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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

DESCHUTES RIVER ALLIANCE, an Oregon nonprofit corporation,

Plaintiff,

v.

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

Defendant.

Case No.: 3:16-cv-01644-SI

PGE'S REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

This case should be dismissed under Rules 12(b)(7), 19(a)(1)(A) and (B), and 19(b)(4) because the Deschutes River Alliance ("DRA") failed to join—and indeed cannot join—the Confederated Tribes of the Warm Springs Reservation of Oregon ("Tribe" or "CTWS"), a necessary and indispensable party to this case.[1] DRA seeks an order finding defendant Portland General Electric ("PGE") in violation of the Clean Water Act ("CWA") and injunctive relief requiring PGE to operate its Selective Water Withdrawal facility ("SWW") to discharge additional cold water releases to benefit resident trout downstream of the Pelton Round Butte Hydropower Project ("Project") at issue in this case. DRA seeks relief that necessarily requires a curtailment of surface water withdrawals necessary to attract fish and to facilitate the fish passage requirements also mandated by the CWA section 401 certifications DRA seeks to enforce. In other words, the relief sought by DRA—more bottom water withdrawals—is in conflict with fish passage. *See* Declaration of Brad Houslet at ¶¶8-9, attached to the Tribe's Reply in Support of Its Motion to Dismiss. This conflict matters because fish passage was a central goal of the license reissued by the Federal Energy Regulatory Commission ("FERC") for

[1] Contrary to DRA's arguments, PGE's motion is neither untimely nor disallowed under Rules 12(g)(2) and 12(h)(2), because a party's failure to join an indispensable party under Rule 19 can never be waived. *See* Rules 12(b)(7), 12(h)(1). In any event, PGE put DRA and the Court on notice, when it filed its original motion to dismiss, that it would be filing a second motion to dismiss on Rule 19 grounds if its first motion was unsuccessful. *See* Doc 7, at n.2 (stating that CTWS is a necessary and indispensable party to this suit and putting the Court and DRA on notice that PGE would be raising this issue in a subsequent motion).

The reason it took PGE 18 months to file this second motion to dismiss is because the parties have been involved in settlement discussions ever since the Ninth Circuit declined in August of 2017 to award discretionary review over the District Court's denial of PGE's original motion to dismiss. *See* Doc 74 at n.1. In fact, the Court entered a stay of all proceedings (at the parties' request) to facilitate settlement proceedings, which were conducted by Judge Acosta late last year. Once those proceedings came to a close, the Court ordered the parties to submit a briefing schedule. PGE promptly moved to dismiss immediately after DRA filed its summary judgment motion. Accordingly, DRA's contention that PGE purposely delayed in filing this second motion to dismiss is patently frivolous.

the Project and because the Tribe is the primary beneficiary of that fish passage effort. As a result, the Tribe's interests are inherently implicated and are likely to be adversely affected by the relief sought by DRA. Accordingly, the Tribe is a necessary party to this suit.

But the Tribe cannot be joined to this case because as a sovereign, it is immune from suit. While DRA argues that the CWA contains a sovereign immunity abrogation to allow suits against a Tribe, the definitional provision it points to (33 U.S.C. § 1362) is not an abrogation. Immunity abrogations must be clear and unambiguous, and in light of the language contained in the citizen suit provision of the CWA (33 U.S.C. § 1365), which allows suit against the United States and the individual states (and therefore waives the immunity enjoyed by those sovereigns but does not reference tribes), it cannot be said that the CWA contains a clear and unambiguous abrogation of tribal immunity to suit. Moreover, even if it were such an abrogation, it would arguably apply only to tribes alleged "to be in violation" of the CWA. Here, DRA does not contend that the Tribe is, in fact, in violation of the CWA. Instead, DRA insists that PGE—and PGE alone—is liable as the Project operator. Accordingly, if that provision could be construed as an abrogation (and it cannot for reasons more fully explained below), it would be *inapplicable* to the Tribe in any case.

