agency acting on behalf of any of the defendants, has submitted any application for any type of permit or authorization from New York alleged by the plaintiffs to be required for development of the Westwoods Parcel. (Stipulation, dated January 16, 2007, Stip. No. 1.) The construction of a casino at Westwoods likely would require the following permits or authorizations that under New York law are issued by the DEC: (a) a permit for the construction and operation of a waste water treatment facility that will discharge to ground or surface waters pursuant to ECL Article 17; and (b) the SPDES General Permit for Stormwater Discharges from Construction Activity, Permit No. GP-02-01, pursuant to ECL Article 17, titles 7 and 8, and ECL Article 70. (Stipulation, dated January 16, 2007, Stip. No. 27.) The DEC would generally use certain procedures in conducting the assessments or studies relating to the issuance of any permits or authorizations in connection with the proposed construction of a casino at Westwoods, including likely requiring the preparation of an environmental impact statement ("EIS") with public notice and review.[37] (Stipulation, dated January 16, 2007, Stip. No. 25.)

Neither the Nation, nor any representative, Trustee, or any other person or entity acting on its behalf, has submitted a completed environmental assessment or any other form to the DEC with respect to construction of any building to be constructed at Westwoods. (Stip. No. 52.) No project for development of Westwoods by the defendants, or by any person or agency acting on behalf of any of the defendants, has been the subject of a consistency review pursuant to the Waterfront Revitalization and Coastal Resources Act, State Executive Law, Article 42 and 19 N.Y.C.R.R. Part 6. (Stipulation, dated January 16, 2007, Stip. No. 2.) The Nation has enacted no environmental statutes, laws, or regulations. (Tr. 2887.)

[37] The procedures are set forth in more detail in the January 16, 2007 Stipulation, Stip. No. 25.

(2) Non-Traffic Related Environmental Impacts

The type of construction activities that reasonably could be expected for a casino complex at Westwoods include the following: site clearing, grubbing, and grading; excavation and fill activities; hauling of construction materials, and of construction debris; transport of construction workers to and from the site; material staging; sand mining; material backfilling; excavation dewatering; storm water management; construction of foundations and facilities, roadways, parking, signage, and lighting installation, or the extension of infrastructure (water, sewer, electrical power, natural gas, telecommunications, and cable); and site restoration and landscaping. (S125, at 3.)

The types of equipment that would be required to construct a casino complex include the following: earth-moving equipment (front loaders, bulldozers, dragline, backfillers, scraper/graders, and trucks); materials-handling equipment (concrete mixers, concrete pumps, a motor crane, and delivery trucks); and stationary equipment (pumps, generators, compressors, lighting, fuel storage, dumpsters, roll-offs, and other waste handling and storage equipment). (S125, at 3-4.) Construction activities would likely extend over a 24-month time period based on an 8 hours per day, five to six days per week schedule. (S125, at 4.) A casino at

Westwoods most likely would operate 24 hours per day, 7 days per week, consistent with other existing casinos in the northeast such as Foxwoods Resort Casino, Mohegan Sun, and Turning Stone Resort Casino. (S125, at 4.) Impacts on adjacent properties, including those associated with operational noise and traffic, would be expected to occur during the 24-hour period. (S125, at 5.)

As set forth below, even without consideration of the adverse impacts arising from increased traffic to and from an operating casino at Westwoods, construction and operation of a casino at Westwoods would have disruptive practical consequences, disrupt settled expectations of the local communities and residents surrounding Westwoods, and seriously burden the administration of state and local governments.

(A) IMPACTS TO GEOMORPHOLOGY

On the approximately five to ten acres that have been cleared at the Westwoods site, no measures are present to prevent erosion of cleared soils and vegetation, and new erosion patterns are visible from the action of storm water runoff on the site. (S125, at 49.) Because of the large sand content (70 to 100%) of the soil, it could be mined for use as a sand source, and development projects in the region are known to remove (mine) sand for sale elsewhere, while lower quality fill is hauled to the development site as replacement material. (S125, at 11.)

Potential short-term (construction-related) adverse impacts on geological resources from the construction of a casino complex at Westwoods include the following: (a) increased erosion due to the clearing of existing soil-stabilizing vegetation; (b) increased erosion and sediment transport due to additional site clearing, grading, and the stockpiling of soils at the site; (c) the absence of erosion control measures will result in soil erosion and sedimentation of adjacent, downgradient surface waters in the Peconic Bay watershed, including the nearshore area of the Great Peconic Bay; (d) erosion, storm water runoff, and flooding, or ice formation in the winter, have the potential to impact NYS Route 27 due to the proximity of the southern boundary of the property immediately adjacent to the highway's right-of-way corridor; (e) degradation of surface and ground water quality from the discharge of chemicals, solvents, and petroleum products from heavy machinery and other construction uses; and (f) impacts on air quality due to dust generation during construction. (S125, at 49-50; Tr. 1845.)

Potential significant long-term adverse impacts to geological resources from the operation of a casino complex at Westwoods include the following: (a) incompatibility of facility design with on-site geologic conditions (*i.e.*, seismic zones, soils, and subsurface conditions), and consequent safety risks if facility designs are not prepared consistent with established practices for seismic protection and geotechnical considerations and are not subject to appropriate review and oversight; (b) permanent modifications to existing topography due to site grading activities resulting in the loss of the scenic quality afforded by the undulating (morainic) characteristics of the site; (c) degradation and instability of the existing coastal bluff through reduction in vegetation cover, increased slopes, and consequent erosion, affecting the surrounding land and the shape and form of

the beach below, and increasing sedimentation in the nearshore water; (d) accelerated erosion of the bluff due to a significant increase in human activities on the steeply-sloped bluff, the increased numbers of people who will have uncontrolled access to the bluff, and the increased quantity of storm water runoff; (e) if wastewater discharges are directed to the bluff directly or indirectly, accelerated erosion of the bluff; (f) as a result of the instability to and deterioration of the bluff, reduced capacity for the bluff to act as a natural protective barrier against wave energy and high water; (g) significantly increased erosion potential due to regrading, vegetative clearing, and an increase in storm water runoff resulting from the creation of impervious surfaces (*e.g.*, rooftops, parking lots, sidewalks, and roads); (h) in full development of property, adverse impacts on the surrounding residential neighborhoods from eroding soils, sediment transport, increased storm water runoff, and localized flooding; and (i) impairment of the natural viewshed due to changes in local topography, the deterioration of the coastal bluff, and the imposition of structures on the viewshed that includes the bluff and the beachfront at the Great Peconic Bay. (S125, at 50-51.)

(B) IMPACTS TO WATER RESOURCES

Potential short-term (construction-related) adverse impacts to water resources from the construction of a casino complex at Westwoods during construction include the following: (a) off-site sediment transport resulting in sedimentation of surrounding surface waters including the nearshore area of the Great Peconic Bay, degrading water quality of affected surface waters and adversely affecting aquatic habitats, recreational uses, and aquaculture; (b) deposition of eroded sediments on adjacent properties resulting in drainage and aesthetic/landscaping problems that can be costly for homeowners to address; (c) discharge of petroleum products stored in tanks (*e.g.*, diesel fuel for construction vehicles and gasoline for other machinery) and 55-gallon drums (*e.g.*, lubricating oils), solvents in containers up to 55-gallons in size for parts cleaning and related machinery maintenance, as well as cleaning agents, paints, thinners, and other materials containing solvents, all of which are subject to leaks, spills, and general releases thereby impacting surface and ground water quality and aquatic habitats on- and off-site; and (d) impacts on tidal wetlands and buffer along the Great Peconic Bay shoreline, including removal of wetland vegetation and habitat, and erosion and sedimentation. (S125, at 52-53.)

Potential long-term impacts to water resources from the operation of a casino complex at Westwoods include the following: (a) because of the significant amount of impervious surfaces (*e.g.*, parking lots, buildings, sidewalks, and paved areas), reduced opportunities for rainfall and snowmelt to percolate to ground water to recharge the aquifer; (b) an increase in runoff with the potential to negatively impact surface water quality; (c) increased nutrient loading of nearby surface waters, including the Peconic Bay Estuary, due to increases in storm water runoff at the site from the increase in impervious surfaces; (d) modifications to the existing floodplain elevation along the Great Peconic Bay shoreline and construction of facilities within the designated flood zone altering the conveyance of floodwaters that can result in flooding of adjacent lands and destabilization of the coastal bluffs; (e) direct (*i.e.*, filling) or indirect (*i.e.*, disruption of drainage patterns and hydraulic inputs)

impacts on nearshore wetland habitats and associated values and functions; (f) increased instability of the bluff resulting in sedimentation of surrounding surface waters including the nearshore area of the Great Peconic Bay, degrading water quality of affected surface waters, and adversely affecting aquatic habitats, recreational uses and aquaculture; (g) removal of wetland vegetation and wetland habitat erosion and sedimentation, and permanent damage to wetland functions and values; and (h) increase in the contribution of toxic compounds to surface waters, including the Peconic Estuary, due to the use of toxic substances at Westwoods. (S125, at 53-54; Tr. 1846-47.)

(C) IMPACTS TO AIR RESOURCES (NON-TRAFFIC RELATED)

Potential adverse long-term impacts on air resources include emissions from the following: (a) natural gas or fuel oil fired boilers; (b) emergency/standby generators; (c) motors associated with fire pumps; (d) heating, ventilation, and air conditioning ("HVAC") systems; and (e) off-site power generating facilities required to provide electricity to the site. (S125, at 56.)

(D) IMPACTS TO BIOLOGICAL RESOURCES

Potential short-term (construction-related) adverse impacts on biological resources (other than fish, shellfish, and bay biota) from the construction of a casino complex at Westwoods include the following: (a) short-term displacement of species during construction phase activities; and (b) loss of wildlife food and cover, as well as disruption of normal nutrient cycling during construction activities. (S125, at 60.)

Potential long-term significant adverse impacts on biological resources (other than fish, shellfish, and bay biota) from the operation of a casino complex at Westwoods include the following: (a) the permanent loss of maritime pitch pine dune woodland habitat at Westwoods, which has been identified as being rare, (SI), and especially vulnerable to extinction in New York; (b) habitat modifications and/or degradation due to vegetative clearing and removal of trees (including trees 90 to 110 years old); (c) loss of habitat (maritime oak forest) identified as having limited acreage, (S3), or vulnerable to extinction, (S2), in New York; (d) removal, significant reduction, or segmentation of the coastal, transitional, and/or woodland zones characterizing Westwoods; (e) loss of diverse habitats on Westwoods, several of which are fragile, not well-represented in New York, and subject to extinction; (f) introducing of "edge" habitat along the perimeter of the clearing that will facilitate the incursion of undesirable species into the interior portions of the woodland areas, resulting in the displacement of native birds; (g) degradation of important coastal habitats and consequent impacts due to construction and operation of gaming-related facilities and influx of a significant concentration of people (casino patrons) along the Great Peconic Bay shoreline; (h) increased development pressures of Town lands from businesses that provide support to the casino development (such as suppliers, vendors, maintenance and repair, and business support) or businesses that will leverage the casino operations for their own gain (such as other entertainment, restaurant, hotel, retail, or service ventures). (S125, at 61; S226, at 3; Tr. 1848, 1957-58.)

The lights, noise, and activity associated with the use of a casino complex at Westwoods will further disturb the wildlife in any remaining woodlands, further degrading

the woodlands' value as a habitat. (S226, at 4.)

(E) IMPACTS TO LAND USE

Potential long-term adverse impacts related to land use from the operation of a casino complex at Westwoods include the following: (a) reductions in the residential quality of life in areas surrounding Westwoods resulting from lighting, noise, traffic, litter, the presence of multi-story buildings, the absence of buffers, and other operational characteristics of a casino; (b) impairment of the area's rural character resulting from, among other things, the daily assembly of a large number of people on the surrounding streets and increased commercialization; (c) increased potential for accidents, and increased dust and vehicle air emissions that can adversely affect the health, safety, and welfare of the existing, surrounding residents; (d) loss of the ability for the Town to manage its finite infrastructure resources consistent with the Comprehensive Plan; (e) loss of a vegetative buffer between Westwoods and adjacent residential land uses; and (f) increase in ambient noise in the adjacent residential neighborhoods from truck and other vehicular traffic. (S125, at 63-64; Tr. 1848-50.)

(F) IMPACTS TO COMMUNITY SERVICES

I. FISCAL IMPACTS

The daily number of employees at a 130,000 sf. casino (with an additional 32,500 sf. as "back of house" space) at Westwoods, with related hotels and related facilities, are to be estimated between 3,227 and 4,927, with approximately one-third of the employees on site at one time.[38] (S16, at ix and 4 (Table 3).) The daily number of visitors at a 130,000 sf. casino at Westwoods with related hotels and related facilities is estimated to be between 17,994 and 35,000. (S16, at ix, and 4 (Table 3).) The total daily population at a casino that would be built at Westwoods is estimated to be between approximately 21,000 and 40,000, with between approximately 10,500 and 19,500 persons present at any one time. (S16, at ix and 4 (Table 3).)

If the Nation exercises exclusive sovereignty over Westwoods, no revenue to the Town will be generated by local taxes during the operation of a casino at Westwoods, although Town costs for the provisions of local services will increase. (S16, at viii, 3, 34.) The total cost of municipal services for the Town are likely to increase by $21.1 million if a 130,000 sf. casino with related hotels and facilities operates at Westwoods over a build-out period of 4 and one-half years and the first 1 and one-half years of operation. (S16, at xiii, 2, 34-38.) For example, the total cost of municipal services for the HBWD and Ambulance District are likely to increase by over $5.3 million if a 130,000 sf. casino with related hotels and facilities operates at Westwoods over a build-out period of 4 and one-half years and the first 1 and one-half years of operation. (S16, at xiii, 36-37.) Moreover, the total cost of State Police services is estimated to increase by over $2.1 million if a 130,000 sf. casino with related hotels and related facilities operates at

[38] As noted above, it was estimated that the130,000 sf. casino would also include 32,500 sf. for "back of house" space. As discussed *supra*, based upon the expert evidence offered at trial, the Court concludes that a casino of this size certainly would be economically feasible at Westwoods.

Westwoods over a build-out period of 4 and one-half years and the first 1 and one-half years of operation. (S16, at xiv, 38.)

II. Other Impacts Relating to Community Services

The operation of a casino complex at Westwoods, the influx of a significant amount of people to one site, the increased traffic congestion on local roads (discussed *infra*), and the incompatible nature of the proposed use with the surrounding existing residential uses will cumulatively result in the increased need for emergency services including the following: (a) police and security services to respond to emergency situations including theft/burglary, drunk driving, underage drinking, noise complaints, and trespass on adjacent residential properties; (b) police and security services to manage potential conflicts between users of the gaming facilities and adjacent landowners; (c) police and emergency services associated with increases in traffic accidents; (d) police services associated with managing traffic flow; (e) emergency services associated with responding to health-related emergencies at Westwoods; and (f) emergency services associated with fighting fires (including potential multi-floor fires) at Westwoods. (S125, at 66, 77; Tr. 1851.)

(G) Impacts to Potable Water Supplies and Distribution

The existing water transmission network is unable to support necessary fire flow demands. (S125, at 67.) Development of a casino at Westwoods would significantly increase potable water demand. (S125, at 68.) The current system pumping capacity of 6.7 million gallons per day ("MGD") cannot accommodate a Westwoods casino development. (S125, at 67-68.) The existing water transmission system, consisting of combinations of 4-inch, 6-inch, 8-inch, 10-inch, and 12-inch diameter mains, depending on which water supply pump stations may be providing water at any given time, will not support a seasonal population water demand with the addition of a casino at Westwoods. (S125, at 68.)

Modifications to the HBWD's existing water supply, storage, and conveyance system would be necessary to support a casino at Westwoods. (S125, at 68; Tr. 1902-03, 3300-01.) Potential long-term adverse impacts from modifications of the HBWD's existing water supply, storage, and conveyance system include the following: (a) localized drawdown of ground water elevations and increased salt water intrusions from pumping of an on-site well supply or increased pumping of existing municipal supplies to meet Westwoods's water demands; (b) increased cost of potable water supply resulting from the cost of new well sites, acquisition of buffer areas around well sites, pipes, and related equipment necessary to pump and convey additional supplies of potable water; and (c) reduced groundwater supplies for use as potable water for uses other than the casino at Westwoods. (S125, at 14, 68; Tr. 1923-24.)

