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UNITED STATES DISTRICT COURT

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

PLAINTIFF'S CONSOLIDATED RESPONSE TO MOTIONS TO DISMISS

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I. INTRODUCTION

Defendant Portland General Electric ("PGE") has brought a motion to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(7), and has joined a similar motion brought by amicus curiae the Confederated Tribes of the Warm Springs Reservation of Oregon ("the Tribe"). These motions come nearly 20 months after Plaintiff Deschutes River Alliance ("DRA") filed this Clean Water Act citizen suit, and 18 months after PGE filed its first motion to dismiss under Fed. R. Civ. P. 12(b)(1).

These motions should be denied. The subject of this case is whether PGE is operating the Pelton Round Butte Hydroelectric Project ("the Project") in violation of the Project's Clean Water Act Section 401 Certification. PGE is the designated Operator of the Project, and in that role is responsible not only for operating and maintaining the Project but for compliance with all applicable laws, permits, and licenses. As such, it is the appropriate defendant in this case, and the Tribe is not a required party under Rule 19 because the interests of the Tribe in the subject of this litigation will be adequately represented by PGE. But even if the Tribe *were* a required party, the motions should be denied because it is feasible to join the Tribe in this case, as Congress has expressly abrogated tribal immunity under the Clean Water Act ("CWA" or "the Act"). And even if this were not so, equity and good conscience weigh heavily toward allowing the case to proceed among the existing parties.

II. FACTUAL AND LEGAL BACKGROUND

A. Project Licensing and Certification

In 2001, PGE and the Tribe filed a joint application with the Federal Energy Regulatory Commission ("FERC") for a renewed Project license. Doc. 73 at ¶ 23. Because the Project discharges water into Oregon's navigable waters, the applicants were required to provide FERC

with a Clean Water Act § 401 Certification, issued by the Oregon Department of Environmental Quality ("ODEQ"). *See* 33 U.S.C. § 1341(a). Section 401 requires that each such certification provide that the license or permit holder's discharges will comply with the Clean Water Act, including any applicable state water quality standards and requirements. *Id.* Further, each § 401 Certification "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure" that the applicant's discharges and other activities will comply with applicable state water quality standards and requirements. *Id.* § 1341(d). Each of these requirements "shall become a condition on any Federal license or permit subject to [§ 401 Certification]." *Id.*

In their application for § 401 Certification, the applicants gave assurances that after a new Selective Water Withdrawal tower was constructed and implemented, the Project "will meet all applicable water quality standards." *See* Doc. 66-7 at 13. On June 24, 2002, ODEQ issued a § 401 Certification for the Project, containing several operational conditions to ensure the Project complied with all applicable water quality standards. Doc. 66-8. Each of the conditions in the § 401 Certification are enforceable under the Clean Water Act, and are legally binding conditions of the Project's FERC license itself. *See Deschutes River All. v. Portland Gen. Elec. Co.,* 249 F.Supp.3d 1182 (D.Or. 2017); 33 U.S.C. § 1341(d).

B. PGE's and the Tribe's Ownership Rights and Responsibilities at the Project

PGE was originally the sole licensee for the Project, obtaining Federal licensing for the Project in 1951. Doc. 66-4 at 2. In 2000, PGE entered into a Long-Term Global Settlement and Compensation Agreement with the Tribe. *See* Doc. 66–5. Under that agreement, the Tribe became a 1/3 owner of the Project, with the option to purchase a greater stake in coming years. *See Id*. at 11–14. Exhibit D to the Global Agreement is an "Ownership and Operation

Agreement" between PGE and the Tribe. *See* Doc. 66–6. That document identifies PGE as the "Operator" of the Project. *Id.* at 5–6. In that role, PGE is obligated, among other duties, to "operate and maintain the Project" and to "take any and all actions necessary or appropriate to comply with such Applicable Laws, orders, permits and licenses, now or hereafter in effect." *Id.* at 6.

C. Procedural History

On August 12, 2016, Plaintiff Deschutes River Alliance ("DRA") filed this Clean Water Act citizen suit against PGE over ongoing violations of the Project's CWA § 401 Certification. Doc. 1. On September 30, 2016, PGE filed a motion to dismiss the case under Fed. R. Civ. P. 12(b)(1), alleging lack of subject matter jurisdiction. Doc. 7. That motion was denied on March 27, 2017. Doc. 22. Soon after, the Tribe filed an unopposed motion for leave "to appear as amicus curiae in all aspects of [the] case," "in order to protect its proprietary, sovereign, and treaty-reserved rights and interests." Doc. 23 at 2.

Now, the Tribe attempts to move, pursuant to Fed. R. Civ. P. 12(b)(7), to dismiss the case for DRA's alleged failure to join it as a required party under Fed. R. Civ. P. 19. Doc. 72. Defendant PGE followed by filing its own motion to dismiss under Rule 12(b)(7), and in that motion also joined in the Tribe's motion. Doc. 74 at 1.

