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

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR STATE AND TOWN PLAINTIFFS-APPELLEES

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PRELIMINARY STATEMENT

In the summer of 2003, without complying with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, or obtaining State or Town authorization of any kind, the Shinnecock Indian Nation commenced construction of a 61,000-square-foot casino on nearly 80 acres of non-reservation land, known as Westwoods, in the Town of Southampton. The State of New York and the Town of Southampton commenced separate lawsuits in state court against the Shinnecock and its trustees to enjoin the construction. The Shinnecock removed both actions to the United States District Court for the Eastern District of New York where the actions were consolidated.

After a lengthy trial, the district court (Bianco, J.) issued a comprehensive decision granting an injunction and holding that the Shinnecock's planned construction and operation of the casino complex violates federal, state, and local laws. (SPA35-163, *reported at* 523 F. Supp. 2d 185). The court rejected the Shinnecock's primary argument that it held unextinguished aboriginal title to Westwoods and thus, its casino development project was immune from state and local laws and regulations. The court relied on three independent grounds

for its decision, each of which was a sufficient basis for the injunction. First, the court found that the Shinnecock ancestors' aboriginal title to Westwoods was extinguished in the 17th century, and that the Shinnecock therefore lack sovereignty over that land (SPA36-37, 44-72, 102-136). Second, the district court held, regardless of whether aboriginal title had been extinguished, the Shinnecock's proposed casino development was barred under *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), because of the Shinnecock's long-delayed assertion of sovereignty over Westwoods and the "highly disruptive consequences" that the casino development would have (SPA37, 85-91). Third, the court concluded that the Shinnecock casino was not authorized by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., which totally supplanted any federal common law right Indian tribes may have had to conduct the type of gaming proposed by the Shinnecock (SPA37, 149-155).

The district court also rejected the Shinnecock's defense of sovereign immunity, holding that the Shinnecock submitted themselves to the federal court's jurisdiction by removing the case to federal court at the outset of the litigation (SPA157). In the alternative, the court

held that the equitable doctrines discussed in *Sherrill* preclude the Shinnecock from asserting sovereign immunity, given the disruption that would be caused by building and operating the casino at Westwoods (SPA157-158). Finally, the court held that the defense of sovereign immunity would not in any event bar the claims asserted here, which seek forward-looking injunctive relief against tribal officials, citing *Ex parte Young*, 209 U.S. 123 (1908) (SPA158-159).

Accordingly, the district court entered a final judgment in plaintiffs' favor, declaring the Shinnecock's planned actions illegal and permanently enjoining them from building and operating a casino and related facilities at Westwoods. For the reasons stated in this brief and in the district court's thorough and well-reasoned decision, the judgment should be affirmed in all respects.

STATEMENT OF THE CASE

Westwoods consists of three parcels of undeveloped property, totaling about 80 acres, in the western part of the Town of Southampton (JA3667). The property, which the Shinnecock own in fee as a result of a 1922 judgment of title by adverse possession, is bounded on the north

by the Great Peconic Bay and generally on the south by Sunrise Highway (also known as SR 27), a major traffic artery that traverses Long Island. Westwoods lies west of the Shinnecock Canal, a small waterway that connects the Great Peconic Bay to the Shinnecock Bay. The site of the canal has been known historically as "Canoe Place" or "Niamuck" (JA3670). Westwoods is not part of the Shinnecock Indian Reservation, recognized by the State of New York since 1859 (JA3668; *see* N.Y. Laws of 1859, ch. 46, § 1.) The Reservation is located east of Canoe Place on the southeastern shore of Shinnecock Bay, several miles from Westwoods (JA3667-3668). *See* Town Exhibit 272 (oversized map).

In 2003, without complying with IGRA and without obtaining any permits from the State of New York or the Town of Southampton, the Shinnecock's gaming authority, Shinnecock Nation Casino at Westwoods, entered into a contract for the immediate construction of a 61,000 square foot casino and related facilities at Westwoods (JA60, JA86; JA4147; JA4081; *see* EX5267-5346). The casino complex was to include as many as 1,000 slot machines and 100 gaming tables, a food court, an entertainment stage, and a high-stakes bingo hall (JA60: JA86). Construction of the casino complex, with supporting

infrastructure, was to begin on June 30, 2003 and was scheduled for completion by January 2004, when it was to open for business (*id.*). In early July 2003, the Shinnecock began clearing the land for construction, using a bulldozer to knock down old-growth trees, clear brush and excavate soil on the property (JA3672; JA4010; SPA83).

Procedural History

1. The Complaints

On June 30, 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 this action against the Shinnecock Indian Nation and its trustees in their official capacities (collectively "the Shinnecock" or "Tribe") in New York Supreme Court, Suffolk County to prevent the Shinnecock from going forward without complying with federal or state laws (JA53-68; JA74). The State's complaint asserted five causes of action. In its first cause of action, the State alleged that the Shinnecock's planned construction and operation of the casino "cannot be authorized by the IGRA and, therefore, are in violation of the federal statute," nor are they authorized by state law governing gaming activities (JA64). In the next

three causes of action, the State alleged that construction of the casino facilities would violate state environmental protection laws because the Shinnecock neither sought nor obtained a stormwater pollution prevention permit, a State Pollutant Discharge Elimination System (SPDES) permit for discharging wastewater from a treatment facility, or a permit to install a high-capacity well to supply water to meet the needs of the casino complex (JA64). In its fifth cause of action, the State alleged that the construction and operation of the casino would be unlawful for the additional reason that the Shinnecock had not conducted an environmental review as required by the State Environmental Quality Review Act (SEQR) (JA65).

The State sought a preliminary and permanent injunction against the Shinnecock, restraining them from constructing and operating gaming facilities at Westwoods (JA65-66). It also sought a declaration, among other things, that the Shinnecock may not pursue gambling activities at the site "until they fully comply with the provisions of State law governing all forms of gaming or the provisions of IGRA"; that they are "subject to the provisions of IGRA and, therefore, may not conduct bingo or any other form of gambling at the gaming site until they

comply with its provisions"; and that they "cannot build a casino or any other structure for the purpose of gaming at the gambling site unless they first comply with Town, state, and federal and environmental laws" (JA66). At the same time it filed its complaint, the State moved for, and the state court granted, a temporary restraining order enjoining the Shinnecock from taking any steps to build any structure intended to be used as a gaming facility on the Westwoods site (JA75-79).

On July 1, 2003, the Shinnecock filed a notice of removal, pursuant to 28 U.S.C. § 1441, to the United States District Court for the Eastern District of New York, on the ground that the State's complaint on its face pleaded a federal question (JA69-73). The district court (Platt, J.), in its decision dated July 29, 2003, denied the State's motion to remand to state supreme court, finding under the well-pleaded complaint rule that the State asserted a federal claim, and further that the complaint necessarily raised questions related to the possessory rights of Indian tribes and other matters governed by federal law (JA144-148, reported at *New York v. Shinnecock Indian Nation*, 274 F. Supp. 2d 268 (E.D.N.Y. 2003)).

Meanwhile, on July 14, 2003, the Town of Southampton likewise commenced an action in New York Supreme Court claiming that the Shinnecock had commenced clearing and grading land in preparation for building a large-scale casino at Westwoods in violation of the Town's zoning, land use, and wetlands protection ordinances (JA3992-4000). The Town also sought a preliminary injunction barring further development of the property (JA4029; SPA40). As they did in the State's action, the Shinnecock removed the Town's action to the federal district court in the Eastern District (JA4001-4006). The Town moved for remand (JA4019-4050), which the Shinnecock opposed (JA4109-4122). The district court suspended decision on the Town's motion.

2. The Preliminary Injunction

On August 29, 2003, the district court (Platt, J.) granted the State's application for a preliminary injunction, which the Town supported (JA177-198, *reported at* 280 F. Supp. 2d 1 (E.D.N.Y. 2003)). Specifically, the court found that the State and Town would be harmed irreparably if the Tribe built a gambling casino at Westwoods without adhering to state and local environmental laws (JA183-188), that the State's and Town's claims were more likely than not to succeed on the

merits and at the very least fair ground for argument (JA188-196), and that the balance of equities tipped decidedly in the governmental plaintiffs' favor (JA196). The court observed that the Shinnecock are not permitted to conduct gambling at Westwoods under New York law; and that they are not authorized under IGRA to operate such facilities because they had not been recognized by the federal government as an Indian tribe, and because Westwoods is not "Indian lands" within the meaning of IGRA. Because the Shinnecock's petition for federal acknowledgement was pending before the Bureau of Indian Affairs ("BIA"), the district court stayed the action for eighteen months and enjoined development of the property to allow the BIA time to act on the Shinnecock's pending application (JA197-198).

After the Shinnecock appealed the preliminary injunction order, and the BIA advised this Court and the parties that it would not be able to decide the Tribe's application for acknowledgment within eighteen months, this Court remanded the case to the district court for a determination whether the stay and preliminary injunction remained warranted. The district court then lifted the stay of proceedings, but

continued the injunction against constructing and operating gaming facilities (JA253-254).

3. Consolidation of the State and Town Actions and Joinder of the United States

In light of the district court's earlier decision denying the State's motion to remand the action to state court, the Town stipulated to retaining its action in the federal court and to consolidating it "for all purposes" with the State's action (JA205, JA284-286). Pursuant to the stipulation, which the district court so ordered, the Town also joined as a plaintiff in the State's action (JA205; JA286; JA288). Thereafter, the district court ordered the United States joined as a necessary party, designating it an involuntary plaintiff (JA254; JA289-290), but the court later granted the United States' motion to be dismissed as a party, "with prejudice" (JA298).

4. Cross-Motions for Summary Judgment

In December 2004, the Shinnecock moved for summary judgment dismissing the consolidated complaints on the ground of sovereign immunity (JA299-300). The State and Town opposed the motion asserting, among other things, that the Shinnecock were not a federally recognized tribe and that the State's long-time recognition of the

Shinnecock was for limited state purposes; that the current inhabitants of the Shinnecock reservation bear no significant genealogical connection to the Shinnecock who inhabited the lands when the Europeans arrived; that the Shinnecock long ago relinquished sovereign control over their affairs and their cultural identity; and that while the Shinnecock now own Westwoods in fee, the Shinnecock's aboriginal title was extinguished in colonial times. The State also cross-moved for partial summary judgment declaring that the Shinnecock's planned construction and operation of gaming facilities at Westwoods violates New York State law and is not authorized by federal law (JA2195-96). The Town similarly moved for partial summary judgment, seeking a declaration that Westwoods is neither Indian country nor land to which the Shinnecock hold aboriginal title (JA2336).

The district court denied both the Shinnecock's motion and the plaintiffs' cross motions (SPA1-34, *reported at* 400 F. Supp. 2d 486 (E.D.N.Y. 2005) (Platt, J.)). The court concluded that the Shinnecock are a "tribe" under the analysis set forth in *Montoya v. United States*, 180 U.S. 261 (1901) (SPA11-14). The court held, however, that under *City of Sherrill v. Oneida Indian Nation*, factual issues concerning the

nature of the Shinnecock's title and the extent of disruption that would ensue if the casino were built on the Westwoods property precluded summary judgment for any party (SPA14-20).

5. The Trial

In a jointly proposed pretrial order, the parties stipulated to the underlying facts described in this paragraph and the following two paragraphs (JA3665-3682). At that time, the Shinnecock Indian Nation had not been acknowledged as an Indian tribe by the Department of the Interior and did not appear on the list of tribal entities recognized as eligible for funding and services from the federal government by virtue of its status as an Indian tribe (JA3669).[1] Nor is Westwoods listed in the records of the Bureau of Indian Affairs as trust lands subject to restrictions against alienation under 25 U.S.C. § 177 (JA3669). And it is not under federal superintendence, and has never been set aside as a "dependent Indian community" under 18 U.S.C. § 1151 (JA3669).[2]

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[1] On October 1, 2010, the Bureau of Indian Affairs placed the Shinnecock Indian Nation on the list of federally recognized tribes maintained by the United States Department of Interior. *See* 75 Fed. Reg. 6614 (Oct. 27, 2010).

[2] While the BIA has placed the Shinnecock Indian Nation on the list of federally recognized Indian tribes, it has not designated Westwoods as Indian trust lands, and no application for such designation has been made.

The relationship between the government of the State of New York (and its colonial predecessors) and the Shinnecock predated the existence of the United States. The Shinnecock currently occupy and possess a reservation, the Shinnecock Neck Reservation, in the Town of Southampton, where they maintain offices and some members reside (JA3667). The Shinnecock Neck Reservation is described in the New York Laws of 1859, ch. 46, § 1. It does not encompass Westwoods (JA3668). New York law provides for the election of tribal trustees who may allot tribal lands to individuals or families, designate areas where firewood and timber may be cut, and lease such lands for limited periods of time with the consent of three justices of the peace. N.Y. Indian Law § 121.

Westwoods is comprised of two contiguous lots on the Suffolk County Tax Map bordered on the north by the Great Peconic Bay and on the south by Sunrise Highway, and a third two-acre parcel immediately to the south of Sunrise Highway (JA3667-3668). There is no recorded deed in the Office of the Clerk of Suffolk County by the Shinnecock as grantor to any person, nor is there a recorded deed conveying title to any portion of Westwoods to the Shinnecock tribe as

grantees (JA3669). The parties agree, however, that the Shinnecock hold fee simple title to the property (JA3668). No permanent structure exists on the property (JA3668).

The district court conducted a lengthy bench trial lasting 30 days, heard the testimony of more than 20 witnesses, and received over 600 exhibits (SPA36). The major factual issues at trial were (i) whether the Shinnecock held unextinguished aboriginal title to the parcels that comprise Westwoods, (ii) whether the Shinnecock had long acquiesced in the exercise of state and local governance over Westwoods, and (iii) whether the Shinnecock's construction and operation of gaming facilities at Westwoods would be so disruptive of settled expectations and of State and Town governance that the Shinnecock should be enjoined from proceeding with their plans to build and operate a casino based on the doctrines of laches, acquiescence, and impossibility articulated in *Sherrill*.

a. Extinguishment of Aboriginal Title

The Shinnecock asserted exclusive sovereign control over Westwoods and on that basis claimed immunity from state and local laws (JA91-92; JA4014-4015). Consequently, the question of whether

the Shinnecock hold unextinguished aboriginal title to Westwoods was prominent at trial. According to the district court, the State and the Town "overwhelmingly demonstrated" (SPA36) that nearly 350 years ago, the Shinnecock conveyed, ceded, and relinquished all their right, title, and interest in all lands west of Canoe Place, including Westwoods, and that all Shinnecock aboriginal rights to those lands were extinguished by the English sovereign during the 17th century (SPA36).

The extinguishment of the Shinnecock's aboriginal title to Westwoods is reflected in five key documents from the Colonial era: two deeds (the Ogden Purchase and the Topping Purchase) by which the Tribe conveyed its entire interest in all Shinnecock lands west of Canoe Place, including Westwoods; and three Colonial gubernatorial pronouncements, including two patents, by which the British Crown unambiguously extinguished any aboriginal rights in lands including Westwoods.

The Ogden Purchase

In or about 1644, the "Towne of Southampton," consisting of "eight square miles" of land situated entirely to the *east* of Canoe Place, was

accepted into the jurisdiction of the Colony of Connecticut, under terms and provisions set forth in a document entitled "Combynation of Southampton with Har[t]ford." (EX3911; JA5187; JA4655 [p2443]) (emphasis added).[3]

On May 12, 1659 Shinnecock Sachem Wyandanch (JA2504) and his son, on behalf of the Tribe (SPA123), conveyed lands west of Canoe Place ["west to Peaconock"] to John Ogden, a Southampton proprietor and magistrate to the Connecticut General Court (EX4151; EX4152; JA4685 [p2557]), by an instrument (EX278; SPA47) which is referred to herein as the "Ogden Deed." This acquisition by John Ogden became known as the "Quogue Purchase" or "Ogden Purchase" (EX878). Experts for all parties agreed that the lands of the Quogue Purchase included Westwoods (JA5198; JA6328).

At the time of the Quogue Purchase, the western boundary of Southampton was Canoe Place (JA5185; JA6433), and thus the lands conveyed to John Ogden were not then part of Southampton or the Colony of Connecticut (JA5185; JA5187; JA5191).

[3] Citations appearing as (JAXXXX[pYYYY]) refer first to the page of the Joint Appendix and then, in brackets, to the page of the trial transcript, since four pages of the trial transcript appear on each page of the Joint Appendix.

The conveyance to Ogden was made in part payment of a fine imposed on the Shinnecock by the Connecticut General Court, resulting from Shinnecock participation in an incident of arson (JA5198-5199; JA4273 [p888]; SPA122; SPA48)). Ogden was one of four magistrates authorized and appointed by the Connecticut General Court on May 20, 1658 (a year before the Quogue Purchase), to collect and distribute the proceeds of the arson fine (EX3838; JA6391).

Sometime between May 12, 1659 and February 2, 1663, John Ogden sold the lands of the Quogue Purchase to John Scott (JA5199; JA4662 [p2472]; SPA48). On February 2, 1663, John Scott sold the lands of the Quogue Purchase to the proprietors of Southampton (EX321; SPA48; JA4662 [p2472]).

The Topping Purchase

On April 10, 1662 (approximately 10 months before John Scott sold the lands of the Quogue Purchase to the proprietors of Southampton), Sachem Wyandanch's political successor, Weany Sunk Squaw, and others, on behalf of the Shinnecock, sold, conveyed, ceded and relinquished all Shinnecock lands west of Canoe Place to Thomas Topping, a Southampton proprietor who was also a magistrate to the

Connecticut General Court (JA5200; JA4685 [p2558]; SPA49), for the price of "four score fathoms of wampum, or other pay, equivelent [sic]" (EX299; JA4276 [p899]; JA4609 [p2183-2184]). This transaction has become known as the "Topping Purchase" (EX878). At the time of the Topping Purchase, as with the Quoque Purchase, the western boundary of Southampton was Canoe Place (SPA49).

The lands conveyed by the Topping Purchase ran from Canoe Place west to "Seatuck," which is the modern-day border between the towns of Southampton and Brookhaven (JA3672). The lands of the Topping Purchase included Westwoods (SPA49; JA3677). As with the Quogue Purchase, the lands of the Topping Purchase were not part of Connecticut Colony at the time of the conveyance, because they were outside the limits of the Town of Southampton, *i.e.*, they were west of Canoe Place (JA5193; JA6433; EX3911; SPA49).

