

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
STATE OF NEW YORK, NEW YORK STATE
RACING AND WAGERING BOARD, NEW YORK
STATE DEPT. OF ENVIRONMENTAL
CONSERVATION, and TOWN OF SOUTHAMPTON

Plaintiffs,

- against -

THE SHINNECOCK INDIAN NATION, FREDERICK
C. BESS, LANCE A. GUMBS, RANDALL KING and
KAREN HUNTER,

Defendants.
----- X

03 CIV. 3243 (JFB)(ARL)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CONSOLIDATED

----- X
TOWN OF SOUTHAMPTON,

Plaintiffs,

- against -

THE SHINNECOCK TRIBE A/K/A THE
SHINNECOCK INDIAN NATION, FREDERICK C.
BESS, LANCE A. GUMBS and RANDALL KING,

Defendants.
----- X

03 Civ. 3466 (JFB)(ARL)

DEFENDANTS' PROPOSED FINDINGS OF FACT

The Shinnecock Indian Nation (the “Nation”), and all other defendants in the above-captioned consolidated actions, respectfully submit the proposed findings of fact enumerated below. For convenience of reference each proposed finding is separately enumerated, and the proposed findings are separated into topical subsections. Where appropriate to ensure a clear presentation, reference is made to Defendants’ Proposed Conclusions Of Law (“Def. Conc. L.”), submitted herewith, or to the facts stipulated in the stipulated facts section of the parties’ Proposed Joint Pretrial Order (“Fact Stip.”).

The Shinnecock Indian Nation Is An Indian Tribe As A Matter Of Federal Law

1. On November 7, 2005, following extensive discovery and cross-motions for summary judgment, the Court rendered a decision in the above-captioned actions finally determining certain issues and ordering other issues to be resolved at trial. Memorandum and Order, November 7, 2005, (“November 7 Order”) (published as State of New York et al. v. Shinnecock Indian Nation et al., 400 F.Supp.2d 486 (E.D.N.Y. 2005)); Fact Stip. 5.
2. In the November 7 Order the Court unambiguously held that the Nation “plainly satisfies” the “federal common law standard for determining tribal existence” and “that the Shinnecock Indians are in fact an Indian tribe.” The Court was unambiguous in stating that it was “recognizing the Shinnecoeks as a Tribe” and finally determining that issue in favor of the Nation. November 7 Order at 489 – 494.
3. The Courts of the United States are authorized, in circumstances such as those present here, to determine whether a group is a tribe of Indians as a matter of federal law. Def. Concl. L. Section I-B.
4. The determination of the Court that the Nation is a tribe of Indians as a matter of federal law is final and binding until and unless disturbed on appeal. Def. Concl. L. Section I-B.
5. Defendants continue to believe that both the Nation and the individual defendants are immune from suit with respect to the claims asserted by these plaintiffs by virtue of the inherent immunity of Indian tribes under federal law. Defendants recognize that this defense was implicitly rejected by the Court but expressly continue to assert and preserve all defenses based on tribal sovereign immunity. Def. Concl. L. Section I-C.

6. The Nation currently occupies and is in possession of a reservation (the "Shinnecock Neck Reservation") within the Town of Southampton in Suffolk County, New York, on which the Nation maintains its offices and on which some members of the Nation reside. Fact Stip.13.
7. Each year the Nation meets to elect three Trustees, who conduct the governmental business of the Nation, and the Nation has done so for at least 200 years. November 7 Order; Ex. S-251 (Deposition of L. Gumbs) 7:18 – 8:18; Trial Tr. (L. Gumbs) 2835:24 – 2836:16; Ex. D109 at 141.
8. Members of the Nation who have been resident on tribal land for at least six months and who are at least 21 years old may vote in the annual trustee election. Trial Tr. (L. Gumbs) 2838:4 – 19.
9. The Nation's Trustees are advised by a Tribal Council, which is elected by the same body that elects the Trustees. Trial Tr. (L. Gumbs) 2839:14 – 2841:10.
10. The Nation also conducts meetings of the Tribal membership throughout the year to discuss tribal business, at which the Trustees preside. Trial Tr. (L. Gumbs) 2844:4 – 20.
11. The Tribal Council has historically formed various committees, including an economic development committee, to advise the trustees on various issues. Trial Tr. (L. Gumbs) 2839:14 – 12841:10; Ex. S-250 (Deposition of P. Brown) 7:16 – 8:14, 8:18 – 20, 8:24 – 9:12.
12. Defendant Lance A. Gumbs was, at the time the complaints in the Actions were filed and is now an elected Trustee and official of the Nation, and is being sued by the State in his official capacity only. Fact Stip. 7.
13. Defendant Frederick C. Bess was, at the time the complaints in these Actions were filed, chairman of the Shinnecock Nation Casino at Westwoods Authority, and is now an elected Trustee of the Nation, and is being sued by the State in his official capacity only. Fact. Stip. 8.
14. Defendant Karen Hunter is now chair of the Shinnecock Nation Gaming Authority and is being sued by the State in her official capacity only. Order, April 17, 2007, dkt. no. 349.
15. Defendant Randall King is now an elected Trustee of the Nation and is being sued by the State in his official capacity only. Order, April 17, 2007, dkt. no. 361.
16. The entity formerly known as the Shinnecock Nation Casino at Westwoods Authority is now known as the Shinnecock Nation Gaming Authority, and is an instrumentality of the Shinnecock Indian Nation. Fact Stip. 49.

**The Shinnecock Indian Nation Holds Westwoods By Unextinguished
Aboriginal Title**

The Nation Currently Owns And Occupies Westwoods

17. The Shinnecock Indian Nation owns a parcel of land commonly known as "Westwoods", of approximately 80 acres in total area, located in the Hampton Bays area within the boundaries of the Town of Southampton. Fact Stip.15.
18. Westwoods consists of three tax lots: (a) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38 ("Parcel A"); (b) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78 ("Parcel B"); and (c) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1 ("Parcel C"). Ex. D259 at 4; Ex. D156a,b,c,d; Fact Stip. 16.
19. Parcel A is property to the north of Newtown Road and south of Great Peconic Bay; this parcel is about 41.5 acres. Parcel B is property north of Sunrise Highway and south of Newtown Road; this parcel is about 36.7 acres. Parcel C is property south of Sunrise Highway and is about 2.0 acres. Trial Tr. (J. Mansky) 3292:5 – 3294:11; Ex. D259 at 8; Ex. D264; Ex. D156d.
20. These Suffolk County Tax Maps identify both Westwoods and the Nation's reservation at Shinnecock Neck as "Shinnecock Indian Reservation." Ex. D156a,b,c,d.
21. The Shinnecock Indian Nation currently occupies and possesses Westwoods. Fact Stip. 18.

The Nation Had Aboriginal Title To Westwoods At The Time Of The First European
Contact

22. The Nation was in possession of the lands in and around the Town of Southampton when the first European settlers arrived in 1640. November 7 Order at 489.
23. At the time of first European contact in 1640, Westwoods was land of the Shinnecock Indian Nation, held in aboriginal title, and "[w]hen the first Europeans arrived, the whole town [of Southampton] was owned by the Shinnecoeks" Trial Tr. (J. Lynch) 1115:15 – 1116:22.
24. In addition, the history of the Town of Southampton contained in its own records states that when the first settlers arrived "it appears that the whole extent of what is now the town of Southampton was owned by the Shinnecock tribe of Indians, who were divided into many small bands, and

were living in villages that were without exception situated near the different creeks or branches of the bays” Ex. D3, at II – III.

25. This is consistent as well with contemporary historical records and oral history and is not controverted by any evidence in the record. Ex. D29 at 1, 3 – 5 and 18 and documents there cited; Ex. D107 at 6; Ex. D183 at 3; Ex. D374 (Response to Second Request for Admission No. 253 and Ex. VV at 9 – 10); Trial Tr. (A. von Gernet) 2226:3 – 2228:1.

Land Conveyances From Indians Were Prohibited At All Relevant Times

26. Until 1752, when the Gregorian calendar still used today was adopted, England and its colonies followed the Julian calendar, under which March 25 was the beginning of the new year.¹ Ex. D32 at 28; Ex. D67.
27. Canoe Place or Niamuck (“Canoe Place”) is a name given to a place where Indians formerly carried their canoes between Shinnecock Bay and the Great Peconic Bay in what is now the Town of Southampton. Fact Stip. 35.
28. Canoe Place is located at the approximate current site of the Shinnecock Canal in the Town of Southampton. Fact Stip. 36; Trial Tr. (A. von Gernet) 2225:11 – 18.
29. The portion of Westwoods to the south of Newtown Road is located less than 400 feet to the to the west of Canoe Place. Ex. D358; Ex. T-4; Trial Tr. (J. Lynch) 1009:2 – 25.
30. The first European settlers arrived in what is now the Town of Southampton in 1640, from Lynn, Massachusetts and from the Colony of Connecticut. Ex. T-241 at 3; Ex. D25 at 19; Ex. D32 at 12 – 13; Trial Tr. (K. Hermes) 2435:12 – 14.
31. Those settlers arrived under authority of a 1635 patent from the Plymouth Colony to the Earl of Sterling and a subsequent confirmation and clarification by the Earl of Sterling’s agent, James Farrett. Trial Tr. (A. von Gernet) 2221:16 – 2224:2; Ex. D32 at 12; Ex. D80; Ex. S-64.
32. Only lands located east of Canoe Place are described in the confirmation of the Sterling patent by James Farrett, which is dated July 7, 1640, and the settlers claiming under Sterling’s Patent were only allowed to occupy lands east of Canoe Place. Fact Stip. 22; Ex. D80; Ex. S-65 at 5; Trial Tr. (K. Hermes) 2441:6 – 25.

¹ In these Findings of Fact, “O.S.” indicates that the date is expressed as it was in the original document (that is, in accordance with the Julian calendar). Except as expressly annotated with “O.S.”, all dates here are expressed using the modern, Gregorian calendar.

33. On December 13, 1640, a purported deed was executed by certain named Shinnecock Indians, as grantors, and certain named freeholders of Southampton (the "1640 Deed"). Ex. S-66.
34. Only lands located to the east of Canoe Place are described in the 1640 Deed. Fact Stip. 21.
35. In the 17th century, the General Court of the Colony of Connecticut was the supreme lawmaking body of that colony, and towns in Connecticut had only such powers as the General Court expressly granted to them. Webster v. Town of Harwinton, 32 Conn. 131, 138 (Ct. S. Ct. 1864).
36. The Colony of Connecticut exercised personal jurisdiction over its inhabitants and regulated the purchase of land by them from Indians. Ex. D32 at 14, 20.
37. Under the concept of personal jurisdiction as it existed in the New England colonies, including Connecticut, in the 17th century, an inhabitant of a colony belonged to that colony and the inhabitant remained subject to the laws of that colony, until the colony released him. Trial Tr. (K. Hermes) 2438:22 – 2440:14.
38. In every case, the Colony of Connecticut asserted its jurisdiction over tracts of land owned by Indians and supervised the settlement of those tracts. Ex. D32 at 18; Ex. D45 at 84.
39. In 1643, Southampton entered into a combination with the Colony of Connecticut. Ex. D95.
40. Southampton came under the jurisdiction of the Colony of Connecticut in 1644 and sent its first representative to the Connecticut General Court in 1645. Ex. D25 at 20.
41. From the time when Southampton came under the jurisdiction of the Colony of Connecticut, its inhabitants became members of the Colony of Connecticut and subject to its personal jurisdiction and its laws. Trial Tr. (K. Hermes) 2442:22 – 2444:5.
42. Many towns, including Setauket and Huntington, joined with the Colony of Connecticut on the same terms as did Southampton. Ex. D25 at 20 and fn. 64; Ex. D32 at 11; Ex. D39.
43. Those towns had to obey Connecticut law. Ex. D32 at 11.
44. Southampton had no special status as a Connecticut town and, in particular, had no special status in respect of the laws and orders of the Colony of Connecticut on the subject of purchases of land from Indians. Ex. D32 at 5.

45. The claim made by James P. Lynch that Southampton had any special status while under the jurisdiction of the Colony of Connecticut is false. Ex. D32 at 10.
46. There was no local Southampton law in conflict with the laws of the Colony of Connecticut as regards the prohibition of purchases of Indian land by individuals. Ex. D32 at 5.
47. The Dutch ceded all land on Long Island east of Oyster Bay to the United Colonies in 1650. Ex. D6 at 189 – 193; Ex. D25 at 26 and fn. 92; Ex. D32 at 21; Ex. T-12 at fn. 5; Trial Tr. (J. Lynch) 1163:22 – 1164:4.
48. Connecticut was one of the United Colonies. Ex. D25 at 12; Trial Tr. (J. Lynch) 1164:7 – 13.
49. Southampton is well to the east of Oyster Bay. Ex. D119.
50. In 1650, the Connecticut General Court enacted an order that prohibited individuals from buying any land from Indians, either directly or indirectly, under any pretence whatsoever (the “1650 Order”). Ex. D46.
51. There is no evidence in colonial records that transactions in violation of the 1650 Order ever were recognized as legal. Ex. D25 at 17.
52. For example, in 1651 the Colony of Connecticut required that colonists “resign up” land that had been obtained from Indians to the Connecticut General Court to be returned to the Indians. Ex. D25 at 12; Ex. D129.
53. The 1650 Order remained the law of the Colony of Connecticut until 1663, when the Connecticut General Court enacted an order that replaced it. That successor order prohibited purchases of Indian land by individuals, except with allowance of the General Court. Ex. D25 and 20 – 21; Ex. D100; Trial Tr. (K. Hermes) 2453:11 – 21.
54. New England colonies other than Connecticut had laws similar to the 1650 Order and these laws were very widely published and understood. Ex. D25 at 3.

The So-Called Topping And Ogden Deeds Did Not Extinguish The Nation’s Title To
Westwoods

55. On or about May 12, 1659, “Wiandance Sachem” and “his son Weeayacombonne,” as grantors, executed a purported deed in favor of John Ogden, an individual, as grantee (the “Ogden Deed”). Ex. D98.
56. The Ogden Deed is for a tract of land including Westwoods. Ex. D25 at 23 – 25.

57. On or about April 10, 1662, “Weany Sunk squaw, Anabackus and Iachanapes all of them residents of Shinnecock”, as grantors, executed a purported deed in favor of Thomas Topping, an individual, as grantee (the “Topping Deed”). Ex. D7.
58. The Topping Deed is for a tract of land that included Westwoods. Ex. D25 at 23 – 25.
59. All of the grantors of the Ogden Deed and the Topping deed were Indians. Ex. D25 at 2.
60. In the 17th century, Indians did not read or write English, in general. Trial Tr. (A. von Gernet) 2255:19 – 2256:7.
61. In the 17th century, Indians did not use English legal language or understand English legal concepts. Trial Tr. (A. von Gernet) 2260:6 – 2261:18.
62. Both the Ogden Deed and the Topping Deed evidence a purported land transfer by Indians to particular individuals in an individual capacity, those individuals being Ogden in the one case and Topping in the other. Trial Tr. (A. von Gernet) 2230:19 – 25.
63. Thomas Topping was an elected magistrate of the Connecticut General Court in 1656, 1659, 1660 and 1661. Ex. D25 at 24; Trial Tr. (J. Lynch) 1138:5 – 17.
64. John Ogden was an elected magistrate of the Connecticut General Court in 1657, 1658, 1659 and 1660. Ex. D25 at 24; Trial Tr. (J. Lynch) 1138:5 – 17.
65. The Colony of Connecticut had personal jurisdiction over both Ogden and Topping at the time the Ogden Deed and the Topping Deed were executed. This fact required each of them to comply with the requirements of Connecticut law. Ex. D32 at 23, 24; Trial Tr. (K. Hermes) 2444:25 – 2446:23.
66. Ogden and Topping, as magistrates elected to the Connecticut General Court, had to have been aware of the 1650 Order and of the illegality of their deeds because of its prohibitory terms. Ex. D25 at 4, 24 – 25.
67. The 1650 Order applied to actions taken during the period 1659 through 1662 by John Ogden and Thomas Topping. Trial Tr. (K. Hermes) 2449:14 – 2451:3.
68. Neither the Colony of Connecticut nor any other New England Colony ever excepted magistrates as a class from the prohibition against private, unauthorized land transactions with Indians. Ex. D25 at 25.

