No. 18-35867, 18-35932, 18-35933

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DESCHUTES RIVER ALLIANCE,
an Oregon nonprofit corporation

Plaintiff–Appellant/Cross Appellees

vs.

PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon corporation, and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, a federally-recognized Indian tribe

Defendants–Appellees/Cross Appellants,

On Appeals from the United States District Court
for the District of Oregon
No. 3:16-cv-1644-SI
The Honorable Michael H. Simon, Judge

APPELLEE/CROSS APPELLANT'S SECOND BRIEF ON CROSS-APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Defendant-Appellee/Cross Appellant The Confederated Tribes of the Warm Springs Reservation of Oregon is a federally-recognized Indian tribe and the legal successor in interest to the Indian signatories of the Treaty with the Tribes of Middle Oregon. 12 Stat. 963.

Date: September 28, 2020

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Attorneys for Defendant-Appellee/Cross Appellant The Confederated Tribes of the Warm Springs Reservation of Oregon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES Cont.

CASES Cont.

CASES Cont.

CONSTITUTION

STATUTES

STATUTES Cont.

OTHER AUTHORITIES

INTRODUCTION

The Confederated Tribes of the Warm Springs Reservation of Oregon ("Tribe") is a federally-recognized, sovereign Indian tribe occupying the Warm Springs Reservation, which was reserved for its exclusive benefit by an 1855 Treaty with the United States. The 1855 Treaty also reserved to the Tribe the right to take fish outside the Reservation throughout its aboriginal lands. Like other Columbia River treaty tribes, the Tribe and its members are a "salmon people" for whom fishing is "not much less necessary to [their] existence … than the atmosphere they breathe[]." *See United States v. Winans*, 198 U.S. 371, 381 (1905).

The Deschutes River forms the eastern boundary of the Warm Springs Reservation and is a traditional treaty-reserved fishery of significance to the Tribe. In the mid-twentieth century, the Deschutes River also became a source of hydropower with the issuance of a license to Portland General Electric Company ("PGE") for the construction the Pelton Round Butte Hydroelectric Project ("Pelton Project" or "Project"). The Pelton Project is partially located on the Warm Springs Reservation. During its original license period, the Project failed to meet water quality standards. The Project also caused the extirpation of anadromous fish, such

as salmon and steelhead trout, from the upper Deschutes Basin.[1] This was a culturally devastating circumstance for the Tribe.

In the early 2000s, the Tribe and PGE entered into an agreement, approved by Congress, through which the Tribe became co-owner of the Pelton Project. The parties then filed a joint application with the Federal Energy Regulatory Commission ("FERC") for a new license. The Tribe and PGE next went about the painstaking work of engaging key stakeholders (including federal and state agencies, counties, cities, a water company, and non-profit environmental organizations) to resolve a variety of interrelated issues associated with relicensing the Pelton Project. Again the Tribe and PGE achieved success, reaching an agreement in 2004 that contained the terms and conditions for a proposed license.

A "Fish Passage Plan" is a key feature of this settlement, and is consistent with the Tribe's long-held goal of re-establishing harvestable populations of anadromous fish in the upper Deschutes River Basin. The settlement agreement is premised on the recognition that fish passage and water quality are inextricably intertwined. The settlement provided for a selective water withdrawal facility ("SWW"), the principal infrastructure improvement for both fish passage and water

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[1] Anadromous fish are born in fresh water; they then migrate to the ocean, grow to adulthood and, finally, return the freshwater place of birth to complete their life cycle. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 (1979).

quality that has been described as the "centerpiece of the resource protection measures." The suite of resource protection measures contained in the settlement are best understood, and have been described, as a "complex package" of "interrelated and delicately balanced components."

FERC ultimately approved the settlement and issued a new fifty-year license for the Project in 2005 ("2005 License"). The 2005 License incorporates the terms and conditions of certifications issued by the Oregon Department of Environmental Quality ("DEQ") and the Tribe under Section 401 of the Clean Water Act ("CWA"). The DEQ certification, for example, requires PGE and the Tribe to undertake adaptive management of the Pelton Project in order to reduce its contributions to exceedances of water quality standards.

The SWW has been in operation since 2009, and anadromous fish are now passing through the Pelton Project for the first time since the 1970s. Despite that remarkable achievement, the Deschutes River Alliance ("DRA") commenced this action pursuant to the citizen suit provision in Section 505 of the CWA alleging violations of the certification issued by DEQ. The gravamen of DRA's claim is that the certification requires *elimination* rather than *reduction* of the Pelton Project's contribution to exceedances of three individual water quality criteria, despite the plain and unambiguous contrary provisions in the certification.

This Court should remand this appeal for dismissal on two independent grounds. First, the Tribe is a necessary and indispensable party whose sovereign immunity bars its joinder in the action. Contrary to the district court's conclusion, there is no clear evidence that Congress considered and unambiguously chose to abrogate tribal sovereign immunity when it enacted the citizen suit provision in Section 505 of the CWA. Second, the Court should remand the appeal for dismissal because DRA has failed to establish that it has Article III standing by showing that its alleged harm is judicially redressable.

If the Court reaches the merits of DRA's claim, it should affirm the district court's grant of summary judgment in favor of PGE and the Tribe. Properly construed, the DEQ certification requires that PGE and the Tribe "undertake to *reduce*" the Project's exceedances of water quality standards; it provides no obligation to *eliminate* all such exceedances—which the district court correctly found would not be possible. The Tribe, PGE, and DEQ all agree that the certification imposes an obligation to adaptively manage the Pelton Project to meet the best balance of the multiple objectives that are in tension with one another and, at times, require tradeoffs. The recognition of that tension is reflected in the obligation to reduce, rather than eliminate, exceedances. DRA is wrong to ignore that plain meaning of the certification.

JURISDICTIONAL STATEMENT

The district court lacked jurisdiction over this action because the Tribe is an indispensable party, which has not waived its sovereign immunity. *See infra* Section I. The district court also lacked jurisdiction over this action because DRA has no standing under Article III of the U.S. Constitution. *See infra* Section II. This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, to adjudicate DRA's appeal because it filed a notice of appeal on October 17, 2018. R. 137.[2] The Court also has jurisdiction to adjudicate PGE and the Tribe's cross-appeals because they each filed timely notices of appeal on October 31, 2018. R. 138, 139.

CONSTITUTIONAL, TREATY, STATUTORY, AND REGULATORY AUTHORITIES

All relevant constitutional, treaty, statutory, and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

1. Whether this case must be dismissed on the grounds that the Tribe is an indispensable party that cannot feasibly be joined because Congress did not unequivocally abrogate tribal sovereign immunity when it enacted the citizen suit provision in Section 505 of the CWA, 33 U.S.C. § 1365.

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[2] Citations to "R." refer to the district court's docket. Citations to "ER" refer to the "Excerpts of Record" filed by DRA. Citations to "SER" refer to "Supplemental Excerpts of Record" filed by PGE. Citations to "Dkt." refer to this Court's docket.

2. Whether this case must be dismissed on the grounds that DRA lacks standing under Article III of the U.S. Constitution because there is no judicially administrable remedy that would redress its alleged harms.

3. Whether the district court properly granted summary judgment in favor of the Tribe and PGE on the grounds that there is no genuine issue of material fact that they operated the Pelton Project in compliance with the certification issued by the DEQ pursuant to Section 401 of the CWA, 33 U.S.C. § 1341.

STATEMENT OF THE CASE

A. Legal Background

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832)). Indian tribes possess sovereignty predating the founding of this nation. *Id*. at 56 (tribes remain "separate sovereigns pre-existing the Constitution"). Because of their sovereign status, the Constitution recognizes "Indian tribes" together with "foreign Nations" and the "several States." U.S. Const., art I., § 8. But Indian tribes are not foreign nations or States; they are "domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509 (1991)). Indian tribes are subject

to plenary control by Congress, but they "'retain' their historic sovereign authority" in every respect "'unless and until' Congress acts." *Id.* (quoting *United States v. Wheeler,* 435 U.S. 313, 323 (1978)).

Common law immunity from suit is one of the "core aspects of sovereignty" retained by Indian tribes. *Id.* Sovereign immunity from suit is a "necessary corollary to Indian sovereignty and self-governance." *Id.* (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 890 (1986)). Congress, not the federal judiciary, is the only branch of the federal government that may modify tribal sovereign immunity. *Id.* at 788-89. The Supreme Court has repeatedly recognized that the doctrine of tribal sovereign immunity is settled law. *See id.* at 798. An Indian tribe is subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).[3]

Tribal immunity is the "baseline position" and "[t]o abrogate [such] immunity, Congress must 'unequivocally express that purpose.'" *Bay Mills Indian Community*, 572 U.S. at 790 (alteration in original) (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla*, 532 U.S. 411, 418 (2001)). The requirement that an abrogation of tribal sovereign immunity must be unequivocally

[3] No party argues that the Tribe has waived its sovereign immunity for purposes of this action.

expressed is a rule of construction that "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* (citing, *inter alia, United States v. Dion*, 476 U.S. 734, 738-39 (1986)). As observed by the Supreme Court, "what is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand" and the rights of Indian self-determination on the other, and chose to resolve that conflict by abrogating those rights. *See Dion*, 476 U.S. 739-40 (applying this rule of construction to the question of whether the Bald Eagle Protection Act abrogated tribal treaty rights).

B. Factual Background

1. The Tribe

The Tribe is a federally recognized, self-governing, sovereign Indian tribe. SER 187, ¶ 4. It consists of three tribal groups: the Warm Springs, the Wasco, and the Paiute. *Id.* The Tribe is the legal successor in interest to the Indian signatories to the Treaty between the United States and the Tribes and Bands of Middle Oregon, which was executed on June 25, 1855, and ratified by the U.S. Senate on March 8, 1859, 12 Stat. 963 ("1855 Treaty" or "Treaty"). *Id.*

The Tribe is organized under a Constitution and Bylaws that were ratified by its members on December 18, 1937, and approved by the United States Department

of the Interior ("Interior") on February 14, 1938, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). SER 187, ¶ 5. On April 23, 1938, the Tribe ratified a Corporate Charter issued to it by Interior pursuant to Section 17 of the Act of June 18, 1934. SER 187-188, ¶ 5.

Pursuant to the 1855 Treaty, the Tribe reserved approximately 640,000 acres of land for exclusive use and occupation of the Tribe and its members as a permanent homeland ("Warm Springs Reservation" or "Reservation"). SER 188, ¶ 6. The Reservation is located in central Oregon and is bordered on the east by the middle of the channel of the Deschutes River and on the south by the Metolius River. *Id.* The United States holds legal title to almost all of the Warm Springs Reservation in trust for the benefit of the Tribe or its members. *Id.*

The 1855 Treaty expressly reserves rights to the Tribe or its members to go outside (or "off") the Warm Springs Reservation to all of the lands and waters that it had used prior to the treaty to hunt, fish, gather roots, berries, and medicines and to pasture livestock. SER 298, ¶ 8. The Tribe has legally enforceable treaty-reserved rights for the vast majority of the Deschutes Basin. *Id.*

The Tribe has approximately 5,300 members. SER 188, ¶ 7. Most Tribal members reside on the Reservation. *Id.* The Tribe has significant levels of unemployment exceeding thirty percent and high rates of poverty. *Id.* It is confronted

with substantial social challenges associated with this unemployment and poverty, including diminished life expectancy, poor health indicators, low high school graduation rates, crime, and drug use. *Id.* The Tribe depends on revenues that it receives from the Pelton Project to fund governmental services that address those issues and promote the well-being of its members. SER 188, ¶ 7, ¶ 9.

