UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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.

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03 CIV. 3243 (JFB)(ARL)

CONSOLIDATED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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.

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03 Civ. 3466 (JFB)(ARL)

DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

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The Shinnecock Indian Nation (the "Nation") and all other defendants in the above-captioned consolidated actions respectfully submit the following proposed conclusions of law. Where appropriate to ensure a clear presentation, reference is made to Defendants' Proposed Findings of Fact ("Def. Find. Fact"), submitted herewith, or to the facts stipulated in the stipulated facts section of the parties' Proposed Joint Pretrial Order ("Fact Stip."). For the reasons explained below, as supported by the facts proved at trial—and those the plaintiffs failed to prove at trial—the Court must decide in favor of the Nation and the individual defendants, dissolve the injunction and dismiss both of these consolidated actions.

SUMMARY OF CLAIMS ASSERTED AGAINST THE DEFENDANTS

Plaintiffs the Town of Southampton (the "Town") and various agencies of the state of New York (collectively, the "State") brought these lawsuits against the Shinnecock Indian Nation (the "Nation") and certain of its officers,[1] seeking a permanent injunction to prevent the Nation from using a parcel of land located to the west of Canoe Place in the Town of Southampton, known as "Westwoods" and conceded to be owned by the Nation, for gaming purposes. The plaintiffs' claims were defined in the Proposed Joint Pretrial Order, executed by all parties and filed on September 28, 2006 (the "JPTO"). See Docket no. 245.[2] The claims actually advanced by the plaintiffs at trial are summarized below to provide context for the defendants' substantive arguments, which follow.

[1] The Town appears inexplicably to continue to assert certain claims against the individual defendants in their personal—rather than official—capacities. With respect to these claims the defendants merely note that no plaintiff has offered any evidence at all that any defendant has undertaken any action complained of by any plaintiff in a personal, rather than official, capacity.

[2] All references to docket numbers refer to the civil docket for case 03 CIV. 3243.

The State's Claims

The State claims that the Nation "violated and threaten[s] to violate State environmental and gaming laws with the imminent construction of a casino at the Westwoods property . . . ." JPTO at 4. Specifically, the State argues that "[t]he Nation is not federally recognized and the land on which it proposes to conduct gaming is neither Indian land nor Indian Country" and asserts that, for these reasons, Westwoods is subject to state law. JPTO at 5. As the State implicitly acknowledges, these facts are significant because of the general freedom from state and local regulation enjoyed by Indian tribes on Indian lands, discussed generally in Section VI.

As discussed in Section I, this Court has unambiguously recognized the Nation as a tribe of Indians as a matter of federal law. With respect to "recognition," the State appears to mean that the Nation is not on the list of acknowledged tribes maintained by the Department of the Interior. This is true, but irrelevant with respect to the inherent power enjoyed by Indian tribes to be free from state and local regulation (except as authorized by federal law), as discussed below in Section II.

Whether Westwoods constitutes aboriginal Indian land as a matter of federal law is necessarily the first factual question to be addressed, as this Court has recognized. See Section III. The State argues that the Nation's aboriginal title "was extinguished during the colonial period." JPTO at 5. As explained in Section III, this is incorrect. Westwoods constitutes aboriginal tribal land of the Nation, not subject to state or local regulation. Nor does the federal Indian Gaming Regulatory Act explicitly or implicitly prohibit gaming by the Nation at Westwoods or permit the application of state gaming laws to Westwoods. See Section VI.

The State also contends that the "defendants are violating the environmental laws because of defendants' initiation of construction of a casino at Westwoods without first applying for and receiving relevant environmental *permits and authorizations*." JPTO at 5 (emphasis added). The State further claims that even if Westwoods is Indian land they may enjoin development of Westwoods because development would be "inherently and actually disruptive" under the Sherrill and Cayuga decisions.[3] JPTO at 6. This is simply wrong.

The defendants admit that they have neither sought nor obtained any of the permits or authorizations alleged to be necessary under state environmental laws. However, New York State's permitting regime does not apply to development at Westwoods for the same reasons as its gaming regulation and licensing regime does not apply—the Nation is an Indian tribe, and Westwoods is Indian land. As discussed in Section VI, the State also misunderstands Sherrill and Cayuga, which, if anything, argue against the imposition of state and local law at Westwoods.

The State does not, however, appear to allege that the Nation's *actually contemplated* plans for developing Westwoods cannot be implemented in a manner consistent with the substantive standards the State applies during a permitting process. Instead, the State claims that it is what *might* be built, not what *will* be built, that matters. The State simply ignores the testimony of the Nation's officers with respect to the Nation's planned development, the provisions of the subsisting development agreement between the Nation and its developer, and the express requirement in that agreement that all development must meet or exceed the substantive standards of state

[3] City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (U.S. 2005) and Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005)

environmental law. As discussed in Section VII, this results in a fatal defect of proof because the plaintiffs cannot obtain a permanent injunction based on a parade of horribles unconnected to actual evidence, and, in any event, what there is of the State's evidence with respect to disruptive impact is speculative and unreliable.

The Town's Claims

The Town's claims are simpler than the State's, and largely do not require separate analysis. The Town contends that the defendants have "violated, and threaten[ ] to continue to violate, the Town's Zoning Law" and that the "development of Westwoods potentially implicates Chapter 325 of the Town Code." JPTO at 8. Chapter 325 relates to the protection of tidal wetlands. The Town also advances the same argument based on "disruption," under Sherrill and Cayuga, as the State.

As Sherrill recently acknowledged, state and local laws, such as those pertaining to taxation and zoning, do not constrain an Indian tribe in the use of tribal lands. Further, the Town has completely failed to prove the presence of any protected wetlands at all within the part of Westwoods, south of Newtown Road, actually contemplated for development. Finally, the Town's argument with respect to Sherrill and Cayuga fails for the same reasons as the State's

SUMMARY OF ARGUMENT

It is a fundamental precept of federal constitutional law, as well as federal statutory and common law, that federal law is preeminent in the regulation of Indian affairs, and that Indian tribes are not restricted in the use of their lands by state or local law, except as expressly authorized by federal statute. To foster its economic development and self-sufficiency, the Nation now seeks to develop a gaming facility at

Westwoods, although it was enjoined before construction or architectural plans for such a facility could be developed. The proposed gaming facility is described generally in an executed development agreement (the "Development Agreement") between the Nation's duly constituted gaming authority (the "Authority") and the Nation's developer.

The plaintiffs have sought to enjoin any development at all of Westwoods, on a variety of grounds. The plaintiffs first contended that the Nation is not a tribe of Indians as a matter of federal law and asserted that, consequently, the Nation's proposed development of Westwoods is not entitled to the general freedom from state and local regulation accorded to tribal activities on tribal lands. The plaintiffs advanced this argument despite having consistently treated the Nation as a tribe of Indians for centuries. In its November 7, 2005, memorandum and order (the "November 7 Order," New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486 (E.D.N.Y. 2005) (dkt. no. 181 in 03 CIV. 3243)), the Court, recognizing (among other things) the "blatant" inconsistency of the plaintiffs' position with respect to the Nation's tribal identity, held unambiguously that the Shinnecock Indian Nation is a tribe of Indians as a matter of federal law. No plaintiff sought to revisit this determination at trial; this ruling is final and the law of this case.

The plaintiffs' next theory is that the Nation's aboriginal title to Westwoods somehow was extinguished, and that the Nation has only fee simple title—not aboriginal title—to Westwoods. This theory is inconsistent with what is perhaps the single most important—and undisputed—fact: Westwoods never has been taxed. Westwoods still appears on the Suffolk County Tax Map as "Shinnecock Indian Reservation," as does the Nation's other reservation at Shinnecock Neck. The Nation concededly occupied

and possessed all or most of what is now the Town of Southampton, including Westwoods, at the time the first European settlers arrived in 1640. The Nation also concededly owns and occupies Westwoods today. No act of the United States is alleged to have extinguished the Nation's aboriginal title to Westwoods, whether under the federal constitution or the Articles of Confederation. The plaintiffs rely principally on two colonial-era deeds to individuals—the so-called Ogden and Topping Deeds—and two colonial-era patents—the so-called Andros and Dongan Patents, as evidence of extinguishment. This reliance is misplaced.

The Ogden and Topping Deeds plainly were null and void *ab initio* under a 1650 Order of the General Court of the Colony of Connecticut, which at the time of their alleged execution had personal jurisdiction over Ogden and Topping and territorial jurisdiction over the Town. Even the plaintiffs' experts concur with the view that the Andros Patent did not purport to extinguish aboriginal title to any Indian lands at all. The Dongan Patent on its face unambiguously acknowledged and preserved the possibility of unextinguished, unpurchased aboriginal land to the west of Canoe Place, such as Westwoods; the only Indian land this document itself addressed (whether conclusively or not) was land said to have been sold to the freeholders of the Town. Plainly, those lands are located to the east of Canoe Place and do not include Westwoods.

The so-called Canoe Place Division of 1738, on which the plaintiffs also rely to assert extinguishment, in fact demonstrates nothing. There is no evidence that the Canoe Place Division ever was implemented, and it is conceded that no allottee of land named in it ever took title to or possession of any part of Westwoods—or anywhere

else—as a result of it. Indeed, there is credible evidence to the contrary. The plaintiffs failed even to prove that Westwoods was within the area allegedly addressed by the Canoe Place Division. The direct testimony of James P. Lynch, the plaintiffs' so-called "expert," involving strained constructions, pure surmise, obvious bias and a genial willingness to ignore inconvenient evidence, is too incredible to be believed and must be rejected. Without that testimony being fully credited, the plaintiffs cannot hope to establish that aboriginal title to Westwoods was extinguished.

The plaintiffs plainly bear the burden of proving extinguishment—in fact, they bear an elevated burden of proof. They have not come close to meeting it. But whoever has the burden of proof, the evidence overwhelmingly is in favor of the Nation's contention that it retains unextinguished aboriginal title to Westwoods.

The evidence clearly shows that the Shinnecock Indian Nation has physically occupied and used areas west of Canoe Place including Westwoods at all relevant times. In addition, the evidence shows that members of the Nation inhabited Westwoods both before and after the Ogden and Topping deeds were executed, and in the 19th century, and provides no basis to assert that anyone other than the Nation ever physically occupied or used Westwoods at any time.

No deed exists for Westwoods, which is entirely consistent with the Nation's aboriginal title to it from time immemorial. A very thorough search of recorded deeds for all land surrounding Westwoods shows that Westwoods consistently has been described as Indian land as far back as records exist—more than 150 years. This demonstrates not only that Westwoods consistently was acknowledged to be Indian land, but also that adjoining landowners have been on record notice of its status since

at least the mid-19th century. The current Town zoning map, and the Town's electronic GIS system, also show both Westwoods and the Nation's Shinnecock Neck reservation to be Indian reservations, as does the county tax map. Finally, neither the State nor the Town ever has sought to enforce any state or local laws or regulations with respect to activities at Westwoods—until this lawsuit.

The plaintiffs' unbroken course of conduct with respect to Westwoods could not be clearer; they have consistently treated it as Indian land. Notwithstanding the plaintiffs' tortured attempts to explain away these facts, the simplest explanation is also the correct one—Westwoods is Indian land, held by the Nation in unextinguished aboriginal title. Just as with the Nation's status as an Indian tribe, the plaintiffs' objections to the status of Westwoods as Indian land appear to have been concocted on the day this action was filed, and solely for the litigation purpose of prosecuting it.

Perhaps mindful of their consistent treatment of the Nation as a tribe of Indians and of Westwoods as Indian land over the course of centuries, the plaintiffs advance equally defective legal arguments predicated on federal law. They contend that even if the Nation is an Indian tribe as a matter of federal law, and even if Westwoods is Indian land held by the Nation in aboriginal title, federal law permits them to bring this action to enjoin development at Westwoods. These claims are supposedly based both on statutory enactments and supposed recent changes in the federal common law. Although these arguments at least have the advantage of not requiring a wholesale rewriting of history, they are supported neither by the law nor the facts.

The plaintiffs suggest that the federal Indian Gaming Regulatory Act ("IGRA") impliedly prohibits gaming by Indian tribes not included on the list (the "List")

required to be published by the Department of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454 (1994), 25 U.S.C. § 479a *et seq*. (the "List Act").[4] Whether or not this is correct (it is not), the plaintiffs agree that they do not have standing to sue for violation of IGRA, and that IGRA does not apply to tribes not on the List. To overcome the problems that IGRA confers no right of action upon any plaintiff and that IGRA does not apply to the Nation, the plaintiffs suggest that IGRA—a statute they claim "occupies the field" with respect to gaming by Indian tribes—impliedly withdrew whatever immunity from state or local regulation the Nation enjoyed with respect to gaming activities at Westwoods, and thereby conferred upon the State the power to enforce state gaming laws on Indian lands held by the Nation.

This assertion reflects a complete misunderstanding of the nature of federal preemption. If IGRA in fact occupies the field with respect to the regulation of gaming by Indian tribes (as the plaintiffs have argued), *all* state law regarding gaming has been displaced and there is nothing left for the plaintiffs to enforce. This assertion also reflects an inability to read the statute, which in fact provides for the enforcement of state gaming laws on Indian land—just not by the plaintiffs. As part of IGRA, Congress added a section to Title 18 of the United States Code (18 U.S.C. § 1166, added by Pub. L. 100-497 (1987)) reserving "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws" in Indian country to the United States. It is bizarre for the State to suggest that it is entitled to an injunction barring future conduct that it would be powerless to prosecute should it actually occur. The simple fact is that no plaintiff

[4] This argument was raised and implicitly (and correctly) rejected by the Court prior to the reassignment of this case. As with several other decisions, the plaintiffs sought to relitigate this issue, which was fully briefed. See dkt nos. 305, 322.

has standing to raise any claim under IGRA; the only party that could possibly have done so—the United States—has refused to participate in these lawsuits, and has been dismissed with prejudice.

Finally, the plaintiffs argue that even if the Nation is a tribe of Indians and Westwoods is Indian land, the holdings in Sherrill and Cayuga authorize them to seek an injunction against development of Westwoods. Neither case supports this proposition, and indeed both argue powerfully *against* the plaintiffs' claims.

