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Metlakatla Indian Community v. Dunleavy

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Metlakatla Indian Community v. Dunleavy, 58 F.4th 1034 (9th Cir. 2023).

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The United States Court of Appeals for the Ninth Circuit reversed the District Court of Alaska's judgment that dismissed the Metlakatla Indian Community's suit against Alaska's limited entry program. On appeal, the Ninth Circuit addressed whether and to what extent the 1891 Act preserved an implied off-reservation fishing right for members of the Metlakatla Indian Community. The Ninth Circuit ruled in favor of the Metlakatla Indian Community but remanded to the district court to determine the boundaries of the traditional off-reservation fishing grounds. Motions for rehearing and rehearing en banc were denied.

I. INTRODUCTION

In *Metlakatla Indian Community v. Dunleavy*,[1] the United States Court of Appeals for the Ninth Circuit held that the 1891 Act establishing the Metlakatla Indian Community's (the "Community") reservation preserved an implied right to nonexclusive off-reservation fishing within the tribe's traditional gathering locations.[2] The Community sued Alaska in the United States District Court for the District of Alaska, arguing that Alaska's limited entry program for commercial fishing impermissibly infringed on their reserved off-reservation fishing rights.[3] The district court held that the 1891 Act reserved no such rights and dismissed the tribe's suit.[4] The Ninth Circuit reversed the district court's judgment.[5] Applying the Indian Canons of Construction, the court held that the 1891 Act preserved an implied right to nonexclusive off-reservation fishing within the tribe's traditional areas.[6] The Ninth Circuit remanded to the district court to determine whether the traditional off-reservation fishing grounds include the areas impacted by Alaska's commercial fishing regulations.[7]

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1. 58 F.4th 1034 (9th Cir. 2023).
2. *Id.*
3. *Id.* at 1037.
4. *Id.* at 1041–42.
5. *Id.*
6. *Id.*
7. *Id.* at 1045.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Legal Framework: Indian Canons of Construction and Reserved Rights

The Canons of Construction ("Canons") are specific rules of construction for interpreting the documents that establish and define the federal-tribal relationship between the United States and Indian tribes.[8] In disputes arising under Federal Indian Law, the Supreme Court has stated that "the standard principles of statutory construction do not have their usual force," and the Canons are applied instead.[9] The Canons were first articulated in the context of treaty interpretation, but have since been extended to executive orders, statutes, federal regulations, and other sources of positive law.[10] Regardless of the type of document being examined, the reviewing court will only apply the Canons when the document is determined to be ambiguous.[11] The Canons require that (1) treaties and agreements must be construed as the tribes would have understood them when they were entered; (2) treaties, agreements, statutes, and executive orders must be liberally construed with all ambiguities resolved in the tribes' favor; and (3) abrogation of tribal sovereignty or property rights must be clearly and unambiguously expressed by Congress.[12]

The Canons are "rooted in the unique trust relationship between the United States and the Indians."[13] The Court first articulated the trust relationship in *Cherokee Nation v. Georgia*,[14] in which Chief Justice Marshall characterized the Cherokee Nation as a "domestic dependent nation."[15] Justice Marshall recognized the tribe as a "distinct political society" that was "capable of managing its own affairs and governing itself," but also characterized the relationship with the federal government as resembling a ward and its guardian.[16] The Canons were subsequently announced in the related case of *Worcester v. Georgia*,[17] in which the Court considered the boundaries of state, federal, and tribal authority over

8. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton, ed., 2019) [hereinafter "COHEN"].

9. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

10. *See, e.g.*, Winters v. United States, 207 U.S. 564 (1908) (agreement creating the Fort Belknap Reservation); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (Statute); Arizona v. California, 373 U.S. 546 (1963) (Executive order).

11. South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress").

12. *Cohen*, *supra* note 8, § 2.02.

13. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

14. 30 U.S. 1 (1831).

15. *Id.* at 17.

16. *Id.* at 16–17.

17. 31 U.S. 515 (1832).

Cherokee territory.[18] The Court emphasized that the unequal bargaining positions of the parties required the Court to read the Treaty of Hopewell as the Indian signatories, who could neither read nor write English, would have understood it.[19] From that perspective, the Court determined that the Cherokee Nation had not surrendered its sovereignty to the United States.[20]

The Court, through Chief Justice Marshall's detailed analysis of the Treaty of Hopewell, posited that a treaty was a grant of rights from a tribe to the United States, with the tribe reserving for itself all interests not granted.[21] This framing respects the inherent sovereign status of tribes and recognizes treaties as public documents of governance memorializing a government-to-government relationship with the United States.[22] The Court elaborated on this framework in later decisions contemplating reserved tribal rights to water, hunting, fishing, and gathering.[23]