69. From a historical point of view, there is no question that any land transaction purportedly or actually conducted between a private person and an Indian under the jurisdiction of Connecticut in the 17th century that had not been approved by the Connecticut General Court in advance of the transaction was void. Ex. D25 at 17, 32.
70. The Colony of Connecticut kept strict control of land transactions and land records. Ex. D25 at 18.
71. Without specific approval granted in advance by the Connecticut General Court, there was no authority for any individual to purchase land from Indians. Ex. D25 at 18.
72. No surviving records of the Colony of Connecticut or of any other New England colony contain any indication that the General Court of Connecticut ever gave its consent to any private purchase by John Ogden or Thomas Topping of the land that purportedly is conveyed by the Ogden Deed or the Topping Deed. Ex. D25 at 2.
73. There was no ruling by the Connecticut General Court whatsoever concerning the land that purportedly is conveyed by the Ogden Deed or the Topping Deed. Trial Tr. (admission by Town counsel) 40:2 – 3, 601:5 – 9.
74. The Connecticut General Court did not approve either the Ogden Deed or the Topping Deed. Trial Tr. (K. Hermes) 2409:2 – 10, 2458:16 – 2460:5.
75. The “Allyn Letter,” a primary historical document dated February 1, 1665 and created by John Allyn, the Secretary of the Connecticut General Court, shows that by established order of the Colony of Connecticut no land might be purchased to the particular use of any person without consent of the Connecticut General Court and any such purported purchase was null in law. Ex. D25 at 26; Ex. D71.
76. As Secretary of the Colony of Connecticut, John Allyn was well informed about its laws. Trial Tr. (K. Hermes) 2489:7 – 18.
77. Setauket, as referred to in the Allyn Letter, was part of the Colony of Connecticut. Trial Tr. (K. Hermes) 2487:1 – 9.
78. Setauket, as referred to in the Allyn Letter, refers to what is now the Town of Brookhaven, the town to the west of Southampton. Trial Tr. (K. Hermes) 2487:1 – 9.
79. Setauket, Setauk, Seatuck and various phonetic spellings of that word, when used in 17th century documents, all refer to what is now the Town of Brookhaven. Trial Tr. (K. Hermes) 2486:3 – 2486:10; Trial Tr. (J. Lynch) 910:17 – 24, 1139:7 – 1140:10.

80. Setauket joined the Colony of Connecticut on the same terms as Southampton. Ex. D39.
81. At the time the Allyn letter was written “null in law” meant void and of no effect. Trial Tr. (J. Lynch) 1137:23 – 1138:1; Trial Tr. (K. Hermes) 2487:21 – 2488:17.
82. As a matter of historical fact, title to land claimed to exist under a deed from an Indian to an individual under the personal jurisdiction of the Colony of Connecticut was understood to be void and of no value or effect. Ex. D25 at 2, 32.
83. Both the Ogden Deed and the Topping Deed, as deeds prohibited by the 1650 Order and not having been approved at any time by the Connecticut General Court, were as a matter of historical fact null and void. Trial Tr. (K. Hermes) 2409:11 – 2410:8.
84. On March 12, 1664, Charles II, King of England, issued a grant to his brother James, Duke of York, for the territory embracing New York, including Long Island. Ex. S-72 at xi.
85. Richard Nicolls was appointed the first Governor of New York by the Duke of York, sailed from England and arrived at New York in August 1664. The Dutch surrendered and Nicolls thereafter established the Province of New York in the Duke’s name. Ex. S-72 at xi.
86. After the Dutch surrender, territorial jurisdiction over the area in which the Town of Southampton now is located passed from Connecticut to New York. Ex. S-72 at xi; Trial Tr. (K. Hermes) 2460:2 – 17.
87. Among the first steps taken by Nicolls was to promulgate on Long Island a series of laws named the “Duke’s Laws.” The Duke’s Laws were promulgated on March 1, 1665. Ex. S-72 at xii; Trial Tr. (K. Hermes) 2461:15 – 2462:6.
88. One heading of the Duke’s Laws was “Indians.” Under that heading, on the subject of purchases of land from Indians, appeared the following text:

No purchase of lands from Indians After the first day of March, 1664, shall be Esteemed a good Title without leave first had and obtained from the Governour and after leave so obtained, The Purchasers shall bring the Sachem and right owner of such Lands before the Governoure to acknowledge satisfaction and payment for the said Lands whereupon they shall have a grant from the Governoure And the Purchase so made and prosecuted is to be entered upon record in the Office

& from that time to be valid to all intents and purposes.

Ex. S-72 at 40.

89. Subsequent to March 1, 1664 (O.S.) and prior to the date of the Dongan Patent of 1686, no purchase from any purported Indian or tribe or group of Indians of lands to the west of Canoe Place within the current boundaries of the Town of Southampton was recorded with the Office of the Secretary of the Province of New York. Fact Stip. 73.
90. From the date the Duke's Laws went into force, the only way for a private individual in New York to obtain title to land was by following the procedure they required. Trial Tr. (K. Hermes) 2466:8 – 2467:14. Ex. S-62 at 22.
91. Under the Duke's Laws as they related to purchases of Indian land, aboriginal title to that land remained in the Indians until the procedures required by the Duke's Laws to extinguish that title were complied with, including the issuance of a patent by the Governor. Trial Tr. (K. Hermes) 2467:10 – 2468:2; Trial Tr. (A. von Gernet) 2252:24 – 2254:23.
92. The Court of Sessions of Southold had no power or authority to circumvent the requirements of the Duke's Laws or to provide legitimacy to purchases of land from Indians that were not authorized as the Duke's Laws required. Ex. D32 at 25.
93. In the fall of 1665, Governor Nicolls established the Court of Assizes of the Province of New York, comprised of the governor, his council, the justices and the high sheriff. The Court of Assizes was little more than the mouthpiece of the Duke and the Governor in the promulgation of edicts. Ex. S-72 at xiii.
94. In a document dated October 5, 1665 relating to a dispute between the Shinnecock Indians and Unchechawk Indians, Governor Nichols fixes the westward boundary of Shinnecock lands at "Apaacock Creek." Ex. D19.
95. Apaacock Creek, as referred to in the document dated October 5, 1665, relating to a dispute between the Shinnecock Indians and Unchechawk Indians, is currently known as Beaverdam Creek and is located in the hamlet of Westhampton Beach, within the Town of Southampton, west of Canoe Place and southwest of the Westwoods Parcel. Fact Stip. 69.
96. The Shinnecock lands described in this October 5, 1665 document are east of Apaacock Creek (now Beaverdam Creek) and within the lands purportedly granted in the Ogden Deed and the Topping Deed. Ex. D358.

97. The Ogden Deed and the Topping Deed were the subject, in part, of a document signed by Governor Richard Nicolls of the Province of New York, bearing the date October 3, 1666 (the "Nicolls Determination"). Fact Stip. 62.
98. On the face of the Nicolls Determination, no Indians were parties to it or asked Nicolls to do anything. Trial Tr. (Katherine A. Hermes) 2475:11 – 2476:13; Trial Tr. (A. von Gernet) 2247:5 – 2248:16.
99. The Nicolls Determination was a diplomatic exercise and a mediation of a dispute between European settlers. Trial Tr. (K. Hermes) 2475:19 – 2476:10.
100. Richard Nicolls, as Governor of New York, issued no patent or grant of any lands within what is now the Town of Southampton. Fact Stip. 67.
101. No deed or indenture granting lands west of Canoe Place to anyone was acknowledged, confirmed or endorsed by the Shinnecock tribe of Indians, or by any alleged Shinnecock Indian, after 1666 and prior to 1687. Fact Stip. 70.
102. What Governor Nicolls had in mind in the Nicolls Determination is ambiguous. Ex. D32 at 7.
103. "The Inhabitants of the Town of Southampton" sued "The Inhabitants of the Town of Southold" over the possession and/or ownership of a Parcel of land described as the "Aquebak meadows", and a trial or hearing concerning the matter took place in 1667 in the Court of Assizes of the Province of New York (the "1667 Trial"). Fact Stip. 64.
104. The "Aquebak meadows" were, as of the date of the 1667 Trial, situated to the west of Westwoods. Fact Stip. 65.
105. Westwoods is within "the land and marsh ground between Peaconnet and Niamocke" referred to in the testimony of "two Ancient women" named Aquabacack and Impeagwam taken on or about October 17, 1667 during the 1667 Trial. Fact Stip. 66.
106. In the record of that trial is a statement ascribed to Governor Nicolls to the effect that "he did not create any new Right in either of them [that is, Thomas Topping or Southampton]." Ex. D32 at 33 n.54; Ex. D91 at 14; Ex. D183 at 62.
107. A summary of this statement by the former archivist of the State of New York, to the effect that Governor Nicolls "created no new rights" by that decision [the Nicolls Determination] correctly concludes that Governor Nicolls did not create anything new in the Nicolls Determination. Ex. D183 at 59; Ex. D91 at n.31; Trial Tr. (K. Hermes) 2492:8 – 2495:20.

108. It is clear that Governor Nicolls, in the Nicolls Determination, was trying to make sure he did not give someone something that they had no existing right to have. Ex. D91 at n.31; Ex. D32 at n.54.
109. Among other things, Governor Nicolls in the Nicolls Determination did not determine what legal title, if any, Topping had in the land that was the subject of the Topping Deed. Ex. D32 at 32; Ex. D91 at 13 – 14.
110. In the fall of 1666, the Court of Assizes ordered all towns and “persons in perticuler” to take out new grants and, to that end, to bring in to the Governor all documents evidencing their claims of title to land, failing which, as of April 1, 1667, all “old grants pattents or Deeds of purchase in Law . . . shall be looked upon as invalid to all intents and purposes.” Ex. S-72 at 93; Ex. S-62 at 23.
111. In 1670, the Court of Assizes issued an order amplifying its order of 1666, demanding that “all Townes or private Psons” claiming an interest in land “upon pretence of purchase or Patent from any other Pson or Psons whether Indians or others” should present them to the Governor to be renewed or confirmed. Ex. S-72 at 84; Ex. S-62 at 24.
112. This 1670 order notes that Southampton had not complied with the 1666 Court of Assizes order and decreed that “in ye meantyme that all their Deeds of purchase Grants or Patents not confirmed as aforesaid shall be lookt upon as Invalid to all Intents & Purposes as is in ye book of Laws Specified.” Ex. S-72 at 84; Ex. S-62 at 23; Trial Tr. (A. von Gernet) 2270:18 – 2271:5.
113. In response to this 1670 order of the Court of Assizes, Southampton submitted a letter to the then New York Governor Francis Lovelace (Nicolls having departed New York by 1668). Ex. S-72 at xiii; Ex. D32 at 35; Ex. D187 at 722 – 23.
114. In that letter, Southampton did not mention the Ogden Deed, the Topping Deed or the Nicolls Determination and based its entire claim to lands on rights it asserted under “Lord Sterlings Agent,” that is, its rights under the 1640 Deed to lands entirely to the east of Canoe Place. Ex. D187 at 723.

Neither The Andros Patent Nor The Dongan Patent Extinguished The Nation’s Title To Westwoods

115. No patent was issued to Southampton until the Andros Patent of November 1676. Fact Stips. 74, 75, 76.
116. In July of 1673, the Dutch reconquered New York during the Third Anglo-Dutch War. Ex. S-72 at xiii; Trial Tr. (K. Hermes) 2495:22 – 2498:18.

117. In consequence of its failure to have its claims to interest in land confirmed by a patent as the 1670 order of the Court of Assizes required, as a matter of historical fact any documents or events on which Southampton might base such a claim were invalid as of the date of the Dutch reconquest of New York. Ex. S-72 at 84; Ex. S-62 at 23; Trial Tr. (A. von Gernet) 2270:18 – 2271:5.
118. The reconquest of New York by the Dutch voided the 1664 grant of Charles II to James, Duke of York for the area including New York and Long Island. Trial Tr. (J. Lynch) 1170:14 – 15.
119. The Treaty of Westminster, which ended the Third Anglo-Dutch War, restored sovereignty over New York to England. Ex. S-72 at xiii.
120. As a result of the Third Anglo-Dutch War, the basis for England's right to sovereignty over New York changed from the Doctrine of Discovery to the Doctrine of Conquest. Trial Tr. (J. Lynch) 1168:23 – 1172:18.
121. In 1674, Charles II issued a second grant to James, Duke of York, encompassing the same territory as the prior, 1664 patent. Ex. S-72 at xiii.
122. The second grant to the Duke of York was made for the purpose of removing doubts that had then arisen as to the validity of the first. Martin v. Waddell's Lessee, 41 U.S. 367, 407 (1842).
123. At the point of issuance of the second grant by Charles II to the Duke of York, the Province of New York started over. Trial Tr. (J. Lynch) 1172:10 – 25.
124. Edmund Andros was appointed Governor of the Province of New York in 1674 and arrived there, and in that year put into execution the Duke's Laws under authority from the second grant by Charles II to the Duke of York. Ex. S-72 at xiv; Ex. S-62 at 25 – 26.
125. In or prior to September of 1676, Governor Andros required that Southampton submit to him an explanation of why it had not taken out a patent for lands. Ex. D187 at 722.
126. In response to this requirement by Andros, Southampton submitted exactly the same document it had submitted in 1670 to Governor Lovelace, described at Def. Find. Fact 113.
127. Having received Southampton's response, the Court of Assizes gave judgment on October 5, 1676 that for its "disobedience to Lawes" Southampton "had forfeited all [its] titles, Rights & priviledges to the lands" to which it claimed rights. Ex. D187 at 724.

