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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 PROTECT THE PENINSULA’S
9 FUTURE; COALITION TO PROTECT
10 PUGET SOUND HABITAT; and
11 BEYOND PESTICIDES,

12 Plaintiffs,

13 v.

14 DEB HAALAND, SECRETARY OF
15 THE INTERIOR; UNITED STATES
16 FISH AND WILDLIFE SERVICE;
17 MARTHA WILLIAMS, DIRECTOR OF
18 UNITED STATES FISH AND
19 WILDLIFE SERVICE; HUGH
20 MORRISON, REGIONAL DIRECTOR
21 OF THE PACIFIC REGION; and
22 JENNIFER BROWN SCOTT,
PROJECT LEADER, WASHIN,

Defendants.

CASE NO. CV23-5737-BHS

ORDER

19 This matter is before the Court on Limited Intervenor Jamestown S’Klallam
20 Tribe’s motion to dismiss. Dkt. 44. Jamestown asserts that it is a required party under
21 Rule 19 because this case impedes its lease and treaty rights, but that it cannot be joined
22 due to its sovereign immunity. It argues that the Court therefore must dismiss this action

1 under Rule 12(b)(7). Because the claims here seek only prospective, injunctive relief
2 requiring the Service to comply with Refuge Act procedures, and because Jamestown
3 failed in its burden to show compliance would destroy any legally protected interest, it is
4 not a required party. Even if it were, the public interest exception to traditional joinder
5 rules would allow the case to go forward because the claims seek to vindicate a public
6 right to administrative mandates to protect the Refuge. Jamestown's motion to dismiss is
7 denied.

8 I. BACKGROUND

9 1. Procedural posture

10 This case centers on United States Fish and Wildlife's (the Service's)
11 administrative duties regarding the Jamestown S'Klallam Tribe's proposed oyster farm
12 located on tidelands it leased from the State within the Dungeness Wildlife Refuge on the
13 north end of the Olympic Peninsula. An explanation of the proposed oyster farm and an
14 overview of the Dungeness Wildlife Refuge are in the Court's previous order, Dkt. 20,
15 and incorporated by reference here. A summary of the litigation and contested property
16 interests follows for ease of reference.

17 Protect the Peninsula along with fellow environmental protection groups sued the
18 Service and related federal defendants, alleging the Service violated the Refuge Act¹
19 because it failed to fulfill its mandatory administrative duties to conduct a compatibility
20

21 ¹ The National Wildlife Refuge System Administration Act, as amended by the National
22 Wildlife Refuge System Improvement Act (collectively, Refuge Act), 16 U.S.C. §§ 668dd–
668ee.

1 determination (count 1) and/or require a special use permit (count 2) for Jamestown's
2 proposed oyster farm within the Refuge. Dkt. 22.

3 The Service moved to dismiss the action for lack of subject matter jurisdiction and
4 failure to state a claim. Dkt. 13. It argued that because "other sovereigns" granted
5 Jamestown permission for the farm, it does not need to complete a compatibility
6 determination nor require a permit, and that plaintiffs lacked a final agency action to
7 challenge. *Id.* at 12.

8 The Court denied in part the Service's motion to dismiss. Dkt. 20. It concluded
9 that the Refuge Act requires the Service to complete a compatibility determination. It
10 granted dismissal on count 2, however, concluding that plaintiffs failed to show that
11 issuance of a special use permit is a discrete agency action that the Refuge Act requires
12 the Service to take at that juncture. Finally, it concluded that plaintiffs failed to state a
13 plausible claim for relief from a final agency action under APA § 706(2), but allowed
14 them leave to amend.

15 Protect the Peninsula timely filed an amended complaint. Dkt. 22. Jamestown filed
16 a motion to intervene for the limited purpose of moving to dismiss plaintiffs' claims
17 without waiving its sovereign immunity. Dkt. 29. The Court granted limited intervention
18 as a matter of right under Rule 24(a)(2). Dkt. 42.

