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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 MOTION TO DISMISS
PURSUANT TO RULE 19 AND JOINDER
TO CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF
OREGON'S MOTION TO DISMISS

(oral argument requested)

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CERTIFICATE OF COMPLIANCE WITH LR 7.1

The undersigned counsel certifies that the parties have made a good faith effort to confer on the issues in these motions but have been unable to resolve those issues.

MOTION TO DISMISS

Defendant, Portland General Electric Company (“PGE”) moves the Court, pursuant to Rules 12(b)(7) and 19(a)(1)(A) and (b)(4), for an order dismissing this action for failure to join the Confederated Tribes of the Warm Springs Reservation of Oregon (“Tribe”), a party required by Rule 19. The motion is supported by relevant excerpts from the underlying Federal Energy Regulatory Commission (“FERC”) licensing process governing the issues in this case, attached to the Declaration of Beth S. Ginsberg (“Ginsberg Dec.”). PGE also joins in the Tribe’s Motion to Dismiss (“Tribes’ Mot.”), filed contemporaneously with this Motion.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff, the Deschutes River Alliance (“DRA”), seeks summary judgment to enforce a water quality certification issued by the Oregon Department of Environmental Quality (“DEQ”) pursuant to Clean Water Act (“CWA”) section 401, 33 U.S.C. § 1341. DRA seeks a declaration of liability against PGE in connection with PGE’s operation of the Selective Water Withdrawal Facility (“SWW”), which discharges water ultimately to the lower Deschutes River. Although this Court previously denied PGE’s Motion To Dismiss on subject matter jurisdictional grounds (finding that a cause of action exists under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(1), (f)(5)),¹ the Court should dismiss this case under Fed. R. Civ. P. 12(b)(7), and

¹ The Court subsequently certified the issue of whether the CWA citizen suit provision, 33 U.S.C. § 1365(a)(1), (f)(5) provides a cause of action to enforce a water quality certification. Dkt 34 (finding that the Court’s decision involves a controlling question of law the resolution of which “could materially

19(a)(1)(A) because the Tribe is an indispensable party to this suit yet cannot be joined as a result of its sovereign immunity and because the court cannot accord complete relief among existing parties. Pursuant to Rule 19(b)(4), the case cannot proceed in equity and good conscience without the Tribe for the reasons discussed in the Tribe’s Mot. and because the FERC provides Plaintiff with an alternative forum to address the issues raised in this lawsuit, a forum, which under the specific facts of this case, is far more suitable.

A major problem with DRA’s suit is that it seeks a declaration of liability against PGE alone, when PGE and the Tribe co-own the SWW and the Pelton Round Butte Hydropower Project (“Project”) and are also joint-licensees under the FERC license for the Project. This means that any declaration of liability issued by this Court under the Declaratory Judgment Act, 28 U.S.C. § 2201, would run not only to PGE, but to the Tribe as well. The Tribe, however, is not a party to this suit, and cannot be joined on sovereign immunity grounds. *See generally* Tribe’s Motion.

The relief sought by DRA would necessarily implicate the interests of the Tribe and its Water Control Board (“WCB”), which issued a separate water quality certification for the Project under CWA section 401, and which—in addition to DEQ’s certification and other conditions of the FERC license—also governs the manner in which the SWW must be managed.

In determining whether the case should proceed “in good conscience and equity” without the Tribe, the Court looks to a number of factors, including whether an alternative forum exists to resolve these issues in a manner that would not prejudice the Tribe. *See Dewberry v.*

Kulongoski, 406 F. Supp. 2d 1136, 1148 (D. Or. 2005)(balancing Rule 19 factors and

affect the outcome of the litigation in the district court”). On August 14, 2017, the Ninth Circuit issued an order denying PGE’s petition for interlocutory review without explanation. *Deschutes River Alliance v. Portland Gen. Elec. Co.*, No. 17-80092 (9th Cir. Aug. 14, 2017), Dkt 8.

determining that case could not proceed in equity and good conscience without absent tribe). Given the unique posture of this case, the appropriate forum for resolving the issues raised by Plaintiff is that established by the FERC License for the Project, and more specifically, its Fish Committee.

