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Of Attorneys for Amicus Curiae
The Confederated Tribes of the Warm Springs
Reservation of Oregon

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

REPLY MEMORANDUM
In Support of Motion to Dismiss
by The Confederated Tribes of the
Warm Springs Reservation of Oregon

I. Introduction.

Amicus curiae the Confederated Tribes of the Warm Springs Reservation of Oregon ("Tribe") is co-owner and joint-licensee of the Pelton Project.[1] The Pelton Project is located

[1] Except as otherwise noted, capitalized terms in this memorandum are defined in the Tribe's Motion to Dismiss (ECF Dkt. 72). This memorandum is supported by the Court file and the Declarations of Robert A. Brunoe ("Brunoe Dec."), Bradley S. Houslet ("Houslet Dec."), and Josh Newton ("Newton Dec.") filed together herewith.

partially within the Tribe's Reservation, an area reserved by the 1855 Treaty for the Tribe's exclusive use and occupation. The Tribe possesses inherent sovereign authority to regulate the natural resources of its Reservation, including in its Tribal waters. In that capacity, the Tribe's Water Control Board ("WCB") has issued a water quality certification for the Project pursuant to Section 401 of Clean Water Act, 33 U.S.C. § 1341, ("CWA"). The Tribe also regulates fisheries throughout the Deschutes River basin pursuant to its sovereign authority reserved in the 1855 Treaty.

Plaintiff Deschutes River Alliance ("DRA") seeks judicial relief modifying operation of the Pelton Project to comply with its view of the requirements of one of the two water quality certifications issued for the Project, which is the Oregon Department of Environmental Quality ("DEQ") certification. DRA does not allege any violation of the WCB water quality certification nor has DRA attempted to join the Tribe as a party despite the Tribe's broad sovereign and proprietary interests related to the action. DRA's focus is trained solely on defendant Portland General Electric Company ("PGE"), the co-owner, joint licensee, and operator of the Project. In so doing, DRA misses the point. The declaratory and injunctive relief sought by DRA necessarily implicates the Tribe's interests. Any operational change to the Project will unavoidably affect *both* state and Tribal waters; it will also affect the Deschutes River fishery, including fish passage at the Project. Despite those physical realities, DRA does not meaningfully acknowledge the Tribe's profound interests relating to the subject of this action.

There is no reasonable doubt that the Tribe is a necessary party to this action. PGE is not authorized and cannot adequately represent all of the Tribe's interests that relate to this action. The Tribe cannot feasibly be joined because of its sovereign immunity. Equity and good

conscience require that the action be dismissed for several reasons, including the interest in efficient administration of justice by avoiding piecemeal litigation. DRA has alternative remedies before FERC and the Fish Committee established by the Project license, both of which are more comprehensive than this action. Based on the facts and practical realities of this action, the Tribe requests that the Court grant its motion to dismiss.

II. Argument.

A. The Tribe's Motion to Dismiss is Proper and Timely.

DRA alleges that the Tribe and PGE are not authorized to file motions to dismiss at the present time. (ECF Dkt. 76 pp. 10 -11.) DRA also challenges the Tribe's standing to bring the motion.

The challenge to the timing of Tribe's motion to dismiss should be rejected. A Rule 12(b)(7) motion is not waivable and may be made as late as trial. *See* Fed. R. Civ. P. 12(h)(2) (failure to join a person required by Rule 19 may be raised at trial); *Citibank, N.A. v. Oxford Properties & Finance Ltd*, 688 F.2d 1259 (9th Cir. 1982) (absence of indispensable party need not be raised in first responsive pleading). *See accord* Fed. R. Civ. P. 19 Advisory Committee Notes (motion to dismiss may be made as late as trial). The Tribe has filed its Rule 12(b)(7) motion before trial, which is currently scheduled to begin on December 3, 2018. The Tribe's motion to dismiss is timely, and DRA's contrary assertions should be rejected.

With respect to the Tribe's standing to file the motion to dismiss, on April 6, 2017, the Tribe filed an unopposed motion to appear and participate as amicus curiae in all aspects of the action. (ECF Dkt. 23.) The Tribe sought leave to appear as amicus curiae to "protect its proprietary, sovereign, and treaty-reserved rights and interests." (*Id.*). On April 7, 2017, the Court granted the Tribe's motion. (ECF Dkt. 27.)

