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' PETITION FOR PANEL AND EN BANC REHEARING

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INTRODUCTION AND RULE 35 STATEMENT

The panel concluded that when Congress created a reservation for the Metlakatla Indian Community, it intended to recognize non-exclusive off-reservation fishing rights in the areas where the parties dispute (but have not yet litigated) the existence and scope of the Community's historical fishing. The panel also concluded that Alaska's limited entry program is "incompatible" with that newly-found right.

This decision will have significant impact on Alaska's management of Southeast fisheries, undermining state laws that have guided fishing in the region for fifty years. Rehearing is warranted for three reasons.

First, the panel considered the Community's *allegations* of the nature, scope, and extent of its historical fishing practices in what are now state waters to conclude that the Community has off-reservation fishing rights. But the Community's historical fishing practices involve disputed facts. While disputed facts may be accepted as true for the purpose of determining whether they can support a claim upon which relief can be granted, mere allegations cannot sustain an affirmative fact-dependent ruling. The panel suggested it was undisputed that the Community had been fishing in Alaska's fishing districts 1 and 2 since time immemorial, and recognized an off-reservation fishing right based on that disputed

factual assertion. This conflicts with Rule 12(b)(6) and *United States v. Lummi Indian Tribe*, 841 F.2d 317, 319 (9th Cir. 1988).

Second, the panel's decision conflicts with *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 337, 342–43 (9th Cir. 1996), and *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78 (1918). In *Chehalis*, this Court refused to hold that Congress preserved off-reservation fishing rights simply because it created a reservation proximate to fishing grounds for a fishing people. The panel here accepted the very argument this Court rejected in *Chehalis*. The panel purported not to newly recognize an implied fishing right and to instead determine the contours of an implied right the Supreme Court already found in *Alaska Pacific Fisheries*. But that case was about the boundaries of the reservation, not "implied rights" as the panel's decision suggests. Opinion 20.

Third, the panel's decision conflicts with *United States v. Sohappy*, 770 F.2d 816, 823 (9th Cir. 1985), *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392, 398–403 (1968), and *Antoine v. Washington*, 420 U.S. 194, 207 (1975). Even when there are off-reservation fishing rights, states may regulate fishing in state waters so long as the regulations are "reasonable," "necessary for conservation purposes," and do "not discriminate against the Indians." *United States v. Sohappy*, 770 F.2d 816, 823 (9th Cir. 1985) (quoting *Puyallup* and progeny). Without any reference to binding precedent, without any analysis, and

without the issue being litigated by the trial court, the panel found that the State's fisheries regulations in districts 1 and 2 are "incompatible" with the Community's newly found off-reservation fishing right. When the Alaska Supreme Court considered the same issue last year, it applied binding federal precedent and concluded that the State's nondiscriminatory conservation program "easily" meets the federal standard. *Scudero v. State*, 496 P.3d 381, 386–89 (Alaska 2021).

The State is constitutionally mandated to maintain its fisheries to promote sustainability for the common use of all Alaskans. Alaska Const. art. 8, §§ 3, 4. The State created the limited entry program in response to overfishing and minimal regulation leading to crashing fish stocks. When the program was created, those who were historically most dependent on fishing in Alaska's fishing districts 1 and 2 (including some Community members) received free permits. Alaskans have been fishing under this system for a half century, during which these once free permits have become valuable property. These property rights have sustained small businesses, been the focus of divorce and inheritance proceedings, and are critical to the economic well-being of hundreds of Alaskans. Not only does the Court's conclusion substantially affect the State's sovereign ability to manage its fisheries, it also threatens the viability of generations of Alaskans' decades-old property rights.

BACKGROUND

In 1887, a Christian missionary persuaded about 800 Tsimshian Indians, known as Metlakatlans, to migrate from British Columbia to the Annette Islands for religious asylum. *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 48 (1962). He went to Washington to seek consent for that migration. 21 Cong. Rec. 10092 (Sept. 16, 1890).

