12-668

No. 12-___

IN THE

Supreme Court of the United States

NATIVE VILLAGE OF EYAK;
NATIVE VILLAGE OF TATITLEK;
NATIVE VILLAGE OF CHENEGA;
NATIVE VILLAGE OF NANWALEK;
NATIVE VILLAGE OF PORT GRAHAM,
Petitioners,

v.

REBECCA BLANK, ACTING SECRETARY OF COMMERCE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit agreed with the district court's findings that at the time of first contact with Europeans, the Chugach were a culturally, ethnically and linguistically related people who had made actual and continuous use and occupancy of an area of the Outer Continental Shelf for a long time. The courts also agreed there was no evidence that others used the area, except for the periphery. Based on these showings by the Chugach, did the Ninth Circuit err in concluding that the exclusive use required to establish aboriginal title was defeated by a failure to demonstrate an ability to expel a hypothetical invader, by other groups' use of the periphery of the Chugach territory, and by the fact that the Chugach villages were politically independent?

PARTIES TO THE PROCEEDINGS

The petitioners, Native Village of Eyak, Native Village of Tatitlek, Native Village of Chenega, Native Village of Nanwalek, and Native Village of Port Graham (collectively, "Chugach" or "Villages"), were plaintiffs and appellants in the action and appeal below. The respondent, Rebecca Blank, Acting Secretary of Commerce ("Secretary"), was the defendant and appellee.

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's *en banc* opinion affirming the district court's judgment that the Chugach failed to establish aboriginal rights is reported at 688 F.3d 619 (9th Cir. 2012) and reproduced in petitioners' Appendix ("App.") at 1a-37a. The district court's decision is unreported and reproduced at App. 76a-101a.

JURISDICTION

The Ninth Circuit entered its opinion and judgment on July 31, 2012. On October 23, 2012, Justice Kennedy granted petitioners an additional 30 days (to November 28, 2012) to file a petition for certiorari. This petition for certiorari is timely filed. This Court has jurisdiction to review the Ninth Circuit's judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Preliminary Statement

This case concerns the aboriginal fishing and hunting rights of the Chugach Eskimos and their effort to continue exercising those rights without foreclosing non-Native use. For thousands of years before European contact, the Chugach regularly fished, hunted and traversed the ocean waters surrounding Prince William Sound and the Lower Kenai Peninsula in southwestern Alaska. Based on this history, the Chugach have the right to non-exclusive access to the commercial fisheries for sablefish and halibut in these waters. But the Secretary, who now regulates these fisheries, has refused to recognize this right. Without judicial relief, the Chugach will continue to be barred from these fisheries and denied their aboriginal rights.

This Court has long recognized the crucial importance of the doctrine of aboriginal rights to the preservation of Native property and culture:

> Humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in

> their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 589 (1823).

Under this doctrine, the law recognizes aboriginal rights of Native people who establish "actual, exclusive, and continuous use and occupancy 'for a long time'" of a reasonably well-defined area. *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967). This use and occupancy requirement must be measured "in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." *Id.*

To establish aboriginal rights, a Native group must satisfy a four-part test by demonstrating that its use and occupancy of the area claimed was (1) actual, (2) continuous, (3) exclusive, and (4) for a long time prior to contact with Europeans. *Sac & Fox*, 383 F.2d at 998. The Ninth Circuit ruled that the Chugach had satisfied all parts of this test except for the exclusivity requirement.

The Ninth Circuit's decision was based on a legally erroneous construction of the exclusivity requirement. There was no evidence that any other Native group similarly used and occupied the claimed area. Under the doctrine of aboriginal rights, that is all the Chugach were required to prove to demonstrate exclusivity. However, the Ninth Circuit held that the Chugach did not satisfy the exclusivity requirement to any portion of the claimed area because the district court had found that neighboring Native groups likely fished and hunted the waters "on the periphery

of the Chugach territory," that the Chugach lacked the ability to repel a hypothetical invader, and that because the Chugach villages had a certain degree of political independence from each other, their use of the area could not be considered as a whole. App. 8a-12a. By adding these requirements, the Ninth Circuit drastically modified the previously well-accepted meaning of the "exclusivity" needed to establish aboriginal rights.