19 Jamestown now moves to dismiss this case under Rule 12(b)(7) asserting it is a
20 required, indispensable party that cannot be joined due to its sovereign immunity. Dkt.
21 44. It argues that it is required because it has protectable interests from its lease for the
22 tidelands, oyster farm investment, treaty rights, and sovereignty. *Id.* at 10.

1 Protect the Peninsula argues that Jamestown is not a necessary party because the
2 claims here are purely procedural, and will only affect future compliance with
3 administrative process. Dkt. 57 at 17. Even if the Tribe was a required party, it argues the
4 public rights exception to traditional joinder rules applies because its claims seek to
5 benefit the public by requiring the Service to honor its administrative duties.

6 The Service does not take a position on whether Jamestown is a required party, but
7 it asserts that if the Court reaches the merits, it has the authority to control Jamestown's
8 activity within the Refuge because of its easement from the State. Dkt. 56.

9 **2. Property interests in the Dungeness Tidelands**

10 Washington State owns the Dungeness Bay tidelands including those within the
11 Refuge. Jamestown has historical ties to the Sequim and Dungeness Bay area, where they
12 have lived and fished, "including gathering and procuring shellfish, long before this
13 country's existence." Dkt. 44 at 7.

14 In 1915, President Woodrow Wilson established the Dungeness National Wildlife
15 Refuge within the Dungeness Bay as a refuge and breeding ground for native birds. Dkt.
16 1 at ¶ 30. The Service is tasked with maintaining the refuge pursuant to the Refuge Act.
17 16 U.S.C. §§ 668dd-668ee.

18 In 1943, the State executed a "public purpose" easement to the tidelands to the
19 Service. Dkt. 26-2 at 6. The Service uses the tidelands in the easement to maintain the
20 Refuge. Dkt. 56 at 8.

21 Beginning in 1990, the State leased portions of the Dungeness Bay tidelands to
22 Jamestown. Dkt. 26-2 at 14. Jamestown renewed its lease in 2007, which permitted it to

1 use tidelands for oyster and geoduck cultivation. Dkt. 26-2 at 28–87. In 2021, Jamestown
2 entered its current lease for 50 acres of tidelands through July 2031. Dkt. 26-3 at 51–91.
3 The current lease permits Jamestown to cultivate pacific oysters. Dkt. 26-3 at 53. It states
4 that the leased tidelands are “the subject of a Consent Decree and Settlement Agreement
5 (‘Settlement Agreement’) in *U.S. v. Washington*, Case No. 2:70-cv-09213-RSM.” *Id.* at
6 52. “Under the Settlement Agreement, the signatory Tribes agree not to conduct tribal
7 shellfish harvest on the tidelands while State continues to lease the tidelands to the same
8 Tenant[.]” *Id.* Each lease includes language that the Jamestown’s activity in the tidelands
9 is subject to all prior valid interests of third parties, is limited to the natural resources
10 detailed in the lease, and is subject to compliance with government rules and regulations.
11 Dkt. 26-3 at 54 (current lease); Dkt. 26-2 at 52 (2007 lease); *Id.* at 14 (1990 lease).

12 Jamestown maintains that in addition to its lease rights, it also has treaty rights to
13 shellfish in the tidelands. It asserts that it first signed a treaty affirming its right to fish
14 there in 1855 when it signed the Treaty of Point No Point, reserving the right to fish,
15 hunt, and gather “as they always had” within their “usual and accustomed” areas (U&A).
16 12 Stat. 933 (1855). Plaintiffs assert that the Tribe forfeited any treaty rights to farm
17 shellfish within the Refuge when it signed the settlement agreement in *United States v.*
18 *Washington*, 20 F. Supp. 3d 828 (W.D. Wash. 2007). Dkt. 57 at 12. Jamestown argues
19 that the Settlement does not obviate its shellfish rights within the refuge in part because
20 of its lease: “The *shellfish proviso* is limited to addressing access to shellfish on parcels a
21 tribe does not own or control, and, importantly, here, it does not *render* the activity ‘non-
22 treaty’ (outside the scope) when the tribe is operating on a parcel they control or own

