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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNION PACIFIC RAILROAD COMPANY,

Plaintiff,

v.

ROD RUNYON, Commission Chair of the
Wasco County Board of County
Commissioners, *et al.*,

Defendants.

Case No. 3:17-cv-00038-AA

JOINT MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P.
12(b)(7) and 19; MEMORANDUM IN
SUPPORT

CERTIFICATE OF COMPLIANCE WITH LR 7.1

The undersigned counsel certifies that the parties have made a good faith effort to confer on the issues in these motions but have been unable to resolve those issues.

MOTION TO DISMISS

While expressly reserving their sovereign immunity, the Confederated Tribes of the Warm Springs Reservation of Oregon (“Confederated Tribes of Warm Springs”), the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), and the Confederated Tribes of the Umatilla Indian Reservation (“Umatilla Tribe”) (collectively, “Treaty Tribes”) jointly move the Court, pursuant to Rule 12(b)(7), for an order dismissing this action for failure to join parties—*i.e.*, Treaty Tribes, required by Rule 19. The motion is supported by the court file, the below memorandum in support, and the Declarations of Eugene “Austin” Greene, Bruce Jim, Gerald Lewis, and Jeffrey S. Hinman.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Union Pacific Railroad Company (“Union Pacific”) proposes a railroad track expansion project near Mosier, Oregon (“Track Expansion Project” or “Project”). The Track Expansion Project threatens the Treaty Tribes’ treaty-reserved rights. Because of the threat to their sovereignty and culture, the Treaty Tribes appeared and provided evidence in opposition to the land use application that Union Pacific submitted to Wasco County in connection with the Track Expansion Project.

The Wasco County Board of County Commissioners agreed with the Treaty Tribes and denied the application because of the Project's impacts to their treaty-reserved rights. Because the Track Expansion Project is within the Columbia River Gorge Nation Scenic Area, Union Pacific is currently appealing that decision to the Columbia River Gorge Commission.

Union Pacific also initiated the present action to preempt its own appeal to the Columbia River Gorge Commission. If successful, Union Pacific would be permitted to proceed with its Track Expansion Project despite the Wasco County Board of County Commissioners' factual findings that the Project would, in fact, impact the Treaty Tribes' treaty-reserved rights.

The Treaty Tribes undeniably have a legally protectable interest in this action, which is the protection of their treaty-reserved rights. Proceeding with this action without the Treaty Tribes impairs and impedes their ability to protect those treaty-reserved rights, which are fundamental to the cultural identity and health of their People. Given this undeniable, protected, and weighty interest, the Treaty Tribes are necessary parties to this action, and this action must be dismissed because it cannot proceed in equity and good conscience in the absence of the Treaty Tribes. That is especially so given the fact that Union Pacific has already selected an alternative forum with its appeal to the Columbia River Gorge Commission to challenge the same Wasco County land use decision.

II. BACKGROUND

A. The Treaty Tribes.

The Treaty Tribes are federally-recognized Indian tribes. Each Treaty Tribe is a legal successor in interest to the Indian signatories of treaties with the United States, all of which were negotiated and entered into in 1855. *See* 12 Stat. 963 (Confederated Tribes of Warm Springs treaty); 12 Stat. 951 (Yakama Nation treaty); 12 Stat. 945 (Umatilla Tribe treaty). Each Treaty

Tribe possesses inherent sovereignty, the scope of which extends to treaty-reserved rights in their historic ancestral domains.

The Columbia River fisheries are fundamental to the cultural identity and health of each of the Treaty Tribes and their People. From time immemorial, the Treaty Tribes have depended on the fisheries of the Columbia River for subsistence, ceremonial, and medicinal purposes. They have historically harvested those fish throughout their aboriginal territories at many locations including, without limitation, areas within and proximate to Union Pacific's Track Expansion Project.

Water, along with salmon, eels, deer, cous root, bitter root, and huckleberry, are among the Treaty Tribes' "first foods." Those first foods are central to the perpetual cultural, economic, and sovereign benefit of the Treaty Tribes. Each are served at long house ceremonies to remind the Treaty Tribes and their People of their responsibility to respectfully use and take care of their first foods. Sadly, like many first foods, salmon populations are imperiled, which can limit their availability for cultural purposes.

For many decades, the Treaty Tribes have worked individually and together to achieve Columbia River basin wide goals to protect their sovereign and treaty-reserved fishing rights. The Treaty Tribes are members of the Columbia River Inter-Tribal Fish Commission ("CRITFC"). CRITFC was formed in 1977 to provide coordination and technical assistance to the Treaty Tribes in regional, national, and international efforts to ensure that treaty-reserved fishing rights issues are resolved in a way that guarantees the continuation and restoration of tribal fisheries into perpetuity.