Potential adverse impacts from the construction and use of an on-site water supply source (*i.e.*, well(s) and a storage facility (for fire flows)) to provide potable water for a casino include the following: (a) increased intrusion of salt-water into the Upper Glacial aquifer, thus limiting its usefulness as a source of water supply for the HBWD; (b) localized drawdown of ground water due to pumping of an on-site well supply; (c) impairment of the area's viewshed resulting from the installation of a water

storage tank; (d) additional site clearing associated with constructing water supply facilities; (e) additional security measures associated with protecting water supply; and (f) additional treatment chemicals on site and increased potential for spills associated with water treatment. (S125, at 68.)

(H) WASTEWATER TREATMENT IMPACTS

Operation of a 130,000 sf. casino at Westwoods will require the construction and operation of a wastewater treatment facility capable of handling a design wastewater peak flow rate of 1.44 MGD with effluent discharges to either groundwater or surface waters. (S125, at 69.)

Because estimated sewage flows exceed the maximum population density equivalent flow rate of approximately 46,200 gallons per day that could be treated using an on-lot subsurface septic system, a wastewater treatment facility will be necessary in order to prevent contamination of groundwater or surface waters if a 130,000 sf. or a 300,000 sf. casino were to operate at Westwoods. (S125, at 69.)

If a casino of 130,000 sf. or larger were opened at Westwoods, the potential long-term environmental impacts of a discharge to groundwater or surface waters, even with a wastewater treatment plant, include the following: (a) reduction in groundwater and surface water quality resulting from the discharge of nutrients and oxygen-demanding substances and disinfectants, which are residual in the treated wastewater; and (b) increased likelihood of algal blooms due to nutrient discharges to nearshore waters. (S125, at 69.)

(I) SOLID WASTE IMPACTS

Potential adverse environmental impacts associated with the collection, on-site storage of solid wastes, and subsequent hauling to offsite transfer/disposal facilities from a casino complex at Westwoods include the following: (a) generation of odors from stored solid wastes causing nuisance conditions to neighboring residential properties; (b) visual impairment due to litter generated by visitors and wastes dropped along local roads; (c) increased noise resulting from the operation of solid waste compactor units and trucks hauling solid wastes to off-site transfer/disposal facilities; and (d) potential for increased numbers of vermin (*i.e.*, rodents and insects) and resultant health and safety issues. (S125, at 73.)

(J) AESTHETIC IMPACTS

Short-term and long-term aesthetic impacts from construction and operation of a casino complex at Westwoods include the following: (a) encroachment on setbacks and height restriction exceedances typically applied to residential areas (if there is maximum build-out); (b) visual impacts on the coastal bluffs and scenic highway (Sunrise Highway); (b) significant changes in the viewshed from the Great Peconic Bay; (c) significant loss (if not elimination) of the tree buffer between the Westwoods site and adjacent residential land uses; (d) increased noise due to significant traffic increases on Newtown Road and Sunrise Highway; (e) increased noise due to day-to-day operations such as deliveries and workers' entering and exiting the establishment; (f) increased noise due to building HVAC units and restaurant exhaust fans; (g) irreversible changes to the neighborhood and Town community character; (h) light pollution from facility and

parking lot lighting; and (i) noise from facility patrons. (S125, at 75-76.)

(K) IMPACTS FROM ENERGY INFRASTRUCTURE CONSTRUCTION AND OPERATION

Potential adverse short-term and long-term impacts from the construction of electrical transmission lines to the site to provide the necessary energy needs of facilities at Westwoods include the following: (a) disruption of traffic along residential roads during construction causing potential congestion, as well as safety issues (*e.g.*, traffic accidents and injuries); (b) particulate air emissions during construction potentially resulting in visual impairment and health-related respiratory effects (*e.g.*, asthma and reduced lung capacity); (c) increased noise impacts on neighboring residential properties during construction; (d) additional growth inducing aspects and associated impacts from increasing electrical capacity to the area; (e) impairment of the area's viewshed due to overhead power lines and poles; and (f) traffic disruption during routine maintenance of the power lines and poles. (S125, at 56, 71-72.)

Potential adverse long-term impacts from the extension of a natural gas supply line to Westwoods to provide for on-site natural gas and the operation of a cogeneration facility in lieu of extension of high power lines include the following: (a) an increase in the localized area of criteria air pollutants including carbon monoxide ("CO"), hazardous air pollutants ("HAPs"), greenhouse gases such as nitrogen oxides ("NOx"), particulate matter equal to or less than 10 microns ("PM10"), sulfur dioxide ("SO2"), and volatile organic compounds ("VOCs"); (b) ground level ozone formation as a result of NOx, VOC, and CO emissions; (c) visibility impairment impacts as a result of NOx and SO2 emissions; (d) acid rain impacts as a result of NOx and SO2 emissions; (e) traffic disruption for routine maintenance of the natural gas lines; and (f) additional growth-inducing aspects and associated impacts from increasing natural gas capacity to the area. (S125, at 57-58.)

Potential adverse long-term impacts from the operation of on-site storage of distillate oil and an on-site distillate oil-powered cogeneration facility, such as a No. 2 fuel oil powered cogeneration facility, include the following: (a) an increase in the localized area of criteria air pollutants including CO, HAPs, NOx, PM10, SO2, and VOCs; (b) ground level ozone formation as a result of NOx, VOC, and CO emissions; (c) visibility impairment impacts as a result of NOx and SO2 emissions; (d) acid rain impacts as a result of NOx and SO2 emissions; (e) potential for spill or leaks of fuel oil during storage tank re-filling operations; (f) potential for spill or leaks from the storage tanks during normal facility operations or catastrophic failure; (g) potential contamination of surface and ground water resources due to spills or leaks; and (h) roadway congestion and safety concerns due to daily trucking of fuel oil deliveries on residential roads in order to access the site. (S125, at 58.)

(L) TRAFFIC-RELATED IMPACT

As set forth below, the Court concludes that the operation of a casino at Westwoods would have substantial disruptive impacts on the community due to increased traffic.

1. Traffic Analysis

The engineering firm of Greenman-Pedersen, Inc. ("GPI") was retained by the State to conduct an analysis of the traffic impacts that would be created by the construction and operation of a casino complex at Westwoods. (S108, at 2; Tr. 1519.) The traffic impact analysis was conducted by the Transportation Service Division of GPI, headed by Michael J. Salatti, a Professional Engineer and a Professional Transportation Operations Engineer. (S108, at 2; Tr. 1510-11, 1514, 1519.) The Court found this analysis to be credible and reliable in determining potential traffic impact and the results of that study are summarized below. In analyzing the traffic impact of a proposed land use, traffic engineers assume a "reasonable-worst-case" scenario in order to ensure that all the actual impacts are assessed and addressed.[39] (Tr. 1528, 1530.) In order to analyze a "reasonable worst-case" scenario, GPI analyzed the traffic impacts of a casino complex at Westwoods during the peak traffic hours in the peak summer season. (S77, at 6-7.)

2. 2006 (Baseline) Traffic

Traffic on the east end of Long Island has been growing progressively slower and more congested since the 1990s. (Tr. 1438-39.) People driving to the Hamptons from the New York City area take the Long Island Expressway to CR 111 to SR 27 as the preferred route. (Tr. 1445-46, 1449.) There currently is congestion on CR 111 during the peak periods of Friday afternoon and Saturday morning going eastward and Sunday afternoons and Monday mornings going westward during the months of April through October, and particularly heavy congestion in the months of July and August during such periods, and including Thursday nights going eastward. (Tr. 1449-50.) The Hamptons Bottleneck is where SR 27 becomes CR 39 going eastward near the intersection of SR 27/CR 39 and North Road. (Tr. 1452-53.)

The Town has legitimate concerns that changes to improve traffic on SR 27/CR 39 and to relieve the traffic at the Hamptons Bottleneck have created safety problems. (Tr. 1458-59.) In addition, congestion on SR 27 and CR 39 east of Southampton has not been relieved by measures addressing congestion at the Hamptons Bottleneck. (Tr. 1459-60, 1468.)

Traffic at the traffic circle on SR 24 is very heavy with severe congestion in various directions along the circle's entry points. (Tr. 1448.) There are backups and heavy traffic blocking SR 24 leading to the intersection of SR 24 and Old Montauk Highway. (S95, at 31-33; Tr. 1464-65.)

The roads around Westwoods are smaller, winding residential roads without shoulders and curbs and usually without sidewalks and street lights, and are inappropriate for travel by tour buses. (Tr. 1466-67.) GPI analyzed current traffic impacts in the vicinity of Westwoods in April and June of 2006. The primary study area included roadways close to the project site that would receive the maximum number of vehicle trips generated by the proposed casino complex at

[39] GPI's analysis is contained in an initial report and an addendum to that report. (S77; S108.) GPI also prepared a rebuttal report addressing the analysis of defendants' experts. (S95.)

Westwoods. The secondary study area encompassed locations further from the site and included major intersections, ramps, weaving areas, and corridors on roads from the New York City metropolitan area to Westwoods. (S77, at 7-9.)

3. BUILD CONDITION 2010 (TRAFFIC IN 2010 WITH CASINO COMPLEX AT WESTWOODS)

The traffic volume estimated for the "2010 Build Condition" consists of traffic capacity without a casino complex (the "No-Build 2010 Condition") on the primary and secondary street network[40] plus the new traffic generated by operation of a casino complex at Westwoods for the Friday and Sunday PM peak traffic hours during the peak summer season. (S77, at 26.) GPI assumed the following elements of a casino complex at Westwoods when calculating vehicle traffic generated by its operation: (a) casino (130,000 sf. with 4,785 gaming positions); (b) theater (50,000-60,000 sf. with 3,000 seats); (c) retail (75,000 sf.); (d) casino hotel (600 rooms, 4 stories); (e) casino hotel (400 rooms, 6 stories); (f) spa (25,000 sf.); (g) convention center (50,000 sf.); (h) temporary casino (21,600 sf.); (h) free-standing hotels (604 rooms); and (i) free-standing restaurants (500 seats). (S77, at III and 27.)

In 2010, the casino complex at Westwoods would 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. (S108, at 11.) During peak traffic hours, the increase in vehicular activity would include 3,009 new vehicle trips during a summer Friday peak hour and about 3,689 new vehicle trips during a summer Sunday peak hour. (S108, at 11.)[41]

4. TRAFFIC CAPACITY ANALYSIS

GPI considered two alternates in determining the traffic impacts from a casino complex at Westwoods. (S77, at 36.) In "Build Alternate 1," GPI assumed that Westwoods cannot be directly accessed from Sunrise Highway and vehicles traveling to the casino complex on Sunrise Highway would have to use either Exit 65 or Exit 66 and then travel along the local roadways, including North Highway, Newtown Road (CR 62), Squiretown Road, and Montauk Highway (SR 27A), to reach Westwoods. (S77, at 36-37; Tr. 1522.)

In "Build Alternate 2," GPI assumed that ramps would be built from Sunrise Highway to Westwoods. One ramp would provide

[40] To estimate traffic impacts in the 2010 No-Build Condition, GPI assumed that the casino complex at Westwoods would begin operating in 2010 and a traffic growth rate of 2% per year was assumed based on a stipulation between the parties that traffic would grow at a yearly rate of between 2 and 2 ½ percent. Based on this growth rate, GPI assumed that traffic volumes in 2010 would be 8 percent higher than in 2006. (S77, at 19; Tr. 1551-52.)

[41] With respect to defendants' traffic volume estimates, the Court finds a number of flaws in the methodology used by defendants' expert, Mr. Rittvo, including the use of a gravity model to generate trips to a particular land use (rather than vehicle counts at similar land uses), which resulted in a significant disparity in his trip rates when compared to ten published studies of casino traffic generation. (S95, at 3-5; D328, at 49-51; Tr. 3772-73.)

direct access for eastbound traffic on Sunrise Highway (SR 27) to Westwoods, one ramp would provide direct access for westbound traffic from Westwoods to the Sunrise Highway, and one ramp would provide direct access for westbound traffic on Sunrise Highway from east of the Shinnecock Canal to Westwoods. (S77, at 37; Tr. 1578-80.) Visitors to the casino complex from east of the Shinnecock Canal would have to return on local streets. (S77, at 37.)

GPI conducted traffic capacity analyses for the two alternates using SYNCHRO and HCS software. The traffic impacts of the Westwoods casino complex were assessed by comparing traffic impacts in the No-Build 2010 Condition with Build Alternates 1 and 2. (Tr. 1547-52.) These analyses resulted in the following data: Eight of the nine signalized intersections analyzed would be operating under constrained traffic conditions during either the Friday and Sunday peak traffic hours under both Build Alternates 1 and 2, but the impacts would be more severe under Build Alternate 1. Of the eight intersections, four would be operating under constrained conditions during both Friday and Sunday peak hours, two would be operating under constrained conditions on Friday only, and the other two would be operating under constrained conditions on Sunday only. (S108, at capacity analysis summary tables; Tr. 1585-87.) Twelve of the fifteen unsignalized intersections would be operating under constrained traffic conditions in Build Alternate 1. Eleven intersections will be operating under constrained conditions during both the Friday and Sunday peak hours and one will be operating under constrained conditions only during the Sunday peak hour. Five unsignalized intersections will be operating under constrained traffic conditions under Build Alternate 2 during both Friday and Sunday peak hours. (S108, at capacity analysis summary tables.) The off-ramp at westbound Sunrise Highway (SR 27) and northbound CR 111 would be operating under constrained traffic conditions under both Build Alternates 1 and 2. In addition to this ramp, Build Alternate 2 would also result in traffic constraints at the off-ramp at westbound Sunrise Highway (SR 27) and northbound Route 24 operating at the lowest level of service. This ramp would not operate under constrained conditions under the No-Build 2010 Condition. (S108, at capacity analysis summary tables.) The freeway weaving segments at Sunrise Highway (SR 27) westbound between NYS Route 24 On/Off ramps would operate under constrained traffic conditions under both Build Alternates 1 and 2. (S108, at capacity analysis summary tables.) Based upon the data, GPI concluded:

> These capacity constraints and delaysassociated with the proposed project would have a negative cumulative impact on the overall traffic operations of the surrounding roadway network. Thus, the individual delays and queues at intersections would collectively result in a gridlock situation under Alternate 1 and significantly high traffic impacts under Alternate 2, when compared to the No-Build 2010 Conditions. The local streets would be unable to accommodate the newly added traffic under

> these conditions. . . . In summary, the analyses conducted for this assessment have indicated, even under the reasonable scenario we have assumed, that the traffic impacts imposed upon the existing road network would be overwhelmingly significant, imposing lengthy delays, creating extraordinary queues and resulting in degradation of safety.

(S77, at V.)

5. DEFENDANTS' TRAFFIC EXPERT

As a threshold matter, because defendants' traffic analysis expert, Sam Schwartz, used project-generated traffic volumes for his traffic impact analysis from Mr. Rittvo (Tr. 3771, 3780), the reliability of Mr. Schwartz's analysis is undermined by the flaws in Mr. Rittvo's estimates. There are also flaws in the defendants' traffic impact analysis (S95, at 24-48), which the Court believes further contribute to an underestimation of the traffic impact by a casino at Westwoods.

In any event, Mr. Schwartz conceded that, in analyzing the casino currently proposed by the defendants (with 1,310 gaming stations and no hotel), certain traffic engineering changes would need to be made in order for traffic to operate at a "reasonable" level, such as upgrading or introduction of traffic signals, and some redesign of several intersections. (D320, at 5-6; D321, at 1; Tr. 3541.) Although he classifies these improvements as "routine," it is far from clear that these modifications will not implicate other traffic issues and considerations, or that they will necessarily alleviate the problems caused by the additional traffic. (S95, at 40-45.)

Moreover, Mr. Schwartz conceded that traffic generated by the casino in the constrained scenario (with 3,000 gaming stations and a 450-room hotel) and the unconstrained scenario (with 6,500 gaming stations and a 1,000-room hotel) would cause unreasonable disruption in the area of Westwoods in the absence of direct access ramps from Sunrise Highway to the casino. (Tr. 3935-37.)

