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' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants' Memorandum in Opposition confirms their misunderstanding of bedrock Indian law principles governing aboriginal rights and failure to take direction from the Second Circuit's opinion. The Second Circuit has already clarified that Plaintiffs' remaining relief sought does not amount to a disruptive land claim, nor would it displace New York State's regulatory jurisdiction over lands or waters. In particular, Plaintiffs are not claiming *title* to lands or Long Island waters, rather they seek to affirm their non-possessory, non-exclusive usufructuary right to fish alongside non-Natives, which is fully consistent and compatible with state authority over natural resources. Undisputed facts and clear law dictate judgment for Plaintiffs.

ARGUMENT

I. The Shinnecock Indian Nation Holds Aboriginal Fishing Rights That Can Be Exercised by Its Members.

A. Plaintiffs Have Established Aboriginal Shinnecock Fishing Rights.

Defendants do not contest that the Shinnecock have "exclusively" used and occupied the waters around the Town of Southampton. Defs.' Mem. in Opp'n 3. Defendants dispute only that the Shinnecock have historically used and occupied Atlantic Ocean waters outside of Southampton's boundaries to the exclusion of other Indian groups. *Id.* The common use of fishing waters by the Shinnecock and other Algonquin tribal villages within New York's now-existing 3-mile jurisdictional boundary is legally sufficient to establish "exclusive" use.

Defendants falsely assert that there is "no evidence" of "specific" territory the Shinnecock used and occupied waters beyond Southampton. Because "it is extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation," it is "necessary to take a common sense approach" "to establish boundaries and occupancy." *Upper Chehalis Tribe v. United States*, 155 F. Supp. 226, 229 (Ct. Cl. 1957). "[T]he ultimate fact of beneficial ownership

by exclusive possession and occupancy can only be inferred and found from many separate events and a variety of documentary material … with reference to or having a bearing on the tribe or the area in question." *Snake or Piute Indians v. United States*, 112 F. Supp. 543, 552 (Ct. Cl. 1953).

Experts on both sides agree that archeological evidence shows the Shinnecock historically occupied and used Long Island waters for fishing. *See, e.g.*, Expert Report of Dr. John A. Strong, ECF No. 127-38, at 2-4 (discussing archaeological evidence of early Shinnecock presence on Long Island and fishing activities since time immemorial); Dep. Tr. of John Strong, ECF No. 127-6, at 86-87 (explaining that the Shinnecock have fished in the waters in and around Long Island "1,000 years or more before the colonists arrived"); Dep. Tr. of Amalia Baldwin, ECF No. 127-7, at 26 ("Shinnecock have been [on Long Island] for thousands of years … made use of the full environment available there"); Rebuttal Expert Report of Amalia Baldwin, ECF No. 127-4, at 4.

Historical sources also indicate that the Shinnecock's use and occupancy of Long Island waters. The first mention of the Shinnecock in the colonial records appears to be made by Issack de Rasieres around 1628 identifying the Shinnecock's making of wampum: "where many savages dwell, who support themselves by planning maize and making sewan, and who are called Souwenoes and Sinnecox." Strong Report at 5. In the 1648 Deed to East Hampton, Nowedonah, a Shinnecock sachem joined with the Montaukett, Corchaug, and Manhansett sachems to negotiate a purchase of a tract of land running from the eastern bounds of Southampton to western border of Montauk, which expressly preserved the "Libertie, freely to fish in any or all the cricks and ponds." *Id.* at 14. The common sense and practical construction of the 1648 Deed is that the Shinnecock and other tribal villages shared common Long Island fishing waters.

The U.S. Department of Commerce has acknowledged the Shinnecock's use of Long Island waters: "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, Econ. Dev. Admin., Federal and State Indian Reservations: An EDA Handbook 307 (1971), ECF No. 127-15, at 6. Anthropologist Mark Harrington also explained that ocean waters 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." M.R. Harrington, Anthropological Papers of the American Museum of Natural History: An Ancient Village Site of the Shinnecock Indians 233 (1924).

Defendants are wrong that Plaintiffs need to show the Shinnecock "are one tribe with other separate tribes of Eastern Long Island," Defs.' Mem. in Opp'n 4, for Long Island waters commonly used with other Algonquin villages to be regarded as "exclusive" use. No case holds that only one tribe that previously descended from a broader group of Indian people may claim aboriginal fishing rights. The concept of separate tribes did not exist during the colonial era. When the colonists arrived, Natives Americans were regarded as "the original inhabitants" who remained "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573-74 (1823).

