23-1013

United States Court of Appeals
for the Second Circuit

UNKECHAUG INDIAN NATION and HARRY B. WALLACE,
Plaintiffs-Appellants,

-against-

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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The plaintiffs Unkechaug Indian Nation and Harry B. Wallace in his official capacity as Chief and individually, seek a reversal and remand of the Summary Judgment of the District Court granting Summary Judgment to the Appellees, Basil Seggos in his official capacity as the Commissioner of the New York State Department of Environmental Conservation and the New York State Department of Environmental Conservation. The Appellants set forth below its Reply to the Appellees Opposition.

ARGUMENT IN SUPPORT OF REPLY

I. THE DISTRICT COURT FAILED TO APPLY THE CORRECT METHODOLOGY TO INTERPRET THE AMBIGUOUS LANGUAGE IN THE ANDROS TREATY:

The Appellees' Opposition[1] attempts to support the lower court's erroneous interpretation of the May 24, 1676, Treaty between the Unkechaug Indian Nation and the colonial governor, Andros. The District Court failed to apply the Indian Cannons of interpretation of treaties between Indians and non-Indians that directs any interpretation under the Indian Cannons to make a determination in favor of the Indians as to how the Native participants would understand the treaty. (Appellees brief P. 29-31) The Appellants provided the lower court with the appropriate case law and rational to support the application of the Indian Cannons in the interpretation of the Andros Treaty with the Unkechaug.

[1] Appellants reference Appellees' argument on P. 29-31 of their brief.

The only historical expert produced was Appellants' expert, Dr. John Strong, PhD., to examine and offer expert opinions concerning the complexities of interpreting an ancient document that was ambiguous, including the historical setting at the time the treaty was entered into between the Unkechaug and Colonial Governor Andros. (See A5489-A5535)

The expert report and testimony of Dr. John Strong provided the court with the appropriate methodology to interpret the Andros Treaty that included a detailed historical perspective at the time the treaty was entered into between Andros and the Unkechaug. Despite the Appellants' arguments in favor of the application of the Indian Cannons and the expert testimony from Dr. John Strong, the court failed to apply the Indian Cannons as required that resulted in an erroneous decision as to the Andros Treaty that relied solely on the plain language of a treaty that was drafted in the colonial time in old English and was ambiguous and unclear. Without the application of the Indian Cannons the lower court was not capable of rendering a valid decision and lacked the experience or knowledge to make an informed decision on the treaty. The plain language application by the court may have been expedient but was clearly inappropriate and denied the Appellants due process concerning the complex treaty issues in this case.

The language of the Andros Treaty, an ancient document, was ambiguous and required a detailed and academic methodology to fully comprehend the

significance of the treaty by understanding the historical setting, previous agreements between the colony and Unkechaug, and how the Unkechaug, as participants, would understand the Treaty. The plain language approach taken by the court was essentially based on expedience and a pretext to ignore the detailed application of the proper methodology set out in case law. The selective language relied on by the court raises issues as to the laws and customs in colonial times that the court relied on. The reliance from the district court and Appellees' argument that "law and custom" impose a restriction on the Unkechaug and that it must have followed English law, is false and disingenuous. Similarly, in a treaty drafted in the 1850's approximately 200 years after the Andros treaty between the United States and the Indian Nations of the pacific northwest the treaty text contained a clause that stated, "in common with all citizens of the Territory."" *Washington v Fishing Vessel Assn*, 443 US 658 [1979] The Supreme Court properly applied the Indian cannons and looked to the historical context and of the Indian understanding at the time the treaties were entered into, "There is no evidence of the precise understanding the Indians had of any of the specific English terms and phrases in the treaty." *Washington v Fishing Vessel Assn*, 443 US 658, 666-67 [1979] Additionally, the Supreme Court correctly analyzed how both parties understood the language and intent of that treaty to take fish. The Indians understood that non-Indians would also have the right to fish at their off-reservation fishing sites. But

