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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

**METLAKATLA INDIAN
COMMUNITY**, a Federally
Recognized Indian Tribe,

Plaintiff,

v.

MICHAEL J. DUNLEAVY, et al.,

Defendants.

Case No.: 5:20-cv-00008-SLG

Oral Argument Requested

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

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I. INTRODUCTION.

The Ninth Circuit and this Court have repeatedly held that that this is not an aboriginal rights case. Ignoring those holdings, the State yet again attempts to resurrect an aboriginal rights standard in disguise. Importing the "usual and accustomed" language from the Palmer-Stevens treaties and the standards associated with the decisions interpreting those treaties, the State argues (wrongly) that the Community's "traditional fisheries" include only the waters surrounding Annette Island and the Nass and Skeena rivers because that is where the Community held exclusive fishing rights. Docket 95-1 at 18-19 & 31-32 (arguing that to establish its "usual and accustomed" fishing grounds, the Community must prove that its "usual or regular" fishing areas were those where the Community enjoyed a "treaty-time exercise or recognition of *paramount or preemptive fisheries control* (primary right control)[.]" (emphasis in original). Consistent with the State's proposed test and its refusal to acknowledge that the relevant inquiry is about fishing practices, not rights, the State's expert, Dr. Anthony Gulig,

focuses only on whether the Community's Tsimshian ancestors had exclusive rights to the areas where they fished.¹

That is not the proper test. As this Court has recognized, the test established by the Ninth Circuit requires that it consider where the Community's members have fished since "time immemorial and where they continued to fish in 1891 when their reservation was established". *Metlakatla Indian Community v. Dunleavy*, 736 F.Supp.3d 741, 754 (D. Alaska 2024). This requires the Court to look not at exclusive rights, but rather the Community's "fishing practices," from time immemorial and at the time the Reserve was established, including those of the "Tlingit & Haida that joined [the Community] at that time." *Metlakatla Indian Community v. Dunleavy*, U.S. Dist. Case No 5:20-cv-00008-SLG, 2025 WL3140741, *6 (D. Alaska, Nov. 10, 2025) (Docket 129 at 17). As the evidence set forth in detail below establishes, it is undisputed that the Community's Tsimshian, Tlingit and Haida ancestors, from time immemorial through the creation of the Annette Islands Reserve, fished extensively throughout Southeast

¹ Dr. Gulig's testimony is subject to a concurrently filed Motion to Exclude for that very reason; his misguided focus on the wrong factual question and legal standard renders his opinion misleading and irrelevant.

Alaska in the areas now designated as Districts 1 and 2. Accordingly, the State's motion for summary judgment must be denied.

II. THE MATERIAL FACTS ARE UNDISPUTED.

There is no dispute that the Community's Tlingit and Haida ancestors fished extensively throughout Southeast Alaska; the evidence presented by both the Community and the State demonstrates that fact. There is also no dispute that the Tsimshian have a long and ancient presence in Southeast Alaska and that the Tsimshian, Tlingit, and Haida have a well-documented and dynamic, interrelated lineage and related ancient fishing practices throughout Districts 1 and 2.² This shared lineage informs the time-immemorial Tsimshian fishing practices, even after significant migrations to what is today British Columbia, because it includes reciprocity and marital access to the territory and resources of the other tribes.³ This is important because in deciding whether the Community's reserved fishing rights include Districts 1 and 2, this Court must consider the time immemorial fishing practices not just of the Tsimshian, but also of the Tlingit and Haida that joined the Community at the time the Reserve was established. Docket 129 at 17.

² Declaration of Dr. Stephen Langdon (Docket 119), ¶¶ 13-15 & 24.

³ *Id.*, ¶ 12.

The undisputed evidence produced by both the Community and the State of Alaska leads to only one undeniable conclusion: the Community's members and ancestors – including those of Tlingit and Haida descent – have fished extensively in Districts 1 and 2 "from time immemorial" and continued to do so in 1891 when the Reserve was established.

A. It is Undisputed that the Community's Tlingit and Haida Ancestors Fished in the Waters of Southeast Alaska Since Time Immemorial and when the Reserve was Established.

