

IN THE SUPREME COURT OF THE STATE OF ALASKA

John Albert Scudero, Jr.,

Appellant,

v.

State of Alaska,

Appellee.

Supreme Court No. S-17549

Trial Court Case No. 1KE-14-00672 CR

APPEAL FROM THE DISTRICT COURT  
FIRST JUDICIAL DISTRICT  
THE HONORABLE KEVIN MILLER

SUPPLEMENTAL BRIEF OF APPELLEE  
STATE OF ALASKA

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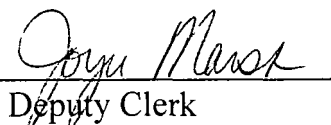
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## **AUTHORITIES PRINCIPALLY RELIED UPON**

### **UNITED STATES STATUTES**

**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.

### **UNITED STATES REGULATIONS**

#### **25 C.F.R. § 241.2 Annette Islands Reserve; definition; exclusive fishery; licenses.**

(a) Definition. The Annette Islands Reserve is defined as the Annette Islands in Alaska, as set apart as a reservation by section 15 of the Act of March 3, 1891 (26 Stat. 1101, 48 U.S.C. sec. 358), and including the area identified in the Presidential Proclamation of April 28, 1916 (39 Stat. 1777), as the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the broken line upon the diagram attached to and made a part of said Proclamation; and also the bays of said islands, rocks, and islets.

(b) Exclusive fishery. The Annette Islands Reserve is declared to be exclusively reserved for fishing by the members of the Metlakatla Indian Community and such other Alaskan Natives as have joined or may join them in residence on the aforementioned islands, and any other person fishing therein without authority or permission of the Metlakatla Indian Community shall be subject to prosecution under the provisions of section 2 of the Act of July 2, 1960 (74 Stat. 469, 18 U.S.C. sec. 1165).

(c) Licenses. Members of the Metlakatla Indian Community, and such other Alaskan Natives as have joined them or may join them in residence on the aforementioned islands, shall not be required to obtain a license or permit from the State of Alaska to engage in fishing in the waters of the Annette Islands Reserve.

#### **25 C.F.R. § 241.3 Commercial fishing, Annette Islands Reserve.**

(a) Definition. Commercial fishing is the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of such fish, shellfish, or

other fishery resources or parts thereof for profit, or by sale, barter, trade, or in commercial channels.

(b) Trap fishing sites; number and location. During 1963, and until the Secretary of the Interior or his duly authorized representative determines otherwise, the Metlakatla Indian Community is permitted to operate not more than one trap per site for salmon fishing at any four of the following sites in the Annette Islands Reserve, Alaska:

- (1) Annette Island at 55 degrees 15 minutes 09 seconds north latitude, 131 degrees 36 minutes 00 seconds west longitude.
- (2) Annette Island at 55 degrees 12 minutes 52 seconds north latitude, 131 degrees 36 minutes 10 seconds west longitude.
- (3) Annette Island at 55 degrees 02 minutes 47 seconds north latitude, 131 degrees 38 minutes 53 seconds west longitude.
- (4) Annette Island at 55 degrees 05 minutes 41 seconds north latitude, 131 degrees 36 minutes 39 seconds west longitude.
- (5) Annette Island at 55 degrees 01 minute 54 seconds north latitude, 131 degrees 38 minutes 36 seconds west longitude.
- (6) Annette Island at 55 degrees 00 minutes 45 seconds north latitude, 131 degrees 38 minutes 30 seconds west longitude.
- (7) Annette Island at 54 degrees 59 minutes 41 seconds north latitude, 131 degrees 36 minutes 48 seconds west longitude.
- (8) Ham Island at 55 degrees 10 minutes 13 seconds north latitude, 131 degrees 19 minutes 31 seconds west longitude.

(c) Trap fishing season. Fishing for salmon with traps operated by the Metlakatla Indian Community is permitted only at such times as commercial salmon fishing with purse seines is permitted by order or regulation of the Alaska Board of Fish and Game for Commercial Fishing in any part of the following area: from the point at which meridian 132°17'30", thence due east along said parallel to longitude 130°49'15", then due south along said meridian to the point at which it intersects with the United States-Canadian boundary, thence due west along said boundary to the point of beginning, provided, however, that the Secretary or his duly authorized representative may upon request by the Metlakatla Indian Community, authorize fishing for salmon with traps, at such other times as he shall prescribe, which authorization shall be based upon the following criteria:

- (1) Number of fish required for spawning escapement and any other requirements reasonable and necessary for conservation;
- (2) Fair and equitable sharing of the salmon resource with other user groups fishing in State waters under State law and within the State fisheries management system; and

(3) The federal purpose in the establishment and maintenance of the Metlakatla Indian Reservation.

