

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

**No. 18-1316**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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*In Re* SISKIYOU COUNTY WATER USERS ASSOCIATION

*Petitioner*

*On Petition for Writ of Mandamus*

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**BRIEF OF  
THE INSTITUTE FOR TRADE, STANDARDS  
AND SUSTAINABLE DEVELOPMENT (ITSSD)  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rules 12(c) and 28(a)(1), Petitioner certifies the following:

### A. Parties and Amici

*Petitioner:* The Siskiyou County Water Users Association is the Petitioner.

*Respondent:* The Federal Energy Regulatory Commission is the Respondent.

*Amicus Curiae:* The Institute for Trade, Standards and Sustainable Development is the only *Amicus Curiae* participating in this matter (“*Amicus* ITSSD” or “ITSSD”).

*Intervenors:* The Court has not granted any motions to intervene at this time, nor have any motions been filed.

### B. Rulings Under Review

An accurate reference to the ruling at issue appears in Petitioner’s brief.

### C. Related Cases

An accurate reference to cases related to the current matter appears in Petitioner’s brief and below.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amicus curiae*, the Institute for Trade, Standards and Sustainable Development (“ITSSD”), makes the following disclosure: ITSSD is a nonprofit (501(c)(3)) research and educational organization formed under the law of the State of New Jersey. It has no parent corporation, and no publicly-held company has a 10% or greater ownership interest in ITSSD.

Date: March 19, 2019

/s/ Lawrence A. Kogan  
LAWRENCE A. KOGAN  
*Counsel for Amicus Curiae*

**STATEMENT REGARDING CONSENT TO FILE  
AND SEPARATE BRIEFING**

ITSSD filed Notice of its Intent to Participate in this case as *Amicus Curiae*, including its consent to file, on March 11, 2019 (Doc. # 1777049).<sup>1</sup>

Pursuant to Circuit Rule 29(d), ITSSD certifies that a separate brief is necessary to share ITSSD's legal research and analyses regarding: 1) the U.S. Congress' indispensable role in determining whether the removal of the four (4) FERC-licensed PacifiCorp-owned-and-operated hydroelectric generating facilities and their adjoining reservoirs/impoundments located along the Klamath River in southern Oregon and northern California is consistent with the Klamath River Basin Compact ("KRBC" or "Compact") and the U.S. Constitution; and whether 2) the U.S. Environmental Protection Agency's failure to assert primary jurisdiction over the dam removal process and to conduct the required scientific assessment of the risks to human health and welfare engendered by the release of many decades' worth of toxic substances accumulated in the four dams' reservoir bottoms, upon removal, is in the public interest.

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<sup>1</sup> No counsel for a party authored this brief, in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. See Fed. R. App. P. 29(a)(4)(E)

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**GLOSSARY**

<b>Abbreviated Reference in <i>Amicus</i> ITSSD Brief</b>	<b>Full Name of Reference <u>Or</u> Referenced Source in Table of Authorities</b>	<b>Table of Authorities (“TOA”) Section</b>
4-6-16-Amended KHSA	Klamath Hydroelectric Settlement Agreement (Amended April 4, 2016)	Interstate Agreements
11-30-16-Amended KHSA	Klamath Hydroelectric Settlement Agreement (Amended Nov. 30, 2016)	Interstate Agreements
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Council of State Gov'ts	Council of State Governments (2011) Report	Other Authorities
Dillennmuth	Dillennmuth, Holly	Other Authorities
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Gailey	Gailey, Brian	Other Authorities
Grad	Grad, Frank	Other Authorities
Greenson	Greenson, Thadeus	Other Authorities
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Henry	Henry, Devin	Other Authorities
ITSSD Comments	Amicus ITSSD Public Comments, California State Water Resources Control Board (Feb. 26, 2019)	Other Authorities
ITSSD Memo	Amicus ITSSD Memorandum of Law (Feb. 25, 2019)	Other Authorities
Jacobs	Jacobs, Hilary	Other Authorities
KID	Klamath Irrigation District	Cases
KBRA	Klamath Basin Restoration Agreement (2010)	Interstate Agreements
KHSA	Klamath Hydroelectric Settlement Agreement (2010)	Interstate Agreements
KPFA	Klamath Power and Facilities Agreement (April 4, 2016)	Interstate Agreements
KRRC	Klamath River Renewal Corporation	
KRRC Definite Plan	Klamath River Renewal Corporation Definite Plan Report	Other Authorities
NEPA	National Environmental Policy Act	
NRC 2004	National Research Council Report (2004)	Cong. Bills/ U.S. Publications
NRC 2014	National Research Council Report (2014)	Cong. Bills/ U.S. Publications
S.133	Klamath Basin Recovery & Economic Restoration Act of 2015	Cong. Bills/ U.S. Publications

