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,

and

JAMESTOWN S'KLALLAM TRIBE,

Limited Intervenor.

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

LIMITED INTERVENOR JAMESTOWN S'KLALLAM TRIBE'S REPLY TO PLAINTIFFS' RESPONSE TO THE MOTION TO DISMISS

Note on Motion Calendar: January 10, 2025

Oral Argument Requested

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I. INTRODUCTION

The Jamestown S'Klallam Tribe ("Tribe") remains deeply connected to Dungeness Bay in a place-based way, meaning their ties are irreplaceable and their needs cannot be fulfilled with imports or oysters grown outside their homeland. Dungeness Bay is where they feel protected from harm and connected to their ancestors, as even ancestral burial sites dot the Bay's shoreline.

Plaintiffs, three nonprofits,[1] concede that the Tribe cannot be joined due to sovereign immunity, but try to silo the legal issues, ignore Tribal interests, then directly challenge treaty rights—though not pleaded, and seek to dismantle the Tribe's farm, by attacking their renewable lease,[2] existing permits, and operations. Plaintiffs should not prevail on these facts by merely asserting a public purpose, because their request is obviously focused on the Tribe's farm.

II. REPLY ARGUMENT

A. Rule 19 Analysis is Focused on Equitable Balancing Test, Which Favors Dismissal

Under the law of this Circuit, this case must be dismissed for failure to join a "required" party under Rule 19. Fed. R. Civ. P. 12(b)(7). This Court already determined that the Tribe "clearly" is "necessary." Dkt. 42 at 3. Plaintiffs assert a right to revisit this issue, even though it was decided. Plaintiffs Response, Dkt. 57 ("Resp.") at 12. This whole case, though, would not exist *but for* the Tribe. *See* Dkt. 22 [amended complaint] at ¶ 2, ¶ 29, ¶¶ 36-37; ¶¶ 47-49, ¶¶ 52-

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[1] One nonprofit, Beyond Pesticides, is Washington, D.C. based. See https://www.beyondpesticides.org/about/our-mission (last visited Jan. 6, 2025). The Tribe is not using pesticides.

[2] Their historic rights and 1990 lease predate the 1997 Refuge Act that Plaintiffs are interpreting. *Compare* Dkt. 46 at ¶¶ 7-8, ¶¶ 10-11 and Hals Decl. ¶ 5 (1990 aquaculture lease) *with* National Wildlife Refuge System Improvement Act of 1997, 105 Enact. H.R. 1420, 105 P. L. 57, §1, §2, § 5, 111 Stat. 1252 (1997).

53; *see also Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002) ("litigation does not *incidentally* affect the gaming tribes . . . . This litigation is *aimed* at the tribes . . . .").

Underlying the Plaintiffs' entire case are two claims: (1) the Tribe lacks *any* legally protected interest that would be impacted; and (2) the Tribe is unharmed because it can just *later* sue the government. Resp. at 13, 16, 22. While clearly there is a benefit to Plaintiffs litigating this case without a true adversary,[3] their arguments fail because the Tribe is a sovereign entity with legally protected interests, making it indispensable, and this case is an end run around sovereign immunity.

1. Joinder is Infeasible as Tribe is a Sovereign and This Case Impacts Their Rights

Plaintiffs concede the Tribe is sovereign and has not waived immunity, making joinder infeasible. Resp. at 15 n.76. Therefore, this case's Rule 19 analysis is based on the indispensability prong, which "favors dismissal when a tribe cannot be joined due to tribal sovereign immunity[.]" *Maverick Gaming LLC v. United States*, 2024 U.S. App. LEXIS 31673 at *41, 2024 WL 5100829, No. 23-35126 (9th Cir. Dec. 13, 2024) (citing *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 947 (9th Cir. 2022) and *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) (citation omitted)). There is "very little room for balancing of other factors set out in Rule 19(b) where a necessary party . . . is immune from suit because immunity" is "compelling" enough. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt* ("*Kickapoo II*") 43 F.3d 1491, 1496 (D.C. Cir. 1995);

[3] *See* Tribe's Reply to Federal Defendants' brief.

