The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PROTECT THE PENINSULA'S FUTURE; COALITION TO PROTECT PUGET SOUND HABITAT; and BEYOND PESTICIDES,

Plaintiffs,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE; MARTHA WILLIAMS, DIRECTOR OF UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendants.

Case No. 3:23-CV-05737-BHS

LIMITED INTERVENOR JAMESTOWN S'KLALLAM TRIBE'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(7)

Noted on Motion Calendar: December 16, 2024

Oral Argument Requested

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I. INTRODUCTION

The purpose of the Plaintiffs' case is to stop or severely restrict the Jamestown S'Klallam Tribe ("Tribe") from farming in their historic homeland, but the Tribe cannot be joined due to sovereign immunity, which has not been waived. This Court recently ruled that the Tribe is a necessary party with an important "leasehold and . . . property interests in the farm," allowing limited intervention to file this motion. Dkt. 42 at 4. Devastating injury to the Tribe will necessarily occur if this suit proceeds in their absence, including, but not limited to their ability to provide for their people. Applying the Fed. R. Civ. P. 19(b) balancing test, this case cannot proceed in equity and good conscience without them. Accordingly, the Tribe, as a limited intervenor and without waiving their sovereign immunity, moves to dismiss this lawsuit pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19.

II. FACTUAL BACKGROUND

A. Jamestown S'Klallam Tribe and Dungeness Tidelands

Jamestown is a federally recognized Indian tribe with deep historical ties to the Sequim and Dungeness Bay area, where they have lived and fished, including gathering and procuring shellfish, long before this country's existence. Dkt. 31, ¶ 2, ¶¶ 7-9, Ex. B at 16 (Finding 358)[1]; *United States v. Washington*, 626 F. Supp. 1405, 1432-34, 1486-87 (W.D. Wash. 1985) (orders issued May 8, 1981, corrected orders, March 14, 1984, Feb. 21, 1985). In 1855, Tribal leaders signed the Treaty of Point No Point ("Treaty") with the federal government, agreeing to cede their vast expanse of land but reserving the right to fish, hunt, and gather 'as they always had'

[1] This motion relies on the previously filed Declarations of W. Ron Allen, Dkt. 31 and Elizabeth Tobin, Dkt. 33 which will be refiled for the Court's convenience.

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within their "usual and accustomed" areas ("U&A"). 12 Stat. 933 (1855). The Tribe's adjudicated U&A for "fishing" is described as including "the waters of the Strait of Juan de Fuca, all the streams draining into the Strait from the Hoko River east to the mouth of Hood Canal . . . ." 626 F. Supp. at 1486 (Finding of Fact No. 358). Subsequent decisions have determined that the right to "fish" includes shellfish. *United States v. Washington*, 157 F.3d 630, 643, 647 (9th Cir. 1998) ("Rafeedie Decision"), reaffirming Judge Boldt's inclusion of shellfish harvesting within the Tribe's Treaty right, 12 Stat. 933 (1855). *United States v. Washington*, 873 F. Supp. 1422, 1429 (W.D. Wash. 1994), rev'd in part on other grounds 135 F.3d 618 (9th Cir. 1998). They share this same fishing area with the Port Gamble S'Klallam and Lower Elwha Klallam Tribes.

The Refuge is in the Olympic Peninsula, near Sequim, Washington, and was created by President Woodrow Wilson's 1915 executive order (EO), where it included only "Dungeness Spit" as the Refuge. Dkt. 1 at ¶¶ 32-34, AR 1 ("hereby order that Dungeness Spit . . . be . . . reserved and set apart . . . ."). In 1943, the State of Washington, owner of the tidelands, through legislative action granted an easement to the United States Fish and Wildlife Service ("USFWS") over an area greater than the Spit; but no subsequent EO or federal legislation expanded the Refuge to include the tidelands or area beyond "that Dungeness Spit." FWS-000001 ("AR" 1)[2]; AR 6. The Service's easement is subservient to the State's ownership. AR 6 (Second Class Deed); Dkt. 31 (Allen Decl.), ¶ 21, Ex. D. This easement was authorized by the State Legislature

[2] Citations to the administrative record ("AR") are bate stamped "FWS-00000_" but are hereby shortened to just "AR" with the document number (removing zeros before the numerical digit), such that "FWS-000001" will be cited as "AR 1."

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pursuant to Section 152, Chapter 255, Session Laws of 1927, and conveyed for "any public purpose[.]" AR 677. The Refuge is part of the National Wildlife Refuge System administered by the Service pursuant to 16 U.S.C. §§ 668dd-668ee. The Tribe was never consulted about the passage of these laws, which often valued non-Indian rights over Tribal.[3]

In 1983, Jamestown obtained a letter of agreement with the Service regarding their Treaty access to these tidelands. AR 7-AR 9; AR 636-AR 676. In 1990, the Tribe purchased oyster farm assets and acquired their first lease for a 50-acre parcel of State-owned tidelands from the Washington State Department of Natural Resources (DNR), where they cultivate oysters on the tidelands, within the Service's easement. AR 9-AR 25 (1990 lease); AR 636 (2021 Lease); AR 24 (map); Dkt. 31, ¶ 8, ¶11. The Tribe's operation is small in scale and intended to provide cultural connection, funds, and oysters supplied to Tribal programs as well as used in ceremonies. Dkt. 31, ¶ 11, ¶ 15, ¶ 19, ¶ 23. Currently, only 0.5 acres are being used in the 34 acres of leased State-owned tidelands,[4] all of which lie squarely within the Tribe's adjudicated U&A. Dkt. 31, ¶¶ 8-9, Ex. B at 16; *see United States v. Washington*, 626 F. Supp. at 1486. Raising and procuring shellfish within their U&A is part of the Tribe's right to take fish and is an integral part of their cultural practice, funding for their programs, and providing traditional foods for their people. Dkt. 31 ¶¶ 7-9, ¶ 11, ¶ 19, ¶20.

