UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DAVID T. SILVA,
GERROD T. SMITH, and
JONATHAN K. SMITH,
Members of the Shinnecock Indian Nation,

Plaintiffs,

CV 18-3648
(SJF)(SIL)

-against-

BRIAN FARRISH, JAMIE GREENWOOD, EVAN LACZI, BASIL SEGGOS, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.
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STATE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO REPORT AND RECOMMENDATIONS

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PRELIMINARY STATEMENT

Defendants New York State Department of Environmental Conservation, Basil Seggos, Brian Farrish, and Evan Laczi ("State Defendants") respectfully submit this Memorandum of Law in Opposition to Plaintiffs' Objections to Magistrate Judge Locke's Report and Recommendations ("Objections").

Plaintiffs' Objections are a rehash of earlier arguments, as well as an attempt to introduce yet more documents and arguments they failed to include in their Complaint. As Plaintiffs' arguments are either mere repetition of their opposition to the motions to dismiss, or attempts to introduce new arguments and evidence at this late stage, the Court need only review Magistrate Judge Locke's Report and Recommendations ("R&R") for clear error.

STANDARD OF REVIEW

Where a specific, timely objection has been made to any portion of a Report and Recommendation, the District Court Judge reviews that portion *de novo*. *See Harper v. Brooklyn Children's Ctr*., 2014 U.S. Dist. LEXIS 37649, *2 (E.D.N.Y. March 20, 2014). However, "[g]eneral objections, or 'objections that are merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original papers will not suffice to invoke de novo review because such objections would reduce the magistrate's work to something akin to a meaningless dress rehearsal.'" *Stair v. Calhoun*, 2015 U.S. Dist. LEXIS 42766, *3 (E.D.N.Y. March 31, 2015)(internal citations omitted). Instead, if a party merely reiterates their original arguments, the Court reviews the Report and Recommendations only for clear error. *See Brooks v. Educ. Bus Transp*., 2015 U.S. Dist. LEXIS 153309, *3 (E.D.N.Y. November 12, 2015).

"Furthermore, even in a de novo review of a party's specific objections, the Court ordinarily will not consider arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance." *Libbey v. Vill. of Atl. Beach*, 982 F. Supp. 2d 185, 199 (E.D.N.Y. 2013)(internal citations omitted); *see also Charlot v. Ecolab, Inc.*, 97 F. Supp. 3d 40, 51-52 (E.D.N.Y. 2015)("it is well-established in this district and circuit that a district court generally will not consider new arguments raised for the first time in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not."); *Azkour v. Little Rest Twelve, Inc.*, 2012 U.S. Dist. LEXIS 42210, *7 (S.D.N.Y. March 27, 2012)("[c]ourts generally do not consider new evidence raised in objections to a magistrate judge's report and recommendation absent a compelling justification for failure to present such evidence to the magistrate judge."); *Feehan v. Feehan*, 2010 U.S. Dist. LEXIS 100422, *7 (S.D.N.Y. September 22, 2010)("it is inappropriate for the Court to consider new evidence upon review of a Magistrate's Report and Recommendation, when Parties had an opportunity fully to brief their Cross-Motions before the Magistrate.").

"[T]he purpose of objections to a report and recommendation is to focus the attention of the district court on possible errors of law or fact contained in the report, not to present new evidence and arguments that were not presented to the magistrate judge in the first instance." *Isaacs v. Smith*, 2005 U.S. Dist. LEXIS 16791, *14 (S.D.N.Y. August 12, 2005).

ARGUMENT

Plaintiffs' Objections fail for each of the above reasons. In arguing against Eleventh Amendment Sovereign Immunity, Plaintiffs both repeat the prior arguments of their opposition to State Defendants' Motion to Dismiss, as well as improperly attach new documents, without

any justification for why these publicly available documents and the new arguments based upon them are put forth only now. In arguing against *Younger* abstention, Plaintiffs reiterate the same arguments they made in their Memorandum of Law in Opposition to the State Defendants' Motion to Dismiss ("Plaintiffs' Memo in Opp."). They additionally attach a new DEC policy document, and offer new arguments based upon it. In alleging discriminatory intent under 42 U.S.C. §§ 1981, 1982, Plaintiffs rehash prior arguments from their "sur reply" in opposition to State Defendants' Motion to Dismiss. Lastly, Plaintiffs have failed to address the R&R's analysis of standing, or Defendant Seggos' personal involvement, or that certain claims are time-barred.

Eleventh Amendment Sovereign Immunity

Plaintiffs object to the analysis of Eleventh Amendment Sovereign Immunity and the non-application of the *Ex Parte Young* Exception under *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997), and *W. Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004).

