from the Army to speak at that event. [45]

In November of 1999 and 2000, Western Mohegan tribal representatives were invited to Washington, D.C. to participate in the Army's observance of National American Indian Heritage Month, held at the Pentagon.[46] On January 11, 2001, Ray Clark, the Principal Deputy Assistant Secretary of the Army, wrote that:

> the long history of the Mohegan people of your tribe and its constant alliance with the Army from pre-Revolutionary days to the present time is something to be proud of. Our government-to-government dealings have been mutually beneficial.... [47]

The Tribe received unambiguous legal and de facto recognition by the federal government in October 1999 when it received from the Department of the Army a Right of Entry on Hudson River-Houghtailing Island (that part of Schodack Island owned by the Federal government) "to conduct prayers, rituals and give honor to the ancestral burial grounds and heritage".[48] The Right of Entry, dated October 14, 1999, confirmed the Army's "government to government" relationship with the Tribe.[49]

IV.

VARIOUS OTHER INDICIA OF THE TRIBE'S STATUS AS A SOVEREIGN INDIAN NATION SUPPORT THE RELIEF REQUESTED

Several other indicia of the Tribe's status as a sovereign Indian tribe support the declaratory relief requested herein, such as the following:

On April 17, 2001, the U.S. Court of Appeals for the Second Circuit vacated and remanded a decision of the U.S. District Court that the Tribe did not have standing to

[45] Lawson Report, p. 17 and Exh. 53-54.
[46] Lawson Report, p.17-18.
[47] Lawson Report, p.18; Roberts Aff ¶11.
[48] Lawson Report, p.18 and Exh. 57; Roberts Aff ¶11.
[49] Lawson Report, p.17-18 and Exh. 56-57. Roberts Aff ¶11.

invoke a First Amendment claim against the State of New York to conduct religious ceremonies on that part of Schodack Island owned by the State. The Court of Appeals declared that the Tribe "consists of the descendants of Native Americans who stayed behind when most of their counterparts left the area in the late 1700s."[50]

In a joint letter on August 17, 1998, Senators D'Amato and Moynihan and Representatives Benjamin A. Gilman and Maurice D. Hinchey of New York requested President Clinton to reaffirm the Muh-hea-hun-nuk as a federally recognized tribe.[51]

The effort of the Tribe to have its Federal relationship reaffirmed has been supported by a number of other Indian tribes, including the Aroostook Band of Micmacs, the Passamaquoddy Tribe, the Pleasant Point Indians, and the Houlton Band of Maliseet Indians (all of Maine), the Abenaki Nation of Vermont, and the Wampanoag Tribe of Gay Head, Massachusetts. The Western Mohegan have also participated in the cultural events of other Indian tribes, such as the Oneida Indian Nation of New York.[52]

On March 22, 2000, a number of members of the Stockbridge-Munsee Community of Mohican Indians in Wisconsin signed a petition supporting Federal reaffirmation of the Western Mohegan Tribe and Nation, as well as its efforts to protect and preserve their mutual New York homelands, including but not limited to Schodack Island. On August 22, 2000, the Stockbridge-Munsee Community of Wisconsin voted to extend its Federal recognition to the Western Mohegan Tribe and Nation and to establish a sub-agency of the combined tribes in New York. This approved plan has not

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50 Western Mohegan Tribe and Nation v. State of New York, 246 F.3d 230, 232 (2d Cir. 2001).
51 Lawson Report, p. 18-19. The Clinton Administration did not take any action on that request. Id. at 19.
52 Lawson Report, p.20; Roberts Aff ¶16.

been implemented by the Stockbridge-Munsee Community nor approved by the BIA.[53]

The Tribe has been widely applauded for its cultural outreach efforts. In 1997, for example, the Vermont legislature recognized the Tribe for its "important educational and cultural endeavors" within the state and requested the Governor's Advisory Commission on Native American Affairs to assist tribal members in Vermont. In a March 1999 letter, Vermont Governor Howard Dean praised Chief Roberts for his personal contributions in developing a Native American curriculum in the State's schools.[54]

As discussed above, in 2001, the U.S. Bankruptcy Court for the Eastern District of New York approved the County's conveyance of the Property to the Tribe under the terms set forth in the Western-County Agreement, thereby implicitly recognizing the sovereignty of the Tribe and the status of the Property as Indian Country.