The Ninth Circuit's decision represents a significant departure from the doctrine of aboriginal rights and creates a conflict in the Circuits. Without warrant, the decision substantially increases the already heavy evidentiary burden that Native groups must carry to secure recognition of their aboriginal rights. Certiorari is warranted to correct the erroneous course that the Ninth Circuit charted.

B. Regulatory Framework

In 1993, the Secretary promulgated regulations limiting access to the Outer Continental Shelf ("OCS")[1] fisheries under the Magnuson Fishery Conservation Management Act ("Magnuson Act"), 16 U.S.C. §§ 1801-1882, and the Northern Pacific Halibut Act of 1982 ("Halibut Act"), 16 U.S.C. §§ 773-773k. Under these regulations, any boat fishing commercially for halibut or sablefish in portions of the Gulf of Alaska must have an Individual Fishing

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[1] The OCS includes U.S. territorial waters from three to 200 miles offshore. The term "EEZ"–Exclusive Economic Zone–has sometimes been used in this litigation to describe the same area. In this case, the Chugach claim rights in an area that extends from three miles to up to 60 miles into the waters surrounding Prince William Sound and the Lower Kenai Peninsula in Alaska.

Quota ("IFQ") permit specifying the maximum amount of fish that the vessel may take. 50 C.F.R. § 679.4(d)(1)(ii).

The regulated area encompasses the Chugach's aboriginal fishing and hunting grounds. But in allocating IFQs, the Secretary failed to take into account the Chugach's aboriginal rights. The Secretary allocated IFQs only to persons or entities who happened to own or lease vessels used to catch halibut or sablefish, and who actually caught those fish, between 1988 and 1990; Chugach members who did not own or lease a fishing vessel and catch those fish between 1988 and 1990 were ineligible. *See* 50 C.F.R. §§ 679.40(a)(2)(A)-(B) & 679.40(a)(3)(i). Fishermen qualifying for IFQs were allocated a fraction of the total allowable catch (a "quota share") based on their proportion of the total catch between 1984-1990 (for halibut) or 1985-1990 (for sablefish). *See* 50 C.F.R. § 679.40(a)(4)(i)-(ii).

The Secretary's decision to award fishing rights based solely on a recent three-year period (1988-1990) disregarded the thousands of years the Chugach fished and hunted in their aboriginal territory. At the same time, the Secretary failed to take into account the impact of the Exxon-Valdez oil spill, which occurred in Prince William Sound on March 23, 1989. Many Chugach fishermen who owned or leased vessels decided to participate in environmental cleanup after the catastrophic spill and thus did not fish (or fished less) during these years.[2] They had

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[2] The U.S. Department of the Interior, Minerals Management Service, Alaska OCS Region published a report on how the spill dramatically reduced Native participation in fisheries and caused reluctance to eat the resources. IMPACT ASSESSMENT, INC., *EXXON VALDEZ* OIL SPILL, CLEAN-UP, AND LITIGATION:

no way of knowing that by engaging in cleanup efforts, they were materially damaging their right to fish or hunt in this area again. The Chugach have been shut out of commercial fishing for halibut and sablefish in this area ever since.

In this case, the Chugach seek vindication of their non-exclusive right to fish in OCS waters that are part of their aboriginal territory. The Ninth Circuit recognized non-exclusive rights to fish and hunt in the OCS based on aboriginal title in *Gambell v. Hodel* (*"Gambell III"*), 869 F.2d 1273 (9th Cir. 1989). In *Gambell III*, the Alaska Native Villages of Gambell and Stebbins claimed that the government's sale of oil and gas exploration leases on the OCS would interfere with their aboriginal right to fish and hunt on the OCS. *See* 869 F.2d at 1275. The Ninth Circuit held that the villages' claims were legally cognizable, notwithstanding federal paramountcy. *Id.* at 1276-77. Here, the Chugach assert the same right that the Ninth Circuit recognized in *Gambell III*—*i.e.*, a non-exclusive right to fish in OCS waters that are part of their aboriginal territory.

In asserting non-exclusive rights, the Chugach are not requesting that current IFQ permit-holders be ejected from the fisheries. They request only that the regulations be revised in a way that accommodates the Chugach's aboriginal rights. The Secretary would retain discretion to determine how best to allocate the allowable catch among interested parties, so long as the Chugach are granted access consistent with their rights.