The Nicolls Determination

In a document dated September 17, 1666, several Shinnecock recorded their "protest" over the Topping Purchase, claiming they were "the true proprietors of the said lands" (EX303; JA4608-4609 [pp2180-2183]; SPA49-50)). That document recites the signatories' desire to

have New York provincial governor Richard Nicolls determine that they were the "true proprietors" of the lands of the Topping Purchase, and that they should receive the consideration recited in the Topping Deed, *i.e.*, the "four score fathoms of wampum, or other pay, equivalent" (EX303; JA4608-4609 [pp2180-2183]; SPA50). Richard Nicolls had been appointed the first English governor of New York on April 2, 1664, by a commission from the Duke of York (JA5088; EX2583; JA4610 [pp2189-2190]).

Notwithstanding its use of the word "protest," the September 17, 1666 document recited the intention of its signatories to cede, relinquish, transfer, and convey any and all Shinnecock interest in the lands of the Topping Purchase to "our ancient and loving friends the Townes men of Southampton to them and their successors for ever" (EX303; JA4608 [p2182]; SPA50).

On October 3, 1666, approximately two weeks after the date of the "protest" document, Governor Nicolls issued a "final determination" (the "Nicolls Determination") (EX321), in which he noted that he had reviewed the Topping Deed and the deed from "John Scott to Southampton men" (*i.e.*, the 1663 deed conveying the lands of the

Quogue Purchase to Southampton) (JA5150; SPA50). Governor Nicolls determined, *inter alia*, that "all the right and interest that ye said Capt Thomas Topping" had by virtue of the Topping Deed "is belonging, doth and shall belong unto the town of Southampton . . . and their successors forever" (EX321). By virtue of the foregoing language, Governor Nicolls determined that Southampton was the rightful owner of the lands of the Topping Purchase (EX321; JA5209-5210; JA5320; JA5079). Moreover, Governor Nicolls promised to defend the Town of Southampton in its "peaceable enjoyment" of the lands of the Topping Purchase "[a]gainst *all other claims whatsoever*." (EX321; JA4686 [p2564]; SPA50) (emphasis added).

The parties have stipulated that Westwoods is located within the boundaries of the lands that were the subject of the Nicolls Determination (JA3674). The Nicolls Determination ordered, *inter alia*, the Town to pay to the "Indians concerned to receive it" the sum of four score fathoms of wampum, which was precisely the same amount specified in the Topping Deed as consideration to be paid to the Shinnecock for the lands of the Topping Purchase (EX321; JA4609 [pp2183-2184]; EX299).

At the time of his determination Governor Richard Nicolls was the prevailing sovereign authority within the Province of New York, which included Long Island (JA4355 [pp1203-1204]; JA5088-5094). Governor Nicolls possessed law-making authority to promulgate the Duke's Laws[4] and the authority to settle disputes (JA5206-5207; JA4610-4611 [pp2189-2191]). Moreover, under the Duke of York's proprietorship, Governor Nicolls also had the authority to address the question of Indian land purchases (JA5089-5093). The State's and Town's expert on the authority of colonial governors with regard to aboriginal peoples, Alexander von Gernet, Ph.D., testified that during the colonial era New York governors frequently exercised their authority to decide on the validity of purchases from Indians and to impose settlements (JA5096; SPA115).

Pursuant to Governor Nicolls' explicit direction, on November 6, 1667, Thomas Topping assigned and delivered to the Town the Topping

[4] The Duke's Laws, which, *inter alia*, regulated the purchases of Indian lands occurring after March 1, 1664 (EX3873; EX311), had been enacted by Governor Nicolls more than a year before he issued the Nicolls Determination (EX311; JA5150-5151; JA5090). Thus, at the time of his determination, Governor Nicolls was well-acquainted with the existence of laws regulating the purchase of lands from Indians. His ratification and approval of the Topping Purchase, therefore, did not result from his unfamiliarity with restrictions on Indian land purchases. To the contrary, his determination reflects his view that the Topping Purchase was lawful and legitimate.

Deed, and all his right, title, and interest in the lands of the Topping Purchase, *i.e.*, the lands from Canoe Place to Seatuck, including Westwoods. (EX733; SPA51; JA4277 [pp901-902]; JA4686-4687 [pp2564-2565]; JA5320).

Further confirming the force and effect of the Nicolls Determination, on February 22, 1667 (N.S.), several Shinnecock, including Weany Sunk Squaw and others, confirmed and acknowledged (i) that they had sold their lands to Thomas Topping on April 10, 1662; (ii) that Topping thereafter had sold those lands to Southampton; (iii) that Governor Nicolls had ordered the Town to pay "four score fathoms of wampum" and (iv) that they had received such payment from the Town. (EX2577; EX2581; JA6438; JA4277-4278 [pp902-905]; JA4612-4613 [pp2198-2199]; JA5081; SPA51-52).

The 1676 Andros Patent

On July 1, 1674 Major Edmund Andros was appointed Governor of the Province of New York, by a commission from the Duke of York (JA5094; EX2577).[5] On November 1, 1676,[6] Governor Andros issued a

[5] The Shinnecock urge that as a result of the Dutch conquest of New York in 1673, the 1664 grant of Charles II to James, Duke of York, for New York and Long Island was "voided." (Br. at 25). After English sovereignty over New York was restored in February 1674, Charles II issued a second grant to the Duke of York, encompassing

patent (the "Andros Patent") to the proprietors of Southampton (EX708; SPA52).

Among other things, the Andros Patent confirms the existence of "a certaine Towne . . . commonly called and knowne by the name of South Hampton" (EX708; SPA52). Moreover, Governor Andros states that he has thereby "Ratifyed Confirmed and granted . . . unto . . . the ffreeholders and Inhabitants of the said Towne . . ." the "certaine Tract of Land thereunto belonging [to Southampton]" extending from Seatuck on the west to Wainscott on the east. These are essentially the eastern and western boundaries of the Town of Southampton as they exist today (EX708; SPA52; *see* Town Exhibit 226 [oversized map]). The western boundary of Southampton Town, as specified by the Andros Patent, is identical to the western boundary of the lands specified in the Topping

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the same territory as the earlier patent. *Id.* The Shinnecock assert that "[a]t the point of issuance of the second grant by Charles II to the Duke of York, New York started over." *Id.* But shortly after his appointment as provincial Governor of New York in June 1674, Edmund Andros issued a *status quo ante bellum* proclamation, on behalf of the British Crown, assuring all inhabitants that "all former grants priviledges and concessions heretofore granted and all estates legally possessed by any under his Royal Highness before the late Dutch government . . . *are hereby confirmed*" (EX2605-2606; JA5095) (emphasis added). *See also* JA4347 [p1172]. Thus the district court properly rejected the Tribe's assertion (SPA127).

[6] At this time the Colony of Connecticut had no jurisdiction over the Province of New York (SPA53).

Deed, *i.e.*, "Seatuck" (EX708; EX299; SPA52). The parties have stipulated that Westwoods is located within the lands described in the Andros Patent (JA3677).

The Andros Patent also provides that Governor Andros does expressly "Ratifie Confirme and grant, unto . . . as Patentees . . . the ffreeholders and Inhabitants of the said Towne, their Heires, Successors and Assignes, All the aforementioned Tract of Land . . . and of every part and parcel thereof, to the said Patentees and their Associates, their Heires Successors and Assignes . . . for ever " (EX708; SPA53). Accordingly, as recognized by the district court, the Andros Patent confirmed Southampton's ownership of all lands west of Canoe Place, including Westwoods (SPA53).[7]

According to Dr. von Gernet, Governor Andros possessed "broad" powers, including the requisite authority to issue this patent, and "during this [colonial] period New York governors frequently exercised their authority to decide on the validity of old Indian purchases or to impose settlements" (JA5094; JA5096).

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[7] The Andros Patent also provides that "if it shall so happen that any part or parcell of the Lande within the bounds and Limits afore described be not already Purchased of the Indyans It may bee purchased (as occasion) according to Law" (EX708; JA5210-5211; JA5083).

The 1686 Dongan Patent

In January 1683, Colonel Thomas Dongan received from the Duke of York instructions and a commission appointing him Governor of the Province of New York (JA5097). In 1686, Governor Dongan received a new commission and instructions directly from the King of England, James II, the former Duke of York, which granted Dongan certain powers and authority, including full power and authority "to make, constitute and ordain Laws, Statutes and Ordinances for the publick peace, welfare & good government of our said Province and of the people and inhabitants thereof" (SPA53; JA5097-5098).

According to Dr. von Gernet "[s]eventeenth-century colonial governors [such as Nicolls, Andros, and Dongan] were nothing short of the Crown's duly appointed, official representative in the colony" (JA5096). On December 6, 1686 Governor Dongan issued a patent (the "Dongan Patent") to the proprietors of Southampton (EX324-329; SPA53). The Dongan Patent recites that it was issued in response to the application of Major John Howell, a freeholder of the Town of Southampton, and one of the patentees under the Andros Patent, for confirmation unto the freeholders of the Town "in a more full & ample

manner all the above recited tracts and parcells of land within the limitts and bounds aforesaid and [to] finally determine the difference between the Indyans and the ffreeholders of the said towne of Southampton" (JA3676; EX325).

The Dongan Patent, *inter alia*, confirms and reiterates the provisions of the Andros Patent, including its description of the "certaine tract of Land" belonging to the Town of Southampton, running from Wainscott on the east to Seatuck on the west (EX324; EX708; JA6313; JA4279 [pp911-912]). The patent recites also that Governor Dongan had "examined the matter in variance between the ffreeholders of the said Towne of Southampton and the Indyans and do finde that *the ffreeholders of the Towne of Southampton aforesaid have lawfully purchased the lands within the Limitts and bounds aforesaid of the Indyans and have payd them therefore according to agreement so that all the Indyan right by virtue of said purchase is invested into the ffreeholders of the Towne of Southampton* aforesaid" (EX325; EX323; JA4279-4280 [pp911-913]) (emphasis added). The "lands within the Limitts and bounds aforesaid," referenced in the Dongan Patent are

stated explicitly to be the lands of the Town of Southampton, from Wainscott on the east to Seatuck on the west (*id.*).

Dr. von Gernet testified that "[t]here is nothing in the 1686 [Dongan Patent] . . . that is inconsistent with the scope of [Governor Dongan's] authority as defined in his commission and instructions from the king" (JA5098). Moreover, Dr. von Gernet concluded that "during the seventeenth century there were no limits on the gubernatorial discretion and authority to determine whether Indian lands had been lawfully purchased in a manner amounting to extinguishment of Indian title. New York Governors Nicolls, Andros and Dongan had the discretion or authority to issue patents or grants based on their review of past purchases from Indians" (JA5104).

The district court noted that there is no historical evidence that before this litigation the Shinnecock had ever challenged or contested the validity, legality, or effectiveness of the Nicolls Determination, the Andros Patent, or the Dongan Patent (SPA51; SPA53; SPA54; JA4280 [p913]).

Shinnecock Recognition of the Extinguishment of Their Aboriginal Rights to Westwoods

The trial record contains abundant evidence demonstrating that the Shinnecock have recognized for more than three centuries: (1) the validity of their 17th century transfers of lands west of Canoe Place; (2) the British Crown's contemporaneous extinguishment of their aboriginal rights; and (3) that the Tribe lacked any remaining interests in those lands. Some of the evidence comes from the Tribe itself.

In an 1822 tribal petition to the New York State Legislature, the Shinnecock claimed to be the "lawfull owners of a certain tract of land . . . in the … town of Southampton . . . *bounded on the west by a place called canoe place*" (JA5260; EX602) (emphasis added). No claim of ownership of any lands west of Canoe Place appears in that petition (SPA59).

Perhaps the most compelling evidence in this regard is found in the Tribe's statements to the United States Department of the Interior. In February 1978 the Tribe submitted a request that Interior prosecute a land claim action on its behalf (JA3679; JA2504; SPA65). The land that was the subject of the 1978 litigation request did not include Westwoods or any other land located to the west of Canoe Place

(JA3680). In a memorandum supporting its litigation request, the Tribe admitted the validity, legality, and effectiveness of the Ogden Deed and the Topping Deed by stating that "the Tribe's domain to the west of Canoe Place was conveyed to non-Indian individuals in 1659, 1662"; and also that "[t]he tribal territory to the west of Canoe Place was subsequently conveyed to non-Indian individuals by deeds of 1659 and 1662" (JA2514; JA2522; SPA65). No assertion or suggestion that the Ogden and Topping Deeds were in any way unlawful, ineffective, or void appears in that memorandum, or elsewhere in the litigation request.

Additional record evidence, consisting of a variety of ancient, contemporaneous maps of Southampton and its vicinity,[8] further documents the common understanding that the Shinnecock had relinquished all rights to lands west of Canoe Place. By the late 17th century or the first decades of the 18th century, the Shinnecock resided only east of Canoe Place (SPA60-62). And an excerpt of the

[8] These maps included a 1797 survey map created by the New York State Department of Transportation (EX740); a 1780 map prepared by Major John Andre (EX5186); an 1829 map of Suffolk County created by David Burr (EX2527); the 1833 Sumner map (EX1196); the 1838 U.S. Coast Guard and Geodetic Survey map (EX1165-1167); the 1859 Chase map (EX1168); the Gazetteer of the State of New York (Tenth Edition), published in 1861 (EX625); and the 1873 Beers map (EX1170).

Southampton Town Records from 1795, depicting a plan for the laying out of a road, refers to a highway running "from the Canoe Place ditch at the *western* boundary of the Indian land to the said Red Creek Island Road" (JA4809 [pp3065-3066]; EX460) (emphasis added). During that time, the Town and Shinnecock expressly agreed to the Shinnecock presence only east of Canoe Place. By an "indenture" dated August 16, 1703 (sometimes referred to as the "1000 year lease"), the Shinnecock acquired from the Town certain usufruct rights, for a period of 1,000 years, in lands exclusively east of Canoe Place (SPA56; EX339-341).

b. The Tribe's Acquiescence in State and Local Authority over Westwoods

The evidence at the trial also established that, for three centuries, the Shinnecock have acquiesced in state and local authority over Westwoods. There is no record that the Shinnecock imposed any laws or regulations over the property, nor did they object when the Town subdivided the property in 1738 and allotted it to non-Indians. And in 1808, the Shinnecock affirmatively sought to lease the property from the Town. Indeed, until 2003, the Shinnnecock had never taken any action whatsoever at Westwoods to assert tribal sovereignty over Westwoods.

The Canoe Place Division of 1738

One of the earliest examples of the Town's exercise of governmental authority over lands west of Canoe Place occurred in or about 1738 (SPA142). Then, the Southampton Town proprietors laid out a 3000-4000 acre subdivision of property known as the "Canoe Place Division" of the Quoga ("Quogue") purchase, consisting of 39 numbered lots (SPA68), which were subsequently allotted exclusively to the non-Indian proprietors of the Town (EX5012-5016; JA3677; SPA69). There is no documented record of any objection or challenge by or on behalf of the Tribe to the laying out or allotment of the 1738 Canoe Place Division (JA3678; SPA35).

The surveying and laying out of the Canoe Place Division[9], and the relationship of Westwoods to the Division were the subject of a painstaking analysis performed by the Town's expert land surveyor, Martin A. Read (JA5139-5140; JA4371-4372 [pp1268-1269]). Mr. Read concluded that the vast majority, if not the entirety, of Westwoods is located within the boundaries of the 1738 Canoe Place Division (EX396;

[9] The laying out of the Canoe Place Division was acknowledged by the New York Court of Appeals in *Beers v. Hotchkiss*, 256 N.Y. 41, 47 (1931).

EX868; EX867; JA5139-5140; EX873). The district court found Mr. Read's testimony to be credible (SPA70).

Other examples of the Town's exercise of governmental authority over Westwoods (and other lands west of Canoe Place) included proof that at various times during the 18th century, the Southampton Trustees regulated timber resources throughout the Town, including the right of the Shinnecock to cut timber (JA5223-5229; JA4283-4284 [pp925-932]; SPA71-72; SPA142). For example, by order of the Southampton Trustees, dated April 2, 1754, no timber was to be cut or carted off "any part of the undivided land westward of Canuplace on penalty of six shillings" (EX682; JA5226; JA4285 [p933-934]).[10]

The Creation of Shinnecock Leasehold Rights to Westwoods

According to the Town's ethnohistoric expert, James Lynch, in the early part of the 19th century timber resources within the Town of Southampton were being depleted (JA5223-5229; JA4284-4285 [pp932-934]). As a result, the Shinnecock sought to obtain from Southampton

[10] By a second order of the Southampton Trustees issued on the same date, there was to be no flaxseed "soed on any part of the Indian land" (EX682). By distinguishing between the "Indian land" and the "land westward of Canuplace" in the two orders of the same date, the Southampton Trustees recognized that the "Indian land" was situated exclusively east of Canoe Place, while the lands west of Canoe Place were not considered "Indian land" (*id.*).

the right to cut timber on lands situated to the west of Canoe Place (JA5258-5259; JA4284-4286 [pp932-937]; SPA58).

At an Indian Trustee Meeting held on April 7, 1808, it was decided that the Shinnecock should lease 120 acres of land west of Canoe Place (JA5256-5258; JA4285 [pp934-935]; EX549). According to an analysis performed by Mr. Lynch, which the district court accepted, the 120 acres referenced in the minutes of that Trustee meeting included Westwoods (JA5256-5258; JA4285-4286 [pp934-938]; JA4288 [p945]; SPA58; SPA130).[11] The district court observed that "[t]he Shinnecock's desire to lease these timber lands west of Canoe Place, including Westwoods, from the Town reflects an understanding by the Shinnecock that they no longer possessed ownership or occupancy rights west of Canoe Place" (SPA130); *see* JA5258; JA4285-4286 [pp936-937].

Tribal Accession to Town Jurisdiction in the Twentieth Century

That the modern-day relationship between the Shinnecock and Westwoods had its genesis in a lease granted by the Town is confirmed by documents regarding the surveying and laying out of a Town road through Westwoods in the early part of the 20th century, which include

[11] No actual lease instrument has ever been located.

explicit references to "land leased to Indians" as land available for the road (JA4295-4297 [pp976-981]; EX862; SPA59). According to the district court, these references to "land leased to Indians" support the conclusion that the current Shinnecock presence at Westwoods was the result of the Shinnecock having obtained a lease from the Southampton Trustees circa 1808 (SPA59; *see also* JA5335-5336; JA4295-4297 [pp976-981]).