[3] Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 496 n.21 (2017), at https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-491.pdf (last visited September 13, 2024).
[4] https://jamestowntribe.org/history-and-culture/jamestown-sklallam-history/ (last visited Nov. 18, 2024).

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The tideland at issue was understood to have had an oyster farm on it for over a century, and there is no evidence the State intended to extinguish oyster farming on these tidelands when in 1943, it granted a "public purpose" easement to the federal government. Dkt. 33 (Tobin Decl.), Ex. A (continuing uses); AR 86-AR 87, AR 677-AR 679. On the contrary, the deed reserves considerable rights, including access for the purpose of removing natural or manufactured products "of the land." AR 6; Declaration of Lauren P. Rassmussen ISO Mot. to Dismiss ("Rasmussen Decl."), Ex. A (Session Laws). For more than 10 years, the Tribe worked with various agencies to obtain clearances, all designed to protect the birds and wildlife impacted by their operations, namely:

1. Clallam County, Washington: shoreline permits;

2. Washington State Dept. of Ecology: reviewed and approved the Clallam County shoreline permits; Coastal Zone Management Certification; and Water Quality Certification;

3. Washington State Dept. of Fish and Wildlife: shellfish transfer permit;

4. U.S. Fish and Wildlife Service: Endangered Species Act compliance;

5. U.S. Army Corps of Engineers: Water Quality Section 404b authorization and Section 10 authorization for navigable waters; and

6. Washington State DNR: Lease for Aquaculture.

Dkt. 31, ¶¶ 12-18, Ex. C; Dkt. 33, ¶ 6. At no time during this permitting with the county, state, and federal authorities, did Plaintiffs appeal. Dkt. 31, ¶ 20, Ex. D.

Notably, the Service's 2013 comprehensive plan is still in effect and consistent with the position of not requiring a compatibility determination for the Tribe's operations on these

tidelands. AR 136 (recognizing that the Service will coordinate with appropriate tribes as they exercise their treaty rights); AR 185 (recognizing the Service has a mere consultation right on the leasehold).

B. Current Lawsuit

PPF and two other environmental groups (collectively "PPF" or "Plaintiffs"), filed this suit on August 16, 2023, without notifying the Tribe, asking the Court to order the Service to complete a compatibility study for the Tribe's operations and compel the Tribe to obtain a special use permit. Dkt. 1; Dkt. 22 at 2-3. The Tribe, upon discovery of the lawsuit, filed for and was granted limited intervention. Dkt. 42. The Tribe is a sovereign nation that has not waived sovereign immunity. Dkt. 31, ¶¶ 5-6. PPF's suit requests "reversal of the Service's decision that no approvals or permits are needed[,]" which would effectively halt the Tribe's existing access and use of these tidelands. Dkt. 22, ¶ 1; Dkt. 21 at 12 ¶¶ B-C; Dkt. 31, ¶¶ 19-20, ¶ 22. Harvesting and procuring shellfish on these tidelands occurred at pre-treaty times (1855) and within the last 30 years. Dkt. 31, ¶¶ 7-10.

The Service has clearly indicated it does not represent the Tribe. Dkt. 30, ¶ 4. The Tribe's actions, though, are the true target of this suit (Dkt. 22), and this Court recognized such. Dkt. 42 at 3-4. But the Tribe has not waived sovereign immunity. Dkt. 31, ¶ 5 (only Tribal Council can waive and has not). PPF cannot sue the Tribe directly, and therefore has only sued the Service. *Dawavendewa v. Salt River Project Agr. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002) (Parties should not be allowed to circumvent sovereign immunity by substituting parties). Earlier in the case, before the Tribe was granted limited intervention, the Service filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Dkt. 20 at 3. The Court

ruled on the Service's motion, denying dismissal of Count 1, but dismissing Count 2, regarding compelling the special use permit, without prejudice but with leave to amend. Dkt. 20 at 3. PPF filed an amended complaint on August 6, 2024, and Defendants answered. Dkt. 22; Dkt. 23.[1] On September 12, 2024, prior to the Tribe's limited intervention, the Court entered a Minute Order implying it ruled, in-part, on the Service's jurisdiction to act in this case, but not all relevant facts or necessary parties were before the Court at that time. Dkt. 27.

On November 12, 2024, the Court granted the Tribe limited intervention as a matter of right, determining the Tribe is a necessary party whose interests would be impacted if the case proceeds without them. Dkt. 42 at 3-4.

III. ARGUMENT

This type of lawsuit is the reason behind Rule 19: to prevent a backdoor attack of absent parties' rights. The Tribe, without waving their sovereign immunity, intervened only to file this motion to dismiss, as tribes are immune from lawsuits targeting federal actions that impact their interests. *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966, 971 (W.D. Wash. 2023); *see Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 785 (2014).

A. Legal Standards for Dismissal Under Rules 12(b)(7) and 19

A nonparty who has not consented to a lawsuit may appear to seek dismissal pursuant to Rule 19. *Friends of Amador County v. Salazar*, 554 Fed. Appx. 562, 564 (9th Cir. 2014); *Maverick Gaming*, 658 F. Supp. 3d 966, 970 (allowing tribal limited intervention to file motion to dismiss). Under Fed. R. Civ. P. 12(b)(7), a complaint must be dismissed for "failure to join a party" according to Rule 19. *Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022-25 (9th Cir. 2002). Rule 19 requires an analysis of (i) whether the nonparty should have been joined (i.e., is

necessary or required); (ii) if so, whether joining that nonparty is feasible (i.e., is it possible); and (iii) if not, whether the case can proceed in the required party's absence. Fed. R. Civ. P. 19; *Maverick Gaming*, 658 F. Supp. 3d at 970; *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005). Whether a nonparty is required depends on whether in their "absence, the court cannot accord complete relief among existing parties; or . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1).