Defendants presented no evidence concerning when, by whom, or at whose cost improvements described by Mr. Schwartz to any intersections intended to reduce traffic impacts would be accomplished. Moreover, there are other legal hurdles regarding the building of direct ramps to Westwoods from Sunrise Highway, which plaintiffs have failed to address. Specifically, the portion of SR 27 commonly known as Sunrise Highway, which bisects the southern portion of the Westwoods Parcel, is a New York highway. (Stipulation, dated January 16, 2007, Stip. No. 20.) There is currently no direct vehicular access to Westwoods from State Route 27. (Stipulation, dated January 16, 2007, Stip. No. 21.) Currently, the only vehicular access onto the Westwoods site from a public street is from Newtown Road. (Stipulation, dated January 16, 2007, Stip. No. 22.) None of the defendants, nor any person or agency acting on behalf of any of the defendants, has sought any authorization or permit from New York or the NYDOT alleged by the State to be necessary to build a highway or ramp connection from Sunrise Highway to Westwoods. (Stipulation, dated January 16,

2007, Stip. No. 24.) The Nation will not alienate any portion of Westwoods. (Tr. 2935, 2964.) The NYDOT will not grant a permit to any person seeking to build an access ramp from a limited access highway, such as Rt. 27, to private property unless the ramp connects to a publicly owned roadway before the private property. (S245; D361, at 75-76.) There are no public roads on the middle Westwoods parcel south of Newtown Road and north of Sunrise Highway. (D266; D274.)

6. Adverse Air Quality Impacts Related to Traffic

Mr. Grover of GPI prepared a Mobile Source Air Quality Report, in connection with development of a casino at Westwoods, which the Court found credible and reliable. (S200.) The purpose of the air quality assessment was to determine the impact of traffic generated by the development of a casino at Westwoods on air quality emissions in the area surrounding the property. (S200, at 4.) Highway traffic is a significant source of emissions of several air contaminants. (S200, at 4; Tr. 1933.) The pollutants emitted by automobiles and trucks consist of CO, VOCs, NOx, and particulate matter ("PM"), all of which are detrimental to human health when they or chemicals created by them are inhaled. (S200, at 4; Tr. 1934-36.)

CO, VOC, and NOx emissions are all higher in the build condition than in the no-build condition. (S200, at 8; Tr. 1941-42.) Persons residing in and around the main travel routes to and from Westwoods would be exposed to greater amounts of CO, and to greater amounts of ozone arising from the reactions of VOCs and NOx in the atmosphere, should a casino be built at Westwoods. (S200, at 8; Tr. 2006-07.) PM emissions are higher for a casino complex at Westwoods in 2010, both with and without ramp access from Route 27, for both PM2.5 and PM10 in an amount over 40% greater than the levels expected should no casino be built. (S200, at 8.)

7. Disruptive Traffic Noise

GPI performed a study of the expected noise levels from traffic that would arise from the operation of a casino complex at Westwoods, which the Court found credible and reliable. (S200; S230.) The noise predictions made by GPI only consider typical vehicle noise, and do not account for the associated noise often encountered in a recreational/resort setting that a casino at Westwoods will likely create, such as loud stereos, beeping horns, etc. (S200, at 15; Tr. 1947.) GPI assigned 10 receptor locations for noise monitoring purposes on the basis of the proximity to the project and adjacent roads, and representation of the residential land use primarily found in the project area. (S200, at 10, and Figure 3; S230, at Figure 1; Tr.1944.) GPI conducted monitoring using equipment certified by the manufacturer to meet or exceed American National Standards Institute standards for Type 1, 2 and 2A sound level meters, and which was calibrated at the beginning and end of each measurement session. (S200, at 13.)

According to Federal Highway Administration standards, traffic noise impacts from a highway improvement project occur when the predicted traffic noise levels approach or increase the noise abatement criteria, or when predicted future traffic noise levels substantially exceed the no-build levels.

(S200, at 15; Tr. 1944-45.) The New York State Noise Analysis Policy has established that impacts occur when the predicted future traffic noise levels approach one decibel or exceed the noise abatement criteria or when the predicted future traffic noise levels substantially increase the no-build levels by six or more decibels. (S200, at 15; Tr. 1944-45.)

The predicted noise levels with an operating casino complex at Westwoods in 2010 exceed the noise levels expected in 2010 if no casino complex is built by more than 6 decibels at 6 of the 10 receptors under a Westwoods casino with no Route 27 access, affecting all of the residential development on Squiretown Road and Newtown Road north of Route 27, which includes approximately 75 single-family homes. (S200, at 14 (Table 18) and 16; Tr. 1945-46.)

V. CONCLUSIONS OF LAW

There are several legal questions that the Court will address: (A) whether plaintiffs have demonstrated, as alleged in the causes of actions in the complaints, that the commencement of construction on Westwoods and the proposed gaming facility violates New York gaming laws and environmental laws, and the Town Code; (B) whether the Shinnecock Indian Nation's aboriginal title to Westwoods has been extinguished; (C) whether, even if the Nation holds unextinguished aboriginal title to Westwoods, plaintiffs have demonstrated that they are entitled to prevent the construction of a gaming facility under the Supreme Court decision in *Sherrill* because of the disruptive impact that will result from the Nation's assertion of sovereignty over Westwoods; (D) whether defendants can operate a gaming facility at Westwoods in violation of New York gaming laws when such activity is not within the confines of the federal legal framework embodied in IGRA; (E) whether defendants can assert sovereign immunity as a defense; and (F) whether the requirements for permanent injunctive relief have been satisfied. The Court will address each of these issues in turn.

A. THE CAUSES OF ACTION

As set forth below, the Court concludes that plaintiffs have demonstrated that the defendants' actions and threatened actions with respect to the construction and operation of a casino at Westwoods are not in compliance with applicable New York anti-gaming laws and environmental laws, as well as the Town Code.

(1) NEW YORK ANTI-GAMING LAWS

With respect to the State's First Cause of Action, the State established that the Nation's planned gaming facility is not in compliance with New York anti-gaming laws. Although the New York State Constitution generally forbids gaming, it does allow certain forms of gaming, including a state lottery for education, pari-mutuel betting on horse racing, and limited charitable gaming in the form of bingo and "games of chance" conducted by religious, charitable, and certain non-profit groups. *See* N.Y. Const. art. I, § 9. Moreover, only authorized organizations that are licensed by the Board may conduct bingo and "games of chance." *See* N.Y. Gen. Mun. Law § 187. The General Municipal Law defines an "authorized organization" to "mean and include bona fide educational, fraternal or

service organization or bona fide organization of veterans or volunteer firemen. . . ." N.Y. Gen. Mun. Law § 186(4). Furthermore, the conduct of these games is strictly regulated by New York law and regulations. *See* N.Y. Gen. Mun. Law §§ 188-a, 475; Exec. Law § 431. Unless the gaming activity is conducted pursuant to these exceptions in the New York Constitution and New York laws, gaming for profit in New York violates New York's criminal laws and is against public policy.[42] *See* Gen. Mun. Law §§ 189(14), 495-a; Penal Law § 225.30. Defendants have not obtained any authorization under New York law to conduct gaming at Westwoods.

(2) NEW YORK ENVIRONMENTAL LAWS

With respect to the State's other causes of action, the Court concludes that the evidence at trial demonstrated that the Nation's actions and threatened actions with respect to the proposed gaming facility at Westwoods are not in compliance with New York environmental laws that are the subject of those causes of action. First, the Nation cannot operate the proposed casino without construction and operation of a sewage treatment facility that will, at least from time to time, discharge wastewater to surface or ground waters of the State from a pipe or other outfall. Accordingly, under New York law, the Nation is required to obtain a SPDES permit for the discharge of sanitary wastewater to either surface or ground waters of New York. *See* 6 N.Y.C.R.R. § 750-1.5(a)(4) (stating SPDES permit needed for discharges in excess of 1,000 gallons/day); 6 N.Y.C.R.R. § 750-1.14(c) (stating SPDES permit must be obtained before construction of wastewater treatment plant begins).

Similarly, under New York law, the Nation is also required to file for coverage under the SPDES General Permit for Stormwater Discharges for Construction Activities pursuant to N.Y. Envtl. Conserv. Law ("ECL") § 17-0807(4) and 6 N.Y.C.R.R. § 750-1.21(b)(2), by submitting a NOI certifying completion of a SWPPP that meets all of the DEC's technical requirements for erosion and sediment control. Thus, the Nation would be required to implement the SWPPP pursuant to the general permit and the NOI is required to be filed before the start of any construction activities. The Nation has not submitted an NOI to the DEC.

Furthermore, the issuance of the SPDES permit is also subject to an environmental review under SEQRA, which requires that an environmental review of an agency's proposed action occur before the action is undertaken. *See, e.g., Tri-City Taxpayers Ass'n v. Town Bd. of Queensbury,* 55 N.Y.2d 41, 45-46 (1982). In this case, the action would be the construction of a water treatment facility. Thus, the issuance of necessary governmental permits for the proposed casino are agency actions subject to SEQRA, and no permits can issue before the required environmental review has been completed. ECL § 8-0109(2). As stipulated by the parties, "the development of a gaming facility

[42] In 2001, the New York Legislature repealed in part the *per se* exception for slot machines. The use of slot machines, however, remains prohibited unless it is approved by the Board as an authorized "game of chance" or it is included in a State-Tribal Compact executed in accordance with federal law. *See* N.Y. Gen. Mun. Law § 186(3); N.Y. Penal Law § 225.30; 9 N.Y.C.R.R. § 5620.1.

at the Westwoods Parcel would likely to be a Type I action, a type of activity identified in 6 N.Y.C.R.R. Part 617.4 as being likely to require the preparation of an EIS; if the lead agency determines that the proposed action may result in at least one potential significant adverse impact, it would issue a positive declaration to that effect in accordance with 6 N.Y.C.R.R. Part 617.7." (Stipulation, dated January 16, 2007, at ¶ 25.) Given the potential environmental impacts, the preparation of an EIS to identify, and then propose mitigation of, environmental impacts would be necessary before construction could commence on a casino in accordance with state law. *See Chinese Staff & Workers Ass'n. v. City of N.Y.*, 68 N.Y.2d 359, 366 n.7 (1986) (holding that unlike NEPA, SEQRA requires EIS whenever there may be significant effect on environment). Violations of New York's environmental laws are subject to suit for injunctive relief pursuant to ECL § 71-1931. *See also* ECL § 71-1929 (holding that violators of ECL article 15, titles 1 through 11, "may be enjoined from continuing such violation").[43]

In the instant case, the Nation has stipulated that it has not even applied for any environmental permits from New York and has not commenced any aspect of the required SEQRA review. (Stip. No. 52; Stipulation, dated January 16, 2007, at ¶ 1.) Accordingly, the Nation's actions concerning the construction of the casino, and their threatened actions, are in violation of New York's environmental laws.

(3) TOWN CODE

With respect to the Town's causes of action, the Court concludes that the Town has established that the Nation's actions and threatened actions, in connection with the development activities and planned use of Westwoods for a casino facility, violate the provisions of the Town Code set forth in the causes of action.

Section 330-184 (subdivision I) of the Southampton Town Zoning Law provides that "no regrading, clearing, tree removal or any other work in preparation of future use of a site may take place until site plan approval or written permission has been received from the Planning Board." (T267.) None of the site preparation activities in which the Nation engaged on or about July 12, 2003 was preceded by any application or request for, or issuance of, site plan approval or written permission of the Southampton Planning Board, as required by Section 330-184(1) of the Town Code. Thus, these July 12 activities were not in compliance with Section 330-184 of the Town Code.

Similarly, under section 325-6, subdivision A of the Town Code, a permit must be

[43] The State's Complaint also includes a cause of action asserting that defendants could not build a casino with a new well whose pumping capacity exceeded forty-five gallons per minute and thus was proposing to build a casino which would draw ground water in violation of ECL § 15-1527. ECL § 15-1527 imposes permit requirements whenever any person proposes to build such a well. *See* ECL § 15-1527(2). The State's environmental expert concluded that on-site wells could not supply a sufficient amount of potable water. (S125, at 68.) In any event, if the Nation should propose substituting such wells for water supplied by the HBWD, the Nation then would be in violation of that provision of state law.

obtained to develop land within 200 feet of wetlands. Such development includes the clearing of natural vegetation, grading, excavation, placement of fill, building, structural changes, the installation of any man-made structure, planting, and landscape activities. (Tr. 277-28.) The northern parcel of Westwoods contains or lies adjacent to wetlands, as the Great Peconic Bay system is regulated as wetlands under Chapter 325 of the Southampton Town Code. Thus, any development of Westwoods within 200 feet of the wetlands on its northern boundary also would implicate Chapter 325 of the Town Code.

In addition to the violations of the specific Town Code sections referenced in the Complaint, the Town also established at trial defendants' violations of Town Code §§ 330-6 and 330-10, regarding zoning, as well as Town Code § 123-9A. First, the operation of a gaming casino is not a permitted use at Westwoods, which is zoned R60, according to Section 330-6 of the Town Zoning Law, and the related "Residence Districts Table of Use Regulations," set forth in Town Zoning Law Section 330-10. (T267.) As a R-60 designated parcel, Westwoods is limited to single-family residential use. (Tr. 114, 245; T267.) A gaming casino is not a permitted use in an R-60 zone, or in any other residential zone. In addition, the operation of a casino has not been identified as a "permitted" or "special exception" use within any "County Residence" or "Residence" zoning districts in the Table of Use Regulations appearing at § 330-10 of the Town of Southampton Zoning Law. (T267.) In fact, a gaming casino is not a permitted use anywhere in Southampton, and is not otherwise authorized in any respect by the Town. (Tr. 245-46; T267.) Thus, the Town has demonstrated that the Nation's proposed casino development violates the Town's zoning law as set forth in Section 330-6 and the related "Residence Districts Table of Use Regulations" as set forth in Section 330-10. (Stip. No. 48.)

To the extent that defendants suggest that Westwoods was "unzoned" because the current Town Zoning Map references Westwoods as "Ind-Res," the Court rejects that argument. Despite the lack of a designated zoning classification for Westwoods on the current version of the Town zoning map, the Town has classified the Westwoods parcel as residential property in 1957, 1972, 1984, and 1986, and has never taken any of the steps required to effectuate a change in that classification since 1986. Thus, there is no question, from a legal standpoint, that the Town has zoned Westwoods as residential and any references on the zoning map have no legal implication. *See, e.g., Paradis v. Town of Schroeppel,* 735 N.Y.S.2d 278, 278 (N.Y. App. Div. 2001) (invalidating town board resolution purporting to amend town zoning code provision); *accord Noghrey v. Town of Brookhaven,* 625 N.Y.S.2d 268, 268 (N.Y. App. Div. 1995); *Naftal Assocs. v. Town of Brookhaven,* 633 N.Y.S.2d 798, 798 (N.Y. App. Div. 1995); *Rockland Props. Corp. v. Town of Brookhaven,* 612 N.Y.S.2d 673, 673 (N.Y. App. Div. 1994).

The Court also rejects any argument by the defendants that the Town should be estopped from enforcing any zoning regulation because of its failure to place the designation on the current zoning map or because of a failure to enforce it. As a threshold matter, the Second

Circuit has held that "principles of laches or estoppel do not bar a municipality from enforcing ordinances that have been allowed to lie fallow." *LaTrieste Rest. & Cabaret, Inc. v. Village of Port Chester,* 40 F.3d 587, 590 (2d Cir. 1994); *see also Parkview Assocs. v. City of New York,* 71 N.Y.2d 274, 282 (1988) (holding that "'[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error,'" and such an administrative error does not confer rights contrary to the zoning laws) (quoting *Morley v. Arricale,* 66 N.Y.2d 665, 667 (1985)). In any event, even if applicable, defendants' estoppel argument also fails on the merits. First, Shinnecock Trustees Gumbs and Eleazer acknowledged they were aware that Westwoods was assigned a zoning classification by the Town. (Tr. 2943; S249, at 12, 98-99.) In fact, the Nation made an unsuccessful request to remove such classification in 1985. Thus, the Nation has been aware of the residential classification. Second, any argument that the Town should be estopped because it failed to enforce the zoning law is also factually flawed because, prior to the Nation's July 2003 activities, Westwoods had essentially remained in its natural state as a woodlot and, therefore, there was no reason for the Town to seek to enforce any provision of the Town Code or zoning laws prior to that time.

In addition to the zoning issues, the Town Code requires a Town-issued building permit to be issued in order to construct a commercial structure within Southampton. *See* Town Code 123-9. There is no question that the proposed construction of the casino facility at Westwoods would require the issuance of a building permit by the Town prior to the commencement of any construction or site preparation activities. Here, before commencing its site preparation activities, the Nation did not obtain a building permit. Thus, the activity at Westwoods violates Section 123-9 of the Town Code.

Defendants essentially concede that they have not complied with these New York and Town laws and have not obtained the various approvals and permits that would be required to construct and operate a gaming facility in New York and Southampton. The Nation's position is that it is immune from these laws and legal requirements because Westwoods is tribal land over which the Nation holds unextinguished aboriginal title and it is to this legal issue that the Court now turns.