this was not understood as a significant limitation on their right to catch fish. Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights. The parties accordingly did not see the need and did not intend to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen. *Washington v Fishing Vessel Assn*, 443 US 658, 668 [1979] The Andros Treaty provides similar language and guarantees the Unkechaug the right to fish and that clause is not to be interpreted as a limitation to the Unkechaug but a guarantee to fish without molestation by the colony/state following the same interpretation by the Supreme Court held in *Washington* Ibid. Additionally, the District Court erred by not considering how the Indians would have understood the treaty and the negotiation of the Courts have held that because Indians did not understand the English language that the Court is required to interpret the treaty how the Indian would at the time of the treaty. “Moreover, that the tribal signatories spoke very little English and signed their names with an "X" further emphasizes the need to carefully consider how the Government's actions may have impacted their understanding of the agreement.” *Rosebud Sioux Tribe v United States*, 9 F4th 1018, 1024 [8th Cir 2021] In analyzing the Andros treaty the Unkechaug leadership were unfamiliar with the English language and euro-centric concepts utilized by the colonists when dealing with Native Americans. Often

throughout American and Colonial history the colony, state and federal government would take advantage of the Native's ignorance of English and the legal meaning of certain words and provisions. The Supreme Court remedied this by creating the Indian Cannon when interpreting Indian treaties. Certainly, the Unkechaug in 1676 were negotiating at a profound disadvantage by trying to negotiate in an unknown language and relied on the Andros regime to write the treaty in vocabulary and terminology they chose. This required the Court to apply the Indian Cannons of construction to understand what the Unkechaug would have understood those terms to mean, and the historical context of the treaty negotiation including previous agreements. "Treaty analysis begins with the text, and treaty terms are construed as " 'they would naturally be understood by the Indians.' " *Washington v. Fishing Vessel Assn.* , 443 U.S. at 676, 99 S.Ct. 3055." *Herrera v Wyoming*, 139 S Ct 1686, 1701 [2019]

The District Court and the Appellees also failed to analyze "they are at liberty and may freely whale or fish for or with Christians or by themselves" (A5526-A5530) The impact of the statement "may freely" and "for or with Christians or by themselves" is significant and illustrates that Andros wanted to appease the Unkechaug most likely because of the impending Kings Phillips War in Connecticut that could certainly have entered Long Island with the assistance of

the Unkechaug. Christian is a term used by the English and all Europeans in the 1600's as a term to distinguish themselves from the "Heathen" Native.

> "On the discovery of this immense continent, the great nations of Europe were eager to appropriate for themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."

Johnson v M`INTOSH, 21 US 543 [1823] Chief Justice Marshall continues his decision describing the history of the English occupying its colonies through the doctrine of discovery and distinguishing itself from the Indians by European Christianity. Yet in the Andros Treaty, the Colony of New York does not impose a limitation on the Unkechaug as "Heathens" or non-Christians as implied by the District Court and Appellees. The Andros Treaty acknowledges the Unkechaugs' power and confirms their right to fish and dispose as they ought with or without Christians. The District Court failed to analyze the statement and failed to apply the Indian Cannons to understand the historical context of the negotiation and the understanding the Unkechaug would have had of the Andros Treaty.

Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court (Supreme Ct.) has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U.S. 1, 11. This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor. *quoting Tulee* v. *Washington*, 315 U.S. 681; *Seufert Bros. Co*. v. *United States*, 249 U.S. 194; *United States* v. *Winans*, 198 U.S. 371. See also *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 484 in *Washington v Fishing Vessel Assn*, 443 US 658, 675-76 [1979]

The District Court never endeavored in its decision to analyze how Unkechaug would understand the treaty at the time they entered into the Andros treaty. Furthermore, the Appellees and lower Court disingenuously argue that the Court does not need to apply Indian Cannons or look at how the Unkechaug would have interpreted the treaty because a treaty that is 347 years old is somehow unambiguous nor required an Indian Cannon analysis. The arrogance of the District

Court and Appellees to maintain unambiguousness in the Court's decision, and Appellees' brief that they understood the terms and vocabulary of olde English from 1676 and understood the complexities of colonial negotiations with Indian Nations on Long Island throughout this period without any historical context between the two parties, is alarming. Even more disturbing is that Appellants provided the District Court with the only historical expert witness in this case and the court did not even examine the testimony of the foremost expert/ethnohistorian on Long Island Indians during the colonial period which is relevant in this case. (See Strong Resume A5517-A5525) Dr. Strong PHD provided the historical context in his expert report, declarations, and testimony. (A4742-A4746) Plaintiffs' expert Dr. Strong explains why Governor Andros would appease the Unkechaug by entering a Treaty with the tribe because of the fear of the Long Island Indians joining with the New England Indians (King Phillip's war) and revolt against the settlers of Long Island, the consideration for the treaty. (See Strong Report A5505-A5515, Strong Declaration A4783-A4785)

