NO. 17-1592

In the
Supreme Court of the United States

MAKAH INDIAN TRIBE,

PETITIONER,

v.

QUILEUTE INDIAN TRIBE AND
QUINAULT INDIAN NATION, ET AL.,

RESPONDENTS.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF UNITED CATCHER BOATS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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June 25, 2018

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), United Catcher Boats respectfully requests leave to submit a brief as *amicus curiae* in support of the petition for writ of certiorari filed by the Makah Indian Tribe. As required under Rule 37.2(a), *amicus* provided counsel of record for all parties with timely notice of its intent to file this brief 10 days before its due date. Most parties have consented to the filing of this brief. Certain respondents did not respond or grant consent[*] and, therefore, *amicus* files this motion.

UCB seeks leave to file this brief because it is deeply concerned that the Ninth Circuit's decision expanding the Quileute Indian Tribe and Quinault Indian Nation's usual and accustomed fishing grounds will drastically upset the settled expectations and reliance interests of the fishing community. The Ninth Circuit gave the Quileute and Quinault tribes fishing rights over a massive area in the Pacific Ocean, despite district court findings that the Quileute and Quinault did not customarily catch fish there. Pet. App. 3a. This extension of fishing rights will necessarily decrease the fish available to nontribal fishers. Compounding this problem, the decision was in direct contradiction to the position previously taken by the Ninth Circuit, the Western District of Washington, and the United States that hunting whales and seals did not constitute sufficient

[*] Parties that did not respond or give consent include the Hoh Indian Tribe, Skokomish Indian Tribe, Suquamish Tribe, and the United States.

evidence of customarily fishing in an area under the Stevens Treaties. If the court of appeals' decision is allowed to stand, every party to a Stevens Treaty will likely seek to relitigate its customary fishing grounds, and individuals and families who have fished in the disputed area will be pushed out of the market.

For these reasons, and because *amicus* is well-equipped to help the Court evaluate the parties' arguments, the Court should grant this motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

United Catcher Boats (UCB) provides a unified voice for the owners of commercial fishing vessels that trawl for groundfish such as Pacific whiting. The Ninth Circuit's decision expands the fishing rights of the Quileute Indian Tribe and Quinault Indian Nation to areas where those tribes had *not* customarily fished. That will adversely affect the amount of fish that UCB's members will be allowed to catch, threaten the livelihoods of UCB's members, and upset the settled expectations of the tribal and nontribal fishing communities alike.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fishing industry is vital to the coastal communities of Washington, Oregon, and California. In 2015, these three states alone generated more than $27 billion in commercial and recreational fishing sales.[2] As fish have become a scarce resource, and as the United States has imposed caps on the number of fish that can be caught or harvested, "the

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[1] Pursuant to Sup. Ct. R. 37.2(a), *amicus* timely notified the parties in writing of its intent to file this brief. Because certain respondents did not consent, *amicus* is submitting a motion for leave to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* NOAA, Press Release, *U.S. Fishing Generated More than $200B in Sales in 2015; Two Stocks Rebuilt in 2016* (May 9, 2017), available at http://www.noaa.gov/media-release/us-fishing-generated-more-than-200b-in-sales-in-2015-two-stocks-rebuilt-in-2016.

meaning of the Indians' treaty right to take fish has . . . become critical." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669 (1979).

In this case, the Ninth Circuit extended the fishing rights of the Quinault and Quileute tribes to 2,400 square miles in which they may have traditionally hunted for marine mammals like whales and seals, but did *not* customarily catch fish. That is an enormous area. It is about the same size as the State of Delaware (including its land and water bodies), and about 50% bigger than the Great Salt Lake. 62.4 billion people could stand in a space that size.[3] Many times as many fish might be found there. UCB agrees with all of the legal and policy arguments in the Makah's petition. Instead of repeating them here, this brief focuses on the decision's extraordinarily important impact on non-tribal fishers. In at least three different ways, the Ninth Circuit's largesse to these two tribes would upset the settled expectations of the fishing community and be devastating to the catcher boats that currently trawl for whiting and other fish.

