UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
X----------X
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 Environmental Conservation, and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Defendants.

X----------X

Docket No. 18-CV-01132

Date Served: August 20, 2021

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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INTRODUCTION TO SUMMARY JUDGEMENT MOTION

The Unkechaug Indian Nation brings this action pursuant to 28 USC SS 2201 and Fed. Rel. Civ. Proc. 65 seeking Permanent Injunctive relief and Declaratory Judgment. The plaintiffs' move for summary judgment pursuant to Rule 56 of Federal Rules of Civil Procedure ("FRCP 56") to eliminate regulatory environmental actions and New York State Environmental Conservation power that restricts and criminally prosecutes Unkechaug Indians from fishing in Reservation and Unkechaug customary waters based on their inherent sovereignty, religious freedom and expression, treaties, and federal law. (Exhibit 1 ¶1) As set forth below in detail, the plaintiffs shall meet the requirements for complete or partial summary judgment.

The Unkechaug assertion of its rights has been challenged by the defendants with a dismissive and dehumanizing arrogance, sculpted over centuries, and developed to justify the theft of Unkechaug lands and the illicit interference with all aspects of their culture from spiritual to commercial. The defendants' congenital animus has deprived the Unkechaug of their spiritual beliefs and practices that are interconnected to the natural world that encompasses fishing and conservation of the American Eel through Unkechaug self-government and self-determination since time immemorial, and centuries prior to the arrival of European interlopers. The Unkechaug are belief bound to preserve the natural world including the American Eel and its habitat. The plaintiffs have a unique insight into generational consequences of environmental harm to the American Eel since the first Europeans interfered with Unkechaug traditional fishing and environmental practices upon their arrival. The defendants' reliance on the ASFMC management plan is hypocritical because the scheme, on its face, permits unregulated

interruption in the natural life cycle of the American Eel as compared to the Unkechaug plan that ensures a full life cycle to guarantee reproduction and provide accountability.

The defendants have applied only one tool from its countless resources in response to the Unkechaug assertion of its rights in this case, a hammer. Every encounter between the Unkechaug and the defendants have been viewed as a nail to be pounded into the ground by the defendants' hammer. The threats of arrest against Chief Wallace and other tribal members were planned and designed to deny sovereign rights of the Unkechaug to exercise their valid treaty rights and practice their native beliefs without interference by the defendants. The plaintiffs were provided with an ultimatum of immediate criminal prosecution or commencement of this legal action to prove its rights.

Since the inception of this case, there has been no attempts to act in good faith that is consistent with the defendants' own rules and regulations to (CP-42 (See Exhibit 2) cooperate with indigenous people to understand traditional wisdom accumulated over centuries, for the preservation of the natural world and environment. During this case and throughout the court ordered discovery procedure, the Unkechaug management plan for the American Eel was not studied or even acknowledged by the defendants and their experts. The defendants continue to rely on police enforcement in lieu of a meaningful management plan for the American Eel that is not based on arbitrary and capricious policies that were poorly conceived. The defendants' management plan is counterintuitive to successful traditional methods practiced by Native people and the Unkechaug that has sustained the American Eel for centuries. Defendants' enforcement plan is unscientific and deceptively promoted by defendants as a comprehensive blueprint to conserve the environment for the Native people and nonnative residents of New York State.

The defendants' treatment of the Unkechaug for asserting their rights is symptomatic of a mistaken belief that Unkechaug are inferior, and because they are inferior, they should be dehumanized based on the debunked belief in pseudo intellectual Darwinism and policies of assimilation. Because the Unkechaug reside on their traditional lands and fish in their traditional waters within NYS they are required to interact with the defendants on a regular basis. The lack of respect and consideration for native culture by defendants is manifested in the failure to honor treaties, cooperate in conservation efforts, and accept successful conservation methods and beliefs practiced and proven successful for generations.

The defendants have withheld thousands of pages of discovery claiming privilege based on alleged investigation of NYSDEC Statute NY Envtl. Conserv. Law § 71-0924, that has since expired pursuant to the statute of limitations. The failure to provide discovery under the technical argument of privilege was strategic rather than substantive because there was no criminal action commenced and the statute of limitations has since expired. Defendants were successful in improperly withholding substantial information from the plaintiffs. The delay in discovery to obtain a historical expert was another tactic used by the defendants who failed to produce a historical expert after six months delay in the case and burden of added expenses to plaintiffs' prosecution of this case. The defendants waived the production of a historical expert to challenge Dr. Strong because they could not provide a countervailing recitation of historical facts and opinions that contradicted the foremost scholar of Native people of Long Island, New York. Rather than produce expert testimony that corroborated plaintiffs' expert, the defendants chose omission over intellectual integrity and legal responsibilities.

The description of the defendants' actions is apropos because of the failure to provide the court with written documented proof of Unkechaug treaties already in their possession. The

defendants' indifference to truthfulness further blunts the senses of integrity and fairness as NYS officials dealing with Native residents. The written documentation referred to squarely addresses the colonial relationship to the Unkechaug and the acknowledged treaties and the legitimacy of those treaties with New York State under the NYS Constitution.

Essentially, the scorched earth strategy by defendants was born of prejudice and animus against the Unkechaug for asserting its treaty rights and discrediting the environmental conservation plan for the American Eel that is faulty on its face and based on unscientific and outdated methodologies. The defendants' plan permits overfishing and disruption of the completion of the life cycle of the American Eel by permitting unregulated use of the American Eel without accountability based on scientific methodologies practiced by the Native people over centuries.

The defendants have not only failed in their mission to protect the species of the American Eel for the residents of New York State, but it has cajoled its citizens through environmental and climate anxiety, to accept and allow defendants to create and put into practice environmental management plans that are not beneficial to conservation but rather conceal actual flaws and harm to the environment. The overriding fears of the public based on concerns with the climate and environment have allowed the defendants to take advantage of these anxieties and avoid criticism and the employment of superior traditional management plans offered by the Unkechaug. The defendants' management plan for the American Eel is riddled with inconsistent rules that render the plan a spectacular failure that is transparent and even obvious to the agencies charged with the management of the plan and admitted to by the ASMFC administrator. (Trans Kerns) However, the financial relationship and structure of the ASMFC with the

NYSDEC is significant and a substantial financial resource for NYS that aligns their interests as interdependent or in other words their interests are financially self-serving.

The fishing and environmental obligation of the Unkechaug is born from Unkechaug belief as expressed in their creation (Exhibit 3) and spiritual principles practiced by their members who have "walked on" and members on their present journey. The moral obligation to conserve and care for common territory for the benefit of all is well understood by the Unkechaug and Native people under the "one bowl one spoon" belief and practices.[1]

STATEMENT OF FACTS

A. Government-to-Government Relationship

The Unkechaug (Unkechaug inskitompak-the People beyond the hill) Indian Nation has existed since time immemorial and is a New York State recognized Indian Nation pursuant to New York State Indian Law §§ 150-153 and a federally recognized Indian Nation under Federal Common Law. (See *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442 (2009)) The Unkechaug are Algonquin people and follow customs and beliefs that are consistent with the Algonquin natives that reside on the Eastern Seaboard of the United States. The Unkechaug built their lands where the fresh-water and salt-water meet and fished the customary waters since time

[1] ONE BOWL ONE SPOON

The brilliant metaphor used by native people "One bowl one spoon" represented an early understanding of conservation and the cooperative use of "bowl" land and water, and the "spoon" as use of resources or bowl in cooperation that included Indian Nations, Native people, and Europeans in the spirit of peace with friendship and mutual respect. The Europeans concept of ownership was void of the notion of conservation and contrasted with the natural understanding of Native people since time immemorial. The metaphor was understood and meaningful to Unkechaug and reflects their understanding as to shared resources. Chief Wallace statement trans Exhibit 2 (Site)

immemorial. The Unkechaug continue to follow their spiritual beliefs concerning fishing and the conservation of life in the water that includes the American Eel. The Unkechaug have continued their religious tradition of making sacred wampum from shells obtained from their traditional waters.

All the European newcomers consistently maintained a government-to-government relationship between their government and the leadership of the Unkechaug Indian Nation. This includes the Dutch, the English and the Colony of New York and the United States. (See Exhibit 1 Complaint) The Unkechaug, as an independent government, conducted trade with other Indian Nations and the Dutch, English, Colony of New York, State of New York, and the United States of America. Commerce conducted by the Unkechaug were consistent with the culture and customs of the Unkechaug as Algonquin people living on the Atlantic seaboard.

B. Unkechaug Land, Water and Spiritual/Religious Belief System

The Unkechaug lands are known as the Poospatuck (where the water meets) Indian Reservation located within the borders of the State of New York, near current day Mastic, New York. The ancestral lands of the Unkechaug included vast areas of present-day Long Island that provided the Unkechaug with fishing (Kupiyamaqchmun – Unkechaug fishing) and whaling (Putuap-whaling). The Unkechaug with the other Indian Nations of Long Island shared unrestricted access to all bays, streams, rivers, and the ocean. Because the Unkechaug lived by water access points they perfected methods of fishing, harvesting, and preserving fish, crustaceans, whales, and other sea living creatures.[2] These methods of fishing and conservation

[2] "Yes. As part of our traditional way of handling our shell, our clams and our miigis and our periwinkle shell, whatever we use as wampum makers, we take that shell that we don't use as part of our tradition and return it back to the water. And in so doing, it creates an environment that allows the shell to regenerate another – more life. We consider the shell to be alive, and the evidence of that being alive is when you place it back in the water,

were consistent with their spiritual and cultural practices. The Unkechaug religious (Midewiwin-the way of the heart) centered on the belief of creation of the world and their people from the water and through the living organisms within and by the sea. Unkechaug people believe that they are the Metowak- people of the shell. Their creation story that is taught and passed down by each generation was explained by Chief Wallace in his deposition while questioned by the defendants' attorney:

> We are the Midweiein inni, which is in our way its called the – Midwiwin means way of the heart, way of the good heart, and the metowak means the people of the shell, and that's who we are. And we are part of an alliance that goes from here to the Great Lakes. And so what we do is the shell to us is a living, breathing thing. The creation of—you got to bear with me, because I'm – I'm, you know, im trying to retell a story for a deposition that's told in a much different context. But in our—in what I am taught and what we are taught is that the shell, the miigis shell which I wear and the wampum shell which I wear, was important in the creation of man.
> And when the creator tried to create man, he tried four times to create him. The third – The first three times he tried to breathe life into man, and as a result of his power, the Power of his breath, the man that he tried to create in his own image was destroyed Because his breath was too powerful
> And so the shell being went to the creator, and asked him and said to him that I will Sacrifice my life and my existence so that your breath could be deflected. Because if you Look inside the shell, it's made by – it's a coil on the inside, and so when breathing into The shell he would kill the being.
> But his breath; the power of his breath would be deflected in such a way that life could be Given to man. And so the fourth time he breathed into – the creator breathed into the sHell, and in the fourth creation man was created.
> And so we wear the shell has a representation of the creation of all life, the creation of Man. And so we work with tis shell, we work with the clam shell and the miigis shell and The periwinkle. When we work with them, we are working with something that we know Was part of the creation of man.
>
> (See Exhibit 3 p33-36 Deposition of Harry B. Wallace Jan 28, 2020)

Chief Wallace details the creation story and the interrelatedness between the Unkechaug people and the water animals and organisms. This relationship is evident throughout Unkechaug

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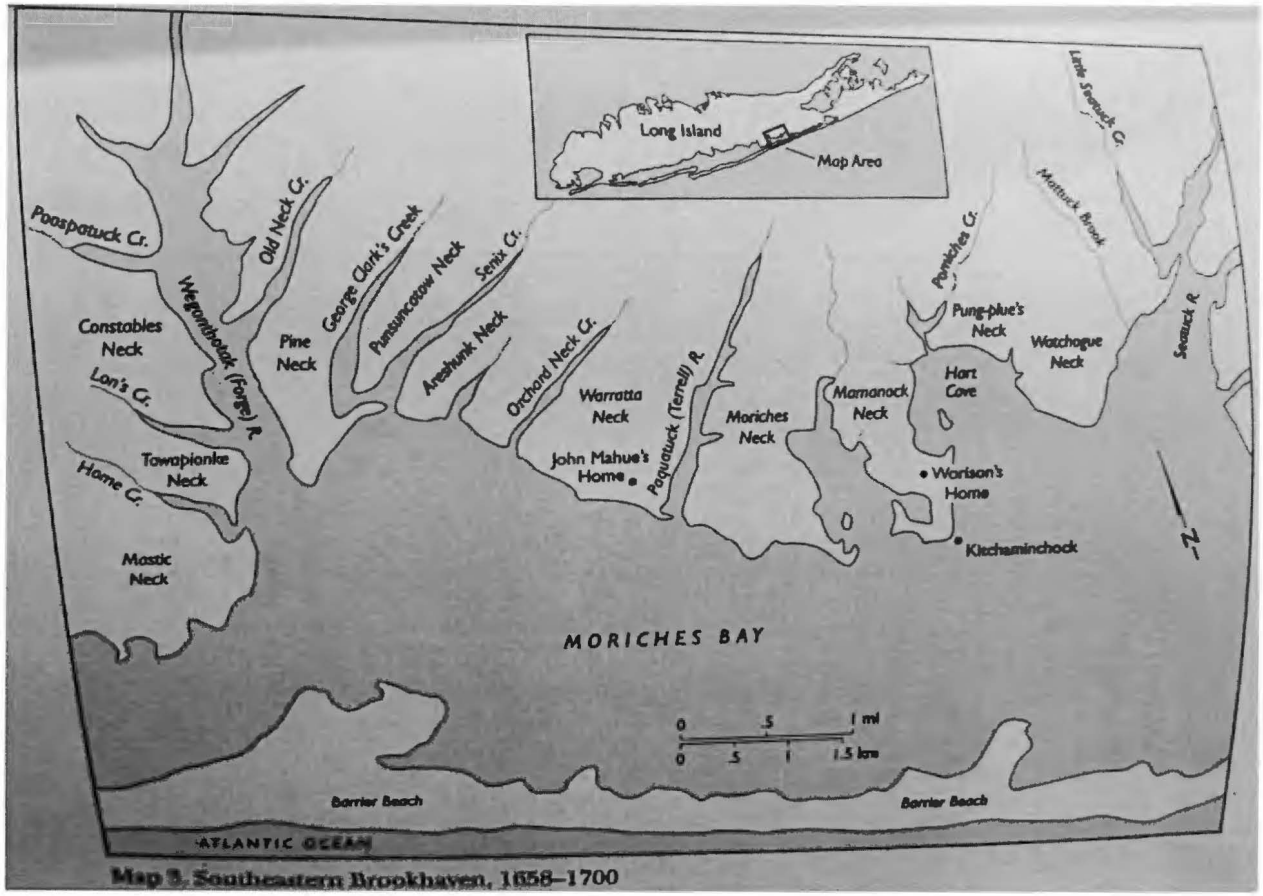
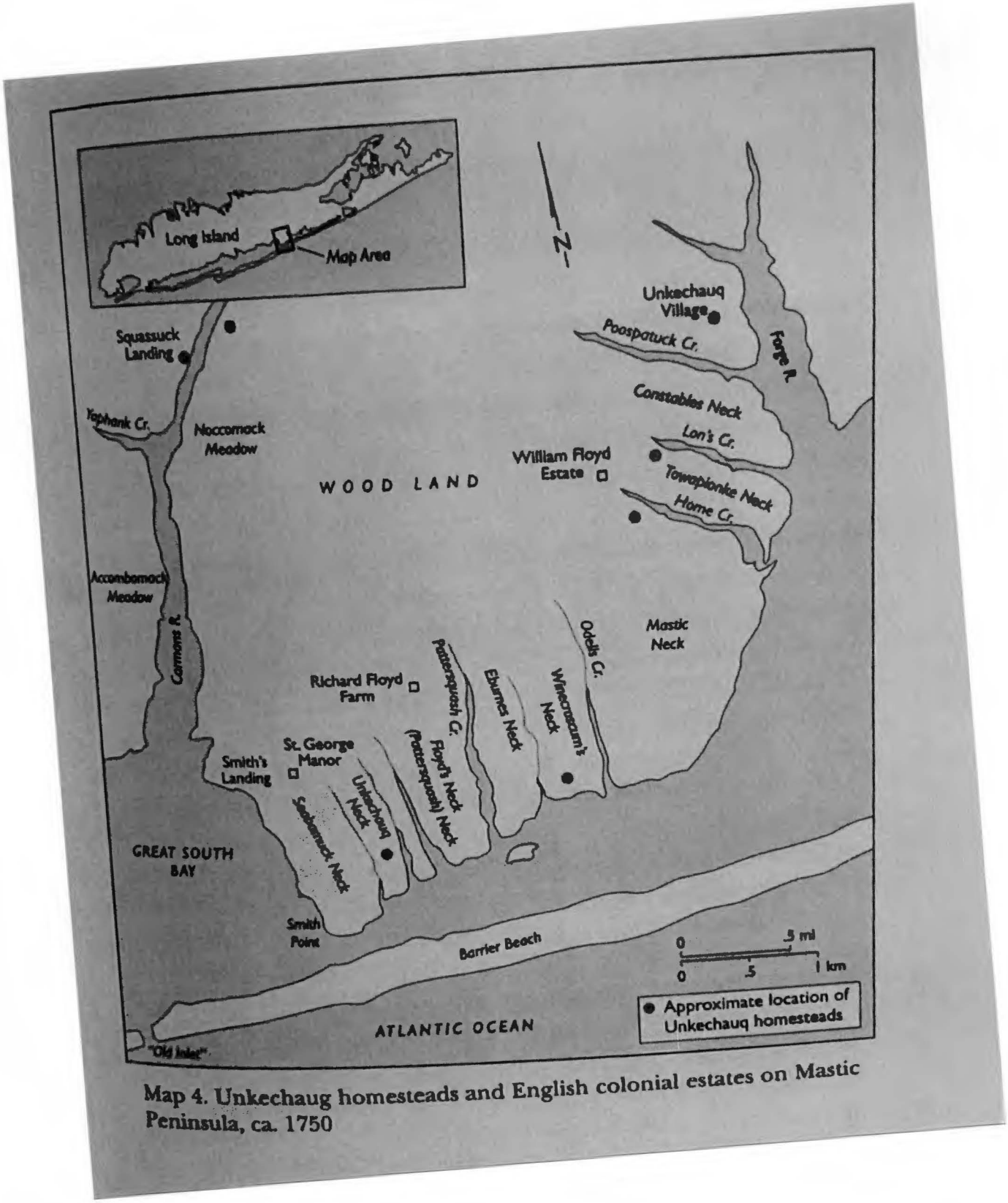
an entire estuary of life forms around it, including fish, including growth, all those things. And as our part of the way that we institute the matter of re-creating life from that which we use, we put the shell back into the water" (Exhibit 3 P. 32 Chief Harry B. Wallace Deposition on January 28, 2020)

history as detailed by Dr. John Strong, PhD. In Dr. Strong's deposition he described the Unkechaug as people living by the sea and how the basis of their survival depended on living by the water and interacting with the natural world through fishing, clamming, whaling, and traveling along waterways. The Unkechaug viewed whaling and fishing as spiritual and necessary for their economic survival and realized that a treaty with the non-Indians would be beneficial to them both spiritually and economically, accordingly the Unkechaug entered into a treaty with the colony of New York on May 24, 1676 that remains valid today.



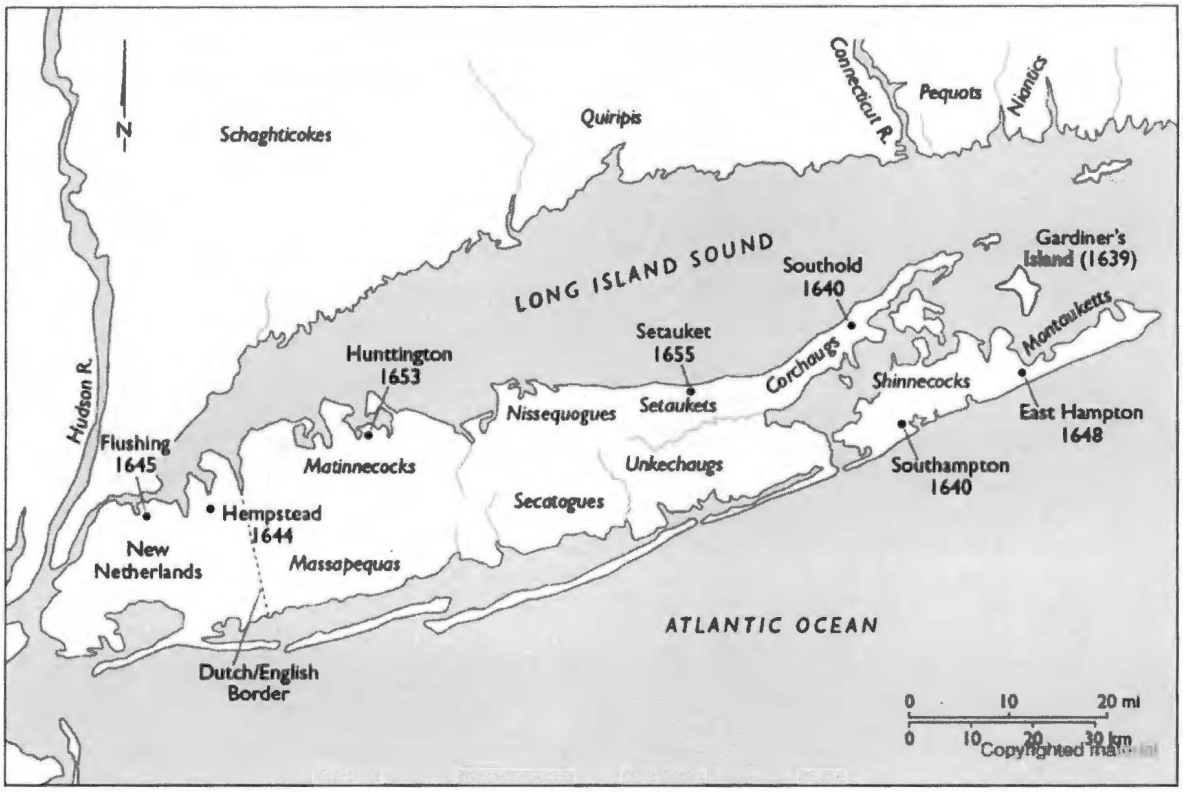
Map 3. Southeastern Brookhaven, 1658–1700

Figure 1



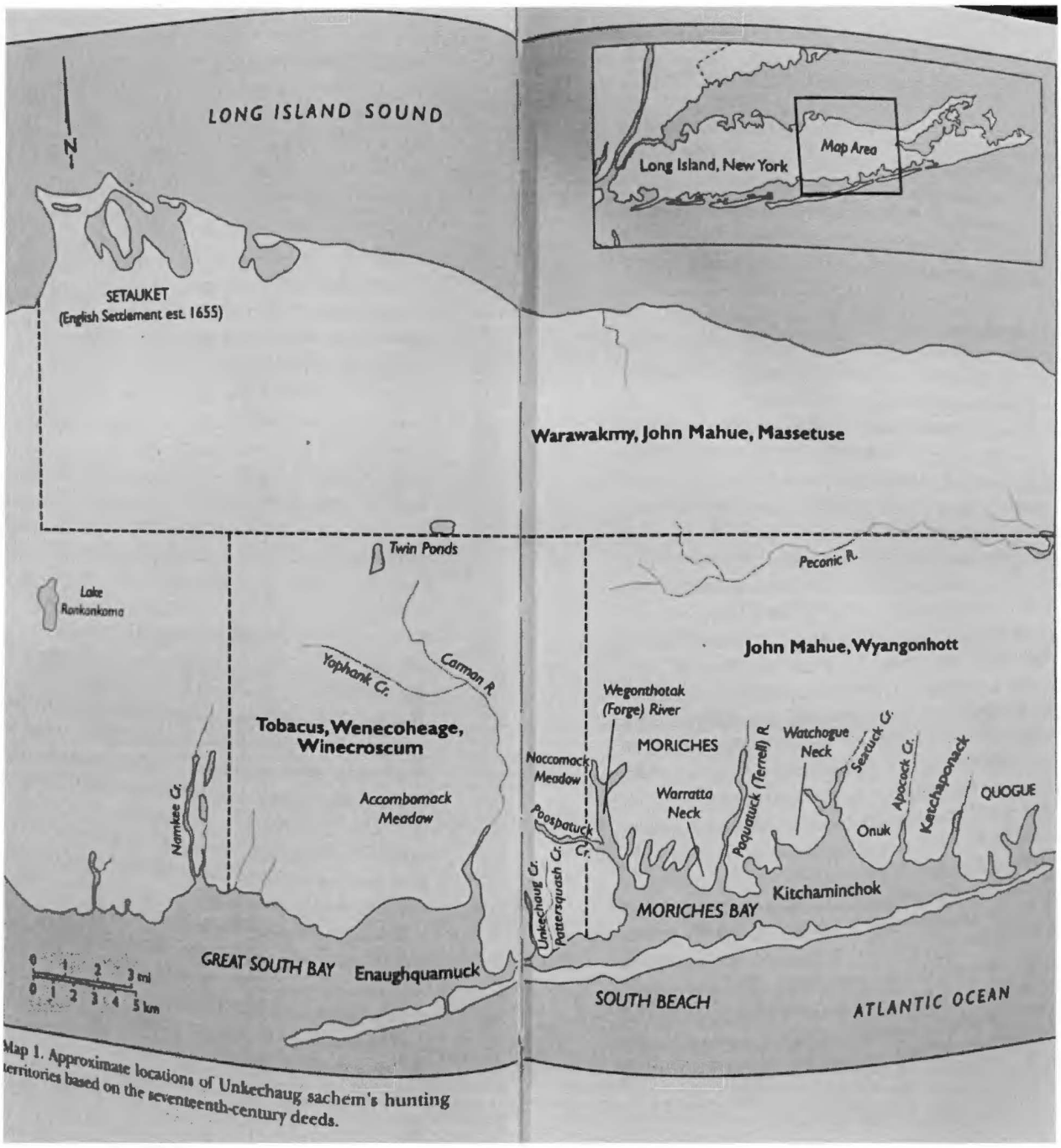
Map 4. Unkechaug homesteads and English colonial estates on Mastic Peninsula, ca. 1750

Figure 2



Map 2. Tribal territories and English and Dutch settlements on Last Island, ca. 1650

Figure 3



Map 1. Approximate locations of Unkechaug sachem's hunting territories based on the seventeenth-century deeds.

Figure 3

C. Unkechaug Land and Economic Engine

All blood-right members of the Unkechaug who reside on the Poospatuck Reservation hold their land in common and do not have fee-title over their individual land where their houses

are situated. The Native concept of land ownership is consistent with common ownership of land and distinguished from the European concept of land ownership in fee simple. Tribal land is granted by the Tribal Council to nation members to reside on. Once the nation member no longer resides on the allotted land it reverts to the Nation. Because the land is held in common the Unkechaug people cannot obtain a mortgage to raise capital to build a home or for other investment purposes because non-reservation land cannot be used as collateral for loans or mortgages. Due to the inability to build generational wealth through property ownership or the ability to generate capital, the Unkechaug have used their traditional knowledge and skills to create an economic engine for members who reside on the reservation. The Unkechaug members are no less intelligent than other entrepreneurs and have created businesses that reflect marketplace needs such as in the sale of the American Eel.

During Chief Wallace's deposition, he spoke of the traditional ways the Unkechaug sustained themselves by fishing, hunting and planting and created an economic engine consistent with these skills and beliefs. Wallace stated:

> I believe fishing as a way of sustaining our way of life, as apart of our spirituality. I Believe that fishing and hunting and planting was a way in which we sustain ourselves. We can't pay for or we can't get a mortgage to build our homes. We can get financing to improve the lives of our people. We have to pay for that in cash, because the land is held in common. So there is no way for us to do that, other than through traditional forms of -- of practicing, of economic development, and that includes hunting fishing and making wampum. Exhibit 2 P. 40-41

The Unkechaug have survived since time immemorial due to their ability to negotiate and reach agreements with other native nations and European and American governments since colonial times. The spiritual and lifestyle is connected to the natural world and the cooperation and sharing of resources (bowl) so that all the residence who shared resources could survive

from nature (spoon). The Unkechaug are also resilient to economic change because of its stewardship of the environment and practicing conservation as taught under its belief systems. These practices have lasted and provided an economic engine for the nation members. The most recent attack on the Unkechaug is focused on prejudice and the racist allegations of primitivism and poverty because the Unkechaug have adopted to changing markets and selling Eels to non-American markets. The perverted belief that Native American should remain in a primitive life existence and be impoverished is a proposition not so subtly argued by the defendants. Although it is sadly offered by defendants that are employed for and officials of the State of New York that use misleading names such as social justice and environmental conservation, nevertheless their prejudicial ideals are unredeemable. Defendants' false priesthood of singular knowledge all matters environmental concerning the American Eel, in this case, is devastating to the residents of New York including the Unkechaug. The misleading verbiage known as Commissioners Policy 42 (Exhibit 2) that calls for "Contact, Cooperation and Consultation with Indian Nations" was abandoned and deliberately ignored by the NYSDEC when dealing with the Unkechaug on the issues in this case even before a legal action was commenced.

Defendants resent the Unkechaug economic success or opportunity for economic success while encouraging entrepreneurship to nonnative people living off reservations. The defendants' allegations and use of primitivism and poverty to disparage the plaintiffs makes the fallacious argument that the Unkechaug are less Indian because they do not want to be limited to a subsistence life and they want to use their status for economic advantage. Defendants rely heavily on this Indian specific racist argument that was consciously meant to demean and prejudice the plaintiffs by lauding an image of greedy and opportunistic Natives.

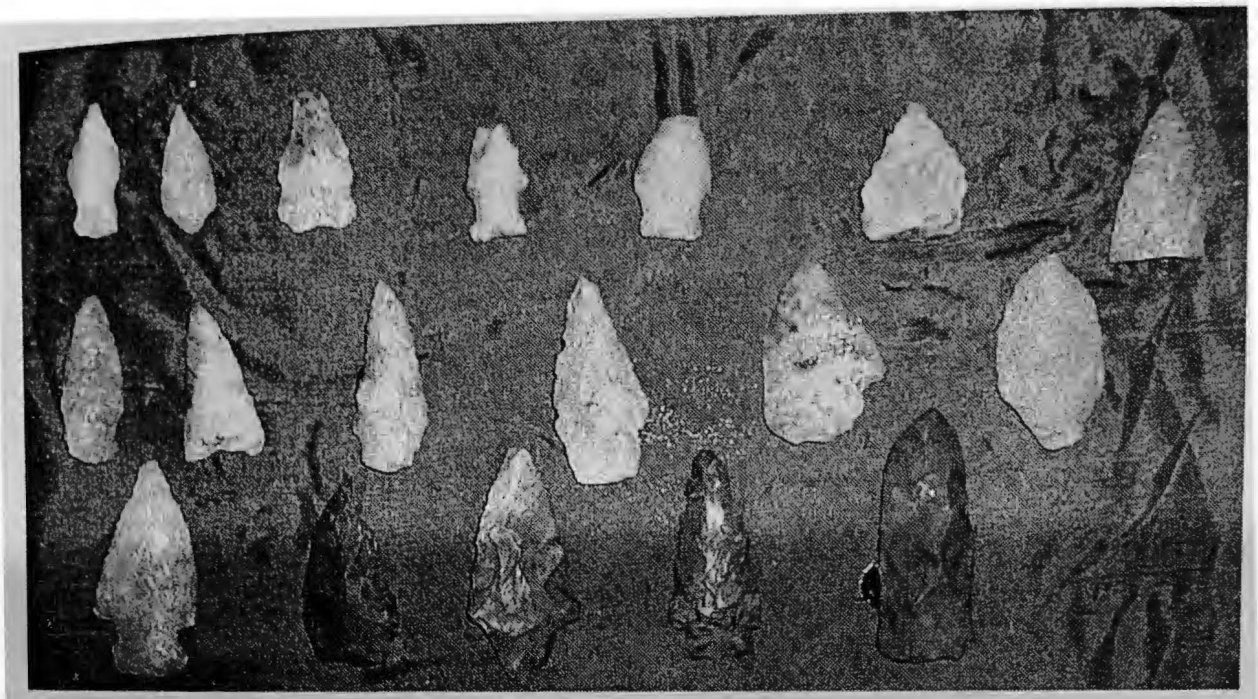


Figure 1. Projectile points found near Poospatuck Creek on the Unkechaug Reservation include stemmed, side-notched, and Orient fish tail points from the Archaic Period (4000–1000 B.C.) Courtesy of Veronica Treadwell, Treadwell family collection.

Figure 4

gure 18. Thomas Hill (1888–ca. 1930) with eel spear and fishin quipment. The photo was taken by Francis Harper on April 2, 1910. rge net reel stands behind Hill on the left, and a "torch basket," use for fishing at night, stands to his right near the duck decoys. Courtes of the Smithsonian Institution.

Figure 5

D. Defendants Interference with Unkechaug Fishing

The Unkechaug Indian Nation has passed down intergenerational skills to each generation in fishing, wampum making, and preserving the environment through conservation. These traditional skills and beliefs have survived since time immemorial and the specific tradition of fishing for eels was, formally interfered with by the defendants for the first time. The Unkechaug have continuously fished and followed its beliefs in traditional fishing. Plaintiffs

have continued to be subjected to threat and fear of criminal prosecution by defendants for exercising their right to fish freely on reservation waters and in customary fishing waters. There have been criminal charges by defendants against tribal members and specific threats of felony criminal prosecution directed against Chief Harry B. Wallace, duly elected Chief of the Nation. (Exhibit 1 ¶4) On April 8, 2014, NYSDEC and Commissioner Seggos issued Criminal summons to Unkechaug Tribal Members for fishing on reservation lands and in Unkechaug customary fishing waters. (See Exhibit 5 Summons) This was the first interference with Unkechaug fishing. (See Exhibit 6 aff of Harry B. Wallace) The next interference with Unkechaug sovereign and treaty rights occurred on or about April 6, 2016, by the order of Commissioner Seggos and through the actions of NYSDEC enforcement officers who confiscated fish from the Unkechaug Indian Nation that were caught on waters that are the usual and customary waters of the Poospatuck Indian Reservation. (Exhibit 1 ¶ 23 and Exhibit 7) The NYSDEC confiscated the fish and seized possession and control over the fish.[3]

Despite a Court Order and agreement between NYSDEC and the Unkechaug Indian Nation to release the fish on April 18, 2016, the NYSDEC destroyed most of the fish through their negligence and misunderstanding of how to care for glass eels on August 17, 2016, or a

[3]After NYSDEC improperly seized Unkechaug glass eels the Nation moved for and Order to Show Cause (April 8, 2016, In Supreme Court Queens County, to provide access for the Nation's representatives so that they could refresh water and care for eels' security and packing to preserve the eels. The Order to Show Cause prevented NYSDEC from destroying the eels or releasing the eels into the wild without further order from the Court. The Unkechaug Nation and NYSDEC agreed to meet on April 18, 2016, to jointly release the eels into the wild however before the Unkechaug Nation representative members arrived NYSDEC had destroyed and killed most of the glass eels on April 17, 2016. The Nation believed that NYSDEC purposefully killed the eels in order not to litigate the substantive issues of Unkechaug right to fish and freely dispose of its property but to simply limit the case to monetary damages which would ultimately only be litigated in the New York State Court of Claims.(See Exhibit 8)

tactic to avoid litigation over fishing rights. (Inexplicably one day prior to the agreed time to jointly release the glass eels) Exhibit 8

The actions against the plaintiffs were elevated when the NYSDEC made a criminal referral to the Queens Assistant District Attorney, Hugh Lambert McLean against Chief Harry B. Wallace. Rather than indict Chief Wallace, DA McLean took a highly unusual approach and called counsel James F. Simermeyer and threatened Chief Wallace with indictment and prosecution under N.Y. Envtl. Conserv. Law § 71-0924 if Chief Wallace and the Nation did not litigate their "alleged" rights to fish without interference from NYSDEC. Chief Wallace then hired a criminal attorney, Daniel Driscoll, who also spoke with Hugh Lambert McLean and confirmed that the threats were legitimate and advised Chief Wallace to either initiate the instant action or face prosecution. (See Exhibit 6 and Aff of Hugh Lambert McLean Exhibit 9) Chief Wallace and the Nation were faced with a highly unusual, unfair, and prejudicial choice to allow the leader of their Indian Nation face criminal charges and ruin his reputation as a Chief, attorney, mentor, husband, and father. The threat also extended to the nations' sovereign rights, treaty rights and belief system unless a legal action was commenced to determine the Unkechaug rights against Commissioner Seggos and the NYSDEC. The nation and Chief Wallace commenced this action to protect their inherit rights and treaty rights as sovereign people and Unkechaug.

ARGUMENT

I. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP

56(a). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (citations omitted). "The party [*28] seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant . . . . Summary judgment is improper if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party." *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002) (citations omitted). The standard for summary judgment does not change when both sides file cross-motions seeking the same relief. "When each side has moved for summary judgment, the district court in entertaining the motions—and the court of appeals in reviewing the district court's decisions—are required to assess each motion on its own merits and to view the evidence in the light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party." *Wachovia Bank, Nat. Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 171 (2d Cir. 2011) (citations omitted). "[W]hen both sides move for summary judgment, neither side is barred from asserting that there are issues of fact, sufficient to prevent the entry of judgment, as a matter of law, against it. When faced with cross-motions for summary judgment, a district [*29] court is not required to grant judgment as a matter of law

for one side or the other." *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993) (citation omitted).

II. PRINCIPLES OF TREATY CONSTRUCTION

"Treaty analysis begins with the text" and treaties "are construed as they would naturally be understood by the Indians." Herrera, 139 S. Ct. at 1701 (quotation marks omitted). "'[A]ny ambiguities are to be resolved in their favor[.]'" Naftaly, 452 F.3d at 524 (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999)). Beyond the text, the historical context and the treaty negotiations are "central to the interpretation of treaties." Mille Lacs Band, 526 U.S. at 202. See Herrera, 139 S. Ct. at 1702 (looking to "the treaty's text and the historical record"). "Our job in this case is to interpret the treaty as the [tribe] originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact."

Washington State Dep't of Licensing v. Cougar Den, Inc., ___ U.S. ___, 139 S. Ct. 1000, 1019 (2019) (Gorsuch, J., concurring). A court interpreting an Indian treaty "must not give the treaty the narrowest construction it will bear." *Tulee v. Washington*, 315 U.S. 681, 684 (1942). Far from a four-corners analysis, the Supreme Court has oft repeated the rule that "it is the intention of the parties," and particularly tribal intent that controls a treaty's meaning. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (citing cases); *see also Tulee*, 315 U.S. at 684 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council").

1. Indian-understanding canon

The Indian-understanding treaty-interpretation canon requires this Court to

look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties. In this case, an examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful to the extent that it sheds light on how the [tribal] signatories to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (quotation and citation omitted). "This review of the history and the negotiations of the agreements is central to the interpretation of treaties." *Mille Lacs*, 526 U.S. at 202 (citation omitted).

2. Liberal-construction canon

Under a separate treaty-interpretation canon, if, after review of the historical record, it is unclear what meaning treaty negotiators (and particularly, tribal negotiators) afforded to a treaty, then "Indian treaties are to be interpreted liberally in favor of the Indians" and "any ambiguities are to be resolved in their favor." *Mille Lacs*, 526 U.S. at 200 (citing cases and resolving "plausible ambiguity" in favor of tribe).

III. HISTORICAL CONTEXT OF ANDROS TREATY

The timing surrounding the Andros Treaty with the Unkechaug Nation was indeed tumultuous with competing interests from Colony of Connecticut, the Dutch, Long Island Towns looking to join the Colony of Connecticut, Native Nations fighting to maintain their independent government from the invading European Interlopers, and King Phillips War. These threats to English colonial control explain why Andros would have entered this treaty with the Unkechaug Nation. As Dr. John A. Strong, PhD eloquently explains:

> And to look at the
> 13 context as well of that situation in '76, what was
> 14 going on there as a way of getting some sense of the
> 15 interests that were at stake by both party, the
> 16 Unkechaug, Andros and the Colonial government. I
> 17 was looking in terms of context. I mean, the --
> 18 they were in the middle of an Anglo and Dutch war,
> 19 which had just been resolved with the English coming
> 20 back into control in 1674. Andros is just beginning
> 21 to readjust to the -- you know, the new officials
> 22 and new interpretations and so forth now that the
> 23 English jurisdiction had been restored.
> 24 King Philip's War was reaching its
> 25 most vicious dimensions in this period when -- that
> Page 27
> 1 spring of '76, when the decision was rendered.
> 2 There was also tensions because the eastern towns
> 3 that were prominent in whaling attempted, not for
> 4 the first time, by the way, to leave Long Island and
> 5 go to Connecticut in terms of jurisdiction. You
> 6 also had attempts by both the Shinnecock and the
> 7 Unkechaug to form their own whaling companies.
> 8 And so this -- and probably lastly,
> 9 but more interestingly in some ways, Andros attempt
> 10 to seize the whole Colony of Connecticut and add it
> 11 to New York.
> 12 All of this was going on while
> 13 Andros was trying to sort things out and make a
> 14 decision, which is another reason why I argued that
> 15 it does raise to the level of pretty serious
> 16 matters.

(Exhibit 11 Dr. John Strong, PhD, Deposition)

Typical during this period was the understanding that treaties between the colonial government and Native Nations had always maintained Natives their non-exclusive right to hunt and fish at their usual and accustomed waterways and land. In Dr. Strong's' Report he identifies several agreements between the English Colony of New York and the Unkechaug Indian Nation that encompasses these principles.

DOCUMENT ONE

June 10, 1658 Agreement between Wyandanch, sachem of Paumanack and Lion Gardiner regarding rights to hunt, fish, and to gather plants.

"Be it known to all men by this present writing, that this indenture, covenant or agreement was made this tenth of June in the year of our Lord one thousand six hundred fifty-eight between Wyandanch Sachem of Paumanack with his son Wyancombone and their associates.... on the other side Lion Gardiner and his

associates... [for the purchase of beach lands west of Southampton in Unkechaug territory] "But the whales that shall be cast upon this beach shall belong to me and the rest of the Indians *as they have been anciently granted to them formerly by our fathers to and also liberty to cut in the summer time flags, bull rushes and such things as they make their mats of .. without any reservation or farther interpretation on it. We have both of us interchangeably set to our hands and sea/es,*

Henry Hutchinson, ed. 1880. *Records of the Town of Brookhaven to 1800.* Patchogue, N.Y.: Office of the Patchogue Advance. Pp.3-4.

DOCUMENT TWO

May 12, 1659 Agreement between Wyandancb, sachem of Paumanack and John Ogden of Southampton. The sachem sold a tract of Unkechaug beach land lying west of Southampton to John Ogden of Southampton with the following clause: *"And it shall be agreed that we will keep our privilege of fishing, fowling or gathering of berries or anyother thing for our use... ,,*

William Pelletreau, ed. 1874. *The First Book of Records of the Town of Southampton.* Sag Harbor, N.Y.: John Hunt printer. P. 162.

DOCUMENT THREE

Treaty between the Town of Brookhaven and Tobacus, Sachem of the Unkecbaug June 10, 1664.

The indentor witnessed a bargain or agreement, between the sachem of Unkechaug, Tobacus, and the inhabitants of Brookhaven, alias Setauket, concerning a parcel of land, lying upon the south side of Long Island being bounded on the south with the great bay and on the west with a fresh pond adjoining to a place commonly called Acombamack, and on the east with a river called Yampanke, and on the north, it extends to the middle of the Island, provided the afore said Tobacus have sufficient planting land for those that are the true
Native proprietors and their heirs, also *that either and both parties have free liberty for fishing, fowling and hunting without molestation of either party,* this is in

consideration of a certain sum of money to be paid to the valuation of fifty fathom of wampum as witness my hand, the date and day above written. Signed, sealed and delivered in the presence of us

Richard Howell The mark of

Tobacus

John Cooper

Henry Hutchinson, ed. 1880. *Records of the Town of Brookhaven to 1800.* Patchogue, **N.Y.:**Office of the Patchogue Advance. Pp.IO-I I

DOCUMENT FOUR

This addendum guaranteeing the right of the Unkechaug to hunt, /awl, and fish was attached to the sale of meadawland, creeks, ponds and harbors to the English. Both parties understood that the hunting, fishing, and fowling rights were shared rights that were not compromised by the sale.

These presents testifyeth that we the inhabitants of Seatauket *[Brookhaven]* doth promise and ingage for to find Gie and his associates that is to say all the

Indians that was the true proprietors of the land of Seataukett with land sufficient for their planting for them and their heirs as also *to* ***give them free Uberty*** *to* ***hunt,fowl, or fishing within the bounds of Seataukett*** and to the true and absolute Confirmation of the Same we do hereunto set our hands this 19th of November 1675,

Richard Woodhull

John Tooker

Andrew Miller

Thomas Biggs

Henry Hutchinson, ed. 1880, *Records of the Town of Brookhaven* Patchogue, N.Y.: Patchogue Advance Press. Pg. 46

(Exhibit 12 Dr. Strong Report)

These four documents illustrate the importance of hunting and fishing for the Unkechaug that was always acknowledged and included in each document. Dr. Strong points out that the English had traditionally acknowledged the right to hunt and fish by the English Colonial government even before Andros took charge of the Colony of New York; in fact Andros simply followed previous agreements cited above. Dr. Strong states the following:

I'm making the point that there is a
23 pattern to Colonial Algonquin settlements and deeds
24 and so forth in which, even though the land has been
25 sold, the right to fish and hunt is retained. I
Page 30
Veritext Legal Solutions
212-267-6868 www.veritext.com 516-608-2400
1 guess you could call it the usufruct option and so
2 forth, but you will see those purchases for my
3 East Hampton and others.
4 My point was to show that even
5 before Andros went into -- there's the one in 1658
6 with having the -- dealing with hunting and fishing
7 rights, but reserving the rights for the -- in this
8 case, for the Montauketts. And the -- I think
9 that's -- I think I have highlighted -- or in the
10 italics there, noted that this was --
11 Q. You're referring to -- I'm sorry,

Dr. Strong, you're returning to Document One in your report, page 1?
A. Document One, and if you scroll down a little bit there to the italics where it says that, "They have anciently granted to them formally by our fathers," this is Wyandanch making this, "and also the liberty to cut in the summertime flags, bulrushes and such things that they make their mats of... without any reservation or further interpretation on it. We have both of us interchangeably set to our hands and seales." Those natural products, if you go hunting, fishing and grasses for their wigwams, were -- the pattern was to reap -- to allow the

native peoples to retain them.
My point is that Andros was just following an existing pattern in Algonquin-English relations.
MR. THOMPSON: We would just make the same objection regarding legal conclusions.
Q. Could we go to Document Two, now, please, and review that?
A. Yeah. Document Two is the similar kind of pattern, and agreed that they will keep the privilege of fishing, fowling, gathering berries, and so forth.
In fact, things like the gathering of berries could also be as a boundary marker and a sign of proprietorship. If you had the -- the right to control the access to fishing and berries and so forth, that was an indication of family territory.
MR. THOMPSON: Same objection to the testimony.
Q. Document Three.
MR. THOMPSON: Objection. Vague.
A. Document Three --
MR. SIMERMEYER: Excuse me?
A. The treaty between the Town of Brookhaven and Tobacus, sachem of the Unkechaug in

1664.
So here, you begin to get to the Unkechaug also in terms of these patterns, and you

4 see it -- if you scroll down, I've put in italics
5 that, "Both parties," come back there, "have free
6 liberty for fishing, fowling and hunting without
7 molestation of either party," which is -- Andros is
8 restating that in his decision.

(See Exhibit 11 Dr. Strong Deposition)

On July 1, 1674, James appointed Edmund Andros to govern the restored colony of New York. During Andros' leadership he had to deal with the rising tensions between the native nations and the settlers. (See Exhibit 12 John Strong Report) In June of 1675 King Phillip's War broke out in New England. (See Exhibit 12 John Strong Report) The fear of the massacre of settlers in New England travelled fast to the interlopers of Long Island. Rumors continued to inflame anxieties, particularly in Southampton and Brookhaven. (See Exhibit 12 John Strong Report) These fears and anxieties led Andros to quell any controversy between the settlers and the Unkechaug, leading to the Unkechaug negotiations with Andros in Manhattan. On May 23rd the Unkechaug delegation arrived in Manhattan to present their concerns to Andros. (See Exhibit 12 John Strong Report) After the traditional presentation of white wampum symbolizing peace and black wampum signifying Unkechaug sovereignty and strength Andros set out in Treaty dated May 24, 1676, that Unkechaug and in consistent fashion from the previous documents discussed above acknowledged Unkechaug fishing rights free of "molestation". (See Exhibit 12 John Strong Report and Andros Treaty Exhibit 4) This treaty was necessary to keep the peace between the New York Colony and the Unkechaug.

IV. MAY 24, 1676, ANDROS TREATY IS IN EFFECT TODAY

The Andros Treaty is central to this case and can only be understood through the historical events at the time the treaty was entered into as detailed by plaintiffs' expert Dr Strong. The plain language of the treaty expresses the Unkechaug's rights under the treaty to fish and depose

of their catch as they see fit. The treaty language also distinguishes the two cultures by describing the colonist as Christian and the Unkechaug as non-Christian. The treaty provides language to allow the Unkechaug to either fish with "Christians" or by "themselves". The treaty also expresses an unapologetic but condescending and racist attitude against the Unkechaug consistent with the times and the false sense of superiority by the colonists. More importantly and significant is that the colonial government recognized the importance of the fishing rights of the Unkechaug in their customary waters. The colonial government was concerned with the political situation at the time and was convinced by the Unkechaug to permit fishing and avoid possible military action by the Unkechaug as experienced in Connecticut.

[25:119a]

[ORDER GRANTING THE ABOVE FISHING RIGHTS]

At a Councell held in N.Y. the 24th day off May 1676.

Upon the request of the Ind[ ]s of Unchechauge upon Long Island

Resolved and ordered that they are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good according to law and Custome of the Government of which all Magistrates officers or others whom these may concerne are to take notice and suffer the said Indyans so to doe without any manner of lett hindrance or molestacion they comporting themselves civilly and as they ought.

By Order of the Go: in Councell

[ENDORSED:] Order of Councell may 24. 1676.
Unchechaug Indians.

See Exhibit 4

The Unkechaug remain on a slither of their once vast amount of land since time immemorial. The current reservation has been reduced to only 50 acres. However, the Unkechaug land abuts the Poospatuck creek which empties into the forger river that then

flows into the Atlantic Ocean. The Unkechaug have always utilized their proximity to the water due to necessity of survival and spiritual interconnectedness to their environment.

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 Oevisee 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 (181 9) (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 any uprisings by the Unkechaug that was occurring in New England. The Unkechaug, as was its custom, presented wampum to Andros to engage in government-to-government negotiations.

The United States of America acknowledges and accepts colonial treaties between the English colonies and Indian Nations. The United States incorporated and ratified preexisting agreements, by reference into the Constitution of the United States when it indicated in Article VI. Sec (1).

"All…Engagements entered into, before the adoption of this Constitution shall be as valid as against the United States under the Constitution, as under the Confederation.

This doctrine was articulated by the Honorable Hosea Hunt Rockwell, Representative from New York, and a member of the House Appropriations Committee in 1892. In a well-known speech before the Committee on February 17, 1892. Rep. Rockwell describes the relationship between the Indian people in the English colonies and the subsequent American government:

> "The people of all the English colonies, especially those of New England, settled their towns upon the basis of title procured by the equitable purchase from the Indians…" "The English Government never attempted to interfere with the internal affairs of the Indian Tribes further than to keep out the agents of foreign powers…" "…They were considered as nations competent to maintain the relations of peace and war and to govern themselves under the Protection of the Government of Great Britain. After the war of the Revolution, or upon the attainment of independence, the United States succeeded to the rights of Great Britain, and continued the policy instituted by that Government. The protections given was understood by all parties as only binding the Indians to the Government of the United States as dependent allies."

Rep. Rockwell concluded:

"We found that it was a condition and not a theory that confronted us."

Additionally, pursuant to the long-standing blanket acknowledgement of the acts of the colonial government and acceptance of those acts by the New York State government. In a letter by Robert Batson to Barbara M. Whiplush, Esq., Assistant Town Attorney Town of Brookhaven on April 15, 1994, he states the following:

> It is my understanding that the State of New York honored deed and patents granted by its colonial predecessor. You may want to research the first State Constitution and the early session laws of the State Legislature. I believe you will find that there was a blanket acknowledgment of the acts of the colonial government, and not acknowledgement of each individual transaction such as the 1700 deed by Colonel William Smith.
>
> (See Exhibit 13 Letter from Batson to Whiplush)

Consistent with this position is a letter from New York State Attorney General, Dennis C. Vacco that stated on August 29, 1996, the following:

> The Only tribes recognized by the State and not the Federal Government are the Unkechaug and Shinnecock tribes, whose relationship and treaties with New York State Government predate the existence of the Federal Government. The State of New York does not officially recognize the Replough Mountain Indian Tribe.
>
> (See Exhibit 14 Letter from AG Vacco to Hon. Vogt)

Once again Governor Cuomo in 1988 ordered Henrick N. Dullea the Director of State Operations and policy Management of New York to give a report of the relationship between the State of New York and nine Indian Nations. This report also details how New York State followed the treaties entered between the English Colony and the Native Nations stating the following:

> The Shinnecock and Poospatuck (Unkechauge) Tribes, of Algonquin origin, reside on reservations in Suffolk County. These nations are recognized by New York State through treaties negotiated with our colonial predecessors…
>
> (See Exhibit 15 Letter and Report from Henrick Dullea to Hon. Roderickk G.W. Chu)

Following with tradition, New York State has followed in the footsteps of its predecessors and acknowledged the Andros Treaty with the Unkechaug. The State has never tried to interfere with those treaty protected fishing rights against the Unkechaug until 2014. The Unkechaug's Treaty is enforceable today and cannot be abrogated more than 200 years later.

V. THE UNKECHAUG ANDROS TREATY IS ENFORCEABLE AGAINST NYSDEC REGULATIONS BECAUSE THEIR CONSERVATION RULES AND METHODS ARE NOT A NECESSITY AND ARE ARBITRARY AND CAPRICIOUS

It is basic to our system of governance that "all Treaties made . . . shall be the supreme Law of the Land" (US Const art VI [2]). 2 This principle applies with full force to treaties with the Native American nations (*see Settler v Lameer*, 507 F.2d 231, 238 n 16 [9th Cir 1974] ["The various Indian treaties constitute the Supreme Law of the Land"]). *HN4* It is also fundamental that states have sovereign power to regulate hunting and fishing within their borders. People v. Patterson, 5 N.Y.3d 91, 94, 800 N.Y.S.2d 80, 81, 833 N.E.2d 223, 224 (2005) In its "conservation necessity" line of cases, the United States Supreme Court has long experience in mediating between these two vying interests. In *Tulee v Washington* (315 U.S. 681,

683-684, [*95] 86 L. Ed. 1115, 62 S. Ct. 862 [1942]), the defendant, a member of the Yakima Nation, was charged with violating a state law requiring a license fee to catch salmon with a net, in spite of treaty language providing that the Yakima retained an "exclusive [***82] [**225] right of taking fish in all the streams, where running through or bordering said reservation" (*id.* at 683). The treaty also secured the Yakima's right of "taking fish at all usual and accustomed places" (*id.*). The Supreme Court held that the State's attempt to impose a license fee on members of the Yakima was unconstitutional. Critical to the decision was the existence of a treaty fishing right in conflict with the State's regulatory scheme. The Court held that, in the face of this treaty right, the State retained only certain regulatory powers. It could impose on the Yakima, "equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary [****5] for the conservation of fish" (*id.* at 684).People v. Patterson, 5 N.Y.3d 91, 94-95, 800 N.Y.S.2d 80, 81-82, 833 N.E.2d 223, 224-25 (2005)

Essentially, this line of cases stands for the proposition that *HN7* a state law or regulation may impair an off-reservation treaty [*96] fishing right only when (1) it represents a reasonable and necessary conservation measure and (2) does not discriminate against the Native American treaty rightholders. The existence of, first, a treaty right and, second, a conflict between the treaty right and a state statute or regulation is the sine qua non of the Supreme Court's conservation necessity jurisprudence. Absent a treaty fishing right, the State enjoys the full run of its police powers in regulating off-reservation [****7] fishing.

People v. Patterson, 5 N.Y.3d 91, 95-96, 800 N.Y.S.2d 80, 82, 833 N.E.2d 223, 225 (2005)

A. *Factor One: N.Y. Envtl. Conserv. Law § 71-0924, N.Y. Envtl. Conserv. Law § 40.1(p)(1) and NYSDEC's prohibition of catching eels under 9 inches is not a reasonable and necessary conservation measure 6 CRR-NY 10.1 NY-CRR(12) 40*

The Environmental Statute at issue in this case is under NYSDEC regulations limiting the size of American eel that can be fished. NYSDEC prohibits a taking of eels under the size of nine (9) inches.

The defendants have also evoked violation of N.Y. Envtl. Conserv. Law § 71-0924 that prohibits the illegal commercialization of fish, shellfish, crustaceans, and wildlife without a commercial license. The defendants, in 2014 charged Unkechaug members with violation of commercialization of fish without a license. However, the Unkechaug members were licensed and permitted to fish and commercialize their catch under the rules and regulations of the Unkechaug nation and consistent with the Unkechaug management plan and treaty.

Those individuals were also charged with violating N.Y. Envtl. Conserv. Law § 40.1(p)(1), knowingly using American eel traps in the waters of the marine coastal district with a mesh size smaller than one inch by one-half inch.

On April of 2016 the Unkechaug Indian Nation attempted to ship eels to a buyer and NYSDEC seized the shipment. After the shipment was seized NYSDEC issued a criminal referral to ADA Hugh Lambert McLean who threated Chief Wallace with indictment for violating N.Y. Envtl. Conserv. Law § 71-0924.

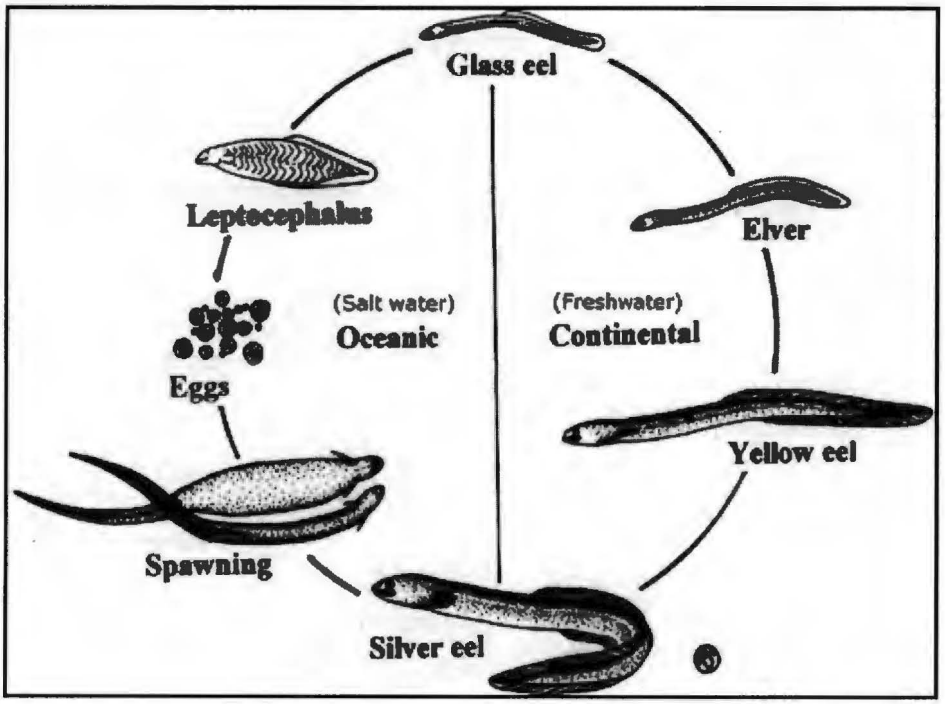
The cited laws evoked by the defendants against the plaintiffs categorically fail to protect the American Eel species and are laws that are arbitrary and capricious. To further explain the failure of the environmental laws at issue in this case the plaintiffs shall commence with the life cycle of the American Eel.

i. Life Cycle of the American Eel

Life History

American eel (Anguilla rostrata) is a catadromous fish species, spending most of their life in freshwater or estuarine environments, traveling to the ocean as adults to reproduce and die. Sexually maturing eel migrate to spawning grounds located in the Sargasso Sea, a large portion of the western Atlantic Ocean east of the Bahamas and south of Bermuda. American eel is a panmictic stock, meaning that individuals from the entire range come together to reproduce. American eel found along the eastern coast of Mexico are from the same population as eel found in the St. Lawrence River in Canada.

American eels have a multitude of life stages: leptocephali, glass eel (also known as elvers), yellow eel, and silver eel. http://www.asmfc.org/species/american-eel



https://www.fws.gov/fisheries/fishmigration/american_eel.html Figure 6

The chart above displays the life cycle of the eel. People have fished and farmed eels for thousands of years, but until recent times, little was known about the eel's complex life history. The American eel has survived multiple ice ages and seems to be equipped to withstand the

cycles and fluctuations inherent in ocean dynamics. Some scientists consider the highly adaptive American eel to have the broadest diversity of habitats of any fish species in the world. The American eel hatches in the ocean waters of the Sargasso Sea, 2 million square miles of warm water in the North Atlantic between the West Indies and the Azores. This snake-like fish uses currents to move from its natal waters to find homes throughout its range, from Greenland south to Brazil. Eel Migration and Life Cycle During its lifetime, the American eel changes habitats and undergoes several physical phases, known as metamorphoses. The life of the American eel is believed to begin and end in the Sargasso Sea. Each winter, mature American eels return to spawn in these natal waters. Eels gather here from across the species' range, such that individuals could breed with American eels from Greenland down to South America. This behavior perpetuates a single breeding population, preventing the distinctions sometimes found in species that live in different geographic areas. Leptocephali: After fertilization, the eel eggs eventually float to the ocean surface and hatch into small, transparent larvae that are shaped like willow leaves. These larvae drift with the Gulf Stream and other currents, taking about a year to reach the Atlantic coast. Glass eels: By the time they reach the coast, the larvae have developed fins and the shape of adult eels. In this phase, these juveniles, known as glass eels, are still transparent and are about 2 to 3 inches long. Elvers: At this stage, eels migrate to brackish waters and begin to develop gray to green-brown pigmentation. Many elvers have been known to move to inland habitats through tidal rivers, yet some remain in estuaries or brackish habitats or in marine waters. This phase includes all eels that reached more than 4 inches in length. Yellow eels: Before the final maturation stage, they become yellow eels—sexually immature adults that are actually yellow-green to olive-brown. In their yellow phase, American eels are nocturnal, swimming and feeding at night. In freshwater, they find homes in streams, lakes, ponds and the

eel are a smooth and snake-like fish that feeds on insects, fish, mollusks, crustaceans and dead animal matter. Silver eels collected in Shenandoah River to be radio tagged for a tracking study. MFRO/USFWS MFRO/USFWS Classifying the American Eel Migration: Is it catadromous or anadromous? American eels were long considered North America's only catadromous fish—meaning born in the ocean, mature in freshwater and return to the ocean to spawn. Anadromous fish, like salmon, are born in freshwater streams, travel to the ocean to mature, and return to freshwater to spawn. While some American eels swim up freshwater streams to mature, others remain and mature in both estuarine and marine waters. The discovery of eels in both marine and estuarine habitats led biologists to revise that description to facultative catadromy, meaning they may be found in freshwater or saltwater during maturation. Eels can absorb oxygen through their skin and gills, allowing them to travel over land, particularly wet grass or mud. Eels also can cover their entire bodies with a mucous layer, making them nearly impossible to capture by hand—making "slippery as an eel" more than just a figure of speech. rivers, particularly where they can hide under logs and rocks. After 3 to 40 or more years of living in freshwater, brackish waters, or marine waters, the yellow eels begin to sexually mature. Eels that remain in estuarine and marine waters undergo the same changes but mature earlier than those in freshwater. Silver eels: American eels begin sexual differentiation at a length of about 8 to 10 inches. Depending on a variety of factors, which can include population density, eel growth rate, and water salinity, they become male or female silver eels with dark coloring, bronze-black backs and silver undersides. Female American eels can grow to 5 feet in length, and males usually reach about 3 feet. Silver eels' complete sexual maturation as they return to the Sargasso Sea to spawn. They undergo amazing physical changes enabling this return to the ocean, transforming the eels from shallow water, bottom dwellers to ocean travelers. Eels cease to feed during ocean migration,

and their gut begins to degenerate. To fuel the long ocean swim, their fat reserves increase. Eyes double in size and become more sensitive to blue, enhancing vision in deep water. Blood vessels feeding their swim bladders increase in number, allowing increased gas deposition and reduced loss of gas, both critical for buoyancy. Upon return to the Sargasso Sea, females release 20 to 30 million eggs that are fertilized by males. Once they spawn, it is assumed that adult eels die, but researchers have never witnessed eels spawning in the wild.

https://www.fws.gov/northeast/newsroom/pdf/Americaneel9.26.11.2.pdf

The Unkechaug and Indian Nation management plans differ from NYSDEC. The Unkechaug, under traditional eel management believe that it is more effective to manage and preserve the species by catching and caring for the glass eels where the State believes that it should prohibit anyone from catching eels under 9-inches. The Unkechaug also challenge the status of the American Eel and believe them to be in abundance contrary to NYSDEC's unsubstantiated position. The species threat to over-fishing is miniscule versus the threat from power plants that heat the streams and rivers, turbines that decimate migrating eels and pollution that poisons the eels. Although the NYSDEC imposes criminal enforcement against Native Americans and Native Nations, it allows the man made mechanical and chemical decimation of the eel population. Below, plaintiffs will discuss the actual population and threats to the eel species.

ii. Population Status and threats to the population of the American Eel

Very little is known about the natural mortality of American eels. Since eels are highly fecund (Wenner and Musick 1974; Barbin et al. 1998; Tremblay 2009), natural mortality is likely very high, particularly during the early life stages. Eel survival is likely impacted by changes in oceanographic conditions, predation, and the spread of the non-native swim bladder nematode.

(*Anguillicoloides crassus)* Waldt et al. (2013), found that nearly 50% of American eels in a Hudson River tributary in New York were infected during the fall of 2009. Zimmerman and Welsh (2012) confirmed the presence of A. crassus in the upper Potomac River watershed and found that length-at-age was lower in previously infected American eels than those uninfected, potentially reducing reproductive capabilities. Hein et al. (2014) reevaluated A. crassus infection in South Carolina where the American eel population in the 2017 American Eel Stock Assessment Update 9 has been declining since 2001 and the infection was first reported nearly 20 years ago. That study found that parasite prevalence was higher in South Carolina than in New York and Chesapeake Bay and possibly has been increasing over time. Additionally, the authors suggest that milder winters due to climate change could increase infection.

2.4.6 Incidental Mortality: Incidental mortality, caused by anthropogenic activities other than harvest, can be attributed to habitat alterations and restrictions as well as mechanical and chemical injuries. Inland habitat alterations and restrictions come primarily in the form of barriers to upstream migration for American eels. These can either be physical (dams) or chemical (areas of poor water quality) factors that limit habitat use by eels. This compression of range through habitat restrictions may increase the level of predation mortality or contribute to density dependent effects on growth or reproductive success. The location and number of dams may restrict eel distribution by limiting upstream movements (Levesque and Whitworth 1987; Goodwin and Angermeier 2003; Verreault et al. 2004; Machut et al. 2007; Hitt et al. 2012) and could impact the total number, size distribution, and number of eggs produced from a river system (Sweka et al. 2014). (See ASMFC website)

https://www.asmfc.org/uploads/file/59fb5847AmericanEelStockAssessmentUpdate_Oct2017.pdf

The Information above is based on research conducted by the Atlantic States Marine Fisheries Commission (ASMFC) an interstate compacts congressionally approved and followed by NYS through the NYSDEC membership and participation. As detailed above, very little is known about the American Eel and the actual risk to the population is due to the decline of habitat, climate change, poor water quality and other factors such as power plants and turbines interrupting eel migration. The overfishing argument is a disingenuous theory that lacks validity because any effect from fishing is *de minimis* on the population. In fact, the American Eel population is so stable when the ASMFC petitioned for Endangered Species List it was denied.

> 1.3 Petitions for ESA Listing In response to the extreme declines in American eel abundance in the Saint Lawrence River Lake Ontario portion of the species' range (personal comm., Dr. John Casselman, DFO), the ASMFC requested that the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) conduct a status review of American eels in 2004. The ASMFC also requested an evaluation of a Distinct Population Segment (DPS) listing under the Endangered Species Act (ESA) for the Saint Lawrence River/Lake Ontario and Lake Champlain/Richelieu River portion of the species range, as well as an evaluation of the entire Atlantic coast American eel population. A preliminary status review conducted by USFWS determined that American eel was not likely to meet the requirements of DPS determinations. However, the USFWS initiated a coastwide status review of the American eel in coordination with the NMFS and ASMFC. At this same time, two private citizens submitted a petition to the USFWS and NMFS to list American eel under the ESA. In February 2007, the USFWS announced the completion of a Status Review for American Eel (50 CFR Part 17; USFWS 2007). The report concluded that protecting eels as an endangered or threatened species was not warranted. The USFWS did note that while the species' overall population was not in danger of extinction or likely to become so in the foreseeable future, the eel population has "been extirpated from some portions of its historical freshwater habitat over the last 100 years… [and the species abundance has declined] likely as a result of harvest or turbine mortality, or a combination of factors". In 2010, the Center for Environmental Science Accuracy and Reliability filed a petition to the USFWS to consider listing the American eel on the endangered species list. The proposal was based on new information that had become available since the last status review. In September 2011, the USFWS published a positive 90-Day Finding, which stated that the petition contained enough information to warrant conducting a status review (USFWS 2011). In 2015, USFWS announced that the American eel population is stable and protection under ESA was not warranted although the agency did recommend continuing efforts to maintain healthy habitats, monitor harvest levels, and improve river passage (USFWS

2015https://www.asmfc.org/uploads/file/59fb5847AmericanEelStockAssessmentUpdate_Oct2017.pdf

Additionally, ASMFC's estimates of the American Eel are based on stale statistics and are simply extrapolated from limited surveys using mathematical equations and data analysis. As Defendants' Expert explains:

21 Q. So let's go down to -- so you have
22 this Exhibit 2012 of your report as a bench --
23 benchmark stock assessment. What do you mean by
24 that?
25 A. Mm-hmm.

1 A benchmark stock assessment is when we
2 take a -- basically, we, I would almost say,
3 start fresh.
4 What we do is we put out a call for
5 data, so we'll make a public announcement that
6 goes far and wide through our e-mail list-serves,
7 as well as requests to different universities and
8 scientific individuals that we know, or agencies
9 that are working on eel, as well as to just the
10 general public, for anybody that has information
11 on American Eel, so we'll request all of those
12 data sources, and then we'll analyze those data
13 sources and then consider any types of new models
14 or new scientific processes that are out there to
15 assess the stock. So it's, basically, starting
16 from scratch and trying to come up with the model
17 that will give us the population estimates.
18 Q. Is this report still relied upon today
19 as a comparison study?
20 A. The -- well, we have the 2017 Stock
21 Assessment Update, which is the most recent
22 information, but it is based on the analysis
23 that was peer-reviewed and approved in the 2012
24 Benchmark Stock Assessment.
25 Q. Mm-hmm. And that -- that report was

(Exhibit 18 Toni Kerns Deposition Transcript P. 65-66)

Ms. Kerns describes a flawed system of determining the eel stock assessment by reaching out to everyone they know and running data analysis on those statistics. Despite the lack of control and proven methodology, in 2021 ASMFC advised NYSDEC, and the other Atlantic States on American Eel management based on 2012 stock assessment numbers. Reliance on the 2012 population assessment is faulty because it relies on stale information that was obtained without a proven methodology that is reliable.

iii. The NYSDEC'S policy prohibiting anyone from catching eels under nine inches is not a valid conservation method but arbitrary and capricious and prejudicial to the Unkechaug traditional conservation method that has proven valid for generations.

The NYSDEC's rule of prohibiting fishing of eels under 9 inches is not based on a scientific methodology that would preserve eels. As defendants' own expert witness Ms. Toni Kerns stated:

4 Q. And would it make any difference if --
5 if a -- if one of the American Eels was destroyed
6 at one stage of its life or other stages of its
7 life as far as its ability to reproduce?
8 A. Mortality on a pre-spawn eel is
9 mortality, so any eel that doesn't survive is an
10 eel that will not be able to spawn.

(Exhibit 18 Toni Kerns Deposition Transcript P. 94 L.4-10)

The death of eels at any stage of their life cycle when they are pre-spawn age results in the loss of population and future population of the American Eel, accordingly there is no distinction in permitting fishing of a specific size eel over another size of pre-spawn eel unless the eel can spawn the population will be reduced. The regulation that allows the fishing of a nine-inch eel over a three-inch eel is meaningless and an arbitrary and capricious rule. Equally arbitrary is the NYSDEC statute that allows for any recreational fisherperson, to fish eels over nine inches and permitted to fish up twenty-five at a time and party boats are allowed fifty catch at a time. The permitted catches are allowed for bait and not even limited to human consumption. Kerns further states:

3 A. There is recreational fishing
4 management measures, as well as commercial
5 measures. There is still a nine-inch minimum
6 size limit for the recreational fishermen. They
7 are permitted to take 25 eel at a time. And the

8 for-hire industry, so a party boat or a charter
9 boat, someone that you would pay to go out on
10 their vessel and fish for the day, those -- those
11 vessels are allowed to have 50 eel on them at a
12 given time.
13 Q. And the 25 eel limitation, that's for
14 each individual in New York State, correct?
15 A. It's, yeah, 25 eel per person.
16 Q. Okay. So if a million people wanted to
17 fish for eels in New York, that would be 25
18 million eels that would be fished by -- by New
19 Yorkers pursuant to that law, correct?
20 A. That is correct. They have to be nine
21 inches, yes, if they -- it's -- in recreational
22 fishing, yes

(Exhibit 18 Toni Kerns Deposition Transcript P. 89 L.14-22)

The illogical prohibition by NYSDEC against the Unkechaug does not serve as a valid conservation measure where their rules allow for any recreational fishing to remove 25 eels over 9 inches. If one million New York residents alone were to fish for eels, they could deplete the eel population by twenty-five million in New York alone under this arbitrary rule.

iv. The Unkechaug American Eel Management Plan is superior to that of the NYSDEC's regulations to preserve the American Eel

Native Americans have fished and conserved the American Eel species since time immemorial. In fact, the Algonquins fed eels to the pilgrims to prevent starvation. (Exhibit 19) Even the ASMFC report acknowledges the spiritual connection between Natives and the eel.

> In New Zealand, anguillid eels are revered as spirits as much as they are prized as food (Prasek 2010). In traditional North American Indian cultures, the same is true. The Iroquois Confederacy in New York State has an Eel Clan; many of the governing leaders are recruited from this clan. However, today, the American eel is all but extirpated from Lake Ontario drainages, and most members of the Eel Clan have never seen a live eel (J. Shenandoah, Onondaga Nation elder, personal communication).
>
> Eels were formerly extremely abundant in inland waters of eastern North America, colonizing lakes, rivers, streams, and estuaries. In Onondaga Lake in New York State,

> 17th century Jesuit missionaries noted with wonder that "...the eel is so abundant that a thousand are sometimes speared by a single fisherman in a night..." (Clark 1849). American eels penetrated the major Atlantic waterways of North America, reaching the Great Lakes via the St. Lawrence River and the mid-western American states via the Mississippi as far as Minnesota (Eddy and Underhill 1974). Coastal eel abundances were very high, and during the spring, runs of recruiting glass eels would form "walls of glass" as they ascended barriers. Eel fisheries flourished well into the early 20th century.
>
> (See Exhibit 20)

The Unkechaug Nation developed a modern day written eel management plan with the help of the Passamaquoddy, also Algonquin cousins of the Unkechaug. This management plan was written in cooperation between the Unkechaug and Passamaquoddy under the terms of their nation-to-nation trade agreement. (See Exhibit 21)

The destruction of the American Eel in New York is mostly caused by loss of habitat and decimation caused by power plants, dams, turbines, and pollution (mechanical and chemical). The Unkechaug management addresses the major causes of destruction of the eels by transporting eel catches beyond the dangers of NYS streams, rivers, and other waterways. This traditional and proven management plan would provide the eel with greater opportunity to mature and reproduce, thus increasing the overall population.

The Unkechaug Management Plan states the following:

1.1 Increase in wild caught stocking effort.

A. Commencing with the 2014 glass eel fishing season, no less than 10% of all glass eels harvested by the Unkechaug Indian Nation, shall immediately be placed directly above artificial barriers to passage of glass eels to historic American eel habitat and

B. During each subsequent fishing year thereafter, the Unkechaug Indian Nation shall require an additional 10 % percent of glass eels harvested by the Unkechaug Nation to be stocked in accordance with the provisions established under Section 2.1 or until the nation has attained its goal of 50% stocking of wild caught glass eels into bodies of waters beginning nearest to the Unkechaug Indian Nation territory, then

C. To other bodies of water within the territories of Native American jurisdictions having executed fisheries cooperation and trade agreements with the Unkechaug Indian Nation and who have instituted similar American Eel management plans

D. In coordination with non-native organizations and jurisdictions having entered into agreements authorizing the co management of the American eel resource. Provided such co management agreements respect the cultural values and economic interests of the Unkechaug Indian Nation and or others with respect to access, management, and restoration of American Eels within their natural range.

(Exhibit 16 Unkechaug Management Plan)

Although the defendants and its expert claim to never have read the above management plan, Ms. Kerns validated the Unkechaug method of removing the glass eels and placing them above destructive barriers. Mr. Kerns states:

Q. I'm sorry. Okay. In other words, if
8 there's an area that's not passable by the -- by
9 the eel, say, for dams or whatever, is there a
10 method of taking those -- those fish and moving
11 them to -- to an area above and beyond the dam so
12 that they can pass and -- and live in their
13 -- the environment safely?
14 A. There are many different passage
15 techniques that are out and available. You know,
16 I think some studies have shown that certain
17 types of passage works better in certain
18 conditions than others, and so we provide
19 information on a lot of different types of
20 passage that you can use to help get eels over
21 dams and culverts and impediments to waterways.

(Exhibit 18 Toni Kerns Deposition Transcript P. 95 L.7-21)

The Unkechaug method of preserving the American Eel is specific and comprehensive allowing for co management rather than management by enforcement of arbitrary size regulations. Simply put, the NYSDEC's regulation is not a necessity for the eel population and is subjective and unreliable. The statutes do not enhance protection of the American Eel, but through subjective rules and selective enforcement has infringed on the Unkechaug treaty right to fish and practice their religious expression.

The Unkechaug Management Plan is thoughtful and inclusive and calls for cooperation with regulatory agencies such as the NYSDEC or other commercial fisheries. Plaintiffs will illustrate the prejudice to the Unkechaug by the enforcement of the NYSDEC statutes.

B. Factor 2: The NYSDEC Statutes and the selective enforcement of those statutes discriminate and prejudice Plaintiffs.

As shown in detail above, the NYSDEC limitation of fishing for eels under 9-inches does not provide for an effective conservation method. Clearly, the Unkechaug Management Plan provides for better management of the species. The following statutes limit the length of mesh net for catching the glass eel to restrict the catch size to 9 inches and serves no other purpose. The fishing of eel by the Unkechaug is a right provided for under the Andros Treaty. The statutory law prohibiting commercialization of the catch specifically violates the Andros Treaty. The treaty states that the Unkechaug may "freely dispose of their effects as they think good..." contrary to the States requirement of the Unkechaug obtaining a permit to sell fish caught.

The Unkechaug have attempted to work with the NYSDEC in good faith but have been rejected and disrespected for making the effort. Chief Wallace requested numerous meetings with representatives of the NYSDEC to set up an aquaculture program to catch, manage and care for glass eels but was outright rejected. Chief Wallace emailed a letter to Deputy Commissioner and General Counsel Thomas Berkman, on March 24, 2016, attaching the Eel Plan and requesting NYSDEC cooperation in development of a quota management plan for glass eels. In that letter, Mr. Wallace states that he sent the Unkechaug Eel Management Plan to NYSDEC more than two years prior and received no response. Failure to cooperate or even acknowledge the Unkechaug management plan shows animus and disparate treatment by NYSDEC toward the Unkechaug. Even defendants' expert witness admitted to the acceptance of aquacultural programs and states:

23 Q. Is fishing also allowed in New York for
24 aquacultural plans or aquacultural purposes?
25 A. Agri -- aquaculture or agriculture?

1 Q. Aquaculture. I'm sorry. Aquacultural

purposes.
A. Aquaculture.
Q. Water.
A. Thank you.
So I don't -- so each individual state has different rules and regulations surrounding aquaculture, so I -- I don't know what all of the regulations are in the State of New York concerning aquaculture programs. Generally speaking, I can tell you that I am not aware of any American Eel aquaculture programs in New York. That is not necessary because they -- the State does not allow it. It's just that nobody has asked for a permit to do it. But the State of New York has other aquaculture programs for marine species that are underway.
Q. And is there a limitation to the harvest of -- of -- of eels to manage or to run one of these -- one of these plans for aquaculture?
A. So through the Commission's Fishery Management Plan, we allow a state to apply for up to 200 pounds of Glass Eel to be used for aquaculture purposes. So an individual state

could harvest those 200 pounds and it be put into an aquaculture program. That doesn't prohibit the person running that aquaculture facility from buying Glass Eel from the market to add additional eels to their program from just the regular market. So they could have more than 200 eel -- Glass Eel at their facility, but only 200 of those could come from the aquaculture permit.
Q. Are there any additional base -- any additional ways in which New York State can allow the fishing of eels other than those you mentioned?
A. The fishing of what kind of eels?
Q. Glass Eels, from what you mentioned, --

15 A. Okay.
16 Q. -- is there any additional way in which
17 they can --
1 A. A state can ask for additional -- or to
2 ask for a quota for Glass Eel if they can prove
3 that they are putting production into a system.
4 So if they make improvements to a river
5 system that are going to, in some way, improve
6 the habitat or allow for more passage of eels,
7 then they can petition the Commission for Glass
8 Eel quota.
(Exhibit 18 Ms. Kerns Deposition P. 89-92)

Ms. Kerns admits that NYSDEC could have worked with the Unkechaug in setting up a quota for an Unkechaug Glass Eel fishery program. Rather than cooperate with the Unkechaug in development of an aquaculture program as required under CP-42, the NYSDEC chose to use bully tactics and threatened criminal prosecution over environmental conservation. (See Exhibit 23. Exhibit 9, Exhibit 5, Exhibit 7)

CP-42/ requires Cooperation, and Consultation with Indian Nations clearly sets a policy to interact with Native Nations in good faith and to acknowledge their treaties and beliefs. Cp-42 states the following:

II. Policy

It is the policy of the Department that relations with the Indian Nations shall be conducted on a government-to-government basis. The Department recognizes the unique political relations based on treaties and history, between the Indian Nation governments and the federal and state governments. In keeping with this overarching principle, Department staff will consult with appropriate representatives of Indian Nations on a government-to- government basis on environmental and cultural resource issues of mutual concern and, where appropriate and productive, will seek to develop cooperative agreements with Indian Nations on such issues.

The NYSDEC ignored this policy and lashed out against the Unkechaug for exercising their rights under treaty and custom. NYSDEC totally ignored the language in CP-42 Section 2:

2. Hunting, Fishing, and Gathering

> The Department recognizes that hunting, fishing, and gathering are activities of cultural and spiritual significance to the Indian Nations. The Department is committed to collaborating with Indian Nations to develop written cooperative agreements that protect the rights of such Nations to engage in these activities consistent with the Department's interest in protection and management of the State's natural resources.
> (Exhibit 2)

The NYSDEC did not follow its own policy and did not even attempt to read the Unkechaug Management plan or understand the historical treaty relationship. The failure to read the Unkechaug management plan is painfully apparent in three witness depositions and one expert deposition held by the plaintiffs in discovery. Not one witness or the expert admitted to reading the Unkechaug management plan although it was provided to defendants in 2014 and again to Deputy Commissioner and General Counsel Thomas Berkman in March of 2016. Plaintiffs deposed the NYSDEC Chief Marine Biologist, James Gilmore, Counsel to NYSDEC Deputy Commissioner and General Counsel, Berkman. NYSDEC Commissioner Seggos and expert Kerns. All the individuals deposed denied reading or knowing any details about the Unkechaug Management Plan.

Additionally, the plaintiffs' deposed NYSDEC attorney Kreshik and NYSDEC Police Officer, Major Florence, both of whom confirmed subjective and prejudicial actions against the plaintiffs by the defendants through direct illegal action and omission to research the Unkechaug rights prior to prosecution.

The testimony of the witnesses and expert are illustrative of prejudice against the Unkechaug by ignoring a traditional native conservation method plan and evaluation of plaintiffs' rights to fish eels.

i. JAMES GILMORE

On February 18, 2020 plaintiffs deposed a non-party witness pursuant to subpoena, James Gilmore, the Director of the Marine Division at NYSDEC and one of the Commissioners representing New York state at the Atlantic States Marine Fisheries Commission. Mr. Gilmore's testimony was the following:

> Q Are you familiar with Unkechaug Indian Nation American Eel Restoration and Management Plan?
> A Only that I heard that there is some of effort, but I don't know details of it.
> Q Where did you hear this at?
> A I believe it might have been from
> our law enforcement, but I don't recall exactly.
> Q You never received a copy of it, never read it?
> A To my knowledge, no.
> Q Do you have an understanding of what the plan was?
> A No.
> Q And you said you were informed of this by your law enforcement?
> MR. THOMPSON: Objection to the form of the question.
> You can answer.
> THE WITNESS: Yeah. Again, I was -- during this enforcement action, there was a lot of questions that law enforcement
> had with me, and so I -- at one point, I believe that's where I had heard it. But other than that, I didn't know much of the details about it.
> Q Did you bother to learn about the details of it?
> MR. THOMPSON: Object to the form of question.
> You can answer.
> THE WITNESS: There was an ongoing enforcement action, so no, I did not pursue anything.
> Q Did they advise you as to what the plan meant?
>
> MR. THOMPSON: Objection to the form of the question.
> THE WITNESS: No.
> Q What did they advise you about the
> plan?
>
> MR. THOMPSON: Objection to the form of the question.
> You can answer.
> THE WITNESS: Again, there was some activity to -- for some plan to grow or agriculture eels on the reservation list. Q Have you ever attended any alternate
>
> plans for fisheries by native Americans?
> MR. THOMPSON: Objection to the form of the question.

You can answer.
THE WITNESS: No.
Q Were you ever invited to attend any of these seminars or meetings or groups?
A No.
MR. THOMPSON: Same objection.
Q Do you believe that native Americans would have a meaningful dialogue, concerning fishing of American eels?
MR. THOMPSON: Objection to the form of the question.
You can answer.
THE WITNESS: Possibly.
Q Your response is "possibly," what do you mean by that?
A Well, they -- as I mentioned
previously, I am not aware of their traditional fishing practices. And I'm not sure they have some knowledge of fishing in general over time, so anything that it can learn in terms of
management, to help improve, you know,
sustainability of any of the populations, I would be interested in.
Q Did you make any attempt to learn any of these methods?
A No.
MR. THOMPSON: Objection to the form of the question.
Q Let's take a short break.
(At this time a short recess was held.)
Q Mr. Gilmore, are you familiar with Thomas Burkeman?
A Yes.
Q And who is he?
A He is deputy counsel for the Department of Agriculture Conservation.
Q Did there come a time that Mr.
Burkeman sent you the Unkechaug Management Plan, fishing?

MR. THOMPSON: At this points, I
would say any communication you have had with Mr. Burkeman, Mr. Kreshick (phonetic), with counsel's office,
concerning legal advice, or concerning the work done in preparation for this litigation are privileged.
So do you want to restate the question?
MR. SIMERMEYER: Yeah.
Q Did there come a time when you spoke to Mr. Burkeman concerning Unkechaug's Management Plan?
MR. THOMPSON: And I will instruct
you to answer outside of any conversations involving legal aid advice, and any regarding this litigation, or any other lawsuit.
THE WITNESS: Can answer it this way, I have many conversations with Mr. Burkeman. I may have had a conversation on this, but I don't recall the specifics of it.
Q Did he forward you a copy of the Unkechaug's Fishing Plan?
MR. THOMPSON: Again, please answer the question without reference to any

conversations, involving legal advice, or involving this, or any other lawsuit.
THE WITNESS: Not that I recall, but I may have.
Q Did you have a conversation with Commissioner Seggos concerning the Unkechaug Fishing Plan?
A Not that I recall.
Q Did Commissioner Seggos send you a copy of Unkechaug Fishing Plan?
A Not that I recall.
(Exhibit 24 James Gilmore Deposition P. 41-46)

The testimony shows that Mr. Gilmore did not read the Unkechaug Fishing Plan and could not evaluate the plan according to his testimony. The testimony also illustrated the prejudice of the NYSDEC and the failure to follow its own policy of consultation and cooperation of the Indian nations. Mr. Gilmore demonstrates his own personal prejudice by dismissing Native fishing traditional ecological knowledge by not even trying to understand the Unkechaug Methods. Further, Mr. Gilmore confirms that Deputy Commissioner and General Counsel, Thomas Berkman, and Commissioner Seggos' failure to provide or discuss the Unkechaug Management Plan. As we shall see later in other deposition testimony, Mr. Gilmore is relied upon by the entire NYSDEC to recommend, research and initiate management plans as he is the Director of Marine Resources and the Commissioner for New York State with the ASMFC.

The testimony of Major Florence confirms that the NYSDEC police were authorized by the NYSDEC commissioner to proceed against the plaintiffs.

ii. Major Scott Florence

On October 9, 2019, the plaintiffs deposed Major Scott Florence of the NYSDEC. Major Scott Florence identifies that the orders to seize or arrest Unkechaug members came directly from the Commissioner of NYSDEC.

Q. Did there come a time you became
involved in other matters involving the Unkechaug Indians?
A. Yes, there was two other times where
there was allegations the Unkechaugs were taking,
illegally taking eels and shipping them through JFK.

Q. Okay. And when did you learn of this?

A. I would have to look at the files for the exact date, but it would have been after -- again, what came first is kind of, without looking at the file again, was kind of confusing but it
would be sometime after the 2014 arrest.
Q. And did you do anything once you learne of these allegations?
A. On the first case, yes. We learned tha eels were being shipped through JFK that had been illegally taken, I believe, from New York waters. Again, I would have to look at the file to refresh exactly what the allegations were. And I had, I
believe, John Fitzpatrick respond to JFK and seize that shipment.
Q. And how did you learn of the shipment?
A. That I'd have to look at the file. I'm not 100 percent sure how we learned of that. I would really have to see the file again. I don't want to answer incorrectly.
Q. How did Fitzpatrick respond to that?
A. He responded.
Q. How did he respond?
A. He responded to JFK and we ultimately seized that shipment.
Q. And did you authorize him to do that?
A. Yes, you know, in consultation with my director and --
Q. And who would that be at the time?
A. I'd have to look at the time line of who it was. At this time I can't remember.
Q. Do you know whether or not the director of the agency was informed about the seizure?
A. In that particular case I do believe we met with or I met with Commissioner Martins who
would have been the commissioner at the time, I believe. Yes, I believe we met with the commissioner for that particular one. Again,
there's two cases that occurred. So I don't want to --

Q. This is the one with the seizure at the airport, correct?
A. Correct, with John Fitzpatrick. On that particular one I believe that's the one where we met with Commissioner Martins to advise him we had this evidence of this illegal shipment and we were
working to seize that.
Q. And did you seek his permission to go forward with it?
A. He's the boss, yes.
Q. And did he give you permission to go
forward with the seizure?
A. Yes.
Q. And how was that transmitted? Was that oral? Was that in writing?
A. Just verbal as I remember. Again, I mean, without looking at the file, but my recollection is we met face to face.
Q. Would that be recorded in your file?
A. I don't believe so, no. But again, I'm not a hundred percent sure. I'd have to look at my file.

Q. And was any action taken after you obtained his permission?
A. Yep. Directed John Fitzpatrick to seize the shipment.
Q. And did he seize the shipment?
A. Yes, he did.
Q. And the shipment was seized at JFK, is that correct?
A. Correct.
(Exhibit 25 Deposition Transcript of Major Scott Florence P. 16-19)

Major Florence goes on further when he confirms sending an email stating the following:

A. "Yes, John seized a shipment at JFK
being shipped out by a Native American Tribe from Long Island, the Unkechaugs. The seizure needed approval all the way to our Commissioner."
Q. And continue, please.
A. How far?
Q. The next two sentences.
A. "When the Commissioner asked if we were sure that the shipment was illegal, I only had to tell him John Fitzpatrick is on the investigation and that John says it's illegal. After that the Commissioner approved our seizure and supported our prosecution of the case."
(Exhibit 25 Deposition Transcript of Major Scott Florence P. 24 and Exhibit 26)

The testimony by Major Florence acknowledges direct involvement by the Commissioner. It also confirms that action taken was targeted against the Unkechaug by prejudicial enforcement of NYSDEC regulations without consideration of the plaintiffs' management plan or treaty rights.

The testimony of Monica Kreshik acknowledges exceptions to NYSDEC regulations against fishing of eels by natives.

iii. Monic Kreshik

On February 11, 2020 the plaintiffs deposed Monica Kreshik, legal in-house counsel to NYSDEC. Ms. Kreshik states the following :

Q. So is it DEC's position that fishing of elvers by Unkechaug Indians is a crime?
MR. THOMPSON: Object to the form.
A. It's DEC's position that we don't have an elvers fishery so that fish, anyone who takes elvers under nine inches is committing a crime, yes.
Q. Regardless of the location, whether it's on the reservation or off reservation?
A. New York State doesn't have jurisdiction

over the fishing of Native Americans on their own reservation land.
Q. So elvers could be fished on reservation land and DEC would have no jurisdiction?
A. If there was a viable water body on the reservation, then I suppose the nation of Native A Americans could fish for elvers.

(Exhibit 27 P.52-53)

Ms. Kreshik admits that there are exceptions to the prohibition of elvers fishing by Native Americans. The witness also admits in a May 14, 2014, affirmation that "Providing certain requirements are met, it is legal in Maine and may be legal on the Reservation to take or possess baby eels. (Exhibit 35 Aff Kreshik)

The sworn statement by Ms. Kreshik at her deposition and again by affirmation in previous litigation acknowledges that NYSDEC was not certain about the fishing status of the Unkechaug, and their rights could be an exception to the enforcement of NYSDEC rules and regulations. Although possessed with the uncertain knowledge of Unkechaug fishing rights, NYSDEC chose threat of prosecution over research and communication as directed under CP-42 and an obligation as state actors to proceed in good faith. The threat of prosecution to force legal action by the Unkechaug was prejudicial and directed at this specific Indian nation. The prejudice of litigation against the State of New York was calculated by NYSDEC who was aware of the financial burden of such intricate litigation and the unmatched human resources of the mega state agency unmatched that also has their own police force.

Ms. Kreshik acknowledges the fact that Indian Treaties could override NYSDEC regulations.

Q. Would it also be fair to say that any treaty rights by the Unkechaug people would be relevant as to whether or not they can fish on waters near the reservation?
A. The existence of treaty rights is relevant, yes.
Q. How is that relevant?

A. I'm not an expert on treaties, but my understanding is that there are some treaties that provide certain Indian Nations with the ability to hunt and fish off the reservations.
Q. In New York State are you aware of any of them?
A. Yes.
Q. Which ones?
A. There is the Treaty of Canandagua, and again I'm not an expert on what they say, but it was brought to my attention. The Treaty of Canandagua and I believe there are a few other documents or agreements with New York State. I don't know whether they are treaties or not though.
Q. Are you aware of any with the Unkechaug?
A. No, I'm not.
(Exhibit 27 Kreshik Deposition P46)

Ms. Kreshik also confirms that Mr. Gilmore would be the one to work with the Unkechaug in developing an eel fishing cooperation plan. Ms. Kreshik states:

Q. And are you aware of any federal regulations that impact Indians' ability to fish or hunt on traditional lands in New York State?
A. Yes, I believe there are. I'm not an expert in that area though.
Q. And which ones are they?
A. I don't know. There may be.
Q. Are you familiar with Jim Gilmore?
A. Yes.
Q. Who is he?
A. He is the Director of our Division of Marine Resources.
Q. And what does that entail?
A. He oversees the Marine Resources Program.
Q. Would that include fishing?
A. Yes, marine fishing.
Q. Would that including fishing by Native Americans in New York State?
A. It would be fishing generally.
Q. Do you have any specific or special individuals or agency dealings with Native American fishing in New York State?
A. Not that I'm aware of.

Q. So it would all fall under Gilmore's offices as Director of Fishing?
A. He would be responsible for the department's program on fishing generally.
(Exhibit 27 Monica Kreshik Deposition Pg. 47-48)

Ms. Kreshik confirms that NYSDEC enforcement against the Unkechaug was prejudicial and focused on this specific Indian nation by ignoring the exceptions to NYSDEC rules and pushing forward with criminal prosecution while overlooking its duty under CP-42 to cooperate with the Native people of New York.

iv. Thomas Berkman

On March 3, 2020, plaintiffs deposed NYSDEC's General Counsel and Deputy Commissioner, Thomas Berkman. Throughout the entire deposition Mr. Berkman displayed his prejudice toward the Unkechaug with his dismissive and disrespectful tone with disingenuous responses. Mr. Berkman states the following: (Exhibit 28)

MR. THOMPSON: Well, you are asking what issues they looked at in connection with --
MR. SIMERMAYER: I asked him whether or not he looked at a treaty dealing with fishing, and that's it.
A To clarify, I am unaware if there is an actual treaty with respect to the Unkechaugs. So I should clarify that answer. And that's my clarification.
Q Okay. Are you familiar with the complaint in this case?
A Very vaguely.
Q Have you read the complaint?
A I can't recall.
Q Are you familiar with the issues in this case?
A Vaguely, yes.
Q Do you know that one of the issues in this case is concerning a treaty allowing the Unkechaug to fish in their customary waters?

MR. THOMPSON: Objection to the form of the question. You can answer the question.

A Well, no. I cannot recall as to that, and that's mainly because my understanding is to whether there is a treaty in place. I am unclear on that, a specific treaty.

Q I am not asking you at this point to direct that. I am saying are you familiar with what the allegations of the complaint are?

A Vaguely.

Q Here is a copy of the complaint. Take a look at it and see if it refreshes your memory.

MR. THOMPSON: Are we going to mark this?

MR. SIMERMAYER: Let me take a look at it first.

Q Does this refresh your memory as to the allegations in the complaint?

A Yes.

Q Now specifically if you go to page 11, paragraphs 54 through 56, this claim, the fourth claim in the complaint refers to the treaty with Governor Andros. Are you familiar with that treaty?

MR. THOMPSON: Objection to the form. You can answer that.

A I can't recall.

Q So you can't recall whether or not you are familiar with it?

A I am not familiar with whether it is a treaty or anything else. I have a vague recollection of there being a document from that time period.

Q What is your recollection of that document?

A My recollection is this was brought up. Again, I am not 100 percent certain on this, but it is brought up during a conversation with, I believe, Chief Wallace at D.E.C., and this issue was raised.

Q Is it your belief that this is a

treaty or not a treaty?
A I don't have an opinion on that.
Q Do you understand the significance of a treaty with the United States government generally?
MR. THOMPSON: Is that a question?
MR. SIMERMAYER: That's a question, yes.
MR. THOMPSON: I will object to the form.
A Generally I do.
Q Okay. What is your understanding of the significance of a treaty?
A My understanding is that if there is a specific treaty that it brings certain legal rights.
Q Those rights would be set forth in the treaty, correct?
A I don't know specifically.
Q Well, in this case do you see the language of the treaty there? What does it refer to?
MR. THOMPSON: I will object to the form. Just note that this is a quote from the treaty, not the whole thing.
MR. SIMERMAYER: Right.
MR. THOMPSON: Or the alleged treaty. Beyond what is written, that's all I can speak to.
MR. SIMERMAYER: I will mark this as Plaintiff's Exhibit 1.
(Whereupon a treaty was marked as Plaintiff's Exhibit 1 for Identification, as of this date).
Q So this is a full text of the treaty that is referred to in the complaint. I call your attention to the second page. This document, does it set forth the rights of the Unkechaugs as far as fishing is concerned?
MR. THOMPSON: Objection to the form of the question. You can answer the question.
A The document speaks for itself. I am not in a position to interpret its meaning.
Q Does it reference fishing rights to the Unkechaug Indians in this document?

A It mentions -- I will quote from it.
"Resolved and ordered that they are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they think good according to law and custom of the government." And it goes on.
Q Does D.E.C. have a policy concerning fishing by Indians?
A I don't know.
Does D.E.C. have a policy concerning fishing of American eels?

A I don't know.
Q Does the D.E.C. have a limitation on the fishing of or capturing of glass eels?
A I believe so, yes.
Q Do you know what that is?
A I am not specifically familiar with it, but my understanding is that the taking of glass eels is prohibited.
Q Would that apply to Indians, western New York State Indian reservations?
A On reservations?
Q Yes.
A I don't know.
Q Would that apply to Indians fishing or taking glass eels or in customary, in traditional waters?
A It would apply to all New York waters.
Q And would it also apply to Indians fishing in those waters?
A I believe so.
Q Would it apply to the Unkechaug Indians fishing in those waters for glass eels?
A I believe so.
Q And if that a treaty that was a valid

treaty and it allowed them to fish as they saw fit and dispose of the fish as they saw fit, would that alleviate their violations of D.E.C. rules concerning catching eels that are under nine inches?
MR. THOMPSON: Objection to the form of the question. You can answer the question.
(The question was read back by the

court reporter).
A It is a hypothetical that I don't know the answer to.
Q Would a valid federal treaty allowing certain rights to Indian nations specifically the Unkechaug Indian nation, make the inforcement by D.E.C. invalid or not allow D.E.C. to enforce some of their regulations are contrary to the terms of the treaty?
MR. THOMPSON: Objection to the form of the question. You can answer the question.
A Can you read back the question?
(The question was read back by the court reporter).
A Again, it is a hypothetical that I don't have the answer for.
Q If the court enforced a treaty, specifically that treaty with the right to the Unkechaug Indians to fish for glass eels under nine inches, would D.E.C. still enforce its laws against the Unkechaug?
A Again, it is a hypothetical that I don't have the answer for.
Q When you say you don't have an answer for it, you don't want to answer it or you don't have an answer for it? In what sense?
A In the sense that, you know, the facts that you provided, I would have to as general counsel review those facts and work with folks within my office to make a final determination without having a full set of facts before me, without having the ability to do that type of research and work. I am not in the position to form an opinion sitting here today.
Q Even in a court ordered D.E.C. to allow Unkechaug Indians to fish for eels that are under nine inches the D.E.C. would not allow it, is that what you are saying?
MR. THOMPSON: Objection. Asked and answered. You can answer the question.
A That's not what I was saying. I was saying that at this juncture I am not. Without having the opportunity to review and understand everything I am not in the position to answer that today.

Q What more would you need to understand?
A I would have to consult with individuals within my office to understand all of the legal implications of what you have set forth.
Q What questions would you raise concerning that?
A The questions I would raise would be more general questions to better understand the legal implications of precisely what your hypothetical is. And I would hope or I would look for individuals with more specific knowledge and greater expertise in this area to advise me.
Q So you would need someone to advise you concerning the treaty rights of Indians?
A Yes.
Q Did there ever come a time where you communicated with the Unkechaug Indian nation concerning fishing of American eels?
A I can't specifically recall, but having read the complaint my memory has been refreshed that a letter was sent to Chief Wallace with my signature.
(Whereupon two letters were marked as as Plaintiff's Exhibits 2 and 3 for Identification, as of this date).
Q Plaintiff's Exhibit 2, is this a leter that you sent to Mr. Wallace?
A I believe so.
Q In this letter do you set forth D.E.C.s position concerning the fishing of glass eels?
A Yes. The letter speaks for itself.
Q Did Mr. Wallace respond to your letter?
A I can't recall.
Q Does Plaintiff's Exhibit 3 refresh your memory?
A No.
Q Along with this letter did you receive a management plan from Chief Wallace?
A I can't specifically recall.
MR. SIMERMAYER: Mark this as Plaintiff's Exhibit 4.
(Whereupon a letter was marked as Plaintiff's Exhibit 4 for Identification, as

of this date).
Q Mr. Berkman, this is a document that was turned over by your counsel to us and in discovery. Does this reference the letter that we just discussed and the eel plan being forwarded to two other individuals?
MR. THOMPSON: I am going to instruct him not to respond to that question. It is attorney-client communication.
Q Mr. Berkman, did there come a time when you forwarded to anyone the letter that Mr. Wallace forwarded to you and the management plan?
MR. THOMPSON: Again, I am going to instruct him not to answer that question with regard to attorney-client communication.
MR. SIMERMAYER: I am not asking specifically. I am asking generally whether or not he forwarded it to other people.
MR. THOMPSON: In that case I don't think there is any way to ask him that question without referring to attorney-client communications, so no, I will instruct him not to answer that question, and I think this probably ought to be subject to the 502D order.
MR. SIMERMAYER: You gave it to us without any restriction item along with the other -- 4,000 other pages, whatever it was.
MR. THOMPSON: There is also a 502-D order governing this case for privilege.
(Whereupon a management plan was marked as Plaintiff's Exhibit 5 for Identification, as of this date).
Q Does this help refresh your memory as to the management plan?
A No.
Q Do you recall receiving that management plan?
A Not to my recollection.
Q You do recall receiving the letter from Chief Wallace, is that correct?
A Not to my recollection.
Q Are you aware of the Unkechaug's position concerning the management of American eels?

A (No answer).
Q Outside of that document?
A Can you clarify your question?
Q Are you aware of the Unkechaug's Indian management plan concerning American eels?
A No.
Q Have any experts concerning the management of eels in the D.E.C. looked at that management document, that management plan by the Unkechaugs?
MR. THOMPSON: I would object to that on work product ground and instruct you not to answer. I suppose you can answer if you are aware of anyone doing that outside the context of this or any other litigation.
A I am not aware.
Q Is there anyone at D.E.C. that is an expert on the American eel?
A I don't know.
Q What was the basis for you writing your letter? I think it was Exhibit 1 to Chief Wallace.
MR. THOMPSON: I would object to that on work product grounds.
MR. SIMERMAYER: Him writing a letter to Chief Wallace?
MR. THOMPSON: To why he wrote the letter and his motivations for doing it. That's work product. What is in the letter and what he wrote I think that's perfectly in bounds, but as you know there has been litigation or the threat of litigation between the Unkechaug and D.E.C. since at least 2014 and certainly was at the time of this letter.
Q Were you directed to write that letter or did you write it on your own?
MR. THOMPSON: Objection. Attorney-client privilege. Attorney work project.
Q Did the governor's office request you to write that letter?
MR. THOMPSON: Objection. Attorney work product.
MR. SIMERMAYER: The governor's office, they are not attorneys in this case.

(Exhibit 28)

Mr. Berkman's animus against the Unkechaug is evident from his disrespectful tone and responses. Mr. Berkman had the audacity to claim that he never received the Unkechaug management plan or remember that he received a response to his letter threatening prosecution of the Unkechaug. Berkman's testimony also illustrates the disregard he has for Unkechaug treaty rights that would protect fishing against prosecution by the NYSDEC or interference of their sovereign rights. Mr. Berkman as the Deputy Commissioner and General Counsel of the NYSDEC had an obligation to communicate with the Unkechaug on issues of treaty rights and fishing management plans. Berkman stated that he reported to the Governor's counsel on issues with the NYSDEC however, he ignored basic research and cooperation and chose criminal prosecution and litigation.

v. Basil Seggos

On March 10, 2020, plaintiffs deposed Commissioner of NYSDEC, Basil Seggos. Commissioner Seggos stated that he had no knowledge of the Unkechaug management plan despite Berkman receiving a copy from Chief Wallace. Commissioner Seggos states the following:

Q Did there ever come a time when you received an eel management plan from Unkechaug Indian Nation?
A I don't believe I received it.
Q Have you heard of that management plan from anyone else in your offices?
A No.
(See Exhibit 29 Deposition Transcript of Seggos P. 44)

Seggos also states that NYSDEC would rely on Director Gilmore in developing plans regarding the American Eel and that he would be directly supervised by himself and Deputy Commissioner Berkman.

Q Who would be the person or individual who would be most knowledgeable concerning the fishing of the eels in your DEC?
A Within DEC, Division of Marine Resources Director Jim Gilmore would be the most knowledgeable. He might have specific individuals under him that are exclusively focused on eels, the American glass eel and other species. But the marine division has that knowledge within the agency.
Q And you supervise Mr. Gilmore?
A I do. I mean, not directly. I have a deputy commissioner that supervises him but he reports to me, effectively.
Q Was he hired under you or was he working there prior to you becoming commissioner?
A He predated me. I promoted him in my time.
Q What information do you have concerning his expertise with eels or his knowledge of eel fishing?
A I don't have any specific information about his knowledge. I know that he is the state's expert on -- DEC's expert on fishing issues. That would include glass eels, American eels and other species off marine waters.
Q Would it be fair to say that you would rely on his opinion concerning glass eels?
A Yes.
(See Exhibit 29 Deposition Transcript of Seggos P. 45)

Commissioner Seggos goes on further in his deposition testimony admitting that he was not knowledgeable of the status of the eel fishing and eel population in NYS.

Q And do you know the amount of eels

that are taken out annually?
A I don't.
Q Are there statistics concerning this that are accurate or is it just general numbers that are provided by some other agencies concerning the eel management?
A Again, I'm not entirely clear on the specifics of the eel. I mean, as with all marine species, the federal government sets quotas, we then have to enforce those quotas and develop management plans for those species. So the statistics would be contained within those plans and the quotas that we get.
Q And does New York State provide an independent review of the eel population?
A I'm not entirely clear what we present in terms of the eel population in New York. I know Jim Gilmore is recognized as an expert on marine fisheries and represents the state at multistate proceedings with other eastern seaboard states.
Q So you would rely on him to make that determination?
MR. THOMPSON: Objection; asked and answered. You can answer.
A Yes, I would rely on him to represent the state's interest in that. And the state's interests generally are we need our fair share of quotas, and occasionally we may recognize that certain species are at risk or endangered or threatened and they need better management
(Exhibit 29 Seggos Dep P.49-50)

Commissioner Seggos obviously had little or no experience with the eel population and eel fishing in New York State and failed to provide knowledgeable oversight although he was aware of the issues with the Unkechaug and authorized criminal action against the Unkechaug. The Commissioner's failure to read and understand the Unkechaug management plan prior to permitting criminal prosecution was culpable and derelict. The blanket reliance on Gilmore and

Berkman fails to relieve Seggos of his responsibility and involvement in permitting prejudicial criminal prosecution against the Unkechaug. The Commissioner's failure to understand and evaluate the Andros Treaty impact of NYSDEC enforcement prior to criminal prosecution was reckless and illustrative of his disregard for treaty rights of the Unkechaug. The failure of the Commissioner to comply with his own policies under CP-42 is evidence of the prejudicial enforcement of unnecessary statutes.

C. *Weight of Unkechaug Andros Treaty Fishing rights outweigh the States right to enforce an unnecessary conservation measure that is prejudicial to the Unkechaug*

In conclusion of the lengthy analysis above, the States' conservation regulation N.Y. Envtl. Conserv. Law § 71-0924, N.Y. Envtl. Conserv. Law § 40.1(p)(1) and NYSDEC's prohibition of catching eels under 9 inches is not a reasonable and necessary conservation measure 9CRR-NY 10.1 NY-CRR(12) 40. According to the defendant's expert Ms. Kerns, the catch of eel under 9 inches as illegal is not a rational and necessary conservation measure because any taking of eels prior to reproduction in the Sargasso Sea is a reduction of the population and future population. Defendants' expert witness, Toni Kerns explained that any death at any life stage has an important impact on eel population, including glass eels to adult eels. This statement by Ms. Kerns is telling and illustrates the faulty logic of NYSDEC regulation allowing recreational fisherman in New York State to fish for 25 eels at a time. If one-million people fished for eels at the same time, 25-million fish would be destroyed significantly reducing the population of eels on the Atlantic Seaboard.

However, because the eel population is stable it would not be dramatically affected by a small number of Unkechaug fishing under the Unkechaug management plan, as compared to

the open-ended state fishing regulations and the loss of habitat from dams, turbines, pollution, obstructions, power plants and global warming.

Ms. Kerns acknowledged that preserving the glass eels would be achieved by moving them above any obstructions in the waterways as set out in the Unkechaug management plan. However, defendants' failure to read the plan or acknowledge the plan ignores a methodology that is more effective than the NYSDEC enforcement plans. Unkechaug eel fishing impact on the eel population would be *de minimis* at best. The Unkechaug is not asking for exclusive rights to fish in customary waters, only their treaty rights to fish and to freely dispose of their catch. The Unkechaug plan incorporates cooperation and return of percentages of the catch to insure the conservation of the American Eel. The plan is inclusive and not exclusive and would provide landing information that would be actual rather than speculative and create an accurate methodology to count the eel population. The NYSDEC regulations are not necessary and are prejudicial to the Unkechaug who offer a management plan that is superior to that relied on by the NYSDEC. These arbitrary and capricious statutes should not be enforced against the Unkechaug.

VI. NYSDEC REGULATIONS ARE PRE-EMPTED BY FEDERAL LAW AND IMPAIR TRIBAL SELF-GOVERNMENT

Questions of conflicting tribal-state jurisdiction are no longer resolved by automatic application of the tribal sovereignty doctrine enunciated by Mr. Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832), and most controversies are settled by reliance on federal preemption principles. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); See *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2, 96

S. Ct. 2102, 48 L. Ed. 2d 710 (1976). [**5] HN2 Abrogation of the Worcester rule of complete sovereignty means states may regulate reservation Indians and non-Indians in certain situations. Absent acts of Congress or strong federal policies indicating a desire to exclude state regulation, inquiry should be directed to the right of reservation Indians to make their own laws and to govern themselves. State action which substantially impinges upon that right is impermissible. *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). Under *Williams*, HN3 [*78] state regulatory laws may apply to tribal regulations unless their application would frustrate tribal self-government or impair a right granted or reserved by federal law. See Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 482-83, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); *Mescalero Apache Tribe v. Jones*, supra; *McClanahan v. Arizona State Tax Comm'n*, supra; *Kennerly v. District Court*, 400 U.S. 423, 426-27, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686-87 and n.3, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965); *Organized Village of Kake v. Egan,* 369 U.S. 60, 67-68, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962). [**6]

§ 232. Jurisdiction of New York State over offenses committed on reservations within State

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: Provided, That nothing contained in this Act [this section] shall be construed to deprive any Indian tribe, band, or community, or members thereof, [of] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.
>
> 25U.S.C.S. § 232 (LexisNexis, Lexis Advance through Public Law 117-36, approved August 6, 2021, excepting Part V of Subtitle A of Title 10, as added by Public Law 116-283 (effective 1/1/2022))

New York State does not have exclusive jurisdiction to prosecute Indians for crimes which they commit on reservations within state; rather, § 232 extends concurrent jurisdiction to states United *States v. Cook*, 922 F.2d 1026 (2d Cir.), cert. denied, 500 U.S. 941, 111 S. Ct. 2235, 114 L. Ed. 2d 477 (1991).

26 U.S.C.S. § 232 (LexisNexis, Lexis Advance through Public Law 117-36, approved August 6, 2021, excepting Part V of Subtitle A of Title 10, as added by Public Law 116-283 (effective 1/1/2022)

The Unkechaug seek to prohibit the NYSDEC from enforcement of fishing regulations that infringe upon their inherent sovereignty and historical Treaty protected fishing rights. 25 U.S.C. 232 states "that nothing contained in this Act shall be construed to deprive any Indian tribe, band, community or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights."

As argued in the previous section above, the Unkechaug entered a treaty with Governor Andros, the head of the Colony of New York in 1676. This treaty has been ratified by amendments in the U.S. and New York Constitution. The acts of the State of New York in relationship to Unkechaug fishing has remained consistent since the Andros treaty (Exhibit 4) until recently in 2014 when the NYSDEC attempted to interfere with Unkechaug fishing rights under the treaty. The enforcement against Unkechaug members, representatives and Chief interfered with the sovereignty of the nation and prevented them from conducting their governmental responsibilities to promote the economic and religious welfare of their people. Since the illegal enforcement by the defendants, the nation members have not been able to fish and conserve their fishing habitat in the manner that they have since time immemorial.

25 U.S.C. §232 prevents the state from enforcing regulation that interferes with Unkechaug traditional fishing. Like the Eastern Band of Cherokee case, NYSDEC intends to interfere with Unkechaug governmental affairs and their ability to create revenue for its nation members. "We find enforcement of North Carolina's license requirement against non-Indian fishermen on the tribe's reservation violates both parts of the Williams preemption test."

Band of Cherokee Indians v. N.C. Wildlife Res. Com., 588 F.2d 75, 78 (4th Cir. 1978)

VII. COMISSIONER SEGGOS AND DEPUTY COMMISSIONER BERKMAN VIOLATED FEDERAL LAW WHEN ENFORCING NYSDEC REGULATIONS AGAINST THE UNKECHAUG CONTRARY TO A TREATY RIGHT AND FEDERAL LAW

Actions for damages against a state official in his or her official capacity are essentially actions against the State and will be barred 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) 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

Plaintiffs have faced and continue to face criminal prosecution, seizure, and threats of future prosecution. NYSDEC commissioner directed NYSDEC police 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. (Exhibits 28, Exhibit 5, Exhibit 23 Exhibit 1- Complaint ¶s 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. (Exhibit 1 Complaint ¶'s 35,26,31,32, Exhibit 9 Hugh Lambert Affidavit) 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 Wildlife and other state agencies to enforce NYSDEC regulations against Chief Wallace and the Unkechaug Indian Nation. (Exhibit 23)

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 customs and shall continue such fishing activities without consent or permission of the State. (Exhibit 22)

The violation of the plaintiffs' rights is readily traceable to Seggos and Berkman. The NYSDEC has violated the plaintiffs' rights 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 Hugh Lambert McLean unless the nation commences an action in Federal Court. (Exhibit 9) Additionally, Major Scott Florence states in his deposition when reading an email, that the commissioner approved the confiscation of Unkechaug glass eels at JFK. (Exhibit 26, Exhibit 25)

In addition to Seggos, Thomas Berkman as Deputy Commissioner, sent the letter to Chief Wallace threatening future prosecution. In an email communication between Monica Kreshik and James F. Simermeyer, Kreshik states that: "As Deputy Commissioner and General Counsel, Tom Berkman is delegated to act with the same force and effect as the Acting Commissioner in his absence." (Exhibit 34) Clearly the top two officials of NYSDEC made and continue to make threats of criminal prosecution against the Unkechaug Indian Nation and its members and representatives. (See Exhibit 34) Undoubtedly, the plaintiffs can expect the continuation of violations of their rights unless the court grants declaratory and injunctive relief to the plaintiffs.

A. Plaintiffs Seek Recognition of its Right to Fish and Hunt with Limited Regulation and without Exclusive Rights

Plaintiffs seek 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).

An Indian nation seeking to enforce limited treaty fishing rights which does not amount to a quiet title action or exclusion of others, is not barred by the eleventh amendment.

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, 11 7 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 Northpo rt, 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 sujt 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 autho rity and its standing in the Urno n 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 *Coeur d'Alene. Arnett v. Myers,* 281 F.Jd 552, 568 (6th Cir. 2002); *Hamilton v. Myers,* 281 F.Jd 520, 528 (6th Cir. (*840) 2002). In *Arnett v. Myers,* the Sixth Circuit explained the broad implications at issue in *Coeur d'Alene:* "(i]f the Tribe in *Coeur d'Alene* had prevailed, Lake Coeur 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.Jd 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 *Coeur 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 Coeur d'Alene, and *this court does not read the ruling of Coeur d'Alene to extend to every situation where a state properly interest is implicated.*

Id. (emphasis supplied).

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

> In *Western Mohegan Tribe & Nation v. Orange County*, the Second Circuit [*18] relied on *Coeur D'Alene* in determining that the Eleventh Amendment barred a suit brought by the Western Mohegan Tribe against the New York State Governor. *See* 395 F.3d 18, 23 (2d Cir. 2004). There, the tribe asserted that its claims were more limited in nature than those in *Coeur d'Alene*—namely, the tribe sought "only Indian title, which it describe[d] as the right to camp, to hunt, to fish, [and] to use the waters and timbers' in the contested lands and waterways." *Id.* at 22 (internal quotation marks omitted). The Court, nevertheless, found that "the action [was] squarely governed by *Coeur d'Alene*." *Id.* at 23. The court found that, like the tribe in *Coeur D'Alene*, the Western Mohegan Tribe was seeking a "determination that the lands in question are not even within the regulatory jurisdiction of the [s]tate[.]" *Id.* (internal quotation marks and citation omitted). Specifically, the court noted that the tribe's allegations that it held aboriginal title over the contested areas rendered the tribe's claim "fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas." *Id.*
>
> Silva v. Farrish, No. 18-cv-3648 (SJF)(SIL), 2020 U.S. Dist. LEXIS 94517, at *17-18 (E.D.N.Y. May 27, 2020)

In the present case 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." The 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. Distinct from *Western Mohegan* and *Silva* the Unkechaug are not claiming Aboriginal Title to the waterways but continued use of the waterways to fish consistent with the Andros and Unkechaug Treaty. The nation is not asking the court for far-reaching rights such as those of in *Coeur de Alene* case, they are simply asking the court to maintain their treaty protected rights.

VIII. NYSDEC EXPRESSLY WAIVED ELEVENTH AMENDMENT IMMUNITY BY COERCING PLAINTIFFS TO INITIATE THE PRESENT CASE IN BAD FAITH

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].)

It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying [***813] that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate [****12] seriously unfair results. Thus, it is not surprising that more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity. *Clark* v. *Barnard*, 108 U.S. 436, 447, 27 L. Ed. 780, 2 S. Ct. 878 (1883) (State's "voluntary appearance" in federal court as an intervenor avoids Eleventh Amendment inquiry). The Court subsequently held, in the context of a [**1644] bankruptcy claim, that a State "waives any immunity. . . respecting the adjudication of" a "claim" that it voluntarily files in federal court. *Gardner* v. *New Jersey*, 329 U.S. 565, 574, 91 L. Ed. 504, 67 S. Ct. 467 (1947). And the Court has made clear in general that "where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U.S. 273, 284, 50 L. Ed. 477, 26 S. Ct. 252 (1906) (emphasis added). The Court has long accepted this statement of the law as valid, often citing [****13] with approval the cases embodying that principle. See, *e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 666, 681, n.3, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999) (citing *Gardner); Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U.S. 279, 294, 36 L. Ed. 2d 251, 93 S. Ct. 1614, and n. 10 (1973) (Marshall, J., concurring in result) (citing Clark); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276, 3 L. Ed.

2d 804, 79 S. Ct. 785 (1959) (citing *Clark).*

"In this case, the State was brought involuntarily into the case as a defendant in the original state-court proceedings. But the State then voluntarily agreed to remove the case to federal court. See 28 U.S.C. § 1446 (a); *Chicago, R. I. & P. R. Co.* v. *Martin,* 178 U.S. 245, 248, 44 L. Ed. 1055, 20 S. Ct. 854 (1900) (removal requires the consent of all defendants). In doing so, it voluntarily invoked the federal court's jurisdiction. And unless we are to abandon the general principle just stated, or unless there [****14] is something special about removal or about this case, the general legal principle requiring waiver ought to apply. We see no reason to abandon the general principle. Georgia points out that the cases that stand for the principle, *Gunter, Gardner,* and *Clark,* did not involve suits for money damages against the State--the heart of the Eleventh Amendment's concern. But the principle enunciated in those cases did not turn upon the nature of the relief sought. And that principle remains sound as applied to suits for money damages. *Lapides v. Bd. of Regents*, 535 U.S. 613, 619-20, 122 S. Ct. 1640, 1643-44 (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 125 and Exhibit 6)

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. (Exhibit 9, Exhibit 6)

IX. THE NYSDEC REGULATIONS INTERFERE WITH THE UNKECHAUG FREEDOM OF RELIGION

Badoni v. Higginson, [*12] 638 F.2d 172, 176-77 (1980), set forth the test under the Free Exercise clause of the First Amendment: HN6 Analysis of a free exercise claim involves a two-step process. We first determine whether government action creates a burden on the exercise of plaintiffs' religion. "[I]t is necessary in a free exercise case to show the coercive effect of the enactment as it operates against . . . the practice of [their] religion. School District of *Abington v. Schempp*, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844 (1963). The practice allegedly infringed upon must be based on a system of belief that is religious, see, e.g., *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). If such a burden is found, the action is violative of the Free Exercise clause, unless the government establishes an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise clause." *Wisconsin v. Yoder*, 406 U.S. at 214, 92 S. Ct. at 1532.

A. Unkechaug Religion

The Unkechaug Nation as Algonquin people have a spiritual connection to the water and fishing. This connection is eloquently stated by Chief Wallace in recitation of Unkechaug creation story.

> We are the Midweiein inni, which is in our way its called the – Midwiwin means way of the heart, way of the good heart, and the metowak means the people of the shell, and

> that's who we are. And we are part of an alliance that goes from here to the Great Lakes. And so what we do is the shell to us is a living, breathing thing. The creation of—you got to bear with me, because I'm – I'm, you know, im trying to retell a story for a deposition that's told in a much different context. But in our—in what I am taught and what we are taught is that the shell, the miigis shell which I wear and the wampum shell which I wear, was important in the creation of man.
> And when the creator tried to create man, he tried four times to create him. The third – The first three times he tried to breathe life into man, and as a result of his power, the Power of his breath, the man that he tried to create in his own image was destroyed Because his breath was too powerful
> And so the shell being went to the creator, and asked him and said to him that I will Sacrifice my life and my existence so that your breath could be deflected. Because if you Look inside the shell, it's made by – it's a coil on the inside, and so when breathing into The shell he would kill the being.
> But his breath; the power of his breath would be deflected in such a way that life could be Given to man. And so the fourth time he breathed into – the creator breathed into the shell, and in the fourth creation man was created.

(Exhibit 3 Pg33-36) The creation story shines a light on the importance of water and the shell needed to breathe life into man. It can be difficult for non-Indians to understand Native religion because of the fundamental ideological difference and in the practice of their own respective religions. Plaintiffs' Expert Fredrick Moore passionately describes native belief system and distinguishes it from nonnative religious practices:

Q. So can you explain to me a
little bit more. You mentioned that your
family had a special status in the
religion; is that correct?
A. Well, if you look at religion
from our standpoint, religion is not a word
that we use. We have a belief system which
you can call religion, but we also have a
faith, which is not part of a religion.
There's a difference between the two. We
practice a faith and that is our belief
system.
Q. Can you explain that distinction
for me a little bit more?
A. Sure. I believe I can.
Religion, in the formal sense,
is a structured system of ceremony and/or

42 functions, whereas our belief system is a
21 way of life occurring every day,
(Exhibit __ Excerpt of Moore Dep P. 19)

Mr. Moore continues and states:

43 he doesn't pray in a church. He doesn't go
44 to a church to pray.
45 When he is standing behind his
46 house looking out over the water and he
47 acknowledges the beauty of the ocean, the
48 water, when it's calm and clear as glass,
49 and he acknowledges that, and he's looking
50 at the mountains across the bay covered
17 with snow reflecting off the water on a
18 clear, blue day, he is praying.
19 As he's going about his life he
20 will stop and pause and acknowledge God's
21 work, as he put it. That's prayer. A form
22 of prayer. It's not a structured formal
23 prayer led by an individual who is standing
24 up in front of everybody. It's a more
25 practical -- go ahead, I'm sorry.
26 Q. No, I'm sorry. I didn't mean to
9 cut you off.
10 A. We have a more practical
11 application of our belief system.
12 Q. Can you explain to me what you
13 mean by that, "more practical"?
14 A. Yeah. Everything we do with
4 regard to, for example, the nature of this
5 case is connected to our belief system in
6 that when we acknowledge or give thanks.
7 For example, we are
8 acknowledging the spirit of all living
9 things. From time to time, that could be
10 rocks, it could be the water, living
11 creatures within the green environment, all
12 of which have a spirit that we have not, at
13 least in our belief system, have not lost
14 our connection to.

(Exhibit 30 Moore Dep P20-21)

Throughout the course of this action defendants and their attorneys have made crude religious arguments and posed dehumanizing questions to Fred Moore and Harry B. Wallace who are both Indians and follow native beliefs. The history concerning organized native religion was marred with violence since the first European-Christians came to the Americas. The religious beliefs of the native people were seen as anti-Christian and attempts to dehumanize the natives resulted in violence against native people practicing their religions. Indian children were taken from their parents' homes and sent to federal and state Indian boarding schools to prohibit native people from learning their languages, cultures, and religions. As a result of forced assimilation, many native people hid their language, culture, and religions not to be brutalized by the government. The Unkechaug suffered brutal assimilation and were subjected to a New York State Indian schools on their reservation.

The expectation of a formal well-organized religion is inconsistent with native belief and any attempts to demonstrate native ceremonies has been forcible stopped to assimilate natives by the United States Government. There should be no negative inference made about the Unkechaug belief system because it is philosophically different and practiced in a substantially different manner than European religions. An example of the brutality against native religious express was suffered by the Sioux Nation. [4]

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[4]" Chief Luther Standing Bear of the Sioux Tribe commented on the strange feeling of alienation which the intruder experiences and applied his analysis to the American whites as follows:

" The white man does not understand America, his is too far removed from its formative process. The roots of the tree of his life have not yet grasped the rock and soil. The white man is still troubled by primitive fears; he still has in his consciousness the perils of this frontier continent, some of its fastness not yet having yielded to his questioning footsteps and inquiring eyes. He shudders still with the memory of the loss of his forefathers upon its scorching desserts and forbidding mountain tops. The man from Europe is still a foreigner and an alien. And he still hates the man who questioned his oath across the continent.

In 1890 the US Army massacred Native American practicing the Ghost Dance at wounded knee and was described as follows:

The thunder stopped. Silence replaced the roar of guns. At its core, the cloud of carbon haze clung to the ground. On its edges, the smoke thinned, and the blanket of snow that stretched to the horizon reemerged. Gradually, the cover of smoke lifted, revealing the wrath of the gunfire. Lying near where the Army had ordered them to congregate, hundreds of bodies, wrapped in tattered clothing, rested in small pools of blood-soaked snow. The Ghost Dance at Wounded Knee had ended.

The Law review article below eloquently states intolerance of and the United States government's treatment of Native American religious practice and its continued rejection.

Ethnocentrism is at the root of this denial, as it has been in the past. An empowering sense of cultural superiority encouraged Europeans to mount a war of cultural genocide against American Indians, nearly exterminating them in the process. Wounded Knee represents the nadir of the white man's inhumanity and religious intolerance. European immigrants, limited by their own religious experience, misunderstood the religious nature of the Ghost Dance and misinterpreted this messianic religion as a militaristic uprising. Contemporary attitudes have changed little from the ethnocentrism that has historically influenced our treatment of American Indians.

The courts do not understand the nature of Indian religious beliefs because most judges are confined intellectually by Judeo- Christian notions of what constitutes a religion. This bias is reflected in the judicially constructed legal doctrines for determining the constitutional validity of religious claims; because these doc- trines are framed in Western concepts of religiosity, they are prejudicial to the non-Western religions of Native Americans. Similarly, courts are unwilling to recognize the free exercise rights of Ameri- can Indians whenever this recognition would impose substantial costs on the government, suggesting that .it is not the religious liberty of Native Americans that is instrumental in deciding Indians' free exercise

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But in the Indian spirit of the land is still vested; it will be until other men are able to divine and meet its rhythm. Men must be born and reborn to belong. Their bodies must be formed of the dust of their forefather's bones." *V. Deloria, GOD IS RED 58-59 (2003) FN* 3 *Luther standing Bear, Land of the Spotted Eagle (Boston: Houghton Mifflin 1993), 248.*

claims, but rather the cost to the government of in-dulging this liberty. *John Rhodes, An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13 (1991).

Mr. Rhodes correctly describes the problem with the Courts understanding of Native Religion and imposing their Judeo-Christian limited understanding of religious practice. It is important for the Court to understand the principles of all Native Religion because there are unique religious principles that apply to all Native Religions and must be understood for the Court to even rule on a Native Free Exercise claim.

1. The Traditional **"Oneness of Indian Life"** "The area of worship cannot be delineated from social, political, cultural, and other areas of Indian life-style, including his general outlook upon economic and resource development…Worship is… and integral part of the Indian way of life and culture which cannot be separated from the whole. This oneness of Indian life seems to be the basic difference between the Indian and non-Indians of a dominant society." *John Rhodes, An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13 (1991). Quoting, *American Indian Religious Freedom: Hearings on S.J. Res, 102, Before the Senate Select Committee on Indian Affairs, 95th Cong., 2d Sess. 86-87 (1978) (statement of Barney Old Coyote, Crow Tribe Montana)*
2. **A Tradition of Interdependency and Stewardship**: "A consequence of this perception of the interdependency of living things is the Indian notion of stewardship. Native Americans perceive themselves as caretakers of the earth, not as developers. This notion of stewardship permeates Native American religions throughout the continent." *John Rhodes, An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13 (1991) "

3. **American Indian Spirituality and Traditional Sacred Lands**: "The animated and life-sustaining traits of land make the relationship of a particular people with a particular land " the primary thesis of tribal religions." *V. Deloria, GOD IS RED 103 (1973)*
4. **Religion and the Preservation of Traditional Native American Culture:** Preserving Native Americans' freedom of religion is of more than constitutional significance. It is a matter of cultural survival. As the American Indian Religious Freedom Act acknowledged, "[T]he religious practices of the American Indian ... are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems." *John Rhodes, An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13 (1991) Quoting, *American Indian Religious Freedom Act, Pub. L. No. 950341, 1978 U.S. Code Cong. & Admin. News (92 Stat.) 469 (codified at 42 U.S.C. § 1996 (1988)*

These common tenants in all native religions are present in the Unkechaug practice of their religion. The burden placed by NYSDEC through its regulations and enforcements against the Unkechaug has interfered with their religious expression. As Chief Wallace explained in the creation story the importance of water and shells is directly tied to the creation of the Unkechaug people. The practice of gathering shells from the water cleaning the shells so that they can refortify their shoreline and cleanse pollutants in the water has been a traditional method since time immemorial. Chief Wallace further states:

5 Q Are you aware of any specific threats to
6 prosecute the tribe or members of the tribe for
7 making Wampum?
8 A If we can't place shell back in the
9 estuary the way it should be and if we're prosecuted
10 for doing that that interferes with the ability for
11 us to make Wampum. So that whole process of
12 removing, restoring and using, all of that it has to

be -- we have to be able to do all of that together. If one of those things is interfered with then that is an interference in the process of making Wampum. So prohibiting us from engaging in the activity that guarantees the restoration of the shell and the clam is an interference with that.
Q And the 2014 prosecution that you referred to was that for making Wampum or returning shells?
A Returning shells, yes.
Q And did the Berkman letter refer to any intent to prosecute for returning shells to the water?
A If I remember correctly it referred to any activity in the water. So it did not. I don't think it specifically referenced shell but it did reference any activity in the water, which would include shell.
Q And did AG McClean ever make any specific threats regarding prosection for returning shells to the water?
A I never spoke to McClean directly so I did know that he threatened to prosecute me to the full extent of his nature of prosecution. I'm not sure.
Q Is the tribe aware of any specific threat or intent to prosecute any of its members or the tribe itself for producing Wampum or returning shells to the water?
A I just referred to you to the instances, those things are threats so, yes, we are aware of those threats. Yes.
Q And would it be correct to summarize your testimony as you believe those threats are contained in the 2014 prosecutions and the Berkman letter?
A Yes.
Q All right. Moving on to your third Claim for Relief, paragraph 46 of the Complaint, can you explain this claim to me.
A This is a restriction of the use of making, manufacturing, Wampum on our land is not simply an economic activity it is an expression of ancient traditional form of spiritualty that the Wampum is used to make belts, it's used to make represent stories of our history. It's used in ceremonies, in marriage ceremonies, and burial ceremonies. So it's critical that we have access to Wampum and we manufacture, we're one of the

remaining nations that continually manufacture Wampum for use amongst a myriad of nations, Indian nations, along the coastline and to be able to do that is part and parcel to being able to breathe. Some of these shells -- some of the fish that we work with, some of the clams that we work with could be hundreds of years old. The color of the shell here is particular to the Northeast United States and Unkechaug territory is renown in the world for it's dark color, the color is so purple that it's considered black and in any point of fact some of the shell is actually black and if they're older it's actually, the color is actually black and a black shell is absolutely used for very, very, special ceremonies that are very restricted and certainly not subject to public display but it's certainly used in burials. It's certainly used in very restrictive prayers.
So to be able to do this is to be able to be Unkechaug. That's what this means, and so interfering with the ability to do that is basically interfering with our way of life and the state's interference with that is a violation of our sovereignty and a violation of our religious and cultural inherent rights.
Q What specific instances are there in which the tribe contends that DEC interfered with its religious rights?
A Okay. If you prosecute somebody who is engaged in its manufacture -- excuse me. If you prosecute somebody who is engaged in the manufacture of items that have such significant cultural, spiritual value, then in any part of that prosecution is an interference with those rights. Okay. You don't have to walk into a ceremony and break up a ceremony but if you prevent the ceremony from being conducted in a way that it should be conducted by not allowing those items that should be a part of it to be produced that's as if you just walked in and broke up the ceremony itself.
So all across -- we are called The People of the Shell, and all the way from here to the Great Lake The People of the Shell reflect the significant use of Wampum in our lives, in our spiritual and cultural lives and the State of New York because it doesn't like the way we do things is interfering

9 with that. It denigrates us. It insults us. It
10 restricts us and it does everything it can to
11 humiliate us in as much a way it can so that the
12 state can assert control over our activity. And
13 going in and trying to prevent us from using our
14 waterways to restore shell to its proper function is
15 as much a part of the ceremony as the use of the
16 individual bead itself and we assert that that is a
17 fundamental right beyond everything else that we're
18 doing.
19 Q Sir, can I ask you to list for me the
20 specific instances in which the tribe contends that
21 DEC infringed on it rights.
22 Q So, sir, let me reask the questions. Can
23 you, please, list the specific instances in which
24 the tribe contends that DEC infringed on its
25 religious expression?
2 A Preventing us from using our shoreline in
3 the way that we have traditionally done. All of
4 those instances I listed before, alleging of
5 violations of wetlands, preventing us from
6 preventing erosion of our shoreline, preventing us
7 from restoring our shell back into the water,
8 fishing, all of that is part of your way of life and
9 part of our spiritual way of life. So we include
10 all of those things as part of our religious -- you
11 call it religious we call it spiritual expression.
12 I would include all of those things as part of that.
13 So the specifics that we listed. The ones that you
14 went over individually with me, you know, the shell,
15 the barrier, the fishing, the prosecution of
16 fishermen, the threats of prosecution, the alleged
17 violations for dumping, all of those things what I
17 would assert are in violation of our spiritualty.
(Exhibit 31 Nation Dep P. 39-45)

Chief Wallace as representative for the Unkechaug Nation describes the religious importance of the shell and the important use of the shell as stewards of the land. He shows the significance of the shell for the Unkechaug religion and its use in their religious practice. The act of gathering the shell cleansing of it and placing it on shoreline strengthens and cleans water. This act illustrates the Unkechaugs' stewardship of the land

and waterways that is a tenant of their religion. The use of the wampum shell to record agreements and important events such as burials, marriage and agreements illustrates the oneness with the environment and interrelatedness between nature and religion. (Exhibit 32) The act of fishing and preserving glass eels is a religious expression through Unkechaug interaction with the natural world and includes preservation of the Unkechaug culture.

B. NYSDEC'S Places a significant burden on the Unkechaug religion without a legitimate interest

The Unkechaug reservation has always abutted the water and south shore of Long Island since time immemorial. New York State has always recognized their inherent rights and importance until 2008 when NYSDEC issued a summons to the Unkechaug for "illegal dumping". The Unkechaug took discarded shells and placed them by the shoreline to refresh the shore and provide nutrients to the water and its creatures. The ecological method of using discarded shells was passed down through the generations to current blood right members of the nation. This technique is responsible for the refortification of shorelines and cleanses millions of gallons of water. NYSDEC's. interference with that scientifically proven way of preserving the shoreline and cleansing the water interferes with Unkechaug religious practice of conservation and preservation of sacred fish and crustaceans. There is no legitimate interest by NYSDEC in their interference of shell conservation methods by the Unkechaug because this practice is scientifically sound in cleansing and preserving the waterways. Recent scientific methods include those the Unkechaug have been practicing for hundreds of years.

> Natural and nature-based infrastructure is intended to harness the protective ecosystem services that many natural coastal features can provide such as attenuating wave energy, absorbing floodwater, slowing erosion, and accreting sediment. Research suggests that U.S. coastal wetlands provide $23.2 billion in storm protection services annually.11 Many of these natural and nature-based

> approaches for shoreline protection are known as "living shorelines," and using living shorelines, rather than hard armoring, is gaining traction in some coastal regions.
>
> Living shoreline creation typically relies on native materials, such as vegetation, shellfish, or other naturally occurring elements. These can be used alone or in combination with structural components to increase stability. Commonly used structural components include hardened toes, sills, biologs (e.g., coir logs), groins, and on-shore and off-shore breakwaters. While structural elements can include the use of "natural" components like oyster shells, a subset of living shorelines can be categorized as "hybrid" approaches. Hybrid approaches incorporate both natural materials and "nature-based" structural features like concrete reef balls or newly-placed rocks. As such, living shoreline design occurs along a continuum from green (natural materials only) to green/gray (hybrid) approaches. Regardless of the type, the goal of living shorelines is often to provide shoreline stabilization services similar to those achieved through a gray-only approach like sea walls, while maximizing the benefits inherent to natural shorelines by mimicking the function of natural shorelines in the local system.
> (See National Wildlife Federation website) https://www.nwf.org/-/media/Documents/PDFs/NWF-Reports/2020/Softening-Our-Shorelines.ashx

Consistent with the living shorelines approach NYSDEC has finally come around to a standard Unkechaug fortification approach developed thousands of years ago.