(d) Size, construction and closure of fish traps--

(1) Size. When any part of a trap is in a greater depth of water than 100 feet, the trap as measured from shore at mean high tide to the outer face of the pot shall not extend beyond 900 feet.

(2) Construction. Poles shall be permanently secured to the webbing at each side of the mouth of the pot tunnel and shall extend from the tunnel floor to a height at least four feet above the water. A draw line shall be reeved through the lower end of both poles and the upper end of one.

(3) Method of closing. The tunnel walls shall be overlapped as far as possible across the pot gap and the draw line shall be pulled tight and both secured so as to completely close the tunnel. In addition, 25 feet of the webbing of the heart on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of fish.

(e) Other forms of commercial fishing. All commercial fishing, other than with traps, shall be in accordance with the season and gear restrictions established by rule or regulation by the Alaska Board of Fish and Game for Commercial Fishing in any part of the previously defined area; provided, however, that the Secretary or his duly authorized representative may, upon request by the Metlakatla Indian Community authorize such other commercial fishing at such times as he shall prescribe, which authorization shall be based upon the following criteria:

(1) Number of fish required for spawning escapement and any other requirements reasonable and necessary for conservation;

(2) Fair and equitable sharing of the fishery resource with other user groups fishing in State waters under State law and within the State fisheries management system; and

(3) The Federal purpose in the establishment and maintenance of the Metlakatla Indian Reservation.

**25 C.F.R. § 241.4 Subsistence and sport fishing, Annette Islands Reserve.**

(a) Definitions.

(1) Subsistence fishing is the taking or attempting to take any species of fish or shellfish for purposes other than sale or barter, except as provided for in paragraph (a)(2) of this section.

(2) Sport fishing is the taking or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line or by such means as defined by regulation or statute of the State of Alaska.

(b) Restrictions. Subsistence fishing within the Annette Islands Reserve shall be in accordance with the season, gear and bag restrictions established by rule or regulation of the Alaska Board of Fish and Game for Commercial Fishing in Fishing District No. 1. Sport fishing within the Annette Islands Reserve shall be in accordance with the season, gear and bag restrictions established by rule or regulation for Southeastern Alaska by the Alaska Board of Fish and Game. Both subsistence and sport fishing shall also be in accordance with such ordinances as may be adopted by the Council of the Metlakatla Indian Community and approved by the Secretary of the Interior.

## **PRESIDENTIAL PROCLAMATION**

**39 Stat. 1777 (1916).**

WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery [on Annette Island];

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet, from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation; also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaska natives as have joined them or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.



## INTRODUCTION

Following an invitation from this Court, the Metlakatla Indian Community filed a six-page amicus brief summarily announcing its position that its members possess undefined and unproven additional off-reservation fishing rights that conflict with existing Alaska law. The brief is remarkable for what it does not do: (1) it does not assert that Scudero's particular fishing activity would have been lawful under the Tribe's expanded view of its fishing rights; (2) it does not assert that any court has acknowledged the Tribe's expanded rights; (3) it does not assert that any court has enough evidence to recognize those rights now; (4) it does not endorse Scudero's arguments of immunity from liability based on the Tribe's alleged aboriginal rights and its failure to participate in the Alaska Native Claims Settlement Act (ANCSA).<sup>1</sup> Instead, the Tribe's amicus brief asserts in general terms a new theory of additional reserved fishing rights for its tribal members outside of its reservation. It concedes those additional rights are both unacknowledged by any court to date and contradicted by existing Alaska law that has been on the books since 1973. [MIC Br. 2] And the Tribe never ties its proposed reserved rights to Scudero's particular fishing violations. Given these characteristics, the Tribe's amicus brief does not justify upsetting the State's ability to enforce its presumptively valid non-discriminatory laws regulating fishing in state waters. Accordingly, Scudero's convictions should be affirmed.

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<sup>1</sup> 43 U.S.C. § 1601, *et seq.*

## ARGUMENT

### I. The Metlakatla Indian Community's brief does not support Scudero's arguments.

Scudero's brief argued that he was immune from prosecution based on unextinguished aboriginal rights and the fact that Metlakatla Indian Community did not participate in ANCSA. [Op. Br. 19] But weighing in upon this Courts invitation, the Metlakatla Indian Community did not support either facet of that claim. [See MIC 1-6] The Tribe makes a separate and distinct argument, not raised below, about reserved rights, and the case that it relies on most heavily—*Confederated Tribes of Chehalis Indian Reservation v. State of Washington*—exemplifies that aboriginal claims require separate analysis than a reserved rights claim.<sup>2</sup> In *Chehalis* the Ninth Circuit reiterated that aboriginal title “refers to the right of the original inhabitants of the United States to use and occupy their aboriginal territory” and requires “continuous exercise of the right.”<sup>3</sup> This makes the claim of aboriginal rights a poor fit for members of the Metlakatla Indian Community who migrated from British Columbia to Alaska in 1887, after Alaska's purchase by the United States. It also leaves unrefuted the State's arguments that aboriginal rights, even if they existed, did not exempt tribal members from non-discriminatory regulation by the State. [See State's Ans. Br. 9-10]

