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

REPLY CROSS-APPEAL BRIEF OF THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

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INTRODUCTION[1]

DRA has pursued a litigation strategy throughout this action that is founded on two organizing principles. First, DRA has sought to isolate PGE as the sole defendant—presumably to fit the well-worn David and Goliath framing of a small, gritty environmental organization taking on a deep-pocketed utility company. The Tribe and its core sovereign and proprietary interests do not fit that neat but incomplete framing. And, rather than deal forthrightly with the issue, DRA has sought to obscure and minimize the Tribe's indispensability in ways that are both legally and factually incorrect as well as insensitive to the Tribe's ancient sovereign interests. Second, DRA has failed to provide a candid description of the relief and particular remedy that it seeks. Instead, it has prematurely sought (and continues to seek) a judicial determination of liability prior to any meaningful consideration of a remedy. PGE characterizes DRA's approach as "head-in-the-sand." Dkt. 39 at 50. But there is another consideration: DRA knows that there is no cognizable, justiciable remedy that will result in compliance with all water quality standards and fish passage objectives at all times. And so, DRA surely understands that, if it concedes this point, its grievance is nothing more than a non-justiciable policy

[1] Unless noted otherwise, capitalized terms shall have the meaning ascribed to them in the Tribe's Second Brief on Cross-Appeal. *See* Dkt. 41. Citations to "FER" refer to "Further Excepts of Record" filed by DRA.

disagreement with the priorities expressed in the water quality certification issued by DEQ, including the Tribe's sovereign and treaty-reserved rights to a harvestable population of anadromous fish throughout the Deschutes River Basin. In all events, DRA has arrived at a jurisdictional dead end. The Court must remand the appeal to the district court for dismissal.

ARGUMENT

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

A. PGE Is Operator of Only the Pelton and Round Butte Facilities

DRA wrongly asserts that the Tribe has assigned to PGE all operational authority for the entire Pelton Project. *See* Dkt. 58-1 at 26. The Ownership and Operation Agreement for the Pelton and Round Butte Dams and Generating Facilities ("O & O Agreement") entered into by the Tribe and PGE designates PGE as "Operator" to "operate and maintain the Project." ER 226–27. Under the O & O Agreement, however, the term "Project" includes the Pelton and Round Butte facilities but does not include the Reregulating Dam generating facilities. SER 192, ¶ 21. The district court correctly understood this fact. The findings of fact in its June 11, 2018, Opinion and Order are consistent with this understanding. SER 3. Those findings may not be set aside absent an abuse of discretion. *Cachil Dehe Band of Wintun Indians of the Colusa Cmty. v. California*, 547 F.3d 962, 969 (9th Cir. 2008). No such abuse of discretion exists here.

The district court recognized that the Tribe has not only proprietary but also *sovereign* interests in the subject of the action. SER 10. The Tribe has a proprietary interest as a co-owner and joint licensee of the Pelton Project. *Id.* The Tribe as a sovereign has interests in exercising its treaty-reserved fishing rights and its governmental authority to regulate activities and resources within the Warm Springs Reservation. *Id.* The district court rightly rejected DRA's effort to limit the framing of the action to the question of whether "PGE is operating the Pelton Project in violation of" the Section 401 certification issued by DEQ, finding DRA's effort "unpersuasive." *Id.*

The district court concluded that the Tribe is a necessary party to this action because 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.* DRA's effort to minimize the Tribe's proprietary and sovereign interests in the subject of this action should be rejected for the same reasons identified by the district court. DRA cannot wish away those solemn interests. The Tribe's sovereignty pre-dates the founding of this nation and is expressly recognized by the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); U.S. Const., Art. I., § 8, cl. 3. The district court correctly understood that the Tribe's constitutionally-recognized, ancient sovereignty is at the heart of this action when it held that the Tribe is a necessary party under Rule 19.

