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,

Docket No. 18-CV-01132

Date Served: October 1, 2021

-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

PLAINTIFFS' MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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INTRODUCTION

Plaintiffs submit their Reply to Defendants' Opposition of Plaintiffs Summary Judgment Motion.

ARGUMENT

I. THE COURT HAS BROAD DISCRETION ON A RULE 56 MOTION

The defendants erroneously argue that the plaintiffs' evidence is inadmissible for summary judgment because it is not properly offered and fails to state facts from an individual with personal knowledge. (Def. Opp Mem of Law Pg.17) Contrary to defendants' interpretation of Rule. 56.1, the court is not limited to a narrow interpretation of the evidence offered under this rule for summary judgment and has wide discretion. Narrowing the standard for evidence restricts the trial court's discretion which was not the intention under the rule that provides the trial court board discretion. The evidence presented by plaintiffs, in the entirety of this motion, are sufficient under Rule 56 and made with requisite personal knowledge of the declarants. The defendants as self-appointed gatekeepers want to create a higher standard for the Unkechaug plaintiffs than required under the rule of law and case law to distract the plaintiffs and the court from focusing on the issues and merits in plaintiffs' case.

The court has broad discretion in considering the evidence presented in the parties' summary judgment motions. Defendants erroneously argue that the Court cannot grant summary judgment for plaintiffs' motion because the plaintiffs fail to marshal admissible evidence to support their Rule 56.1 statements. (Def. Opp Mem of Law Pg. 17) The 2nd Circuit has held that the Court in its discretion can opt to conduct an assiduous review of the record. Hotlz v Rockefeller & Co., 258 F.3d 62, 73 (2d Cir. 2001). The Court stated the following:

> We nonetheless reject RCI's argument. A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules. See Wight v.

> Bankamerica Corp., 219 F.3d 79, 85 (2d Cir. 2000); Somlyo v. J. Lu-Rob Enters., 932 F.2d 1043, 1048 (2d Cir. 1991). Thus, we have previously indicated, and now hold, that while a court "is not required to consider what the parties fail to point out" in their Local Rule 56.1 statements, it may in its discretion opt to "conduct an assiduous review of the record" even where one of the parties has failed to file such a statement. Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 292 (2d Cir. 2000) (internal citations and quotation marks omitted); see also Prunella v. Carlshire Tenants, Inc., 94 F. Supp. 2d 512, 513 n.1 (S.D.N.Y. 2000) (declining to deem admitted facts contained in defendant's Local Rule 56.1 statement where plaintiff failed to file responsive statement); Cello Holdings, L.L.C. v. Lawrence-Dahl Cos., 89 F. Supp. 2d 464, 469 (S.D.N.Y. 2000) (same); Local Union No. 38 v. Hollywood Heating & Cooling, Inc., 88 F. Supp. 2d 246, 247 n.1 (S.D.N.Y. 2000) [**15] (same).
>
> The district court did not mention Holtz's failure to file a Local Rule 56.1 statement, and conducted at least some scrutiny of the record independent of RCI's Local Rule 56.1 statement. See Holtz, 1999 U.S. Dist. LEXIS 17682, at *13, 1999 WL 1043866, at *5. The court concluded from that review of the record that Holtz had failed to raise a triable issue on the sexual harassment claim. In reviewing that ruling, we take our cue from the district court, in whose discretion lay the initial determination not to apply Local Rule 56.1 to Holtz's failure to file a counter-statement, and review the record de novo.

Holtz v. Rockefeller & Co., 258 F.3d 62, 73 (2d Cir. 2001)

In the unlikely event that the Court finds that the evidence produced by plaintiffs was not properly adduced under Local Rule 56.1, under the Holtz case, Court is permitted to conduct its own review of the record and grant Plaintiffs' summary judgment. In any event plaintiffs' reply to defendants' opposition have submitted their evidence through declarations with personal knowledge. (See Declaration of JFS and Declaration of Harry B. Wallace and Declaration of John A. Strong.) Additionally, plaintiffs' attorney, James F. Simermeyer has personal knowledge of the exhibits introduced as he was present at all depositions. Moreover, the following exhibit produced in plaintiffs' summary judgment are documents and information personally known to attorney Simermeyer, Exhibit 3 (Deposition of Harry Wallace Jan 28, 2020 conducted by Defendants), Exhibit 8 (NYS AG DeLuca letter to Simermeyer), Exhibit 11 (Deposition of Dr. Strong April 12, 2021 conducted by Simermeyer), Exhibit 24 (Simermeyer conducted deposition of James Gilmore), Exhibit 25 (Simermeyer conducted Major Florence deposition), Exhibit 27

(Simermeyer conducted Monica Kreshik Deposition), Exhibit 28 (Simermeyer conducted Berkman deposition, Exhibit 29 (Simermeyer conducted Seggos deposition), Exhibit 30 (Simermeyer present when Defendants conducted Fred Moore Deposition), Exhibit 31 (present for Nation deposition conducted by Defendants), Exhibit 33 (Present for Dr. Strong's deposition conducted by Defendants), Exhibit 34 (Monica Kreshik email to James Simermeyer), Exhibit 35 (Kreshik Affidavit in Dayrich case where Simermeyer opposing attorney). Attorney Simermeyer has personal knowledge of all exhibits presented above making these exhibits admissible for summary judgement.

