

NO. 14-1271

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

HOOPA VALLEY TRIBE, *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*

AMERICAN RIVERS, *et. al, Intervenors*

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

MOTION FOR INVITATION TO FILE BRIEF OF KARUK TRIBE, YUOK
TRIBE, AMERICAN WHITEWATER, CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE, SOUTH YUBA RIVER CITIZENS LEAGUE,
CALIFORNIA OUTDOORS, FRIENDS OF THE RIVER, AND IDAHO RIVERS
UNITED AS *AMICUS CURIAE* IN SUPPORT OF INTERVENORS' PETITION
FOR PANEL REHEARING OR REHEARING *EN BANC*

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INTRODUCTION

The Karuk Tribe, the Yurok Tribe, American Whitewater, California Sportfishing Protection Alliance, South Yuba River Citizens League, California Outdoors, Friends of the River, and Idaho Rivers United, (collectively, *amici*) respectfully request an invitation from this Court pursuant to Federal Rule of Appellate Procedure 29(b)(2) and Circuit Rules 29(b) and 35(f) to file a brief as *amici curiae* in support of the petitions for rehearing or rehearing *en banc* filed by the American Rivers, California Trout, and Trout Unlimited (collectively, Intervenor). *See, e.g., PHH Corp., et al. v. Consumer Financial Protection Bureau*, No. 15-1177 (D.C. Cir. Feb. 16, 2017) (granting similar request for an invitation to file an amicus brief in support of *en banc* petition). The *amici* have not filed an earlier brief in this proceeding. All parties have been notified of the filing of this Motion. Petitioner Hoopa Valley Tribe represented it will not oppose the motion; Respondent Federal Energy Regulatory Commission took no position, Intervenor American Rivers consented, Intervenor Siskiyou County took no position, and Intervenor Pacific Corps did not provide a position.

INTERESTS OF AMICI

Amicus Petitioners are federally recognized Indian tribes situated on the Klamath River downstream of the Klamath Hydroelectric Project, and national, state, and regional organizations with extensive practical experience and expertise

in restoring rivers that are impacted by hydropower dams. Combined, these tribal governments and organizations have invested tens of thousands of hours in hydropower licensing and associated water quality certification proceedings in the last decade, including significant resources on the Klamath Hydroelectric Project. Each of the non-tribal Amicus Petitioners is a member of the steering committee of the national Hydropower Reform Coalition or the California Hydropower Reform Coalition, or both.

Amicus Karuk Tribe is a federally recognized Indian tribe with approximately 3,700 members. Its headquarters is located in Happy Camp, California, along the Klamath River approximately 40 miles downstream of the Klamath Hydroelectric Project. The Karuk Tribe has lived in northern California since time immemorial. The stated mission of the Karuk Tribe is to promote the general welfare of all Karuk people; establish equality and justice for the Tribe; restore and preserve Tribal traditions, customs, language, and ancestral rights; and secure for themselves and their descendants the power to exercise the inherent rights of self-governance. The Tribe depends on native fish and wildlife species for traditional cultural, religious, and subsistence uses.

Amicus Yurok Tribe is a federally recognized Indian tribe with over 6,300 tribal members which has occupied the lower Klamath River since time immemorial. The Yurok Tribe's reservation includes one-mile on each side of the

lower 45 miles of the Klamath River in Northern California. The Yurok Tribe has federally reserved fishing and water rights on the Klamath River. The Tribe maintains a fishing based way of life on the Klamath River which includes several villages along the river, a subsistence and commercial fishery, numerous religious ceremonies and other cultural activities. The Tribe has invested decades of work and significant human and financial resources toward dam removal and restoration of the Klamath River.

Amicus American Whitewater is a national non-profit organization with a mission “to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely.” American Whitewater represents more than 5,000 members and 100 local paddling club affiliates across America. American Whitewater has actively participated in more than 50 FERC licensing proceedings over the past decade, the majority of which were associated with water quality certification proceedings.

Amicus California Sportfishing Protection Alliance (CSPA) is a non-profit fishery conservation organization incorporated in 1983. On behalf of its 1,000 members, CSPA’s mission is to protect, restore, and enhance California’s fishery resources and their aquatic ecosystems. CSPA carries out a substantial portion of its advocacy through hydropower relicensing proceedings. In the last 13 years,

CSPA has actively participated in 14 licensing proceedings and seven water quality certification proceedings.