B. The Tribe Has Not Waived Its Sovereign Immunity

It is settled law that tribal immunity from suit is the "baseline position." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 790 (2014). There are "only two ways in which a tribe may lose its immunity from suit." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016). Congress may "abrogate" tribal immunity, or a tribe itself may "waive" immunity.[2] *Id.*

In its Third Brief on Cross-Appeal, DRA argues for the first time that the Tribe has waived its sovereign immunity for purposes of this action. Dkt. 58-1 at 27; *see* SER 13 ("No party argues that the Tribe has waived its immunity in this case.") This argument comes too late; and, in any event, DRA is mistaken.

As a general rule, this Court declines to consider arguments raised for the first time on appeal. *Spurlock v. F.B.I.*, 69 F.3d 1010, 1017 (9th Cir. 1995). Exceptions to that rule include circumstances where appellate review is "necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process," where a new issue arises because of a change in the law while the appeal is pending, or where the issue is "purely one of law, because the necessary facts have been fully developed." *Id.* Because none of those circumstances exist in this case, the Court

[2] The Tribe addresses DRA's argument that Congress abrogated tribal sovereign immunity for the purpose of CWA citizen suits in Section I.D. of this brief.

should decline to consider DRA's untimely argument that the Tribe waived its sovereign immunity for purposes of this citizen suit action.

Even if DRA's argument was properly before the Court (it is not), it is legally incorrect. The Tribe has not waived its sovereign immunity here. A waiver of tribal sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). A tribe's expression must "manifest the tribe's intent to surrender immunity in 'clear' and unmistakable terms." *See Bodi*, 832 F.3d at 1016 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)). Absent a clear and unequivocally expressed waiver by a tribe (or congressional abrogation), tribal sovereign immunity bars a suit against the tribe. *Id.*

In 2002, the Tribe, PGE, and DEQ entered into the "Clean Water Act Section 401 Implementation Agreement Pelton Round Butte Hydroelectric Project" ("Implementation Agreement" or "Agreement"). FER 27–35. The Agreement provides that "[n]one of the Parties … may assert … sovereign immunity … to any other Party's authority or standing to seek any remedies set forth in this Agreement …" FER 33 (Agreement, § 4e.). The Agreement also contains general stipulations and reservations, including that: "*The Agreement does not create any right or benefit for third parties and is enforceable only by [DEQ], PGE, and [the Tribe]*. FER 31 (Agreement, § 3a.) (emphasis added).

The scope of any waiver of the Tribe's sovereign immunity in the Implementation Agreement is unmistakably limited to citizen suits brought by *DEQ*. FER 33 (Agreement, § 4d(3).). DRA does not argue otherwise. Yet, DRA contends that it ought to be able to stand in DEQ's "shoes to enforce the CWA" and cites subparagraph (b)(1)(B) of the CWA's citizen-suit statute. Dkt. 58-1 at 27 (citing 33 U.S.C. § 1365(b)(1)(B)). Unfortunately for DRA, that subparagraph does not allow a citizen to commence an action on behalf of DEQ; instead, it merely allows a citizen to "intervene" in an action already commenced by DEQ as an agency. 33 U.S.C. § 1365(b)(1)(B). Any suggestion to the contrary by DRA is incorrect as a matter of law.

In addition to conjuring a non-existent legal right to stand in the shoes of DEQ, DRA ignores the clear limitation in the Implementation Agreement. The Agreement expressly provides that it "does not create any right or benefit for third parties and is enforceable only by" DEQ, PGE and the Tribe. FER 31 (Agreement, § 3a.). DRA's decision to ignore this contract language is contrary to fundamental principles of contract interpretation. More specifically, the Implementation Agreement must be read as a whole integrated document. *See generally Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) (written contract must be interpreted as a whole and every part interpreted with reference to the whole), *amended on denial of rehearing*, 203 F.3d 1175 (9th Cir. 2000) (mem.). As a

corollary, the Implementation Agreement must not be read in a way that renders particular terms—such as the limitation quoted above—as "meaningless or surplusage." *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1206 (9th Cir. 2013). By ignoring the express limitation of rights in the Implementation Agreement, DRA runs afoul of both of those fundamental principles of contract interpretation. That error by DRA further undercuts its argument.