128. Soon after this event, Southampton applied to Governor Andros for a patent, and on November 1, 1676, Governor Andros issued it one (the "Andros Patent"). Ex. T-188.
129. Governor Andros had the authority to issue a patent to Southampton, that patent to be based on whatever evidence the applicant had available to it that it brought forward. Trial Tr. (A. von Gernet) 2203:7 – 12.
130. In the case of the Andros Patent, the only evidence brought forward by Southampton was that contained in its 1670 letter to Governor Lovelace, as resubmitted in 1676 to Governor Andros. Ex. D32 at 35 – 36.
131. As recorded in proceedings of the Privy Council in London (the "Privy Council Document"), as late as 1679, Southampton continued to claim the Sterling patent and Farrett confirmation of it as the sole basis for its rights in land. Ex. D188 at 197 – 198; Trial Tr. (K. Hermes) 2517:18 – 2522:11.
132. In the Andros Patent, Governor Andros does not reach any conclusion about whether or not there were any aboriginal Indian lands within the boundaries he patented. Trial Tr. (K. Hermes) 2506:1 – 2507:23; Trial Tr. (A. von Gernet) 2206:9 –17, 2212:23 – 24.
133. The reason for the reference to "Seatuck" being described as the western boundary of the metes and bounds of the land in the Andros Patent is that Brookhaven (also known as Seatuck) had been issued a patent by Governor Nicolls in 1667; Andros was essentially filling in a piece of land (Southampton) in the land puzzle that then was eastern Long Island. Trial Tr. (K. Hermes) 2609:16 – 2611:13; Trial Tr. (A. von Gernet) 2203:13 – 16.
134. On December 6, 1686, a subsequent Governor of New York, Thomas Dongan, issued a second patent for Southampton (the "Dongan Patent") at its request, to confirm the Andros Patent. Ex. D12.
135. Prior to the date he issued the Dongan Patent, it is probable that he knew of the Privy Council Document and of the position of Southampton regarding the source of its rights in land set forth in it. Trial Tr. (K. Hermes) 2517:18 – 2522:11.
136. The Dongan Patent reiterates verbatim the Andros Patent. Trial Tr. (A. von Gernet) 2213:25 – 2214:2.
137. In particular, the Dongan Patent reiterates verbatim the text of the Andros Patent that supports the conclusion that Governor Andros did not make any pronouncement about whether or not there were any aboriginal Indian lands within the patented boundaries. That text, as it appears in the Dongan Patent, is substantive. Trial Tr. (K. Hermes) 2516:11 – 2517:2; Trial Tr. (A. von Gernet) 2290:6 – 12; T-12 at 51.

138. Indians confirmed the 1640 Deed on behalf of its grantors on November 24, 1686. Fact Stip. 21.
139. The “matter in variance between the freeholders of the said Towne of Southampton and the Indjans” referred to in the Dongan Patent and the land “lawfully purchased” from Indians by “the freeholders of the Towne of Southampton” referred to in the Dongan Patent most likely refer to that November 24, 1686 confirmation and to the lands conveyed by the 1640 Deed; whether Dongan had anything else before him at the time he issued the Dongan Patent is speculation. Ex. T-69 at 887; Trial Tr. (A. von Gernet) 2292:14 – 2293:2, 2295:18 – 2297:1; Trial Tr. (K. Hermes) 2513:7 – 2516:9.
140. No party is aware of any documentary evidence that as of the date of the Dongan Patent, any purported Indian or Indian tribe, as grantor, ever had granted any lands to the west of Canoe Place by deed to the freeholders of the Town of Southampton. Fact Stip. 71.

The 1703 Deed Did Not Extinguish The Nation’s Aboriginal Title To Westwoods

141. No plaintiff has offered any evidence that the so-called deed executed in 1703, Ex. T-74, was executed in compliance with the statutory requirements in force at that time. In particular, the plaintiffs have offered no evidence whatsoever that this deed was known to or approved by the Governor of New York or that it was recorded in the office of the Secretary of the Province of New York, both required as necessary preconditions to its validity under applicable New York law. In fact, this document, on its face, does not demonstrate that anyone outside the Town knew of its existence. Of the plaintiffs’ two historical experts, Professor von Gernet does not rely on it or even mention it, and Mr. Lynch has opined that it did not convey any land to the Town at all, while also mistaking the identity of the governor in 1703. The 1703 deed therefore cannot have validly extinguished the Nation’s title to Westwoods. T-12 at 53; Def. Concl. L. Section III-C-7.

The So-Called Canoe Place Division Did Not Extinguish The Nation’s Aboriginal Title To Westwoods

142. The Canoe Place Division of 1738 describes land lots running east to west numbered from one to thirty-nine, with lot one being the eastern-most lot and thirty-nine being the western-most lot. Ex. T-97; Trial Tr. (M. Read) 1326:22 – 1327:2; Trial Tr. (J. Lynch) 1125:17 – 1127:24.
143. The Canoe Place Division contains a general description of its boundaries, but it does not fix the eastern boundary of lot number one, and therefore does not fix the eastern boundary of the entire “division”. Ex. T-97; Trial Tr. (M. Read) 1326:22 – 1327:2; Trial Tr. (J. Lynch) 1125:17 – 1127:24.

144. The eastern boundary of lot number one was the western boundary of the land of Jeremiah Culver. While the northern, southern and eastern boundaries of Jeremiah Culver's land are known, the western boundary is not known, nor is the total acreage of his land. The larger in acreage that Jeremiah Culver's land was, the further west its western boundary would have been located. Thus, the larger Culver's land was, the further west the eastern boundary of lot number one was. The record does not reveal where the eastern boundary of the Canoe Place Division was in relation to Westwoods. Ex. T-97; Trial Tr. (M. Read) 1327:3 – 8; Trial Tr. (J. Lynch) 1125:17 – 1130:3, 1174:4 – 1177:9.
145. Without knowing where the eastern boundary of the first lot of the Canoe Place Division was located, it is not possible to plot the exact location of any of the lots within the Canoe Place Division. Ex. D347; Trial Tr. (M. Haas) 3012:11 – 3018:19, 3074:6 – 3076:24; Trial Tr. (M. Read) 1332:1 – 8, 1334:10 – 1339:23, 1350:15 – 22; Trial Tr. (J. Lynch) 1125:17 – 1130:3.
146. No survey exists of lands described in the Canoe Place Division of 1738. Trial Tr. (M. Haas) 3012:17 – 3013:17, 3074:6 – 16; Trial Tr. (M. Read) 1331:23 – 1332:8; Trial Tr. (J. Lynch) 1129:22 – 24.
147. No deed or other recorded instrument exists that evidences a source of title in any person named as a landowner in the Canoe Place Division of 1738, nor is there any recorded evidence of any fee ownership in property within the Canoe Place Division. Trial Tr. (M. Haas) 3012:17 – 25; D347 at 4 – 5.
148. No reliable documentary evidence exists supporting the notion that the Canoe Place Division was anything more than a proposal for property division that was never executed. Ex. D347 at 5 – 6.
149. Mr. Lynch, who is neither a title abstractor nor a land surveyor, is not qualified to opine on matters of title. Ex. D347 at 1. Trial Tr. (M. Haas) 3014:7 – 3018:15.
150. A professional title abstractor must choose a monument, or a fixed location, as a starting point for a title search along with the current Suffolk County tax map in order to fix the location of a piece of property. Trial Tr. (M. Haas) 2980:17 – 2984:18, 3016:7 – 23.
151. Mr. Lynch did not, and could not, properly and accurately fix the location of any lot within the Canoe Place Division, and his claims otherwise are not credible or supported by the evidence. Ex. D347; Trial Tr. (M. Haas) 3012:11 – 3018:19, 3074:6 – 3076:24; Trial Tr. (M. Read) 1332:1 – 8, 1334:10 – 1339:23, 1350:15 – 22; Trial Tr. (J. Lynch) 1125:17 – 1129:21.
152. The sources that Mr. Lynch cites as support for his conclusions regarding land ownership are largely unacknowledged or secondary. Mr. Lynch

does not rely primarily on the recorded instruments that are the basis of any professional analysis of land title and ownership. D347 at 1.

153. Mr. Lynch misuses or misunderstands many of the sources to which he cites, and fails to consider more reliable sources that contradict his conclusions regarding land ownership and title. D347 at 1; Trial Tr. (J. Lynch) 1177:6 – 1186:2.
154. In analyzing the ownership and location of lands surrounding Westwoods, Mr. Lynch mistakes the placement of several landmarks, which renders his opinions on the subject defective and unreliable. D347 at 1; Trial Tr. (M. Haas) 3016:24 – 3018:19.
155. Mr. Lynch makes erroneous references to ownership of lands within the Canoe Place Division, including unsubstantiated assertions of private, fee ownership of lands within the Canoe Place Division. D347 at 4; Trial Tr. (J. Lynch) 1177:6 – 1186:2.
156. Mr. Lynch's expressed opinions on historical and title matters contained so many fundamental errors of fact and analysis that they are neither credible nor reliable for any purpose. Ex. D32; Ex. D347; Trial Tr. (J. Lynch) 1001:5 – 1198:16.

Westwoods Has Long Been Recognized In The Community As Indian Land And Plaintiffs Have Long Recognized And Acquiesced In The General Immunity Of Westwoods From State And Local Regulation

157. No property taxes have been assessed or imposed on Westwoods from 1927 to the present, and Westwoods is not listed in any tax records of the Town of Southampton for the years 1800 through 1926. Fact Stip. 32.
158. There exists no known evidence that Westwoods ever has been listed as taxable property in any assessment records of the Town of Southampton. Fact Stip. 33.
159. Neither the State Plaintiffs nor the Town is aware of any evidence that Westwoods ever has been listed in any assessment records of the Town of Southampton as anything other than tax-exempt Indian land. Fact Stip. 34.
160. The relevant Suffolk County Tax Maps describe both the Shinnecock Reservation and Westwoods as "Shinnecock Indian Reservation." Ex. D232; Ex. D156d.
161. The characterization of Westwoods as "INDRES" or "Indian Reservation" on the current official zoning map of the Town of Southampton is identical to the characterization of the Shinnecock Reservation at Shinnecock Neck, which is also characterized as "INDRES" or "Indian Reservation" on

the current official zoning map of the Town of Southampton. Ex. T-4; Trial Tr. (Jefferson Murphree) 255:3 – 257:17, 261:7 – 16; Ex. D364 (Deposition of M. Benincasa) at 74:20 – 76:5, 77:2 – 81:9.

162. The computerized GIS (or “Geographical Information System”) in use by the Town department that administers building and zoning, and on which employees of that department rely in their work for the Town, also characterizes both Westwoods and the Shinnecock Reservation at Shinnecock Neck as “INDRES” or “Indian Reservation.” Ex. D364 (Deposition of M. Benincasa) at 78:17 – 79:4, 81:10 – 25.
163. The Town of Southampton never has sought to enforce building, zoning or other regulations on the Shinnecock Reservation at Shinnecock Neck, despite the presence of open and obvious nonconforming development, nor has the State of New York sought to enforce non-criminal laws on the Shinnecock Reservation. Trial Tr. (J. Murphree) 266:24 – 267:7; Trial Tr. (L. Gumbs) 2856:21 – 2859:22; Ex. D364 (Deposition of M. Benincasa) 34:16 – 40:13, 42:2 – 44:7, 48:10 – 50:15.
164. Until this litigation, the Town of Southampton never has sought to enforce building, zoning or other regulations at Westwoods, nor has the State of New York sought to enforce non-criminal laws at Westwoods. Trial Tr. (L. Gumbs) 2855:19 – 2856:18, 2860:4 – 2870:5.
165. The State Of New York has taken the position that the Town is powerless to enforce zoning at the Reservation by virtue of the Reservation’s status as Indian land. Ex. D228.
166. The Town of Southampton routinely applied zoning classifications to all the land area in the Town regardless of whether the Town had the authority to enforce zoning regulations on that land, and did so solely to ensure that should the land at issue become subject to Town zoning regulation it would have an applicable zoning classification. Ex. D229; Trial Tr. (J. Murphree) 261:21 – 266:12.
167. Nonetheless, the Westwoods Parcel remains characterized as “INDRES” or “Indian Reservation” on the current official zoning map of the Town of Southampton. Ex. T-4; Trial Tr. (J. Murphree) 255:3 – 257:17; Ex. D364 (Deposition of M. Benincasa) at 74:20 – 76:5, 77:2 – 81:9.
168. Mason Haas, who has been engaged as a professional abstractor and title searcher in Suffolk County, New York for 24 years and has examined hundreds of thousands of deeds in his career, examined the existing documentary evidence relating to recorded land title in and around Southampton to determine the ownership of Westwoods during the period for which records exist. Trial Tr. (M. Haas) 2972:20 – 2973:24; Ex. D154 at 1.

169. In the course of his title research, Mr. Haas examined the chains of title to the lands surrounding the current Westwoods property, including both the roughly 79 acre northern part of it and the roughly 2 acre southern part. He identified each and every lot adjoining Westwoods by its current Suffolk County tax map designation, which are maintained by the Real Property Tax Service Agency Located in Suffolk County and are distributed to and maintained by the Townships within Suffolk County, including Southampton. Ex. D154 at 2.
170. For each of the properties adjoining the Westwoods property, Mr. Haas conducted a full title examination and reviewed all records available for and relevant to examination of record title, including, but not limited to, records held at the Suffolk County Historical Society, records of the Town of Southampton (including Indian Records), and records on file at the Suffolk County Clerk's Office. Ex. D154 at 2.
171. Numerous documents relating to Indian records and archeology, possibly containing information relevant to the Shinnecock Indian Nation's possession of Westwoods, known to have been in the custody of the Town have disappeared. Ex. D109 at 141; Ex. D363 at 114 – 115; Ex. D199.
172. The documentary evidence relating to recorded land title in and around Southampton, in particular the relevant recorded deeds, tax maps and surveys during the entire period for which such records exist, indicate that the Shinnecock tribe of Indians owned Westwoods. Ex. D154 at 1, 3.
173. In every instance, and without exception, from the most current tax maps and surveys to the earliest that exist in the record, where the land known as Westwoods appears, it is referred to as Indian Land, Indian Reservation, Land of the Shinnecock Tribe of Indians, or by some equivalent reference. Ex. D154 at 3; Ex. D157; Trial Tr. (M. Haas) 2988:13 – 2991:18, 2996:4 – 8, 3026:17 – 3029:1; Exs. D158d, D159c, D160c, D161c, D162c, D163c, D164b, D165, D166c, D167b, D168d.
174. There exists no deed or conveyance within the current boundaries of Westwoods with the Shinnecock Nation as Grantor or Grantee, nor does there exist any deed at all for land within Westwoods, in the Office of the Suffolk County Clerk. Thus, there is no recorded title to any part of the land within Westwoods. Ex. D154 at 3; Fact Stip. 29, 30.
175. The earliest recorded deed in the Suffolk County records for property adjoining Westwoods is from 1845, and it refers to the abutting boundary of Westwoods as the "Indian line." Ex. D157 at 18; Ex. D167b, Deed 16; Trial Tr. (M. Haas) 2992:8 – 2992:22, 2987:12 – 19.

