

FEDERAL COURTS — TRIBAL SOVEREIGNTY AND FISHING RIGHTS — SECOND CIRCUIT CONFIRMS EXCEPTION TO SOVEREIGN IMMUNITY FOR TRIBAL CLAIMS RELATING TO LAND AND FISHING RIGHTS. — *Silva v. Farrish*, 47 F.4th 78 (2d Cir. 2022).

Tribal sovereignty grants Native American nations the right to govern themselves and their lands, thereby protecting, honoring, and preserving their communities and culture.¹ Despite these guarantees, tribal sovereignty is often illusory in practice and has been systemically eroded by courts, state governments, and Congress alike, leading Native nations and tribal members to turn to litigation to preserve their rights.² Today, various federal court doctrines continue to complicate the path to litigation for tribal members.³ These complications are particularly divisive when they clash with state assertions of sovereign immunity.⁴ Recently, in *Silva v. Farrish*,⁵ the Second Circuit rejected the applicability of several such doctrines and allowed a lawsuit from Shinnecock Nation tribal members to proceed to the merits.⁶ In so doing, the panel narrowed increasingly inapposite Supreme Court precedent, offering clarity and strengthening Native nations' opportunity to assert and litigate their rights in federal courts.

Cases implicating tribal rights often embroil the machinations and fictions of state sovereign immunity. The constitutional basis of state sovereign immunity sits principally within the Eleventh Amendment, which disallows states from being sued in federal court without the

¹ See *Tribal Governance*, NAT'L CONG. AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance> [<https://perma.cc/CS2C-B6QF>].

² See Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 2–3 (John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. RWP04-016, 2004), <https://ssrn.com/abstract=529084> [<https://perma.cc/ESC3-DLV6>]; Guy Charlton, *The Law of Native American Hunting, Fishing and Gathering Rights Outside of Reservation Boundaries in the United States and Canada*, 39 CAN.-U.S. L.J. 68, 74–75 (2014) (explaining that the treaties that enshrine sovereignty and the rights they guarantee are “not always clear and often bitterly disputed,” *id.* at 74, leading to court involvement). Even when Native nations turn to litigation they are hardly guaranteed a favorable outcome, and many courts serve as the very forum for the destruction of these rights. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831). Consider also *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (mem.) (granting certiorari), which could render the Indian Child Welfare Act unconstitutional in the October 2022 Supreme Court Term.

³ See, e.g., *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment)).

⁴ See, e.g., Paul Porter, Note, *A Tale of Conflicting Sovereignities: The Case Against Tribal Sovereign Immunity and Federal Preemption Doctrines Preventing States' Enforcement of Campaign Contribution Regulations on Indian Tribes*, 40 U. MICH. J.L. REFORM 191, 211 (2006) (discussing one side of this clash of sovereignties).

⁵ 47 F.4th 78 (2d Cir. 2022).

⁶ *Id.* at 82.

state's consent.⁷ State sovereign immunity bars a plaintiff from naming, for instance, New York State as a defendant. Nevertheless, in *Ex parte Young*,⁸ the Court held that a plaintiff may sue state *officers* to enjoin the enforcement of an unconstitutional or federally illegal state law because the state “has no power to impart” to its officers “any immunity from responsibility” for unlawful deeds.⁹ Known as the *Ex parte Young* fiction¹⁰ — the fiction that a state officer is no longer an agent of the state when engaged in unlawful acts¹¹ — this doctrine allows a plaintiff to sue, say, the Attorney General of New York.

In the context of tribal suits against state officials, the *Ex parte Young* fiction is further complicated and diluted by *Idaho v. Coeur d'Alene Tribe*.¹² In a fractured decision, the Court in *Coeur d'Alene Tribe* disallowed any suit under *Ex parte Young* that is the “functional equivalent of a quiet title action,” because such a claim implicates “special sovereignty interests.”¹³ Namely, such claims seek “a determination that the lands in question are not even within the regulatory jurisdiction of the State.”¹⁴ In the decades following *Coeur d'Alene Tribe*, circuit courts have grappled with the scope and applicability of the *Coeur d'Alene Tribe* exception to the *Ex parte Young* fiction.¹⁵ *Silva* is the most recent example of a circuit court grappling with such questions.