D. Legal Standard for a Motion to Dismiss Under Fed. R. Civ. P. 12(b)(7)

Under Rule 12(b)(7), a party may request dismissal for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). Rule 19, in turn, "imposes a three-step inquiry":

> (1) Is the absent party ... required to be joined if feasible ... under Rule 19(a)?
> (2) If so, is it feasible to order that the absent party 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. & Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir.2012) (footnote omitted). "There is no precise formula for determining whether a particular non-party is necessary to an action; the determination will be heavily influenced by the facts and circumstances of each case." *Biagro W. Sales, Inc. v. Helena Chem. Co.*, 160 F.Supp.2d 1136, 1142 (E.D. Cal. 2001) (citing *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991)). The moving parties "bear the burden in producing evidence in support of the motion." *Biagro*, 160 F.Supp.2d at 1141.

III. ARGUMENT

The dual motions to dismiss brought by PGE and the Tribe should be denied. As an initial matter, neither of these motions are allowed at this time under the Federal Rules. And further, the Tribe and PGE fail to establish the central elements necessary to their defenses under Fed. R. Civ. P. 19. In particular, first, the Tribe is not an entity required to be joined in the present case because its interests in the subject of the case will be adequately represented by PGE. Second, if the Court nonetheless determines that the Tribe is an entity required to be joined, the Court *could* join the Tribe to the action, as the Tribe does not enjoy sovereign immunity from enforcement under the Clean Water Act. And third, even if the Court determines that the Tribe is required to be joined but that its joinder is not feasible, the Court should nonetheless decline to dismiss the case because the factors provided in Rule 19(b) weigh strongly in favor of proceeding among the existing parties.

A. The Federal Rules Do Not Authorize Either The Tribe Or PGE To Bring A Motion Under Rule 12(B)(7) at the Present Time.

As a threshold matter, we observe that under Fed. R. Civ. P. 12, neither the Tribe nor PGE may bring a motion under Rule 12(b)(7) at the present time. Regarding the Tribe, Rule

12(b) provides only for "a party" to assert the defenses listed under that subsection, including a Rule 12(b)(7) motion for failure to join a party under Rule 19. Fed. R. Civ. P. 12(b). The Tribe asserts that its motion is "pursuant to Rule 12(b)(7)," Doc. 72 at 1, but the Tribe is not a party to the present case and thus may not bring any motion under Rule 12(b).

In the Tribe's motion to appear as amicus curiae, it identified the "classic role" of an amicus curiae: "to assist the Court 'in a case of general public interest, supplementing the efforts of counsel [for the parties], and drawing the court's attention to law that escaped consideration.'" Doc. 23 at 3 (quoting *Miller-Wohl Co., Inc. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Along those lines, nothing precludes the Tribe filing support for motions or briefs properly filed by PGE (a party), but the Federal Rules do not entitle amicus entities to file their own motions. As a result, the Tribe's motion should be denied as improper.

PGE's motion under Rule 12(b)(7) is also disallowed at the present time. Generally speaking, a party making a motion to dismiss under Rule 12(b) may not make another subsequent motion under Rule 12 "raising a defense or objection available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2).[1] On Sept. 30, 2016, PGE filed a motion to dismiss under Rule 12(b)(1) asserting lack of subject matter jurisdiction. Doc. 7. At the time that motion was filed, PGE clearly had all the information it needed to bring a Rule 12(b)(7) motion as well, as it had identified the defense in its Answer filed three weeks before. Doc. 5 at 6 ("The Complaint should be dismissed because Plaintiffs [sic] have failed to join [the Tribe], who is a co-owner and joint manager of the Project…. Because Plaintiffs have failed to join a necessary and indispensable party the case should be dismissed….").

[1] Rule 12(h) provides exceptions to this general rule, allowing a defendant to raise the issue of failure to join a party under Rule 19(b) in three other specific circumstances, none of which are applicable here: "(A) in an pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial." Fed. R. Civ. P. 12(h)(2).

joining a motion under Rule 12(b)(7) with its original motion to dismiss, PGE instead announced that it would file "a separate motion to address" its allegation that DRA failed to join the Tribe as a necessary party only "if necessary, after the Court decides the instant motion." *Id.* at 5 n.2. That "separate motion" is now before the Court, eighteen months after PGE's initial motion to dismiss was filed.

PGE's present motion to dismiss under Rule 12(b)(7) is disallowed under Rules 12(g)(2) and 12(h)(2). Notwithstanding those Rules, the Ninth Circuit recently signaled that even where a successive motion is involved, it "should generally be forgiving of a district court's ruling on the merits of a late-filed Rule 12(b)(6) motion." *In re Apple Iphone Antitrust Litig.*, 846 F.3d 313, 319-20 (9th Cir. 2017). In that case, the Court declined to disturb the district court's allowance of defendant's successive 12(b)(6) motions to dismiss where the defendant had "promptly moved to dismiss each of Plaintiff's four [successive] complaints," and where the subsequent motions did not "appear to have been filed for any strategically abusive purpose." *Id.*

In sharp contrast here, PGE's presently asserted defense was available to it in September 2016, as it identified that defense in its Answer and in its initial motion to dismiss. Doc. 5 at 6; Doc. 7 at 5 n.2. PGE now, as then, has failed even to advance an argument that its 12(b)(7) defense was not available to it in 2016 when it brought its initial motion. DRA can conceive of no reason why PGE delayed its promised motion, other than for the purpose of delay. That is reason enough for the Court to refrain from bending the rules to allow its late filing. Accordingly, PGE's present motion should be dismissed as untimely.