176. The Elected Trustees of the Shinnecock Tribe are the source of earliest recorded title, as evidenced in an 1873 deed, to all properties within the area located to the east of Westwoods, to the west of the Shinnecock Canal and running along the Peconic Bay to the north of Newtown Road. Trial Tr. (M. Haas) 3007:12 – 3010:7; Ex. D157 at 20; Ex. D168c, Deed 12.
177. The only deed that exists out of the Trustees of the Proprietors of the Common and Undivided Lands of the Town of Southampton for property in the area west of the Shinnecock Canal and north of Montauk Highway contains a deed description stating the land runs “to the easterly line of what is known as Indian land.” The “Indian land” there referred to is Westwoods. Ex. D166c, Deed 24; Ex. D154 at 3; Trial Tr. (M. Haas) 3005:23 – 3007:5; Trial Tr. (J. Lynch) 1142:25 – 1144:17.
178. The Southampton Town Planning Board has approved file survey maps, which subdivide parcels into minor subdivisions, of property adjoining Westwoods that refer to Westwoods as “Lands of the Shinnecock Indian Reservation” and “Shinnecock Reservation Land.” Ex. D163b; Ex. D162b; Trial Tr. (M. Haas) 3003:2 – 3005:22; Ex. D157 at 6 – 7.
179. In 1959, the New York State Department of Public Works Bureau of Rights of Way and Claims noticed an Appropriation of Property by the People of the State of New York 0154 for land lying within the Westwoods parcel for the bed of the Sunrise Highway. The Notice of Appropriation states that the owner of the parcel is “The Shinnecock Tribe of Indians,” located at “Indian Reservation, Peconic Bay, Southampton, N.Y.” Ex. D169; Ex. D154 at 2; Ex. D157 at 20; Trial Tr. (M. Haas) 2996:11 – 2997:23.
180. During the 19th and 20th Centuries, the size of Westwoods was diminished by apparent encroachment by surrounding landowners and by the taking for public use of Newtown Road and the southern portion of Westwoods for the Sunrise Highway. Ex. D169; Ex. D154 at 2-3; Trial Tr. (M. Haas) 2996:11 – 2997:23; Def. Find. Fact 179, above.
181. In 1890, the trustees of the Shinnecock tribe of Indians brought suit against James Cassady in the Supreme Court, Suffolk County, in their capacity as trustees (the “Cassady” case). The court entered judgment for the trustees and made findings of fact including that the Nation had, at that time, been in quiet possession of Westwoods for “upwards of sixty years.” Ex. D2; Trial Tr. (J. Lynch) 1098:9 – 1099:17; Fact. Stip. 100.
182. A 1922 case in New York Supreme Court, Suffolk County, titled The Shinnecock Tribe of Indians v. William W. Hubbard involved the illegal taking of loam from Westwoods by a road foreman of the Town of Southampton. The findings of fact of that case demonstrate that within the memory of witnesses then living, three, four or five families of tribe

members lived at Westwoods and cultivated parcels of land there under a claim of right. Ex. D1; Trial Tr. (J. Lynch) 1103:11 – 1104:14; Fact Stip. 101.

183. The Cassady and Hubbard cases support the conclusion that the Nation had been in possession of and made active use of Westwoods from at least the mid-19th century until some time after 1922. Ex. D1; Ex. D2.
184. Except for his time at college, Mr. Gumbs, a current tribal Trustee, has always resided on the Shinnecock Reservation at Shinnecock Neck. Trial Tr. (L. Gumbs) 2844:21 – 2845:2.
185. Mr. Gumbs is familiar with the reputation regarding Westwoods in the community. Trial Tr. (L. Gumbs) 2845:8 – 2846:23.
186. In particular, Mr. Gumbs is familiar with the oral history of Westwoods from a tribe member named Gus Thompson who died in 1970 over the age of 80 and of sound mind. Trial Tr. (L. Gumbs) 2846:17 – 2848:6.
187. In or around 1968 Mr. Gumbs personally accompanied Mr. Thompson to Westwoods to gather wood as heating fuel. All members of the Nation are entitled to make use of Westwoods. Trial Tr. (L. Gumbs) 2849:6 – 2850:25.
188. Mr. Thompson had himself been coming to Westwoods since he was a boy. Trial Tr. (L. Gumbs) 2850:22 – 2852:1.
189. Mr. Thompson identified certain indentations in the ground at Westwoods north of Newtown Road and on the coastal bluffs as related to wiki-ups, a kind of shelter. Trial Tr. (L. Gumbs) 2852:4 – 2854:6.
190. It was Mr. Thompson's belief, and it was reported by him to be the general belief in the community, that the Nation had always owned Westwoods. Trial Tr. (L. Gumbs) 2854:7 – 13.
191. It remains the general reputation in the community that Westwoods has always been the property of the Nation. Trial Tr. (L. Gumbs) 2854:13 – 2855:18.
192. There is no evidence in the record that the Nation ceased to occupy and possess Westwoods at any time.
193. During the seventeenth century and well into the nineteenth century, members of the Shinnecock Indian Nation inhabited the area west of Canoe Place, at or in the vicinity of Westwoods. Ex. D29 at 1, 2 and exhibits there cited.

194. Throughout the nineteenth and twentieth centuries the Shinnecock Indian Nation made use of the area known as Westwoods. Ex. D29 at 1, 18 and exhibits there cited.
195. M.R. Harrington, an archaeologist speaking as of 1902, concluded that numerous traces of ancient Indian habitation might be seen on the northern side of Canoe Place and that Canoe Place had good springs of water, proximity to the ocean, the best of fishing and numerous clams and oysters and a nearby forest that must have abounded in game. Ex. T-200 at 233; Trial Tr. (J. Lynch) 1055:12 – 1058:1.
196. Indeed, a spring existed immediately to the west of Canoe Place and to the east of Westwoods as late as the mid-1880s. Trial Tr. (M. Haas) 3009:17 – 3012:10; Ex. D168-B.
197. In 2004, the Town engaged Barbara M. Moeller to produce a written Phase I Historical Profile of Hampton Bays. Ex. D359 (Deposition of B. Moeller) at 20:2 – 22:14.
198. Westwoods is within the hamlet of Hampton Bays. Ex. D359 (Deposition of B. Moeller) 27:8 – 13.
199. Ms. Moeller's assignment was to produce a historically accurate report, and she believes she carried out that assignment. Ex. D359 (Deposition of B. Moeller) 30:6 – 12.
200. In June of 2005, Ms. Moeller produced on behalf of the Town the final form of a report called "Historic Profile of Hampton Bays Phase I" (the "Hampton Bays History Report"). Ex. D359 (Deposition of B. Moeller) 35:11 – 22; Ex. D192.
201. Ms. Moeller's objective when she wrote the Hampton Bays History Report was to give an accurate statement of the history of Hampton Bays so that the Town would have a basis to make decisions about preserving structures and sites, and what she wrote in this document reflected as accurately as possible the conclusions she reached. Ex. D359 (Deposition of B. Moeller) 69:3 – 70:5.
202. The Canoe Place Inn is a building west of Canoe Place within the Town of Southampton and is located approximately 700 yards south of the closest boundary of Westwoods. Fact Stip. 40.
203. The Hampton Bays History Report concludes that that Canoe Place Inn area "has been an Indian habitation for centuries" and recommends an archaeological survey of its grounds. Ex. D192 at 13.

204. The grave of Paul Cuffee is within the Town of Southampton to the west of Canoe Place and is located approximately ½ mile southwest of the closest boundary of Westwoods. Fact Stip. 41.
205. The Hampton Bays History Report concludes that there was an Indian burying ground at the site of the grave of Paul Cuffee and that Indian remains other than those of Paul Cuffee himself are or were buried at that site. Ex. D192 at 16.
206. Paul Cuffee was a preacher to the Shinnecock Indians, among others, and died in 1812. Trial Tr. (J. Lynch) 1088:14 – 1089:6.
207. Ms. Moeller is of the opinion that when the railroad went through near the grave of Paul Cuffee in 1869, Indian remains there were dug up and moved to the Nation's reservation at Shinnecock Neck. Ex. D359 (Deposition of B. Moeller) 78:20 – 79:12, 80:21 – 23.
208. The Hampton Bays History Report states that early settlers in Hampton Bays mingled with Indians already living in the area. Ex. D192 at 54.
209. It is probable that the first settlement in Southampton anywhere to the west of Canoe Place was in 1730, and until after the Revolutionary War there was one settler house at Canoe Place itself. Ex. D117 at 286.
210. As a matter of logic, the “mingling” to which the Hampton Bays History Report refers must have commenced in the 18th century.
211. The opinions expressed by Ms. Moeller are credible and establish the continuous presence of members of the Nation in the area of Hampton Bays from time immemorial until at least the latter part of the 19th century.
212. According to the Eighth Volume of Records of the Town, Part 2, written in or about 1928 by Harry Sleight as Town historian, Indians continued to live west of Canoe Place after the date of the Topping Deed and, in particular, “long years ago numbers of Indians lived about the Canoe Place fishing grounds.” Ex. T-108 at 237; Trial Tr. (J. Lynch) 1065:7 – 1067:11.
213. It is a reasonable inference that the reference to “long years ago” in the language quoted in Def. Find. Fact 212 is to a period as measured from 1928.
214. There was a Shinnecock Indian village at Canoe Place in 1812. Trial Tr. (J. Lynch) 1155:17 – 1156:25.
215. According to an article written by William S. Pelletreau and published in 1882, “[a]t the beginning of the present century [i.e., the 19th] the Indians lived entirely in wigwams, of which several stood near the bay at Canoe Place.” Ex. T-241.

216. William S. Pelletreau was Town Clerk of the Town of Southampton from April of 1862 until April of 1870 and wrote the Introduction to the First Book of Records 1874 under the authority of the Town. Fact. Stip. 58, 59.
217. According to the Eighth Volume of records of the Town, Part 2, published in 1928, the Nation then owned the grave site of Paul Cuffee and an "Indian church edifice" once stood near that site. T-108; Trial Tr. (J. Lynch) 1068:21 – 1069:7, 1070:12 – 21.
218. As of 1827, there was an operating church attended by Shinnecock Indians at the site of the grave of Paul Cuffee. Trial Tr. (J. Lynch) 1090:11 – 16.
219. James Y. Downs, a preacher to Shinnecock Indians, preached to them at Canoe Place until 1877. Trial Tr. (J. Lynch) 1085:10 – 1087:19; Ex. D108 at 20.
220. Good Ground was the name utilized during the later part of the 19th century and until 1922 to refer to what is now known as the hamlet of Hampton Bays within the Town of Southampton. Fact Stip. 45.
221. There was an active Indian church in Good Ground in 1829 or 1830. Trial Tr. (J. Lynch) 1091:13 – 16.
222. There are indications that there were two Indian meeting houses to the west of Canoe Place at different locations. Trial Tr. (J. Lynch) 1071:6 – 9.
223. The use of Indian meeting houses, to which reference is made in Def. Find. Fact 222, was basically to conduct church services. Trial Tr. (J. Lynch) 1073:10 – 12.
224. One of these meeting houses is called the Canoe Place Chapel and still exists; it has been dated to approximately 1840. Trial Tr. (J. Lynch) 1073:13 – 1074:24.
225. The Canoe Place Chapel is shown as an Indian meeting house on a map originally created in 1848 by Jonathan Fithian. Mr. Fithian was a Justice of the Peace of the Town at various times and Superintendent of the Shinnecock school and held other Town offices. Trial Tr. (J. Lynch) 1075:8 – 1077:6; Ex. D191; Fact Stip. 97.
226. The map originally prepared by Jonathan Fithian in 1848 identifies the land immediately surrounding and to the west of the Canoe Place Chapel as Indian land. Trial Tr. (J. Lynch) 1077:7 – 10; Ex. D191.
227. It is a reasonable and appropriate inference of fact that Shinnecock Indians resided west of Canoe Place and at or near where they mingled with early settlers, worshipped and buried their dead, as described in Def.

Find. Fact 193 – 226 and during the periods to which those proposed fact findings relate.

228. Maps dated 1839 and 1844 show Shinnecock Indians residing to the west of Canoe Place and in proximity to the location of the Canoe Place Chapel. Trial Tr. (J. Lynch) 1091:21 – 1096:11; Ex. D118; Ex. D119.
229. A photograph taken 1879 depicts an Indian wigwam and hut near Canoe Place. D377; Trial Tr. (J. Lynch) 1118:12 – 1120:10.
230. The Indian wigwam and hut depicted in D377 were probably located near the bend in the road running south from the Canoe Place Inn. Ex. D109 at text for Photo 6.
231. There was a Shinnecock Indian settlement on the west side of Shinnecock Bay, to the south of the Montauk Highway where Shinnecoeks resided at least up until the 1840s. Trial Tr. (J. Lynch) 1255:16 – 1256:23.
232. No evidence shows any structure constructed by a European settler at Westwoods at any time, or any occupancy or use of Westwoods by any European settler at any time.
233. For example, a 1780 map shows the area of Westwoods as “Woods.” Ex. D208.
234. There is evidence of Indian occupancy and use of land adjacent to Westwoods, specifically, in a report prepared in December 2003 by Tracker Archaeology Services, Inc. (“Tracker”). Ex. T-202.
235. Tracker by reputation is a firm of competent archaeological investigators. Trial Tr. (J. Lynch) 1003:3 – 5.
236. The parcel that is the subject of Ex. T-202 (the “Holzman Parcel”) is both to the south of Westwoods and to the east of Westwoods, and to the south and west of Newtown Road. The Holzman Parcel is within 160 feet of Westwoods, or closer. Trial Tr. (J. Lynch) 1008:2 – 5, 1009:21 – 25.
237. According to Tracker, an Indian trail was recorded in the period after first European contact along what is probably the present day Montauk Highway and a second Indian trail appears to have been located along, or near, Newtown Road. Ex. T-202 at 5.
238. According to Tracker, prehistoric sites surround the Holzman Parcel and many of these may be associated with coastal resources. Ex. T-202 at 6.
239. According to Tracker, in the 17th century the native inhabitants of Southampton were seasonally migratory maritime hunter/gathers. Ex. T-202 at 7.

- 240. According to Tracker, in the 17th century the Holzman Parcel and surrounding territory appeared to be occupied by Indians that were sub-tribes of the Shinnecock Indian Nation. Ex. T-202 at 7.
- 241. According to Tracker, the Holzman Parcel has a higher than average potential for Native American historic sites. Ex. T-202 at 10.
- 242. These conclusions are credible.
- 243. Indians lived on the bluffs at Westwoods in the period after the first European contact. Ex. D-107; Trial Tr. (J. Lynch) 1019:5 – 1022:7; Trial Tr. (J. Mansky) 3323:13 – 3326:6.
- 244. Quogue is a hamlet within the Town of Southampton to the west of Canoe Place and is located approximately 6-1/2 miles southwest of the closest boundary of Westwoods. Fact Stip. 39.
- 245. During the mid-18th century, Shinnecock Indians lived in or near Quogue in the winter months, migrating in the summer months to Seabonck and Shinnecock to the east of Canoe Place. Ex. D-29 at 6 – 8.
- 246. The area of the current Town of Southampton is 138.9 square miles, of which 53%, or a bit more than 70 square miles, is west of Canoe Place. Trial Tr. (J. Mansky) 3320:19 – 21, 3321:6 – 9.
- 247. The European settler population of Southampton was between 100 and 200 at the start of 1641. Ex. D380 at 51.
- 248. The total population of Suffolk County by 1771 was less than 12,000, living in a land area of 1,222 square miles. Ex. D29 at 14 – 15.

**The Plaintiffs' Case Regarding The Impact Of Economic Development Suffers
From A Fatal Failure Of Proof**

The Actual Contemplated Development Of Westwoods Is Reflected In A Carefully
Planned And Negotiated Development Agreement

- 249. The entity formerly known as the Shinnecock Nation Casino at Westwoods Authority is now known as the Shinnecock Nation Gaming Authority (the "Authority"), and is an instrumentality of the Shinnecock Indian Nation. Fact Stip. 49.
- 250. The Nation created the Authority to handle matters relating to the development of a gaming facility on the Nation's land. Trial Tr. (L. Gumbs) 2842:3 – 22.