Aboriginal Indian title refers to a tribe's claim to land based on its sovereignty and its historic use, possession, and occupation of the territory.[24] To establish aboriginal title, a tribe must show its "actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property."[25] Aboriginal title, which includes hunting, fishing, and gathering rights,[26] remains with a tribe unless it has been granted to the United States by treaty, extinguished by statute, or abandoned by the tribe.[27] If aboriginal title to land is extinguished, so are the hunting, fishing, and gathering rights on that land—unless those rights are expressly or implicitly reserved by treaty, statute, or executive order.[28] Courts will generally only find that aboriginal title has been extinguished upon a showing of "plain and unambiguous" congressional intent.[29]

The Court established the foundational principles for determining the existence and extent of implied off-reservation rights in its decision in the seminal water rights case, *Winters v. United States*.[30] The *Winters* Court found implied water rights for the Gros Ventre and Assiniboine tribes on the Fort Belknap Reservation in Montana.[31] The *Winters* Court explained that the act of creating a reservation for a tribe impliedly reserves sufficient water rights to fulfill the purposes for which that land

18. *Id.*
19. *Id.* at 551.
20. *Id.* at 553.
21. *Cohen*, *supra* note 8, § 2.02.
22. *Id.*
23. United States v. Winans, 198 U.S. 371, 381 (1905).
24. *Cohen*, *supra* note 8, § 15.04(2).
25. *Id.*
26. *Id.* at § 18.01.
27. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).
28. *Cohen*, *supra* note 8, § 18.01.
29. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247–48 (1985).
30. 207 U.S. 564 (1908).
31. *Id.* at 576–77.

was reserved.[32] In *Arizona v. California*,[33] the Court provided that such water rights are "intended to satisfy the future as well as the present needs" of the reservation's tribal members.[34]

The Ninth Circuit has applied the principles from the *Winters* decision and the Canons to determine the existence and extent of a tribe's implied rights.[35] In *Colville Confederated Tribes v. Walton*,[36] the Court found an implied right was sufficient water for irrigation and "for the development and maintenance of replacement fishing grounds."[37] The court broadly construed the reservation's general purpose, to provide a home for the tribe, as including the preservation of the tribe's access to fishing grounds.[38] Similarly, in *United States v. Adair*,[39] the Court inferred a water right sufficient to ensure an adequate amount of game and fish for the Klamath Tribe in Oregon.[40] The Court found that a primary purpose of the reservation was to "secure to the Tribe a continuation of its traditional hunting and fishing lifestyle," citing the historical importance of hunting and fishing to the tribe and noting that the Treaty language also reflected this importance.[41]

In *United States v. Michigan*[42], the Sixth Circuit upheld the district court's finding of implied non-exclusive fishing rights in parts of the Great Lakes for the Ste. Marie Tribe of Chippewa Indians of Michigan and Bay Mills Indian Community.[43] The district court determined that the treaty "impliedly reserved a right to fish commercially and for subsistence."[44] Applying the Canons and the *Winters* doctrine, the district court reasoned that when the tribe signed the treaty, it depended almost exclusively on commercial fishing for its livelihood such that a voluntary abandonment of fishing rights would have been "tantamount to agreeing to a systematic annihilation of their culture and perhaps of their very existence."[45]

B. Historical Background

Since time immemorial, the Community members, and their Tsimshian ancestors, have lived and fished throughout the Pacific Northwest.[46] Traditionally, the Tsimshian live in northwestern British

32. *Id.*
33. 373 U.S. 546 (1963).
34. *Id.* at 599–600.
35. *Cohen*, *supra* note 10, § 19.03.
36. 647 F.2d 42 (9th Cir. 1981).
37. *Id.* at 48.
38. *Id.*
39. 723 F.2d 1394 (9th Cir. 1983).
40. *Id.* at 1409.
41. *Id.*
42. 653 F.2d 277 (6th Cir. 1981).
43. *Id.* at 278–280.
44. United States v. Michigan, 471 Supp. 192, 258 (W.D. Mich. 1979).
45. *Id.*
46. Metlakatla Indian Cmty. v. Dunleavy, 58 F.4th 1034, 1037 (9th Cir. 2023).