The plaintiffs utterly miss the simple fact that unites Sherrill and Cayuga—and that distinguishes those cases from this litigation. In Sherrill, an Indian tribe unsuccessfully asserted the general immunity from state and local taxation and zoning regulation enjoyed by Indian land with respect to land it had recently reacquired, but which had been out of tribal possession and subject to state and local taxation and regulation for two hundred years. In Cayuga, the plaintiff tribe sought to reacquire possession of Indian land taken from it two centuries ago. In each of those cases, the court ruled that a settled pattern of jurisdictional authority should not be disturbed. Here, however, the record shows that Westwoods *always* has been used and possessed by the Nation and *never* has been either taxed or regulated.

For more than two centuries the plaintiffs and adjoining private landowners have without exception treated the Shinnecock Indian Nation as a tribe of Indians and Westwoods as untaxed Indian land. It is the plaintiffs who now seek to upset the *status quo ante* and assert regulatory authority where they had never done so before, and without any basis in law. The settled expectations of *all* parties, as evidenced not by their litigation claims but by their historical conduct and the historic record, are simple—

Westwoods is Indian land, held by unextinguished aboriginal title. No disruption will result from a judicial acknowledgement of the status of Westwoods as aboriginal Indian land, whereas a rejection of that status (in complete disregard of the record at trial) would upset the *status quo ante*. In other words, the teaching of Sherrill and Cayuga that the *status quo ante* should not be disturbed dictates a ruling for the defendants.

No settled expectations of the parties would be upset by the Nation's development of Westwoods as contemplated by the Development Agreement. Sherrill and Cayuga, even if applicable, addressed the effect of possible reassertion of sovereignty that had long been lost, an issue that has no bearing on the facts here; Westwoods has been owned and possessed by the Nation as tribal land since time immemorial. In Sherrill, the Supreme Court necessarily accepted, and indeed based its ultimate holding in that case on, the premise that land held by an Indian tribe as tribal land generally is not subject to state and local law. Westwoods is, and always has been treated by the plaintiffs as, tribal land.

As state and local laws do not apply to Westwoods, no plaintiff may state a cognizable claim for relief on an amorphous allegation that "disruption" caused by development of Westwoods is actionable. Having no substantive basis to apply state or local law to Westwoods, any such "disruption" is legally irrelevant. Despite this, prior to the reassignment of this case, the Court specifically indicated that it wished to hear evidence about the potential impact of development at Westwoods on the environment and the community. For this reason, the parties presented evidence at trial of the impact of the contemplated development at Westwoods on the surrounding area. The defendants continue to believe all this evidence is irrelevant and should be disregarded.

In any event, the evidence of "disruption" adduced by the plaintiffs at trial suffers from a fatal defect. Instead of addressing the development of Westwoods as actually contemplated by the Development Agreement, the State and the Town chose to present only evidence with respect to the potential impact of a grossly overstated development of Westwoods that is contemplated only in their own imaginings.[5]

It is a venerable and well-settled principle of law that the speculative possibility of future injury may not be a basis for injunctive relief. Despite the existence of an operative, executed Development Agreement, the plaintiffs' "disruption" witnesses used as their baseline for analysis a fictional behemoth of a casino of their own creation, unconnected to any actual facts, based solely on their speculation about what might possibly be built at Westwoods. Not one "disruption" witness for the plaintiffs even knew of or considered the gaming facility described in the Development Agreement, and none provided any testimony with respect to that facility or its effects. The plaintiffs simply ignore the testimony both of tribal officers, and the contents of the Development Agreement, including not only its description of the planned facility but also its express requirement that the developer meet or exceed all substantive state and federal environmental protection standards.

The plaintiffs have failed completely to offer evidence addressing the effect of the development of Westwoods that the Nation actually has contemplated. In contrast, the defendants have shown that the actual development of Westwoods contemplated by the Development Agreement could be accommodated at Westwoods

[5] The plaintiffs attempt to cover up this fatal failure of proof by suggesting that because something that somehow might violate some federal standard might be built at Westwoods at some point in the future, an injunction should issue barring any development at Westwoods. There is no basis in law for this extraordinary proposition. Even if there were, the testimony of the plaintiffs' "disruption" experts is inconsistent and incredible, and in some cases downright incompetent, and cannot be relied upon.

without any unreasonable effects, on or off Indian land. The defendants, in an abundance of caution, also presented evidence with respect to a reasonably expanded facility (though not the preposterous Foxwoods-like megacasino hypothesized by the plaintiffs), with the same result—it can be accommodated without "disruption." The Court therefore has no basis in law or fact to enjoin the development of Westwoods.

ARGUMENT

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

A. This Court Has Determined That The Shinnecock Indian Nation Is A Tribe Of Indians As A Matter Of Federal Law

In its November 7, 2005 memorandum and order, the Court unambiguously held that the Shinnecock Indian Nation is a tribe of Indians as a matter of federal law. See November 7 Order at 490 – 92. It did so unequivocally, in a detailed opinion and on a thorough factual record, determining 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 November 7 Order also was unambiguous in stating that the Court was "recognizing the Shinnecocks as a Tribe" and finally determining that issue in favor of the Nation. Id.

B. The Courts Of The United States Are Authorized To Make Such Determinations

There are several methods, all historically and legally recognized as valid, by which a tribe may be recognized as a matter of federal law. Among these is recognition by a United States court. This was expressly acknowledged by Congress in the List Act, in which Congress unambiguously stated that, in addition to direct legislative action by Congress and administrative action by the Department of the

Interior, "Indian tribes presently may be recognized . . . by a decision of a United States court." List Act § 103(3).

The existence of Indian nations and the rights and powers enjoyed by them are inherent. Those rights and powers are not created or conferred by administrative action. See, e.g., United States v. Lara, 541 U.S. 193, 204-05 (2004); United States v. Wheeler, 435 U.S. 313, 322-23 (1978); Cherokee Nation v. Georgia, 30 U.S. 1, 16-17 (1831). This is why the process for identifying an Indian tribe as a tribe as a matter of federal law is called "acknowledgment" or "recognition," rather than creation, and it simply is incorrect to suggest that an Indian tribe does not "exist" if it has not yet been placed on the List by the Department of the Interior. Also, it is Congress that has "plenary and exclusive" authority over Indian affairs, not the Department of the Interior. See, e.g., Lara, 541 U.S. at 200; Nell J. Newton, Cohen's Handbook of Federal Indian Law § 5.02 (2005 ed.) ("Cohen"). The authority of the Department over Indian affairs is grounded entirely in statutes enacted by Congress and is limited and guided by that statutory grant of authority. Cohen, § 5.03[2]. Section 103 of the List Act is no anomaly and reflects a consistent view of federal Indian law by Congress at or about the time of its enactment.[6]

[6] For example, see the 1994 comments of Senator John McCain on the floor of the Senate in support of an amendment to S.1654, which became Pub. L. 103-263, § 5(b), 25 U.S.C. § 476(g). This statute declares that any existing "regulation or administrative decision or determination of a department or agency of the United States . . . that classifies, enhances or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to . . . other federally recognized Indian tribes . . . shall have no force or effect." Speaking in support of enactment of this statute, Senator McCain stated: "The recognition of an Indian tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution . . . . [T]he Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority." 140 Cong. Rec. S1644-03, 1994 WL 196882 at *S6146 (103rd Cong., 2d Sess.) (May 19, 1994) (emphasis added). See also 140 Cong. Rec. H3802-01, 1994

In this Circuit, the leading precedent for tribal recognition by a federal court is Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51 (2d Cir. 1994). Consistent with Congress's statement of law in the List Act, Golden Hill plainly stands for the proposition that a federal court has jurisdiction and authority to recognize an Indian tribe as a matter of federal law in appropriate circumstances. In this action, the Second Circuit plainly contemplated that this Court would make such a finding, if appropriate, in its mandate dated November 3, 2003 (docket no. 57). The plaintiffs have made no application to revisit this Court's determination of the Shinnecock Indian Nation's tribal status, which is final and conclusive upon the parties as law of the case unless modified on appeal. Consequently, as a result of the November 7 Order the Shinnecock Indian Nation must be treated as a recognized Indian tribe as a matter of federal law.

C. The Nation Enjoys Sovereign Immunity From Suit With Respect To The State Of New York And The Town Of Southampton Except As Expressly Authorized By Congress In A Federal Statute

Sovereign immunity from suit is a fundamental aspect of a tribe's inherent sovereignty and generally bars lawsuits against a tribe or its officials for their activities, whether on tribal lands or elsewhere. See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998); Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004).[7] The Nation is a sovereign tribe of Indians and consequently as a matter of law cannot

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WL 200895 at *H3803 (103rd Cong., 2d Sess.) (May 23, 1994) (similar comments of Representative Bill Richardson).

[7] Quite apart from the sovereign immunity Indian tribes enjoy as a matter of federal law, New York State courts have held as a matter of state law that the Nation is protected from suit by sovereign immunity. See Collins v. Shinnecock Tribe, 141 Misc.2d 191, 193 (Sup. Ct. Suffolk Co. 1988). This is consistent with the immunity from suit that New York state courts extend generally to Indian tribes and their officials. See, e.g., Ransom v. St. Regis Mohawk Educ. and Cmty. Fund, Inc., 86 N.Y.S.2d 553 (N.Y. 1995); Doe v. Oneida Indian Nation of N.Y., 278 A.D.2d 564 (3rd Dept. 2000).

be sued absent consent or waiver, which it did not give in either of these consolidated actions. The defendants raised this defense in their motion for summary judgment, and it was fully briefed. See Dkt Nos. 116-118, 123-124, 128. In its November 7 Order, this Court acknowledged the Nation to be a tribe of Indians as a matter of federal law, but denied the defendants' motion for summary judgment on the basis of sovereign immunity. November 7 Order at 493. This issue being one of law, and having been conclusively ruled upon by the Court, at present is law of the case. However, the defendants preserve for appeal their argument that the Shinnecock Indian Nation and the other defendants are entitled to sovereign immunity from suit and continue to urge, as they have done consistently in these lawsuits, that these lawsuits should be dismissed for that reason.

II. The Rights Of Indian Tribes With Respect To The Governance Of Their Lands Are Not Conferred By The United States But Inhere In The Tribes By Virtue Of Their Status As Tribes

A. The Sovereignty Of The Shinnecock Indian Nation Does Not Depend On Federal Action Or Approval

The rights and powers enjoyed by Indian nations are inherent, not "created" by Congressional (or any governmental) action. See, e.g., Lara, 541 U.S. at 204-05 (tribes exercise retained, not delegated, sovereignty); Wheeler, 435 U.S. at 322-23; Cherokee Nation, 30 U.S. at 16-17. The fundamental principle of Indian sovereignty is that the "powers of Indian tribes are … '*inherent powers of a limited sovereignty which has never been extinguished*.'" Wheeler, 435 U.S. at 322 (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original)). See also Lara, 435 U.S. at 323; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) ("Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of

local self-government.") (citation omitted); 140 Cong. Rec. S1644-03, 1994 WL 196882 at *S6146 (103rd Cong., 2d Sess.) (May 19, 1994) (Senator John McCain explained: "Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government."). As the First Circuit noted in rejecting a state's contention that tribal status is bestowed upon tribes by some form of official "recognition":

> In effect, [the state's] approach would condition the exercise of an aspect of sovereignty on a showing that it had been granted to the tribe by the federal government, either by explicit recognition or implicitly through a course of dealing. As the Supreme Court recently explained, however, the proper analysis is just the reverse.

Bottomly v. Passamaquoddy, 599 F.2d 1061, 1066 (1st Cir. 1979) (citing Wheeler). As the 2004 Lara decision shows, the principle that tribal sovereignty is inherent, and not conditioned on federal (or state) delegation, is not an ancient doctrine that has fallen into desuetude, but rather remains today a centerpiece of Indian law.

B. The Status Of Westwoods As Aboriginal Indian Land Does Not Depend On Federal Action Or Approval

Just as Indian tribes enjoy retained—not delegated—sovereignty, Indian tribes do not hold their aboriginal territory by virtue of a grant from any governmental agency, but rather have and retain their aboriginal rights in them by virtue of having occupied and used them prior to first European contact. Westwoods plainly is Indian land of this sort. With respect to such lands, Indians have no power of alienation of their aboriginal territory except to the sovereign. See, e.g., Oneida Indian Nation of N.Y. v. County of Oneida, N.Y., 414 U.S. 661, 667 (1974) (Indian title extinguishable only by the United States); Holden v. Joy, 84 U.S. 211, 244 (1872) (under the "doctrine of discovery" Indians could sell their lands only to the government of the discoverer, but

could not sell land to its subjects or others); Seneca Nation of Indians v. New York, 382 F.3d, 245, 249 n.4 (2d Cir. 2004) ("only extinguishment by the sovereign could trump the Indian right of occupancy"); Cohen, §15.04[2] at 973 ("[O]nly the federal government (and before it the 13 states or European nations) could extinguish Indian title.")[8]

Unless the sovereign's intent to extinguish aboriginal title is "plain and unambiguous," aboriginal title will continue to inhere, even surviving a transfer of the fee title in those lands to a state or other third party. See United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1941); Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 248 (1985) (Congressional intent to extinguish Indian title must be "plain and unambiguous"). This doctrine is predicated on the strong "policy of the federal government from the beginning to respect the Indian right of occupancy." Cramer v. United States, 261 U.S. 219, 227 (1923). From the earliest colonial times to the present, grants by the sovereign of fee title to lands in the possession of Indian tribes uniformly have been held by the transferee subject to Indian tribes' pre-existing legal rights of possession. See, e.g., Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Worcester v. Georgia, 31 U.S. 515, 545 (1832); Johnson v. M'Intosh, 21 U.S. 543 (1823); Fletcher v. Peck, 10 U.S. 87, 142-43 (1810); Seneca Nation, 382 F.3d at 249 n.4. See also Chouteau v. Molony, 57 U.S. 203, 239 (1853) (land grants by the Spanish governors subject to the rights of Indian occupancy); U.S. ex rel. Chunie v. Ringrose 788 F.2d 638, 642-43 (9th Cir. 1986) (title under receipts of grant from Mexican

[8] As is obvious from the holdings in these cases, the idea that anyone other than the sovereign (such as the Town) ever had the power to extinguish aboriginal title to Westwoods is completely without basis in law.

government subject to Indian aboriginal right of occupancy);[9] Powell on Real Property § 67.02[2][iii] ("It has long been settled law that aboriginal title survives conveyances between governments and individuals, runs with the land, and binds subsequent purchasers."). Because the Nation's aboriginal title to Westwoods never has been validly extinguished, as explained below, it remains Indian land as a matter of federal law.

