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*,

-against-

Case No.: Case No.: 08-CV-0149 (GLS/RFT)

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

*Defendant.*

# MEMORANDUM OF LAW

DATED: November 23, 2009
Saugerties, New York

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## PRELIMINARY STATEMENT

This lawsuit is the most recent attempt by a group of individuals self-identified as "The Western Mohegan Tribe and Nation of the State of New York (hereinafter "WMTN"), seeking recognition as an Indian Tribe for purposes of developing a casino. Previously, plaintiff WMTN and its leader, Ronald Roberts, have made various unsuccessful attempts seeking to assert Tribal claims or sovereignty on behalf of WMTN. Plaintiff BGA, LLC (hereinafter "BGA") is one of the financial backers of the casino development proposed by WMTN. Plaintiffs have manufactured this controversy by claiming breach of an Agreement between WMTN and the County of Ulster (hereinafter "County") for the sole purpose of obtaining sovereign recognition from a U.S. District Court. However, by the terms of the Agreement, defendant has not breached. Defendant now moves pursuant to Federal Rules of Civil Procedure 56 and 12 on the following grounds: (1) there is no breach of contract based upon the language of the Agreement; (2) the County did not confer tax exemption status to the Property; (3) as a non-contractual third-party, BGA is without standing to claim breach against the County; (4) plaintiffs' claims are bared by *res judicata*, and this Court is without jurisdiction pursuant to the *Rooker-Feldman* doctrine; (5) this Court should decline to exercise jurisdiction over plaintiffs' claim for declaratory judgment; and, (6) plaintiff WMTN does not have standing under the "Non-Intercourse" Act, and this Court should defer to the Bureau of Indian Affairs relative to WMTN's status as an Indian tribe.

## PRIOR LAWSUITS

As mentioned *supra,* plaintiffs' purpose in bringing this lawsuit is to obtain recognition of the supposed sovereignty of WMTN by a U.S. District Court for the purpose of developing a casino. In this action, plaintiffs seek declaratory judgment from the Court relative to their

purported sovereignty, and that a Catskill Resort purchased in 2001 by WMTN is "Indian Country." The common thread throughout all the prior actions involving plaintiffs is their claims seeking recognition in various forms that WMTN is an Indian Tribe. All prior Courts have either denied this claim or abstained from making such a determination.

In April, 1997, Mr. Ronald Roberts, the leader of WMTN, declared his home in Granville, New York to be "Indian Country" and not subject to the State's bingo laws. After Mr. Roberts attempted to conduct bingo gaming in his home, the State Attorney General's Office brought a successful action in Washington County Supreme Court to enforce the State's gaming laws which prohibit unlicensed bingo gaming. The Court issued a preliminary injunction prohibiting Mr. Roberts from operating a high stakes bingo operation in his home (*State of New York v. Roberts*, Index No. 7327D [Wash. Co., July 3, 1997]). In upholding the applicability of the State's Bingo laws to Mr. Roberts' home, the Court noted that the Western Mohegan Tribe is not federally recognized (*Id.* at 3)[Mandell Affidavit, exhibit "K"].

Also in 1997, Mr. Roberts, as Chief of WMTN, attempted to intervene in original litigation before the U.S. Supreme Court in which New Jersey sued New York over title to a portion of Ellis Island (*State of New Jersey v. State of New York*, 523 U.S. 767 [1998]). Mr. Roberts' intervention motion alleged that as it had not yet been decided whether the Hudson River drainage basin, estuary and islands including Ellis and Liberty Island had been purchased from Indians by the United States, and that the Supreme Court of the United States should invoke original jurisdiction to settle the dispute as an impartial third party without prejudice to the Indian interest. Despite submitting two motions (February 6, 1997 and October 20, 1997), these attempts to intervene by WMTN were denied.

In 1998, WMTN (a/k/a "Muhheakunnuk") brought a suit against the United States for alleged violations of the 1st and 14th Amendments of the Constitution, the Indian Treaties of 1623, 1645, and 1664, and the Genocide Convention Implementation Act of 1987 (Proxmire Act) (*Muhheakunnuk v. United States*, Index No. 98-CV-1098 [N.D.N.Y., June 15, 1998]). The cause of action alleged breach of contract of the Indian Treaties and breach of the Constitutional duty to protect pursuant to the 1st and 14th Amendments and the Proxmire Act because the United States allegedly disposed of the Muhheakunnuk Tribe's land in the Hudson River drainage basin, forced the conversion, concentration and removal of a portion of the Muhheakunneuw (the People of the Muhheakunnuk), and continued the suppression of the Muhheakunneuw who remained behind. Despite submitting a detailed complaint, Judge Kahn ruled that the complaint should be dismissed for failure to state a claim. Moreover, Judge Kahn noted that even if a claim had been adequately stated, the complaint would still be dismissed based on the doctrine of sovereign immunity. Finally, Judge Kahn noted that "under current federal law such a relationship between an Indian Tribe and the United States only arises after an Indian tribe is acknowledged as such by the Department of Interior. It remains within the plaintiff's prerogative to seek that status."

Also in 1998, WMTN attempted to join a bankruptcy proceeding in an attempt to obtain land in Sullivan County (*In the Matter of FRE-PAR Laboratories, Inc.*, U.S. Bank. Ct. [S.D.N.Y., Aug. 27, 1998]). Here, WMTN attempted to argue that because the United States never purchased the land from the Muhheakunnuk Tribe, the land involved in the bankruptcy proceeding still belonged to the Muhheakunnuk. WMTN argued that if it recognized the Muhheakunnuk as having sole jurisdiction over the land as rightful and original owners, then the Court would consequently be recognizing the Muhheakunnuk's gaming jurisdiction over the

land. As a result of obtaining gaming jurisdiction, the Muhheakunnuk would then be able to obtain the financing necessary to satisfy the debt of the estate by payment in full. Judge Adlai S. Hardin, Jr., stated "[i]t should be perfectly clear from the foregoing that the claims which Muhheakunnuk seeks to assert here are far reaching and momentous." Judge Hardin went on to discuss that a judgment in favor of the Muhheakunnuk would negatively affect private property ownership and government sovereignty and jurisdiction relative to all lands in the Hudson River drainage basin. Accordingly, the Muhheakunnuk's motion for joinder was denied (*Id.*).

In 1999, Mr. Roberts sued the State of New York in his own name, his alias "Chief Golden Eagle," and in the name of WMTN. That action was brought in the US. District Court in the Northern District of New York to stop construction of a State park on Schodack Island just south of Albany on the Hudson River (*Western Mohegan Tribe and Nation of New York v. State of New York*, 100 F.Supp.2d 122 [N.D.N.Y.2000], *aff'd in part, vacated in part,* 246 F.3d 230 [2d Cir.2001]). In dismissing the complaint *sua sponte*, Judge Lawrence Kahn found that "[p]laintiffs make various allegations of federal and state recognition of the Western Mohegan Tribe and Nation that are baseless" (*Id.* at 128). The Court noted that the Bureau of Indian Affairs (hereinafter "BIA") had rejected plaintiff's application for federal recognition "due to significant deficiencies, unverifiable statements, doctored original documents, and significant omissions in all areas required by the acknowledgment regulations" (*Id.*)[1][Mandell Affidavit, exhibit "L"].

In the Schodack Island lawsuit, Judge Kahn found:

> [e]qually damaging to Plaintiffs' First Amendment claim is the very real possibility that the Mohegan tribe from which they allegedly descend never inhabited the

[1] As discussed *infra,* Mr. Roberts was indicted and plead guilty to submitting false documentation in the WMTN's application for recognition to the Executive Branch (*United States of America v. Ronald A. Roberts*, Criminal Action No. 02-CF-111[LEK])[Mandell Affidavit, exhibit "M"].

> Island. *See* Affidavit of Paul R. Huey, Ph.D., New York State Bureau of Historic Sites, sworn to April 27, 2000. Dr. Huey, an archeologist with an interest in local history and anthropology , persuasively argues that the Mahicans – a tribe with no cultural links to the Mohegans and actually hostile to them – occupied the island. According to Dr. Huey, the Island's very name, "Schodack" derives from a combination of the Mahican words for fire – "ischoda" – and earth or land – "akee." By contrast, the Mohegans, a Connecticut tribe, employed a completely different dialect in which the word for fire was "squotta" (*Id.* at 128).

The District Court concluded that Mr. Roberts and his alleged Tribe lacked standing since "[t]he historical record is thus far from clear that Plaintiffs are Native American and that the tribe from which they allege descent ever dwelled on the Island" (*Western Mohegan Tribe and Nation of New York*, 100 F.Supp2d 122 [N.D.N.Y.2000])[Mandell Affidavit, exhibit "L"].

While the Second Circuit reversed Judge Kahn's *sue sponte* dismissal of the lawsuit, its ruling was limited to the question of whether the tribe had alleged injury from an alleged denial of its right to freely exercise its religious beliefs and perform religious ceremonies on Schodack Island. In that context, the Court concluded that WMTN and Roberts did not have to prove that they were Native American and descendants of the Island's inhabitants (*Western Mohegan Tribe and Nation of New York v. New York*, 246 F.3d at 230 [2d Cir.2001])[Mandell Affidavit, exhibit "L"].

In 2001, the State Attorney General's office brought another action against Mr. Roberts in Ulster County Supreme Court because Mr. Roberts had advised a licensed bingo supplier that he intended to open a high stakes bingo operation at a former Catskill resort, the Tamarack Lodge, over the Thanksgiving holiday. The Tamarack Lodge is the property that is the subject matter of this lawsuit. The Lodge was purchased by WMTN from the County in 2001, however, neither the State or Federal governments acknowledge the property as "Indian Country." The Court granted the requested temporary restraining order in that case, but later dismissed it after Mr. Roberts represented in a sworn affidavit that there were no plans to conduct gaming at the

Tamarack Lodge. The Court dismissed this action on ripeness grounds (*State of New York v. Roberts*, Index No. 01-3384 [Ulster Co., March 31, 2002]).

