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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

REPLY MEMORANDUM
In Support of Motion to Dismiss By Treaty Tribes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

INTRODUCTION

Plaintiff Union Pacific Railroad Company ("Union Pacific") is forum shopping in connection with a significant railroad Track Expansion Project[1] located in the Columbia River Gorge National Scenic Area. Faced with an adverse land use decision from Wasco County, Union Pacific is seeking to avoid an appeal on the merits that it has initiated before the Columbia River Gorge Commission. The Wasco County Board of Commissioners denied Union Pacific's application because of impermissible impacts to treaty-reserved rights of the Treaty Tribes.

Given the posture of this action, the Court cannot second guess the Commissioners' decision with respect to the Track Expansion Project impermissible impact on Treaty Tribes' treaty-reserved rights. Yet, if successful, Union Pacific will proceed with the Track Expansion Project that the Commissioners determined would impair those sovereign treaty-reserved rights.

The Treaty Tribes are unquestionably necessary parties to this action under Rule 19(a). It is not feasible to join the Treaty Tribes because of sovereign immunity. The action cannot in equity and good conscience proceed without the Treaty Tribes under Rule 19(b). Further, the public rights exception does not apply to this action. As a result, the Treaty Tribes request that the Court allow their motion and dismiss the action.

POINTS AND AUTHORITIES

Union Pacific does not dispute that Rule 12(b)(7) authorizes dismissal of an action for failure to join a party (or parties) required to be joined by Rule 19. Union Pacific also does not quarrel with the proposition that the Ninth Circuit imposes the following three-step test in making that determination:

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[1] The phrase Track Expansion Project or Project is defined in the memorandum in support of the motion to dismiss. (Doc. 28, p. 2.)

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 under Rule 19(b)?

Salt River Project Agric. Improvement and Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012) (internal citation omitted).

Contrary to Union Pacific's unsupported assertion, dismissal under Rule 12(b)(7) is not an "extreme remedy." (Doc. 42, p. 7.) 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). At its essence, the focus of the inquiry is on the "*practical ramifications*" of joinder versus nonjoinder. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 n.14a (9th Cir. 1983) (emphasis added).

I. The Treaty Tribes are Necessary Parties.

The Treaty Tribes are necessary parties because they claim an interest relating to the subject of the action and are so situated that disposing of the action in the Treaty Tribes' absence would as a practical matter impair or impede their ability to protect their interest. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). The Treaty Tribes' interest relating to the subject of this action are their treaty-reserved rights to fish in areas within and proximate to Union Pacific's Track Expansion Project. The Treaty Tribes' absence from this action would, as a practical matter, impair their ability protect their treaty-reserved rights. If Union Pacific were to prevail in this action, it could proceed with the Track Expansion Project despite its impermissible impacts to the Treaty Tribes' treaty-reserved rights.

Union Pacific asserts that the Treaty Tribes are not necessary parties for two reasons. First, according to Union Pacific, the Treaty Tribes do not have legally protected interests related to the subject of the action. Second, Union Pacific contends that any legally protected interests that the Treaty Tribes may have will not be impaired or impeded by this action. Union Pacific is mistaken on both counts.

A. The Treaty Tribes Have a Legally Protected Interest—*i.e.*, Treaty-Reserved Rights—Relating to the Subject of this Action.

The Ninth Circuit has observed that a crucial inquiry in determining whether an absent party is a necessary party under Rule 19(a) is whether the absent party possesses an interest in the pending litigation that is "legally protected." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Comty. v. California*, 547 F.3d 962, 972 (9th Cir. 2008) (quoting *Makah*, 910 F.2d at 558). The Treaty Tribes' treaty-reserved rights are legally protected interests for Rule 19(a) purposes. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (treaty-reserved right in fish harvest allocation is a legally protected interest); *See also Makah*, 910 F.2d at 559 (same).

Union Pacific does not dispute that the Treaty Tribes' treaty-reserved rights are legally protected interests for Rule 19(a) purposes. Rather, Union Pacific asserts that the Treaty Tribes do not have a legally protected interest in the "subject matter of the action." (Doc. 42, p. 8 (quoting Fed. R. Civ. P. 19(a)(1)(B).)[2] Union Pacific's assertion begs the question: What is the subject of this action? Union Pacific seeks to answer that question by contending that the "subject in this litigation is who has jurisdiction to regulate the rail construction project." (Doc. 42, p. 2 (no emphasis).) Union Pacific then contends that the Treaty Tribes interests in

[2] Union Pacific misquotes Rule 19(a)(1)(B), which provides that a party must be joined as a party if that person claims an interest "relating to the subject of action".

protecting their treaty-reserved rights are "indirect and contingent" to that jurisdiction issue and therefore not sufficiently related to the subject of this action for Rule 19(a) purposes. (Doc. 42, p. 8.) In support of its contention, Union Pacific cites *United Keetowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318 (Fed. Cir. 2007).

Setting aside for the moment the fact that Union Pacific misconstrues the Federal Circuit's decision in *Keetowah*, the Treaty Tribes first explain why this Court should reject the narrow premise on which Plaintiffs rely as to when a party is considered a necessary party under Rule 19(a). The Treaty Tribes then respond to the flawed assertion that the subject of this action is "who has jurisdiction to regulate the rail construction project." (Doc. 42, p. 2 (no emphasis).) The Treaty Tribes then address *Keetowah's* application to this action, if any. Finally, the Treaty Tribes explain why Union Pacific's other case law does not support its position.

1. The Treaty Tribes Are Necessary Parties Under Rule 19(a)(B)(1).

There can be no serious question that the Treaty Tribes have claimed a legally protected interest relating to the subject of the action. Rule 19(a)(1)(B) confers required party status on one who "claims an interest relating to the subject of the action." As adopted and reaffirmed by the Ninth Circuit, "it is the party's *claim* of a protectable interest that makes its presence necessary or required." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (emphasis in original), *see also Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002).

Union Pacific contends that the Treaty Tribes' interests in protecting their treaty-reserved rights are "indirect and contingent" and therefore not sufficiently related to the subject of the action for Rule 19(a) purposes. (Doc. 42, p.3, 8.) Not only is that contention inconsistent with prevailing Ninth Circuit precedent, it is inconsistent with text of Rule 19, which, by its plain

language, does not require the absent party to actually possess an interest; it only requires the movant to show that the absent party "claim" an interest relating to the subject of the action, excluding only those claimed interests that are "patently frivolous." *Shermoen,* 982 F.2d at 1318. So long as the claimed interest is neither fabricated nor frivolous, it is not excluded from consideration under Rule 19.

"Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen*, 982 F.2d at 1317. The Treaty Tribes have a claim to a legally protected interest related to the subject of this action because of their treaty-reserved fishing rights. The Treaty Tribes' claims are not patently frivolous. The absent Treaty Tribes have an indisputable legally protectable interest in the subject of the action sufficient to satisfy Rule 19(a)(1)(B).

a. The Subject of this Action is the Enforceability of the Wasco County Decision.

The subject of this action is whether the Wasco County Board of Commissioner's November 10, 2016 final decision ("County Decision" or "Decision") denying Union Pacific's land use application is legally enforceable. Union Pacific contends that the decision is not enforceable based on two legal theories. First, Union Pacific asserts that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b) preempts the National Scenic Area Land Use and Development Ordinance for Wasco County ("NSA Ordinance")[3] "*as applied*" to the Track Expansion Project. (Doc. 1, Prayer For Relief, ¶ 1

[3] A copy of the NSA Ordinance can be found at http://www.co.wasco.or.us/departments/planning/nsa_ordinance.php (last visited February 8, 2017).

(emphasis added).) Second, Union Pacific contends that the NSA Ordinance "*as applied*" to the Track Expansion Project is unconstitutional. (Doc. 1, Prayer For Relief, ¶ 1 (emphasis added).)

Whatever Union Pacific's legal theories may be--*e.g.*, federal preemption or unconstitutionality--the subject of the action remains the same: the enforceability of the County Decision. Because that Decision denies Union Pacific's land use application based on the Treaty Tribes' treaty-reserved rights, the Treaty Tribes have legally protectable interests related to the subject of the action.[4]

b. The Treaty Tribes' Treaty-Reserved Rights Are Inextricably Intertwined with the Wasco County Decision.

To better understand the Treaty Tribes treaty-reserved rights relationship to the County Decision, it is useful to place that Decision in context. The Decision was issued pursuant to the NSA Ordinance, which itself is promulgated, in part, pursuant to the Columbia River Gorge National Scenic Act ("Gorge Act"). *See* 16 U.S.C. § 544d(c)(2) (county may adopt land use ordinance within Columbia River Gorge National Scenic Area).

The Gorge Act expressly provides that nothing in the act shall "affect or modify any treaty or other rights of any Indian tribe." 16 U.S.C. §544o. To ensure that the Gorge Act does not affect tribal treaty-reserved rights, the Columbia River Gorge Commission has adopted consultation provisions with the Treaty Tribes as part of its management plan. *See* Management Plan for the Columbia River Gorge National Scenic Area, http://www.gorgecommission.org/images/uploads/pdfs/Management_Plan_as_amended_through_Sept_1_2011.pdf (Part IV

[4] While not before the Court on this motion, the Treaty Tribes' observe that Union Pacific's preemption argument will be subject to vigorous challenge from Defendants. Defendants have provided a preview of that argument in their motion to extend. (Doc. 25.)

Administration, Chapter 3, Indian Treaty Rights and Consultation) (last visited February 8, 2017).[5]

Similarly, Wasco County's NSA Ordinance provides that the ordinance "shall protect treaty and other rights of Indian tribes" and that nothing in the ordinance "may interfere with the exercise of those rights." NSA Ordinance § 1.080 A. The Ordinance defines "Effect on Treaty Rights," in part:

> "To bring about a change in, to influence, to modify, or to have a consequence to Indian treaty or treaty related rights in the Treaties * * * [with], Umatilla, Warm Springs, and [Yakama] tribes * * *."

NSA Ordinance § 1.200.

Union Pacific's Track Expansion Project is located within the General Management Area ("GMA") of the Columbia River Gorge Scenic Area. Like the Management Plan, the NSA Ordinance contains tribal consultation provisions for land use applications within the GMA. NSA Ordinance § 14.800. The express purpose of those consultation provisions is to "[e]nsure that the Scenic Area Act, the Management Plan, and these implementing ordinances *do not affect or modify any treaty or other rights of any Indian tribe*." *Id.* (Emphasis added.)

The County Decision describes the Treaty Tribes' participation in the Wasco County land use proceeding with respect to the concern about the Track Expansion Project's impact to their treaty-reserved rights. (Doc. 32-2, pp. 129-34.) The Yakama Nation provided letters, written and oral testimony. (*Id.* at 227-36, 255-265; Doc. 32-3, pp. 80-167.) The Umatilla Tribe

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[5] The Treaty Tribes attach, as Exhibit 1, a copy of Part IV Administration, Chapter 3, Indian Treaty Rights and Consultation of the Management Plan for the Columbia River Gorge National Scenic Area. The Treaty Tribes request that the Court take judicial notice of Exhibit 1. Fed. R. Evid. 201(b) (judicial notice appropriate where fact is not subject to reasonable dispute and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned).

provided letters and written testimony. (Doc. 32-2, pp 237-38, 245-53.) The Confederated Tribes of Warm Springs provided oral testimony. (Doc. 32-3, pp 120-21.)[6]

In its Decision, the Wasco County Board of County Commissioners found that the Treaty Tribes' concerns focused on:

> "Treaty-reserved rights and Treaty protected resources, including, impacts to and possible elimination of fishing access, ecosystem health that would harm the tribal members' ability to hunt, fish and gather for foods at usual and accustomed areas, participate in traditional religious and cultural practices, and likely damage cultural resources."

(Doc. 32-2, pp. 132-33.) At its November 2, 2016 hearing, the Wasco County Board of County Commissioners concluded that Union Pacific's application must be denied because the Track Expansion Project would adversely affect the Treaty Tribes' treaty-reserved rights. (*Id.* at 134.)

Throughout its Opposition Memorandum, Union Pacific seeks to compare the Wasco County treaty consultation process with the treaty consultation process employed by the U.S. Army Corps of Engineers ("ACOE") in connection with its verification letter for the Track Expansion Project issued pursuant to ACOE's Nationwide Permit No. 14. The action before this court is not a judicial review of ACOE's agency action. The Treaty Tribes do not believe that the ACOE permitting process is relevant to the issues before the Court.

To the extent that it is relevant, the record is clear that ACOE used an expedited nationwide permitting process with an abbreviated review process for the Track Expansion Project. (Docs. 4-1 and 4-2.) ACOE expressly relied upon Wasco County to ensure that the Track Expansion Project was consistent with the Gorge Act (which includes the robust treaty consultation process described above):

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[6] The Confederated Tribes of Warm Springs and the Yakama Nation filed declarations in support of this motion further describing the nature of their treaty-reserved rights. (Docs. 29, 30, and 31.)