B. Issue of Extinguishment of Aboriginal Title

Defendants argue that the construction and operation of a casino at Westwoods is immune from New York and local laws and regulations because the Nation holds unextinguished aboriginal title to Westwoods. In particular, at paragraph 16 of their Answer to the Town's Complaint, defendants

> Admit that none of Defendants has applied for or received any permit or approval from the Town of Southampton and aver that the Town of Southampton has no jurisdiction over the Westwoods Parcel and has no power or right to enforce any part of the Code of the Town of Southampton or any other local law or regulation of the Town of Southampton within

> Shinnecock tribal lands or, specifically, within the Westwoods Parcel.

(Defs. Ans. to Town Complaint, at ¶ 16; *see also* Defs. Ans. to State Complaint, at ¶¶ 54, 59.) Similarly, defendants concede that the Gaming Authority "has not submitted any document to the DEC and aver that this agency of the State of New York has no right or power to require any of the Defendants to obtain any license or permit for activities on Shinnecock tribal lands or to regulate or interfere with any activities on Shinnecock tribal lands." (Defs. Ans. to State Complaint, at ¶ 58.)

Defendants' position on this issue is contained in the Third Affirmative Defense to the Town's claims:

> Under the Constitution and laws of the United States and federal common law, neither the Town of Southampton or any other municipal corporation in the State of New York, including any county in the State of New York, has any right or power (a) to require the Shinnecock Indian Nation or any of its instrumentalities or affiliates to obtain a license, permit or any other form of permission prior to conducting any of the activities sought to be enjoined by the Complaint; or (b) to interfere with the right of the Shinnecock Indian Nation or any of its instrumentalities or affiliates from engaging in any of those activities or, in particular, from engaging in gaming or gambling activities on Shinnecock tribal lands.

(Defs. Ans. to Town Complaint, at 8, 9.) The virtually identical Third Affirmative Defense is contained in the Defendants' Answer to the State Complaint. (*See* Defs. Ans. to State Complaint, at 13.)

As analyzed in detail below, the Court concludes that the evidence at trial established in a clear and convincing manner that the Nation's aboriginal title to the Westwoods land was extinguished in the 17th century and, thus, defendants' defense to the current and threatened violations of New York and local laws in construction and operation of a casino at Westwoods fails on the merits.

(1) Legal Framework for Analyzing Aboriginal Title Issue

"Aboriginal title refers to the Indians' exclusive right to use and occupy lands they have inhabited 'from time immemorial,' but that have subsequently become 'discovered' by European settlers." *Seneca Nation of Indians v. New York,* 382 F.3d 245, 249 n.4 (2d Cir. 2004) (*quoting County of Oneida v. Oneida Indian Nation of N.Y.,* 470 U.S. 226, 233-34 (1985) ("*Oneida I*")), *cert. denied,* 126 S. Ct. 2351 (2006). In *Oneida I,* the Supreme Court explained how aboriginal Indian title derived from the doctrine of discovery, which provided that "discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use." *Oneida I,* 470 U.S. at 234; *see also Tee-Hit-Ton Indians v. United States,* 348 U.S. 272,

279 (1955) ("After conquest [Indians] were permitted to occupy portions of territory over which they had previously exercised sovereignty.") (internal quotation marks omitted).

This "[a]boriginal title, however, was not inviolable." *Seneca,* 382 F.3d at 249 n.4. Specifically, "Indians were secure in their possession of aboriginal land until their aboriginal title was 'extinguished' by the sovereign discoverer." *Id.*; *see also Oneida I,* 470 U.S. at 234 ("[N]o one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign."). As the Supreme Court has long recognized, the sovereign "possessed exclusive power to extinguish the right of occupancy at will." *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 46 (1946); *see also Johnson v. M'Intosh,* 8 Wheat. 543, 21 U.S. 543, 588 (1823) ("All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right."). "Extinguishment could occur through a taking by war or physical dispossession, or by contract or treaty. . . and did not give rise to an obligation to pay just compensation under the Fifth Amendment." *Seneca,* 382 F.3d at 249 n.4 (citations omitted); *see also United States v. Santa Fe Pac R.R. Co.,* 314 U.S. 339, 347 (1941) (holding that aboriginal title can be extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise") (citation omitted).

The Second Circuit also has confirmed that, during the colonial era, Great Britain held the right of extinguishment. *See Oneida Indian Nation v. New York,* 860 F.2d 1145, 1150 (2d Cir. 1988) ("*Oneida II*") ("The right to extinguish Indian title, sometimes called a right of extinguishment, was held by the sovereign-Great Britain in the period prior to the American Revolution."); *see also Seneca Nation of Indians v. New York,* 206 F. Supp. 2d 448, 505-06 (W.D.N.Y. 2002) ("In the period prior to the American Revolution, Great Britain, recognized as the discovering nation and sovereign after defeating the French, held both the right of extinguishment and the right of preemption of Indian lands located in the colonies. Thus, Britain had the exclusive authority to extinguish Indian title, and its underlying fee title or right of preemption was good against all other discovering nations."), *aff'd,* 382 F.3d 245 (2d Cir. 2004), *cert. denied,* 126 S. Ct. 2351 (2006).

Although the sovereign clearly possesses a right of extinguishment, aboriginal title is not easily extinguished. In particular, "[i]t is well-settled that an intention to authorize the extinguishment of Indian title must be 'plain and unambiguous,' either 'expressed on the face of the [instrument] or . . . clear from surrounding circumstances.'" *Seneca,* 382 F.3d at 260 (quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 276 (1985) (other citations omitted)); *see also Oneida I,* 470 U.S. at 248 ("[C]ongressional intent to extinguish Indian Title must be 'plain and unambiguous,' . . . and will not be 'lightly implied.'") (*quoting Santa Fe,* 314 U.S. at 346, 354)); *Delaware Nation v. Pennsylvania,* 446 F.3d 410, 417 (3d Cir. 2006) ("For extinguishment to occur, the sovereign must intend to revoke the Indians' occupancy rights. . . . The intent to extinguish aboriginal title must be 'plain and unambiguous' based

on either the face of the instrument or surrounding circumstances. . . . Extinguishment cannot be lightly implied."). The foundational underpinning of this standard is the "policy of the federal government from the beginning to respect the Indian right of occupancy." *Cramer v. United States*, 261 U.S. 219, 227 (1923). Thus, given this strong policy, any ambiguity on the issue of whether aboriginal title has been extinguished must be resolved in favor of the Indian tribe. *See Santa Fe*, 314 U.S. at 354.

Moreover, in order to ensure that the extinguishment was plain and unambiguous, the Court may also consider events subsequent to any sovereign determinations that may be relevant on that issue. For example, in *Absentee Shawnee Tribe of Indians of Oklahoma v. Kansas*, the Tenth Circuit examined events subsequent to the treaty at issue to determine the intent and understanding of the Shawnee tribe:

> [T]he historical record indicates that the Shawnees understood that the Treaty entitled the Rev. Johnson to the property under the Treaty, and that they intended him to have it.
>
> This letter [from Chiefs and Council of the Shawnee Tribe of Indians] supports the conclusion that the Shawnees were fully cognizant of the effect of the 1854 Treaty in divesting their rights in the mission property. Even after the mission had discontinued providing educational services, the Shawnees clearly did not contemplate that they had any continued claim in the property. This is a case in which we cannot "ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims."

Id. at 1421-22 (quoting *Klamath Indian Tribe*, 473 U.S. 753, 754 (1985) and *Wash. 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) (remanding to district court to examine, among other things, the circumstances surrounding 1855 Treaty between the United States and the Yakima Tribe, and the post-Treaty conduct of parties in order to interpret the scope of rights granted by the Treaty); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1220 (10th Cir. 2005) (holding that courts may not ignore plain language that "'runs counter to a tribe's later claims'"); *Cook v. United States*, 32 Fed. Cl. 170, 174 (Fed. Cl. 1994) (same); *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979) ("To determine the intent of Congress and understanding of the Indians, the court must analyze the wording of the treaties, agreements, and enactments, the prior history, the surrounding circumstances, and the subsequent construction given those documents by the parties.").

Finally, once extinguishment of aboriginal title occurs, it cannot be revived. *See, e.g., Delaware Nation v. Commonwealth of Pennsylvania*, No. 04-CV-166, 2004 WL 2755545, at *10 (E.D. Pa. Nov. 30, 2004)

("[W]e find that the original right to possession, 'once having been extinguished, could not be revived, even if title were thereafter acquired by those who originally possessed that right.'") (quoting *Tuscarora Nation of Indians v. Power Auth. of N.Y.*, 164 F. Supp. 107, 113 (W.D.N.Y. 1958)), *aff'd*, 446 F.3d 410, 417 (3d Cir. 2006); *see also Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 191 (1998) ("When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation. The repurchase of such land by an Indian tribe does not cause the land to re-assume tax-exempt status.").

(2) COLLATERAL ESTOPPEL ISSUE

As a threshold matter, the Town made a motion *in limine* to bar defendants from introducing any evidence, including any expert testimony, or making any argument at trial that the Shinnecock Tribe currently holds unextinguished aboriginal title to Westwoods. In particular, the Town argues that the Shinnecock are collaterally estopped from claiming that they have unextinguished aboriginal title to Westwoods because the Shinnecock Tribe participated as a defendant in *King v. Shinnecock Tribe of Indians*, 221 N.Y.S.2d 980 (N.Y. Sup. Ct. 1961),[44] in which the New York State Supreme Court held that the Shinnecocks' aboriginal rights to certain lands, including Westwoods, was extinguished in the 17th century (the "*King* Litigation"). Defendants argue that this motion is essentially a motion for reconsideration of Judge Platt's denial of summary judgment under the guise of an evidentiary motion *in limine*.[45] Specifically, defendants contend that, although Judge Platt did not explicitly address this issue in his November 7 Memorandum and Opinion, the Town specifically moved for summary judgment in part on the ground of collateral

[44] This lawsuit was authorized by an act of the New York State Legislature, Chapter 379, New York Laws of 1960, which expressly subjected the Shinnecock Tribe to the lawsuit commenced by King. *Id.* at 982.

[45] Motions for reconsideration may be filed pursuant to Federal Rule of Civil Procedure 59(e). The decision to grant or deny a motion for reconsideration falls squarely within the discretion of the district court. *See Devlin v. Transp. Commc'ns Int'l Union*, 175 F.3d 121, 132 (2d Cir. 1999). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked . . . that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (internal citations omitted). Similarly, Local Civil Rule 6.3 provides that a party moving for reconsideration must "set[] forth concisely the matters or controlling decisions which [the party] believes the court has overlooked." In any event, "reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *In re Health Mgmt. Sys. Inc. Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (citation and quotation marks omitted); *see also Medoy v. Warnaco Employees' Long Term Disability Ins. Plan*, No. 97 Civ. 6612 (SJ), 2006 U.S. Dist. LEXIS 7635, at *4 (E.D.N.Y. Feb. 15, 2006) ("The standard . . . is strict in order to dissuade repetitive arguments on issues that have already been considered fully by the Court.").

estoppel and, by denying the motion, Judge Platt implicitly must have rejected this argument. As set forth below, whether viewed as a motion for reconsideration or a motion considered *de novo* by the Court, the Court finds the collateral estoppel doctrine to be inapplicable under the peculiar circumstances of the instant case. More specifically, since the issue was addressed in the prior lawsuit in the form of a stipulation by a New York State attorney acting on behalf of the Shinnecock Nation, the Town cannot rely on the collateral estoppel doctrine to preclude litigation of that issue in this lawsuit.

"Under New York law, collateral estoppel bars relitigation of an issue when (1) the identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate the issue in the prior action."[46] *In re Hyman,* No. 05-7026-BK, 2007 WL 2492789, at *3 (2d Cir. Sept. 6, 2007) (citations omitted); *accord Hoblock v. Albany County Bd. of Elections,* 422 F.3d 77, 94 (2d Cir. 2005). "The party seeking the benefit of collateral estoppel bears the burden of proving the identity of the issues, while the party challenging its application bears the burden of showing that he or she did not have a full and fair opportunity to adjudicate the claims involving those issues." *Khandhar v. Elfenbein*, 943 F.2d 244, 247 (2d Cir. 1991) (citing *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455-56 (1985)).

Thus, the Court must look to the circumstances surrounding the *King* litigation to determine if these requirements were met. In *King*, a claim was brought by Douglas King against the Shinnecock Tribe to have the court resolve conflicting claims to land located within Southampton to the west of Canoe Place. *King*, 221 N.Y.S.2d at 981 (noting that the property at issue was located "about one quarter mile south of Montauk Highway at Hampton Bays in the Town of Southampton" and is " bounded . . . on the east by Shinnecock Bay"). King contended that he and his family members had actually possessed the land for at least 100 years and, thus, he had title to land based upon adverse possession. *Id.* at 982. In the lawsuit, the Attorney General of New York, by an Assistant Attorney General, appeared for both the State and the Nation. As part of the litigation, the Assistant Attorney General conceded or stipulated, that "as of the year 1738, record title to the premises was in the white proprietors of the Town of Southampton and not in the Shinnecock Indians, who had divested themselves of any recorded interest by treaty in the years 1662 and 1666." *Id.* at

[46] The Second Circuit has stated that, where as here a party is seeking to enforce a New York judgment, New York law is applied. *See Marvel Characters, Inc. v. Simon,* 310 F.3d 280, 286 (2d Cir. 2002) ("We apply federal law in determining the preclusive effect of a federal judgment and New York law in determining the preclusive effect of a New York State court judgment.") (internal citations omitted). In any event, although federal and state law differ in certain respects on some collateral estoppel issues, see *Indus. Risk Insurers v. Port Auth. of N.Y. and N.J.*, 493 F.3d 283, 288 (2d Cir. 2007) (noting, as to collateral estoppel under New York and federal law, that "these two bodies of law do appear to diverge in some particulars"), the result here would be the same under either standard.

982.[47] Therefore, it was conceded that there was no aboriginal title to the lands; instead, the court noted that "[i]t is the contention of the defense that at some time prior to 1810 the premises became part of the reservation and property of the Shinnecock Indians." *Id.* at 983. The court, however, rejected that argument due to a lack of evidence.[48] *Id.* at 986-87. In particular, the court explained:

> There being no persuasive proof that the Shinnecock Indians have ever acquired any tribal interest in the premises in question since their right of occupancy was extinguished by the sovereign, I conclude that the plaintiff has clearly established his title thereto by adverse possession.

221 N.Y.S.2d at 987.[49]

Although the Town argues that the defendants are collaterally estopped from denying the extinguishment of their aboriginal rights in Westwoods because the court in *King* determined that the Andros and Dongan Patents extinguished such aboriginal title, this Court concludes that the doctrine of collateral

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[47] The concession was actually made in a prior similar action in 1953, *see King v. Warner*, 137 N.Y.S.2d 568, 569 (N.Y. Sup. Ct. 1953), but it was agreed that the 1961 *King* action would be tried based upon the record of the trial of the 1953 action. *King*, 221 N.Y.S.2d at 981. Thus, this stipulation in the 1953 action was applied to the 1961 *King* action.

[48] In reaching this decision, the court did review "the genesis of title to lands in the Town of Southampton" and specifically referenced the analysis in *Trustees of the Freeholders and Commonalty of Southampton v. Mecox Bay Oyster Co.*, 116 N.Y. 1, 8 (1889). *See King*, 221 N.Y.S.2d at 985-86 (citing *Mecox Bay*). In *Mecox Bay*, the Court of Appeals referred to the Andros and Dongan patents and found that, prior to the Andros patent, "all the Indian deeds had been delivered, and the rights of the Indians extinguished." Specifically, the Court of Appeals reviewed the land grants to the Town of Southampton, including the Andros and Dongan patents:

> The first patent of the town was in 1676 by Governor Andros . . . . There can be no doubt that under this patent the title to all the lands vested in the corporate body thereby created. The grant was from the sovereign, who gave the grantees capacity to take and hold in a corporate character . . . .
> Under this grant, therefore, title vested in the town. The Dongan charter was granted 10 years later. It can hardly be presumed that it could have been intended by that deed to have changed the title to the land. Prior to the date of the Andros 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.

116 N.Y. at 8. As discussed *infra*, it is undisputed that the Andros and Dongan Patents covered all lands within the Town of Southampton, including Westwoods. (Stip. No. 77.)

