No. _____

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

In re SISKIYOU COUNTY WATER USERS ASSOCIATION

Petitioner.

PETITION FOR WRIT OF MANDAMUS

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Counsel for Petitioner

November 21, 2018

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

Amici: The Court has not granted any motions to participate in this case as amicus curiae, nor have any motions been filed.

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

B. Rulings Under Review

Petitioner seeks a writ of mandamus to compel the Federal Energy Regulatory Commission ("FERC") to rule on its motion to dismiss, filed April 24, 2018 in administrative proceedings in which a nonprofit corporation (501(c)(3), the Klamath River Renewal Corporation, is seeking to receive a license transfer from PacifiCorp to four hydroelectric dams along the Lower Klamath River in Northern California, for the purpose of destroying those hydroelectric facilities pursuant to an Amended Klamath River Hydroelectric

Settlement Agreement entered into between the States of Oregon, California and PacifiCorp and various environmental organizations.

C. Related Cases

Petitioner is aware of no related cases, and this case has not previously come before this Court or any district court.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner, the Siskiyou County Water Users Association ("SCWUA") makes the following disclosure: SCWUA is a nonprofit (501(c)(4)) association organized under the law of the State of California. It has no parent corporation, and no publicly-held company has a 10% or greater ownership interest in SCWUA.

/s/ James L Buchal
JAMES L. BUCHAL
Counsel for Petitioner

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Jurisdictional Statement

This Court is empowered to issue writs of mandamus under 28 U.S.C. § 1651. The Administrative Procedure Act authorizes this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Petitioner filed its motion to dismiss the underlying proceedings before the Federal Energy Regulatory Commission ("FERC") on April 24, 2018 (Addendum at A-150[1]), and Respondent has failed to make any ruling on the motion.

Statement of the Issue

Whether FERC's ruling on Petitioner's motion to dismiss has been "unlawfully withheld or unreasonably delayed" within the meaning of § 706 or otherwise where FERC has proceeded to consider and resolve other, non-dispositive motions and take other substantial steps in furtherance of the administrative action inimical to Petitioner.

Statement of the Case

This Petition involves a public policy choice of immense importance to Petitioners and rural populations along the Klamath River in southern Oregon and northern California: a proposal to remove functioning hydroelectric

[1] Petitioner is filing herewith a separately-bound Addendum containing relevant statutory and administrative materials from the FERC proceedings below.

facilities along the Klamath river (currently operated by PacifiCorp), and transferring the project license to a California nonprofit corporation, the Klamath River Renewal Corporation ("KRRC"), for the purpose of destroying the hydrofacilities and water reservoirs behind them. Residents of Siskiyou County voted over 80% against the removal of these dams and regard the dam removal project as a severe and unlawful threat to their community, properties and economic futures.

Notwithstanding this widespread public opposition, a coalition of governmental agencies and others entered into a multiparty Klamath River Hydroelectric Settlement Agreement calling for dam removal "after passage of federal legislation and approval by the Secretary of Interior". (A-80, at 3 (FERC's order of March 15, 2018.)). Congress, however, never enacted the required legislation. *Id.*

Many (but not all) of the same parties, including the States of Oregon and California and PacifiCorp then entered into an April 6, 2016 Amended Klamath River Hydroelectric Settlement Agreement ("Amended Settlement Agreement"), also calling for dam removal; in an apparent attempt to evade Federal law, they sought to achieve the removal goal through transfer of the project license to a third party, the KRRC. This Amended Settlement Agreement is not before FERC for FERC approval (*id.* n.10), nor has any

Congress enacted any legislation approving the proposed process (nor has any state legislature approved the entering into the Amended Settlement Agreement).

