UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v. Index No. 08-CV-0149(GLS)(RFT)

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

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TODTMAN, NACHAMIE, SPIZZ & JOHNS, P.C.
Attorneys for Plaintiffs
425 Park Avenue
New York, NY 10022
(212) 754-9400
By: Barton Nachamie, Esq.
Jill L. Makower, Esq.

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Plaintiffs BGA, LLC ("BGA") and The Western Mohegan Tribe and Nation of the State of New York (the "Tribe" or "Western Mohegan Tribe"), the plaintiffs herein ("Plaintiffs"), by and through their counsel, Todtman, Nachamie, Spizz & Johns, P.C., submit this Memorandum of Law in opposition to the motion for summary judgment (the "Motion") filed by defendant Ulster County (the "County"), and respectfully represent:

PRELIMINARY STATEMENT

The Plaintiffs state claims in this action for declaratory judgment (first cause of action), specific performance (second cause of action), breach of contract (third cause of action), violation of the federal Nonintercourse Act, 25 U.S.C. §177 (fourth cause of action) and injunction (fifth cause of action). The County's Motion, which addresses only some of the Plaintiffs' causes of action, sets forth no basis for summary judgment to be granted in

favor of the County on any cause of action.

Plaintiffs' response to the County's Statement of Material Facts Pursuant to Local Rule 7.1(a)(3) (submitted herewith) demonstrates that the material facts do not support the County's Motion for Summary Judgment, as the County's Statement is little more than a series of suppositions, legal arguments and biased opinions of the County's former attorney.

The lack of any basis for summary judgment is also demonstrated by the following accompanying affidavits: (i) Affidavit of Chief Ronald A. Roberts, sworn to on March 18, 2010 (the "Roberts Aff."), (ii) Affidavit of Bernard Wiczer, sworn to on March 18, 2010 (the "Wiczer Aff."), (iii) Affidavit of William P. Ruffa, sworn to on March 17, 2010 (the "Ruffa Aff."), and (iv) the Response Affidavit of Chief Ronald A. Roberts, sworn to on March 22, 2007 ("the Response Aff.").[1]

I. THERE ARE NO GROUNDS TO DISMISS PLAINTIFFS' BREACH OF CONTRACT CAUSE OF ACTION

The County's first (and primary) argument is that summary judgment should be granted because the County is not obligated to accept Pilot Payments until such time that the Property becomes tax exempt, and no breach of the 2001 "Agreement and Mutual Release" (the "Agreement") occurred because the Property has not been declared tax exempt. (County's Brief, pp.19, 27.) Contrary to the County's assertions, there are no grounds for dismissal of the Plaintiffs' breach of contract claim.

Plaintiffs dispute the County's contention that, under the Agreement, the County is

[1] The Response Aff. was previously filed in this Court in the 2006 Action (defined below) in response to the Amicus Curiae Brief dated February 26, 2007 (the "Amicus Brief") of the United States of America.

not obligated to accept Pilot Payments until such time that the Property becomes tax exempt. The County's contention makes no sense. If the County's obligation to accept Pilot Payments actually hinged on the Property becoming tax exempt in the future (as opposed to the Property being immediately recognized by the County as tax exempt), the Tribe surely would not have agreed to pay Pilot Payments upon the Property being declared tax exempt in the future, because once that occurred, the Tribe would have no legal obligation to pay taxes. (See Roberts Aff., ¶33.)

According to the County, the County's intention with respect to the Agreement was as follows:

> "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."

(County's Brief, p.21, citing Murray Affidavit, ¶9.) That argument is either pure speculation of then County Attorney Francis T. Murray ("Murray"), or just Murray's biased opinion. (See Roberts Aff., ¶32.) In any event, that was definitely not the intent of the Plaintiffs. (See Roberts Aff., ¶31.)

The County asserts that the Agreement is unambiguous, repeatedly pointing to the phrase "the property may be tax exempt in future tax years" (Agreement ¶A.1.(a)(iv)).[2] Not surprisingly, the County neglects to mention the inconsistent language in the Agreement by which the County unequivocally admits and recognizes that the Tribe is a sovereign Indian nation. See Agreement ¶A.1.(b) (stating that "The County shall not adopt any resolutions or take any other action to contravene the subject matter of the Resolutions or

[2] A copy of the Agreement is annexed to the Mandell Aff. as Exhibit "B".

affect the Real Property's trust status and/or 'Indian Country' status."); Agreement ¶A.2.(c) (stating that "The Tribe hereby waives its right to sovereign immunity only to the extent of and in connection with the enforcement by the County of the Tribe's obligations hereunder...."). In spite of that language, the County foreclosed on the Property, in breach of the Agreement and in violation of the Nonintercourse Act.

The County also tries to hide from the statements it made in County Resolution No. 376 (the "Resolution").[3] In the Resolution, the County:

- stated that "the Tribe is a tax exempt organization";
- stated that it is "RESOLVED, that the County convey its interest in the Tamarack 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'..."; and
- promised to hold the Property for the benefit of the Tribe as "Indian Country".

Based on the language contained in the Agreement and the Resolution, it is indisputable that the Agreement is ambiguous and that the obvious ambiguity makes summary judgment untenable as a matter of law.

Moreover, Murray, the former County attorney, was the exclusive or virtually exclusive draftsman of the Agreement. (See Ruffa Aff., ¶7; Roberts Aff., ¶24.) Indeed, the County admitted in its Answer to the Complaint that "the 2001 Agreement was drafted by Frank Murray."[4] As such, the ambiguity must be construed against the County, the party who drafted the Agreement. Murray's contention that the Agreement was the combined work product of both the Tribe and the County (Murray Aff., ¶¶16, 17)

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[3] A copy of the Resolution is annexed to the Mandell Aff. as Exhibit "F".

[4] See Complaint, ¶45; Answer, ¶1.

is inaccurate, as demonstrated in the Ruffa Aff. and the Roberts Aff. [5]

The County argues that, pursuant to the merger clause in the Agreement, the language of the Resolution is not a part of the Agreement and the County is not bound by the Resolution. (County's Brief, p.19 n7, p.30). This argument not only lacks merit, but it is also absurd. The Agreement expressly states that the County's adoption of the Resolution constituted consideration by the County (see Agreement ¶A.1.(a)). The Agreement further states that "The County shall not adopt any resolutions or take any other action to contravene the subject matter of the Resolutions or affect the Real Property's trust status and/or 'Indian Country' status." (Agreement ¶A.1.(b).). These two documents are inextricably interwoven and conditional on each other. This Court, in its January 7, 2008 Order (the "January 2008 Order") in BGA, LLC and The Western Mohegan Tribe and Nation of the State of New York v. Ulster County, Civ. Action 06-cv-0095 (GLS)(RFT)(N.D.N.Y. 2006) (the "2006 Action") noted that "the Agreement and Mutual Release (in conjunction with the Resolution incorporated therein) arguably contains a covenant on the part of Ulster County to treat the Tribe's property as tax exempt." BGA, LLC v. Ulster County, 2008 WL 84591 at *3, n.4, 2008 U.S. Dist. LEXIS 1029 at *9-10, n.4 (N.D.N.Y Jan. 7, 2008). The Resolution is a legal admission by the County of the Tribe's tax exempt status which is binding on the County. The County is barred from taking any position other than treating the Property as tax exempt.

[5] As set forth in the Ruffa Aff., Mr. Ruffa was an investor of the Tribe. (Ruffa Aff., ¶3.) Murray drafted the Agreement and sent it to Mr. Ruffa for review. Mr. Ruffa is an attorney, but he was not an attorney for the Tribe. (Ruffa Aff., ¶¶2 and 5.) Mr. Ruffa reviewed the Agreement. (Ruffa Aff., ¶6.) Chief Roberts subsequently signed the Agreement after communicating with Mr. Ruffa. Chief Roberts confirms that Murray drafted the Agreement and that Ruffa looked it over, but that Ruffa was not an attorney for the Tribe at that time. (Roberts Aff., ¶25.) Chief Roberts further confirms that the Tribe was not represented by any attorneys at the time of the Agreement, but that the Tribe trusted the County to prepare the Agreement in accordance with the Resolution. (Roberts Aff., ¶25.)

When deciding a summary judgment motion, a court must construe all the evidence in the light most favorable to the nonmoving party (in this case the Plaintiffs) and draw all inferences and resolve all ambiguities in that party's favor. Topps Co. v. Cadbury Stani S.A.I.C., 526 F.3d 63, 68 (2d Cir. N.Y. 2008); LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp., 424 F.3d 195, 205 (2d Cir. 2005). "This generally means that a motion for summary judgment may be granted in a contract dispute only when the contractual language on which the moving party's case rests is found to be wholly unambiguous and to convey a definite meaning." Topps, 526 F.3d at 68, citing Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 232 F.3d 153, 157-158 (2d Cir. 2000). "Ambiguity here is defined in terms of whether a reasonably intelligent person viewing the contract objectively could interpret the language in more than one way." Id., citing Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan, 7 F.3d 1091, 1095 (2d Cir. 1993). "To the extent the moving party's case hinges on ambiguous contract language, summary judgment may be granted only if the ambiguities may be resolved through extrinsic evidence that is itself capable of only one interpretation, or where there is no extrinsic evidence that would support a resolution of these ambiguities in favor of the nonmoving party's case." Id., citing Compagnie Financiere, 232 F.3d at 158.

Since the Agreement is certainly not "wholly ambiguous", Compagnie Financiere, 232 F.3d at 157-158, the County is not entitled to summary judgment on the breach of contract cause of action.[6]

[6] The County contends that "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." (County's Brief, p. 21, citing Computer Associates Intern., Inc., 10 A.D.3d 699 (2d Dept.

Summary judgment must also be denied on the breach of contract cause of action for another independent reason - - that the breaches alleged by the Plaintiffs go far beyond the simple rejection of Pilot Payments.

The County focuses solely on Plaintiffs' claim that the County breached the Agreement by failing to accept Pilot Payments. That limited view fails to recognize the breadth of the County's exposure for breach. The Plaintiffs have also alleged that the County breached the Agreement (i) by contravening the subject matter of the Resolution and by taking other actions that affect the Property's "trust status" and/or "Indian Country" status (see Complaint ¶170), (ii) by refusing to recognize the Tribe's tax exempt status and the Tribe's sovereign immunity (Complaint ¶171) and (iii) by commencing and prosecuting the County's 2002 foreclosure action (the "Foreclosure Action") to judgment. (Complaint ¶173). There can be no dismissal of the breach of contract cause of action in view of these allegations. As demonstrated below, the County violated federal Indian law, as well as the Agreement, by commencing and prosecuting the Foreclosure Action to judgment. Furthermore, since the Resolution authorized the County to convey its interest in the Property to the Tribe to be held as "Indian Country" and stated that the Property would be held for the benefit of the Tribe as "Indian Country", the County also "contravene[d] the subject matter of the Resolutions" by commencing and prosecuting the Foreclosure Action to judgment.

Based on the foregoing, the County's Motion must be denied.