The Shinnecock Nation (the Nation) is a self-governing, federally recognized Native nation on Long Island.¹⁶ For centuries before the arrival of European colonizers, the Nation relied heavily on fishing and whaling in the surrounding waters.¹⁷ Preconstitutional treaties and

⁷ U.S. CONST. amend. XI.

⁸ 209 U.S. 123 (1908).

⁹ *Id.* at 160 (citing *In re Ayers*, 123 U.S. 443, 507 (1887)); *see also id.* at 159–60.

¹⁰ *See, e.g.*, Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 269, 273 (2011) (Roberts, C.J., dissenting) (citing the *Ex parte Young* fiction); John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 990 (2008) (explaining how the Court “maintains that *Young* used a legal fiction, despite [its] hesitation with the characterization”).

¹¹ *See* Harrison, *supra* note 10, at 994–95.

¹² 521 U.S. 261 (1997).

¹³ *Id.* at 281.

¹⁴ *Id.* at 282.

¹⁵ *See, e.g.*, Hill v. Kemp, 478 F.3d 1236, 1256–57 (10th Cir. 2007); AT&T Commc'ns v. BellSouth Telecomms. Inc., 238 F.3d 636, 647–49 (5th Cir. 2001).

¹⁶ *See* Frank James, *NY's Shinnecock Indians Gain Official Status*, NPR (June 15, 2010, 1:41 PM), <https://www.npr.org/sections/thetwo-way/2010/06/15/127858064/ny-s-shinnecock-indians-gain-official-status> [<https://perma.cc/6XJ3-XHNL>]. After occupying the Long Island peninsula for centuries and being denied federal recognition for over thirty-two years, the Nation was federally recognized on October 1, 2010, when President Obama approved the Nation's petition for federal recognition. Danny Hakim, *U.S. Recognizes an Indian Tribe on Long Island, Clearing the Way for a Casino*, N.Y. TIMES (June 15, 2010), <https://www.nytimes.com/2010/06/16/nyregion/16shinnecock.html> [<https://perma.cc/NL8Z-GQW2>].

¹⁷ *See* Corey Kilgannon, *Indians in the Hamptons Stake Claim to a Tiny Eel with a Big Payday*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/nyregion/hamptons-shinnecock-indians-eels.html> [<https://perma.cc/6XTY-ATGW>]; Alexandra Talty, *Can the Shinnecock Nation Save Its Fishing Rights?*, CIV. EATS (Mar. 15, 2018), <https://civileats.com/2018/03/15/can-the-shinnecock-nation-save-its-fishing-rights> [<https://perma.cc/PH4A-MJA2>].

deeds signed between the Nation and European colonizers reflect these traditional practices and preserve the Nation's rights to fish, hunt, and gather on familiar aboriginal lands and waters.¹⁸ As the plaintiffs alleged in *Silva*, these treaties remain enforceable under state and federal law and the plaintiffs' right to fish in aboriginal territories is protected under the Supremacy Clause.¹⁹ Nevertheless, many state fishing and hunting regulations have sidestepped the Nation's tribal sovereignty and existing contracts in an effort to promote wide-reaching enforcement of these regulations.²⁰

In New York State, the Department of Environmental Conservation (DEC) and its officers execute enforcement conservation regulations.²¹ Despite the DEC's promises of operating with a "spirit of Peace and Friendship" with Native nations,²² members of the Nation, including David Taobi Silva, alleged regular and repeated targeting by DEC officials.²³ Silva, along with two other tribal members, sued the DEC and several DEC officials.²⁴ Their complaint alleged, first, that the officials' "repeated interference, seizures, and prosecution . . . violate[d] [tribal] fishing rights protected under the Supremacy Clause"; and, second, that the officials' actions "constitute[d] a continuing pattern and practice of purposeful acts of discrimination based on [the tribal members'] race as Native Americans."²⁵

The Eastern District of New York granted summary judgment in favor of the DEC officials.²⁶ Magistrate Judge Locke recommended that summary judgment be granted on two bases: first, that the plaintiffs' claims were barred by sovereign immunity, and second, that the plaintiffs lacked standing to seek prospective relief.²⁷ The district court adopted the magistrate's recommendation.²⁸

¹⁸ See Talty, *supra* note 17.

¹⁹ Complaint at 6, *Silva*, 47 F.4th 78 (No. 18-cv-3648). After the ratification of the Constitution, these agreements not only remained in effect but were also federally adopted and recognized under the Supremacy Clause, which maintains that "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.

