CLYDE "ED" SNIFFEN
ACTING ATTORNEY GENERAL

Christopher F. Orman (Alaska Bar No. 1011099)
Jeffrey G. Pickett (Alaska Bar No. 9906022)
Assistants Attorney General
Alaska Department of Law
PO Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-3019
Email: *christopher.orman@alaska.gov*
jeff.pickett@alaska.gov

Attorneys for the State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

METLAKATLA INDIAN COMMUNITY, a Federally Recognized Indian Tribe, Plaintiff, 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.	Case No.: 5:20-cv-00008-JWS **REPLY IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

Before addressing the specific arguments made by Metlakatla Indian Community ("MIC") in their opposition to the motion to dismiss, the State of Alaska ("State") reiterates that Metlakatlans enjoy the right to commercially fish off-reservation just like

all other commercial fishermen. Whether they exercise that right, is a financial and personal decision each person chooses to make.

The state recognizes "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[1] MIC's opposition frames four legal issues which when considered together warrant dismissal of MIC's claims.

First, MIC's aboriginal fishing rights claims are barred under the Alaska Native Claims Settlement Act ("ANCSA") and the Court of Claims holding in *Tlingit and Haida Indians of Alaska v. U.S.*, 147 Ct.Cl. 315 (Ct.Cl. 1959). With no aboriginal fishing rights, MIC lacks the legal foundation to claim an off-reservation fishing right.

Second, MIC relies on reserved-water-rights doctrine cases, *Confederated Tribes of Chehalis*, and *United States v. Michigan*. These cases reaffirm that a court determines congressional or presidential intent by reviewing the circumstances surrounding the creation of the reservation. When applied here, these cases affirm Congress did not intend to grant a Metlakatlan off-reservation fishing right.

Third, from 1867 to 1960 the federal government minimally regulated Alaska fisheries. The lack of federal regulation for all commercial fishermen cannot be attributed to Congress recognizing a Metlakatlan off-reservation fishing right.

Fourth and lastly, Metlakatlans have been awarded limited entry permits and nothing prevents them from purchasing limited entry permits today.

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[1] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007).

II. DISCUSSION

A. ANCSA and the holding in *Tlingit and Haida Indians of Alaska* both establish Metlakatlans lack aboriginal fishing rights and thus lack the necessary foundation for a successful implied off-reservation fishing right claim.

Without aboriginal fishing rights, MIC lacks the mandatory foundation for proving its claim of implied off-reservation fishing rights.[2] Metlakatlans lack aboriginal fishing rights for two reasons: (1) any such rights were extinguished by ANCSA; and (2) the Court of Claims in 1959 held the Tlingit and Haida Indians – not the Metlakatlans or Canadian Tsimshian – had aboriginal title to Southeast Alaska waters.

1. ANCSA extinguished all aboriginal fishing rights in Alaska.

MIC failed to oppose the state's argument that ANCSA extinguished all aboriginal title and thus aboriginal fishing rights in Alaska.[3] By failing to oppose, MIC has waived any argument that ANCSA did not extinguish the Metlakatlans' asserted aboriginal fishing rights, and MIC's silence is a concession that ANCSA bars their claims.[4]

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[2] *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 n. 12 (9th Cir. 1981) ("An aboriginal right to fish has been recognized only in the context of interpretation of a ratified treaty or federal statute, where courts have held that aboriginal fishing rights were impliedly reserved to the Indians."). In the absence of aboriginal rights, a treaty, executive order, or statute can -- via expressed language -- grant off-reservation fishing or hunting rights. *See* Treaty with the Chippewa, 10 Stat. 1109 (1855); Treaty with the Chippewa, 7 Stat. 503 (1836). MIC has not identified any expressed language in the 1891 Act.

[3] *See* Opp. Mot. Dismiss (Nov. 5, 2020) [Dkt. 23].

[4] *Narang v. Gerber Life Ins. Co.*, 2018 WL 6728004 (N.D. Ca. 2018) ("A plaintiff's failure to oppose a defendant's argument was a concession that such claims should be dismissed.").

