No. 21-35185

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METLAKATLA INDIAN COMMUNITY, a Federally Recognized Indian Tribe,

Plaintiff-Appellant,

v.

Michael J. Dunleavy, Governor of the State of Alaska, DOUG VINCENT-LANG, Commissioner of the Alaska Department of Fish and Game, and AMANDA PRICE, Commissioner of the Alaska Department of Public Safety,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska
No. 5:20-cv-00008-JWS
Hon. John W. Sedwick

APPELLEES' ANSWERING BRIEF

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INTRODUCTION

When Congress granted the Metlakan Indian Community's ancestors asylum from persecution in Canada in 1891, Congress never meant to give Metlakatlans off-reservation fishing rights. Nothing in the text of the statute creating the Annette Islands Reserve discusses fishing rights, much less off-reservation fishing rights. Nothing in the legislative history surrounding the creation of the Reserve discusses fishing rights. The fact that Metlakatlans like other Alaskans fished in state waters prior to significant regulation does not mean they have a protected and prioritized right immunizing them from territorial and later state regulation.

The State is sympathetic to the Community's struggles caused by declining and migrating fishing stocks, and will by no means minimize those concerns. Indeed, many of Alaska's fisherman face the fiscal fallout of declining and migrating fish stocks.[1] But the difficulties facing the fishing industry today do not change the unambigious statutory language that created the Annette Islands Reserve, the clear congressional record, and the unique circumstances surrounding

[1] Laine Welch, 2020 salmon returns have been so poor that Alaska communities already are claiming fishery disasters, Anchorage Daily News, Aug. 11, 2020, available at https://www.adn.com/business-economy/2020/08/11/2020-salmon-returns-have-been-so-poor-that-alaska-communities-already-are-claiming-fishery-disasters; Zachariah Hughes, Unprecedented salmon declines force fish donations to Alaska's Yukon River villages, Anchorage Daily News, July 30, 2021, available at https://www.adn.com/alaska-news/rural-alaska/2021/07/30/unprecedented-salmon-declines-force-fish-donations-to-alaskas-yukon-river-villages/.

the creation of the Reserve. Congress never granted Metlakatlans off-reservation fishing rights. Metlakatlans, like all other fishers, are free to fish in state waters outside the Reserve. They simply must hold a limited entry permit to do so.

JURISDICTIONAL STATEMENT

The State agrees with the appellant's statement of jurisdiction.

ISSUE PRESENTED

Did the district court err in concluding that the 1891 Act creating the Annette Islands Reserve did not grant Community members any off-reservation fishing rights and thus the Community could never allege any set of facts demonstrating an off-reservation fishing right?

STATUTORY AUTHORITY

An Act to Repeal Timber-Culture Laws, and for other purposes, ch. 561 § 15, 26 Stat. 1095, 1101 (March 11, 1891) (codified at 48 U.S.C. § 358 and later 25 U.S.C. § 495):

> That until otherwise provided by law the body of land known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla [sic] Indians, and those people known as Melakahtlans [sic] who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior.

STATEMENT OF THE CASE

A. In 1891, Congress passed an unambigious act that granted recently emigrated Canadian Tsimshian Indians a reservation on the Annette Islands for a religious colony.

Tsimshian Indians lived in concentrated groups in the areas around the Skeena River, the Nass River and the Portland Inlet in British Columbia.[2] They lived in "a single winter village, moving in the spring to fishing villages on the lower Nass and in the summers to fishing camps on other rivers."[3]

Following the Christian minister Father William Duncan, many Tsimshian Indians accepted Christianity and formed a religious settlement in British Columbia called Metlakatlan.[4]

Facing religious persecution in British Columbia, in 1887, Father Duncan persuaded about 800 Tsmishian Indians to emigrate to the Annette Islands to create a new Christian community; a new Metlakatla.[5]

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2 Marjorie M. Halpin and Margaret Seguin, *Tsimshian Peoples: Southern Tsimshian, Coast Tsimshian, Nishga, and Gitksan*, in Handbook of North American Indians 267 (1990), http://aashley.weebly.com/uploads/4/3/8/2/4382474/tsimshian_peoples.pdf.

3 *Id*.

4 21 Cong. Rec. 10092 (Sept. 16, 1890) (ADD 7).

5 *Id*.

Father Duncan went to Washington to obtain consent from Congress for the Tsimshian Indians to remain on the Annette Islands and to settle those islands.[6] Four years after their emigration, Congress created the Annette Islands Reserve, the statute reading:

> That until otherwise provided by law the body of land known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla [sic] Indians, and those people known as Melakahtlans [sic] who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior.[7]

The Congressional Record explained that the purpose of creating the Reserve was "simply to allow this band of Indians to remain [on the Annette Islands] under such rules and regulations as the Secretary of Interior may impose, and give them some recognized footing at that place," and "[a]ll [it] proposes is that, until otherwise ordered by Congress, that island which is good for nothing except the wild beasts that are in the mountains and the thousand acres perhaps that run down on a level into the sea, upon which they have planted their town, shall be

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[6] 21 Cong. Rec. 10092 (ADD 7).

[7] 26 Stat. 1095, § 15 (1891), (codified at 48 U.S.C. § 358 and later 25 U.S.C. § 495) (ADD 1).

set apart for them under such rules and regulations the Secretary of the Interior may prescribe."[8]

One Senator explained that this recognition would protect the recently emigrated Natives from encroaching settlers pretending to have claims over mining and timber resources on the islands.[9] Another Senator explained that the legislation would protect Metlakatlans from those "who desire[d] to plunder them."[10] That senator also explained that the Metlakatlans were scarred from being dispossessed of their land in British Columbia and they believed the United States President might do the same.[11] He urged the creation of a reservation to quell their fear that "the Government of the United States [could] drive [them] off" the settlement they had built on the Annette Islands.[12]

While recognizing that the "non natives" community could not actually "acquire th[e] property" on the Annette Islands without first becoming citizens, the senators were nonetheless supportive of the creation of the Reserve, emphasizing the Metlakatlans' conversion to Christianity, what the senators deemed a "common sense in the matter of civilization," and the community's allegiance to the

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8 21 Cong. Rec. 10092 (ADD 7).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

American flag.[13] Senators explained they wanted to "look after these Indians" and "give them this island."[14] One senator applauded the community's religiosity and lack of alcohol, envisioning that Metlakatla "in many respects [could be] a model" to both Indian and white communities.[15]

For these reasons, the Annette Islands Reserve differs from any other reservation in the United States in that the "original settlers of Metlakatla came to the Annette Islands, not because they were removed there after losing a war but because they sought religious and economic freedom in the United States as an alternative to oppressive conditions in British Columbia."[16]

It is undisputed that the text of the Act does not mention—even ambiguously—surrounding waters or fishing rights. Op. Br. 50. It is also undisputed that the 1890 Congressional Record is similarly silent as to surrounding waters and fishing rights. Op. Br. 50–51.