First, the zero sum nature of the fishing industry means that any increase in fish allocation for the Quinault and Quileute tribes will result in a corresponding decrease to existing fishers. And the Quinault and Quileute tribes intend to take a

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[3] *See* Ana Swanson, *The entire world fits in New York City*, The Washington Post, (Apr. 2 2015), available at https://www.washingtonpost.com/news/wonk/wp/2015/04/02/the-entire-world-fits-in-new-york-city/?utm_term=.8a19ed71dab8 (explaining that 26 million people fit in one square mile).

tremendous portion of the Pacific whiting catch—approximately 40% in an average year. Worse yet, the consequences are not limited to Pacific whiting, as they could extend to other fish such as Pacific cod and rockfish.

Most of the catcher boats that participate in the Pacific whiting fishery are owned by families or small businesses that invested significant amounts of money based on settled understandings of the Indians' treaty rights. They now run the risk of financial ruin under the Ninth Circuit's decision.

Second, new entrants who are unfamiliar with the Pacific whiting fishery could cause it to be shut down altogether. Trawling for whiting can result in "bycatch" of other types of fish that are highly regulated. If fishery-wide caps on bycatch are exceeded, the fishery is shut down for *everyone* to protect those species. That has happened before, and it is all the more likely to happen again with new participants who are not experienced with trawling for whiting, who have stated their intent to catch whiting early in the season when bycatch concerns are heightened, and who do not have a track record of working cooperatively with the other participants in this fishery.

Third, the Ninth Circuit's newfangled treaty interpretation will generate years and likely decades of contentious litigation to, among other things: determine the portion of fish to which the Quinault and Quileute possess rights; reestablish and redraw the fishing rights of all other tribes who hunted and fished in different regions of the Pacific Ocean; and

reallocate whatever fishing rights remain among other tribes and non-tribal interests.

The Court should nip all of this in the bud. The whole point of the relevant treaty provisions was to *reserve* fishing rights the tribes had previously exercised. Nonetheless, the Ninth Circuit (mis)construed those treaties more than 160 years later to *expand* fishing rights to a broad expanse in which the tribes had only hunted for marine mammals, not caught fish. That is incredibly destabilizing, with potentially dire economic impacts for all those who—unlike the Quinault and Quileute tribes—have customarily fished in the relevant expanse.

REASONS FOR GRANTING THE PETITION

I. The Extension of Tribal Fishing Rights to New Areas Will Cause Grave Harm to Established Fishers

"The Pacific whiting (or Pacific hake) fishery is the largest fishery in terms of pounds landed on the west coast of both the United States and Canada (not including Alaska)."[4] Between 2013 and 2017, the ex-vessel revenue for whiting (that is, the amount received for the whiting at the point of landing)

[4] Oregon Dep't of Fish & Wildlife, *Oregon's Ocean Commercial Fisheries* ("*Oregon's Commercial Fisheries*") at 5 (June 2017), available at https://www.dfw.state.or.us/mrp/docs/Backgrounder_Comm_Fishing.pdf.

contributed more than $485 million to the West coast's economy.[5]

This is not the first controversy to affect the economically important Pacific whiting fishery. To resolve international conflict and overfishing, the United States and Canada entered into a treaty in 2002 that created new independent bodies to assess the fish stock and to recommend each year an overall total allowable catch for both countries.[6] The treaty also established a default harvest division between the countries: 73.88% of the total allowable catch to the United States and 26.12% to Canada.[7]

To ensure that United States fishers do not exceed the treaty limits on harvesting whiting, the National Marine Fisheries Service ("NMFS") allocates fishing rights between tribal and non-tribal United States fishers. Pursuant to rules issued under 50 C.F.R. § 660.50, Pacific Coast Indian tribes that have a treaty right to harvest groundfish have been entitled to 17.5% of the United States' total

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[5] *See* Pacific Fishery Management Council ("PFMC"), *Pacific Coast Groundfish Fishery 2019-2020 Harvest Specifications and Management Measures ("2019-2020 Harvest Specifications")*, at 54 (May 2018), available at https://www.pcouncil.org/wp-content/uploads/2018/06/E4_Supp_REVISED Att2_2019-20_GFSpexEA_E-Only_June2018BB.pdf#page=88 .PFMC.

