beneficial uses in tributaries upstream of Hells Canyon Dam.

3
4 37.

5 Oregon’s designated beneficial uses for the Snake River and its tributaries are provided
6 at OAR 340-041-0007 and include “Fishing” and “Fish & Aquatic Life.” ODEQ states in its
7 Evaluation and Findings Report for its 401 certification: “The Project’s significant impact to
8 beneficial uses in Oregon tributaries upstream of the Hells Canyon Dam is of particular
9 concern. [...] Project dams currently interrupt or prevent the safe, timely and effective passage
10 on migratory fish upstream, downstream and between Project segments [...] eliminating access
11 to and reducing available spawning, rearing, and holding habitat.”

12
13 38.

14 Fish play an important role in aquatic ecosystems. Fish often create linkages between
15 different habitat types because of their role as top consumers within the food web, their high
16 mobility, and their variety of foraging strategies. The loss of fish in a habitat can, therefore, alter
17 the biological, physical, and chemical components of the habitat, compromising its ecological
18 integrity.

19
20 39.

21 The annual return of anadromous fish contributes significant quantities of marine-
22 derived nutrients to inland ecosystems that have limited geologic nutrients. Many animal and
23 plant species in riparian ecosystems make direct and/or indirect use of the marine derived
24 nutrient subsidy increasing riparian vegetation growth.

1 relating to the introduction or reintroduction of fish above, below, or within the Project, or fish
2 production, fish placement, monitoring or studies, fish habitat restoration or evaluation, or fish
3 collection.”

4
5 46.

6 ODEQ expressly acknowledges in its Evaluations and Findings Report that it must act
7 on an application for certification in a manner consistent with state requirements, including the
8 fish passage requirement in ORS 509.585. The final 401 certification ODEQ issued for the
9 Project on May 24, 2019, however, conformed to the 2019 Stipulation and Implementation
10 Agreement and contains no fish passage requirement for the life of the new FERC license.
11

12 **C. Mercury/Methylmercury**

13 47.

14 Methylmercury is an organic form of mercury. Organisms found in soil and water can
15 convert inorganic mercury into an organic mercury compound, methylmercury, through a
16 process known as “methylation.”
17

18 48.

19 Methylmercury is a bioaccumulative environmental toxicant that biomagnifies in aquatic
20 food chains. This means that at each level of the food chain the concentration of methylmercury
21 in organisms increases, reaching levels many times higher in top predators than that found in the
22 water column. Because methylmercury is not effectively eliminated by metabolic systems, it
23 continues to accumulate in fish as they age, making consuming the older, predatory fish, such as
24 sturgeon, dangerous to human health.
25
26
27

1 49.

2 Most human methylmercury exposure comes from eating fish and other aquatic life and
3 can cause various health issues, especially in fetuses and children.
4

5 50.

6 The formation and presence of methylmercury within the Project, including its discharge
7 to areas downstream of the Project, provides for the bioconcentration and accumulation of
8 mercury in living organisms and the food chain.

9 **(a) Oregon’s Mercury/Methylmercury Water Quality Standards**
10

11 51.

12 Oregon’s applicable aquatic human health water quality criteria for toxic pollutants for
13 methylmercury is provided at OAR 340-041-8033. The criterion for the protection of human
14 health is an “organism only” concentration expressed as 0.040 milligrams per kilogram
15 (“mg/kg”) methylmercury, as measured in contaminated fish and shellfish.
16

17 **(b) Oregon and Idaho Have Failed for 13 Years to Issue a Mercury TMDL**

18 52.