2004)). As stated in Computer Associates, "[a] contract is unenforceable where there is no meeting of the minds between the parties regarding a material element thereof." Id. at 699. If the Court determines that the Agreement is unenforceable because there was no meeting of the minds, then the County must be compelled to return the $900,000 that the Plaintiffs paid to the County for the Property.

II. THE COUNTY'S ARGUMENT THAT IT LACKS AUTHORITY TO CONFER TAX EXEMPT STATUS ON THE PROPERTY PROVIDES NO BASIS TO DISMISS THIS ACTION

The County's second argument is that summary judgment should be granted because the County is without the authority or ability to confer tax exempt status on the Property. (County's Brief, p.27.) This twisted argument must be flatly rejected. The fact that the County has no control over the question of sovereignty and no authority to alter the Tribe's state or federal tax status is irrelevant to this action. The Plaintiffs have never contended that the County, through the Resolution or the Agreement or otherwise, conferred any state or federal tax exemption on the Property. (See Roberts Aff., ¶36.) To the contrary, it has always been the Plaintiffs' position that the Tribe has sovereign immunity which is inherent, and which prevents the County from taxing the Tribe and its territory and from foreclosing on the Property. (Roberts Aff., ¶36.) See United States v. Wheeler, 435 U.S. 313, 322-323, 98 S.Ct. 1079, 1086 (1978) ("The powers of Indian Tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished'" and their inherent "sovereignty [extends] over both their members and their territory'"); Okla. Tax Comm'n v. Chicksaw Nation, 515 U.S. 450, 458 (1995) ("'Absent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians.") (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 252, 258, 116 L.Ed.2d 687, 112 S.Ct. 683 (1992)); Gristedes Foods, Inc. v. Unkechauge Nation, 660 F.Supp.2d 442, 466 (E.D.N.Y. 2009) ("the court is mindful of the inherent nature of tribal sovereign authority, which 'predates federal recognition – indeed, it predates the birth of the Republic'"); New York Indian

Law §6 ("No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same."); Oneida Indian Nation v. Oneida County, 432 F. Supp. 2d 285, 289 (N.D.N.Y. 2006) (because the Nonintercourse Act prohibits alienation of tribal land without consent of Congress, it precludes a county from foreclosing upon tribal fee land for nonpayment of property taxes); Oneida Indian Nation of N.Y. v. Madison County, 401 F. Supp. 2d 219, 227-228 (N.D.N.Y. 2005) (same). The Tribe claims "aboriginal title" or "Indian title" (as well as "legend title" under New York laws to its lands) to the Property because the Property consists of land located in the territory of the Tribe's aboriginal and ancestral lands. The Tribe asserts that its aboriginal title has never been lawfully extinguished or terminated because no sale of the Property has ever been made which complied with the Nonintercourse Act. (Roberts Aff., ¶7.)

Although the County lacks authority to alter the Tribe's state or federal tax status, it represented to the Tribe that it had the authority to pass the Resolution and to enter into the Agreement. (Roberts Aff., ¶34.) Plaintiffs reasonably relied upon the County's covenant to treat the Property as tax exempt. (See Roberts Aff., ¶20; Wiczer Aff., ¶2.) Under the doctrine of estoppel, the County must be barred from denying the Tribe's sovereign immunity and the Property's tax exempt status.

The County errs in arguing that Plaintiffs cannot assert estoppel. (County's Memorandum of Law, p. 29.) The County's claim that "*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" (*Id.*, at p.29) must be rejected. The cases cited by the County for this proposition do not support the County's argument. The County's suggestion that this is such a case where the party claiming estoppel should have discovered the error with reasonable diligence, is absurd. As stated above, the Plaintiffs have never contended that the County, through the Resolution or the Agreement or otherwise, conferred any state or federal tax exemption on the Property. No case law prevents estoppel from applying to the County's own covenant to treat the Property as tax exempt.

III. BGA HAS STANDING IN THIS ACTION

The County argues that all claims brought on behalf of BGA must be dismissed for lack of standing. The County is incorrect because pursuant to the Security Agreement dated as of September 30, 2004 between the Tribe and its funder, BGA, BGA is a secured party and assignee with respect to various rights of the Tribe including claims against the County set forth in the Complaint. (A copy of the Security Agreement is annexed to the Roberts Aff. as **Exhibit "9"**.)

IV. PLAINTIFFS' CLAIMS ARE NOT BARRED BY *RES JUDICATA*

The County argues that *res judicata* bars the Plaintiffs' claims because:

> "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'..... Thus, plaintiffs should be barred from re-litigating these issues by *res judicata.*"

(County's Brief, pp. 33-34.)

The County is incorrect. The doctrine of *res judicata* does not apply in this case, as demonstrated below.

To invoke the doctrine of *res judicata*, "a party must show that 1) the previous action involved an adjudication on the merits; 2) the previous action involved the plaintiffs or those in privity with them; and 3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 285 (2d Cir. N.Y. 2000). Accord Pike v. Freeman, 266 F.3d 78, 91 (2d Cir. N.Y. 2001). "In deciding whether a suit is barred by res judicata, [i]t must first be determined that the second suit involves the same claim or - - nucleus of operative fact - - as the first suit." Channer v. Dep't of Homeland Sec., 527 F.3d 275, 280 (2d Cir. 2008). *Res judicata* does not apply in this suit for at least four reasons, as demonstrated below.

First, *res judicata* does not apply because this action does not involve the same claim or nucleus of operative fact as the Foreclosure Action. See Channer, 527 F.3d at 280. In the Foreclosure Action, which was presided over by Judge Bruhn, the County, as plaintiff, sought to foreclose on the Property pursuant to NY RPTL Article 11. In the present action brought by the Tribe and BGA, the causes of action are completely different. Plaintiffs herein are seeking a declaratory judgment, specific performance of the Agreement, damages for breach of contract, damages for violation of the federal Nonintercourse Act, and an injunction. The Tribe did not assert any counterclaims in the Foreclosure Action, but the Tribe raised various defenses, including that it is a sovereign Indian nation, that its Reservation is protected from taxation pursuant to

federal common law and N.Y. Indian Law §6, and that the County is barred under the doctrine of estoppel from taxing the Property. (See Roberts Aff., **Exhibit "8"**.) The Tribe also argued that District Judge Hurd's decision in Oneida Indian Nation of New York v. Madison County, 2005 WL 2810537 (N.D.N.Y. 2005), which held that a foreclosure action against land owned by an Indian tribe is prohibited by the Nonintercourse Act, required dismissal of the foreclosure action.[7] (See Roberts Aff., **Exhibit "8"**.)

Although the Tribe has asserted its sovereign immunity and its rights under the Agreement in both actions, the Foreclosure Action did not involve the same nucleus of operative fact as the present action. This is true primarily because the central issue herein, i.e., whether the Tribe is entitled to Federal recognition as an Indian tribe under the Federal common law, and the "operative facts" relevant thereto (including the history and genealogy of the Tribe), were not before Judge Bruhn. That issue and those "operative facts" were not before Judge Bruhn for three reasons: (1) the County Court had no jurisdiction over the central issue of Federal recognition of tribal status, and was

[7] The U.S. Supreme Court held in March 2005 that the Oneida Indian Nation ("OIN") was subject to local taxation. See City of Sherrill v. Oneida Indian Nation of New York, 125 S. Ct. 1478 (March 29, 2005). That decision, however, did not give Madison County the right to foreclose upon the OIN's property in the state court foreclosure action. Indeed, on October 27, 2005, the U.S. District Court for the Northern District of New York granted OIN's motion for summary judgment for injunctive and declaratory relief and permanently enjoined Madison County from any attempt to foreclose on OIN property or in any way alter OIN's property. See Oneida Indian Nation of New York v. Madison County, 401 F.Supp.2d 219, 227-228 (N.D.N.Y. 2005) (because the Nonintercourse Act prohibits alienation of tribal land without consent of Congress, it precludes a county from foreclosing upon tribal fee land for nonpayment of property taxes). In that decision, Judge Hurd held that OIN was entitled to summary judgment on four independent grounds, including (i) if Madison County were to proceed with the foreclosure, title to an Indian tribe's land would be transferred without Congressional approval, in violation of the Nonintercourse Act, and (ii) sovereign immunity precluded Madison County from maintaining the foreclosure action.

In the Foreclosure Action, the Tribe argued, citing Oneida, that the Foreclosure Action was prohibited by the Nonintercourse Act because, under that federal statute, "land owned by an Indian tribe is inalienable…except with the approval of Congress." The Tribe argued that under Oneida, even if it owed property taxes, the County could not foreclose on the Property.

without authority to grant Federal recognition to the Tribe,[8] (2) the County Court refused to permit the Tribe to demonstrate that it is a sovereign Indian nation (and that its Reservation therefore cannot be taxed and that its Property is therefore protected from foreclosure pursuant to the Nonintercourse Act) - - Judge Bruhn considered the Tribe's claim to sovereignty to be irrelevant because the Tribe has not been recognized by the Department of the Interior (the "DOI") and its Property has not been "granted tax exempt status by the Federal Government"[9] and (3) the Tribe was already seeking Federal recognition as a tribe on its cross-claim against the County in the United States Bankruptcy Court for the Eastern District of New York and had filed a motion for summary judgment on that cross-claim in 2003 which was *sub judice* until August 12,

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[8] The County Courts have limited jurisdiction over actions both at law and in equity. 1-1 Weinstein, Korn & Miller CPLR Manual § 1.04. See NY Const. Art. VI, § 11 (2010); NY Judiciary Law §190. See also 25 U.S.C. §233.

[9] Judge Bruhn erred in failing to recognize that a tribe's identity as a tribe and its sovereign immunity are not delegated to it by the United States, the BIA, or any other legislative or executive entity. See United States v. Wheeler, 435 U.S. 313, 322, 98 S.Ct. 1079, 1086 (1978) ("The powers of Indian Tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'"); Unkechauge, 660 F.Supp.2d at 67-68 ("the court is mindful of the inherent nature of tribal sovereign authority, which 'predates federal recognition – indeed, it predates the birth of the Republic'").

Judge Bruhn also failed to recognize that the inherent sovereignty of Indian tribes extends "over both their members **and their territory**." Wheeler, 435 U.S. at 323 (emphasis added). Accord *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members **and their territory**.") (emphasis added). Inherent tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Wheeler, 435 U.S. at 323 (emphasis added).

As demonstrated below, it is well-settled that federal recognition of tribal status may be given by a Federal court, and does not need to be given by or established through the BIA. See The Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 60-61 (2d Cir. 1994) (federal district court has authority to determine the question of tribal status and decide the merits of tribe's Nonintercourse Act claims); Unkechauge, 660 F.Supp.2d at 67-68 (E.D.N.Y. 2009) ("Pursuant to federal law, a group of Indians is a tribe - and therefore enjoys sovereign immunity - if it either 1) has been federally recognized by Congress or the BIA, or 2) meets the federal common law definition first articulated by the Supreme Court in *Montoya v. United States*, 180 U.S. at 266."); New York v. Shinnecock Indian Nation, 280 F.Supp.2d 1, 9-10 (E.D.N.Y. 2003) (a federal district court has the power and jurisdiction to make the determination of whether a tribe meets the federal criteria for tribal status and to grant federal recognition to a tribe); New York v. Shinnecock Indian Nation, 400 F.Supp.2d 486 (E.D.N.Y. 2005) (holding that the Shinnecock Indian Nation, which is not recognized by the BIA, is a legitimate Indian tribe).