Four years later, Congress passed an Act establishing the Annette Islands Reserve. The Act provides:

> 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 Indians, and those people known as Melakahtlans 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, 1101 (1891) (codified at 25 U.S.C. § 495).

Lawmakers explained the purpose of 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." 21 Cong. Rec. 10092. This "footing" was necessary, they explained, to protect the Community from people coming onto the land and taking minerals and timber, and because the Community lived in "constant terror" of having their land taken away, just as the Catholic Church had done when they lived in Canada. *Id.*

The Secretary regulates fishing within the reservation. 25 C.F.R. Part 241. The State regulates fishing in state waters. *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."); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

The State is constitutionally required to maintain its fisheries to promote sustainability for the common use of all Alaskans. Alaska Const. art. 8, §§ 3, 4. Since 1973, one of the ways the State has protected its fisheries from overfishing and facilitated 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 into the commercial fisheries in the public interest and without unjust discrimination." Alaska Stat. 16.43.010.

When the State adopted the limited entry program, Community members, like all other Alaskans, were eligible for free permits and many received them. *See* Reply to Mot. to Dismiss at 17–18, 5:20-cv-00008, Dkt. No. 24 (citing data

enumerating state permits issued to Community members at beginning of limited entry program). Permit applicants were prioritized based on economic dependence and past participation in the fishery. Alaska Stat. 16.43.250(a)(2); Alaska Admin. Code, tit. 20, § 05.600(a). The fishery includes state waters, but not the Annette Islands Reserve, which is not state water. Alaska Admin. Code tit. 20, § 05.310, tit. 5, § 33.200. Through the application process, Community members who fished in state waters were given credit for their past participation in the state water fishery; those who fished only within the boundaries of the Reserve were not given credit for past participation. *See May v. State, Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 880–82, 885 (Alaska 2007) (explaining that Community member was "being treated similarly to all other persons properly denied limited entry permits for which they are not eligible" and affirming eligibility criteria requiring May to have fished within the geographical area that defines the fishery, not simply in reservation waters outside the fishery).

In 2020, the Metlakatla Indian Community filed a lawsuit seeking a declaration that when Congress created the Annette Islands Reserve, it gave the Community an implied right to fish "in common with other users" and "free from unreasonable interference" from the State, focusing (for now) on state waters in Alaska's fishing districts 1 and 2. ER 43 (Compl.). The Community alleged that Alaska's limited entry program unreasonably interfered with its rights because the

permit allocations to fish in districts 1 and 2 were based on historical fishing in districts 1 and 2, and the State did not count "the fish landed by Community fisherman in the Community's reserved waters" as historical evidence of fishing in districts 1 and 2. ER 41. The Community also alleged that permits that were provided for free in the 1970s are today too expensive to purchase. ER 41. The State has consistently agreed that Community members, like all other Alaskans, are allowed to fish in state waters subject to state regulation. But the State argued that the 1891 Act did not give Community members any prioritized right above and beyond anyone else.

The district court dismissed the Community's complaint because the facts alleged were insufficient to conclude that the 1891 Act gave the Community or its members any implied off-reservation fishing rights. *Metlakatla Indian Community v. Dunleavy*, 2021 WL 960648 (D. Alaska Feb. 17, 2021). The court accepted as true the Community's allegations for the purpose of adjudicating the motion to dismiss: that the purpose of granting the reservation was to encourage the establishment of a self-sufficient community, that its Community members have always been a fish-reliant people, that the Reserve was adjacent to productive fishing grounds, and that since emigrating to the islands, Community members fished within a day's travel of the Reserve. *Id.* at *1. But, following this Court's precedent in *Chehalis*, the court held that these allegations, taken as true, were

simply insufficient to demonstrate the legal conclusion that Congress granted through implication off-reservation fishing rights. *Id.* at *6.