The Ninth Circuit's decision in *Native Village of Eyak v. Blank*, 668 F.3d 619 (9th Cir. 2012) is instructive on how tribal villages who historically shared common fishing grounds and later became separate tribal entities may be capable of holding aboriginal fishing rights. In the case, the court analyzed whether five separate federally recognized Alaska Native Villages[1] who are all descendants of the Chugach held non-exclusive aboriginal fishing rights of people in the Outer Continental Shelf ("OCS") more than three miles from shore in the Gulf of Alaska. *Id.* at

[1] The plaintiffs in the case included the Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham. *Native Village of Eyak*, 688 F.3d at 620-21. Each of the Native Villages are separate federally recognized native entities eligible to receive services from the United States. 89 Fed. Reg. 99,899, 99,902 (Dec. 11, 2024).

620-21. The Ninth Circuit determined that the record evidence was insufficient to show that the Villages used and occupied the claimed areas of the OCS "to the exclusion of other tribes" as the record is "clear that the Villages did not use hunting and fishing areas in common." *Id.* at 625. Despite the fact that the Villages are separate tribal entities in modern times did not have any bearing on whether they *could* hold aboriginal fishing rights in waters used by their ancestors.

Historically, the tribal villages on Long Island "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." James Truslow Adams, History of Southampton, East of Canoe Place 21 (1918). "The eastern Long Island Indigenous villagers had close family and political ties to other villages in the region whom they traded, intermarried, and united for protection." Baldwin Report at 4. The 1648 Deed exemplifies how the Shinnecock and other Algonquin villages intended to preserve their traditional fishing practices in Long Island waters.

Given Shinnecock's use and occupancy of its aboriginal homelands directly abutting the Atlantic Ocean and close cultural ties and political affiliations with other Algonquin villages, the shared use of common fishing areas is legally sufficient to establish exclusive use in waters within New York's now-existing 3-mile jurisdictional boundary. *See, e.g.*, *Muckleshoot Tribe v. United States*, 3 Ind. Cl. Comm. 669, 674-75 (1955); *Suquamish Tribe v. United States*, 5 Ind. Cl. Comm. 158, 164 (1957); *Upper Skagit v. United States*, 8 Ind. Cl. Comm. 492, 497 (1960).[2]

B. Plaintiffs Have Standing to Establish Aboriginal Shinnecock Fishing Rights Outside Southampton's Jurisdiction.

Contrary to Defendants' erroneous assertion, the Second Circuit did *not* say that Plaintiffs' requested relief under Count I was limited to waters within Southampton's jurisdiction. Rather, the Second Circuit said that Plaintiffs "have shown an injury in fact for standing to pursue

[2] Unlike *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975), Plaintiffs do not assert a land claim.

declaratory and injunctive relief" under Count I. *Silva v. Farrish*, 47 F.4th 78, 88 (2d Cir. 2022). The court explained that Plaintiffs' requested declaratory and injunctive relief would prevent Defendants' interference with Plaintiffs' "'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*.'" *Id.* at 83 (quoting Compl. ¶, ECF No. 1, at 7 (Prayer for Relief) (emphasis added). The Second Circuit held that Plaintiffs have standing to assert declaratory and injunctive relief because: (1) Plaintiffs "allege that the enforcement of state fishing regulations violates their federally protected fishing rights"; and (2) Plaintiffs' "requested relief—that the DEC officials be enjoined from enforcing the state fishing regulations against them—would prospectively end the alleged violation." *Id.* at 84. Such requested relief is not limited to only Southampton waters.

C. Aboriginal Shinnecock Fishing Rights Do Not Depend on Aboriginal Title.

Defendants' case rests on the false premise that aboriginal fishing rights "are not independent from aboriginal title" and extinguishment of title terminates occupancy rights. Defs.' Mem. in Opp'n 10. Literal ownership of land or waters is not necessary to establish the existence of aboriginal rights in the first place. "It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favor of Indian tribes, because of their original and previous possession." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946). Those who obtained title of land through grants "would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy would only be interfered with or determined by the [sovereign]." *Tee–Hit–Ton Indians v. United States*, 348 U.S. 272, 281 (1955) (citation omitted). "The state may own the resources of these lands, even the fish, but this does not necessarily abrogate the Indians' right to fish." *United States v. Michigan*, 471 F. Supp. 192, 276 (W.D. Mich. 1979).

The Supreme Court has drawn a distinction between tribal claims to land and tribal usufructuary rights based on the Indian right of occupancy. The Supreme Court held that the creation of a reservation for the Walapai Tribe "amounted to a relinquishment of any tribal claims to lands which they have had outside that reservation and that … relinquishment was tantamount to an extinguishment by 'voluntary cession.'" *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 357-58 (1941). The Court stated that the "relinquishment of any tribal claims to land" is "distinguished from individual rights of occupancy," which "are not foreclosed or affected by the judgment in [a] case" regarding the relinquishment of claims to tribal lands. *Id.* at 357-58 & n.23; *Cramer v. United States*, 261 U.S. 219, 235 (1923) (holding that a land grant conveyed fee title subject to the right of occupancy where the "claim for the Indians is based on occupancy alone").

