

IN THE SUPREME COURT FOR THE STATE OF ALASKA

JOHN A. SCUDERO, JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Supreme Court No.: S-17549

Trial Court Case No. 1KE-14-00672CR
Court of Appeals No. A-12729

On Appeal from the Superior Court
First Judicial District at Anchorage, No. 1KE-14-00672CR
The Honorable Kevin Miller, Judge

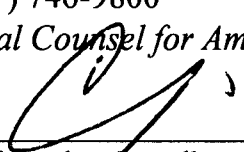
AMICUS CURIAE BRIEF OF METLAKATLA INDIAN COMMUNITY

VRA CERTIFICATION. The undersigned certifies that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

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Filed in the Supreme Court for
the State of Alaska,
this ____ day of _____, 2019

By _____
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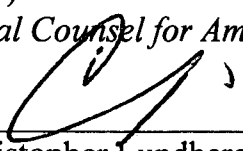
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PROVISIONS RELIED UPON

Act of March 3, 1891, ch. 561 § 15, 26 Stat. 1095, 1101 (formerly codified at 48 U.S.C. § 358 and transferred to 25 U.S.C. § 495 prior to deletion from the Code).

Annette Islands reserved for Metlakahtla Indians

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who, on March 3, 1891, had 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.

Alaska Statute 16.43.140(a) Permit Required

- (a) A person may not operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.
- (b) A permit is not required of a crewmember or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear.
- (c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

- (1) fishing more than one type of gear;

- (2) fishing in more than one administrative area;
- (3) harvesting particular species for which separate interim-use or entry permits are issued;
- (4) if authorized by regulations of the commission, fishing an entire unit of gear in a fishery in which the commission has issued entry permits for less than a unit of gear under AS 16.43.270(d); under this paragraph, a person may not hold more than two entry permits for a fishery; however, the person may not:
 - (A) fish more than one unit of gear in the fishery; or
 - (B) acquire a second entry permit for the fishery after the person has acquired an entry permit that authorizes the use of an entire unit of gear in the fishery;
- (5) consolidation of the fishing fleet for a salmon fishery; however, a person may hold not more than two entry permits for a salmon fishery under this paragraph, but the person who holds two entry permits for a salmon fishery may not engage in fishing under the second entry permit.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Metlakatla Indian Community (“the Community”) appreciates the Court’s invitation to file this brief as *Amicus Curiae* – and the opportunity to explain a significant error in the State’s argument. The State has wrongly asserted a so-called “fatal flaw” in Mr. Scudero’s argument, which the State characterized as a purported absence of any federal authority for members of the Community to commercially fish off-reservation, where Mr. Scudero’s and other Community members’ ancestors fished, free of State interference. [Ap. Br. 8]

Federal authority does exist in the form of a reserved right: When Congress established the Annette Islands Reserve in 1891, it reserved for Metlaktlans the right to fish in waters surrounding the Annette Islands, which the Community asserts extend into the fishing areas currently designated by the Alaska Department of Fish and Game as Areas 1 and 2.¹ Act of March 3, 1891, ch. 561 § 15, 26 Stat. 1095, 1101 (formerly codified at 48 U.S.C. § 358 and transferred to 25 U.S.C. § 495 prior to deletion from the Code); see *Confederated Tribes of Chehalis v. State of Wash.*, 96 F.3d 334, 342-3 (9th Cir. 1996). President Wilson’s Proclamation of 1916 enhanced that reserved right by establishing an exclusive fishery for the Community’s protection. See *Meltakatla Indian*

¹ The timing of Mr. Scudero’s case is coincidental in that the Community has prepared a lawsuit for filing in federal district court in the near future that will seek to restore the full scope of the Community’s reserved fishing rights. In that lawsuit, the Community will present substantial evidence from the late nineteenth and early twentieth centuries showing that the Metlaktlans, the Federal Government, and the Territory of Alaska all recognized the Community’s off-reservation fishing rights.

Community, Annette Islands Reserve v. Egan, 369 U.S. 45, 54–55, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962)(discussing the purpose and effect of the 1916 Presidential Proclamation). However, that Proclamation did not diminish or affect in any way the off-reservation fishing rights reserved by Congress. *See id.* For all practical purposes, those rights were unlawfully extinguished with the State’s passage of its limited entry regulatory program in 1973 and the State’s refusal to credit the Community’s on-reservation catch for purposes of issuing related permits. *See generally* AS 16.43.140; *see also Alaska Pacific Fisheries Company v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918)(finding that access to fishing grounds were essential for the Metlakatla Indian Community to prosper).

Accordingly, the Community strongly supports the right of its members – including Mr. Scudero – to fish in the waters surrounding the Reserve free of State interference. As explained below, under the proper analytical framework, it is clear that the Community has a reserved right to fish, on a non-exclusive basis, in the off-reservation waters surrounding the Reserve.

ARGUMENT

In 1891, by way of a statute, Congress established the Annette Island Reserve. Act of March 3, 1891, ch. 561 § 15, 26 Stat. 1095. Similar to a treaty, the statute creating the Reserve also created rights benefitting the Community, including off-reservation rights, necessary to fulfill the purpose of the reservation. *Confederated Tribes of Chehalis*, 96 F.3d at 342-3. In determining the scope of the Community’s rights, which were unarticulated in the statute itself, a court “must consider the [statute], the

circumstances surrounding [its] creation, and the history of the [Metlakatians] for whom [the reservation was] created.” *Id.* at 342. In other words, the *Chehalis* court announced the principle that reserved rights are created - even where a statute was silent on the subject - if the existence of the rights is clear from the circumstances surrounding the creation of the reservation. *Id.* Here, Congress reserved an island in southeast Alaska for the Metlakatians (a fishing people who had historically engaged in the commercial fish trade) for the purpose of establishing a self-sustaining and permanent community. *See* Act of March 3, 1891, ch. 561 § 15, 26 Stat. 1095. The fulfillment of that purpose would have been impossible if the Reserve did not include associated fishing rights. *See Alaska Pacific Fisheries Company*, 248 U.S. at 89. In turn, the Metlakatians obviously understood the Reserve to be facilitating rather than restricting their traditional fishing lifestyle and economy.