It is undisputed that Tlingit and Haida occupied Southeast Alaska and fished in Southeast Alaska for subsistence, ceremonial and trade purposes.⁴ That fact was judicially acknowledged by the Federal Court of Claims in 1959. *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 455-458 (Ct. Cl. 1959). Notably, a map submitted in that case to show the extent of Tlingit and Haida territory in Southeast Alaska in 1867, designates the western half of the Portland Canal as Tsimshian territory.⁵ Thus, the fishing practices of the Community's Tsimshian, Tlingit and Haida ancestors in Districts 1 and 2 has long

⁴ Docket 119-1 at. ¶¶43

⁵ *Id.*, ¶¶ 30-31 & Docket 120-6.

been recognized, and there is no dispute about the Tsimshian presence in Southeast Alaska in 1867.

The Tsimshian, Tlingit and Haida regularly shared traditional cultural practices such as potlatches, and they are so integrated that some Tlingit tribes are descendants of ancient Tsimshian tribes.⁶ A concrete example of this integrated history is the 1,500-year-old petroglyph on the Unuk River that marks the historical Tlingit familial fishing grounds of Louie and Walter Wagner, and Albert Smith, the Metlakatla Indian Community's mayor.⁷ This is a result of the intertwined history of the Tsimshian, Tlingit, and Haida; many of today's Community members trace their ancestral roots to one or more of those tribes.⁸ As Dr. Barbara Lang explained, when the Tsimshian moved from Old Metlakatla to Alaska, "they were moving into a territory which was familiar to them" and they were "related, at the clan level, with various Tlingit groups who had occupied the area at previous times."⁹

⁶ Declaration of David R. Boxley (Docket 120), ¶¶ 2 & 21.

⁷ Declaration of Albert G. Smith (Docket 117), ¶¶ 1; 10-12 & Docket 117-1.

⁸ Docket 119, ¶¶ 14, 34-37; Docket 120, ¶ 34; Docket 117, ¶ 1; Declaration of Desmond Hayward-King (Docket 113) ¶1; Declaration of Edward Gunyah (Docket 114), ¶ 1; Declaration of Freeman McGilton (Docket 115), ¶ 1; Declaration of Daniel Mardsen, Sr. (Docket 118), ¶ 1.

⁹ Docket 119-4 at 17, lns. 17-21.

It is undisputed that there were substantial Tlingit and Haida among the original members of the Community.¹⁰ At the time the Reserve was established, the Community included a significant number of Tlingit and Haida. The 1895 Census Report recorded that the population of the Community was 823 and consisted of 717 Tsimshian, 94 Tlingit, 7 Haida, 3 Englishmen, 1 Canadian and 1 Japanese.¹¹ While the 1890 Census Report did not identify tribal affiliation, it did list the number of Alaska "Natives" as 101.¹² Given the number of Alaska "Natives" recorded in the 1895 report, it is reasonable to conclude that the proportion of Tlingit and Haida Community members was similar.¹³

Consistent with the wishes of Chief William Kinnincock – the Tlingit Chief who initially granted permission to the Metlakatla Tsimshian to inhabit Annette Island and whose gravestone sits in the Community cemetery – many Tongass Tlingits continued to reside on the Reserve as Metlakatlans.¹⁴ Members of today's Community trace their lineage directly back to those Tongass Tlingits,¹⁵ including

¹⁰ *Id.*, ¶¶ 39-41.

¹¹ Docket 119, ¶¶ 40-41.

¹² *Id.*

¹³ *Id.*

¹⁴ Docket 120, ¶ 34 & Docket 120-7.

¹⁵ Docket 113, ¶1; Docket 114, ¶1; Docket 115, ¶1; Docket 117, ¶1.

Daniel Marsden who is a direct descendent of Chief Kinnicock.¹⁶ Chief Kinnincock wanted the Tongass Tlingit "to join the Metlakatla community to better their economic welfare and material condition," and he expressed his "hope" that the Annette Islands Reserve "will continue unhindered, to prosper through the years to come, as it has in the past."¹⁷

The foregoing evidence that the Tlingit and Haida ancestors of the Community fished in Districts 1 and 2 is buttressed by the testimony of numerous Tlingit and Haida members. For example, the Central Council of Tlingit and Haida submitted numerous declarations from its members in support of its Motion to Dismiss. Those declarations extensively detail their Tlingit and Haida ancestors' – including Metlakatlan ancestors' – fishing practices throughout Southeast Alaska and recognize that Tsimshian regularly fished in their ancestors' territory.¹⁸

The evidence of the Tlingit and Haida time immemorial practices is wholly undisputed; the State's expert did not undertake a review or analysis of the Tlingit

¹⁶ Docket 118, ¶1

¹⁷ Docket 120, ¶ 34 & Docket 120-7.

