

SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS (“Agreement”) is entered into by and among Petitioner Nez Perce Tribe (“Tribe”), a federally-recognized Indian tribe; Petitioners Pacific Rivers and Idaho Rivers United (“Conservation Petitioners”), non-profit environmental conservation organizations with missions to protect and restore waterways including the Snake River; and Oregon Department of Fish and Wildlife (“ODFW”) and Respondent Oregon Department of Environmental Quality (“ODEQ”), agencies of the state of Oregon, with respect to claims arising out of consolidated cases currently pending in the state of Oregon’s Marion County Circuit Court, captioned *Nez Perce Tribe v. Oregon Department of Environmental Quality*, Case No. 19CV32752 and *Pacific Rivers and Idaho Rivers United v. Oregon Department of Environmental Quality*, Case No. 19CV32375 (“Consolidated Case No. 19CV32752/19CV32375”).

DEFINITIONS

As used in this Agreement, the following terms shall apply:

- a. “Collaborate” or “collaboratively” shall mean that Oregon and the Tribe shall work together in a meaningful manner, including timely notice of, and an opportunity to participate in and provide input on, material developments related to the 401 certification at issue and shall require each Party to consider and respond to input from the other in a timely and meaningful manner. “Oregon” refers to the state of Oregon, by and through ODEQ and ODFW;
- b. “Days” means calendar days unless otherwise expressly specified;
- c. “Final § 401 certification” shall mean the final federal Clean Water Act Section 401 Certification issued by ODEQ to IPC for the Hells Canyon Complex on May 24, 2019.
- d. “IPC” shall mean Idaho Power Company;
- e. “Mercury and Methylmercury TMDL” refers to the mercury and methylmercury total maximum daily load that shall include the Hells Canyon reach of the Snake River, but has yet to be promulgated by ODEQ or approved by the the Environmental Protection Agency (“EPA”);

- f. “Party” and/or “Parties” refers to the Tribe, Conservation Petitioners, and/or Oregon, by and through ODEQ and ODFW; and
- g. “SIA” shall mean Stipulation and Implementation Agreement for Hells Canyon Complex Hydroelectric Project entered into by and between the state of Oregon, state of Idaho, and IPC in 2019.

RECITAL OF MATERIAL REPRESENTATIONS

WHEREAS, the Hells Canyon Complex Hydroelectric Project (“Complex”) consists of three dams (Brownlee, Oxbow, and Hells Canyon) on the portion of the Snake River that flows through the southern end of Hells Canyon and is licensed to IPC by the Federal Energy Regulatory Commission (“FERC”), Project No. 1971; and

WHEREAS, the Complex is located within and adjacent to areas in which the Tribe holds Treaty-reserved rights to fish, hunt, gather, pasture, and travel pursuant to the 1855 Treaty with the United States, Treaty with the Nez Perces, art. 3, June 11, 1855, 12 Stat. 957; and

WHEREAS, the Tribe, pursuant to its Treaty-reserved rights, shares with Oregon co-management responsibilities for fish populations in the Columbia River Basin as described in the *U.S. v. Oregon* Management Agreement (2018–2027 *U.S. v. Oregon* Management Agreement, Civ. No. 3:68-cv-00513-MO (D. Or., Feb. 26, 2018) ECF 2607-1); and

WHEREAS, the Clean Water Act (“CWA”) requires that Oregon certify, through issuance of a § 401 certification, that the Complex will meet Oregon water quality standards before FERC may issue a new license for the Complex to IPC; and

WHEREAS, the Tribe’s goal for the final § 401 certification is to ensure that Treaty-reserved aquatic resources continue to inhabit the Snake River within and downstream of the Complex and are safe to support Treaty-reserved rights to harvest and consume fish within and below the Complex no later than the year 2045 and at levels at least as protective as Oregon’s human health criteria reflecting a per-capita fish consumption rate of 175 grams per day at a risk level of 10⁻⁶; and

WHEREAS, the Tribe and Conservation Petitioners submitted timely comments regarding fish passage, methylmercury, and temperature conditions on Oregon’s draft § 401 certification; and

WHEREAS, in April 2019, Oregon and the state of Idaho entered into a SIA related to § 401 certification conditions for fish passage and fish introduction or reintroduction; and

WHEREAS, on May 24, 2019, ODEQ issued, after a public comment period, the final § 401 certification; and

WHEREAS, Conservation Petitioners filed a Petition for Judicial Review of Final Administrative Order in this matter on July 22, 2019, alleging that ODEQ violated the CWA, the CWA's implementing regulations, and Oregon law when issuing the final § 401 certification, and seeking declaratory and injunctive relief; and

WHEREAS, the Tribe filed a Petition for Judicial Review of Final Administrative Order in this matter on July 23, 2019, alleging that ODEQ violated the CWA, the CWA's implementing regulations, and Oregon law when issuing the final § 401 certification, and seeking declaratory and injunctive relief.

