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Sacred in the City: The Huron Indian Cemetery and the Preservation Laws

By

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Chapter One: Introduction

The Huron Indian Cemetery[1] sits on a hill above the confluence of the Missouri and Kansas Rivers. It is several acres of predominant green, with grass, mature trees, and modest, weathered grave stones, surrounded by the sterile concrete of a struggling Midwestern city. Desultory businesses, colorless governmental offices, a casino, and strong evidence of poverty and vandalism lap at the shores of the small sanctuary. Yet despite the drab and essential joylessness of the encircling faded modernity, the cemetery holds a surprising sense of peace and even timelessness[2]. The serenity may seem incongruous, not only because of the tawdry surroundings, but also because of the cemetery's chaotic history as a center of numerous legal and economic conflicts.

Perhaps the quiet dignity of the place may have been the source of the strength that enabled survival. It may have been a force that emanated outward and simultaneously drew energy and passion within.

This article will focus on the story of endurance and on the reciprocating feelings inspired by and invested in this unique burial place. It will deal with the general, perhaps inevitable, tension

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[1]It's also known as the Wyandot National Burying Ground. See Suzanne Hogan "The Story Behind the Historic American Indian Cemetery in Downtown KCK" KCVR 89.3 (Oct. 29, 2014) accessed at http://kcur.org/post/story-behind-historic-american-indian-cemetery-downtown-kck

[2]For similar sentiments in another threatened place, see Charles Wilkinson, "The Public Lands and the National Heritage". 14 HASTINGS W.-Nw. J. Envtl. L. & Pol'y 499, 503 – 504 (2008).

> "The languid stillness of Kaiparowits turns your mind gently and slowly to wondering about time, to trying to comprehend the long, deep time all of this took, from Cretaceous, from back before Cretaceous, and to comprehend, since Lake Powell and the seventy-story stacks of Navajo Generating Station also now play part of the vista, how it is that our culture has so much might and how it is that we choose to exert it so frantically, with so little regard of the time that you can see, actually, see, from here. Perhaps somehow by taking some moments now, here in this stark pinon-juniper rockland place, here in this farthest-away place, a person can nurture some of the fibers of constancy and constraint that our people possess in addition to the might. The silence is stunning, the solitude deep and textured."

Id at 503 – 504

between the sacred and the profane – the clash between the emotion, solemnity, and repose of a spiritual site, the transformative calculations of economic and political expediency and the law that may bridge that gap[3].

It's perhaps useful, or even necessary, to have some working conception of the sacred, especially if it is to be pitted against – or acknowledged within – the persuasive, dollar-based, cost-benefit analysis used by business people, legislators and courts. It is essential to have discourse or dialogue that advocates directly for the sacred and does not attempt to operate behind an opaque veil of unexplained and unchallengeable faith or emotion[4].

It is also imperative for real discussion that economic realists not cynically or condescendingly question the relevance of all emotion or belief in intangibles. Thus, each side of the debate must avoid assertions for the total definitional domination if compromise rather than capitulation is desired[5].

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[3]MIRCEA ELIADE, THE SACRED AND THE PROFANE. (1957 (Hereinafter, ELIADE))

[4]Mircea Eliade wrote:

> "Revelation of a sacred space makes it possible to obtain a fixed point and hence to acquire orientation in the chaos of homogeneity, to "found the world" and to live in a real sense. The profane experience, on the contrary, maintains the homogeneity and hence the relativity of space. No true orientation is now possible, for the fixed point no longer enjoys a unique ontological status; it appears and disappears in accordance with the needs of the day."

ELIADE, supra note 2, at 23

[5]See JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS.* (1980) 108 – 109; see also Lawrence Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*. 83 Yale L.J. 1315 (1974) (Hereafter, TRIBE).

> "At a minimum, we must begin to extricate our nature-regarding impulses from the conceptually oppressive sphere of human want satisfaction, by encouraging the elaboration of perceived obligations to plant and animal life and to objects of beauty in terms that do not falsify such perceptions from the very beginning by insistent "reference to human interests."

Id, at 1341

One way to begin a discourse on the sacred is to acknowledge the absolute unfathomability of infinity, eternity, being and nothingness[6]. Science cannot explain nor can, in all honesty, our minds even comprehend space without end, the essence of timelessness or creation emergent out of a void. We can profess an understanding of the abstract concepts but attempts at explanation chase a horizon line that always retreats beyond our grasp[7]. Thus we are doomed to live on an island of tentative reality rather than one of absolute, discernible truth; although we may successfully attempt to ignore the infinite night that surrounds, it is still, always, there. It would seem that even the most fervent of realists, or brilliant of physicists or dedicated deniers of God most contemplate the darkness beyond the light[8]. There are, as they say, no atheists in the foxholes.

Anglo-Americans and their European predecessors have tended to go aggressively about the business of living. They brought with them a focus on property, efficiency, and profit that was to explode beyond community and custom and was to become a central personal and societal

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[6]TRIBE, supra note 4 at 1346

> "The vision of process I have sought to sketch transcends the intermediate stances of consciousness achieved at discrete points along the spiral's path. Its insistence on the continuing reformulation and evolution of the principles distilled from it at each stage provides a way of not only bridging the gap between successive stages but also energizing the journey through a commitment to overcome the inevitable inadequacies at each stage. Thus consciousness remains in a double stance: While vigorously living out the values provided by the present stage, we remain aware of the fact that these values themselves pass through evolutionary stages whose unfolding we participate in and sanctify."

Id

[7]See gen., JEAN-PAUL SARTRE, BEING AND NOTHINGNESS. (1956), "Nothingness haunts Being" at 49.

[8]See Kenneth Minoque, "The Guru" in RICHARD DE MILLE (ed.), THE DON JUAN PAPERS. (1990), 188

> "We live in the island of the tonal and we could not live without it. Nevertheless, it limits us; and we may break out of these limits if we can come to apprehend the nagual…by which our world is surrounded and out of which it has been created."

Id.

quest[9]. This obsession led to a commodification of land and resources, a reduction of natural worth to monetary pricing and a flattening of quality into quantity and linear measurements[10]. In short, exponential economic growth became the secular of religion of the new nation[11]. Formal religion was conscripted into an authorization for the subjugation of the natural; the sacred was confined behind the walls of the churches, and within the prayers for eternal salvation after death.[12] Eventually the Constitution would enshrine this secular religion, though the Declaration of Independence would link it to God's will. The Constitution itself would forbid the government's establishment of religion, and the interference with its free exercise, and it would enable individualism and the free market by forbidding the retroactive impairment of contract, and the taking of private property for public use without the payment of just compensation.[13]

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[9]See VINE DELORIA, JR., RED EARTH, WHITE LIES. 16 – 18 (1995) (Hereinafter, VINE DELORIA).

[10]See TRIBE, supra note 4, at 1332; See also Douglas Linder, "A New Direction For Preservation Law: Creating an Environment worth Experiencing" 20 ENVIRONMENTAL LAW 49, 70-72 (1989).

[11]WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY. 184 – 185 (1977).

[12]See Lynn White, Jr., "THE HISTORICAL ROOTS OF OUR ECOLOGICAL CRISIS". 155 SCIENCE 1203, 1205 – 1206 (1967).

> "We are superior to nature, contemptuous of it, willing to use it for our slightest whim. The newly elected Governor of California, like myself a churchman but less troubled than I, spoke for the Christian tradition when he said (as is alleged), "when you've seen one redwood tree, you've seen them all." To a Christian a tree can be no more than a physical fact. The whole concept of the sacred grove is alien to Christianity and to the ethos of the West. For nearly 2 millennia Christian missionaries have been chopping down sacred groves, which are idolatrous because they assume spirit in nature."

Id, 1206.

[13]See John Ragsdale, "To Return from Where We Started: A Revisioning of Property, Land Use, Economy and Regulation in America". 45 Urban Lawyer 631, 650 – 659 (2013). See U.S. Const. amends IV and Article 1, Section 10, Clause 1.

American Indians have generally been more expansive, if not purely pantheistic, in their view of sacredness and obligation[14]. Most groups believed in the reciprocal relations of everything in existence, and the imperative human obligation of maintaining balance[15]. It is true that tribes could exhibit hostility with one another, have disagreements and divisions within, and could mismanage the environment[16]. They still, however, exhibited an overriding community, within the group and with the earth[17]. There was an embracing sense of permanence and balance, in contrast to an ongoing, exponential linear increase[18]. The primal, intense relations with the land,

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[14]See PEGGY BECK, ANNA LEE WALTERS, NIA FRANCISCO, THE SACRED: WAYS OF KNOWLEDGE SOURCES OF LIFE. 3 – 32 (1977) (Hereinafter, THE SACRED).

[15]Id, at 102.

[16]See SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY. 27 (1999).

[17]JOHN COLLIER, INDIANS OF THE AMERICAS. 7 – 16 (1947)

> "They had what the world has lost. They have it now. What the world has lost, the world must have again, lest it die. Not many years are left to have or have not, to recapture the lost ingredient.
>
> This is not merely a passing reference to World War III or the atom bomb—although the reference includes these ways of death, too. These deaths will mean the end if they come—racial death, self-inflicted because we have lost the way, and the power to live is dead.
>
> What, in our human world, is this power to live? It is the ancient, lost reverence and passion for human personality, joined with the ancient, lost reverence and passion for the earth and its web of life.
>
> This invisible reverence and passion is what the American Indians almost universally had; and representative groups of them have it still.
>
> They had and have this power for living, which our modern world has lost – as world-view and self-view, as tradition and institution, as practical philosophy dominating their societies and as an art supreme among all the arts."

Id, at 7.

[18]David H. Getches, "A Philosophy of Permanence: The Indian Legacy for the West", 29 JOURNAL OF THE WEST, 54 – 68 (July 1990).

> "Indians survived on the American continents for thousands of years based on a pervasive set of cultural values integrating human life with other forms of life.

traced through the tribal histories, legends and culture, can stretch these sacred concerns across extensive sweeps of time and space – far beyond an immediate presence or physical control[19]. Within this revered fabric were and are special places of even more intense emotional sanctity, commemoration or revelation. These sites are the sacred polestars of the tribal communities – the hubs around which all life, ceremony and world view revolve. Even in times of physical dislocation and stress, these center places could maintain or reunite the tribal community.

> "The vast majority of Indian tribal religions, therefore, have a sacred center at a particular place, be it a river, a mountain, a plateau, valley, or other natural feature. This center enables the people to look out along the four dimensions and locate their lands, to relate all historical events within the confines of this particular land, and to accept responsibility for it. Regardless of what subsequently happens to the people, the sacred lands remain as permanent fixtures in their cultural or religious understanding. Thus, many tribes now living in Oklahoma, but formerly from the eastern United States, still hold in their hearts the sacred locations of their history, and small groups travel to obscure locations in secret to continue tribal ceremonial life[20].

> Today these same values guide tribes in the United States as they move into an era of unprecedented sophistication in managing reservation environments. Most important for the non-Indian West, Indian values arc crucial for the future of a region where resource issues are intertwined with economic and social survival."

Id, 54.

[19]JOHN G. NEIHARDT, BLACK ELK SPEAKS. 17 – 39 (1959)

> "Then I was standing on the highest mountain of them all, and round about beneath me was the whole hoop of the world. And while I stood there I saw more than I can tell and I understood more than I saw; for I was seeing in a sacred manner the shapes of all things in the spirit, and the shape of all shapes as they must live together like one being. And I saw the sacred hoop of my people was one of the many hoops that made one circle, wide as daylight and as starlight, and in the center grew one mighty flowering tree to shelter all the children of one mother and one father. And I saw that it was holy."

Id, at 36.

[20]VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION. 66 (2003) (Hereinafter, GOD IS RED).

Over the course of the four centuries since the European incursion, the Indians sacred world was physically shattered; many of the most revered sites were on lands lost, along the various Trails of Tears, or on lands threatened by the non-Indians' relentless, uncaring economy, law and politics[21].

The laws and the courts of the conqueror[22] have, in the latter part of the twentieth century provided significant protection for non-possessory sacred sites, but the reach of the laws has still been limited by the lateness of their arrival, by legislative and judicial compromise, and by the protection of private property through the takings clause. Much of the sacred has slipped through the gaps and been lost forever. Much that remains is still threatened[23]. In a few cases, the dedication and extraordinary efforts of the individuals may transcend the available law and pave a way to future reconsiderations.

This article chronicles the odyssey of the Wyandot people and a place of burial along their journey way. It deals with the fierce dedication of some singular individuals to this sacred cemetery, that saved it when the law faltered. It concludes that the preservation of this sacred cemetery not only sustained the local community but reunited the tribe, after secular forces had forced a schism. It also suggests that both the place and the people that have uncompromisingly loved it provide a source of inspiration and aspiration for non-Indian people.

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[21]VINE DELORIA, JR., SPIRIT AND REASON. 323 – 328 (1999) (Hereinafter, SPIRIT AND REASON).

[22]See WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR. (2010) (Hereinafter, CONQUEROR).

[23]Id, at 325 – 356: See also Kristen A. Carpenter, "Limiting Principles and Empowering Practices in American Indian Religious Freedoms". 45 Conn. L. Rev. 387, 447-460 (2012; Kelly D. Lynn, "Seeking Environmental Justice for Cultural Minorities: The South Lawerence Trafficway of Lawrence, Kansas". 12 Kan. J.L. & Pub. Pol'y 221, 241-243 (2003); Ted Griswold, Jonathan P. Scoll, "Gregory Mountain: A Sacred Site Protection Failure". 26 WTR Natural Resources & Environmental 56 (2012); William Perry Pendley, "The Establishment Clause and the Closure of "Sacred" Public and Private Lands". 83 Denv. U.L. Rev. 1023, 1032-1033 (2006).

Chapter 2: The Removal of the Wyandots – 1842

The Wyandot Indians, descended in part from the once powerful Hurons[24] were less orientated toward war than their militant ancestors, in part because they were relatively small in number. They, instead, were oriented toward a stable-state, subsistence life-style featuring agriculture, hunting, fishing and fur-trapping, especially after the arrival of the French traders[25]. By the beginning of the eighteenth Century, when the white incursion into the trans-Appalachian area was gathering force, the Wyandots had come to occupy a somewhat uneasy balance point south of Lake Erie, with the Iroquois to the East, and The Sioux to the West[26]. The Wyandots began their interactions in a friendly fashion, dealing first with the French fur traders, then allying with them when subsequent tensions emerged between the French and their English competitors[27]. By 1754, full scale war had broken out. Although the French and their Indian allies were successful at the outset, the English numbers and firepower eventually prevailed, and the French withdrew from the Ohio Valley[28].

The still-resistant Wyandots, along with their long-time allies, the Ottawa, participated in the Pontiac Rebellion, which followed the conclusion of the French and Indian War. The effort, though unsuccessful in daunting the British[29], still influenced the Crown to continue the Indian

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[24]FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE. 101 – 102, 352 – 353 (1984) (Hereinafter, JENNINGS).

[25]Elisabeth Tooker, "Wyandot" in WILLIAM C. STURTEVANT ED, "15 HANDBOOK OF NORTH AMERICAN INDIANS – NORTHEAST, 398 – 399 (1978) (Hereinafter, TOOKER).

[26]JENNINGS, supra note 24, at 352 – 353.

[27]TOOKER, supra note 25, at 399.

[28]Douglas Edward Leach, "Colonial Indian Wars". In WILLIAM C. STURTEVANT ED., 4 HANDBOOK OF NORTH AMERICAN INDIANS – HISTORY OF INDIAN – WHITE RELATIONS, 137 – 139 (1988).

[29]Id, at 141 – 142.

pacification efforts manifested in the Proclamation of 1763[30]. The Proclamation forbade the settlement of English colonists in the Ohio Valley, and precluded their acquisition of Indian land. In a sense the proclamation was the first reservation of land as sovereign Indian country in the Americas[31].

> "In short, the Proclamation of 1763 sought to resolve the three most important struggles that plagued the management of colonial Indian affairs and which, ironically, epitomized the focus the Euro-American/Indian conflict over the next 225 years. These three struggles involved: (1) the contest between centralized and colonial – now state – management of relations with Indian tribes; (2) conflicts between honoring legal and treaty guarantees of Indian land rights and autonomy and the Euro-American settlers' economic need for land and resources; and (3) difficulties involved in reconciling Indian political sovereignty with the authority of surrounding governments, particularly colonial – now state – authority. The Proclamation was designed to resolve these issues in favor of centralized control, through agents responsible to London, through protecting Indian treaty guarantees, land rights, and access to hunting and fishing resources necessary to their survival and through recognizing and respecting tribal sovereignty and autonomy[32]."

The Proclamation also proved to be a legal lynch-pin for the Supreme Court's' later incorporation of the international doctrine of discovery into the center of future land titles emanating from the United States. Johnson v. McIntosh[33] affirmed that the discoverer of the new lands in the Americans, and the successor, acquired not only priority with respect to other contending Christian explorers[34], but also a legal fee title that would become a transferable fee

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[30]Wilbur R. Jacobs, "British Indians Policies to 1783". In WILLIAM C. STURTEVANT ED. 4 HANDBOOK OF NORTH AMERICAN INDIANS – HISTORY OF INDIAN – WHITE RELATIONS", 10 – 12 (1988).

[31]Robert N. Clinton, "*THE PROCLAMATION OF 1763: COLONIAL PRELUDE TO TWO CENTURIES OF FEDERAL-STATE CONFLICT OVER THE MANAGEMENT OF INDIAN AFFAIRS*", 69 BOSTON UNIV L. REV. 329, 369 – 380 (1989)

[32]Id, at 370.

[33]21 US. 543, (1823).

[34]21 US. at 573.

simple absolute after the extinguishment of Indian possessory title. The discoverer or successor had the exclusive power to extinguish, either through purchase or conquest[35]. Thus unauthorized attempts to acquire possession, after the Proclamation of 1763, after the transfer of English sovereignty to the states, or after the passage of ultimate sovereignty to the United States are void[36].

The Proclamation of 1763 was also a substantial factor in colonial irritation with Great Britain's economic domination and in the ensuing revolution[37]. Indeed, the freedom sought by the colonists, and lauded in The Declaration of Independence, was, in significant part, the freedom to appropriate the land and resources of the Indians west of the Appalachians[38].

The Articles of Confederation adopted by the revolutionary states in 1777, did not unify Indian affairs in the new Continental Congress, but reserved power to deal with Indian lands in the individual states[39]. By 1787, the uncertainty over the dispersed land power and the direct actions of frontier whites, who were pouring into the Ohio Valley, had created general chaos and threats of Indian wars[40].

The Constitution of the United States, drafted in 1787, and ratified in 1788, consolidated the power over Indian lands in Congress[41]. It responded with the Trade and Intercourse Act of

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[35]21 US. at 587

[36]21 US. at 604 - 605

[37]DAVID GETCHES, CHARLES WILKINSON, ROBERT WILLIAMS, MATHEW FLETCHER, FEDERAL INDIAN LAW, 6th Ed. 60 – 61 (2011) (Hereinafter, FEDERAL INDIAN LAW).

[38]Id, at 62.

[39]Id, at 62 – 63; See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1154 (2nd Cir. 1988); See U.S. Articles of Confederation, Art. IX (4) (1777).

[40]BILL GILBERT, *GOD GAVE US THIS COUNRTY,* 114 – 117 (1989); STUART BANNER, *HOW THE INDIANS LOST THEIR LAND.* 124 – 159 (2005).

[41]*COHEN'S HANDBOOK OF FEDERAL INDIAN LAW,* 2012 Ed., 22 (Hereinafter, COHEN'S); See *U.S. Const. Art. 1, 58.*

1790[42], which prohibited the sale of Indian lands to states or private persons except under the authority of the United States. Despite the unifying of treaty and land acquisition power in the federal government, conflict with the tribes escalated.

Responding to the threats of rising violence and possible united Indian action, George Washington sent military expeditions into the Ohio Valley. After initial defeats were suffered by Generals Harmar and St. Clair, Washington dispatched General Anthony Wayne who defeated the Indians decisively at the Battle of Fallen Timbers in 1794[43]. The Treaty of Greenville was signed in 1795[44] by the surviving Indian leaders including Tarhe, the chief of the Wyandots[45].

The Greenville Treaty line, drawn through Ohio, ceded Indian territory, south and east of the line, and confined the Wyandots, and other tribes to the Great Lakes area. It was not the last of the cessions. By 1817 the Wyandots, withered by war and disease to less than one tenth of their pre-incursion number, had ceded all their Ohio Valley land with the exception of the Grand Reserve at Upper Sandusky, approximately 110,000 acres, and a small reserve of 5,000 acres on the Huron River, near Detroit[46].

The compression of their sovereign land holdings forced the Wyandot to modify their economy, and turn from hunting and trapping to a concentration on agriculture. The resiliant Wyandots, from the time of Tarhe and the signing of the Greenville Treaty, acknowledged the inevitability of the white western advancement, and the necessity of fundamental adjustment[47].

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[42]COHEN'S, supra note 41, at 35; See Act of July 22, 1790, 4, 1 Stat. 137; 25 U.S.C § 177.

[43]ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES.* 90 – 93 (1970) (Hereinafter, DEBO).

[44]*Treaty with the Wyandot*, etc. 7 Stat 49 (1795).