²⁰ See Talty, *supra* note 17.

²¹ Press Release, N.Y. State Dep't of Env't Conservation, Environmental Conservation Police on Patrol (Dec. 21, 2022), <https://www.dec.ny.gov/press/126789.html> [<https://perma.cc/BXL3-S49J>].

²² N.Y. STATE DEP'T OF ENV'T CONSERVATION, CONTACT, COOPERATION, AND CONSULTATION WITH INDIAN NATIONS, POLICY NO. CP-42, at 1–2 (2009), https://www.dec.ny.gov/docs/permits_ej_operations_pdf/cp42.pdf [<https://perma.cc/C8EQ-PX7Q>]. In this policy, the State recognized that "close consultation" better positioned both the Department and Indian Nations to protect resources, share concerns, and reach "appropriate resolution[s] of occasional disagreements or misunderstandings." *Id.* at 2.

²³ Complaint, *supra* note 19, at 4.

²⁴ *Id.* at 1; *Silva*, 47 F.4th at 81.

²⁵ Complaint, *supra* note 19, at 6.

²⁶ *Silva v. Farrish*, No. 18-CV-3648, 2021 WL 613092, at *3 (E.D.N.Y. Feb. 17, 2021).

²⁷ *Silva v. Farrish*, No. 18-CV-3648, 2020 WL 3451344, at *7, *11 (E.D.N.Y. May 27, 2020).

²⁸ *Silva*, 2021 WL 613092, at *3.

The Second Circuit affirmed in part, vacated in part, and remanded in part.²⁹ Writing for the court, Judge Menashi³⁰ focused first on the applicability of the *Ex parte Young* fiction to the defense of sovereign immunity.³¹ The court explained that *Ex parte Young* functions as an exception, allowing plaintiffs to sue government officials in their individual capacities when the “complaint (1) ‘alleges an ongoing violation of federal law’ and (2) ‘seeks relief properly characterized as prospective.’”³² The court found that the *Ex parte Young* fiction applied only to the claims against the DEC officials and “ha[d] no application to the DEC itself.”³³

The court then rejected the defendants’ assertion that *Coeur d’Alene Tribe* foreclosed the plaintiffs’ action under *Ex parte Young*.³⁴ The Second Circuit explained that it read *Coeur d’Alene Tribe* to apply only to claims asserting an “exclusive” use of land, which was not the case here.³⁵ Instead, looking to the Sixth Circuit’s decision in *Hamilton v. Myers*,³⁶ the court held that the relief requested “would not divest the state of its ownership of the land or waters” and therefore the suit was not “one against the state.”³⁷ Next, the court found that the plaintiffs had Article III standing because they credibly alleged a threat of future enforcement of fishing laws,³⁸ which amounted to an imminent injury in fact.³⁹ Lastly, the court found that the abstention doctrine from *Younger v. Harris*⁴⁰ did not bar the plaintiffs’ claim for injunctive relief.⁴¹ The *Younger* doctrine mandates that federal courts abstain from cases that are also pending in state proceedings.⁴² Because Silva’s appeal of his state-level prosecution was dismissed, the court found that *Younger* did not apply.⁴³

Having addressed justiciability, the court then turned to the merits of the plaintiffs’ discrimination claims.⁴⁴ The court explained that to

²⁹ *Silva*, 47 F.4th at 90.

³⁰ Judge Menashi was joined by Judges Jacobs and Wesley. *Id.* at 81.

³¹ *See id.* at 84.

³² *Id.* (quoting *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002)).

³³ *Id.* (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

³⁴ *Id.* at 85.

³⁵ *Id.*

³⁶ 281 F.3d 520 (6th Cir. 2002).

³⁷ *Silva*, 47 F.4th at 86.

³⁸ *Id.* at 87 (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

³⁹ *Id.* The plaintiffs alleged that they faced imminent injury from the DEC and DEC officials’ enforcement of conservation regulations in violation of their preserved aboriginal fishing rights. *Id.* Under the test for injury from threat of prosecution, “an imminent injury is apparent when the plaintiff has alleged (1) ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute,’ and (2) ‘a credible threat of prosecution thereunder.’” *Id.* at 86 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

⁴⁰ 401 U.S. 37 (1971).

⁴¹ *Silva*, 47 F.4th at 89.

⁴² *Younger*, 401 U.S. at 41.