In the event that the Tribe's motion is not dismissed as improper or that PGE's motion is not dismissed as untimely, we proceed to the merits of these motions below.

B. The Tribe is not a Required Party in This Case.

PGE and the Tribe argue that the Tribe is a party that must be joined to the case, if feasible. Specifically, the Tribe asserts that it "claims an interest relating to the subject of the action," and that it is "so situated that disposing of the action" in its absence "may [] as a practical matter impair or impede" its ability to protect its interest.[2] Tribe Mot, Doc. 72, at 15; FRCP 19(a)(1)(B)(i). However, because PGE will adequately represent the Tribe regarding any interests the Tribe may have in the specific subject of this case, the Tribe's ability to protect those interests will not be impaired by its absence.

1. The Tribe's Interests Relating to the Subject of the Case.

It is clear from the Tribe's motion and the Declaration of Charles R. Calica that the Tribe has a rich history in the Deschutes Basin, and a unique and important role there. There is no question that the Tribe holds essential interests related to the basin's fish and wildlife, water quality, the Tribe's sovereignty, and in the Pelton Round Butte Project itself. *See generally* Doc. 73. However, it is less clear how these interests are implicated by this case, or how any of these interests would be impaired were the case to proceed in the Tribe's absence.

The subject of this case is whether, in its operation of the Pelton Round Butte Project, PGE is violating requirements provided in the Project's Clean Water Act § 401 Certification. In its motion, the Tribe asserts "vast legally protected interests that relate to the subject of DRA's action." Doc. 72 at 20. These include co-ownership of the Project, the Tribe's role as joint

[2] For completeness we note that the Tribe does not urge that its presence as a party is needed to ensure the Court's ability to accord complete relief, pursuant to 19(a)(1)(A). [The Tribe attempts to "reserve" the option to later argue that it is a required party pursuant to FRCP 19(a)(1)(A). Tribe Mot. at 15 n.3.] Similarly, neither the Tribe nor PGE argue that the Tribe's presence as a party is needed for PGE to avoid being subjected to multiple or inconsistent obligations, pursuant to 19(a)(1)(B)(ii).

licensee to the Project's FERC license, and its status as a party to the PGE/Tribe Global Settlement and Compensation Agreement. *Id.* at 16-17. But the Tribe's ownership interest, status as licensee, and party status to the various joint agreements simply are not implicated by DRA's water quality enforcement action against PGE, in which DRA is attempting to enforce water quality requirements that are already mandatory under the Clean Water Act and conditions on the Project's FERC license. *See* 33 U.S.C. § 1341(d). Similarly, the Tribe's interest in its right to take fish at its usual and accustomed stations on the Deschutes River, Doc. 72 at 17, simply is not connected to the narrow subject of DRA's enforcement action. This is in sharp contrast to cases in which the subject of a case is the direct reallocation of tribal revenue sources. *See, e.g.*, *Makah Indian Tribe v. Verity*, 910 F2d 555, 559 (9th Cir 1990) ("[T]o the extent the Makah seek a reallocation of the 1987 harvest or challenge the Secretary's inter-tribal allocation decisions, the absent tribes may have an interest in the suit").[3]

2. The Tribe's Interests Will Not be Impaired if the Case Proceeds in its Absence.

Second, and more fundamentally, even if the Tribe is found to have "claimed an interest relating to the subject of the action," for it to be a required party under Rule 19 the court must further determine whether, "as a practical matter," the Tribe's absence will "impair or impede" its ability to protect that interest. Fed. R. Civ. P. 19(a)(1)(B). "Impairment may be minimized if the absent party is adequately represented in the suit." *Shermoen v. United States,* 982 F.2d 1312, 1318 (9th Cir 1992).

[3] The Tribe also asserts a general "sovereign authority to regulate activities within the boundaries of the Reservation and the natural resources of the Deschutes River basin." But this vast assertion of interest contains no limiting principle and, again, there is no explanation as to how DRA's enforcement against *PGE* implicates that sovereignty.

The Ninth Circuit has identified "three factors in determining whether an existing party adequately represents the interests of an absent party: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir 2012) (quoting *Shermoen*, 982 F.2d at 1318). All three of these *Salt River* factors indicate that PGE will adequately represent the Tribe's interests in this case.

First, PGE is sure to make any relevant arguments related to DRA's specific claims that the Tribe would make. In this matter, DRA seeks a declaration that PGE is violating the requirements in the Pelton Round Butte Project's § 401 Certification, and injunctive relief compelling PGE to comply with those requirements. Doc. 1 at 9. As the designated Operator of the Project, PGE is responsible for compliance with the § 401 Certification and other Project permits and licenses. Doc. 66-6 at 6. PGE is also the majority owner of the Project. As a result, it has every incentive to make any available argument to defeat DRA's specific claims, including any that the Tribe as minority owner of the Project might be inclined to make. Further, PGE has clearly demonstrated an interest in every reasonably available argument that is relevant to its determined efforts to defeat DRA's claims, including a willingness even to challenge the applicability or enforceability of key provisions of federal law and incorporated state requirements and limitations. *See, e.g.*, Doc. 7.

