UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNKECHAUG INDIAN NATION, CHIEF HARRY B. WALLACE, In his capacity as Chief and Individually,

Plaintiffs,

-against-

BASIL SEGGOS, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Defendants.
X----------X

Docket No. : 2:18-cv-01132 (WFK)(AYS)

Date Served: 01/22/2019

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

January 22, 2019

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I. PRELIMINARY STATEMENT

This action was commenced by the Unkechaug Indian Nation ("Nation") and Chief Harry B. Wallace ("Chief Wallace") in his official and individual capacity seeking declaratory and injunctive relief for the retention of fishing rights that are essential to the Nations' self-governing, culture, economic and spiritual practices.

The New York State Department of Environmental Conservation ("NYSDEC") and NYSDEC Commissioner Basil Seggos ("Seggos") moves the Court under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint premised on the Plaintiff's failure to state a cause of action and an Eleventh Amendment argument that the Defendants are immune from prosecution. Additionally, the Defendants argue issues of mootness as to NYSDEC enforcement on the Unkechaug Reservation lands (known as the Poospatuck Indian Reservation) because Defendants admit that they do not have the authority to enforce fishing regulations on the reservation. Finally, Defendants make cursory arguments that the Plaintiffs' religious claims are not ripe, and the Nation and Chief Wallace do not have standing to make religious claims under the First Amendment.

As argued below, the Plaintiffs will show through detailed legal analyses that the complaint states a cause of action sufficient to defeat the Defendants' Motion. Plaintiffs have suffered a concrete injury that complies with the standing requirements to commence this Article Three action. Plaintiffs will further show that State sovereign immunity under the Eleventh Amendment does not apply in this case because the Defendants waived immunity and Plaintiffs meet the exception under Ex Parte Young. The cursory arguments of mootness fail because Defendants' rely on a counterintuitive argument that the NYSDEC has no authority over reservation activities by Plaintiffs, while the concrete facts show criminal enforcement, including

confiscation of property related to fishing and threat of criminal enforcement for fishing against tribal members. The ripeness argument also fails, because it is the Defendants' interference, through criminal prosecution, confiscation of property related to fishing and the threat of criminal prosecution of fishing, including shell fish, that violated the spiritual practices of the Nation and Chief Wallace. Lastly, the standing issue is inconsistent with the Unkechaug spiritual and religious beliefs that are inclusive of all Unkechaug individually and collectively tied to their relationship with the spirituality of fishing.

Defendants have arrogantly disparaged the Plaintiffs with cursory, general statements in its brief and footnotes labeling the Nation as an "Organization" (Def. Brief P.2) and that the Nation does not have standing because it is not on the Bureau of Indian Affairs list of Recognized Tribes (Def. Brief P.2 and Def. Ex. A 81 Fed. Reg. 510-5024). Defendants further trivialize the Andros Treaty with cursory remarks as to the age of the document rather than providing the court with prevailing case law on the issue of treaty rights; Because the Defendants are aware of the fact that this issue cannot be dismissed under a motion for relief pursuant to Fed. R. Civ. P. 12(b)(6).

II. STANDARD OF REVIEW PURSUANT TO FED. R. CIV. P 12(b)(6)

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court construes the claims liberally, "accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the Plaintiff's favor." Chambers V. Time Warner, Inc., 282 F.2d 147, 152 (2d Cir. 2002). For a party to survive a motion to dismiss, each claim must set forth sufficient factual allegations, accepted as true, "to sate a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. .d. 2d 868 (2009).

In the Court's analysis in determining a claim under Rule 12(b)(6), the Court may consider only the allegations on the face of a pleading. Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered. Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007). The Court may consider documents outside of the pleading if the documents are integral to the pleading or subject to judicial notice. Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 156 (2d Cir. 2006)

III. STATUS OF THE PLAINTIFF NATION

The Unkechaug Indian Nation is a New York State recognized Indian Nation pursuant to New York State Indian Law §§ 150-153 and federally recognized Indian Nation under Federal Common Law. (See Gristede's Foods. Inc. v. Unkechauge Nation, 660 F. Supp. 2d 442 (2009), Defendants seem to challenge this fact in Defendants' Memorandum of Law P. 2, however a Tribe can be recognized by the Federal Government for one purpose and not for others.

> Thus, a tribe might be recognized for some purposes and not for others. *Id.* For example, under the Indian Nonintercourse Act, 25 U.S.C. 177, [**11] which, like 25 U.S.C. 81 refers to any "tribe of Indians," the Supreme Court has held that explicit recognition is not required if the group satisfies the general test of tribal status laid out in *Montoya v. United States*, 180 U.S. 261, 266, 45 L. Ed. 521, 21 S. Ct. 358 (1901). That decision defines a tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *See United States v. Candelaria*, 271 U.S. 432, 442, 70 L. Ed. 1023, 46 S. Ct. 561 (1926). *See also Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir.), *cert. denied*, 444 U.S. 866, 62 L. Ed. 2d 90, 100 S. Ct. 138 (1979); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 n.8 (1st Cir. 1975).
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> (W. Shoshone Bus. Council v Babbitt, 1 F3d 1052, 1056 [10th Cir 1993].)

