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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2024
Argued: September 18, 2024
Decided: January 28, 2025

No.23-1013-cv

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

v.

BASIL SEGGOS, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Defendants-Appellees,[*]

Appeal from the United States District Court
for the Eastern District of New York
No. 2:18CV01132,
William F. Kuntz, II, *Judge*.

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[*] The Clerks office is directed to amend the caption as reflected above.

Before: LYNCH, ROBINSON, and MERRIAM, *Circuit Judges*.

The Unkechaug Indian Nation ("Nation") and its Chief Harry B. Wallace challenge the enforcement by the New York State Department of Environmental Conservation ("DEC") of regulations prohibiting the harvesting of American glass eels. Central to plaintiffs' challenge is the Andros Order, a 1676 agreement between the Royal Governor of New York and the Nation that allowed members of the Nation to "freely whale or fish for or with" the colonists. App'x at 3007. The Nation and Wallace contend that the Andros Order is a valid and enforceable federal treaty preempting the DEC's fishing regulations as applied to the Nations' members in the Nation's customary off -reservation fishing waters.

Plaintiffs filed this action in the United States District Court for the Eastern District of New York (Kuntz, *J.*) against the DEC and its Commissioner Basil Seggos in his official capacity. Plaintiffs sought declaratory and injunctive relief to prevent the DEC from enforcing New York fishing regulations, including those barring the harvesting of glass eels, against members of the Nation in "its Reservation waters and customary Unkechaug fishing waters." Appx at 26. The District Court granted summary judgment to defendants holding, in relevant part, that the Andros Order is not federal law preempting New York's fishing regulations.

We hold that the Eleventh Amendment bars plaintiffs' claims against the DEC, but that the *Ex*

parte Young exception to sovereign immunity applies to the claims for declaratory and injunctive relief asserted against Commissioner Seggos in his official capacity. We also hold that the District Court did not abuse its discretion in failing to dispose of the parties' *Daubert* motions or privilege disputes before ruling on the motions for summary judgment. Finally, we hold that the Andros Order is not federal law binding on the United States because it was entered before the Confederal period, on behalf of the British Crown, and has not been ratified by the United States. Because the Andros Order is not federal law, it does not preempt New Yorks fishing regulations, including those prohibiting the harvesting of American glass eels in off-reservation New York waters.

The judgment of the District Court is therefore **AFFIRMED**.

JAMES F. SIMERMEYER,
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Melville, NY, *for PlaintiffsAppellants*.

ELIZABETH A. BRODY
(Barbara D. Underwood,
Judith N. Vale, *on the brief*),
for Letitia James, Attorney General
for the State of New York, New York, NY,
for Defendants-Appellees.

SARAH A. L. MERRIAM, *Circuit Judge*:

The Unkechaug Indian Nation (the "Nation") is a sovereign Native American tribe recognized under

New York state law. *See* N.Y. Indian Law §2 (McKinney 2013).[1] The Nation has historically inhabited Long Island, New York, and today its reservation lands are situated near Mastic, New York. Fishing and whaling have long held historical, economic, and cultural significance to the Nation.

The Nation and its Chief Harry B. Wallace (collectively "plaintiffs challenge the enforcement by the New York State Department of Environmental Conservation ("DEC") of regulations prohibiting the harvesting of American glass eels. *See* N.Y. Comp. Codes R. & Regs. tit. 6, §§10.1(a), 10.1(b)(13), 40.1(e), 40.1(o).[2] Central to plaintiffs challenge is the Andros Order, a 1676 agreement between the Royal Governor of New York and the Nation that allowed members of the Nation to "freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good according to law and Custome of the Government." App'x at 3007.[3] Plaintiffs contend that the Andros Order is a valid and enforceable

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[1] The Nations tribal status has been recognized under the federal common law. *See Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442, 469-77 (E.D.N.Y. 2009). The Nation has not been federally recognized by the United States Department of the Interior.

[2] In October 2021, when the parties briefed summary judgment, sections 40.1(e and (o were codified at subsections (f and (i) respectively.

[3] Throughout this Opinion, quotations from the Andros Order use the original spelling and punctuation of that document.

federal treaty preempting the DECs fishing regulations as applied to the Nations members in the Nation's customary off-reservation fishing waters.

Plaintiffs filed this action in the United States District Court for the Eastern District of New York (Kuntz, *J.*) against the DEC and its Commissioner Basil Seggos in his official capacity (collectively "defendants"). Plaintiffs sought declaratory and injunctive relief to prevent the DEC from enforcing New York fishing regulations, including those barring the harvesting of glass eels, against members of the Nation in "its Reservation waters and customary Unkechaug fishing waters." App'x at 26. The District Court granted summary judgment to defendants holding, in relevant part , that the Andros Order is not federal law preempting New Yorks fishing regulations. Plaintiffs timely appealed.

For the reasons that follow, we hold that the Eleventh Amendment bars plaintiffs' claims against the DEC, but that the *Ex parte Young*[4] exception to sovereign immunity applies to the claims for declaratory and injunctive relief asserted against Commissioner Seggos in his official capacity. We also hold that the District Court did not abuse its discretion in failing to dispose of the parties *Daubert*[5] motions or privilege disputes before ruling on the motions for summary judgment. Finally, we hold that the Andros

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[4] *Ex parte Young*, 209 U.S. 123 (1908).

[5] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Order is not federal law binding on the United States because it was entered before the Confederal period, on behalf of the British Crown, and has not been ratified by the United States. Because the Andros Order is not federal law, it does not preempt New Yorks fishing regulations, including those prohibiting the harvesting of American glass eels in off-reservation New York waters.

Accordingly we AFFIRM the judgment of the District Court.

I. Background

A. The American Eel and Conservation Efforts

Historically, American eels were abundant in East Coast waterways, but their numbers have declined significantly since the 1970s. "Glass eels" are miniature, transparent juvenile eels ranging in length from two to four inches. A lucrative overseas trade for glass eels has emerged due to the demand for glass eels to serve as seed stock for aquaculture facilities in Asia. The increasing demand for American glass eels has caused market prices to soar to over $2,000 per pound. These high prices and the relative ease of harvesting glass eels have encouraged poaching and over-harvesting in many states, giving "rise to serious concern as to the future viability of the eel industry." App'x at 1371.

In an effort to preserve the American eel population, New York has implemented various regulatory measures through federally-mandated

Fishery Management Plans.[6] As relevant here, New York law prohibits the harvesting of juvenile American eels under nine inches long. *See* N.Y. Comp. Codes R. & Regs. tit. 6, §§10.1(a), 10.1(b)(13), 40.1(e), 40.1(o). New York does not regulate fishing by members of the Nation in the Nation's reservation waters. *See* N.Y. Envt Conserv. Law §11-0707(8) ("The enrolled members of an Indian tribe having a reservation located wholly or partly within the state and such other Indians as are permitted by the tribal government having jurisdiction over such reservation may hunt fish, trap upon such reservation subject only to rules, regulations and fish and wildlife laws established by the governing body of such reservation."). Defendants-Appellees confirmed this in their brief, stating: "New York does not dispute the Unkechaug Nation's sovereignty over its reservation lands in Long Island and is not seeking to regulate fishing that takes place on the Unkechaug reservation. Appellees' Br. at 8-9 n.2.

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[6] The Atlantic States Marine Fisheries Commission ("ASMFC") is a congressionally authorized interstate compact organization that is responsible for coordinating fishery management for Atlantic coastal fisheries including the American eel. *See generally* 16 U.S.C. §§5101, *et seq*. New York is one of fifteen member states comprising the ASMFC. In an attempt to preserve the American eel population the ASMFC has implemented various regulatory measures, which are carried out by member states through Fishery Management Plans ("FMP"). *See id.* §§5102(1)-(2), 5104(a). The ASMFC first adopted an FMP for American eels in 1999. The FMP requires ASMFC member states to impose fishing regulations with respect to the American eel in an attempt to conserve the species. *See id.* §5104(b).

B. DEC Enforcement of the Regulations against the Nation

In March 2014, DEC officers encountered eight fishermen, including members of the Nation, harvesting glass eels in off -reservation waters. When confronted, the fishermen presented the DEC officers with a letter written on the Unkechaug Tribal Council's letterhead , signed by Chief Wallace, stating that four named individuals were "authorized to engage in traditional glass eel fishing pursuant to the Tribal Customs and practices of the Unkechaug Indian Nation." App'x at 3002. The DEC issued "criminal summons to the fisherman for harvesting glass eels in violation of New York law and seized fishing equipment and over seven pounds of glass eels. App'x at 4489. Six of the eight fishermen pled "guilty to violation[-]level offenses." App'x at 2780.

From approximately 2014 to 2016, the Nation attempted to export several shipments of glass eels to Hong Kong. Some of these shipments were intercepted and seized by the DEC. Following an April 2016 interception of a glass eel shipment, the Nation filed a lawsuit against the DEC in the Supreme Court of the State of New York, County of Queens, alleging that the DECs interception efforts had violated the Nations sovereign fishing rights and interfered with its religious practices. The Nation requested damages for the interception of the April 2016glass eel shipment, as well as injunctive relief. The state court dismissed the complaint on the DECs motion for lack of subject matter jurisdiction and for failure to state a cause of action.

C. Procedural Background

On February 21, 2018, plaintiffs initiated this action by filing a Verified Complaint against defendants alleging that New York's fishing regulations interfere with the Nation's federally recognized "right to fish freely on reservation waters and in customary fishing waters." Appx at 17. The Verified Complaint asserts four causes of action; only two are before us on appeal,[7] and both depend upon the claim that federal law preempts the challenged New York regulations. Specifically, plaintiffs contend that a 1676 "treaty" between the Nation and the Royal Governor of New York, Edmund Andros, is "the Supreme Law of the Land and enforceable against local and state regulations that would interfere with Unkechaug fishing rights and rights to sell fish." App'x at 25; *see also id.* at 22 ("Regulation by the Federal government of Indian Reservation lands is absolute

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[7] Plaintiffs have forfeited any argument about the other two claims, having failed to meaningfully brief them on appeal. Plaintiffs contend in a footnote that the District Court erred in ruling that 25 U.S.C. §232 (expanding New York's criminal jurisdiction over tribal reservations does not preempt New York's fishing regulations . *See* Appellants Br. at 11, n.1. In another footnote, they assert that because the District Court failed to consider the testimony of their expert Federick Moore we should "reverse the denial of Plaintiffs Freedom of Expression of Religion claim." *Id.* at 12 n.2. We deem these arguments forfeited and do not address them further. *See Revitalizing Auto Cmtys. Env't Response Tr. v. Nat'l Grid USA*, 10 F.4th 87, 100 n.9 (2d Cir. 2021) ("We ordinarily deem an argument to be forfeited where it has not been sufficiently argued in the briefs such as when it is only addressed in a footnote. (citations and quotation marks omitted).

and prevails over state and local regulations pursuant to [the] Supremacy Clause of the United States Constitution which includes treaties entered into by Indians.").

In their prayer for relief, plaintiffs seek: (1) "A declaration that the Nation, Harry B. Wallace as Chief and individually, its officials, and its . . .customary Unkechaug fishing waters are immune from [New York's] . . .fishing regulations and that the [defendants] lack authority to enforce fishing regulations under New York State Environmental Laws against them; (2) "A permanent injunction against [defendants'] attempts to impose [New York's] fishing restriction on eels . . . on . . . customary Unkechaug fishing waters and any attempts by [defendants] or [DEC's] officials, employees or legal representatives to enforce the civil or criminal laws against the Nation, Harry B. Wallace as Chief or in his individual capacity, its officials and its employees and (3) "A permanent injunction against any attempts by defendants] and [DEC's] officials and attorneys to impose . . . criminal prosecution under the Environmental Laws against the Nation, Harry Wallace as Chief and individually, its officials and employees in relation to the conduct on April 6, 2016 when eels caught on the Poospatuck Indian Reservation [were] confiscated from Unkechaug Indians." Appx at 26.

After the close of discovery and pursuant to the briefing schedule set by the District Court, each party filed a motion seeking to preclude the testimony of the others expert witnesses. Shortly thereafter, the parties

filed cross-motions for summary judgment. The District Court granted defendants motion for summary judgment holding, in relevant part, that (1) the Eleventh Amendment does not bar the claims asserted against Commissioner Seggos, and (2) the Andros Order is not federal law preempting New York's fishing regulations. *See generally Unkechaug Indian Nation v. N.Y. Dep't of Env't Conservation*, 677 F. Supp. 3d 137 (E.D.N.Y. 2023). The District Court also denied plaintiffs' motion for summary judgment and terminated, without comment, several pending motions including the parties *Daubert* motions. The Nation and Chief Wallace timely appealed.

II. Standard of Review

The standard by which we review the grant of summary judgment is well established:

> We review de novo a district court's decision to grant summary judgment construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party's favor. Summary judgment is required if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc., 62 F.4th 748, 752 (2d Cir. 2023) (per

curiam) (citations and quotation marks omitted).[8]

III. Discussion

A. The Eleventh Amendment does not bar this action against Commissioner Seggos in his official capacity.

Before reaching the merits of plaintiffs' appeal, we first address defendants' contention that the Eleventh Amendment bars this action because: (1) the DEC is a state entity not subject to suit; and (2) the *Ex parte Young* exception to sovereign immunity does not apply to the claims against Commissioner Seggos because plaintiffs claims "functionally seek [] to divest the State of its sovereign control over public lands."[9]

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[8] "The same standard applies where, as here, the parties filed cross -motions for summary judgment and the district court granted one motion but denied the other. *Morales v. Quintel Ent., Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

[9] "The Eleventh Amendment does not automatically destroy original jurisdiction but rather grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense and a court need not raise the defect on its own. Unless the State raises the matter, a court can ignore it." *Donohue v. Cuomo*, 980 F.3d 53, 77 n.15 (2d Cir. 2020) (citation and quotation marks omitted. Additionally, we have "previously declined to address Eleventh Amendment issues, even where the issue *was* raised by a state defendant, so as to avoid unnecessarily taking up a difficult constitutional issue. *Id.* Here, defendants have raised an Eleventh Amendment immunity defense that does not implicate "taking up a difficult constitutional issue. *Id.* Accordingly, we address the issue of sovereign immunity before turning to the merits of plaintiffs

Appellees Br. at 54 (citation to record and quotation marks omitted).

Plaintiffs assert that we cannot consider defendants' Eleventh Amendment arguments because defendants failed to cross-appeal the District Court's rejection of this defense. Plaintiffs' argument ignores the well-established principle that "[a]n appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Drax v. Reno*, 338 F.3d 98, 105 (2d Cir. 2003) (citation and quotation marks omitted. Of course "an appellee who does not cross-appeal may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." **Jennings v. Stephens**, 574 U.S. 271, 276 (2015) (citation and quotation marks omitted). Defendants here do "not seek to enlarge [their] own rights . . . but seek[] merely to sustain a judgment on grounds with support in the record. *Drax* , 338 F.3d at 106 (citation and quotation marks omitted. We therefore consider defendants Eleventh Amendment arguments.

"Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021). States also generally "enjoy Eleventh Amendment immunity"

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appeal.

against suits brought by Native American tribes. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). The parties do not dispute that the DEC is a state entity, and we agree. *See Silva v. Farrish*, 47 F.4th 78, 84 (2d Cir. 2022). Accordingly, the Eleventh Amendment bars plaintiffs' claims against the DEC.[10]

We agree with the District Court, however, that the *Ex parte Young* "exception to Eleventh Amendment immunity applies to claims asserted against Commissioner Seggos in his official capacity. *Unkechaug Indian Nation*, 677 F. Supp. 3d at 148. The *Ex parte Young* doctrine provides "a narrow exception" to Eleventh Amendment immunity "that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Silva* , 47 F.4th at 84 (citation and quotation marks omitted). "[I]n determining whether the *Ex parte Young* doctrine applies . . . a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *W. Mohegan Tribe & Nation v. Orange Cnty.*, 395 F.3d 18, 21 (2d Cir. 2004) (per curiam) (citation and quotation marks omitted. Applying this "straightforward inquiry *id.*, we find that the allegations in the Verified Complaint satisfy the requirements of *Ex parte Young*. The Nation

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[10] Because we dismiss plaintiffs' claims against the DEC on sovereign immunity grounds at the outset, we refer to the defendant in the singular throughout the remainder of this opinion.

alleges that (1) the ongoing enforcement of New York fishing regulations violates its federally-guaranteed rights, and (2) the requested relief would prospectively end the alleged violations.[11] Thus, the *Ex parte Young* exception to sovereign immunity applies to the claims asserted against Seggos in his official capacity.

Defendant insists that this does not end the inquiry, asserting that the Supreme Courts decision in *Coeur d'Alene* bars plaintiffs claims. We disagree. e have previously considered *Coeur d'Alene* in the context of assessing whether enforcement of New York fishing regulations against a Native American tribe violated the tribes federally protected fishing rights. *See Silva*, 47 F.4th at 85. We conclude in this matter, as we did in *Silva* , that *Coeur d'Alene* does not bar plaintiffs claims.

In *Coeur d'Alene*, a Native American tribe sued the State of Idaho, state agencies, and several state officials in their individual capacities, seeking to establish its entitlement to the exclusive use, occupancy, and right to quiet enjoyment of certain submerged lands that, while within the boundaries of the tribes reservation, had been claimed and governed

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[11] Because plaintiffs' request "for declaratory relief adds nothing to the prayer for injunction and "does not impose *upon the State* a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials plaintiffs claims seeking forward-looking declaratory relief fall within the *Ex parte Young* exception to Eleventh Amendment immunity. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002) (citation and quotation marks omitted).

by Idaho for more than a century. *See* 521 U.S. at 264-66. The tribe also sought a declaration that all Idaho laws and regulations purporting to regulate or affect that land in any way were invalid. *See id.* at 265. The Supreme Court considered whether the tribes lawsuit fell within the *Ex parte Young* exception to Eleventh Amendment immunity and found, under the circumstances of that case, that it did not. *See id.* at 281. The Court reasoned that the requested relief would have major implications on "Idaho's sovereign authority" because it was "the functional equivalent of quiet title to land," and that, as a result, the lawsuit was barred by state sovereign immunity. *Id.* at 282; *see also id.* at 287–88. In sum, under *Coeur d'Alene*, a "suit cannot proceed if it asserts an 'entitlement to the exclusive use and occupancy and the right to quiet enjoyment of . . . lands.' " *Silva*, 47 F.4th at 85 (quoting *Coeur d'Alene*, 521 U.S. at 265).

Relying on *Silva*, the District Court determined that *Coeur d'Alene* does not bar the claims against Seggos because, as was true in *Silva*, plaintiffs here "do not seek to divest the state of its ownership of any lands or waters," but rather "seek a declaration . . . that [defendant has] interfered with their established right to fish in Reservation and customary Unkechaug fishing waters without regulatory interference by the State, and to permanently enjoin the [defendant] from interfering with said right in the future." *Unkechaug Indian Nation*, 677 F. Supp. 3d at 152 (citations and quotation marks omitted). The District Court concluded that plaintiffs requested relief "neatly accords with *Silva*," and *Coeur d'Alene* does not bar the claims against Seggos. *Id.* We reach the same

conclusion.

Defendant asserts that *Silva* is distinguishable because it involved narrower claims than those asserted here. Not so. As was true in *Silva*, plaintiffs' requested relief in this case "would not transfer ownership and control of the [waters] from the state to an Indian tribe. Nor would it allow the plaintiffs to prevent others from fishing in the [waters]. It would merely resolve the plaintiffs individual claims that they have their own right to fish there." *Silva*, 47 F.4th at 85. Also, as in *Silva*, "[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. The relief sought by plaintiffs "in this case is not a right to *exclude all others*." *Id.* at 85 n.7 (citation and quotation marks omitted). Thus, because plaintiffs' "requested relief would not divest the state of its ownership of the [waters] this suit is not effectively one against the state," and "plaintiffs' claims seeking prospective relief against [Commissioner Seggos] fall within the *Ex parte Young* exception to state sovereign immunity." *Id.* at 86.

Accordingly, we hold that plaintiffs' claims seeking prospective declaratory and injunctive relief against Commissioner Seggos in his official capacity fall within the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. We turn next to the merits of the appeal.

B. The District Court did not abuse its discretion in failing to dispose of the

> *Daubert* motions, or in failing to rule on defendant s claims of privilege, before deciding the cross-motions for summary judgment.

Before reaching the question of whether the Andros Order is valid federal law, we pause to briefly address plaintiffs arguments that the District Court erred by ruling on the cross-motions for summary judgment without first (1) disposing of the parties respective *Daubert* motions, and (2) conducting an *in camera* review of documents defendant withheld from discovery as privileged and adjudicating those claims of privilege.

We generally review a district court's "evidentiary rulings for abuse of discretion, reversing only if we find manifest error." *United States v. Miller*, 626 F.3d 682, 688 (2d Cir. 2010) (citation and quotation marks omitted).e also review a district courts discovery rulings for abuse of discretion, with the understanding that a "district court enjoys wide discretion in its handling of pre trial discovery. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 68 (2d Cir. 2003) (citation and quotation marks omitted).

It is generally the better practice for a district court to resolve any pending *Daubert* motions or discovery disputes before adjudicating dispositive motions, so as to conclusively define the summary judgment record. *See Rakin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997) ("Because the purpose of summary judgment is to weed out cases in which there is no genuine issue as to any material fact and the moving

party is entitled to a judgment as a matter of law, it is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment because it "conserves the resources of the parties the court, and the jury." (citations and quotation marks omitted)). But under the circumstances here, the District Court did not abuse its discretion – let alone commit manifest or clear error – in failing to resolve the *Daubert* motions or plaintiffs discovery objections because (1) the District Court did not rely on the expert opinions, which are not relevant to the question of whether the Andros Order is valid federal law,[12] and (2) the District Court did not rely on or, from what we can discern from the record, otherwise consider the privileged material in reaching its decision. *See, e.g.*, *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 156 (2d Cir. 2011) (finding no error in district courts failure to consider an expert report that was irrelevant to its decision).

Nevertheless, plaintiffs now contend that the documents withheld as privileged could have provided

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[12] The Nations expert Dr. John Strong provided testimony as to the *meaning* of the Andros Order, and defendants expert Toni M. Kerns provided testimony relevant to the parties arguments implicating the conservation necessity doctrine. Neither informs our decision nor would they have benefitted the District Court. To the extent that Dr. Strong opined that the Andros Order is a federal treaty binding on the United States, that would play no role in the District Court's analysis because "experts are not permitted to present testimony in the form of legal conclusions. *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined No. of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994).

additional evidence with which to oppose summary judgment – but present no argument as to how that evidence might have resulted in a different outcome. Plaintiffs did not claim at summary judgment any inability to "present facts essential to justify [their] opposition" because of the District Courts failure to rule on the privilege issues. Fed. R. Civ. 56(d). If plaintiffs had, then the District Court could have "issue[d] an[] appropriate order." *Id.* But by failing to present an affidavit or declaration to the District Court pursuant to Rule 5(d), plaintiffs have forfeited this issue. *See Gurary v. Winehouse*, 190 F.3d 37, 43-44 (2d Cir. 1999). In any event, defendant s privilege log includes no reference to the Andros Order or other treaties, making it unlikely that any of the requested documents would have any bearing on the determinative question here.

Finding no procedural error, we turn to the crux of the Nation's appeal Is the Andros Order binding federal law that preempts New Yorks fishing regulations?

C. The Andros Order is not federal law.

On May 24, 1676, the royally-appointed colonial Governor of New York, Edmund Andros, issued an "Order" endorsed by the Nation stating:

> Resolved and ordered that [the Unkechaug Nation] are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good according to law and

> Custome of the Government of which all Magistrates officers or others whom these may concerne are to take notice and suffer the said Indyans so to doe without any manner of lett hindrance or molestacion they comporting themselves civilly and as they ought.

App'x at 3007. Plaintiffs claim that this Order is a valid treaty binding on the United States because the adoption of Article VI of the United States Constitution renders it enforceable. Two clauses of Article VI of the United States Constitution are relevant here: (1) the Debts and Engagements Clause, and (2) the Supremacy Clause.

In interpreting Article VI of the United States Constitution, we begin with the text. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338-39 (1816) ("If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.");*see also N.L.R.B. v. Noel Canning*, U.S. 513, 557 (2014) ("[W]e interpret the Constitution in light of its text, purposes, and our whole experience as a Nation." (citation and quotation marks omitted)). Based on the text of Article VI, we conclude that the Andros Order does not today bind, nor did it ever bind, the United States.

1. Debts and Engagements Clause

Plaintiffs contend that the Andros Order is binding on the United States through the Debts and Engagements Clause of Article VI, which states: "All

Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, *as under the Confederation*." U.S. Const. art. VI, cl. 1 (emphasis added). But in making this argument the Nation conflates "Engagements" made during the Confederal period – that is after the American Revolution, when the Articles of Confederation were in effect, formally binding the American States together prior to the adoption of the Constitution – and those entered *before* the Confederal period. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995).

The Andros Order was entered in 1676, prior to the formation of the United States, on behalf of the British Crown. Nothing in the text of the Debts and Engagements clause suggests that *pre*-Confederal "Engagements" or agreements on behalf of the British Crown, such as the Andros Order, would bind *the United States* after the ratification of the Constitution. To the contrary, the plain language of the Debts and Engagements Clause limits its application to "Engagements" entered during the Confederation but before the adoption of the Constitution. U.S. Const. art. VI, cl. 1. The purpose of the Debts and Engagements Clause was "to assure creditors that the adoption of the Constitution would not erase existing obligations *recognized under the Articles of Confederation*." *Lunaas v. United States*, 936 F.2d 1277, 1278 (Fed. Cir. 1991) (emphasis added).

It is undisputed that the Andros Order was not made during the Confederal period; indeed, it predates

the Confederation by nearly 100 years. Accordingly, we have little trouble concluding based on the plain language of the Debts and Engagements Clause that the Andros Order does not today bind the United States.

2. The Supremacy Clause

Next plaintiffs contend that the Andros Order is a valid treaty of the United States that overrides New Yorks regulations under the Supremacy Clause of Article VI, which provides, in relevant part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2. The plain language of the Supremacy Clause thus contemplates two types of treaties that are, or will be "the supreme Law of the Land": (1) treaties that were entered *under the authority of the United States* before the ratification of the Constitution, *i.e.*, those entered during the Confederal period , and (2) future treaties made by the United States *after* the ratification of the Constitution.

As explained above, the Andros Order was entered in 1676, more than 100 years before the adoption of either the Articles of Confederation or the Constitution. It therefore plainly does not fall within the Supremacy Clauses contemplation of future treaties.

The question, therefore, is whether the Andros

Order is an enforceable treaty made before the ratification of the Constitution. The placement of the commas around "or which shall be made" makes very clear that the phrase "under the Authority of the United States modifies "all Treaties made as well as "all Treaties . . . which shall be made." Thus, the only pre-existing treaties that are "the supreme Law of the Land" under the Supremacy Clause are those made "under the Authority of the United States," not those made before the United States existed. We thus agree with the reasoning of the Virgina Supreme Court in *Alliance to Save the Mattaponi v. Commonwealth, Department of Environmental Quality ex rel. State Water Control Board*, 621 S.E.2d 78, 94 (Va. 2005) ("*Mattaponi*"). There, the Mattaponi Indian Tribe challenged "a Virginia Water Protection Permit . . . for construction of" a reservoir on the grounds that the permit violated certain aspects of "the 1677 Treaty at Middle Plantation . . .entered into by King Charles II and ancestors of the Mattaponi Indian Tribe (the Tribe)." *Id.* at 83; *see also id.* at 85. The Tribe asserted that Virginia was bound, as a matter of federal law, by the treaty because "the Constitution's Supremacy Clause adopted as federal law treaties made between Indian tribes and the British Crown." *Id.* at 93. The Virginia Supreme Court rejected that argument and concluded that the plain language of the Supremacy Clause does not support a finding that a treaty entered in 1677 between the British Crown and a Native American tribe was made under federal law.

Like the treaty considered by the Virginia Supreme Court, the Andros Order was executed before the creation of the United States, at a time when the

British Crown held "in its utmost extent" the power to make treaties with the Native Americans. *Oneida Indian Nation of N.Y. v. New York* ("*Oneida I*"), 691 F.2d 1070, 1087 (2d Cir. 1982) (citation and quotation marks omitted).The Supremacy Clauses reference to ""Treaties made . . . does not refer to treaties entered into between the British Crown, by its royal representative, and the Crown s adversaries." *Mattaponi*, 621 S.E.2d at 94; *see also Oneida I*, 691 F.2d at 1088 (observing that while the states were British colonies, they lacked the power to "enter into treaties of peace or alliance"). Rather, "the adoption of the treaty provision in Article VI make[s] it clear that . . . agreements made *by the United States under the Articles of Confederation*, including the important peace treaties which concluded the Revolutionary War, would remain in effect." *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (emphasis added).

The Andros Order plainly could not have been made under the "Authority of the United States which did not exist in 1676 when the Order was executed. U.S. Const. art. VI, cl. 2 *see Mattaponi*, 621 S.E.2d at 95; *see also* Restatement of the Law of Am. Indians: Treaties with Indian Tribes §5 cmt. h (Am. L. Inst. 2024) ("Indian treaties with American colonies or states before the Articles of Confederation . . . are not treaties entitled to status under the Supremacy Clause."). Thus, the plain text of the Supremacy Clause does not support plaintiffs assertion that the Andros Order is a federal treaty that was ratified under the Constitution's Supremacy Clause and binding on the United States today.

Plaintiffs cite to no authority supporting their argument that preConfederal treaties with a sovereign tribe, such as the Andros Order, were ratified through the adoption of Article VI of the Constitution. When pressed at oral argument for authority supporting their position, plaintiffs cited two cases: *Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009), and *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Neither of these cases supports the conclusion that a pre-Confederal treaty between the British Crown and a sovereign Native American tribe, like the Andros Order, binds (or ever bound) the United States.

First, plaintiffs contend that because *Gristede's* recognized the Nation as a tribe under the federal common law, the Orders and treaties the Nation entered into with the British Crown are now "effective under the Constitution." Oral Argument at 9:06. *Gristede's* does not support this claim. In *Gristede's*, a supermarket chain brought various claims against the Nation arising from the Nation's "tax-free cigarette sales and advertising." 60 F. Supp. 2d at 445. The Nation moved to dismiss for lack of subject matter jurisdiction, asserting immunity "from suit by virtue of [its] sovereign status as [an] Indian tribe[]." *Id.* The *Gristede's* Court found that the Nation "is a 'tribe'" under federal common law and "enjoys sovereign immunity" from suit. *Id.* at 465. But such common law recognition says nothing about whether the United States has ratified the Andros Order. Rather, *Gristede's* simply applies the well-established principle that "tribes possess the common-law immunity traditionally enjoyed by sovereign powers." *Oneida*

Indian Nation v. Phillips, 981 F.3d 157, 170 (2d Cir. 2020).

Second, at oral argument and in its briefing before this Court, the Nation relied on *Trustees of Dartmouth College* to argue that we should deem the Andros Order "a contract protected under the Contract Clause of the U.S. Constitution," which cannot be altered or amended by the New York legislature. Reply Br. at 22-23; *see also* Appellants Br. at 25-56. *Trustees of Dartmouth College* has nothing to do with the Supremacy Clause; rather, that case held that the charter of Dartmouth College, which had been granted by the British Crown, is a contract that could not be impaired by the State of New Hampshire without violating the Contracts Clause of the Constitution. *See* 17 U.S. at 650. That case, however, has no relevance here because the Nation did not plead a Contracts Clause claim. Thus, whether the Andros Order is a contract protected by the Contracts Clause is not before us. *See, e.g.*, *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (recognizing that a party may not amend its pleadings through statements made in its briefs or its opposition to the motion for summary judgment).

In sum, for the reasons stated, the Andros Order is not federal law binding on the United States, based on either the Debts and Engagements Clause or the Supremacy Clause of the United States Constitution. The Andros Order therefore does not preempt New York's regulations governing the harvesting of American glass eels in off-reservation New York waters.

IV. Conclusion

Because our conclusion that the Andros Order is not federal law is dispositive of this appeal, we need not address the parties' remaining arguments. Accordingly, for the reasons stated the District Court appropriately entered summary judgment in defendants favor, and we AFFIRM the judgment of the District Court.

United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: January 28, 2025
Docket #: 23-1013cv
Short Title: Unkechaug Indian Nation v. Seggos

DC Docket #: 18-cv-1132
DC Court: EDNY (CENTRAL ISLIP)
DC Judge: Shields
DC Judge: Kuntz

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

* be filed within 14 days after the entry of judgment;

* be verified;

* be served on all adversaries;

* not include charges for postage, delivery, service, overtime and the filers edits;

* identify the number of copies which comprise the printer's unit;

* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;

* state only the number of necessary copies inserted in enclosed form;

* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;

* be filed via CM/ECF or if counsel is exempted with the original and two copies.

VERIFIED ITEMIZED BILL OF COSTS

Counsel for _____ respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the _____ and in favor of _____ for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNKECHAUG INDIAN NATION and
HARRY B. WALLACE,
Plaintiffs,

v.

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

DECISION & ORDER
18-CV-1132 (WFK) (AYS)

WILLIAM F. KUNTZ, II, United States District Judge:

Unkechaug Indian Nation (the "Nation") and Harry B. Wallace (collectively, "Plaintiffs") bring this action pursuant to 25 U.S.C. § 2201 and Fed. R. Civ. P. 65 seeking a permanent injunction and declaratory judgment against the New York State Department of Environmental Conservation ("NYSDEC") and Basil Seggos, the NYSDEC Commissioner (collectively, "Defendants"). In the Complaint filed on February 21, 2018, Plaintiffs allege NYSDEC's regulations

unlawfully interfere with Plaintiffs' fishing rights in designated Reservation areas and in customary fishing waters. ECF No. 1. Specifically, Plaintiffs argue their fishing rights are protected by treaty and enforceable against NYSDEC, NYSDEC's regulations are preempted by federal law, and NYSDEC's regulations interfere with tribal self-government and impair Plaintiffs' freedom of religious expression. On October 1, 2021, Defendants and Plaintiffs filed fully-briefed crossmotions for summary judgment pursuant to Fed. R. Civ. P. 56. ECF Nos. 98, 104. For the reasons stated below, Defendants' Motion for Summary Judgment at ECF No. 98 is GRANTED and Plaintiffs' Motion for Summary Judgment at ECF No. 104 is DENIED.

BACKGROUND

The Unkechaug Indian Nation (the "Nation") is recognized under both federal and New York state law. *See* Compl. ¶ 2 (citing *Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442, 469-70 (E.D.N.Y. 2009) (Matsumoto, J.)); N.Y. Indian Law § 2. On February 21, 2018, the Nation and its chief, Harry B. Wallace ("Chief Wallace"), (collectively, "Plaintiffs") filed a Complaint against the New York State Department of Environmental Conservation ("NYSDEC") and Basil Seggos, the NYSDEC Commissioner (collectively, "Defendants"). *See* Compl. ¶ 1, ECF No. 1. Plaintiffs bring this action pursuant to 25 U.S.C. § 2201 and Fed. R. Civ. P. 65, seeking a judgment from this Court that they are not subject to Defendant NYSDEC's regulations and enforcement authority over fishing in reservation lands and Unkechaug customary fishing waters. *Id.* Specifically,

Plaintiffs challenge Defendants' attempts to regulate, restrict, and criminally prosecute Plaintiffs for fishing in their reservation and customary fishing waters and allege their claims accord with inherent native sovereignty, religious freedom and expression, treaties, and other federal laws. *Id*.

At the heart of this case is New York State's effort to conserve the American eel (*Anguilla rostrata*) species. The American eel represents an important resource for both biodiversity and human use. Kerns Dec., ECF No. 101, Ex. 5 at 17. This species possesses significant ecological, cultural, and commercial value and has therefore been the subject of increasingly stringent protection at the federal and state level. The Atlantic States Marine Fisheries Commission ("ASMFC" or "the Commission"), a congressionally authorized interstate regulatory body comprised of scientists and marine policy experts, controls much of the species' oversight protection. *See* Kerns Dec., Ex. 4 (Atlantic States Marine Fisheries Commission, Interstate Fisheries Management Program Charter).[1]

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[1] ASMFC was developed in response to the Atlantic Coastal Fisheries Cooperative Management Act of 1993, which "provided the Commission with responsibilities to ensure member state compliance with interstate fishery management plans." Kerns Dec., Ex. 4, at 3. The body is overseen by representatives of the fifteen states bordering the Atlantic Ocean, including New York. *Id.*; *see generally* Kerns Dec., ECF No. 101 (providing a detailed overview of the ASMFC, including the processes by which the Commission promulgates American Eel Stock Assessment Reports, Fishing Management Plans, and supplemental addenda thereto).

The Commission has tracked trends in the American eel's population over the past few decades. According to ASMFC studies, the American eel population has been steadily declining since the 1990s.[2] In an attempt to preserve the species' population, the Commission has implemented various regulatory measures. *See* Kerns Dec., Ex. 4 at 16. The Commission, together with the fifteen Member States which comprise the organization, carry out this mandate by generating Fishery Management Plans ("FMPs"). 16 U.S.C. § 5104(a) (prescribing state implementation of coastal fishery management plans; detailing coastal fishery management plans). The Commission first adopted an FMP pertaining to American eels in the 1990s. *See* Def's Mot. for Summary Judgment ("Def's Mem."), ECF No. 99 at 20. The FMP statutorily required ASMFC Member States—including New York—to impose fishing regulations with respect to the American eel in an attempt to conserve the species. *See* 16 U.S.C. § 5104(b) (setting forth state implementation and enforcement obligations) ("Each State identified under [16 U.S.C. § 5104(a)] with respect to a coastal fishery management plan shall implement and enforce the measures of such plan within the timeframe established in the plan.").

Despite the efforts of the Commissions and its Member States, ASMFC reports compiled in 2012 and

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[2] *See* Def's Mot. for Summary Judgment, ECF No. 99 at 15-18 (providing a historical summary of the American Eel's population decline in the Atlantic marine ecosystem).