Even if this Court concludes that MIC has not waived the argument, ANCSA clearly extinguished all Metlakatlans' putative aboriginal fishing rights.[5] Metlakatlans were excluded from ANCSA's land allocations benefits because they retained the Annette Islands Reserve. But ANCSA broadly extinguished all aboriginal rights in Alaska, which then bars MIC's current aboriginal fishing right claims.

Three subsections of 43 U.S.C. § 1603 address the broad extinguishment of aboriginal title, and in particular, aboriginal hunting and fishing rights in Alaska.

43 U.S.C. § 1603(a) states

> All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

43 U.S.C. § 1603(b) states

> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

43 U.S.C. § 1603(c) states

> All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

[5] 43 U.S.C. § 1603(a)-(c).

Combined, these three provisions extinguished aboriginal fishing and hunting rights in Alaska and expressly foreclosed claims against the State of Alaska "based on claims of aboriginal right, title, use, or occupancy."[6]

The provisions contained in 43 U.S.C. §§1603(a)-(c) extinguished all aboriginal fishing rights claims in Alaska and not just those belonging to "Natives." ANCSA's definition of "Native" does not include Tsimshian Indians enrolled in the Metlakatla Indian Community.[7] The word "Native" only appears in 43 U.S.C. §§ 1603(a)-(c) once, in a subsection of Section 1603(c). Section 1603(c) sets forth, in the disjunctive, three distinct sources of claims against the State that are extinguished: (i) those based on aboriginal right, title, use, or occupancy of land or water; (ii) those based on a statute or treaty with the United States relating to Native use or occupancy; and (iii) those based on another nation's laws.[8] Based on the plain language of the statute, Congress differentiated the extinguishment of aboriginal title derived from use and occupancy in non-treaty situations from the extinguishment of aboriginal title derived from "Native occupancy and use" pursuant to a treaty.[9] Section 1603(c)'s use of the disjunctive would be unnecessary if Congress intended ANCSA to bar only those aboriginal rights claims raised by the subset of Alaskan Natives specifically defined in Section 1602(b).[10]

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[6] 43 U.S.C. § 1603(c); *see also U.S. v. Atlantic Richfield Co*., 612 F.2d 1132, 1134 n. 5 (9th Cir. 1980).
[7] 43 U.S.C. § 1602(b).
[8] 43 U.S.C. § 1603(c).
[9] 43 U.S.C. § 1603(c).
[10] *U.S. v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 246 (1989) ("There is no reason to suspect that Congress did not mean what the language of the statute says.").

Instead, ANCSA affirmed Metlakatlans would retain the Annette Islands Reserve, and as consideration for retaining the Reserve, Metlakatlans were excluded from ANCSA's land allocation benefits.[11] If Congress intended to preserve Metlakatlans' alleged aboriginal rights, Section 1618 would not have been limited to land allocation "benefits" and instead would have expressly excluded Metlakatlans from ANCSA entirely. Metlakatlans were excluded under 43 U.S.C. § 1618 to ensure they retained their 1891 land grant and nothing more.[12]

These statutory provisions plainly extinguish any aboriginal fishing rights MIC asserts. Without aboriginal rights, MIC has then failed to state a claim upon which the relief it requests—that Congress granted implied off-reservation fishing rights—can be granted.

2. The *Tlingit and Haida Indians of Alaska* decision also extinguished any of the Metlakatlans's alleged aboriginal fishing rights.

In addition to ANCSA, the Court of Claims' *Tlingit and Haida Indians of Alaska* decision establishes Metlakatlans could never present sufficient facts establishing that they had aboriginal fishing rights in Southeast Alaska waters. As the State noted in its opening brief, the Court of Claims held:

> [T]he plaintiffs have established their use and occupancy, i.e., Indian title, of the lands and waters in southeastern Alaska shown on the map . . . that they were using and occupying that land according to their native manner of use and occupancy in 1867 when the United States acquired Alaska from Russia; that

[11] 43 U.S.C.§ 1618 (stating that MIC retains the Annette Islands Reserve and as a result would not receive the "benefits" of ANCSA's land allocations).
[12] 43 U.S.C. § 1618.