Instead, on October 5, 2017, FERC issued a Notice of Application for Amendment and Transfer of License and Soliciting Comments, Motions to Intervene, and Protests. (A-32.) Specifically, the applicants requested that Respondent amend the existing Klamath Project No. 2082 license to remove four hydroelectric facilities from the license (the J.C. Boyle in Oregon, and, in California, Copco No. 1, Copco No. 2 and Iron Gate Dams), and create a new project, the Lower Klamath Project, for those developments. The applicants also requested that the Lower Klamath Project be transferred from PacifiCorp to KRRC which, if Respondent approved a surrender application in another proceeding, would then result in the surrender of the license for the Lower Klamath Project and removal of the four active carbon-free hydroelectric facilities and related water reservoirs.

Proceedings to process the application then began under Respondent's Docket Nos. 2082-062 (Klamath Project) and 14803-000 (Lower Klamath Project). Also on October 5, 2017, FERC issued a letter requiring PacifiCorp and KRRC to "convene an Independent Board of Consultants" to "review and assess all aspects of the dam removal process". (A-37.) The letter notes a

proposed timeline that would "begin deconstruction work by January 1, 2020". (A-40.[2])

On October 27, 2017, Petitioner timely moved to intervene in these dockets, and filed comments opposing the dam removal (A-40.1); Petitioner became an intervenor by operation of FERC Rule 214 when no opposition was filed. 18 C.F.R. § 385.214(c). Petitioner carefully analyzed the complex history of the development of the Klamath River Compact which set forth an agreed and Congressionally-approved beneficial use of the River , and came to the conclusion that through its legislation adopting and approving the Klamath River Compact (71 Stat. 497-508[3]), Congress had provided the exclusive means by which the States of Oregon and California could jointly act concerning development of the Klamath River. In particular, Petitioner concluded that the Amended Settlement Agreement, by its terms, constitutes an agreement between California, Oregon and other parties, the implementation of which is barred by federal law, which does not allow these parties to evade the

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[2] Petitioner is aware that KRRC has filed a "Definitive Plan for the Lower Klamath Project" which states that "decommissioning" may commence by January 1, 2021, but includes multiple, ongoing activities in 2018, 2019, and 2020.

[3] Klamath River Basin Compact Act of August 30, 1957, Pub. L. No. 85-222, 71 Stat. 497 (1957) is reproduced in Petitioner's Addendum filed herewith at A-7 through A-24.

requirement for Congressional consent for the momentous and ill-considered policies they advocate.

Accordingly, on April 24, 2018, Petitioner moved, pursuant to FERC Rule 212 (18 C.F.R. § 385.212), for an order dismissing the application to transfer the license to Klamath River Renewal Corporation on the ground that the application constituted an unlawful attempt to evade the law established by the Klamath River Compact, such that KRRC was not qualified to receive a project license until the Compact approved such action or Congress otherwise approved the dam removal scheme. With the motion, Petitioner filed declarations showing that the Klamath River Compact Commission has never taken any action with respect to the Amended Settlement Agreement, hydrofacility removal, or the KRRC (A-157).

PacifiCorp and KRRC filed an answer to the Petitioner's motion on May 9, 2018 (A-164). On May 17, 2018, Petitioner filed a motion for leave to reply to this answer, including a proposed reply (A-171); FERC has never ruled on this motion either.

Notwithstanding FERC's failure to rule on the motion to dismiss, FERC continues to move the removal process forward with its further decisions. *See, e.g.*, A-202 (October 22, 2018 staff feedback on Independent Board of Consultants); A-199 (August 15, 2018 approval of change in Board); A-179

(May 22, 2018 approval of BOC). FERC has also continued to issue other procedural rulings. *E.g.*, A-201 (September 6, 2018 grant of late intervention); A-191 (August 1, 2018 grant of late intervention); A-185 (June 11, 2018 grant of extension of time).

Summary of Argument

Petitioner's motion before Respondent raises a threshold and dispositive issue: where Congress has approved and established an interstate compact agency for decision making concerning the beneficial use of the Klamath River, may Respondent assist the States of California, Oregon and certain other federal agencies in evading the Congressional design by agreeing to remove dams without a Compact decision or other action by Congress.

Mandamus is warranted in this case because FERC has refused to address the issue, while continuing to proceed rapidly toward approval of the destruction of active hydroelectric facilities and related equipment and reservoirs, with an apparent target date for deconstruction of January 1, 2020, little more than a year from now. *But see supra* n.1.