2017 confirmed the species' population continued to decline. *Id.*; *see also* Kerns Dec., Ex. I at 14-33 (2017 ASMFC American Eel Stock Assessment Update stating the American eel's population is in a "depleted state"). Indeed, the rate of the American eel's population decline has worsened in recent years due to the emergence of a lucrative overseas trade in the species, which has further spurred overfishing. *Id.* at 10; *see also* Def's Mem. at 17.

In an effort to combat this precipitous population decline, the ASMFC adopted Addenda III (2013) and IV (2014) to the FMP. *See* Kerns Dec., Ex. G; H. These new regulations impose greater fishing limitations on American eels, including stricter size and catch restrictions. *Id.* As an ASMFC Member State, New York is required to adopt and enforce the FMP and the supplemental Addenda thereto pursuant to 16 U.S.C. § 5104. *See also* Kreshik Dec., ECF No. 102 ¶ 5. Accordingly, the State promulgated N.Y.C.R.R. §§ 10.1 (a) and (b) and 40.1(f) and (i), making it illegal to take or possess American eels less than nine inches long, which includes all juvenile eels, also known as "glass eels." *Id.*; *see also* Kerns Dec. ¶ 35.

The State's attempt to regulate fishing, including its ban on taking glass eels in non-reservation customary fishing waters, is at the core of Plaintiffs' case. Plaintiffs claim fishing and whaling have been the Nation's "main economic engine" for "time immemorial." Compl. ¶¶ 2, 28. Plaintiffs also allege Nation members require access to their customary fishing waters to gather crustaceans and shells in

order to make wampum[3] for religious and cultural uses, and that the State's regulations interfere with this practice. *Id.* ¶¶ 2, 27.

Throughout their Motion for Summary Judgment, Plaintiffs reiterate fishing's historical, cultural, and economic significance. *See* Pls. Mot. for Summary Judgment ("Pls. Mot."), ECF No. 104; Memorandum in Support of Pls. Mot. for Summary Judgment ("Pls. Mem."), ECF No. 105. Indeed, in their fully-briefed motion filed October 1, 2021, Plaintiffs challenge Defendants for having subjected Plaintiffs—and Plaintiff Chief Wallace in particular—to threats and fear of criminal prosecution for exercising their right to fish in reservation and customary fishing waters. *Id.* at 25. In particular, Plaintiffs claim Defendants confiscated fish and fishing equipment from Nation members and issued criminal summonses to other Nation members for fishing on reservation lands and in Unkechaug customary fishing waters. *Id.* Plaintiffs further allege Hugh Lambert Mclean, an Assistant New York State Attorney General, threatened to criminally prosecute Chief Wallace for unlawfully selling glass eels in violation of New York State's environmental law. *Id.* at 26.

Plaintiffs detail these accusations further in their Motion for Summary Judgment before the Court. Indeed, Plaintiffs argue they have proved they are

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[3] Wampum refers to traditional shell beads. *See generally* Pls. Mot. for Summary Judgment ("Pls. Mot."), ECF No. 104.

likely to succeed on the merits in all causes of action asserted in the Complaint and set forth in their instant motion. That is to say, Plaintiffs argue they have proved:

(i) The NYSDEC regulations are preempted by federal law and impair tribal selfgovernment. Pls. Mem. at 77-80, 109; *see also* Compl. ¶¶ 34-39;[4]

(ii) The Unkechaug Andros Treaty is enforceable against NYSDEC regulations. Pls. Mem. at 40-77, 107; *see also* Compl. ¶¶ 55-56;

(iii) NYSDEC Commissioner Seggos and Deputy Commissioner Thomas Berkman violated federal law by enforcing NYSDEC regulations against the Unkechaug contrary to the Nation's treaty rights and federal law. Pls. Mem. at 80-85, 105; *see also* Compl. ¶¶ 34-39, 42-45; and

(iv) The NYSDEC regulations interfere with the Unkechaug's freedom of religion. Pls. Mem. at 110; Compl. ¶¶ 46-53.

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[4] 25 U.S.C. § 232 provides in relevant part: "The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York . . . Provided, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom . . . ."

On the other hand, Defendants argue:

(i) The NYSDEC's regulations are not preempted. Def's Mem. at 43;

(ii) Plaintiffs are not entitled to relief under the Free Exercise Clause. *Id.* at 46;

(iii) Plaintiffs are not exempt from NYSDEC's regulations by virtue of the Andros Order, even if the Court were to construe said Order as a treaty. *Id.* at 55;

(iv) Plaintiffs' sovereignty claims, separate from the Andros Order, also fail. *Id.* at 67; and

(v) The Andros Order is not a treaty and does not preclude state regulation. *Id.* at 67.

For the reasons set forth below, this Court finds for Defendants on each of their claims recounted *supra* in points (i) through (v): NYSDEC's regulations are neither preempted by federal nor state law; the Andros Order and NYSDEC's regulations are reconcilable; and Plaintiffs are not entitled to relief under the Free Exercise Clause of the First Amendment.

LEGAL STANDARD

Summary judgment is appropriate 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" by citation to materials in the record, including depositions, affidavits,

declarations, and electronically stored information. Fed. R. Civ. P. 56(a)-(c). Affidavits and declarations, whether supporting or opposing a summary judgment motion, "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Id.*; *see also Patterson v. Cty. of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004). A genuine dispute exists if a reasonable jury could find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001). In determining whether summary judgment is appropriate, courts must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (citation and internal quotation marks omitted). The role of the district court is not to weigh the evidence and determine the truth of the matter, but rather to answer "the threshold inquiry of determining whether there is the need for a trial." *Anderson*, 477 U.S. at 24950.

If the moving party carries its preliminary burden, the burden shifts to the non-movant to raise the existence of "specific facts showing that there is a genuine issue for trial." *Cityspec, Inc. v. Smith*, 617 F. Supp. 2d 161, 168 (E.D.N.Y. 2009) (Wexler, J.) (quoting *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The mere existence of a scintilla of evidence" in support of the non-movant will not alone defeat a summary judgment motion. *Anderson*, 477 U.S. at 252. Rather, the non-

moving party must make a showing sufficient to establish the existence of each element constituting its case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) ("[A] complete failure of proof concerning an essential element of the nonmov[ant]'s case necessarily renders all other facts immaterial."). Conclusory statements, devoid of specifics, are insufficient to defeat a properly supported motion for summary judgment. *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998).

ANALYSIS

As a threshold matter, this Court must address all jurisdictional arguments before reaching the merits of this case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 84 (1998). Defendants raise two such arguments here. First, they claim this Court lacks jurisdiction to review Plaintiffs' causes of action on the grounds Defendants are immune from suit under the Eleventh Amendment. Def's Mem. at 31. Second, Defendants argue Plaintiffs' claims are precluded from review under the doctrines of *res judicata* and collateral estoppel. *Id.* at 39. For the reasons to follow, this Court finds both arguments unpersuasive.

I. The Eleventh Amendment

The parties do not dispute Defendant NYSDEC is a state agency, and Defendant Seggos is a state official. Therefore, it is essential for this Court to consider whether it may exert jurisdiction over Defendants or whether they are immune from suit by

virtue of the Eleventh Amendment to the U.S. Constitution.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "A State is thus immune from suits in federal court brought by its own citizens and such immunity extends to officers acting on behalf of the State." *Soloviev v. Goldstein*, 104 F. Supp. 3d 232, 243 (E.D.N.Y. 2015) (Kuntz, J.) (internal citation and quotation marks omitted). State agencies acting as "arms of the state" are also entitled to sovereign immunity under the Eleventh Amendment. *McGinty v. New York*, 251 F.3d 84, 95-96 (2d Cir. 2001). Moreover, sovereign immunity applies to suits against states brought by Indian tribes. *See Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996).

There are three exceptions to Eleventh Amendment immunity. Namely, this protection does not apply if (1) a state waives its immunity; (2) Congress clearly abrogates state sovereign immunity; or (3) the suit is against a state official and seeks prospective relief. *See Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011); *Lapides v. Bd. of Regents*, 535 U.S. 613, 619 (2002); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976).

Plaintiffs argue Defendants expressly waived Eleventh Amendment immunity by coercing Plaintiffs

to initiate the present case in bad faith. Pls. Mem. at 85. Defendants reject this argument in full, arguing the State Defendants' Eleventh Amendment immunity has neither been abrogated nor waived. They also argue the relief sought by Plaintiffs is unavailable in federal court under the *Ex Parte Young* exception as established by the Supreme Court in *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) and the Second Circuit in *Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004). Lastly, Defendants add, Plaintiffs' sovereignty and treaty claims are barred from review in accordance with the *Pennhurst* doctrine as these claims allegedly sound in state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

This Court agrees with Defendants insofar as it finds neither the waiver nor abrogation exception apply here. However, the Court disagrees with Defendants' *Ex Parte Young* analysis. This exception to Eleventh Amendment immunity does apply with respect to Plaintiffs' claims against Defendant-NYSDEC officials in light of the Second Circuit's recent holding in *Silva v. Farish*, No. 21-616 (2d Cir. 2022).

As an initial matter, neither party argues Congress abrogated Defendants' Eleventh Amendment Immunity. This Court agrees. This exception to Eleventh Amendment immunity is inapplicable to the case at hand and therefore the following analysis omits any discussion of abrogation. Instead, the Court first proceeds by addressing the issue of waiver—namely, by discussing why this exception does not apply

here—before it applies the *Ex Parte Young* exception to the case at bar in light of the recent *Silva* ruling.

A. Waiver

Waiver, or consent to suit, is not lightly inferred; federal courts strictly construe statutes which purportedly provide consent to suit. *See Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944). A state waives immunity by, for example, subjecting itself to suit in federal court. *Lapides*, 535 U.S. at 618-20. However, it does not waive immunity by consenting to suit in its own courts. *Id.*

In the instant action, Plaintiffs argue the State, acting through its legal counsel, coerced Plaintiffs into filing the instant action and that such coercion constitutes waiver for Eleventh Amendment purposes. Pls. Mem. at 85. This Court disagrees.

As previously stated, "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. . .waiver of a State's Eleventh Amendment immunity will not be found unless such consent is unequivocally expressed." *Boddie v. New York State Div. of Parole*, 08-CV-911, 2009 WL 1033786, at *4 (E.D.N.Y. Apr. 17, 2009) (Matsumoto, J.), *opinion modified on denial of reconsideration*, 08-CV-911, 2009 WL 1938981 (E.D.N.Y. July 7, 2009) (quoting *Close v. New York*, 125, F.3d 31, 39 (2d Cir. 1997) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984))) (quotations omitted). "States cannot 'constructively

consen[t]' to waiver of their Eleventh Amendment protection from suit." *Santiago v. N.Y. State Dep't of Corr. Servs.*, 945 F.2d 25, 30 (2d Cir. 1991) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). States themselves must decide to waive their immunity in federal court. *Id.* Indeed, "waiver will only be found. . .where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Id.* (quoting *Edelman*, 415 U.S. at 673).

Plaintiffs fail to demonstrate how Defendants' actions, or the actions taken by other state officials acting on their behalf, constitute waiver of Eleventh Amendment immunity. Importantly, neither party contends Defendant NYSDEC or Defendant Seggos directly waived sovereign immunity. Rather, Plaintiffs argue Defendants indirectly waived their sovereign immunity when New York State Assistant Attorney General Hugh McLean allegedly coerced Plaintiffs into filing the instant case in federal court. Pls. Mem. at 87. Plaintiffs also argue Defendants waived their privileges under the Eleventh Amendment when they voluntarily invoked federal jurisdiction—that is, to the extent Defendants submitted their rights to judicial determination by a federal court. *Id.* at 86-87. Neither of these claims are true.

With respect to the latter point, Plaintiffs argue a state's voluntary appearance in federal court amounts to waiver of Eleventh Amendment immunity, and they cite a number of Supreme Court cases allegedly supporting this proposition. Pls. Mem. at 86. The first of these cases is *Clark v. Barnard*, 108 U.S.

436, 447 (1883). However, there is a clear distinction between *Clark* and the instant matter, because in *Clark*, the state-party appeared as an intervener, in contrast to the position of Defendants here. *Id.* (stating the fact that the state sought affirmative relief was dispositive to finding waiver). *But see Missouri v. Fiske*, 290 U.S. 18, 25 (1933) (holding "intervention was too limited in character to constitute a waiver."). Plaintiffs next cite the Supreme Court's ruling in *Gardner v. New Jersey* in support of their waiver argument. Pls. Mem. at 86; 329 U.S. 565, 574 (1947). Yet Plaintiffs again fail to distinguish the fact the state-party in *Gardner* voluntarily filed their case in federal court as opposed to the State-Defendants here who were brought into this action on Plaintiffs' accord rather than their own. Plaintiffs also attempt to bolster their argument by invoking the Supreme Court's ruling in *Gunter v. Atlantic Coast Line R. Co*, 200 U.S. 273 (1906), arguing *Gunter* and its progeny support the longstanding principle "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." Pls. Mem. at 87 (quoting *Gunter*, 200 U.S. at 284).

It appears to this Court that by referencing this line of cases Plaintiffs mean to imply New York State voluntarily consented to federal jurisdiction over the suit at bar simply because it chose to defend itself against the instant allegations. This is not so. *See Quirk v. DiFiore*, 582 F. Supp. 3d 109, 113–14 (S.D.N.Y. 2022) (distinguishing *Quirk* from *Gunter* on

the grounds the latter "stand[s] for the proposition that a state waives its Eleventh Amendment sovereign immunity when it voluntarily becomes a party to a suit *and* submits its rights for judicial determination." (referencing *Gunter*, 200 U.S. at 284) (emphasis added)). A state-party does not waive immunity merely by defending itself against claims in court. *Id.* (referencing *NRA of Am. v. Cuomo*, 525 F. Supp. 3d 382, 407 (N.D.N.Y. 2021), *rev'd on other grounds, NRA of Am. v. Vullo,* 49 F.4th 700 (2d Cir. 2022) ("New York has not unequivocally expressed waiver of immunity, nor has it waived this immunity simply by defending the claims against it. To hold otherwise would mean a waiver of sovereign immunity occurs every time a State appears in federal court to defend itself in litigation. Such a result is not supported by either case law or logic.")). This Court agrees. Defendants have not availed themselves of the federal courts beyond defending against the instant claims. This does not amount to waiver.

Moreover, this Court is also not convinced AAG McLean waived the State's sovereign immunity, either explicitly or implicitly; nor is the Court convinced AAG McLean *could* waive such immunity even if he wished to—which, to be sure, the Court does not so find. Nothing in the evidence before the Court suggests AAG McLean intended to waive sovereign immunity on behalf of the State-Defendants. AAG McLean's interaction with Plaintiffs is traceable to the incident occurring on April 6, 2016 when NYSDEC law enforcement officers seized a shipment of glass eels belonging to Plaintiffs from the customs area at John F. Kennedy ("JFK") Airport . Compl. ¶ 23; Kreshik

Decl. ¶ 16, Ex. C (noting the seizing officers were acting pursuant to their authority under ECL § 71-09079(4)(4)). Following this incident, Plaintiffs allege AAG McLean "threatened to criminally prosecute [Plaintiff Wallace] . . . unless the Nation would file an action in Federal Court asserting its rights." Compl. ¶ 25 (referring to Plaintiffs' alleged treaty right to fish in Reservation and customary Unkechaug fishing waters without being subject to NYSDEC regulations). This does not amount to waiver.

Beyond referencing this alleged interaction between Plaintiffs and AAG McLean, Plaintiffs did not adduce any additional evidence to demonstrate AAG McLean intended to waive Defendants' immunity. Nor did Plaintiffs show how AAG McLean's interaction with Plaintiff Wallace could reasonably be construed as a "threat" or a viable means by which to "coerce" Plaintiffs into filing the instant suit. This Court takes as true Plaintiff Wallace's declaration, in which he stated he was threatened with "criminal felony prosecution by New York State Assistant Attorney General Hugh Lambert McClan [sic]" but also notes Plaintiff Wallace himself claimed this interaction occurred "[o]n or about 2017." Wallace Dec., ECF No. 31-1 at 3. This begs the question: why would AAG McLean seek to pressure Plaintiff Wallace to file in federal court in 2017 when, by this point in time, Plaintiffs had already filed an action against Defendants in state court for the same underlying incident, and that case had already been dismissed for failure to state a claim? *See* Kreshik Dec., ECF No. 102, Ex. D (Plaintiffs' State Court Complaint); *see id.*, Ex. I (New York Supreme Court Order) (dismissing

Plaintiffs' Complaint, dated October 12, 2016). The logic does not follow.

Throughout the correspondence cited to the Court between Defendants, other NYSDEC employees, and officials in the State's Attorney General's Office, there is no indication AAG McLean or Defendant Seggos attempted to coerce Plaintiffs to file in federal court. *Cf.* Pls. Mem. 81-82; Pls. Reply, ECF No. 111 at 52-65. At most, Plaintiffs demonstrate the State's Attorney General's Office was in communication with Defendant NYSDEC regarding developments in the instant litigation and in the State Action. *Id.* But this does not amount to waiver. To be clear, nothing in the materials before the Court suggests an attempt by Defendants, or AAG McLean on behalf of Defendants, to coerce Plaintiffs into filing the instant action in federal court, or that Defendants were otherwise availing themselves of the judicial power of the State or federal government such that the Court could perhaps find inadvertent waiver sufficient to overcome the privilege of sovereign immunity.

However, the Court's inquiry into the Eleventh Amendment does not end here.

B. Ex Parte Young

As determined by the Supreme Court in *Ex Parte Young* , the third exception to sovereign immunity provides "the Eleventh Amendment does not bar a suit against a state official when that suit seeks . . . prospective injunctive relief." *Seminole Tribe*, 517 U.S. at 55 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). The

Ex Parte Young exception exists because "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office*, 563 U.S. at 254. For this exception to apply, the state official does not need to have allegedly violated the law before he or she may be sued, since the relief sought is prospective in nature. *See Ex Parte Young*, 209 U.S. 123 (1908) (upholding injunction against state attorney general preventing him from enforcing a railroad rate-reduction law that provided severe penalties for noncompliance). Again, this exception "applies only to prospective relief, [it] does not permit judgments against state officers declaring that they violated federal law in the past, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citation omitted).

Defendants argue the *Ex Parte Young* exception does not apply to Defendant NYSDEC or Defendant Seggos, acting in his official capacity, pursuant to the Supreme Court's holding in *Coeur d'Alene* and the Second Circuit's holding in *Western Mohegan*. Def. Mem. at 34. As a threshold matter, Defendants argue "the *Ex Parte Young* exception to Eleventh Amendment immunity applies to individual officials, not to state agencies such as DEC." *Id.* (referencing *Seminole Tribe*, 517 U.S. at 74). Next, Defendants argue Plaintiff's suit is barred by *Coeur d'Alene*, in which the Supreme Court held "the Eleventh Amendment barred a Native American tribe seeking prospective injunctive relief against state officials,

where the suit sought declaratory relief concerning the tribe's exclusive use, occupancy and right to quiet enjoyment of 'the submerged lands and bed of Lake Coeur d'Alene and of the various navigable rivers and streams that form part of its water system.'" *Id.* (quoting *Coeur d'Alene,* 521 U.S. at 264).

On the other hand, Plaintiffs argue the conclusion reached by the Supreme Court in *Coeur d'Alene* does not apply to this case. This is "based on the fact that the Plaintiffs do not seek fee simple title to New York's waters or because the property right they claim is non-exclusive." *Id.* at 35. That is, in Plaintiffs' view, because the Second Court has previously barred a plaintiff's suit based on the Eleventh Amendment because "[the plaintiff-] Tribe's claims were 'fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas' and [because plaintiffs] effectively sought a 'determination that the lands in question are not even within the regulatory jurisdiction of the State.'" *Id.* (quoting *Western Mohegan*, 395 F.3d at 23 (referencing *Coeur d'Alene*, 521 U.S. at 282)) (internal quotation marks omitted). This Court agrees.

Highly instructive in the instant case is the Second Circuit's recent decision in *Silva v. Farish*, No. 21-616. Particularly relevant for present purposes is the appellate court's analysis of *Coeur d'Alene*, *Western Mohegan*, and *Ex Parte Young*.

In *Silva*, the court applied similar questions of law to facts not unrelated to those at bar. The plaintiffs in *Silva*, similarly to Plaintiffs in this case,

"[sought] a declaration that the law grants them a right to fish in the Shinnecok Bay without interference and that the DEC officials are unlawfully denying them that right" by enforcing against them N.Y.C.R.R. § 40.1(b)—the State's prohibition against possessing eels of a certain size—and for otherwise interfering with their right to fish in customary Shinnecock fishing waters. *Silva*, No. 21-616 at 6-7, 11. In turn, the *Silva* defendants, which included NYSDEC and Seggos, in his capacity as NYSDEC Commissioner, argued—as they do here—*Coeur d'Alene* and *Western Mohegan* barred plaintiff Silva's suit. The Second Circuit rejected this argument on the grounds that "[u]nlike the tribes in *Coeur d'Alene* and *Western Mohegan,* the plaintiffs' request for relief in this case would not transfer ownership and control of the Shinnecock Bay from the state to an Indian tribe. Nor would it allow the plaintiffs to prevent others from fishing in the Shinnecock Bay." *Id.* at 11-12. The court added, "[i]t would merely resolve the plaintiffs' individual claims that they have their own right to fish there[,]" reasoning "[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 right." *Id.* at 12. In other words, because plaintiffs did not seek a right to "exclude all others[,]" *id.* (referencing *Western Mohegan*, 395 F.3d at 22), the case was a "'typical *Young* action,' …[seeking] to 'bring the state's regulatory scheme into compliance with federal law.'" *Id.* (quoting *Coeur d'Alene,* 521 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment)). The same reasoning applies here:

Plaintiffs in this case do not seek to "divest the state of its ownership" of any lands or waters. *Id.* at 13. Rather, they seek a declaration from this Court that Defendants NYSDEC and Seggos have interfered with their established right to fish in Reservation and customary Unkechaug fishing waters without regulatory interference by the State, and to permanently enjoin the State-Defendants from interfering with said right in the future. Plaintiffs' suit neatly accords with *Silva*. Therefore, this Court finds, as the *Silva* court previously ruled, the instant case is "not effectively one against the state." Rather, Plaintiffs' "claims [are] seeking prospective relief against DEC officials," namely, Defendant Seggos in his official capacity, and thus "fall within the *Ex Parte Young* exception to state sovereign immunity[,] and accordingly may proceed." *Id.* at 13.

C. *Pennhurst* Doctrine

Defendants also argue "the *Pennhurst* doctrine poses a separate and independent Eleventh Amendment bar to consideration of the Plaintiffs' non-federal claims." Def. Mem. at 39 (referencing *Pennhurst*, 465 U.S. at 106). In *Pennhurst,* the Supreme Court ruled the Eleventh Amendment bars any federal action against a state officer for an alleged violation of state law. *Pennhurst*, 465 U.S. at 106. *See Vega v. Semple*, 963 F.3d 259, 284 (2d Cir. 2020) ("To the extent Plaintiffs seek prospective relief . . . for violations of the '[state] Constitution' and 'state law,' those claims are indeed barred by the Eleventh Amendment under the Pennhurst doctrine." (internal reference omitted)). Defendants argue Plaintiffs'

second and fourth causes of action, pertaining to its inherent sovereignty and treaty-based claims, are thus barred. Def. Mem. at 38. However, Defendants do not challenge Plaintiffs' first and third claims, which assert federal preemption and a violation of the First Amendment's Free Exercise Clause, respectively, on this basis, as they concede these claims are federal in nature. *Id*. The Court declines to address this issue here. It chooses instead to engage in a more extensive analysis of the nature of Plaintiffs' claims, namely, whether they arise under federal or state law, *infra* in section IV.

II. Res Judicata and Collateral Estoppel

Defendants also argue Plaintiffs' claims are barred by the doctrines of *res judicata* and collateral estoppel. Def's Mem. at 39. "Under both New York law and federal law, the doctrine of *res judicata*, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Malcolm v. Bd. of Educ. of Honeoye Falls-Lima Central Sch. Dist.*, 506 F. App'x 65, 68 (2d Cir. 2012) (internal brackets and quotation marks omitted). Whether a state court judgment constitutes a final judgment on the merits is determined by the law of the rendering state. *See DDR Const. Servs., Inc. v. Siemens Indus., Inc.*, 770 F. Supp. 2d 627, 647 (S.D.N.Y. 2011) (stating this proposition); *see also Cloverleaf Realty of New York, Inc. v. Town of Wawayanda*, 572 F.3d 93, 95 (2d Cir. 2009) (same). "Under New York Law, a dismissal pursuant to N.Y. C.P.L.R. 3211(a)(7), for failure to state a cause of

action, is presumptively not on a case's merits and lacks *res judicata* effect." *DDR Const. Servs., Inc.*, 770 F. Supp. at 647. "Absent an affirmative indication that a § 3211(a)(7) dismissal constitutes a decision on the merits, that dismissal precludes, at most, relitigation of the sole issue decided, *i.e.* whether the dismissed complaint states a cause of action under the applicable pleading standards." *Mejia v. City of New York*, 17-CV-2696, 2020 WL 2837008, at *9 (E.D.N.Y. May 30, 2020) (Garaufis, J.) (referencing *Blake v. City of New York*, 41 N.Y.S.3d 755, 757 (2d Dep't 2016)).

Some courts have held dismissal pursuant to CPLR § 3211(a)(7) is only considered to have been decided on the merits of a case "if the rendering court explicitly says so." *Id*. Courts within this District have also ruled "[a] granted motion to dismiss is generally not *res judicata* of the entire merits of a case, but only of the point actually decided." *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 264 (E.D.N.Y. 2004) (Weinstein, J.) (internal citations omitted). Courts are generally "reluctant to find the dismissal of a prior complaint on the pleadings sufficient to preclude a second action." *Id.* Thus, in instances where a case was dismissed due to an insufficiency of the pleadings pursuant to CPLR § 3211(a)(7), a new action that remedies the deficiency is not generally precluded. *Id.*

In April 2016, Plaintiffs filed an action against Defendant NYSDEC in New York State Supreme Court in Queens County, captioned *Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation*, Index No. 4254/2016. *See* Kreshik Dec., ECF No. 102, Ex. D

(Plaintiffs' State Court Complaint). Many of Plaintiffs' allegations in that case mirror those presently before this Court. *Id.* (Plaintiffs alleged, *inter alia,* Defendant NYSDEC violated the Nation's sovereign fishing rights and interfered with Plaintiffs' cultural and religious practices by enforcing the State's fishing regulations. Specifically, Plaintiffs brought their suit after state and federal law enforcement officers seized roughly $40,000.00 of glass eels—which were subject to NYSDEC's American eel regulations— and which the Unkechaug planned to export to Hong Kong).

In July 2016, Defendants moved to dismiss Plaintiffs' state court action pursuant to CPLR § 3211(a)(7) on the grounds Plaintiffs failed to state a claim. *See* Kreshik Dec., Ex. F (Def's 2016 Mot. to Dismiss). With respect to Plaintiffs' request for prospective injunctive relief authorizing the Unkechaug to take and possess glass eels, Defendants alleged (1) "Plaintiff cites no legal authority showing that it has any legal right to take or possess glass eels in contravention of New York State law"; and (2) "Plaintiff has failed to cite to any cases or treaties showing that it has any legal right to circumvent the American Eel Fishery Management Plan or New York State Law, both of which prohibit the taking and possession of glass eels." *Id.* at 13.

In October 2016, the Honorable Justice Robert L. Nahman granted Defendants' motion. *See* Kreshik Dec., Ex. I (New York Supreme Court Order). Justice Nahman determined "the branch of the defendant's motion to dismiss the plaintiff's complaint upon the grounds that the complaint fails to state a cause of

action [pursuant to CPLR § 3211(a)(7)] is granted without opposition to the extent that the branches of plaintiff's complaint which seek injunctive relief are dismissed." *Id.* at 2.

This Court finds Justice Nahman's 2016 order is not a final judgment on the merits and thus declines to give it *res judicata* effect. Where a case is dismissed pursuant to CPLR § 3211(a)(7) for failure to state a claim, unless the presiding court indicates otherwise, the case is generally not considered a final judgment on the merits for the purposes of determining claim preclusion. *See DDR Const. Servs., Inc.*, 770 F. Supp.; *Beretta U.S.A. Corp.*, 315 F. Supp.; *Cloverleaf Realty of New York, Inc.*, 572 F.3d. Justice Nahman "did not state that the decision was on the merits, that the dismissal was with prejudice, or that Plaintiff[s] could not conceivably allege a set of facts that would support [their] claims." *Mejia*, 2020 WL 2837008, at * 9. Accordingly, Plaintiffs' instant claims are not precluded.

Defendants also argue this action is barred from review by the related yet distinct doctrine of collateral estoppel, which "prevents parties or their privies from relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding." *See* Def's Mem. at 39 (quoting *Burton v. Undercover Officer*, 671 F. App'x 4, 4-5 (2d Cir. 2016)). This doctrine applies when "1) the identical issue was raised in a previous proceeding, 2) the issue was actually litigated and decided, 3) the party had a full and fair opportunity to litigate the issue, and 4) the resolution of the issue was necessary to support a valid

and final judgment on the merits." *Burton*, 671 F. App'x at 4-5 (citing *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288-89 (2d Cir. 2002)).

Having just found Plaintiffs' 2016 state court action was not adjudicated as a final judgment on the merits, this Court declines to reiterate this point further.

III. Preemption

A. NYSDEC'S Regulations are Not Preempted by Federal Law

When federal and state law conflict, the federal law displaces, or preempts, the state law pursuant to the Supremacy Clause. U.S. const. art. VI. In order to "win preemption of a state law[,] a litigant must point specifically to a constitutional text or a federal statute that [displaces] or conflicts with state law." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019). In considering federal preemption claims, courts adhere to two fundamental principles: (1) "every preemption case starts with the presumption that Congress did not intend to displace state law," and (2) Congress's preemptive intent is adduced "by examining the federal scheme as a whole and identifying its purpose and intended effects." *Pet Welfare Ass'n, Inc. v. City of N.Y.*, 850 F.3d 79, 86 (2d Cir. 2017) (citing *Wyeth v. Levine*, 55 U.S. 555, 565 (2009)).

The presumption against federal preemption is especially strong in fields "the States have

traditionally occupied[,]" including areas affecting States' police powers. *Wyeth*, 55 U.S. at 565. *Id.* In such cases, Congress's preemptive purpose must be "clear and manifest" to overcome the presumption against preemption. *Id.*

Fish management is one such area that is traditionally reserved for the States pursuant to their police powers. *See State of N.Y. v. Locke*, 08-CV-2503, 2009 WL 1194085, at *2 (E.D.N.Y. 2009) (Weinstein, J.) ("The management of fisheries within state waters, including inland waters and coastal waters extending three miles seaward from shore, is subject to regulation by the states under their police powers."); *Aqua Harvesters, Inc. v. DEC*, 17-CV-1198, 2019 WL 3037866, at *25 (E.D.N.Y. July 11, 2019) (Azrack, J.) (finding states' legal authority to manage their fisheries arises from their police powers). Therefore, to succeed in their claim that NYSDEC's fishing regulations are federally preempted, Plaintiffs must not only point to a specific provision of federal law that conflicts with these regulations; they must also show a clear and manifest intention on the part of Congress to displace the State's laws in this area. Plaintiffs have done neither here.

Plaintiffs argue N.Y.C.R.R. §§ 10.1 (a) and (b) and 40.1(f) and (i), which limit fishing for American eels under nine inches in length and which were promulgated pursuant to New York's obligations as a ASMFC Member State, are preempted by 25 U.S.C. 232 and the Andros Order— a purported instrument of federal law. Pls. Mem. at 77-80. *See also New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524,

528–29 (2d Cir. 2010) (discussing ASMFC Member States' general obligations); 16 U.S.C. § 5104 (setting forth States' ASMFC implementation requirements ("Each State identified under subsection (a) with respect to a coastal fishery management plan shall implement and enforce the measures of such plan within the timeframe established in the plan.")). This is not so. Indeed, the regulations in question are not preempted by federal law.

The sole federally enacted statute Plaintiffs cite, 25 U.S.C. § 232, does not limit the State's regulatory authority vis-à-vis Native Americans and Native American Reservations. In fact, it extends it. 25 U.S.C. § 232 ("The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State[.]"). *See also United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991) ("The plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York."). Plaintiffs attempt to circumvent the statute's plain meaning by emphasizing the provision's limiting clause, namely, "[t]hat nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof,[] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights." 25 U.S.C. § 232. However, this attempt is unavailing. *See Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir.

1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms."); *see also Shinnecock Indian Nation v. Kempthorne*, 06-CV-5013, 2008 WL 4455599, at *11 (E.D.N.Y. Sept. 30, 2008) (Bianco, J.) (finding, *inter alia*, 25 U.S.C. § 232 "relate[s], respectively, to New York State's jurisdiction over crimes committed on Indian reservations and civil actions involving Indian litigants" thereby refusing to "strain [this] statute[] beyond [its] plain and unambiguous meaning.").

Plaintiffs fail to cite any operative agreement or treaty needed to substantiate a federal preemption claim premised on 25 U.S.C. § 232. Nor do they persuasively argue their customary fishing rights are irreconcilable with N.Y.C.R.R. §§ 10.1 (a) and (b) and 40.1(f) and (i). The sole treaty rights Plaintiffs invoke derive exclusively from the Andros Order, an agreement entered into in 1676 by the English colonial Governor, Edmund Andros, and the Unkechaug, purportedly extending to the Nation the right to fish freely. Pl. Mem. at 35. This legal instrument does not nor could not serve as grounds upon which to rest Plaintiffs' federal preemption claims as it is not itself federal law. *See infra* section IV. As for their customary fishing rights, Plaintiffs overlook the well-established principle that these rights are subject to limitations.

Plaintiffs claim they have a customary right to "fish freely on reservation waters and in customary fishing waters." Pl. Mem. at 25. *But see id.* at 77 (Plaintiffs later clarify "The Unkechaug is not asking

for exclusive rights to fish in customary waters, only their treaty rights to fish and to freely dispose of their catch."). By stating "fish freely," Plaintiffs seem to suggest they are free from government regulations altogether. *See* Compl. at 13 ¶ 1 (Plaintiffs' prayer for relief seeking, *inter alia*, a declaratory judgment that: "the Nation, Harry B. Wallace as Chief and individually, its officials, and its *Reservation waters and customary Unkechaug fishing waters are immune from NYSDEC and Commissioner Basil Seggos fishing regulations* and that the NYSDEC and Commissioner Basil Segos lack authority to enforce fishing regulations under New York State Environmental laws against the Nation, Harry B. Wallace as Chief and individually, its officials and employees.") (emphasis added).

Plaintiffs are not simply asking the Court to declare Plaintiffs' right to self-govern on reservation lands. Plaintiffs are asking the Court to declare a far greater right: to be immune from New York State's authority to regulate fishing *off* reservation lands—including in areas quite far from Unkechaug Reservation lands. This is a right Plaintiffs do not have.

Plaintiffs claim, at a minimum, "customary Unkechaug fishing waters" extend to "Poospatuck Bar, off the reservation land[.]" *Id.* ¶ 32. However, Plaintiff Chief Wallace suggested these bounds extend even further still. In fact, Chief Wallace would essentially remove all boundaries confining Unkechaug customary waters entirely. *See* Plaintiff Wallace's Rule 30(b)(6) Dep. Tr. ("Wallace Tr."), ECF No. 103, Ex. A. Consider

this exchange during Plaintiff Wallace's Rule 30(b)(6) deposition, which took place on Tuesday, January 28, 2020:

> Q: What are the extent of the traditional waters that you claim the Unkechaug have the unlimited right to fish?
>
> A: Where the fish travel.
>
> Q: So anywhere fish go?
>
> A: Anywhere fish go.
>
> Q: So the Forge River?
>
> A: Yes.
>
> Q: The whole shore of Long Island?
>
> A: Yes.
>
> Q: Hudson River?
>
> A: Yes.
>
> Q: Atlantic Ocean?
>
> A: Yes.

Id. at 137-38:18-6. Plaintiff Chief Wallace's answers, taken in conjunction with Plaintiffs' prayer for relief, suggests Plaintiffs are asking this Court to declare them entirely immune from the States'

regulatory authority anywhere—regardless of whether the State seeks to enforce said regulations on or *off* reservation lands, as is the case here. This is a step too far.

This Court need not determine the bounds of the Nation's customary fishing rights in order to find, as it does, Plaintiffs' fishing rights are not without limits. It is well-established that States may impose and enforce certain regulations on such rights. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–05 (1999) (stating, even when there exists a binding treaty between the Federal Government and an Indian nation—which is notably not the case here—"Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation.") (quoting *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 765 n.16 (1985)). Indeed, where, as here, the state seeks to regulate in the interest of conservation, the Supreme Court has "repeatedly affirmed state authority" to regulate Indian fishing rights. *See id.* at 205 (noting the Supreme Court has "repeatedly affirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.") (referencing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 682 (1979); *Antoine v. Washington*, 420 U.S. 194, 207–08 (1975); *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398 (1968)); *accord Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019) ("States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting,

fishing, and gathering rights on state land when necessary for conservation.").

As there is no agreement, no treaty, and no custom upon which Plaintiffs can establish their purported right to "fish freely" anywhere they so choose, the Court finds there is no basis upon which to base a federal preemption claim premised on 25 U.S.C. § 232.

IV. The Andros Order and Inherent Sovereignty

A. The Andros Order is Not Legally in Effect

As the Court's analysis in the previous section suggests, the Andros Order is not federal law, nor is it operative under state law.

1. The Andros Order is Not Federal Law

Plaintiffs erroneously argue the United States incorporated and ratified the Andros Order by reference to Article VI of the U.S. Constitution. Pls. Mem. at 37. This is not so.

