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

UPPER CROOKED RIVER  
CONSERVATIONISTS, an Oregon  
nonprofit corporation; and SHOTGUN  
RANCH, L.L.C., an Oregon limited liability  
company,

Plaintiffs/Petitioners,

v.

WATER RESOURCES DEPARTMENT of  
the State of Oregon and WATER  
RESOURCES COMMISSION of the State of  
Oregon,

Defendants/Respondents.

Case No. 23CV46779

**WATERWATCH OF OREGON'S  
MOTION TO INTERVENE**

*[Case involves water rights]*

**MOTION**

WaterWatch of Oregon (“WaterWatch”) hereby moves this Court for an order allowing it to intervene in this matter as an intervenor-respondent. This motion is supported by the points and authorities below as well as by the accompanying Declaration of Kimberley Priestley (“Priestley Decl”). A proposed motion to dismiss is included as Exhibit 1 to this motion to intervene.

Counsel for WaterWatch has conferred with counsel for Petitioners and counsel for Respondents. Respondents take no position on WaterWatch’s motion to intervene. Petitioners cannot take a position until they have had time to review this motion.

1 **POINTS AND AUTHORITIES**

2 **A. Introduction**

3 WaterWatch has long been involved in efforts to secure legal protection for flows in  
4 the Crooked River adequate to support a healthy ecosystem. Priestley Decl ¶¶ 6–9. Relevant to  
5 this case, WaterWatch invested significant time and energy advocating for and helping  
6 develop the Crooked River Collaborative Water Security and Jobs Act of 2014 (“Crooked  
7 River Act”), Pub. L. No. 113-244 (2014), which is supposed to help ensure that the U.S.  
8 Bureau of Reclamation (“Reclamation”) stores and releases sufficient quantities of water  
9 from the Prineville Reservoir to protect downstream fish and wildlife. Priestley Decl ¶ 7. In  
10 order to implement the Crooked River Act, Reclamation applied for and was granted by  
11 Respondent Oregon Water Resources Department (“OWRD”) a secondary permit for the use  
12 of up to 78,887 acre-feet of water stored in the Prineville Reservoir under certificate 93660,  
13 with at least 68,887 acre-feet of that water for fish use and wildlife use in the river channel of  
14 the Crooked River from Bowman Dam downstream to Lake Billy Chinook.

15 This lawsuit seeks to invalidate that secondary permit, threatening to undermine the  
16 implementation of the Crooked River Act. Because of WaterWatch’s longstanding support  
17 for increased, legally protected flows in the Crooked River, its advocacy for the Crooked  
18 River Act in particular, and its members’ concerns about protecting healthy flows in the  
19 Crooked River, WaterWatch has an interest in this case sufficient to warrant intervention.  
20 And, because granting intervention would not unduly delay the proceedings or prejudice any  
21 party, WaterWatch’s motion to intervene should be granted.

22 **B. Legal Standard**

23 This Court may, at any time before trial, allow “any person who has an interest in the  
24 matter in litigation [to] ... intervene.” ORCP 33 C. “In exercising its discretion, the [C]ourt  
25 shall consider whether the intervention will unduly delay or prejudice the adjudication of the  
26 rights of the original parties.” ORCP 33 C.

1                   **C. WaterWatch Should Be Granted Intervention.**

2                   1. *WaterWatch Has a Sufficient Interest to Justify Intervention.*

3                   WaterWatch is a 501(c)(3) nonprofit founded in 1985. Priestley Decl ¶ 3.

4 WaterWatch works to protect and restore in-stream flows in Oregon’s rivers and streams for  
5 the benefit of fish, wildlife, recreation, and the people who enjoy and depend on healthy  
6 rivers and streams. Priestley Decl ¶¶ 3–4. WaterWatch has many members with aesthetic and  
7 recreational interests in a healthy Crooked River. Priestley Decl ¶ 5, 10.