[6] *See* U.S. Dep't of State, *Letter of Submittal* (Apr. 19, 2004), available at https://www.congress.gov/108/cdoc/tdoc24/CDOC-108tdoc24.pdf.

[7] Agreement on Pacific Hake/Whiting, Art. III. § 2, Can.-U.S., Nov. 21, 2003, T.I.A.S. 08-625.

allowable catch.[8] After removing the Canadian and Indian allocation, nontribal United States fishers' harvest is currently capped at approximately 60% of the Pacific whiting fishery's total allowable catch.

A. Allocation of Fish to the Quileute and Quinault Tribes Will Force Non-Tribal Fishers to Compete for Fewer Fish

Under the Ninth Circuit's decision, the nontribal share of the whiting catch would be substantially diminished. The Quileute and Quinault tribes each intend to operate five or six catcher boats, which would together harvest approximately 70 thousand metric tons of whiting annually. *See* Dist. Ct. Dkt. No. 126-1 at 50–51.

In an average year, this would be approximately 40% of the United States' total allowable catch; in a lean year, it could be as much as 75% of the total. Fishing is an unpredictable industry, subject to weather conditions, pollution, the fishing activities of other nations, and global demand for fish. From 1966 to 2017, the United States' combined harvest of Pacific whiting averaged 174 thousand metric tons, with a low of 90 thousand metric tons in 1980.[9] Even looking only at more recent years, the United States'

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[8] *See* NMFS, *Magnuson-Stevens Act Provisions; Fisheries Off West coast States; Pacific Coast Groundfish Fishery; Annual Specifications and Management Measures for the 2015 Tribal and Non-Tribal Fisheries for Pacific Whiting*, 80 Fed. Reg. 27588, 27592 (May 14, 2015).

[9] Whiting Agreement Joint Technical Committee, *Pacific Hake Assessment 2018* at 6, available at http://www.westcoast.fisheries.noaa.gov/publications/fishery_management/groundfish/whiting/hake-assessment-2018.pdf.

harvest between 2006 and 2017 varied dramatically from less than 122 thousand metric tons in 2009 to 354 thousand metric tons in 2017.[10]

If the Quileute and Quinault's projected harvest were added to the 17.5% allocation already retained by the Makah, the non-tribal allocation could be cut in half in many years. And even if *total* tribal allocation for the Makah, Quileute, and Quinault were set at 70,000 metric tons of fish, this would result in more than a 27% decline in whiting available to nontribal fishers in an *average* year. Especially in *lean* years, the plans of the Quileute and Quinault tribes would be devastating to established fishers.

Most of the 40 catcher boats that participate in the Pacific whiting fishery are owned by individuals or families that, even now, face slim profit margins due to expenses for crew, insurance, fuel, and gear. Catcher boats are long-term investments that were made well before the Quileute and Quinault expressed any interest in the Pacific whiting fishery or sought an adjudication of their fishing grounds based on where they previously hunted whales or seals. If the Quinault and Quileute have their way, a substantial percentage of non-tribal catcher boats may be forced to exit the fishing industry, inflicting financial ruin on the families and small businesses that have invested in the boats and jeopardizing the livelihoods of all the other people who work on the boats or support their operation from shore.

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[10] *Id.* at 7.

