

The Honorable Benjamin H. Settle

IN THE UNITED STATES DISTRICT COURT
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; HUGH MORRISON,
REGIONAL DIRECTOR OF THE PACIFIC
REGION; and JENNIFER BROWN SCOTT,
PROJECT LEADER, WASHINGTON
MARITIME NATIONAL WILDLIFE REFUGE
COMPLEX,

Defendants.

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

**FEDERAL DEFENDANTS’
CORRECTED RESPONSE TO
JAMESTOWN S’KLALLAM
TRIBE’S MOTION TO DISMISS
UNDER FED. R. CIV. P. 12(b)(7)**

Noted on Motion Calendar:
December 16, 2024

TABLE OF CONTENTS

INTRODUCTION	1
FACTUAL BACKGROUND.....	2
A. 1943 Deed Conveying an Easement to the Service	2
B. 1990 Lease to the Tribe.....	3
C. 2007 Lease to the Tribe.....	4
D. 2021 Lease to the Tribe.....	4
DISCUSSION	4

TABLE OF AUTHORITIES

Cases

Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs,
932 F.3d 843 (9th Cir. 2019) 1

Firth v. Lu,
49 P.3d 117 (Wash. 2002) (en banc) 5

Nat'l Licorice Co. v. NLRB,
309 U.S. 350 (1940) 1

Sofie v. Kane,
650 P.2d 1124 (Wash. Ct. App. 1982) 5

United States v. Park,
536 F.3d 1058 (9th Cir. 2008) 5

Zonnebloem, LLC v. Blue Bay Holdings, LLC,
401 P.3d 468 (Wash. Ct. App. 2017) 5

1 Federal Defendants hereby respond to limited-Intervenor Jamestown S’Klallam Tribe’s
 2 (“Tribe”) Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(7), ECF No. 44
 3 (“Mot.”).

4 INTRODUCTION

5 The Tribe moves to dismiss Plaintiffs’ Amended Complaint, ECF No. 22 (“Am.
 6 Compl.”), filed against Federal Defendants, which alleges that the U.S. Fish and Wildlife Service
 7 (“Service”) violated the Refuge Improvement Act with respect to its administration of the
 8 Dungeness National Wildlife Refuge (“Refuge”). The Tribe contends that it is a required party
 9 that must be joined because disposition of this action might impair or impede the Tribe’s
 10 property rights—a lease granted by the State of Washington in 2021 (the “2021 Lease”)—and
 11 the Tribe’s asserted Treaty rights but cannot be joined due to its sovereign immunity.

12 The principal claim before the Court is brought under Section 706(1) of the
 13 Administrative Procedure Act (“APA”) and concerns the Service’s alleged failure to perform a
 14 compatibility determination pursuant to the Refuge Act respecting the Tribe’s oyster farming on
 15 tidelands in the Refuge. No final decision respecting compatibility of the Tribe’s oyster farming
 16 with refuge purposes has issued. Plaintiff does not ask this Court to review, set aside, or vacate a
 17 final decision favorable to the Tribe. The Tribe therefore focuses on the presumed impacts of
 18 any future final compatibility determination.

19 Under Ninth Circuit precedent, a challenge to federal action under the APA may be
 20 dismissed for failure to join a nonparty tribe where the impact of a successful challenge would
 21 impair a right granted to the absent tribe. *See Dine Citizens Against Ruining Our Env’t v.*
Bureau of Indian Affairs, 932 F.3d 843, 852 (9th Cir. 2019).¹ In the limited context of the

22 ¹ Although binding on this Court, the Federal Defendants note their disagreement with the *Dine*
 23 *Citizens* holding: judicial review challenging a federal agency action that concerns public rights
 24 should generally proceed even where it is not feasible to join a third party, such as a tribe, who
 25 benefits from the agency action. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940)
 26 (finding litigation “restraining the unlawful actions of the defendant” may proceed without
 27 joining as parties those with whom the defendant has contracted—“even though the restraint
 28 prevented [the defendant’s] performance of the contracts”—because an independent “public right
 was vindicated by restraining the unlawful actions.”)

Tribe's Rule 19 motion, Federal Defendants take no position on whether the Tribe has met the standard for indispensable party status. However, Federal Defendants reserve all arguments regarding the priority of any property rights conveyed to the Tribe by the 2021 Lease. While Federal Defendants take no position on the Tribe's right as an indispensable party, to assist the Court, we provide background that may be relevant to the Court's adjudication of the limited-Intervenor's motion.

