The Honorable Benjamin H. Settle

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

Defendants,

and

JAMESTOWN S'KLALLAM TRIBE

Limited Intervenor.

NO. 3:23-cv-5737 BHS

PLAINTIFFS' OPPOSITION TO LIMITED INTERVENOR JAMESTOWN S'KLALLAM TRIBE'S MOTION TO DISMISS [DKT 44]

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I. INTRODUCTION

In this suit, Plaintiffs Protect the Peninsula's Future, Coalition to Protect Puget Sound Habitat, and Beyond Pesticides (collectively referred to as "Protect the Peninsula") ask the Court to declare that the Federal Defendants are in violation of the National Wildlife Refuge System Improvement Act ("Refuge Act") because they failed to fulfill their mandatory duties to conduct a compatibility determination and/or require a special use permit for Intervenor Jamestown S'Klallam Tribe's ("Jamestown" or "Tribe") commercial aquaculture operation within the Dungeness National Wildlife Refuge. Protect the Peninsula further asks the Court to declare that the Federal Defendants' conclusion that no approvals are needed from the United States Fish and Wildlife Service (the "Service) for the Tribe's commercial activities is arbitrary, capricious, an abuse of discretion, and otherwise incompatible with law and vacate that decision.

Having been granted limited intervention status, Jamestown filed a motion to dismiss all of Plaintiffs' claims against the Federal Defendants under Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19. Jamestown claims that it is a necessary and indispensable party to this action and the entire case should be dismissed because it cannot be joined due to its sovereign immunity.

To the contrary, Protect the Peninsula should be permitted to continue with their claims against Federal Defendants because their claims fall squarely within the public rights exception to traditional joinder. The public rights exception allows litigation to proceed in the absence of a necessary party, even though the absent party's interest may be adversely affected, so long as the litigation does not destroy the legal entitlements of the absent party. The litigation must transcend the private interests of the litigants and seek to vindicate a public right. This litigation does just that.

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Protect the Peninsula's claims undoubtedly center on vindicating a public right under the Refuge Act, which is a federal statute created to safeguard public interests in wildlife refuges. National Wildlife Refuges are sanctuaries that ensure the survival of wildlife and ecosystems amid increasing human impact. Their singular focus on conservation, coupled with strict legal protections, makes them indispensable for maintaining biodiversity, protecting migratory species, and fostering ecological resilience. At stake in this lawsuit are the policy objectives of the Refuge Act, which aims to administer these areas for the conservation, management, and, where appropriate, restoration of fish, wildlife, and plant resources and their habitats for the benefit of present and future generations of Americans.

Jamestown's portrayal of Plaintiffs' lawsuit as an effort to "stop or severely restrict" the Tribe's farming operations and Jamestown's warning of "devastating injury" to the Tribe is a blatant misrepresentation of Protect the Peninsula's claims and request for relief. That argument presumes the outcome of the compatibility determination and/or special use permit decision by the Service. Protect the Peninsula is not asking the court to interfere with the Service's discretion in managing Jamestown's activities. This lawsuit does not seek to destroy any legal entitlements that are held by Jamestown. Protect the Peninsula does not seek reversal of an existing compatibility determination or special use permit—neither have been issued to Jamestown. Protect the Peninsula is not asking the court to predetermine the outcome of the Service's compatibility determination or to declare the Tribe's operations incompatible with Refuge purposes. Nor does Protect the Peninsula seek to compel the Service to deny a special use permit, impose conditions on the Tribe's activities, or vacate any existing approvals.

Jamestown neither owns the property in question nor holds jurisdiction or self-governance rights over it. While Jamestown had a historical presence in the Dungeness Refuge area and once

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held a treaty-based right to shellfish on Refuge tidelands in the past, it relinquished that legal entitlement in 2007 in exchange for a share of $33 million in federal and state funds.

Upon close examination, Jamestown cannot name a single viable existing legal entitlement that would be "destroyed" if this court rules in favor of Plaintiffs. Jamestown has created a misleading narrative, suggesting there is a legitimate issue over whether the Service has jurisdiction under the Refuge Act to regulate uses on state-owned tidelands within the Dungeness Refuge. Jamestown claims that resolving this case requires first addressing a threshold question of state versus federal authority, rooted in state property law. This argument is baseless. More importantly, this issue is not ripe for review. Any challenge to the Service's authority would only arise if, and when, the Service denies the Tribe access or determines that a proposed use is incompatible. At that point, the Tribe can raise that issue in a legal challenge to such a determination. Until then, Jamestown's argument is speculative and premature.

II. BACKGROUND

A. The National Wildlife Refuge System Improvement Act

While the National Wildlife Refuge System has been managed by the United States Fish and Wildlife Service for almost a century, the National Wildlife Refuge System Improvement Act ("Refuge Act" or "Act") was not enacted until 1997.[1] The Refuge Act is codified at 16 U.S.C. §§ 668dd–668ee and its implementing regulations are 50 C.F.R. § 25.11 through § 38.17. The Act provides comprehensive legislation that spells out precisely how the National Wildlife Refuge System must be managed and used by the public.

[1] *Alaska v. Bernhardt*, 500 F. Supp. 3d 889, 896 (2020). *See also* Declaration of Claudia M. Newman in Support of Plaintiffs' Opposition to Tribe's Motion to Dismiss (Dec. 19, 2024) (hereinafter "Newman Dec."), Ex. A.

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National Wildlife Refuges are unique and special within the framework of federal lands due to their distinct purpose, management focus, and legal protections. They provide critical habitats for a wide range of species, including those that are endangered or threatened.[2] Unlike national parks or forests, which prioritize recreation or multiple uses, Wildlife Refuges are dedicated primarily to the protection and conservation of wildlife and their habitats.[3] Indeed, the Refuge System is the only system of federal lands devoted specifically to wildlife protection and conservation.[4] The Act expressly states that wildlife conservation is the priority and that the Interior Secretary shall ensure that the biological integrity, diversity, and environmental health of the Refuge lands are maintained.[5]

Conducting a commercial enterprise on any Wildlife Refuge "is prohibited except as may be authorized by special permit."[6] In addition, disturbing, injuring, spearing, poisoning, destroying, or collecting any plant or animal on any Wildlife Refuge "is prohibited except by special permit" unless otherwise permitted under the regulations.[7]

The Refuge Act's mandate for compatibility determinations is fundamental to implementing the mission of the Refuge System. The Act states that the Service "shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the [Refuge Manager] has determined that the use is a compatible use and that the use is not inconsistent with public safety."[8] A "compatible use" is one which, in the sound professional

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2 16 U.S.C. § 668dd(a).
3 *Id*.
4 Newman Dec., Ex. A at 2 (pdf).
5 *Id*. *See also* 16 U.S.C. § 668dd(a).
6 50 C.F.R. § 27.97.
7 50 C.F.R. § 27.51(a).
8 16 U.S.C. § 668dd(d)(3)(A)(i). *See also* 50 C.F.R. 25.21(b).

