

158 FERC ¶ 61,048  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Colette D. Honorable.

Idaho Power Company

Project No. 1971-079

ORDER DISMISSING PETITION FOR DECLARATORY ORDER ON FEDERAL  
PREEMPTION OF STATE FISH PASSAGE REQUIREMENTS

(Issued January 19, 2017)

1. On November 23, 2016, Idaho Power Company (Idaho Power), licensee for the Hells Canyon Hydroelectric Project No. 1971, filed a petition for a declaratory order, asking the Commission to declare that, under the Supremacy Clause of the U.S. Constitution, Part I of the Federal Power Act (FPA)<sup>1</sup> preempts the state of Oregon's fish passage requirements with respect to the Hells Canyon Project. The project is located on the Snake River in Washington and Adams Counties, Idaho, and Wallowa and Baker Counties, Oregon. Idaho Power requests that the Commission expedite action on the petition and issue the declaration by February 1, 2017. For the reasons discussed below, we dismiss the petition.

**Background**

2. The Hells Canyon Project is located on a 38-mile section of the Snake River that forms the border between Oregon and Idaho. The project consists of three developments (including dams, reservoirs, and powerhouses) with a combined generating capacity of 1,167 megawatts (MW): Hells Canyon (391.5 MW), Oxbow (190 MW), and Brownlee (585.4 MW). The Commission issued a 50-year license for the project in 1955.<sup>2</sup> The license expired on July 31, 2005, and since then the project has operated under an annual license.

3. Idaho Power filed its application for a new license on July 21, 2003. Commission staff issued a draft and final environmental impact statement (EIS) on the applicant's proposal and alternatives in July 2006 and August 2007, respectively. Beginning in July 2003, Idaho Power filed applications for water quality certification under

---

<sup>1</sup> 16 USC 791a-823d (2016).

<sup>2</sup> See *Idaho Power Co.*, 14 FPC 35 (1955).

section 401 of the Clean Water Act with the Idaho Department of Environmental Quality (Idaho DEQ) and the Oregon Department of Environmental Quality (Oregon DEQ).<sup>3</sup> Since then, to avoid a possible denial of certification, Idaho Power has withdrawn and refiled its applications each year, thus establishing a new one-year deadline.

4. Because relicensing the project may affect several threatened and endangered fish species, the Commission must consult formally with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) under section 7(a)(2) of the Endangered Species Act (ESA).<sup>4</sup> Both NMFS and FWS have declined to begin ESA consultation until after the states have issued (or waived) water quality certification. As a result, the Commission has been unable to act on the relicense application and it remains pending.

5. Idaho Power filed its most recent certification requests with Idaho and Oregon on July 29, 2016.<sup>5</sup> On November 23, 2016, Idaho Power filed its petition for a declaratory order. The Commission issued notice of the petition on November 30, 2016, requesting comments, protests, and motions to intervene by December 30, 2016.

6. On December 13, 2016, the Oregon Department of Water Resources (Oregon DWR) requested public comments on a draft final order that would reauthorize Idaho Power's water rights.<sup>6</sup> That same day, Oregon DEQ requested public comments on draft water quality certification conditions for the project.<sup>7</sup> On December 14, 2016, Idaho

---

<sup>3</sup> Project works of the Hells Canyon Project are located in both Washington and Oregon, and the project discharges into the navigable waters of both states for purposes of section 401 of the Clean Water Act. 33 U.S.C. § 1341 (2016). As a result, both states have authority to issue a water quality certification for the project under that section.

<sup>4</sup> 16 U.S.C. § 1536(a)(2) (2016).

<sup>5</sup> See Letter from James Tucker, Idaho Power, to Kimberly Bose, Commission Secretary (filed July 29, 2016), attaching Idaho Power's notice of withdrawal of its pending certification applications and contemporaneous filing of new certification applications with Idaho DEQ and Oregon DEQ.

<sup>6</sup> See Appendix 1 to Oregon DFW's motion to dismiss (filed Dec. 23, 2016). Water rights are allocated as a matter of state law in state proceedings that occur outside the Commission's licensing process. Section 27 of the FPA, 16 U.S.C. § 821 (2016), reserves these matters to the states. See *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 175 (1946).

<sup>7</sup> *Id.* at Appendix 2.