Defendants' argument of inadmissibility for the submission of Dr. Strong's report unsigned and use of his testimony is disingenuous. The court ordered Dr. Strong's testimony to be preserved. (ECF Doc # 67) Plaintiffs conducted the direct examination on April 12, 2021, and defendants conducted their cross-examination on April 13, 2021. During that examination Dr. Strong referred to the expert report and stated that he wrote that report during direct and cross-examination. Dr. Strong's declaration identifies that he wrote and produced his expert report and attached it to his as Exhibit B-1. Defendants had an opportunity to examine Dr. Strong and clearly know from his testimony, that Dr. Strong wrote the expert report. In plaintiffs' reply, a declaration by Dr. Strong identifies and submits his expert report to remove distraction from defendants' meritless procedural arguments.

Plaintiff Chief Wallace submits his declaration in support of plaintiffs' reply papers and addresses his and the Nations' claims. Chief Wallace introduces 13 exhibits based on his personal knowledge. Accordingly, those exhibits, and statements should be considered by this Court. (See Dec. of Chief Wallace)

Lastly, defendants mischaracterize statements and letters as hearsay written by New York State officials from the attorney general's office. Defendants have failed throughout this entire case to produce any official record or opinion from the state or a historian setting forth the relationship between NYS and the Unkechaug in reference to colonial agreements. The letters and reports submitted in plaintiffs' summary judgment as Exhibits 13, 14,15, and 36 were entered into as evidence in a prior case in the Eastern District and ruled on by Judge Kiyo Matsumoto. (See Gristede's Foods, Inc. v. Unkechauge Nation, 660 F. Supp. 2d 442, 457-60 (E.D.N.Y. 2009) Chief Wallace's declaration attaches the documents and states that the documents are part of the Unkechaug Indian Nation records. Although the documents objected to by defendants are undoubtedly in their archives, they have failed to produce the documents in this case and have intentionally withheld the documents or other essential historical documents relevant to this case that would be beneficial to the plaintiffs' case. (See Dec. Chief Wallace Exhibits A-1-A-5 attached thereto)

This Court should reject defendants' meritless arguments and consider all of plaintiffs' evidence in its determination of plaintiffs' motion for summary judgment

II. THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS

Eleventh Amendment immunity is not available to defendants because NYSDEC waived their immunity by orchestrating a scheme with the assistance of AG Hugh Lambert McLean to threaten criminal prosecution (With Environmental Conservation Law) of Chief Wallace unless he and the Nation commenced the present legal action. Ex Parte Young applies to Commissioner Segos because he exceeded his authority and violated federal law when he ordered seizure and arrest of Unkechaug members, representatives, and property in fishing for eels. Defendants' arguments are not valid as detailed below. Plaintiffs incorporate by reference their arguments in

section VII and VIII of its memoranda of law (pg. 71- 76) supporting plaintiffs' motion for summary judgment and section II of its opposition to defendants' summary judgment memorandum of law (pg. 51-67)

A. Plaintiffs Have Provided the Court with Ample Evidence that NYSDEC Waived Eleventh Amendment Immunity

Defendants' attempt to mischaracterize defendants' waiver of eleventh amendment based on the actions of AG McLean, however plaintiffs have proved that NYSDEC, at the behest of Commissioner Seggos, carried out the conspiracy of threatening criminal prosecution and forcing plaintiffs to initiate this action so that defendants could bar plaintiffs' claims with affirmative defenses and Eleventh Amendment Immunity.

Although the defendants do not deny that McLean made the threat, they do assert that Chief Wallace didn't personally hear the threat. (Def Mem of law pg. 22) This argument is disingenuous because McLean submitted a Declaration (ECF # 48) stating that "I am the lead attorney in charge of the OAG's ongoing criminal investigation into Plaintiff Henry Wallace's potential violation of N.Y. Envtl. Conserv. Law § 71-0924, which prohibits illegal trafficking in protected fish and wildlife." Although McLean never states whether he made these criminal threats unless the pending case was initiated by plaintiffs, he is contradicted by Chief Wallace in his declaration attached as Exhibit A and in the Declaration of James F. Simermeyer affirming the threats by McLean. (Dec of JFS, Dec. of Chief Wallace)

Defendants' attempt to separate McLean from NYSDEC is contrary to the evidence found in the privilege log that proves that McLean was in constant communication since 2016 with NYSDEC regarding prosecuting Chief Wallace and how they would move forward. (See Dec of Chief Wallace Exhibit A- 7, Exhibit J to Dec of JFS and plaintiffs' opposition Exhibit 23

excerpts of privilege log) Even more convincing is the email exchange in 2018 regarding the Unkechaug lawsuit identified in the privilege log. (See Dec of Chief Wallace Exhibit A- 7, Exhibit J to Dec of JFS and plaintiffs' opposition Exhibit 23 excerpts of privilege log)

Moreover, defendants produced emails from NYSDEC employees explaining that DEC Exec was aware of the 2016 seizure of eels from JFK and that they would wait and see what Chief Wallace would do. (See Exhibit L to Dec. JFS)

The Court cannot allow the NYSDEC to proceed in such a deceptive and fraudulent manner. The evidence proves that NYSDEC and Commissioner Seggos were unsure whether the Unkechaug had a Treaty right to fish for eels contrary to New York State laws and regulations. (See affidavit from Kreshik attached as Exhibit K to Dec. JFS) Rather than work with the Unkechaug it chose to develop a scheme to beat down Chief Wallace and the Unkechaug. AG McLean participated in this illegal scheme and acted with the knowledge and authority of Commissioner Seggos and the NYSDEC. (Kreshik confirms Berkman can act in same authority as Seggos see Exhibit B attached to Dec. JFS) Using coercive power of arrest and threat of felony prosecution, New York waived its sovereign immunity. Seggos and NYSDEC directed its legal representative, NYS AG McLean to cunningly coerce chief Wallace and the Nation into initiating this action.

