08-1194-cv(L)

08-1195-cv(CON)

United States Court of Appeals

for the

Second Circuit

STATE OF NEW YORK, NEW YORK STATE RACING AND WAGERING BOARD, AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Plaintiffs-Appellees,

TOWN OF SOUTHAMPTON,

Consolidated-Plaintiff-Appellee,

UNITED STATES OF AMERICA, ADDED TO THIS ACTION AS AN INVOLUNTARY PLAINTIFF BY COURT ORDER DATED 12/22/03,

Plaintiff,

– v. –

SHINNECOCK INDIAN NATION, LANCE A. GUMBS, RANDALL KING, KAREN HUNTER, AND FREDERICK C. BESS, SHINNECOCK TRIBE,

Defendants-Appellants.

CHARLES K. SMITH, II, JAMES W. ELEAZER, JR., FRED BESS, AND PHILIP D. BROWN,

Defendants.[1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

(Continued on inside cover)

[1] Official Caption required by notice from the Clerk of the Second Circuit dated May 7, 2008.

(Continued from outside cover)

BRIEF OF DEFENDANT-APPELLANT
THE SHINNECOCK INDIAN NATION
AND ALL OTHER DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Defendant-Appellant the Shinnecock Indian Nation and all other Defendants-Appellants in these consolidated actions (together, the "Nation") appeal from the amended judgment and permanent injunction of the United States District Court for the Eastern District of New York (Joseph F. Bianco, D.J.), Nos. 03 Civ. 3243 (L), 03 Civ. 3466 (con) (JFB), slip op. (E.D.N.Y. Feb. 12, 2008), SPA-176(Dkt. no. 388)[1] (the "Judgment") and its associated memoranda and orders: namely, a Memorandum and Order dated February 7, 2008 (Joseph F. Bianco, D.J.), SPA-164(Dkt. no. 385); a Memorandum and Order dated October 30, 2007, State of N.Y. v. Shinnecock Indian Nation, 523 F. Supp. 2d 185 (E.D.N.Y. 2007) (Joseph F. Bianco, D.J.), SPA-35(Dkt. no. 372) (the "Opinion" or "Op.") and a summary judgment Memorandum and Order dated November 7, 2005, State of N.Y. v. Shinnecock Indian Nation, 400 F. Supp. 2d 486 (E.D.N.Y. 2005) (Thomas C. Platt, Senior D.J.), SPA-1(Dkt. no. 181).

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[1] The parties are using the deferred appendix method. "A" refers to the Joint Appendix. "SPA" refers to the Special Appendix. "EX" refers to the Exhibit Volumes, and "D" refers to the Nation's, "S" to the State's and "T" to the Town's admitted trial exhibits. In direct citations to the record, "Dkt. no." refers to the document number on the district court docket sheet. "Tr." refers to the trial transcripts. Appellants will file a revised brief containing references to the pages of the appendix pursuant to Fed. R. App. P. 30(2)(B) within 14 days after the deferred appendix is filed.

JURISDICTIONAL STATEMENT

The actions that give rise to this appeal commenced as two separate actions in New York State court. Defendants separately removed each action to federal court pursuant to 28 U.S.C. §§ 1441 and 1446 on the basis that it presented federal questions within the meaning of 28 U.S.C. § 1331. The district court held there to be subject matter jurisdiction over the State Action (defined below) pursuant to 28 § U.S.C. 1331 and 28 U.S.C. § 1441, finding that the State's complaint stated a claim for a violation of a federal statute on its face, and, in the alternative, a claim arising under the Indian Commerce Clause of the Constitution. A-143(Dkt. no. 24 (274 F. Supp. 2d 268 (E.D.N.Y. 2003))). The district court did not make a specific finding as to its subject matter jurisdiction over the Town Action (defined below); instead, the parties agreed by stipulation, so ordered by the district court on December 22, 2003 (the "Stipulation"), that the Town would withdraw its motion to remand the Town Action and would be joined as a plaintiff in the State Action, and that the Town and State Actions would be consolidated for all purposes, pursuant to Fed. R. Civ. P. 42(a). A-284(Dkt. no. 71 (Stip. and Order)). As explained below, this Court must determine as a threshold issue whether federal subject matter jurisdiction exists here; thus, please see Argument Section I, infra, for a more thorough treatment of the basis for federal subject matter jurisdiction over these consolidated actions.

After a bench trial, a final judgment and permanent injunction was entered against the Nation on February 7, 2008 (amended on February 12, 2008). SPA-170, 176 (Dkt. nos. 386, 388). The Nation filed a timely notice of appeal on March 10, 2008. A-3963(Dkt. no. 390). The appeal was repeatedly withdrawn from active consideration, without prejudice and with leave to reactivate, by stipulation between the parties to await the judgment of this Court in Oneida Indian Nation v. Madison County, 605 F.3d 149 (2d Cir. 2010). That judgment was entered by this Court on April 27, 2010, and this appeal was reactivated on May 26, 2010. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether subject matter jurisdiction pursuant to 28 § U.S.C. 1331 and 28 U.S.C. § 1441 exists over the actions that are the subject of these consolidated appeals.
2. Whether the district court erred in holding that the Nation may not assert sovereign immunity as a complete jurisdictional bar to the actions that are the subject of these consolidated appeals.
3. Whether the district court erred in holding that the aboriginal title of the Shinnecock Indian Nation to "Westwoods," the tribally-owned property that is involved in the actions that are the subject of these consolidated appeals, was extinguished in the 17th century.

4. Whether the district court erred in holding that Westwoods was not Indian land exempt from state and local laws and in holding that, consequently, the laws of the State of New York and the local laws and codes of the Town of Southampton apply to activities by the Nation at Westwoods.
5. Whether in light of the federal recognition of the Nation by the United States Department of the Interior that is expected to become effective prior to the argument of these consolidated appeals, the permanent injunction issued below should be vacated as moot.

STATEMENT OF THE CASE

On June 29, 2003, the State of New York, the New York State Racing and Wagering Board, and the New York State Department of Environmental Conservation (collectively, the "State") commenced an action in the New York State Supreme Court for Suffolk County against the Shinnecock Indian Nation and its tribal trustees, acting in their official capacity (the "State Action," No. 03-cv-3243 after removal). The State Complaint alleged that the defendants had violated or then were threatening to violate certain New York State laws relating to the conduct of gaming and to the environment by commencing to clear a portion of land concededly owned by the Nation in Southampton, New York, commonly known as "Westwoods," with the intention at that time of constructing a gaming facility there. The State sought, among other things, a preliminary injunction

barring certain activities at Westwoods. A-53(See dkt. nos. 9, 10 (State Compl. ¶1). On July 1, 2003, defendants removed the State Action to federal court. A-69(Dkt. no. 1 (Notice of Removal)).

On July 14, 2003, the Town of Southampton (the "Town") commenced a separate action in the same state court (the "Town Action," No. 03-cv-3466 after removal) arising out of the same set of facts and circumstances as the State Action. The Town sought injunctive and declaratory relief against the Shinnecock Indian Nation and its tribal trustees in their official and (initially) their individual capacities, asserting that defendants had violated and threatened to continue to violate the Town's Zoning Law contained at Chapter 330 of the Southampton Town Code by commencing the same clearing operations at Westwoods. The Town also contended that the Nation's development of Westwoods potentially violated Chapter 325 of the Town Code, the purpose of which is to protect and conserve Town wetlands, because Westwoods allegedly is in the immediate vicinity of tidal wetlands. A-3995-99(Town Compl. ¶¶19-39).[2] On July 15, 2003, defendants removed the Town Action to federal court. A-4001 (Dkt. no. 1 (Notice of Removal)).

[2] The Town Complaint can be found on the docket for the Town Action, No. 03-cv-3466 (E.D.N.Y.), attached to the Notice of Removal (Dkt. no. 1, Exhibit A).

Shortly after removal of the State Action, the State moved to remand. Its motion was denied. SPA-40(Op. 192). The Town also moved to remand but later withdrew its motion pursuant to the Stipulation consolidating the two actions. Id.

On August 29, 2003, the district court granted the preliminary injunction sought by the State against the Nation and stayed the State Action for eighteen months "from the time [the Nation's] petition [for federal recognition] is deemed complete by the [Bureau of Indian Affairs ("BIA"), within the Department of the Interior (the "Department")]."[3] A-197(Dkt. no. 37 (280 F. Supp. 2d 1, 10 (E.D.N.Y. 2003)). On December 22, 2004, the Nation moved for summary judgment against the State and Town on the basis of the bar of sovereign immunity. A-299(Dkt. no. 116). The State and Town filed cross-motions for partial summary judgment. A-2195, 2289(Dkt. nos. 130, 138). By Memorandum and Order dated November 7, 2005, the district court held unambiguously that the Shinnecock Indian Nation is a tribe of Indians as a matter of federal law, a holding that neither the State nor the Town appealed. The district court otherwise denied

[3] On September 26, 2003, the Nation filed an interlocutory appeal from the grant of the preliminary injunction. This Court subsequently remanded the case to the district court to determine the Nation's tribal status and to determine whether the preliminary injunction and stay were still warranted since the BIA could not address the Nation's acknowledgment petition within 18 months. See SPA-40-41(Op. 192-193).

the summary judgment and partial summary judgment motions. SPA-1(Dkt. no. 181 (400 F. Supp. 2d 486)).

The case proceeded to a bench trial on the issues of aboriginal title and "disruption," that is, injury-in-fact from the Nation's proposed activities at Westwoods,[4] which commenced on October 4, 2006 and concluded on May 10, 2007.[5] The district court issued the Opinion on October 30, 2007, finding that the State and Town had met their burden for declaratory and permanent injunctive relief. SPA-36(Op. 188). Accordingly, the district court issued the Judgment on February 7, 2008 (amended February 12, 2008), permanently enjoining the Nation from engaging in gambling at Westwoods or commencing any work at Westwoods in preparation for engaging in gambling, in violation of the specified State laws and Town ordinances. The Judgment also declared, among other things, that the Nation's aboriginal title to Westwoods was extinguished in the 17th century, that

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[4] The latter issue was rendered irrelevant by this Court's holding in City of N.Y. v. Golden Feather Smoke Shop, 597 F.3d 115, 121 (2d Cir. 2010), that a municipal corporation (and, *a fortiori*, a state) need not establish injury in order to be entitled to injunctive relief when suing under a state statute that itself provides a presumption that violative conduct, in and of itself, is harmful to the public. The Nation must concede that the state statutes and town ordinances at issue in these consolidated appeals benefit from such a statutory presumption of harm. Consequently, injury-in-fact need not be shown and the evidence adduced at the trial below of injury-in-fact has no relevance to any issue on appeal. See generally, Prayze FM v. FCC, 214 F.3d 245, 248 (2d Cir. 2000).

[5] On the sixth day of trial, the case was reassigned from Senior District Judge Thomas C. Platt, the presiding judge until that day, to District Judge Joseph F. Bianco. See SPA-41-2(Op. 193).

Westwoods is not "Indian Lands" as defined by 25 U.S.C. § 2703(4) or "Indian Country" as defined by 18 U.S.C. § 1151, and that the Nation may not invoke sovereign immunity from State or Town law in connection with any use or development of Westwoods. SPA-179-181(Judgment 4-6). The Nation now appeals the Judgment.

STATEMENT OF MATERIAL FACTS

The principal question of law presented on appeal necessitating a recitation of material facts is whether the aboriginal title of the Nation to Westwoods was extinguished; accordingly, the principal facts material to this issue are set forth below. Extinguishment is asserted by the State and the Town to have occurred in the 17th century. The material facts that principally bear on this issue, consequently, also date from that time period. The bulk of those facts, set out below, is taken from the Opinion. Others were stipulated by the parties but not referred to in the Opinion. Some of these, and some other material evidentiary facts not controverted in the record, the district court did not address because it viewed them (incorrectly, the Nation argues) not to be probative or relevant to the legal issues decided. SPA-55(Op. n.22). Most of the evidentiary facts material to

these consolidated appeals are contained in primary historical documents, the meaning of which is unambiguous.[6]

The defendant Shinnecock Indian Nation is an Indian tribe. SPA-6-17(Dkt. no. 181 (400 F. Supp. 2d at 489-94)); SPA-36(Op. n.1).[7] The other defendants are tribal officials sued in their official capacity. SPA- 36(Op. 188). At the time of first European contact with the Shinnecocks (1640), the whole land area of what is now the Town of Southampton was owned by the Shinnecocks. SPA-44(Op. 196).

The Nation currently occupies and is in possession of a reservation (the "Shinnecock Neck Reservation") within the Town, on which the Nation maintains its offices and on which some members of the Nation reside. SPA-43(Op. 194). The Nation also owns the parcel of land commonly known as "Westwoods," of approximately 80 acres in total area, located in the Hampton

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[6] To the extent that the district court below failed to find the material facts to be as here set forth, the Nation argues that its determinations were clearly erroneous.

[7] The Office of Federal Acknowledgment of the U.S. Department of the Interior recently issued a Final Determination "extend[ing] Federal Acknowledgment . . . to the Shinnecock Indian Nation," including an affirmation of the descent of the current Shinnecock tribe from the historical tribe as it existed in 1789 (the year the Constitution came into force) and its continuous existence from that year to the present. Final Determination for Federal Acknowledgment of the Shinnecock Indian Nation, June 13, 2010, published at 75 F.R. 34760, 34761, 34765 (June 18, 2010). When this Final Determination becomes effective, the Nation will be recognized as eligible by the Secretary of the Interior for the special programs and services provided by the United States to Indians because of their status as Indians and recognized as possessing powers of self-government and entitled to be placed on the List of federally recognized Indian tribes maintained by the BIA.

Bays area within Town's boundaries. SPA-43(Op. 195). Canoe Place or Niamuck ("Canoe Place") is a name given to a place where Indians formerly carried their canoes between Shinnecock Bay and the Great Peconic Bay in what is now Southampton. Canoe Place is located at the approximate current site of the Shinnecock Canal in Southampton, SPA-44(Op. 196), and is approximately in the middle of the Town as it now exists, running north-south at a point where Shinnecock Bay and the Peconic Bay are in close proximity. EX-6242(D358). At the time of first European contact in 1640, Westwoods was owned and possessed by the Shinnecocks. SPA-44(Op. 196). In the 17th century, the Nation had aboriginal title to Westwoods. SPA-103, 110(Op. 250, 256). The Nation currently occupies and possesses Westwoods, which it owns in fee simple. SPA-43(Op. 195).

Westwoods consists of three tax lots: (a) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38 ("Parcel A"); (b) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78 ("Parcel B"); and (c) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1 ("Parcel C"). A-3529(Declaration of Mason Haas ("Haas Decl.") at

1); EX-4239-4242(D156a,b,c,d); A-3667(JPTO Fact Stip. 16)).[8] All of Westwoods is located to the north of the Montauk Highway. EX-6242(D358).

Suffolk County Tax Maps identify both Westwoods and the Nation's reservation at Shinnecock Neck as "Shinnecock Indian Reservation." EX-4239-4242(D156a,b,c,d); SPA-67(Op. 217). No property taxes have been assessed or imposed on Westwoods from 1927 to the present, and Westwoods is not listed in any tax records of the Town for the years 1800 through 1926. Neither the State nor the Town is aware of any evidence that Westwoods ever has been listed in any assessment records of the Town as anything other than tax-exempt Indian land. SPA-67(Op. 217).

The current zoning map of the Town identifies Westwoods as "Shinnecock Indian Reservation." SPA-73(Op. 223). The Shinnecock Neck Reservation also is identified in Town zoning maps as "INDRES" or "Shinnecock Indian Reservation". EX-4(T4); A-4199(Tr. (Jefferson Murphree) 255:3-257:17, 261:7-16); EX-6524-26, 6527-31(D364 (Deposition of M. Benincasa) at 74:20-76:5, 77:2-81:9).

There exists in the Office of the Suffolk County Clerk no recorded deed by the Nation, as grantor, conveying title to all or any part of Westwoods to

[8] "JPTO Fact Stip." refers to the Stipulations of Fact, pp. 13-30 in the [Proposed] Joint Pretrial Order, dkt. no. 245.

anyone, nor is there a recorded deed conveying title to all or any part of Westwoods to the Nation, as grantee. SPA-44(Op. 195-96). In short, there is no recorded title to any part of the land within Westwoods. A-3531(Haas Decl. at 3, ¶ 13). As evidenced in an 1873 deed, the elected Trustees of the Shinnecock Tribe are the source of the earliest recorded title to all properties within the area located immediately to the east of Westwoods, to the west of the Shinnecock Canal and running along the Peconic Bay to the north of Newtown Road. A-4794-95(Tr. (M. Haas) 3007:12-3010:7); EX-4946(D168c, Deed 12). The only recorded deed that exists out of the Trustees of the Proprietors of the Common and Undivided Lands of the Town for property in the area west of the Shinnecock Canal and north of Montauk Highway (executed in 1927) contains a deed description stating the land conveyed runs "to the easterly line of what is known as Indian land." The "Indian land" there referred to is Westwoods. EX-4851-54(D166c, Deed 24); A-3531 (Haas Decl. at 3); A-4794(Tr. (M. Haas) 3005:23-3007:5); A-4338-39(Tr. (J. Lynch) 1142:25-1144:17).

Mason Haas was a trial expert witness for the Nation on matters of title. At the time of trial, he had been a professional abstracter and title searcher in Suffolk County for 24 years and had examined hundreds of thousands of deeds in his career. Mr. Haas examined the existing documentary evidence relating to recorded land title in and around Southampton to determine the ownership of

Westwoods during the period for which records exist. A-4785-86(Tr. (M. Haas) 2972:20-2973:24); A-3529(Haas Decl. at 1). In the course of his title research, Mr. Haas examined the chains of title to the lands surrounding the current Westwoods property, including both the roughly 79 acre northern part of it and the roughly 2 acre southern part. He identified each and every lot adjoining Westwoods by its current Suffolk County tax map designation. A-3530(Id. at 2).

For each of the properties adjoining Westwoods, Mr. Haas conducted a full title examination and reviewed all records available for and relevant to examination of record title, including, but not limited to, records held at the Suffolk County Historical Society, records of the Town (including Indian Records) and records on file at the Suffolk County Clerk's Office.