19 The Snake River is listed as water-quality limited under § 303(d) of the CWA, between
20 the Snake River’s intersection with the Oregon/Idaho border at river mile 409 to immediately
21 above the confluence of the Salmon River at river mile 188 (“Hells Canyon reach”), due to
22 ongoing violations of water quality standards for Oregon and Idaho. As required by 33 U.S.C §
23 1313 of the CWA, ODEQ and IDEQ issued a Total Maximum Daily Load (“TDML”) in 2004
24 for the Hells Canyon reach of the Snake River (“Hells Canyon TMDL”). The Hells Canyon
25 TMDL issued allocation loads to the Project for mercury and temperature as well as dissolved
26
27

1 oxygen, nutrients, pH, sediment, and total dissolved gas. The Hells Canyon TMDL was also
2 supposed to include mercury load allocations. However, because there was very little water
3 column data available, ODEQ, IDEQ, and the Environmental Protection Agency (“EPA”)
4 agreed to reschedule the issuance of a mercury TMDL for Snake River’s Hells Canyon reach for
5 December 2006. The date change was to allow the states to collect additional data and to give
6 Oregon time to develop a model for site-specific bioaccumulation factors.

8 53.

9 According to ODEQ's and IDEQ's 2004 Hells Canyon TMDL, data available at the time
10 "show[ed] that mercury concentrations in the [Hells Canyon] reach of the Snake River exceed
11 the fish tissue target established by this TMDL." The Hells Canyon TMDL states:
12

13 All fish tissue data available in this reach were positive for mercury. A summary of
14 these data show that the Oregon and Idaho levels of concern were exceeded by 80%
15 (0.35 mg/kg) and 52% (0.5 mg/kg) respectively. Both states have acted to issue fish
16 consumption advisories based on these exceedances. Primary sources of mercury within
17 the [Hells Canyon] TMDL reach are legacy mining and natural loading. Both are
18 associated with geological deposits of mercury within the Owyhee and Weiser
19 watersheds. Based on these findings, and on the concerns associated with consumption
20 of fish by both waterfowl and wildlife within the [Hells Canyon] TMDL reach, a TMDL
21 is considered necessary.
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1 54.

2 The Hells Canyon TMDL also described the relationship between
3 mercury/methylmercury and its presence upstream, within, and its transport downstream of the
4 Project. It states:
5

6 There is a relationship between mercury concentrations observed in bed sediments and
7 those observed in the tissue of resident fish. Methylmercury produced in the Upstream
8 Snake River segment ([river mile] 409 to 335) and Brownlee Reservoir segment ([river
9 mile] 335 to 285), has the potential to affect not only local aquatic life but also
10 downstream species as well, as the methylmercury produced will be carried downstream
11 by flowing water. Organic matter accumulating from algal growth and nutrient
12 enrichment in the Upstream Snake River segment ([river mile] 409 to 335) is of
13 particular concern as it accumulates in the area between [river mile] 340 and [river mile]
14 320, the location identified as exhibiting the highest concentrations of sediment-
15 associated mercury within the TMDL reach. This condition has the potential to
16 exacerbate the conversion of inorganic mercury to methylmercury within this reach and
17 contribute to higher methyl-mercury concentrations in the Hells Canyon Complex
18 reservoirs and further downstream.
19
20

21 55.

22 To date, neither ODEQ nor IDEQ have issued a mercury TMDL for the Snake River's
23 Hells Canyon reach and neither agency has announced any intention to develop or complete one
24 in the near future.
25
26
27

1 than four feet in length had methylmercury levels greater than 1.000 mg/kg,
2 **amounting to 25 times higher** than Oregon’s allowable methylmercury fish
3 tissue standard of 0.040 mg/kg. Thirty eight percent of sturgeon greater than six
4 feet in length had methylmercury levels greater than 2.000 mg/kg and as high as
5 3.000 mg/kg (**50 and 75 times higher than Oregon’s methylmercury**
6 **standard**).

- 8 ● Smallmouth Bass: Samples were taken from fish in the Snake River downstream
9 to the confluence with the Salmon River. Sixty eight out of seventy samples from
10 smallmouth bass greater than twelve inches long had methylmercury levels
11 greater than 0.300 mg/kg and as high as 0.750 mg/kg (**7.5 and 18.75 times**
12 **higher, respectively, than Oregon’s methylmercury standard**).