The standard for proceeding without a required party is whether "in equity and good conscience, the action should proceed among . . . existing parties." Fed. R. Civ. P. 19(b); *Maverick Gaming*, 658 F. Supp. 3d at 975; *Dawavendewa*, 276 F.3d 1150, 1161 (citing Rule 19, deciding that "real claim" is against tribal nation itself and plaintiffs cannot circumvent sovereign immunity). A court looks at the rule's four factors to determine if an absent party is indispensable:

> (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.

276 F.3d at 1161-62. Stated differently, if it is not feasible to join the absent party, "the court must determine . . . whether the case can proceed without the absentee, or whether the absentee is an 'indispensable party' such that the action must be dismissed." *EEOC,* 400 F.3d 774, 779; *see also Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 48 F.4th 934, 943 (9th Cir. 2022).

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In the unique case of tribal parties, though, there is a "wall of circuit authority" that supports balancing these factors in favor of "dismissal . . . when the case involves the interests of a Tribe who cannot be joined[.]" *Deschutes River All. v. Portland Gen. Elec. Co.,* 1 F.4th 1153, 1163 (9th Cir. 2021) (quoting *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs*., 932 F.3d 843, 857 (9th Cir. 2019)); *see also Klamath Irrigation Dist.,* 48 F.4th at 946; *Maverick Gaming*, 658 F. Supp. 3d at 970-71. Stated differently, in such cases the Circuit favors dismissal because preserving tribal sovereignty is compelling on its own. *Makah Indian Tribe v. Verity,* 910 F.2d 555, 560 (9th Cir. 1990) ("prejudice to any party resulting from a judgment militates toward dismissal of the suit.") (emphasis omitted); *see also Greyhound Racing*, 305 F.3d at 1025; *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (interest in preserving sovereign immunity or to not have their interests determined without consent). As part of this analysis, if a court's ruling on the matter detrimentally impacts an absent tribe, the court will look at whether a plaintiff's successful remedy comes at the absent tribe's expense. *Makah Indian Tribe,* 910 F.2d at 560

Given the facts and demonstrated harm to Jamestown's interests, the Tribe meets the elements for dismissal under Rule 12(b)(7) and Rule 19, as discussed below. The Tribe is "required" and "indispensable," but cannot be joined because of sovereign immunity, and equitably the case cannot proceed without them given their strong interest in maintaining this sovereignty, their farm and leasehold, and direct challenge to their Treaty rights. Further, given Plaintiffs' positions and pervasive arguments implicating tribal and State rights, there are

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arguably other absent, necessary parties[5] who cannot be joined due to sovereign immunity, another reason why dismissal is warranted.

B. Jamestown is a Required and Indispensable Party Under Rule 19

The "required" party analysis under Rule 19(a) begins with determining whether the absent party, in this case the Tribe, has a "legally protected interest" in the subject of the lawsuit. *Shermoen*, 982 F.2d at 1317; *Salt River Project Agric. Improvement & Power Dist. v. Lee,* 672 F.3d 1176, 1179 (9th Cir. 2012). Here, the Tribe meets this "required"[6] standard because their "legally protected interest" lies in their "ability to protect" their property rights, their oyster farm investment, their Treaty rights, and their sovereignty to decide what is in the best interests of their programs, people, and way of life, all of which cannot be adjudicated in their absence. Dkt. 31, ¶¶ 12-14, ¶20, ¶¶ 22-23; *Shermoen*, 982 F.2d at 1317 (interest in preserving their sovereignty). This Court has already concluded that the Tribe is "necessary" as it possesses "leasehold and . . . property interests" that are the subject of this suit with "treaty rights and property interests . . . separately sufficient" for rightful intervention. Dkt. 42 at 3-4. And further examination of the legally protected interests at stake demonstrates that the Tribe is both required and indispensable.

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[5] Given Plaintiffs' position and attempt to use and interpret a 2007 settlement agreement from *U.S. v. Washington*, C70-9213, the State of Washington and all 15 tribal signatories are arguably additional required parties, as interpretation of this settlement impacts their rights as well. *See* Dkt. 39, Ex. B; Rasmussen Decl. Ex. F (recognition of the requirement for concurrence from the Tribes of the settlement if changes are required).

[6] Rule 19 was amended where 'necessary' was replaced by the word 'required,' but this change was only intended to be stylistic. *Republic of Philippines v. Pimental,* 553 U.S. 853, 855-56 (2008).

1. Legally Protected Interests: Property Rights

Part of this analysis requires the Court to determine whether complete relief among the current parties can be obtained in the Tribe's absence. *Shermoen*, 982 F.2d at 1317. Here the answer is "no" because the case issues, as this Court has indicated, require more than cursory legal analysis of the property rights, which includes Treaty rights (Dkt. 20 at 17 ("lack of clarity")) and the Tribe, at least, would need to be joined to properly defend their interests and rights. Dkt. 42 at 3-4 ("disposition of this matter, which includes the potential for a ruling that implicates their rights" and "treaty rights and its property interests are separately sufficient").

Any ruling on this case's outcome requires addressing the threshold question of the State's and Service's authority, which involves State property law. The scope of the Refuge's easement is a question of State, not just federal law, as it invokes property rights, and the fee owner is the State of Washington. *See Vacation Vill., Inc. v. Clark Cty.*, 497 F.3d 902, 917 (9th Cir. 2007); *accord Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n*, 173 Wash. App. 778, 789-90, 295 P.3d 314, 320 (2013). To prevail, Plaintiffs need to demonstrate (i) that the Service, as easement holder, has the authority[7] to regulate the Tribe, a sovereign domestic nation, who is operating on State-owned tidelands outside the Dungeness

[7] The Court recently entered a Minute Order implying it decided the jurisdictional question (Dkt. 27) and in the recent Order implied the Service "must" do a compatibility study (Dkt. 42 at 3:11); however, a motion to dismiss generally does not reach the merits, as it assumes all facts in the pleadings are true. *See generally Erickson v. Pardus*, 551 U.S. 89 (2007). Not all the facts or the necessary parties in this case were even before the Court at that time. *See, e.g.,* Allen Decl., ¶20, Ex. D (2018 Letter); Dkt. 20. In fact, a decision on the merits would not be appropriate, in this instance, because the question before the Court at that time was "whether the claimant is entitled to offer evidence to support the claims" not whether they will prevail. *Jackson v. Carey,* 353 F.3d 750, 755 (9th Cir. 2003) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)); *see also Austin v. Terhune,* 367 F.3d 1167, 1171 (9th Cir. 2004).

