IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BGA, LLC and THE WESTERN MOHEGAN TRIBE AND NATION OF THE STATE OF NEW YORK, Plaintiffs, v. ULSTER COUNTY, NEW YORK, Defendant.	Case No. 06-CV-0095 (GLS) (RFT)

AMICUS CURIAE BRIEF OF THE UNITED STATES OF AMERICA

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This brief is respectfully submitted on behalf of the United States of America to inform the Court of its interests that are implicated in Plaintiffs' First Amended Complaint for Declaratory Judgment. At its heart, this appears to be a contract dispute between Plaintiffs BGA, LLC and the non-federally recognized Western Mohegan Tribe and Nation of the State of New York ("the Western Mohegan group"), and Defendant Ulster County, turning on whether Ulster County agreed to accept payments in lieu of taxes for the Western Mohegan group's properties. The United States' interests are not implicated by a resolution of these claims within the four corners of the agreement between Plaintiffs and Defendant. Plaintiffs, however, seek broad declarations that implicate federal administrative procedures concerning groups pursuing federal recognition as Indian tribes. The Western Mohegan group seeks a declaration that it is a "sovereign Indian Nation" that is "recognized on a government to government basis under the laws of the United States of America." Compl. ¶ 69. The group seeks a ruling from this Court that it is not required to "seek any re-affirmation of its recognized relationship with the federal government from the Department of the Interior." And the group asks this Court to make rulings with potentially broad implications regarding the land held by the group, including declarations that the land is "Indian Country" and "Indian lands" and that it is "exempt from taxation." *Id.* ¶ 69; *see also* Plaintiffs' Motion for Summary Judgment. These requests implicate, among other things, federal civil and criminal jurisdiction.

Notably, while the requested relief clearly implicates the interests of the federal (and state) government, the Plaintiffs do not sue the United States and have already invoked the primary jurisdiction of the Department of the Interior ("Department") by previously filing a petition for recognition as an Indian tribe with it, which will be evaluated pursuant to the agency's regulations at 25 C.FR. Part 83. Defendant Ulster County has apparently agreed not to

dispute the Western Mohegan group's allegations regarding its history or purported tribal status. Answer ¶ 2.

In light of this unusual situation, the United States files this *amicus curiae* brief to notify the Court of the significant potential implications of granting Plaintiffs' requested relief and to inform the Court of the substantial case law that holds that tribal status determinations should not be made by the federal courts in the first instance. The remedies Plaintiffs seek either directly address, or are closely related to the decision to federally recognize an Indian group as an Indian tribe with a government-to-government relationship with the United States. This is a political question, entrusted to the Congress and the Executive branch. Moreover, determining whether a group should be recognized as an Indian tribe is a complicated and fact-intensive process that is not well-suited for a court to undertake - all the more so in this case, where it is not clear that the Defendants are mounting any defense to Plaintiff's claims of tribal status.

To the extent that the Plaintiffs present any justiciable dispute regarding the county tax status of the Western Mohegan group's property, the Court should decide this dispute on the basis of the specific agreements cited by the parties. It need not wade into fact-based political determinations regarding the status of the Western Mohegan group as an Indian tribe under federal law, or impinge upon other functions more properly vested in the Executive branch.

STATUTORY AND REGULATORY BACKGROUND

A. Significance and Attributes of Federal Recognition as an Indian Tribe

Plaintiffs request this Court to declare that the Western Mohegan group is a federally recognized Indian tribe, a decision of enormous and enduring importance. Federal recognition establishes a government-to-government relationship between the group and the United States. Thus, an Indian tribe "does not exist as a legal entity unless the Federal Government decides that

it exists." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004), *cert. den.* 545 U.S. 1114 (2005). Non-federally recognized groups claiming status as tribes "do not enjoy the same status, rights and privileges accorded federally recognized tribes." *Id.* n.1; *see also* 25 C.F.R. § 83.2.

A federally recognized tribe has sovereign authority independent of the state in which it is located and independent of the United States, although it remains a domestic dependent nation. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Consequently, a tribe has sovereign immunity and may exercise jurisdiction over its territory and establish tribal courts, administer funds under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, exercise treaty hunting and fishing rights, obtain federal benefits, and exercise sovereign authority except as limited by federal law. Federally recognized tribes may be eligible to establish gaming facilities under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21.

A federally recognized Indian tribe is a political, not a racial classification. *Rice v. Cayetano*, 528 U.S. 495, 519-22 (2000); *United States v. Antelope*, 430 U.S. 641, 645-46 (1977). Thus, a collection of persons of Indian ancestry, or even ancestral commonality, does not constitute a tribe unless they and their ancestors are part of a continuously existing political entity. 25 C.F.R. § 83.3(a), (c); *Miami Nation of Indians of Indiana v. Babbitt*, 112 F. Supp. 2d 742, 746 (N.D. Ind. 2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001).

The lands of federally recognized tribes may become part of the tribe's reservation, and are then under federal jurisdiction, and are generally not subject to taxation by the state. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Lands that are within a federally recognized Indian tribe's reservation are considered "Indian Country," which is defined by statute as: "(a) land within the limits of an Indian reservation under the jurisdiction of the United

States Government…, (b) all dependent Indian communities within the borders of the United States. . ., and (c) all Indian allotments, the Indian titles to which have not been extinguished…." 18 U.S.C. § 1151.

B. The Department's Acknowledgment Process

Congress has delegated to the Executive branch the "management of all Indian affairs and of all matters arising out of Indian relations." *See* 25 U.S.C. § 2; *see also* 25 U.S.C. § 9. This includes the power of recognition of Indian tribes. *Miami Nation of Indians, Inc. v. Department of the Interior*, 255 F.3d 342, 345 (7th Cir. 2001). Historically, the Department decided tribal status on an *ad hoc* basis. In 1978, however, the Department established a uniform regulatory process for the review and approval of petitions for acknowledgment of Indian tribes. 34 Fed. Reg. 39,361 (1978). The regulations establish uniform standards and procedures for "acknowledging that certain American Indian groups exist as tribes." 25 C.F.R. § 83.2. Under the Department's regulations, acknowledgment is granted to Indian groups that can establish a "substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 C.F.R. § 83.3(a).

The regulations require Indian groups to apply for acknowledgment by filing a "documented petition" that must provide "thorough explanations and supporting documentation" demonstrating the petitioner meets the seven mandatory criteria set forth in the regulations. *See* 25 C.F.R. §§ 83.6(c) & 83.7. The burden of proof is on the petitioning group to submit evidence that establishes each of the seven criteria, which are that (a) the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900; (b) a predominant portion of the petitioning group comprises a distinct community from historical times until the present; (c) the petitioner has maintained tribal political influence or other authority over its

members as an autonomous entity throughout history; (d) the group has a governing document; (e) the group's membership descends from a historical Indian tribe or from historical tribes which combined and functioned as a single autonomous entity; (f) the membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe; and (g) Congress has not expressly terminated or forbidden a Federal relationship with the group. *See* 25 C.F.R. § 83.7(a)-(g).

Petitions for acknowledgment are processed by the Office of Federal Acknowledgment ("OFA"), which is in the office of the Assistant Secretary – Indian Affairs ("AS-IA") of the Department. Prior to active consideration of the petition, an OFA expert team made up of an anthropologist, historian and genealogist conducts a "preliminary review for the purposes of technical assistance," regarding additional research needed to support the petitioner's claims. 25 C.F.R. § 83.10(b). Interested parties, such as the relevant state governors and attorneys general, are provided notice of the petition and the opportunity to become active participants in the process, along with other third parties that might be affected by an acknowledgment determination. *See* 25 C.F.R. §§ 83.1, 83.9. Once the OFA determines that the documentation in the petition is adequate to permit a full review, the petition is placed on the "Ready, Waiting for Active Consideration" list ("Ready list"). The acknowledgment regulations specify that "[t]he order of consideration of documented petitions shall be determined by the date of the Bureau's notification to the petitioner that it considers that the documented petition is ready to be placed on active consideration." *See* 25 C.F.R. § 83.10(d).

The actual evaluation of the petition and its evidence under the regulatory criteria by the agency professional staff occurs during "active consideration." During active consideration, an expert team representing the three disciplines prepares a recommendation to the AS-IA who

issues a proposed finding. *See id.* at § 83.10(h). The proposed finding is a preliminary decision as to whether the petitioning group meets the regulatory criteria based on the documentation before the agency at the time. After issuance of notice in the Federal Register of the proposed finding, there is a public comment period of 180 days, with extensions granted for good cause. *See* 25 C.F.R. § 83.10(i), (j). Following the close of the public comment period, the petitioner has a reply period, during which it responds to comments submitted during the public comment period. *See* 25 C.F.R. § 83.10(k).

Following consultation, 25 C.F.R. § 83.10(l), the OFA professional staff evaluates anew the evidence in the record, prepares a summary of the evidence under the regulatory criteria and recommends to the AS-IA whether the petitioner meets the criteria. The AS-IA then issues a final determination on the status of the petitioner. *See* 25 C.F.R. § 83.10(l)(2). A request for reconsideration may be filed with the Interior Board of Indian Appeals ("IBIA") within 90 days of the final determination and the IBIA may affirm, vacate, or refer issues to the Secretary of the Interior for further response or evaluation. *See* 25 C.F.R. § 83.11(a)(2). Once the determination becomes final agency action, it may then be challenged in federal court under the Administrative Procedure Act ("APA"). *See Miami Nation*, 255 F.3d at 348.

The Assistant Secretary's final decision to acknowledge a group under the regulations establishes a government-to-government relationship with the United States, with all accompanying privileges and immunities. 25 C.F.R. § 83.12(a). The tribe is put on the list of federally recognized tribes, and is considered eligible for federal services and benefits that are available to other federally recognized tribes. 25 C.F.R. § 83.12(a).