B. The congressional record for proposed legislation in 1894 and 1898 that could affect the Annette Islands Reserve does not mention any grant of off-reservation fishing rights.

After creating the Annette Islands Reserve in 1891, Congress twice in the

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13 *Id.* at 10092–93 (ADD 7–8).

14 *Id.*

15 *Id*. at 10092 (ADD 7).

16 *United States v. Booth*, 161 F. Supp. 269, 275 (D. Alaska 1958).

1890s revisited the creation of the Annette Islands Reserve: first in the context of granting the Metlakatlans citizenship and then in considering ending the Annette Islands Reserve. The congressional record for each proposed act reaffirms Congress granted the Metlakatlans land and again never mentions any fishing rights.

In 1894, in a floor discussion about granting Metlakatlans citizenship, Senator Manderson—who had advocated for the creation of the Reserve just a few years prior—reminded the Senate why Congress created the Annette Islands Reserve in 1891:

> I appreciate that some of the Senate are familiar – but I know that other Senators are not familiar – with the history of a settlement in Alaska known as New Metlakahtla. I think there is nowhere an account of greater self-abnegation, indeed of utter self-sacrifice than that of William Duncan, an Englishman, who nearly forty years ago went to a barbarous tribe of Indians in British Columbia and started the work of their reformation and civilization; nor is there anywhere an account of greater religious bigotry and of strait-laced oppression than some persons in high places in British America were guilty of towards Duncan and those interesting Indians which compelled them to take refuge in Alaska.
>
> The Government of the United States granted to the Indians what is know as Annette Island, and they have formed there a prosperous Christian community.[17]

In so stating, Senator Manderson reiterated that Congress created the Reserve to

[17] 26 Cong. Rec. 3603 (April 10, 1894).

give Metlakatlans religious asylum and never mentioned any fishing rights.

In 1898, Congress considered ending the Annette Islands Reserve. Senator Vest described the Metlakatlans' leaving British Columbia to avoid religious persecution and his own work in helping create the Annette Islands Reserve:

> I interested myself on my return here to secure for [Father Duncan] lands within the domain of this Government upon which he and his people might live and worship the Deity as they thought proper. So in 1891 both branches of Congress passed a law creating a reservation upon Annette Island, where these people to-day are and where, as Senators will see if they will read the report, just made by the Agricultural Department, there is more agriculture than in all the balance of Alaska besides. The agent reports that he found there 7 acres of garden, growing all sorts of vegetables, for those people are industrious, patient, and temperate. They are Christians. . . Mr. Duncan thought, I thought, and others interested in this matter thought that when he had taken this secluded and uninhabited island, Annette Island, in the southern part of Alaska, off in the ocean, upon which no white man had ever settled, and placed his people there, that they would be safe from the greed and avarice of our people.[18]

Again, fishing rights, much less off-reservation fishing rights, were never mentioned. Interestingly, agriculture was mentioned. What was repeated, instead, was that the islands were given to the Metlakatlans for a Christian mission fleeing Canadian persecution, believing they would be "safe" there and not be

[18] 31 Cong. Rec. 2464–65 (March 4, 1898).

"plundered."[19]

C. The Supreme Court pragmatically delineated the Reserve's boundaries consistent with President's Wilson's Presidential Proclamation in 1916.

A quarter century after the reservation was created, a California corporation set up a fish trap within 3,000 feet from the shore of the Annette Islands at low tide.[20] This action sparked a controversy regarding the boundaries of the reservation.

First, President Woodrow Wilson proclaimed that waters 3,000 feet from the low-tide mark around the Annette Islands were exclusively reserved for the Metlakatans, so that the waters immediately surrounding the islands could source a cannery on the reservation.[21]

Then, when the Supreme Court was asked to decide "whether the reservation created by the 1891 Act embraces only the upland of the islands or includes as well the adjacent waters and submerged land," it held that the 1891 Act included not just the uplands but also "the intervening and surrounding waters."[22] The Court

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19 21 Cong. Rec. 10092 (ADD 7).

20 *Alaska Pac. Fisheries v. United States*, 240 F. 274, 276 (9th Cir. 1917), *aff'd by*, 248 U.S. 78 (1918).

21 A Proclamation. Annette Island Fishery Reserve, Alaska, 39 Stat. 1777 (April 28, 1916).

22 *Alaska Pac. Fisheries*, 248 U.S. at 89.

characterized the Act's phrase "body of lands known as Annette Islands" as "descriptive of the area comprising the islands."[23] To interpret the meaning of that ambiguous phrase, the Court considered "the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained."[24] The Court asserted that the purpose of the Metlakatlans migrating to the island was to create "an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people," that the Metlakatlans "were largely fishermen and hunters, accustomed to live from the returns of those vocations," and the "fishery adjacent [to] the shore [of the Annette Islands] would afford a primary means of subsistence and a promising opportunity for industrial and commercial development."[25]

Without ever recognizing or relying on President Wilson's proclamation, the Supreme Court reached the same conclusion and recognized the Reserve's boundaries to include 3,000 feet from the low tide mark.[26]

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23 *Id.* at 89.

24 *Id.* at 87.

25 *Id*. at 88-89.

26 *Id*.

While there have been continued disputes about precisely how to survey the reservation's 3,000 foot boundary, that the reservation's boundary includes the waters 3,000 feet from low tide is settled.[27]

Likewise, federal and state jurisdiction inside and outside the reservation is also settled. The Secretary of the Interior regulates fishing within the Reserve's boundaries.[28] The State regulates fishing in state waters outside those boundaries.[29]

D. After years of minimal federal fisheries regulations in Alaska's waters, in 1973, Alaska enacted the Limited Entry Act, a conservation law limiting commercial fishing access in state waters.