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Spit, and interfere with their leasehold activities, and, if so, (ii) that the Tribe lacks a legal right, i.e., no Treaty right, that would exempt their activities from a compatibility determination and special use permit. Both questions (i) and (ii) impact the Tribe's rights and the resources—therefore, to answer either question, the Tribe would need to be joined.[8] In addition, the analysis necessarily impacts the fee owner as it requires understanding the scope of the Refuge's easement, a mixed question of law and fact involving State law that invokes property rights determined by the intentions of the parties, the easement's use, and the Service's authority, without a federal order expanding the Refuge's boundary. *See Vacation Vill., Inc. v. Clark Cty.*, 497 F.3d 902, 917 (9th Cir. 2007); *accord Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n*, 173 Wash. App. 778, 789-90, 295 P.3d 314, 320 (2013). In reviewing the scope of the 1943 Refuge easement, it is relevant to examine the surrounding circumstances and how it has been used and occupied. *Id.* at 792. The State has repeatedly asserted its ownership precludes the Service's authority:

> This easement was authorized by the Washington State Legislature pursuant to Section 152, Chapter 255, Session Laws of 1927, and notably did not convey fee title ownership to the USFWS, but instead conveyed only an easement for "any public purpose[.]

AR 677; *see also* Rasmussen Decl. Ex. G ("[w]hile we appreciate USFWS' desire to manage the refuge, DNR does not believe the USFWS has the jurisdiction to deny the Tribe access to its leasehold."); Ex. E ("DNR views this language, which is unique in leases issued by DNR, as

[8] The Court implied that due to limited intervention the parties can now litigate the existence of Treaty rights, but this goes to the merits of the case, not to the purpose of the dismissal motion—that parties lack jurisdiction to litigate these exact claims in the Tribe's absence. Dkt. 42. If the Court were to entertain these questions, in the absence of all necessary Tribal parties, it would be circumventing the very purpose of this motion.

providing a *role* for USFWS rather than a property right or an increase of USFWS jurisdiction"), Ex. F (2019) ("DNR may grant additional authorizations for other uses on these tidelands . . . .). In 2007, the Service even agreed that it possessed limited authority, signing an agreement recognizing such. Rasmussen Decl., Ex. B ("we have met the obligation to honor USFWS's consultative status in this continuation of a shellfish lease in Dungeness Bay".). The State reserved the right to authorize other uses on the tidelands when it granted an easement to the United States. AR 6 (Deed); Rasmussen Decl., Ex. A at 9.

DNR has also invoked Washington State's public trust doctrine as separate grounds for asserting its superior interests in the tidelands at issue. Rasmussen Decl., Ex. G ("The public trust doctrine is another reason we do not believe USFWS has the authority to prevent the Tribe from accessing the DNR leasehold"). The public trust doctrine provides that DNR has a separate interest to "protect various public interests in state-owned tidelands, shore lands and the beds of navigable waters. The traditionally protected interests include commerce, navigation, and commercial fishing." *Orion Corp. v. State*, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987); *Wash. State Geoduck Harvest Ass'n v. Dep't of Nat. Res., 124 Wash. App*. 441, 448, 101 P.3d 891, 895 (2004). Given these circumstances and the complex interlay of State law at issue, relief cannot be fashioned nor equitably be made in a vacuum without *all* required parties to this case.[9]

[9] Interpreting the scope of the Service's power and duties necessarily implicates rights of parties that are not before the Court. Any decision which indicates the Service has jurisdiction to order the Tribe to complete a compatibility study and obtain a special use permit, necessary is interpreting the scope of the Treaty rights and settlements in *United States v. Washington*. Even considering reinterpreting the language of a *U.S. v. Washington* agreement requires Tribal and State parties to 2007 Shellfish Settlement, given the State places high value on leasing the settlement parcels. *See* Rasmussen Decl. Ex. F (DNR asserting it prioritizes leases of the settlement parcels, and any changes would require all signatories to the settlement itself).

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The Plaintiffs' case also requires the Court find *no* exemptions are applicable to the management statute, 16 U.S.C. § 668dd(d) et seq., including the Tribe's Treaty rights and other agreements, which runs counter to the State's position, and the Service's manual and cannot be decided without the Tribe:

> There are other circumstances under which the compatibility requirements may not be applicable…. **Exceptions may apply when there are rights or interests imparted by a treaty or other legally binding agreement, where primary jurisdiction of refuge lands falls to an agency other than us, or where legal mandates supersede those requiring compatibility**. Where **reserved rights or legal mandates** provide that we must allow certain activities, **we should not prepare a compatibility determination**. In the case of reserved rights, the refuge manager should work with the owner of the property interest to develop stipulations in a special use permit or other agreement to alleviate or minimize adverse impacts to the refuge. (emphasis added)

AR 32 (Refuge Management Manual,[10] 602 FW 2 (April 1, 2024)); AR 586-587 (DNR); *see also* AR 677.

In addition, all of the relief requested by the Plaintiffs necessarily impacts the Tribe's lease agreement. AR 586-87 (2015 DNR letter); Dkt. 31 ¶¶ 20-23.; AR 586-587 (noting "DNR views this language, which is unique in leases issued by DNR, as providing a role for *USFW* rather than a property right, or an increase in USFW "jurisdiction"). This Court has already recognized as much. Dkt. 42 at 4. Here, the Plaintiffs cannot claim that this case is exclusively about a federal statute, as it reaches beyond that into Tribal and State property rights, which will be negatively impacted should this case proceed. Dkt. 31, ¶ 9, ¶20, ¶¶ 22-23; AR 32.

[10] Also available at https://www.fws.gov/policy/603fw2.html (accessed Sept. 3, 2024).

