It is settled law in the Second Circuit that federal recognition of tribal status may be given by a Federal Court, and need not be given by or established through the BIA. For the reasons set forth herein, it is eminently appropriate and urgently necessary that this Court exercise its authority to reaffirm the Tribe's status as a sovereign Indian tribe and recognize the status of the Property as Indian Country.

Plaintiffs now seek summary judgment and request a declaratory judgment as follows:

> (a) Declaring that the Tribe is a sovereign Indian Nation and that as such, the Tribe is recognized as sovereign on a government to government basis under the laws of the United States of America, and is not required to seek any re-affirmation of its recognized relationship with the federal government from the Department of the Interior;
>
> (b) Declaring that 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;
>
> (c) Declaring that the Property is Indian Country which is exempt from taxation and exempt from foreclosure;
>
> (d) Declaring that the Property qualifies as "Indian lands" under the laws of the State of New York and decisions of the Federal Courts; and
>
> (e) Declaring that the Tribe is exempt from paying taxes pursuant to the laws of the United States of America and the laws of the State of New York.[2]

Plaintiffs submit that the declaratory relief sought herein is warranted and critically necessary to resolve the controversy between the parties. As demonstrated below, the requested declaratory relief would not have any disruptive consequences which would implicate the equitable doctrines of laches, acquiescence or impossibility. Cf. City of

[2] Pursuant to an agreement between the Plaintiffs and the County, the Complaint herein was amended, inter alia, to omit causes of action against the County for monetary relief and injunction. (See Roberts Aff., ¶65).

Sherrill v. Oneida Indian Nation, 544 U.S. 197, 125 S. Ct. 1478 (2005) (equitable doctrines of laches, acquiescence and impossibility barred the tribe's claim for sovereign control). The declaratory relief would not be disruptive primarily because (i) the County has already agreed that the Tribe is a sovereign Indian Nation and that the Property is Indian Country; (ii) the County was paid a fair price ($900,000) for the Property by Plaintiffs and Plaintiffs have obligated themselves to make certain specified payments to the County in lieu of taxes; (iii) the Tribe has exclusive possession and ownership of the Property, and the County does not dispute the Tribe's right to own or possess the Property; and (iv) there are no private landowners on the Property and, therefore, no residents would be uprooted or prejudiced if the requested declaratory judgment were granted.

The equitable doctrines of laches, acquiescence and impossibility also have no application to the facts presented herein, as demonstrated below. The doctrine of laches, for example, would not bar the Tribe's claim for declaratory relief because no inequity would result from such relief. See Cayuga Indian Nation of New York v. Pataki, 413 F. 3d 266, 274 (2d Cir. 2005)("[L]aches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced."). On the contrary, the declaratory relief would bring a needed end to the County's ongoing breaches of the Western-County Agreement and the County's other inequitable conduct.

BGA AND WESTERN SATISFY THE STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate now to end the County's continued demands for real property taxes and the County's threats to commence another foreclosure action. The Supreme Court of the United States has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Saucier v. Katz, 533 U.S. 194, 201,

121 S. Ct. 2151, 2156 (2001). It is especially important to resolve sovereign immunity issues promptly because a "[t]ribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation." Kiowa Tribe of Oklahoma v. Hoover, 150 F. 3d 1163, 1172 (10th Cir. 1998). Indeed, it has been held to constitute an irreparable harm when a tribe is "forced to expend time and effort in litigation in a court that does not have jurisdiction over [it]." Seneca-Cayuga Tribe of Okla. v. Oklahoma, 874 F.2d 709, 716 (10th Cir. 1989). See also Dibble v. Fenimore, 339 F. 3d 120, 123 (2d Cir. 2003) ("immunity is intended to shield the defendant not only from an adverse outcome, but also from the burden of having to go through the litigation process at all"). On the uncontroverted evidence here, summary judgment should be granted expeditiously to stop the County from further violating the Western-County Agreement and further infringing the Tribe's sovereign immunity.

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled, as a matter of law, to a judgment in its favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986); Federal Deposit Ins. Corp. v. Bernstein, 944 F.2d 101, 106 (2d Cir. 1991).

In the instant case, there is no genuine issue as to any material fact. Plaintiffs' Amended Complaint and the County's Answer demonstrate that the factual allegations of the Amended Complaint are all undisputed. See Amended Complaint ¶¶ 7-46 and Answer ¶ 2. In addition, Plaintiffs are entitled to judgment as a matter of law on their cause of action for declaratory relief. Accordingly, this Court should enter an Order granting summary judgment on the Plaintiffs' count for declaratory judgment.

ARGUMENT

I.

THIS COURT SHOULD EXERCISE ITS AUTHORITY TO RECOGNIZE AND REAFFIRM THE TRIBE AS A SOVEREIGN INDIAN NATION

In this action, Plaintiffs seek recognition and reaffirmation of the Western Mohegan Tribe as a sovereign Indian Nation, by this Federal Court. The Tribe has neither filed for nor received recognition by the BIA.[3] The fact that the Tribe has not received recognition by the BIA does not preclude this action, as discussed below.