Another example of Shinnecock accession to Town jurisdiction is the Town's 20th-century widening and improvement of a local road (Newtown Road) that traverses Westwoods, without any objection or protest from the Shinnecock (SPA59; JA5334-5336; JA4295-4297 [pp976-981]; SPA142). Finally, the Town classified Westwoods as "residential" property when it enacted its zoning law in 1957, and has retained that classification at all times since (SPA101).

After reviewing this historical evidence, the district court held that the evidence adduced by the State and the Town "plainly and unambiguously demonstrate[s] beyond any question the extinguishment of aboriginal title by the sovereign authority on all Southampton lands west of Canoe Place, including Westwoods" (SPA129). The court

concluded that "[t]he extinguishment of aboriginal title to this land is not only apparent from these colonial era documents and transactions, but is also confirmed by the conduct and statements of the Shinnecock in the centuries that followed these events" (SPA130). Indeed, the district court found that "plaintiffs have demonstrated by clear and convincing evidence" (a higher standard than that which is applicable to this issue) that the Tribe's aboriginal title to Westwoods had been extinguished in a plain and unambiguous manner" (SPA111).

c. Disruptive Impacts[12]

Finally, the evidence adduced at trial established the substantial disruption that the Shinnecock's construction and operation of their casino would cause. The three parcels that constitute Westwoods are undeveloped; there is "minimal documented human activity in the past" (EX552). For two centuries, the Shinnecock have used the property only for cutting wood and timber and for Sunday school and Fourth of

[12] The Shinnecock assert (Br. at 7 and n. 4) that the evidence and findings regarding disruption, which they term "injury-in-fact," have been "rendered irrelevant" by this Court's decision in *City of New York v. Golden Feather Smoke Shop*, 597 F.3d 115, 121 (2d Cir. 2010), and their concession that the State and Town need not establish injury as a result of noncompliance with state and local laws. But the evidence and findings of disruption are relevant to more than the standing issue; they bear on plaintiffs' contention that the Shinnecock are barred by laches, acquiescence and impossibility from building and operating a casino at Westwoods, and on the State's argument that construction of the casino complex will have significant environmental impacts necessitating compliance with SEQR.

July picnics (JA4757[p2865]). The northern half of the property consists of sandy bluffs overlooking and sloping toward the Great Peconic Bay. The remainder of the property consists primarily of sand barrens. Access to the parcel is from Sunrise Highway and Newtown Road, the sole public road that intersects with Sunrise Highway and runs through the property (JA5823).

Development of Westwoods as a gaming complex would have serious disruptive impacts on local governance and the community, on transportation and other infrastrucure, and on environmental resources both on and off the site, as the district court documented in great detail (SPA 84-98). The Shinnecock's proposal called initially for a 61,000 square foot casino that would accommodate as many as 1,000 slot machines, 100 gaming tables, a food court, an entertainment stage, and a high-stakes bingo hall, and provided a contingency for further expansion (JA60; JA 4147 [pp58-60]; EX5288). Given the size of the site and its proximity to New York City, the evidence shows that Westwoods could support a massive 300,000 square feet gambling complex, totaling 7,000 gaming devices and 250 tables, capable of generating annual gaming revenues ranging from $500 million to $1 billion (JA4409

[pp1407, 1410]; *see* JA5361-5406). The Tribe's own expert, Steven Rittvo, concluded that a gaming facility with 3,000 gaming positions would be optimally sized, and that a facility with as many as 6,500 gaming positions would be viable (JA4847 [p3216]; JA4823-4824 [pp3118-3122]; JA6545; EX3697). Regardless of whether the analysis focuses on the impacts of a casino complex sized as proposed, at full capacity, or somewhere in between, building and operating such a facility at Westwoods would undeniably disrupt the settled expectations of the State, the Town, and the surrounding communities.

Disruption of Local Governmental Interests

The State's experts prepared a fiscal impact analysis showing that the proposed gambling complex would necessitate vast expenditures of state and local resources to provide essential services to support the development. If the Tribe were to prevail in its argument that Westwoods is not subject to state and local governmental authority, the State, Town, and other governmental entities would be unable to offset the enormous cost of such services by levying taxes on the Shinnecock. The Town of Southampton would incur millions of dollars in costs and would be required to reallocate tax revenues from other programs

and/or raise the taxes of local inhabitants to pay for the infrastructure necessary to accommodate the gambling complex. (*See* JA6192-6250).

The daily number of employees at a 130,000 square foot casino, hotels, and related facilities is estimated between 3,227 and 4,927, and the daily number of visitors at such a complex is estimated to be between 17,994 and 35,000 (JA6194; JA4831 [pp5150-5152]). The increases in daily population would place substantial burdens on local service districts – including the local fire, water, and ambulance districts. All would be required to spend funds beyond their current levels. Costs to the ambulance and water districts, for example, are estimated in the millions of dollars, depending on the ultimate size of the casino (JA6245-6250). The complex would place increased demands costing millions of dollars on the local and State Police, the New York Department of Transportation, solid waste disposal facilities, and hospitals and medical centers (*id.*).

Moreover, the evidence showed that because the site is undeveloped, it currently has no demand for electrical power, natural gas, sewage treatment, or potable water. Construction of a casino complex would impose a substantial burden on the Hampton Bays

Water District which provides potable water for commercial and domestic use and fire protection (JA4536 [pp1902-1903]; JA4541 [pp1923-1924]; JA4869 [pp3300-3301]; JA5890). Westwoods is not currently served by any community sewer system or wastewater treatment plant (JA5891). The closest electrical substation, with a capacity of about ten megawatts, is located south of the Sunrise Highway about one-quarter mile from the Westwoods property (JA5863). The nearest high pressure natural gas pipeline is located about one-half mile southeast of the property (JA459; JA5863).

Thus, building a casino at Westwoods would necessitate the construction of extensive infrastructure. For example, the Hampton Bay Water District would have to expand its existing transmission network to provide peak flows of more than one million gallons of water per day to the site (JA5889-5890). This would necessitate the construction of additional conveyance lines, storage facilities and pump stations. Supplying additional water to Westwoods would result in local drawdown of ground water elevations and increased salt-water intrusions (JA5890). Similarly, the operation of a 130,000 square foot casino would require the construction and operation of a wastewater

treatment plant capable of processing 1.44 million gallons of sewage per day (JA5891). Such a plant would discharge large volumes of effluent containing nutrients, oxygen demanding substances and residual disinfectants into the ground water or surface water and would adversely affect water quality (JA5891). Even building the substantial infrastructure to address these needs, as well as facilities that supply electricity and fuel to the site, would necessarily cause habitat destruction, pollution of air and water resources, and adverse aesthetic impacts.

Disruption of Traffic Patterns

The operation of a casino complex at Westwoods would have major traffic-related impacts in the immediate vicinity and in other locations further from the site, including intersections, ramps, and arteries running from the New York City metropolitan area to the project site. Plaintiffs retained Greenman Pederson, Inc. (GPI), headed by professional transportation operations engineer Michael Salatti, to analyze the traffic impacts of the casino complex (JA4435 p1508]; JA4438 [p1519]; JA5430-5687; JA5755-5811). First, GPI conducted a baseline traffic analysis, finding that traffic on eastern Long Island has

been growing progressively slower and more congested since the 1990s (JA4416-4417 [pp1438-1439]). People driving from New York City and environs take the Long Island Expressway to CR 111 to SR 27 (Sunrise Highway) as the preferred route (JA4418; JA4419). As a result, there is currently congestion on CR 111 from April through October going eastward on Friday afternoons and Saturday mornings, and going westward on Sunday nights and Monday mornings (JA4419). The congestion is more extreme in July and August (JA4419). In the area known as the Hamptons Bottleneck, where SR 27 becomes CR 39, efforts to improve traffic flow have resulted in safety problems and have not relieved the congestion (JA4421-4422). Severe congestion and backups also occur at the traffic circle on SR 24 and on SR 24 near the Old Montauk Highway (JA4419; JA4423). Aside from the congestion on these arteries, the smaller residential roads around Westwoods are incapable of accommodating tour buses and large volumes of traffic (JA4423-4424).

GPI conducted baseline traffic counts at many intersections in the primary areas proximate to Westwoods and in more remote secondary areas, and determined their levels of service (LOS). (LOS range from A

through F based on seconds of delay experienced by drivers as they move through intersections, with LOS F representing longest queues of vehicles and greatest delays) (JA4441 [pp1530-1533]). GPI gathered data in April and June 2006, adjusted it to reflect peak seasonal variation, and used a widely accepted computer model to analyze the data (JA4443-4444 [pp1538-1545]). It found four of the nine signalized intersections in the primary area already operating at LOS E or F during peak hours in the summer of 2006 (delays of at least 55 and 80 seconds, respectively) (JA5769; JA5771). Four unsignalized intersections in the primary area also exhibited LOS E or F (delays of at least 30 and 60 seconds, respectively) during peak summer hours (JA5770; JA5772). None of the junctions or highway segments in the secondary area exhibited significant delays in that year (JA5773).

GPI next made projections for 2010 under a no-build scenario, assuming yearly traffic increases of 2 % in accordance with a stipulation of the parties (JA4446[pp1551-1553]). It found five of the nine signalized intersections would be operating at LOS E or F during peak traffic hours on a typical summer Friday or Sunday in 2010 (JA5769; JA5771). The additional signalized intersection operating at a higher

LOS was the Sunrise Highway westbound off-ramp and CR 111 (*id.*). In addition to the four unsignalized intersections showing congestion in 2006, the intersection at Squiretown Road and Old Rivertown Road would mostly operate at LOS F in 2010 under the no-build scenario (JA5770; JA5772). A similar analysis concluded that the junction of Sunrise Highway westbound and CR 111 would operate at LOS F during peak hours under this scenario (JA5775).

GPI then projected LOS levels in 2010 assuming the construction and operation of a 130,000 square foot casino complex. GPI found that the casino complex was likely to generate about 39,681 new daily vehicle trips during a typical peak season Friday, and about 47,292 new daily vehicle trips during a typical peak season Sunday (JA5765). GPI conducted the analysis of increased traffic delays under two different scenarios -- one assuming that vehicles would use existing exits from Sunrise Highway and then travel along local roadways to reach Westwoods, and a second assuming the construction of new ramps to provide direct access from Sunrise Highway to Westwoods. GPI concluded that under either alternative, eight of the nine signalized intersections in the area would operate under constrained conditions

during either Friday or Sunday peak traffic hours, with up to eight minute delays at certain times (JA4454-4455 [pp1584-1589]: JA5769, JA5771). With respect to unsignalized intersections, GPI found that twelve of the fifteen intersections would operate under constrained conditions in the first alternative, and eleven would do so under the second alternative (JA5770; JA5772). In fact, defendants' expert agreed that the traffic generated by the casino would cause unreasonable disruption near Westwoods unless direct access ramps to and from Sunrise Highway were built, particularly in view of the fact that the only access to Westwoods currently is via Newtown Road (JA5033 [pp3936-3937]). Moreover, because Sunrise Highway is a state-owned limited access highway, the Shinnecock could not build these access ramps; the State itself would be required to do so (EX3421-3425).

Disruption of Community Character

The Town of Southampton is a community of just under 60,000 permanent residents on eastern Long Island (JA5865). The Town's population swells dramatically during the summer tourist season, peaking at nearly three times its year-round population (JA5865). Tourism and vacation homes drive the Town's economy (JA5865). The

Town's Long Range Comprehensive Plan seeks to maintain the Town's rural and scenic quality, which is characterized by land use patterns that reflect a patchwork of farmland, undeveloped open space, and hamlet centers (JA5855-5859). Unimpeded views of the coastal bluff and the Great Peconic Bay are important visual resources that contribute to the overall community aesthetics of the Town of Southampton (JA5865-5867). The Town's unique scenic quality is critical to its economic vitality as a visitor attraction and to maintaining itself as an attractive place to live and work (JA5857-5858).

Westwoods is zoned for residential use with a minimum lot size of 60,000 square feet. It is surrounded by residential zones with minimum lot sizes ranging from 15,000 to 80,000 square feet (JA5853-5854, 5869, 6882). There are about 75 private residences in the immediate vicinity of Westwoods, primarily along the eastern border of the property; these residents would be immediately and directly affected by the construction of a casino complex in their neighborhood (JA6133-6136; JA6175-6177). The traffic impacts alone would cause disruptive noise levels for nearby residents living along Newtown and Squiretown Roads (id.).

Disruption of Water Resources

Westwoods is situated in the Long Island Central Pine Barrens, where current residents obtain their drinking water solely from groundwater sources – the Upper Glacial, Magothy and Lloyd aquifers (JA5834, 5836). Characteristic of the Pine Barrens, the soils underlying Westwoods are coarse and permeable, which allows for the recharge of these drinking water aquifers (JA5835). The high soil permeability at Westwoods also increases the aquifers' vulnerability to contamination by septic systems, spills, and other development-related discharges (JA5873-5877).

The proposed development would result in increased overland flow of surface water runoff into the Great Peconic Bay and other nearby water bodies – the Shinnecock Canal and Squire Pond – as a result of impervious roofs, parking lots and access roads and sidewalks associated with the complex (JA5837-5842; JA5875). The Great Peconic Bay is part of the Peconic Estuary, which separates the North and South Forks of the eastern end of Long Island. Consisting of over 100 bays, harbors and tributaries, the Great Peconic Bay has been designated under the National Estuary Program as an "Estuary of

National Significance" (JA5849, JA5882). Moreover, the State of New York has mapped the Great Peconic Bay and Shinnecock Canal for protection as tidal wetlands, and has designated the northern portion of Westwoods as within the coastal zone subject to the federal Coastal Zone Management Act and related state statutes (JA5849-5853).

Construction of a large-scale casino complex on the property would potentially compromise these water resources (JA5873-5877). On the approximately five to ten acres that were cleared before the preliminary injunction took effect, no measures to prevent erosion or manage stormwater were undertaken, and erosion patterns are visible on the site (JA5874). Short-term impacts to water resources include increased erosion and sediment transport to the downgradient surface waters, including the nearshore area of the Great Peconic Bay, and degradation of surface water and ground water quality from the discharge of chemicals, solvents and petroleum products from heavy equipment during construction (JA5874-5875). Long-term impacts include diminished recharge of groundwater aquifers due to impervious surfaces; accelerated erosion of the bluff due to increased human activity and resulting sedimentation and nutrient loading of nearby

surface waters; adverse modifications to floodplains and tidal wetland habitats; and increased stormwater runoff impacts on surrounding residential neighborhoods due to eroding soils, sediment transport and local flooding (JA4521 [pp1846-1847]; JA5875-5876).

Disruption of Air Resources

Long Island, including Suffolk County, is in an Ozone Transport Region (JA5842-5843). It lies within a moderate non-attainment zone for nitrogen dioxide and ozone due to non-compliance with the National Ambient Air Quality Standards for those compounds under the Clean Air Act (JA5843). Long Island also lies within a non-attainment zone for particulate matter below 2.5 microns in size. (JA5842.)

Construction of the casino complex would increase particulate emissions in the form of dust from earth-moving activities, and in the form of diesel particulates from construction vehicles and equipment on Westwoods and area roads (JA5877). Longer term, non-traffic related impacts on air quality include emissions from boilers, generators, fire pumps and off-site generating facilities powered by fossil fuels, and emissions from heating, ventilation and air conditioning systems (JA4520 pp1842-1845]; JA5877-5881).

Traffic-related impacts on air quality present greater threats. Highway traffic is a major source of emissions of carbon monoxide, volatile organic compounds and nitrogen oxides -- precursors to ozone, and particulate matter -- all of which are detrimental to human health when inhaled. Increases in emissions of ozone precursors and fine particulates are particularly problematic because ambient levels of these pollutants in the area of Westwoods already exceed national standards established as necessary to protect human health. Plaintiffs' Mobile Source Air Quality Report (JA6107-6113), which analyzed average daily traffic, daily vehicle miles traveled and resulting emission loads, found that residents in and around the major travel routes to and from Westwoods would be exposed to significantly greater amounts of pollutants. Fine particulate matter would increase by approximately 45 percent as would larger particulate matter of less than 10 microns. (JA4544-4546 [pp1934-1944]; JA6113).

Disruption of Ecological Assets

Westwoods consists of three ecological zones: coastal, transitional and terrestrial (JA5843). These ecological zones contain various habitats, including maritime beach, maritime shrubland, maritime oak

forest, pitch pine slope, pitch pine oak forest, successional maritime forest, successional old field, and maritime pitch pine dune woodland (JA5843-5844). The maritime oak forest located on Westwoods has a high ecological value (JA5846, JA5881). The maritime pitch pine dune woodland area of Westwoods has been assigned the highest value within New York State because this habitat is rare and especially vulnerable to extinction (JA5845-5846, JA5882).

Westwoods is dominated by a pitch pine - oak forest. It contains old-growth trees 90 to 110 years old, does not have significant incursions of invasive species, and supports many species indigenous to this type of forest (JA5847). The bluff areas contain potential habitat for the Nantucket shadbush, an endangered species (JA5848-5849). Westwoods also provides nesting areas for dozens of bird species, and habitat for species of special concern including the eastern box turtle, sharp-shinned hawk, and Cooper's hawk (JA5848). The Great Peconic Bay, to which Westwoods is hydrologically connected, provides spawning grounds for fish and shellfish, which are critical to the community character and well being of eastern Long Island (JA5849-5853).

Construction and operation of the casino complex would result in the permanent loss of valuable maritime pitch pine dune woodland, maritime oak forest, and old-growth trees (JA5882-5883). It would also result in the degradation of important coastal habitats along the Great Peconic Bay shoreline and the introduction of edge habitats that facilitate incursion of undesirable species (JA5883). Finally, building and operating a casino complex would increase development pressures on the Town's lands from businesses that would spring up to support and profit from the casino operations (JA5883).