Article VI states in relevant part: "[a]ll... [e]ngagements entered into, before the adoption of this Constitution shall be as valid as against the United States under the Constitution, as under the Confederation." U.S. Const. art. VI. Courts have long interpreted this clause to mean agreements validly entered into *by the United States government during the confederal period* remain valid as against the new

federal government under the U.S. Constitution. *See Oneida Indian Nation of New York v. State of N.Y.*, 860 F.2d 1145, 1155 (2d Cir. 1988) ("We do not doubt that treaties made during the confederal period between the United States and Indian nations are entitled to the same respect as treaties made with foreign nations and that both equally became "the supreme Law of the Land" by virtue of Article VI of the Constitution."). However, contrary to Plaintiffs' position, this provision does not declare all agreements entered by individual colonial governments actionable as against the federal and state governments by virtue of Article VI. *See* Pls. Mem. at 38 (setting forth this argument). Indeed, the scope of this constitutional provision is far more limited than Plaintiffs suggest.

Article VI addresses the legal status of the Nation's debts and engagements, specifically, those debts and engagements the United States government incurred or entered into pursuant to its powers under the Articles of Confederation, and the effect, if any, the transition from the Articles to the Constitution had on the legal effect of those debts and engagements. Contrary to Plaintiffs' assertion, this provision does not lift all colonial treaties to the level of federal law. *See, e.g.*, *Deeks v. United States*, 04-580C, 2005 WL 6112655, at *3 (Fed. Cl. Feb. 18, 2005) (Braden, J.), *aff'd*, 151 F. App'x 936 (Fed. Cir. 2005) ("The Articles of Confederation included a provision that protected creditors who had made loans to the United States prior to the adoption of Article XII [of the Articles of Confederation]. This protection of creditors subsequently was included in the United States Constitution." (citing U.S. Const. art . VI, cl. 1));

Lunaas v. United States, 936 F.2d 1277, 1278 (Fed. Cir. 1991); *see also* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 337–38 (2022) (analyzing art. VI, cls. 1 & 2) (explaining "the Constitution does not eliminate contractual obligations *the national government assumed* under the Articles… Under [art. VI, cl. 2] *treaties validly ratified under Article IX of the Articles of Confederation* remain in force under the Constitution. . .") (emphasis added). Moreover, because the Andros Order was not a treaty—and certainly not one validly ratified under Article IX of the Articles of Confederation— art. VI, cl. 1 has no bearing on Plaintiffs' claim.

The Andros Order is an executive order of New York's English Governor and his council, as confirmed by the minutes of the meeting between the Unkechaug and the Governor, as well as by the text of the Order itself. Nowhere in the meeting minutes nor in the text of the Order is there any indicia the Unkechaug and the Governor—on behalf of the colonial State of New York –were entering into a treaty. *See* Andros Order and Meeting Minutes, ECF No. 103-10. Indeed, as Defendants note, the word "treaty" does not appear in the document, while "the word 'order' appears five times. . . the word 'liberty' twice, and 'leave' and 'privilege' once each." Def. Mem. at 69. The Order's language stands in stark contrast to contemporary treaties of the time between the colonies and Native American tribes, as the latter characteristically include express language setting forth the parties and terms, as well as the bargained-for consideration, of the agreement. *Id.* at 69-70 (referencing Thompson Dec. Ex. L, ECF No. 103-12 (a 1646 treaty between

Virginia and the Powhatan Indians which refers to itself as "articles of peace"); Thompson Dec. Ex. M, ECF No. 103-13 at 2-3 (the 1664 Fort Albany Treaty with the "New York Indians" which similarly refers to itself as "Articles made and agreed to"); Thompson Dec. Ex. N, ECF No. 103-14 (the 1666 agreement between Maryland and eleven Native American tribes, also referred to as "Articles of peace & amity."); Thompson Dec. Ex. O, ECF No. 103-15 ("The 1677 Treaty of Middle Plantation referring to itself as "Articles and Overtures, for the firm Grounding, and sure Establishment of a good and just Peace with the said Indians[.]"); Thompson Dec. Ex. P, ECF No. 103-16 (the 1638 Treaty of Hartford between the "English in Connecticut" and several Native American tribes is referred to as "Articles of Agreement" and "A Covenant and Agreement.")).

Both the phrasing of the Andros Order and the historical context of the meeting between the Unkechaug and the Governor militate against this Court finding the Andros Order is a treaty. As the meeting minutes indicate, on May 23, 1676, the Unkechaug came to Governor Andros with the "desire. . . that they may have leave. . . to fish and dispose of what they shall take, as to whom they like best." Andros Order and Meeting Minutes at 2. The Unkechaug made this request upon their allegations "the English have come and taken [their fish] away from them per force." *Id.* The Governor reserved his decision until the following day. *Id.*

As the meeting minutes dated May 24, 1676 explain, the Unkechaug came to meet with Governor

Andros again, this time in the presence of his council, seeking an Order "grant[ing] them as to their free liberty of fishing[.]" *Id.* at 3. "[T]o shew for their privilege[,]" the Governor, in council, granted the Unkechaug the order they sought, declaring "[the Unkechaug] are at liberty and may freely whale or fish. . .as they thinke good according to law and Custome of the Government. . ." *Id.* The plain meaning of the Order, and the surrounding context, make clear the Governor was not bargaining with the Unkechaug; he was not entering into a formal treaty with the Nation on behalf of the colony; nor was he granting the Unkechaug this "privilege" as consideration for something in exchange—regardless of whether he, or the colony of New York, benefitted from this arrangement. Accordingly, the Court does not find the Andros Order was a treaty. *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232–33 (2014) ("A treaty is in its nature a contract between nations, not a legislative act.") (internal citations omitted); *Georges v. United Nations*, 834 F.3d 88, 92-93 (2d Cir. 2016) ("[A] treaty is a contract . . . between nations, and is to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals." (citing *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014) (internal quotation marks omitted)).

Indeed, even if the Andros Order were a treaty, which it is not, it does not operate as Plaintiffs say, which is to grant the Unkechaug immunity from all state regulation with respect to fishing. By the instrument's own terms, the Order qualified the right of the Unkechaug insofar as they can only "freely. . .

fish" to the extent their fishing was in accordance with the "law and Custome of the Government." Andros Order at 3. The State promulgated its fishing regulations, N.Y.C.R.R. §§ 10.1 (a) and (b) and 40.1(f) and (i), pursuant to its obligations as an ASMFC Member State, in the interest of preserving the American eel population. The Unkechaug may fish freely in customary waters, off reservation lands, but only to the extent they adhere to the State's conservation laws. The Andros Order does not immunize the Unkechaug from State regulation, and Plaintiffs' attempt to ground their argument to the contrary in Supreme Court case law is unpersuasive.

In particular, the Court is not convinced by Plaintiffs' invocation of the Supreme Court's decision in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019) to argue the Andros Order's use of the phrase "they are at liberty and may freely whale of fish" prevents the State from imposing fishing regulations against them outright. Pls. Mem. at 28, 35; *See* Pls. Response, ECF No. 111 at 8. Upon careful review, the Court finds this case does not support Plaintiffs' argument. In *Cougar Den, Inc.*, the Yakama Nation challenged the imposition of Washington State's fuel tax in light of a treaty between the Yakama Nation and the United States government, which permits the Nation to travel freely on public highways. 139 S. Ct. 1000 (2019). The Supreme Court ultimately ruled in favor of the Yakama Nation, finding the State's tax interfered with the Yakamas' treaty right, and thus, the tax was preempted by federal law. *Id*. at 1011. However, important to the Court's reasoning was the fact "the

Yakamas bargained in the treaty to protect their right to travel," as well as the Court's finding, in seeking the treaty with the federal government, "[the Yakamas] could only have cared about preventing the State from burdening their exercise of that right." *Id*.

Cougar Den, Inc. is distinguishable from the instant case for a number of reasons. First, as the Court previously established, the Andros Order is not a federal treaty but more akin to an executive order by then-colonial Governor Andros. Second, in *Cougar Den, Inc.*, using canons of Indian treaty construction, the Supreme Court determined the Yakamas not only "bargained" for their treaty rights, but they also did so with the express purpose of "preventing the state" from interfering with their right to travel to and from their reservation. *Id.* at 1010 ("Here, the Yakamas' lone off-reservation act within the State is traveling along a public highway with fuel."). Third, crucial to the Supreme Court's decision in *Cougar Den, Inc.* was the burden a state tax imposes on a federally guaranteed treaty right. None of these factors are present here. Therefore, *Cougar Den, Inc.* is distinct from the case at hand and Plaintiffs' reliance upon it is unavailing.

The Andros Order is not a treaty; the rights set forth therein do not reflect the culmination of a bargained-for agreement; and the Nation seemingly sought an order declaring its rights as against English colonists—not against the colonial government—which is all evinced by the meeting minutes between the Unkechaug and Governor Andros as explained *supra*. *See* Andros Order and Minutes. Furthermore, the state

regulations at issue here are narrow in scope, restricting fishing merely with respect to the size of the eels that may be taken and in order to preserve the species' continued existence.

Unlike *Cougar Den, Inc*, or its predecessor case, *Tulee v. State of Washington*, 315 U.S. 681 (1942), the State is not attempting to limit the Unkechaug Tribe's established right through the imposition of a tax or licensing requirement. This type of imposition is far more burdensome than the instant regulations, hence the reason behind the Supreme Court's rulings in this arena. *See Tulee*, 315 U.S at 683-84 ("Relying upon its broad powers to conserve game and fish within its borders. . . the state asserts that its right to regulate fishing may be exercised . . . outside of [the Yakima's] reservation. It argues that the treaty should not be construed as an impairment of [the Yakima's treaty right] and that since its license laws do not discriminate against the Indians, they do not conflict with the treaty. . .The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty.").

2. The Right to Freely Fish Does Not Immunize the Unkechaug from State Fishing Regulations

a) The Conservation Necessity Principle

The Supreme Court has consistently held states may impose reasonable, nondiscriminatory regulations on off-reservation lands in the interest of conservation necessity. *See, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019) ("States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation."); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 at 204–05 (1999) ("This 'conservation necessity' standard accommodates both the State's interest in management of its natural resources and the [Native American tribe's] federally guaranteed treaty rights. . . Thus. . . treaty rights are reconcilable with state sovereignty over natural resources."); *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (holding that in accordance with the conservation necessity doctrine, states must show "the regulation meets appropriate standards and does not discriminate against the Indians," and that "its regulation is a reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation." (quotation and internal citation omitted)).

Indeed, the Supreme Court in *Puyallup Tribe* expressly dealt with this issue. 391 U.S. 392 (1968).

There, the Court held while Washington State could not "qualify" the Tribe's right to fish—guaranteed to them by a federal treaty, the Treaty of Medicine Creek—the State could nevertheless regulate the manner in which the Puyallup fished. *Id.* at 398 (the Treaty granted the Puyallup "the rights to fish 'at all usual and accustomed places.'"). Specifically, the Court held "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.* This same applies here. The State has a clear interest in conserving the American eel population, and it has imposed reasonable, nondiscriminatory regulations in furtherance of this interest. *See* Pls. Mem. at 56-57 (reiterating the important nature of the State's interest and outlining the equal basis upon which the State's law is applied). In accordance with the Supreme Court's jurisprudence in this area, the Court finds Defendants' regulations comport with the well-established conservation necessity principle and thus permissibly confine Plaintiffs' fishing rights.

The Supreme Court's holding in *People of the State of New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916) further supports this Court's position. There, the Court rejected the Seneca Nation's argument that the Treaty of Big Tree prohibited the State of New York from regulating their off-reservation fishing despite the existence of an agreement which provided members of the Nation with "the privilege of fishing and hunting on [certain off-reservation] lands." *People ex. rel. Kennedy v. Becke*r,

215 N.Y. 42, 44, 45 (1915). Writing for a unanimous court, Justice Hughes explained the Seneca Nation sought "the denial with respect to these Indians . . . of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the State." *Becker*, 241 U.S. at 562. However, the Court held the Seneca's supposed treaty right with respect to off-reservation lands was best construed as "a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised." *Id.* at 563–64. This Court finds the same holding and reasoning applies to the Unkechaug's fishing rights here.

3. The Andros Order has No Force Under State Law

The preceding section assumes *arguendo* Plaintiffs have a "valid and enforceable" right as a matter of state law. Pls. Mem. at 37. However, the Court does not necessarily find this is the case. The Court disagrees with Plaintiffs that New York State's Constitution incorporated the Order into State law, and agrees with Defendants that whatever legal effect the Order once had, it has long since been abrogated. *See* N.Y. Gen. Constr. Law § 71 ("Acts of the legislature of the colony of New York shall not be deemed to have had any force or effect in this state since December twenty-ninth, eighteen hundred and

twenty-eight."); *see also* N.Y. Gen. Constr. Law § 72 (McKinney) ("The resolutions of the congress of the colony of New York and of the convention of the state of New York, shall not be deemed to be the laws of this state hereafter.").

Plaintiffs claim the Andros Order remains legally effective today pursuant to, *inter alia*, article 1, section 14 of the Constitution of the State of New York. Pls. Mem. at 105 ("[The Andros Order] and the relationship between Unkechaug and settlers continued under the terms of the treaty and was further ratified upon the formation of the United States and the State of New York. As indicated in both constitutions. Section 14 of the Constitution of the State of New York and Article VI. Sec (1) of the U.S. Constitution."). The applicable provision of the State's Constitution reads:

> Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of

> the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated. *See* N.Y. Const. art. 1 § 14 (Formerly N.Y. Const. art. 1 §16. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938).

However, Plaintiffs' assertion is incorrect. New York State's constitution incorporates (1) *legislative acts* entered into by the State's former colonial government which were still in effect on April 19, 1775, and (2) *congressional resolutions* passed by the State's colonial-era congress or by State convention, still in force on April 20, 1777—unless subsequently altered or abrogated by the State. N.Y. Const. art. 1 § 14. By its plain language, New York's Constitution does not incorporate into state law colonial era agreements that are neither (1) legislative acts nor (2) congressional resolutions. Construed as either a treaty or, better, as an executive agreement, the Andros Order is neither a legislative act nor a congressional resolution. Therefore, it has no legal effect under New York State law by virtue of art. 1 § 14 of the State's constitution. Moreover, the Court is convinced by Defendants' argument; whatever legal effect the Andros Order may have previously possessed, it no longer does so today.

However, the Supreme Court has held a "treaty will not be deemed to have been abrogated or modified by a later statute unless such *purpose* on the part of Congress has been clearly expressed." *Cook v. United*

States, 288 U.S. 102, 120 (1933). The Second Circuit has interpreted this ruling to mean "the question of abrogation does not turn on whether the [law] has been expressly identified for abrogation." Rather, "[w]hat is required is a clear expression by Congress of a purpose to override protection that a treaty would otherwise provide." *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2d Cir. 2000). And it is clear from New York's navigation and environmental laws, New York's legislature has purposefully sought to regulate fishing and off-reservation waters within the State continuously and deliberately in the many years since colonial Governor Andros signed his order. *See* N.Y. Navigation Law § 30 (the State has asserted "jurisdiction over navigation on the navigable waters of the state" and declared that nothing authorized by that law "shall be construed to convey any property rights, either in real estate or material, or any exclusive privilege; nor authorize any injury to private property or invasion of private rights or any infringement of federal, state or local laws or regulations. . ."); ECL § 11- 0105 (declaring the State "owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition."). Thus, while not essential to the Court's holding here, the Court nevertheless concurs with Defendants to the extent it finds, were the Andros Order once in effect, it has long since been abrogated by the State.

V. Free Exercise

A. Plaintiffs' First Amendment Claims Lack Merit

Without addressing Defendants' claim that "Plaintiffs are not entitled to relief on the Free Exercise claims because they are factually deficient, time-barred, lacking standing, and/or unpled[,]" the Court nevertheless reaches the same conclusion on the merits. Def. Mem. at 52.

Plaintiffs claim "the Unkechaug Indian Nation cherished and used shells of crustaceans fished from the Moriches Bay and customary Unkechaug fishing waters to make wampum" and that "the NYSDEC and Commissioner Seggos has [sic] attempted to regulate the fishing of crustaceans by the Unkechaug Indian Nation that would interfere with the religious expression of the Nation and limit the making and use of wampum for its religious and cultural ceremonies." Compl. ¶¶ 47-50. The Complaint alleges further "the restriction by the state on fishing and obtaining the shells to make wampum violates [the Nation's] religious practice and expression through the creation and use of the sacred wampum." *Id.* ¶ 50.

Plaintiffs' free exercise claims fail. The Free Exercise clause of the First Amendment does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d

194, 210 (2d Cir. 2012) (quoting *Employment Division v. Smith*, 494 U.S. 872, 879 (1990)). "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

The effect of New York State's fishing regulations on Plaintiffs' religious practices, if any, is incidental. The regulations do not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct *because* it is undertaken for religious reasons." *Id.* (emphasis added). Moreover, the regulations do not target Plaintiffs' religious beliefs in any way, nor is "the object of [the regulations][] to infringe upon or restrict practices because of their religious motivation[.]" *Id.* (referencing *Smith*, 494 U.S. at 878-79). "[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878 (comparing *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969) (upholding application of antitrust laws to press), with *Grosjean v. American Press Co.*, 297 U.S. 233, 250– 251 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level), and referencing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983)).

Nothing in the text or statutory history

surrounding New York's fishing regulations, 6 NYCRR §§ 10.1 (a) and (b) and 40.1(f) and (i), or in ECL § 25-0401—which Plaintiffs do not cite but which regulate dumping (or transferring waste)—suggest the laws target religion in any way. The former makes it illegal to take or possess American eels less than nine inches within the State, and the latter makes it illegal to, *inter alia*, "dump either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind" into a "tidal wetland area" without a permit, while allowing for the "depositing or removal of the natural products of the tidal wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping, . . . where otherwise legally permitted." *See* 6 NYCRR §§ 10.1 (a) and (b) and 40.1(f) and (i); ECL § 25-0401. Moreover, the Court's analysis *supra* regarding the context of the State's fishing regulations--specifically, the State's adoption thereof pursuant to its ASMFC obligations—indicate the State did not implement these laws with an eye to religion. Accordingly, the Court agrees with Defendants: rational basis review applies, which Defendants easily pass. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 220 (2d Cir. 2012) ("[W]here the government seeks to enforce a law that is neutral and of general applicability, it need only demonstrate a rational basis for its enforcement." (quoting *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (internal quotation marks omitted))).

"Under the rational basis test, a statute will be upheld 'if there is a rational relationship between the disparity of treatment and some legitimate

governmental purpose.'" *Roman Catholic Diocese of Rockville Ctr. v. Inc. Vill. Of Old Westbury*, 128 F. Supp. 3d 566, 581 (E.D.N.Y. 2015) (Chen, J.) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Defendants clearly articulate the State's rationale behind its regulations.

With respect to ECL § 25-0401, Defendants note the law "was enacted to further 'the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of this state.'" Def. Mem. at 54 (quoting ECL § 25-0102 and referencing 6 N.Y.C.R.R. § 661.2 ("Tidal wetlands constitute one of the most vital and productive areas of the natural world and collectively have many values. These values include, but are not limited to, marine food production, wildlife habitat, flood and storm and hurricane control, recreation, cleansing ecosystems, sedimentation control, education and research, and open space and aesthetic appreciation, as set forth in the legislative findings contained in Section 1 of Chapter 790 of the Laws of 1973. Therefore, the protection and preservation of tidal wetlands are essential.")). With respect to New York's laws limiting fishing for American eels, Defendants make clear these regulations were enacted pursuant to the ASMFC's FMP and its addenda as required by 16 U.S.C. § 5104 with the express purpose of conserving the species' population and in response to peer-reviewed findings that American eel numbers were dwindling. *Id.* Therefore, the Court finds the laws at issue "unquestionably bear a rational relationship to New

York's interest in protecting its natural resources, both wildlife and tidal wetlands." *Id.*

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment at ECF No. 98 is GRANTED, and Plaintiffs' Motion for Summary Judgment at ECF No. 104 is DENIED. The Clerk of Court is directed to terminate the motions pending at ECF Nos. 85, 88, 98, and 104 and to close the case.

SO ORDERED

/s/ WFK
HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: June 16, 2023
Brooklyn, New York

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNKECHAUG INDIAN NATION and
HARRY B. WALLACE,
Plaintiffs,

v.

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

ORDER
18-CV-1132 (WFK)(AYS)

WILLIAM F. KUNTZ, II, United States District Judge:

The Court has reviewed the letters submitted by the parties on April 15, April 22, and May 3, 2021. *See* ECF Nos. 73-78. In light of the COVID-19 pandemic, the Court dispenses with its pre-motion conference requirement. Therefore, the Court DENIES the parties' requests for pre-motion conferences, *id.*, as moot and sets the following briefing schedule for the *Daubert* and summary judgment motions in the above-captioned case:

Daubert Motions:

- The parties shall file their *Daubert* motions by Friday, June 11, 2021 at 5:00 P.M.;

- The parties shall file their oppositions to the opposing parties' *Daubert* motions by Friday, July 9, 2021 at 5:00 P.M.; and

- The parties shall file their replies, if any, by Friday, July 23, 2021 at 5:00 P.M.

Summary Judgment Motions:

- The parties shall file their summary judgment motions by Friday, August 20, 2021 at 5:00 P.M.;

- The parties shall file their oppositions to the opposing parties' summary judgment motions by Friday, September 17, 2021 at 5:00 P.M.; and

- The parties shall file their replies, if any, by Friday, October 1, 2021 at 5:00 P.M.

Furthermore, the parties' requests for expanded page limits for their summary judgment motion briefing is hereby GRANTED.

As a courtesy to the Court, the Court requests the parties refrain from filing motion papers until the motion has been fully briefed. If the parties elect to file

their motion only once it is fully briefed, the notice of motion and all supporting papers are to be served on the other party along with a cover letter setting forth whom the movant represents and the papers being served. Only a copy of the cover letter shall be electronically filed in advance of the fully briefed motion, and it must be filed as a letter, not as a motion. On the day the motion is fully briefed, each party shall electronically file their individual motion papers by 5:00 P.M. Plaintiffs shall also mail a complete set of courtesy copies of the *Daubert* motion papers, via overnight mail, to the Court, attention of Ms. Alexis Love. Defendants shall also mail a complete set of courtesy copies of the summary judgment motion papers, via overnight mail, to the Court, attention of Ms. Alexis Love.

SO ORDERED.

s/ WFK
HON. WILLIAM F. KUNTZ, II

Dated: May 4, 2021
Brooklyn, New York

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of March, two thousand twenty-five.

Unkechaug Indian Nation, Harry B. Wallace,
Plaintiffs - Appellants

v.

Basil Seggos, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, New York State Department of Environmental Conservation,
Defendants - Appellees.

ORDER

Docket No: 23-1013

Appellants, Unkechaug Indian Nation and Harry B. Wallace, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNKECHAUG INDIAN NATION,
CHIEF HARRY B. WALLACE in
his capacity as Chief and Individually,
Plaintiffs,

-against-

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

18-CV-1132 (WFK)

United States Courthouse
Brooklyn, New York

Monday, April 15, 2019
1:00 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORAL
ARGUMENT BEFORE THE HONORABLE
WILLIAM F. KUNTZ, II

UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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3040 88th Street East
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JAMES F. SIMERMEYER, II, ESQ.

For the Defendants:
STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
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BY: JAMES M. THOMPSON, ESQ.
ROBERT E. MORELLI, ESQ.

Court Reporter:
DAVID R. ROY, RPR
225 Cadman Plaza East
Brooklyn, New York 11201
drroyofcr@gmail.com

Proceedings recorded by Stenographic machine shorthand, transcript produced by Computer-Assisted Transcription.

(In open court.)

THE COURTROOM DEPUTY: All rise.

The Honorable William F. Kuntz, II is now

presiding. Civil cause for oral argument, Unkechaug Indian Nation, et al. versus Seggos, et al.

Counsel, will you please state your appearances for the record, and spell your first and your last names for the court reporter.

MR. SIMERMEYER: James Simermeyer, J-A-M-E-S, S-I-M-E-R-M-E-Y-E-R for the plaintiff.

THE COURT: Good afternoon, Counsel.

MR. SIMERMEYER: Good afternoon.

MR. SIMERMEYER, II: James F. Simermeyer, II, for the plaintiff.

THE COURT: Would you spell your name, sir?

MR. SIMERMEYER, II: Sure. J-A-M-E-S, F., S-I-M-E-R-M-E-Y-E-R, the second.

THE COURT: Thank you. You may be seated.

Those of you in the public may be seated as well. Thank you.

MR. MORELLI: Robert Morelli, Assistant Attorney General for Letitia James, our Attorney General, for Defendants, R-O-B-E-R-T, M-O-R-E-L-L-I.

THE COURT: Good afternoon. You may be seated.

MR. THOMPSON: James M. Thompson, from the Office of Attorney General, Letitia James, J-A-M-E-S, M., T-H-O-M-P-S-O-N, also for the defendants.

THE COURT: Thank you. You may be seated as well, Counsel. Good afternoon.

We are here on an oral argument on the pending motion to dismiss the action in Unkechaug Indian Nation, et al. versus Seggos, et al., 18-CV-1132. The parties also plan to address a letter request to compel the production of certain documents.

The background of this action is as follows: On February 21st of 2018, the Unkechaug Indian Nation and Chief Harry B. Wallace, in his capacity as chief and individually and collectively the plaintiff, filed a complaint against the New York State Department of Environmental Conservation, NYSDEC, and its Commissioner Basil Seggos, S-E-G-G-O-S, collectively the defendant.

As alleged in the complaint, the Unkechaug Nation, Indian Nation is recognized as an Indian Nation by New York State and by the United States of America under federal law. That Nation has existed since time immemorial. Its lands are known as the Poospatuck, spelled P-O-O-S-P-A-T-U-C-K, Indian Reservation located within the state of New York near Mastic, M-A-S-T-I-C, New York. The plaintiffs allege the defendants have subjected them to the threat and the fear of criminal prosecution simply for exercising their right to fish freely on reservation waters and in customary fishing waters.

The plaintiffs aver as follows: (1) Federal laws preempts the application of state and local laws to all Indian Tribes, including regulations promulgated by these defendants which interfere with the plaintiffs' right to fish;

(2) the defendants' attempts to regulate fishing upon reservation in customary fishing waters violates the plaintiffs' inherent right to self-government;

(3) the defendants' regulations interfere with plaintiffs' freedom of religious expression;

And (4) a treaty entered into by Governor Andros and the Unkechaug Indian Nation on May 24, 1676 is valid and adopted by the New York and Federal Constitutions and provides that the plaintiffs may sell their fish as they see fit.

The plaintiffs seek (1) declaration they are immuned from the defendants' regulations;

(2) a permanent injunction regarding Defendants' attempts to impose fishing restriction on eel and crustaceans on reservation land and customary waters;

(3) a permanent injunction against criminal prosecutions intended to chill the rights of the Native American.

The Motion to Dismiss: On June 19th of 2018, this Court held a promotion conference at the request of the defendant instead of briefing schedule for the

Defendants' Motion to Dismiss. The motion was fully briefed as of February 28, 2019. In their motion to dismiss, the defendants argue first the complaint fails to state a claim upon which relief may be granted any plausible claims at all.

Secondly, the plaintiffs' action is barred by the Eleventh Amendment to the United States Constitution.

And, third, certain claims are not justiciable.

In response, the plaintiffs argue they have standing. Each claim is justiciable and arises from a case or controversy and asserts the Eleventh Amendment does not bar their claim under the doctrine of *Ex Parte Young*. The plaintiffs also request leave to amend their complaint in the event this Court dismisses any causes of action to which the defendants object.

Motion to Compel Discovery. On April 3rd of 2019, the plaintiff filed a letter motion to compel these defendants to produce documents withheld on alleged grounds of privilege or the alternative, to provide for *in-camera* inspection of the documents together with an appropriate index to privileged documents.

On April 4th of 2019, the defendants filed a response objecting to the motion arguing it is barred by Rule 37(a) of the *Federal Rule's of Civil Procedure* because the plaintiffs did not meet and confer with the defendants in advance. The defendants also aver they have not waived privilege and Plaintiffs make no

substantive objection to their privileged designation.

Is that a fair and accurate summary of where we are in the case so far, Counsel?

MR. SIMERMEYER: Yes, Your Honor.

MR. MORELLI: It is, Your Honor.

THE COURT: That is because I have the world's best law clerks.

All right. Let's go first with respect to the motion to dismiss. I will hear from the Government, then I will hear from the Nation, and then we will proceed to address that and then proceed to address the discovery issue.

So I will hear first from the Government. Just state your name. You can just remain seated or you can go to the podium, whatever you are more comfortable doing. It is up to you.

MR. MORELLI: I'll remain seated.

THE COURT: Okay.

MR. MORELLI: Thank you, Your Honor.

THE COURT: Of course.

MR. MORELLI: I would like to point out first certain arguments that we made in our motion to dismiss that were basically unopposed in opposition by

the plaintiffs. First that the action is subject to complete dismissal against the Department of Environmental Conservation in and of itself under the Eleventh Amendment.

Second is everything with respect to any of the plaintiffs' alleged on-reservation fishing or clamming activities because pursuant to Environmental Conservation Law 11-0707(8), the DEC does not enforce any of its regulations on the actual Unkechaug Reservation itself. So those claims are moot.

I would next point to the fact that this complaint is largely devoid of necessary factual detail that permits the Defendants to actually put up a real defense to this action. Besides 25 U.S.C., Section 232, absolutely no information is given in the complainant about the allegedly controlling preempting regulations from the Federal Government.

Similarly with respect to the freedom of expression claims, no detail is given about the religious practices themselves or how they're being interfered with, including whether or not those regulations are actually in effect or they're proposed or forthcoming regulations that may interfere with their religious expression in the future.

Similarly I would note that the treaty itself, even if it is a treaty, the plain language of it doesn't support the argument that the plaintiffs make. They leave out certain language showing that any right that they're allegedly granted under this treaty are subject to the law and custom of the Government in any event.

We'd ask, Judge, that the Court dismiss the complaint just because it doesn't fit a cause of action against any of the defendants for any of the causes of action.

THE COURT: Anything else?

MR. MORELLI: That's it, Your Honor.

THE COURT: I will hear from the plaintiff.

You can remain seated, sir.

MR. SIMERMEYER: Firstly, the regulations interfere with fishing of the Nation both on its customary waters and on its reservation land. Although there's an argument made here that they don't enforce reservation fishing; however, the mere fact that there is regulations affecting the ability of the Nation to fish and to trade its fish or proceeds from fishing with other individuals or other Indian Nations is in violation of the treaty that was entered into in the 1600's with Andros. So the regulations generally by any sort of regulation has that chilling effect to not allow the Tribe to go forward and fish.

Also the fact that in the regulations by the Department under Commissioner's Procedures 42 they acknowledge the spiritual connection between fishing and Native Americans. They also in this same regulation state that they will consult with Native Americans concerning any issues with fishing or use of waters on the reservation or on its customary waters. In addition to this, under *Montoya,* which is the

standard for definition of Indians and Indian lands, it specifically states that territories, although may be ill-defined, are also part and parcel of the Indians' territory and land. So the idea of customary waters and the fishing waters fit squarely within *Montoya*, which this tribe has already had the opportunity to present in court and was ruled in its favor to go forward as a recognized Indian Nation of the Federal Common Law.

As far as the religious aspects are concerned and the spiritual aspects as stated are recognized by the State. They're recognized in many, many court cases which we listed in our brief concerning the spirituality of fishing and those aspects of the environment that are closely connected to Native Americans. I think the allegations set forth in the complaint fully set forth the violations of the rights of the Unkechaug by the criminal arrest records; summonses issued to the Tribe; confiscation of eels that were captured by the Tribe and destroyed by the State, not even returned; the fishing equipment; the continued threat of criminal action if, in fact, the Tribe continues to fish. And clearly under the letter that's also exhibited in our opposing papers by Berkman clearly states that there's intention by the Department to continue to prosecute the Tribe and its members for fishing and does not accept its treaty rights. In response to that, Chief Wallace has clearly stated that the Tribe will continue to fish under its treaty rights and will not stop regardless of the threat of such criminal action.

So the fact that the State has actually acted in a concrete manner by issuing summonses and the threat

of prosecution unless the Tribe commence this action has, in effect, acted as a waiver and the State has, in fact, waived its Eleventh Amendment argument due to the fact that it has threatened criminal action unless an action was brought. So therefore, any argument or claim under the Eleventh Amendment has been waived or should have been waived by the State based on its actions in this case.

That's all I have.

THE COURT: Thank you. Any response?

MR. MORELLI: Yes, Your Honor.

I think we're kind of talking difficult points here. To the extent Counsel is talking about the state regulations and how the state regulations require consultation with the Tribe, these aren't federal regulations. These are not regulations that allegedly preempt the state's regulation of fishing. We still don't know which regulations Counsel is talking about allegedly control in this case. 25 U.S.C. 232, first off, it's not a regulation. And in any event, it only applies to on-reservation offenses, so it has nothing really to do with this suit. I don't think there's any argument that's been put forward showing what actually preempts and controls this analysis with respect to Plaintiffs' fishing rights.

Next I would talk about the summonses and the arrest and all the things that Counsel just pointed to. These don't have anything to do with fishing for eels. None of that has to do with the harvest and creation of

wampum, which forms the basis of Plaintiffs' religious expression claims. Those arguments are still essentially unaddressed in the state papers. You know, and I point out that the Eleventh Amendment waiver argument, I don't believe that holds any water at all. Waiver is a very high bar to meet, and it certainly has not been met here, Judge.

THE COURT: Anything else?

MR. MORELLI: No, thank you.

THE COURT: Anything in response?

MR. SIMERMEYER: Yes, Your Honor.

The fishing rights we're talking about is a treaty, the fishing treaty between the Unkechaug and the Government under Andros, and that any regulations whatsoever that violate or interfere with those is a violation of their treaty rights, whether it's under the state regulations or federal regulations that would violate that. However, the commissioner and the department cannot violate this federal treaty that was entered into back since the 1600's.

THE COURT: Anything else?

MR. SIMERMEYER: (No audible response.)

THE COURT: Sir, anything else?

MR. SIMERMEYER: That's all.

THE COURT: Anything else?

MR. MORELLI: No, Judge. Thank you.

THE COURT: All right. The motion to dismiss is denied in its entirety.

Now let's talk about the schedule for the production of documents. I am going to require the defendants to produce a detailed privilege log within -- what is four weeks from this Friday, Mr. Jackson?

THE COURTROOM DEPUTY: One second, Your Honor. The computer is loading up the calendar.

That takes us to May 10th, Judge.

THE COURT: Okay. By 5:00 p.m. on May 10th I want all of the documents that are being withheld on privileged grounds to be provided to the Court for *in-camera* review together with a privilege log. The privilege log will be provided to the defendants at the same time it is provided to the Court. You can provide it on ECF, and I will review the documents that are being withheld to determine whether or not they ought to be produced in the litigation; whether the privileges that are being asserted, whether it is attorney/client, trade secrets, communicative, deliberative privilege, whatever the privileged ground is, please assert it and assert the statutory or rule basis for the privilege. I will also issue an opinion within the next 72 hours setting forth in detail the reasons for the denial of the motion to dismiss the complaint in this action, and there will be a judgment, obviously, that goes with

that. So that will be submitted for your folks' guidance on-line.

So that is where we are in the motion to dismiss. That is where we are on the discovery schedule.

Is there anything else I can help you Counsel with today while we are all here?

MR. THOMPSON: Yes, Your Honor. There are a couple of points that I would like to make on discovery, if I may?

THE COURT: Of course.

MR. THOMPSON: First is just to state for the record that Defendants did, in fact, produce a 451-page privileged log which is attached to ECF Number 33 as Exhibits 1 through 3.

THE COURT: Is it complete?

MR. THOMPSON: Yes, it is. We'd be happy to add in anything that Your Honor wants us to add.

THE COURT: As long as you represent to the Court that it is complete and that there is nothing that is left off, then you are ahead of the game. I just give you an opportunity to rethink when you go back to your colleagues whether, in fact, it is complete or not. And I have given you until the date I have stated, May 10th, to complete the privileged log. So if you should discovery that there is more that you need to -- no pun intended on the word "discover" -- that there is more

that you need to put on the privileged log, you may do so without any fear of adverse reaction from the Court.

So I just like to give -- as a practicing lawyer who used to handle millions of pages of documents and occasionally has actually reviewed, even recently, hundreds of thousands of documents personally, I understand how sometimes what you understand to be the complete universe of documents, may not in fact, be the complete universe of documents. So I am giving you a grace period until May 10th at 5:00 p.m. to "belt and suspenders" as we used to say on Wall Street. Make sure you have got everything in. And if you want to supplement the privilege log that you have got now, that is no harm, no foul. Come May 11th, the Court may have a very different view. So I am just giving you that courtesy, as it were.

MR. THOMPSON: Duly noted, Your Honor.

THE COURT: Okay.

MR. THOMPSON: Two additional matters.

THE COURT: Yes, sir.

MR. THOMPSON: As I'm sure Your Honor is aware, we put in a letter motion late last week regarding five deposition notices that were served by the plaintiffs. I'm not sure if Your Honor wants to hear that today or --

THE COURT: I will hear it today.

MR. THOMPSON: All right. So the plaintiffs served notices of deposition seeking the depositions of five members of DEC, five employees of DEC: Commissioner Basil Seggos; Thomas Berkman, who is the General Counsel of DEC; Monica Kreshik, who is an associate attorney in DEC's Office of General Counsel, and she's the representative of the legal department who has supervised all the various litigations regarding the plaintiffs. And two additional ones: James Gilmore, who is the Director of DEC's Marine Resources Division based on Long Island; and Lieutenant Nicholas Desotelle, D-E-S-O-T-E-L-L-E, who is a law enforcement officer in DEC's Law Enforcement Division.

We believe those depositions are improper for three reasons: First of all, the plaintiffs have not shown the exceptional circumstances that the Second Circuit requires in order to take the deposition of a Senior Government Official, like Commissioner Seggos.