The case should therefore be dismissed because it cannot proceed in equity and good conscience without the Tribe. As applicable Ninth Circuit case law establishes, PGE cannot adequately represent the Tribe's treaty-protected interests in this case, and there is an alternative remedy provided under the Federal Power Act ("FPA") that Congress intended third parties like DRA to utilize in these circumstances. Indeed, DRA can pursue the goals it seeks to vindicate through this suit through the FERC enforcement process which is available to third parties like DRA to utilize in situations where the licensee is alleged to be in violation of its license. The

fact that the FERC process may not (in DRA's estimation) be as ideal as the process DRA asks this Court to create from whole cloth here, is legally immaterial. The FERC process is *the* procedural mechanism Congress established in these circumstances, where FERC—and the fish agencies (NOAA Fisheries, the U.S. Fish and Wildlife Service ("FWS"), and the Oregon Department of Fish and Wildlife ("ODFW")) who together established the fish passage requirements of the certification and corresponding FERC license—may substantively engage with PGE, the Tribe and DRA.

Dismissal is particularly proper here because neither FERC nor any of the fish agencies (as non-parties to this suit) may help shape or weigh in on issues that are of central importance to the ongoing enforcement of the license regarding fish passage. Without these other parties, the Court should be very wary of granting injunctive relief that will undoubtedly affect these absent parties' interests and continuing jurisdiction.

II. ARGUMENT

A. The Tribe Is a Necessary Party Because Its Interests Would Be Harmed if the Case Were Decided in Its Absence

In this case, "[t]here is no question that the Tribe holds essential interests related to the basin's fish and wildlife, water quality, the Tribe's sovereignty, and in the Pelton Round Butte Project itself." DRA Resp. at 13 (Doc 76). The Tribe is also co-owner of the Project, a joint licensee to the Project's FERC license, and a party to the PGE/Tribe global Settlement and Compensation agreement. The parties do not disagree about any of those facts. But DRA asserts that despite all of those interests, the Tribe is "not implicated by DRA's water quality enforcement action against PGE." *Id.* at 14. DRA further asserts that "the Tribe's interest in its right to take fish at its usual and accustomed stations on the Deschutes River, simply is not

connected" to DRA's enforcement action. *Id.* While articulating some of the Tribe's interests in this case, DRA concludes that the Tribe does not have an interest in this case, an assertion that is directly contradicted by the Tribe's own statements. DRA may presume *it* (or alternatively, PGE) speaks for the Tribe, but it most assuredly does not (nor does PGE).

DRA cites one case in support of its claim that the Tribe does not have an interest in this case, *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), a case involving the Makah Indian Tribe's action to "challenge federal regulations allocating the ocean harvest of migrating Columbia River salmon," *id*. at 556. But in that case, the Ninth Circuit held that when it comes to fish, and tribal allocation of the right to take fish, that other tribes missing from the Makah suit were necessary and indispensable parties to that suit. Thus, contrary to DRA's assertion, that case supports the notion that the Tribe here will be harmed if this case proceeds because any relief the Court might award DRA would directly affect the Tribe's interests in both fish passage and its treaty rights to have and to take fish at its usual and accustomed places. This is because any modification to the SWW to allow for increased cold water releases below the Project would necessarily impact the fish passage requirements imposed in both the certification and the license itself, due to the inverse relationship that exists between attainment of temperature standards and the fish passage goals in the license. Houslet Dec. at ¶¶8-9 (increases in bottom water withdrawal—which results in cold water discharges below the Project—necessarily decrease surface water withdrawal necessary to meet fish passage goals); Declaration of Robert Brunoe at ¶6, attached to Tribe's Reply.