[45]See Jan English, *The Wyandot Nation of Kansas.* In *THE CONSOLIDATED ETHNIC HISTORY OF WYANDOTTE COUNTY.* 517, 526 (2000) (Hereinafter, JAN ENGLISH).

[46]Id, at 528; See also TOOKER, supra note 25, at 402.

[47]JAN ENGLISH, supra note 45, at 526 – 527.

Thus, they turned to white methodology – fencing, plowing, and animal husbandry. They lived in log houses, wore white clothing and substantially embraced the Methodist church[48]. Indeed, the Wyandots, through adoption and marriage had become racially mixed with few, if any, remaining full bloods[49]. Despite the substantial racial, material and economic blending, however, the tribe firmly maintained its cultural, political and linguistic integrity[50].

The experience of the Cherokee had recently demonstrated that tribal advancements in white economy and material society were no assurance that the white wave could be stemmed. A mere defusing of the pretextual claim that tribalism and savagery were incompatible with ascendant white society could not defeat the rapacious land hunger that grew increasingly frustrated with Indian assertions of political sovereignty and territorial control[51].

The national response, in 1830, was the Indian Removal Act[52]. The legislation was born from an odd combination of motivations including the desire for free land, a concern for the internal protection of states' rights, and a general humanitarian feeling that Indian societies would be eroded or destroyed by corrosive contract with whites[53]. The possibility of removal, as a unified, out-of-sight and mind solution, was made theoretically possible by the vast Louisiana Purchase of trans-Mississippi lands. Thomas Jefferson, in fact, was among the architects of Indian removal, several decades before. He overcame his constitutional equivocations about executive power and

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[48]TOOKER, supra note 25, at 402.

[49]Kimberly Dayton, "*Trespassers Beware: Lyda Burton Conley and the Battle for the Huron Place Cemetery"*. 8 YALE JOURNAL OF LAW AND FEMINISM 1, 5 (1996) (Hereinafter, DAYTON).

[50]Id, at 5.

[51]See Duane King, "Introduction" in CHEROKEE INDIAN NATION, DUANE KING ED., XV-XVI (1979).

[52]*Act of May 28, 1830.* 4 Stat 411.

[53]FRANCIS PRUCHA, *THE GREAT FATHER,* 195-199 (1984) (Hereinafter, PRUCHA).

national land holding to buy the land that could make this happen[54]. The act, despite its draconian – sounding title, professed to call for voluntary and negotiated departure, rather than extermination, and thus called for treaties of cession with willing tribes[55].

The Wyandots, however, were not eager to sell, although they did go west to the frontier to inspect some of the proffered land. William Walker Jr., a mixed race Wyandot leader, a formidable intellectual, and later to be the first provisional governor of the Nebraska Territory, led an exploratory expedition, the first of several, and in general found the lands – and the rough frontier whites nearby –unsuitable[56]. In 1839, however, the Wyandots concluded that Shawnee lands, west of the Missouri line near Westport, were satisfactory and a draft treaty to purchase 58,000 acres was composed – but was never ratified by the Senate[57].

The inertia and indecision of the Wyandots was broken, however, in November of 1940 when the Wyandot Principal Chief, Summudowat, and his family were robbed and murdered by whites in the Henry County, Ohio. The dismissal of indictments convinced the Wyandots that white law would not protect them, and that it was time to leave[58]. They were the last of the Northeastern tribes to agree to remove[59].

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[54]Id, at 183 – 184; See also JON MEACHAM, *THOMAS JEFFERSON: THE ART OF POWER*, 389-392 (2012).

[55]COHEN'S supra note 41, at 44.

[56]GRANT FOREMAN, THE LAST TREK OF THE INDIANS, 92-93 (1946) (Hereinafter, FOREMAN).

[57]VINE DELORIA JR. and RAYMOND DEMAILLE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY, citing "*Treaty With The Shawnee*, December 18, 1839" at 781.

[58]LARRY HANCKS, THE EMIGRANT TRIBES: WYANDOT, DELAWARE AND SHAWNEE. 146 (1998) (Hereinafter, THE EMIGRANT TRIBES).

[59]DAYTON, supra note 49, at 5.

Under the terms of the treaty[60], the tribe ceded the Grand Reserve of Ohio, 109,144 acres, and the Wyandot Reserve of Michigan, 4,996 acres[61]. The United States granted an indeterminate tract of 148,000 acres to be located west of the Mississippi "on any lands owned by the United States…not already assigned to any other tribe or nation[62]." The Wyandot still hoped to buy land from the Shawnee, but they left Ohio without an agreement, and with no other definite, settled destination[63].

Chapter Three: A New Beginning Around the Cemetery on the Hill—and Another Removal.

Indian removal was a low point of Federal policy, and despite the veil of negotiation, was designed to be destructive in both a cultural and perhaps physical sense[64]. It is appropriate to view this as genocidal[65]. The Wyandots, despite their advancement in, or adaptations to, white society and economy, received no respite. The end of their trek from Ohio to Kansas ended in driving rain and uncertainty. Because the land promised was neither provided nor obtainable, they were forced to camp in the swampy bottoms of the Missouri River[66]. Almost a tenth of the tribal population,

[60]Treaty with the Wyandot 11 Stat., 581 (March 17, 1842).

[61]Id, Article 1.

[62]Id, Article 2.

[63]WILLIAM ELSEY CONNELLEY, A STANDARD HISTORY OF KANSAS AND KANSANS. 257 (1918) (Hereinafter, CONNELLEY).

[64]PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST. 194 (1987).

[65]Lindsay Glauner, "The Need for Accountability and Reparations: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans". 51 DEPAUL L. REV. 911, 912 – 913, 931 - 934 (2002).

[66]See FOREMAN, supra note 56 at 97 – 98; JAN ENGLISH, supra note 45, at 530 – 531.

many of them children, died within the first few months[67]. Thus, before the Wyandot had even procured land to live on, they had to find places for the dead[68].

The Wyandots believed that ultimately they could buy land from the Delaware, who held a reserve stretching west, across the Missouri and north of its junction with the Kansas River. The Delaware, who had been allies with the Wyandots in Ohio gave their permission, pending the negotiations, and the Wyandot crossed the river with their dead[69]. They buried them on high point of land above the confluence of the two rivers, and this spot was to become known as the Huron Indian Cemetery[70]. By the end of 1843 the Wyandot and the Delaware had forged a treaty, without any United States involvement, and agreed to a Wyandot purchase of 36 sections. The Delaware, remembering past Wyandot favors, added 3 more sections as a gift[71]. Though the treaty was ratified by the United States in 1848, the 148,000 acres promised by the United States in 1842 remained unforthcoming, and the Wyandots were forced to buy their new reserve with their own money and credit[72].

The Wyandots built their new settlement surrounding the cemetery which, due to its location between the rivers, had both strategic commercial potential – as well as vulnerability to

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[67]JOHN P. BOWES, EXILES AND PIONEERS: EASTERN INDIANS IN THE TRANS-MISSISSIPPI WEST, 95 (2007) (Hereinafter, BOWES).

[68] GRANT W. HARRINGTON, HISTORIC SPOTS OR MILESTONES, 113 – 114 (1935)

> "Death began its work early among the tribe, while still in camp on the east bank of the Kansas River, an epidemic carried away 60 members of the tribe."

Id, 113 – 114.

[69]CONNELLEY, supra note 63, at 257.

[70]The EMIGRANT TRIBES, supra note 58, at 155.

[71]See Agreement with the Delaware and the Wyandot 1843, 9 Stat 337, (1843) in CHARLES KAPPLER, INDIAN TREATIES, 1048 (1972).

[72]BOWES, supra note 67, at 179.

the seamier sides of frontier life such as thieves and whiskey peddlers[73]. However, the building of homes, the establishment of church and schools and the rich agriculture lands had a stabilizing influence on the new community[74]. Led by the educated Wyandot intelligentsia – the Walkers, Zanes, Tauromees, Northrups, Hicks and Armstrongs, the new town of Wyandot City became a vibrant jumping-off place for the cresting wave of western expansion[75].

The Wyandots, far from eschewing white contact and seeking isolation, embraced the white society and sought to emulate it and profit from it. The tribe formed a new, progressive constitutional government, complete with a balanced division of power, strong property laws, economic ambitions and Christian temperance; and they blended it with their traditional culture[76]. In a sense, they retrofitted their historic society both for interaction with the surrounding, inescapable white society and for the simultaneous maintenance of their internal sovereignty and traditions. This is much the same as would be attempted under John Collier and Felix Cohens' Indian Reorganization Act almost a century later[77].

The question was, in 1850, would the non-Indian society regard the Wyandots as deserving of acceptance and equal protection, or would they, because of unabated racial and cultural prejudices, regard them as expendable? Once again, as in Ohio, the Wyandot may have mistaken the effect that their sophisticated formal structure and civilized veneer would have on the white society. The forces of western advance sought cheap land and right-of-way to the Pacific, and if the Indians could be induced to move, regardless of their priority or their institutions, that would be preferable. Though the removal treaties of the 1830's and 1840's had promised a permanent

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[73]FOREMAN, supra note 56, at 98.

[74]Id, at 193 – 195.

[75]DAYTON, supra note 49 at 8; THE EMIGRANT TRIBES, at 155 – 193; LOUIS BERRY, The BEGINNING OF THE WEST, 499-501.
[76]BOWES, supra note 67, at 178 – 184.

[77]25 USC § 461 et seq; See generally COHEN'S , supra note 42 at 81 – 84.

repose in the lands west of Missouri and Iowa[78], honor and theory was no match for economic realities and the apologies of superior culture and race[79].

In March of 1853, a rider to an Indian appropriation bill authorized the President to negotiate removal with the tribes west of the Missouri and Iowa lines[80] and the following year, the Kansas – Nebraska Act created official territories and opened the area to settlement[81]. Paul Gates later stated "There was not an acre of land that was available for sale," instead there was "a formidable array of Indian reservations… to which they owners clung tenaciously[82]…" In the winter of 1853-1854, George Manypenny, the Commissioner of Indian Affairs, arrived on the Indian Frontier with the objective of negotiating a new round of treaties with the barely settled emigrant tribes[83]. Manypenny was sensitive to the fact that the Indians had received the most solemn and absolute promises of permanence only a few decades before[84]. Likewise, he did not adhere to the expedient, self-serving view that Indians were racial and cultural inferiors that would hold land perpetually in a state of nature, and deny the dominant cultures right of subjugation[85]. Realistically, however, Manypenny and many of the educated tribal leaders recognized the flood-

[78]See H. CRAIG MINER, WILLIAM E. UNRAU, THE END OF INDIAN KANSAS, 5 – 6 (1978) (Hereinafter, MINER AND UNRAU); PAUL GATES, FIFTY MILLION ACRES, 15 – 16 (1997) (Hereinafter, GATES).

[79]BRIAN DIPPIE, THE VANISHING AMERICAN, 10 – 11 (1982) (Hereinafter, DIPPIE).

[80]PRUCHA, supra note 53, at 345 – 350; 10 Stat 238 – 239 (1983).

[81]10 US Stat. 277 (1854); See MINER & UNRAU, supra note 78 at 145 n. 14.

[82]GATES, supra note 78, at 3.

[83]GEORGE MANYPENNY, OUR INDIAN WARDS, 117 (1880) (Hereinafter, MANYPENNY).

[84]Id, 131.

[85]Id, 132 – 133.

like, dispassionate economic forces that had been unleashed by the discovery of western gold, and the annexation of Texas and the Mexican Cession[86].

Manypenny's resolution was a series of treaties in 1854 and 1855 with the emigrant eastern tribes along the permanent Indian frontier. In general the treaties featured large cessions of land that opened the way to travel and settlement, and some reduced reservations and individual allotments for the tribes[87]. The device of allotment would convert collectively-held tribal land into individualized tracts, paralleling in size those available under the federal land disposition scheme[88]. Federal officials believed that allotments would free up land for whites, teach Indian the value of farming and private property, and depower the tribes[89]. The experiments in Kansas paved the way for general utilization of allotments as the primary tool of assimilation[90].

It was also felt by Manypenny and others that individualized property and smaller reserves would be more easily protected. It was to his chagrin that his inclusionary experiment came largely to naught; by the mid 1870's most of the allotments had been lost through duress, fraud and the pressures of poverty, and only small reservations, and a few allotments still remained in central Kansas[91].

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[86]DIPPIE, supra note 79, at 76.

[87]PRUCHA, supra note 53, at 348 – 350.

[88]See generally, PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 87 – 435 (1968).

[89]FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIAN. 1880 – 1920, 24 – 39 (1984).

[90]COHEN'S supra note 42, at 61 – 64; The comprehensive use of allotment, as an attempt to assimilate the Indians and unlock their land holdings, was employed in the General Allotment Act of 1887, 24 Stat 388, Ch.119, 25 USC § 331, commonly referred to as the Dawes Act Id, at 72; See also JANET MCDONNELL, THIS DISPOSSESSION OF THE AMERICAN INDIAN. 1 – 18, 121 – 125 (1991).

[91]See MANYPENNY, supra note 83 at 131; Annie Heloise Abel, "Indian Reservations in Kansas and the Extinguish of Their Title", KU Scholarworks, The University of Kansas Pre – 1923 Dissertations, https://kuscholarworks.ku.edu, 2627 (1990) (Hereinafter, Abel); MINER AND UNRAU, supra note 78, at 139 – 141.

The Wyandot Treaty of 1855[92], was not an immediate outgrowth of Manypenny's involvement, but was instead the culmination of five years of negotiations conducted by the Wyandot intelligentsia as a facet of the tribes continuing claim for the 148,000 acres promised but unfulfilled by the Treaty of 1842[93]. These discussions broached but did not resolve the additional issues of citizenship and land in severalty. They did, however, make a formalistic attempt to rectify the failures of 1842. The Treaty with the Wyandot of 1850[94] promised the Wyandots $185,000, in return for their release of claims to the promised, but un-received, 148,000 acres[95]. The United States again failed to fulfill their promise, and the Wyandot leaders redoubled their efforts to parlay their small but strategic thirty-nine section reserve into economic and political advantage[96].

In 1855, a small faction of progressives, in clear violation of the Wyandot Constitution[97], signed a document that agreed to dissolve the tribe, apportion the land in individualized severalty to all the members, and make United States citizenship available to those competents who chose it[98].

More specifically, the tribe agreed, in Article One, to dissolve its organization and terminate its relations with the United States, except as necessary to carry out the stipulations

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[92]10 Stat 1159 (I1855).

[93]11 Stat 581, Article 2 (1842); Abel, supra note 91, at 26; DAYTON, supra note 49, at 9 – 10.

[94]9 Stat 987 (1850).

[95]Id, Article 1.

[96]DAYTON, supra note 49, 9; BOWES, supra note 67, at 202 – 207.

[97]BOWES, supra note 67, wrote;

> "Yet approximately thirty men authorized the treaty negotiations in 1855. In a clear violation of the laws set forth in their 1851 constitution, a small fraction decided the fate of the entire nation."

Id, at 206.

[98]Treaty with the Wyandot, 1855 10 Stat 1159, Proclaimed March 1, 1855.

therein[99]. In this regard, there were several dangling and continuing obligations. In one sense, the land held as tribal property would, under the treaty, be ceded to the United States for survey[100] and redistribution to "all the individuals and members of the Wyandot Tribe[101]. Each tribal member, then, either as an individual or part of a family, could share equally in the former tribal lands. In addition, the United States agreed to pay $380,000, plus accrued annuities and unpaid investments from the Treaty of 1850, in return for the general relinquishment of all tribal claims, including former treaties[102].

The strings that remained were several. A list of Wyandots deemed incompetent by reason of age, mental capacity or orphan status was to be prepared, guardians were to be appointed and review was to be made by the Commissioner of Indian Affairs. In addition, though citizenship was available to competent Wyandots who wanted it, those who didn't wish it could apply for temporary exemptions and continued protection and assistance from the United States[103].

Finally, the treaty specified that two acres "now enclosed and used as a public burying ground be permanently reserved and appropriated for that purpose[104]." The treaty doesn't say who, exactly, was the beneficiary of this trust, but it does seem to assume the United States as the trustee-obligor, and as the stakeholder for much of the ensuing conflict.

The treaty purported to dissolve the tribe[105], but it contained a provision allowing competent class Wyandots to defer citizenship. At least 60 Wyandots, more concerned with

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[99]Treaty with the Wyandot, 1855, Article 1, 10 Stat 1159.

[100]Id, Article 2.

[101]Id, Article 3.

[102]Id, Article 6, 7.

[103]Id, Article 3.

[104]Id, Article 2.

[105]BOWES, supra note 67, said;

maintenance of the traditional community than with individual financial and political prospects, formed an Indian party under the leadership of Tauromee, a former principal chief[106]. These traditionalists continued to observe the past customs, practices and ceremonies. Among these tribalists was Hannah Zane, grandmother of the Conley girls whose life mission would be the preservation of the sanctity of Huron Indian Cemetery[107].

In 1857 a group of the traditionalists and incompetent non-citizens emigrated to the Seneca Reserve in northern Oklahoma, but many returned to Kansas after the Confederate invasion of the Reserve in 1862[108]. Relations between the returning emigrants and the citizen-class Wyandots remained strained[109] and in 1867, after negotiations in Washington by Tauromee, the United States signed an omnibus treaty which, in part, allowed the Indian party Wyandots to purchase land from the Seneca in Northern Oklahoma and resume tribal status[110].

Thus, the Wyandots who emigrated to Oklahoma, either because they refused citizenship and chose tribalism, or because they were labeled incompetent to choose, established the new

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> "The driving force behind the treaty was a group of men who believed both that they could better secure their property with the protection offered by citizenship and that they had a real stake in the future of Kansas Territory. For those Wyandots who opposed the treaty, eastern Kansas no longer provided safe home and relocation appeared to be the best option. Although Kansas and Indian Territory served as the stage, the federal government's lists served as the media through which these opposing parties acted out their respective visions of the Wyandots' future."

Id, at 210.

[106]THE EMIGRANT TRIBES, supra note 58, at 230; See also BOWES supra note 67, at 217.

[107]DAYTON supra notes 49, at 10; see infra Chapter Four.

[108]See United Government of Wyandotte County (Larry Hancks), "Huron Indian Cemetery". www.wycokck.org/WorkArea/DownloadAsset.aspx?id,at 5 (Herein after, HANCKS).

[109]Id

[110]Id; See Treaty with the Seneca, Mixed Seneca, and Shawnee, Qupaw, etc. 1867, 15 Stat 513 (Proclaimed Oct 14, 1868), Article 13; See BOWES, supra note 67, at 217.

Wyandot tribe in Oklahoma, and were legally both wards of the United States, and entitled to the benefits and prerogatives of recognized tribal Indians[111]. The tribe refused to grant membership to citizen-Wyandots who remained in Kansas[112]. But some of the Kansas Wyandots had never sought

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[111]See COHEN'S, supra note 42, at 152.

[112]DAYTON, supra note 49, at 12. The fact that non –citizen Wyandots from Kansas were part of the tribalists argueably recognized by the Treaty of 1862 (see infra footnote 315), has induced some to assert that the present day Wyandot Nation of Kansas, need not continue its petition for recognition before the Bureau of Indian Affairs (See infra notes 340-344) because they are still recognized and, indeed, have a judicial claim against the United States for mismanagement of trust assets. See Andrew Westney, "Kansas Tribe Says DOI Mismanaged Trust Lands in KC" Law 360, New York (June 2, 2015).

> "The Wyandot Nation of Kansas hit the federal government with a complaint Monday in the U.S. Court of Federal Claims, alleging the U.S. Department of the Interior failed to require Kansas City, Kansas, to pay for easements on tribal trust land in a cemetery and mismanaged their nation's trust lands and funds.
>
> The government failed to fulfill its trust duties for the sale of historical tribal trust lands under an 1867 treaty and failed to charge the city of Kansas City for its use of two streets that run through the edges of the nation's trust land in the Huron Indian Cemetery.
>
> The breach of trust claims include the government's "failure to collect, deposit, account for and invest plaintiff's trust funds derived from its treaty lands" and its failure to protect the nation's ownership interest in the lands and funds, according to the complaint.
>
> While the nation isn't included in the BIA's list of federally recognized tribes, it claims it is federally recognized under the 1867 treaty, according to the complaint.
>
> The predecessor to the current Wyandot Nation acquired the 2 acres in the cemetery among other trust lands it received from the Delaware Nation under an 1843 treaty, according to the complaint.
>
> The Bureau of Indian Affairs has had complete control over the cemetery lands since 1855, including executing a 1918 contract with the city for the care and preservation of the grounds, according to the complaint.
>
> But the DOI grossly mismanaged the lands, in part by failing to require that Kansas City obtain and pay for easements, as required by federal law, for portions of Minnesota Avenue and Seventh Street in the city that pass through corners of the nation's cemetery trust land.
>
> The nation asserts four claims for relief, including for funds owed to the nation by the government for the cemetery lands and funds owed for the sale of trust lands under the 1867 treaty and the 1994 American Indian Trust Fund Management

citizenship and wished to be listed on the Indian role, and thus eligible for tribal membership. Among them was Eliza Burton Zane Conley , daughter of Hannah Zane who requested that she and her family be placed on the official Indian list – a request that failed. Conley and her children were mistakenly placed on the citizen-Wyandot list, a mistake that would play a significant role in Lyda Conley's subsequent suit to protect the cemetery[113].