> following the purchase of Alaska in 1867 these Indians continued to exclusively use and occupy the same areas of land and water as previously, and that such use and occupancy was not interfered with by the United States or its citizens until 1884; that beginning in 1884 and continuing thereafter, these Indians lost most of their land in southeastern Alaska through the Government's failure and refusal to protect the rights of the Indians in such lands and waters, through the administration of its laws and through the provisions of the laws themselves; *that a large area of land and water in southeastern Alaska was actually taken without compensation and without the consent of the Indians, through Presidential proclamations issued pursuant to law, and through reservation of part of the land for Canadian Indians under the Act of March 3, 1891*.[13]

The Court of Claims did not just find the Tlingit and Haida Indians had aboriginal title to Southeast Alaska waters. The Court found Congress and the President impermissibly took Tlingit and Haida Indians' lands and waters with the creation of the Annette Islands Reserve and the 1916 proclamation.[14] The Court of Claims' map resolved the aboriginal rights in Southeast Alaska, and nothing in the map suggested that Canadian Tsimshian were granted aboriginal rights in Southeast Alaska alongside the Tlingit and Haida.[15] This means MIC cannot present any facts establishing an aboriginal fishing right in Southeast Alaska.

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[13] *Tlingit and Haida Indians of Alaska v. U.S.*, 147 Ct. Cl. 315, 342 (Ct. Cl. 1959) (emphasis added).
[14] *Id*.
[15] Wars were common between the Haida and Canadian Tsimshian. *See* John Swanton, Haida Texts and Myths, "Fights Between the Tsimshian and Haida and among the Northern Haida," 384-390 (Bureau of American Ethnology 1905); available at: https://archive.org/details/bulletin291905smit/page/390/mode/2up (accessed on November 9, 2020).

B. The circumstances surrounding the creation of the Annette Islands Reserve – and thus the 1890 congressional record – determine Congress's intent and whether Congress granted an off-reservation fishing right.

Congressional intent defines the parameters of a tribe's off-reservation fishing rights.[16] "In all cases, the face of the Act, the surrounding circumstances, and the legislative history are to be examined with an eye toward determining what congressional intent was."[17] The cases cited by MIC in their opposition – the reserved-water-rights doctrine cases, *U.S. v. Michigan*, and *Chehalis* – all affirm that courts must consider the circumstances surrounding the creation of the reservation to determine congressional or presidential intent.

1. While the reserved-water-rights doctrine does not apply here, cases like *Winters* and *Colville* highlight how the circumstances surrounding the creation of a reservation inform a court's analysis.

In reserved-water rights cases, courts have inferred the United States' intent to grant tribes appropriations of off-reservation water "if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."[18] MIC has not asserted the state has denied them reservation water rights.[19] MIC has not asserted the state has denied them an appropriation of off-reservation water.[20] Therefore, MIC's reliance on reserved-water-rights doctrine cases is simply inapposite.

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[16] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977).
[17] *Id*.
[18] *U.S. v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983); *see also* Cohen's Handbook of Federal Indian Law, §§ 19.01-19.06 (Lexis Nexis 2012).
[19] *See* Am. Compl. (Oct. 1, 2020) [Dkt. 20].
[20] *Id*.

Still, these cases are helpful in demonstrating how the circumstances surrounding the creation of a reservation elucidate either congressional or presidential intent. In *Winters v. U.S.*, the U.S. Supreme Court's finding that the tribes' had an off-reservation reserved water right relied on the specifics surrounding the creation of the Fort Belknap Reservation:

> In the construction of [the executive order of May 1888] there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and without irrigation, were practically valueless.[21]

Therefore, in *Winters* the U.S. Supreme Court recognized the tribes owned a larger tract of land and waters, the tribes relinquished their rights to those lands and waters, and as consideration for the reduction of the reservation the Supreme Court determined the smaller reservation lands required an adequate flow of water for the intended agricultural purposes.[22]

Similarly, in *Coville Confederated Tribes v. Walton*, the Ninth Circuit found the reserved-water-rights doctrine applied because:

> The Colvilles were in a similar position when their reservation was created. As in *Winters*, the Indians relinquished extensive land and water holdings when the

[21] 207 U.S. 564, 576 (1905).
[22] *Id*.