S.2012es	United States Senate, omnibus Energy Policy Modernization Act of 2016	Cong. Bills/ U.S. Publications
S.2012eah	United States House of Representatives, omnibus North American Energy Security and Infrastructure Act of 2016	Cong. Bills/ U.S. Publications
SA 3288	Wyden-Merkley Amendment, Amending the Klamath Basin Water Supply Enhancement Act of 2000	Cong. Bills/ U.S. Publications
Siders-Sabalow	Siders, David and Sabalow, Ryan	Other Authorities
TMDL	Total Maximum Daily Load	
UKBCA	Upper Klamath Basin Comprehensive Agreement (2014)	Interstate Agreements
USGS (2012)	United States Geological Survey Forest and Rangeland Ecosystem Science Center 2012 Report	Cong. Bills/ U.S. Publications

## **INTEREST OF THE *AMICUS CURIAE***

ITSSD is concerned that Oregon and California violated the U.S. Constitution by intentionally circumventing federal law – the 1957 Klamath River Basin Compact (“Compact”). ITSSD also is concerned that these states helped federal agencies to shift federal jurisdiction over dam removal from the U.S. Environmental Protection Agency (“EPA”) to the U.S. Department of the Interior (“DOI”) and the Federal Energy Regulatory Commission (“FERC”), thereby endangering the human health and welfare of Klamath Basin residents.

### **SUMMARY OF ARGUMENT**

Oregon and California’s execution with the federal government (“USG”) and PacifiCorp in 2016 of two interstate agreements calling for removal of PacifiCorp’s four Klamath River dams<sup>2</sup> constituted an informal Compact amendment. Even if deemed “inadequate” to address current environmental and wildlife concerns (Hall, at 297)), their failure to formally amend/redraft or terminate the Compact (Jacobs, at 124, 127) and to secure Congress’ consent thereto contravened both federal law and the U.S. Constitution. The Compact remains the controlling law governing “the orderly, integrated, and comprehensive development, use, conservation, and control’ of the waters of the Klamath River Basin” (KRBC, P.L. 85-222, at Art. I.A), and its amendment requires congressional approval.

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<sup>2</sup> These include John C. Boyle, the Copco 1, Copco 2 and Iron Gate dams.

The States, by assisting USG to shift jurisdiction over dam removal from EPA to DOI and FERC, effectively freed DOI from conducting the rigorous EPA-required scientific assessment of the significant risks to human health and welfare dam removal would trigger upon release of decades of contaminants accumulated in the dam reservoir bottoms. This Court's 1-29-19 ruling that FERC acted arbitrarily and capriciously by repeatedly treating each of PacifiCorp's State-approved recycled CWA § 401 water quality certification requests during the past decade as independent requests subject to new review periods, and its ordering FERC to determine whether to transfer the Klamath Hydroelectric Project license " *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, No. 14-1271 (D.C. Cir. 1-25-19), slip op. at 11 (ITSSD Comments, at 24-26) reveals the urgency underlying the bases for Petitioner's request for relief in this action and the significance of *Amicus* ITSSD's supporting brief.

## ARGUMENT

### **I. The Klamath River Basin Compact is a Congressionally Approved Interstate Compact Addressing U.S. Interests that Governs the Use, Storage and Allocation of Water Between Oregon and California**

Article I, Section 10, Clause 3 of the U.S. Constitution, known as the Compact Clause, provides that, "No state shall, without the consent of Congress enter into any agreement or compact with another state, or with a foreign power." It is the legislative means by which "the Constitution provides for adjusting interstate

controversies” *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938), and for “safeguarding the national interest.” *West Virginia ex rel. Dyer v. Sims*, 341 US 22, 27 (1951).