FERC's refusal to rule on the motion prejudices SCWUA's ability to seek judicial review of the lawfulness of the underlying proceedings, as the inaction produces no final order for review. And because the applicants and

FERC continue to process the application, moving closer and closer to approval of the destruction of facilities Petitioner resists, further prejudice arises.

Accordingly, Petitioner respectfully requests that this Court issue a writ compelling FERC to rule upon Petitioner's motion to dismiss.

Identity and Standing of Petitioner

SCWUA represents domestic, commercial and agricultural water users in Siskiyou County. The interests of SCWUA's members are directly affected by the outcome of the proceeding in a variety of ways, including loss of water availability, loss of ability of "flushing" the River to maintain the health of the Salmon and loss of ability to control river flow, loss of inexpensive carbon-free electrical power and loss of property value among others. (*See generally* A-42 to A-44; *see also* A-87 to A-88.)

For this reason, SCWUA has been actively engaged in all matters relating to the Klamath Hydro Dams proposed removal by PacifiCorp since the inception of that proposal. SCWUA organized and carried out during a General Election, Measure G on the ballot which garnered support of nearly 80% of the voters in Siskiyou County to preserve the hydroelectric dams. In addition, SCWUA produced a substantial analysis of "Alternatives to Dam Removal" which fully explored and supported a fish bypass analysis which would have cost considerably less than the PacifiCorp proposal and achieved the same or

improved results without exposing the Klamath to potentially catastrophic biological damage. SCWUA has investigated and commented on many occasions regarding the scientific issues involved in the Klamath Basin Project. Among their membership are individuals who are residents of the COPCO Lake area and who are directly impacted by the potential of dam removal and have already suffered significant and irreparable damage to the value of their homes.

SCWUA has actively participated both as a group and individually in the Department of Interior ("DOI") environmental impact analysis and in the California Public Utilities Commission ("CPUC") hearings regarding the Amended Klamath Hydroelectric Service Agreement ("KHSA"), which set in motion the process to destroy these active hydroelectric facilities by the KRRC.

Argument

Mandamus is an extraordinary remedy, but it is appropriately imposed where an agency has refused to perform a statutory duty or has unreasonably delayed in doing so. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) ("American Rivers"). The Administrative Procedure Act ("APA") requires this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). And this Court is empowered to issue writs of mandamus to ensure agencies comply with the APA by the All Writs Act. 28 U.S.C. § 1651(a) (empowering "[t]he Supreme Court and all

courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions").

In assessing whether to issue a writ based on unreasonable delay, the Court must determine whether the agency has a duty to act and, if so, whether it has unreasonably delayed in complying with that duty. *American Rivers*, 372 F.3d at 418 (D.C. Cir. 2004). While FERC has a duty to rule upon motions presented to it, there is no statutory deadline for action. The circumstances here, with FERC proceeding headlong toward dam removal without resolving critical threshold jurisdictional issue, establishes substantial cause for concern by the Petitioners and the need for mandamus

A. FERC's Continuing the Transfer Proceedings Without Resolving the Threshold Question Presented by Petitioner's Motion is Irrational and Prejudicial.

At the outset, it is important to stress that Petitioner's motion does not challenge FERC's raw power to grant an application to change ownership of a hydroelectric project. The question is whether FERC can lawfully promote the scheme, when the proposed transferee has been established by joint state action that evades the exclusive method for decision making established by the Klamath River Compact and the U.S. Congress.

1. The Klamath River Compact

The Constitution provides: "No State shall, without the Consent of Congress... enter into any Agreement or Compact with another State." U.S. Const. Art. I, § 10, cl. 3. This provision is known as the Compact Clause. On August 30, 1957, though Public Law 85-222, Congress gave its consent to the Klamath River Compact, which is reproduced in the bill and the Statutes at Large (71 Stat. 497-508 (A-7 to A-24)). The Compact has extremely broad purposes, including:

> "To facilitate and promote the orderly, integrated, and comprehensive development, use, conservation and control [of the waters resources of the Klamath Basin] for various purposes, including, among others, . . . the use of water for industrial purposes and hydroelectric production". (71 Stat. 497 (A-7).)