FACTUAL BACKGROUND

The Refuge was established in 1915 as a refuge for birds. It is located near Sequim, Washington, on the north end of the Olympic Peninsula. The Refuge includes portions of tidelands in the Dungeness Bay, to which the State of Washington conveyed an easement to the Service in 1943. Jamestown S'Klallam Tribe is a federally recognized Indian Tribe who currently conducts oyster farming in the area of the Service's easement in Dungeness Bay, under a lease of around 50 acres of tidelands from the Washington State Department of Natural Resources ("DNR" or the "State").

A. 1943 Deed Conveying an Easement to the Service

In 1943, the State executed a Deed conveying an easement to tidelands in Dungeness Bay to the Service. Admin. Record ("A.R.") at FWS-000006, ECF No. 26-2 at 6. The Deed provides, in part:

IN CONSIDERATION of Section 152, Chapter 255, Laws of 1927, the STATE OF WASHINGTON does hereby grant, bargain, sell and convey unto United States of America Fish and Wild Life Service, its successors and assigns, the following described tide lands of the second class, as defined by Chapter 255 of the Session Laws of 1927, situate in Clallam County, Washington, to wit:

All tide lands of the second class owned by the State of Washington, situate in front of adjacent to or abutting upon the following described uplands in township 31 north, range 4 west, W. M. . . . [*List of parcels*]. . .

The above described tide lands are conveyed under the provisions of section 152 of Chapter 255 of the Session Laws of 1927. . . .

TO HAVE AND TO HOLD the said premises, with their appurtenances, unto the

1 said United States of America Fish and Wild Life Service, its successors and
2 assigns, forever.

3 *Id.* The subject tidelands included those adjacent to or abutting:

- 4 • “Lots 1, 2, and 3, section 23, with a frontage of 179.28 lineal chains, more or less”;
- 5 and
- 6 • “Lots 1, 2, 3, 4, and 5, section 24, with a frontage of 258.35 lineal chains, more or
7 less.”

8 *Id.* Section 152 in Chapter 255 of the Laws of 1927 of the State of Washington, which is
9 referenced in the Deed as consideration, provides:

10 SEC. 152. [Grant of easement to the U.S. in tide and shore lands.] Whenever
11 application is made to the commissioner of public lands, by any department of the
12 United States government, for the use of any tide or shore lands belonging to the
13 state, for any public purpose, and said commissioner shall be satisfied that the
14 United States requires or may require the use of such tide or shore lands for such
15 public purpose, said commissioner may reserve such tide or shore lands from public
16 sale and grant the use of them to the United States, so long as it may require the use
17 of them for such public purposes; and the commissioner of public lands shall certify
18 such fact to the governor, who shall thereupon execute an easement to the United
19 States, which shall be attested by the secretary of state, granting the use of such tide
20 or shore lands to the United States, so long as it shall require the use of them for
21 said public purpose.

22 **B. 1990 Lease to the Tribe**

23 In 1990, the State executed a lease to the Tribe to some of the tidelands within the United
24 States’ easement in exchange for rent paid to the State.² A.R. at FWS-000010–25, ECF No. 26-2
25 at 10–25. Specifically, the 1990 Lease covered:

- 26 • Parcel I—“Tidelands of the second class owned by the state of Washington, situated
27 in front of, adjacent to, or abutting upon the southeasterly side of Government Lots 1,
28 2, and 3, Section 23, . . . containing 53.5 acres more or less”; and
- Parcel II—“Tidelands of the second class, owned by the state of Washington, lying
westerly of Government Lots 4 and 5, Section 24, . . . containing 16.6 acres more or
less.”

² The 1990 Lease provided that the Tribe would “cause all work on the Property and all business
conducted thereon during the Term to be performed in accordance with all directions and
regulations of all governmental agencies and the representatives of such agencies.” A.R. at
FWS-000014 ¶ 4.6(a), ECF No. 26-2 at 14.

A.R. at FWS-000010, ECF No. 26-2 at 10.

