UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

BRIAN FARRISH, EVAN LACZI, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and BASIL SEGGOS,

Defendants.

----------X

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

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AND SHINNECOCK KELP FARMERS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

Daniel Cordalis
Ashley Anderson
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Ave
Boulder, CO 80302
Phone: (303) 447-8760

Attorneys for Amici Curiae National Congress of American Indians and Shinnecock Kelp Farmers

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INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of Plaintiffs David Silva, Gerrod Smith, and Jonathan Smith. Amici are the National Congress of American Indians ("NCAI") and the Shinnecock Kelp Farmers. NCAI, founded in 1944 and based in Washington, D.C., is the oldest and largest national organization comprised of American Indian and Alaska Native Tribal governments and their citizens. NCAI advises and educates the public, state governments, and the federal government on a broad range of issues involving Tribal sovereignty, self-government, treaty rights, and policies affecting Tribal Nations, including their fishing rights and harvesting activities in their historical waters. NCAI serves the broad policy interests of Tribal governments and their communities by working daily to strengthen the ability of Tribal Nations to ensure their health and welfare. NCAI's primary focus is protecting the inherent and legal rights of Tribal Nations through policy positions directed by consensus-based resolutions. These resolutions are presented and adopted at national conventions of the organization's membership, comprised of approximately 300 Tribal Nations, which is renewed annually.

NCAI is deeply committed to the issues presented in this case, including longstanding commitments to upholding the inherent rights of Tribal peoples to continue traditional fishing and harvesting practices within their aboriginal territory. NCAI, as the largest body representing the political interests of Tribal Nations, passed a resolution in 1957 at its convention in Claremore, Oklahoma, urging Congress to protect Tribal fishing rights at all usual and accustomed locations, whether the Tribe had a treaty or not. The NCAI membership body passed many similar resolutions over the decades calling on the protection of Tribal fishing rights in Alaska and the Pacific Northwest as well as the restoration of Tribal fisheries across the United States. Further, NCAI has an interest in the recognition and consistent application of

federal Indian law principles addressing unresolved Tribal claims that implicate the ability for Tribal people to continue their traditional ways of life.

The Shinnecock Kelp Farmers is a multi-generation collective of indigenous women who are enrolled citizens of the Shinnecock Indian Nation that use their 10,000+-year-old traditional relationship with the sea to advocate for the health of Shinnecock Bay. It is deeply invested in its ability to continue using Shinnecock Bay waters for traditional Tribal lifeways, build a local economy based on restoration practices, and help improve water quality in its local marine environment. The Shinnecock Kelp Farmers grow kelp in Shinnecock Bay to absorb the high levels of carbon and nitrogen pollution discharged into the bay by Long Island communities. The restoration work will facilitate the return of fish, shellfish, and other marine life to the bay and allow Shinnecock people to continue their traditional ocean-based way of life.

ARGUMENT

I. Introduction

Plaintiffs David Silva, Gerrod Smith, and Jonathan Smith ("Plaintiffs") are enrolled citizens of the Shinnecock Indian Nation ("Shinnecock"), a federally recognized Tribal Nation that has occupied its ancestral territory on Long Island for millennia. The Shinnecock people are fishers who have continuously harvested fish, shellfish, and other marine resources in the waters around their ancestral territory, including Shinnecock Bay. Defendants, New York State Department of Environmental Conservation officials, cited Plaintiffs for state law fishing violations in Shinnecock Bay, and Plaintiffs challenged those citations as interference with their Tribal right to fish, which is not subject to state law or state jurisdiction.

Plaintiffs' assertion of retained aboriginal fishing rights presents a unique historical and legal situation involving nuanced federal Indian law issues. As discussed below, in nearly all

cases adjudicating Tribal aboriginal claims, the courts wrestled with treaty language, federal statutes, executive orders, land cession agreements, and Indian Claims Commission ("ICC") decisions addressing a Tribal Nation's land claims (aboriginal title) and usufructuary rights (aboriginal rights) to determine what land title and rights, if any, remained. But not here. Shinnecock never ceded its ancestral lands or inherent rights through a treaty with the United States, no federal statute expressly authorized the cession of Shinnecock ancestral lands or hinted at extinguishing Shinnecock aboriginal title or rights, and Shinnecock was not party to any ICC proceedings that addressed land or rights taken involuntarily. In fact, there are no federal actions that meet the "plain and unambiguous" standard for aboriginal title or rights extinguishment. Instead, Defendants assert this case hinges on whether Shinnecock unambiguously ceded its inherent fishing rights in agreements between Shinnecock leaders and pre-American Revolution townships. Amici do not discuss those agreements, rather, amici offer this brief to help the Court parse aboriginal title and rights legal precedent to show the framework the Court should employ in its review, namely, that those agreements must be analyzed under both the law of aboriginal rights and the Indian canons of construction. This analysis requires this Court to rule for Plaintiffs unless there is plain and unambiguous intent and language that Shinnecock ceded its fishing rights. If not, the Tribal Nation and its citizens, including Plaintiffs, retain their inherent sovereign rights.