The complexities of Indian law in the United States courts have been described by Justice Thomas as schizophrenic because of the historical relationship of the indigenous people of this country and the changes in political and legal relationships over the centuries. (See US v. Lara, 541 U.S. 193, 219 (2014) (Thomas concurring) In the landmark case, Montoya v. United States, 180 U.S. 261, 266, 45 L. Ed. 521, 21 S. Ct. 358 (1901) the standard for the recognition of Indian Tribes was articulated by the Supreme Court and has remained the standard since 1901. The standard set by the Montoya Court was used by the Indian Reorganization Act-Wheeler Howard Act of 1934 to determine tribal status under 25 CFR Pt. 83 (federal acknowledgment).

The Indian Reorganization Act-Wheeler Howard Act of 1934 was an attempt to invite and organize tribes under a federal organizational umbrella that was consistent with, at that time, a federal scheme to standardize Indian governments. However, the Indian Reorganization Act-Wheeler Howard Act was proven defective for many reasons, including prejudice by its head, John Collier against certain tribes based on phenotype and racial mixture. [1]

Interestingly, the only Indian Nation in New York that obtained Federal Recognition through the Part 83 was the Shinnecock Nation after a 21 year wait for a determination from the Bureau of Indian Affairs. The remaining New York Indian Nations, Tuscarora, Onondaga, Oneida, Seneca, Cayuga and the Mohawk were federally recognized by an administrative act by the Under Secretary of Interior for the Bureau of Indian Affairs. Although

[1] John Collier acting as Commissioner of the BIA oversaw placing Japanese Americans, under Executive Order 9066, on Indian Reservations. Collier during his tenure as BIA Commissioner was also responsible for sending anthropologists and sociologists (Harvard Graduate-Carl Seltzer) to determine the quantum of Indian Blood in each applicant through Anthropometric study which included phrenology and the measuring of heads. (See Maynor v Morton, 167-US APP DC 33, 510F 2d 1254, 1256 (1975). Being consistent with actions described in Maynor, Id., Collier as Commissioner of the BIA denied Tribes, including the Unkechaug, from adopting the Indian Reorganization Act because they were of mixed race with blacks and appeared more black than Indian.

Part 83 was never applied to these New York Indian Nations and each Nation is now on the list of recognized tribes by the federal government.

As the Court can see from the brief historical outline of New York State Indian Nation status, the federal recognition process is not exclusive to approval under 25 C.F.R. Part 83. The Unkechaug were recognized under federal common law pursuant to a full evidentiary hearing in the Eastern District of New York by Hon. Justice Matsumoto in Federal Court, using the high standard of preponderance of evidence as compared to the BIA standard of reasonableness.

Accordingly, the Federal Common Law recognition of the Nation is sufficient to proceed in this case and gives the Nation standing under Federal Common Law. The Plaintiffs seek no benefits or actions from the Bureau of Indian Affairs in this case. The primary purpose of being listed as a federally recognized tribe is purely to obtain benefits or action on your behalf by the Bureau of Indian Affairs. The Unkechaug under federal common law is recognized as an Indian Nation and entitled to pursue its rights in this Court. The Defendants' argue that Plaintiffs do not have standing due to not being listed by the Bureau of Indian Affairs; this is patently erroneous.

IV. ARGUMENT

a. THE ANDROS TREATY IS A JUSTICIABLE CONTROVERSY AND CAN NOT BE DISMISSED PURSUANT TO A MOTION UNDER FED. R. CIV. P12(b)(6)

The Defendants' brief fails to specifically deny the existence of the Andros Treaty and whether it applies to the Plaintiffs. Defendants however emphasize that the Treaty is an ancient

document that predates the United States by 100 years (Def. Brief P 2). The Andros Treaty referred to in the Complaint (See Complaint ¶54-56), was entered into on May 24, 1676 by Governor Andros and the Unkechaug. The treaty stated "that they (Unkechaug) are at liberty and may freely whale and fish for or with Christians or by themselves and dispose of their effects as they thinke good according to Custome.." (See Andros Papers, 1674-1676 Dec. JFS Exhibit 2). This articulated treaty right was clear and unequivocal, and the treaty continues today to provide the nation a right to fish. The controversy as to whether the Andros Treaty exists today and what are the rights of the Unkechaug is a justiciable matter and properly before this court. The Plaintiffs seek declaration of their fishing rights under the language of the Andros Treaty. The issues of the Unkechaug rights are concrete, not speculative or conjectural, and require the Court's determination.

> Generally, treaties are construed liberally in favor of the Indians. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 766, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985); 42 C.J.S. Indians [**21] § 35. A court must examine the history, purpose, and negotiations of a treaty to determine the rights thereunder. *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 202, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). A court interprets an Indian treaty to "give effect to the terms as the Indians themselves would have understood them." *Id.* at 196.
> Cession treaties and agreements must be interpreted as the Indians understood them and doubtful expressions must be resolved in their favor. *United States v. State. of Minn.,* 466 F. Supp. 1382, 1384 (D. Minn. 1979) *aff'd sub nom. Red Lake Band of Indians v. State of Minn.,* 614 F.2d 1161 (8th Cir. 1980).
> The parties concede that the interpretation of these treaties are the heart of the case. Given the sparse record before the Court at this juncture, the Court cannot dismiss the case under the Federal Civil Rules 12(b)(6) standard.