The Tribe has the inherent sovereign authority to make its own laws. SER 188, ¶ 8.[4] It is governed by a tribal council made up of eleven members, eight of whom serve in elected positions. *Id.* The remaining three positions are lifetime chieftain positions, one for each of the three tribes (Wasco, Warm Springs, and Paiute). *Id.*

The Tribal Council oversees the Tribe's governmental services, including natural resource management (both within and outside the Reservation), a court system, police and fire protection, water and sewer services, and social services. SER 189 ¶ 9. The Tribe is dedicated to improving the quality of life of Tribal members and engages in various activities in the fields of health care, housing, education, and cultural development in order to achieve that goal. *Id.* Annually, the Tribe employs over 600 people in connection with its governmental activities. *Id.*

[4] Consistent with federal law, the Warm Springs Reservation is exempt from state jurisdiction. 28 U.S.C. § 1360.

The Tribe has been conducting commercial activities on the Warm Springs Reservation since at least the 1940s. SER 189, ¶ 10. Pursuant to the Tribe's Corporate Charter, the members of the Tribe vote by referendum to establish a business enterprise for each commercial activity. *Id.* The Tribal Council also has the authority pursuant to the Constitution of the Tribe to establish subordinate organizations for economic purposes. *Id.* The Tribal enterprises are managed under written plans of operation and are overseen by boards of directors appointed by the Tribal Council. *Id.*

2. The Pelton Project – Original License Period

The Pelton Project is located on the Deschutes River within and adjacent to the Warm Springs Reservation. SER 189, ¶ 11. The Project is comprised of three dams (the Round Butte Dam, the Pelton Dam, and the Reregulating Dam) and certain related generating and transmission facilities. *Id.* The Project operates as a modified "run of the river" system, meaning that the normal daily outflow from the Reregulating Dam is roughly equal to the daily inflow to the Pelton Project. *Id.*

In 1951, the Federal Power Commission ("FPC") issued a fifty-year license for the Pelton Project to PGE. SER 189-90, ¶ 12. The original license authorized the construction of the Pelton and Reregulating Dams; in 1960, the FPC amended the license, authorizing PGE to construct the Round Butte Dam. *Id.*

In 1955, the Tribe and PGE entered into an agreement pursuant to which the Tribe granted to PGE certain easements and rights necessary for the construction and operation of (i) the Pelton Dam and the Round Butte Dam, and the generation and transmission facilities associated with those dams, and (ii) the Reregulating Dam. SER 190, ¶ 13. The agreement also affirmed certain rights of the Tribe, including the right to construct, operate, and maintain power generation facilities in the Reregulating Dam. *Id.*

PGE completed construction of the Pelton and Reregulating Dams by 1958 and completed construction of the Round Butte Dam by 1964. SER 190, ¶ 14. The Round Butte Dam is the uppermost of the three dams and impounds portions of the Metolius, Crooked, and Deschutes Rivers, forming Lake Billy Chinook. *Id.* The Pelton Dam is located seven miles downstream of the Round Butte Dam. *Id.* It impounds the Deschutes River to create Lake Simtustus, which extends back to the tailrace of the Round Butte Dam. *Id.* The Reregulating Dam is located below Pelton Dam; its primary purpose is to distribute the uneven discharges from the two upper dams to approximate natural river flows over the remaining length of the Deschutes River. *Id.*

In 1979, the Tribe established Warm Springs Power Enterprises, now Warm Springs Power and Water Enterprises ("WSPWE"), for the purpose of constructing, operating, and managing the power generation facilities at the Reregulating Dam.

SER 190, ¶ 15. In the same year, PGE and the Tribe filed a joint application with FERC to amend the Pelton Project license to authorize the Tribe to construct power generation facilities there. *Id.*

In 1980, FERC amended the license and designated PGE and the Tribe as joint licensees for the Pelton Project, to the extent of their interests in the Project. SER 191, ¶ 16. FERC also authorized the Tribe to construct, operate, and maintain a powerhouse, transmission line, and appurtenances at the Reregulating Dam, which the Tribe subsequently did. *Id.*

In December 1999, PGE and the Tribe filed competing applications for a new FERC license for the Project. SER 191-92, ¶ 20. The following April, PGE, the Tribe, and Interior entered into a Long-Term Global Settlement and Compensation Agreement ("GSA"). *Id.* The GSA was not intended to impair the Tribe's treaty-reserved rights, which include the rights to hunt and to fish, to gather roots and berries, and to pasture livestock—and which also include implied water rights necessary to support those rights. *Id.* The GSA also contains provisions relating to the settlement and release of claims among the parties. *Id.* Pursuant to the GSA, the Tribe has granted certain rights to PGE including easements for dams and equipment and flowage easements. *Id.* The GSA addresses PGE's obligation to compensate the Tribe for the Project's use and occupation of lands within the Warm Springs Reservation, which includes the opportunity for the Tribe to acquire a majority of

PGE's undivided interest in the Project assets. *Id.* The GSA also recognizes the Tribe's sovereign authority to exercise certain governmental powers over natural resources within the boundaries of the Warm Springs Reservation. *Id.*

Pursuant to the GSA, the Tribe and PGE entered into an Ownership and Operation Agreement for the Pelton and Round Butte Dams and Generating Facilities ("O&O Agreement"). SER 192, ¶ 21. The O&O Agreement addresses the co-ownership, operation, and maintenance of the Pelton Project and appoints PGE operator of the Pelton and Round Butte facilities; this does not include the Reregulating Dam generating facilities, for which the Tribe remains operator. *Id.*

In August 2000, the Oregon Public Utility Commission approved PGE's application to sell up to a 50.01 percent ownership interest in PGE's Project assets to the Tribe. SER 192, ¶ 22. FERC approved the GSA in November 2000, and it was then approved and ratified by Congress effective April 12, 2000, as Pub. L. 107-102, 115 Stat. 974 (2001). *Id.*

3. The Pelton Project – Relicensing Negotiations

In June 2001, PGE and the Tribe filed a joint application amendment with FERC and applied for a new license for the Project. SER 193, ¶ 23. That same month, the Tribe and PGE filed applications for water quality certifications for the Project pursuant to Section 401 of the CWA with the Tribe's Water Control Board ("WCB") and DEQ. *Id.* WCB and DEQ cooperated on their certification activities,

and, in June 2002, issued water qualify certifications for the Project to both PGE and the Tribe. *Id.* Both certifications reference and incorporate a Water Quality Management and Monitoring Plan ("WQMMP"), which is intended to provide a coordinated and integrated application of both certifications to the Project. *Id.*

During the original license term, the Project did not meet all State of Oregon and Tribal water quality standards in the Deschutes River immediately below the Project. SER 193, ¶ 24. The water quality certifications issued by WCB and DEQ contain conditions designed to manage the Project's effects on water quality. *Id.* While similar, the WCB and DEQ certifications are not identical. *Id.* For example, the certification issued by WCB contains more detailed conditions relating to Fish Passage. *Id.* Due to such differences, the Project's compliance with one certification does not necessarily result in compliance with the other. *Id.*

In January 2003, PGE and the Tribe initiated settlement discussions with a group of stakeholders. SER 193-94, ¶ 25. A facilitated Settlement Working Group was formed ("SWG") for the purpose of resolving all issues associated with relicensing of the Pelton Project. *Id.* The SWG met over a period of seventeen months, until June 2004. *Id.* Those settlement discussions produced the Settlement Agreement Concerning the Relicensing of the Pelton Round Butte Hydroelectric Project, FERC Project 2030, dated July 13, 2004 ("Relicensing Settlement Agreement"). *Id.* The parties to the Relicensing Settlement Agreement include, in

addition to the Tribe and PGE: Bureau of Indian Affairs ("BIA"); Bureau of Land Management ("BLM"); United States Fish and Wildlife Service ("USFWS"); National Marine Fisheries Service ("NMFS"); United States Forest Service ("USFS"); Oregon Department of Fish and Wildlife ("ODFW"); Oregon Water Resources Department ("OWRD"); Oregon Parks and Recreation Department ("OPRD"); DEQ; Deschutes County, Oregon; Jefferson County, Oregon; City of Bend, Oregon; City of Madras, Oregon; City of Redmond, Oregon; Avion Water Company; American Rivers; Oregon Trout; The Native Fish Society; Trout Unlimited; and WaterWatch of Oregon. *Id.*

A key feature of the Relicensing Settlement Agreement is the Fish Passage Plan. SER 194, ¶ 26. Since the Project's inception, fish passage has been a paramount concern for the Tribe and other fishery resource managers; for example, the State of Oregon had raised objections to the original license relating to the Project's anticipated effect on anadromous fish. *See FPC v. Oregon*, 349 U.S. 435 (1955). Those concerns were well-founded; the Project had problems with fish passage from the beginning, and by 1973 fish passage had been abandoned in favor of a hatchery. SER 194, ¶ 26. The extirpation of anadromous fish from the upper Deschutes Basin above the Project has had a profoundly negative effect on the Tribe and its members; it is for that reason that the Tribe views the Fish Passage Plan as a principal component of the Relicensing Settlement Agreement. *Id.*

4. The Pelton Project – Current FERC License

In July 2004, PGE and the Tribe submitted the Relicensing Settlement Agreement to FERC for approval. SER 194-95, ¶ 27. PGE and the Tribe also submitted a document titled "Offer of Settlement and Joint Explanatory Statement And Request For Technical Conference" ("Explanatory Statement"). *Id.* The Explanatory Statement provides that all parties to the Relicensing Settlement Agreement agreed that it was "fair and reasonable and in the public interest." *Id.* The Explanatory Statement also generally describes the Relicensing Settlement Agreement as a "complex package containing numerous interrelated and delicately balanced components." *Id.* In particular, the Explanatory Statement states that the resource protection measures in the Relicensing Settlement Agreement "make up a finely-crafted package, each element of which is essential to the successful implementation" of the Relicensing Settlement Agreement. *Id.*

On June 21, 2005, FERC issued an Order Approving Settlement and Issuing New License. SER 195, ¶ 28. This 2005 License is issued to PGE and the Tribe as joint licensees to operate and maintain the Pelton Project for a period of fifty years. *Id.* at ¶ 29. It mostly (but not entirely) follows the proposed license articles from the Relicensing Settlement Agreement. *Id.* The 2005 License is subject to the conditions set forth in water quality certifications issued by DEQ and WCB, and provides that PGE and the Tribe shall conduct water quality monitoring pursuant

to the WQMMP. *Id.* PGE and the Tribe must file annual reports to DEQ and WCB, with copies to FERC and the "Fish Committee." *Id.*

The Fish Committee consists of PGE and the Tribe in their capacities as joint licensees along with NMFS; USFWS; USFS; BIA; BLM; the Tribe's Branch of Natural Resources ("BNR"); WCB; ODFW; and DEQ. SER 196, ¶ 32. It also includes a representative from the following non-governmental organizations: Trout Unlimited, American Rivers, Oregon Trout, and the Native Fish Society. *Id.* The 2005 License designates NMFS, USFWS, ODFW, and the Tribe's BNR as the "Fish Agencies" and recognizes that each possesses distinct regulatory authority regarding the fishery resources implicated by the Project. *Id.* The Fish Committee strives to conduct its business by consensus pursuant to the process set forth in the Relicensing Settlement Agreement and the 2005 License. *Id.*

Consistent with the Tribe's interests, anadromous fish passage (both upstream and downstream) at the Project is an essential component of the 2005 License, which is subject to fishway prescription conditions submitted by Interior and NMFS pursuant to section 18 of the Federal Power Act. SER 196, ¶ 30. The 2005 License requires terms and conditions for implementing the "reasonable and prudent measures" imposed by NMFS and USFWS to address the Project's effect on species protected under the Endangered Species Act—namely, Middle Columbia River summer steelhead and bull trout. *Id.* The measures are essential to the "incidental

take authorization" granted by those agencies with respect to the protected species, and include implementation of the Fish Passage Plan, which is part of the 2005 License. *Id.*; R. 73-9, pp. 32, 104, 173, 174.

The 2005 License also establishes certain implementation committees as provided in the Relicensing Settlement Agreement, including the Fish Committee. SER 196, ¶ 31. Pursuant to the Relicensing Settlement Agreement, the implementation committees are meant to have a pivotal role in the administration of a large variety of post-licensing activities, including enhancement measures intended to benefit fish and wildlife populations. *Id.*

5. Fish Passage and Water Quality are Inextricably Intertwined

Since time immemorial, the Tribe has recognized that water quality and the health of a fishery (both anadromous and resident) are inextricably intertwined. SER 197, ¶ 33. The Tribe has been a staunch advocate in multiple forums (international, federal, tribal, and state) for the recognition of that inter-relationship and the development of policies to manage water quality for the benefit of its treaty-reserved fisheries. *Id.* That policy is manifest in the 2005 License. *Id.* Both DEQ's and the Tribe's WCB water quality certifications require PGE and the Tribe to provide for fish passage. *Id.* The WQMMP also recognizes that reintroduction of anadromous fish above the Project is a key mitigation measure under the 2005 License. *Id.*

The 2005 License provides that the principal infrastructure improvement for both fish passage and water quality management is the construction of the SWW at the existing Round Butte Dam intake tower, which the Explanatory Statement describes as the "centerpiece of the resource protection measures" to be implemented pursuant to the Relicensing Settlement Agreement. SER 197, ¶ 34. The SWW is designed to allow water withdrawal from both the warmer surface water and the cooler bottom water. *Id.* The WQMMP states that the SWW is intended to achieve two important objectives: (a) to help the Project meet temperature and water quality goals and standards in the lower Deschutes River and Project reservoirs; and (b) to allow the withdrawal of surface waters during salmonid smolt migration periods to facilitate the capture of downstream emigrating smolts from Lake Billy Chinook, in support of the goal of anadromous fish reintroduction. *Id.* The WQMMP notes that because the SWW has the potential to affect water quality and fish passage, all possible impacts must be considered in the operation of the SWW, which should be adaptively managed pursuant to the WQMMP. *Id.*

After issuance of the 2005 License, PGE and the Tribe constructed the SWW, which is physically located within the exterior boundary of the Warm Springs Reservation. SER 198, ¶ 35. The cost of construction of the SWW was approximately $110 million. *Id.* The SWW has been in operation since 2009, and anadromous fish are now passing upstream and downstream through the Project for

the first time since at least the early 1970s. *Id.* The return of anadromous fish is a remarkable achievement for the Tribe and its members. *Id.*

C. Procedural Background

In August 2016, DRA commenced this action against PGE pursuant to the citizen suit provision of the CWA, 33 U.S.C. § 1365. ER 258. DRA sought declaratory and injunctive relief, alleging that PGE had violated, and was reasonably likely to continue to violate, the water quality certification issued by DEQ for the Pelton Project. *Id.* In September 2016, PGE filed an answer alleging, in part, that the complaint should be dismissed under Rule 12(b)(7) for failure to join the Tribe as a necessary and indispensable party, which could not be joined because of its sovereign immunity. ER 255.

On March 5, 2018, DRA filed a motion for partial summary judgment. R. 65. On March 21, 2018, the Tribe and PGE filed motions pursuant to Rule 12(b)(7), asserting that the Tribe's absence from the action required its dismissal. R. 72, 74. On April 27, 2018, PGE filed a cross-motion for summary judgment. R. 86.

On June 11, 2018, the district court entered an opinion and order denying the Tribe and PGE's motions to dismiss the action pursuant to Rule 12(b)(7) and ordering DRA to join the Tribe as a defendant. R. 103; SER 1-22. On June 23, 2018, DRA filed a first amended complaint joining the Tribe as a defendant. R. 116. The Tribe filed its answer, affirmative defenses, and counterclaim on July 12, 2018.

R. 123; SER 53. The Tribe also joined PGE's cross-motion for summary judgment and its motion to dismiss based on the doctrine of primary jurisdiction. R. 122; SER 61.

On August 3, 2018, the district court entered an opinion and order denying DRA's motion for partial summary judgment and granting PGE and the Tribe's cross-motions for summary judgment, and entered judgment. R. 128, 130; ER 4-38. On August 24, 2018, DRA filed a motion to alter or amend the judgment pursuant to Rule 59(e). R. 132. The district court denied that motion on October 1, 2018. R. 136. DRA filed its notice of appeal on October 17, 2018. R. 137. The Tribe and PGE filed their notices of cross-appeal on October 31, 2018. R. 138, 139.

SUMMARY OF THE ARGUMENT

I. The Court should remand for dismissal on the grounds that the Tribe is a necessary and indispensable party that cannot be compelled to join the action because it possesses sovereign immunity that has not been abrogated or waived. The Tribe is a necessary party because of its legally-protected sovereign and proprietary interests in the action and because proceeding with the action risks impairing those interests. In particular, the action risks impairing its sovereign interests in exercising its governmental power over the natural resources of the Warm Springs Reservation and its treaty-reserved rights to take fish (and have fish to take) throughout the Deschutes River Basin. PGE cannot adequately protect the Tribe's interests, and this

case cannot proceed in equity and good conscience without participation of the Tribe.

Tribal sovereign immunity is the baseline position, and to abrogate such immunity, there must be clear evidence that Congress actually considered the issue and unequivocally chose abrogation. This citizen suit provision in Section 505 of the CWA, 33 U.S.C. § 1365, falls short of that demanding standard. While Congress expressly provided that citizen suits may be initiated against a "person," including the United States and other government agencies to the extent allowed by the Eleventh Amendment, Section 505 is silent with respect to Indian tribes. Elsewhere, the CWA generally defines "person" to include a "municipality," and "municipality" to include "Indian tribes." That attenuated definitional structure, however, differs from the manner in which Congress expressly waived the United States' sovereign immunity in Section 505 of the CWA, and there is no evidence of an intent to abrogate tribal sovereign immunity in the legislative history of Section 505. There is no clear evidence that Congress considered and unequivocally chose to abrogate the sovereign immunity of tribes. The district court erred in concluding otherwise.

II. The Court should also remand for dismissal because DRA lacks standing under Article III of the U.S. Constitution. In particular, DRA has failed to establish that it has a judicially administrable remedy that would redress its alleged injury. For the remainder of its argument summary, the Tribe expressly endorses and

incorporates by reference that part of the Second Brief on Cross-Appeal filed by PGE containing its summary of argument on this issue.

III. To the extent that the Court reaches the merits, it should affirm the district court's grant of summary judgment in favor of PGE and the Tribe. For the remainder of its argument summary, the Tribe expressly endorses and incorporates by reference that part of the Second Brief on Cross-Appeal filed by PGE containing its summary of argument on this issue.

ARGUMENT

I. THE TRIBE'S SOVEREIGN IMMUNITY REQUIRES DISMISSAL OF THIS ACTION

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

1. Is the absent party necessary under Rule 19(a)?
2. If so, is it feasible to order the absent party to be joined?
3. If joinder is not feasible, is the absent party indispensable such that the action must be dismissed pursuant to Rule 19(b)?

Salt River Project Agr. Imp. and Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012). 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 district court correctly determined that the Tribe is a necessary party to this action. It erred as a matter of law, however, in concluding that it is feasible to join the Tribe in the absence of clear evidence that Congress unequivocally chose to abrogate tribal sovereign immunity. There is no such evidence, and the Tribe's sovereign immunity remains intact. For this reason it is not feasible to join the Tribe, and equity and good conscience require dismissal of this action. *See Makah*, 910 F.2d at 559-60 (setting forth indispensability analysis).

A. Standard of Review

The Ninth Circuit reviews Rule 19 factual determinations for an abuse of discretion and associated legal conclusions de novo. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 969-70 (9th Cir. 2008). Issues of tribal sovereign immunity are subject to de novo review. *Lineen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). The Tribe and PGE raised this issue in their Rule 12(b)(7) motions to dismiss, which the district court denied on June 11, 2018. R. 72, 74, 103.[5]

[5] The district court denied the Tribe's motion to dismiss on the grounds that as an amicus curiae, the Tribe was not a party authorized to file the motion. SER 6-7. The district court nonetheless considered the Tribe's arguments in conjunction with PGE's companion Rule 12(b)(7) motion. The Tribe disagrees that it was not authorized to file the motion to dismiss as an amicus party. *Cf. Union Pacific Railroad Company v. Runyon*, 320 F.R.D. 245 (2017) (district court allowed the Tribe and other Columbia River treaty tribes to file Rule 12(b)(7) motion despite nonparty status). Given the importance of the Tribe's legally protectable sovereign interests in this case, the district court should have requested that the Tribe file a

B. The Tribe is a Necessary Party

A party is "necessary" for Rule 19(a) purposes if the party "has an interest in the action and resolving the action in [the party's] absence may as a practical matter impair or impede [the absent party's] ability to protect that interest." *Salt River Project Agr. Imp. and Power Dist.*, 672 F.3d at 1179. The Tribe has legally protected proprietary and sovereign interests in the subject of the action, and is a necessary party.

The district court summarized the Tribe's legally protected interests as follows:

> This lawsuit arises out of DRA's assertion that the Pelton Project is being operated in violation of the CWA. The Tribe and PGE are co-licensees of the Pelton Project. Additionally, although under the O & O Agreement between the Tribe and PGE, PGE is the operator of the Round Butte and Pelton Dams, and of certain aspects of the Reregulating Dam, the Tribe holds an ownership interest in the entirety of the Pelton Project, and serves as operator of the generation facilities at the Reregulating Dam. Furthermore, the operation of the Pelton Project has a direct effect on the Tribe's treaty-reserved rights, including not only its right to dictate how its land is used and how facilities within its boundaries are operated, but also the Tribe's right to the resources, including fish, within the Deschutes River Basin.

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limited motion to intervene for the purpose of filing the Rule 12(b)(7) motion to dismiss if the court did not believe that a nonparty sovereign entity could file a Rule 12(b)(7) motion. *Cf. Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs,* 932 F.3d 843, 849 (9th Cir. 2019) (tribal entity allowed to intervene for the limited purpose of filing motion to dismiss under Rule 12(b)(7)). The Tribe also asks that the Court consider the Tribe's argument in this Section I in conjunction with PGE's cross-appeal.

SER 10. The district court, thus, rightly concluded that the Tribe "has an interest in the subject matter of this action, and that interest is legally protected by both the Tribe's ownership of and license for the Pelton Project and by the 1855 Treaty." *Id.*

Proceeding in the Tribe's absence also jeopardized its legally protected proprietary and sovereign interests in the subject of the action. The district court correctly observed that the relief sought by DRA "could impair the Tribe's interest as co-operator and co-licensee of the Pelton Project" and risked impairing "the Tribe's sovereign interest in exercising governmental power over the natural resources [of the Warm Springs Reservation] and … the Tribe's right to fish in and around the Deschutes River Basin." *Id.* at 11.

The risk of impairment to the Tribe's legally protected interests cannot be minimized by PGE's presence in the action; stated differently, PGE is not able to adequately represent the full scope of the Tribe's interests in the action, particularly the Tribe's sovereign interests. The district court was mainly concerned with the potential impact that a court ordered remedy could have on the Tribe, which it observed is a "sovereign entity." *Id.* at 12. The court viewed the Tribe's participation in the action as necessary to "fashioning a remedy in a way that [would] not unnecessarily impinge on the Tribe's treaty-protected interests." *Id.*

The Tribe is, quite simply, a necessary party for purposes of Rule 19(a). And, the district court did not abuse its discretion in holding as such. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty.*, 547 F.3d at 969-70.