The Tribe acknowledges that as an amicus party, it is neither a plaintiff nor a defendant in the action. The Tribe also recognizes that as an amicus party, it does not have full party status. *See, e.g., Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986) (amicus party does not have right to appeal judgment). The Tribe, however, is not aware of any authority that proscribes an amicus party from filing a Rule 12(b)(7) motion, and DRA offers none. Rule 12 merely authorizes a "party" to file a motion to dismiss; it does not limit the types of parties for bringing such a motion to plaintiffs or defendants.

It is reasonable to construe Rule 12 in a manner that allows an amicus curiae party to file a Rule 12(b)(7) motion to protect its interests. If an amicus party is not allowed to file such a motion, it would be dependent on another party's willingness and ability to file such a motion to vicariously protect the amicus party's interest. Alternatively, an amicus party would be dependent on the Court raising the issue *sua sponte*. *See Republic of Philippines v. Pimental*, 553 U.S. 851, 861 (2008) (court may consider *sua sponte* the absence of a required person and dismiss for failure to join). In either case, there would be no assurance that the prejudice to an amicus party's interests would be apparent to another party or the Court. For that reason, it is sensible to interpret Rule 12 as allowing an amicus (or other absent) party to file a Rule 12(b)(7), motion to protect its interests.

The Court, however, need not resolve whether the Tribe has standing to file the Rule 12(b)(7) motion because PGE has joined the Tribe's motion. DRA does not challenge PGE's standing to file the motion to dismiss. Therefore, the Court can proceed with addressing the merits of PGE's motion to dismiss without resolving whether the Tribe has standing to file an

independently move to dismiss. *Id.* at 861-62. Failing that, the Court should address *sua sponte* whether this action should be dismissed for failing to join the Tribe pursuant to Rule 19.[2] *Id.*

B. This Action Should be Dismissed for Failure to Join the Tribe, a Required Party Under Rule 19.

Rule 12(b)(7) authorizes dismissal of an action for failure to join a party required to be joined by Rule 19. The parties agree that in determining whether a party is required to be joined, Rule 19 imposes a three-step inquiry set forth in *Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012). The parties also agree that the inquiry is practical, fact specific, and designed to avoid the harsh results of rigid application. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The Tribe concurs with DRA that the moving party bears the burden of persuasion. *See Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991).

Notwithstanding the parties' agreement regarding the Rule 19 inquiry, DRA disputes that the Tribe is a necessary party under Rule 19(a). DRA also disputes the feasibility of compelling the Tribe to join as a party to the action. Even if the Tribe is a necessary party that cannot be compelled to join the action, DRA contends that this action cannot in equity and good conscience be dismissed. The Tribe disagrees and addresses each argument in turn.

1. The Tribe is a necessary party under Rule 19(a).

DRA acknowledges that "[t]here 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

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[2] In the alternative, the Tribe asks that it be given the opportunity to file a motion to intervene for the limited purpose of filing a Rule 12(b)(7) motion as the absent tribal entity did in *Dine Citizens Against Ruining Our Environment v. BIA*, Case No. 3:16-cv-08077-SPL (see ECF Dkt. 31, 49.)

Round Butte Project itself." (ECF Dkt. 76, p. 13.) DRA nonetheless mistakenly asserts that it is "less clear" how the Tribe's interests are "implicated by this case" or how the Tribe's interests would be impaired if the action were to proceed in its absence. (*Id.*) The Tribe has extensive interests relating to the subject of the action and is so situated that disposing of the action in the Tribe's absence would impair and impede the Tribe's ability to protect those interests. The Tribe is thus a necessary party under Rule 19(a)(1)(B).

a. The Tribe's interests relating to the subject of the action.