Second --

THE COURT: He is a party to the action, right?

MR. THOMPSON: He is, yes. But as we point out in our letter motion, when he's named in his official capacity, that doesn't change the analysis because the suit against the commissioner in his official capacity is essentially a suit against the agency.

THE COURT: Why should he not give a deposition?

MR. THOMPSON: Because he's a cabinet level official. He supervises a department of 3,000 people, and --

THE COURT: So what?

MR. THOMPSON: -- and because under the *Letterman* case, *Letterman versus New York City Department of Parks and Recreation,* the burden is on the plaintiffs if they want to depose a high-ranking government official to show several things: First that the official has unique first-hand knowledge related to the litigated claims.

THE COURT: Let's stop there. Does he?

MR. SIMERMEYER: Yes, he does.

THE COURT: What is the basis of that statement on your part? Why does he have unique -- your associate can speak, too. You know, we are here doing discovery, so it is not, you know, both sides over there spoke. This gentleman spoke. So you know...

MR. SIMERMEYER: Thank you.

THE COURT: I used to do this for a living, so that is okay. The guy who knows the details can speak, too -- or the gal who knows the detail. You know, you are not precluded from bringing women into the courtroom, by the way, as my female law clerks and my male law clerk often remind me of. I am just saying.

But so, go ahead.

MR. SIMERMEYER, II: Well, Defendants have actually --

THE COURT: Use the microphone, please, for me. I'm sorry.

MR. SIMERMEYER, II: The defendants --

THE COURT: And turn it on. Otherwise you have to channel your inner Lord Vader speak pattern. I am not the only one who gets away with not using a mic, and even I have got my mic turned on.

So go ahead.

MR. SIMERMEYER, II: All right. Thank you.

Defendants have provided in production of documents, there's actually an email between I believe it was Investigator Scott Torrance, where he states that the 2016 confiscation at JFK Airport of the eels from the Unkechaug Nation actually were directed by Commissioner Seggos.

THE COURT: Did he sign off on any of the documents personally and directly that are at issue in this case?

MR. SIMERMEYER, II: And also --

THE COURT: Did he?

MR. SIMERMEYER, II: Yes, he did.

THE COURT: Okay. I am going to allow this deposition to go forward. The application is denied.

I mean, look, my view is as follows: I recently had a case where I pointed out, I thought there was a particular gentleman whose address happens to be 1600 Pennsylvania Avenue, and I was not going to insist at the preliminary injunction state that he be made personally available for a deposition, and people got along with that. But other than that, Secretaries of Homeland Security, Secretaries of State, they are just government employees and they don't even have Article III protection. So I am going to allow the depositions that have been noticed to go forward. If you find that the depositions as they are being conducted for some reason you have to give instructions not to answer questions, then we can get into a posture where you can come before me as your discovery master and I will make rulings.

But when I was a first-year associate, I worked on a case involving the near default of New York City, and I sat through the depositions carrying the bag for the guy carrying the bag for the guy carrying the bag for the following people: Walter Rifkind, who happened to be the Chair of Citicorp; Donald Regan, who happened to subsequently become a senior cabinet official; David Rockefeller himself, was the senior official at Chase; Harrison Goldin, who was in control of the City of New York; Abe Beame, who had been the Mayor of New York. So the fact that you have some bureaucrats who have responsibility for running some

state agencies or federal agencies, with the exception of the person who shall not be named, I am not persuaded.

Now, if the plaintiffs abuse the privilege and start wasting the time of these senior officials by asking them about what was going on in the mail room, for activities that they were not involved with, then you make your motion for protective order and I will remind Plaintiffs' Counsel that -- no pun intended -- they're not allowed to go on fishing expeditions. Yes, I know. But then again, you made the comment earlier about deep waters and I did not refer to it then. And I am an avid fisherman, not a good one, but an avid one, so I know all the clichés, you know, about slippery as an eel, deep waters, I get it. Okay? We can spend all day with lots of bad fishing puns. That being said, give them the depositions, work out a schedule.

Please, Plaintiffs' Counsel, do not waste the time of senior officials asking them about materials that are beyond their ken. Both sides are very experienced lawyers. Your papers are excellent. You know what you are doing. Do not make it easy for a lawyer for the State to come back and say, See, Your Honor, they are wasting our time. We need a protective order. Because if you waste their time, I will grant them a protective order. But by the same token, when these guys, government officials who are signing off on documents, making the decisions, I believe Plaintiffs have a right to question them about their decisions, again, with a big carve-out for the person who shall not be named. Okay? He is not named as a party, so you are not going to get him. But everybody else is within the licensed

fishing season. Okay? I will not say hunting season.

All right. What else do we have?

MR. THOMPSON: Your Honor, there's also the matter of the depositions of the senior lawyers, Tom Berkman and Monica Kreshik.

THE COURT: Right.

MR. THOMPSON: As you know in the Second Circuit, depositions of counsel for the other side are disfavored, and there's a burden that's on the parties seeking a deposition to show that such depositions are necessary.

THE COURT: I mean, look, I do not like -- there are two things I do not like, and that is lawyers being deposed when the businesspeople, the principals who are the decision makers can be deposed. As I said, they took David Rockefeller's deposition, but they did not take the deposition of the senior lawyers of Milbank Tweed who were representing him, so... When you are in-house counsel as a government lawyer, you very often wear two or three or four different hats. I would suggest, and it is just a suggestion, that you start with the businesspeople who are not the lawyers in terms of taking their depositions to get the story about the business decision equivalence of governmental decisions that were made.

On the other hand, if the lawyers were functioning as bureaucrats and policymakers and you need to have their depositions taken and if the

businesspeople, I will use that term for the policy people, were not the lawyers or not functioning as lawyers say, Well, this is all done on advice of counsel and they start hiding behind the lawyers, then you will make your motions to compel to me and I will grant them. I mean, this is a search for the truth. This is a spoiler alert. That is how I look at trial. That is how I look at motions for preliminary injunctions.

So I do not want to see attorney/client communication privileges blown up, and you are entitled to properly protect them. On the other hand, I do not want to see lawyers being used as businesspeople and trying to hide the ball. Because I have only practiced law for about 33 years before becoming a judge about eight years ago, so I have only done this for about 40-some-plus years, which means as Judge Weinstein would say, I am sort of a baby judge. That being said -- maybe I am a toddler judge and toddlers can be cranky, okay? So do yourselves a favor, both sides you are experienced lawyers. Proceed in good faith. Take the depositions. Do not go fishing in inappropriate waters and do not try to hide true business policy decisions behind the lawyers. And you folks know the difference, and if you do not, I will sort it out for you. So start with the people who are not the lawyers in your depositions, and then if you need to move on to the in-house lawyers, do it.

I would much prefer that you work out in advance the areas that you are going to be questioning with respect to -- you folks know your case, and you do not need a judge to be a buttinsky and to get down in the weeds with you in terms of which questions can be

asked and which questions may not be asked. I will do it, but I can only promise you this: If I have to get to that level of being your discovery master, both sides will be unhappy. You are much better off as sophisticated counsel asking real questions that are appropriate and getting real answers.

But if you want me to become the ultimate pilar fish, I will do it and you will both be shaking your heads saying, to use the ancient phrase of, "oy." Okay. "Oy." That's the phrase. You really will wish that you just worked it out amongst yourselves.

So is there anything else I can help you with today?

MR. THOMPSON: Two other very quick things: The first will be as we put in our motion the Kreshik, Gilmore, and Desotelle depositions need to be initiated by *subpoena*. So if the other side would serve *subpoenas*, we would, of course, produce them.

THE COURT: Stop right there.

Would you spell those names for the court reporter?

And will you do that, Counsel?

MR. SIMERMEYER: Yes.

THE COURT: All right. So why don't you spell the names for the reporter just so the record is clear?

MR. THOMPSON: It's Kreshik, K-R-E-S-H-I-K; Gilmore, G-I-L-M-O-R-E; and Desotelle, D-E-S-O-T-E-L-L-E.

And one last matter, Your Honor, especially given there's going to be *in-camera* review. I believe the plaintiffs requested an extension of discovery. We would consent to that. I believe currently discovery is set to close at the end of next week.

THE COURT: As you know, I set discovery schedules. And when I have magistrates doing it, they always roll their eyes because I typically blow up the discovery schedule so the lawyers can get the discovery done and either resolve the case consensually or litigate it. So I am blowing up my own discovery schedule as well and my own discovery deadline.

What makes sense for you folks in terms of a discovery cutoff and, obviously, I will be prepared to blow that up, too, if you guys decide it needs to be extended, but what is reasonable? Or if you want to talk and then submit something, a proposed schedule on ECF, a stipulation order, that is the other way to do it, as well. There is no need to try to, you know, work it out here. You can talk about it, and then put something in on-line, or you can agree on a date now? Whatever makes most sense to you.

MR. THOMPSON: I think that might make sense to meet and confer.

THE COURT: Yes, why don't you do that. I am a big believer in lawyers meeting and conferring and

putting the stipulations and proposed orders on-line, I mean, especially when you have really smart lawyers who know the case. I know you have clients who are very demanding. That is fine. I had lot of clients who were demanding in the 33 years I practiced. I get it. You have to go back to your respective mother ships and report what is going on. But just tell them the best way to get the case resolved is to have a reasonable discovery schedule, present the people who need to be presented for depositions, provide the documents that need to be provided, have a reasonable discovery cutoff, final motion cutoff and trial date, and that way you will be able to decide if you can consensually resolve it or if you really want the judge to decide the issues in a trial? I mean, I love to try cases. It is what I do. And as I have often said, and my law clerks have heard it to the point they roll their eyes, sometimes the plaintiffs leave happy, sometimes they leave unhappy. Sometimes the defendants leave unhappy, sometimes they leave happy. Sometime both the plaintiffs and the defendants leave this courtroom unhappy. But the one thing that always happens, the judge always leaves the courtroom a happy man because I love my job and I am appointed for good behavior. And if you have been watching what is going on in Washington, although I am a flawed man, I am good. That is a very low bar. That is with one R, not two.

All right. Anything else?

MR. MORELLI: Not from the defendants, Your Honor.

THE COURT: Anything else?

MR. SIMERMEYER: Nothing further. Thank you, Your Honor.

THE COURT: Thank you. All right. We are adjourned. Have a good day everyone.

(Matter concluded.)

--oo0oo--

I (we) certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ David R. Roy
DAVID R. ROY

19th Day of April, 2019
Date

APPENDIX F

General Docket
Court of Appeals, 2nd Circuit

Court of Appeals Docket#: 23-1013
Nature of Suit: 3893 STATUTES-Environmental Matters
Unkechaug Indian Nation v. Seggos
Appeal From: EDNY (CENTRAL ISLIP)
Fee Status: Paid
Docketed: 07/12/2023
Termed: 01/28/2025

Case Type Information:

1) Civil
2) Private
3) -

Originating Court Information:

District: 0207-2: 18-cv-1132
Trial Judge: William F Kuntz, II, U.S. District Judge
Trial Judge: Anne Y. Shields, U.S. Magistrate Judge
Date Filed: 02/21/2018
Date Order/Judgment: 06/20/2023
Date Order/Judgment EOD:
06/20/2023
Date NOA Filed:
07/12/2023
Date Rec'd COA:
07/12/2023

Prior Cases:
None
Current Cases:
None

Panel Assignment: Not available

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(COR LD NTC Retained]
(see above)

Basil Seggos, in his official capacity as the Commissioner of the New York State Department Environmental Conservation
Defendant - Appellee

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(see above)

Unkechaug Indian Nation, Harry B. Wallace,
Plaintiffs - Appellants,

v.

Basil Seggos, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, New York State Department of Environmental Conservation,
Defendants - Appellees.

07/12/2023	☐ 1 19 pg. 201.07 KB	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Unkechaug Indian Nation and Harry 8. Wallace, FILED. [3541707] [23-1013] [Entered:07/14/2023 01:09 PM]
07/12/2023	☐ 2 40 pg. 431.06 KB	DISTRICT COURT ORDER, dated 06/16/2023, RECEIVED. [3541715] [23-1013] [Entered:07/1 4/2023 01:13PM]
07/12/2023	☐ 3 1 pg, 92.38 KB	DISTRICT COURT JUDGMENT, dated 06/20/2023, RECEIVED. [3541720] [23-1013] [Entered:07/14/2023 01:16 PM]
07/12/2023	☐ 4	PAYMENT OF DOCKETING FEE, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, district court receipt # ANYEDC-16882421, FILED. [3541724] [23-1013] [Entered:07/14/2023 01:17 PM]

07/12/2023	☐ 6 19 pg. 342.52 KB	ELECTRONIC INDEX, in lieu of record, FILED. [3541726] [23-1013] [Entered:07/14/2023 01:18 PM]
07/17/2023	☐ 9 1 pg, 59.41 KB	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee New York State Department of Environmental Conservation and Basil Seggos, FILED. Service date 07/17/2023 by CM/ECF. [3542710] [23-1013] [Entered:07/17/2023 04:35 PM]
07/20/2023	☐ 10	ATTORNEY, David Lawrence III, [9], in place of attorney Barbara D. Underwood, SUBSTITUTED. [3544540] [23-1013] [Entered:07/20/2023 01:36 PM]

07/20/2023	☐ 11 1 pg, 93.02 KB	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service dale 07/20/2023 by CM/ECF.[3544821] [23-1013] [Entered:07/20/2023 04:38 PM]
07/26/2023	☐ 12 92pg. 4.1 MB	FORM C, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 07/26/2023 by CM/ECF. [3547067] [23-1013] [Entered:07/26/2023 10:40 AM]
07/26/2023	☐ 13 1 pg, 91.93 KB	FORM D, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 07/26/2023 by CM/ECF. [3547071] [23-1013] [Entered:07/26/202310:42 AM]

07/26/2023	☐ 14 1 pg, 25.29 KB	LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, informing Court of proposed due date 10/25/2023, RECEIVED. Service date 07/26/2023 by CM/ECF. [3547076] [23-1013] [Entered:07/26/2023 10:47 AM]
07/27/2023	☐ 17 2 pg, 199.21 KB	CAMP ORDER, Type of Conference:In-Person, Scheduled Date of Conference:09/06/2023, Start Time:10:30 AM, Required Attendees:Clients with Counsel, with Kathleen M. Scanlon, ENTERED. [3548038] [23-1013] [Entered:07/27/2023 02:27 PM]
08/03/2023	☐ 20 1 pg, 87.36 KB	NEW CASE MANAGER, Ronald Willoughby, ASSIGNED.[3551363] [23-1013] [Entered:08/03/2023 04:25 PM]

08/04/2023	☐ 23 1 pg, 134.31 KB	SO-ORDERED SCHEDULING NOTIFICATION, selling Appellant Unkechaug Indian Nation and Harry B. Wallace Brief due date as 10/25/2023. Joint Appendix due date as 10/25/2023, FILED. [3551500] [23- 1013] [Entered:08/04/2023 08:22 AM]
08/21/2023	☐ 24 1 pg, 369.61 KB	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee New York State Department of Environmental Conservation and Basil Seggos, FILED. Service date 08/21/2023 by CM/ECF. [3559120] [23-1013] [Entered:08/21/2023 01:25 PM]
08/21/2023	☐ 25	ATTORNEY Elizabeth A. Broday, [24], in place of attorney David Lawrence III, SUBSTITUTED. [35591461 [23-1013] [Entered:08/21/2023 01:50 PM]

08/24/2023	☐ 26 1 pg, 95.26 KB	CAMP ORDER, The Court's Order dated July 27, 2023 scheduling a mediation with the Civil Appeals Mediation Program ["CAMP"] for September 6, 2023 is hereby VACATED, ENTERED. [3560980] [23-1013] [Entered: 08/24/2023 04:56 PM]
10/25/2023	☐ 28 301 pg. 23.97 MB	APPENDIX, volume 1 of 21, (pp. 1-280), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584681] [23-1013] [Entered: 10/25/2023 04:51 PM]
10/25/2023	☐ 29 301 pg, 3.7 MB	APPENDIX, volume 2 of 21, (pp. 281-560), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584688] [23-1013] [Entered: 10/25/2023 04:59 PM]

10/25/2023	☐ 30 301 pg, 29.49 MB	APPENDIX, volume 3 of 21, (pp. 561-840), on behalf of Appellant Harry B. Wallace and Unkechaug Indian Nation, FILED. Service date 10/25/2023 by CM/ECF. [3584693] [23-1013] [Entered: 10/25/2023 05:10 PM]
10/25/2023	☐ 31 301 pg, 17.64 MB	APPENDIX, volume 4 of 21, (pp. 841-1120), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584694] [23-1013] [Entered: 10/25/2023 05:13 PM]
10/25/2023	☐ 32 301 pg, 15.18 MB	APPENDIX, volume 5 of 21, (pp. 1121-1400), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584698] [23-10131 [Entered: 10/25/2023 05:18 PM]

10/25/2023	☐ 33 301 pg, 3.54 MB	APPENDIX, volume 6 of 21, (pp. 1401-1680), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584699] [23-1013] [Entered: 10/25/2023 05:21 PM]
10/25/2023	☐ 34 301 pg, 15.67 MB	APPENDIX, volume 7 of 21, (pp. 1681-1960), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584 700] [23-1013] [Entered: 10/25/2023 05:23 PM]
10/25/2023	☐ 35 301 pg, 19.32 MB	APPENDIX, volume 8 of 21, (pp. 1961-2240), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584703] [23-1013] [Entered: 10/25/2023 05:26 PM]

10/25/2023	☐ 36 301 pg, 3.66 MB	APPENDIX, volume 9 of 21, (pp. 2241-2520), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584705] [23-1013] (Entered: 10/25/2023 05:28 PM]
10/25/2023	☐ 37	APPENDIX, volume 10 of 21, (pp. 2521-2800), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584706] [23-1013] [Entered: 10/25/2023 05:29 PM]
10/25/2023	☐ 38 301 pg, 19.26 MB	APPENDIX, volume 11 of 21, (pp. 2801-3080), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584707] [23-1013] [Entered: 10/25/2023 05:32 PM]

10/25/2023	☐ 39 301 pg, 53.8 MB	APPENDIX, volume 12 of 21, (pp. 3081-3360), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584708] [23-1013] [Entered: 10/25/2023 05:35 PM]
10/25/2023	☐ 40 301 pg, 97.81 MB	APPENDIX, volume 13 of 21 , (pp. 3361-3640), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584711] [23-1013]– [Edited 10/26/2023 by RW] [Entered: 10/25/2023 05:40 PM]
10/25/2023	☐ 41 301 pg, 82.6 MB	APPENDIX, volume 14 of 21, (pp. 3641-3920), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584712] [23-1013] [Entered: 10/25/2023 05:46 PM]

10/25/2023	☐ 42 301 pg, 27.13 MB	APPENDIX, volume 15 of 21, (pp. 3921-4200), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584713] [23-1013] [Entered: 10/25/2023 05:50 PM]
10/25/2023	☐ 43 301 pg, 20.47 MB	APPENDIX, volume 16 of 21, (pp. 4201-4480), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584714] [23-1013] (Entered: 10/25/2023 05:53 PM]
10/25/2023	☐ 44 301 pg, 13.15 MB	APPENDIX, volume 17 of 21, (pp. 4481-4760), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584715] [23-1013] [Entered: 10/25/2023 05:55 PM]

10/25/2023	☐ 45 301 pg, 27.85 MB	APPENDIX, volume 18 of 21, (pp. 4761-5040), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584716] [23-1013] [Entered: 10/25/2023 05:58 PM]
10/25/2023	☐ 46 301 pg, 41.72 MB	APPENDIX, volume 19 of 21, (pp. 5041-5320), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584718] [23-1013] [Entered: 10/25/2023 06:01 PM]
10/25/2023	☐ 47 301 pg, 54.39 MB	APPENDIX, volume 20 of 21, (pp. 5321-5600), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584719] [23-1013] [Entered: 10/25/2023 06:05 PM]

10/25/2023	☐ 48 242 pg, 28.46 MB	APPENDIX, volume 21 of 21, (pp. 5601-5821), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584720] [23-1013) [Entered: 10/25/2023 06:08 PM]
10/25/2023	☐ 49 44 pg, 1.07 MB	SPECIAL APPENDIX, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584721] [23-1013] [Entered: 10/25/2023 06:12 PM]
10/25/2023	☐ 50 38 pg, 1002.32 KB	BRIEF, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584722] [23-1013] [Entered: 10/25/2023 06:13 PM]

10/26/2023	☐ 51 301 pg, 4.9 MB	APPENDIX, volume 10 of 21, (pp. 2521-2800), on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 10/25/2023 by CM/ECF. [3584838] [23-1013] [Entered: 10/26/2023 11:35 AM]
10/26/2023	☐ 52 2 pg, 150.94 KB	DEFECTIVE DOCUMENT, APPENDIX, volume 10 of 21, [37], on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. [3584856] [23-1013] [Entered: 10/26/2023 11:47 AM]
10/26/2023	☐ 53	CURED DEFECTIVE APPENDIX, volume 10 of 21, [51], on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. [3584861] [23-1013] [Entered: 10/26/2023 11:52 AM]

10/26/2023	☐ 54 1 pg, 100.04 KB	LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellee New York State Department of Environmental Conservation and Basil Seggos, informing Court of proposed due date 01/24/2024, RECEIVED. Service date 10/26/2023 by CM/ECF. [3585040] [23-1013] [Entered: 10/26/2023 05:24 PM]
10/27/2023	☐ 57 1 pg, 120.31 KB	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee New York State Department of Environmental Conservation and Basil Seggos Brief due date as 01/24/2024, FILED. [3585131] [23-1013] [Entered: 10/27/2023 09:32 AM]

01/12/2024	☐ 63 7 pg, 306.29 KB	MOTION, to extend time, on behalf of Appellee New York State Department of Environmental Conservation and Basil Seggos, FILED. Service date 01/12/2024 by CM/ECF. [3603713] [23-1013] [Entered: 01/12/2024 01:52 PM]
01/19/2024	☐ 67 2 pg, 150.34 KB	MOTION ORDER, granting Appellees an extension of time to 03/25/2024 to file their brief [63], filed by Appellee New York State Department of Environmental Conservation and Basil Seggos, by WJN, FILED. [3604981] [67] [23-1013] [Entered: 01/19/2024 03:10 PM]

03/25/2024	☐ 68 72 pg. 570.28 KB	BRIEF, on behalf of Appellee New York State Department of Environmental Conservation and Basil Seggos, FILED. Service date 03/25/2024 by CM/ECF. [3616815] [23-1013] [Entered: 03/25/2024 06:59 PM]
03/27/2024	☐ 69 1 pg, 267.92 KB	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Elizabeth A. Brody, Esq. for Appellee New York State Department of Environmental Conservation and Basil Seggos, FILED. Service date 03/27/2024 by CM/ECF. [3617184] [23-1013] [Entered: 03/27/2024 11:27 AM]

03/27/2024	☐ 71 1 pg, 77.39 KB	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney James F. Simermeyer for Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 03/27/2024 by CM/ECF. [3617272] [23-1013] [Entered: 03/27/2024 03:19 PM]
04/10/2024	☐ 76	CASE CALENDARING, for the week of 06/24/2024, PANEL B, PROPOSED. [3619372] [23-1013] [Entered: 04/10/2024 04:33 PM]
04/15/2024	☐ 77 37 pg, 861.75 KB	REPLY BRIEF, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 04/15/2024 by CM/ECF. [3619810] [23-1013] [Entered: 04/15/2024 02:10 PM]

05/31/2024	☐ 82 1 pg, 1.35 MB	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Elizabeth A. Brody, Esq. for Appellee New York State Department of Environmental Conservation and Basil Seggos, FILED. Service date 05/31/2024 by CM/ECF. [3625003] [23-1013] [Entered: 05/31/2024 03:43 PM]
07/01/2024	☐ 84	CASE CALENDARING, for the week of 09/16/2024, PROPOSED. [3628112] [23-1013] [Entered: 07/01/2024 04:33 PM]
07/19/2024	☐ 85	CASE CALENDARING, for argument on 09/18/2024, SET. [3629783] [23-1013] [Entered: 07/19/2024 05:27 PM]
08/13/2024	☐ 86 2 pg, 103.49 KB	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. [3631833] [23-1013] [Entered: 08/13/2024 10:26AM]

08/14/2024	☐ 87 1 pg, 168.07 KB	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee New York State Department of Environmental Conservation and Basil Seggos. FILED. Service date 08/14/2024 by CM/ECF. [3631965] [23-1013] [Entered: 08/14/2024 12:11 PM]
09/12/2024	☐ 88 1 pg, 637.85 KB	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 09/12/2024 by CM/ECF. [3633917] [23-1013] [Entered: 09/12/2024 05:54 PM]
09/18/2024	☐ 89	CASE, before GEL, BR, SALM, HEARD.[3634195] [23-1013] [Entered: 09/18/2024 10:21 AM]

01/28/2025	☐ 91 1 pg. 87.83 KB	NEW CASE MANAGER, Khadijah Young, ASSIGNED. [3639951] [23-1013] [Entered: 01/28/2025 09: 16 AM]
01/28/2025	☐ 92 32 pg, 656.02 KB	OPINION, we affirm the judgment of the District Court, by GEL, BR, SALM, FILED.[3639952] [23-1013] [Entered: 01/28/2025 09:21 AM]
01/28/2025	☐ 94	CAPTION, in light of opinion dated 01/28/2025, AMENDED. [3639954] [23-101 3] [Entered: 01/28/2025 09:29AM]
01/28/2025	☐ 98 1 pg, 142 KB	JUDGMENT, FILED. [3639986] [23-1013] [Entered: 01/28/2025 12:39 PM]
02/11/2025	☐ 99	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 02/11/2024 by CM/ECF. [3640608] [23-1013] [Entered: 2/11/25, 1:22 PM]

02/11/2025	☐ 100 2 pg, 151.31 KB	DEFECTIVE DOCUMENT, petition for rehearing/rehearing en bane, (99). on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. [3640621] [23-1013] [Entered: 02/11/2025 04:20 PM]
02/11/2025	☐ 101 49 pg, 667.62 KB	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. Service date 02/11/2025 by CM/ECF. [3640625] [23-1013] [Entered: 02/11/2025 06:07 PM]
02/12/2025	☐ 102	CURED DEFECTIVE petition for rehearing/ rehearing en banc, [101], on behalf of Appellant Unkechaug Indian Nation and Harry B. Wallace, FILED. [3640690] [23-1013] [Entered: 02/12/2025 01:13 PM]

03/03/2025	☐ 105 1 pg, 113.39 KB	ORDER, petition for rehearing/rehearing en banc denied, FILED. [3641430] [23-1013] [Entered: 03/03/2025 03:09 PM]
03/10/2025	☐ 106 31 pg, 1.17 MB	JUDGMENT MANDATE, ISSUED. [3641757] (23-1013] [Entered: 03/10/2025 01:48 PM]

5/5/25, 1:22 PM 23-1013 Docket

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U.S. District Court
Eastern District of New York (Central Islip)
CIVIL DOCKET FOR CASE
#: 2:18-cv-01132-WFK-AYS

Unkechauge Indian Nation et al v. Seggos et al
Assigned to: Judge William F. Kuntz, II
Referred to: Magistrate Judge Anne Y. Shields
Cause: 28:2201 Declaratory Judgement

Date Filed: 02/21/2018
Date Terminated: 06/20/2023
Jury Demand: Defendant
Nature of Suit: 893 Environmental Matters
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
02/21/2018	2	NOTICE of Appearance by James Francis Simermeyer, II on behalf of All Plaintiffs (aty to be noticed) (Simermeyer, James) (Entered: 02/21/2018)
02/21/2018	1	COMPLAINT against All Defendants Was the Disclosure Statement on Civil Cover Sheet completed -NO,, filed by Harry Wallace, Unkechauge Indian Nation. (Attachments: # 1 Proposed Summons, # 2 Civil Cover Sheet) (Landow, Concetta) Modified on 2/23/2018 (Landow, Concetta). (Entered: 02/23/2018)
02/21/2018		FILING FEE:$ 400.00, receipt number 0207-10218697 (Landow, Concetta) (Entered: 02/23/2018)

02/23/2018	3	This attorney case opening filing has been checked for quality control. See the attachment for corrections that were made, if any. (Davis, Kimberly) (Additional attachment(s) added on 2/23/2018: # 1 Additional Corrections) (Landow, Concetta). (Entered: 02/23/2018)
02/23/2018		Case Assigned to Judge Leonard D. Wexler and Magistrate Judge Anne Y. Shields. Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. (Landow, Concetta) (Entered: 02/23/2018)

02/23/2018	4	In accordance with Rule 73 of the Federal Rules of Civil Procedure and Local Rule 73.1, the parties are notified that *if* all parties consent a United States magistrate judge of this court is available to conduct all proceedings in this civil action including a (jury or nonjury) trial and to order the entry of a final judgment. Attached to the Notice is a blank copy of the consent form that should be filled out, signed and filed electronically only if all parties wish to consent. The form may also be accessed at the following link: http://www.uscourts.gov/uscourts/FormsAndFees/Forms/A0085,pdf. You may withhold your consent without adverse substantive consequences. Do NOT return or file the consent unless all parties have signed the consent. (Landow, Concetta) (Entered: 02/23/2018)
02/23/2018	5	Summons Issued as to Basil Seggos. (Landow, Concetta) (Entered: 02/23/2018)

02/23/2018	6	Summons fssued as to New York State Department of Environmental Conservation. (Landow, Concetta) (Entered: 02/23/2018)
03/05/2018	7	NOTICE of Appearance by Robert Edward Morelli on behalf of All Defendants (aty to be noticed) (Morelli, Robert) (Entered: 03/05/2018)
03/05/2018	8	SUMMONS Returned Executed by Harry B. Wallace, Unkechaug Indian Nation. Basil Seggos served on 2/28/2018, answer due 3/21/2018. (Simermeyer, James) (Entered: 03/05/2018)
03/05/2018	9	SUMMONS Returned Executed by Harry B. Wallace, Unkechaug Indian Nation. New York State Department of Environmental Conservation served on 2/27/2018, answer due 3/20/2018. (Simermeyer, James) (Entered: 03/05/2018)

03/20/2018	10	Letter *requesting pre-motion conference in anticipation of Defendants' motion to dismiss the Complaint* by New York State Department of Environmental Conservation, Basil Seggos (Morelli, Robert) (Entered: 03/20/2018)
03/27/2018	11	Letter *responding to Defendants letter requesting a pre-motion conference* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 03/27/2018)
04/04/2018		Case Reassigned to Judge Joseph F. Bianco. Judge Leonard D. Wexler no longer assigned to the case. Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. (Corsini, Alexander) (Entered: 04/04/2018)

04/05/2018		SCHEDULING ORDER. The Court is in receipt of defendant's letter requesting a pre-motion conference in anticipation of moving to dismiss the complaint, and plaintiff's letter in response. IT IS HEREBY ORDERED that the parties shall participate in a telephone pre-motion conference on Wednesday, April 25, 2018 at 1:45 p.m. At that time, counsel for defendant shall initiate the call and, once all parties are on the line, shall contact Chambers at (631) 712 5670. SO ORDERED. Ordered by Judge Joseph F. Bianco on 4/5/2018. (Karamigios, Anna) (Entered: 04/05/2018)
04/24/2018		SCHEDULING ORDER: IT IS HEREBY ORDERED that the telephone conference scheduled for April 25, 2018 is rescheduled to Monday, May 14, 2018 at 1:45 p.m. SO ORDERED. Ordered by Judge Joseph F. Bianco on 4/24/2018. (Karamigios, Anna) (Entered: 04/24/2018)

05/04/2018		Case Reassigned to Judge William F. Kuntz, II. Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing counesy copies to judges where their Individual Practices require such. (Russo, Eric) (Entered: 05/04/2018)
05/14/2018	12	Letter *concerning conference scheduled by prior Judge for May 14, 2018* by New York State Department of Environmental Conservation, Basil Seggos (Morelli, Robert) (Entered: 05/14/2018)
05/14/2018		SCHEDULfNG ORDER: Pre Motion Hearing set for June 7, 2018 at 1:30 P.M. in Courtroom 6H North before Judge William F. Kuntz, II. So Ordered by Judge William F. Kuntz, II on 5/14/2018. (Meltz, Eli) (Entered: 05/14/2018)

05/15/2018	13	Letter MOTION to Adjourn Conference *regarding Defendants' proposed motion to dismiss* by New York State Department of Environmental Conservation, Basil Seggos. (Morelli, Robert) (Entered: 05/15/2018)
05/15/2018		ORDER granting 13 Motion to Adjourn Conference. The Pre Motion Hearing is hereby rescheduled for June 19, 2018, at 11 :30 A.M., in Courtroom 6H North before Judge William F. Kuntz, II. So Ordered by Judge William F. Kuntz, II on 5/15/2018. (Meltz, Eli) (Entered: 05/15/2018)

06/19/2018		Minute Entry for proceedings held before Judge William F. Kuntz, II: Pre Motion Conference held on 6/19/2018. Appearances: James Simermeyer, Esq., appeared on behalf of Plaintiff Unkechaug Indian Nation & Harry B. Wallace. Robert Morelli, Esq., appeared on behalf of Defendants Basil Seggos and New York State Department of Environmental Conservation. The Court granted Defendants application to make a motion to dismiss. The Court ordered the fol lowing briefing scbedule: 1) Defendant shall serve the motion to dismiss on or before Friday, September 28, 2018; 2) Plaintiff shall serve the memorandum in opposition on or before Friday, November 2, 2018; and 3) Defendant shall serve the reply memorandum on or before Friday, November 30, 2018. As a courtesy to the Court, the Court requests that the parties refrain from filing motion papers until the motion has been fully briefed.

		If the parties elect to file their motion only once it is fully briefed, the notice of motion and all supporting papers are to be served on the other parties along with a cover letter setting forth whom the movant represents and the papers being served. Only a copy of the cover letter shall be electronically filed in advance of the fully briefed motion, and it must be filed as a letter, not as a motion. On the day the motion is fully briefed, each party shall electronically file their individual motion papers by 5:00 p.m. on November 30, 2018. Defense counsel shall also mail a complete set of courtesy copies of all motion papers, via overnight mail, to the Court, attention of Mr. Andrew Jackson. (Court Reporter Charlene Heading.) (Jackson, Andrew) (Entered: 07/05/2018)

06/22/2018	14	ORDER: As ordered during the June 19, 2018 pre-motion conference held in the above-captioned action, all discovery disputes will be handled by the Hon. William F. Kuntz, II and should be addressed to the Court accordingly. SO Ordered by Judge William F. Kuntz, II on 6/21/2018. (Tavarez, Jennifer) (Entered: 06/22/2018)
06/25/2018	15	Notice of Related Case indicated on the civil cover sheet in case number 18cv3648. (Rodin, Deanna) (Entered: 06/25/2018)
07/19/2018	16	Letter *Requesting a 26(f) Conference* by Unkechaug Indian Nation, Harry B. Wallace I (Simermeyer, James) (Entered: 07/19/2018)

07/20/2018		SCHEDULING ORDER: The Court will hold a Rule 26(f) conference on September 28, 2018, at 3:00 .P.M., in Courtroom 6H North before the Hon. William F. Kuntz, II. So Ordered by Judge William F. Kuntz, II on 7/20/2018. (Meltz, Eli) (Entered: 07/20/2018)
07/20/2018	17	NOTICE of Appearance by Mark Siegmund on behalf of All Defendants (aty to be noticed) (Siegmund, Mark) (Entered: 07/20/2018)
08/23/2018	18	Letter *requesting an expedited 26(f) Conference* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 08/23/2018)

08/23/2018		SCHEDULING ORDER: The Rule 26(f) conference previously scheduled for September 28, 2018, is hereby rescheduled for Tuesday, September 4, 2018, at 12:00 Noon before Judge William F. Kuntz, II. So Ordered by Judge William F. Kuntz, II on 8/23/2018. (Meltz, Eli) (Entered: 08/23/2018)
08/23/2018	19	Letter *to Judge Kuntz responding to Plaintiffs' August 23, 2018 letter (ECF No. 18)* by New York State Department of Environmental Conservation, Basil Seggos (Siegmund, Mark) (Entered: 08/23/2018)
08/24/2018		ORDER: The defendants' motion in opposition to the acceleration of the date for the Rule 26(f) conference is denied. The Rule 26(f) conference will take place as ordered on Tuesday, September 4, 2018, at 12:00 Noon. So Ordered by Judge William F. Kuntz, II on 8/24/2018. (Meltz, Eli) (Entered: 08/24/2018)

08/28/2018		Set/Reset Hearings: The Rule 26(f) conference previously scheduled for September 28, 2018, is hereby rescheduled for Tuesday, September 4, 2018, at 12:00 Noon before Judge William F. Kuntz, II. So Ordered by Judge William F. Kuntz, 11 on 8/28/2018. (Meltz, Eli) (Entered: 08/28/2018)

09/04/2018	21	Minute Entry for proceedings held before Judge William F. Kuntz, II: Discovery Hearing held on 9/4/2018. Appearances: James Simermeyer, II, Esq., and James Simermeyer, Esq., appeared on behalf of Plaintiffs Unkechaug Indian Nation and Harry Wallace. Mark Siegmund, Esq., appeared on behalf of Defendants Basil Seggos and New York State Department of Environmental Conservation. The Court ordered the following revised briefing schedule: 1) Defendants shall serve the motion to dismiss on or before Friday, November 30, 2018; 2) Plaintiffs shall serve the memorandum in opposition on or before Friday, January 23, 2019; and 3) Defendants shall serve the reply memorandum on or before Friday, February 28, 2019. As a courtesy to the Court, the Court requests that the parties refrain from filing motion papers until the motion has been fully briefed.

