

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID T. SILVA,
GERROD T. SMITH, and
JONATHAN K. SMITH,
Members of the Shinnecock Indian Nation,

Plaintiffs,

18-CV-3648
(GRB)(SIL)

-against-

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

Defendants.

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

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I. Plaintiffs Misconstrue Defendants' Arguments

Plaintiffs misconstrue Defendants' argument as being that an agreement or treaty is necessary to create aboriginal rights. *See* Plaintiffs' Response Memorandum of Law, dated May 23, 2025 ("Pl. Opp."), pp. 5-8. However, it was Plaintiffs who relied on colonial documents as support for fishing rights. Complaint at ¶ 15 (a) through (e), D.E. 1. Plaintiffs premised their claims on the assertion that "Colonial Deeds and related documents clearly support the right of the Shinnecock and other native peoples of eastern Long Island to fish in the waters adjacent to their communities without interference . . ." *Id.* Plaintiffs claimed to have "aboriginal usufructuary fishing rights un-relinquished and retained by Plaintiffs' ancestors in the aforementioned Colonial Deeds and related documents. . ." *Id.* at ¶ 22. Plaintiffs have abandoned their reliance on these deeds. Pl. Opp., p. 8. Conversely, Defendants' argument is that aboriginal title—and contingent rights—were extinguished by the sovereign, conclusively by the Andros and Dongan Patents.

Second, Plaintiffs conflate arguments about aboriginal title with those concerning sovereign or legal title. Pl. Opp. pp. 8-9. Plaintiffs argue generally that aboriginal rights may exist alongside legal title or sovereignty. Pl. Opp. pp. 10-11. However, Shinnecock *aboriginal title* was extinguished. Because contingent aboriginal rights do not endure upon extinguishment of aboriginal title, unless reserved by treaty or agreement (*see Confederated Tribes of Chehalis*, 96 F.3d 334, 341 (9th Cir. 1996)), Plaintiffs do not possess off-reservation aboriginal fishing rights.

II. Plaintiffs Fail to Meet their Burden of Establishing Exclusive Use and Occupancy

For the reasons set forth in Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, dated May 23, 2025 ("Def. Opp."), Plaintiffs fail to meet their burden of establishing exclusive use and occupancy of territory outside Southampton, including Atlantic Ocean waters, or "Long Island water" including the Peconic Bay. Plaintiffs put forth no

evidence of exclusive use or occupancy, or having the ability to exclude other tribes from waters outside Southampton. *See Pueblo of Jemez v. United States*, 790 F.3d 1143, 1166 (10th Cir. 2015).

III. Shinnecock Aboriginal Title Is Unambiguously Extinguished

Plaintiffs' claim to possess off-reservation fishing rights fails because Shinnecock aboriginal title, which encompasses the use and occupancy rights Plaintiffs assert, was extinguished. The concept of aboriginal title is derived from the doctrine of discovery, which provides that "discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). However, the sovereign could extinguish aboriginal title at will, including by contract, purchase, complete dominion, or otherwise. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941). Fishing and hunting are aspects of the "use and occupancy" rights encompassed by aboriginal title. *Penobscot Nation v. Frey*, 3 F.4th 484, 534 (1st Cir. 2021) ("aboriginal title includes 'component hunting [and] fishing... rights.'"). Therefore, extinguishment of aboriginal title "terminates corresponding use and occupancy rights, including fishing rights," unless those rights are reserved. *Confederated Tribes of Chehalis*, 96 F.3d at 341; Cohen's Handbook of Federal Indian Law § 20.01 (2025) ("If original Indian title to land is extinguished, the hunting, fishing, and gathering rights on the land are extinguished as well, unless those rights are expressly or implicitly reserved by treaty, statute, or executive order.").