> In recognition of the value of the State's extensive natural coastal resources, New York emphasizes the use of non-structural measures, and if active shoreline management is necessary, the use of soft approaches to shoreline stabilization.54 On November 22, 2017, New York State Department of Environmental Conservation (DEC) announced new guidance for living shoreline projects in the marine district of the State. The guidance document provides information on the issuance of permits for living shorelines and encourages the use of natural infrastructure. In addition, the guidance provides information on types of living shorelines, reviews how tidal wetland and protection of waters permit standards relate to living shorelines, and speaks to proper siting, maintenance, and monitoring considerations. (See National Wildlife Federation website) https://www.nwf.org/-/media/Documents/PDFs/NWF-Reports/2020/Softening-Our-Shorelines.ashx

Chief Wallace describes the Unkechaug method of making natural barriers to re-fortify shorelines consistent with the spiritual belief of the shell.

> We consider the shell to be alive, and
> 2 the evidence of that being alive is when you place
> 3 it back in the water, an entire estuary of life
> 4 forms around it, including fish, including growth,

all those things. And as our part of the way that we institute the matter of re-creating life from that which we use, we put the shell back into the water. The DEC claimed that we were dumping. We were also protecting the shoreline from eroding, because we had a 60-foot erosion during one hurricane back in 1994. And so we tried to restore that to shoreline using natural elements, because we're the only ones that don't have bulkheading in that entire area. So we tried to restore the shoreline there and we were accused of dumping; and a ticket was issued alleging that we were dumping. We had to fight that and we did successfully. But that was -- that was an allegation made by the DEC against us.
And the second time was when the land along Poospatuck Creek had flooded during one storm, and the homeowner or the tribal member was -- tried to place a natural barricade to prevent flooding into his house. And the DEC asked to speak to me, and I went to a football game practice and at the football game practice an officer of the DEC handed me a ticket as representative of the Unkechaug Nation, which we also challenged that successfully. Those are the two incidences that I remember.
Q And you said the first happened in 1994; is that correct?
A I'm not entirely sure, but it's around that period of time.
Q Can you tell me a little bit more about how the shells are placed back into the water? Where are they put into the water?
A Sure. They're put into the water next to the shoreline. That's absolutely -- we are the wampum makers. We have been traditional wampum makers for as -- as the Midewiwin grand chief said, since the flood, okay, which according to our scientific knowledge is at least 9,000 years ago. And we have been -- we are the people of the shell. We are the Midewiwin inini, which is in our way it's called the -- Midewiwin means way of the heart, way of the good heart, and the metoawak means the people of the shell, and that's who we are. And we are part of an alliance that goes from here to the Great Lakes.
And so what we do is the shell to us

is a living, breathing thing. The creation of --
you got to bear with me, because I'm -- I'm, you know, I'm trying to retell a story for a deposition that's told in a much different context. But in our -- in what I am taught and what we are taught is that the shell, the miigis shell which I wear and the wampum shell which I wear, was important in the creation of man.

(Exhibit 3 p31-34)

Chief Wallace continues speaking of the importance of the shell

So being able to restore them back into the place from which they came is a way in which we can perpetuate the living species. And that is why the East Coast, and particularly the northeast coast is the only place in the world where you can find purple shell.

Q And can I ask you to describe just the mechanics of how you return the shell to the water?

A Sure. We gather up all those pieces that we are going to return. They're usually cut or they're in a form of dust. Okay. So because if you -- eggs that are in the water attach themselves to the smallest of pieces. So we gather up those smallest of pieces.

We have a ceremony where songs are sung, prayers are done, cleansing is done, and we take those things and we take the shell that we have not used and we restore them back into the water; and we place them perhaps in a pile near stone, near rock or near mud. We know that once it seeps into the mud that it will -- that it will regenerate itself and a whole new estuary will create around it.

The other thing is when we use the shell, we cleanse the shell of any potential man-made impurities. We use a nontoxic cleanser like Palmolive, for example. So -- and we have to use raw shell because you can't use cooked shell to make these things that we -- the wampum that we make. Because if you use cooked shell, it's too brittle and it disintegrates if you try to cut it.

So when we put it back into the water, it's as clean as when it came out.

Q And when you put it back into the

11 water, do you place it back in above or below the
12 waterline?
13 A We usually place it -- above or below
14 the waterline? It would be -- I'm not sure what you
15 mean by "above." Are you talking about high tide or
16 low tide?
17 Q Well, let's start with that. Let's
18 start with below the high tide water mark.
19 A I don't think we pay attention to
20 where the waterline is. It happens to be at the
21 time that we're placing it we put it underwater, so
22 I don't think the high or low tide has any bearing.
23 Q That's really what I'm getting at.
24 But you put it under the water?
25 A Put it under the water, yes.
Q And this -- this --
2 A Let me tell you another point too,
3 because you need to know this and understand this,
4 because we are accused by DEC of polluting the
5 water. The clam shell, the periwinkle, the miigis,
6 these beings are there to clean the water. One
7 clam, one quahog clam sifts through 50 gallons of
8 water a day, and whatever impurity is in that water,
9 it captures it and secretes a gel over the top so
10 that it doesn't harm itself or any other being, and
11 it holds that toxin until it dissipates its
12 impurities and then it releases it back into the
13 water as clean.
14 So one clam sifts through 50 gallons
15 of water a day, so 1 million clams would sift
16 through 50 million gallons of water a day. So when
17 you harvest that, when you're restoring that back
18 into the water, you're actually helping the water
19 purify itself because those are the beings that help
20 clean it, and that's been scientifically established
21 as well.
22 Q And this process of returning the
23 shells to the water, is that the process that you're
24 contend -- the area of your religious freedom that
25 you contend DEC has interfered with in this case?
A That's part of it, yes.
(Exhibit 3 p36-39)

There is a similarity in the restoration of shoreline between the Unkechaug and the NYSDEC. Accordingly, the interference by NYSDEC does not serve a legitimate interest

because the Unkechaug religious practice of the use of the shell does not create any danger or harm to the environment. The NYSDEC simply intends on interfering with the religious practices of the Unkechaug without any legitimate interest in the enforcement of their regulations.

The second way that NYSDEC interferes with Unkechaug religious practice is by imposing fishing regulations such as prohibiting catching eels under 9-inches. The Unkechaug religious interaction with fishing and using their traditional knowledge to catch and preserve the eels is superior to that of NYSDEC. As detailed in the section X above, plaintiffs show how there are an abundance of eels and that the cause for decline in the species is not a result of Unkechaug fishing but rather caused by depletion of habitat. The plaintiffs have demonstrated how the NYSDEC 9-inch fishing limitation is arbitrary and capricious, especially when the same rules allow individual fishermen to catch 25 eels at a time and party boats to catch 50 eels at a time. Therefore, if a million New Yorkers decided to go fishing, they could potentially kill twenty-five million eels over 9-inches at any given time. Plaintiffs also illustrated how Defendants' expert witness stated that any eel death at any stage of life of the eel prior to reproduction in the Saragossa Sea is destructive to its species. Considering these facts, the NYSDEC's 9-inch limitation and interest in preserving eels is arbitrary and capricious and should not interfere or burden Unkechaug religious practices. [5]

[5] NYSDEC petitioned US Fish and Wildlife to place American Eel on the Endangered Species List and was rejected finding that the American Eel population is stable.

X. A PERMANENT INJUNCTION SHOULD BE GRANTED AGAINST THE DEFENDANTS

"The requirements for a permanent injunction are 'essentially the same' as for a preliminary injunction, except that the moving party must demonstrate actual success' on the merits." *New York Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2011) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)). To obtain a preliminary injunction, a party "must establish: (1) either (a) a likelihood of success on the merits of its case or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, and (2) a likelihood of irreparable harm if the requested relief is denied." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 152-53 (2d Cir. 2007); *Golden Feather II*, 2009 U.S. Dist. LEXIS 76306, 2009 WL 2612345, at *25. In general, however, "'[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.'" *E.E.O.C. v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012) (quoting *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 32, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). To convince the court that prospective injunctive relief is needed, the moving party must demonstrate "'that there exists some cognizable danger of recurrent violations.'" Id. (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)); [*82] see also *CSX Corp. v. Children's Inv. Fund Mgmt. LLP*, 654 F.3d 276, 285 (2d Cir. 2011) ("The usual basis for prospective injunctive relief is not only irreparable harm . . . but also some cognizable danger of recurrent violations." (internal quotation marks and citation omitted)). Furthermore, HN36 a court may, where there is no material fact in dispute, grant a party's request for a permanent injunction on summary judgment without holding a hearing. See *Beck v. Levering*, 947 F.2d 639,

642 (2d Cir. 1991) (noting that evidentiary hearing required before granting permanent injunction only where a material fact is in dispute).

A. Actual Success on the Merits

The Unkechaug have proved in this motion and throughout this case that the plaintiffs shall be meritorious in all cause of actions alleged in its Complaint.

i. NYSDEC, Commissioner Seggos and Deputy Commissioner Berkman violated federal law in its enforcement of regulations and laws that have directly caused harm and prospective harm against the Unkechaug Nation members, officials and representative that entitles plaintiffs to injunctive protection from present and future harm.

As discussed above in greater detail, the Unkechaug have traditionally fished and used the water and the natural environment on Long Island since time immemorial. These uses were recognized and acknowledged in 1676 by the Colonial Governor of New York, Andros and a treaty was made. This treaty and the relationship between Unkechaug and settlers continued under the terms of the treaty and was further ratified upon the formation of the United States and the State of New York. As indicated in both constitutions. Section 14 of the Constitution of the State of New York and Article VI. Sec (1) of the U.S. Constitution. The relationship between the State and the Unkechaug remained the same even through the 1970,80s and 90s as reported by a Robert Batson, New York State assigned to explain the State of New York's colonial relationship with the Unkechaug. (See Exhibit 13, Exhibit 14, Exhibit 15) Another letter by NYS Secretary of State, Gail Schaffer, confirmed that Unkechaug had a government to government relationship with the colony of New York and that course of dealing continued with the State of New York after the American Revolution. (Ex. 36)

Not until 2014 did the NYSDEC interfere with Unkechaug Fishing under the Andros treaty through criminal enforcement of arbitrary statutes used against the Unkechaug. Five

criminal summonses were issued to Unkechaug Indians and representatives for fishing pursuant to Unkechaug authority. (Exhibit 5 criminal summons Exhibit 7) Chief Wallace tried to consult and work with NYSDEC and even proposed a fishing plan. (Exhibit 22) In 2016, NYSDEC seized a shipment of glass eels from the Unkechaug ordered directly by Commissioner Seggos.(Exhibit 26) A letter from Deputy Commissioner and General Counsel, Thomas Berkman continued threats of future prosecutions. (Exhibit 23) A criminal referral from NYSDEC to ADA McLean to criminally prosecution Chief Harry B. Wallace was obtained by the NYSDEC. Then the Unusual threats by AD McLean to prosecute Chief Wallace unless he and the Nation asserted its "alleged rights" in Federal Court. (Exhibit 9) These conniving and well-orchestrated attacks on the Unkechaug forced them to seek injunctive relief from this court. These actions by NYSDEC against Unkechaug provide a concrete injury sufficient to establish standing and the need for prospective relief from the Court.

NYSDEC waived their sovereign immunity through their bad faith and threats of criminal prosecution against Chief Wallace unless the Unkechaug commenced legal action against NYSDEC in federal court. The NYSDEC forced the Unkechaug to commence the action, under threat of criminal prosecution, to preserve its immunity defense and claim privilege to evidence to their advantage.

It is obvious that Commissioner Seggos and Deputy Commissioner and General Counsel, Thomas Berkman were instrumentally involved in the decision to prosecute and enforce NYSDEC rules, regulations, and statutes without against the Unkechaug despite CP-42 policy of cooperation with Native Nations.

Plaintiffs have proved prospective relief is necessary and that they will be successful against NYSDEC and its Commissioners.

ii. There is a Valid treaty that is the supreme law of the land which necessitates this Court to enjoin NYSDEC and its Commissioners from prosecuting or enforcing NYSDEC regulations against the Unkechaug and its members, representatives, and officials

The Andros treaty is in effect today as argued above and is incorporated by reference here. Plaintiffs provided the court with expert historical context from Dr. John A. Strong, PhD the pre-eminent scholar on the Native and colonial relationships. Dr. Strong opined about the validity of the Andros Treaty and placed the treaty into historical context to explain the events and facts surrounding the treaty. Dr. Strong states:

Q. Yes. And Dr. Strong, in your
opinion, is this Order of Council dated
3 May 14, 1676, a treaty between the
4 Unkechaug and Colony of New York?
5 A. Yes.

A. Yes, indeed, it -- it is an
9 agreement and a treaty. Those terms
10 can be used interchangeably. There
11 have been a number of legal rulings, if
12 you will, that have made that point,
13 that agreements which provide for
14 off-reservation hunting, fishing,
15 things of that sort are essentially
16 contracts between sovereign nations.
(See Exhibit 33)) Dr. Strong Dep Day 2 P.8-9)

Dr. Strong further indicates in his testimony that the treaty incorporated eel fishing as he states the following:

Q. Would this also relate to
21 fishing for eels?

Well, of course it did. The
25 eels were a -- from what I gathered

from interviews I've done with elderly,
3 both the Shinnecock -- particularly
4 Shinnecock, but some Unkechaug, eels --
5 eels were a common delicacy that the
6 native peoples were consuming.
7 And, of course, the eels were
8 not particularly popular with the
9 colonists, so the eels became even more
10 popular as the English colonists began
11 fishing in the areas, taking the other
12 fish they wanted and leaving the eels.
13 But the eels became more and
14 more important. We have a number of
15 photographs going back to the turn of
16 the century with the eel traps and all
17 that equipment. I have pictures of
18 that in the -- in the book on the
19 Unkechaug.
(See Exhibit 33 Dr. Strong Dep 2nd day P. 15-16)

The court is provided with only one expert opinion from Dr. John Strong because the defendants have waived their right to present to the court their own expert report and opinions.

Defendants do not have a valid conservation necessity to override the Unkechaug treaty rights. Plaintiffs incorporate by reference the arguments made above in section V. plaintiffs clearly established the faulty logic and the arbitrary and capricious way NYSDEC made and enforced the minimum eel catch to over nine inches. By defendants' own expert testimony, Ms. Kerns stated that fishing eels at any life cycle prior to reproduction has the same impact of reducing population. The salient point is that there is no logical or scientific reason to exclude the fishing of eels under nine inches. The native management plan allows for fishing of eels but also includes a return to the safe wild component absent in the NYSDEC plans.
NYSDEC has regulations that allows any recreational fisherman to kill twenty-five eels over the nine-inch minimum at each fish outing. If a million New Yorkers went out on the same day to fish for eels potentially twenty-five million eels would be decimated. This illogical rule does not

advance any conservation interest for NYSDEC. Furthermore, defendant's expert also acknowledged that a method the Unkechaug use in their Eel management plan is one of the best ways to ensure eel migration survival. The Unkechaug would remove the glass eels care and strengthen the eel and then place the eel above any artificial barriers. As stated by the ASMFC report, the greatest impact on the eel population is due to artificial obstructions, climate change, power plants, turbine, and disease. Not from Unkechaug Fishing.

Clearly, the NYSDEC actions and statutes discriminate against the Unkechaug. CP-42 policy mandates that the NYSDEC contact and cooperate with Indian Nations. However, when the Nation reached out to develop a glass eel fishing plan with NYSDEC they flatly rejected the plan. (Exhibit 2, Exhibit 22, Exhibit 23) Ms. Kerns in her testimony stated the ways that other states like, Maine, South Carolina and North Carolina have issued glass eels quota to people and organizations within their respective states. New York does not any eel quota programs and has never sought to apply for one with the ASMFC.

For the reasons stated herein the plaintiffs will be successful in the enforcement of rights under the Andros treaty and preventing NYSDEC from enforcement of their rules because they are not a necessary measure that outweighs the Unkechaug treaty rights. The actions and policies of NYSDEC clearly discriminate against the Unkechaug.

iii. 25 U.S.C.S. 232 pre-empts any NYSDEC regulation against the Unkechaug regarding fishing

Plaintiffs incorporate by reference their previous arguments from Section VI herein. 25 U.S.C. 233 clearly states that federal government gives concurrent jurisdiction to the State but is limited: "Provided, That nothing contained in this Act [this section] shall be construed to deprive any Indian tribe, band, or community, or members thereof, [of] hunting and fishing

rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights. 25 U.S.C.S. § 232

The language of the statute clearly states that section 232 would not permit the interference with Native treaty rights to fish or hunt. The Unkechaug have a treaty that preserves their fishing rights to do as they will with their catch without regulation. NYSDEC does not have any necessary measure to override this legislation.

Therefore, plaintiffs will have actual success with its pre-emption cause of action.

iv. NYSDEC interference with Unkechaug religion and practice of their religion

The plaintiffs incorporate by reference Section IX above herein. The Unkechaug use shells for many purposes including making belts to signify life and spiritual events and agreements. They also use shells to cleanse and refortify the shore. NYSDEC have interfered with this practice including their fishing of eels. The Unkechaug beliefs are sincere and historically acknowledged. As Dr. John A. Strong, PhD States:

Prior to that it would have
8 been primarily a religious ritual, in
9 terms of the importance of the whale in
10 their -- in their culture.
11 Q. Did the religious aspects of
12 fishing go beyond fishing of whales?
13 A. Well, yes. We know more
14 about the rituals involved with the
15 whale fishery than we do about other
16 aspects of it. But just a notion of
17 the spirits of the water and the role
18 of the turtle that related to this, as
19 well, it clearly indicates -- and if
20 you look at -- by analogy to other
21 Algonquian coastal peoples, yes,
22 indeed, the -- the waters around them
23 had decided the spiritual impacts.
24 And, you know, the origins -- origin
25 stories are arising out of the water on

the back of the turtle and so forth.
3 And these are quite common
4 origin stories in Algonquian people.
5 And in particular with the Unkechaug,
6 Howard Treadwell has recorded some of
7 these early stories of origin and
8 stories of the crisis where the turtle
9 came to the rescue of the Unkechaug by
10 offering up himself as a sacrifice to
11 be cut up and eaten by the people.
12 So those connections with the
13 water around them are quite common in
14 not only Algonquian people, but on the
15 west coast, the same -- any coastal
16 Native American community will have a
17 rich lore of stories and beliefs
18 related to the sea and to the denizens
19 of the sea.
20 Q. Would this also relate to
21 fishing for eels?
22 MR. THOMPSON: Objection,
23 leading.
24 A. Well, of course it did. The
25 eels were a -- from what I gathered
from interviews I've done with elderly,
3 both the Shinnecock -- particularly
4 Shinnecock, but some Unkechaug, eels --
5 eels were a common delicacy that the
6 native peoples were consuming.
7 And, of course, the eels were
8 not particularly popular with the
9 colonists, so the eels became even more
10 popular as the English colonists began
11 fishing in the areas, taking the other
12 fish they wanted and leaving the eels.
13 But the eels became more and
14 more important. We have a number of
15 photographs going back to the turn of
16 the century with the eel traps and all
17 that equipment. I have pictures of
18 that in the -- in the book on the
19 Unkechaug.
(Exhibit 33 Strong Dep 2nd day P. 14-16)

NYSDEC does not have a legitimate interest in enforcing its rules that would outweigh the burden placed on the Unkechaug in practicing their religion. The Unkechaug management

plan for eel fishing and refortification of shoreline using shells is scientifically sound and acknowledged as valid by the NYSDEC and members of the ASMFC.

Therefore, plaintiffs will have actual success on this claim.

B. Prospective and Irreparable harm is likely to recur if the Court does not grant injunctive relief and the Hardships tip in favor of the Plaintiffs

The Unkechaug have always and will continue to fish and practice its religion regardless of NYSDEC rules and regulations. The disregard of NYSDEC from following its own policy laid out in CP-42 and the bad faith displayed throughout this case illustrates the impending collision between these parties unless this Court enjoins NYSDEC. Chief Wallace states in his declaration that the Unkechaug have and will continue to fish pursuant to their historical and traditional methods. (Exhibit 6)

The unusual and sly approach taken by NYSDEC in conjunction with ADA Hugh Lambert McLean to threaten criminal prosecution and force the Unkechaug to litigate its rights in federal court illustrates its thirst to prosecute, harass and intimidate the Unkechaug. The General Counsel and Deputy Commissioner Berkman's letter issued to Chief Wallace threatens future prosecution. The Declaration of Hugh Lambert McLean also states that there was an active criminal investigation against Chief Wallace for alleged NYSDEC violations. (Exhibit 23, Exhibit 9) If the Court does not grant plaintiffs' injunction, the Unkechaug will undoubtedly face persecution and continued persecution by the defendants.

CONCLUSION

For the foregoing reasons herein, the Court should grant summary judgment in favor of plaintiffs for all cause of actions set forth in the Complaint and relief demanded in the Complaint and Notice of Motion.

Dated: East Elmhurst, New York
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