The oldest relevant recorded deed that Mr. Haas located dates from 1845. A-3530(Haas Decl. at 2); A-4790(Tr. (M. Haas) 2992:12-22). The documentary evidence relating to recorded land title in and around Southampton, in particular the relevant recorded deeds, tax maps and surveys during the entire period for which such records exist, indicate that the Nation is the owner of Westwoods. A-3529, 3531(Haas Decl. at 1, 3). In every instance, and without exception, from the most current tax maps and surveys to the earliest that exist in the record, where the land known as Westwoods appears, it is referred to as Indian Land, Indian Reservation, Land of the Shinnecock Tribe of Indians or by some

equivalent reference (some more precise than others). No deed examined by Mr. Haas to land adjoining Westwoods refers to Westwoods in a manner inconsistent with Indian ownership and occupancy. A-3531(Haas Decl. at 3); A-4789-90, 4791, 4799-800(Tr. (M. Haas) 2988:13-2991:18, 2996:4-8, 3026:17-3029:1); EX-4244, 4306, 4404, 4501, 4544, 4573, 4638, 4701, 4737, 4874(D158d, D159c, D160c, D161c, D162c, D163c, D164b, D165, D166c, D167b). See generally SPA-70(Op. 220). Indeed, in Mr. Haas's experience deed references such as those recited above 99% of the time refer to the adjoining landowner. A-4790(Tr. (M. Haas) 2989:8-2990:20).

The State and Town's trial expert land surveyor, Martin Read, testified that in his 16 years of experience, deed references to adjoining property normally are to the owner or former owner of that property. Indeed, after considerable thought Mr. Read could recall only one deed of the several thousands he had reviewed where this was not the case. A-4390; A-4391(Tr. (M. Read) 1337:20-24; 1340:7-1342:11).

By a Patent granted on April 20, 1635 by the Plymouth Company (the "Sterling Patent") the Earl of Sterling, obtained undisputed title, in the name of the King of England, to the lands of Long Island. James Farrett was the duly appointed agent of the Earl of Sterling, who was granted the right and authority to convey lands within the Sterling Patent. By deed dated April 17, 1640 (the

"Farrett Deed"), Farrett granted free leave and liberty to four named English colonists and their associates to possess and improve a parcel of "eight miles square" of land on Long Island. The Farrett Deed also granted to those named in it the right to purchase land from Indians. By a confirmation document dated July 7, 1640, Farrett specified the bounds of the aforesaid "eight miles square" of land that constituted the plantation that came to be known as Southampton. In particular, the confirmation of July 7, 1640 specified that the westerly bounds of the "eight miles square" was "the place where the Indians drawe over their canoes out of the north bay over to the south side of the island," i.e., Canoe Place. Thus, settlers claiming under the Sterling Patent were only allowed to purchase or occupy lands east of Canoe Place. On December 13, 1640, certain Indians executed a deed that conveyed to English colonists all title to lands bounded on the west by "the place where the Indians hayle over their cannoes out of the North bay to the south side of the Island," i.e., Canoe Place (the "1640 Deed"). A-3668(JPTO Fact Stip. 21-22; SPA-45(Op. 196-97).

In or about 1644, the "Towne of Southampton" was accepted into the jurisdiction of the Connecticut Colony, under terms set forth in a document entitled "Ye Combynation of Southampton Wth Har[t]ford." A-6346(Katherine A. Hermes, *Report on the History of Land Transactions Between the Colony of Connecticut and the Long Island Indian Tribes in the Seventeenth Century*, June

30, 2006 ("Hermes Rep.") at 20)[9]; EX-3911(D95); A-4655(Tr. (K. Hermes) 2442:22-2444:5); SPA-45(Op. 197). In 1650, the Dutch ceded all of Long Island east of Oyster Bay to the United Colonies by the so-called "Treaty of Hartford". EX-3726-30(D6 at 189-193); A-6352 (Hermes Rep. 26 and n.92); A-6449(Katherine A. Hermes, *Rebuttal Report to Alexander von Gernet's Report Entitled "On the Authority of New York Colonial Governors to Decide on Matters Relating to Shinnecock Lands and the Town of Southampton,"* Aug. 21, 2006 ("Hermes Rebuttal") at 21); A-5194(James P. Lynch, *The Shinnecock and "Westwoods" in Southampton, New York: An Ethnohistorical Analysis*, Feb. 16, 2005 ("Lynch Rep.") at 33 n.5); A-4345-46(Tr. (J. Lynch) 1163:15-1167:19).[10] Connecticut was one of the United Colonies. A-6338 (Hermes Rep. 12); A-4345(Tr. (J. Lynch) 1164:7-13). The Town is located well east of Oyster Bay. EX-4111 (D119).

In 1650, the Connecticut General Court enacted an order that prohibited individuals from buying any land from Indians, either directly or

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[9] Professor Hermes, who has a Ph.D. in History from Yale University, a J.D. from Duke University School of Law and is a tenured Associate Professor of American Colonial History at Central Connecticut State University, A-6359(Hermes CV), was a trial expert for the Nation on historical matters.

[10] Among other things, Mr. Lynch, who was a trial expert "ethnohistorian" for the State and the Town, agreed on cross-examination concerning the Treaty of Hartford that "jurisdiction from 1650 onward to the eastern part of Long Island was in the United English colonies." A-4346(Tr. (J. Lynch)1168:15-19).

indirectly (the "1650 Order"). EX-3824(D46). The 1650 Order remained the law of the Connecticut Colony until 1663, when the Connecticut General Court enacted an order that replaced it. That successor order prohibited purchases of Indian land by individuals, except with allowance of the General Court. EX-3928(D100); A-6346-47(Hermes Rep. 20-21); A-4658(Tr. 2453). New England colonies other than Connecticut had similar laws and these laws were very widely published and understood. A-6329(Hermes Rep. 3); see also SPA-46(Op. 198).

There is no evidence in colonial records that land transactions in violation of the 1650 Order ever were recognized as legal. A-6343(Hermes Rep. 17). On or about May 12, 1659, two Indians executed a deed in favor of John Ogden, an individual, as grantee (the "Ogden Deed"). EX-3922(D98). The Ogden Deed is for a tract of land including Westwoods. A-6349-51(Hermes Rep. 23-25); SPA-15(Op. 200).

On or about April 10, 1662, three other Indians, all residents of "Shinnecock," executed a document in favor of Thomas Topping, an individual, as grantee (the "Topping Deed"). EX-3731(D7). The Topping Deed also is for a tract of land including Westwoods. A-6349-51(Hermes Rep. 23-25). See generally SPA-14-15(Op. 198-200). Both the Ogden Deed and the Topping Deed evidence a purported land transfer by Indians to particular individuals in an

individual capacity, those individuals being Ogden and Topping. A-4620(Tr. (A. von Gernet) 2230:19-25).[11]

When the Ogden and Topping deeds were executed, Ogden and Topping were elected magistrates of the Connecticut General Court. SPA-47, 49 (Op. 198, 200). In the 17th century, the Connecticut General Court was the supreme lawmaking body of that colony, and towns in Connecticut had only such powers as the General Court expressly granted to them. Webster v. Town of Harwinton, 32 Conn. 131, 131 (Conn. 1864).

The Connecticut Colony had personal jurisdiction over both Ogden and Topping when the Ogden Deed and the Topping Deed were executed. This fact required them to comply with the requirements of Connecticut law. A-6442, 6448, 6451, 6452, & 6443(Hermes Rebuttal at 14, 20, 23, 24 & n.34); A-4655-56 (Tr. (K. Hermes) 2444:25-2446:23).[12] Ogden and Topping, as magistrates elected to the Connecticut General Court, must have been aware of the 1650 Order and of the illegality of the Ogden Deed and the Topping Deed because of the prohibitory terms of the 1650 Order. A-6330, 6350-51(Hermes Rep. 4, 24-25). The 1650

[11] Adjunct Professor von Gernet was a trial expert for the State and the Town regarding certain historical matters.

[12] The district court made no clear determination on this subject. See SPA-46(Op. n.10).

Order applied to actions taken during the period 1659 through 1662 by John Ogden and Thomas Topping. A-4657(Tr. (K. Hermes) 2449:14-2451:3).

From a historical point of view, there is no question that any land transaction purportedly or actually conducted between an Indian and a private person under Connecticut jurisdiction in the 17th century and not specifically approved in advance by the Connecticut General Court was void. A-6343, 6344, 6358(Hermes Rep. 17, 18, 32).

The Connecticut Colony kept strict control of land transactions and land records. A-6344(Hermes Rep. 18). No surviving records of the Connecticut Colony or of any other New England colony contain any indication that the Connecticut General Court ever gave its consent to any private purchase by Ogden or Topping such as that evidenced by the Ogden Deed or the Topping Deed. A-6328(Id. at 2). There was no ruling by the Connecticut General Court concerning the land that purportedly is conveyed by the Ogden Deed or the Topping Deed. A-4142, 4259 (Tr. (admission by Town counsel) 40:2-3, 601:5-9), and it did not approve either deed. A-4647, 4659 (Tr. (K. Hermes) 2409:2-10, 2458:16-2460:5).

Both the Ogden Deed and the Topping Deed, as deeds prohibited by the 1650 Order and not approved by the Connecticut General Court, were as a matter of historical fact null and void. A-4647(Id. at 2409:11-2410:8).

On March 12, 1664, Charles II, King of England, issued a grant to his brother James, Duke of York, for the territory embracing New York, including Long Island. EX-2585(S72 at xi). Richard Nicolls was appointed the first Governor of New York by the Duke of York, sailed from England and arrived at New York in August 1664. The Dutch surrendered and Nicolls thereafter established the Province of New York in the Duke's name. Id. After the Dutch surrender, territorial jurisdiction over the area in which the Town now is located passed from Connecticut to New York. Id.; A-4659(Tr. (K. Hermes) 2460:2-17).

The "Allyn Letter," a primary historical document written to Governor Nicolls dated February 1, 1665 [NS][13] by John Allyn, Secretary of the Connecticut General Court, states in substance that by established order of the Colony of Connecticut no land might be purchased from an Indian to the particular use of any person without consent of the Connecticut General Court, and any such purported purchase was null in law. EX-3870(D71); A-6352(Hermes Rep. 26). As Secretary of the Colony of Connecticut, Allyn was well informed about its laws. A-4668 (Tr. (K. Hermes) 2489:7-18). At the time the Allyn Letter was written, "null in law" meant void and of no effect. A-4337(Tr. (J. Lynch) 1137:23-1138:1);

[13] Until 1752, when the Gregorian calendar still used today was adopted, England and its colonies followed the Julian calendar, under which March 25 was the beginning of the new year. A-6397(D32 at 28); SPA-51(Op. n.20). In this brief, "NS" indicates that the date is expressed using the modern, Gregorian calendar rather than the date expressed in the original document.

A-4667(Tr. (K. Hermes) 2487:21-2488:17). Setauket, as referred to in the Allyn Letter, was part of the Connecticut Colony, A-4667(Tr. (K. Hermes) 2487:1-9), and is now the Town of Brookhaven, New York, immediately west of Southampton. A-4667(Tr. (K. Hermes) 2487:1-9). Setauket joined the Connecticut Colony on the same terms as Southampton. EX-3796(D39).

Soon after Governor Nicolls arrived in New York he promulgated on Long Island a series of laws named the "Duke's Laws." He did so on March 1, 1665 [NS], exactly one month after the date of the Allyn letter. EX-2586(S72 at xii); A-4660(Tr. (K. Hermes) 2461:15-2462:6). One heading of the Duke's Laws was "Indians." Under that heading, on the subject of purchases of land from Indians, appeared the following text:

> No purchase of lands from Indians After the first day of March, 166[5] [NS] shall be Esteemed a good Title without leave first had and obtained from the Governour and after leave so obtained, The Purchasers shall bring the Sachem and right owner of such Lands before the Governoure to acknowledge satisfaction and payment for the said Lands whereupon they shall have a grant [i.e., a patent] from the Governoure And the Purchase so made and prosecuted is to be entered upon record in the Office & from that time to be valid to all intents and purposes.

EX-2595(S72 at 40).

Subsequent to March 1, 1665 [NS] and prior to the date of the Dongan Patent of 1686 (discussed below), no purchase from any purported Indian or tribe

or group of Indians of lands to the west of Canoe Place within the current boundaries of the Town was recorded with the Office of the Secretary of the Province of New York. A-3676(JPTO Fact Stip. 73).

From the date the Duke's Laws came into force, the only way for a private individual in New York to obtain title to land was by following the procedure they required. A-4661(Tr. (K. Hermes) 2466:8-2467:3); A-5090-91(S62 at 21-22). Under the Duke's Laws, aboriginal title remained in the Indians until the procedures required by the Duke's Laws to extinguish that title were complied with, including the issuance of a patent by the Governor. A-4661(Tr. (K. Hermes) 2467:10-2468:2); A-4626(Tr. (A. von Gernet) 2252:24-2254:23).

In a document dated October 5, 1665 relating to a land dispute between the Shinnecock and Unchechauk Indians, Governor Nichols fixed the westward boundary of Shinnecock lands at "Apaacock Creek." EX-3760 (D19). "Apaacock Creek" is currently known as Beaverdam Creek and is located in the hamlet of Westhampton Beach, within the Town of Southampton, west of Canoe Place and southwest of Westwoods. A-3675(JPTO Fact Stip. 69). This 1665 document, determining that lands of the Shinnecock Indians (including Westwoods) existed as of its date postdates both the 1659 Ogden Deed and the 1662 Topping Deed.

Westwoods is located within the boundaries of lands west of Canoe Place that were the subject, in part, of a document signed by Governor Richard Nicolls bearing the date October [3], 1666 (the so-called "Nicolls Determination"). A-3674(JPTO Fact Stip. 62). The lands involved in the "Nicolls Determination" included lands that he had ruled a year earlier, in his October 5, 1665 document above, were Unchechauk Indian lands and Shinnecock Indian lands.

The "Nicolls Determination" is not a royal charter or patent granting lands. A-3674(Id. at 63). Governor Nicolls issued no patent or grant for any lands within what is now the Town. A-3675(Id. at 67). Prior to the mid-19th century, the "Nicolls Determination" was not a source of claimed relevance to title of the Town to any land west of Canoe Place. In particular, there is no evidence that in the 17th century the Town relied upon the "Nicolls Determination" as a claimed source of title to any land.

In the fall of 1665, Governor Nicolls established the Court of Assizes of the Province of New York, comprised of the governor, his council, the justices and the high sheriff. The Court of Assizes was little more than the mouthpiece of the Duke and the Governor in the promulgation of edicts. EX-2586 (S72 at xiii).

In the fall of 1666, the Court of Assizes ordered all towns and "persons in perticuler" to take out new grants and, to that end, to bring in to the Governor all documents evidencing their claims of title to land, failing which, as of

April 1, 1667, all "old grants pattents or Deeds of purchase in Law . . . shall be looked upon as invalid to all intents and purposes." EX-2603(S72 at 93); A-5092 (S62 at 23). In 1670, the Court of Assizes issued another order, amplifying its 1666 order, ordering that "all Townes or private Psons" claiming an interest in land "upon pretence of purchase or Patent from any other Pson or Psons whether Indians or others" should present them to the Governor to be renewed or confirmed. EX-2601(S72 at 84); A-5093(S62 at 24). This 1670 order notes that Southampton had not complied with the 1666 order (that is, it had submitted no documents to the Governor asserting title to any land at all) and decreed that "in ye meantyme that all their Deeds of purchase Grants or Patents not confirmed as aforesaid shall be lookt upon as Invalid to all Intents & Purposes as is in ye book of Laws Specifyed." EX-2601(S72 at 84); A-5093(S62 at 24); A-4630-31(Tr. (A. von Gernet) 2270:18-2271:5).

In response to this 1670 order of the Court of Assizes, Southampton submitted a letter to then New York Governor Francis Lovelace (Nicolls having departed New York by 1668). EX-2586(S72 at xiii); A-6404(D32 at 35); EX-5037-38(D187 at 722-23). In it, Southampton made no mention of the Ogden Deed, the Topping Deed or the Nicolls Determination. Instead, it based its entire claim to lands on rights it asserted under "Lord Sterlings Agent," that is, its rights

under the 1640 Deed to lands entirely to the east of Canoe Place obtained pursuant to authority of the Sterling Patent. EX-5038(D187 at 723).[14]

In consequence of its failure to have its claims to interest in land confirmed by a patent as the 1670 order of the Court of Assizes required, as a matter of historical fact any documents or events on which Southampton might base such a claim were invalid as of the date of the Dutch reconquest of New York. EX-2601(S72 at 84); A-5092(S62 at 23); A-4630-31(Tr. (A. von Gernet) 2270:18-2271:5).

In July of 1673, the Dutch conquered New York during the Third Anglo-Dutch War. EX-2586(S72 at xiii); A-4669-70(Tr. (K. Hermes) 2495:22-2498:18). The 1673 conquest of New York by the Dutch voided the 1664 grant of Charles II to James, Duke of York for the area including New York and Long Island. A-4347(Tr. (J. Lynch) 1170:14-15). The Treaty of Westminster, which ended the Third Anglo-Dutch War in February 1674, restored sovereignty over New York to England. EX-2586(S72 at xiii).

As a result of the Third Anglo-Dutch War, the basis for England's right to sovereignty over New York changed from the Doctrine of Discovery to the

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[14] Specifically, this 1670 dated document states "wee . . . here [in Southampton] purchased our land wee now possess of the Natives the then proper owners of them and that [purchase] by the approbation of Lord *Sterlings* Agent" (emphasis in original) and refers to possession of those lands for "about the space of thirty years," that is, since ca. 1640. EX-5038(D187 at 723).

Doctrine of Conquest. A-4346-47(Tr. (J. Lynch) 1168:23-1172:18). In June 1674, Charles II issued a second grant to James, Duke of York, encompassing the same territory as the prior 1664 patent. EX-2586(S72 at xiii). The second grant to the Duke of York was made for the purpose of removing doubts that had then arisen as to the validity of the first. Martin v. Waddell's Lessee, 41 U.S. 367, 407 (1842). At the point of issuance of the second grant by Charles II to the Duke of York, New York started over. A-4347(Tr. (J. Lynch) 1172:10-25). Edmund Andros was appointed Governor of the province in 1674 and in that year reinstituted the Duke's Laws, under authority from the second grant by Charles II to the Duke of York. EX-2587(S72 at xiv); A-5094-95(S62 at 25-26).

