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

Plaintiffs,

-against-

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

Defendants.

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Case No. 18-CV-3648-GRB-SIL

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case is about the continued existence of the aboriginal fishing rights held by the Shinnecock Indian Nation and its members' efforts to continue exercising those non-exclusive rights in common with non-Natives in New York waters. Plaintiffs David Silva, Gerrod Smith, and Jonathan Smith (collectively, "Plaintiffs"), members of the Shinnecock Indian Nation—a federally recognized sovereign Indian tribe—hereby move for summary judgment on Count I of the Complaint seeking a declaration that their retained aboriginal fishing rights continue to exist in New York waters, and prospective injunctive relief against New York State officials to prevent the unreasonable interference with their retained aboriginal fishing rights. *See* Compl. ¶ 1, ECF No. 1, at 7 (Prayer for Relief); *Silva v. Farrish*, 47 F.4th 78, 83, 89 (2d Cir. 2022) (stating Plaintiffs' remaining claim for declaratory and injunctive relief).

Since time immemorial, the Shinnecock have occupied their aboriginal homelands on eastern Long Island, and they have never left. As recently explained by the U.S. Department of the Interior: "[T]he Nation has resided within its aboriginal territory since time immemorial and has never removed therefrom[.]" Letter from Bryan Newland, Assistant Secretary – Indian Affairs, Dep't of Interior to Lisa Goree, Chairwoman, Shinnecock Indian Nation (Jan. 2, 2025).[1] For thousands of years and prior to European contact, the Shinnecock have routinely fished the waters around Long Island for their sustenance, economic livelihood, and cultural and religious practices. But New York State, which regulates the ocean waters within three miles from the State's coastline,[2] has refused to recognize retained aboriginal Shinnecock fishing rights.

[1] A copy of this letter is attached to the Declaration of Joseph Plumer.

[2] 43 U.S.C. § 1312; *New York v. Atlantic States Marines Fisheries Comm'n*, 609 F.3d 524, 527 (2d Cir. 2010) ("The Atlantic seaboard states retain primary authority over the conservation and management of fisheries within the 'territorial sea'—waters within three miles of shore, as well as in river and estuaries. The federal government is responsible for regulation of the 'exclusive economic zone'—waters from three to 200 miles from shore."); *United Boatmen v. Gutierrez*, 429 F. Supp. 2d 543, 546 (E.D.N.Y. 2006).

From the beginning of European "discovery" of the Americas, respect for the Indian right of occupancy was part of the international law of nations and became part of the law of the United States. A bedrock rule of federal Indian law is that Indian tribes were not granted rights by the United States or any "discovering" sovereign, but rather hold such rights inherently. These rights "flow[] from a settled governmental policy" and do not depend on "any statute or other formal government action." *Cramer v. United States*, 261 U.S. 219, 229 (1923). In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the Supreme Court held "that discovery gave title to the [European] government … by whose authority, it was made," but that fee title is "subject only to the Indian right of occupancy" of lands they have occupied since before European arrival. *Id.* at 573-74. "The right to fish is one of the aboriginal usufructuary rights included within the totality of use and occupancy rights which Indian tribes might possess." *United States v. Michigan*, 471 F. Supp. 192, 256 (W.D. Mich. 1979), *aff'd in part and modified in part*, 653 F.2d 277 (6th Cir. 1981).

Controlling precedent holds that aboriginal rights *cannot* be extinguished absent some specific affirmative action by the sovereign manifesting a plain and unambiguous intent to accomplish that result. *E.g., United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346 (1941). Any "doubtful expressions" of a sovereign's intent to extinguish aboriginal rights are resolved in the Indians' favor. *Id.* at 354. Here, there is no indication, let alone a plain and unambiguous intent, by *any* sovereign—including Great Britain, the Colony of New York, or the United States—to extinguish aboriginal Shinnecock fishing rights in any manner whatsoever. Any grant or patent of lands possessed by the Shinnecock was made subject to the Indian right of occupancy, and does not extinguish aboriginal Indian rights. *E.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 546 (1832). All of Defendants' stated sources of extinguishment fall far short of the standard necessary to find a plain and unambiguous intent and an adverse act to extinguish Shinnecock fishing rights.

It is critical to recognize the specific scope of Plaintiffs' requested relief. Plaintiffs seek complementary rights: fishing rights based on the Shinnecock's aboriginal right of use and occupancy that has always been the counterpart of – and not the displacement of – sovereignty over the "discovered" territory. Plaintiffs are also *not* seeking to exclude non-Natives from fishing in New York waters. *Silva*, 47 F.4th at 85 n.7. Nor are Plaintiffs asking to be allowed to take as many fish as they can or would like to, or to fish without limits or regulations. Plaintiffs are asking that New York fishing regulations be revised to accommodate their retained aboriginal fishing rights: "If the plaintiffs succeed in obtaining their requested relief, at most the state would need to tailor its regulatory scheme to respect the plaintiffs' fishing rights." *Silva*, 47 F.4th at 86. The New York regulations as currently drafted make no accommodation for the fishing rights of the Shinnecock – specific rights to the New York fishery, different from those held in common by non-Natives – and that is why Plaintiffs are challenging them.

STATEMENT OF FACTS

A. Factual Background

1. Shinnecock Background and Fishing History.

The Shinnecock Indian Nation is a federally recognized Indian tribe located on eastern Long Island, New York. Pls' Statement of Facts ("SOF") ¶ 69, ECF No 127-1.[3] The Shinnecock Indian Nation is the only federally recognized tribe in New York State with lands directly abutting the Atlantic Ocean. The Shinnecock are amongst a small number of federally recognized Indian tribes in the United States that were never wholly displaced from their aboriginal homelands.

The Shinnecock have never left their ancestral homelands on eastern Long Island and they continue to occupy their homelands today. SOF ¶ 71; *see also* Dep't of Interior, Bureau of Indian

[3] For a full recitation of facts, Plaintiffs refer the Court to their Statement of Facts.

Affairs, *Summary Under the Criteria and Evidence for the Proposed Finding for Acknowledgment of the Shinnecock Indian Nation*, at 9 (Dec. 17, 2009), ECF No. 127-34 ("The evidence in the record indicates that there was a Shinnecock Indian tribe on the eastern end of Long Island in the early colonial period."); *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 492 n.2 (E.D.N.Y. 2005) ("[T]he Shinnecocks have inhabited a particular and defined territory, namely the Town of Southampton, since before the arrival of the Europeans.").

Fishing is and always has been the lifeblood of the Shinnecock. "[T]he Shinnecock have harvested fish and shellfish for centuries" in their traditional fishing areas. Beverly Jensen, Images of America: Shinnecock Indian Nation 15 (2015). "[T]he outstanding fact of ancient Shinnecock economics: that the sea furnished the greater part of their living." M.R. Harrington, Anthropological Papers of the American Museum of Natural History: An Ancient Village Site of the Shinnecock Indians 249 (1924) ("Anthropological Papers"). "The Shinnecock … were largely a fishing and whaling tribe. They had contact with the Algonquin tribes in Connecticut, travelling the Long Island Sound." U.S. Dep't. of Commerce, Economic Development Administration, Federal and State Indian Reservations: An EDA Handbook 307 (1971), ECF No. 127-15 at 6.

2. English Colonization of Eastern Long Island.

"Soon after Great Britain [became] determined on planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves." *Worcester*, 31 U.S. at 544. "When the British crossed the Atlantic, they brought with them their own legal understandings." *Haaland v. Brackeen*, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring). "[T]he British regarded 'the Indians as owners of their land.'" *Id.* (citation omitted). "Britian often purchased land from Tribes (at least nominally) and predicated its system of legal title on those purchases." *Id.* In 1640, the

first English colonists arrived on the eastern end of Long Island. Rebuttal Expert Report of Amalia Baldwin, ECF No. 127-4 ("Baldwin Report") at 7. Shortly after their arrival, English colonists sought land deeds from the Indians as the Dutch "were also founding towns on Long Island" and the deeds provided "an added acknowledgment of their right to the land." Dep. Tr. of Amalia Baldwin, ECF No. 127-7 ("Baldwin Tr.") at 41.