A COLLECTION OF SOCIAL-IMPACTS INFORMATION AND ANALYSIS 27-29, 31 (2001), http://www.arlis.org/docs/vol1/E/51215707/51215707v3.pdf.

C. Case History

The Chugach brought this action for recognition of non-exclusive fishing rights on the OCS based on aboriginal use following the decision in *Eyak Native Village v. Trawler Diane Marie, Inc.* (*"Eyak I"*), 154 F.3d 1090 (9th Cir. 1998). In *Eyak I*, the Chugach challenged the Secretary's failure to take into account aboriginal rights in promulgating the 1993 halibut and sablefish regulations. *Id.* at 1092. In that case, the Chugach asserted that they had *exclusive* aboriginal rights to fish and hunt on the OCS. *Id.* In response, the Secretary invoked the federal paramountcy doctrine, under which federal regulation of offshore waters preempts state regulation of those areas. *Id.*

In *Eyak I*, the district court ruled that federal paramountcy precluded aboriginal title in the OCS. *Id.* The district court also ruled in the alternative that there is no exclusive right to fish in navigable waters based on aboriginal title outside of a treaty or federal statute. *Id.* The Ninth Circuit affirmed on federal paramountcy grounds and declined to address the district court's alternative holding. *Id.* at 1097 & n.6.

The Chugach filed this action in November 1998, asserting *non-exclusive* rights to fish and hunt in OCS waters based on aboriginal use.[3] The district court granted summary judgment for the Secretary,

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[3] By asserting non-exclusive aboriginal rights in this case, as opposed to the exclusive rights asserted in *Eyak I*, the Chugach are not seeking to exclude IFQ permit-holders from the Chugach's aboriginal territory. Rather, the Chugach are seeking recognition of their aboriginal right to be included in the IFQ system managed by the Secretary.

holding that federal paramountcy precludes *all* aboriginal fishing and hunting rights on the OCS, including non-exclusive rights. App. 38a-71a. Having barred the Chugach's claim of aboriginal rights as a matter of law, the district court declined to determine whether the Chugach had produced sufficient evidence to support their claim. App. 71a

On appeal, a three-judge panel of the Ninth Circuit *sua sponte* requested briefing on whether the case should be considered *en banc* in view of the seemingly conflicting decisions in *Eyak I* and *Gambell III*.

After accepting and hearing the case *en banc*, the Ninth Circuit directed the district court to develop a full factual record on the scope of the Chugach's aboriginal rights on the OCS. App. 72a-73a. The court vacated the district court's summary judgment order and remanded "with instructions that the district court decide what aboriginal rights if any, the plaintiffs have." App. 73a. The court further directed that, for purposes of the remand, "the district court should assume that the villages' rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Id.*

On remand, the Secretary again moved for summary judgment. This time, the district court denied the Secretary's motion, ruling there were genuine issues of material fact regarding the Chugach's use of the OCS. App. 81a.

The case finally went to trial four years after the remand, and after more than a decade of litigation. During a seven-day bench trial, the district court heard testimony from six expert anthropologists, an expert in Native languages, four fisheries biologists, and six Chugach tribal elders whose responsibility it

is to maintain and pass on Chugach oral history and culture. The court heard extensive evidence demonstrating that the Chugach fished and hunted in the OCS waters and have had the equipment, know-how, and occasion to fish and hunt on the OCS dating back prior to their first contact with European explorers in the eighteenth century. Through contemporaneous historical documents, five eighteenth-century eyewitness accounts were presented.

There was no evidence during trial that any other group besides the Chugach fished or hunted in the claimed OCS waters before European contact. Substantial evidence was presented indicating that the Chugach were the only Native group to have used the claimed area of the OCS. For example, the court heard unrebutted evidence that the Chugach were the only Native group to have place-names in their native language for geographic features within the claimed area of the OCS, including Wessels Reef, Seal Rocks, and Middleton Island. Expert witnesses explained that the fact that no other Native group had names for these locations in its language strongly suggests that the other Native groups did not frequent these locations. App. 23a.