- 14 ● Bull Trout: Samples were taken from fish in the Imnaha River (tributary of the
15 Snake River downstream of the Project). Methylmercury levels ranged from
16 0.076 to 0.383 mg/kg (**1.9 and 9.6 times higher, respectively, than Oregon’s**
17 **methylmercury standard**).

19 58.

20 Idaho Power’s collection of fish tissue data upstream, within, and below the Project
21 confirms that the water quality limited status on the 2012 integrated report for the Snake River
22 remains justified. Idaho Power acknowledged to ODEQ that “[l]evels of methyl mercury
23 generally increases in fish tissue downstream through the [Project’s] reservoirs, [...] with some
24 of the higher levels immediately below Hells Canyon Dam.”
25

- Within 180 days of completion of the report on key processes, Idaho Power shall run a series of management scenarios to evaluate how to minimize, to the maximum extent practicable, the Project's effect on methylmercury production.
- Within 180 days following completion of the management scenarios, Idaho Power shall propose to ODEQ and IDEQ a methylmercury management plan to address the Project's role in methylmercury production.
- After consultation with IDEQ, and once approved by ODEQ, Idaho Power shall implement the methylmercury management plan in accordance with ODEQ's approval.

D. Temperature

67.

Water temperature has a profound effect on organisms that live or reproduce in the water. This is particularly true of native "cold water" fish in Oregon such as salmon, bull trout, and steelhead. When water temperature becomes too high, salmonids suffer a variety of ill effects. These include the sub-lethal effects of impaired feeding, decreased growth rates, reduced resistance to disease and parasites, increased sensitivity to toxics, additional stress during migration, reduced ability to compete with more temperature-resistance species and increased vulnerability to predation. If temperatures are high enough for sustained periods, mortality occurs.

68.

The Snake River, downstream of the Project, is listed as water-quality limited for temperature under § 303(d) of the Clean Water Act. 33 U.S.C. § 1313(d). The Hells Canyon

1 TMDL identified a 13° Celsius maximum weekly maximum temperature target for salmonid
2 spawning. Oregon's salmon and steelhead spawning temperature criteria below the Project is
3 also a maximum seven-day-average maximum temperature not to exceed 13° Celsius (from
4 October 23 through April 15 from the Hells Canyon Dam to the confluence of the Salmon River
5 and from November 1 through May 15 from the confluence of the Salmon River to the
6 Oregon/Washington border). OAR 340-041-0028(4)(a).

8 69.

9 The 13° Celsius salmonid spawning criterion and target has not been met since at least
10 1991. Since 1991, the seven-day-average maximum temperature of the Snake River on October
11 29th, during the spawning period, has exceeded 16.5° Celsius in 2003, 2010, 2014, and 2015.

13 70.

14 The Project's operations cause a shift in downriver temperatures from those that would
15 occur had the Project not been constructed. Peak downriver temperatures in the summer are
16 cooler than they would be otherwise and downriver temperatures in the fall are warmer than
17 they would be otherwise due to the Project slowing the pace at which upriver warm water
18 moves downstream.

20 71.

21 Under the Hells Canyon TMDL, the Project is responsible for exceedances of salmonid
22 spawning criteria. Idaho Power's thermal load allocation is, therefore, no greater than a
23 maximum weekly maximum temperature of 13° Celsius, when the inflow temperature to
24 Brownlee Reservoir is less than a maximum weekly maximum temperature of 13° Celsius. If
25 inflow water temperatures exceed 13° Celsius during the salmonid spawning period, Project
26
27

1 operations can only raise outflow temperatures by 0.14° Celsius over inflow temperatures. This
2 temperature load allocation, like Oregon’s 13° Celsius salmonid spawning criterion, applies
3 from October 23 through April 15 for salmonid spawning and from November 1 through March
4 30 for mountain whitefish spawning.
5

6 72.