> "Here, it is UPRR that is proposing to conduct the development action in the scenic area, not the Corps and as such the responsibility to comply with the Act, if any, should fall on UPRR. UPRR has applied for Scenic Area Act approval from Wasco County. There is nothing in the Act that indicates a project which requires a federal permit should undergo substantially duplicative reviews at the local levels."

(Doc. 4-2, p. 18.)

The Treaty Tribes have questioned whether ACOE's decision to defer to the Wasco County land use process was consistent with its obligations under the Gorge Act and its trust responsibilities owed to the Treaty Tribes. (Doc. 28, p. 7 n. 2.) The Treaty Tribes, however, continue to believe that the question is not germane to this motion to dismiss, except to the extent that Union Pacific implies that the ACOE treaty consultation process was more robust because of ACOE's fiduciary relationship with the Treaty Tribes. Owing a fiduciary duty and faithfully discharging that duty are two different issues. The Treaty Tribes do not agree that ACOE use of NWP 14 (the nationwide permit process) was appropriate for the Project or consistent with its fiduciary duty owed to the Treaty Tribes, especially if ACOE was aware that Union Pacific reserved its rights to invoke federal preemption in the Wasco County land use proceeding.

Returning to the Rule 19(a) inquiry of whether the Treaty Tribes have a legally protectable interest relating to the subject of this action, the answer is assuredly yes. The relationship of the Treaty Tribes' legally protectable interests--*i.e.*, their treaty-reserved rights--to the subject of this action is akin to the absent tribal parties in *Washington v. Daley*.

In *Washington*, the State of Washington and several groups representing the commercial fishing industry challenged regulations promulgated by the Secretary of Commerce allocating groundfish catches off the Washington coast to four Northwest Indian tribes. 173 F.3d at 1158, 1161 (9th Cir. 1999). The Secretary of Commerce moved to dismiss under Rule 19 on the grounds that absent Indian tribes were not, and could not, be joined in the action. The Ninth

Circuit concluded that the absent Indian tribes had an interest in the subject of the action because plaintiffs sought to invalidate the regulation recognizing their treaty rights to harvest groundfish. *Id.* at 1167. The court observed that if plaintiffs were "ultimately successful, the [t]ribes [would] lose their rights to harvest [fish]." *Id.*; *see also Makah Indian Tribe v. Verity*, 910 F.2d at 555, 558-59 (9th Cir. 1990) (absent Indian tribes had legally protected interests—*i.e.* treaty-reserved rights, related to subject of action in which federal regulation allocating ocean harvest of salmon).[7]

Similar to the absent Indian tribes in *Washington* and *Makah*, the Treaty Tribes have a legally protected interest in the subject of this action because Union Pacific seeks to invalidate the County Decision, which recognized the Treaty Tribes' treaty-reserved fishing rights and denied Union Pacific's land use application because of impermissible impacts to those rights. If Union Pacific is successful in this action and this Court enters a judgment declaring the County Decision unenforceable, Union Pacific will proceed with the Project that will result in impermissible impacts to the treaty-reserved fishing rights of the Treaty Tribes. Those impacts are real and immediate, and not indirect or contingent as Union Pacific contends. *Generally See*

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[7] The court in *Washington* ultimately concluded that the absent tribes were not necessary parties because the United States could adequately represent their legally protected interests. 173 F.3d at 1167. The United States is not a party to this action. The Treaty Tribes strongly object to any insinuation that another party to this action could adequately represent and defend their sovereign and treaty-reserved interests at issue in this action.

In addition to concluding that absent tribes had legally protected interests related to federal regulation allocating ocean harvest of salmon, the court in *Makah* determined that the absent tribes were not necessary parties in that part of the action relating to enforcement of future compliance with administrative procedures. The Treaty Tribes interests in this action are not focused on future compliance with the Gorge Act. Rather, the Treaty Tribes are focused on protecting their treaty-reserved rights imperiled by the Union Pacific Track Expansion Project, which was properly denied by Wasco County.

Docs. 29, 30 and 31; *see also* Declaration of Audie Huber in Support of Motion to Dismiss ("Huber Dec.").

2. *Keetowah* Reinforces the Conclusion that the Treaty Tribes' Treaty-Reserved Rights Are Related to the Subject of this Action.

Union Pacific asserts that the Treaty Tribes legally protectable interests are not sufficiently related to this action to support the conclusion that the Treaty Tribes are necessary parties under Rule 19(a). Union Pacific relies on *Keetowah* as its principal authority to support this proposition. Union Pacific's reliance on *Keetowah* is misplaced. Careful examination of that case reveals that it supports the conclusion that the Treaty Tribes' interest is sufficiently related to the subject of this action for Rule 19(a) purposes.

In *Keetowah*, the Federal Circuit determined that when an absent party claims it is necessary under Rule 19(a)(2) to adjudicate an action, the absent party must show that its interest in the "subject matter" of an action is not "indirect or contingent" but is of such a "*direct and immediate character that the [absent party] will either gain or lose by the direct legal operation and effect of the judgment*."[8] 480 F.3d 1318, 1324-25 (Fed. Cir. 2007) (internal quotations omitted) (emphasis added). In *Keetowah*, the absent Indian tribe claimed an interest in the action relating to title of certain real property. *Id.* at 1325. The court determined that the subject of the action related to claims arising under a federal act that expressly prohibited adjudication of the

[8] The Treaty Tribes observe that *Keetowah* is a Federal Circuit case construing the Rules of the United States Court of Federal Claims ("RCFC"), and not the Federal Rules of Civil Procedure. While materially similar, the rules are not identical. In *Keetowah*, the joinder rule developed by the court was based on laws cobbled from a variety of federal circuits, and included standards set forth in RCFC 24(a), the rule for intervention of a matter of right. That Federal Circuit standard is not the same standard followed by the Ninth Circuit in addressing FRCP Rule 19. *See Keetowah,* 480 F.3d at 1323-25. No Ninth Circuit case has adopted the "indirect or contingent" standard set by *Keetowah* and relied upon by Union Pacific in its opposition memorandum.

title issues. *Id.* at 1326. For that reason, the court determined that the absent Indian tribe did not have an interest relating to the subject of the action. *Id*. Put differently, the absent Indian tribe would not gain or lose by the operation and effect of any judgment in that case, because the court could not adjudicate any real property title issues.