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The fact that the Plaintiffs also now claim, without having raised it in their complaint, that the Tribe's Treaty rights were waived, concedes any possibility that this case is only about interpretation of a federal statute, and is proof that this case cannot be litigated without the Tribe. Dkt. 14 at 11 ("[t]he Service's research also revealed that the Tribe does not have a treaty right for shell fishing . . . ."). [11] Further, even if this case were merely procedural, dismissal is still warranted as the case law is clear that even procedural claims can implicate tribal economic and sovereign interests. *See Maverick,* 658 F. Supp. 3d at 970-971; *Dine,* 932 F.3d at 852.

Plaintiffs carefully avoided using the word "treaty" in their complaint, but it is clear the claims directly challenge Treaty rights and interpretation of the shellfish settlement from *U.S. v. Washington*. Dkt. 38 at 5 ("The Tribe also lacks treaty rights over the tidelands at issue, having released claims to those rights in a formal settlement agreement in 2007"), 7, 11, 12 ("As a result, the Tribe does not have a legally protected interest via treaty rights to engage in shellfish harvest operations in the Refuge."), and 17 ("the Tribe does not have treaty rights in the property"); Dkt. 22 (Amended Complaint). The Court even recognized Tribal rights are implicated here. Dkt. 20 n.2 [12]; Dkt. 20 at 17:14-16 ("Court notes that the lack of clarity in the briefing regarding potentially competing authority of the State of Washington over the state-owned tidelands or the Tribe's treaty rights within the refuge complicates its analysis.").

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[11] Without waiving the Tribe's objection that this forum is the appropriate to adjudicate the extent of their reserved Treaty rights and *U.S. v. Washington* settlements, the Tribe necessarily responds this issue to the extent it is raised by the Plaintiff's case and position.

[12] The Service's analysis in that internal memo did not adjudicate the rights of the Tribe, and it is deeply flawed. The right of taking fish is only limited when a property is "staked and cultivated" by "citizens." 12 Stat. 933 (Treaty of Point No Point). This limit does not apply when a Tribe is the owner of the lease. This type of superficial analysis is exactly why the Tribe is a necessary party and why this case cannot proceed in their absence.

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The Tribe's position is that the Treaty right to take shellfish has been affirmed by the Circuit; tribes have a right to harvest farmed shellfish under their treaty, similar to the right to harvest hatchery fish in the finfish context. *United States v. Washington*, 759 F.2d 1353, 1360 (9th Cir. 1985). Farmed fish, like hatchery fish, serve a mitigating function essentially to replace natural fish lost to "non-Indian degradation of the habitat." *Id*. And under the law of the Circuit, "fish" includes all fish, whether originating in the "wild or in state, Indian or federal hatcheries." *Id.* at 1354.

Prior argument in this case regarding the 2007 *U.S. v. Washington* settlement misconstrues the rights addressed in that meticulously crafted agreement, and further demonstrate why this case cannot proceed. Dkt. 15 at 27 (Ex. D); Dkt. 20 at 17:14-16; Order Approving Shellfish Consent Decree, *United States v. Washington*, No. 2:70-cv-09213, Sub. no. 89-3, Dkt. no. 18839, §4B (W.D. Wash. June 21, 2007) ("If tribes elect to negotiate a lease for the covered tidelands, DNR and the tribes will negotiate a lease on terms that are comparable to other commercial shellfish leases for the type of property and shellfish cultivation operation being considered."). The Tribe retains a reserved right[13] to any other treaty right not addressed in the settlement. In other words, under principles of treaty interpretation,[14] the treaties are a reservation of rights; that is, a grant of rights from the tribes to the United States, which means any rights not specified in the treaty, remain with the Tribes. *United States v. Washington*, 19 F.

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[13] *"This paper secures your fish. Does not a father give food to his children*[.]*" Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 677 n.11 (1979) (italics in original); *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash 1974), aff'd, 520 F.2d 676 (9th Cir. 1975).

[14] The Tribe is only arguing Treaty rights to respond to the claim they are not implicated herein. Treaty rights and their scope must be adjudicated in *U.S. v. Washington*.

Supp. 1126, 1129-1120 (W.D. Wash. 1994) (order affirming that as a matter of law the Tribes are not limited by the species of harvest at treaty times, nor the location of harvesting, such as deep-water, even if the exact activity did not occur at treaty times because shellfish are considered "fish" under the plain language of the treaties); *see also United States v. Winans*, 198 U.S. 371 (1905) (reservation of rights presumes access for the purpose of harvesting fish). This right includes freedom from being excluded from their ancient fisheries. *United States v. Washington,* 873 F. Supp. 1422, 1435 (W.D. Wash. 1994); Dkt. 31, ¶¶ 8-9, ¶ 22. Treaty rights are considered the supreme law of the land. U.S. Const. art. VI, cl. 2.

The *shellfish proviso*[15] is limited to addressing access to shellfish on parcels a tribe does not own or control, and, importantly, here, it does not *render* the activity 'non-treaty' (outside the scope) when the tribe is operating on a parcel they control or own (i.e., via lease). *United States v. Washington*, 873 F. Supp. 1422, 1441 (W.D. Wash. 1994) ("purchase of tideland by individual Indians, however, has little if any probative value, as to the meaning of the Shellfish Proviso. . . . the evidence indicates that . . [the Indians were] simply responding to a massive land rush and taking all possible steps to safeguard their access to fish and their personal self-interests.").

[15] The "*shellfish provisio*" is a rule adjudicated by Judge Rafeedie in the federal court in 1994, where the court found that the Tribes did not reserve the right to harvest farmed shellfish beds "staked and cultivated" by citizens. The *shellfish proviso* states:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

United States v. Washington, 873 F. Supp. 1422, 1427 (W.D. Wash. 1994); 12 Stat. 933 (Treaty of Point No Point).