FACTUAL BACKGROUND

A. The Western Mohegan Group's Submissions to the Department

Plaintiff the Western Mohegan Tribe and Nation of New York is not on the list of federally recognized tribes. *See* 70 Fed. Reg. 71,194 (Nov. 25, 2005). On or about September 9, 1997, the Western Mohegan group submitted a documented petition for federal acknowledgment as an Indian tribe to the Department. (Ex. A.) The Western Mohegan group explicitly stated that this is "the group's official documented petition under 25 C.F.R. § 83.6." (Ex. B.) In accordance with its regulations, the Department conducted a technical assistance ("TA") review of the Western Mohegan petition. 25 C.F.R. § 83.10(b), (c). The TA letter sent to the Western Mohegan group identified numerous deficiencies in the group's petition. (Ex. C.) Specifically, the Department noted that the group had not submitted adequate genealogies and documentation for its membership: "We cannot determine from your submission who the ancestors of a majority of your members were, and we find that the ancestors known are not Indians." (Ex. C at 2.) The Department also indicated that the petition failed to show that the members of the group had interacted with each other on a continuous basis as a tribe in the years from 1850 through the present. (Ex. C at 3.)

On its initial review, the Department "found that several crucial submitted documents contain alterations from the originals that tend to show a pattern supporting your position, and the interpretation of some of the evidence is insupportable." (Ex. C at 3.) For instance, the Department found that the copy of the 1845 Census of New York submitted by the Western Mohegan group had significant alterations and additions compared with the original 1845 Census document. (Ex. C at 4-7.) If accurate, the alterations would have supported the Western Mohegan's case for acknowledgment, such as by adding a purported Western Mohegan ancestor

to a list of Indian household heads. The Department also noted that a death certificate for a claimed Western Mohegan ancestor was altered to indicate that the individual's race was "Indian;" the original death certificate indicates the individual's race as "White." (Ex. C at 7.) The Department also identified other deficiencies and inconsistencies with the group's petition. (Ex. C at 8-20.) The Department offered to provide the group with additional technical assistance, and explained the process for submitting additional information to the Department. (Ex. C at 20.)

The Western Mohegan group has not submitted any additional materials in response to the September 24, 1998 TA letter. In its Memorandum of Law in Support of Motion for Summary Judgment ("Mem."), the Western Mohegan group asserts that "no petition for recognition was ever filed by the Tribe and the Tribe is not seeking recognition by the BIA." Mem. at 11. However, the above documentation and correspondence show otherwise.

On March 28, 2002, the United States charged Ronald Roberts, the leader of the Western Mohegan group and the author of the primary factual affidavit submitted in support of Plaintiffs' summary judgment motion, with eight criminal counts relating to making false statements or submitting false documents in a bankruptcy proceeding and in a submission to the Department. *See United States v. Roberts*, No. 1:02-CR-00111 (LEK) (N.D.N.Y). On February 6, 2004, at the end of the second week of a jury trial, Mr. Roberts entered pleas of guilty to making and using, and causing to be made and used materially false documents in a matter within the jurisdiction of the Executive branch of the United States, by presenting to the President and the Secretary of the Interior "A 1st Amendment Petition for a Redress of Grievances From the Western Mohegan Tribe & Nation of New York," knowing the same to contain false and

fictitious documents, in violation of 18 U.S.C. § 1001(a)(3).[1] (Ex. D at 1.) Mr. Roberts also pled guilty to a charge of making a false declaration as to his social security number under penalty of perjury in a bankruptcy proceeding. (*Id.*) Mr. Roberts was sentenced to two five-year terms of probation to be served concurrently, six months of home detention, and over $28,000 in fines and restitution. (Ex. E at entry 104.)

B. Plaintiffs' Allegations Regarding This Suit

According to Plaintiffs' Complaint, in December 2000, Ulster County passed a resolution to convey the County's interest in the Tamarack Hotel property to the "Western Mohegan Tribe and Nation or such trustee designated by it to hold said property for the benefit of the tribe as 'Indian Country' for the sum of $900,000." Am. Compl. ¶ 23 & Ex. A. The Resolution states that the Western Mohegan group "will agree to pay $25,000 per year in lieu of taxes or 5% of any net revenue derived by any use or activities upon such property, whichever is greater, to a maximum of $250,000 per year." Am. Compl. ¶ 27 & Ex. A. According to Plaintiffs, the Western Mohegan group and the County subsequently entered into an Agreement and Mutual Release of claims, and Plaintiffs paid the County for the property as agreed. Am. Compl. ¶¶ 30, 37. Plaintiffs also apparently purchased a nearby property, and have conducted "environmental impact studies in order to develop an Indian gaming casino." Am. Compl. ¶¶ 39-40.

Plaintiffs assert that they attempted to pay the first $25,000 payment "in lieu of taxes" to the County, but that the County refused to accept this payment and instead demanded that "all regular taxes on the Property be paid." Am. Compl. ¶ 42. The County brought a foreclosure

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[1] The testimony at this trial included evidence that false documents, including a false death certificate, were submitted to the Department by Mr. Roberts on behalf of the Western Mohegan group. (Ex. D at 11-14.) The evidence also indicated that in May 1996 Mr. Roberts had submitted a formal application for membership in the Mashantucket Pequot tribe (a federally-recognized tribe) using the falsified death certificate. (Ex. D. at 18-19.)

action in the County Court of Ulster for foreclosure on its tax lien, and obtained a final judgment of foreclosure as to the Property on or about September 30, 2005. Am. Compl. ¶¶ 43-44. On March 23, 2006, BGA, the Western Mohegan group, and the County entered into an Escrow Agreement to forestall foreclosure on the Property. Am. Compl. ¶ 11.

In their Complaint and Motion for Summary Judgment, Plaintiffs do not ask the Court to directly address the contract dispute set forth in their Complaint. While their Complaint asserts that the foreclosure action "will divest title to an Indian tribe's land without Congressional approval, in violation of the Nonintercourse Act, 25 U.S.C. § 177," Plaintiffs do not seek an order prohibiting the foreclosure action. Rather, they ask this Court to make broad declarations regarding the Western Mohegan's status as an Indian tribe, as well as the status of the group's lands, and its status for purposes of federal and state taxation. Mem. at 27-32, 43-44. Ulster County has agreed to not contest Plaintiffs' factual assertions regarding its tribal status. *See* Settlement Agreement at 4, attached to May 24, 2006 Letter from Jill Makower to Robyn Hoffman (Docket Entry 9).

ARGUMENT

While the Western Mohegan group does not use the term "federal recognition," this appears to be what it seeks. It requests that the Court declare that it is "sovereign on a government to government basis under the laws of the United States of America," and that the group is "not required to seek any re-affirmation of its recognized relationship with the federal government from the Department of the Interior," the agency charged with making federal acknowledgment decisions. The Western Mohegan group also seeks a series of declarations regarding the status of its land holdings, which are entangled with the determination of the group's tribal status. As described below, the determination of whether the United States should

recognize a government-to-government relationship with the Western Mohegan group is a nonjusticiable political question.

The United States is not in a position to express an opinion as to whether, if the Western Mohegan group completed the Department's established federal acknowledgment process, the group would receive a positive or a negative determination regarding its federal tribal status. However, the Western Mohegan group improperly asserts that the United States has implicitly or explicitly recognized the group as an Indian tribe under federal law. The Western Mohegan group is not on the list of federally recognized tribes – the definitive statement of which tribes are recognized by the federal government. And the recent correspondence and other incidental contacts between United States officials and the Western Mohegan group cited by Plaintiffs do not support a claim of federal recognition of tribal status.

In light of the complex and inherently political issues raised by Plaintiffs' requested relief, this Court should exercise its substantial discretion under the Declaratory Judgment Act and decline to grant the relief requested in Plaintiffs' Motion for Summary Judgment. To the extent that the Plaintiffs present any valid dispute for resolution by this Court, it should be decided based on the parties' agreements or other narrow grounds, not through potentially far-reaching determinations regarding federal tribal status.

I. FEDERAL RECOGNITION OF AN INDIAN TRIBE MAY ONLY BE CONFERRED BY THE POLITICAL BRANCHES OF THE GOVERNMENT

A. Tribal Status Is a Nonjusticiable Political Question

The determination of whether a group will be recognized as an Indian tribe by the federal government on a sovereign-to-sovereign basis is a quintessentially nonjusticiable political question. The political question doctrine "identifies a class of questions that either are not

amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to weigh" or "have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative – the so-called political – branches of the federal government." *Miami Nation*, 255 F.3d at 347. When a political question is "inextricable from the case at bar," dismissal is warranted. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Federal determination of tribal status has long been regarded a political question inappropriate for judicial decision. *E.g. United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("[T]he questions whether, and to what extent, and for what time they [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.").[2] In the seminal Supreme Court case addressing the contours of the political question doctrine, the Court specifically characterized judicial deference to tribal recognition decisions by the political branches of the government as "reflect[ing] familiar attributes of political questions." *Baker v. Carr*, 369 U.S. 186, 215 (1962).[3]

The political question doctrine applies where it would be difficult to gather and assess, by the methods of litigation, the facts relevant to such a decision, or difficult to formulate a legal

2 *See also United States v. Rickert*, 188 U.S. 432, 445 (1903) ("It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine."); *United States v. Holliday*, 708 U.S. [3 Wall] 407, 419 (1865) ("[I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.").

3 *See also Miami Nation*, 255 F.3d at 347-48 ("[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review."); *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition.").

construct to govern the decision. *Miami*, 255 F.3d at 347. With respect to tribal recognition decisions, the courts have "no judicially discoverable or manageable criteria by which to afford federal recognition." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1372 (Fed. Cir. 2005). This concern is especially acute here, where it appears that the Defendant is not actively contesting the Western Mohegan group's assertion of tribal status. Also, the determination of whether a group constitutes an Indian tribe under federal law is enormously detailed and turns on specialized expertise. *See* 25 C.F.R. Part 83. This determination is not well-suited to resolution in court.

Furthermore, the decision to establish a government-to-government relationship with a group of Indians implicates the Constitutional powers of Congress and the Executive branches. The Indian Commerce Clause, Article I, Section 8, Clause 3, expressly grants Congress the authority to "regulate Commerce with ... the Indian tribes," and the "existence of federal power to regulate and protect the Indians and their property" is implicit in the structure of the Constitution. *Board of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 715 (1943). Congress' plenary power in this area necessarily encompasses broad authority to identify the Indian groups that will be accorded a government-to-government relationship with the United States. *See Kahawaiolaa*, 386 F.3d at 1276. Congress has in turn delegated to the Executive Branch broad authority to manage and regulate Indian affairs, including the authority to recognize Indian tribes. 25 U.S.C. § 2. Thus, "[t]he treaty power and the Congressional power to regulate commerce with Indian tribes are plainly matters textually committed, by the constitution, to the political branches." *Samish*, 419 F.3d at 1372. *See also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) (A court declaration placing an unrecognized group on the list of federally recognized tribes would "frustrate Congress' intent that recognized status be determined

through the administrative process."). Thus, under this well-settled law, the determination of whether to recognize a group as an Indian tribe is a question committed to the political branches, not to the courts.[4]

B. The *Golden Hill* Decision Is Consistent with the Rule of Nonjusticiability of Tribal Recognition Decisions

Plaintiffs assert that it is "settled law in this Circuit that federal recognition of tribal status may be given by a Federal court, and does not need to be established though the BIA." Mem. at 9. This statement does not accurately characterize governing Circuit law. The primary case relied on by Plaintiffs, *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51 (2d Cir. 1994), was a suit brought by a non-federally recognized group pursuant to the Nonintercourse Act, a statute originally enacted in 1790 which prohibits the alienation of the lands of any "Indian nation or tribe of Indians" without federal consent. The Second Circuit held that the plaintiff was not required to exhaust administrative remedies because the Bureau of Indian Affairs ("BIA"), a bureau within the Department, lacked the authority to determine plaintiff's land claim. However, the Court nonetheless declined to decide whether the plaintiff was an Indian tribe for the purposes of the Nonintercourse Act and instead stayed the action in order to allow the Department to rule on the Golden Hill group's petition. *Id.* at 59-60.

Golden Hill does not establish any rule allowing the courts of this Circuit to decide federal tribal status. The only question before the Second Circuit was "whether plaintiff, as a group of American Indians seeking to invoke the Nonintercourse Act in federal court, must first complete acknowledgment proceedings before the BIA." *Id.* at 57. While the Plaintiffs invoke the

4 The political question doctrine does not remove all judicial involvement from the tribal recognition process, as a final decision by the Department on a group's petition for acknowledgment is reviewable under the Administrative Procedure Act. *Miami Nation*, 255 F.3d at 347-48.

Nonintercourse Act in passing, they are not seeking a declaration under that Act that a particular land transfer is invalid because it was not approved by the United States.[5] Instead, Plaintiffs seek broad declarations that they have a sovereign-to-sovereign relationship with the United States and are entitled to accompanying benefits and privileges under federal and state law. Mem. at 43-44. The *Golden Hill* court expressly distinguished these two inquiries: "tribal status for the purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." 39 F.3d at 57. Thus, nothing in the *Golden Hill* decision suggests that federal courts can or should make determinations regarding the federal status of putative Indian tribes, only that they *may* address tribal status for the limited purposes of deciding claims properly brought under the Nonintercourse Act.

Moreover, *Golden Hill* demonstrates that, even in the limited context of a properly stated Nonintercourse Act claim, federal courts are not eager to address the complicated and fact-intensive issues of tribal status. In *Golden Hill*, the Second Circuit allowed the Executive branch to first make the determination of whether that group constitutes a tribe for the purposes of federal recognition, applying the doctrine of primary jurisdiction. This doctrine applies "where a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body." *Id.* at 58-59. The *Golden Hill* court found

5 If the Western Mohegan group was bringing a Nonintercourse Act claim, it would have to establish that: (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. *Golden Hill*, 39 F.3d at 56. It has not made such a showing here. *Cf. Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938 (N.D.N.Y. 1987). However, even if the Western Mohegan group could properly bring a Nonintercourse Act claim, the only proper relief would be to declare a challenged land transfer to be invalid – not broad pronouncements regarding the group's tribal or tax status.

that "the creation in 1978 of the acknowledgment process currently set forth in 25 C.F.R. Part 83 – a comprehensive set of regulations, the BIA's experience and expertise in implementing these regulations, and the flexibility of the procedures weigh heavily in favor of a court's giving deference to the BIA." *Id.* at 60. In fact, after the Department issued a Final Determination rejecting the Golden Hill group's petition for recognition, the district court applied the doctrines of primary jurisdiction and collateral estoppel to the Department's findings, and held that the Golden Hill group could not state a claim under the Nonintercourse Act. *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192 (D. Conn. 2006). Thus, the application of the primary jurisdiction doctrine conserved judicial resources and avoided duplicative or contradictory decisions.

Here, while the primary jurisdiction doctrine does not directly apply because the Western Mohegan group's request for recognition as a sovereign Indian tribe is a political question *not* cognizable in this court, these same factors would weigh in favor of deference to the agency process here. *See also United Tribe of Shawnee Indians*, 253 F.3d at 551 ("Determining whether a group of Indians exists as a tribe is a matter requiring [] specialized agency expertise…."); *see also Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938, 943 (N.D.N.Y 1987) (assigning "great weight" to the federal government's determination of tribal status in deciding Nonintercourse Act claims). Thus, even assuming that the Western Mohegan group properly brought a Nonintercourse Act claim, this Court should defer to the Departments' administrative recognition process.

The Western Mohegan group has suggested that the *Golden Hill* case is distinguishable because the plaintiff in that case had a petition for acknowledgment pending before the Department, whereas the Western Mohegan group asserts that they have never filed a petition for

recognition with the Department. *See* Mem. at 11. As an initial matter, this statement is belied by the correspondence sent by the Western Mohegan group to the Department, as well as by the testimony and guilty plea submitted in Mr. Robert's criminal case. (Exs. A-E.) However, any dispute on this point is irrelevant, as *Golden Hill* does not govern this case. Furthermore, the *Golden Hill* court expressly did not reach the issue of whether "deference would be appropriate if no recognition application were pending." 39 F.3d at 60.

The other case relied on by Plaintiffs is *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486 (E.D.N.Y. 2005), an interlocutory determination denying cross-motions for summary judgment. In that case, the State of New York sought to enjoin the Shinnecock Indian Nation – a group recognized by the State of New York as an Indian tribe, but not by the United States – from taking steps to build a gambling facility allegedly in violation of New York State law. In its decision denying the motions, the district court determined that New York treated the Shinnecock group as an Indian tribe "in 1792 when New York State enacted a law confirming that fact and that they remain an Indian Tribe today." *Id.* at 491. The Court also concluded that the group satisfied "a federal common law standard for determining tribal existence." *Id.* at 492. That decision, however, does not establish a government-to-government relationship between the Shinnecock group and the United States, nor does it purport to overturn the substantial case law holding that only the political branches can establish such a relationship. This non-final district court decision provides no authority for Plaintiffs' requested relief.

Plaintiffs also refer to a handful of other decisions in which federal courts have addressed issues of tribal status. While courts have addressed tribal status issues at times, they have approached these issues differently after the Department established regulations for the review and approval of petitions for acknowledgment of Indian tribes. As the Tenth Circuit explained,

"the limited circumstances under which *ad hoc* determinations of recognition were appropriate have been eclipsed by federal regulation." *Western Shoshone Bus. Council*, 1 F.3d at 1056; *see also James v. Department of Health and Human Serv.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987).

Under any circumstances, to the extent that courts have occasionally discussed tribal status in interpreting the application of a particular federal law or treaty, these decisions do not establish or prohibit a political relationship (as the Western Mohegan group requests). *E.g. Montoya v. United States*, 180 U.S. 261 (1901) (concerning the Indian Depradation Act). For example, while the court in *Mashpee Tribe v. Town of Mashpee* determined after a forty-day jury trial that the Mashpee group was not an Indian tribe for the purposes of the Nonintercourse Act, the Department was not bound by this determination for federal acknowledgment purposes. 447 F. Supp. 940 (D. Mass. 1978), *aff'd, Mashpee v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). Indeed, the Department recently completed its review of the Mashpee petition pursuant to the acknowledgment regulations, and found that the Mashpee fully met the criteria for federal recognition as an Indian tribe. 72 Fed. Reg. 8007 (Feb. 22, 2007).

Thus, the decision of a federal court regarding tribal status in the context of the Nonintercourse Act and similar statutes does not establish a government-to-government relationship with the group. The Western Mohegan group cannot rely on these cases to support its special attempt to gain federal recognition as an Indian tribe through a mere contract dispute.

C. The List Act Does Not Authorize This Court to Make Determinations of Federal Tribal Status

Plaintiffs also suggest that the List Act supports the argument that a federal court can recognize an Indian tribe. Mem. at 9. Section 103 of the List Act includes several congressional findings, including one 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 (1994). However, the quoted portion of the List Act is part of the "findings" section of that bill, and is not part of the codified statute. *See* 25 U.S.C. § 479a-1. Findings in a statute do not have the force and effect of law, although they can provide a factual justification and reasons for congressional enactments and may be considered in interpreting the statute or determining whether Congress has acted within its authority by enacting the legislation. *See, e.g., Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 33 n.12 (1985); *United States v. Lopez*, 514 U.S. 549, 562-63 (1995). Indeed, the List Act's sponsor, Representative Richardson, in his floor comments on the Act, specifically acknowledged that the "findings are not legally binding." 140 Cong. Rec. H10488-01 (October 3, 1994).