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<sup>2</sup> 96 F.3d 334, 341-42 (9th Cir. 1996) (separately analyzing alleged aboriginal rights and alleged reserved rights using different legal standards and reviewing different evidence).

<sup>3</sup> *Id.* at 341 (quoting, in part, *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 n.12 (9th Cir. 1981)).

Additionally, despite having ample opportunity to weigh in on the convictions for fishing violations of one of its members, the Tribe's brief does not actually address the lawfulness of Scudero's actions. It argues that the Tribe will bring a suit to gain recognition of greater fishing rights than acknowledged under at least forty-five years of state law, but is silent as to the contours of the rights it will claim and whether the Tribe believes Scudero's fishing falls within it. [See MIC Br. 2] The Tribe's brief does not delineate what waters it believes its members are entitled to fish in without being subject to state regulation. [See MIC Br. 1] The most clarity it offers is that this includes "waters surrounding the Annette Islands, which the Community asserts extend into fishing areas currently designated by the Alaska Department of Fish and Game as Areas 1 and 2." [MIC Br. 1] Stating that its assertion of rights "extends into" those areas does not establish its relevance to this case. Nowhere does the Tribe explain whether its claims cover the location in which Scudero was fishing.

This lack of support for Scudero's actual legal arguments and situation is telling.

**II. The Metlakatla Indian Community's brief does not establish alternative grounds for dismissing Scudero's convictions.**

**A. The Metlakatla Indian Community's cursory declaration of unspecified additional rights does not invalidate Alaska's fishing laws.**

The Tribe admits that it has not established—or even filed suit to begin to establish—fishing rights to be free from state regulation outside of the 3000-foot boundary of the Annette Islands Reserve. [MIC Br. 1 n.1] It acknowledges that its position conflicts with Alaska laws that have been on the books since 1973. [MIC Br. 2] The Tribe explains that it will be filing a lawsuit "in federal district court in the near

future.” [MIC Br. 1 n.1] This not-yet-existing federal litigation is apparently going to include presentation of “substantial evidence from the late nineteenth and early twentieth centuries” purporting to show recognition of the Community’s off-reservation fishing rights. [MIC Br. 1 n.1] But this evidence was not described in the Tribe’s six-page brief in this matter, let alone provided or subjected to a contested hearing.

The potential existence of a future lawsuit advocating the unlawfulness of a criminal statute is too tangential to factor into this Court’s analysis. The superior court correctly enforced existing Alaska law, which is presumptively valid.<sup>4</sup> Indeed, this Court has previously upheld a Commercial Fisheries Entry Commission decision applying existing law and denying credit towards a limited entry permit in state waters for fishing conducted within the Annette Islands Reserve Waters.<sup>5</sup> And the possibility that a lawsuit *might* invalidate a law in the future is not a basis for a court to decline to apply it in the interim.

**B. The Tribe’s legal theory of reserved rights lacks merit.**

The amicus brief argues that the Tribe has implied reserved fishing rights from the

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<sup>4</sup> *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979) (“Statutes validly enacted by the legislature come to this court with a presumption of constitutionality.”); *Zerbe v. State*, 578 P.2d 597, 598 n.2 (Alaska 1978), *overturned on other grounds* by *Kinegak v. State, Dep’t of Corrections*, 129 P.3d 887 (Alaska 2006), (where constitutional claim was not thoroughly briefed, court “employ[ed] the presumption of validity of legislative enactments, to hold the party challenging the constitutionality of the statute has not met the burden of overcoming that presumption” (citing *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447 (Alaska 1974))).