¹⁸ Docket 97, ¶¶ 2-15; Docket 100, ¶¶ 6-12; Docket 101, ¶¶ 2-6; Docket 102, ¶¶ 12-29; Docket 104, ¶¶ 2-13; Docket 105, ¶¶ 23-25; Docket 107, ¶¶ 11-19.

or Haida time immemorial fishing practices in Southeast Alaska.¹⁹ Unsurprisingly, as to the evidence at the time the Reserve was founded, the Community's evidence is confirmed by the State's evidence. The State's expert concedes that both the Tlingit and Haida brought fish from Kasaan and the eastern side of Prince of Wales Island to the Metlakatla cannery.²⁰ A map submitted by the State shows that the federal government recognized that "aboriginal" trolling for salmon and halibut occurred throughout Southeast Alaska in the areas designated as Districts 1 and 2.²¹ This evidence is consistent with the Community's expert, who explained that in connection with prosecuting the newly emerging commercial fishery at that time, those Tlingit and Haida Metlakatlans also fished in off-reservation areas that included the waters of Districts 1 and 2.²² Thus, there is "no question" that the Tlingit and Haida members of Metlakatla traditionally fished in Districts 1 and 2.²³ There is also no question that, as expressed by Chief Kinnincock, those members

¹⁹ Declaration of Christopher Lundberg in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Lundberg Decl."), ¶ 2 and Ex. 1 at 3:13-4:10.

²⁰ Docket 95-2 at 46-47.

²¹ Docket 95-8 at 2 & 3.

²² Docket 119, ¶ 42 and Docket 119-2, pgs. 1-15

²³ Docket 119, ¶ 21.

expected that the Reserve would allow them to prosper into the future in the ways that they had since time immemorial.²⁴

B. It is Undisputed that the Community's Tsimshian Ancestors Fished in the Waters of Southeast Alaska Since Time Immemorial.

1. Precontact Tsimshian occupied and migrated throughout Southeast Alaska.

The Tsimshian have been present in the area that is now Southeast Alaska since time immemorial, where they coexisted with the Tlingit and Haida and continuously used the marine resources in Districts 1 and 2.²⁵ As Dr. Stephen J. Langdon notes, "the historical evidence of those facts is beyond dispute."²⁶ Pre-contact Tsimshian occupied the areas from the east coast of Prince of Wales Island north to the Stikine River.²⁷ A rich salmon system existed at Lake Bay on the east coast of Prince of Wales Island.²⁸ Conflict broke out among the Tsimshian in the

²⁴ Docket 120, ¶ 34 & Docket 120-7.

²⁵ *Id.*, ¶¶ 23-24 & Docket 119-1 at 20-32; Docket 120, ¶¶ 2, 7-9 & Docket 120-1 & 120-2.

²⁶ Docket 119, ¶ 24.

²⁷ Docket 119-1 at 20.

²⁸ *Id.* at 20-22.

Lake Bay area, and they dispersed to points east and south.²⁹ Subsequent conflict spread the precontact Tsimshian even further throughout the region.³⁰

A map reproduced in Dr. Langdon's report shows that the precontact Tsimshian emigrating from Prince of Wales Island spread as far north as Chilkat and into what is today known as Wrangell, Loring and Cape Fox.³¹ Tsimshian territorial waters in Southeast Alaska were documented as far north as Kake and included the western side of the Portland Canal.³²

Dr. Barbara Lane, Ph.D., explains that United States and Canadian government records recognized that the Tsimshian "traditional domain" included the "drainage areas of the Portland Canal" as well as the "adjacent coastal and island territories."³³ In that regard, Dr. Lane cites a Tsimshian leader, Mountain Chief, who was concerned that the Tsimshian would lose access to the western half of the Portland Canal when Alaska was purchased by the United States.³⁴ The United States assured Mountain Chief that the Tsimshian would not be "disturbed"

²⁹ *Id.*

³⁰ *Id.*

³¹ Docket 119, ¶ 48; Docket 119-1 at 20-22; Docket 120, ¶¶ 23-24, 28 and 30-31; Docket 120-6.