Beyond affecting participants in the whiting fishery, the Ninth Circuit's expansion of the tribes' fishing rights will affect all those who catch other species of fish. In the coastal communities of Washington, Oregon, and California, commercial groundfish fishing as a whole contributes approximately $138 million to personal income.[11] Many commercially important fishing species are located in the disputed grounds, including Pacific cod[12] and rockfish, which in 2017 generated revenue for boat owners of nearly $10 million.[13] Devastation to fishers of the Pacific whiting is therefore only the beginning of the harms the Ninth Circuit's ruling will inflict on established fishers.

B. Inexperienced New Entrants Jeopardize the Fishery's Ongoing Operation

Inexperienced fishing could result in the shutdown of entire fishery sections. To catch whiting, fishing vessels trawl the bottom of the ocean with little ocean floor contact.[14] Generally, this produces a fairly single-species catch.[15] But during certain seasons, vessels—particularly vessels with inexperienced crew—may catch salmon or rockfish in their nets as bycatch.

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[11] *See* PFMC, *2019-2020 Harvest Specifications a*t 92.

[12] NOAA Fisheries, *Pacific Cod*, available at https://www.fisheries.noaa.gov/species/pacific-cod; *see also* PFMC, *2019-2020 Harvest Specifications* at 14.

[13] *See* PFMC, *2019-2020 Harvest Specifications a*t 53.

[14] *Oregon's Commercial Fisheries* at 5.

[15] *Id.*

Because of the low stock abundance of certain fish species, particularly varieties of rockfish and salmon,[16] an entire sector of the fishery may be required to shut down if the catch quota for specific fish species is exceeded—even as bycatch to a whiting haul. *See* 50 C.F.R. § 660.131(c)(4) ("Bycatch reduction area closures . . . may be implemented inseason through automatic action when NMFS projects that a Pacific whiting sector will exceed an allocation for a non-whiting groundfish species specified for that sector before the sector's whiting allocation is projected to be reached."). The shutdown of fisheries or sections of a fishery as a result of excess bycatch is not unprecedented. Indeed, bycatch shutdowns occurred in both 2007 and 2014. [17]

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[16] Rockfish can live for up to 200 years. *See* Elizabeth Barber, *200-year-old rockfish caught off Alaska coast*, The Christian Science Monitor (July 3, 2013), available at https://www.csmonitor.com/Science/2013/0703/200-year-old-rockfish-caught-off-Alaska-coast. And many female rockfish do not spawn for the first 25 years. Christine Baier, *New information on how long some rockfish live and how often they spawn will help ensure healthy populations*, NOAA (May 22, 2017), available at https://www.afsc.noaa.gov/News/Rockfish_conrath.htm. Because of their long life spans, the management of rockfish stock is particularly complicated. *Id.*

[17] *Fisheries council recommends reopening whiting fishery* Associated Press (Sept. 19, 2007), available at http://blog.oregonlive.com/breakingnews/2007/09/fisheries_coucil_recommends_re.html; Jeanine Stewart, *Pacific whiting mothership fishing closes over 'lightning strike' bycatch accident*, Undercurrent News, (Oct. 15, 2014), available at https://www.undercurrentnews.com/2014/10/15/pacific-whiting-mothership-fishing-closes-over-lightning-strike-bycatch-accident/. For other instances of fishery shutdowns, *see* Zaz

As the NMFS explained, the bycatch problem is particularly concerning when different groups compete to catch a single allocation of fish. *See* Pet. App. 141a, Dkt. No. 126, Ex. U, p. 25 ("A race for fish could result in excessive bycatch of overfished species, and the closure of other groundfish fisheries."). The federal government has been clear that it will not divide the tribal allocation for whiting between different tribes. Pet. App. 141a. Instead, the Makah, Quileute and Quinault (and any other tribes that, in the future, are able to assert new fishing rights) would race to gather as much of their single allocated percentage as possible. *Id.*

Indeed, the Quileute intend to concentrate their harvest in the early months of the fishing season to gather as many fish as possible before the whiting migrate north into the Makah fishing grounds. *See* Dkt. No. 126-1 at 49; Dkt. No. 126-2 at 25. The early part of the season is when the bycatch rates are particularly high, increasing the likelihood of a fishery shutdown. *Id.*