Plaintiffs rely on *United States v. Abouseiman*, 976 F.3d 1146 (10th Cir. 2020), for the proposition that unreserved aboriginal rights may exist without aboriginal title. Pl. Opp, p. 11. *Abouseiman* contradicts Plaintiffs' characterization, applying the standards for extinguishment of aboriginal title, and using the terms "aboriginal title" and "aboriginal rights" interchangeably. 976 F.3d at 1155-56 ("Aboriginal title refers to land claimed by a tribe by virtue of its possession and

exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance...Extinguishing aboriginal rights is complicated; aboriginal rights can only be extinguished by the sovereign. A sovereign can extinguish aboriginal title by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.” (internal citations and quotation marks omitted)). In the section: “Extinguishing Aboriginal Rights Requires an Affirmative Act,” *Abousselman* uses the terms “title,” “Indian title,” or “aboriginal title” twelve times. *Id.* at 1158-60. *Abousselman* concludes: “a sovereign must affirmatively take an action...adverse to the Indians’ right of occupancy sufficient to extinguish aboriginal title.” *Id.* at 1160. *Abousselman* does not hold that aboriginal rights remain once aboriginal title is extinguished.

Plaintiffs try to distinguish the cases and treatise cited by Defendants, arguing that because they involved the Indian Claims Commission or federal action, they are inapplicable. Pl. Opp., pp. 11-13. However, these authorities each expressly holds that, unless reserved by treaty or agreement, aboriginal rights are lost upon extinguishment of aboriginal title. *See, e.g., supra*, p. 2. Plaintiffs cite no authority that contradicts this rule.

A. The 1640 Southampton Deed Conveyed All Indian Title and Interest

The language of the 1640 Deed, conveyed “all our title & interest,” (Ex. F), and extinguished aboriginal title. *See Or. Dep’t of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766 (1985) (“the Tribe ceded ‘all their right, title, and claim’ to the described area. Yet that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed. . .”); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 266-7 (E.D.N.Y. 2007) (“The use of language such as ‘all our right title and interest’ is

precisely the type of language used when there is an intent to transfer all title in land.”), *vacated on other grounds*, 686 F.3d 133 (2d Cir. 2012)¹.

Plaintiffs cite *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), as holding that language in an 1855 Treaty ceding “all right, title, and interest” is insufficient to abrogate aboriginal rights. Pl. Opp, p. 18. However, *Mille Lacs* involved prior 1837 and 1842 treaties that guaranteed the Chippewa the right to hunt, fish and gather on the ceded territory. *Id.* at 177. In holding that the 1855 Treaty did not relinquish these treaty-reserved rights, *Mille Lacs* focused on the Treaty’s history and held that it was designed to transfer land to the United States, not terminate usufructuary rights, and did not address the 1837 Treaty, which guaranteed those rights. *Id.* at 195-7. The Court also focused on the 1854 Treaty that secured *new* usufructuary rights to other Chippewa bands on the same territory, while only the Mille Lacs Band signed the 1855 Treaty. *Id.* at 199. The Court held it implausible that the United States intended to abrogate only the Mille Lacs Band’s hunting and fishing rights, while leaving intact or expanding other Chippewa Bands’ usufructuary rights on the same territory. *Id.* The Court stated: “It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment.” *Id.* at 198. *Mille Lacs* is circumscribed by its emphasis on prior explicitly guaranteed treaty rights. Here, in contrast, there is no contemporaneous treaty that expressly reserved fishing rights for the Shinnecock, and in fact no treaty at all.²

¹ Although the Second Circuit determined that the district court lacked subject matter jurisdiction without reaching the merits, and thus not precedential, Defendants cite to Judge Bianco’s decision for its overview of the law of aboriginal title and persuasive discussion of extinguishment by the same colonial documents involved here.

² Plaintiffs’ citations to *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Herrera v. Wyoming*, 587 U.S. 329 (2019), are likewise inapposite. These decisions analyzed whether *preexisting treaty rights* were implicitly terminated upon a state’s admission to the union, and the validity of the “equal footing” doctrine, since repudiated, none of which is relevant here. *Herrera*, 587 U.S. at 342.

