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Of Attorneys for Amicus Curiae
The Confederated Tribes of the Warm Springs Reservation of Oregon

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DESCHUTES RIVER ALLIANCE, an Oregon nonprofit corporation,

Plaintiff,

v.

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

Defendant.

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

TRIBE'S MEMORANDUM In Support of Defendant's Cross-Motion for Summary Judgment and In Response to Plaintiff's Motion for Partial Summary Judgment

I. Introduction.

Amicus curiae The Confederated Tribes of the Warm Springs Reservation of Oregon ("Tribe") urges the Court to consider *sua sponte* whether to entertain this action further, because declaratory relief is an equitable remedy that should be granted only as a matter of discretion and in the public interest. Plaintiff Deschutes River Alliance's ("DRA") claim for declaratory relief in this action raises issues of serious public concern and must be based on an "adequate and full-

bodied" record so that the Court may consider its effect on judicial economy, comity, and federalism. Judged against that standard, the Court should decline to exercise its discretion to adjudicate DRA's claim.

DRA moves the Court for partial summary judgment, bifurcating liability from its currently vague request for injunctive relief. In so doing, DRA deprives the Court of the meaningful opportunity to understand fully the operational changes that DRA seeks to impose on the Pelton Round Butte Hydroelectric Project ("Pelton Project" or "Project") as Court analyzes DRA's interpretation of the water quality certification issued by the Oregon Department of Environmental Quality ("DEQ") pursuant to Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, ("DEQ Certification"). Not only is such an approach unfair to the Court it is also unduly prejudicial to defendant Portland General Electric Company and the Tribe.[1]

DRA has adopted an approach designed to obtain an unjust res judicata advantage; it is attempting to obtain an adjudication of liability in its favor before disclosing, with any particularity, its requested injunctive relief to the Court and the other parties. Established judicial precedent cautions courts against exercising their discretion to adjudicate declaratory relief claims in such circumstances. Given the intricately balanced water quality and fish passage requirements in the DEQ Certification and the Project License issued by the Federal Energy Regulatory Commission ("FERC"), the Count should decline to exercise its discretion here.

[1] Although only an amicus party, in its Rule 12(b)(7) motion to dismiss, the Tribe has provided substantial evidence and argument setting forth its significant sovereign and proprietary interests relating to the subject of this action.

To the extent that the Court exercises its discretion and adjudicates DRA's claim for declaratory relief, the Tribe asks that the Court grant PGE's motion for summary judgment and deny DRA's motion for partial summary judgment. Both motions focus on the proper interpretation of the requirements of the DEQ Certification relating to pH, temperature, and dissolved oxygen. PGE construes the DEQ Certification in accordance with applicable Ninth Circuit precedent and provides a reasonable interpretation of the DEQ Certification which gives effect to its fish passage and adaptive management requirements, and gives due consideration to other equally important conditions of the FERC license, including conditions to protect species listed under the Endangered Species Act, 16 U.S.C. § 1531 *et. seq.*, ("ESA").

II. Argument.

A. Applicable Legal Standards.

1. Declaratory judgment standard.

Under the Declaratory Judgment Act, a district court "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). The Declaratory Judgment Act includes both constitutional and prudential concerns. *Gov't Emps. Inc. Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998). An action seeking federal declaratory relief must first present an "actual case or controversy" under Article III, section 2 of the United States Constitution. *Id.* Next, the action must meet certain statutory jurisdictional prerequisites. *Id.* at 1223. Even if the action passes constitutional and statutory muster, the district court must also be satisfied that "entertaining the action is appropriate." *Id.* That determination is discretionary, because the Declaratory Judgment Act is "deliberately cast in terms of permissive, rather than mandatory, authority." *Id.* (internal quotations and citation

omitted). The Act gives district courts the "competence to make a declaration of rights; it [does] not impose a duty to do so." *Id.* (internal quotations and citation omitted).

Prudential guidance for retention of the court's authority to adjudicate a Declaratory Judgment Act claim can be found in *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1962), and its progeny. *Id.* As a form of equitable relief, declaratory judgments should be granted "only as a matter of discretion, exercised in the public interest." *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962). Adjudication of Declaratory Judgment Act claims in cases of "serious public concern," are to be based on an "adequate and full-bodied" record. *Id.* at 113.

The Ninth Circuit instructs district courts to consider how proceeding with the action would affect judicial economy, comity, and federalism. *Allstate Co. v. Herron*, 634 F.3d 1101, 1108 (9th Cir. 2011). Factors that a district court may consider in determining whether to entertain a Declaratory Judgment Act action include whether retaining jurisdiction would:

> "(1) involve the needless determination of state law issues; (2) encourage the filing of declaratory actions as a means of forum shopping; (3) risk duplicative litigation; (4) resolve all aspects of the controversy in a single proceeding; (5) serve a useful purpose in clarifying the legal relations at issue; (6) permit one party to obtain an unjust res judicata advantage; (7) risk entangling federal and state court systems; or (8) jeopardize the convenience of the parties."