While acquiring the Property, plaintiff WMTN joined in a pending bankruptcy proceeding involving the former owner to establish clear title. During this proceeding, WMTN brought a cross-claim seeking recognition by the U.S. Bankruptcy Court that they were sovereign (*Neil's Mazel, Inc. v. BGA, LLC and The Western Mohegan Tribe and Nation of the State of New York et al.*, Adv. Pro. No. 02-1442-260 [U.S. Bank. Ct. [E.D.N.Y.2002]). This cross-claim was ultimately dismissed.

In February, 2003, WMTN initiated a lawsuit against the State of New York and various Counties[2] alleging they were wrongly in possession of land, seeking repossession of the land, and damages in violation of Federal common law and the "Non-Intercourse" Act. The U.S. District Court for the Southern District of New York granted defendant State of New York's motion to dismiss, on the alternative grounds that WMTN's claims were barred by the 11th Amendment to the U.S. Constitution and the *Ex parte Young* exception was not applicable, and for failure to state a claim for which relief could be granted (*Western Mohegan Tribe and Nation v. State of N.Y.*, 2003 WL 24052010 [S.D.N.Y., Dec. 23, 2003])[Mandell Affidavit, exhibit "N"]. The Second Circuit affirmed the District Court's dismissal of WMTN's claim based upon the 11th Amendment, holding that the relief sought by WMTN was the functional equivalent of seeking a determination that the lands in question were not within the regulatory jurisdiction of the State, and were therefore barred by the 11th Amendment under *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). (*Western Mohegan Tribe and Nation v. Orange Co.*, 395 F.3d 18 [2d Cir.2004])[Mandell Affidavit, exhibit "O"].

[2] Notably, Ulster County was not named as a defendant in this lawsuit.

In 2004, the County attempted to foreclose on the Property based upon WMTN's failure to pay property taxes due. In County Court, County of Ulster, WMTN argued that the Property was immune from foreclosure based upon the sovereignty of WMTN and their claim that the Property is "Indian Country." WMTN relied on the Agreement and Resolution, arguing that the County was prohibited by the Agreement to seek taxes from WMTN for the Property. In his Decision dated September 9, 2005, Judge Michael Bruhn held:

> The lands of Indian Tribes can only be granted tax exempt status by the Federal government under 25 USC § 465 which allows the Secretary of the Interior to acquire an interest in real property for the purpose of providing land for Native Americans. Title to any lands so acquired is taken in the name of the United States and held in trust for the Native American tribe for which the land is acquired. Such lands held in trust for Native American Tribes are exempt from state and local taxation. Western Mohegan has never applied to have the subject real property held in trust by the United States government so that it is tax exempt (*See City of Sherill v. Oneida Indian Nation of New York*, 25 S.Ct. 1478 [March 29, 2005]).

Central to plaintiffs' breach of contract claim is the allegation that the Property is tax exempt. However, in the Decision and Order of Judge Bruhn dated September 9, 2005, the County Court already determined that the Property is not tax exempt (*In the Matter of the Foreclosure of Tax Liens by Proceeding In Rem pursuant to Article Eleven of the Real Property Tax Law by Ulster County*, Index No. 02-3818 [Ulster Co. Ct.])[Mandell Affidavit, exhibit "P"][3].

In 2006, plaintiffs commenced a lawsuit in the U.S. District Court for the Northern District of New York, against the County of Ulster, alleging breach of contract, and seeking declaratory judgment that WMTN is a sovereign Indian Tribe and the Property is "Indian Country" and tax exempt. (*BGA, LLC and The Western Mohegan Tribe and Nation of the State of New York v. Ulster Co.*, Index No. 06-CV-0095 (GLS)(RFT)[N.D.N.Y.2006])[Mandell

[3] WMTN removed the foreclosure proceeding to the U.S. Bankruptcy Court, Northern District, in an attempt to have a Federal Court declare them sovereign, however, this removal was subsequently remanded. (*In the Matter of the Foreclosure of Tax Liens by Proceeding In Rem pursuant to Article Eleven of the Real Property Tax Law by Ulster County*, Adv. Pro. No.: 01-90301-1-REL [U.S. Bank. Ct., N.D.N.Y.2004]).

Affidavit, exhibit "Q"]. During the pendency of this litigation, the parties agreed to a partial settlement and stipulation wherein plaintiffs would proceed solely on their claim for declaratory judgment, and would discontinue all other claims against the County. Specifically, paragraph 4(c) of the 2006 Settlement Agreement states, "BGA[4] agrees that it will discontinue, with prejudice, all claims by BGA for monetary damages against the County, Albert Spada and Lewis C. Kirschner." [Mandell Affidavit, exhibit "C"]. Subsequently, the Court dismissed plaintiffs' claims for lack of case or controversy, to which plaintiffs appealed. The Second Circuit affirmed this Court's dismissal of plaintiffs' claims. (*Ulster Co. v. BGA, LLC and the Western Mohegan Tribe and Nation of the State of New York*, 08-0596 [2d Cir.2008])[Mandell Affidavit, exhibit "R"]. On motion for reconsideration, this Court affirmed there was no case or controversy, and further held that it declined to exercise jurisdiction for declaratory relief because "the declaratory relief requested by the plaintiffs would have a broad impact reaching far beyond the limits of this case" (*BGA, LLC v. Ulster County, New York*, 2008 WL 84591, at * 3 [N.D.N.Y.,Jan. 7, 2008])[Mandell Affidavit, exhibit "S"]. This Court also recognized that plaintiffs' claim pursuant to the "Non-Intercourse" Act was premature because the County was not attempting to foreclosure on the property, and also recognized that plaintiffs' suit "smacks of a collateral attack on a state court judgment" (*Id.* at * 3, n. 5).

## STATEMENT OF FACTS

Plaintiffs commenced this action in the U.S. District Court, Northern District of New York on or about February 8, 2008. In their complaint, plaintiffs allege breach of contract against the County based upon an agreement between WMTN and the County entered into on January 5, 2001 (hereinafter "Agreement"). In addition, plaintiffs also seek declaratory

[4] At the time of the 2006 Settlement Agreement, only BGA was a named plaintiff. By the terms of the Settlement Agreement, WMTN was added as a named plaintiff.

judgment that they are a sovereign Indian Tribe and that the Tamarack Lodge is "Indian Country," and allege violations of the "Non-Intercourse Act" [Mandell Affidavit, exhibit "A"][5].

The Agreement was entered into by the County to accomplish the sale of a Catskill Resort, the Tamarack Lodge (hereinafter "Property"), to WMTN [Murray Affidavit, ¶ 3]. The County previously acquired the Property in a tax foreclosure proceeding, and accepted the offer of WMTN to purchase the Property in exchange for a cash payment and payment of a portion of the taxes owed by the prior owner, Neil's Mazel, Inc. [Murray Affidavit, ¶ 4].

The language of the Agreement states that payment in lieu of taxes (hereinafter "PILOT") payments will be paid by WMTN in years when the Property is tax exempt. Paragraph A(1)(a)(iv) of the Agreement provides:

> Except for the current year's school and general property taxes, (2000-2001 School taxes and 2001 General town, county and special district taxes) which the Tribe will pay at closing, the County shall release the Tribe from any and all taxes, liens and other obligations due and owing to the County or any other local County governmental agency in respect of the Real Property and understands that ***the property may be tax exempt in future tax years*** in which event the Tribe agrees to make payments in lieu of taxes to the County ***for any tax year in which the property is tax exempt*** as follows"

[Mandell Affidavit, exhibit "B"](emphasis added). The Agreement then goes on to establish the amounts of potential PILOT payments and allows for WMTN to acquire additional property under these same terms. [Murray Affidavit, ¶ 5]. This language does not grant tax exemption, rather, it merely provides for the payment of PILOT payments in years when the Property may become tax exempt [Murray Affidavit, ¶ 6]. The intent of the County was to convey the property to WMTN, and establish the potential amount of PILOT payments should WMTN establish tax-

[5] In substance, the allegations contained in plaintiffs' current complaint for breach of contract, injunctive relief, and declaratory judgment are the same as the allegations previously raised in *BGA, LLC and The Western Mohegan Tribe and Nation of the State of New York v. Ulster Co.*, Index No. 06-CV-0095 (GLS)(RFT)[N.D.N.Y.2006][Mandell Affidavit, exhibit "D"]. It is respectfully submitted that despite agreeing to discontinue these allegations with prejudice, plaintiffs have renewed these claims for the sole purpose of manufacturing a case or controversy so they may seek recognition from a U.S. District Court, affirmatively attempting to circumvent the administrative process for recognition prescribed by Congress (*but cf. Gristede's Foods, Inc. v. Unkechauge Nation*, --- F.Supp.2d ---, 2009 WL 3235181, at * 25 [E.D.N.Y., Oct. 8, 2009]).

exemption for the Property with the appropriate assessing authorities. [Murray Affidavit, ¶ 7]. The County does not have the authority or ability to confer tax exempt status to an entity or property, including WMTN and the Property. [Murray Affidavit, ¶ 27; Sommer Affidavit, ¶ 10]. It was the expectation of the County that after acquiring this Property, WMTN would undertake the necessary steps to have the Property declared tax exempt, *i.e.*, that the Property would be held in trust by the United States government. [Murray Affidavit, ¶ 9].

The County does not have the authority or ability to convey property, including the subject Property, as "Indian Country." Paragraph A(1)(a)(iii) provides that "***[t]o the extent it is so authorized***, the County agrees and accepts that the uses and purposes of the Real Property as may be placed in Trust as Indian Country shall be solely determined by the traditional government of the Tribe" [Mandell Affidavit, exhibit "B"](emphasis added). The language of the Agreement contains an express qualification of the County's authority to convey the Property as Indian Country. This language contemplates that the property may be held in trust as Indian Country pending approval of the appropriate governments and that the County does not have the authority or ability to designate the Property as "Indian Country." This language contemplated WMTN making the necessary applications to the State and/or Federal governments to have the Property designated as Indian Country, and is consistent with both the County's expectations and applicable law. [Murray Affidavit, ¶ 11].