B. The Nicolls Determination Extinguished Aboriginal Title

Following the 1662 Topping Purchase, which relinquished Shinnecock aboriginal title west of Canoe Place, then-Governor Nicolls issued the 1666 Nicolls Determination, that “all the right and interest...in the said tract of land... is belonging, doth and shall belong unto the towne of Southampton . . .” Yorke Decl., Ex. L at 172-4. The Nicolls Determination ratified Shinnecock conveyances and extinguished aboriginal title in the tract. *New York v. Shinnecock*, 523 F. Supp. 2d at 270 (“The language of the 1666 Nicolls Determination reveals the plain and unambiguous intent . . . to extinguish the Shinnecock’s aboriginal title. . .”); *Trustees, etc. of Southampton v. Mecox Bay Oyster Co.*, 116 N.Y. 1, 8 (N.Y. 1889) (“Prior to the date of the Andross[sic.] charter all the Indian deeds had been delivered and the rights of the Indians extinguished.”).

Plaintiffs argue that the 1640 Deed, Topping Purchase and Nicolls Determination did not encompass waters (Pl. Opp., pp. 16-21). However, the 1640 Deed and the other purchases were confirmed and ratified through the Andros and Dongan Patents, which categorically encompassed all Southampton waters. *See* 56.1 at ¶¶ 228-34; Yorke Decl., Ex. O at 281.

C. The Andros and Dongan Patents Unambiguously Extinguished Aboriginal Title

The Andros and Dongan Patents ratified Shinnecock conveyances to Southampton and unambiguously extinguished aboriginal title, and any contingent rights. The Dongan Patent responded to Southampton’s application that Governor Dongan “confirm unto ye ffreeholders of said Town in a more full & ample manner all the abovesited tracts and parcells of land within the limitts and bounds aforesaid and finally determine the difference between the Indyans and the...towne of Southampton . . .” 56.1 at ¶ 229; Ex. O at 282. The Dongan Patent:

examined the matter in variance between the ffreeholders of the said Towne of Southampton and the Indyans and do finde that the ffreeholders of the Towne of Southampton aforesaid have lawfully purchased the lands within the Limitts and bounds aforesaid of the Indyans and have payd them

therefore according to agreement so that all the Indyan right by virtue of said purchase is invested into...the Towne of Southampton. . .

Ex. O at 282-3.

The Dongan Patent ratified Shinnecock conveyances, confirming the land “in any ways taken up and appropriated before the day of the date hereof unto...Southampton by virtue of the aforerecited deed or Patent. . .” *Id.* The Dongan Patent conclusively extinguished Shinnecock aboriginal title and included rights. *New York v. Shinnecock*, 523 F. Supp. 2d at 273 (“the Dongan Patent again emphasizes in clear and unmistakable language the prior extinguishment of the Shinnecock’s aboriginal rights to any and all lands within the bounds of Southampton . . .”).

The Amici Curiae Brief of Law and History Professors (“Professors’ Brief”) D.E. 160, pays short shrift to the Dongan Patent, disregarding its plain language. *Id.*, pp. 8-9. The Professors’ Brief does not grapple with the Dongan Patent’s determination that “all the Indyan right” vested in Southampton, after ratifying the Shinnecock conveyances. Ex. O. at 282-3. The Professors’ Brief, without foundation, characterizes the Dongan Patent as addressing a “dispute between the Shinnecock and the Town over additional lands.” Professors’ Brief, p. 8. However, the Dongan Patent explicitly referred to the “lands within the Limitts and bounds aforesaid,” *i.e.*, the entirety of the boundaries of Southampton. Ex. O at 282.³

Plaintiffs object to the Patents’ extinguishment of Shinnecock aboriginal title on several grounds. First, Plaintiffs argue that New York’s Colonial Governors lacked authority to extinguish

³ The Professors’ Brief (p. 8, n. 5) is also incorrect that conditional purchase language in the Andros Patent supports Shinnecock property claims. *See New York v. Shinnecock*, 523 F. Supp. 2d at 272 (“the word ‘if’ indicates that Governor Andros was not making any finding that there were lands not already purchased from Indian tribes, but rather was simply providing that any such lands, if they existed, could be purchased. Thus, this language does not undermine the conclusion that all lands within the bounds of the Town had, in fact, already been lawfully purchased from the Shinnecoeks.”)