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see also Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996). The State,[4] also absent, has interests too, namely property ownership rights, as it has leased these tidelands to the Tribe since 1990, collected rent, retained *profits à prendre*, and other fee-simple rights. AR-6; AR-10; Hals Decl. at ¶ 5, ¶¶ 7-8, ¶ 11. Plaintiffs engage in a shell-game, claiming they are neutrally asking for a compatibility determination (CD) and a special use permit (SUP), when the impact on two absent sovereigns is obviously inextricably linked. P. Resp. at 13:22, 14:1-9; *see id*.; Hals Decl. ¶¶ 19-22.

2. Equitable Factors Favor Dismissal

A court looks at the prejudice factors[5] but "almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity." *Klamath Irrigation* 48 F.4th at 947 (quoting *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th at 1163). Plaintiffs' claims impact the Tribe's lease on State-owned tidelands, which infringes on their sovereignty. There is no evidence, though, that the Refuge Act modifies the easement. *See* National Wildlife Refuge System Improvement Act of 1997, 105 Enact. H.R. 1420, 105 P. L. 57, §1, §2, § 5, 111 Stat. 1252 (1997)*; see* AR-1. Plaintiffs' attempt to apply the Act to the Tribe, but this harms their Treaty rights, rights within the lease, permit rights, and ownership rights within their farm operations, which support their Traditional Foods and Culture Program, all of which will be

[4] There is also failure to join the State, clearly possessing sovereign immunity.
[5] The four factors are (1) prejudice to absent party; (2) whether relief can lessen prejudice, (3) whether there's an adequate remedy, even if incomplete that can be awarded; and (4) an alternative forum exists. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002) (citing Rule 19(b)).

impaired should this case proceed and where prejudice cannot be reduced. Hals Decl. at ¶¶ 20-22.

3. The Service Lacks Jurisdiction Over the Lease Area

Plaintiffs attack the Tribe's jurisdiction position as 'unripe' and assert that a compatibility determination (CD) must happen *before* the Tribe can be harmed. Resp. at 7. Their attacks, though, falsely claim there is no "reasonable dispute" about the Service's 1943 easement or jurisdictional reach and falsely assert the Service has done CD's in the past for the farm. *Compare* Resp. at 27, 29 *with* Dkt. 46 (Dkt. 31), Ex. D; Hals Decl. at ¶ 11 (property right not broad enough), ¶ 18 (no compatibility determination for the farm was done, and Morrison was likely mistaken, confusing consultation with compatibility); and Dkt. 45 [Rasmussen Decl.], Ex. B (2007 agreement). Plaintiffs' arguments fail because the Service and the Refuge Act are not all-powerful, nor all-reaching. Here, the Service must have jurisdiction to require a compatibility determination (CD), the prerequisite of which is knowing (1) that the property is actually within the "refuge"; (2) whether there are other vested property rights possessed by another that must be respected, such as here, State lease rights; and (3) whether there are reserved rights attaching, such as treaty rights. *See* 16 U.S.C. § 668ee (defining "refuge"); AR-311 ("The Service does not prepare compatibility determinations for uses when the Service does not have jurisdiction.").

A "refuge" can have limited jurisdiction or limited property rights. Hals Decl. Ex. E, ¶ 4.e. For the Service to do a CD or require an SUP, it must be able to take "action" over the property, and here, the Act's definitions indicate that means jurisdiction. *See* 16 U.S.C. § 668ee (defining "refuge" as a "*designated* area of land, water, or an interest in land or water *within the System*, but does not include . . . ." and "Purpose of the Refuge" as the property areas within the

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legal documents "establishing, authorizing, or expanding" the "refuge"). Even the 2013 Dungeness Comprehensive Plan and the Service's own policies recognize this. Hals Decl. at ¶ 4.b-4.c, Ex. B, ¶ 7*;* AR-311 ("The Service does not prepare compatibility determinations for uses when the Service does not have jurisdiction.); AR-26 ("This policy applies to all proposed and existing uses of national wildlife refuges where we have jurisdiction over such uses); Hals Decl., Exs. A, D.