Unlike the absent Indian tribe in *Keetowah*, the Treaty Tribes will gain or lose by the direct legal operation and effect of any judgment entered in this action. If the Court agrees with Union Pacific and concludes that the County Decision is not enforceable, Union Pacific will proceed with the Track Expansion Project. For the reasons explained throughout this memorandum, the Track Expansion Project presents a substantial risk of harm to the Treaty Tribes' ability to exercise and protect their treaty-reserved rights. That risk of harm is not contingent; it is a direct consequence of a judgment entered in favor of Union Pacific.

3. Union Pacific's Other Case Law Does Not Support Its Proposition that the Treaty Tribes' Treaty-Reserved Rights are Not Related to the Subject of this Action.

In support of its contention that the Treaty Tribes' treaty-reserved rights are not sufficiently related to the subject of this action for Rule 19(a) purposes, Union Pacific cites a number of Rule 19 cases in addition to *Keetowah*. Those cases include *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996); *Dewberry v. Kulongoski*, 406 F.Supp.2d 1136 (2005); *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999); *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013); *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962 (9th Cir. 2008); *American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015 (9th Cir. 2002); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *Makah*, 910 F.2d 555; *Northrop Corp v. McDonnell Douglas*, 705 F.2d 1030 (9th Cir. 1983); and *McLaughlin v. Int'l. Ass'n of Machinists & Aerospace Workers*, 847 F.2d 620 (9th Cir. 1998). (Doc. 42, pp. 8-11.)

The Treaty Tribes have already addressed the Ninth Circuit decisions in *Washington* and *Makah* in Section I.A.1. above, explaining why those decisions reinforce the conclusion that the Treaty Tribes have legally protectable interests in the subject of this action. The Treaty Tribes do not further address *Washington* and *Makah*.

Six of the remaining cases involve sovereign tribal entities that were absent from the action: *Yellowstone County*; *Dewberry*; *Alto*; *Cachil Dehe Band*; *American Greyhound Racing*; and *Kescoli.* Three of those cases—*Dewberry, Cachil Dehe Band*, and *American Greyhound Racing*—involve tribal gaming compacts, and one case, *Kescoli*, involves a settlement agreement.

From the Treaty Tribes perspective, *Dewberry, Cachil Dehe Band*, *American Greyhound Racing*, and *Kescoli* support the conclusion that the Treaty Tribes are necessary parties in this action. In general, those cases stand for the proposition that Indian tribes have legally protected interests in gaming compacts and are entitled not to have those interests impaired by a legal action in which the Indian tribes are absent. *Compare American Greyhound Racing*, 305 F.3d 1015 (Indian tribes were required parties in action to enjoin state from entering into tribal gaming compacts); *Dewberry*, 406 F.Supp.2d 1136 (Indian tribe was necessary party in action challenging validity of its gaming compact); *with Cachil Dehe Band of Wintun Indians*, 547 F.3d 962 (Indian tribe brought action against state regarding breach of gaming compact; absent Indian tribes were not required parties because they were not parties to compact); *see also Kescoli*, 101 F.3d 1304 (absent Indian tribes were necessary parties in challenge to settlement agreement in which the absent Indian tribes were parties).

Each of the Treaty Tribes have treaty-reserved rights, which are legally protected, and at issue in this action because Wasco County determined that the Track Expansion Project would

impair those rights. Like the absent Indian tribes in *American Greyhound Racing*, *Kescoli*, and *Dewberry*, the Treaty Tribes are entitled not to have those interests impaired by a legal action in which the Treaty Tribes are absent.[9] None of the remaining cases cited by Union Pacific alter that conclusion.

In *Alto*, tribal members challenged a Bureau of Indian Affairs order upholding the Indian tribe's decision to disenroll descendants from tribal membership. 738 F.3d at 1115. In that case, the absent Indian tribe asserted interests in maintaining its sovereignty over membership matters. *Id.* at 1127. The court appears to have assumed that the absent Indian tribe's interest was both legally protectable and related to the subject of the action. The court did not expressly address that issue, however, because it determined that the Bureau of Indian Affairs could adequately represent the absent Indian tribe's interests in the action.[10]

In *Yellowstone County*, the county sought a declaration that the tribal court lacked jurisdiction to enjoin the county from imposing state property taxes on reservation land owned by a tribal member and patented in fee. 96 F.3d at 1170. The court determined that it was not necessary to join the tribal court for several reasons including the fact that tribal judges, like state judges, are expected to comply with binding pronouncements of federal courts. *Id.* at 1173. *Yellowstone County* is materially distinguishable from this action for the simple reason that the court in that action was not asked to set aside a prior decision blocking development because of

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[9] *Cachil Dehe Band* is factually distinguishable from this action. In that case, the absent Indian tribes were not parties to gaming compact at issue in the action. Unlike the absent Indian tribes in that case, the Treaty Tribes each have treaty-reserved rights that are directly related to the subject of this action.

[10] Union Pacific contends that Defendants can adequately represent the Treaty Tribes' interests in this action. The Treaty Tribes strongly dispute that contention and address it in Section II.B. of this memorandum.

impairment to treaty-reserved fishing rights, which are legally protected interests related to the subject of this action.

Union Pacific relies on its final two cases, *Northrop* and *McLaughlin*, for the proposition that speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable under Rule 19. Without conceding that is a correct statement of the law, the Treaty Tribes do not believe that the proposition is helpful or germane to the issues before this Court. Given the findings in the County Decision, there is nothing speculative about the Track Expansion Project's impermissible effect on treaty-reserved rights. Unless Union Pacific is prepared to represent to the Court that it is abandoning the Track Expansion Project, the Treaty Tribes assume that Union Pacific will proceed with construction if the Court awards the relief that Union Pacific seeks.[11]

B. The Treaty Tribes' Absence Would as a Practical Matter Impair or Impede their Ability to Protect Their Treaty-Reserved Rights.

To be a necessary party, the Treaty Tribes recognize that in addition to showing that they have a legally protectable interest in the subject of the action, they must also show that their absence would as a practical matter, impair or impede their ability to protect their treaty rights. Fed. R. Civ. P. 19(a)(1)(B)(i). If this case were to proceed without the Treaty Tribes, it would impair and impede their treaty-reserved rights because if Union Pacific were to prevail, it could proceed with the Track Expansion Project despite the factual findings of the Wasco County Board of County Commissioners that the Track Expansion Project should not proceed because of impacts to the Treaty Tribes' treaty-reserved rights in violation of the Gorge Act.