Prior to statehood, Alaska's fisheries were largely unregulated.[30] The lack of regulation was due to commercial fishing businesses lobbying for minimal

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27 *See, e.g., State of Alaska Forest Serv., U.S. Dep't of Agric.*, 127 IBLA 1, 1993 WL 417977 (July 12, 1993).

28 *Metlakatla Indian Cmty., Annette Islands Rsrv. v. Egan*, 369 U.S. 45, 53–57 (1962) (confirming that the 1891 Act gave the Secretary the authority to pass fishing regulations *within* Metlakatlan waters); 25 C.F.R. Part 241 (federal regulations regarding fishing *within* the reservation).

29 AS 16.43.250(a)(2); 20 AAC 05.600(a); 20 AAC 05.310; 5 AAC 33.200 (describing fishery boundaries in southeastern districts); *see generally* John H. Clark, et al., *The Commercial Salmon Fishery in Alaska*, Alaska Fishery Research Bulletin, 1, 25 (2006), *available at* http://www.adfg.alaska.gov/fedaidpdfs/AFRB.12.1.001-146.pdf; *see also Sturgeon v. Frost*, 139 S. Ct. 1066, 1074 (2019) ("[A] State's title to the lands beneath navigable waters brings with it regulatory authority over . . . fishing . . . of those waters.").

30 *See* Clark, *The Commercial Salmon Fishery in Alaska*, at 1–3.

regulation, prosperous salmon industries, and food scarcity during World War II.[31]

By the 1950s, overfishing and minimal federal regulation had devastated many of Alaska's fishing runs.[32] In 1953, when salmon fisheries had reached their lowest point in thirty-two years, President Eisenhower declared the territory a federal disaster area.[33]

Five years later, Congress enacted the Alaska Statehood Act, giving the State the authority and responsibility of reviving its fisheries.[34] The State is constitutionally required to maintain its fisheries to promote sustainability for the common use of all Alaskans.[35]

One of the ways the State protects its fisheries from overfishing and promotes sustainability is through its limited entry program. The program promotes "the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry of participants and vessels into the commercial fisheries in the public interest and without unjust discrimination."[36]

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31 *Id*. at 2–3.

32 *Id.*

33 Ernest Gruening, The State of Alaska 400–05 (1968).

34 PL 85-508, sec. 6(e), 72 Stat. 339, 340–41 (1958).

35 Alaska Const. art. 8, §§ 3, 4.

36 Alaska Stat. 16.43.010.

In 1973, the State enacted the limited entry program. Alaskan commercial fishers earned points and qualified for and were granted free limited entry permits.[37] Permit applicants were prioritized based on economic dependence on the fishery and past participation in the fishery.[38] Through the application process, Metlakatlans who fished in state waters were given credit for their past participation in the fishery, while Metlakatlans who fished within the boundaries of the Annette Islands Reserve, but who did not fish within state waters, were not given credit for past participation in the state's fisheries.[39] Since the State initially

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[37] *See May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 885 (Alaska 2007) (rejecting Community member's discrimination claim, and explaining that he was "being treated similarly to all other persons properly denied limited entry permits for which they are not eligible") *See also* Metlakatla: Holdings of Limited Entry Permits, Sablefish Quota Shares, and Halibut Quota Shares through 1997 and Data on Fishery Gross Earnings (1998); *available at* https://www.cfec.state.ak.us/RESEARCH/coast98/METLAKAT.PDF (enumerating state permits issued to Metlakatlans at beginning of limited entry program and how many permits were still held by Metlakatlans in 1997); Dinneford, Elaine, "Changes in Holdings of Permanent Limited Entry Permits in Metlakatla, Alaska; 1975-1991," (1992), abstract *available at* https://www.cfec.state.ak.us/RESEARCH/rptlist/R9212.HTM (examining changes in Metlakatlan permit holders due to migration of permit holders).

[38] *May*, 168 P.3d at 877; see also Alaska Stat. 16.43.250(a)(2); Alaska Admin. Code, tit. 20, § 05.600(a).

[39] *May*, 168 P.3d at 877; *see also* Alaska Stat. 16.43.250(a)(2); Alaska Admin. Code, tit. 20, § 05.600(a). The State has defined its fisheries as excluding waters within the Annette Islands Reserve, which is not part of state waters, which the State does not control, and which does not require a state permit to fish in. *May*, 168 P.3d at 877, 880–81; Alaska Admin. Code tit. 20, § 05.310, tit. 5, § 33.200 (describing State's fishery boundaries of southeastern districts).

gave out a finite set of permits, the value of those permits has increased.[40] Metlakatlans have had the opportunity to sell those permits, and some permit-holders have chosen to do so.[41]

E. Now, as fishermen across the State suffer from the decline in fishery resources, the Metlakatla Indian Community sues the State to try to rewrite the unambigious 1891 Act.

In 2020, the Community filed this lawsuit, seeking a declaration that the 1891 creation of the Annette Islands Reservation gave its members an implied right to fish "in common" with other users and without "unreasonable interference" from the State for salmon, halibut, cod, rockfish, and herring in certain state waters for subsistence and commercial purposes. Compl. at 21 (ER 43). The Community alleges that due to declining catch size in the Reserve's waters over recent years, its fish processing plant has closed and its members' commercial and subsistence harvests have declined. Compl. at ¶¶ 1, 40 (ER 25, 39–40).

Although not entirely clear from its complaint, the Community appears to seek an injunction so that the State cannot enforce its limited entry fishing program against non-permit holding Community members in the state waters adjacent to the

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[40] Metlakatla: Holdings of Limited Entry Permits, Sablefish Quota Shares, and Halibut Quota Shares through 1997 and Data on Fishery Gross Earnings (1998); and Dinneford, Elaine, "Changes in Holdings of Permanent Limited Entry Permits in Metlakatla, Alaska; 1975-1991," (1992).

[41] *Id*.

Annette Islands Reserve, specifically in Fishing Districts 1 and 2 in Southeast Alaska. Compl. at ¶ 21 (ER 43).

Because Congress did not expressly or implicitly grant the Community off-reservation fishing rights, the State moved to dismiss; noting no set of facts pled by the Community could overcome this legal deficiency. State's Motion to Dismiss Pursuant to Rule 12(b)(6), 5:20-cv-00008, Dkt. No. 22 (October 15, 2020) (ER 67).