8                   WaterWatch has long advocated for legally protected flows adequate to support fish  
9 and wildlife in the Crooked River downstream of Bowman Dam/Prineville Reservoir.  
10 Priestley Decl. ¶¶ 6–9. Most relevant to this case, WaterWatch played a key role in the  
11 development of the Crooked River Act. WaterWatch was a principal negotiator in the talks  
12 leading up to the Act, attending negotiations over a two-year span with Senator Merkley  
13 and/or his staff, American Rivers, Trout Unlimited, the Confederated Tribes of the Warm  
14 Springs Reservation, irrigation districts, the City of Prineville, and, at times, state agencies  
15 and/or the Governor’s office. Priestley Decl ¶ 7. WaterWatch helped to draft bill language  
16 specific to in-stream flows, edited/commented on numerous iterations of the bill, and  
17 participated in several meetings with Senator Merkley’s staff on the language in the bill and  
18 the bill’s intent and purpose. Priestley Decl ¶ 7.

19                   As enacted, the Crooked River Act requires Reclamation to store and release  
20 sufficient quantities of water from Prineville Reservoir to “provide instream flows consistent,  
21 to the maximum extent practicable, with the” Deschutes Subbasin Plan. Pub. L. No. 113-244,  
22 § 4. Reclamation also must develop, in coordination with the U.S. Fish and Wildlife Service  
23 and the National Marine Fisheries Service, “annual release schedules ... that maximize[,], to  
24 the maximum extent practicable, benefits to downstream fish and wildlife.” *Id.* In short, the  
25 Act requires Reclamation to take steps to ensure that it stores and releases from storage  
26 adequate amounts of water to maximize benefits to downstream fish and wildlife in the

1 Crooked River, and it must also take steps to ensure that the released water remains in the  
2 river for downstream fish and wildlife use from Bowman Dam to Lake Billy Chinook.

3 Since the passage of the Crooked River Act in 2014, WaterWatch has worked to  
4 make sure that Reclamation implements the Act. In order to secure legally protected flows  
5 downstream of Bowman Dam, as contemplated by the Act, Reclamation has taken two  
6 distinct steps: (1) it transferred a portion of its right to store water in Prineville Reservoir for  
7 irrigation use to a right to store water in the reservoir for fish and wildlife use and (2) it  
8 obtained a secondary water right to ensure that water released from the reservoir remains in  
9 the Crooked River for fish and wildlife purposes from Bowman Dam to Lake Billy Chinook.  
10 Priestley Decl ¶ 8. WaterWatch has been involved in both steps of this process: WaterWatch  
11 was a party to the settlement that resulted in the transfer of a portion of Reclamation’s  
12 storage right from irrigation use to “downstream fish life and wildlife use,” and WaterWatch  
13 submitted lengthy comments supporting the issuance of the secondary water right challenged  
14 by Petitioners in this case. Priestley Decl ¶ 8. In those comments, WaterWatch explained that  
15 obtaining a secondary water right to allow storage releases for fish use and wildlife use from  
16 Bowman Dam to Lake Billy Chinook was essential to the implementation of the Crooked  
17 River Act. Priestley Decl ¶ 8. OWRD ultimately granted Reclamation’s application and  
18 issued Permit S-55394 on September 15, 2023. Priestley Decl ¶ 8.

19 If Petitioners prevail in this case, it would make it harder to ensure adequate, legally  
20 protected flows in the Crooked River downstream of Bowman Dam to Lake Billy Chinook,  
21 frustrating the implementation of the Crooked River Act. Priestley Decl ¶ 10. This would  
22 threaten to undermine all the hard work that WaterWatch has put into securing flows for fish  
23 and wildlife in the Crooked River under the Crooked River Act. Priestley Decl ¶ 10. And it  
24 would threaten the interests of WaterWatch’s members who recreate in and derive pleasure  
25 from a healthy Crooked River ecosystem replete with adequate flows for fish and wildlife.  
26 Priestley Decl ¶ 10.

1 Courts have recognized that interests like the ones described above allow for  
2 intervention. In *Rendler v. Lincoln County*, 302 Or 177 (1986), for instance, the Oregon  
3 Supreme Court held that the Committee to Save Yachats 804 Trail, a nonprofit membership  
4 corporation, had an interest sufficient to justify intervention based on its members' use of a  
5 trail whose legal status was at issue in the case. 302 Or at 184–85. Moreover, courts have  
6 found that interests like the ones described above are sufficient to demonstrate standing  
7 under the Oregon Administrative Procedures Act.<sup>1</sup> See *WaterWatch of Or., Inc. v. Water Res.*  
8 *Com'n*, 193 Or App 87, 94–99 (2004) (concluding that WaterWatch had standing because the  
9 water-rights decision at issue threatened to undermine work in which WaterWatch had  
10 invested heavily), *rev'd on other grounds*, 339 Or 275 (2005). An interest sufficient for  
11 standing is necessarily sufficient for intervention. See *Rendler*, 302 Or at 182–85.