In other words, any order requiring PGE to provide more cold water releases, and to curtail surface water releases, would necessarily diminish surface water releases, and the corresponding surface water attraction flows that are critical to fish passage efforts. Houslet

Dec. at ¶¶8-9; Brunoe Dec. at ¶6. That is why the certifications call for adaptive management and require a fundamental balancing of these competing environmental goals. In addition, cold water releases at certain times of the year are actually harmful to fall chinook, a species that the Tribe has a vested treaty interest in protecting. Houslet Dec. at ¶¶5-6. Thus, because "any relief would be detrimental to" the Tribe (*Makah Indian Tribe*, 910 F.2d at 560), particularly if it is excluded from the process, or if relief would alter its carefully negotiated agreements with PGE and the United States and its agencies, the Tribe's interests are strong in this case and should not be impaired. *United States v. Winans*, 198 U.S. 371, 381 (1905) ("The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians . . . which were not much less necessary to the existence of the Indians than the atmosphere they breathed . . . .").

B. PGE Cannot Adequately Represent the Interests of the Tribe

PGE cannot adequately represent the sovereign interests of a federally recognized Indian Tribe in this matter. DRA cannot demonstrate that "the interests of a present party to the suit are such that it will undoubtedly make all of" the absent party's arguments, that PGE is "capable of and willing to make such arguments," and that the Tribe would not "offer any necessary element to the proceedings" that the present parties would neglect. *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980).

"Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian Tribe are . . . inherent powers of a limited sovereignty which has never been extinguished." Felix Cohen, *Handbook of Federal Indian Law* 122 (1942); *see United States v. Wheeler*, 435 U.S. 313, 322 (1978) (endorsing Cohen's statement). Indeed, it is facially impractical to suggest that PGE can adequately represent the sovereign interests of an Indian tribe. PGE has a duty to its customers that differs from the Tribe's duties to its

members, and PGE lacks the protectable treaty interest that, for example, guarantees exclusive rights to take fish at usual and accustomed places. Although the Tribe delegated some limited responsibility to PGE to operate the Project, the Tribe most certainly did not (and never would) delegate its authority to represent the Tribe's sovereign interests to defend its treaty-reserved rights under the 1855 treaty, which are implicated by this action. Brunoe Dec. at ¶7.

Here, DRA's lawsuit attempts to have this Court alter provisions and obligations that protect the Tribe's interests—interests that cannot be wholly shared by PGE. The license has fish passage requirements, which inure to the benefit of the Tribe, but the Tribe's focus on the fish passage components of the certification and license is different than PGE's. Nor is it true, as DRA suggests, that PGE would undoubtedly make every conceivable argument that the Tribe would otherwise make in this case. PGE has an obligation to deliver safe, reliable, affordable and clean energy to its customers. Its interests in this case revolve around its environmental compliance with the license conditions and the various ongoing fish passage and water quality requirements therein, including the significant investment in the SWW required as a core compliance mechanism. As demonstrated above, however, the Tribe's interests are specifically focused on its treaty rights, including fish passage, and the right to take fish at the usual and accustomed places.

For example, as part of any settlement, PGE's responsibility to comply with the terms of the license could, with direction from FERC and the fish and other regulatory agencies that participated in the underlying license effort, potentially accommodate adjustments to the SWW or operational modifications to provide additional early-season cold water releases (if deemed to be beneficial from a water quality perspective), despite potential trade-offs with respect to fish passage. These trade-offs would also undoubtedly affect salmonids, including fall chinook—a

species that is not protected under the Endangered Species Act, but which is protected under the Tribe's treaty. PGE's ability to advocate protection of the fish, in the context of this case, is constrained within the bounds of its license obligations, so when it comes to fish passage, and protection of its treaty rights, the Tribe cannot rely on PGE to singularly represent its interests. *Cf. Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (court held that local cities, together with the federal government acting as a trustee for the tribe, could collectively represent tribe's interests where there was an identity of interest in opposing plaintiff's enforcement efforts, and where the tribe failed to identify any argument that the United States would or could not make on the tribal community's behalf).

In addition, as explained by the Tribe's General Manager of its Branch of Natural Resources, the Tribe has sovereign rights (much like Canada or any other sovereign nation) to manage its natural resources for the benefit of its people's cultural, social environmental and economic needs. Brunoe Dec. at ¶7. PGE does not speak for the Tribe on issues implicated in this case that necessarily affect those cultural, social and economic needs. Accordingly, unlike the situation in *Babbitt*, here DRA can make no showing that PGE would necessarily make (or be motivated to make) every argument that the Tribe would make on behalf of its unique fish interests.