“Interstate compacts are legal agreements between states that bind member states to their provisions in the same manner as contracts entered into by individuals or corporations.” Compacts can “address complex problems [...] not confined to their borders, such as apportioning interstate waters.” (GAO-07-519, at 6). Since 1970, most interstate compacts “have established interstate commissions [...] consist[ing] of appointed representatives [commissioners] of each compacting state [...] who [...] administer[] the compact’s provisions.” (GAO-07-519, at 7). Many federal representatives appointed to compact commissions by the President, however, do not have voting rights. (GAO-07-519, at 9). Federal-interstate compacts are a subcategory of compacts where two or more States and USG collaboratively promote effective basin-wide water resources management, the commissions hold broader planning, management and development responsibilities, (CED-81-34 at 1), and/or federal grants-in-aid facilitate greater federal-state cooperation in exchange for state compliance with Congressional standards. (Grad, at 831-832), (ITSSD Memo, at 13-14).

Congressional consent to a compact may be required to prevent “the increase of *political* power in the states, which may encroach upon or interfere with the just

supremacy of the United States” (emphasis added) *Virginia vs. Tennessee*, 148 U.S. 503, 519 (1893), and “in order to check any infringement of the rights of the national government,” including a power reserved to Congress. 148 U.S. at 519. Consent is required if “the Compact enhances state power *quoad* the National Government” and thereby has an “impact on our federal structure.” *U.S. Steel v. Multistate Tax Comm’n*, 434 U.S. 452, 470-471, 473 (1978). The Compact Clause’s purpose is to ensure States secure Congress’ *political* judgment in ascertaining whether an agreement: 1) “is likely to interfere with federal activity in the area;” 2) “is likely to disadvantage other States to an important extent;” and 3) “is a matter that would better be left untouched by state and federal regulation.” 434 U.S. at 485. *See also Colorado v. Kansas*, 320 U. S. 383, 392 (1943), (Frankfurter-Landis, at 706-707) (expressing the preferability of compacts to litigation).

Congressional consent may be express or implied and may precede or follow the compact/agreement. Consent “is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them.” *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893). Implied congressional “actions usually include federal legislation supporting the terms of a compact or legislation that strengthens the objective of a specific compact.” (Council of State Gov’ts at 2, citing *Georgia v. South Carolina*, 497 U.S. 376 (1990), *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926), *Vermont v. New Hampshire*, 289 U.S. 593 (1933)).

Congressional consent “transforms” a compact from state law into valid federal law. *Virginia v. Maryland*, 540 U.S. 56, 66 (2003); *New Jersey v. New York*, 523 U. S. 767, 811 (1998); *Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419 (1940). “And, from the date of its ‘transformation,’ [...] its interpretation and construction present[s] federal, not state questions.” *Bush v. Muncy*, 659 F. 2d 402, 410 (4th Cir. 1981), citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959). A validly enacted interstate compact supersedes inconsistent state laws, unless the Compact or Congress’ consent legislation provides otherwise. *Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982); *See also Tarrant Regional Water District v. Herrmann*, U.S., No. 11-889, 2013 WLPM (6/19/13), slip op. at 10-11, fn 8, citing *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 152–153 (1982) (holding “the Supremacy Clause, Art. VI, cl. 2 [...] ensures that a congressionally approved compact, as a federal law, pre-empts any state law that conflicts with the Compact.”). Thus, an interstate compact’s water allocation and management requirements have been held to prevail over any conflicting provisions of state law concerning that subject matter. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-535 (1941).

The Klamath River Basin Compact (“KRBC” or “Compact”) between California and Oregon was executed and codified into each state’s laws (ORS 542.610, 542.620, 542.630) and (CA Water Code § 5900 et seq.) on 4-17-57, and it

was ratified by Congress and signed into Federal law by President Eisenhower on 8-30-57 (P.L. 85-222). (ITSSD Memo, at 16). The KRBC's prime objective is "to facilitate and promote the orderly, integrated and comprehensive development, use, conservation and control [over...] the water resources of the Klamath River Basin" for multiple purposes, and "to foster interstate comity between California and Oregon." (KRBC, P.L. 85-222, at Arts. 1A-1B); (ITSSD Memo, at 16). It establishes the following order/preference of water uses: (1) domestic use, (2) irrigation use, (3) recreational use, including use for fish and wildlife, (4) industrial use, (5) generation of hydroelectric power, and (6) such other uses as are recognized under laws of the state involved." (KRBC, P.L. 85-222, at Art. III.B.1), (ITSSD Memo, at 16). They also agreed upon a water use allocation scheme (KRBC and P.L. 85-222, at Arts. III.B, III.C), (*Id.*, at 16-17), and provided for use of interstate waters to generate affordable hydroelectric power. (KRBC and P.L. 85-222, at Art. IV), (ITSSD Memo, at 17-20).