7 Because the actual river temperatures downstream of the Project have exceeded
8 Oregon’s 13° Celsius criterion for salmonid spawning since 1991, and the Project’s temperature
9 load allocation since it was implemented in 2004, ODEQ has chosen, in its 401 certification, an
10 operative management temperature threshold of 16.5° Celsius below the Project during
11 salmonid spawning. ODEQ’s 16.5° Celsius management threshold is not a water quality
12 standard. Rather, 16.5° Celsius is a fish management trigger for adjusting Project operations.
13

14 **(a) Idaho Power’s Temperature Plan**

15 73.

16 Idaho Power developed a “Temperature Management and Compliance Plan” for meeting
17 Oregon’s and Idaho’s temperature water quality standards, and ODEQ’s 401 certification
18 requires that Idaho Power implement this Temperature Management and Compliance Plan,
19 which has two components: the Snake River Stewardship Program and the Brownlee
20 operational component.
21

22 74.

23 The first component of the Temperature Management and Compliance Plan, the Snake
24 River Stewardship Program, is a large-scale watershed restoration plan, encompassing dozens
25 of small restoration projects upstream of the Project in the mainstem Snake River and its
26
27

1 tributaries, many of which require volunteer private landowner participation. Each project is
2 intended to help offset the Project's Hells Canyon TMDL thermal load exceedances below the
3 Project. Accordingly, under the 401 certification, Idaho Power must quantify each implemented
4 project's thermal benefits. The 401 certification's 15 and 30-year earned thermal benefit/credit
5 requirement is 595.8 bkcal and 1191.6 bkcal respectively. If Idaho Power's Snake River
6 Stewardship Program projects are able to earn the requisite credits by years 15 and 30, Idaho
7 Power does not have to meet its temperature load allocation for the Snake River below the
8 Project.
9

10
11 75.

12 The second component of the Temperature Management and Compliance Plan, the
13 Brownlee operational component, is not intended to meet Oregon's 13.0° Celsius salmonid
14 spawning criterion (as required by the Hells Canyon TMDL), but rather to prevent exceeding
15 the 16.5° Celsius temperature management threshold. The Brownlee operational component is
16 an ongoing requirement of Idaho Power that hinges on Idaho Power's forecast of the 7-day
17 average maximum temperatures for the Project's outflow from the Hells Canyon Dam. If the
18 forecast for the beginning of the salmonid spawning period indicates a high probability that
19 temperatures will exceed the 16.5° Celsius 7-day average maximum management temperature
20 threshold, then Idaho Power, under the Temperature Management and Compliance Plan, has to
21 adjust its drafting of the Brownlee Reservoir to attempt to achieve 16.5° Celsius in the Snake
22 River downstream of the Project.
23
24

1 76.

2 ODEQ acknowledges in its 401 certification that the Snake River Stewardship Program
3 and the Brownlee operational component may not be sufficient to provide reasonable assurance
4 that the Project will not violate the Oregon’s water quality standards for temperature and
5 specifically relies on the existence of a corrective action plan to find it has reasonable assurance
6 Oregon water quality standards will be met.
7

8 In conclusion, the DEQ finds that the specificity of reporting and monitoring in the
9 [Snake River Stewardship Program] and implementation of the Brownlee operational
10 component, in combination with an identified corrective action (Plan B) triggered should
11 the required number of projects fail to be achieved by year 15 or the temperature below
12 Hells Canyon dam exceeds 16.5°C three years in a row, will collectively prevent any
13 serious damage to existing uses before such would occur. Accordingly, the DEQ is
14 reasonably assured that Project operation under a new FERC license will comply with
15 the temperature criteria provided IPC complies with the certifications conditions.
16
17

18 77.