Chapter Four: Sanctity and Assault

A. The Sanctity of Burials

Most societies, present and past, have protected their burial grounds and remains against disturbance[114]. James Frazier concluded "the place where the dead are deposited all civilized

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> Reform Act, as well as mismanagement by the government of both those categories of funds.
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> The nation alleges the government breached its constitutional, treaty, statutory and fiduciary duties. The amount of monetary damages the nation is owed is uncertain because of the government's failure to account for the nation's trust funds, according to the complaint."

Accessed at http://www.law360.com/articles/662714/print?section=government contracts.

See also Wyandot Nation of Kansas v. United States, 115 Fed.Ct 595 (2014)(Tribe's claims barred under statutes precluding courts jurisdiction because plaintiff had suit with respect to same claim pending in Federal District Court).

The Tribe may prove to have a further problem with their claim for damages to the property of a recognized fiduciary, caused by mismanagement, because of a recent holding that federal recognition can be lost by abandonment or gaps in the pattern of services or identifications over a period of time. See Mowekma Ohlone Tribe v. Salazar, 708 F.3d 209 (D.C. Cir. 2013). "A once-recognized tribe can fade away", 708 F.3d at 219, and the entity, in order to regain recognized status, must procede, not through the courts, but through the administrative petition process in 25 CFR Section 83.8. See 708 F.3d at 218-220.

[113] Id, at 12.

[114] RICHARD CUNNINGHAM, ARCHAEOLOGY, RELICS AND THE LAW, 2nd Ed., 539 (2005) (Hereinafter, CUNNINGHAM).

nations and many barbarous ones regard… as consecrated ground"[115] American common law would support this in theory, and disturbing burials is generally permitted only under careful supervision or compelling circumstances[116]. Disturbance does occur, however, and not infrequently, even in the case of Anglo-American remains, when development requires it, or when family or cultural linkages grow dim.[117]

The common law and statutory law of the United States has, in general, shown far less protection and respect for the graves and remains of traditional Indians. The law has allowed Indian remains, found on land not owned by descendents or culturally affiliated tribes, to be excavated, removed, possessed and displayed by landowners, scientists, museums, hobbyists, and macabre profit-seekers.[118] Not until 1990 did Congress enact a real semblance of protection and property rights with the passage of the Native American Grave Protection and Repatriation Act (NAGPRA).[119] Under NAGPRA, rights of possession are declared in lineal descendants and culturally affiliated tribes for remains found on federal or tribal lands after 1990.[120] Rights of repatriation for remains held in federally-funded museums both in 1990 and thereafter are likewise vested in lineal descendants and culturally affiliated tribes.[121] NAGPRA does not apply to remains found on state or private land unless they are thereafter placed in the legal possession of a federally-

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[115]Jack Trope, Walters Echo-Kauk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History", 24 ARIZ STATE L. J. 35, 38 (1925) (Hereinafter, TROPE).

[116]H. MARCUS PRICE, DISPUTING THE DEAD, 20 – 24 (1991) (Hereinafter, PRICE).

[117]CUNNINGHAM, supra note 114, 539 – 541

[118]TROPE, supra note 115, at 39 – 40.

[119]25 USC § 3001 et seq; See Trope, supra note 115, at 58 – 76; CUNNINGHAM, supra note 114, at 692 – 713.

[120]25 USC § 3002 (a)(1)(2).

[121]25 USC § 3005 (a)(1).

funded museum or a funded entity such as a school or town that is deemed a museum for NAGPRA repatriation purposes.[122]

Before and even after the passage of NAGPRA, the sanctity of an Indian burial site was – and is – not afforded the right of repose.[123] The best that descendants can really achieve is the property rights of repatriation, and even these rights may be subject to definitional limitation or problems of proving cultural affiliation.[124]

The less than complete protection of all burials, under the American common law, which allows expediency to trump sanctity, and the historically abject insensitivity of the American law toward tribal cemeteries and burials are compounded in their impact on traditional Indian communities which tend to uncompromisingly sacralize their burial sites.[125] This unqualified regard stems from several deep sources. In one sense, the graves are part of the land itself, and the land, for traditional Indian peoples, is itself sanctified.[126] It has been said that the Indians' "belief

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[122]Pueblo of San Ildefonso v. Ridlon 103 F.3d 936, 938 (10th Cir. 1996); Thorpe v. Borough of Jim Thorpe 770 F.3d. 255, 262 (3rd Cir. 2014).

[123]CUNNINGHAM, supra note 114, at 668; Yankton Sioux Tribe v. United States Corps of Engineers, 83 F.Supp 2d. 1047, 1057 – 1059 (D.S.D 2000).

[124]See e.g. Bonnichsen v. United States, 367 F. 3d 864, 882 (9th Cir. 2004)

> "However, because Kennewick Man's remains are so old and the information about his era is so limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures. We thus hold that Kennewick Man's remains are not Native American human remains within the meaning of NAGRPA and that NAGPRA does not apply to them. Studies of the Kennewick Man's remains by Plaintiffs-scientist may proceed pursuant to ARPA".

Id, 882.

[125]See THORPE, supra note 115 at 45 – 47, 59 – 60.

[126]THE SACRED, supra note 14, at 67 – 80; See also Russell L. Barsh "Grounded Visions: Native American Conceptions of Landscapes and Ceremony", 13 ST. THOMAS L. Rev. 127, 129 (2000)

> "Among indigenous peoples who choose to continue close physical, social, and emotional relationships with their ancestral landscapes, land creates a universe of shared meanings. The songs, dances, recitations, and ceremonies of the people are

in the sacredness of the earth is the basis for their belief in the holiness of particular places."[127] Reverence for the remains of ancestors buried at particular places may itself blend several sources. It is seldom suggested that the dead themselves are deities,[128] but there is strong indication, especially among Indians of the Great Lakes region, that reverence is based in respect, love and the desire for spiritual guidance.[129] In a related sense, the ancestors may be seen as intermediaries with higher spiritual beings, or as personal guardians to their descendants.[130]

In a related manner, the sacred dead, as intermediaries between the gods, the past, the present and future, demonstrate the fundamental Indian belief in interdependency, and balanced relationships that is "at the root of native North American sacred tradition."[131] It may also demonstrate what is found in Indian thought – a non-linear, wholistic, cyclical view of life and time.[132] Thus ancestors, as intermediaries or personal guardians, are seen as present, and not just remembered.[133] Consciousness can be collective among the living members of a tribe or

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> tied to particular landmarks, and each performance continues a process of endlessly remembering, renewing, and revising relationships within ecosystems which are themselves forever reiterating yet changing. The landscape not only contains the imprints of past lives, but continually moves people to sing new songs. Landscape is the central integrating principle of culture and artistic expression."

Id, 129.

[127] Richard Pemberton, Jr., "I Saw That It Was Holy: The Back Hills and the Concept of Sacred Land", 3 LAW & INEQUALITY. 287, 243 (1985).

[128] See Ake Hultkrantz, "The Cult of the Dead Among North American Indians", in SUMNER TWISS AND WALTER CONSER, EXPERIENCE OF THE SACRED, 202 (1992) (Hereinafter, HULTKRANTZ).

[129] Id, 209 – 210

[130] Id, 210 – 211, 217 – 218

[131] The SACRED, supra note 14, at 13.

[132] Benjamin L. Whorf, "Time, Space, and Language", in LAURA THOMPSON, CULTURE IN CRISIS, 160 – 171 (1973).

[133] See e.g. JOSEPH EPES BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN, 53 – 55, 115 – 121.

community, and can simultaneously embrace the past and future in a timeless whole.[134] Jan English, principal chief of the Kansas Wyandot, remembered the ancestors in conversations at the Huron Indian Cemetery.

> "English sits, remembering sack lunches here with her Aunt Edith, who would tell stories about the great Wyandot leader Chief Tarhe and her other ancestors. English is French and English, too but her aunt's stories made her feel more Wyandot than anything else. 'Timeless,' is the word she uses to describe the feeling."[135]

Eliza Burton "Lyda" Conley,[136] a Kansas Wyandot Indian, spoke, of the sacred centrality of Indian burial grounds in general, and Huron Indian Cemetery, in particular, to the Supreme Court of the United States. More will be discussed about Lyda Conley and the case later,[137] but in the context of the general focus on the sanctity of burials, it is worthwhile to read here her presentation to the Court. It was the first argument made to the Supreme Court by an Indian woman,[138] and the first time the Court was called on to deal with the topic of sacred Indian burials.[139]

Conley said,

> "History tells us that a superstitious reverence for and burial of the dead has been found a distinguishing trait of Indian character—to some extent we believe this to be true—as graves of the redmen were their only monuments, so traditions were their only history... Like Jacob of old I too, when I shall be gathered unto my people, desire that they bury me with my fathers in Huron Cemetery, the most sacred and hallowed spot on earth to me, and I cannot believe that this is superstitious

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[134]VINE DELORIA, supra note 9, at 51 – 57.

[135]Debbi Snook, "Ohio's Trail of Tears", The Plain Dealer, 22 (July 6 – 12, 2003).

[136]She apparently disliked the name "Eliza". See DAYTON, supra note 49, at 15 n.49.

[137]See infra, Ch 4 (b), (c).

[138]DAYTON, supra note 49, at 25.

[139]Stacy L. Leeds, "Resistance, Resiliance and Reconciliation: Reflections on Native American Women and the Law", 34 THOMAS JEFFERSON L. Rev. 303, 316 – 317 (2012).

reverence ay more than I can believe that the reverence every true American has for the grave of Washington as Mount Vernon is a superstitious reverence… The wisest man the world has ever known admonishes, 'Remove not the ancient (landmark), which thy fathers have set..' and that the hand of the desecrator 'remove not the old landmark; and enter not unto fields of the fatherless; For their redeemer is mighty; he shall plead their cause with thee.' Man goeth to his long home, and the mourners go about the street; or ever the silver could be loose, or the golden bowl be broken, or the pitcher be broken at the fountain; or the well broken at the cistern. Then shall the dust return to the earth as it was; and the spirit shall return unto God who gave it."[140]

Stepping outside the positivistic boundaries of the law, for a moment, one can question: What is owed to the sacred and why? This query needs a framework, as all altruistic, non-gain, seeking behavior may necessitate borders.[141] We can loosely posit the community as the arena, but this needs some further definition. We can describe the community within which the accounting to the sacred is examined, as an aggregate of reciprocal, balanced interactions, or as a collection of common beliefs, attitudes, characteristics or interests.[142]

Within a community, then, at a minimum, respect and reverence are generally afforded to final resting places – by the descendants, by the friends, and usually by visitors. Beyond this, however, burial places may be the recipients of affirmative duty and obligation – acts of

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[140]Quoted in JAN ENGLISH, supra note 45, at 554.

[141]See GARRETT HARDIN, THE LIMITS OF ALTUISM, 26 – 27 (1977).

[142]See JOHN COLLIER, ON THE GLEAMING WAY, 29 – 30 (1962)

> "These incomparable religious expressions are incomparable educational forces too; they form the Indian soul and being, perpetually renew it, induct each generation into the whole of the heritage, sustain the society, discipline as well as nurture its members, and insure their military efficiency. The tribal will to live is closely united with these communal religious inpourings and outpourings. But above all, at this point, the balanced man-sidedness of the Indian group is stressed, and the crucial function of their cosmically oriented religions in producing the many-sidedness and holding it in poised union, each part with all the differing parts, in a community whose shared life is lived with confident power by al its members."

maintenance, protection and even worship. Where do these enhanced duties come from? It may, as mentioned, be positivistic – if not from formal law, from[143] the deep-set commands of custom. The devout may infer a mandate directly from God.[144] But, a larger sense, duty may be chosen. Lawrence Tribe said that the choice to be obligated, to things, ideas, and circumstances beyond oneself,[145] is the highest exercise of freedom. Such choice could, but need not be, the self-consuming duty of martyrdom or sacrifice. More realistically for most, the guardian of the sacred may choose a living duty of protection and thereby become part of the coherent, timeless continuum between the past and the future.[146] Indeed, in a life of service to the scared, one may

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[143]Id see THE SACRED, supra note 14, 8 – 9.

[144]See HULTKRANTZ, supra note 128, at 218.

[145]TRIBE, supra note 4, at 1326 – 1327.

[146]See gen. Erica-Irene Daes, "The Indispensable function of the Sacred", 13 SAINT THOMAS L. Rev. 29, 29 – 34 (2000)

> As we lose contact with, and respect for life generally, we also lose respect for one another as humans. In saying this, I am rejecting the argument, which is frequently heard today, that industrialized societies are morally superior because they place such a high value on humans, human welfare, and human rights. It may be true that the most industrialized societies elevate humans over all other forms of life, in essence they have become human-centered. But this does not mean that technological societies genuinely respect human life over which they have achieved such enormous power. It only means that industrialized societies are completely self-absorbed, and make decisions based chiefly upon the consequences of their human members (often, the interests of only a very small human elite).
>
> We are not becoming more humane; we are becoming more selfish as individuals and as nation-states. We are withdrawing, to use Tagore's analogy, behind the walls of our artificial cities. Even as technology has made it possible for us to maintain an instantaneous communication with each other around the world through television and the Internet, we continue to fight senseless wars and to oppress one another cruelly and without regret. In the absence of the sacred, human life, and all other life, is simply another means to achieve our personal objectives, and to try to fill our emptiness.
>
> Tagore feared that technology and consumerism would transform the entire planet into what he described as the "feast . . . of grossness." This result could be avoided, he argued, only if human beings learned once again to enjoy and love one another, and the rest of creation. Tagore equated the sacred with the joy of discovering the

achieve personal meaning, enlightenment and fulfillment; one may, in a simpler sense, achieve peace.[147]

B. The First Assault on the Sacred

The splitting of the Wyandot tribe, fostered by the dissolution provision of the Treaty of 1855,[148] the tribal resumption Treaty of 1867,[149] the post-Civil War movement of citizen Wyandots to Oklahoma, and their adoption back into the resurrected tribe, resulted in an 1881 membership

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> mysterious unity in diversity of the universe. For him, and I believe for the majority of indigenous peoples, the sacred was not terrifying and threatening, but joyful and filled with song. The sacred is the joy of discovering how we are not alone, and have no need for loneliness.

Id, at 30 – 31.

[147]Black Elk spoke to Joseph Epes Brown about the peace and fulfillment within the sacred.

> "You have noticed that everything an Indian does is in a circle, and that is because the Power of the World always works in circles, and everything tries to be round. In the old days when we were a strong and happy people, all our power came to us from the sacred hoop of the nation, and so long as the hoop was unbroken, the people flourished. The flowering tree was the living center of the hoop, and the circle of the four quarters nourished it. The east gave peace and light, the south gave warmth, the west gave rain, and the north with its cold and mighty wind gave strength and endurance. This knowledge came to us from the outer world with our religion. Every-thing the Power of the World does is done in a circle. The sky is round, and I have heard that the earth is round like a ball, and so are all the stars. The wind, in its greatest power, whirls. Birds make their nests in circles, for theirs is the same religion as ours. The sun comes forth and goes down again in a circle. The moon does the same, and both are round. Even the seasons form a great circle in their changing, and always come back again to where they were. The life of a man is a circle from childhood to childhood, and so it is in everything where power moves. Our teepees were round like the nests of birds, and these were always set in a circle, the nation's hoop, a nest of many nests, where the Great Spirit meant for us to hatch our children."

Supra note 135, at 35.

[148]10 Stat 1159, Article 1.

[149]15 Stat 513, Article 13.

of 292.[150] A number of the citizen and non-citizen Wyandots in Kansas never moved to Oklahoma or rejoined the Wyandot tribe. Instead they remained in the Kansas City, Kansas area, and maintained both their own version of the tribal customs and their close relationship with sacred grounds at Huron Indian Cemetery.[151]

By 1890 Kansas City, Kansas had become not just a jumping-off place for the west; but a vibrant destination in its own right. The increasing land values at its center became focused on the open lands of the cemetery. Kansas senator Preston Plumb hit upon the idea of having Congress declare the cemetery a nuisance, then removing the bodies to a better (and less valuable) place and selling the site for development.[152] The designation of nuisance was and is a frequent ploy of urban entrepreneurs and their legislative accomplices as, if unchallenged, it avoids the pesky inconvenience of the takings clause, contract clause, and the due process clause.[153] Cases of the time, prior to *Pennsylvania Coal Co v. Mahon*,[154] dealt with these issues usually under substantive

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[150]THE EMIGRANT TRIBES, supra note 58, at 421

> For a number of years, citizens continued to be adopted back into the Wyandot tribe, and familiar names again began to dominate on the council. By 1881, ten years after reorganization, the tribal roster stood at 292, but by then included a number of individuals who lived somewhere other than the new reserve. Many Citizen Class Wyandots and their descendants never moved to Indian Territory and were never readmitted to the reorganized tribe. As Indian Agent H.W. Jones had feared, this eventually resulted in the splitting of families .A substantial number of Citizen Class Wyandots continued to live in the Kansas City area, but eventually Wyandot descendents were scatted all across the country.

[151]Id; See also JAN ENGLISH, supra note 45 at 551 – 552.

[152]DAYTON, supra note 49, at 12.

[153]BARLOW BURKE, THE LAW OF ZONING AND LAND USE CONTROLS, 3rd Ed., 39 (2013) (Hereinafter, BURKE).

[154]260 US 393 (1922).

due process, and sustained extreme urban exercises of authority, as long as, arguably, the purpose was legitimate and the means reasonable.[155]

The anomaly, however, of having the legal trustee of reserved property declare that the beneficial interest is a nuisance was too much even for the often- expedient morality of Washington in the 1890's, and Plumb's subterfuge was rejected.[156] The attempt was not unnoticed, however, and the Wyandot community of Kansas voiced strong disapproval. Lucy Armstrong wrote, in June of 1890,

> "To remove the burying ground would be to scatter the dust of the dead to the winds. Such a sale is repugnant to every sentiment we cherish for our dead, as well as being offensive to the highest impulses of a Christian nation."[157]

The lives and the fortunes of the preservationists are never easy. To preserve a scarce resource, or a unique, sacred site requires incessant vigilance. Transformative forces of growth and neglect never sleep; they may be resisted, perhaps many times, but they never cease. The single time that they penetrate the shield of protection is almost always the last. The priceless, the vulnerable, the rare and the sacred are lost; and like extinction, the loss is forever.[158]

It is even more troubling when an ally loses his way. William Elsey Connelley was a significant historian of Indian Kansas and the Wyandots in particular.[159] However his economic

[155]BURKE, supra note 153, at 39; See e.g. Mugler v. Kansas, 123 US 623, (1887); Hadacheck v. Sebastian, 239 US 394 (1915). Unparticularized individual impact, which is always the case of nuisance is used to discount the impact on property, is not a factor in consideration of the general validity of regulation tested by substantive due process. See Euclid v. Ambler Realty Co. 272 US 365 (1925) in contrast with Nectow v. City of Cambridge, 277 US 183 (1928); See STEVEN EAGLE, REGULATORY TAKINGS, 4th Ed., 96 – 110 (2009) (Hereinafter, EAGLE).

[156]DAYTON, supra note 49, at 12 – 13.

[157]Quoted by JAN ENGLISH, supra note 45, at 552.

[158]See generally, John Ragsdale, Possession: An Essay on Values Necessary for the Preservation of Wild Lands and Traditional Tribal Cultures, 40 Urban Lawyer 903, 903 – 918 (2008).

[159]See supra note 63.

desires took precedence over his morality and his art, at least at times. In 1898 he presented the Oklahoma Wyandotte Tribe with a real estate proposal involving the strategic site occupied by the Huron Indian Cemetery.[160] The Wyandotte Tribal Council gave Connelley the power of attorney to move the bodies and sell the reserve for a commission of fifteen percent of the sale price.[161] In 1906 Congress passed an appropriations bill which included a hidden rider that authorized the Secretary of the Interior to provide for removal of the bodies and the sale of the site.[162] The Secretary then appointed commissioners who came to Kansas City, Kansas and prepared to contract for the removal and reburial of the remains, and for the property itself.[163]

The plans of Connelley, the Oklahoma Wyandots and the Department of the Interior were disrupted, however, by the intervention of the Conley sisters-Eliza (Lyda) and Helena (Lena). The sisters were direct descendants of numerous Wyandots buried in the cemetery including parents, grandparents and even the great chief Tarhe, and had cousins and a sister buried there as well.[164] They undertook the duty of protection in the most direct of manners; they built a shack in the cemetery and moved in with shotguns and a steely resolve. They hung a sign saying "Trespass at your peril"[165] and Lyda declared "…woe be the man that first attempts to steal a body…(we) are

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[160]THE EMIGRANT TRIBES, supra note 58, at 421; DAYTON, supra note 49, at 13;

> "Connelley, who is still infamous among local historians for his entrepreneurial skills, must have felt very pleased with himself. He was on the verge, he believed, of accomplishing what the great Senator Plumb could not- the sale of the "eyesore" that was the Huron Place Cemetery."

Id.

[161]JAN ENGLISH, supra note 45, at 552.