DEQ requested public comments on a draft water quality certification for the project.<sup>8</sup> Both states indicate that comments on the draft certifications are due by February 13, 2017.

7. In response to the Commission's notice of Idaho Power's petition, many participants filed timely comments supporting or opposing the petition. Some filed protests and motions to intervene, and others filed motions to dismiss the petition. On January 9, 2017, Idaho Power filed an answer to the motions to dismiss. On January 17, 2017, Oregon DFW filed a request for leave to answer and an answer to Idaho Power's answer to the motions. We discuss these filings in more detail below.

## **Discussion**

### **A. Idaho Power's Petition**

8. Idaho Power asserts that throughout the Hells Canyon relicensing proceeding, Oregon state agencies have maintained as a matter of law that Idaho Power must comply with Oregon's fish passage statute; specifically, Oregon Revised Statute section 509.585 (ORS 509.585).<sup>9</sup> Idaho Power contends that as a result, a Commission declaration of federal preemption is needed to remove uncertainty about whether the company must comply with Oregon's requirements. It adds that without this declaration, "Oregon will attempt to impose fish passage and reintroduction requirements . . . based on state law even though Commission staff has recommended against requiring fish passage or reintroduction pursuant to Part I of the FPA in the absence of a comprehensive plan, and despite the fact that [NMFS] has declined to require fish passage pursuant to FPA section 18."<sup>10</sup> Idaho Power further requests that the Commission act expeditiously on the

---

<sup>8</sup> Idaho's request for comments on its draft water quality certification is available on the Idaho DEQ's website at <https://deq.idaho.gov/news-archives/water-hells-canyon-complex-project-draft-401-certification-comment-121416/>. The draft certification is available on the same website at <https://deq.idaho.gov/media/60179448/hells-canyon-complex-ferc-401-certification-draft-1216.pdf>.

<sup>9</sup> ORS 509.585 (2016) provides that "fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present." ORS 509.585(1). It further provides that "a person owning or operating an artificial obstruction may not construct or maintain any artificial obstruction across any waters of this state that are inhabited, or historically inhabited, by native migratory fish without providing passage for native migratory fish." ORS 509.585(2). The statute is triggered by a "fundamental change in permit status," which includes "expiration of a federally licensed hydroelectric project." ORS 509.585(4), (10).

<sup>10</sup> Petition at 1.

petition and issue the requested declaration by February 1, 2017. In support of this request, Idaho Power states it anticipates that Oregon will issue a draft final order on water rights for the new license term and a draft water quality certification in early December 2016. (As noted earlier, Oregon issued these draft documents for public comment in mid-December 2016.) The company adds that Commission action by February 1, 2017, would allow Idaho Power and other interested parties to include the Commission's conclusions in their comments on these matters and would provide Oregon with time to consider them before taking final action.<sup>11</sup>

9. Idaho Power states that the primary reason for the relicensing delay has been the process of obtaining water quality certification from both Oregon and Idaho. The company explains that the two states do not agree on how to resolve issues regarding fish passage and reintroduction of anadromous fish in tributaries above Hells Canyon Dam; Oregon supports fish passage and reintroduction, and Idaho opposes these measures.<sup>12</sup> Idaho Power notes that Oregon's fish passage statute includes an exception in the event of federal preemption, and states that this exception was the result of Idaho Power's participation as a member of the Fish Passage Task Force established by the Oregon legislature to recommend revisions to the state's fish passage laws. The company adds that, after the Task Force considered and rejected several proposals to address the possibility that the states of Idaho and Oregon might seek to impose conflicting requirements on the Hells Canyon Project, representatives of Idaho Power and the Oregon Governor's office met to discuss the issue and agreed on preemption language very similar to what is now in ORS 509.585, and the Task Force then recommended that language to the legislature.<sup>13</sup> Idaho Power maintains that, because the states of Oregon and Idaho continue to assert "diametrically opposed positions regarding fish passage and reintroduction,"<sup>14</sup> it is now important for the Commission, as the agency charged with administration of the FPA, to determine whether the FPA preempts Oregon law.<sup>15</sup> The company concludes that a decision finding the Oregon statute preempted would, by its

---

<sup>11</sup> Petition at 14-15.