12 2. *Granting Intervention Would Not Cause Delay or Prejudice Any Party.*

13 Because WaterWatch has an interest in this case, it qualifies for intervention under  
14 ORCP 33. In deciding whether to grant intervention, this Court “shall consider whether the  
15 intervention will unduly delay or prejudice the adjudication of the rights of the original  
16 parties.” ORCP 33 C.

17 Allowing intervention here will not delay the proceedings or prejudice any party.  
18 Petitioners filed their Amended Petition on February 28th, 2024, and Respondents filed a  
19 motion to dismiss less than a week ago, on March 22nd. Accordingly, allowing WaterWatch  
20 to intervene at this time would not delay the proceedings at all, nor would it prejudice any  
21 party. Under these circumstances, the Court should grant WaterWatch's motion to intervene.  
22 See *Nakashima v. Bd. of Educ.*, 204 Or App 535, 545 (2006) (allowing intervention because,  
23 among other reasons, “there is no apparent prejudice to any other party that would result

24 \_\_\_\_\_  
25 <sup>1</sup> To be clear, WaterWatch is not required to demonstrate standing in order to qualify for  
26 intervention under ORCP 33 C. But the fact that WaterWatch's interests in this case are  
similar to the types of interests that have been found to support standing in the past strongly  
suggests that WaterWatch qualifies for intervention.

1 from allowing the motion”), *adhered to on reconsideration*, 206 Or App 568, *aff’d*, 344 Or  
2 497 (2008).

3 **D. Conclusion**

4 For the foregoing reasons, the Court should grant WaterWatch’s motion to intervene  
5 as an intervenor-respondent in this case.

6  
7 Dated: March 26th, 2024

Respectfully submitted,

8  
9 /s/ Andrew R. Missel

10 Andrew R. Missel (# 181793)  
11 ADVOCATES FOR THE WEST  
12 3701 SE Milwaukie Ave., Ste. B  
13 Portland, OR 97202  
14 (503) 914-6388

15 *Attorney for WaterWatch of Oregon*

1 **CERTIFICATE OF SERVICE**

2 I certify that on March 26th, 2024, I served the foregoing motion to intervene by  
3 WaterWatch of Oregon upon the parties to this case by email. Service was accomplished at  
4 the following email addresses:

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14  
15  
16  
17 Dated: March 26th, 2024

18  
19 */s/ Andrew R. Missel*  
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22 *Attorney for WaterWatch of Oregon*

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON  
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UPPER CROOKED RIVER  
CONSERVATIONISTS, an Oregon  
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RANCH, L.L.C., an Oregon limited liability  
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Plaintiffs/Petitioners,

v.

WATER RESOURCES DEPARTMENT of  
the State of Oregon and WATER  
RESOURCES COMMISSION of the State of  
Oregon,

Defendants/Respondents.

Case No. 23CV46779

**WATERWATCH OF OREGON'S  
[PROPOSED] MOTION TO  
DISMISS**

*[Case involves water rights]*

**ORAL ARGUMENT REQUESTED**

**MOTION**

WaterWatch of Oregon (“WaterWatch”) hereby moves this Court to dismiss the Amended Petition filed on February 28, 2024. This motion is supported by the Amended Petition and the following memorandum of points and authorities.

**POINTS AND AUTHORITIES**

**A. Introduction.**

In their Amended Petition, Upper Crooked River Conservationists (“UCRC”) and Shotgun Ranch, L.L.C. bring two claims challenging Respondent Oregon Water Resources Department’s (“OWRD”) grant of a water rights permit to the U.S. Bureau of Reclamation.



1 Petitioners' claims are defective as pled, so their Amended Petition should be dismissed for  
2 failure to state a claim.