Dr. Strong also provides the necessary historical context required by the Court to apply the Indian Cannons by providing several previous agreements between Unkchaug and the Colonial government that illustrated that the Unkchaug always retained right to fish, hunt, and plant in all transactions with the Colonial Government. (Strong Report A5493-A5503) Dr. Strong provided the court with a

backdrop of colonial warfare between the colonists and the Indians that lead to the negotiations and creation of the Andros Treaty. The presentation of black wampum to Andros by the Unkechaug represented the threat of war. After entering into the treaty with Andros the Unkechaug presented white wampum to Andros representing peace. [2] These significant historical factors would not have been ignored by the court using the proper method to analyze the ambiguous language in the treaty as set out by Dr. Strong. See (Strong Report A5497 and Strong Deposition testimony A5532-A5533)

Furthermore, Dr. Strong also provided guidance in understanding the terminology in the Andros treaty and the standard references used during this period of negotiations between two sovereigns. (Strong Report A5514-A5515)

Appellees' reliance on cases that did not apply the Indian Cannons because the treaty languages were unambiguous are not relevant and are inapposite to the case at bar. Appellees' disingenuously rely on *Oneida Indian Nation of N.Y. v. New York, 691 F.2d 1070, 1096 (2d Cir. 1982)* where the court reviewed a treaty relying on sale of land in contrast to the Oneidas arguing that it was a constructive trust. The case is not identical to the case at bar, this case examines the language of a fishing treaty that requires analysis by Indian Cannon. Appellees further rely on an

[2] The creation and exchange of wampum was a method of communication between the Unkechaug and Algonquin people. The black wampum symbolized war and the white wampum peace.

inapplicable case *Catawba v. South Carolina*, 475 U.S. at 506 where the court did not find ambiguities in the Catawba act created and passed in 1959. This case clearly does not have any similarities to the case at bar as the Court was tasked with analyzing a treaty from 1676 with many ambiguities that require the court to apply the Indian cannon to interpret the treaty. Appellees' reliance on Catawba and an act that has been repealed and drafted hundreds of years after the treaty at issue is irrelevant case law cited only to confuse this court.

Based on the foregoing reasons the Court was required to apply the Indian Cannons and failed to do so and prejudiced Appellants' case mandating this Court to reverse and remand.

A. PEOPLE ex rel KENNEDY v. BECKER IS INAPPLICALBE AND INAPPOSITE

Appellee's and District Court's reliance on *State of New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916) is inapposite to the case at bar. The Kennedy is inapplicable and the holding in *United States v. Washington*, 384 F. Supp. 312, 336-37 (W.D. Wash 1974) applies a distinction to *Kennedy* which applies to the present case "Most significant of all, it is stated in the very *Kennedy* language quoted in Puyallup-I (391 U.S. pp. 399-400, 88 S. Ct. p. 1729) that the fishing clause in the treaty conveyance "is fully satisfied by considering it a reservation of a *privilege* of fishing…" subject to state regulation. If at this time anything concerning treaty fishing rights should be beyond doubt or question it is

the basic principle that the treaty fishing of plaintiff tribes in this case is a reserved *right* and not a *mere privilege*. The treaty fishing in Kennedy was held to be only a *privilege* under the peculiar facts of that case. Nothing faintly comparable to those facts can be found in either Puyallup-I or the present case." *United States v. Washington*, 384 F. Supp. 312, 336-37 (W.D. Wash. 1974)

The case at bar is not a habeas petition and is similar to the Washington case. The Andros Unkechaug Treaty was meant to be a reserved right for the Unkechaug not a reserved privilege. Washington correctly points out that the language in *Puyallup* should have been applied by the District Court when analyzing the Andros Treaty, "it is the basic principle that the treaty fishing of plaintiff tribe in this case is a reserved *right* and not a *mere privilege Puyallup-I* Id."