The district court dismissed the Community's complaint because the 1891 Act did not give the Community or its members any implied off-reservation fishing rights. Order, 5:20-cv-00008, Dkt. No. 25 (ER 2–20). The court reasoned that the statute itself said nothing about fishing rights. Order at 8 (ER 9). The court reviewed the legislative history, which, it confirmed, also said nothing about fishing rights. Order at 9–10 (ER 10–11).

The court then explained how cases discussing settlements and retained rights of Indians were not particularly helpful, because the Metlakatlans were emigrants from Canada who were granted asylum were not like other tribes that conceded land, ended a war, or negotiated the recognition of aboriginal rights as off-reservation rights. Order at 12–14 (ER 13–15).

The court concluded that the fact that Metlakatlans fished outside of the Reserve for years after its creation did not mean Congress afforded them some sort

of prioritized right, it was merely an outcome of "the minimal regulation of the area's fisheries in general." Order at 18–19 (ER 19–20).

For the purpose of reviewing the State's motion to dismiss, the court accepted the Community's allegations that the purpose of granting the reservation was to "encourage the establishment of a self-sufficient Christian community," that the Metlakatlans were a fish-reliant people, and that the Reserve was adjacent to productive fishing grounds. Order at 16 (ER 17). But the court held that these allegations— even if taken as true—were insufficient to support the legal conclusion that Congress granted off-reservation fishing rights. Order at 16–18 (ER 17–19).

The Community appeals.

SUMMARY OF THE ARGUMENT

The 1891 Act did not grant Metlakatlans off-reservation fishing rights. The text of the statute does not mention fishing, fishing rights, or off-reservation rights.[42] There is nothing ambiguous in the text of the statute that could liberally be interpreted as granting off-reservation fishing rights.[43]

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[42] 26 Stat. at 1101.

[43] *See South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 506 (1986) (noting that while ambiguous phrases should be interpreted in favor of Indians, that canon of construction "does not permit reliance on ambiguities that do not exist").

The congressional record confirms that the 1891 Act did not grant off-reservation fishing rights. Senators explained the Act was to ensure that Metlakatlans had a protected place to live.[44] Fishing, fishing rights, and off-reservation rights were never mentioned.[45]

A review of the circumstances surrounding the creation of the Annette Islands Reserve further supports the 1891 Act's unambiguous language, showing Congress never intended to grant the Metlakatlans any off-reservation fishing rights. The Metlakatlans had no lands or claims to negotiate. The Metlakatlans did not cede any land. They lacked any aboriginal fishing claims that Congress could statutorily recognize. Rather, the historical context illustrates that the Annette Islands Reserve was a gratuitous grant of land[46] to a group of newly immigrated people.

STANDARD OF REVIEW

The Court reviews de novo a district court's order granting a motion to

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44 21 Cong. Rec. 10092 (ADD 7).

45 *Id*.

46 When the state uses the phrase "land grant" or a "grant of land" in this briefing, that should not be interpreted as the state relitigating the *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) case. In *Alaska Pacific Fisheries* the U.S. Supreme Court pragmatically determined the Reserve's boundaries determined the Reserve – being a grant of islands – included the waters surrounding and between these islands. *Id*. Therefore, "land grant" acknowledges that Congress's gave the Metlakatlans and Father Duncan islands and waters, but no off-reservation fishing rights.

dismiss for failure to state a claim.[47] While the Court "assume[s] [a] plaintiff's factual allegations to be true," the Court "do[es] not . . . accept the 'truth of *legal* conclusions merely because they are cast in the form of factual allegations.'"[48] Nor must the Court "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."[49] And "[t]he court need not . . . accept as true allegations that contradict matters properly subject to judicial notice."[50] A court may take judicial notice of certain matters, such as undisputed public records and legislative history, "without converting the motion to dismiss into a motion for summary judgment."[51]

This Court reviews de novo the district court's interpretation of a statute.[52]

ARGUMENT

No one disputes the Community's assertion that Metlakatlans have "equal rights" or equal privileges to fish in state waters: Metlakatlans enjoy the right to fish in state waters just like all other fishers, subject to the same rules and regulations as all other fishermen including the requirement to hold a limited entry

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47 *Robinson v. Jewell*, 790 F.3d 910, 912 (9th Cir. 2015).

48 *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (emphasis in original).

49 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

50 *Id.*

51 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

52 *See Masayesva v. Zah*, 65 F.3d 1445, 1452 (9th Cir. 1995).

permit to commercially fish in Districts 1 and 2.[53] The Community can present no facts that can override the unambiguous 1891 Act that Congress intended to grant Metlakatlans any off-reservation fishing rights above and beyond those enjoyed by other citizens.

I. The 1891 Act did not grant the Community off-reservation fishing rights.

In interpreting the scope of rights provided by a statute, congressional intent is the keystone.[54] Courts glean congressional intent by considering, first and foremost the four corners of the document creating the reservation and whether it either expressly grants the alleged right or contains any ambiguity that might suggest the intent to recognize the alleged right.[55] When the text is ambiguous, courts consider the legislative history and historical circumstances surrounding the

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[53] Despite the Community's assertions, the Annette Islands Reserve is not a "cage." Op. Br. 25

[54] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977).

[55] *See, e.g.*, *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979) (interpreting treaty granting "right of taking fish, at all usual and accustomed grounds and stations"); *Antoine v. Wash.*, 420 U.S. 194, 199–200, 205 (1975) (construing "the wording of treaties and statutes ratifying agreements with the Indians," specifically the phrase "the right to hunt and fish . . . shall not be taken away or in any way abridged"); *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 87 (1918) (interpreting boundaries of Metlakatla reservation by examining the text of the statute creating the reservation and determining "what Congress intended by the words 'the body of lands known as Annette Islands'").

creation of the reservation.[56]

A. The 1891 Act is unambiguous and cannot be interpreted as granting Community members a prioritized off-reservation fishing right.

The 1891 Act that created the Annette Islands Reserve states:

> That until otherwise provided by law the body of land known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla [sic] Indians, and those people known as Melakahtlans [sic] who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior. 26 Stat. 1095 at § 15.

The Community agrees that the 1891 Act's text includes absolutely no reference to off-reservation fishing rights. Op. Br. 50. With no reference, or even ambiguous reference, to fishing, with the 1891 Act Congress did not grant the Metlakatlans any off-reservation fishing rights.