The district court entered findings of fact and conclusions of law in August 2009. App. 76a-101a. The court expressly found that the Chugach were a seafaring people who traveled regularly and fished seasonally on the OCS during pre-contact times and subsequently. App. 89a, 92a-94a. But rather than analyze these facts under the applicable legal test for aboriginal rights—long-term, exclusive use and occupancy of the area in question—the district court ruled as a matter of law that aboriginal fishing rights cannot exist on the OCS or in any "navigable waters."

App. 98a-99a. According to the district court, "no such right exists as a matter of Native American law or statute with respect to the OCS." App. 98a. The district court also reinstated the legal rulings it made when it granted summary judgment to the Secretary in 2002. App. 100a-101a.

D. Ninth Circuit *En Banc* Opinion

On appeal, the Chugach argued that the district court had failed to apply the applicable legal test and exceeded the scope of its mandate on remand. The Chugach further argued that if the correct legal standard is applied to the district court's factual findings, the Chugach had established aboriginal rights to the claimed OCS waters. The Ninth Circuit heard the appeal *en banc*.

A 6-5 majority of the *en banc* court affirmed the district court's ruling dismissing the Chugach's claims in their entirety. App. 1a-13a. The majority did not disturb any of the district court's factual findings. The majority concluded that, based on these findings, the Chugach had satisfied the long-term, continuous use and occupancy requirements of the legal test for aboriginal rights. App. 7a-8a.

However, in its *per curiam* opinion, the majority concluded that the "exclusivity" requirement of the test was not satisfied. The majority rejected the Chugach's argument that the exclusivity requirement was satisfied because there was no evidence that any group other than the Chugach hunted and fished in the claimed area, relying on the district court's findings that neighboring tribes had likely fished and hunted on the "periphery" of the claimed territory, that the Chugach villages were operated independently, and that the population of the ancestral

Chugach villages was too low to have been able to exercise dominion and control over the claimed area. App. 8a-13a. The majority affirmed the district court's decision without reaching the issue of paramountcy. App. 13a.

Judge William Fletcher dissented, joined in full by three other judges. The dissent concluded that the Chugach had satisfied the legal test for aboriginal rights and that the Chugach's aboriginal rights to hunt and fish on the OCS do not conflict with the federal paramountcy doctrine. App. 14a-37a. A fifth judge joined the dissent insofar as it concluded that the Chugach had demonstrated aboriginal rights to the claimed area.

The dissent agreed with the majority that the Chugach had demonstrated long-term, continuous use and occupancy of the claimed area. App. 16a. But it disagreed with the majority's conclusion that the Chugach did not satisfy the exclusivity requirement. App. 16a-30a. The dissent argued that to establish exclusivity under the recognized legal test for aboriginal rights did not require the Chugach to show that they could have repelled hypothetical intruders from the claimed area, as suggested by the district court's population finding. App. 17a-19a. Rather, the dissent explained that, in the absence of evidence of use by others, the case law requires only that the Chugach show that they were the only group that used and occupied the area. *Id.* The dissent found that the Chugach had made this showing for the claimed area, except for parts of the periphery. App. 19a-30a.

The dissent further found that the district court's conclusion that the Chugach's pre-contact hunting and fishing activities "did not give rise" to aboriginal

rights on the OCS was premised on legal errors because the district court had not applied the recognized legal test. App. 35a-37a. The dissent explained that the district court had assumed incorrectly that the law required the Chugach to show an ability to exclude others from the claimed area, even in the absence of use by others. App. 35a-36a. In addition, the dissent found that the district court had mistakenly analyzed the aboriginal rights of the individual Plaintiff Villages, as opposed to the Chugach as a whole, despite finding that the Chugach were culturally, ethnically, and linguistically related, and were "recognized by themselves and others as the Chugach." App. 36a-37a.

The dissent concluded, based on the district court's findings, that the exclusivity requirement had been satisfied with respect to at least some parts of the claimed area. App. 30a. The dissent would have reversed and remanded with instructions to the district court to find, under the proper legal test, precisely where within the claimed area the Chugach have aboriginal rights. App. 37a.

