

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

**No. 18-1316**

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IN RE: SISKIYOU COUNTY WATER USERS ASSOCIATION,  
*Petitioner*

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ON PETITION FOR A WRIT OF MANDAMUS

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**OPPOSITION OF FEDERAL ENERGY REGULATORY COMMISSION  
TO PETITION FOR A WRIT OF MANDAMUS**

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February 26, 2019

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## GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
June 2018 Order	<i>PacifiCorp</i> , 163 FERC ¶ 61,208 (2018)
Klamath facilities	A series of hydropower developments, i.e., dams and related structures, along the Klamath River in Oregon and California
Lower dams	The subset of the Klamath facilities consisting of the four hydropower developments farthest downstream, which are the facilities at issue in this case
March 2018 Order	<i>PacifiCorp</i> , 162 FERC ¶ 61,236 (2018)
P	The internal paragraph number within a FERC order
Pet.	Petitioner Siskiyou County Water Users Association Petition for Writ of Mandamus, filed on Nov. 21, 2018
Renewal Corporation	Klamath River Renewal Corporation, the proposed transferee of the amended license covering the portion of the Klamath hydropower facilities at issue in this case
Water Users	Petitioner Siskiyou County Water Users Association

## INTRODUCTION

The extraordinary remedy of mandamus is inappropriate and unnecessary in these circumstances. As this Court's decision last month in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), illustrates, the licensing and decommissioning process for the hydroelectric facilities along the Klamath River ("Klamath facilities") is a complex, multi-jurisdictional endeavor. For its part, the Federal Energy Regulatory Commission ("Commission") has been steadily managing multiple, interrelated administrative dockets involving the relicensing, license amendment and transfer, facility surrender, and decommissioning of the Klamath facilities. In the past year alone, the Commission has issued orders directing additional process to supplement the evidentiary record on a matter of first impression, and preserving the status quo through a stay pending that supplemental review. The Commission is actively considering the resulting record and will act in a timely manner.

Notwithstanding the Commission's steady progress in this undertaking, Siskiyou County Water Users Association ("Water Users") now attempt to short-circuit the process contemplated by the Federal Power Act. Rather than follow the Congressionally-mandated path to judicial review, Water Users seek a Court order dictating immediate, interlocutory Commission action on their motion to dismiss. That attempt fails on two independent grounds. First, Water Users have not

established—indeed, *cannot* establish—that the Court has jurisdiction to provide mandamus relief in these circumstances. Second, Water Users’ petition fails on the merits because it does not surmount the high bar for mandamus relief.

Perhaps most important, a writ of mandamus is entirely unnecessary to secure the Court’s prospective jurisdiction. The Commission will address Water Users’ motion to dismiss—and the many other issues raised in the administrative proceedings—in a timely manner. Water Users then will have the opportunity to seek judicial review, if necessary, through the statutorily-prescribed process.

The Court should deny the petition.

## **BACKGROUND**

The Klamath facilities consist of a series of dams and related structures<sup>1</sup> along the Klamath River. *Hoopa*, 913 F.3d at 1101. As the Court detailed in *Hoopa*, the contest over the fate of the facilities has been running for fifteen years. *Id.* It began in 2004, two years prior to expiration of the facilities’ original license, when PacifiCorp filed a proposal with FERC to relicense some of the dams and decommission others. *See id.*

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<sup>1</sup> Although each hydroelectric facility consists of dams and related structures—such as powerhouses, water conveyance structures, and fish ladders—this pleading refers to them simply as dams.

In 2010, while that application was pending, a diverse group of parties entered into a settlement agreement (“original settlement”) to decommission the four dams farthest downstream (“lower dams”). *Hoopa*, 913 F.3d at 1101. Because several preconditions in the original settlement had not been satisfied, some of the parties to that agreement entered into an amended settlement in 2016 (“amended settlement”). *Id.* at 1102. The amended settlement set forth an alternative plan for decommissioning, which called for transferring the license for the lower dams to a new company, Klamath River Renewal Corporation (“Renewal Corporation”), formed by the signatories of the amended settlement. *Id.*