1 (i.e., via lease).” Dkt. 21 at 34. Although it has not taken an official position in this
2 litigation, the record shows that the Service has taken inconsistent positions regarding
3 treaty rights. In a letter to plaintiffs, it asserted the “Tribe has a long history of shell
4 fishing and reserved treaty rights in Dungeness Bay.” Dkt. 15 at 62, Ex. J. But in an
5 internal letter to the Service, it determined that Jamestown does not have treaty rights
6 within the Refuge: “the Regional Office of the Solicitor analyzed the shellfish Settlement
7 Agreement in U.S. v. Washington (2007) and it does not appear the Tribe has a treaty
8 right for shell fishing in the lease area.” Dkt. 15 at 27, Ex. D.

9 Jamestown now seeks to operate oyster farm within the Refuge on the tidelands it
10 leased from the State to cultivate approximately 34 acres of non-native Pacific oysters.
11 Dkt.1 at ¶ 36. Since around 2015 it has maintained consistent communications with the
12 Service about its proposed farm. *See* Dkt. 58-5 (chronological summary of
13 communication). The Service informed Jamestown that it would need to complete a
14 compatibility determination for the activity within the Refuge. *Id.* at 4. Jamestown
15 additionally obtained necessary permits from other agencies, including a shellfish
16 aquaculture permit from the United States Army Corps of Engineers. Dkt. 15 at 21 (Ex.
17 C).

18 By March 2022 the Service finished a draft compatibility determination that
19 concluded Jamestown’s oyster farm incompatible with the Refuge’s purposes. Dkt. 15 at
20 27, Ex. D. A “key issue” was that the oyster farm would operate year-round and would be
21 located entirely within the area of the Refuge that is closed from October 1 to May 14 for
22 use by tens of thousands of migrating and wintering waterfowl. *Id.* The regional director

1 for the Service, Hugh Morrison, informed the Service Director in May 2022 that “the
2 Service cannot allow the proposed activity unless the entirety of the commercial oyster
3 farming operation within the Refuge boundary is found Compatible with Refuge
4 purposes.” Dkt. 15 at 27–28, Ex. D.

5 Despite its draft, the Service did not issue a final decision regarding the
6 compatibility of the proposed oyster farm. Dkt. 56 at 4. When plaintiffs asked the Service
7 whether it would complete the compatibility determination or require a special use permit
8 per the Refute Act, the Service responded that it would do neither because a
9 “compatibility determination is not appropriate in this instance where these pre-existing
10 property rights exist.” Dkt. 15 at 62, Ex. J. Plaintiffs sued, and the present litigation
11 ensued.

12 Whether Jamestown is a required party and whether the public rights exception to
13 traditional joinder rules applies are addressed in turn below.

14 II. DISCUSSION

15 Courts employ a two-part analysis to determine whether to dismiss a case because
16 a necessary party cannot be joined. First, it determines if an absent party is required as
17 defined in Rule 19. Then, if the party is required but cannot be joined, the court considers
18 four factors to determine whether the party is “indispensable” so that in “equity and good
19 conscience” the suit should be dismissed. *Makah Indian Tribe v. Verity*, 910 F.2d 555,
20 558 (9th Cir. 1990). The inquiry is fact specific, practical, and “designed to avoid the
21 harsh results of rigid application.” *Id.* The moving party bears the burden of persuasion,
22 and the court accepts allegations in the plaintiff’s complaint as true and draws all

1 reasonable inferences in plaintiff’s favor. *Diné Citizens Against Ruining Our Env’t v.*
2 *Bureau of Indian Affs.*, 932 F.3d 843, 851 (9th Cir. 2019); *Sierra Club v. Watt*, 608
3 F.Supp. 305, 312 (E.D.Cal.1985).