WHEREAS, the case filed by the Tribe and the case filed by Conservation Petitioners were consolidated in Marion County Circuit Court on April 23, 2020 as Consolidated Case No. 19CV32752/19CV32375.

NOW, THEREFORE, in consideration of the covenants, agreements, mutual promises, and representations hereinafter set forth, the Parties agree as follows:

I. Temperature Terms

- a. Relating to Section II.F.2 of the final § 401 certification and the Brownlee operational component:
 - i. ODEQ shall commit to sending IPC a letter within 30 days of verifying a second consecutive year of Snake River temperatures exceeding 16.5°C during the salmonid spawning period. In this letter, ODEQ shall express its support for IPC immediately initiating development of alternative measures, which may include but is not limited to a small-scale hypolimnetic pump system, that could be fully implemented within 18 months—or by the salmonid spawning period of the fourth year—if Snake River temperatures do exceed 16.5°C for the third consecutive year;
 - ii. To ensure that unnecessary delay does not occur, ODEQ commits to approving alternative measures within 90 days of completion of

coordination with the Tribe and receipt of an adequate alternative measures report proposed by IPC. The 90-day window would be suspended during the pendency of any necessary public comment period. An adequate alternative measure shall be designed and implemented to ensure that Snake River temperatures downstream of the Hells Canyon Dam do not exceed 16.5°C for a fourth consecutive year during the salmonid spawning period and do not cause or contribute to a violation of applicable water quality standards.

- b. ODEQ commits to notify the Tribe upon receipt of any Temperature Alternative Measures¹ proposed by IPC, whether proposed through a Temperature Alternative Measures Plan or otherwise, and the Parties agree to coordinate with each other in a timely manner prior to ODEQ making a decision regarding IPC's proposal.

II. Fish Passage Terms

- a. ODFW shall include and work collaboratively with the Tribe in the following processes set out in Attachment A, Section E, of the SIA entitled "Pine Creek Placement, Monitoring and Juvenile Collection," which is attached hereto solely for reference as Appendix A.
 - i. E.1 – Development of anadromous fish placement, monitoring, and evaluation plan for Pine Creek ("Placement Plan") in collaboration with IPC.
 - ii. E.1 – Development of specific annual work plans in collaboration with IPC.
 - iii. E.2 – Decisions regarding agreed-upon number of telemetry tags to be implanted annually.
 - iv. E.3 – Development of pathogen risk assessments.
 - v. E.5 – Development of design and maintenance plans for collection devices (e.g., screw traps) for juvenile spring Chinook salmon and summer steelhead in Pine Creek.

¹ Capitalized terms within these Temperature terms are as defined in the final § 401 certification.

- vi. E.5 – Review of IPC proposals, if any, for alternative means of juvenile collection.
 - vii. E.6 – Development of annual work plans to “design and conduct limited research using surrogate juveniles to monitor movement of out-migrants out of Pine Creek and through Hells Canyon Reservoir.”
 - viii. E.7 – ODFW shall share raw data and annual progress reports provided by IPC regarding the Placement Plan with the Tribe.
 - ix. E.7 – ODFW shall invite the Tribe to participate in meetings with IPC to review annual progress reports that summarize research and findings on adult placement in Pine Creek.
- b. The Parties share the goal of passing juveniles downstream of Hells Canyon Dam. In advancement of that goal, ODFW commits to the following:
- i. In order to keep the Tribe and Conservation Petitioners apprised of ongoing developments regarding juvenile fish passage at high head dams, ODFW shall provide the Tribe and Conservation Petitioners with relevant reports and studies produced or received by ODFW relating to juvenile fish passage at the Pelton Round Butte Dam and Cougar Dam.
 - ii. In collaboration with the Tribe, ODFW shall assess monitoring and evaluation activities conducted under the final § 401 certification and SIA, together with information gained in other passage efforts at high head dams, to develop strategies for facilities to pass juveniles downstream of Hells Canyon Dam.
 - iii. ODFW shall work collaboratively with the Tribe to transport juvenile fish (spring Chinook and summer steelhead) collected in Pine Creek downstream of Hells Canyon Dam.
- c. The Parties agree to the settlement terms in Appendix B (Wallowa Lake Sockeye Salmon Framework, Pilot Project & Reintroduction Plan Settlement Terms), which is incorporated herein in its entirety by this reference.