In or prior to September of 1676, Governor Andros required that Southampton submit to him an explanation of why it had not taken out a patent for lands. In response to this requirement, Southampton submitted exactly the same document it had submitted in 1670 to Governor Lovelace. EX-5037(D187 at 722). Having received Southampton's response, the Court of Assizes gave judgment on October 5, 1676 that for its "disobedience to Lawes" Southampton "[had] forfeited all [its] titles, Rights & priviledges to the lands" to which it claimed rights. EX-5039(D187 at 724).

Soon after this event, Southampton applied to Governor Andros for a patent, and on November 1, 1676, he issued one. EX-707(T188). Prior to the

Andros Patent, the English government possessed sovereignty over all the lands within the current boundaries of the Town, the title thereto being vested in the King (except during a brief period of Dutch rule in 1673-1674). A-3675(JPTO Fact Stip. 68).

Governor Andros had the authority to issue a patent to Southampton, that patent to be based on whatever evidence the applicant had available to it that it brought forward. A-4614(Tr. (A. von Gernet) 2203:7-12). In the case of the Andros Patent, the only evidence brought forward by Southampton was that contained in its 1670 letter to Governor Lovelace, as resubmitted in 1676 to Governor Andros, A-6404-05(Hermes Rebuttal at 35-36), that is, evidence of the 1640 Deed for lands east of Canoe Place issued under the Sterling Patent. In the Andros Patent, Governor Andros does not reach any conclusion about whether or not there were any aboriginal Indian lands within the boundaries he patented. A-4672(Tr. (K. Hermes) 2506:1-2507:23); A-4614, 4616(Tr. (A. von Gernet) 2206:9-17, 2212:23-24). Specifically, the Andros patent recites that "if it shall so happen that any part or parcell of the Lande within the bounds and Limits afore described [Southampton] be not already Purchased of the Indyans It may bee purchased (as occasion) according to Law [that is, the Duke's Law] . . ." EX-709(T188 at 280); SPA-128(Op. n.58).

As recorded in proceedings of the Privy Council in London (the "Privy Council Document"), as late as 1679, three years after the date of the Andros Patent, Southampton continued to claim the Sterling Patent and Farrett confirmation of it as the sole basis for its rights in Southampton land. EX-5042-43 (D188 at 197-198); A-4675-76(Tr. (K. Hermes) 2517:18-2522:11).

On December 6, 1686, a subsequent Governor of New York, Thomas Dongan, issued a second patent for Southampton (the "Dongan Patent") at its request, to confirm the Andros Patent. EX-3742(D12). Prior to the date he issued the Dongan Patent, it is probable that Governor Dongan knew of the Privy Council Document and of the position of Southampton regarding the source of its rights in land set forth in it. A-4675-76(Tr. (K. Hermes) 2517:18-2522:11). The Dongan Patent includes *verbatim* the full text of the Andros Patent, A-4616(Tr. (A. von Gernet) 2213:25-2214:2); in particular, it reiterates *verbatim* the text that supports the conclusion that Governor Andros did not make any pronouncement about whether or not there were any aboriginal Indian lands within the patented boundaries ("if it shall so happen . . ."). That text, as it appears in the Dongan Patent, is substantive. A-4674-75(Tr. (K. Hermes) 2516:11-2517:2); A-4635(Tr. (A. von Gernet) 2290:6-12); A-5212(Lynch Rep. 51).

No party is aware of any documentary evidence that as of the date of the Dongan Patent, any purported Indian or Indian tribe, as grantor, ever had

granted any lands west of Canoe Place by deed to the freeholders of the Town. A-3676(JPTO Fact Stip. 71). Indians confirmed the 1640 Deed to lands east of Canoe Place to the freeholders on behalf of its grantors on November 24, 1686, 12 days before the date of the Dongan Patent. A-3668(Id. at 21). The Dongan Patent refers to a "matter in variance between the ffreeholders of the said Towne of Southampton and the Indyans" and to land "lawfully purchased" from Indians by "the ffreeholders of the Towne of Southampton." These references most likely are to the November 24, 1686 confirmation and to the lands conveyed by the 1640 Deed. Whether Dongan had anything else before him at the time he issued the Dongan Patent is speculation. EX-325(T69 at 887); A-4636, 4637(Tr. (A. von Gernet) 2292:14-2293:2, 2295:18-2297:1); A-4674(Tr. (K. Hermes) 2513:7-2516:9).[15] After the Dongan Patent was issued, there were no further patents issued for lands within Southampton, nor is there any record of the purchase of land within Southampton from Indians in accordance with the procedures required by the Duke's Laws.

SUMMARY OF ARGUMENT

These consolidated actions are, at base, actions brought by a state and its instrumentalities to enforce state and local law against a sovereign Indian tribe

[15] The district court rejected this fact without explanation, SPA-54(Op. n.21), a determination that was clearly erroneous.

and on a tract of land that has been sovereign Indian land since time immemorial. Flying in the face of centuries of precedent regarding tribal immunity and tribal sovereignty, the district court granted the State and Town their requested relief. The Judgment issued by the district court is predicated on findings of fact and conclusions of law set out in the Opinion, which is as lengthy as it is error-ridden, peppered with mistakes of fact and law that mandate *vacatur* of the permanent injunction and its accompanying declaratory judgments.

Before this Court need wade into the nitty-gritty of reviewing the fact-findings and legal conclusions of the Opinion, however, it must determine as a preliminary matter whether federal subject matter jurisdiction exists over the consolidated actions. The district court held there to be subject matter jurisdiction over the State Action by reading the State Complaint to plead a federal question on its face. The district court never made an explicit finding as to subject matter jurisdiction over the Town Action, but consolidated the two Actions on December 22, 2003. A-284(Dkt. no. 71 (Stipulation)). Consolidation, however, has no impact on jurisdiction; thus, this Court must first decide whether it has jurisdiction over the Town Action and review the district court's finding of jurisdiction over the State Action. The Nation urges this Court to hold that federal jurisdiction exists over both actions.

If this Court does find federal question jurisdiction exists over both actions, it must next turn to the jurisdictional question of tribal sovereign immunity. The Nation has continuously invoked its tribal immunity from the claims made in the consolidated actions and from suit since the commencement of this litigation, an immunity that is abrogated "only where Congress has authorized the suit or the tribe has waived its immunity." Oneida Indian Nation v. Madison County, 605 F.3d 149, 159 (2d Cir. 2010). Neither of these exceptions applies here, and so the district court erred first in denying the Nation's motion for summary judgment on the basis of sovereign immunity without explanation, and next in concluding, in the Opinion, that sovereign immunity does not act as a complete bar to these actions. SPA-156(Op. 297).

If this Court surmounts both these jurisdictional bars and proceeds to the merits of this appeal, it must review the district court's fact-finding and legal conclusions on the question of the extinguishment of the Shinnecock's aboriginal title to Westwoods. The State and Town bore the burden to establish, by clear and convincing evidence, that the Nation's aboriginal title to Westwoods has been extinguished—a high standard that they dismally failed to satisfy. Nevertheless, the district court, erroneously relying on reams of irrelevant and unreliable expert testimony offered by the State and the Town, accepted their theory that the land now called Westwoods was conveyed by the Shinnecock to white settlers in the

17th century and the Nation's aboriginal title to it extinguished by one or both of two subsequent land patents issued by colonial governors. This is reversible error, because it ignores the unambiguous meaning of historical documents and uncontroverted expert testimony proffered by the Nation, which irrefutably prove that the purported conveyances were illegal and neither patent extinguished the Nation's aboriginal title to Westwoods.

In addition, all parties conceded that the Nation had aboriginal title to Westwoods in the 17th century and that the Nation has fee simple title to Westwoods now. In the absence of clear evidence of extinguishment or abandonment, neither of which was adduced below, the Nation is entitled to a presumption of continuing possession of Westwoods and does not have to prove habitation or continuous use in the interim order to maintain its aboriginal title. If the Nation's aboriginal title to Westwoods was never extinguished, then Westwoods is "Indian land" to which the State and Town statutes at issue here do not run. The Judgment must therefore be vacated and the actions remanded for dismissal.

Finally, this Court need not turn a blind eye to the reality that circumstances have significantly changed since these actions were commenced in 2003, and even since the Judgment was entered in February 2008. The Shinnecocks' federal acknowledgment as an Indian tribe by the Department of the

Interior soon will be effective, at which time the Nation will be fully subject to the strictures of the Indian Gaming Regulatory Act ("IGRA"), which occupies the field of Indian gaming. SPA-154(Op. 295). The Nation thus will not be able to game at Westwoods without first satisfying the requirements of IGRA, and the State and Town would have no standing to enjoin any gaming activity conducted in violation of those requirements. Fla. v. Seminole Tribe of Fla., 181 F.3d 1237, 1250 (11th Cir. 1999). The permanent injunction therefore is moot and must be vacated. See Malkentzos v. DeBuono, 102 F.3d 50 (2d Cir. 1996) (vacating as moot portion of injunction no longer applicable due to change in circumstances).

ARGUMENT

I. THIS COURT MUST DETERMINE WHETHER FEDERAL SUBJECT MATTER JURISDICTION EXISTS IN THESE ACTIONS PRIOR TO REACHING THE MERITS OF THE JUDGMENT BELOW

This Court must determine as a threshold issue whether federal subject matter jurisdiction exists in these consolidated actions. The district court held there to be subject matter jurisdiction over the State Action pursuant to 28 § U.S.C. 1331 and 28 U.S.C. § 1441, finding that the State's complaint stated a claim for a violation of a federal statute on its face, and, in the alternative, a claim arising under the Indian Commerce Clause of the Constitution. A-146-48(Dkt. no. 24 (274 F. Supp. 2d at 270-71)). The district court did not make a specific finding as to its subject matter jurisdiction over the Town Action; instead, the parties agreed

by the Stipulation, so ordered by the district court on December 22, 2003, that the Town would withdraw its motion to remand the Town Action and would be joined as a plaintiff in the State Action, and that the Town and State Actions would be consolidated for all purposes, pursuant to Fed. R. Civ. P. 42(a). A-284(Dkt. no. 71).

The Nation argued before the district court that federal subject matter jurisdiction existed over both the Town Action and the State Action under 28 U.S.C. § 1331. It continues to do so before this Court, but is obliged to bring subject matter jurisdiction to this Court's attention because the parties alone may not, by stipulation or otherwise, confer subject matter jurisdiction upon the federal courts where it does not otherwise exist. See Poindexter v. Nash, 333 F.3d 372, 383 (2d Cir. 2003) ("[A]ny party . . . at any stage of the proceedings[ ] may raise the question of whether the court has subject matter jurisdiction.") (internal quotations, citations omitted).

"'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'" In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 488 F.3d 112, 121-22 (2d Cir. 2007) (quoting Great S. Fire Proof Hotel Co. v.

Jones, 177 U.S. 449, 453 (1900) (other citations omitted)). Before approaching the merits of this case, this Court must determine whether the State and Town Actions properly were before the district court. Furthermore, the State and Town Actions must be considered individually; the Stipulation notwithstanding, a finding of subject matter jurisdiction over the State Action is insufficient to confer subject matter jurisdiction over the Town Action, and vice versa.

This Court reviews *de novo* a district court's conclusions regarding its subject matter jurisdiction. Plumbing Indus. Bd. v. E. W. Howell Co., 126 F.3d 61, 65 (2d Cir. 1997). Even if the question of subject matter jurisdiction has not been directly addressed below, an appellate court "may examine subject matter jurisdiction, *sua sponte*, at any stage of the proceeding." Adams v. Suozzi, 433 F.3d 220, 224 (2d Cir. 2005) (internal quotations omitted).

A. The Town Action

The Town argued that removal was improper because the district court "lack[ed] original jurisdiction" over the Town Action. A-4026(Dkt. no. 6 (Mem. of Law in Support of Plaintiffs' Motion to Remand at 1)).[16] The Town asserted that no federal claim was pled on the face of the Town's complaint, as assertedly required for removal based on federal question jurisdiction. Id.

[16] Docket references regarding the Town's briefing on remand are to the Town Action's docket, No. 03-cv-3466.

Additionally, the Town argued that its claims were not removable under the ambit of complete preemption pursuant to Oneida Indian Nation v. Oneida County, 414 U.S. 661, 675-78 (1974) ("Oneida"), because they assertedly were not claims brought by an Indian tribe relating to ownership or possession over its tribal lands, but instead were claims brought by the Town to enforce its own municipal code, relating only to alleged violations of that code by a non-federally recognized Indian tribe on non-reservation land held by that tribe in fee simple. A-4037-38(Id. at 12-13).

In opposing the Town's motion to remand, the Nation argued that federal courts had subject matter jurisdiction over the Town Action because the Town claims related to the nature, source and scope of the Nation's ownership and possessory rights to Westwoods, and thus were subject to complete preemption under Oneida. A-4066-70(Dkt. no. 7 (Mem. of Law in Opp. to Plaintiffs' Motion to Remand at 12-16)). The Nation also argued that the Town's right to relief necessarily depended on the resolution of substantial questions of federal law. A-4070-74(Id. at 16-20).

Before the district court ruled on the Town's remand motion, the Town withdrew it pursuant to the Stipulation. A- 284(Dkt. no. 71). The

Stipulation also joined the Town as a plaintiff to the State Action[17] and consolidated the State and Town Actions pursuant to Fed. R. Civ. P. 42(a).[18] That Stipulation, however, is entirely irrelevant to the question whether federal subject matter jurisdiction exists over the Town Action. "Graven in stone is the maxim that parties cannot confer jurisdiction on a federal court by consent or stipulation." Reale Int'l, Inc. v. Fed. Republic of Nigeria, 647 F.2d 330, 331-32 (2d Cir. 1981) (citing Cal. v. LaRue, 409 U.S. 109, 112 n.3 (1972)). This Court has noted that proscription "is enforced with draconian zeal." Id. (citing King Bridge Co. v. Otoe County, 120 U.S. 225, 226 (1887)).

Nor could the district court, by consolidating the Town and State Actions pursuant to Fed. R. Civ. P. 42(a), bequeath subject matter jurisdiction over the Town Action upon itself where subject matter jurisdiction does not as a matter of law exist. "Consolidation under Rule 42(a) … is a procedural device designed

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[17] As the State Action sought relief only under state statutes as to which the Town has demonstrated no standing to sue, this aspect of this stipulation is highly questionable. See Barhold v. Rodriguez, 863 F.2d 233, 234 (2d Cir. 1988) ("insofar as standing is an article III requirement for jurisdiction, the parties do not have the power to confer such jurisdiction upon the Court by conceding the standing of certain plaintiffs.").

[18] Despite consolidation, neither the State Complaint nor the Town Complaint ever was formally amended, and each continued unaltered throughout, as separate pleadings, with separate docket numbers. For example, see stipulation and order substituting new tribal officials for prior ones pursuant to Fed. R. Civ. P. 25, dated June 5, 2006, A-3648(Dkt. no. 225) (substituting officials separately as defendants in each separate complaint, post-consolidation).

to promote judicial economy, and consolidation cannot effect a merger of the actions or the defenses of the separate parties. It does not change the rights of the parties in the separate suits." Cole v. Schenley Indus., Inc., 563 F.2d 35, 38 (2d Cir. 1977); see also Cella v. Togum Constructeur Ensembleier en Industrie Alimentaire, 173 F.3d 909, 912 (3d Cir. 1999) ("[C]onsolidation … does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another,'" quoting Johnson v. Manhattan R. Co., 289 U.S. 479, 496-97 (1933)).

Thus, even if the district court was correct in asserting federal subject matter jurisdiction over the State Action, as the Nation argued below and continues to argue here — a finding that this Court must revisit in any case — the consolidation of the two Actions pursuant to the Stipulation provides no jurisdictional "hook" upon which to hang the existence of federal subject matter jurisdiction over the Town Action. See McKenzie v. United States, 678 F.2d 571, 574 (5th Cir. 1982) (vacating judgment and remanding case to state court because consolidation with pending federal case did not cure jurisdictional defect and no independent basis for subject matter jurisdiction existed).

Rather, subject matter jurisdiction is the predicate for consolidation, not vice versa; according to Fed. R. Civ. P. 42(a), in order for actions to be consolidated, they must be "before the court." If the Town Action was improperly

removed, it was not "before" the district court and thus could not be consolidated with the State Action. See U.S. for Use of Owens-Corning Fiberglass Corp. v. Brandt Constr. Co., 826 F.2d 643, 647 (7th Cir. 1987) (holding that action improperly removed due to lack of federal subject matter jurisdiction does not meet Fed. R. Civ. P. 42(a) requirement that action be pending before the court and thus district court did not acquire jurisdiction over improperly removed case by consolidating it with related federal case).

Consequently, this Court must determine whether federal question jurisdiction lies over the Town Action, standing alone. Given that the Town did not plead any federal question on the face of its complaint, it remains for this Court to decide whether the Town Action falls within an exception to the well-pleaded complaint rule. This Court has looked to the Supreme Court's decision in Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) to guide its understanding of the existing exceptions to the well-pleaded complaint rule, noting, "'a state claim may be removed to federal court in only two circumstances-when Congress expressly so provides . . . or when a federal statute wholly displaces the state-law cause of action through complete pre-emption.'" City of Rome, N.Y. v. Verizon Commc'ns, Inc., 362 F.3d 168, 176-77 (2d Cir. 2004), quoting Beneficial Nat'l Bank, 539 U.S. at 8.

Because Congress did not expressly provide for removal of any of the Town claims, in order to conclude that federal jurisdiction exists over the Town Action, this Court must rely upon and extend Oneida and Beneficial Nat'l Bank[19] to find that subject matter jurisdiction over the Town Action exists (and removal is appropriate), by holding that complete federal preemption provides a sufficient legal basis for subject matter jurisdiction when a complaint brought against an Indian tribe asserting only state law claims requires for resolution of those claims a determination of the nature and scope of an Indian tribe's right of use, possession or ownership of tribal-owned land. The Nation urges this Court to do so and to hold that it has subject matter jurisdiction over the Town Action.