<sup>12</sup> *Id.* at 4-5 (citing ORS 509.585(11) (2016), which states: "To the extent that the requirements of this section are preempted by the Federal Power Act or by the laws governing hydroelectric projects located in waters governed jointly by Oregon and another state, federally licensed hydroelectric projects are exempt from the requirements of this section.").

<sup>13</sup> Petition at 6-7.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* at 2.

terms, result in an exemption and thus would “substantially narrow the issues that remain to be resolved in the relicensing process.”<sup>16</sup>

10. Relying on the Supreme Court’s decision in *First Iowa*,<sup>17</sup> Idaho Power argues that the FPA preempts state laws concerning the construction, operation, maintenance, and equipment of hydroelectric projects, and reserves to the states only those laws regarding proprietary rights in water, rather than a broad authorization to impose state requirements on federally-licensed hydro projects.<sup>18</sup> Idaho Power also relies on the 1986 amendments to the FPA on the Electric Consumers Protection Act (ECPA), particularly the addition of section 10(j), which requires the Commission to adopt fish and wildlife recommendations of federal and state agencies unless they are inconsistent with the FPA or other applicable law, but does not give these agencies mandatory authority or a veto.<sup>19</sup> Further, Idaho Power cites the Supreme Court’s 1990 decision in *California v. FERC*,<sup>20</sup> which held that the FPA preempts state authority to require minimum flows that exceed the Commission’s requirements. Idaho Power also cites the Ninth Circuit’s decision upholding the Commission’s decision rejecting Oregon’s section 10(j) recommendation to include fish passage requirements in a hydro license,<sup>21</sup> and the 2005 Energy Policy Act provisions allowing states and other parties to suggest alternatives and request a hearing on fishway prescriptions without changing the mandatory nature of the federal agencies’ section 18 prescription authority.<sup>22</sup>

11. Although Idaho Power references in a footnote the Second Circuit’s decision in *American Rivers v. FERC*,<sup>23</sup> the company does not discuss this case or otherwise address the significance of the states’ conditioning authority under section 401 of the CWA. Idaho Power also notes that FWS has prescribed fish passage conditions for bull trout,

---

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 160-61 (1946).

<sup>18</sup> Petition at 17-18.

<sup>19</sup> *Id.* at 19-20 (discussing the ECPA amendments, Pub. L. 99-495 (1986)).

<sup>20</sup> *California v. FERC*, 495 U.S. 490 (1990).

<sup>21</sup> *American Rivers v. FERC*, 201 F.3d 1186, 1204 (9<sup>th</sup> Cir. 1999).

<sup>22</sup> Petition at 22 (citing the Energy Policy Act of 2005, Pub. L. No. 109-58, § 241(b) (2005)).

<sup>23</sup> Petition at 14 n.47 (citing *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997)).

but does not otherwise discuss the significance of those conditions with regard to the petition.<sup>24</sup>

### **B. Comments, Protests, and Motions to Dismiss**

12. The following participants filed comments in support of the petition: Idaho Irrigation Pumpers Association, Inc. (Idaho Irrigation Pumpers), Idaho Water Users Association, Inc. (Idaho Water Users), and Edison Electric Institute (EEI). Idaho Water Users note that they have opposed upstream passage and reintroduction since 2001 based on the impacts these measures would have on irrigation, agriculture, water supplies, and electric power production in Idaho. They urge the Commission to refuse to order or allow upstream passage and reintroduction at relicensing. Idaho Irrigation Pumpers support the petition based on concerns about the increased cost of power that would result from new fish passage requirements. EEI supports the requested relief, noting that Oregon's and Idaho's differing positions on fish passage present a clear issue warranting the Commission's resolution, particularly in light of NMFS's decision to reserve its prescription authority rather than prescribing fishways now, and Commission staff's conclusion that passage and reintroduction are not warranted at this time. EEI argues that granting the petition will help resolve the conflict and provide guidance to the industry, federal and state fish and wildlife agencies, Commission staff, and other stakeholders. EEI acknowledges that the states' certification authority under CWA section 401 presents a separate issue, but regards it as beyond the scope of the petition.

13. The Idaho Public Utilities Commission (Idaho PUC) filed comments taking no position on federal preemption but raising concerns about possible increased costs of power to Idaho Power's customers in Idaho. Idaho PUC states that 95 percent of Idaho Power's costs are recovered from Idaho customers, and wants the Commission to be aware of concerns about the disproportionate impacts that Oregon's new requirements would have on those customers.