C. 2007 Lease to the Tribe

In 2005, the Tribe applied for a lease renewal, which was finalized in 2007, for a term renewable through July 2017. A.R. at FWS-000048–87, ECF No. 26-2 at 48–87; A.R. at FWS-000048, ECF No. 26-2 at 84. The 2007 Lease permitted use of the subject tidelands “for Oyster and Geoduck Cultivation with Limited Commercial Harvest (the ‘Permitted Use’), and for no other purpose,” in accordance with the details set out in Exhibit B. A.R. at FWS-000055 ¶ 2.1, Ex. B, ECF No. 26-2 at 55, 84.³

D. 2021 Lease to the Tribe

In 2021, the State and the Tribe entered into a re-lease of the tidelands on Government Lots 1, 2, and 3, Section 23, totaling 2,178,000 square feet, or 50 acres, through July 2031. A.R. at FWS-000636–76, ECF No. 26-3 at 51–91. The 2021 Lease, which is the current lease, permits use of the subject tidelands “for cultivation and harvesting of Pacific oysters (the ‘Permitted Use’), and for no other purpose,” and sets out the details in Exhibit B. A.R. FWS-000638 ¶ 2.1, ECF No. 26-3 at 53. Like the 2007 Lease, the 2021 Lease states that it is subject to all prior valid interests of third parties; does not include a right to natural resources except to the extent expressly permitted in Exhibit B; and is subject to compliance with government rules and regulations. A.R. at FWS-000637, 639 at Background, ¶¶ 1.1, 2.3, 3.2.

DISCUSSION

In its motion to dismiss, the Tribe asserts that the “Service’s easement is subservient to the” property interest of the State of Washington and hence the Tribe’s 2021 Lease. The State of

³ The 2007 Lease recognized that the rights under the lease were subordinate to previous interests conveyed by the State to other entities, which include the United States.

(b) This Lease is subject to all valid interests of third parties noted in the records of Clallam County, or on file in the Office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or federal navigation servitude; and treaty rights of Indian Tribes.

A.R. at FWS-000054 ¶ 1.1, ECF No. 26-2 at 54.

1 Washington could not in 2021 convey to the Tribe a use right superior to the easement granted to
 2 the Service in 1943 under Washington law. *See United States v. Park*, 536 F.3d 1058, 1061 (9th
 3 Cir. 2008) (Federal courts “generally follow state law to resolve property disputes, such as [the]
 4 issue of interpretation of an easement.”). If the Court were to reach the merits, Federal
 5 Defendants’ position would be that the Service’s rights under the easement control the decision
 6 concerning refuge uses.

7 In 1943, the State of Washington granted the Service an easement to use the tidelands at
 8 issue for any “public purpose.” A wildlife refuge is a public purpose. Thus, since 1943, under
 9 Washington law, the Service has held the dominant estate, and the State of Washington has held
 10 the servient estate. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 401 P.3d 468, 471 (Wash. Ct.
 11 App. 2017) (holding that the person benefiting from an easement holds the dominant interest in
 12 the land that is subject to the easement; the grantor of an easement retains a subordinate interest
 13 called the servient estate). As such, the Service’s easement for refuge use is the dominant estate
 14 under state law.

15 After 1943, even though the State possessed fee simple title, it retained no right to use the
 16 tidelands in a manner that would materially interfere with the Service’s easement. Not holding
 17 that right, the State could not thereafter convey such a right to a third party. *See Firth v. Lu*, 49
 18 P.3d 117, 120 (Wash. 2002) (en banc) (citing *Sofie v. Kane*, 650 P.2d 1124, 1128 (Wash. Ct.
 19 App. 1982).

20 Federal Defendants take no position regarding whether the Tribe’s alleged treaty right or
 21 leasehold interest is sufficient to meet the standard under Rule 19 to be declared an indispensable
 22 party, but reserve the right to make arguments consistent with the Federal Defendants’ property
 23 interests should the Court reach the merits.

24 DATED this 23rd day of December, 2024.

25 Respectfully submitted,

26 TODD KIM

Assistant Attorney General
S. JAY GOVINDAN, Section Chief
NICOLE M. SMITH, Assistant Section Chief
Environment & Natural Resources Division
Wildlife & Marine Resources Section

/s/ Marissa Piropato
MARISSA PIROPATO (MA BAR 65160)
DEPUTY CHIEF
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Phone: (202) 305-0470
Marissa.Piropato@usdoj.gov

MAGGIE BAKER SMITH
Trial Attorney (WA Bar No. 45628)
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
7600 Sand Point Way, NE
Seattle, Washington 98155
(202) 598-3088
maggie.smith@usdoj.gov

FREDERICK H. TURNER
Senior Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
P.O. Box 7611
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov

TESSA M. GORMAN
Acting United States Attorney

BRIAN C. KIPNIS
Assistant United States Attorney
Office of the United States Attorney
5220 United States Courthouse
700 Stewart Street

1 Seattle, Washington 98101-1271
2 Phone: (206) 553-7970
3 Fax: (206) 553-4073
4 E-mail: brian.kipnis@usdoj.gov

5 *Attorneys for Defendants*
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27