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[11] If it proceeds with construction, the traffic across the Umatilla Reservation and along the Columbia River could increase as much twenty-five percent (25%). More derailments and spills will occur, harming the treaty-reserved resources of the Tribes. (Huber Dec. generally.)

Union Pacific nonetheless contends, for two reasons, that the interests of the Treaty Tribes will not be impaired if this action proceeds in their absence. First, Union Pacific asserts that the Treaty Tribes have an alternative forum—namely, to seek judicial review of the ACOE authorization of the Track Expansion Project under NWP 14. That argument is not well-taken. To the Treaty Tribes' knowledge, there is nothing in the Rule 19(a)(1)(B)(i) inquiry that requires the Court to examine alternative forums available to the absent party as a basis not to join the absent party. That notion appears to be directly inconsistent with Rule 19(a)(1)(B)(ii). Subparagraph (ii) requires courts to inquire as to whether the absent party's claimed interest may leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Denying a motion to join on the basis of a potential alternative forum would multiply the risk of inconsistent obligations on parties to the action; it also would not be conducive to judicial economy.

More importantly, Union Pacific mistakenly assumes that judicial review of the ACOE decision would provide a viable alternative forum. It does not. As explained in Section I.A.1. above, the Gorge Act expressly provides that nothing in the act shall "affect or modify any treaty or other rights of any Indian tribe." 16 U.S.C. §544o. To ensure that the Gorge Act does not affect tribal treaty-reserved rights, the Columbia River Gorge Commission has adopted consultation provisions with the Treaty Tribes as part of its management plan, and Wasco County's NSA Ordinance expressly addresses the obligation to protect tribal treaty rights. Simply put, the Treaty Tribes availed themselves of their legal right to participate in the Wasco County land use proceeding to protect their treaty-reserved rights. There is nothing that requires them to defend and protect those rights solely in the ACOE permitting process. That is

especially so given the infirmities that the Treaty Tribes have identified in that process. *See* Section I.A.1. *supra*.

Next, Union Pacific asserts that the Treaty Tribes' interests would not be impaired if this action proceeds in their absence because the Defendants can adequately represent the Treaty Tribes' interests. That assertion is incredible to the Treaty Tribes. The Ninth Circuit rejected a similar argument in *American Greyhound Racing*, reasoning that the non-federal defendant owed no fiduciary trust duty to Indian tribes and their interests. 305 F.3d at 1023, n.5; *see also Dewberry*, 406 F.Supp.2d at 1148-49.

While the Treaty Tribes and Defendants have developed a good working relationship, the Treaty Tribes strongly object to any inference that either Wasco County or the Columbia River Gorge Commission can adequately represent Treaty Tribes' sovereign and treaty-reserved interests in this action. Those interests are fundamental to the Treaty Tribes' sovereignty and cannot be outsourced to another entity.

II. It is Not Feasible to Join the Treaty Tribes.

The Treaty Tribes are indisputably necessary parties under Rule 19(a)(1). Union Pacific does not expressly dispute the proposition that 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). Because Union Pacific has failed to argue that joinder is not feasible, it effectively concedes that the sovereign immunity of the Treaty Tribes prevent them from being joined involuntarily unless they waive their immunity. *See McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989). For that reason, the Treaty Tribes do not address this issue

further, except to address Union Pacific's citation of *CFPB v. Great Plains Lending*, ___ F.3d ___, 2017 WL 242560 (9th Cir. Jan. 20, 2017)..

Great Plains Lending does not address Rule 19. Rather, the case addresses whether the Consumer Financial Protection Act of 2010 ("CFPA") applies to tribal business enterprises that engage in financial lending. The focus of that decision was whether the CFPA is a statute of general applicability that would apply to tribal business enterprises, not Indian tribes as sovereigns. To the extent that Union Pacific is citing *Great Plains Lending* for the proposition that the ICCTA is a statute of general applicability that would apply Indian tribes as sovereigns, Union Pacific is not correct. *See generally Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (analyzing doctrine of statutes of general applicability).

Even if the ICCTA were a statute of general applicability, it does not apply to the Treaty Tribes in this context because the rights the Treaty Tribes assert arise out of both treaty and federal statute. Treaty rights will not be abrogated absent explicit statutory language indicating Congress' intent to invalidate or modify the right in question. *See U.S. v. Dion*, 476 U.S. 734, 738-39 (1986). In the absence of an explicit statement, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee Tribe v. U.S.,* 391 U.S. 404, 412 (1968). "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40.

Union Pacific has offered no such evidence in this case that even remotely, let alone clearly, suggests that Congress intended to abrogate the rights of the Treaty Tribes arising out of both treaty and federal statute. In short, Union Pacific's reference to *Great Plains Lending* is material only in that it demonstrates what has been obvious since Union Pacific first engaged in

the Wasco County land use process – its respect for the U.S. Supremacy Clause does not extend to Indian treaties and the reserved rights of the Treaty Tribes.

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

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 for the plaintiff. *Dewberry*, 406 F.Supp.2d at 1148. Contrary to Union Pacific's assertion, balancing of these factors strongly weighs in favor of dismissal of this action. [12]

A. Prejudice to the Parties, Including the Treaty Tribes.

"The first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d at 1015, 1024-25 (9th Cir. 2002); *see also Quileute Indian Tribe*, 18 F.3d at 1460. Union Pacific asserts that the Treaty Tribes "cannot show that their treaty rights would be irrevocably impaired" if the Court granted Union Pacific's requested relief. (Doc. 14, p. 18.) As set forth above in Section I.A, and further demonstrated below, Union Pacific's assertion is not correct.

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[12] While the Ninth Circuit directs district courts to apply the four-part test of Rule 19(b) to determine whether Indian tribes are indispensable, it has also provided that when a necessary party is immune from suit, there may be "very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *see also Kescoli*, 101 F.3d at 1304, 1311; *White v. Univ. of Cal.*, 2012 WL 12335354 (N.D. Cal. Oct. 9, 2012), *aff'd White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014); *Kennedy v. United States DOI*, 282 F.R.D. 588, 634 (E.D. Cal. 2012).