251. The powers of the Authority are limited to gaming and do not extend to other economic development alternatives. Trial Tr. (L. Gumbs) 2842:23 – 2843:15.
252. In 2003 the Nation, through the Authority, entered into a development agreement regarding the development of a gaming facility at Westwoods (the “Development Agreement”). Ex. D237; Trial Tr. (L. Gumbs) 2842:23 – 2843:15.
253. The Development Agreement specifies an initial gaming facility of 61,000 square feet (the “Contract Facility”). Ex. D237 § 4.2.
254. The Development Agreement specifies that the Contract Facility shall be operated without further expansion until such time the Developer/Manager and the Authority determine that all gaming activities are permitted by all legal authorities without the threat of further litigation, or until the State executes a Compact or a cooperation agreement with the Nation and or the Authority.” Ex. D237 § 4.2.
255. The Development Agreement requires that with respect to the design of any facility to be constructed at Westwoods:

The Design Agreement shall provide that the Facility shall be designed and constructed so as to adequately protect the environment and the public health and safety as required by the law or regulations of the State over the Enterprise or the Facility or its development, management and operation. The construction and maintenance of any gaming facilities and the operation of gaming activities shall be conducted in a manner which adequately protects the environment and the public health and safety and for that purpose shall comply with the requirements of all other applicable health, safety and environmental standards enacted by the Tribe. Those standards generally imposed by the laws and regulations of the State relating to public facilities with regard to building, sanitary and health standards and fire safety shall be deemed applicable to the gaming facilities. Those standards generally imposed by the laws and regulations of the State relating to public facilities with regard to water discharges shall be deemed applicable to the gaming facilities of the Tribe; provided, however, that to the extent that federal water discharge standards specifically applicable to the Reservation would preempt such State standards, such federal standards shall govern.

Nothing herein shall cede jurisdiction to the State, County or Town.

Ex. D237 § 6.7; Trial Tr. (L. Gumbs) 2886:17 – 2888:5.

256. The inclusion of this provision was a specific objective of the Nation. Trial Tr. (L. Gumbs) 2882:16 – 2888:5.
257. The Development Agreement requires that with respect to the design of any facility to be constructed at Westwoods:

The Facility shall be constructed and maintained in a good and workman like manner to at least NYS standards. Nothing in this Agreement shall grant any jurisdiction to the State of New York. Fire protection, police and emergency medical services for the Facility will be provided pursuant to service agreements negotiated by the Authority with nearby jurisdictions in a form and substance satisfactory to Developer/Manager and insurance underwriters responsible for approving insurance coverage for the Enterprise. All such expenses shall be treated as Operating Expenses of the Enterprise.

Ex. D237 § 9.5.

258. No blueprints or other construction documents for the Contract Facility currently exist because the Nation was enjoined before they could be created. Trial Tr. (L. Gumbs) 2889:10 – 17; Ex. S-248 (Deposition of F. Bess) 143:21 – 145:18.
259. Any development of Westwoods under the Development Agreement will take place south of Newtown Road and within a 15-acre portion of Westwoods. Trial Tr. (L. Gumbs) 2888:8 – 2889:9; Ex. S-248 (Deposition of F. Bess) 54:2 – 11.
260. There are no current plans for the development of the Westwoods Parcel apart from those reflected in the Development Agreement. Trial Tr. (L. Gumbs) 2889:18 – 2891:1, 2891:2 – 2901:17.
261. The Nation would be willing to discuss alternatives to the development contemplated in the Development Agreement with the plaintiffs, but, in the absence of an alternative agreement, intends to proceed with development of the Contract Facility contemplated in the Development Agreement. Trial Tr. (L. Gumbs) 2889:18 – 2891:1.

The Plaintiffs Have Offered No Evidence Whatsoever As To The “Disruption” That Would Allegedly Result From Development Of Westwoods In Accordance With The Development Agreement

262. No expert witness for any plaintiff whose testimony related to the impact of development at Westwoods analyzed, relied upon, or was even provided with the Development Agreement or any part of it, or even with a general description of the scope and size of the Contract Facility. Trial Tr. (C. Evart) 2102:4 – 14, 2099:9 – 25; Trial Tr. (W. Eadington) 1429:20 – 23; Trial Tr. (M. Salatti) 1605:2 – 1615:13; Trial Tr. (S. Eckler) 1864:15 – 1878:9.
263. No expert witness for any plaintiff whose testimony related to the impact of development at Westwoods analyzed any scenario based on, or similar in size or scope to, the Contract Facility. Compare Exs. S-1, S-16, S-77, S-125, S-200 with Ex. D237.
264. Every scenario analyzed by any expert witness for any plaintiff whose testimony related to the impact of development at Westwoods was substantially larger in size or scope than the Contract Facility. Compare Exs. S-1, S-16, S-77, S-125, S-200 with Ex. D237.
265. The assumptions relied upon by plaintiffs and their testifying experts do not reflect the Contract Facility, and are in some respects directly contrary to the current and previous plans for usage of Westwoods by the Nation, for example in that they anticipate use of land north of Newtown Road or of substantially more than 15 acres. Compare Exs. S-1, S-16, S-77, S-125, S-200 with Trial Tr. (L. Gumbs) 2882:16 – 2888:5, 2891:2 – 2901:17, 2959:3 – 2963:6 and Ex. D237.
266. Consequently, no plaintiff has offered any evidence whatsoever as to the environmental or economic impact on any plaintiff of the Contract Facility.
267. The documents admitted as Exhibits S-113, S-114, S-115, S-116, S-118, and S-119 have been offered by the plaintiffs for the purpose of establishing what they believe might be possible to construct at Westwoods, and not as evidence of the actual plans of the Nation. Trial Tr. 2348:15 – 25 (discussion on record among counsel).

The Plaintiffs’ Assumptions As To What Is Financially Viable At Westwoods Are Not Credible And Are Based On Speculation

268. Steven M. Rittvo has over 15 years experience in performing gaming market assessments and is President and founder of The Innovation Group, Inc., an international financial forecasting, feasibility analysis and market research firm specializing in the gaming and leisure industries. Mr. Rittvo conducted a thorough assessment of a proposed gaming facility at Westwoods, as well as an assessment of the analysis conducted by

William Eadington and Candace Evert for the plaintiffs. Exs. D325 – D329, D343 – D346, D348, D348a; Trial Tr. (S. Rittvo) 3091:21 – 3094:6, 3103:13 – 3106:2.

269. Mr. Rittvo produced a forecast of visitation to the potential gaming facility at Westwoods that provided visitation patterns for a full cross section of time periods, analyzing three different casino scenarios: (1) the facility described in the Development Contract (2) an optimally-sized facility for the site (3) the maximum feasible facility that the market could support at that site. Ex. D325, D328; Trial Tr. (S. Rittvo) 3111:10 – 14, 3113:16 – 3114:10.
270. Mr. Rittvo's analysis provides a much stronger and more accurate visitation forecast than a forecast that relies on general references such as the Institute of Transportation Engineers Trip Generation Manual, because it is based on a proprietary model built from the ground up and tailored to the specific facility and market at issue. Trial Tr. (S. Rittvo) 3112:3 – 3113:5; Ex. D325; Ex. D328.
271. Scenario #3, the maximum feasible facility, is not a realistic development option and no developer, in Mr. Rittvo's experience, has actually implemented a comparable scenario; rather, it is hypothetical scenario utilized to provide a point of comparison. Trial Tr. (S. Rittvo) 3114:12 – 3116:10.
272. Scenario #1, the facility described in the Development Contract, would be economically viable at the Westwoods site. Trial Tr. (S. Rittvo) 3116:11 – 3118:8; 3143:9 – 16.
273. The Westwoods site could accommodate a reasonable expansion of the Contract Facility. Scenario #2 is at the point of diminishing returns; it is the size at which the risk inherent in expanding further is not offset by the rate of return engendered by further expansion. Trial Tr. (S. Rittvo) 3118:9 – 16, 3141:18 – 3143:8.
274. In comparison, Professor Eadington analyzed two different sizes for a potential gaming facility at Westwoods, the smaller of which is more than double the square footage of the Contract Facility. Ex. D343; Trial Tr. (S. Rittvo) 3116:11 – 3121:13.
275. The development scenarios Professor Eadington chose to analyze would put them among the largest casinos in the world. The larger facility analyzed by Professor Eadington is comparable in size to Foxwoods or Mohegan Sun. Trial Tr. (S. Rittvo) 3119:25 – 3120:9, 3134:16 – 19.
276. The market would not support a gaming facility of that size at Westwoods. Trial Tr. (S. Rittvo) 3210:8 – 13; 3134:20 – 3136:15.

277. Professor Eadington based his analysis not upon the Shinnecock Nation's proposed Contract Facility at Westwoods, as outlined in the Development Contract, but upon S-113, a gaming market assessment that had been completed in early 2002 for a different Indian tribe, the Unkechaug, at a different site in a different town. Ex. S-1 at 3 – 4; Trial Tr. (S. Rittvo) 3121:11 – 3122:8.
278. Due to expansions at Foxwoods, Atlantic City, and other gaming facilities in the greater New York area, the gaming market in the area has become much more competitive since 2002, when S-113 was completed. Therefore Professor Eadington's visitation forecasts were premised upon outdated information and are not credible. Trial Tr. (S. Rittvo) 3126:6 – 3131:14.
279. Professor Eadington also based his analysis upon S-115 and S-116, presentations apparently prepared by an entity titled Peconic Bay LLC. Professor Eadington admitted that he has no personal knowledge of the relationship between this entity and the Shinnecock Indian Nation. Ex. S-1 at 4; Trial Tr. (W. Eadington) 1423:20 – 1424:25.
280. The Peconic Bay LLC presentations were in the Shinnecock Indian Nation's files because they are two of the many unsolicited and solicited development scenarios that the Nation has received for Westwoods. The presentations were in no way representative of the Nation's plans for a proposed development at Westwoods. In fact, the Peconic Bay LLC presentations contemplate an expansion of the development to the north of Newtown Road, an idea that the Nation has specifically rejected, and include development on property that is not part of the Westwoods site. Def. Find. Fact. 259 – 260; Trial Tr. (L. Gumbs) 2891:2 – 2901:17, 2916:23 – 2918:22; Ex. D343 at 3; Trial Tr. (W. Eadington) 1427:21 – 1428:12.
281. The only document that details the Shinnecock Indian Nation's actual contemplated plan for a casino development at Westwoods is D237, the Development Contract, which Professor Eadington admitted that he has never seen and so did not consider when conducting his analysis. Def. Find. Fact 258 – 260; Trial Tr. (W. Eadington) 1424:15 – 1425:13, 1429:20 – 23.
282. Professor Eadington assumed a development site for his analysis not at Westwoods but 25 miles closer to New York City than the actual location of Westwoods. Ex. S-1 at 3; Ex. S-113 at 20; Ex. D343 at 3; Trial Tr. (S. Rittvo) 3122:10 – 3126:3.
283. This error caused Professor Eadington to substantially overestimate potential visitation in his analysis. Ex. D343 at 3 – 6; Trial Tr. (S. Rittvo) 3122:10 – 3126:3.

284. Professor Eadington's claim that this error would not have a significant impact on his analysis is not credible because of the importance of location in projecting visitation. Ex. D343 at 3; Trial Tr. (S. Rittvo) 3123:6 – 3126:3.
285. Professor Eadington substantially underestimated the cost of construction in his analysis, which could be three times as high as Professor Eadington estimated. Ex. D343; Trial Tr. (S. Rittvo) 3136:16 – 3141:9.
286. Professor Eadington substantially underestimated the cost of capital in his analysis, and consequently overestimated profitability. Ex. D343 at 9; Trial Tr. (S. Rittvo) 3136:16 – 3141:9.
287. Professor Eadington substantially underestimated the effect of competition to diminish visitation and profitability in his analysis. Ex. D343 at 6 – 7; Trial Tr. (S. Rittvo) 3126:4 – 3131:14.
288. Professor Eadington arbitrarily selected elements of his analyzed development from various sources without regard for whether they are consistent. Ex. D343 at 3 – 4; Trial Tr. (S. Rittvo) 3131:15 – 3133:13.
289. Professor Eadington substantially overestimated the ability of development at Westwoods to draw visitors. Ex. D343 at 4 – 6, 9; Trial Tr. (S. Rittvo) 3133:20 – 3136:15.
290. Professor Eadington's assessment of financial viability is predicated on a win per unit per day of \$300 that is arbitrary and unsupported. Ex. D343 at 4 – 6.
291. Consequently, the assertion by Professor Eadington that the developments outlined in his expert testimony are financially viable is not credible. Ex. D343; Trial Tr. (S. Rittvo) 3106:4 – 3143:16.
292. In any event, because Professor Eadington failed to analyze the actual plans of the Nation with respect to the development of Westwoods, his analysis is irrelevant. Def. Conc. L. Section VII.
293. Mr. Rittvo also analyzed the economic benefits that the Shinnecock Nation could expect to realize by developing a gaming facility at Westwoods, focusing on scenario #2, although the results are generally scalable for the other two scenarios. Ex. D325; Ex. D329; Trial Tr. (S. Rittvo) 3111:15 – 18.
294. Income from tribal gaming is generally (and, according to the Indian Gaming Regulatory Act, regardless of the Act's applicability to a proposed casino at Westwoods, must be) used to fund tribal government programs, to provide for the general welfare of the Indian tribe and its members, to promote tribal economic development, for charitable donations, and to

help fund local government operations. Health care, elderly care, and educational programs are among the most significant benefits funded with gaming income. Ex. D329 at 1.

295. In addition, Indian gaming facilities provide a much-needed source of employment for tribe members. Scenario #2 analyzed by Mr. Rittvo, the optimally-sized facility, could provide employment for over 2,000 individuals. Ex. D329 at 5.
296. Up to 30% of employment positions at Indian gaming facilities are typically held by tribe members. Under scenario #2 of Mr. Rittvo's analysis, this translates into approximately 600 positions potentially available to members of the Shinnecock Indian Nation. Ex. D329 at 5.

The Plaintiffs' Evidence As To The Financial Impact Of Development At Westwoods Is Not Credible And Is Based On Speculation

297. The purpose of Ms. Evert's analysis was to project the costs that would be imposed on the State and Town by development of Westwoods, generally based on the development assumed by Professor Eadington. Ex. S-16 at vii, 1; Trial Tr. (C. Evert) 2116:3 – 7; Trial Tr. (S. Rittvo) 3144:25 – 3145:5.
298. Costs of the sort analyzed by Ms. Evert are not generally imposed upon local governing bodies by Indian casinos without some sort of negotiated reimbursement program, if at all. Trial Tr. (S. Rittvo) 3145:6 – 18.
299. Ms. Evert's assumptions are not based on the Development Agreement, but are generally based on Professor Eadington's assumptions and conclusions, those provided to her by counsel for the plaintiffs, and her own assumptions. Exs. D348 at 2; Trial Tr. (S. Rittvo) 3143:17 – 3145:5; Trial Tr. (C. Evert) 2051:15 – 2052:22, 2099:9 – 2102:14.
300. Ms. Evert has not seen the Development Agreement that lays out the Shinnecock Indian Nation's actual contemplated plan for the development of Westwoods, and therefore did not consider that document when conducting her analysis. Trial Tr. (C. Evert) 2103:7 – 16.
301. Ms. Evert admitted that if what is actually constructed at Westwoods differs substantially from the parameters used in her analysis, her conclusions would be invalid. Trial Tr. (C. Evert) 2099:17 – 2100:21.
302. Ms. Evert's analysis was often inconsistent with that of Professor Eadington, and she arbitrarily selected certain elements of his analysis to rely upon and chose to ignore others. Ex. D348 at 4 – 6; Ex. D348a at 5, 10; Trial Tr. (S. Rittvo) 3143:22 – 3144:24; Trial Tr. (C. Evert) 2110:10 – 2115:23.