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judgment of the Refuge Manager, "will not materially interfere with or detract from the fulfillment of the mission of the System or purposes of the refuge."[9]

B. The Dungeness National Wildlife Refuge

The Dungeness National Wildlife Refuge was established on January 20, 1915, as a refuge, preserve, and breeding ground for native birds.[10] It is located near Sequim, Washington, in Clallam County on the north end of the Olympic Peninsula.[11] The first priority of the Refuge is to conserve, manage, and if needed, restore fish and wildlife populations and habitats according to its purpose.[12]

Dungeness Spit is the longest sand spit in North America.[13] Extending five miles into the Strait of Juan de Fuca, it provides habitat for a great variety of migratory shorebirds, waterfowl, marine mammals, and marine life.[14] The tranquil waters of Dungeness Bay, with its eelgrass beds, mudflats, and tidelands provide food, shelter, and breeding grounds to support a whole ecosystem teeming with life.[15] It is a preserve and breeding ground for more than 250 species of migratory and resident birds and 41 species of land animals.[16] Large numbers of brant, wigeon, pintail, mallard, and bufflehead spend their winters there.[17] "Eelgrass beds attract brant, shorebirds feed on the tideflats, and ducks find sanctuary in the calm waters.[18] A large portion of its coastal habitat, including tidelands within 100 yards of the shoreline, are closed year-round to all public access.[19]

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9 16 U.S.C. § 668ee(1).
10 Newman Dec., Ex. A at 4 (pdf).
11 AR 104, 108.
12 AR 112.
13 AR 104.
14 *Id*.
15 *Id*.
16 Dkt. 22 at ¶ 32. This response brief cites to allegations in the Amended Complaint because, as provided below, upon reviewing the Motion to Dismiss, the court must accept allegations in the plaintiffs' complaint as true and construe the complaint in plaintiffs' favor. *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs*., 932 F.3d 843, 851 (9th Cir. 2019).
17 AR 104.
18 Dkt. 22 at ¶ 32.
19 AR 178. AR 229; AR 273–274; AR 316.

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Tidelands in Dungeness Harbor and Bay are closed to the public from October 1 – May 14 to protect migratory birds.[20]

C. The Jamestown S'Klallam Tribe's Aquaculture Operations

The Jamestown S'Klallam Tribe is conducting commercial activities in the form of a new industrial shellfish aquaculture operation within the Dungeness Refuge.[21] The 50-acre tideland parcel upon which work would occur is owned by the Washington State Department of Natural Resources (DNR).[22] The Service holds an easement on the property that the Tribe is using for purposes of protection under the Refuge Act as a National Wildlife Refuge.[23] The Tribe has entered into a DNR Aquatic Lands Oyster Aquaculture Lease for its shellfish aquaculture operation, which became effective on August 19, 2021.[24] That Lease grants the Tribe permission to cultivate and harvest Pacific Oysters on the leased property, as outlined in its terms.[25] This lawsuit does not challenge the validity of that lease, nor does it present issues related to the scope of authority of the Service under that Lease.[26]

Jamestown has, so far, grown approximately 200,000 oyster seed on the property.[27] This commercial activity is ultimately proposed to involve cultivating 34 acres of non-native Pacific oysters within a 50-acre tideland parcel leased from DNR within the Dungeness Refuge.[28] The operation involves the use of 20,000 mesh bags within the Refuge tidelands, each 2 x 3 feet in size.[29]

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20 *Id*.
21 Dkt. 22 at ¶ 35.
22 Newman Dec., Ex. J at 2 (pdf).
23 *Id*. at 3–4, 9; AR 006.
24 AR 636–676.
25 *Id*.
26 Dkt. 22.
27 *Id*. at ¶ 35.
28 *Id*. at ¶ 36.
29 Newman Dec., Ex. J at 4 (pdf).

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The commercial oyster farm is within an area of the Refuge that supports the highest abundance of waterfowl and shorebirds within the Refuge.[30] The oyster farm would operate year-round despite that is located entirely within the area of the Refuge that is closed from October 1 – May 14 to all human use, to protect tens of thousands of migrating and wintering waterfowl of local, regional, and international importance.[31]

Aside from the new activities that are at issue in this lawsuit, no known commercial oystering has occurred in the area in question for the past 19 years or possibly 24 years.[32] In addition, shellfish harvest under the now-expired 2007 lease was less intensive and the area of use was in a smaller footprint.[33] The Service has issued a compatibility determination for the Tribe in the past for its previous shellfishing operations in the tidelands.[34] Under the previous lease, the Tribe conducted oyster and geoduck production but this was done outside of the closure period (October 1 – May 14), had 60 oyster aqua purses in a 100 x 100 foot area, and required the Tribe to consult with and get approvals from the Refuge before activities commenced.[35] The current proposal for cultivation activities will shift the operation to one that would be year-round, more intensively managed, and would impact a larger area of the Refuge.[36]

D. Jamestown Treaty Rights

Jamestown's assertion of a legal entitlement in the form of a treaty right to shellfish in the Dungeness Refuge tidelands not supported by either the facts or law. Jamestown relinquished any legal entitlements in the form of treaty rights to engage in shellfish harvest operations on its historic

30 *Id.*, Ex. C at 2 (pdf).
31 Dkt. 22 at ¶ 36.
32 *Id.*, Ex. E at 3.
33 *Id.*, Ex. G at 3; Ex. E. at 1–3.
34 *Id.*
35 *Id.*
36 *Id.*

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homelands in areas that were "staked or cultivated by citizens" in exchange for a share of $33 million in federal and state funds in 2007.