The lower court failed to properly analyze and consider plaintiff's argument in its opposition brief and its analysis resulted in a misapprehension of the law and facts. This is another example of the lower court not considering all of Plaintiffs' evidence (A4643-A4645) when deciding the summary judgment motion. Proper consideration of the plaintiffs' evidence by the lower Court would have exposed genuine issues of fact that mandate a trial.

II. THE DISTRICT COURTS' FAILURE TO RULE ON THE OUTSTANDING DAUBERT MOTIONS PREJUDICED THE APPELLANTS AND DENIED DUE PROCESS

The lower Court's failure to rule on the outstanding motions to preclude expert testimony prejudiced the Appellants and denied Appellants' due process. The District Court's decision cited, Appellees' expert Toni Kerns[3] without making any ruling under pending Daubert motions, ordered by the court. The Opposition papers inaptly argue that the District Court's reliance on documents attached to Toni Kern's affidavit was not reliance on their expert. This position is misleading and begs the question of the Courts' unfair and selective use of expert documents that favored the Appellees. The reliance on the Kerns documents by the court in and of itself is prejudicial and reflects prejudice against the Appellants. Appellees' argument that the use of the Kerns documents was limited is conclusory and surmise at the very best.

Furthermore, Appellees' opposition to Appellant's argument go into further detail than the Decision by the District Court. Appellees provide a conclusory analysis of Appellants' Daubert motion but provide more analysis than the District Court in comparison to the District Court who provided absolutely no analysis. The District Court erred and abused its discretion by not conducting a Daubert analysis

[3] The lower Court Decision relied on Appellees' expert Toni Kerns several times, although the District Court never made a ruling to determine the Daubert Motions. See SPA 2, SPA 3, SPA 4.

contrary to the lower Court's own scheduling order. (A1001-A1002) (See A1175-A1263 Appellants' Daubert motion.) "[I]f the expert testimony is excluded as inadmissible under the Rule 702 framework articulated in *Daubert* and its progeny, the summary judgment determination is made by the district court on a record that does not contain that evidence. Such an analysis *must* be conducted even if precluding the expert testimony would be outcome determinative." *Hollan v. Taster Intern. Inc.*, 928 F. Supp. 2d 657, 666 (E.D.N.Y. 2013) (emphasis added). "Accordingly, pursuant to Rule 104 of the Federal Rules of Evidence, the court *must* examine the admissibility of plaintiff's expert testimony in ruling on defendant's motion for summary judgment." *Id.* (emphasis added). In addition, "[e]vidence contained in an expert's report … must be evaluated under [Rule 702] before it is considered in a ruling on the merits of a summary judgment motion." *Cacciola v. Selca Balers, Inc.*, 127 F. Supp. 2d 175, 180 (E.D.N.Y. 2001); *Capri Sun Gmb v. Am. Bev. Corp.*, 595 F. Supp. 3d 83, 119 (S.D.N.Y. 2022) ("Before turning to the merits of the parties' respective summary judgment motions, the Court addresses first the admissibility of certain expert opinions").

"While the district court has discretion in the *manner* in which it conducts its *Daubert* analysis, there is no discretion regarding the actual *performance* of the gatekeeper function." *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) (holding a district court's *Daubert* ruling inadequate where

there was "not a single explicit statement on the record to indicate that the district court ever conducted any form of *Daubert* analysis whatsoever"); (Scalia, J., concurring) (noting that the majority opinion "makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function"). "For purposes of appellate review, a natural requirement of the gatekeeping function is the creation of a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law." *Adamscheck v. Am. Fam. Mut. Ins. Co.*, 818 F.3d 576, 586 (10th Cir. 2016). "Performance of the gatekeeping function on the record [ensures] that a judgment in favor of either party factors in the need for reliable and relevant scientific evidence. It is not an empty exercise; appellate courts are not well-suited to exercising the discretion reserved to district courts." *Goebel*, 215 F.3d at 1088-89.