Amicus South Yuba River Citizens League (SYRCL) is a membership-based non-profit organization with over 3,000 members and nearly 1,000 active annual volunteers supporting the mission to protect and restore California's Yuba River. Over the past decade, SYRCL has devoted substantial resources and advocacy to the relicensing of three hydropower projects in the Yuba River watershed. SYRCL expects that the water quality certification proceedings associated with these relicensings will address important resource issues not resolved in relicensing.

Amicus California Outdoors is a trade industry group comprised of fifty whitewater companies. Based in the foothills of California's Sierra Nevada Mountains, California Outdoors represents outfitters that provide recreational whitewater opportunities for clients on west slope Sierra Nevada rivers. The industry group has been involved in four major relicensing proceedings in the past two decades.

Amicus Friends of the River is a non-profit organization founded in 1973. Friends of the River has more than 3000 members dedicated to the protection, preservation, and restoration of California's rivers, streams, and aquatic ecosystems. Friends of the River's extensive experience in hydropower relicensing

includes participation in 10 relicensing proceedings in the past 15 years, including party status in the Klamath relicensing.

Amicus Idaho Rivers United (IRU) is a non-profit organization founded in 1990 “to protect and restore the rivers of Idaho.” In the past decade, IRU has represented the interests of its 3,500 members in eight FERC licensing proceedings. IRU has a decade of work invested in the water quality certification proceedings of Idaho and Oregon for the Hells Canyon complex of three hydroelectric projects on the Snake River.

**AMICI’S BRIEF WILL ASSIST THE COURT AND IS RELEVANT TO
THE DISPOSITION OF THE MOTION FOR REHEARING**

Amici want to bring to the Court’s attention several “questions of exceptional importance,” Fed. R. App. P. 35(b)(1)(B), that are not examined in the petition for rehearing. These questions relate to the wide-ranging practical impact of the panel’s decision that a state has waived its authority under section 401 of the Clean Water Act, 33 U.S.C. § 1341, when it fails to act within a year on an application that was withdrawn before the time for review had run. The *amici* believe the Panel’s decision was in error because it thwarts state regulatory authority to determine whether hydropower projects discharging flows into navigable rivers will comply with state water quality standards. Under this reading of the law, notwithstanding Congress’s clear intent to ensure the states and tribes retained the necessary tools to protect their water quality, 33 U.S.C. § 1251(b),

FERC would have the authority to license dozens of dams that are currently undergoing review without assuring compliance with state water quality standards. These licenses would last for the next 30 to 50 years.

The *amici* are interested in preserving established state regulatory authority in order to protect their communities and the environment from the risks to water quality associated with dams and hydropower generation. The application of the Panel's expansive interpretation of the one year deadline will increase those risks by creating procedural roadblocks to state and tribal exercise of their authority under section 401 of the Clean Water Act. The retroactive application of the Panel's decision would harm rivers and communities.

Amici believe that their proposed brief would be useful to the Court for several reasons: (1) it discusses grounds for rehearing that are not discussed in the petition for rehearing; and (2) because of the experience and expertise of the *amici* in matters related to the protection of water quality in FERC proceedings, they are uniquely situated to bring to the Court's attention the wide-ranging practical impact of the panel's decision on the vital resources the Clean Water Act is meant to protect.

CONCLUSION

For the foregoing reasons, the movants respectfully request that the Court invite them to file the accompanying brief as amici curiae.

Dated: March 18, 2019

Respectfully submitted,

/s/ Andrew M. Hawley

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(1)(E)(2) because this motion contains 1277 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5)(A), and 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: March 18, 2019

Respectfully submitted,

/s/ Andrew M. Hawley _____

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CERTIFICATE OF SERVICE

The undersigned certifies that this motion was electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on March 18, 2019, by utilizing the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: March 18, 2019

Respectfully submitted,

/s/ Andrew M. Hawley

Andrew M. Hawley

Attorney for Amicus Curiae

**CERTIFICATE OF PARTIES AND CORPORATE DISCLOSURE
STATEMENT**

Under Federal Rules of Appellate Procedure 26.1 and Circuit Rules 27(a)(4) and 26.1, the proposed amici curiae American Whitewater, California Sportfishing Protection Alliance, South Yuba River Citizens League, Friends Of The River, and Idaho Rivers United certify that they are non-profit organizations, and have no parent companies, subsidiaries, or affiliates that have issued shares to the public; California Outdoors certifies that is a trade organization that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

DATED: March 18, 2019

Respectfully submitted,

*/s/ Andrew M. Hawley*_____

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