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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HUMBOLDT BAYKEEPER and
ECOLOGICAL RIGHTS FOUNDATION,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY
and NORTH COAST RAILROAD
AUTHORITY,

Defendants.

No. C 06-02560 JSW

**ORDER DIRECTING PARTIES
TO FILE FURTHER BRIEFING**

_____ /

Now before the Court is Defendants motion for leave to amend. In their reply brief, Defendants agree that because parties may raise this indispensable party issue at any time, their delay cannot constitute “undue” delay and Plaintiffs will not be prejudiced by the proposed amendment. (Reply at 2-3, 5.) However, at the hearing on Defendants’ motion, Plaintiffs responded that pursuant to the *Ex Parte Young* doctrine, the State may be sued for violations of federal law in which the plaintiffs merely seek prospective, injunctive relief, and therefore, the State would be, at most, a necessary party to this action, but would not be indispensable. Moreover, although the absence of an indispensable party may be raised at any time, the failure to join necessary parties may be waived if objections are not made in the defendant’s first responsive pleading. *See Citibank, N.A. v. Oxford Properties & Finance Ltd.*, 688 F.2d 1259, 1263 n. 4 (9th Cir. 1982). The Court is inclined to agree with Plaintiffs and find that because the State is, at most, a necessary party, and not indispensable, Defendants have waived this

1 issue. However, because Plaintiffs raised this argument for the first time at the hearing, the
2 Court will provide Defendants a brief opportunity to respond. Defendants may file a
3 supplemental brief, no longer than five pages, by May 14, 2009. Plaintiffs may file a response,
4 no longer than five pages, by May 21, 2009.

5 **IT IS SO ORDERED.**

6
7 Dated: May 7, 2009



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE