

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

ATTORNEYS AFFIRMATION
Index. No. 06-CV-0095
(GLS/RFT)

ULSTER COUNTY, NEW YORK,
a Municipal Corporation of the State of
New York,

Defendant

Lanny E. Walter, Attorney-at-Law, under penalty of perjury, hereby states:

1. He is attorney for Ulster County and makes this Affirmation to respond to Plaintiffs' motion for summary judgment and the U.S. Government amicus application.

2. The County has agreed not to take any position on the Plaintiffs' motion.

Attached as Exhibit A is a Settlement Agreement signed in May 2006.

3. In Paragraph 8 of that Agreement the County agreed "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".

4. Paragraphs 7 through 46 are the primary factual allegations upon which Plaintiffs rely for the present motion.

5. In partial settlement of this action, which sought monetary relief and injunctive relief against Ulster County and two County officials, the County agreed to take no position in

the amended action seeking declaratory judgment as to whether the Western Mohegan tribe is entitled to recognition as a valid tribe under United States law, and the land at issue is Indian land.

6. Consistent with the County's agreement to take no position on Plaintiffs' summary judgment motion, the County also takes no position on the Government's application for permission to file an amicus brief.

Dated February 26, 2007

A handwritten signature in dark ink, appearing to read "Lanny E. Walter", is written over a horizontal line.

Lanny E. Walter, Esq.
Walter, Thayer & Mishler, P.C.
Attorneys for Defendant
756 Madison Avenue
Albany, NY 12208
(518) 462-6753

Exhibit A

SETTLEMENT AGREEMENT

AGREEMENT made this ____ day of May 2006 by and between (a) BGA, LLC, an Illinois Limited Liability Company ("BGA"), (b) **The Western Mohegan Tribe and Nation of the State of New York** ("Western") and (c) **Ulster County, New York**, a municipal corporation of the State of New York (the "County"). (BGA, Western and the County are collectively referred to hereinafter as the "Parties" and are each singularly referred to hereinafter as a "Party".)

WHEREAS, there currently exists pending litigation between and among the Parties relating to parcel SBL # 81.004-2-3 (the "Property"), commonly known as the Tamarack property, located in Ulster County, New York; and

WHEREAS, such litigation consists of the following:

(a) appeals to the Appellate Division, Third Department of the New York Supreme Court from an Amended Judgment of Foreclosure (the "Foreclosure Judgment") and other orders and judgments of the County Court for the County of Ulster in an in rem foreclosure action under Index No. 02-3818 (the "Foreclosure Action");

(b) an appeal to the United States District Court for the Eastern District of New York from an order of the United States Bankruptcy Court for the Eastern District of New York in Adversary Proceeding No. 02-1442-260 (the "EDNY Adversary Proceeding");

(c) an appeal to the United States District Court for the Northern District of New York from an order of the United States Bankruptcy Court for the Northern District of New York in Adversary Proceeding No. 04-90301-1-rel (the "NDNY Adversary Proceeding"); and

(d) an action commenced in January 2006 by BGA against (i) the County, (ii) Albert Spada, as County Clerk, and (iii) Lewis C. Kirschner, as County Treasurer, in the United States District Court for the Northern District of New York, Case No. 06-CV-0095 (the "BGA Action") seeking monetary damages for breach of contract, injunction and declaratory relief; and

WHEREAS, BGA is a secured party and assignee with respect to various rights of Western by virtue of a Security Agreement dated as of September 30, 2004 between BGA and Western; and

WHEREAS, Wachovia Bank holds title to the Property as Trustee for Western; and

WHEREAS, the County contends that there is currently unpaid real property taxes on the Property in the amount of \$383,718.17 through tax year 2006 (including state, town and county tax through December 31, 2006 and school taxes through June 30, 2006), plus additional interest accrued since the Parties executed the Escrow Agreement (defined below); and