The Tribe has broad, legally-protected interests relating to the subject of the action. Those interests are divided into the Tribe's proprietary and sovereign interests. The proprietary in interest arise from the Tribe's ownership of the Pelton Project. The Tribe's sovereign interests are three-fold. First, the Tribe has an interest in regulating activities within the boundaries of the Reservation. (ECF Dkt. 72, pp. 20 – 21). Second, the Tribe has an interest in regulating the natural resources of the Deschutes Basin, including the fish resources of the lower Deschutes River. (*Id.*) This, the Tribe has in interest in defending its treaty-reserved interests secured by the 1855 Treaty. (*Id.*)

DRA does not dispute the existence of the Tribe's interests nor the fact that those interests are legally protected for purposes of Rule 19(a). Instead, DRA proffers an unduly cramped description of the subject of the action from which it argues that the Tribe's interests are "simply not implicated" and "not connected" to the "narrow" subject of the action. Contrary to DRA's argument, the Tribe need only establish an "interest in the outcome" of the action. *Shermoen v. U.S.*, 982 F.2d 1312, 1317 – 18 (9th Cir. 1992). Properly framed, the Tribe has established that its proprietary and sovereign interests in the outcome of the action.

According to DRA, the "subject of the case is whether, in operation of the [Project], PGE is violating requirements provided in the Project's Clean Water Act § 401 Certification." (ECF Dkt. 76, p. 13.) That framing of the action is narrow and incomplete. The subject of the action is not limited to an academic analysis of DRA's legal theory; rather, it includes, among other things, a practical and fact-specific inquiry regarding the potential outcomes of the action. *See Shermoen*, 982 F.2d at 1317 – 18. Such an inquiry reveals that the Tribe's undisputed proprietary and sovereign interests are plainly related to the subject of the action.

The Tribe's proprietary interests include its status as: co-owner of the Project; joint licensee of the Project (including DEQ's and the WCB's water quality certifications); party to the GSA; and party to the Relicensing Settlement Agreement. The outcome of this action has the potential to impact the Tribe's proprietary interests. If DRA obtains a judgment declaring that PGE is operating the Project in violation of DEQ's water quality certification, there is material risk that the value of the Tribe's ownership interest in the Project will be diminished. There is also a material risk FERC may determine that PGE and the Tribe, as *joint licensees*, are in violation of the 2005 License because of a judicial determination that PGE has operated the Project in violation of DEQ's water quality certification. A FERC determination of a violation of the 2005 License may also unravel the carefully constructed multi-party Relicensing Settlement Agreement. *See* Relicensing Settlement Agreement § 7.4.3 (ECF Dkt. 73-7, p. 25). The Tribe is obviously interested in avoiding such outcomes.

Disposition of this action also has the potential to materially impact the Tribe's sovereign, regulatory interests. For example, a judicial order modifying operation of the Project may be inconsistent with the conditions contained the WCB water quality certification. DRA

sidesteps that issue by entirely ignoring the WCB water quality certification. The WCB water quality certification is germane to the disposition of this action, because the Pelton Project is partially located on the Tribe's Reservation and involves Tribal waters. DRA cannot rightly ignore those facts, which create the misimpression that the Tribe is not a necessary party to this action.

The Tribe anticipates that DRA will seek an injunction modifying the operation of the SWW by requiring substantially more bottom water withdrawal from Lake Billy Chinook. (Brunoe Dec. ¶ 4.) Increased bottom water withdrawal would necessarily reduce surface water withdrawal. (*Id.*) Such a change would harm its legally-protected, treaty-reserved fishery throughout the Deschutes Basin, because it would negatively impact the Fall Chinook salmon fishery and anadromous fish passage through the Project.[3] (*Id.*; Houslet Dec. ¶¶ 3 – 9.) The Tribe is also concerned that modification of the operation of the SWW would place disproportionate, additional conservation burdens on the Tribe. (Brunoe Dec., ¶¶ 5 – 6.)

For the foregoing reasons, the Tribe's proprietary and sovereign interests relate to the subject of DRA's action for purposes of Rule 19. The Court must now determine whether those interests will be impaired or impeded if the action proceeds without the Tribe. *Shermoen*, 982 F.2d at 1318 (citing *Makah*).

[3] Surface water withdrawal through the SWW is essential for creating the "attraction flows" necessary to collect the downstream migrating anadromous fish, including ESA-listed steelhead and bull trout. (Houslet Dec. ¶ 7.) The collection of those juvenile fish is essential for achieving the Fish Passage Plan's objective to re-establish self-sustaining populations of anadromous fish above the Project. (*Id.*) Reducing withdrawal of surface water at any time of year would impair fish passage through the Project and would be inconsistent with the Tribe's policy objectives for management of the anadromous fisheries in the Deschutes River. (*Id.*)

b. Disposing of this action in its absence will impair or impede the Tribe's ability to protect its interests.