4 The Ninth Circuit allows the public rights exception to traditional joinder rules.
5 *Makah*, 910 F.2d at 559 n.6. To qualify, the litigation must “transcend the private
6 interests” of the litigants and seek to vindicate a public right. *Kescoli v. Babbitt*, 101 F.3d
7 1304, 1311 (9th Cir. 1996). If it vindicates a public right, the exception allows litigation
8 to proceed without a required, absent party, even if the party’s interest may be adversely
9 affected so long as the litigation does not destroy the absent party’s legal entitlements.
10 *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988).

11 Because the claims here narrowly seek prospective, injunctive relief requiring the
12 Service to follow administrative procedures that do not destroy any property rights,
13 Jamestown is not a necessary party. Even if it were, the public rights exception would
14 allow this case to proceed in its absence.

15 **A. Jamestown is not a required party for prospective procedural claims**

16 Jamestown argues it is a required party because it asserts it has a legally protected
17 interest in its lease rights, its oyster farm investment, treaty rights, and sovereignty. Dkt.
18 44 at 15. It argues plaintiffs’ requested relief “necessarily impacts the Tribe’s lease
19 agreement” because to prevail, plaintiffs need to demonstrate that the Service has the
20 authority to regulate the Tribe’s leasehold activities and that if so, Jamestown lacks a
21 treaty right that would exempt them from a compatibility determination. *Id.* at 16–17.

1 Jamestown further asserts that it has a treaty right to farm shellfish in the Dungeness Spit
2 including the Reserve. Dkt. 21 at 34.

3 The Service does not take a position on whether Jamestown is a necessary party.
4 Dkt. 56 at 5. But it asserts that the Service’s rights under the public use easement from
5 the State “control the decision concerning refuge uses.” *Id.* at 8. It contends that after the
6 State granted it the easement in 1943, the State “retained no right to use the tidelands in a
7 manner that would materially interfere with the Service’s easement” and “could not
8 thereafter convey such a right” to Jamestown. *Id.* at 8. The Service asserts that the current
9 lease between the State and Jamestown is expressly subject “to all prior valid interests of
10 third parties,” which includes the Service, and is “subject to compliance with government
11 rules and regulations.” *Id.* at 7 (citing Current Lease, 26-3 at 54).

12 Protect the Peninsula argues that Jamestown is not a necessary party because its
13 claims are purely procedural and will only affect future compliance with administrative
14 process. Dkt. 57 at 17 (citing *Makah*, 910 F.2d 555). It emphasizes that it does not ask the
15 Court to “predetermine the outcome of the Service’s” compatibility determination or to
16 declare the Tribe’s operations incompatible with Refuge purposes.” *Id.* at 18. It asserts
17 that Jamestown’s challenge is premature because “any challenge to the Service’s
18 authority to forbid the Tribe from using the tidelands would only arise if, and when, the
19 Service denies the Tribe access or determines that their proposed use is incompatible.” *Id.*
20 at 31.

21 A nonparty is required to be joined in the action if:
22

1 that person claims an interest relating to the subject of the action and is so
2 situated that disposing of the action in the person's absence may as a
3 practical matter impair or impede the person's ability to protect the interest;
or leave an existing party subject to a substantial risk of incurring double,
multiple, or otherwise inconsistent obligations because of the interest.

4 Fed. R. Civ. P. 19(a)(1). “There is no precise formula for determining whether a
5 particular nonparty should be joined under Rule 19(a).” *Bakia v. Los Angeles Cnty.*, 687
6 F.2d 299, 301 (9th Cir. 1982) (per curiam). But the absent party’s interest “must be a
7 legally protected interest and not merely some stake in the outcome of the litigation.”
8 *Jamul Action Comm.*, 974 F.3d at 996. The interest “must be more than a financial stake.”
9 *Diné*, 932 F.3d at 852 (internal quotes omitted). Conversely, “an absent party has no
10 legally protected interest at stake in a suit merely to enforce compliance with
11 administrative procedures.” *Id.* at 971.