2005.[10] Based on the above, the two actions do not involve the same claim or nucleus of operative fact, and therefore, *res judicata* does not apply.

Second, *res judicata* does not apply because Judge Bruhn never made an adjudication of the merits of any claim raised in the instant action.[11] In the September 9, 2005 Order, Judge Bruhn granted the County's application for a foreclosure judgment on the Property, and held as follows:

> "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 Sherrill v. Oneida Indian Nation of New York*, 25 S.Ct. 1478 [March 29, 2005])."

(September 9, 2005 Order, p. 2).

Judge Bruhn then directed the entry of an Amended Judgment of Foreclosure (the "Foreclosure Judgment").[12] The Tribe subsequently moved for reargument. Judge Bruhn denied the Tribe's motion for reargument by Decision dated December 15, 2005. The December 15, 2005 Decision re-stated Judge Bruhn's holding that "the Western Mohegans are not a federally recognized Indian tribe." (Copies of Judge Bruhn's

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[10] See Neil's Mazel, Inc. v. The Western Mohegan Tribe and Nation of the State of New York, Adv. Pro. No. 02-1442 (Bankr. E.D.N.Y. 2002) (Docket No. 25). (Neil's Mazel, Inc., which had sold its alleged interest in the Property to the Tribe, was the debtor in that Chapter 11 proceeding.) On August 12, 2005, the Bankruptcy Court entered an order granting the County's motion to dismiss the Tribe's cross-claim against the County based on the Bankruptcy Court's lack of subject matter jurisdiction over the cross-claim under 28 U.S.C. §1334(b). (Docket No. 58). The Plaintiffs filed an appeal of that order which appeal was discontinued in 2006 pursuant to the Settlement Agreement (hereinafter defined) entered into by the parties in the 2006 Action.

[11] In fact, Judge Bruhn did not even decide whether there was a breach of contract.

[12] The original foreclosure judgment specifically omitted the Property due to the adversary proceeding

September 9, 2005 Order, the Foreclosure Judgment, and Judge Bruhn's December 15, 2005 Decision are annexed to the Mandell Aff., collectively, as Exhibit "P".) (Copies of the parties' submissions in connection with the Tribe's motion for reargument are annexed to the Roberts Aff. as **Exhibit "8"**.)

Judge Bruhn's rulings in the Foreclosure Action, including the ruling that the Property has not been "granted tax exempt status by the Federal government under 25 U.S.C. §465", [13] are irrelevant in this action. Those rulings are irrelevant because the Tribe's Property does not need to "be granted tax exempt status by the Federal government" to be exempt from taxation. The Tribe's claims in this action are based on the Tribe's inherent sovereign immunity, which extends over the Tribe's territory. See Wheeler, 435 U.S. at 323 (the inherent sovereignty of Indian tribes extends "over both their members and their territory."); Mazurie, 419 U.S. at 557 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)("even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. ...Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing

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pending in the Bankruptcy Court. (See September 9, 2005 Order, p.2.)

[13] 25 U.S.C. §465 provides, in pertinent part, that:

> "The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands...for the purpose of providing land for Indians....Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

Indian reservation lands...").[14]

The County's contention that Judge Bruhn's September 9, 2005 Order "resolves plaintiffs' remaining claims for injunctive relief, declaratory judgment, and alleged violations of the 'Nonintercourse Act'" (County's Brief, p.35) is absolutely false. Judge Bruhn did not resolve any of these issues, and could not resolve any of them, because there has never been a legal determination of the issue of whether the Tribe is a sovereign Indian nation.

In view of the fact that none of the Plaintiffs' claims herein were decided by Judge Bruhn and no issue relevant to any of the Plaintiff's claims herein was decided by Judge Bruhn. Based on the above, Plaintiffs' claims are in no way a collateral attack on the County Court's determination, and *res judicata* does not apply. Plaintiffs respectfully submit that this Court's suspicion that Plaintiffs' 2006 Action "smacks of a collateral attack on a state court judgment" is unfounded. See 2008 U.S. Dist. LEXIS 1029 at *3 (N.D.N.Y Jan. 7, 2008). As the Court noted, the parties had not briefed that issue in the 2006 Action. See id.

Third, *res judicata* does not apply because the County cannot satisfy the requirement that the claims asserted in the subsequent action were, or could have been, raised in the prior action. As noted above, the County Court had no jurisdiction to

[14] The County errs in stating that "[t]he Property cannot be tax exempt because WMTN is not recognized by the BIA." (County's Brief, p.25.) The County also misapprehends Indian law by arguing that "[i]n 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 Bank of Chippewa Indians*, 524 U.S. at 114-115; *Golden Feather Smoke Shop, Inc., et al.*, 2009 WL 705815, at *12). (County's Brief, p.31.)

decide the issue of whether the Tribe meets the Federal common law standard for recognition as an Indian tribe. Therefore, the Plaintiffs' declaratory judgment claim was not, and could not, have been made in the Foreclosure Action.

Fourth, *res judicata* does not bar this action because, pursuant to the May 15, 2006 settlement agreement (the "Settlement Agreement") between the Plaintiffs and the County in the 2006 Action, there is no final judgment on the merits in the Foreclosure Action. The Settlement Agreement specifically provided that "the County agrees to treat the Foreclosure Judgment as being of no force or effect and as void *ab initio*"[15] and that "the County agrees that it shall be deemed to have irrevocably waived and released any and all claims and rights to the Property which it may have as a result of the Foreclosure Action and/or the Foreclosure Judgment."[16] (A copy of the Settlement Agreement is annexed to the Mandell Aff. as Exhibit "C".)[17]

Regarding the Settlement Agreement, the County states in a footnote that Plaintiffs agreed (in ¶4(c) thereof) to discontinue with prejudice all claims by BGA for monetary damages against the County, Albert Spada and Lewis C. Kirschner, and that Plaintiffs should therefore be barred from bringing this lawsuit. (See County's Brief, p.34, n.11.) This argument lacks merit because the Settlement Agreement has no

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[15] Settlement Agreement, ¶1(b).

[16] Settlement Agreement, ¶1(c).

[17] The County suggests in a footnote that Judge Bruhn's September 9, 2005 Order, which granted the County's application for a foreclosure judgment on the Property, remains the law of this case. (County's Brief, p.34, n.11.) This argument lacks merit and is completely disingenuous. As the County admits, Plaintiffs had the right under the Settlement Agreement to request vacatur of the Foreclosure Judgment *nunc pro tunc* and deletion of any official record of the foreclosure. The County misleads the Court by failing to mention that vacatur was not necessary, as the Settlement Agreement specifically states that "The Parties agree that the failure to obtain any such relief will not in any way impair any other terms of this Settlement Agreement or any of the Parties' rights or obligations hereunder." (Settlement Agreement, ¶2.) Pursuant to ¶1 of the Stipulation, Judge Bruhn's September 9, 2005 Order is a nullity in all respects.

preclusive effect. The Court dismissed the 2006 Action on jurisdictional grounds,[18] and this Court's August 2007 and January 2008 dismissal orders were affirmed by the Second Circuit Court of Appeals[19] without the parties having litigated any of their causes of action and without this Court having decided any issues on the merits.[20]

V. THE *ROOKER-FELDMAN* DOCTRINE DOES NOT BAR THIS ACTION

The County erroneously argues that the Court is divested of subject matter jurisdiction pursuant to the Rooker-Feldman doctrine. The Rooker-Feldman doctrine does not apply here.

The Supreme Court recently discussed the Rooker-Feldman doctrine in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517 (2005). In Exxon Mobil, the Supreme Court noted that in the years since its decisions in Rooker and Feldman, lower federal courts had incorrectly read the doctrine "to extend far beyond the contours of the Rooker and Feldman cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superceding the ordinary application of preclusion law." Exxon Mobil, 544 U.S. at 283.

In light of Exxon Mobil, the Second Circuit, in its 2005 decision in Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005), reformulated its reading

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[18] See BGA, LLC v. Ulster County, 2007 U.S. Dist. LEXIS 62315 (N.D.N.Y Aug. 22, 2007), reaffirmed, on reconsideration, 2008 U.S. Dist. LEXIS 1029 (N.D.N.Y Jan. 7, 2008).

[19] See BGA, LLC v. Ulster County, 320 Fed. Appx. 92, 93 (2d Cir. N.Y. 2009).

[20] Aside from the fact that the elements of collateral estoppel are not satisfied, giving preclusive effect to the Settlement Agreement would be unjust and would give the County an undeserved and unjustifiable windfall. In the Settlement Agreement, the parties stipulated to have this Court determine the legal dispute between them in the context of the declaratory judgment cause of action (rather than in the breach of contract or injunction cause of action). The parties reasonably believed that the controversy between them would be determined by this Court in the context of the declaratory judgment cause of action. (See Roberts Aff., ¶56.) The Court's determination that the Settlement Agreement mooted out the "case or controversy," and the subsequent dismissal of the 2006 Action on jurisdictional grounds was not anticipated or contemplated by the parties, and defeated the purpose of the Settlement Agreement.

of the Rooker-Feldman doctrine. In Hoblock, the Circuit Court declared that the phrase "inextricably intertwined," as it derived from Feldman, "has no independent content" and had led lower federal courts, including the Second Circuit, to apply Rooker-Feldman too broadly. Hoblock, 422 F.3d at 86-87. As discussed below, the County's argument that "plaintiffs' current allegations are 'inextricably intertwined' with the state court's determination",[21] is erroneous.

To guide the application of Rooker-Feldman as clarified by Exxon Mobil, the Circuit Court identified four requirements, two of which it characterized as substantive and two as procedural. Substantively, the federal plaintiff (1) "must complain of injury from a state-court judgment" and (2) "seek federal-court review and rejection of the state-court judgment." Hoblock, 422 F. 3d at 85. Procedurally, (1) the plaintiff in the federal action must have been the losing party in the prior state court proceeding, and (2) the state court judgment "must have been 'rendered before the district court proceedings commenced'". See Hoblock, 422 F.3d at 85.[22]

Only if a case meets all four requirements may the Court dismiss it pursuant to Rooker-Feldman. Rotering, 2009 U.S. App. LEXIS 4966 at *6, 2009 (2d Cir. Mar. 6,

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[21] County's Brief, p.35.