Id. at 1107. A district court need not consider *sua sponte* whether to entertain the action, but if raised by a party, the court must explain its reasoning for exercising jurisdiction in accordance with *Brillhart* and its progeny. *Dizol*, 133 F.3d at 1227.

2. Summary judgment standard.

Summary judgment is appropriate when "there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Albino v. Baca*,

747 F.3d 1162, 1168 (9th Cir. 2014). A "material" fact is one that is "relevant to a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Materiality determinations rest on the underlying substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is "genuine" if there is evidence from which a reasonable jury could return a verdict in favor of the nonmoving party. *Id.* Once a moving party establishes the lack of a genuine issue of material fact, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv.*, 809 at 630 (quotations and citations omitted). For summary judgment purposes, the evidence, including reasonable inferences drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *Id.*

B. The Court Should Not Exercise its Discretion to Adjudicate DRA's Declaratory Judgment Act Claim.

DRA asks the Court to issue a judgment, pursuant to the Declaratory Judgment Act, declaring that PGE "has violated and continues to be in violation" of the DEQ Certification. (ECF Dkt. 1, pp. 2, 9.) DRA also requests that the Court enjoin PGE from operating the Pelton Project in violation of the DEQ Certification. (*Id.*) In its motion for partial summary judgment, DRA moves the Court for an order declaring that PGE is "liable" for alleged violations of certain water quality requirements of the DEQ Certification relating to pH, temperature, and dissolved oxygen. (ECF Dkt. 65, p. 18.) DRA does not seek injunctive relief in connection with its motion for partial summary judgment. (*Id.*)

DRA and PGE do not dispute that this action asks the Court to determine matters of serious public concern; indeed, there can be no genuine debate about the importance of the matters raised by DRA. The question, therefore, becomes whether DRA's claim is presented on

an "adequate and full-bodied record" that allows the Court adequately consider this claim's effect on judicial economy, comity, and federalism. *Rickover*, 369, U.S. at 113; *Allstate Co.*, 634 F.3d at 1108.

DRA's claim does not, and could not, rest on a "full-bodied record" because DRA resolutely insists on seeking a judicial declaration for only the pH, temperature, and dissolved oxygen requirements of the DEQ Certification without consideration of the context of the entire document and its role in the structure of the Project's 2005 FERC License ("License" or "2005 License"). *C.f. Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("NRDC") (construing NPDES permit in accordance with contract interpretation framework).[2] By narrowly framing its claim for declaratory relief, DRA risks duplicative litigation and fails to tackle how this action can address all aspects of the controversy, including whether its limited claim for declaratory relief serves any useful purpose.

The Pelton Project is located on the Deschutes River within and adjacent to the Tribe's Reservation, which was reserved by the Tribe's 1855 Treaty. (Declaration of Charles R. Calica ("Calica Dec.") ¶¶ 4, 6, and 11.) The Tribe and the State of Oregon share responsibility for regulating the Project's water quality, because it discharges into waters of the State of Oregon and Tribe. (Calica Dec. ¶ 23.) The Tribe's Water Control Board has issued a water quality certification ("WCB Certification") for the Project in coordination with DEQ. (*Id.*) Both certifications reference and incorporate the same Water Quality Management and Monitoring Plan ("WQMMP"), which is intended to provide a coordinated and integrated application of both certifications to the Project. (*Id.*)

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[2] A copy of the 2005 FERC License can be found at ECF Dkt. No. 73-9.

The DEQ and WCB Certifications are also incorporated as conditions of the 2005 License. (ECF Dkt. No. 73-9, pp, 23 – 24, 48.) *See also* U.S.C. § 1341(d) (requirements of certification become conditions of federal license). Both certifications and the WQMMP include requirements relating to fish passage and adaptive management in addition to water quality requirements for pH, temperature, and dissolved oxygen. (ECF Dkt. No. 73-9, pp. 23 – 24, 120 - 21, 133.) The DEQ Certification expressly requires PGE and the Tribe to comply with the Fish Passage Plan, which was developed as part of the Settlement Agreement Concerning the Relicensing of the Pelton Round Butte Hydroelectric Project, FERC Project 2030, dated July 13, 2004 ("Relicensing Settlement Agreement"). (ECF Dkt. No. 73-9, p. 120.; ECF Dkt. No. 73-7, pp. 101 – 267 (Fish Passage Plan).) FERC expressly approved the Fish Passage Plan and made it part of the License. (ECK Dkt. No. 73-9, p. 49.)