> reservation was created. Some gave up valuable tracts with extensive improvements. Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless.[23]

Again, the Colville tribe had a larger tract of land and relinquished the rights to that larger tract of land.[24] The tribe reduced its reservation and sought an agricultural existence.[25] As consideration for relinquishing land claims, reducing the size of their reservation, and the goal of agricultural pursuits, the Ninth Circuit applied the reserved-water-rights doctrine.[26]

In both cases, the courts considered the following in ascertaining the scope of water rights the United States intended to convey in creating these executive order reservations: (1) that the tribes relinquished land and water rights; (2) the tribes' reservations were reduced in size; (3) the tribes negotiated with the United States and requested consideration for the reduction in the size of their reservations and the loss of water and land; and (4) the tribes' smaller lands were intended for agricultural purposes which required sufficient water.[27] These circumstances guided the courts' determination of presidential intent.

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[23] 647 F.2d 42, 46-47 (9th Cir. 1981).
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Winters*, 207 U.S. at 576; *Colville*, 647 F.2d at 46-47.

2. In *U.S. v. Michigan*, the court, in painstaking detail, described the circumstances surrounding the creation of a reservation to find the tribes' aboriginal rights were not extinguished.

In *U.S. v. State of Michigan,* the district court was asked to determine whether an 1836 treaty extinguished the Ottawa and Chippewa tribes' aboriginal rights.[28] In finding the tribes' aboriginal fishing rights were never extinguished, the district court relied on the following:

> (1) the 1812 Treaty of Ghent, which recognized the tribe's aboriginal rights as consideration for them ending their war against the United States;[29]
>
> (2) the Northwest Ordinance, which according to the court "set the standard by which the territorial government and the United States would be obliged to deal with the Indians of the Territory;"[30]
>
> (3) the tribes' 12,000 years of use of these fisheries;[31] and
>
> (4) the disparate bargaining position of the parties, which included details about alcohol use and bribes to disadvantage the tribes.[32]

The district court resolved the ambiguity in Article Thirteen of the 1836 Treaty -- the phrase "usual privileges of occupancy" -- in the tribes' favor and determined that the U.S. never extinguished their aboriginal rights. [33] *U.S. v. Michigan* provides a crystal-clear

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[28] 471 F.Supp. 192, 205-06 (D.W.D. Mich. 1979).
[29] Comparing the 1812 Treaty of Ghent to the June 20, 1867 Cession of Alaska reveals another problem with MIC's reliance on *U.S. v. State of Michigan*. Article III of the Cession of Alaska lacks the recognition of aboriginal rights expressly listed in the Treaty of Ghent. *See* Cession of Alaska, 15 Stat. 539 (June 20, 1867).
[30] 471 F.Supp. at 205.
[31] *Id*. at 271.
[32] *Id*. at 253-56.
[33] *Id*. at 258.

example of how courts carefully consider the circumstances surrounding the formation of a treaty when deciding the parties' intent.

3. *Chehalis*, *Colville Confederated Tribes*, and *Moore* affirm a court reviews documentation completed prior to the creation of the reservation to determine the intent of an executive order.

Unlike a statutory reservation, "the specific purposes of executive-order reservations were often unarticulated."[34] Courts have recognized "it is difficult to identify or to know how much weight to give to [an executive order's] purpose."[35]

Without the luxury of a congressional record, courts discern the intent of an executive order reservation by reviewing correspondence, prior treaties, and executive orders with that same tribe. For example, to determine the scope of the Quillehute Tribe of Indians' fishing rights, the district court in *U.S. v. Moore* considered an earlier treaty, that the executive order had been written by the Indian Service, and the nature of the negotiations and discussions which took place between the Tribe and the U.S.[36] In *Confederated Tribes of Chehalis Indian Reservation*, the Court considered letters from 1854 through 1856 – all prior to the issuance of the 1864 executive order creating the reservation – which discussed the need for the reservation and even mentioned preserving off-reservation fishing rights.[37]

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[34] *Confederated Tribes of Chehalis Indian Reservation v. State of Washington*, 96 F.3d 334, 342 (9th Cir. 1996).
[35] *Colville Confederated Tribes v. Washington*, 647 F.2d 42, 47 n. 8 (9th Cir. 1981).
[36] *U.S. v. Moore*, 62 F. Supp. 660, 668-69 (W.D. Wash. 1945).
[37] 96 F.3d at 343. MIC's *Chehalis* "framework" entirely ignores the fact that the Ninth Circuit reviewed these 1850s letters. *See* MIC Opp. at p. 17-18. [Dkt. 23, p.22-3].