The above indicia of the Tribe's status as a sovereign Indian Nation demonstrate the appropriateness of the declaratory relief requested in this action.

V.

THE FEDERAL GOVERNMENT'S *DE FACTO* RECOGNITION OF THE TRIBE IS ENTITLED TO THE DEFERENCE OF THIS COURT

Federal courts accord great deference to the political branches of the Federal government in determining whether a group of Indians constitutes a tribe. Cayuga Indian Nation v. Village of Union Springs, 317 F.Supp.2d 128, 143 (N.D.N.Y. 2004) (recognizing "the rule that courts should defer to executive and legislative

[53] Lawson Report, p.20.
[54] Lawson Report, p. 21; Roberts Aff ¶17.

determinations of tribal status); United States v. Washington, 394 F.3d 1152, 1158 (9th Cir. 2005); United States v. Washington, 384 F.Supp. 312, 400, *aff'd*, 520 F.2d 676 (9th Cir.1975) (concluding that "[t]he recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government").

"Federal recognition [of an Indian Tribe] may arise from treaty, statute, executive or administrative order, *or from a course of dealing with the tribe as a political entity.*" Kahawaiolaa v. Norton, 386 F.3d 1271, 1273 (9th Cir. 2004), quoting William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed.2004) (emphasis added). Accord Samish Indian Nation v. United States, 419 F.3d 1355, 1369, n.15 (Fed. Cir. 2005); Richmond v. Wampanoag Tribal Court Cases, 431 F.Supp.2d 1159, 1164 (D.Utah 2006). As set forth in Section III. above, the Federal government has uniformly treated the Western Mohegan Tribe as a sovereign Indian tribe. Based upon the authorities cited above, that *de facto* recognition is entitled to deference by this Court.

Based on the foregoing, it is respectfully submitted that the *de facto* recognition that the Federal government has previously accorded to the Western Mohegan Tribe, is entitled to the deference of this Honorable Court.

VI.

THE PROPERTY CONSTITUTES INDIAN COUNTRY

Federal Courts have consistently been called upon to define Indian Country as it "applies to questions of both criminal and civil jurisdictions". Narragansett Indian Tribe v.

Narragansett Elec. Co., 89 F.3d 908, 915 (1st Cir.1996) (quoting California v. Cabazon Bank of Mission Indians, 480 U.S. 202, 208, 107 S.Ct. 1083, 1088, 94 L.Ed.2d 244 (1987)). Classification of certain lands as Indian Country "is the benchmark for approaching the allocation of federal, tribal and state authority with respect to Indians and Indian land." Id.[55] "In general, 'Indian Country' refers to the geographic area in which tribal and federal laws normally apply and state laws do not." Union Springs, 317 F.Supp.2d at 135 (N.D.N.Y. 2004), quoting City of Sherrill, 337 F.3d 139, 153 (2d Cir. 2003).[56]

"[O]nly Congress can divest a reservation of its land and diminish its boundaries. Sherrill, 125 S. Ct. at 1490, n. 9, citing Solem v. Bartlett, 465 U.S. 463, 470 (1984). As the Supreme Court described it, the Nonintercourse Act, passed by Congress in 1790 and now codified at 25 U.S.C. §177, "bars sales of tribal land without the acquiescence

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[55]The determination of whether certain land constitutes Indian Country is a matter for the court rather than the jury. See United States v. Cook, 922 F. 2d 1026, 1031-32 (2d Cir.1991)).