Second, PGE is not only willing to make all available relevant arguments, it is also capable of doing so. The Tribe is obviously correct in its assertion that PGE "is a private, investor-owned utility company; it is not a federally-recognized sovereign Indian tribe that is a

party to a treaty with the United States." But that is to say only that PGE is not the Tribe; it says nothing about the ability of PGE to represent the Tribe's interests and thus to make the Tribe's relevant arguments. Indeed, the Tribe also is not a group of cities, and yet such a grouping has been found to adequately represent a Tribe in litigation challenging changes to the operation of a dam, where the cities shared that Tribe's strong interest in defeating an environmental group's claims. *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998).[4]

Again, the Tribe and PGE simply offer no arguments *related to DRA's specific claims in this case* that PGE, as Project Operator and majority owner, would not be willing or equipped to make.

The Tribe further maintains that PGE lacks the "institutional capacity to make all of the Tribe's arguments in defending against DRA's claim." But the Tribe does not explain what arguments, or types of arguments, the Tribe would make relevant to the specific subject of the litigation that PGE could not make on account of its purported institutional infirmities. By its agreement to assign to PGE the authority to operate the Project, the Tribe, presumably with eyes wide open, considered PGE capable of interpreting and applying the relevant legal standards and requirements of the applicable law, regulations, permits, and the §401 certification. In the light of that assignment, the Tribe does not seem well positioned to argue that PGE is not equipped to make the relevant arguments related to the legality of its actions pursuant to the Project's § 401 Certification.

Another argument advanced by the Tribe derives from its observation that PGE, in theory, may be able to pass on to ratepayers any costs of compliance connected with this Court's

[4] Similarly, the Tribe is not the United States, and yet "the United States may adequately represent an Indian tribe unless there is a conflict between the United States and the tribe." *Makah Indian Tribe v. Verity*, 910 F2d 555, 558 (9th Cir 1990).

potential mandate, while the Tribe cannot. But, as the Defendant notes, "PGE, of course, shares a common interest in the Project, and the Project's financial success. Doc. 72 at 12. More centrally, while the Tribe and PGE do not retain the same organizational structure, the cited differences do not mean that the Tribe's co-licensee and co-owner is incapable of making the Tribe's relevant arguments related to the legality of PGE's actions or the practical consequences of a necessary remedy.[5]

Finally, the Tribe would not offer a necessary element to the proceedings that PGE could not itself present. The Tribe's history and perspective on the Deschutes Basin is certainly worthy of all parties' respect, but neither PGE nor the Tribe have made clear how that perspective is necessary to the specific question of whether PGE is violating the water quality requirements in the Project's § 401 Certification.

Because all three *Salt River* factors support a finding that PGE will adequately represent the Tribe's interests as they relate to DRA's claims, the Tribe is not a required party in the present case. This is so even though PGE also asserts that it cannot adequately represent the Tribe, pointing out that of the two entities the Tribe alone is "a sovereign with unique treaty and other propriety rights that inure solely to the Tribe." Doc. 74 at 11 (citing to Doc. 73 at *passim*). But what matters here is that the two share a common interest in the Project whose operation is at issue in the instant case, not whether the Defendant's relevant interests in it developed on the same path as the Tribe's alleged interests. *See Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F3d 1152, 1154–55 (9th Cir 1998) ("Although [four Arizona cities] assert they do not adequately

[5] As well, at this stage of the litigation the proposition that injunctive relief will raise overall costs for the Tribe is highly speculative. *Makah Indian Tribe v. Verity*, 910 F2d 555, 558 (9th Cir 1990) (Tribe's interest, to be credited, "must be more than a financial stake," and "more than speculation about a future event.").

represent the [tribal community] they offer nothing to show that their interests in the [project] or the arguments they would make differ at all from those of the Community. . . The cities, like the United States, may not share the Community's interest in protecting its sovereignty, but they have not explained how the Community's sovereignty would be implicated in the adjudication of the merits of Southwest's suit.").

We note again, as a practical matter, that the Tribe has been fully participating to date in briefing, argument, and scheduling conferences in this case. All parties have considered the Tribe as to scheduling and related matters no less than if it were a party. Moreover, to adjudge from the record in this case to date, PGE appears exceedingly motivated to consider the Tribe's interests in every filing and, indeed, in every aspect of its advocacy in this matter. As the two parties are closely aligned with respect to the Project, it is improbable that PGE would fail to offer all arguments essential to the Tribe's position in this matter. The Tribe's vigorous continuing participation as amicus curiae would doubly ensure against any inadequate representation. It therefore does not appear that the Tribe is so situated in this case that, as a practical matter, its absence as a party would impair or impede its ability to protect any relevant interests in the subject of the action. As such, it is not a required party under Rule 19 and both motions to dismiss should be denied.

C. Joinder of the Tribe is Feasible Because Congress Has Waived Tribal Immunity Under the Clean Water Act.

Even if the Court does find that the Tribe is a required party under Rule 19(a), the case should not be dismissed because it is feasible for the Court to join the Tribe in the present matter.

The Tribe, in its motion, asserts that it cannot be joined here as a party because it has not unequivocally waived its sovereign immunity and Congress has not expressly abrogated that

immunity. Doc. 72 at 19. For support it observes—without analysis and citing only to the Calica declaration—that it is "aware of no express abrogation of [the Tribe's] immunity by Congress." *Id.* at 19; Doc. 73 at ¶41.[6] However, Congress has in fact expressly abrogated the Tribe's immunity from suit under the CWA's citizen suit provision.