4. The 2007 Settlement Agreement Does Not Waive the Treaty Right to Aquaculture

In a direct frontal attack on the Tribe, Plaintiffs allege the Tribe has no reserved treaty rights of any kind in their ancestral home. They throw a 2007 shellfish settlement on the table, and claim it is a waiver of all possible reserved Treaty rights and includes waivers of reserved aquaculture rights not even addressed in the case. Resp. at 7-9, 26-27. Their attempt to weaponize the agreement is misplaced.[6] First, the settlement is about a tribe's *access* to *grower-controlled* tidelands, where Treaty *harvesting* would otherwise be a windfall (i.e., a tribe is taking private grower's plantings) and nothing within it addresses what happens when a Tribe holds "growers" rights. Hals Decl. at ¶ 6. Here, the Tribe holds both the reversionary interests *as*

[6] Plaintiffs are also not parties to *U.S. v. Washington* and cannot seek to attack and reinterpret *U.S. v. Washington* settlements because those matters are only properly considered with the signatory parties present and using the proper procedure for review. See *Order on Continuing Jurisdiction*, Paragraph 25 of the Court's injunction of March 22, 1974, *United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974), as modified by the Court on August 24, 1993, November 9, 2011, and November 20, 2012.

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well as the access rights to these tidelands. [7] *Id.* In property terms, that is like holding the life estate and the remainder interest. It doesn't give you less of a right, it gives you all the rights.

In addition, the settlement cannot waive rights beyond its terms. This because of the reserved rights doctrine which holds, "the treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). Here, the Tribe's reserved treaty rights are the rights they held that were not granted; therefore, any right they possessed but not addressed therein remains. In addition, Tribes need not prevail on their claims to mandate dismissal due to sovereign immunity. *See White v. Univ. of Cal.,* 765 F.3d 1010, 1024 (9th Cir. 2014).

Plaintiffs' position here is similar to *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992), a case where absent tribes' legally protected interests in a settlement was predicated on validity of their substantive rights, but the court rejected that because it required a decision on the very issues the court lacked jurisdiction to decide. *Id.* at 1317. Similarly, here, there are a number of significant impacts: an existing valid lease; a validly permitted, operating farm; a prior settlement entitling the farm to operate; and a court-approved right to renew the lease. *See* Hals Decl. at ¶¶ 5-8, ¶¶ 19-22.

[7] The reserved right to take "fish," includes shellfish, under the Treaty of Point No Point, and these rights including the tidelands at issue. Dkt. 46, Ex. B; 12 Stat. 933 (1855), art. IV; *see also Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Washington*, 626 F. Supp. 1405, 1432-34, 1486 (W.D. Wash. 1985) (orders issued May 8, 1981 (Jamestown S'Klallam), corrected March 1984, amended Feb. 21, 1985); *see also United States v. Washington*, 459 F. Supp. 1020, 1048-49 (W.D. Wash. 1978) (orders issued March 28, 1975 and April 18, 1975).

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5. Circuit Authority Does Not Require Activity be Exclusively on Tribal Lands

Plaintiffs ignore Circuit authority supporting dismissal, erroneously claiming the law requires 'direct implication' of tribal lands or self-governance. Resp. at 22-23 (e.g., "so called" and "tribal lands and/or self-governance … directly implicated"). No cases have held land ownership to be the only trigger for dismissal of legal rights. For example, in *Makah*, the case involved interpretation of ocean fishing regulations pertaining to *off-reservation* waters beyond the three-mile limit. *Makah Indian Tribe v. Verity* (*"Makah"*), 910 F.2d 555, 557 (9th Cir. 1990) (regulations by the Secretary and challenge to quotas) (emphasis); *see also White v. Univ. of Cal.,* 765 F.3d at 1028 (university professors' claims to human remains found on *university* property, even when not yet been proven to be Native American). In addition, sovereign immunity protects the Tribe regardless of whether their activity is on tribal lands. *Kiowa Tribe v. Mfg. Techs*., 523 U.S. 751, 753 (1998) (immunity exists on or off a reservation). Thus, Plaintiffs' nexus-to-land argument is deeply flawed. In addition, in this context a tribe's "legally protected interest" is one that "does not [even] require a property right," *Am. Greyhound Racing, Inc.*, 305 F.3d at 1023, but just "more than a financial stake" that is not speculative. *Makah,* 910 F.2d at 558; *Dawavendewa,* 276 F.3d at 1156 (multiple economic and sovereign interests impacted); Hals Decl. at ¶¶ 5-6, ¶¶20-22; Dkt. 46 at ¶ 14, ¶¶ 16-19. Here, the Court has already recognized legally protected interests. Dkt. 42 at 3-4.