		If the parties elect to file their motion only once it is fully briefed, the notice of motion and all supporting papers are to be served on the other parties along with a cover letter setting forth whom the movant represents and the papers being served. Only a c-opy of the cover letter shall be electronically filed in advance of the fully briefed motion, and it must be filed as a letter, not as a motion. On the day the motion is fully briefed, February 28, 2019, each party shall electronically file all motion papers by 5:00 p.m. Defense counsel shall also mail a complete set of courtesy copies of all motion papers, via overnight mail, to the Court, attention of Mr. Andrew Jackson. The next status conference is scheduled for Wednesday, April 24, 2019. The Initial Conference Questionnaire was marked as Court's exhibit one. (Court Reporter Lisa Schmid.) (Attachments: # 1 Exhibit) (Jackson, Andrew) (Entered: 09/19/2018)

09/10/2018	20	ORDER: The Court directs the parties to adhere to the following revised briefing schedule: Defendants shall serve their motion to dismiss on or before November 30, 2018. Plaintiffs shall serve their opposition to Defendant's motion on or before January 23, 2019, Defendants shall serve their reply on or before February 28, 2019. The Court requests that the parties refrain from filing motion papers until the motion has been fully briefed. On the day the motionis fully briefed, each party shall electronically file their individual motion papers by 5:00 P.M. on February 28, 2019. SO Ordered by Judge William F. Kuntz, II on 9/7/2018. {See Order for details) (Tavarez, Jennifer) (Entered: 09/10/2018)

09/26/2018	22	NOTICE of Appearance by James M. Thompson on behalf of New York State Department of Environmental Conservation, Basil Seggos (aty to be noticed) (Thompson, James) (Entered: 09/26/2018)
11/29/2018	23	Letter *Regarding Defendants' Service of Motion to Dismiss Papers on Plaintiffs* by New York State Department of Environmental Conservation, Basil Seggos (Morelli, Robert) (Entered: 11/29/2018)
12/13/2018	24	Consent MOTION for Discovery *FRE 502(d) Non-Waiver Order* by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Proposed Order) (Thompson, James) (Entered: 12/13/2018)
12/14/2018	25	FRE 502(d) ORDER. So Ordered by Judge William F. Kuntz, II. (Lee, Tiffeny) (Entered: 12/14/2018)

01/23/2019	26	Letter *regarding Plaintiffs' service of opposition to Defendants' motion to dismiss* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 01/23/2019)
02/28/2019	27	MEMORANDUM in Opposition *to Defendants Motion to Dismiss* filed by Unkechaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 02/28/2019)
02/28/2019	28	MOTION to Dismiss for Failure to State a Claim by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Memorandum in Support of Motion to Dismiss, # 2. Exhibit 1 to Memorandum in Support, # 1 Declaration of R. Morelli in Support of Motion to Dismiss, # 1 Exhibit A to C accompanying Morelli Declaration) (Morelli, Robert) (Entered: 02/28/2019)

02/28/2019	29	REPLY in Support re 28 MOTION to Dismiss for Failure to State a Claim filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit I to Reply Memorandum in Support of Motion to Dismiss) (Morelli, Robert) (Entered: 02/28/2019)
02/28/2019	30	Letter *regarding submission of hard copy motion papers to the Court* by New York State Department of Environmental Conservation, Basil Seggos (Morelli, Robert) (Entered: 02/28/2019)

02/28/2019	31	AFFIDAVIT/DECLARATION in Opposition re 28 MOTION to Dismiss for Failure to State a Claim OPPOSITION filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Ex 1: Declaration of Chief Harry B. Wallace, # 2. Exhibit Ex 2: Andros Treaty with Unkechaug Indian Nation, # 3 Exhibit Ex 3: Part 1, # 1 Exhibit Ex 3: Part 2, # 5 Exhibit Ex 3: Part 3, # 6 Exhibit Ex 3: Part 4, # 7 Exhibit Ex 3: Part 5, # 8 Exhibit Ex 3: Part 6, # 2 Exhibit Ex 3: Part 7, # 10 Exhibit Ex 3: Part 8, # 11 Exhibit Ex 3: Part 9, # 12 Exhibit Ex 3: Part 10, # 13 Exhibit Ex 3: Part 11, # 14 Exhibit Ex 3: Part 12, # 12 Exhibit Ex 3: Part 13, # 16 Exhibit Ex 3: Part 14, # 17 Exhibit Ex 3: Part 15, # 18 Exhibit Ex 3: Part 16, # 19 Exhibit Ex 3: Part 17, # 20 Exhibit Ex 3: Part 18, # 21 Exhibit Ex 3: Part 19, # 22 Exhibit Ex 3: Part 20, # 23 Exhibit Ex 3: Part 21, # 24 Exhibit Ex 3: Part 22, # 25

		Exhibit Ex 3: Part 23, # 26 Exhibit Ex 3: Part 24, # 27 Exhibit Ex 3: Part 25, # 28 Exhibit Ex 3: Part 26, # 29 Exhibit Ex 3: Part 27, # 30 Exhibit Ex 3: Part 28, # 31 Exhibit Ex 3: Part 29, # 32 Exhibit Ex 3: Part 30, # 33, Exhibit Ex 3: Part 31 , # 34 Exhibit Ex 3: Part 32, # 35 Exhibit Ex 4: NYSDEC Receipt of Seizure issued to Unkechaug Members, # 36. Exhibit Ex 5: NYSDEC CP-42 Contact and Cooperation with Indian Nations, # 37 Exhibit Ex 6: Letter from Thomas Berkman, NYSDEC Gen. Counsel and Deputy Commissioner to Chief Harry B. Wallace, # 38 Exhibit Ex 7: Response Letter from Chief Harry B. Wallace to Thomas Berkman, # 39 Certificate of Service Certificate of Service) (Simermeyer, James) (Entered: 02/28/2019)

03/07/2019	32	SCHEDULING ORDER: The Court hereby schedules oral argument on Defendants' 28 motion to dismiss for Monday, April 15, 2019, at 1:00 P.M. in Courtroom 6H North before the Honorable William F. Kuntz, II. So Ordered by Judge William F. Kuntz, II on 3/4/2019. (Lee, Tiffeny) (Entered: 03/07/2019)

04/03/2019	33	Letter *to compel production of documents/in camera inspection of documents* by Unkechaug Indian Nation, Harry B. Wallace (Attachments: # 1 Exhibit Ex 1: Privilege Log PART 1, # 2 Exhibit Ex 1: Privilege Log PART 2, # 1 Exhibit Ex 1: Privilege Log PART 3, # 1 Exhibit Ex 2: Redacted Doc PART 1, # 5 Exhibit Ex 2: Redacted Doc PART 2, # 6 Exhibit Ex 2: Redacted Doc Part 3, # 1 Exhibit Ex 2: Redacted Doc Part 4, # 8 Exhibit Ex 2: Redacted Doc Part 5, # 2 Exhibit Ex 2: Redacted Doc Part 6, # 10 Exhibit Ex 2: Redacted Doc Part 7, # 11 Exhibit Ex 2: Redacted Doc Part 8, # 12 Exhibit Ex 2: Redacted Doc Part 9, # 13 Exhibit Ex 2: Redacted Doc Part 10) (Simermeyer, James) (Entered: 04/03/2019)

04/04/2019	34	SCHEDULING ORDER: The Court is in receipt of Plaintiffs' letter dated April 3, 2019 seeking to obtain an order from this Court to compel Defendants to produce certain documents withheld on grounds of privilege, or in the alternative for an in-camera inspection of said documents. ECF No. 33. The Court will address these discovery disputes at the oral argument alrlady scheduled for Monday, April 15, 2019, at 1:00 P.M. in Courtroom 6H North before the Honorable William F. Kuntz, II. SO Ordered by Judge William F. Kuntz, II on 4/3/2019. (Tavarez, Jennifer) (Entered: 04/04/2019)
04/08/2019	35	Letter *In Opposition To Plaintiffs' Letter-motion To Compel (Dkt. No. 33)* by New York State Department of Environmental Conservation, Basil Seggos (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4) (Thompson, James) (Entered: 04/08/2019)

04/12/2019	36	Letter MOTION for Protective Order *Against Improper Depositions* by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Declaration Rule 37 Certification) (Thompson, James) (Entered: 04/12/2019)

04/15/2019		Minute Entry for proceedings held before Judge William F. Kuntz, II: Oral Argument held on 4/15/2019. Appearances: James Simermeyer, Esq., and James Simermeyer, II, Esq., appeared on behalf of Plaintiffs Unkechaug Indian Nation and Harry B. Wallace. Robert Morelli, Esq., and James Thompson, Esq., appeared on behalf of Defendants Basil Seggos and New York State Department of Environmental Conservation. The Court denied Defendants' motion to dismiss in its entirety. The Court will enter its decision and order within seventy-two hours. Defense counsel is ordered to submit all documents that are being withheld on privilege grounds and a detailed privilege log to this Court by 5:00 p.m. on Friday, May 10, 2019 for an in-camera review. Defense counsel shall also provide the privilege log to Plaintiffs' counsel. The Court denied Defendants' application to preclude Plaintiffs' counsel

		from deposing five DEC employees and two in-house lawyers for the DEC. Plaintiffs' counsel shall serve subpoenas for the depositions of Kreshik, Gilmore, and Desotelle. The parties shall submit, on ECF, a proposed stipulation and order with respect to extending the discovery cutoff date. (Court Reporter David Roy.) (Jackson, Andrew) (Entered: 05/08/2019)
04/17/2019	37	Letter MOTION for Extension of Time to File Answer by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 04/17/2019)
04/22/2019		ORDER granting 37 Motion for Extension of Time to Answer. Defendants New York State Department of Environmental Conservation and Basil Seggos answers due on or before May 29, 2019. So Ordered by Judge William F. Kuntz, II on 4/22/2019. (Douglas, Maura) (Entered: 04/22/2019)

04/23/2019	38	DECISION and ORDER: Defendants' motion to dismiss is DENIED. The Clerk of Court is directed to terminate the motion pending at ECF No. 28. SO Ordered by Judge William F. Kuntz, II on 4/18/2019. (Tavarez, Jennifer) (Entered: 04/23/2019)
05/10/2019	39	Letter *enclosing documents for in camera review* by New York State Department of Environmental Conservation, Basil Seggos (Thompson, James) (Entered: 05/10/2019)
05/29/2019	40	ANSWER to 1 Complaint, by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 05/29/2019)

08/12/2019	41	ORDER: On April 15, 2019, the Court held oral argument on Defendant's motion to dismiss in the above-captioned action and denied the motion in its entirety. The Court instructed the parties to submit, on ECF, a proposed stipulation and order with respect to extending the discovery cutoff date. See Apr. 15, 2019 Minute Entry. The parties have not done so. Accordingly, the Court hereby orders the parties to file the stipulation and order the Court will set a schedule. So Ordered by Judge William F. Kuntz, II on 8/12/2019. (Brown, Marc) (Entered: 08/12/2019)
08/13/2019	42	Joint MOTION for Discovery *Schedule* by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Proposed Order) (Thompson, James) (Entered: 08/13/2019)

08/14/2019	43	ORDER granting 42 Motion for Discovery. (See Order for schedule) SO Ordered by Judge William F. Kuntz, II on 8/13/2019. (Tavarez, Jennifer) (Entered: 08/ 14/2019)

10/08/2019	44	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on April 15, 2019, before Judge William F. Kuntz, II. Court Reporter/Transcriber David R. Roy, Telephone number 7186132609. Email address: drroyofcr@gmail.com. Transcript may be viewed at the court public tem1inal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 10/29/2019. Redacted Transcript Deadline set for 11/8/2019. Release of Transcript Restriction set for 1/6/2020. (Roy, David) (Entered: 10/08/2019)

10/17/2019	45	Letter MOTION to Quash *Subpoena Issued to Assistant Attorney General Hugh McLean* by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 10/17/2019)
10/17/2019	46	AFFIDAVIT/DECLARATION in Support re 45 Letter MOTION to Quash *Subpoena Issued to Assistant Attorney General Hugh McLean Declaration of Monica L. Kreshik* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit McLean Subpoena) (Thompson, James) (Entered: 10/17/2019)
10/17/2019	47	Letter MOTION to Quash *Subpoena issued to Assistant Attorney General Hugh McLean* by State of New York Office of the Attorney General. (Attachments: # 1 Exhibit A (Subpoena)) (Cooney, James) (Entered: 10/17/2019)

10/17/2019	48	DECLARATION *of Assistant Attorney General Hugh L. McLean* by State of New York Office of the Attorney General (Cooney, James) (Entered: 10/17/2019)
10/20/2019	49	RESPONSE in Opposition re 47 Letter MOTION to Quash *Subpoena Issued to Assistant Attorney General Hugh McLean,* 45 Letter MOTION to Quash *Subpoena issued to Assistant Attorney General Hugh McLean Letter Motion in Opposition to Quash Subpoena of Hugh Lambert McLean* filed by Unkechaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 10/20/2019)

10/21/2019	50	Letter MOTION for Discovery *Defendants Waiver of Privilege* by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Ex A Transcript of Major Dennis Scott Florence Oral Testimony, # 2 Exhibit Ex B Third Party communication by Major Florence to Fitzpatrick, # 3 Exhibit Ex C Third Party communication of Unkechaug Investigative Material, # 1 Exhibit Ex D New York Times Article: Florence speaks on behalf of NYSDEC) (Simermeyer, James) (Entered: 10/21/2019)

10/24/2019	51	ORDER: The Court hereby sets the following briefing schedule on both Defendants' motion to quash the subpoena and Plaintiffs' discovery motion: The parties shall file supplemental responses to the respective motions on or before Friday, November 1, 2019. The parties shall file any reply to opposition to the respective motions on or before Friday, November 8, 2019. SO Ordered by Judge William F. Kuntz, II on 10/21/201 9. (Tavarez, Jennifer) (Entered: 10/24/2019)

11/01/2019	52	MEMORANDUM in Opposition re 47 Letter MOTION to Quash *Subpoena Issued to Assistant Attorney General Hugh McLean,* 45 Letter MOTION to Quash *Subpoena Issued to Assistant Attorney General Hugh McLean,* 46 Affidavit in Support of Motion, 48 Declaration *Memorandum in Opposition to Defendants and Third-Party Motion to Quash Subpoena of McLean* filed by Unkechaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 11/01/2019)
11/01/2019	53	MEMORANDUM in Opposition re 50 Letter MOTION for Discovery *Defendants Waiver of Privilege* filed by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 11/01/2019)

11/01/2019	54	AFFIDAVIT/DECLARATION in Opposition re 50 Letter MOTION for Discovery *Defendants Waiver of Privilege Declaration of Monica L. Kreshik* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit 1 - Unagi Email, # 2 Exhibit 2 - Milton Sum Press Release, # 3. Exhibit 3 - Plaintiffs' Queens County Complaint, # 4 4 - Dennis Scott Email, # 5 5 - Director Duffy Press Release) (Thompson, James) (Entered: 11/01/2019)
11/06/2019	55	Joint MOTION for Extension of Time to File Response/Reply *regarding all pending discovery motions and on behalf of OAG and the parties* by State of New York Office of the Attorney General. (Cooney, James) (Entered: 11/06/2019)

11/06/2019		ORDER granting 55 Motion for Extension of Time to File Response/Reply. So Ordered by Judge William F. Kuntz, II on 11/6/2019. (Lanci, Michael) (Entered: 11/06/2019)
11/15/2019	56	REPLY in Support re 53 Memorandum in Opposition, 50 Letter MOTION for Discovery *Defendants Waiver of Privilege Reply in Support of Plaintiffs' Motion* filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Ex 1 Defendants Privilege Log illustrating Florence accessibility with direct communication to Criminal Prosecutor McLean) (Simermeyer, James) (Entered: 11/15/2019)
11/15/2019	57	REPLY in Support re 45 Letter MOTION to Quash *Subpoena issued to Assistant Attorney General Hugh McLean* filed by New York State Department or Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 11/15/2019)

11/15/2019	58	AFFIDAVIT/DECLARATION in Support re 45 Letter MOTION to Quash *Subpoena issued to Assistant Attorney General Hugh McLean Reply Declaration of James M. Thompson* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit 1 - Plaintiffs' State Court Complaint, # 2 Exhibit 2 - Affirmation In Support of Motion to Discontinue, # 3 Exhibit 3 - Order Dismissing State Court Action, # 4 Exhibit 4 - Non-jurisdiction Letter, # 5 Exhibit 5 - Correspondence with Plaintiffs' Counsel, # 6 Exhibit 6 - Wallace Deposition Notice, # 7 Exhibit 7 - Correspondence with Plaintiffs' Counsel) (Thompson, James) (Entered: 11/15/2019)

11/15/2019	59	REPLY in Support *of Non-Party NYS Office of the Attorney General's Motion to Quash the Subpoena Directed to AAG McLean* filed by State of New York Office of the Attorney General. (Cooney, James) (Entered: 11/15/2019)
11/19/2019	60	MOTION to Withdraw as Attorney .for *Defendants* by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Declaration of Mark Siegmund in Support of Motion for Leave to Withdraw as Counsel) (Siegmund, Mark) (Entered: 11/ 19/2019)
11/20/2019		ORDER granting 60 Motion to Withdraw as Attorney. Attorney Mark Siegmund terminated. So Ordered by Judge William F. Kuntz, II on 11/20/2019. (Douglas, Maura) (Entered: 11/20/2019)

11/20/2019	61	MOTION to Withdraw as Attorney *for Defendants* by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Declaration of Robert Morelli in support of motion for leave to withdraw as counsel) (Morelli, Robert) (Entered: 11/20/2019)
11/20/2019		ORDER granting 61 Motion to Withdraw as Attorney. Attorney Robert Edward Morelli terminated. So Ordered by Judge William F. Kuntz, II on 11/20/2019. (Douglas, Maura) (Entered: 11/20/2019)
11/20/2019		ORDER granting 45 Motion to Quash. So Ordered by Judge William F. Kuntz, II on 11/20/2019. (Douglas, Maura) (Entered: 11/20/2019)
11/20/2019		ORDER denying 50 Motion for Discovery. So Ordered by Judge William F. Kuntz, II on 11/20/2019. (Douglas, Maura) (Entered: 11/20/2019)

11/20/2019		ORDER finding as moot 47 Motion to Quash. So Ordered by Judge William F. Kuntz, II on 11/20/2019. (Douglas, Maura) (Entered: 11/20/2019)
02/13/2020		ORDER finding as moot 36 Motion for Protective Order. So Ordered by Judge William F. Kuntz, II on 2/13/2020. (Dixon, Roy) (Entered: 02/13/2020)
02/24/2020	62	First MOTION for Discovery *Joint stipulation and proposed Order to extend fact-discovery for limited purpose Plaintiffs deposing Thomas Berkman and Basil Seggos* by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Proposed Order) (Simermeyer, James) (Entered: 02/24/2020)
02/24/2020	63	ORDER granting 62 Motion for Discovery. SO Ordered by Judge William F. Kuntz, II, undated. (Tavarez, Jennifer) (Entered: 02/24/2020)

03/27/2020	64	Second MOTION for Extension of Time to Complete Discovery *Stipulation by both parties to request extension of Discovery Deadlines* by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Stipulation requesting for extension of time for Discovery) (Simermeyer, James) (Entered: 03/27/2020)
03/27/2020		ORDER granting 64 Motion for Extension of Time to Complete Discovery. So Ordered by Judge William F. Kuntz, II on 3/27/2020. (Dixon, Roy) (Entered: 03/27/2020)
08/25/2020	65	Letter MOTION for Extension of Time to Complete Discovery by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Signed Stipulation and Proposed Order) (Thompson, James) (Entered: 08/25/2020)

08/26/2020		ORDER granting 65 Motion for Extension of Time to Complete Discovery. So Ordered by Judge William F. Kuntz, II on 8/26/2020. (Dixon, Roy) (Entered: 08/26/2020)
03/31/2021	66	First MOTTON for Discovery *Compliance Conference* by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Stipulation and Discovery Order August 26, 2020, # 2. Exhibit Email and Letter requesting Extension of Discovery) (Simermeyer, James) (Entered: 03/31/2021)

03/31/2021	67	ORDER: The Court has reviewed Plaintiffs' counsel's letter. ECF No. 66. The Court hereby GRANTS Plaintiffs' requests in their entirety. Defendants must comply with the Court's August 26, 2020 Discovery Order. ECF No 65. The deposition of Dr. John Strong is scheduled for April 12, 2021 at 11:00 A.M., with permission to continue to April 13 and April 14 as necessary. The deposition of Toni Kerns is scheduled for April 15, 2021 at 10:00 A.M. Plaintiffs' request for a protective order prohibiting Ms. Kerns' agency's in-house counsel from attending her deposition is hereby GRANTED. So Ordered by Judge William F. Kuntz, II on 3/31/2021. (Love, Alexis) (Entered: 03/31/2021)

03/31/2021	68	Letter MOTION to Strike *Expert Disclosure of Frederick Moore* by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit 1 - Moore Expert Disclosure, # 2 Exhibit 2 - 2014 Felony Information, # 1 Exhibit 3 - Moore Deposition Notice) (Thompson, James) (Entered: 03/31/202 1)

03/31/2021	69	Letter MOTION for Reconsideration re 67 Order on Motion for Discovery,, by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit 1 - Moore Deposition Notice, # 2 Exhibit 2 - Strong Deposition Notice, # 3 Exhibit 3 - March 30, 2021 Email to Plaintiffs' Counsel, # 1 Exhibit 4 - March 26, 2021 Email to Plaintiffs' Counsel, # 5 Exhibit 5 - March 26, 2021 Email to Plaintiffs' Counsel, # 6 Exhibit 6 - March 25, 2021 Email to Plaintiffs' Counsel, # 7 Exhibit 7 - March 29, 2021 Letter from Plaintiffs' Counsel) (Thompson, James) (Entered: 03/31/2021)
03/31/2021		ORDER denying 69 Motion for Reconsideration. So Ordered by Judge William F. Kuntz, II on 3/31/2021. (Kuntz, William) (Entered: 03/31/2021)
03/31/2021		ORDER denying 68 Motion to Strike. So Ordered by Judge William F. Kuntz, II on 3/31/2021. (Kuntz, William) (Entered: 03/31/2021)

04/13/2021	70	MOTION to Appear Pro Hac Vice Filing fee $ 150, receipt number ANYEDC-14367168. by Toni H Kerns. (Attachments: # 1 Affidavit in Support) (Donahue, Sean) (Entered: 04/13/2021)
04/13/2021	71	Letter *Regarding April 15 Deposition* by Toni H Kerns (Donahue, Sean) (Entered: 04/13/2021)
04/13/2021		ORDER denying 70 Motion for Leave to Appear Pro Hac Vice. So Ordered by Judge William F. Kuntz, II on 4/13/2021. (Kuntz, William) (Entered: 04/13/2021)

04/13/2021	72	ORDER: On March 31, 2021, this Court granted Plaintiffs' request for a protective order prohibiting Ms. Kerns' (a non-party witness) agency's in-house counsel from attending her deposition. ECF No. 67. On April 13, 2021, outside counsel for Ms. Kerns, Sean H. Donahue, requested this Court enter an order pe1mitting him to attend Ms. Kerns' deposition. ECF No.71. The Court hereby DENIES: Mr. Donahue's request. So Ordered by Judge William F. Kuntz, II on 4/13/2021. (Love, Alexis) (Entered: 04/13/2021)
04/15/2021	73	Letter *Pre-Daubert Motion* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 04/15/2021)
04/15/2021	74	Letter *Pre-Motion letter for Summary Judgment* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 04/15/2021)

04/15/2021	75	Letter *Regarding Motion to Exclude Testimony of Frederick Moore* by New York State Department of Environmental Conservation, Basil Seggos (Attachments: # 1 Exhibit 1 - Excerpts from rough deposition transcript, # 2 Exhibit 2 - Unsigned expert disclosure document) (Thompson, James) (Entered: 04/15/2021)
04/15/2021	76	Letter *Regarding Motion to limit the Testimony of John Strong* by New York State Department of Environmental Conservation, Basil Seggos (Attachments: # 1 Exhibit 1 - Excerpts from deposition transcript) {Thompson, James) (Entered: 04/15/2021)

04/22/2021	77	Letter *Responding to Plaintiffs' Pre-Motion Letter to Exclude The Expert Testimony of Toni M. Kerns* by New York State Department of Environmental Conservation, Basil Seggos (Attachments: # 1 Exhibit 1 - Kerns CV, # 2 Exhibit 2 - Kerns Expert Report, # 1 Exhibit 3 - 2017 ASMFC American Eel Stock Assessment) (Thompson, James) (Entered: 04/22/2021)
05/03/2021	78	Letter *Regarding Motion for Summary Judgment* by New York State Department of Environmental Conservation, Basil Seggos (Thompson, James) (Entered: 05/03/2021)

05/04/2021	79	ORDER: The Court has reviewed the letters submitted by the parties on April 15, April 22, and May 3, 2021. *See* ECF Nos. 73 - 78. In light of the COVID-19 pandemic, the Court dispenses with its pre-motion conference requirement. Therefore, the Court DENIES the parties' requests for pre-motion conferences, *id.,* as moot and sets the following briefing schedule for the Daubert and summary judgment motions in the abovecaptioned case: *Daubert Motions:* The parties shall file their Daubert motions by Friday, June 11, 2021 at 5:00 P.M.; The parties shall file their oppositions to the opposing parties' Daubert motions by Friday, July 9, 2021 at 5:00 P.M.; and The parties shall file their replies, if any, by Friday, Ju1y 23, 2021 at 5:00 P.M.

		Summary Judgment Motions: The parties shall file their summary judgment motions by Friday, August 20, 2021 at 5:00 P.M.; The parties shall file their oppositions to the opposing parties' summary judgment motions by Friday, September 17, 2021 at 5:00 P.M.; and The parties shall file their replies, if any, by Friday, October 1, 2021 at 5:00 P.M. Furthermore, the parties' requests for expanded page limits for their summary judgment motion briefing is hereby GRANTED. As a courtesy to the Court, the Court requests the parties refrain from filing motion papers until the motion has been fully briefed. If the parties elect to file their motion only once it is fully briefed, the notice of motion and all supporting papers are to be served on the other party

		along with a cover letter setting forth whom the movant represents and the papers being served. Only a copy of the cover letter shall be electronically filed in advance of the fully briefed motion, and it must be filed as a letter, not as a motion. On the day the motion is fully briefed, each party shall electronically file their individual motion papers by 5:00 P.M. Plaintiffs shall also mail a complete set of courtesy copies of the *Daubert* motion papers, via overnight mail, to the Court, attention of Ms. Alexis Love. Defendants shall also mail a complete set of courtesy copies of the summary judgment motion papers, via overnight mail, to the Court, attention of Ms. Alexis Love. So Ordered by Judge William F. Kuntz, II on 5/4/2021. (Love, Alexis) (Entered: 05/04/2021)

06/09/2021	80	NOTICE of Appearance by Benjamin D Liebowitz on behalf of All Defendants (aty to be noticed) (Liebowitz, Benjamin) (Entered: 06/09/2021)
06/11/2021	81	Letter *to James Simermeyer, Esq. Re: Service of Defendants' Motion to Preclude Expert Witness Testimony* by New York State Department of Environmental Conservation, Basil Seggos (Liebowitz, Benjamin) (Entered: 06/11/2021)
06/11/2021	82	Letter *Cover letter acknowledging service of motion* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 06/11/2021)
07/09/2021	83	Letter *to James Simermeyer, Esq. Re: Service of Opposition to Plaintiffs' Motion to Exclude Expert Witness Testimony* by New York State Department of Environmental Conservation, Basil Seggos (Liebowitz, Benjamin) (Entered: 07/09/2021)

07/09/2021	84	Letter *to opposing counsel confirming service of Plaintiffs' opposition papers Daubert* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 07/09/2021)
07/23/2021	85	MOTION for Discovery *to Preclude Plaintiffs' Expert Witnesses* by New York State Department of Environmental Conservation, Basil Seggos. (Liebowitz, Benjamin) (Entered: 07/23/2021)
07/23/2021	86	MEMORANDUM in Support *of Defendants' Motion to Preclude Expert Testimony* filed by New York State Department of Environmental Conservation, Basil Seggos. (Liebowitz, Benjamin) (Entered: 07/23/2021)

07/23/2021	87	AFFIDAVIT/DECLARATION in Support re 85 MOTION for Discovery *to Preclude Plaintiffs' Expert Witnesses* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3, Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Liebowitz, Benjamin) (Entered: 07/23/2021)

07/23/2021	88	First MOTION for Discovery *to Preclude Defendants' Expert Witness* by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # l Memorandum in Support Memorandum of Law in support of Plaintiffs' motion to preclude Defendants' Expert Toni M. Kerns, # *2* Declaration Declaration of James F. Simemreyer, # 3 Exhibit Exhibit 1 (Kerns Deposition Transcript), # 1 Exhibit Exhibit 2 (Kerns Expert Report), # 5 Exhibit Exhibit 3 (Kerns CV), # 6 Exhibit Exhibit 4 (Defendants' Expert Disclosure)) (Simermeyer, James) (Entered: 07/23/2021)
07/23/2021	89	MEMORANDUM in Opposition *to Plaintiffs' Motion to Preclude Defendants' Expert Witness* filed by New York State Department of Environmental Conservation, Basil Seggos. (Liebowitz, Benjamin) (Entered: 07/23/2021)

07/23/2021	90	AFFIDAVIT/DECLARATION in Opposition re 88 First MOTION for Discovery *to Preclude Defendants' Expert Witness* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I) (Liebowitz, Benjamin) (Entered: 07/23/2021)

07/23/2021	91	MEMORANDUM in Opposition re 85 MOTION for Discovery *to Preclude Plaintiffs' Expert Witnesses Plaintiffs' Opposition to Defendants' Motion to Preclude Plaintiffs' Expert Witnesses* filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Declaration Declaration of James F. Simermeyer, # 2 Exhibit Exhibit I (Excerpts of Fred Moore Testimony from Deposition Transcript), # 3 Exhibit Exhibit 2 (Fred Moore CV), # 1 Exhibit Exhibit 3 (Plaintiffs' Expert Disclosure of Fredrick Moore), # 5 Exhibit Exhibit 4 (Dr. John Strong Deposition Transcript Day 1), # 6 Exhibit Exhibit 5 (Dr. John Strong Deposition transcript Day 2), # 7 Exhibit Exhibit 6 (Plaintiffs' Expert Disclosure of Dr. John Strong), # 8 Exhibit Exhibit 7 (Excerpt from Toni Kerns Deposition)) (Simermeyer, James) (Entered: 07/23/2021)

07/23/2021	92	REPLY in Support *of Defendants' Motion to Preclude Expert Testimony (ECF No. 85)* filed by New York State Department of Environmental Conservation, Basil Seggos. (Liebowitz, Benjamin) (Entered: 07/23/2021)
07/23/2021	93	REPLY in Support re 88 First MOTION for Discovery *to Preclude Defendants' Expert Witness Plaintiffs' Reply in further support of its motion to Preclude testimony of Toni Kerns and in Reply to Defendants' Opposition* filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Declaration Declaration of James F. Simermeyer, # 2 Exhibit Exhibit 1 (Excerpts of Toni Kerns Deposition Testimony), # 3 Exhibit Exhibit 2 (Excerpt from ASMFC 2012 American Eel Stock Benchmark Report), # 1 Exhibit Exhibit 3 (Toni Kerns Expert Report)) (Simermeyer, James) (Entered: 07/23/2021)

08/20/2021	94	Letter *to James F Simermeyer, Esq. Enclosing the State Defendants' Summary Judgment Moving Papers* by New York State Department of Environmental Conservation, Basil Seggos (Thompson, James) (Entered: 08/20/2021)
08/20/2021	95	Letter *confirming service of Plaintiffs Summary Judgment Motion* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 08/20/2021)
09/17/2021	96	Letter *to James F. Simermeyer; Esq. Enclosing the State Defendants' Summary Judgment Opposition Papers* by New York State Department of Environmental Conservation, Basil Seggos (Thompson, James) (Entered: 09/17/2021)
09/17/2021	97	Letter *Service of Plaintiffs Opposition to Defendants Summary Judgment Motion* by Unkechaug Indian Nation, Harry B. Wallace (Simermeyer, James) (Entered: 09/17/2021)

10/01/2021	98	MOTION for Summary Judgment by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 10/01/2021)
10/01/2021	99	MEMORANDUM in Support re 98 MOTION for Summary Judgment file.d by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 10/01/2021)
10/01/2021	100	RULE 56.1 STATEMENT re 98 MOTION for Summary Judgment filed by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 10/01/2021)

10/01/2021	101	AFFIDAVIT/DECLARATION in Support re 98 MOTION for Summary Judgment *Declaration of Toni M. Kerns* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit A - Expert Disclosure, # 2 Exhibit B - Expert Report, # 3 Exhibit C - Curriculum Vitae, # 1 Exhibit D - ASMFC Interstate Fisheries Management Program Charter, # 5 Exhibit E - ASMFC American Eel Fishery Management Plan, # 8 Exhibit F - 2012 ASMFC American Eel Stock Assessment, # 7 Exhibit G - Addendum III to American Eel Fishery Management Plan, # 9 Exhibit H - Addendum IV to American Eel Fishery Management Plan, # 2 Exhibit I - 2017 ASMFC American Eel Stock Assessment Update) (Thompson, James) (Entered: 10/01/2021)

10/01/2021	102	AFFIDAVIT/DECLARATION in Support re 98 MOTION for Summary Judgment *Declaration of Monica Kreshik* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit A-Plaintiff Wallace DEC License Records, # 2 Exhibit B - 2014 Glass Eel Fishing Arrest Records, # 3 Exhibit C - Commercial Invoice for Sale of Glass Eels, # 1 Exhibit D - Plaintiffs' 2016 State Court Complaint, # 5 Exhibit E - Plaintiffs' 2016 State Court Order To Show Cause Papers, # 6 Exhibit F - DEC's 2016 State Court Motion to Dismiss, # 7 Exhibit G - Plaintiffs' 2016 State Court Order to Show Cause re Withdrawal Motion, # 8 Exhibit H - New York State Ecourts Motion Detail for Plaintiffs' 2016 State Court Action, # 9 Exhibit I - Order Dismissing Plaintiffs' 2016 State Court Action, # 10 Exhibit J - 2008 Notice of Violation) (Thompson, James) (Entered: 10/01/2021)

10/01/2021	103	AFFIDAVIT/DECLARATION in Support re 98 MOTION for Summary Judgment *Declaration of James M. Thompson* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit A - Excerpts of Wallace Deposition, # 2 Exhibit B - Excerpts of Wallace Rule 30(b)(6) Deposition, # 3 Exhibit C - Excerpts of Moore Deposition, # 4 Exhibit D - Excerpts of Strong Deposition, # 5 Exhibit E - Plaintiffs' May 6, 2015 Export Declaration, # 6 Exhibit F - Plaintiffs' May 23, 2015 Export Declaration, # 7 Exhibit G - Plaintiffs' May 2016 Commercial Invoice, # 8 Exhibit H - 2014 Unkechaug Glass Eel Fishing Permit, # 9 Exhibit I - 2016 Unkechaug Glass Eel Fishing Permit, # 10 Exhibit J - Andros Order, # 11 Exhibit K - Plaintiffs' First Interrogatory Responses, # 12 Exhibit L - 1646 Treaty Between Virginia and Powhatan Indians, # 13 Exhibit M - 1664 Fort Albany

		Treaty, # 14 Exhibit N - 1666 Treaty Between Maryland and Native Tribes, # 15 Exhibit O - 1677 Treaty of Middle Plantation, # 16 Exhibit P - 1638 Treaty of Hartford) (Thompson, James) (Entered: 10/01/2021)
10/01/2021	104	First MOTION for Summary Judgment by Unkcchaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 10/01/2021)
10/01/2021	105	MEMORANDUM in Support re 104 First MOTION for Summary Judgment filed by Unkechaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 10/01/2021)
10/01/2021	106	RULE 56.1 STATEMENT re 104 First MOTION for Summary Judgment *Plaintiffs' Rule 56.1 Statement* filed by Unkcchaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 10/01/2021)

10/01/2021	107	AFFIDAVIT/DECLARATION in Support re 104, First MOTION for Summary Judgment filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Exhibit 1 Complaint, # 2 Exhibit Exhibit 2 CP-42, # 3 Exhibit Exhibit 3 Deposition of Harry Wallace, # 4 Exhibit Exhibit 4 Andros Treaty, # 5 Exhibit Exhibit 5 part 1, # 6 Exhibit Exhibit 5 part 2, # 7 Exhibit Exhibit 5 part 3, # 8 Exhibit Exhibit 5 part 4, # 9 Exhibit Exhibit 5 part 5, # 10 Exhibit Exhibit 5 part 6, # 11 Exhibit Exhibit 5 part 7, # 12 Exhibit Exhibit 5 part 8, # 13 Exhibit Exhibit 5 part 9, # 14 Exhibit Exhibit 5 part 10, # 15 Exhibit Exhibit 5 part 11, # 16 Exhibit Exhibit 5 part 12, # 17 Exhibit Exhibit 5 part 13, # 18 Exhibit Exhibit 5 part 14, # 12 Exhibit Exhibit 5 part 15, # 20 Exhibit Exhibit 5 part 16, # 21 Exhibit Exhibit 6 Declaration of HBW previously filed, # 22 Exhibit Exhibit 7 seizure tickets and unkechaug licenses, # 23 Exhibit Exhibit 8 DeLuca Lt

		to Simermeyer killing of eels, # 24 Exhibit Exhibit 9 Declaration of McLean, # 25 Exhibit Exhibit 10 Answoer, # 26 Exhibit Exhibit 11 Strong Dep transcript, # 27 Exhibit Exhibit 12 Strong Report and CV, # 28 Exhibit Exhibit 13 Batson Letters, # 29 Exhibit Exhibit 14 Vacca Lt, # 30 Exhibit Exhibit 15 Dullea Lt, # 31 Exhibit Exhibit 16 Unkcchaug Eel Plan, # 32 Exhibit Exhibit 17 excerpt of 2017 stock assessment ASMFC, # 33 Exhibit Exhibit 18 Kerns Transcript deposition, # 34 Exhibit Exhibit 19 NYT article, # 35. Exhibit Exhibit 20 excerpt of 2012 eel stock assessment ASMFC, # 36 Exhibit Exhibit 21 Unkechaug Passamaquoddy trade agreement, # 37 Exhibit Exhibit 22 Wallace lt to Berkman, # 38 Exhibit Exhibit 23 Berkman lt to Wallace, # 39 Exhibit Exhibit 24 Gilmore deposition transcript, # 40 Exhibit Exhibit 25 Florence deposition transcript, # 41 Exhibit Exhibit 26 Florence

		email, # 42 Exhibit Exhibit 27 Kreshik deposition transcript, # 43 Exhibit Exhibit 28 Berkman Deposition transcript, # 44 Exhibit Exhibit 29 Seggos Deposition transcript, # 45 Exhibit Exhibit 30 Moore Dep Transcript excerpts, # 46 Exhibit Exhibit 31 Nation dep transcript excerpts, # 47 Exhibit Exhibit 32 Picture of Warriors Wampum Belt, # 48 Exhibit Exhibit 33 Strong Deposition Transcript, # 49 Exhibit Exhibit 34 Kreshik email to Simermeyer, # 50 Exhibit Exhibit 35 Kreshik Affirmation in Dayrich, # 51 Exhibit Exhibit 36 NY Sec of State Shafer lt) (Simermeyer, James) (Entered: 10/01/2021)
10/01/2021	108	MEMORANDUM in Opposition re 104 First MOTION for Summary Judgment filed by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 10/01/2021)

