Nos. 18-35867, -35932, -35933

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

DESCHUTES RIVER ALLIANCE,
PLAINTIFF-APPELLANT/CROSS-APPELLEE,
v.
PORTLAND GENERAL ELECTRIC COMPANY AND THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,
DEFENDANTS-APPELLEES/CROSS-APPELLANTS.

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

REPLY CROSS-APPEAL BRIEF OF PORTLAND GENERAL ELECTRIC COMPANY

BETH S. GINSBERG
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 386-7581
beth.ginsberg@stoel.com

JAMES R. GEORGE
PORTLAND GENERAL ELECTRIC CO.
121 SW Salmon Street,
1WTC1301
Portland, OR 97204
(503) 464-7611
Richard.George@pgn.com

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Defendant-Appellee/Cross-Appellant Portland General Electric Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes And Rules

Other Authorities

INTRODUCTION

Although Portland General Electric Company ("Portland General") strongly believes that the district court's summary-judgment order correctly interpreted the Section 401 Certification at issue here, in its cross-appeal, Portland General explained that the district court should never have reached the merits of this case for two independent jurisdictional reasons. First, the Deschutes River Alliance ("the Alliance") lacks Article III standing because the Alliance never even attempted to explain what judicially administrable remedy would redress its claimed harms. Second, as explained in more detail by the Confederated Tribes of the Warm Springs Reservation of Oregon ("the Tribe"), tribal immunity bars this lawsuit because the opaque definitional chain that the Alliance relied upon does not satisfy the demanding standard for unequivocal abrogation of tribal immunity.

The Alliance's Third Brief On Cross Appeal ("Alliance Reply Br."), Dkt. 58-1, does not offer an adequate response to either of these independent jurisdictional failings. On redressability, the Alliance primarily asserts that the remedy it has asked for here is for Portland General and the Tribe to "comply with [the Section 401] Certification" in

order to reduce exceedances of water quality standards, Alliance Reply Br. 7, but the Alliance has no answer for the district court's factual finding—based upon undisputed record evidence—that Portland General and the Tribe, consistent with the Certification, are *already* adaptively managing the Pelton Round Butte Hydroelectric Project ("Pelton Project" or "the Project") to reduce exceedances to the maximum extent feasible. As for tribal immunity, the Alliance's claim that Congress abrogated the Tribe's sovereign immunity in 33 U.S.C. § 1365(a) fares no better, as the Alliance primarily relies upon citations of out-of-circuit cases without offering a meaningful response to how this statute meets the "unequivocal," "clear," "perfect confidence" abrogation standard that this Court recently articulated and applied in *Daniel v. National Park Service*, 891 F.3d 762, 769, 774 (9th Cir. 2018).

ARGUMENT

I. The Alliance Lacks Article III Standing Because It Still Is Unable To Articulate What Judicially Administrable Remedy Would Redress Its Claimed Harms

The Alliance failed to carry its burden of establishing Article III standing under both essential redressability elements. *See* Portland Gen. Elec. Co. Second Br. On Cross-Appeal ("PGE Br.") 37–47, Dkt. 39.

Those elements require a plaintiff to show that "a favorable judicial decision would [actually] require the defendant to redress the plaintiff's claimed injury," and that the "federal court [actually has] the power to issue such relief." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018); PGE Br. 39–40.

Under the first redressability element, the Alliance did not demonstrate below that a "favorable judicial decision would . . . require the defendant to redress the plaintiff's claimed injury." *Brown*, 902 F.3d at 1083. The Alliance brought this case to vindicate its claimed interest in the water quality and fish population of the Deschutes River. Excerpts Of Record ("ER") 272–73. Yet, the Alliance failed entirely to show how Portland General and the Tribe could *better* achieve those interests under the Section 401 Certification, beyond their current efforts. PGE Br. 42–43. While the Alliance wants Portland General and the Tribe to eliminate all exceedances of water quality standards, in any given day, the district court correctly concluded—based upon undisputed record evidence—that this would be "sometimes impossible" because "[t]he three water quality standards and goals at issue in this case—temperature, dissolved oxygen concentration, and pH, are sometimes in tension with