Because the dissent concluded that the Chugach had established aboriginal hunting and fishing rights in at least part of the claimed area of the OCS, it next addressed the question whether non-exclusive aboriginal rights are consistent with federal paramountcy. The dissent concluded that they are consistent. App. 30a-35a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision conflicts with well-established law governing a matter of special federal concern. Specifically, the Ninth Circuit's decision radically revises the accepted definition of "exclusivity" in determining aboriginal rights in three distinct ways. This decision creates a conflict in the circuits and raises the bar for establishing aboriginal rights to a nearly unattainable height.

Under established law, to satisfy the exclusivity requirement, a tribe need only show that it was the only group to have used the claimed territory. It does not have to show that it had the capabilities to exclude all potential intruders, unless there is evidence of use by other groups within the claimed territory. Here, there was no such evidence, as all the experts unanimously testified. App. 23a. The district court merely found that neighboring groups likely fished and hunted in the waters "on the periphery of the Chugach territory." App. 94a. That is not sufficient to defeat aboriginal rights to the entire area. Furthermore, the Ninth Circuit failed to credit use of the area by different Chugach villages as use by one entity despite their existence as one people. Based on these departures from governing law, the Ninth Circuit concluded that the Chugach failed to demonstrate exclusivity.

The Ninth Circuit's decision ignores longstanding precedent of the Indian Claims Commission, a special tribunal created for the express purpose of adjudicating aboriginal rights, and the Claims Court, which is binding on the Federal Circuit. *See South Corp. v. United States*, 690 F.2d 1368, 1370–71 (Fed. Cir. 1982). If this decision stands, it will dramatically increase the burden of proof for Native claimants—

who already face the very high evidentiary burden of showing use and occupancy from prehistoric and early historic times. This important issue warrants certiorari.

As stated, the Ninth Circuit magnified the consequences of its error by holding that other groups' use of the periphery of the claimed area destroys exclusivity for the *entire* claimed area. The Chugach are entitled to recognition of their aboriginal rights to the portions of the claimed area where there was no evidence of use by other groups–*i.e.*, all the areas except for those "on the periphery of the Chugach territory," where the district court found that there was use by neighboring tribes. App. 94a. The Ninth Circuit erred by not remanding to the district court for a determination of the boundaries of that area. This aspect of its decision also creates a conflict with Federal Circuit precedent and ignores longstanding precedent from the Indian Claims Commission. The Court should grant certiorari to resolve this conflict.

A. The Ninth Circuit created a circuit split on an important federal question by erroneously construing "exclusivity" to require evidence that the tribes could repel all hypothetical intruders from the claimed area.

The Ninth Circuit departed from established law by holding that a tribe cannot establish exclusivity simply by showing that it was the only tribe or group that used and occupied the claimed area. Rather, the Ninth Circuit imposed the novel, additional burden of showing that the tribe had the power to exclude other groups. This requirement previously had been imposed only where there is evidence of use or occu-

pancy by another tribe or group. The Ninth Circuit has now made this a requirement for *all* cases, including where, as here, a tribe has shown that it was the only one to use and occupy the claimed area.

The Ninth Circuit's decision on this point creates a conflict with longstanding precedent of the Claims Court and Federal Circuit, which holds that the exclusivity requirement is not necessarily defeated by the presence of other Indians in the area. Consistent with precedent of the Indian Claims Commission, these courts have held in several instances that a tribe may establish aboriginal rights despite the contemporaneous existence of other Native groups in the region.

For example, the exclusivity requirement may be met by showing that the tribe claiming aboriginal rights to the region was dominant. In *United States v. Seminole Indians of State of Fla.*, 180 Ct. Cl. 375, 383 (1967), the fact that there were scattered groupings of other Indians in the claimed area did not defeat aboriginal title where there was no evidence that Seminole dominion was challenged and there was evidence of a pattern of cultural assimilation. The Claims Court explained that the "issue turns not upon whether the [Indians] were the exclusive occupants of the land but, rather, whether they availed themselves of their exclusive position." *Seminole*, 180 Ct. Cl. at 383.

In addition, if one tribe had aboriginal rights to a particular region but gave permission to other Indians to use the land, then this permissive use does not defeat the exclusivity requirement. For example, in *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1385 (Fed. Cir. 1983), the court held that the presence of other Indians in a region as "guests" of

a possessing tribe is not sufficient to defeat the aboriginal rights of the tribe. Accordingly, the court held that the Wichita Indians retained aboriginal title to lands in southern Oklahoma despite the entry of neighboring tribes for purposes of trading with the Wichitas. *Wichita*, 696 F.2d at 1385.