Both DEQ, and the WCB, pursuant to their separate water quality certification conditions, (which are, in turn, incorporated into the FERC License), supervise the operation of the SWW. But, other federal, tribal, and state agencies have similar oversight authority over the Project and the SWW under the License (including the WCB, NOAA Fisheries and the U.S. Fish and Wildlife Service (“FWS”). NOAA Fisheries and FWS each issued a Biological Opinion (“BiOp”) for the Project under section 7 of the Endangered Species Act (“ESA”) together with fishway prescriptions under the Federal Power Act (“FPA”), all of which include fish passage requirements applicable to the SWW that are incorporated into the FERC License issued jointly to PGE and the Tribe.

The FERC License governing the Project in this case brings all these agencies together through the establishment of a Fish Committee with authority to hear and to attempt to resolve the issues presented in this case, and with authority to present any unresolvable issue, or issue requiring License modification, to FERC. NOAA Fisheries, the FWS, DEQ, the WCB, the Tribe’s Branch of Natural Resources (“BNR”), and the Oregon Department of Fish and Wildlife (“ODFW”), in addition to the Joint Applicants (PGE and the Tribe) and environmental organizations, are all members of the Fish Committee and parties to the Settlement Agreement that was adopted by the License. While DRA is not a member of the Fish Committee, it may present its concerns to DEQ and the Fish Committee and may petition FERC under 18 C.F.R. § 385.206 to enforce the DEQ water quality certification conditions—which are incorporated into

the License as License conditions—if it does not believe that its concerns have been adequately addressed by DEQ or the Fish Committee.

The Court should dismiss this case for the reasons stated in the Tribe’s Motion. As explained in the Tribe’s Motion and below, DRA has an alternative forum through the Fish Committee and the FERC License for raising its concerns. Moreover, that alternative forum is likely the only one that can provide it with the relief that it seeks. Complete relief cannot be granted to DRA in this case because the changes in the operation of the SWW that it wants cannot be granted without the approval of FERC, the WCB, the FWS, and NOAA Fisheries, none of which are parties to this lawsuit. The process established in the FERC License for adaptively managing the SWW, including the Fish Committee, is the proper and only forum for resolving the complex adaptive management issues raised here.

II. BACKGROUND

A. The Project

The factual background underlying this controversy can be gleaned from the Declaration of Charles Calica, filed in support of the Tribe’s Motion, together with excerpts of relevant FERC License documents attached to the Declaration of Beth S. Ginsberg. The Project comprises three dams (the Round Butte Dam, the Pelton Dam and the Reregulating Dam) and includes certain related generating and transmission facilities. It is located on the Deschutes River within and adjacent to the CTWS Reservation, which is bordered on the east by the middle channel of the Deschutes River, on the south by the Metolius River, on the west by the summit of the Cascade mountain range, and on the north by the Tygh Ridge. Calica Dec. ¶¶ 5, 10. The Round Butte Dam—which is the subject of this action—is the uppermost of the three dams and impounds portions of the Metolius, Crooked, and Deschutes Rivers, forming Lake Billy

Chinook. *Id.* ¶ 13. *See generally* Ginsberg Dec. Ex. A at 4 (relevant excerpts of FERC Order for Project No. 20-30-036, Approving Settlement and Issuing New License (dated June 21, 2005)).

B. The FERC Licensing Process

In June 2001, PGE and the Tribe filed a joint application for a new FERC project license, and simultaneously filed for water quality certifications pursuant to CWA section 401 with the Tribe's WCB and DEQ. Certifications were issued a year later by both the WCB and DEQ, and while not identical, each references and incorporates the same Water Quality Management and Monitoring Plan ("WQMMP"), which sets out in further detail the adaptive management requirements of the certification. Calica Dec. ¶¶ 23-24. PGE and the Tribe participated in lengthy settlement discussions with a host of interested stakeholders who intervened in the licensing proceeding, including federal, state, and local resource and land management agencies (as relevant here, DEQ, the WCB, ODFW, NOAA Fisheries, and the FWS), in addition to a number of environmental groups: American Rivers, Oregon Trout, the Native Fish Society, Trout Unlimited, and WaterWatch of Oregon. *Id.* ¶ 25; *see also* Ginsberg Dec. Ex. B at 8 (attaching excerpts of Offer of Settlement and Joint Explanatory Statement in Support of Settlement Agreement (filed with FERC on July 30, 2004)).