19 The corrective action plan ODEQ relied on to find it has reasonable assurance that
20 Oregon temperature water quality standards will be met, is referred to in the 401 certification as
21 “Temperature Alternative Measures.” Temperature Alternative Measures are “methods or
22 approaches not included in the [Temperature Management and Compliance Plan (i.e. Snake
23 River Stewardship Program and Brownlee operational component)] that will provide, or assist
24 in providing, reasonable assurance that the required thermal benefits will be achieved, or in the
25
26
27

1 case of Plan B, reasonable assurance that the [Hells Canyon] TMDL temperature load allocation
2 and applicable temperature criteria will be met.”

3
4 78.

5 “Plan B” is the only specifically identified Temperature Alternative Measure in the 401
6 certification. Plan B that calls for the possible construction of a hypolimnetic pump system in
7 Brownlee Reservoir in the life of the next license. The hypolimnetic pump system is expected to
8 blend cooler water from the hypolimnion of the Brownlee Reservoir with warmer upper level
9 waters so that cooler water moves through the Project, cooling the Snake River downstream of
10 the Project.
11

12 79.

13 Idaho Power has concluded there is sufficient cold water in Brownlee Reservoir in
14 October in order to meet Oregon’s salmonid spawning temperature criterion using the
15 hypolimnetic pump system for a maximum of two weeks in some years.
16

17 80.

18 ODEQ’s 401 certification fails to require Idaho Power to analyze and disclose the
19 effects of Plan B prior to issuing the 401 certification and fails to require that Idaho Power to
20 construct the hypolimnetic pump system as soon as FERC issues a new license. This means that
21 ODEQ has issued the 401 certification without first understanding how Plan B will achieve the
22 Project’s thermal load allocation and other applicable temperature criteria; without first
23 conducting an evaluation of whether Plan B will cause or contribute to a violation of applicable
24 water quality standards (and how to prevent such violations); and without first determining the
25 state and federal permits needed and the process and time needed for acquiring them.
26
27

1 81.

2 ODEQ's 401 certification treats Plan B as entirely discretionary and fails to require
3 Idaho Power, at the time the FERC license is issued, to either have completed an evaluation of
4 the effects of Plan B or to have it ready for implementation. Rather, it postpones evaluation of
5 effects and schedule for implementation until if and when ODEQ and IDEQ decide to: 1)
6 approve a plan for Plan B; 2) require Idaho Power to implement a plan for Plan B because
7 temperatures downstream of the Project have exceeded 16.5° Celsius in three consecutive years;
8 or 3) the Snake River Stewardship Program does not appear reasonably likely to earn the 15 and
9 30-year thermal credits required.
10
11

12 **FIRST CLAIM FOR RELIEF**

13 **Fish Passage**

14 **(ORS 509.585; ORS 183.480; 33 U.S.C. § 1341)**

15 82.

16 The Tribe realleges and incorporates by reference all preceding paragraphs.
17

18 83.

19 ODEQ's 401 certification constitutes a "final order" as defined in ORS 183.310(6)(b).
20

21 84.

22 In issuing its 401 certification for the Project, ODEQ has erroneously interpreted ORS
23 509.585 and 33 U.S.C. § 1341 or is otherwise in violation of these statutory provisions. ORS
24 183.484(5)(a), (5)(b)(C). ODEQ has also acted outside the range of discretion delegated to it by
25 law. ORS 183.484(5)(b)(A).
26
27

1 85.

2 ORS 509.585 requires fish passage at all artificial obstructions to provide for upstream
3 and downstream passage for native migratory fish that are currently, or have been historically,
4 absent, unless the ODFW Commission has made specific findings for a waiver of, or exemption
5 to, the fish passage requirement in ORS 509.585, which the ODFW Commission has not done.
6

7 86.

8 Under the CWA, states must certify that they are “reasonably assured” that federally-
9 licensed hydroelectric projects will not violate state water quality standards, including
10 numerical criteria, narrative criteria, and designated uses. 33 U.S.C. § 1341(d); 40 C.F.R. §
11 121.2.
12

13 87.