3 Petitioners' first claim rests on the premise that OWRD granted an "in-stream water  
4 right" to the Bureau of Reclamation under the In-Stream Water Rights Act, ORS 537.332 *et*  
5 *seq.* But that premise is wrong—OWRD granted Reclamation an ordinary secondary water  
6 right to use stored water, not an "in-stream water right" under the In-Stream Water Rights  
7 Act. This is evident from the Amended Petition as well as from the permit granted by  
8 OWRD. Once its faulty premise is exposed, Petitioners' first claim quickly falls apart, and  
9 fails as a matter of law.

10 Petitioners' second claim also fails as a matter of law, because the "public interest  
11 issues" discussed by Petitioners during the comment period for the challenged permit all  
12 related to Reclamation's exercise of its existing *storage* right, not the *use* right at issue in the  
13 permitting process. ORS 537.147 allows for an expedited process for applications to use  
14 stored water. The very reason the process is expedited is because the only relevant issues for  
15 OWRD to consider are those that relate to the proposed *use* of water; the storage of water has  
16 already been permitted. Even assuming that Petitioners raised public interest issues during  
17 the permitting process, none of those issues related to the water right being permitted—the  
18 secondary right to *use* water—and OWRD was thus correct to determine that no "public  
19 interest issues ha[d] been identified" under ORS 537.147(3).

20 **B. Legal Standard.**

21 Under ORCP 21 A, the defense of "failure to state ultimate facts sufficient to  
22 constitute a claim" may be asserted by way of a motion to dismiss. The question for the  
23 Court is whether, accepting the well-pleaded allegations in the Amended Petition and  
24 drawing all reasonable inferences in favor of Petitioners, the Amended Petition fails to state a  
25 claim as a matter of law. *Scovill By and Through Hubbard v. City of Astoria*, 324 Or 159,  
26 164 (1996).

1           **C. Failure to State a Claim: First Claim for Relief (Legal Authority).**

2           Petitioners' first claim is that OWRD lacked authority to "process or approve  
3 Application S-89128" because the U.S. Bureau of Reclamation "is not authorized to hold  
4 instream water rights" under the In-Stream Water Rights Act, ORS 537.332 *et seq.* Amended  
5 Petition ¶¶ 17–21. Accepting as true the legal premise of this claim—that Reclamation  
6 cannot hold in-stream water rights under the In-Stream Water Rights Act—Petitioners' claim  
7 nonetheless fails, because it rests on a false premise: Reclamation did not seek, and OWRD  
8 did not grant, an "in-stream water right" within the meaning of ORS 537.332. Rather,  
9 Reclamation applied for and was granted an ordinary secondary water right to use water  
10 stored in Prineville Reservoir. There is no doubt that Reclamation is allowed to hold such a  
11 secondary water right under Oregon law. Accordingly, Petitioners' first claim fails as a  
12 matter of law.

13           Petitioners allege that Permit S-55394 "allows [Reclamation] to use 68,887 acre-feet  
14 of water for fish life and wildlife use, and 10,000 acre-feet for supplemental irrigation ... and  
15 fish and wildlife use." Amended Petition ¶ 14. This allegation, by itself, demonstrates that  
16 the secondary water right at issue in this case was not granted pursuant to the In-Stream  
17 Water Rights Act. As the Oregon Supreme Court recently explained, "an 'in-stream water  
18 right'" issued under the In-Stream Water Rights Act "does not permit both in-stream uses  
19 and other beneficial uses that are not in-stream uses, such as irrigation." *WaterWatch of Or.*  
20 *v. Water Res. Dep't*, 369 Or 71, 85 (2021). "[W]ater rights that permit multiple uses are  
21 generally called 'water rights,' not a particular kind of water right (*e.g.*, ... 'in-stream')." *Id.*  
22 at 86. The water right at issue here allows for some irrigation use; thus, it is clearly not an  
23 "in-stream water right" within the meaning of the In-Stream Water Rights Act.