These stakeholders reached a comprehensive Settlement Agreement that formed the basis for, and was essentially incorporated into, the FERC License, issued on June 21, 2005. Calica Dec. ¶¶ 25-28. Recognizing that "fish passage is the major resource issue associated with the Project," the parties to the licensing proceeding ensured that the "centerpiece of the Settlement Agreement" and the License Articles was "the restoration of fish passage at the Project through the construction of the SWW." Ginsberg Dec. Ex. B at 24-25. The water quality certifications issued by the WCB and DEQ were incorporated into the FERC License and require construction

and operation of fish passage facilities, including, as relevant here, the SWW. Ginsberg Dec. Ex. A, Apps. A-B. The License in turn incorporated not only DEQ's and the WCB's water quality certifications, but the fishway prescriptions and fish passage requirements of the BiOps issued by the FWS and NOAA Fisheries. *Id.*, Apps. A-E.

C. The Selective Water Withdrawal Facility

The respective certifications, and the corresponding WQMMP, require PGE and the Tribe to construct the SWW to both: (i) reintroduce anadromous fish runs upstream of the Project that were extirpated as a result of Project construction and operation; and (ii) enable the Project to reduce its contribution to water quality problems on the Lower Deschutes River. *See* Ginsberg Dec. Ex. C (attaching relevant excerpts of the WQMMP). The stated purpose of the SWW was to “help the Project meet temperature and water quality goals and standards in the lower Deschutes River and Project reservoirs,” and to “allow the withdrawal of surface waters during salmonid smolt migration periods to facilitate the capture of downstream emigrating smolts from Lake Billy Chinook in support of the anadromous fish reintroduction goal.” *Id.* at 1-2.

Prior to the construction of the SWW, the Project drew and discharged water from the bottom of the reservoir. The Project contributed to water quality standards exceedances in the lower Deschutes River, including exceedances of the temperature, pH, and dissolved oxygen (“DO”) standards. *See* Ginsberg Dec. Ex. B at 23 (noting that the Project altered the water temperature and dissolved oxygen in the lower Deschutes River); *id.* at 3-4 (“currently, state and Tribal water quality standards below the project are violated and dissolved oxygen and temperature do not meet State or Tribal water quality standards in the Deschutes River

immediately below the project; pH standards are not met further downstream”); Calica Dec. ¶ 24. These water quality problems adversely affected fish and other aquatic life below the Project.²

The Project also “form[ed] a total barrier to migration by resident and anadromous fish in the Deschutes River system, . . . block[ing] anadromous and resident salmonids from reaching historical spawning and rearing areas in the Metolius, Middle Deschutes, and Crooked river systems.” Ginsberg Dec. Ex. B at 3, 22-23. Habitat loss due to the creation of man-made barriers was noted as a primary factor for the decline of federally listed stocks of salmon and steelhead under the ESA. *Id.* at 22. Two of the species blocked from spawning and rearing areas are listed under the ESA: bull trout and Middle Columbia River steelhead. This led NOAA Fisheries and the FWS to issue BiOps and fish passage requirements in connection with the FERC relicensing action. The BiOps required construction and operation of the SWW and fish passage and reintroduction measures more generally, and those fishway prescriptions were included in the FERC License. Ginsberg Dec. Ex. A, Apps. C-E; Calica Dec. ¶ 30.

D. The Project’s Adaptive Management Requirements

In light of the water quality and fish passage problems historically experienced by the Project, the DEQ certification requires the Joint Applicants to take measures to reduce the Project’s contribution to exceedances of the water quality criteria for temperature, DO, and pH and to undertake fish passage measures. Ginsberg Dec. Ex. A, App. A at 109, 112, 114. To accomplish these overarching certification goals, the certification and the WQMMP require the Joint Applicants to engage with DEQ and other resource managers to adaptively manage the

² Large reservoirs like Lake Billy Chinook warm and cool much more slowly than rivers, and tend to be colder in the spring and warmer in the autumn than rivers flowing into and out of them. By discharging exclusively bottom water from Lake Billy Chinook, the Project contributed to downstream river temperatures that were unnaturally cold in the spring and early summer and unnaturally warm in the later summer and early autumn. Ginsberg Dec. Ex. B at 3, 23.