In September 2016, PacifiCorp filed an application at the Commission to amend the license for the project to create a separate license for the lower dams and allow their transfer to the Renewal Corporation. *Id.* The proposal to transfer a license for the sole purpose of decommissioning represented a novel issue for the Commission. *See id.* As a result, “and based on legal, technical, and financial concerns, FERC chose to separately review the applications for (1) amendment and (2) transfer.” *Id.* On March 15, 2018, the Commission approved the amendment application, allowing the lower dams to be licensed separately from the upper dams, but directed the submission of additional information concerning the transfer of that license to the Renewal Corporation. *PacifiCorp*, 162 FERC ¶ 61,236 at

PP 71-73 (2018) (March 2018 Order). Although it acknowledged that the transfer application “is the result of a collaborative process between a number of parties – many with disparate interests – that began several years ago,” the Commission found that it “cannot act on the application for transfer until the Renewal Corporation submits” additional information. March 2018 Order at P 73. The Commission, therefore, explained that it would “defer our determinations on the Renewal Corporation’s legal and technical capacity to accept transfer of the license and carry out decommissioning to our review of the transfer application.” *Id.*

Just over one month later, on April 24, 2018, Water Users filed a motion to dismiss the transfer application.<sup>2</sup> The Commission’s review of the transfer application, including Water Users’ related motion to dismiss, is ongoing. Meanwhile, the Commission has stayed the compliance measures associated with its approval of the license amendment, to avoid the possibility that those activities and expenses could be rendered either duplicative or unnecessary by the

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<sup>2</sup> Water Users’ motion to dismiss, and petition for writ of mandamus, presents arguments concerning the Klamath River Compact and the Klamath River Compact Commission. *See* Pet. at 9-14. To Commission counsel’s knowledge, the Klamath River Compact Commission has filed no comments at the Commission in the fifteen years since the Klamath facilities’ relicensing and decommissioning process commenced. *Cf.* Pet. at 11 (“With the motion [to dismiss], [Water Users] filed declarations showing that the Klamath River Compact Commission has never taken any action with respect to the [amended settlement], hydrofacility removal, or the [Renewal Corporation].”).

Commission’s determination on the transfer application. *See PacifiCorp*, 163 FERC ¶ 61,208 at PP 6-9 (2018) (June 2018 Order).

## ARGUMENT

### **I. The Extraordinary Remedy Of Mandamus Is Neither Necessary Nor Appropriate In These Circumstances**

“[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). A petitioner seeking mandamus “must demonstrate (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists.” *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). “These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction.” *Id.*

Even where these jurisdictional requirements are satisfied, “a court may grant relief only when it finds compelling equitable grounds.” *Id.* A petitioner’s burden is high: “The party seeking mandamus has the burden of showing that its right to the issuance of the writ is clear and indisputable.” *Id.* (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)).

“The central question in evaluating ‘a claim of unreasonable delay’—on which Water Users base their request for extraordinary relief—is ‘whether the agency’s delay is so egregious as to warrant mandamus.’” *In re Core Commc’ns*,

*Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984)). The first and most important factor is that “the time agencies take to make decisions must be governed by a ‘rule of reason.’” *Core Commc’ns*, 531 F.3d at 855 (quoting *Telecomms. Research*, 750 F.2d at 79). “[T]he primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart our jurisdiction by withholding a reviewable decision.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004).

Where a petitioner asserts unreasonable agency delay, courts will only interfere with agency proceedings to correct “transparent violations of a clear duty to act,” because courts seek the benefits of agency expertise and the creation of a record.” *In re American Rivers*, 372 F.3d at 418. Courts measure unreasonable delay in *years*—not months. *See id.* at 419 (citing *Midwest Gas Users Ass’n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (“[T]his court has stated generally that a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade.”)); *see also In re Cal. Power Ex.*, 245 F.3d 1110, 1125 (9th Cir. 2001) (“The cases in which courts have afforded relief have involved delays of years, not months.”); *Towns of Wellesley, Concord and Norwood v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (“The cases in which courts have afforded relief have involved delays of years.”).

Water Users' petition for mandamus fails twice-over: it demonstrates neither that this Court has jurisdiction to grant mandamus nor, if jurisdiction is assumed, that the Commission has unreasonably delayed action on Water Users' months-old (not years-old) request to cease reviewing PacifiCorp's license transfer application.