Finally, DRA's assertion that the Implementation Agreement provides legal authority for it to stand in the "shoes" of DEQ to maintain this action against the Tribe contravenes the Supreme Court's essential mandate that waivers of tribal sovereign immunity must be "unequivocally expressed" and will not be implied. *Santa Clara Pueblo*, 436 U.S. at 58. The Tribe has never unequivocally expressed or otherwise manifested any intent to surrender its immunity to the general public or anyone other than the parties to the Implementation Agreement. DRA's attempt to bootstrap a waiver of sovereign immunity for this action out of unrelated contractual rights held by DEQ must be rejected.

C. The Tribe Is an Indispensable Party, and the "Public Rights" Exception Does Not Apply

As part of its persistent effort to obscure the Tribe's sovereign and treaty-reserved interests in this action, DRA contends that the Tribe is not an indispensable

party by exclusively focusing on the Tribe's proprietary interests in the action.[3] Dkt. 58-1 at 27–31. But DRA fails to undertake a clear analysis of the Ninth Circuit's four-factor test for assessing whether an absent party is indispensable. *See Dawavendewa v. Salt River Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1161–62 (9th Cir. 2002). DRA's scattershot argument, instead, combines a misunderstanding of the Ninth Circuit's indispensability test with a belated effort to raise the "public rights" exception to the traditional Rule 19 joinder analysis. For the reasons below, the Tribe is indispensable. And, even if it had been timely raised, the "public rights" exception neither applies nor supports a contrary conclusion.

The prejudice to the absent party is the first factor considered under the Ninth Circuit's indispensability analysis. *Dawavendewa*, 276 F.3d at 1161. DRA incorrectly argues that the Tribe's participation as an *amicus curiae* mitigates the prejudice to it as an absent party. The Ninth Circuit has already rejected that proposition based on *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986). *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990). In *Wichita and Affiliated Tribes*, the D.C. Circuit declined to hold

[3] DRA also reasserts its factually-flawed argument that the O&O Agreement designates PGE as operator of the entire Pelton Project, and, therefore, the Tribe is not a necessary party for purposes of Rule 19. Dkt. 58-1 at 29. The Tribe has already addressed this argument in Section I.A, *infra*.

that *amicus* status is "sufficient to mitigate the prejudice of nonjoinder." 788 F.2d at 775. The court observed that if *amicus* status was sufficient, "non-joinder would never be a problem" because a court could "always allow the non-joinable party to file amicus briefs." *Id.* And, the court rightly recognized that being "party to a suit carries with it significant advantages beyond the amicus' opportunities," including "the ability to appeal an adverse judgment." *Id.* This recognition is particularly apt given that the Tribe availed itself of the right to appeal in this case. Ultimately, as the Ninth Circuit has already recognized, *amicus* status is insufficient to insulate the Tribe and its significant sovereign interests from prejudice here.

The second factor that must be considered is whether relief can be shaped to lessen the prejudice to the absent party. *Dawavendewa*, 276 F.3d at 1162. Because DRA has steadfastly refused to provide an adequate description of the relief it seeks, analyzing this factor has proven challenging. DRA has largely retreated to legalistic arguments asserting that it merely seeks "compliance" with the requirements of the DEQ water quality certification without providing a comprehensive description of what "compliance" looks like to DRA and how it could be achieved, if at all. *See, e.g.*, Dkt. 58-1 at 28–29. Without a baseline definition of the relief it seeks, DRA has made it impossible to conclude that this unspecified relief could possibly be shaped to lessen the prejudice to the Tribe.

DRA has also chided PGE and the Tribe for asserting that DRA desires to return to a largely bottom water withdrawal operating regime similar to that which existed during the original license period. *See* Dkt. 58-1 at 28. Yet, PGE and the Tribe's assertions align with the limited evidence introduced by DRA in this action.[4] DRA has submitted a declaration stating "[t]here is no doubt that *returning* to bottom draw at Round Butte Dam would strongly resolve both the problems in the lower river and *reduce* violations of the [water quality certification issued by DEQ]." SER 245, ¶ 40 (emphasis added). It submitted another declaration stating "[b]efore the SWW tower was completed, cold, clean and clear water from the bottom of Lake Billy Chinook was always passed downstream …." SER 206, ¶ 12.