SWW to reduce the Project's contributions to exceedances of the water quality criteria for temperature, DO, and pH, while still providing for fish passage. *Id.*

The certification also requires the Joint Applicants to construct, maintain and operate facilities and equipment for fish migration, propagation and conservation consistent with the Fish Passage Plan and to cooperate with ODFW (and NOAA Fisheries and FWS) in the design of any modification or operation of the facilities. Ginsberg Dec. Ex. A, App. A at 120, 121. Sufficient surface attraction flows from the SWW are an integral component of the Fish Passage Plan. *Id.*, App. C at 147, App. D at 160, 162 (directing licensees to work with Fish Agencies and Fish Committee to construct and operate SWW so that it achieves a blend of surface/deep water withdrawal that will satisfy criteria for safe, timely and effective downstream passage, and likely meet water quality criteria within a reasonable time through continued iterative adjustments of the SWW system). Recognizing that "operation of the Selective Water Withdrawal facility has the potential to affect numerous water quality parameters, as well as fish passage success, changes in the operation of the Selective Water Withdrawal facility must consider all possible impacts, not merely a single water quality parameter." *Id.*

E. The Fish Committee's Central Role In Resolving Adaptive Management Concerns

Because of the long-term and highly technical nature of the adaptive management approach mandated by the certification and FERC License, the License also establishes Implementation Committees. One of those committees is "the Fish Committee" (composed of NOAA Fisheries, the FWS, ODFW, DEQ, the WCB, the Bureau of Indian Affairs, the Bureau of Land Management, environmental groups, and the Joint Licensees). This committee is empowered to evaluate the success of ongoing SWW operational measures, and to attempt to

resolve any disputes regarding the same, including those related to water quality, by consensus. Ginsberg Dec. Ex. B. at 65-71; Calica Dec. ¶¶ 31-32. In approving the new License, FERC described the Fish Committee as an entity that is “meant to have a pivotal role in the administration of a large variety of post-licensing activities, including changes in protection and enhancement measures on behalf of fish and wildlife and water quality.” Ginsberg Dec. Ex. A at 7.

In general terms, the Fish Committee oversees the implementation of the Fish Passage Plan, and determines what measures require FERC attention. Ginsberg Dec. Ex. B at 66-67. The Fish Committee also refers particular issues to the resource agencies with jurisdiction to resolve any particular concern. *Id.* Of particular relevance here, the Settlement Parties intended that the Fish Committee would be the “key to implementation of the new license,” recognizing the need for “more informed resource management years after license issuance.” *Id.* at 70. The Fish Committee was explicitly empowered to discuss water quality concerns posed by the Project and necessary adjustments to the “blend” of surface and bottom water required to be drawn for power generation, fish passage, and water quality compliance. Ginsberg Dec. Ex. D (excerpts of NOAA Fisheries’ BiOp at 3-8); Ginsberg Dec. Ex. A, App. D at 161-62.

F. The Procedural History Of This Case And DRA’s Pending Summary Judgment Motion

Rather than working through the Fish Committee, of which DEQ is a member, or petitioning FERC to enforce the certification at issue in this case through the License, DRA decided to entirely circumvent this administrative process. Instead, DRA decided to request declaratory relief from this Court, finding PGE—and *PGE alone*—in violation of DEQ’s certification. Most notably, DRA did not choose to sue the Tribe, PGE’s Project partner

(although it issued the Tribe a 60-day notice of intent to sue under CWA section 505(b)). DRA also chose not to include any of the resource agencies that have jurisdiction over the fish, aquatic biota, and surface waters at issue in this case, let alone FERC-- the entity with jurisdiction to enforce the License requirements, including the water quality conditions imposed by DEQ.