14. The following participants filed comments or protests opposing the petition: Oregon Department of Fish and Wildlife (Oregon DFW), the state of Idaho, Northwest Research Information Center, Trout Unlimited, Conservation Groups,<sup>25</sup> Nez Perce Tribe, Shoshone-Bannock Tribes of the Fort Hill Reservation (Shoshone-Bannock Tribes), and Confederated Tribes of the Umatilla Indian Reservation (Confederated Tribes of Umatilla). Idaho residents Lynn and Vince Morrow filed comments in support of fish passage at the Hells Canyon Project. Five participants filed motions to dismiss the

---

<sup>24</sup> *Id.* at 11 n.43.

<sup>25</sup> Conservation Groups are: American Rivers, American Whitewater, California Sportfishing Alliance, Hells Canyon Preservation Council, Idaho Rivers United, Pacific Rivers, and Snake River Waterkeeper.

petition: Oregon DFW, American Rivers, Northwest Research Information Center, Nez Perce Tribe, and Confederated Tribes of Umatilla.

15. Oregon DFW opposes the petition and urges the Commission to dismiss it. Oregon DFW argues that there is no controversy related to state law for the Commission to resolve because Oregon has not attempted to enforce ORS 509.585 against Idaho Power, and has not placed any conditions requiring compliance with that statute in either the proposed final order reauthorizing the project's water rights or the draft water quality certification.<sup>26</sup> Oregon asserts that although its draft water quality certification would require Idaho Power to comply with state water quality standards and other appropriate state requirements related to water quality, including potential restoration of native migratory fish species in certain tributaries above Hells Canyon Dam, those measures result from Oregon's water quality standards and CWA certification authority rather than ORS 509.585.

16. Relying on both Commission and judicial precedent, Oregon DFW argues that the Commission has no authority to revise or delete any of the state's certification conditions.<sup>27</sup> Oregon DFW also notes that these conditions result from the CWA, a federal statute, and are not therefore subject to federal preemption. Finally, Oregon DFW maintains that the Commission should dismiss the petition because it is not ripe, noting that the Commission has not yet issued a final relicensing decision or determined whether fish passage and reintroduction should be required in any new license that it may issue. Oregon DFW adds that, because Commission staff's conclusions regarding fish passage in the final EIS are nearly a decade old and do not take into account new information, including Idaho Power's proposed water quality improvements and NMFS's draft recovery plans for Snake River Spring/Summer Chinook and Steelhead or Snake River Fall Chinook, it would be premature for the Commission to express any views on federal

---

<sup>26</sup> Oregon DFW's motion to dismiss at 1-2. The draft final order reauthorizing the project's water rights is included as Appendix 1 to the motion; the draft water quality certification is included as Appendix 2. In support of its argument that the petition is not ripe, Oregon DFW points out that both of these draft decisions are not yet final, and that under state law, Oregon DWR could await a final Commission decision on Idaho Power's relicensing application before issuing a final decision on reauthorizing Idaho Power's water rights. Oregon DFW's motion to dismiss at 2, n.2.

<sup>27</sup> *Id.* at 2 (citing *Idaho Power Co.*, 110 FERC ¶ 61,345, at 62,372 (2005) (state certification conditions become conditions of any federal license that is issued, and only a reviewing court can revise or delete those conditions) (citing 33 U.S.C. § 1341(d) and *American Rivers v. FERC*, 129 F.3d 99)).

preemption or the appropriateness of Oregon's proposed water quality certification conditions.<sup>28</sup>

17. Other participants support Oregon DFW's motion to dismiss and make similar arguments. The state of Idaho makes essentially the same points, noting that the petition is premature, ineffectual, and foreclosed by CWA section 401. Idaho adds that relicensing is not the appropriate forum for resolving issues related to the states' water quality conditions and that the Commission should not prejudge these issues before the states have taken final action. The Northwest Research Information Center urges the Commission to dismiss the petition as an impermissible collateral attack on section 401(d) of the CWA, which provides that conditions of state water quality certifications are conditions of any federal license or permit that may be issued. The Center adds that, to the extent that Idaho seeks to prevent reintroduction of any fish species in Idaho waters without the state's approval, that provision is a condition of Idaho DEQ's draft water quality certification and would thus be beyond the Commission's authority to reject or revise.