C. It is Not Feasible to Join the Tribe Because Congress Has Not Unequivocally Abrogated the Tribe's Sovereign Immunity

The next question that must be addressed is whether it is feasible to order that the Tribe, as the absent party, be joined. *Salt River Project Agr. Imp. and Power Dist.*, 672 F.3d at 1179. The short answer is no; because Congress did not unequivocally abrogate tribal sovereign immunity from suit when it enacted Section 505 of the CWA, 33 U.S.C. § 1365, it is not feasible to join the Tribe. The district court erred as a matter of law in concluding otherwise.

Tribal immunity is the "baseline position." *Bay Mills Indian Community*, 572 U.S. at 790. To abrogate tribal immunity, Congress must "'unequivocally' express that purpose." *Id*. (citing *C & L Enterprises, Inc.,* 532 U.S. 411. at 418 (2001). This "rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* The Supreme Court, therefore, requires "clear evidence" that Congress actually considered the issue and chose abrogation. *See Dion*, 476 U.S. at 739-40.

Section 505 of the CWA provides, in part, that any "citizen" may commence a civil action:

> against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of … an effluent standard or limitation under [the CWA] . . . .

33 U.S.C. § 1365(a)(1). The statute, then, authorizes citizen suits against a "person" alleged to be in violation of an effluent standard or limitation under the CWA. The Supreme Court has long-applied an interpretative presumption that a person does not include "the sovereign," which may only be overcome by an affirmative showing of contrary legislative intent. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000).

There are three sovereigns to consider in connection with citizen suits under the CWA: the United States; individual States; and Indian tribes. Like the tribal sovereign immunity abrogation standard, a Congressional waiver of the sovereign immunity of the United States "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Section 505 expressly provides that the term "person" includes the United States. 33 U.S.C. § 1365(a)(1) (citizen suits may be commenced against "any person []including [] the United States"). Thus, there can be no reasonable dispute that Congress has unequivocally expressed an intent to waive the United States' sovereign immunity for purposes of the citizen suits under the CWA.

The standard for Congressional abrogation of States' Eleventh Amendment immunity from suit also requires an "unmistakably clear" statement of an intent to abrogate. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996) (quoting *Dellmuth v. Muth,* 491 U.S. 223, 227-228 (1989)). Unless specifically provided otherwise, the CWA defines "person" for purposes of the act as "an individual, corporation, partnership, association, *State*, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (emphasis added). Based on that statutory definition, an argument could be made that Congress intended to abrogate State sovereign immunity for purposes of citizen suits. On the other hand, the citizen suit provision specifically provides that a person includes "other governmental instrumentalities or agencies" to the extent permitted by the Eleventh Amendment. 33 U.S.C. § 1365(a)(1). The statutory text undeniably shows that Congress was aware of, and grappling with, State sovereign immunity, but there remains a question as to whether Congress believed the Eleventh Amendment limited its ability to abrogate the States' immunity from suit. The point here is not to resolve that question but to note that there is uncertainty even as to whether Congress has made an "unmistakably clear" statement of abrogation with respect to State immunity. The argument for abrogation of tribal sovereign immunity is even more muddled.

Turning to the question of whether there is clear evidence that Congress unequivocally chose to abrogate tribal sovereign immunity for purposes of the CWA citizen suits, the Tribe first observes that Section 505 is entirely silent with respect to Indian tribes. Unlike the United States and individual States, Congress did not expressly refer to Indian tribes in the description of "person" contained within the CWA's citizen suit provision. 33 U.S.C. § 1365(a)(1). And, unlike States, Indian tribes are not included in the general statutory definition of "person." *See* 33 U.S.C. § 1362(5).

The CWA's general definition of "person," however, includes "municipality," which, in turn, is defined to include an "Indian tribe or an authorized Indian tribal organization." 33 U.S.C. § 1362(4), (5). So, the precise question presented is whether the attenuated inclusion of Indian tribes in the separate statutory definition of "person" via the secondary definition of "municipality" is clear evidence that Congress considered and unequivocally chose to abrogate tribal sovereign immunity under the CWA. The answer must be no, particularly given the fact that, unlike Indian tribes, Congress expressly addressed whether the United States and the States were subject to citizen suit liability in the text of Section 505 itself. At most, whether Indian tribes are a "person" for purposes of the citizen suit statute is ambiguous, which *a fortiori* cannot be an unequivocal expression of Congressional intent to abrogate tribal sovereign immunity. *See Montana v. Blackfeet Tribe of Indians*,

471 U.S. 759, 766 (1985) (statutes with ambiguous provisions are construed liberally in favor of Indians and interpreted for their benefit).

Indian tribes are not "municipalities as that term has long been commonly understood. A municipality is a "body politic created by the incorporation of the people of a prescribed locality and invested with subordinate powers of legislation to assist in civil government of the state . . . ." Charles W. Tooke, *The Status of the Municipal Corporation in American Law,* 16 Minn. L. Rev. 343, 343 (1932) (emphasis added). Indian tribes are constitutionally distinct from States; they are "domestic dependent nations" with "inherent sovereign authority." *Bay Mills Indian Community*, 572 U.S. at 788. Congress certainly understood that distinction when it enacted the CWA, and understood how to waive sovereign immunity clearly and unequivocally at least with respect to the United States. So why would Congress seek to abrogate tribal sovereign immunity by "shoehorning" Indian tribes into the statutory definition of municipality? The text of the CWA does not contain or suggest an answer, and its legislative history provides no indication that Congress even considered the question of tribal sovereign immunity. *See McGirt v. Oklahoma*, 140 S.Ct. 2452, 2468 (2020) (extratextual sources may be used to "clear up" ambiguity about a statute's original meaning).

The CWA was originally enacted as the Act of June 30, 1948, ch. 758, 62 Stat. 1155. At the time, the act defined "municipality" but that definition did not include

Indian tribes. 62 Stat. 1155, 1157. The act also did not contain a general statutory definition for "person," nor a citizen suit provision. *See generally id.*

In October 1971, Senator Edmund Muskie introduced S. 2770, which eventually became the Federal Water Pollution Act Amendments of 1972. Pub. L. No. 92-500, 86 Stat. 816 (1972). Section 502 of S. 2770 included a general, statutory definition of "person" for purposes of the CWA and amended the definition of municipality, in part to include Indian tribes. Section 505 of S. 2770 contained the citizen suit provision.

The Senate Committee on Public Works issued a report explaining that the definition of municipality was "clarified to make clear" that entities eligible for grants included certain associations formed under state law, as well as certain operating agencies under Section 209 of the CWA. S. Report No. 92-414, at 76 (1971). The report did not explain why Congress included Indian tribes in the definition of municipality, but it is reasonable to conclude that Indian tribes were also included for grant eligibility purposes given that such eligibility was the only explanation for the amendment. The report makes no reference, and contains no other evidence, to support the conclusion that S. 2770 included Indian tribes in the definition of municipality in order to abrogate tribal sovereign immunity.

The report also explained that the term "person, for purposes of the Act, means all entities which are capable of suing *or being sued*." S. Report No. 92-414, at 76

(emphasis added). Of course, similar to the United States, Indian tribes are not "capable" of being sued absent a waiver, or unequivocal and express Congressional abrogation of their sovereign immunity. *See Bay Mills Indian Community*, 572 U.S. at 790. The report makes no mention of Indian tribes, and there is simply no evidence—much less clear evidence—that Congress considered the issue of tribal sovereign immunity in S. 2270. There is also no evidence that Congress chose to abrogate such immunity by including Indian tribes in the definition of "municipality," when it more easily could have expressly included Indian tribes in the list of sovereign entities in Section 505 against whom a citizen suit may be commenced.

The report's explanation of the citizen suit provision is similarly unhelpful. S. Report No. 92-414, at 79-82. First, the report states that S. 2270 contains a citizen suit provision to provide for "citizen participation in the enforcement of control requirements and regulations established under" the CWA. *Id.* at 79. The United States, however, has an established trust duty to protect Indian tribes from "potentially hostile non-Indian populations." *Moapa Band of Paiute Indians v. U.S. Dept. of Interior*, 747 F.2d 563, 567 n. 3 (9th Cir. 1984) (citing *United States v. Kagama*, 118 U.S. 375, 383-84 (1886)). In light of that fiduciary duty, it is simply not reasonable to conclude, in the absence of clear and equivocal evidence to the contrary, that Congress would invite citizens—with goals, interests, and views

potentially hostile to those of Indian tribes—to participate in the enforcement of the CWA against Indian tribes. *Cf. McGirt*, 140 S.Ct. at 2462 (expressing concern about leaving "tribal rights in the hands of the very neighbors who might be least inclined to respect them").

The report observes that the citizen suit provision is "modeled on the provision enacted in the Clean Air Act Amendments of 1970 ("CAA"). S. Report No. 92-414, at 79. Comparing the citizen suit provisions of the CAA with Section 505 of S. 2770 reveals little difference between them. *Compare* Pub. L. No. 91-604, 84 Stat. 1676, § 12(a) (1972) *with* S. 2770, § 5. There is a material difference, however, in the statutory definition of "municipality"; the CAA does not include Indian tribes. Pub. L. No. 88-206, 77 Stat. 392, 400 (1963), 42 U.S.C. § 7602(f).

The omission of Indian tribes from the definition of "municipality" in the CAA is important for at least two reasons. First, it eliminates any argument that Congress intended to abrogate tribal sovereign immunity in the CAA, and that this intent was later imported into the CWA. Because Congress specifically "modeled" the CWA citizen suit provision after the CAA, if it had decided to deviate with respect to tribal sovereign immunity, there would presumably be some discussion of this important distinction in the CWA's legislative history (and tribes most naturally would have been included in Section 505 itself, alongside the references to the United States and States). Second, a conclusion that the CWA citizen suit provision

abrogates tribal sovereign immunity when the CAA does not is the *reductio ad absurdum* of an interpretative analysis not properly focused on whether there is clear evidence that Congress was both aware of and chose to abrogate tribal sovereign immunity—leading to the absurd outcome of tribes being subject to citizens suits with respect to water, but not air. While Congress may have the authority to make that choice, there must be clear and unequivocal evidence of its intention to do so, which does not exist here.

In November 1971, Representative John Blatnik introduced H.R. 11896, which contained the House of Representatives bill to amend the CWA. The House Committee on Public Works issued a report in support of its bill. H.R. Rep. No. 92-911 (1972). The House report is silent with respect to any abrogation of tribal sovereign immunity for citizen suit purposes. *Id.* at 132-34. The report describes the citizen suit provision as authorizing a "citizen to bring a civil action against any person, including the United States and other government agencies to the extent permitted by the Constitution … ." *Id.* at 133. The Constitution distinguishes Indian tribes from other sovereigns. U.S. Const., art I., § 8. Indian tribes are not government agencies; they are "domestic dependent nations." *Bay Mills Indian Community*, 572 U.S. at 788. There is simply no evidence that the House Committee on Public Works, like its Senate counterpart, ever contemplated authorizing citizen suits against Indian tribes.

Nor does the joint explanatory statement of the conference committee provide any evidence indicating Congress intended to abrogate tribal sovereign immunity for citizen suit purposes. S. Rep. 92-1236, 143-46 (1972) (Conf. Rep.); H.R. Rep. No. 92-1465, 143-46 (1972) (Conf. Rep.). In short, the legislative history is completely bereft of any evidence that Congress *considered* the issue of citizen suits against Indian tribes, much less that it chose to abrogate tribal sovereign immunity and authorize such suits. There is simply no "unequivocal expression" of Congressional intent to do so, and the judicial precedent relied upon by the district court in this case does not alter that conclusion.

In *Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, environmental organizations sued an Indian tribe in its capacity as operator of a landfill under the citizen suit provisions of the CWA and the Resource Conservation and Recovery Act ("RCRA") for the defendant-tribe's alleged violations of those acts. 827 F.Supp. 608 (D. Ariz. 1993). The defendant-tribe moved to dismiss the action on the grounds that the citizen suit provisions of the CWA and RCRA did not abrogate the tribe's sovereign immunity. *Id.* at 609. The parties conceded that citizen suit provisions of the CWA and RCRA were identical for purposes of the motion to dismiss. *Id.* at 609 n. 1.