[49] The Shinnecock Nation took an appeal from the decision by the New York Supreme Court, but later abandoned that appeal. *See King v. Shinnecock Tribe of Indians*, 17 A.D.2d 820 (N.Y. App. Div. 1962) (dismissing appeal).

estoppel should not be applied to this lawsuit on that issue because of the circumstances under which this issue was litigated in the New York court. In particular, the Court notes that the Town is seeking estoppel based upon a stipulation made on behalf of the Nation by the State of New York – the Town's current co-plaintiff and the Nation's current adversary in this lawsuit – while, in *King*, New York was representing the Nation in a trust capacity. The Second Circuit has recognized that "[m]ost courts have held that a fact established in prior litigation by stipulation, rather than by judicial resolution, has not been 'actually litigated.'" *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 146 (2d Cir. 2005) (citing cases); *see also North Shore-Long Island Jewish Health Sys., Inc. v. Aetna U.S. Healthcare,* 27 A.D.3d 439, 440-41 (N.Y. App. Div. 2006) ("An issue is not actually litigated if there has been 'a failure to place a matter in issue by proper pleading, or even because of a stipulation'") (quoting *Kaufman,* 65 N.Y.2d at 457 (emphasis omitted)); *1829 Caton Realty v. Caton BMT Assocs.*, 225 A.D.2d 599, 599 (N.Y. App. Div. 1996) ("[T]he doctrine of collateral estoppel is not applicable since the issues resolved by the stipulation of settlement were never actually litigated.") (citation omitted). The Second Circuit also has "specified that where the parties intend a stipulation to be binding in future litigation, issues to which the parties have stipulated will be considered 'actually litigated' for collateral estoppel purposes." *Uzdavines,* 418 F.3d at 146; *see also Red Lake Band v. United States*, 221 Ct. Cl. 325, 607 F.2d 930, 934 (1979) ("As a general rule . . . an issue is not 'actually litigated' for purposes of collateral estoppel unless the parties to the stipulation manifest an intent to be bound in a subsequent action."); *see generally United States v. Int'l Bldg. Co.*, 345 U.S. 502, 504 (1953) (finding no *res judicata* effect concerning tax deficiencies in previous years where deficiencies were entered into in prior tax litigation by stipulation). Here, where the stipulation regarding extinguishment of aboriginal title was entered into on behalf of the Shinnecock Nation by the attorney for New York, there is simply no indication from the record that this was done with the intent to be bound in subsequent actions. *See Red Lake Band,* 607 F.2d at 934 (holding that "an intention to be . . . bound [in future litigations] should not be readily inferred"). Thus, although the Nation was a party to that action, the Court does not consider this issue to have been "actually litigated" or litigated in a manner which provided a "full and fair opportunity" for litigation on the issue when it was based on a stipulation by the State of New York's attorney acting on behalf of the Shinnecock Nation in a lawsuit in which New York was also a party.[50] *See In re Hyman,* 2007 WL 2492789, at *7 (declining to "mechanically apply collateral estoppel").

In sum, the Court concludes, as Judge Platt implicitly did in denying summary judgment, that the stipulation in the *King* litigation should not bar the Nation from litigating the aboriginal title issue in this

[50] To the extent plaintiffs also suggest that defendants should be judicially estopped from challenging the colonial era transactions, that argument is rejected for the same reasons discussed above. *See Uzdavines,* 418 F.3d at 147 (denying judicial estoppel and noting "we limit[] the doctrine of judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity are certain") (citations and quotation marks omitted).

lawsuit; rather, the Court has examined this issue on the merits after a full trial in which the Nation has been given a full and fair opportunity to be heard and, as set forth below, finds that aboriginal title to Westwoods has been extinguished.

(3) BURDEN AND STANDARD OF PROOF

The parties do not agree on the burden of proof or the standard of proof on the issue of the extinguishment of aboriginal title. Plaintiffs argue that, because defendants have asserted "unextinguished aboriginal title" to Westwoods as an affirmative defense to plaintiffs' intention to have this Court enjoin the development of a gaming facility on that land, defendants have the burden of proving this affirmative defense by a preponderance of the evidence. Defendants, however, argue that plaintiffs have the burden of proving by clear and convincing evidence that the Nation's aboriginal title to Westwoods has been extinguished.

The Court concludes that plaintiffs have the burden of proof to establish by a preponderance of the evidence the plain and unambiguous extinguishment of aboriginal title. The Court recognizes that the Nation has asserted aboriginal title as an affirmative defense and that it is well settled that defendants have the burden of proof with respect to affirmative defenses, as well as matters that are interposed in avoidance of plaintiffs' claim. *See, e.g., Fitzgerald v. Henderson,* 251 F.3d 345, 357 (2d Cir. 2001) (holding that defendant bears the burden of proof on an affirmative defense); *United States v. Sun Myung Moon,* 718 F.2d 1210, 1224 (2d Cir. 1983) ("If defendant asserts an affirmative defense he bears the burden of proof on it."). However, in the instant case, it is undisputed that the Nation had aboriginal title at the time of initial discovery in 1640. *See Shinnecock Indian Nation,* 400 F. Supp. 2d at 489 ("Defendants submitted a Fact Statement containing facts which are, for the most part, undisputed and which show that the Shinnecock Indian Nation . . . [w]as in possession of the lands in and around the Town of Southampton when the first European settlers arrived in 1640. . . ."). Instead, the issue is whether that aboriginal title was extinguished. The Court notes that a federal law enacted in 1834, 25 U.S.C. § 194, places the burden of proof on a "white person" in any case concerning Indians with respect to "the right of property." Plaintiffs argue that the Supreme Court, however, has held that this burden-shifting law does not apply to states because a state is not a "person" within the meaning of the statute, *see Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 667 (1979), and that one court has held that Section 194 does not apply to land within the bounds of an original state, such as New York, *see Cayuga Indian Nation v. Pataki,* Nos. 80-CV-930, 80-CV-960, 1999 U.S. Dist. LEXIS 5228, at *13 (N.D.N.Y. 1999). However, in *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. Apr. 15, 2004), the court rejected that argument:

> In *City of Sherrill,* the Supreme Court's language in *Wilson* was relied upon to find that the burden of proof rested with the municipality, and the Court of Appeals for the Second Circuit affirmed, further substantiating that finding. *See [Sherrill], aff'd*

> *in part and rev'd in part*, 337 F.3d 139 (2d Cir. 2003). Therefore, here, as in *City of Sherrill*, the burdens of proof and production rest with defendants, the non-Indian parties questioning Indian title.

317 F. Supp. 2d at 135. This Court agrees with the reasoning in *Cayuga* and concludes, where as here the plaintiffs are questioning Indian title and arguing aboriginal title has been extinguished, the burden lies with plaintiffs.

Although the Nation further argues that the standard of proof is elevated to "clear and convincing" evidence rather than the "preponderance" standard, the Court disagrees. The Court recognizes, as noted *supra*, that extinguishment is not implied and plaintiffs must prove plain and unambiguous extinguishment of aboriginal title. That rule, however, does not transform the underlying standard of proof to a "clear and convincing" standard. The only case cited by defendants that supports this contention is a Court of Claims decision in which reference was made to a "clear and convincing evidence" standard, *Alabama-Coushatta Tribe of Texas v. United States*, No. 3-83, 2000 WL 1013532, at *34 (Fed. Cl. June 19, 2000). However, the citations referenced in the decision do not support such a standard. In fact, the majority opinion in that case actually took exception to the dissenting judge's view that a rule of statutory construction in favor of Native Americans should be utilized in evaluating the findings of an administrative hearing officer and noted that "[i]t is a rule of statutory construction, to aid in determining the meaning of legislation, not a rule for the weighing of evidence and shifting of the normal burden of proof."[51] *Id.* at *7. Thus, this Court concludes that the burden of proof is on plaintiffs here to prove by a preponderance of the evidence that aboriginal title was plainly and unambiguously extinguished.

In any event, this dispute between the parties regarding the burden of proof and standard of proof is not critical to the outcome of this lawsuit because the Court finds that, even if the Court adopted defendants' position by placing the burden of proof on plaintiffs and applied a "clear and convincing evidence" standard, plaintiffs still prevail in this lawsuit. In other words, for the reasons discussed *infra*, the Court finds that plaintiffs have demonstrated by clear and convincing evidence that the Nation's aboriginal title to Westwoods has been extinguished in a plain and unambiguous manner.

(4) USE OF EXPERT TESTIMONY

There were a series of motions and objections by the parties opposing their adversary's use of expert testimony regarding historical facts and circumstances pertaining to the issue of the extinguishment of

[51] To the extent that defendants suggest that, in any situation when something must be proven unambiguously, it necessarily must be by clear and convincing evidence, the Court disagrees. *See, e.g., MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 157 F.3d 956, 961 (2d Cir. 1997) ("To prevail on its claim of promissory estoppel, [plaintiff] had to prove by a preponderance of the evidence . . . a clear and unambiguous promise made by defendant. . . .").

aboriginal title. The Court addressed these issues during the trial utilizing the standards and procedures set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. Specifically, when a party wished to challenge an expert under *Daubert*, the Court allowed the opportunity to question the witness on the *Daubert* issues prior to the Court ruling on the motion to preclude the expert's testimony.[52] For reasons that were set forth on the record, the Court allowed all the proposed expert witnesses to testify because it found the *Daubert* criteria to be satisfied. Specifically, the Court concluded that the purported defects in qualifications and methodology went to the weight of the testimony, and not the admissibility, and that the testimony did not improperly infringe on the Court's role to determine questions of law. Although the legal and factual bases for the Court's decision regarding these challenges to the experts are contained in the record, the Court will highlight key aspects of its rulings below.

[52] Some courts have concluded that, in the context of a bench trial where there is not the same concern of juror confusion or potential prejudice, the court has considerable discretion in admitting the proffered testimony at the trial and then deciding after the evidence is presented whether it deserves to be credited by meeting the requirements of *Daubert* and its progeny. *See, e.g., New York v. Solvent Chem. Co., Inc.*, No. 83-CV-1401C, 2006 WL 2640647, at *2 (W.D.N.Y. Sept. 14, 2006) (collecting cases). Although the Court could have utilized that approach in this bench trial, the Court decided to follow the standard *Daubert* procedure and allowed the parties to conduct a preliminary examination of the witness to address any *Daubert* challenges first and then have the Court rule on those challenges before the witness was permitted to give his or her entire testimony.

(A) THE *DAUBERT* STANDARD

The admissibility of expert testimony is analyzed under Rule 702 of the Federal Rules of Evidence, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Under *Daubert*, the district court must perform a gatekeeping function to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (holding that whether the witness' area of expertise was technical, scientific, or more generally "experience-based," the district court, in its "gatekeeping" function, must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor

that characterizes the practice of an expert in the relevant field"); *Nimely v. City of New York,* 414 F.3d 381, 396 (2d Cir. 2005) ("The shift under the Federal Rules to a more permissive approach to expert testimony . . . did not represent an abdication of the screening function traditionally played by trial judges.").

Thus, under Rule 702, the district court must make several determinations before allowing expert testimony: (1) whether the witness is qualified to be an expert; (2) whether the opinion is based upon reliable data and methodology; and (3) whether the expert's testimony on a particular issue will assist the trier of fact. *See Nimely*, 414 F.3d at 396-97. Moreover, if the requirements of Rule 702 are met, the district court must also analyze the testimony under Rule 403 and may exclude the testimony "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403; *accord Nimely,* 414 F.3d at 397.

Under the *Daubert* standards, the Court must first determine whether the expert has sufficient qualifications to testify. *See Zaremba v. Gen. Motors Corp.,* 360 F.3d 355, 360 (2d Cir. 2004) (stating that, where the witness lacked qualifications, an analysis of the remaining *Daubert* factors "seems almost superfluous"). Specifically, under Rule 702, the Court must determine whether the expert is qualified "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. A court should look at the totality of the witness' qualifications in making this assessment. *See, e.g., Rosco, Inc. v. Mirror Lite Co.,* No. CV-96-5658, 2007 WL 2274858, at *5 (E.D.N.Y. Aug. 6, 2007) ("A court must consider the 'totality of a witness'[] background when evaluating the witness'[] qualifications to testify as an expert.'") (quoting 29 Wright & Gold, Federal Practice and Procedure § 6265, at 246 (1997)); *accord Keenan v. Mine Safety Appliances Co.,* No. CV-03-0710, 2006 WL 2546551, at *2 (E.D.N.Y. Aug. 31, 2006). In addition, the Court must ensure that the expert will be proffering opinions on issues or subject matter that are within his or her area of expertise. *See Stagl v. Delta Air Lines, Inc.,* 117 F.3d 76, 80 (2d Cir. 1997).

With respect to reliability, as the Second Circuit has explained, the *Daubert* Court "has identified a number of factors bearing on reliability that district courts may consider, such as (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) a technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) whether a particular technique or theory has gained general acceptance in the relevant scientific community." *Amorgianos v. Nat'l R.R. Passenger Corp.,* 303 F.3d 256, 266 (2d Cir. 2002) (citations and internal quotations omitted); *accord Nimely,* 414 F.3d at 396. These criteria are designed to be instructive, but do not constitute a definitive test in every case. *Kumho*, 526 U.S. at 151; *Nimely,* 414 F.3d at 396. Moreover, in addition to these criteria for determining whether the methodology is reliable, Rule 702 also requires that there be a sufficiently reliable connection between the methodology and the expert's conclusions for such conclusions to be admissible. *See Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of

Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); *see also Amorgianos*, 303 F.3d at 266 ("[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.").

With respect to whether the expert's testimony will assist the trier of fact, the Second Circuit has repeatedly emphasized that "expert testimony that usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it, . . . by definition does not aid the jury in making a decision; rather, it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's." *Nimely*, 414 F.3d at 397 (citations and quotation marks omitted).

The proponent of the expert testimony bears the burden of establishing the admissibility of such testimony under the *Daubert* framework by a preponderance of the evidence standard. *See Daubert*, 509 U.S. at 592 n.10 ("These matters should be established by a preponderance of proof.") (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)); *see also* Fed. R. Evid. 702 advisory committee's note ("[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."); *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996) ("It is the proponent of the expert who has the burden of proving admissibility."); *accord Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 353 (S.D.N.Y. 2003) (same).

(B) SUMMARY OF COURT'S RULINGS ON THE EXPERTS

As noted above, in the instant case, the Court utilized the procedure established for challenges to expert testimony under *Daubert*, analyzed the particular expert testimony that each party sought to admit under the applicable standard and, for the reasons set forth in detail on the record, determined that the testimony satisfied the requirements of Rule 702 and was not excludable under Rule 403. However, for purposes of convenience and completeness, the Court will summarize below the basis for the Court's ruling on these *Daubert* issues.

First, each of the experts had sufficient qualifications as historians or ethnohistorians by knowledge, skill, experience, training, or education to testify about the colonial era documents pertaining to transactions or events relating to the Westwoods parcel and to provide the historical context for those documents. For example, although the Shinnecock Nation challenged the credentials of Mr. Lynch, Judge Platt correctly found him sufficiently qualified to be permitted to proffer his opinions. Mr. Lynch's qualifications included, among other things, the following: (1) a Bachelor of Arts degree from Southern Connecticut State University where he majored in Sociology/Anthropology; (2) a Masters of Arts Degree from Wesleyan University, where his concentration of study

was Anthropology/History and he authored a thesis on the process of adoption among the Iroquois Confederacy during the 18th century; (3) although he did not obtain a Ph.D., he completed all the necessary requirements for a doctoral degree in Anthropology/History at the University of Connecticut and passed his oral doctoral exam; (4) he has taken courses in title searching and conducted research, published works, and given presentations on many issues relating to Indian tribes of New York and New England; (4) he has approximately 13 years' experience as a private ethnohistorical consultant on Indian-related matters concerning Indian land claims, historical title searching, and petitions for federal acknowledgment as an Indian tribe; and (5) he was qualified as an expert in a Connecticut Superior Court lawsuit and has testified before the Connecticut Legislative Planning and Development Committee regarding legislation involving land grants. (T12; Tr. 394-96.) Thus, the Court found him qualified to testify concerning the matters covered by his report and supplemental report, including an analysis of interactions between the Shinnecocks and early settlers of the Town, the nature and scope of the Shinnecocks' historical use of Westwoods, and the nature and scope of authority exercised over that property by the Shinnecocks and the Town.

The Court also found Alexander von Gernet (an adjunct professor of Anthropology at the University of Toronto) to be qualified based upon his educational background, training, experience, publications, teaching, and prior expert certifications. (Tr. 996-97.) In fact, Professor von Gernet had been qualified as a expert witness in numerous jurisdictions in both Canada and the United States (including testifying and/or writing affidavits in twenty court proceedings), had previously testified as an expert with respect to the authority of the colonial governors, had testified in the *Cayuga* land claim litigation, and had written reports in three New York land claim cases (Cayuga, Seneca, and Oneida) addressing claims that certain Indian lands in New York remained unextinguished due, among other things, to unauthorized acts by New York governors. (S62.) Although defendants raised issues regarding Mr. Lynch's impartiality and certain errors in his reports and testimony, and similar arguments asserted in connection with errors in Professor von Gernet's report, the Court concluded that those issues went to the weight of their testimony, but were not sufficient to render them unqualified under the Rule 702 standard. *See McCullock v. H.B. Fuller Co.,* 61 F.3d 1038, 1043 (2d Cir. 1995) (holding that alleged weaknesses in expert's academic training and "other alleged shortcomings . . . were properly explored on cross-examination and went to his testimony's weight and credibility – not its admissibility").