The Agreement contains a merger clause. [Mandell Affidavit, exhibit "B"]. Paragraph E(1) states, "[t]his Agreement, together with the Exhibits and Schedules hereto, contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, oral or written, with respect to such matters." Any reliance on any additional agreement(s) or resolutions by plaintiffs is contrary to the intent of the

Agreement as indicated by the merger clause contained in paragraph E(1). [Murray Affidavit, ¶ 13].

The Agreement expressly disclaims reliance by third-parties. [Mandell Affidavit, exhibit "B"]. Paragraph E(9) states, "[e]xcept as specifically set forth or referred to herein, nothing herein expressed or implied is intended or shall be construed to confer upon or give to any person or corporation other than the parties hereto and their successors or assigns, any rights or remedies under or by reason of this Agreement."

BGA is not a party to the Agreement. [Mandell Affidavit, exhibit "B"]. BGA is one of the financers of WMTN. [Mandell Affidavit, exhibit "E"]. BGA fulfilled its obligations to WMTN pursuant to their Development Agreement. The relationship between WMTN and BGA is governed by their Development Agreement. Paragraph 10.2 of the Development Agreement provides that "[i]t is the present understanding and intention of the Parties that the establishment, and operation of the Project contemplated conforms to and complies and will continue to comply with all applicable laws. In the event that this Agreement or the Project is determined by the State of New York or the County of Ulster, or the final judgment of a court of competent jurisdiction not to be lawful, the obligations of the Parties hereto shall cease, and this Agreement shall be of no further force and effect …"

The Agreement was the combined work product of both plaintiff WMTN and the County. [Murray Affidavit, ¶ 17]. Copy of drafts of the Agreement being transferred between the parties demonstrates that both parties had an active role in developing the language of the Agreement. [Murray Affidavit, ¶ 17]. An initial draft of the Agreement was provided by WMTN in October, 2000. [Murray Affidavit, ¶ 17, exhibit "A"]. An additional draft of the Agreement was sent from WMTN's counsel, Ruffa & Ruffa, P.C., on November 9, 2000. [Murray Affidavit, ¶ 18, exhibit

"B"]. The facsimile stamp at the bottom of the page demonstrates the sender of the November 9, 2000 draft was Ruffa & Ruffa, P.C. [Murray Affidavit, exhibit "B"]. Most of the handwritten edits on this draft were made by County Attorney Francis Murray. [Murray Affidavit, ¶ 18, exhibit "B"]. Much of the language provided by plaintiff WMTN in the aforementioned draft of November 9, 2000 was ultimately included in the final Agreement. In early December 2000, County Attorney Francis Murray received an additional, and what he believes to be the final draft of the Agreement from WMTN. [Murray Affidavit, ¶ 20, exhibit "C"].

The "whereas" statements contained in the Agreement that suggest conveyance of the Property was primarily for settlement of a land claim were also provided by WMTN. [Murray Affidavit, ¶ 21]. Although the County had received a Notice of Claim from plaintiff WMTN, the County did not believe this claim to be legally viable. [Murray Affidavit, ¶¶ 21-22]. As reflected by the payment of $900,000.00 to the County for the acquisition of this property by WMTN, the conveyance of the Property was in consideration of payment of money. [Murray Affidavit, ¶ 23].

The Agreement was authorized by the Ulster County Legislature's Resolution Number 376 (hereinafter "Resolution"). [Mandell Affidavit, exhibit "F"; Murray Affidavit, ¶ 24]. The Resolution is based on the input of both the County and WMTN. [Murray Affidavit, ¶ 25]. The recital contained in the Resolution as to WMTN's tax exempt status was provided by WMTN. The County took such information as contained in the "whereas" clauses in the Resolution at face value, with the understanding that in substance the "whereas" clauses of the Resolution have no legal importance, are non-binding terms and merely demonstrate the representations and understandings of the parties at the time of the Resolution [Murray Affidavit, ¶ 27].

The second "whereas" clause of the Resolution provides that "although the Tribe is a tax exempt organization and intends that the property be held for its benefit, it will agree to pay $25,000.00 per year in lieu of taxes or 5% of any net revenue derived by any use or activities upon such property, whichever is greater." This information as to tax exempt status in the "whereas" clause was provided by WMTN and taken at face value during the drafting and negotiation of the Resolution, and there is no "resolved" clause whereby the County purported to confer such status, as it had no authority to do so. [Murray Affidavit, ¶ 28].

The Property is not tax exempt. The Assessor for the Town of Wawarsing is responsible for assessing real property parcels for all parcels within the Town's borders, including the subject Property, for the purpose of levying real property taxes. [Sommer Affidavit, ¶ 2]. The Assessor has the authority to grant real property tax exemptions. Until such time that a property is wholly exempted from the assessment roll, it remains fully taxable. [Sommer Affidavit, ¶ 3]. In order for a property to be exempted from the assessment roll, a property must qualify for tax exemption under either Federal or State law. Once it is demonstrated that a property meets this criteria, it will be placed in the wholly exempt section of the assessment roll. A tax bill will no longer be generated for that parcel. [Sommer Affidavit, ¶ 4]. The Property located at 10 Tamarack Road, Ellenville, New York 12428 is within the boundaries of the Town of Wawarsing. [Sommer Affidavit, ¶ 5]. At no time has the Assessor for the Town of Wawarsing granted tax exemption to the Property. [Sommer Affidavit, ¶ 6]. At no time has any individual or organization provided the Assessor for the Town of Wawarsing with documentation that the subject property qualifies for tax exemption. [Sommer Affidavit, ¶ 7]. The Assessor for the Town of Wawarsing has not received any documentation indicating that the owners of the property, the Western Mohegan Tribe and Nation of the State of New York, are a Federally

recognized Indian Tribe, and that the property is held in Trust by the U.S. government. As such, he has not granted this property tax exemption and removed it from the taxable section of the assessment roll based on Federal law. [Sommer Affidavit, ¶ 8]. The Assessor for the Town of Wawarsing has not received any documentation from any entity or individuals demonstrating that this property should be tax exempt pursuant to State law. As such, the Assessor for the Town of Wawarsing has not granted this property a tax exemption and has continued to keep the property taxable based upon State law. [Sommer Affidavit, ¶ 9].

The Town of Wawarsing is the governmental entity where assessments originate. [Sommer Affidavit, ¶ 10]. The Town of Wawarsing serves as a tax collector on the County's behalf. The County of Ulster is without the authority or ability to grant tax exemption on the Town of Wawarsing's assessment roll. [Sommer Affidavit, ¶ 10]. Relative to the Property, at no time did the Town of Wawarsing Assessors' Office delegate or abdicate its authority to grant tax exemptions to the County of Ulster. [Sommer Affidavit, ¶ 11].

On January 17, 2003, the County rejected the tendered PILOT payment from WMTN in the amount of $25,000.00. [Mandell Affidavit, exhibit "G"; Murray Affidavit, ¶ 29]. This tender was rejected by County Treasurer Lewis Kirshner on the advice of the Ulster County Attorney Francis Murray. [Murray Affidavit, ¶ 30]. The basis for the denial of the tender of the PILOT payment was that WMTN's Property was not tax exempt during that taxable year, therefore, pursuant to the Agreement, the County was not required to accept the PILOT payment. Rejection of the PILOT payment is plaintiffs' basis for the alleged breach of the Agreement. [Murray Affidavit, ¶31].

WMTN is not recognized by the Federal government as a sovereign Tribal government. [Mandell Affidavit, exhibit "I"]. Federal tribes acknowledged (or recognized) by the Federal

Government are listed on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," most recently published in Federal Register Volume 74, No. 153. [Mandell Affidavit, exhibit "I"]. WMTN previously submitted to President Clinton its First Amendment Grievance. [Mandell Affidavit, exhibit "H"]. At WMTN's direction, this submission was forwarded to the U.S. Department of Interior Bureau of Indian Affairs (hereinafter "BIA") and handled as an application for Federal Recognition. [Mandell Affidavit, exhibit "J," p. 1]. By submitting this documentation to the BIA and requesting it be handled as an application for Federal Recognition, WMTN invoked the authority of BIA.

Correspondence maintained by the U.S. Department of the Interior (hereinafter "DOI") further demonstrates that WMTN submitted a petition for acknowledgment as an Indian tribe and otherwise invoked the authority of the BIA. [Mandell Affidavit, exhibit "J"]. DOI received a "Resolution" signed by the "Tribal Council" of WMTN which states: "Be it resolved that the Western Mohegan Tribe and Nation of New York petition the Federal government for acknowledgment as an Indian Tribe" (October 21, 1996 Resolution)[Mandell Affidavit, exhibit "J," p. 1]. DOI wrote WMTN on several occasions to inform them of the agency's petitioning process and to confirm that WMTN wished to proceed with this regulatory process. [Mandell Affidavit, exhibit "J," pp. 3, 9-12, 13-14, 17-18, 25-26]. WMTN provided assurances that it wished to continue with the DOI recognition process. [Mandell Affidavit, exhibit "J," pp. 15-16, 19-20, 21-22, 28]. While WMTN at times purported to include various conditions and stipulations regarding its participation in DOI's acknowledgment process, this process is established and governed by regulation, and thus is not subject to *ad hoc* modifications by petitioning groups.

Having initiated the acknowledgement process and otherwise invoked the BIA's authority, WMTN has not clearly stated its intent to withdraw from it. Shortly after DOI sent the September 24, 1998 Technical Assistance ("TA") letter, it received correspondence from Mr. Roberts and WMTN that "re-affirmed" its "notice of cancellation" of its petition. [Mandell Affidavit, exhibit "J," p. 52-53]. However, DOI then received correspondence from a group calling itself the "Muh-he-con-nuk Tribal Nation" disavowing any connection with Ronald A. Roberts. [Mandell Affidavit, exhibit "J," p. 55]. On November 2, 1998, Mr. Roberts and WMTN Attorney General Bruce Clark sent a letter to the President of the United States indicating that "The 1st Amendment grievance petition for Muhheakunnuk is abandoned" – but then Mr. Roberts' December 15, 1998 letter to the President indicates that the November 2 letter should be disregarded, and that the group was conducting additional genealogical research in response to the DOI's TA letter. [Mandell Affidavit, exhibit "J," pp. 56, 57]. On this same day, Mr. Roberts sent a letter to the DOI indicating that the group was obtaining reports from genealogists and historians in response to DOI's TA letter. [Mandell Affidavit, exhibit "J," p. 58]. Upon information and belief, neither WMTN nor Mr. Roberts have submitted any additional documentation to DOI or BIA to resolve the issues raised in the TA letter. Nor have WMTN or Mr. Roberts indicated to DOI or BIA their clear intent to withdraw their petition for acknowledgment.