The district court denied the tribe's motion, relying on the statutory definitions of "person" and "municipality," as well as the Eighth Circuit's decision in *Blue Legs*

v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989). *Id.* at 609-610. The district court did not consider the ambiguity created by Congress' different treatment of the United States, States, and Indian tribes with respect to the citizen suit provisions. The district court never considered whether there was unequivocal evidence showing Congress actually considered and chose to abrogate tribal sovereign immunity for purposes of citizen suits under the CWA. The court, thus, did not adhere to the standard set out by the Supreme Court, and its conclusion must be disregarded. *See Bay Mills Indian Community*, 572 U.S. at 790 (citing *Dion*, 476 U.S. at 738-39).

Relying on *Blue Legs* as support for the conclusion that Congress clearly and unambiguously intended to abrogate tribal sovereign immunity for purposes of CWA citizen suits is also misplaced. *Blue Legs* concerned the citizen suit provision of RCRA, not the CWA. *See* 867 F.2d 1094 1096-97. Congress did not enact RCRA until 1976, which is four years *after* it enacted the CWA citizen suit statute—making RCRA weak evidence at best for Congressional intent with respect to the CWA citizen suit provision. *See Jefferson County Pharmaceutical Ass'n v. Abbott Labs*, 460 U.S. 150, 165 n. 27 (1983) (views of subsequent Congress form "hazardous basis for inferring the intent of an earlier one[,]" quoting *United States v. Price,* 361 U.S. 304, 313 (1960)). Such evidence is relevant only to the extent that it sheds light on the meaning of the CWA citizen suit provision at the time of its enactment. *See*

McGirt, 140 S.Ct at 2468-69 (extratextual considerations may be used to shed light on meaning of text at time of adoption of statute). *Blue Legs* contains no explanation as to how the later-enacted citizen suit provision of RCRA could shed light on earlier-enacted CWA citizen suit provision. That lack of explanation should be fatal to the reliance on *Blue Legs* by *Atl. States Legal Found.*

And the Eight Circuit's analysis in *Blue Legs* is incomplete. The court relied principally on the statutory definitions of "person" and "municipality." 867 F.2d at 1097. Similar to *Atl. States Legal Found.*, the court did not consider the ambiguity created by Congress' disparate treatment of the United States, States, and Indian tribes with respect to RCRA's citizen suit provisions. The court, however, did identify a House Report providing an example of avoiding harm to Indian children playing in dumps on the reservations. *Id.* But the court did not acknowledge that an expression of intent to apply RCRA on Indian reservations is not the same thing as an unequivocal expression of intent to abrogate tribal sovereign immunity so that non-Indian citizens can enforce RCRA against Indian tribes. Congress could rightly intend for RCRA to apply to Indian tribes but reserve its enforcement to the federal government as part of its trust obligation to tribes. *See generally Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir. 1994) (tribal sovereign immunity does not prevent federal government from exercising its sovereign powers).

Unlike the court in Blue Legs, the Environmental Protection Agency ("EPA") undertook an analysis of RCRA's legislative history when it sought to discern Congressional intent in including Indian tribes in the definition of "municipality" (for the purpose of determining whether it is prohibited from allowing tribes to apply for adequacy determinations under RCRA's Sections 4005 and 4010). *See* Proposed Rule, Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule (STIR), 61 Fed. Reg. 2584, 2588-2589 (Jan. 26, 1996). EPA concluded that Congress referred to Indian tribes in the definition of "municipality" for grant eligibility purposes, not to abrogate their sovereignty. *Id.* at 2588-89 ("There is no indication in the legislative history that Congress intended to abrogate any sovereign Tribal authority by defining them as 'municipalities' under RCRA . . . ."). *See also* Michael P. O'Connell, *Citizen Suits against Tribal Governments and Tribal Officials under Federal Environmental Laws,* 36 Tulsa L. Rev. 335, 342-44 (2000) (citing EPA's analysis to support conclusion that Congress did not intend to waive tribal sovereign immunity, despite the *Blue Legs* determination).

EPA's conclusion is consistent with the limited legislative history explaining the 1972 amendment to the CWA definition of "municipality." S. Report No. 92-414, at 76 (1971). It is also consistent with numerous references to "municipality" in the text of the CWA, which center on eligibility for grants and other forms of

funding, such as loan guarantees and revolving loan funds. *See, e.g.*, 33 U.S.C. §§ 1255(a) and (i), 1274(a), 1281(g), 1293(a), 1301(a), and 1383(c).

The Tenth Circuit decision in *Osage Tribal Council v. U.S. Dep't of Labor* does not illuminate Congressional intent with respect to the CWA citizen suit provisions. 187 F.3d 1174 (10th Cir. 1999). In that case, the plaintiff-tribe sought judicial review of an administrative order determining that the whistleblower provisions of the Safe Drinking Water Act ("SDWA") abrogated tribal sovereign immunity. *Id.* at 1178. Like the CWA and RCRA, the SDWA defines "person" to include "municipality," which is in turn defined to include "an Indian tribe." *Id.* at 1181. The text of the SDWA whistleblower statute, however, materially differs from the CWA citizen suit provision, notably excluding the United States from the definition of "person" and omitting any reference to the Eleventh Amendment immunity of States. *Compare* 42 U.S.C. § 300j-9(i)(1) *with* 33 U.S.C. § 1365. The Tenth Circuit cites no legislative history or other extratextual evidence to help clear up the ambiguity of Congress' disparate treatment of the three sovereigns in the CWA citizen suit provision. The court's reference to *Blue Legs* and *Atl. States Legal Found.* is also dictum and is limited to the definitional analysis of "person" and "municipality"—ambiguous provisions that are not a clear and unequivocal abrogation of tribal sovereign immunity. *Osage Tribal Council*, 187 F.3d at 1182.

The Tenth Circuit implicitly acknowledges as much with respect to the similar provisions in the SDWA by noting that "Congress *could* have been more clear." *Id.*

In *Miller v. Wright*, the Ninth Circuit identified *Blue Legs* and *Osage Tribal Council* as examples of Congressional abrogation of tribal sovereign immunity. 705 F.3d 919, 926 (9th Cir. 2013). *Miller* does not control the outcome here; in that case, a cigarette retailer and his customers brought an action against an Indian tribe and its officials arguing that the tribe's imposition of cigarette sales taxes was illegal. The plaintiffs argued that federal antitrust laws abrogated tribal immunity, and the Ninth Circuit disagreed. *Id.* at 926-27. The Ninth Circuit undertook no analysis as whether Congress considered tribal sovereign immunity or chose to abrogate that immunity when it enacted the CWA citizen suit provision.

There is no clear evidence of an unequivocal Congressional intent to abrogate tribal sovereign immunity in connection with CWA citizen suits. The most reasonable conclusion that can be drawn from the statutory text and legislative history is that Congress did not consider the issue. The Tribe's sovereign immunity, therefore, remains intact and prevents DRA from bringing a CWA citizen suit against the Tribe. It is not feasible to compel the Tribe to join this action, and the district court erred as a matter of law in concluding otherwise.

D. The Tribe is Indispensable, and This Case Cannot Proceed in Equity and Good Conscience without the Tribe

The final question to address is whether the case can proceed in equity and good conscience without the Tribe. *Makah*, 910 F.2d at 558. Again, the short answer is no. The Tribe is an indispensable party, and it is inequitable to proceed without the Tribe, a necessary party that is immune from suit for the reasons set forth in Sections I.B. and C. *supra*.

This Court has previously observed that other courts have "noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as 'one of those interests "compelling by themselves,"' which requires dismissing the suit." *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.* 276 F.3d 1150, 1162 (9th Cir. 2002) (quoting *Wichita & Affiliated Tribes v. Hodel,* 788 F.2d 765, 777 (D.C. Cir.1986)). It has also noted that "[i]n many cases in which we have found that an Indian tribe is an indispensable party, tribal sovereign immunity has required dismissal of the case." *EEOC v. Peabody Western Coal Co.,* 400 F.3d 774, 781 (9th Cir. 2005). The Court nonetheless applies the four-part Rule 19(b) test to determine whether Indian tribes are indispensable parties. *Id*. The test balances the following factors: "(1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum." *Id.* at 1161-62.

This Court has previously determined that the first factor, in focusing on the absent party (here the Tribe), "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 1015, 1025-1026 (9th Cir. 2002). The Tribe has argued, and the district court correctly determined, that it has legally protected sovereign and proprietary interests in this action and that proceeding without the Tribe risks impairing those interests. SER 9-12. The district court determined:

> Regardless of the precise relief requested or ultimately ordered, any relief that involves changing the pH, oxygen, or temperature levels of the water in and around the Pelton Project—the very measures that DRA seeks to affect through this lawsuit—will impair the Tribe's sovereign interest in exercising governmental power over the natural resources within the Reservation and risk impairing the Tribe's right to fish in and around the Deschutes River Basin.

SER 11. Because any potential relief will impair the Tribe's exercise of sovereign governmental power, the general rule is that the suit is barred. *See Dawavendewa*, 276 F.3d at 1160. The first factor, therefore, weighs in favor of dismissal.

The second factor centers on whether the district court can shape the relief sought or ordered to lessen the prejudice to the absent party. *Id.* at 1162. As the district court rightly concluded, any conceivable relief would involve changes to the future operation of the Pelton Project, thereby impairing the Tribe's sovereign interest in exercising its government powers. SER 11. There is simply no practical

way to shape relief so as to avoid impairment of the Tribe's protectable interests. This factor thus weighs in favor of dismissal.

The third factor also favors dismissal because any judgment against PGE ordering a change in operation of the Pelton Project will impair the Tribe's protectable interests for reasons already explained. *See Am. Greyhound Racing, Inc.*, 305 F.3d at 1025. Any such judgment may also trigger re-initiation of consultation with NMFS and USFWS, with the attendant risk of termination or modification of the incidental take authorization that both agencies have issued for the Project under the Endangered Species Act.

As to the fourth factor, the Ninth Circuit has "regularly held that the tribal interest in immunity overcomes [a] lack of an alternative remedy or forum for the plaintiff[]." *Id*. DRA, however, appears to have an alternative forum at FERC if this action is dismissed. *See* 16 U.S.C. § 825e. This factor weighs in favor of dismissal.

DRA's apparent effort to avoid the problem of tribal sovereign immunity should also not be overlooked. *See Dawavendewa*, 276 F.3d 1160 (comparing an "attempted end run around tribal sovereign immunity" to a "ploy hatched" in *Shemoen v. United States*, 982 F.2d 1312 (9th Cir. 2002), in order to "circumvent tribal sovereign immunity"). In addition to declaratory relief, DRA seeks an injunction, which is "'a matter of equitable discretion' and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled

to such relief.'" *Earth Island Inst. v. Carlton,* 626 F.3d 462, 475 (9th Cir. 2010) (quoting *Winter v. Natural Res. Def. Council,* 555 U.S. 7, 22 (2008)). In granting injunctive relief, courts are required to balance the competing interests and "claims of injury," which of course, in this case, would require consideration of the Tribe's legally protectable interests relating to the Pelton Project. *See id. at 475* (quoting *Winter,* 555 U.S. at 24). From the beginning, DRA has sought to strategically posture this case as DRA versus PGE alone, although well aware of the Tribe's integral role in the Pelton Project. DRA has ignored and minimized the very real and substantial tribal interests that are implicated by this action, and has failed to fully portray the history of the Pelton Project or its impact on water quality and the fish resources of the Deschutes River. SER 199-200, ¶¶ 38 – 39. When DRA's effort to circumvent the Tribe's sovereign immunity is taken into account, the balance of the equities undeniably favor dismissal.