one another, and with the Fish Passage Plan." ER 12–13. This is why the Section 401 Certification requires Portland General and the Tribe to "undertake to *reduce* the Project's contribution" to exceedances through adaptive-management "measures," not to eliminate all exceedances on any given day. PGE Br. 61 (emphasis added) (citing ER 20–21, 229, 232, 234). Since the Alliance below did not explain what Portland General and the Tribe could possibly do *better* under the Certification, the Alliance fails to satisfy the first redressability element. PGE Br. 44–45.

Under the second redressability element, to the extent that the Alliance is asking the district court to change the Project from the one that the Oregon Department of Environmental Quality ("the Department") certified in its Section 401 Certification, and which the Federal Energy Regulatory Commission ("FERC") thereafter approved in its 2005 license, the federal courts "lack[ ] the power to issue" such relief in this case. PGE Br. 46–47 (quoting *Brown*, 902 F.3d at 1083). Neither the Department nor FERC is a party here, so the district court could not force them to modify the Certification or issue a modified license. Further, the Alliance has not followed the exclusive, statutorily provided

procedure for changing a FERC-issued license, like the hydropower license here. *See* 16 U.S.C. §§ 803(a)(1), 825*l*.

The Alliance's contrary arguments in its Third Brief On Cross Appeal are unavailing.

A. The Alliance Does Not Explain What Actions The District Court Can Require Portland General And The Tribe To Take Under The Certification That Will Reduce The Number Of Exceedances

In its Third Brief On Cross Appeal, the Alliance primarily claims that it only wants an "injunction compelling [Portland General] to comply with its Certification." Alliance Reply Br. 7. By this, the Alliance means that it wants an injunction requiring Portland General and the Tribe to operate the Project consistent with the Alliance's erroneous reading of the Certification as requiring the elimination of all exceedances of water quality standards, each single day. The Alliance makes clear that it believes that such an order would redress its claimed harms "within the strictures of [the] *existing*" Project; that is, under the current Section 401 Certification and FERC license. Alliance Reply Br. 11. To be clear, Portland General strongly disagrees with the Alliance's erroneous reading of the Certification, which the district court correctly interpreted as requiring Portland General and the Tribe to *reduce* exceedances under

the Certification's adaptive management requirements. PGE Br. 60–61. But, in any event, for purposes of the redressability analysis, even if the district court had ordered Portland General and the Tribe to comply with the Alliance's wrongheaded understanding of the Certification, the Alliance does not explain how such an order would redress any of the Alliance's claimed harms.

Most fundamentally, the Alliance has no response to the undisputed record evidence that Portland General and the Tribe are *already* reducing overall exceedances to the maximum extent feasible, by adaptively balancing competing water-quality and fish-passage needs, "within the strictures of [the] *existing*" Project. Alliance Reply Br. 11. That means that the Alliance's vague hope that defendants would figure out some new way to achieve its hoped-for no-exceedance result would be no more effective in remedying the Alliance's harms than the "do-better" declaration that the plaintiffs sought in *Juliana v. United States*. 947 F.3d 1159, 1164–70 (9th Cir. 2020).[1] So while the Alliance cites its

[1] The Alliance purports to distinguish *Juliana* on the basis that plaintiffs there did not prove that the requested declaration would actually reduce climate change. Alliance Reply Br. 10. But that is precisely the Alliance's problem here: because the undisputed evidence

declarants' subjective *hopes* that unspecified "[o]perational changes" at the Project would enable the Deschutes River to "heal," including by an irrelevant analogy to remediation of soil fumigant metam sodium at the Sacramento River in 1991, Alliance Reply Br. 8 (quotation omitted; citing, as relevant, Supplemental Excerpts of Record ("SER") 216, 232, 245–46), those references do not come close to suggesting what *actual steps* Portland General and the Tribe could possibly take under the Certification and license for *this Project*, in response to a "favorable judicial decision" for the Alliance, to achieve fewer overall exceedances, *Brown*, 902 F.3d at 1083.