DRA has since distanced itself from such statements, likely because it is undisputed that the Pelton Project did not meet water quality standards during the original license term and caused extirpation of anadromous fish above the Project. SER 193, ¶ 24; SER 162. The crux of DRA's untenable position is that it does not

[4] In footnote 8 of its Third Brief on Cross-Appeal, DRA asks the Court to take judicial notice of certain documents. The Tribe objects. Those documents are not properly the subject of judicial notice pursuant to Fed. R. Evid. 201. Each of those documents are advocacy pieces or fundraising appeals authored by representatives of DRA. The ostensible facts in those documents are not generally known, and the Tribe disputes their accuracy. The Tribe also objects to the extent that they contain opinions for which DRA has failed to lay a proper foundation pursuant to Fed. R. Evid. 701 and 702.

truly seek strict compliance with water quality standards. Rather, DRA is pursuing an operational change to the Pelton Project *sub rosa* that will resurrect the impaired ecological function of the Deschutes River that existed during the original license period. The problem for DRA, however, is that the extirpation of anadromous fish above the Pelton Project during the original license term impaired the Tribe's legally-enforceable, treaty-reserved fishing rights that entitle the Tribe to a harvestable population of anadromous fish in the Deschutes River. *See United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017), *aff'd by equally div'd court* 138 S.Ct. 1832 (2018) (tribal treaty-reserved rights to take fish include right to a harvestable population of fish). The district court rightly recognized that any relief that could be awarded in this action necessarily involves changing water quality and "risk[s] impairing the Tribe's right to fish in and around the Deschutes River Basin," as well as the Tribe's sovereign interest in exercising governmental power over the natural resources within the Warm Springs Reservation. SER 11.

All day, every day, the Pelton Project discharges the commingled waters of the State and waters of the Tribe. And the Project is located partially within the Warm Springs Reservation. DEQ has no authority over the sovereign waters and territory of Tribe. It is for that reason that DEQ and its tribal counterpart, the Tribe's Water Control Board ("WCB"), coordinated the issuance of their water quality certifications and implementation of the same. The WCB water quality certification

is not part of this action, yet any operational change will necessarily affect the sovereign waters and territory of the Tribe. There is simply no way to shape relief that would lessen the prejudice to the Tribe in its absence.

DRA also briefly addresses, in a footnote, the fourth factor of the Ninth Circuit indispensability test, which focuses on the availability of an alternative forum. Dkt. 58-1 at 30, n. 9. Citing *Friends of the Cowlitz v. Federal Energy Regulatory Commission*, 253 F.3d 1161 (9th Cir. 2001), DRA asserts without explanation that FERC is "no viable alternative forum at all." *Id. Friends of the Cowlitz* contains no discussion or analysis of the Rule 19(b) indispensability test, so it is difficult to understand how it supports DRA's argument here. Moreover, the decision has been amended and superseded. *See Friends of the Cowlitz v. Federal Energy Regulatory Commission*, 282 F.3d 609 (9th Cir. 2002). Also, DRA does not address the fact that the interest in tribal immunity generally outweighs the lack of an alternative forum for joinder purposes. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002). DRA simply fails to articulate any basis to controvert the conclusion that this factor weighs in favor of dismissal of the action.

Finally, DRA summarily argues that the "public rights" exception to traditional joinder rules applies in this case. Dkt. 58-1 at 30–31. DRA raises this argument for the first time in its Third Brief on Cross-Appeal, and, as such, the

argument is not timely. *Spurlock*, 69 F.3d at 1017. The Court should decline to consider this argument.