The KRBC expressed USG's many interests through its designation of a senior U.S. Bureau of Reclamation construction engineer as the representative to help develop and negotiate the compact. (KRBC at Preface), (Grad, at 837), (Ellison, at 15-16). USG also ensured the establishment of and its continued participation in a compact commission with a nonvoting representative to assist compact administration. (KRBC, P.L. 85-222, at Art. IX), (ITSSD Memo, at 20-23), (Grad,



at 838). While USG is a nonparty to the KRBC (*KID v. U.S.*, 67 Fed. Ct. Cl. 2005, at 47), it has endeavored to protect its Klamath Basin interests. These include: 1) the federal navigation servitude; 2) the federal assurance of affordable power; 3) federal flood control; 4) federal irrigation project operation; 5) federal regulation of environmental protection and pollution control; 6) federal protection of fish and wildlife; and 7) the federal tribal trust obligation. (ITSSD Memo, at 23-38).

## **II. Oregon and California Informally Amended the Compact by Executing the KBRA, KHSA and UKBCA, Expressly Providing for Dam Removal and Requiring Congressional Consent/ Authorization**

Having deemed the Compact inadequate to protect the environment, fish and wildlife, tribal trust obligations and irrigation-related water allocation issues, USG, Oregon, California and other stakeholders negotiated and executed three new Klamath Basin Agreements in 2010 and 2014. These included the Klamath Basin Restoration Agreement (“KBRA”) (2010), the Klamath Hydroelectric Settlement Agreement (“KHSA”) (2010), and the Upper Klamath Basin Comprehensive Agreement (“UKBCA”) (2014), which collectively require the removal of the four Klamath River dams. (ITSSD Memo, at 38).

The KBRA reallocated State, federal (tribal) and private water usage in the Klamath Basin. It achieved this reallocation primarily by restoring natural fisheries and ocean and river harvest opportunities, and by establishing reliable replacement water and power supplies capable of sustaining Klamath Basin agriculture and

wildlife refuges. (ITSSD Memo, at 39). The KBRA treated dam removal as essential to producing “environmental water” – a quantity and quality of water legally stored or maintained that benefits fish species. It also obligated signatories to support the KHSA which provided a process for removing PacifiCorp’s Klamath River dams. (ITSSD Memo, at 39-40). The KBRA thereby addressed several of the same federal interests the Compact had addressed, albeit differently. (ITSSD Memo, at 40-43). USG had not been willing to sign the KBRA until Congress enacted legislation authorizing and directing the federal agencies to become parties to the KBRA. And, since Congress never enacted such legislation into law, USG never signed it. (ITSSD Memo, at 43).

The KHSA presumed that dam removal was *the* primary objective needed to restore the Klamath River Basin for environmental and wildlife (fish) purposes and to uphold USG’s Indian trust obligation. The KHSA described a tiered process for the decommissioning and removing PacifiCorp’s four Klamath River dams in fulfillment of that objective. (ITSSD Memo, at 43-44). It designated the Interior Secretary as the lead federal agency official to undertake and/or review new and existing studies and evaluations, including those required by NEPA, of dam sediment content and quantity, to determine whether dam removal should proceed. USG executed the KHSA along with Oregon and California, local and Indian tribal governments, and other stakeholder groups. The KHSA required Congress’ passage

of federal legislation to implement the KHSA, and for all governmental signatories to execute the KHSA and the KBRA concurrently. (ITSSD Memo, at 44-45).

The UKBCA implemented on an ostensibly voluntary basis the KBRA's non-Klamath Irrigation Project ("Project") Program features addressing water rights disputes between Off-Project irrigators, the Klamath Tribes and DOI's Bureau of Indian Affairs. (ITSSD Memo, at 45). The UKBCA increased inflows to Upper Klamath Lake ("Lake"), reduced lake outflows to the Project, and established a Klamath Tribes economic development program to be funded by Congress and DOI. Project and Off-Project Irrigators were to sign up for one of two "voluntary" water reduction programs – the Water Use Program or the Riparian Program – in exchange for financial compensation. The UKBCA did not require USG to execute and legally bind itself to the UKBCA until Congress enacted federal authorizing and funding legislation. (ITSSD Memo, at 45-47).