B. Coeur d'Alene And Western Mohegan Does Not Apply to Plaintiffs' Limited Reserved Treaty Right That Is Limited in Area to The Unkechaug Traditional and Customary Waters

Defendants argue that Idaho v. Coeur d' Alene 521 U.S. 261, 117 S. Ct. 2028, L.Ed.2d 438 (1997) and Western Mohegan applies to plaintiffs' fishing claims; this is unpersuasive and erroneous. (See Def mem of law in opp. Pg. 24-28) Defendants attempt to mischaracterize the relief plaintiffs seek and the effect of such relief if granted. Chief Wallace in his declaration

states that the fishing area where they could fish free of regulation would be their traditional and customary waters limited by the boundaries of the Namkee Creek and Apaucuck Creek, the same boundaries that were identified by plaintiffs' expert witness, Dr. Strong. (See Dec of HBW ¶25 and Exhibit A-12, Exhibit B Strong Dec. ¶14, Exhibit B-4 and B-5)

The Unkechaug requested relief of prohibiting NYSDEC regulation of treaty protected fishing rights is limited to an area of its traditional and customary waters and does not uproot ownership interest nor displace surrounding land ownership but rather enforce a non-exclusive right to fish by the Unkechaug. This relief is not analogous to the relief sought by the Indian Nations in Coeur d' Alene and Wester Mohegan that would uproot such a large area.

Defendants' reliance on Silva v. Farrish No. 18-civ 03648 (E.D.N.Y) is inapposite because the Unkechaug relief is based on a specific Andros Treaty where the Unkechaug are specifically identified in the treaty and the Unkechaug are not seeking aboriginal rights but limited non-exclusive right of a limited area.

Moreover, Silva is inapplicable to the case at bar as distinguished by the court:

> Nor does the holding in Unkechaug Indian Nation v. N.Y.S. Dep't of Envtl. Conservation, No. 18-CV-1132, 2019 WL 1872952, at *1 (E.D.N.Y. Apr. 23, 2019) change the result of the Report. As the Report correctly concludes, *Unkechaug* is distinguishable [*8] because it involves plaintiffs who had an "articulated ... concrete plan" and a reasonable expectancy of prosecution in the future. (*Id.* at 6.) Plaintiffs have not articulated such a plan, here. The Court finds that Plaintiffs lack standing to bring claims for injunctive and declaratory relief.
>
> Silva v. Farrish, No. 18-CV-3648 (SJF)(SIL), 2021 U.S. Dist. LEXIS 29926, at *7-8 (E.D.N.Y. Feb. 16, 2021)

Defendants' attempt to impose restriction on the Court based on Ottawa Tribe of Okla. v. Speck, 447 F. Supp. 2d 835, 839-40 (N.D. Ohio 2006) has no authority in this circuit. However, the 6th circuit provides insight on the application of Coeur d' Alene from its holding in Arnett v Myers,

281 F.3d 552, 568 (6th Cir. 2002) limiting the application of Coeur d' Alene to different factual situations and requested relief. The Court should not enlarge the holdings in Western Mohegan and Coeur d' Alene to apply to the Unkechaugs non-exclusive treaty protected right to fish in a limited area because those cases are factually distinct and had more of an impact on State sovereignty and private land ownership than the Unkechaug requested relief will have.

C. Plaintiffs' Claims Are Not Barred by The Pennhurst

Defendants argue that the Pennhurst Doctrine bars plaintiffs' claims however, this argument is patently false. (See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984)) Plaintiffs seek prospective relief from Commissioner Seggos as the Commissioner of NYSDEC. Plaintiffs seek to have Commissioner Seggos comply with federal law and to enjoin the violation of federal law by enforcing NYSDEC regulations on Unkechaug fishing contrary to the Andros Treaty that is protected under the constitution and 25 U.S.C. § 232. Because plaintiffs seek prospective relief of a state official to prevent Commissioner Seggos from violating federal law the Penhurst Doctrine is inapplicable. Any effect on the state by prohibiting Commissioner Seggos from enforcing conservation laws against the Unkechaug would only be ancillary not barring plaintiffs' claims. (See Nelson v. Miller, 170F.3d641, 646-47 (6th Cir. 1999))

III. PLAINTIFFS' CLAIMS ARE NOT PRECLUDED BY RES JUDICATA AND COLLATERAL ESTOPPEL

Defendants' contention that plaintiffs' claims are precluded by res judicata, and collateral estoppel are meritless. (See Def Mem of Law in Opp. Pg. 30) Plaintiffs incorporate by reference their memorandum of law in opposition section III pages 68-70.

The case at bar and the state case Unkechaug Indian Nation v. New York State Department of Conservation, Index N. 4254/2016 do not address identical issues, nor are parties the same in both cases.

The state case involved the Unkechaug Nation filing an Order to Show Cause for the Court to grant access to eels seized by NYSDEC in April of 2016. (See seizure ticket annexed to Dec of Wallace as Exhibit A-10) The parties to the state action were the Unkechaug Nation and NYSDEC. The central issue to the State case was NYSDEC's unlawful confiscation of the Unkechaug eels at JFK airport. It did not consider all the claims set out in the complaint in this action but was limited to the confiscation of fish. The complaint in the case sets forth criminal charges against Unkechaug members and representatives in 2014. (See Comp. ¶22) The complaint states threats made by Major Florence in the New York Times after the state case. (See Comp. ¶20) The complaint also alleges the threats were made by AG McLean. (See Comp. ¶25) The Complaint also asserts new legal theories as to the right of the Unkechaug based upon the Andros Treaty dated May 24, 1676. (See Comp. ¶28 and Dec. Strong Ex B-3) The Complaint refers to threats made by General Counsel and deputy commissioner Thomas Berkman in a letter to Chief Wallace. (See Comp. ¶31 and Dec. Chief Wallace Exhibit A-8) The Complaint also refers to Chief Wallace's response letter to Berkman. (See Comp. ¶31 and Dec. Chief Wallace Exhibit A-9) The Complaint also bases its interference with its religious practice because of NYSDEC interference with collection and placement of wampum. (See Comp. ¶32 and Dec of Chief Wallace Exhibits A-7 A-13)

All of these different facts are referred to in the current complaint and were not present in the State's case; additionally, the parties are different. The present lawsuit contains Commissioner

Seggos in his official capacity as commissioner of NYSDEC and Chief Harry B. Wallace in his official capacity as Chief and individually.