B. The State Action

This Court cannot end its jurisdictional inquiry with the Town Action, however, but also must satisfy itself that federal subject matter jurisdiction exists over the State Action as well. See In re MTBE, 488 F.3d at 121-22 ("When the district court decides to retain a case in the face of arguments that it lacks jurisdiction, the decision itself is technically unreviewable; but of course the

[19] As the Supreme Court noted in Beneficial Nat'l Bank, "This Court has also held that federal courts have subject-matter jurisdiction to hear possessory land claims under state law **brought by Indian tribes** because of the uniquely federal 'nature and source of the possessory rights of Indian tribes.'" Id. at 8, quoting Oneida, 414 U.S. at 667 (emphasis added).

appellate court reviewing any other aspect of the case must remand for dismissal if the refusal to remand was wrong, i.e., if there is no federal jurisdiction over the case.") (citation omitted).

The Nation argued below, and the district court agreed, that the State complaint fell within the well-pleaded complaint rule because on its face it pled a violation of IGRA, a federal statute, 25 U.S.C. §2701 *et. seq.* A-64(State Compl. ¶77, asserting that the Nation's pleaded actions "are in violation" of IGRA)); A-136-7(Dkt. no. 17 (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Remand) at 6-7); A-144-47(Dkt. no. 24 (274 F. Supp. 2d at 269-70).

The Nation continues to assert this argument before this Court. However, the State has maintained at all times (contrary to the allegations on the face of its own complaint) that it did not intend to plead, and in fact did not plead, a violation of IGRA in the State Complaint, but merely mentioned IGRA to counter the Nation's anticipated federal law defenses. See, e.g., A-101(Dkt. no. 13 (Affirmation of Denis J. McElligott, the State's counsel, dated July 20, 2003 ¶7) (averring that "because a suit by plaintiffs to enforce the provisions of the Indian Gaming Regulatory Act . . . does not lie under the circumstances of this case, this Court lacks original jurisdiction over the action")); A-152, 156(Dkt. no. 26 (Reply Mem. of Law in Further Support of Plaintiffs' Motion to Remand to the New York State Supreme Court at 4, 8)). But a motion for remand is not an occasion for a

party that has made an allegation of violation of federal law functionally to move that its own pleading should be dismissed in order to achieve a tactical objective. Put differently, the proper question for purposes of determining whether to remand is not whether a motion to dismiss the federal claim in the State Complaint that justified removal would succeed, but rather a simpler, more mechanical question: Was there a federal claim pleaded on the face of the State Complaint? The Nation argues that there was.

During the course of these consolidated actions, however, the State never argued, or attempted to prove that the Nation violated IGRA or any other federal statute. Instead, the State consistently argued that the only reference to federal law in its complaint was made in anticipation of defenses, and so the State Action must be remanded to state court, because it is well settled that removal may not be based upon potential defenses. See Beneficial Nat'l Bank, 539 U.S. at 6 ("It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. . . . Thus, a defense that relies on the preclusive effect of a prior federal judgment, or the pre-emptive effect of a federal statute … will not provide a basis for removal.") (citations omitted); see also Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 113, 116 (1936); C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3566 (3d ed.) ("Thus there is … no

federal jurisdiction if the suit is brought … by state officials who contend that the state regulatory scheme can still be applied. Put another way, an action by the state cannot be removed . . . .”). Also, “the possible existence of a tribal immunity defense,” as the Nation argues exists here, does not convert “[state law] claims into federal questions . . . .” Okla. Tax Comm’n v. Graham, 489 U.S. 838, 841 (1989).

If this Court, as Judge Platt did below,[20] reads the State Complaint to plead a violation of IGRA and thus to satisfy the well-pleaded complaint basis for removal, the Nation is obliged to point out that the State Complaint at once pleads a violation of IGRA, A-64(State Compl. ¶ 77) and demands the court declare that defendants are “subject to the provisions of IGRA,” A-66(State Compl. ¶ 90m), while simultaneously alleging that the Shinnecock Indian Nation is not on the Department of Interior’s master list of federally recognized tribes, A-59(State Compl. ¶43, referencing Exhibit A, Pogue Affidavit). Recognition by the Secretary of the Interior, however, is a condition precedent to the applicability of IGRA. See 25 U.S.C. 2703(5) (“The term ‘Indian tribe’ means any Indian tribe, band, nation, or other organized group or community of Indians which . . . is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as

[20] Judge Bianco, however, in his October 30, 2007 Opinion, stated that “[p]laintiffs here are not asserting a cause of action for a violation of IGRA.” SPA-155(Op. 296 n.70).

Indians . . . ."). See generally Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933)

Should this Court decide that the well-pleaded complaint rule is thus not available to sustain removal of the State Action (a conclusion which the Nation opposes), it would have to turn to the available exceptions to that rule in order to sustain federal subject matter jurisdiction over the State Action. As discussed supra with reference to the Town Action, this would entail the extension of Oneida and Beneficial Nat'l Bank to find complete federal preemption of state law claims brought against an Indian tribe that implicate the nature and scope of the tribe's rights to use, possession or ownership of land.[21] This was the Nation's position below, and the Nation maintains it before this Court.

If this Court were to find subject matter jurisdiction over both the Town Action and the State Action lacking and removal improper, all judgments and orders, opinions and other rulings entered by the district court below would be void *ab initio* and rendered of no force or effect. See Cunningham v. BHP

[21] In its Memorandum and Order denying the State's motion to remand, the district court also held that "defendants correctly conclude … the Complaint's demands for declaratory judgment require the resolution of questions of federal law." A-145-48(Dkt no. 24 (274 F. Supp. 2d at 270-71)). The State, however, had argued that the declaratory relief provisions that referred to federal law were "set forth in conjunction with the provisions of the complaint that anticipate that defendants will raise federal [defenses]." A-157(Dkt. no. 26 (Reply Mem. in Further Support of Motion to Remand at 9)). See also Franchise Tax Bd., 463 U.S. at 16 ("[I]f, but for the availability of the declaratory judgment procedure, the federal claim would arise only (continued . . .)

Petroleum Great Britain PLC, 427 F.3d 1238, 1244-45 (10th Cir. 2005) (holding "because the district court never had jurisdiction over the case, it had no power to rule on any substantive motions or to enter judgment in the case"); United States v. 51 Pieces of Real Prop., 17 F.3d 1306, 1309 (10th Cir. 1994) ("[A] judgment is void if the court that enters it lacks jurisdiction over [] the subject matter of the action.").

Accordingly, if removal of both the State Action and the Town Action is held improper, this Court would be obliged to vacate all post-removal actions by the district court and to remand to the district court, with instructions for it to remand both the State Action and the Town Action to state court. See Franchise Tax Bd., 463 U.S. at 28 (upon finding no federal jurisdiction, vacating judgment of Court of Appeals and remanding for remand to state court); see also Cunningham, 427 F.3d at 1245 (vacating all post-removal orders, including those granting full or partial summary judgment, upon finding improper removal due to lack of federal jurisdiction and remanding case to district court with directions to remand to state court.

If this Court were to find subject matter jurisdiction existed over the State Action but not over the Town Action, the legal consequence would be that

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as a defense to a state created action, jurisdiction is lacking.") (internal quotations, citations omitted).

the district court tainted its exercise of subject matter jurisdiction over the State Action with the "jurisdictional infirmity" of the Town Action by consolidating the two Actions and asserting its jurisdiction over both at once. Brown v. Francis, 75 F.3d 860, 866 (3d Cir. 1996). In that circumstance, this Court would be required to restore all parties to the positions they occupied prior to the improper removal of the Town Action by (a) vacating all post-removal orders in which the district court purported to exercise jurisdiction after it "so ordered" the December 22, 2003 Stipulation, and (b) directing the district court to separate the State Action from the Town Action on remand and to remand the improperly removed Town Action to state court, retaining jurisdiction over the State Action. Id. at 866-67.

II. THESE ACTIONS ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY

In this Circuit, "[i]t is now well established that Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers." Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 356 (2d Cir. 2000); accord, Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004). See generally Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (prohibiting suits against states by Indian tribes, analogizing tribes to sovereign powers for purposes of sovereign immunity).

In Oneida Indian Nation v. Madison County, 605 F.3d 149, 159 (2d Cir. 2010),[22] this Circuit recently reiterated the legal conclusion that Indian tribes possess broad sovereign immunity. Following the Supreme Court's holding in Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998), this Court held in Madison County that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[23] As will appear from the discussion below, neither exception applies here.

Tribal sovereign immunity extends to declaratory and injunctive suits, as well as to suits for damages, and may not be evaded by allegations that a tribe acted beyond its tribal powers. See, e.g., Imperial Granite Co. v. Papa Band of Mission Indians, 940 F.2d 1269 (9th Cir. 1991).[24] It also is well-settled that no court in the United States, state or federal, has subject matter jurisdiction to entertain a suit against an Indian tribe in circumstances where sovereign immunity

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[22] Madison County involved the question of whether tribal sovereign immunity bars a state foreclosure proceeding seeking to collect real estate taxes due on land owned by an Indian tribe without any of the protections, such as freedom from taxation, accorded generally to Indian land. Its holding prohibited a suit *in rem* to foreclose on that land, but its logic applies *a fortiori* to suits against a tribe *in personam*, such as those here.

[23] Other circuit courts have confirmed the continuing vitality of the holding of Kiowa, post Sherrill. See Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1292-1293 (10th Cir. 2008).

[24] For discussion of the separate question of whether the bar of tribal sovereign immunity may be evaded by suing tribal officials instead of the tribe itself see infra Section II(C).

applies and that "[o]n a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists." Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 84 (2d Cir. 2001); Chayoon, 355 F.3d at 143.

Other circuits have reached the same conclusion, see, e.g., Sanderlin v. Seminole Tribe of Fla., 243 F.3d 1282, 1285 (11th Cir. 2001), as have state courts. See, e.g., Oneida Indian Nation v. Hunt Constr. Group, Inc., 67 A.D.3d 1345, 1347 (4th Dep't 2009); Houghtaling v. Seminole Tribe of Fla., 611 So. 2d 1235, 1239 (Fla. 1993).[25]

As a prefatory matter, a defendant asserting tribal sovereign immunity obviously must be an Indian tribe. For tribes on the list of tribal entities recognized and eligible for funding and services from the BIA by virtue of their status as Indian tribes (the "BIA List"), see current BIA List at 74 F.R. 40218 (August 11, 2009), tribal status is assumed. See generally, Golden Hill Paugusset Tribe of Indians v. Weicker, 39 F.3d 51, 57 (2d Cir. 1994). At present, the Nation

[25] The issue of whether a tribe may assert the bar of sovereign immunity is, of course, one for judicial determination. See Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1499-1503 (D.C. Cir. 1997) (holding that "the court must itself decide whether the [tribe] constitutes a sovereign tribe" for immunity purposes).

is not on the BIA List, although it likely will be before this appeal is argued.[26] In any event, both the State and Town Complaints allege that the Nation is an Indian tribe. A-54, A-3992(State Compl. ¶ 5, Town Compl. ¶2).[27]

Tribal sovereignty (and immunity) is inherent, is not conditioned on federal (or state) recognition and remains a centerpiece of federal Indian law, see, e.g., Kiowa, 523 U.S. at 758 (Tribal immunity from suit does not depend on the subject matter of the lawsuit, but exists by virtue of the tribe's status as a distinct political entity); United States v. Lara, 541 U.S. 193, 199 (2004) (as a matter of federal law, tribal powers derive from inherent sovereignty and not from delegated federal authority), and, as to tribal sovereign immunity or law as applied to Indian tribes generally, federal law is the only law that matters.[28]

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[26] As noted supra at n.7, the Office of Federal Acknowledgment of the United States Department of the Interior recently issued a Final Determination "extend[ing] Federal Acknowledgment . . . to the Shinnecock Indian Nation" which has not yet become effective.

[27] This alone is sufficient as a matter of law to allow the Nation to raise the defense of sovereign immunity. See, e.g., Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d *147*, 167 (2d Cir. 2003) ("allegations in the ... Complaint. ... are 'judicial admission[s]' by which [the plaintiff-appellant] is 'bound throughout the course of the proceeding'" (quoting Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F.2d 523, 528 (2d Cir. 1985)); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1063-64 (1st Cir. 1979) ("We conclude . . . that appellant clearly brought suit against the Tribe as an entity, and not as a collection of individuals. The Passamaquoddy Indians' tribal status therefore is to be assumed for purposes of deciding the issue squarely raised by this suit: whether this particular tribe enjoys protection from suit by virtue of sovereign immunity.")

[28] That Indian affairs are committed exclusively to the federal government has been reaffirmed consistently. See County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive

(continued . . .)

From the inception of the lawsuits underlying these appeals, the Nation has invoked its sovereign immunity as a jurisdictional bar, both from the claims brought against it and from suit (whether in federal court or state court). A-80(Dkt no. 3 (Answer to State Compl., First and Second Aff. Defenses)), A-4007(Town dkt. no. 4 (Answer to Town Compl., First and Second Aff. Defenses)).

Eventually, in response to a motion for summary judgment filed by the Nation seeking dismissal of these actions on sovereign immunity grounds, the district court held on November 7, 2005 as a matter of federal law that "that the Shinnecock Indians are in fact an Indian Tribe….[T]he [Nation and the other defendants below] are correct in their position that they were an Indian Tribe not only when the first white settlers arrived . . . in 1640 [and] remain an Indian Tribe today" and stating that it was "recognizing the Shinnecocks as a tribe." SPA-6, 10-11, 13-15(Dkt. no. 181 (400 F. Supp. 2d at 489, 491, 493)).

In the same opinion holding the Nation to be an Indian tribe, the district court inexplicably denied, without explanation, the Nation's motion for summary judgment on the basis of sovereign immunity. Because the denial of the Nation's summary judgment motion on the basis of sovereign immunity turns on questions purely of law, the effect of these events was to preserve the issue for

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province of federal law"); United States v. Forness, 125 F.2d 928, 932 (2d Cir. 1942) ("state law does not apply to the Indians except so far as the United States has given its consent").

appeal. Rothstein v. Carriere, 373 F.3d 275, 284 (2d Cir. 2004) (citing Chemetall GMBH v. ZR Energy, Inc., 320 F.3d 714, 718-19 (7th Cir. 2003) and Wilson v. Union Pacific R.R. Co., 56 F.3d 1226, 1229 (10th Cir. 1995)).

After the end of trial, the district court issued a 117 page opinion regarding the issues that were tried, but also chose *sua sponte* to include in its post-trial opinion a three page *coda* to explain its prior denial of the Nation's sovereign immunity defense. SPA-156-58(Op. 297-99). These three pages necessarily assume (correctly) that the Nation is an Indian tribe for purposes of asserting sovereign immunity, but proceed to conclude that the Nation may not assert sovereign immunity as a bar to these actions.

The district court articulated three bases for not affording the Nation sovereign immunity as a complete bar to these actions: (1) that "equitable doctrines preclude the tribe from asserting sovereignty over a particular parcel of land," citing as the basis for this holding the Supreme Court's opinion in City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005) ("Sherrill"); (2) that the Nation voluntarily waived its sovereign immunity by removing the State and Town Actions to federal court; and (3) that "even if the Shinnecock Indian Nation had tribal immunity when sued by the State, its tribal officials could be sued in their official capacities for prospective equitable relief." SPA-158(Op. 298). In the Judgment, the district court further held that "[t]he Shinnecock Indian Nation

may not invoke sovereign immunity from New York State and/or Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods." SPA-180(Judgment at 5). All these legal conclusions are, of course, reviewed by this Court *de novo*. See e.g., In re Complaint of Messina, 574 F.3d 119, 128 (2d Cir. 2009).

A. The Sherrill Case Has No Effect On Tribal Sovereign Immunity

In functional terms, the first legal conclusion of the district court was that, pursuant to its understanding of Sherrill, there is an "equitable" exception to sovereign immunity from suit. As this Court held in the Madison County case, that is an incorrect reading of Sherrill and elides the distinction between tribal sovereignty over reservation lands and a tribe's immunity from suit, which is independent of its lands. Madison County, 605 F.3d 149, 158 (2d Cir. 2010).[29] This Court explained that Sherrill dealt with "the right to demand compliance" with state laws, not "the means available to enforce those laws," a tribe's immunity from suit being absolute unless abrogated by Congress. Id. (citing Kiowa, 523

[29] The district court below stated, as it was obliged to do in order to hold that the Nation cannot assert sovereign immunity, that it disagreed with the holding of the district court in Madison County, a holding this Court subsequently affirmed. SPA-158 (Op. 185 n.73).

U.S. at 755).[30] Consequently, as a matter of law there is no exception to the absolute jurisdictional bar of the Nation's tribal sovereign immunity from the claims of the State or the Town, no matter how "disruptive" or "inequitable" the State or the Town may assert the Nation's actions to be.

B. The Nation Did Not Waive Sovereign Immunity By Removal

The district court's second holding, that the Nation waived its sovereign immunity by removing the State and Town Actions from state to federal court, completely misapprehends the nature of tribal sovereign immunity and the significant, often-expressed limitations of the case law in which waiver of immunity through removal has been held to have occurred.

The federal government, the states of the Union and foreign nations all possess sovereign immunity, to varying degrees. Depending on the circumstances and the nature of the governmental entity asserting it, that immunity may bar only suits in a particular forum (as is generally the case with Eleventh Amendment immunity of states from suit in federal court) or may bar any claim in any court at all (as is generally the case of foreign nations and Indian tribes).

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[30] Of course, in these consolidated actions the Nation argues that the State and Town also do not have the right to demand compliance with their laws at Westwoods because the Nation has continuous and unextinguished sovereignty over that land. Even assuming *arguendo* that the State and Town did have such a right, however, that would not change the rule that, under this Court's holding in Madison County, they lack the means to enforce it by bringing suit against the Nation due to the Nation's tribal immunity from suit.

The source of the concept that an entity may waive its sovereign immunity by removal to federal court is Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002). In Lapides, the Supreme Court held that where a state has waived sovereign immunity in state court with respect to certain claims, that state may not avoid the consequences of this waiver by removing the case to federal court and then asserting Eleventh Amendment immunity from suit as a defense to those claims. The Supreme Court stressed the limited scope of this holding, observing that "we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." 535 U.S. at 617.