Plaintiffs claim that the R&R misstates the relief they seek, and claim that they seek only a "use right" of the waters. Plaintiffs parrot an argument they made in opposition to the State Defendants' Motion to Dismiss. In their prior opposition, Plaintiffs argued that the State Defendants "completely mischaracterize the relief sought by Plaintiffs in conclusory fashion as analogous to a quiet title suit. Plaintiffs seek no such relief defining ownership or its equivalent." *See* Plaintiffs' Memo in Opp., p. 9. Where objections merely rehash arguments presented to the Magistrate Judge, the standard of review by the District Court is not de novo but clear error. *Sibley v. Choice Hotels Int'l, Inc.*, 304 F.R.D. 125, 130, 2015 U.S. Dist. LEXIS 319 (E.D.N.Y. 2015).

Plaintiffs now attempt to expand this argument by improperly attaching new documents to their Objections. Plaintiffs have attached a publicly available Bureau of Indian Affairs document, purportedly to show that the Shinnecock Indian Tribe has historically shared resources when it has "absolute and uncontested control of a resource," (Objections p. 9), along with a 1977 Department of Commerce Report on aquaculture in Indian communities. These documents are both improper at this stage and irrelevant.

These documents are readily available public documents[1], and Plaintiffs not explained why they are submitted only now. As they have done previously, Plaintiffs seek to attach new evidence and documents with nearly every filing. The Court should disregard these documents. *See Azkour*, 2012 U.S. Dist. LEXIS 42210, *7.

Moreover, these documents are irrelevant to the question of Eleventh Amendment Sovereign Immunity. The Bureau of Indian Affairs Report was prepared in response to the Tribe's petition for Federal recognition. Its findings concern activities and governance on the Shinnecock Reservation itself, and were prepared as evidence of a tribe's existence as an "American Indian Entity." *See* Proposed Finding at p. 23. The findings in the report refer to on-reservation land, or lands in the Shinnecock Lease, under actual control of the Shinnecock tribe. These findings have no relevance to this lawsuit.

Plaintiffs also attach a 1977 United States Department of Commerce report on "Aquaculture, Fisheries, and Food Processing as a Combined Economic Development Option for Indian Communities." Plaintiffs improperly put forth a new argument that this document shows that the Federal government recognizes that the Shinnecock tribe "*must possess a high level of water rights*." Objections p. 11. Plaintiffs' new arguments reveal the nature of their claim:

[1] *See* <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/004_shinne_NY/004_pf.pdf> (last visited 2/1/19).

"unextinguished aboriginal Shinnecock Indian Nation water rights" (Objections p. 9), and belies their characterization of seeking vaguely-defined "use rights." Moreover, this document is irrelevant, as it refers to water resources on the Shinnecock reservation. Plaintiffs' claims here are that they are exclusively free from regulation *off* the reservation.

Plaintiffs seek to be uniquely and exclusively free from any state regulation in "usual and customary Shinnecock fishing waters,"—not to share a resource within the Shinnecock reservation itself. This vague relief contains undefined geographic limitations. Their attempt to demonstrate that they have "historically shared these waters" reveals their actual argument: that the Tribe indeed has "regulatory authority . . . over the *contested* waters" (Objections p. 7, emphasis added), and their claim of "historic and contemporary exertion of regulatory and jurisdictional powers of the Shinnecock Indian Nation over the same contested waterways." *Id*. Their assertion that they are seeking an ill-defined "use right" falls flat. Plaintiffs seek absolute and unregulated rights of access and use of waters and resources, where all others remain excluded subject to regulation. Their newly proffered argument—"the significant, historic and contemporary *exertion of regulatory and jurisdictional powers* of the Shinnecock Indian Nation over the same *contested* waterways" (Objections p. 7 emphasis added)—only serves to make the extent of Plaintiffs' claims more abundantly clear. The analysis of the Report and Recommendation is correct.

Younger Abstention

Plaintiffs repeat their prior argument that a bad faith exception to *Younger* abstention applies. Plaintiffs echo the argument made in opposition to State Defendants' Motion to Dismiss, in their October 22, 2018 letter — which Magistrate Judge Locke's R&R considered as

Plaintiffs' "sur-reply." *See* ECF Document 60. Plaintiffs resume their argument that two emails show racial targeting for enforcement. As Plaintiffs merely rehash prior arguments, the Court need only review this section of the R&R for clear error. *Bartels v. Inc. Vill. of Lloyd Harbor*, 97 F. Supp. 3d 198, 204 (E.D.N.Y. 2015).