Based upon these additional fact's res judicata and collateral estoppel cannot preclude plaintiffs claims.

The state case was dismissed because of NYSDEC's deliberate destruction of the Unkechaug eels which destroyed subject matter jurisdiction and did not leave any further action for the Unkechaug Indian Nation in the NYS Supreme Court. (Dec of Chief Wallace Exhibit A-11 and Dec of JFS Exhibit B) The State decision was not on the merits and cannot preclude plaintiffs' claims in this case.

IV. NEW YORK CONSERVATION LAW DOES NOT APPLY TO THE PLAINTIFFS' FISHING

A. The Conservation Necessity Doctrine Does Not Apply

Defendants' arguments that the conservation necessity to protect eels under 9 inches overrides the Unkechaug treaty fishing right is meritless because the regulation is not a necessity, and the law is arbitrary and capricious. (See def mem of law in opp. Pg. 31-37) Plaintiffs incorporate by reference their argument in section I F pages 17-47 of their memorandum of law in opposition and their argument in section V pages 31-45 of plaintiffs' memorandum of law in support of their motion for summary judgment.

Defendants mischaracterize plaintiffs' position as it states that "plaintiffs' asserted unlimited and perpetual right to fish protected species" (Def mem of law in Opp Pg. 33). Plaintiffs do not seek an unlimited right but a non-exclusive right to fish in a limited area between the Namkee Creek and Apaucuck Creek, Unkechaug Traditional and customary waters. (Dec. Chief Wallace Exhibit A-12, Dec Dr. Strong Exhibit B-4 B-5)

The state regulation of the 9-inch ban of fishing eels is not necessary or reasonable to conserve and the State imposes this regulation in a discriminatory manner against the Unkechaug.

The statistics used by defendants' expert organization Atlantic State Marine Fisheries Commission (ASMFC) is stale and was taken in 2012. (See Dec of JFS Exhibit C Kerns Dep Tr. Pg 65-66) The ASMFC state in all their reports on the American Eel "much is unknown about the American Eel". Additionally, if NYSDEC would have come to an agreement with the Unkechaug on a fishing and conservation plan for eels the landing report from the Unkechaug would provide better data to the ASMFC.

Despite defendants' flawed reasoning that NYSDEC and ASMFC must ban fishing for eels of 9-inches to preserve the species, defendant expert Kerns states that "mortality on a pre-spawn eel is mortality, so any eel that doesn't survive is an eel that will not be able to spawn" (Dec of JFS Exhibit C Kerns deposition Tr. Pg. 94) Defendants' defense of this statement simply refers to Kerns Declaration that because glass eels aggregate together fisherman could over fish glass eels. This argument on hypothetical situation is not enough to justify the 9-inch ban on eels. It also does not explain the arbitrary law of NYSDEC to permit each fisherman to take 25 eels at a time and for hire party boats to take 50 eels at a time. (See Dec of JFS Exhibit C Kerns Tr. Pg. 89) So if a million people went out to fish for eels in one day 25 million eels would be killed. (See Dec JFS Exhibit C Kerns Tr. Pg. 89) This would devastate the eel population far more than allowing a small Nation like the Unkechaug fish for glass eels in a limited area.

The Unkechaug have a management plan that provides for stocking effort of 10% to 50% above artificial barriers. (See Dec Chief Wallace Exhibit A-9 section 1.1) The Unkechaug management plan does more for the problem of the small glass eels being decimated by artificial

barriers. Defendants' argument that this does not account for the eels coming down stream is disingenuous because the eels coming down stream have grown in size and have matured to adult eels allowing adult eels to more likely survive barriers. Defendant expert Kerns testified that removing eels and placing above obstructions is a proven conservations method. (See Dec JFS Exhibit C Kerns Tr. Pg. 95)

Defendants' claims that federal law requires NYSDEC to criminally prosecute the Unkechaug that fish for eels under 9-inches is erroneous. As Ms. Kerns states that each State in the ASMFC can apply to ASMFC and receive a quota of 200 pounds of glass eels or more under an aquaculture program. (Dec JFS Exhibit C Kerns Dep Tr. P. 89-92) NYSDEC never attempted to work with the Unkechaug to obtain this permit that is permitted by ASMFC and would not violate any state or federal law.

Based on the above arguments it is evident that there is no conservation necessity to NYSDEC 9-inch ban. Furthermore, the NYSDEC could have worked with the Unkechaug to approve a glass eel aqua culture permit under the ASMFC as implemented in Maine and South Carolina.

Defendants have discriminated against the plaintiffs by not conferring with the Unkechaug as indicated in CP-42 (Dec JFS Exhibit D) and could have easily worked with the Unkechaug and establish an aquaculture program which meet the standards of the ASMFC. The testimony of James Gilmore (Dec JFS Exhibit E), Thomas Berkman (Dec JFS Exhibit H), Monica Kreshik (Dec JFS Exhibit G), Major Florence (Dec JFS Exhibit F), and Commissioner Seggos (Dec JFS Exhibit I) prove the animus against the Unkechaug and the lack of knowledge of the Unkechaug Plan which could have certainly fit the exceptions allowed by the ASMFC as seen in Maine and South Carolina.