Certainly, the Section 103(3) findings cannot be reasonably interpreted as congressional intent to create jurisdiction for a court to recognize an Indian tribe for purposes of establishing a government-to-government relationship with the United States, independent of legislative or executive action. Had Congress intended to make such a significant change in policy, it is reasonable to expect that there would be some discussion of the change in the Act's legislative history. Moreover, it is difficult to believe that Congress would have taken this action without providing any criteria for the courts to use in making tribal status determinations. However, the Act's legislative history is silent on this point. *See* H.R. Rep. No. 103-781, 1994 U.S.C.C.A.N. at 3768-3772 (Oct. 3, 1994). In fact, since the passage of the List Act, federal courts have continued to treat federal tribal status determinations as nonjusticiable political questions. *See, e.g., Samish*, 419 F.3d 1355; *Kahawaiolaa*, 386 F.3d 1271; *Miami Nation*, 255 F.3d 342.

II. THE UNITED STATES HAS NOT RECOGNIZED THE WESTERN MOHEGAN GROUP AS AN INDIAN TRIBE

The Western Mohegan group asserts that it has "been consistently treated by the Federal government as a sovereign Indian Nation." Mem. at 3. This is not accurate. The Department publishes "a list of all Indian tribes entitled to receive services from the Bureau [of Indian Affairs] by virtue of their status as Indian tribes," and the Western Mohegan group is not on this list. *See* 70 Fed. Reg. 71,194-98 (Nov. 25, 2005). This list is ordinarily dispositive evidence of whether a tribe is federally recognized. *See Cherokee Nation*, 117 F.3d at 1499 (noting that the inclusion of group of Indians on list ordinarily suffices to establish that the group is sovereign and thus is immune from suit).

Plaintiffs also point to recent correspondence and other contacts with employees and officials of the United States, and assert that they constitute "de facto" recognition. However, the claimed contacts fall far short of the evidence needed to show federal recognition of an Indian group. To show the Department that it has unambiguous previous federal recognition, a group must make a significant showing, such as by presenting evidence of treaty relations with the United States, evidence that the group has been denominated a tribe by an act of Congress or Executive Order, or evidence that the federal government has treated the group as having collective rights in tribal lands or funds.[6] 25 C.F.R. § 83.8. None of the cited contacts with the United States government rise to this level.

Indeed, most of the cited contacts, such as the Secretary of the Army noting the Western Mohegan group's nomination of the Hudson River as an "American Heritage River" in a speech, are the types of contacts that the federal government routinely has with virtually any group of

6 Even if a group can make such a showing, it must still present this evidence to the Department, which then evaluates this evidence and makes an acknowledgment determination in accordance with its regulations. *See* 25 C.F.R. § 83.8.

citizens, and do not suggest any special sovereign-to-sovereign relationship. Mem. at 23. The remaining contacts – such as the invitation to participate in a National American Indian Heritage Month celebration, or the right of entry to conduct prayers and rituals on the federally-owned portion of Houghtailing Island, are properly viewed as an attempt by certain federal officials to respond to the Western Mohegan group members' claimed Indian ethnicity – not a political recognition of tribal status. Mem. at 24; *see also* Ex. 57 to Lawson Report ("We wish to extend our appreciation for your cultural heritage…."). They do not constitute a "course of dealing with the tribe as a political entity." *Kahawaiolaa,* 386 F.3d at 1273 (citing William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed. 2004). Thus, these cited contacts do not suggest that the Western Mohegan group has been "recognized" by the United States as an Indian tribe.

III. THIS COURT SHOULD NOT REACH THE ISSUE OF THE WESTERN MOHEGAN GROUP'S STATUS AS AN INDIAN TRIBE, THE STATUS OF THE LANDS AS "INDIAN COUNTRY," OR THE TAX STATUS OF THE GROUP

In light of the political nature of the questions raised by Plaintiffs' claims, the complexity of evaluating tribal status, and the potentially significant implications of any determination regarding Plaintiffs' tribal status or lands, this Court should decline to grant Plaintiffs' requested relief. This Court has substantial discretion to decline to award declaratory relief. The language of the Declaratory Judgment Act ("DJA") makes clear that a court "*may* declare the rights and other legal relations of any interested party," but it is not required to. 28 U.S.C. § 2201(a) (emphasis added); *Wilton v. Seven Falls Company*, 515 U.S. 277, 286 (1995) (the DJA "confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants"); *Public Serv. Comm'n of Utah v. Wycoff Co.,* 344 U.S. 237, 241 (1952) (DJA "confers a discretion on the courts rather than an absolute right upon the litigant").