In 1855, the Tribe entered into the Treaty of Point No Point with the United States wherein they reserved certain fishing rights in northwest Washington State, including shellfish harvest rights.[37] In 2007, *United States v. Washington*, 20 F. Supp. 3d 828 (W.D. Wash. 2007), addressed issues related to the Tribe's treaty rights to harvest shellfish from certain state, private, and leased tidelands in Puget Sound.[38] Along with 16 other tribes, the Jamestown S'Klallam signed a settlement agreement ("Agreement") with the federal government and commercial shellfish growers which resolved issues regarding the Tribe's treaty right to take shellfish from lands owned, leased, or otherwise subject to harvest.[39] Under the Treaty of Point No Point, the shellfish harvesting right does not extend to areas that are "staked or cultivated by citizens."[40] The Agreement resolved, with finality, that specific oyster beds within Washington State DNR owned tidelands were "staked or cultivated by citizens."[41] This included the Jamestown S'Klallam Tribe's own existing oyster aquaculture lease on the Refuge tidelands.[42] In exchange for their concessions, the 17 tribes received $33 million in federal and state appropriated funds to acquire or enhance shellfisheries on other tidelands for their exclusive use.[43] The Agreement was ratified by the court and was followed by enactment of state and federal legislation to implement it.[44] As a result, the

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37 *Id*., Ex. H. (Treaty of Point No Point, January 26, 1855 (12 Stat. 933)).
38 *Id*., Ex. I.
39 *Id*. at 9–32, 54 (pdf).
40 *Id*., Ex. H at 3 (pdf).
41 *Id*., Ex. I.
42 *Id*. at 15 (pdf), *see* table including Lease No. 20013012.
43 *Id*. at 24 (pdf).
44 *United States v. Washington*, 20 F. Supp. 3d 828, 874 (2007); Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3649 (2007); Wash. Sess. Laws of 2006, 2018–2022.

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Tribe does not have a legally protected interest via treaty rights to engage in shellfish harvest operations in the Refuge.

The Service's own research confirmed that the Tribe does not have a treaty right for shell fishing in the area at issue.[45] The Acting Regional Chief for the National Wildlife Refuge System Pacific Region 1 stated: "…the location of Dungeness Refuge within tribal ancestral homelands is not unique. Many national wildlife refuges are similarly sited, where tribes may wish to pursue incompatible economic development. In fact, there may be stronger claims in some of those situations where tribes have treaty rights to conduct traditional activities, in contrast to the Jamestown S'Klallam who no longer hold treaty-reserved shellfishing rights on their lease in the Dungeness Refuge due to a recent court settlement agreement."[46]

Jamestown's claim that the 2013 Dungeness National Wildlife Refuge Comprehensive Conservation Plan "is consistent with the position of not requiring a compatibility determination for the Tribe's operations on these tidelands"[47] is not true. The Comprehensive Plan states that the "Service will coordinate with Tribes "as they exercise their treaty rights in an effort to minimize potential adverse impacts to Refuge resources."[48] This general statement of policy does not refer to Jamestown, does not refer to the tidelands at issue in this matter, and says nothing about the compatibility determination or special use permit requirements.[49] Jamestown also cites to AR 185, but there is nothing on that page about the leasehold or the requirement for a compatibility determination and special use permit.

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45 Newman Dec., Ex. G at 2 (pdf).
46 *Id*., Ex. F.
47 *See* Dkt. 44 at 11 *citing* AR 136 and AR 185.
48 *Id*.
49 *Id*.

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E. Procedural Background

In response to Plaintiffs' original complaint, Federal Defendants filed Defendants' Motion to Dismiss on November 3, 2023.[50] In ruling on Defendants' Motion to Dismiss, this court concluded that the compatibility determination is a discrete agency action that the Refuge Act and its implementing regulations requires the Service to undertake.[51] The court concluded that it is a ministerial, non-discretionary act.[52] The action is required pursuant to a legal obligation so clearly set forth that it could have been enforced through a writ of mandamus.[53]

In that same order, this court concluded that, with respect to the "failure to act" claim associated with the special use permit requirement, relief is contingent on a preceding agency action or on the Tribe itself either seeking a permit or operating the farm without one."[54] The court held that 50 C.F.R. § 27.97 does not mandate a discrete agency action that the court could compel before the oyster farm begins operating.[55]

After that Order was issued, Protect the Peninsula filed an amended complaint with new allegations.[56] The original complaint alleged that the facility was still "proposed" and had not yet begun operations, but now, as stated in the amended complaint, the Tribe is "currently conducting commercial activities in the form of a new industrial shellfish operation" within the Refuge and that they have "so far, grown approximately 200,000 oyster seed" on the land.[57]

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50 Dkt. 13.
51 Dkt. 20 at 12–18 (Order).
52 *Id*. at 14.
53 *Id*. at 12–13.
54 *Id*. at 20.
55 *Id*. at 20–21.
56 Dkt. 22.
57 *Id*. at ¶ 35.

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After the court granted Intervenor Jamestown's request for limited intervention, Jamestown filed a motion to dismiss all of Plaintiffs' claims on grounds that Plaintiffs had failed to join Jamestown as a necessary and indispensable party. This response follows.

III. ARGUMENT

A party may move to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(7) by challenging the plaintiffs' "failure to join a party under Rule 19."[58] Whether an action should be dismissed under Fed. R. Civ. P. 19 involves a two-part analysis.[59] First, the court must determine whether the absent party is a "necessary" party. *Id.* If the absent party is necessary and cannot be joined, the court next must determine whether the party is "indispensable."[60] If a necessary and indispensable party cannot be joined, the court must dismiss the case. The joinder determination is "a practical one and fact specific."[61] The court accepts allegations in the plaintiff's complaint as true and construes the complaint in plaintiff's favor.[62]

In its motion to dismiss, Jamestown claims that Protect the Peninsula's claims should all be dismissed because Jamestown is both a necessary and indispensable party to this action. As is demonstrated below, the public rights exception to joinder compels a different conclusion.

A. Necessary Party

Under Fed. R. Civ. P. 19(a)(1), a nonparty is necessary if "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;

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58 Fed. R. Civ. P. 12(b)(7).
59 *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996).
60 *Id.*
61 *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).
62 *Dine Citizens Against Ruining Our Env't.*, 932 F.3d at 851.