Defendants' contention that plaintiffs' arguments that the defendants violated CP-42 policy is a red herring because CP-42 is not binding on the NYSDEC. (Def mem of law in Opp. Pg. 41) This argument concerning CP-42 is made in bad faith because CP-42 is a commissioners policy published to the public that Defendants failed to abide by. Defendants mischaracterize Thomas Berkman's letter claiming that he attempted to reach out to plaintiffs. A more accurate reading of the Berkman letter, written on behalf of the commissioner Seggos and the NYSDEC, was a threat of criminal prosecution of Chief Wallace and the Unkechaug. Berkman's threats included cooperating to prosecute the Unkechaug with the United States Fish and Wildlife, not a NYS agency under his control and not a party to this action. (Dec of Wallace Exhibit A-8) The declaration of James Simermeyer verifies the Berkman threats. Berkman's deposition testimony further articulates his animus against plaintiffs. (Dec JFS Exhibit H)

Lastly, Defendants' argument that Plaintiffs' eel plan is irrelevant is a desperate attempt to distract the court away from a significant factor that includes a plan that was used to distinguish this case from the Silva case by another federal judge in the Eastern District. (Def Mem or Law in Opp. Pg. 43) The eel plan demonstrates that the Unkechaug researched and put together a scientifically sound plan that incorporated modern science and traditional ecological knowledge that incorporated cooperation with other governmental entities in its fishing and management plan. Defendants never deny that the Unkechaug Eel management plan and proposed agreement by the Unkechaug was in their possession since 2014. The defendants failed to cooperate with the plaintiffs and failed to even read the management plan. (See Dec. Chief Wallace Exhibit A-9)

Depositions of the defendants, their employees and expert all admit that they have not read the Unkechaug management plan. (Dec JFS Exhibits C, E, F, G, H, I) Not only has the

defendants' attorney acted as a self-appointed historical expert, but he has also taken the role as a self-appointed expert on the American Eel in his meaningless and meritless critique of the Unkechaug management plan. Attorneys for the defendants have no qualification to critique the Unkechaug plan and all such comments should be rejected by the court. The defendants had the opportunity to present the plan to their expert, Ms. Kerns but consciously decided not to provide the plan to her, taking the same strategy in not retaining a historical expert. The Unkechaug management plan was written in cooperation with the Passamaquoddy who have used a similar plan that was adopted by federal agencies and the State of Maine that is also a member of ASMFC.

Defendants do not have a conservation necessity to override the Unkechaug fishing right, and its 9-inch ban has been implemented in a discriminatory manner by defendants against the plaintiffs.

B. Sherrill Doctrine Does Not Bar Plaintiffs' Claim.

The defendants' arguments and cases cited are the same as their moving papers for summary judgment. Plaintiffs incorporate by reference its arguments in section I. C. pages 10-15 memorandum of law in opposition.

The plaintiffs never had to enforce its treaty rights because there was never any interference until 2014 of Unkechaug fishing. (Dec. Chief Wallace) Additionally, the plaintiffs are not seeking to uproot thousands of private property owners as in City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005). Plaintiffs only seek a limited declaration of its non-exclusive fishing rights at a limited location near the Poospatuck Reservation and does not seek any property rights that infringe on the rest of New York State residents as in Sherrill.

The courts have narrowed the defense of Sherrill in Oneida Indian Nation of New York v. Madison County, 605 F.3d 149 (2d Cir. 2010), Cayuga Indian Nation of New York v. Seneca County, 761 F.3d 218 (2d Cir. 2014) and Cayuga Indian nation of New York v. Seneca County, 761 F.3d 218 (2d Cir. 2014) and Cayuga Indian Nation of N.Y. v. Seneca Cty., 978F.3d829, 832 (2d Cir. 2020)

The plaintiffs relief is similar to the Saginaw Chippewa Indian Tribe v. Granholm, No. 05-10296-BC, 2009 U.S. Dist. LEXIS 89020, at 8-9 (E.D. Mich. Sept. 28, 2009) holding that Sherrill did not apply against the Indian Nation because their suit sought a declaration that they retained rights to self-government under 1855 and1865 treaties unlike Sherrill, the remedy sought by Plaintiffs is not predicated on reversing an ancient wrong for the benefit of a modern real estate transaction, it is simply a request for a declaration. Id.

Plaintiffs' relief is not like that of the Sherrill case therefore Sherrill is inapplicable to bar plaintiffs' claims.

C. The Supreme Court Ruling in Kennedy Does Not Apply to Plaintiffs' Claims

The defendants' arguments and cases cited are the same as their moving papers for summary judgment. Plaintiffs incorporate by reference its arguments in section I. D. pages 15-17 memorandum of law in opposition.

The defendant's reliance on N.Y. ex rel. Kennedy v. Becker, 241 U.S. 556, 563, 36 S. Ct. 705, 707 (1916) is misplaced and illustrates their reliance on racist undertones and social Darwinism of whites being superior to Natives.

The Kennedy case interprets a Seneca Treaty on behalf of individual Seneca Indians as distinguished from the case at bar where plaintiffs based their contentions on the Andros Treaty and the Nation as a party to the treaty.

The case that is more analogous is United States v. Washington, 384 F. Supp. 312, 336-37 (W.D. Wash. 1974) where the Court distinguished the Kennedy case and held the Individual Seneca Indians held a reservation of a privilege of fishing where in the present (of U.S. v. Washington) case it was a reserved right by treaty.

The Andros treaty provides for a reserved right not a mere privilege. Thereby rendering the Kennedy decision inapplicable to the case at bar.

Additionally United States v. Washington, 384 F. Supp. 312, 340 (W.D. Wash 1974) held that the Tribe could fish free of State regulation provided the Tribe maintains qualifications and conditions.