The protection of their treaty-reserved fishing rights has often taken the Treaty Tribes to the halls of Congress and to federal courthouses. For example, the Treaty Tribes are parties to

United States v. Oregon, United States District Court, District of Oregon, Case No. 68-513-KI, which was commenced in 1968 and enforces and implements their treaty-reserved rights in the Columbia River. The Treaty Tribes have achieved many successes over the years and are now recognized by the United States and others as governmental co-managers for the Columbia River fisheries. The Treaty Tribes also regularly consult and coordinate with federal agencies pursuant to Executive Order 13175, which expressly recognizes their sovereignty, rights of self-government, and the trust relationship between the Treaty Tribes and the United States.

B. Union Pacific's Track Expansion Project.

Union Pacific currently has a single mainline track along the southern bank of the Columbia River near Mosier, Oregon as well as a sidetrack to the east of Mosier. (Declaration of Luke Baatz in Support of Union Pacific's Motion for a Preliminary Injunction ("Baatz Decl."), ¶¶ 5, 9). Union Pacific states that because there is only a single mainline track near Mosier, railroad traffic is limited to one train traveling through the area at a time while the sidetrack is used to temporarily hold trains traveling in the opposite direction. (Baatz Decl., ¶ 9). Union Pacific claims that the Mosier sidetrack is too short to hold many of the trains that travel on the mainline track so larger trains are held in other areas with larger sidetracks or pass oncoming trains at sections where Union Pacific has a double mainline track. (*Id.*).

Union Pacific's proposed Track Expansion Project would add 4.02 miles of new mainline track to the existing Mosier sidetrack running adjacent to its existing mainline track and extending to the east and west of Mosier. (Baatz Decl., ¶ 10). The proposed construction of the Project would result in a total of 5.37 miles of double mainline track extending from rail mile post 66.98 to rail mile post 72.35 along the Oregon bank of the Columbia River ("Project Area"). (Baatz Decl., ¶¶ 10, Exhibit B, p. 2). According to Union Pacific, the Project would allow

simultaneous two-way train traffic through the Project Area rather than the status quo of allowing one train to pass through the area at a time and minimal use of the existing Mosier sidetrack for holding trains. (Batz Decl., ¶ 11). The Project Area is within the Columbia River Gorge National Scenic Area (“Scenic Area”).

1. The ACOE Permitting Process.

The Project would include six single and complete waterbody crossings, the construction of which would necessitate discharging fill material into a variety of wetlands and ponds that are waters of the United States and adjacent to the Columbia River. (Batz Decl., Exh. A, p. 1). Union Pacific sought verification from the U.S. Army Corps of Engineers (“ACOE”) that the work could be completed under ACOE’s Nationwide Permit No. 14 (“NWP”).¹ (Batz Decl., ¶ 17; Exh. A, p. 1).

On November 4, 2016, ACOE completed its review of Union Pacific’s application and determined that the Project could be completed under NWP 14. (Batz Decl., ¶ 18; Exh. A, p. 1). During ACOE’s review, among other things, ACOE acknowledged that the Project Area is within the Scenic Area and considered whether it was necessary for the U.S. Forest Service (“USFS”) to undertake a consistency review under the Columbia Gorge National Scenic Area Act (“Scenic Area Act”). (Batz Decl., Exh. B, p. 18). ACOE concluded that such review by USFS was not necessary because Union Pacific had applied for review of the Project’s Scenic

¹ The purpose of NWPs is to provide an expedited permitting process for projects that require ACOE permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899 but are expected to have minimal individual and cumulative adverse effects on the aquatic environment. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184 (Feb. 21, 2012). NWP 14 is available for linear transportation projects that fit certain criteria under the NWP. 77 Fed. Reg. at 10200. NWPs are issued every five years by the ACOE. The current NWP expires on March 18, 2017.

Area Act compliance through Wasco County's land use process. (*Id.* emphasis added). In rejecting the need for USFS to conduct a consistency review under the Scenic Area Act, ACOE noted that it did not believe the Scenic Area Act required both USFS and Wasco County to conduct reviews of the Project because that would create duplicative reviews at the federal and local levels.² (*Id.*).

In issuing its verification letter, ACOE indicated that the verification of the NWP would be valid until March 18, 2017, the date that the current NWP is set to expire. (Baatz Decl., ¶ 23; Exh. A, p. 4). ACOE indicated that if the Project is not completed, begun, or under contract by that date Union Pacific would be required to reapply for verification under the reissued NWP that will be effective on March 19, 2017. (*Id.*).