WHEREAS, BGA and Western contend that no taxes are owed on the Property because, *inter alia*, (a) Western is a sovereign Indian Nation and the Property is "Indian Country;" (b) the Property is exempt from taxation; (c) the County had no right to tax the Property; and (d) the County previously agreed in writing that the Property would be held as "Indian Country" and that the County would not tax the Property, all of which claims are disputed by the County; and

WHEREAS, the Parties have been having settlement discussions with the goal of entering into a global settlement agreement to compromise and settle various disputes pending between the County and BGA and between the County and Western, in order to reduce the costs and uncertainties of litigation; and

WHEREAS, the Parties entered into an Escrow Agreement as of March 23, 2006 (the "Escrow Agreement"); and

WHEREAS, in accordance with the Escrow Agreement, BGA deposited with the County Treasurer as Escrow Agent the sum of \$383,718.17 (the "Escrow Fund"), representing all amounts which would be owed on the Property for general State, County and Town real property taxes through December 31, 2006 and Ellenville Central School taxes through June 30, 2006 in the absence of the Property being exempt from real estate taxes; and

WHEREAS, in accordance with the Escrow Agreement, BGA paid to the County the sum of \$52,000, representing legal fees which the County has paid to outside counsel in connection with the EDNY Adversary Proceeding and the NDNY Adversary Proceeding; and

WHEREAS, the Parties have agreed on the terms of a global settlement to resolve various disputes pending between the County and BGA and between the County and Western, which terms are set forth herein.

NOW, THEREFORE, the Parties do hereby agree as follows:

1. Upon execution of this Settlement Agreement by all of the Parties:

(a) the Escrow Agent shall release the Escrow Fund to the County;

(b) the County agrees to treat the Foreclosure Judgment as being of no force or effect and as void *ab initio*, and the County agrees not to construe the

Foreclosure Judgment as having caused any break or interruption in Western's trustee's legal title to the Property or in Western's beneficial interest in the Property; and

(c) the County agrees that it shall be deemed to have irrevocably waived and released any and all claims and rights to the Property which it may have as a result of the Foreclosure Action and/or the Foreclosure Judgment.

2. Western and/or BGA may request vacatur of the Foreclosure Judgment, nunc pro tunc, and deletion of any official record of the foreclosure on the Property. By executing this Settlement Agreement, the County gives its consent to such requests. The Parties agree that the failure to obtain any such relief will not in any way impair any other terms of this Settlement Agreement or any of the Parties' rights or obligations hereunder.

3. Within twenty (20) days after execution of this Settlement Agreement by all of the Parties, BGA and Western shall serve and file an Amended Complaint in the BGA Action in the form annexed hereto as **Exhibit "A"**.

4. With respect to the BGA Action::

(a) The County agrees that the Amended Complaint may add Western as a party plaintiff.

(b) BGA agrees that the Amended Complaint shall drop Albert Spada and Lewis C. Kirschner as defendants;

(c) BGA agrees that it will discontinue, with prejudice, all claims by BGA for monetary damages against the County, Albert Spada and Lewis C. Kirschner; and

(d) BGA agrees that it will discontinue, with prejudice, BGA's claim for injunctive relief.

5. BGA's and Western's Amended Complaint may:

(a) extend the cause of action for declaratory relief to the real property commonly known as the Kelly/Sherry property located on State Route 209 in Ulster County immediately south of the Village of Ellenville village limits (the "Option Property"), which is described on **Exhibit "C"** hereto; and

(b) seek a declaratory judgment: (i) Declaring that the Tribe is a sovereign Indian Nation and that as such it is recognized as sovereign on a

government to government basis under the laws of the United States of America and the Tribe is not required to seek any reaffirmation of its recognized relationship with the federal government from the Department of the Interior; (ii) 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 Indian Country by the Federal Government or have been held to be such by the Federal Courts of this District; (iii) Declaring that the Property is Indian Country which is exempt from taxation and exempt from foreclosure; (iv) Declaring that the Property qualifies as "Indian lands" under the laws of the State of New York and decisions of the Federal Courts; (v) Declaring that the Option Property will be Indian Country which is exempt from taxation and exempt from foreclosure when conveyed to the Tribe or its trustee; (vi) Declaring that the Option Property will qualify as "Indian lands" under the laws of the State of New York and decisions of the Federal Courts when conveyed to the Tribe or its trustee; and (vii) 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.