To the extent that the Alliance purports to make various factual claims to explain that Portland General and the Tribe can do better under the Certification, those claims find no record support.

The Alliance claims, *without a single citation of the record*, that some unspecified "evidence" "establishes significant additional room to more fully utilize [the Project's] compliance facilities to secure

---

shows that Portland General and the Tribe are already adaptively managing the Project to reduce exceedances to the maximum extent feasible, an injunction telling these parties to "do better," *somehow*, would not redress the Alliance's claimed injuries.

compliance" with temperature and dissolved-oxygen thresholds. Alliance Reply Br. 13. That unsupported assertion cannot stand against the district court's factual finding that Portland General and the Tribe are *already* adaptively managing the Project to the maximum feasible extent to reduce overall exceedances, under the Certification. *See* ER 28, 36–37; *accord* SER 107, 144 (same conclusion from the Department).

The Alliance also asserts that "the Project retains ample potential" to reduce temperature and pH exceedances by "releas[ing] additional bottom water" with the Selective Water Withdrawal Facility or by taking other measures with the Reregulating Dam. Alliance Reply Br. 9 (citing "beneficial impact" "evidence" at SER 245). But the only record entries that the Alliance cites for those claims are two portions of the Water Quality Management and Monitoring Plan, neither of which provides support. The first citation states that adjustments to bottom-water discharges will be made "to ensure discharges meet the applicable temperature standard," Alliance Reply Br. 9 (citing ER 163); however, the undisputed record evidence is that Portland General and the Tribe are *already* making those adjustments. As the Department recognized, "[w]hen there was a departure from expected temperatures or dissolved

oxygen," Portland General and the Tribe "made timely changes in order to balance competing processes . . . as well as possible," SER 107; *see* SER 144, and the Alliance cites no evidence to the contrary. And the Alliance asserts with its second citation of the Water Quality Management and Monitoring Plan that the Reregulating Dam "may also be used" for compliance, which the undisputed evidence establishes that Portland General and the Tribe have already done, as needed, SER 107; ER 160–62 (listing adaptive management considerations).

The Alliance also cites its own First Brief On Cross-Appeal before this Court with regard to pH and temperature, but that citation also fails to support its position. Alliance Reply Br. 9 (citing Alliance First Brief On Cross-Appeal ("Alliance Opening Br."), Dkt. 28 at 26, 50–51). The only record evidence that the Alliance's Opening Brief points to is an inapposite "*cf. . . . with*" cite of a narrow range of bottom-water release data. Alliance Opening Br. 26 (citing ER 103, 118). That data set does not even mention the bottom-water releases' effects on pH or fish-passage goals in any respect, *see* ER 103, 118, and thus it too fails to show how Portland General and the Tribe could better operate the Project to maximize all these relevant criteria and goals.

The Alliance also cites a single page from a single declaration of Greg McMillan—the "President and Director of Science and Conservation" of the Alliance, SER 243—which again fails to support the Alliance's redressability assertions on appeal. Alliance Reply Br. 9 (citing SER 245). The Alliance cites a portion of Mr. McMillan's declaration stating that "[t]here is no doubt that returning to [increased] bottom draw at Round Butte Dam would strongly resolve both the problems in the lower river and reduce the violations of the § 401 Certification." SER 245.[2] Yet, Mr. McMillan provides no record support for his *ipse dixit* "no doubt" assertion. So, while he claims that, during a period in August 2017, Portland General allegedly "increased bottom draw," which improved water quality and "nearly or totally eliminated" "all water quality violations," SER 245, he cites no data whatsoever backing up any portion of that statement, *see* SER 245.[3] On the contrary,

[2] Mr. McMillan's statement may also claim that a return to the "bottom draw at Round Butte Dam" *prior to* the installation of the Selective Water Withdrawal Facility is required to increase water quality, *see* SER 245, which would require removing or ceasing to operate that facility. As discussed below, the district court lacks the power to order such extreme relief, even if the Alliance did prove a violation of the Section 401 Certification (which it did not). *Infra* Part I.B.