On December 13, 1640, English colonists negotiated with the Shinnecock for the first time for the purchase of Indian lands. SOF ¶ 130. In the transaction—referred to as the 1640 Deed to Southampton—the Shinnecock who were identified as "the native Inhabitants and true owners of the eastern part of the Long Island" granted land east of Canoe Place to the English colonists. *Id.*

From 1648 to 1662, English colonists acting *without* royal or sovereign authority, executed agreements with the Shinnecock and other Indian groups for the purchase of Indian lands, beach access, and more. SOF ¶¶ 150-73. Following the execution of these agreements, the Shinnecock continued to engage in fishing activities in the waters in and around Long Island. *Id.* ¶¶ 213-14.

In 1676, Governor Edmond Andros issued a patent to the Town of Southampton. SOL ¶ 193. In 1686, Governor Thomas Dongan issued a second patent to the Town of Southampton. *Id.* ¶ 195. The Dongan Patent was granted to 12 individual "freeholders and inhabitants of Southampton," and declared them as the Town's first trustees. *Id.* ¶ 196.

In 1703, in an attempt to put an end to land disputes, the Town of Southampton entered into a purported land cessation involving lands within the Shinnecock's territory, which included Shinnecock Hills. *Id.* ¶ 223. By its terms, the Shinnecock obtained a 1,000-year lease from the Town for 3,600 acres of land within its already reduced territory. *Id.* In return, the Town received a deed to the Nation's interest in the remainder of their aboriginal territory. *Id.* In 1859, the New York State legislature enacted a law purporting to convey all of the Nation's "right, title and

interest" in its lands to Southampton proprietors. *Id.* The federal government did not authorize the New York legislature to pass the 1859 Act. *Id.* ¶ 236.

3. Plaintiffs' Lawsuit.

This litigation already has a long and storied procedural history dating back to 2018. On June 22, 2018, Plaintiffs brought this suit against New York State Department of Environmental Conservation ("NYSDEC") officials; the NYSDEC itself; Jamie Greenwood, an Assistant District Attorney at the Suffolk County District Attorney's Office; and the Suffolk County District Attorney's Office. Compl. ¶¶ 2-10, ECF No. 1. Plaintiffs were previously cited and prosecuted in New York state courts for alleged violations of the New York Environmental Conservation Law while engaging in fishing-related activities. *Id.* ¶¶ 14, 16, 18-20.

Plaintiffs' Complaint asserts two counts: (1) declaratory and injunctive relief against Defendants' attempts to interfere with their "use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters," and (2) a claim under 42 U.S.C. §§ 1981 and 1982 of the Civil Rights Act for monetary damages for alleged discrimination by "Defendants for blocking Plaintiffs' participation in the elver eel market during the 2017 and 2018 seasons." *Id.* ¶¶ 1-2 (Prayer for Relief).

4. Initial Rulings.

Plaintiffs moved for a preliminary injunction to prevent interference with their use of waters and fishing activities. ECF No. 2. This Court issued initial rulings against Plaintiffs. It denied Plaintiffs' motion for preliminary injunction on the grounds, at that time, that it believed Plaintiff Silva failed to show a likelihood of success on the merits and that even if he had, abstention was required under the *Younger* abstention doctrine. ECF No. 48. The Court held that Plaintiffs Gerrod Smith and Jonathan Smith lacked standing. *Id.* at 11.

Defendants moved to dismiss Plaintiffs' Complaint. ECF Nos. 54, 56. Magistrate Judge Locke recommended dismissal, and Plaintiffs objected to the Magistrate's recommendation. ECF Nos. 63, 64. Defendants filed summary judgment motions. ECF No. 83, 84.

On May 27, 2020, Magistrate Judge Locke recommended that summary judgment be granted in Defendants' favor. ECF No. 89 at 19. Magistrate Judge Locke concluded that the *Younger* abstention doctrine precluded Plaintiff David Silva's claim for prospective relief, and Plaintiffs Gerrod Smith and Jonathan Smith lacked standing. *Id.* at 21, 26-29, 29 n.19. Magistrate Judge Locke also recommended that Plaintiffs' discrimination claim for monetary damages for being blocked out of the eel market failed to state a claim. *Id.* at 31-33. On February 17, 2021, this Court adopted the Magistrate's report and recommendation "in its entirety." ECF No. 96 at 6. Plaintiffs timely appealed this Court's dismissal of the case. ECF No. 98.

5. Second Circuit's Decision.

On August 25, 2022, the Second Circuit reversed this Court's dismissal of Plaintiffs' claim for declaratory and injunctive relief against NYSDEC officials. *Silva*, 47 F.4th at 78. The court held that "*Ex parte Young* applies to the plaintiffs' fishing-rights claims … because the plaintiffs alleged an ongoing violation of federal law and seek prospective relief against state officials." *Id.* at 82. The Second Circuit fully dismissed Plaintiffs' Count II in their Complaint brought under 42 U.S.C. §§ 1981 and 1982 of the Civil Rights Act seeking monetary damages for allegedly being blocked out of the eel market during the 2017 and 2018 seasons. *Id.* at 90.[4] Thus, the only remaining Defendants are NYSDEC officials. *Id.* at 81 n.4.

On appeal, Defendants relied on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and *Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004), to

[4] Defendants agree that Count II seeking monetary damages based on alleged discrimination is "no longer at issue in this case" and "has been dismissed in its entirety." Defs' Answer ¶¶ 1,16, ECF No. 100.

contend that *Ex parte Young* "does not apply when, as here, plaintiffs seek to divest the state of regulatory jurisdiction over public land and navigable waters, and effectively impinge on the State's sovereign exercise of fee title in such land and waters." State Defs' Br. at 2, *Silva v. Farrish*, 47 F.4th 78 (2d Cir. Sept. 29, 2021) (No. 21-0616).

The Second Circuit determined that *Coeur d'Alene* and *Western Mohegan* are inapposite to this case as Plaintiffs' request for declaratory and injunctive relief "would not transfer ownership and control of the Shinnecock Bay from the state to an Indian tribe." *Silva*, 47 F.4th at 85. The court explained that Plaintiffs' requested relief would "merely resolve" their claim that they have a "right to fish" and said their claim "seeking prospective relief against the DEC officials fall[s] within the *Ex parte Young* exception to state sovereign immunity." *Id.* at 85-86. The Second Circuit remanded the case "for further proceedings consistent with th[e] opinion." *Id.* at 89.

6. Remand Proceedings.

On remand, the parties engaged in fact and expert discovery. SOF ¶ 33. Plaintiffs designated Dr. John Strong to serve as an expert historian. *Id.* ¶ 34. Defendants designated Amalia Baldwin to serve as a historical witness and John Maniscalco, Jr. to serve as a fishery conservation expert focused on the American eel. *Id.* ¶ 41.[5]

STANDARD OF REVIEW

"Summary judgment, pursuant to Rule 56, is appropriate only where the movant 'shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Schanker & Hochberg, P.C. v. Berkley Assurance Co.*, 589 F. Supp. 3d 281, 289 (E.D.N.Y. 2022) (quoting Fed. R. Civ. P. 56(a)). "The relevant governing law in each case

[5] Plaintiffs filed fully briefed motions to strike portions of Ms. Baldwin's expert report and the entirety of Mr. Maniscalco's expert report. SOF ¶ 47. The Court denied the motions, finding that "as the issues are more appropriately addressed at trial, if the challenged statements are offered, the motions are denied." *Id.* ¶¶ 48-49.

determines which facts are material; '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

ARGUMENT

I. Under Well-Settled Federal Indian Law Principles, the Shinnecock Indian Nation Continues to Hold Aboriginal Fishing Rights in New York Waters That May Be Exercised by Its Members.

To resolve Count I, this Court need only apply well-settled federal Indian law principles regarding aboriginal rights based on the Indian right of use and occupancy, as is true as a matter of law and undisputed fact. The dispositive question here is: whether aboriginal Shinnecock fishing rights based on the Indian right of use and occupancy exist, and whether such fishing rights have been extinguished by a sovereign's exercised clear and unambiguous intent and complete dominion adverse to Shinnecock fishing rights. Put simply, aboriginal Shinnecock fishing rights, and such rights have not been extinguished by any sovereign in any manner whatsoever.