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Farmed or raised fish are still considered treaty fish and nothing in the *proviso* or subsequent settlement eliminates those rights. *United States v. Washington*, 506 F. Supp. 187, 198 (W.D. Wash. 1980) ("Because of competitive water, land, and forest exploitation, it has been necessary to develop controlled methods of sustaining or rehabilitating the stocks of fish which inhabit fresh water streams"). Programs are necessarily designed to replace natural fish lost to non-Indian degradation of the habitat and commercialization of the fishing industry. *United States v. Washington*, 759 F.2d at 1360. It would be inequitable and inconsistent with the Treaty if the Tribes were to bear the full burden of fish decline, which includes shellfish, caused by their non-Indian neighbors, without sharing the replacement achieved through hatcheries. 759 F.2d at 1360; *see generally* Dkt. 31, ¶ 12 (water quality impacted by upland sources).

2. Legally Protectable Interests: Dungeness Bay and the Refuge Area

Not only does the Tribe have a "legally protected" interest in their lease and interpretation of their Treaty rights, but the tidelands at issue here are of great historical importance to them, which further cements why the Tribe is indispensable. This territory is essential to their identity and existence as a people. Dkt. 31, ¶ 5, Ex. B at 16, 22. The Tribe's ability to fish and trade has been impacted by development, such that aquaculture serves a mitigating function to preserve their way of life. Dkt. 31, ¶ 7, ¶ 11. Even though the Tribe leased the tidelands in Dungeness Bay in 1990, in order to renew their oyster farming,[16] it was part of the Tribe's homeland, with tribal oral histories discussing Dungeness Bay. Dkt. 31, ¶¶ 8-11, Ex. B. Their historical ties and beliefs about the Bay have made this particular site uniquely part of

[16] Dkt. 31 ¶ 11, ¶ 15, Ex. C.

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the Tribe's identity, and their reserved rights and documented historical evidence of use of the area, alongside a reading of the Treaty of Point No Point, 12 Stat. 933, leads to the conclusion that the Tribe would have understood they had the rights to procure shellfish for trade and sale as part of their Treaty rights. Dkt. 31, ¶ 11.

The Tribe's deep ties to the areas is well-documented in *United States v. Washington*. 626 F. Supp. at 1433, 1486 (Finding nos. 331, 341, 358); Dkt. 31, ¶ 10. Dungeness Bay, for example, is a place where the Tribe's ancestors taught them that shellfish was protected, believing the Spit itself was one of the reasons red tide was not prevalent. Dkt. 31, Ex. B at 22. Through these teachings and narratives, the Tribe historically focused on Dungeness Bay as an area for safe and culturally relevant shellfish procurement. Dkt. 31, ¶ 10. For example, expert anthropologist Karen James in *United States v. Washington*, case no. C70-9213, describes in direct testimony a narrative depicting the Tribe's important historic use of shellfish in this area:

> a S'Klallam man recovers his lost power. He shows his power by bringing sea food to the Dungeness Flats, including horse clams and crab. **(**As indicated previously, Allen's mother was Dungeness S'Klallam).
>
> Now there was no such thing as horse clams (na' na) in the Dungeness flats. but the young men wnt [went] to look anyway. And here comes one young fellow with na'na! All the people wonder, "Did this come from the flat? There are no na'na' there!" The young fellow says, "Horse clams are there just like this, big as two hands, all over the ilat!~"----Then everybody is happy, everybody goes to the flats . . . feeding the people. . . . . (Elmendorf 1993:241).

Dkt. 31, ¶ 10, Ex. B at 22.[17] James continues on, describing the importance of the Spit, in particular, to the Tribe, as it was understood to be a critical, safe location for gathering shellfish:

[17] When determining whether Rule 19 requires joinder, the court is allowed to consider evidence outside the pleadings. *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir 2004); *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960).

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> Johnson said that the old people believed that Dungeness Spit protected shellfish in the bay from poisoning. Johnson's statement appears to refer to the shellfish poisoning that can occur from "red tide".
>
> Henry Johnson: . . . People often get poisoned by eating clams, but the older Indians said that the Spit was put there to make the shellfish inside harmless. (Harrington 1942).

Dkt. 31, ¶ 10, Ex. B at 21-22. This historical information shows how important this location is to the Tribe, and how their historical ties and beliefs make this site a place they would have understood was part of their reserved rights; it is vitally important for them to stay connected to their way of life, which includes the cultivation of shellfish in this precise area. Dkt. 31, ¶ 3, ¶ 7, ¶ 20.

The use of shellfish, commercially for trade is a well-established part of the Tribe's way of life (Dkt. ¶ 7, ¶ 9, ¶ 11) and is also documented in *United States v. Washington*, C70-9213. While the Tribe would prefer to rely on naturally occurring shellfish, this is insufficient to provide for their governmental needs and cultural programs. Dkt. 31, ¶ 7, ¶ 11, ¶ 19. The funds obtained by the Tribe from aquaculture directly support critical programs, such as the Traditional Foods and Culture Program and can help achieve independence from the federal government. Dkt. 31, ¶ 19, ¶ 20. Given these interests, strong ties, the Tribe has legally protectable sovereign interests in the case and what activities can occur on their homeland, which cannot proceed without them.

3. Legally Protectable Interests: Oyster Farm and Lease

The Tribe also has an existing oyster farm and lease, which provides a reliable funding and supply source for its Traditional Foods and other cultural programs, which would be

negatively impacted if this case proceeds. Dkt. 31, ¶¶ 12-14, ¶¶ 16-21; Dkt. 33, ¶ 7. The Court recently confirmed the Tribe's interest. Dkt. 42 ("Jamestown clearly has an interest relating to the property"). Since 2016, the Tribe has invested significant resources to secure permitting and maintain compliance with relevant regulations, and it has contracted with environmental consulting firms, legal counsel, and engaged staff to ensure compliance and best practice standards are achieved. Dkt. 31, ¶ 13, ¶ 14, ¶¶ 16-19; Dkt. 33, ¶¶ 6-7. Since at least 1997, when Dungeness National Wildlife Refuge first completed compatibility determinations in the area, the Tribe understood it had limited authority over their lease and oyster farm, and the Tribe has relied on this position. Dkt. 31, ¶ 21, Ex. D; Dkt. 33, ¶ 7; AR 136 (2013 comprehensive plan).[18] For example, the Tribe has a signed agreement from 2007, where the Service acknowledged their limited role. Rasmussen Decl., Ex. B ("We feel that we have met the obligation to honor USFWS's consultative status in this continuation of a shellfish lease in Dungeness Bay.")