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or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

In its November 12, 2024 Order, this court concluded that Jamestown "clearly has an interest relating to the property that is the subject of the action" and held that Jamestown satisfied the requirements to intervene as a matter of right.[63] Considering the similarity between the legal standard in Fed. R. Civ. P. 24(a)(2) and that in Fed. R. Civ. P. 19(a)(1), Protect the Peninsula acknowledges that this court's conclusion in its Order may necessitate a conclusion that Jamestown is a necessary party under Rule 19. However, for the reasons stated below and in Plaintiffs' Response to Jamestown S'Klallam Tribe's Motion for Limited Intervention (Dkt. 38), Protect the Peninsula reserve the right to assert in future proceedings that Jamestown is not a necessary party under Fed. R. Civ. P. 19(a)(1) and that the Federal Defendants are the only necessary defendants in this litigation.

As the Ninth Circuit has said:

> To come within the bounds of Rule 19(a)(1)(B)(i), the interest of the absent party must be a legally protected interest and not merely some stake in the outcome of the litigation." *Jamul Action Comm.*, 974 F.3d at 996. This interest "must be 'more than a financial stake.' " *Diné Citizens*, 932 F.3d at 852 (*quoting Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)). For example, "an interest that arises from terms in bargained contracts may be protected, but such an interest must be substantial." *Id.* (*quoting Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California* (*Colusa*), 547 F.3d 962, 970 (9th Cir. 2008)) (quotation marks and alterations omitted). However, "[t]here is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a)," *Bakia v. Los Angeles Cnty.*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam), and "we have emphasized the 'practical' and 'fact-specific' nature of the inquiry," *Colusa*, 547 F.3d at 970 (*quoting Makah*, 910 F.2d at 558).[64]

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[63] Dkt. 42 at 3.

[64] *Maverick Gaming LLC v. United States*, No. 23-35136, 2024 WL 5100829, at *7 (9th Cir. Dec. 13, 2024).

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Protect the Peninsula's claims are similar to the claims for injunctive relief in *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990). In *Makah*, the Makah Indian Tribe challenged federal regulations allocating certain limited quota to the Makah's ocean harvest of salmon for 1987. The regulations at issue set minimum harvest levels for 1987 for at least twenty-three other tribes in addition to the Makah Indian Tribe.[65] The question presented to the court was whether the other twenty-three tribes were necessary and indispensable parties to the litigation since the Makah's lawsuit sought a reallocation of the 1987 harvest quotas overall.[66]

The Ninth Circuit held that the absent tribes were not necessary to the Makah's procedural claims for which they sought prospective injunctive relief.[67] The court made a distinction between claims that would affect only the future conduct of the administrative process versus substantive claims requesting a higher quota.[68] With respect to the former, the court explained that, because those procedures were subject to judicial review under the APA and any person adversely affected may seek review under that law, the district court had the authority to grant relief on the Makah's procedural claims without the presence of the other tribes.[69] With respect to the latter, the court held that the other tribes were necessary parties because the relief would directly change the allocations for those other tribes.[70]

Protect the Peninsula's claims in this case are exactly like the Makah's procedural claims in *Makah Indian Tribe*. They will affect *only* the future conduct of the administrative process. Protect the Peninsula is not asking the court to predetermine the outcome of the Service's

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65 *Makah Indian Tribe*, 910 F.2d at 557.
66 *Id*. at 558.
67 *Id*. at 559.
68 *Id*.
69 *Id*.
70 *Id*.

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compatibility determination or to declare the Tribe's operations incompatible with Refuge purposes. Nor does Protect the Peninsula seek to compel the Service to deny a special use permit, impose conditions on the Tribe's activities, or vacate any existing approvals. Protect the Peninsula is simply asking the court to require the Service to execute ministerial duties of issuing a compatibility determination and/or requiring a special use permit. A compatibility determination is a circumscribed, discrete agency action that is required by law under the Refuge Act.[71] Protect the Peninsula's claims do not ask the court to interfere with the Service's discretion in managing Jamestown's activities.

In contrast, the facts of this case are different from those in *Dine Citizens Against Ruining Our Env't*. In *Dine*, the plaintiffs sued the U.S. Department of the Interior challenging actions that reauthorized coal mining activities on Navajo Nation's tribal lands. The Navajo Transitional Energy Company (NTEC), which was wholly owned by the Navajo Nation, moved for dismissal on grounds that it was a necessary and indispensable party that could not be joined due to tribal sovereign immunity.[72] NTEC owned and operated the coal producing strip mine and power plant that were the subject of the lawsuit.[73] Unlike this case, however, both the coal mine and the power plant were located on tribal land within the Navajo Nation.[74] Also, unlike this case, the plaintiffs challenged discretionary agency decisions that managed NTEC's coal operations, such as a lease renewal and permit approvals.[75] The Ninth Circuit's conclusion that NTEC had a legally protected interest in the subject matter of the action was made in the context of a lawsuit that was specifically aimed at destroying an existing lease, permits, and other government approvals of ongoing

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71 16 U.S.C. § 668dd(d)(3)(A)(i).
72 *Dine Citizens Against Ruining Our Env't.*, 932 F.3d at 847–848.
73 *Id.*
74 *Id.*
75 *Id.* at 848.

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commercial activities on Navajo Nation's own tribal lands. Protect the Peninsula's claims are more like those in *Makah* than those in *Dine*. This litigation does not challenge any approved lease or permits, nor does it challenge the Tribe's ownership of land, its governance authority, or its self-determination.

The claims Jamestown seeks to dismiss are clearly directed at a federal agency, challenging that agency's compliance with federal law. In such cases, the involvement of the federal defendants whose actions are under scrutiny is sufficient as a matter of law. Moreover, since the relief sought is purely procedural and ministerial, Jamestown does not qualify as a necessary party.

B. Indispensable Party

When joining a necessary party is not feasible, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.[76] This determines whether the party is "indispensable."[77] If a necessary and indispensable party cannot be joined, the court must dismiss the case.[78]

To the extent that this court's conclusion in its November 12, 2024 Order that Jamestown satisfied the requirements to intervene as a matter of right (Dkt. 42 at 3) may necessitate a conclusion that Jamestown is also an indispensable party under Rule 19, Protect the Peninsula reserves the right to assert in future proceedings that Jamestown is not an indispensable party under Fed. R. Civ. P. 19(a)(1) for the reasons stated below and in Plaintiffs' Response to Jamestown S'Klallam Tribe's Motion for Limited Intervention (Dkt. 38).