[162]THE ENGLISH TRIBES, supra note 58, 422.

[163]DAYTON, supra note 49, at 18.

[164]See JAN ENGLISH, supra note 45, at 553; Henry Van Brunt, "Three Sisters' Defense of Cemetery Continued for Nearly Forty Years", Kansas City Times (June 7, 1946), 3 (reprinted at http://www.wyandot.org/sisters.html) (Hereinafter, Van Brunt).

[165]VAN BRUNT, supra note 164, at 7.

part owners of the ground and have right…to keep off trespassers, the right a man has to shoot a burglar who enters his home."[166] Helena, self-professed to be a sorceress, cursed those who would disturb the graves, and today is buried in the cemetery with a tombstone warning "Cursed be the villain that molests their graves."[167]

It's noteworthy that Lyda Conley's defense contained, in addition, a legal foundation: an assertion of ownership and a night of resistance against trespass that could extend, perhaps, to the use of deadly force. The origin of such rather nuanced legal accompaniment to otherwise dire physical threats was Lyda's rather formidable education, unique enough for a woman at the frontiers' edge at the end of the 19th century, and even more so far a woman of Indian origin.

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[166] JAN ENGLISH, supra note 45, at 553; See also Robert Downs, "From Petticoats to Briefs; A History of The University of Missouri – Kansas City School of Law" 72 UMKC L. Rev. 1011 (2004) (Hereinafter, DOWNS), where he quotes the sisters;

> "The first man to turn a sod over one of those graves would either turn another for the Conley sisters or have some other person bury him."

Id, at 1016.

[167] Jay Lastelic, "Curse May Play a Role in Cemetery Combat", Kansas City Star and Times, 2 (May 17, 1959), reprint at; http://www.wyandot.org/curse.htm,

> "Miss Conley said the power of the curse was transmitted to her by a woman of the tribe, known as a witch who is buried in the cemetery.
>
> "She asked me," Miss Conley used to tell, "if I would rather have power or money. I said power." . . .
>
> 'My father's spirit came to me in a dream and was unhappy and I knew what that meant,' Helena said then, 'The dead want this holy place defended and it will be.'
>
> Helena Conley was the last survivor of the family. She died September 15, 1958, at the age of 94. Often she wondered about her longevity.
>
> 'Our body has to return to mother earth and our spirit to God who made it', she said. 'We don't know how we came here, nor why, nor where we go. I don't know why I'm left in this God-forsaken place. It's a cursed world - a separation from God.'

Id, at 2.

Lyda had rowed a boat daily across the Missouri River to attend Park College,[168] and, in 1900, had entered Kansas City College of Law, later to become the University of Missouri-Kansas City School of Law.[169] She graduated in 1902, one of four women in a class of sixty seven, and was admitted to the Missouri Bar. She was the first Indian woman attorney in the United States to argue before the United States Supreme Court. [170]

She eschewed her formal training at the outset of the assault on the Cemetery, and opted for direct self-help which proved effective in the immediate sense-a sort of de facto temporary restraining order. The Interior Commission, unable to arrange a sale, left for Washington empty-handed, tails clamped firmly between their legs. They had been deterred by both direct force, and by the ground swell of popular support for the courageous "Conley girls." – but they had not been defeated.[171] The threats posed by the Act of 1906 was still in place and, for this Sword of Damocles, Lyda turned to her legal training. On June 11, 1907 she filed suit in federal court to enjoin James Garfield, the Secretary of the Interior, from executing the statutory authorization of sale.[172] The district court rather summarily dismissed her pleadings for lack of jurisdiction, but allowed appeal, which would lead to argument before the United States Supreme Court[173]. Though she did not get any traction in the lower court, Conley had introduced some interestingly ideas that would come to fruition and play later roles in the federal Indian Law.

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[168]JAN ENGLISH, supra note 45, at 553.

[169]See gen. DOWNS, supra note 166.

[170]Id, at 1016; See DAYTON, supra note 49, at 25.

[171]DAYTON, supra note 49, at 19.

[172]THE EMIGRANT TRIBES, supra not 58, at 422.

[173]See Conley v. Garfield, No. 8548, (C.C.D. Kan. July 2, 1907) noted in DAYTON, supra note 49 at 23 n.99, 100.

Lyda Conley, by seeking to enjoin the Secretary of the Interior's disposal of Indian land, had drawn a vital distinction between the authority of the executive to extinguish Indian title, and the authority of Congress. Case law would come later to confirm that only Congress has this authority. *Lane v. Santa* Rosa held that the Secretary of the Interior had no inherent authority to dispose of Pueblo lands, in disregard of Indian ownership[174], even if the Indians were in generally deemed wards,[175] subject to guardianship. Congress, on the other hand, had the plenary power to abrogate a treaty and extinguish Indian title.[176] Though *Lone Wolf v. Hitchcock*[177] suggested that Indian interests in lands might not be within the protection of the Fifth Amendment,[178] the case ultimately decided that the actions of Congress, in abrogation and allocation of treaty lands, were not an unconstitutional taking but were "a mere change in the form of investment" and presumed to be "in perfect good faith."[179] Subsequent cases in the twentieth century made it clear, however, that Indian treaty land was property protected by the Fifth Amendment, and that Congress's administrative transformations must in fact be in good faith to earn managerial discretion on the form and results of investment.[180] In *United States v. Sioux Nations of Indians*,[181] the Court said, which respect to the seizure, under duress of starvation, of the Black Hills in 1877:

> "In sum, we conclude that the legal analysis and factual finding of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a

[174]Lane v. Santa Rosa held that unilateral disposition "would not have been an exercise of guardianship, but an act of confiscation", 249 U.S. at 113.

[175]United States v. Kagama, 118 U.S. 375, 383 – 384 (1886).

[176]Lone Wolf v. Hitchcock, 187 US 553 (1903).

[177]Id

[178]187 U.S. at 565-566.

[179]187 US at 568.

[180]See United States v. Sioux Nation of Indians, 448 US 371, 416 (1980).

[181]Id.

mere change in the form of investment of Indian tribal property." Lone Wolf v. Hitchcock, 187 U.S., at 568, 23 S.Ct., at 222. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid."[182]

Conley asserted in the federal courts that a Wyandot Indian with citizenship had an individualized standing based on a "seizin and a legal estate" in the cemetery land.[183] In a related sense, she was also contending status as a third party beneficiary of the Treaty of 1855 between the United States and the simultaneously terminated Wyandot Tribe. These rights in land and contract would be secured, she asserted, under both the Fifth Amendment prohibition against taking without due process, and under the Supremacy Clause of Article VI.[184]

The claim of a personal legal estate, based on the burial of ancestors, even on land held in trust or fee by another, has a resonance that increases during the 20th century. Cases from the common or civil law have declared descendants' interest in the unabandoned bodies of ancestors buried on private land of another.[185] After 1990, the Native American Grave Protection and Repatriation Act (NAGPRA)[186] provided a statutory declaration that lineal descendants have priority in the control of remains that are found on federal or tribal lands,[187] or in the legal custody

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[182]Id, at 423.

[183]See DAYTON, supra note 49, at 20, quoting petition for injunction in Conley v. Garfield, supra note 173; See also Conley v. Ballinger, 216 US 84, 88 (1910) infra at Chapter 4 (c).

[184]See DAYTON, supra note 49, at 22.

[185]See Charrier v. Bell, 496 So 2d 601, 607 (La. App. 1986); PRICE, supra note 116, at 23 – 24.

[186]25 USC § 3001 et. seq. (1990); see supra notes 119 – 125.

[187]25 USC § 3002.

of a federally-funded museum.[188] The linkage of NAGPRA to the Huron Indian Cemetery was to reemerge at the end of the 20th Century.[189]

Conley's assertion of third party beneficiary status under a treaty with a terminated tribe, also surfaces again in the Post World War II termination era when Congress severed relations with a number of recognized tribes.[190] Subsequently, a number of cases emerged when individual members of the former tribes successfully asserted individualized rights in treaty promises regarding hunting, fishing, and jurisdiction.[191]

Conley, and other Kansas Wyandots were, likewise, claiming standing with regard to personal interests in ancestral remains in the aftermath of the termination of the treaty tribe. But, there was a significant difference that made their argument even stronger. Not only were the rights under the Treaty of 1855 essentially individual ones, as they related to the burials and interest of lineal descendants, but, in addition, the termination of the treaty tribe was not later, in the future, it was simultaneous with ratification of the treaty. Individualization of rights in the Huron Indian Cemetery was present from the outset.

There may be another modern parallel to Lyda Conley's argument for personal standing in treaty land cases. Aboriginal, pre-treaty rights in land are clearly dealt with as a tribal claim,[192] and individuals have never been able to make a claim for tribal aboriginal rights.[193] Individual Indians have, however, been able to establish protectable rights in land to which the United States holds

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[188]25 USC § 3005.

[189]See infra, Chapter 6a.

[190]See, generally, DONALD FIXICO, TERMINATION AND RELOCATION, (1986) (Hereinafter, FIXICO).

[191]See e.g. Kimbell v. Callahan, 493 F.2d. 564, 569 (9th Cir. 1974); United States v. Felter, 752 F. 2d. 1505, 1509 – 1510 (1985).

[192]See Johnson v. McIntosh, 21 US 543, 574 (1823).

[193]MICHAEL LIEDER and JAKE PAGE, WILD JUSTICE, 266 – 267 (1997).

legal title, sometimes called individual aboriginal rights.[194] The individual must be able to demonstrate actual, exclusive occupation since time immemorial or, more realistically, since before the operation of United States land management law.[195]

It might have been argued by Lyda Conley, that since the Wyandot Treaty of 1855 and the dissolution of the Tribe, the federal government has held legal title to the Huron Indian Reservation, at least until the 1867 treaty,[196] without an indicated tribal beneficiary. There was, however, from 1843 until 1867, an actual, exclusive occupation of a defined portion of the land by various sets of remains, and by the visitation of descendants. Lyda Conley was the direct inheritor of the actual, exclusive, individualized occupation of her ancestors and, under cases like *Dann* and *Cramer*,[197] she could have had standing before the federal courts to protect her possessory and visitation rights.

One further development in Indian sacred site law has recently emerged and might have provided Conley with standing to enjoin disinterment. In the late 1970's, Indian tribes began to invoke the First Amendment Free Exercise Clause in cases where government management of the federal public lands threatened religious sites with substantial burdens.[198] These cases, at first unsuccessful, employed the logic of *Sherbert v. Verner*[199] which held that governmental actions and regulations that substantially burdened the free exercise of religion are presumed invalid unless

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[194]See United States v. Dann 470 US 39, 50 (1985); United States v. Dann, 873 F. 2d. 1189, 1195 (9th Cir. 1989).

[195]See 873 F. 2d at 1199 – 1200; Cramer v. United States, 261 US 219, 234 – 235 (1923).

[196]15 Stat 513 (1867); See supra note 110.

[197]Supra notes 194, 195.

[198]See Sequoyah Valley v. TVA 480 F. Supp 608 (E.D. Tenn 1979); Badoni v. Higginson 455 F. Supp. 641 (D. Utah 1977); Wilson v. Block 708 F. 2d. 735 (D.C. Cir 1983).

[199]374 US 398 (1963) See also Wisconsin v. Yoder, 406 US 205 (1972).

shown to further compelling state interests with the least restrictive means.[200] The first major victory for the tribes was in *N.W. Indian Cemetery Protective Assn. v. Peterson*[201] where the Ninth Circuit found that a proposed logging road, on non-tribal land in a national forest, would virtually destroy the tribes' ability to practice religion.[202] The Supreme Court reversed, however, in *Lyng v. N.W. Indian Cemetery Protective Assn.*[203] The Court held that a prima facie violation of the Free Exercise Clause, necessitating a compelling state interest for validity, would require a showing of intentional discrimination, prohibition or coercion of belief. Indirect impacts of government land management would not, even if devastating to a sacred site, be enough to trigger strict scrutiny.[204]

Employment Division v. Smith[205] went beyond Lyng's focus on public land management and held that governmental actions would be judged on the reasonable basis test and not under strict scrutiny, if the substantial burden "is not the object of the [law] but merely the incidental impact of a generally applicable and otherwise valid provision"[206] Congress responded to the scope of *Smith* by passing the Religious Freedom and Restoration Act (RFRA) which professed to "restore[207] the compelling state interest test[208] as set forth in *Sherbert* and Yoder."

The Supreme Court was not amused by the attempted overrule of Smith and charged Congress with an unauthorized use of the Fourteenth Amendment's Section Five enforcement

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[200] 374 US at 404 – 407.

[201] 795 F. 2d. 688 (9th Cir. 1986).

[202] 795 F. 2d. at 693.

[203] 485 US 439 (1988).

[204] 485 US at 451.

[205] 494 US 872 (1990).

[206] 494 US at 878.

[207] 42 USCA §§ 2000 bb (et. seq.) (1993).

[208] See § 2000 bb (b)(1).

power; at least with respect to state and local governments.[209] RFRA continued to be applicable to the federal government, as Congress can police itself under Article I plenary power, without recourse to Section 5 of the Fourteenth Amendment[210]. RFRA's use for strict scrutiny protection of tribal sacred sites was, however, undercut by a split in the lower courts. The Ninth Circuit read "substantial burden" as unchanged from *Lyng*[211] and, thus, still demanding of a showing of intentional discrimination, prohibition or coercion of belief before strict scrutiny would be forthcoming.[212] An Oklahoma district court case, however, allowed a prima facie case under RFRA to be made on a basis of a substantial, though indirect, exercise of adjacent land management.[213]

The Supreme Court's recent decision in *Burwell v. Hobby Lobby*[214] seems to stretch the reach of the RFRA and the compelling interest test to the far edges of substantial burden,[215] as well as extending religious-based standing beyond tribes and individuals to corporations.[216] Under the

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[209]Boerne v. Flores 117 S. Ct. 2157, 2170 (1997).

[210]See Guam v. Guerro 290 F. 3d. 1210, 1220 (9th Cir. 2002).

[211]Supra note 203.

[212]See Navajo Nation v. United States Forest Service, 535 F. 3d. 1058, 1069 – 1074 (9th Cir. 2008).

[213]Comanche Nation v. United States 2008 WL 4426621 at 3, 17.

[214]Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751 (2014).

[215]Rather than examine the extent of the burden in terms of the ability to practice or hold religious beliefs, the Court looked at the burden in a cumulative financial sense.

> "Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."

Id at 2779.

[216]Id, at 2771.

Oklahoma district court ruling in Comanche[217] and clearly under *Burwell*, Lyda Conley could have established standing by asserting that the federal disinterment of her ancestors, and sale of sacred burial ground was a substantial, devastating burden on religious practice, even if not intentionally designed to prohibit or coerce belief. She would have had a basis for injunction unless the government could show a compelling state interest and no less restrictive means.

But the reality of time over a century ago intrudes on revery. Let us explore what Oliver Wendell Holmes and the Supreme Court did in 1910.

C. Conley v. Ballinger[218]-The Supreme Courts Weighs In

To raise the substance of issues that might merit equitable relief in federal court, Lyda Conley needed to first to demonstrate justiciability sufficient to satisfy the constitution. In particular, she had to show that the federal law authorizing the sale of Huron Cemetery was an imminent threat to a legally protected interest, and might thus deprive her of her property without due process of law.[219] She reiterated some of her arguments below that she was both a citizen of the State of Kansas and a descendent of Wyandot tribal members who signed the Treaty of 1855, and parents who were buried in the cemetery. She asserted possessory right on that basis alone, and additionally asserted rights as a third party beneficiary of the treaty.[220]

Holmes marginalized Lyda's seisin argument by expanding it beyond realistic application. "The allegation of plaintiff's interest plainly does not mean that she has taken possession of the

[217]Supra note 213.

[218]Conley v. Ballinger, 216 US 84 (1910).

[219]See supra, at notes 173 – 197.

[220]216 US at 88 – 89.

whole burying ground, and has acquired seisin of the whole by wrong."[221] He then focused on the idea of a third party beneficial interest in severalty, established by the treaty.

> "The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent appropriation of the land in question as a public burying ground, that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the members of the integrated tribe...and their representatives, whether as individuals or as a limited public, and this it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill."[222]

Holmes rejected this approach with a tautology. "but we do not pursue the attempt to state the argument on that side because we are of the opinion that it is plainly impossible for the plaintiff to prevail."[223] The "plain impossibility" was not only defused by subsequent cases such as *Menominee Tribe v. United States*,[224] but was inconsistent with *Lone Wolf v. Hitchcock*,[225] which Holmes saw as precedent. Holmes felt that, under *Lone Wolf*, the United States remained a trustee of the cemetery, even after the dissolution of the tribe, but not a trustee for the citizen descendents of ancestors, buried in the reserved land. Rather, it was a trustee for Indian wards, and this could include the new tribe recognized in 1867, regardless of its identity with the tribe that signed the Treaty of 1855. As trustee for the new ward, the United States had, under *Lone Wolf*, the power

[221] 216 US at 89.

[222] 216 US at 89 – 90.

[223] 216 US at 90.

[224] 319 US 404 (1968) which held that the Treaty of Wolf River 10 Stat 1064 vested hunting and fishing rights which are necessarily individualized in practice, and which cannot be abrogated without constitutional consequence. 391 US at 413.

[225] 87 US 553 (1903).

to change or transmute the land interest reserved and hold the monetary return for the new members.

> "The government cannot be suppose to have abandoned merely for a moment and for a secondary matter its general attitude toward the Indians as wards over whom and whose property it retained unusual powers, so long as they remained set apart from the body of the people. The very treaty of 1867, cited in the bill, providing for the resumption of the tribal mode of life by the Wyandottes, shows that the United States assumed still to possess such unusual powers. It seems to us that the reasonable interpretation of the language as to the burying ground is…that the words, 'shall be permanently reserved and appropriated for that purpose,' like the rest of the treaty, were addresses only to the tribe, and rested for their fulfillment on the good faith of the United States,-a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians.
>
> We are driven to the conclusion that…the United States retained the same power that it would have had if the Wyandotte tribe had continued in existence after the treaty of 1855; that the only rights in and over the cemetery were tribal rights; and that the plaintiff cannot establish a legal or equitable title…or indeed any right to have the cemetery remain undisturbed by the United States."[226]

The doctrine of the unreviewable discretion of the federal trustee to transmute Indian ward trust assets without constitutional consequence, sustained in the notorious *Lone Wolf* case,[227] but overturned in the *United States v. Sioux Nation*,[228] was allowed to expand its reach. It now permitted the federal courts to extend wardship in an inchoate form beyond the dissolution of the treaty tribe, to apply it in favor of new wards in a new tribe which favored the exchange of treaty lands for money, and to deny the justiciability of inherently individualized treaty rights of descendants to the sanctity of the very burials that held their ancestors' bodies.

D. The Various Failures to Sell Huron Indian Cemetery

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[226]216 US at 90 – 91.

[227]See WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR, 161 – 186 (2010).

[228]448 US 371 (1980).

The Supreme Court's opinion let stand the lower court's denial of an injunction against the legislation authorizing the sale of the cemetery so that the threat persisted, as did the resistance of the unrepentant Conleys as well as the Kansas Wyandot community.[229] McIntyre Armstrong despaired,

> "Huron cemetery is to be sold. The government has broken every treaty it has made with the Indians and they have been driven from place to place until even the dead are not allowed to rest in peace."[230]

The Wyandots, however, managed to enlist the support of Senator Charles Curtis, who was of Indian descent when it was to his advantage.[231] He convinced his colleagues that it would be better to retain the cemetery as a monument than to sell it. Congress, in 1913, repealed the legislation authorizing the sale of the cemetery and recommended that it become a national monument.[232] Three years later, it authorized $10,000 for improvements to the grounds and contracted with Kansas to "forever maintain, care for and preserve Huron Cemetery."[233] The Conley sisters, who had failed to achieve third party beneficiary standing under the treaty, did not place full trust in this legislative pledge either. They continued to respond with direct action to the practical realities and the corrosive forces of neglect, vandalism, and opportunism. They cared for the birds and squirrels, chased away trespassers, pulled up surveyor stats and even served time (ten days) for disturbing the peace.[234]

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[229]See THE EMIGRANT TRIBES, supra note 58, at 423.

[230]See Rachel Armstrong, "'When Can They Rest?', The History of the Huron Indian Cemetery", 4 at http://www.wyandot.org/huroncem.html accessed 12/4/2013.

[231]THE EMIGRANT TRIBES, at 423.

[232]See DAYTON, supra note 49, at 28, citing Act of Feb 13, 1913, Ch. 44, 37 Stat 668.

[233]Id, citing Act of Sept 8, 1916, Ch. 468, 39 Stat 844.

[234]Henry Van Brunt, "Three Sisters Defense of Cemetery Continued for Nearly Forty Years", Kansas City Times, June 7, 1946, 8 – 9 http://www.wyandot.org/sisters.html accessed 1/8/2015.

On May 28, 1946, Lyda Conley died at the age of 92 and was buried in the Huron Cemetery next to her parents.[235] Her sister, Helena, died twelve years later and was likewise buried with her family and a gravestone reading "Floating Voice…Cursed be the villain that molests these graves"[236] Their deaths, in part, lowered the preservationist guard and enabled the inexorable growth forces to rekindle.