6. District Court's Decision After Trial

The district court issued a comprehensive and meticulously documented decision on October 30, 2007, in favor of the State and the Town, granting the permanent injunction (SPA35-163, reported at 523 F. Supp. 2d 185). It concluded that there are "three independent grounds" for granting plaintiffs relief (SPA36). First, the court found that "the evidence overwhelmingly demonstrated in a plain and unambiguous manner that aboriginal title held by the Shinnecock Indian Nation to the Westwoods land was extinguished in the 17th century" (SPA36). Specifically, the court reviewed colonial era

documents that demonstrated in clear and unequivocal language that the Shinnecock sold their land, including Westwoods, to non-Indians in the 17th century, the land was subsequently acquired by the Town of Southampton, and the sovereign authority of Great Britain confirmed and ratified the Town's ownership before the end of the 17th century. Thus, although it is undisputed that the Shinnecock now own and occupy Westwoods, the court held that the extinguishment of aboriginal title renders the property subject to New York State and Town laws (SPA36-37, 44-72, 102-136).

Second, the district court held, regardless of extinguishment of aboriginal title, the proposed casino should be enjoined under the equitable principles articulated in *Sherrill* because of the Shinnecock's long delay in asserting sovereignty over Westwoods and the "highly disruptive consequences" the casino would have (SPA37). The court concluded that the proposed development would severely disrupt the administration of governmental affairs, transportation infrastructure, and the settled expectations of the greater Suffolk County community (SPA37, 91-98, 136-149). The court also found that the Shinnecock's proposed development would have a "multitude of other health and

environmental impacts" on the neighboring landowners and the Town (SPA37, 85-91).

The court's third independent ground for enjoining construction of the casino is that the Shinnecock casino is not authorized by IGRA, which has totally supplanted any federal common law right tribes may have had to conduct the type of gaming proposed by the Shinnecock (SPA37; SPA149-155). At the time the court issued its opinion, the federal government had not acknowledged the Shinnecock as a tribe for purposes of IGRA. And then, as now, the federal government had not designated Westwoods as "Indian lands," as that term is defined by IGRA. Where a facility is not authorized by IGRA, the court held, it must comply with state laws governing gambling. Indisputably, the Shinnecock have not complied with New York's strict gambling laws (SPA36-37).

Finally, the district court rejected the Shinnecock's defense of sovereign immunity from suit. While the court did not revisit Judge Platt's earlier decision that the Shinnecock constitute a tribe for purposes of federal law (SPA36, n. 1), it concluded that the Tribe was not immune from suit, again relying on three independent grounds

(SPA156-159). First, the court held that the Shinnecock submitted themselves to the federal court's jurisdiction by removing the case to federal court at the outset of the litigation (SPA157). Second, the court held that the Supreme Court's decision in *Sherrill* precludes the Shinnecock from asserting sovereign immunity from suit, given the disruption that would ensue if their plans to build and operate the casino at Westwoods went forward (SPA157-158). And third, citing *Ex parte Young*, the court held that the defense of sovereign immunity in any event does not bar this lawsuit against Shinnecock tribal officers, seeking forward-looking injunctive relief (SPA158-159).

Accordingly, the district court granted the State's and Town's request for a permanent injunction enjoining the defendants from building and operating a casino and related facilities at Westwoods. In doing so, the court rejected the Shinnecock's contention that any harm from the proposed casino was speculative and not imminent and concluded that the State and the Town had "demonstrated in an overwhelming fashion that they are entitled to a permanent injunction preventing the development of a casino at Westwoods" (SPA159-162).

The court entered judgment permanently enjoining the defendants from engaging in gambling or constructing or operating a facility intended for gambling on the Westwoods property without first obtaining licenses from the New York State Racing and Wagering Board under New York Executive Law, and the Town of Southampton under New York's General Municipal Law; permits from the New York State Department of Environmental Conservation, including a SPDES permit for discharging sewage or other pollutants into the surface or groundwater, a permit for the installation of a groundwater well if its capacity exceeds the statutory threshold in the New York Environmental Conservation Law, a tidal wetlands permit, and a stormwater discharge permit. (SPA170-175, reported at 450 F. Supp. 2d 186).

On February 7, 2008, the district court denied the Shinnecock's motion to reconsider based on allegedly newly discovered evidence that the federal government had effectively recognized the Shinnecock as a tribe, contrary to the express joint stipulation of facts in that regard (SPA164-169, *see* JA3737). The court held that the Shinnecock failed to demonstrate clear factual error, and that in any event IGRA would not

authorize the proposed gambling facilities because Westwoods has not been designated "Indian lands" within the meaning of IGRA (SPA168). Further, the court noted, it had concluded that two other independent grounds support the judgment in favor of the plaintiffs (SPA168, n. 2). The court therefore declined to reconsider based on the newly submitted papers.

SUMMARY OF ARGUMENT

For the past 350 years the Shinnecock have recognized and accepted the fact that Westwoods is part of the sovereign territory of New York State, subject to state and local laws. In 2003, abruptly claiming tribal sovereignty over Westwoods, the Shinnecock began building a large casino complex there without complying with state and local laws regarding gaming, the environment, land use, and zoning. The district court properly rejected the Shinnecock's unilateral and unprecedented claim to tribal sovereignty over Westwoods, and their claim to immunity from enforcement of state and local laws, for the reasons set forth in its comprehensive and well-reasoned decision after trial.

Preliminarily, Point I of the Argument below addresses the jurisdictional issues that the Shinnecock now raise. This Court has subject matter jurisdiction over both the State's and the Town's claims. The State's complaint expressly alleges a federal cause of action under the Indian Gaming Regulatory Act. In addition, both the State's and the Town's right to relief necessarily depend on resolving substantial questions of federal law. And even if it were held that the Town's complaint did not independently raise a federal question, the district court properly exercised supplemental jurisdiction over the Town's claims under 28 U.S.C. § 1367(a).

Nor is this case moot based on defendants' unilateral assertion that they now no longer intend to build a casino at Westwoods. In any event, the Court should not vacate the district court's decision where, as here, any mootness is caused by the unilateral action of the party seeking vacatur.

Point II of the Argument shows that the district court correctly concluded that *Sherrill* bars the Shinnecock's assertion of sovereignty over Westwoods after three centuries of acquiescing in state and local jurisdiction. For the same reasons, *Sherrill* precludes the Shinnecock

from invoking sovereign immunity from this lawsuit. Under the *Sherrill* formulation of laches, acquiescence, and impossibility, too much time has passed to permit the Shinnecock to rekindle "the embers of sovereignty that long ago grew cold." 544 U.S. at 214. Allowing the Shinnecock to assert sovereignty over Westwoods would disrupt settled expectations concerning the governance of these lands and settled expectations of neighboring landowners, and would adversely impact the environment and would impose unreasonable burdens on the local infrastructure, including roads and utilities.

In Point III, we explain why the district court properly rejected the sovereign immunity defense on two alternative grounds. The State and the Town may obtain prospective injunctive relief against the defendant tribal officials under *Ex parte Young* and the defendants waived the defense of sovereign immunity when they removed these actions from state court.

Point IV of the Argument demonstrates, as the district court found, that the Shinnecock's aboriginal rights in Westwoods were extinguished in the colonial era by two separate deeds in which the Shinnecock relinquished and conveyed their interest in all lands west of

Canoe Place. Three subsequent colonial era documents conclusively recite the British Crown's intent to extinguish permanently any and all aboriginal rights in those lands, including Westwoods. Because the Shinnecock's aboriginal title to Westwoods was extinguished centuries ago, the district court correctly rejected the Shinnecock's claim of present-day sovereignty over Westwoods based on unextinguished aboriginal title.

Finally, in Point V, we explain that, contrary to the Shinnecock's contention, Westwoods is subject to State and local regulation because it is not "Indian country" within the meaning of 18 U.S.C. § 1151. Moreover, Westwoods is not "Indian lands" within the meaning of IGRA, nor is there a tribal-state gaming compact, so the Shinnecock's planned construction of a casino at Westwoods is not authorized by IGRA.

For these reasons, this Court should affirm the district court's judgment in favor of the State and the Town permanently enjoining the defendants from building and operating a casino at Westwoods without complying with federal, state and local laws.

STANDARD OF APPELLATE REVIEW

This Court accords considerable deference to a district court's findings of fact after a bench trial, and will reverse only for clear error. *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 49 (2d Cir. 2010); see Fed. R. Civ. Proc. 52 ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.") The deferential "clearly erroneous" standard applies to all of the district court's findings of fact, not just credibility determinations. *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985) (holding that equal deference is due to findings that are "based instead on physical or documentary evidence or inferences from other facts."). A finding is "clearly erroneous" only when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).[13]

[13] The Seventh Circuit attempted to convey in more earthy terms the arduousness of this endeavor: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

This Court reviews the district court's conclusions of law, or of mixed fact and law, *de novo*. *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d at 49, citing *Skoros v. City of New York,* 437 F.3d 1, 12 (2d Cir. 2006). The Court also reviews *de novo* issues of the Court's subject matter jurisdiction and sovereign immunity. *See, e.g.*, *Gollomp v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009) (sovereign immunity); *Maloney v. Social Security Admin.*, 517 F.3d 70, 74 (2d Cir. 2008) (per curiam) (jurisdiction). The Court may affirm the district court's decision on any ground appearing in the record. *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d at 49, citing *Liberty Mut. Ins. Co. v. Hurlbut,* 585 F.3d 639, 648 (2d Cir. 2009).

ARGUMENT

POINT I

THIS COURT HAS JURISDICTION OVER THIS CASE

After having removed these cases to federal court, and having zealously and unsuccessfully defended them at great length, the Shinnecock now suggest that this Court lacks subject matter jurisdiction, either because the Tribe erroneously removed the cases in the first place or because they are now moot. These arguments are

without merit. As explained below, the district court properly exercised jurisdiction over these actions, and the Tribe's declaration that it now has no plans to develop the Westwoods casino does not moot this case. Moreover, even if this Court were to find that the Tribe's appeal is moot, the Court should dismiss the appeal without vacating the district court's decision and judgment because the Tribe, the loser below, would have caused the mootness by its unilateral voluntary action.

A. This Court Has Subject Matter Jurisdiction Over The State's And The Town's Claims.

The Shinnecock ask (Br. at 33-46) this Court to revisit the issue whether federal subject matter jurisdiction exists over the State and Town claims before proceeding to the merits. The Shinnecock continue to maintain that federal subject matter jurisdiction exists over these claims, as they did when they removed both cases to federal court and when they vigorously opposed the State's motion for remand. But now that the federal district court has issued its decision against them, the Shinnecock suggest that there is a "serious question" of subject matter jurisdiction, which, if answered in the negative, requires vacatur.

Title 28 U.S.C. § 1331 vests in district courts "original jurisdiction" over "all civil actions arising under the Constitution, laws,

or treaties of the United States." Whether federal courts have federal question jurisdiction over an action is generally governed by the "well-pleaded complaint" rule: federal question jurisdiction exists if "plaintiff's statement of his own cause of action shows that it is based upon [federal law]." *Vaden v. Discover Bank,* 129 S.Ct. 1262, 1265 (2009); *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987). A case arises under federal law within the meaning of § 1331, if a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *Empire Healthchoice Assur. v. McVeigh,* 547 U.S. 677, 689-90 (2006); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1, 27-28 (1983).

Although the State argued below that it was not truly pressing a federal claim, the district court appropriately looked to the face of the complaint to find allegations that that the Shinnecock's proposed construction and operation of the casino violated federal law – IGRA – as well as state law. In addition, both the State's and the Town's right to relief necessarily depends on resolution of substantial questions of

federal law. Removal under 28 U.S.C. § 1441 was therefore appropriate, the district court properly retained jurisdiction, and this Court has jurisdiction to resolve the merits of this appeal.

1. The State's complaint alleges a federal cause of action under the Indian Gaming Regulatory Act.

Under the "well-pleaded complaint" rule, the State's complaint alleges a cause of action under the Indian Gaming Regulatory Act. The principal basis for the State's lawsuit was that the Shinnecock have no authority to build and operate a casino complex on Westwoods. To prevail in obtaining injunctive relief, the State was required to allege, and then prove, that the Shinnecock were proceeding with their plans to build and operate a casino in violation of both federal and state laws.

Accordingly, in its first cause of action, the State alleged that "[i]n passing IGRA," Congress "created a comprehensive statutory scheme intended to regulate all Indian gaming," which superseded the Supreme Court's pre-IGRA decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (JA63). The complaint alleged further that the "planned casino is not in 'Indian country' as defined in federal law and in IGRA," so the decision in *Cabazon* "has no application at all"

(JA63). Therefore, the State claimed, the defendants' "planned actions to build a casino and conduct gaming cannot be authorized by IGRA and, therefore, are in violation of the federal statute" (JA64).

In addition to injunctive relief, the State's complaint sought the following declaratory relief relative to its IGRA cause of action (JA65-66):

> i. the defendants are not a federally-recognized Tribe;
>
> j. the defendants' property which is the subject of this action, the gaming site, does not constitute "Indian lands" as that term is used in 18 U.S.C. § 1151 and in 25 U.S.C. 2701 et seq. ("IGRA")
>
> * * *
>
> l. the defendants may not pursue bingo gaming or any other form of gaming anywhere in the State of New York unless and until they fully comply with the provisions of State law governing all forms of gaming or the provisions of IGRA;
>
> m. the defendants are subject to the provisions of IGRA and, therefore, may not conduct bingo or any other form of gambling at the gaming site until they comply with its provisions;

Thus, on the face of the complaint, the State alleged a violation of IGRA and sought a declaration and injunction against the defendants,

requiring them to comply with IGRA before proceeding with their plans to build and operate gaming facilities. While the State also alleged that the Shinnecock were building the casino complex in violation of state law, the failure of the project to comply with IGRA was an element of its failure to comply with New York law (which, among other things, generally bars casino gambling outside the IGRA context). Accordingly, the district court's jurisdiction was proper under the well-pleaded complaint rule because the State alleged a cause of action based on the Shinnecock's failure to comply with federal law.

2. Plaintiffs' right to relief necessarily depends on resolving substantial questions of federal law.

Regardless of whether the complaints had expressly asserted a cause of action alleging a violation of federal law, the claims asserted by the State and the Town necessarily depend on the resolution of substantial questions of federal law. There is no dispute that the Shinnecock have not complied with state and local laws, and a central question in the case is whether compliance is required in order for the Shinnecock to build a casino complex on Westwoods, property owned by the Tribe that is not part of any federal or state-recognized reservation.

Because federal statutory and common law govern this substantial question, and because a federal court may resolve the question without disturbing the congressionally-approved balance between federal and state court jurisdiction, the federal courts have jurisdiction. *See Grable & Sons Metal Products, Inc. v. Dague Engineering & Manufacturing*, 545 U.S. 308, 312-14 (2005).

Here, issues regarding the Shinnecock's right to conduct gaming at Westwoods without complying with state and local law involve substantial federal issues, including the scope of IGRA and its effect on prior federal common law, whether the Shinnecock are a tribe under federal law, whether the Tribe retained aboriginal title and sovereignty over Westwoods,[14] and whether the equitable doctrines discussed in *Sherrill* apply in this case. *Cf. Oneida Indian Nation of N.Y. v. Oneida County*, 414 U.S. 661, 666-667 (1974) (finding jurisdiction on ground that Indians' possessory rights to lands derived from federal law). The district court recognized the essential federal issues in this case when it

[14] On the question of its sovereignty over property, the district court adopted the Tribe's argument that the burden of proof was on plaintiffs to prove that the Shinnecock do not hold aboriginal title or exercise sovereignty over Westwoods (SPA110). In other words, alleging and proving that the Shinnecock lacked sovereignty over the property was a necessary element of the plaintiffs' case.

joined the United States as a necessary party. These issues of federal law sensibly belong in federal court. And there is no indication that adjudicating these issues in federal court would disturb the federal-state jurisdictional balance. Because these issues are raised by both the State's and the Town's complaints, the district court properly exercised jurisdiction over both actions.

3. The district court properly exercised supplemental jurisdiction over the Town's claims under 28 U.S.C. § 1367(a).

In addition, the district court properly retained supplemental jurisdiction over the Town's claims, even though the Town did not explicitly invoke IGRA in its complaint. The federal district courts have supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Moreover, "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." *Id.* The federal courts have consistently held that where state law claims arise out of the same set of operative facts as federal claims the courts have discretionary power to hear state law claims.

Here, the district court permitted the Town to join in the State's complaint, which expressly alleged federal claims. By stipulation of all parties, including the Shinnecock, the Town was joined as a party plaintiff to the State's complaint (JA284-285). Thus, the Town is a party to the State plaintiffs' federal claim. The district court then consolidated the Town's complaint alleging violations of the Town's land use and zoning codes with the State's complaint, as their causes of action involved the very same property, sought the very same relief, and turned on the very same issues, again by stipulation of all parties (JA285-286). The Tribe's argument (Br. at 37, n. 18) that the State and Town did not jointly file a consolidated amended complaint is of no moment.[15] To the extent that the Town's causes of action are found not raise a federal question, the district court properly exercised supplemental jurisdiction under 28 U.S.C. § 1367(a) over the causes of action contained in the Town's complaint.

[15] The Shinnecock's argument (Br. at 37, n. 17) that the Town could not join the State's complaint because it has demonstrated "no standing to sue for violations of state laws" was waived by stipulation (JA284-285), and is in any event meritless. Indeed the Shinnecock concede (Br. at 7, n.4) 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 statute that itself provides a presumption that violative conduct, in and of itself, is harmful to the public."

The Shinnecock's final argument (Br. at 45-46), that if this Court were to find no supplemental or other federal jurisdiction over the Town's causes of action, all post-removal orders would be tainted and should be vacated, is mistaken. The Shinnecock rely on one case, from the Third Circuit, *Brown v. Francis*, 75 F.3d 860 (3d Cir. 1996), which in unusual factual circumstances adopted an odd rule of decision akin to the "fruit of the poisonous tree" in a criminal case. *Brown* involved an inverse condemnation claim filed in federal court by a private litigant, over which the district court had jurisdiction, and a competing eminent domain claim filed by the government in a territorial (state) court but removed to federal court, over which federal jurisdiction was lacking. The opposing claims sought different determinations as to the value of the same land. The claims were so intertwined that any resulting judgment would not be attributable solely to the federal claim. Under the unique circumstances of that case, the Third Circuit concluded that the joinder of the improperly-removed state condemnation action with the jurisdictionally – proper inverse condemnation action caused an unacceptable jurisdictional blurring – what the Third Circuit characterized as "taint." *Id*. at 866.