Even with an executive order reservation, a court determines intent by reviewing documents dated prior to the creation of the reservation.[38] None of these cases suggest a court derives intent by ignoring such correspondence or a congressional record.

4. Applying the principles derived from the above cases, the circumstances surrounding the creation of the Annette Islands Reserve can never support a finding that Congress intended to recognize or grant off-reservation fishing rights.

Given the unique circumstances surrounding the creation of the Annette Islands Reserve, cases like *Winters*, *Colville*, and *U.S. v. State of Michigan* provide little guidance. Unlike the tribes in *Winters* or *Colville*, the Metlakatlans did not have title to land and water they were relinquishing.[39] Unlike the Ottawa and Chippewa, the Metlakatlans did not have a pre-existing treaty with the United States which recognized aboriginal rights.[40] The Metlaktalans were not involved in any negotiations; much less negotiations tainted by alcohol and bribes.[41] The Metlakatlans were never at war with the United States.[42] To summarize, the Metlakatlans provided no consideration for the Annette Islands Reserve.[43]

Instead, like the correspondence from the 1850s the Ninth Circuit relied on in *Chehalis*, the 1890 congressional record provides the best evidence of Congress' intent and proves Congress never considered granting a Metlakatlan off-reservation fishing

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[38] See Opp. [Dkt. 23]; Am. Compl. (Oct. 1, 2020) [Dkt. 20].
[39] *See* 21 Cong. Rec. 10092-93.
[40] *U.S. v. State of Mich*., 471 F.Supp. at 205-06.
[41] *Id*.
[42] *Id*. MIC's comparisons to the Nez Perce or the Lakota similarly lack merit. *See* MIC Opp. at p. 23 [Dkt. 23, p.28].
[43] *Id*. at 253-56.

right.[44] Congress intended to grant the Metlakatlans a safe place to live.[45] About this religious community, Congress noted the Metlakatlans were a "Christian and God-fearing people," and wanted to "render them all the encouragement that is in our power."[46] Congress hoped the Annette Islands Reserve would be a model Christian community that other Alaska natives would emulate.[47] With this missionary purpose in mind, Congress allowed Alaska natives to join this Christian community; to ensure a "great influence . . . over all the Indians of Alaska."[48]

The fact that Metlakatlans provided no consideration for the Annette Islands Reserve is essential to this Court's review of the state's motion to dismiss. It serves as the initial fissure from which MIC's alleged claims of an implied off-reservation fishing right caves and crumbles. Every case cited in MIC's briefing – and even arguably in the state's briefing – consists of a tribe relinquishing land and water rights as consideration for their reservation and any retained rights. The Metlakatlans, however, provided no consideration. These are the circumstances surrounding the Annette Islands Reserve, which in conjunction with the 1890 congressional record, demonstrate congressional intent.

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[44] In *Hynes v. Grimes Packing Co.* 337 U.S. 86, 113-14 (1949) the U.S. Supreme Court used phrases like "felt compelled" and "vigorous attack," to clarify the pragmatic nature of the *Alaska Pacific Fisheries* decision.
[45] 21 Cong. Rec. 10092 (Sept. 16, 1890).
[46] *Id*.
[47] 21 Cong. Rec. 10092 (Senator Manderson speaking).
[48] *Id*.

C. The lack of federal fishing regulations in Alaska waters from 1867 to 1960 does not support a finding that Congress granted Metlakatlans off-reservation fishing rights.