C. The Tribe Cannot Be Joined Because, as a Sovereign, It Is Immune from Suit

DRA has failed to establish an abrogation of the Tribe's sovereign immunity for two reasons. First, DRA has not alleged that the Tribe has violated "an effluent standard or limitation" or "an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). As a result, DRA has failed to allege that the Tribe violated the CWA provision it says waives the Tribe's sovereign immunity. Without such an allegation,

there is no abrogation of sovereign immunity and DRA's complaint must be dismissed because it fails to join a necessary and indispensable party. Second, the CWA citizen suit provision does not unequivocally express Congressional intent to abrogate tribal sovereign immunity.

1. DRA Has Failed to Allege That the Tribe Violated the CWA Provision It Says Waives Sovereign Immunity

Any putative wavier of sovereign immunity in this case would be limited to claims that the Tribe violated an effluent standard or limitation or an order regarding such a standard or limitation, as provided for under the citizen suit provision of the CWA, 33 U.S.C. § 1365 (authorizing a cause of action against any person alleged to be in violation of an effluent standard or limitation). But DRA's complaint does not allege that the Tribe violated "an effluent standard or limitation" or "an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). Instead, DRA has sued PGE and PGE alone, contending that PGE is the sole operator of the Project and that the Tribe is neither liable nor necessary to the resolution of its suit.[2] *See* Doc 76 at 19 (claiming that PGE alone is responsible for operating the Project and taking all actions necessary or appropriate to comply with applicable laws). Nor does DRA's response brief contend that the Tribe is "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 . . . ." 33 U.S.C. § 1365(a)(1).

Without contending that the Tribe is violating the CWA, DRA attempts nonetheless to rely on the CWA citizen suit provision to assert that the Tribe's sovereign immunity has been

[2] DRA urges the Court to reject this motion because it would somehow create a "new stratagem" and improperly encourage corporate entities to partner with tribal entities to escape suit. Doc 76 at 16. But the problems with DRA's suit are entirely of DRA's own making. DRA, not PGE, created a theory of the case that focuses exclusively on PGE's conduct and ignores the Tribe. DRA had every opportunity to name the Tribe as a defendant, but chose not to, presumably for strategic reasons related to its goal of isolating the Tribe and keeping tribal interests out of sight.

abrogated. But the Tribe's sovereign immunity cannot be abrogated on the basis of a claim that DRA has not made in its complaint, or even its briefing. Because DRA has not sued the Tribe or alleged that it is violating the CWA (and because, as demonstrated below, it cannot successfully do so because of the Tribe's sovereign immunity), there is no abrogation of tribal sovereign immunity. Accordingly, the Court should dismiss DRA's complaint for failure to join a necessary and indispensable party.[3]

2. The Citizen Suit Provision of the CWA Does Not Abrogate the Tribe's Sovereign Immunity

Even if DRA had asserted liability against the Tribe, the Tribe would still be unable to be joined because the CWA citizen suit provision does not unequivocally express Congressional intent to abrogate tribal sovereign immunity. Instead, the citizen suit provision authorizes any citizen to bring an enforcement 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) . . . ." 33 U.S.C. § 1365(a)(1). That provision is entirely silent with respect to tribes. Absent a clear and unequivocal revocation of sovereign immunity in the language of the statute, there can be no abrogation of tribes' sovereign immunity.