(Ottawa Tribe of Oklahoma v Speck, 447 F Supp 2d 835, 844 [ND Ohio 2006].)

Although in this case the Defendants have failed to articulate specific challenges to the Andros Treaty, the heart of this particular controversy is the Unkechaug's fishing rights set out in the Andros Treaty.

b. THE COLONIAL TREATY IS ENFORCEABLE TODAY

The colonial Treaty relied on by Plaintiffs is valid and enforceable. Section 14 of the Constitution of the State of New York guarantees the present validity of the body of Colonial Laws prior to the revolution. Section 14 provides:

> Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.

Colonial documents are legally enforceable today under Federal Law. For example, Virginia's property confiscation laws enacted prior to the present federal constitution as a commonwealth during and after the revolution was ruled unconstitutional. See: Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603 (1813). Dartmouth College's Crown Charter was ruled not affected by the war of independence. The Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 644-650 (1819) (Dartmouth's 1769 charter, although granted by the Crown under the seal of the Province of New Hampshire, was nonetheless binding upon the State of New Hampshire as

successor, and is a contract, the obligation of which cannot be impaired by the state without violating the contract clause of the federal constitution).

> It is too clear to require the support of argument, that all contracts and rights respecting property, remained unchanged by the revolution. The obligations then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government.
> Dartmouth College, 17 U.S., at 651 (Marshall, CJ.)

The Andros Treaty was a valid agreement between Governor Andros and the Unkechaug Indian Nation at a historical point in time when Andros wanted to avoid uprisings by the Unkechaug that were imminent in New England. The Unkechaug, as was its custom, presented wampum to Andros to engage in government to government negotiations.[2]

The Plaintiffs rights under 25 USC ¶ 232 prohibits NYSDEC interference with fishing and hunting and preempts the State's authority.

c. THE PLAINTIFFS HAVE STANDING TO BRING AN ACTION UNDER ARTICLE III "CASE OR CONTROVERSY" OF THE UNITED STATES CONSTITUTION

Defendants fail to directly challenge Plaintiffs' Article III standing and only state that Plaintiffs have not plead enough factual allegations to support a "need for clear and definite prospective relief, Plaintiffs have merely, provided a laundry list of vague grievances and conclusory allegations about past events in the past" (See Def. Brief P. 1) Defendants' statement is incorrect.

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[2] See John A. Strong, PHD *The Unkechaug Indians of Eastern Long Island:* A History 68-73 (2011)

To establish standing under the "case or controversy" requirement of Article III of the United States Constitution, a Plaintiff must demonstrate a enough personal stake in the outcome to justify the invocation of judicial process. Eu, 979 F.2d at 700 (citing Baker v. Carr, 369 U.S. 186, 204, 82. S. Ct. 391, 7L, Ed. 2d 663 (1962)). "It is well established the irreducible constitutional minimum of standing contains three elements: (1) a concrete and particularized injury that is 'actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's challenged conduct; and (3) a likelihood that a favorable decision will redress that injury." Pyramid Lake Paiute Tribe of Indians v. Nevada, Dep't of Wildlife, 724 F.3d 1181, 1187-88 (9th Cir. 2013) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 55, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks and citations omitted)).

In determining an injury that is concrete and particularized the Unkechaug Indian Nation, as the party invoking federal jurisdiction, bears the burden of establishing standing. See Lujan, 504 U.S. at 561. However, in ruling on a motion to dismiss for want of standing, the "court must accept as true all material allegations of the complaint and must construe the complaint in favor of complaining party." Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1121 (9th Cir. 2010); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Thus, "[a]t the pleading stage," as in this case, "general factual allegations of injury resulting from the defendant's conduct may suffice . . . ." Cardenas v. Anzai, 311 F.3d 929, 933 (9th Cir. 2002) (quoting Lujan, 504 U.S. at 561); see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 n.3, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) ("Lujan, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the

same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been [**22] unsuccessful."). The court cannot, however, interpret the complaint so liberally as to extend its jurisdiction beyond constitutional limits. Western Mining Council, 643 F.2d at 624. Further, because Unkechaug Indian Tribe seeks injunctive relief, it must show "a very significant possibility of future harm." Montana Shooting Sports Ass'n v. Holder, 727 F.3d 975, 979 (9th Cir. 2013) (quoting Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 855-56 (9th Cir. 2002), opinion amended in other respects on denial of reh'g, 312 F.3d 416 (9th Cir. 2002)).

An analogous case with similar facts on the issue of standing is Ottawa Tribe of Oklahoma v. Speck, 447 F. Supp. 2d 835 (N.D. Ohio 2006), that "held that an Indian Tribe demonstrated injury-in-fact for purposes of Article III standing where the Tribe had informed the State's Director of Natural Resources that it intended to commence exercising its commercial hunting and fishing rights allegedly preserved under treaty and the same day the State's attorney general announced that he was disclaiming the Tribe's claim for hunting and fishing rights. Id. At 838. (quoting Skokomish Indian Tribe v Goldmark, 994 F Supp 2d 1168, 1178 [WD Wash 2014].)

In this case, the Nation seeks to enforce their treaty rights to fish at will in accordance with the treaty entered into with Governor Andros in May 24, 1676. In Speck, the court found a concrete injury and standing for the Tribe based on a press release by the Attorney General of Ohio that rejected the Ottawa's Nations' Treaty. Equally if not more compelling, in the case at bar, the NYSDEC issued criminal summons and had the New York State Attorney General's Office prosecute members of the Unkechaug under New York Environmental Conservation criminal statutes. The NYSDEC, under the direction of Seggos, confiscated property of the Unkechaug Indian Nation under New York Environmental Conservation Statutes that included

fishing nets and glass eels. (See Dec. JFS Exhibits 1, 3, 4, 5) (See Complaint ¶4, ¶7, ¶8, ¶21, ¶22, ¶23, ¶24.)

Under the direction of the Seggos, New York State Attorney General Hugh Lambert McLean threatened to criminally prosecute, Chief Harry B. Wallace with criminal felony charges based on the New York State Environmental Conservation criminal laws for the sale of glass eels by the Unkechaug Indian Nation, unless the Nation filed an action in Federal Court to assert its "alleged" fishing and hunting treaty rights. (See Complaint ¶ 25 and Dec. JFS Exhibit 1)

Additionally, the Office of the General Counsel, Deputy Commissioner & General Counsel for the NYSDEC, Thomas S. Berkman wrote a letter to Chief Harry B. Wallace stating that "Although the Unkechaug Indian Nation asserts a sovereign right to harvest these eels. DEC Staff are unaware of any legal authority or treaty-based rights authorized to harvest….." Mr. Berkman goes on further "...Therefore, DEC will continue to work with the U.S. Fish and Wildlife Service, other state law enforcement agencies and concerned Indian Nations to address violations and illegal commercialization of American eel less than 9 inches long." (Dec. JFS Exhibit 6)

Mr. Berkman renounces the Andros Treaty and vows to "address violations and illegal commercialization of American eels less than 9 inches long". The actions of Seggos and the NYSDEC against the Plaintiffs culminates in a series of concrete injuries sufficient to allow standing to pursue this Article III action by Plaintiffs.

Chief Harry B. Wallace, on behalf of the Nation, responded to the Berkman letter and stated that the Nation will continue to fish and hunt in accordance with their ancient customs. "While the Unkechaug have been a traditional fishing people, a history which is well

documented (see The Unkechaug Indians of Eastern Long Island: a History by John Strong, PHD) there has never been any law nor regulation that has ever been imposed to restrict our ability to engage in subsistence fishing as set forth above. Please understand that we remain committed to entering into a management agreement with the DEC. However, we neither request nor accept permission to engage in historic subsistence activity, particularly when the activity may be displaced by recreational sport fishing interests." (Dec. JFS Exhibit 7)

Chief Wallace's response to Berkman, NYSDEC General Counsel and Deputy Commissioner, clearly articulates that the Unkechaug shall continue to practice its ancient fishing practices without permission or consent of Seggos or the NYSDEC. (See Complaint at ¶ 31) (See Dec. JFS Exhibits 1,7)

d. PLAINTIFFS OVERWHELMINGLY MEET THE TEST OF WHETHER PLAINTIFFS DEMONSTRATED A GENUINE THREAT OF PROSECUTION BY DEFENDANTS

The injury-in-fact and genuine threat has been illustrated above and is consistent with a favorable analysis set out in the Speck case. The case at bar is also compliant with the more stringent analysis in Skokomish Indian Tribe v Goldmark, 994 F Supp 2d 1168, 1179 [WD Wash 2014] that requires the demonstration of a genuine threat of prosecution by Defendants. Under the genuine threat test, Plaintiffs still have plead sufficiently to meet the standard set out in this Ninth Circuit case:

> The Ninth Circuit has held that, although "arrest is not necessarily a prerequisite for an individual to challenge the applicability of a criminal [**24] statute," Oklevueha Native Am. Church of Haw., Inc. v. Holder, 676 F.3d 829, 835 (9th Cir. 2012), "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement," Thomas v. Anchorage Equal Rights Comm'n, 220

> F.3d 1134, 1139 (9th Cir. 2000) (en banc) (citing San Diego Cnty. Gun Rights Comm'n v. Reno, 98 F.3d 1121, 1126-27 (9th Cir. 1996)). Rather, the plaintiff "must show a *genuine* threat of *imminent* prosecution," not the "mere possibility of criminal sanctions." San Diego Cnty. Gun Rights Comm'n, 98 F.3d at 1126 (internal quotation marks omitted; emphasis in original).
>
> (Skokomish Indian Tribe v Goldmark, 994 F Supp 2d 1168, 1179 [WD Wash 2014].)

In determining whether Plaintiffs have standing to pursue its claims, the court must consider whether the Nation and Chief Wallace have alleged a genuine threat of imminent prosecution. "when evaluating whether a claimed threat of prosecution is genuine," the court must "consider:

> (1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute." Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010).

i. First Consideration: *Concrete Plan*

When viewing the first consideration of whether the plaintiff has articulated a concrete plan to violate the law or regulation in question, "[a] general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." Thomas, 220 F.3d at 1139. However, where a plaintiff alleges that he or she has actually engaged in the illegal behavior at issue, the first element is satisfied. Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 773 (9th Cir. 2006); see also Jacobus v. Alaska, 338 F.3d 1095, 1105 (9th Cir. 2003) (holding that a challenge to the validity of campaign finance laws was ripe because

"plaintiffs have gone far beyond the requirement that they articulate a concrete plan to violate the law, and instead have actually engaged in the illegal behavior at issue.").

In the present case, Plaintiffs have promulgated its own ancestral regulations for fishing which historically continue to challenge NYSDEC regulations making the Nation's regulations in violation of the State regulations and statutes. (see Complaint ¶ 3, ¶26, 29, ¶30, ¶31 and Dec. JFS Exhibits 1, 3, 4, 6, 7)

> The court finds the Ninth Circuit's recent decision in *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012), to be instructive. In that case, the district court dismissed a Native American church's complaint challenging federal drug laws on the ground that the laws infringed on the church's use of [**28] cannabis. The court reasoned that the complaint failed to allege "exactly how, where, in what quantities Plaintiffs intended to consume marijuana, and d[id] not specify how they intend[ed] to cultivate or acquire, store, and distribute marijuana." *Id.* at 835. The Ninth Circuit reversed the district court, holding that Plaintiffs had sufficiently alleged a concrete plan when they alleged that "they ha[d] used marijuana in violation of the [challenged law] countless times, and plan[ned] to continue to do so." *Id.* at 836. The Ninth Circuit "explained that the 'concrete plan' element of the genuine threat inquiry is satisfied where plaintiffs had more than a 'concrete plan' to violate the laws at issue because they actually did violate them on a number of occasions." *Id.* (some internal quotation marks omitted).
>
> (Skokomish Indian Tribe v Goldmark, 994 F Supp 2d 1168, 1180 [WD Wash 2014].)

The case at bar, is analogous to the Skokomish Indian Tribe case where the Skokomish promulgated their own hunting rules which challenged Washington States rules and they continued to violate the law. The Court in that case held the Skokomish Indian Tribe satisfied the

"Concrete plan" element of the genuine threat inquiry. The Nation has articulated its plan for fishing that continues to violate the NYSDEC law. (Dec. JFS Exhibits 1,7)

ii. Second Consideration: *Specific Warning or threat*

The second element the court must consider is whether the prosecuting authorities have communicated a specific warning to initiate proceedings. Wolfson, 616 F.3d at 1058. The Ninth Circuit has *found a threat by a State Official to refer a matter to a county attorney for enforcement to be sufficient for purposes of Article III standing analysis*. (emphasis added) (See Culinary Workers Union v. Del Papa, 200 F.3d 614, 617-18 (9th Cir. 1999) finding attorney general's threat "to refer prosecution to 'local criminal authorities'" sufficient for purposes of Article III Standing.)"

The Plaintiffs in this case had specific warning by the past issuance of criminal summons and prosecution by NYSDEC and confiscation of property including glass eels. More significantly, New York State Assistant Attorney General Hugh Lambert McLean, on behalf of his clients NYSDEC and Seggos, threatened to prosecute Chief Wallace for alleged NYSDEC criminal felony offenses that included the commercialization of fish. (see Complaint ¶25, ¶26 and Dec. JFS Exhibits 1, 3, 4, 6, 7)

The single act of the confiscation of the glass eels by NYSDEC from the Plaintiffs meets the threshold of specific warning or threat, as set stated below:

> even if the foregoing statements, however, did not constitute "specific warnings" or "threats" to initiate proceedings, Skokomish Indian Tribe's allegations would still satisfy the second element. Once again, [**31] the court finds the Ninth Circuit's decision in *Oklevuehato* be instructive. In *Oklevueha*, federal agents seized $7,000.00 worth of marijuana that was intended for the church's use. 676 F.3d at

> 834. No prosecution arose out of the seizure. *Id.* The district court found that the plaintiffs had not adequately alleged a specific threat of prosecution because the complaint lacked allegations of any threat or warning from federal authorities or that the plaintiffs intended to continue to bring in marijuana in a way likely to be noticed by federal drug authorities. *Id.* at 836. The Ninth Circuit held that the district court's focus on future prosecution was inapposite where the statute had already been enforced against the plaintiffs. *Id.* The court found that where the regulation had already been enforced against the plaintiffs, any concerns that the plaintiffs' fear of enforcement is purely speculative are eliminated.
>
> (Skokomish Indian Tribe v Goldmark, 994 F Supp 2d 1168, 1181 [WD Wash 2014].)

Pursuant to the Ninth Circuit decisions in Skokomish id. and Oklevuehato id., the court held that confiscation of property and threats to initiate proceedings against tribal members are sufficient to satisfy the second element. In 2016 at JFK Airport, Seggos and the NYSDEC confiscated eels and fishing property from the Plaintiffs. Defendants also threatened prosecution in the letter from Berkman, General Counsel and Deputy Commissioner of NYSDEC, and made specific threats of prosecution to Chief Wallace through their attorney, Assistant NYS Attorney General Lambert. (See Complaint ¶23, ¶24, ¶25, ¶26, ¶31 and Dec. JFS Exhibits 1,3,4,6,7)

iii. History of *Past Prosecutions*

The Unkechaug easily meet the final prong of the genuine threat inquiry that requires a history of past prosecution or enforcement. Wolfson, 616 F.3d at 1058. There was prosecution in 2014 of Nation members fishing under the Unkechaug rules and regulations. These Nation members were issued criminal summons and charged with five different counts of 1.) take undersized species, American eel under 6 inches; 2.) take in excess of bag limit, species of American eel; 3.) take food fish from marine and coastal district; 4.) use American eel traps in

the waters of the marine; 5.) conspiracy in the fifth degree. (See complaint ¶ 22 and Dec. JFS Exhibits 1,3) The issuance of these 25 summonses clearly meets the third element of past prosecution.

> Again, Defendants assert that the two specific prosecutions identified in Skokomish Indian Tribe's Amended Complaint are stale. (State Mot. at 6-7; Pros. Mot. at 6.) However, the fact that Skokomish Indian Tribe members have been prosecuted [**33] while exercising their Treaty hunting rights in the past supports their claim that the alleged threat of prosecution today is genuine, particularly when coupled with the explicit threat that if members are discovered exercising Treaty rights in disputed areas "evidence will be gathered and filed with the appropriate county prosecutor."
>
> (Skokomish Indian Tribe v Goldmark, 994 F Supp 2d 1168, 1182 [WD Wash 2014].)

Accordingly, the past prosecution of the Nation members is consistent with Skokomish.

In conclusion, the Plaintiffs have met the three-part test set forth in the above cases through sufficient factual content to illustrate the genuine threat inquiry.

e. PLAINTIFFS' COMPLAINT SUFFICIENTLY PLEADS FACTS AND CLAIMS THAT SQUARELY FIT THE EX PARTE YOUNG EXCEPTION WHERE THE ELEVENTH AMENDMENT BAR DOES NOT APPLY TO SEGGOS

Seggos created an injury in fact to the Plaintiffs by his direct actions to violate the Plaintiffs' Treaty Rights to fish. The actions by Seggos violated the Plaintiffs' rights to practice their cultural, economic, and spiritual sovereignty by the continuous violation of their rights under the Andros Treaty to "freely fish". Plaintiffs have suffered an injury-in-fact because under the direction of Seggos, the Plaintiffs will be prohibited from the exercise of their rights under the Andros Treaty which is ongoing and a tangible violation of Plaintiffs' Treaty Rights and right

to self-govern and religious expression. Seggos directed continuing criminal prosecution and confiscation of eels from the Plaintiffs in violation of the Plaintiffs sovereign rights as an Indian Nation and under the Andros Treaty. (See Dec. JFS Exhibit 1) Seggos' violation of Unkechaug treaty, federal and sovereignty rights is ongoing and shall continue, unless the court grants Plaintiffs injunctive relief to prohibit Seggos' illegal behavior. The Plaintiffs do not seek exclusive fishing rights but just recognition of its rights to fish and depose of the fish consistent with their customs. The action brought by the Plaintiffs does not preclude the Plaintiffs from management and control of the water ways, it only seeks to define its fishing rights. Plaintiffs sue Seggos in his official capacity seeking declaratory and injunctive relief.

i. **Standard Under Eleventh Amendment Ex Parte Young:**

Actions for damages against a state official in his or her official capacity are essentially actions against the State and will be bared by the Eleventh Amendment. Will v. Michigan State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989)

Under the doctrine of Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, the Eleventh Amendment does not bar suits seeking to "enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury." Quern v. Jordan, 440 U.S. 332, 337, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (citing Ex Parte Young). The Ex Parte Young exception also encompasses claims for prospective declaratory relief. Alden v. Maine, 527 U.S. 706, 747, 119 S.Ct. 2240, 144, 144 L.Ed.2d 636 (1999).

"In determining whether the Ex Parte Young doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether the

complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 636, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)

Defendants erroneously argue that Plaintiffs have not specifically been threatened with prosecution for their future activities and have not connected Seggos to these acts. (Def. Brief. P.12) This is patently false. Seggos directed NYSDEC officers to confiscate eels at JFK which were property of Unkechaug Indian Nation and directed Thomas Berkman of the NYSDEC to challenge the treaty-based rights of the Unkechaug Indian Nation. (Dec. JFS. Exhibits 1, 4 and Complaint ¶ 4, ¶5, ¶8 ¶20, ¶25, ¶27, ¶31, ¶32) Additionally, Seggos directed Hugh Lambert McClean, Assistant New York State Attorney General, to threaten Chief Wallace with felony prosecution unless Plaintiffs initiated an action to determine its treaty rights in Federal Court. (Dec. JFS. Exhibit 1 and Complaint ¶25, ¶26 ¶31, ¶32.) NYSDEC and Seggos are represented by the New York State Attorney General's Office and the attorneys that are employed by the New York State Attorney General.