The Fourth Circuit's analysis of Lapides in Stewart v. N.C., 393 F.3d 484 (4th Cir. 2005) is instructive. There, the plaintiff had brought a suit in state court against the state of North Carolina, alleging violations of both state and federal laws. The state, which had not waived its immunity to the state law claims at issue, removed the suit to federal court. The Fourth Circuit held that under these circumstances, the state had not waived its immunity:

> North Carolina chose to employ the removal device to have the issue of sovereign immunity resolved in a federal, rather than a state, forum. We see nothing inconsistent, anomalous, or unfair about permitting North Carolina to employ removal in the same manner as any other defendant facing federal claims. We therefore hold that North Carolina, having not already consented to suit in its own courts, did not waive sovereign immunity by voluntarily removing the action to federal court

for resolution of the immunity question.

393 F.3d at 490.

If the Shinnecock Indian Nation were a state, the reasoning of the Stewart case and other appellate holdings regarding Eleventh Amendment immunity in the context of removal[31] would be a complete answer to the assertion that it, or its officials, waived their sovereign immunity by removing these actions to federal court.

But of course the Nation is an Indian tribe, not a state; consequently Eleventh Amendment jurisprudence, by its terms applicable only to states and granting them limited sovereign immunity from suit in federal court, has no application here at all. Rather, as an Indian tribe, the Nation has sovereign immunity in both state forums and federal ones, alike.[32]

Research has disclosed no precedent of this Court addressing the specific issue of whether Eleventh Amendment jurisprudence regarding immunity

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[31] The Fourth, Seventh, and District of Columbia Circuits have "limit[ed] the waiver principle [of Lapides] to cases in which a state would obtain an unfair advantage *by enjoying immunity in federal court that it would not have otherwise commanded in state court*." Lombardo v. Pa. Dep't of Pub. Welfare, 540 F.3d 190, 197, n.5 (3d Cir. 2008) (citing Stewart v. N.C., 393 F.3d 484 (4th Cir. 2005) (emphasis added); Omosegbon v. Wells, 335 F.3d 668 (7th Cir. 2003); Watters v. Washington Metro. Transit Auth., 295 F.3d 36 (D.C. Cir. 2002)). is view is shared in scholarly commentary. See Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1167, 1233-35 (2003); see generally In re Charter Oak Assocs., 361 F.3d 760, 767 (2d Cir. 2004).

[32] See discussion of the scope of tribal sovereign immunity supra pp. 45-49.

of states from suit in federal court is controlling of the scope of tribal sovereign immunity,[33] but the logic of this Court's repeated holdings, most recently in Chayoon, 355 F.3d at 143, that "Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers" strongly suggests that the broad immunity of foreign nations, not the narrow Eleventh Amendment immunity of states from suit in federal court, provides the proper legal context for analysis. Under that framework, removal to federal court is irrelevant to the applicability of tribal sovereign immunity, which applies equally in the original state forum in which a suit is commenced as in the federal forum to which it is removed. The district court's legal conclusion to the contrary is simply incorrect.

C. The Doctrine Of *Ex Parte Young* Has No Application Here

The third legal ground articulated by the district court for holding that sovereign immunity does not bar these actions is its assertion that, as a matter of

[33] At the district court level, research has disclosed two cases decided after Lapides, Sonoma Falls Developers, LLC v. Dry Creek Rancheria Band of Pomo Indians, 2002 U.S. Dist. LEXIS 28087 at **16-19 (N.D. Cal. 2002) and Ingrassia v. Chicken Ranch Bingo and Casino, 676 F. Supp. 2d 953 (E.D. Cal. 2009), that held, correctly, that a tribe's removal of an action to federal court does not waive tribal sovereign immunity. But see State Eng'r of the State of Nev. v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev., 66 F. Supp. 2d 1163 (D. Nev. 1999), based entirely on Eleventh Amendment jurisprudence and in its conclusion simply wrong, for the reason (among others) that that ignored the Supreme Court's holding in Kiowa, 523 U.S. at 756, that "the immunity possessed by Indian tribes is *not* coextensive with that of the States." (Emphasis added).

law, tribal officials may be sued for declaratory and injunctive relief even if the Shinnecock Indian Nation itself may not. This is simply wrong.

It is well settled that "as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." Pennhurst State Sch. v. Halderman, 465 U.S. 89, 101-102 (1984); see Cory v. White, 457 U.S. 85, 91 (1982). Consequently, when an action against a state (or, if the analogy is held to be apt, a tribe) is barred by sovereign immunity, that bar may not be evaded by suing officials of the defendant unless through some exception to the general rule.

The seminal case providing the intellectual underpinning for the concept that state officials may be sued even if the government for whom they act may not is Ex parte Young, 209 U.S. 123 (1908). As this Circuit has held, "[t]he doctrine of Ex parte Young is a limited exception to the general principle of sovereign immunity. It 'allows a suit for injunctive [or declaratory] relief challenging the constitutionality [under the federal Constitution] of a state official's actions in enforcing state law'" (citations omitted) and thus provides a narrow exception to the Eleventh Amendment bar to suit. W. Mohegan Tribe v. Orange County, 395 F.3d 18, 21 (2d Cir. 2004); cf. Garcia, 268 F.3d at 88 (holding complaint against tribal official as pled failed to state a claim, remanding to district court to allow plaintiff to amend complaint to state viable claim, if she could).

As a prefatory matter, there is an obvious problem in using Ex parte Young analysis here to justify abrogating the sovereign immunity of officials of the Shinnecock Indian Nation: It is an Indian tribe, not a state. As discussed above, in this Circuit it is settled that tribes occupy a status for sovereign immunity purposes analogous to that of a sovereign power, to which the doctrine of Ex parte Young does not apply as an exception to the sovereign immunity.

Under settled common law principles, officials of foreign nations generally are entitled to broad sovereign immunity in state and federal courts for their official acts. See, e.g., Ky. v. Graham, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit [against a foreign official] is, in all respects other than the name, to be treated as a suit against the entity" and barred by the sovereign immunity of the foreign sovereign power); In re Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 84 (2d Cir. 2008) (cataloguing relevant sovereign immunity case law and confirming, quoting from the holding of Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895), aff'd 168 U.S. 250 (1897), that "the acts of the official representatives of the [foreign] state are those of the state itself, when exercised within the scope of their delegated powers" and barred from suit by sovereign immunity); Heaney v. Gov't of Spain, 445 F.2d 501, 504 (2d Cir. 1971) ("the immunity of a foreign state extends to any other official or agent of the state with respect to acts performed in his official capacity if the effect of exercising

jurisdiction would be to enforce a rule of law against the state") (internal quotation marks omitted). See generally Samantar v.Yousuf, 130 S. Ct. 2278 (2010) (sovereign immunity of officials of sovereign powers governed by the common law).

Consequently, when tribal officials are sued only in an official capacity, the sovereign immunity of the tribe bars the suit. See Native Am. Distrib., 546 F.3d at 1296 ("It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials; the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself." (citation and internal quotation marks omitted)); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985) ("tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority").[34]

[34] The State purports on the face of the State Complaint to sue tribal officials only in their official capacity. A-51 (State Compl.). The Town in its complaint purported to sue tribal officials in both an official and an individual capacity, A-3992(Town Compl.), but no individual claims ever were articulated, and any possibility of individual claims was foreclosed by the Town's repeated stipulations as these actions proceeded, see, e.g., A-3648(Dkt. no. 225) and A-3862(Dkt. no. 349), to substitute newly-elected tribal officials for those previously named. See Hammer v. Ashcroft, 512 F.3d 961, 971 (7th Cir. 2008), vacated on other grounds, 570 F.3d 798 (7th Cir. 2009) (*en banc*) (claim for injunctive relief against defendant officials in their individual capacities moot because none of the defendant officials still held the positions in which they were sued).

Even assuming, for purposes of argument, that the doctrine of Ex parte Young is applicable to suits against tribal officials equally as against state ones, by its express terms that doctrine is limited to situations not here present. As the Supreme Court instructs:

> Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.

Edelman v. Jordan, 415 U.S. 651, 664 (1974).

Other Supreme Court cases cautioned that "the theory of [Ex parte] Young has not been provided an expansive interpretation." Pennhurst, 465 U.S. at 102. In particular, "[Ex parte Young] does not foreclose an Eleventh Amendment challenge [to subject matter jurisdiction] where the official action is asserted to be illegal as a matter of state law alone." Papasan v. Allain, 478 U.S. 265, 276 (1986).

Upon this rock any argument for application of the Ex parte Young doctrine here to escape the bar of sovereign immunity sinks. No violation of the Fourteenth Amendment, or indeed of any federal law, is implicated in either the State or the Town Action. Rather, only violation of state statutes and town

ordinances was properly alleged[35] and only such violations were pursued. In such circumstances, there is no basis to invoke the Ex parte Young exception from sovereign immunity to sue tribal officials in any capacity and, consequently, all officials so sued are entitled to the same bar of sovereign immunity as is the Nation itself.

D. Congress Has Not Abrogated The Nation's Sovereign Immunity

Finally, it is of course well settled that Congress (and only Congress), which has the ultimate authority to regulate the legal status of Indian tribes, may abrogate the sovereign immunity of tribes in specific situations, through legislative enactment. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (tribal sovereign immunity "subject to the broad power of Congress").

However, it also is well settled that abrogation of tribal sovereign immunity is not lightly assumed. As the Supreme Court has cautioned "[a]lthough Congress clearly has power to authorize civil actions against tribal officers . . . , a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear

[35] The Town Complaint on its face alleges only violation of town ordinances. The State Complaint alleged only violation of state statutes, except for a legally baseless and admittedly unintentional and apparently unintended assertion of a violation of IGRA, quickly withdrawn, functionally waived and not at any time pursued. See discussion supra pp. 40-41.

indications of legislative intent." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

Below, the Town did not advance any argument that through statutory enactment Congress has abrogated the sovereign immunity of the Nation in respect of any town ordinance under which the Town sued, nor did the State advance such an argument in respect of the state statutes under which the State sued, except one: the New York Environmental Conservation Law (the "NYECL") Article 17, Titles 7 & 8. A-57-8, 64, 64 (State Compl., Causes of Action II, III and IV, ¶¶24-31, 80-81, 82-87). The discussion here thus is relevant, if at all, solely to the State Complaint and, specifically to one specific asserted state statutory basis for it.[36]

The State can point to no Congressional enactment that abrogates the general sovereign immunity of tribes from claims or suits and thus allows a lawsuit alleging violation either of the NYECL or of any rule or regulation of the state promulgated under it (or, for that matter, any other state environmental law) to proceed. Rather, the State argued below that Congress had abrogated tribal immunity to allow citizen suits against tribes for alleged violations of a different

[36] Below, the district court stated it "decline[d] to address" the State's argument discussed here because it held the Nation did not have sovereign immunity on other grounds. See SPA-159 (Op. n.76).

statute, the Clean Water Act, 33 U.S.C. § 1251 *et seq*. (the "CWA"),[37] and that this asserted abrogation of immunity (which the Nation does not concede, but rather argues to be irrelevant assuming *arguendo* it occurred) somehow also abrogated tribal sovereign immunity from claims based on the NYECL.

The short answer to this argument is that the State has not pled any claim under the CWA, and there is no indication of any legislative intent at all, much less any clear indication, by Congress to abrogate tribal sovereign immunity to allow tribes to be subject to claims for alleged violation of state environmental laws such as the NYECL. Consequently, the sovereign immunity of the Nation bars any claim against them under the NYECL or rules or regulations promulgated under that state statute.

A bit of explanation of the interplay of state and federal environmental laws only reinforces this conclusion. Briefly, the discharge of pollutants into the waters of the United States is regulated by the CWA, which is a comprehensive regulatory scheme governing the discharge of pollutants into the environment. The CWA sets up a two-level enforcement scheme. The United States Environmental Protection Agency (the "EPA") is granted authority to

[37] Specifically, Section 1365(a) of the CWA provides that "[a]ny citizen may commence a civil action on his own behalf against any person . . . *who is alleged to be in violation of [this Act]* . . . ." (emphasis added). Obviously, this provision of the CWA does nothing to authorize lawsuits based on any other statute, whether state or federal.

enforce the CWA's provisions and to issue "National Pollution Discharge Elimination System" ("NPDES") permits. 33 U.S.C. § 1342(a). There also is a procedure established by the CWA under which a state that wishes to regulate such discharges may be substituted for the EPA to the extent the state submits for approval, and the EPA approves, a state permitting program that is at least as stringent as the federal permitting program under the CWA. See 33 U.S.C. § 1342(b-c). See generally Wis. v. EPA, 266 F.3d 741, 743-4 (7th Cir. 2001), cert. denied, 535 U.S. 1121 (2002).

New York State applied to the EPA under § 1342(b) to undertake administration of NPDES permitting, including submission of "appropriate implementing regulations," and the EPA eventually approved its request, giving New York the authority to regulate the discharge of pollutants into navigable waters in accordance with the NPDES and within the limitations contained in New York's application to the EPA. 40 F.R. 54462-3 (Nov. 24, 1975).

The extent to which the EPA's otherwise exclusive authority to regulate discharges under the CWA has thus been delegated to New York obviously is governed by the terms of the particular delegation to New York that the EPA approved. The authority delegated to New York by the EPA under the CWA specifically *did not* include the authority to regulate Indian activities on Indian lands. The implementing regulations, submitted to and approved by the

EPA as the basis for New York's authority to enforce the CWA, specifically provides that "[t]he SPDES Program [enacted pursuant to the NYECL] does not apply to . . . Indian activities on Indian lands under the jurisdiction of the United States . . . ." 6 NYCRR § 750.1(b)(1). N.Y. Comp. Codes R. & Regs. Tit. 6 § 750-1.1 (2010).

With respect to the State's environmental allegations, therefore, not only has there been no federal abrogation of the Nation's general sovereign immunity from claims grounded in state and local regulation, but the powers otherwise delegated to New York by the EPA under the CWA specifically exclude the power to apply New York's substantive regulatory powers with respect to activities by Indians on Indian lands and expressly preserve exclusive federal jurisdiction over such activities.

Thus, regardless of whatever abrogation of tribal immunity may or may not have been intended by Congress to have applied to certain citizen lawsuits brought under the CWA itself, it is evident that there was no intention by Congress (or for that matter by the EPA, as administrator of the CWA) to abrogate tribal sovereign immunity from claims based on the NYECL or any other state statute, which themselves are enforceable only within the scope of delegated authority

granted by the EPA to New York.[38] Rather, there is every indication that the federal government expressly declined to extend any power to New York to enforce its environmental laws against Indian tribes. In such circumstances, it would be entirely insupportable as a matter of law to conclude that there has been any clear indication from Congress that the bar of sovereign immunity of Indian tribes does not extend to bar claims under the NYECL. Rather, no Congressional abrogation has occurred and the sovereign immunity of the Nation is viable and a complete bar to the claims of the state and the town here.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE NATION'S ABORIGINAL TITLE TO WESTWOODS WAS EXTINGUISHED IN THE 17TH CENTURY

A. Standard Of Review

[38] It also bears mention that determination of what "Indian lands under the jurisdiction of the United States" are for purposes of the CWA is within the sole authority of the EPA and, under principles of administrative deference, is not one to be made by the judiciary or by the State of New York. See Hydro Res. v. EPA, 608 F.3d 1131 (10th Cir. 2010) (*en banc*). Aboriginal Indian lands certainly would qualify, but so should land purchased and long held by an Indian tribe in fee simple, even outside its federal reservation. See Tuscarora Nation of Indians v. Power Authority of the State of N.Y., 257 F.2d 885 (2d Cir. 1958), cert. denied, 358 U.S. 841 (1958) ("Tuscarora I") (land purchased in 1804 by an Indian tribe in fee simple and not taxed by state or local governmental entities held to be Indian land restricted from alienation by the Nonintercourse Act, 25 U.S.C. § 177, absent express Congressional expression of assent); Tuscarora Indian Nation v. FPC, 265 F.2d. 338, 342 (D.C. Cir. 1958) (the same land as was in issue in Tuscarora I held "clearly . . . entitled to the protections accorded without distinction to Indian tribal lands elsewhere"), rev'd on other grounds, 362 U.S. 99 (1960). See generally, Thompson v. County of Franklin, 15 F.3d 245, 250 (2d Cir. 1994). In any event, the status of Westwoods for purposes of the CWA is for the EPA alone to decide.

As the district court below correctly held, the question of whether the Nation's aboriginal title to Westwoods was extinguished is a conclusion of law. "[T]he issue of whether aboriginal title was extinguished is a legal question for the Court to resolve." SPA-116(Op. 262). Prior to discussing why this legal conclusion was entirely incorrect, it is necessary to set forth the standard of review that applies to this issue.

The standards of review to be applied when this Court reviews on the merits the findings of fact and the conclusions of law reached at a bench trial take as their starting point Rule 52(a)(6) of the Federal Rules of Civil Procedure, which provides that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . ."

This Rule applies to all findings of fact, whether based solely on documentary evidence, on "live" testimony, or any other form of evidence. However, although the "same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony, . . . the presumption has lesser force in the former situation than in the latter." Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 500 (1984). While "there is a strong presumption in favor of a trial court's findings of fact **if** supported by substantial evidence," Travellers Int'l, A.G. v. Trans World Airlines, Inc., 41 F.3d 1570, 1574 (2d Cir. 1994) (emphasis added, internal quotation marks

omitted), it also is the law of this Circuit that "[i]f a finding is directly contrary to the only testimony presented, it is properly considered to be clearly erroneous" and factual findings unsupported by substantial evidence, lacking in adequate evidentiary support, or against the clear weight of the evidence are clearly erroneous. Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 571 (2d Cir. 1991).

Concerning the standards of review that apply to the many stipulations of fact regarding historical events and other matters entered into by the parties here (which the district court largely ignored), the answer is clear: stipulations of fact are binding and conclusive. As the Supreme Court recently emphasized, litigants are entitled to have their case tried upon the assumption that facts stipulated into the record were established. Christian Legal Soc. Chapter of Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2983 (2010). Consequently if a district court makes a finding of fact contrary to a stipulation or simply ignores a stipulation of fact relevant to or dispositive of a legal issue in contention, that conduct is clearly erroneous. See In re Petition of Alva S.S. Co., Ltd. v. City of N.Y., 616 F.2d 605, 611-12 (2d Cir. 1980) (district court erred in accepting expert testimony contrary to stipulation, as the latter is controlling).