[22] Most recently, by a summary order rendered in Rotering v. Amodeo, the Second Circuit once again articulated the four Rooker-Feldman requirements as originally stated in Hoblock. See No. 07-4357-cv., 2009 U.S. App. LEXIS 4966 at *4, 2009 WL 579138 (2d Cir. Mar. 6, 2009) (citing McKithen, 481 F.3d at 97; Hoblock, 422 F.3d at 85). In Rotering, the Second Circuit stated:

> "Four requirements must be met for the Rooker-Feldman doctrine to apply: (1) the federal plaintiff must have lost in the state court; (2) the federal plaintiff must complain of injuries caused by a state-court judgment; (3) the federal plaintiff must invite the district court's review and rejection of that state-court judgment; and (4) the state-court judgment must have been rendered before the federal action commenced. McKithen v. Brown, 481 F.3d 89, 97 (2d Cir. 2007) (citing Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005)). We explained that the procedural requirements imposed by Exxon Mobil Corp. mean: (a) the federal suit must follow the state judgment; and (b) there must exist a common identity between the party defeated in a state court and the federal plaintiff. Hoblock, 422 F.3d at 89.

Id. at *3-4.

2009); Hoblock, 422 F.3d at 85; Lomnicki v. Cardinal McCloskey Servs, 2007 U.S. Dist. LEXIS 54828 at *12 (S.D.N.Y. July 20, 2007). In the instant case, the County can not satisfy the substantive requirements of the Rooker-Feldman doctrine. The doctrine, therefore, does not apply.[23]

Hoblock's discussion of the substantive Rooker-Feldman requirements is instructive here:

> Exxon Mobil declares these [substantive Rooker-Feldman] requirements but scarcely elaborates on what they might mean. The Court does, however, give some negative guidance as to what cases are not captured by the requirements. The Court points out that 28 U.S.C. § 1257 (and thus Rooker-Feldman) does not deprive a district court of subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff "presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . ., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." [citations omitted.] This language describes a set of federal suits - those raising "independent claims" - that are outside Rooker-Feldman's compass even if they involve the identical subject matter and parties as previous state-court suits.
>
> The voters' federal suit is therefore barred by Rooker-Feldman only if it complains of injury from the state-court judgment and seeks review and rejection of that judgment, but not if it raises "some independent claim."
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> * * * *
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> The "inextricably intertwined" language from Feldman led lower federal courts, including this court in Moccio, 95 F.3d at 199-200, to apply Rooker-Feldman too broadly. In light of Exxon Mobil - which quotes Feldman's use of the phrase but does not otherwise explicate or employ it, 544 U.S. at , 125 S. Ct. at 1523 & n.1 - it appears that describing a federal claim as "inextricably intertwined" with a state-court judgment only states a conclusion. Rooker-Feldman bars a federal claim, whether or not raised in state court, that asserts injury based on a state judgment and seeks review and reversal of that judgment; such a claim is "inextricably intertwined" with the state judgment. But the phrase "inextricably

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[23] In addition, the first procedural requirement is not satisfied with respect to BGA because BGA was not a party to the Foreclosure Action.

> intertwined" has no independent content. It is simply a descriptive label attached to claims that meet the requirements outlined in Exxon Mobil.

Hoblock, 422 F.3d at 86-87 (2d Cir. 2005).

The Substantive Rooker-Feldman Requirements Are Not Satisfied

(1) Plaintiffs do not "complain of injury from a state-court judgment"

In interpreting the first substantive requirement that the federal plaintiff "must complain of injury from a state-court judgment", the Second Circuit in McKithen v. Brown, 481 F.3d 89, 97 (2d Cir. 2007) stated that the applicability of Rooker-Feldman turns not on the similarity between a party's state and federal claims, "but rather on the *causal relationship* between the state-court judgment and the injury of which the party complains in federal court." 481 F.3d at 98 (emphasis in original). A federal suit complains of injury from a state court judgment when the injury the plaintiff complains about in the federal action is "caused by" or "produced by" the prior state court judgment. Id. at 87. See Glatzer v. Barone, 614 F.Supp.2d 450, 463 (S.D.N.Y. 2009).

In this action, Plaintiffs do not complain of injury that was caused by the County Court's Foreclosure Judgment. The requisite causal connection between the Foreclosure Judgment and the source of the injury Plaintiffs assert in this federal action is not satisfied because the Foreclosure Judgment is not the source or cause of the injury that Plaintiffs complain about in this Federal suit. The sources of the injury the Plaintiffs complain about in this Federal suit are the County's consistent failure for the past nine or so years to abide by the Agreement, the County's commencement and prosecution of the Foreclosure Action, which Plaintiffs were compelled to defend against

at substantial cost, and the County's many threats to commence additional foreclosure actions, all of which have prevented the Tribe from utilizing and enjoying the Property.

Plaintiffs' Complaint makes clear that the Plaintiffs have suffered injuries independent from the harm caused by the Foreclosure Judgment, and that this action raises one or more independent claims beyond the contours of Rooker-Feldman. Contrary to the County's unsupported assertion, the Tribe's federal claims are absolutely not "inextricably intertwined" with the Foreclosure Judgment.

Plaintiffs' "independent claims" are "outside Rooker-Feldman's compass" even though they involve some similar subject matter and, with the exception of BGA, the same parties as the Foreclosure Action. See Hoblock, 422 F.2d at 87 ("This language describes a set of federal suits - those raising "independent claims" - that are outside Rooker-Feldman's compass even if they involve the identical subject matter and parties as previous state-court suits."). The fact that Plaintiffs seek in Federal Court a result opposed to the one that occurred in the County Court, also does not cause them to run afoul of Rooker-Feldman. See Hoblock, 422 F.3d at 87 ("by focusing on the requirement that the state-court judgment be the source of the injury, we can see how a suit asking a federal court to 'deny a legal conclusion' reached by a state court could nonetheless be independent for Rooker-Feldman purposes.").

(2) Plaintiffs do not "seek federal-court review and rejection of the state-court judgment"

The second substantive requirement - - that the federal plaintiff "seek federal-court review and rejection of the state-court judgment" - - is not satisfied here. This is abundantly clear from the fact that, pursuant to the Settlement Agreement, the

Foreclosure Judgment is void *ab initio*.[24] That being the case, it cannot be said that the Plaintiffs are "seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights". See Johnson v. De Grandy, 512 U.S. 997, 1005-06, 114 S. Ct. 2647 (1994).

The fact that the second substantive requirement is not met is also evident from the irrelevance of Judge Bruhn's rulings in the Foreclosure Action. Judge Bruhn did not determine any issues relevant to the present action. (See discussion above regarding the County's *res judicata* argument.)

Because the remedy that Plaintiffs seek in this action to redress their injuries does not require the District Court to review and reject the Foreclosure Judgment, the second of the Hoblock substantive elements is not satisfied.

VI. THE COURT SHOULD EXERCISE ITS JURISDICTION OVER PLAINTIFFS' DECLARATORY JUDGMENT CLAIM

The County argues that its Motion should be granted because the Court should decline to exercise jurisdiction over Plaintiffs' declaratory judgment claim. The Plaintiffs vigorously disagree and urge this Court to permit the Tribe to demonstrate that it is a Native American tribe under the federal common law standard.

The Second Circuit has "outlined five factors to be considered" by the Court to guide its discretion in cases involving the Declaratory Judgment Act. The New York Times Company v. Gonzales, 459 F.3d 160, 167 (2d Cir. 2006). The five factors must be considered. See id.; General Motors Corp. v. Dealmaker, LLC, 2007 WL 2454208

[24] See Settlement Agreement, ¶1(b).

(N.D.N.Y. 2007) at *3; Interscope Records v. Kimmel, 2007 WL 1756383 at *4 (N.D.N.Y. 2007); Diaz v. Pataki, 368 F.Supp.2d 265, 272 (S.D.N.Y. 2005). The five factors are (i) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (ii) "whether a judgment would finalize the controversy and offer relief from uncertainty"; (iii) "whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'"; (iv) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (v) "whether there is a better or more effective remedy." New York Times, 459 F.3d at 167, quoting Dow Jones & Co., Inc. v. Harrods Ltd., 346 F.3d 357, 359-60 (2d Cir. 2003). All five of the factors enunciated by the Second Circuit militate in favor of the Court exercising jurisdiction over the declaratory judgment claim and granting the declaratory relief requested.

The first and second factors are satisfied because a ruling on the declaratory judgment cause of action would settle the legal and equitable issues involved, terminate the controversy and offer relief from uncertainty. The County continues to demand taxes from the Plaintiffs under threat of foreclosure. (Roberts Aff., ¶66.) If the Court exercises jurisdiction over the declaratory judgment cause of action, the issue of whether the Tribe is a sovereign Indian nation will be decided, as will the issue of whether the County may tax the Property and the issue of whether a foreclosure for non-payment would violate the Nonintercourse Act.[25] If the requested declaratory

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[25] In order for the Tribe to prove tribal status under the Nonintercourse Act, it must establish the following three factors:

(1) that it is a body of Indians of the same or a similar race,
(2) that it is united in a community under one leadership or government, and
(3) that it inhabits a particular though sometimes ill-defined territory.

judgment is granted, the County would be required to accept the agreed upon Pilot Payments and the Tribe would, upon making such payments, be free of the threat of foreclosure.

The County is obviously aware that this Court would most likely enjoin the County from commencing another foreclosure action while this action is pending. Thus, the County need only wait to see what this Court will do before pouncing on the Property with a new foreclosure action. By exercising jurisdiction in this case, the Court can settle the legal issues involved and resolve the controversy once and for all, because this Court (unlike the County Court) has the authority to determine whether the Tribe meets the standard for proving tribal status for purposes of a Nonintercourse Act claim and for the purposes of proving sovereign immunity from suit. See Unkechauge, 660 F.Supp.2d at 469 (making the tribal status determination where such determination was "necessary to resolve a critical issue arising from their status as defendants in this case: whether the Unkechauge enjoys sovereign immunity from suit.").

Third, the declaratory relief claim is not being used for "procedural fencing" or a "race to res judicata." Rather, the Plaintiffs' purpose in bringing their declaratory judgment claim is for the Tribe to obtain Federal recognition of its tribal status and to thereby prevent the loss of its Reservation by foreclosure. (Roberts Aff., ¶10.)

Fourth, a declaratory judgment would not increase friction between sovereign legal systems or improperly encroach on the domain of the state courts. This is especially true given that the County Courts have no jurisdiction to determine whether

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The Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51,59 (2d Cir. 1994); Montoya v. United States, 180 U.S. 261, 266, 45 L.Ed. 521, 21 S.Ct. 358 (1901). Notably, the Agreement did not address the issue of whether the County could foreclose in the event of non-payment.

the Tribe is a sovereign Indian nation under the Federal common law standard. See N.Y. Const. Art. VI, §11, N.Y. Judiciary Law §190. Notably, New York state courts also lack jurisdiction to make this determination. See 25 U.S.C. §233.[26]

Fifth, there is no better or more effective remedy than the requested declaratory relief. In fact, settling the crucial issues of sovereign immunity from suit and tribal status for purposes of the Nonintercourse Act by resolving the declaratory judgment cause of action is the only effective remedy for the Tribe. If this Court declines jurisdiction, the County will undoubtedly promptly commence another foreclosure action against the

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[26] In adopting 25 U.S.C. § 233, the statute that gave jurisdiction over civil actions involving Indians to the New York courts, Congress included this proviso: "[N]othing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." 25 U.S.C. § 233. See Oneida County, N.Y. v. Oneida Indian Nation of New York State, 105 S.Ct. 1245, 1255, 470 U.S. 226, 241 (1985). In providing New York state courts with jurisdiction over civil actions between Indians in 25 U.S.C. §233, Congress emphasized that the statute was not to be "construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." 25 U.S.C. § 233. See Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 680-681, n. 15, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (" 'The text and history of the new legislation are replete with indications that congressional consent is necessary to validate the exercise of state power over tribal Indians and, most significantly, that New York cannot unilaterally deprive Indians of their tribal lands or authorize such deprivations. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts reservations from state and local taxation."); Thompson v. County of Franklin, No. 92-CV-1258, 1992 WL 554369 at *9 (N.D.N.Y. 1992) ("the Court in Oneida I recognized that the final provision of section 233,... and the legislative history thereto, establishes that claims thereunder may be adjudicated in federal court.").