III. The Shinnecock Indian Nation Holds Westwoods By Unextinguished Aboriginal Title.

A. The Court Must First Resolve The Title Status Of Westwoods

The title status of Westwoods is the first issue the Court should decide. The question was properly framed by this Court in its November 7 Order, in which it observed: "Defendants submitted a Fact Statement containing facts which are, for the most part, undisputed and which show that the Shinnecock Indian Nation…[w]as in possession of the lands in and around the Town of Southampton when the first European settlers arrived in 1640 . . . ." New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 489 (E.D.N.Y. 2005). The Court then noted that: "In dispute is the nature of the title held by the defendant Indian Tribe, i.e. whether it *currently still holds its aboriginal title* (as the Defendants claim) . . . or whether it holds *a reacquired title* by adverse possession or some other right (as the Plaintiffs claim) . . . ." Id. at 493 (emphasis supplied).

B. The Plaintiffs Bear The Burden Of Showing By Clear And Convincing Evidence That The Nation's Aboriginal Title To Westwoods Has Been Extinguished

[9] A related observation based on these cases is that the presumption that aboriginal title subsists absent plain and unambiguous evidence of extinguishment applies whether the sovereign in question was the United States government or one of its colonial predecessors.

"It is well-settled that an intention [of the sovereign] to authorize the extinguishment of Indian title must be 'plain and unambiguous,' either 'expressed on the face of the [instrument] or . . . clear from the surrounding circumstances.'" Seneca Nation, 382 F.3d at 260 (quoting United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1941), other citations omitted). Extinguishment of aboriginal title is not lightly implied and must be proved by clear and convincing evidence. See County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 247-48 (1985) (Congressional intent to extinguish Indian title "must be 'plain and unambiguous' and will not be 'lightly implied'") (quoting U.S. v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 354 (1941)); Seneca Nation, 382 F.3d at 260; Ala.-Coushatta Tribe of Tx. v. United States, Cong. Ref. No. 3-83, 2000 WL 1013532, at *34 (Ct. Cl. June 19, 2000) ("In sum, the law of aboriginal title requires 'clear and convincing evidence' that the sovereign intended to terminate an Indian tribe's occupancy rights in its ancestral lands. Therefore, [the government's] burden of proving that the sovereign extinguished an Indian tribe's aboriginal title is a heavy one.") (citation omitted); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, Appeal No. 10-65, 1967 WL 8874, at *2-3 (Ct. CI. 1967). In addition, the canons of construction established by Indian law require any ambiguities regarding the continuation of aboriginal title to be resolved in favor of the Indian tribe:

> [A]n extinguishment [of aboriginal title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards . . . . [T]he rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.

Santa Fe, 314 U.S. at 354 (citation omitted).

Extinguishment of aboriginal title other than by war, by contract, or by treaty with the sovereign (none of which occurred here) requires a showing of actual physical dispossession. See Seneca Nation, 382 F.3d at 257 n.4. Any claim that aboriginal title has been extinguished by physical dispossession (or, as this is sometimes called, by voluntary abandonment) must also be "clearly established by clear and adequate proof" that the Indians who had aboriginal title to a parcel of land in fact have voluntarily ceased to physically occupy and use it. Quapaw Tribe of Indians v. United States, 120 F. Supp. 283, 286 (Ct. Cl. 1954). See also Seneca Nation, 382 F.3d at n.4; United States v. Arredondo, 31 U.S. 691, 747-48 (1832) (involuntary abandonment ineffective to extinguish aboriginal title); Cohen, §15.09[1][b].

As a matter of well-established federal law,[10] the plaintiffs, who seek to enjoin the Nation's use of lands it concededly owns and occupies, bear the burden of showing by clear and convincing evidence that the Nation's aboriginal title has, as a matter of historical fact, been extinguished. They completely failed to do so.

[10] Even if federal Indian law, with its obvious interest in protecting and preserving Indian relations as an exclusively federal area, did not expressly require a heightened burden of proof to show extinguishment, ordinary property law places the burden squarely on the plaintiffs. Under New York law, there is a legal presumption of continuance where a gap in title appears to exist: "When a fact or condition is shown to have existed, it is presumed to have continued to exist, unless evidence to the contrary is introduced." Warren's Weed N.Y. Real Prop. (5th ed.) § 50.10[3]. In such a circumstance "[p]ossession is presumed to continue . . . . So of ownership . . . ." Wilkins v. Earle, 44 N.Y. 172, 192 (N.Y. 1870). See also The Ne-Ha-Sa-Ne Park Ass'n v. Lloyd, 25 Misc. 207, 212 (N.Y. Sup. Ct. 1898) (considering "the legal presumption that conditions proved to exist are presumed to continue to exist" in finding continued possession in assignees and thus reversion to assignor absent any record assignees executed conveyance of property within one year as required by deed); People v. Scandore, 171 N.Y.S.2d 808, 810 (N.Y. Ct. App. 1958) (finding continued possession in defendant under "the well-established presumption of continuance of ownership"). In the absence of evidence clearly establishing, without ambiguity, that Westwoods was validly conveyed away and then conveyed back to the Nation, the presumption of its continued use and occupancy by the Nation since first European contact in 1640 must stand.

C. The Evidence Plainly Demonstrates That The Nation Retains Aboriginal Title To Westwoods

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." Santa Fe, 314 U.S. at 345. The Santa Fe court also observed that "[i]f it were established as a fact that the lands in question were, or were included in, the ancestral home of the [tribe] in the sense that they constituted definable territory occupied exclusively by the [tribe] (as distinguished from land wandered over by many tribes), then the [tribe] had 'Indian title.'"[11]

Whether the Nation holds aboriginal title to Westwoods thus clearly is a question of fact within the competence of this Court to determine. No matter who bears the burden of demonstrating aboriginal title, the evidence is clear and convincing—the Nation's aboriginal title to Westwoods never has been validly extinguished. All parties agree that the Shinnecock Indians occupied the land currently known as Westwoods, and indeed the entire area of land that now is the Town of Southampton, when the first European settlers arrived in 1640, and this was specifically noted by the Court in its November 7 Order. See November 7 Order at 489 (the Nation "[w]as in possession of the lands in and around the Town of Southampton when the first European settlers arrived in 1640"). All parties also agree the Shinnecock Indian Nation currently has title to and occupies Westwoods, see Fact Stip. 17, 18, and it is now settled that members of the Nation have inhabited the area "for centuries." November 7 Order at 492, n.2. The burden is therefore squarely on the plaintiffs to demonstrate by clear and

[11] It has, of course, been clear since at least 1835 that the sort of occupancy and use required for aboriginal title to subsist does not require continuous inhabitation, or inhabitation at all, but simply use for hunting or as a source for other foodstuffs or as a resource, such as a woodlot, orchard or a cultivated field. See, e.g., Mitchel v. United States, 34 U.S. 711, 746 (1835) (Indian hunting grounds sufficiently occupied for aboriginal title to exist). See generally, Cohen, §15.05[1] (possessory aboriginal title may be premised on any tribal use).

convincing evidence that the Nation's aboriginal title to Westwoods is no more, either because the sovereign extinguished it by valid, affirmative act, or because the Nation voluntarily ceased, as a physical fact, to occupy and possess it. The plaintiffs have failed utterly to meet this burden. There was no properly authorized extinguishment by the sovereign, and the evidence overwhelmingly supports the conclusion that the Nation has continuously owned and occupied Westwoods since first European contact.

No act of the United States is alleged to have extinguished the Nation's aboriginal title to Westwoods, whether under the federal constitution or the Articles of Confederation. Plaintiffs instead allege that certain events in the 17th century operated to extinguish the Shinnecocks' aboriginal title. As discussed below, the plaintiffs completely misunderstand the law that applies and misconstrue the historical record to which they apply it. The simple fact is that the plaintiffs cannot point to any colonial act that evidenced any intent at all, let alone a clear and convincing intent, to extinguish the Nation's aboriginal title to Westwoods.

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

The undisputed historical record establishes that the Shinnecocks inhabited the entirety of what is now the Town of Southampton prior to the arrival of the first Europeans. November 7 Order at 489. A succession of documents (including the ones on which the plaintiffs rely to allege extinguishment) demonstrate that the Nation was in possession of areas west of Canoe Place into the 18th century. It is also indisputable that the Nation had possession of Westwoods in the 19th century and at all subsequent times, including fee simple ownership now.

The plaintiffs, and in particular the Town's historical expert, Mr. Lynch, have suggested that at some intervening point the Nation had abandoned its aboriginal lands to the west of Canoe Place, and occupied only areas east of Canoe Place. This is belied not only by ample evidence of habitation in and around Westwoods, but also by the admissions of Mr. Lynch himself. In addition, no party asserts that the Nation's possession was obtained through purchase, and there is no evidence in the record that anyone else ever possessed Westwoods at any time. The only conclusion supported by the record is that the Nation has continually possessed Westwoods from time immemorial.

2. Applicable Law Expressly Forbade The Conveyances Alleged By The Plaintiffs To Have Extinguished The Nation's Aboriginal Title To Westwoods

Southampton was under the jurisdiction of the Colony of Connecticut from at least 1644 until at least 1664. Like other British colonies in North America, the Connecticut Colony from an early date expressly prohibited any individual from directly acquiring Indian lands. The power validly to acquire Indian lands was, as a matter of policy, tightly controlled and limited to the General Court of the Connecticut Colony. At no point did the Colony of Connecticut ever authorize the purchase of Westwoods or any other land to the west of Canoe Place within what is now the Town of Southampton. Indeed, from and after February of 1650 (O.S.)[12] if not earlier, the Colony of Connecticut by Order of its General Court (the "1650 Order") expressly prohibited all individuals within its jurisdiction from purchasing any land from Indians:

[12] 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. In these Conclusions of Law, "O.S." indicates that the date is expressed as it was in the original document (that is, in accordance with the Julian calendar). Trial Ex. D-32 at 28; Trial Ex. D-67. Except as expressly annotated with "O.S.", all dates here are expressed using the modern, Gregorian calendar.

> Whereas there is an order of Courte amongst vs wch prohibitts all perticular persons within this Jurissdiction from buying any land of the Indians, either directly or indirectly, vnder any pretence whatsoeuer . . . .

Ex. D-46.[13] The necessary consequence of the 1650 Order is that any and all purported purchases of Indian lands in Southampton made by a private individual while the 1650 Order, such at the Topping and Ogden Deeds, were null and void *ab initio* and of no legal effect.[14]

Later, when the eastern portion of Long Island, including Southampton, came under the jurisdiction of the newly formed Province of New York, a law very similar to the 1650 Order, reflecting a very similar governmental policy, promptly was

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[13] In 1993, the State of Connecticut passed an act that purportedly acted retroactively to validate certain land transfers that were "otherwise valid except for the possible fact that the general assembly or its predecessor legislative bodies or other governmental authorities did not confirm, validate, ratify or approve such transfers of land in accordance with colonial laws or resolutions, common law or provisions . . . ." Conn. Sp. Act 93-1 (1993), Ex. T-366. Apart from implicitly acknowledging the effect of violation of the 1650 Order to be what the defendants assert it to be, this statute has no bearing on this case. The Court can take judicial notice that in 1993 no part of Southampton, Long Island was subject to the jurisdiction or laws of Connecticut. It also was clearly beyond the Constitutional power of the State of Connecticut to legislate in derogation of the unquestioned exclusive commitment of Indian affairs to the national government generally, and of the Nonintercourse Act in particular, or to divest by legislative *fiat* the Nation's aboriginal title to Westwoods, which has subsisted for hundreds of years. See generally discussion in Section VI, below.

[14] Individual settlers plainly had no power to acquire Indian lands. Nor did Connecticut "towns," whether properly incorporated or not. The 1650 Order conferred no special powers on towns generally or on the Town of Southampton in particular. It is abundantly clear as a matter of Connecticut law that in the 17th century Connecticut towns had no powers at all other than as expressly delegated to them by the Connecticut General Court. See Webster v. Town of Harwinton, 32 Conn. 131, 138 (Ct. S. Ct. 1864) (so-called Connecticut Constitution of 1639, under which the Colony of Connecticut was governed at all relevant times, conferred upon the Connecticut General Court "supreme and exclusive legislative, executive and judicial power"; towns in colonial Connecticut had only such powers, other than the power to elect representatives ("magistrates") to the General Court, as the Connecticut General Court expressly delegated to them); State Ex. Rel. Bulkeley v. Williams, 68 Conn. 131, 149, 35 A. 24, 29 (Ct. S. Ct. 1896), aff'd sub nom., Williams v. Eggleston, 170 U.S. 304 (1898) ("Towns have no inherent rights. They have always been the mere creatures of the colony or the state, with such functions and such only as were conceded or recognized by law."). In this regard, Connecticut law is no aberration. As a matter of general municipal law, powers granted to municipalities are construed narrowly and ambiguities as to the existence of municipal power are resolved against the municipality. See, e.g., In Re Piers Old Nos. 8, 9, 10, and 11, North River, In New York, 228 N.Y. 140, 152 (N.Y. 1920) ("When there is a fair, reasonable, and substantial doubt concerning the existence of an alleged power in a municipality, the power should be denied.") (citations omitted); 2A McQuillin Mun. Corp. (3rd ed.) §10:3 ("municipalities have no inherent powers").

put in place. In 1664, Charles II, King of England, granted a patent to his brother James, Duke of York, for a large part of North America, including what is now New York. Richard Nicolls (who had been appointed deputy governor of the newly created "dominion" of New York by the Duke of York) led an English squadron that arrived at Manhattan in August 1664, and on September 8 of that year wrested control of the colony of New Netherland from the Dutch. (New Netherland did not include the eastern portion of Long Island, including Southampton, which was at that time still under the jurisdiction of Connecticut.) The Province of New York was born, and Nicolls was its first governor.