[3] Indeed, the Alliance itself failed to even discuss this August 2017 period either in its First Brief On Cross Appeal to this Court, *see* Alliance

the Department contradicted Mr. McMillan's subjective claims when it concluded that Portland General "is operating the project and facilities consistent with the 401 certification *and that water quality has improved in demonstrable ways*." SER 107–09 (emphasis added). (Moreover, the alleged increased bottom-draw that Mr. McMillan identifies would appear to be consistent with the Certification's adaptive-management requirements. *Compare* SER 245, *with* ER 12.) And Mr. McMillan's declaration does not confront the inherent tension between the water quality standards and fish passage that the district court expressly identified, ER 12—tension that is part and parcel of increased bottom-water withdrawal, ER 11–14, 52, 58–59; SER 113–14, 131.

Finally, the Alliance briefly mentions that the Project has the ability to "institute controlled spills" at the Reregulating Dam to avoid dissolved-oxygen-concentration violations. Alliance Reply Br. 13 (citation omitted); *see supra* pp. 9–10 (rebutting similar argument at Alliance Reply Br. 9). Here, again, the Alliance has not (and cannot) rebut the district court's uncontested finding that the Alliance "has not

Opening Br., Dkt. 28, or in its summary-judgment papers below, SER 315, 318, 320 (R. 65, 104, 126-1), which explains why the August 2017 period is absent from the district court's opinion, *see* ER 4–37.

established that [Portland General and the Tribe] failed to meet their adaptive management obligations" with respect to "initiat[ing]" these "spill[s]." ER 34; *accord* SER 107–09, 144 (similar conclusion by the Department).

The remainder of what the Alliance says about the actions that it would expect Portland General and the Tribe to take in the face of a "do-better" district-court injunction amounts to hand-waiving. The Alliance claims that it wants Portland General and the Tribe to "figure out the details of implementation," Alliance Reply Br. 12 (citation omitted), or somehow "modify" the Project to come into compliance with the Alliance's no-exceedance desires, Alliance Reply Br. 14, but does not explain what this means in the context of these parties already adaptively managing the Project to the full satisfaction of the Department, consistent with the Certification's requirements. And the Alliance's citation of broadly-worded injunctions in non-Section 401 cases, Alliance Reply Br. 12–13 & n.5, is beside the point because none of those injunctions involved a finding by a district court, based upon undisputed evidence, that the defendants were *already* undertaking fully measures that reduce the defendant's claimed harms to the maximum extent feasible.

B. The Alliance Does Not Explain How An Injunction Changing The Selective Water Withdrawal Facility's Operations Would Satisfy Either Redressability Element

When the Alliance gets around to discussing the remedy it seems to want from the district court—an unspecified change to the operation of the Selective Water Withdrawal Facility, contrary to the requirements and license conditions that non-parties the Department and FERC have imposed on the Project[4]—its argument only further supports Portland General's point that any such remedy would fail *both* redressability elements.