⁴³ *Silva*, 47 F.4th at 89.

⁴⁴ *Id.*

state a prima facie claim under §§ 1981 and 1982,⁴⁵ a plaintiff must prove that “(1) they are members of a racial minority; (2) [there was] an intent to discriminate on the basis of their race by [the] defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute.”⁴⁶ The court focused on the second element — an intent to discriminate — and affirmed the judgment of the district court after finding no evidence of racial animus.⁴⁷

Beneath the surface of the substantive debate raised over the Nation’s fishing rights is a delicate and technical procedural question: when and how can a Native nation and its tribal members sue to protect their rights? To answer this question, the Second Circuit grappled with the applicability and scope of *Coeur d’Alene Tribe*. Ultimately, the Second Circuit’s decision in *Silva* narrowed the applicability of *Coeur d’Alene Tribe* by defining “exclusion” using the full scope of property rights, rather than any one right.⁴⁸ By cabining the state’s sovereign immunity in this way, the court’s holding expands and preserves tribal rights to future litigation and aligns with other circuits’ decisions, which have taken similar stances on the scope of *Coeur d’Alene Tribe*.

Since the Supreme Court first handed down *Coeur d’Alene Tribe* in 1997, the case has raised more questions than answers.⁴⁹ Writing for the Court, Justice Kennedy found that a suit against an officer in their individual capacity can amount to an attempted suit against the state if the claim is “the functional equivalent of a quiet title action.”⁵⁰ He distinguished these land-claim cases from others where “state officials . . . were acting beyond the authority conferred upon them by the State.”⁵¹ Ultimately, the Court concluded that when land was at issue, there was no such differentiation between a claim against state officials and a claim against the state itself.⁵²

But Justice Kennedy’s opinion struggled to define “functional equivalent.”⁵³ The Court pointed to a number of factors to clarify the state’s

⁴⁵ 42 U.S.C. §§ 1981–1982.

⁴⁶ *Silva*, 47 F.4th at 90 (quoting *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 85.

⁴⁹ See, e.g., *Abbey v. Rowland*, 359 F. Supp. 2d 94, 101 n.3 (D. Conn. 2005) (“The meaning of *Coeur d’Alene [Tribe]* is . . . somewhat disputed.”). The progeny of *Coeur d’Alene Tribe* has been equally confusing, with some circuits claiming that the opinion’s rationale has been circumscribed. See, e.g., *Tarrant Reg’l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2007 WL 3226812, at *4 (W.D. Okla. Oct. 29, 2007) (citing *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007)) (“The concern with special sovereignty interests suggested in *Coeur d’Alene [Tribe]* has been rejected.”).

⁵⁰ *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 281 (1997).

⁵¹ *Id.* (citing *Florida Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 696–97 (1982)).

⁵² See *id.* at 287.

⁵³ In addition to courts, scholars have voiced confusion about the *Coeur d’Alene Tribe* holding and Justice Kennedy’s lack of clarity. See, e.g., Scott Stevenson, *Muddying the Waters: Stop the*

historical control over the land — including the ability of government agents to exercise police power in the disputed territory and the extent of the plaintiffs’ potential property rights — while ignoring the historical control of the Coeur d’Alene Tribe (the Tribe) prior to the existence of Idaho’s state government.⁵⁴ Despite the blurry scope of the prohibition on “functional” quiet title claims, the Justices demonstrated a desire to sidestep the Tribe’s assertion of rights, elucidating the “conception [that] a state’s pain threshold is much lower than the Court’s previous conception.”⁵⁵ The question from *Coeur d’Alene Tribe*, then, was whether a suit asserts an “entitlement to the *exclusive* use and occupancy and the right to quiet enjoyment of . . . [contested] lands.”⁵⁶

In assessing the applicability of *Coeur d’Alene Tribe*, both the panel and the defendants in *Silva* focused on the concept of “exclusivity,” but each came to different conclusions. Start with the defendants. Given the fractured and unclear scope of the decision in *Coeur d’Alene Tribe*, the defendants plausibly asserted that the plaintiffs’ claims sufficiently paralleled those of the Tribe.⁵⁷ In the DEC’s memoranda, the defendants argued that the plaintiffs’ claims were “fundamentally inconsistent with the State of New York’s exercise of fee title over the contested areas,”⁵⁸ and were thereby impermissible under *Coeur d’Alene Tribe*.⁵⁹ The defendants pointed to the exclusive nature of the Nation’s asserted rights over the ecosystem of Shinnecock Bay, which they claimed would tie the hands of the state’s “ability to regulate and protect its wildlife.”⁶⁰ Indeed, DEC regulations have prevented decimation of wildlife that occurs due to overfishing and pollution in the Bay.⁶¹