The Ninth Circuit cited two cases in support of its incorrect holding that a claimant must always show that it had the power to exclude other groups–*United States v. Pueblo of San Idelfonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975), and *Osage Nation of Indians v. United States*, 19 Ind. Cl. Comm. 447, 489 (1968). App. 8a. Neither case supports the Ninth Circuit's holding.

In *San Idelfonso*, the court made clear that aboriginal title is "called into question" only when there is evidence that the claimed area was "inhabited, controlled or wandered over by many tribes and groups." *San Idelfonso*, 513 F.2d at 1395. Where there is no such evidence, the exclusive ownership of the tribe using and occupying the land is not "called into question." *Id.*

In *Osage*, like in *San Idelfonso*, there was evidence in the record indicating that other tribes used and occupied part of the claimed territory. *Osage*, 19 Ind. Cl. Comm. at 489-90. Therefore, in that circumstance, the Osage were required to show they had the ability to exclude those tribes from that part of the territory.

Here, the district court found no use or occupancy by others within Chugach territory. Indeed, such a finding would have been clearly erroneous because all six expert anthropologists who testified in the district court (including the Secretary's experts) testified that there was no evidence of any other group fishing in

the claimed area of the OCS in prehistoric or early historic times. App. 23a. The district court merely found that other groups hunted and fished "on the periphery" of the claimed area. App. 94a.

Because the Chugach claim aboriginal rights only in areas where there is no evidence of use by others, they need only prove that they were the only tribe to use and occupy these areas in order to demonstrate exclusivity. The Ninth Circuit committed legal error in denying the Chugach aboriginal rights because they failed to demonstrate that they were capable of excluding all potential intruders from the claimed area.

For these reasons, it was also legal error for the Ninth Circuit to rely on the district court's findings regarding the size of the Chugach population to support its holding that the Chugach did not exclusively use the claimed area. App. 10a-11a. Where there is no evidence of use by other groups, exclusivity is not defeated simply because the population of a tribe is small and the area claimed may be vast.

The Ninth Circuit's decision on this point conflicts with Claims Court decisions that have rebuffed attempts to defeat exclusivity by reference to population density.

In *United States v. Seminole Indians of State of Fla.*, 180 Ct. Cl. 375, 384 (1967), the Claims Court recognized aboriginal title to most of the Florida peninsula even though "the total Seminole population did not exceed 2,500 individuals." The court expressly rejected an argument that Seminoles were numerically incapable of occupying a territory as vast as the Florida peninsula.

In *Zuni Tribe of New Mexico v. United States*, 12 Ct. Cl. 607, 608 n.2 (1987), the Claims Court rejected the government's assertion that between 1,500 to 2,000 Indians could not have exclusively used and occupied 5 million acres of land, stating: "the matter could not be resolved solely by noting the Zuni population and acreage but rather would require examination of the patterns of all populations of all similar areas at the time."

In addition, the Ninth Circuit erroneously concluded that the Chugach did not satisfy the exclusivity requirement because the district court found that the villages were politically independent units which did not collectively use the claimed area. App. 11a-12a. The Ninth Circuit's decision on this point conflicts with precedent of the Indians Claims Commission and Claims Court, which holds that, for purposes of demonstrating exclusive use, the relevant unit is not a village or even necessarily one tribe. Rather, the relevant unit—the "landowning entity"—is a socio-cultural group that uses and occupies a generally definable territory. *See Muckleshoot Tribe of Indians v. United States*, 3 Ind. Cl. Comm. 659, 674-75 (1955) (three "separate, distinct, and autonomous" villages collectively established aboriginal rights held by the Muckleshoot people; the villages were separate but were also part of the larger Muckleshoot culture); *Seminole*, 180 Ct. Cl. at 386 (granting the Seminole Indians aboriginal rights to most of the Florida peninsula because they were recognized as "a distinct Indian group" and shared a common culture).

Here, the district court's findings clearly demonstrate that the five plaintiff villages were a single socio-cultural group. App. 86a-87a. Therefore, it was

error for the Ninth Circuit to hold that the Chugach did not demonstrate exclusivity because the villages were politically independent or did not collectively use the entire claimed area.