12 Ninth Circuit law on challenges to federal action under the APA where absent
13 tribes seek dismissal fall into two camps. If the claims seek prospective compliance with
14 administrative procedures, and compliance would not destroy the absent tribe’s legally
15 protected interest, the case can proceed without the absent tribes. *See Makah*, 910 F.2d
16 555. But if the impact of a successful challenge would impair a property right already
17 granted to the absent tribe, courts dismiss the case. *See Dine*, 932 F.3d at 852.

18 *Makah* exemplifies the first category. The Makah Indian Tribe challenged federal
19 regulations allocating a quota to the ocean harvest of salmon for the Makah and at least
20 twenty-three other absent tribes. The Makah brought two types of claims: (1) it alleged
21 that the quotas violated treaty rights, and sought reallocation; (2) it challenged the
22 procedures the Secretary employed to issue the regulations, asserting they violated the

1 Fishery Conservation and Management Act,² and sought prospective injunctive relief to
2 require the proper procedures. The question presented was whether the twenty-three
3 absent tribes were necessary and indispensable parties to the case since some of the
4 Makah’s claims sought a reallocation of the 1987 harvest quotas overall.

5 The Ninth Circuit affirmed the trial court’s ruling that the absent tribes were
6 necessary and indispensable parties for the first type of claim, “to the to the extent the
7 Makah seek a reallocation of the 1987 harvest or challenge the Secretary’s inter-tribal
8 allocation decisions.” *Id.* at 559. But it determined the absent tribes were not necessary to
9 the Makah’s procedural claims, ruling “[t]o the extent that the Makah seek relief that
10 would affect only the future conduct of the administrative process, the claims [] are
11 reasonably susceptible to adjudication without the presence of other tribes.” *Id.* It noted
12 that because the procedures for promulgating the challenged regulations were reviewable
13 under the FCMA and APA, the trial court had “authority to grant relief on the Makah’s
14 procedural claims without the presence of the other tribes.” *Id.* It reasoned that the
15 “absent tribes would not be prejudiced because all of the tribes have an equal interest in
16 an administrative process that is lawful.” *Id.*

17 *Diné* illustrates the second category: courts dismiss claims that require retroactive
18 relief that impacts tribes’ protectable interests. Plaintiffs there sued the U.S. Department
19 of the Interior challenging a variety of final agency actions that reauthorized coal mining
20 activities on Navajo Nation land. 932 F.3d 843. The actions included discretionary

21 _____
22 ² Fishery Conservation and Management Act of 1976 (FCMA), Pub. L. 94–265, 90 Stat.
331 (codified at 16 U.S.C. § 1801, *et seq.*)

1 agency decisions such as a lease renewal and permit approvals. *Id.* at 848. The Navajo
2 Transitional Energy Company (NTEC), a corporation wholly owned by the Navajo
3 Nation that owns the mine, intervened for the limited purpose of moving to dismiss. The
4 court determined NTEC had a legally protectable interest in the case. It reasoned that
5 plaintiffs’ challenge “does not relate only to the agencies’ future administrative process,
6 but instead may have retroactive effects on approvals already granted for mining
7 operations” and that if they “succeeded in their challenge and the agency actions were
8 vacated, NTEC's interest in the existing lease, rights-of-way, and surface mining permits
9 would be impaired” and NTEC’s expected revenues lessened. *Id.* at 853.