25 U.S.C. §233 applies in this matter because this is an action "involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." 25 U.S.C. § 233. Although the County only conveyed the Property to the Tribe in 2001, the conveyance was in settlement of the Tribe's aboriginal claims to their historical homelands. Thus, 25 U.S.C. §233 applies here and deprives the New York state courts of jurisdiction over this declaratory judgment action relating to the Tribe's ancestral lands. See Oneida County, 105 S.Ct. at 1255, 470 U.S. at 241 ("This proviso [in 25 U.S.C. §233] was added specifically to ensure that the New York statute of limitations would not apply to pre-1952 land claims... In Oneida I, we relied on the legislative history of 25 U.S.C. § 233 in concluding that Indian land claims were exclusively a matter of federal law...This history also reflects congressional policy against the application of state statutes of limitations in the context of Indian land claims."); Cayuga Indian Nation of New York v. Fox, 544 F.Supp. 542,547 (N.D.N.Y. 1982)(Indian nation was entitled to injunction against enforcement of state court orders enjoining county clerks from indexing notices of pendency filed by tribe in connection with its land claim suit relating to alleged ancestral lands; in 25 U.S.C. §233, "Congress has expressly withheld jurisdiction from New York State courts over civil actions 'involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to (September 13,1952).'").

Property. The Tribe's primary defenses to such action are sovereign immunity and the Nonintercourse Act, but the Tribe will have no ability to successfully assert either of those defenses in the County Court. The County Court will permit the foreclosure as it did in 2005 and the Tribe will surely lose its Reservation. The Tribe also will not be able to prevent the foreclosure by seeking Federal recognition from the DOI because the Government's own data shows the terribly slow pace at which petitions for recognition are evaluated.[27] The Tribe also will have no remedy in the state courts because, as stated above, the state courts lack jurisdiction to determine whether the Tribe is a sovereign Indian nation under the Federal common law standard. See 25 U.S.C. §233.[28]

The fact that the County has not yet initiated new foreclosure proceedings is irrelevant. For a controversy to have sufficient immediacy for a declaratory judgment to issue, the Supreme Court has held that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 99 S.Ct. 2301, 2308 (1979). Accord, MedImmune, Inc. v. Genetech, Inc., 127 S.Ct. 764, 772 (2007)

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[27] The Office of Federal Acknowledgment's ("OFA") "Status Summary of Acknowledgment Cases" states that as of February 15, 2007, there were 324 petitioning groups that had come before the DOI since October 1978 (when 25 C.F.R. Part 83 became effective) and that only 43 of the 324 cases had been resolved by the DOI. (See Response Aff, Exhibit "L" at p. 1.). This is an average of only 1.33 petitions per year. A comparison of the OFA's 2006 "Status Summary of Acknowledgement Cases" (annexed to the Response Affidavit as Exhibit "M") shows that only two petitions were resolved by the BIA or DOI between February 3, 2006 and February 15, 2007.

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

("where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat."). See also Crow Tribe, 819 at 903 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988) (justiciable controversy existed where Indian tribe sought declaratory relief against the imposition of state severance and gross proceeds taxes on coal mined within the tribe's Indian reservation, even though the mining, and therefore the application of the taxes, had not commenced).

A. TRIBAL STATUS IS NOT A NONJUSTICIABLE POLITICAL QUESTION

The County urges the Court to decline jurisdiction over Plaintiffs' declaratory judgment claim on the ground that tribal status is a non-justicable political question. The claim that only the political branches may confer federal recognition on an Indian tribe is untrue and is a gross misstatement of the law. The law is clear in the Second Circuit that federal recognition of tribal status may be given by a Federal court, and does not need to be given by or established through the BIA or the DOI. See Golden Hill, 39 F.3d at 60-61 (2d Cir. 1994) (federal district court has authority to determine the question of tribal status and decide the merits of tribe's Nonintercourse Act claims); Unkechauge, 600 F.Supp.2d 42 (E.D.N.Y. 2009) (finding that the defendant Unkechauge Nation is a "tribe" pursuant federal common law, stating "the exercise of federal court jurisdiction to determine tribal status in cases in which the tribe has no pending federal recognition application with the BIA and in which the resolution of a group's status is necessary to deciding an issue before the court does not encroach on the political branch's authority over Indian affairs and is consistent with the judiciary's authority to 'draw [] the bounds of tribal immunity.'"); Shinnecock Indian Nation, 280

F.Supp.2d at 9-10 (E.D.N.Y. 2003) (a federal district court has the power and jurisdiction to make the determination of whether a tribe meets the federal criteria for tribal status and to grant federal recognition to a tribe); Shinnecock Indian Nation, 400 F.Supp.2d at 492-93 (E.D.N.Y. 2005) (recognizing the Shinnecock Indian Nation as an Indian tribe). See also Masayesva v. Zah, 792 F. Supp. 1178, 1183-1185 (D. Az. 1992) ("modern law may not treat tribal existence as a political question"). The cases cited by the County for the proposition that tribal status is a non-justicable political question are antiquated. (See County's Brief, p.36.) The County's position that the tribal status determination is nonjusticiable is completely contradicted by the holdings in Golden Hill and its progeny.

B. EXERCISING JURISDICTION OVER PLAINTIFFS' DECLARATORY JUDGMENT CLAIM WILL NOT HAVE A "BROAD IMPACT" BEYOND THE LIMITS OF THIS CASE, BUT EVEN IF IT WOULD, THAT IS NO BASIS FOR DECLINING JURISDICTION

The County argues that the Court should decline jurisdiction over Plaintiffs' declaratory judgment claim because the declaratory relief requested "will have a broad impact beyond the limits of this case" and "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." (County's Brief, p. 37). The County's argument must be rejected.

At the outset, Plaintiffs recognize that this Court's January 2008 Order, as an alternative ground for dismissal, declined to exercise its discretionary power under the Declaratory Judgment Act. The Court held that "the declaratory relief requested by the plaintiffs would have a broad impact reaching far beyond the limits of this case" and "would have repercussions on the Tribe's relationships not only with the defendant,

Ulster County, but with federal and New York state entities as well."[29] "Broad impact" and "repercussions" are not recognized factors under the Declaratory Judgment Act, but, in any event, Plaintiffs dispute that there would be any "broad impact" or repercussions if the Court were to exercise its jurisdiction over the declaratory judgment cause of action. Notably, the declaratory judgment sought by the Tribe would recognize the sovereignty that the Tribe has always had. See Wheeler, 435 U.S. at 322 ("[t[he powers of Indian Tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'"). It is also crucial that this sovereignty was recognized by the County in the Resolution and the Agreement, which settled all of the Tribe's claims to lands in the County. Furthermore, neither the Federal government nor New York State taxes the Property, and the Tribe is not seeking acknowledgment by the BIA or benefits from the BIA. (See Roberts Aff., ¶63.) In addition, there are no private landowners on the Property and the Tribe is in exclusive possession of the Property. (id. at ¶8.)

A comparison of this case with Sherrill and its progeny is useful to demonstrate that there would not be any "broad impact" or disruptive repercussions if the Court were to exercise its jurisdiction over the declaratory judgment cause of action in this case.

(1) THE DECLARATORY RELIEF SOUGHT HEREIN IS NOT DISRUPTIVE AND IS NOT BARRED BY EQUITABLE DOCTRINES

In Sherrill, the Oneida Indian Nation of New York (the "OIN"), a federally recognized tribe, sought equitable relief reinstating its tribal sovereignty over parcels of land which the tribe purchased in the open market and which were within the

[29] BGA, LLC v. Ulster County, 2008 U.S. Dist. LEXIS 1029 at *8 (N.D.N.Y. Jan. 7, 2008).

boundaries of its historic reservation, so that the newly purchased properties would no longer be subject to local taxation. The United States Supreme Court held that, even though the parcels were Indian Country, the equitable doctrines of laches, acquiescence and impossibility barred the tribe's claim for sovereign control.

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

a. The Tribe's Sovereignty over the Property Is Not At Issue

The equitable remedy sought in Sherrill – a reinstatement of tribal sovereignty over its ancestral lands (which the Supreme Court found would disrupt the governance of central New York's counties and towns), is not being sought by the Tribe. The Tribe, which holds fee title to the Property through its Trustee, already has sovereignty over its Property, and the County specifically recognized that sovereignty in the Resolution and the Agreement. (See Roberts Aff., ¶¶6 and 7.) Since the Tribe owns the fee title to the Property, the Tribe's sovereignty over the Property is not at issue here. Sherrill must be distinguished from the present case on this important ground as well as other important grounds discussed below.

b. The Tribe Is In Exclusive Ownership and Possession of the Property

The instant case must also be distinguished from Sherrill based on the fact that the Tribe is in exclusive ownership and possession of the Property and there are no private landowners on the Property. (Roberts Aff., ¶¶7 and 8.) By contrast, the parcels that were at issue in Sherrill are overwhelmingly populated by non-Indians and numerous private landowners who would have been affected by a revival of the Oneidas' sovereignty over the parcels. See Sherrill, 125 S.Ct. at 1493.

c. The Declaratory Relief Sought Is Not Precluded By the Doctrine of Impossibility

In Sherrill, the Supreme Court held that the doctrine of impossibility barred the OIN's claims due to the "impracticability of returning to Indian control lands that generations earlier passed into numerous private hands", 125 S.Ct. at 1492, and the fact that a "checkerboard of alternating state and tribal jurisdiction in New York State -- created unilaterally at OIN's behest -- would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the trial patches." Id. at 1493.