With regard to the first redressability element—that the requested order would actually redress the plaintiff's claimed injury—the Alliance does not cite a word in the record to refute Portland General's point that

[4] The Alliance also appears to argue that the district court could, perhaps, order "modification" of the Selective Water Withdrawal Facility because Portland General and the Tribe allegedly "fail[ed] to construct" this facility under the terms of the Water Quality Management and Monitoring Plan, since the facility cannot achieve "100% 'deep [water] withdrawal.'" Alliance Reply Br. 16 n.6 (quoting ER 163). Yet, the portion of the Plan that the Alliance cites here, Table 2.1, does not impose that requirement. Instead, Table 2.1 simply states that the facility's "bottom withdrawal at a given time [must] fall *within the range* of" certain percentages, including the range of 0% to 100%. ER 163 (emphasis added). The record also refutes the Alliance's intimation that Portland General and the Tribe misstated the Facility's capabilities. Alliance Reply Br. 16 n.16. The Department participated in the design of this facility, along with numerous other state, federal, and tribal agencies. PGE Br. 11–12 & n.2; ER 10.

the "Alliance has not submitted any record evidence to support the conclusion that any such changes [to the Selective Water Withdrawal Facility] would *actually* reduce any of its claimed harms." PGE Br. 45. And, of course, absent a showing that somehow changing the operation of the Selective Water Withdrawal Facility would lead to fewer overall exceedances, the Alliance cannot satisfy the first redressability element.

Turning to the second redressability element—that the court actually has the power to issue the requested order—the Alliance appears to concede that, at the very minimum, non-party Department would need to approve the types of modifications to the Selective Water Withdrawal Facility that the Alliance contemplates because only the Department has "authority to compel such modifications" under the Certification. *See* Alliance Reply Br. 16–17; ER 252 (Section 401 Certification, providing that the Department "may modify this Certification to add, delete, or alter Certification conditions"). Given that the Department is a non-party here, the district court could not issue an order requiring the Department to "compel" or agree to any such modifications. *See Smith v. Bayer Corp.*, 564 U.S. 299, 305, 313–14 (2011); *contra* Alliance Reply Br. 16–17. Further, under the Clean Water Act, the State of Oregon has

the statutory authority to issue a Section 401 certification for the Project. 33 U.S.C. § 1341(a)(1); *see PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). The Alliance points to no authority for a district court altering the terms of such a state-issued Section 401 certification, including by deleting the requirement that any changes can only take place with the State's consent.

As for FERC, the Alliance appears to concede by silence Portland General's point that "a *wholesale reworking* of the Pelton Project," including "removing or ceasing to operate the selective water withdrawal facility"—unlike a more modest modification that the FERC license already contemplates, Alliance Reply Br. 15 (emphasis added; alteration in original)—"would . . . require FERC to amend the license to remove or revise the conditions that are inconsistent with such relief," Alliance Reply Br. 15, which this Court lacks jurisdiction to order, PGE Br. 46–47; *see Portland Gen. Elec. Co.*, 111 FERC ¶ 61,450, 62,914 (2005) (distinguishing "possible modifications" and "material amendments," the latter of which require "the Commission's approval").

Finally, the Alliance closes its redressability argument with the remarkable claim that the district court could evade any Article III

redressability problems here by ordering Portland General and the Tribe to undertake "supplementary environmental projects." Alliance Br. 17. The Alliance does not cite any decision, from any court, ever ordering "supplementary environmental projects" as a remedy for a claimed Section 401 certification violation, let alone using the hypothetical possibility of such an unprecedented remedy as the basis for establishing Article III redressability. *See Juliana*, 947 F.3d at 1174 (remedies within Article III must be "informed by tradition, methodized by analogy, [and] disciplined by system" (citations omitted)).[5]

II. Tribal Immunity Bars This Lawsuit Because The Opaque Definitional Cross-Reference Upon Which The Alliance Relies Does Not Meet The Unequivocal Abrogation Standard

As Portland General explained in its Opening Brief, in support of the Tribe's more fulsome argument, tribal immunity bars this lawsuit.

---

[5] The Alliance's claim that Portland General and the Tribe discussed pursuing "alternative mitigation measures," Further Excerpts Of Record ("FER") 14, instead of installing the Selective Water Withdrawal Facility in their Section 401 application does not change the Alliance's failure to demonstrate redressability here, *see* Alliance Reply Br. 18 (citing FER 14). That application specifically stated that Portland General and the Tribe would "develop[ ]" those alternatives, if needed, "in consultation with the appropriate resource agencies and managers" and then "seek to amend the FERC license for the Project to permit the[ir] implementation." FER 14. A court ordering parties to undertake environmental measures found within the FERC license itself is, of course, different in kind from the court ordering compliance with measures of its own making. *See Juliana*, 947 F.3d at 1174.