After review of the materials submitted by WMTN, the BIA determined that WMTN's application for Federal recognition had significant deficiencies in documentation, unverifiable statements, altered original documents and significant omissions in all areas required by the acknowledgment regulations. [Mandell Affidavit, exhibit "J," pp.29-50]. Mr. Roberts was subsequently charged with submitting false documentation to the Executive Branch of the U.S.

Government and plead guilty to this charge, as well as using a false social security number in a bankruptcy proceeding. [Mandell Affidavit, exhibit "M"].

Even if WMTN was a Federally recognized Tribe, land acquired by them does not automatically become tax exempt. In order for property owned by an Indian Tribe to become tax exempt, it must either be exempt under State law, or held in trust by the U.S. government. The Property is not exempt under State statute nor is it held in trust by the U.S. government.

ARGUMENT

**STANDARD OF REVIEW**

Defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. Defendant is entitled to judgment as a matter of law because there is no genuine issue of fact, therefore plaintiffs' complaint should be dismissed in its entirety. When there is no genuine issue as to any material fact, the moving party in a motion for summary judgment is entitled to judgment as a matter of law. FRCP 56(c). The party moving for summary judgment has the initial burden of submitting affidavits and other evidentiary material to show the absence of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 [1986]). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" (*Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 [1986]). Once the moving party has sustained the initial burden, the opposing party may not rest upon the mere allegations or denials of the pleadings, but instead must come forward with specific evidence, by affidavits or as otherwise provided in Rule 56, showing that there is a genuine issue for trial (*Celotex*, 477 U.S. at 324). It is respectfully submitted the defendant's affidavits and memorandum of law

demonstrate there is no issue of fact, and that defendant is entitled to judgment as a matter of law.

In addition to moving under Federal Rule of Civil Procedure 56, defendant also moves under Federal Rule of Civil Procedure 12(b)(1), to the extent that plaintiffs' claims should be dismissed for lack of subject matter jurisdiction[6]. "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it" (*Shinnecock Indian Nation v. Kempthorne*, 2008 WL 4455599, at * 7 [E.D.N.Y., Sept. 30, 2008], *quoting* *Makarova v. United States*, 201 F.3d 110, 113 [2d Cir.2000]). In reviewing a motion to dismiss under Rule 12(b)(1), the Court must accept as true all material factual allegations in the complaint, but should not draw inferences from the complaint favorable to plaintiffs (*Id.* at * 7, *quoting* *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 [2d Cir.2004]). The Court may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but may not rely on conclusory or hearsay statements contained in the affidavits (*Id.*). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence" (*Id.* at * 7, *quoting* *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 [2d Cir.2005]). It is respectfully submitted that defendant's affidavits and memorandum of law demonstrate that plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction.

[6] It is respectfully submitted that this Court is without subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine, discussed *infra*, and that this Court should decline jurisdiction in reviewing plaintiffs' claims for declaratory judgment and violation of the "Non-Intercourse" Act.

**DEFENDANT'S MOTION SHOULD BE GRANTED BECAUSE THE COUNTY IS NOT OBLIGATED TO ACCEPT PILOT PAYMENTS UNTIL SUCH TIME THAT THE PROPERTY BECOMES TAX EXEMPT, THEREFORE, THERE IS NO BREACH OF THE AGREEMENT**

Defendant's motion for summary judgment should be granted because the County is not obligated to accept the PILOT payment(s) therefore there is no breach of the Agreement. Plaintiffs allege defendant County breached the Agreement when the County Treasurer, Lewis Kirschner, rejected WMTN's tender of the PILOT payment(s). However, based upon the express language of the Agreement[7], and the status of the Property under State and Federal law, defendant is not obligated to accept the PILOT payment(s) because the Property is not tax exempt.

**A.) The County is not obligated to accept PILOT payments pursuant to the language of the Agreement.**

Defendant County's motion for summary judgment should be granted because pursuant to the language of the Agreement, defendant County is not obligated to accept PILOT payments until such time that the Property becomes tax exempt. Paragraph A(1)(a)(iv) of the Agreement states, "***the property may be tax exempt in future tax years*** in which event the Tribe agrees to make payments in lieu of taxes to the County ***for any tax year in which the property is tax exempt*** [Mandell Affidavit, exhibit "B"](emphasis added). This language expressly states that the Property may be tax exempt in future tax years, and that WMTN agrees to make PILOT payments to the County for any tax year in which the property is tax exempt. This language does not confer tax exemption on the Property, it merely contemplates plaintiff WMTN's obligation to make PILOT payments to the County at such time when the Property becomes tax exempt.

[7] Pursuant to the merger clause contained in the Agreement, paragraph E(1), the language of the Resolution is not a part of the Agreement. The County and WMTN are only bound by the express language of the Agreement. Any reliance or claim of breach based on extrinsic documents, including the Resolution, is not actionable against defendant County based upon this merger clause.

It was the intent and expectation of the County that WMTN would undertake the additional necessary steps after acquiring the Property to have the property declared tax exempt and/or held in trust by the Federal government. [Murray Affidavit, ¶ 9]. When such exemption is established, the County will then be obligated to accept PILOT payments pursuant to this agreement.

Pursuant to paragraph E(6) of the Agreement, this Court should interpret the Agreement under New York State law. Under New York State law, agreements are to be construed in accord with the parties' intent (*Computer Associates Intern., Inc. v. US. Balloon Mfg. Co., Inc.*, 10 AD3d 699, 699 [2d Dept.2004]). An agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Id.* at 699). "A contract is unambiguous if the language it uses has a 'definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion'" (*Id.* at 699, *quoting Breed v. Insurance Co. of North Amer.*, 46 NY2d 351, 355 [1978]). Where there is no meeting of the minds between the parties regarding a material element of the agreement, the contract is unenforceable (*Computer Associates Intern., Inc.*, 10 AD3d at 699). Courts should not enlarge the meaning of the words in a contract so as to correct a party's oversight (*Firtell v. Crest Builders, Inc.*, 159 AD2d 352 [1st Dept.1990]).

Pursuant to paragraph A(1)(a)(iv) of the Agreement, and based upon the plain and unambiguous meaning of the language used, the County is not obligated to accept PILOT payments until such time as the Property becomes tax exempt. The language contained in the aforementioned paragraph, as well as found in paragraph A(1)(a)(iii), wherein the parties contemplate that the Property may be held in Trust as "Indian Country," discussed *infra*, is

consistent with this interpretation. Specifically, it was the intent and expectation of the County that WMTN would undertake additional steps to have the Property held in Trust by the U.S. Government as "Indian Country," and at such time, the Property would become tax exempt. [Murray Affidavit, ¶ 9]. Any alternative interpretation of this language offered by plaintiffs is contrary to the plain and unambiguous meaning of the language contained in the Agreement, and would evince that there was no meeting of the minds (*cf.* Computer Associates Intern., Inc., 10 AD3d 699). This Court should not expand the terms of the Agreement to include any additional obligation on the County (*see* Firtell, 159 Ad2d 352). If plaintiff WMTN did not understand and/or intend the meaning of this unambiguous and unequivocal language, then there was no meeting of the minds and the Agreement is unenforceable (Computer Associates Intern., Inc., 10 AD3d 699).

It is anticipated that plaintiffs will argue that the Agreement is ambiguous and should be interpreted in their favor (*see* Turner Press, Inc. v. Gould, 76 AD2d 906 [2d Dept.1980]). However, this argument is unpersuasive because the Agreement is not ambiguous. Where a contract is unambiguous on its face, its proper construction is a question of law for the Court (Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 906 F.2d 884, 889 [2d Cir.1990]). "Contract language is unambiguous if it has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion" (Id. at 889; *quoting* Breed, 46 NY2d at 355). Language whose meaning is otherwise plain is not ambiguous merely because the parties urge different interpretations in the litigation (Id. at 899). "The court should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would 'strain the

contract language beyond its reasonable and ordinary means'" (*Id.* at 889, *quoting* *Bethlehem Steel Co. v. Turner Construction Co.*, 2 NY2d 456, 459 [1957]).

The language contained in paragraphs A(1)(a)(iii) and (iv) is unambiguous. This language specifies that the Property ***may*** become tax exempt. The use of the word "may" is permissive. Based upon the subject matter and the contract as a whole, the use of the word "may" demonstrates that the Property needed to be determined to be tax exempt by an appropriate authority in the future, in order for the County to accept PILOT payments. The language of the Agreement requires the County to accept PILOT payments only at such time as the Property becomes tax exempt. Any alternative interpretation is contrary to the plain meaning of the language contained in the Agreement.

Assuming *arguendo* that the language of the Agreement is ambiguous, which defendant denies, the Agreement should not be interpreted in plaintiffs' favor (*but cf.* *Turner Press, Inc.*, 76 AD2d 906). The standard of construction interpreting a contract in one party's favor should not arise in this case because the Agreement was drafted by both the County and WMTN. The affidavit of County Attorney Francis Murray demonstrates the Agreement was the combined work product of both plaintiff WMTN and the County. [Murray Affidavit, ¶ 17]. Copy of drafts of the Agreement being transferred between the parties demonstrates that both parties had an active role in developing the language of the Agreement. An initial draft of the Agreement was provided by WMTN in October, 2000. [Murray Affidavit, ¶ 17]. An additional draft of the Agreement was sent from WMTN's counsel, Ruffa & Ruffa, P.C., on November 9, 2000. The facsimile stamp at the bottom of the page demonstrates the sender of the November 9, 2000 draft was Ruffa & Ruffa, P.C. [Murray Affidavit, ¶ 18]. Most of the handwritten edits on this draft were made by County Attorney Francis Murray. [Murray Affidavit, ¶18]. Much of the language

provided by plaintiff WMTN in the aforementioned draft of November 9, 2000 was ultimately included in the final Agreement. In early December 2000, County Attorney Francis Murray received an additional, and what he believes to be the final draft of the Agreement. Thus, it cannot be said that the Agreement was drafted by the County.