Columbia along the Nass and Skeena rivers and south to the Milbanke Sound.[47] In 1862, the Tsimshian established a coastal community and communal fishing enterprise in Metlakatla, British Columbia.[48] By 1884, the Community's enterprise expanded to include a fish cannery that produced 8,300 cases of canned fish in its first year.[49]

During this time, the Canadian government began implementing its reserve system in Tsimshian territory by dividing tribal land into individual allotments for tribal families and appointing a federal agent to oversee tribal affairs.[50] The Community sought recognition of its aboriginal resource rights to protect itself from increased competition from non-Indian fishermen and commercial canneries.[51] The provincial Supreme Court denied the Community's request, prompting the Community to seek land in the Alaska Territory.[52] President Grover Cleveland supported the Community's bid, and by 1887 the group began relocating its members to the Annette Islands.[53] The Community chose the Annette Islands for their abundant fishing potential that could provide for both the Community's subsistence needs and the industrial development of its commercial enterprise.[54] Congress officially recognized the Metlakatla Indian Community and established the Annette Islands as their reservation in the 1891 Act.[55]

After relocating, Community members continued to fish in their traditional areas—often traveling miles off the reservation.[56] The Community also reestablished a cannery and ramped up its commercial production in the following years.[57] In 1916, the Court recognized the importance of fishing to the Community's goals of self-sufficiency and commercial industry when it upheld the Community's exclusive fishing rights in waters surrounding the reservation.[58] The Court reasoned that the purpose of creating the reservation was to "encourage, assist, and protect" the Community in its goals of self-sufficiency and industry, which necessarily included the waters surrounding the reservation.[59]

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47. MARJORIE M. HALPIN & MARGARET SEGUIN, *Tsimshian Peoples: southern Tsimshian, Coast Tsimshian, Nishga, and Gitksan, in* 7 HANDBOOK OF NORTH AMERICAN INDIANS 267, (Wayne Suttles & William Sturtevant eds., 1990).
48. *Metlakatla*, 58 F.4th at 1037.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 1038.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).
59. *Id.*

C. Alaska's Limited Entry Program

In 1973, Alaska enacted legislation regulating commercial fisheries to promote the conservation and sustained yield of the fishery resource.[60] The limited entry program required commercial fishermen to obtain permits to access fisheries designated as distressed or otherwise at capacity.[61] The program prioritized applicants based on economic dependence and historical participation in the fishery through a point-allocation system to award free permits.[62] Points are awarded based on the length of time the applicant held a state license for their commercial fishing gear and their dependence on harvesting from the fishery while a license holder.[63] However the Community members cannot accrue points under this program because the state lacks regulatory authority over the reserve and tribal harvesting does not implicate state gear licenses.[64] The reserve is located in and contiguous to Districts 1 and 2, which are regulated by the State's limited entry program.[65] As a result, the Community members are unable to procure permits and risk state prosecution or exclusion from the surrounding waters, where they historically fished.[66]

D. Lower Court Proceedings

On August 7, 2020, the Community brought suit against Alaska in the United States District Court for the District of Alaska, alleging that the limited-entry program illegally restricts the Community members' off-reservation reserved fishing rights.[67] The complaint sought declaratory relief that the 1891 Act included a non-exclusive right to fish in nearby waters designated by Alaska as Districts 1 and 2.[68] Additionally, the complaint sought to enjoin Alaska from exercising jurisdiction over and unreasonably interfering with Community members' attempts to exercise their reserved fishing rights.[69]

The state filed a motion to dismiss for failure to state a claim upon which relief can be granted, arguing that the Community had failed to establish sufficient evidence that Congress had granted any implied off-reservation fishing rights when it enacted the 1891 Act.[70] The court

60. Alaska Stat. § 16.43.010 (2021).
61. Alaska Admin. Code tit. 20, § 05.100 (2023).
62. *Id.* § 05.600.
63. *Id.* § 05.630.
64. Plaintiff-Appellant's Opening Brief at 20, Metlakatla Indian Cmty. v. Dunleavy, 58 F.4th 1034, 1037, No. 21-35185, (9th Cir. 2023).
65. *Id*. at 21.
66. *Id*.
67. Metlakatla Indian Cmty. v. Dunleavy, 58 F.4th 1034, 1041 (9th Cir. 2023).
68. *Id*.
69. *Id*.
70. Metlakatla Indian Community v. Dunleavy, No. 5:20-cv-00008, 2021 WL 960648, at *2 (D. Alaska Feb. 17, 2021).

granted the motion to dismiss.[71] It reasoned that even when construing the Act liberally in favor of the Metlakatla, the reservation's purpose was missionary in nature: to provide "a secure place to live and to encourage the establishment of a self-sufficient, Christian community that other Alaska natives could emulate."[72] The court further reasoned that the Metlakatlans abandoned any claims to implied reserved rights when they voluntarily emigrated to the island, distinguishing the Community's origins from that of other indigenous tribes.[73] The Community appealed the decision to the Ninth Circuit.