**A. Water Users Cannot Satisfy The Jurisdictional Requirements For Mandamus Relief**

Water Users have not made the requisite jurisdictional showing for mandamus relief. Nor can they. This is not a case, like *American Hospital*, involving a Congressionally "prescribed specific time frame[] for the [agency] to reach decisions on various stages of administrative appeals," 812 F.3d at 125. Neither the Federal Power Act nor the Commission's regulations set forth a timeframe within which the Commission must respond to Water Users' motion to dismiss. *See* 16 U.S.C. §§ 791a-825r (Federal Power Act); 18 C.F.R. § 385.212 (FERC regulations governing motions); *see also* Pet. at 15 ("[T]here are no concrete time tables setting standards by which FERC must rule on motions to dismiss."). "Where a matter is committed to [the agency's] discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical*, 449 U.S. at 36.

It is within the Commission's purview to determine how best to allocate its resources for the most efficient resolution of matters before it. "An agency enjoys

broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities . . . .” *Mobil Oil Expl. & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991); *see also, e.g., Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“Absent constitutional constraints or extremely compelling circumstances . . .

administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”) (internal quotation marks and citations omitted); *Tenn. Valley Mun. Gas Ass’n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (“An agency has broad discretion to determine when and how to hear and decide the matters that come before it.”) (citing cases).

Courts are appropriately reluctant to interfere with that discretion, even in the ordinary course of appellate review—let alone on an extraordinary petition for mandamus relief. *See Mobil*, 498 U.S. at 230 (appeals court had “clearly overshot the mark” if it required the Commission to resolve a particular issue in a particular proceeding) (internal citations omitted); *FPC v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (“At least in the absence of substantial justification for doing otherwise, a reviewing court may not . . . proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry . . . .”); *Consol. Edison Co. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002) (“[A] duty must be so

plainly prescribed as to be free from doubt and equivalent to a positive command. Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.”) (internal quotations and alterations omitted) (quoting *Wilbur v. United States*, 281 U.S. 206, 218-19 (1929)).

Moreover, in this case, an adequate alternative remedy to mandamus already exists. *See Telecomms. Research*, 750 F.2d at 78 (“Mandamus is an extraordinary remedy that is not available when review by other means is possible.”). When the Commission issues a final, appealable order on PacifiCorp’s transfer application, judicial review will be available in the normal course that Congress prescribed in the Federal Power Act. *See* 16 U.S.C. § 825l(b). If Water Users are then aggrieved by the Commission’s order, they can then seek to avail themselves of that opportunity. *See id.* Thus, the Court’s jurisdiction to review final agency action is unaffected by the agency’s delay in addressing Water Users’ motion to dismiss. There is no basis for bypassing those established statutory procedures in this case. *See Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (“[R]elief under the All Writs Act . . . is an ‘extraordinary remedy that may be invoked only if the statutorily prescribed remedy’ is ‘clearly inadequate.’”) (quoting *In re GTE Serv. Corp.*, 762 F.2d 1024, 1027 (D.C. Cir. 1985)).

At bottom, Water Users seek to force an interlocutory, non-final agency decision on a question of the Commission’s jurisdiction. *See* Pet. at 9 (Water Users seek immediate resolution of a “critical threshold jurisdictional issue”). The Court must reject that attempt. Such an order would be only an intermediate step toward a final decision on the merits of the transfer application, which may only be challenged on appeal from such a final ruling. *See Allied Chemical*, 449 U.S. at 35 (allowing review of a non-appealable interlocutory order through mandamus “would undermine the settled limitations upon the power of an appellate court to review interlocutory orders”) (internal quotations omitted) (quoting *Will v. United States*, 389 U.S. 90, 98 (1967)); *In re Murray Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015) (“In short, the All Writs Act does not authorize a court to circumvent bedrock finality principles[.]”) (citing *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34 (1985), and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964)); *Hunter v. FERC*, 348 Fed. App’x 592, 594 (D.C. Cir. 2009) (dismissing attempt to force interlocutory ruling on agency jurisdiction based on the fact that the jurisdictional argument was raised in the FERC proceeding, which “demonstrates that the ‘jurisdictional determination’ is related [to the merits of that proceeding] and could be raised on appeal of the final order”).