It is well established that Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted). However, "[t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress." *Id.* Where Congress has "unequivocally expressed" a waiver of tribal immunity, an Indian tribe is subject to suit. *Id.* at 58–59 (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)).

In the Clean Water Act's citizen suit provision, Congress has unequivocally expressed a waiver of tribal immunity. That provision provides that any citizen may commence a civil action on his own behalf "against any *person*…who is alleged to be in violation of…an effluent standard or limitation under this chapter…." 33 U.S.C. § 1365(a)(1) (emphasis added). The Act in turn defines "person" to include a "municipality," *id.* § 1362(5), and defines "municipality" to include "an Indian tribe or an authorized Indian tribal organization." *Id.* § 1362(4). Thus, the CWA explicitly identifies an Indian tribe as a party that may be sued under the Act's citizen suit provision.

A court in this circuit has explicitly held that the above language constitutes an unequivocal waiver of sovereign immunity under the CWA. *Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community*, 827 F.Supp. 608, 609–10 (D. Ariz. 1993). That

[6] The Calica declaration, in turn, provides no statutory analysis of the question. *See* Doc. 73 at ¶41.

court confirmed that "the term 'person' in the relevant section[] of the CWA…unequivocally includes Indian tribes as 'persons'" *Id.* at 610.

Further, the *Atlantic States* court and other courts have found an unequivocal waiver of sovereign immunity under other statutes where Congress used the same or similar language to authorize enforcement actions against Indian tribes. The Tenth Circuit neatly summed up this line of cases when faced with the question of whether similar language related to whistleblower provisions of the Safe Drinking Water Act constituted a waiver of sovereign immunity:

> We hold that where Congress grants an agency jurisdiction over all "persons," defines "persons" to include "municipality," and in turn defines "municipality," to include "Indian Tribe[s]," in establishing a uniform national scheme of regulation of so universal a subject as drinking water, it has unequivocally waived tribal immunity. We note that Congress *could* have been more clear. Congress could have included a provision directly stating its intent to waive tribal immunity. However, "that degree of explicitness is not required." *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990) (noting Congress need not state in "so many words" its intent to abrogate state sovereign immunity). Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the *Santa Clara* requirement than that Congress unequivocally state its intent. *See Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) ("text and history of the [Resource Conservation and Recovery Act] clearly indicated congressional intent to abrogate the Tribe's sovereign immunity" when provision authorized suit "against any person," "person" included "municipality," and "municipality" included "an Indian Tribe"); *see also Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community*, 827 F.Supp. 608 (D.Ariz. 1993) (citizen suit provision in Clean Water Act unequivocally waived tribal immunity by defining term "person" to include "Indian tribe").

Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dept. of Labor, 187 F.3d 1174, 1182 (10th Cir. 1999). *See also In re Greektown Holdings, LLC,* 516 B.R. 462, 472 (Bankr. E.D. Mich. 2014), *rev'd and remanded,* 532 B.R. 680 (E.D. Mich. 2015) ("What can be gleaned from these examples is that an explicit reference to 'Indian Tribes' in a statute is sufficient for Congress to clearly and unequivocally abrogate tribal sovereign immunity."). *See also* American Indian Law Deskbook § 10:11: Tribal Liability for Violation of Federal Pollution Control Statutes.

In sum, the plain language of the Clean Water Act unequivocally waives tribal immunity from Clean Water Act citizen suits. As a result, joinder of the Tribe is not infeasible in this case; the two motions to dismiss may be denied on this ground.

D. The Case Cannot in Equity and Good Conscience be Dismissed.

Even if the Court were to find the Tribe to be a required party that is nonetheless infeasible to join, this action still should be allowed to proceed among the existing parties rather than be dismissed. Fed R. Civ. P. 19(b) identifies four factors for the Court to include in its consideration of whether, "in equity and good conscience," a case should proceed in such an instance:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b)(1)-(4). The above list "is not exclusive of other considerations, however. At all events, Rule 19(b) requires [the Court] to undertake a 'practical examination of [the] circumstances' to determine whether an action may proceed 'in equity and good conscience' without the absent party." *Paiute Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 1000 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 n.6 (1968)). The Rule 19(b) factors "represent an attempt to balance the rights of all those affected by the litigation." *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1094 (9th Cir. 1985). Further, the phrase "equity and good conscience" "emphasizes the flexibility that a judge may find necessary

in order to achieve fairness in the judge's choice of solutions…." *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp*, 464 F.3d 885, 890-94 (9th Cir. 2006).

In the present case, overarching policy considerations would support a decision to allow the case to proceed among existing parties. Further, each of the Rule 19(b) factors support such a decision.

1. Dismissal of the Case Would Undermine the Purposes of the Clean Water Act.

As an initial matter, it is worth examining what the dismissal requested by the Tribe and PGE would mean in the scheme of Clean Water Act enforcement. First, the Tribe and PGE argue that in this case it is not only the Tribe that is immune from enforcement of the CWA. In addition, since PGE and the Tribe are co-licensees at the Project, those parties argue that the case against *PGE itself* should be dismissed due to the Tribe's status, interests, and immunity. But if this argument were to hold, it would accord other private corporations contemplating activity subject to the CWA (or other environmental statutes) a new stratagem: alignment with a Tribe as a shield against prospective citizen enforcement. Second, in the context of this case—where, as the record will establish, state and federal authorities in receipt of PGE reports manifesting hundreds of water quality violations have taken no enforcement action—dismissal will neuter the Clean Water Act and render the Deschutes River without viable protection.