303. Ms. Evert based her analysis on cost estimates received from various local governing bodies based on her representations as to the scope of the facility as assumed by her, and, contrary to sound methodological practice, did not independently validate those estimates. Ex. D348 at 4; Ex. D348a at 4; Trial Tr. (S. Rittvo) 3146:8 – 15; Trial Tr. (C. Evert) 2117:20 – 2121:17, 2127:18 – 2128:6, 2132:2 – 23, 2133:21 – 2134:19, 2135:7 – 2135:18.
304. Ms. Evert's initial expert report contained numerous methodological and arithmetic errors, including one of over \$3 billion, which were not discovered by her until they were pointed out in her deposition and as a result of the exchange of rebuttal reports. These errors led Ms. Evert to substantially overestimate the costs incurred by local governing bodies. Ex. D348 at 2-3, 6; Ex. D348a at 2 – 3; Trial Tr. (C. Evert) 2097:9 – 2098:25; Trial Tr. (S. Rittvo) 3149:20 – 3156:1.
305. The supplemental report submitted by Ms. Evert was not, as she claimed, "based on additional information not known at the time of" her initial report, but to correct the numerous errors pointed out in her initial report. Ex. D348a at 2, 9; Trial Tr. (C. Evert) 2099:9 – 2102:14.
306. Even her corrected report contained numerous unjustified, incredible assumptions, such as that 7 employees could operate a restaurant of 7,500 square feet, that 15 employees could operate a 55,000 sq. ft. theater, and that one-third of gaming employees and one-half of non gaming employees would be present on-site at any given time. Ex. S-16 at iv, 4 39, Scenario 1-Appendix 1, Scenario 2-Appendix 1; Ex. D348a at 2, 5-9; Trial Tr. (C. Evert) 2105:9 – 2110:9; Trial Tr. (S. Rittvo) 3149:17 – 3155:19.
307. Her corrected report also contained new methodological errors, such as the method by which she estimated the property tax assessment for Westwoods. Her unfamiliarity with the Marshall & Swift software that she used to conduct part of this analysis further demonstrates that her property assessment conclusions are not credible. Ex. D348a at 5 – 9; Trial Tr. (C. Evert) 2117:8 – 2126:2.
308. Consequently, the assertions by Ms. Evert with respect to the costs imposed by her hypothetical development of Westwoods are not credible. Ex. D348; Ex. D348a; Trial Tr. (S. Rittvo) 3143:17 – 3156:1.
309. In any event, because Ms. Evert failed to analyze the actual plans of the Nation with respect to the development of Westwoods, her analysis is irrelevant. Def. Conc. L. Section VII.

The Plaintiffs' Evidence As To The Air Quality And Noise Impacts Of Development At Westwoods Is Not Credible And Is Based On Speculation; No Significant Disruption In These Areas Would Result From The Nation's Development Of Westwoods

310. Fang Yang, senior air quality and noise scientist at Earth Tech, evaluated the methodology used and conclusions reached by Mr. Grover regarding his expert testimony as to air quality and noise impacts on behalf of the plaintiffs. Ex. D330 at 1-1; D330a.
311. Mr. Grover erred in basing his conclusions on a mesoscale emissions analysis to assess air quality, when a microscale concentration analysis, which focuses on local impact, is the appropriate methodology for assessing the air quality impact of a project like the proposed casino. Mr. Grover's methodological error had the effect of greatly exaggerating the projected air quality impact of the proposed development. Ex. D330 at 2-1; Trial Tr. (F. Yang) 3397:1 – 3410:19.
312. Mesoscale analysis was developed primarily for addressing potential regional air quality impacts from regionally significant transportation projects, not for the purpose of evaluating local neighborhood air quality impact. For this reason, mesoscale analysis is not standard practice for conducting a mobile source localized air quality impact assessment, particularly for a non-transportation project. The EIS for comparable development projects in New York State have been prepared without use of a mesoscale analysis. Ex. D330 at 2-2 – 2-5; Trial Tr. (F. Yang) 3397:3 – 3397:20, 3405:21 – 3409:5.
313. Microscale analysis is the proper method of analysis for accurately gauging the impact upon air quality for the proposed development at Westwoods, because it measures localized concentration levels of pollutants at the area where the emissions are released. Mr. Grover did not conduct a microscale analysis. Ex. D330 at 2-2; Ex. S-200; Ex. S-230; Trial Tr. (F. Yang) 3402:15 – 3405:19.
314. Lack of a microscale analysis makes it impossible to determine whether the proposed development would have an adverse impact to air quality and to determine whether any local impact to air quality would be significant. Ex. D330 at 2-14; Trial Tr. (F. Yang) 3402:17 – 3403:25, 3409:16 – 3410:19.
315. Mr. Grover's mesoscale analysis is not only irrelevant but inaccurate because it failed to incorporate, as directed by various federal, state and city guidelines, all affected regional roadways. Instead, Mr. Grover selectively defined the roadway network based upon only his "best judgment and experience as to what roadways are going to be the roadways that are going to be impacted by traffic from a facility like this, and that was it." This nonstandard, self-serving method of selection

skewed Mr. Grover's results, producing a disproportionately high percentage increase in "mesoscale" emissions from the project. Ex. D330 at 2-1, 2-3, 2-8; Trial Tr. (F. Yang) 3398:2 – 3402:14; Trial Tr. (R. Grover) 1971:12 – 19; 1972:21 – 1979:14.

316. Mr. Grover relied on the traffic analysis conducted by Mr. Salatti in preparing his original report. Since Mr. Salatti's analysis is riddled with methodological and analytical errors and therefore is not credible, Mr. Grover's conclusions cannot be relied upon. Ex. S-200 at 6-7; Trial Tr. (R. Grover) 1960:25 – 1961:16; Trial Tr. (F. Yang) 3387:1 – 3388:10; Ex. D330 at 2-9 – 2-13; Def. Find. Fact 365 – 373.
317. Furthermore, Mr. Grover's conclusions are inaccurate because additional methodological errors underlie the traffic input parameters such as vehicle volume, vehicle classification, and vehicle speed that Mr. Grover used in generating his emissions results, which had the effect of grossly exaggerating the projected increase in emissions that would be caused by the proposed casino development. Ex. D330 at 2-9 – 2-13; Trial Tr. (F. Yang) 3392:8 – 3395:12.
318. Ignoring established guidelines for evaluating the significance of air quality impact, Mr. Grover arbitrarily defined his own percentage increase criterion for "severe" air quality impact; thus there is no credible basis for his determination that his estimated emission levels, which are in any case inaccurate, would actually be considered to pose a significant adverse impact to air quality under standard guidelines. Ex. D330 at 2-14 – 2-16.
319. Mr. Grover failed to use standard noise measurement and modeling procedures, relying more heavily on arbitrary personal judgment than well-established federal or state guidelines, in his traffic noise impact analysis. Ex. D330 at 3-1 – 3-6. Trial Tr. (F. Yang) 3411:10 – 3415:5.
320. Mr. Grover's initial report failed to establish existing noise conditions, needed in order to validate the mathematical model he used to predict future noise levels generated by a casino development at Westwoods. All results generated by that model regarding noise impact are therefore not reliable. Ex. D330 at 3-3 – 3-4. Trial Tr. (F. Yang) 3412:1 – 3415:5.
321. According to Mr. Grover's own report, a casino development at Westwoods with access from Route 27 would not result in significant traffic noise impact. Ex. S-200 at 14; Ex. D330 at 3-4; Trial Tr. (R. Grover) 1998:24 – 1999:14.
322. The NYSDOT Project Environment Guidelines for Noise Analysis Procedures mandate that noise impact be evaluated by comparing predicted future noise levels to existing noise levels. Contrary to this standard, Mr. Grover compared noise levels under "no build" conditions, to

predicted noise levels under “build” conditions. As a result, Mr. Grover’s projections as to the noise impact of a casino development at Westwoods are exaggerated and inaccurate. Ex. D330 at 3-4 – 3-5; Trial Tr. (F. Yang) 3412:1 – 3415:5; Trial Tr. (R. Grover) 1999:15 – 2001:4.

323. Mr. Grover further deviated from standard practice by failing to conduct a noise abatement analysis after predicting traffic noise impact. According to standard professional practice, noise abatement measures must be examined and evaluated for all areas where traffic noise impacts are determined to occur. When noise abatement measures are being considered, every reasonable effort should be made to obtain substantial noise reductions. Mr. Grover’s report is therefore incomplete, and an analysis according to accepted standards demonstrates that the noise impact of the proposed development at Westwoods is actually de minimus, and any impact could be easily addressed by reasonable noise abatement measures. Ex. D330 at 3-6, Ex. D341 at 3-1 – 3-11.
324. Mr. Grover’s supplemental report on noise impact utilized an entirely different set of traffic data inputs from his original report, abandoning Mr. Salatti’s data and relying instead on additional speed runs and on traffic inputs developed by defendants’ traffic expert Samuel I. Schwartz. This is contrary to standard practice and resulted in inconsistencies between Mr. Grover’s initial and supplemental reports. Ex. S-230; Ex. D330a at 8 – 10; Trial Tr. (F. Yang) 3415:21 – 3419:5.
325. Furthermore, while Mr. Grover abandoned Mr. Salatti’s data in his supplemental report and redid his *noise* analysis using Mr. Schwartz’s data, he did not rerun his *air quality* analysis on the same basis, but retained Mr. Salatti’s data. Ex. S-230; Trial Tr. (F. Yang) 3419:6 – 17, 3489:5 – 17.
326. In general, faster traffic is associated with less severe air quality impacts and more severe noise impacts; slower traffic is associated with more severe air quality impacts and less severe noise impacts. Mr. Salatti’s data generally showed slower traffic than Mr. Schwartz’s. Therefore, by discarding Mr. Salatti’s data and adopting Mr. Schwartz’s data only for his noise analysis, Mr. Grover inconsistently and incorrectly exaggerated the noise impacts in his analysis without appropriately reconsidering his air quality analysis. Trial Tr. (R. Grover) 1995:22 – 24; Trial Tr. (F. Yang) 3388:11 - 25.
327. Rather than following established guidelines regarding the appropriate time frames and procedures for conducting ambient noise measurements for a traffic noise assessment, Mr. Grover’s supplemental report was prepared based on limited noise measurements from an arbitrary non-peak traffic hour. Ex. D330a at 2.

328. Mr. Grover's supplemental report also makes unfounded and inaccurate assumptions regarding the impact of traffic speed as opposed to traffic volume on noise levels, and the difference in traffic speed between peak hour and non-peak hour traffic on the local roads surrounding Westwoods, leading him to greatly overestimate the noise impact of the proposed casino at Westwoods. Ex. D330a at 2 – 3.
329. Mr. Grover's supplemental report compounded rather than corrected the errors with the mathematical model he used to predict future noise levels; therefore the data generated by that model is not credible. Ex. D330a at 4 – 6.
330. The methodology used in conducting the additional speed runs for Mr. Grover's supplemental report was flawed and contrary to standard practice, resulting in inaccurate and exaggerated predicted noise levels. Ex. D330a at 6 – 8; Ex. D382; Trial Tr. (F. Yang) 3417:7 – 3419:5; Trial Tr. (R. Grover) 1988:2 – 1995:21.
331. Consequently, the assertions by Mr. Grover with respect to the air quality and noise impact of the proposed development of Westwoods are not credible. Ex. D330, D330a; Trial Tr. (F. Yang) 3409:16 – 3420:3.

The Plaintiffs' Evidence As To The Traffic Impact Of Development At Westwoods Is Not Credible And Is Based On Speculation; No Significant Traffic Disruption Would Result From The Nation's Development Of Westwoods

332. Westwoods is located just to the north of Route 27 (Sunrise Highway) in Hampton Bays. Fact Stip. 16; Trial Tr. (S. Schwartz) 3541:20.
333. The proposed casino site, as described in the Development Contract, is located within Westwoods, north of Route 27 but south of Newtown Road. Ex. D237 at SN15597, 15599 – 15600; Trial Tr. (S. Schwartz) 3541:20 – 3542:12.
334. Samuel I. Schwartz, a traffic engineer with over 35 years experience in the New York area and elsewhere, in both the government and private sector, and principal of the traffic engineering firm Sam Schwartz PLLC, conducted a traffic study to evaluate traffic generated by the proposed development of a casino at Westwoods. Trial Tr. (S. Schwartz) 3512:2 – 3534:1; Ex. D320.
335. Mr. Schwartz's traffic study encompassed an area of approximately 55 square miles around the proposed casino site. Ex. D320 at 11 – 13.
336. This area consists mainly of open space, a commercial corridor along the Montauk Highway, and low-density residential development. Ex. D320 at 13.

337. Almost one-half of the residents in the study area are secondary as opposed to primary homeowners. Ex. D320 at 13.
338. The State Environmental Quality Review Act ("SEQRA") does not contain substantive standards for the approval or rejection of a proposed project; rather, it requires a disclosure of potential impacts. Mr. Schwartz therefore utilized his professional experience to develop a definition of "reasonable disruption." Trial Tr. (S. Schwartz) 3543:20 – 3545:6; Ex. D320 at 3, 218.
339. Based upon approved Environmental Impact Statements ("EIS") in New York State, as well the considered expert judgment of Mr. Schwartz, "reasonable disruption" can be defined as an increase in the average delay at any given intersection of between 5 and 15 seconds, depending upon the current LOS at the intersection. Ex. D320 at 3; Trial Tr. (S. Schwartz) 3544:1 – 6, 3555:1 – 25, 3557:2 – 3558:6.
340. Environmental Impact Statements have been approved by New York State based upon criteria less stringent than that of the definition of "reasonable disruption," above, used by Mr. Schwartz in his study in this case. Trial Tr. (S. Schwartz) 3559:15 – 3560:13.
341. Mr. Schwartz analyzed three scenarios for a casino at Westwoods: (1) the scenario specified in the Development Contract, with 1,310 gaming positions, (2) a larger scenario with 3,000 gaming positions and a hotel with 450 rooms and (3) a third, larger scenario with 6,500 gaming positions and 1,000 rooms. Ex. D237 at SN15599 – 15600; Trial Tr. (S. Schwartz) 3540:1 – 6; Ex. D320 at 1, 10.
342. Currently, traffic on Route 27 in the vicinity of the project site operates well below capacity. Ex. D321.
343. Under Scenario 1, traffic on existing highway ramps, access routes and local streets would continue to operate reasonably with routine traffic engineering changes such as appropriate signage, upgrading or introduction of traffic signals, and some redesign of several intersections. Trial Tr. (S. Schwartz) 3540:15 – 21; Ex. D320 at 5 – 6; Ex. D321.
344. Under Scenarios 2 and 3, traffic would flow reasonably well on existing highway ramps, access routes and local streets by taking the steps recommended for the first scenario, above, plus one additional intersection modification and the construction of a ramp from Route 27 eastbound to the site and from the site to Route 27 westbound. Trial Tr. (S. Schwartz) 3541:6 –16; Ex. D320 at 6.
345. Ramps from Route 27 to the casino site, recommended to ease traffic impact only for the two larger scenarios analyzed by Mr. Schwartz, can be built entirely on the existing right-of-way of Route 27 without any taking of

additional land, within existing parameters accepted by traffic engineers. Trial Tr. (S. Schwartz) 3757:18 – 3759:10; Ex. D320 at 138 – 142.