Early in 1665, Governor Nicolls imposed the "Duke's Laws" on the towns of Long Island, including Southampton. The Duke's Laws prohibited all purchases of lands from the Indians after March 1, 1665 without prior leave of the Governor and, even after leave was obtained, required the Sachem of the Indians that owned the lands to come before the Governor to acknowledge payment and satisfaction for the lands before a transfer could be approved and a grant (patent) of the lands made:

> 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 (emphasis added). Note that, under this statute, the source of title in the purchaser is a grant (that is, a patent) from the governor, and that it was expressly not valid until "entered upon record." This express prohibition demonstrates that there was

no change in colonial policy—acquisitions of Indian lands were at all times very strictly regulated—and is entirely consistent with the policy of the American colonies generally (and of the federal constitution) to reserve to the sovereign the exclusive right to acquire Indian land.[15]

3. Acquisition Of Indian Lands In Violation Of Law Are Void

It is well settled that any purported conveyance of Indian land in violation of colonial laws that expressly prohibited such conveyances is null and void *ab initio* as a matter of law. As a matter of historical fact, this principle was well understood and enforced by colonial authorities. See D-71; Trial Tr. (Katherine A. Hermes) 2484:9 – 2489:18; D-25 at 3-4, 26-28 (Hermes Original Expert Report). A February 1, 1664 letter by John Allyn, Secretary of the Connecticut General Court, to Governor Nicolls, regarding Indian land purchased by a Mr. Scott (who was "agayne making disturbance amongst the people of Setawkett") is particularly instructive. Allyn first noted that Nicolls had been "pleased to determine, when or [*sic*, our] Governoure was last at New Yorke, that what had bin formerly setled and determined by Connecticutt upon Long Island, was so to continue" under the new colonial administration. He then went on to state, with respect to Mr. Scott's Indian land purchases, that:

> Your Honour may allso please to understand that by the established order of this Colony (of which Setawkett was a member severall yeares, by theire owne desires) no land was to be purchased so the perticuler use of any person,

[15] The only acts alleged by the plaintiffs to have had the effect of extinguishing the Nation's aboriginal title took place well before the establishment of the federal constitution. It is noteworthy, however, that the first Congress to meet under the federal constitution passed the Indian Trade And Intercourse Act (commonly known as the "Nonintercourse Act"), Act of July 22, 1790, ch. 33, 1 Stat. 137, now codified as 25 U.S.C. § 177, which prohibits the acquisition of Indian lands without prior Congressional approval. See generally U.S. v. Candelaria, 271 U.S. 432, 442 (1926) ("Congress, in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians.").

> without the consent of or Generall Courte, *and all such purchases to be null in lawe*; so that if such ingrossings of land (to private uses) from Indians should be tolerated it would be found destructive to whole townships and much obstruct the peopling of His Majesties dominions in these partes.

D-71 (emphasis added). The Connecticut Colony, and later the Province of New York, had a simple, strong public policy that did not depend on a conveyance being involuntary, fraudulent, or unfair. Nor did it matter if a purported deed was signed, sealed, ratified or anything else. Prohibited conveyances of Indian land simply were, as Allyn put it, "null in lawe."

This principle has also been reaffirmed and consistently applied in federal case law, after the adoption of the federal constitution, by courts considering transfers in violation of law. Quite early in our nation's jurisprudence, the Supreme Court of the United States readily accepted the proposition that a contract between an individual and an Indian tribe during the colonial period for the purchase of land was null and void, and without legal effect. See Pennsylvania v. Franklin, 4 U.S. 255 (1802) (misdemeanor indictment for taking possession of lands through a purported purchase from Indians in violation of colonial-era Pennsylvania law upheld).[16] Indeed, by 1824, the principle that purported grants of Indian land to individuals in violation of prohibitory statutes were without legal effect was so well established that the Supreme Court of the United States declared that "this Court has never hesitated to consider all such . . . grants as wholly void." Danforth v. Wear, 22 U.S. 673, 675-76 (1824) (internal quotation marks omitted).

[16] This rule is in keeping with the general principle that agreements that violate a statute are "absolutely void . . . not merely voidable, but void ab initio." The Village of Fort Edward v. Fish, 156 N.Y. 363, 371, 373 (N.Y. 1898). See also Bank v. Owens, 27 U.S. 527, 539-41 (1829) (agreements in violation of law absolutely void) (citations omitted); Peck v. Burr, 10 N.Y. 294, 299 (N.Y. 1851) (no cause of action can arise from an agreement prohibited by statute); Town of Stratford v. Fidelity & Cas. Co., 106 Conn. 34 (Conn. 1927) (agreement in violation of statute was void and could not be made enforceable by estoppel).

Federal courts sitting in New York also recognized from an early date that purported acquisitions of land by individuals from Indians in violation of an applicable statute were null and void. For example, in Jackson v. Porter, 13 F. Cas. 235 (C.C.N.Y. 1825), a New York Circuit Court held an asserted colonial era purchase of land by an individual by deed from Indians, in violation of orders and proclamations issued by the Lieutenant Governor of New York and the King of England forbidding such purchases, was void, and declared that the purchaser "could acquire no right whatever thereby"—this despite the fact that the deed in question had been expressly confirmed by Sir William Johnson, the Crown's Superintendent of Indian Affairs. Id., 13 F. Cas. at 240.

These settled legal principles never have changed. Sherrill and Cayuga are not to the contrary. Neither case asserts that the initial transfers of Indian land at issue were or are valid. Rather, each case imposes limitations on the *relief* that can be sought after the passage of hundreds of years in connection with the undoubtedly illegal transfers.[17]

4. The So-Called Ogden and Topping Deeds Did Not Extinguish The Nation's Title To Westwoods

The Ogden and Topping deeds, by which private individuals purported to purchase some of the Nation's land to the west of Canoe Place, were executed in clear violation of the applicable Connecticut law (the 1650 Order), which expressly prohibited land purchases of that sort. Therefore, the conveyance purportedly made in each of them was void *ab initio*—or "null in lawe" as described in the Allyn Letter, a

[17] As explained below, Sherrill and Cayuga, because they seek to protect the *status quo ante*, argue *against* the relief sought here by the plaintiffs.

contemporary primary historical document. D-71.[18] The subsequent so-called Andros and Dongan Patents, discussed below, could not have confirmed any extinguishment of the Shinnecocks' aboriginal title to Westwoods predicated upon the Ogden or Topping deeds because under settled law deeds of that sort were "as if [they] had never been written. [They were] absolutely void." Turner v. Gilliland, 76 S.W. 253, 254 (Indian. Terr. 1903). The very inconsistency between the Ogden and Topping claims, and the many subsequent conflicting claims with respect to lands west of Canoe Place, is powerful evidence of the sagacity of Connecticut's prohibition on private purchases of Indian land. Unsurprisingly, the disregard of settled law resulted in later problems, including overlapping, inconsistent—and, of course, illegal—claims to the lands west of Canoe Place.

In 1664, territorial jurisdiction over what is now the Town was transferred from the Colony of Connecticut to the Province of New York. In October of 1666, issues relating to the lands to the west of Canoe Place were the subject of the attention of Richard Nicolls, the first Governor of the Province of New York. He was asked to settle a dispute regarding competing deeds among Topping, a man named John Cooper, and the inhabitants of Southampton claiming as alleged assignees of the Ogden deed, each of whom asserted claims by virtue of alleged purchases of overlapping parcels of land from Indians. No Indians were a party to these proceedings.

The way in which Nicolls mediated the dispute is instructive. Rather than grant or confirm title to any particular lands, Governor Nicolls ordered Topping and

[18] Indeed, the Town's counsel candidly admitted on the record that "there was no ruling by the Connecticut [General] court whatsoever concerning that property [the property conveyed by the Ogden and Topping deeds]." Trial Tr. 40:2 - 3 and that "we all are in agreement that there is no comment or reference by the Connecticut general court in history that anyone's found with specific reference to either the Ogden transaction or the Topping transaction." Trial Tr. 601:5 – 9.

Cooper to turn their deeds into the Town in exchange for payment and stated that "all right and interest" that Topping and Cooper "have by the said deeds or any other way or means obtained . . . doth and shall belong unto to the town of Southampton." Ex. T-66. Governor Nicolls omitted any statement of what that "right and interest" was, but merely settled matters between the three parties, Topping, Cooper and the Town, carefully avoiding the issue of the continuing vitality of the Nation's aboriginal right of occupancy or use of the lands in question. In fact, Governor Nicolls later stated himself that he "was pleased to declare that what hee did ye last yeare about the Matter in Controversy between Capn Tapping [*sic*] and ye Towne of Southampton which was then composed, Hoe [*sic*, he] only Confirmed the right that either of them really had, but did not create any new Right in either of them." Ex. D183. Whatever "right that either of them really had" as to Westwoods was derived from the Topping and Ogden deeds, which were void *ab initio.*. In short, Nicolls by his own admission did nothing with respect to the Nation's interest in its aboriginal lands to the west of Canoe Place, including Westwoods. [19]

In fact, it is unassailable that Governor Nicolls did nothing at any time to convey title of any land within the boundaries of what is now the Town to anyone. The parties are agreed that (a) during the entire period he was New York's Governor, Nicolls never issued any patent or grant for any lands at all within the Town, see Fact Stip. 67, and (b) that prior to the Andros Patent for Southampton of November 1676 and except during a period of Dutch rule in 1673-1674 the English government possessed

[19] Governor Nicolls certainly was aware that the Nation had rights in those lands, because on October 5, 1665, he formally fixed the western boundary of Shinnecock lands at a location well to the west of Canoe Place, a location where the Nation would have had no lands if the Ogden or Topping deed was valid. See Ex. D19.

sovereignty over all the lands within the current boundaries of the Town, the title thereto being vested in the King. See Fact Stip. 68. In short, whatever Governor Nicolls said in the course of his so-called "determination" of October 1666 unquestionably did not vest land title in, or divest land title from, anyone.

5. The Andros And Dongan Patents Must Be Construed Narrowly And In Favor Of The Nation

Before turning to a discussion of the Andros and Dongan Patents, it is useful to consider certain legal aspects of patent construction. Patents, like statutes, must be interpreted as a whole. See Brown v. Huger, 62 U.S. 305, 318 (1858) ("[T]he patent itself must be taken as evidence of its meaning; that, like other written instruments, it must be interpreted as a whole, its various provisions be taken as far as practicable in connection with each other, and the legal deductions drawn therefrom must be conformable with the scope and purpose of the entire document."). See also TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotations, citation omitted).

The scope and application of a colonial land patent is a question of law for this Court to decide. See Brown, 62 U.S. at 305 ("[t]his construction and these deductions we hold to be within the exclusive province of the court"). Such patents must be strictly construed—"[p]ublic grants convey nothing by implication; they are construed strictly in favour of the king." U.S. v. Arredondo, 31 U.S. 691, 738 (1832).[20]

[20] This principle was not new when Arredondo was decided. Indeed, to demonstrate its long-accepted vitality the court in that case at 31 U.S. at 738 cites the Earl of Leicester's Case, 73 E.R. 812, 3 Dyer 362a (King's Bench Division 1578) (grant of a manor to an Earl strictly construed in favor of the

See also United States v. Michigan, 190 U.S. 379, 401 (1903) (land grants from the sovereign "must be interpreted most strongly against the grantee and for the government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed"); Walton v. United States, 415 F.2d 121, 123 (10th Cir. 1969) ("[i]n a public grant nothing passes by implication and, unless the grant is clear and explicit regarding the property conveyed, a construction will be adopted which favors the sovereign rather than the grantee").

Absent "clear and convincing evidence" of the sovereign's "plain and unambiguous" intent to extinguish aboriginal title, courts have uniformly held that aboriginal title survives a grant of title in fee simple to land in the possession of an Indian tribe. See, e.g., Worcester v. Georgia, 31 U.S. 515, 546 (1832) ("these grants [patents] asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned").

Furthermore, and although nothing in the text of the Andros or Dongan Patent suggests that they are ambiguous, there is a well-settled principle of statutory construction that courts are to construe ambiguities in favor of Indians. See, e.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (holding that a federal statute could not be construed as allowing taxation of tribal leases given that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973).

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sovereign), decided during the reign of Queen Elizabeth I. It thus is apparent that the principle of strict construction of sovereign land grants was well established by the 17th century. A very similar principle of strict construction applies to statutory grants of power by state legislatures to municipalities. See discussion at n.14, supra.

6. Neither The Andros Patent Nor The Dongan Patent Extinguished The Nation's Aboriginal Title To Westwoods

Even without benefit of these canons of construction, a consideration of the plain text of the patents issued by Governor Edmund Andros and Governor Thomas Dongan with respect to the Town of Southampton—each of which is alleged by the plaintiffs to be evidence of extinguishment of the Nation's aboriginal title—shows that neither extinguished, or was intended to extinguish, the Nation's aboriginal title to Westwoods.

The Town of Southampton did not exist as a functioning incorporated town until the Andros and Dongan Patents created it as a legal matter.[21] See Beers v. Hotchkiss, 256 N.Y. 41 (1931) ("Southampton in its beginnings was without a royal patent, though its inhabitants like true precursors of the thought of Hobbes and Locke, had organized themselves already into a political community. The defect in the documents was supplied by the Andros patent of 1676 and the Dongan patent a decade later. By these, the title to the town lands vested in a public corporation, the Trustees of the Freeholders and Commonalty of the Town of Southampton."). The history of these patents is not as simple as the plaintiffs suggest.

Governor Nicolls issued land patents to the trustees of the freeholders of some Long Island towns (including Brookhaven, also known as Setauk and Setauket, immediately to the west of Southampton, and East Hampton, immediately to its east), but he never issued a land patent or any other patent for Southampton or for Southold,

[21] This issue was extensively briefed in the defendants' bench memoranda, submitted to the court as Dkt No. 294, to which the defendants respectfully refer the Court.

an area to the north of Southampton.[22] Subsequently, in September 1676 Governor Edmund Andros demanded that the inhabitants of Southampton and Southold each take out a patent for their town and land; they refused, presumably because the inhabitants wished to remain under the jurisdiction of Connecticut Colony.