With respect to various arguments by the Shinnecock Nation that either Mr. Lynch or Professor von Gernet were testifying about issues or subject matters that were purportedly beyond their area of expertise, the Court also found those arguments unavailing. For example, although the Shinnecock Nation argued that Professor von Gernet was not qualified to give testimony regarding the historical powers of New York colonial governors and the Shinnecock Tribe because he had never researched that particular issue prior to this litigation, the Court concluded that his expertise and qualifications could not be viewed so narrowly. Specifically, the

Court ruled that the training and skills he had clearly developed in his other research and writing about the relationship between aboriginal people and colonial governors qualified him to provided testimony about the historical context of the authority of colonial governors as it related to the Shinnecock Nation. (Tr. 997-98.) Similarly, despite objections from the Shinnecock Nation, Mr. Lynch was qualified, based upon the experience outlined above, to testify about the historical context of various colonial era documents, including deeds and patents, as well as the Canoe Place Division. *See, e.g., Bunt v. Altec Indus. Inc.*, 962 F. Supp. 313, 317 (N.D.N.Y. 1997) ("Liberality and flexibility in evaluating qualifications should be the rule . . . [T]he expert should not be required to satisfy an overly narrow test of his own qualifications.") (citation and quotation marks omitted).

Second, the Court found that the methodology used by the various experts was sufficiently reliable to be admissible after considering the *Daubert* factors relating to this requirement. Specifically, the experts analyzed and considered the pertinent historical documents (including deeds, patents, confirmations, and other colonial era documents) in the context of the contemporary historical understanding. For example, Mr. Lynch's research included a review of "historical documents and records, deed, wills, leases, municipal and public records, treatises, and reports." (T12, at 6-7.) As a result, he spent substantial time researching and compiling the historical record that he has outlined in great detail in his report. The other experts, including Professor von Gernet and Professor Hermes, utilized a similar methodology. Based upon a review of these methodologies, the Court found that the experts' testimony was sufficiently reliable to be admissible under *Daubert* and, as with the objections to qualifications, the purported weaknesses complained of by the parties regarding methodology were the proper subject of cross-examination and went to the weight of these witnesses' testimony, not the admissibility. *See McCullock*, 61 F.3d at 1044 (finding expert testimony properly admitted where "[d]isputes as to the strength of his credentials, faults in his use of different etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony"); *see also Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

Finally, while seeking to offer their own expert testimony on these issues and topics, the parties sought to exclude or limit the opposing expert's testimony by arguing that the proffered expert testimony would not assist the court (as the trier of fact) in resolving the disputed issue regarding the extinguishment of aboriginal title and by arguing the testimony involved purely questions of law. After carefully considering this issue, the Court rejected those arguments and allowed both sides to present their expert testimony. The Court recognizes that the issue of whether aboriginal title was extinguished is a legal question for the Court to resolve and not experts. However, in deciding that issue, the Court is required to analyze centuries-old documents and historical events. It is the Court's conclusion

that the consideration of expert testimony in the form of historians and ethnohistorians clearly assists the Court as the trier of fact, at a minimum, in identifying the ancient documents and historical events that may be relevant on this issue and providing testimony about the historical context for these documents and events to ensure that the meaning of the documents and/or events are not being misunderstood due to the substantial passage of time.

In fact, the Second Circuit has emphasized, in the context of litigation involving disputes about title to Indian land and extinguishment of Indian title to that land, that it is critical that the Court consider expert historical testimony to assist in the Court's determination of the meaning and interpretation to give to historical events. For example, in *Oneida Indian Nation v. New York*, 691 F.2d 1070 (2d Cir. 1982), the issue was whether, under Article IX of the Articles of Confederation, New York had authority to extinguish Indian title to lands within its bounds. The district court, in granting a motion to dismiss, took judicial notice of historical facts that had been presented by both sides without the use of expert testimony. On appeal, the Second Circuit reversed and remanded the case for an evidentiary hearing to assist the district court in determining the issue raised by the motion to dismiss. The Second Circuit explained:

> The district court, after reviewing the language and meager legislative history of the pertinent Articles [of Confederation] (no record of debates or committee reports was made), took judicial notice of pertinent individual records, notes, correspondence, histories, articles and other data, which may collectively be described as "historical evidence," as aids in interpreting the Articles, the Proclamation of 1783, and the 1784 Fort Stanwix Treaty. When there is no dispute as to the authenticity of such materials and judicial notice is limited to law, legislative facts, or factual matters that are incontrovertible, such notice is admissible. . . . However, when facts or opinions found in historical materials or secondary sources are disputed, it is error to accept the data (however authentic) as evidence, at least without affording the opposing party the opportunity to present information which might challenge the fact or the propriety of noticing it. Judicial notice of a disputed fact should not ordinarily be taken as the basis for dismissal of a complaint on its face. The better course is to conduct an evidentiary hearing at which the plaintiff may have its "day in court," and, through time-honored methods, test the accuracy of defendants' submissions and introduce evidence of its own.

In the present case evidence of

> contemporary construction of the key Articles and surrounding circumstances relevant to their meaning, of which the district court took notice, contains statements with respect to factual issues, such as the understanding of representatives of federal and state governments and the Oneidas regarding the meaning of the disputed clauses, the pre-Revolutionary practices of the British Crown with respect to matters involved, and the post-Revolutionary practices of the new federal government and the states under the clauses. The district court drew heavily upon this extrinsic historical evidence as the basis for its interpretation of the Articles even though the evidence had not been the subject of cross-examination or analysis through expert testimony and may not have been put in perspective by introduction of other relevant evidence. In short, both sides and the court appear to have referred to, relied upon, and quoted from numerous untested primary and secondary historical sources, including history books, treatises, and other papers. We agree with appellants that the district court should not have granted defendants' Rule 12(b)(6) motion on the basis of this type of evidence without affording the plaintiffs an evidentiary hearing in order to clarify the meaning and context of statements relied on and the weight to be given to them.

Oneida, 691 F.2d at 1086 (citations omitted). In another opinion issued before the evidentiary hearing in *Oneida* took place, the Second Circuit further articulated what type of hearing needed to be held:

> [T]he hearing to be held by the district court will be unlike the traditional trial of an issue of fact. Instead, the trial court will consider issues of law and statutory construction, against the historical background of the events surrounding the treaties, and the adoption of the applicable portions of the Articles of Confederation relied on by plaintiffs. This factual background in turn will probably be derived from the expert testimony of historians and others, and consideration by the court of contemporaneous documents and oral traditions.

Oneida Indian Nation v. New York, 732 F.2d 261, 265 (2d Cir. 1984). On remand, the district court conducted an evidentiary hearing during which it considered the reports and testimony of the parties' respective experts and then granted the defendants' motion to dismiss. *Oneida Indian Nation v. New York*, 649 F. Supp. 420, 422 (N.D.N.Y. 1986), *aff'd*,

860 F.2d 1145 (2d Cir. 1988).

In other cases involving tribal land and gaming claims, courts have similarly allowed consideration of historical experts to assist the trier of fact. *See, e.g., Cayuga Indian Nation v. Pataki,* 165 F. Supp. 2d 266, 304-357 (N.D.N.Y. 2001) (considering the testimony of Professor von Gernet on the question of New York's good faith in dealing with the Cayugas from the 1700s through the 1900s); *see also United States v. Idaho,* 210 F.3d 1067, 1069 (9th Cir. 2000) ("At issue in this case is the ownership of submerged lands lying within the present-day boundaries of the Coeur d'Alene Indian Reservation, which was originally set aside by executive order in 1873. After a nine-day trial involving multiple expert and lay witnesses, extensive written reports, scientific studies, and historical documents, the district court issued a lengthy and meticulous decision . . . ."); *Wisconsin v. Stockbridge-Munsee Cmty.,* 67 F. Supp. 2d 990, 993 (E.D. Wis. 1999) (noting that court heard testimony of historian in lawsuit involving plaintiff seeking a preliminary injunction to enjoin defendant Indian tribe from conducting a gambling operation in an area which the state argued was statutorily off-limits to gambling); *Wisconsin v. Stockbridge-Munsee Cmty.,* 366 F. Supp. 2d 698, 742-43, 779 (E.D. Wis. 2004) (granting summary judgment to the state and listing numerous expert witnesses).

Therefore, having considered the objections by the parties to their adversary's experts, the Court concluded that this expert testimony regarding these historical documents, and the circumstances surrounding the creation and implementation of these documents, was necessary and appropriate given the legal issues that the Court needed to resolve and did not constitute pure questions of law for which no expert testimony was necessary.[53]

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[53] In addition to objecting to Professor Hermes's testimony on the grounds that it involved purely legal conclusions, the State also objected to her testimony because the State believed that the political question doctrine precluded any testimony or exhibits offered to question the propriety of the sovereign's extinguishment of aboriginal title over the Westwoods land. The Court has considered that objection, but declines to reject or strike her testimony on that basis. The Court recognizes that, once extinguishment by the sovereign is established, the Court cannot question the wisdom or propriety of such extinguishment (as discussed *infra*). However, Professor Hermes's testimony was offered, in part, to attempt to persuade the Court *as a matter of historical fact* that extinguishment never occurred in the first place because the purchase of lands reflected in the Ogden and Topping Deeds was purportedly never approved by the General Court of the Colony of Connecticut as required by the 1650 Order. In other words, her position as it related to the two deeds was not that the sovereign invalidly extinguished aboriginal title in these deeds, but rather that the land transactions by these individuals with the Indians were invalid or void because they were never approved by the sovereign. Although the Court ultimately disagreed with her analysis, it needed to be fully considered. As noted above, the Second Circuit has cautioned that "when facts or opinions found in historical materials or secondary sources are disputed, it is error to accept the data (however authentic) as evidence, at least without affording the opposing party the opportunity to present information which might challenge the fact or the propriety of noticing it." *Oneida Indian Nation,* 691 F.2d at 1086. Therefore, despite the State's objection to Professor Hermes's testimony on grounds of the political question doctrine and the

In sum, as set forth in the trial record, the Court found that each party provided a sufficient basis for the admissibility of the expert testimony under *Daubert* and the Court considered that testimony, not as direct testimony on the ultimate legal issue of extinguishment, but rather for a different purpose – namely, as instructed in other cases by the Second Circuit, to assist the Court in identifying the relevant colonial era documents and understanding the historical context for those documents, so that the Court could make the legal determination on the issue of extinguishment of aboriginal title.[54]

The Court will now turn to its analysis of that issue having carefully considered the exhibits, expert testimony, and other evidence presented during the trial.

(5) ANALYSIS

The evidence at trial demonstrated in an overwhelming manner that, during the colonial era, the Shinnecock Nation conveyed, ceded, and relinquished all of its right, title, and interest in the Southampton lands west of Canoe Place, including Westwoods, and that aboriginal title to those lands was extinguished by the then-prevailing sovereign authority. As set forth in detail below, the intentional sale of these lands, including Westwoods, by the Shinnecock Nation to non-Indians and the extinguishment of aboriginal title to such lands are plainly and unequivocally contained in the language of a series of colonial era documents pertaining to these transactions, including the following: (1) the 1659 Ogden Deed and 1662 Topping Deed reflecting transactions in which the Shinnecock conveyed certain lands, including Westwoods, to non-Indians; (2) the 1666 Nicolls Determination, in which Governor Nicolls confirmed that the lands, including

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other grounds outlined in their motion to strike, the Court declines to preclude consideration of Professor Hermes's testimony regarding information that the Shinnecock Nation seeks to present to the Court that they view as challenging the fact or the propriety of the Court considering these historical documents. Instead, the Court has fully considered Professor Hermes's testimony, and the other evidence pointed to by the Shinnecock Nation seeking to undermine the plain language of these historical documents, and finds such arguments unpersuasive in light of the entire trial record, for the reasons discussed in detail *infra*.

[54] As noted *supra*, the parties agreed that the contents of the expert reports would be deemed to have been read into the record for purposes of direct examination. In addition to moving to exclude certain experts in their entirety on the grounds that the expert's testimony related purely to questions of law, there were also objections to the reports because of purported legal opinions contained in certain portions of the reports. In other words, the argument was that, even assuming *arguendo* that the testimony should not be excluded in its entirety as pure legal opinions, there were certain statements within the report that should be stricken on that basis. However, the objecting parties made this generalized objection without identifying specific sentences or portions of the report that were objectionable. When the objections were made, the Court reiterated that, to the extent the reports contained sentences constituting pure questions of law, it was not going to consider such portions of the report, but invited the parties to submit objections to particular sentences within the report if they wanted to move to strike portions of a report. No such specific objections were submitted by the parties.

Westwoods, had been conveyed by the Shinnecock Nation, thereby extinguishing aboriginal title in those lands; (3) the 1676 Andros Patent, in which Governor Andros issued a patent to the Proprietors of Southampton, which included Westwoods; and (4) the 1686 Dongan Patent, in which Governor Dongan again confirmed the prior extinguishment of aboriginal title. The assertions by the defendants that these transactions were void, and that the decisions of the New York Provincial Governors acting with sovereign authority were somehow inconsequential, are plainly contradicted by the historical record. Neither the language nor the context of the colonial era documents 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. Moreover, in addition to the clear and unmistakable intent of the sovereign authority to extinguish the Shinnecock Nation's aboriginal title to Southampton lands west of Canoe Place contained in these colonial era documents, the subsequent actions, and inactions, of the Shinnecock Nation after the issuance of these documents further confirm the extinguishment of aboriginal title to those lands – namely, prior to the position taken in the instant lawsuit, the Shinnecock Nation failed to challenge these conveyances and sovereign acts of extinguishment for over 300 years.

(A) THE COLONIAL ERA DOCUMENTS

(I) THE OGDEN AND TOPPING DEEDS

The Ogden and Topping Deeds reflect the plain and unambiguous conveyance of Southampton lands west of Canoe Place, including Westwoods, by the Shinnecock Tribe to non-Indians. *See South Dakota v. Bourland,* 508 U.S. 679, 689 (1993) ("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."). Although the defendants presented expert testimony and other factual evidence in support of their argument that these conveyances were invalid or void, the Court found such evidence unpersuasive for the reasons set forth below.

As outlined in the Finding of Facts, the first critical colonial era document is the May 12, 1659 Ogden Deed by which the well-known Sachem Wyandanch and his son conveyed all of the Shinnecock Tribe's right, title, and interest in lands west of Canoe Place (which was then the western boundary of the Town) to John Ogden. (T50.) Ogden was a Southampton Proprietor and Connecticut General Court magistrate. The language of the Ogden Deed clearly states the Shinnecock's intent to relinquish and cede all of their rights to the lands covered by the Ogden Deed, which included Westwoods. In particular, the Ogden Deed provides that the Shinnecock have "given and granted" such lands "unto Mr. John Ogden for himself his heirs executors and assigns for ever. . . ." (T50, at 162.) When examining the execution of this deed in the historical context of other colonial era documents, it is clear that the reason for the conveyance of these lands

to Ogden was payment of an arson fine imposed on the Shinnecock by Connecticut Colony. This conveyance to Ogden has become known as the "Ogden Purchase" or "Quogue Purchase." The lands involved in the Ogden Purchase were subsequently conveyed by Ogden to John Scott and Scott then conveyed those lands to the Proprietors of Southampton on February 2, 1663.

The second critical document of the colonial era is the April 10, 1662 Topping Deed. In the Topping Deed, Sachem Wyandanch's political successor, Weany Sunk Squaw, and others, on behalf of the Shinnecock Tribe, sold and conveyed lands west of Canoe Place (including lands located to the west of the western boundary of the Ogden Purchase) to Thomas Topping. (T58.) Topping was a Southampton Proprietor and Connecticut General Court magistrate. The Topping Deed specifically provides that the Shinnecock have "given and granted and by these presents do give and grant bargain sell assign and set over unto Thomas Topping aforesaid his heirs and assigns for ever all our right title and interest that we have or ought to have in a certain tract of land. . . ." (T58, at 167.) The use of language such as "all our right title and interest" is precisely the type of language used when there is an intent to transfer all title in land. *See, e.g., Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 766 (1985) ("The 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. . . ."); *see also United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979) ("[T]he 'all right, title, and interest' language is 'precisely suited' for the purpose of eliminating Indian title. . . ."") (citation omitted). The lands of the Topping Deed ran from Canoe Place, on the east, to "Seatuck" on the west, which is the modern-day border between Southampton and Brookhaven. More importantly, there is no question that those lands included Westwoods. The purchase price reflected in the Topping Deed was "four score fathoms of wampum." (T58, at 168.)