Impairment of an absent party's interests may be minimized if the absent party is adequately represented by another party in the action. *Shermoen*, 982 F.2d at 1318. Courts examine three factors, all of which must be satisfied, in making the determination as to whether the absent party is adequately represented by another party. *Id.* DRA contends that those factors support a conclusion that PGE will adequately represent the Tribe's interests. The Tribe disagrees. PGE cannot adequately represent the Tribe for purposes of Rule 19(a).

DRA first asserts that "PGE is sure to make any relevant arguments * * * that the Tribe would make." (ECF Dkt. 76, p 15.) DRA supports that assertion by focusing solely on the Tribe's ownership interests in the Project. DRA argues that as "Operator" of the Project, PGE is responsible for compliance with the DEQ water quality certification and other permits and license. DRA also asserts that as "majority owner of the Project," PGE has every incentive to make every argument that the Tribe would make as minority owner of the Project. DRA misapprehends the scope of PGE's role as "Operator," which does not extend to the Tribe's sole ownership of the Reregulating Dam's generating facilities and transmission facilities as defined in the GSA. (Newton Dec. Exs. 1 and 2.) The Tribe remains sole owner and operator of the generating unit in the Reregulating Dam. (*Id.* at Ex. 2, Section 5.3.) While generally aligned, PGE and the Tribe do not have co-extensive joint ownership interests in the Project. Thus, it is not accurate to contend that PGE will undoubtedly make all arguments that the Tribe would make if it were present as a full party.

Assuming without conceding that PGE could adequately represent the Tribe's ownership interests in the Project, DRA makes no attempt to explain why PGE would or could advance any,

much less all, of the Tribe's arguments relating to its sovereign and treaty-reserved interests. DRA does not put forward any argument that PGE is authorized or even capable of representing the Tribe's sovereign and treaty-reserved interests relating to the subject of this action. Indeed, the undisputed evidence shows that the Tribe has not delegated and would not delegate to PGE any authority to represent the Tribe's sovereign interests and treaty-reserved rights related to this action. (Brunoe Dec. ¶ 7.)

PGE has expressly agreed that the Tribe has certain regulatory authority over the Project, including the authority to regulate water quality. (Newton Dec. Ex. 2, Article VI.) As the regulated entity, PGE is not capable of representing the Tribe's regulatory interest in this action. (Brunoe Dec. ¶ 7.) In fairness, DRA does not assert that PGE can represent the Tribe's regulatory interests; rather, it dodges the issue by not addressing the Tribe's regulatory interests in their entirety, which is fatal to DRA's analysis.

DRA's omission of the Tribe's sovereign and treaty-reserved interests that relate to the subject infects the entire argument as to whether PGE can adequately represent the Tribe's interests. When properly considered, there is little debate that PGE is not capable of representing all of the Tribe's interests. Because no other party is authorized to represent, or is capable of representing, the Tribe's sovereign and treaty-reserved interests, the Tribe would surely add a necessary perspective that DRA and PGE cannot provide. For those reasons, PGE cannot adequately represent the Tribe's sovereign and treaty-reserved interests in this action.

DRA's reliance on *Sw. Ctr. For Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) does not alter that conclusion. In that case, an environmental organization brought an action against the Secretary of the Interior alleging violations of certain federal environmental

laws in connection with the increased water storage capacity resulting from the modification of a dam. *Id.* at 1153. The absent tribe claimed an interest relating to the subject of the action arising out of a settlement agreement giving it rights to part of the newly created storage capacity. *Id.* The district court dismissed the action for failure to join the absent tribe. *Id.* The Ninth Circuit reversed on the grounds that the United States could adequately represent the absent tribe's interest because the United States and the absent tribe shared a "strong interest" in defeating the action and making the additional water storage capacity available as soon as possible. *Id.* The Ninth Circuit also noted that the presence of several cities further ensured that the absent tribe would be adequately represented, because the cities had made substantial financial contributions and shared the interest of defeating the plaintiff's claims. *Id.*