14 As a result of the 2019 Implementation and Settlement Agreement, ODEQ has
15 erroneously interpreted or otherwise violated ORS 509.585 and exceeded its discretion by
16 failing to require fish passage, an appropriate requirement of state law, in its 401 certification
17 for the Project’s new license term.
18

19 88.

20 ODEQ also erroneously interpreted or otherwise violated 33 U.S.C. § 1341 and
21 exceeded its discretion when it failed to support beneficial uses upstream of Hells Canyon Dam
22 by requiring fish passage in the 401 certification.
23

24 89.

25 ODEQ is, therefore, in violation of ORS 509.585, 33 U.S.C. § 1341, and 40 C.F.R. §
26 121.2 for failing to require fish passage in its 401 certification.
27

1 **SECOND CLAIM FOR RELIEF**

2 **Mercury**

3 **(ORS 183.480; 33 U.S.C. § 1341)**

4 90.

5 The Tribe realleges and incorporates by reference all preceding paragraphs.

6 91.

7 ODEQ's 401 certification constitutes a "final order" as defined in ORS 183.310(6)(b)

8 92.

9 In issuing its 401 certification for the Project, ODEQ has acted outside the range of
10 discretion delegated to it by the CWA, 33 U.S.C. § 1341, and issued an order that is not
11 supported by substantial evidence in the record. ORS 183.484(5)(b)(A), (5)(c).

12 93.

13 Under the CWA, states must certify that they are "reasonably assured" that federally-
14 licensed hydroelectric projects comply with state water quality standards, including numerical
15 criteria, narrative criteria, and designated uses. 33 U.S.C. § 1341(d); 40 C.F.R. § 121.2.

16 94.

17 Oregon's criterion for the protection of human health is an "organism only"
18 concentration expressed as 0.040 milligrams per kilogram ("mg/kg") methylmercury, as
19 measured in contaminated fish and shellfish. OAR 340-041-8033.

20 95.

21 According to Oregon's 2018 Integrated Report for CWA § 303(d) listings for the Snake
22 River in the Project vicinity and Idaho Power's fish tissue data, the mercury concentrations
23

1 violate Oregon’s criterion of 0.040 (mg/kg) for the protection of human health. In the case of
2 white sturgeon, smallmouth bass, and bull trout fish tissue samples taken in and adjacent to the
3 Project, the violations are documented to significantly exceed Oregon’s methylmercury
4 criterion for the protection of human health.
5

6 96.

7 ODEQ’s CWA § 401 certification conditions for methylmercury include a requirement
8 that Idaho Power develop a series of management scenarios for reducing methylmercury “to the
9 maximum extent practicable.” Based on these management scenarios, Idaho Power is required
10 to develop a methylmercury management plan to “address the Hells Canyon Complex’s role in
11 methyl mercury production.” (Emphasis added.) ODEQ’s methylmercury management plan
12 condition also requires, “[a]fter consultation with IDEQ and once approved by ODEQ, Idaho
13 Power shall implement the methyl mercury management plan in accordance with ODEQ’s
14 approval.” (Emphasis added).
15

16 97.

17 ODEQ’s methylmercury conditions fail to specify by how much Idaho Power must
18 reduce methylmercury caused by the Project and fail to require that Project methylmercury
19 contributions actually be reduced during the life of the next FERC license. ODEQ’s 401
20 certification conditions also fail to require that ODEQ even approve a methylmercury
21 management plan within the life of the FERC license.
22

23 98.