Shutdowns affect all participants, not just those who exceed the bycatch quota. And these shutdowns can result in the loss of millions of dollars and the

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Hollander, *Dismal Copper River salmon run prompts 'unprecedented' shutdown of dipnetting at Chitina*, Anchorage Daily News, (June 13, 2018), available at https://www.adn.com/outdoors-adventure/fishing/2018/06/13/dismal-copper-river-salmon-run-prompts-unprecedented-shutdown-of-dipnetting-at-chitina/; *Lucrative baby eel fishery shut down over illegal sales*, Associated Press (May 23, 2018), available at http://www.businessinsider.com/ap-lucrative-baby-eel-fishery-shut-down-over-illegal-sales-2018-5.

loss of employment for those working on whiting boats. Ensuring that the industry does not exceed the bycatch quota requires cooperation and communication among industry participants. All those who currently catch whiting have developed good, cooperative relationships with the primary goal of minimizing the catch of bycatch species to avoid a fishery closure. But the presence of new entrants who have not customarily fished in the area, and who seek to endanger others' livelihoods by aggressively asserting rights never before recognized under treaties that are more than 160 years old, would make industry-wide cooperation significantly more difficult.[18]

C. The Ninth Circuit's Novel Treaty Interpretation Will Inevitably Spur Costly Litigation

Rather than resolve the current dispute between fishing groups, the Ninth Circuit's decision will only serve to jumpstart lengthy and costly litigation over unresolved questions. First, courts will need to resolve the extent of the Quileute and Quinault tribes' fishing grounds and the allocation of fish *between* the two tribes. Indeed, litigation has already begun—the Quileute and Quinault have filed a notice of appeal regarding the boundaries drawn by the district court. *See* Dkt. No. 461 (Quileute Indian

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[18] *See, e.g.*, *Request for Industry Cooperation to Avoid Sablefish Bycatch in the At-Sea Whiting Fishery*, NOAA, (May 30, 2018), available at http://www.westcoast.fisheries.noaa.gov/publications/fishery_management/groundfish/public_notices/nmfs-sea-18-11.pdf (requesting that the industry voluntarily cooperate to decrease the bycatch of sablefish).

Tribe and Quinault Indian Nation's Notice of Appeal) (May 1, 2018); *see also United States v. Washington*, No. C70-9213 RSM, 2018 WL 2461832 (W.D. Wash. June 1, 2018); *United States v. Washington*, No. C70-9213, 2018 WL 1933718 (W.D. Wash. Apr. 24, 2018); *United States v. Washington*, No. C70-9213 RSM, 2018 WL 1792200 (W.D. Wash. Apr. 16, 2018). And the federal government has been clear that intertribal allocation will likely be determined by litigation. *See* Pet. App. 141–42a (quoting 50 C.F.R. § 660; Dkt. No. 126, Ex. U, p. 26).

Second, the determination that a tribe has fishing rights in areas in which the tribe had customarily hunted but not fished will spawn a new wave of litigation interpreting the other Stevens Treaties. *See Fishing Vessel*, 443 U.S. at 662 n.2 (naming 20 tribes that are parties to the treaties). Indeed, the Ninth Circuit expressly reserved the question of treaty interpretation for the other Stevens Treaties. *See* Pet. App. 21a ("We do not address or offer commentary on whether the same result would obtain for the 'right of taking fish' in other Stevens Treaties.").

The Ninth Circuit's opinion thus results in unsettled and unresolved rights in the short term while muddying the waters for tribal and non-tribal fishing rights going forward. The cost of litigation is particularly problematic for family owned and operated catcher boats, who may be unable to fully represent their interests at each stage of the litigation.