A. Bedrock Legal Principles Governing Aboriginal Indian Rights.

It has been long recognized that "the Indians as tribes or nations, have been considered as distinct, independent communities, retaining their original, natural rights as the undisputed possessors of the soil, from time immemorial." *Holden v. Joy*, 84 U.S. 211, 244 (1872). "When Europeans arrived on the North American continent, hunting, fishing, and trapping, and gathering were vital to Indian life." Cohen's Handbook of Federal Indian law § 18.01, at 1154 (Nell Jessup Newton ed., 2012). Such activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905).[6]

[6] *Winans* establishes that that treaties and agreements with Indian tribes are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." 198 U.S. at 381. "Under Winans, … Indians retain whatever rights they possess which are not relinquished by treaty or taken by Congress." *Michigan*, 471 F. Supp. at 258.

In *Johnson v. M'Intosh*, a foundational federal Indian law case, the U.S. Supreme Court explained that a discovering sovereign acquired fee title "against all other European governments," but that "the original inhabitants" remained "the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion." 21 U.S. at 573-74. The discovering sovereign took title "subject … to the Indian right of occupancy." *Id.* at 584-85. The Court reviewed the law of all the sovereigns that had claimed territory within North America—England, Holland, France, and Spain—and explained that the law of "discovery" was "universal[ly] recogni[zed]." *Id.* at 573-74.

Under the law of discovery, the so-called discoverers "asserted the ultimate dominion to be in themselves" on lands, subject to the Indian right of occupancy. *Id.* at 574; *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 493 (1967) (stating the "consensus of the whole western world" that discovery was always subject to the Indian right of occupancy, and citing Supreme Court cases holding so with respect to the original 13 states, Louisiana Purchase, Mexican Cession, Florida, Oregon, and Alaska). The discoverer's fee title "asserted a title against Europeans only, and [was] considered as blank paper, so far as the rights of the natives were concerned." *Worcester*, 31 U.S. at 546. The discovery gave the sovereign only an "ultimate revision in fee," *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 756 (1835), subject to the Indians' "perpetual right of possession … considered as sacred as the fee-simple of the whites," *id.* at 745-46. The Supreme Court has emphasized that the Indian "occupancy of the land is not less valuable than full title in fee." *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938).

In *Mitchel*, the U.S. Supreme Court elaborated on aboriginal rights and the doctrine of the Indian right of occupancy in holding that a sale of Indian land that occurred with both the consent

of Spain, the sovereign at the time, and the Creek and Seminole Indians who agreed to the sale of land. The Supreme Court described the broad scope of the Indian right of occupancy:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and from their own purposes were as much respected until they abandoned them, made a cession to the government, or an authorized sale to individuals.

34 U.S. at 746. Until a sovereign affirmatively extinguishes aboriginal rights in an adverse manner, such "rights are superior to those of third parties, including the states." *People of Village of Gambell v. Clark*, 746 F.2d 572, 574 (9th Cir. 1984). "Aboriginal rights based on occupation and use are entitled to the protection of federal law even when they are not formally recognized as ownership by treaty or statute." *Id.* Aboriginal rights based on the Indian right of occupancy are inherent and "flow[] from a settled governmental policy," and do not require any affirmative sovereign recognition through a "statute or other formal governmental action" to exist. *Cramer*, 261 U.S. at 229; *Santa Fe Pac.*, 314 U.S. at 347 ("Nor is it true … that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action."); *Native Village of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012) ("Aboriginal rights don't depend on a treaty or an act of Congress for their existence.").[7]

B. Plaintiffs Have Established Aboriginal Shinnecock Fishing Rights.

Aboriginal rights are established with "actual, exclusive, and continuous use and occupancy 'for a long time.'" *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 900 (1967). The legal meaning of each of these elements – *i.e.*, that the area is used and occupied, that it is used exclusively, and that it is used for a "long

[7] The rebuttal report of Defendants' historical expert rested on the false premise that aboriginal rights require formal governmental action to exist. *See* Baldwin Tr. at 18 ("The conclusion of my report is that there is no document retaining an aboriginal right for the Shinnecock to fish in Shinnecock Bay."). Such a concept is antithetical to tribes' inherent sovereignty and the rights that flow with it.

time" – has been clearly established, most notably through decades of application by the U.S. Claims Court and the Indians Claims Commission, the tribunals that handled aboriginal rights cases. The undisputed facts in this case clearly show the existence of aboriginal Shinnecock fishing rights since time immemorial.

1. The Shinnecock's Long-Term Use and Occupancy of Long Island Waters is Sufficient to Establish Aboriginal Fishing Rights.

Under the first element, a court looks to a tribe's customs and ways of life to determine whether an area in question was "used" by the people. "Use and occupancy" means "use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." *Sac & Fox Tribe*, 383 F.2d at 998; *Mitchel*, 34 U.S. at 746 ("[T]heir hunting grounds were as much in their actual possession as the cleared fields of the whites."); *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1156 (10th Cir. 2015) (stating that the Indian right of occupancy "covers lands used by the Indians in their daily lives as hunters and gatherers as well as lands on which they actually resided").

"Use and occupancy" is not limited to the villages where a tribe's ancestors actually resided: "[T]he 'use and occupancy' … essential to the recognition of Indian title does not demand *actual* possession of the land, but may derive through intermittent contacts … which define some general boundaries of the occupied land." *United States v. Seminole Indians of Fla.*, 180 Ct. Cl. 375, 385 (1967) (emphasis in original). The Court of Claims explained that "[h]ad the Seminoles chosen to live by food-raising alone, we would regard the 'village' evidence … [as] persuasive … in limiting the Seminoles' 'title' to the land falling within … their permanent homesites, … [b]ut the Seminoles … survived … by food-gathering and hunting as well …. Seminole land-use clearly encompassed more than the soil actually 'possessed.'" *Id.* at 384. Given this standard, the court concluded that the Seminole "used" the entire Florida peninsula. *Id.* at 386.

In accordance with this standard, Shinnecock use and occupancy is viewed through the lens of the Shinnecock culture. The Shinnecock are a people possessing a maritime culture who have historically depended on fish and marine resources for their sustenance, culture, and traditional and religious practices since time immemorial. The maritime orientation of eastern Long Island has remained unchanged. Expert Report of Dr. John A. Strong, ECF No. 127-38 ("Strong Report") at 3. The first evidence of Shinnecock fishing in the waters around Long Island is found in the late Archaic Period dating back to at least 1,000 B.C. Dep. Tr. of John A. Strong, ECF No. 127-6 ("Strong Tr.") at 85.

The first mention of the Shinnecock in the colonial records appears to be made by Issack de Rasieres sometime around 1628, noting Shinnecock's dependence on maritime resources and their making of a product harvested from the creeks and bays. Strong Report at 5; SOF ¶ 78. By the time the first English settlers arrived in present-day Southampton, New York, the Shinnecock fished and used the waters in and around Long Island, for cultural purposes, sustenance, and trade. SOF ¶ 79-108.

The history of the Town of Southampton in its own records states that when the first English settlers arrived "it appears that the whole extent of what is now the town of Southampton was owned by the Shinnecock tribe of Indians, who were divided into many small bands, and were living in villages that were without exception situated near the different creeks or branches of the bays." The First Book of Records of the Town of Southampton with Other Ancient Documents of Historic Value at II (John H. Hunt, Book and Job Printer 1874) ("Southampton Records Book"). Defendants' historical expert agrees that the Shinnecock "lived in small villages scattered on the south fork of eastern Long Island" and the "villages were concentrated along streams, bays, and tidal estuaries, and people moved from place to place to take advantage of seasonal or local

abundance of resources." Baldwin Report at 4. The close proximity to the ocean waters to access fishing and marine resources made it an ideal place for the Shinnecock. Strong Tr. at 87.

Fishing was necessary for the Shinnecock's survival on Long Island. *Id.* at 87-88. Fish and marine resources provided the Shinnecock with a consistent and adequate food supply in comparison to hunting animals. *Id.* at 88; William Wallace Tooker, Some Indian Fishing Stations Upon Long Island 12 (1901) ("[T]he waters afforded a more abundant and more certain food supply for the natives than could be obtained by their precarious methods of hunting, or by their crude processes of agriculture."); James Truslow Adams, History of the Town of Southampton, East of Canoe Place at 27 (1918) (for the Shinnecock, "fish … formed a large part of their diet").