Similarly, fact-findings are clearly erroneous when "the trial court incorrectly assessed the probative value of various pieces of evidence, leading it to

rely on speculation, and where the court failed to weigh all of the relevant evidence before making its factual findings." Locurto v. Giuliani, 447 F.3d 159, 181 (2d Cir. 2006) (citations, internal quotations omitted). This is exactly the situation here.

Finally, "a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

This Court reviews the district court's conclusions of law, and its application of the law to the facts, *de novo*. In re Complaint of Messina, 574 F.3d at 127-28. And in this Circuit, this standard "is equally applicable to the so-called mixed question of law and fact." Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 870 (2d Cir. 1994).

Also, "[a] district court cannot, by couching a legal conclusion as a finding of fact, prevent appellate review of legal errors." Griggs v. Provident Consumer Discount Co., 680 F.2d 927, 931 n.3 (3d Cir. 1982), vacated on other grounds, 459 U.S. 56 (1982). Rather, the question of what is a "fact," what is a "mixed question of law and fact" and what is a "legal conclusion" is for this Court alone to decide. Similarly, a district court may not avoid appropriate appellate review by failing to indicate in its opinion which of its determinations are findings

of fact, which are mere commentary on trial evidence and which are conclusions of law.[39] And, finally, the question of which facts are pertinent to determination of the legal issues presented below obviously is entirely a question of law for determination *de novo* by this Court.

B. The State And Town Failed To Demonstrate Extinguishment Of The Nation's Aboriginal Title To Westwoods By Clear And Convincing Evidence

Any discussion of extinguishment of aboriginal title necessarily must commence by laying out the law as it applies to that subject. The first legal question, evidently, is what aboriginal title is. In this Circuit, the contours of aboriginal title were described most recently in Seneca Nation of Indians v. N.Y., 382 F.3d 245, at 249 n.4 (2d Cir. 2004), which explained:

> Aboriginal title refers to the Indians' exclusive right to use and occupy lands they have inhabited "from time immemorial," but that have subsequently become "discovered" by European settlers. Under the doctrine of discovery, European nations that "discovered" lands in North America held fee title to those lands, subject to the inhabiting Indians' aboriginal right of occupancy and use. Aboriginal title, however, was not inviolable. Indians were secure in their possession of aboriginal land until their aboriginal title was "extinguished" by

[39] This is a particular problem here, where in its opinion below, the district court stated "[t]o the extent any Finding of Fact reflects a legal conclusion, it shall be to that extent deemed a Conclusion of Law, and vice versa." SPA-42(Op. n.4). This statement, together with the district court's extended commentary in the Opinion on evidence at trial without indicating whether it found the facts in that evidence to be credible or true, casts the Opinion free of its moorings and leaves this Court without clear guidance on what facts the district court relied on in reaching its legal conclusions.

> the sovereign discoverer. Extinguishment could occur through a taking by war or physical dispossession, or by contract or treaty . . . ." (citations omitted).

To this cogent summary, one must add that any claim that aboriginal title has been extinguished by physical dispossession" (or, as this is sometimes called, by voluntary abandonment) must also be "clearly established by clear and adequate proof" that the Indians who had aboriginal title to a parcel of land in fact have voluntarily ceased to physically occupy and use it. Quapaw Tribe of Indians v. United States, 120 F. Supp. 283, 286 (Ct. Cl. 1954). See also United States v. Arredondo, 31 U.S. 691, 747-48 (1832) (involuntary abandonment ineffective to extinguish aboriginal title); Nell J. Newton, Cohen's Handbook of Federal Indian Law (2005 ed.), §15.09[1][b].

In short, extinguishment of aboriginal title is not lightly implied and must be proved by clear and convincing evidence. County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 247-48 (1985); Seneca Nation, 382 F.3d at 260; see also Ala.-Coushetta Tribe of Tx. v. United States, 2000 WL 1013532, at *34 (Fed. Cl. June 19, 2000) ("In sum, the law of aboriginal title requires 'clear and convincing evidence' that the sovereign intended to terminate an Indian tribe's occupancy rights in its ancestral lands. Therefore, [the government's] burden of proving that the sovereign extinguished an Indian tribe's aboriginal title is a heavy one.") (citation omitted). In addition, the canons of

construction established by Indian law require any ambiguities regarding the continuation of aboriginal title to be resolved in favor of the Indian tribe:

> [A]n extinguishment [of aboriginal title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards . . . . [T]he rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'"

Santa Fe, 314 U.S. at 354 (citation omitted).

Finally, as to the temporal element of proving extinguishment, "[i]t is well-settled that an intention [of the sovereign] to authorize the extinguishment of Indian title must be 'plain and unambiguous,' either 'expressed on the face of the [instrument alleged to extinguish aboriginal title] or . . . clear from the surrounding circumstances.'" Seneca, 382 F.3d at 260 (2d Cir. 2004) (quoting United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1941), other citations omitted).

It is important to note that the "surrounding circumstances" referred to are those at or about the time extinguishment is alleged to have occurred. Put differently, nothing said about extinguishment subsequent to the 17th century is of any relevance to the legal question of whether, according to what the relevant 17th century documents show, extinguishment of aboriginal title to Westwoods then occurred.

Consequently, the Court's detailed and prolix focus below on an alleged 19th century leasehold for property west of Canoe Place, timber rights in the Town during the 18th century and, for that matter, anything else that occurred after the 17th century, is completely irrelevant and immaterial. Rather, when as here the documents from the Colonial period relevant to extinguishment are unambiguous,[40] there is no need for any expert exegesis of any sort and the Court should rule on the meaning of the pertinent Colonial documents as a matter of law, without taking testimony. See, e.g., Seneca, 382 F.3d at 248-49.

If the relevant Colonial era documents are ambiguous, the Court may consider expert testimony on "evidence of contemporary construction of the key [colonial enactments in issue] and surrounding circumstances relevant to their meaning," Oneida Indian Nation v. N.Y., 691 F.2d 1070, 1086 (2d Cir. 1982), and on "the historical background of the events surrounding [those Colonial enactments]." Oneida Indian Nation v. N.Y., 732 F.2d 261, 265 (2d Cir. 1984). The district court noted these restrictions, SPA-118(Op. 263), but did not heed them, and instead allowed extensive "expert" testimony, upon which it apparently relied in its rulings on 17th century extinguishment, about topics as diverse as historic 18th century timber regulation in Southampton, an alleged leasehold to the

[40] The district court held that "[n]either the language nor the context of the colonial era documents is ambiguous in any way." SPA-121(Op. 265).

Shinnecock in 1808,[41] various maps (the earliest dating from the late 18th century), and 1880 testimony before a legislative committee by an alleged tribe member that may or may not have been about Westwoods, among numerous other irrelevancies. This was clear legal error.

As a matter of well-established federal law, the State and the Town, who seek to enjoin the Nation's use of lands to which it concededly had aboriginal title in the 17th century and concededly owns and occupies, bear the burden of showing by clear and convincing evidence that the Nation's aboriginal title has been extinguished.

This they completely failed to do. The stipulated or uncontroverted facts bearing on the question of lack of extinguishment are set forth above in the Statement of Material Facts. There is no purpose in repeating them here. All point to the conclusion that the aboriginal title to Westwoods never was extinguished. Most telling, perhaps, to the arguments for extinguishment made by the State and the Town are these.

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[41] This refers to the irrelevant and completely incompetent, see A-6497 (Haas Rebuttal Report), concoction of a 19th century "lease" by the State and Town's trial expert "ethnohistorian," James Lynch, which occupies many pages of his report and is mentioned repeatedly throughout the Opinion, SPA-58, 131, 135, 140-41(Op. 209, 275, 278, 283), and appears to be one of the bases for its legal conclusions. The document that Lynch asserts evidences this irrelevant "lease" (this itself, a legal conclusion and an incorrect one from the face of the document asserted by Lynch to prove its existence) is not one. See A-5256-57(Lynch Rep. 95-6). In any event, none of this later material has any bearing on the legal effect of the relevant 17th century documents.

The theory put forward by the State and Town's "ethnohistorian" Mr. Lynch, that the area of Southampton including Westwoods was a legal no man's land during the 1650s and 1660s, where settlers could take land from Indians as they saw fit, is a complete fabrication, unsupported by any recognized historical source. This concept depends, for its validity, on the Lynch-created notion that Southampton, at the time, had been created as a "mini-colony" by the Colony of Connecticut, so that outside its borders, consequently, there was no law.

Among other things, this flies in the face of the 1650 "Treaty of Hartford," in which the Dutch transferred jurisdiction over Long Island east of Oyster Bay from their colonial government to that of the Colony of Connecticut. This is the definitive interpretation of Trumbull's A Complete History of Connecticut, published in 1818, EX-3724(D6), and it is correct as a matter of fact and law. Mr. Lynch himself identified Trumbull as the leading early Connecticut historian and the "father of Connecticut history." A-4346(Tr. (J. Lynch) 1165:3-19). Professor Hermes also has shown that Lynch's concept of a Southampton "mini-colony" in a sea of lawlessness is completely at variance with history, A-6372(Hermes Rebuttal 3 *et seq*.), and that even if Mr. Lynch's made-up "mini-colony" theory was historically valid (which it is not), Topping and Ogden, the purported grantees of the Indian lands in issue and elected Connecticut magistrates, were bound under principles of personal jurisdiction (placed in evidence by

Professor Hermes and not contradicted in the record) to comply with Connecticut law, not only when within its borders but also outside them.[42] See supra pp. 18-19. This is but one detail among many littered about by Mr. Lynch in his reports to try to convey an aura of authenticity to his baseless opinions and merely is indicative of the total lack of reliability of Mr. Lynch's opinions (which, in any event, are irrelevant to the legal issue of extinguishment).[43]

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[42] This concept is not an antique and retains currency today, see Blackmer v. United States, 284 U.S. 421, 438 (1932), holding that "[t]he jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them," (emphasis added).

[43] As Mr. Lynch admitted, work product he prepared and submitted to the BIA was viewed as so sloppy as to be unusable and a staff historian with the BIA stated she could not rely on the validity of anything in his work. In response to this criticism, Mr. Lynch did not change his research methods. A-4244(Tr. (J. Lynch) 486:3-487:1). In his reports here, Lynch admitted to having committed a fundamental error of historical analysis, A-4352(Tr. (J. Lynch) 1189:6-1190:9) in not understanding the Julian calendar and consequently misstating historical events and then proceeded to compound that error by claiming, contrary to all recorded history and to the face of the Duke's Laws, that Governor Nicolls enacted the Duke's Laws in 1664 [NS] while on a ship on the coast of Massachusetts, prior to his arrival in New York. A-4352-53 (Tr. (J. Lynch) 1190:10-1194:20). Lynch also admitted to failing to mention pertinent historical information in his reports, for example the Allyn Letter, A-4248(Tr. (J. Lynch) 504:6-505:2), and improperly rendered legal opinions in his reports, despite objections by the Nation. See A-5212 (Lynch Rep. 51) (opining that the Nation's aboriginal title was extinguished). These examples are typical of Mr. Lynch's deficient, results-oriented approach and indicative of his disinterest and total lack of professionalism in correctly interpreting historical facts. Perhaps for this reason, and contrary to his warm reception by the district court here, Mr. Lynch has not been so well received by another federal court. See Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp. 2d 442, 474 (E.D.N.Y. 2009) ("The court finds the testimony of plaintiff's expert, Mr. Lynch, . . . particularly results-driven. It appears that Mr. Lynch ultimately chose what evidence to rely on and the weight to be given that evidence based on whether it supported his client's position and his ultimate conclusions.").

It also is clear as a matter of fact and law that the 1659 Ogden Deed and the 1662 Topping Deed, under which the Town claimed title to Westwoods, were void *ab initio* under the 1650 Order of the Connecticut General Court. That 1650 Order provided that:

> Whereas there is an order of Courte amongst vs wch prohibitts all perticular persons within this Jurissdiction from buying any land of the Indians, either directly or indirectly, vnder any pretence whatsoeuer . . . .

EX-3825(D-46).[44] The necessary consequence of the 1650 Order, which was fully applicable in Southampton, is that any and all purported purchases of Indian lands in Southampton made by a private individual and not approved in advance by the General Court while the 1650 Order was in effect, such at the Topping and Ogden Deeds, were void *ab initio* and of no legal effect.[45]

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[44] In 1993, the State of Connecticut passed an act that purportedly acted retroactively to validate certain land transfers that were "otherwise valid except for the possible fact that the general assembly or its predecessor legislative bodies or other governmental authorities did not confirm, validate, ratify or approve such transfers of land in accordance with colonial laws or resolutions, common law or provisions . . . ." Conn. Sp. Act 93-1 (1993). Apart from implicitly acknowledging the effect of violation of the 1650 Order to be what the defendants assert it to be, this statute has no bearing on this case. The Court can take judicial notice that in 1993 no part of Southampton, Long Island was subject to the jurisdiction or laws of Connecticut. It also was clearly beyond the Constitutional power of the State of Connecticut to legislate in derogation of the unquestioned exclusive commitment of Indian affairs to the national government generally, and of the Nonintercourse Act in particular, or to divest by legislative *fiat* the Nation's aboriginal title to Westwoods, which has subsisted for hundreds of years.

[45] Individual settlers plainly had no power to acquire Indian lands. Nor did Connecticut "towns," whether properly incorporated or not. The 1650 Order conferred no special powers on towns generally or on the Town of Southampton in particular. It is abundantly clear as a matter of Connecticut law that in the 17th century Connecticut towns had no powers at all other than as expressly delegated to them by the Connecticut General Court. See Webster v. Town of

(continued . . .)

It is well settled that any purported conveyance of Indian land in violation of colonial laws that expressly prohibited such conveyances is null and void *ab initio* as a matter of law. As a matter of historical fact, this principle was well understood and enforced by colonial authorities. See EX-3870(D71); A-4666-68(Tr. (Katherine A. Hermes) 2484:9-2489:18); A-6329-30, 6352-54(Hermes Rep. 3-4, 26-28).

The February 1, 1665 [NS] letter by John Allyn, Secretary of the Connecticut General Court, to Governor Nicolls, regarding Indian land purchased by a Mr. Scott (who was "agayne making disturbance amongst the people of Setawkett") is particularly instructive on his point. Allyn first noted that Nicolls had been "pleased to determine, when or [*sic*, our] Governoure was last at New Yorke, that what had bin formerly setled and determined by Connecticutt upon Long Island, was so to continue" under the new colonial administration. He then went on to state, with respect to Mr. Scott's Indian land purchases, that:

Harwinton, 32 Conn. 131, 138 (Conn. 1864) (so-called Connecticut Constitution of 1639, under which the Colony of Connecticut was governed at all relevant times, conferred upon the Connecticut General Court "supreme and exclusive legislative, executive and judicial power"; towns in colonial Connecticut had only such powers, other than the power to elect representatives ("magistrates") to the General Court, as the Connecticut General Court expressly delegated to them); State v. Williams, 35 A. 24, 29 (Conn. 1896), aff'd sub nom., Williams v. Eggleston, 170 U.S. 304 (1898) ("Towns have no inherent rights. They have always been the mere creatures of the colony or the state, with such functions and such only as were conceded or recognized by law.").

> Your Honour may allso please to understand that by the established order of this Colony (of which Setawkett was a member severall yeares, by theire owne desires) no land was to be purchased so the perticuler use of any person, without the consent of or Generall Courte, *and all such purchases to be null in lawe*; so that if such ingrossings of land (to private uses) from Indians should be tolerated it would be found destructive to whole townships and much obstruct the peopling of His Majesties dominions in these partes.

EX-3872(D71) (emphasis added). The Connecticut Colony, and later the Province of New York, had a simple, strong public policy that did not depend on a conveyance being involuntary, fraudulent, or unfair. Nor did it matter if a purported deed was signed, sealed, ratified or anything else. Prohibited conveyances of Indian land simply were, as Allyn put it, "null in lawe."

This principle has also been reaffirmed and consistently applied in federal case law, after the adoption of the Constitution, by courts considering transfers in violation of law. Quite early in our nation's jurisprudence, the Supreme Court readily accepted the proposition that a contract between an individual and an Indian tribe during the colonial period for the purchase of land was null and void, and without legal effect. See Pa. v. Franklin, 4 U.S. 255 (1802) (misdemeanor indictment for taking possession of lands through a purported purchase from Indians in violation of colonial-era Pennsylvania law upheld).[46]

[46] This rule is in keeping with the general principle that agreements that violate a statute are "absolutely void . . . not merely voidable, but void ab initio." Vill. of Fort Edward v. Fish, 156 N.Y. 363, 371, 373 (N.Y. 1898). See also Bank of the United States v. Owens, 27 U.S. 527, (continued . . .)

Indeed, by 1824, the principle that purported grants of Indian land to individuals in violation of prohibitory statutes were without legal effect was so well established that the Supreme Court of the United States declared that "this Court has never hesitated to consider all such . . . grants as wholly void." Danforth v. Wear, 22 U.S. 673, 675-76 (1824) (internal quotation marks omitted).

Federal courts sitting in New York also recognized from an early date that purported acquisitions of land by individuals from Indians in violation of an applicable statute were null and void. For example, in Jackson v. Porter, 13 F. Cas. 235 (C.C.N.D.N.Y. 1825), a New York Circuit Court held an asserted colonial era purchase of land by an individual by deed from Indians, in violation of orders and proclamations issued by the Lieutenant Governor of New York and the King of England forbidding such purchases, was void, and declared that the purchaser "could acquire no right whatever thereby"—this despite the fact that the deed in question had been expressly confirmed by Sir William Johnson, the Crown's Superintendent of Indian Affairs. Id. at 241. These settled legal principles never have changed.

539-41 (1829) (agreements in violation of law absolutely void) (citations omitted); Peck v. Burr, 10 N.Y. 294, 299 (N.Y. 1851) (no cause of action can arise from an agreement prohibited by statute); Town of Stratford v. Fidelity & Cas. Co., 106 Conn. 34 (Conn. 1927) (agreement in violation of statute was void and could not be made enforceable by estoppel).