On appeal, this Court reversed. It interpreted the United States Supreme Court's decision in *Alaska Pacific Fisheries*—a case about the boundaries of the reservation—as implicitly recognizing an implied fishing right within the reservation. Opinion 20–21. And it expanded that purported right to include personal, ceremonial, and commercial fishing off reservation "in the areas where [the tribe has] fished since time immemorial and where they continued to fish in 1891." Opinion 22, 28. In reviewing the district court's Rule 12(b)(6) dismissal, the Court then suggested that it was undisputed that Community members have always, since time immemorial, fished in the state waters outside their reservation (in fishing districts 1 and 2). Opinion 22, 25. Finally, the Court held that Alaska's limited entry program "is incompatible with the Community's off-reservation fishing rights," and any regulation must be "consistent" with the Community's off-reservation rights. Opinion 27.

ARGUMENT

I. The panel's decision conflicts with Rule 12(b)(6) and *Lummi Indian Tribe* to the extent it made factual findings defining the scope and existence of an implied fishing right.

The panel suggested that it was undisputed that the Community had been fishing since time immemorial in districts 1 and 2 and found an implied right to

fish based on that asserted fact. But "historical fact[s] concerning Indian fishing" are *factual* questions to be decided by the trial court and *reviewed* by this Court. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 319 (9th Cir. 1988); *see also Chehalis*, 96 F.3d at 342.

The State did not challenge the Community's factual allegations about the history of its fishing because this is an appeal from a Rule 12(b)(6) order. The panel's decision conflicts with the standard of review and *Lummi Indian Tribe* by seeming to take the Community's one-sided history of its fishing practices as true—not merely to determine if the Community stated a claim, but to affirmatively find off-reservation fishing rights based on factual allegations.

Moreover, the panel appeared to make factual findings that the Community did not even allege. The panel stated, there "appears to be no dispute that the traditional fishing grounds of Metlakatlans have always included the waters within [Alaska's districts 1 and 2]." Opinion 22. The panel also stated, "[a]fter Congress established the reservation, Community members *continued to fish where they had always fished,* both in the waters immediately surrounding the reservation and in the waters miles away." Opinion 8–9 (emphasis added). In responding to the State's assertion that the Community lacked aboriginal rights, the panel stated "Metlakatlans and their Tsimshian ancestors asserted and exercised a right to fish in these waters since time immemorial." Opinion 25.

These disputed factual findings about historical aboriginal use are at the heart of the panel's holding. The panel held that the Act reserves for the Community "an implied right to non-exclusive off-reservation fishing *in the areas where they have fished since time immemorial* and where they continued to fish in 1891 when their reservation was established." Opinion 28 (emphasis added). The panel concluded that the Act "confirmed the continued existence" of this aboriginal right to fish in districts 1 and 2 since time immemorial. *Id.* at 25.

But the Community did not fish in districts 1 and 2 since time immemorial. It never even alleged that. Met. Opening Brief at 13–20; *see also* ER 24–25. Rather, the Community alleged that it fished in districts 1 and 2 *beginning* sometime in or after 1887 (after they immigrated to the Annette Islands). Met. Opening Br. at 13–20. In fact, in 1959, the Court of Claims listened to extensive evidence and found that the Haida and Tlingit Indians *exclusively* used since time immemorial the waters in districts 1 and 2. *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 457, 466-69 (Ct. Cl. 1959) ("The most valuable asset lost to these [Tlingit and Haida] Indians was their fishing rights in the area they once used and occupied to the exclusion of all others.").

Had the Community actually alleged that the reservation incorporated aboriginal fishing rights (i.e., those exercised since time immemorial), the State would have presented argument about how the Alaska Native Claims Settlement

Act "extinguished" "[a]ll aboriginal titles . . . including any aboriginal hunting or fishing rights that may exist" and "extinguished" "[a]ll claims against . . . the State . . . that are based on claims of aboriginal right . . . ." 43 U.S.C. § 1603; *see also United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134 (9th Cir. 1980) (ANCSA "extinguished not only the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title"). But because the Community's allegations did not assert aboriginal use in districts 1 and 2, the State had no occasion to develop and explain its ANCSA-related arguments.