A plaintiff requesting declaratory relief must show that "there is a substantial controversy,

between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment. *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (citing *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The only dispute between the parties to this case appears to be the county tax status of the property; there is not a sufficient controversy, or adversity between the parties, to warrant the broad relief Plaintiffs request. The Supreme Court has cautioned that: "A maximum of caution is necessary... where a ruling is sought that would reach far beyond the particular case." *Wycoff*, 344 U.S. at 243. That is certainly true here, where granting Plaintiffs' requested relief would go far beyond the dispute between the parties and could have significant implications for local and state governments, local citizens, and the United States, among others.

The Second Circuit has developed a set of factors to guide the exercise of discretion in cases involving the Declaratory Judgment Act. These include: (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (2) whether a judgment would finalize the controversy and offer relief from uncertainty; (3) whether the declaratory judgment is being used for "procedural fencing" or a "race to res judicata;" (4) whether a declaratory judgment would increase friction between sovereign legal systems, and (5) whether a better or more effective remedy presents itself. *Dow Jones & Co., Inc. v. Harrods Ltd.*, 346 F.3d 357, 369 (2d. Cir. 2003).

Here, the first and second factors weigh in favor of denying the requested declaratory relief, or at a minimum, narrowly tailoring the Court's order to the actual dispute between the parties. Specifically, if the Court finds that such relief is appropriate, it could resolve the dispute regarding the county tax status of Plaintiffs' land by reference solely to the four corners of the parties' written agreement, and avoid making overly broad pronouncements regarding the

Western Mohegan group's status as a sovereign Indian tribe. The third and fourth factors are used where multiple court systems are involved in a dispute (as apparently is the case here) – but here it could equally apply to the need to avoid the political questions raised by determinations of tribal status and interference with the Department's existing administrative recognition process. Finally, other remedies are available to the Plaintiffs to resolve any valid dispute, such as an action to enforce any agreements between the parties or its appeal of the county court foreclosure judgment.

There are similar reasons for avoiding any determination regarding the status of Plaintiff's property as "Indian Country" or "Indian lands." Plaintiffs invoke the portion of 18 U.S.C. § 1151 which defines "Indian Country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." Mem. at 28 n.56. However, as Plaintiffs admit, their property does not meet this statutory description since it is not part of a federal Indian reservation. Nor does their property meet the other definitions of "Indian Country" found in that statute: it is not part of a "dependent Indian community," and it is not part of an Indian allotment. *See Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 (1998) ("dependent Indian community" provision requires that lands were set aside by the federal government for the use of Indians and that the lands are under federal superintendance).

Finally, this Court should not reach the issue of the status of the Western Mohegan group's lands (or the group itself) for the purposes of state and federal taxation. The only issue that may be properly before the Court is Plaintiffs' tax status for the purposes of *county* law. This case does not present a proper dispute to rule on the group's state or federal tax status.

It appears from Plaintiffs' complaint that the Western Mohegan group and Ulster County entered into a specific agreement regarding tax payments for the properties. Am. Compl. ¶¶ 22-

38. Plaintiffs also allege that Ulster County agreed that the Western Mohegan group is a sovereign Indian Nation.[7] Am. Compl. ¶ 32. Thus, there is no apparent reason why this Court could not decide any properly justiciable portion of the dispute on the basis of the parties' agreements.[8]

CONCLUSION

For the reasons set forth above, this Court should not issue any declaratory judgment addressing the status of the Western Mohegan group as a federally recognized Indian tribe, adjudicating the status of the group's land as "Indian Country" or "Indian lands," or addressing the federal or state tax status of the group.

Dated: February 26, 2007

Respectfully Submitted,

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7 To the extent that these materials refer to tribal status, any such status would necessarily be limited to recognition of the plaintiffs by Ulster County for a limited purpose, and would not encompass or affect recognition by the State of New York or the United States.

8 It is not clear that Plaintiffs raise any justiciable dispute at all. On the face of Plaintiffs' complaint, it appears that this action may barred by the doctrines of res judicata or collateral estoppel. In the county court action, Plaintiffs and Defendant have already litigated the tax and foreclosure status of the property. Plaintiffs' complaint appears to seek relief regarding the exact issues already determined in this previous action. It is also unclear whether this case meets the case and controversy requirement. By agreement, the County does not contest the vast majority of Plaintiffs' claims.

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Exhibits to the *Amicus Curiae* Brief of the United States

Exhibit A	September 9, 1997 Letter from Ronald Roberts & Bruce Clark accompanying "1st Amendment Petition to the President of August 20, 1997
Exhibit B	January 8, 1998 Certification of Documented Petition by Tribal Council of the Western Mohegan Tribe & Nation
Exhibit C	September 24, 1998 Technical Assistance Letter from the U.S. Department of the Interior, Bureau of Indian Affairs
Exhibit D	Sentencing Memorandum of the United States, *United States v. Roberts*, No. 1:02-CR-00111-LEK (N.D.N.Y)
Exhibit E	Docket Report, *United States v. Roberts*, No. 1:02-CR-00111-LEK (N.D.N.Y)