Indian law canons of construction applicable to this dispute support that conclusion. In that regard, those canons require this Court to consider the statute creating the Annette Islands Reserve in light of “the unique trust relationship between the United States” and the Metlakatians. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985). Additionally, statutes, executive orders, and treaties creating reservations must be liberally construed in favor of establishing Indian rights, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767, 105 S.Ct. 2399, 2404, 85 L.Ed.2d 753 (1985), and “ambiguities must be resolved in favor of the Indians.” *Parrava v. Babbitt*, 70 F.3d 439, 544 (9th Cir. 1995). Notably, the scope of the rights associated with establishing a reservation must be interpreted as the Indians

themselves, at the time of the reservation's creation, would have understood them. *Id.* In the light of *Chehalis*, those canons only reinforce the conclusion that Congress would not have created the Reserve without adequate fishing rights, and that the Metlakatians necessarily would have understood that the Reserve included such rights.

In fact, in 1922, six years after President Wilson's proclamation of 1916, the Territory of Alaska submitted an Answer to Complaint in Intervention in which it recognized the mutual understanding of the United States and the Community as to the Community's off-reservation fishing rights, as follows:

That the inhabitants of Annette Island, ever since their settlement on said Island, have been and yet are in the habit of fishing outside of said reserve, and a large percentage of the fish canned from year to year by the defendant company was caught in waters outside of said reserve; that during the year 1919 at least 130,000 salmon canned by the defendant company at its cannery on Annette Island were caught by residents of Metlakahtla in waters outside the reserve; . . . and the right of the inhabitants of said Annette Island reserve to catch fish outside of the reserve, and to engage in any other business outside of the reserve, has always been and is now recognized by the intervenor and by the Government of the United States, and such right is and at all times has been claimed by the said Metlakatla people.

Answer to Complaint in Intervention, Secretary of the Interior, for and on behalf of the people of the Annette Island Reserve at 4-5, *Territory of Alaska v. Annette Island Packing Company*, No. 2023-A (District Court for the District of Alaska, April 4, 1921). Notably, in that case, the Court ultimately held that the Territory could not interfere with the reserved rights of the Metlakatians. *See Territory v. Annette Island Packing Co.*, 6 Alaska 585, 611 (D. Alaska 1922), *aff'd sub nom. Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923) (“ . . . [I]t would not be open to the territory to

question the use of any portion of the reserve by the political department of the government in furtherance of the intention of Congress.”).

Similarly, in two cases, the United States Supreme Court has held that the statute creating the Annette Islands Reserve also reserved a fishing right. In *Alaska Pacific Fisheries Company*, 248 U.S. at 89, the Supreme Court acknowledged that Metlakatians were a fishing people who “could not sustain themselves” without fishing rights. The Court held that “the use of the adjacent fishing grounds was equally essential” to the purpose of the Annette Islands Reserve, which the Court viewed as providing Metlakatians with the means to become self-sustaining. *Id.* In *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed. 262 (1962), the Supreme Court also recognized that the Metlakatians depended on fishing for their livelihood and that Congress had reserved their fishing rights by creating the Annette Islands Reserve.²

² The State erroneously implies that under *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), it has the right to regulate the Community’s fishing rights. In that case, the Court specifically distinguished reserved rights of the Community from the claims being made by Kake and Angoon, as follows: “The situation here differs from that of the Metlakatians in that neither Kake nor Angoon has been provided with a reservation” *Id.* at 62. Far from supporting the State’s position, *Organized Village of Kake and Metlakatla Indian Community vs. Egan* stand for the well-accepted proposition that state cannot destroy federally reserved fishing rights of a tribe. In *Atkinson v. Haldene*, 569 P.2d 151, 156 (Alaska 1977), this Court similarly recognized “that the reservation status of the Metlakatla Indian Community sets them apart from other Alaska Natives and that the status of the Metlakatla Indian Community” granted them special rights.

CONCLUSION

The Metlakatla Indian Community has a reserved non-exclusive right to fish outside of the Reserve under the *Chehalis* framework. The United States Supreme Court and this Court have both found that the purpose of the Reserve was to create a self-sustaining community, which, given the Reserve's geography, requires access to fishing sites in the off-reservation waters surrounding the Reserve. The State's argument to the contrary is based on a flawed analysis, and ignores the history of the Metlaktlans and the purpose of the Annette Islands Reserve.

At this time, the Community does not intend to move to appear at oral argument. However, the Community respectfully offers to do so if the Court feels that the Community's perspective would assist it in resolving this important matter.

Respectfully submitted at Anchorage, Alaska this 18th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus curiae* brief is submitted in Times New Roman typeface and is in 13-point font.



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CERTIFICATE OF SERVICE

I certify that on the following date: November 18, 2019, I served a copy of this

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CERTIFICATE OF FILING

I certify that on the following date: November 18, 2019, per the Court's Notice dated November 11, 2019, I filed this brief with the Court by:

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