Likely recognizing that it is unlikely to overcome the significant hurdles associated with injunctive relief in this case, DRA decided in essence to bifurcate this case, by filing a motion for summary judgment on liability alone. DRA asks this Court to declare that PGE is violating its certification by operating the Project in a manner that causes water quality standards exceedances. It appears through review of DRA's declarations, however, that DRA plans to ask this Court to require PGE "to return to bottom draw" throughout the year to bring the river back to "pre-SWW conditions." *See* Declaration of Greg MacMillan at 12, attached to DRA's Summary Judgment Motion. This puts the Court in an untenable position. The posture of this case does not permit the Court to consult with the Tribe (including its WCB and BNR), DEQ, WCB, NOAA Fisheries, FWS, or ODFW in fashioning any remedy because none of those entities is a party to the case, and none of those entities can be compelled to participate. Moreover, FERC must ultimately approve any modifications to the SWW, or major changes in the manner in which it is operated, and FERC is not a party to this suit.

III. THE COURT SHOULD GRANT PGE'S AND THE TRIBE'S MOTIONS TO DISMISS

Because the Tribe is a necessary and indispensable party which, as a result of its sovereign immunity, cannot be joined to this suit, DRA's case should be dismissed. Rules 12(b)(7), 19(a) and (b)(4). In addition to filing its own motion, PGE also joins the Tribe's Mot. In the interests of brevity and judicial economy, PGE will not repeat the Tribe's arguments here;

PGE will instead address the discrete question of whether PGE can adequately represent the Tribe, a question the Court must answer in the negative to determine that the Tribe's absence would as a practical matter impair or impede its ability to protect its interests. *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013).

In the absence of the Tribe, the Court must also determine whether the case can proceed "in equity and good conscience." Rule 19(b), Fed. R. Civ. P. Because the FERC licensing process provides DRA with an alternative and more appropriate forum to resolve the issues presented in DRA's Motion for Summary Judgment, the Court should dismiss this case.

A. Dismissal Is Appropriate Because PGE Cannot Adequately Represent The Tribe

To answer the threshold question of whether PGE can adequately represent the Tribe, courts look at whether the existing parties would undoubtedly make all of the arguments that the absent party would otherwise make to protect its interests. *See Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Alto*, 738 F.3d at 1127. As well explained in the Tribe's Motion, in this case, the short answer to this pivotal inquiry is unequivocally "no" because the Tribe is a sovereign with unique treaty and other proprietary rights that inure solely to the Tribe. As described in the Calica Declaration (¶¶ 4, 6, 8, 20, 26), the Tribe has sovereign authority to exercise certain governmental powers over natural resources within the boundaries of its Reservation, and the extirpation of anadromous fish from the upper Deschutes basin above the Project, which has had a "profound effect [on] the Tribe and its members." *Id.* at 26. As Mr. Calica explains, "it is for that reason that the Tribe views the Fish Passage Plan as a principal component of the Relicensing Agreement." *Id.* The Settlement Agreement (on which the License was based) includes provisions that were carefully crafted to "ensure the long-term

maintenance of tribal trust resources and improve Tribal control over these resources. . . .”

Ginsberg Dec. Ex. B at 4.

PGE is not so situated that it will undoubtedly make every argument that the Tribe would make to protect interests that are both unique and run solely to the Tribe. PGE, of course, shares a common interest in the Project, and the Project’s financial success. But PGE’s interests in fish passage derive from its more limited regulatory obligations under the License (which includes the certification requirements). In contrast, the Tribe’s interests in fish passage (and the ESA protected anadromous fish) date back to “time immemorial,”³ stem from its cultural heritage and way of life, and are protected under a treaty to which PGE is not a party. Under these circumstances, PGE cannot adequately represent the Tribe’s interests.

Moreover, the Tribe would undoubtedly assist the Court’s analysis. Given its cultural reliance on the fish for subsistence, ceremonial, and medicinal purposes, and the scientific data that the Tribe collects in furtherance thereof, the Tribe would be best positioned to provide information to the Court on the status of the fisheries impacted by the Project. *Alto*, 738 F.3d at 1127-28 (focusing on the capability and willingness of the parties to make the absent party’s arguments and the necessity of the information to the court’s inquiry). In short, given the centrality of the Tribe’s relationship to the fisheries, and the inextricably intertwined relationship between the water quality and fish passage goals of the DEQ certification at issue in this case (*see* WQMMP, Ginsberg Dec. Ex. C at 2), the Court should dismiss the lawsuit in light of the Tribe’s absence.