Even if the "public rights" exception was properly before the court, it does not apply. While the contours of the exception are not well-defined, it does not apply if the litigation "destroy[s] the legal entitlements of the absent parties." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). In *Kescoli*, the Ninth Circuit concluded that the litigation in that case destroyed the legal entitlements of the absent tribal parties, at least in part, because it threatened their "sovereignty by attempting to disrupt their ability to govern themselves and to determine what is in their best interests … ." *Id.* at 1312. As in *Kescoli*, this action threatens the Tribe's sovereignty at its core by attempting to disrupt the Tribe's right to govern itself by exercising governmental power over the natural resources of the Warm Springs Reservation. This action also threatens the Tribe's treaty-reserved rights to have a harvestable population of fish in the Deschutes River Basin, a right recognized by the Supreme Court over a century ago as no "less necessary to the existence of the Indians than the atmosphere they breathe[ ]." *United States v. Winans*, 198 U.S. 371, 381 (1905). The public rights exception does not apply here; the Tribe is an indispensable party.

D. Congress Has Not Unequivocally Abrogated the Tribe's Sovereign Immunity

Common law immunity from suit is a "core aspect[] of tribal sovereignty." *Bay Mills Indian Community*, 572 U.S. at 788. Such immunity "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 has the power to abrogate tribal sovereign immunity, but absent congressional abrogation, such immunity remains intact as the "baseline position." *Bay Mills Indian Community*, 572 U.S. at 790. Because federal courts will not "lightly assume" Congress "intends to undermine self-government," Congress must "'unequivocally express'" its intent to abrogate sovereign immunity. *Id.* (quoting *C & L Enters., Inc.*, 532 U.S. at 418). Congressional abrogation of tribal sovereign immunity requires "clear evidence" that Congress *both* considered the issue *and* chose abrogation of tribal immunity. *See United States v. Dion*, 476 U.S. 734, 739–40 (1986) (applying standard to question of whether federal act abrogated tribal treaty rights). Such evidence is lacking here, and the district court erred in concluding otherwise.

The best evidence of congressional intent is the text of the statute at issue. *Patagonia Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 517 F.2d 803, 813 (9th Cir. 1975); *see also United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020)

(statutory interpretation begins with text of statute). The CWA citizen suit statute provides, in part, that a 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 of the Constitution) … ." 33 U.S.C. § 1365(a)(1). There is no doubt that this part of the statute—which plainly contemplates a waiver of sovereign immunity with respect to the United States (and, less clearly, States)—is silent with respect to Indian tribes. There is also no question that had Congress considered and chosen to abrogate tribal sovereign immunity, the most unequivocal way to express its intent would have been to include Indian tribes in the parenthetical list of sovereign entities—*i.e.*, the United States and States—against whom a citizen suit could be brought. It did not do so, and this omission supports the conclusion that no abrogation of tribal sovereign immunity was intended. But the analysis does not stop there. *Pacheco*, 977 F.3d at 768 (statute must be interpreted in context of whole law).

The next question to address is whether there is clear evidence that Congress otherwise expressed an intent to include Indian tribes within the meaning of "any person" against whom a citizen suit may be brought. In the absence of contrary evidence, courts presume that Congress intended that the words used be given their "plain and ordinary meaning." *Pacheco*, 977 F.3d at 767. The plain and ordinary meaning of "person" does not include sovereign entities. *Vermont Agency of Natural*

Resources v. United States ex rel. Stevens, 529 U.S. 765, 780 (2000). The citizen suit statute itself, then, contains no evidence that Congress considered and unequivocally chose to abrogate tribal sovereign immunity for purposes of CWA citizen suits.

Elsewhere, however, the CWA contains a definition of "person" for purposes of the CWA. *See* 33 U.S.C. § 1362(5) ("The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."). Notably, however, the statutory definition that Congress chose does not include Indian tribes. *Id.* Thus, in addition to omitting Indian tribes in the citizen suit statute's parenthetical listing of sovereign entities, Congress did not include Indian tribes in its statutory definition of "person." Two steps into the interpretive analysis, there is still no evidence (let alone clear evidence) that Congress *considered* abrogating tribal sovereign immunity, much less that it chose to do so.