In sum, the KBRA, KHSA and UKBCA were intertwined agreements with cross-referenced and mutually reinforcing provisions and similar, if not, identical appendices. They collectively required Congress to pass federal authorizing and funding legislation to facilitate the achievement of their stated and unstated objectives consistent with federal interests. (ITSSD Memo, at 47-57). These Agreements required federal authorizing and funding legislation as both a condition of USG becoming an executing signatory and of achieving the Agreements' goals.

Congress, however, never passed the necessary authorization and funding legislation (S. 133) and thus, USG never executed the Agreements. Consequently, the entire KHSA and portions of the KBRA terminated in 2016 (Hearden) (Greenon), while the UKBCA terminated in 2018. (Gailey), (Dillemuth). As the applicable case law and relevant GAO studies reveal, had these Agreements been executed and ratified by Congress, they would have amended and transformed the Compact from a traditional interstate Compact into a federal-interstate Compact the subsequent amendment of which would have required congressional consent and authorization. (ITSSD Memo, at 58-72).

### **III. Oregon and California Informally Amended the Compact by Executing the Amended KHSA and the KPFA Providing for Dam Removal and Indirectly Requiring Congressional Authorization and Funding Tied to an Omnibus Energy Bill**

With Congress having failed to pass S.133, Oregon, California and PacifiCorp publicly announced, in February 2016, their intent to execute two new interstate agreements – the Amended Klamath Hydroelectric Settlement Agreement (“Amended KHSA”) and the Klamath Power and Facilities Agreement (“KPFA”). (DOI Press Release), (Siders-Sabalow). The Amended KHSA endeavors to ensure the same result as the KHSA, but differently. Dam removal would occur vis-à-vis the FERC’s established administrative processes involving public comment, and through other more comprehensive steps enabling the restoration of basin fisheries, the honoring of USG’s tribal trust obligation, and regional farmer’s water needs.

(DOI Press Release). The Amended KHSA and the KPFA were executed concurrently on 4-6-16 and signed by the Interior Secretary and the Undersecretary of Commerce for Oceans and Atmosphere. (ITSSD Memo, at 73-74, 79).

The 4-6-16 KHSA amendments shifted dam removal funding from mainly congressional sources to mainly state sources, though congressional funding requirements and contingencies remain given continually rising estimates of dam removal costs. (4-6-16-Amended KHSA, at Arts. 1.6.1-1.6.2, 1.6.4, 7.2.1-7.2.2, 8.16, App. 1, Ex. 2 at E2-2), (KRRC Definite Plan), (ITSSD Memo, at 88).<sup>3</sup> Subsequent 11-30-16 KHSA amendments changed the recipient of dam removal funding from state trust accounts to a specified dam removal entity - the Klamath River Renewal Corporation (“KRRC”). (11-30-16-Amended KHSA, at Arts. 1.4, 3.2, 4.12). The Amended KHSA is intertwined with and mutually reinforces the KPFA (and the UKBCA until it terminated in 2018). And, each requires federal authorizing and funding legislation. (ITSSD Memo, at 78 – 88).

The KPFA *inter alia* reproduces and tracks the KBRA Fisheries (Restoration) Program and the KBRA avoidance or minimum adverse impact and reduced fish

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<sup>3</sup> Oregon’s and California’s dam removal contributions are approximately \$184 million and \$16 million, respectively, (\$200 million-in-total) vis-à-vis public utility commission electricity rate surcharges, and California has raised an additional \$250 million via a state general obligation bond issuance (\$450 million-in-total). (Amended KHSA Arts. 4.1.1C-D, and 4.1.2.A). But, the KRRC estimates that full dam removal costs are likely to run as high as \$507 million. (KRRC Definite Plan, at 303-304).

entrainment provisions (KBRA Arts. 9, 21), as well as, the UKBCA General Conservation Plans or Habitat Conservation Plans (UKBCA Art. 9), each requiring congressional appropriations. (ITSSD Memo, at 75-76). Significantly, the KPFA obligated all non-federal parties to support the now-expired Wyden-Merkley Amendment (SA 3288) and actions and appropriations to implement it (KPFA Art. II.C.1), and to consider supporting other legislative measures or initiatives relating to the parties' interests if SA 3288 failed to become law. (KPFA Art. II.C.2), (ITSSD Memo, at 77). The KPFA ensures that all USG-required actions are subject to/conditioned upon congressional appropriations. (KPFA Art. IV.A.3.b), (ITSSD Memo, at 78-79).