Unlike this action, there is no indication that the absent tribe claimed any regulatory or treaty-reserved interests in the subject of that action. There are no facts showing that dam was located, even partially, on Indian trust land or within the absent tribe's reservation. Simply put, the only interest claimed by the absent tribe was its interest in the settlement agreement that gave it the right to part of the newly created storage capacity behind the dam, an interest shared by the United States and the cities. In contrast, here the Tribe claims both proprietary and sovereign interests that relate to the subject of this action. The Tribe is the only party in this action that claims a treaty-reserved interest in the fishery of the Deschutes River; PGE does not claim a similar interest and cannot speak for the Tribe.

The Tribe briefly addresses any contention by DRA that the Tribe's amicus status is a viable substitute for full party status under Rule 19. The Ninth Circuit has expressly rejected that amicus status is a valid alternative to full party status under Rule 19. *Makah*, 910 F.2d at 560

(citing *Wichita*, 788 F.2d at 775). In *Wichita*, the court observed that "[i]f the opportunity to brief an issue as a non-party were enough to eliminate prejudice, non-joinder would never be a problem since the court could always allow the non-joinable party to file amicus briefs." *Wichita*, 788 F.2d at 775. Pursuant to Ninth Circuit precedent, the only acceptable means through which the Tribe can protect its interests in this action is through full party status.

2. It is not feasible to join the Tribe because of sovereign immunity.

Indian tribes possess common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Tribal sovereign immunity extends to suits for money damages, declaratory relief, and injunctive relief. *Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093, 1096 (9th Cir. 2017). Although this immunity, like sovereign immunity in any context, can foreclose recourse that might otherwise be available to putative plaintiffs, courts "have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

As a result of their sovereign immunity, "Indian tribes are immune from suits unless their immunity is waived or abrogated by Congress."[4] *United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 943 (9th Cir. 2017). Although DRA appears to use the terms "waiver" and "abrogation" synonymously, the pleadings make clear that DRA has not alleged that the

[4] Either of two circumstances can render tribal sovereign immunity inapplicable: (1) abrogation by Congress *or* (2) waiver by a tribe. Abrogation and waiver are not synonymous and each is a distinct mechanism that dislodges common-law sovereign immunity. On the one hand, abrogation results when Congress exercises the federal legislative power to alter the application of the common-law sovereign immunity doctrine. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016-17 (9th Cir. 2016). On the other hand, waiver results when an Indian tribe, for itself, surrenders its immunity in any respect. *Id.*

Tribe has waived its sovereign immunity in any respect. Rather, DRA has alleged that Congress has rendered tribal sovereign immunity inapplicable through federal legislation. DRA has therefore alleged that sovereign immunity does not apply on account of congressional abrogation.

Whether or not Congress has abrogated tribal sovereign immunity in any other circumstances under the Clean Water Act, 33 U.S.C. §§ 1251 to 1388, ("CWA"), it has not done so here. The plain text of the citizen suit provision authorizes any citizen to commence a civil action "against any person * * * *who is alleged to be in violation of* (A) an effluent standard or limitation under [the CWA] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a) (emphasis added). The provision permits suit against a person only if that person "is alleged to be in violation" of the CWA.

Consistent with the principle that an abrogation of sovereign immunity must be narrowly construed in favor of the sovereign, a suit must satisfy all of an abrogating statute's textual prerequisites in order to invoke the abrogation. *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1043 (9th Cir. 2015). If a suit does not conform precisely to the requirements of the abrogating statute, then sovereign immunity remains intact with respect to that suit. *Id*. To the extent, if any, that the citizen suit provision abrogates tribal sovereign immunity, the abrogation must be strictly limited to the terms of the statute. *Id*. The citizen suit provision expressly predicates the right of the action it creates on an allegation that the defendant has violated the CWA—without such an allegation, the CWA supplies no cause of action.