The district court below failed to perform its role as a gatekeeper to ensure that Defendants' expert report "both rests on a reliable foundation and is relevant to the task at hand," which requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 597; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (holding that the district court's gatekeeping function applies to all

expert testimony, whether based on scientific, technical, or other specialized knowledge). The district court below did not rule on the admissibility of either party's expert evidence, but rather ignored the parties' pending *Daubert* motions without any explanation or analysis. The District Court abused its discretion in failing to address the parties' pending *Daubert* motions. *See In re Pfizer Inc. Securities Litigation*, 819 F.3d 642, 658 (2d Cir. 2016) ("The 'gatekeeping' function under *Daubert* is fundamentally about 'ensur[ing] the reliability and relevancy of expert testimony,' and district courts may not stray from those goals.").

In the proceedings below, Appellants contended that Ms. Kerns' expert report and testimony was unreliable due to citing only "secondary sources from [the Atlantic State Marine Fisheries Commission] and not from … original scientific research." (See A1191-A1194). "Though courts have afforded experts a wide latitude in picking and choosing the sources on which to base opinions, Rule 703 nonetheless requires courts to examine the reliability of those sources." *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1223, 1244 (E.D.N.Y. 1985) (quoting *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983)). Ms. Kerns even admitted to only using secondary sources from ASMFC reports and not from the original scientific research and did not conduct her own independent research. Such expert methodology is flawed, and the district court

should first review the admissibility of Ms. Kerns' expert evidence. *See Moore v. Ashley Chem. Inc.*, 151 F.3d 269, 278 (5th Cir. 1998) (en banc) (approving district court's rejection of secondary source material support expert testimony where the expert "admitted that he did not know what tests [the secondary author] had conducted in generating the [secondary source material]" and reaching the conclusion proffered).

III. FAILURE OF THE DISTRICT COURT TO RULE ON THE PRIVILEGED DOCUMENTS WAS PREJUDICIAL TO APPELLANTS AND DENIED APPLELLANTS' DUE PROCESS:

Furthermore, from May 10, 2019, until the lower Courts' decision was entered on June of 2023, the court held in its possession the Appellees' alleged privileged documents. (See R. A983 ¶25- R. A984 ¶1-16) The District Court held on to the alleged privileged documents[4] for four (4) years without making a ruling which raises the question of whether any of those documents were relied on by the court in its determination that would prejudice the Appellants and deny due process. (See *Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 67-68 (1st Cir. 1984))

[4] The Appellees filed these documents redacted for public view and provided the unredacted documents for the district court to review *in camera* pursuant to Judge Kuntz order on April 15, 2019. The Appellants focus on the privileged documents in its Reply to the Appellees opposition contending that the lower Court disobeying his own order to rule on the privileged *documents in camera* had no effect. See Appellees argument on P. 47-48.

The Appellees' opposition papers only offer the unpersuasive argument that the Appellants did not identify the specific privileged documents that would raise issues of fact, knowing that the documents were completely redacted but for the privilege chart. The privileged chart contains numerous e-mails between the executives of NYSDEC, executive of New York State, and NYSDEC law enforcement, including emails to and from Commissioner Seggos. (See A36-A901)

Additionally, the lower Court Judge was in possession of these documents unredacted for four (4) years and both parties are unaware of how many of these documents the lower Court reviewed, and what it relied on in making the decision in this case. Appellees try to justify the District Court's failure to review these documents and downplay the extraordinary potential for prejudice because Appellees argue that "there is no indication here that any portion of the district court's holding improperly rested on privileged material." (See Appellees' Brief P. 47) This statement is unpersuasive and disingenuous as there is a statement on the record where Judge Kuntz states affirmatively that he will review these documents and even states that he will not appoint a magistrate and read the documents himself because he is a voracious reader. (See A929- A932) The order was followed by Appellees as they filed the log with a letter to the Judge confirming that order. (See A959) Litigants and attorneys must take Judges at their word and when they issue an Order everyone must comply or risk waiving their right to be

heard on the issues. Based on the logic of Appellees, the District Court can disobey its own order and rely on potentially privileged documents or disregard documents that were wrongfully held back in discovery as privileged, without allowing the party who contested the privileged designation to have the documents reviewed. By not knowing what the District Court Judge may have reviewed and relied on in his decision requires the appellate court to reverse and remand to ensure fairness to both parties and correct a violation of Appellants' due process. The lower Court Judge not only disregarded his own order by not deciding on the in-camera review of alleged privilege documents, but he also failed to decide the Daubert motions, both errors require reversal and remand.