In contrast, here, the Shinnecock removed the Town's action to federal court, stipulated to joining it with the State's action, and obtained an unfavorable decision which they now contend is tainted under *Brown*. But there was no similar blurring of competing claims here. The Town has always been aligned in interest with the State, and the Town's claims, based on local land use and zoning laws, were in addition to the State's gaming and environmental claims. If for some reason the Town's claims did not fall within the district court's original or supplemental jurisdiction (notwithstanding the host of federal issues they, like the State's claims, inherently raise, *see*, *supra,* at pp. 66-68), the Town's claims are cumulative and entirely separable from the State's claims. Thus, regardless of the Town's participation, the district court's factual finding that the Shinnecock's aboriginal title was clearly and unambiguously extinguished, and the legal conclusion that the Shinnecock have no right to build and operate a casino complex at Westwoods, are unassailable. The Tribe's conclusory assertion that these findings and conclusions would be "tainted" (Br. at 46) if the Court were to find no basis for federal jurisdiction over the Town's claims is wrong and should be rejected.

B. This Appeal Is Not Moot.

The Shinnecock now argue (Br. at 99-108), that this case is moot and the judgment below should be vacated because the Shinnecock are now a federally-recognized tribe subject to IGRA and because the tribe "has no current intention to construct a gaming facility at Westwoods." But the fact that the Shinnecock have now obtained federal recognition does not insulate the Tribe from being subject to State and local laws that govern development of the Westwoods property. Moreover, the Shinnecock's unilateral statement that it no longer intends to build a casino at Westwoods cannot support vacatur of the judgment, especially one reached after a lengthy trial and years of litigation.

The Tribe's argument that the State's and Town's state law claims are moot because IGRA now preempts them is incorrect. First, the consolidated complaint alleges that the Shinnecock violated IGRA, not only because the Shinnecock were then not a federally recognized tribe, but also because Westwoods is not Indian country or Indian lands under IGRA and because the Tribe and the State had not entered into a compact to conduct class III gaming as IGRA requires. Thus, for example, an Indian tribe that purports to conduct class III casino

gambling on lands, such as Westwoods, that are not Indian lands under IGRA or Indian country under 18 U.S.C. § 1151, is not in compliance with IGRA and the State may seek declaratory and injunctive relief on that basis. The Shinnecock's reliance (Br. at 102) on *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996), is mistaken because the gaming in that case took place on Indian lands within the meaning of IGRA.

Nor does defendants' representation that they now have no plans to building the casino complex at Westwoods render this appeal moot. A party seeking to moot an issue in litigation through its own "voluntary conduct" bears a "heavy," "stringent," and "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000) (citations omitted). To allow a litigant to engineer a mootness-based dismissal at such a late date "would be justified only if it were absolutely clear that the [opposing] litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam). Here, defendants have

not disclaimed sovereignty over Westwoods; they merely have asserted that they have no current plans to build the casino there given the BIA's recent recognition of the Shinnecock as a Tribe. This belated assertion, now that many years of litigation yielded a decision unfavorable to them, does not demonstrate with absolute clarity that the plaintiffs have no need of the judicial protection they sought when they commenced this lawsuit.

Even if this Court concludes that the Shinnecock's representation that they no longer intend to build a casino complex at Westwoods requires the dismissal of the Tribe's appeal as moot, the Court should not vacate the decision below. The party seeking vacatur bears the burden of demonstrating entitlement to that extraordinary remedy. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26, (1994). In considering whether or not vacatur of a lower court opinion is warranted when a case becomes moot on appeal, the Court looks to "the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (internal quotation marks omitted). If the case has become moot due to circumstances unattributable to any of the parties or from the unilateral action of the party who prevailed in the

district court, vacatur is usually warranted. *See id.* at 23. But when, as in this case, "the party seeking relief from the judgment below caused the mootness by voluntary action," *id.* at 24, vacatur is not warranted.

Here, the Shinnecock should not be permitted unilaterally to undo an unfavorable judgment after years of litigation and enormous expenditures of the parties' and judicial resources. Consequently, if this Court determines that the case is now moot, it should dismiss the Shinnecock's appeal but should let stand the district court's decision and judgment.

POINT II

SHERRILL BARS THE SHINNECOCK'S CLAIMS OF SOVEREIGNTY OVER WESTWOODS AND OF SOVEREIGN IMMUNITY FROM THIS LAWSUIT

The district court relied on the Supreme Court's decision in *Sherrill* to reject both the Shinnecock's claim of sovereign immunity from this lawsuit as well as the Shinnecock's claim on the merits to sovereignty over Westwoods. The district court concluded, in accordance with *Sherrill*, that the doctrines of laches, acquiescence, and impossibility barred these assertions of tribal sovereignty because of the

Tribe's inordinate delay in asserting sovereignty and the substantial disruptions that its belated assertions of sovereignty would cause. This Court should affirm these holdings.

We explain in subsequent sections the district court's other reasons for rejecting the Shinnecock's claim of sovereign immunity from suit (Point III) and its other reasons for rejecting the Shinnecock's claim to sovereignty over Westwoods (Points IV and V). But we begin with the *Sherrill* analysis because it provides a single and compelling reason for rejecting both claims: namely, that any assertion of sovereignty by the Shinnecock regarding Westwoods, including a claim of sovereign immunity from this suit to enforce the State's and the Town's longstanding regulatory jurisdiction over Westwoods, is barred by equitable principles such as laches and the other delay-based doctrines, which this Court has called "the *Sherrill* formulation." *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 275 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).

Accordingly, Point II(A) first demonstrates that under *Sherrill*, laches bars the Shinnecock's belated claim of sovereignty over Westwoods. Point II(B) then explains that *Sherrill* compels the

conclusion, contrary to this Court's now-vacated decision in *Oneida Indian Nation of N.Y. v. Madison County and Oneida County, N.Y.*, 605 F.3d 149 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 459 (2010), *opn. vacated and remanded*, 2011 W.L. 55360 (Jan. 10, 2011), that the *Sherrill* formulation also bars the Shinnecock's assertion of sovereign immunity from this suit.

A. *Sherrill* Bars The Shinnecock's Assertion of Sovereignty Over Westwoods.

In *Sherrill,* the Supreme Court rejected the Oneida Indian Nation's ("OIN") attempt to revive sovereignty over lands it had last governed more than 150 years earlier, holding that the OIN "cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* at 203; *see also id.* at 222 (Justice Souter concurring) (the OIN "is not now immune from the taxing authority of local government"). The Court held that the OIN was not exempt from state and local taxation and regulation of lands that the OIN had recently purchased in Madison and Oneida Counties within its ancient reservation boundaries. The Court relied on the equitable doctrines of laches, acquiescence, and impossibility, which were evoked by the long passage of time before the assertion of sovereignty, the non-Indian

nature of the governance and character of the present day area, the serious burden on the administration of state and local governance that the exercise of sovereignty would engender, the long-settled expectations of the region's residents, and the adverse impacts on neighboring landowners that would result from the OIN's exercise of sovereignty.

These same equitable concerns doomed the recent land claim brought by the OIN, *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir.), *rehg. en banc denied*, __ F.3d __ (2010); the land claim brought by the Cayuga Indian Nation, *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d. Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006); and even the land claim brought by the Shinnecock, *Shinnecock Indian Nation v. New York*, 2006 W.L. 3501099 (E.D.N.Y. 2006) (involving lands east of Canoe Place). Similarly here, the district court correctly concluded that these equitable principles preclude the Shinnecock from asserting sovereignty over Westwoods.

The Shinnecock first asserted sovereignty over Westwoods in 2003, after acquiescing in State and local sovereignty over the land for nearly 350 years. The Tribe's delay in asserting sovereignty is

inordinate by any measure, dwarfing even the tribal delay in *Sherrill*. The record establishes that the Shinnecock acquiesced when the Town exercised its authority to create the 1738 Canoe Place Division. These lots were subsequently allotted exclusively to the non-Indian proprietors of the Town (EX5012-5016; JA3677; SPA69). Yet there is no documented record of any objection or challenge by or on behalf of the Tribe to the laying out or allotment of the 1738 Canoe Place Division (JA3688; SPA35).

Other examples of the Town's exercise of governmental authority over Westwoods (and other lands west of Canoe Place) included proof that at various times during the 18th century the Southampton Trustees regulated timber resources throughout the Town, including the right of the Shinnecock to cut timber (JA5580-5586; JA4283-4284 [pp925-932]). For example, by order of the Southampton Trustees, dated April 2, 1754, no timber was to be cut or carted off "any part of the undivided land westward of Canuplace on penalty of six shillings" (EX682; JA5226; JA4285 [pp933-934]). And then, in 1808, the Shinnecock clearly demonstrated their acquiescence in the Town's sovereignty over

Westwoods when they voted to enter into the lease with the Town for use of the property.

A more recent example was the Town's 20th-century widening and improvement of a local road (Newtown Road) that traverses Westwoods, without any objection or protest from the Shinnecock (JA6347-6349; JA4295-4297 [pp976-981]). Finally, the Town classified Westwoods as "residential" property when it enacted its zoning law in 1957, and has retained that classification at all times since. Yet until 2003, the Shinnecock never took any legal action to challenge local authority over Westwoods. Nor did they ever take action in derogation of State laws before that year. There is no question that the Shinnecock's recent assertion of sovereignty over Westwoods would be inherently disruptive to patterns of governance and the settled expectations of the State and the Town, as well as the residents of the area.

And as the district court found, the casino complex itself would have enormous impacts on the communities surrounding Westwoods. First, a casino at Westwoods would require the State and local governments to make significant expenditures of funds to provide essential services to the facility, including police, fire, ambulance, and

water. And if the Shinnecock were able to assert its sovereignty over the property, the State and local governments may be unable to impose property taxes to offset those expenditures (SPA143) .

Second, the district court made a factual finding after examining the conflicting expert testimony, that "a casino at Westwoods would have substantial disruptive impact on the area's already saturated transportation infrastructure" (SPA143). As the court observed, the traffic in and around Southampton in the summer is already extremely heavy and results in substantial delays to motorists. And a project of the size proposed would create seriously detrimental traffic and safety impacts on the local roads and surrounding communities even if ramps were built from Sunrise Highway as defendants' experts proposed (SPA143.)

Third, the district court properly credited the evidence the State's and Town's experts presented at trial regarding the negative health and environmental impacts that would flow from the project if it went forward. Specifically, the court found that there would be numerous short-term and long-term impacts, including (1) the degradation of water quality; (2) the loss or fragmentation of very sensitive and rare

ecological sub-communities in the area; (3) potential erosion of the coastal bluff area; (4) the generation of very detrimental edge habitats that would provide avenues for incursion of non-native species into the interior of the forest; and (5) potential damage to a critical ecosystem that supports dozens of bird species and rare plant species. In addition, the district court found "credible evidence" that increased traffic would generate pollutants that would cause adverse health impacts, and noise impacts detrimental to the surrounding residential community. (SPA144.)

Finally, the district court properly rejected the Tribe's arguments that it intended to use best environmental practices and comply with environmental standards; and that the plaintiffs' experts based their opinions on potential larger scale casino facilities than those initially proposed. The Court noted that the Tribes' experts themselves had analyzed larger scale facilities and concluded that a facility of up to 300,000 square feet with 7,000 gaming devices would be profitable. Regardless, the court found, even the Tribe's initially contemplated 61,000 square foot facility would be seriously disruptive and thus is

barred by the Supreme Court's analytical framework in *Sherrill* (SPA145-1148).

B. *Sherrill* Also Precludes the Shinnecock from Invoking Sovereign Immunity from this Lawsuit.

The district court properly held that the Shinnecock are also precluded by the Supreme Court's decision in *Sherrill* from asserting sovereign immunity from lawsuits brought by the State and Town to enforce state and local environmental, land use, and gambling laws.

In *Sherrill*, the Supreme Court held that the OIN was precluded by laches and other delay-based doctrines from asserting sovereign immunity from the city's tax enforcement proceedings concerning the lands that the OIN had recently acquired within its ancient reservation boundaries. The OIN sued, among others, the City of Sherrill in federal court after the city had initiated eviction proceedings against the OIN after the OIN's nonpayment of taxes and the city's administrative foreclosure. *See Sherrill*, 544 U.S. at 211; *see also Oneida Indian Nation of N.Y. v. City of Sherrill*, 145 F. Supp. 2d 226, 236-40 (N.D.N.Y. 2001) (in *Sherrill*, the OIN sought to bar local governments from foreclosing or otherwise enforcing their real property taxes), *aff'd*, 337

F.3d 139 (2d Cir. 2003), *rev'd and remanded*, 544 U.S. 197 (2005). The OIN sought "declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the [OIN] purchased in the open market," including foreclosure and eviction. *Sherrill*, 544 U.S. at 214.

The Court held that the OIN could not invoke immunity to defend against the city's real property tax enforcement proceedings. In his dissent, Justice Stevens suggested that tribal immunity could be raised "as a *defense* against a state collection proceeding" and observed that *Sherrill* itself presented that very issue. *Id*. at 225. However, the Court's majority squarely rejected that argument:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. *Post*, at 225. *We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively*.

Id. at 214 n.7 (emphasis added); *see also id*. at 222 (Justice Souter concurring) (rejecting claim of tribal sovereignty, "whether affirmative or defensive"). Accordingly, in *Sherrill* the Court rejected the OIN's claim of immunity from tax enforcement proceedings.

Likewise, under *Sherrill*, the Shinnecock cannot invoke sovereign immunity to bar this action to enforce state and local laws over Westwoods. Depriving the State and Town of their enforcement authority would inevitably result in the "disruptive practical consequences," including jurisdictional "checkerboard[ing]," that led the Supreme Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n. 13 (observing that the OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"). Therefore, the same equitable principles of laches, acquiescence and impossibility that barred the OIN's claim of sovereignty in *Sherrill* bar the Shinnecock's assertion of sovereign immunity here.

Further, the Supreme Court has now vacated this Court's decision in *Madison County v. Oneida Indian Nation*, 605 F.3d 149, 156-60 (2d Cir 2010), *cert. granted* (Oct. 12, 2010), *vacated and remanded* (Jan. 10, 2011), which held that tribal sovereign immunity barred the counties' proceedings to foreclose the real property taxes that *Sherrill* required the OIN to pay. Thus, *Madison County* is a nullity and does not bind this panel. Moreover, this panel should not adopt the

reasoning of *Madison County* because, as explained here, it was incorrectly decided. The OIN essentially conceded as much when, following the grant of certiorari, the OIN waived sovereign immunity from real property tax foreclosure proceedings throughout the United States, thus prompting the Supreme Court to vacate the judgment and remand the case to this Court.

The panel's decision in *Madison County* erred in several respects. First, it ignored the Supreme Court's rejection of the OIN's defensive use of immunity in *Sherrill*. Specifically, the panel did not address the dispositive footnote 7 in *Sherrill*, or that the OIN had asserted sovereign immunity as a defense to both the City's foreclosure and eviction proceeding. Instead, the *Madison County* panel found that *Sherrill* did not apply to the OIN's claim of sovereign immunity, based in part on the panel's mistaken distinction between tribal sovereign authority over land and tribal sovereign immunity. But the Supreme Court drew no such distinction in *Sherrill*, repeatedly using the words "sovereign" and "sovereignty" in holding that the OIN's claim of "sovereign immunity from local taxation" was barred. 544 U.S. at 214; *see also id.* at 202, 203, 213, 214, 215 n.9, 216, 219, 220, 221 n.14.

As the term implies, "sovereign immunity" is an attribute of sovereignty generally. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25, 30-31 (1st Cir. 2006) (en banc) ("tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty" and "[t]he Tribe has not explained how being subject to the *enforcement* of the State's cigarette tax scheme is an infringement on its retained sovereignty when being subject to the *requirements* of the scheme is not"). Indeed, the Supreme Court's decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), recognized that tribal sovereign immunity is part of the tribes' "inherent sovereign authority over their members and territories." *Id.* at 509 (suits against Indian tribes "are *thus* barred by sovereign immunity") (emphasis added).

Sherrill squarely presented the issue whether a local government can enforce its real property tax laws against the OIN. *Sherrill's* context makes clear that the Court was permitting the city's eviction proceeding to go forward over the OIN's sovereignty-based objections. Thus, the sovereignty that *Sherrill* barred the OIN from exercising regarding its lands necessarily included the assertion of sovereign

immunity from foreclosure and other enforcement proceedings. The same anomaly would occur in this case if the State and the Town were unable to enforce their regulatory jurisdiction against the Shinnecock. Depriving the counties of their enforcement authority will inevitably result in the "disruptive practical consequences," including jurisdictional "checkerboard[ing]," that led the Supreme Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n. 13. Therefore, contrary to the panel's holding in *Madison County*, the same equitable principles of laches, acquiescence and impossibility that barred the OIN's claim of sovereignty in *Sherrill* bar the Shinnecock's similarly disruptive assertion of sovereign immunity here.

POINT III

THE TRIBE'S ASSERTION OF IMMUNITY FROM SUIT IS MISPLACED FOR OTHER REASONS AS WELL

The Shinnecock's argument that this lawsuit should be dismissed on the ground of sovereign immunity is barred not only by *Sherrill*, but for two other reasons. As the district court held, the Shinnecock tribal officials are not immune from suits for prospective injunctive relief, and

the defendants in any event waived immunity from suit when they removed these cases to federal court.

A. Sovereign Immunity Does Not Protect Tribal Officials from Suit for Injunctive Relief Under *Ex Parte Young*.

Even if the Shinnecock were not barred by laches, acquiescence, and impossibility from invoking sovereign immunity from suit by the State and Town, its tribal officials could be, and here have been, sued in their official capacities for prospective equitable relief under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), as the district court held (SPA158).

Under *Ex parte Young*, the federal courts are not barred by the Eleventh Amendment from enjoining state officers from violating the United States Constitution or a federal statute. In *Ex parte Young,* a private party was allowed to pursue an injunction in federal court against Minnesota's attorney general to prohibit his enforcement of a state statute alleged to violate the Fourteenth Amendment. This result rested upon the fiction that the suit went against the officer and not the State, thereby avoiding sovereign immunity's bar. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 114 n. 25 (1984). The officer was not permitted to take refuge in the State's immunity if he continued to

contravene federal law, and is "stripped of his official or representative character and ... subjected in his person to the consequences of his individual conduct." *Ex parte Young,* 209 U.S. at 159-60. The doctrine of *Ex parte Young* applies where the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, 645 (2002) (citation and quotation marks omitted).