In its complaint, DRA alleges that PGE is in violation of the CWA, but it makes no allegation that the Tribe is in violation of the CWA. (ECF Dkt. 1.) The absence of any such

allegation against the Tribe is fatal to DRA's attempt to invoke congressional abrogation of the Tribe's sovereign immunity. The citizen suit provision cannot subject the Tribe to suit where the textual prerequisite of an alleged CWA violation by the Tribe is missing. The question of whether Congress abrogated tribal sovereign immunity to any extent pursuant to the citizen suit provision is unnecessary to the disposition of this action, because the citizen suit provision does not apply in the first instance against a party not alleged to be in violation of the CWA.[5]

Even if this Court were to reach the question of whether the citizen suit provision effectively abrogated tribal sovereign immunity, the text and context of the provision fail to disclose the necessary unequivocal congressional intent. "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). Courts will not "lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2032 (2014).

"Whether Congress has abrogated the sovereign immunity of Indian tribes by statute is a question of statutory interpretation." *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 555 (9th Cir. 2016). Generally, "[s]tatutory definitions control the meaning of statutory words," but "statutory definitions must not be read in a mechanical fashion that would create obvious incongruities in the language." *In re RW Meridian LLC*, 564 B.R. 21, 31 (B.A.P. 9th Cir. 2017).

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[5] DRA appears to be inviting the Court to issue an advisory opinion as to whether the CWA would abrogate the Tribe's sovereign immunity in the event that DRA commences an action against the Tribe pursuant to Section 505 of the CWA. If so, the Tribe disputes that the issue is ripe for judicial determination.

Because "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," the "overall statutory scheme must be taken into consideration." *Id*.

The citizen suit provision of the CWA authorizes any citizen to commence a civil action against any "person" for an alleged violation of the CWA. 33 U.S.C. § 1365(a). The CWA supplies a general default definition of defines "person" that includes "municipality," which in turn includes Indian tribes. 33 U.S.C. §§ 1362(4)-(5). This definition, however, applies only where the specific context of the term does not "otherwise specifically provide[]" for an alternative definition. 33 U.S.C. § 1362.

Importantly, the citizen suit provision provides for an alternative definition of the term "person," when construed in the context of that particular provision. The citizen suit provision evinces clear congressional intent to render two different sovereigns, but *not* Indian tribes, amenable to suit. First, the citizen suit provision defines "person" to include the United States, which is otherwise generally not defined as a "person" under the CWA. 33 U.S.C. § 1365(a). Second, the citizen suit provision expressly defines "person" to include "any other governmental instrumentality or agency *to the extent permitted by the eleventh amendment to the Constitution*." *Id*. (emphasis added).

Although tribes, like states, are otherwise generally defined as "persons" under the CWA, the qualifying reference to the Eleventh Amendment, which applies only to suits against states, clearly limits the scope of the term "other governmental instrumentality or agency" to states and subordinate political subdivisions. Because the citizen suit provision diverges from the definition of "person" otherwise applicable under the general definitions, the citizen suit provision does not reflexively incorporate Indian tribes as persons subject to suit. Rather, the

citizen suit provision calls for a more specific inquiry into congressional intent respecting abrogation of sovereign immunity.

When Congress does abrogate tribal sovereign immunity, the abrogation must be "construed strictly in favor of the sovereign * * * and not enlarged beyond what the language requires." *United States v. Nordic Vill. Inc*., 503 U.S. 30, 34 (1992) (internal quotation marks omitted). Reading the modified definition of "person" supplied by the citizen suit provision narrowly, as the law requires, its application to sovereigns is limited to the United States and to states and their political subdivisions. To construe the term "person" in the citizen suit provision to include Indian tribes would subvert the specific definition of "person" for purposes of the citizen suit provision to an inconsistent general default definition. Doing so would expand the reach of the abrogation contained in the citizen suit provision beyond what Congress unequivocally expressed and what is warranted by the context in which the term appears.

3. The Tribe is indispensable such that the action cannot proceed in equity and good conscience under Rule 19(b).

Because it is not feasible to join the Tribe, a necessary party, the Court must now determine whether in equity and good conscience, the action should proceed or be dismissed. Fed. R. Civ. P. 19(b). DRA argues that this action should proceed, and not be dismissed, for several reasons.