As a threshold matter, the Tribe is both a necessary and an indispensable party. PGE Br. 49–51. A party is "necessary" if, among other things, it has a protectable interest at issue in the lawsuit that could be impaired or impeded by the lawsuit's disposition. Fed. R. Civ. P. 19(a); PGE Br. 48. A "necessary" party is "indispensable" if the lawsuit cannot proceed "in equity and good conscience" in the absence of that party, Fed. R. Civ. P. 19(b), a determination that requires the court to balance: "(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." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161–62 (9th Cir. 2002); PGE Br. 48–49.

Here, the district court acted well within its broad discretion in finding that the Tribe is a necessary party to this lawsuit under Federal Rule of Civil Procedure 19(a) because the Tribe is a "co-licensee[ ] of the Pelton Project," "holds an ownership interest in the entirety of the Pelton Project, and serves as operator of the generation facilities at the Reregulating Dam," and also holds treaty-based rights impacted by this

litigation, SER 10; and any effective relief the district court could order "would inevitably impact, or at least carry a risk of impacting, the Tribe's interests in the resources of the Deschutes River Basin," SER 11.

The Tribe is an indispensable party for many of the same reasons. PGE Opening Br. 50–51; Tribe's Reply Cross-Appeal Br., Dkt. 64 at 7–12. This litigation threatens the Tribe's proprietary and sovereign interests, and there is no practical way to "lessen prejudice" to the Tribe, since any remedy against Portland General impacting the Project would simultaneously affect the Tribe's own interests. *Dawavendewa*, 276 F.3d at 1161–62. And FERC provides an adequate forum for the Alliance's grievances, *id.*, as the Tribe explains more fully, Tribe's Reply Cross-Appeal Br. 12; *see* PGE Opening Br. 51.

The district court's holding that Congress abrogated the Tribe's sovereign immunity through the Clean Water Act's definitional cross-reference does not, with all respect, give sufficient weight to the "express and unequivocal waiver of immunity" standard, *Dawavendewa*, 276 F.3d at 1159, including as this Court articulated and applied that standard recently in *Daniel*, 891 F.3d at 769. PGE Br. 51–57. That the Clean Water Act's citizen-suit provision permits a lawsuit against "any other

governmental instrumentality," 33 U.S.C. § 1365(a), then another provision of the Act defines "person" as encompassing a long list of entities including "municipality," 33 U.S.C. § 1362(5), and then *yet another* provision of the Act defines "municipality" with another long list of options that includes "Indian tribe or an authorized Indian tribal organization," 33 U.S.C. § 1362(4), does not meet the "express and unequivocal waiver of immunity" standard. Nothing in this definitional chain clearly shows that Congress "specifically considered" and "intentionally legislated on the matter" of tribal immunity. *Sossamon v. Texas*, 563 U.S. 277, 290 (2011). And that conclusion becomes even more clear when one considers that the Clean Water Act *did* specifically address lawsuits against the "United States" and "any other governmental instrumentality or agency to the extent permitted by the eleventh amendment," without any such opaque definitional chain. 33 U.S.C. § 1365(a)(1).

The Alliance's contrary arguments are unpersuasive.

A. The Alliance's Various Arguments That The Tribe Is Not An Indispensable Party Are Waived And Meritless

While the Alliance does not challenge the district court's conclusion that the Tribe is a necessary party, it argues that the Tribe is nevertheless not an indispensable party.