When Congress intends to grant off-reservation fishing rights, it has expressed that intent. For instance, in the Treaty of Yakima, Congress ratified a negotiation granting the Yakima "the exclusive right of taking fish in all the

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[56] *See, e.g., Alaska Pac. Fisheries*, 248 U.S. at 87 (resolving the ambiguity in the 1891 Act to determine the Reserve's boundaries by considering "the circumstances in which the reservation was created-the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be obtained.").

streams, where running through or bordering said reservation . . . also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory."[57] In ratifying negotiations with the Colville Confederated Tribes, Congress provided "expressly that 'the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.'"[58] Congress ratified the agreement with the Colville Confederated Tribes in 1891, the same year it created the Annette Islands Reserve.[59] Unlike these textual expressions of intent, the text of the 1891 Act creating the Annette Islands Reserve is utterly silent about fishing rights, much less off-reservation fishing rights.

Contrary to the Community's assertion, *Confederated Tribes of Chehalis Indian Reservation v. Washington*, does not stand for the proposition that off-reservation fishing rights can be implied from historical context alone without any textual anchor.[60] Op. Br. 52. In *Chehalis*, this Court interpreted the scope of *executive-order* reservations – not a reservation created by statute like the Annette

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57 Act of June 9, 1855, 12 Stat. 951, 1855 WL 10420; *United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that this language gave tribal members the exclusive right to fish within the reservation, and the right to fish "in common" with territorial citizens at certain places outside the reservation).

58 *Antoine*, 420 U.S. at 196.

59 *See id.*

60 96 F.3d 334 (9th Cir. 1996).

Islands Reserve – and noted that because "the specific purposes of *executive-order* reservations were often unarticulated," courts have to interpret the purpose and the rights associated with them by considering "*the executive orders themselves*, the circumstances surrounding their creation, and the history of the Indians for whom they were created."[61] Despite the complications associated with interpreting executive order reservations, this Court still recognized that the context *and* text of those orders are germane to understanding the rights reserved or granted to the tribe.[62]

Applying these legal principles here, the 1891 Act never mentions fishing. Rather, the Act identifies its purpose as setting apart a grant of land to be a reservation for a group of newly emigrated Indians. But executive-order reservations are distinguishable from statutorily-created reservations, like the 1891 Act, which identify a textual purpose and which are supported by a congressional record.[63] As noted below, the congressional record here supports the text's plain, unambiguous purpose.

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61 *Chehalis*, 96 F.3d at 342 (emphases added). In essence, with executive order reservations, courts have almost suggested implied ambiguity due to their purposes often being "unarticulated." *Chehalis*, 96 F.3d at 342; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981).

62 *Chehalis*, 96 F.3d at 342.

63 *See King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 994-95 (9th Cir. 2014) (requiring tribes to prove that an express federal law (a treaty)

Not only does the text of the 1891 Act contain no reference to off-reservation fishing rights, but there is also no ambiguity that could possibly be interpreted as implying such rights. While the Indian canons of construction instructs courts to construe "doubtful phrase[s]" in favor of tribes[64], the Community has pointed to no ambiguous language that might be broadly interpreted as granting off-reservation fishing rights. Rather, it has admitted that the 1891 Act is "silent" regarding fishing rights. Op. Br. 50.

Should the Community respond in its reply brief that some ambiguity does exist in the 1891 Act, the argument lacks merit. In its reply brief before the trial court, the Community argued that the 1891 Act's language of "body of lands known as Annette Islands" "for the use of the Metlakahtla Indians," is ambiguous and that Congress meant to set aside resources *outside* "the body of lands known as Annette Islands" for the Metlakatlans' fishing "use."[65] However, there is no question that Congress expressly set aside the "body of lands known as Annette Islands"—the boundaries of which include the adjacent waters—for the

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granted them a right to have their off-reservation activities free from state regulation).

64 *Alaska Pac. Fisheries Co.*, 248 U.S. at 89 (1918)

65 The argument is also waived pursuant to *United States v. Patterson,* 230 F.3d 1168, 1172 n.3 (9th Cir. 2000) ("[A]rguments raised for first time in reply briefs [are] waived.").

Metlakatlans' "use."[66] The U.S. Supreme Court has already resolved this ambiguity regarding the Annette Islands Reserve's boundaries.[67] Creating a reservation so that the Metlakatlans could "use" the land and waters *inside* the reservation does not even ambiguously imply that Congress meant to create implied rights of use *outside* the reservation. Furthermore, the United States Supreme Court already interpreted the phrase "the body of lands known as Annette Islands" and determined that the phrase delineated the reservation's geographical boundaries, not off-reservation fishing rights.[68]

Because there is no relevant ambiguous statutory language, the Indian canon of construction instructing courts to construe "ambiguous provisions" "in favor of the Indians" does not apply.[69] When statutory language is "plain and unambiguous," it should be applied "according to its terms."[70] "The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of

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66 *Alaska Pacific Fisheries Co*., 248 U.S. at 88–89.

67 *Id*.

68 *Id.*

69 *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *King Mountain Tobacco*, 768 F.3d at 995 ("The Indian canon of construction does not alter the outcome in this case because the relevant text of the Yakama Treaty is not ambiguous . . . .").

70 *Caricieri v. Salazar*, 555 U.S. 379, 387 (2009).

the clearly expressed intent of Congress."[71] Courts "cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean."[72]

B. The legislative history demonstrates no congressional intent to convey off-reservation fishing rights.

To the extent this Court concludes that the lack of any mention—even an ambiguous mention—of fishing rights in the 1891 statute itself does not foreclose the Community's argument, legislative history also demonstrates a lack of intent to convey off-reservation fishing rights.

The congressional record demonstrates that the purpose of creating the Reserve was "simply to allow this band of Indians to remain [on the Annette Islands] under such rules and regulations as the Secretary of Interior may impose, and give them some recognized footing at that place."[73] The Senate's understanding of the Metlakatlans' history was "well known."[74] The Senate understood that Father Duncan sought Congress's "consent" to allow these

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71 *Catawba Indian Tribe*, 476 U.S. at 506; *see also Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.").

72 *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

73 21 Cong. Rec. 10092 (ADD 7).

74 *Id.*

immigrants to continue to live on the Annette Islands.[75] And Congress gave that consent after considering that the Metlakatlans had formed what senators believed was a model Christian community.[76] Senators explained that the boundaries of the reservation would protect Metlakatlans from encroaching settlers pretending to have claims over mining and timber resources on the islands.[77] The congressional record says nothing about fishing rights, much less some sort of prioritized off-reservation fishing rights for the Metlakatlans.[78]

C. That the Metlakatlans had no aboriginal claims to preserve and did not have any land to cede in any negotiations affirms the absence of any implied off-reservation fishing right.