**B. The Equities Overwhelmingly Disfavor Using Mandamus To Short-Circuit The Commission’s Active Proceeding**

Moreover, the relevant equities strongly favor denial of Water Users’ petition. Water Users’ months-old motion—which is one of numerous submissions in the FERC proceeding—has suffered no unreasonable delay. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (whether a delay is unreasonable depends “upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency”).

The relicensing process for the Klamath facilities had already been underway for years when the Renewal Corporation was created and put forth as the proposed license transferee. This shift in the facts was significant. It exposed legal and technical terrain that the Commission had not seen in the nearly 100 years that it has been regulating hydroelectric facilities. *See Hoopa*, 913 F.3d at 1102; March 2018 Order at P 73; *id.* P 70 (explaining the unprecedented size and cost of the decommissioning, and emphasizing the Commission’s concern that transfer to the Renewal Corporation “would leave the Commission with no authority to require PacifiCorp to take any action required for the removal, or to pay for any unexpected costs that might arise”). The Commission’s decision to not rush to judgment under such novel circumstances and heightened consequences is eminently reasonable. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991)

(“The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way.”).

Water Users’ petition does not move the equity scales. Although Water Users repeatedly assert that dam removal is proceeding apace, *see* Pet. at 6 (Commission is “continuing to proceed rapidly toward approval of the destruction of active hydroelectric facilities and related equipment and reservoirs”), *id.* at 14 (“FERC Is Proceeding Full Speed Ahead with Dam Removal”), those assertions betray Water Users’ apparent misunderstanding of the Commission’s proceeding.

The very purpose of the ongoing review in the license transfer proceeding is to further build the record on which the Commission will assess—and, if appropriate, establish—legal and technical prerequisites for license transfer and possible decommissioning. It currently is unclear whether the Commission’s proceeding will result in the approval of the license transfer. Beyond that, if a transfer is authorized, a separate proceeding (not yet begun) will be required to determine whether the Commission will authorize any physical dam removal activity.

The only harm to Water Users at this point is the burden of continuing to participate in the administrative proceeding. *See* Pet. at 16 (mandamus will “potentially avoi[d] very significant expenditures of resources”). But that concern

cannot tip the scales, because the courts removed it years ago. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (“[T]he expense and annoyance of litigation is part of the social burden of living under the government.”) (internal quotations omitted) (quoting *Petroleum Expl., Inc. v. Pub. Serv. Comm’n*, 304 U.S. 209, 222 (1938)), *quoted in Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134, 141 (5th Cir. 2009)); *Hunter v. FERC*, 403 Fed. App’x 525, 527 (D.C. Cir. 2010) (“The only consequence of the Commission’s order [holding that it has jurisdiction] was to subject Petitioner to further proceedings before the Commission, but this does not qualify the Commission’s . . . order as a final agency action.”). Further, participating in the Commission’s proceeding, at this stage, is not particularly onerous (on the spectrum of administrative proceedings). The Commission is now reviewing the evidentiary record, as supplemented following the March 2018 Order, and intends to act on the license transfer application in a timely manner.

Meanwhile, the Commission has preserved the status quo. *See* March 2018 Order at P 71 (“PacifiCorp will remain the licensee for both the Klamath and Lower Klamath Project licenses until we receive and review the additional information required below.”); June 2018 Order at P 9 (finding that “justice requires a stay” of the license amendments required by the March 2018 Order and, “[i]n the meantime, PacifiCorp will continue to operate the Klamath Project and

the Lower Klamath Project pursuant to annual licenses”). Contrary to their assertions, Water Users are not prejudiced by the agency’s measured approach to this multi-faceted proceeding. With the status quo preserved, the Commission is acting in a timely manner to build and review the evidentiary record it needs to support a public interest determination in this uniquely complicated matter. A writ of mandamus would inappropriately and unnecessarily truncate that review.

## CONCLUSION

For the foregoing reasons, Water Users' petition should be denied.

Respectfully submitted,

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February 26, 2019

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of the Court's January 31, 2019 order in this case because this motion contains 3,800 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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February 26, 2019

***In re: Siskiyou County Water Users Association***  
**D.C. Cir. No. 18-1316**

**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 26th day of February 2019, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system:

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