In 1947 and 1949 Senate bills were introduced which called for, again, a sale of the cemetery and the distribution of the proceeds to the Wyandotte Tribe of Oklahoma.[237] The Wyandottes had, in 1937, incorporated under the Oklahoma Indian Welfare Act of 1936,[238] and under their constitution, only those on the roll in Oklahoma in 1937 were eligible to be tribal members.[239] The Senate bills—as well as the Wyandottes' exclusionary policies – provoked strong opposition from the Kansas Wyandot community, and the introduction of House Bill 3659 to make the cemetery a National Monument.[240] Though neither billed passed, the post-War winds of change were blowing.

The first to feel them, ironically, was not the cemetery but the driving force from Oklahoma. In 1956, Congress terminated the Oklahoma Wyandottes from federal recognition and supervision.[241] Termination was similar to Nineteenth Century allotment in that it was designed to weaken if not necessarily to end tribalism. It went even further by literally purporting to end the

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[235]Id, at 1; See also JAN ENGLISH, supra note 45, at 558.

[236]Id, at 563.

[237]Id, at 558.

[238]25 USC §§ 501 – 509, Cohen (2012) at 82

[239]See Constitution of the Wyandotte Tribe of Oklahoma, Article, Section one at; http://www.wyandotte-nation.org/government/legal-documents/constitution/ accessed 2/8/201.

[240]JAN ENGLISH, supra note 45, at 561.

[241]70 Stat 893, 25 USC § 791.

special federal relationship and protective duties.[242] The purpose, often dramatically stated, was to set the Indians free of the federal custodial yoke, in a manner similar to the Emancipation Proclamation.[243] More precisely, the termination of federal trusteeship would end special protection for Indian property, such as the Non Intercourse Acts restraint on alienability, and subject both the tribe and its property to state law and taxation.[244] Though sometimes the terminated tribes got direct control of their property, freed from federal supervision, in other cases the federal government preempted the ownership, and sold the property as a part of termination with cash distributions to be made to individual tribal members.[245]

Under Section 5 of the Termination Law[246], the Secretary of the Interior was authorized to transfer title to Huron Cemetery to a corporation organized by the tribe for management or sale

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[242]See generally, DONALD L. FIXICO, TERMINATION AND RELOCATION, (1986).

[243]Senator Arthur Watkins stated;

> "In view of the historic policy of Congress favoring freedom for the Indians, we may well expect future Congresses to continue to endorse the principle that 'as rapidly as possible' we should end the status of Indians as wards of the Government and grant them all the rights and prerogatives pertaining to American citizenship.
>
> "With the aim of 'equality before the law' in mind our course should rightly be no other. Firm and constant consideration for those of Indian ancestry should lead us all to work diligently and carefully for the full realization of their national citizenship with all other Americans. Following footsteps of the Emancipation Proclamation of 94 years ago, I see the following words emblazoned in letter of fire above the heads of the Indians – "These people shall be free!"

Cited by Gary Orfield, "A Study of the Termination Policy", included in FEDERAL INDIAN LAW, supra note 37, at 201.

[244]Charles F. Wilkinson and Eric R. Biggs, "The Evolution of the Termination Policy", AMERICAN INDIAN L. Rev. 139, 151 – 154 (1977) quoted in FEDERAL INDIAN LAW, supra note 37, at 204 – 207.

[245]Id.

[246]See supra, note 241; See also "Wyandotte Nation" at http://www.wyandotte-nation.org/culture/public-acts/1956-2/, accessed on 6/15/2015.

and distribution among the members.[247] This was an ironic twist on an all-too-frequent pattern of termination where a termination tribe lost its land base- its sovereign, economic, political and cultural center- in exchange for relatively small distributions of cash. These were quickly spent on maintenance, leaving the individuals unbuffered and without a cohesive center.

> "The check did not compensate for the loss of federal benefits of the new tax burdens. It could not pay for the loss of tribal governmental authority, or compensate for the discrimination that followed in the state agencies and courts. Perhaps most tragic of all, the check could not possibly pay for the psychological costs of 'not being an Indian anymore.'"[248]

In the case of the Wyandottes of Oklahoma, the terminated tribe got the right to sell reserved land in another state that had been abandoned and never used by the Oklahoma tribe, but which was the center of the cultural, spiritual and community life of the Kansas Wyandots who had never left, and who had guarded the cemetery with unceasing passion.[249]

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[247]Id; See City of Kansas City v. United States, 192 F. Supp 179, 181 (D. Kansas 1960)

> Section 5(c) of Public Law 887, (Aug. 1, 1956) upon which this action is predicated, provides for the transfer or sale of the Huron Place Cemetery in accordance with subsections (a) and (b) of Section 5, and the use of the proceeds from such sale for the removal and reburial of the remains of those now buried in the cemetery and for the erection of a monument to their memory. It is to prevent a proposed sale under this Act that these actions were instituted.

Id, at 181.

[248]See WILKINSON AND BIGGS, supra note 244, at 207.

[249]See "Indians: Ambush", Time Magazine, Monday, Sept. 17, 1956

> "Nobody paid any attention last July when Congress routinely passed Public Law 887, entitled "Wyandotte Tribe Termination of Federal Supervision." But last week Kansas' Senators and Representatives discovered they should have been listening to the rustling in the woods. Public Law 887 gives the Wyandotte Indian tribe of northeastern Oklahoma full title to two valuable acres of land in the heart of downtown Kansas City, Kans., estimated variously to be worth as much as $1,500,000. Last week, while Kansas Citians raged and Kansas' red-faced Congressmen fired off telegrams to Washington, Lawrence Zane, a custodian in the Miami, Okla. Post office and duly elected chief of the 900-member Wyandotte tribe, told how simple it was. Said he: "We kept it quiet."

George Zane Jr., the Kansas Wyandots, and the City of Kansas City, Kansas filed suit in the federal district court of Kansas to enjoin both the Wyandotte Tribe of Oklahoma and Fred Seaton, the Secretary of the Interior from selling the Huron Place Cemetery and removing the bodies for reburial in another place.[250] The Court noted the clear division between the interests of the Oklahoma Tribe and the plaintiffs. The Kansas Wyandots desperately wanted to continue the use and protect the sanctity of the cemetery, while the defendants excluded the Kansas tribe from membership, had not used the cemetery since their removal to Oklahoma over a hundred years before, and had no interest in maintaining it as a burial ground.[251] But, having observed this, the Court afforded the plaintiffs no better result than that achieved by Lyda Conley. The Court said: "If Conley, an individual, had no individual rights under the Treaty which she could enforce in a court of law, then plaintiffs in this action, and those similarly situated, have no individual rights which they may enforce herein."[252]

But indeed, things had changed since *Conley v. Ballinger*. The Fifth Amendment right to just compensation for takings of treaty rights questioned in *Lone Wolf*,[253] was distinctly confirmed in a serious of Supreme Court cases including. *United States v. Creek Nation*,[254] *LanE v. Pueblo of Santa Rosa*[255] and *Shoshone Tribe v. United States*.[256] Secondly, the individual assertion of certain severable treaty guarantees such as hunting and fishing rights, and ancestral grave sites

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Id, accessed at http://content.time.com/time/magazine/article/ 0,9171,893532,00. Html

[250]See City of Kansas City, Kansas v. United States, 192 F.Supp 179 (D. Kansas, 1960)

[251]192 F.Supp at 181

[252]192 F.Supp at 182

[253]Lone Wolf v. Hitchcock, 187 US 553 (1903), supra note 176

[254]295 US 103, 110 (1935)

[255]249 US 110, 113 (1919)

[256]299 US 476, 497 (1937)

seemed increasingly clear. Indeed the Supreme Court, shortly after this case, recognized the continuing validity of constitutionally protected tribal hunting and fishing rights after termination,[257] and lower courts specifically viewed the protection as individualized as well as tribal.[258]

In *United States v. Felter*[259], a Tenth Circuit case paralleling the Wyandotte situation in several aspects, the court examined the Ute Termination Act of 1954,[260] which terminated the mixed-blood Utes, and continued recognition of the full-bloods. The court held, equal protection considerations aside, that individuals among the terminated mixed-bloods retained the rights to hunt and fish on the Uintah Reservation, even if the full-bloods retained ownership and sovereign power.[261] Likewise, even the sovereign ownership of treaty rights to the cemetery by the Oklahoma Wyandottes should not preempt the right of individual Kansas Wyandots to assert constitutionally protected property rights in the remains of their ancestors and their particular gravesites.[262]

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[257]Menominee Tribe of Indians v. United States, 391 US 404, 412-413 (1968)

[258]Kimbell v. Callaghan, 493 F.2d 564, 569 (9. Cir. 1974)

[259]752 F.2d 1505 (10th Cir. 1985)

[260]25 USCA §§ 677-677aa

[261]752 F.2d at 1512.

The court held that the canons of construction favored the claims of the terminated mixed-blood Ute individuals.

> "We reject the Government's position that this canon is inapplicable to mixed-blood Ute Indians because they are like "ordinary American citizens." Unlike the "ordinary American citizen," these mixed-blood Ute Indians enjoyed the right to hunt and fish on the reservation before passage of the 1954 Act. Following the teaching of the Supreme court in *Menominee Tribe,* we decline to construe the 1954 Act "as a backhanded way of abrogating the hunting and fishing rights of these Indians" in the absence of an "explicit statement" in the 1954 Act abrogating these rights."

Id.

[262]Id.

Perhaps, in the Tenth Circuit, this would not prevent a decision by the Oklahoma Wyandottes to disinter and rebury,[263] but it would not preclude the standing of the Kansas Wyandot descendants to seek an injunction.

After the Supreme Court refused to overturn the three-judge district courts' dismissal of the Wyandot suit[264] or reconsider Conley v. Ballinger, the fate of the cemetery remained in limbo. No buyers emerged, no attempts at disinterment were made and, although the Oklahoma Wyandottes and the Department of the Interior remained interested in sale, and reburial, there was a growing movement for preservation.

Chapter 5: Historic Preservation Comes to Kansas City, Kansas- Sort of

As the United States began its extrication from the grinding futility of the war in Vietnam, it turned its attention toward the seemingly more relevant and tractable problems of the domestic environment, poverty and discrimination. Part of the refocus was on historic preservation which had some successful local precedents in well-known venues like Williamsburg, Charleston, New Orleans and Santa Fe.[265] These cities made a special use of zoning power-sometimes on their own

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[263]See Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996)

> " . . .Christian beliefs in the sanctity of burial sites are not violated by moving gravesites when necessary, and moving the gravesites would not be inconsistent with tenets of American Indian spirituality if the Thirys believed it to be necessary. Although a site for prayer and worship is important to Quakers, a basic tenet of Quakerism is that God is within individuals and one particular location is no more or less sacred than another. Despite their beliefs in the sanctity of burial sites, the Thirys would agree to move their child's grave if they believed that it was required in order to build a safe highway."

78 F.3d at 1494

[264]See JAN ENGLISH, supra note 45, at 570.

[265]See Norman Tyler, Ted Legibel and Irene Tyler "Historic Preservation: An Introduction to Its History, Principles and Practice" in SARA BRONIN, J. and PETER BYRNE, HISTORIC PRESERVATION LAW, 4-5 (2012)(Hereinafter, BRONIN and BYRNE).

initiative and sometimes with authorization from state constitutions or enabling legislation- to protect landmarks and historic districts threatened by the pace and insensitivity of growth, redevelopment and decay.[266] The inspiration for historic preservation was, in central part, educational and cultural. It manifested a concern with time and the past, with history and with context, and with the vulnerability of iconic and anachronistic benchmarks to the relentless cost-benefit, dollar-based calculus, and the pursuit of profits and growth.[267] Historic urban protection, however, had its own economic potential as landmarks and historic districts could attract tourism and could generate internal synergy that might dilute the forces of inner city decay and might counter the centrifugal tendencies toward suburbia.[268]

In 1966, Congress passed the National Historic Preservation Act (NHPA)[269] which aided local preservation efforts in several distinct ways. In one thrust, the Act established the National Register of Historic Places, and a process for inclusion.[270] The Register automatically lists National Historic Sites and Landmarks designated under the Historic Sites Act of 1935,[271] and other historic areas within the National Park Systems.[272] Future nominations can be presented by federal agencies, state historic preservation officers and tribal historic preservation officers who identify

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[266]See Julia Miller, "National Trust for Historic Preservation, A Lay person's Guide to Historic Preservation Law", in BRONIN and BYRNE, supra note 265, at 268-269.

[267]See John Ragsdale, "Possession" 40 Urban Lawyer 903, 913-918 (2008).

[268]David Listokin, Barbara Listokin, and Michael Lahr, "The contributions of Historic Preservation to Housing and Economic Development", in BRONIN and BYRNE, supra note 265, at 23-28.

[269]16 USC § 470 et. seq.

[270]BRONIN and BYRNE, supra note 65 at 57-73.

[271]16 USC §§ 461-467.

[272]See BRONIN and BYRNE, supra note 65, at 57; See Historic Green Springs, Inc. v. Bergland, 497 F.Supp 839, 846-847 (E.D.Va. 1980).

potentially eligible buildings, districts or sites within the jurisdictions.[273] National Register criteria, at least one of which must be met, include: a property making a contribution to a major pattern of American history, a building with distinctive architecture or construction, a property associated with the life of a significant person in history, or a site that has provided or may provided important historical of prehistorical information.[274]

The criteria are developed and applied by the National Park Service, and state and tribal historic preservation officers.[275] Cemeteries are presumptively excluded from eligibility on the National Register,[276] but the National Park Service may make an exception for

> "A cemetery that derives its primary significance from the graves of persons of transcendent importance, from age, from distinctive design features or from association with historic events…"[277]

This exception clearly could reach the Huron Indian Cemetery and, on September 3, 1971, it was listed on the National Register.[278] This alone does not assure protection as the owner remains legally free to modify or demolish the inclusion, or even delist the site.[279] There is however, some indirect federal protection afforded by Section 106 of the National Historic Preservation Act.[280]

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[273]BRONIN and BYRNE, supra note 265, at 58-64.

[274]See 36 C.F.R. §§ 60.3 – 60.4.

[275]See 16 USC §§ 470 a(a)(1)(A) and 470 a (b)(3)(B).

[276]BRONIN and BYRNE, supra note 265, at 58.

[277]36 C.F.R. Section 60.4 (d)

[278]See "Cemeteries on the National Register of Historic Places in Kansas", page 1-2, accessed at http://www.snipview.com/q/Cemeteries%20on%20the %20 National%20 Register%20of%20. (3/15/2015)

[279]See Moody Hill Farms v. United States Dept. of the Interior 205 F.3d 554, 562-563 (2d. Cir. 1999).

[280]16 USC Section 470f

This section, procedural in nature rather than substantive, requires federal agencies to take account of the impact of their undertakings, such as direct action, financing or regulation, affecting properties on or eligible for the National Register.[281] If a federal agency undertaking could have an effect on a listed site such as the Huron Indian Cemetery, than the agency is obligated to consult with the state or tribal historic preservation officers and possibly the Advisory Council on Historic Preservation (ACHP).[282] Consultation generally leads to a memorandum of agreement outlining measures to avoid or limit the adverse effects.[283]

Theoretically, a failure to reach agreement, even after the commentary of the ACHP, is not substantively binding on an unrepentant agency, but the procedure and the considerations are mandatory.[284] Furthermore, the NHPA allows both the ACHP as well as the agencies to promulgate binding rules and regulations on the implementation of Section 106,[285] and some of these regulations may go beyond procedure to substantive demand.[286]

Still, even assuming that any federal agency involved with a covered undertaking has complied with the procedures of Section 106 and its own formally adopted regulations, the undissuaded property owner, without more, remains free to undertake his desired transformation.[287] But there can be, and often is more. Direct substantive restraints against modification or demolition of historic structures may be provided by state statutes or local

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[281]36 C.F.R. § 800.1(a).

[282]36 C.F.R. § 800.2(a) – (d). See generally BRONIN and BYRNE, supra note 265, at 144-147.

[283]Id, at 164-165; 36 C.F.R. § 800.16.

[284]City of Alexandria v. Slater, 198 F.3d. 862, 871 (D.C.Cir. 1999)

[285]16 U.S.C. § 470s.

[286]See Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 808 (9th Cir. 1999); 36 C.F.R. § 800a(c)(1)-(3).

[287]Commonwealth of Pa. v. Morton, 381 F.Supp. 293, 299 (D.D.C. 1974).

preservation ordinances that are keyed to inclusions on the National Register and the National Park Services' criteria, as well as the standards of the enacting body. This is, in fact, the situation in Kansas City, Kansas with respect to the Huron Indian Cemetery. Kansas City adopted its first historic preservation ordinance in 1970,[288] and a year later, listed the Huron Indian Cemetery among its first inclusions.[289]

The ordinance would seem on its face to provide complete substantive protection for its inclusions. It states

> "It shall be unlawful for any person to construct, reconstruct, structurally alter, remodel, renovate, restore, demolish, raze, maintain, excavate, zone, or place signs in or on any historic landmark within a historic district in violation of the provisions of this article."[290]

This prohibition must, however be read in conjunction with the Kansas Historic Preservation Statute[291] which states,

> The state or any political subdivision of the state, or any instrumentality thereof, shall not undertake any project which will damage or destroy any historic property included in the national register of historic places or the state register of historic places until the state historic preservation officer has been given notice, as provided herein, and an opportunity to investigate and comment upon the proposed project.
>
> If the state historic preservation officer determines, with or without having been given notice of the proposed project, that the proposed project will damage or destroy any historic property include in the national register of historic places or the state register of historic places the project shall not proceed until
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> . . .

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[288]Ord. No. 49004 § 2, (9/1/1970); see http://www.wycokck.org/historic preservation/, accessed 3/15/2015.

[289]See Kansas City, Kansas Department of Urban Planning and Land Use "Landmark Designations" at http://www.wycokck.org/historicpreservation/ accessed 3/15/2015.

[290]Wyandotte County-Unified Government of Kansas Code of Ordinances. Section 27-83(a).

[291]K.S.A. § 75-2724a

Electronic copy available at: https://ssrn.com/abstract=2648526

> the governing body of the political subdivision, in the case of a project of a political subdivision or an instrumentality thereof, has made a determination, based on a consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to such historic property resulting from such use.[292]

The ability of a property owner to contend that the ordinance and the statute bear so heavily on the possible utility of the property that there are no feasible and prudent economic options left means that the government may have to afford a variance to avoid the finding of an unconstitutional inverse condemnation.[293]

Chapter 6: Leaford Bearskin and The Rising Tide of the Indian Gaming

A. A Casino on Stilts?

Leaford Bearskin was born in 1921 on his family's Indian allotment, and grew up near the Oklahoma Wyandotte Reservation – or what was left of it.[294] The Oklahoma Wyandotte, after emigration from Kansas, acquired 21,000 acres in Northeastern Oklahoma Indian Territory after the Civil War.[295] This was dissipated into individual allotments to 214 tribal members by 1893.[296] Though the tribe was recognized by the United States and organized under the Oklahoma Indian Welfare Act (in 1937)[297] the tribal holdings had withered away to 287 acres in 1971 when Bearskin

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[292]Id.

[293]See Mount St. Scholastica, Inc. v. Atchison, 482 F. Supp 2d. 1281, 1291-1299 (D.Kan., 2007).

[294]See Senator David Haley, "Senate Resolution No. 1867: A Resolution Congratulating Chief Bearskin on his Service to all Citizens in the State of Kansas and the United States of America" enrolled Friday, May 13, 2011 at https://legiscan.com/KS/text/SR1867/id/552832 accessed 3/15/2015.

[295]See FOREMAN, supra note 56 at 197.

[296]Id. 198-199; See also, Rick Stansfield "Wyandotte in Encyclopedia of Oklahoma History and Culture, at www.okhistory.org/publications/enc/entry.php?entry= WY001 accessed 3/15/2015.

[297]Id; See Act of June 26, 1936 49 Stat 1967, codified at 25 U.S.C. § 501-509; See COHEN'S, supra note 41 at 288-310.

returned from forty years of military service.[298] Bearskin had been a war hero and had retired as a Lt. Colonel. He had flown 46 combat missions, in World War II, participated in Berlin air lift, been a squadron commander in Korea, and had won, among numerous citations, the Distinguished Flying Cross and the Medal for Humane Action.[299]

Bearskin was, in sum, a tough, competent, disciplined man, and he was disturbed by the desuetude he found in his home country.[300] Bearskin resolved to use his leadership skills, practical education, and familiarity with the connections beyond the insularities of the tribal world to revive the Wyandotte culture, identity and pride. He rightly believed that economy on a sovereign land base was essential for the renaissance.

Upon his election to chief, in 1983, he revised the tribal constitution and began the restructuring and expansion of the desultory business and service activities.[301] He pursued the capital needed for physical improvements; instituted legal proceedings for land payments owed by the United States, and, in addition, began focusing on the issues and potential for Indian gaming.[302]

Gambling began to emerge in the 1980's as the new "white buffalo",[303] portending an economic survival on Indian reservations desperate for self-sufficiency. Many tribes had been

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[298]T.R. Witcher "Bearskin's Gamble" in the Pitch, 4 (Sept.12, 2002) at www.pitch.com/gyrobase/bearshins-gamble/Content?oid=2166674&mode=print accessed 4/12/2012 (hereinafter, "Bearskin's Gamble").