B. The Public Rights Exception Does Not Apply Here

Seeking another way to avoid dismissal, Plaintiffs try to characterize their case as a 'vindication' of public rights (Rep. at 19), but this overreaches. To apply this narrow exception, the Plaintiffs claim must be shown to "transcend" the rights of the litigants and cannot impact the

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current rights of the Tribe or be focused on the Tribe. See *Am. Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1026 (9th Cir. 2002); *Kescoli*, 101 F.3d at 1311; *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 256 (D. Or. 2017) ("question is whether the litigation is aimed at the absent parties' interests").

1. Exception is Not Applicable When Alleged Vindication is Questionable

First, to apply the exception, the law that the plaintiff is purporting to uphold must actually apply to the actions—here the Tribe's farm or the State's tidelands—underlying the alleged infraction, such that it transcends joinder requirements. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940) (no dispute over NLRB's underlying authority to interpret contracts; vindication to prevent unfair labor practices). There is no public purpose vindicated when a threshold issue is whether the Refuge Act even applies to the Tribe's lease and operations on the State-owned tidelands. *See* Dkt. 46, Ex D (USFW asserting no jurisdiction); *see also* Hals Decl., Ex. A-B, ¶4.c, ¶ 4.e, ¶¶ 5-7, ¶ 8, ¶¶ 10-12. The Tribe's (and State's) position, that the Service lacks authority, is consistent with the Act's definitions, and the Service's own decisions. *See* id; AR-294; AR-299; AR-311 ("Service does not prepare compatibility determinations for uses when the Service does not have jurisdiction."); Dkt. 46, Ex. D; Dkt. 45, Exs. B, D-G.

2. Not Implicated When the Case Narrowly Focused

Second, in this Circuit, the exception has only been applied once to a tribe asserting immunity and those circumstances were very narrow and inapplicable here because of the immediate impact, vested rights, and prejudice. *See Makah*, 910 F.2d at 559 (holding that twenty-three absent tribes *were* indispensable parties to the litigation because of prejudice to their interests). It also relates directly to the Rule 19(b) test "whether in equity and good

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conscience the action should proceed." Plus, when the case is only focused on one Tribe, operating in one Bay within their ancestral home to provide necessary funds and oysters, there is no vindication of some greater public right. Hals Decl. at ¶¶ 11-12, ¶¶ 19-22. Here nobody disputes that the Refuge Act's management provisions apply when the Service has jurisdiction over the property; the only dispute is whether it applies to this Tribe's *leased area* operations and if it does, whether it qualifies for an exception due to reserved, vested, or treaty rights. Hals Decl. at ¶ 8; Dkt. 46, Ex. D. As a result, there is not a great number who cannot be joined, supporting an equity argument, nor is there a large number of leases or vast land impacted, like in *Conner*. 848 F.2d at 1444 (700 private leases on 1.3 million acres of forestland for oil and gas development).

3. Not Implicated Where it Impacts Legally Protected Rights

Third, for the exception to apply the claims cannot "destroy the legal entitlements of the absent parties." *White v. Univ. of Cal.*, 765 F.3d at 1028 (citing *Kescoli v Babbitt*, 101 F.3d 1304, 1311). The Tribe's Treaty rights, lease to access and raise oysters on these tidelands, existing permits and approvals, among others, are legal entitlements that would be destroyed should this case proceed; at a minimum, a CD would result in an immediate closure of their farm, loss of oysters during evaluation, and operations limited to closure periods, making the farm non-viable and destroying this cultural connection. Hals Decl. at ¶¶ 19-22.