³² Docket 120, ¶¶ 28-29 & Docket 120-5.

³³ Docket 119-5 at 2.

³⁴ *Id.* at 2-3

in their "possessions."³⁵ Dr. Lane further explains that the traditional Tsimshian territory within Southeast Alaska was far more extensive than what was documented by the United States and Canada.³⁶

2. Precontact Tsimshian went on trade voyages throughout Southeast Alaska.

In addition to the occupation and migrations described above, trade occurred between the tribes throughout Southeast Alaska since time immemorial, and the Tsimshian engaged in "extensive and longstanding trade relationships" with the Tlingit.³⁷ The ancestors of today's Metlakatla Indian Community routinely traded with other tribes in Southeast Alaska.³⁸ One concrete example of these trade expeditions is related by Metlakatla's Mayor, Albert Smith, who tells the history that he learned from his grandfather.³⁹ Mayor Smith describes how Tsimshian twice annually travelled to Prince of Wales island, circling the entire island in their canoes to trade eulachon and eulachon grease for dried halibut and seaweed.⁴⁰ During such trading expeditions, the Tsimshian would engage in subsistence

³⁵ *Id.*

³⁶ *Id.* at 4.

³⁷ Docket 119, ¶¶ 56 & 64; Docket 117, ¶ 15.

³⁸ Docket 117, ¶¶ 14-16.

³⁹ Docket 117, ¶ 15.

⁴⁰ *Id.*

fishing, reflecting an expected and recurring use of the marine fisheries for personal consumption.⁴¹

3. Precontact Tsimshian were integrated with the Tlingit and travelled throughout Southeast Alaska for marriages, potlatches, and other cultural events.

Intermarriage, potlatches, and other cultural practices also led the Community's Tsimshian ancestors to travel extensively throughout Southeast Alaska.⁴² Intermarriage was an important feature of the relationship between the Tsimshian and Tlingit for many generations.⁴³ This created bonds between various Tsimshian and Tlingit clans that brought with it access to the other clan's marine resources for the intermarrying parties and immediate relatives.⁴⁴ In-depth research has concluded that there was extensive intermarriage between the Tongass Tlingit and the Tsimshian.⁴⁵ This reality is reflected in the fact that many of the inhabitants of Tlingit and Tsimshian villages were bi-lingual.⁴⁶ One concrete example of this interrelation is a carved stone eagle crest shown to researchers by

⁴¹ Docket 119, ¶¶ 56-57 & Docket 119-1.

⁴² Docket 119, ¶¶ 14-15 & 64;

⁴³ Docket 119-1 at 16.

⁴⁴ *Id.*

⁴⁵ Docket 119-1 at 23-25.

⁴⁶ *Id.*

the mayor of a Tsimshian clan living on the Nass River. The Tsimshian had brought the crest with them when they migrated from Alaska.⁴⁷ That Tsimshian clan was also made up of Tlingit members.⁴⁸

This research and testimony is corroborated by the numerous Tsimshian place names throughout Southeast Alaska.⁴⁹ This includes Tsimshian names for Cape Fox (Hal Xsdaxl), Prince of Wales Island (Wil Lum Gyeks), Cape Chacon (Wil Ukst'aa Mediik), and the Tongass Narrows (Xlmgaaws).⁵⁰ Such place names are a concrete manifestation of the Tsimshian's long-standing presence in Southeast Alaska.⁵¹

4. Precontact Tsimshian necessarily engaged in fishing throughout Southeast Alaska.

As a fishing people, the precontact Tsimshian were routinely fishing in these waters—while they were living in their villages, travelling for intermarriages and other ceremonial occasions, on trading missions, and as they migrated through marine waters to find new homes.⁵² Tsimshian fishing technologies demonstrate

⁴⁷ *Id.* at 24-25.

⁴⁸ *Id.*

⁴⁹ Docket 120, ¶ 9; Docket 120-1 at 2-4.