³ *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 680 (1979) (the significance of the treaty right to fish at off-reservation usual and accustomed places is “not much less necessary to the existence of the Indians than the atmosphere they breathed”). The CTWS has historically depended upon the fish populations of the Columbia River Basin for subsistence, ceremonial and other interests. *See also* Ginsberg Dec. Ex. B at 4.

B. The Case Cannot Proceed In Equity and Good Conscience Without The Tribe

In addition to the arguments presented above, the case cannot go forward in equity and good conscience, for the reasons provided in the Tribe's Mot. and because Plaintiff has an alternative forum -- the FERC post-licensing process--that is more appropriate to resolve this dispute. Rule 19(b)(4), Fed. R. Civ. P. *See Dewberry*, 406 F. Supp. 2d 1148. Here, DRA seeks only a declaration of liability finding PGE to be operating the SWW in violation of the DEQ certification, and an order requiring PGE to comply with applicable water quality standards. But any specific injunctive relief that DRA might ultimately seek-- including any relief requiring PGE to operate the SWW differently --would require approval from FERC and the resource agencies on the Fish Committee with jurisdiction over fish passage requirements. 16 U.S.C. § 799 (requiring FERC approval of License amendments). Moreover, and perhaps even more fundamentally, any relief awarded against PGE necessarily impacts the Tribe, which is not a party to this case.

Here, the Court will be constrained from awarding injunctive relief because modifications to the SWW or its operations will necessarily impact fish passage. *See Calica Dec.* at ¶33. DEQ's WQMMP (incorporated into DEQ's certification) prominently emphasizes that because

operation of the SWW has the potential to affect numerous water quality parameters as well as fish passage success, changes in the operation of the Selective Water Withdrawal facility must consider all possible impacts, not merely a single water quality parameter.

Ginsberg Dec. Ex. C at 2. Accordingly, because the resource agencies with jurisdiction over those resources (including NOAA Fisheries, ODFW, and FWS) are not a party to this case, injunctive relief cannot be awarded. The Court's ability to fashion a remedy is further hamstrung

because FERC is not a party to this case, and because FERC must approve any modification to the License, the Project or its operations.

Under these circumstances, the Court should give comity to FERC, and the Fish Committee which supervises the adaptive management of the SWW, by dismissing this case under Rules 7 and 19(a), including the declaratory relief sought by DRA. *See United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (holding that declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations of the parties nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties). Indeed, the Court has discretion to deny DRA relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, and should exercise that discretion here. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (court’s decision to award declaratory relief is purely discretionary, as the Act confers no absolute rights upon the litigant).

Generally, a district court should not entertain a claim for declaratory judgment when the action is used “to try a controversy by piecemeal, or to try particular issues without settling the entire controversy.” *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 422 (4th Cir. 1998) (per curiam) (citation omitted). The key question the Court must ask is the extent to which the desired declaration “would be of practical assistance in setting the underlying controversy to rest.” *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 537 (1st Cir. 1995) (citation omitted); *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1107 (9th Cir. 2011) (district court should consider whether retaining jurisdiction to issue declaratory relief would “resolve all aspects of the controversy in a single proceeding”). Accordingly, Declaratory Relief should not be granted here because of the piecemeal nature of the litigation and the Court’s inability to award injunctive relief given the absence of critical parties to the case. Rule 19(a).

Moreover, an alternative forum is available that *does* have the critical entities that are missing here. Rule 19(b)(4). The FERC License-- and the Fish Committee established by that License-- is the vehicle that brings together all the agencies with the unique expertise and jurisdiction over both the fish and the water quality of the receiving waters at issue here. The integrity of the FERC licensing scheme is violated if DRA is able to circumvent that process—and the expertise of FERC, NOAA Fisheries, the FWS, ODFW, DEQ, and the WCB—through prosecution of this action. *See* Ginsberg Dec. Ex. B at 68 (“the Settlement Agreement provides for consultation with the Fish Committee prior to all significant decision points” and “requires the Joint Licensees to obtain certain ‘fish agency’ approvals” (*i.e.*, NOAA Fisheries, the FWS, ODFW, and the Tribe’s Bureau of Natural Resources)); *id.* at 70 (emphasizing that the Fish Committee and the other Implementation Committees established by the License “are to be consulted in the development of the various monitoring and adaptive management plans”).⁴