18. Trout Unlimited asserts that the site-specific aquatic resources at issue in the states' water quality certifications are of regional and national importance, and stresses that because the Commission has no authority to review or revise the certification conditions, an order finding ORS 509.585 would have no practical effect in the relicensing proceeding. Similarly, Conservation Groups point out that to the extent that Idaho Power's petition seeks to challenge the merits of the states' draft water quality certifications, the petition is premature because the certifications are not final and in any event, the Commission has no authority to resolve the issue.

19. The Nez Perce Tribe, Shoshone-Bannock Tribes, and Confederated Tribes of Umatilla argue that fish passage and habitat and water quality improvements are needed to mitigate the project's adverse effects to their treaty-protected rights and trust resources. The Nez Perce Tribe and Shoshone-Bannock Tribes note that they recommended relicensing conditions to restore anadromous fish above the Hells Canyon Dam and continue to support fish passage and reintroduction. Confederated Tribes of Umatilla point out that more than two decades ago, in their 1995 Columbia River Basin Salmon Policy, they stated that their overall policy was to restore the health of the Columbia Basin and the Pacific Ocean and to restore all salmon and other native fish species to the same population levels and to all rivers where they lived before the Treaty of 1855.<sup>29</sup> The Tribes all urge the Commission to dismiss or deny the petition, arguing that it is not ripe because the Commission has not made a final licensing decision or determined whether fish passage and reintroduction should be required. They maintain that Oregon's

---

<sup>28</sup> *Id.* at 12-13.

<sup>29</sup> Confederated Tribes of Umatilla's motion at 2-3.



fish passage requirements are not at issue in relicensing and are not in conflict with the FPA, because Oregon's December 23 filing demonstrates that the state has not attempted to enforce the fish passage statute in its draft final order reauthorizing the project's water rights or in its draft section 401 water quality certification. Finally, they assert that the Commission has no authority to review or reject a state's water rights decisions or water quality certification conditions.

### **C. Idaho Power's Response to Motions to Dismiss**

20. In response to the motions to dismiss, Idaho Power maintains that Oregon DFW's assertion that ORS 509.585 "plays no role" in the relicensing proceeding is incorrect.<sup>30</sup> In support, Idaho Power cites the wording and legislative history of ORS 509.585, Oregon's reliance on that statute in its FPA section 10(j) recommendations and comments on the draft EIS, and Oregon DEQ's reference to ORS 509.585 as one of the state laws supporting the fish passage and reintroduction conditions in its draft water quality certification for the Hells Canyon Project.

21. Idaho Power reiterates that, as discussed in the petition, it participated as a member of the Fish Passage Task Force that the Oregon Legislative Assembly established to recommend revisions to the state's fish passage laws. Idaho Power adds that the Task Force produced a report recommending a fish passage and reintroduction requirement coupled with preemption language similar to that now found in ORS 509.585, which the company asserts reflected a compromise between Oregon's desire to mandate fish passage for hydroelectric projects and Idaho Power's position that the FPA preempts any such requirement. As a result, Idaho Power maintains that ORS 509.585 expressly invites a determination of whether it is preempted and does not require the Commission to make a final decision on the relicense application before determining whether the state statute is preempted.

22. Idaho Power adds that, because ORS 509.585 uses mandatory language, it requires fish passage independently of Oregon's certification authority under CWA section 401. The company notes that Oregon DEQ issued a report supporting its draft water quality certification that expressly cites ORS 509.585 as an applicable state requirement.<sup>31</sup> Finally, Idaho Power argues that, because ORS 509.585 applies unless and until preempted, the petition is neither premature nor speculative, and the Commission should provide clarity to the parties by promptly issuing an order finding the statute preempted.

---

<sup>30</sup> Idaho Power's response at 4 (filed Jan. 9, 2017) (quoting Oregon DFW's response at 2).

<sup>31</sup> Idaho Power's response at 7 (citing the 401 Report at 2; the report is included as attachment 1 to Idaho Power's response).

The company acknowledges that “the scope of section 401 is an important matter,”<sup>32</sup> but stresses that it takes no position on this issue and is not asking the Commission to review or reject the conditions of a CWA section 401 certification.