The Wyden-Merkley Amendment (SA 3288 in Cong. Rec.)<sup>4</sup> had been introduced as an amendment to SA 2953 and successfully included within the 2016 omnibus Senate energy bill (S.2012es, at 769-779). The House-Senate Conference Committee, however, failed to reconcile the provisions of S.2012es with those of the 2016 omnibus House energy bill (S.2012eah) before the close of the 114<sup>th</sup> Congress. Consequently, such legislation expired. (ITSSD Memo, at 88-89), (Henry). SA 3288 indirectly authorized Interior and Commerce Department programs identified in the KPFA, Amended KHSA, KBRA and UKBCA, and directly authorized the Interior

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<sup>4</sup> SA 3288 had been proposed as an amendment to the Klamath Basin Water Supply Enhancement Act of 2000 (P.L. 106-498, 114 Stat. 2221).

Secretary to make financial assistance available to parties *inter alia* for executing such agreements. SA 3288 directly authorized contracts and financial assistance to develop and administer programs to fulfill Project irrigator water needs, to minimize irrigation environment & wildlife impacts and restore fish habitats, and to limit the cost of procured power, consistent with USG's interests in the Basin and with these Agreements. (SA 3288 §§ 4(b)(1)(A)-(C), 4(b)(2)(A)-(B), 4(c)(1)-(2), 4(d)(1)-(2), 4(e)(1)-(2), (ITSSD Memo, at 90, 93-100). SA 3288 tried to underwrite KPFA, Amended KHSA and UKBCA programs, to resurrect portions of the KBRA, and to facilitate the ongoing activities of the KBRA's Klamath Basin Coordinating Council and Klamath Basin Advisory Committee, and the UKBCA's Joint Management Entity (the responsibilities of which were comparable to or greater than those of the Compact Commission) in implementing said Agreements. (ITSSD Memo, at 38-39, 50, 62-65).

In sum, SA 3288, in combination with the KPFA, the Amended KHSA and the ongoing provisions of the KBRA and UKBCA, involved USG participation, sought congressional funding to facilitate the agreements' objectives, and addressed the same federal interests as those the Compact addresses. Applicable federal case law shows these amalgamated features were tantamount to an informal Compact amendment requiring congressional consent (ITSSD Memo, at 100-101), unlike the more modest provisions of P.L. 106-498 calling only for congressionally funded

studies and surveys. Congress' *political judgment*, rather than FERC's legal judgment, therefore, is needed to ascertain whether the informal Compact amendment Oregon and California consummated will likely interfere with or otherwise infringe upon federal activity or interest in the area, and significantly disadvantage other States, and/or is a matter that would be better left untouched by State and Federal legislation/regulation.

#### **IV. EPA Should Have Exercised Primary Jurisdiction Over Dam Removal Under the CWA § 303(d) Process and CERCLA § 121(e)(1), Rather Than Let FERC Operate Under the CWA § 401 Water Quality Certificate Process**

The National Research Council and DOI's U.S. Geological Survey have issued reports documenting the industrial, commercial and agricultural sources of historical contamination of the Klamath River, dating back to the early 1900's. (NRC 2004, at 64-65), (USGS 2012, at 15-16, 18-21, 23-25, 38, 44-46, 49, 54, 79, 82), (ITSSD Comments, at 3-6). The four PacifiCorp Klamath River dams have been operational for approximately 56-100 years and their reservoir bottom sediments contain a commensurate amount of accumulated and synthesized contaminants. (ITSSD Comments, at 6-7).

EPA is the primary federal agency responsible for enforcing the CWA in "waters of the United States" ("WOTUS") (e.g., the Klamath River) within Oregon and California. If state water quality standards are inadequate to protect said waters, these states are required under CWA § 303(d)(1)(A) to identify the waterbody as



impaired under CWA § 303(d)(1)(C), and to calculate the “total daily maximum load” (“TMDL”) for each problematic pollutant in said river. The TMDL generally represents the maximum amount of each point source and nonpoint source pollutant that can occur without causing the waterbody to fail to meet State water quality standards. EPA has informed States how upstream nonpoint source pollution can contribute to contaminant sediment loads in dam reservoirs, and how the nature and severity of those impacts will depend *inter alia* on the storage time of the impounded water, the depth of the reservoir, and on whether the stream flow behind the dam slows. (ITSSD Comments, at 9-11).