III. Methymercury and Mercury Terms

- a. The Parties agree to the following actions and timeline related to the Mercury and Methylmercury TMDL:
 - i. Actions currently underway or to begin upon execution of this Agreement and filing of notice or stipulation of dismissal and form of judgment.
 1. ODEQ shall inventory what data is presently available for the Mercury and Methylmercury TMDL and identify data needs and gaps.
 2. ODEQ shall convene a Mercury and Methylmercury TMDL Advisory Committee to develop and design the TMDL structure (i.e., provide input regarding the design of the mathematical model, data to be included in the model, additional data needed (if any), and/or analyses to be performed). ODEQ shall invite the Tribe to participate in that technical committee, and the Tribe shall participate in the technical committee. ODEQ shall provide Conservation Petitioners notice of the convening of the technical committee and shall invite Conservation Petitioners to nominate a representative.
 3. ODEQ shall invite the Conservation Petitioners to nominate a representative to participate in any local stakeholder advisory committee that is convened as part of the Mercury and Methylmercury TMDL development.
 4. ODEQ shall notify the Tribe and Conservation Petitioners of any public comment opportunities or public hearings that occur as part of the Mercury and Methylmercury TMDL development, including the release of the draft Mercury and Methylmercury TMDL.
 5. ODEQ shall ensure that the Mercury and Methylmercury TMDL includes a Water Quality Management Plan (“WQMP”), as described in Oregon Administrative Rules Chapter 340, Division 42, and the WQMP shall include specific components designed to

lead to assured methylmercury reductions in the Complex. *See, e.g.,* OAR 340-42-0030(17) (WQMP is “the element of a TMDL describing strategies to achieve allocations identified in the TMDL to attain water quality standards.”); OAR 340-042-0040(4)(1) (“The WQMP provides the framework of management strategies to attain and maintain water quality standards.”). Oregon shall convene a WQMP technical committee and agrees to invite the Tribe to participate on that committee.

6. Throughout the Mercury and Methylmercury TMDL and WQMP development processes, ODEQ agrees to collaborate with the Tribe and further agrees to meet with the Tribe on a government-to-government basis prior to finalizing the Mercury and Methylmercury TMDL or WQMP.
7. ODEQ shall work with the Tribe to develop ways to measure progress towards methylmercury reductions, including by identifying appropriate surrogate and other measures through the WQMP Advisory Committee described above. The specific measures in the Methyl Mercury Management Plan (“MMMP”) referenced in the final § 401 Certification shall be informed by the WQMP. Oregon acknowledges the Tribe’s expectation for monitoring as it is a typical component of any management plan. ODEQ shall ensure that the WQMP Advisory Committee and Mercury and Methylmercury TMDL Advisory Committee consider and determine appropriate measures, which may include:
 - a. annual estimation of total (biotic and abiotic) methylmercury passing Hells Canyon Dam;
 - b. annual measurement of methylmercury (ppm) in smallmouth bass (medium - 250—300mm and large - > 300 mm size categories) sampled in Brownlee Reservoir forebay and downstream of Hells Canyon dam; and

- c. 5-year measurement of methylmercury (ppm) in sturgeon (4–6 feet, and greater than 6 feet size categories), sampled downstream of Hells Canyon Dam.

ii. Future Timeline

1. 2021: ODEQ began Mercury and Methylmercury TMDL development through a workgroup in July 2021.
2. 2023:
 - a. The Parties agree that the currently anticipated date for completion of the U.S. Geological Survey’s Mercury study is 2023.
 - b. Contingent on receiving funds, ODEQ shall:
 - i. release a draft of the Mercury and Methylmercury TMDL for public comment within 3 months after receiving the predictive model methylmercury management scenarios from the U.S. Geological Survey’s mercury study.
 - ii. finalize the Mercury and Methylmercury TMDL within 8 months of receiving the predictive model methylmercury management scenarios. This schedule accounts for 2 months of public notice on the draft TMDL and 3 months for ODEQ to incorporate comments, finalize the TMDL, and issue the Mercury and Methylmercury TMDL.
3. 2024 (based upon the currently anticipated date of 2023 for completion of the U.S. Geological Survey’s Mercury study): ODEQ shall send a letter to IPC expressing support for:
 - a. IPC initiating development of a draft MMMP, and
 - b. IPC including in the MMMP routine methylmercury monitoring for the entire license term to evaluate the

effectiveness of the MMMP in addressing IPC's methylmercury contributions to the Snake River.