Although the defendants concede that the language of these deeds involve the conveyance of land including Westwoods by Shinnecock members, they seek to have this Court disregard these transactions as void or legally invalid on several grounds, including the following: (1) Sachem Wyandanch lacked authority from the Shinnecock to convey the land; (2) the Shinnecock may not have understood the import of the transaction; and (3) the applicable law of the Colony of Connecticut, whose jurisdiction Southampton operated under at the time of these transactions, prohibited any individual from directly acquiring Indian lands. These arguments were presented primarily through defendants' expert, Professor Hermes. However, the Court finds these arguments, and the evidence presented in support thereof, unpersuasive. As a threshold matter, prior to this litigation, the Shinnecock have never challenged the validity of these transactions. In fact, in the 1978 Litigation Request, the Shinnecock declared that "the Tribe's domain to the west of Canoe Place was conveyed to non-Indian individuals in 1659, 1662." (T229, at 8; *see also id.* at 16 ("The tribal territory to the west of Canoe Place was subsequently conveyed to non-Indian individuals by deeds of 1659 and 1662.").)

Moreover, as set forth below, their current position regarding the invalidity of these deeds is clearly contradicted by historical documents, the opinions of other historians, and the Shinnecock's own admissions.

With respect to Sachem Wyandanch, although Professor Hermes disputed Sachem Wyandanch's authority to act on behalf of the Shinnecock Tribe as a matter of historical fact, that position is undermined by, among other things, the following: (1) the September 19, 1666 reports of Southampton Proprietors Thomas Saire and Thomas Halsey (T46, at 158); (2) the fact that, as acknowledged by Professor Hermes, Sachem Wyandanch's authority over the Shinnecocks was recognized by the Connecticut Colony General Court in 1657 (T47, at 295; Tr. 2541); (3) Professor Hermes's admission that John Strong, a historian who Professor Hermes admitted possessed some expertise regarding the Shinnecocks, also concluded that Sachem Wyandanch had such authority, which is the same conclusion reached by Mr. Lynch (Tr. 2542-43); and (4) Professor Hermes's concession that the Shinnecock Tribe has never disagreed with the proposition that Sachem Wyandanch was authorized to act on the Tribe's behalf (Tr 2544).[55] In short, the historical record clearly supports the conclusion that Sachem Wyandanch was acting with the authority of the Shinnecock at the time of the Ogden transaction; there is simply no evidence to suggest otherwise.

[55] In fact, in its 1978 Memo, the Shinnecock Nation referenced that the Ogden Deed was from "Shinnecock sachem, Wiandance" and did not contest his authority to act on their behalf. (T229, at "I" of "Index to Appendices.")

The defendants' second argument – that the Shinnecocks may not have understood the meaning or import of their transactions with Ogden and/or Topping – is similarly unavailing. As one court noted in rejecting such an argument, the purported failure to recognize the import of giving up its rights at the time does not relieve the Shinnecock Nation of its obligations to live up to its agreement:

> Plaintiff's second argument is equally unavailing. Although plaintiff may not have thought it was relinquishing usufructuary rights in the 1831 treaty, its lack of understanding does not relieve it of its agreement to give up those rights.
>
> Plaintiff's third argument is that the tribe would not have understood the terms, "surveyed and offered for sale." . . . . It is one thing for the tribe to show that a particular term would have had another meaning to treaty negotiators in the mid-nineteenth century; it is an entirely different thing for the tribe to say that its leaders would not have known the meaning of a particular term . . . . [A] claim of the . . . lack of understanding by one party, is essentially immaterial.

Menominee Indian Tribe of Wis. v. Thompson, 943 F. Supp. 999, 1009, 1010 (W.D. Wis. 1996), *aff'd*, 161 F.3d 449 (7th Cir. 1998).

Moreover, in the instant case, any suggestion that the Shinnecock did not understand the parameters of these transactions, is based upon sheer speculation, rather than any evidence in the historical documents or record. To the contrary, the consideration received for these transactions and subsequent actions of the Shinnecock fully support a finding that they understood exactly what lands they were conveying by executing these transactions.

Finally, the defendants seek to evade the legal impact of the Ogden and Topping Deeds by arguing, through Professor Hermes, that those conveyances were "void ab initio" by reason of a pre-1650 order (law) of the Connecticut General Court, which required the General Court's approval of any transactions between settlers and Indians, and that no one has been able to locate any such approval. This position, however, has a number of significant weaknesses. First, Professor Hermes acknowledged that she has been unable to locate the pre-1650 Order of the Connecticut General Court upon which her opinion is based. (Tr. 2545-46.) Second, Professor Hermes conceded that she does not know whether that pre-1650 Order prescribed any consequences for its violation, such as rendering violative transactions "void." (Tr. 2548.) In fact, the 1650 Order, which makes reference to the pre-1650 Order on which Professor Hermes relies, does not contain the word "void" or its synonym, or the phrase "null in law." Third, although Professor Hermes testified she was unable to find any record of Connecticut General Court approval of either the Ogden Purchase or the Topping Purchase, she also conceded that there is no way to know for certain whether every transaction between settlers and Indians would necessarily be reflected in the records of a Colony's General Court. (Tr. 2594-96.) Thus, her unsuccessful search for a record such as the authorization of a transaction between settlers and Indians does not necessarily mean that such a record never existed. In short, after considering the historical evidence, the Court does not believe that the pre-1650 Order provides a sufficient legal basis to declare these transactions void as a matter of historical fact or as a matter of law.[56]

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[56] In addition, the Court notes that any alleged deficiency in these conveyances because of purported violations of Connecticut law was remedied by the Connecticut State Legislature in 1993. In particular, in 1993, the General Assembly of the State of Connecticut enacted "An Act Validating Transfers of Certain Lands," which provides, in pertinent part, as follows:

> All transfers of land more than sixty years prior to the effective date of this act of any person or group or association of persons, 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. Thus, to the extent that the

In any event, the resolution of this issue regarding the 1650 Order is not critical to the Court's analysis because of subsequent historical events that demonstrate the clear and unambiguous intention to extinguish aboriginal rights in the lands involved in the Ogden and Topping Deeds, including Westwoods. More specifically, as discussed below, even assuming *arguendo* that the Ogden and Topping Deeds were violative of a pre-1650 Order of the Connecticut General Court, these transactions were later confirmed and ratified by the prevailing sovereign authority – namely, various New York Provincial Governors – thereby clearly extinguishing aboriginal title to those lands.

(II) THE NICOLLS DETERMINATION

In a document dated September 17, 1666, several Shinnecock members recorded their "protest" over the 1662 Topping Purchase. In that document, these Shinnecock members argued that they were the "true proprietors of the said lands," and they expressed their desire to receive compensation for the sale to Topping. (T61.) Significantly, these protestors did not question the validity of the conveyance itself or seek to void that transaction. In particular, the protesting Shinnecock group expressly assigned and conveyed whatever interest they held 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." (T61, at 169.) Instead, the focus of the protest was whether they should receive payment from Southampton for the land. Thus, the protesters asked that Governor Nicolls determine whether they should receive payment from the Southampton Proprietors for their interest.

Governor Nicolls had been appointed the first English governor of the Province of New York on April 2, 1664, by virtue of a commission from the Duke of York. As such, Governor Nicolls possessed the authority to make laws, settle disputes, and address the question of Indian land purchases. As a result of this protest, Governor Nicolls considered the dispute fully and, on October 3, 1666, he issued the Nicolls Determination. Specifically, Governor Nicolls concluded and determined a "difference" between the "town of Southampton" and Topping. (T66, at 54.) The Nicolls Determination was made at a time when Connecticut no longer had jurisdiction over Long Island and while Governor Nicolls was the prevailing sovereign authority in the Province of New York, which included Long Island.

The language of the 1666 Nicolls Determination reveals the plain and unambiguous intent of Governor Nicolls (the sovereign authority at that time) to recognize the validity of the Topping Deed and to extinguish the Shinnecock's aboriginal title to the lands of the Topping Purchase – namely, all Southampton lands west of Canoe Place, including Westwoods – and to recognize that those lands were now owned exclusively by the Town, subject to no other rights or interests. In the Determination, Governor

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defendants argue that the Ogden and Topping Deeds are somehow invalid because they were never approved under Connecticut law, this statute further defeats such an argument because it approved, validated, and ratified such transactions. The Court is unaware of any legal constraint that would prevent Connecticut from approving these colonial era transactions in modern times.

Nicolls declared 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." (T66, at 54.) In addition, Governor Nicolls directed Thomas Topping and John Cooper to "deliver the town of Southampton all their deeds, writings and evidences that they have of a certain tract of land [*i.e.*, the lands of the Topping Purchase]." (T66, at 54.) He further instructed the Town to pay to the "Indians (concerned to receive it)" the sum of four score fathom of wampum, which was precisely the amount specified as consideration in the Topping Deed. (T66, at 55.) Finally, Governor Nicolls assured the Town that he would defend the Town in its peaceable enjoyment of the lands of the Topping Purchase, "[a]gainst all other claims whatsoever." (T66, at 55.)

Therefore, any conceivable doubt as to the validity of the Ogden and Topping Deeds, based upon those transactions having been purportedly done in violation of the laws of Connecticut, was completely eliminated by this Determination of Governor Nicolls, when he (and not the Connecticut Colony) was now the sovereign authority. At that time, Governor Nicolls would have already been aware of the contention of Connecticut Colony Secretary John Allyn, who had written to Governor Nicolls some 18 months earlier, that under Connecticut Colony law "no land was to be purchased to the perticuler use of any person, without the consent of or Generall Courte, and all such purchases to be null in lawe."[57] (D71.) Despite the existence of Allyn's claim, however, Governor Nicolls recognized the validity of the Topping Deed and the Town's title, which ultimately rested on that Deed. In fact, the Nicolls Determination does not suggest in any way that the Topping Deed was invalid or legally defective. It may have been that Governor Nicholls disregarded Allyn's position either because he did not believe that the Topping Deed had violated any Connecticut law, or he determined that the law of Connecticut Colony was irrelevant to his Determination as the sovereign authority over New York. In any event, whatever the reason, it is clear from the historical record that, despite Allyn's objection, the sovereign authority of New York ratified and confirmed the transaction.

Subsequent to the Nicolls Determination, the directives of Governor Nicolls were clearly implemented. Specifically, Topping delivered the deeds, writings, and evidences of his Topping Purchase to Southampton by an instrument dated November 6, 1667, in which he formally assigned his right, title, and interest in the Topping Purchase to the Town. (T197.) Moreover, the Town remitted the "four score fathom of wampum" to the Shinnecock. This is confirmed in a document dated February 22, 1667 (N.S.), in which several Shinnecocks affirmed not only their April 10, 1662 sale of lands to Topping and that they were "fully contented" with that transaction, but they also acknowledged their

[57] Professor Hermes testified that "it is likely" that the Allyn Letter was referring to a 1663 law of the Connecticut Colony (not the 1650 Order), which was enacted after both the Ogden and Topping Deeds, but opined that it could have been referring to past practice. (Tr. 2554.)

receipt of the four score fathom of wampum from the Town. (S70, 70A.) *See United States v. Dann*, 873 F.2d 1189, 1194 (9th Cir. 1989) ("[P]ayment for the taking of a[n] aboriginal title establishes that title has been extinguished."); *see also United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976) ("[A]ny ambiguity about extinguishment . . . has been decisively resolved by congressional payment of compensation.").

Therefore, the events surrounding the Nicolls Determination conclusively establish that: (1) the Shinnecock signatories in February 1667 expressed their agreement with their prior conveyance of land to Topping; (2) payment from the Town was accepted and retained by the Shinnecock for that land; and (3) the Governor, as the sovereign, had determined that, regardless of any position by the Connecticut Colony, the rights and interests to the land from the Topping Deed (including Westwoods) belonged to the Town. Under such circumstances, it is hard to imagine a more clear and unambiguous extinguishment of aboriginal title to this land.

Defendants attempt to argue that any alleged extinguishment of title, by Governor Nichols or otherwise, was subsequently invalidated by the Dutch's re-conquering New York in 1673 as a result of the Third Anglo-Dutch War and by the Order of the New York General Court of Assizes, dated October 5, 1676, relating to Southampton's failure to comply with the Law of 1664 concerning the taking out of "Grants, Patents, or Confirmations for their Towns or Lande." The Court finds both of these arguments to be without merit.

First, as a threshold matter, once aboriginal title is extinguished, it cannot be revived. In any event, any potential invalidation of titles by the Dutch re-conquering New York in 1673, for a brief period, was clearly remedied by Governor Andros in 1674 after the English re-conquered New York. More specifically, after the English re-conquered New York in 1674, a new charter was granted to the Duke of York in June 1674 on substantially the same terms that had existed previously. (S62, at 25.) Moreover, in that same year, after Governor Andros was appointed Governor of New York, he issued a proclamation in which he explicitly stated that "all former grants priviledges or concessions heretofore granted and all the estates legally possessed by any under his Royall Highnesse before the late Dutch government, As also all legall, judiciall proceedings during that government to my arrivall in these parts are hereby confirmed; And the possessors by virtue thereof to remain in quiet possession of their rights." (S72, at 108.) In other words, at the time when Governor Andros was the sovereign in New York, he made clear that all the transactions that occurred before the Dutch re-conquered in 1673 were still valid. Therefore, any argument that the prior extinguishment of aboriginal title was invalidated by the Dutch re-conquering of New York cannot prevail.

Second, defendants' contention regarding the consequence of the 1676 Order of the Court of Assizes is similarly unavailing. The Judgment made clear that the execution of the forfeiture of their titles and rights to lands in the town would take place *if* they did not comply with the Law of 1664 (regarding the taking out of "Grants, Patents or Confirmations for their Towns or Lande") by October 23, 2006, stating that the Town of

Southampton "have forfeited all their titles, Rights & priviledges to the lands in the sd Townshipps & if they doe not by Monday fortnight next (being the 23rd day of this instant month) send up the acknowledgmt of their past Default & Resolves & Desire to obey & fulfill the Law & the severall orders of the Cort of Assizes, for the taking out their Grants, Patents or Confirmations, as directed by Law, Then Execution to issue out by Authority of this Crt for the above forfeiture to the use of his Maty without further delay." (D77, at 724.) However, the Town did comply with the Judgment, as well as the Law of 1664 and the prior orders, by the October 23, 1676 deadline. (D77, at 724.) Therefore, the condition that would lead to the execution of the forfeiture Judgment never took place. Accordingly, any claim that the Town lost title to Westwoods because of failure to comply with the October 5, 1676 Order is simply contradicted by the historical record.

(III) The Andros Patent

On November 1, 1676, at a time when New York was no longer under the jurisdiction of Connecticut Colony, Governor Andros issued the Andros Patent. Governor Andros's authority to issue such a Patent, and to extinguish Indian title, cannot be questioned.

The Andros Patent confirmed the tract of land belonging to Southampton, and described that land as running from Seatuck on the west (which is the same western border established by the Topping Deed) and Wainscott on the east. (T188.) Thus, the Andros Patent described the entirety of the lands of modern-day Southampton, which include Westwoods, and ratified, confirmed, and granted, unto the freeholders and inhabitants of the Town, all of those lands, and "every part and parcell thereof . . . for ever . . . ." (T188, at 280.) Thus, Governor Andros confirmed that the Town was the owner of all lands from Wainscott (East Hampton) to Seatuck (Brookhaven), which included Westwoods.[58]

(IV) The Dongan Patent

Subsequent to the issuance of the Andros Patent, disputes apparently arose between the Town and the Shinnecocks regarding the respective rights of the parties in the lands of the Town. As a result, an application was made by Major John Howell, a freeholder of the Town, and one of the patentees under the Andros Patent, for confirmation that the freeholders of the Town lawfully held the land. *See* T69, at 387 (seeking to have the Governor "confirm unto ye ffreeholders of said Towne in a more full & ample manner all the aboverecited tracts and parcells of land

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[58] 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 . . . ." (T188, at 280.) Although the defendants contend that this sentence suggests that lands such as Westwoods had not been purchased lawfully, such an inference cannot be drawn from this language. Specifically, the word "if" indicates that Governor Andros was not making any finding that there were lands not already purchased from Indian tribes, but rather was simply providing that any such lands, if they existed, could be purchased. Thus, this language does not undermine the conclusion that all lands within the bounds of the Town had, in fact, already been lawfully purchased from the Shinnecocks.

within the limitts and bounds aforesaid and finally determine the difference between the Indyans and the ffreeholders of the said towne of Southampton").