Since upstream pollutants and contaminants from point and nonpoint sources have flowed into and accumulated and synthesized in the sediments at the bottom of PacifiCorp’s four Klamath River dam reservoirs for many decades, Oregon and California should have properly characterized and included these impairments as a load allocation under CWA § 303(d)/40 CFR Part 130 in calculating the river’s TMDL. However, California, under EPA’s direction, failed to include incremental impairments from the dam reservoirs in the TMDL load allocation it calculated for the Klamath River. Instead, California treated said impairment as part of PacifiCorp’s CWA Act § 401 water quality certificate application incident to its request for FERC relicensing, which imposes a less rigorous standard. By conditioning its prior approval of California’s proposed Klamath River TMDL upon

such characterization, EPA thereby manipulated the CWA § 303(d)/40 CFR Part 130 rules for calculating TMDLs as applied to dam-related impairments to water quality. EPA thus entrusted the protection of human health and welfare from the release of decades of contaminants that had accumulated and synthesized in the dam reservoirs' bottom sediments to other than environmental regulators - the FERC and DOI. (ITSSD Comments, at 11-17).

DOI had taken only 26 core samples of the sediments from three of PacifiCorp's four Klamath River dams' reservoir bottoms during 2004-2005, and 2009-2011, covering approximately 2,400 surface acres, and only 10 of those samples had been collected at a depth greater than 10 feet. Did USG effectively downplay the potential contamination of the dam reservoir bottom sediments containing chemicals otherwise includable on the CWA and Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") hazardous substance lists? (P.L. 96-510), (40 C.F.R. § 302.4, Table 302.4), (ITSSD Comments at 6-7, 18-23). By comparison, when EPA evaluated the sediment at the bottom of the 34-acre reservoir behind the century's-old Ohio-based Gorge Dam during 2009 and 2011, it took core samples from 43 locations in that single reservoir bottom, revealing moderate levels of contamination but no major toxic problems. (Downing).

EPA failed to justify the inconsistency of DOI's core sampling methods (ITSSD Comments, at 23), with EPA standards for developing suspended and

bedded sediment water quality criteria. (EPA 2006), (Anderson-USGS, at 3-7, 14-15, 17). EPA also didn't explain whether its failure to undertake a human health or ecological risk assessment of such sediments was attributable to the documented weaknesses of its own IRIS human and ecological toxicological risk assessment process. (NRC 2014, at 86-87). EPA, furthermore, failed to explain why it didn't ensure that the U.S. Department of Health and Human Services' Agency for Toxic Substances and Disease Registry ("ATSDR") performed assessments of the human health risks associated with the sediment-laden chemicals (40 C.F.R. § 300.4(a); § 300.175(8)(i)), (Comments, at 20), or why it didn't assess alternative solutions and technologies that would significantly decrease hazardous substance toxicity, as CERCLA requires. (P.L. 96-510, at §121(b)(1); 42 U.S.C. § 9621(b)(1)), (ITSSD Comments, at 23). EPA should now be compelled to invoke CERCLA § 121(e)(1) jurisdiction over dam removal, consistent with FERC's ruling in *Clark Fork and Blackfoot LLC*, 110 FERC ¶ 61,024 (1-19-05), to ensure public health and welfare, if this Court directs FERC to determine whether transfer of the dam licenses to KRRC and dam decommissioning should proceed. (ITSSD Comments, at 26-27).

## CONCLUSION

For all the reasons stated above, this Court should grant Petitioner's motion for issuance of a writ of mandamus should be granted.<sup>5</sup>

Dated: March 19, 2019

Respectfully Submitted

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<sup>5</sup> That the Compact Commission has filed no comments with FERC since the Klamath facilities' relicensing and decommissioning process began is inapposite to the Court's disposition of this issue. (Doc. # 1775026, at n. 2).

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,897 words, excluding the parts exempted by Fed. R. App. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: March 19, 2019

By: /s/ Lawrence A. Kogan  
Lawrence A. Kogan

**CERTIFICATE OF SERVICE**

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on March 19, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: March 19, 2019

By: /s/ Lawrence A. Kogan  
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