Shinnecock fishing rights. Pl. Opp., p. 22-23. Plaintiffs cite only the 1682 and 1683 Commission and Instructions to Governor Dongan from the Duke of York. *Id.* However, in 1686, King James II issued a new Commission and Instructions to Dongan. *See* Yorke Decl., dated June 13, 2025, Ex. Z, Documents Relative to the Colonial History of the State of New York, Vol. III, 369-382 (Albany: Weed, Parsons 1853). Each of these documents granted broad authority.

The Commission to Governor Dongan, dated September 30, 1682, recited the Duke of York's "power to...governe and rule ye inhabitants thereof by my selfe or such Deputyes Commissioners or Officers as I shall thinke fitt..." and granted Governor Dongan authority to "performe & execute all and every the powers which are...granted unto me to be executed by me my Deputy Agent or Assignes..." *Id.*, p. 329. The Instructions to Governor Dongan, dated January 27, 1682/3, gave plenary authority: "And if any thing shall happen which may be of advantage or security to any of the places under your government which is not herein or by your commission provided for; I doe hereby allow unto you, with advice and consent of my Councill to take order for the present therein..." *Id.*, p. 333. They instructed Governor Dongan to, "take all opportunityes to gaine and procure from the Indians...such tracts and quantityes of ground as are contiguous to my other lands...thereby to enlarge and secure my territoryes." *Id.*, p. 334.

King James II's Commission to Governor Dongan, dated June 10, 1686, granted "full power and Authority...to make, constitute and ordain Laws, Statutes and Ordinances for the publick peace, welfare & good Government of our said Province and of the people and inhabitants thereof..." *Id.*, p. 378. The Instructions to Dongan, dated May 29, 1686, granted plenary authority: "And if any thing shall happen that may bee of advantage & security to our said Province which is not herein or by our Commission provided for; Our will & pleasure is, and wee doe hereby allow unto you, with ye advice and consent of Our Council, to take order for the present therein..." *Id.*,

p. 375. The King instructed that “when any opportunity shall offer for purchasing great Tracts of Land for us from the said Indians...you are to use your discretion therein as you shall judge for the convenience, or prejudice or advantage which may arise unto us by ye same.” *Id.*, p. 374.

The King conferred broad authority upon Governor Dongan. *See New York v. Shinnecock*, 523 F. Supp. 2d at 204 (“Governor Dongan was granted full power and authority ‘to make, constitute and ordain Laws, Statutes and Ordinances for the publick peace, welfare & good Government of our said Province and of the people and inhabitants thereof.’”) (citing 1686 Commission). “There is nothing in the Dongan Patent...that is inconsistent with the scope of Governor Dongan’s authority, as set forth in his 1686 commission and instructions from the king.” *Id.* The 1682 Commission “appoint[ed]...Dongan as [the Duke of York’s] lieutenant and governor of the province of New-York...to perform and execute all and every the powers which the duke of York, by himself, his deputies, agent or assigns, might execute under the letters patent issued to him from his brother the king of Great Britain.” *People v. Livingston*, 8 Barb. 253, 271 (N.Y. Sup. Ct. Columbia County 1850).

Next, Plaintiffs assert that transfer of fee title cannot extinguish aboriginal rights. However, the inquiry is not whether the Shinnecock Indian Nation, Southampton, or the State of New York holds *fee title* over the Shinnecock Bay or whether fishing rights are compatible with sovereignty (Pl. Opp., pp. 23-24); it is whether the Shinnecock Indian Nation continues to possess *unextinguished aboriginal title*—the only source of off-reservation fishing rights where such rights were not reserved by treaty when territory was ceded. The Dongan Patent was not a contingent land grant, subject to Shinnecock use and occupancy rights; it was a sovereign act that extinguished aboriginal title, conveyed “all the Indyan right,” and ratified prior Shinnecock conveyance of all right, title, and interest in the territory to Southampton. Ex. O. A sovereign may extinguish

