

ELLEN F. ROSENBLUM
Attorney General
SCOTT KAPLAN #913350
FRANK HAMMOND #852239
Senior Assistant Attorneys General
Department of Justice
100 SW Market Street
Portland, OR 97201
Telephone: (971) 673-1880
Fax: (971) 673-5000
Email: scott.kaplan@doj.state.or.us
frank.hammond@doj.state.or.us

Attorneys for Oregon Department of Environmental Quality

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DESCHUTES RIVER ALLIANCE, an
Oregon nonprofit corporation,

Plaintiff,

v.

PORTLAND GENERAL ELECTRIC
COMPANY, an Oregon corporation,

Defendant.

Case No. 3:16-cv-01644-SI

AMENDED MOTION OF OREGON
DEPARTMENT OF ENVIRONMENTAL
QUALITY TO APPEAR AS AMICUS
CURIAE

MOTION & LR 7-1(a) CERTIFICATION

The Oregon Department of Environmental Quality (“DEQ”) respectfully moves for an order allowing to supplement the scope of its amici curiae in this case to submit an amicus brief and supporting declarations on plaintiff’s motion for partial summary judgment to present DEQ’s position as to the applicable water quality standards, the Pelton Round Butte Project (“Project”) 401 certification conditions, and the existing water quality conditions in the Lower Deschutes

River. The undersigned counsel certifies that he has conferred in good faith with counsel for

plaintiff Deschutes River Alliance (“DRA”) and defendant Portland General Electric Company (“PGE”), and amicus Confederated Tribes of the Warm Springs Reservation of Oregon (“CTWS”). No party or amicus opposes this motion.

This motion is based on the accompanying memorandum, proposed Amicus Brief (Exhibit 1 hereto), Declaration of Rod French (Exhibit 2 hereto) and Declaration of Eric Nigg (Exhibit 3 hereto) and the pleadings and papers on file herein.

MEMORANDUM IN SUPPORT

I. Introduction

DEQ seeks leave to amend the scope of its amici curiae appearance in this case¹ to ensure that the Court fully consider Oregon’s perspective with respect to the applicable water quality standards, certification conditions, and existing conditions of the Lower Deschutes River, as well as its interest in the preserving the current adaptive management water quality program at the Project that seeks to balance multiple and often competing water quality objectives, including restoring anadromous fish runs. DEQ is concerned that, although plaintiff has not yet specified the relief it will seek, an order overturning this thoughtful, science-based adaptive management approach may endanger the progress made toward restoring salmon runs in the Deschutes.

II. Legal Standard

This Court has broad discretion to allow appearance of amici curiae. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). “The classic role of amici curiae ... [is to assist] in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). District courts frequently allow amicus briefs from non-

¹ DEQ currently has joined with the Washington Department Ecology (“WDOE”) as amici to defend DEQ’s and WDOE’s ability to enforce water quality standards in opposition to a federal preemption argument raised by PGE and rejected by the Court. (ECF No. 22). WDOE does not join this Motion, which is Oregon-specific.

parties concerning legal issues that are of broad public interest, have potential ramifications beyond the parties directly involved or upon which the amicus has unique information or perspective. *See, e.g., Cent. Or. Landwatch v. Connaughton et al.*, 6:13-CV-02027-AA (D. Or. Sept. 5, 2014) (granting Oregon Water Resources Department's motion to appear as amicus curiae); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 878602, *3-6 (D. Or. Apr. 8, 2005) (allowing amicus parties to submit extra-record evidence).

III. Conclusion

DEQ has significant expertise and interests related to interpretation of its water quality standards, the Project 401 certification, and the characterization of existing conditions in the Lower Deschutes River that warrant amicus participation in this matter. DEQ is concerned that judicial intervention at this time, if based upon allegations that refer to an inappropriate baseline and inapplicable standards, may jeopardize the progress made towards restoration of the anadromous fish runs that are the objective of the existing adaptive management approach in the Project's 401 certification. The Court should grant this Motion to amend the scope of DEQ's amicus participation in this case to allow briefing on the merits.

DATED April 27, 2018.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/Scott Kaplan

SCOTT KAPLAN #913350
FRANK HAMMOND #852239
Senior Assistant Attorneys General
Trial Attorneys
Tel (971) 673-1880
Fax (971) 673-5000
scott.kaplan@doj.state.or.us
frank.hammond@doj.state.or.us
Of Attorneys for Oregon Department of
Environmental Quality