The existence of aboriginal rights depends only on "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, 997 (Ct. Cl. 1967). Shinnecock's right of use and occupancy, and associated non-exclusive aboriginal fishing rights, do not depend on title to any lands or waters. *See People of Village of Gambell v. Hodel*, 869 F.2d 1273, 1276-77 & n.3 (9th Cir. 1989) (explaining that Native Villages' non-exclusive aboriginal fishing rights claim did "not assert[] a claim of sovereign rights" but rather only a claim that "they possess rights of occupancy and use," and noting "the Villages assert merely a right to occupy and use, rather than title to" waters and submerged lands); *Native Village of Eyak*, 688 F.2d at 621-22 (applying *Sac & Fox* test to Villages' aboriginal fishing rights claim).

As detailed in Plaintiffs' opposition, Pls.' Mem. in Opp'n 12-14, Defendants' cited cases in support of their argument that aboriginal fishing rights cannot be separated from aboriginal title are neither controlling, nor persuasive in resolving the existence of aboriginal Shinnecock fishing rights. Defendants rely on decisions by the Indian Claims Commission ("ICC") or formal federal

actions—a treaty, federal statute, or executive order—implicating the asserted tribal right, none of which is presented here. Defendants also rely on decisions rested on reasoning that has been repudiated in modern developments in federal Indian law. Pls.' Mem. in Opp'n 17-20.[3]

In the non-Indian fishing context, the U.S. Supreme Court has held that state ownership and title of submerged lands is compatible with fishing rights granted to federally issued licensees. In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), the Supreme Court explained that while the Submerged Lands Act gives states "title," "ownership," and "the right and power to manage, administer, lease, develop, and use" "the lands beneath the oceans and natural resources in the waters within state territorial jurisdiction," it did not preempt or repeal fishing rights granted to federal licensees. *Id.* at 283-84. Consistent with the conservation necessity doctrine, the Court stated that "reasonable and evenhanded conservation measures, so essential to the preservation of our vital marine resources of food supply, stand unaffected by our decision." *Id.* at 287.

II. Aboriginal Shinnecock Fishing Rights Have Not Been Extinguished.

Defendants contend that colonial era land deeds, royal determinations, and land patents "unambiguously extinguished" Shinnecock aboriginal title which in turn purportedly extinguished aboriginal Shinnecock fishing rights. But the dispositive question is whether any sovereign took "plain and unambiguous" action, *Santa Fe Pac.*, 314 U.S. at 346-47; *United States v. Abouselman*, 976 F.3d 1146, 1158 (10th Cir. 2020) ("*Santa Fe Pacific* requires a sovereign to exercise complete dominion, not merely to possess complete dominion."),[4] necessary to extinguish Shinnecock fishing rights. No such extinguishment of aboriginal Shinnecock fishing rights ever took place.

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[3] Defendants' citation to Cohen's Handbook of Federal Indian Law, Defs.' Mem. in Opp'n 10-11, is unpersuasive as it relies on *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996) and *Western Shoshone National Council v. Molini*, 951 F.2d 200 (9th Cir. 1991)—cases that are wholly inapposite and irrelevant to this case. Moreover, the amicus brief by Law and History Professors consists of seven executive editors of Cohen's Handbook who disagree with any argument that aboriginal Shinnecock fishing rights have been extinguished.

[4] "[T]o 'exercise' something is not to merely possess it." *Abouselman*, 976 F.3d at 1158. "Exercise" means "[t]o make use of" or "to put into action." *Exercise*, Black's Law Dictionary (12th ed. 2024).

A. The Colonial Era Deeds Did Not Extinguish Shinnecock Fishing Rights.

The 1640 Deed to Southampton does not mention Shinnecock fishing rights and does not encompass any ocean waters. ECF No. 127-19, at 13; Defs.' Mem. in Opp'n 12. The other colonial era deeds also do not contain any plain and unambiguous intent to cede or extinguish Shinnecock fishing rights. Furthermore, the colonial era deeds were executed with private individuals—not a "discovering" sovereign—who lacked any authority to extinguish Shinnecock's aboriginal rights. *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1150 (2d Cir. 1988).

B. The 1666 Nicolls Determination, 1676 Andros Patent, and 1686 Dongan Patent Did Not Extinguish Shinnecock Fishing Rights.