While the statutory definition does not contain Indian tribes, it does include "municipality" in addition to eight other "persons" specifically enumerated. *See* 33 U.S.C. § 1362(5). The inclusion of municipality in the statutory definition of person, by itself, does not have any bearing on the question of whether Congress considered and unequivocally chose to abrogate tribal sovereign immunity for purposes of CWA citizen suits. Indian tribes are not municipalities under any ordinary understanding of that word, including in the constitutional sense. They are

constitutionally-recognized sovereign entities; they are "domestic dependent nations" with "inherent sovereign authority," including immunity from suit—which municipalities do not enjoy. *Compare Bay Mills Indian Community*, 572 U.S. at 788 *with Pittman v. Oregon*, 509 F.3d 1065, 1071 (9th Cir. 2007) ("Municipalities … are not entitled to sovereign immunity in federal court.").

Even so, Congress defined "municipality" for purposes of the CWA, and that definition includes "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 a designated and approved management agency under section 1288 of this title" in addition to "an Indian tribe or an authorized Indian tribal organization." 33 U.S.C. § 1362(4). DRA enters the statutory analysis at this point and tries to explain this curious congressional choice in a manner that would allow it to join the Tribe in this action. DRA argues that the inclusion of "Indian tribe" in the definition of "municipality," which in turn is included in the statutory definition of "person," is unambiguous evidence of Congressional intent to abrogate tribal sovereign immunity. Dkt. 58-1 at 31. But this "opaque definitional chain," as described by PGE, does not satisfy the rigorous standard of providing clear evidence that Congress actually *considered and chose* to abrogate tribal sovereign immunity.

As noted, had Congress actually considered and chosen to abrogate tribal sovereign immunity it most naturally would have provided unequivocal evidence of its intent by including Indian tribes in the text of the citizen suit statute, along with the United States and States. In other contexts, Congress has specifically identified Indian tribes along with the federal government when it intends to refer to the tribes, such as in its enumeration of sovereigns excluded from the definition of "employer" in 42 U.S.C. § 12111(5)(B)(1). *See Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1172 (9th Cir. 1999). And courts will not rewrite Congress's list of government entities that are within or beyond the scope of a statutory definition based on the principle *expressio unius est exclusio alterius*. *Id.* at 1179. The mere fact that Congress has cross-referenced and incorporated some parts of a statutory scheme into another provision does not mean that a wholesale incorporation of terms is warranted without regard for the context and mechanics of different statutory provisions. *Id.* All of this is to say that Congress would have listed Indian tribes in the CWA's citizen suit statute if it intended to include them in the category of sovereign entities subject to suit. The fact that Congress set forth a separate definition of "person" in 33 U.S.C. § 1362(5) does not justify rote incorporation of this general definition into provisions, such as the citizen suit provision, to supplant the specific, localized definition of person already provided at 33 U.S.C. § 1365(a)(1).

DRA explains that "[t]here was no reason to include" Indian tribes in the text of the citizen suit statute itself because the "existing definition" of municipality already includes Indian tribes. Dkt. 58-1 at 36. But DRA is wrong. The citizen suit statute and the addition of Indian tribes to the definition of municipality were part of the 1972 amendments to the CWA. *Compare* Act of June 30, 1948, ch. 758, 62 Stat. 1155 *with* Pub. L. No. 92-500, 86 Stat. 816 (1972). Thus, the definition of municipality that includes Indian tribes does not predate the CWA citizen suit statute. Congress had a blank slate in 1972, and there is no rational explanation for not including Indian tribes in the text of the citizen suit statute itself if Congress intended to abrogate tribal sovereign immunity.

Nor has DRA meaningfully considered why Congress did not include Indian tribes in the second most natural location—in the statutory definition providing for nine specifically enumerated "persons." *See* 33 U.S.C. § 1362(5). Again, if Congress had considered and chosen to abrogate tribal sovereign immunity for CWA citizen suits, why not include Indian tribes in the definition of person as the primary alternative to including Indian tribes in the citizen suit statute itself? DRA seems unbothered by this question, perhaps because of its mistaken belief that a definition of municipality that includes Indian tribes predated the 1972 amendments to the CWA.