II. The Scope of Aboriginal Title and Aboriginal Rights.

a. Aboriginal Title and Aboriginal Rights Are Inherent Rights Established Through a Tribal Nation's Customary Use of Its Ancestral Territory.

Tribal Nations have inherent rights that predate the formation of the United States and, in the absence of express cession or abrogation, remain today as aboriginal rights. *See Holden v. Joy*, 84 U.S. 211, 243 (1872) (recognizing that the Cherokee Nation has inherent rights to its

ancestral land because it was "unquestionably the sole and exclusive master[] of the territory"). As a result of their inherent sovereignty, Tribal Nations possess aboriginal hunting, fishing, and gathering rights based upon their use and occupation of their ancestral territory. *See White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1137 (8th Cir. 1982) ("The Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty."); *see also Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (Tribal Nations have "always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial…"). These rights remain unless ceded, abandoned, extinguished, or formally addressed through federal action.

International law also recognizes Tribal Nations' inherent rights to their traditional territories and resources. Under the United Nations Declaration on the Rights of Indigenous Peoples, "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," and "States shall give legal recognition and protection to these lands, territories and resources." U.N. Declaration on the Rights of Indigenous Peoples, art. 26, Sep. 13, 2007, U.N. Doc. A/RES/61/295 ("the Declaration"). Article 26 of the Declaration further supports the recognition of Tribal Nations' rights to occupy and possess their traditional territory and the right to use their traditional resources.

As understood in property law and federal Indian law, aboriginal title is a right of occupancy and an equitable possessory interest in land. *See Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 784 (1993); *see generally* Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 20-21 (2017). Aboriginal title has been formally recognized since at least

1823, when the Supreme Court recognized Tribal Nations' rights to occupy and possess their aboriginal homelands despite not having fee title, a principle adopted from international law. *See Johnson & Graham's Lessee v. M'Intosh,* 21 U.S. 543, 571-603 (1823) (discussing the "doctrine of discovery," which asserts that, upon a discovering sovereign claiming already inhabited land, the discovering sovereign is vested with fee title, subject to the Tribal sovereign's continued right of occupancy). All European land grants were issued subject to the Tribal Nations' possessory and occupancy rights. *Alabama–Coushatta Tribe of Texas v. United States*, No. 3-83, 2000 WL 1013532 at * 14 (Fed. Cl. June 19, 2000) (citing *M'Intosh*, 21 U.S. at 574-76, 593). Individuals who obtained land through land grants "would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy would only be interfered with or determined by the [sovereign]." *Tee–Hit–Ton Indians v. United States*, 348 U.S. 272, 281 (1955) (citation omitted).

It is "a settled principle" that aboriginal title "is considered as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. 711, 746 (1835). Because aboriginal title and aboriginal rights are property interests protected by the Constitution, the Supreme Court has required the recognition and protection of such rights. *See* Felix S. Cohen, *Original Indian Title*, MINN. L. REV. 28, 48 (1947). Courts have, therefore, repeatedly recognized the existence of aboriginal title. *See Oneida Indian Nation of N. Y. v. County of Oneida,* 414 U.S. 661, 667-69 (1974) (recounting the Supreme Court's aboriginal title cases); *see also Pueblo of Jemez v. United States*, 63 F.4th 881, 896 (10th Cir. 2023) (holding that the Pueblo continues to hold aboriginal title to Banco Bonito). Courts also have recognized specific aboriginal usufructuary rights independent of aboriginal title. *See United States v. Abouselman*, 976 F.3d 1146, 1160 (10th Cir. 2020).

b. Aboriginal Title and Aboriginal Rights Legal Framework.

Aboriginal title and use rights derive from inherent Tribal sovereignty and remain unless ceded, abandoned, extinguished, or formally addressed through federal sovereign action. Tribal Nations asserting an aboriginal title claim have the burden of demonstrating "actual, exclusive, and continuous use and occupancy [of land] 'for a long time' prior to the loss of property." *Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 903 (Ct. Cl. 1963). This is a factual determination, and the claimant Tribal Nation must provide evidence to support each element of an aboriginal title claim.