In the Wasco County land use proceeding, the Treaty Tribes provided substantial evidence focused on treaty-reserved rights and treaty protected resources, including, but not limited to, impacts to and possible elimination of fishing access; impairment of ecosystem health that would harm tribal members ability to hunt, fish and gather for foods at usual and accustomed areas; impairment of the ability to participate in traditional religious and cultural practices; and likely damage to cultural resources. After a thorough review of the record, the Wasco County Board of Commissioners denied Union Pacific's application because the Commissioners determined that the Track Expansion Project would adversely affect the Treaty Tribes' treaty-reserved rights in contravention of the Gorge Act.

Given the posture of this action, the Court is not in a position to second guess the Wasco County Board of Commissioners' factual findings or their conclusion that the Track Expansion Project would adversely affect the Treaty Tribes' treaty-reserved rights in contravention of the Gorge Act. If Union Pacific prevails in this action, it will proceed with the Track Expansion Project. Doing so will impair the Treaty Tribes treaty-reserved rights in violation of the Gorge Act. 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. Despite Union Pacific's assertions to the contrary, 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.

B. Relief Cannot be Tailored to Lessen the Prejudice.

Union Pacific argues that any prejudice to the Treaty Tribes can be limited (or eliminated) by the relief given by this Court. According to Union Pacific, the "relief can and

should focus on the validity of the permit requirement and not adjudicate any treaty rights." (Doc. 42, p. 14.) With respect, the Treaty Tribes do not understand Union Pacific's argument.

For this Court to have subject matter jurisdiction, there must be a case or controversy. U.S. Const. art. III, § 2. The Court cannot render advisory opinions. *Id.* In this action, Union Pacific asserts that ICCTA preempts Wasco County's NSA Ordinance "*as applied*" to the Track Expansion Project. (Doc. 1, Prayer For Relief, ¶ 1 (emphasis added).) Second, Union Pacific contends that the NSA Ordinance "*as applied*" to the Track Expansion Project is unconstitutional. (Doc. 1, Prayer For Relief, ¶ 1 (emphasis added).)

Union Pacific's prayer is plainly challenging Wasco County's Decision denying its land use application *because* of impermissible impacts to the Treaty Tribes' treaty-reserved rights. The impact to those treaty-reserved rights is the *sine qua non* of the County Decision and cannot be carved out of this action. Again, if Union Pacific succeeds, the Treaty Tribes' treaty-reserved rights will be impaired. There is simply no way to tailor the relief to lessen or avoid that prejudice. *Dewberry*, 406 F.Supp.2d at 1148.

C. An Adequate Remedy Cannot be Awarded Without the Treaty Tribes.

For the reasons set forth in Section B, and contrary to Union Pacific's bald assertion that "a judgment rendered in the Tribes' absence will be adequate," (Doc. 42, p.14.), 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 diminish 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.

Union Pacific has not identified any Ninth Circuit case in which litigation proceeded without a necessary party that could not be joined because of sovereign immunity. The prevailing weight of Ninth Circuit authority dismisses actions under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes vested with sovereign immunity. *See, e.g., Am. Greyhound Racing*, 305 F.3d 1015; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*., 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *McClendon*, 885 F.2d 627. Because the Treaty Tribes cannot feasibly be joined, the action must be dismissed.

D. Union Pacific Has an Alternative Forum To Adjudicate the Issues in this Action.

Union Pacific disagrees that its pending land use appeal before the Columbia River Gorge Commission is a viable alternative forum. Aside from an *ad hominem* attack on the competency of the Commission (Doc. 42, p. 14-15.), Union Pacific has not identified any barrier to the Commission addressing Union Pacific's federal preemption and constitutional arguments presented here. As the Court well knows, tribunals are often called upon to analyze their own jurisdiction to adjudicate a matter. Timing of the Commission's process may be an issue, but it seems largely self-inflicted and should not weigh in Union Pacific's favor. (Doc. 25, p. 7-8.) The Treaty Tribes cannot envision any prejudice to Union Pacific in proceeding with the land use appeal that it has already initiated. That is especially the case given the fact that Union Pacific has a right of judicial review of any decision issued by the Columbia River Gorge Commission. Or. Rev. Stat. § 196.115 (2016).

Union Pacific cites to two state court cases in support of its contention that the application of tribal sovereign immunity should not deprive a party of their "day in court."

Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047 (N.Y. 2003); *Auto. United Trades v. State*, 285 P.3d 52 (Wash. 2012). Those cases are not applicable here. Neither case construes Rule 19. Further, the Ninth Circuit has expressly rejected *Saratoga County's* state law joinder analysis when applying Rule 19. *Wilbur v. Locke*, 423 F.3d 1101, 1115-16 (9th Cir. 2005), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). Likewise, the Western District of Washington rejected an attempt to use *Automotive United Trades* for a Rule 19 analysis. *Skokomish Indian Tribe v. Goldmark,* 994 F.Supp.2d 1168, 1192 n. 13 (W.D. Wash 2014).

The prevailing Ninth Circuit precedent applying Rule 19 concludes that tribal sovereign immunity outweighs the plaintiff's interest in litigating their claims. *Am. Greyhound Racing*, 305 F.3d at 1025; *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1999 (9th Cir. 1991); *Dewberry*, 406 F.Supp.2d at 1148 (citing *Am. Greyhound Racing,* 305 F.3d at 1025). Other federal courts have applied that rule even if there is no alternative forum in which the plaintiff can bring its claims. *Mesa Grande Band of Mission Indians v. United States*, 121 Fed.Cl. 183, 191 (2015). But, that circumstance is not present here. Union Pacific has an alternative forum; its appeal to the Columbia River Gorge Commission, which is subject to judicial review by the Oregon Court of Appeals. Or. Rev. Stat. § 196.115. Union Pacific may prefer this Court, but that preference does not deny the existence of an alternative forum available to Union Pacific.

IV. The Public Rights Exception Does Not Apply to this Action.

The Treaty Tribes have established that they are necessary and indispensable parties and that this action must be dismissed under Rule 19. Nonetheless, Union Pacific asserts that the Court should allow the action to proceed under the "public rights" exception to the traditional

joinder rules established by Rule 19. Two requirements must be satisfied to qualify for the public rights exception. *Dewberry*, 406 F.Supp.2d at 1148-49 (citing *Kescoli*, 101 F.3d at 1304, 1311.) First, the litigation must transcend the private interests of the litigants and seek to vindicate a public right. *Id.* Second, although the litigation may affect the absent party's interests, it must not destroy legal entitlements of the absent parties. *Id.* Contrary to what Union Pacific would have this Court believe, this action fails to meet both requirements and application of the public rights exception is therefore inappropriate.