It establishes "prescribed relationships between beneficial uses of water" and provides for certain "preferential rights". (*Id.*) Pertinent to this motion, Article IV declares that:

> "It shall be the objective of each state, in the formulation and execution of plans for the distribution and use of the waters of the Klamath River Basin, to provide for the most efficient use of available power head and its economic integration with the distribution and use of water and lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells."

(71 Stat. 500 (A-12).)

As the Supreme Court has explained, "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of

that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 441 (1981). There is no question that the Compact addresses subjects, such as water resource development, that are plainly appropriate for congressional legislation. The Compact is therefore federal law that must be considered by FERC and this Court.

Congressional approval of the Compact created federal law that now requires decision making by a specific entity, the Klamath River Compact Commission (the "Compact Commission"). *See also James v. Dravo Contracting Co.*, 302 U.S. 134, 148 (1937) ("It can hardly be doubted that in giving consent [to a compact] Congress may impose conditions"). Unless and until Congress passes legislation endorsing Klamath River dam removal, its consent to the dam removal can only be obtained, if at all, through lawful decision making through the specific procedures required by the Compact.

Specifically, the Compact Commission includes a representative of the United States who serves as chairman of the Commission. (71 Stat. 502 (A-14).) It is the Compact Commission's responsibility, though public meetings, to "administer this compact" on behalf of all parties thereto. (*Id.* (A-15).) The Commission's exercise of powers is conditioned on the ability of "any

interested person [to] have the opportunity to present his views on the proposed action" before Commission action, after "reasonable" advance notice of the action. (*Id.* at 505 (A-19).)

Decision making by the compact entity is thus nothing like the negotiation of a settlement agreement without such opportunity for public comment. The Supreme Court has confirmed that the requirement of decision making by a compact entity involves a different sort of "political accountability;"

> "An interstate compact, by its very nature, shifts a part of a authority to another state or states, or to the agency the several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government."

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 42 (1994) (quoting M. Ridgeway, Interstate Compacts: A Question of Federalism 300 (1971)). Whether or not the Compact Commission could approve the Amended Settlement Agreement, federal law as set forth in P.L. 88-222 requires at least that the Compact Commission exercise its authority on that question before decisions concerning the Klamath River Basin within the purview of the Compact Commission may proceed.

Again, Congress has expressly declined to endorse the dam removal plan, which is directly contrary to the Congressional interest in "efficient use of the

available power head" adopted in P.L. 88-222. Congressional consent to the Amended Settlement Agreement cannot be obtained as a matter of federal law, without Compact Commission review of the anti-development efforts represented by that Amended Settlement Agreement, including approval of the KRRC as the entity to engage in that wasteful and destructive effort.

In short, FERC's proceeding with the dam removal plan is illegal because it defies Congress by evading the Compact mechanism adopted by Congress to make such decisions concerning the development (or here, deconstruction) associated with the Klamath River. For FERC to award the license to the KRRC, when the Compact Commission has not considered the joint state action represented by the KRRC, would also supersede the jurisdiction of the Compact Commission. *Cf. American Bankers Ass'n v. SEC*, 804 F.2d 739, 755 (D.C. Cir. 1986).

Put another way, FERC is presently considering whether to transfer the license to KRRC, a process which involves whether the transferee has "the financial, technical, and legal qualification . . . to hold the license for the project". *Eugene Water & Electric Board*, 155 FERC ¶ 62,242, at 16-17 (2016). KRRC has no legal right to hold the license for this project, because it has been established pursuant to the plan of the parties to the Amended

Hydroelectric to purposefully evade the Congressionally-required compact process.