It is well settled that tribal sovereign immunity remains unless Congress uses clear and unequivocal language to revoke tribal sovereign immunity. "'[W]ithout congressional authorization,' the 'Indian Nations are exempt from suit.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)). "It is [also] settled that a waiver of sovereign immunity '"cannot be implied but must be

[3] Although the Tribe has asserted its immunity from suit, PGE makes this argument here in the event the Court gives credence to DRA's contention that the Tribe, as *amicus curiae*, lacks the right to file its own motion to dismiss. For the reasons provided in the Tribe's Reply, and given all that is at stake here, PGE urges the Court to accept the Tribe's motion.

unequivocally expressed.'"' *Id*. (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). "In the absence … of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe . . . are barred by its sovereign immunity from suit." *Id*. at 59. This immunity "applies to the tribe's commercial as well as governmental activities." *Cook v. AVI Casino Enters., Inc*., 548 F.3d 718, 725 (9th Cir. 2008) (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc*., 523 U.S. 751, 754-55 (1998)).

There is no clear and unequivocal abrogation of tribal sovereign immunity in the citizen suit provision of the CWA. While the term "person" is defined in another provision of the statute to included "municipalit[ies]," which in turn is defined to include "tribe[s]," 33 U.S.C. § 1362(4)-(5), this definitional provision most certainly is not a unequivocal intent to abrogate tribal sovereign immunity. Moreover, the definitions set forth under CWA section 502 apply when used in the chapter "except as otherwise specifically provided," 33 U.S.C. § 1362, and the citizen suit provision specifically provides otherwise by specifying waivers for two other sovereigns—but not tribes, 33 U.S.C. § 1365(a)(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)"). Section 505's reference to "any other governmental instrumentality or agency to the extent permitted by the eleventh amendment" obviously refers to states, which are already defined as persons in section 502(5) ("The term 'person' means an individual, corporation, partnership, association, State, municipality, commission . . . .").

Thus, Congress made a painfully explicit effort to include a waiver of sovereign immunity for both the United States, which is not defined as a "person" in 33 U.S.C. § 1362(5), and individual states, which are each defined as a "person" in § 1362(5), within the citizen suit provision's specific expression of which "person" may be sued. This separate and distinct

definition of "person" clearly and unambiguously waives the sovereign immunity of the United States and of states and political subdivisions of states to the extent permitted by the Eleventh Amendment. But the separate and distinct definition of person in the CWA citizen suit section is silent about Indian tribes. In such cases, "'the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (ellipses in original) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982)).

Moreover, the use of "person" in § 1365 cannot be presumed to include tribes because there is a "longstanding interpretive presumption that 'person' [when used in federal legislation] does not include the sovereign," and this "presumption is 'particularly applicable where it is claimed that Congress has subjected [a sovereign] to liability to which [it] had not been subject before.'" *Ver. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989)); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) ("'the term "person" does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.'" (brackets in original) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))). That is why the CWA citizen suit provision modifies the definition of "person" elsewhere defined in the statute and redefines "person" subject to citizen suits to include the United States. The citizen suit's redefinition of person to include states would be superfluous and unnecessary if the general definition of "person" was sufficient itself to waive sovereign immunity.[4] Accordingly, there is

[4] The District of Arizona case cited by DRA to the contrary is neither binding nor persuasive, as it did not attempt to resolve the textual arguments against waiver asserted here. *See Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Community*, 827 F. Supp. 608, 609-10 (D. Ariz. 1993). Nor do any of the other cases cited in DRA's response brief (Doc 76 at 14) attempt to wrestle with the specific language of the citizen suit provision which clearly waives the sovereign immunity of the federal and state governments, but which is notably silent with respect to tribes.

no indication that Congress clearly, expressly, and unequivocally intended to waive tribal sovereign immunity.

D. Available FERC Proceedings Weigh in Favor of Dismissal Here

Having established that (i) the Tribe has a protected interest which will be harmed in its absence; (ii) PGE cannot speak for the Tribe when it comes to that interest; and (iii) the Tribe cannot be joined because its sovereign immunity has not been waived, the Court must determine whether in equity and good conscience this case can proceed without the Tribe. The answer to that question here, is "no," because Congress provided an alternative process for interested third parties to utilize in seeking to enforce provisions of a FERC license, including water quality certification conditions.[5] *See* Doc 64 at 16-17.