If the Court asserts that the Service has authority over the Tribe's lease interest, this impacts DNR's rights and the Tribe's access and activities therein, which will negatively impact current operations and programs. Dkt. 31, ¶ 19, ¶¶ 22-23. Economic and sovereign interests of a Tribe are sufficient interests to render the Tribe required and indispensable. *See Maverick*, 658 F. Supp. 3d at 973, 976. Again, given all of these Tribal interests and their significance, as this Court has recognized (Dkt. 42), the Tribe is indispensable in this case.

[18] The current 2013 comprehensive plan is where compatibility determinations were made. AR 136.

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C. Even Though the Tribe is Required, Joining Them is not Feasible as the Tribe Has Not Waived its Sovereign Immunity

Federally recognized Native American tribes are "domestic dependent nations" possessing "inherent sovereign authority." *Michigan*, 572 U.S. at 788 (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla*., 498 U.S. 505, 509 (1991)). The law is clear that "unless and 'until Congress acts, the tribes retain' their historical sovereign authority." *Id*. (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); *see also* U.S. Const. art. I, § 8, cl. 3 (authorizing Congress); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 756 (1998). As the Supreme Court has stated, "only where Congress has authorized suit or the tribe has waived its immunity" can a tribe be so subject. *Id.* at 754. PPF's case cannot make an "end run around" the Tribe's sovereign immunity. *See Aguayo v. Jewell*, 827 F.3d 1213, 1222 (9th Cir. 2016). Waiver of their sovereignty cannot be implied. It is clear Congress did not authorize such a lawsuit under the Refuge Act, and the Tribe has in no way waived their sovereign immunity. Dkt. 31 ¶¶ 5-6.

The Tribe has intervened to seek dismissal, not to adjudicate their Treaty rights. Dkt. 31, ¶ 6; Dkt. 42. PPF cannot hide behind this basic fact and seek a backdoor way to regulate the Tribe's activity or seek to adjudicate or diminish their rights. In other words, the Plaintiffs cannot use this case to "circumvent the barrier of sovereign immunity by merely substituting" the Service as the target of action instead of the Tribe, whose actions are at issue. *Dawavendewa*, 276 F.3d at 1160. A tribe's interest in maintaining sovereign immunity in almost every instance outweighs a plaintiff's interest in litigating. *See Greyhound Racing*, 305 F.3d at 1025; *Dine*, 932 F.3d at 857; *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014); *Dawavendewa,* 276

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F.3d at 1152; *Quileute Indian Tribe v. Babbit*, 18 F.3d 1456, 1460 (9th Cir. 1994). Here is no exception. Therefore, it is clear that under Rule 19(a), the Tribe is a required party but under subsection (b) joinder is infeasible, as they are a sovereign entity that has not waived sovereign immunity and have a strong interest in maintaining such; therefore, it is indispensable. The Tribe cannot be joined involuntarily and because the Tribe is a required and indispensable party under Rule 19, the entire case must be dismissed per Rule 12(b)(7). *Salt River Project*, 672 F.3d at 1179; *Greyhound Racing,* 305 F.3d at 1022-25; *Maverick*, 658 F. Supp. 3d at 976.

D. Disposition Without Jamestown Will Severely Impair Their Ability to Protect Their Treaty Rights and Property Interests And Limit Their Ability to Operate Their Oyster Farm in Their Homeland

When a required party cannot be joined, the court will evaluate whether the absent parties' interests would be impaired, such that "in equity and good conscience" the case "should proceed" without them. Fed. R. Civ. P. 19(b); *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988). To do so, a court looks at the four 'indispensable party' factors. *Dawavendewa*, 276 F.3d at 1161-62.[19] Here, the four factors of Rule 19(b) weigh in the Tribe's favor, as the Tribe's interest in maintaining their sovereignty outweighs all else, particularly given the wall of Circuit

[19] In a typical joinder case, part of this equitable evaluation would include examining if a 'public rights' exception applies. *Conner,* 848 F.2d at 1458-59 . The 'public rights' exception, though, is inapplicable when a lawsuit will extinguish a tribe's sovereign rights or legal entitlement. *Shermoen*, 982 F.2d at 1319 (threat of extinguishing absent tribe's right, sovereignty). Here, there is no doubt the Tribe's lease rights, legal right to access, harvest, and farm within their adjudicated U&A and provide oysters necessary for their programs and people – important legal entitlements nonetheless – would be impaired and possibly extinguished if the case proceeds in their absence. This Court has already indicated the Tribe has an interest in its lease and property interests that will be impacted. Dkt. 42. See discussion *supra* section III.B. The public rights exception does not apply.

authority favoring dismissal when a tribe cannot be joined due to sovereign immunity. *Maverick*, 658 F. Supp. 3d at 976 citing *Klamath*, 48 F.4th at 947. Nevertheless, evaluation of these factors, which is almost identical to the discussion of the Tribe's interests at stake, as described above in section III.B.1-3, all favor the Tribe.

1. Prejudice to the Tribe

The Tribe, if absent from these proceedings, would be unable to preserve or protect their existing lease rights or potentially harm their Treaty right to aquaculture, or access rights, which in turn impairs their ability to provide necessary funds and resources for their government and cultural programs, and ultimately infringes on their sovereignty and ability to continue their way of life. See further discussion regarding the Tribe's interests in sections III.B.1-3, above. Without the farm the Tribe also cannot meet its goal to become independent from the federal government, which is key to its sovereign status.