10/01/2021	109	RULE 56.1 STATEMENT re 104 First MOTION for Summary Judgment *State Defendants' Local Civil Rule 56.1 Counterstatement of Material Facts* filed by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 10/01/2021)
10/01/2021	110	AFFIDAVIT/DECLARATION in Opposition re 104 First MOTION for Summary Judgment *Declaration of Benjamin D. Liebowitz* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # 1 Exhibit A - Excerpts of Wallace Deposition, # 2 Exhibit B - Excerpts of Wallace Rule 30(b)(6) Deposition, # 3 Exhibit C - Excerpts of Moore Deposition, # 4 Exhibit D - Excerpts of Strong Deposition) (Thompson, James) (Entered: 10/01/2021)

10/01/2021	111	MEMORANDUM in Opposition re 98 MOTION for Summary Judgment *Plaintiffs' Opposition to Defendants' Motion for Summary Judgment* filed by Unkechaug Indian Nation, Harry B. Wallace. (Simenneyer, James) (Entered: 10/01/2021)
10/01/2021	112	RULE 56.1 STATEMENT re 98 MOTION for Summary Judgment *Plaintiffs' Counterstatement of Facts* filed by Unkechaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 10/01 /2021)

10/01/2021	113	AFFIDAVIT/DECLARATION in Opposition re 98 MOTION for Summary Judgment *Declaration of James F Simermeyer in support of Plaintiffs' opposition of Defendants' Summary Judgment Motion* filed by Unkechaug Indian Nation, Harry B Wallace (Attachments: # 1 Exhibit Exhibit 1 Andros Treaty, # 2 Exhibit Exhibit 2 Strong Report and CV, # 3 Exhibit Exhibit 3 Strong Declaration, # 4 Exhibit Exhibit 4 Batson Letters, # 5 Exhibit Exhibit 5 Vacco Lt, # 6 Exhibit Exhibit 6 Dullea lt, # 7 Exhibit Exhibit 7 NYS Assembly Bill, # 8 Exhibit Exhibit 8 Declaration of Chief Wallace, # 9 Exhibit Exhibit 9 Deposition of Kerns, # 10 Exhibit Exhibit 10 NYT Article, # 11 Exhibit Exhibit 11 benchmark 2012 stock assessment of eel ASMFC, # l2 Exhibit Exhibit 12 Unkechaug Passamaquoddy trade agreement, # 13 Exhibit Exhibit 13 Cp-42, # 14 Exhibit Exhibit 14 Gilmore dep transcript, # 15 Exhibit

		Exhibit 15 Florence dep transcript, # 16 Exhibit Exhibit 16 Kreshik dep Transcript, # 17 Exhibit Exhibit 17 Kreshik Aff in dayrich, # 18 Exhibit Exhibit 18 Berkman dep transcript, # 19 Exhibit Exhibit 19 Seggos dep transcript, # 20 Exhibit Exhibit 20 Strong excerpt dep transcript, # 21 Exhibit Exhibit 21 Complaint, # 22 Exhibit Exhibit 22 McLean Dec, # 23 Exhibit Exhibit 23 excerpts of Defendants' privilege log, # 24 Exhibit Exhibit 24 google map print out of traditional and customary waters of unkechaug, # 25 Exhibit Exhibit 25 Berkman lt to Wallace, # 26 Exhibit Exhibit 26 emails produced by Defendants, # 27 Exhibit Exhibit 27 Florence email, # 28 Exhibit Exhibit 28 Wallace lt to Berkman, # 29 Exhibit Exhibit 29 Kreshik email to Simermeyer, # 30 Exhibit Exhibit 30 2016 state action, # 31 Exhibit Exhibit 31 DeLuca lt to Simermeyer, # 32 Exhibit Exhibit 32 Wallace deposition

		excerpt of transcript, # 33 Exhibit Exhibit 33 Moore deposition excerpt of transcript, # 34 Exhibit Exhibit 34 Nation Deposition excerpt of transcript, # 35 Exhibit Exhibit 35 NYSDEC violations against Unkechaug, # 36 Exhibit Exhibit 36 Unkechaug eel plan, # 37 Exhibit Exhibit 37 Lt Simermeyer to Thompson) (Simermeyer, James) (Entered: 10/01/2021)
10/01/2021	114	REPLY in Support re 98 MOTION for Summary Judgment filed by New York State Department of Environmental Conservation, Basil Seggos. (Thompson, James) (Entered: 10/01/2021)

10/01/2021	115	AFFIDAVIT/DECLARATION in Support re 98 MOTION for Summary Judgment *Reply Declaration of James M. Thompson* filed by New York State Department of Environmental Conservation, Basil Seggos. (Attachments: # l Exhibit A - State Defendants' Contention Interrogatories, # 2. Exhibit B - Plaintiffs' Second Interrogatory Responses, # 3 Exhibit C - Plaintiffs' Initial Disclosures) (Thompson, James) (Entered: 10/01 /2021)
10/01/2021	116	REPLY in Support re 104 First MOTION for Summary Judgment *Reply in Support* filed by Unkechaug Indian Nation, Harry B. Wallace. (Simermeyer, James) (Entered: 10/01/2021)

10/01/2021	117	AFFIDAVIT/DECLARATION in Support re 104 First MOTION for Summary Judgment *Declaration of Chief Harry B. Wallace in support of Reply* filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Exhibit A-1 Batson Letter, # 2 Exhibit Exhibit A-2 Batson Letter, # 3 Exhibit Exhibit A-3 Vacco letter, # 4 Exhibit Exhibit A-4 Dullea letter report, # 5 Exhibit Exhibit A-5 Shaffer letter, # 2 Exhibit Exhibit A-6 Unkechaug Passamaquoddy agreement, # 7 Exhibit Exhibit A-7 Wallace Declaration in opp, # 8 Exhibit Exhibit A-8 Berkman Lt to Wallace, # 9 Exhibit Exhibit A-9 Wallace Lt to Berkman with management plan and agreement, # 10 Exhibit Exhibit A-10 seizure tickets, # 11 Exhibit Exhibit A-11 photos of eels killed by NYSDEC, # 12 Exhibit Exhibit A-12 map print out of Unkechaug Traditional and customary fishing waters, # 13 Exhibit Exhibit A-13 tickets

		for dumping) (Simermeyer, James) (Entered: 10/01/2021)
10/01/2021	118	AFFIDAVIT/DECLARATION in Support re 104 First MOTION for Summary Judgment *Declaration of Dr John A. Strong PhD in support of Reply* filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 7 Exhibit Exhibit B-1 Strong Expert Report, # 2 Exhibit Exhibit B-2 Strong Curriculum Vitae, # 3 Exhibit Exhibit B-3 Andros Treaty, # 4 Exhibit Exhibit B-4 excerpt of Strong deposition transcript cross-examination April 13, 2021, # 5 Exhibit Exhibit B-5 map print out of Unkechaug traditional and customary waters for Unkechaug fishing) (Simermeyer, James) (Entered: 10/01/2021)

10/01/2021	119	AFFIDAVIT/DECLARATION in Support re 104 First MOTION for Summary Judgment *Declaration of James F. Simermeyer in support of Reply* filed by Unkechaug Indian Nation, Harry B. Wallace. (Attachments: # 1 Exhibit Exhibit A letter from DeLuca to Simermeyer, # 2 Exhibit Exhibit B Kreshik email to Simermeyer, # 3 Exhibit Exhibit C Kerns Deposition Transcript, # 1 Exhibit Exhibit D CP-42, # 2 Exhibit Exhibit E Gilmore deposition transcript, # 2 Exhibit Exhibit F Florence deposition transctip, # 7 Exhibit Exhibit G Kreshik deposition transcript, # 8 Exhibit Exhibit H Berkman deposition transcript, # 9 Exhibit Exhibit I Seggos deposition transcript, # 10 Exhibit Exhibit J Defendants' except of privilege log, # 11 Exhibit Exhibit K Kreshik Affirmation in Dayrich case, # 12 Exhibit Exhibit L emails produced by Defendants) (Simermeyer, James) (Entered: 10/01/2021)

06/16/2023	120	DECISION & ORDER: Unkechaug Indian Nation (the "Nation") and Harry B. Wallace (collectively, "Plaintiffs") bring this action pursuant to 25 U.S.C. § 2201 and Fed. R. Civ. P. 65 seeking a permanent injunction and declaratory judgment against the New York State Department of Environmental Conservation ("NYSDEC") and Basil Seggos, the NYSDEC Commissioner (collectively, "Defendants"). In the Complaint filed on February 21, 2018, Plaintiffs allege NYSDEC's regulations unlawfully interfere with Plaintiffs' fishing rights in designated Reservation areas and in customary fishing waters. ECF No. 1. Specifically, Plaintiffs argue their fishing rights are protected by treaty and enforceable against NYSDEC, NYSDEC's regulations are preempted by federal law, and NYSDEC's regulations interfere with tribal self-government and impair Plaintiffs' freedom of religious

		expression. On October 1, 2021, Defendants and Plaintiffs filed fully-briefed crossmotions for summary judgment pursuant to Fed. R. Civ. P. 56. ECF Nos. 98, 104. For the foregoing reasons, Defendants Motion for Summary Judgment at ECF No. 98 is GRANTED, and Plaintiffs' Motion for Summary Judgment at ECF No. 104 is DENIED. The Clerk of Court is directed to terminate the motions pending at ECF Nos. 85, 88, 98, and 104 and to close the case. Ordered by Judge William F. Kuntz, II on 6/16/2023. (SY) (Entered: 06/16/2023)
06/20/2023	121	CLERK'S JUDGMENT that Defendants Motion for Summary Judgment at ECF No. 98 is granted; and that Plaintiffs Motion for Summary Judgment at ECF No. 104 is denied. Signed by Deputy Clerk Jalitza Poveda on behalf of Clerk of Court Brenna B. Mahoney, on 6/20/2023. (IH) (Entered: 06/20/2023)

07/12/2023	122	NOTICE OF APPEAL as to 121 Clerk's Judgment, 120 Order on Motion for Discovery,,,,,,,,,,, Order on Motion for Summary Judgment,,,,,,,,,, by Unkechaug Indian Nation, Harry B. Wallace. Filing fee $ 505, receipt number ANYEDC-16882421. Appeal Record due by 7/26/2023. (Simermeyer, James) (Entered: 07/12/2023)
07/12/2023		Electronic Index to Record on Appeal sent to US Court of Appeals. 122 Notice of Appeal, Documents are available via Pacer. For docket entries without a hyperlink or for documents under seal, contact the court and we'll arrange for the document(s) to be made available to you. (VJ) (Entered: 07/12/2023)

03/10/2025	123	MANDATE of USCA as to 122 Notice of Appeal, filed by Harry B. Wallace, Unkechaug Indian Nation. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED. Issued as mandate; 03/10/2025 USCA #23-1013. (DS) (Entered: 03/11/2025)

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APPENDIX H

The Andros Papers
1674-1676

Files of the Provincial Secretary
of New York During the Administration
of Governor Sir Edmund Andros
1674-1680

Peter R. Christoph and Florence A. Christoph

With translations from the Dutch by
CHARLES T. GEHRING

SYRACUSE UNIVERSITY PRESS

FIRST EDITION, 1989
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MANUFACTURED IN THE UNITED STATES
OF AMERICA

* * *

New York
May [blank] 1676.
By Mr. Mayor.[*]
I pray give my best respects
to your honorable Governor
your very affectionate
humble servant.
M.N.

[ENDORSED:] Copie of a Letter to Mr. Rawson Secr. at Boston. by Mr. Mayor May 1676.

[25:118]

[MINUTES OF A MEETING WITH UNCHECHAUG INDIANS CONCERNING FISHING RIGHTS]

May 23. 1676.

At a meeting of the Unchechaug Indyans of Long Island–Before the Go: at the Fort.

They give thankes for their peace, and that they may live, eate, and sleepe quiet, without feare in the Island, They give some white strung seawant.

They desire they being free borne on the said Island, that they may have leave to have a whale boate with

[*] William Dorvall

all other materiells to fish and dispose of what they shall take, as and to whorn they like best.

They complaine that fish being driven upon their beach etc. the English have come and taken them away from them per force.

The Go: Demands if they made complainte of it to the Magistrates in the Townes, who are appointed to redresse any Injuryes.

They say no, but another time will doe it.

The Go: will consider of it and give them Answer tomorrow.

May 24. 1676.

The Indyans come againe to the Governor in presence of The Councell.

What they desire is granted them as to their free liberty of fishing, if they bee not engaged to others; They say they are not engaged. They are to have an Order to shew for their priviledge.

[ENDORSED:] May 23.24 1676.
Unchechaug Indyans.

[25:119a]

[ORDER GRANTING THE ABOVE FISHING RIGHTS]

At a Councell held at N.Y. the 24th day off May 1676.

Upon the request of the Ind[ ]s of Unchechauge upon Long Island

Resolved and ordered that they are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good according to law and Custome of the Government of which all Magistrates officers or others whom these may concerne are to take notice and suffer the said Indyans so to doe without any manner of lett hindrance or molestacion they comporting themselves civilly and as they ought.

By Order of the Go: in Councell

[ENDORSED:] Order of the Councell may 24. 1676. Unchechaug Indians.

[25:119b]

[LIST OF OWNERS OF VACANT LOTS IN NEW YORK]

Mr. Steenwyck	The vacant Ground etc.
Mr. V: Brugge	Mr. Allard Anthony
Mr. de Peyster	X Mr. Sam: Edsall
Mr. Hoogland	Mr. Guylayne Verplanck
Mr. Ebbing	X Adolphe Peterse.
Mr. Rombout	X Seuart Olferts
Mr. Ver Plancke	X Mr. Thomas Lewis
Mr. Gerrit V: Tright	X Peter Stoutenberg

Mr. Winder etc.	Jan Vigne
	Mr. Ebbing
	Mr. Rombout
	Cor: V: Borsum
	Mr. Hoogelandt
	6 or 7

* * *

APPENDIX I

CP-42 / Contact, Cooperation, and Consultation with Indian Nations

New York Department of Environmental Conservation
DEC Policy

Issuing Authority: Alexander B. Grannis, Commissioner
Date Issued: March 27, 2009
Latest Date Revised:

I. Summary

This policy provides guidance to Department staff concerning cooperation and consultation with Indian Nations on issues relating to protection of environmental and cultural resources within New York State. Specifically, this policy (i) formally recognizes that relations between the Department and Indian Nations will be conducted on a government-to-government basis; (ii) identifies the protocols to be followed by Department staff in working with Indian Nations; and (iii) endorses the development of cooperative agreements between the Department and Indian Nations to address environmental and cultural resource issues of mutual concern.

II. Policy

It is the policy of the Department that relations with

the Indian Nations shall be conducted on a government-to-government basis. The Department recognizes the unique political relations based on treaties and history, between the Indian Nation governments and the federal and state governments. In keeping with this overarching principle, Department staff will consult with appropriate representatives of Indian Nations on a government-to-government basis on environmental and cultural resource issues of mutual concern and, where appropriate and productive, will seek to develop cooperative agreements with Indian Nations on such issues.

III. Purpose and Background

A. General

Nine Indian Nations reside within, or have common geographic borders with New York State: the Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tonawanda Seneca, Tuscarora, Unkechaug, and Shinnecock. The United States formally recognizes all but the Unkechaug and Shinnecock Nations. The State of New York recognizes all nine Nations.

The Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tonawanda Seneca, and Tuscarora are known as the Six Nations or Haudenosaunee. Relations between the Department and the Haudenosaunee will be conducted in the spirit of Peace and Friendship established in the 1794 Treaty of Canandaigua.

All nine Indian Nations and their diverse governments

and governmental entities may share mutual interests with the Department concerning environmental and cultural resources. For the purposes of this policy, the Department will communicate with representatives from any Indian Nation government where there are environmental or cultural resource issues of mutual concern.

The Department interacts with Indian Nations in two critical areas of mutual importance; the environment (including air, land use, water, fish and wildlife) and cultural resources (including sacred sites, traditional cultural properties, artifacts, ancestral remains, cultural items, and pre- and post-contact historic sites). It does so in several capacities, including, but not limited to, permit application review, site remediation, hunting and fishing regulation, and the development, implementation, and enforcement of regulations.

It also has care, custody and responsibility for 13 percent of the State's land area, and, as such, is its largest single steward of archaeological resources. The Department wishes to ensure that its actions with respect to the environment and cultural resources are sensitive to the concerns of Indian Nations, and that the perspective of the recognized Indian Nations is sought and taken into account when the Department undertakes an action having implications for Indian Nations or their territories.

B. Consultation

Close consultation ensures that the Department and

Indian Nations are better able to adopt and implement environmental and cultural resource protection policies and programs in a manner that is cognizant of shared concerns and interests. Additionally, mutually beneficial cooperation and the appropriate resolution of occasional disagreements or misunderstandings can best be achieved if there is a commitment to regular consultation on environmental and cultural resource issues of mutual concern. While successful intergovernmental communication and cooperation are not guarantees of agreement on every issue, communication and cooperation will ensure a durable, effective working relationship between the Department and Indian Nations.

Communication between the Department and Indian Nations should be direct and involve two-way dialogue and feedback. Meetings between Indian Nation representatives' and Department policy and/or technical staff, as appropriate, can increase understandings of any proposed actions and enhance the development of effective outcomes and solutions. Face-to-face meetings are generally desirable; however, phone calls, correspondence, and other methods of communication are also encouraged.

Identifying the need for consultation and making the decision to consult may be difficult to determine in some cases and will vary among the diverse Indian Nation governments. The main guide, though, and one that requires further delineation, is that consultation is required for any Department decision or action which could foreseeably have Indian Nation implications. Consultation can be initiated by either

the Department or an Indian Nation. The Department understands that its planning and permitting processes may not be familiar to the Nations and shall take that into account when initiating consultation. To ensure sufficient time for input before decisions are made and actions taken, early involvement of Indian Nations is essential.

Good faith efforts should be undertaken to involve Indian Nations. The Department should strive to ensure that appropriate communication and response for any particular Indian Nation government or governmental entity is provided to any request for consultation.

C. Protection of Environmental Resources

Since all the natural world is interconnected and interrelated, environmental issues transcend geographic boundaries. As such, there are numerous unexplored opportunities for the Department and Indian Nations to pursue programs and policies through partnership for the bettennent of all of our communities and citizens.

The Department and Indian Nations share key roles in protecting and preserving natural and cultural resources important to all citizens, and early consultation and cooperation between the Department and Indian Nations will foster more comprehensive protection and preservation of those resources.

D. Protection of Cultural Resources

The preservation of Native American sacred sites, pre- and post-contact historic sites, and traditional cultural properties, and the preservation, disposition, and repatriation, when appropriate, of Native American ancestral remains, funerary objects, artifacts, cultural items, and cultural property ("Native American Sites and Objects") displays respect for Indian Nations, and preserves the historical, ancestral, and cultural heritage of Indian Nations and all New Yorkers. Actions approved, undertaken, or funded by the Department may have the unintended and inadvertent result of disturbing or adversely affecting Native American Sites and Objects. Accordingly, early consultation with Indian Nations connected to such Native American Sites and Objects is necessary to ensure proper and respectful treatment and to avoid any irreplaceable loss.

The careful consideration of the preservation, disposition, and repatriation of Native American Sites and Objects is consistent with the State Historic Preservation Act, State Environmental Quality Review Act, the federal Native American Graves Protection and Repatriation Act, and the National Historic Preservation Act.

IV. Responsibility

The Department's Office of Environmental Justice in the Office of General Counsel will provide oversight to ensure compliance with this policy. It shall assess the policy's effectiveness and initiate changes as needed, and shall appoint an individual to serve as Indian Nations Affairs Coordinator for all matters concerning

this policy. The Office of Environmental Justice will maintain a list of current contacts for each Indian Nation, and will provide the contact list and any updates to the list to regional and central office staff.

All the Department's divisions and regional offices will fully cooperate and work closely with the Office of Environmental Justice in the implementation of this policy. Each division and regional office will appoint a single point of contact for Indian Nation matters; and each will identify that individual to the Office of Environmental Justice. Each division and regional office may issue its own guidance to further the implementation of this policy. Such guidance shall be developed in consultation with the Office of Environmental Justice to ensure consistency with this policy and uniformity of application throughout the Department.

The Commissioner and Department staff will strive to meet with representatives of each Indian Nation on an annual basis to continue to foster this cooperative, government-togovemment policy.

V. Procedure

This policy is intended solely for the purpose of facilitating intergovernmental cooperation between the Department and recognized Indian Nations and may not serve as a basis for any legal claim against the Department or its employees, agents, or contractors. Nothing in this policy shall or is intended to modify, diminish, or alter any rights and is not intended to create any right, benefit, obligation, or cause of action,

whether direct or indirect, for any person or entity.

A. Contact

Department staff are encouraged to engage in regular contact with representatives of Indian Nations, especially program counterparts, in order to facilitate a cordial and cooperative working relationship. Informal contacts (e.g., telephone calls and in-person meetings) should be conducted on an as-needed basis, without the necessity of prior review or approval. Formal written contacts or contacts resulting in commitments should be coordinated with the appropriate Department executive, Office of Environmental Justice and, if deemed necessary, legal staff.

B. Consultation

Department staff shall consult with appropriate Indian Nation representatives on a government-to-government basis regarding matters affecting Indian Nation interests, with the goal of creating durable intergovernmental relationships that promote cooperative partnerships on environmental and cultural resource issues of mutual concern. As used herein:

- "Consultation" means open and effective communication in a cooperative process that, to the extent practicable and permitted by law, works toward a consensus before a decision is made or an action is taken. Consultation should begin as early as practical, and, where appropriate, consultation

should continue through the implementation of such decision or action. Consultation means more than simply informing affected Indian Nations about what the Department is planning. Consultation is a process, not a guarantee of agreement on outcomes. Consultation should not be limited to specific issues or actions, but applied broadly in order to achieve mutually beneficial priorities, programs and interests.

- "Affecting Indian Nation interests" means a proposed action or activity, whether undertaken directly by the Department or by a third party requiring a Department approval or pennit, which may have a direct foreseeable, or ascertainable effect on environmental or cultural resources of significance to one or more Indian Nations, whether such resources are located on or outside of Indian Nation Territory.

- "Indian Nation Territory" means all lands within the exterior boundaries of any Indian reservation and all lands held in trust by the federal government for any Indian Nation.

It is expected that Department staff will work with each Indian Nation to identify categories of actions or activities that will likely require consultation. As this policy is implemented, the Department will cooperatively establish with affected Indian Nations the manner and time frame for consultation, and will strive to accommodate the differences in deliberative processes. When a regulatory or policy change is planned that may affect Indian Nation interests, the

Department will invite interested Indian Nations to consult on a government-to-government basis. The Department will be receptive to requests from Indian Nations for intergovernmental consultation on actions, policies, and issues within the Department's authority. To further achieve proper contact and consultation the Department will develop and conduct sensitivity training of all staff who will or may implement this policy. To the extent that it is achievable, the development and conduct of such training shall include Indian Nation representation.

C. General Consultation Subjects

1. Environmental Resources

The Department is committed to working cooperatively with Indian Nations to address issues of mutual concern involving environmental resources, whether located on or outside of Indian Nation Territory. The Department recognizes that environmental resources transcend these boundaries, and that protection and preservation of those resources requires close cooperation between the Department and Indian nations. The Department also recognizes that environmental impacts transcend these boundaries and remediation and reduction of impacts should be addressed cooperatively.

Where appropriate, the Department may consider entering into a written cooperative agreement or agreements with one or more Indian Nations where it will achieve protection, preservation, or

remediation of such environmental resources. With respect to environmental matters occurring wholly or partly on Indian Nation Territory, the Department shall seek to achieve protection, preservation or remediation of such resources through development of a cooperative agreement or agreements with that Indian Nation.

2. Hunting, Fishing, and Gathering

The Department recognizes that hunting, fishing, and gathering are activities of cultural and spiritual significance to the Indian Nations. The Department is committed to collaborating with Indian Nations to develop written cooperative agreements that protect the rights of such Nations to engage in these activities consistent with the Department's interest in protection and management of the State's natural resources.

3. Cultural Resources

The Department recognizes the importance of Native American Sites and Objects to Indian Nations. Specifically, for example, the Department recognizes the profound connection Indian Nations and their citizens have with their ancestors and their preeminent desire, therefore, to protect them from disturbance. The Department also recognizes that there are locations within the State that have great cultural and pre- and post-contact historical significance to Indian Nations that require similar protection.

The Department, in consultation with each Indian Nation and with the Office of Parks, Recreation and Historic Preservation, will develop a map showing the area of aboriginal occupation of each Indian Nation within the State. When the Department undertakes an action that might affect a Native American Site or Object, including but not limited to a known or potential burial, or pre- or post-contact historic site, or traditional cultural property or sacred site, it will use this information to notify and consult with any Indian Nation claiming interest in the site location, including Nations that formerly resided within the State. Similarly, the Department will *5* consult with the Indian Nations before it takes any action with respect to any law, regulation or policy that relates to Native American Sites and Objects.

VI. Related References

- State Historic Preservation Act [Article 14, Parks, Recreation and Historic Preservation Law]

- National Historic Preservation Act [16 U.S.C. 470 et seq.]

- State Environmental Quality Review Act [ECL Article 8]

- Native American Graves Protection and Repatriation Act [25 USC 3001 et seq.)

APPENDIX J

8/23/20

Unkechaug Indian Nation, et. al. v. Basil Seggos, as Commissioner, et. al. Index No. 2:18-cv-01132-LDW-AYS

Report on the Historical, Political, and Cultural Context of the Anglo-Unkechaug Treaty of May 24, 1676.

John A. Strong, Professor Emeritus, Long Island University.

Commissioner Seggos and the DEC attorneys reject arguments based on the Anglo-Unkechaug Treaty between the Unkechaug Nation and Governor Edmund Andros (May 24, 1676), declaring that it was an order in Council and not the equivalent of a treaty. They also dismissed references to Unkechaug Common Lands as geographically "vague and imprecise."

The Unkechaug, a coastal Algonquian Indian Nation, have, since prehistoric times, depended on their *maritime* environment to sustain them (Salwen 1978, 160-176; Conkey, Bossievain, and Goddard 1978, 177-89; Strong 2011, 4-10).

The Anglo-Unkechaug agreement in 1676 was, in fact, a re-statement of an international position on maritime rights established in three previous nation to nation pacts with Eastern Long Island Algonquian

sachems. The right to fish, hunt whales and water fowl and to gather berries and grasses for mats and housing on the beaches adjacent to their villages was established in the following covenants between the sachems and the English authorities.

DOCUMENT ONE

June 10, 1658 Agreement between Wyandanch, sachem of Paumanack and Lion Gardiner regarding rights to **hunt, fish, and to gather plants.**

"Be it known to all men by this present writing, that this indenture, covenant or agreement was made this tenth of June in the year of our Lord one thousand six hundred fifty-eight between Wyandanch Sachem of Paumanack with his son Wyancombone and their associates .... on the other side Lion Gardiner and his associates ... [for the purchase of beach lands west of Southampton in Unkechaug territory] "But the whales that shall be cast upon this beach shall belong to me and the rest of the Indians *as they have been anciently granted to them formerly by our fathers to and aslo liberty to cut in the summer time flags, bull rushes and such things as they make their mats of... without any reservation or farther interpretation on it. We have both of us interchangeably set to our hands and seales,*

Henry Hutchinson, ed. 1880. *Records of the Town of Brookhaven to 1800.* Patchogue, N.Y.: Office of the Patchogue Advance. Pp.3-4.

DOCUMENT TWO

May 12, 1659 Agreement between Wyandanch, sachem of Paumanack and John Ogden of Southampton. The sachem sold a tract of Unkechaug beach land lying west of Southampton to John Ogden of Southampton with the following clause: *"And it shall be agreed that we will keep our privilege of fishing, fowling or gathering of berries or any other thing for our use ... "*

William Pelletreau, ed. 1874. *The First Book of Records of the Town of Southampton.* Sag Harbor, N.Y.: John Hunt printer. P. 162.

DOCUMENT THREE

Treaty between the Town of Brookhaven and Tobacus, Sachem of the Unkechaug June 10, 1664.

The indentor witnessed a bargain or agreement, between the sachem of Unkechaug. Tobacus, and the inhabitants of Brookhaven, alias Setauket, concerning a parcel of land, lying upon the south side of Long Island being bounded on the south with the great bay and on the west with a fresh pond adjoining to a place commonly called Acombamack, and on the east with a river called Yampanke, and on the north, it extends to the middle of the Island, provided the afore said Tobacus have sufficient planting land for those that are the true Native proprietors and their heirs, also *that either and both parties have free liberty for fishing, fowling and hunting without molestation of either party,* this is in consideration of a certain sum of money to be paid to the valuation of fifty fathom of

wampum as witness my hand, the date and day above written. Signed, sealed and delivered in the presence of us

Richard Howell

The mark of Tobacus

John Cooper

Henry Hutchinson, ed. 1880. *Records of the Town of Brookhaven to 1800.* Patchogue, N.Y.: Office of the Patchogue Advance. Pp.10-11

DOCUMENT FOUR

This addendum guaranteeing the right of the Unkechaug to hunt, fowl, and fish was attached to the sale of meadowland, creeks, ponds and harbors to the English. Both parties understood that the hunting, fishing, and fowling rights were shared right, that were not compromised by the sale.

These presents testifyeth that we the inhabitants of Seatauket *[Brookhaven]* doth promise and ingage for to find Gie and his associates that is to say all the Indians that was the true proprietors of the land of Seataukett with land sufficient for their planting for them and their heirs as also *to give them free liberty to hunt, fowl, or fishing within the bounds of Seataukett* and to the true and absolute Confirmation of the Same we do hereunto set our hands this 19th of November 1675,

Richard Woodhull
John Tooker

Andrew Miller
Thomas Biggs

Henry Hutchinson, ed. 1880, *Records of the Town of Brookhaven* Patchogue, N.Y.: Patchogue Advance Press. Pg. 46

Historical context for Anglo-Unkechaug Treaty of May 24, 1676

Robert Morelli, in his letter to Judge Leonard Wexler (March 20, 2018) argued that the 1676 agreement was an "alleged treaty," not a "real" treaty. It was, he said, "actually an order issued by the English colonial administrator ... " He adds that, "Even if it were a treaty," it is apparent, at least to him, that the phrase "according the law and custom of the government" refers to colonial regulation of fishing rights, but offers no evidence from the seventeenth century records to support his view. His interpretation will be addressed below.

Morelli's interpretation of the treaty was ignored a year later by U.S. District Judge William F. Kuntz. In his *Decision and Order* 18-CV-1132 (WFK) ruling on April 19, 2019, he described the May 24, 1676 agreement between the Unkechaug Nation and the Colony of New York as a treaty without any qualifying references.

Judge Kuntz, in effect, takes an "originalist" approach to treaties in harmony with the definition of a treaty by Hugo Grotius, the father of international law. His classic *On the Law of War and Peace*

published early in the seventeenth century would have been in the libraries of many colonial jurists. Grotius divides public conventions into treaties, engagements, and other compacts. Treaties, he says, citing Livy, the Roman historian, "... are those contracts which are made by the express authority of the sovereign power ..." as opposed to engagements which require a further ratification from the sovereign himself" (Grotius 1626, 97). Grotius also noted that treaties may be made between Christian and non-Christian sovereigns. "For the rights, which it [a treaty] establishes are common to all men without distinction of religion" (Ibid., 100-101). The proper rule of interpretation of all these treaties, "... is to gather the intent of the parties pledged, from the most probable signs. (Ibid., 103). Grotius warns that it may be necessary "... to make use of conjecture, where words or sentences admit of many meanings" (Ibid., 104).

In order to appreciate the intent and the nature of the Anglo-Unkechaug agreement, it is necessary to understand the larger historical, political, and cultural context of the negotiations. The interpretation of treaties, noted Grotius, must consider the many motives brought to the negotiation by the parties involved (Grotius, 1626, 2019, 103). Eastern Long Island, at the time, was a cockpit of conflicting imperial ambitions and continuing contentions related to the lucrative whaling enterprise which involved influential sachems and colonial leaders on both sides of Long Island Sound. One of these contentions centered around the use and control over the beach areas where whale carcasses drifted ashore or were the most suitable for the landing of the whales killed

by the whaling companies, who launched crews in small boats from the shore.

The contentions which were at play in the spring of 1676 did not emerge out of a vacuum, they were rooted in a tumultuous history involving three international confrontations resulting in regime changes, a plot by an adventurer named John Scott to make himself "president of Long Island," a major Indian war which nearly wiped out the New England settlements and threatened to spread to Long Island, an armed stand--offbetween Connecticut and New York militias over colonial borders, an attempt by Native American whalers to form their own whaling companies to compete with the English owned companies, and a plot by the towns of eastern Long Island to remove themselves from the jurisdiction of New York and join Connecticut. It was against the backdrop of these events that Governor Andros and the Unkechaug met in May 1676 to negotiate the Anglo-Unkechaug Treaty.

Anglo-Unkechaug Relations 1662-1665

When Governor John Winthrop received a patent in 1662, signed by King Charles II, he and the other Connecticut officials believed it included all of Long Island (Dunn 1956, 4-5). The English towns on eastern Long Island, beginning with Southampton in 1640 were settled by families from Massachusetts Bay and Connecticut. These towns, Southampton (1644), East Hampton (1649), and Brookhaven (1661), had placed themselves under Connecticut's jurisdiction for trade and military protection.

Tobacus, the Unkechaug sachem, understood that Winthrop represented the English interests on eastern Long Island and sought to establish a closer relationship with him. On June 10, 1664 Tobacus gave Winthrop a tract of land running westward from Acombamack, a neck of land near present-day Bellport, to the Namke River, near the present-day village of Patchogue (RTBH Hutchinson 1880, 23). Tobacus saw this gift as a means of incorporating the English into what legal historian Stuart Banner calls "traditional Indian social and political networks ... with the expectation the settlers would become long-term trading partners and military allies" (Banner 2005, 58). It is possible that the two men had met in May when Winthrop came to Long Island to meet with Governor Peter Stuyvesant about their disputes concerning the 1650 border agreement. **This transaction established the Namkee River as the western boundary of the Unkechaug Common Lands on the south shore of Long Island.**

All three of these men, Tobacus, Winthrop, and Stuyvesant were surprised a month after Winthrop received his gift from Tobacus to learn that Charles II had granted his younger brother, James the Duke of York, a patent creating the new colony of New York. In July 1664 the British fleet under the command of Richard Nicolls sailed into New York harbor and seized New Netherland, a colony the Dutch had established following the voyages of discovery by Henry Hudson in 1609. At the time, the eastern boundary of New Netherland was marked by a line running from north to south across Long Island east of Oyster Bay, set in an agreement between the English

and the Dutch in 1650. The English towns east of the line, Huntington, Brookhaven, Southampton, Southold, East Hampton were under the jurisdiction of either Connecticut or in the case of Southold, New Haven. These towns, beginning with Southampton in 1644, had petitioned to place themselves under the jurisdiction of Connecticut soon after they had been settled (Strong 2007). Most of the settlers had migrated from Connecticut and Massachusetts Bay and had many friends and relatives there.

To the dismay of Winthrop, the Connecticut Court at Hartford and the towns on eastern Long Island, the Duke's new patent included all of Long Island and a large part of western Connecticut with no prior consultation with Winthrop or with the residents of the eastern towns. Southampton, East Hampton and Southold had shared religious views and family connections with Connecticut which would soon lead to conflict and plots of open revolt from the colony of New York. James and his older brother Charles II represented a religious belief bitterly opposed by the Puritan settlers in New England and on Long Island. The patent was an affront that would later play a role in the negotiations between the Unkechaug and Governor Andros in 1676.

It also undoubtedly caused some uncertainty in Tobacus's mind about his plans for an Anglo-Unkechaug Alliance. A year after the English conquest, Tobacus, threatened with the possibility of attacks on his villages by the Niantics and Narragansetts from across the sound, must have been unsure about where to appeal for military aid. Having

established no alliance with Richard Nicolls, the newly appointed governor of the new colony of New York, Tobacus turned to Governor Winthrop, assuming that the governor would honor the obligations of the alliance established when he accepted the tract of land from the Unkechaug sachem.

In June 1665 Tobacus turned to Daniel Lane, a Setauket resident who had served as a liaison between Tobacus and Governor Winthrop the previous year. The sachem was, at the time, living in Lane's home under his protection. He asked Lane to write a letter to Winthrop on his behalf, appealing for military aid against what the sachem said was the "... the great danger of his life" from the Pequots, Narragansetts, and Niantics from across the sound who are "hoping to bring the rest of the Long Island Indians" into a tributary relationship to them (MHS, Winthrop Family Papers, reel 8:350; Strong 2011, 61). Tobacus invited Winthrop to visit him on Long Island where he could "gratify your favors to him."