23. Our rules do not permit answers to either an answer or a protest.<sup>33</sup> However, answers to motions are permitted.<sup>34</sup> Therefore, we have considered Idaho Power’s arguments in response to the motions to dismiss the petition. We have not considered Oregon DFW’s answer to Idaho Power’s answer.

#### **D. Interventions**

24. A number of participants filed motions to intervene or notices of intervention with their comments or protests.<sup>35</sup> The Commission issued notice of the petition in the subdocket for the relicensing proceeding (Project No. 1971-079). To the extent that participants were already parties to that proceeding, there was no need to file a second motion to intervene or notice of intervention.<sup>36</sup> Federal and state agencies and Indian tribes entitled to file notices of intervention are automatically granted party status if the notice is timely filed.<sup>37</sup> For other participants who were not already parties to the proceeding, all timely motions are granted by operation of the Commission’s regulations if no party files an answer in opposition within 15 days after the motion to intervene was filed.<sup>38</sup> In light of Idaho Power’s request for expedited action, and in consideration of the

---

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *See* 18 C.F.R. § 385.214(a)(2) (2016).

<sup>34</sup> *Id.* at § 213(a)(3) (an answer may be made to any pleading, if not prohibited by paragraph (a)(2) of that section). *See also* 18 C.F.R. § 385.202 (2016) (a motion is a type of pleading).

<sup>35</sup> The following participants filed notices of intervention: Oregon DFW, Oregon DEQ, and Oregon DWR (to provide notice of their separate interventions in the proceeding); and Confederated Tribes of Umatilla. The following participants filed motions to intervene: Nez Perce Tribe, Shoshone-Bannock Tribes, Trout Unlimited, Conservation Groups, Idaho Irrigation Pumpers, Idaho Water Users, and EEI.

<sup>36</sup> The following participants were already parties to the relicensing proceeding: state of Oregon, state of Idaho, Nez Perce Tribe, Northwest Research Information Service, Trout Unlimited, Shoshone-Bannock Tribes, American Rivers, American Whitewater, Idaho Rivers United, and Idaho PUC. *See* final EIS at 6.

<sup>37</sup> *See* 18 CFR § 385.214(a) (2016).

<sup>38</sup> *Id.* at § 385.214(c) (2016).

broad general interest in petition, we waive the 15-day response period and grant any remaining timely-filed motions to intervene.

### **E. Dismissal of the Petition**

25. After considering the petition, answers and protests, motions to dismiss, and response to the motions, we agree that Idaho Power's petition for a declaratory order on federal preemption is premature. In our view, there is currently no conflict between state and federal law that would require us to make a preemption determination. We therefore grant the motions to dismiss the petition.

26. Currently, Oregon's draft water quality certification includes conditions that would require fish passage and reintroduction of anadromous fish above Hells Canyon Dam, whereas Idaho's draft certification includes conditions that would preclude Idaho Power from introducing or reintroducing fish species to Idaho waters without Idaho's consent. However, both states' draft certifications are not yet final.

27. More importantly, however, Idaho Power's relicensing application remains pending, and we have not yet decided what action to take on the license application. Many issues remain to be resolved. For example, the states may decide to amend the conditions of their draft water quality certifications. Once those certifications are finally issued (or waived), the Commission will need to consult formally with FWS and NMFS regarding the possible effects of relicensing the project on ESA-listed fish and other species. The outcome of those consultations is similarly unknown and may influence the conditions of any new license that we might consider issuing. In these circumstances, it would be inappropriate for us to attempt to prejudge any of these issues, and no purpose would be served by our issuing a declaratory order on whether the FPA preempts ORS 509.585.

28. We appreciate that Idaho Power seeks a preemption ruling independently of the states' CWA section 401 certification authority, and asserts that such a ruling would provide clarity to participants in the relicensing proceeding. However, we fail to understand how this could be possible. In fact, the petition is expressly based on the possibility that Oregon may require fish passage and reintroduction as a condition of its water rights decision or water quality certification for the Hells Canyon Project. The company claims that, as a result, "Idaho Power is likely to be placed in the impossible position of having to respond to Oregon's efforts to enforce a state statute that contradicts the provisions of its FERC license, and which directly conflicts with Idaho law."<sup>39</sup> As we just noted, the conditions of any license that we might choose to issue have yet to be determined.