Experts on both sides agree that archeological evidence shows the Shinnecock occupied lands on the eastern end of Long Island long before the arrival of the first English colonials, and that the Shinnecock have fished and used the marine resources in Long Island waters as far as history goes back. *See* Strong Report at 2-4 (discussing archaeological evidence of early Shinnecock presence on Long Island and fishing activities since time immemorial); Strong Tr. at 88-90 (discussing archaeological records regarding Shinnecock's fishing history as reflected in their culture, religion, and traditional practices); Baldwin Report at 1 (admitting the "historical and cultural importance of marine resources to the Shinnecock Nation"); Baldwin Tr. at 25-27 (acknowledging that the "Shinnecock have been [on Long Island] for thousands of years" and "made use of the full environment available there" and that "archeological evidence points to [the Shinnecock] having used the marine resources as well as the land resources for as far back as we can go," and stating "[i]t was clear to me from my research that the Shinnecock peoples have a long, as far back as we can go, history of using marine resources…. I think that's something that the historical records support"); Baldwin Report at 4 (stating that "archaeological and

ethnohistorical evidence indicates that [the Shinnecock] lived on Long Island subsisting on the natural resources … available on the island"). As Dr. Strong explained, the archaeological evidence reveals "a pattern of dependence on products from the maritime environment that explains why [the Shinnecock] never left the area and why their descendants never intended to leave." Strong Report at 29. The Shinnecock taught the English colonists their native fishing practices and the value of Long Island's marine resources. Strong Tr. at 94-95.

In 1902, Mark Harrington for the American Museum of Natural History in New York conducted "the first attempt to study in detail any of the aboriginal village sites on the eastern end of Long Island," which belonged to the Shinnecock. Harrington, Anthropological Papers at 231. Mr. Harrington endeavored to uncover "the material side of the life of the Indians who inhabited this village, and to give a glimpse of their arts and crafts, their dwellings, and the means by which they gained their livelihood." *Id.* Mr. Harrington and his associates dug around Sebonic Creek and in Shinnecock Hills, locating five sites along the west bank of the creek from its source in a series of springs northward to the tidal wetlands and on into Peconic Bay. *Id.* at 234.

As a means of sustenance, Mr. Harrington observed, "oysters, hard clams, soft clams, and scallops constituted the whole of the ocean's contribution, for the refuse layers and pits yielded crumbling bony plates once forming the armer of huge sturgeons, while the teeth of sharks, the bones, and sometimes the scales of other fish, most of them beyond precise identification, together with the claws of crabs, show that the Shinnecock made good use of all the edible creatures the local waters afforded." *Id.* at 250-51. Mr. Harrington explained that the close distance to the Atlantic Ocean made the "region attractive to the Indian[s], supplementing its natural advantages of good springs of water, proximity to the ocean and to nearly land-locked bays furnishing the best

of fishing and numerous clams and oysters, a nearby forest which must have abounded in game, and convenient fertile tracts suitable for cultivation." *Id.* at 233.

The federal government has also affirmatively supported the Shinnecock's fishing activities and use and occupancy of Long Island waters. In the 1970s, the Shinnecock received financial support from the federal government to support its oyster farm as well as send four Shinnecock tribal members to attend the Lummi Indian School of Aquaculture in Washington State to study the operation of one of the largest oyster/fish producing hatcheries in the country. SOF ¶¶ 237-242. When the Shinnecock tribal members returned, the Shinnecock's governing body turned to the American Indian Development Association for help to organize Shinnecock's own tribal facility, the Shinnecock Tribal Oyster Project "to research the possibility of replenishing Shinnecock Bay." *Id.* ¶ 239. Between 1977 and 1978, the Shinnecock constructed a small hatchery and launched oyster trays into the tribal waters in Heady Creek on the southeast border of the reservation. *Id.* ¶ 240. It was the first such facility in the Town of Southampton. *Id.*

Because the historical record clearly demonstrates that the Shinnecock have used and occupied the waters around Long Island for fishing since time immemorial, Plaintiffs have, as a legal matter, satisfied the long-term use and occupancy requirement of establishing aboriginal rights. *See Alabama-Coushatta Tribe of Texas v. United States*, No. 3-83, 2000 WL 1013532, at *39-42 (Fed. Cl. June 19, 2000) (holding that "period of thirty years" satisfies "the 'long time' requirement"); *Seminole Indians*, 180 Ct. Cl. at 387 (holding that use for "more than 50 years" is sufficient to establish long-term use).

2. Plaintiffs Establish Exclusive Shinnecock Use of New York Waters.

Plaintiffs also satisfy the historical "exclusivity" element of establishing aboriginal fishing rights as it relates to the waters in and around the Town of Southampton, including Shinnecock

Bay, Great Peconic Bay, and surrounding waters as well as the ocean waters within New York's 3-mile jurisdictional boundary. "Exclusivity is established when a tribe or a group shows that it used and occupied the land to the *exclusion* of other Indian groups" historically. *Native Village of Eyak*, 688 F.3d at 624. The area of the aboriginal rights need only be defined by general boundaries. *Upper Chehalis Tribe v. United States*, 155 F. Supp. 226, 229 (Ct. Cl. 1957) (explaining that tribal claimants do not have to define the claim area with surveyor-like precision, but rather "some general boundary lines of the occupied territory must be shown") (citation omitted).

Courts take a "liberal approach" in weighing limited historical evidence regarding occupancy and exclusive use. *Nooksack Tribe of Indians v. United States*, 3 Ind. Cl. Comm. 492, 499 (1955);[8] *Muckleshoot Tribe v. United States*, 3 Ind. Cl. Comm. 669, 677 (1955) (stating that, because "it is extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation," courts must "take a common sense approach" when evaluating exclusivity); *Snake or Piute Indians v. United States*, 112 F. Supp. 543, 552 (Ct. Cl. 1953) (stating that "exclusive possession and occupancy can only be inferred" because it is difficult to prove "as of a date too remote to admit testimony of living witnesses"). Because the territory at issue here is comprised of water, boundaries can be described by the limited landmarks available, namely the scope of New York's now-existing 3-mile regulatory jurisdictional boundary.

There is no dispute that the Shinnecock have historically exclusively occupied and used the waters around Southampton to the exclusion of other Indian groups. As Defendants' historical expert explained, "[t]he peoples who came to be identified as Shinnecock generally lived between the peoples who came to be known as the Montauketts (on the eastern end of the southern fork of

[8] The decisions of the Indian Claims Commission are available at https://library.okstate.edu/search-and-find/collections/digital-collections/indian-claims-commission-decisions. For the Court's convenience, each decision cited herein is also attached to the Declaration of Joseph Plumer.

Long Island) and the Unkechaugs (who spanned the island west of the forks)." Baldwin Report at 4; Southampton Records Book at II (explaining that, when the English colonists arrived, the "whole extent of what is now the town of Southampton was owned by the Shinnecock tribe of Indians"); *Shinnecock Indian Nation*, 400 F. Supp. 2d at 492 n.2 ("[T]he Shinnecocks have inhabited a particular and defined territory, namely the Town of Southampton, since before the arrival of the Europeans."); 1640 Deed to Southampton, ECF No. 126-12 (recognizing the Shinnecock as "the native Inhabitants and true owners of the eastern part of the Long Island").

Furthermore, the Shinnecock also have, within the meaning of the legal test, exclusively used and occupied the waters around Long Island within New York State's now-existing 3-mile jurisdictional boundary, despite some, common use of such waters with other tribal villages. The Court of Claims has acknowledged "on several occasions, that two … or more tribes … might inhabit a region in joint and amicable possession without destroying the 'exclusive' nature of their use and occupancy, and without defeating Indian title." *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975); *see id.* at 1395 ("There are no holdings of this court which say that two Indian tribes or groups, each a separate 'entity' and each with its own separate lands, can never assert joint ownership to other lands which are commonly used and occupied in addition to the common areas.").