2. The Wasco County Land Use Process.

Wasco County's National Scenic Area Land Use Development Ordinance ("Ordinance"), promulgated pursuant to the Scenic Area Act, applies to development projects that fall within Wasco County and the Scenic Area. Ordinance §§ 1.010; 1.080. The Project meets both locational requirements, so Union Pacific sought approval from Wasco County of the Project under Ordinance by filing a land use application on January 9, 2015. (Declaration of Jeffrey S. Hinman in Support of Treaty Tribes' Motion to Dismiss ("Hinman Decl."), ¶ 2; Exh. A, p.1). On September 29, 2016, Wasco County's Planning Commission approved Union Pacific's application with a number of conditions, including conditions intended to protect the treaty-reserved rights of the Treaty Tribes. (Hinman Decl., ¶ 3, Exh. B, p. 10).

² The Treaty Tribes question whether ACOE's decision to defer to the Wasco County land use process was consistent with its obligations under the Scenic Area Act and its trust responsibilities to the Treaty Tribes. The Treaty Tribes, however, acknowledge that the question is not germane to this motion to dismiss.

Union Pacific and other parties to the land use decision, including the Yakama Nation, appealed the Planning Commission's decision to the Wasco County Board of Commissioners. (*Id.*). The Treaty Tribes participated in the appeal and opposed Union Pacific's land use application on the basis that it would substantially interfere with the exercise of their respective treaty-reserved rights. (Hinman Decl., ¶ 3; Exh. B, pp. 132-34). On November 10, 2016, the Board of Commissioners issued a unanimous decision denying Union Pacific's application on the basis that the "proposal affects Treaty rights." (Hinman Decl., ¶ 2; Exh. A, p. 10) Union Pacific has appealed that decision to the Columbia River Gorge Commission and now seeks through this lawsuit to enjoin the Gorge Commission from exercising jurisdiction in that pending appeal. (Union Pacific's Complaint for Declaratory and Injunctive Relief, Doc. No. 1, ¶ 42).

III. POINTS AND AUTHORITIES

A. Legal Standard For Rule 12(b)(7) Motion.

Rule 12(b)(7) authorizes dismissal of an action for failure to join a party (or parties) required to be joined by Rule 19. In determining whether a party is required to be joined, Rule 19 imposes the following three-step inquiry:

1. Is the absent party necessary under Rule 19(a)?
2. If so, is it feasible to order the absent party to be joined?
3. If joinder is not feasible, can the case proceed without the absent party, or is the absent party indispensable such that the action must be dismissed?

Salt River Project Agr. Imp. and Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012) (citing *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005)). The inquiry is practical, fact specific, and designed to avoid the harsh results of rigid application. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

The Treaty Tribes are necessary parties to this action because proceeding in their absence would, as a practical matter, impair or impede the Treaty Tribes' ability to protect their treaty-reserved fishing rights. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (absent tribe's claim of interest in protecting treaty fishing rights is a legally sufficient interest). It is not feasible to join the Treaty Tribes because of sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (Indian tribes enjoy sovereign immunity and may not be sued without unequivocal waiver or Congressional abrogation). The case cannot in equity and good conscience proceed without the Treaty Tribes and must be dismissed. *See Dewberry v. Kulungoski*, 406 F.Supp.2d 1136, 1148 (D. Or. 2005) (balancing factors and determining that case could not proceed in equity and good conscience without absent tribe).

B. The Treaty Tribes are Necessary Parties to this Action Because Proceeding with the Action in Their Absence would, as a Practical Matter, Impair or Impede The Treaty Tribes' Ability to Protect Their Treaty-Reserved Rights.

A party is necessary and must be joined if, among other things, that party claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest. Fed. R. Civ. Pro. 19(a)(1)(B)(i). To be considered a necessary party, the absent party must only *claim* a non-frivolous interest in the subject of the action such that proceeding with the litigation without them would impair or impede the absent party's ability to protect the claimed interest. *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992). The protection of tribal treaty rights is a legally sufficient interest in a case for the purposes of necessary party analysis. *See Washington*, 173F.3d at 1167 (absent tribe's claim of interest in protecting treaty rights is a legally sufficient interest).