The definition of "municipality" is undeniably two steps removed from the text of the citizen suit statute and, consequently, is an unlikely source for locating an implicit abrogation of tribal sovereign immunity for citizen suits without an express indication of intent to do so. Congress understands how to effectively abrogate immunity—it did so with respect to the United States in the text of the citizen suit statute itself. Especially given that municipalities and Indian tribes are constitutionally distinct, DRA's conclusion that Congress unambiguously abrogated tribal sovereign immunity through a circuitous definitional chain is a logically and legally fallacious assertion.

DRA's view that Congress considered and chose to abrogate tribal sovereign immunity by including Indian tribes in the definition of municipality, which is in turn contained in the definition of person, is not a reasonable interpretation of the citizen suit statute. The more plausible and reasonable interpretation of the statute is that Congress included Indian tribes in the definition of municipality for other reasons and never considered (let alone intended) any implications to tribal sovereign immunity. Unlike Indian tribes, municipalities are not entitled sovereign immunity in federal court. *Pittman v. Oregon*, 509 F.3d at 1071. So Congress, it seems, was not considering sovereign immunity at all when it included "municipality" in the definition of "person"—it seems even less likely that it

considered sovereign immunity when it later included "Indian tribes" in the definition of "municipality."

The most that could possibly be drawn from the foregoing statutory scheme is that it is ambiguous. *See Alaska Wilderness League v. U.S. E.P.A.*, 727 F.3d 934, 938 (9th Cir. 2013) (statute is ambiguous if susceptible to more than one reasonable interpretation). An ambiguous statutory interpretation, however, is not clear evidence that Congress considered and chose to abrogate sovereign immunity. And when a statute is ambiguous, courts must construe it liberally in favor of the Indians. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Thus, there must be more before this Court may conclude that the CWA contains clear evidence that Congress considered and chose to abrogate tribal sovereign immunity for citizen suits. *Id.*

Finally, in contrast to the approach taken by DRA, the Tribe has provided an extensive analysis of the legislative history of the CWA—including the citizen suit statute and the statutory definitions of "person" and "municipality"—in its Second Brief on Cross-Appeal. Dkt. 41 at 41–46. The Tribe reiterates that courts may consult such extra-textual sources to clear up ambiguity about a statute's original meaning. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2468 (2020). The Tribe does not rehash its analysis here, except to briefly respond to DRA's argument relating to the fact that

the CWA citizen suit statute was modeled after the citizen suit in the Clean Air Act Amendments of 1970 ("CAA").

Unlike the CWA, Indian tribes are not included in the CAA definition of "municipality." DRA, thus, argues that Congress's inclusion of Indian tribes in the definition of municipality for purposes of the CWA is a "tidbit of history" that "strengthen[s] the case for CWA abrogation, irrespective of whether Tribes enjoy immunity to suit under the CAA." Dkt. 58-1 at 40. DRA's argument fails for several reasons:

1. DRA offers only a weak assertion that "we can presume" that Congress "would have understood" the implications of the circuitous definitional chain contained within the CWA amendments—but it offers no evidence that Congress was *actually* aware of those implications, or that it in fact made a conscious decision to abrogate tribal sovereign immunity;

2. DRA ignores the fact that the legislative history is devoid of any such evidence that Congress made a considered decision to abrogate tribal sovereign immunity for purposes of CWA citizen suits;

3. Third, DRA does not meaningfully account for what the legislative history does suggest—that Congress included Indian tribes in the definition of municipality for grant eligibility purposes as reflected by the numerous references to municipalities in provisions centering on eligibility for grants and other forms of

funding for local water treatment and infrastructure projects. *See*, *e.g.*, 33 U.S.C. §§ 1255(a) and (i), 1274(a), 1281(g), 1293(a), 1301(a), and 1383(c); and

4. DRA ignores the maxim of statutory construction counseling courts to avoid construing statutes in a manner that leads to absurd results. *Pacheco*, 977 F.3d at 767. DRA's argument would lead to the absurd conclusion that Congress intended to subject Indian tribes to citizen suits with respect to water but not air. There is no rational justification or policy reason for such a distinction. To be sure, the legislative history contains no evidence that Congress made a considered and intentional decision to manifest such a statutory scheme and impact tribal sovereignty and sovereign immunity in that way.