II. Protecting Settled Expectations Is Key to a Viable and Sustainable Fishing Industry

A longstanding canon of construction for Indian Treaties explains that treaties with Indian tribes do not grant those tribes new rights, but rather provide legal protection for the rights that tribes already possessed. *See United States v. Winans*, 198 U.S. 371, 381 (1905); *Fishing Vessel*, 443 U.S. at 678. In other words, the treaties assure the right to "procure their food *as they had always done*." James Swan, *The Northwest Coast; or Three Years' Residence in Washington Territory* at 343 (New York: Harper & Brothers, 1857) (emphasis added).

The reserved-rights doctrine fits within the law's broader respect for settled expectations. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Woven throughout the Constitution—from the Due Process Clauses, to the Ex Post Facto Clauses, to the Takings Clause—and integral to the interpretation of laws and treaties (specifically Indian Treaties), is the fundamental principle that people are entitled to notice of their rights and obligations. *See, e.g., Dimaya v. Sessions*, 138 S. Ct. 1204 (2018); *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Abbott v. Abbott*, 560 U.S. 1, 10 (2010).

The Ninth Circuit's decision that whale and seal *hunting* grounds are actually *fishing* grounds flies in the face of settled expectations. Indeed, it is directly contrary to the Ninth Circuit's own previous decision in *United States v. State of Washington*, 730 F.2d 1314, 1317–18 (9th Cir. 1984), as well as the position taken by the United States. In the *Makah* proceedings, the Ninth Circuit determined that whaling and sealing practices are not determinative of usual and accustomed fishing grounds. In that litigation, the Special Master concluded that the Makah customarily fished to a distance of 100 miles based on their whaling, sealing, and capacity to travel that distance. The district court "agreed with the Special Master with regard to all of the latter's findings of historical fact," but "disagreed . . . with the conclusion that those facts were sufficient to establish that the Makah Tribe's 'usual and accustomed' fishing grounds extended 100 miles offshore in 1855." *Id.* at 1317. Affirming the district court's decision, the Ninth Circuit clarified the facts—the Makah Tribe "may have canoed [up to 100 miles from shore] for whale and seal" but "[t]hese facts do not show that their usual and accustomed fishing areas went out 100 miles in 1855." *Id.* at 1318.

The United States also recognized that "there are essential differences between whaling and fishing." United States Supplemental Memorandum re Makah Renewed Request for Determination of Ocean Fishing Grounds at 4, *United States, et al. v. State of Washington, et al.*, No. 9213 (W.D. Wash. Oct. 12, 1982). Thus, "the usual and accustomed fishing areas must be defined now in terms of where

tribal members customarily fished." *Id.* at 5; *see also* Brief of Plaintiff-Appellee United States of America at 9–10, *United States, et al. v. State of Washington, et al.*, No. 83-3802 (9th Cir. Nov. 18, 1983). The position of the United States is triply important in this case because, as trustee, the United States has "an active interest" in Indian treaty rights, *Heckman v. United States*, 224 U.S. 413, 441–42 (1912) (quoting *McKay v. Kaylton*, 204 U.S. 458, 469 (1907)), "the United States' interpretation of a treaty is entitled to great weight," *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (internal quotation marks omitted), and the United States' views are demonstrative of the "existing rules or understandings" that serve as the foundation of property rights, *see Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (internal quotation marks omitted).

By construing the treaties to grant rights contrary to their plain language, the prior interpretations, and the historical realities of where the tribes had customarily caught fish, the Ninth Circuit made treaty interpretation a guessing game for tribal and nontribal communities alike. And it severely penalized catcher boat owners who had invested heavily in purchasing equipment, establishing markets, entering into contracts, and hiring fishing crews based on settled and extremely reasonable expectations.

That is especially troublesome for a fishing community that needs to work together closely to abide by regulations, as discussed above, and to ensure safety in the water. Tribal and non-tribal interests may fish in the affected areas, sometimes

bringing boats into close proximity as they seek to catch the same migrating fish to fulfill their allocations. Settled expectations and understandings promote cooperation. Court decisions that turn expectations on their head and lead to contentious, protracted litigation do not.

CONCLUSION

The petition should be granted.

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