The License also includes conditions relating to the fishway prescriptions submitted by the United States Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") pursuant to Section 18 of the Federal Power Act, 16 U.S.C § 811. (ECF No. 73-9, pp. 48, 143 – 72.) Those fishway prescriptions require PGE and the Tribe to "implement the Fish Passage Plan to establish self-sustaining harvestable anadromous fish runs of Chinook, steelhead and sockeye above the Project." (*Id.*at pp. 143, 159.)

Two ESA-listed fish species are also known to occur in the vicinity of the Project: the Columbia River bull trout Distinct Population Segment (DPS) (threatened); and the Middle Columbia River steelhead evolutionarily Significant Unit (ESU) (threatened). (*Id.* at 31 – 32.) FERC consulted with NMFS and USFWS, who then issued incidental take statements with reasonable and prudent measures to minimize incidental take of bull trout and steelhead.

(*Id.* at 32, 173 - 74.) Those measures include implementation of "all protection, mitigation, and enhancement measures" set forth in the Relicensing Settlement Agreement, which includes carrying out the Fish Passage Plan. (*Id.* at 173 – 74.) PGE and the Tribe are also required to use "best available science to adaptively manage Project operation * * * activities to avoid or minimize effects" to bull trout and steelhead. (*Id.*) The License also requires a FERC approved Threatened and Endangered Species Protection Plan, which implements NMFS's and USFW's reasonable and prudent measures. (*Id.* at 104.)

The principal infrastructure improvement to facilitate both fish passage and water quality management is the selective water withdrawal facility ("SWW") at the existing Round Butte Dam intake tower. (Calica Dec. ¶ 34.) The SWW is the "centerpiece of the resource protection measures." (*Id.*) The SWW is designed to allow water withdrawal from both the warmer surface water and the cooler bottom water from Lake Billy Chinook. (*Id.*) The WQMMP, which is incorporated into the DEQ and WCB Certifications, states that the SWW is intended to achieve two important objectives: (a) help the Project meet temperature and water quality goals and standards in the lower Deschutes River and Project reservoirs; *and* (b) allow the withdrawal of surface waters during salmonid smolt migration periods to facilitate the capture of downstream emigrating smolts for anadromous fish reintroduction. (*Id.*; ECF Dkt. 73-7, pp. 512 – 13.) The WQMMP observes that because the SWW has the potential to affect water quality and fish passage, all possible impacts must be considered in its operation, which is to be adaptively managed. (*Id.*)

DRA asserts that since SWW operations began, the Project discharges have regularly exceeded the DEQ Certification's requirements for pH and temperature and have fallen below

the DEQ Certification's requirements for dissolved oxygen. DRA then concludes, without any analysis, that such excursions necessarily violate the DEQ Certification and the CWA. (ECF Dkt. 65, pp. 15 – 19.) In similar circumstances, courts have determined that the failure to meet an approved benchmark is not, itself, a violation of a CWA storm water permit where the permit contains an adaptive management scheme. *Tualatin Riverkeepers v. Oregon Dept. of Environmental Quality*, 235 Or. App. 132, 147 – 48, 230 P.3d 550 (2010). Rather, the failure to engage in the adaptive management process is the violation of the permit in those circumstances. *Id.*

DRA, however, ignores the fish passage and adaptive management requirements in the DEQ Certification. DRA also does not provide any explanation as to why the DEQ Certification requirements relating to pH, temperature, and dissolved oxygen should be prioritized over fish passage, adaptive management, the other requirements of the Certification, or the other conditions of the License, including conditions to protect ESA-listed steelhead and bull trout. DRA makes no attempt to harmonize its interpretation of the DEQ Certification and the CWA with other applicable federal laws and Tribal laws, including the Tribe's 1855 Treaty. *See e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 665 (2007) (CWA and ESA must be construed in harmony so as to avoid abrogation of the provisions of either statute); *United States v. Payne*, 264 U.S. 446, 448 (1924) (federal statute, though later in time, required to be harmonized with Indian treaty to protect rights guaranteed by treaty). Instead, DRA asks this Court to adjudicate its claim for declaratory relief without even acknowledging that an appropriate interpretation of the DEQ Certification and CWA must be harmonized with other

applicable authority as a matter of judicial economy, comity, and federalism. DRA's contention is at odds with the judicial precedent and should be rejected. *Id.*

