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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

----- x

BGA, LLC and THE WESTERN MOHEGAN  
TRIBE AND NATION OF THE STATE OF  
NEW YORK,

Plaintiffs,

v.

Index No. 06-CV-0095 (GLS)(RFT)

ULSTER COUNTY, NEW YORK,  
a municipal corporation of the State of  
New York,

Defendant.

----- x

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR RECONSIDERATION OF (A) AUGUST 22,  
2007 MEMORANDUM-DECISION AND ORDER  
DISMISSING COMPLAINT FOR LACK OF SUBJECT  
MATTER JURISDICTION, AND (B) JUDGMENT OF  
DISMISSAL PURSUANT TO FED.R.CIV.P. 59(e)**

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MATTER JURISDICTION, AND (B) JUDGMENT OF  
DISMISSAL PURSUANT TO FED.R.CIV.P. 59(e)**

Plaintiffs, BGA, LLC ("BGA") and THE WESTERN MOHEGAN TRIBE AND NATION OF THE STATE OF NEW YORK (the "Tribe"), by and through their counsel, Todtman, Nachamie, Spizz & Johns, P.C., respectfully submit this memorandum of law in support of Plaintiffs' motion (the "Motion") pursuant to Federal Rule of Civil Procedure 59(e) and N.D.N.Y. Local Rule 7.1(g) for reconsideration of (a) this Court's August 22, 2007 Memorandum-Decision and Order (the "Order") and (b) this Court's judgment

entered on August 23, 2007 (the "Judgment") dismissing this action for lack of subject matter jurisdiction, and respectfully represent as follows:

### **PRELIMINARY STATEMENT**

In this action, Plaintiffs requested declaratory relief to resolve an ongoing legal dispute against Ulster County. The dispute has always been real, and it almost resulted in the loss of the Tribe's Reservation by foreclosure. If unresolved by this Court, the controversy will surely result in the loss of the Reservation, as the state courts have no jurisdiction to determine whether the Tribe is a sovereign Indian nation or if the Property is Indian Country.

The dispute has never been factual - - it has always been legal. Thus, the parties agreed that they would stipulate to the undisputed facts and reserve the determination of the legal disputes for decision by declaratory judgment by the Court. Surprisingly, however, the parties' May 15, 2006 Settlement Agreement (the "Settlement Agreement") was misconstrued by the Court. The Court incorrectly determined that there is no live controversy between the parties, and dismissed this action. The controversy between the adverse parties before the Court, and the fact that it continues unresolved, has been completely overlooked.

In the Settlement Agreement, the County stipulated to the factual allegations made by the Plaintiffs (in ¶¶7-46 of the Amended Complaint). The County did not stipulate as to the legal conclusions set forth in Plaintiffs' cause of action for declaratory relief (contained in ¶¶48-69 of the Amended Complaint). Instead, the County agreed that the disputed legal issues would be decided by the Court. See Settlement Agreement, ¶7 ("The County further agrees that its response to BGA's motion for

summary judgment shall admit that there is no genuine issue as to any material fact and that the Court should rule on the issues of law.") (emphasis added). (Copies of the Amended Complaint and the Settlement Agreement are annexed to the accompanying Affidavit of S. Robert Parker, sworn to on August 31, 2007, as **Exhibits "A"** and **"B"**, respectively).

The critical legal issue raised in Plaintiffs' Amended Complaint is whether the County may continue to tax the Tribe's Reservation under threat of foreclosure, or, alternatively, whether the Tribe is a sovereign Indian Nation which satisfies the federal common law standard for recognition as an Indian tribe and which, therefore, may not be taxed by the County. Other legal issues raised in the Amended Complaint include: whether the Tribe is required to seek any re-affirmation of its recognized relationship with the federal government from the Department of the Interior; whether the Property has the same legal and equitable rights and designation as Indian Country as the lands of the other New York Indians which are designated as Indian Country by the Federal Government or have been held to be such by the Federal Courts of this District; and whether the Property is Indian Country which is exempt from taxation and exempt from foreclosure. See Amended Complaint, ¶69.

