

## 2nd Circ. Revives Long Island Tribe's Fishing Rights Case

By Caleb Symons

Law360 (August 26, 2022, 4:54 PM EDT) -- The Second Circuit revived a suit in which three members of the Shinnecock Indian Nation seek to continue using the tribe's ancestral fishing grounds off Long Island, finding they brought a valid bid to stop New York state regulators from prosecuting them for that practice.

The unanimous ruling by a three-judge panel Thursday will send a limited version of the Shinnecock trio's lawsuit back to a district court that **sided with state and local authorities** last year, as the Second Circuit found no evidence that their prosecutions were racially motivated.

Still, the appeals court said Thursday there is "no doubt" that the Native citizens — David Silva, Gerrod Smith and Jonathan Smith — may sue New York Department of Environmental Conservation officials to defend their fishing rights in Shinnecock Bay, on the southern side of Long Island. That claim is enough to overcome the state regulators' sovereign immunity, according to the Second Circuit, which noted that the relief sought is not some expansive land grab that would transfer ownership of the bay or prevent other people from fishing there.

"It would merely resolve the plaintiffs' individual claims that they have their own right to fish there," said U.S. Circuit Judge Steven J. Menashi, who authored this week's opinion.

The new ruling reverses a decision by the late U.S. District Judge Sandra J. Feuerstein, who concluded in February 2021 that the Shinnecock trio did not qualify for an *Ex parte Young* exception to sue the individual DEC officials.

Adopting a magistrate's recommendations, Judge Feuerstein said she also lacked jurisdiction to enjoin Silva's criminal prosecution. As for the plaintiffs' discrimination charge, the judge said she was "not persuaded" that a DEC supervisor's March 2017 emails — telling staff to watch for illegal eel harvesting by the Shinnecock — proved the subsequent criminal proceedings were racially motivated.

"To the contrary," she wrote, "the emails demonstrate that the DEC was enforcing regulations which it thought applied to all New Yorkers, 'native or not', and thus, evidence that the DEC was not acting in bad faith."

But the Second Circuit overturned that ruling, in part, saying the Shinnecock plaintiffs do have standing because their fear of being prosecuted under New York fishing laws "amounts to an injury in fact."

The appeals court did, however, block the men from reviving their discrimination claim against the DEC and Suffolk County.

In district court proceedings, the plaintiffs had pointed to the March 2017 emails in which DEC Captain Dallas Bengel told staff that Shinnecock citizens were reportedly fishing for eel and instructed them to "work the off-reservation areas diligently to prevent illegal harvest."

Those messages neither used a slur to describe tribal members nor ordered DEC workers to harass them, according to the Second Circuit, which said they rather sought a reasonable enforcement goal. Indeed, the DEC cited all three plaintiffs for violating "race-neutral, generally applicable fishing regulations in state waters," Judge Menashi wrote.

"There is no evidence that the DEC officials did or said anything that would indicate racial animus," he said. "Nor is there evidence that they treated non-Indians more favorably than the plaintiffs."

The DEC said Friday it is "reviewing the court's decision and determining next steps."

The New York Attorney General's Office did not respond Friday to a request for comment. A lawyer for the plaintiffs also did not respond.

In their 2018 lawsuit, the Shinnecock men accused the DEC and the county of engaging in a "pattern of criminal prosecutions" against them for fishing in waters where they have "unrelinquished aboriginal and retained rights to fish," including Shinnecock Bay.

But the trio's case experienced early setbacks. In July 2018, Judge Feuerstein **declined to block Silva's criminal prosecution**, following his arrest the previous year for eel fishing without a license in the contested waters. In that decision, the judge — who **died last year in a hit-and-run incident** — also noted that the other two plaintiffs lacked standing because their prosecutions for fishing-related infractions had been tossed years prior.

With the litigation now headed back to trial court, U.S. District Judge Gary R. Brown is set to preside over the proceedings.

The plaintiffs are represented by Scott M. Moore of Moore International Law PLLC.

The state defendants are represented by Letitia James, Barbara D. Underwood, Steven C. Wu and Ari J. Savitzky of the New York Attorney General's Office.

Suffolk County is represented by Dennis M. Cohen and Brian C. Mitchell of the county Attorney General's Office.

The case is *Silva v. Farrish*, case number 21-616, in the U.S. Court of Appeals for the Second District.

--Additional reporting by Emma Whitford. Editing by Patrick Reagan.