[76] Fed. R. Civ. P. 19 (b). Plaintiffs concede that the sovereign immunity of Jamestown prevents them from being joined involuntarily in this action.

[77] *Makah Indian Tribe*, 910 F.2d at 559.

[78] *Id*.

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The Supreme Court has emphasized that sovereign immunity should not be used to insulate federal agencies from judicial review of their compliance with statutory obligations.[79] Similarly, in environmental litigation, courts have consistently allowed challenges to agency actions even when third parties' interests may be affected indirectly.[80] And again, for the same reasons presented in the "necessary" party argument above, the Ninth Circuit's decision in *Makah Indian Tribe* and other cases cited above compel a conclusion that Jamestown is not an indispensable party to this action.[81] Protect the Peninsula's claims in this case, like the Makah's procedural claims in *Makah Indian Tribe*, will affect only the future conduct of the administrative process. Because the relief requested is purely procedural and ministerial, Jamestown is not an indispensable party.

C. The Public Rights Exception

The Supreme Court has recognized a public rights exception to the traditional joinder rules, stating: "In a proceeding . . . narrowly restricted to the protection and enforcement of *public rights*, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights."[82] The public rights exception to mandatory joinder allows litigation to proceed in the absence of a necessary party, even though the absent party's interest may be adversely affected, so long as the litigation does not destroy the legal entitlements of the absent party.[83] The litigation must transcend the private interests of the litigants and seek to vindicate a public right.[84]

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79 *See Ex parte Young*, 209 U.S. 123 (1908)
80 *See, e.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).
81 *See e.g., Id.*
82 *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940) (emphasis added).
83 *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988).
84 *Kescoli v. Babbitt*, 101 F.3d at 1311.

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The Ninth Circuit's thorough discussion of the public rights exception in *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), provides a persuasive framework for resolving the issues before this court. In *Conner*, the key question was whether federal agencies violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) by selling oil and gas leases on 1.3 million acres of national forest land in Montana without first preparing an Environmental Impact Statement (EIS) and a comprehensive Biological Opinion.[85]

The case arose after the Forest Service issued a Finding of No Significant Impact under NEPA, and the Fish and Wildlife Service provided an incomplete Biological Opinion under the ESA. Despite these deficiencies, the Bureau of Land Management proceeded to sell over 700 oil and gas leases for exploration, development, and production on the national forest lands.[86] The Ninth Circuit ultimately held that the federal agencies had violated both NEPA and the ESA.[87] The Ninth Circuit also "enjoin[ed] the federal defendants from permitting any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA and ESA." *Id*. at 1461.

A number of the lessees had sought intervention and dismissal of the case on grounds that they were necessary and indispensable parties that could not be joined under Rule 19.[88] There was no dispute that the lessees were indeed "necessary" parties.[89] The Ninth Circuit found that the case was amenable to application of the *National Licorice* public rights exception to traditional joinder. The *Conner* court explained that courts should not require the joinder of all parties affected by public rights litigation, even when those parties have property interests at stake, when requiring

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85 *Conner*, 848 F.2d at 1442–43.
86 *Id*. at 1443–4.
87 *Id*. at 1462.
88 *Id*. at 1445.
89 *Id*. at 1458.

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such joinder would impose overly strict constraints on litigation against the government, undermining the ability to address public rights effectively.[90]

Relying on *National Licorice* and multiple other cases, the *Conner* court held that the appellees' litigation against the government did not purport to adjudicate the rights of current lessees; it merely sought to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA.[91] In response to the lessees' strong objections that the court had destroyed their property rights in their absence by setting aside the leases, the court stated:

> We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government. Thus, the public right to compliance with environmental standards is vindicated with a minimum imposition on the rights of lessees. The order as modified will obviously preclude immediate government approval of surface-disturbing activity, but such foreclosure of the lessees' ability to get "specific performance" until the government complies with NEPA and the ESA is insufficient to make the lessees indispensable to this litigation. … Once the government complies with NEPA and the ESA, it is entirely possible that it will authorize surface-disturbing activities on many of the leased tracts. Thus, although development probably will be delayed, it is conceivable that it will occur on some of the leases already sold. The legally protected interests of the lessees are barely affected until the government decides that no development and production of the oil and gas reserves will be allowed, and even then they may have claims for damages against the government.[92]

In sum, the burden on the rights of the nonparties was acceptable because the adjudication did not destroy the legal entitlements of the absent parties—they were free to assert such legal rights as they might have acquired under the contracts.

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90 *See id*. at 1459–1460.
91 *Id*. at 1460.
92 *Id*. (internal footnote omitted).

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D. The Public Rights Exception applies to Protect the Peninsula's claims.

This litigation perfectly illustrates why the public rights exception to traditional joinder exists. At its core, this litigation transcends the private interests of Jamestown and seeks to vindicate a public right. Plaintiffs' focus is on protecting wildlife on publicly owned property within a National Wildlife Refuge, making this a textbook example of the broader public interests the exception is designed to protect.

1. Protect the Peninsula's claims seek to vindicate a public right.

This case highlights a critical issue: Federal agencies must be required to execute ministerial legal duties designed to protect publicly owned lands. Protect the Peninsula's claims center on vindicating a public right under the Refuge Act—a federal statute created to safeguard public interests on public lands in a Wildlife Refuge. At stake are the policy objectives of the Refuge Act, which expressly states that wildlife conservation is the priority of Refuge System lands and that the Interior Secretary shall ensure that the biological integrity, diversity, and environmental health of the Refuge System lands are maintained.[93]

The Refuge Act was passed to ensure that the Refuge System is managed as a national system for the protection and conservation of our Nation's wildlife resources. The main components of the Refuge Act include "a strong and singular wildlife conservation Mission for the Refuge System."[94] The mission of the Refuge System is "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."[95] In administering the Refuge System, the Service shall,

[93] 16 U.S.C. § 668dd(a); *See also* Newman Dec. Ex. A at 2 (pdf).
[94] *Id.*
[95] 16 U.S.C. § 668dd(a)(2).

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among other things, "provide for the conservation of fish, wildlife, and plants, and their habitats within the System[.]"[96] The Refuge Act further requires that the Service must "ensure that the mission of the [Refuge] System . . . and the purposes of each refuge are carried out."[97] Areas in the Refuge System are closed to public and private access until and unless the Service opens the area for a use in accordance with the Act. This is a matter of agency accountability to the administration of law—a quintessential public right that transcends the private interests of any one party, including Jamestown.

If the Tribe were deemed an indispensable party and could not be joined due to sovereign immunity, this would effectively bar Protect the Peninsula from seeking judicial review of the Service's failure to comply with this administrative obligation under federal law. Such an outcome would impose excessive constraints on litigation, undermining the public's ability to address violations of statutory mandates. Similar to *National Licorice* and *Conner,* this case demonstrates the necessity of the public rights doctrine. The enforcement of laws protecting public interests must not be derailed by procedural barriers or sovereign immunity; agencies must remain accountable to the public. The public rights doctrine ensures that public interests enshrined in statutory mandates are not thwarted by procedural barriers. Denying judicial review of the Service's failure to follow statutory mandates would unjustly shield the government from accountability, contrary to established legal principles.

Again, this case is similar to *Makah Indian Tribe*, referenced above. In that case, the Ninth Circuit held that, to the extent that the Makah sought relief that would affect only the future conduct of the administrative process, its claims were reasonably susceptible to adjudication without the

[96] 16. U.S.C.§ 668dd(a)(4)(A).
[97] 16 U.S.C. § 668dd(a)(4)(D).

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presence of other tribes.[98] The absent tribes would not be prejudiced because all of the tribes had an equal interest in an administrative process that is lawful.[99] The court stated:

> Even if the absent tribes were "necessary" to the Makah's procedural claims, they would not be "indispensable." We have adopted the "public rights" exception to traditional joinder rules. *See Conner v. Burford,* 848 F.2d 1441, 1459–61 (9th Cir.1988), *cert. denied,* sub nom., *Sun Exploration & Production Co. v. Lujan,* 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989). In *Conner,* mineral lessees argued that changing agency procedures to require an EIS before approving mining activity threatened their property rights; this was "insufficient to make the lessees indispensable to this litigation." *Id.* at 1461; *see also Manygoats v. Kleppe,* 558 F.2d 556, 558–59 (10th Cir.1977) (tribe necessary but not indispensable to procedural challenge to environmental impact statement); *National Wildlife Fed'n v. Burford,* 835 F.2d 305, 333 (D.C.Cir.1987) ("administrative litigation commonly inflicts drastic effects on absent third parties" but "potential unfairness seems in accord with what we often tolerate").
>
> Congress explicitly made FCMA regulations subject to judicial review. The Makah seek to use that tool to question whether the 1987 regulations were lawfully adopted in the first place. To the extent the Makah seek to enforce the duty of the PFMC and the Secretary to follow statutory procedures in the future, this is a "public right" and this action becomes one that potentially benefits all who participate in the ocean fishery. The district court recognized this might be a claim, but held the public rights doctrine was "misplaced under the circumstances of this litigation" because the Makah sought primarily a reallocation of the quotas. Court's order at 29. We disagree and find the claims severable.

Protect the Peninsula's claims fit squarely within this framework. This lawsuit is similarly simply seeking a lawful administrative process. This lawsuit seeks prospective injunctive relief in the form of proper process, not any particular substantive outcome. If Protect the Peninsula prevails, the Service will be required to conduct a compatibility determination and assess the

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98 *Makah Indian Tribe*, 910 F.2d at 559.

99 *Id*.

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issuance of a special use permit—a process in which Jamestown will have the opportunity to participate and assert its interests.

Jamestown's mischaracterization of Protect the Peninsula's lawsuit as an attempt to "stop or severely restrict" the Tribe's farming operations[100] is a gross distortion of what this case is about. Protect the Peninsula is not asking the court to predetermine the outcome of the Service's compatibility determination regarding the Tribe's activities. Plaintiffs do not seek a court order determining that the Tribe's operations are incompatible with Refuge purposes. Nor do they ask the court to direct the Service to deny a special use permit, impose conditions on the Tribe's activities, or vacate any existing permits or approvals. Protect the Peninsula is not asking this court to wade into the discretionary domain of how the Service manages the Tribe's activities, nor do Protect the Peninsula's claims directly challenge the Tribe's operations.

Instead, Protect the Peninsula's lawsuit is narrowly focused on a procedural question: Is the Service is complying with its clear, mandatory obligations under the Refuge Act? Federal law requires the Service to perform a compatibility determination and issue a special use permit before allowing commercial activities in a wildlife refuge. Protect the Peninsula is simply seeking an order compelling the Service to fulfill these statutory duties—nothing more. This is about enforcing accountability to the law, not dictating the outcome of the Service's decisions or interfering with the Tribe's operations. The Tribe's mischaracterization of the lawsuit's limited scope should be firmly rejected.

Jamestown cites the so-called "wall of circuit authority" supporting the balancing of factors under Fed. R. Civ. P. 19(b) to justify dismissal.[101] However, it is critical to note that the *Diné* court

[100] *See* Dkt. 44 at 7.
[101] Dkt. 44 at 14.

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addressed this principle in the context of the "indispensable party" test—not within the framework of the public rights doctrine.[102]

Moreover, Protect the Peninsula's claims stand apart from those in other cases where courts dismissed actions for lack of joinder involving sovereign tribes. Many of the cases involving dismissal for lack of joinder, where the absent party was a sovereign tribe, have centered on plaintiffs pursuing private interests rather than advocating for a broader public interest.[103] Moreover, tribal lands and/or self-governance was directly implicated in those cases, involving fundamental questions of tribal self-determination.[104]

For instance, in *Kescoli*, the Ninth Circuit determined that the plaintiff's claims primarily addressed her personal dispute with the Tribe, rather than advancing a larger public purpose.[105] The litigation also sought to interfere with the Tribe's self-governance and decision-making about its own best interests.[106] As a result, the court declined to apply the public rights exception, citing the "essentially private nature" of the case and the "significant threat" it posed to the Tribe's interests.[107]

In *American Greyhound Racing*, the plaintiffs—racetrack owners and operators—sought

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[102] *Dine Citizens Against Ruining Our Env't,* 932 F.3d at 857.