The principle of *Ex parte Young* also strips tribal officials of immunity from prospective injunctive relief. In *Santa Clara Pueblo,* for example, the Supreme Court relied on *Ex parte Young* to hold a tribal officer is "not protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978); *see Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State," citing *Ex parte Young*); *cf. Puyallup Tribe, Inc. v. Dep't of Game of Wash.,* 433 U.S. 165, 171-72 (1977) ("[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible.").

This Court has likewise held that a suit for injunctive relief can be pursued against a tribal official in his official capacity. *Garcia v. Akwesasne Hous. Auth.,* 268 F.3d 76, 87-88 (2d Cir. 2001) (even though plaintiff could not sue tribal housing authority, she could "still obtain injunctive relief against it by suing an agency officer in his official capacity"); *Bassett v. Mashantucket Pequot Tribe,* 204 F.3d 343, 358-59 (2d Cir. 2000) (should district court find that agency is entitled to benefit of tribe's sovereign immunity, plaintiff would need to amend to seek injunction against administrators of museum rather than museum itself), *on remand*, 221 F. Supp. 2d 271, 278-79 (D. Conn. 2002) ("[U]nder the doctrine of *Ex parte Young,* prospective injunctive or declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact."). *See also Frazier v. Turning Stone Casino,* 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003) (*"Ex parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal

officials acting in their official capacities . . . to enjoin conduct that violates federal law.").[16]

In this case, the State and the Town asserted claims under State, federal, and local law for prospective declaratory and injunctive relief against the Shinnecock and its trustees in their official capacities. Thus, the district court correctly held in the alternative (SPA158) that the State's and Town's claims can proceed against the defendant tribal officials, even if the Tribe were entitled to assert sovereign immunity.

B. Defendants Waived Any Defense of Sovereign Immunity When They Removed These Actions from State Supreme Court.

The Tribe voluntarily submitted to the jurisdiction of the federal courts by removing the State's and Town's claims to federal court. The Supreme Court, in *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613, 616 (2002), held that a state waives its Eleventh Amendment immunity from suit when it voluntarily removes a lawsuit to federal court. Although *Lapides* concerned immunity only

[16] Other Circuits have likewise recognized that tribal officers are not immune from suits for prospective injunctive relief. *E.g.,Vann v. Kempthorne*, 534 F.3d 741, 749-56 (D.C. Cir. 2008); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir.1984).

as to state law claims, its broad rationale suggests strongly that the invocation of federal court jurisdiction amounts to a waiver of sovereign immunity as to both state and federal claims. *See, e.g., Lombardo v. Pennsylvania Dep't of Public Welfare*, 540 F.3d 190, 197 and n. 5 (3d Cir. 2008); *Embury v. King,* 361 F.3d 562, 564 (9th Cir. 2004); *Estes v. Wyo. Dep't of Transp.,* 302 F.3d 1200, 1204 (10th Cir. 2002); *Brownscombe v. Dep't of Campus Parking,* 203 F. Supp. 2d 479, 482 (D. Md. 2002).

As the district court held in this case, the issue of Indian tribal sovereignty should be analyzed under an analogous legal framework. The court adopted the analysis of a Nevada district court in *State Engineer v. South Fork Band of the TE-Moak Tribe of Western Shoshone Indians*:

> In the instant case Respondent Tribe joined in the removal to federal court, answered the complaint, and opposed a motion to remand on immunity grounds. If the Tribe were a state, that would clearly be sufficient to waive the state's sovereign immunity. We see no reason to treat the Tribe differently. As such, we treat the Tribe's actions as amounting to a clear and unequivocal waiver of immunity in this Court.

66 F. Supp. 2d 1163, 1173 (D. Nev. 1999).

The Tribe asks this Court to adopt the contrary views of California district courts rejecting the *State Engineer* view and holding that Indian tribes are more like foreign sovereigns who do not waive immunity by removal. (Br. at 55, n. 33, citing, *e.g.*, *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F. Supp. 2d 953 (E.D. Cal. 2009)). But the *Ingrassia* court was wrong to equate tribal sovereign immunity with the immunity of foreign sovereigns.

Native American tribes have been described as "domestic dependent nations" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)), and "wards of the Nation" *(U.S. v. Kagama*, 118 U.S. 375, 383 (1886)), giving tribes a "peculiar 'quasi-sovereign' status." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). Tribes retain "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." *White Mountain Apache v. Bracker*, 448 U.S. 136, 142 (1980); *see United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character."). Indeed, tribal sovereignty "exists only at the

sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 450 U.S. at 323.

The "unique and limited character" of tribal sovereignty stands in contrast to the plenary sovereignty of the federal government and each of the fifty States under the Constitution. *See Alden v Maine*, 527 U.S. 706, 712-715 (1999) ("our Constitution . . . reserves to [the States] a substantial portion of the Nation's primary sovereignty . . . . The States thus retain a residuary and inviolable sovereignty"); *cf. Three Affiliated Tribes,* 476 U.S. at 890-891 ("the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy"), citing *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 513 (1940).

Allowing the tribes to assert immunity from all suits brought by the State and Town to enforce their laws on lands within their sovereign jurisdiction would create without justification a kind of super-sovereignty for tribes, giving them the right to resist lawfully-imposed regulatory requirements that no foreign nation or state sovereign enjoys. That result cannot be reconciled with the "limited character" of

tribal sovereignty and, correspondingly, limited tribal immunity from suit. *See Three Affiliated Tribes*, 476 U.S. at 890-91.

Thus, the district court properly held, as an alternative ground for its decision, that the Shinnecock cannot invoke tribal sovereign immunity because the Tribe voluntarily removed the state actions to federal court.

POINT IV

THE DISTRICT COURT CORRECTLY FOUND THAT SHINNECOCK'S ABORIGINAL RIGHTS IN WESTWOODS WERE EXTINGUISHED DURING THE COLONIAL ERA

Not only was the Shinnecock's assertion of sovereignty over Westwoods barred by the *Sherrill* formulation of laches and other equitable doctrines, but the Tribe's claim of sovereignty over Westwoods is meritless, as the district court found, because the Tribe's aboriginal title to Westwoods was extinguished in the 17th century.

A. The Burden Of Proof Regarding Extinguishment of Aboriginal Title Is "Preponderance of the Evidence."

The Shinnecock first argue (Br. at 71) that the applicable standard of proof regarding the extinguishment of aboriginal title is "clear and convincing evidence," rather than "preponderance of the

evidence." The district court properly rejected this assertion, recognizing that the citations in *Alabama-Coushatta Tribe of Texas v. United States*, No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000), the only case supporting the Tribe's contention, do not support application of such a standard (SPA111).

The Shinnecock present no authority contradicting the district court's holding, but merely reiterate their reliance on *Alabama-Coushatta* and cite several additional cases which apply a "plain and unambiguous" standard of proof, rather than the "clear and convincing" standard they urge. *See County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247-48 (1985); *see also Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004); *Greene v. Rhode Island*, 398 F.3d 45, 54 (1st Cir. 2005). The Tribe is unable to cite any authority which equates "plain and unambiguous" with "clear and convincing," and the district court explicitly, and properly, rejected that proposition (SPA111).

In any event, even if the Shinnecock's contention regarding the applicable standard of proof were correct, the district court's determination regarding extinguishment must be upheld, for the court

found that the proof of extinguishment adduced by the State and the Town was "clear and convincing" (SPA111), substantially exceeding the applicable standard.

B. Five Unambiguous Colonial-Era Documents Confirm (i) the Ancient Shinnecock's Conveyance, Cession, and Relinquishment of Its Interest in the Lands West of Canoe Place, Including Westwoods; and (ii) the British Crown's Intent to Extinguish Permanently Any and All Shinnecock Aboriginal Rights in Those Lands.

The State and the Town presented the district court with five colonial-era documents (the Ogden Deed, Topping Deed, Nicolls Determination, Andros Patent, and Dongan Patent), by which the tribe conveyed and relinquished its entire interest in the lands west of Canoe Place, and by which the British Crown expressed its intent to extinguish any and all Shinnecock aboriginal rights in those lands. Not a single document offered by Appellants reflects anything to the contrary.

1. The Shinnecock Relinquished Their Rights to Westwoods in the Ogden and Topping Deeds.

Each instrument of conveyance, *i.e.*, the 1659 Ogden Deed and the 1662 Topping Deed, includes unequivocal language of relinquishment and conveyance. The Ogden Deed provides, *inter alia*, that the

Shinnecock have "*given and granted unto Mr. John Ogden and his heirs for ever*" (EX278) (emphasis added) the tract of land described therein, which included Westwoods. (JA5198; JA6327; JA6349; EX278; JA6350; SPA47).

The Topping Deed provides, *inter alia*, that the Shinnecock have "*given and granted* and by these presents do *give and grant bargain sell assign and set over* unto Thomas Topping … *for ever all our right title and interest* that we have or ought to have in a certain tract of land . . ." running from Canoe Place west to Seatuck (including Westwoods). (EX299) (emphasis added); (SPA49; JA3677). This language of conveyance could not be more definitive. It has been held that "the 'all right, title, and interest' language is 'precisely suited' for the purpose of eliminating Indian title." *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979) (citation omitted). In *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766 (1985), the Supreme Court noted that "[t]he Treaty language that ceded that entire tract . . . stated only that the Tribe ceded 'all their right, title, and claim' to the described area. Yet that general conveyance

unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed."

The Supreme Court has recognized also that "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (referencing *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)); *see also Seneca Nation*, 382 F.3d at 260-62 (Seneca's 1764 conveyance of Niagara River islands to the Crown's representative extinguished their aboriginal title to the islands).

2. The Nichols Determination Validated The Ogden and Topping Conveyances.

The three subsequent pronouncements of the English sovereign are no less clear. The Nicolls Determination sets forth Governor Nicolls' validation of the conveyance effectuated by the Topping Deed, his declaration that the lands of the Topping Purchase were now owned exclusively by Southampton, and his intent to extinguish any and all Shinnecock aboriginal rights in those lands. The language of the

determination is explicit. Governor Nicolls declared, *inter alia*, that "*all the right and interest* that ye said Capt Thomas Topping and John Cooper have by the said deeds or any other way or means obtained . . . *is belonging, doth and shall belong unto the town of Southampton . . . and their successors forever*." (EX321) (emphasis added). He also directed Thomas Topping to "deliver the town of Southampton all [his] deeds, writings and evidences that [he has] of a certain tract of land [the lands of the Topping Purchase]" (EX321), and directed the Town to pay to the "Indians concerned to receive it" the sum of four score fathoms of wampum – precisely the amount specified as consideration in the Topping Deed (*id.*). Finally, he promised to defend the Town in its peaceable enjoyment of the lands of the Topping Purchase, "[a]gainst *all other claims whatsoever*" (*id.*) (emphasis added).

The directives of Governor Nicolls were subsequently implemented, first, through an instrument by which Thomas Topping formally assigned all his right, title, and interest in the lands of the Topping Purchase to Southampton (EX733; SPA51); and second, by the Town's remittance of the "four score fathoms of wampum" to the Shinnecock, who acknowledged receipt and contentment with the

transaction by a writing dated February 22, 1667 (N.S.). (EX2577; EX2581). Even apart from the subsequent patents of Governors Andros and Dongan, the Shinnecock's acknowledgment of payment for the lands of the Topping Purchase establishes the extinguishment of the tribe's aboriginal title to those lands. *See United States v. Dann*, 873 F.2d 1189, 1194 (9th Cir. 1989) ("payment for the taking of aboriginal title establishes that title has been extinguished"), *citing United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976) ("any ambiguity about extinguishment . . . has been decisively resolved by congressional payment of compensation").

The Tribe asserts (Br. at 81) that two of the stipulated facts (JA3675) somehow operate to "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." Appellants have misinterpreted those stipulations and ignored the substantial weight of the evidence presented at trial.

The Shinnecock also suggest that the stipulation (JA3675) that Governor Nicolls issued no patent or grant for any lands within

Southampton during his tenure as governor is at odds with the Nicolls Determination. The suggestion is meritless. The Nicolls Determination, admittedly, was not a patent or land grant, but this is immaterial as far as the consequences of the determination are concerned. Patents were not the sole means through which a sovereign could extinguish a tribe's aboriginal title. In *Seneca Nation of Indians v. State of New York*, 382 F.3d 245, 249 (2d Cir. 2004), this Court noted that "[e]xtinguishment could occur through a taking by war or physical dispossession, or by contract or treaty." *Id.* (emphasis added). Thus, there was no need for Nicolls to issue a grant to Southampton. The Shinnecock had already conveyed their interest via the Topping Deed, which Nicolls ratified through his determination.

The Tribe asserts also (Br. at 81) that stipulation No. 68 is "devastating" to the State's and Town's contentions because it allegedly includes a statement (*i.e.*, that at the time of the Andros Patent, title to all lands of the Town were vested in the King of England) which precludes "the possibility that governor Nicolls transferred title of any lands within the Town to anyone." But the status of title to Town lands at the time of the Andros Patent is not the thrust of this stipulation at

all. The thrust of the stipulation is simply that prior to the 1676 Andros Patent the English government possessed sovereignty over Southampton lands, and thereby possessed the authority to extinguish aboriginal title. Moreover, the final phrase of the stipulation, *i.e.*, "the title thereto being vested in the King" (JA3675), does not state that at *all* times prior to November 1676 title to Southampton lands was vested in the King; nor does it say that title to Southampton lands was *never* vested in anyone other than the King.

In addition, the interpretation the Shinnecock urge is at odds with numerous other fact stipulations, such as one which references a 1640 deed to Southampton lands, from certain Shinnecock Indians, as grantors, and certain named freeholders of the Town, as grantees (JA3668); and others (JA3679-3680) that pertain to the tribe's 1978 litigation request, in which the Shinnecock represented that "the Tribe's domain to the west of Canoe Place was conveyed to non-Indian individuals in 1659, 1662" (JA2514; SPA65). Stipulation No. 68 was obviously not intended as a representation that the Ogden Deed, Topping Deed, and Nicolls Determination were meaningless exercises, as defendants contend. That the parties reached stipulations regarding

the Nicolls Determination (*see* JA3674-3675) suggests quite the contrary.

It is neither incongruous nor inherently contradictory for the district court to have found that Governor Nicolls issued no patents *and* that his determination operated to extinguish the Tribe's aboriginal title to lands west of Canoe Place.

3. The Andros and Dongan Patents Confirmed the Relinquishment of Aboriginal Rights

The Andros Patent of 1676 (EX707) describes the "certaine Tract of Land" constituting the "Towne . . . [of] South Hampton," as running from Wainscott on the east to Seatuck on the west (EX708; EX1570). These are virtually the same east-west boundaries of the Town that exist today (EX2231). Moreover, in his patent, Governor Andros states that he does explicitly "Ratifie Confirme and grant" unto the freeholders and inhabitants of the Town, "All the aforementioned Tracts of Land . . . *and of every part and parcel thereof . . . for ever*" (EX708) (emphasis added). Clearly, as far as Governor Andros was concerned, the Town was the owner of all lands from Wainscott (East Hampton) to Seatuck

(Brookhaven),[17] including Westwoods, subject to no claims by the Shinnecock or anyone else.

The Andros Patent provides also that "*if* it shall so happen that any part or parcell of the Lande within the bounds and Limits afore described be not already Purchased of the Indyans It may bee purchased (as occasion) according to Law" (EX709) (emphasis added). By this *conditional* language Governor Andros was not suggesting that there were, in fact, lands not already purchased from the Indians. In fact, Appellants' expert, Katherine Hermes, conceded the possibility that at the time of the Andros Patent all lands within the bounds of the Town had already been purchased from the Indians (JA4691 [pp2583-2584]).

The Andros Patent was issued to the proprietors of Southampton when New York was no longer under the jurisdiction of Connecticut Colony. The district court credited the trial testimony of Appellees' expert Alexander von Gernet, Ph.D., and recognized Governor Andros'

[17] In 1889, the New York Court of Appeals commented that "Prior to the date of the Andross [sic] charter all the Indian deeds had been delivered and the rights of the Indians extinguished. Under that charter the title had vested absolutely in the town." *The Trustees of the Freeholders and Commonality of the Town of Southampton v. The Mecox Bay Oyster Co.*, 116 N.Y. 1, 8 (1889).

authority to issue the patent and to extinguish Indian title in the process (SPA53; JA5094-5096).

A number of years after the issuance of Governor Andros' patent an application was made by Major John Howell, a freeholder of the Town, and one of the patentees under the Andros Patent, for confirmation unto the freeholders of the Town "in a more full & ample manner all the above recited tracts and parcells of land within the limitts and bounds aforesaid and [to] finally determine the difference between the Indyans and the ffreeholders of the said towne of Southampton" (EX325; JA3676).

In response, on December 6, 1686, New York Provincial Governor Thomas Dongan issued the Dongan Patent to the proprietors of Southampton (EX323). The district court properly recognized Governor Dongan's authority to issue such a Patent, and to extinguish Indian title in the process (SPA53), consistent with the testimony of Dr. von Gernet, Ph.D. (JA5070-5104), and with *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1150 (2d Cir. 1988), in which this Court confirmed that prior to the American Revolution, Great Britain possessed the right to extinguish Indian title. *See also Seneca Nation of Indians v.*

New York, 206 F. Supp. 2d 448, 505-06 (W.D.N.Y. 2002), *aff'd,* 382 F.3d 245 (2d Cir. 2004), *cert. den.,* 126 S.Ct. 2351 (2006) (same). (SPA104).

The Dongan Patent restates and reiterates the contents of the Andros Patent, including its description of the "tract of land" belonging to Southampton, running from Wainscott to Seatuck. (EX324; EX707; JA6313; JA5210-5212). Most importantly, however, the Dongan Patent recites that Governor Dongan had:

> examined the matter in variance between the freeholders of the said Towne of Southampton and the Indyans and do *f*inde that the freeholders of the Towne of Southampton aforesaid have lawfully purchased the lands within the Limitts and bounds aforesaid of the Indyans and have payd them therefore according to agreement so that all the Indyan right by virtue of said purchase is invested into the ffreeholders of the Towne of Southampton aforesaid. . . .