2. Any Prejudice to the Tribe if the Case Proceeds Would be Mitigated.

The First Rule 19(b) factor—the extent to which a judgment entered without the Tribe's presence in the case might prejudice the Tribe—weighs strongly in favor of allowing the case to proceed. This is so because any potential prejudice to the Tribe will be mitigated by PGE's representation of the Tribe's interests, as well as the Tribe's extensive participation as an amicus party.

The principal consideration with regard to this first factor "is whether [the absent party's] interests are adequately protected by [the existing defendant]. If they are, his absence will have little, if any, effect." *Professional Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc.*, 787 F. Supp. 706, 713 (E.D. Mich. 1992) (citing *Moore's Federal Practice* § 19.07-2[1] (1991)). Here, as discussed above, neither PGE nor the Tribe have identified any argument that the Tribe might make, specifically related to the adjudication of DRA's claims, that PGE could not or would not make. Indeed, since PGE is the party responsible for compliance with the § 401 Certification and all other licenses and permits, it has even more incentive than the Tribe to make every possible potential argument to avoid liability. *See* Doc. 66-6 at 10 (requiring PGE as the Project Operator to "take any and all actions necessary or appropriate to comply with such Applicable Laws, orders, permits and licenses" related to the Project, and requiring PGE to "operate and maintain the Project so as to produce, where practicable and consistent with Prudent Utility Practice and the terms of this Agreement, the amounts of Energy which may be scheduled by the Owners. . . .").

The Tribe's status as an amicus curiae would further mitigate any prejudice resulting to the Tribe from the case proceeding in its absence. The Tribe's amicus party status allows it to file a brief at any point in the proceedings, where it can make any arguments or highlight any issues it chooses.

Thus, PGE's representation of the Tribe's interests, along with the Tribe's status as an amicus curiae, would mitigate any potential prejudice to the Tribe resulting from the case proceeding in the Tribe's absence as a party. As a result, the first Rule 19(b) factor weighs strongly in favor of allowing the case to proceed.

3. Any Prejudice to the Tribe Could be Lessened or Avoided.

The second Rule 19(b) factor—the extent to which any prejudice to the Tribe could be lessened or avoided—similarly weighs against dismissing the case. As discussed above, it is unclear to DRA what type of prejudice would result to the Tribe by a judgment rendered with PGE as the sole defendant in the case. In its motion, the Tribe states that "any relief that changes the operation of the Project will necessarily affect the Tribe's sovereign and proprietary interests," and that the Tribe "is not aware of any practical way to shape relief so as to avoid impairment" of those interests. Doc. 72 at 21. As an initial matter, while it may be true that changes in operations might "affect" the Tribe's interests, it is difficult to discern how changes in operations to gain compliance with water quality standards would *negatively* impact the Tribe. *See Id.* at 12 ("Since time immemorial, the Tribe has recognized that a healthy fishery (native and resident) and water quality are inextricably intertwined."). Indeed, an order compelling PGE to comply with the § 401 Certification's water quality requirements—requirements designed and implemented to protect aquatic life in the lower Deschutes River—will lead to a more healthy fishery and will benefit the Tribe's interests in the basin.

Further, and contrary to vague statements in both the Tribe's and PGE's motions, DRA has not pressed for a "mandatory injunction that requires PGE to discharge bottom water in a fashion similar to the original license period" as the injunctive relief it intends to seek. Tribe Mot., Doc. 72, at 14. *See also* PGE Mot., Doc. 74, at 10. On the contrary, there may well be operational changes significantly departing from the prior flow regime (year-round 100 percent bottom water release) that yet could secure compliance with the Clean Water Act. Both PGE and the Tribe will have ongoing opportunities to weigh in as the court fashions relief in this case, to assist the court in identifying operational changes that will best secure such compliance. The resolution of that question requires further factual development into operation of the Project. At

this stage, purported fear that injunctive relief will not be shaped to mitigate harm to the Tribe's interests is speculative and likely unwarranted. Accordingly, this factor also does not weigh in favor of dismissal.

4. A Judgment Rendered in the Tribe's Absence Would be Adequate in this Situation.

The third Rule 19(b) factor examines whether a judgment rendered without the absent party would be adequate. Under the present circumstances, this factor weighs heavily in favor of allowing the case to proceed.

In this case, DRA has requested two principal actions by the Court. First, DRA has requested a declaration that PGE is operating the Pelton Round Butte Project in violation of the Project's CWA § 401 Certification. Doc. 1 at 9. Second, DRA has requested an injunction, ordering PGE to cease operating the Project in violation of the § 401 Certification. *Id.* This requested relief would be fully adequate without the presence of the Tribe as a Defendant. PGE is the Operator of the Project, and in that role is responsible for "operat[ing] and maintain[ing] the Project" as well as taking "all actions necessary or appropriate to comply" with applicable laws and regulations related to the Project. Doc 66-6 at 2. Neither the Tribe nor PGE has explained why this requested relief would be inadequate in the Tribe's absence, given PGE's role as Project Operator.