10 The present case resembles *Makah* rather than *Diné*. The claims here are purely
11 procedural and seek prospective, injunctive relief to require the Service to follow the
12 proper Refuge Act procedures. As in *Makah*, the challenged procedures under the Refuge
13 Act are reviewable under the APA. *See* 5 U.S.C. §§ 701, 706. The claims do not attempt
14 to predetermine the result of a compatibility determination. Nor do they not ask to
15 review, set aside, or vacate a final decision favorable to Jamestown as in *Diné*. And
16 unlike *Diné*, the challenged activity here does not take place on the absent tribe’s land,
17 but instead on a wildlife refuge owned by the State, under an easement to the Service and
18 leased to Jamestown. Because Protect the Peninsula seeks “relief that would affect only
19 the future conduct of the administrative process, the claims [] are reasonably susceptible
20 to adjudication without the presence of [Jamestown].” 910 F.2d 555.

21 Jamestown has not shown that merely completing a compatibility determination or
22 requiring a special use permit would impede its lease or treaty rights. Even if the Court

1 grants all the relief sought by Protect the Peninsula, the current lease and any treaty rights
2 Jamestown has will remain fully intact. The existence of a draft compatibility
3 determination that determined the proposed farm incompatible does not alter this
4 analysis. It is not a final agency action, and the Court cannot dismiss the case on
5 speculation that it would be published in its present form or that doing so will impede
6 lease rights.

7 The issue of whether the Service has authority to control Jamestown's activity in
8 the refuge is not ripe for review. Although the Court does not decide the priority of
9 property interests in this Order, it accepts as true the allegations in plaintiffs' complaint
10 and draw all reasonable inferences in plaintiffs' favor. *Diné*, 932 F.3d at 851. The record
11 reveals that Jamestown was aware of the compatibility determination requirement for
12 activities in the refuge even with its asserted lease and treaty rights long before this suit
13 was filed. For example,

- 14 • In September 2015 the Service met with Jamestown and “Discussed the
15 process the Refuge would take to determine compatibility.” Dkt. 58-5 at 4.
- 16 • In April 2016 Jamestown hosted a multiagency meeting where the Service
17 “explained how we would be evaluating the project for compatibility with
18 the Refuge mission/purposes,” and noted that Jamestown would “respond
19 to the compatibility questions from FWS” in its application. *Id.* at 5.
- 20 • In March 2021 Jamestown requested an update on the Service's
21 compatibility determination. The Service clarified that it was “unable to
22 proceed” with its analysis until the USACE 404 permit was issued to
identify the full scope of the activity. *Id.* at 8.
- In September 2021 the Service gave Jamestown a courtesy call to explain
compatibility determination “in process by DNWR manager is finding
access to the lease site to be incompatible with refuge functions/purpose
and would like the Tribe to contact her to change operational activities to

1 ensure compatibility.” *Id.* at 19. The Service further “confirmed that
2 shellfish aquaculture was not exempt from compatibility policy per
Solicitor review.” *Id.*

3 Consequently, Jamestown’s assertion that it has a protectable interest because “[s]ince
4 2016, [it] has invested significant resources to secure permitting and maintain compliance
5 with relevant regulations,” and that it is relying on the projected income is unavailing.
6 Dkt. 44 at 26. The Service requested that Jamestown obtain permits first so that it could
7 complete a compatibility determination. Dkt. 58-5 at 8. And the USACE permit is
8 explicit that it “does not obviate the need to obtain other Federal, State, or local
9 authorization required by law.” Dkt. 39-7 at 4. Additionally, the Service completed
10 compatibility determination for past aquaculture farming within the refuge by
11 Jamestown. Dkt. 58-7 at 3. In any event, Jamestown invested resources while in
12 communication with the Service about the compatibility determination requirements.

13 Similarly, Jamestown’s assertion that the completion process for the compatibility
14 determination would be “immediately disruptive” to its lease rights and would result in
15 leaving the planted oyster seeds unmanaged is unavailing. Dkt. 63 at 12–13. Although the
16 timeline of when Jamestown began operations is unclear on the record, it had notice that
17 a compatibility determination was likely required since 2015 (Dkt. 58-5 at 4), Plaintiffs
18 promptly sued to require one by August 2023, the Court ordered that the Service had to
19 complete one in July 2024. Dkt. 20. When the Court inquired as to status of the
20 operations of the farm in September 2024, the parties responded in October that “[w]ith
21 respect to the status of the oyster farm, the parties submit that the question should be
22 addressed following resolution of the Tribe’s motions.” Dkt. 37 at 2. Drawing all

1 reasonable inferences in favor of plaintiffs, Jamestown appears to have planted seeds
2 after it was aware that it was probable the Service would conduct a compatibility
3 determination.