As the history of the FERC licensing process reveals in this case, the Fish Committee was meant to have “a pivotal role in the administration of a large variety of post-licensing activities, including adaptation of protection and enhancement measures on behalf of fish and wildlife, water quality, and recreation.” Ginsberg Dec. Ex. B at 70. “The inclusion of these committees in the Settlement Agreement and the new license allows for more informed resource management years after license issuance.” *Id.*

Accordingly, dismissing this case does not leave DRA without a remedy. DRA is free to approach the Fish Committee with its concerns and to petition FERC to enforce any alleged non-

⁴ An example of the significant role played by the Fish Committee is depicted in a FERC Order issued to PGE and the Tribe in 2007, approving the Joint Licensees’ application to modify the design of the SWW. *PGE & Confederated Tribes of Warm Springs Reservation*, 119 FERC ¶ 62006 (2007).

compliance with License conditions (including certification conditions). 18 C.F.R. § 385.206.

Indeed, FERC regulations allow

any person [to file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

Id. After notice and opportunity for hearing, FERC can approve reasonable modifications of the project structures or other measures for the conservation and development of fish and wildlife resources. *See* Ginsberg Dec. Ex. A, License Order (Paragraph (K)).

Section 31 of the FPA requires FERC to “monitor and investigate compliance with each license” and “to conduct such investigations as may be necessary and proper.” FERC may also “issue such orders as necessary to require compliance with the terms and conditions of licenses. . . .” 16 U.S.C. § 823b(a). To ensure compliance with license requirements, FERC is empowered to order civil penalties, and, in extreme cases, to revoke licenses. 16 U.S.C. § 823b(b)(c). *See e.g., Boyce Hydro Power, LLC*, 162 FERC ¶ 61,116 at p 14 (2018)(holding that the FPA provides FERC “with broad authority to ensure that licensees comply with the FPA, Commission regulations, and conditions of their licenses). However, if FERC declines to award such relief, DRA may then challenge that decision in the appropriate Court of Appeals. 16 U.S.C. § 8251(b).

Indeed, third party environmental groups like DRA have successfully availed themselves of this process, and there is no reason preventing DRA from doing so similarly. For example, American Rivers and other environmental groups filed a petition with FERC claiming that the South Carolina Electric & Gas Company violated the terms of a license for a hydropower project by operating the project in a manner that violated the DO water quality standards. *See S.C. Elec.*

& Gas Co., 108 FERC ¶ 61064 (2004). The parties to that FERC petition (the company and a variety of local, state and federal natural resource managers, including the South Carolina Department of Health Environmental Control, the U.S. FWS, and NMFS) eventually settled and submitted the settlement agreement to FERC for approval. After approving the settlement, FERC then amended the license to require the project operator to file annual operating plans to enhance water quality in the lower Saluda River, including measures to achieve DO levels.

In other situations, the FERC process has allowed certifying agencies like DEQ to avail themselves of the FERC license administration and enforcement process to accomplish similar water quality objectives. For example, in a recent FERC proceeding, the licensee, at the behest of DEQ, successfully petitioned FERC to approve a modified plan for water quality compliance in connection with the Dorena Lake Dam Hydroelectric Project on the Row Rover, the operation of which caused DO problems in the receiving waters. *See Symbiotics, LLC*, 161 FERC ¶ 62153 (2017).

In short, FERC and the Fish Committee (including DEQ, the WCB, FWS, and NOAA Fisheries) are the only entities with the skill set, historical knowledge, and scientific horsepower to balance the twin objectives of water quality improvement and fish passage. And FERC and the agencies with mandatory conditioning authority, including DEQ and the WCB through their section 401 certifications, are the only entities with the ultimate ability to effectuate any appropriate modifications to the License. *See, e.g., PGE & Confederated Tribes of Warm Springs Reservation*, 119 FERC ¶ 62006 (2007). In a case like this, where alternative remedies are available and more appropriate, and where the Fish Committee process established by the License and FERC procedures can provide the complete relief that this Court cannot award, the Court should dismiss the case in the interests of good conscience and equity.

IV. CONCLUSION

For the reasons provided herein, and in the Tribe's Motion, PGE respectfully requests that the Court dismiss this case with prejudice pursuant to Fed. R. Civ. P. 12(b)(7), and 19.

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