The parties have consistently held adverse positions on the critical legal issue of whether the County's taxation of the Reservation violates the Tribe's sovereign immunity. The Plaintiffs' position is that the Tribe is a sovereign Indian Nation and the Property is Indian Country which may not be taxed or foreclosed upon. The County takes an adverse position, maintaining that taxes must be paid on the Property. By coercing the Tribe to pay under threat of foreclosure and rejecting the Tribe's claims to

sovereign immunity, the County's unmistakable position is that the Tribe is not a sovereign and that the Property is not Indian Country. If this were not the County's position, the County would be knowingly violating federal law by taxing a sovereign Indian Nation.

Now that the Court has dismissed this action, the legal dispute continues, unresolved. Plaintiffs have learned that a new tax bill will soon be sent by the County to the Tribe.

In the County's Answer to the Amended Complaint, the County took no position on the factual allegations contained ¶¶7-46 but maintained its adverse position on the legal issues. The County's Answer denied that the Plaintiffs were entitled to the declaratory relief that they requested. See County's Answer, ¶5. (A copy of the County's Answer is annexed to the Parker Affidavit as **Exhibit "C"**).

Although the County did not agree at all regarding the Plaintiffs' legal conclusions, the Court states that it did. The Court misconstrued the Settlement Agreement, finding that

By settlement agreement, the **County previously stipulated that it would take no position on the** factual and/or **legal conclusions** set forth in the tribe's motion for summary judgment. Therefore, the tribe and the County do not have adverse legal interests with respect to the issues presented to the court...

Order, p. 6-7 (emphasis added).

Since the Settlement Agreement did not contain any agreement with regard to the Plaintiffs' legal conclusions, the Court erred in concluding that the County stipulated that it would take no position on the Plaintiffs' legal conclusions. Based upon this error



of fact, the Court concluded that the parties do not have adverse legal interests with respect to the issues presented to the Court. This conclusion also was erroneous, because the parties clearly hold adverse positions on the legal issue of whether the County's taxation of the Reservation violates the Tribe's sovereign immunity.

The Court also concluded, based on the mootness doctrine, and based on its misinterpretation of the Settlement Agreement, that the Settlement Agreement eliminated the controversy between the parties. Plaintiffs submit that this conclusion was erroneous.

Plaintiffs respectfully submit that there are other errors contained in the Order. Plaintiffs believe that the Court erred in concluding that the County is not the appropriate defendant in this action for declaratory relief. Plaintiffs also find clear error in the Court's conclusion that the Tribe did not seek to litigate its underlying contract dispute with the County.

Plaintiffs' Motion seeks reconsideration of this Court's Order and Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Local Rule 7.1(g). Plaintiffs respectfully submit that the Order and Judgment should be vacated because they are based upon clear errors of fact and law. Plaintiffs' action presents an actual and substantial "case or controversy" within the meaning of Article III of the Constitution and the Declaratory Judgment Act, and the Court has jurisdiction to resolve this case.

#### **LAW GOVERNING MOTIONS FOR RECONSIDERATION**

A motion for reconsideration in this Court is governed by Federal Rule of Civil Procedure 59(e) and Local Rule 7.1(g). Federal Rule 59(e) provides:

Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e).

Local Rule 7.1(g) also requires a motion for reconsideration to be filed within 10 days after entry of the order or judgment.

A motion for reconsideration under Federal Rule 59(e) serves the limited purpose of allowing “the moving party [to attempt to] point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” Smith v. Guilford Bd. of Educ., 226 Fed.Appx. 58, 64 (2d Cir. 2007); Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir.1995). Rule 59(e) does not prescribe the specific grounds on which a motion for reconsideration may be brought, but it is clear that district courts may alter or amend a judgment to correct an error in interpreting the facts or the law. Munafu v. Metro. Transp. Auth., 381 F.3d 99, 105 (2d Cir.2004); Greene v. Town of Blooming Grove, 935 F.2d 507, 512 (2d Cir.1991) (“The ‘narrow aim’ of Rule 59(e) is ‘to mak[e] clear that the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment.’”) (quoting White v. N.H. Dep’t of Employment Sec., 455 U.S. 445, 450 (1982)).