⁵⁰ Docket 120-1 at 3.

⁵¹ Docket 120, ¶ 9.

⁵² Docket 119, ¶¶ 25, 43-47 & 63-65; Docket 119-1 at 20-32; Docket 119-5 at 4.

that these early people exploited the marine, estuarine, and riverine resources equally.⁵³ For example, precontact Tsimshian harvested salmon in the estuarine areas with intertidal fish traps and in the marine environment with trolling techniques.⁵⁴ Precontact Tsimshian designed a specific V-shaped hook that was adorned with carvings to attract and catch deep-water halibut.⁵⁵ Similarly, the Tsimshian also caught oceanic Ling- and Pacific Cod using hook and line jigging techniques or with floats.⁵⁶ The Tsimshian harvested herring in inshore areas using a herring rake from a boat and collected herring roe through a net system suspended in the water.⁵⁷ These fishing technologies were exploited by Tsimshian in Southeast Alaska from time immemorial.⁵⁸

The State's expert, Dr. Anthony Gulig, did not undertake a review or analysis of the time immemorial fishing practices of the Tsimshian.⁵⁹ Thus, the foregoing facts are entirely undisputed. It is worth noting, however, that other evidence submitted by the State confirms the fishing practices described above.

⁵³ Docket 119-1 at 11.

⁵⁴ *Id.* at 11 and 13.

⁵⁵ *Id.*

⁵⁶ *Id.* at 11 and 14.

⁵⁷ *Id.* at 11 and 14-15.

⁵⁸ *Id.* at 15.

⁵⁹ Lundberg Decl., ¶ 2 and Ex. 1 at 2:13-18 and 3:24-4:2.

Dr. Gulig concedes that "Tsimshians traveled extensively and, when doing so, fished for subsistence."⁶⁰ He further concedes that such fishing practices took place "in Tlingit and Haida territories."⁶¹ And, as noted above, a map submitted by the State in support of its motion shows that "aboriginal" open water trolling for salmon and halibut occurred throughout Southeast Alaska in the areas designated as Districts 1 and 2.⁶²

C. It is Undisputed that the Community Fished the Waters of Southeast Alaska at the time the Annette Island Reserve was Established.

"After moving to the Annette Islands, the Metlakatlangs continued to fish throughout the waters of Southeast Alaska." *Metlakatla Indian Community v. Dunleavy*, 58 F.4th 1034, 1039 (9th Cir. 2023). In 1891, the Community established a cannery on Annette Island to replace the one on Old-Metlakatla in British Columbia. *Id.* at 1039. To supply it, Community members fished in off-reservation waters "throughout" Southeast Alaska, including in "the waters immediately surrounding the reservation and in the waters miles away." *Id.* at 1038-39. The federal government documented fish harvests by Community

⁶⁰ Docket 95-2 at 17.

⁶¹ *Id.*

⁶² Docket 95-8 at 2 & 3.

fishermen as far away as Moira Sound, Quadra Bay, Home Site, Tamgas, Karta Bay and Kah Shakes Cove. *Id.*

At that time the Community was using drag and purse seine nets for its commercial salmon harvest, which allowed for more frequent marine catches rather than waiting for the salmon to reach the estuaries and rivers when they spawned.⁶³ To provide fish for the Community's cannery, the Community operated a small steamer accompanied by two skiffs to harvest larger amounts of salmon and to extend their range.⁶⁴ A map based on research conducted by the Community shows that their commercial landings between 1890 and 1930 were distributed throughout Southeast Alaska, extending as far north as Kasaan Bay and as far south as Cape Chacon.⁶⁵ That map demonstrates that the Community fished commercially throughout Districts 1 and 2.⁶⁶ Even the State's expert concedes that Metlakatlan fishermen at that time fished on the east side of Prince of Wales Island.⁶⁷

⁶³ Docket 119, ¶ 33 and Docket 119-2 at 6-8.

⁶⁴ *Id.* at 6.

⁶⁵ Lundberg Decl., ¶ 4 and Exs 2 & 3.

⁶⁶ *Id.*

⁶⁷ Docket 95-2 at 47-48.