Similarly focused on the meaning of “exclusion,” the Second Circuit adopted a narrower interpretation than the defendants’. The panel in *Silva* considered exclusion through a more limited and multifactorial test, examining the claimed fishing rights,⁶² potential prohibitions of

Beach Renourishment and the Procedural Implications of a Judicial Takings Doctrine, 42 STETSON L. REV. 785, 817 (2013) (“[T]he resolution of this question is uncertain.”); Patrick J. Barrett, *Edward T. Young Still Living the Good Life: Coeur d’Alene Tribe v. Idaho*, 73 NOTRE DAME L. REV. 1077, 1078–79 (1998) (describing the “badly fractured Court,” *id.* at 1078, and the many remaining questions left by the opinion and concurrence).

⁵⁴ See *Coeur d’Alene Tribe*, 521 U.S. at 282.

⁵⁵ Barrett, *supra* note 53, at 1107 n.178.

⁵⁶ *Coeur d’Alene Tribe*, 521 U.S. at 265 (emphasis added).

⁵⁷ State Defendants’ Reply Memorandum of Law in Further Support of Motion to Dismiss Complaint at 3, *Silva v. Farrish*, No. 18-CV-3648 (E.D.N.Y. May 27, 2020), 2018 WL 9440007.

⁵⁸ *Id.* (quoting *W. Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 23 (2d Cir. 2004)).

⁵⁹ State Defendants’ Memorandum of Law in Support of Motion to Dismiss Complaint at 5, *Silva*, No. 18-CV-3648, 2018 WL 9440005.

⁶⁰ *Id.* at 5–6.

⁶¹ See *Shinnecock Bay Current Challenges*, SHINNECOCK BAY RESTORATION PROGRAM, <http://www.shinnecockbay.org/program/current.html> [<https://perma.cc/LF9P-P4QC>].

⁶² *Silva*, 47 F.4th at 85 (stating that relief would not “allow the plaintiffs to prevent others from fishing”).

entry,⁶³ and the state's control over the area.⁶⁴ While the plaintiffs' requested relief might impinge on certain *aspects* of the state's right to exclude, such as its power to regulate the capture and removal of animals from the Bay, the court ultimately determined that *Coeur d'Alene Tribe's* prohibition on quiet title claims against states was not triggered.⁶⁵ Thus, the plaintiffs' assertion of their rights to aboriginal waters was proper under *Ex parte Young*. Instead of wholly prohibiting state use of the land, the action would "at most" require the state "to tailor its regulatory scheme to respect [tribal] fishing rights."⁶⁶

In arriving at its conclusion, the Second Circuit appeared to add another limitation to *Coeur d'Alene Tribe's* reach: that any exclusion must be "substantial" for the *Ex parte Young* fiction not to apply.⁶⁷ In its analogy to *Coeur d'Alene Tribe*, the court noted that there, "the suit [was] effectively one against the state [because] 'substantially all benefits of ownership and control would shift from the State to the Tribe.'"⁶⁸ But in *Silva*, the court observed that "relief . . . 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."⁶⁹ Therefore, the Second Circuit moved closer toward a rejection — or at least a tight cabining — of *Coeur d'Alene Tribe* by interpreting exclusion to require broad and substantial enjoyment of "*all benefits* of ownership."⁷⁰ In so doing, the court expanded the *Ex parte Young* fiction for future plaintiffs.

And the Second Circuit is not alone. By rejecting a broad application of *Coeur d'Alene Tribe*, the Second Circuit joined a larger trend in the judiciary of cabining the scope of claims that are deemed to be the "functional equivalent" of quiet title claims.⁷¹ This cabining is occurring in light of fears that *Coeur d'Alene Tribe* would undermine large swaths of Native American hunting, fishing, and water-use claims that could be broadly interpreted as quiet title claims.⁷² Arising from the Court's lack of clarity — and Justice Kennedy's suggestions that the Court

⁶³ *Id.* (referencing the lack of assertion of the right "to exclude all others" (quoting *W. Mohegan Tribe & Nation*, 395 F.3d at 22)).