II. THIS APPEAL MUST BE DISMISSED BECAUSE DRA HAS FAILED TO IDENTIFY A JUDICIALLY ADMINISTRABLE REMEDY FOR PURPOSE OF ARTICLE III STANDING

The Tribe expressly endorses and incorporates by reference Section I.A. of the Second Brief on Cross-Appeal filed by PGE.

III. THE UNDISPUTED EVIDENCE ESTABLISHES THAT PGE AND THE TRIBE COMPLIED WITH THE DEQ CERTIFICATION

The Tribe expressly endorses and incorporates by reference Section I.B. of the Second Brief on Cross-Appeal filed by PGE. The DEQ certification requires

PGE and the Tribe to adaptively manage the Pelton Project in a manner that reduces its contribution to exceedances of the applicable water quality standards for temperature, dissolved oxygen, and pH, in conjunction with other water quality and fish passage requirements. There is no genuine issue of material fact that PGE and the Tribe are adaptively managing the Project in a manner consistent with the certification.[6] The district court, therefore, properly granted summary judgment in favor of PGE and the Tribe and should be affirmed.

[6] In Appellant's First Brief on Cross-Appeal, DRA seems to argue that because the Tribal water quality standards are incorporated into the WQMMP, those standards can be enforced with respect to the waters of the State of Oregon via the Section 401 certification issued by DEQ. DRA, thus, chides the district court for ignoring tribal law. Dkt. 28, p. 37. DRA is not correct. The Tribe's water quality standards apply to the waters of the Tribe, which are not within the scope of the Section 401 certification issued by DEQ or this action. DRA's attempt to bootstrap the Tribe's water quality standards into this action should be rejected.

CONCLUSION

This Court should either remand for dismissal of the action, or affirm the district court's grant of summary judgment in favor of the Tribe and PGE.

Date: September 28, 2020

KARNOPP PETERSEN LLP

s/ Josh Newton
Josh Newton

Attorneys for Defendant-Appellee/Cross Appellant The Confederated Tribes of the Warm Springs Reservation of Oregon

STATEMENT OF RELATED CASES

The Tribe is aware of the following related case: *Deschutes River Alliance v. Portland General Electric Company*, Ninth Circuit Case No. 17-80092.

Date: September 28, 2020.

KARNOPP PETERSEN LLP

s/ Josh Newton
Josh Newton

Attorneys for Defendant-Appellee/Cross Appellant The Confederated Tribes of the Warm Springs Reservation of Oregon

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Date: September 28, 2020.

KARNOPP PETERSEN LLP

s/ Josh Newton
Josh Newton

Attorneys for Defendant-Appellee/Cross Appellant The Confederated Tribes of the Warm Springs Reservation of Oregon

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 28, 2020.

KARNOPP PETERSEN LLP

s/ Josh Newton
Josh Newton

Attorneys for Defendant-Appellee/Cross Appellant The Confederated Tribes of the Warm Springs Reservation of Oregon

ADDENDUM

Page

United States Code Annotated
Constitution of the United States
Annotated
Article I. The Congress

U.S.C.A. Const. Art. I § 8, cl. 3
Also cited as USCA CONST Art. I § 8

Section 8, Clause 3. Regulation of Commerce

Currentness

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Notes of Decisions (4511)

U.S.C.A. Const. Art. I § 8, cl. 3, USCA CONST Art. I § 8, cl. 3
Current through P.L. 116-158.

End of Document

12 Stat 963 (U.S. Treaty), 1859 WL 10144 (U.S. Treaty)

UNITED STATES OF AMERICA

Native American

Treaty between the United States and the confederated tribes and bands of Indians in Middle Oregon.

Concluded at Wasco, in Oregon Territory, June 25, 1855.
Ratified by the Senate, March 8, 1859.
Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

JAMES BUCHANAN, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

***1** WHEREAS a treaty was made and concluded at Wasco, near the Dalles of the Columbia River, in Oregon Territory, on the twenty-fifth day of June, eighteen hundred and fifty-five, between Joel Palmer, superintendent of Indian affairs for the said Territory, on the part of the United States, and the following-named chiefs and headmen of the confederated tribes and bands of Indians residing in Middle Oregon, they being authorized thereto by their respective bands, to wit: Symtustus, Locks-quis-sa, Shick-a-me, and Kuck-up, chiefs of the Ta-ih or Upper De Chutes band of Walla-Wallas; Stocket-ly and Iso, chiefs of Wyam or Lower De Chutes band of Walla-Wallas; Alexis and Talk-ish, chiefs of the Tenino band of Walla-Wallas; Yise, chief of the Dock-spus or John Day's River band of Walla-Wallas; Mark, William Chenook, and Cush-Kella, chiefs of the Dalles band of the Wascoes; Toh-simph, chief of the Ki-gal-twal-la band of the Wascoes, and Wal-la-chin, chief of the Dog River band of the Wascoes; which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Wasco, near the Dalles of the Columbia River, in Oregon Territory, by Joel Palmer, superintendent of Indian affairs, on the part of the United States, and the following-named chiefs and headmen of the confederated tribes and bands of Indians, residing in Middle Oregon, they being duly authorized thereto by their respective bands, to wit: Symtustus, Locksquis-sa, Shick-a-me, and Kuck-up, chiefs of the Taih or Upper De Chutes band of Walla-Wallas; Stocket-ly and Iso, chiefs of the Wyam or Lower De Chutes band of Walla-Wallas; Alexis and Talk-ish, chiefs of the Tenino band of Walla-Wallas; Yise, chief of the Dock-spus or John Day's River band of Walla-Wallas; Mark, William Chenook, and Cush-Kella, chiefs of the Dalles band of the Wascoes; Toh-simph, chief of the Ki-gal-twal-la band of Wascoes; and Wal-la-chin, chief of the Dog River band of Wascoes.

ARTICLE I.

The above-named confederated bands of Indians cede to the United States all their right, title, and claim to all and every part of the country claimed by them, included in the following boundaries, to wit:

Commencing in the middle of the Columbia River, at the Cascade Falls, and running thence southerly to the summit of the Cascade Mountains; thence along said summit to the forty-fourth parallel of north latitude; thence east on that parallel to the summit of the Blue Mountains, or the western boundary of the Sho-sho-ne or Snake country; thence northerly along that summit to a point due east from the head waters of Willow Creek; thence west to the head waters of said creek; thence down said stream to its junction with the Columbia River; and thence down the channel of the Columbia River to the place of beginning. *Provided, however*, that so much of the country described above as is contained in the following boundaries, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, which tract for the purposes contemplated shall be held and regarded as an Indian reservation, to wit:

***2** Commencing in the middle of the channel of the De Chutes River opposite the eastern termination of a range of high lands usually known as the Mutton Mountains; thence westerly to the summit of said range, along the divide to its connection with the Cascade Mountains; thence to the summit of said mountains; thence southerly to Mount Jefferson; thence down the main branch of De Chutes River; heading in this peak, to its junction with De Chutes River; and thence down the middle of the channel of said river to the place of beginning. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white persons be permitted to reside upon the same without the concurrent permission of the agent and superintendent.

The said bands and tribes agree to remove to and settle upon the same within one year after the ratification of this treaty, without any additional expense to the United States other than is provided for by this treaty; and, until the expiration of the time specified, the said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all white citizens the right to enter upon and occupy as settlers any lands not included in said reservation, and not actually enclosed by said Indians. *Provided, however*, That prior to the removal of said Indians to said reservation, and before any improvements contemplated by this treaty shall have been commenced, that if the three principal bands, to wit: the Wascopum, Tiah, or Upper De Chutes, and the Lower De Chutes bands of Walla-Wallas shall express in council, a desire that some other reservation may be selected for them, that the three bands named may select each three persons of their respective bands, who

with the superintendent of Indian affairs or agent as may by him be directed, shall proceed to examine, and if another location can be selected, better suited to the condition and wants of said Indians, that is unoccupied by the whites, and upon which the board of commissioners thus selected may agree, the same shall be declared a reservation for said Indians, instead of the tract named in this treaty. *Provided, also*, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, is secured to them. *And provided, also*, That if any band or bands of Indians, residing in and claiming any portion or portions of the country in this article, shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to receive such part of the several and other payments herein named as a consideration for the entire country described as aforesaid as shall be in the proportion that their aggregate number may have to the whole number of Indians residing in and claiming the entire country aforesaid, as consideration and payment in full for the tracts in said country claimed by them. *And provided, also*, That where substantial improvements have been made by any members of the bands being parties to this treaty, who are compelled to abandon them in consequence of said treaty, the same shall be valued, under the direction of the President of the United States, and payment made therefor; or, in lieu of said payment, improvements of equal extent and value at their option shall be made for them on the tracts assigned to each respectively.

ARTICLE II.

***3** In consideration of, and payment for, the country hereby ceded, the United States agree to pay the bands and tribes of Indians claiming territory and residing in said country, the several sums of money following, to wit:

Eight thousand dollars per annum for the first five years, commencing on the first day of September, 1856, or as soon thereafter as practicable.

Six thousand dollars per annum for the term of five years next succeeding the first five.

Four thousand dollars per annum for the term of five years next succeeding the second five; and

Two thousand dollars per annum for the term of five years next succeeding the third five.

All of which several sums of money shall be expended for the use and benefit of the confederated bands, under the direction of the President of the United States, who may from time to time at his discretion determine what proportion thereof shall be expended for such objects as in his judgment will promote their well-being and advance them in civilization; for their moral improvement and education; for building, opening and fencing farms, breaking land, providing teams, stock, agricultural implements, seeds, &c.; for clothing, provisions, and tools; for medical purposes, providing mechanics and farmers, and for arms and ammunition.

ARTICLE III.

The United States agree to pay said Indians the additional sum of fifty thousand dollars, a portion whereof shall be applied to the payment for such articles as may be advanced them at the time of signing this treaty, and in providing, after the ratification thereof, and prior to their removal, such articles as may be deemed by the President essential to their want; for the erection of buildings on the reservation, fencing and opening farms; for the purchase of teams, farming implements, clothing and provisions, tools, seeds, and for the payment of employees; and for subsisting the Indians the first year after their removal.

ARTICLE IV.

In addition to the considerations specified, the United States agree to erect, at suitable points on the reservation, one saw-mill and one flouring-mill; suitable hospital buildings; one school house; one blacksmith shop with a tin and a gunsmith shop thereto attached; one wagon and ploughmaker shop; and for one sawyer, one miller, one superintendent of farming operations, a farmer,

a physician, a school teacher, a blacksmith, and a wagon and ploughmaker, a dwelling house and the requisite outbuildings for each; and to purchase and keep in repair for the time specified for furnishing employees, all necessary mill fixtures, mechanics' tools, medicines and hospital stores, books and stationery for schools, and furniture for employees.

The United States further engage to secure and pay for the services and subsistence, for the term of fifteen years, of one farmer, one blacksmith, and one wagon and ploughmaker; and for the term of twenty years, of one physician, one sawyer, one miller, one superintendent of farming operations, and one school teacher.

***4** The United States also engage to erect four dwelling houses; one for the head chief of the confederated bands, and one each for the Upper and Lower De Chutes bands of Walla-Wallas, and for the Wascopum band of Wascoes, and to fence and plough for each of the said chiefs ten acres of land; also to pay the head chief of the confederated bands a salary of five hundred dollars per annum for twenty years, commencing six months after the three principal bands named in this treaty shall have removed to the reservation, or as soon thereafter as a head chief should be elected: *And provided, also*, That at any time, when by the death, resignation, or removal of the chief selected, there shall be a vacancy, and a successor appointed or selected, the salary, the dwelling and improvements shall be possessed by said successor, so long as he shall occupy the position as head chief; so also with reference to the dwellings and improvements provided for by this treaty for the head chiefs of the three principal bands named.

ARTICLE V.