Deleted: ; and (viii) Declaring that the Resolution and the County's obligations under the Agreement are valid obligations of the County to which the County is legally bound and that failure to perform the same is a breach of contract by the County for which, for years after 2006, it may be held liable to Plaintiffs for monetary damages.

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.

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.

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.

9. Within twenty days after the County serves an answer to the Amended Complaint in accordance with the terms of this Settlement Agreement, Western and BGA shall discontinue the appeals in the Foreclosure Action and the NDNY Adversary Proceeding, with prejudice.

10. Western and/or BGA may request that the U.S. District Court place the appeal in the EDNY Adversary Proceeding on its suspended calendar. By executing this Settlement Agreement, the County gives its consent to such request.

11. BGA and Western agree that nothing contained in this Settlement Agreement shall inhibit the right of the Tax Assessor of the Town of Wawarsing to make such assessments with respect to the Property and/or the Option Property as authorized by law. BGA and Western reserve the right to challenge and raise any defenses to any assessment with respect to the Property and/or the Option Property which has been or may hereafter be made by the Assessor.

12. In the event of default by any Party under this Settlement Agreement, the non-defaulting Party shall serve upon the defaulting Party a Notice of Default. The defaulting Party shall have five (5) business days after receipt of the Notice in order to cure the default.

13. Notwithstanding anything contained herein to the contrary, if the County breaches this Settlement Agreement, BGA will have the right to reinstate its causes of action against the County for monetary damages and injunctive relief.

14. Notices. All notices, requests and other communications under this Escrow Agreement shall be in writing and shall be deemed to have been duly given if sent by hand-delivery, by facsimile followed by first-class mail, by nationally recognized overnight courier service or by prepaid registered or certified mail, return receipt requested, to the addresses set forth below:

If to BGA:

BGA, LLC
c/o Bernard Wiczer, Esq.
Wiczer and Zelmar, LLC
500 Skokie Blvd. - #350
Northbrook, IL 60062-2856

With Copy to Todtman, Nachamie, Spizz & Johns, P.C.:

Barton Nachamie, Esq.
Todtman, Nachamie, Spizz & Johns, P.C.
425 Park Avenue, 5th Floor
New York, NY 10022
Fax: 212-754-6262

With Copy to Kalter, Kaplan & Ziegler:

Jeffrey Kaplan, Esq.
Kalter, Kaplan & Ziegler
P.O. Box 186
Ellenville, NY 12428
Fax: 845-436-8156

If to Western:

Robert Parker, CEO
The Western Mohegan Tribe and
Nation of the State of New York
P.O. Box 309
Greenfield Park, NY 12435

With a Copy to Todtman, Nachamie, Spizz & Johns, P.C.:

Barton Nachamie, Esq.
Todtman, Nachamie, Spizz & Johns, P.C.
425 Park Avenue, 5th Floor
New York, NY 10022
Fax: 212-754-6262

With Copy to Kalter, Kaplan & Ziegler:

Jeffrey Kaplan, Esq.
Kalter, Kaplan & Ziegler
P.O. Box 186
Ellenville, NY 12428

If to the County:

Joshua Koplovitz, Esq.
Ulster County Attorney
County Office Building
244 Fair Street
P.O. Box 1800
Kingston, NY 12401-0906
Fax: 845-340-3691

With a Copy to Walter, Thayer & Mishler, P.C.

Lanny Walter, Esq.