Courts have recognized that implied off-reservation fishing rights exist only where (1) a tribe had aboriginal fishing rights that could be preserved, (2) the tribe negotiated the retention of those rights, and (3) the tribe relinquished land or rights to the United States as consideration.[79] As a result, no court has found that a tribe

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75 *Id.*

76 *Id*.

77 *Id.* at 10092–93 (ADD 7–8).

78 This is reaffirmed in the 1894 and 1898 Congressional Record as well. *See* 26 Cong. Rec. 3603 (April 10, 1894), and 31 Cong. Rec. 2464–65 (March 4, 1898).

79 *See United States. v. Washington*, 520 F.2d 676 (9th Cir. 1975); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

without aboriginal claims has implied off-reservation fishing rights.[80] Implied off-reservation fishing rights cases consider whether a federal law preserves a tribe's aboriginal fishing rights and thus allows the tribe to continue to fish at, for instance, all "usual and accustomed grounds and stations."[81] If a tribe lacks aboriginal fishing rights, there would be no off-reservation fishing rights for Congress to preserve.

Treaties, executive orders, or congressional acts include language preserving a tribe's aboriginal rights as a result of a tribe ceding land and foregoing certain rights during negotiations. Cases like *Winters v. United States*[82], *Colville Confederated Tribes v. Walton*[83], and *United States v. Michigan*[84], are all cases where a tribe negotiated the retention of off-reservation aboriginal rights to offset the lands and rights the tribe relinquished.[85] In *Winters* and *Colville*, the fact that

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80 The State has found no such cases and the Community has cited none.

81 *See Washington*, 520 F.2d 676.

82 207 U.S. 564 (1908)

83 647 F.2d 42 (9th Cir. 1981).

84 471 F.Supp. 192 (W.D. Mich. 1979).

85 The Community's reliance on *Winters* and *Colville* is also misplaced for another reason. *Winters* and *Colville* interpret water rights *appurtenant to* reservation lands, not off-reservation fishing rights. In *Winters*, the Court considered whether Congress reserved not only land in establishing reservations, but also the flow of water within those reservations. *Winters*, 207 U.S. at 568 (discussing inclusion of "the waters of the river or its tributaries or use on said reservation"). Similarly, in *Colville*, this Court considered whether a tribe had water rights "located entirely on the Colville Reservation." *Colville Confederated*

"Indians relinquished extensive land and water holdings when the reservation was created" was critical to understanding what rights the tribes retained and what rights were thus included in those reservations.[86] Likewise, in *Michigan*, the district court considered whether tribes gave up (or retained) their off-reservation aboriginal fishing rights when they signed a treaty.[87] The district court in *Michigan* framed its analysis of reserved rights not as a set of rights granted by the federal government, but rather as the aboriginal rights the tribe retained during negotiations and as consideration for lands it ceded.[88]

The Metlakatlans, who immigrated to the Annette Islands just a few years before enactment of the 1891 Act, had no aboriginal claims.[89] The Metlakatlans therefore had no aboriginal fishing rights to retain in any negotiations.[90] Father

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Tribes, 647 F.2d at 45, 47–48. While *Winters* and *Colville* certainly considered the federal purpose in creating the reservations when interpreting whether reserving federal land also reserved water rights attached to that land, they do not stand for the proposition that an alleged, but unarticulated statutory purpose of creating self-sufficiency for a fishing people includes an implied off-reservation fishing right.

86 *Colville Confederated Tribes,* 647 F.2d at 47; *Winters*, 207 U.S. at 567–68.

87 471 F.Supp. at 204, 212–14.

88 *Id.* at 212–13.

89 *See* 21 Cong. Rec. 10092–93 (ADD 7–8); *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012) (describing aboriginal claims based on "a group's exclusive, long, and continuous use of an area").

90 While Congress welcomed to the Reserve any other Natives who might join the Metlakatlans, Congress believed, in 1891, that no other Alaska Natives—"[n]ot a living soul"—inhabited the islands besides the Metlakatlans. 21 Cong. Rec. 10093 (ADD 8). Later, the Court of Claims concluded that Haida and Tlingit

Duncan negotiated for the tribe to settle on the Annette Islands, but in doing so the Metlakatlans did not cede lands or waters; even if they had some aboriginal rights in those lands and waters to retain.[91] The 1891 Act was not the culmination of negotiations settling aboriginal rights or tribal land claims, but rather a gratuitous land grant.[92]

That the 1891 Act was a gift to the Metlakatlans does not mean that a wardship and trust relationship does not exist between the federal government and the Metlakatlans. Contrary to the Community's assertion otherwise, the district court never held – and the State never argued – that the Annette Islands Reserve is not a reservation, that Community members are not "real Indians," or that a trust relationship does not exist. Op. Br. 52–59. Rather, both the district court and the State simply highlighted the uncontroverted fact that the 1891 Act was a gift of

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Indians (rather than Metlakatlans) had aboriginal claims over the Annette Islands. *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 466–69 (Ct. Cl. 1959). But Congress in 1891 did not recognize those aboriginal claims, and in any event extinguished all aboriginal claims when it passed the Alaska Native Claims Settlement Act. 43 U.S.C. § 1603(b)–(c).

91 *See* 21 Cong. Rec. 10092–93 (ADD 7–8).

92 The Community argues that contract principles do not "guide judicial review in this case." Op. Br. 52. Case law does not support that generalization. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)["A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."]; *see also* The Treaty of Yakima, 12 Stat. 951, 1855 WL 10420 (June 9, 1855) ("This treaty shall be obligatory *upon the contracting parties* as soon as the same shall be ratified by the President and Senate of the United States.").

land to recently emigrated Indians rather than an act negotiating and settling aboriginal claims. Order 16 (ER 19).