The Western Mohegan Tribe's identity as a tribe and its sovereign immunity are not delegated to it by the United States, the BIA, or any other legislative or executive entity. It is a fundamental principle of Federal Indian law that "[t]he powers of Indian Tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'" United States v. Wheeler, 435 U.S. 313, 322, 98 S.Ct. 1079, 1086 (1978). Accord Felix S. Cohen, Handbook of Federal Indian Law 231-32 (1982 ed.) (It is "[p]erhaps the most basic principle of all Indian law, supported by a host of decisions, [ ] that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished".)* (emphasis added).

The inherent sovereignty of Indian tribes extends "over both their members and their territory." Wheeler, 435 U.S. at 323, quoting *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 717 (1975). Inherent tribal sovereignty "exists

[3] See Roberts Aff. ¶ 19; Lawson Report pp. 18-19.

only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Wheeler, 435 U.S. at 323 (emphasis added). Accord Naragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 25 (1st Cir. 2006) ("An Indian tribe's sovereign immunity may be limited by either tribal conduct (i.e., waiver or consent) or congressional enactment (i.e., abrogation)... such action must be clear and unequivocal in their import").

In rejecting a state's contention that tribal status is bestowed upon tribes by some form of official "recognition," the First Circuit explained:

> 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 Tribe, 599 F.2d 1061,1065 (1st Cir. 1979), citing Wheeler, 435 U.S. at 322-23.

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. See, e.g. United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 1632 (2004)(reaffirming that the authority to prosecute nonmember Indians for crimes is an exercise of "inherent tribal sovereignty", not delegated federal authority). Consequently, to determine whether the Western Mohegan Tribe is a tribe within the meaning of federal law, this Court must determine whether

the inherent sovereignty of the Tribe has been withdrawn or extinguished by Congress, not whether it has been "granted" or "delegated" by the United States, the BIA or any other legislative or executive authority.

It is now settled law in this Circuit that federal recognition of tribal status may be given by a Federal court, and does not need to be given by or established through the BIA. See The Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 60-61 (2d Cir. 1994) (federal district court has authority to determine the question of tribal status and decide the merits of tribe's Nonintercourse Act claims); New York v. Shinnecock Indian Nation, 280 F.Supp.2d 1, 9-10 (E.D.N.Y. 2003) (a federal district court has the power and jurisdiction to make the determination of whether a tribe meets the federal criteria for tribal status and to grant federal recognition to a tribe); New York v. Shinnecock Indian Nation, 400 F.Supp.2d 486 (E.D.N.Y. 2005) (holding that the Shinnecock Indian Nation, which is not recognized by the BIA, is a legitimate Indian tribe). Moreover, the United States Congress has legislated that:

> "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe'; *or by a decision of a United States court.*"

Pub. L. 103-454 § 103(3) (1994) (emphasis added). Accord Cherokee Nation of Oklahoma v. Norton, 389 F.3d 1074 (10th Cir. 2004)("The law governing Federal recognition of an Indian tribe is, today, clear. The Federally Recognized Indian Tribe List Act of 1994 provides Indian tribes may be recognized by: (1) an "Act of Congress;" (2) "the administrative procedures set forth in part 83 of the Code of Federal Regulations[;]" or (3) "a decision of a United States court.""), citing Pub.L. No. 103-454, § 103(3), 108

Stat. 4791.

Eventual acknowledgement by the Byzantine procedures of the BIA is not, and has never been, the *sine qua non* of tribal existence. The stated purpose of BIA "acknowledgement" is not conclusively to determine tribal identity, but to provide one way to identify tribal groups that are eligible for specified federal services and benefits. See 25 C.F.R. § 83.2 (2004)("The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes..."). See also Golden Hill, 39 F.3d. at 58 ("Regardless of whether the BIA were to acknowledge Golden Hill as a tribe for purposes of federal benefits, Golden Hill must still turn to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act").[4]

Any argument that the Tribe must or should first exhaust administrative remedies by applying for federal recognition from the BIA, must be rejected. This is clear from the Second Circuit Court of Appeals' decision in Golden Hill. In that case, the District Court had ruled that the Golden Hill Paugussett Tribe was required to exhaust administrative procedures for tribal recognition prior to seeking a judicial determination of tribal status under the Nonintercourse Act, 25 U.S.C. §177. The Second Circuit identified the issue on appeal as whether plaintiff, as a group of American Indians seeking to invoke the

[4] The Department of the Interior did not actively begin to engage in recognition determinations until after the passage of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § § 461-479 (1988)). Golden Hill, 39 F.3d at 57 (2d. Cir. 1994). After passage of the Indian Reorganization Act, recognition proceedings were necessary for tribes seeking benefits because the benefits created by it were made available only to descendants of "recognized" Indian tribes. Golden Hill, 39 F.3d at 57.