In the case at bar, the declaratory relief sought is neither impossible nor impractical. The Tribe's Property, which consists of only one 250 acre parcel (as compared to the OIN's various parcels scattered over thousands of acres), is owned and possessed exclusively by the Tribe. (Roberts Aff., ¶6.) There would be no "checkerboard of alternating state and tribal jurisdictions" because there is only one parcel at issue. (Under the Agreement, the Tribe took fee title to the Property in settlement of all of its land claims against Ulster County.) The administration of state and local governments would not be burdened. Nor would landowners neighboring the

Property be affected. The Property is already in the control and exclusive possession of the Tribe -- no change of control or possession would result if the Tribe were to prevail in this action. Finally, the governance of the Property would not be disrupted, as it would have been on the parcels claimed by the Oneidas in Sherrill. For these reasons, the doctrine of impossibility has no application to this action.

d. Laches Is Not Applicable Because No Inequity Would Result From Enforcement of The Agreement

In Sherrill, the Supreme Court held that the doctrine of laches also was a bar to the Oneidas' claims. Laches is not applicable here. "[L]aches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced." Cayuga, 413 F. 3d at 274. The doctrine of laches would not bar the Tribe's claim for declaratory relief because no inequity would result from such relief. In fact, it would be entirely equitable for this Court to grant the declaratory judgment requested in this action, as this would force the County to stop violating the Agreement and the Tribe's sovereign immunity. It would be incredibly inappropriate to invoke the doctrine of laches here, where the Tribe aggressively pursued its land claims against the County and settled its lands claim under an Agreement that the County has breached and defied.

e. The Agreement Renders The Acquiescence Doctrine Inapplicable

The doctrine of acquiescence was also found to be a bar to the tribe's claims in Sherrill. See Sherrill, 125 S.Ct. at 1492. In applying the doctrine of acquiescence, the Supreme Court recognized that "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." Id. at 1492.

The Western Mohegan Tribe cannot fairly be deemed to have acquiesced in the

County's taxation of its Property. The Tribe pursued its land claims against the County and ultimately settled those claims with the County under the Agreement. This case arises out of the immediate breach of the Agreement by the County. The very first Pilot Payment tendered by the Tribe was rejected by the County and the Tribe immediately objected and sought relief.[30] In evaluating the "settled expectations" of the parties, this Court ought to conclude that the parties would expect that their Agreement, which was unanimously authorized by the Resolution and approved by the Bankruptcy Court, would be enforced according to its terms. Based on the above, the Agreement renders the acquiescence doctrine inapplicable to this case.

f. Exemption From Taxation By Local Government Would Not Be Disruptive

In Sherrill, the Supreme Court's focus was on the disruptiveness of the OIN's claim for sovereign control. See Cayuga Indian Nation of New York v. Pataki, 413 F. 3d at 273 (2d Cir. 2005) ("The Court's characterizations of the Oneidas' attempt to regain sovereignty over their land indicate that what concerned the Court was the disruptive nature of the claim itself."), quoting Sherrill, 125 S.Ct. at 1483 ("[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns.") and id. at 1491 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Tribe] from gaining the disruptive remedy it now seeks.").

Although exemption from taxation would have resulted from the revival of

[30] As indicated above, the Tribe filed a cross-claim against the County for declaratory relief in 2003 in the Chapter 11 case of Neil's Mazel, Inc. (Roberts Aff., ¶45.)

sovereignty requested by the OIN, the Court's focus was not on taxation, but rather, on the disruption to the governance of central New York's counties and towns and the "checkerboard of alternating state and tribal jurisdiction" that would have been created. In any event, if the Western Mohegan Tribe were to be exempted from taxation by local government, there would be no disruptive consequences. This is true because the Agreement requires the Tribe to make specified payments in lieu of taxes (over and above the $900,000 already paid). Thus, neither the County nor its subdivisions would be deprived of any revenue source if the Court were to grant the requested declaratory relief. By contrast, in Sherrill and most other cases, immunity from taxation would deprive the municipalities of substantial revenues, disrupting their economies.

g. The "Possessory Land Claim" Cases Are Inapposite Because The Tribe Has Exclusive Possession and Ownership Of The Property, There Are No Private Landowners Who Could Be Displaced, And The Agreement Settled The Tribe's Land Claim

The Second Circuit Court of Appeals, in Cayuga, 413 F. 3d at 273 recognized that "the import of Sherrill is that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches...Sherill's holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally." Cayuga, 413 F.3d at 274.

In Cayuga, the Cayuga Indian Nation was seeking possession of a large swath of central New York State and the ejectment of tens of thousands of landowners. The Second Circuit found the tribe's possessory land claim inherently disruptive and subject to a defense of laches. The Second Circuit Court of Appeals, holding the claim barred by laches, stated:

> The nature of the claim as a "possessory claim," as characterized by the District Court, underscores our decision to treat this claim like the tribal sovereignty claims in Sherill. Indeed, this disruptiveness is inherent in the claim itself--which asks this Court to overturn years of settled land ownership--rather than an element of any particular remedy which would flow from the possessory land claim. Accordingly, we conclude that possessory land claims of this type are subject to the equitable considerations discussed in Sherrill.

Id. at 275. The Second Circuit further concluded:

> Whether characterized as an action at law or in equity, any remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York, can only be understood as a remedy that would similarly "project redress into the present and future."
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> * * * *
>
> The District Court found that laches barred the possessory land claim, and the considerations identified by the Supreme Court in *Sherill* mandate that we affirm the District Court's finding that the possessory land claim is barred by laches. The fact that, nineteen years into the case, at the damages stage, the District Court substituted a monetary remedy for plaintiffs' preferred remedy of ejectment cannot salvage the claim, which was subject to dismissal *ab initio*.

Id. at 277-78.[31]

In Shinnecock Indian Nation v. New York, 05-CV-2887 (TCP)(E.D.N.Y. 2006), the Shinnecock Indian Nation sought to vindicate its rights to certain lands which were alleged to have been wrongfully conveyed in 1859 in violation of the Nonintercourse Act. The Nation sought broad relief including damages for each portion of the Subject Lands acquired or transferred from the Nation for the period from 1859 to present, a declaration that the Nation has possessory rights to the Subject Lands, immediate ejectment of all defendants from the lands, and other declaratory and injunctive relief as

[31] In addition to dismissing the Cayuga's claim for ejectment, the court also dismissed the Cayuga's remaining claims, including requests for a declaration of title to the land and for damages based on a trespass claim. The court dismissed these claims as they were "predicated entirely upon plaintiffs' possessory land claim," which was barred by laches. Id. at 278.

necessary to restore the Nation to possession of the lands. Defendants moved to dismiss the case under, *inter alia*, Fed.R.Civ.P. 12(b)(6) on the ground that the plaintiffs failed to state a claim for relief. In November 2006, District Judge Platt concluded that the Shinnecock Nation's claims and the nature of the relief sought, pose the same type of "pragmatic concerns" that guided the Supreme Court and Second Circuit to deny relief in Sherrill and Cayuga. Shinnecock Indian Nation v. State of New York, 2006 WL 3501099, 2006 U.S. Dist. LEXIS 87516 (E.D.N.Y. 2006).

In Shinnecock, Judge Platt stated that Cayuga unveiled the following three principles: (i) equitable defenses apply to disruptive Indian land claims, such as possessory land claims, and are not limited to claims seeking a revival of sovereignty, (ii) equitable defenses apply to both actions at law and in equity, because the focus is on the potentially disruptive nature of the claim, and (iii) equitable defenses can be applied at the pleadings stage to dismiss disruptive possessory land claims. Shinnecock, 2006 WL 3501099, at *4. Judge Platt concluded that each of the principles applied with equal force in the Shinnecock case. The Court held that the claim the Shinnecock Nation has asserted is exactly the type of claim that the Cayuga court found barred by laches: a forward looking, possessory land claim, that seeks to "project redress ... into the present and future". Shinnecock, 2006 WL 3501099, at *4.

Judge Platt found the tribe's possessory land claim to be particularly disruptive, noting that the Shinnecocks' claim sought the immediate ejectment of a number of defendants.[32] The Court observed:

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[32] Judge Platt noted that ejecting the Long Island Railroad Company from the Subject Lands would have devastating consequences to the region's economy and a drastic impact on thousands of commuters. *Accord,* Cayuga Indian Nation v. Cuomo, 1999 WL 509442, at *29 (N.D.N.Y.1999) ("... ejectment would

> Similarities also exist in the relief sought. For example, like the plaintiffs in *Cayuga,* the Shinnecocks seek, *inter alia,* a declaration of their possessory interest in the subject land, restoration to possession of the land and immediate ejectment of defendants from the subject land, damages equal to the fair market value of the land for the entire period of plaintiffs' dispossession, as well as an accounting and disgorgement of all benefits received by the defendant municipalities, such as tax revenue.

Shinnecock, 2006 WL 3501099 at *3. Judge Platt held that plaintiffs' possessory land claim was subject to laches, and dismissed on that basis. Because the rest of plaintiffs' claims were "predicated entirely upon plaintiffs' possessory land claim", they were also dismissed. Shinnecock, 2006 WL 3501099 at *6.

In the Cayuga and Shinnecock cases, the tribes' primary claims were in the nature of possessory land claims; both tribes were seeking possession of the land and ejectment of the current residents. See Cayuga, 413 F.3d at 274. These cases are inapposite and easily distinguished.

The Western Mohegan Tribe's claim for declaratory relief cannot be characterized as a possessory land claim, because, as discussed above, the Tribe is in exclusive possession of the Property and owns the fee title to the Property (through its Trustee). Moreover, as discussed above, the Tribe obtained the fee title as a result of the settlement of its land claims with the County. There is no dispute as to ownership or possession of the land. Unlike the Oneidas, the Cayugas and the Shinnecocks, the Western Mohegans are not asking the Court to overturn years of settled land ownership. Furthermore, unlike the Cayugas and the Shinnecocks, the Western Mohegan Tribe is not seeking the remedy of ejectment. There are no private

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mean that transportation systems, such as the New York State Thruway, would have to be rerouted at great expense. Putting aside costs, rerouting the Thruway would have almost unthinkable consequences in terms of intrastate and interstate commerce.")

landowners on the Property. Therefore, ejectment, which can be impractical and impose disruptive consequences of the type that led the Supreme Court to initiate the impossibility doctrine in Sherrill, and which guided the decisions in Cayuga and Shinnecock, is not at issue here.

Based on the foregoing, the Western Mohegan Tribe's claim for declaratory relief is not disruptive, and may not be barred by the equitable doctrines of laches, acquiescence or impossibility.