Under the FPA, FERC is authorized to monitor and investigate compliance with license terms and to "issue such orders as necessary to require compliance with the terms and conditions of licenses." 16 U.S.C. § 823b(a). If FERC declines to award such relief, DRA may challenge that decision in the appropriate Court of Appeals. 16 U.S.C. § 825l(b).

Citing *Friends of the Cowlitz v. FERC*, 253 F.3d 1161 (9th Cir. 2001), DRA argues that the process Congress established for third parties to seek enforcement of a FERC license is somehow inferior to the one DRA created here, and insists that dismissal is inappropriate as a result. In that case, the Ninth Circuit held that FERC had improperly dismissed plaintiffs' complaint, but that FERC, in the end, retained enforcement discretion that the Court was not willing to override. *Id*. In so holding, the Court emphasized that the presumption of unreviewability as it pertains to an agency's exercise of its enforcement discretion can be

[5] In the interests of brevity and judicial economy, PGE will not repeat the arguments made by the Tribe on the other factors courts use to balance the parties' various interests under Rule 19(b), in determining whether to dismiss an action when a necessary and indispensable party to the case cannot be joined.

overcome in cases where the substantive statute provides guidelines for the agency to follow in exercising its enforcement powers. *Id*. at 1170. Thus, it is conceivable that in contrast to the facts at issue in *Friends of the Cowlitz*, that DRA would be able to persuade the Court to review FERC's enforcement decision on its merits given the prescriptive nature of the certification and the guidance it provides for enforcement purposes.

In any event, Rule 19 requires dismissal where necessary and indispensable parties are absent from a suit and unable to be joined, even in the *absence of any alternative process*, let alone one that is totally to a plaintiff's liking. *See Makah Indian Tribe*, 910 F.2d 555 (establishing that the absence of an alternative process is not a bar to dismissal). To the contrary, the Court emphasized that "lack of an alternative forum does not automatically prevent dismissal of a suit" and that "[s]overeign immunity may leave a party with no forum for its claims." *Id.* at 560. Thus, because (i) dismissal under Rule 19 is not conditioned upon the existence of an alternative process—much less a process that is "equivalent" to the process that DRA chose to invoke—and because (ii) an alternative enforcement process exists under the FPA, dismissal is appropriate here in "equity and good conscience." *See Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1148 (D. Or. 2005)(balancing Rule 19 factors and determining that case could not proceed in equity and good conscience without absent tribe).

This is especially true here, where the FERC process is the *only* process where all interested parties to DRA's action can participate, including the fish agencies with jurisdiction over the fishway prescriptions, the Oregon Department of Environmental Quality ("DEQ"), the Tribe, and FERC itself. The FERC process, in fact, is a far preferable process to the instant lawsuit, because all of the regulatory agencies that participated in the relicensing process could intervene in any proceeding commenced by DRA to protect jurisdictional interests, including

NOAA Fisheries, FWS, ODFW, DEQ, and the Tribe's Water Control Board. Each of these federal, state, and tribal agencies has regulatory authority over the SWW and can exercise that authority in any proceeding commenced by DRA under 18 C.F.R. § 385.206. *See* Doc 64 at 15-17.

The ability of all of the parties (with a stake in any future operational changes) to intervene in any future FERC petition filed by DRA is particularly important here, because any modification to the SWW to allow for increased cold water releases below the Project would necessarily impact the fish passage requirements imposed in the certification, and the license itself, due to the inverse relationship that exists between attainment of temperature standards and the fish passage goals in the license. Houslet Dec. at ¶¶8-9. That is why the certifications call for adaptive management and require a fundamental balancing of the competing environmental goals. Thus, given the existence of this alternative process—the process prescribed by Congress to deal with precisely the issues raised by DRA here—the principles of equity and good conscience weigh heavily in favor of dismissal.

III. CONCLUSION

For the reasons provided herein, and in PGE's opening brief, PGE respectfully urges the Court to dismiss this case with prejudice under Rules 12(b)(7) and 19.

DATED: April 18, 2018

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