III. ANALYSIS

A three-judge panel of the Ninth Circuit Court of Appeals reversed the district court's judgment.[74] The Ninth Circuit determined that the Supreme Court's decision in *Alaska Pacific Fisheries v. United States*[75] had already established the Community's "implied fishing right stemming from the 1891 Act."[76] Thus, the question on appeal was the scope of that right.[77] The Ninth Circuit held that "the 1891 Act 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."[78]

On appeal, the Community argued that the district court erred in dismissing the complaint for failure to state a claim for relief.[79] The Community argued that the legal framework established by the Canons and the reserved rights doctrine support the plausibility of their claim that Congress impliedly reserved the Community's off-reservation fishing right in the waters adjacent to the Annette Islands.[80]

Alaska argued that the "plain and unambiguous statutory language" does not grant off-reservation rights, and that the Canons should not be applied when no ambiguity exists.[81] Further, Alaska argued that the legislative history demonstrated no congressional intent to convey off-reservation fishing rights.[82] Finally, Alaska argued that the Community

71. *Id*.
72. *Id*. at *6.
73. *Id.* at *7.
74. Metlakatla Indian Cmty. v. Dunleavy, 58 F.4th 1034, 1042 (9th Cir. 2023).
75. 248 U.S. 78, 88–89 (1918).
76. *Metlakatla*, 58 F.4th at 1044.
77. *Id*.
78. *Id*. at 1045.
79. Appellant's Opening Brief at 25, ECF No. BL-17. Metlakatla Indian Community v. Dunleavy, 58 F. 4th 1034, No. 21-35185, (9th Cir. 2023) ECF No. BL-17.
80. *Id.* at 31.
81. Appellee's Answer 20–24, Metlakatla Indian Community v. Dunleavy, 58 F. 4th 1034, No. 21-35185, (9th Cir. 2023) ECF No. BL-24.
82. *Id*. at 25.

relinquished its aboriginal fishing rights when its members left their traditional territory to settle on the Annette Islands.[83]

The Ninth Circuit disagreed with Alaska's argument that the Canons and reserved rights doctrine do not apply to the Community because they did not receive their reservation as part of land exchange.[84]No case law supported this claim and the Ninth Circuit expressed doubt that any reservation was the product of a genuine exchange.[85] Further, the Ninth Circuit rejected Alaska's contention that the 1891 Act's silence on fishing rights prevents a finding for implied fishing right.[86] Harkening back to Chief Justice Marshall's framework, the Ninth Circuit reiterated that the Canons are rooted in the trust relationship between two political sovereigns.[87] This underscored the importance of the recognition of the government-to-government relationship, and the constitutive rights it modifies, rather than the type of document chosen to memorialize the relationship.[88] Therefore, the Ninth Circuit held "the type of legal instrument that establishes a reservation […] makes no difference to [its] inquiry into a tribe's attendant resource rights."[89]

The Ninth Circuit also rejected Alaska's claim that the legislative history's silence on off-reservation fishing demonstrates a lack of intent to convey those rights.[90] Alaska's analysis of the congressional record was largely irrelevant and failed to discuss whether Congress understood that the Community would support itself through off-reservation fishing.[91]

To determine the scope of the Community's fishing rights, the Ninth Circuit followed the framework established in the reserved rights doctrine and examined the "central purpose of the reservation, understood in light of the history of the Community."[92] This approach recognized the Community's long-established history of fishing throughout their aboriginal territory "for ceremonial purposes, for personal consumption, and for trade."[93] The Community established a commercial cannery to "adapt their mode of trade to modern conditions," and promptly resumed this commercial enterprise upon relocating to the Annette Islands.[94] This economic consistency supports the contention that the Community and Congress intended for the Community to support itself through its fishing activities.[95] Further, the Community possessed an aboriginal fishing right that had not been expressly abrogated by Congress.[96] Congress

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83. *Id.* at 28.
84. *Metlakatla,* 58 F.4th at 1045.
85. *Id.* at 1047.
86. *Id.*
87. *Id.* at 1046
88. *Id.*
89. *Id.* at 1046.
90. *Id.* at 1047.
91. *Id.*
92. *Id.* at 1044.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1046.

contemplated that the Community would continue to fish off-reservation throughout its traditional territory to satisfy its present and future needs.[97] In light of this historical economic, cultural, and subsistence reliance on fishing, the court inferred that the 1891 Act reserved the Community's off-reservation fishing right for personal, ceremonial, and commercial needs.[98]

IV. CONCLUSION

The Ninth Circuit's decision established the Metlakatla Community's right to fish off-reservation in their traditional waters. The decision further clarified the scope of that right extends to personal, ceremonial, and commercial uses. On remand, the district court must determine the boundaries of the Community's traditional fishing waters as it relates to Alaska's limited entry regulations. The decision strongly bolsters judicial application of the Canons and the reserved rights doctrine to promote tribal sovereignty and the finding of implied off-reservation rights.

97. *Id.*
98. *Id.* at 1045.