346. Regional routes could accommodate the additional traffic with minor changes all within public right-of-ways. These are routine changes that should probably be made now to improve flow and safety. Ex. D321.
347. Traffic operations are generally described by Level of Service (“LOS”) measures, which are defined in the Transportation Research Board’s Highway Capacity Manual 2000 (“HCM”), a standard text used by traffic engineers across the United States and recognized as the standard for traffic analysis by the United States Department of Transportation’s Federal Highway Administration (“FHWA”). Trial Tr. (S. Schwartz) 3545:8 – 19; Ex. D320 at 25.
348. LOS measures describe the quality of traffic flow and are a function of delay (the amount of time a vehicle must wait to travel through an intersection) and volume/capacity (the number of vehicles which travel through an intersection). Ex. D320 at 2.
349. LOS measures are reported using grades from A (best operating condition, free traffic flow) to F (worst operating condition). LOS measures are defined differently for signalized intersections, unsignalized intersections, and highways, in terms of average vehicle delay. Ex. D320 at 25 – 27.
350. At peak hours, a reasonable LOS measure for a two-lane, limited access highway like Route 27 is LOS C or D. Trial Tr. (S. Schwartz) 3547:9 – 3550:18.
351. Mr. Salatti’s characterizations of traffic conditions in Southampton as “hopeless” or “legendary” are undefined, unprofessional, and inaccurate. Ex. D349 at 5 – 7; Trial Tr. (M. Salatti) 1666:8 – 14, 1669:19 – 1670:9.
352. To determine the actual state of traffic operations in the study area, Mr. Schwartz conducted extensive field research during the summer including traffic volume and movement counts for at least 75 locations, ground-level photography, and over 1,600 aerial photographs observing peak hour traffic conditions. Trial Tr. (S. Schwartz) 3568:14 – 18, 3573:17 – 3575:7, 3577:5 – 3580:17.
353. The local roads surrounding the proposed casino site (Newtown Road, Sunset Ave., Squiretown Road and Red Creek Road) are currently very low-density roadways. During many visits to those roadways at various times, and as demonstrated by photographs marked as part of a demonstrative exhibit, Mr. Schwartz rarely observed other vehicles. Trial Tr. (S. Schwartz) 3568:3 – 3571:18.

354. The existing "Hamptons Bottleneck" occurs east of the Shinnecock Canal, caused primarily by lane reductions that begin 1.8 miles east of the proposed casino site, and traffic signals that begin 5 miles east of the proposed casino site. Adding traffic to Route 27 from the casino site, west of the lane reductions and traffic signals, would not impact the existing congestion at the "Bottleneck". Ex. D320 at 20 – 24, 219; Trial Tr. (S. Schwartz) 3619:25 – 3621:4; Ex. D321
355. On June 30, 2006, the Friday before the July 4th weekend, Mr. Schwartz took aerial photographs of the roads in the study area from 4:30 – 8 p.m. The roads approaching Westwoods displayed a LOS of primarily A, with a few stretches that displayed a LOS of B. The photos clearly showed that the holiday weekend "bottleneck" did not impact the roads around Westwoods, but rather began a mile and a half east of the Shinnecock Canal. Trial Tr. (S. Schwartz) 3613:17 – 3620:16; Ex. D320.
356. Similarly, Mr. Schwartz's aerial photographs taken at other peak times displayed a consistent LOS of A in both directions on the portion of Route 27 that abuts Westwoods. Trial Tr. (S. Schwartz) 3625:9 – 3628:23; Ex. D320.
357. The capacity of Route 27 is 4,040 vehicles/hour; 85% capacity, which would be LOS E, is therefore roughly 3,400 vehicles/hour. Trial Tr. (S. Schwartz) 3629:8 – 3631:25; Ex. D320.
358. For both the first casino scenario analyzed, with 1,310 gaming positions, and the largest casino scenario analyzed, with 6,500 gaming positions and a 1,000 room hotel, the most conservative estimate of eastbound traffic in 2009 on the surrounding road network at peak hours is still well below the roads' capacity. Trial Tr. (S. Schwartz) 3632:1 – 3635:12; Ex. D320.
359. For both the first casino scenario analyzed, with 1,310 gaming positions, and the largest casino scenario analyzed, with 6,500 gaming positions and a 1,000 room hotel, the westbound traffic in 2009 on the surrounding road network at peak hours would remain well below the roads' capacity, except for one instance, relating only to the largest hypothetical scenario. Even in that one instance, traffic would remain below the road's total capacity of 4,040 vehicles per hour but above the 85th percentile threshold set by Mr. Schwartz of 3,400 vehicles/hr. Trial Tr. (S. Schwartz) 3632:1 – 3635:12; Ex. D320.
360. Even if peak hour traffic were to exceed the 85th percentile threshold westbound on Route 27 at Route 24 on summer or holiday return Sundays or Mondays, that translates into a drop from LOS C or D to LOS E, or an additional 10 seconds/mile of delay for motorists on less than 5 percent of the days of the year. Trial Tr. (S. Schwartz) 3644:6 – 3645:5; Ex D320.

361. The volume/capacity analysis performed by Mr. Schwartz is based on exceedingly conservative conditions unlikely to occur in reality, such as:
- i. A conservative estimate of the roadways' total capacity.
 - ii. An overestimate of traffic volumes, arrived at by superimposing peak hour traffic to/from the casino (which generally occurs between 10 – 11 p.m.) over peak hour commuter traffic (which generally occurs between 4 – 5 p.m.), even though those peak hours occur at different times of day.
 - iii. All casino visitors arriving by private car and zero by bus or other public transportation.
 - iv. A lower person/car number (1.9) than that reflected by data on visitors to Atlantic City (2.3), resulting in a higher total car count.

Trial Tr. (S. Schwartz) 3631:20 – 3642:25; Ex. D320 at 49 – 68.

362. On Fridays in the summer of 2006, the only significant point of traffic on Route 27 congestion was the point, east of the Shinnecock Canal, where Route 27 narrows from two lanes to one lane. Trial Tr. (S. Schwartz) 3623:15 – 3624:7; Ex. D320.
363. The longest traffic queue observed as a result of this summer weekend bottleneck was 3,700 ft., on May 26, 2006, the Friday before Memorial Day Weekend. Traffic navigated that queue in under 10 minutes, and the queue was entirely to the east of the Shinnecock Canal and did not back up as far as the Canal. Trial Tr. (S. Schwartz) 3649:25 – 3651:18.
364. Construction is currently in progress (and projected to be completed by May 2008) to physically widen County Road 39 (Route 27) along an over four mile stretch at the area where the bottleneck occurs, which will dramatically improve traffic flow from LOS C-F to LOS B-C, and eliminate the bottleneck. Mr. Salatti's conclusion that the widening project would result in little to no changes at various intersections along County Road 39 is grossly inaccurate. Trial Tr. (S. Schwartz) 3673:24 – 3677:22, 3688:3 – 3689:12; Ex. D349a at 30 – 39.
365. Congestion at the Route 27 off-ramp to County Road 111, where Mr. Salatti estimated a 10 minute delay, actually evidenced only a 15-30 second delay at the most congested time observed, peak hour on Sunday, August 13, 2006. Trial Tr. (S. Schwartz) 3663:10 – 3664:9.
366. Mr. Salatti made fundamental methodological errors in his initial report that resulted in artificially high baseline traffic volumes, which call into question all of his conclusions and were not adequately redressed in his

subsequent reports. Trial Tr. (S. Schwartz) 3693:21 – 3701:25; Ex. D349 at 1,4, 9 – 10, 16 – 22, 45.

367. Mr. Salatti made fundamental methodological errors in his initial report in his trip generation analysis, including greatly overestimating the size of the proposed project, which call in question all of his conclusions and were not adequately redressed in his subsequent reports. Trial Tr. (S. Schwartz) 3703:19 – 3717:11; Ex. D349 at 1, 4 – 5, 8, 26 – 28, 45; Trial Tr. (S. Rittvo) 3248:21 – 3250:6.
368. Mr. Salatti made fundamental methodological errors in his initial report in his determination of trip assignment and traffic allocation for traffic generated by the casino on the road network surrounding Westwoods, which call into question all of his conclusions and were not adequately redressed in his subsequent reports. Trial Tr. (S. Schwartz) 3718:18 – 3720:25; Ex. D349 at 28 – 31, 45.
369. Mr. Salatti used outdated traffic model software, Synchro 5, to run the traffic analyses in his original report, despite the fact that a superior, later model, Synchro 6, has been available since 2003 and that NY State DOT requires use of the “latest version and patches”. The use of Synchro 5 resulted in numerous inaccuracies and exaggerated congestion and delays in Mr. Salatti’s original report. While Mr. Salatti did issue a corrected addendum report using Synchro 6, the addendum report still had numerous coding errors, which generated erroneous conclusions. Trial Tr. (S. Schwartz) 3721:3 – 3728:20; Trial Tr. (M. Salatti) 1604:14 – 1605:1; Ex. D349 at 1, 5, 10 – 15, 22 – 25, 32 – 42, 45 – 46; Ex. D349a.
370. Contrary to accepted professional standards in the field of traffic engineering, Mr. Salatti did not calibrate his data results. Trial Tr. (S. Schwartz) 3728:21 – 3731:22; Ex. D349a at 2.
371. Mr. Salatti’s original and addendum report contained numerous mathematical and other errors that caused his calculation of traffic volumes to be unreliable, and generally significantly inflated. Trial Tr. (S. Schwartz) 3731:23 – 3742:11; Ex. D349 at 1, 7, 46.
372. Despite Mr. Salatti’s attempt to “fix” his original, error-ridden report through multiple addendums, significant errors remain and new errors have been made. Ex. D349a.
373. While the corrections in Mr. Salatti’s addendum reports generally resulted in a lowering of the artificially high baseline conditions in his original report, which should result in a lowering of projected traffic volumes after the proposed casino is built, the corrected traffic volumes in the build conditions are even higher than the original report. This is the result of

fundamental methodological errors, and should be disregarded as unreliable. Ex. D349a at 1 – 3, 5 – 7.

374. Mr. Salatti's conclusions regarding the traffic impact of a proposed casino at Westwoods are therefore invalid and should be disregarded. Trial Tr. (S. Schwartz) 3742:12 – 15; Ex. D349; Ex. D349a.

The Plaintiffs' Evidence As To The General Environmental Impacts Of Development At Westwoods Is Not Credible And Is Based On Speculation; No Significant Environmental Disruption Would Result From The Nation's Development Of Westwoods

375. If the Westwoods Parcel were zoned as the Town of Southampton claims, it could be developed into 22 single family homes consistent with that zoning designation. Trial Tr. (S. Eckler) 1887:1 – 24.
376. James M. Mansky, a Senior Project Director and Principal Ecologist at Earth Tech, a former chief of the regulatory branch of the United States Army Corps of Engineers with over 30 years experience in ecological research, conducted an ecological investigation and evaluation of the Westwoods property. Trial Tr. (J. Mansky) 3274: 21 – 3283:25; Ex. D259 at 1.
377. The Westwoods property consists of three parcels: (a) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38 ("Parcel A"); (b) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78 ("Parcel B"); and (c) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1 ("Parcel C"). Parcel A is property to the north of Newtown Road and south of Great Peconic Bay; this parcel is about 41.5 acres. Parcel B is property north of Sunrise Highway and south of Newtown Road; this parcel is about 36.7 acres. Parcel C is property south of Sunrise Highway and is about 2.0 acres. Ex. D-156d; Ex. D-259 at 4, 8; Trial Tr. (J. Mansky) 3292:5 – 3294:11; Ex. D-264.
378. Mr. Mansky considered four development scenarios in his ecological evaluation of the Westwoods property: (1) a casino with 6,500 gaming positions and 1,000 hotel rooms; (2) a casino with 3,000 gaming positions and 450 hotel rooms; (3) the casino contemplated in the Development Agreement with 1,300 gaming positions and no hotel rooms; and (4) a "no action alternative" with residential development of 22 single family houses on one-acre lots. Trial Tr. (J. Mansky) 3294:18 – 3297:14; Ex. D259 at 5 – 6.
379. The Development Agreement commits the Nation and the Developer to develop Westwoods in accordance with the substantive requirements of state and local law, other than zoning. Def. Find Fact 255, 257.
380. Mr. Mansky evaluated for each of the four development scenarios whether the Nation feasibly could develop Westwoods in accordance with the

substantive requirements of state and local law, other than zoning, and concluded that they could. Trial Tr. (J. Mansky) 3372:22 – 3373:12.

381. Under all of the four development alternatives Mr. Mansky considered, there would be no ecological impacts at all to Parcel A. Ex. D259 at 4.
382. Construction and operation under any of the four development alternatives could be done in such a manner that no significant environmental impacts would result. Trial Tr. (J. Mansky) 3298:12 – 20; Ex. D259 at 3.
383. In the course of Mr. Mansky's investigation and evaluation, he visited the Westwoods property on six separate occasions. Trial Tr. (J. Mansky) 3298:24 – 3299:14.
384. During his investigation of Westwoods, Mr. Mansky considered the ecological constraints and considerations that would apply to the evaluation of the proposed development scenarios. Ex. D259 at 1.
385. There is a lack of diversity of vegetation on the Westwoods property and there are sandy soils throughout the site. Ex. D259 at 2.
386. The vegetation on the Westwoods property is classified as Coastal Oak-Heath Forest. The dominant tree is the oak tree, which is neither threatened nor endangered. Trial Tr. (J. Mansky) 3318:16 – 23, 3327:21 – 3329:22; Ex. D259 at 7; Ex. D269 at 93-94.
387. Mr. Eckler and Mr. Grover have opined that the vegetation classification of Westwoods is Pitch Pine-Oak Forest. This designation is not correct. Whether the vegetation at Westwoods is classified as Coastal Oak-Heath Forest or Pitch Pine-Oak Forest is of no significance, however. Neither classification implicates environmental restrictions, as the trees are neither threatened nor endangered. Trial Tr. (J. Mansky) 3318:16 – 3319:12, 3327:21 – 3329:17; Ex. D387 at 8.
388. Westwoods has already been impacted by prior development around Parcels B and C, including adjacent residential development, Newtown Road and the Sunrise Highway. There is also a large area to the east of Westwoods that is zoned as commercial and is being used a boat yards. Trial Tr. (J. Mansky) 3330:1 – 22; D387 at 10.
389. Because of the prior development on all sides of Parcels B and C, an environmentally sensitive edge habitat does not exist at Westwoods and would not be threatened by even the most expansive development analyzed in development scenario one. Trial Tr. (J. Mansky) 3330:1 – 22.
390. Based on prior development in the areas surrounding Westwoods, Mr. Grover's conclusion that Westwoods has a significant edge habitat is not credible. Trial Tr. (J. Mansky) 3330:1 – 22.