In this action, Union Pacific seeks a declaration that federal law preempts Wasco County's land use permitting requirements, claiming that such permitting requirements are unconstitutional. As a result, Union Pacific seeks to enjoin application of Wasco County's land use permitting requirements to its Track Expansion Project. The Treaty Tribes' interest in this action is the protection of their treaty-reserved rights. If this case were to proceed without the Treaty Tribes, it would impair and impede that interest. If Union Pacific were to prevail in this action, it could proceed with the Track Expansion Project despite the factual findings of the Wasco County Board of County Commissioners that the Project should not proceed because of impacts to the Treaty Tribes' treaty-reserved rights in violation of Article 6 of the U.S. Constitution. For that reason, the Treaty Tribes are necessary parties under Rule 19(a).

C. The Treaty Tribes Cannot Be Joined Because of Sovereign Immunity.

As sovereign powers, Indian tribes possess common law immunity from suit. *Santa Clara Pueblo*, 436 U.S. at 58 (1978). Indian tribes cannot be compelled to join a federal action unless the tribe unequivocally waives sovereign immunity, *id.*, or Congress expressly abrogates the tribe's immunity from suit. *See Dewberry*, 406 F.Supp.2d at 1145 (citing *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 760 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

The Treaty Tribes have not waived their sovereign immunity, and have, in fact, expressly reserved their sovereign immunity in this joint motion. The Treaty Tribes are aware of no express abrogation of their sovereign immunity by Congress in these circumstances. Accordingly, the Treaty Tribes cannot be compelled to join this action, *i.e.*, joinder is not feasible under Rule 19(a).

D. The Case Cannot in Equity and Good Conscience Proceed Without the Treaty Tribes and Must Be Dismissed.

The Rule 19(b) factors demonstrate conclusively that this case cannot proceed “in equity and good conscience” without the Treaty Tribes. Fed. R. Civ. P. 19(b). In determining whether, in equity and good conscience, a case may proceed without the absent party or whether the absent party is indispensable such that the action must be dismissed, a court must consider: (1) prejudice to the parties, including the absent party; (2) whether relief can be tailored to lessen the prejudice; (3) whether an adequate remedy can be awarded without the absent party; and (4) whether there exists an alternative forum.³ *Dewberry*, 406 F.Supp.2d at 1148. Those factors strongly favor dismissal of this action.

With respect to the first factor, if Union Pacific prevails in the action, it will proceed with the Track Expansion Project. Doing so will impair the Treaty Tribes treaty-reserved rights—*i.e.*, their protectable interests. On the other hand, dismissing the action would likely result in Union Pacific proceeding with its appeal of the Wasco County decision to the Columbia River Gorge Commission. On balance, there is substantially more prejudice to the Treaty Tribes in proceeding in their absence with the action as opposed to the limited impact to Union Pacific of a dismissal, given its pending land use appeal.

As to the second factor, the Treaty Tribes cannot envision how the relief could be tailored to lessen the prejudice on them. Again, if Union Pacific succeeds, the Treaty Tribes’ reserved treaty rights will be impaired; there is simply no way to tailor the relief to lessen or avoid that

³ While the Ninth Circuit consistently applies the Rule 19(b) factors under these circumstances, it has observed that some courts take the position that “when a necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.” *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1999 (9th Cir. 1991).

prejudice. *Dewberry*, 406 F.Supp.2d at 1148. For similar reasons, as to the third factor, there is no adequate remedy that can be awarded in the absence of the Treaty Tribes. *Id.* As a practical matter, any injunctive relief that would grant Union Pacific the right to commence its Track Expansion Project would come at the expense of the Treaty Tribes and diminishing their treaty-reserved rights. Because of impacts to their sovereignty and treaty-reserved rights, the Treaty Tribes must be parties to this action if it were to proceed.

As to the fourth factor, an alternative forum exists, and it is a forum that Union Pacific has already chosen. That forum is the appeal that Union Pacific filed against the Wasco County land use decision giving rise to this action. There is no reason that Union Pacific cannot raise the same legal challenges in that proceeding that it asserts in this action. The Treaty Tribes cannot envision any prejudice to Union Pacific in proceeding with the land use appeal that it has already initiated.

IV. CONCLUSION

For the foregoing reasons, the Treaty Tribes are necessary parties because proceeding with the action would, as a practical matter, impair or impede the Treaty Tribes' ability to protect their treaty-reserved rights. The Treaty Tribes inherent sovereign powers preclude their joinder in this action, and the case cannot in equity and good conscience proceed without the Treaty Tribes. The Treaty Tribes' motion to dismiss should be granted, and this action should be dismissed with prejudice.

Respectfully submitted.

DATED this 30th day of January, 2017.

KARNOPP PETERSEN LLP

KARNOPP PETERSEN LLP

/s/ Josh Newton

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2017, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Oregon via the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

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CERTIFICATE OF SERVICE