The Ninth's 'wall of authority' supports tribal sovereignty when *existing* tribal right(s) will be impaired. *See, e.g., Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 947 (9th Cir. 2022) (dismissal of an APA challenge involving waters where Tribe could not be

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joined, affirming prejudice to the Tribe's opposing interests in management); *Deschutes River All. v. Portland Gen. Elec. Co*., 1 F.4th 1153, 1163 (9th Cir. 2021) (dismissal of nonprofit citizen group's Clean Water Act suit as tribal interests in self-governance and the preservation of fishing rights); *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 853 (9th Cir. 2019) (dismissal of an action, challenging agency actions under environmental statutes finding litigation "may" impact existing leases, rights-of-way, and mining permits); *White,* 765 F.3d at 1028 (dismissal of university professors' claims to remains found on *university* property, even where there was scientific interest in studying them). In fact, the Circuit has described the distinguishing factor as whether the claims will have "retroactive" impairment of rights "already enjoyed" or whether the claims are only "future administrative process." *Diné* at 853 (citing *Makah*).

Here, Plaintiffs try to argue mere future, administrative impacts, but this ignores, the obvious immediate lease and farm impacts. Dkt. 46 at ¶¶ 19-23; Hals Decl. at ¶ 15, ¶¶ 20-22. For instance, Tribe risks not being able to defend[8] their current farm operations, which infringes on their sovereignty. *See, e.g.,* Hals Decl. at ¶¶ 12-13, ¶¶ 16-17, ¶¶ 19-21 (immediate impacts to lease, programs, permits, connections, expectancy and decisions therein); Dkt. 46 at ¶ 7 ("Shellfishing within our ancestral homeland is necessary for our survival, as it provides connection to our ancestors, our way of life, as well as provides important resources for the important programs that support our people"); ¶19 ("the farmed oysters will be made available to

[8] This is especially true if the federal government has a conflict of interest and is using the lack of State opponent for an advantageous determination. *See* Fed. Resp. at 4:20, 5:1-22 (asserting the State "retained no rights" to lease the tidelands in a way that interferes with Service's "public purpose" easement.).

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our Traditional Foods Program, including cultural and elder programing, as well as for ceremonial events" and oyster seed loss); ¶22 ("farm would be forced to close, at least pending these processes, and the Tribe's existing oyster seed would not be able to be maintained or harvested"); ¶23 (harm to treaty rights, impact on livelihood, violate letter of agreement, violate lease, court order requiring DNR to lease property for aquaculture, harm settled expectations). Performing a compatibility study alone will immediately halt existing operations and harm years of investment and production potential. *Id.;* Hals Decl. at ¶¶ 19-21, ¶ 22 (loss would "break this deeply sought after cultural connection"). This case implicates significant legal rights (e.g., Dkt. 46 ¶ 8; Hals Decl. at ¶¶ 5-6, ¶¶ 12-13, ¶ 15, ¶¶ 19-22), which includes the right to be free from lawsuits aimed at their sovereignty. *See Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) (noting the social importance of shielding tribes from suit).

4. Inextricably Intertwined and Focus is the Tribe's Farm

The public rights exception is equally inapplicable when the claims cannot be cleanly separated in a way to avoid harm. *See Makah,* 910 F.2d at 557, 559.[9] The Rule 19(a)(1)(B) standard is whether "continuing the action will impair the absent party's ability to protect its interest." *Kickapoo II,* 43 F.3d at 1497*; see also Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1148 (D. Or. 2005). The relief sought in this case, necessarily requires a conclusion that the Service has unfettered jurisdiction to regulate their farming, thus "there is no way the court can

[9] *Makah* pre-dates recent authority on tribal sovereignty, such as *Diné,* and was a case where only claims with no possible way of harming the absent tribes survived. *Makah,* 910 F.2d at 559 (claims in paras. 1.3.3 and 1.6.8.2 surviving); Declaration of Lauren Rasmussen ("Rasmussen Decl."), Ex. A (*Makah* complaint with surviving claims).

avoid the prejudice" to the Tribe. *See Kickapoo II*, 43 F.3d at 1498. The relationship between Plaintiffs' suit and the Tribe's farm, its lease and treaty rights is direct. *Cf. Am. Greyhound Racing, Inc.*, 305 F.3d at 1026 ("In the present case, the effect of the district court's injunction is not merely to require adherence to certain procedures in entering or extending gaming compacts with the tribes; it is to prevent new compacts or the extension of existing ones."). The Service also attacks the State's very right to lease the tidelands to the Tribe, creating yet another prejudice to the Tribe.[10]