Because the Ninth Circuit's decision creates a circuit split on an important legal question affecting aboriginal rights, certiorari should be granted.

B. The Ninth Circuit also created a circuit split by erroneously concluding that use by other Native groups on the periphery of Chugach territory destroys exclusivity for the entire claimed area.

The Ninth Circuit's holding that use by other tribes "on the periphery of the Chugach territory" defeats exclusivity to the entire claimed area also creates a conflict with Federal Circuit precedent.

In *Wichita Indian Tribe v. United States*, 696 F.2d 1378 (Fed. Cir. 1983), the Federal Circuit reversed and remanded a Claims Court decision that denied aboriginal rights to the entire claimed area based solely on evidence of use by neighboring tribes in hunting grounds on the outskirts of the claimed area. The Federal Circuit agreed that the claimant had not demonstrated exclusive use of the claimed hunting grounds where there was evidence of use by neighboring tribes. *Wichita*, 696 F.2d at 1385. However, the court declined to affirm the lower court's ruling that the claimant failed to establish exclusive use of the claimed area because there were clear findings that the claimant had traditionally used and occupied parts of the claimed area and that no other group had similarly used and occupied those areas. *Id.* The court recognized that other tribes may have come into the area for purposes of trade or

warfare, but such use does not destroy exclusivity, and the only evidence of use by others was in hunting grounds on the periphery of the claimed area. *Id.* Accordingly, the Federal Circuit reversed the trial court's dismissal of the claims and remanded for a determination of the extent of the claimant's aboriginal rights. *Id.* at 1386.

In direct conflict with the Federal Circuit's decision in *Wichita*, the Ninth Circuit in this case determined that the Chugach should be accorded no aboriginal rights based solely on the district court's finding that neighboring tribes also fished and hunted in waters "on the periphery of the Chugach territory." App. 8a-10a. This conflict warrants review.

The Ninth Circuit's erroneous interpretation of "periphery" also conflicts with cases from the Indian Claims Commission and Claims Court that clearly recognize a distinction between shared use on the periphery of a claimed territory and shared use inside the territory.

In *Caddo Tribe of Okla. v. United States*, 35 Ind. Cl. Comm. 321, 360-62 (1975) the court referred to Caddo confederacies that "lived within the area of Caddo use and occupancy," as opposed to other tribes that were found "on the western boundary" or "on the western *periphery* of Caddo territory" (emphasis added). The court held that the Caddo established exclusive use of the claimed territory despite the presence of these neighboring groups on the periphery of Caddo territory. *Caddo*, 35 Ind. Cl. Comm. at 360.

Similarly, in *Hualapai Tribe v. United States*, 18 Ind. Cl. Comm. 382, 395 (1967), the court found exclusive use and occupancy, but declined to enlarge

the area of aboriginal territory to include "*peripheral* areas" that were "used and occupied at the same time by other neighboring Indians" (emphasis added). And in *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607, 608 n.3 (1987), the court found exclusive use of the claimed area, despite evidence of use by another tribe neared shared borders, because "such boundaries are the limit of the Zuni claim area, with Zuni use and occupancy within its boundaries."

Thus, the courts in *Wichita*, *Caddo*, *Hualapai*, and *Zuni* distinguished between the claimed "territory" and the "periphery," "outskirts," or "boundaries" of that territory. These courts ruled that aboriginal rights survived if neighboring Native groups only used the "periphery," "outskirts," or "boundaries" of the territory, as opposed to the territory itself.

The district court in this case similarly distinguished between the Chugach's territory and the periphery or boundaries of that territory. As part of their aboriginal rights claim, the Chugach were required to provide the boundaries or borders of the territory they were claiming. *See Quapaw Tribe of Indians v. United States*, 1 Ind. Cl. Comm. 469, 481 (1951) (claimants do not have to demarcate the claim area with surveyor-like precision, but "some general boundary lines of the occupied territory must be shown"). The district court identified particular areas that were on the periphery or boundaries of the Chugach territory:

> [S]ome of the OCS areas in question (in particular, the Lower Cook Inlet, the area between the Barren Islands and Kodiak Island, and the Copper River Delta and Copper River flats) were on the ***periphery*** of the ***[Villages'] territory***. That is, the

> foregoing are the areas where the [Villages' ancestors] met up with the Dena'ina, the Koniag, the pre-consolidation Eyak, and the Tlingit. More likely than not, these areas were fished and hunted on a seasonal basis by all of the Koniag, the Chugach, the Eyak, and the Tlingit.