IV. 25 USC SECTION 232 HAS SPECIFIC LANGUAGE TO PROTECT NATIVE FISHING RIGHTS AND APPLIES TO THE UNKECHAUG TREATY RIGHTS TO FISH:

The Appellees argument that the 25 U.S.C. § 232 is irrelevant, fails because it attempts to avoid the specific language in the statute that protects natives' rights to hunting, fishing and planting.

> *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing

> herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom:

25 U.S.C. § 233.

Although the statute confers criminal jurisdiction to New York State of New York State Indian Nations, this section limits New York State's authority to treaties that predate this statute. Appellees argue that the State's police powers over the fish and wildlife predate the enactment of 25 U.S.C §232 however NYSDEC arrests, and refers prosecution of NYSDEC regulations, to the District Attorney in New York State. The quasi-criminal enforcement of NYSDEC regulation against the Unkechaug which is partial basis of why the Unkechaug brought the lawsuit; because of the unlawful prosecution of Unkechaug fisherman, that violate years of traditional Native fishing. Contrary to Appellees argument that Unkechaug did not fish for eels until 2013, the Unkechaug have fished since time immemorial on eels and all life forms in the waters that encompass their customary fishing areas. Appellants presented two pictures as exhibits that are in the history book entitled The Unkechaug Indians of Eastern Long Island A History written by John A. Strong PHD, 2011, University of Oklahoma Press: Norman. (See A3082 picture of

projectile points found near Poospatuck Creek on the Unkechaug Reservation include stemmed, side-notched, and orient fish tail points from the Archaic Period (4000-1000B.C.) Courtesy of Veronica Treadwell, Treadwell family collection and A3083 Thomas Hill (188-ca. 1930) with eel spear and fishing equipment. The photo was taken by Francis Harper on April 2, 1910. A large net reel stands behind Hill on the left, and a "torch basket," used for fishing at night, stands to his right near the duck decoys. Courtesy of the Smithsonian Institution.) These photos prove Appellees are completely incorrect; this evidence proves that Unkechaug people have fished from the Archaic period to the present day. The expert report of Dr. Strong emphasized the acknowledgement and historical preservation through deeds and treaties that reserved the rights of Native peoples' to fish, hunt and plant since colonial times. The fishing, hunting, and planting rights were understood to be connected to native beliefs and religions and those acts of fishing hunting and planting were sacred. (A5489-A5535)

V. THE HISTORICAL RECORD SUPPORTS THE UNKECHAUG TREATY RIGHTS AND ITS FEDERAL RECOGNITION SINCE COLONIAL RULE OVER NEW YORK:

The Appellees argument that the Unkechaug Indian Nation is not entitled to treaty rights because it is not federally recognized, is unpersuasive because it is premised on a list created by the Bureau of Indian Affairs. The Opposition fails to include the various methods of obtaining "federal recognition", one of which is

through federal common law, achieved by the Unkechaug. (See *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009) The historical record of the Unkechaug goes beyond the first colonists but is well documented since that time. The Appellants presented to the lower court specific historical references to the federal government's recognition of the Unkechaug going back to the colonial period. This was also acknowledged in (*Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009) where the court found that the Unkechaug met the *Montoya v. United States 180 U.S. 261,21S.Ct.358(1901)* standards after a full hearing before Justice Matsumoto. Despite the Appellees position that the Unkechaug are not a federally recognized Indian Nation, it fails to acknowledge that the District Court recognized the Unkechaug as a Federal Indian Nation under federal common law. The hundreds of documents accepted by the court as evidence in the Gristede's case further proves the Federal relationship with the Unkechaug since colonial times. (*Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009 over 390 exhibits produced and admitted for Unkechaug) (Not unlike the office of the State Attorney General which traces its roots and organization back to the colonial period.) Ironically, Appellees, through their counsel at the office of attorney general and solicitor general of New York State, omitted and waived any opposition to the documentation submitted by Appellants at Summary Judgment of

New York State documents that acknowledge that New York State has routinely applied actions by the English Colony of New York in regard to the Unkechaug. And more significantly, New York State has followed the colonial actions concerning the Unkechaug and honored those treaties and transactions.