In the present case the Unkechaug have a reserved treaty right and impose obligations on the Unkechaug Nation consistent with the Unkechaug management plan. (See Exhibit A Chief Wallace Dec. Exhibit A-9 Exhibit A-7)

For the following reasons the Unkechaug have a reserved treaty right not a privilege as held in Kennedy rendering the decision in Kennedy inapplicable.

D. The Andros Treaty is Binding on New York State

i. Federal

Defendants once again mischaracterize the law and attempt to limit the court's discretion by citing non-binding precedent and secondary sources. (See Def. Mem of Law Opp. Pg. 53) Plaintiffs incorporate by reference their argument in their memorandum of law in support of

plaintiffs' summary judgment section IV pages 26-31 and plaintiffs' memorandum of law in opposition to defendants' summary judgement section I B pages 5- 10.

Defendants' plain language argument analysis of the supremacy clause of the U.S. Const. Art. VI fails because colonial land grants and agreements were blanketly acknowledged under the federal constitution. (See Hon. Hosea Hunt Rockwell well known speech before the Committee on February 17, 1892, cited in plaintiffs opp. mem of law pg. 9) Consistent with blanket acknowledgement are federal cases upholding colonial patents and agreements after the formation of the United States. (See Fairfax's Oevisee v. Hunter's Lessee, 7 Cranch 603 (1813), The Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 644-650 (1819)) Defendants' reliance on these cases in this matter is unsuccessful because using the same logic in Sherrill the court in Fairfax and Dartmouth upheld these colonial agreement and patents because it could upend and disrupt property ownership and rights if abrogated. This Court should apply the same reasoning and logic to the case at bar.

Defendants cite to a secondary source that is not binding on this court and should not be considered. (Def mem of law opp. Pg. 53) Defendants far reaching comparisons to the state of Virginia case also has no binding effect on this court and are distinguished from the present case before this court. (Def mem of law opp. Pg. 54) Defendants use of Seneca Nation of Indians v. New York, 382 F.3d 245, 268 (2d Cir. 2004) and Golden Hill Paugusset Tribe of Indians v. Weicker, 839 F Supp. 130, 137-32 (D. Conn. 1993) is inapposite because it is dealing with entirely different agreements and have no bearing on the case at bar.

ii. State of New York

Defendants mischaracterizes the law and plaintiffs' evidence and provide a feeble argument that New York State has repealed the Andros Treaty. Plaintiffs incorporate by

reference their argument in their memorandum of law in support of plaintiffs' summary judgment section IV pages 26-31 and plaintiff's memorandum of law in opposition to defendants' summary judgement section I B pages 5- 10.

The New York State Constitution Section 14 clearly provides that such parts of the common law and acts of the legislature of the colony of New York are in force. (See N.Y. Const. Art. I ¶14) Defendants' argument that it was generally appealed through General Construction Law § 71 and General Construction Law § 72 (See Def Mem of law Opp. Pg. 55) are not enough to abrogate an Indian Treaty that was blanketly acknowledged by New York State. The state of New York has continued to maintain its relationship pursuant to colonial treaties and relationships with New York State natives such as the Unkechaug.

The State or Federal Government must clearly set out its intent to abrogate any Indian Treaty. ".. It may abrogate a treaty with an Indian tribe only by an Act of congress that "clearly express an intent to do so." Minnesota v. Millie Lacs band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999), United States v. Washington, 853 F.3d 946, 967 (9th Cir. 2017)

The laws cited to in defendants' brief does not specifically abrogate the Andros Treaty or any relationship with New York State and the Unkechaug Indians Nation.

Defendants erroneously assert that New York State's historical documents from its own office are hearsay. (Def. Mem of Law. Opp. Pg. 56) These letters from New York State Attorney General, NY Secretary of State, and New York State representatives recognize the States relationship with the Unkechaug and New York State's blanket acknowledgement of its relationship with the Unkechaug and treaties with the Unkechaug like the Andros Treaty.

These letters are attached to the Declaration of Chief Wallace and are from the Unkechaug Indian Nation files. (See Dec Chief Wallace Exhibits A-1 – A-5) These letters were also accepted and ruled on in the Eastern District of New York by Hon. Kiyo Matsumoto. See Gristede's Foods, Inc. v. Unkechauge Nation, 660 F. Supp. 2d 442, 457-60 (E.D.N.Y. 2009

iii. Andros Treaty Not Abrogated by general provisions of New York State Laws.

Defendants regurgitate the same argument and unpersuasively and erroneously argue that the Andros Treaty has been abrogated. (See Def Mem of Law Opp. Pg. 57) Plaintiffs incorporate by reference their argument in their memorandum of law in support of plaintiffs' summary judgment section IV pages 26-31 and plaintiffs' memorandum of law in opposition to defendants' summary judgement section I B pages 5- 10.

Defendants again point to general laws passed by New York State and its Conservation Law that fail because abrogation requires a clear and specific language to abrogate an Indian Treaty. See Minnesota v. Millie Lacs band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999), United States v. Washington, 853 F.3d 946, 967 (9th Cir. 2017)

V. THE ANDROS TREATY IS A TREATY AND DOES NOT PROVIDE FOR REGULATION OF UNKECHAUG FISHING

The arguments made by defendants (Def. Opp. P 59-62) as to the validity of the Andros Treaty is an attempt to parse language without competent evidence from a historian who specializes in this specific colonial time period. Failure by the defendants to provide expert testimony has resulted in amateur attempts by Mr. Thompson to deconstruct the language of the treaty without historical context and to disregard the legal standards relied on by the courts in understanding treaties with Native people. Defendants' arguments that it is not a treaty and allows for regulations over the Unkechaug fishing are unsubstantiated by historical expert proof

and consists of a desperate attempt to limit the treaty to a plain language meaning as interpreted by attorney Thompson, while ignoring the cannons of Indian construction relied on by the court. On one hand, the defendants criticize the Andros Treaty as an ancient document that is not relevant, and on the other, wants to limit the treaty to a plain reading interpretation. The complexity in the understanding of the Andros Treaty requires scholarly interpretation and the correct application of legal standards in Native treaties. Plaintiffs have thoroughly discussed these points in plaintiffs' brief pages 1-4.