The actual use element requires a Tribal Nation to show that "its people have 'used the claimed land for traditional purposes, including hunting, grazing of livestock, gathering of medicine and of food for subsistence, and the like.'" *Pueblo of Jemez v. United States,* 63 F.4th at 885 (citation omitted); *see also Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012) (stating the "use and occupancy requirement is measured in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers.'") (citation omitted). To prove exclusivity, a Tribal Nation must demonstrate that it "used and occupied the land to the exclusion of other Indian groups," *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975), although there are important exceptions to exclusivity for joint Tribal use areas, *Alabama-Coushatta Tribe,* 2000 WL 1013532, at *16 ("This general rule of exclusive use and occupancy is subject to three exceptions: (1) the joint and amicable use exception; (2) the dominated use exception; and (3) the permissive use exception."). Finally, the Tribal Nation must prove it continuously used and occupied the land over a long period of time. *Pueblo of Jemez*, 63 F.4th at 885.

Because many integral Tribal practices, traditions, and customs are tied to the land, courts have sometimes addressed aboriginal use rights in the same manner as aboriginal title. *See Native Vill. of Eyak*, 688 F.3d at 622-23; *see also Metlakatla Indian Cmty. v. Dunleavy*, 736 F. Supp. 3d 741, 753 (D. Alaska 2024). But in other instances, the same Ninth Circuit court offered a more focused standard on the continued exercise of the inherent sovereign right: "[w]hether or not an aboriginal [fishing] right exists would be a question of fact to establish continuous exercise of the right since before pre-treaty times." *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 n.12 (9th Cir. 1981); *see also Confederated Tribes of the Chehalis Indian Rsrv. v. Washington*, 96 F.3d 334, 341 (9th Cir. 1996) (quoting *Bateman* standard). This latter approach is more consistent with aboriginal use practices, as fishing and hunting locations were occasionally shared between Tribal groups. *See Strong v. United States*, 518 F.2d 556, 561 (Ct. Cl. 1975) ("[T]he court has held on several occasions that two or more tribes or groups might inhabit an area in 'joint and amicable' possession without erasing the 'exclusive' nature of their use and occupancy.").[1]

It is also appropriate for this Court to recognize international law principles in the Declaration protecting aboriginal rights and title. The district court in the 2019 *Pueblo of Jemez v. United States* decision cited the Declaration to support the legal standards governing aboriginal title and its extinguishment, helping lead to the Tenth Circuit's recognition of aboriginal title. 430 F. Supp. 3d 943, 1182 n.217, 1191 n.230 (D.N.M. 2019) (Note 230 states "[t]he United Nations Declaration on the Rights of Indigenous Peoples provides significant protection for

[1] Moreover, the actual, continuous, and exclusive use standard was formalized in the Tribal property takings cases before the ICC, where Tribal Nations sought compensation for claims against the United States for broken treaties and other land losses. *See infra* n.3. Shinnecock is not asserting a takings claim here, only seeking recognition of inherent aboriginal fishing rights.

indigenous peoples' right to the lands and resources they have traditionally owned and prevents the taking of such lands without due process and compensation.").

c. Aboriginal Title and Aboriginal Rights Remain Unless Expressly Extinguished by "Plain and Unambiguous" Sovereign Action.

Aboriginal rights and aboriginal title each exist until they are abandoned or explicitly extinguished by sovereign act – either by the conquering sovereign or Tribal sovereign. In the seminal aboriginal title case, *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 348-51 (1941), the Supreme Court held that the Hualapai Tribe retained aboriginal title to ancestral lands because the congressional acts partitioning out its ancestral territory did not have the express intent to extinguish aboriginal title. While the United States could extinguish aboriginal title through a variety of methods, its intent to do so must be "plain and unambiguous" and will not be "lightly implied." *Id.* at 346, 354.