MIC states that after Congress created the Annette Islands Reserve, it "did not diminish in any way that fishing right . . . nor has it taken any action to do so since 1891."[49] MIC's arguments rely on the premise that Congress did not regulate Metlakatlans fishing in Southeast Alaska. The state failed to find any Indian law cases supporting the proposition a tribe has an implied off-reservation fishing right based on the federal government minimally regulating fisheries for the benefit of all commercial fishermen.[50]

From 1889 until 1958, Alaska's fisheries were relatively unregulated.[51] Commercial fishing businesses lobbied for minimal regulation.[52] From 1906 to 1924, forty-two bills were introduced in Congress to regulate Alaska's fisheries.[53] None passed.[54] "Between 1930 and 1939, the Alaskan commercial harvest averaged about 90 million salmon; the industry was prosperous and salmon prices increased.[55] Given these

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[49] MIC Opp., at pp. 8, 20 [Dkt. 23, pp. 13, 25]
[50] MIC ignores laws regulating Alaska's fisheries which never excluded Metlakatlans. *See* 43 Stat. 464(June 6, 1924); 48 Stat. 594(April 16, 1934); 72 Stat. 545(August 8, 1958).
[51] John H. Clark, Andrew McGregor, Robert D. Mecum, Paul Krasnowski and Amy Carroll, "The Commercial Salmon Fishery in Alaska," Alaska Fishery Research Bulletin 12(1):1-146, pp. 1-3 (ADF&G 2006); available at: http://www.adfg.alaska.gov/fedaidpdfs/AFRB.12.1.001-146.pdf (accessed on November 9, 2020).
[52] *Id*.
[53] *Id*. at p. 2.
[54] *Id*.
[55] *Id*.

profits, in Washington D.C., industry lobbied hard to ensure new regulations restricting harvests, proposed by the Bureau of Fisheries, were abandoned or liberalized."[56] Then, from 1940 to 1949, food scarcity during and after World War II led to abolishing most regulations and area closures, which only further reduced regulations.[57] The lack of regulations had significant consequences; it led to "overfished salmon runs" and forced Alaska at statehood to find a way to revive its once lucrative fisheries.[58]

This absence of fisheries regulations from 1867 to 1960 does not support MIC's claim that Congress recognized a Metlakatlan off-reservation fishing right. The entire commercial fishing industry in Alaska benefited from the financial boon of these minimal regulations. Congress did not minimally regulate Alaska fisheries because the 1891 Act granted Metlakatlans' some unexpressed off-reservation fishing right; it was minimally regulated for a variety of reasons unrelated to the Metlakatlans.

D. Metlakatlans were awarded limited entry permits and the State has never excluded them from commercial fishing in Southeast Alaska waters.

MIC's opposition boldly states, "even though the Metlakatlans have been and continue to be among the most economically dependent on the fisheries in Southeast Alaska, the State arbitrarily excluded Metlakatlan fishermen from participation" in the State's limited entry program.[59] This statement implies Metlakatlans have never held limited entry permits, or that the state has discriminated against Metlakatlans and barred

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[56] *Id*.
[57] *Id*. at p. 3.
[58] *Id*.
[59] MIC Opp., p. 8 [Dkt. 23, p. 13]

them from participating in the limited entry commercial fisheries.[60] Alaska fisheries' reports do not support MIC's assertions.

The limited entry program sought to conserve and rebuild Alaska's salmon harvests.[61] The limited entry program works by regulating and controlling the "entry of participants into the commercial fisheries in the public interest and without unjust discrimination."[62] In the 1970s, commercial fishermen were awarded limited entry permits based on point totals.[63] Points were calculated by considering: (1) whether a commercial fisherman historically participated in that commercial fishery; and (2) the commercial fisherman's economic dependence on fishing.[64] Initial permits were awarded by the state at no cost.[65] However, because the state issued a limited number of permits, the permits had some economic value.[66] Those not awarded permits could then purchase a limited entry permit and participate in these fisheries.[67]

Under this program, the State awarded limited entry permits to Metlakatlans who could then commercially fish in Southeast Alaska waters.[68] Admittedly, the data shows