(EX324).

Thus, while the Andros Patent left the door open to the possibility that not all Indian lands had yet been purchased by the Town ("*if* it shall so happen that any part or parcel of the lands from Wainscott to Seatuck had not already been purchased from the Indians") (emphasis added), the Dongan Patent slammed that door shut when it declared that Governor Dongan had examined the matter and found that the

freeholders had lawfully purchased the lands from Wainscott to Seatuck and paid the Shinnecock, so that "*all the Indian right is invested in the freeholders of the Town*." (EX707; EX325-326) (emphasis added). It is hard to imagine a plainer, more unambiguous expression of the extinguishment of aboriginal title.

While the Shinnecock are constrained to concede that there is no ambiguity in either the Andros or Dongan Patent (Br. at 82 ["nothing in the text of the Andros or Dongan Patents suggests that they are ambiguous"]),[18] they nevertheless invoke the "well-settled principle of statutory construction that courts are to construe ambiguities in favor of Indians" (Br. at 83), and urge that "under these standards of strict

[18] Despite their concession that no ambiguity appears in the Dongan Patent, the Tribe continues to advance the suggestion that the Dongan Patent somehow relates only to lands *east* of Canoe Place (Br. at 29). This defies not only the plain language of the document (which makes explicit reference to the lands from "Wainscott . . . to . . . Seatuck"), but also the credited testimony of Dr. von Gernet, who found it "inconceivable" that (i) Governor Dongan had only one document, *i.e.*, the Farrett grant, before him, while describing geographic boundaries that extended well beyond that document; and that (ii) the boundaries described by Governor Dongan happened "coincidentally" to be in accord with other documents, such as the Topping Deed. (JA4638 [pp2300-2302]; JA4640 [pp2309-2310]). Dr. von Gernet was confident that Governor Dongan had the Ogden and Topping Deeds as well as the Farrett grant before him, when he issued the Dongan Patent, because of the strength of the redundant language which was intended to remove lingering doubt, and the fact that Governor Dongan reiterated the description of the lands addressed by Andros Patent, which sets forth a western boundary that is identical to that found in the Topping Deed and Odgen Deed (JA4616-4617 [pp2214-2217]; JA4709 [pp2300-2302]; JA5156). The district court appropriately rejected Shinnecock's suggestion that Governor Dongan's patent references lands only to the east of Canoe Place (SPA54).

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" (*id.*). The Shinnecock do not explain how they can concede that the language of the patents is unambiguous and yet invoke the canon that requires construing ambiguities in favor of the Indians. In any event, as a matter of law, the explicit language of these colonial era documents must be given its intended construction, *despite* the principle that ambiguities are to be resolved in favor of Indian tribes:

> The above principles require the court to take a sympathetic view toward the position of the [Indians], but those principles do not permit us to ignore the clear wording of a treaty, agreement, or enactment, or to disregard the intent of Congress. The Supreme Court has cautioned that the courts cannot remake history or expand treaties and legislation beyond their clear terms to remedy a perceived injustice suffered by the Indians.

United States v. Minnesota, 466 F. Supp. at 1385; *see also Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 507 (W.D.N.Y. 2002), *citing Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *Confederated Bands of Ute Indians v. United*

States, 330 U.S. 169, 179 (1947); *Choctaw Nation of Indians*, 318 U.S. 423, 432 (1943).

With regard to all five of the critical colonial-era documents, the district court noted correctly that "[n]either the language nor the context . . . is ambiguous in any way; rather, the documents reflect a clear and compelling historical record establishing the sale of the land by the Shinnecock Nation and the repeated approval and confirmation of this conveyance of title to Southampton by various New York Provincial Governors, acting under the authority of the British Crown" (SPA121). This determination was not clearly erroneous, and should not be disturbed on appeal.

C. Through Their Subsequent Actions the Shinnecock Confirmed Their Understanding of the Meaning and Effect of the Five Colonial-Era Documents.

The Tribe argues (Br. at 72-73) that "nothing said about extinguishment subsequent to the 17th century is of any relevance to the legal question of whether . . . extinguishment of aboriginal title to Westwoods then occurred," and that "the Court's detailed and prolix focus below on . . . anything . . . that occurred after the 17th century is completely irrelevant and immaterial." To the contrary, the district

court properly considered post-17th century statements and actions of the Shinnecock and the Town in rejecting the Shinnecock's contention that the ancient Shinnecock did not understand the meaning or import of those 17th century documents. *See United States v. Minnesota*, 466 F. Supp. at 1385 (court must analyze, among other things, the subsequent construction given those documents by the parties); *Absentee Shawnee Tribe of Indians of Okla. v. Kansas*, 862 F.2d 1415, 1421-22 (10th Cir. 1988) (historical record showed tribe intended grantee to have the property) (quoting *Klamath Indian Tribe*, 473 U.S. at 774, and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)); *see also Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996) (remand to district court to examine, *inter alia*, the circumstances surrounding 1855 Treaty between U.S. and Yakima Tribe, and the post-Treaty conduct of parties in order to interpret scope of rights granted by Treaty).

In this case, the Shinnecock's statements and actions after the 17th century confirm that the Tribe understood quite clearly that it no longer held any rights in the lands west of Canoe Place, and it acted accordingly for centuries. These statements and actions include the

Shinnecock habitation east of Canoe Place; various references to Canoe Place as the western boundary of the "Indian land"; the Shinnecock's 19th century claim of ownership of lands bounded on the west by Canoe Place; the tribe's failure to complain about or challenge the Town's 1738 creation of the Canoe Place Division and its 1739 allotment exclusively to non-Indians; and of course, the tribe's 1978 litigation request, confirming the Nation's acceptance and recognition of the 1659 and 1662 conveyances of its "tribal territory" to the west of Canoe Place.

These statements, actions, and the Tribe's "long delay" in making the assertions finally advanced at trial (*see Sherrill*, 544 U.S. at 202, 214-16), confirm that the Tribe has, for centuries, understood that it no longer possesses any aboriginal rights in any of the lands west of Canoe Place, including Westwoods. *See Menominee Indian Tribe of Wis. v. Thompson*, 943 F. Supp. 999, 1009, 1017 (W.D. Wisc. 1996), *aff'd*, 161 F.3d 449 (7th Cir. 1998). ("[S]ubsequent representations to various courts and commissions are a strong indication that [the tribe] has known for quite some time that it had lost its usufructuary rights").

In light of these consistent statements and actions, the Shinnecock's suggestion (Br. at 87-88) that the Tribe is entitled to a

presumption of continuous occupancy of Westwoods should be rejected. The fact that the parties agreed that the Shinnecock had aboriginal title to Westwoods in the 17th century, and that the Tribe owns the parcel today, do not establish that the Shinnecock have aboriginal title today. A presumption of continuous occupancy is both unnecessary and inappropriate in this case, where evidence establishes that the ancient Shinnecock effectively ceased any use of Westwoods from the mid-17th century until at least 1830 (SPA59-60; EX3707). The Shinnecock themselves introduced evidence from the *Carpenter* litigation, which, in 1890, placed the Shinnecock at Westwoods only for some "sixty years." Their reference to a "lacuna in the evidence" (Br. at 87), therefore, is a mistaken characterization. As the district court held, "from the late 17th century through the 18th century, there is overwhelming evidence that the Nation occupied land to the east of Canoe Place during this period and scant, if any, evidence that they used land west of Canoe Place" (SPA55). [19]

[19] In any event, the authorities the Tribe cites in support of its claim that it is entitled to a presumption of continuous occupancy do not govern this case, because they concern non-tribal lands held in fee simple by non-Indians, *see Lazarus v. Phelps*, 156 U.S. 202 (1895); *Wilkins v. Earle*, 44 N.Y. 172 (N.Y. 1870); *People v. Scandore*, 3 N.Y.2d 681 (N.Y. 1958); *Collins v. Streitz*, 95 F.2d 430 (9th Cir. 1938); *Old Salem Chautauqua Ass'n v. Ill. Dist. Council of the Assembly of God*, 158

D. The Ogden and Topping Deeds Were Not Void Under the Law of Connecticut Colony.

The Shinnecock argue again in this Court that the Ogden and Topping Deeds "were void *ab initio* under the 1650 Order of the Connecticut General Court" (Br. at 77). They cite the opinion of their trial expert, Kathryn Hermes,[20] that "[t]he necessary consequence of the so-called 1650 Order "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 . . . were void *ab initio* and of no legal effect" (Br. at 77-78). They conclude that because Prof. Hermes was

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N.E.2d 38 (Ill. 1959); or tribal lands to which aboriginal title was never clearly extinguished by the sovereign, *see Marsh v. Brooks*, 55 U.S. 513 (1852); or the standard for establishing, not terminating, aboriginal title, *see Wichita Indian Tribe v. United States*, 696 F.2d 1378 (Fed. Cir. 1983); *Mitchel v. United States*, 34 U.S. 711 (1835); *Ala.-Coushetta Tribe of Tex.*, *supra*; *Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184, 1966 WL 8893 (Ct. Cl. 1966). In contrast to these cases, here there are multiple declarations of extinguishment of aboriginal title.

[20] This opinion was not formulated by Prof. Hermes at all. It was handed to her by the Tribe's counsel, in the form of a legal memorandum expressing counsel's view of the 1650 Order, on the very day that Hermes was engaged as a trial expert (JA4677-4678 [pp2527-2529]). Hermes testified that she obtained a copy of the 1650 Order from defense counsel, not through her own research (JA4678 [p2529]; JA4679 [pp2534-2535]).

unable to locate evidence of the General Court's prior approval of those transactions[21] they were necessarily void *ab initio*.

The 1650 Order, however, does *not* include a proscription against land purchases from Indians. Rather, it refers to another, *prior* order of the General Court (the "Prior Order") (referred to by the district court as the "pre-1650 order") (SPA124), which purportedly addressed that issue. Prof. Hermes admitted, however, that the Prior Order has never been located (JA4682 [p2547]), and that she merely assumed that the preamble to the 1650 Order (reproduced in Appellants' Brief at 77) contains a "true, accurate, and *complete* quotation of the precise language of the prior order" (JA4682 [p2547]) (emphasis added). Even if Prof. Hermes' assumption were correct, there is no suggestion in the

[21] Prof. Hermes conceded that her inability to locate any record of General Court approval of either the Ogden Purchase or the Topping Purchase does not necessarily mean that such a record never existed (JA4694 [p2596]). She conceded also that she was unable to locate any approvals of transactions with Indians in the records of the General Court during the period in which the 1650 Order was in place (JA4658 [p2453], suggesting that it may not have been the practice of the day for such approvals to be recorded. It is also possible that the General Court's prior appointment of John Ogden (among others) to collect an arson fine from the Shinnecock (EX3838), was viewed as sufficient authorization for him to accept the conveyance effectuated by the Ogden Deed, which was given in satisfaction of that fine.

quoted language that under the Prior Order, transactions that did not comply were void.[22]

Further, the Prior Order, as an order of the Connecticut colonial court, did not apply to Westwoods, which was outside the limits of the Town at the time (i.e., west of Canoe Place), and thus outside the limits of the colony. The Shinnecock's argument that the Prior Order was nonetheless binding on Ogden and Topping by reason of "principles of personal jurisdiction" (Br. at 75) is mistaken.

First, the only authority cited for the proposition does not support it. *Blackmer v. United States*, 284 U.S. 421 (1932) (Br. at 76, n. 42) addressed only the ability of the United States to recall its citizens via subpoenas served in foreign countries, and did not address the power of the United States to invalidate land transactions beyond its borders.[23]

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[22] The Shinnecock's reliance on the 1650 Order to prove the terms and provisions of some earlier law, which has not been located, violates the principle that "[s]ubsequent legislation, while not always without significance, usually is not entitled to much weight in construing earlier statutes." *State of Idaho v. Andrus*, 720 F.2d 1461, 1468 (9th Cir. 1983), *cert. denied sub nom Idaho v. Coeur D'Alene Tribe*, 469 U.S. 824 (1984).

[23] In furtherance of their assertion of Connecticut Colony jurisdiction over lands beyond its borders, the Shinnecock invoke the 1650 "Treaty of Hartford," which they claim conferred jurisdiction over "Long Island east of Oyster Bay" to Connecticut Colony. (Br. at 75). This treaty was not effective to give the Connecticut colony

Second, the Tribe relies heavily on the February 1, 1665 [N.S.] letter of Connecticut Colony Secretary John Allyn, to New York Governor Nicolls, regarding land within "Setawkett" (Town of Brookhaven), in which Allyn referred to "the established order of this Colony" under which no land was to be purchased without the consent of the General Court, "and all such purchases to be null in lawe." (Br. at 20, 79; EX3870). The Shinnecock suggest that the Allyn letter confirms that the Prior Order rendered non-complaint land transactions void *ab initio*. This suggestion is meritless. To begin with, Prof. Hermes opined that Secretary Allyn's letter likely referred to a Connecticut Colony law enacted in *1663* – after the Ogden and Topping Deeds had been executed (JA4684 [pp2553-2555]). Moreover, at the time of the Allyn Letter in 1665, Southampton was no longer under the jurisdiction of Connecticut Colony. Furthermore, since Governor Nicolls rendered his 1666 determination (EX320) after he presumably received and read the Allyn Letter, Nicolls evidently did not consider John Allyn's advice about the law of Connecticut Colony to be an impediment

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jurisdiction over Westwoods because it was never ratified by the British sovereign. *See* EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES VOL. II, 3 (Francis G. Davenport ed., 1929); John Austin, *The English in New York 1664-1689, in* NARRATIVE AND CRITICAL HISTORY OF AMERICA VOL. III, 388 (Justin Winsor ed., 1884).

to Nicolls' validation of the Topping Deed. Governor Nicolls acted on behalf of the British Crown; thus his endorsement, ratification, and acceptance of the Topping Deed is what matters – not the law of Connecticut Colony, or the various 19th century decisions cited by the Tribe (Br. at 79-80) nullifying certain land transactions with Indians.

In sum, the Shinnecock's claim that the Ogden and Topping Deeds were void is based on a law they cannot locate, the provisions of which they cannot establish, and their inability to locate a record of General Court approval of those transactions (although they concede that such approvals might have been provided). Their challenges to the Ogden and Topping Deeds are meritless and of very recent vintage. In their 1978 litigation request to the Department of the Interior (JA3679; JA2503; SPA65), the Shinnecock declared that "the Tribe's domain to the west of Canoe Place was conveyed to non-Indian individuals in 1659, 1662" (JA2503); an obvious reference to the Ogden and Topping Deeds. The litigation request included no hint of any challenge to the legitimacy or efficacy of those conveyances.

Finally, to the extent the Ogden and Topping Deeds required the approval of colonial Connecticut and did not obtain it at the time, the

Connecticut state legislature confirmed, validated, ratified and approved them in 1993, thereby remedying any alleged deficiency in those conveyances (SPA124). [24]

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[24] That year, the Connecticut State Legislature enacted Special Act 93-1, entitled "An Act Validating Transfers of Certain Lands." In pertinent part, this Act provides:

> All transfers of land more than sixty years prior to the effective date of this act . . . 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 state or colonial laws or resolutions, common law or any other provisions requiring legislative or governmental approval of transfers of land held or occupied by any such person or group or association of persons, are hereby confirmed, validated, ratified and approved.

Special Act 93-1. Although Appellants assert that this Act "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" (Br. at 77, n. 44), they cite no authority for this proposition. A sovereign state is authorized to validate, retroactively, the transfer of lands that were within its borders and jurisdiction at the time of transfer. *See Anchor Oil Co. v. Gray*, 256 U.S. 519, 522 (1921)(acknowledging as valid the Secretary of the Interior's retroactive approval of a lease of an Indian allotment); *Lykins v. McGrath*, 184 U.S. 169, 171 (1902) ("the consent of the Secretary of the Interior to a conveyance by one holding under a patent...may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance"); *Pickering v. Lomax*, 145 U.S. 310, 316 (1892) (deed ratified by a subsequent patent issued by the President was valid, noting "if the ratification be retroactive, it is as if it were endorsed upon the deed when given"); *Wilfred v. Greene*, 398 F.3d 45, 54 (1st Cir. 2005) (where Congressional act expressly approved transfers retroactively, such transfers were valid as if ratified at the time of the transaction); *United States* ex rel *Buxbom v. Naegele Outdoor Advertising Co. of Ca., Inc.*, 739 F.2d 473, 474 (9th Cir. 1984) (retroactive approval of a lease agreement by the Bureau of Indian Affairs was valid and voided appellant's claim for relief); *Wishkeno v. Deputy Assistant Secretary, Indian Affairs*, 89 Interior Dec. 655, 659

E. The British Crown's Extinguishment of Shinnecock Aboriginal Title to Westwoods was Effective Whether or Not the Ogden and Topping Deeds Were Valid.

Alternatively, even if the Ogden and Topping Deeds did not comply with Connecticut colonial law at the time they were made, the Shinnecock's aboriginal title to Westwoods was extinguished when the British Crown, acting through three New York colonial governors, repeatedly expressed its intent to extinguish those rights. The Nicolls Determination, the Andros Patent, and the Dongan Patent extinguished the Shinnecock's aboriginal title regardless of whether the Crown's intent to extinguish resulted from a mistake (*e.g.*, as to the legitimacy of the Ogden and Topping Deeds), or even from fraud or bias. The English sovereign's right to extinguish aboriginal rights was absolute. "[T]he manner, method, and time of the sovereign's extinguishment of aboriginal title raise political, not justiciable, issues." *Delaware Nation v. Pennsylvania*, 446 F.3d 410, 416 (3d Cir.), *cert. denied*, 549 U.S. 1071 (2006), *quoting United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941). *See also Oneida Indian Nation v. New York*, 691 F.2d 1070, 1096 (2d Cir. 1982) ("[A]ssuming *arguendo* that New York was entitled

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(IBIA 1982) (recognizing that judicial precedents have repeatedly upheld "the authority to approve conveyances of trust property retroactively").

without federal consent to purchase the Oneidas' land, judicial inquiry into the "manner, method and time" of its extinguishment of Indian title would be barred") (quoting *Santa Fe*, 314 U.S. at 347).