Even more devastating to the State and Town's contentions are the stipulated facts that (a) during the entire period he was New York's Governor, Nicolls never issued any patent or grant for any lands at all within the Town, A-3675 (JPTO Fact Stip. 67), and (b) that prior to the Andros Patent for Southampton of November 1676 and except during a period of Dutch rule in 1673-1674 the English government possessed sovereignty over all the lands within the current boundaries of the Town, **the title thereto being vested in the King**. A-3675(JPTO Fact Stip. 68). These stipulations of fact completely preclude the possibility that Governor Nicolls transferred title of any lands within the Town to anyone, as if he had done so it would be impossible for title to those lands to be vested in the King at the date of the Andros Patent.

Also, at all times prior to the Andros Patent being issued in 1676 and for years thereafter the Town, in its proof of title submitted to the Governors of New York in the 17th century in order to seek a grant of title to lands, **based its claims solely upon the 1640 Deed for land located to the east of Canoe Place** (thereby excluding from its claims any assertion of title over any lands to the west of Canoe Place, including Westwoods), thus foreclosing as a matter of historical fact and law any possibility that the Town had title to any lands west of Canoe Place at that time, no matter whether on the basis of the so-called 1666 "Nicolls Determination" or any other claimed basis. See supra pp. 26-29. There can be no

question about these historical realities, based as they are upon the plain text of 17th century primary historical documents.

This brings the discussion of extinguishment to the Andros and Dongan Patents. Prior to analyzing their content, a brief recitation of the law of interpretation of such governmental instruments is in order. Patents, like statutes, must be interpreted as a whole. See Brown v. Huger, 62 U.S. 305, 318 (1858) ("[T]he patent itself must be taken as evidence of its meaning; that, like other written instruments, it must be interpreted as a whole, its various provisions be taken as far as practicable in connection with each other, and the legal deductions drawn therefrom must be conformable with the scope and purpose of the entire document."); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

The scope and application of a colonial land patent is a question of law for this Court to decide. Brown, 62 U.S. at 305. Such patents must be strictly construed—"[p]ublic grants convey nothing by implication; they are construed strictly in favour of the king." United States v. Arredondo, 31 U.S. 691, 738 (1832).[47] See also United States v. Mich., 190 U.S. 379, 401 (1903) (land grants

[47] This principle was not new when Arredondo was decided. Indeed, to demonstrate its long-accepted vitality the court in that case at 31 U.S. at 738 cites the Earl of Leicester's Case, 73 E.R. 812, 3 Dyer 362a (King's Bench Division 1578) (grant of a manor to an Earl strictly construed in favor of the sovereign), decided during the reign of Queen Elizabeth I. It thus is apparent that the principle of strict construction of sovereign land grants was well established by the 17th century.

from the sovereign "must be interpreted most strongly against the grantee and for the government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed"); Walton v. United States, 415 F.2d 121, 123 (10th Cir. 1969) ("[i]n a public grant nothing passes by implication and, unless the grant is clear and explicit regarding the property conveyed, a construction will be adopted which favors the sovereign rather than the grantee").

Absent "clear and convincing evidence" of the sovereign's "plain and unambiguous" intent to extinguish aboriginal title, courts have uniformly held that aboriginal title survives a grant of title in fee simple to land in the possession of an Indian tribe. See, e.g., Worcester v. Ga., 31 U.S. 515, 546 (1832) ("these grants [patents] asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned"); Clark v. Smith, 38 U.S. 195, 201 (1839) (ultimate fee in patented land encumbered by Indian right of occupancy).

Furthermore, and although nothing in the text of the Andros or Dongan Patents suggests that they are ambiguous, there is a well-settled principle of statutory construction that courts are to construe ambiguities in favor of Indians. See, e.g., Mont. v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (holding that a federal statute could not be construed as allowing taxation of tribal leases

given that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973).

Under these standards of strict interpretation, it is impossible to conclude as a matter of law that either the Andros Patent or the Dongan Patent extinguished the Nation's aboriginal title to Westwoods. As is shown supra, pp. 27-28, the Andros Patent, by its terms, does not purport to extinguish aboriginal title anywhere within the Town.[48] The Dongan Patent does so, but only for the lands east of Canoe Place that were the subject of the 1640 Deed.[49] After the Dongan Patent was issued, there were no further patents issued for lands within Southampton, nor is there any record of the purchase of land within Southampton from Indians in accordance with the procedures required by the Duke's Laws. Consequently, the Nation's aboriginal title to Westwoods remains intact today.

This conclusion is not surprising, as the record reflects that Westwoods has never been subject to taxation by the Town at any time in recorded

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[48] On this point, to the extent any factual determination is involved, the State and Town's expert Adjunct Professor Von Gernet agrees. A-4614, 4616(Tr. (A. von Gernet) 2206:9-17, 2212:23-24).

[49] See supra pp. 27-29 for a factual discussion of the reference in the Dongan Patent to extinguishment of title to certain Indian lands and the surety that those facts demonstrate conclusively that the lands as to which title was extinguished were only the lands conveyed to the freeholders of the Town in the 1640 Deed, i.e., lands east of Canoe Place, a conveyance confirmed 12 days before Governor Dongan issued his patent.

history. The only rational explanation for this reality is that the Town consistently has recognized that Westwoods is sovereign Indian land, held in aboriginal title. Also, under settled legal principles, continued aboriginal title of land after its grant by a sovereign to a municipality or to private party is not foreclosed. As Seneca explains:

> [W]here the fee title was devised by the sovereign prior to extinguishment of aboriginal title, the devisee held the 'right of preemption,' which was the exclusive, alienable right to acquire fee title to Indian land upon extinguishment. The right of preemption . . . is similar to a contingent future interest in the land: only extinguishment by the sovereign could trump the Indian right of occupancy and thereby perfect the right of preemption."

382 F.3d 245, at 249 n.4. This is exactly the situation here, and the record demonstrates without the slightest doubt that the Town took the lands patented to it by Governors Andros and Dongan subject to the aboriginal title of the Nation to the portion of those lands (including Westwoods) to the west of Canoe Place (which the sovereign never extinguished).

C. The Nation's Possession Of Westwoods Is Entitled To A Presumption Of Continuance And No Record Evidence Contradicts This Presumption

Because the district court below seems to have concluded, wrongly, that the Nation must show habitation SPA-55, 141(Op. 206, 284) and, possibly, actual occupancy of Westwoods throughout history in order to maintain its legal

status there, a brief discussion of the proof of occupancy that is required is necessary.

First, this appeal does not present the more usual Indian case, where an Indian tribe is attempting to make a claim for damages based on an allegation of illegal taking of its land by the sovereign at some point in the distant past. Rather, it is conceded by all that the Nation had aboriginal title to Westwoods in the 17th century and that the Nation has fee simple title to Westwoods now (those two sorts of title, of course, being entirely consistent, and, when present together, uniting the Indian right of occupancy of aboriginal title with the fee, otherwise held subject to that right). And it is evident (looking backward from the present day) that the Nation has been in actual possession of Westwoods, and used it, for a very long time.

As the district court found, correctly, the Nation pursued litigation in 1890 to defend its right to occupy land including Westwoods and prevailed (the so-called Cassady lawsuit), the court in it finding as a fact that the Nation "had been in quiet and peaceable possession of the premises [notably, untaxed by the Town] for upward of sixty years [that is, since at least 1830]." SPA-59(Op. 210). And the district court also found correctly that the Nation had pursued litigation in 1922, 32 years later, against the road foreman of the Town for removing loam from land including Westwoods without permission (the so-called Hubbard lawsuit).

The Nation prevailed in that lawsuit as well, the court in it finding as a fact that "for more than 70 years past," that is, since at least the mid-19th century, the Nation and its members "have obtained its firewood and fencing" from Westwoods. SPA-60(Op. 210-11). The district court also appears to have found as a fact, apart from these lawsuits, that the Nation "has been using the land (Westwoods) for timber and some limited recreational uses for many years since the 19th century." SPA-134(Op. 278).

What is missing here, concededly, is any completely unequivocal evidence of anyone using Westwoods, specifically, for a period commencing at the end of the 17th century and continuing until some point early in the 19th century. The next obvious question is: Does this lacuna in the evidence undermine the Nation's aboriginal title to Westwoods? The answer is no.

The answer to the question lies in the law of aboriginal title and of burden of proof. First, there is no legal requirement for the Nation to prove that its aboriginal title to Westwoods, once established, continues. Rather, as the discussion above shows, the burden is on the opponents of that title to show extinguishment. They have not done so.

Second, in any event, the gap in the proof regarding use or occupancy of Westwoods in the 18th century is filled here by applicable evidentiary principles fundamental to questions of real estate title generally. It has long been a settled

principle of law that "[p]ossession of real property once proven to exist is presumed to continue." Lazarus v. Phelps, 156 U.S. 202, 205 (1895). "When a fact or condition is shown to have existed, it is presumed to have continued to exist, unless evidence to the contrary is introduced." Warren's Weed N.Y. Real Prop. (5th ed.) § 50.10[3]. In such a circumstance "[p]ossession is presumed to continue . . . . So of ownership . . . ." Wilkins v. Earle, 44 N.Y. 172, 192 (N.Y. 1870); see also People v. Scandore, 3 N.Y.2d 681, 684 (N.Y. 1958). In the absence of evidence clearly establishing, without ambiguity, that Westwoods was validly conveyed away and then conveyed back to the Nation, the presumption of its continued use and occupancy by the Nation in aboriginal title since first European contact in 1640 must stand. See, e.g., Collins v. Streitz, 95 F.2d 430, 433 (9th Cir. 1938) (discussing "the presumption of continuity of ownership, i.e., that a status once established is presumed by law to remain until the contrary appears"); Old Salem Chautauqua Ass'n v. Ill. Dist. Council of the Assembly of God, 158 N.E.2d 38, 41 (Ill. 1959) ("When a particular title has been proved, the presumption is that title and ownership continue to exist as established until some change or alienation is shown.").

Third, precedent suggests that for abandonment to be found to have occurred (abandonment being the only possible way for Westwoods to be held no longer to be land in aboriginal title), "open and notorious actual occupancy . . .

holding for himself" by a third party is necessary. Marsh v. Brooks, 55 U.S. 513, 524 (1852). There is no evidence in the record here that anyone other than the Nation ever physically occupied Westwoods at any time.

Fourth, proof of aboriginal title in the first place (not involved in this appeal) does not require proof of habitation or even proof of continuous use. Proof of aboriginal use may include evidence of hunting, gathering or agricultural use (such as timber cutting), and does not require a showing of habitation. See Wichita Indian Tribe v. United States, 696 F.2d 1378, 1380-81 (Fed. Cir. 1983); Mitchel v. United States, 34 U.S. 711, 746 (1835) (holding that, for purposes of establishing Indian title, tribes' "hunting grounds were as much in their actual possession as the cleared fields of the whites"). Also, sustained intermittent use satisfies the requirement (for a showing of aboriginal title to exist *ab initio*) of use and occupancy for aboriginal title to be held to exist. Ala.-Coushetta Tribe of Tex v. United States, 28 Fed. Cl. 95, 107 (Fed. Cl. 1993), aff'd in part, rev'd in part on other grounds 2000 WL 1013532 (Fed. Cl. Jun. 19, 2000); Confederated Tribes of the Warm Springs Reservation of Or. v. United States, 177 Ct. Cl. 184, 1966 WL 8893 at *5 (Ct. Cl. 1966). Although, aboriginal title being conceded in the Nation in the 17th century, there is no need to delve into these matters here, there cannot be a higher standard applied to defending the continuing existence of aboriginal title

(such as, for example, a requirement of showing habitation) than to establish it in the first place.

i. Subsequent Acts By The Town Presented As Evidence Of Extinguishment Did Not Operate To Extinguish The Nation's Aboriginal Title To Westwoods

The State and the Town have suggested that a pronouncement of the Town called the "Canoe Place Division" of 1738 (the "CPD") is of possible relevance to the aboriginal title of the Nation in Westwoods. This is simply incorrect, as a matter of law. At trial, the principal testimony concerning the CPD was by Martin Read, a surveyor and expert trial witness for the Town. The district court pronounced Mr. Read's testimony credible. SPA-70(Op. 219). The CPD, according to the historical record, was an area of land of something between 3,000 and 4,000 acres, located to the west of Canoe Place. Mr. Read, as a surveyor, was unable to produce a map of the CPD with the location of Westwoods in relation to it indicated, due to insufficient information, nor was he able to produce a signed survey of it, for the same reason. A-4389-91(Tr. (M. Read) 1334:10-1340:6). No map or sketch of the location of the CPD exists within the Town's archives, nor does Mr. Read know of any survey of the CPD. A-4388(Tr. (M. Read) 1331:16-1331:25). It is uncontested that no deed or other recorded instrument exists that evidences a source of title in any person named as an allottee in the CPD, nor is there any recorded evidence of any fee ownership in property within the CPD by

anyone. A-4795(Tr. (M. Haas) 3012:17-25); A-6497-98(D347 at 4-5). There was no evidence at trial that anyone occupied or took possession of Westwoods as a result of the CPD or asserted any claim of title to Westwoods on the basis of it (no deed for any part of Westwoods having been shown ever to exist).

It also has been suggested that the zoning of Westwoods by the Town may somehow be inconsistent with ownership of Westwoods by the Nation in aboriginal title. However, the uncontested evidence at trial shows that the Town routinely has applied zoning classifications to all the land in the Town, regardless of whether the Town had the authority to enforce zoning regulations on that land and does so solely to ensure that should the land at issue become subject to Town zoning regulation it would have an applicable zoning classification. For example, the Town has applied zoning for residential use only to a state highway, the Sunrise Highway, and even purported to zone a United States Coast Guard Station (neither of which is subject to any Town law). EX-5191(D229); A-4200-02(Tr. (J. Murphree) 261:21-266:12).

In any event, as a matter of law encroachment by settlers on areas near Westwoods or inclusion of Westwoods within a survey or "division" by the Town does not support an allegation that the Nation's aboriginal title to it has been extinguished. See Plamondon ex rel. Cowlitz Tribe of Indians v. United States, 467 F.2d 935, 937-38 (Ct. Cl. 1972) (limited settlement by whites on Indian lands

that "did not significantly disrupt" tribe's way of life held not to extinguish aboriginal title); United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1388 (Ct. Cl. 1975) (process of surveying lands and performing other acts in anticipation of future white settlement held by itself not to extinguish aboriginal title). Certainly, the evidence adduced at trial concerning the CPD and zoning is clear and convincing proof of nothing relating to aboriginal title to Westwoods and is irrelevant to the Nation's aboriginal title to that land, which rests on the correct construction as a matter of law of the meaning of 17th century documents and the Nation's continued possession of Westwoods, as a matter or law, as discussed above.

IV. LAND HELD BY AN INDIAN TRIBE BY VIRTUE OF UNEXTINGUISHED ABORIGINAL TITLE IS SOVEREIGN INDIAN LAND IN ITS EARLIEST AND MOST FUNDAMENTAL SENSE TO WHICH STATE AND LOCAL LAW DOES NOT RUN

There is no statutory definition of "Indian land," "tribal land," "Indian Country" or "aboriginal land" of general application. Rather, it has long been settled in the federal courts that, for purposes of the application of general federal law, "land formerly held by the Indians [that is, since prior to first European contact], and to which their title remains unextinguished" is restricted, sovereign Indian territory—that is, Indian land or Indian country. Donnelly v. United States, 228 U.S. 243, 268-69 (1913). See also Minn. v. Hitchcock, 185 U.S. 373, 388-89

(1902) (both lands set aside by the United States as a reservation and unceded Indian country, i.e., land held in aboriginal title, are restricted Indian land); Ex parte Crow Dog (Ex parte Kang-Gi-Shun Ca), 109 U.S 556, 561-62 (1883). Indeed, land the aboriginal title to which remains unextinguished is the first and primary exemplar of Indian country. See Donnelly, 228 U.S. at 269 ("the term [Indian country] cannot now be *confined* to land formerly held by the Indians, and to which their title remains unextinguished") (emphasis added).

A finding that a tribe of Indians holds a parcel of land by virtue of aboriginal title, and that parcel therefore is "Indian land," is a determination of historical fact, and does not depend on the use of any magic words or on an express designation by the federal government. See Santa Fe, 314 U.S. at 347 ("Nor is it true . . . that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.'") (quoting Cramer v. United States, 261 U.S. 219 (1923)). The Supreme Court and this Court have made clear on numerous occasions that lands to which an Indian tribe possesses unextinguished aboriginal title are quintessential "Indian land," "aboriginal land" or "Indian country": "Aboriginal title refers to the Indians' exclusive right to use and occupy

lands they have inhabited 'from time immemorial,' but that have subsequently become 'discovered' by European settlers." Seneca Nation, 382 F.3d at 249 n.4.

For example, the Nonintercourse Act (the current version of which is codified at 25 U.S.C. §177, and some version of which has been in place since the first Congress of the United States) does not contain a specific statutory definition of the lands it restricts from alienation. In contemplating the applicability of the Nonintercourse Act's limitation on the alienability of Indian lands, this Court rejected the notion that it was tied to a particular definition of "Indian country" and concluded that "extinguishment of *all* Indian title was meant to be a matter of federal concern" and thus all Indian lands subject to federal jurisdiction and restriction on alienation. Mohegan Tribe v. Conn., 638 F.2d 612, 626 (2d Cir. 1981) (emphasis added).[50]

Congress has, however, on occasion adopted by statute differing definitions of "Indian land" or "Indian country" for various specific statutory purposes. One of these is 18 U.S.C § 1151 ("Section 1151"), adopted for the purpose of defining "Indian country" to establish criminal jurisdiction over certain

[50] See, for example, the discussion supra n.38 of the recognition by this Court and the Court of Appeals for the District of Columbia Circuit that the restrictions on alienation of the Nonintercourse Act generally apply to lands, outside of any reservation, purchased by an Indian tribe in 1804 and not taxed.

Indian lands.[51] Nothing in Section 1151 suggests that Congress intended by its enactment to deprive aboriginal tribal lands of their historic status as Indian country. The evidence is, in fact, to the contrary. In that particular definition, the intent of Congress was to make it clear that certain Indian lands **other** than aboriginal land **also** were "Indian country."