Historically, the Shinnecock and other native villages on Long Island had close cultural and political ties to one another and consistently used the waters in and around Long Island as a common resource. Strong Tr. at 101. As explained by Defendants' historical expert, the Shinnecock "spoke an Eastern Algonquian language and were culturally and linguistically

affiliated with other villages located" in the region. Baldwin Report at 4.[9] Ms. Baldwin further stated that "[t]he eastern Long Island Indigenous villagers had close family and political ties to other villages in the region with whom they traded, intermarried, and united for protection." *Id.*[10]

Indeed, there was even some political overlap between the tribal communities. For example, while a leader of the Montaukett, Sachem Wyandanch also represented the Shinnecock. Strong Tr. at 52. Wyandanch "repeatedly worked with local sachem Mandush" on matters and "earn[ed] him greater credentials in the negotiations and land sales that followed." Baldwin Report at 9. Ms. Baldwin explained that scholars "generally agree that Wyandanch was an important cultural intermediary who no subsequent leader was able to replace." *Id.* at 10. In 1648, the four sachems of the Shinnecock, Montaukett, Corchaug, and Manhansett negotiated the 1648 Deed to East Hampton involving the sale of an approximately 30,000-acre tract of land to an English consortium. These four sachems all had "related family structures." Strong Tr. at 43-44.

The common use of fishing waters in and around Long Island by the Shinnecock and other tribal villages is legally sufficient to establish exclusive use in waters within New York's now-existing 3-mile jurisdictional boundary. This is analogous to cases in which common areas used by multiple tribal villages who each are a landholding entity was determined to "exclusive" use of the common areas – regardless of the fact that each village occupied lands of its own. *See e.g., Muckleshoot Tribe*, 3 Ind. Cl. Comm. at 674-75 (recognizing aboriginal rights where Indians in an

[9] *See also* James Truslow Adams, History of the Town of Southampton, East of Canoe Place 22 (1918) (stating that all tribal villages on Long Island historically "belonged to the great Algonquin family, the most widely extended of all the aboriginal stocks, and differed so little among themselves as almost to be considered bands rather than tribes").

[10] *See also* Faren R. Siminoff, Crossing the Sound: The Right of Atlantic American Communities in Seventeenth-Century Eastern Long Island 16-17 (2004) (discussing archeological evidence pointing to "common cultural and political links" of the native communities located on eastern Long Island "divided into four apparently separate but related communities commonly known as the Shinnecocks, the Montauketts, the Curchaugs, and the Manhassets" and who all "resided in small, scattered villages united by family and geographic ties, as well as by shared common cosmological beliefs"); John A. Strong, The Montaukett Indians of Eastern Long Island 6 (2001) (stating that Long Island native communities "spoke languages with a common Algonquian root, lived in small settlements linked by extended kinship systems, and shared a common belief system").

area "consisted of separate, distinct and autonomous villages, each such village or settlement having the exclusive use (in the sense that members of other villages could use same only with the permission of the permanent occupants thereof) of their village settlement area" and "fishing waters were used in common by the occupants of all the villages"); *Suquamish Tribe v. United States*, 5 Ind. Cl. Comm. 158, 164 (1957) (recognizing aboriginal rights where villages "spoke a common dialect and had a common culture, and they shared gathering, fishing, and hunting areas"); *Upper Skagit v. United States*, 8 Ind. Cl. Comm. 492, 497 (1960) (recognizing aboriginal rights where villages "extracted their principal sustenance from the same areas").

II. Aboriginal Shinnecock Fishing Rights Have Not Been Extinguished.

Aboriginal rights do not require any affirmative act of a sovereign for their continued viability. *See Santa Fe Pac.*, 314 U.S. at 347; *Pueblo of Jemez v. United States*, 63 F.4th 881, 890 (10th Cir. 2023). Once established, aboriginal rights continue to exist "until extinguished or abandoned." *Lipan Apache Tribe*, 180 Ct. Cl. at 492; *Oneida Cnty. v. Oneida Indian Nation*, 414 U.S. 661, 667 (1974) (explaining that the Indian right of occupancy is "good against all but the sovereign, could be terminated only by sovereign act"); *Pueblo of Jemez*, 63 F.4th at 891 (stating that abandonment of the Indian right of occupancy "must be voluntary").

A. Shinnecock Fishing Rights Have Not Been Abandoned.

It is undisputed that the Shinnecock never abandoned their aboriginal homelands on the eastern end of Long Island. Strong Tr. at 85-86; *Shinnecock Indian Nation*, 400 F. Supp. 2d at 490 ("[T]he Shinnecock Tribe occupies the same territory where it was found by European settlers in 1640."). Nor is there any suggestion that the Shinnecock ever voluntarily relinquished their aboriginal fishing rights. Strong Tr. at 119-120 (discussing the lack of any historical documents in which the Shinnecock clearly agreed to give up or relinquish their fishing rights); Decl. of John

Strong ¶ 9 ("Through my over 50 years of research, I have not identified any agreement, transaction, or other arrangement throughout history in which the Shinnecock were a party and agreed in clear and plain terms to give up or relinquish their fishing rights."); Baldwin Tr. at 26 (Defendants' historical expert explaining her understanding the Shinnecock never left their homelands on Long Island); Baldwin Tr. at 53, 60, 73, 80 (Defendants' historical expert explaining her understanding that the Shinnecock did not stop fishing even after colonial era deeds, the Nicholls Determination of 1666, the Andros and Dongan Patents, and the 1703 Lease were all executed).

B. Shinnecock Fishing Rights Have Not Been Extinguished by a Plain and Unambiguous Sovereign Act.

The only remaining question is whether any sovereign with such authority ever extinguished Shinnecock fishing rights by a "plain and unambiguous" act. *Santa Fe Pac.*, 314 U.S. at 346-47. The answer is no. Controlling U.S. Supreme Court precedent confirms that aboriginal rights cannot be extinguished absent some specific affirmative action by the sovereign manifesting a clear and unambiguous intent to accomplish that result.

Any "doubtful expressions" of a sovereign's intent to extinguish the Indian right of occupancy are to be resolved in favor of the Indians "who are wards of the nation and dependent wholly upon its protection and good faith." *Santa Fe Pac.*, 314 U.S. at 354. The U.S. Supreme Court has reaffirmed that extinguishment of the Indian right of occupancy "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefit of that policy." *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 248 (1985) (citations omitted); *Lipan Apache Tribe*, 180 Ct. Cl. at 492 ("[T]he actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a clear and plain indication in the public records that the sovereign intended to extinguish all of the rights in their property, Indian title continues.").

Importantly, only the so-called "discovering" sovereign can extinguish aboriginal Indian rights, which was "first the discovering European nation and later the original States and the United States." *Oneida*, 414 U.S. at 667. During the colonial era, Great Britain held the right of extinguishment of Indian aboriginal rights. *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1150 (2d Cir. 1988). In 1644, the "Towne of Southampton" was accepted into the jurisdiction of the British Colony of Connecticut. Baldwin Report at 8. In 1664, Long Island became part of the British Colony of New York. *Id.* at 10. In 1781, with the adoption of the United States' Articles of Confederation, the United States became the sovereign with exclusive authority over Indian affairs, which granted Congress the "sole and exclusive right and power of … managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." Articles of Confederation of 1781, art. IX, para 4.

"With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida*, 470 U.S. at 234.[11] The first Congress also understood its Indian-affairs power to encompass all relations with Indians. It passed the Non-Intercourse Act of 1790, which prohibited any transfer of title to Indian lands to any person or state "whether having the right of pre-emption to such lands or not" unless consented to by the federal government. Act of July 22, 1790, § 4, 1 Stat. 137 (1790); *Oneida*, 470 U.S. at 245 (the Non-Intercourse Act "merely codified the principle that a sovereign act was required to extinguish aboriginal title").

In sum, Defendants do not reference any affirmative act by Great Britain or the United States, or even by Britain's Colony of New York, that purports to extinguish the aboriginal

[11] The fact that the United States "never held fee title to the Indian lands in the original States … did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida*, 414 U.S. at 670.