Rule 59(e) “is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the court.” Walker v. U.S., 321 F.Supp.2d 461 (N.D.N.Y. 2004); Ades v. Deloitte & Touche, 843 F.Supp. 888, 892 (S.D.N.Y.1994).

While the decision whether to grant a motion for reconsideration is left to the discretion of the district court, it may be an abuse of discretion to let stand an error of

law or fact brought to its attention in a timely manner. See RJE Corp. v. Northville Indus. Corp., 329 F.3d 310, 316 (2d Cir.2003) (noting, on review of a denial of a motion for reconsideration, that “[a] court abuses its discretion when its decision rests on a legal error”); In re 310 Assocs., 346 F.3d 31, 35 (2d Cir.2003) (noting that it is an “abuse of discretion not to correct [an] obvious factual mistake”) (citing Cappillino v. Hyde Park Cent. Sch. Dist., 135 F.3d 264, 266 (2d Cir.1997)); Cruz v. Barnhart, 2006 WL 547681 (S.D.N.Y. 2006) (granting motion for reconsideration based on Court’s mistake of law.)

### **ARGUMENT**

#### **THE ORDER AND JUDGMENT SHOULD BE VACATED BECAUSE THIS COURT HAS SUBJECT MATTER JURISDICTION**

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#### **I. THE COURT ERRED IN FINDING THAT THE COUNTY STIPULATED TO TAKE NO POSITION ON PLAINTIFFS’ LEGAL CONCLUSIONS**

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The Settlement Agreement provided that the County would not contest the factual assertions of the Plaintiffs’ Amended Complaint (which were set forth in ¶¶7-46).

The Settlement Agreement provides in paragraphs 6 and 8 as follows:

“6. Within twenty (20) days after BGA and Western serve the Amended Complaint, the County shall answer the Amended Complaint. The County agrees that its Answer to the Amended Complaint will not deny or contest any of the factual allegations set forth in paragraphs 7 through 46 of the Amended Complaint. If the County lacks information sufficient to know the truth of any of such factual allegations, the County may plead that it lacks such knowledge as to any such factual allegations.”

\* \* \* \*

“8. The County agrees that it will not, in the BGA Action or at any time thereafter, take any position that is contrary to any of the factual allegations set forth in paragraphs 7 through 46 of BGA’s and Western’s Amended Complaint.”

Settlement Agreement, ¶¶6, 8 (emphasis added).

The parties were free to stipulate to the facts without depriving the Court of subject matter jurisdiction. See McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 283 (2d Cir. 2004)(in appeal after trial on stipulated facts, court held that "[b]ecause ... the parties stipulated to all facts, the district court's conclusions are exclusively conclusions of law that are reviewed *de novo*."); U.S. v. Larson, 302 F.3d 1016, 1020 (9<sup>th</sup> Cir. 2002) ("a stipulated-facts trial will not in the normal course deprive this court of jurisdiction"); 83 CJS Stipulations §40 ("Ordinarily, litigants may stipulate as to agreed statement of facts on which to submit their case to the court for decision, and such stipulations are, indeed, encouraged by the courts, subject to some limitations"). The parties stipulated to the facts in order to let the Plaintiffs proceed expeditiously with their declaratory judgment cause of action and to let the Court decide the disputed legal issues, including whether the County had the right to continue to tax the Property, or whether the Property was Indian Country which cannot be taxed or foreclosed upon. This is clear from paragraph 7 of the Settlement Agreement, which states:

"7. BGA and Western may pursue the cause of action for declaratory relief in the BGA Action, including seeking summary judgment on such cause of action. The County agrees that it will respond to BGA's and Western's motion for summary judgment within the time limit provided by applicable law. **The County further agrees that its response to BGA's motion for summary judgment shall admit that there is no genuine issue as to any material fact and that the Court should rule on the issues of law.**"

Settlement Agreement, ¶7 (emphasis added). Thus, the County did not stipulate away the dispute with respect to any of the Plaintiffs' legal conclusions.