(2) RECOGNITION OF THE TRIBE'S SOVEREIGNTY WOULD NOT PREVENT STATE REGULATION

The County erroneously contends that a determination of sovereignty "would be a determination that the lands in question are not within the regulatory jurisdiction of the State." (County's Brief, p.37.) Western Mohegan Tribe & Nation v. Orange County, 395 F.3d 18, 23 (2d Cir. 2004). It is clear from the Plaintiffs' Complaint herein that the Tribe is not seeking any such determination, and that no such determination would necessarily result if the Court were to exercise jurisdiction in this case. Plaintiffs recognize that New York State would retain the right to regulate and/or restrict certain activities on the Property even if this Court were to grant federal recognition of the Tribe, if a Court were to so hold. See, e.g., New York v. Shinnecock Indian Nation, 523 F.Supp.2d 185, 289-291 (E.D.N.Y. 2007).[33]

[33] In New York v. Shinnecock Indian Nation, 03-CV-3243 (TCP) CONSOLIDATED 03-CV-3466 (TCP) (EDNY), plaintiffs New York State and a town, in a consolidated action sought to enjoin defendants, the Shinnecock Indian Nation and various individuals, from developing a certain part of the Nation's real property with a casino to be opened to the public. In October 2007, District Court Judge Bianco concluded that plaintiffs were entitled to a permanent injunction enjoining defendants from developing a casino that did not comply with New York law and the town's code. The Court found that "even assuming arguendo that the Nation had aboriginal title over Westwoods, the equitable doctrines of laches, acquiescence, and impossibility as articulated in Sherrill preclude the Nation from exercising sovereignty over that land for purposes of developing such land without regard to local zoning and land

Western Mohegan Tribe & Nation v. Orange County, 395 F.3d 18, relied upon by the County, is inapposite. In that case, fee title to the land at issue was owned by the State of New York, and the complaint sought a declaration "that New York's exercise of fee title remains 'subject to' the Tribe's rights, i.e., a "determination that the lands in question are not even within the regulatory jurisdiction of the State." In the instant case, the Tribe, not the State, is the fee owner of the Property.

(3) THE ABSENCE OF THE STATE FROM THIS LAWSUIT IS IMMATERIAL

The County's argument that the State is not a party to this lawsuit and is unable to defend its interests in this litigation is also without merit. The State is free to move to intervene in this action. In any event, the State does not tax the Property.

VII. THE COUNTY'S ARGUMENTS REGARDING THE BIA ARE LEGALLY AND FACTUALLY FLAWED AND ERRONEOUS

A. THE TRIBE DID NOT FILE A PETITION WITH THE BIA FOR FEDERAL RECOGNITION UNDER 25 C.F.R. PART 83

The County argues that the Tribe previously invoked the primary jurisdiction of the DOI by filing a petition there for recognition as an Indian tribe under 25 C.F.R. Part 83. This is factually incorrect. Various documents demonstrating the falsity of this argument were submitted in the 2006 Action, annexed to the Response Affidavit which accompanies this Memorandum of Law.

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use laws, or other New York and local laws and regulations." New York v. Shinnecock Indian Nation, 523 F.Supp.2d at 291 (E.D.N.Y. 2007), and "even assuming arguendo that the Shinnecock Indian Nation has unextinguished aboriginal title to Westwoods, their proposed casino development is barred under the Supreme Court's decision in Sherrill because of the highly disruptive consequences the development and operation of a casino would have on the neighboring landowners, as well as the Town and the greater Suffolk County community." Id. at 189. In New York v. Shinnecock Indian Nation, 560 F. Supp. 2d 186 (E.D.N.Y. 2008), the Court ruled that the permanent injunction would be limited to the construction and operation of a casino or gaming on Westwoods.

On August 20, 1997, the Tribe sent a "First Amendment Petition for Redress of Grievances" (the "First Amendment Petition") to then-President Clinton.[34] The First Amendment Petition requested reaffirmation of the Tribe's sovereignty and pre-existing relationship with the Federal Government. The First Amendment Petition was clearly not a request for recognition under federal law. This is extremely clear from the language of the First Amendment Petition, which explicitly stated that the Tribe was not seeking recognition under 25 C.F.R. 83 and was not requesting any federal benefits.[35] Nevertheless, the Clinton White House mistakenly (or intentionally) interpreted it as a petition for Federal acknowledgment under 25 C.F.R. 83. Accordingly, it sent the First Amendment Petition to the Office of the Solicitor General of the DOI (the "Solicitor's Office"). The Solicitor's Office then turned the Petition over to the BIA for evaluation.

Because the Administration was taking no further action on the First Amendment

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[34] A copy of the First Amendment Petition is annexed to the Response Aff. as Exhibit "B".

[35] The First Amendment Petition states, in pertinent part:

> Dear President Clinton:
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> Pursuant to the *1st Amendment* right "*to petition the Government for a redress of grievances*" I am writing to request a letter from you acknowledging the existence of the Western Mohegan Tribe & Nation of New York so that we can fulfill our rightful role as participants in the life of the Hudson River valley. . . . I am not writing so that this native nation can become a welfare recipient of programs and services under federal law. These we do not want and will not accept. I am writing to you so that we can regain our liberty under anterior and superior natural, international and constitutional law. . . . The court's phrase *"federal recognition"* is the key to comprehending precisely how the genocide of native Americans today is implemented by the United States . . . . As a matter of bureaucratic assumption and convention, the adjective *"federal"* in the crucial phrase *"federal recognition"* is taken to signify that the recognition specifically be by the federal Bureau of Indian Affairs (BIA) or Congress. . . . **Therefore, we are not willing to attorn to the genocidally illegal assumption of jurisdiction over us by the United States pursuant to the spurious doctrine of federal plenary jurisdiction, by implicitly accepting the application of federal law by applying for *"federal recognition"* under 25 CFR in order to secure the *"special programs and services"* on offer**. . . . These are the reasons, then, that I request from you (a) a letter recognizing the domestic dependent nation status of the Western Mohegan Tribe & Nation of New York under natural, international and constitutional law and (b) instructions to the Bureau of Indian Affairs that it cooperate either to settle jurisdictional disputes with this nation without litigation or, if litigation is necessary, that same be submitted for independent and impartial third-party adjudication or arbitration.

Petition, the Western Mohegan Tribal Council decided to allow the BIA to evaluate the documents to see if the BIA would reaffirm the Tribe's status as a sovereign Indian nation without requiring the Tribe to go through the tedious and lengthy recognition application process under the C.F.R. In a September 5, 1997 letter to then BIA Director Deborah Maddox, the Tribe requested to be advised as to whether its First Amendment Petition raises "a situation capable of being dealt with other than as a run-of-the-mill application under section 151.2(b) of Title 25 of the *Code of Federal Regulations,* which limits the concept 'Tribe' to entities 'recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.'"[36] (A copy of the Tribe's September 5, 1997 letter is annexed to the Response Affidavit as Exhibit "C".)

By letter dated September 9, 1997, the Tribe wrote to the Solicitor's Office regarding the First Amendment Petition. The Tribe's September 9, 1997 letter enclosed the First Amendment Petition and the September 5, 1997 letter to BIA Director Maddox, and stated that the "legal point of the enclosed petition is to apprehend the genocide of traditional natives that is taking place through the agency of the Bureau of Indian Affairs (BIA)." It did not request recognition by the BIA. (A copy of the Tribe's September 9, 1997 letter, without exhibits, was annexed to the Amicus Brief as Exhibit "A".)

The Assistant Solicitor, Scott Keep, wrote to the Tribe by letter dated October 3, 1997, encouraging the Tribe to seek acknowledgment by the BIA. (A copy of the October 3, 1997 letter is annexed to the Response Affidavit as Exhibit "D".)

First Amendment Petition (emphasis added).

[36] The September 5, 1997 letter goes on to state that since the Tribe had already been recognized (prior to the Revolutionary War), and "since we expressly and explicitly have indicated that we do not want and will not accept *'the special programs and services from the Bureau of Indian Affairs,'* we do not think that your recommendation need take long to process."

The BIA Office of Tribal Services subsequently wrote to Chief Roberts by letter dated January 2, 1998, directing that the Tribe provide a certification stating that the materials provided by the Tribe under its September 9, 1997 letter "is the group's official documented petition under 25 C.F.R. §83.6." (A copy of the BIA Office of Tribal Services' letter dated January 2, 1998 is annexed to the Response Aff. as Exhibit "E".)

The Tribe responded by submitting a "Certification of Documented Petition" dated January 8, 1998 (the "Certification"). (A copy of the Tribe's Certification is annexed to the Response Aff. as Exhibit "F".) According to the Amicus Brief, the Tribe's Certification "explicitly stated that this is 'the group's official documented petition under 25 CFR §83.6.'" (Amicus Brief, p.7) This is not true. The Tribe's Certification did not make such statement. Rather, it stated that the Office of Tribal Services' January 2, 1998 letter has directed the Tribe to file a certification containing that language. The Tribe's Certification essentially states the opposite of what was required by the Office of Tribal Services. Indeed, the Certification states that the Tribe is not making any "attornment to the jurisdiction under federal legislation of the Bureau of Indian Affairs...." In the Certification, the Western Mohegans clearly expressed their desire to not be encumbered with the BIA acknowledgment process and the myriad of rules and regulations imposed on BIA recognized tribes, as they did not want any of the government "handouts" for Indians.

The Tribe sent a letter to the Secretary of the Interior dated April 30, 1998. In the April 30, 1998 letter, the Tribe expressly stated that "we have to withdraw from [BIA Involvement]". The Tribe also explained that its

> "purpose for engaging in [BIA involvement] was not for federal recognition under federal law but rather to inform the President via the BIA of the facts

> and law in order that the President might by making a revised treaty in response to [the First Amendment Petition] apprehend the genocidally unconstitutional suppression of native sovereignty in relation to unpurchased territory which occurs in virtue of the premature application thereupon of federal law."

(A copy of the April 30, 1998 letter is annexed to the Roberts Aff. as **Exhibit "10"**.).[37] The BIA responded to the Tribe's April 30, 1998 letter with an August 5, 1998 letter stating that it needed to receive "a clear request signed by the Council members to withdraw the Western Mohegans' petition from the petitioning process." (A copy of the BIA's August 5, 1998 letter is annexed to the Roberts Aff. as **Exhibit "11"**.)[38]

The Tribe submitted a letter dated August 28, 1998 to the BIA stating that the Tribe:

> "...does look forward to receiving the technical assistance review document, as a step toward the settlement of this native nation's outstanding *1st Amendment* grievance petition and related litigation, specifically by the modernization of the existing treaty relationship with the United States . . . . the said grievance and litigation expeditiously can be settled simply by revising the existing treaties instead of making an entirely new one..."

(A copy of the August 28, 1998 letter is annexed to the Response Aff. as Exhibit "I".)

On September 24, 1998, the BIA issued a Technical Assistance letter (the "TA Letter") to the Tribe suggesting and outlining steps that might be taken to supplement and strengthen the First Amendment Petition. The TA Letter indicated that the First Amendment Petition was deficient and not ready for evaluation. The TA Letter stated

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[37] The Tribe's April 30, 1998 letter was not annexed to Chief Roberts' Response Affidavit because it could not be located at that time.

[38] An incomplete copy of that letter was annexed to the Response Affidavit as Exhibit "G". The Tribe could not locate Page 1 of that letter at that time.

that the Tribe had certain options with respect to the Petition, including the right to withdraw the Petition. See TA Letter, p.21.[39]

In a "Re-Affirmation of Cancellation Notice" dated September 29, 1998 addressed to DOI, the Tribe again requested cancellation of the First Amendment Petition. The Re-Affirmation of Cancellation Notice was signed by the Western Mohegan Tribal Council, and stated that the Tribe:

> "hereby re-affirms the cancellation of the said certification made by the Sachem under letter dated April 30, 1998 (true copy annexed), since the Bureau illegally insists upon disregarding the said previous cancellation."