Five months later, Richard Nicolls invited all of the major Long Island sachems, including Quashawam, Wyandanch's daughter, who represented the Montauks after her father's death in 1659, to come to New Yorlc for a meeting (DSBD 2: 123-127). It is likely that Nicolls knew of Tobacus's communications with Winthrop and wanted to affinn that he, not Winthrop, now spoke for the English authority on Long Island. Nicolls and the sachems established the easternmost boundary of the Unkechaug "Common Lands" at this time.

> The Bounds agreed upon between the Shinnecock and the Unkechaug Indians before the right honorable the governor at New York, the 5th day of October 1665.
>
> That the Unkechaug Bounds to the East are Apaucock Creek.
>
> That the middle of the river is the utmost bound to each, but that either Nation may cut flags for their use on either side of the river without molestation or breach of the limits agreed. (DSBD vol. 2:125)

The Namkee gift deed from Tobacus to Governor John Winthrop, Jr., (June 10, 1664) and this agreement, negotiated by Governor Richard Nicolls, clearly affirm the western and eastern boundaries of the Unkechaug "Common Lands."

Contested Beaches 1665-73

Contentions related to the carcasses of drift whales on Unkechaug beaches soon set English neighbor against neighbor, with good reason. The average adult North Atlantic right whale would yield thirty-six barrels of oil and six hundred pounds of baleen (Reeves, Briewick, and Mitchell 1999, 28-29). At two pounds sterling per barrel, for the oil and eight pence a pound for the baleen amounting to about ninety pounds sterling, that was enough, according to the Court of Sessions estate records, to purchase the house, twenty-nine acres of land and livestock from East Hampton resident, Isaac Hedges (March 7-9,

1677). (RTEH 1:249; Cooper 1993, 61).

These contentions began before the colony of New York was established, following the conquest of New Netherland in 1664. In 1659 Tobacus, reluctantly and wider pressure from Wyandanch, the Montaukett sachem, had agreed to give Lion Gardiner a twenty-one-year lease to harvest the whale carcasses which frequently drifted ashore on Ukechaug beaches (RTSH 2:34-36). The sachems, however, reserved the rights to the tails and fins for ritual purposes.

Gardiner, having little interest in the Unkechaug beaches so far away from his home, turned his leases over to John Cooper, Jr. and Anthony Waters of Southampton. These transactions left the beaches in control of Southampton entrepreneurs some seven years before Setauket settlers had shown any interest in expanding southward. During that time the Southampton men had harvested a lucrative bounty from the drift whales and Cooper had begun experimenting with hunting whales from the shore. In 1667, however, the Setauket officials decided to expand southward. Daniel Lane was appointed to petition Governor Nicolls for a patent with boundaries that ran south to the Atlantic shore overlapping the Cooper and Waters leases. Nicolls approved the patent and Setauket became Brookhaven in February 1667, with the exclusive right to buy any wipurcbascd land from the Unkechaug that lay within the boundaries of the patent (RTBH Hutchinson 1880: 18-19). A year later the town bought the rights to drift whales on the south shore beaches from Tobacus (Ibid., 23-24). The settlers agreed to pay the Unkechaugs a fee of five

pounds in wampum for each carcass.

The Unkechaug, who still owned the beaches, hunted small sea mammals there using a traditional strategy called "spear herding" wherein the Indians would drive them into the shallow waters where they would flounder and be easy prey to the hunter's spears and arrows. The Unkechaug described this practice to governor in 1676 when they presented him with their complaint (NYCD 14: 720). Lane, Woodhull, and the Brookhaven officials knew, of course, that Gardiner had purchased the beach leases in 1659 and they apparently assumed, rightly in fact, that their new patent voided that agreement, because the Gardiner purchase was made without permission from the crown. As noted by historians, John Romeyn Brodhead and Charles M. Andrews, no valid patent for any of the crown land on Long Island had been signed until Charles II granted John Winthrop Jr., his patent for Connecticut in 1662. The "so called" Stirling (eastern Long Island) and Warwick Patents (Connecticut, Southold and Brookhaven) had never passed through the royal seals (Brodhead 1853-71, 1: 760; Andrews 1: 403-404, 2: fn. 128). Until then all of the Long Island towns were Squatters on crown land. All of their purchases from local Indians were equally vulnerable in the English courts.

Contentions driven by the economic competition between Brookhaven and Southampton emerged almost immediately. Cooper and Waters protested that Gardiner had purchased the rights to the beaches from Tobacus in July 1659 and continued to harvest the drift whales in defiance of the Brookhaven men.

Brookhaven complained to Nicolls that "unauthorized outsiders" were cutting up and processing the whales, "contrary .... [to] an agreement made with some Unkechaug Indians" (NYCD 14: 605). In April 1668, Nicolls ruled, appropriately, that Brookhaven had the exclusive right to ".... cut or carry away any whales or great fish which are [now]or hereafter cast upon any part of the land or beach within the bounds and limits of the patent .... " In so ruling, he affirmed the language in the patent he had signed in 1667, and supported the right of the Unkechaug to determine who had access to their beaches. His decision here underscored the economic stakes as well as the legal complications in the negotiations related to these same beaches in 1676.

That did not end the matter. Over the summer of 1668, Nicolls resigned his position and returned to England to be replaced in August by Francis Lovelace. Anthony Waters and two other Southampton men came to New York and complained to the new governor that the Brookhaven men had "misinformed" Nicolls about their previous lease (NYCD 14: 607-608). Although the records are not specific about the alleged "misinformation," Waters may have been alluding to problem that had arisen when the shore whaling operations began in the mid-1650s. The earlier references to drift whales assumed that the whales had died of natural causes and drifted ashore. This assumption could no longer made once the whale hunting began because of the challenges inherent in the hunt. Wounded animals often escaped and died later some distance away on another beach, raising a different question about the rights to the carcus. Did

the whale belong to the owner of the beach or to the company who killed the whale? The Court of Assizes decided in November 1667 that the whale belonged to the company whose harpoons with company marks were embedded in the dead whale (RTEH I: 265-66; Barstow 2004, 227). This was one of the "laws and customs" alluded to in the 1676 treaty.

The Brookhaven men would also certainly have stressed to Nicolls that the Gardiner purchase and the Cooper and Waters leases had been made without permission from the crown. The patents for Southampton and East Hampton gave the town officials the exclusive right to purchase Indian land within the boundaries of their patents, but not in the Unkechaug lands to the west. Lovelace who seemed uncertain about his decision, ruled that he was "at present" suspending the rights of Brookhaven to the beaches.

Lovelace, who was committed to promoting the colonial economy, did not want to hamper the Southampton whaling companies that had established flourishing whaling enterprises and were a potential source of tax revenue for the colony. That same month he granted John Cooper an exemption from the laws restricting the sale or distribution of guns powder and shot to the Indians, ".... as shall be helpful and assisting to him in his design of killing whales ...." (NYCD 14: 608-09). He soon discovered, however, that the challenge of collecting taxes on eastern Long Island was daunting.

In 1670 the matter related to the Unkechaug

beaches was still unresolved. Two Brookhaven constables, Daniel Lane and Richard Woodhull made plans for a whaling company with eleven Brookhaven investors wider their direction. They petitioned Governor Lovelace for permission to negotiate with the Unkechaug for the purchase of land on the south shore, "for the convenience of whalefishing" and for adjacent meadowland for gmDDg (NYCD 14: 648-49). Unfortunately the names of the other men and the location of the beach tract did not survive in the New York records, nor did the deeds of purchase from the Unkechaug. It seems quite likely, however, that the beach area was on the south shore of the tract that Tobacus gave to John Winthrop in 1664, between the Namke River on the west and the Carmen River on the east (Strong 2011, map 5). A map drawn in 1670 by Robert Ryder, a Setauket school teacher, shows the strip of beach with the notation, "whale fishery upon the beach." This tract of land appears to overlap land claimed by the Southampton leases. Although there is no indication that the Setauket entrepreneurs were able organize a company capable of competing with the Southampton companies until after the English reconquest of the colony in 1674, it was undoubtedly a source of contention that Andros had to address in his negotiation with the Unkechaug. It is possible that the theft of the Unkechaug fish cited in the meeting with Andros in 1676 took place on these beaches.

The Dutch Reconquest of Their former Colony 1673-74

When the news reached New York in the spring of 1672 that England and the Dutch were at war,

Governor Lovelace failed to respond with improved fortifications or plans for defense. The following year a Dutch fleet, after successful engagements against the English in the Caribbean, headed north along the Atlantic coast raiding English towns as it went. When the Dutch ships arrived in New York harbor in July 1673, Governor Lovelace promptly surrendered without firing a shot, incurring the wrath of the King Charles for losing his younger brother's colony. The governor's Long Island estates were confiscated and he was recalled to England in disgrace and imprisoned in the tower of London. (Ritchie 1977, 87-88).

The Dutch reoccupation made little daily interruption to the daily routine of Long Islanders. The surviving records kept by the Dutch during the 1673-74 occupation also show very little interaction with the native peoples of Long Island (NYCD 2: 567-743). Sheriffs became *schouts* and local magistrates became *Schepens* but their duties remained pretty much the same (Ritchie 1977, 88-90). The eastern towns, however envisioned a more radical change. Three representatives, John Howell of Southampton, Reverend Thomas James of East Hampton and John Young of Southold, and several other delegates came to the October 9, 1673 session of the Connecticut General Court in Hartford, armed with letters and other credentials, asking to return to their former status under the jurisdiction of Connecticut. The delegation was warmly received by Governor Winthrop and the Connecticut Court. (RCC 2: 212; Dunn 1956, 14-26).

Although the Treaty of Westminster ending the

Anglo-Dutch War in February 1673 called for eastern Long Island to be returned to New York, the Connecticut Court, at their May 1674 session, issued a statement approving the petition that the Long Island delegates submitted the previous October (RCC 2: 226). A month later East Hampton, along with Southampton and Southold, endorsed their union underthejurisdictioo of Connecticut (RTEH 1: 370-71). The next step for Winthrop was to obtain approval from the Privy Council in London for his annexation of eastern Long Island (Dunn 1956, 20).

The Duke of York immediately interceded, motivated by personal pride and the economic importance of the three wealthiest settlements in the colonies. The whaling companies, all manned by Indian whalers from the Unkechaug, Shinnecock, and Montaukett communities were one the few sources of hard currency north of the Virginia tobacco plantations. Oil from the North Atlantic right whale, killed as they swam along the coast of Long Island during their annual migration route from November to March was shipped to markets in New York. Boston and London, creating a wealthy elite class of entrepreneurs who dominated political affairs on eastern Long Island (Strong 2011, 56-78).

The Andros Administration 1674-76

On June 29, 1674, a few weeks after the East Hampton towns had voted to join Connecticut, Charles II renewed his younger brother's patent which unequivocally restated the earlier boundaries at the far end of eastern Long Island and all of the land in

the 1662 Connecticut Patent from the west bank of the Connecticut River to the Hudson, absorbing most of what had been western Connecticut (RCC 2: 568). He had, in effect, turned over Winthrop's colony to the Duke of York.

On July 1, 1674 James appointed Edmund Andros to govern the restored colony (Dunn 1956, 21). Andros faced a lengthy and acrimonious contention with John Winthrop, Jr., who was one of the most influential New England leaders (NYCD 3: 215). His commission was accompanied by a set of specific instructions which included an admonition to treat the "natives" well and not "to disturb them in their possessions," an admonition he followed in his negotiations with the Unkechaugs (NYCD 3: 216-17). On December 4, two weeks after his arrival in New York, Andros received a letter from the representatives of East Hampton, Southampton, and Southold, congratulating him on his "happy arrival" in New York and reminded him that Governor Lovelace had made no effort to protect them from the Dutch invasion in contrast to their "loving neighbors of his majesties colony of Connecticut." The colony of New York, they said, had "left us miserable, without aid or council" (NYCD 14: 681). They were now quite comfortable living under the jurisdiction of these "loving neighbors." The towns had, in effect, taken *de facto* the action they had petitioned for two years earlier. The wealthiest towns in his colony had fled to Connecticut.

Andros could not let this stand. Were he to disappoint the Duke of York by losing eastern Long Island, he would likely suffer the fate of his

predecessor before his own administrative career even began. Andros went in person to the eastern towns where he threatened John Howell (Southampton), John Mulford (East Hampton), and John Young (Southold) with being declared "rebels" unless they acknowledged the jurisdiction of New York (Ritchie 1977, 98). They reluctantly agreed, ending the stand-off. Andros sent a letter to Winthrop on December 28, 1674 telling him that he had "... settled things at the east end of Long Island ..." and dismissing the matter as a "misunderstanding" (NYCD 14: 684). Although the personal visit quieted the East End ambitions for the moment, they were not, noted historian Robert Ritchie, "docile sheep" (Ritchie 1977, 98). Their ambitions remined a factor at play in the diplomatic mix when Andros met with the Unkechaug sachems. Were Andros to give concessions to the Unkechaug at the expense of the Southampton whaling companies, he risked another revoh on the east end.

King Philips War June 1675- August 1676

Winthrop's willingness to compromise on the question of the Long Island towns, may have misled Andros. During the spring of 1675 Andros found himself embroiled in another heated bowidary dispute with Connecticut. Although the western boundary of Connecticut had been settled by Governor Richard Nicolls and a commission in 1667, the Duke of York's renewed patent included nearly all of Connecticut (Dunn 1956; Black 1966, 225, 281-82). An angry exchange of letters continued throughout the spring (NYCD 14: 688-89; RCC 2: S69-74).

The dispute was pushed into the background in June, 167S when King Philip's War broke out in New England. The Wampanaogs and their allies attacked the village of Swansea at the mouth of the peninsula of Good Hope where Philip's villages were located (Jennings 1975, 298-326; Leach 1958, 30-50). There were rumors that the Long Island Indians would send warriors and supplies to Philip. Early in July Andros ordered that all of the Indians on the island be given the choice of sending hostages to the English or surrender their guns, but to not be "... in any [other] way injured" (NYCD 14: 692). Reluctantly the sachem chose to surrender their weapons. Confiscating Indian guns, however, was not an easy task for English authorities. Guns were a symbol of manhood and sovereignty, and, in the late summer, a necessity for the fall deer hunt which would provide food for the winter. The Unkechaug showed their desire for peace by complying, albeit reluctantly, and turning over their guns to Richard Woodhull, a Setauket settler who had earned the trust of the Unkechaugs over the years since he had negotiated the purchase of the southern part of Brookhaven Town in 1657.

Andros, believing that the Indians on western Long Island were "very quiet," went to Southampton and East Hampton to inspect their arrangements for defense (NYCD 14: 693-94). Two months later on August 4, 1675, Andros sent a letter to Richard Woodhull praising him for his success in securing the Unkechaug guns and storing them in his home (NYCD 14: 695). In the same letter he asked Woodhull to inquire about information he had received that the Nissequogues, whose villages were located on the

western borders of the Unkechaug lands, had held a large gathering. The English always viewed these large, annual intertribal gatherings called *Kintecoys* ("big dances") often held in late August or following the fall harvest with fear and suspicion. It was a time when sachems from neighboring communities could meet, exchange information, and share ideas (Strong 1997, 118; Williams 1973, 191; Simmons, 1975, 226-227). Andros suspected that, in the current climate, these ideas might be dangerous to the English. He assured Woodhull that any expenses he incurred would be compensated by the colony. He ended his letter with the hope that "... all our Indians will be quiet" but that he should remain vigilant (NYCD 14: 695). There is no record of Woodhull's report.

Andros, who was still becoming familiar with his colony, then left Long Island and traveled north to the Albany area where he met with the Mohawks to discuss their relations with King Philip and the English colonies and to mediate a dispute between the Mohawks and some French traders. He met with the sachems in their villages to gain their confidence and successfully resolved the issue with the traders while establishing the groundwork for a more expansive, multi-party "Covenant Chain" treaty, described by historian Francis Jennings as " a multiparty alliance binding tribes and colonies in a silver chain of friendship" (Jennings 1975, 322; 1984, 148-49; Trelease 1960, 249; Richter 1983, 59).

In appreciation the sachems gave Andros, as a title of respect, the name "Corlaer," after a Dutch trader named Arent van Curler (Corlaer) who had learned the

Iroquois language and has gained their trust and confidence. (Richter 1983, 55-59). The sachems referred to Andros as "the new Corlaer" and continued to address the English governors with that title, particularly in diplomatic negotiations (Ibid., 55). He would return to Long Island and begin his negotiations with the Unkechaugs as an experienced diplomat who understood the challenges and complexities of commwiicating across cultural boundaries. The governor demonstrated his capacity for such understanding a decade later when he acted to protect Native American land rights under the Dominion of New England (Hermes, 2008, 50).

In Andros's absence from Manhattan, Anthony Brockholes, his lieutenant governor, received a letter late in August from Setauket officials expressing fears that the Unkechaug, even though they had turned over their guns, might be plotting some "ill-design" against the English. They "stragle abroad and are not as comfortable as they ought to be to the orders left by the governor" (NYCD 14, 695). Similar rumors had been gathering momentum on eastern Long Island that summer as news came from Narragansett country that King Philp had out maneuvered the English troops who had hoped to trap him on the peninsula in Narragansett Bay and escaped to the north where he recruited more warriors (Leach 1958, 55).

There was nothing he could do, said Brockholes, beyond advising the Setauket settlers to threaten the Unkechaugs with arrest if they should commit any acts of violence against the English or give shelter to any "strange" Indians from Narragansett country. He

advised them to await the return of Governor Andros. In the meantime, said Brockholes, "... don't show any doubts or fears you may have of them." Such advice would soon be tested as waves of racist hysteria swept across southern New England and Long Island. Brockholes told the Setauket officials that he had received a message from an unidentified Unkechaug sachem carried by an Unkechaug man identified as "Tom" (aka Meneges). Meneges, who had learned to speak English and had established a relationship of trust with Richard Woodhull, was identified on several documents as "Mr. Woodhull's Tom" (RTBH 1924, 50, 52, 56). He often served as a translator and liaison between the Unkechaug and the English. He told Brockholes that he had been sent by his sachem "only to see if the governor had returned. It appears that the Unkechaug were eager to bring their concerns to the governor and avoid any misunderstandings which might arise from the current fears and uncertainties.

By the end of July King Philip's war had spread north and west from Narragansett Bay into the Connecticut Valley as the Nipmucks joined Philip's forces (Leach 1958, 74, 82). In spite of the hysteria some of the Long Island sachems refused to humbly maintain a low profile. In early August Tackapousha. the Massapequa sachem on western Long Island, thought that this might actually be a good time to present the English with grievances and demands, a strategy that the Unkechaug would soon adopt The day after Andros had left for Albany, Tackapousha appeared before the Court of Assizes in Manhattan and complained that the town of Hempstead had not been paid for land purchased thirty years ago (NYCD

14: 696). The matter was deferred until Andros returned from Albany.

When Brockholes met with his Council in September 1675, he sent word to the Long Island sachems telling them of the negotiations between the Mohawks and assuring them that if "... they comport themselves as they aught and as they have done, they shall be protected and may live quiet and there upon that an order be made for the redelivery of their guns" (NYCD 14: 696). This was greeted with great relief by the Unkechaugs and the other Long Island sachems because it was time for the fall deer hunt.

Upon his return to Manhattan five days later, however, Governor Andros rescinded his order to seize the guns from the Montauketts and from the Manhansetts on Shelter Island because both were suspected of communicating with a Namgansett faction allied with King Philip (NYCD 14: 697). Andros added two somewhat contradictory messages in the order: He told the town officials that the Montauketts and Manhansetts were not to be molested and be left in peace as long as they remained quiet, while ordering the towns to fortify a place in their communities where they could "secure their wives and children."

Rumors continued to inflame English anxieties, particularly in Southampton and Brookhaven. The governor sent letters to the town officials assuring them that "... a report of our Indians (Shinnecock and Unkechaug) ill-intent against us ..." was false (NYCD 14: 697-98). "Though I don't apprehend any danger," he said, "I have commissioned an armed sloop to patrol

the sound and intercept any canoe traffic," adding that he would immediately commission more if necessary. He told Richard Woodhull that he was satisfied with the relations between the English and the Unkechaugs in Brookhaven in spite of the "Noise, jealousies, and apprehensions" abroad (NYCD 14: 698). I find that the Unkechaug, he said, "have not misbehaved themselves." His paternalistic tone and phrasing revealed a common mindset among the colonists. He noted, however, that the "Indians to the eastward are still strong and active," and reminded the officials that an armed sloop would prevent any "ill Indians" from crossing the sound to attack them. There was, of course, no way to dispel the fears and racial anxieties that had spread throughout eastern Long Island that fall and into the following spring.

In October Andros prohibited the sale or distribution of alcohol, powder, and shot to "Indian plantations" and rejected another request from the Montauketts to have their arms restored in spite of an endorsement by Reverend Thomas James, the East Hampton minister (NYCD 14: 700). A few days later, following a letter from William Leete, the deputy governor of Connecticut reporting that Long Island Indians were "in confederacy with the Narragansetts," Andros ordered the confiscation of guns from all of the Indian tribes on Long Indians, including the Unkechaug. Panic and uncertainty gripped English and Indian alike. The residents of Setauket were authorized to clear private lands and provide wood for a fort (NYCD 14: 704). More rumors came to Andros's attention later in the month alleging that the Massapeaqua and Rockaway Indians were plotting

against the English. Andros was becoming concerned that some whites might take independent military action against Indian communities near them. He advised an East Hampton town official that he must be vigilant and prevent any breach of peace " ... not only by Indians but Christians," as well (NYCD 14: 706). Andros may have been thinking of a letter he received that fall from Thomas Topping, the constable from Southampton, who decried the loss of "English blood by the cruel dammed pagans" (NYDH 2: 263-64).

Early in November Andros, concerned about the pattern of constant movement by Indians from one village to another to trade and visit extended family members, issued an order requiring them not to leave their home villages RTEH 1: 380-81; NYCD 14: 708-09). The order brought a protest from Jacob Schellinger, a whaling company owner who had eight Montaukett and four Manhansett whalers under contract to man their whale boats for the annual hunting season from November through March (NYCD 14: 708-09; RTEH l: 378-79, 407- 09). Unless he could get an exemption for the Manhansett whalers he could not man the two whale boats necessary for whale hunting.

The stakes were high. There were three other companies with Indian whalemen under contract for the 1675-76 season which began in November. Experienced and skilled harpooners and boat steersmen could not easily be replaced. Reverend James of East Hampton, John Cooper and Richard Howell of Southampton all had whaling crews under contract for the season (SHTA Liber A2: 99-100).

Andros, who had to balance economics and security concerns, had to make this difficult choice quickly. The loss of a seasons' revenue from one company had implications for the local economy as well as for the colonial tax revenues. In one season, for example, a company owned by John Cooper of Southampton had killed four whales yielding 144 barrels of oil that sold on the market for 288 pounds sterling, enough to buy four twenty-acre farms with buildings (Pelletreau 1903. 495-96). According to Suffolk County estate records, John Cooper was one of the three wealthiest men in Suffolk County (Cooper 1993 73-75). Andros quickly granted Schellinger's request. The experience would be a factor in the back of his mind when he had to consider the Unkechaug request for a whaling company that would compete with the English companies.

Although in December the English massacred an estimated six hundred Narragansetts in "the Great Swamp Battle, including some three hundred women and children, the fighting continued into the spring of 1676. Historian, Douglas Leach refers to the months from February to May as "A Time of Troubles," when the towns of Lancaster, Groton, Sudbury, and Medfield were attacked. The English on Long Island watched with increasing anxiety. It was against this volatile background that the Unkechaugs opened negotiations with Andros.

ANGLO-UNKECHAUG TREATY May 24. 1676

Although the colonial records do not mention of the names of the Unkechaugs who negotiated with Andros

in the spring of 1676, they must have been leaders from the villages along the southern shores of Brookhaven Town who depended on fishing for their livelihood and held proprietorial interests in the area. They are easy to identify. Tobacus, the Unkechaug sachem, would have been their leader. His name appears on fourteen transactions from July 1659 until April 1694 (RTSH 2:34-35; DSBD 2:156-157; RTBH Hutchinson 1880, 10-11; 15; 23, 24-25; 32-33; 75-76; WFEA, Box 1, F. 17 F115 9665; BTH Shaw Notebooks; 225; AF52; AF 10; AF59; AF60; AF16). Village headmen Massetus, Meneges, Mahue, and Warisone, identified as the proprietors of the south shore beaches, were often associated with those transactions. These documents include specific geographic locations between Apocock Creek and Namkee Creek marking the area of Unkechaug "Common Waters."

Preliminary Negotiations April 17, 1676

The preliminary contact for the negotiations with Andros began on April 17, 1676 when Tackapousha came to Manhattan with a delegation of sachems including the Unkechaugs. Concerned about the rumors of collaboration with King Philip, they presented Andros with a string of white wampum to open the meeting, signifying their peaceful intent followed by a multi-rowed "large band of black (purple) wampum a yard and a half long signifying the strength of their alliance with the governor (NYCD 14: 717-18). When the delegation returned the next day, Andros reciprocated with gifts of coats, duffel cloth, Tobacco, and pipes. He also promised that he would send for their guns and return them "in a little time."

The Unkechaugs, returned home, satisfied that they had renewed their alliance with Andros and had their guns back. The peace, however, was shattered ten days later on April 27th when report of a quarrel on the south beach of Brookhaven between two Unkechaugs and the same number of Southampton residents, "whereby mischief hath happened" reached the governor's council. (NYCD 14, 718-19). Andros ordered his Lieutenant Governor, Anthony Brockholes to go to Brookhaven and to administer justice on the guilty as he saw fit. He warned Brockholes not to take any action that would provoke either side to violence.

There was no further mention of the matter when Brockholes met with the Council the next week because it was overshadowed by a plea from Rhode Island settlers requesting immediate help in rescuing some settlers who had been driven from their homes. King Philip's spring offensive had launched successful attacks over a wide area. Philip's strategy of small-scale warfare involving surprise attacks on isolated homesteads and small villages unnerved the settlers on Long Island because their settlement patterns were similar.

Andros asked the Long Island towns, "upon the extraordinary occasion of the war and other late intelligences," to send provisions to support the war effort and keep the conflict from reaching the Long Island (NYCD 14: 719-20). April 1676 was described by historian, Douglas Leach, as "the blackest month of all." (Leach 1958, 186). In early May Andros dispatched several sloops to Rhode Island to rescue families whose homes had been burned in the fighting.

Some were resettled on Long Island in Glen Cove (Leach 1958, 177). The arrival of these frightened refugees with their accounts of the conflict heightened local anxieties. Although King Philip's efforts to recruit other tribes had very limited success, irrational fears of a "Pan-Indian" uprising had been voiced from the beginning of conflict (Pulsifer 2005, 111). Fears that Philip might find support among the Algonquian sachems on Long Island were undoubtedly rekindled.

Wampum Presentation and Petition, May 23

On May 23rd, in the midst of these dramatic events the Unkechaug delegation arrived in Manhattan to present their concerns to Andros. Not surprisingly they opened the meeting with a presentation of more white wampum establishing the peaceful foundation of their intent and reassuring the English that they had nothing to fear from the Unkechaug. For the Unkechaug delegation, the meeting in council with Andros would have been a familiar venue. As historian, Katherine Hermes, noted, traditional Algonquian societies resolved disputes in the same manner (Hermes 2008, 39).

According to anthropologist, George Hammel, who served as Senior Historian at the New York State Museum until 2007, during the seventeenth and eighteenth centuries, these wampum strings and belts were curated attached to the more formal paper treaties (Hammel 2011, 11). This was done by colonial administrators, such as Edmund Andros, so that both parties to the agreement would have a record that they could refer when necessary. Unfortunately the

wampum was separated by nineteenth century administrators, who considered them "savage trinkets," and sent to the musewn where the context, and often the wampum as well, was lost (Hammel 2011, 13). Many of the paper documents from this period were also lost in March 29, 1911 when the State Museum and Library burned. Fortunately, the Council Minutes for 1676 have survived, albeit in an abbreviated version (NYCD 14).

The Unkechaug opened the meeting by giving thanks that they lived in peace "without fear on the island" as they presented the wampum. This was followed with an assertion of their sovereignty. They came to Manhattan to meet the governor, they said, as an independent people, "freeborn on the island" (NYCD 14: 720). Without pause they made a request for a "... whaleboat with all other materials to fish and dispose of what they shall take in and to whom they like best." This was no small request. The "other materials" for a whaling operation included flensing knives, harpoons, lances, 250 gallon iron try pots, barrels, and 1,200 feet of thick warps. Five years earlier the Shinnecocks had attempted to form their own company with the help of some English investors, but were unable to compete with the well-established processing and marketing systems controlled by the English companies (Strong 2011, 105-108).

Andros realized that permitting an Unkechaug whaling operation might be upset the influential owners of the English companies, who had given him so much trouble from the beginning of his administration. He weighed this against the widely

expressed fears of a spreading Indian war voiced in the east end towns. Andros made a careful political calculation that in these turbulent times, concerns about security would trump economic interests.

Following this request, the Unkechaug raised an example of a concern which was likely related to the quaml between the Unkechaug men and the two Southampton residents that had been reported to Andros a month earlier (see above). They complained that even though they were "free born on Long Island," the English had, by force, stolen the fish that the Unkechaug fishermen "had driven upon their beach," The governor asked the Unkechaug delegation if they had brought their complaint to the "magistrates in the town s who are appointed to redress any injuries." They dismissed his query, saying only that "... another time [they] will do it," and went on the restate their request for permission to have boats and materials "... of their own to goe a whaling and that they may dispose of their oil as they think good" (NYCD 14: 720). It was evident that the Unkechaug believed such altercations on the beach would no longer be a problem if Andros guaranteed their right to fish.

In both statements of their request, the Unkechaug asked for the right to sell the product of their whaling enterprise to "... whom they liked best," a reference to the near monopoly held by English companies. The Unkechaug wanted the freedom to sell their oil and baleen to the highest bidder in a free market. Here again they were probably thinking of the difficulties faced by Shinnecock's enterprise.

The governor said he would consider the request and give them an answer the next day.

21 May 24, 1676: The Treaty

The Unkechaug delegation returned the next day to hear the Governor grant their "free liberty of fishing, if they are not engaged to others ... " The last phrase referred to what had become one of the "laws and Customs" of the government regarding the whaling enterprise. These ordinances, such as exemptions for English company owners from the laws prohibiting the sale and distribution of alcohol to Indians during the whaling season, regulations setting the standard volume of whale-oil barrels at thirty-one and one half gallons, and requiring company identification marks on harpoons and lances, were put in place to encourage the development and expansion of the whaling enterprise, not to regulate the amount or size of the catch.

In this case the law prohibited a whaling company owner from tampering with the contracts signed by the Indian whalemen. Beginning in 1670 a contract system was initiated by the English companies because of.the fierce demand for experienced harpooners and boat steerers. Unscrupulous owners would lure away these vital members of the whaleboat crews. A whaling company needed two whaleboats manned by six-man crews for a successful hunt. Each boat needed an experienced harpooner and boat steerer (Strong 2018, 57-58). Andros wanted to make sure that the newly established Unkechaug whaling enterprise did not lure away whalers wider contract to English companies. He

undoubtedly added that admonition with an eye to the concerns of the English companies who might have contracts with individual Unkechaug whalemen.

"Resolved and ordered" at Council in New York

"Upon the request of Indians of Unlcechaug upon Long Island that they may have the liberty to whale and fish upon their own account."

"That they are at liberty and may freely whale or fish or with Christians or by themselves and dispose of their effects as they think good according to the law and custom of the government of which all magistrates officials or others whom this may conceme are to take notice and suffer the said Indians so to do without any manner of let hindrance or molestation they comporting themselves civily and as they ought."

By order of the Governor in Council.

This treaty was a part of a continuing diplomatic relationship between two sovereigns that established the rights of the Unkechuags to harvest the bounty of their maritime environment as they had for thousands of years. It was an agreement between two sovereigns which served both of their interests, meeting the classic definition of a treaty between nations as defined by Hugo Grotius. Although Andros was viewed by some historians as autocratic, he nevertheless proved to be a skillful negotiator when he met with the Unkechaug sachems over the two days of meetings in May (Dunn 1956, 21; Ritchie 1977, 94). His sympathetic understanding of Algonquian rights were

again displayed a decade later during his administration of the New England Confederation. For the Unkechaug, justice was satisfied in accordance with Algonquian custom "by putting the world back in balance" (Hermes 2008, 41).

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"The Autonomous Commonwealth: Southampton, 1640-1644, Conference on New York State History, Columbia University, June 1-3, 2006.

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"Protecting Whaling Rights: Patterns of Native American Leadership on Eastern Long Island in the Seventeenth Century." Organization of American Historians, Providence, Rhode Island, April 7-10, 2016.

AWARDS:

Danforth Associate Appointment, 1972 (Excellence in Teaching award based on student nominations)

National Endowment for the Humanities Seminar for Teachers, 1978 Department of Anthropology, University of California at Los Angeles

Long Island University Trustees Award for Research and Publication, 1990 and 1998

Fulbright Teaching Fellowship, University of Miskolc, Hungary 1998- 1999, extended for Spring 2000.

CONSULTANT WORK:

Ford Foundation Curriculum Improvement Program, Bennington, Vermont, 1966 Suffolk County Head Start, Fall 1968

Board of Cooperative Educational Services, NY State Department of Education 1967-68

Shinnecock Portraits and Voices: Museum Exhibit, NY State Museum Projects 1986-87

Montauk Portraits and Crafts: Guild Hall Museum Exhibit, 1990-91.

Herricks Teacher Center Consortium, New Hyde Park, N.Y. Oct.-Nov. 1990. Workshop on the Teaching of Native American History.

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Nov. 7, 2018-Oct. 4, 2019.

APPENDIX K

[LETTERHEAD OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION]

Harry Wallace, Chief
Unkechaug Indian Nation
P.O. Box 86
Mastic, N.Y. 11950

Dear Chief Wallace:

I am writing to open a dialogue between the people of the Unkechaug Indian Nation and the New York State Department of Environmental Conservation (DEC) concerning conservation and management of the American Eel species. The American eel is in decline over much of its range and DEC has been working closely with the Atlantic States Marine Fisheries Commission to conserve and manage this species. To that end, New York State law prohibits the taking of American eel less than nine inches long which includes all "glass eels".

DEC has reason to believe that the Unkechaug Indian Nation is harvesting American eel less than nine inches long from the waters of New York State. DEC received copies of export documentation and a fishing permit which the Unkechaug Indian Nation issued to itself in 2015. Although the Unkechaug Indian Nation asserts a sovereign right to harvest these eels. DEC staff are unaware of any legal

authority or treaty-based rights authorizing the harvest.

DEC invites the Unkechaug Indian Nallon to join New York State in protecting the American eel species. We also ask lnat you provide us with any relevant information concerning your belief that the Unkechaug people have rights to harvest American eel less than nine inches long and where you believe such harvest can legally occur.

Enforcement of the American eel harvest limits is vital to conserve and manage this species. Therefore, DEC will continue to work with the U.S. Fish and Wildlife Service, other state law enforcement agencies and concerned Indian Nations to address violations and illegal commercialization of American eel less than 9 inches long.

Please call me at (518) 402-9185 if you have any questions and to set up a meeting to discuss this further.

Sincerely,

Thomas S. Berkman
Deputy Commissioner
and General Counsel

TRIBAL COUNCIL UNKECHAUG
INDIAN NATION
P.O. BOX 86
UNKECHAUG INDlAN TERRITORY
MASTIC, NY 11950
(631) 281-6464

March 18, 2016

N.Y.S. Dept. of Environmental Conservation
Office of the General Counsel, Deputy Commissioner and General Counsel
625 Broadway, 14th Floor
Albany, N.Y. 12233
Attn: Thomas Berkman, Deputy Commissioner and General Counsel

Dear Mr. Berkman:

Aquay (greetings). I am in receipt of your letter dated March 3, 2016. We are pleased to open a dialogue with respect to the Unkechaug aboriginal right to fish that can never be restricted nor otherwise regulated by the State of New York.

We are, however, concerned with the tone of your correspondence which implies that our traditional fishing activity is unlawful. Under well established legal precedent, including specific litigation with a third party two years ago, the New York State Attorney General's office acknowledged in a sworn affidavit that the Unkechaug have the right to fish and market glass eel independent of the regulations imposed by the State of New York. Two years ago we

submitted a draft Eel Management Plan to DEC for review (a copy of which is attached to this correspondence) as well as a Memorandum of Understanding in an effort to reconcile our differences. It has been two years since we've heard from anyone in your office.

We are proceeding in a good faith dialogue to resolve any misunderstandings that the State may have in regard to the well-established Unkechaug fishing rights. Your letter references New York State's ongoing collaboration with the Atlantic State Marine Fisheries Service (ASMFC) to preserve and manage eels. As you know, ASMFC requires States to consult with Native American Tribes when considering the establishment of state plans. In addition, your own regulations obligate consultation with Native Nations as it relates to the imposition of regulations. The Unkechaug people are an ancient Native people that lived on these lands and fished these waters of Long Island from time immemorial and cenainly well before there was a Colony of New York.

New York State never consulted with the Unkechaug with respect to those regulatory restrictions that impact our fishing rights. In point of fact. New York State harvested 32,573 lbs of adult and juvenile eels in 2013 according to the National Marine Fisheries Service. NMFS believes the numbers are underreported from actual eel landings.

Given these enormous numbers, it is disingenuous to assert that our efforts endanger the well being of the eel population in our waters.

As I indicated in our telephone conversation, our Eel Management Plan is modeled after those plans accepted by the ASMFC and particularly the plan enacted by the Passamaquoddy Tribe of Maine. Our Eel Management Plan is thus MORE RESTRICTIVE THAN THAT IMPOSED BY NEW YORK STA TE. The Unkechaug Policy seeks to ensure the continued survival and growth of the eel fishery as a natural resource for future generations. To this end, we remove obstructions and thereby guarantee survival far in excess of those man-made barriers that have significantly reduced the eel population.