App. 94a (emphasis added).

The areas of the OCS the district court specifically identified in making this statement (*i.e.*, "the Lower Cook Inlet, the area between the Barren Islands and Kodiak Island, and the Copper River Delta and Copper River flats") were the markers the Chugach have used in this litigation to demarcate the external boundaries of their claimed area. It is not surprising that different Native groups would be present at the boundaries of Chugach territory.

Accordingly, it was an erroneous departure from established law for the Ninth Circuit to deny the Chugach rights to the inner parts of the claimed area. Because there was no finding by the district court that other tribes used the inner portion of the claimed area, there was no basis for the Ninth Circuit to find that the Chugach did not satisfy the exclusivity requirement for this portion of the claimed area.

Consequently, the Ninth Circuit erred in denying the Chugach aboriginal rights to at least the inner portion of the claimed area. *See, e.g.*, *Osage*, 19 Ind. Cl. Comm. at 492 (holding that Osage demonstrated "exclusive use and occupancy" of portions of claimed area where there was no evidence of use by other tribes, despite finding that Osage did not have rights to other portions of claimed area because there was

such evidence). As the dissent recognized, the correct disposition would have been for the Ninth Circuit to reverse and remand with instructions for the district court to determine the portions of the claimed area that were used exclusively by the Chugach–*i.e.*, the boundaries of the area within the periphery of Chugach territory where there was no evidence of use by neighboring groups. App. 37a. The Ninth Circuit's decision is thus at odds with the decisions in *Wichita*, *Caddo*, *Hualapai*, and *Zuni*, and review is warranted for this reason too.

C. Federal paramountcy does not foreclose aboriginal rights in the OCS.

The district court ruled that aboriginal rights in the OCS are abrogated by the federal paramountcy doctrine, which provides that federal regulation of offshore waters preempts state regulation of those areas. The Ninth Circuit majority did not address this issue, but four of the five judges who joined in the dissent agreed that aboriginal rights in the OCS do not conflict with paramount federal interests. App. 13a, 30a-35a.

Whether the paramountcy doctrine should be extended to foreclose aboriginal rights on the OCS is an important federal question with far-reaching consequences for Native claimants. Granting certiorari and reversing in this case will ensure that the Ninth Circuit must address this important issue. It also will give this Court an opportunity to resolve any conflict among the courts of appeals that may result from the Ninth Circuit's decision on remand. For these reasons, while paramountcy is not technically part of the question presented by this petition, the Chugach will briefly address the paramountcy issue here.

Aboriginal rights cannot offend federal paramountcy because by definition such rights exist at the sufferance of Congress. *See, e.g.*, *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941) (holding that Congress can modify or extinguish aboriginal rights at will and without compensation, unlike the property of States or private citizens). Aboriginal rights are subordinate to federal rights; they are also an embodiment of the federal interest in protecting Native peoples. The complementary nature of federal and aboriginal rights reflects, among other things, the trust relationship between Native Americans and the United States, in which the role of the government is to protect aboriginal property from intrusion by third parties. *Id.* at 346 (observing that an aboriginal right "is considered as sacred as the fee-simple of the whites"). Given this relationship, aboriginal rights are limited in important ways.

Because of the unique nature of aboriginal rights, there is no room for—and there is no need to apply—the paramountcy doctrine in this area. There are no conflicting rights here, as there have been in the cases of dispute between federal and state power that gave rise to the paramountcy doctrine. This Court has stated that the paramountcy doctrine exists to protect the federal government's authority over foreign affairs, foreign commerce, and national defense. *United States v. California*, 332 U.S. 19, 29 (1947). None of those concerns is remotely implicated by the Chugach's request to be allowed to participate in an existing fisheries management scheme that is run by the federal government. To rule otherwise would be a dramatic and unwarranted extension of the paramountcy doctrine. In all events, the

importance of the paramountcy issue underlying this case is yet another reason to grant certiorari here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted

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