[299]"Wyandotte Chief Bearskin Dies", Wyandotte Nation of Oklahoma, accessed at http://www.Wyandotte-nation.org

[300]"Bearskin's Gamble", supra note 298, at 4.

[301]Id. at 5.

[302]Id. at 6.

[303]Pierre C. Van Rysselbersghe wrote "Gaming is for many isolated, neglected and destitute Native Americans the modern version of the myth of survival, called by some the *White Buffalo* in "People of the White Buffalo: Gambling is the Modern Version of the Myth of Survival for Many Native Americans" Or. St. B. Bull (December 1995) at 41, quoted in Tess Johnson, "Fencing the Buffalo: Off-Reservation Gamming and Possible Amendments to Section 20 of the Indian Gaming Regulatory Act" 5 UNLV GAMING LAW JOURNAL 101 (2014)(Hereinafter, Johnson).

severely handicapped by truncated land holdings that inhibited traditional economies such as hunting, gathering, ranching and even agriculture. Compounding the economic complexities for many tribalists was the isolation from most national business centers and the unavailability of easy access to a cash economy. Gaming, however, might provide a low investment means of attracting some of the urban consumers to the forbidden fruit of gaming made legal within the cocoon of tribal sovereignty.[304] Money from the gaming could pay for the prizes, cover the labor and overhead, and provide a surplus for the rebuilding of tribal government and culture.[305]

In the early 1980's, Seminole Indians in Florida decided to open a bingo hall on their reservation, and offer games with higher prizes, better hours and stronger refreshments than those offered at the area churches where state law limited jackpots, and the Bible counseled temperance.[306]

States, made more nervous by the competition than the taint of decadence, pursed litigation – which was unsuccessful as long as the state did not prohibit gambling altogether but permitted gaming in some form, even if not as full-blown as on the reservations.[307] In 1981, the Fifth Circuit Court of Appeals in Florida held that bingo games on federally-recognized reservations were immune from Florida jurisdiction.[308] Six years later, in California v. Cabazon Band of Mission

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> "Tribal gaming has frequently been compared to the buffalo as it has successfully fed, clothed, and sheltered numerous tribal communities, and generally improved the quality of life on many reservations. Tribal gaming has changed the lives of countless Native Americans by giving tribes a real opportunity to be economically independent. Johnson, supra, at 101.

[304]See KIM ISAAC EISLER, REVENGE OF THE PEQUOTS, 89-107 (2001)(Hereinafter, EISLER).

[305]W. DALE MASON, INDIAN GAMING, 3-8 (2000)(Hereinafter, MASON).

[306]EISLER, supra note 304, at 101-103.

[307]See infra at 309.

[308]Seminole Tribe of Florida v. Butterworth, 658 F. 2d. 310, 313 (5th Cir. 1981).

Indians,[309] the United States Supreme Court confirmed that, when states allow gaming in some form, and do not prohibit it in its entirety, efforts to regulate and restrict more extensive tribal gaming are necessarily civil in nature. This means that such state efforts are not included within the grants of criminal jurisdiction over tribes made to states under Public Law 280.[310]

The ensuing Indian Gaming Regulatory Act of 1988 (IGRA)[311] was not so much a grant of gaming authority to tribes, which seemed to already possess this power within their retained sovereignty, as it was a comprehensive but restrictive approach that would balance tribal sovereignty and economic needs against state desires to regulate competition in an enterprise it was not willing to criminalize and prohibit.[312]

One of the keystones to gaming under the IGRA is "Indian lands" which means:

> "all lands within the limits of any Indian reservation; and . . .
> any land . . . held in trust by the United States for the benefit
> of any Indian tribe or individual . . . and over which an Indian
> Tribe exercises governmental power."[313]

Another requirement for utilization of the IGRA is that the tribe seeking to game is recognition:

> "[R]ecognized as eligible . . . for the special programs and services provided by the United States to Indians because of their status as Indians and . . . is recognized as possessing the powers of self government."[314]

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[309]480 U.S. 202 (1987).

[310]480 U.S. at 202.

[311] 25 U.S.C. § 2701 et.seq.

[312] See MASON, supra note 305 at 45; See also G. WILLIAM RICE, TRIBAL GOVERNMENTAL GAMING LAW, 71 (2006) (Hereinafter, RICE).

[313]25 U.S.C. Section 2703(4).

[314]25 U.S.C. § 2703(5).

The Oklahoma Wyandotte Tribe has twice been recognized as a partner in a nation-to-nation relationship[315], and is thus capable of both receiving special programs and services, and exercising the powers of self-government.[316] It holds reservation land in Oklahoma that is capable of supporting class III casino gaming under the IGRA[317] and which does in fact house the Wyandotte Nation Casino.[318] However, a major key to successful gaming is location in or near a substantial metropolitan area, and the reservation headquarters in Wyandotte, Oklahoma are almost 200 miles from Wichita, Kansas and 100 miles from Tulsa which are the nearest metropolitan areas of more than 500,000 people. In addition, the Wyandotte Nation Casino faces stiff competition from other tribal casinos in more strategic Oklahoma locations.

Leaford Bearskin, however, contemplated an additional angle of attack – reserved land in a big city market. The Huron Indian Cemetery, in the heart of the Kansas City metropolitan area, was, by its treaty terms and the rulings of the federal courts, a reservation held in trust by the United States for the benefit of the Wyandotte Tribe. Not only that, but tribal gaming competitors

[315]The tribe was originally recognized in 1937, was terminated in 1956, and was recognized again in 1978. See supra, notes 237-245 and 25 U.S.C. Section 861 (1978) which repealed the termination provisions of 25 U.S.C. Sections 791-807 and restored all the rights and privileges of protecting supervision and recognition to the Wyndottes. It is possible to argue that formal jurisdictional recognition, on a government-to-government, basis was confirmed conceptionally in the Kansas Indians, 72 U.S. 737 (1866) and could have been intended by the Wyandot Treaty of 1867, 15 Stat. 513, Article 13. However, research suggests that the concept of jurisdictional recognition, as opposed to mere cognitive recognition, of a tribe as a tribe, did not become a centralized concept until the Indian Reorganization Act of 1934. See WilliamW. Quinn, Jr., "Federal Acknowledgement of American Indian Tribes: The Historical Development of a legal Concept", 34 Am. J. of legal Hist. 331, 333-332 (1990).

[316]Id.

[317]See 25 U.S.C. §§ 2703(4) and 2703(8); and 25 U.S.C. § 2719(a).

[318]The casino is located at 100 Jackpot place in Wyandotte, Oklahoma, several miles west of the Indigo Sky Casino, which is owned by the Eastern Shawnee Tribe and sits on the Oklahoma border, just west of Senaca, Missouri.

in Kansas were located 90 miles to the northwest on fairly remote, less attractive sites.[319] True, the cemetery was only two acres in size, and thus capable of supporting only a small facility,[320] but, perhaps, it could be a springboard to – or a stalking horse for – a larger complex at a more compatible site – such as one at the struggling Woodlands race track.[321] Woodlands was clearly not federal property but, perhaps, the Department of the Interior could be induced to acquire Woodlands in trust under its statutory authority.[322] All prospects would stem from a plan-sure to be controversial-to retrofit the cemetery for gaming.

Bearskin's first proposal, in February 1994, was to disinter the graves at Huron, rebury the remains at the nearby Quindaro Cemetery, and then seek a compact with the State for a high-stakes bingo parlor on the now secularized premises.[323] Almost immediately the Bureau of Indian Affairs office at Andarko, Oklahoma stated that no action requiring the BIA's involvement would occur without "consent from the lineal descendants of individuals interred at the Huron Park Cemetery, as required in the Native American Grave Protection and Repatriation Act of 1990" (NAGPRA).[324]

NAGPRA does indeed show distinct, preeminent concern for the lineal descendants of buried ancestors – but not in the fashion asserted by the Andarko office. The Act was passed, in substantial part, to deal with the rights of possession to remains discovered on federal or tribal

[319]The Golden Eagle Casino (Kickapoo Tribe), The Sac and Fox Casino, and The Prairie Band (Potawatomi) Casino are all located near Horton, Kansas, north of Topeka and west of St. Joseph, Missouri.

[320]"Bearskins Gamble", supra note 298, at 7.

[321]Id.

[322]25 U.S.C. § 465; See infra, notes 438-482.

[323]THE EMIGRANT TRIBES, supra note 58, at 425.

[324]See JAN ENGLISH, "A Brief Chronological Overview of the Wyandot Nation of Kansas and the Huron Indian Cemetery", 1 at http://www.wyandot.org/ cemetery.html (accessed March 21, 2015).

lands after 1990,[325] and to remains and cultural patrimony in the legal custody of federally funded museums.[326] Property rights in such remains and items would indeed be within the priority of those able to establish lineal descendancy with a preponderance of evidence.[327] Here, however, the Andarko BIA asserted that lineal descendants would not only have a property priority but, in addition, a right to insist on nondisturbance – against even a federally recognized tribe with full beneficial ownership of the site.

NAGPRA does not go this far. Indeed, a federally recognized tribe has sovereign jurisdiction over reservation land use decisions, and can insist on compliance by others,[328] even by lineal descendants of a non-recognized tribe like the Kansas Wyandots. The Oklahoma Wyandottes, willing to transfer possession of the remains, but not sovereignty over land use, were not precluded either by the language or the intent of NAGPRA. They could have insisted that disinterment and repatriation of remains at another site take place, and that no non-members, even if lineal descendants, had the right to prohibit or condition their sovereign discretion.[329]

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[325] 25 U.S.C. § 3002.

[326] 25 U.S.C. § 3005.

[327] See Fallon Paiute-Shoshone v. United States Bureau of Land Management, 455 F.Supp.2d 1207, 1214-1215 (D. Nev. 2006).

[328] See e.g. 25 U.S.C. § 470cc(9)(2) which states:

> "In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe."

Since Huron Cemetery is owned by the Oklahoma Wyandottes, and not the Kansas Wyandots, and since the Oklahoma Wyandottes have jurisdiction, under Conley v. Ballinger, see supra notes 218-228, the Kansas Wyandot descendants would have a proprietary interest in remains but no jurisdiction to resist disinterment.

[329] Id.

Bearskin, however, had his sights set on the bigger prize of the Woodlands, and didn't wish to needlessly antagonize the Kansas Wyandots, many of whom were friends and relatives. Instead, he floated the possibility of a creative use of the unused airspace over the cemetery – much the same as the proposal by Penn Central Railroad in the classic New York City Preservation case.[330] If the disputed use can be elevated above the ground, then there is no physical disturbance, only visual or qualitative change. The sacred and profane can be neatly balanced.

Penn Central wished to build a modern tower over the iconic railroad station, and thus make physical and financial use of the unused air space extending above the relatively squat station all the way to the lofty regulatory height limit.[331] The City, however, used its historic preservation ordinance to block not only physical transformation, but also the character – diminishing indignity of a modern skyscraper on stilts rising over the enfolded landmark.[332]

The Supreme Court held that the ordinance, though denying Penn Central Railroad the use of substantial, buildable air space between the legal height limit and the top of the station, still did not, in regulatory taking parlance go "too far."[333] The substantial impact on the regulated property site was partially offset by the showing of some economic return on the still – operational station, tax abatement and the potential of transferable development rights.[334] Penn Central could, in theory, transfer some of the unused building potential to other sites where construction could

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[330]See Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)

[331]438 U.S. at 115-116.

[332]438 U.S. at 117-119.

[333]The inherent and resolutely indeterminate line between the legitimate use of the police power and the nether reaches requiring just compensation for validity was described by Justice Holmes as the point at which power has gone "too far". Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). "The general rule . . . is that while property may be regulated to a certain content, if regulation goes too far it will be recognized as a taking." Id.

[334] 38 U.S. at 118-119, 137-138.

then exceed the structures of the zoning envelope without changing the overall density limits of the zoning area.[335]

In the case of Huron Cemetery, the constitutional argument for use of the airspace was considerably stronger. Since the BIA had effectively precluded disturbance of the surface, the use of the airspace was necessary to allow any reasonable economic use of the trust land and avoid the declaration of a categorical taking.[336]

Though Bearskin would later claim that the casino-on-stilts idea was hyperbole and an attempt to force action on the Woodlands site[337], the Kansas Wyandots felt that he meant it. Holly Zane, tribal attorney and a daughter of former Chief George Zane, said "if the cemetery came between his casino, he'd take a shovel and dig up the bodies himself."[338]

The fight was on. On May 12, 1994, Jan English, the second chief of the Kansas Wyandots, filed a letter of intent to petition for federal recognition with the Office of Acknowledgement within the BIA.[339] The process of acknowledgement is long, expensive and uncertain, but, if successful, would place the Kansas Wyandots on an equal footing with the Oklahoma Wyandottes in future battles over the cemetery.[340]

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[335]See generally, John J. Costonis, "Development Rights Transfer, An Exploratory Essay", 83 YALE L. J. 75 (1973); John J. Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks", 85 HARVARD L. REV. 574 (1972).

[336]See Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992). " . . . . when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking." 505 U.S. at 1019.

[337]"Bearskin's Gamble", supra note 298, at 9." 'We never intended to build a casino over the cemetery', Bearskin now says about what would have been not only a logistical and an engineering nightmare but a political one." Id.

[338]Id. at 9.

[339]Jan English, supra note 45, at 572.

[340]See Mike Belt, "Wyandots Seek Tribal Status" Kansas City Kansan, (Sunday, April 16, 1995) 1, accessed at http://www.wyandot.org/recogn.htm (11/15/2014) (Hereinafter, Belt). See supra, note 112.

Though federal recognition of Indian tribes has historically been accorded by treaty, statute and court decision,[341] the approach since 1994 has involved a multi-fact administrative procedure outlined in the Code of Federal Regulations.[342] Among the most significant of the mandatory criteria are: a) petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900; b) a predominant part of the petitioning group composes a distinct community and has existed as a community from historical terms until the present; c) the petitioner has maintained a political influence or authority over its members as an autonomous entity from historical times until the present; and d) the membership consists of individuals who descend from a historical Indian tribe.[343]

Most of the nearly 400 Kansas Wyandot members live in the Kansas City metropolitan area and have maintained tribal and corporate relations since the treaty – induced split of 1855.[344] Land is perhaps the critical core of sovereignty[345] and, although the Kansas Wyandots did not

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[341]See Public Law 103-454, 108 Stat 4791 § 3(3) (Nov. 2, 1994)

[342]25 C.F.R. Part 83.

[343]25 C.F.R. § 83.7.

[344]See Belt, supra note 340, at 1-2. The Kansas Wyandots incorporated under state law as a non-profit corporation in 1959. Id, at 2.

[345]See Charles Wilkinson and Eric Biggs, "The Evolution of the Termination Policy" 5 Am. Ind. L. Rev. 139, 151-154 (1977); Joseph Singer has written that the Federal Government and the Supreme Court have manipulated the proprietary power and sovereign power unity into separate categories in order to facilitate their self-interest at the tribes expense.

> "In recent years, the Supreme Court has manipulated the public/private distinction as it applies to tribes in a way that has given tribal governments the worst of both worlds. When tribes would benefit from being classified as property holders, the courts often treat them as sovereigns. Thus when Congress abrogates treaties, the Court often conceptualizes Indian tribes as public sovereigns and assumes that Congress has plenary power to pass statutes which limit tribal sovereignty by regulating areas of social life that otherwise would have been left to the tribes. Under this view treaties are not conceptualized as creating property rights that are protected by the Fifth Amendment and thus Congress is free to cut back on tribal sovereignty at will. On the other hand where tribes would benefit from being classified as sovereigns, the Court often conceptualizes tribes as private

have true tribal land base, they did have, at Huron Cemetery, an emotional center.[346] Jan English, who became the tribe's principal chief following the retirement of George Zane and is the driving force behind the quest for recognition,[347] has written about her entrance into the embrace of the sacred cemetery.

> "Our walk toward the peaceful and quiet graves serenaded by the songs of birds and the soft percussion of creatures rustling through dried leves, was interrupted by my grandmother's cry of "Come Back here!" One of the three teen-aged boys running away from the graves toward the back exit of the cemetery stopped, briefly talked with my grandmother, dropped his head and loped off to join companions who laughed at us from a distance. One held a small metal sign attached to a stake, and taunted us by waving it in our direction.
>
> Grandmother turned and walked toward me. For the first time I saw that she was crying and that tears ran down her face. When I asked what was wrong, she told me that the boys had stolen the modest little metal marker that served as a monument over her baby son's graves in order to be the first to obtain a list of items that were required in order to win a game called "Scavenger Hunt." We walked back in silence, and I was somewhat uncomfortable as we passed the graves of Hannah Zane, my third great-grandmother, her children, and grandchildren.
>
> I later learned the stories that connected these women to our sisters whose courage and determination link them with Indigenous women throughout the world; for their stories contain the contemporary themes that today resonate among people who must engage in a struggle to preserve rights of justice and self-identity for themselves and their families. Within these stories is interwoven the thread of grief that arises from the tension created when a paradigm of fear, power and control is pitted against a journey toward interconnectedness and interdependence.
>
> It was on that day I began to internalize the oft told story of the daughters of my great-great aunt's Eliza Burton Conley, Sr., the three Conley sisters who referred

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> associations. Thus, in determining the legitimate extent of tribal sovereignty, the Court has increasingly assumed that tribes cannot exercise powers over nonmembers. Under this view, tribes are merely voluntary associations which can act only in ways that affect their members, rather than sovereigns who can exercise governmental power over any persons who come within their territorial boundaries, including nonresidents." Joseph Singer, "Property and Sovereignty" 86 N.W. U.L. Rev. 1, 6 (1991)

[346]"Bearskin's Gamble", supra note 298, at 8.

[347]Belt, supra note 340 at 1.

> to themselves as Ida, Lyda, and Lena. Our family simply called them, "The Sisters" or "The Cousins." Their lives were full of stories of heroism and heartache, respect and humiliating derision; inspiration for our people, and headaches for those who would intrude upon the rights of our People and, especially, to disrespect the bones and resting place of Our Ancestors. " [348]

Sam Brownback, the current governor of Kansas, was newly elected to Congress in 1994. Characterized by core values of faith and morality, he became an ally of the Kansas Wyandot, in part because of his respect for the sacred, and also because of his basic opposition to gaming.[349] When Leaford Bearskin announced plans to build a casino over the cemetery, in lieu of his preferred but unfulfilled dream of a casino at the Woodlands, Brownback preempted the ploy with an amendment to the appropriation legislation for the Department of the Interior.

> "the lands of the Huron Cemetery shall be used only –
>
> a) For religious and cultural use that are compatible with use of the lands as a cemetery; and
>
> b) As a burial ground"[350]

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[348] See Jan K. English, "Tears of the Grandmothers", 2 (unpublished manuscript on file with the author).

[349]See Jeff Sharlet "Gods Senator", Rolling Stone (Jan. 25, 2006), accessed at http://www.yuricareport.com?PoliticalAnalysis/GodsSenatorBrownback.html (4/3/2015).

> "Brownback has been a staunch opponent of environmental regulations that Koch finds annoying, fighting fuel-efficiency standards and the Kyoto Protocol on global warming. But for the senator, there's no real divide between the predatory economic interests of his corporate backers and his own moral passions. He received more money funneled through Jack Abramoff, the GOP lobbyist under investigation for bilking Indian tribes of more than $80 million, than all but four other senators – and he blocked a casino that Abramoff's clients viewed as a competitor. But getting Brownback to vote against gambling doesn't take bribes; he would have done so regardless of the money."

Id., at 11.

[350]Brownback's Amendment No. 1204 to the Indian Appropriations Bills. HR 2107, was enacted into law on several occasions , including Public Law 106-291 (2000)

Brownback stated "It's beyond decency to do something like that. This is an ancestral burial ground and it should be left as such."[351] To which Bearskin replied "Apparently the senator is of the old school that believes that treaties with Indian Tribes were meant to be broken."[352]

Bearskin had a point. The only way Brownback's legislation could square with the language of the Treaty of 1855 – and with the Constitution – was if the words "the portion now enclosed and used as a public burying ground shall be permanently reserved and appropriated for that purpose" were intended by both parties to be words of limitation or prescription.[353] Many treaties contained language of reservation seemingly qualified and limited to particular uses, but the Court has consistently read the words as words merely of description that did not impair the tribes' residual sovereignty, proprietary interests or discretion.[354] The Supreme Court has long

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[351]Libby Quaid, "Brownback Legislation Would Bar Tribe From Building Bingo Hall Atop Indian Cemetery in Kansas City, Kansas" Topeka Capital Journal/Associated Press (Sept. 19, 1997) accessed at http://cjonline.com/ stories/091997/gambling.html (4/3/2015)

[352]Id.

[353]Treaty with the Wyandot 10 Stat. 1159, Article 2; Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, (1992) held in part,

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the native of the owners estate were not part of his life to begin with."

(emphasis added) 505 U.S. at 1027.

[354]See e.g. Worcester v. State of Georgia, 31 U.S. 515 (1932). In describing the Treaty of Hopewell language of land "allotted" as "hunting grounds", the Court said the language was descriptive rather than restrictive.