The Alliance claims that this case may proceed "in equity and good conscience," Fed. R. Civ. P. 19(b), without the Tribe because Portland General may "defend claims that implicate [the] operation of the [ ] Project" on behalf of itself and the Tribe, according to the Project's operating agreement, Alliance Reply Br. 19–22 (citing ER 235). This novel argument is waived, *see In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010), as the Alliance never presented it to the district court below, *see generally* SER 316 (R. 76). In any event, the contractual language that the Alliance cites does not strip the Tribe of its "ownership interest in the entirety of the Pelton Project," which is what makes the Tribe an indispensable party. SER 10. Nor would the Tribe's opportunity to participate as an amicus allow these proceedings to continue "in equity and good conscience" without the Tribe as a party, Fed. R. Civ. P. 19(b), since "[a]micus status is not sufficient to satisfy" Rule 19(b), *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir.

1990); *see also Hood ex rel. Miss. v. City of Memphis*, 570 F.3d 625, 629 & n.4 (5th Cir. 2009); *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986).

The Alliance also claims that a 2004 agreement between the Tribe, the Department, and Portland General waives the Tribe's sovereign immunity as to the Alliance's suit here, since that agreement states that the Tribe will not claim "sovereign immunity or raise any other federal or state law challenge to any other *Party's* authority or standing." Alliance Reply Br. 20 (emphasis added) (citing FER 33–34). The Alliance has, again, waived this argument for lack of presentment below. *See In re Mercury*, 618 F.3d at 992. In any event, the waiver in the 2004 agreement applies only to "the *Parties* to this Agreement," FER 33 (emphasis added), and the Alliance is a non-party, FER 27 (listing parties to agreement). The Alliance oddly asserts that it can "stand in the[ ] shoes" of the Department, Alliance Reply Br. 20, but the Department *itself* participated here as an amicus, and it opposed the Alliance, *e.g.*, SER 142–45; *accord* FER 31 (explicitly stating that the agreement creates no "right or benefit for third parties"). And while the Alliance also cites 33 U.S.C. § 1365(b)(1)(B), Alliance Reply Br. 20, that provision

simply authorizes the Alliance's intervention on its *own* behalf, not on behalf of a state agency, as the Tribe also correctly argues. Finally, to the extent there is any possible doubt about the 2004 agreement, this Court must resolve it against a finding of waiver. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94–95 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978).

B. The Alliance Fails To Show That The Purported Abrogation Here Is Express And Unequivocal

As to whether Congress has "express[ly] and unequivocal[ly]" abrogated the Tribe's sovereign immunity, *Dawavendewa*, 276 F.3d at 1159, the Alliance begins, Alliance Reply Br. 25, by repeating the district court's reliance on the district-court opinion in *Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community*, 827 F. Supp. 608 (D. Ariz. 1993); the Tenth Circuit's Safe Drinking Water Act decision in *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Department of Labor*, 187 F.3d 1174 (10th Cir. 1999); the Eighth Circuit's Resource Conservation and Recovery Act decision in *Blue Legs v. U.S. Bureau of Indian Affs.*, 867 F.2d 1094 (8th Cir. 1989); and this Court's passing dicta referencing *Blue Legs* in *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013). But as Portland General explained in its Second Brief On

Cross-Appeal, the analysis in these cases falls short of the demanding inquiry that this Court more recently conducted in *Daniel*. PGE Br. 56–57. Just as *Daniel* did not hesitate to honor a tribe's sovereign immunity in the face of a contrary decision in the Seventh Circuit on the same statute (not merely similarly worded statutes, as is the case with *Osage* and *Blue Legs*), so this Court should conduct its own analysis of the statutory text and decide whether a multi-step definitional cross-reference satisfies the demanding "express and unequivocal waiver of immunity" test. *Dawavendewa*, 276 F.3d at 1159. And *Daniel* is this Court's most on-point application of the sovereign-immunity principles discussed in more detail in the Tribe's briefing here.