The President may from time to time at his discretion cause the whole, or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for these Indians, to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privilege, and locate thereon permanently. To a single person over twenty-one years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons, and not exceeding ten, one hundred and twenty acres; and to each family over ten in number, twenty acres for each additional three members. And the President may provide such rules and regulations as will secure to the family in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvement thereon; and he may, at any time, at his discretion, after such person or family has made location on the land assigned as a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years and shall be exempt from levy, sale or forfeiture, which condition shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the State shall remove the restrictions. *Provided, however*, That no State legislature shall remove the restrictions herein provided for without the consent of Congress. *And provided, also*, That if any person or family shall at any time neglect or refuse to occupy or till a portion of the land assigned and on which they have located, or shall roam from place to place indicating a desire to abandon his home, the President may, if the patent shall have been issued, revoke the same, and if not issued, cancel the assignment, and may also withhold from such person, or family, their portion of the annuities or other money due them, until they shall have returned to such permanent home, and resumed the pursuits of industry, and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation.

ARTICLE VI.

***5** The annuities of the Indians shall not be taken to pay the debts of individuals.

ARTICLE VII.

The confederated bands acknowledge their dependence on the government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredation on the property of said citizens; and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities;

nor will they make war on any other tribe of Indians except in self-defence, but submit all matters of difference between them and other Indians to the government of the United States, or its agents, for decision, and abide thereby; and if any of the said Indians commit any depredations on other Indians, the same rule shall prevail as that prescribed in the case of depredations against citizens; said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians.

ARTICLE VIII.

In order to prevent the evils of intemperance among said Indians, it is hereby provided, that if any one of them shall drink liquor to excess, or procure it for others to drink, his or her proportion of the annuities may be withheld from him or her for such time as the President may determine.

ARTICLE IX.

The said confederated bands agree that whensoever, in the opinion of the President of the United States, the public interest may require it, that all roads, highways, and railroads shall have the right of way through the reservation herein designated, or which may at any time hereafter be set apart as a reservation for said Indians.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Joel Palmer, on the part of the United States, and the undersigned, chiefs, headmen, and delegates of the said confederated bands, have hereunto set their hands and seals, this twenty-fifth day of June, eighteen hundred fifty-five.

JOEL PALMER,
[L. S.]
Superintendent of Indian Affairs, O. T.

Wasco.

MARK, his x mark. [L. S.]

WILLIAM CHENOOK, his x mark. [L. S.]

CUSH KELLA, his x mark. [L. S.]

Lower De Chutes.

STOCK-ETLEY, his x mark. [L. S.]

ISO, his x mark. [L. S.]

Upper De Chutes.

SIMTUSTUS, his x mark. [L. S.]

LOCKSQUISSA, his x mark. [L. S.]

SHICK-AME, his x mark. [L. S.]

KUCK-UP, his x mark. [L. S.]

Tenino.

ALEXSEE, his x mark. [L. S.]

TALEKISH, his x mark. [L. S.]

Dog River Wasco.

WALACHIN, his x mark. [L. S.]

TAH SYMPH, his x mark. [L. S.]

ASH-NA-CHAT, his x mark. [L. S.]

CHE-WOT-NLETH, his x mark. [L. S.]

TE-CHO, his x mark. [L. S.]

SHA-QUALLY, his x mark. [L. S.]

LOUIS, his x mark. [L. S.]

YISE, his x mark. [L. S.]

STAMITE, his x mark. [L. S.]

TA-CHO, his x mark. [L. S.]

PENOP-TEYOT, his x mark. [L. S.]

ELOSH-KISH-KIE, his x mark. [L. S.]

AM. ZELIC, his x mark. [L. S.]

KE-CHAC, his x mark. [L. S.]

TANES SALMON, his x mark. [L. S.]

TA-KOS, his x mark. [L. S.]

DAVID, his x mark. [L. S.]

SOWAL-WE, his x mark. [L. S.]

POSTIE, his x mark. [L. S.]

YAWAN-SHEWIT, his x mark. [L. S.]

OWN-APS, his x mark. [L. S.]

KOSSA, his x mark. [L. S.]

PA-WASH-TI-MANE, his x mark. [L. S.]

MA-WE-NIT, his x mark. [L. S.]

TIPSO, his x mark. [L. S.]

JIM, his x mark. [L. S.]

PETER, his x mark. [L. S.]

NA-YOCT, his x mark. [L. S.]

WAL-TACOM, his x mark. [L. S.]

CHO-KALTH, his x mark. [L. S.]

PAL-STA, his x mark. [L. S.]

MISSION JOHN, his x mark. [L. S.]

LE KA-YA, his x mark. [L. S.]

LA-WIT-CHIN, his x mark. [L. S.]

LOW-LAS, his x mark. [L. S.]

THOMSON, his x mark. [L. S.]

CHARLEY, his x mark. [L. S.]

COPEFORNIA, his x mark. [L. S.]

WA-TOI-METTLA, his x mark. [L. S.]

KE-LA, his x mark. [L. S.]

PA-OW-NE, his x mark. [L. S.]

KUCK-UP, his x mark. [L. S.]

POYET, his x mark. [L. S.]

YA-WA-CLAX, his x mark. [L. S.]

TAM-CHA-WIT, his x mark. [L. S.]

TAM-MO-YO-CAM, his x mark. [L. S.]

WAS-CA-CAN, his x mark. [L. S.]

TALLE KISH, his x mark. [L. S.]

WALEME TOACH, his x mark. [L. S.]

SITE-WE-LOCH, his x mark. [L. S.]

MA-NI-NECT, his x mark. [L. S.]

PICH-KAN, his x mark. [L. S.]

POUH-QUE, his x mark. [L. S.]

EYE-EYA, his x mark. [L. S.]

KAM-KUS, his x mark. [L. S.]

SIM-YO, his x mark. [L. S.]

KAS-LA-CHIN, his x mark. [L. S.]

PIO-SHO-SHE, his x mark. [L. S.]

MOP-PA-MAN, his x mark. [L. S.]

SHO-ES, his x mark. [L. S.]

TA-MO-LITS, his x mark. [L. S.]

KA-LIM, his x mark. [L. S.]

TA-YES, his x mark. [L. S.]

WAS-EN-WAS, his x mark. [L. S.]

E-YATH KLOPPY, his x mark. [L. S.]

PADDY, his x mark. [L. S.]

STO-QUIN, his x mark. [L. S.]

CHARLEY-MAN, his x mark. [L. S.]

ILE-CHO, his x mark. [L. S.]

PATE-CHAM, his x mark. [L. S.]

YAN-CHE-WOC, his x mark. [L. S.]

YA-TOCH-LA-LE, his x mark. [L. S.]

ALPY, his x mark. [L. S.]

PICH, his x mark. [L. S.]

WILLIAM, his x mark. [L. S.]

PETER, his x mark. [L. S.]

ISCHA YA, his x mark. [L. S.]

GEORGE, his x mark. [L. S.]

JIM, his x mark. [L. S.]

SE-YA-LAS-KA, his x mark. [L. S.]

HA-LAI-KOLA, his x mark. [L. S.]

PIERRO, his x mark. [L. S.]

ASH-LO-WASH, his x mark. [L. S.]

PAYA-TILCH, his x mark. [L. S.]

SAE-PA-WALTCHA, his x mark. [L. S.]

SHALQUILKEY, his x mark. [L. S.]

WA-QUAL-LOL, his x mark. [L. S.]

SIM-KUI-KUI, his x mark. [L. S.]

WACHA-CHILEY, his x mark. [L. S.]

CHI-KAL-KIN, his x mark. [L. S.]

SQUA-YASH, his x mark. [L. S.]

SHA KA, his x mark. [L. S.]

KEAUI-SENE, his x mark. [L. S.]

CHE-CHIS, his x mark. [L. S.]

SCHE-NOWAY, his x mark. [L. S.]

SCHO-LEY, his x mark. [L. S.]

WE-YA-THLEY, his x mark. [L. S.]

PA-LEYATHLEY, his x mark. [L. S.]

KEYATH, his x mark. [L. S.]

I-POTH-PAL, his x mark. [L. S.]

S. KOLPS, his x mark. [L. S.]

WALIMTALIN, his x mark. [L. S.]

TASH WICK, his x mark. [L. S.]

HAWATCH-CAN, his x mark. [L. S.]

TA-WAIT-CLA, his x mark. [L. S.]

PATOCH SNORT, his x mark. [L. S.]

TACHINS, his x mark. [L. S.]

COMOCHAL, his x mark. [L. S.]

PASSAYEI, his x mark. [L. S.]

WATAN-CHA, his x mark. [L. S.]

TA-WASH, his x mark. [L. S.]

A-NOUTH-SHOT, his x mark. [L. S.]

HANWAKE, his x mark. [L. S.]

PATA-LA-SET, his x mark. [L. S.]

TASH-WEICT, his x mark. [L. S.]

WESCHA-MATOLLA, his x mark. [L. S.]

CHLE-MOCHLE-MO, his x mark. [L. S.]

QUAE-TUS, his x mark. [L. S.]

SKUILTS, his x mark. [L. S.]

PANOSPAM, his x mark. [L. S.]

STOLAMETA, his x mark. [L. S.]

TAMAYECHOTOTE, his x mark. [L. S.]

QUA-LOSH-KIN, his x mark. [L. S.]

WISKA KA, his x mark. [L. S.]

CHE-LO-THA, his x mark. [L. S.]

WETONE-YATH, his x mark. [L. S.]

WE-YA-LO-CHO-WIT, his x mark. [L. S.]

YOKA-NOLTH, his x mark. [L. S.]

WACHA-KA-POLLE, his x mark. [L. S.]

KON-NE, his x mark. [L. S.]

ASH-KA-WISH, his x mark. [L. S.]

PASQUAI, his x mark. [L. S.]

WASSO-KUI, his x mark. [L. S.]

QUAINO-SATH, his x mark. [L. S.]

CHA-YA-TEMA, his x mark. [L. S.]

WA-YA-LO-CHOL-WIT, his x mark. [L. S.]

FLITCH KUI KUI, his x mark. [L. S.]

WALCHA KAS, his x mark. [L. S.]

WATCH-TLA, his x mark. [L. S.]

ENIAS, his x mark. [L. S.]

Signed in presence of-

WM. C. MCKAY, *Secretary of Treaty, O. T.*

R. R. THOMPSON, *Indian Agent*.

R. B. METCALFE, *Indian Sub-Agent*.

C. MESPOTIE.

JOHN FLETT, *Interpreter*.

DOMINICK JONDRON, his x mark, *Interpreter*.

MATHEW DOFA, his x mark, *Interpreter*.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, eighteen hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the Chiefs and Headmen of the confederated tribes and bands of Indians, residing in Middle Oregon, signed the 25th day of June, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate as expressed in their resolution of the eighth of March, eighteen hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.
Done at the City of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-third.

[SEAL.]
JAMES BUCHANAN.

By the President:
LEWIS CASS,
Secretary of State.

12 Stat 963

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1362

§ 1362. Definitions

Effective: January 14, 2019
Currentness

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters

(A) In general

The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions

The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material

(A) In general

The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions

The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator

The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production

The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel

(A) In general

The term "recreational vessel" means any vessel that is--

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion

The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works

The term "treatment works" has the meaning given the term in section 1292 of this title.