As a result, the General Court of Assizes, the highest court in the Province of New York, gave "judgmt That the sd Towns for their disobedience to Lawes have forfeited all their titles, Rights and privileges to the lands in the sd Townshipps . . . ." Ex. D187. By this judgment whatever interests the inhabitants of Southampton or Southold may have had in the Nation's lands (in actuality, none) was forfeited.[23] These events led to a subsequent acquiescence by the inhabitants of Southampton in the authority of Andros and the Province of New York, and to the grant of the first patent for Southampton, by Andros, on November 1, 1676. The necessary legal consequence of these events (forfeiture of all claims to rights in land, followed by a grant of fee simple

[22] But see Trustees of the Freeholders of the Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1 (1889). In that case the New York Court of Appeals decided an action for ejectment seeking to recover land under the waters of Mecox Bay in Southampton. The parties were the Town, as plaintiff, and an oyster company. Mecox Bay is several miles to the east of Canoe Place. As discussed above, the title history of lands to the east of Canoe Place is quite different from those west of Canoe Place, such as Westwoods. The defendant oyster company claimed title under an Indian deed and under an alleged patent from one Farrett, acting for the Earl of Sterling. Among the holdings in Mecox is that there was no showing that the Earl of Sterling had any land title in Long Island and that, based on the principles of Johnson v. McIntosh, 21 U.S. 543, 573-74 (1823), the Indians had no title to the land in question which they could grant (the fee to aboriginal land being in the sovereign under the doctrine of discovery). Mecox, 166 N.Y. at 7. The Mecox opinion contains a passing dictum, unnecessary to its holding, about extinguishment of Indian title in the Town generally, rather than simply to the lands east of Canoe Place that were at issue. Irrespective of the validity of the court's analysis with respect to the submerged lands at Mecox Bay—the defendants do not concede the court's reasoning to have been factually or legally correct—Mecox Bay evidently dealt only with lands east of Canoe Place, and these were the subject of its holding. In any event, the Nation was not a party to that action, and cannot have had its rights in its lands adjudicated by it.

[23] This forfeiture followed upon and reinforced prior declarations that all claims to rights in land by Southampton were invalid, accomplished by orders of the New York Court of Assizes, both in 1670 (prior to the Dutch reconquest of New York in 1673) and in 1676 (after English title to New York was re-established by conquest. All these forfeitures and declarations of invalidity of land rights of course followed the 1666 Nicolls determination upon which the plaintiffs rest their arguments of title.

title by patent) is that only the title granted to the freeholders of the Town by the Andros Patent or by subsequent sovereign grant has any validity.

The Andros does not support the plaintiffs' argument. The Andros Patent, on its face, does nothing to extinguish Indian title to any lands in Southampton. Even the plaintiffs' experts agree on this point. See Def. Find. Fact 132. In fact, that patent specifically acknowledged the possibility of continuing aboriginal title to lands within Southampton, and expressly conditioned the future purchase of such lands on compliance with the law in force at the time—the Duke's Laws—which established a precise procedure for the acquisition of Indian lands: "if it shall so happen that any part or parcel of the Lande within the bounds and Limits afore described be not already Purchased of the Indyans It may bee purchased (as occasion) according to Law." T-188.

The Andros patent was followed some ten years later by another, issued on December 6, 1686 by Thomas Dongan, his successor. See D12. Both the Andros and Dongan Patents recognize the possibility of existence of aboriginal land west of Canoe Place, and expressly condition permission to acquire such land on compliance with the Duke's Laws: "if it shall so happen that any part or parcel of the Lande within the bounds and Limits afore described be not already Purchased of the Indyans It may bee purchased (as occasion) according to Law." This forecloses any claim that either of the Andros or Dongan Patents were intended to extinguish all aboriginal Indian title in Southampton, much less title west of Canoe Place. No intention to extinguish aboriginal title to lands to the west of Canoe Place (including Westwoods) is "expressed on the face" of these patents, or "clear from the surrounding circumstances" as is required for

extinguishment to occur. Seneca Nation, 382 F.3d at 260. The Dongan patent also reiterates the conditional prospective permission to purchase Indian lands "according to law" contained in the Andros patent. These words indicate as a matter of historical interpretation that the possibility of aboriginal title to lands in Southampton was not foreclosed—and certainly not adjudicated to be foreclosed. This conclusion is further demonstrated (as to lands to the west of Canoe Place) by the fact that in its communications to New York Governors that preceded the issuance of these patents, Southampton predicated its claim to title solely on the Sterling grant of 1640, which involved a parcel of land eight miles square and entirely to the east of Canoe Place, a position that Southampton continued to assert elsewhere as late as 1679. See Ex. D62b.

The plaintiffs have formerly identified language in the Dongan Patent stating that he had

> examined the matter in Varience between the Freeholders of the said towne of Southampton and the Indians And doe find that the freeholders of the towne of Southampton Aforesaid have Lawfully purchased the land within the limits and bounds Aforesaid of the Indians and have paid them therefore According to Agreem[en]t so that all the Indian right by virtue of said Purchase is invested into the Freeholders of the Towne of Southampton.

Ex. D12. They argue, incorrectly, that this language operates to extinguish *all* aboriginal title in Southampton. This interpretation is entirely inconsistent with the settled principles of patent construction, discussed above, by which a patent should be taken as a whole, construed narrowly, and effect given to every part. As noted above, the Dongan Patent specifically acknowledged the possibility of continuing aboriginal title within the geographical boundaries of the Town and conditioned its acquisition in

compliance with law. In the circumstances, it is clear that here Dongan was referring to the lands east of Canoe Place, which were the subject of the patent as a whole.

The contemporary facts make it even more clear that Dongan was not referring to lands west of Canoe Place, such as Westwoods. The language upon with the plaintiffs rely on its face refers to the purchase of land "by the freeholders of the town" and addresses the effect of that purchase. The parties have stipulated that:

> No party is aware of any documentary evidence that as of the date of the Dongan Patent for Southampton of December 6, 1686 (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 parties also have stipulated that:

> Only lands located to the east of Canoe Place are described in the deed executed in 1640 by certain named Shinnecock Indians, as grantors, and certain named freeholders of Southampton, as grantees; and the November 24, 1686 confirmation of that deed, purported to confirm only that conveyance.

Fact Stip. 21.

Taking into account these stipulated facts, and the close proximity between the date the Dongan Patent was issued, December 6, 1686, and the date of ratification of the 1640 deed to freeholders for lands to the east of Canoe Place, November 24, 1686, the obviously correct interpretation of the words upon which the plaintiffs rest their argument, and certainly the one construing the Dongan Patent strictly in favor or the grantor and the Indians, as settled principles of interpretation require, is that nothing in it addresses or affects aboriginal title to lands to the west of Canoe Place.

7. The 1703 Deed Did Not Extinguish The Nation's Aboriginal Title To Westwoods

In 1703, the trustees of the freeholders of the Town purported to obtain yet another Indian deed, this one including lands to the west of Canoe Place. 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. Accordingly, this 1703 deed plainly was void, as were the Ogden and Topping deeds that preceded it, and is but another example of private individuals attempting to acquire Indian lands in obvious violation of settled colonial law and public policy.[24]

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

The last event the plaintiffs look to as evidence that the Nation's aboriginal title to Westwoods had been extinguished is the so-called Canoe Place Division of 1738. The only reasonable inference that can be drawn from the Canoe Place Division is that the Town of Southampton did *not* exercise sovereignty over Westwoods at the time of its occurrence (or more accurately, non-occurance).

There is no evidence that the Canoe Place Division ever was implemented. Nor is there any evidence that any alleged allottee named in it ever took title to or possession of any part of Westwoods as a result of the Canoe Place Division.

[24] Perhaps for this reason, the Plaintiffs' expert Alexander von Gernet does not mention this deed at all and the plaintiffs' expert James P. Lynch attempts to justify its legality (a subject beyond his expertise and one that is the sole province of the Court) by advancing the absurd and legally baseless argument that "no land was actually being conveyed to the Town by this document" and, for that reason, it "did not require the consent of the Governor (now Lovelace [*sic*]) as required by the law enacted in March of 1664 [*sic*], apparently a reference to the Duke's Laws of March 1,1665]. See T-12 at 53.

In fact, the plaintiffs failed even to prove that Westwoods was within the area of land that allegedly was the subject of the Canoe Place Division. There is no recorded title, evidence of actual dispossession of the Nation, evidence of actual *seizin* by an allottee, or even a claim of adverse possession suggesting that possession of Westwoods did not remain with the Nation after the Canoe Place Division occurred. Not only is this true for Westwoods, but a title search of lands allegedly within the Canoe Place Division shows no evidence that *any* landowner traces title to this alleged division.

In sum, it appears that the Canoe Place Division was planned by someone for some unclear purpose, but never carried out. The inference that this is so because the Town *did not* in fact exercise governmental authority over the land purportedly divided is far more plausible than the plaintiffs' theory that this division extinguished the Nation's aboriginal title, but that no settler could be bothered actually to take possession of the lands allotted.

In any event, since the Shinnecocks' aboriginal title to that land never was validly extinguished, as a legal matter any transfer of fee title to Westwoods necessarily was subject to the Shinnecocks' continuing aboriginal original right of occupancy and use, which only the sovereign could extinguish. Nor does encroachment by settlers on areas near Westwoods or inclusion of Westwoods within a survey or "division" by the Town support an allegation that the Nation's aboriginal title to it has been extinguished. See Plamondon ex rel. Cowlitz Tribe of Indians v. United States, 467 F.2d 935, 937-38 (Ct. Cl. 1972) (limited settlement by whites on Indian lands that "did not significantly disrupt" tribe's way of life held not to extinguish aboriginal title); United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1388 (Ct. Cl. 1975) (process of surveying lands and

performing other acts in anticipation of future white settlement held by itself not to extinguish aboriginal title).

9. The Shinnecock Indian Nation Never Has Abandoned Westwoods

As shown above, no sovereign power ever validly extinguished the Nation's aboriginal title to Westwoods. The only other mechanism by which the Nation could have lost its aboriginal rights is by physical dispossession through voluntary abandonment. The evidence overwhelmingly demonstrates that this did not occur. As discussed above, the Nation was in possession of Westwoods at the time of first contact with the European settlers, and continues to possess Westwoods now. The uncontroverted evidence shows that all recorded land titles to property adjoining Westwoods, from the very first ones recorded, refer to Westwoods as Indian land.

Where no records exist (an unsurprising circumstance given the antiquity of the Nation's ownership) under the strong legal presumption of continuance (discussed above in Sections III-B and C) the Shinnecocks are presumed to have retained consistent possession of Westwoods during the intervening years.[25] The plaintiffs have offered nothing to rebut this entirely sensible presumption. In fact, the plaintiffs have offered no credible evidence—indeed, no substantial evidence of any kind, credible or not—that anyone other than the Nation ever has taken possession of or occupied Westwoods.[26]

[25] In several cases Indian historical and archaeological records known to have been in the custody of the Town have disappeared. See Def. Find. Fact 171. The Town cannot use its failure adequately to preserve records as affirmative evidence that the Nation was not in possession of Westwoods during the relevant periods.

[26] Precedent suggests that for abandonment to be found to have occurred, "open and notorious actual occupancy . . . holding for himself" by a third party is necessary. Marsh v. Brooks, 55 U.S. 513, 524 (1852). In contrast, there is no evidence here that anyone other than the Nation ever occupied or attempted to occupy Westwoods at any time.

10. The Defendants Are Not Collaterally Estopped From Asserting That The Nation's Aboriginal Title Survives

The Town has asserted (twice) that the defendants are collaterally estopped from denying the extinguishment of the Nation's aboriginal title to Westwoods.[27] This claim is based upon a stipulation made in the record of a 1953 trial in Suffolk County Supreme Court by Henry S. Manley, a New York State Assistant Attorney General appearing on behalf of the Nation. See King v. Shinnecock Tribe of Indians, 221 N.Y.S.2d 980 (Sup. Ct. Suffolk County 1961).[28] In that action Assistant Attorney General Henry Manley appeared for both the State of New York and the Nation. There is immediately an obvious ethical concern arising from Assistant Attorney General Manley acting on behalf of two parties, the Nation and the State of New York, regarding an issue as to which their interests evidently were opposed (as demonstrated, among other things, by this litigation). It is also the case that the purported 1953 stipulation by Assistant Attorney General Manley stipulated to facts that no party to

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[27] The Town initially raised this argument in connection with its motion for summary judgment. As the Court denied that motion, it necessarily rejected the Town's argument. The Town then sought to revisit this issue by filing a motion *in limine* repeating the same argument in almost identical language. See docket nos. 262-263. The defendants opposed, and continue to oppose, that motion—which had no more merit the second time—on the merits and on the ground that it has already, correctly, been rejected. See docket no. 268.

[28] In 1953, Douglas King sued the trustees of the Shinnecock Indian Nation *and* the State of New York. See King v. Warner, 137 N.Y.S. 2d 568 (N.Y. Sup. Ct. Suffolk County 1953). In that action the Attorney General of New York appeared (by assistant attorney general Henry S. Manley) for both the State and the Nation. See id. During the trial of the case, Assistant Attorney General Manley argued (successfully) that the Nation was immune from suit, but he also made a stipulation related to lands west of Canoe Place upon which the Town wishes to rely. The State of New York subsequently passed a statute purporting to enable Mr. King to sue the Nation, which he did. See King v. Shinnecock Tribe of Indians, 221 N.Y.S.2d 980 (Sup. Ct. Suffolk County 1961). The 1961 action was tried upon the record of the 1953 action.

these consolidated actions believes to be correct as a matter of fact or law.[29] However, there is a more grave, and immediately fatal, defect.

The Town now is attempting to estop the Nation on the basis of a statement by an attorney who was both employed by and representing the Town's current co-plaintiff at the time the statement was made. To permit plaintiffs to assert estoppel against the Nation based on statements made by Assistant Attorney General Manley, who was both employed by and actually representing the interests of its current co-plaintiff, would make ridiculous the basic precepts of the adversarial system and issue preclusion.

However, even if the Nation had made that stipulation through a lawyer representing only it, and not also representing its current adversary, it would be of no effect. Mr. Manley was, in effect, attempting to stipulate not to facts—the occurrence or non-occurrence of certain events—but to the legal effect of those facts—extinguishment of aboriginal title. The legal effect of any instruments to which Mr. Manley may have referred is very much in dispute, and while parties may stipulate to facts, the legal effect of those facts is strictly a matter for the court. See U.S. Nat'l Bank of Or. v. Indep. Ins.

[29] For example, that "record title" of the Shinnecocks—a concept alien to aboriginal title—was divested "by treaty" in 1662 and 1666. King v. Shinnecock Tribe of Indians, 221 N.Y.S.2d at 982. The defendants believe that Assistant Attorney General Manley's remarks clearly show a serious lack of understanding of the early history of land title in Southampton, and of the legal events related to that land title. It is certain, from a review of the record of that case, that only the most cursory historical research was undertaken by the State in its "defense" of the Nation and itself.