(Copies of the Tribe's September 29, 1998 Re-Affirmation of Cancellation Notice and the Tribe's September 29, 1998 cover letter are annexed to the Response Aff. as Exhibit "J".)

The Tribe again requested withdrawal of its First Amendment Petition in a November 2, 1998 letter to President Clinton. That letter states: "The 1st Amendment grievance petition of Muhheakunnuk is abandoned." (A copy of the Tribe's November 2, 1998 letter is annexed to the Response Aff. as Exhibit "K".)

As detailed above, the Tribe has submitted clear evidence that it cancelled the First Amendment Petition various times in 1998 and rejected all involvement with the BIA acknowledgment process various times in 1998. The County's reliance upon the 1996 resolution (Mandell Aff., Exh "J") is misplaced because that resolution was nullified

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[39] The TA Letter further stated that:

> "the Government has not made a decision concerning your case, and this TA review is not a preliminary determination of your case. At this point in the process, the BIA does not make conclusions that an evaluation of your petition will result in a positive or negative decision."

TA Letter, p.20-21.

and/or revoked in 1998 by the Tribe's various refusals to submit to the jurisdiction of the BIA and the various rejections of involvement with the BIA recognition process.

B. THE DOI IGNORED THE TRIBE'S REQUESTS FOR WITHDRAWAL OF THE FIRST AMENDMENT PETITION

Although the Tribe never filed a petition for recognition under the C.F.R., it is important to note that an Indian tribe which does file a petition for recognition, retains the right to withdraw that petition. See 25 C.F.R. §8.10(b)(2) ("After the technical assistance review, the Assistant Secretary shall . . . provide the petitioner with an opportunity to withdraw the documented petition. . .").

As detailed above, the Tribe made various requests for withdrawal or cancellation of its First Amendment Petition. Yet, the BIA has chosen not to honor those requests. The Tribe cannot help but wonder why the BIA has honored other tribes' withdrawals of their documented petitions, but has refused to recognize the Western Mohegan Tribe's right to withdraw its First Amendment Petition. In fact, the DOI's last published "Status Summary of Acknowledgment Cases", annexed to the Response Aff. as Exhibit "L", indicates that as of February 15, 2007, at least four petitions for federal recognition were deemed withdrawn at the petitioner's request. Id. at p.6. Incredibly, to this day, the Government maintains the Western Mohegan Tribe on the list of tribes seeking recognition.[40]

C. THIS COURT HAS NO REASON TO DEFER TO THE DEPARTMENT OF THE INTERIOR

The County unconvincingly argues that this Court should defer to the DOI. In the instant case, deference to the DOI recognition process is wholly inappropriate for

[40] The Tribe is listed as no. 173 on the DOI's Register of Incomplete Petitions. See Id. at p.8.

the numerous reasons described herein. Those reasons can be succinctly summarized as follows. First, no petition for recognition is pending with the DOI or the BIA.[41] Second, the Tribe is not seeking any benefits from the DOI. Third, the Tribe is not affirmatively seeking federal recognition from this court in an attempt to circumvent the administrative process prescribed by Congress. Instead, the Tribe seeks the Court's determination of its tribal status to resolve critical issues of sovereign immunity and tribal status for purposes of the Nonintercourse Act between the Tribe and the County which the County Court would not and could not decide in the Foreclosure Action, and, if not decided by this Court, will leave the Tribe with no ability to defend the inevitable second foreclosure action that the County will promptly commence if this action is dismissed. Fourth, the Court is well-equipped to make the tribal status determination and does not need the DOI's expertise. Fifth, the recognition process is unreasonably slow and it would undoubtedly take many, many years for the DOI to make a determination. Sixth, the Tribe needs a prompt recognition of its tribal status to prevent foreclosure of its Property. Seventh, the BIA has demonstrated possible animus towards the Tribe. Eighth, of the seven (7) federally recognized tribal entities based in New York, none have gone through the DOI recognition process.[42] Based on the

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[41] Cf. Golden Hill, 39 F.3d at 60 ("We need not decide whether deference would be appropriate if no recognition application were pending, but deferral is very warranted here where the plaintiff has already invoked the BIA's authority."); Unkechauge, 660 F.Supp.2d at 468 ("The exercise of federal court jurisdiction to determine tribal status in cases in which the tribe has no pending federal recognition application with the BIA and in which the resolution of a group's status is necessary to deciding an issue before the court does not encroach on the political branch's authority over Indian affairs and is consistent with the judiciary's authority to "draw [] the bounds of tribal immunity.").

[42] The history of Indian lands in the State of New York is quite unique in that there are no Indian lands held in federal trust in the State of New York. See Sherrill, 137 F.Supp.2d at 144. These are just some of the reasons why deference to the DOI recognition process is inappropriate. It is apparent that because of the unique facts and circumstances of the New York and other eastern tribes (who have operated independently of the BIA for numerous years and long before the 1978 BIA acknowledgment regulations), this Circuit has developed its current criteria in resolving recognition issues as well as Nonintercourse Act

above, there is absolutely no reason to defer to the expertise of the DOI for resolution of factual issues regarding tribal status.

The instant case must be distinguished from Golden Hill, 39 F.3d 51, wherein it was reasonable for the Second Circuit Court of Appeals to give the BIA some extra time to complete the recognition process in connection with the tribe's pending petition for recognition.[43] Here, unlike in Golden Hill, the Tribe has no petition for recognition pending in the DOI. There is no reason for the Court to defer to the DOI.[44]

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issues.

[43] The Golden Hill tribe's petition was being evaluated by the BIA and the Court of Appeals was advised that a determination by the BIA could take up to two (2) years. The Court of Appeals expressed its concern regarding additional delays and recognized the public interest in reasonably prompt adjudication of plaintiff's claims. The Court of Appeals remanded the action, directing the Connecticut District Court to stay the action to permit Golden Hill to reapply to the trial court for a ruling on the merits, if within 18 months the BIA has not then ruled on plaintiff's tribal status. If no ruling by the BIA was made within this time frame, the BIA or the defendants could show why the stay should be extended. Upon failure to make such a showing or to resolve the question of tribal status within the 18-month period, the District Court would be allowed the reach the merits of the case, including deciding whether the tribe should receive federal recognition. Id. at 60-61. The BIA denied the plaintiff's acknowledgment petition. Thus, the District Court did not ultimately make the tribal status determination. The District Court then applied the doctrine of collateral estoppel to the BIA's factual findings. See Golden Hill v. Rell, 463 F.Supp. 2d 192 (D. Conn. 2006).

[44] In 2008, Shinnecock Indian Nation v. Kempthorne, No. 06-cv-5013 (JFB) (ARL), 2008 U.S. Dist. LEXIS 75826, at *5 (E.D.N.Y. Sept. 30, 2008) acknowledged the validity of the district court's exercise of jurisdiction to recognize the tribe in the 2005 Shinnecock decision, although the Kempthorne court ultimately held that it should defer deciding tribal recognition of the Shinnecock in the case before it because the Shinnecock had a pending recognition application with the BIA. Kempthorne, 2008 U.S. Dist. LEXIS 75826 at *5 ("the [2005 Shinnecock] Court clearly had the authority to determine the common law tribe issue for purposes of deciding the limited issue before it"). In Kempthorne, the Shinnecock was awaiting BIA determination of its federal recognition petition, filed in 1978, and sued the Secretary of the Department of the Interior for violations of the Administrative Procedures Act and Due Process. Id. at *2. With regard to the issue of federal recognition, the court held that "although the [2005 Shinnecock] Court could and did determine common law tribal status in order to decide the issues presented in the casino litigation, that determination has no binding effect on the BIA." Id. at *53. Kempthorne distinguished federal recognition through common law from recognition through the BIA, holding that the recognition by the 2005 Shinnecock court "was not meant to encompass recognition for purposes of obtaining federal benefits." Id. at *60; see also Golden Hill, 39 F.3d at 59. The exercise of federal court jurisdiction to determine tribal status in cases in which the tribe has no pending federal recognition application with the BIA and in which the resolution of a group's status is necessary to deciding an issue before the court does not encroach on the political branch's authority over Indian affairs and is consistent with the judiciary's authority to "draw [] the bounds of tribal immunity." Kiowa, 523 U.S. at 759.

Analogous to the instant case is the Unkechauge case. In Unkechauge, the District Court recently analyzed the issue of whether it had jurisdiction to determine tribal status for the purpose of tribal immunity to the suit brought against it, and answered that question in the affirmative. The Court's analysis is instructive here:

> Like the Supreme Court, the Second Circuit has not had occasion to determine tribal status in the specific context of an assertion of tribal sovereign immunity. The Second Circuit has held that a court should not make a determination of tribal status when the purported tribe has an application for federal recognition pending with the BIA, but the Second Circuit has "not decid[ed] whether deference would be appropriate if no recognition application were pending . . . ." Golden Hill Paugussett of Indians v. Weicker, 39 F.3d 51, 60 (2d Cir. 1994). The Second Circuit did not foreclose the judiciary's role in making such a determination when there is no application pending with the BIA, acknowledging that federal courts have jurisdiction to determine tribal status, and noting that "[w]here an executive agency and the federal courts have overlapping, though not identical, jurisdiction, judicial authority is often exercised in conjunction with the administrative." Id. at 54 (emphasis added). The Second Circuit further noted that the "formulation of [the Montoya] standard and its use by the federal courts occurred after Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs, and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior." Id. at 59 (citing 25 U.S.C. § 9; Candelaria, 271 U.S. at 442; Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1298 (4th Cir. 1983); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975)).
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> In light of the foregoing, the question of the Unkechauge Nation's tribal status falls squarely within the court's jurisdiction. The Unkechauge has never been rejected from BIA recognition and has no pending BIA application. Additionally, the Unkechauge is not affirmatively seeking

> federal recognition from this court in an attempt to circumvent the administrative process prescribed by Congress. Instead, the Unkechauge defendants seek this court's determination of the Unkechauge Nation's tribal status because it is necessary to resolve a critical issue arising from their status as defendants in this case: whether the Unkechauge enjoys sovereign immunity from suit. Put another way, a determination of tribal status will resolve whether the court has subject matter jurisdiction over plaintiff's claims against the Unkechauge Nation, a threshold question the court must answer in each case before it. See Steel, 523 U.S. at 94 ("'the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer'") (citation omitted). Consequently, the court's jurisdiction to determine tribal status in this case is necessary to ensure that the court is ultimately acting within the limits of its Article III power. See id.

Unkechauge, 660 F.Supp.2d at 467-469.

Here, as in the Unkechauge case, the issue of tribal status must be determined to resolve the critical issue of sovereign immunity. In the present case, the need for this determination to be made is much more compelling than in Unkechauge because the tribal status determination is the only thing that can prevent the Tribe from tragically losing its Reservation in an unlawful foreclosure.

CONCLUSION

Based on the above, the County's Motion should be denied.

Dated: New York, New York
March 19, 2010

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

By: _____
Barton Nachamie (BN-6732)
Jill L. Makower (JM-4842)
425 Park Avenue
New York, NY 10022
(212) 754-9400