Nonintercourse Act in Federal court, must first complete acknowledgment proceedings before the BIA. See Golden Hill, 39 F.3d at 57. The Court of Appeals then rejected the District Court's suggestion that dismissal of the action was warranted by the exhaustion of administrative remedies doctrine.

The Golden Hill tribe had petitioned for recognition by the BIA and the Court of Appeals was advised that a determination by the BIA could take up to two (2) years. The Court of Appeals expressed its concern regarding additional delays and recognized the public interest in reasonably prompt adjudication of plaintiff's claims. The Court of Appeals remanded the action, directing the District Court to stay the action to permit Golden Hill to reapply to the trial court for a ruling on the merits, if within 18 months the BIA has not then ruled on plaintiff's tribal status. If no ruling by the BIA was made within this time frame, the BIA or the defendants could show why the stay should be extended. Upon failure to make such a showing or to resolve the question of tribal status within the 18-month period, the District Court would be allowed the reach the merits of the case, including deciding whether the tribe should receive federal recognition. Id. at 60-61.

The Western Mohegan Tribe has never been recognized by the BIA.[5] Nor has it ever sought any benefits for its tribal members from the Federal government which would require recognition by the BIA. Western does not by this lawsuit seek any such benefits.[6] Since no petition for recognition was ever filed by the Tribe and the Tribe is not seeking recognition by the BIA, there is absolutely no reason to defer to the expertise of the BIA for resolution of factual issues regarding tribal status. See Golden

[5] See Roberts Aff. ¶ 19; Lawson Report, pp.18-19.
[6] See Roberts Aff., ¶20.

Hill, 39 F.3d at 60 ("We need not decide whether deference would be appropriate if no recognition application were pending, but deferral is very warranted here where the plaintiff has already invoked the BIA's authority.").

The Second Circuit Court of Appeals has taken note of the fact that applications for BIA acknowledgement have been languishing in the BIA for many years.[7] It would be extremely inappropriate and would cause irreparable harm to the Tribe to require the Tribe to seek acknowledgement by the BIA under these circumstances.

Based on the above, this Court should exercise its authority to reaffirm the Tribe as a sovereign Indian Nation and to issue the declaratory relief requested herein.

II.

THE UNDISPUTED EVIDENCE SHOWS THAT THE TRIBE SATISFIES THE FEDERAL COMMON LAW STANDARD FOR DETERMINING TRIBAL EXISTENCE

When the status of an Indian tribe is at issue, the courts of the United States look exclusively to Federal law to determine the tribe's status. Shinnecock, 400 F.Supp.2d at 491. See, e.g., *Montoya v. United States,* 180 U.S. 261, 266, 36 Ct.Cl. 577, 21 S.Ct. 358, 45 L.Ed. 521 (1901); *United States v. Candelaria,* 271 U.S. 432, 442, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); *Cherokee Nation of Okla. v. Babbitt,* 117 F.3d 1489, 1499-1503 (D.C.Cir.1997) (holding that "the court must itself decide whether the [tribe] constitute[s] a sovereign tribe" for immunity purposes); *Golden Hill,* 39 F.3d at 59; *Mashpee Tribe v. Sec'y of Interior,* 820 F.2d 480, 482-84 (1st Cir.1987); *Bottomly,* 599

[7] See Shinnecock, 400 F.Supp.2d at 493 (the "Second Circuit remanded this and all similar questions to this Court for determination (because of the BIA's inability to reach these decisions for some twenty years from that date))", citing New York v. Shinnecock Indian Nation, No. 03-7996 (2d Cir. Nov. 26, 2003).

F.2d at 1064-67.

In this action, Western seeks federal recognition of its tribal status and related declaratory relief on its Nonintercourse Act claim. The factors which need to be established to prove tribal status in the context of a Nonintercourse Act claim were described by the Second Circuit in Golden Hill:

> Federal courts have held that to prove tribal status under the Nonintercourse Act, an Indian group must show that it is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *See, e.g., United States v. Candelaria,* 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926) (quoting *Montoya v. United States,* 180 U.S. 261, 266, 21 S.Ct. 358, 359-60, 45 L.Ed. 521 (1901)); *Catawba Indian Tribe,* 718 F.2d at 1298; *Passamaquoddy,* 528 F.2d at 377 n. 1.

Golden Hill, 39 F.3d at 59.[8] The formulation of this standard and its use by the federal courts occurred after Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs, *see* 25 U.S.C. § 9, and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior. Golden Hill, 39 F.3d at 59, citing Candelaria, 271 U.S. at 442, 46 S.Ct. at 563; Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975).

The cases described above, beginning with Montoya and continuing to the present, "establish a federal common law standard for determining tribal existence." Shinnecock, 400 F.Supp.2d at 492. In order for the Tribe to prove tribal status under the Nonintercourse Act, it must establish the following three factors:

[8] Tribal status for obtaining federal benefits isn't necessarily the same as tribal status under the Nonintercourse Act. Golden Hill, 39 F.3d at 57. As stated above, the Tribe is not seeking federal benefits.