Thomas Berkman General Counsel for Seggos, categorically stated that NYSDEC, will work with US Fish and Wild Life and other state agencies to enforce NYSDEC regulations against Chief Wallace and the Unkechaug Indian Nation. (Dec. JFS Exhibits 1,6)

Chief Wallace emphatically stated in his reply letter to Berkman that the Nation shall continue to engage in their traditional and ancient customs of fishing in customary Unkechaug Waters as guaranteed in the Andros Treaty; That the Nation will not stop their treaty rights and ancient custom and shall continue such fishing activities without consent or permission of the State. (Dec. JFS. Exhibits 1,7)

The violation of the Plaintiffs' rights is readily traceable to Seggos and the NYSDEC as illustrated by the issuance of criminal summons to nation members for fishing, confiscation of glass eels and other property belonging to the Nation and threats of felony prosecution by NYS Assistant Attorney General Lambert unless the Nation commences an action in Federal Court.

Undoubtably, the Plaintiffs can expect the continuation of the violation of their rights unless the court grants declaratory and injunctive relief to the Plaintiffs.

ii. **Plaintiffs Seek Recognition of its Right To Fish And Hunt With Limited Regulation Not Exclusive Rights**

Plaintiff seeks a declaration of its right to fish and hunt with limited regulation not exclusive rights. A declaration of rights, in contrast to a quiet title action, is consistent with the holding by the Supreme Court in Idaho v. Coeur d'Alene, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

The Second Circuit provides no guidance in applying Couer d' Alene id, to these specific facts; an Indian Nation seeking to enforce limited treaty fishing rights which does not amount to a quiet title action or exclusion of others. Therefore, the Court must look to the 6th circuit which have applied similar facts in a myriad of cases as analyzed below.

In Coeur d' Alene, the Supreme Court held that *Ex Parte Young* exception is inapplicable when a "suit is the functional equivalent of a quiet title action which implicates special sovereignty interest.: 521 U.S. at 281, 117 S.Ct. 2028. Thus, Eleventh Amendment immunity will apply to a case against a state official sued in his official capacity if the suit 1) implicates special sovereignty interests and 2) is the "functional equivalent of a quiet title action." Id.; MacDonald v. Village of Northport, Mich., 164 F.3d 964, 971-72 (6th Cir. 1999)

In Coeur d' Alene, the Court explained at 282:

> The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunction relief would bar the State's principal officers from exercising their governmental powers an authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the relief the Tribe demands.

The Sixth Circuit has distinguished Couer d' Alene Id.

> The Sixth Circuit has held that anything short of a quiet title action is not barred under *Couer d'Alene*. *Arnett v. Myers,* 281 F.3d 552, 568 (6th Cir. 2002); *Hamilton v. Myers,* 281 F.3d 520, 528 (6th Cir. [*840] 2002). In *Arnett v. Myers,* the Sixth Circuit explained the broad implications at issue in *Couer d'Alene:* "[i]f the Tribe in *Couer d'Alene* had prevailed, Lake Couer d'Alene would have been annexed to the sovereign control of the Tribe, effectively placing the lake beyond the jurisdiction of the State of Idaho." *Arnett,* 281 F.3d at 568. The Sixth [**7] Circuit distinguished the Arnetts' action seeking a declaration of their riparian fishing rights already recognized by the State of Tennessee from *Couer d'Alene. Id.* The court explained:
> If the Arnetts prevail at trial, Reelfoot Lake will remain within the sovereign control of the State of Tennessee, and will continue to be subject to Tennessee's regulatory authority. At most, if the Arnetts prevail, the State of Tennessee will be required to respect the Arnetts' riparian fishing rights-something the state is required to do under the jurisprudence of the Supreme Court of Tennessee. The relief sought by the Arnetts in this case does not begin to approach the far-reaching and invasive relief sought by the Tribe under the particular and special circumstances of Couer d'Alene, and *this court does not read the ruling of Couer d'Alene to extend to every situation where a state property interest is implicated.*

Id. (emphasis supplied).

(Ottawa Tribe of Oklahoma v Speck, 447 F Supp 2d 835, 839-840 [ND Ohio 2006].)

In the present case before this Court, the facts are identical to Speck id. where the court held "The Tribe does not seek exclusive hunting and fishing rights, but just recognition of its right to fish and hunt with limited regulations." Speck Court further distinguishes the facts from

Coeur d' Alene, the State will not lose jurisdiction or the ability to regulate the land and waterways at issue. Accordingly, the narrow and limited exception set forth in Coeur d' Alene does not apply to this case.

In the Complaint, Plaintiffs never ask the Court for quiet title of the State's jurisdiction of waters or seek exclusive jurisdiction of those waters, only a determination of their fishing rights.