2. FERC Is Proceeding Full Speed Ahead with Dam Removal.

FERC's appointment and ongoing supervision of the Independent Board of Consultants ("BOC") demonstrates continuing exertion of agency power to achieve the result Petitioner demonstrates is unlawful: a transfer of the project licenses to KRRC for the purposes of hydroelectric facilities removal. Specifically, the Board was charged in May 22, 2018 to assess, among other things, detailed operational plans for dam removal and the costs thereof. (May 22, 2018 FERC directive to BOC (A-179). FERC continues as recently as October 22, 2018 to manage the BOC (A-202), and unless this Court grants relief, may well grant the relief sought by applicants PacifiCorp and KRRC without ever ruling on the Compact question. This must not be allowed for the reasons stated heretofore.

B. FERC's Ruling on Petitioner's Motion to Dismiss Is Unreasonably Delayed.

In assessing whether an agency's unreasonable delay in a particular case warrants mandamus, this Court has articulated several principles that may serve as "useful guidance":

> "(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the

> enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("*TRAC*") (internal citations and quotations omitted). This Court describes these *TRAC* principles as "the hexagonal contours of a standard," but has been careful to emphasize that they are "hardly ironclad," *id.*, and that "[e]ach case must be analyzed according to its own unique circumstances," *Air Line Pilots Ass'n v. Civil Aeronautics Board*, 750 F.2d 81, 86 (D.C. Cir. 1984).

While there are no concrete time tables setting standards by which FERC must rule on motions to dismiss, FERC's Rule 504 declares, consistent with the APA, that matters "proceed with all reasonable diligence and with the least delay practicable" (18 C.F.R. § 385.504(a)(4)).

As to the time reasonable to address a motion to dismiss, the judicial analogy provides reasonable time intervals. Indiana, for example, has established a remedy for litigants when "a court fails for thirty (30) days to set a motion for hearing or fails to rule on a motion within thirty (30) days after it was heard or thirty (30) days after it was filed . . .". *See* Indiana Trial Court

Rule 53.1(a). *Cf.* Arizona Const., Art. VI, § 21 ("Every matter submitted to a judge of the superior court for his decision shall be decided within sixty days from the date of submission thereof").

There is every reason to believe that public safety, health and welfare will be damaged, including environmental habitat for the aquatic life in the River and other wildlife utilizing the unadulterated waters of the Klamath by the destruction process espoused by KRRC. FERC itself has recognized the issue. (*See* March 15, 2018 Order (A-80).) The headlong rush to commence this process by the January 1, 2020, or even sooner, threatens the interests of Petitioner, its members, and those similarly situated in Southern Oregon and Northern California.

There is no reason to believe that requiring FERC to rule on the motion will have "the effect of expediting delayed action on agency activities of a higher or competing priority". *TRAC*, 750 F.2d at 80. This motion presents a threshold issue that can and should be resolved promptly, potentially avoiding very significant expenditures of resources by the agencies, the applicants, and all the many parties involved.

C. Because FERC's action is unreasonably delayed, this Court should compel agency action under § 706.

In § 706 of the APA, Congress decreed that when federal courts review agency actions, they "*shall* . . . compel agency action unlawfully withheld or

unreasonably delayed." 5 U.S.C. § 706(1) (emphasis added). If a court finds that a delay is unreasonable or if a court finds that agency action is unlawfully withheld, then under the APA, a court must compel agency action.

While a court has equitable discretion to issue a petition for mandamus, that discretion is limited by Congress' clear expression in § 706 that agency action must be compelled if unreasonably delayed or unlawfully withheld. *Forest Guardians v. Babbit*, 174 F.3d 1178, 1187 (10th Cir. 1999).

In *Forest Guardians*, the Tenth Circuit rejected the argument that even if action was "unlawfully withheld" under § 706, the court had the equitable discretion not to compel such action. *Id.* The Secretary pointed to Supreme Court opinions holding that even in the face of a government statutory violation, the power to grant or deny injunctive relief rests in the sound discretion of the court. *Id.* The Tenth Circuit disagreed, observing that those Supreme Court opinions also hold that a court's equitable discretion may be curbed by Congress: "these cases also unmistakably hold that Congress may 'restrict[] the court's jurisdiction in equity' by making injunctive relief mandatory for a violation." *Id.* (Citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798 (1982); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-43 & n.9, 107 S.Ct. 1396 (1987); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279 (1978)).