Regarding this factor, the Tribe again offers that "any judgment against PGE ordering a change in operation of the Pelton Project will impair the Tribe's protectable interests." Doc. 72 at 21. But the Tribe does not make clear why this is so—why a change in operation, *for the purposes of compliance with the required conditions in the Project's § 401 Certification*, would impair the Tribe's interests. The water quality requirements contained in the § 401 Certification are designed to ensure the Project complies with the State of Oregon's water quality standards,

and those requirements are conditions on the Project's FERC license. *See* 33 U.S.C. §§ 1341(a), (d). PGE and the Tribe represented to ODEQ, in their application for § 401 Certification, that these requirements would be met. Doc. 66-7 at 13. As such, it is difficult to discern how an order mandating changes in operation in order to gain that compliance would impair the Tribe's interests, unless the Tribe is arguing that it has a protectable interest in PGE operating the Project in contravention of the Project's legal requirements.

Because the requested relief in this case would be adequate and sufficient in the absence of the Tribe, the third Rule 19(b) factor weighs in favor of allowing the case to proceed.

5. DRA Will Not Have An Adequate Remedy If The Case Is Dismissed.

The fourth Rule 19(b) factor weighs against dismissal as well, because DRA would not have an adequate remedy for PGE's Clean Water Act violations if the case were dismissed.

The Tribe and PGE have suggested that DRA should bring its claims to the Federal Energy Regulatory Commission and/ or the Pelton Round Butte Fish Committee. FERC is a Congressionally mandated independent regulatory body within the Department of Energy. It retains no direct authority to enforce the Clean Water Act by adjudicating citizen suits under CWA §505. The Fish Committee, for its part, is an advisory body established under the Project's FERC license, and is comprised of various federal and state agencies and select private groups. *See* Doc. 75-1 at 6 (identifying the Fish Committee as "responsible for commenting and making recommendations on study plans, reports, facility designs, and operating and implementation plans."); *Id.* at 10–11 (identifying the members of the Fish Committee). It too retains no authority to hear Clean Water Act citizen suits.

The present case will turn, in large part, on a proper construal of the legal requirements under which PGE must operate the Project, and an application of the law to its past and

continuing performance. These are decidedly functions of the federal courts. *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

Specifically here, we observe that in the Clean Water Act's citizen suit provision itself Congress provided the district courts with jurisdiction to hear citizen enforcement cases for alleged violations of effluent standards and limitations, and to enforce relevant orders. 33 U.S.C. § 1365(a). The Act, further, provides only one venue for adjudication of a citizen enforcement action: "the judicial district in which the source is located." 33 U.S.C. § 1365(c)(1).

Neither PGE nor the Tribe explain how the procedures for dealing with a petition to FERC or rules governing a citizen's "approach" to the Fish Committee parallel the procedures available to DRA under the Clean Water Act's citizen suit provision. Quite simply, as explained below, these avenues are not reasonable alternatives to judicial enforcement in federal court.

a. A Petition to FERC is Not an Adequate Alternative.

PGE and the Tribe first suggest that that if the case were dismissed, DRA could "petition FERC to enforce any alleged non-compliance with License conditions (including certification conditions)." Doc. 74 at 19-20; *see also* Doc. 72 at 25. This does not provide an adequate alternative to the DRA's citizen action in federal court. First, upon information and belief, FERC retains limited expertise in water quality issues. *See* 33 U.S.C. § 1251(d) (vesting only the Environmental Protection Agency with authority to administer the CWA). And FERC holds even less expertise in enforcing the CWA against violators, including through declaratory and injunctive relief.

Further, DRA would be left with virtually no recourse and no avenue to appeal if FERC refused to grant its potential petition. As the Ninth Circuit has recognized, FERC has "virtually unreviewable discretion" regarding whether to investigate alleged violations of a FERC license, hold evidentiary hearings, or to enforce those violations. *Friends of Cowlitz v. F.E.R.C.*, 253 F.3d 1161, 1173 (9th Cir. 2001). Indeed, in *Friends of Cowlitz* the Court found that FERC had erred in dismissing a complaint alleging violations of FERC License conditions. *Id.* at 1170. Still, the Court found that FERC's governing statute "affords the Commission wide latitude in its enforcement decisions," and that the agency "could lawfully decline to prosecute any [License] violations, and that such a decision would be *immune from judicial review*." *Id.* at 1171 (emphasis added).

In its motion, PGE points to what it describes as a "third party environmental group…successfully avail[ing itself]" of the FERC petition process. Doc. 74 at 16. But the example provided is quite distinguishable from the present situation. There, the parties to the petition eventually settled amongst themselves, and submitted a new settlement agreement to FERC, which agency then amended the license for the Project at issue. *Id.* Here, by contrast, the parties (including the Tribe) have engaged in a succession of settlement negotiations, but to no avail. It is thus imperative that the merits of the case be heard by a court with the authority to both declare the law and to order injunctive relief. It is critical to DRA, as well, that it retains meaningful access to judicial review of any potentially unfavorable decision.