Shinnecock fishing rights in a clear and unambiguous manner. Rather, Defendants invite this Court to find extinguishment of Shinnecock fishing rights in vaguely-worded historical documents that are completely silent about Shinnecock fishing rights, that address fee title ownership to lands in and around the Town of Southampton, and that deal with mere regulatory authority over public waters and marine resources. The colonial era deeds all pertain to landlocked areas, and do not encompass any ocean waters, let alone extinguish Shinnecock fishing rights in any ocean waters. All of Defendants' stated sources of extinguishment are distractions and fall far short of the standard necessary to find a plain and unambiguous extinguishment of tribal rights—including aboriginal fishing rights—by a "discovering" sovereign.

1. The 1640 Deed Did Not Extinguish Shinnecock Fishing Rights.

The Deed to Southampton dated December 13, 1640 did not cede or extinguish aboriginal Shinnecock fishing rights in the ocean waters in and around Long Island. The 1640 Deed purported to convey from the Shinnecock to English colonists title to *lands* bounded on the west by "the place where the Indians hayle over their canoes out of the North bay to the south side of the Island," *i.e.*, Canoe Place. ECF No. 127-19 at 13. The area encompassed within the 1640 Deed is landlocked, as the boundaries end at the water: "all the lands lying eastward between the forsaid bounds by water, to wit, all the lands lying eastward between the foresaid bounds by water, to wit, all the land pertaining to the partyes aforesaid." *Id.*; *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 197 (E.D.N.Y. 2007), *vacated*, 686 F.3d 133 (2d Cir. 2012) ("Only lands located to the east of Canoe Place are described in the 1640 Deed."). The 1640 Deed does not encompass the waters in the Shinnecock Bay estuary, or any ocean waters.[12]

[12] To the extent that the 1640 Deed encompasses *any* waters by its reference to "all lands, woods, waters," this would be limited in geographic scope to the fresh waters actually encompassed within the 1640 Deed area. Certainly, this would not include any ocean waters or the Shinnecock Bay estuary *not* encompassed within the 1640 Deed area.

Even if its geographic scope covered ocean waters, the 1640 Deed does not mention fishing rights, and it cannot as a matter of law operate to extinguish Shinnecock fishing rights by silence. The extinguishment of aboriginal rights cannot be "lightly implied" and any "doubt whether" whether such rights are "validly extinguished … [must] be resolved in favor of the Indians." *Pueblo of Jemez*, 790 F.3d at 1162 (quoting *Santa Fe Pac.*, 314 U.S. at 354).

In Defendants' expert's view, the 1640 Deed "did not reserve access to fishing," and thus those rights can no longer exist. Baldwin Report at 39. This conclusory opinion fails entirely. As noted above, aboriginal rights do not originate in any treaty, agreement, or other governmental act, but rather exist inherently. *See Santa Fe Pac.*, 314 U.S. at 347; *Cramer*, 261 U.S. at 229. In a mirror to this concept, and consistent with the requirement that the "discovering" sovereign must be clear and plain when it extinguishes aboriginal rights, there is also no requirement that aboriginal Indian rights be expressly retained in explicit language in any agreement or other historical document to continue to exist. *Lipan Apache Tribe*, 180 Ct. Cl. at 492 ("[A]boriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival" and "[o]nce established in fact, it endures until extinguished or abandoned"); *Johnson*, 21 U.S. at 592 (the Indian right of occupancy is "entitled to the respect of all Courts until it should be legitimately extinguished"). The 1640 Deed thus does nothing to support Defendants' flawed extinguishment argument.

2. None of the Deeds From 1648 to 1662 Extinguished Shinnecock Fishing Rights.

No other colonial era deed or agreement from the 17th Century—including the 1648 Deed to East Hampton, the 1658 Deed to Beach, the 1659 Quogue Purchase, and 1662 Topping Purchase—ceded or extinguished Shinnecock fishing rights. Defendants do not point to any language in any of these deeds purporting to cede or extinguish Shinnecock fishing rights. Rather,

these deeds reflect the Shinnecock's intent "to preserve access to the land and waters they depended upon for their livelihood." Strong Report at 12. These deeds contain language indicating the Shinnecock's intent to retain their ability to fish and use marine resources as their people had done since time immemorial.[13] Moreover, these deeds from the 17th Century were executed on behalf of private individuals, all of whom acted *without* sovereign or royal approval. Strong Tr. at 46, 51, 59, 60, 64, 68. As a result, these deeds would not constitute affirmative acts by a *sovereign* with the authority to extinguish aboriginal Shinnecock fishing rights.

3. The Nicolls Determination Did Not Extinguish Shinnecock Fishing Rights.

The Nicolls Determination concerned a "protest" over a 1662 sale of lands west of Canoe Place by Weany (Sunk Squaw) and other Shinnecock members to Captain Thomas Topping, claiming that they were "the true proprietors of the said lands." The 1662 Topping Purchase covered "a certain tract of land lying and being westward of the Shinecock and the lawful bounds of Southampton." ECF No. 127-25 at 3. The protest document states that it is the intent of the Shinnecock signatories to "impart and assigne all our said Interest in ye said lands [of the purchase of Thomas Topping]" to Southampton. ECF No. 127-26 at 3. In the Nicolls Determination, Governor Nicolls determined that "all the right and interest that ye said Capt Thomas Topping" "is belonging, doth and shall belong unto of Southampton … and their successors forever." *Id.* at 5. Both the 1662 Topping Purchase and the 1666 Nicolls Determination encompassed landlocked areas, and did not include any ocean and bay waters or anything related to Shinnecock fishing

[13] 1648 Deed to East Hampton, ECF No. 127-20 (reserving right to "freely to fish in any or all the cricks and ponds" and "libertie to fish in all convenient places"); 1658 Deed to Beach, ECF No. 127-21 (stating that the "whales that shall be cast upon this beach shall belong to me and the rest of the Indians in their bounds as they have been anciently granted to them formerly by my forefathers"); 1659 Quogue Purchase, ECF No. 127-22 (reserving "privilege of fishing and fowling, hunting or gathering of berries or any other thing for our use"); June 8, 1659 Deed, ECF No. 127-23 ("reserving to ourselves and the Indians all the fins and tails"); July 28, 1659 Deed, ECF No. 127-24 (retaining "half the profits and benefits of the beach on the south side of the said Island in respect of fish, whale or whales that shall be God's providence be cast up from time to time, and at all times, with all the herbage or feed growing thereon").

rights. No language in these documents expresses any plain and unambiguous intent to extinguish Shinnecock fishing rights. *See Santa Fe Pac.*, 314 U.S. at 354.

4. The 1703 Lease Did Not Extinguish Shinnecock Fishing Rights.

In a deed related to the 1703 Lease, the Shinnecock confirmed that it would "give grant Remise Release and for ever Quit Claim unto ye said Trustees … all such Right, Estate, title, Interest and Demand whatsoever, as they … and their people had or out [ought] to have of in or to all that tracte of Land of ye township of Southampton." ECF No. 126-22. The 1703 Lease did not encompass any ocean waters, or Shinnecock rights relating to the use of waters or fishing. As stated by Defendants' expert Ms. Baldwin, "[t]here is nothing in th[e] 1703 lease that denies fishing rights to the Shinnecock." Baldwin Tr. at 80. Additionally, the Town of Southampton was not the relevant "discovering" sovereign in 1703, and did not hold any right of preemption in the Colony of New York necessary to extinguish tribal rights.

5. The Andros and Dongan Patents Did Not Extinguish Shinnecock Fishing Rights.

Defendants contend the Andros and Dongan Patents "unambiguously extinguished" Shinnecock fishing rights. ECF No. 126 at 2. Defendants' rationale is Shinnecock fishing rights were extinguished by the Patents affirming the Town of Southampton's ownership of submerged lands under its adjacent bays and assigning the Town control of the fisheries and management of common resources. Baldwin Report at 39. Defendants are wrong. Their position conflicts with well-settled precedent establishing that a patent or grant of fee title to land in possession of Indians does not extinguish the Indian aboriginal right of use and occupancy and accompanying tribal rights. As detailed below, the ownership of waters and submerged lands by New York State and the Town and their control over common resources is fully consistent and compatible with the continued existence of non-exclusive aboriginal Shinnecock fishing rights.