Mr. Manley's historical confusion also demonstrates that the factual predicates upon which the stipulation was based are fundamentally different from those being asserted by the parties in this action. Because King was decided in a New York Superior Court, this Court must apply New York State law to determine any potential preclusive effect of the judgment in that case. Under New York law, "'[w]hat is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding[.]'" Weiss v. Manfredi, 83 N.Y.2d 974, 976 (N.Y. 1994) (quoting Ryan v. New York Tel, Co., 62 N.Y.2d 494, 500 (1984)). The "'party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination[.]'" In re Juan C. v. Cortines, 89 N.Y.2d 659, 667 (1997) (quoting Kaufman v. Lilly & Co., 65 N.Y.2d 449, 456 (1985)).

Agents of Am., Inc., 508 U.S. 439, 448 (1993) (Court of Appeals acted properly in rejecting "what in effect was a stipulation on a question of law"); Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 289 (1917) ("if the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative").

IV. Land Held By An Indian Tribe By Virtue Of Unextinguished Aboriginal Title Is Sovereign Indian Land In Its Earliest And Most Fundamental Sense

There is no statutory definition of "Indian land," "tribal land," "Indian Country" or "aboriginal land" of general application. Rather, it has long been settled in the federal courts that, for purposes of the application of general federal law, "land formerly held by the Indians [that is, since prior to first European contact], and to which their title remains unextinguished" is restricted, sovereign Indian territory—that is, Indian land or Indian country. Donnelly v. United States, 228 U.S. 243, 268-69 (1913). See also Minnesota v. Hitchcock, 185 U.S. 373, 388-89 (1902) (both lands set aside by the United States as a reservation and unceded Indian country, i.e., land held in aboriginal title, are restricted Indian land); Ex Parte Crow Dog (Ex Parte Kang-Gi-Shun Ca), 109 U.S 556, 561-62 (1883). Indeed, land the aboriginal title to which remains unextinguished is the first and primary exemplar of Indian country. See Donnelly, 228 U.S. at 269 ("the term [Indian country] cannot now be *confined* to land formerly held by the Indians, and to which their title remains unextinguished") (emphasis added).

A finding that a tribe of Indians holds a parcel of land by virtue of aboriginal title, and that parcel therefore is "Indian land," is a determination of historical fact, and does not depend on the use of any magic words or on an express designation by the federal government. See Santa Fe, 314 U.S. at 347 ("Nor is it true . . . that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal

government action. As stated in the Cramer case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.'") (quoting Cramer v. U.S., 261 U.S. 219 (1923)). The Supreme Court of the United States and the Second Circuit have made clear on numerous occasions that lands to which an Indian tribe possesses unextinguished aboriginal title are quintessential "Indian land," "aboriginal land" or "Indian country": "Aboriginal title refers to the Indians' exclusive right to use and occupy lands they have inhabited 'from time immemorial,' but that have subsequently become 'discovered' by European settlers." Seneca Nation, 382 F.3d at 249 n.4.

For example, the Nonintercourse Act (the current version of which is codified at 25 U.S.C. §177, and some version of which has been in place since the first Congress of the United States) does not contain a specific statutory definition of the lands it restricts from alienation. In contemplating the applicability of the Nonintercourse Act's limitation on the alienability of Indian lands, the Second Circuit rejected the notion that it was tied to a particular definition of "Indian country" and concluded that "extinguishment of *all* Indian title was meant to be a matter of federal concern" and thus all Indian lands subject to federal jurisdiction and restriction on alienation. Mohegan Tribe v. Connecticut, 638 F.2d 612, 626 (2d Cir. 1981) (emphasis added).

Congress has, however, on occasion adopted by statute differing definitions of "Indian land" or "Indian country" for various specific statutory purposes. One of these is 18 U.S.C § 1151 ("Section 1151"), adopted for the purpose of defining "Indian country" to establish criminal jurisdiction over certain Indian lands.[30] Nothing in

[30] New York State has its own statute, 25 U.S.C. § 232, granting New York jurisdiction to enforce its criminal laws on "Indian reservations" within the state. This statute contains no definition of "Indian

Section 1151 suggests that Congress intended by its enactment to deprive aboriginal tribal lands of their historic status as Indian country. The evidence is, in fact, to the contrary. In that particular definition, the intent of Congress was to make it clear that certain Indian lands *other* than aboriginal land *also* were "Indian country."

In drafting Section 1151 Congress specifically relied on the Donnelly decision, which declared Indian land to include "land formerly held by the Indians, and to which their title remains unextinguished," as noted above. See 18 U.S.C § 1151, Historical and Revision Notes. Indeed, the Supreme Court Donnelly with approval in its most recent review of Section 1151. See Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 528 n.3 (1998). Furthermore, the Supreme Court has stated that the language of Section 1151 must be construed broadly "to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993). Westwoods, as aboriginal land that the Nation has possessed since time immemorial, and over which it has exercised authority unchallenged by state and local authorities (until now), is exactly the sort of "informal reservation" to which Section 1151 refers.[31]

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reservations." For a recent decision relating to the application of Section 232 with respect to the Nation's reservation, see Bess v. Spitzer, 459 F.Supp.2d 191 (E.D.N.Y. 2006) (Spatt, J.). Section 232 is also noteworthy because of its expansive preservation of hunting and fishing rights for "any Indian tribe, band, or community, or members thereof." Id. The State's criminal laws pertaining to gaming are not enforceable through § 232 based on the reasoning in Cabazon and their express preemption under IGRA, as discussed in Section V.

[31] The plaintiffs sometimes appear to misunderstand the significance of Section 1151 and the admissions made relating to it. The defendants have admitted, as they must in candor, that just as the Nation is not *currently* on the List, see Fact Stip. 10, neither is Westwoods *currently* under federal superintendence. See Fact Stip. 25. The reason for this is simple: at present the Department of the Interior currently refuses to carry out its affirmative duty of active oversight and protection (superintendence) of Westwoods because it has declined to place the Nation on the List and refuses generally to acknowledge the Nation to be an Indian tribe with Indian land. However, this departmental inaction has nothing whatsoever to do

Another example of a definition created for a specific statutory purpose can be found in the federal regulations promulgated pursuant to IGRA. Under those regulations, "Indian lands" means: "(a) Land within the limits of an Indian reservation; or (b) Land over which an Indian tribe exercises governmental power and that is either—(1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation." 25 C.F.R. § 502.12. IGRA's definition plainly is not identical to that in Section 1151, although the two definitions obviously overlap in many cases. Land to which aboriginal title never has been extinguished certainly is land "subject to restriction by the United States against alienation" under the current Nonintercourse Act and its predecessors. See Mohegan Tribe, 638 F.2d at 626. In short, whatever particular definitions Congress has adopted in connection with specific statutory schemes, what is clear is that lands to which a tribe retains unextinguished aboriginal title are "Indian land" or "Indian country" in its earliest and most fundamental sense.

V. The Plaintiffs Assert No Valid Basis For Relief Under Federal Law.

A. The Plaintiffs Have No Standing To Sue Under IGRA[32]

The most basic point with regard to the State's claims with respect to IGRA is that no plaintiff has standing to sue under any provision of that statute. The

with the title status of Westwoods as Indian country for purposes of Section 1151, or with the exclusive right of Congress to regulate lands possessed by an Indian tribe in aboriginal title, such as Westwoods, or with whether the Nonintercourse Act applies to that land. The question of what land is Indian land is for court to determine on the historical facts. See generally, Mohegan Tribe v. Connecticut, supra.

[32] Issues relating to IGRA have recently been extensively briefed, for the second time, in connection with the State Plaintiffs' application to revisit this Court's denial of its motion for summary judgment. See Docket Nos. 305, 322. The defendants respectfully refer the Court to those papers for a fuller exposition of the defects in the plaintiffs' position.

State has acknowledged that "a suit by plaintiffs to enforce the provisions of [IGRA] … does not lie under the circumstances of this case." Affirmation of Denis J. McElligott, July 20, 2003, paragraph 7 (dkt. no. 13). See also Reply Mem. Of Law In Supp. Of Pls.' Mot. To Remand To The N.Y. State Sup. Ct. dated July 24, 2003 at 4 (dkt. no. 26) ("plaintiffs have demonstrated in their main brief that a claim of violation of IGRA by the State against the Tribe would not arise under federal law, since there is no express or implied cause of action under IGRA"). In this, the State surely is correct—IGRA affords no private right of action under these circumstances. See, e.g., Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994), cert. denied sub nom, Pfingst v. Sycuan Band of Mission Indians, 516 U.S. 912 (1995) and Sycuan Band of Mission Indians v. Pfingst, 516 U.S. 912 (1995). These plaintiffs simply cannot obtain (and have expressly disclaimed) relief on the basis of an alleged violation of IGRA, even if one were to occur as a result of the Nation's planned use of Westwoods. Although the Court need not reach any question with respect to IGRA (except to note that no plaintiff has stated a viable claim under it), a brief discussion of the history and substance of IGRA is useful.

B. IGRA Does Not Prohibit Gaming By The Nation At Westwoods And Affirmatively Preempts Enforcement Of State Gaming Law

In 1987 the Supreme Court decided California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). Cabazon once again reaffirmed the basic principle that Indian tribes are not generally subject to state or local regulation with respect to the use of tribal lands. More specifically, Cabazon held that the states cannot

regulate gaming on Indian lands in states, such as New York, where gaming is permitted but subject to regulation.[33] Cabazon, 480 U.S. at 208-210.

Congress responded to Cabazon by enacting IGRA in 1987, imposing certain limitations on gaming conducted by certain Indian tribes on certain lands, and afforded to states the ability to enter into tribal-state compacts relating to certain types of gaming. See Pub. L. 100-497 (1987). In its 1996 Seminole Tribe of Florida v. Florida decision, the Supreme Court noted that the purpose of IGRA was to "grant[ ] the States a power that *they would not otherwise have, viz., some measure of authority over gaming on Indian lands*. It is true enough that the Act extends to the States *a power withheld from them by the Constitution*." Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 58 (1996), citing Cabazon, 480 U.S. 202 (1987) (emphasis added).[34] IGRA created only very limited private rights of action in circumstances not relevant here, and did not tamper with the underlying principle that Indian tribes, as an aspect of their inherent, retained sovereignty, are generally free from state and local regulation except as authorized by Congress. As the New York Court of Appeals recently (correctly) observed:

> Through IGRA the states are granted a certain degree of authority over Class III gaming that they otherwise would not have due to the sovereignty of Indian nations. . . . Thus, through the compacting process, IGRA confers a benefit on the state by allowing it to negotiate and to have some input into how Class III gaming will be conducted.

[33] Any claim that New York has a strong public policy against gaming is simply false. New York State itself operates a lottery and horse-racing facilities, and has approved the operation of "racinos"—horse-racing facilities with slot machines. The argument that because a state absolutely prohibits *unregulated* gaming, its law should be classed as a criminal law enforceable on Indian land is exactly what was rejected in Cabazon.

[34] IGRA nevertheless does not grant states unfettered power, but affirmatively requires states to negotiate in good faith for a tribal-state compact upon the request of a tribe seeking to engage in "Class III" gaming. 25 U.S.C. § 2710(d)(3)(A).

Dalton v. Pataki, 5 N.Y.3d 243, 260 (N.Y. Ct. App. 2005) (citation omitted). The regulatory scheme created by IGRA therefore acts as a carefully qualified limitation on the *inherent* powers of Indian tribes to be free from state regulation in the use of their lands, recognized in Cabazon and confirmed in Seminole Tribe.

IGRA does not by its terms apply to all Indian tribes. IGRA expressly applies only to Indian tribes that are "recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians," 25 U.S.C. §2703(5)(a)—that is, tribes on the List. At present the Nation is not such an Indian tribe, although as this Court of course is aware the Nation is seeking to become one.[35] See 06 CIV. 5013. In fact, it is a key part of the plaintiffs' case that IGRA does *not* apply to the Shinnecock Nation because it is not on the List. See JPTO at 5. As an Indian tribe "unrecognized" by the Secretary of the Interior, although recognized—properly—by this Court as a matter of federal law, the Nation falls outside IGRA's regulatory framework and is subject instead to the rule established in Cabazon.

No language in IGRA expressly prohibits gaming by tribes of Indians not on the List. The plaintiffs' arguments are silently premised on the assumption that when IGRA was enacted following the decision of the Supreme Court of the United States in

[35] A full analysis of the complexities of the Department of the Interior's administration of the 25 C.F.R. Part 83 rules would be quite voluminous, and is beyond the scope of this memorandum. It is sufficient to note that no part of the 25 C.F.R. Part 83 rules regarding tribal acknowledgement is mandatory on tribes—that is, no federal law or rule obligates an Indian tribe to seek acknowledgment by the Department of the Interior. Because so many statutory benefits are conditioned upon such acknowledgement, most tribes have sought, or are seeking, recognition through Interior's Byzantine procedures, including the Nation. However, as discussed above, the general right of Indian tribes to govern their lands free from state or local regulation is *not* a statutory benefit or a benefit to be conferred by the Department of the Interior, but is an *inherent* attribute of an Indian tribe on its tribal lands. The persistent efforts of the plaintiffs (and, in all candor, of the Department of the Interior itself) to argue that the Nation's rights and privileges as an Indian tribe are contingent upon the placement of the Nation on the List are simply contrary to over a century of settled law.

Cabazon, the *implicit* effect of its passage was to prohibit as a matter of federal law gaming by tribes on lands subject to tribal jurisdiction, but outside the technical definition of "Indian lands" in IGRA. The federal courts lack authority to expand the scope of a federal regulatory scheme. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 320 (1981). IGRA cannot be read implicitly to prohibit gaming to which its express terms do not apply, and which would otherwise be permitted under Cabazon by virtue of the Nation's inherent sovereignty.

Having no federal claim under IGRA itself, the plaintiffs rely upon a perplexing *non sequitur*. Observing first that IGRA is understood to preempt completely state law with respect to gaming by Indian tribes, see Gaming Corp. of Am. v. Dorsey and Whitney, 88 F.3d 536, 544 (8th Cir. 1996), they then assert that IGRA somehow enabled the states to enforce *state* gaming laws on lands under the jurisdiction of tribes holding that status as a matter of federal law, but not on the List.