[56] Although Congress has statutorily defined the term "Indian Country" (in 18 U.S.C. §1151), the only Indian reservations that fall within that definition are Indian reservations which are "under the jurisdiction of the United States Government." See 18 U.S.C. §1151(a) stating, in pertinent part, that: "the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government"). The "practical effect [of section 1151] was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." City of Sherrill, 337 F.3d at 153, n. 11 (2d Cir. 2003).

Where, as here, a tribe's reservation land is not held in trust by the federal government, 18 U.S.C. §1151 does not apply. See 25 CFR §151.1 ("These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations").

The Western Mohegan Tribe holds fee simple title to the Property through its private Trustee. Notably, Indian Country status "is not precluded when a tribe holds fee title to the land." Union Springs, 317 F.Supp.2d at 137. Accord, Oneida Indian Nation of New York v. City of Sherrill, 145 F.Supp.2d 226, 245 (N.D.N.Y. 2001) (land need not be held in trust by the federal government to constitute Indian Country), aff'd 337 F.3d 139 (2d Cir. 2003), reversed on other grounds, Sherrill, 544 U.S. 197, 125 S.Ct. 1478 (2005); Sandoval, 231 U.S. at 48, 34 S.Ct. at 6 (1913) (rejecting argument that Indian Pueblo lands, held in fee simple by the Pueblo, cannot be Indian Country due to fee simple title). The history of Indian lands in the State of New York is quite unique in that there are no Indian lands held in federal trust in the State of New York. See November 4, 2003 letter by BIA Eastern Region Director, quoted in Sherrill, 137 F.Supp.2d at 144.

of the Federal Government." *Sherrill*, 125 S.Ct. at 1484.[57]

Because Congressional action is required to alienate Indian land, either a treaty approved by Congress or a Federal statute must plainly and unambiguously express the intent to effect such an alienation. See Sherrill, 337 F.3d at 160 (when there is no "substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening. The same analysis applies to the termination or disestablishment of a reservation."); Oneida County, N.Y. v. Oneida Indian Nation of New York, 470 U.S. 226, 247-48, 105 S.Ct. 1245, 1258 (Congressional intent to terminate Indian title to land will not be " 'lightly implied' " because of the "strong policy of the United States 'from the beginning to respect the Indian right of occupancy.' "); Oneida, 145 F.Supp.2d at 242.

Reservation status of Indian land may be changed only upon a plain and unambiguous expression of congressional intent to do so. Sherrill, 337 F.3d at 160; Cayuga Indian Nation, 667 F.Supp. at 944 (citing Oneida County, 470 U.S. at 247-48, 105 S.Ct. at 1258; Narragansett Indian Tribe, 89 F.3d at 914; Oneida, 145 F.Supp.2d at 242.

In keeping with the strong policy of the federal government to protect Indian lands, once an Indian tribe makes out a prima facie case of prior possession or title to

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[57] Successive versions of the Nonintercourse Act have been continuously in force from 1790 to the present day. *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268 (2d Cir.2005). The current version of the Nonintercourse Act reads, in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. §177.

the property in dispute, the burden of proof rests upon the non-Indian to demonstrate otherwise. Union Springs, 317 F. Supp. 2d at 134-35. The burden of proof thus shouldered by the non-Indian questioning Indian title encompasses both the burden of producing evidence and the burden of persuasion. Id. The County, therefore, bears the burden of production and persuasion as to whether the Property constitutes Indian Country.

As discussed above, the County has already agreed that the Property is Indian Country.[58] The County admits this in its Answer.[59] Having taken the position in the Bankruptcy Court that the Tribe is a Sovereign Indian Nation and that the Property is Indian Country, the doctrine of judicial estoppel would preclude the County from taking an inconsistent position in this Court.

The Western Mohegan Tribe claims "aboriginal title" or "Indian title" (as well as "legend title" under New York laws to its lands) because the Property consists of land located in the territory of the Tribe's aboriginal and ancestral lands.[60]

As set forth above, the Muh-hea-kun-nuk, of which the Western Mohegan Tribe is a successor, never relinquished its sovereign powers to the United States. Its government-to-government relationship with Euro-American governments pre-dated the American Revolution. The Muh-hea-kun-nuk never waged war against the United States, but was in fact its staunch ally against Great Britain during the American Revolution. The Muh-hea-kun-nuk never relinquished its lands as a result of warfare with any Euro-American power and its tribal sovereignty was never disestablished by the United States.