Accordingly, Plaintiffs should not fall into the limited exception set out in Coeur de' Alene because of the facts distinguished above.

f. NYSDEC EXPRESSLY WAIVED ELEVENTH AMENDMENT IMMUNITY

The state through its legal counsel used coercive powers against the Nation and Chief Wallace by threatening criminal felony charges, unless a suit was initiated by Wallace and the Nation, against NYSDEC in the United States Federal Courts to determine the treaty rights of the Unkechaug.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another State, or by Citizens or Subjects of any foreign state.

> The test for determining whether a state has waived its immunity from federal court jurisdiction is a stringent one. The United States Supreme Court has indicated that generally, it will find a waiver either if the state voluntarily invokes Supreme Court jurisdiction, or else if the state makes a clear declaration that it intends to submit itself to Supreme court jurisdiction.
>
> (Native Am. Mohegans v United States, 184 F Supp 2d 198, 201 [D Conn 2002].)

Once the States used coercive power of arrest and threatened to charge Chief Wallace with felony prosecution, the State of New York waived its sovereign immunity under the Eleventh Amendment. Seggos and NYSDEC directed its legal representative, NYS Assistant Attorney General Lambert to cunningly coerce Chief Wallace and the Nation into bringing this action. This action was commenced by threat of felony prosecution and arrest of Chief Wallace for the illegal possession and shipment of glass eels. By coercion and threat of arrest, the Defendants attempted to circumvent making an express waiver of sovereign rights under the Eleventh Amendment. Accordingly, the actions of the Defendants amount to nothing less than a waiver of the Eleventh Amendment sovereign immunity. (See Complaint ¶25 and Dec. JFS Exhibit 1)

Defendants' brief fails to justify or deny the actions of Lambert and offers only criticism of the Plaintiffs for not naming Lambert, attorney for Seggos, as a party. (Def Brief P. 11 Footnote 8) Defendants' cannot be rewarded for their duplicitous actions in this case and certainly should not be allowed to claim sovereign immunity under the Eleventh Amendment after threat of felony prosecution of Chief Wallace unless this action was commenced in Federal Court by the Plaintiffs. (Dec. JFS Exhibit 1)

g. DEFENDANTS' CRIMINAL PROSECUTION OF TRIBAL MEMBERS FOR FISHING HAS PRECLUDED NATION MEMBERS FROM PRACTICING THEIR RELIGION:

The Defendants' Brief ridicules the religious practices of the Plaintiffs and the Nation, making statements that are in direct conflict with the religious practices of the Unkechaug and inconsistent with the Defendants' own regulation that acknowledge the cultural and spiritual significance in fishing, hunting and gathering to Indian Nations. "The department recognizes that

hunting, fishing and gathering are activities of cultural and spiritual significance to the Indian Nations." (CP-42/Contact, cooperation and consultation with Indian Nations) (Dec. JFS Exhibit 5)

The facts alleged in the complaint include the criminal prosecution of tribal members for fishing, the confiscation of property and the threat of prosecution by Berkman and Lambert on behalf of Seggos and the NYSDEC; these facts are a concrete injury. The actions by the Defendants have violated the Nations' members' right to fish and practice their spiritual and religious practice related to fishing, including the harvesting crustaceans to make wampum and other religious artifacts. Some Nation members are frightened to even go out into their waterways because of the criminal prosecution by the Defendants. After issuance of 25 criminal summonses by NYSDEC, some men, women and children of the reservation are frightened of being arrested if they go onto the water even for spiritual and religious reasons. (Dec JFS Exhibit 1)

i- The Plaintiffs Have Standing:

The Defendants' attempts to argue a lack of standing must fail because the true nature of the spiritual and religious beliefs is that all Unkechaug are born into their religion and are members for life. They further believe that the Unkechaug people have an obligation to maintain their traditions and spiritual beliefs based upon their relationship to the natural world. Unkechaug means "people from beyond the hill". They are part of "the people of the shell". Their spiritual beliefs called in their prayers and songs is Midewiwin- "The way of the heart". There is no separation of Church and State in their Spirituality. Their traditional way of life is tied directly into their religion. Their Tribal symbol emphasizes the power of the natural world that has

sustained their people and their way of life despite the onslaught of anawux (strangers). (See Dec. JFS Exhibit 1)

h. LEAVE TO AMEND

In the unlikely event the Court dismisses any cause of Action in the complaint, Plaintiffs' request leave to amend the complaint.

While leave to amend a complaint should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2), it is 'within the sound discretion of the district court to grant or deny leave to amend." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007) "

CONCLUSION:

The Plaintiffs have plead sufficient facts to sustain this action and clearly met the Justiciable Controversy requirements under Article Three, as fully set forth above, as well as the requirements to overcome an Eleventh Amendment challenge by the Defendants as argued under the facts of this case and relevant case law. The Plaintiffs have also plead sufficient facts that the religious claims are ripe and that the Plaintiffs have standing to commence this claim. Accordingly, the Plaintiffs request that the court deny the Defendants' motion to dismiss under Fed.R.Civ.P. 12 (B)(6) and for such further relief this court may deem just and proper.

Dated; Queens, New York
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