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[60] *Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868 (N.D. Ca. 2015).
[61] *See Grunert v. State of Alaska*, 109 P.3d 924, 939-42 (Alaska 2005).
[62] AS 16.43.010.
[63] AS 16.43.010.
[64] 20 AAC 05.600 – 620.
[65] *See* Commercial Fishing Permits – Commercial Fisheries Entry Commission (November 2016); available at: https://cfec.state.ak.us/Publications/Commercial_Fishing_Permits.pdf (accessed on November 9, 2020).
[66] *Id.*
[67] *Id*.
[68] Metlakatla: Holdings of Limited Entry Permits, Sablefish Quota Shares, and Halibut Quota Shares through 1997 and Data on Fishery Gross Earnings, CFEC Report-98-SPMEtlakat-N (AK CFEC 1998); available at:

the number of permits held by the Metlakatlans declined over time.[69] Given the economic value of these permits, Metlakatlans appeared to have sold them.[70] Nevertheless, this data rebuts the Metlakatlans' assertion the State has barred them from obtaining limited entry permits.

Lastly, nothing prevents Metlakatlans from purchasing limited entry permits and participating in these fisheries, like all other commercial fishermen.[71] There may be costs to legally participate in these fisheries, but those costs are the same for Metlakatlans and other commercial fishermen who were not awarded limited entry permits in the 1970s.

III. CONCLUSION

MIC fails to state a claim for relief because: (1) ANCSA and the *Tlingit and Haida Indians of Alaska* decision extinguished any alleged Metlakatlan aboriginal fishing rights and without such rights they cannot successfully assert a claim of implied off-reservation fishing rights; and (2) the Annette Islands Reserve was not created to settle claims or as consideration for the Metlakatlans relinquishing land and water rights.

While MIC has failed to state a claim in this case, Metlakatlans retain the right to participate in Alaska's commercial fisheries like all other commercial fishermen. They

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https://www.cfec.state.ak.us/RESEARCH/coast98/METLAKAT.PDF (accessed on November 9, 2020); *see also* Dinneford, Elaine, "Changes in Holdings of Permanent Limited Entry Permits in Metlakatla, Alaska; 1975-1991," CFEC Report-92-12 (AK CFEC 1992).

[69] *Id*.

[70] *Id*. If Metlakatlans fished off-reservation as much as they assert, they would have been awarded permits assuming they applied. *See* 20 AAC 05.610.

[71] *See* Commercial Fishing Permits – Commercial Fisheries Entry Commission, p. 1 (November 2016).

previously were awarded limited entry permits. Nothing prevents Metlakatlans from obtaining additional permits to commercially fish in Southeast Alaska.

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CLYDE "ED" SNIFFEN
ACTING ATTORNEY GENERAL

By: s/Christopher F. Orman

Christopher F. Orman
Alaska Bar No. 1011099
Assistant Attorney General
Office of the Attorney General
Natural Resources Section
Alaska Department of Law
PO Box 110300
Juneau, AK 99811-0300
christopher.orman@alaska.gov
Phone: (907) 465-3600
Facsimile: (907) 465-3019

s/Jeffrey G. Pickett
Assistant Attorney General
Alaska Bar No. 9906022

Attorneys for the State of Alaska

CLYDE "ED" SNIFFEN
ACTING ATTORNEY GENERAL

Christopher F. Orman (Alaska Bar No. 1011099)
Jeffrey G. Pickett (Alaska Bar No. 9906022)
Assistants Attorney General
Alaska Department of Law
PO Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-3019
Email: *christopher.orman@alaska.gov*
jeff.pickett@alaska.gov

Attorneys for the State of Alaska

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FOR THE DISTRICT OF ALASKA

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I hereby certify that a true and correct copy of **Reply in Support of Motion to Dismiss** were 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-JWS who are registered CM/ECF users will be served by the CM/ECF system.

Christopher Lundberg; clundberg@hk-law.com
Joshua J. Stellmon; jstellmon@hk-law.com
Haglund, Kelly, Horngren, Jones, and Wilder
200 SW Market Street, Suite 1777
Portland, OR 97201-5727

/s/ Elizabeth R. Forkan 11/19/2020
Elizabeth R. Forkan
Law Office Assistant I