Out of convenience of argument, defendants take the unpersuasive position that the fishing, hunting, and planting rights of Indians and the Unkechaug were of no consequence. (Def Opp brief P) This is contrary to Dr. Strong's detailed analysis showing the significance of the acknowledgment by colonists of native fishing, hunting, and planting rights that were always included in transfer of land between colonist and natives to preserve native subsistence and spirituality. (See Plaintiff opp. brief Exhibit 3) Defendants' willful ignorance to these basic principles is disingenuous and planned to misinterpret the Andros Treaty as a document limited to plain language. Defendants fail to offer any scholarship as to the meaning of treaty.

Defendants' argument that the Andros Treaty regulated the Unkechaug fishing, and those regulations were passed down to the NYSDEC is absurd, unreasonable, and baseless under expert historical or legal interpretations. The treaty interpretation theory of plain language relied on by defendants is a far reach in support of the position that the current regulations were foreseen by Andros and the Unkechaug. Clearly, the Unkechaug and Andros would not have an inkling as to the environmental conditions of today. Andros would never have thought that his European progeny would have been so careless with the environment.

The language arguments made by the defendants that the word treaty is required to make a writing a treaty, is baseless as is their argument that there is no consideration stated in the treaty, so it is not valid. The defendants go even further off track and argue, with no historical basis, that the treaty was a contract based on recent case law that is neither relevant nor on point. The defendants' creation of artificial burdens such as specific language that the document is a treaty and written consideration in the treaty is required to make the treaty valid is a less than a clever way to avoid valid expert historical analysis of the treaty. Defendants' failure to produce a historical expert should not prevent the court from accepting the plaintiffs' evidence submitted by Dr. Strong as an historical expert. Defendants' attempts to keep the Strong report and testimony from the court is made in desperation and to distract the plaintiffs and the court from allowing and applying the only expert analysis offered in this case by a qualified expert. (See Plaintiffs' opp. brief and expert report Exhibit B- 1 of Dec of John Strong).

The analysis of Dr. Strong was specific and properly analyzed using reliable methodology and reliable legal standard of Indian cannon of treaty interpretation. (See Pl opp. Brief @ pg. 1-15) The historical context is fully explained in detail and underscores the threats faced by the colonist in New York and New England from war with the Native Algonquin Nations. The concerns of Andros to protect the colonists in Long Island and New York in general lead to negotiations (Dec Strong Exhibit B-1) with the Unkechaug and resulted in a treaty on May 24, 1676, that acknowledged Unkechaug fishing rights and rights to dispose of the fish as the Unkechaug see fit. The consideration to the colony and Andros is abundantly obvious, to prevent war or conflict with the Unkechaug. Defendants' argument that the consideration was not written into the treaty is disingenuous and attempts to avoid the fact that the defendants failed to produce a historical expert with a counter interpretation of the treaty. (See Def Opp Brief at 59.)

Defendants' make an opportunistic argument that the treaty interpretation must be limited to a plain reading because the defendants knowingly failed to offer expert testimony to assist the court. The use of experts to interpret treaties is essential and accepted practice by the courts. Finally, defendants' interpretation of the Kennedy case is misapplied and irrelevant because this treaty is a right not privilege to fish. (United States v. Washington, 384 F. Supp. 312, 336-37 (W.D. Wash. 1974)) The racist dicta used in ancient documents expressed the colonist belief of superiority and segregation between Christians and non-Christians. As explained by Dr. Strong the custom phrase in the treaty allowed the Unkechaug to enforce their rights under the treaty, not to allow regulations by the NYSDEC in 2021. (Dec Strong Exhibit B-1)

VI. NYSDEC CANNOT REGULATE UNKECHAUG FISHING BECAUSE OF FEDERAL PRE-EMPTION

Even if we apply the standard set out in defendants' brief at page 63 pre-emption would still apply to the NYSDEC regulation.

Defendants' pre-emption analysis is not correct. The plaintiffs will prove that the 25 U.S.C. §232 conflicts with NYS Environmental Conservation law against Unkechaug fishing for glass eels. The clause in 25 U.S.C. §232 explicitly states that "noting contained in this section shall be construed to deprive any Indian Tribe of hunting and fishing rights guaranteed to them by treaty. Whatever jurisdiction that the federal government issued to New York State was expressly limited by a pre-existing treaty. The case at bar involves the Andros Treaty that came into effect prior to both NYS Environmental laws and 25 U.S.C. § 232 thereby requiring the state not to enforce environmental regulation over Unkechaug fishing.

The intention of the federal government was to grant concurrent jurisdiction to New York State without interference with any treaty right. The Unkechaug Andros Treaty provides for unregulated fishing right in the Unkechaug customary and traditional waters. Therefore 25 U.S.C. § 232 foresaw these potential conflicts and carefully constructed the language so that New York State laws would not interfere with a pre-existing treaty resulting in pre-empting the NYS environmental laws against Unkechaug fishing in their traditional and customary waters.