To determine intent, courts must employ the Indian canons of construction. The canons are a set of judicial rules stating treaties and other agreements allegedly abrogating Tribal property rights must be interpreted as the Tribal Nation would have understood them, that doubtful expressions are resolved in favor of the Tribal Nation, and that treaties and agreements must be construed liberally in favor of the signatory Tribal Nations. *See, e.g.*, *Herrera v. Wyoming*, 587 U.S. 329, 345 (2019) ("Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.") (internal quotations omitted); *Santa Fe Pac.*, 314 U.S. at 354 (Any doubts regarding whether aboriginal title has been validly extinguished "are to be resolved in favor of the [Tribal Nation]."); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (Treaty terms must be construed in the sense they would have been understood by the Tribal Nation.); *Menominee Indian Tribe of Wis. v. Thompson*, 922 F. Supp. 184, 216 (W.D. Wis. 1996) (Potential ambiguities in treaty language

precluded dismissal of a Tribal Nation's claims to off-reservation hunting, fishing, and gathering rights.), *aff'd on other grounds*, 161 F.3d 449 (7th Cir. 1998); *United States v. Michigan*, 471 F. Supp. 192, 252-53 (W.D. Mich. 1979) (Treaties should be construed so Tribal Nations retain all powers of self-government, sovereignty, and aboriginal rights not explicitly taken from them by Congress.). The canons provide a critical lens for this Court to view alleged cessions of Shinnecock aboriginal fishing rights. Given Shinnecock's marine-based lifestyle, it is unlikely that Shinnecock leaders willingly and knowingly gave up fishing rights or rights to access fishing locations. Any doubts, therefore, should be resolved in favor of Shinnecock.

III. Aboriginal Rights Exist Unless Expressly Extinguished and Are Not Immediately Extinguished Even If Aboriginal Title Is Lost.

The cases addressing the interplay between aboriginal title and aboriginal rights claims do not create guideposts as absolute as Defendants assert.[2] *See* Defs.' Mem. Supp. Summ. J. 9-10 ("[A]boriginal fishing and hunting rights are not independent from aboriginal title."). Defendants' theory is that if Plaintiffs cannot establish aboriginal title, they are precluded from asserting an aboriginal rights claim. Defendants cite several sources on this point, *see id*. (cases and treatise), but those sources rely on review of federal actions specifically implicating the asserted Tribal right, such as a treaty, executive order, or federal statute. Notwithstanding the fact that those actions are absent from Shinnecock's history, the cases Defendants rely on still reviewed aboriginal use rights claims independently from aboriginal title. *See* discussion *infra* pp. 11-13. Moreover, in unique circumstances – which Shinnecock's certainly is – courts analyzed aboriginal rights claims without any aboriginal title analysis. *See, e.g., Abouselman*,

[2] Many courts have failed to distinguish "aboriginal rights" from "aboriginal title," often using the terms interchangeably, which can lead to some confusion regarding the appropriate standards. *See, e.g., Native Vill. of Eyak*, 688 F.3d at 622-23 (characterizing the Native Village's aboriginal hunting and fishing rights claims as an aboriginal title claim).

976 F.3d at 1158-60 (Pueblo retained aboriginal water rights); *Vill. of Gambell v. Hodel*, 869 F.2d 1273, 1277-78 (9th Cir. 1989) (Alaska Native Village's aboriginal fishing rights could exist alongside paramount federal interest.).

a. This Court Should Follow the Tenth Circuit's Definitive Statement in *Abouselman* That Aboriginal Use Rights Remain Unless Expressly Ceded or Extinguished.

Aboriginal use rights are extinguished only through express and intentional sovereign action directed at taking those rights. The definitive statement on this requirement comes from the Tenth Circuit's decision on interlocutory appeal in *United States v. Abouselman,* 976 F.3d 1146 (10th Cir. 2020). The issue before the court was "whether, as a matter of law, a sovereign can extinguish aboriginal rights by the mere imposition of its authority and without any affirmative adverse act." *Id.* at 1158. The district court found that the Pueblos had aboriginal water rights, but Spain extinguished those rights when it asserted its law over the region in the 1500s. *Id*. at 1151. The lower court concluded that the imposition of Spanish water management over Pueblo water use, though not impairing their use, constituted aboriginal rights extinguishment. *Id.* at 1152. The Tenth Circuit reversed, stating "[t]here is no indication, let alone a clear and plain indication, that Spain intended to extinguish any aboriginal rights of these three Pueblos." *Id.* at 1160. In comprehensively surveying extinguishment precedent, the court summarized:

> In all cases addressing extinguishment courts have pointed to specific sovereign action that was directed to a right held by an Indian tribe. … Only when that review has shown a sovereign intent to extinguish an Indian right, have courts found that an extinguishment was effectuated. An intent to extinguish can only be found when there is an affirmative sovereign action focused at a specific right that is held by an Indian tribe that was intended to, and did in fact, have a sufficiently adverse impact on the right at issue.