aboriginal title by purchasing Indian land (*Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 504 (W.D.N.Y. 2002), *aff'd* by 382 F.3d 245), and a sovereign can extinguish aboriginal title by ratifying a tribe's conveyance. *Mitchel v. United States*, 34 U.S. 711, 745-7 (1835) (extinguishment occurred when Spain ratified tribe's sale of land to private owners). Once aboriginal title is extinguished, the owner of the underlying fee title obtains fee simple absolute title to the land, unencumbered by Indian use and occupancy rights. *Seneca Nation*, 206 F. Supp. at 504. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (“[W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands.”). Nor are the Patents mere land grants, as Plaintiffs argue. Pl. Opp., p. 24. The Dongan Patent organized an intricate corporate governing structure for Southampton, and for management and control of common lands and resources. Ex. O, at 283-7.

Next, Plaintiffs characterize the Patents as reciting only common rights of navigation and fishing. Pl. Opp., p. 25. Plaintiffs disregard the plain language of the Dongan Patent, determining that “all the Indyan right...is invested into...Southampton.” Ex. O, at 282-3. The Dongan Patent also significantly expanded the rights and easements enumerated in the Andros Patent, responding to Southampton's petition “that the clauses above expressed for...giving them privileges and Immunities are not sufficient in the law to convey to them such privileges & Immunities as was designed to be given them.” *Id.* The Patents' granting of numerous rights and easements to which Plaintiffs' argument is inapplicable undercuts the characterization that they merely recited common law public rights.

The Professors' Brief repeats Plaintiffs' argument. Professors' Brief, pp. 2-3. However, the authorities cited by Plaintiffs and the Professors' Brief discuss the restraint of *public* rights of fishing and navigation by the grant of *exclusive private* rights and by conveyance of navigable

waters as private property. *Id.* The Professors' Brief addresses public common fishing rights and access vis-à-vis private exclusive right and control of waters. This is irrelevant to the Dongan Patent's extinguishing of aboriginal title and vesting the rights of the waters and fishing in the Town of Southampton.

Lastly, Plaintiffs argue that regulatory authority cannot extinguish aboriginal rights. Pl. Opp., pp. 26-27. Plaintiffs state generally that the sovereignty of the "discoverer" over natural resources is subject to Indian rights of use and occupancy, *i.e.*, aboriginal title. Pl. Opp., p. 25. However, Shinnecock aboriginal title was extinguished by a sovereign act, through the Patents. Plaintiffs' reliance on *Abouseman*, 976 F.3d 1146, is inapposite, as *Abouseman* analyzed only whether Spain's unexercised sovereignty extinguished aboriginal rights. *Id.* at 1153. *Abouseman* distinguished between possession of ultimate dominion—which all sovereigns hold by virtue of "discovery"—and its exercise. *Id.* at 1158-9. *Abouseman* held that because Spain had not exercised its power to adjudicate water rights between the tribes and other users, the sovereign had not undertaken an affirmative act to extinguish aboriginal rights. *Id.* at 1155-60. Here, in contrast, the sovereign "finally determine[d] the difference between the Indians and...Southampton," and determined that "all the Indian right...is invested into...Southampton." Ex. O. at 282-3.

IV. Plaintiffs' Claims are Barred Under the Sherill Doctrine and May Be Regulated Under the Doctrine of Conservation Necessity

For the reasons set forth in Defendants' Memo of Law in Support of Summary Judgment, dated April 25, 2025, and Def. Opp., under *City of Sherill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and the doctrine of conservation necessity (*Mille Lacs*, 526 U.S. at 205), Plaintiffs' claims are barred under the *Sherill* Doctrine, and Plaintiffs' fishing may be regulated under the doctrine of conservation necessity.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment, deny Plaintiffs' Motion for Summary Judgment, and grant such other and further relief as the Court deems just and proper.

Dated: Mineola, New York
June 13, 2025

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