This proposition finds no support in the express text of IGRA, and turns the notion of federal preemption on its head. Just as IGRA cannot be read implicitly to have prohibited, as a matter of federal law, conduct to which it does not apply, neither can IGRA be understood implicitly to have abrogated the inherent immunity of Indian tribes and granted to states enforcement powers they did not previously possess. To do so would be inconsistent with the fundamental concept of federal field preemption, by which *all* state law is displaced within the relevant field—here, gaming by Indian tribes. See Gaming Corp. of Am., 88 F.3d at 544 ("[e]xamination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise

indicates that Congress intended it [to] completely preempt state law").[36] Gaming Corp. of America correctly notes that "[t]he legislative history indicates that Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact." Gaming Corp. of Am., 88 F.3d at 545. See also Dalton v. Pataki, 5 N.Y.3d at 257-258 (2005) (citing legislative history of IGRA to the effect that "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.")

The Court need not rely on implied field preemption to conclude that the plaintiffs are barred from enforcing state gaming law, however. Any authority the states may have had to enforce state laws on lands subject to the jurisdiction of Indian tribes has been *expressly* preempted by IGRA. Title 18, section 1166 of the United States Code ("Section 1166") was enacted as part of IGRA by Pub. L. 100-497 (1987). Section 1166 makes applicable to "Indian country" some state laws relating to gaming,[37] but expressly reserves *exclusive* jurisdiction for prosecution of those state gaming statutes to the United States. See 18 U.S.C. 1166(d).

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[36] For a more general discussion of federal preemption, See generally Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (noting that "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . . [o]r the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604–605 (1991) (reviewing types of preemption, collecting cases including Rice).

[37] As with "Indian land" under IGRA, the State Plaintiffs simply assume that Westwoods is not "Indian country" under this statute. To the contrary, as discussed in greater detail above in Section IV, land as to which an Indian tribe has never been divested of its aboriginal title and which it still occupies, such as Westwoods, is Indian country, as is land that constitutes a "formal or informal" Indian reservation, a status Westwoods enjoys. See Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) ("Congress has defined Indian country broadly to include formal and informal reservations"); Donnelly v. United States, 228 U.S. 243, 269 (1913) (Indian country "cannot now be *confined* to land formerly held by the Indians, and to which their title remains unextinguished") (emphasis added).

Section 1166 recognizes that, given the federal preemption of the entire field of Indian gaming, state laws do not apply to lands under tribal jurisdiction of their own force, but are federalized and "made applicable under this section to Indian country" as federal law. Id. Section 1166 also reflects Congress's unambiguous direction that even where it has made state gaming laws applicable on lands subject to the jurisdiction of an Indian tribe, the standing and power to enforce those laws is *exclusively* federal. In fact, Indian tribes have sought and received injunctive relief to prevent prosecution of an Indian tribe by a state in violation of the command of Section 1166 that only the United States may enforce these state laws. See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994) cert. denied sub nom Pfingst v. Sycuan Band of Mission Indians, 516 U.S. 912 (1995) and Sycuan Band of Mission Indians v. Pfingst, 516 U.S. 912 (1995). See also Wyandotte Nation v. Sebelius, 337 F. Supp. 2d 1253 (D. Kan. 2004), affirmed in part, vacated in part and remanded 443 F.3d 1247 (2006). Whatever power may exist to prohibit gaming by the Nation at Westwoods is expressly reserved to the United States, which was given the opportunity to participate in these proceedings but declined to do so.[38]

VI. The Plaintiffs Assert No Valid Basis For Relief Under State Or Local Law

As an Indian tribe that predated the arrival of the first European settlers and has retained its aboriginal possessory rights to Westwoods, the Shinnecock Indian Nation has sovereign power over Westwoods, to which state and local law, without express Congressional authorization (here absent) does not run.

[38] The United States was ordered to appear in this action and then dismissed as a party. Recognizing the essentially federal nature of Indian relations and "having determined that in the absence of the United States, complete relief cannot be accorded among those already parties," the Court ordered the United States joined as a party. See Memorandum and Order dated Dec. 22, 2003 at 1-2 (dkt. no. 72). The United States resisted joinder, see docket nos. 97-99, 102, and was ultimately dismissed on the merits, with prejudice. See Memorandum and Order dated May 26, 2004 (dkt. no. 105).

A. State And Local Laws Generally Are Not Applicable To Indian Lands

The Indian Commerce Clause grants Congress the "power . . . to regulate commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8. It is an undisputed, fundamental tenet of our nation's legal framework that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985). The Supreme Court of the United States and federal Courts of Appeals repeatedly have reaffirmed that the authority of the states over Indian tribes terminated with the coming into effect of the federal Constitution in 1789. As a consequence of exclusive federal jurisdiction over Indian affairs, "'[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' Accordingly, state law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress." Cohen, § 6.01[2], quoting Rice v. Olson, 324 U.S. 786, 789 (1945). See also McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 170-71 (1973) (discussing evolution of principle that "State laws generally are not applicable to tribal Indians on an Indian reservation except as Congress has expressly provided that State laws shall apply," invalidating state imposed tax) (citation omitted); United States v. Forness, 125 F.2d 928, 932 (2d Cir. 1942) ("state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because . . . state law does not apply to the Indians except so far as the United States has given its consent").

The legal principle that Indian tribes are free from state and local regulation on tribal lands is one of the most ancient in Indian law. See Worcester v. Georgia, 31 U.S. 515 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all

intercourse with them shall be carried on exclusively by the government of the union... The whole intercourse between the United States and [the Cherokee] nation, is by our constitution and laws, vested in the government of the United States."). This principle has been repeatedly reaffirmed. See Cohen § 6.01[2], n.24, n.25 (collecting, discussing cases). See also Cabazon and Seminole Tribe, discussed in greater detail above.

The recent holding of the Supreme Court of the United States in Sherrill reaffirms in the most basic way the continued vitality of the principle that state and local laws do not run to Indian land. That opinion necessarily was predicated upon a finding that the resumption of tribal sovereignty over the land there in issue would "remove these parcels from the local tax rolls" and that "little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls." Sherrill, 544 U.S. at 220.[39] The Supreme Court evidently accepted without question that, if permitted, the renewed exercise of tribal sovereignty over the lands at issue would result in a revival of their general immunity from state and local regulation, such as taxation and zoning. Indeed, absent such a revival, the result in that case would make no sense.

B. None Of The Specific Statutes Upon Which The Plaintiffs Rely Are Applicable To Westwoods

The Town does not point to any federal authorization whatsoever for the application of its local laws to Indian lands. Because Westwoods, as Indian land, is generally not subject to local regulation, as discussed above, the Town cannot prevail.

[39] Of course, Sherrill dealt with the unilateral reassertion by the Oneidas of "territory last held by the Oneidas 200 years ago." Sherrill, 544 U.S. at 221. In contrast, as the facts adduced at trial establish, the Nation never has been divested of Westwoods, and Westwoods never has been taxed or otherwise regulated by either the State Plaintiffs or the Town. Sherrill argues powerfully *against* permitting the State or Town to assert sovereign authority over land that has been under the jurisdiction of the Shinnecock Indian Nation since time immemorial.

See Sherrill, 544 U.S. at 220 and n.13 (warning that a reassertion of Indian sovereignty over the lands in question would immunize them "from local zoning or other regulatory controls" and citing cases in New York where other tribes asserted immunity from local regulation). See also Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) (state and local governments lack jurisdiction to regulate Indian use of Indian land through zoning laws), cert. denied, 429 U.S. 1038 (1977). Neither can the State, but its statutory allegations are somewhat more complicated.

As discussed above, IGRA does not authorize the application of state civil or criminal law with respect to gaming to Indian lands. See Cabazon, 480 U.S. 202; Seminole Tribe of Fl., 517 U.S. 44. With respect to its environmental claims, the State asserted several specific statutory grounds relating generally to permitting and authorizations alleged to be necessary, rather than the violation of substantive standards. See State's Complaint ("St. Compl."), docket no. 9, filed July 16, 2003. The State claims that before construction of a casino at Westwoods may commence, the defendants are required to prepare a Stormwater Pollution Prevention Plan and file a Notice of Intent pursuant to General State Pollution Discharge Elimination System ("SPDES") of the DEC. St. Compl. ¶¶24-31, 80-81. Similarly, the State alleges that the defendants are required to obtain a SPDES permit under New York Environmental Conservation Law ("ECL") §17-0803 before they may commence construction of a casino at Westwoods with a wastewater treatment facility that will discharge effluent into the waters of the State. St. Compl. ¶¶82-84.[40] The State also asserts that the

[40] This assertion is inconsistent with the text of ECL §17-0803, which in fact only requires a permit prior to the commencement of *discharge* of effluent "into the waters of the state," not prior to the construction of a facility containing a wastewater treatment facility.

defendants are required to obtain a permit from the DEC under ECL §15-1527 before they may sink a well at Westwoods having a pumping capacity in excess of 45 gallons per minute. St. Compl. ¶¶85-87.[41] More generally, the State claims that the defendants are required (and have failed) to conduct assessments or studies necessary under the State Environmental Quality Review Act ("SEQRA").

There is no basis in federal law for the application of any of these statutes or rules to the development of Westwoods. The discharge of pollutants into the waters of the United States is regulated by the federal Clean Water Act, 33 U.S.C. §1251 et seq. (the "CWA"), which is a comprehensive regulatory scheme governing the discharge of pollutants into the environment. The CWA sets up a two-level enforcement scheme. The United States Environmental Protection Agency (the "EPA") is granted authority to enforce the CWA's provisions and to issue "National Pollution Discharge Elimination System" permits, or "NPDES" permits. 33 U.S.C. § 1342(a). There also is a procedure established by the CWA under which a state that wishes to regulate such discharges may be substituted for the EPA to the extent the state submits for approval, and the EPA approves, a state permitting program that is at least as stringent as the federal permitting program under the CWA. 33 U.S.C. § 1342(b-c). See generally Wisconsin v. EPA, 266 F.3d 741, 743-4 (7th Cir. 2001), cert. denied, 535 U.S. 1121 (2002).

New York State applied to the EPA under U.S.C. § 1342(b) to undertake administration of NPDES permitting, including submission of "appropriate implementing regulations," and the EPA approved its request, giving New York the authority to regulate the discharge of pollutants to navigable waters in accordance with the NPDES

[41] Apart from the legal defects in its assertions the State has utterly failed to adduce any evidence that the Nation intends to sink such a well at Westwoods.

and with the terms of its application to the EPA. 40 Fed. Reg. 54462-3 (Nov, 24, 1975). The extent to which the EPA's otherwise exclusive authority to regulate discharges under the CWA has been delegated to the State of New York obviously is governed by the terms of the particular delegation to New York that the EPA approved.

The authority delegated to the State of New York by the EPA under the CWA specifically *did not* include the authority to regulate Indian lands. The implementing regulations, submitted to and approved by the EPA as the basis for New York State's authority to enforce the CWA, specifically provide that "[t]he SPDES Program does not apply to . . . Indian activities on Indian lands under the jurisdiction of the United States . . . ." 6 NYCRR § 750.1(b)(1). As discussed above in Section IV, Westwoods is exactly this sort of Indian land. The necessary conclusion is that there has been no delegation by the EPA to the State of the EPA's authority under the CWA to regulate activities at Westwoods.[42] With respect to the State's environmental allegations, therefore, not only has there been no federal abrogation of the Nation's general immunity from state and local regulation, but the powers otherwise delegated to the State of New York by the EPA under the CWA specifically limit the State's power with respect to Westwoods and preserve exclusive federal jurisdiction.

[42] The CWA provides that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311. "Person," as used in this section, is defined to include a "municipality," 33 U.S.C. § 1362(5), and "municipality" is defined to include "an Indian tribe," 33 U.S.C. § 1362(4). The CWA also allows certain sorts of Indian tribes, i.e., those appearing on the List, to have the same rights as states to obtain with EPA consent the right to regulate discharges within their territory in lieu of the EPA doing so. See Wisconsin v. EPA, 266 F.3d at 744; 40 C.F.R. §131.8(a). The net effect of these provisions is to make the Nation subject to substantive regulation by the EPA under the CWA but to deny it the right to apply to the EPA to self-administer the discharge of pollutants within its tribal lands. If the CWA were construed to exclude the Nation from the scope of the term "Indian tribe" in its general definitional section (as the State's arguments in the past seem sometimes to have implied), the CWA would neither reach nor substantively regulate the discharge of pollutants into the waters of the United States by the Nation. The Nation does not urge this result (which is not necessary to the resolution of this case), but expressly preserves the argument that the CWA contains no waiver of its sovereign immunity from suit by the State for alleged violation of that statute or of the ECL or SEQRA.

C. The Plaintiffs Have Long Recognized And Acquiesced In The General Immunity Of Westwoods From State And Local Regulation

Perhaps the single most important fact—and one not subject to dispute—that demonstrates that Westwoods has always been regarded as Indian land not subject to state or local regulation is that Westwoods *never* has been taxed.[43] All parties agree that there exists no known evidence contradicting the fact that Westwoods never has been listed in the Town's assessment records as taxable property, see Fact Stip. 33, that the Town's tax records from 1800 through 1926 do not list Westwoods, and that no property taxes have been assessed or imposed on Westwoods from 1927 to the present. See Fact Stip. 32.

The taxation of New York Indians was specifically addressed by the Supreme Court in The N.Y. Indians, 72 U.S. 761, 769, 771-72 (1866), which held that the State of New York was powerless to tax Indian lands while in tribal possession. The particular interest of this case is not in its holding, which is entirely consistent with pre-existing Supreme Court precedent confirming the general exemption of Indian lands from state and local law, including taxation. Rather, it is in the fact that no plaintiff has come forward with any reason for Westwoods' exemption from taxation, or its continued identification on Suffolk County tax maps as "Shinnecock Indian Reservation," other than the exemption from taxation afforded to Indian lands in tribal possession specifically upheld in The N.Y. Indians, decided long before the creation of the administrative rules under 25 U.S.C. Part 83 for the acknowledgment of Indian tribes.[44]

[43] This simple fact also demonstrates, more than any other, the inapplicability of Sherrill's reasoning. A judicial recognition of Westwoods' continuing status as aboriginal Indian land will not remove it from the tax rolls, because it never has been on the tax rolls.