The Metlakatlangs understood that Congress established the Reserve to allow them to successfully participate in the newly emerging commercial fishery.⁶⁸ Many of the species that the Community pursued – such as salmon and herring – are migratory, and to successfully prosecute those fisheries, the fishermen had to go where the fish were.⁶⁹ The Community fishermen traditionally did just that; they did not limit themselves to the waters surrounding the Reserve but instead followed the fish throughout Southeast Alaska.⁷⁰ It is thus undisputed that the Community fished commercially in Districts 1 and 2 at the time the Reserve was established.

D. It is Undisputed that the Community Continued to Fish the Waters of Southeast Alaska Until the State's Limited Entry Program Excluded Them.

After the establishment of the Annette Islands Reserve, the Community continued to fish in the off-reservation marine waters of Districts 1 and 2 and beyond to successfully prosecute the commercial fishery.⁷¹ The ability to fish outside the Annette Islands Reserve was essential to its commercial success. When

⁶⁸ Docket 113, ¶ 14; Docket 114, ¶¶ 9 & 10; Docket 117, ¶ 20.

⁶⁹ Docket 114, ¶¶ 8 & 10; Docket 115, ¶ 6; Docket 117, ¶ 18.

⁷⁰ *Id.*, see also, Docket 114, ¶¶ 8 & 10; Docket 115, ¶ 6; Docket 117, ¶ 18.

⁷¹ Docket 117, ¶¶ 17-18; Docket 113, ¶¶ 9-10; Docket 115, ¶ 4; Docket 114, ¶ 4; Docket 118, ¶ 5; Declaration of Solomon H. Guthrie (Docket 116), ¶¶ 4-7.

it was founded, only 30% of the fish processed by the Annette Islands Packing Company ("AIPC") came from reservation waters.⁷² Approximately two-thirds of the commercial harvest came from off-reservation waters.⁷³ *Id.* This is simply the nature of commercial fishing – fishermen need to go where the fish are and the Community expected to be able to do so.⁷⁴

These practices did not change until the State established its limited entry permit system because many Community members were unable to secure a limited entry permit.⁷⁵ As one fisherman describes it, the limited entry system "turned Annette Islands into a cage."⁷⁶ As a direct result of the limited entry system, the Community has been unable to maintain its previous harvest levels, and the AIPC was forced to close.⁷⁷

AIPC was the longest continuously running business enterprise in Indian country.⁷⁸ The loss of that economic engine has been devastating to the

⁷² Docket 119, ¶ 34.

⁷³ *Id.*

⁷⁴ Docket 117, ¶¶ 17-18; Docket 116, ¶ 8; Docket 113, ¶¶ 9-10; Docket 114, ¶ 8; Docket 118, ¶¶ 5-6; Docket 115, ¶¶ 2-4 & 6; Docket 119, ¶¶ 33-34 & Docket 119-2.

⁷⁵ *Id.*

⁷⁶ Docket 114, ¶ 10.

⁷⁷ Docket 117, ¶ 19; Docket 116, ¶ 10; Docket 113, ¶¶ 12-14; Docket 114, ¶¶ 8-10; Docket 115, ¶¶ 6-8.

⁷⁸ Docket 117, ¶ 19.

Community.⁷⁹ As a result of the closure, the long-term survival of the Community is at risk.⁸⁰ That is directly contrary to the Congressional intent in establishing the Annette Islands Reserve—to allow the Community to successfully support itself through commercial fishing. This Court must correct the State's unlawful restriction on the Community's reserved fishing rights so that its members may pursue the fishing rights that Congress granted them in the hopes that they would succeed in the commercial fishing industry that was "newly emerging" when it established the Reserve intending it to be the Community's permanent home.

III. POINTS AND AUTHORITIES.

Despite being repeatedly told in no uncertain terms to the contrary – by this Court and the Ninth Circuit – the State of Alaska continues to treat this case as if it were an aboriginal rights case. It is not. The standard for determining the extent of the Community's Congressionally reserved fishing rights is the Community's fishing *practices* engaged in by its Tsimshian, Tlingit and Haida members and ancestors since time immemorial and at the time the Reserve was established. As the undisputed evidence shows – including the testimony of the State's expert – the

⁷⁹ *Id.*

⁸⁰ *Id.*

Community and its Tsimshian, Tlingit, and Haida ancestors fished throughout southeast Alaska from time immemorial until Defendant's limited entry program unlawfully barred the Community from participating in that fishery. Accordingly, the Community's reserved rights include Areas 1 and 2.