PPF's "enforcement" action is an end run around sovereignty and uses indirect methods of preventing the Tribe from accessing and using their historical home, thereby interfering with their Treaty rights and sovereignty. *See* Dkt. 22; Dkt. 31, ¶ 20, ¶¶ 22-23; Dkt. 33, ¶ 4, ¶ 6. In addition, as a practical matter, the pleadings show that the Plaintiffs have made multiple misstatements which have also prejudiced the Tribe by misleading the Court. *See* Allen Decl., Ex. A; Rasmussen Decl., Ex. C (USFWS withdrawing letters cited by Plaintiffs).

2. Relief Cannot Be Shaped to Lessen Prejudice

There is no possibility of shaping the relief requested to lessen the prejudice. Recall, PPF's relief is specifically directed at controlling the Tribe's oyster farm, which has been in existence since before the National Wildlife Refuge System Improvement Act, establishing

management standards at issue, and is outside the boundaries of the EO establishing the Refuge area.[20] Dkt. 22 at 12; *Dawavendewa*, 276 F.3d at 1156-57 ("No procedural principle is more deeply imbedded in the common law than . . . an action to set aside a lease or contract, all parties who may be affected by the determination . . . are indispensable") (internal citations omitted). The Tribe is severely prejudiced by all of the Plaintiffs' claims and ruling on any of the issues would harm their existing farm and property interests and cast doubt or reject tribal Treaty rights outright. See discussion of Tribal interests in section III.B.1-3, *supra*.

3. Complete Relief Cannot be Awarded Without the Tribe

Complete relief in this case cannot be awarded without the Tribe.[21] Here, the Court cannot evaluate (1) whether the Service's easement provides it with jurisdiction over the Tribe's lease to which neither it nor the Plaintiffs are parties; (2), if there is jurisdiction, whether the Tribe's reserved rights should be adjudicated in this lawsuit without the Tribe or any other treaty tribe; and/or (3) whether DNR's property interests precludes the Refuge from controlling the leasehold activities when DNR reserved the right to such authorization on these tidelands. Necessarily at issue here, because it was raised by the Plaintiffs, is also whether aquaculture is a reserved Treaty right or whether all tribal rights to shellfish were waived by a prior settlement, but these complex questions necessarily involve the interests of parties not before the Court.

It is sufficient here to consider the undisputed facts: Jamestown's interests in maintaining sovereignty and providing for their cultural, economic and religious needs would be impacted if

[20] National Wildlife Refuge System Improvement Act of 1997, 105 Enact. H.R. 1420, 105 P. L. 57, §1, §2, § 5, 111 Stat. 1252 (1997).
[21] And arguably the State as well.

this Court were to make a decision about their existing oyster farm lease, particularly as it contains shellfish that must be harvested and where the Tribe has obtained permits and invested resources in it. Dkt. 31, ¶ 20. Clearly the relief and outcome requested, *if* it favors the Plaintiffs, cannot be awarded without the Tribe present to weigh in on issues vital to their existence, but the Tribe has not waived sovereign immunity; therefore, dismissal is warranted. See discussion of the Tribe's interests in section III.B.1-3, *supra*; Dkt. 31, ¶ 5-6.

4. Alternative Forums Are Not Dispositive

The lack of an alternative forum is not dispositive when a Tribe cannot be joined due to sovereign immunity, as a tribe's interest in maintaining sovereign immunity almost always outweighs a plaintiff's interest in litigating its claims. *White*, 765 F.3d 1010, 1028; *Greyhound Racing*, 305 F.3d at 1025. Circuit precedent confirms such. *Id.* Proceeding without the Tribe in this case is wholly inequitable, as it could alter or extinguish or impair their lease, alter their right to access the leased tidelands, which are within their U&A, harm their existing farm supplies and investment, and as a result, dictate how the Tribe can feed, educate, and raise funds for their people. This cannot occur when the Tribe cannot be made party.

E. Existing Defendants Cannot Adequately Represent the Tribe's Interests

To evaluate the adequacy of an existing party's ability to represent the interests of an absent party, a court must consider "whether the interest of a present party to the suit are such that it will undoubtedly make all the absent party's arguments' whether the party is capable of and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Dine*, 932 F.3d at 852 (quoting *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013)). If the interests of the absent party

"might diverge" or when no existing defendant shares the absent tribe's "sovereign interests[,]" in the outcome, the court has determined that the absence necessitates dismissal. *Dine*, 932 F.3d at 855. In this case, the federal government cannot and does not represent the Tribe's interests and could have actual conflicting interests with respect to rights obtained in their easement. Dkt. 30, ¶¶ 4-5. The Court has agreed. Dkt. 42 at 3:9-10.[22]

At a minimum, this case involves interpretation of how the Refuge Act's prohibition on access during certain times is directly at odds with the Tribe's interest in leased activities that require year-round operation. *Compare* 16 U.S.C. § 668dd(c) and 50 C.F.R. part 27 (Prohibited Acts) *with* Dkt. 31, ¶ 19, ¶ 22. Key to this analysis is also the assumption that the scope of the Service's easement can later be enlarged through its own management legislation, or the extent of the rights in the easement itself, especially where the EO creating the Refuge limited the area to only the Dungeness Spit. These issues cannot be swept under the rug by siloing the legal issues and adjudicating them without the Tribe or the State.

IV. CONCLUSION

For the foregoing reasons, the Court must dismiss the Complaint and Amended Complaint and issue a final order dismissing the case with prejudice.

Respectfully submitted this 18th day of November, 2024.

s/ Lauren P. Rasmussen

[22] Tribal interests often cannot be adequately defended by the United States when "Federal Defendants have an interest in defending their own analyses that formed the basis of the approvals at issue" such that "they do not share an interest in the *outcome* . . . ." *Dine,* 932 F.3d at 855 (emphasis in original).

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CERTIFICATE

I certify that this memorandum contains 8,391 words, in compliance with the Local Civil Rules.

DATED this 18th day of November, 2024.

s/ Lauren P. Rasmussen

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