[44] Quite apart from the prohibition on taxing Westwoods imposed by the inapplicability of state and local law to it as a matter of federal law, the Town also may not tax it because New York state statutes

Prior to this lawsuit, the Town never had attempted to impose its zoning regulations on Westwoods, and only purported to zone the land in case it lost its exemption from zoning regulation. See Ex. D229. The Town identifies Westwoods as Indian reservation land in its current zoning map, see Ex. T-4, and has always treated Westwoods in a manner consistent with the Nation's reservation to the east of the Shinnecock Canal, at Shinnecock Neck, on which zoning has never been enforced despite obvious commercial and residential development. The State's and Town's consistent failure to enforce, or even attempt to enforce (at least until this lawsuit), state or local laws and regulations on the Nation's lands, including Westwoods, surely was correct. The only conclusion supported by the evidence is that not only is Westwoods immune from state and local regulation on the basis of its status as aboriginal Indian land, but the plaintiffs have long acquiesced in this status and acted accordingly.

D. The Plaintiffs Fundamentally Misunderstand Sherrill And Cayuga Which, Properly Construed, Defeat Plaintiffs' Claims

Lacking any statutory basis on which to enforce state or local law at Westwoods, the plaintiffs look to Sherrill and Cayuga as a basis for enjoining the Nation. Their claim is that these cases prohibit the Nation from making use of Westwoods in a manner that is "disruptive," and that the Nation's proposed development would be "disruptive"—indeed, that the very *assertion* of sovereignty is disruptive. See JPTO at 7, 10. Neither case provides a valid basis for plaintiffs' substantive claim for relief or

(presumably enacted to implement the holding in The N.Y. Indians) expressly exempt from taxation "[t]he real property in any reservation owned by the Indian nation, tribe or band occupying them," NY Real Property Tax Law §454, and prohibit assessment of any taxes "for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." NY Indian Law §6. By not taxing Westwoods, the plaintiffs necessarily admit that Westwoods is an Indian reservation within the meaning of these statutes.

limits the Nation's power to develop Westwoods. In fact, both cases, properly understood, defeat the plaintiffs' claims.

The Sherrill court held that the passage of time and the settled expectations of the parties prevented the plaintiff Indian tribe from affirmatively reviving the sovereign status of land that was recently reacquired, but had been out of tribal possession for 200 years and, during that time, subject to state and local regulation. The Cayuga court applied the equitable defense of laches to bar the claims of the plaintiff Indian tribe, which was attempting to obtain certain relief with respect to reservation lands that it alleged had been illegally taken from it, and which were out of tribal possession for more than a century.

The plaintiffs fail to perceive the key fact that unites Sherrill and Cayuga. In each case, an Indian tribe was affirmatively attempting to revivify its sovereign authority over land that had been out of Indian possession, and subject to taxation and state and municipal regulation, for more than a century. As the Supreme Court observed in Sherrill, "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." Sherrill, 544 U.S. at 218. This is exactly what the plaintiffs (*not* the Nation) now seek to do. Here the Indian tribe is the defendant, and asserts no counterclaims against any plaintiff. The *plaintiffs* have brought suit to prevent certain uses by the Nation of what is concededly the Nation's land and has been since time immemorial. Westwoods has *never* been subjected to state or local regulation or taxation. See discussion in Section VI-C, above. For more than 150 years Westwoods has been identified in recorded deeds as Indian land. See discussion in Section III-C-

10, above. The settled expectations of the State, the Town and adjoining landowners (each of whom took title based on a deed chain that clearly identified Westwoods as Indian land—a status quo ante which Sherrill seems intended to protect) are that Westwoods is Indian land, not subject to State or local regulation except as specifically authorized by federal law.

Under the reasoning of Sherrill, the plaintiffs' long acquiescence in the Shinnecock Indian Nation's dominion and sovereignty over Westwoods bars them from now seeking to apply local laws and regulations to Westwoods. In Sherrill, the Supreme Court stated (as an example of a settled principle of government-to-government relations) that "[a]s between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty." Here, the plaintiffs have "belatedly assert[ed] a right to present and future sovereign control over territory"; therefore "longstanding observances and settled expectations are prime considerations." Sherrill, 544 U.S. 197, 200 (footnote omitted). Sherrill therefore argues powerfully against the plaintiffs' claims.

VII. The Plaintiffs' Case Regarding The Impact Of Economic Development At Westwoods Suffers From A Fatal Failure Of Proof

Because Westwoods is Indian land held by an Indian tribe in its most fundamental sense, state and local laws do not apply to activities at Westwoods except as specifically authorized by Congress. Having been unable to show that the Nation's aboriginal title to Westwoods ever was properly extinguished, the plaintiffs argue in the alternative that Sherrill and Cayuga operate affirmatively to prohibit "disruptive" uses of Westwoods.[45] As discussed above, this argument fundamentally misunderstands those

[45] The plaintiffs have at times suggested that, even if state and local law do not apply by their own force, Sherrill and Cayuga implicitly prohibit conduct in violation of state or local law (or that that conduct is inherently "disruptive") as a matter of federal law. The effect of this would be to completely abrogate the

cases. In any event, the plaintiffs' evidence at trial relating to "disruption" suffers from an even more startling and fatal failure.

The plaintiffs each seek a permanent injunction prohibiting any and all development of Westwoods not in compliance with state and local law. JPTO at 4, 11. The plaintiffs have, however, offered absolutely no evidence whatsoever as to the disruption that may result from the Nation's *actual* development plans. Instead, they have argued that the very *assertion* of continued sovereignty over Westwoods by the Nation is sufficiently disruptive that it should be precluded on the basis of Sherrill.[46] For this reason, they presented evidence at trial not of the disruptive impact of the Nation's actual plans, but of their experts' view of what *might* be possible to develop at Westwoods and what *might* happen as a result.[47] No plaintiff even showed the relevant provisions of the actual executed development agreement describing the contemplated facility to any of their "disruption" witnesses. The law does not permit such speculation.

"Injunctive relief should be narrowly tailored to fit specific legal violations. Accordingly, an injunction should not impose unnecessary burdens on lawful activity."

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general immunity enjoyed by tribal lands that is itself at the heart of Sherrill's reasoning. In effect, the plaintiffs urge the court to read Sherrill and Cayuga to mean "either state law applies, or it applies." Even if Sherrill and Cayuga stood for the proposition plaintiffs claim (they do not) this cannot be correct. There is nothing in Sherrill or Cayuga (which, after all, deal with equitable limitations on *remedies*, not the applicability of state law) to suggest that "disruption" and "violation of state or local law" are coterminous.

[46] Of course, as discussed above, it is the plaintiffs and not the Nation that has "belatedly assert[ed] a right to present and future sovereign control over" Westwoods. Sherrill, 544 U.S. at 197 (footnote omitted). It is also noteworthy that no "checkerboarding" would result from a judicial recognition that Westwoods is Indian land. The Nation is not attempting to reacquire individual discontinuous portions of privately held land within its original territory, but simply making use of property that has been the Nation's since time immemorial. Westwoods also is a single contiguous block of land (though it is admittedly not contiguous with the Nation's reservation at Shinnecock Neck). While it is putatively zoned residential, it is very near to property zoned for commercial use, and is in fact bisected by a state limited access highway.

[47] This issue was raised in a series of bench memoranda (see dkt. nos. 287, 293) and raised on the record in connection with the certain evidentiary issues and the defendants' motion for judgment on partial findings pursuant to Fed. R. Civ. P. 52(c) (see Tr. Trans. Jan. 18, 2007 2360:8 – 2384:16; Tr. Trans. Jan. 23, 2007 2806:4 – 2829:14.

Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775, 785 (2d Cir. 1994) (citing Soc'y For Good Will To Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1251 (2d Cir.1984)). It is well settled that the speculative possibility of future injury cannot provide the basis for injunctive relief. See Conn. v. Mass., 282 U.S. 660, 674 (1931) ("Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future.").

For an injunction to issue, "more than an abstract or nebulous plan to possibly commit a wrong sometime in the future, must be shown before the broad and potentially drastic injunctive power of the court will be exercised. Rather, 'injunction issues to prevent existing or presently threatened injuries.'" Gen. Fireproofing Co. v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971) (citing, quoting Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931)). See also Hunyadi Janos Corp. v. Stoeger, 10 F.2d 26, 27 (2d Cir. 1925) ("defendant cannot be enjoined from acts it has not done nor threatened to do"); Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 92 (3d Cir. 1992) ("[I]njunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties. Nor will an injunction be issued to restrain one from doing what he is not attempting and does not intend to do.") (internal citation, quotation omitted). To obtain permanent injunctive relief, the "[p]laintiffs must demonstrate a real danger that the act complained of will actually take place. There must be more than a mere possibility or fear that the injury will occur." N.Y. State Nat. Org. for Women v. Terry, 704 F. Supp. 1247, 1262 (S.D.N.Y. 1989), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990).

The Development Agreement (admitted in redacted form as Exhibit D-237) describes a 61,000 square foot facility, see Exhibit D-237, pp. 15 – 16, to be constructed on approximately 15 acres of the approximately 80 acres at Westwoods, entirely south of Newtown Road. See Exhibit D-237, p. 13. The Development Agreement also specifically requires not only that the initial facility be constructed in accordance with state environmental standards, but that any future expansion do so as well. Preservation of the environment, including meeting or exceeding substantive environmental standards of state law, is a significant goal of the Nation. See Def. Find. Fact 255 – 256.

The plaintiffs have offered no evidence to suggest that the Nation or its developer will not utilize Westwoods in accordance with the Development Agreement or the Nation's stated goals. While it is correct to say that the Nation does not believe that State and Town *permitting* regulations apply to the Nation's development of Westwoods, it is simply wrong to say that the Nation ever has planned or threatened conduct in violation of *substantive* building, sanitary, health, fire, and environmental or similar standards. There is no impediment to the development of Westwoods, as described in the Development Agreement, in accordance with state *substantive* standards.

All of the scenarios analyzed by the plaintiffs' witnesses with respect to disruption are far larger than the actual planned development—larger in some cases than Foxwoods, arguably the largest casino in the world.[48] None of the scenarios analyzed by the plaintiffs' witnesses have any bearing whatsoever on the disruption (if

[48] It is also noteworthy that the plaintiffs' experts did not even analyze a *consistent* hypothetical facility—each expert to a greater or larger extent developed his or her own model for analysis.

any) that would result from development in accordance with the Nation's actual plans. The plaintiffs have, essentially, instructed their expert witnesses to assume a catastrophe, and go from there.

Even if the evidence offered by the plaintiffs relating to the impact of a "maxed-out" development of Westwoods were relevant to establish disruption (and if disruption were relevant at all), it is so unrealistic and unreliable as to be useless for any purpose. The economic models utilized by the plaintiffs' experts to establish the possible size of a gaming facility are unrealistic in the extreme, and result in a gross overestimate of what might be possible.

They are also incompetently created, and based on incorrect assumptions, including the actual location of the facility. The methodology underlying the plaintiffs' expert testimony relating to the costs that would be imposed on the State and Town is characterized by gross errors and unfounded assumptions, and ignores any possibility of economic benefits to the community. The plaintiffs' environmental analysis suffers from the same unfounded assumptions, and displays a notable lack of expertise. In particular, the plaintiffs' analysis of air and noise issues is amateurish and so methodologically defective as to be useless for any purpose.

The plaintiffs' evidence with respect to traffic issues is particularly egregious. The first expert report suffered from so many errors it was withdrawn. The second report also had errors in it, and required a corrected report. It takes as a baseline a facility drawing more visitors than Foxwoods, despite having fewer gaming stations. In addition to a defective model, the expert double-counted many visitors to the hypothetical facility, and made significant arithmetic errors besides. The computer

model used by the plaintiffs' expert was characterized by numerous modeling errors, including "fatal errors" as described by the software.

In fact, the plaintiffs' traffic expert appeared not to fully understand the capabilities of the modeling software used. After these errors (and others) were pointed out by the defendants during discovery, the expert corrected some (but not all) of them, and the corrections had the nearly uniform effect of improving traffic operations—all of these errors, suspiciously, had redounded to the benefit of the plaintiffs. The only reason the final corrected report prepared by the plaintiffs' traffic expert did not show dramatic improvements when compared to the initial report was that the expert changed a single key assumption, which has the effect of camouflaging the improvements.

In contrast, the defendants' testimony on the same topic is entirely credible, and demonstrates that, with respect to the actual planned facility, as described in the Development Agreement, impact on traffic will be minimal, and would actually improve in some cases as a result of minor, routine improvements in traffic operations. Taken as a whole, the testimony with respect to disruption demonstrates that development in accordance with the Development Agreement can occur in complete compliance with the substantive goals of state and local environmental policy.

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

Economic development is a legitimate goal in furtherance of the self-governance of an Indian tribe. See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991) (doctrine of tribal immunity "reflect[s] Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development")

(citation, quotation omitted). The balance of equities tilts decidedly in favor of supporting the Nation's attempt at economic self-sufficiency. If the permanent injunction the plaintiffs seek is granted, the Nation will be deprived of the opportunity to provide much-needed jobs and alleviate high unemployment, and revenue, that would permit adequate funding for Shinnecock Nation housing, health care, security and law enforcement, pre-school, adult care, scholarship and other necessary programs which are in dire need of funding. United States census data reveals that in 1999 50.6% of individuals and 61.3% of families on the Nation's reservation lived in poverty. Exhibit D-356. An astounding 35 of 35 tribal families with small children lived in poverty. Id. This is in stark contrast with the surrounding community of summer residents with multimillion-dollar homes. The Nation has explored many avenues for economic development, without success, in an effort to end a culture of dependency on government support. Indian gaming, however, has a proven track record; the Nation has done its homework and is prepared to operate its gaming facility in a responsible manner. The plaintiffs, as demonstrated by the testimony regarding disruption, would on the other hand suffer negligible harm (and could derive considerable economic benefit, if an amicable agreement were reached) from the construction of a gaming facility at Westwoods.

CONCLUSION

For the reasons discussed herein, the Court should:

(1) Find that the Shinnecock Indian Nation's aboriginal title to Westwoods never has been validly extinguished, and that Westwoods therefore is Indian land and an "informal" Indian

reservation as a matter of federal common law and 25 U.S.C. Section 1151;

(2) Hold, on this basis, that the Shinnecock Indian Nation is not limited in its use of Westwoods by state or local law, except as specifically authorized by federal law;

(3) Hold that no plaintiff has successfully stated a claim authorized as a matter of federal law;

(4) Order that the preliminary injunction entered on August 29, 2003, be dissolved; and

(5) Enter judgment in all respects for defendants the Shinnecock Indian Nation, Frederick C. Bess, Lance A. Gumbs, Randall King and Karen Hunter.

Dated: New York, New York
May 1, 2007

Respectfully submitted,

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