First, as the Second Circuit clarified, Plaintiffs' "request for relief in this case would not transfer ownership and control of the Shinnecock Bay from the state to an Indian tribe." *Silva*, 47 F.4th at 85. Plaintiffs recognize that "the ownership of land under navigable waters is an incident of sovereignty." *Montana v. United States*, 450 U.S. 544, 551 (1981). States' fee title of waters and submerged lands within the 3-mile boundary from the State's coastline has been confirmed by Congress. In the Submerged Lands Act, 43 U.S.C. § 1301, *et seq.*, Congress "extended the boundaries of Coastal States up to three geographic miles into the Atlantic and Pacific Oceans." *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 211-12 (2012). Congress has also separately affirmed the "Federal Government's authority and control over the 'outer Continental Shelf,' defined as the submerged lands subject to the jurisdiction and control of the United States" lying outside the extended state boundaries. *Id.* at 212. The Submerged Lands Act "restored the rights to the submerged land and its resources to individual states." *Michigan*, 471 F. Supp. at 275. However, importantly, "[n]either the language of the Act nor its purposes are in conflict with the Indians' retention of fishing rights," and "[t]he state may own the resources of these lands, even the fish, but this does not necessarily abrogate the Indians' right to fish." *Id.* at 276.

Second, contrary to Defendants' misunderstanding, the Shinnecock's right of use and occupancy, and the associated fishing rights do not depend on fee title ownership to waters or submerged lands. *People of Village of Gambell v. Hodel*, 869 F.2d 1273, 1276-77 & n.3 (9th Cir. 1989) (explaining that Alaska Native Villages' non-exclusive aboriginal fishing rights claim was "not asserting a claim of sovereign rights" but rather only a claim that "they possess rights of occupancy and use," and stating that the Villages "assert merely a right to occupy and use, rather than title to" waters in the Gulf of Alaska); *Sac & Fox Tribe*, 383 F.2d at 997 ("[R]ight of use and occupancy by Indians … is not the same as sovereign or legal title"); *Pueblo of Jemez*, 790 F.3d

at 1161 ("[S]imultaneous occupancy and use of land pursuant to fee title and aboriginal title could occur because the nature of Indian occupancy differed significantly from the occupancy of settlers"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43 (1810) ("[T]he nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."); 57 Interior Dec. 461, 477 (Feb. 13, 1942) (affirming the existence of aboriginal fishing rights for Alaska Natives, and noting that "aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action").[14]

Third, any transfer of fee title to the submerged lands and waters in and around Long Island, by itself, did not extinguish non-exclusive Shinnecock fishing rights based on the Indian right of occupancy. It is well-settled that a land grant or patent by a "discovering" sovereign, by itself, does not extinguish the Indian right of occupancy and accompanying tribal rights. "[A]ll European land grants were issued subject to the Indians' possessory and occupancy rights." *Alabama-Coushatta*, 2000 WL 1013532, at *10; *Sac & Fox*, 383 F.2d at 997 ("[T]he right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land.").

"Although charters and patents granted by European monarchs customarily contained sweeping assertions of legal title to land in the Western Hemisphere, the primary purpose of such grants was to prevent encroachment by other European powers. The 'right of discovery' gave a European nation the sole authority to acquire the specified land from its native inhabitants and to establish settlements. It did not affect the possessory rights of the aboriginal inhabitants." Cohen's Handbook § 1.02[1], at 12-13; *Worcester*, 31 U.S. at 546; *Pueblo of Jemez*, 790 F.3d at 1155

[14] A copy of this Department of Interior legal opinion is attached to the Declaration of Joseph Plumer.

(*Worcester* "clarified the proposition suggested in *Johnson v. M'Intosh* that a grant to third parties by the sovereign of land in possession of the Indians and which they presently occupied did not extinguish their aboriginal title").

Santa Fe Pacific—a leading case on extinguishment—illustrates how a grant of Indian-occupied land does not, by itself, extinguish the Indian right of occupancy and accompanying tribal rights. In *Santa Fe Pacific*, the United States sued a railroad, claiming the Walapai Tribe held unextinguished aboriginal title to the railroad's right-of-way both on and off the tribe's reservation in Arizona. The U.S. Supreme Court rejected the railroad's argument that actions of Congress in 1865 establishing a reservation for the tribe outside its aboriginal homelands and inviting the tribe to move to that reservation – which the tribe refused – extinguished the tribe's right of occupancy, because it did not constitute a "voluntary cession" of tribal land. *Id.* at 355. Instead, the Supreme Court held that the tribe's right of occupancy to lands outside its reservation – which the Walapai asked for and accepted – had been extinguished by a later executive order in 1883 establishing a reservation for the tribe within its aboriginal territory. *Id.* at 356-58. The Court explained that "[i]f the right of the Walapais was not extinguished … then the respondent's predecessor took the fee subject to the encumbrance of Indian title." *Id.* at 347. *Santa Fe Pacific* stands for the proposition that the Indian right of occupancy "survived a course of congressional legislation and administrative action that had proceeded on the assumption that the area in question was unencumbered public land." Felix Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 43 (1947). Accordingly, "the decision stands as a warning to purchasers of real property … reminding them that not even the Government can give what it does not possess." *Id.*

Other cases have repeatedly affirmed that the any land grant made by a sovereign to a third-party is made subject to the Indian right of occupancy, and does not extinguish aboriginal Indian

rights. *See Chouteau v. Molony*, 57 U.S. (16 How.) 203, 239 (1853) (holding that land grants by Spanish colonial governors were made subject to the Indian right of occupancy, and explaining that possessory rights of the Fox Tribe of Indians on lands aboriginally occupied by them were such that any grants made by the Spanish Governor would be "subject to the rights of Indian occupancy" and "would not take effect until that occupancy had ceased, and whilst it continued it was not the power of the Spanish Governor to authorize anyone to interfere with it"); *Buttz v. N. Pac. R. Co.*, 119 U.S. 55, 66-67 (1886) ("The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this [e]ncumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States."); *Cramer*, 261 U.S. at 229 (holding that a grant to railroad did not extinguish Indian right of occupancy); *Pueblo of Jemez*, 790 F.3d at 1162-63 (holding that the United States' grant of land occupied by the Jemez Pueblo, but deemed "vacant" by the Surveyor General, could not extinguish the Pueblo's right of occupancy); *United States ex rel. Chunie v. Pingrose*, 788 F.2d 638, 641 (9th Cir. 1986), *cert. denied*, 479 U.S. 1009 (1986) ("A grant of Indian-occupied land by the government to an individual does not, however, constitute extinguishment.").

Fourth, the language in the Dongan Patent conveying to the freeholders and inhabitants of the Town of Southampton the "Rivers Rivolets waters lakes ponds Brookes streames beache … Creeks harbors" and providing easements for "fishing hawking hunting and fowling," ECF No. 127-27 at 7, does not in any way extinguish Shinnecock fishing rights. As Defendants' historical expert points out, Southampton's founding documents from March 1639—shortly before the first English colonists arrived on eastern Long Island—declared that: the "ffreedom of fishing, fowling and navigation shall be common to all within the banks of the said waters whatsoeuer." Baldwin Report at 7. The common right of access to navigable waters for fishing and other marine activities

was unquestionably nothing new when the execution of the Andros and Dongan Patents took place as this concept was simply imported directly from English common law.[15]

As the U.S. Supreme Court has explained, "the public and common right of fishery in navigable waters, [] has been so long and so carefully guarded in England, and [] was preserved in every other colony founded on the Atlantic borders." *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 414 (1842). "Not surprising, American law adopted as its own much of the English respecting navigable waters, including the principle that submerged lands are held for a public purpose." *Coeur d'Alene*, 521 U.S. at 284; *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012) ("The public trust doctrine is of ancient origin. Its root traces to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country.").[16] Such language about the public and common right of fishing in navigable waters contained in statutes or regulations—such as the language in the Andros and Dongan Patents—was "not necessary to create or preserve these rights," and constituted a normal reflection of the common law at the time. Bethany R. Berger, *Property and the Right to Enter*, 80 Wash. & Lee L. Rev. 71, 97 (2023). Defendants fail to show how the language in the Andros and Dongan Patents, which merely recites the English common law public right to fishing in navigable waters, serves as any plain and unambiguous intent to extinguish Shinnecock fishing rights.