24 In issuing its 401 certification for the Project, ODEQ has acted outside the range of
25 discretion delegated to it by the CWA, 33 U.S.C. § 1341, because its 401 certification provides
26
27

1 no timelines, milestones, or other conditions requiring ODEQ to approve and Idaho Power to
2 implement, a methylmercury management plan to reduce the Project's contribution of
3 methylmercury during the new license term to levels that will not violate Oregon's
4 methylmercury human health criteria. The record also lacks substantial evidence that the
5 mercury/methylmercury plan ODEQ has approved in its 401 certification will ensure the Project
6 complies with Oregon water quality standards for mercury/methylmercury.
7

8 99.

9 Consequently, ODEQ has no assurance, reasonable or otherwise, in ODEQ's CWA Act
10 § 401 certification that the Project will not result in violation of state water quality standards for
11 mercury/methylmercury. ODEQ is, therefore, in violation of 33 U.S.C. § 1341; 40 C.F.R. §
12 121.2(a)(3).
13

14 **THIRD CLAIM FOR RELIEF**

15 **Temperature**

16 **(ORS 183.480; 33 U.S.C. § 1341)**

17 100.

18 Nez Perce Tribe realleges and incorporates by reference all preceding paragraphs.

19 101.

20 ODEQ's 401 certification constitutes a "final order" as defined in ORS 183.310(6)(b)

21 102.

22 In issuing its 401 certification for the Project, ODEQ has acted outside the range of
23 discretion delegated to it by the CWA 33 U.S.C. § 1341, and issued an order that is not
24 supported by substantial evidence in the record. ORS 183.484(5)(b)(A), (5)(c).
25
26
27

1 103.

2 Under the CWA, states must certify that they are “reasonably assured” that federally-
3 licensed hydroelectric projects will not violate water quality standards, including numerical
4 criteria, narrative criteria, and designated uses. 33 U.S.C. § 1341(d); 40 C.F.R. § 121.2.
5

6 104.

7 ODEQ acknowledges that Idaho Power’s proposed Temperature Management and
8 Compliance Plan does not, in itself, provide reasonable assurance that Oregon’s water quality
9 standards will not be violated by the Project. Rather, ODEQ states that it is the temperature
10 contingency plan, the Temperature Alternative Measures Plan, that provides reasonable
11 assurance that the Project will meet state water quality standards.
12

13 105.

14 In issuing its 401 certification for the Project, ODEQ has acted outside the range of
15 discretion delegated to it by the CWA, 33 U.S.C. § 1341, and has issued an order that is not
16 supported by substantial evidence in the record because the Temperature Alternative Measures
17 Plan, cannot bring the Project into compliance with Oregon’s temperature spawning criterion
18 and the Project’s load allocation under the Hells Canyon TMDL of 13° Celsius (or 3.14°
19 Celsius) from October 23 through April 15, in all years and in all river conditions. Thus, the
20 Temperature Alternative Measures Plan, will not ensure compliance with state water quality
21 standards and ODEQ has not identified any other specific measures for ensuring Oregon’s
22 spawning criterion will not be violated below the Project.
23
24
25
26
27

ODEQ is, therefore, in violation of 33 U.S.C. § 1341; 40 C.F.R. § 121.2(a)(3) because it has no reasonable assurance that the Project will not result in violation of state water quality standards for temperature.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court, exercising its authority under ORS 183.484, issue a Judgment and Decree that:

- (a) Declares ODEQ violated the CWA, its implementing regulations, and/or Oregon law when issuing its CWA § 401 certification for the Project;
- (b) Declares that ODEQ’s CWA § 401 certification for the Project has erroneously interpreted a provision of law, otherwise in violation of a constitutional or statutory provision, outside the range of discretion delegated to the agency by law, and not supported by substantial evidence and is unlawful;
- (c) Sets aside the CWA § 401 certification for the Project and remands it to ODEQ with instructions to comply with the law;
- (d) Awards Petitioner reasonable attorney fees and costs under ORS 183.497, ORS 182.090, and/or any other relevant provision of law; and
- (e) Awards Petitioner such other relief as this Court deems just and proper.

Dated this 23rd day of July, 2019.

/s/ Amanda Wright Rogerson
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