VII. FEDERAL LAW DOES NOT SPECIFICALLY EMPOWER AND REQUIRE NEW YORK'S REGULATION OF GLASS EEL FISHING

Defendants' argument asserting that New York State ban on fishing of eels under 9-inches is federal law because it is a member of the ASMFC is erroneous. (See def. mem. Of law. Opp. Pg. 67)

The Unkechaug fishing plan fits within the exceptions permitted by ASMFC and the States of Maine and South Carolina for having a glass eel fishery. Additionally, Toni Kerns testified that New York State like other states could apply for an aqua culture permit and maintain a glass eel fishery with 200 pounds of glass eels or even more. (See Dec JFS Exhibit C Kerns Dep) NYSDEC never sought one nor did they ever try to cooperate with the Unkechaug to develop one. (See Dec of Wallace Exhibit A-8 A-9)

Moreover, ASMFC's guidelines on the implementation of fishing limitations do not automatically impose a moratorium on fishing in that state for that species. The ASMFC must petition the Secretary of Commerce to impose a moratorium on that state. After the Secretary of Commerce investigates ASMFC's findings it can decide with its broad discretion whether to impose a moratorium or not. https://apnews.com/article/592672bbe8614c4ab684f76f55ee9df7

The enforcement is not automatic as illustrated by the actions of the Secretary of Commerce Wilbur Ross when he reversed a decision on flounder fishing regulations against New Jersey.

Maine is home to the United States' largest and most profitable glass eel fishery. South Carolina also has a glass eel fishery. Defendants' arguments are disingenuous because the Unkechaug could operate a glass fishery like these two other states without violating federal law.

VIII. PLAINTIFFS' FREE EXCERSE CLAIMS ARE VALID

Defendants' arguments opposing plaintiffs' free exercise claim is meritless. (See Def Mem of Law Opp. Pg. 69) Plaintiffs incorporate by reference their memorandum of law in support for summary judgment section IX pages 79-89 and its memorandum of law in opposition section V. 74-91.

Plaintiffs properly alleged in their complaint (¶ 51-52) that NYSDEC regulations interfered with their use of wampum and placing the wampum and rocks back into the water to protect the shoreline and cleanse the water. NYSDEC twice issued summons against the Nation for placing shells and rocks into the water on the Poospatuck Reservation. (See Dec Chief Wallace Exhibit A-13.) additionally, defendants have continued to interrupt Unkechaug religious practice because of its restriction of Unkechaug fishing for eels.

The Unkechaug religion is intertwined with the natural world and the consistent interference from NYSDEC in its use of wampum shells and eel fishing have interfered with that belief and practice. (See Dec of Wallace Exhibit A-13) NYSDEC's interference is discriminatory and does not serve a legitimate governmental purpose. The methods used to reinforce shoreline is the same methods used by the federal government and NYSDEC. Glass eel fishing is already

permitted under the ASMFC, but defendants have refused to cooperate and work with the Unkechaug in the development of an Unkechaug fishery. (See Exhibit A Dec of Wallace)

IX. PLAINTIFFS HAVE AND CONTINUE TO SUFFER IRREPARABLE HARM THAT REQUIRE THIS COURT TO GRANT INJUNCTIVE RELEIF

Defendants' contentions that plaintiffs should not be granted injunctive relief is erroneous. (Def mem of law Opp. Pg. 82)

Plaintiffs seek injunctive relief that prohibit defendants from enforcing environmental laws against plaintiffs from fishing in their traditional and customary waters. (Traditional waters as set out by Chief Wallace and Dr. John Strong Exhibit A and Exhibit B) Plaintiffs seek injunctive relief from defendants from enforcing environmental laws against plaintiffs that interfere with plaintiffs gathering or placing wampum on water that abuts the Poospatuck reservation. Additionally, plaintiffs seek this court to assert continuing jurisdiction against both parties to enforce compliance and implementation of Unkechaug eel management plan and cooperation between the parties.

Plaintiffs have undoubtedly suffered and continue to suffer irreparable harm as illustrated in these motion papers. Defendants have seized, arrested, and threatened future criminal prosecution of plaintiffs. Plaintiffs have articulated a concrete plan to fish that conflicts with the NYSDEC environmental restriction that will guarantee future conflict between the parties and create irreparable harm to the plaintiffs.

The balance of the equities favors plaintiffs. The enforcement of injunctive relief for plaintiffs will not have a great impact on defendants but granting injunctive relief will enforce plaintiffs' treaty protected non-exclusive right to fish in its limited traditional and customary

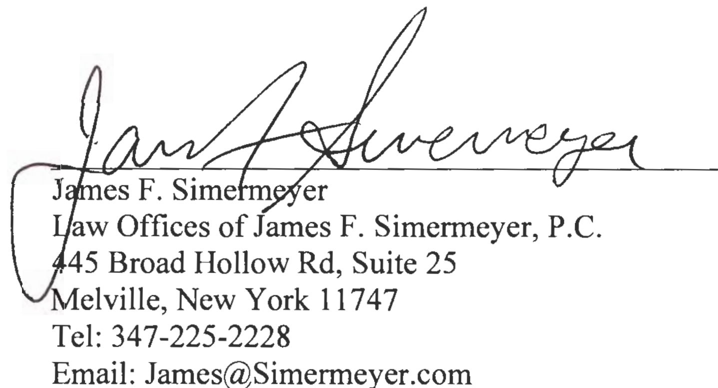
waters. Also, the plaintiffs have a likelihood of success on the merits based on their treaty rights and historical relationship with New York as a state recognized Indian Nation.

Plaintiffs' injunctive relief must be granted to prevent irreparable harm.

CONCLUSION

For the foregoing reasons the Court should grant plaintiffs' motion for summary judgment in its entirety and deny defendants' motion for summary judgment in its entirety.

Dated: East Elmhurst, New York
September 29, 2021



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