391. Mr. Grover's testimony that Westwoods is "relatively pristine forest" does not express a scientific standard and does not reflect the reality that Westwoods lies within an area that has already been developed significantly, and has been utilized for logging and the disposal of litter. Trial Tr. (J. Mansky) 3330:1 – 3332:11.
392. Mr. Eckler's statement that the Westwoods area has a "rural community character" is unsupportable, as there is a large commercial development and high density residential housing in close proximity to Westwoods. Trial Tr. (S. Eckler) 1908:19 – 1913:10.
393. There is no evidence that the Westwoods Property provides habitat of value to any threatened or endangered flora. Ex. D268 at 4.
394. The soil on the property is classified as part of the Carver Series. The Carver Series consists of deep, excessively drained coarse-textured soils with very low available moisture capacity and very low natural fertility. Ex. D259 at 7 – 8; Ex. D276.
395. The Westwoods property is of low quality as habitat for wildlife. Ex. D259 at 2.
396. Evidence and observations of fauna indicated limited utilization of the property. The observed species included white-tailed deer, raccoons, red-tailed hawks and box turtles. None of these species are threatened, endangered or a species of special concern. Ex. D259 at 7.
397. A few other species of mammals and birds likely use the property, but there is no indication or record of any threatened or endangered species utilizing the proposed development area on the Westwoods Property. Ex. D259 at 2, 7.
398. Mr. Eckler's suggestion that Westwoods supports a rich and abundant wildlife was not observed to be accurate at any actual field observation conducted by Mr. Mansky. Ex. D259 at 7; Ex. D268.
399. The bird species that are indicated in the Breeding Bird Atlas as utilizing Westwoods are all common birds. None are protected as endangered, threatened, or species of special concern. Trial Tr. (J. Mansky) 3323:13 – 3327:20; Ex. D388; Ex. 389.
400. The New York State Department of State has classified particular areas as coastal zones and regulates impacts to those areas. Only Parcel A of the Westwoods property is within the defined coastal zone. Ex. D259 at 8 – 9; Ex. D278.

401. There is no impact to Parcel A under any development scenario, and thus there would be no impact to a coastal zone under any development scenario. Def. Find. Fact 381; Ex. D259 at 9.
402. The New York State legislature has enacted legislation to protect the Central Pine Barrens and has designated both a Core Preservation Area and a Compatible Growth Area. Both of these areas extend into the Town of Southampton but they terminate several miles to the west of the Westwoods property. Trial Tr. (J. Mansky) 3316:17 – 3317:18; Ex. D259 at 9; Ex. D280.
403. The U.S. Fish and Wildlife Service has designated the Long Island Pine Barrens as a habitat of significance, but the boundary of the significant area lies several miles to the west of the Westwoods property. Trial Tr. (J. Mansky) 3319:15 – 23; Ex. D259 at 10; Ex. D284; Ex. D285.
404. There are no state, local or federal laws which designate Westwoods as being within any pine barren nor any which restrict development at Westwoods on the basis of it being part of a pine barren. Trial Tr. (J. Mansky) 3317:19 – 3318:2.
405. Westwoods is not a continuous habitat with any portion of the core Pine Barrens designated by any state, local or federal laws, being separated from that Pine Barrens by several miles. Mr. Grover's claim that Westwoods is a continuous habitat with the Pine Barrens is not substantiated by any evidence. Trial Tr. (J. Mansky) 3319:24 – 3320:7; Trial Tr. (R. Grover) 1955:18 – 20.
406. The New York State Department of Environmental Conservation Natural Heritage Program has identified three protected species (two birds and one plant) that occur in the vicinity of the Westwoods property, along the shoreline of the Great Peconic Bay to the east of the Shinnecock Canal. It is possible that Parcel A would also make a suitable habitat for this species, but none has been observed on the parcel, and, as noted previously, there will be no impact to Parcel A under any development scenario. Ex. D259 at 9 – 10; Ex. D282; Ex. D283; Def. Find. Fact 381.
407. The New York State Department of State has developed a management plan to protect the resources and water quality of the Long Island South Shore Estuary Reserve. Parcel C, the two-acre parcel south of the Sunrise Highway, appears to lie within the reserve. However, if the proposed development were to impact Parcel C, the discharge of stormwater could be managed to meet or exceed the regulatory requirements. Ex. D259 at 11; Ex. D286.
408. The Town of Southampton has prepared a "Comprehensive Plan Update Implementation Strategies," which provides a map of Significant Natural

Areas within the West Half of the Town. The Westwoods Property has not been designated by the town as a Significant Natural Area. Ex. D259 at 11; Ex. D287; Ex. D288.

409. The Town of Southampton has designated certain lands as Central Pine Barrens and South Fork Pine Barrens. Westwoods is not part of the land so designated. Trial Tr. (J. Mansky) 3315:9 – 3316:16; Ex. D288.
410. The Town of Southampton's official Zoning Map, Sheet 3 of 5 for Hampton Bays to Shinnecock Hills, identifies Westwoods as "Indian Reservation". However, the Town of Southampton contends that Westwoods is zoned R-60, a residential zoning. Trial Tr. (J. Mansky) 3296:19 – 3297:6; Ex. D259 at 11 – 12; Exs. D289 – D291; Def. Find. Fact 161 – 162.
411. The property that would be developed under the alternative scenarios is not within an area identified by law as specially preserved or protected. Trial Tr. (J. Mansky) 3318:3 – 8; Ex. D259 at 12.
412. No wetlands or protected species have been identified on either Parcel B or Parcel C. Ex. D259 at 12.
413. Due to the lack of diversity of the vegetation on Parcel B and Parcel C, the wildlife habitat value is considered to be of low quality. Ex. D259 at 12.
414. The construction and operation of any of the proposed development scenarios would not result in a significant adverse impact to ecological resources on or adjacent to the Westwoods Property, and any adverse impacts are capable of being mitigated. Ex. D259 at 2.
415. Mr. Eckler's assertion that National Wetland Inventory maps identify five wetland habitats on Westwoods is patently false. Ex. D387 at 8.
416. The U.S. Fish and Wildlife Service and the New York State Department of Environmental Conservation have established maps showing the existence of tidal and freshwater wetlands. The only wetlands shown on these maps depicting the Westwoods property are located on Parcel A. Ex. D259 at 12 – 13; Exs. D292 – D295.
417. The construction and operation of any of the proposed development scenarios would not result in a significant adverse impact to surface waters on or adjacent to the Westwoods Property. Ex. D259 at 2 – 3, 13.
418. There are no surface waters on or adjacent to Parcel B or Parcel C of the Westwoods Property. Trial Tr. (J. Mansky) 3299:15 – 24; Ex. D259 at 2, 13.
419. The Westwoods property is located within the Hampton Bays Water District, a municipal water supply. Ex. D259 at 13 – 16; Ex. D302.

420. For each of the four development scenarios, potable water could be provided by the Hampton Bays Water District ("HBWD"). Trial Tr. (J. Mansky) 3299:25 – 3301:19; Ex. D259 at 3, 13 – 16; Ex. D304.
421. An 8-inch water main currently exists beneath Newtown Road including but not limited to that portion of Newtown Road that bisects the Westwoods Parcel. Fact Stip. 57; Trial Tr. (J. Mansky) 3300:18 – 22; Ex. D259 at 15; Ex. D303.
422. The potable water required could be provided by the HBWD without adverse impact, using existing or supplemental wells and existing or additional infrastructure. Trial Tr. (S. Eckler) 1902:14 – 1903:19; Trial Tr. (J. Mansky) 3299:25 – 3301:19, 3373:13 – 19; Ex. D259 at 3; Ex. D305.
423. There is sufficient water in the aquifers under Nassau and Suffolk counties to supply the current population for hundreds of years. Trial Tr. (J. Mansky) 3303:4 – 14, 3304:19 – 3305:9; Ex. D259 at 15; D301.
424. The Town of Southampton has adopted zoning laws that restrict the types of land use permitted in particular areas due to the potential impact upon the aquifer and its quality. The Town has identified proposed protected areas, and they lie to the east of the Shinnecock Canal and are not in the vicinity of Westwoods. Ex. D259 at 17.
425. During his investigation of Westwoods, Mr. Mansky considered the impacts to groundwater quality and quantity from the discharge to groundwater by the proposed development scenarios on the Westwoods property. Ex. D259 at 2.
426. There exist wastewater treatment systems, which could be utilized at Westwoods, that would meet or exceed standards for discharge to groundwater or other uses on-site at Westwoods. Trial Tr. (S. Eckler) 1905:20 – 1906: 3; Trial Tr. (J. Mansky) 3306:2 – 3313:3, 3373:20 – 3374:16; Ex. D259 at 21 – 23.
427. Excess effluent treated in the wastewater system could be recycled and employed for such uses as irrigation and landscaping, flush water, cooling water and fire-fighting use. Trial Tr. (James M. Mansky) 3306:2 – 3311:21; Trial Tr. (S. Eckler) 1906:13 – 1907:19; Ex. D259 at 22.
428. Wastewater treatment systems generate "solid" wastes that would require removal as a matter of routine maintenance. Any solid wastes can be removed and disposed of off-site. Trial Tr. (J. Mansky) 3306:2 – 3311:21; Ex. D259 at 23.
429. If Westwoods were developed into residential properties, wastewater would instead be discharged, untreated, to individual septic tank/leaching

pool systems. Trial Tr. (J. Mansky) 3305:14 – 3306:1; Ex. D259 at 19 – 20, 23.

430. The construction and operation of the casino development scenarios would not result in a significant adverse impact to groundwater resources on or adjacent to the Westwoods Property; any adverse impacts would be mitigated. Ex. D259 at 3, 23.
431. Stormwater discharge would be generated by any development alternatives. The stormwater runoff under all three casino development alternatives could be collected from the road system and discharged to a recharge basin constructed within the development area. Trial Tr. (J. Mansky) 3310:7 – 14, 3314:3 - 23; Ex. D259 at 24 – 25.
432. The roadway drainage and the recharge basin could be designed and constructed to meet or exceed the requirements of the “Road and Drainage Standards” for the Town of Southampton. Ex. D259 at 24; Ex. D318.
433. Stormwater runoff from the roads, if Westwoods were developed into residential housing, would be discharged untreated to the recharge basin. Ex. D259 at 25.
434. The runoff from the development area of the casino development scenarios could be treated to remove oil, grease and sediment before it was discharged to a recharge basin, so it would meet or exceed state and town standards. Trial Tr. (J. Mansky) 3313:6 – 22; Ex. D259 at 25.
435. Stormwater discharge is generally regulated by the United States through the National Pollution Discharge Elimination System (NPDES) and by New York State through a State Pollution Discharge Elimination System (SPDES). Ex. D259 at 23 – 24; Ex. D316; Ex. D317.
436. Mr. Eckler presents potential impacts from the discharge of wastewater and stormwater without considering any treatment options that would take place before these waters are discharged. Therefore, Mr. Eckler’s impact findings are overstated. D387 at 14.
437. Under any development scenario considered, both federal and New York State standards for the discharge of stormwater could be met or exceeded. Trial Tr. (J. Mansky) 3313:23 – 3314:23; Ex. D259 at 23 – 25.
438. Due to the high permeability of the sandy soil on the property, no discharge of stormwater to surface waters on or adjacent to the site is expected. Ex. D259 at 25.
439. It is entirely possible to develop Westwoods in a manner such that there would be no significant impact to ecology, surface water, potable water

and groundwater resources. Trial Tr. (J. Mansky) 3298:12 – 20; Ex. D259 at 3, 26.

440. The plaintiffs' analysis assumed the development of a 130,000 square foot casino, which is more than twice the size of the facility contemplated in the Development Agreement. Ex. S-125 at 2 – 3; Ex. D242; Trial Tr. (S. Eckler) 1872:13 – 25.
441. The plaintiffs' analysis used Foxwoods, one of the world's largest casinos, as a "reasonable benchmark" for the second development scenario he considered. Ex. S-125 at 2-3; Trial Tr. (S. Eckler) 1840:4 – 1841:9.
442. In both development scenarios that Mr. Eckler considered, he assumed that there would be development of Parcel A. Parcel A includes bluffs abutting the Great Peconic Bay and implicates environmental impacts that would not occur from only development of Parcels B and C. The Development Agreement does not call for any development of Parcel A. Therefore, Mr. Eckler's conclusions based on impacts deriving from development of Parcel A are irrelevant. Trial Tr. (S. Eckler) 1891:15 – 1892:4; D387 at 11 – 13; Def. Find. Fact 259 – 260, 381
443. Mr. Eckler analyzed the environmental impact of development at Westwoods using a baseline of the existing undeveloped condition, despite the Town's claim that R-60 zoning applies and homes could be built at Westwoods. There would be environmental impacts associated with the construction of homes at Westwoods, and thus the appropriate benchmark is to compare the casino development to development of single family houses. Trial Tr. (S. Eckler) 1886:18 – 1889:19; D387 at 2; Def. Find. Fact 410.
444. According to the New York State Environmental Quality Review Act ("SEQRA"), an environmental impact statement must include an analysis of the potential beneficial impacts of a proposed development. Despite engaging in an environmental impact analysis, Mr. Eckler did not identify the potential beneficial impacts of the development of a casino at Westwoods. Ex. D387 at 3.
445. In preparing an environmental impact statement, it is normal and customary to discuss mitigating factors. Mr. Eckler assessed adverse environmental impacts with the assumption that the Nation would not implement any mitigation measures, and he did not discuss any mitigating factors at all in his analysis. As such, Mr. Eckler's report is skewed and overstates the negative impacts of development. Trial Tr. (S. Eckler) 1862:16 – 1864:14; D387 at 11.
446. Ample electrical power generation capacity is available to supply development of a gaming facility at Westwoods, and an additional 13kV

substation has recently been constructed less than ¼ mile from Westwoods. Trial Tr. (S. Eckler) 1892:6 – 1896:9.

447. It would also be possible to extend natural gas service to Westwoods. Trial Tr. (S. Eckler) 1898:15 – 1899:18.

Development Of Westwoods Will Provide The Nation With Much Needed Economic Development To Support Its Self-Governing Community

448. United States census data shows that more than half of individuals and families residing on the Shinnecock Reservation live in poverty. Trial Tr. (L. Gumbs) 2870:8 – 2874:13; Ex. D356.
449. There is a shortage of adequate housing on the Shinnecock Reservation, with many generations often residing in the same residence. Trial Tr. (L. Gumbs) 2873:12 – 2874:13, 2875:8 – 21.
450. Over the years the Nation has explored numerous alternatives for the purpose of community economic development. Trial Tr. (L. Gumbs) 2878:14 – 2880:24.
451. The Nation has rejected certain economic development alternatives for environmental reasons. Trial Tr. (L. Gumbs) 2879:14 – 2881:13.
452. Through its elected representatives, the Nation did extensive research regarding Indian gaming and its effects. Trial Tr. (L. Gumbs) 2842:23 – 2843:15.
453. The Contract Facility would be profitable and provide revenue for the tribe at minimal risk. Trial Tr. (S. Rittvo) 3113:16 – 3120:13, 3143:9 – 16.

Dated: New York, New York
May 1, 2007

Respectfully submitted,

CLEARY GOTTlieb STEEN & HAMILTON LLP

By: /s/ Evan A. Davis
Evan A. Davis (ED-4055)

One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for Defendants the Shinnecock Indian
Nation, Frederick C. Bess, Lance A. Gumbs,
Randall King and Karen Hunter

Of Counsel:

Christopher H. Lunding (CL-5920)

S. Christopher Provenzano (SP-3017)

Julia D. Paylor (JP-8731)

Ashika Singh (AS-8942)