The Tenth Circuit concluded that a court's traditional equitable power was curbed by the APA's mandatory language that agency inaction "shall" be compelled. *Forest Guardians*, 174 F.3d at 1187. "Through § 706 Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed." *Id.* Simply put, "'[s]hall' means shall." *Id.* In reaching its holding, Forest Guardians rejected this Court's decision in *In re Barr Laboratories*, 930 F.2d 72 (D.C. Cir. 1991) ("*Barr*"). *Forest Guardians*, 174 F.3d at 1190-91.

In *Barr*, this Court denied petitioner's request for writ of mandamus regarding the Food and Drug Administration's ("FDA") failure to comply with a 180-day statutory deadline to approve or disapprove generic drug applications. 930 F.2d at 73. Despite the FDA's statutory violation, the *Barr* panel reviewed the *TRAC* factors and held that "a finding that delay is unreasonable does not, alone, justify judicial intervention." *Id.* at 75. The Court reasoned that "[e]quitable relief, particularly mandamus, does not necessarily follow a finding of a violation." *Id.* at 74. The *Barr* panel, however, never considered § 706 and its mandate to compel agency action, nor did it consider the Supreme Court precedent holding that Congress may limit a court's equitable discretion. This Court has never considered whether the "shall" language in 5 U.S.C. § 706(1) requires a court to compel agency action.

See Cobell v. Norton, 240 F.3d 1081, 1096 & n.4 (D.C. Cir. 2001) (citing *Forest Guardians* as contrary precedent but failing to address or discuss § 706).

While a panel cannot overrule a prior panel decision of this Court, *see, e.g., Humane Society of U.S. v. E.P.A.,* 790 F.2d 106, 110 (D.C. Cir. 1986), the fact that this Court has never squarely considered whether the Court's equitable discretion is limited by the mandatory language of § 706(1) indicates that it is an issue suitable for this panel's review. This Court should follow *Forest Guardians* and hold that a court must compel agency action under § 706 if unreasonably delayed or unlawfully withheld. To the extent this Court concludes that under *Barr*, § 706 does not limit a court's equitable discretion in compelling agency action, Petitioner preserves its position to seek *en banc* review to overrule *Barr* and reconcile that decision with Supreme Court precedent recognizing congressional limitations on equitable discretion. "In the end, although courts must respect the political branches and hesitate to intrude on their resolution of conflicting priorities, our ultimate obligation is to enforce the law as Congress has written it." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016). As written, "shall" means shall and the law requires courts to compel agency action that is unlawfully withheld or unreasonable delayed. 5 U.S.C. § 706(1). "To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers."

Forest Guardians, 174 F.3d at 1190; *see also In re Aiken Cty.*, 725 F.3d 255, 267 (D.C. Cir. 2013) (granting mandamus and holding that "constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law"). If courts find that action was unreasonably delayed or unlawfully withheld, and they refuse to act, they legitimize agency non-compliance with mandatory congressional deadlines.

Because FERC's delay here is "unreasonable" the APA mandates this Court to compel agency action.

Relief Sought

For the reasons set forth above, Petitioner respectfully urges this Court to issue a writ of mandamus compelling FERC to expeditiously enter an order granting or denying Petitioner's motion to dismiss.

Dated: November 21, 2018.

Respectfully submitted

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CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing petition complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word. I further certify that the foregoing petition complies with Circuit Rule 21(d).

Dated: November 21, 2018.

/s/ James L Buchal
JAMES L. BUCHAL
Counsel for Petitioner

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 21st day of November, 2018, I caused two copies each of the foregoing petition to be served by U.S. mail on counsel for respondents listed below. As Circuit Rule 21(c) requires, I will also cause to be filed with the clerk of this Court, by overnight delivery, four paper copies of the foregoing document.

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