The lack of aboriginal claims and the fact that Metlakatlans provided no consideration for the Reserve is significant in understanding the purpose of the 1891 Act. While there is no ambiguous statutory language for this Court to resolve[93], it should be noted that when courts do resolve ambiguities in a treaty or statute in favor of Indians, they do so to "mediate the problems presented by the *nonconsensual inclusion of Indian nations* into the United States."[94] This case does not involve the nonconsensual inclusion of Indian nations in the United States. It does not involve Indians or tribes giving up land or rights. Rather, it involves Congress granting asylum to emigrants who were *given* land and protection, but who did not have any rights to retain or negotiate away. Therefore, cases interpreting whether tribes and their members truly understood whether they were giving up rights, and narrowly interpreting such forfeitures, are simply inapposite.[95]

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93 *King Mountain Tobacco*, 768 F.3d at 992–93 (rejecting application of the canon because there were no textual ambiguities to resolve).

94 Felix Cohen, Federal Indian Law § 2.02[2] (2012 ed.); *emphasis added*.

95 *See, e.g.*, *Colville Confederated Tribes*, 647 F.2d at 47 (concluding that Congress meant to deal fairly with Indians such that when they gave up extensive land and water rights in negotiations, the land that they did keep retained water rights).

D. An intent to establish a "self-sufficient Community" for a "fishing people," is insufficient for inferring implied off-reservation fishing rights.

This Court has already rejected the Community's argument that a reservation created for a fishing tribe whose "livelihood depends on fish and seafood" is enough to infer off-reservation fishing rights.[96] In *Chehalis*, the tribes argued that executive orders creating a reservation impliedly reserved off-reservation fishing rights.[97] The executive orders creating the reservations did not mention fishing rights.[98] The Court acknowledged that the location of one of the reservations was chosen based on its proximity to fishing resources and that historical evidence showed that the tribes fished.[99] Nevertheless, this Court upheld the district court's legal conclusion that an intent to locate a reservation proximate to fishing did "not amount to the creation of a special off-reservation fishing right."[100]

The Community is essentially making the same argument this Court already rejected in *Chehalis*, except the Community's allegations supposedly supporting off-reservation fishing rights are even more tenuous. Unlike the utter lack of

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96 *Confederated Tribes of Chehalis*, 96 F.3d at 337, 342–43.

97 *Id.* at 342.

98 *Id.*

99 *Id.* at 343.

100 *Id.*

historical record implying any federal intent to convey off-reservation fishing rights in this case, in *Chehalis*, the record did "reveal some evidence suggesting an intent on the part of the government to provide off-reservation fishing."[101] Plus, in *Chehalis*, the reservations were created by executive order and with the tribe ceding lands, so this Court looked beyond the executive orders themselves to consider the purposes which "were often unarticulated," and thus "the circumstances surrounding their creation, and the history of the Indians for whom they were created."[102]

Here, the facts the Community alleges are simply insufficient to support the legal conclusion that Congress intended to convey off-reservation fishing rights. The Community alleges that (i) Congress intended the Annette Islands Reserve to become a self-sufficient community, (ii) some Metlakatlans fished for at least four years in then-territorial (now state) waters prior to the establishment of the Reserve, (iii) fishing was important for Metlakatlans, and (iv) after the creation of the Reserve, fishermen (Community and non-Community members alike) who fished in then-territorial (now state) waters were subject to minimal regulation.

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101 *Id.* at 342 (describing failed treaty and historical discussions by federal officials about possible off-reservation fishing).

102 *Id.*

Op. Br. 39-41.[103] These facts, taken as true for the purpose of a motion to dismiss, do not support the conveyance of off-reservation fishing rights. This is especially true in light of the 1891 Act's text and legislative history, which say nothing about fishing rights, much less off-reservation fishing rights, and which articulate the purpose of the Annette Islands Reserve as setting aside a body of islands for a group of newly emigrated Indians.

E. Congress could not have intended to grant Metlakatlans *broader* fishing rights outside the Reserve than within the Reserve.

If Congress intended to give Metlakatlans an unregulated right to fish off-reservation (or the right to fish subject to whatever the Community deems "meets the Community's needs"), it would not have made their fishing rights within the reservation subject to plenary federal regulatory authority. Op. Br. 22. The 1891 Act makes Metlakatlans' rights—including any articulated fishing rights—subject to "rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior." The authority Congress granted to the Secretary of the Interior is unique and unrestricted.[104] The Secretary of the

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[103] The Community attempts to frame legal conclusions asserted in its complaint—such as an allegation that "Congress reserved [the Metlakatlans'] access to fish" [At. Br. 41]—as factual allegations. But the Court "do[es] not [] accept the 'truth of *legal* conclusions merely because they are cast in the form of factual allegations.'" *Doe*, 557 F.3d at 1073.

[104] *See Metlakatla Indian Cmty*, 369 U.S. at 48–49, 53–54 (discussing Secretary's broad authority subjecting Metlakatla to Secretary's rules and

Interior could completely close down fisheries within the Annette Islands Reserve, should she choose to do so.[105] Although she has not done so directly, the Secretary has made state regulations (including state fishery closures) applicable to commercial fishing, subsistence fishing, and sport fishing *within* the reservation.[106] It makes no sense that State regulations (including regulations that completely close fisheries) apply *within* the reservation, but not *outside* the reservation.

The federal government likewise acknowledges that permits are required off the reservation, and thus affirms Metlakatlans lack any implied off-reservation fishing right. While the federal government has made many state fishing regulations applicable within the Reserve, it provides that Community members do not need state permits to fish "in the waters of the Annette Islands Reserve."[107] In so doing, the federal government implicitly acknowledges that state permits are required outside the Reserve. If Metlakatlans had an implied off-reservation fishing right and thus no permit is required outside the Reserve, this regulatory language would be superfluous.

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regulations as "without parallel" and explaining that Metlakatlans fish upon the consent of the Secretary).

[105] The Secretary's regulations of the Annette Islands Reserve can be found in 25 C.F.R. Part 241.

[106] 25 C.F.R. §§ 241.3(c), (e), 241.4(b).

[107] 25 C.F.R. § 241.2(c).

F. The reduced fisheries returns *within* the Reserve do not permit the Court to rewrite the 1891 Act to provide the Community fishing rights *outside* the Reserve.

The Community states that fisheries returns within the Annette Islands Reserve has decreased. Op. Br. 22-23. The Community argues that to be self-sufficient requires the recognition of an implied off-reservation fishing right. Op. Br. 42-43.