A. Union Pacific's Lawsuit Seeks to Advance its Own Private Interests.

The Ninth Circuit considers the nature of "the rights in issue between the plaintiffs in [the] case, the [absent parties], and the [defendants]" as opposed to the "general subject" of the case. *Am. Greyhound Racing*, 305 F.3d at 1015, 1026 ("The general subject of gaming may be of great public interest, but the rights in issue between the plaintiffs in this case, the tribes and the state are more private than public."). Union Pacific argues that the general subject of this case involves public rights, but the actual rights in issue between the parties are narrow private rights between the parties. The public rights exception does not apply.

While "[t]he contours of the public rights exception have not been clearly defined," it is generally applied in actions where either federal agencies seek to enforce federal law or in public rights litigation where private parties seek to require federal agency compliance with federal environmental law. *See Kescoli*, 101 F.3d at 1311 (citing *Kickapoo Tribe of Indians v. Kansas*, 43 F.3d 1491, 1500 (D.C. Cir. 1995) (noting that "the exception generally applies where 'what is at stake are essentially issues of public concern'" and that "[w]ithout the exception, public rights

litigation would be severely curtailed"). There are few cases that demonstrate the successful application of the exception.[13]

The Treaty Tribes could only locate one case in which the Ninth Circuit has approved the application of the public rights exception, *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), which involved public rights litigation under the National Environmental Protection Act ("NEPA") and the Endangered Species Act ("ESA"). In *Conner*, the plaintiffs were public interest groups seeking judicial review of the adequacy of the environmental impact statements ("EIS") and biological opinions relied on by federal agencies in granting oil and gas leases on 1.3 million acres of national forest land in Montana. *Id.* at 1443-45. The purported indispensable parties in that action were the lessees of the more than 700 leases issued by the federal agencies under the inadequate EIS and biological opinions. *Id.* at 1443, 1458.

A group of the lessees intervened on appeal and argued that all lessees were indispensable to the action and that the district court should not have rendered judgment without all lessees being joined to the action. *Id.* at 1458. The court identified the "danger of expanding joinder requirements in the public rights area" as potentially "sound[ing] the death knell for any judicial review of executive decisionmaking" due to the difficulty of joining such a large group of potential parties. *Id.* at 1460. In determining that the public rights exception applied in *Conner*, the Ninth Circuit noted that the plaintiffs action "merely [sought] to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the

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[13] *See, e.g.*, *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940) (announcing and applying for the first time the public rights exception in the context of joinder analysis for enforcement action by National Labor Relations Board, NRLB was not required to join employees of the employer subject to its enforcement action).

ESA." *Id.* In addition, the Ninth Circuit clarified the order of the district court to assure that it did not destroy the legal entitlements of the lessees. *Id.* at 1460-61.

Unlike *National Licorice* (see footnote 13) and *Conner*, this action does not involve a federal agency enforcing a federal statute against private violators or a public interest group seeking judicial review of a federal agency's failure to follow a federal statute. Union Pacific, nonetheless, attempts to squeeze this case into the exception by arguing the action will vindicate public rights that transcend Union Pacific's private interests. Union Pacific alleges those public rights are national policies underpinning the ICCTA, its status as a common carrier, and the general public interest in enforcing the Constitution and federal law. Union Pacific further characterizes the public right that it seeks to vindicate as "seek[ing] to enforce the duty of the [County and Commission] to follow statutory procedures." *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 n.6 (9th Cir. 1990) (In *dicta*, the court contemplated that if the absent Indian tribes had been necessary to the plaintiff's prospective procedural claims that the public rights exception would have applied "[t]o the extent that the [plaintiff] [sought] to enforce the duty of the PFMC and the Secretary to follow statutory procedures *in the future*.") (emphasis added).

While there is a general public interest in the U.S. Supremacy Clause and the ICCTA, that is not the subject matter of this litigation. The subject matter here is much more narrow (*i.e.*, the enforceability of the County Decision) and "the rights in interest" among the parties are primarily private in nature. By framing the action based on the general public interest in enforcing the law rather than based on the specific interests of the parties in the action, Union Pacific runs afoul of the Ninth Circuit's admonition that "[a]lmost any litigation * * * can be characterized as an attempt to make one party or another act in accordance with the law." *Am. Greyhound Racing*, 305 F.3d at 1026.

The Ninth Circuit has consistently declined to apply the public rights exception where private parties bring litigation seeking to advance their own private interests even where the general subject of the action or legal theories advanced involve strong public interests. *See, e.g.*, *id.* at 1026 (determining that the plaintiffs' interests were primarily private where the plaintiffs argued that "their action seeks only to ensure that the Governor acts in accordance with the state constitution and laws"); *See also Kescoli,* 101 F.3d at 1304, 1311 (The plaintiff's claims were "essentially private in nature" and public rights exception did not apply despite plaintiff's argument that the action merely sought to force a federal agency to comply with federal statutes.).

Union Pacific's interests are more like the private plaintiffs in *American Greyhound Racing* and *Kescoli* seeking to advance private rights, as opposed to the federal agency and environmental groups in *National Licorice* and *Conner*. Union Pacific is a publicly traded, Delaware corporation. (Huber Dec., ¶ 12.) Union Pacific's profits in 2016 exceeded $4.2 billion. (Huber Dec., ¶ 12.) If successful in this action, Union Pacific will be able to construct its Track Expansion Project, which will benefit Union Pacific's operations and bottom line.[14] Despite Union Pacific's statements to the contrary, Union Pacific's own marketing materials touting the benefits of the Track Expansion Project state that it will be able to run an additional five to seven trains per day once the Project is constructed. ***This is approximately a 25%***

[14] According to Union Pacific, the Track Expansion Project will alleviate a significant "bottleneck" in its Portland-Hermiston rail line which will substantially lower its daily business costs. (Declaration of Luke Baatz in Support of MPI ("Baatz Decl."), ¶ 25.). Union Pacific also claims that the Track Expansion Project will provide it with operational efficiency that will allow it to better serve its customers. (*Id.*). Union Pacific also claims that if this action and the associated motion for preliminary injunction are successful it will avoid significant construction delays and costs. (Baatz Decl., ¶¶ 20-23.)

increase in rail traffic. (Huber Dec., ¶ 11.) Union Pacific earned on average $2,203 per freight car in 2016. (Huber Dec., ¶ 12.) While it is unclear how many freight cars Union Pacific's projected 1,825 to 2,555 additional annual trains will have, it is safe to say that Union Pacific expects to reap a significant financial benefit from the construction of the Track Expansion Project. Finally, if Union Pacific prevails in this action it will benefit from constructing the Track Expansion Project without the oversight of the Gorge Act, the GMA, Wasco County's NSA Ordinance, and without regard to the treaty-reserved rights of the Treaty Tribes.