(See A5414-A5416 Hon. Henrick N. Dullea Director of State Operations and policy Management of New York, Robert Batson A5405-A5407, New York State Attorney General, Dennis C. Vacco A5411-A5412)

The New York State constitution Section 14 provides that colonial transactions survive statehood and shall continue to take effect. Statehood cannot abrogate a treaty see *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696-97 (2019)

Article VI of the U.S. Constitution includes treaties are the supreme law of the land and includes the Andros treaty. Courts have routinely upheld transactions that occurred prior to the formation of the United States as valid. 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 were 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 (1819) The Andros Treaty should also be deemed a contract protected under the Contract Clause of the U.S.

Constitution. The Contract Clause of the U.S. Constitution provides that no state shall pass any law impairing the obligations of contract. U.S. Const. art. 1, § 10. In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), the Supreme Court determined that the Contract Clause prevents a state from altering or amending terms in a private corporation's charter, unless the state's powers to amend was reserved in the charter itself or in a law to which it was original subject.

In the case, King George III granted Dartmouth College a charter in 1769, which established the College's governing structure, including a board of trustees. In 1816, the New Hampshire legislature attempted to alter the Dartmouth College charter in order to reinstate Dartmouth's deposed president and give the New Hampshire Governor authority to appoint members of the Dartmouth College board of trustees. The Supreme Court invalidated the New Hampshire law, holding that the Dartmouth College charter qualified as a contract in which the New Hampshire legislature could not interfere pursuant to the U.S. Constitution's contract clause. The same reasoning in *Dartmouth College* applies in this case, and the Andros Treaty should be treated as a contract under the U.S. Constitution.

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).

The Andros Treaty is recognized by the Federal Government as well. "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."

Appellees fail to address any of Appellants' points and case law and only rely on cases that are distinguishable, such as the Virginia state court that has no

binding authority over this case. According to the logic of Appellee's argument, that the government can pick and choose what charters, contracts, and agreements (such as in the Darthmouth case) apply while denying application of a treaty with an Indian Nation as not valid. The Unkechaug was recognized under federal common law based on its history and historical documentation from colonial time to present. The Unkechaug are recognized by New York State because of the "blanket acknowledgement" of colonial acts. Because this blanket acknowledgement extends to the existence of an Indian Nation it must also act as a blanket acknowledgement of those agreements. The federal government also acknowledged these acts by the inclusion of New York State into the union as Rep. Rockwell stated before committee.

VI. THE APPELLEES' OPPOSITION FALSELY STATES THAT THEUNKECHAUG SEEK EXCLUSIVE AND UNRESTRICTED FISHINING AND FISH MANAGEMENT:

The characterization by the Appellees that the Unkechaug wanted unrestricted fishing anywhere is plainly false. (See A26 Complaint) The testimony of Chief Wallace and the testimony and report of Dr. Strong provides specific points for fishing that were Unkechaug customary fishing areas on long island. (See Strong Dec. A5489-5491, A5531- A5533, A5534-A5535 Map, see Chief Wallace Dec. A5399-A5404, Chief Wallace Map A5484-A5485) The Courts' reference to Wallace deposition (SA24) contradicts Wallace's complete testimony

and affidavit limiting Unkechaug fishing to specific locations.(A5484-A5485 and A5399-A5404) These contradictions raise issues of fact. The district court cherry picked one deposition response by Chief Wallace and ignored the full testimony in conjunction with Dr. Strong's report and testimony that specifically limits the customary fishing areas of the Unkechaug and does not seek exclusive fishing rights. (See Strong Dec. A5489-5491, A5531- A5533, A5534-A5535 Map, see Chief Wallace Dec. A5399-A5404, Chief Wallace Map A5484-A5485) Furthermore, the Unkechaug fishing management plan claimed by the Appellees to give total control to the Unkechaug overfishing is mispresented because no one at the NYSDEC even read the management plan to make an informed opinion concerning the fish management plan. Appellees' statements of attempts to work with the Unkechaug are totally false. This action was commenced under the threat of prosecution of Chief Wallace by the assistant attorney general Hugh Lambert McLean directed and supervised by Commissioner Seggos. (Management Plan A4089-A4092)

VII. THE CONSERVATION NECESSITY CANNOT BE APPLIED BECAUSE IT IS ARBITRARY AND CAPRICIOUS AND IF APPLIED DISCRIMINATES AGAINST THE UNKECHAUG

Appellees' own expert admitted to flaws in its policies which prove the arbitrary and capricious nature of NYSDEC regulations prosecuted against Unkechaug.