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[15] Under English law, "the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it." Matthew Hale, *A Treatise de Jure Maris et Brachiorum Ejusdem*, *reprinted in* Stuart Moore, A History of the Foreshore and the Law Relating Thereto 370, 377 (1888). "These rights were part of the liberties of the people against the King officially protected by the Magna Carta." Bethany R. Berger, *Property and the Right to Enter*, 80 Wash. & Lee L. Rev. 71, 96 (2023). Defendants entirely fail to discuss this relevant historical context involving the English common law right of access to fishing in navigable waters, and how this concept was simply imported into early American law.

[16] The Supreme Court in *Shively v. Bowlby*, 152 U.S. 1 (1894), summarizing English common law, stated: "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king; except so far as an individual or corporation has acquired rights in it by express grant, or by prescription or usage … and that this title, *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing." *Id.* at 13.

Fifth, any control over the fisheries assigned to Southampton in the Andros and Dongan Patents did not extinguish Shinnecock fishing rights. Any regulatory authority over natural resources held by any government, by itself, has never been found to be a source of extinguishment of non-exclusive tribal rights to the same resources. The Tenth Circuit's decision in *United States v. Abouselman*, 976 F.3d 1146 (10th Cir. 2020) is instructive on this point. In *Abouselman*, the Tenth Circuit held that the Pueblos continue to hold aboriginal water rights despite "Spain's control of water" in which "public waters were held in common and shared by everyone" and "one could not use public waters to the detriment of other users." *Id.* at 1155. The issue in *Abouselman* was whether the laws of Spain unambiguously expressed Spain's intent to extinguish the Pueblo's aboriginal water rights, even though Spain made no affirmative act. *Id.* at 1152. When Spain arrived at the Jemez River Basin in 1598, it brought with it the concept of "regalia," or the royal prerogative over natural resources, including water. *Id.* at 1154. Thus, the crown had the power to grant dominion over water, but it often allowed local authorities to oversee the distribution of resources and to respect and protect Indian rights to property. In applying *Santa Fe Pacific*, the Tenth Circuit held that Spain's actions provided no indication, "let alone a clear and plain indication," that Spain intended to extinguish the Pueblo's aboriginal water rights. *Id.* at 1158-60.

Similarly, here, any passive control of the fisheries by the Town of Southampton did not extinguish Shinnecock fishing rights. The rights of a "discovering" sovereign to natural resources have always been able to coexist with aboriginal Indian rights: "[T]he right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land." *Sac & Fox Tribe*, 383 F.2d at 997. Like *Abouselman*, Defendants fail to show *any* evidence of a sovereign through a clear and affirmative statement attempting to enforce either the Andro or Dongan Patents in a manner adverse to Shinnecock fishing rights. *See*

Abouselman, 976 F.3d at 1160 ("[N]ot until the sovereign exercises [its] authority through clear and adverse affirmative action may it extinguish aboriginal rights"). Defendants' historical expert concedes this point as well. Baldwin Tr. at 75, 78-79. The Andros and Dongan Patents, therefore, do nothing to extinguish Shinnecock fishing rights.[17]

6. No New York State Statute Could Extinguish Shinnecock Fishing Rights.

No New York State statute passed after the United States became the relevant "discovering" sovereign in 1781, could extinguish Shinnecock fishing rights. "Once the United States was organized and the Constitution adopted," tribal rights "became the exclusive province of federal law" and were "extinguishable [only] by the United States." *Oneida*, 414 U.S. at 667.

7. No Federal Statute Extinguished Shinnecock Fishing Rights.

Defendants have not referenced a single sovereign act by the United States that purports to extinguish Shinnecock fishing rights in an unambiguous manner. Congressional silence cannot extinguish aboriginal Shinnecock fishing rights.

III. The Sky Will Not Fall.

Without any plain and unambiguous source of extinguishment by the United States or an earlier discovering sovereign, Defendants fall back on what they hope to be convincing equitable arguments. They contend that "equitable principles," "impossibility," "conservation necessity," and longstanding and settled expectations should lead this Court to disregard Shinnecock fishing rights. ECF No. 126 at 2. These sky-is-falling arguments by states are nothing new in Indian law cases and should be entirely rejected here. *See McGirt v. Oklahoma*, 591 U.S. 894, 936 (2020) (observing that Oklahoma's "dire warnings" about the consequences of recognizing certain lands within the State of Oklahoma as reservation lands is "not a license for us to disregard the law").

[17] Similarly, despite the Town's regulation of waters, New York courts in the 1850s recognized the Shinnecock's right to remove seaweed and other "drift stuff" from Shinnecock and Peconic Bays. SOF ¶¶ 226-31.

The existence of tribal usufructuary rights in the 21st Century is not a new concept. Courts all across the United States have affirmed the continued existence of non-exclusive rights held by tribes and their members to hunt, fish, gather, and use resources in common with non-Natives, and yet the sky did not fall. *See, e.g.*, *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974) (upholding treaty right to take fish "at usual and accustomed grounds and stations … in common with all citizens of the United States"); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999) (holding that statehood does not extinguish treaty right to hunt, fish, and gather on off-reservation lands); *Metlakatla v. Dunleavy*, 58 F.4th 1034, 1047 (9th Cir. 2023) (holding that statute "implied right to non-exclusive off-reservation fishing in the areas where they have fished since time immemorial"); *Aboulseman*, 976 F.3d at 1160 (upholding aboriginal Pueblo water rights over dissenting opinion's concerns about upsetting "settled expectations").[18] The U.S. Supreme Court has repudiated prior precedent that "rested on a false premise" that tribal rights to hunt, fish, and gather "conflict[] irreconcilably with state regulation of natural resources," *Mille Lacs*, 526 U.S. at 204, and the Court has confirmed that such tribal rights "can coexist with state management of natural resources," *id.*

There are obvious limits to the scope of non-exclusive Shinnecock fishing rights. Plaintiffs do not doubt that "States have broad trustee and police powers over wild animals within their jurisdiction." *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). Those powers are, however, subject to an important limitation: they "exist only 'in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the [C]onstitution.'" *Id.* It is well-settled that "[a]boriginal rights based on occupation and use are

[18] These are just a small sample of federal cases affirming the continued existence of tribal rights.

entitled to the protection of federal law even when they are not formally recognized as ownership by treaty or statute." *People of Village of Gambell*, 746 F.2d at 574.

Plaintiffs acknowledge that their fishing rights would be subject to sound conservation management principles under the conservation necessity doctrine, *see Mille Lacs*, 526 U.S. at 223,[19] and would promote the joint management of fishery and marine resources by the Shinnecock Indian Nation and New York State.[20] Plaintiffs specifically do not welcome any fishing, aquaculture entry, or related program that disadvantages their fishing rights at the outset by not considering the Shinnecock's historical dependence on and rights to fishery and marine resources in Long Island waters since time immemorial. Any conservation management matters related to implementing Shinnecock fishing rights can be resolved in a future proceeding, or can potentially be resolved by the parties once the continued existence of Shinnecock fishing rights is affirmed.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their motion for summary judgment and enter the declaratory and injunctive relief under Count I in their Complaint.

Dated: April 25, 2025
Bemidji, Minnesota

Respectfully submitted,

/s/ Joseph Plumer

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[19] The conservation necessity standard is analogous to the standard employed by this Court in the non-Indian fishing context involving a federally-issued fishing permit. *Aqua Harvesters, Inc. v. N.Y. Dep't of Envtl. Conservation*, 399 F. Supp. 3d 15, 42 (E.D.N.Y. 2019) ("States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power.") (citation omitted).

[20] Tribal fishing rights are typically regulated jointly by tribal, state, and federal governments in accordance with the conservation necessity doctrine. Across the United States, tribes, states, and the federal government have developed and implemented conservation codes and entered into consent decrees and other agreements that promote consistent natural resources management and regulation. Notably, many of these agreements were born out of extensive fishing rights litigation in which tribes and states have forged working relationships based on mutual respect for each other's authority and shared concern for conserving natural resources.