<sup>5</sup> *May v. State, Commercial Fisheries Entry Comm’n*, 168 P.3d 873, 881 (Alaska 2007). This case did not include a facial or as applied challenge to the credit given for fishing in AIR waters. *Id.*

statute creating the Annette Island Reserve and presidential proclamation establishing the area of exclusive fishing, and it relies on the Ninth Circuit Court of Appeals case of *Confederated Tribes of Chehalis v. State of Washington*.<sup>6</sup> But the brief largely ignores the United States Supreme Court cases of *Metlakatla Indian Community v. Egan*<sup>7</sup> and *Organized Village of Kake v. Egan*,<sup>8</sup> which deal specifically with commercial fishing by Alaska Natives in Alaska. In *Metlakatla Indian Community*, the Court held that the State had no authority to regulate fishing done *within* the Annette Island Reserve under authority of the Secretary of the Interior; this case only dealt with fishing within the waters of the Annette Islands Reserve and did not recognize any right to fish free from State regulation outside the Annette Islands Reserve.<sup>9</sup> And the companion case of *Organized Village of Kake v. Egan* clarified that the State could regulate fishing by Alaska Natives in state waters outside any reservation: “Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation.”<sup>10</sup>

The *Chehalis* framework states that where a reservation predates statehood, implied reservations may predate rather than conflict with a State’s claim to regulate and therefore the pre-statehood reservation may be honored when it is less explicit than a

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<sup>6</sup> 96 F.3d 334, 342-3 (9th Cir. 1996).

<sup>7</sup> 369 U.S. 45 (1962).

<sup>8</sup> 369 U.S. 60 (1962).

<sup>9</sup> *Metlakatla Indian Community*, 369 U.S. at 52-59.

<sup>10</sup> *Organized Village of Kake*, 369 U.S. at 75-76 (emphasis added).

post-statehood reservation would need to be.<sup>11</sup> But is not clear that the *Chehalis* framework is appropriate here, because as the Supreme Court recognized in *Metlakatla Indian Community*, “the Secretary, in the exercise of the authority delegated him by Congress, subjected self-government of Metlakatla not only to federal oversight but to territorial laws as well.”<sup>12</sup>

And even within the *Chehalis* framework, there is not sufficient reason to believe the executive orders contained “implied off-reservation fishing rights.”<sup>13</sup> Because “specific purposes of executive-order reservations were often unarticulated” the court considers “the executive orders themselves, the circumstances surrounding their creation, and the history of the Indians for whom they were created.”<sup>14</sup> Those factors do not warrant finding an implied off-reservation fishing right *beyond the 3000-foot boundary* defined in the 1916 order of President Wilson. The Metlakatla Tribe consisted of a group of migrants, who were not ceding territory to the United States in exchange for a reservation.<sup>15</sup> They moved to the Annette Islands before a land grant was given, and then received Congressional sanction for their move in 1891.<sup>16</sup> The Congressional Record did not discuss fishing at all in considering the amendment to create the Annette Islands

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<sup>11</sup> *Chehalis*, 96 F.3d at 342 n.2.

<sup>12</sup> 369 U.S. at 54.

<sup>13</sup> *Chehalis*, 96 F.3d at 342.

<sup>14</sup> *Id.*

<sup>15</sup> *Atkinson v. Haldane*, 569 P.2d 151, 153 (Alaska 1977).

<sup>16</sup> *Id.*

Reserve, only discussing that the Tribe had been ousted from their settlement in Canada, that they had settled on Annette Island, that the Tribe needed a “recognized footing at that place.”<sup>17</sup>

Whether the Tribe’s reservation included any fishing rights at all was subject to litigation in the early 1900s that made its way to the United State Supreme Court in *Alaska Pacific Fisheries Co. v. United States*.<sup>18</sup> But the litigation that settled the issue incorporated a clear 3000-foot boundary. The Tribe’s argument now seems to be that in addition to that implied right codified by executive order, there was an additional undefined boundary also implied, of an area in which they could fish free from state regulation. That position is inconsistent with the case law.

*Alaska Pacific Fisheries* confirmed that waters “adjacent” to the Annette Islands were included in the reservation created by Congress, and that therefore a California corporation could be forced to remove its fish trap from the waters.<sup>19</sup> Central to the decision was an analysis of the extent of territory included in the reservation.<sup>20</sup> The Supreme Court did not refer to the Presidential Proclamation issued by President Wilson just two years earlier proclaiming that the 3000 feet of water from the shoreline was included in the Reserve.<sup>21</sup> However, the proceedings below, which the Supreme Court

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<sup>17</sup> Cong. Rec. Senate 10092 (Sept. 16, 1890).

<sup>18</sup> 248 U.S. 78, 90 (1918).

<sup>19</sup> *Id.*

<sup>20</sup> *See id.* at 87.