[103] *See e.g. Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1027 (9th Cir. 2002) (gaming on tribal lands); *Kescoli v. Babbitt*, 101 F.3d at 1307 ("Although the mine complexes are located on the Navajo Nation's reservation, the Navajo Nation and the Hopi Tribe are joint owners of some of the subsurface minerals"); *Maverick Gaming LLC v. United States*, No. 23-35136, 2024 WL 5100829 (9th Cir. 2024) (gaming operations on the Shoalwater Bay Indian Tribe's Reservation).

[104] *Id*. *See also Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 48 F.4th 934, 948 (9th Cir. 2022) (this will imperil tribal water rights); *Deschutes River All. v. Portland Gen. Elec. Co*., 1 F.4th 1153, 1163 (9th Cir. 2021) ("The Tribe's sovereign immunity requires dismissal of this suit, in which DRA challenges the operation of a large hydroelectric project co-owned and co-operated by the Tribe, and located partly on the Tribe's reservation."); *Dine Citizens Against Ruining Our Env't*., 932 F.3d at 858 (coal mine and power plant on Navajo Nation land); *White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (repatriation of aboriginal human remains).

[105] *Kescoli*, 101 F.3d at 1311.

[106] *Id*. at 1312.

[107] *Id*.

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an injunction to prevent the Governor of Arizona from entering into gaming contracts with Indian tribes under the Indian Gaming Regulatory Act. The Ninth Circuit found that the public rights doctrine did not apply because the plaintiffs were focused on their private interest in eliminating competition from Indian gaming.[108] Their lawsuit was not incidental to enforcing a public right but was directly aimed at terminating the tribes' existing gaming compacts. *Id.* The court contrasted this scenario with cases, like *Makah*, that involved genuine public interests.

Similarly, in *Maverick Gaming LLC*, private cardroom and casino owners sought to invalidate tribes' gaming compacts under the Indian Gaming Regulatory Act.[109] Like *American Greyhound Racing*, the court concluded that the public rights doctrine was inapplicable because the plaintiffs were business competitors seeking to overturn legally recognized tribal compacts.[110] In both cases, the claims centered on plaintiffs' private economic interests rather than the enforcement of public rights.

These cases underscore a key distinction: When plaintiffs pursue private gains or seek to undermine tribal governance, courts are reluctant to apply the public rights exception. In contrast, where claims genuinely serve the broader public interest and only incidentally impact a tribe, the public rights doctrine is appropriate. Here, because Protect the Peninsula are not private litigants with their own commercial interests as in *Kescoli*, *Maverick Gaming*, and *Greyhound Racing*, the public rights exception should apply.

2. Protect the Peninsula's lawsuit does not seek to destroy any legal entitlements that are currently held by Jamestown.

This lawsuit does not seek to disrupt or invalidate any legal entitlements held by Jamestown.

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108 *American Greyhound Racing*, 305 F.3d at 1026.
109 *Maverick Gaming LLC*, 2024 WL 5100829 at *1–2.
110 *Id.*

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Protect the Peninsula does not seek reversal of an existing compatibility determination or special use permit—neither have been issued to Jamestown. Protect the Peninsula is not asking the court to predetermine the outcome of the Service's compatibility determination or to declare the Tribe's operations incompatible with Refuge purposes. Nor does Protect the Peninsula seek to compel the Service to deny a special use permit, impose conditions on the Tribe's activities, or vacate any existing approvals.

Jamestown's depiction of Plaintiffs' lawsuit as an attempt to "stop or severely restrict" the Tribe's farming operations, coupled with its warning of "devastating injury" to the Tribe,[111] grossly misrepresents Protect the Peninsula's claims and requested relief. This argument improperly presumes the outcome of the Service's compatibility determination or special use permit decision. In managing Refuge access, the Service must consider allowing continued access for Jamestown while, at the same time, determining compliance with Refuge regulations. It is, frankly, ironic that Jamestown repeatedly emphasizes the importance of protection of Dungeness Bay while simultaneously assuming that its commercial shellfish activities cannot possibly be mitigated in any way to be considered compatible with the Refuge Act's primary purpose of protecting the Bay. Considering Jamestown's assertion that the Tribe's operation is "small in scale" and comprises less than 0.5 acres of the total area under the DNR lease,[112] the Service could possibly conclude that Jamestown's operation is compatible with the goals of the Refuge and issue a special use permit. But that is not the question presented in this lawsuit.

The argument by Jamestown that requiring a compatibility determination will automatically "halt the Tribe's existing access and use of these tidelands"[113] also doesn't hold up because the

[111] Dkt. 44 at 7.
[112] Dkt 44 at 9; Dkt. 31 at ¶ 8.
[113] Dkt 44 at 11.

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Service has previously issued a compatibility determination for the Tribe's shellfishing operations in the tidelands within the Refuge. That alone demonstrates that such determinations do not inherently block access or use of these tidelands by the Tribe.[114]

Jamestown devotes considerable effort to emphasizing historic uses of this land and its treaty rights as if these factors establish a legal entitlement to the disputed use. This approach overlooks a critical point: The Tribe relinquished its treaty rights to oyster aquaculture on these very same tidelands in the 2007 settlement agreement. Under this agreement, Jamestown exchanged its treaty-based rights to these specific shellfish operations for a share of $33 million in federal and state funds, which were intended to acquire or enhance exclusive shellfish operations elsewhere. This agreement, ratified by the court and codified through federal and state legislation, extinguished any treaty-based claims to shellfish harvest operations within the Refuge. Jamestown's reliance on past entitlements ignores the clear and binding terms of the 2007 settlement agreement. The Tribe voluntarily accepted significant compensation in exchange for relinquishing these specific rights, a decision that cannot now be undone to justify the disputed use.

Jamestown claims a "position" that its treaty right to take shellfish has been affirmed by *United States v. Washington*, 759 F.2d 1353, 1360 (9th Cir. 1985). A 1985 case addressing treaty rights cannot and does not override the 2007 Settlement Agreement. Jamestown's assertion that it retained treaty rights over tidelands in the 2007 Settlement Agreement —despite explicitly and unambiguously waiving those rights in exchange for compensation from state and federal governments—is a diversion. This argument is nothing more than an attempt to create the illusion of a viable legal basis to justify its involvement in this lawsuit.

[114] *Id.*, Ex. G at 3, Ex. E at 1–3.