Walter, Thayer & Mishler, P.C.
765 Madison Avenue
Albany, NY 11208
Fax: 518-432-7325

15. Miscellaneous.

15.1. Jurisdiction. Any action or proceeding seeking to enforce any provision of, or based on any right or obligation arising out of, this Settlement Agreement shall be brought against any of the Parties in the United States District Court for the Northern District of New York, where the BGA Action is pending, or, if such Court refuses to exercise jurisdiction over this Settlement Agreement, in the courts of the State of New York, County of Ulster, and each of the Parties hereby irrevocably consents to the exclusive jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue or inconvenient forum laid therein. Process in any such action or proceeding may be served anywhere in the world.

15.2. Entire Agreement. This Settlement Agreement contains the entire agreement and understanding between the parties hereto and may not be terminated or modified except by a written instrument signed by the parties hereto. However, nothing in this Settlement Agreement limits or shall be construed to limit any right of any Party under the Escrow Agreement.

15.3. Facsimile Copies. This Settlement Agreement may be executed and accepted by signed facsimile copies which shall be deemed originals.

IN WITNESS WHEREOF, the parties have duly executed this Settlement Agreement as of the date first set forth above.

BGA, LLC

ULSTER COUNTY

By: _____
Bernard Wiczer

By:  _____
Joshua Koplovitz, 5/15/06
Ulster County Attorney

THE WESTERN MOHEGAN TRIBE
AND NATION OF THE STATE

NY-105-2006 10-10

WALTER W. APPLAND, DELEGATE

545 547 5222

8.03

OF NEW YORK

By



Robert Parker, CEO

Dated: New York, New York
January __, 2007

TODTMAN, NACHAMIE, SPIZZ
& JOHNS, P.C.
Attorneys for Plaintiffs

By: _____
Jill L. Makower (JM-4842)
425 Park Avenue
New York, NY 10022
(212) 754-9400

Dated: Kingston, New York
January 26, 2007

WALTER, THAYER & MISHLER, P.C.
Attorneys for Defendant

By: 
Lanny E. Walter (LW - _____)
756 Madison Avenue
Albany, NY 12208
(518) 462-6753

Dated: Washington, D.C.
January __, 2007

For the UNITED STATES:

R. Justin Smith
Amber Blaha (AB-7798)
Law & Policy Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 4390, Ben Franklin Station
Washington, DC 20044-4390
202-616-5515
202-514-4231 (fax)
amber.blaha@usdoj.gov

William H. Pease
Assistant U.S. Attorney
Chief, Civil Division
U.S. Attorney's Office
100 S. Clinton Street
Syracuse, NY 13261

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AFFIDAVIT OF SERVICE BY MAIL

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

**BGA, LLC and THE WESTERN MOHEGAN
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Index. No. 06-CV-0095

**ULSTER COUNTY, NEW YORK,
a municipal corporation of the State of
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Defendant

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

GRACE S. PURCELL, being duly sworn, deposes and says:

1. That I am over eighteen years of age.
2. That on the 26th day of February, 2007, I served the following attorney(s)

Jill L. Makower, Esq.
Todtman, Nachamie, Spizz & Johns, P.C.
425 Park Avenue
New York, NY 10022

William H. Pease, Assistant U.S. Attorney
Chief of Civil Division
U. S. Attorney's Office
100 S. Clinton Street
Syracuse, NY 13261


R. Justin Smith
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 4390
Ben Franklin Station
Washington, D.C. 20044-4390

a true copy of **ATTORNEY'S AFFIRMATION**, by depositing a true and correct copy of the same properly enclosed in a post paid envelope, in the Official Depository maintained and exclusively controlled by the United States Post Office, directed to said attorney(s), at said address, mentioned above, that being the address(es) within the state designated for that purpose upon the last papers served in this action or the place where the above then resided or kept offices, according to the best information which can be conveniently obtained.



GRACE S. PURCELL

Sworn to before me this
26th day of February, 2007



Notary Public

LANNY E. WALTER
Notary Public, State of New York
No. 02WA4147310
Qualified in Ulster County
Commission Expires July 31, 20 09