In *Delaware Nation*, 446 F.3d at 416, plaintiff tribe claimed that proprietor Thomas Penn's purchase of aboriginal lands from the Delaware Indian Nation was accomplished through fraud, rendering it invalid. The Third Circuit refused to examine the propriety of that purchase because, regardless of the fraud pervading the transaction, the issue of extinguishment turns solely on the intent of the sovereign to extinguish Indian title, and the sovereign's intent to extinguish title was "plain and unambiguous." *Delaware Nation*, at 417, *citing Seneca Nation*, 382 F.3d at 260.

Like the plaintiff in *Delaware Nation*, the Shinnecock contend that because (they assert) the lands were taken by Magistrates Ogden and Topping through improper means (*i.e.*, by transactions not previously approved by the Connecticut General Court) the Tribe's aboriginal rights were never validly extinguished. Similarly, Prof. Hermes asserted below that "both Ogden and Topping became examples of one of the kinds of corruption that the colonial governments aimed to

eliminate with their prohibition against private dealing" (JA7385). But as in *Delaware Nation*, these arguments are irrelevant, because three New York colonial governors, acting under authority of the British Crown, repeatedly recognized, approved, and confirmed the transactions by which the Shinnecock ceded, relinquished, and conveyed their interest in lands west of Canoe Place.

Because the intent to extinguish aboriginal title was clearly and repeatedly expressed, the justness of the extinguishment cannot be questioned. *See United States v. Gemmill*, 535 F.2d 1145, 1147 (9th Cir. 1976) ("when the Government clearly intends to extinguish Indian title the courts will not inquire into the means or propriety of the action"). Therefore, even if the Nicolls Determination, the Andros patent and the Dongan Patent were unfair, extreme, inconsistent with prior actions, or based on mistakes of fact or law, the extinguishment of Shinnecock rights in Westwoods is nonetheless valid.

F. The Town's Submission to the Court of Assizes in the Mid-1600s Pertains to Lands East of Canoe Place, and Does Not Estop the Town from Claiming Lands West of Canoe Place.

The Shinnecock assert (Br. at 81) that "any possibility that the Town had title to any lands west of Canoe Place" as of 1676 is "foreclose[ed] as a matter of historical fact and law." They report (Br. at 23-24) that in 1666 the Court of Assizes requested that the Town produce all of the "*grants and patents*" upon which its land claims were based (EX2603) (emphasis added). A 1670 order of the Court of Assizes reiterated this demand (EX2603). According to the Shinnecock (Br. at 24; EX5038), the Town responded by producing only the 1640 Sterling Patent, regarding land situated exclusively east of Canoe Place, and not the Nicolls Determination, the Ogden Deed, or the Topping Deed. They argue (Br. at 81-82) that by reason of the Town's failure to reference those instruments, Southampton is estopped from claiming title to the lands west of Canoe Place, through the Ogden Deed, Topping Deed, and Nicolls Determination. This argument is without merit.

Preliminarily, the subsequent Andros and Dongan Patents unequivocally extinguished the Tribe's aboriginal title to Westwoods regardless of whether the Town is estopped to rely on the earlier

documents. And the estoppel argument is incorrect. First, what the Court of Assizes demanded was the production of "grants or patents" to be renewed or confirmed by the Duke of York, not deeds or gubernatorial determinations (EX2603). Second, the Tribe's contention (Br. at 25) that in its eventual response to the demands of the Court of Assizes, the Town "based its entire claim to lands on rights it asserted under 'Lord Sterlings Agent" is inaccurate. In fact, the Town made no "claim" at all – it simply responded to the demand by the Court of Assizes that all "townes and persons" either renew old grants and patents from the British Crown, or take out new ones (EX2603). The Town's response consisted merely of a letter to Governor Francis Lovelace (EX5038). The letter advanced no "claim," but rather set forth Southampton's view that it did not require a patent at all: "we have a just & lawfull right and title to our land already without such a patent" (EX5038). Although the letter includes a reference to "the approbation of the Lord Sterlings Agent" (*id.*), that is hardly a representation that the Town's "entire claim" to its lands was based upon rights granted by that approbation, as the Tribe argues. Nothing in the Town's letter to

Governor Lovelace suggests that the Town placed any limitation on the manner and source of all of its land holdings.

Third, even if the absence of any reference to the Ogden Deed, Topping Deed, and/or Nicolls Determination could be considered significant, there is no legal basis for an estoppel against the Town based upon these omissions. *See Pless v. Town of Royalton*, 81 N.Y.2d 1047 (N.Y. 1993); *United States v. Schmitt*, 999 F. Supp. 317, 360 (E.D.N.Y. 1998) (acknowledging that estoppel cannot lie against a municipality); *Van Kleeck v. Hammond*, 811 N.Y.S.2d 452, 453 (N.Y. App. Div. 3d Dep't. 2006) (same); *Natale v. Brown*, 1993 U.S. Dist. LEXIS 9479 (S.D.N.Y. June 24, 1993)(same); *Ostrom v. O'Hare*, 160 F. Supp. 2d 486, 500 (E.D.N.Y. 2001) (estoppel not available against local government for ratifying administrative error) (internal citations, quotations omitted).

Finally, this argument is disposed of by the Andros Patent itself, which makes explicit reference to "Seatuck" as the western boundary of the Town – the very boundary established by the Topping Deed. As Appellants pointed out, no mention of that deed or of Seatuck appears in the Town's letter to Governor Lovelace. It is obvious therefore, that

Governor Andros had more than just the Town's letter to Governor Lovelace before him when he issued his patent. Thus, the Tribes's declaration that "the only evidence brought forward by Southampton [to Governor Andros] was that contained in its 1670 letter to Governor Lovelace" (Br. at 27) is belied by the Andros Patent itself. In sum, the Shinnecock's contention that the Town may not rely on the Ogden Deed, Topping Deed, or Nicolls Determination because the instruments were not referenced in Southampton's 1676 letter to the Court of Assizes (enclosing the Town's earlier letter to Governor Lovelace) is unfounded and should be rejected.[25]

[25] The district court also rejected the Shinnecock's assertion that by reason of the Town's delay in providing evidence of its title to the Court of Assizes, "Southampton '[had] forfeited all [its] titles, Rights & priviledges to the lands' to which it claimed rights." " (Br. at 26). The Court of Assizes' order threatening forfeiture was conditional only ("in 1670 the Southampton titles were declared invalid by the Court of Assizes unless renewed under the new government") (EX3808). According to the district court "[t]he foregoing passage confirms that the invalidation of Southampton's titles was conditional only. . . . The condition . . . did not occur and, therefore, the forfeiture of Southampton's land titles never occurred" (SPA55).

POINT V

WESTWOODS IS SUBJECT TO STATE AND LOCAL LAWS

Finally, the district court correctly held that the Shinnecock have no sovereignty over Westwoods for a third reason: the parcel is not "Indian country" within the meaning of 18 U.S.C. § 1151 or "Indian lands" within the meaning of IGRA, 25 U.S.C. § 2703(4). On appeal, the Shinnecock argue (Br. at 92-97) that under federal common law, Westwoods is sovereign Indian country immune from state and local laws. This argument is unfounded; whether Westwoods is subject to state and local laws, however, is governed by federal statute, primarily 18 U.S.C. § 1151, not federal common law. *See DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n. 2 (1975) ("[w]hile § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction"). Accordingly, the existence of tribal governmental authority regarding a parcel of land turns in the first instance on whether the parcel is "Indian country" within the meaning of § 1151. The district court properly rejected the argument that "that Westwoods is 'Indian country' under 18 U.S.C. § 1151" finding that "it fails to

satisfy any of the § 1151 criteria and has never been set aside and superintended by the federal government" (SPA152).

Moreover, IGRA renders state and local gaming laws inapplicable only when a federally recognized tribe conducts gaming on "Indian lands" pursuant to a lawful tribal-state compact. There is substantial overlap between "Indian country" for purpose of § 1151 and "Indian lands" for purposes of IGRA – for example, both generally include lands within a reservation. The district court also correctly concluded that Westwoods is not "Indian lands" within the meaning of IGRA. Because Westwoods is neither Indian country nor Indian lands, the Shinnecock's proposed casino at Westwoods is subject to state and local gaming laws.

A. Westwoods Is Not "Indian Country" Within the Meaning of 18 U.S.C. § 1151.

Westwoods is subject to State and local laws because it is not "Indian country" under statutory or common law. "Indian country" is defined in 18 U.S.C. § 1151 to include (a) Indian reservations under the jurisdiction of the United States, (b) dependent Indian communities, and (c) Indian allotments. Each of the three categories requires that the land in question have been both "set apart" by the federal government for the Indians' use and be under federal

"superintendence." In *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998), the Supreme Court rejected a federally-recognized tribe's assertion that *all* lands owned by it were Indian country:

> This argument ignores our Indian country precedents, which indicate both that the Federal Government must take some action setting apart the land for the use of the Indians 'as such' and that it is *the land in question,* and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government.

Id. at 531, n.5 (emphasis in original).

In *Venetie*, the Court also rejected the tribe's effort to equate the government's provision of various forms of health, social, and welfare benefits with "federal superintendence" for such benefits "are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." 522 U.S. at 534. *See also Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 884 (9th Cir. 1999) (holding that non-reservation fee ownership by Navajo Nation did "not become Indian Country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation"); *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 915, 922 (1st Cir. 1996) (enjoining Tribe from constructing

housing complex on lands without obtaining state and local permits because property was neither a reservation nor a "dependent Indian community" under § 1151); *Buzzard v. Oklahoma Tax Comm'n.*, 992 F.2d 1073, 1075-76 (10th Cir. 1993) (rejecting Keetoowah Band's argument that their land had been "validly set apart" for Indian use by virtue of the restraint on alienation imposed by the Indian Trade and Intercourse Act where there was no active federal superintency).

In this case, the Shinnecock stipulated below that Westwoods does not fall within any of the categories of Indian country listed in 18 U.S.C. § 1151; that Westwoods is not part of a reservation; that it does not appear in the BIA's records as Indian fee land restricted against alienation under 25 U.S.C. § 177; that Westwoods is not under federal superintendence; that Westwoods is not a "dependent Indian community"; and that there is no express agreement between the Shinnecock and the United States regarding Westwoods (JA3668-3669). Since Westwoods has never been set aside or superintended by the United States in any capacity, there is no basis for the Shinnecock's claim that Westwoods is Indian country.

Nor do the cases appellants cite (Br. at 92-94) support their argument that § 1151 does not provide the exclusive basis for immunizing Indian lands from state and local laws. In *Donnelly v. United States*, 228 U.S. 243, 269 (1913), the Supreme Court noted that "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land that, being part of the public domain, is lawfully set apart as an Indian reservation." Similarly, in *Minnesota v. Hitchcock,* 185 U.S. 373, 390 (1902), the Supreme Court confirmed that the establishment of an Indian reservation required the creation, approval, oversight, or, at a minimum, recognition of the reserved land by the federal government.

The Tribe's reliance on *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), is also misplaced. The land at issue there was part of a federally-recognized tribal reservation, thus highlighting the need for federal superintendence as an essential element of proving land to be Indian country. The Court held that the tribe's acceptance of the reservation arrangement precluded the tribe from making claim to

any land beyond or outside of the reservation based on alleged aboriginal title. *Id.* at 358.[26]

As explained in Point IV above, and as the district court found, the Shinnecock's aboriginal title to Westwoods was clearly and unambiguously extinguished. Thus, today the Tribe holds only fee title to Westwoods as a result of a 1922 judgment of adverse possession (EX3698). The Tribe's current fee ownership of Westwoods does not make it Indian country, and accordingly the land remains subject to state and local law, including the zoning and land use laws of the Town. *See Blunk v. Arizona Dept. of Transp.*, 177 F.3d at 884 (holding that

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[26] The Tribe mistakenly relies on several cases to urge the existence of a common-law definition of "Indian country" that co-exists with § 1151, but these cases do not support that argument. *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004), does not define Indian country at all, but addresses the extinguishment of aboriginal title. *Id.* at 271-72. *Mohegan Tribe v. Conn.*, 638 F.2d 612 (2d Cir. 1981), concerns land that a state had purchased from the tribe in violation of a federal statute, *i.e.*, land as to which aboriginal title had not been properly extinguished. No such land is at issue here, since the Tribe's aboriginal title was properly extinguished in the colonial era. *Thompson v. County of Franklin*, 15 F.3d 245 (2d Cir. 1994), addresses a land claim by a member of a federally-recognized tribe whose property was allegedly located within the bounds of a federally superintended reservation. Here, the Shinnecock were not federally recognized at the time of trial, and Westwoods is not now, and has never been under federal superintendence. *Ex parte Crow Dog (Ex parte Kang-Gi-Shun Ca)*, 109 U.S. 556 (1883), concerned a crime committed on a federally-recognized Indian reservation and has repeatedly been ruled superseded by subsequent federal law regarding the extent of federal jurisdiction in Indian country. *See, e.g. United States v. Welch*, 822 F.2d 460 (4th Cir. 1987); *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983); *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005); *United States v. Prentiss*, 206 F.3d 960 (10th Cir. 2000).

non-reservation, fee land purchased by the Navajo Nation did "not become Indian Country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation" and upholding the Arizona Department of Transportation's authority to regulate the erection of billboards on that property); *see also Tunica-Biloxi Indians of Louisiana v. Pecot*, 351 F. Supp. 2d 519, 525 (W.D. La. 2004) ("Land is not Indian country merely because it is owned by a federally recognized tribe … fee land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the . . . reservation") (internal citations, quotations omitted). The district court correctly determined that Westwoods is not Indian country under 18 U.S.C. § 1151.

B. Westwoods is Subject to State and Local Gaming Laws Because It Is Not Indian Lands Within the Meaning of IGRA and No Tribal-State Gaming Compact Exists.

The district court properly held that the Shinnecock may not build and operate a casino complex at Westwoods without complying with state and local laws, because IGRA does not authorize casino gambling at variance with state law unless that gaming satisfies IGRA's requirements, The Shinnecock's proposed casino would not satisfy

IGRA's requirements because, among other things, it is not located on Indian lands.

Congress enacted IGRA in 1988 to establish a comprehensive approach to regulating Indian gaming by federally recognized tribes on specifically identified Indian lands. In doing so, Congress supplanted any federal common law right the Shinnecock may have had under *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), which recognized a tribal right to conduct gaming in Indian country that is located in a State which permits the gaming subject to regulation. Under IGRA, the Shinnecock's casino must satisfy IGRA's requirements or, it must comply with State and local laws.

Specifically, IGRA provides that state laws applicable to the licensing, regulation, or prohibition of casino gaming apply even *within* Indian country unless the gaming occurs in compliance with IGRA. *See* 18 U.S.C. § 1166(a), (c). IGRA defines "Indian lands" to include only lands within the limits of any Indian reservation and any trust or restricted fee lands over which the tribe exercises governmental power. 25 U.S.C. § 2703(4); 25 C.F.R. 502.12. By parity of reasoning, casino

gaming that occurs *outside* Indian country or Indian lands is subject to state law because it fails to satisfy IGRA's Indian lands requirement.

IGRA divides gaming into three classes. Relevant here, class III gaming includes casino games, banking card games, and lotteries. 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4. In addition to requiring that the gaming be engaged in only by an "Indian tribe" on "Indian lands," IGRA provides that class III gaming is lawful only where it is: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian Tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian Tribe and the state that has been approved by the Secretary of the Interior and is in effect. 25 U.S.C. § 2710(d)(1).

"Since New York allows some forms of class III gaming – for charitable purposes – such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact." *Dalton v. Pataki,* 5 N.Y.3d 243, 259 (2005). Accordingly, under IGRA, class III gaming may be conducted in

New York only by an "Indian tribe" on "Indian land" pursuant to a tribal-state compact approved by the Secretary. *See Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) ("The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities *only* in conformance with a valid compact between the tribe and the State in which the gaming activities are located.") (emphasis added).

In this case, the Shinnecock do not satisfy the requirements necessary to conduct gaming at Westwoods lawfully under IGRA, as the district court found, despite the BIA's recent acknowledgement of the Shinnecock as an "Indian tribe." Westwoods is not "Indian lands" under IGRA because it is not reservation land, trust land, or restricted fee land. Moreover, the casino gaming proposed by the Shinnecock has not been authorized pursuant to a properly approved tribal-state compact.[27]

Since the Shinnecock's proposed gaming violates the requirements of IGRA, the Shinnecock must comply with State law. *See, e.g., Carruthers v. Flaum,* 365 F. Supp. 2d 448, 466 (S.D.N.Y.2005) ("IGRA

[27] IGRA's legislative history demonstrates that Congress devised the compacting process as a means for states and tribes to resolve a fundamental disagreement over which sovereign would have regulatory authority over Class III gaming conducted on Indian lands within state boundaries. *See* S.Rep. No. 100-446, at 13 (1988), *reprinted in* 1998 U.S.C.C.A.N. 3071, 3083.

preempts state anti-gaming laws, but only to the extent of its application."); *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs,* 317 F. Supp. 2d 128, 148 (N.D.N.Y.2004) (same); *see also First Am. Casino Corp. v. E. Pequot Nation,* 175 F. Supp. 2d 205, 209-10 (D. Conn. 2000). New York's Constitution and laws generally prohibit casino gaming of the kind that the Shinnecock intend to conduct at Westwoods. Thus, the Shinnecock are not authorized to build and operate the casino complex they have proposed unless they comply with state and local laws.

CONCLUSION

The judgment should be affirmed.

Dated: Albany, New York
January 21, 2011

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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

On Appeal from the United States District Court
for the Eastern District of New York

CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)(7)

The undersigned attorney, DENISE A. HARTMAN, hereby certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). According to the word processing system used by this office, this brief, exclusive of the title page, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 27,757 words.

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AFFIRMATION OF SERVICE

Oren L. Zeve, affirms upon penalty of perjury:

(1) I am over eighteen years of age and an Assistant Solicitor General in the office of Eric T. Schneiderman, Attorney General of the State of New York, attorney for the State of New York herein.

(2) On the 21st day of January, 2011 I served the attached Brief for Appellee State of New York in the following manner:

(i) two paper copy/copies by personal service and one Portable Document Format (PDF) copy by electronic mail, in accordance with Interim Local Rule 25.2 upon the following named person(s):

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Oren L. Zeve

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

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