The cases relied upon by the district court and DRA do not support a different conclusion. *See Alt. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F.Supp. 608 (D. Ariz. 1993); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989); *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174 (10th Cir. 1999); *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013). In the Second Brief on Cross-Appeal, the Tribe provided a detailed analysis of each case explaining why they do not control the outcome here. DRA does not offer a meaningful rebuttal. The Tribe stands on the analysis in its earlier brief.

In sum, 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.

II. THIS APPEAL MUST BE DISMISSED BECAUSE DRA LACKS ARTICLE III STANDING[5]

To have standing under Article III of the Constitution, a plaintiff must have "(1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision." *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020). Not all claims are redressable in federal court; rather, a plaintiff must show that the relief sought is "both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Id.* at 1170. This is where DRA's claim falls down.

By seeking a judicial liability determination before engaging in any meaningful consideration of a remedy, DRA has failed to establish (as is its burden) that there is any judicial relief that would redress its alleged injuries. The district court found that it is "sometimes impossible for the Project to simultaneously

[5] The Tribe expressly endorses and incorporates by reference Section I of the Reply Brief on Cross-Appeal filed by PGE.

achieve all water quality and fish passage objectives," ER 28. DRA does not dispute that fact, but instead broadly argues that it is PGE and the Tribe's responsibility to find a way to comply with "all applicable water quality standards, and with fish passage." ER 28, n. 8. But, as the district court found, that is not what is required. ER 23-24. The DEQ water quality certification requires only that Defendants "reduce" water quality exceedances by "using the techniques identified to work toward compliance, and following the overall mandate to use adaptive management." *Id.*

DRA knows that there is no judicial relief that will achieve all applicable water quality standards and fish passage objectives at all times. Yet, DRA apparently seeks judicial relief to do the impossible. DRA offers that the injunction it seeks would compel "a reduction in warm water release when temperature or pH approach relevant limits, or increasing spill when Project discharge DO approaches the minimum." Dkt. 58-1 at 17. But those types of responses are already being carried out through adaptive management, and do not result in perfect compliance. *See, e.g.* ER 28-29. If DRA wants something more or different, it must precisely say what that is and how it will improve conditions.

DRA has, instead, strategically reserved for a future time the revelation of its preferred method of "compliance," knowing that the Pelton Project cannot simultaneously achieve all applicable water quality standards and fish passage

objectives. Properly framed, DRA's legal claims are a policy disagreement with the choices contained in the DEQ water quality certification and the FERC license, which, again prioritize the Tribe's sovereign and treaty-reserved rights to a harvestable population of anadromous fish.

DRA's policy disagreements with DEQ and FERC do not give rise to a cognizable claim under the CWA citizen suit statute. The remedy sought by DRA is simply not "within the district court's power to award." *Juliana v. United States*, 947 F.3d at 1170. Because DRA's claim is not redressable, it lacks standing under Article III of the Constitution and the claim must be dismissed.

CONCLUSION

DRA has been unable to genuinely account for the Tribe's sacred, treaty-reserved right to a sustainable harvest of fish in its traditional watershed, as well as its fundamental right as a sovereign to exercise governmental authority over the land and resources within the Warm Springs Reservation. It also misapprehends the Tribe's sovereign immunity as something that can be waived or abrogated by implication. DRA's action not only risks grave harm to the interests of the Tribe, but it does so while attempting to exclude the Tribe from defending its rights in the process. The Tribe, however, is an indispensable party whose sovereign immunity, still intact, prevents its joinder in this suit. For that reason, and because DRA has

failed to articulate a judicially administrable remedy that would better advance the achievement of water quality standards *and* fish passage objectives, this Court should remand for dismissal of the action.

Date: December 16, 2020

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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 6,302 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: December 16, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 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: December 16, 2020.

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