> "So with respect to the words 'hunting grounds.' Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field, interrupted, and gave some variety to the scene.

31 U.S. at 553.

felt that the tribes, ceding land to another party in control of the language, the drafting and the negotiating power, should be accorded the benefit of the doubt in cases of ambiguity and vagueness, and an interpretation in accord with their expectations.[355] Thus, clearly since the Indian Reorganization Act of 1934, the Court has viewed even vague descriptions of reservation as affording a full beneficial interest, constitutionally protected against an uncompensated taking.[356]

The language of the Treaty of 1855, though referring to the present use as a burial ground, did not prohibit other uses or perhaps more significantly, did not purport to retain any beneficial interest in the United States.[357] Yet that, in fact, is what Brownback's amendment did. The Wyandotte stilt proposal, though not inconsistent with the cemetery use as a burial ground, was deemed by Congress to be incompatible with its view of decency and proper spiritual observation. Those interests, certainly not illegitimate, were, however, not beneficial interests that the United States had clearly sought to retain.

It would seem that the Oklahoma Wyandotte had the basis for a Tucker Act proceeding in the Court of Federal Claims for Fifth Amendment compensation,[358] or, at least, for additional

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[355]See Charles Wilkinson and John Volkman "Judicial Review of Treaty Abrogation: As Long as Water Flows or Grass Grows Upon the Earth" – How Long a Time is That", 63 CAL. L. REV. 601, 617-619 (1975).

[356]U.S. v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming, 304 U.S. 111, 117-118 (1938).

> "The treaty, though made with knowledge that there were mineral deposits and standing timber in the reservation, contains nothing to suggest that the United States intended to retain for itself any beneficial interest in them. The words of the grant, coupled with the government's agreement to exclude strangers, negative the idea that the United States retained beneficial ownership."

Id, at 117.

[357]Id.

[358]Id, at 112-116.

leverage in the quest for gaming at the Woodlands. In fact, the House Resource Committee voted to pursue the Woodlands compromise because Brownback's amendment had been unfair and perhaps illegal.[359]

B. Acquisition of the Scottish Rite Temple Tract

Leaford Bearskin was proceeding on a number of fronts in Kansas, even though his central quest was the expansive opportunities at the Woodlands. It may well have been that collateral endeavors such as the casino on stilts was a diversion designed to bring the Woodlands venture to fruition. Another brushfire – or so it may have seemed – was the idea of gaming at the Scottish Rite Temple, adjacent to the Huron Cemetery.

The temple, only three stories in height, represented at best less than 30,000 square feet of interior space[360] – hardly enough for a destination casino. In addition, the temple had been listed on the National Register since 1985, and, since 1983, was a Kansas Historic Landmark.[361] The procedural provision of the National Historic Preservation Acts' Section 106 and the substantive protections of the city and state preservation legislation would thus come into play in

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[359]See Libby Quaid, "Bill Would Pave Way For a Casino", Associated Press (May 20, 1998).

> "The House Resources Committee voted Wednesday to lift a prohibition on an Oklahoma Indian tribe's opening a casino at a Kansas racetrack. The committee's chairman, Rep. Don Young, R. Alaska, said Congress had unfairly blocked an earlier casino plan by the Wyandotte Tribe of Oklahoma. Sen. Sam Brownback, R-Kan., had the prohibition inserted into a spending bill last year. "It passed without a hearing, without giving the tribe a chance to argue its side of the issue, without the input of local officials," Young said."

Id.

[360]See National Park Service, National Register of Historic Places – Nomination Form/Scottish Rite Temple/Kansas City, Kansas. The nomination form was prepared by Richard Cawthon of the Kansas State Historical Society, on June 24, 1985, and was based on a draft submitted by Larry C. Hancks (accessed at www.kshs.org/..national register/..Wyandotte../scottish rite-Temple (4/5/2015).

[361]See Larry Hancks, Unified government of Wyandotte County, Scottish Rite Temple, accessed at www.wycokck.org/WorkArea/DownloadAsset.aspx?id (4/5/2015)(hereinafter Larry Hancks)

the event of a transformative threat.[362] It is ironic at the least that, of all Bearskin's Kansas plans, this was the one that first became reality.

Bearskin had acquired an option on the temple in 1996, and was proposing to use money to be received from the United States in settlement of historic treaty underpayments, as both purchase money and the lever to precipitate automatic trust status.[363] Congress had passed a law in 1984 to appropriate and distribute money awarded to the Wyandottes by the Indian Claims Commission and the Court of Claims.[364] One directive in the 1984 statute stated " . . . $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe."[365]

In January of 1996, the Oklahoma Wyandottes requested that the Department of Interior take the Shriner Tract into trust, and on June 12, 1996, the Assistant Secretary for Indian Affairs posted a notice expressing BIA consent.[366] Reaction was swift.

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[362]See Chapter Five, supra.

[363]See Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1255-1256) (10th Cir. 2001). The Courts consistently refer to the Scotish Rite Temple as the "Shriner Tract" or "Shriner Temple", Id. at 1256. The Tenth Circuit also noted that the Oklahoma Wyandotte Tribe had unsuccessfully tried to claim the former Federal Court house, across the street from the Huron Cemetery as excess property to be distributed to the tribe with its adjacent reservation. Id, 1256. The claim was based on 40 U.S.C. Section 483 (a)(2) which limited such transfers to tribes that housed federal properties "within the reservation" and therefore did not include property nearby but not within the Huron reservation. See Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs 1995 WL 699236, 28 IBIA 247, 258 (1995).

[364] Pub.L. 98-602, 98 Stat.3149 (1984), cited in 240 F.3d, at 1255.

[365] "Admin Record at 77 (98 Stat 3151)" quoted in 240 F.3d at 1255; See also Andrew Miller, "Iowa Tribe of Kansas and Nebraska v. Salazar: Sovereign Immunity as an Ongoing Inquiry" 7 SETON HALL CIRCUIT REV. 409, 409 (2011)(Hereinafter, MILLER).

[366]See Penny Coleman, "Memorandum to Phillip Hogen, Chairman, National Indian Gaming Commission, on legality of gaming under the IGRA on the Shriner Tract owned by the Wyandotte Tribe", 6-7(July 19, 2004)(Hereinafter, Coleman) (accessed at www.nigc.gov/LinkClick.aspx?link . . . . wyandotentinshmrtrct.pdf 4/5/2015).

A month later, the state of Kansas, the Kickapoo Tribe, the Iowa Tribe, the Prairie Band Potawatomi, the Sac and Fox and the Kansas Wyandots sought a temporary injunction against trust acquisition which was granted by the district court on July 12, 1996[367] – and lifted three days later by the Tenth Circuit, which preserved the rights of the parties to seek ultimate resolution of the issues.[368] The same day, July 15, the Secretary took title to the temple tract into trust for the benefit of the Oklahoma Wyandotte.[369]

C. The Settlement Contract and the Wendat Confederacy

The Kansas Wyandot, plaintiffs in the suit to enjoin the trust acquisition of the temple, made a dramatic and unusual turn away from arena of litigious battle and toward the healing of the chasm that had split the Wyandot for nearly a century and a half. In July of 1998, the Wyandotte Tribe of Oklahoma and the Wyandot Nation of Kansas signed a settlement agreement that largely ended the squabbles over the cemetery and promised alliance, cooperation and support for the future.

It was not total consensus, it might be noted upfront, because the Oklahoma tribe still claims, by virtue of Supreme Court precedent, that it holds the full beneficial interest, while the Kansas Wyandots still feel that their individualized treaty rights passed from signatory ancestors to their descendants.[370] More significantly, however, the parties agreed that

> "The use and enjoyment of the Huron Cemetery has been and shall forever be limited to the preservation, protection, restoration, maintenance and use of the Huron Cemetery as a cemetery… [and that the parties shall not] authorize or permit

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[367]COLEMAN, supra note 366, at 7.

[368]Id.

[369]Id; See also 240 F.3d at 1257 and Miller, supra note 365 at 1.

[370]See Chapter 4(c) supra.

any construction, development or business activity on, over, or under the Huron Cemetery."[371]

The Wyandot Nation also agreed that, if it received federal recognition, it would not seek to obtain a gaming facility in Kansas, an assurance that it gave to all the other Kansas-based tribes.[372] It also promised the Oklahoma tribe that it would drop out of the multi-plaintiffed lawsuit challenging the trust status of the temple[373] – at least if the Department of the Interior approved the compact. Because the agreement bore on the usage of Indian trust land, it theoretically required the assent of the trustee.[374] Holly Zane, attorney for the Wyandot Nation, felt that though approval was desirable, it was not necessary to bind the parties[375] – which was fortunate since the BIA, enmeshed in the Cobell[376] litigation, never responded.

The agreement did not prohibit – nor encourage – gaming on the temple site, and the Kansas Wyandots clearly were not happy with any gaming in the vicinity of the cemetery. But, as Holly Zane said,

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[371]Draft Settlement Agreement between The Wyandotte Nation of Oklahoma, and the Wyandotte Nation of Kansas, Inc., Part 1, (2)(3)(2/27/97) on file with the author. This draft was formally agreed to, substantially as written. See John Carras, "Wyandotte/Wyandot Peace Pact Signed" Kansas City Kansan, 1 (july 15, 1998)(Hereinafter, Carras).

[372]Carras, supra note 371, at 1.

[373]See supra, note 367.

[374]See 25 U.S.C. § 177 and 25 U.S.C. § 81.

[375]Carras, supra note 367, at 2.

[376]The Cobell litigation, which began in 1996 as Cobell v. Babbitt, spanned four different Secretaries of the Interior, 13 years of litigation and over 20 legal opinions. It was finally settled in 2010 by the Claims Resolution Act which provided 3.4 billion dollars for the plaintiffs in the Cobell v. Salazar class action trust case. See Patrick Reis, "Obamma Administration Strikes §3.4 B Deal in Indian Trust Lawsuit" New York Times, (Dec. 8, 2009) accessed at http://www.nytimes.com/gwire /2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-lawsuit.

> "Our top priority with the agreement was to prevent gambling on the cemetery site. We don't think the temple is the right place either. But we have shut off any possibility of gambling at the cemetery itself. "[377]

The agreement proved to be a watershed – not only a binding statement on the mutual desire to preserve the cemetery but a beginning to the end of discord and a foothold for the reunification of cultural relations of the former Wendat Confederacy. The Confederacy consists of the four existing tribes, two in Canada and two in the United States that descended from the original Wendat/Ouendat Nation which was in effect before European incursion into the Hudson Lake – Great Lakes region.[378] The Nation, scattered and distracted by the external forces, retained a common spiritual essence within the several parts and this was reunited in a cultural cohesion on August 27, 1999 in Midland, Ontario.[379] The leaders of the respective tribes – Chief Willie Piccard, Huron Wendat of Wendake, Chief Leaford Bearskin, Wyandotte Nation of Oklahoma, Second Chief Jim Bland, Wyandotte Nation of Oklahoma, Chief Janith K. English, Wyandot Nation of

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[377] Carras, supra note 367, at 3.

[378]See "Wendat". Encyclopedia Britannica. Encyclopedia Britannica Online. Encyclopedia Britannica Inc., 2015. Web. 05 Apr. 2015 http://www.britannica.com/EBchecked/topic/639738/Wendat.

> "Wendat, among North American Indians, a confederacy of four Iroquois -- speaking bands of the Huron nation—the Rock, Bear, Cord, and Deer bands – together with a few smaller communities that joined them at different periods for protection against the Iroquois Confederacy. When first encountered by Europeans in 1615, the Wendat occupied a territory, sometimes called Huronia, around what are now Lake Simcoe and Georgian Bay, Ontario, Canada. Some of the Wendat villages, consisting of large bark-covered dwellings housing several families each, were palisaded for protection. Villages were situated near fields where the Wendat grew corn (maize), the staple of their diet, which they supplemented with fish and, to a lesser extent, game. Weakened by diseases introduced by Europeans and unable to obtain as many firearms and ammunition as their enemies, the Wendat were destroyed by the Iroquois Confederacy in 1648-50, and the constituent tribes dispersed. The neighbouring Tionontati united with some Huron refugees and became known to the English as the Wyandot, a corrupted form of Wendat. In the early 21st century, population estimates indicated some 3,500 Wendat descendants."

[379] See "The Wendat Conderacy" The Wyandot Nation of Kansas website, www.wyandot.org accessed 11/26/2014.

Kansas, Spokesperson Steven A. Gronda, Wyandot Nation of Anderdon, -- adopted a foundational document for the Wendat Confederacy. It states:

> "Over ten generations ago, the Wendat people were driven to many directions from our beloved homeland. Today, 350 years later, we stand with our children and grand children at our sides and come together once again to affirm the Wendat Confederacy. With gratitude to the Creator and the reverent thanksgiving of kinship, we light the council fire and invite all who come in a spirit of peace and brotherhood to enjoy its warmth. The Wendat tree of brotherhood has sent out four strong roots to form four nations, each on separate and growing in different direction, yet each adding strength to the whole. These four roots feed the branches of our families and clans so that the Wendat people may endure and flourish through ten more generations. May we sit in the shade and watch the council fire as we meet together to affirm the bond of the Confederacy. May our hearts be pure and our minds clean as we act in a manner that will bring honor to the ancestors and hope to our children.
>
> The Wendat Peacemaker once outlined the path towards unity. Leaders were admonished to never disagree seriously among themselves, for to do might cause the loss of rights of their grandchildren. May we always cultivate feelings of friendship, love, and honor for each other so that the good tiding of Peace and Power of Righteousness will be our guide.
>
> May our leaders endeavor to serve each nation in a manner that will bring peace, happiness and prosperity for all the people. May the thickness of our skin be seven spans – which is to say the span should protect against anger, offensive actions, and criticism. May our hearts be full of peace and good will and our minds filled with a yearning for the welfare of the people of the Confederacy. With endless patience, may we fulfill our duty, and may our firmness be tempered with tenderness and compassion. May neither anger nor fury find lodging in our minds; and may all our words and actions be marked by calm deliberation.
>
> Finally, if any nation of the Confederacy should ever need help. [L]et it call out the others to come to its aid. We vow to attempt to work together in way that embers of long ago council fires may be fanned into a flame of kinship, culture and love that will warm countless generations of Wendat people. "[380]

Historian Lee Sultzman once wrote that,

> "[F]actionalism has plagued the Huron and/or Wyandot for the last 400 years. The bitter fight for recognition between the Citizens and Indian Parties has persisted to

[380]Id.

> the present day between the Wyandot Nation of Kansas and the Wyandotte Tribe of Oklahoma."[381]

The modern Wendat Confederacy, reborn in 1999, represents a cultural and spiritual, if not political, reunion, and an end to fighting over the future of the cemetery, if not a common economic agenda.

D. Attacks on the Land in Trust

The reestablishment of the Wendat Confederacy and the healing of inter-tribal relationships did not, however, soften the economic necessities and aspirations of Leaford Bearskin. He may have foresworn intentions for the cemetery, but he still wanted a Kansas City casino – and he had title to the Scottish Rite Temple tract. Its status as a base for gaming, however, was under continued legal attack by the Kansas tribal coalition, and was not warmly embraced by the Kansas Wyandots who saw it as a profane and discordant contrast to the sacredness of the cemetery.[382] Bearskin saw it as a less desirable than the Woodlands but, if necessary, he could accept it as a not inconsistent economic polarity to the other wordly repose of the cemetery.[383]

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[381]Lee Sultzman, "Huron History", accessed at www.tolatsga.org/hur.html (11/26/2014). Sultzman also stated that "Americans usually do not realize that Huron and Wyandot are the same people." Id, at 3. This may account for the oft-voiced confusion over the name of the "Huron Indian Cemetery."

[382]See supra, note 377.

[383]See ELIADE, supra note 2, at

> "It must be added at once that a profane existence is never found in the pure state. To whatever degree he may have desacralized the world, the man who has made his voice in favor of a profane life never succeeds in completely doing away with religious behavior. It will appear that even the most desacralized existence still preserves traces of a religious valorization of the world."

Id. at 23.

After the Tenth Circuit vacated the 1996 temporary injunction,[384] the plaintiffs – now without the company of the Kansas Wyandots – again challenged the legality of the Department of the Interior's trust acquisition of the temple tract. On March 2, 2000 the District Court dismissed the complaint for failure to join the Wyandottes as a necessary and indispensible party.[385] On appeal, the Tenth Circuit concluded that the Wyandotte Tribe was not essential to a determination[386] and then proceeded to deal with the validity of the trust acquisition and the intended use of gaming.

The Court of Appeals felt that, in spite of the Indian Reorganization Acts' provision on the acquisition of land for Indians,[387] and notwithstanding the implementing regulations' emphasis on agency discretion,[388] the Distribution Act of 1984[389] had clearly indicated that the Secretary had a *non-discretionary* mandate to take into trust property purchased with Indian Claim Commission awards.[390] Thus, the Secretary was obligated to take the temple tract directly into trust, and was

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[384] See supra notes 367-368.

[385]Sac and Fox Nation of Missouri v. Babbitt, 92 F. Supp. 2d 1124, 1127 (D. Kansas 2000) See "Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, (1991)

> ('Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation' . . . Under the circumstances of this case, we do not believe that, even though the Wyandotte Tribe voluntarily intervened as a defendant there has been a clear or unequivocal waiver of sovereign immunity as to either taking the Shriner Tract into trust or declaring the Huron Cemetery to be "reservation" land."

Id, at 1127.

[386]Sac and Fox Nation of Missouri v. Norton, 240 F.3d. 1250, 1258 (10th Cir. 2001).

[387]25 U.S.C. §465.

[388]25 C.F.R. § 151.3(a)

[389]Pub.L. 98-602; 98 Stat. 3149 See supra, Chapter 6(b).

[390]See 240 F. 3d. at 1261-1262

> "[Pub.L. 98-602 Section 105 ©(1) states] . . . approval of the Secretary for any payment or distribution by the Wyandotte Tribe of Oklahoma of any funds

not obligated or entitled to comply with either the National Historic Preservation Act[391] or The National Environmental Protection Act[392] before acting.[393] The Court was not, however, able to conclude from the facts shown that *only* funds appropriated under the Distribution Act were used to purchase the temple tract, and thus remanded the case for consideration by the Department of the Interior.[394]

The Secretary later confirmed that the allotted funds, together with interest, was more than enough to cover the purchase price.[395] The clogged plaintiffs, however, refused to quit and filed

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> described in subsection*(b) . . . shall not be required and the Secretary shall have no further trust responsibility for the investment, supervision, administration, or expenditure of such funds. "Subsection (c)(1) clearly indicates that the Secretary shall have no discretion in deciding whether to take into trust a parcel of land purchased by the Wyandotte Tribe with Pub.L. 98-602 funds. We therefore agree with the Secretary and the district court that, notwithstanding the provisions of the IRA, Pub.L. 98-602 imposed a nondiscretionary duty on the Secretary."

Id at 1261-1262.

[391]16 U.S.C. § 470 et. seq.

[392]42 U.S.C. § 4321 et. seq.

[393]240 F.3d. at 1162.

[394]240 F.3d at 1163-1164.

[395]See Kevin Washburn, Asst. Sec. Of Indian Affairs, United States Department of Interior, 3-4 (July 3, 2014). Washburn, writing to Chief Billy Friend of the Wyandotte Nation, said:

> "At one stage of the Shriner Tract litigation, the Tenth Circuit remanded the acquisition decision to the district court after concluding the Department's administrative record did not support a finding that the Nation used 602 Funds to acquire the property. The district court then remanded the decision back to the Department to "reconsider whether [602 Funds] alone were used to purchase the Shriner Tract. Responding to this directive, the Nation hired the accounting firm KPMG to prepare an analysis that tracked the amount of interest earned from the 602 Funds during the 10 year period of its investment. The Department's position, which was later affirmed in litigation, was that the Nation could invest its 602 Funds and add the interest it earned from the 602 Funds to the principal $100,000 to purchase property for acquisition under the Act.

Letter link included in "Indian Gaming: BIA won't place Wyandotte Nation Casino site (at Park City) in Trust" Indianz.com (July 7, 2014) accessed at http://www.indianz.com/IndianGaming/2014/027972.asp (4/9/2015).

yet another action in district court challenging the Secretary's determination of the funds and decision on the trust as arbitrary and unsupported by the evidence. Judge Julie Robinson affirmed the trust status, finding that there was substantial evidence to support the Secretary,[396] and that any interpretation of ambiguities in the language of the Distribution Act were entitled to ***Chevron*** difference.[397]

Before reaching the merits of any disputes over monetary evidence or statutory construction, the Tenth Circuit Court of Appeals put what seemed to be the final stopper in the incessant paper wars, relentlessly waged by the State of Kansas and the Horton area Indian Tribes.[398] The Secretary raised, for the first time in the case, a preclusive jurisdictional argument that sovereign immunity barred the challenge to title in trust for Indians.[399] The Court, considering the claim because claims of sovereign immunity are an exception to the general rule against considering new arguments on appeal,[400] noted that, at the time the complaint was filed, the tract

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The Bureau of Indian Affairs previously had published an official notice in the Federal Register confirming that The Secretary of the Interior has determined that the funds used to purchase the Shriner's Property in Kansas City, Kansas were from the section 602 settlement of specific land claims. The Secretary affirms that trust status of the subject lands. 67 FR 10926-01 (Monday, March 11, 2002).