However, the Community's reduced fisheries returns *within* the Reserve does not support its request for injunctive relief to commercially fish without a limited entry permit *outside* the Reserve. The Seventh Circuit heard and rejected the same argument decades ago. In *Menominee Indian Tribe of Wisconsin v. Thompson,*the Tribe argued that because its exclusive right to fish sturgeon on reservation was impeded by off-reservation manmade dams, it should be granted the remedy of an off-reservation fishing right distinct from other citizens.[108] The Seventh Circuit disagreed, reasoning that the treaty providing the Tribe exclusive on-reservation fishing rights did "not expressly entitle the Tribe to a specific proportion of sturgeon," and "[a] declaration of on-reservation fishing rights is not equivalent to a right to some proportion of the sturgeon catch."[109] Quoting the Supreme Court, the Seventh Circuit explained it was without authority to rewrite a

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108 161 F.3d 449, 457 (7th Cir. 1998).

109 *Id.* at 461.

congressional act, even when doing so might "remedy a claimed injustice."[110] Just as the Seventh Circuit held in *Menominee*, the Community's exclusive fishing rights within the Annette Islands Reserve do not entitle its members to prioritized fishing rights outside the Reserve.

The Community's argument that this Court should provide it with off-reservation fishing rights to meet "self-sufficiency" would yield an ever-evolving, limitless possibility of off-reservation rights as circumstances change. If Districts 1 and 2 do not provide enough fish to meet the Community's asserted need of self-sufficiency, there is no principle limiting the Community's argument to just those districts. Similarly, if hunting or timber resources decline on the reservation, the Community's logic would entitle it to hunt and harvest timber on land adjacent to the Reserve, regardless of state regulation. After all, when Congress established the Reserve, it knew the Metlakatlans' livelihood and economy (i.e., their ability to be "self-sufficient") depended on hunting and milling timber.[111] This is precisely the

110 *Id.* at 457 (citing *Choctaw Nation*, 318 U.S. at 432).

111 21 Cong. Rec. 10092 (ADD 7).

sort of rewriting of an unambiguous statute[112] the Supreme Court has warned against.[113]

G. The minimal federal fishing regulations in Alaska waters from 1867 through statehood does not support a finding that Congress intended to grant off-reservation fishing rights.

Minimal federal regulation of fishing in state waters after the creation of the Annette Islands Reserve does not indicate that Congress intended in 1891 that Metlakatlans have off-reservation fishing rights. From 1889 until 1958, Alaska's fisheries were largely unregulated.[114] They were minimally regulated as to Metlakatlans, other Alaska Natives, and non-Natives alike.[115] The entire commercial fishing industry in Alaska was minimally regulated. This was due to the advocacy of commercial fishing lobbyists, a lucrative salmon industry, and food scarcity during World War II.[116]

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112 The Community in its reply might argue these concerns will not exist because they would need to show a historical record of such use. But under their application of Indian law, the right hinges not on the statute or even the tribe's historical use, but on the tribe's present and future needs as a self-sustaining colony.

113 *See Catawba Indian Tribe*, 476 U.S. at 506 (Indian canon " does not permit reliance on ambiguities that do not exist"); *Choctaw Nation of Indians*, 318 U.S. at 432 ("But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.")

114 Clark, *The Commercial Salmon Fishery in Alaska*, at 1–3.

115 *Id.*

116 *Id.*

The Community argues that the district court should have inferred that minimal regulation of the fisheries and the fact that Community members fished outside the Reserve supports its allegation that Metlakatlans had a right to fish free from regulation. Op. Br. 13–20, 46. But none of the documents the Community cites recognizes a right of its members that is distinct from other commercial fishermen. Instead, the Commuity's allegations reaffirm simply that there was widespread relatively unregulated fishing throughout Alaska's waters from statehood until 1973. The district court did not err by taking judicial notice of facts explaining that the fisheries were minimally regulated as to Community and non-Community members alike, and the undisputed reasons for that even-handed minimal regulation.[117] Order at 20–21 (ER 21-22).

II. Metlakatlans fishing outside of the Annette Islands Reserve are subject to nondiscriminatory State regulation.

As discussed above, the Community and its members have no reserved rights to fish off-reservation. But "[e]ven where [such rights are] reserved, off-reservation fishing rights have been held subject to state regulation."[118] In such

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[117] *Sprewell*, 266 F.3d at 988 ("The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice" . . . [n]or is the court required to accept as true . . . unreasonable inferences").

[118] *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75 (1962); *see also Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768–69 (1985) ("[E]ven if the Tribe had expressly reserved a 'privilege of fishing and hunting' on the ceded [off-reservation] lands, our precedents demonstrate that such an express

situations, states may implement regulations that are "reasonable and necessary for conservation" and that "do not discriminate against the Indians."[119]

Because the Community and its members do not have any reserved right to fish outside the reservation, there is no need to analyze whether the State's limited entry program is "reasonable and necessary for conservation" and does "not discriminate against Indians." Nonetheless, the limited entry program is both reasonable and necessary for conservation and it does not discriminate against Indians. The program promotes conservation by issuing a limited number of permits in order to "control . . . entry of participants into the commercial fisheries," and does so "without unjust discrimination."[120] The Alaska Supreme Court recently held that regardless of any "reserved rights" the Community alleges, the purposes of the State's limited entry program "easily fall within the ambit of the 'conservation necessity' principle."[121] The Alaska Supreme Court has also held

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reservation would not suffice to defeat the State's power to reasonably and evenhandedly regulate such activity.").

[119] *United States v. Sohappy*, 770 F.2d 816, 823 (9th Cir. 1985) (citing *Puyallup I*, 391 U.S. 392, 398 (1968) (approving of state conservation regulations concerning the manner of fishing.).

[120] AS 16.43.010.

[121] *Scudero v. State*, No. S-17549, 2021 WL 3123069, at *7 (Alaska July 23, 2021) (to be published in P.3d).

that the limited entry program is non-discriminatory.[122] Therefore, both of the *Sohappy* factors are met here.

CONCLUSION

For the abovementioned reasons, the State requests this Court affirm the district court's finding that the 1891 Act does not provide any off-reservation fishing rights and the Community could not plead any set of facts to overcome the plain language of the 1891 Act.

Date: August 9, 2021.

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[122] *May*, 168 P.3d at 885 ("May has not been discriminated against; he is being treated similarly to all other persons properly denied limited entry permits.").

STATEMENT OF RELATED CASES

The State is not aware of any related cases pending before this Court.

Date: August 9, 2021.

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CERTIFICATE OF SERVICE

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Date: August 9, 2021.

TREG R. TAYLOR
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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