⁶⁴ *Id.* (finding that the plaintiffs' claims did not "divest sovereign ownership" from the state (quoting *Hamilton v. Myers*, 281 F.3d 520, 527 (6th Cir. 2002))).

⁶⁵ *Id.* at 86.

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ *Id.* at 85 (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 282 (1997)).

⁶⁹ *Id.*

⁷⁰ *Id.* (emphasis added).

⁷¹ *See, e.g.*, *CSX Transp. Inc. v. Bd. of Pub. Works*, 40 F. App'x 800, 803 (4th Cir. 2002); *AT&T Commc'ns v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 648 (5th Cir. 2001); *Elephant Butte Irrigation Dist. v. Dep't of Interior*, 160 F.3d 602, 612 (10th Cir. 1998).

⁷² *See* Brief Amicus Curiae of the American Civil Liberties Union in Support of Respondents at 21–22, *Coeur d'Alene Tribe* (No. 94-1474), 1996 WL 376980; *see also* Pamela D. Bucy, *This Land Is Our Land*, or *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 19 PUB. LAND & RES. L. REV. 113, 126 (1998).

pursue a “fundamental shift” in the *Ex parte Young* fiction⁷³ — there was a possibility for inconsistent application in the courts of appeals, and a concern that states might argue that *Ex parte Young* actions constitute unconstitutional invasions of state sovereignty.⁷⁴

But these concerns have not been borne out in practice. Recognizing the potential for broad applications of *Coeur d’Alene Tribe*, the Tenth Circuit doubted that the Court intended for its holding to extend to “every situation where a state property interest is at issue” and instead found that *Coeur d’Alene Tribe* “reflects the extreme and unusual case.”⁷⁵ The Sixth Circuit similarly constrained *Coeur d’Alene Tribe*, finding that fishing rights asserted by plaintiffs did not constitute an illegal divestment of state sovereignty.⁷⁶ Other circuits followed suit,⁷⁷ and now the Second Circuit has followed the trend of cabining the Court’s holding to be only a narrow carve-out to the *Ex parte Young* fiction.

In *Silva*, the Second Circuit joined an ongoing judicial pattern rejecting a broad reading of *Coeur d’Alene Tribe*. To do so, the court focused on the meaning of “exclusion” and suggested that its definition in relation to a functional quiet title action may be multifaceted.⁷⁸ This approach may prove particularly important to protecting tribal fishing and hunting rights in the future, as it creates flexibility in understanding a plaintiff’s claims and requested relief. By clarifying the meaning of “exclusion” in *Coeur d’Alene Tribe*, the Second Circuit cabined the decision and rejected the state’s assertion that *any* abridgment of the DEC’s enforcement in order to protect tribal sovereignty and fishing rights is exclusionary, and therefore unconstitutional. In a modern judiciary where the “guarantees” of tribal sovereignty are anything but guaranteed, *Silva* provides a small but important foothold for future tribal litigants in their efforts to protect their rights.

⁷³ Barrett, *supra* note 53, at 1078.

⁷⁴ See, e.g., *Elephant Butte*, 160 F.3d at 612; *Abbey v. Rowland*, 359 F. Supp. 2d 94 (D. Conn. 2005).

⁷⁵ *Elephant Butte*, 160 F.3d at 612.

⁷⁶ In describing the approach of the Sixth Circuit, an Ohio district court stated that “[t]he Sixth Circuit has held that anything short of a quiet title action is not barred under *Coeur d’Alene [Tribe]*.” *Ottawa Tribe v. Speck*, 447 F. Supp. 2d 835, 839–40 (N.D. Ohio 2006) (citing *Arnett v. Myers*, 281 F.3d 552, 568 (6th Cir. 2002); *Hamilton v. Myers*, 281 F.3d 520, 528 (6th Cir. 2002)). Indeed, *Hamilton v. Myers*, 281 F.3d 520, was the case that the Second Circuit cited and followed instead of *Coeur d’Alene Tribe*. *Silva*, 47 F.4th at 85.

⁷⁷ See, e.g., *CSX Transp. Inc. v. Bd. of Pub. Works*, 40 F. App’x 800, 803 (4th Cir. 2002); *AT&T Commc’ns v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 648 (5th Cir. 2001).

⁷⁸ *Silva*, 47 F.4th at 86.