(27) Green infrastructure

The term "green infrastructure" means the range of measures that use plant or soil systems, permeable pavement or other permeable surfaces or substrates, stormwater harvest and reuse, or landscaping to store, infiltrate, or evapotranspirate stormwater and reduce flows to sewer systems or to surface waters.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 502, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 886; amended Pub.L. 95-217, § 33(b), Dec. 27, 1977, 91 Stat. 1577; Pub.L. 100-4, Title V, §§ 502(a), 503, Feb. 4, 1987, 101 Stat. 75; Pub.L. 100-688, Title III, § 3202(a), Nov. 18, 1988, 102 Stat. 4154; Pub.L. 104-106, Div. A, Title III, § 325(c)(3), Feb. 10, 1996, 110 Stat. 259; Pub.L. 106-284, § 5, Oct. 10, 2000, 114 Stat. 875; Pub.L. 109-58, Title III, § 323, Aug. 8, 2005, 119 Stat. 694; Pub.L. 110-288, § 3, July 29, 2008, 122 Stat. 2650; Pub.L. 113-121, Title V, § 5012(b), June 10, 2014, 128 Stat. 1328; Pub.L. 115-436, § 5(a), Jan. 14, 2019, 132 Stat. 5561.)

Notes of Decisions (239)

33 U.S.C.A. § 1362, 33 USCA § 1362
Current through P.L. 116-158.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1365

§ 1365. Citizen suits

Effective: December 4, 2018
Currentness

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment

standards under section 1317 of this title; (5) a standard of performance or requirement under section 1322(p) of this title; (6) a certification under section 1341 of this title; (7) a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (8) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 505, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 888; amended Pub.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), Feb. 4, 1987, 101 Stat. 49, 73, 75, 76; Pub.L. 115-282, Title IX, § 903(c)(3), Dec. 4, 2018, 132 Stat. 4356.)

Notes of Decisions (881)

33 U.S.C.A. § 1365, 33 USCA § 1365
Current through P.L. 116-158.

Public Law 107–102
107th Congress

An Act

Dec. 27, 2001
[H.R. 483]

Regarding the use of the trust land and resources of the Confederated Tribes of the Warm Springs Reservation of Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AUTHORIZATION FOR 99-YEAR LEASES.

The first section of the Act entitled "An Act to authorize the leasing of restricted Indian lands for public, religious, educational, residential, business, and other purposes requiring the grant of long-term leases", approved August 9, 1955 (25 U.S.C. 415(a)), is amended—

(1) by inserting ", the reservation of the Confederated Tribes of the Warm Springs Reservation of Oregon," after "Spanish Grant")"; and

(2) by inserting "lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon" before ", lands held in trust for the Cherokee Nation of Oklahoma".

SEC. 2. USE OF CERTAIN TRUST LANDS AND RESOURCES FOR ECONOMIC DEVELOPMENT.

(a) APPROVAL OF AGREEMENT.—The use of tribal lands, resources, and other assets described in the document entitled "Long-Term Global Settlement and Compensation Agreement", dated April 12, 2000 (hereafter referred to as the "GSA"), entered into by the Department of the Interior, the Confederated Tribes of the Warm Springs Reservation of Oregon (in this section referred to as the "Tribes"), and the Portland General Electric Company, and in the Included Agreements, as attached to the GSA on April 12, 2000, and delivered to the Department of the Interior on that date, is approved and ratified. The authorization, execution, and delivery of the GSA is approved. In this section, the GSA and the Included Agreements are collectively referred to as the "Agreement". Any provision of Federal law which applies to tribal land, resources, or other assets (including proceeds derived therefrom) as a consequence of the Tribes' status as a federally recognized Indian tribe shall not—

(1) render the Agreement unenforceable or void against the parties; or

(2) prevent or restrict the Tribes from pledging, encumbering, or using funds or other assets that may be paid to or received by or on behalf of the Tribes in connection with the Agreement.

(b) AUTHORITY OF SECRETARY.—

(1) IN GENERAL.—Congress hereby deems that the Secretary of the Interior had and has the authority—

(A) to approve the Agreement; and

(B) to implement the provisions of the Agreement under which the Secretary has obligations as a party thereto.

(2) OTHER AGREEMENTS.—Any agreement approved by the Secretary prior to or after the date of the enactment of this Act under the authority used to approve the Agreement shall not require Congressional approval or ratification to be valid and binding on the parties thereto.

(c) RULES OF CONSTRUCTION.—

(1) SCOPE OF SECTION.—This section shall be construed as addressing only—

(A) the validity and enforceability of the Agreement with respect to provisions of Federal law referred to in section 2(a) of this Act; and

(B) approval for provisions of the Agreement and actions that are necessary to implement provisions of the Agreement that the parties may be required to obtain under Federal laws referred to in section 2(a) of this Act.

(2) AUTHORITY.—Nothing in this Act shall be construed to imply that the Secretary of the Interior did not have the authority under Federal law as in effect immediately before the enactment of this Act to approve the use of tribal lands, resources, or other assets in the manner described in the Agreement or in the implementation thereof.

SEC. 3. EFFECTIVE DATE. 25 USC 415 note.

This Act shall take effect as of April 12, 2000.

Approved December 27, 2001.

LEGISLATIVE HISTORY—H.R. 483:

HOUSE REPORTS: No. 107–257 (Comm. on Resources).
CONGRESSIONAL RECORD, Vol. 147 (2001):
Oct. 30, considered and passed House.
Dec. 13, considered and passed Senate.

○

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 19

Rule 19. Required Joinder of Parties

Currentness

(a) Persons Required to Be Joined if Feasible.

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(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.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

CREDIT(S)
(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES
1937 Adoption

Note to Subdivision (a). The first sentence with verbal differences (e.g., "united" interest for "joint" interest) is to be found in [former] Equity Rule 37 (Parties Generally--Intervention). Such compulsory joinder provisions are common. Compare Alaska Comp.Laws (1933) § 3392 (containing in same sentence a "class suit" provision); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-515 (immediately followed by "class suit" provisions, § 89-516). See also former Equity Rule 42 (Joint and Several Demands). For example of a proper case for involuntary plaintiff, see *Independent Wireless Telegraph Co. v. Radio Corp. of America,* 269 U.S. 459, 46 S.Ct. 166, 70 L.Ed. 357 (1926).

The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (b). For the substance of this rule see [former] Equity Rule 39 (Absence of Persons Who Would be Proper Parties) and U.S.C., Title 28, § 111 [now § 1391] (When part of several defendants cannot be served); *Camp v. Gress,* 250 U.S. 308, 39 S.Ct. 478, 63 L.Ed. 997 (1919). See also the second and third sentences of [former] Equity Rule 37 (Parties Generally--Intervention).

Note to Subdivision (c). For the substance of this rule see the fourth subdivision of [former] Equity Rule 25 (Bill of Complaint--Contents).

1966 Amendment

General Considerations

Whenever feasible, the persons materially interested in the subject of an action--see the more detailed description of these persons in the discussion of new subdivision (a) below--should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished--a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue--the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Original Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Colum.L.Rev. 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the rule was defective in its phrasing and did not point clearly to the proper basis of decision.

Textual defects.--(1) The expression "persons * * * who ought to be parties if complete relief is to be accorded between those already parties," appearing in original subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons.

(2) The word "indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable," in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in subdivision (a). See *United States v. Washington Inst. of Tech., Inc.,* 138 F.2d 25, 26 (3d Cir. 1943); cf. *Chidester v. City of Newark,* 162 F.2d 598 (3d Cir. 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, *Compulsory Joinder of Parties in Civil Actions,* 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was "subject to the jurisdiction of the court as to both service of process and venue," spoke of whether the person could be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression used "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was "indispensable" or "who ought to be [a] part[y]" itself deprived the court of the power to adjudicate as between

the parties already joined. See *Samuel Goldwyn, Inc. v. United Artists Corp.,* 113 F.2d 703, 707 (3d Cir. 1940); *McArthur v. Rosenbaum Co. of Pittsburgh,* 180 F.2d 617, 621 (3d Cir. 1949); cf. *Calcote v. Texas Pac. Coal & Oil Co.,* 157 F.2d 216 (5th Cir. 1946), cert. denied, 329 U.S. 782 (1946), noted in 56 Yale L.J. 1088 (1947); Reed, supra, 55 Mich.L.Rev. at 332-34.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general analysis of the cases showed that there was good reason for attempting to strengthen the rule. The literature also indicated how the rule should be reformed. See Reed, supra (discussion of the important case of *Shields v. Barrow,* 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L.Rev., p. 340 ff.); Hazard, supra; N.Y. Temporary Comm. on Courts, First Preliminary Report, Legis.Doc.1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, Twelfth Ann.Rep., Legis.Doc.1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, Final Report, Pt. III, p. 69 (1960); Note, *Indispensable Parties in the Federal Courts,* 65 Harv.L.Rev. 1050 (1952); *Developments in the Law--Multiparty Litigation in the Federal Courts,* 71 Harv.L.Rev. 874, 879 (1958); Mich.Gen.Court Rules, R. 205 (effective Jan. 1, 1963); N.Y.Civ.Prac.Law & Rules, § 1001 (effective Sept. 1, 1963).

The Amended Rule

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, supra, 55 Mich.L.Rev. at 330, 338; Note, supra, 65 Harv.L.Rev. at 1052-57; *Developments in the Law,* supra, 71 Harv.L.Rev. at 881-85.

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests--"joint," "united," "separable," or the like. See N.Y. Temporary Comm. on Courts, First Preliminary Report, supra; Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. See 3 Moore's *Federal Practice* 2153 (2d ed. 1963); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b).--When a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See *Roos v. Texas Co.,* 23 F.2d 171 (2d Cir. 1927), cert. denied 277 U.S. 587 (1928); *Niles-Bement-Pond Co. v. Iron Moulders' Union,* 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, supra; cf. *A. L. Smith Iron Co. v. Dickson,* 141 F.2d 3 (2d Cir. 1944); *Caldwell Mfg. Co. v. Unique Balance Co.,* 18 F.R.D. 258 (S.D.N.Y.1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward v. Deavers,* 203 F.2d 72 (D.C.Cir.1953); *Miller & Lux, Inc. v. Nickel,* 141 F.Supp. 41 (N.D.Calif.1956). On the use of "protective provisions," see *Roos v. Texas Co.,* supra; *Atwood v. Rhode Island Hosp. Trust Co.,* 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. *Stumpf v. Fidelity Gas Co.,* 294 F.2d 886 (9th Cir. 1961); and the general statement in *National Licorice Co. v. Labor Board,* 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See *Hudson v. Newell,* 172 F.2d 848, 852 mod., 176 F.2d 546 (5th Cir. 1949); *Gauss v. Kirk,* 198 F.2d 83, 86 (D.C.Cir. 1952); *Abel v. Brayton Flying Service, Inc.,* 248 F.2d 713, 716 (5th Cir. 1957) (suggestion of possibility of counter-claim under Rule 13(h)); cf. *Parker Rust-Proof Co. v. Western Union Tel. Co.,* 105 F.2d 976 (2d Cir. 1939), cert. denied, 308 U.S. 597 (1939). So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See *Developments in the Law,* supra, 71 Harv.L.Rev. at 882; Annot., *Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship,* 134 A.L.R. 335 (1941); *Johnson v. Middleton,* 175 F.2d 535 (7th Cir. 1949); *Kentucky Nat. Gas Corp. v. Duggins,* 165 F.2d 1011 (6th Cir. 1948); *McComb v. McCormack,* 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor--whether an "adequate" judgment can be rendered in the absence of a given person--calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. *Kroese v. General Steel Castings Corp.,* 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald v. Haynes,* 241 F.2d 417, 420 (3d Cir. 1957); *Fouke v. Schenewerk,* 197 F.2d 234, 236 (5th Cir. 1952); cf. *Warfield v. Marks,* 190 F.2d 178 (5th Cir. 1951).

The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others,

may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign community or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in *Johnson v. Kirkland,* 290 F.2d 440, 446-47 (5th Cir. 1961) (stressing the practical orientation of the decisions); *Shaughnessy v. Pedreiro,* 349 U.S. 48, 54 (1955). Recent legislation, P.L. 87-748, 76 Stat. 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

Notes of Decisions (2309)

Fed. Rules Civ. Proc. Rule 19, 28 U.S.C.A., FRCP Rule 19
Including Amendments Received Through 8-1-20

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