Because FERC has little to no expertise in water quality issues, limited to no authority to declare the law and enjoin violations of the Clean Water Act, and virtually unlimited discretion to decline to investigate or enforce license violations, a petition to FERC to enforce against

PGE's violations does not provide DRA with an adequate or effective alternative to citizen enforcement in federal court.

b. Approaching the Pelton Round Butte Fish Committee is not an Adequate Alternative.

PGE's suggestion that DRA can "approach the Fish Committee" with its concerns is similarly untenable as an alternative. First, PGE fails to specify how DRA—which is not a named member of that Committee—could undertake such an "approach." *See* Doc. 75-1 at 10–11 (identifying members of the Committee). Second, PGE and the Tribe offer no reason to believe that the Fish Committee would have jurisdiction under the Clean Water Act either to adjudicate DRA's claims, declare the law, or to issue injunctive relief as warranted. Indeed, the Committee is not even a judicial body.[7] Neither does PGE even attempt to establish that the Fish Committee has equivalent procedures to enable it to serve as an acceptable alternative to federal court.

Because neither FERC, the Project Fish Committee, or any other venue present an adequate alternative forum for entertaining, deciding, and enforcing DRA's claims, the fourth Rule 19(b) factor weighs strongly in favor of allowing the case to proceed.

6. Other Considerations Also Weigh in Favor of Allowing the Case to Proceed.

Other arguments identified by PGE and the Tribe in favor of dismissal are similarly unpersuasive.

[7] PGE and the Tribe appear to take the position that DRA should have named not only the Tribe as a defendant in this case but also certain resource agencies represented on the Fish Committee. *See* Doc. 74 at 14; Doc. 72 at 21 n.5. The CWA citizen suit provision authorizes, among other actions, suits against any person alleged to be in violation of a § 401 Certification. 33 U.S.C. § 1365(f)(5). Neither PGE nor the Tribe explain how any of these resource agencies—who serve in an advisory role on the Project's Fish Committee—could be deemed to be in violation of the Project's § 401 Certification. *See* Doc. 66-6 at 2.

The Tribe cites what it calls DRA's "strategic maneuvering" in the case as weighing toward dismissal. Doc. 72 at 21. The Tribe accuses DRA of "strategically postur[ing] the case as DRA versus PGE alone," and of "ignor[ing] the very real and substantial interests of the Tribe that are implicated by this action." *Id.* at 25-26. As discussed above, DRA has named PGE alone as a defendant in this case because PGE, as Project Operator, is responsible for compliance with the § 401 Certification and other License and Permit requirements. *See* Doc. 66-6 at 6. But, to the extent the argument is relevant here, DRA strongly disagrees that it has "ignored" the Tribe's interests. DRA did not oppose the Tribe's motion to appear as an amicus party, and has responded to the Tribe's arguments in its various court filings whenever appropriate. Further, the Tribe has participated fully in several months of settlement talks, and engaged as an active participant in all scheduling matters and other issues requiring consultation between the parties.

Next, PGE advances a wide-ranging argument that the Court is without authority to issue "any specific injunctive relief" in this matter without FERC approval, so that the action amounts to one purely for declaratory relief uncoupled from practical effect. Therefore, PGE avers, the Court should exercise its discretion not to proceed in what PGE urges is essentially a declaratory judgment action. Doc. 74 at 13-14.

This argument is simply irrelevant to PGE's Rule 12(b)(7) motion and its joinder of the Tribe's Rule 12(b)(7) motion. Still, by way of a brief response we note that PGE provides no support for its contention that FERC approval, or perhaps even a FERC License amendment, would be necessary before the requested relief could be granted. On the contrary, the water quality requirements DRA is seeking to enforce *are already conditions of the FERC License*. *See* 33 U.S.C. §1341(d). The operational changes DRA seeks are for the purpose of complying with

requirements incorporated into the existing license—PGE gives no reason why such changes would necessitate an amendment to that license.

Further, this Court's declaration of the operative legal requirements may do much to resolve the case. And summary judgment is not a "disfavored procedural shortcut, but an integral part of the federal rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Partial summary judgment is permissible in appropriate cases resolving threshold legal issues, including as to liability. Rule 56(a) (allowing a party to move for summary judgment on part of a claim); *Forest v. E.I. Dupont de Nemours & Co.,* 791 F. Supp. 1460, 1462 (D. Nev. 1992); *Chao v. Self Pride, Inc*., No. CIV. RDB 03-3409, 2006 WL 469954, at *1 (D. Md. Jan. 17, 2006), aff'd, 232 F. App'x 280 (4th Cir. 2007) (determining liability on summary judgment and reserving for nonjury trial issues of willful violation of the FLSA, appropriate damages, and injunctive relief). *See also* Wright & Miller, *Fed. Prac. & Proc. Civ*. § 2736 (4th ed.). Thus, to the extent PGE's argument is relevant here, DRA's requested relief on summary judgment clearly does not weigh in favor of dismissal.

In sum, "a practical examination" of all the circumstances in this case demonstrates that in equity and good conscience the case should proceed with the existing parties. *Paiute Shoshone Indians*, 637 F.3d at 993.

CONCLUSION

For the foregoing reasons, DRA respectfully requests that this Court deny both PGE's and the Tribe's motions to dismiss.

Respectfully submitted this 4th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2018, 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.

LAW OFFICE OF DANIEL M. GALPERN

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