4 Contrary to Jamestown’s assertions, Protect the Peninsula does not need to show
5 that “the Service has the authority to regulate the Tribe’s leasehold activities and that if
6 so, Jamestown lacks a treaty right that would exempt them from a compatibility
7 determination” to prevail. Dkt. 44 at 16–17. Its claims are narrowly tailored to requiring
8 the Service to follow the procedures in the Refuge Act by completing a compatibility
9 determination and/or requiring a special use permit. Jamestown is not a necessary party
10 under Rule 19 because it lacks a protected interest for purely procedural and prospective
11 claims.³ Because Jamestown is not a required party to the procedural challenges, the
12 Court need not proceed to the “indispensable party” analysis under Rule 19(b). *Makah*,
13 910 F.2d at 559.

14 **B. Public rights exception**

15 Even if Jamestown were a required party to the procedural claims, they would not
16 be “indispensable” because of the public rights exception to traditional joinder rules. *See*

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18 ³ The Court recognizes that it granted intervention as a matter of right under Rule 24 and
19 that given the similarity in standards, it implied Jamestown qualifies as a required party for
20 purposes of Rule 19. However, at the time the Court granted intervention, it lacked the benefit of
21 briefing on the relationship between Jamestown lease and the Service’s easement, and the extent
22 of the communications between the Service and Jamestown regarding the compatibility
determination process, or the public rights exception to joinder rules. Dkts. 56, 58-5. Interpreting
the record broadly in favor of intervention, it assumed that Jamestown was “situated such that
disposition of the action may impair or impede [its] ability to protect [its] interest[s],” Fed. R.
Civ. P. 24. The additional briefing has revealed that the claims here do not in fact impair or
impede a protectable interest.

1 *Conner*, 848 F.2d at 1459–61. The exception allows a case to proceed without a
2 necessary party even if the absent party’s interest may be adversely affected, so long as
3 the litigation seeks to vindicate a public right and does not destroy the absent party’s
4 legal entitlements. *Id.* at 1460; *see also Manygoats v. Kleppe*, 558 F.2d 556, 558–59 (10th
5 Cir.1977) (tribe necessary but not indispensable to procedural challenge to environmental
6 impact statement); *National Wildlife Fed’n v. Burford*, 835 F.2d 305, 333 (D.C.Cir.1987)
7 (“administrative litigation commonly inflicts drastic effects on absent third parties” but
8 “potential unfairness seems in accord with what we often tolerate”). In coining the
9 exception, the Supreme Court reasoned that “[i]n a proceeding . . . narrowly restricted to
10 the protection and enforcement of public rights, there is little scope or need for the
11 traditional rules governing the joinder of parties in litigation determining private rights.”
12 *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940).

13 *Makah* once again proves instructive. The Ninth Circuit determined that even if
14 the absent tribes were necessary to the procedural claims, the public rights exception
15 would apply:

16 Congress explicitly made FCMA regulations subject to judicial review. The
17 Makah seek to use that tool to question whether the 1987 regulations were
18 lawfully adopted in the first place. To the extent the Makah seek to enforce
19 the duty of the PFMC and the Secretary to follow statutory procedures in
20 the future, this is a “public right” and this action becomes one that
21 potentially benefits all who participate in the ocean fishery.

22 910 F.2d at 559 n.6, (9th Cir. 1990). The same logic holds here. Congress made the
Refuge Act regulations subject to judicial review under the APA. Protect the Peninsula
seeks to enforce the Service’s duty to follow statutory procedures in the Refuge Act for