In drafting Section 1151 Congress specifically relied on the Donnelly decision, which declared Indian land to include "land formerly held by the Indians, and to which their title remains unextinguished," as noted above. See 18 U.S.C § 1151, Historical and Revision Notes. Indeed, the Supreme Court cited Donnelly with approval in its most recent review of Section 1151. See Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 528 n.3 (1998). Furthermore, the Supreme Court has stated that the language of Section 1151 must be construed broadly "to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993). Westwoods, as aboriginal land that the Nation concededly has possessed since time immemorial,

[51] New York State has its own statute, 25 U.S.C. § 232, granting New York jurisdiction to enforce its criminal laws on "Indian reservations" within the state. This statute contains no definition of "Indian reservations." For a recent decision relating to the application of Section 232 with respect to the Nation's reservation, see Bess v. Spitzer, 459 F. Supp. 2d 191 (E.D.N.Y. 2006). Section 232 is also noteworthy because of its expansive preservation of hunting and fishing rights for "any Indian tribe, band, or community, or members thereof." Id.

and over which it has exercised authority unchallenged by state and local authorities (until now), is exactly the sort of "informal reservation" to which Section 1151 refers.[52] Indeed, this Court has held that Section 1151 **expands** the definition of "Indian Country," to include lands **in addition to** "those lands in which the Indians held some form of property interest." Thompson v. County of Franklin, 15 F.3d 245, 250 (2d Cir. 1994). It is apparent that Westwoods, as land held by the Nation in both aboriginal and fee title, was within the definition of "Indian County" both prior to enactment of Section 1151 and subsequently, as well.

Another example of a definition created for a specific statutory purpose can be found in the federal regulations promulgated pursuant to IGRA. Under those regulations, "Indian lands" means: "(a) Land within the limits of an Indian reservation; or (b) Land over which an Indian tribe exercises governmental

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[52] The Nation has admitted, as they must in candor, that just as the Nation is not *currently* on the List, see A-3666(JPTO Fact Stip. 10), neither is Westwoods *currently* under federal superintendence (because the BIA has refused to acknowledge its obligation do so, see S238. See A-3669(JPTO Fact Stip. 25). It soon expects to have its Final Determination of acknowledgment by the Department of the Interior become effective, however, see supra n.7. Be that as it may, the record status of the Nation with the Department of the Interior has nothing whatsoever to do with the title status of Westwoods as Indian country for purposes of Section 1151, or with the exclusive right of Congress to regulate lands possessed by an Indian tribe in aboriginal title, such as Westwoods, or with whether the Nonintercourse Act applies to that land. The question of what land is Indian land is for the court to determine on the historical facts. See generally Mohegan Tribe v. Connecticut, supra.

power and that is either—(1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation." 25 C.F.R. § 502.12. IGRA's definition is not identical to that in Section 1151, although the two definitions obviously overlap in many cases. Land to which aboriginal title never has been extinguished certainly is land "subject to restriction by the United States against alienation" under the current Nonintercourse Act and its predecessors. See Mohegan Tribe, 638 F.2d at 626. In short, whatever particular definitions Congress has adopted in connection with specific statutory schemes, what is clear is that lands to which a tribe retains unextinguished aboriginal title are "Indian land" or "Indian country" in its earliest and most fundamental sense, and subject to the restrictions on alienation contained in the Nonintercourse Act.

A. State And Local Laws Generally Are Not Applicable To Indian Lands Or, In Particular, To Westwoods

As noted above, the Indian Commerce Clause grants Congress the "power . . . to regulate commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8. It is an undisputed, fundamental tenet of our nation's legal framework that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985). The Supreme Court and federal Courts of Appeals repeatedly have reaffirmed that the authority of the states over Indian tribes terminated with

the coming into effect of the federal Constitution in 1789. As a consequence of exclusive federal jurisdiction over Indian affairs, "'[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' Accordingly, state law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress." Cohen, § 6.01[2], quoting Rice v. Olson, 324 U.S. 786, 789 (1945). See also McClanahan, 411 U.S. at 170-71 (discussing evolution of principle that "State laws generally are not applicable to tribal Indians on an Indian reservation except as Congress has expressly provided that State laws shall apply," invalidating state imposed tax) (citation omitted); United States v. Forness, 125 F.2d 928, 932 (2d Cir. 1942).

The legal principle that Indian tribes are free from state and local regulation on tribal lands is one of the most ancient in Indian law. See Worcester v. Ga., 31 U.S. 515, 519-20 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."). This principle has been repeatedly reaffirmed. See Cohen § 6.01[2], n.24, n.25 (collecting, discussing cases).

The holding of the Supreme Court in Sherrill reaffirms in the most basic way the continued vitality of the principle that state and local laws do not run to Indian land. That opinion necessarily was predicated upon a finding that the

resumption of tribal sovereignty over the land there in issue would "remove these parcels from the local tax rolls" and that "little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls." Sherrill, 544 U.S. at 220.[53] The Supreme Court evidently accepted without question that, if permitted, the renewed exercise of tribal sovereignty over the lands at issue would result in a revival of their general immunity from state and local regulation, such as taxation and zoning. Indeed, absent such a revival, the result in that case would make no sense. For all these reasons, as a matter of law the State laws and Town laws that form the legal basis for these consolidated actions do not apply to Westwoods or to any activities by the Nation at Westwoods.

V. THE JUDGMENT AND INJUNCTION SHOULD BE VACATED BECAUSE IGRA PREEMPTS THE STATE AND TOWN LAWS UPON WHICH THEY ARE BASED AND BECAUSE THE JUDGMENT AND INJUNCTION ARE MOOT DUE TO CHANGED CIRCUMSTANCES

[53] Of course, Sherrill dealt with the unilateral reassertion by the Oneidas of "territory last held by the Oneidas 200 years ago." Sherrill, 544 U.S. at 221. In contrast, as the facts adduced at trial establish, the Nation never has been divested of Westwoods, and Westwoods never has been taxed or otherwise regulated by either the State or the Town. Sherrill argues powerfully *against* permitting the State or Town to assert sovereign authority over land that has been under the jurisdiction of the Nation since time immemorial. Thus the court has no basis upon which to embark on a Sherrill analysis of disruptive consequences, and the State and Town cannot assert injury-in-fact arising from the violation of State and Town statutes because those statutes do not apply to Westwoods.

The permanent injunction issued by the court below is tailored to prohibit the Nation only from gaming at Westwoods or taking any steps towards the construction of any facility in which gaming is intended to be conducted there, without first complying with the specified provisions of State and Town law. See SPA-177(Judgment 2); A-3954(Dkt. no. 384 (Feb. 7, 2008 Mem. and Order)).

The district court correctly outlined the standard for a permanent injunction, observing that "[t]he standard for a permanent injunction is the same as that for a preliminary injunction except that the plaintiff must establish actual success, rather than merely a likelihood of success on the merits." SPA-159-60(Op. 300). The district court determined that the State and Town proved the merits of their claims that the Nation, in commencing steps to construct a casino at Westwoods, was in violation of various provisions of State and Town law. However, on June 18, 2010, a Notice of Final Determination ("FD") for Federal Acknowledgment of the Shinnecock Indian Nation by the Department of the Interior was published, 75 F.R. 34760 (2010). As discussed below, when the FD becomes effective, State and Town laws no longer will apply to regulate the Nation's gaming activities.[54] Instead, IGRA occupies the field of Indian gaming,

[54] See discussion at n.7, supra, of the current status of the federal acknowledgment of the Nation by the Department of the Interior. The Nation presents this argument now in the expectation that its federal acknowledgment by the Department of the Interior will be effective before argument of these consolidated appeals occurs and to avoid any objection that this (continued . . .)

when the FD becomes effective, the Nation will be fully subject to IGRA and all its requirements, and whatever the Nation does or does not do at Westwoods with regard to gaming can only be pursuant to (or in violation of) IGRA, a statute that the State and Town have no standing to enforce. Consequently, the State and the Town no longer will be able to establish "actual success" on the merits of their claims, as required for a permanent injunction and the permanent injunction entered below and the declaratory judgments entered in support of it must be vacated.

In addition, and for the same reasons, the injunction is moot upon effectiveness of the FD, because there will be no cognizable danger that the injuries feared by the State and Town will reoccur. Injunctive relief is moot if "due to changed circumstances, the threatened harm dissipates, or ceases to be 'actual and imminent,'" Murray v. N.Y., 604 F. Supp. 2d 581, 584-85 (W.D.N.Y. 2009) (citing Martin-Trigona v. Shiff, 702 F.2d 380, 386 (2d Cir. 1983)), and this Court may vacate or modify an injunction to adapt to a change in circumstances. See, e.g., United States v. Swift & Co., 286 U.S. 106, 114 (1932); Malkentzos v. DeBuono, 102 F.3d 50 (2d Cir. 1996).

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argument, if raised in the first instance in the Nation's reply brief, might be attacked by the State or the Town as improperly tardy.

A. As An Indian Tribe Federally Acknowledged By The Department Of The Interior, The Nation Will Be Subject To IGRA, Which Occupies The Field Of Indian Gaming

When the FD becomes effective, the Nation will be an Indian tribe as defined in IGRA, 25 U.S.C. § 2710(d)(1), causing IGRA[55] to become applicable to the Nation. As the district court noted below, "IGRA preempts state law in the field of regulating Indian gaming," SPA-151-52(Op. 293), and "it is clear from the comprehensive statutory scheme that Congress enacted as part of IGRA that Congress intended to occupy the field of tribal gaming." SPA-153-54(Id. at 295); see also Gaming Corp. of Am. v. Dorsey & Whitney, 88 F. 3d 536, 547 (8th Cir. 1996), ("IGRA has the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule."); Dewberry v. Kulongoski, 406 F. Supp. 2d 1136, 1152 (D. Or. 2005) (It is well-established that IGRA, as a matter of federal law, preempts state regulation which "interferes or is incompatible with federal or tribal interests"). As a tribe within the definition of "Indian Tribe" in IGRA, the Nation will be required to jump

[55] Congress enacted IGRA in 1988 pursuant to the Indian Commerce Clause, US Const, art I, § 8, cl 3, which grants the federal government exclusive jurisdiction over relations with Indian tribes. By allowing states to play a role through a compacting process, IGRA "extends to the States a power withheld from them by [the Indian Commerce Clause of] the Constitution." Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 58 (1996). IGRA does not, however, extend to the states any unilateral power to apply their laws to Indian tribes absent tribal consent. 25 USC 2710(d)(3)(C) (providing that a state and a tribe may agree to apply a state's criminal and civil laws to Indian gaming). See also Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 546 (continued . . .)

through a series of federally constructed hoops before it could contemplate engaging in any gaming activities at Westwoods. The State, however, will be left with "no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." Gaming Corp. of Am., 88 F. 3d at 546.

Thus, if the Nation were to ignore IGRA after the FD becomes effective and engage in gaming activities without satisfying IGRA's requirements, it would be doing so in violation of IGRA, and not in violation of state law or local law. As they have candidly admitted below, the State and Town have no power to enjoin any such violation. See A-122(Dkt. no. 15 (Mem. of Law in Support of State Motion to Remand at 20) (citing Fla. v. Seminole Tribe of Fla., 181 F.3d 1237, 1250 (11th Cir. 1999) for the proposition that "the State has no implied right of action under IGRA for declaratory or injunctive relief against class III tribal gaming that is being unlawfully conducted without a Tribal-State compact"); A-101(Dkt. no. 13 (Affirmation of Denis J. McElligott, July 20, 2003, ¶ 7) ("[A] suit by plaintiffs to enforce the provisions of [IGRA] … does not lie under the circumstances of this case.")). The district court agreed that the State and Town have no standing to enforce IGRA. SPA-155(Op. 296 n.70) ("Defendants also

(8th Cir. 1996) (finding that Congress left the states "with no regulatory role" in Indian gaming unless one is negotiated through a compact).

assert that plaintiffs have no standing to enforce IGRA, except where the State is seeking to enforce a tribal-state compact…. [T]he Court agrees with this general point.").

In fact, IGRA expressly preempts state enforcement of all state and local laws regulating Indian gaming to which IGRA applies. 18 U.S.C. §§ 1166(a), (d); see Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994), cert. denied sub nom., Pfingst v. Sycuan Band of Mission Indians, 516 U.S. 912 (1995) and Sycuan Band of Mission Indians v. Pfingst, 516 U.S. 912 (1995); State of R.I. v. Narragansett Indian Tribe, 19 F.3d 685, 690 (1st Cir. 1994) (IGRA "forbids the assertion of state civil or criminal jurisdiction over class III gaming except when the tribe and the state have negotiated a compact that permits state intervention"). Thus, when the FD becomes effective, state and local regulation of the Nation's gaming activity will be preempted by IGRA, the State and Town will be barred by IGRA's preemptive force from enjoining the Nation's gaming activity under state law, and the injunction as it stands clearly must be vacated.[56] See United Keetoowah Band of Cherokee Indians v. Okla., 927 F. 2d 1170, 1177 (10th Cir. 1991) (in vacating injunction entered by district

[56] Because the State and the Town can no longer demonstrate actual success as to the merits of their claims and the injunction must be vacated, the declaratory judgments below upholding those claims and determining that state gaming laws apply to Westwoods must be vacated as well. See, e.g., Conn. Bar Ass'n v. U.S., -- F.3d --, 2010 WL 3465650 (2d Cir. 2010) (vacating declaratory judgment and dissolving injunction on basis of same analysis).

court at the request of state to enjoin operation of high stakes bingo hall by Indian tribe, court held that 18 U.S.C. § 1166 incorporates state anti-gaming laws into federal law and provides that "the power to enforce these newly incorporated laws rests solely with the United States").

B. The Nation Has No Current Intention To Construct A Gaming Facility At Westwoods And Intends To Negotiate For A Gaming Location With The State

The permanent injunction also must be vacated when the FD becomes effective because it restrains gaming conduct in which the Nation has no current intention to engage and which, in any event, under IGRA will require execution of a compact with the State as a necessary predicate. The Nation offered uncontroverted evidence before the district court proving that the Nation had no current intention simply to start building a casino at Westwoods in the absence of an injunction. Tribal Trustee Lance Gumbs testified at trial that if the injunction were lifted, the Nation's first step would be to enter into negotiations with the State regarding the construction of a casino and that the Nation would be open to alternate sites to locate a casino suggested by the State. A-4763-64 (Tr. (Gumbs) 2889:18-2890:18). Neither the State nor the Town proffered any evidence to the contrary.

C. Due To These Changes In Circumstances, The Injunction Is Moot And Must Be Vacated

The State and Town cannot claim ignorance of the developments recited above and thus cannot establish that there is any "reasonable likelihood" that any "wrong" allegedly committed by the Nation will be repeated. See SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100 (2d Cir. 1972). "The hallmark of a moot case or controversy is that the relief sought can no longer be given or **is no longer needed.**" Martin-Trigona v. Shiff, 702 F.2d 380, 386 (2d Cir. 1983) (emphasis supplied). While it is well established that voluntary cessation of illegal conduct alone will not render a case moot, there must be some "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953); see also Gen. Fireproofing Co. v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971) (citing, quoting Conn. v. Mass., 282 U.S. 660, 674 (1931)) (for an injunction to issue, "more than an abstract or nebulous plan to possibly commit a wrong sometime in the future, must be shown before the broad and potentially drastic injunctive power of the court will be exercised. Rather, [an] 'injunction issues to prevent existing or presently threatened injuries.'"); Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 92 (3d Cir. 1992) ("[I]njunctions will not be issued … to restrain one from doing what he is not attempting and does not intend to do.") (internal citation, quotation omitted); N.Y. State Nat'l Org. for Women v. Terry,

704 F. Supp. 1247, 1262 (S.D.N.Y. 1989), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) (to obtain permanent injunctive relief, the "[p]laintiffs must demonstrate a real danger that the act complained of will actually take place. There must be more than a mere possibility or fear that the injury will occur").

It certainly is incorrect that, after the FD becomes effective, the equitable power of this Court must be exercised at the behest of the State and the Town to assure that development of a gaming facility at Westwoods does not occur without appropriate governmental oversight. As soon as the FD becomes effective, the National Indian Gaming Commission and the Department of the Interior will have significant regulatory power in that regard, as will the State (as a practical matter) through the Tribal-State compact negotiation process mandated by IGRA for tribes subject to it that wish to engage in Class III gaming (that is, gaming including table games), as is the Nation's intention. See generally, Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996).[57] In short, once the FD becomes effective, the Nation will be unable to engage in the sort of gaming activities at Westwoods that

[57] To engage in the sort of gaming the Nation hopes to conduct, see SPA-151(Op. 292), at Westwoods or anywhere else in New York, under IGRA the Nation would have to (among other things) negotiate an effective Tribal-State Compact with the State of New York and have that Tribal-State compact approved by the Secretary of the Interior, 25 U.S.C. § 2710(d)(3)(B).

it once contemplated without first complying with the strictures of IGRA, as discussed above.

Because the circumstances have changed here to such an extent that the possible occurrence of the injuries feared by the State and Town has gone from slim to none, the injunction is moot and must be vacated. See Robert Stigwood Group Ltd., v. Hurwitz, 462 F.2d 910, 912-13 (2d Cir. 1972) (injunctive relief moot because future violations by defendants were highly unlikely).

CONCLUSION

For the foregoing reasons, the Nation respectfully requests that this Court (1) reverse the district court's holding on sovereign immunity, vacate the permanent injunction and the Judgment and remand for dismissal on sovereign immunity grounds; or (2) reverse the district court's holdings as to the extinguishment of aboriginal title and the application of state and local laws at Westwoods, vacate the permanent injunction and the Judgment and remand for dismissal; or (3) vacate the permanent injunction and the Judgment as moot due changed circumstances and remand for dismissal.

Dated: New York, New York
September 23, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the Court's Order dated September 7, 2010, extending the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) to 28,000 words, because it contains 27,944 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: New York, New York
September 23, 2010

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CERTIFICATE OF SERVICE

I, Richard V. Conza, an attorney admitted to practice in the State of New York and the Managing Attorney for Cleary Gottlieb Steen & Hamilton LLP, hereby certify that:

On the 20th day of January 2011, I have caused service of the Brief of Defendant-Appellant The Shinnecock Indian Nation and All Other Defendants-Appellants to be made by Federal Express upon:

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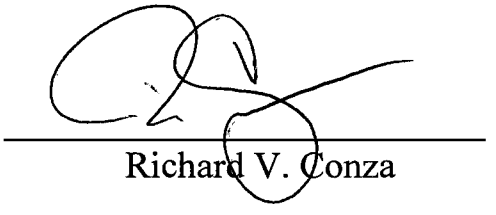
January 20, 2011



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