A. Standards.

1. Summary judgment standard.

A party is entitled to summary judgment only where it “shows that there is no genuine dispute as to any material fact” and it is “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party must establish the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). In deciding a summary judgment, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party’s favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001).

2. Standards for deciding whether the Community's reserved fishing rights include Districts 1 and 2.

The Metlakatla Indian Community enjoys an implied right to non-exclusive off-reservation fishing in their "traditional fishing grounds," which includes "the areas where they have fished since time immemorial and where they continued to

fish in 1891" when the Annette Island Reserve was created. *Metlakatla Indian Community v. Dunleavy*, 736 F.Supp.3d 741, 752 (D. Alaska 2024) (quoting *Metlakatla Indian Community v. Dunleavy*, 58 F.4th 1034, 1048 (9th Cir. 2023)).

The limited scope of this proceeding is to determine whether the Community's "traditional fishing grounds" include the waters within Districts 1 and 2. *Id.* at 753. To answer that question, this Court must consider where the Community's members have fished since "time immemorial and where they continued to fish in 1891 when their reservation was established". *Id.* at 754. This inquiry is not limited to the Community's Tsimshian ancestors but includes "other Alaskan natives as may have joined them." *Id.* Thus, this Court "looks to" the "prior fishing practices of those in the Community in 1891 ... including Tlingit & Haida that joined them at that time." Docket 129 at 17.

In deciding the extent of the Community's reserved rights, this Court must consider the Congressional purpose of the Reserve—to "preserve for the Community and its members" off-reservation fishing "in the traditional fishing grounds for personal consumption and ceremonial purposes, as well as for commercial purposes." *Metlakatla Indian Community*, 736 F.Supp.3d at 750 & 752. Congress intended that the Community would "continue to support

themselves by fishing," including pursuit of the "commercial fishery that had provided . . . essential economic support for the Community." *Metlakatla Indian Community*, 58 F.4th at 1045. The Reserve was "'intended to satisfy the *future* as well as the present needs' of the Community" to allow it to successfully prosecute the then-newly emerging commercial fishery in Southeast Alaska. *Id.* (emphasis added). Thus, this Court must consider not only the Community's needs at the time the Reserve was established, but also its future needs, to allow the Community to "maintain themselves under changed conditions." *Id.* at 1042-43 and 1045 (internal citations omitted). In other words, this Court must construe the Community's fishing rights to allow it to survive in its permanent home by successfully prosecuting the commercial fishery in today's fishing environment.

B. The State Again asks this Court to Apply the Wrong Standard.

The State wholly ignores this Court's prior decision which stated in no uncertain terms that "the State's aboriginal rights arguments are irrelevant to this reserved rights case." *Metlakatla Indian Community*, 736 F.Supp.3d at 754. Instead, it tries to resurrect an aboriginal rights standard, arguing at length that this Court should adopt the "usual and accustomed fishing location" standard and narrow the Community's reserved fishing rights to include only areas where the

Community engaged in "regular or frequent treaty-time use" and held a "paramount or preemptive fisheries control (primary right of control)." Docket 95-1 at 20-25 & 31-32. Using that test, the State asks this Court to conclude that the Community's reserved fishing rights "end" in the "Anette Islands' freshwater streams and the marine fisheries 3,000 feet from the Annette Islands uplands[.]" Docket 95-1 at 43. That is entirely incompatible with the Ninth Circuit's holding that Congress "preserved for the Community and its members an implied right to non-exclusive *off-reservation* fishing in the traditional fishing grounds for personal consumption and ceremonial purposes, as well as for commercial purposes." *Metlakatla Indian Community*, 58 F.4th at 1045 (emphasis added).