4. 2026 and beyond (based upon the currently anticipated date of 2023 for completion of the U.S. Geological Survey's Mercury study): The Parties recognize and agree that the final § 401 certification sets forth the schedule for IPC's submission of a proposed MMMP to ODEQ. *See* Final § 401 certification Section VIII.D ("Within 180 days following completion of the Hells Canyon Complex predictive model scenarios described in section VIII.C above, IPC shall propose to the DEQs a MMMP to address the Hells Canyon Complex's role in methyl mercury production."). ODEQ herein agrees that:
 - a. ODEQ shall, within one year of IPC's submission of an MMMP or EPA's approval of the Mercury and Methylmercury TMDL, whichever is later, collaborate with the Tribe to identify and resolve MMMP insufficiencies, if any.
 - b. One year after IPC submission of the MMMP or EPA's approval of the mercury TMDL, whichever is later, ODEQ shall determine the sufficiency of the MMMP.
 - c. If ODEQ determines that the MMMP is insufficient, ODEQ shall collaborate with the Tribe on revisions to the MMMP to address the Complex's role in methylmercury production. ODEQ and the Tribe agree that these collaborations shall take no more than nine months.
 - d. If ODEQ determines that IPC's MMMP is insufficient, ODEQ shall approve a revised MMMP within two years of IPC's MMMP submission or EPA's approval of the Mercury and Methylmercury TMDL, whichever is later.

- e. Every five years after EPA's approval of the Mercury and Methylmercury TMDL during the duration of the license, ODEQ and the Tribe shall meet to evaluate the MMMP and Mercury and Methylmercury TMDL and to discuss whether adaptive management is necessary under the MMMP or whether the Mercury and Methylmercury TMDL needs to be reopened for revision under OAR 340-042-0040(7).

iii. Funding

1. Consistent with Governor Brown's signing statement with ODEQ budget bill (HB 5516), ODEQ shall use \$750,000 from its water quality budget to support promulgation of the Mercury and Methylmercury TMDL over the period required to do this work, beginning with the 2021–23 biennial budget, on the condition that IPC provides \$750,000 to Oregon for ODEQ's costs on the Mercury and Methyl mercury TMDL.
2. Should ODEQ require additional funds beyond the \$1.5 million to complete the TMDL, it shall promptly notify the Tribe and Conservation Petitioners and use its best efforts to secure any additional funds to complete the TMDL. The Tribe and Conservation Petitioners shall support ODEQ in its efforts as needed.
3. ODEQ and the Tribe shall seek EPA resources and funding for TMDL when appropriate.

IV. General Terms

- a. Notice or Stipulation of Dismissal with Prejudice and Form of Judgment: Within five business days of the full execution of this Agreement, the Tribe and Conservation Petitioners shall, pursuant to ORCP 54A(1), file a notice or stipulation of dismissal with prejudice and form of judgment of dismissal with prejudice of Consolidated Case No. 19CV32752/19CV32375, without costs or fees to any Party.
- b. Dispute Resolution and Enforcement of Agreement
 - i. If there is a dispute over compliance with any term or provision of the Agreement, the disputing party shall notify the other Parties in writing of the dispute. The Parties shall attempt to settle the dispute informally before filing a complaint in the state of Oregon's Marion County Circuit Court, as set forth below.
 - ii. The disputing party shall first engage the other Parties in informal dispute resolution. During this informal dispute resolution period, which shall not exceed sixty (60) days (unless the Parties agree to an extension of the period), the Parties shall make good faith efforts to resolve the dispute, including through in person or telephonic conferences.
 - iii. If the Parties are unable to resolve the dispute through informal dispute resolution, any Party may file a new case to enforce the relevant term(s) and provision(s) of this Agreement; provided however that such action shall be brought and conducted solely within the state of Oregon's Marion County Circuit Court. The Parties hereby consent to in personam jurisdiction of this court and waive any objection to venue and any claim that the forum is an inconvenient forum. The Tribe and State of Oregon hereby agree to waive sovereign immunity from suit in this court for the sole and limited purpose of enforcing the terms of this Agreement.
 - iv. Parties shall be entitled to equitable relief, including injunction and specific performance, in the event of any material breach of the provisions of this Agreement. Notwithstanding any other provision of this Agreement

to the contrary, the Parties shall not be liable for any monetary damages, including but not limited to compensatory, consequential, special, punitive, or indirect damages arising under, or as a result of a breach of this Agreement.