1. All of the NYSDEC employees, executives and experts failed to review the Unkechaug management plan even though the Unkechaug reached out since 2013 to establish a co-management plan consistent with the Unkechaug Sovereignty and with NYSDEC Commissioner Policy -42 which is consultation policy between NYSDEC and Indian Nations to work with them because they understand the importance of fishing and hunting rights to Indians culture, religion, and treaties. (See A3206, A3210 CP-42, Unkechaug Management Plan A4104)

2. Appellees expert Ms. Kerns acknowledged that the methods used in the Unkechaug plan were effective and known methodologies. (A1440 P. 95 L. 14-L.21) The District Court failed to consider CP-42 and the management plan creating an issue of fact to deny summary judgment (Kuntz Decision SPA1-SPA40, Gilmore Dep. A4197-A4223, Florece Dep. A4224-A4263, Kreshik Dep. A4267-A4294, Berkman Dep. A4295-A4319, Commissioner Seggos Dep. A4320-A4343, See Pl Mem of Law SMJ A3117-A3136)

3. Kerns admitted that American Eels destroyed at any life stage was just as harmful to the American Eel species as dying young or old. There by illustrating the arbitrary capricious nature of the size limitation prosecuted against the Unkechaug. (See Pl SMJ Brief. A3109 and Kerns Dep. A4140 L. 4-L.10)(A4651-A4652)

4. Kerns also admitted that any recreational fisherman can catch 25 eels a day at a nine-inch minimum size and a party boat or charter boat can catch 50 eels at a given time. Ms. Kerns admitted that if a million people in New York State went to fish for 25 eels each over the 9-inch limitation that they could legally catch 25 million eels over 9 inches. (See Kerns Dep. A4139 P. 89 L.3-L.22) The illogical prohibition by NESDEC does not serve as a valid conservation measure.

The foregoing evidence was ignored by the Trial Court and was not adequately opposed by Appellees and this evidence creates an issue of fact requiring reversal of the lower Court decision.

VIII. APPELLEES' LAST-DITCH EFFORT TO CROSS-APPEAL BASED ON AFFIRMATIVE DEFENSES IS MERITLESS

Appellees failed to cross appeal and now rely on this Court to *sua sponte* overturn the lower Court ruling and dismiss the appeal based upon affirmative defenses that clearly do not apply. The District Court was correct on this portion of the decision because it did not require an examination of the record but simply an application of the law. The eleventh amendment cannot bar Appellants claims because *Ex parte Young* is applicable against Commissioner Seggos. Appellees use of *Idaho v. Coeur d'Alene Tribe of Idaho* , 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), and in *Western Mohegan Tribe & Nation v. Orange County* , 395 F.3d 18 (2d Cir. 2004) to bar *Ex Parte Young* are not applicable because the relief sought herein is not a quiet of title action it is a declaration of

prospective rights that are non-exclusive. See *Silva v Farrish*, 47 F4th 78 [2d Cir 2022].

Lastly, Res Judicata and Collateral Estoppel are not applicable for several reasons. *First*, the parties are not the same as the New York State case, the present case consists of additional parties. *Second*, the requested relief is different from the relief in the State case. *Finally*, the New York State case never reached the merits because the State and NYSDEC intentionally destroyed the American Eels in their possession. (See A3868-A3890 letter from Assistant Attorney General informing the Unkechaug that NYSDEC destroyed the fish hours prior to the scheduled joint parties release of the glass eels and colored photos of the States destruction) Due to the destruction of the glass eels under New York State law the Unkechaug could not litigate the merits and the only obtainable relief was money damages through the Court of Claims, an unscrupulous scheme planned and implemented by NYSDEC and permitted by the New York State Attorney General's office.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand the District Court's Decision.

Dated: April 15, 2024
New York, New York

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 6,990 words of text.

The brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2003, Times New Roman, Size 14.

Dated: Melville, New York
April 15, 2024

/s/ James F. Simermeyer