In the County's Answer to the Amended Complaint, the County took no position on the factual allegations contained in ¶¶7-46. However, the County maintained its

adverse position on the legal issues, and denied that Plaintiffs were entitled to the declaratory relief requested. (See Answer ¶5.)<sup>1</sup> The parties anticipated that the disputed legal issues would be decided by the Court, either on summary judgment, or at trial, as contemplated by paragraph 7 of the Settlement Agreement.<sup>2</sup> Instead, the Court dismissed the action for lack of subject matter jurisdiction.

Even though the Settlement Agreement did not contain any stipulations as to the Plaintiffs' legal conclusions, the Court stated, erroneously, in various places in its Order, that the County stipulated that it would take no position on the Plaintiffs' legal conclusions.<sup>3</sup> This is a clear error of fact. This error of fact lies at the heart of the Court's decision to dismiss this case for lack of subject matter jurisdiction. Indeed, the Court stated in its Order:

By settlement agreement, the **County previously stipulated that it would take no position on the factual and/or legal conclusions set**

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<sup>1</sup> Paragraphs 48 – 69 of the Amended Complaint comprise the Plaintiffs' Cause of Action for Declaratory Judgment.

The County's Answer states as follows in response to those paragraphs:

“3. Defendant lacks sufficient knowledge or information to admit or deny the truth of allegations 48 – 63, and 65 of the Amended Complaint.

4. Defendant admits in Paragraph 64 of the Amended Complaint that it intends to treat the Property as taxable, and in all other respects lacks sufficient knowledge or information to admit or deny the truth of said paragraph.

5. Defendant denies allegations 66, 67, 68 and 69 of the Amended Complaint.”

County's Answer, ¶¶3-5.

<sup>2</sup> The County essentially defaulted on the summary judgment motion, expecting the Court to decide the disputed legal issues, as contemplated by Paragraph 7 of the Settlement Agreement. However, the County didn't need to respond to the summary judgment motion, since its Answer took an adverse position on the legal conclusions in the Plaintiffs' Amended Complaint and denied that Plaintiffs were entitled to the declaratory relief requested.

<sup>3</sup> See Order, pp. 3, 6, 7.  
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forth in the tribe's motion for summary judgment. **Therefore, the tribe and the County do not have adverse legal interests with respect to the issues presented to the court.**<sup>6</sup> In fact, the County, as a local political entity, has no direct control over the question of sovereignty, which lies at the heart of the tribe's requested relief. Moreover, the County is not the appropriate party to sue for the type of relief sought by the tribe since, *inter alia*, it does not have the authority to alter the tribe's state and/or federal tax status. Most notably, the tribe is not asking the court to settle its underlying contract dispute with the County. See Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 94 F.3d 747, 753 (2d Cir. 1996) (No genuine dispute existed between the parties under the Nbnintercourse Act, and instead, the cause of action arose solely under state law). In sum, the **County's refusal to take a position on the factual and legal conclusions set out in the tribe's motion removes any substantial controversy for the court to decide. Therefore, the court lacks subject matter jurisdiction.** Accordingly, the motion is moot, and the case is dismissed for lack of jurisdiction.

FN 6: Other circuits have previously held that due to stipulations predetermined by the parties via settlement agreement "there [were] no live parties with a live controversy before the court" and thus, the district court was "powerless to act." Fenner v. Cont'l Diving Serv., Inc., 543 F.2d 1113, 1117 (5<sup>th</sup> Cir. 1976).

Order, p. 7 (emphasis added).

Based on the Court's error of fact, the Order and Judgment should be vacated.

## **II. THE COURT ERRED IN CONCLUDING THAT THE PARTIES DO NOT HAVE ADVERSE LEGAL INTERESTS**

The parties have consistently held adverse positions on the critical legal issue of whether the County's taxation of the Reservation violates the Tribe's sovereign immunity, and the dispute between them has always been real and substantial. In fact, the controversy almost resulted in the Tribe losing the Property in the County's 2002 foreclosure action.