---

<sup>39</sup> Petition at 13.

29. As a practical matter, we do not believe the issue of federal preemption in this case can be considered in a vacuum, without reference to the possible effect of the states' CWA certification authority. The cases that Idaho Power cites in support of federal preemption either predate the states' certification authority or present issues unrelated to that authority. For example, in *California v. FERC*, the Supreme Court relied on *First Iowa* to hold that California could not impose a minimum stream flow requirement pursuant to state law that conflicted with the lower minimum flows that the Commission had required in the license.<sup>40</sup> Idaho Power fails to mention, however, that four years later, in a case involving the state of Washington's water quality certification authority, the Supreme Court held that the state's minimum flow condition was an appropriate requirement of state law and, given that the Commission had not yet acted on the license application, would not be limited by the Commission's comprehensive authority to license hydroelectric projects under the FPA.<sup>41</sup>

30. We have recognized that an exception to the FPA's preemption of inconsistent state requirements can occur when later-enacted federal statutes provide for a state role in specific areas, such as the water quality certification requirement for federally-licensed projects under section 401 of the CWA, or state shoreline permits and consistency certifications issued pursuant to federally-approved state programs under the Coastal Zone Management Act.<sup>42</sup> In addition, we find no basis to presume that a state could not include provisions requiring fish passage and reintroduction as conditions of its water quality certification. The conditions at issue in *American Rivers v. FERC*<sup>43</sup> included fish passage provisions. In *S.D. Warren Co. v. Maine Board of Environmental Protection*,<sup>44</sup> the Supreme Court quoted the Maine Board's findings that Warren's dams have blocked fish and eel passage, eliminated fishing opportunities, and prevented recreational access to the river. The Court stated: "Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that

---

<sup>40</sup> 495 U.S. at 506-507.

<sup>41</sup> *Public Utility Dist. No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 721-23 (1994).

<sup>42</sup> See *Public Utility District No. 1 of Snohomish Co.*, 147 FERC ¶ 61,215 at P 22 (2014), *reh'g denied*, 149 FERC ¶ 61,206 (2014).

<sup>43</sup> 129 F.3d at 104.

<sup>44</sup> 547 U.S. 370, 385 (2006).

respects the States' concerns."<sup>45</sup> Although the specific certification conditions were not at issue in the case, they included provisions for fish and eel passage.<sup>46</sup>

31. In any event, if Oregon ultimately seeks to require fish passage and reintroduction as a condition of either its water rights decision or its water quality certification, the Commission would have no authority to review these state determinations. Under section 27 of the FPA, the Commission has no authority to adjudicate issues related to state water rights.<sup>47</sup> Similarly, the Commission has no authority to review or reject conditions of a state's water quality certification.<sup>48</sup> Nor would we have any authority to resolve conflicts between the states' certifications, if they exist, or conflicts between the states' certification conditions and any mandatory fishway prescriptions or other mandatory conditions. We encourage the parties with authority to impose conditions on the license in this case to resolve their differences to the fullest extent possible. Commission staff (including separated staff currently assigned to this case) remain available to assist the parties with these issues. If we are nevertheless faced with irreconcilable conflicts, however, our only options would be to issue the license with the conflicting conditions of the state water certificates included, thus leaving Idaho Power to challenge the conditions in the appropriate state courts or other appropriate forum,<sup>49</sup> or to deny the license.

32. For all the foregoing reasons, we find that Idaho Power's petition for a declaratory order is premature, cannot realistically be considered separately from the issue of the states' certification authority under CWA section 401, and raises issues that are beyond our authority to decide. We therefore dismiss the petition.

---

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 375.

<sup>47</sup> *City of Tacoma, Washington*, 86 FERC ¶ 61,311 at 62,073 n.13 (1999), *aff'd*, *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 71 (D.C. Cir. 2006).

<sup>48</sup> *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997).

<sup>49</sup> See *Roosevelt Campobello International Park Commission v. EPA*, 684 1041, 1056 (1<sup>st</sup> Cir. 1982) and cases there cited (the proper forum to review the appropriateness of a state's certification is the state court, and federal courts and agencies are without authority to review the validity of requirements imposed in a state's certification).

The Commission orders:

The petition for a declaratory order on federal preemption, filed by Idaho Power Company in this proceeding on November 23, 2016, is dismissed.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.