The Alliance then attempts to distinguish *Daniel*, Alliance Reply Br. 27, but its analysis fails to grapple with how demanding *Daniel* is in terms of seeking text so clear that this Court has "perfect confidence that Congress meant to abrogate . . . sovereign immunity." *Daniel*, 891 F.3d at 774 (citations omitted). While this case involves tribal immunity, and *Daniel* involved the "*federal* government's immunity," Alliance Reply Br. 28, the standard is just as demanding for abrogation of either type of sovereign immunity, *compare Daniel*, 891 F.3d at 769, *with Santa Clara*

Pueblo, 436 U.S. at 58–59. And, if anything, the Fair Credit Reporting Act ("FCRA") at issue in *Daniel* was clearer on the immunity question than the Clean Water Act at issue here, given that (1) the federal government is plainly a type of "government or governmental subdivision or agency" under the FCRA, 15 U.S.C. § 1681a(b); (2) the reference to tribes in the Clean Water Act's citizen-suit provision comes only at the end of a two-step definitional chain; and (3) the FCRA, unlike the Clean Water Act's citizen-suit provision, does not specifically discuss how immunity of other sovereigns would be treated, while saying nothing so specific about tribal immunity.

The Alliance attempts to explain away the Clean Water Act's specific discussion of the immunity of both "the United States" and "any other governmental instrumentality or agency to the extent permitted by the eleventh amendment," 33 U.S.C. § 1365(a)(1), by arguing that Congress included the United States within this provision to "*expand* the definition of 'persons.'" Alliance Reply Br. 29. But the Alliance misses the relevant point. When Congress specifically addresses the immunity of various governments—the "United States" and "any other governmental instrumentality or agency to the extent permitted by the

eleventh amendment," 33 U.S.C. § 1365(a)(1)—but does not address the immunity of tribes, this defeats any claim that this Court could have "'perfect confidence' that Congress meant to abrogate . . . sovereign immunity," *Daniel*, 891 F.3d at 774 (quoting *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 827 (7th Cir. 2016)).

Finally, the Alliance misunderstands Portland General's argument when it claims that if this Court holds that Congress did not unambiguously abrogate tribal immunity, "then a number of so-defined persons would escape coverage . . . includ[ing] private corporations." Alliance Reply Br. 30. Portland General's argument is simply that the standard for abrogation of tribal immunity is a high bar, and that the Alliance's Clean Water Act definitional two-step chain, combined with its specific discussion of the immunity of "the United States" and "any other governmental instrumentality or agency to the extent permitted by the eleventh amendment," 33 U.S.C. § 1365(a)(1), falls short of that demanding test. No such analysis would apply to any non-sovereign parties, providing an ample "limiting principle." Alliance Reply Br. 30.

CONCLUSION

This Court should remand for dismissal.

Dated: December 16, 2020

Respectfully submitted,

BETH S. GINSBERG
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 386-7581
beth.ginsberg@stoel.com

JAMES R. GEORGE
PORTLAND GENERAL
ELECTRIC CO.
121 SW Salmon Street,
1WTC1301
Portland, OR 97204
(503) 464-7611
Richard.George@pgn.com

/s/ Misha Tseytlin
MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Defendant-Appellee/Cross-Appellant Portland General Electric Company

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-35867, 18-35932, 18-35933

I am the attorney or self-represented party.

This brief contains 5,239 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[**X**] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Misha Tseytlin **Date** December 16, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2020, I filed the foregoing Reply Cross-Appeal Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: December 16, 2020

/s/ Misha Tseytlin

MISHA TSEYTLIN

ADDENDUM

All applicable statutes and regulations are contained in the First Brief On Cross-Appeal of Plaintiff-Appellant/Cross-Appellee Deschutes River Alliance, or its addendum; the Second Brief On Cross-Appeal of Defendant-Appellee/Cross-Appellant Portland General Electric Company, or its addendum; or in the Third Brief On Cross-Appeal of Plaintiff-Appellant/Cross-Appellee Deschutes River Alliance, or its addendum.