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[58] See Roberts Aff., ¶46.
[59] See Complaint ¶ 25, 32-34 and County's Answer, ¶ 2.
[60] Lawson Report, p.14, Roberts' Aff., ¶ 5.

The Property was reacquired by the Tribe in 2001 as the result of its land claim settlement with Ulster County.[61] Under that settlement, the County deeded fee simple title to the Property to the Tribe's Trustee in trust for the Tribe, and the County declared the Property to be an Indian Reservation.[62] The formal reservation conveyed, described and authorized by the Agreement and Resolution, falls within the definition of Indian Country.[63]

The Tribe was divested of its lands solely by acts of settlers and local governments which were affirmed by the laws of the State of New York. Congress never acted to divest Western of its lands.[64]

The Property is Indian Country since Congress never terminated or diminished the reservation status of the subject land which was previously occupied by the Western Mohegans' ancestors. The Tribe's' aboriginal title has never been lawfully extinguished or terminated because no sale of the Property has ever been made which complied with the Nonintercourse Act, 25 U.S.C. § 177 (2005).

This Court reached this same conclusion with respect to the Cayuga Indian Nation. The Cayugas, in 2003, reacquired certain property in Union Springs, New York and sought declaratory relief that the property was "Indian Country" pursuant to 18 U.S.C. §1151(a) and therefore subject to the Nation's jurisdiction and self-government. The Court granted the declaratory relief, stating: "...Since Congress has not divested the Cayugas of their title to the land claim area, it stands to reason that the reservation

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[61] Roberts' Aff., ¶46; Lawson Report, p.15.
[62] Roberts' Aff., ¶ 38-54.

[63] Roberts' Aff., ¶ 5,43, 46.
[64] Roberts' Aff., ¶ 9.

status of the land remains in place to this day." Union Springs, 317 F.Supp. 2d at 137. The Court further held that "because there has been no congressional act to terminate the reservation status of the Property, it remains within the Nation's reservation land, and as such, is Indian Country." Id. at 143.

Based on the foregoing, the Property constitutes Indian Country under Federal law and 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.

[L]and in Indian Country, including reservation land, is not subject to state taxation absent express Congressional authorization. "Sherrill, 337 F. 3d at 154. Accord, Union Springs, 317 F. Supp. 2d at 145. By demanding real property taxes after the Tribe obtained fee title to the Property and continuing to demand real property taxes, and by seeking and obtaining a foreclosure judgment against the Property, and by threatening another foreclosure action against the Property, the County has violated and continues to violate federal as well as state law. See Sherrill, 337 F.3d at 154; New York Indian Law §6 ("No taxes shall be assessed, 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.")

VII.

THE DECLARATORY RELIEF SOUGHT BY THE TRIBE IS NOT DISRUPTIVE AND IS NOT BARRED BY EQUITABLE DOCTRINES

In City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478 (2005), the Oneida Indian Nation of New York (the "Oneidas"), a federally recognized tribe, sought equitable relief reinstating its tribal sovereignty over parcels of land which the tribe purchased in the open market and which were within the boundaries of its historic reservation, so that the newly purchased properties would no longer be subject to local taxation. The United States Supreme Court held that, even though the parcels were Indian Country, the equitable doctrines of laches, acquiescence and impossibility barred the Tribe's claim for sovereign control.

The Supreme Court held that given the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, standards of federal Indian law and federal equity practice preclude the Oneidas from unilaterally reviving its ancient sovereignty, in whole or in part, over the parcels at issue. The Sherrill case must be distinguished from the case at bar, as demonstrated below, primarily because the relief sought by the Western Mohegan Tribe herein is not disruptive and does not implicate the equitable doctrines of laches, impossibility or acquiescence.