The Plaintiffs' position is that the Tribe is a sovereign Indian nation and that the Property is Indian Country which may not be taxed or foreclosed upon. By contrast, the County has consistently maintained that taxes must be paid on the Property and has coerced the Tribe to pay under threat of foreclosure. The County has been enforcing tax laws against the Tribe since January 2003, for its own financial benefit, after having expressly agreed not to do so in the 2001 Agreement. The County has a significant stake in the outcome, as the Tribe's tax status directly affects the County. If the Tribe is declared a sovereign Indian Nation by this Court, the County will be adversely affected because it must cease taxing the Reservation. Although the County may have portrayed itself as neutral on the legal issues, the County's unmistakable position is that the Tribe is not a sovereign and that the Property is not Indian Country. If this were not the County's position, the County would be knowingly violating federal law by taxing a sovereign Indian Nation.

The County is sufficiently adverse to the Tribe for purposes of the Declaratory Judgment Act, as a matter of law. As set forth in Plaintiffs' May 24, 2007 Memorandum of Law, when an Indian tribe has been threatened by a tax, even if the tax has not yet been imposed and no position has been taken by the taxing authority, there exists a justiciable case or controversy. See Crow Tribe of Indians v. State of Montana, 819 F.2d 895, 903 (9<sup>th</sup> Cir. 1987), *aff'd*, 484 U.S. 997 (1988) (justiciable controversy existed where Indian tribe sought declaratory relief against the imposition of state severance and gross proceeds taxes on coal mined within the tribe's Indian reservation, even though the mining, and therefore the application of the taxes, had not commenced).

The Court's conclusion that the parties do not have adverse legal interests is an

erroneous conclusion which guided the Court's decision to dismiss this action. Based on this error, the Order and Judgment should be vacated.

### III. **THE COURT ERRED IN CONCLUDING THAT THE SETTLEMENT AGREEMENT MOOTED THE CONTROVERSY BETWEEN THE PARTIES**

The mootness doctrine provides that “an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” British Intern. Ins. Co. Ltd. v. Seguros La Republica, S.A., 354 F.3d 120, 122 (2d Cir. 2003); Steffel v. Thompson 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209 (1974). “[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” British Intern. Ins., 354 F.3d at 122; Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944 (1969). A case is not moot, however, “so long as the appellant retains some interest in the case, so that a decision in its favor will inure to its benefit.” British Intern. Ins., 354 F.3d at 123; New England Health Care Employees Union, Dist. 1199, SEIU AFL-CIO v. Mount Sinai Hosp., 65 F.3d 1024, 1029 (2d Cir. 1995).

The Court's decision was based, in part, on its conclusion that the Settlement Agreement mooted the controversy between the parties. The Court's Order stated, in part:

In sum, the County's refusal to take a position on the factual and legal conclusions set out in the tribe's motion removes any substantial controversy for the court to decide. Therefore, the court lacks subject matter jurisdiction. Accordingly, the motion is moot, and the case is dismissed for lack of jurisdiction.

Order, p. 7.



Plaintiffs respectfully submit that the Court erred in concluding that the Settlement Agreement “removes any substantial controversy”. As demonstrated above, there is still an ongoing controversy over whether the County may continue to tax the Tribe’s Reservation under threat of foreclosure, or, alternatively, whether the Tribe is a sovereign Indian Nation, making the County’s conduct a violation of federal law. The Settlement Agreement only brought the Tribe current on the assessments made for taxes on the Property- - it did not address any issues concerning taxes which would be assessed after the Settlement Agreement. The County has continued to assess taxes on the Property. The parties remain truly adverse on the critical legal issue, and the dispute between them has always been real. Moreover, both the Plaintiffs and the County have a significant stake in the outcome. Cf. Keefe v. Property and Casualty Ins. Co., 203 F.3d 218, 224 (3<sup>rd</sup> Cir. 2000) (holding that settlement as to damages issue did not moot the controversy, finding that the parties’ “positions are truly adverse with respect to the critical legal issue....and the dispute between them is not feigned...[and] both parties have a significant stake in the outcome.”)