Defendant's motion for summary judgment should be granted because based upon the clear and unambiguous language contained in the Agreement, the County is not obligated to accept PILOT payments until the Property is tax exempt.

**B.) The Property is not tax exempt under State law.**

Defendant's motion for summary judgment should be granted because the Property is not exempt under State law, therefore, defendant County is not obligated to accept PILOT payments pursuant to the Agreement. All real property within the State of New York is subject to real property taxation unless exempt by law (*Erie County Water Authority v. Erie County*, 47 AD2d 17, 20 [4th Dept.1975]; *Real Property Tax Law* § 300). Statutes granting tax exemption are strictly construed against the taxpayer, but a construction so literal and narrow that it defeats the exemption's settled purpose is to be avoided (*Erie County Water Authority*, 47 AD2d at 20). Ownership of a property by an entity entitled to exemption, standing by itself, is not sufficient to qualify property as tax exempt. The property must also be used for a purpose recognized by the legislature as qualifying for tax exemption (*Id.* at 20; *citing* *Real Property Tax Law* Art. 4, generally). Until such time as a property qualifies for tax exemption, it remains wholly taxable (*Id.*). At no time have plaintiffs demonstrated to the Assessor for the Town of Wawarsing that the Property is tax exempt pursuant to State law, therefore under State law, the Property remains fully taxable.

The sworn affidavit of Michael B. Sommer, Assessor for the Town of Wawarsing, demonstrates that he has not received any documentation from any entity and/or individuals demonstrating that this property should be tax exempt pursuant to State law. As such, he has not granted this property a tax exemption and has continued to keep the property taxable based upon State law. [Sommer Affidavit, ¶ 9]. Because plaintiffs have not demonstrated to the Assessor for the Town of Wawarsing that the Property is tax exempt, it remains fully taxable.

**C.) The Property is not tax exempt under Federal law.**

Defendant's motion for summary judgment should be granted because the Property is not exempt under Federal law, therefore, the County is not obligated to accept PILOT payments pursuant to the Agreement. Under Federal law, real property owned by Indian Tribes may become tax exempt where the Indian Tribe is Federally recognized and when the real property is held in trust for the benefit of that Tribe (*City of Sherrill v. Oneida Indian Nation of New York et al.*, 125 S.Ct. 1478, 1493 [2005]; Title 25 U.S.C. § 465). However, acquisition of real property purchased through the open market by an Indian Tribe, even where that Indian Tribe is federally recognized by the BIA[8], does not automatically create or revive the tax-exempt status of its former reservation lands (*Id.* at 1491; *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 [1998]).

At no time have plaintiffs demonstrated to the Assessor for the Town of Wawarsing that the Property is tax exempt pursuant to Federal law, therefore under Federal law, the Property remains fully taxable. The sworn affidavit of Michael B. Sommer, Assessor for the Town of Wawarsing demonstrates that at no time have plaintiffs demonstrated to him that the Property is tax exempt under Federal law. Mr. Sommer has not received any documentation indicating that

[8] Defendant disputes that WMTN is recognized by the U.S. Government and respectfully maintains that until such time that WMTN becomes Federally recognized by the Bureau of Indian Affairs (BIA), they are ineligible to have the Property held in Trust by the U.S. Government and declared tax exempt pursuant to Federal Law.

the owners of the property, the Western Mohegan Tribe and Nation of the State of New York, are a Federally recognized Indian Tribe, and that the property is held in Trust by the U.S. government. As such, he has not granted this property tax exemption and removed it from the taxable section of the assessment roll based on Federal law. [Sommer Affidavit, ¶ 8].

The Property cannot be tax exempt because WMTN is not recognized by the BIA. [Mandell Affidavit, exhibit "I"]. Federal recognition of an Indian Tribe by the BIA is a condition precedent to holding a property, including the subject Property, in trust by the U.S. Government (*see* Sherrill, 544 U.S. at 220; *Leech Lake Band of Chippewa Indians*, 524 U.S. 103; *City of New York v. Golden Feather Smoke Shop, Inc., et al.*, 2009 WL 705815, at * 12 [E.D.N.Y., March 16, 2009]; 25 U.S.C. § 465). The Property does not qualify to be held in trust because WMTN is not recognized by the BIA.

The U.S. Secretary of Interior and the Commissioner of Indian Affairs are charged with the responsibility of supervising all public business with Indians and matters arising out of Indian relations (43 U.S.C. § 1457; 25 U.S.C. §§ 2 and 9). Pursuant to this general statutory authority, the Assistant Secretary – Indian Affairs issued regulations in 1979 governing the *Procedures for Establishing That an American Indian Group Exists as an Indian Tribe.* (25 C.F.R. Part 83). Those procedures were intended to identify those Indian entities which may be considered Indian Tribes under statutes and regulations which do not specifically define the term "Indian Tribe." BIA's Branch of Acknowledgement and Research implements the regulations. Those procedures require BIA to issue periodically a list of all Indian tribes entitled to receive services from the BIA by virtue of their status as Indian tribes (25 C.F.R. § 83.5[a]).

On November 2, 1994, Congress passed the Federally Recognized Indian Tribe List Act of 1994 (hereinafter the "List Act") mandating the Secretary to publish annually in the Federal

Register a list of all Indian tribes that the Secretary of the Interior recognizes as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. § 479a-1). The BIA is responsible for publishing this listing of all tribes which are acknowledged and eligible to receive services from the BIA. Currently, there are 564 Federal tribes acknowledged (or recognized) by the Federal Government and listed on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," published in Federal Register Volume 74, No. 153. Being listed in the Federal Register pursuant to the List Act is determinative as to whether a Tribe is recognized by the Federal government. WMTN is not on this list and therefore is not a sovereign and recognized tribe [Mandell Affidavit, exhibit "I"].

WMTN is not recognized by the Federal government as a sovereign Tribal government. WMTN previously submitted to President Clinton its First Amendment Grievance. [Mandell Affidavit, exhibit "H"]. At WMTN's direction, this submission was forwarded to the BIA and handled as an application for Federal Recognition. [Mandell Affidavit, exhibit "J," p. 1]. By submitting this documentation to the BIA and requesting it be handled as an application for Federal Recognition, WMTN invoked the authority of BIA. After review of the materials submitted by WMTN, the BIA determined that WMTN's application for Federal recognition had significant deficiencies in documentation, unverifiable statements, altered original documents and significant omissions in all areas required by the acknowledgment regulations. [Mandell Affidavit, exhibit "J," pp. 29-50]. Mr. Roberts was subsequently charged with submitting false documentation to the Executive Branch of the U.S. Government and plead guilty to this charge, as well as using a false social security number in a bankruptcy proceeding. [Mandell Affidavit, exhibit "M"]. The record is clear that BIA has not recognized WMTN as an Indian Tribe.

WMTN is not a recognized Tribe under Federal law, therefore, the Property cannot be in trust by the U.S. Government. Thus, the Property is not exempt under Federal law.

**D.) The County's rejection of WMTN's tender of the PILOT payment(s).**

County Attorney Francis Murray directed County Treasurer Lewis Kirschner not to accept the PILOT payment(s) because pursuant to the express language of the Agreement, the County is not obligated to accept PILOT payment(s) until such time as the Property becomes tax exempt. [Murray Affidavit, ¶¶ 30-31]. At all times relevant to this lawsuit, the Property has not been determined to be tax exempt, therefore, defendant County is under no obligation to accept PILOT payments. Because defendant County was not obligated to accept PILOT payment(s), they are not in breach of the Agreement by rejecting plaintiff WMTN's tender of the PILOT payment(s).

Defendant's motion for summary judgment should be granted because the Property is not declared tax exempt, therefore, the County is not obligated to accept PILOT payments from plaintiff WMTN and there is no breach of the Agreement.

## THE COUNTY IS WITHOUT THE AUTHORITY OR ABILITY TO CONFER TAX EXEMPT STATUS ON THE PROPERTY, THEREFORE, ANY CLAIM THAT THE PROPERTY IS TAX EXEMPT DUE TO ANY ACT OF THE COUNTY IS WITHOUT MERIT

Plaintiffs may argue that defendant County granted tax exemption on the Property through the terms of the Agreement and Resolution[9] when it conveyed the Property to WMTN. However, defendant's motion for summary judgment should be granted because the County is without the authority or ability to confer tax exempt status on the Property, therefore, any claim that the Property is tax exempt due to any act of the County is without merit.

[9] Based upon the merger clause contained in the Agreement, paragraph E(1), the language of the Resolution is not a part of the Agreement between the parties, and therefore, is not a basis for a breach of contract claim against Ulster County.

Municipal contacts which violate express statutory provisions are invalid (*Seif v. City of Long Beach*, 286 NY 382, 387 [1941]; *Kelly v. Cohoes Housing Authority*, 27 AD2d 463, 465 [3d Dept.1967] *aff'd* 23 NY2d 692 [1968]; *Albany Supply & Equip. Co. v. City of Cohoes*, 25 AD2d 700, 700 [3d Dept.1966] *aff'd* 18 NY2d 968 [1966]). Resolutions granting tax exemption that violate State law are a nullity where not expressly authorized under the State statutory scheme (*Granda Bldgs., Inc. v. City of Kingston*, 58 NY2d 705, 708 [1982]). An agreement to grant a tax exemption that is not authorized by law is *ultra vires* (*Troy Union R. Co. v. City of Troy*, 227 AD 351 [3d Dept.1929]; *Matter of Snowpine Vil. Condominium Bd. of Mngrs. V. Town of Great Val.*, 114 Misc.2d 1049 [Sup. Ct., Cattaraugus Co., 1989]). "Furthermore, because a governmental subdivision cannot be held answerable for the unauthorized acts of its agents [...] *estoppel* is unavailable against a public agency (*Id.* at 708)." *Estoppel* is generally not available against a municipality acting in its governmental capacity, particularly where reasonable diligence by a good-faith inquirer would have disclosed the true facts or error (*Parkview Associates v. City of New York*, 71 NY2d 274 , 278-279 [1988], *appeal dismissed, cert. denied* 488 U.S. 801). It is undisputable that taxation and the collection of municipal taxes are uniquely governmental functions (*City of Buffalo v. State Bd. of Equalization and Assessment*, 26 AD2d 213, 215 [3d Dept.1966]).