Plaintiffs also resuscitate their argument that bad faith applies due to State Defendants' failure to consult with the Shinnecock Indian Nation pursuant to Federal Executive Order No. 13175. Objections p. 13. Plaintiffs pick up the same argument they previously made, *see* Plaintiffs' Memo in Opp. pp. 14-15; however, they now attach a publicly available 2009 DEC document: CP-42, Contact, Cooperation, and Consultation with Indian Nations.[2] Once again, Plaintiffs offer no justification for improperly submitting new documents and putting forth a new argument based upon it in their Objections to the R&R. The Court should not consider this new document. *See Libbey v. Vill. of Atl. Beach*, 982 F. Supp. 2d 185, 199 (E.D.N.Y. 2013)("Furthermore, even in a de novo review of a party's specific objections, the Court ordinarily will not consider arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance.")(internal citations and brackets omitted). As Plaintiffs' argument again merely reprises their previous argument in opposition to State Defendants' Motion to Dismiss, the Court need only review for clear error. *Bartels*, 97 F. Supp. 3d at 204.

Standing

Though Plaintiffs state in a cursory fashion that they "object to the Report's find[sic] that Plaintiffs Jonathan and Gerrod lack standing," and block quote two paragraphs from the R&R

[2] <https://www.dec.ny.gov/docs/permits_ej_operations_pdf/cp42.pdf> (last visited 2/1/19)

(Objections p. 4), they fail to pursue this argument. They make no argument that Magistrate Judge Locke misapplied law or fact in his analysis that Plaintiffs lack standing. Plaintiffs fail to address the crucial point: that their request for relief is "entirely speculative and remote" and that they have failed to establish a "concrete and particularized injury." R&R at pp. 38-39. Conclusory and general arguments do not suffice; thus, the Court need only review this portion of the R&R for clear error. *See Jemine v. Dennis*, 901 F. Supp. 2d 365, 371 (E.D.N.Y. 2012); *Edwards v. Fischer*, 414 F. Supp. 2d 342, 346-347 (S.D.N.Y. 2006)("where objections are merely perfunctory responses, argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original petition, reviewing courts should review a report and recommendation for clear error.")(internal quotations and citations omitted); *Watson v. Astrue*, 2010 U.S. Dist. LEXIS 39717, *2 (S.D.N.Y. 2010)("To the extent, however, that the party makes only conclusory or general arguments, or simply reiterates the original arguments, the Court will review the Report strictly for clear error.")(internal citations omitted).

As the R&R concludes, all Plaintiffs lack standing as to the injunctive and declaratory relief they seek. This lack of standing precludes their claims, independent of the *Younger* and Eleventh Amendment bars. R&R p. 39 n. 19, p. 53.

Failure to State a Claim – 42 U.S.C. §§ 1981, 1982

Plaintiffs again recycle their argument that internal DEC emails and failure to consult with the Shinnecock tribe show that the Shinnecock people were "racially profiled and targeted for prosecution." Objections pp. 4, 11. Though Plaintiffs label their argument here as "Errors of Fact" (*id*.), they rehash the arguments that Magistrate Judge Locke considered as a "sur-reply" to State Defendants' Motion to Dismiss. *See* Plaintiffs' Letter dated October 22, 2018, ECF

Document 60. Plaintiffs offer nothing new from their prior "sur-reply": "This email shows that the Shinnecock were referred to and targeted for prosecution by race before Plaintiff Silva was arrested." *Id*. The Court should review this section of the R&R only for clear error. *Reeder v. Young*, 2018 U.S. Dist. LEXIS 49145, *6 (N.D.N.Y. March 6, 2018)("when an objection merely reiterates the *same arguments* made by the objecting party in its original papers submitted to the magistrate judge, the Court subjects that portion of the report-recommendation challenged by those arguments to only a *clear error* review.")(emphasis in original).

Magistrate Judge Locke's analysis is correct. Plaintiffs have alleged no facts showing a) that Plaintiffs were treated less favorably than white citizens, or that the State Defendants enforced the law in a discriminatory manner, and b) that Defendants Farrish, Laczi or Seggos were motivated by racial animus.

As with the R&R's analysis of standing, Plaintiffs do not substantively—or in any way—object to the R&R's analysis that the Complaint fails to allege Defendant Seggos's personal involvement, or that Gerrod and Jonathan's claims under Sections 1981 and 1982 are time-barred. R&R p. 43, n. 23. The Court need not consider Plaintiffs' perfunctory "objections" to these recommendations. *Edwards v. Fischer*, 414 F. Supp. 2d at 346-347.

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that this Court accept the Report and Recommendations of Magistrate Judge Locke in its entirety, and dismiss the Complaint in its entirety.

Dated: Mineola, New York
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