24           Even more fundamentally, there is no such thing as a "permit" for an in-stream water  
25 right under the In-Stream Water Rights Act. Unlike a request for an ordinary water right  
26 (such as the one at issue in this case), a request for an in-stream water right results in a

1 *certificate*; there is no permit. Compare ORS 537.336 (allowing certain state agencies to  
2 request the Water Resources Commission to “issue water right certificates for in-stream  
3 water rights”), with ORS 537.140 (setting out the requirements for a permit to appropriate  
4 water). There would be no reason to force an applicant for an in-stream water right to first  
5 obtain a permit and then “perfect” their right by constructing diversion works, etc., because  
6 an in-stream water right “does not require a diversion or any other means of physical control  
7 over the water.” ORS 537.332(3). Presumably for this reason, when a request for an in-  
8 stream water right is granted, it results in a *certificate*—a perfected water right—rather than a  
9 *permit*. See OAR 690-777-0053; see also *Fort Vannoy Irr. Dist. v. Water Res. Com’n*, 345 Or  
10 56, 83–84 (2008) (explaining the difference between a permit and a certificate). The water  
11 right at issue here is reflected in a *permit*, demonstrating that it is not an in-stream water right  
12 under the In-Stream Water Rights Act.

13 An examination of the permit itself confirms that OWRD did not issue Reclamation  
14 an “in-stream water right” under the In-Stream Water Rights Act.<sup>1</sup> Nowhere does Permit S-  
15 55394 state that Reclamation is being granted an “in-stream water right” under the In-Stream  
16 Water Rights Act. See Morgan Decl. Ex. 4 at 3–5. Rather, the permit states that Reclamation  
17 is allowed to use water for “fish life and wildlife use, and supplemental irrigation.” *Id.* at 3.

18 In short, the water right granted to Reclamation by Permit S-55394 is not an “in-  
19 stream water right” within the meaning of the In-Stream Water Rights Act, but rather an  
20 ordinary secondary water right allowing fish and wildlife and irrigation use, both beneficial  
21 uses under Oregon law. ORS Reclamation has legal authority to hold that ordinary water  
22 right. Therefore, Petitioners’ first claim for relief fails as a matter of law.

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25 <sup>1</sup> The Court may consider Permit S-55394 in resolving this motion to dismiss. The permit is  
26 referenced several times in the Amended Petition, and it represents a “[p]ublic and private  
official act[] of the ... executive ... department[] of this state” subject to judicial notice. ORS  
40.090(2).

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**D. Failure to State a Claim: Second Claim for Relief (Public Interest).**

Petitioners’ second claim for relief concerns the process through which OWRD granted Permit S-55394. According to Petitioners, OWRD violated the law when it used the expedited procedure of ORS 537.147 in granting Reclamation’s application. Amended Petition ¶¶ 22–28. Petitioners contend that they “raised ... public interest issues” in their comments on the application, thus triggering the normal (non-expedited) permit procedure. Amended Petition ¶¶ 24–26. This claim fails as a matter of law, because none of the issues discussed by Petitioners in their comments related to the *use* of water by Reclamation, which is the subject of the application and challenged permit; rather, the issues all related to Reclamation’s *storage* right, which is a separate water right that had already been permitted at the time of the relevant permit application.

OWRD processed Reclamation’s permit application through the expedited procedure of ORS 537.147, which applies to “water right permit[s] to use stored water.” ORS 537.147(1). This procedure can be used only when there already exists a permit or other legal entitlement to store water and the applicant has access to a sufficient quantity of that stored water for their proposed use. *See* ORS 537.147(1)(c) (requiring that the “proposed use of the stored water is one of the authorized uses under the water right permit, certificate or decree that allows the storage of water”); ORS 537.400(1) (requiring the applicant to submit, among other things, “documentary evidence that an agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the application”). Thus, when OWRD processes a permit to use stored water, there already exists a permit, certificate, or decree allowing the storage of that water.

With certain exceptions not relevant here, “the storage of water in and of itself is not a ‘use’ of water.” *Bridge Creek Ranch, LLC v. Or. Water Res. Dep’t*, 329 Or App 568, 587 (2023). When a right to store water for later use (irrigation, fish and wildlife, etc.) is granted, it is understood that the water will, in fact, be used—otherwise, the storage right could not be

1 perfected. *See id.* at 576–78 (discussing the relationship between permits to store water and  
2 secondary use permits).