Significantly, the Maine State legislature has during the past two years begun the implementation of major provisions of the Passamaquoddy plan into state law. including the first ever Glass Eel total allowable catch quota adopted by the tribe a full year and half ahead of the State of Maine.

I ask that you note for future reference the compliance provision found in Part 5 of Addendum IV to the Interstate Fishery Management Plan for American Eel approved in October 2014 (*see* http://www.asmfc.org/uploads/file/5327t05fAmericanEel_AddendumIV_Oct2014.pdf]. States and jurisdictions are required to approve regulations that would allow for implementation of a state-specific quota management program and timely monitoring of harvest no later than March 2016. Any state or jurisdiction can request an allowance for commercial harvest of glass eels based on stock enhancement programs implemented after January 1, 2011 subject to review and Board approval.

While the Unkechaug have been a traditional fishing people, a history which is well documented *(see* The Unkechaug Indians of Eastern Long Island: a History by John Strong, PHD) there has never been any law nor regulation that has ever been imposed to restrict our ability to engage in subsistence fishing as set forth above. Please understand that we remain committed to entering into a management agreement with the DEC. However, we neither request nor accept permission to engage in historic subsistence activity, particularly when that activity may be displaced by recreational sport fishing interests.

I look forward to speaking with you.

Wunegan

/s/
Harry B. Wallace, Chief
Unkechaug Indian Nation

c.c.: James F. Simermeyer, Esq.

APPENDIX L

Unkechaug Indian Nation
American Eel Restoration and Management

PART 1. SECTION 1: Purpose.

Because the history, culture and economy of the Unkechaug Indian Nation are based upon our continued ability to access marine environments in a safe and responsible manner, and

Because inadequate management mechanisms which facilitate the privileged exploitation of adult and juvenile American eels for commercial and recreational purposes has resulted in the illegal use of force to displace indigenous marine fishing and seafaring cultures, and

Because centuries of human activity have created impediments to American eel migration beyond artificial barriers which pose significant threat to American eel populations, and

Because health advisories discouraging the consumption of American eels due to pollution identifies a significant threat to the culture and health of the Unkechaug Indian Nation, and

Because regulations which enable privileged exploitation of live animals for recreational purposes are immoral and inconsistent with Unkechaug Indian Nation cultural values and

Because competing jurisdictions have promulgated rules which do not take into account the inherent right of indigenous communities to economic self-sufficiency and

Because indigenous people have an obligation to ensure Eel populations can be sustained through management mechanisms which balance the economic interests of Unkechaug Nation members, with the cultural interest of future generations and the environment, and

Because it is necessary to ensure continued access to healthy food sources through nation programs to encourage cultural awareness, healthy living and sustainable job creation, now

Therefore, the Unkechaug Indian Nation establishes the American Eel management plan for development of fisheries management and restoration of eel populations within their natural range through responsible stewardship on an individual and community basis.

In furtherance of these objectives and in accordance with fisheries cooperation and trade agreements entered into between the Unkechaug Indian Nation and other indigenous tribal governments and organizations, the nation has establishment the following policies setting forth a regulatory system to safeguard against continued depletion of American Eels, and

For the purpose of ensuring Unkechaug Indian Nation

development of eel capture, grow out and stalking is undertaken in a manner consistent with nation responsible stewardship objectives, the Unkechaug Indian Nation hereby establishes the American eel management and restoration plan to authorize cooperation with indigenous and other governments in the responsible management and restoration of this vital cultural and economic resource.

SECTION 1.2: Moratorium; taking of Elvers, Silver and Yellow Eels Prohibited. Except as authorized under this Part, no person may take American Eels in excess of 4 inches.

SECTION 1.3: Authorized Takings/Uses. The following methods of taking and purposes of use shall be authorized through a license/permit issued by the designated agent of the Unkechaug Indian Nation provided no eels may be taken unless authorized under this part.

A. Ceremonial/Subsistence use: In accordance with the provisions set forth in this Plan, any member of the Unkechaug Indian Nation whose license or permit to harvest marine resources is not revoked or suspended by the Unkechaug Indian Nation, is eligible to engage in the taking of Yellow Eels under the following conditions.

1. **Subsistence Fishing.** Until the Unkechaug Indian nation has determined that the consumption of adult eels does not pose a health risk. a weekly subsistence take and possession limit shall consist of one Silver or Yellow eel no

less thanlB inches in total body length, per each member of the permit holder's household.

2. **Ceremonial Purposes.** The authorized take limit for ceremonial purposes shall be established by the designated agent of the Unkechaug Indian Nation, provided

   i. the number of Eels taken for consumption at a private ceremony, shall not exceed one yellow eel, no Jess thanlBinches in total body length per adult participating in the ceremony, regardless of the nature of the ceremony,

   ii. If the taking is for a public ceremony or cultural event, the number eels authorized to be taken shall be established by the designated agent after consultation with the applicant for a ceremonial fishing license/permit.

B. **Educational Purposes.** Any enrolled member of the Unkechaug Indian Nation, whose license/permit is not under suspension or revocation by the Unkechaug Indian Nation, may apply for a pennit to take American eels for educational purposes provided that

1. American eels taken for educational purposes shall be returned unharmed to the waters where such eels were taken, except that yellow eels in excess of 18 inches in total body length may be used for subsistence or communal use upon

written authorization/direction by the designated agent of the Unkechaug Indian Nation, or

2. Upon approval of a written request made by any member of the Nation to the designated agent as long as the request is provided in writing prior to the taking.

C. Commercial Taking of Glass Eels. Any enrolled member of the Unkechaug Indian Nation whose subsistence or commercial Yellow eel fishing license/permit is not under suspension or revocation by the Nation may apply for a commercial Glass Eel fishing license/permit under the following conditions.

1. **Election of Method.** Members of the Unkechaug Indian Nation applying for a commercial Glass Eel fishing license/permit, shall elect one of the following methods when completing an application for a glass eel fishing license/permit;

   a. dip net,

   b. Fyke net, or

   c. Combination dip/Fyke net,

2. **Reporting Requirements.** The designated agent of the Unkechaug Indian Nation shall require all applicants for **a** commercial Glass Eel fishing license/permit to complete any past

due or delinquent landings reports prior to being issued a glass eel fishing license/permit, or American eel transportation license/permit,.

a. An applicant subject to subsection 1.3. C,2 must complete a landings report provided by the designated agent regardless of whether the applicant landed any American Eels during the preceding year.

b. The designated agent shall develop application and landings report forms necessary to satisfy the requirements of the Unkechaug Indian Nation, provided

c. Landings reports shall require a description of the body of water and town or territory from which any American Eels were taken for any purpose.

d. all personal information collected or obtained from individual members through the landings report process shall be held by the Nation as confidential

e. Information regarding American eel landings may be provided to regulatory bodies, provided that the designated agent may only provide information describing total landings under American eel Permits, on a geographic basis.

3. **Commercial Glass Eel Dip Net fishing license/permits.** Any member of the

Unkechaug Nation shall be eligible to apply for a commercial Glass Eel Dip Net fishing license/permit, provided that, the applicant does not possess an American Eel fishing license or permit issued by another jurisdiction.

4. **Commercial Glass Eel Fyke Net fishing license/permits.** Any member of the Unkechaug Nation shall be eligible to apply for a commercial Glass Eel Fyke Net fishing license/permit, provided the applicant does not possess an American Eel fishing license or permit issued by another jurisdiction.

5. **Combination Dip/Fyke Net Glass Eel Fishing license/Permit.** Any member of the Unkechaug Indian Nation whose Commercial fishing license or permit is not under suspension or revocation by the Unkechaug Indian Nation, shall be eligible to apply for a combination Dip/Fyke Net Glass Eel fishing license/permit, provided the applicant does not possess an American Eel fishing license or permit issued by any other jurisdiction.

6. **Conditional Glass Eel Fyke Net Fishing permit** An applicant for a commercial Glass Eel fishing permit, whose license/permit is under suspension by a Court of competition jurisdiction for failure to pay child support, may apply for a conditional commercial Glass Eel fishing permit under the following conditions

    a. The applicant enters into an agreement with the designated agent requiring the applicant to forfeit, to the designated agent, a sum

equal to the amount owed but not to exceed fifty percent (50%) of the value of the applicant's daily catch.

b. Each amount forfeited to the designated agent in accordance with subsection 5.3, C.6, be shall be immediately transferred by the designated agent to the individual or entity to whom the debt is owed.

   i. The designated agent shall maintain a report detailing the catch from which the forfeiture was made and a monetary receipt signed by the person to whom the forfeiture was transferred identifying the balance owed.

   ii. An applicant for a conditional Glass Eel fishing permit shall be subject to the reporting requirements established under Section 1.3 C, 2, a, b, c.

   iii. A member of the Unkechaug Nation who is also a member of another band, nation or tribe and whose license or permit is under suspension or revocation by such other band, nation or tribe for reasons identified in Paragraph 7 above, shall not be eligible to apply for a conditional permit.

   iv. The holder of an Unkechaug Nation conditional Glass Eel fishing permit may, upon meeting all conditions and

obligations identified under Section 1.3 C, 7, a, b, and d, apply for and receive an Unkechaug Indian Nation commercial Glass Eel fishing license/permit established under Section 1.3 of this part

SECTION 1.4: Prohibited Acts/Restrictions. It shall be a violation of this Part for the holder of an Unkechaug Indian Nation commercial fishing license/permit to engage in activities described herein without the written authorization of the designated agent.

A. Restrictions on use Fyke Nets.

1. No Fyke Net may be deployed, located, set or used in any manner, which prevents the free passage of American eels and other fishes by obstructing or blocking any river, tributary, branch of a river, stream, brook, estuary, creek or other area or

2. Set a Fyke net, leave a Fyke net or cause a Fyke net to injure, damage, kill or otherwise destroy Glass Eels or other species of fish while fishing for Glass Eels.

3. Net tags provided by the Unkechaug Indian Nation shall be affixed at all times to the outer wing section of Fyke nets prior to transportation and deployment

4. No person may build or use a platform, boat or other artificial structure or to fish for

Glass Eels. This subsection does not prohibit fishing for Glass Eels from piers or floats established for purposes other than American Eel fishing.

B. Minimum Distance between Fyke Nets.

1. No person, whether that person is permitted to engage in the taking of Glass Eels, may set or cause another to set a Fyke Net within 30 feet in any direction, of any section (excluding the anchor line and anchor) of another Fyke net onto which an Unkechaug Indian Nation Commercial Glass Eel fishing net tag is attached, when such other net has been set at or below the high-water mark.

2. Any commercial Glass fishing Dip net or Fyke net determined by an authorized agent of the Unkechaug Indian Nation to be in violation of this section may be forfeited if the person setting the Fyke net refuses to remove the net after having been directed to do so by the designated agent of the Unkechaug Indian Nation.

3. In addition to a forfeiture resulting from a violation of this section, a person who declines to remove a commercial Glass Eel Fyke net after having been directed to do so by the designated agent of the Unkechaug Indian Nation, shall have his or her Unkechaug Indian Nation commercial glass eel license/pennit revoked and be assessed a

penalty of not more than $250.00 to be deducted from the permit holder's share to cover the costs incurred in removal of the Fyke net.

C. Damaging, Molesting, Tampering with a Fyke Net.

1. No person, whether they are licensed or pennitted by the Unkechaug Indian Nation to engage in the commercial taking of eels, may damage, molest, move, obstruct, tamper with, or cause another to damage, molest, move, obstruct or tamper with a Fyke net, whether or not the Fyke net is tagged, without being authorized to do so by the Designated agent of the Unkechaug Indian Nation.

2. For purposes of this section, damaging. molesting. obstructing or tampering with fishing equipment shall include but is not limited to, altering the performance of a Fyke net belonging to another whether the Fyke net is tagged or not, by

    a. lifting a Fyke net for the purposes of emptying the contents of a Fyke net without being authorized to do so, or

    b. Altering the performance of a Fyke net by damaging a Fyke net, setting or placing an obstruction on or near a Fyke net in a manner that interferes with the

performance and operation of a Fyke net.

D. Exception. It shall not be considered a violation of this Part for the holder of an Unkechaug Indian Nation commercial fishing license/permit to aid the holder ofa Unkechaug Nation commercial Glass Eel fishing license/permit in tending a Fyke net, provided

1. the person(s) to whom assistance is being provided owns the Fyke Net to be tended, is present, and has first notified the designated agent of the Unkechaug Indian Nation of the request and location of the Fyke net, or

2. A Unkechaug Indian Nation fishing license/pennit holder is providing a commercial Glass Eel Fyke Net license/pennit holder with assistance in meeting compliance requirements associated with ensuring the free passage of fishes and any eels greater than 4 inches in length away from a net.

3. The persons providing assistance are acting in the capacity of fisheries observers on behalf of the Unkechaug Indian Nation or have been authorized to provide technical assistance by the designated agent of the Unkechaug Indian Nation.

E. Neglecting or leaving a Fyke Net Unattended. It shall be considered a violation of this part for any person, to

1. leave or cause another to leave a Fyke net, which is capable of catching or retaining Eels in any location at or below the high water mark, unattended for any duration of time that may result in the destruction or waste of any eels, and

2. to leave or cause another to leave a Fyke net at any location at or below the high water mark for purposes of holding a place to deploy a Fyke net. if the Fyke net remains fixed to the shoreline for more than twelve 12 hours regardless of whether the Fyke net is set in a manner which allows the net to catch eels.

SECTION 1.5: Illegal Use of Fyke Nets/Over Fishing. No member of the Unkechaug Indian Nation may engage in the illegal use of a Fyke net, or overfishing. by

A. supplying a person with a Fyke net. for the purpose of obtaining or receiving through any means, payment or other consideration, which exceeds ten percent 10% of the value of Glass Eels taken or which in the aggregate, exceeds the reasonable value of a Fyke net, within any period; or

B. Accepting a Fyke net by entering into any agreement through which the person(s) supplying the Fyke net receives payment or other consideration which exceeds ten percent 10% of the value of Glass Eels taken, or which

in the aggregate, exceeds the reasonable Value of the Fyke net within any period.

i. For purposes of this section, the reasonable value of a Fyke net shall be determined by comparing the Fyke net allegedly supplied or used in violation of this Part, with a Fyke net of comparable condition, design and size, whether or not the person supplying the Fyke net is engaged in the manufacturing or commercial sale of Fyke nets.

ii. The terms "supplying a Fyke net" and "accepting a Fyke net" shall have the same meaning when accomplished through any type of permanent or temporary lease, sale or transfer of Fyke nets, for fees or other consideration 6 which exceeds ten percent 10% of the value of Glass Eels taken in any period or which in the aggregate amount of eels exceeds the total value of the Fyke net.

iii. "Illegal use of a Fyke net" shall be defined as, but not restricted to engaging in any act that would affect the status or condition of a Fyke net, for purposes of checking a Fyke net for contents, removing any eels, or emptying the contents of a Fyke net without authorization.

iv. It shall not be considered a violation of this part for a person acting in any official capacity on behalf of the designated agent of the Unkechaug Indian Nation to lift, move or

check the contents of **a** Fyke net for purposes of training and or ensuring compliance with the provisions of this part.

SECTION 1.6: Restrictions on the use of Dip Nets.

1. It shall be a violation of this section for any person, to use a dip net within six feet 6' of any Fyke net in any direction without being authorized to do so.

2. If the handle of a dip net exceeds six feet 6', then the minimum distance from a Fyke Net within which the Dip Net may be used shall be determined by the overall length of the Dip Net including the hooped or circular portion of the Dip Net.

SECTION 1.7: Penaltles for fishing out of Area/Season. Any Unkechaug Indian Nation commercial fishing license/permit holder found to be fishing outside the American Eel Management area designated on the permit holder's application, or during any closed period, shall be ineligible to apply for a commercial glass eel fishing license/permit during the following year.

A. Illegal Possession.

1. American eels found by the designated agent of the Unkechaug Indian Nation to be in the possession of any member of the Unkechaug Indian Nation in violation of this Part shall be

subject to seizure and immediately released unharmed into the waters from which they were taken or in an adjacent body of water established as an American Eel restoration target area by the designated agent.

B. Mandatory Suspension/Revocation.

1. A violation of subsection 1.5,6 and 7, shall be considered an offense for which the designated agent shall have authority to enforce the laws of the Unkechaug Indian Nation by assigning the following penalties.

    a. for a period of one year for each of up to three violations of subsection 1.5,6, 7, occurring within the same fishing year, and

    b. For a period of five years for three or more violations of subsection 1. 5, 6 and 7 occurring within the same fishing year.

2. The designated agent of the Unkechaug Indian Nation shall consider the totality of the circumstances, including economic loss (if any) and impose an order of restitution if the designated agent of the Unkechaug Indian Nation finds that the offense resulted in economic or property loss, including

    a. The reasonable expenses borne by the Unkechaug Nation in the investigation of allegations resulting in a finding of

violations of section 1.5, 6 and 7.

3. In addition to any suspensions or revocations, the designated agent of the Unkechaug Indian Nation may consider alternative penalties which include community service to aid restoration efforts commensurate with the severity of the violations of this Part for which a person has been found to have committed.

    a. The designated agent of the Unkechaug Indian Nation may levy a community service term of no more than one year to any tribal member who intentionally, knowingly, or recklessly:

        i. Damages or destroys the property of another, having no reasonable grounds to believe that the person has a right to do so, such that the injured party is severely impeded in their ability to undertake the activities for which they were permitted under this Part, including but not limited to the harvest and restoration of American Eels.

        ii. For the purposes of this Part, "property of another" shall mean any equipment used in conjunction with the lawful harvest of American Eels and or glass eels under this Part, including but not limited to Fyke and

dip nets. The term "property of another" shall also mean any American Eels landed in exercise of an individual's lawfully recognized right to do so.

SECTION 1.8: Unsafe Fishing, Zero Tolerance.

A. Zero Tolerance. A person who fishes for, takes or attempts to take American Eels while under the influence of intoxicants, shall be considered to be engaging in "unsafe fishing" that poses a danger to themselves and others, whether or not that person possesses a valid Unkechaug Indian Nation fishing license or permit.

B. Unsafe Fishing Activity Defined. Unsafe fishing activity includes but is not limited to.

1. fishing or attempting to fish for American Eels at any location, near or below the high water mark in any area while under the influence of intoxicants;

2. possessing a Fyke net or Dip net at any location near or below the high water mark in any fishing area while under the influence of intoxicants;

3. While under the influence of intoxicants, accompanying a person in possession of a Fyke net or Dip net, who is fishing or attempting to fish for eels in any fishing area, and engaging in any activity defined

under this part

C. A member of the Unkechaug Indian Nation who fishes for, takes or attempts to take American Eels in any eel fishing area has a duty to submit to a test to determine that person's drug alcohol level or drug concentration by analysis of blood, breath or urine if there is a probable cause to believe that the person is harvesting or attempting to harvest American Eels while under the influence of intoxication, alcohol or drugs.

   a. The duty to submit to a blood-alcohol or drug concentration test includes the duty to complete either a blood, breath or urine test, or any combination thereof.

D. The penalty for unsafe fishing defined under section 1.8, A, B and C.

   1. A violation of subsection 1.8, A. shall be considered an offense for which the designated agent of the Unkechaug Indian Nation shall have authority to enforce the laws of the Unkechaug Indian Nation by assigning the following penalties.

   2. A member of the Unkechaug Indian Nation found to be in violation of SECTIONS 1.6, A, 1.7 1.8: A, B., 1.9: B. D. the designated agent of the Unkechaug Indian Nation may suspend the offending party's right to apply for and obtain any Unkechaug Indian Nation

Salt Water Hunting, Fishing and Gathering licenses/permit,

a. for a period of one year for each of up to three violations of subsection 1.6, C occurring within the same fishing year, and

b. For a period of five years for three or more violations of subsection 1.6, C occurring within the same fishing year.

3. The designated agent of the Unkechaug Indian Nation may consider the totality of the circumstances, including economic loss (if any) and impose an order of restitution if the designated agent of the Unkechaug Indian Nation finds that the offense resulted in economic or property loss, including,

   a. The reasonable expenses borne by the Unkechaug Indian Nation in the investigation of allegations resulting in a finding of any violations of this part

4. In addition to any suspensions or revocations, the designated agent of the Unkechaug Indian Nation may consider alternative penalties which include community service to aid restoration efforts commensurate with the severity of the violations of this Part for which a person has been found to have committed.

1.9: Annual American Eel Resource Report. At the conclusion of each seven day period following the date during which glass eels are initially taken under authority of the Unkechaug Indian Nation or at the direction of the designated agent of the Unkechaug Indian Nation,

1. The designated agent shall establish an American eel resource report establishing the number and weight in kilograms of eels harvested by members of the Unkechaug Indian Nation.

2. The report shall quantify the number and type of permits issued and shall include all infonnation collected pursuant to the requirements of this Part, in addition to meeting the requirements of this part, the report shall serve as the basis for establishing restoration objectives by,

3. assessing the health of the American eel resource, including but not limited to the estimated population of American eels within harvesting and restoration areas and the stability of the American Eel habitat within those areas

    a. Assess the effectiveness of existing regulatory measures implemented by the Unkechaug Indian Nation.

    b. consider measures to enhance Unkechaug Indian Nation American eel restoration

efforts within targeted areas and

c. recommend changes, if any, to the existing the Unkechaug Indian Nation American Eel restoration and management plan;

i. Within seven days of completing the American Eel Resource Report, the designated agent shall assess the condition of the American Eel resource to determine the adequacy of existing management measures to achieve responsible stewardship objectives.

ii. In carrying out the assessment and reporting requirements of this Part, the Unkechaug Indian Nation may undertake further assessment of the biological health of the resource by determining toxin levels and overall health of all life stages of American Eels.

iii. The designated shall determine whether changes are needed to existing management measures and develop those changes, if any.

iv. In developing proposals for adjustment to existing management measures, the department shall base its recommendations concerning the ability of the Unkechaug Indian Nation to meet current American Eel restoration objectives within existing American eel

harvesting areas while providing precedence to American Eel restoration over commercial utilization of eels.

v. The designated agent shall incorporate proposals based upon the American eel resource reports into the Unkechaug Indian Nation eel restoration plan.

Part 2: American Eel restoration, stocking, objectlves.

In accordance with the provisions set forth under Part 1: of the Unkechaug Indian Nation American Eel management plan, the taking of American Eels shall remain consistent with the cultural values and traditional practices of the Unkechaug Nation, by

Ensuring the American eel continues to play an important role ln the culture and economy of the Unkechaug Indian Nation through development of restoration and grow out capacity which enables the Unkechaug Nation to meet culturally based responsible stewardship objectives established under the provisions of this plan within 5 years.

Those objectives include but are not limited to ensuring to the greatest extent possible, that in support of developing economic opportunities for its members, the Unkechaug Nation shall take only what is needed to sustain the cultural and economic interests of the Unkechaug Nation and future generations by requiring the stocking no less than fifty percent of glass eels taken by the Nation for any

purpose from within its territorial waters into areas designated by the Nation as traditional American eel habitat within five years.

2.1 Identifying potential areas for stoking.

A. The Unkechaug Nation or its designee shall identify potential areas for stocking by surveying bodies of water to determine the number and extent to which artificial barriers pose a threat to American eel passage to historic areas

B. By assessing glass eel mortality associated with the inability of glass eels to negotiate artificial barriers to American eel passage to suitable American eel habitat

C. Surveying potential stocking areas for sources of human activity which may contribute to recreational overutilization and exploitation of American eels, and

D. Establish recommendations to mitigate threats to migrating American eels from commercial, industrial and recreational activities within Unkechaug territories.

E. To the extent feasible and consistent with the laws and customs of the Unkechaug Indian Nation, coordinate with tribal nations, state and federal jurisdictions for the restoration of the American eel resource within its natural habitat and range.

2.2 Increase in wild caught stocking effort.

A. Commencing with the 2014 glass eel fishing season, no less than 10% of all glass eels harvested by the Unkechaug Indian Nation, shall immediately be placed directly above artificial baniers to passage of glass eels to historic American eel habitat and

B. During each subsequent fishing year thereafter, the Unkechaug Indian Nation shall require an additional 10 % percent of glass eels harvested by the Unkechaug Nation to be stocked in accordance with the provisions established under Section 2.1 or until the nation has attained its goal of 50% stocking of wild caught glass eels into bodies of waters beginning nearest to the Unkechaug Indian Nation territory, then

C. To other bodies of water within the territories of Native American jurisdictions having executed fisheries cooperation and trade agreements with the Unkechaug Indian Nation and who have instituted similar American Eel management plans

D. In coordination with non-native organizations and jurisdictions having entered into agreements authorizing the co management of the American eel resource. Provided such co management agreements respect the cultural values and economic interests of the Unkechaug Indian Nation and or other with respect to

access, management and restoration of American Eels within their natural range.

2.3 Eel farm (on growing) participation in stocking effort.

A. The development of Unkechaug Indian Nation American eel growing capacity shall be pursued in a manner which enables the Nation to meet its wild caught glass eel stocking objectives established under this part and

B. Shall maintain sufficient capacity to assist other Native American governments with meeting American eel stocking objectives in accordance with section 2.2, C

C. Enter into agreements with non-native jurisdictions to facilitate American eel restoration for purposes of increasing the American Eel biomass and not for purposes of commercial utilization or recreational exploitation of American eels

D. Enter into agreements with power generating facilities in order to establish greater escapement for migrating adult American eels and stocking of glass eels.

/s/ FRED MOOSE MOORE

APPENDIX M

Memorandum of Agreement between the Unkechaug Indian Nation

and the

State of New York

on

Joint Management of the American eel

I. PREAMBLE

A. Pursuant to the government-to-government relationship between the Unkechaug Indian Nation (Nation) and the State of New York ("State") (hereinafter referred to as the "Parties"), the Parties proclaim a Memorandum of Agreement ("Agreement") to promote cooperation and good relations between governments, and commit their respective departments and agencies to fultill this Agreement and adhere to the policies set forth herein.

B. The Parties recognize that the survival of the American eel is linked to sound management measures and will require coordinated efforts to protect the long term health of the resource and the ability of current and future generations of Unkechaug Indian Nation and non-nation members to harvest the American eel.

C. The Parties support self-determination and meaningful self-regulation, enforcement, and prosecution of violations of state and Unkechaug Indian Nation laws with respect to management of the American eel.

D. The Agreement demonstrates to the federal government, and others, our good faith efforts to responsibly and effectively conserve the American eel for the long term, while addressing the American eel related concerns of all New York state citizens.

E. The Parties are cognizant of the overlapping nature of their respective jurisdictions and authorities, which create a cooperative co-management relationship between the two sovereigns.

F. This Agreement delineates how the Nation and State will exercise their unique authorities to work in concert as sovereign governments to maintain self-sustaining American eel populations, and avoid a moratorium on the statewide fishery or the placement of the American eel under federal protection.

II. PURPOSE

A. This Agreement is intended to promote coordination and communication in the conservation of American eels in New York, in which the Unkechaug Indian Nation and State share a mutual concern.

B. The purposes of this Agreement are to:

i. Designate responsibilities for each party with respect to American eel conservation in New York.

ii. Delineate a process to co-manage the Unkechaug Indian Nation American eel fishery for the 2014 season and implement a comprehensive government-to-government American eel management plan for 2014 and beyond.

iii. Outline management measures that the Nation will implement to limit the amount of gear utilized by Nation members for the harvest of the American eel within the areas Easterly of Nicoll island in Nicoll Bay and westerly of Reedy Island in Moneyboque Bay.

iv. Require accurate and comprehensive reporting of landings by Nation members, and assist the State in cooperative management of the American eel fishery.

v. Ensure that the State does not purssue measures that constitutes a unilateral and severe restriction on the ability of Unkechaug indian Nation members to pursue a livelihood where scarce opportunities for meaningful employment exist.

III. COMMITMENTS

In recognition of the foregoing statements, the Parties

adopt the following commitments to guide the cooperative management process and implementation activities relative to the shared American eel resource:

A. In addition to committing to the adherence of permitted its members to the Unkechaug Indian Nation American Eel Management Plan, the Nation will implement the following management measures to reduce the amount of gear utilized by Nation members for the harvest of the American eel, ensure that all reporting requirements are met, and alleviate pressure on the American eel:

   i. **Election of Method** - The Nation shall institute a measure restricting Nation membeers to the use of Dip nets in conjuction with the taking of glass eels

   ii. **Permit Application Deadline**- the Nation shall establish a permit application deadline for 12:00 p.m. eastern standard time on March 22, 2014, thereby eliminating entry to the fishery beyond the beginning of the season.

   iii. Mandatory Reporting Requirements- the Nation shall require all members who hold permits during the 2014 American eel fishery tp report their 2014 landings, which the Nation shall make available to the state

B. The State shall agree to "refrain" from any action, which purports to address the declining population of the American eel by placing a unilateral action to limit the harvest of the American eels by the

Unkechaug Indian Nation.

C. The Parties shall coordinate management activities, and regularely communicate landings information, as required under Nation and state law for the duration of the 2014 American eel season.

D. The Parties shall form an Joint American Eel Technical Committee. The Committee will meet at the conclusion of 2014 American eel season to exchange landings reports and information; discuss management and enforcement activities from the 2014 season; and coordinate the preparation of a comprehensive cooperative management agreement that may be considered for enactment by the Unkechaug Indian Nation and the state of New York.

   i. Issues that the Joint American Eel Technical Committee shall discuss include but are not limited to:

      a. The effectiveness of management mechanisms utilized during the 2014 Unkechaug Indian Nation American eel season;

      b. The extant to which the parties to this Agreement met the obligations set forth herein;

      c. Policies to further alleviate pressure on the American eel in the State of New York by

addressing problems such as habitat loss, passage mortality, illegal takings, and overfishing;

d. Consider alternative management mechanisms, such as Total Allowable Catch, that will improve efforts to manage the harvest of the American eel and improve the health of the resource; and

e. Means to improve coordination between the Nation and State on marine resource management and enforcement.

IV. RECITALS

A. Nothing in this Agreement shall be deemed as a concession by either party as to the other party's claims, nor an admission of the same, nor a waiver of the right to challenge such claims. Neither this position nor the activities of the parties pursuant to this Agreement shall be utilized to affect the equitable or legal position of either party in another future litigation.

B. This Agreement does not purport to declare any legal rights or authorities. Nothing herein shall be deemed as enlarging or diminishing the jurisdiction or authority of the State or Nation to regulate the activities of Nation members.

C. This Agreement shall be for a term of one year, commencing on the effective date of this Agreement, provided however, that this Agreement

may be terminated by either party by deliver of written notice of termination to the other party not less thanthirty (30) days prior to the date of desired termination.

D. This Agreement shall be ratified by the Unkechaug Indian Nation and the State of New York, in a manner to be determined by each respective sovereign.

V. EFFECTIVE DATE

This Agreement shall take effect when each of the signatories indicated below have executed this document.

_____

Unkechaug Indian Nation

Commissioner, Department
of Environmental Conservation

[NEW YORK STATE DEPARTMENT OF
ECONOMIC DEVELOPMENT LETTERHEAD]

April 15, 1994

Barbara M. Whiplush, Esq.
Assistant Town Attorney
Town of Brookhaven
Department of Law
3233 Route 112
Medford, NY 11763

Dear Ms. Whiplush:

I am in receipt of your letter which seeks documentation regarding official recognition by New York State of the land of the Unkechauge Nation (Poospatuck Tribe) as an Indian Reservation.

The Poospatuck Reservation is within the lands which were patented to Colonel William Smith, Chief Justice of the Province, in 1693 by William and Mary. From those lands, Colonel Smith conveyed, by a deed dated July 2, 1700, to the tribe 175 acres to "the intent sayd@@ Indiaus@@, their children and postarryts@@ may not want sufficient land to plant on forever." *N.Y.S Assembly Report of Special Committee to Investigate the Indian Problem of the State of New York,* 55 (1889) ("Whipple Report"). The language of the conveyance expresses an intent to grant an Indian tribe the right to possess land and to render the land inalienable.

It is my understanding that the State of New York honored deeds and patents granted by its Colonial predecessor. You may want to research the first State Legislature. I believe you will find that there was a blanket acknowledgement of the acts of the colonial government, and not acknowledgement of each individual transaction such as the 1700 deed by Colonel William Smith.

I have been advised by the State Education Department that it has provided for the education of children on the Poospatuck Reservation since 1846 when the State assumed responsibility for the education of Indian children on all reservations. The Whipple Report noted that there was a State school on the Poospatuck Reservation in 1688. Currently, the State Education Department contracts with the Center Moriches School District to educate children from the Poospatuck Reservation.

Although the Unkechauge Nation is not a federally recognized Indian tribe, its lands may be subject to the protection of the United States pursuant to 25 U.S.C. §177. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F. 2d 370 (1st Cir. 1975); *Naragansett Tribe of Indians v. Southern Rhode Island Land Development Corp*., 418 F. Supp. 798 (Dist. Ct. R.I/ 1976).

Feel free to contact me if I can be of further assistance to you.

Sincerely,

/s/
Robert C. Batson

1. Indians - General Info
2. RCB
3. Chron.

January 8, 1982

Joe A. Quatone
Executive Director
Florida Governor's Council
on Indian Affairs, Inc.
521 E. College Avenue
Tallahassee, Florida 32301

Dear Mr. Quatone:

I am writing in response to your letter to Governor Carey concerning guidelines utilized by New York State in determining whether a Native American group is acknowledged as an Indian tribe for state governmental purposes.

No specific guidelines for this purpose exist in New York. All organizations which are presently acknowledged as Indian tribes have been so acknowledged since colonial times or shortly after the American Revolution. The following acknowledged tribes are mentioned in treaties with the United States or New York State or both: Cayuga, Oneida, Onandaga, Seneca, St. Regis Mohawk and Tuscarora. The Poospatuck and Shinnecocks were treated as Indian tribes by the colonial government and their continuing status has been referred to in several acts of the State Legislature. In addition, the Tonawanda Band of Senecas has been treated as a separate tribal

organization by various acts of the State Legislature, and is currently recognized as an Indian tribe.

Some other tribal organizations are mentioned in colonial documents and early acts of the State Legislature. However, these organizations have ceased to exist in New York State and they are no longer acknowledged as Indian tribes for state governmental purposes.

No other organization has requested tribal status in modern times. Thus, the State has had no need to develop guidelines for determining tribal status.

I trust this information will be of assistance to you.

Sincerely,

Robert C. Batson
Associate Attorney

RCB:wly

cc: Elma Patterson

[STATE OF NEW YORK
EXECUTIVE CHAMBER LETTERHEAD]

Henrik Dullea
Director of State Operations
And Policy Management

June 8, 1988

Dear Commissioner Chu:

In his 1988 State of the State Message to the Legislature, Governor Cuomo asked me to review State relations with the nine Indian Nations Located in New York State and report my findings and recommendations to him.

Enclosed for your review and comment is a copy of my Preliminary Report to the Governor on State–Indian Relations. Although it reflects only an initial examination of this issue, I believe that it represents an important first step in improving both the State's understanding of these critical intergovernmental issues and focusing attention on a number of areas that warrant action or additional study.

It is our intention, after discussion with interested parties such as you, to use the findings and recommendations contained in this Preliminary Report to form the basis of recommendations for further administrative actions and possible legislative and/or budgetary action.

Any comments that you may have on this report should be transmitted to Jeffrey Cohen, Program Associate in the Governor's Office. He can be reached at the State Capitol, Executive Chamber, Room 242, Albany, New York 12224.

Sincerely,

/s/

Honorable Roderick G.W. Chu
Department of Taxation and Finance
State Campus Building #9
Rm. 250
Albany, New York 12227

CONTENTS

* * *

The Seneca Nation and St. Regis Mohawk Tribe have elective governments. The Seneca nation has a written constitution with a single, elected chief executive (president), an elected council and a formal judicial system. The St. Regis Mohawk Tribe has three elected chiefs who govern as a council. In recent times, the St. Regis Mohawk chiefs have voluntarily shared some power with the traditional chiefs and an elective government on the Canadian side of the reservation.

The Shinnecock and Poospatuck (Unkchauge) Tribes, of Algonquin origin, reside on reservations in Suffolk County. These nations are recognized by New York State through treaties negotiated with our colonial predecessors, but they are not recognized by the United States Bureau of Indian Affairs and, thus, are not eligible for programs of that agency. Both tribes are governed by elected trustees.

New York State's relationship with the Indian nations initially developed through treaties with colonial authorities and then with the State government in the early post–revolutionary period. Title to Indian land in New York is generally held in fee simple by the individual nations. This arrangement contrasts with the State–Indian relationships that developed in the West and most states of the South, where the federal government holds title to Indian land in trust for the tribe or nation.

* * *

[STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
LETTERHEAD]

August 29. 1996

Hon. Anita Vogt, Administrative Judge
Office of Hearings and Appeals
Interior Board of Appeals
4015 Wilson Blvd.
Arlington, VA 22203

Re: Federal Acknowledgement of the Ramapough Mountain Indians
Docket No. IBLA@@ 96-61-A

Dear Honorable Judge Vogt:

The Office of the Attorney General of the State of New York is in receipt of your order dated July, 25, 1996 in regard tp the above-referenced matter. The existing policy of the State of New York with regard to recognition of Native American tribes is that the State will grant recognition following a determination of federal recognition by the United States Department of the Interior.

The only tribes recognized by the State and not the Federal Government are the Unkechaug and Shinnecock tribes, whose relationship and treaties with New York State Government predate the existence of the Federal Government. The State of New York does not officially recognize the Ramapough Mountain Indian Tribe.

Please advise this office when briefing resumes so that this office has the opportunity to file an answer brief, if warranted. Thank you for your consideration.

Sincerely,

/s/
DENNIS C. VACCO
Attorney General

DCV:HCW
cc: /Governor George Pataki