It is also the wrong test. The "usual and accustomed" standard relied on by the State reflects the express language of the Palmer Stevens' treaties at issue in those cases, not a legal standard to apply across all fishing rights cases. *See, e.g., U.S. v. State of Washington*, 384 F. Supp. 312, 331 (D. Wash. 1974) ("Each treaty in this case contains a provision substantially identical to that in the Medicine Creek treaty: 'The right of taking fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians[.]')(emphasis added). The State's proposed test is contrary to the law of this case. *Moore v. Jas H. Matthews & Co.*,

682 F.2d 830, 833 (9th Cir.1982)("The 'law of the case' rule ordinarily precludes a court from reexamining an issue previously decided by the same court, or a higher appellate court, in the same case."). As this Court has already recognized in no uncertain terms, it "need not reference . . . *any other cases* to determine 'what test' a court would use to determine the scope of a tribe's implied off-reservation fishing rights," because the Ninth Circuit "has already spoken to that issue here."

Metlakatla Indian Community, 736 F.Supp.3d at 755 (emphasis added). The State's suggestion to adopt the "usual and accustomed" standard and narrow the Community's rights to only those waters within the 3,000 foot boundary of the Annette Islands should be summarily rejected.

Similarly, the State attempts to limit the Community's fishing rights to salmon alone, arguing that "fish" as that term was traditionally used meant only salmon. Docket 95-1 at 25-26. Again, wrong. The State ignores the extensive historical evidence set forth above showing that the Community fished for numerous other marine species throughout District 1 and 2, including halibut, rock fish, herring and eulachon. It also ignores the basic interpretive principle governing this proceeding that, unless *specifically excluded*, a tribe's reserved rights include the right to *all* species within the fishery. *See, e.g., U.S. v. State of*

Washington, 157 F.3d 630, 643 (9th Cir. 1998) (rejecting State's argument that the tribe's fishing rights were limited to those species it harvested at the time the treaty was enacted because the treaty specified no limitations on species or harvest method; the State's position was "plainly inconsistent with the language of the Treaties, the law of the case, and the intent and understanding of the signatory parties."); *see also*, *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974) (holding that reservation of fishing rights also included the unstated right to hunt and trap because that is how the Klamath Indians would have understood it and such interpretation is consistent with the interpretive canon requiring the Courts to interpret treaties in favor of the tribe.). Again, the State's position that the Community's reserved right is limited to only salmon should be summarily rejected.

C. Under the Proper Test, there is no Dispute that the Community's Reserved Fishing Rights Include Areas 1 and 2.

The overwhelming evidence described above demonstrates in no uncertain terms that the Community's Tsimshian, Tlingit and Haida ancestors fished extensively throughout the waters of Southeast Alaska in what is now known as Districts 1 and 2 "from time immemorial." That evidence is entirely unrebutted; the State's expert testified that he was not asked to "review the historical record

concerning the traditional fisheries, harvest methods, and fishing locations" of the Tsimshian, Tlingit and Haida "ancestors of the Metlakatla Indian Community."⁸¹ He also testified that he had not conducted an analysis of the "time immemorial fishing practices" of the Tsimshian, Tlingit and Haida "ancestors of the Metlakatla Indian Community."⁸² The undisputed evidence set forth above also shows that the Community continued to fish throughout Districts 1 and 2 at the time of the founding of the Annette Islands Reserve. Thus, the State of Alaska is not entitled to judgment as a matter of law and its motion for summary judgment must be denied.

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⁸¹ Lundberg Decl., Ex. 1 at 2:13-18 and 3:13-23.

⁸² *Id.* at 3:24-4:10.

IV. CONCLUSION.

As set forth in detail above, the Metlakatla Indian Community and its Tsimshian, Tlingit and Haida ancestors have fished the waters of Districts 1 and 2 from "time immemorial" until they were unlawfully excluded by the State of Alaska's limited entry program. Accordingly, Defendant's motion for summary judgment must be denied.

DATED this 12th day of January, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **PLAINTIFF'S OPPOSITION TO DEFENDANT's MOTION FOR SUMMARY JUDGMENT** was filed with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in Case No.: 5:20-cv-00008-SLG who are registered CM/ECF users will be served by the CM/ECF system.

CERTIFICATE OF COMPLIANCE - L. CIV. R. 7.4(a)(1)

This brief complies with the type-volume limitation of L. Civ. R. 7.4(a)(1) because the brief contains 5,050 words, excluding the parts of the brief exempted by L. Civ. R. 7.4(a)(4).

DATED this 12th day of January, 2026.

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