Id. at 1158. The *Abouselman* court conducted the most thorough analysis of aboriginal rights extinguishment law to date and properly concluded that each right – title or use – must be intentionally and expressly extinguished. *Id.* at 1159.

This requirement is buttressed by the Supreme Court's recent ruling in a Tribal jurisdiction case, *McGirt v. Oklahoma*, 591 U.S. 894 (2020). There, the Court held that the State of Oklahoma's treatment of the Muscogee Creek Nation reservation as disestablished was unlawful because Congress never expressly disestablished it. *Id.* at 903-04 ("If Congress wishes to break the promise of a reservation, it must say so."). The Court declared that Tribal Nations are not affected by only the implication of federal action; there must be express congressional language directed at the Tribal property. *Id.* at 916 (dismissing the state's asserted extratextual considerations: "[n]one of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights.").

b. Defendants' Authorities Are Inapposite to Plaintiffs' Claims Because They Involved ICC Awards or Federal Actions Absent in This Case.

Defendants overstate the common thread in the sources they claim bind aboriginal usufructuary rights to aboriginal title. These cases – which are all based on treaty, statute, or ICC awards – do not unequivocally hold that aboriginal rights are extinguished with aboriginal title extinguishment. Instead, they show clearly that courts carefully evaluate aboriginal use rights and that those rights remain until expressly and intentionally extinguished.

In the treaty and statute cases, some which entertain both, the courts delved into treaty language, treaty negotiation documents, statutory language and history, and surrounding circumstances, employing the canons of construction to review the parties' expectations and understandings. When the courts concluded aboriginal rights were extinguished, they did so

only after careful consideration of the right. *See, e.g., Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 471 U.S. 753, 768-74 (1985) (reviewing treaty, land cession agreement, and canons as applied to hunting and fishing rights); *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979) (To review right extinguishment, "the language used in the enactments and agreements that resulted in those [land] cessions must be analyzed."). The state court cases Defendants cite reflect the same methodic approach. *See* Defs.' Mem. Supp. Summ. J. 9-10. And in *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 181 (9th Cir. 1981), the court's extinguishment decision occurred only upon finding that Congress intended a statute to extinguish the Tribal Nation's rights and compensated it for all claims resulting from an unratified treaty. In all, these cases show the necessity of careful judicial review of relevant federal actions, implementing the canons of construction, not that courts summarily dismiss aboriginal rights along with extinguished title.

Further, the two cases reviewing ICC awards support this approach.[3] In *Confederated Tribes of the Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 342 (9th Cir. 1996), the Ninth Circuit held the Tribal Nation's ICC settlement did not provide for reinstatement of extinguished aboriginal fishing rights. Notably, the appeals court did not review the lower court's finding that aboriginal title and aboriginal fishing rights were extinguished because the

[3] The ICC was a statutorily created body whose purpose was to "dispose of the Indian claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45 (1985) (citation omitted). The ICC was created pursuant to the Indian Claims Commission Act of 1946, Act of August 13, 1946, ch. 959, 60 Stat. 1049, to adjudicate and compensate Tribal Nations for land and use rights claims against the United States accruing prior to August 13, 1946 – often aboriginal based – for broken treaties and other land losses. Importantly, once the ICC awarded compensation for Tribal claims, which was the ICC's purpose, those aboriginal, treaty, or other claims were extinguished. In *Pueblo of Jemez*, the Tenth Circuit noted that "Congress deliberately used broad terminology in the [Indian Claims Commission] Act in order to permit tribes to bring all potential historical claims and to thereby prevent them from returning to Congress to lobby for further redress." 790 F.3d 1143, 1152 (10th Cir. 2015) (citation omitted).

Tribal Nation did not appeal that finding, making the court's brief discussion on that issue dicta. In the second case, *Western Shoshone National Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), the court concluded that the Tribal Nation's aboriginal hunting and fishing rights claims were barred because it had received an ICC settlement award to compensate for "full title extinguishment," including use rights. The premise of these cases is that ICC decisions resolved aboriginal title and rights claims through consideration of each right and then compensated Tribal Nations for the extinguishment of those rights. The takeaway is not that these use rights were inextricably tied to aboriginal title.[4]

c. Aboriginal Fishing Rights Can Exist Concurrent to State and Federal Interests.