In response to that application, and on December 6, 1686, Governor Dongan issued the "Dongan Patent" to the Proprietors of Southampton. Governor Dongan's authority to issue such a Patent is well-established and the Colony of Connecticut had no jurisdiction over the Province of New York at this time. The Dongan Patent restates the terms of the Andros Patent, including its description of the "tract of land" belonging to Southampton, running from Wainscott on the east to Seatuck on the west. Moreover, the Dongan Patent provides, in relevant part, that the Governor 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. . . .

(T69, at 387-88.) The "lands within the Limitts and bounds aforesaid," which the Town purchased from the "Indyans," were the entire lands of the Town, from Wainscott on the east, to Seatuck on the west. As with the Nicolls Determination, the Dongan Patent again emphasizes in clear and unmistakable language the prior extinguishment of the Shinnecock's aboriginal rights to any and all lands within the bounds of Southampton, including Westwoods.[59]

In short, these colonial era documents plainly and unambiguously demonstrate beyond any question the extinguishment of aboriginal title by the sovereign authority on all Southampton lands west of Canoe Place, including Westwoods.

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[59] To the extent that the defendants suggest that the Town was not created until the Dongan Patent was issued in 1686 and thus could not have acquired land as a Town prior to that time, the Court rejects that argument. Although the Trustees of the Freeholders and Commonality of the Town of Southampton was formerly created in 1686, the Town itself dates back to 1640. *See, e.g., Beers v. Hotchkiss,* 256 N.Y. 41, 46 (1931) ("Southampton in its beginnings was without a royal patent, though its inhabitants like true precursors of the thought of Hobbes and Locke, had organized themselves already into a political community. The defect in the documents was supplied by the Andros patent of 1676 and the Dongan patent a decade later."). In fact, as discussed *supra,* there are numerous colonial era documents created between 1640 and 1676 that confirm that the Town was formed, and in actual existence, well before the Andros and Dongan Patents were issued. Thus, the Andros and Dongan Patents did not create the Town; rather, "[t[he rights of the original settlers were recognized and confirmed by the Andros and Dongan [patents], and any divisions of the common lands made prior thereto do not appear thereafter to have been questioned." *Shinnecock Hills & Peconic Bay Realty Corp. v. Aldrich,* 132 A.D. 118, 122 (2d Dep't 1909).

(B) SUBSEQUENT STATEMENTS AND CONDUCT BY THE SHINNECOCK NATION

The 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.

First, in 1808, due to the rapid depletion of timber resources to the east of Canoe Place within Southampton, the Shinnecock sought to obtain from the Town the right to cut timber situated to the west of Canoe Place. Specifically, at the 1808 Trustee Meeting, it was voted, in the presence of Shinnecock Trustees and Southampton Trustees, that the Shinnecock lease 120 acres west of Canoe Place that, by reference to the land boundaries in the minutes of the meeting, included Westwoods. (T134.) The 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.

Second, there have been sworn statements by members of the Shinnecock before the New York State Legislature reflecting their understanding that Southampton lands west of Canoe Place had been sold by the Shinnecock. For example, in 1888, Milton Winfield Lee, a Shinnecock Tribe member who was later elected multiple times as a Shinnecock Tribal Trustee, testified before the Special Committee that "[t]he tribe bought fifty acres of wood land" and that "I think they [the tribe] have a deed of this tract." (T145, at 850-51.) This testimony, which appears to be a reference to land including Westwoods, reflects an understanding that the Shinnecock no longer had aboriginal rights to this land and had to purchase it. Similarly, in 1943, a 74-year old Shinnecock member named Fred Smith testified at a public hearing before the "Joint Legislative Committee on Indian Affairs," which had been established by the New York State Legislature. Smith testified that he had lived in Southampton his whole life and that the Tribe had purchased the "west wood land," an apparent reference to Westwoods, "by some money the Shinnecocks had." (T233, at 41-42.)

Finally, perhaps the most compelling statement by the Shinnecock Nation indicating their understanding that aboriginal title in Westwoods had been extinguished was in connection with a document submitted by the Tribe to the federal government about thirty years ago. Specifically, in the 1978 Litigation Request, the Shinnecock did not contest, or refuse to recognize, the legality of the Ogden and Topping Deeds in connection with Westwoods; rather, the Tribe conceded the validity and legality of these deeds by stating that "the Tribe's domain to the west of Canoe Place was conveyed to non-Indian individuals in 1659, 1662" (T229, at 8) and that "[t]he tribal territory to the west of Canoe Place was subsequently conveyed to non-Indian individuals by deeds of 1659 and 1662." (T229, at 16.)

Thus, the actions and statements by the Shinnecock Nation, or its members, in dealings with both the federal and state government bodies, as well as the 1808 lease with the Town, provide further evidence in support of the plain and unambiguous extinguishment of aboriginal title that is

demonstrated in the series of colonial era documents relating to Southampton lands west of Canoe Place, including Westwoods.[60]

(C) Evidence Regarding Use and Occupancy of Westwoods

In support of its argument that plaintiffs have failed to demonstrate extinguishment of aboriginal title to Westwoods, defendants presented evidence regarding the Shinnecock Nation's use and occupancy of land west of Canoe Place, including Westwoods, and argued that "the evidence overwhelmingly supports the conclusion that the Nation has continuously owned and occupied Westwoods since first European contact." (Plts. Conclusions of Law, at 23.) Defendants pointed to several pieces of evidence including, but not limited to, the following: (1) the *Cassady* Litigation, in which the Trustees of the Shinnecock Tribe of Indians brought suit in 1890 against James Cassady in Suffolk County Court, in their capacity as Trustees; (2) the *Hubbard* Litigation, in 1922, in Suffolk County Court, involving the taking of loam from Westwoods by a road foreman of the Town; (3) the oral history of the Shinnecock Nation, as reflected in the testimony of a current Shinnecock Trustee who reported the general belief in the community that the Nation has always owned Westwoods; (4) historical evidence regarding meeting houses, chapels, and interactions with missionaries in the vicinity of Westwoods; (5) a 1879 photograph of purported Indian huts; and (6) a book in which the author recounts information told to him by his grandfather concerning the Shinnecock Nation.

The Court has carefully examined all of the evidence regarding the use and occupancy of the Westwoods land as it relates to the issue of aboriginal title and disagrees with both the factual assertion by defendants based upon this evidence, as well as the legal conclusions to be drawn from the evidence of use and occupancy.

With respect to the defendants' factual assertion, although there is evidence demonstrating the Shinnecock's use of the

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[60] In addition to the affirmative actions and statements by the Shinnecock Nation, there also are a number of points in history, after the issuance of these colonial era documents, where the Shinnecock failed to claim it had aboriginal title to the land west of Canoe Place in circumstances where, if the Shinnecock understood such aboriginal title still existed, such a position logically would have been taken. For example, in 1738, the Town laid out and created the 1738 Canoe Place Division. This Division subdivided a 3,000 to 4,000 acre area west of Canoe Place and north of Montauk Highway, which included Westwoods, into 39 numbered lots. The Shinnecocks were not allotted any interests in those lots and there is absolutely no evidence in the historical record to any objection or challenge to the Canoe Place Division by the Shinnecock Tribe. Furthermore, in the Tribe's petition in 1822 to the New York State Legislature, the Shinnecock contended 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 . . . ." (T136.) However, in that petition, the Shinnecock did not make any claim of ownership of any lands west of Canoe Place. In addition, in the early 1920s, the Town widened and improved Newtown Road (T208; T232, at 350), including the section of the road that runs across Westwoods, and there was no objection to that activity by the Shinnecock Nation.

land west of Canoe Place in the 19th and 20th century, there is insufficient credible, reliable evidence demonstrating use or occupancy of that land by the Shinnecock Nation from the time of these colonial era transactions through the 18th century. As outlined in more detail in the Findings of Fact, there are several reasons for the Court's conclusion on this factual issue.

First, much of defendants' evidence only pertains to use of such land in the 1800s going forward. For example, in the 1890 *Cassady* Litigation, the court entered judgment for the Trustees and made a finding that the Nation had, at that time, been in quiet possession of Westwoods for "upwards of sixty years," which would place such possession in the early 1800s. Similarly, in the 1922 *Hubbard* Litigation, the court found that "for more than 70 years last past" plaintiff Shinnecock Tribe and its members "have obtained its firewood and fencing" from Westwoods, which would place such activity in the mid-1850s.[61] Thus, these references do not establish possession or use of Westwoods from the late 1600s to the 1800s.

Second, much of the evidence offered by the defendants to try to establish use and occupancy of the land west of Canoe Place, including Westwoods, between the late 17th and end of the 18th centuries is unpersuasive either because (1) the evidence only demonstrated use and occupancy of land east of Canoe Place (which is not in dispute); or (2) the evidence showed that Shinnecock may have been in the vicinity of Canoe Place or Westwoods, without any specificity regarding location in terms of whether it was west or east of Canoe Place and/or the precise nature and scope of the relationship of the Shinnecock Tribe to the location. For example, although there was a meetinghouse constructed by the Shinnecock Tribe in the late 18th century, the clear evidence is that it was situated east of Canoe Place. In addition, although there was evidence regarding the existence of the Canoe Place Chapel and the Reverend Paul Cuffee burial plot, both located south of Westwoods, there is no evidence of a Shinnecock Tribal settlement at that location or evidence that the chapel was exclusively a Shinnecock house of worship. Similarly, nothing in the missionary records shows that members of the Shinnecock Tribe inhabited Westwoods during the 18th century. Moreover, although defendants introduced an 1879 photograph purporting to depict Indian huts, there is nothing in the photograph supporting the position that the huts were at or near Westwoods, nor does it show when the huts were erected or whether the huts were occupied by Indians or non-Indians at the time.

Third, the Court finds that some of the evidence, in addition to being vague, is simply not reliable. For example, defendants point to Russell Carman's article *In the Beginning: The Shinnecock Indians and the First White Settlers in Quogue*, in which Carman stated that "[t]he Indians told my grandfather, and he

[61] Although the referee appointed in the *Hubbard* case also stated that "within the memory of living witnesses three, four or five families of said tribe resided on said tract," (D1, Findings, at 2), there is no specific information that those families resided on Westwoods because the tract at issue in that case was "about 100 acres," (*id.*), while Westwoods is approximately 80 acres, and there is no information that any other families or individuals ever resided at Westwoods.

told me, that a large portion of the [Shinnecock] tribe lived, except during the severe cold months, on the bluffs overlooking the Peconic Bay, on the westerly side of the 'haulover', where the Shinnecock locks are today." (D107, at 1.) However, the Court views this secondary source (with multiple levels of hearsay) as having very little, if any, probative value for several reasons. First, Carman does not identify the period of time during which this was reported and defendants' Indian habitation witness (Dr. Campisi) estimated that Carman's grandfather was told this information concerning the purported habitation of the haulover 200 years after the latest time at which the habitation occurred. (Tr. 2726-27.) Second, Carman cited no historical sources or documents for his statement that the Shinnecocks were living west of the "haulover" and the information itself is also vague. Even defendants' expert acknowledged that this "is not the strongest piece of evidence in the world" and is not a primary source document. (Tr. 2654-55; 2658-60.) Finally, and perhaps most importantly, to the extent defendants try to argue that this supports their position in a meaningful way, there is simply insufficient corroboration in the historical record to support their position.

Not only is there the absence of reliable proof of use and occupancy of the land west of Canoe Place by the Shinnecock Tribe from the late 17th century until the 19th century, there is affirmative evidence that, at least as of the late 18th century, the Shinnecock Tribe was situated only east of Canoe Place, near Cold Spring, and not west of Canoe Place. In the late 18th century, the Shinnecocks built a meeting house that was situated east of Canoe Place. Specifically, the maps from that time period show the presence of a meeting house for the Shinnecock Tribe, east of Canoe Place, and no indication of habitation west of Canoe Place, including the following: (1) the 1797 NYDOT Map, which depicts the Indian meeting house east of Canoe Place and does not indicate any Shinnecock habitation west of Canoe Place (T199); (2) the 1780 map prepared by Major John Andre, which does not show any Indian habitation at all west of Canoe Place (D208a); (3) the 1829 Burr Map, which indicates both the name Shinnecock (spelled "Shunnecock") and the meeting house east of Canoe Place, but does not indicate the presence of Shinnecock Indians west of Canoe Place (T360); (4) the 1833 Sumner Map depicts a triangle symbol, indicating the location of the Indians, east of Canoe Place (T250); (5) the 1838 U.S. Coast Guard and Geodetic Survey Map depicts Indian dwellings east of Canoe Place at Shinnecock Neck, but shows no Indian dwellings or Indian habitation west of Canoe Place (T247, at 265, 269-71); (6) the 1859 Chace Map places the Shinnecock Indians east of Canoe Place, and does not show any Shinnecock habitation west of Canoe Place (T247, at 272); (7) the 1873 Beers map displays the Shinnecock Indians east of Shinnecock Bay, and east of Canoe Place, on Shinnecock Point or Shinnecock Neck, and contains no indication of Shinnecock presence or habitation west of Canoe Place (T247, at 274); (8) the Proprietor's Map, created no later than 1885, referenced two Shinnecock locations east of Canoe Place, but contains no indication of any Shinnecock interest in lands west of Canoe Place (T226).[62]

[62] Although the 1836 Smith Map indicates a Shinnecock reservation south of Canoe Place on the west side of Shinnecock Bay, a report co-

Similarly, the Court does not view evidence regarding Shinnecock's oral history as undermining the extinguishment of aboriginal title. Defendants rely on the testimony of Mr. Gumbs, Chairman of the Shinnecock Tribal Trustees, to support the Shinnecock's position that its oral history demonstrates that it has always owned Westwoods. As a threshold matter, the Court notes that Mr. Gumbs's testimony is not a particularly strong basis for the evidence regarding oral history because the principal source of his understanding and knowledge of Westwoods was from Augustus (Gus) Thompson, who died when Mr. Gumbs was 10 years old, and with whom Mr. Gumbs became close because of nightly dinners and helping Mr. Thompson on his garbage collection route. There is no basis for concluding that Mr. Thompson had any leadership position with the Tribe or had any special knowledge as it related to tribal history. Moreover, this testimony is inconsistent with evidence regarding views of other members of the Shinnecock Nation. For example, during the course of a Shinnecock tribal meeting held on February 4, 2003, Kevin Eleazer, a former Shinnecock Tribal Trustee, stated, "[W]e're not even sure if we own the land in West Woods. . . . It was given to us by a millionaire, and yet there was never a deed for that." (T261, at 42; Tr. 2947-48.) Moreover, as discussed in detail *supra*, the testimony by Mr. Gumbs about the oral history is also contradicted by the statements of Shinnecock representatives in state legislative hearings and in litigation that suggests that the Shinnecock Nation's aboriginal title to the Westwoods land was extinguished. Therefore, the Court concludes that the evidence of the Shinnecock Nation's oral history does not undermine the overwhelming evidence of extinguishment of aboriginal title contained in the record as a whole.

In sum, the Court's thorough examination of the use and occupancy demonstrates that (1) there is no reliable evidence of use and occupancy of land west of Canoe Place by the Shinnecock Tribe from about 1675 until the 1800s; and (2) at some point in the 1800s, the Shinnecock Tribe was using land west of Canoe Place (which may have included Westwoods) for timber and, since that time, the Tribe has used such land for timber and other recreational uses, such as picnics. In terms of the legal conclusion that can be drawn from this factual evidence, the Court concludes that there is nothing in the historical evidence regarding use and occupancy that is inconsistent with the extinguishment of aboriginal title to Westwoods in the mid-17th century as indicated in the colonial era documents, discussed *supra,* from that time period. In fact, the use and occupancy evidence is completely consistent with the 1808 Southampton record indicating that the Shinnecock Tribe (through lease or otherwise) sought to use the Westwoods land for timber. Thus, the fact that the Shinnecock Tribe has been using the land for timber and some limited recreational uses for many years since the 19th century does not undermine the Court's conclusion from the plain and unambiguous language in the colonial era documents of the 17th century, demonstrating the acquisition of this land by the Town and

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authored by defendants' habitation witness concluded that the map was in error. Moreover, the 1839 republication of the 1829 Burr map repeats the error in the 1836 Smith map.