The panel should clarify that the State can litigate disputed historical facts on remand from a Rule 12(b)(6) dismissal. The trial court would then review the evidence provided by both parties regarding the history of the Community's fishing—which has not yet happened at this early stage in the proceedings—and such facts would inform the existence, scope, and nature of any off-reservation fishing right that might exist. Alternatively, the en banc Court should vacate the decision as inconsistent with Rule 12(b)(6) and *Lummi Indian Tribe*, because the existence and scope of Indian fishing is a historical fact to be decided by the trial court after presentation of evidence from both parties and *reviewed* by the appellate court.

II. The panel's opinion conflicts with the Supreme Court's holding in *Alaska Pacific Fisheries*, and this Court's decision in *Confederated Tribes of Chehalis Indian Reservation*.

The panel misread *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78 (1918). It concluded that *Alaska Pacific Fisheries* already found that "there is an implied fishing right stemming from the 1891 Act." Opinion 20. The panel then described its analysis as merely interpreting the scope of that previously-found right. Opinion 20–21. But the United States Supreme Court never found an implied fishing right.

In *Alaska Pacific Fisheries*, the Supreme Court was asked to resolve the boundaries of the Annette Islands Reserve and the Community's ability to exclude people from the reservation. 248 U.S. 78. The case began with the United States seeking to enjoin a fishing company unaffiliated with the Community from fishing near the shores of the Reserve. *Id.* at 86. The Court was not determining whether the 1891 Act impliedly reserved fishing rights. Rather, it interpreted express statutory language: "what Congress intended by the words 'the body of lands known as Annette Islands.'" *Id.* at 87. Considering the circumstances in which the reservation was created (which included the needs of the Indians), it held that the ambiguous phrase was not simply a description of the uplands but embraced "the intervening and surrounding waters as well." *Id.* at 87, 89. The Court therefore upheld the Community's right "to exclude others from the waters surrounding their

islands on the ground that these waters were included within the original reservation." *Egan*, 369 U.S. at 49.

The Supreme Court never found an implied on-reservation fishing right, at least no more than defining geographic boundaries might imply rights for the Community to build houses, hunt, and live how it pleases on its own lands. The panel's statement otherwise reads too much into the Court's opinion. The panel here did not interpret the scope of a previously-identified right; it recognized new rights that had never before been judicially or legislatively confirmed.

The panel's opinion also conflicts with this Court's decision in *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996). This Court has already rejected the argument that a reservation created for a "fish-eating" people whose "livelihood depended on fish and seafood" is enough to infer off-reservation fishing rights. *Id*. at 337, 342–43. In *Chehalis*, the tribes argued that their executive order reservations impliedly reserved off-reservation fishing rights. *Id.* at 342. The executive orders creating the reservations in *Chehalis* did not mention fishing rights, just as the 1891 Act in this case did not mention fishing rights. *Id.* There was evidence that the location for one of the tribe's reservations was chosen based on its proximity to fishing resources, just at the Community alleges here. *Id.* at 343. And there was evidence that the tribes in *Chehalis* had long fished in the area, as the Community alleges here. *Id.* at 343. Nevertheless, the

Court affirmed that an intent to locate a reservation proximate to a fishing ground for a fishing people did "not amount to the creation of a special off-reservation fishing right." *Id.* The panel here did not explain how the intent to create a self-sufficient reservation for a fishing people impliedly reserved off-reservation fishing rights for the Community when parallel facts did not imply off-reservation fishing rights for the tribes in *Chehalis*. If *Chehalis* is not the law, then all reservations for tribes who fish would impliedly include off-reservation fishing rights, and that is not the case.