The 1666 Nicolls Determination, 1676 Andros Patent, and 1686 Dongan Patent all concerned a transfer of fee title, passive regulatory authority, or powers between Europeans. None of these actions had any impact on the Shinnecock's aboriginal rights because they solely concerned the claims of Europeans—the English Crown, New York colonial governors, the Town of Southampton, and English settlers—as against each other.

Well-settled federal Indian law principles dictate that the question of title among non-Indians does not affect the underlying aboriginal Indian rights. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 546 (1832) ("[European] motives for planting [a] new colony are incompatible with the lofty ideas of granting the soil, and all its inhabitants from sea to sea" as "grants asserted a title against Europeans only, and were considered a blank paper so far as the rights of the natives were concerned"); *Johnson*, 21 U.S. at 543 ("[European] grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."). Any passive regulatory control over natural resources by Southampton does not amount to any plain and unambiguous intent of extinguishment. *Abouselman*, 976 F.3d at 1160; *Santa Fe Pac.*, 314 U.S. at 347 (sovereign must exercise "complete dominion adverse to the right of occupancy").

The Nicolls Determination and the Patents do not contain any plain and unambiguous intent necessary to extinguish Shinnecock fishing rights. These documents are also limited to their stated borders, landlocked (and thereby exclude any ocean waters), and are subject to the presumption against exclusive fishery. *See* Professors' Amicus Br., ECF No. 160, at 2-3; *Martin v. Waddell's Lessee*, 41 U.S. 367, 414-16 (1842).

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

The 1703 Lease was purportedly executed between the Shinnecock and the Town of Southampton. But the Town of Southampton was not the relevant "discovering" sovereign in 1703. *Oneida*, 860 F.2d at 1150. The 1703 Lease also does not mention Shinnecock fishing rights, or encompass any ocean waters, and therefore, cannot as a matter of law extinguish fishing rights.

III. Conservation Necessity Does Nothing to Affect Aboriginal Shinnecock Fishing Rights.

As amici Great Lakes Indian Fish and Wildlife Commission ("GLIFWC") ably demonstrates with its real-world experience, the conservation necessity doctrine merely balances the rights and interests of states and tribes, and provides incentives for tribes and states to work together to co-manage natural resources. GLIFWC Amicus Br., ECF No. 159. The conservation necessity doctrine "does not by default" provide states with unilateral authority to dispose of tribal fishing rights, but rather it provides that a "[s]tate may only step in if Tribal self-regulation is insufficient to conserve the species or protect public safety." *Id.* at 12. Defendants fail to show how non-possessory, non-exclusive aboriginal Shinnecock fishing rights would be irreconcilable with New York State's regulatory authority over lands or waters.

IV. Laches and Equitable Doctrines Do Not Apply to Non-Exclusive Aboriginal Shinnecock Fishing Rights.

Defendants urge the Court to apply the equitable doctrine of laches to foreclose affirming the continued existence of non-exclusive aboriginal Shinnecock fishing rights. But the U.S.

Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and its application of "laches" to avoid the "disruptive remedy" of restoring a tribe's inherent sovereignty over a newly purchased parcel of land, does not foreclose Plaintiffs' requested relief in this case. In *Sherrill*, the Supreme Court applied laches in response to a tribe's revival of a "long-dormant claim[]" when "long acquiescence" and "inaction" on the part of the Oneidas had led to "legitimate reliance" by state and local officials. *Id.* at 217-18. Here, as the Second Circuit already clarified, Shinnecock's non-possessory, non-exclusive fishing rights would not disrupt anyone's existing rights as Plaintiffs requested relief "is not a 'right to *exclude all others*.'" *Silva*, 47 F.4th at 85 n.7. Plaintiffs' requested relief "would not divest the state of its ownership of the submerged land or the waters"; rather, "[i]f 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." *Id.* at 86. *Sherrill* thus has no relevance to the scope of Plaintiffs' requested relief in this case.[5]

CONCLUSION

For the foregoing reasons and those in their opening and opposition memorandums, Plaintiffs respectfully request that the Court grant their motion for summary judgment, deny Defendants' motion, and enter the declaratory and injunctive relief requested in their Complaint.

Dated: June 13, 2025
Bemidji, Minnesota

Respectfully submitted,

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[5] Defendants' misplaced reliance on statements from Plaintiffs' depositions about the scope of requested relief are legal interpretations or opinions that may be ignored by the Court. Plaintiffs testified as lay fact witnesses, and their testimony is limited only to facts based on their own perceptions and first-hand observations. Fed. R. Civ. P. 701(a); *Bank of China, N.Y. Branch v. NBM LLC*, 359 F.3d 171, 181-82 (2d Cir. 2004). The Second Circuit has clarified the limited scope of legal relief involving non-possessory, non-exclusive fishing rights available on remand in this Court.