- c. Authority of the Parties: The undersigned representative(s) for each party certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of this Agreement and to bind legally such party or parties to it.
- d. Entire Agreement: This Agreement represents the entire agreement among the Parties in this case. All prior conversations, meetings, discussions, drafts, and writings of any kind regarding the Tribe's and Conservation Petitioners' Petitions for Judicial Review of Final Administrative Order are specifically superseded by this Agreement.
- e. Mutual Drafting and Construction: The Parties expressly understand and agree that this Agreement was jointly drafted by the Tribe, Conservation Petitioners, and Oregon. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.
- f. Compliance with Other Laws
 - i. No provision in this Agreement shall be interpreted as or constitute a commitment or requirement that Oregon take action in contravention of the Oregon Administrative Procedures Act or any other law or regulation, either substantive or procedural.
 - ii. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that Oregon pay funds in contravention of any applicable provision of law.
 - iii. No provision of this Agreement shall be construed to interpret, modify, or diminish the Tribe's Treaty-reserved rights or other rights under applicable federal, state, or Tribal law.

- g. Consistency with Final § 401 Certification:
- i. The Parties intend and agree that nothing in this Agreement conflicts with or otherwise may be construed as inconsistent with the final § 401 Certification; and
 - ii. No Party to this Agreement shall be deemed to have approved, accepted, agreed to, or otherwise consented to any principle underlying any of the matters covered by this Agreement. The Parties agree that nothing in this Agreement shall be construed to constitute Oregon's encouragement or collaboration with the Parties to make any recommendation, condition, prescription, determination, or comment with respect to spring Chinook salmon or summer steelhead in any proceeding relating to any new FERC license for the Complex that materially conflicts with, adds to, omits portions of, or prevents or renders impracticable implementation of the SIA during the first twenty (20) years of the term of any new FERC license.
- h. Severability: Subsequent to execution of this Agreement, if any term, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the state of Oregon or by the United States invalid, void, or unenforceable, the remainder of the terms, covenants, conditions, or provision of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

- i. Release of Claims:
- i. The Tribe and Conservation Petitioners, on their own behalf and on behalf of any executors, administrators, successors, agents, and assigns, agree to release, acquit, and forever discharge ODEQ, the State of Oregon and all of its political subdivisions, agencies, departments, administrators, officers, current and former employees, agents, attorneys, and insurers (collectively “Released Parties”), from any claims or causes of action challenging ODEQ’s final § 401 certification.
- ii. The scope of this Release is solely limited to the final § 401 certification. Except as expressly provided herein, nothing in this Agreement shall limit the Tribe’s or Conservation Petitioners’ rights to assert any claim for relief or defenses, to make any legal or factual assertion or defense in any other proceeding, forum, or advocacy effort, or otherwise be deemed to waive or limit the Tribe’s or Conservation Petitioners’ right to pursue or support administrative, judicial, or legislative action related to the Complex.
- j. No Admission of Fault or Future Precedent: The Parties agree that this Agreement is not to be construed as an admission or proof of any liability or fault whatsoever on the part of the Released Parties. This Agreement does not establish a precedent in the settlement of any current or future grievance, claim of unfair labor practice, or other dispute among the Parties, and shall not be admissible as evidence in any future arbitration, administrative or court proceeding without the Parties’ express written consent, except in a proceeding brought to enforce the terms of this Agreement.
- k. No Waiver; Amendments: No waiver or amendment of terms of this Agreement shall bind any Party unless in writing and signed by all Parties, and all necessary approvals have been obtained. Waivers shall be effective only in the specific instance and for the specific purpose given. The failure of any Party to enforce any provision of this Agreement shall not constitute a waiver by a Party of that or any other provision.

- l. Binding Effect: This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns.
- m. No Third-Party Beneficiaries: Nothing contained in this Agreement shall entitle any person or entity other than the Parties or their successors or assigns to any claim, cause of action, remedy, right, benefit, or immunity of any kind whatsoever.
- n. Execution in Counterparts: This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.
- o. Notification to Conservation Petitioners: Oregon shall provide Conservation Petitioners notice of any public comment opportunities resulting from the implementation of these settlement terms.
- p. Funding: Nothing in this Agreement shall be construed as permitting any violation of Article XI, Section 7, of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the state of Oregon. This Agreement shall not be interpreted as binding ODEQ or ODFW to expend any sum in excess of appropriations made by the Oregon Legislature, and available for purposes of this Agreement, or as involving ODEQ or ODFW in any contract or other obligation for the further expenditure of money in excess of such appropriations.
- q. Notice: All notices or other communications required or permitted by this Agreement, except as otherwise provided by this Agreement, shall be in writing and personally delivered, delivered by reputable overnight courier, or sent by registered or certified mail, return receipt requested, and postage prepaid, addressed to the Parties at the addresses set forth below (or any other address that the party to be notified may have designated to the sender by like notice), or by electronic mail to the e-mail addresses set forth below. Notice of change of address shall be given by written notice in the manner detailed in this paragraph.

If to the Tribe:

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