It is anticipated that plaintiffs will argue that the County, either by the Agreement or Resolution, conferred tax exempt status on the Property. This argument is without merit because the County is without the authority or ability to confer tax exempt status on the Property under State and Federal law. Thus, any act by the County that allegedly conferred such status is *ultra vires* and void (*Troy Union R. Co*, 227 AD 351; *Snowpine Vil. Condominium Bd. of Mngrs.*, 114 Misc.2d 1049). Defendant County is without the authority or ability to confer tax exempt status,

therefore any act that allegedly conferred tax exemption on the Property is illegal and unenforceable (*Seif*, 286 NY at 387; *Kelly*, 27 AD2d at 465; *Albany Supply & Equip. Co.*, 25 AD2d at 700). Any claim of *estoppel* by plaintiffs is equally unpersuasive because *estoppel* does not generally apply to municipalities, including the County of Ulster, particularly where the party claiming *estoppel* should have discovered the error with reasonable diligence, and where the municipality is engaged in uniquely governmental functions including collection of taxes (*Parkview Associates*, 71 NY2d 274 at 278-279; *City of Buffalo*, 26 AD2d at 215). Only the local assessor and State government, or the Federal government, have the authority and ability to grant tax exempt status on the Property.

The sworn affidavit of Mr. Sommer demonstrates that the Town of Wawarsing is the governmental entity where assessments originate. [Sommer Affidavit, ¶ 10]. The Town of Wawarsing serves as a tax collector on the County's behalf. The County of Ulster is without the authority or ability to grant tax exemption on the Town of Wawarsing's assessment roll. [Sommer Affidavit, ¶10]. Relative to the subject property, at no time did the Town of Wawarsing Assessors' Office delegate or abdicate its authority to grant tax exemptions to the County. [Sommer Affidavit, ¶ 11]. Thus, the County of Ulster is without the authority or ability to grant tax exemption to the Property.

Plaintiffs may argue that the County conveyed the Property as "Indian Country," and that this designation has legal importance including tax exemption. However, the description of the Property as "Indian Country" has no legal significance, and merely contemplated the further actions needed to be taken by WMTN to place the Property in trust with the U.S. Government. Paragraph A(1)(a)(iii) of the Agreement provides, ***"[t]o the extent it is so authorized***, the County agrees and accepts that the uses and purposes of the Real Property as may be placed in Trust as

Indian Country shall be solely determined by the traditional government of the Tribe" (emphasis added). This language clearly contemplates the County's limitations relative to any specialized treatment or status of the Property as "Indian Country." This language is consistent with the County's expectation that upon acquiring the Property, plaintiff WMTN would undertake the additional appropriate actions with the governments with proper authority, *i.e.*, State and/or Federal government, to hold the land in trust for the benefit of WMTN.

"Indian Country" is a term defined by 18 U.S.C. § 1151. "Not all land on which Native Americans reside is 'Indian Country.' Section 1151 defines 'Indian Country' as encompassing three categories of land: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. §1151. The common element running throughout these three categories is that in each case the land has been designated as Indian country by the federal government" (*Golden Feather Smoke Shop, Inc., et al.*, 2009 WL 705815, at * 12). Thus, it is respectfully submitted that the County is without the authority or ability to confer "Indian Country" status on the Property.

It is further anticipated that plaintiffs will claim that the second "whereas" clause contained in the Resolution conferred tax exemption on the Property. As a threshold matter, it is respectfully submitted that pursuant to the merger clause contained in the Agreement, paragraph E(1), the language of the Resolution is not a part of the Agreement. Moreover, language

contained in recitals of a contract, including the "whereas" clauses of the Resolution and Agreement, do not impose contractual obligations beyond those specifically set forth in the contract (*Trump Village Section 3, Inc. v. New York State Housing Finance Agency*, 292 AD2d 156, 158 [1st Dept.2002]) and are not part of the operative agreement (*Jones Apparel Group, Inc. v. Polo Ralph Lauren Corp.*, 16 AD3d 279 [1st Dept.2005]). The pertinent part of the second "whereas" clause states, "and although the Tribe is a tax exempt organization..." It is anticipated that plaintiffs will rely on this language alleging that the County conferred tax exemption to WMTN. However, the tax exempt status of an entity owning a property is distinct and different from the tax exemption of the property itself (*Erie County Water Authority*, 47 AD2d at 20). WMTN's alleged status as a tax exempt organization would not automatically make the Property exempt from taxation. In order for the Property to be tax exempt, it must also be used for a purpose recognized by the legislature as qualifying for tax exemption (*Erie County Water Authority*, 47 AD2d at 20; *citing* *Real Property Tax Law* Art. 4, generally), or be placed in trust by the U.S. Government pursuant to the procedures established under 25 U.S.C. § 465 (*Leech Lake Band of Chippewa Indians*, 524 U.S. at 114-115; *Golden Feather Smoke Shop, Inc., et al.*, 2009 WL 705815, at * 12). Even if WMTN was tax exempt, which defendant denies, the Property still needs to be determined to be tax exempt in order to be placed in the wholly exempt section of the assessment rolls.

Defendant's motion for summary judgment should be granted because the County is without the authority or ability to confer tax exemption on the Property. Because the County is unable to confer tax exemption on the Property, any claims by plaintiffs to the contrary are without merit. As that the Property remained fully taxable, the County is under no obligation to

accept PILOT payments pursuant to the Agreement. Thus, because the County is not obligated to accept the PILOT payments, there is no breach of the Agreement.

**DEFENDANT'S MOTION SHOULD BE GRANTED BECAUSE PLAINTIFF BGA IS WITHOUT STANDING**

Defendant's motion for summary judgment should be granted because plaintiff BGA does not have standing to allege any claims against defendant County. The Agreement expressly disclaims reliance by third-parties. Paragraph E(9) states, "[e]xcept as specifically set forth or referred to herein, nothing herein expressed or implied is intended or shall be construed to confer upon or give to any person or corporation other than the parties hereto and their successors or assigns, any rights or remedies under or by reason of this Agreement." BGA is not a party to the Agreement. [Mandell Affidavit, exhibit "B"]. Thus, as a non-contractual third party, BGA has no standing to claim breach against defendant County.

BGA has no standing to seek declaratory judgment that WMTN is an Indian Tribe, or that the County has violated the "Non-Intercourse" Act. Thus, in light of plaintiffs' various causes of action, BGA is entirely without standing[10]. Accordingly, all claims brought on behalf of BGA should be dismissed.

**DEFENDANT'S MOTION SHOULD BE GRANTED BECAUSE PLAINTIFF'S CLAIMS ARE BARRED BY *RES JUDICATA* & THE *ROOKER-FELDMAN* DOCTRINE**

**A.) Defendants' motion should be granted because plaintiff's claims are barred by the doctrine of *res judicata*.**

Defendants' motion for summary judgment should be granted because plaintiffs' claims are barred by the doctrine of *res judicata*. The doctrine of *res judicata*, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that earlier action (*Wiesner v. Nardelli*,

[10] Without BGA as a plaintiff, there is not complete diversity among the parties. Thus, if the claims of BGA are dismissed, there is no longer subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

307 Fed.Appx. 484 [2d Cir.2008]; *quoting* Monahan v. New York City Dep't of Corr., 214 F.3d 275, 284 [2d Cir.2000]). "In deciding whether a suit is barred by *res judicata*, it must first be determined that the second suit involves the same 'claim' or -'nucleus of operative fact' – as the first suit" (*Wiesner*, 307 Fed. Appx. at ** 1; *quoting* Channer v. Dept. of Homeland Sec., 527 F.3d 275 [2d Cir.2008]).

As discussed *supra,* in 2004, the County attempted to foreclosure on the Property based upon WMTN's failure to pay property taxes due. In County Court, County of Ulster, WMTN argued that the Property was immune from foreclosure based upon the sovereignty of WMTN and their claim that the Property is "Indian Country." WMTN relied on the Agreement and Resolution, arguing that the County was prohibited by the Agreement to seek taxes from WMTN for the Property. In his Decision dated September 9, 2005, Judge Michael Bruhn held:

> The lands of Indian Tribes can only be granted tax exempt status by the Federal government under 25 USC § 465 which allows the Secretary of the Interior to acquire an interest in real property for the purpose of providing land for Native Americans. Title to any lands so acquired is taken in the name of the United States and held in trust for the Native American tribe for which the land is acquired. Such lands held in trust for Native American Tribes are exempt from state and local taxation. Western Mohegan has never applied to have the subject real property held in trust by the United States government so that it is tax exempt (*See* City of Sherill v. Oneida Indian Nation of New York, 25 S.Ct. 1478 [March 29, 2005]).[Mandell Affidavit, exhibit "P"].

Central to plaintiffs' breach of contract claim is the allegation that the Property is tax exempt and "Indian Country." However, the issue of whether the Property is tax exempt and "Indian Country" based upon the Agreement and Resolution has already been decided by Judge Bruhn. In his Decision and Order dated September 9, 2005, Judge Bruhn determined that the Property is not tax exempt and is not held in trust by the United States government, *i.e.,* "Indian Country" (*In the Matter of the Foreclosure of Tax Liens by Proceeding In Rem pursuant to Article Eleven of the Real Property Tax Law by Ulster County*, Index No. 02-3818 [Ulster Co.