DRA's ultimate goal appears to be to largely return the Pelton Project to the pre-SWW operating regime in which the Project would discharge predominantly bottom water, rather than a blend of surface water and bottom water. (ECF Dkts. 1, 65 – 71.) DRA does not deal forthrightly with the environmental consequences of that regime, including extirpation of anadromous fish above the Project and water quality problems associated with bottom water withdrawal. (ECF Dkt. 73 ¶¶ 24, 26.) By focusing on a limited sub-set of conditions in the DEQ Certification, DRA seems to be attempting to obtain an unjust res judicata advantage. DRA seeks an order declaring limited violations of the DEQ Certification without disclosing in any detail the injunctive relief that it would pursue in the event that the Court enters an order in DRA's favor. DRA appears intent on obtaining a declaration of liability without giving the Court the opportunity to consider how those changes would affect the Project's carefully crafted fish passage conditions before making any liability determination. DRA's approach deprives the Court of the ability to assess the impact of a liability determination on the adaptive management requirements in the DEQ Certification; there is risk that such a liability determination could limit the discretion of the PGE, the Tribe, and Fish Committee to adaptively manage the Project in the future.

DRA's litigation strategy is contrary to the fair and efficient administration of justice; it deprives the Court of the opportunity to meaningfully assess the consequences of any liability determination on future operations of the Project. The Tribe urges the Court not to countenance such an approach, especially in light of the Tribe's sovereign and proprietary interests implicated

by this action. (ECF Dkt. Nos. 33, 73, 79, 80.) The Court should not exercise its discretion to adjudicate DRA's Declaratory Judgment Act claim.

C. PGE's Motion for Summary Judgment Should Be Granted, and DRA's Motion for Partial Summary Judgment Should be Denied.

If the Court adjudicates DRA's Declaratory Judgment claim, the Tribe asks that the Court grant PGE's motion for summary judgment and deny DRA's motion for partial summary judgment. DRA's and PGE's cross-motions for summary judgment focus on the proper interpretation of the DEQ Certification, which can be decided on summary judgment *C.f., NRDC*, 725 F.3d 1194. PGE construes the DEQ Certification in accordance with applicable Ninth Circuit precedent and offers a reasonable interpretation of the DEQ Certification that gives effect to its fish passage and adaptive management provisions, along with the conditions of the FERC license. The Tribe shares PGE's interpretation of the DEQ Certification, which it incorporates by reference into this memorandum.

DRA, in contrast, offers an interpretation that any excursion outside requirements for pH, temperature, and dissolved oxygen is necessarily a violation of the DEQ Certification and CWA. DRA's interpretation is contrary to the plain and unambiguous meaning of the text of the DEQ Certification, including the WQMMP, which contains the following admonishment:

> "Because operation of the [SWW] has the potential to affect numerous water quality parameters, as well as fish passage, *changes in the operation of the [SWW] must consider all possible impacts, not merely a single water quality parameter.* * * *.
>
> "*For the purpose of satisfying water quality standards for temperature, DO, [and] pH* * * *, as well as ensuring downstream fish passage*, * * * [PGE and the Tribe] *shall operate the [SWW] pursuant to general adaptive management considerations*."

(Emphasis added.) DRA's interpretation of the DEQ Certification fails to give effect to the foregoing provisions. DRA does not consider "all possible impacts" because it ignores, at the minimum, the WQMMP's fish passage requirements. DRA also does not give effect to the WQMMP's requirement that the Project be operated pursuant to general adaptive management considerations for the purpose of satisfying water quality standards for temperature, dissolve oxygen, pH as well as *ensuring downstream fish passage*.[3]

Viewing the plain language of the DEQ Certification in the context of the WQMMP and the 2005 License (which includes the WCB Certification), it is not reasonable for DRA to conclude that any excursion outside requirements for pH, temperature, and dissolved oxygen is necessarily a violation of the DEQ Certification and CWA. The Court should reject DRA's assertions to the contrary and should grant PGE's motion for summary judgment because it is a reasonable construction of the DEQ Certification in light of the structure of the 2005 License as a whole. *NRDC*, 725 F.3d at 1204 - 05.

III. Conclusion.

For the foregoing reasons, the Tribe believes that it is not in the public interest for the Court to exercise its discretion to adjudicate DRA's Declaratory Judgment Act claim. If the Court proceeds with this action, the Court should enter an order granting PGE's motion for summary judgment and denying DRA's motion for partial summary judgment.

[3] Additional bottom water withdrawal necessarily reduces surface water withdraw through the SWW and impairs fish passage. (ECF Dkt. 80.)

Respectfully submitted.

Dated: April 27, 2018

s/ Josh Newton
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Attorney for The Confederated Tribes of the Warm Springs Reservation of Oregon

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2018, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Oregon via the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

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