This Court should not be concerned with Defendants' attempts to scare it away from recognizing Shinnecock's aboriginal fishing rights. Tribal Nations have collaboratively managed fisheries with state, federal, and other Tribal governments across the United States for decades, and Tribal governments devote significant resources to protect and restore fisheries and habitat. *See* Pacific Coast Treaty Indian Rights, 50 C.F.R. § 660.706(d) (2024) ("The Secretary of Commerce recognizes the sovereign status and co-manager role of [Hoh, Makah, and Quileute Indian Tribes and the Quinault Indian Nation] over shared Federal and tribal fishery resources… [and] will develop tribal allocations and regulations in consultation with the affected tribe(s)…"); *see also* Michael C. Blumm et. al., *A Half-Century of Pacific Salmon Saving Efforts: A Primer on Law, Policy, and Biology*, 64 NAT. RES. J. 137, 203 (2024) ("Tribes will play an increasingly prominent role in saving salmon. Along with the federal and state governments, they are one of three sovereigns managing habitat, hatcheries, and harvest..."). Rather than being a threat to

[4] Moreover, Defendants' cite to Cohen's Handbook of Federal Indian Law § 20.01 (2025) lacks force because it relies on only *Molini* and *Confederated Tribes of Chehalis.*

New York's fishery management, Shinnecock's involvement would likely be a boon. Shinnecock's motivation in exercising its fishing rights is the same as it has been for many hundreds of generations: to harvest in a way that utilizes but maintains the important cultural resource of the various species involved. The Court need look no further than the Amici Shinnecock Kelp Farmers' work seeking solutions to restore Shinnecock Bay water quality for marine habitat and protect Shinnecock Tribal trust resources.[5]

Further, Shinnecock aboriginal fishing rights do not displace state fishery interests, as Tribal fishing rights have not displaced federal offshore interests. In *People of the Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989), the Ninth Circuit addressed whether Alaska Native Villages' aboriginal fishing and hunting rights offshore on the Outer Continental Shelf ("OCS") were extinguished by, inter alia, the United States' paramount interests in the OCS, including oil and gas leasing. *Id.* at 1276 ("[T]he national government has 'paramount' interests in ocean waters and submerged lands below the low water mark []. Any claims of right that are inconsistent with national paramountcy, such as state ownership of the seabed beneath adjacent waters, cannot be recognized."). But, as the court clarified, the Villages did not assert sovereign rights, they asserted "rights of occupancy and use that are subordinate to and consistent with national interests," and such rights could exist alongside the overriding federal interests. *Id.* at 1276-77 ("[W]e reverse the district court and hold that the federal government's paramount interests in the OCS do not extinguish the asserted aboriginal rights of the Villages"). Plaintiffs here assert a similar right, an aboriginal right to fish offshore that can exist and be managed alongside state interests.

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[5] *See* Iris M. Crawford, *How Kelp Farming Is Reviving the Economy and Ecology of a Long Island Bay*, POPULAR SCI. (Nov. 18, 2022), https://www.popsci.com/environment/kelp-shinnecock-bay/.

CONCLUSION

Plaintiffs assert they, as Shinnecock Tribal citizens, have aboriginal fishing rights that preclude state interference. Plaintiffs do not need to prove they still have aboriginal title for these rights to exist. If after applying the aboriginal rights framework, including the Indian canons of construction, this Court cannot find in an agreement express language with "plain and unambiguous" intent to cede Shinnecock's aboriginal fishing rights, Plaintiffs retain and can exercise their aboriginal fishing rights.

RESPECTFULLY SUBMITTED this 15th day of May, 2025.

s/ Daniel Cordalis
s/ Ashley Anderson
Daniel Cordalis
Ashley Anderson
NATIVE AMERICAN RIGHTS FUND

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitations of Loc. Civ. R. 7.1(c) and this Court's Order dated April 15, 2025, providing NCAI and Shinnecock Kelp Farmers permission to submit an Amici Curiae brief not to exceed 15 pages, because this brief contains 4,532 words and is 15 pages long, excluding the parts of the brief exempted by Loc. Civ. R. 7.1(c). I certify that this brief complies with the typeface requirements of Loc. Civ. R. 7.1(b) because this brief has been prepared in 12-point Times New Roman font.

s/ Daniel Cordalis
Daniel Cordalis
NATIVE AMERICAN RIGHTS FUND

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2025, I electronically filed the foregoing *Brief of Amici Curiae National Congress of American Indians and the Shinnecock Kelp Farmers* with the Clerk of Court for the United States District Court for the Eastern District of New York through the CM/ECF system. All participants in the case are registered CM/ECF users.

s/ Daniel Cordalis
Daniel Cordalis
NATIVE AMERICAN RIGHTS FUND