Ct.])[Mandell Affidavit, exhibit "P"][11]. Thus, plaintiffs should be barred from re-litigating these issues by *res judicata*.

**B.) Defendants' motion should be granted because this Court is without subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine.**

Defendants' motion to dismiss should be granted because this Court is divested of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine[12]. The *Rooker-Feldman* doctrine dictates that inferior federal courts lack subject matter jurisdiction over cases that effectively seek review of judgments of state courts and that federal review, if any, can occur only by way of a *certiorari* petition to the U.S. Supreme Court. Jurisdiction is also lacking where plaintiff's claims before the district court are "inextricably intertwined" with the state court's determinations (*King v. Commissioner and New York City Police Dept.*, 60 Fed.Appx. 873 [2d Cir.2003]; *cf. Sorenson v. Suffolk County Child Support Enforcement Bureau*, 2009 WL 580426 [E.D.N.Y. March 5, 2009]).

In *Sorenson*, *supra*, a plaintiff alleged constitutional injuries arising from a defendant county's attempts to collect child support arrears. The U.S. District Court for the Eastern District of New York observed that that plaintiff's allegations were "essentially an attempt to vacate a judgment in Family Court for child support arrears" that the defendant County sought to enforce, and the plaintiff's lawsuit was an attempt to obtain the relief he desired after having no success in the state courts (*Sorenson*, 2009 WL 580426, at * 6). The District Court held that because the

[11] Pursuant to paragraph 2 of the 2006 Settlement Agreement between the parties, WMTN 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. However, upon information and belief, the Decision and Order of Judge Bruhn dated September 9, 2005 was never vacated by the Court, and remains the law of this case. Additionally, in paragraph 4(c) of the 2006 Settlement Agreement, plaintiffs agreed to discontinue with prejudice all claims by BGA for monetary damages against the County, Albert Spada and Lewis C. Kirschner. Thus, plaintiffs should be barred from bringing this lawsuit pursuant to paragraph 4(c) of the 2006 Settlement Agreement. [Mandell Affidavit, exhibit "C"].

[12] Because defendant argues that this Court is without subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine, it is respectfully submitted that the standard of review for this argument is under Federal Rule of Civil Procedure 12(b)(1).

plaintiff's claims sought review of the state court proceedings, and that review was barred by the *Rooker-Feldman* doctrine, the plaintiff's claims must be dismissed. *Id.* at * 6.

As mentioned *supra*, in his Decision dated September 9, 2005, Judge Michael Bruhn determined that the Property is not tax exempt and is not held in trust by the U.S. Government (*In the Matter of the Foreclosure of Tax Liens by Proceeding In Rem pursuant to Article Eleven of the Real Property Tax Law by Ulster County*; Index No. 02-3818 [Ulster Co. Ct.])[Mandell Affidavit, exhibit "P"]. These issues are central to plaintiffs' breach of contract claims, thus, plaintiffs' current allegations are "inextricably intertwined" with the state court's determinations (*King*, 60 Fed.Appx. 873; *cf. Sorenson*, 2009 WL 580426). Further, this prior determination resolves plaintiffs' remaining claims for injunctive relief, declaratory judgment, and alleged violations of the "Non-Intercourse" Act (*Id.*). Because the State Court has already determined that the Property is taxable and is not held in trust by the U.S. Government, *i.e.*, "Indian Country," allowing plaintiffs to proceed with this current lawsuit would serve as a collateral attack on the State Court's prior determination (*cf. King*, 60 Fed.Appx. 873; *cf. Sorenson*, 2009 WL 580426). This Court has previously recognized that plaintiffs claims are a collateral attack on the State Court's determination (*BGA, LLC v. Ulster County, New York*, 2008 WL 84591, at * 3, n. 5 [N.D.N.Y.,Jan. 7, 2008]). Thus, it is respectfully submitted that this Court is divested of subject matter jurisdiction based upon the *Rooker-Feldman* doctrine. Because this Court is without subject matter jurisdiction, defendant's motion should be granted.

Defendant's motion should be granted because plaintiffs' claims are barred by *res judicata* and the *Rooker-Feldman* doctrine.

**DEFENDANT'S MOTION SHOULD BE GRANTED BECAUSE THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER PLAINTIFFS' DECLARATORY JUDGMENT CLAIM**

Defendant's motion should be granted because this Court should decline to exercise jurisdiction[13] over plaintiffs' declaratory judgment claim. Under the Declaratory Judgment Act, a court may declare the rights and other legal relations of any interested party (28 U.S.C. § 2201[a]). Courts have consistently interpreted this permissible language as a broad grant of discretion to district courts to refuse to exercise jurisdiction over a declaratory action (*Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 [1995]).

**A.) This Court should decline to exercise jurisdiction over plaintiff's declaratory judgment claim because tribal status is a nonjusticiable political question.**

This Court should decline to exercise jurisdiction over plaintiff's claim for declaratory judgment because Tribal status is a nonjusticiable political question. Federal determination of tribal status has long been regarded a political question inappropriate for judicial decision (*United States v. Sandoval*, 231 U.S. 28, 46 [1913]; *United States v. Rickert*, 188 U.S. 432, 445 [1903]; *United States v. Holliday*, 708 U.S. [3 Wall] 407, 419 [1865]). Such a determination would require a detailed and specialized analysis (25 C.F.R. Part 83). "[T]he BIA is better qualified by virtue of its knowledge and experience to determine at the outset whether [WMTN] meets the criteria for tribal status" (*Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 [2d Cir.1994]). Thus, it is respectfully submitted that this Court should decline to exercise jurisdiction over plaintiffs' claim for declaratory judgment because Tribal status is a nonjusticiable political question that should be determined by the BIA.

[13] It is respectfully submitted that the standard of review for this branch of the motion is appropriately under Federal Rule of Civil Procedure 12(b)(1), to the extent that plaintiffs' claim for declaratory relief should be dismissed because this Court should decline to exercise subject matter jurisdiction (*Shinnecock Indian Nation v. Kempthorne*, 2008 WL 4455599, at * 7 [E.D.N.Y., Sept. 30, 2008]).

**B.) This Court should decline to exercise jurisdiction over plaintiff's declaratory judgment claim because this determination will have broad impact beyond the limits of this case.**

This Court should decline to exercise jurisdiction over plaintiffs' declaratory judgment claim because this determination will have broad impact beyond the limits of this case. It is beyond dispute that a determination of sovereignty of WMTN will have broad and significant impact (*BGA, LLC v. Ulster County, New York*, 2008 WL 84591, at * 3 [N.D.N.Y., Jan. 7, 2008] *citing* *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243 [1952])[14]. "A declaration that the Tribe is a sovereign Indian Nation and that the property in question is Indian Country would have repercussions on the Tribe's relationship not only with the defendant, Ulster County, but with federal and New York state entities as well" (*Id.* at * 7) [15]. As the Second Circuit has previously recognized, such a determination of sovereignty would be a determination that the lands in question are not within the regulatory jurisdiction of the State (*Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18, 23 [2d Cir.2004]). Although the 11th Amendment does not bar suits against municipalities, the requested declaratory relief would necessarily raise 11th Amendment concerns as that it would impact the State's interests (*see* *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 [1997]). Because the State is not a party to this lawsuit and unable to fully defend its interests in this litigation, this Court should defer from

[14] It is respectfully submitted that this Court has already determined it will not exercise jurisdiction for plaintiffs' declaratory relief in *BGA, LLC v. Ulster County, New York*, 2008 WL 84591, at * 3 [N.D.N.Y., Jan. 7, 2008], and that plaintiffs should be barred from re-litigating this point.

[15] Plaintiffs' claims for declaratory judgment directly implicate State and Federal governmental interests with respect to government-to-government relations and jurisdiction over the Property. As such, the State of New York, and the United States of America are indispensible parties to this suit (*Jackson v. Statler Foundation*, 496 F.d 623, 626 [2d Cir.1974][suit challenging federal and state tax exempt status "is deficient on its face for failure to join the Secretary of the Treasury and the New York State Tax Commissioner, who would be indispensable parties to a suit for such relief"]). Because the State of New York and the United States of America cannot be made parties to this suit under principals of sovereign immunity, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable" (Fed. R. Civ. P. 19[b]). Dismissal is warranted here because any declaration made by this Court relative to recognition of WMTN sovereignty, or the status of the Property as tax-exempt or "Indian Country" would not be binding against the United States of America or the State of New York, thus these parties are indispensable (*cf.* *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48 [2d Cir.2004]).

making a determination that would necessarily impact the relationship between the State and WMTN (*Couer d'Alene*, 521 US. At 282). This Court has previously recognized that this case "presents a textbook example of a case in which a court should exercise its discretionary power to decline jurisdiction over a declaratory judgment action" (*BGA, LLC v. Ulster County*, 2008 WL 84591, at * 2 [N.D.N.Y., Jan. 7, 2008]).

If this Court were to take any action contrary to the State's current relationship with WMTN and the Property, it would violate the 11th Amendment because it would impact the State's authority to exercise its governmental powers and authority over the Property (*cf. Couer d'Alene*, 521 U.S. at 282). Thus, in light of the broad impact of the sought declaratory relief and the impact that would have on the State of New York including the 11th Amendment concerns, this Court should decline to exercise jurisdiction over plaintiffs' claim for declaratory judgment.