Union Pacific clearly seeks to advance substantial private interests in this action. The "*as applied*" nature of its claims also ensure that Union Pacific's private interests will be primarily served by this litigation and any public benefit will be incidental. In its attempt to have this Court reach a different conclusion, Union Pacific primarily relies on *Makah* and the Tenth Circuit's decision in *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977) for its position that its significant private interests in this action are somehow transcended by the vindication of public rights.[15] *Makah*, however, was not decided based on application of the public rights exception and is of very little value for the purposes of this analysis.[16] *Manygoats* does not expressly apply

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[15] Many of the other cases Union Pacific relies on to support its public right arguments either do not construe Rule 19 or do not apply the public rights exception, or both, and are therefore not addressed further by the Treaty Tribes. *See CFPB v. Great Plains Lending*, __ F.3d __, 2017 WL 242560 (9th Cir., Jan. 20, 2017) (addressing whether the Consumer Financial Protection Act of 2010 ("CFPA") applies to tribal business enterprises that engage in financial lending); *Auto. United Trades v. State of Washington*, 285 P.3d 52 (Wash. 2012) (applying Washington joinder rules and not analyzing the public rights exception); *Or. Coast Scenic R. R. v. State of Or. Dept. of State Lands*, 841 F.3d 1069 (9th Cir. 2016). (preemption case that does not construe FRCP 19 or the public rights exception); *City of Auburn v. U.S. Gov't.*, 154 F.3d 1025 (9th Cir. 1998) (same).

[16] The court in *Makah* dismissed nearly all of the plaintiff's claims for failure to join indispensable tribes as parties. *Makah*, 910 F.2d at 560 (dismissing substantive claims). Like Union Pacific's claims in this action, the dismissed claims in *Makah* sought to prevent the enforcement of a regulatory action applying the treaty-reserved fishing rights of a number of

the public rights exception standard, but at least one district court case in the Tenth Circuit presumes that is what the court intended. *See Dine Citizens Against Ruining Our Environment v. U.S. Office of Surface Mining Reclamation and Enforcement*, 2013 WL 68701at *5 (D.Col. 2013). Regardless, the *Manygoats* decision is similar to the Ninth Circuit's in *Conner* in that it involved private parties seeking to enjoin the performance of government lease agreements until an EIS that complies with NEPA could be completed. *Manygoats*, like *Conner*, is materially distinguishable from this action. Those cases involved public rights litigation that did not attempt to invalidate the absent parties' rights in the government leases.

Like the plaintiffs in *American Greyhound Racing* and *Kescoli*, Union Pacific's action fundamentally seeks to advance its own private rights. Application of the public rights exception is therefore inappropriate.

B. The Adjudication of this Action will Destroy Legal Entitlements of the Treaty Tribes

Just as Union Pacific's claims fail to meet the first requirement of the public rights exception, its claims also fail to meet the second requirement as the application of the exception in this action would destroy the Treaty Tribes' legal entitlements in their treaty-reserved rights. The requisite level of interference with a legal entitlement needed to take an action out of the public rights exception is low. To qualify for the exception, an action's effect on the legal entitlement of an absent party must be merely "incidental." *Am. Greyhound Racing*, 305 F.3d at

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absent tribes. *Id.* at 559. The court determined that the absent tribes were not necessary parties, however, for the plaintiff's prospective procedural claims because they did not seek to invalidate the past decision implicating treaty rights but rather looked to the future application of federal law. *Id.* In a footnote, the court noted that the absent tribes, if they had been necessary, would not be indispensable because the public rights exception would have applied to the claims that were not dismissed but only "[t]o the extent the Makah [sought] to enforce the duty of the PFMC and the Secretary to follow statutory procedures *in the future*." *Id.* at 559 n. 6 (emphasis added).

1026 (emphasis in original); *see also Dewberry*, 406 F.Supp. 2d at 1150 (acknowledging the "incidental effect" standard). As is discussed throughout this Reply, the Treaty Tribes' treaty-reserved fishing rights are imperiled by this action and, if Union Pacific is successful, the result will have more than an incidental effect on the Treaty Tribes' legal entitlements under each Treaty.

Union Pacific contends that this action meets the second requirement of the public rights exception because "Union Pacific does not seek to adjudicate any rights of the Tribes." (Doc. 42, p. 16.) Union Pacific also asserts that its lawsuit does not "seek to invalidate the [Treaty] Tribes' treaty rights," that the "litigation is not aimed at * * * the [Treaty] Tribes' legal entitlements," and that "[t]o the extent there is any impact on the [Treaty] Tribes] * * * it would be only 'incidental' to the enforcement of the public right that Union Pacific seeks to vindicate." (Doc. 42, p. 17.)

While Union Pacific seems to acknowledge the "incidental" standard, it attempts to muddy the waters by claiming its action does not meet a variety of other high standards. Even if Union Pacific's proffered standards were accurate, it is unmistakable that this litigation takes direct aim at and seeks to invalidate legal entitlements of the Treaty Tribes.

By this action, Union Pacific seeks to render the County Decision unenforceable, which denied Union Pacific's land use application for the Track Expansion Project primarily on the basis of the impact the Track Expansion Project would have on the Treaty Tribes' treaty-reserved rights. In addition, Count II of Union Pacific's Complaint alleges that "denial of the permit is not necessary to protect tribal fishing rights under treaties with the United States." (Doc. 1, ¶ 56.) As the Wasco County Board of Commissioners found, if allowed to move forward, the Track Expansion Project will impact the Treaty Tribes treaty-reserved rights and resources by possibly

eliminating access to fishing sites in and adjacent to the Project area and by increasing the likelihood of damage to ecosystem health necessary to the Treaty Tribes' exercise of their treaty-reserved rights.

There can be no serious question that the Treaty Tribes' legal entitlements in and around the Track Expansion Project area will be destroyed if this litigation is allowed to continue without the Treaty Tribes. The Treaty Tribes respectfully request that the Court reject Union Pacific's invitation to apply the public rights exception to this action.

CONCLUSION

For the foregoing reasons, the Treaty Tribes are necessary parties 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. 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 10th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 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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