Plaintiffs excise the details out of *Makah* that do not fit their narrative, but the case actually held that most of the claims could not be litigated without prejudicing absent Tribes. Resp. at 13-14; *Makah,* 910 F.2d at 559. In *Makah,* the Court only allowed claims about issues clearly *not* "inextricably intertwined," that would have no potential to prejudice absent tribes, as the surviving claims were about the Secretary respecting the notice and comment time periods (i.e., no "secret negotiations"; providing a nine-day comment period and properly publishing the rule). 910 F.2d at 559 (paras. 1.3.3 and 6.8.2 surviving); Rasmussen Decl., Ex. A (Makah complaint highlighting paras.). Here, instead of avoiding prejudice, Plaintiffs create it. They assert claims regarding the Tribe's farming operations and existing lease, as well as reserved Treaty rights, property rights, and ancestral ties to this Bay, unlike the surviving claims in *Makah*. Hals. Decl. at ¶¶ 5-6, ¶ 11, ¶¶ 20-22; 910 F.2d at 559. In *Makah* the Circuit also affirmed dismissal of other claims impacting 23 absent tribes, who would have been *detrimentally impacted* by such a decision.

[10] The Tribe responds to the Service separately on this.

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5. *Conner* and *National Licorice* Are Inapposite

Plaintiffs urge this Court to apply *Conner*, where federal agencies leased over 1.3 million acres of federal forest land to private oil and gas companies, without ensuring environmental protections. *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988). But *Conner* did not involve a tribal sovereign, a direct challenge and impact on the scope of a lease and intertwined property rights, treaty rights, or a direct challenge to a treaty-based settlement. Recall, the Refuge was created on the Spit *after* the Treaty promises, 12 Stat. 933 (1855), and the 1997 Refuge Act with its compatibility standards was enacted decades after the 1943 easement. Dkt. 46 at ¶¶ 7-11; Hals Decl. Ex. A, ¶ 5; Dkt. 46, Exs. B-G (State and federal correspondence regarding jurisdiction). And *National Licorice* is about the legality of a National Labor Relations Board ruling about private contracts.[11]

6. Plaintiffs Attempt to Distance Themselves from Extensive Circuit Law

Plaintiffs claim that this case "stand[s] apart" challenging the 'wall of authority,' based on the public rights exception. Resp. at 23-24. They try to distinguish *Kescoli*, even though the Circuit affirmed dismissal there largely based on its impact—the "retroactive relief" sought on the "conditions on which mining operations could be conducted" and on the employment and royalties therefrom. *Kescoli*, at 101 F.3d at 310-311. Here, the claims reach back and impact the Tribe's existing lease[12] and operations and ability to reconnect to their homeland. Hals Decl. at ¶¶ 19-22. They also attempt to avoid Diné, falsely claiming it is only an "indispensable parties test" case, not about the public rights exception. Resp. at 22-23. But this is clearly incorrect,

[11] Addressed further in the Tribe's Reply to Federal Defendants, Dkt. 56.
[12] AR-640.

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because in *Diné* a coalition challenged the validity of the "leases and rights-of-way" for Tribal coal mines where the Court indicated that "if approvals were vacated, then those agreements would be invalid[,]" and the Navajo's company would lose all associated legal rights, including revenue and substantial investment in lease, rights of way, and surface mining permits. 932 F.3d 843, 860. The Court clearly declined to apply the public rights exception. *Id.* at 861. Here, the Tribe already possesses an existing lease, permits, contracts, and operations with active, growing shellfish that supports an existing government program, all of which, will be harmed, like the lease, permits and harm in *Diné*. Dkt. 46 at ¶¶ 22-23; Hals Decl. at ¶¶ 19-22.

The law of the Circuit supports dismissal.

III. CONCLUSION

The Court should grant the Tribe's motion to dismiss.

Respectfully submitted this 10th day of January, 2025,

s/ Lauren P. Rasmussen

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CERTIFICATE

I certify that this Reply contains 4,143 words in compliance with the Local Civil Rules.

DATED this 10th day of January, 2025.

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