**DEFENDANT'S MOTION SHOULD BE GRANTED BECAUSE PLAINTIFF WMTN HAS NOT BEEN DETERMINED TO BE AN INDIAN TRIBE BY THE BIA, THEREFORE, THEY ARE WITHOUT STANDING TO ALLEGE A VIOLATION OF THE "NON-INTERCOURSE" ACT, AND THIS COURT SHOULD DEFER TO THE BIA TO DETERMINE WHETHER WMTN IS IN FACT AN INDIAN TRIBE**

Defendant's motion should be granted because until such time as plaintiff WMTN is determined to be an Indian Tribe, they are without standing to allege a violation of the "Non-Intercourse" Act[16]. Further, this Court should defer to the BIA to determine whether WMTN is

[16] In order for a plaintiff to have standing to allege a violation of the "Non-Intercourse" Act, it must be recognized as an Indian Tribe by the BIA or under Federal Common law. Recognition of an Indian Tribe under Federal Common law is distinct from recognition by the BIA for the purpose of, among other things, obtaining the benefits of federal status governing the United States' relationship with Indian Tribes (*Gristede's Foods, Inc. v. Unkechauge Nation*, --- F.Supp.2d ---, 2009 WL 3235181 at * 25 [E.D.N.Y., Oct. 8, 2009]; *Shinnecock Indian Nation v. Kempthorne*, 2008 WL 4455599, at * 16, n. 7 [E.D.N.Y., Sept. 30, 2008]). Notwithstanding, for purposes of recognition for tax exemption, *i.e.,* the U.S. Government holding the land in trust (25. U.S.C. § 465), as well as gaming under the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701, *et seq.*), an Indian Tribe must be recognized by the BIA (*Cass County, Minn v. Leech Lake Bank of Chippewa Indians*, 524 US. 103, 115 [1998]; *Carruthers v. Flaum*, 365 F,.Supp.2d 448, 451 [S.D.N.Y.2005]; *New York State Racing and Wagering Board v. Shinnecock Indian Nation*, 523 F.Supp.2d 185, 246 [E.D.N.Y.2007]). Thus, even if this Court were to determine that WMTN is an Indian Tribe for purposes of the "Non-Intercourse" Act, such a determination would not be determinative relative to plaintiffs' claims that the Property is tax exempt, or that plaintiffs may conduct gaming under Federal and State law.

in fact an Indian Tribe and whether the Property is "Indian Country." Where a "nonrecognized" Indian Tribe, including WMTN, seeks recognition as an Indian Tribe for purposes of alleging a violation of the "Non-Intercourse" Act, deference to the primary jurisdiction of the BIA is appropriate (*Golden Hill*, 39 F.3d at 59-60). Deference is to be given to the BIA where the "nonrecognized" Indian Tribe has invoked the authority of the BIA (*Id.* at 60).

In this case, the Court should defer to the BIA to determine whether WMTN is an Indian Tribe. This Court should defer to the BIA because WMTN has invoked the authority of the BIA, therefore, deference should be given under primary jurisdiction (*cf. Golden Hill*, 39 F.3d at 59-60). WMTN is not currently recognized by the BIA as a sovereign Tribal government. WMTN previously submitted to President Clinton its First Amendment Grievance. [Mandell Affidavit, exhibit "H"]. At WMTN's direction, this submission was forwarded to the BIA and handled as an application for Federal Recognition. [Mandell Affidavit, exhibit "J," p. 1]. By submitting this documentation to the BIA and requesting it be handled as an application for Federal Recognition, WMTN invoked the authority of the BIA (*cf. Golden Hill*, 39 F.3d at 59-60).

This Court should defer to the BIA to resolve the factual and historical issues in WMTN's petition for recognition. After receiving the certified documented petition from WMTN, the BIA determined that WMTN's application for Federal recognition had significant deficiencies in documentation, unverifiable statements, altered original documents and significant omissions in all areas required by the acknowledgment regulations. [Mandell Affidavit, exhibit "J," pp. 29-50]. Then, on July 2, 2004, Mr. Roberts plead guilty to making and using materially false writings and documents in a matter within the jurisdiction of the Executive Branch (Count V) in violation of 18 U.S.C. §§ 1001(a)(3) and (2) (*United States of America v. Ronald A. Roberts*, Criminal Action No. 02-CF-111[LEK], *affd* 134 Fed. Appx. 470 [2d

Cir.2005])[Mandell Affidavit, exhibit "M"]. The false writings and documents that were the basis for Mr. Robert's conviction are some of the same documents analyzed in the BIA's technical assistance letter that were submitted by WMTN in support of their acknowledgment petition. [Mandell Affidavit, exhibit "J," pp. 29-50]. In light of the discrepancies and convictions concerning the documented history of WMTN, it is respectfully submitted that this Court should defer to the BIA to resolve these issues. Based upon its qualifications by virtue of its knowledge and experience to determine whether WMTN is in fact an Indian Tribe, the BIA is best equipped to resolve these historical and factual issues (*Golden Hill*, 39 F.3d at 60).

After having invoked the authority of the BIA and receiving an unfavorable response in the BIA's Technical Assistance letter, WMTN is now affirmatively attempting to circumvent the recognition process prescribes by Congress (*but cf. Gristede's Foods, Inc.*, --- F.Supp.2d ---, 2009 WL 3235181, at * 25). Because WMTN has previously invoked the authority of the BIA and that application remains pending, this Court should defer from making such a determination until the BIA recognition process is complete (*Golden Hill*, 39 F.3d at 59-60).

It is anticipated that plaintiffs will argue that WMTN never invoked the authority of the BIA, therefore, under *Golden Hill*, *supra*, deference is not required. Correspondence maintained by the U.S. Department of the Interior (hereinafter "DOI") demonstrates that WMTN submitted a petition for acknowledgment as an Indian tribe and otherwise invoked the authority of the BIA. [Mandell Affidavit, exhibit "J"]. DOI received a "Resolution" signed by the "Tribal Council" of WMTN which states: "Be it resolved that the Western Mohegan Tribe and Nation of New York petition the Federal government for acknowledgment as an Indian Tribe" (October 21, 1996 Resolution)[Mandell Affidavit, exhibit "J," p. 1]. DOI wrote WMTN on several occasions to inform them of the agency's petitioning process and to confirm that WMTN wished to proceed

with this regulatory process. [Mandell Affidavit, exhibit "J," pp. 3, 9-12, 13-14, 17-18, 25-26]. WMTN provided assurances that it wished to continue with the DOI recognition process. [Mandell Affidavit, exhibit "J," pp. 15-16, 19-20, 21-22, 28]. While WMTN at times purported to include various conditions and stipulations regarding its participation in DOI's acknowledgment process, this process is established and governed by regulation, and thus is not subject to *ad hoc* modifications by petitioning groups (*see* 25 C.F.R. Part 83).

Having initiated the acknowledgement process and otherwise invoked the BIA's authority, WMTN has not clearly stated its intent to withdraw from it. Shortly after DOI sent the September 24, 1998 Technical Assistance ("TA") letter, it received correspondence from Mr. Roberts and WMTN that "re-affirmed" its "notice of cancellation" of its petition. [Mandell Affidavit, exhibit "J," p. 52-53]. However, DOI then received correspondence from a group calling itself the "Muh-he-con-nuk Tribal Nation" disavowing any connection with Ronald A. Roberts. [Mandell Affidavit, exhibit "J," p. 55]. On November 2, 1998, Mr. Roberts and Bruce Clark sent a letter to the President of the United States indicating that "The 1st Amendment grievance petition for Muhheakunnuk is abandoned" – but then Mr. Roberts' December 15, 1998 letter to the President indicates that the November 2 letter should be disregarded, and that the group was conducting additional genealogical research in response to the DOI's TA letter. [Mandell Affidavit, exhibit "J," pp. 56, 57]. On this same day, Mr. Roberts sent a letter to the DOI indicating that the group was obtaining reports from genealogists and historians in response to DOI's TA letter. [Mandell Affidavit, exhibit "J," p. 58]. Upon information and belief, neither WMTN nor Mr. Roberts have submitted any additional documentation to DOI or BIA to resolve the issues raised in the TA letter. Nor have WMTN or Mr. Roberts indicated to DOI or BIA their clear intent to withdraw their petition for acknowledgment.

Defendant's motion should be granted because until such time as plaintiff WMTN is determined to be an Indian Tribe, they are without standing to allege a violation of the "Non-Intercourse" Act, and this Court should defer to the BIA to determine whether WMTN is in fact an Indian Tribe and whether the Property is "Indian Country."

Assuming *arguendo* that WMTN has standing to allege a violation of the "Non-Intercourse" Act, which defendant denies, WMTN still fails to have a viable claim. Plaintiffs fail to proffer any evidence that defendant County is currently initiating any foreclosure proceedings or is otherwise attempting to alienate the Property (*BGA, LLC v. Ulster County, New York*, 2008 WL 84591, at * 3). Thus, plaintiffs have failed to state a viable claim under the "Non-Intercourse" Act. Defendant's motion should be granted because WMTN is without standing to allege a violation of the "Non-Intercourse" Act, this Court should defer to the BIA to determine whether WMTN is in fact an Indian Tribe, and even if WMTN has standing, plaintiffs fail to have a viable claim for a breach of the "Non-Intercourse" Act.

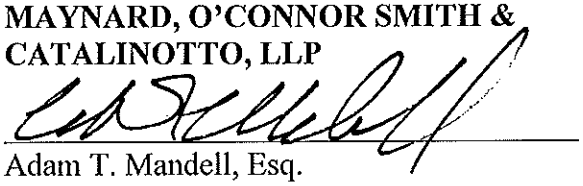
## CONCLUSION

In light of the foregoing, it is respectfully submitted that defendant's motion pursuant to Federal Rules of Civil Procedure 56 and 12 should be granted. Defendant's motion should be granted because there is no breach of the Agreement and the County did not confer tax exempt status to the Property. Defendant's motion should be granted because plaintiff BGA is without standing to support any viable claim(s) against defendant. Defendant's motion should be granted because plaintiffs' claims are barred by *res judicata* and the *Rooker-Feldman* doctrine. Finally, defendant's motion should be granted because this Court should defer from exercising jurisdiction over plaintiffs' claims for declaratory judgment, and should defer to the BIA for any determination that WMTN is an Indian Tribe and that the Property is "Indian Country."

Defendant respectfully requests an Order from the Court granting defendant's motion, and dismissing all of plaintiffs' claims in their entirety and with prejudice, with costs and disbursements, and such other and further relief this Court deems proper..

DATED: November 23, 2009
Saugerties, New York

**MAYNARD, O'CONNOR SMITH & CATALINOTTO, LLP**



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