<sup>21</sup> *See Alaska Pac. Fisheries Co. v. U.S.*, 248 U.S. at 78-89.

affirmed, had focused on the proclamation as the basis to oust Alaska Pacific Fisheries' fish traps from within the 3000 feet, and enjoined outside fishing only within that area.<sup>22</sup> And the U.S. Supreme Court later confirmed that the reserved waters only included those within 3000 feet of the Annette Islands. In *Hynes v. Grimes Packing Co. v. U.S.*, the Court relayed that in *Alaska Pacific Fisheries* it had "affirmed the decree as to the waters within 3,000 feet of the shore lines."<sup>23</sup>

This boundary also represents settled law. About 25 years ago, the Department of the Interior established the exact boundaries of the Annette Islands Reserve.<sup>24</sup> The purpose was so that everyone, including both members of the Metlakatla Indian Community and nonmembers, would know exactly where the waters of the Annette Islands Reserve and state waters are located so that they know exactly where they can legally fish.

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<sup>22</sup> *Alaska Pac. Fisheries v. United States*, 240 F. 274, 283 (9th Cir. 1917).

<sup>23</sup> *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 113 (1949) (emphasis added); see also *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 56 (1962) (stating that the exclusivity to the Metlakatla fishery within 3000 feet of the Island "was a part of the reservation as created in 1891 and clarified by the proclamation of 1916").

<sup>24</sup> In 1991, the U.S. Department of Interior published notice of a survey that had just been finished establishing the exact boundary of the waters of the Annette Island Reserve: "This plat [in three (3) sheets] identified as U.S. Survey No. 9630, Alaska, represents the Annette Islands Indian Reservation as established under the Congressional Act of March 3, 1891, and Presidential Proclamation 1332, dated April 28, 1916, and was accepted August 22, 1991." 56 Fed. Reg. 51727-02 (October 15, 1991). After protests and appeals, this survey was finally accepted in 1994 by the U.S. Department of the Interior. See *State of Alaska, U.S. Forest Service, Department of Agriculture*, 127 IBLA 1 (Interior Board of Land Appeals 1993); *State of Alaska, U.S. Forest Service, Department of Agriculture*, 11 OHA 53 (Interior Office of Hearing and Appeals 1994); Memorandum, Secretary of the Interior Bruce Babbage, dated September 25, 1994.



In its brief, the Metlakatla Indian Community claims that its members have a right to fish in the waters outside the Reserve: they have rights to “commercially fish off-reservation, where Mr. Scudero’s and other Community members’ ancestors fished,” “the Community has a reserved right to fish, on a non-exclusive basis, in the off reservation waters surrounding the Reserve.” [MIC Br. 1, 2] But nothing in the 1891 law establishing the Annette Islands Reserve, in President Wilson’s Proclamation setting up the area of exclusive fishing, or in the 1991 survey establishing the exact boundary of the Annette Islands Reserve fishing area supports off-reservation fishing rights free from state regulation.

Finally, the Tribe’s argument for off-reservation fishing rights not subject to state regulation presents an incongruity. By federal regulation, commercial fishing, subsistence fishing, and sport fishing *within* the Reserve must be done in accordance with the season, gear, and bag restrictions set by the Alaska Board of Fish and Game.<sup>25</sup> The Tribe is now arguing that *outside* of the Reserve they are not subject to any regulation by the State of Alaska. Thus, the Tribe is arguing that they are subject to less regulation off-reservation than they are subject to on-reservation. This turns the foundational tenets of Indian law on their head. It also renders superfluous wording provided in regulation

25 C.F.R. § 241.2, which provides that “Members of the Metlakatla Indian Community . . . shall not be required to obtain a license or permit from the State of Alaska to engage in fishing *in the waters of the Annette Islands Reserve*.” If no permit is required outside

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<sup>25</sup> 25 C.F.R. §§ 241.3(c), (e), 241.4(b).

of the Reserve because of the existence of some implied fishing right, then this regulatory language is meaningless.

The federal regulations are inconsistent with the Tribe's assertion of a reserved right to fish free from State regulation outside of the reserve. They also present a reason not to retroactively excuse Scudero's fishing violations based on a hypothetical future change in the Tribe's recognized fishing rights. If Congress elected to give the Tribe greater fishing rights, it presumably would enact regulations limiting the exercise of those rights including the type of closure requirements the State enforced here.

The Tribe's argument that historically its members were known and allowed to fish outside of the 3000-foot boundary does not change this analysis. [MIC Br. 4] The State does not contest that members of the Metlakatla Indian Community can and do fish outside those boundaries. It simply insists that when they do, they are subject to the same non-discriminatory laws that apply to everyone else, including other Alaska Natives.

### **CONCLUSION**

For the foregoing reasons and those articulated in the State's answering brief, the Court should affirm Scudero's convictions and sentence with respect to the fines and suspension of fishing privileges, and should remand for removal of the sentence of probation.