3 This is why there is an expedited process for permits to use stored water: the  
4 existence of a storage right means that it has already been decided that the water in question  
5 will eventually be used, and so the only issues that remain relate to whether the specific  
6 proposed use complies with Oregon water law and policy. As a representative from the  
7 Oregon Water Resources Commission testified during the legislature’s consideration of HB  
8 2178, the bill that included the expedited review process, “the proposed use of water already  
9 legally stored in a reservoir is unique—the storage of the water has already been permitted  
10 and the use of the stored water has a low likelihood of harm to existing water users or the  
11 state’s water resources.”

12 It is in this context that ORS 537.147(3) must be read. *See Shepard Inv. Grp. LLC v.*  
13 *Ormandy*, 371 Or 285, 290 (2023) (stating that a statute must be construed in light of “its  
14 immediate context ... and its broader context, which includes other statutes on the same  
15 subject.”). ORS 537.147(3) functions as a sort of safety valve, in that it requires OWRD to  
16 exit the expedited permitting process and use the normal permitting process if “public  
17 interest issues have been identified” through the comment process. Given the context of ORS  
18 537.147, the “public interest issues” that matter must be related to the proposed *use* of water  
19 under the secondary permit, not the *storage* of water. In other words, to trigger the safety  
20 valve of ORS 537.147(3), commenters must raise issues concerning the *use* of water under  
21 the secondary permit.

22 All of the “public interest issues” pointed to by Petitioners in their comments related  
23 to Reclamation’s *storage* right, especially the effects that Reclamation’s exercise of its  
24 *storage* right might have on water users and resources upstream of Prineville Reservoir. For  
25 instance, in Shotgun Ranch’s comments, the public interest issues discussed were almost all  
26 tied to the threatened “regulation” of upstream users, which was itself tied to Reclamation’s

1 exercise of “its 1914 storage rights.” *See* Amended Petition Ex. A at 5–12. Similarly, the  
2 comments from UCRC were entirely focused on the possible effects of Reclamation’s  
3 exercise of its *storage* right. *See* Amended Petition Ex. A at 15–19.

4 At certain points in their comments, Petitioners were candid about the fact that their  
5 gripe is with Reclamation’s possible exercise of its storage right. *See* Amended Petition Ex.  
6 A at 6 (stating that if Reclamation were “to make calls for water under its 1914 storage  
7 rights,” it “would result in regulation of all post-1914 rights to use or store water on the upper  
8 Crooked River”). Those concerns are simply not relevant to OWRD’s processing of  
9 Reclamation’s secondary permit application. Those concerns could and should have been  
10 raised earlier—for instance, when Reclamation applied to change the “character of use” of  
11 the water stored in Prineville Reservoir to facilitate releases for downstream fish and wildlife.  
12 *See* Morgal Decl. Ex. 1 (materials related to Reclamation’s application to change the  
13 “character of use” of the water stored in Prineville Reservoir).

14 Because all of the issues discussed in Petitioners’ comments related to Reclamation’s  
15 storage right, not the secondary right to use stored water at issue in the permitting  
16 proceeding, Petitioners did not raise any relevant public interest issues within the meaning of  
17 ORS 537.147. It was thus appropriate for OWRD to process Reclamation’s application  
18 through that statute’s expedited process.

19 **E. Conclusion**

20 For the foregoing reasons, the Court should dismiss the Amended Petition.<sup>2</sup>

21  
22  
23  
24 <sup>2</sup> WaterWatch does *not* join with Respondents in seeking dismissal of the Amended Petition  
25 on standing grounds. WaterWatch takes no position on whether Petitioners have standing to  
26 challenge OWRD’s Final Order. However, WaterWatch supports Respondents’ motion to  
dismiss insofar as it seeks dismissal of Petitioners’ first claim for failure to state a claim.  
*Compare* Resps. Mot. to Dismiss at 12–14, *with supra* at 3–4.

EXHIBIT 1 TO WATERWATCH'S  
MOTION TO INTERVENE

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Dated: March 26th, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on March 26th, 2024, I served the foregoing proposed motion to dismiss by WaterWatch of Oregon upon the parties to this case by email. Service was accomplished at the following email addresses:

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Dated: March 26th, 2024

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