The court’s reliance upon Fenner v. Continental Diving Serv., Inc., 543 F.2d 1113 (5<sup>th</sup> Cir. 1976) is misplaced because, in the case before this Court, there is a live controversy between truly adverse parties. Fenner is also distinguishable in that it involved a contrived controversy which left one party in control of the litigation. That is not the situation here. The Settlement Agreement was not intended to leave any party in control of the litigation, and did not leave any party in control of the litigation. The Settlement Agreement explicitly provided that the Court would decide the disputed legal issues based on stipulated facts. It is not possible for the questions of law to be

decided favorably to both sides of the dispute.

Based on the above, the controversy is not moot, and therefore, the Order and Judgment should be vacated.

**IV. THE COURT ERRED IN CONCLUDING THAT THE COUNTY IS NOT THE APPROPRIATE DEFENDANT IN THIS ACTION FOR DECLARATORY RELIEF**

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The Court's Order was based, in part, on its conclusion that:

"the County, as a local political entity, has no direct control over the question of sovereignty, which lies at the heart of the tribe's requested relief...and.. the County is not the appropriate party to sue for the type of relief sought by the tribe since, *inter alia*, it does not have the authority to alter the tribe's state and/or federal tax status."

Order, p.7.

The County has been injuring and continues to injure the Tribe by collecting taxes on Indian County in violation of Federal common law. The County, therefore, is the appropriate defendant in this action.

The fact that the County has no control over the question of sovereignty and no authority to alter the Tribe's tax status is irrelevant and certainly does not deprive this Court of subject matter jurisdiction. In similar situations where governmental entities have no control over tax status, courts enter declaratory judgments to resolve controversies concerning taxes. See, e.g., Board of Educ. v. Alexander, 92 N.Y.S.2d 471 (1949) (taxability of school property by village in which property located is proper question for declaratory judgment); Crow Tribe of Indians, 819 F.2d 895 at 903 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988) (justiciable controversy existed where Indian tribe

sought declaratory relief against the imposition of state severance and gross proceeds taxes on coal mined within the tribe's Indian reservation, even though the mining, and therefore the application of the taxes, had not commenced); Matter of McKorkle, 209 B.R. 773 (Bankr. M.D. Ga. 1997) (in adversary proceeding brought by debtor-taxpayer to determine extent of tax liens, "case of actual controversy" existed within meaning of the Declaratory Act where interest at stake was debtor's property interest; even though controversy centered around future act of debtor to make mortgage payments or to abandon the property, debtor's present property interest was immediately and directly affected); Gifford Memorial Hosp. v. Town of Randolph, 119 Vt. 66, 118 A.2d 480 (1955) (an allegation that a building has been appraised for taxation, and a tax assessed against the owner, may be sufficient to show the existence of an actual controversy without alleging that any proceeding has been brought or threatened to collect such tax).

Based on the foregoing, the Court erred in concluding that the County is not the appropriate defendant in this action.

**V. THE COURT ERRED IN CONCLUDING THAT THE TRIBE DID NOT ASK THE COURT TO SETTLE ITS UNDERLYING CONTRACT DISPUTE WITH THE COUNTY**

The Court stated in its Order that "the tribe is not asking the Court to settle its underlying contract dispute with the County". The Court is in error. That is the very basis of the Tribe's action for a declaratory judgment. The Agreement of January 5, 2001, attached to the Amended Complaint as Exhibit "B", clearly states in Section A.1.(b): "The County shall not adopt any resolutions or take any other action to

contravene the subject matter of the Resolutions or affect the Real Property's trust status and/or 'Indian Country' status." The Plaintiffs, in their Amended Complaint, specifically sought a declaration that the Property is Indian Country and is exempt from taxation and foreclosure. See Amended Complaint, ¶69. That is exactly what the County agreed to in the 2001 Agreement. It is the County's actions in violation of its covenants in the 2001 Agreement that the Tribe is seeking to put an end to. The declaratory judgment requested would resolve the controversy between the parties.

### **CONCLUSION**

Based on the foregoing, Plaintiffs respectfully submit that this Court should vacate the Order and the Judgment pursuant to Federal Rule 59(e), and grant the Plaintiffs' motion for summary judgment.

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