Unkechaug Indian Nation v. New York State Dept. of Environmental Conservation, 2023 WL 4054525 (E.D.N.Y., June 16, 2023).

- **Holding**: Fishing by members of the Unkechaug Indian Nation was subject to New York's restrictions on eel fishing because the Nation did not have federally-protected fishing rights under order issued by colonial governor or under limiting language of 25 U.S.C. § 232, and restrictions were necessary for conservation even if such rights existed.
- **Summary**: New York, as a member of the Atlantic States Marine Fisheries Commission, a congressionally authorized interstate regulatory body created to protect Atlantic fisheries, imposed size and catch restrictions on the fishing of American eels in order to prevent further decline in the species. The Unkechaug Indian Nation (Nation) brought an action against the New York State Department of Environmental Conservation and its Commissioner, alleging that New Yorks' fishing regulations were preempted by federal law incorporating an Order issued by New York's colonial governor in 1676 declaring that "[the Unkechaug] are at liberty and may freely whale or fish...as they thinke good according to law and Custome of the Government." The plaintiffs also alleged that the state's restrictions violated their first Amendment right of free exercise of religion because members required access to their customary fishing waters to gather crustaceans and shells in order to make wampum for religious and cultural uses.

  After determining it had jurisdiction pursuant to *Ex parte Young*, and that the Nation's claims were not barred by a state court decision addressing similar claims because it was dismissed for failure to state a claim and did not reach the merits, the court proceeded to hold that:

  - ✔ New York's fishing regulations were not preempted by the limiting clause of 25 U.S.C. § 232, which provides that "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 ...." The court concluded that the limiting clause in § 232 did not apply because there was no agreement or treaty preserving their fishing rights, and rejected the Nation's argument that § 232 preserved their "customary right to fish freely on reservation waters and in customary fishing waters" on the basis that such claim would essentially give them the right to be "free from government regulations altogether," noting that the Nation was claiming that their customary fishing right extended to wherever the fish traveled. The court characterized the claim as "a step too far."
  - ✔ The court found that an order issued by colonial governor Edmund Andros in 1676 (the "Andros Order) declaring that "[the Unkechaug] are at liberty and may freely whale or fish...as they thinke good according to law and Custome of the Government" was not a federal law incorporated by Article VI of the Constitution ("[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"), concluding that Article VI "does not lift all colonial treaties to the level of federal law," and even if it did, the Andros Order was not a treaty because it did 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."

- ✔ If the Tribe possesses the right to freely fish, such right was still subject to state regulation necessary for conservation of the eels, a fact recognized by the Supreme Court in *Puyallup Tribe v. Department of Game of Wash*., 443 U.S. 658 (1979) and *People of the State of New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916) (hunting and fishing rights of Senaca Nation were "subject … 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").
- ✔ The Andros Order was not incorporated into New York state law.
- ✔ The Tribe's claim that New York's restrictions violate dthe Nation's free exercise of religion lacked merit because they were laws of neutral and general applicability that did not target religious beliefs or regulate conduct because it was undertaken for religious purposes.

- **Relevant (2023) Deskbook Sections**: 3:18, 9:5, 9:15
- **Comment**: 1. The court denied the Nation's claim that New York violated its rights by restricting fishing on both reservation and customary fishing waters. Presumably, the holding allows New York to continue enforcing its restrictions on both on-reservation and off-reservation fishing, although the court repeatedly emphasized the greater authority of states to regulate fishing outside reservations. *See* slip op. at 12 ("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."); slip op. at 12 ("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."); slip. op. at 16 (The Supreme Court has consistently held states may impose reasonable, nondiscriminatory regulations on off-reservation lands in the interest of conservation necessity."); slip op. at 16 (citing *New York ex rel. Kennedy* for the proposition that New York could regulate "off-reservation fishing" of Seneca Nation and finding that "the same holding and reasoning applies to the Unkechaug's fishing rights here.").

  2. In making their Free Exercise claim, the Tribe apparently did not cite the Religious Freedom Restoration Act of 1993, which prohibits government from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability, unless the government can show that the burden furthers a "compelling governmental interest" and does so by "the least restrictive means."