First, DRA expresses concern that dismissal of this action would undermine the purposes of the CWA, arguing that private corporations may be incentivized to align with a tribe as a shield against prospective citizen enforcement. Under the circumstances, DRA's concerns are not only speculative but misplaced. The record is abundantly clear that the Tribe's and PGE's co-ownership of the Pelton Project is *sui generis* and driven in large part by the fact that

the Project is partially located within the Tribe's Reservation, including tribal waters. Put differently, the Project is partially located within the area reserved by the 1855 Treaty for the Tribe's exclusive use and occupation. The Tribe, after the first 50-year license that resulted in extirpation of anadromous fish above the Project, entered a global settlement, which was approved by Congress, with PGE resulting in co-ownership of the Project. When viewed in that light, the Tribe's motion to dismiss raises issues of comity between the United States, the State of Oregon, and the Tribe. It also necessarily requires the Court to harmonize the CWA with the Tribe's sovereignty, including its treaty-reserved rights. DRA offers no authority (and the Tribe is aware of none) that gives the CWA legal priority over the 1855 Treaty.

Second, DRA next argues that any prejudice to the Tribe would be mitigated if the action proceeds because of the Tribe's extensive participation as an amicus party. As noted in Section 1.b, the Ninth Circuit has rejected that argument. *Makah*, 910 F.2d at 560 (citing *Wichita*, 788 F.2d at 775). The Tribe will not address it further.

Third, DRA contends that any prejudice to the Tribe can be lessened or avoided. While it has not yet articulated the amount of additional bottom water withdrawal it would seek as part of any injunctive relief, DRA does not deny the Tribe's essential understanding that it would seek additional bottom water withdrawal, which would necessarily decrease surface water withdrawals. The Tribe has provided evidence about the harm to the Fall Chinook fishery and fish passage through Project that would result from additional bottom water withdrawal. (Houslet Dec. ¶¶ 3 – 9; Brunoe Dec. ¶¶ 2 – 7.) Unless DRA statess unequivocally on the record that it will not seek additional bottom water withdrawal, the prejudice to the Tribe's interests cannot be lessened or avoided.

Fourth, DRA asserts that a judgment rendered in the Tribe's absence would be adequate. DRA's myopic focus misses the point. The adequacy of the judgment focuses on the "social interest in the efficient administration of justice and the avoidance of multiple litigation." *Pimentel*, 553 U.S. at 870. Because DRA seeks a mandatory injunction, any judgment in its favor would necessarily change the operation of the Pelton Project, thereby creating a risk of future litigation. For example, because DRA assiduously ignores the WCB water quality certification, there is more than a remote risk that judicial relief in this case could create inconsistent obligations for PGE. There is also risk that PGE may be required to violate the FERC license to comply with any injunction issues in this action because the injunctive relief may be inconsistent with the license terms. DRA has chosen a litigation strategy to isolate PGE and create the misimpression that the Project's compliance with the DEQ water quality certification can be adjudicated in a vacuum. It cannot. Under the unique circumstances of this case, DRA's citizen suit action against PGE creates an unfair and inequitable risk of piecemeal adjudication that is contrary to the efficient administrative of justice.

Fifth, DRA contends that it will not have an adequate forum if the action is dismissed, asserting that FERC and the Fish Committee are not an adequate, alternate remedies. To begin, it bears emphasis that the Ninth Circuit has dismissed actions based on the infeasibility of joining an absent Indian tribe despite there being no available alternative forum. *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir.2002). The United Supreme Court also recognizes that the sovereign immunity outweighs a party's interest in a forum for definitive resolution of their claims. *Pimentel*, 553 U.S. at 872. Put differently, the Court may dismiss this action even if DRA does not have alternative forum to definitively

resolve its claims. But, that is not the case here. DRA may petition FERC to redress its claims, or DRA may seek to work collaboratively with the Fish Committee to resolve its claims.

III. Conclusion.

For the foregoing reasons, the Tribe is a necessary party to this action. It is not feasible to join the Tribe because of sovereign immunity, and this case cannot in equity and good conscience proceed without the Tribe. The Tribe's motion to dismiss should be granted.

Respectfully submitted.

Dated: April 18, 2018

s/ Josh Newton
Josh Newton, OSB 983087
Attorney for The Confederated Tribes of the Warm Springs Reservation of Oregon

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 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.

KARNOPP PETERSEN LLP

s/ Josh Newton
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