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Even more critically, however, this issue is not ripe for review. Any challenge to the Service's authority to forbid the Tribe from using the tidelands would only arise if, and when, the Service denies the Tribe access or determines that their proposed use is incompatible. At that point, the Tribe could raise this issue in a legal challenge to such a determination. Until then, Jamestown's argument is speculative and premature.

Jamestown claims that it has a legal entitlement to a lease with Department of Natural Resources (DNR). Protect the Peninsula is not challenging that DNR Lease. A ruling in favor of Protect the Peninsula will not affect that DNR Lease. Even if the Court grants all the relief sought by Protect the Peninsula, the current DNR Lease will remain fully intact and enforceable. Exactly like the situation in *National Licorice* and *Conner v. Burford*, Protect the Peninsula's claims will not "destroy" the lease itself. In those cases, there was no dispute that the lessees were indeed "necessary" parties.[115] They were free to assert such legal rights as they might have acquired under the contracts. Like those lessees in *National Licorice* and *Conner v. Burford*, Jamestown remains free to assert whatever claims it may have against the government. Protect the Peninsula's litigation against the government does not purport to adjudicate the rights of Jamestown under its DNR Lease; it merely seeks to enforce the public right to administrative compliance with the Refuge Act standards.[116]

Jamestown has created a misleading narrative, suggesting there is a legitimate issue over whether the Service has jurisdiction under the Refuge Act to regulate uses on state-owned tidelands within the Dungeness Refuge. Jamestown claims that resolving this case requires first addressing a threshold question of state versus federal authority, rooted in state property law. This argument is baseless. There is no reasonable dispute about the scope of the Service's easement. As the Federal

[115] *Id*. at 1458.
[116] *Id*. at 1460.

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Defendants made clear in their response to the Tribe's motion to dismiss, the State of Washington could not, in 2021, grant the Tribe a right that supersedes the Service's easement under Washington law.[117] The 1943 easement unequivocally gave the Service the right to use the tidelands for any "public purpose."[118] A wildlife refuge is, without question, a public purpose. Moreover, the state retained no right to use the tidelands in a way that would materially interfere with the Service's easement.[119]

Rather than directly addressing this reality, the Tribe sidesteps the issue, claiming, "to answer that question, the Tribe would need to be joined."[120] Nowhere does Jamestown offer a viable legal argument to support the notion that the Service lacks authority to regulate the Tribe's uses within the Refuge.

Also, like the treaty rights issue, the issue concerning scope of authority of the Service is also not yet ripe for review. A challenge to the Service's authority would arise only if the Service denies the Tribe access or deems a proposed use incompatible. A court needs a specific decision to evaluate whether it falls within the scope of a particular easement. Until then, Jamestown's argument remains speculative and premature.

When you look closely at the joinder case law involving sovereign tribes, courts have dismissed cases under Rule 19 only when the absent tribe's land and/or self-governance was directly implicated and the cases involve fundamental questions of tribal self-determination.[121] No such interests are at stake here. This litigation does not challenge activities on the Tribe's land, its governance authority, or its self-determination. Jamestown is engaging in commercial activity

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117 Dkt. 56 at 7-8 *citing United States v. Park*, 536 F.3d 1058, 1061 (9th Cir. 2008).
118 AR 006.
119 *Id. See also* Dkt. 56 at 8.
120 Dkt. 44 at 17.
121 *See Klamath Irrigation Dist.*, 48 F.4th at 948; *Deschutes River All*, 1 F.4th at 1163; *Dine Citizens Against Ruining Our Env't*, 932 F.3d at 858; *White v. Univ. of California*, 765 F.3d at 1028 (9th Cir. 2014).

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within a United States National Wildlife Refuge. The land at issue is owned by Washington State subject to an easement held by the United States. This land is not located within the reservation, nor is it subject to Tribal jurisdiction or ownership.[122]

In its motion, the Tribe indicates that it invested significant resources from 2016 to 2022."[123] But the Tribe has known that the Service had jurisdiction over its commercial activities under the Refuge Act since at least 2015. For example, Tribe representatives attended a meeting in 2015 during which Refuge Supervisor Sylvia Pelizza outlined concerns regarding the ability for its commercial oyster aquaculture to meet compatibility and biological integrity, diversity, and environmental health (BIDEH) requirements.[124] The Service and Tribe have been engaged in conversations regarding compatibility issues since then.[125] Furthermore, a compatibility determination was required in the past for the Tribe's previous shellfish activities in the Refuge.[126] The Service's Project Leader, Jennifer Brown-Scott's comment letters outlining concerns regarding the compatibility requirement are dated April 4, 2018, February 27, 2019, and May 22, 2019.[127] These were submitted during the review process for other approvals and copied to the Tribe.[128] Jamestown continued to invest resources towards obtaining other (apparently easier to obtain) unrelated approvals and permits despite this knowledge. Plaintiffs were under no obligation to appeal these other approvals before challenging the Service's failure to exercise its duties under the Refuge Act. Spending money and time on obtaining other approvals for a development project is not itself a legal entitlement—it's poor planning. Jamestown made a choice to invest time and

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122 Newman Dec., Ex.'s D and J.
123 Dkt. 29 at 4.
124 Newman Dec., Ex. E at 3; Ex. K, Ex. G.
125 *Id*.
126 *Id*., Ex. G at 3.
127 *Id*., Ex C, Ex. D.
128 *Id*., Ex. E (with attachments)

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resources in this effort knowing that a compatibility determination and permit from the Service would be required under the Refuge Act.

This court already rejected the Service's argument that it did not need to complete a compatibility determination because "other sovereigns" granted the Tribe permission for the aquaculture operations.[129]

IV. CONCLUSION

Protect the Peninsula requests that the court deny Jamestown's motion to dismiss. Jamestown is not an indispensable party under Rule 19 because Protect the Peninsula's claims fall within the public rights exception, focusing solely on administrative compliance with federal law. Requiring the Tribe's joinder would impose unreasonable barriers to judicial review, undermining public rights and the integrity of environmental statutes like the Refuge Act. The court should allow this case to proceed to protect the public interest in lawful and transparent agency decision-making. Dismissing the case for non-joinder would deprive Protect the Peninsula of the opportunity to enforce public rights under the Refuge Act, undermining the statute's purpose and the rule of law.

I certify that this memorandum contains 8,012 words in compliance with the Local Civil Rules.

By: *s/Claudia M. Newman*
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[129] Dkt. 20 at 18.

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