III. The panel's conclusion that Alaska's conservation program is "incompatible" with the Community's new-found implied off-reservation right is inconsistent with *Puyallup I,* and its progeny.

The United States Supreme Court as well as this Court has held that even when tribes have off-reservation fishing rights, states can regulate fishing so long as the regulation is "reasonable," "necessary for conservation purposes," and "does not discriminate against the Indians." *United States v. Sohappy*, 770 F.2d 816, 823 (9th Cir. 1985) (quoting *Puyallup Tribe v. Dep't of Game (Puyallup I)*, 391 U.S. 392, 398 (1968) and *Antoine v. Washington*, 420 U.S. 194, 207 (1975)). In other words, states can curtail off-reservation fishing rights for non-discriminatory conservation purposes. The Community has acknowledged this and agrees that the State can regulate its members' off-reservation fishing, including by closing fisheries. Met. Reply Br. 8, 24.

The panel cursorily concluded, without citing or applying binding precedent, that the State's permitting program is "incompatible" with the Community's implied right to fish and that any state regulation must be "consistent" with that right. Opinion 27. In so stating, it is unclear whether the panel meant to resolve an issue both parties agreed should occur in the first instance in the district court. *See* Met. Reply Br. at 23 (agreeing issue is for the district court in the first instance).

Complicating matters further, the Alaska Supreme Court recently concluded that the State's limited entry program *is* reasonable and necessary for conservation purposes. *Scudero v. State*, 496 P.3d 381, 386 (Alaska 2021). *Scudero* concerned the prosecution of a Community member for commercial fishing in state waters without a permit. *Id.* at 384. The Community provided amicus briefing in that case, asserting its members had an implied right to fish in state waters. *Id.* at 386. The Alaska Supreme Court concluded that even if the Community has a "reserved right to fish, on a non-exclusive basis, in the off-reservation waters surrounding the Reserve," it is "well settled that the State can regulate commercial fishing in its waters for conservation purposes." *Id.* at 386–88 (citing *Puyallup I* and its progeny). The court explained the purpose of the State's limited entry program "easily fall within the ambit of the 'conservation necessity' principle." *Id.*

It is not clear whether the panel meant to foreclose the application of *Puyallup I* and its progeny when it stated that Alaska's limited entry program is

"incompatible" with the Community's fishing rights and that any regulation would have to be "consistent" with such rights. Opinion 27. If the panel did not intend to foreclose the State from developing a record below to make the *Puyallup I* argument, it should make that clear. After all, "[e]ven where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation." *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75 (1962).

If, on the other hand, the panel meant to foreclose the State from arguing that its regulations meet the *Puyallup I* test, then en banc review is warranted. Such a decision would conflict with *Puyallup I* and its progeny.

CONCLUSION

The panel's decision about the existence and scope of implied off-reservation fishing rights is based on disputed facts, so conflicts with Rule 12(b)(6) and *Lummi Indian Nation*. The decision also conflicts with *Alaska Pacific Fisheries*, which never recognized an implied fishing right in the 1891 Act, and *Chehalis*, which rejected the argument the Community is making here—that creating a reservation for a fishing people impliedly reserves off-reservation fishing rights. If the panel intended to preclude the State from litigating on remand that its conservation program is reasonable, necessary for conservation, and nondiscriminatory, then the panel's opinion also conflicts with *Puyallup I* and its progeny.

For these reasons, rehearing is warranted. The panel should vacate its decision and conclude simply that based on the allegations, it is plausible the Community can assert off-reservation fishing rights and clarify that the State may litigate disputed historical facts and whether its permitting program meets the *Puyallup I* criteria. Should the panel decline to grant rehearing, en banc review is warranted because the panel's decision both creates intra-circuit conflicts and conflicts with decisions of the United States Supreme Court.

Date: September 21, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: September 21, 2022.

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