[396] Governor of the State of Kansas v. Norton, 430 F.Supp. 2d. 1204, 1222-1226 (D. Kan. 1218).

[397]430 F.Supp. 2d at 1218-1221, citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843.

[398]Governor of the State of Kansas v. Kempthorne, 516 F.3d. 833 (Tenth Cir. 2008)

[399]See 516 F.3d at 840-841:

> "Before we may reach the various facets of this question, however, we are faced with a jurisdictional argument raised by the Secretary for the first time on appeal. The Secretary now argues that sovereign immunity bars the present suit because, at the time the instant complaint was filed, the Shriner Tract was already held in trust by the United States for the Wyandotte, and the Quiet Title Act, 28 U.S.C. §2409a, 'retain[s] the United States' immunity from suit by third parties challenging the United States' titled to land held in trust for Indians.' Id."

[400]516 F.3d at 841.

was already held in federal trust.[401] The Court, further, agreed with the Secretary that the Quiet Title Act[402] provided no waiver of sovereign immunity for suits by third parties challenging the United States title in trust for Indian lands.[403] The appeal was dismissed and the case remanded to the district court with instructions to vacate the judgment for lack of jurisdiction.[404]

The gates of sovereign immunity had swing shut with Leaford Bearskin's little casino tucked safely inside as Indian trust property. Perhaps now the litigation could end and the Oklahoma Wyandotte's might reap some modest profits for the persevering tribe. Almost simultaneously with the Tenth Circuit opinion, the tribe opened the doors of the 7th Street Casino on January 10, 2008.

> "After years in court, Chief Bearskin said, the fight is over and the tribe won. 'We went by all the rules and regulations set up by Washington,' said Chief Bearskin. 'We went by the law and came out on top. We're going to stay on top.' 'The people of Kansas City will never be sorry the Wyandotte are here.'"[405]

Well, perhaps a bit more litigation. Even after the opening of the casino, and even after the city seemed to embrace it and appreciate the boost it provided to the struggling urban economy, the state of Kansas and the Kansas Tribes, plowed ahead with yet another lawsuit. The plaintiffs claimed that they had originally sued in 1996 before the temple tract was purchased and taken into trust,[406] and had alleged facts that made the land into trust decision improper as a matter of

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[401] 516 F.3d. at 844.

[402] 28 U.S.C. § 4209a; See Miller, supra note 365 at 410.

[403] 516 F.3d at 845-846.

[404] 516 F.3d at 846.

[405] Lloyd Devine, "7th Street Casino Opens" Tribal News, (Febr. 10, 2008) accessed at http://www.wyandotte-nation.org/tribal-news/7th-street-casino/ (4/9/2015).

[406] See supra Chapter 6(b).

substantive administrative law.[407] The District Court, feeling that the current status of land in trust was determinative on the issue of sovereign immunity, and not the date of filing, dismissed the action.[408] The Tenth Circuit agreed, holding that the Quiet Title Act provides the "exclusive means [to] challenge the United States' title to real property".[409] Moreover, said the Court, the QTA may bar suit even when the plaintiff does not claim an interest in the property, but only the propriety of acquisition.

> "In determining whether a suit must be treated as a quiet title action sufficient to invoke the QTA, we 'focus on the *relief* sought by the plaintiffs. Seeking to remove land currently held in trust by the United States or to encumber that land constitutes a challenge to the government's title sufficient to bring a claim within the ambit of the QTA, despite the fact that plaintiffs do not themselves seek title to the land. Consequently, if plaintiffs' case is to proceed, it must do so exclusively under the QTA; the APA is no longer relevant given the relief sought."[410]

It is noteworthy – and ominous – that, for this holding, the Court relied on the precedent of <u>Neighbors for Rational Development v. Norton</u>.[411] This presents a problem that will be explored in Chapter 8.

Chapter 7: The Quixotic Quest for the Lowlands

Off to the side of the decades of litigation over the cemetery, the temple and trust status was a land-claim joy-ride brought by Leaford Bearskin and his merry band of litigators. In truth it seemed in retrospect more like a ploy-perhaps tongue in cheek – to promote, or provoke, a

[407]See Sac and Fox Nation of Missouri v. Kempthorne, 2008 WL 4186890, at 1-2.

[408]Id at 11.

[409]Iowa Tribe of Kansas and Nebraska v. Salazar, 607 F.3d. 1225, 1230 (Tenth Cir. 2010). Only the Iowa Tribe had appealed to the Tenth Circuit. Id.

[410]607 F. 3d, at 1230-1231.

[411]379 F.3d. 956, 961-962 (Tenth Cir. 2004); See 607 F.3d. at 1230-1231.

settlement on the Woodlands, rather than a sincere effort at reclamation.[412] Still, it had some wheels and raised some nervous eyebrows.

In June of 2001, the Oklahoma Wyandotts sued the Unified Government of Kansas City and Wyandotte County, Kansas, and numerous private land owners including International Paper, Owens Corning Fiberglass and General Motors.[413] The suit claimed ownership of three sections of land and riverbed accretions that the plaintiffs' alleged were not ceded to the United States under the Treaty of 1855, and had been illegally granted to non-Indians.[414] The tribe asserted that under Article 2 of the treaty, the tribe agreed to cede only the land that "was *purchased* (emphasis added) by them of the Delaware Indians"[415] and did not agree to give up the three sections of land that had been gifted.[416] Furthermore the Tribe contended that "patents by the United States to land within the sections, and subsequent transfers by the grantee are all invalid."[417]

Larry Hancks, the foremost Wyandot historian in the Kansas City area, states that "Historically, this was nonsense, although obviously very few people were aware of that."[418]

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[412]Larry Hancks, a historian working for the Unified Government of Wyandotte County, wrote:

> "It was speculated by some of the more cynical observers that one possible purpose of the lawsuit was not to seriously claim that the Wyandotte Tribe of Oklahoma was the legitimate owner of the properties in question, but rather to state a claim with just enough apparent validity that it could raise questions about land titled, making the obtaining of loans and the sale of property more difficult for the present property owners of record to accomplish",

"Scottish Rite Temple" at 10 accessed at www.wycokck.org/WorkArea/ DownloadAsset.aspx?id (11/25/2014) (Hereinafter, LARRY HANCKS).

[413]Id., at 7.

[414]Id., at 7.

[415]See Wyandotte Nation v. Unified Government of Wyandotte County/Kansas City, Kansas, et al, 222 FRD 490, 493 (2004).

[416]222 FRD at 494.

[417]222 FRD at 494.

[418]See LARRY HANCKS, supra note 412, at 7; See also THE EMIGRANT TRIBES, supra note 58.

Hancks notes that the three gifted sections were only referred to as a general, undivided measurement of land at the time of the transfer from the Delaware, and later under the Treaty of 1855; the three sections were included in the whole and was not separately surveyed until after the Treaty.[419] Thus, there was no way that the plaintiffs could determine which three sections of land had actually been gifted.

Furthermore, Hancks says, the claim that the United States sold the ceded lands, as it chose, was wrong. The Wyandots has sought the treaty, citizenship and allotments in severalty and had been the original holders in severalty of all the ceded lands, including the gifted sections, after the survey was completed.[420]

Hancks and others think that the tribe was trying to state a claim with just enough credibility to escape sanctions for frivolous litigation and put some concern into the minds of title holders and insurers of some of the most valuable industrial and governmental property in the city.[421] Hancks said, "This in turn could give the tribe a strong bargaining chip in dealing with the State and Federal governments, possibly leading to an out-of-court settlement giving the tribe both money and a grant of land in Wyandotte County on which establish a casino, which had always been Chief Bearskin's long term goal."[422]

The worth of the chips was defused, however, by the federal courts' interpretive and procedural approach to dismissal of the claim. In the first sense, the court felt that the treaty language of cession to both land and sovereignty within "Wyandott country" referred to *all* of

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[419] LARRY HANCKS, supra note 412, at 7-8.

[420] Id., at 9.

[421] See supra, note 412.

[422] LARRY HANCKS, supra note 412, at 10.

Wyandotte land, including the gifted sections.[423] The court felt that this interpretation was clear, unambiguous, in accord with the tribal understanding and thus within the interpretive canon that calls for ambiguities to be construed in the Indians' favor.[424]

In a procedural sense, the court found that the Kansas statute of limitations on land claims had run.[425] Under the terms and intent of the 1855 treaty, the tribe had ceded its land to the United States for survey and reconveyance in severalty to the individuals, and had agreed to the dissolution and termination of the tribe.[426] The use of termination in this sense was even broader than the post World War II experience in that it contemplated not only ending the nation-to-nation trust relationship but the tribe itself.[427] Of course, attempting to end future internal association is both impossible and generally unconstitutional.[428] In the immediate sense, however, the jurisdiction of

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[423]222 FRD at 497.

> "The court thus finds that the reference to the "Wyandott country" in the 1855 treaty, understood within the meaning of the phrase "Indian country" in 1855, refers to the territory of the Wyandottes, then existing, within the boundary line of the tribe, or as to which tribal law applied instead of state or territorial law. Therefore, all the land of the Wyandotte tribe, including the giften sections, was within the "Wyandott country" referred to in the 1855 treaty."

Id.

[424]222 FRD at 496-498.

[425]222 FRD at 499-500.

[426]222 FRD at 497.

[427]See supra Ch3, at notes 98-105.

[428]See Thomas Emerson, "Freedom of Association and Freedom of Expression" 74 YALE L.J. 1 (1964).

> "Freedom of association has always been a vital feature of American society. In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life. At the same time the exercise of this freedom has given rise to novel and troublesome problems. Organizations have grown in size and power, and organizational techniques have achieved a new order

the territory of Kansas was extended over the "Wyandott country" in the same manner as over the other parts of THE territory, and over individual Indian citizens, no longer within a recognized tribe, as early at 1859.

> "The court finds that, given the clear language in Article I of the 1855 treaty making state and federal law applicable not only to the individual Wyandottes, but also to the 'Wyandott country' as a whole within the Territory of Kansas, that once the lands were allotted to individual Wyandottes and restraints on alienation removed, Kansas law applies to subsequent claims regarding the lands at issue in this case… Applying these principles, Kansas law began to apply to any challenges to the land patents to the gifted sections no later than their issuance of 1859 to Wyandottes who were members of the competent class, and no later than 1867 to members of the incompetent class."[429]

Since Kansas law had never provided more than 21 years in which to bring claims for the recovery of real property, the limitations had long expired and plaintiffs' complaint was time-barred.[430]

As an alternative argument the defendants state that the tribe's claims should be dismissed for failure and inability to join the United States as a party.[431] The court, swept aside plaintiffs collateral estoppel arguments from a prior case[432] because, at this later point in time, numerous

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> of effectiveness. These associations have been strenuously resisted at times by other private groups, or sought to be regulated or curbed by government authority. At another level the rights of individual members and minority groups within these centers of private power have come to be a matter of growing concern. And likewise the position of the individual who does not belong, and who does not wish to be forced into association, has raised the problems of defining an area of personal freedom into which neither government nor private organizational power may intrude."

Id., at 1.

[429]222 FRD at 499, citing Schrimpser v. Stockton, 183 U.S. 290, 296 (1902) and South Carolina v. Catawba 476, U.S. 498, 507-509 (1986).

[430]222 FRD at 499-500.

[431]222 FRD at 500.

[432]Wyandotte Nation v. City of Kansas City Kansas, 200 F.Supp. 2d 1279, 1294-1299 (D. Kan. 2002).

additional defendants had been added.[433] It then considered whether claims could exist against the federal government for wrongful issuance of patents from the gifted section and against the holders of such invalid titles.[434] The court found that, under Tenth Circuit law, tribal claims against the United States, for wrongful taking of land, before August 13, 1946, had to be filed with the Indian Claims Commission by August 13, 1951.

> "Certainly, plaintiff was aware of such claims prior to August 1946, when the ICC was formed and in August 1951, when the five-year statute of limitations under the ICCA expired. Plaintiff cannot, in good faith, assert that it was not inconsistent with its title to the disputed lands prior to 1946, or that no claim against the United States arose before it decided to bring this lawsuit in 2001. As a result, plaintiff would be barred from pursing such claims against the United States in this court, or in any other forum. By sleeping on its claim, the Tribe simply lost its forum to litigate the pre-1946 actions of the Government that were inconsistent with its alleged title."[435]

Having concluded that the Treaty of 1855 gave up all the Wyandotte lands, including the gifted sections, and that the state and federal statute of limitation had run, the court added another millstone on the neck of this highly problematic claim. It stated that no suit could be brought against the individual landowners if the United States, as original grantor and indispensible party could not be joined.[436] Indeed, the courts' rejection was so complete that the Oklahoma Wyandottes did not appeal the case, and Larry Hancks reported that disgruntled defendants, forced to defend a near-frivolous lawsuit, were seeking to recover some of their considerable expenses from the Tribe.[437]

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[433]222 FRD at 500.

[434]Id., at 502.

[435]Id., at 502, citing Indian Claims Commission Act § 12, 25 U.S.C. § 70k (1976) and Navajo Tribe v. State of New Mexico, 809 F.2d. 1455, 1460-1461 (10th Cir. 1987). This seems additionally appropriate in light of the Wyandotte Tribes use of the Indian Claim Commission to secure finds for the purchase of the Scottish Rite Temple. See supra Chapter 6(b).

[436]222 FRD at 504-505.

[437]LARRY HANCKS, supra note 412, at 10.

Chapter 8 Conclusion: The Supreme Court and the Future of Trust Lands, Indians and Sacred Sites

A. Trust Lands

There are few things more important to the future of Indian sovereignty than the federal land trust.[438] Though some have denigrated the trust as paternalistic, an anachronism, or a constraint on self determination,[439] in fact, the trust has shielded the land base and the Indians' sovereignty from the almost consistently hostile forces of the surrounding states and the local governments.[440] From the inception of the new American nation and the Non-Intercourse Act restraint on alienation of land without federal consent,[441] Indian trust land has been, with the exception of periods of

[438] See COHEN'S, supra note 41, at 997-999.

> "The terminology of trust law gradually worked its way into the law of tribal property. Some treaties and statutes referred to tribal ceded land as land to be held in trust and sold, with the proceeds being deposited in accounts for the tribes. Often not all of the ceded land was sold, and the trust land remained the property of the tribe. The first general statute to use the word "trust," however, appears to be the General Allotment Act of 1887, which provided that allotted lands were to be held "in trust." During the allotment era, federal courts also began to draw on the language of trust law with respect to tribal property. The Indian Reorganization Act of 1934, which repudiated the allotment policy, similarly indefinitely extended all "existing periods of trust placed upon any Indian lands," and authorized the Secretary of the Interior to take land "in trust" for Indians and Indian tribes. Although most tribal property is trust land, not all tribal property is held in trust. The term "trust land" is often used imprecisely in the case law, however, and it is important to distinguish between the use of the term for jurisdictional purposes and for describing tribal interests in property. As a description of property interests, "trust land" refers to land held in trust by the United States for the benefit of a tribe or individual Indian. The land may be located within or outside the boundaries of a reservation."

Id, at 998.

[439]See FEDERAL INDIAN LAW, supra note 37, at 201, 440.

[440]WILKINSON AND BIGGS, supra note 345, at 152-154, quoted in FEDERAL INDIAN LAW, supra note 37, at 205-207.

[441]25 U.S.C. §177; See COHEN'S supra note 41, at 997-999.

termination for certain tribes, shielded from theft, trespass, fraud and state procedural provisions like tax foreclosure, adverse possession and statutes of limitations that operate remorselessly against the often unwary and usually impecunious tribes.[442] In addition, the Non-Intercourse Act is coupled, under the trust doctrine and the federal common law, with an overarching federal presence that his both plenary power under the constitution[443] and the ownership of a legal property title in trust.[444] The result is the power of preemption over unauthorized state intrusion,[445] as well as the duty of oversight and protection.[446] The tribe enjoys a presumptive immunity from state and local regulation and taxation,[447] and an economic initiative that, though not total, is still basic to a functioning self-determination and to the prospect of long-term sustainability.[448] The tribe's land

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[442]See supra Chapter 7; See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234-240 (1985).

[443]Id.

[444]Supra note 438.

[445]Worcester v. Georgia, 31 U.S. 515, 561-563 (1832). The partial limitation of the Worcester holding was recognized in Nevada v. Hicks, 533 U.S. 353, 361-362 (2001).

> "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entitles, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries . . . That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."

Id

[446]United States v. White Mountain Apache Tribe, 537 U.S. 465, 474-475 (2003).

[447]White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-145 (1980).

[448]See Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014)

> "A Key goal of the Federal Government is to render. Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. 25 U.S.C. §2702(1)(explaining that Congress' purpose in enacting

interest is, generally, one of full beneficial ownership rather than dictated federal management, and the United States interest is essentially one of naked legal ownership and trust responsibility. This is, however, enough to create the shield.[449]

The tribes know very well the essential nature of the trust. Though the terminationists might tout the ending of the trust as the prelude to freedom and equality, the Indians are clearly aware that it would really be the obituary to measured separation and meaningful self-determination.[450]

> IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments",

134 S. Ct, at 2043 (Sotomayor, concurring)

[449]See U.S. v. Shoshone Tribe of the Wind River Reservation, 304 U.S. 111 (1938).

> "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title . . . the authority of the United States . . . tracts nothing from the tribe's ownership but was reserved for the more convenient discharge of the duties of the United States as guardian and sovereign.

Id at 117-118.

As discussed above, supra Chapter 6(a) this general holding seems fundamentally inconsistent with the Brownback Bill limitation on the use of the Huron Cemetery.

[450]See Charles Wilkinson, "Shall the Islands be Preserved?" in THE EAGLE BIRD, (Hereinafter, The Eagle Bird)(1999).

> "The reservation system is essential to the preservation of Indian culture. Termination of the reservation system has been tried in many forms, but it has never worked. The cultures of Jews, Italians, Blacks, Hispanics, Asians, and others have all survived in the cities. Indians in the cities have sometimes made it as individuals but not as a culture. The pace is too frenzied, the contacts too superficial, and the space too tight. Indian culture has not survived in the cities because Indians are separatists. They are bound to their land and the sustenance, open space, and protection it provides. Indians are island people. We should continue to preserve the islands. Such a course is inconvenient and even mildly expensive. But the alternatives are worse. Termination of the reservation system would terminate something inside Indian people. It would terminate values and ideals that should be available to the rest of society. Termination would also lessen the stature of the majority society by stripping away a badge of honor: the United States of America made real promises to real people at real bargaining sessions that the islands would

Since 1934, tribal land has been held in trust under the general operation of the Indian Reorganization Act (IRA) which stopped the hemorrhaging of allotment and extended all trusts previously established by statute and treaty indefinitely into the future.[451] The forward-looking thrust of the IRA, necessary for the future of tribalism, for newly recognized tribes, and for the reconstitution of the decimated tribal land bases, was implemented by 25 USC Section 465, the land-in-trust provision that authorized the Secretary of the Interior to acquire lands for the tautologically-stated purpose of "providing lands for Indians" The section also provides that title to the land "shall be taken into trust for the Indian tribe or individual Indian for which the land is acquired, and such land shall be exempt from state and local taxation."[452]

The distinction between trusts for tribes or individuals has been blurred and the *operation of Section 465* obstructed by the recent Supreme Court decision in *Carcieri v. Salzar*,[453] which has clear implication for the future plans for the Oklahoma Wyandotte – and may portend problems for even the security of the Huron Cemetery and the future options of a recognized Kansas Wyandot tribe.

In *Carcieri,* the Court examined the language of 25 USC Section 479, which defines the word "Indian" and at least partially qualifies the delegated power to take land into trust for Indian Tribes and individuals. Section 479 states,

"The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now (emphasis added) under Federal jurisdiction, and all person

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> be preserved. If we ever close out the differentness on the islands, we will have closed out something in Indians and in ourselves.

Id, 41.

[451] 25 U.S.C. §§ 461-464.

[452] 25 U.S.C. § 465.

[453] 129 S.Ct. 1058 (2009)

who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood". [454] Though research has demonstrated that the "recognized Indian Tribe now under Federal jurisdiction", addition was indeterminant in meaning and purpose,[455] Justice Thomas, writing for the majority, felt that the clause was clear and unambiguous. The ameliorating approach of the Department of the Interior, which viewed "now" as meaning at the time of the taking into trust,[456] was thus not entitled to *Chevron* deference, despite 80 years of consistent

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[454]25 U.S.C. § 479.

[455]See Hilary Thompkins, "The Meaning of Under Federal Jurisdiction for Purposes of the Indian Reorganization Act" United States Department of the Interior, Office of the Solicitor, Memorandum M-37029, 8-21)(Hereinafter, Thompkins Memo)(March12, 2014).

> "Thus, having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction, I construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions - through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.

Id at 19.

[456]See 129 S. Ct. at 1061. The Court and the parties agreed that the only two interpretive options were 1934 or 1998.

> "The parties are in agreement, as are we, that the Secretary's authority to take the parcel in question into trust depends on whether the Narragansetts are members of a "recognized Indian Tribe now under Federal jurisdiction." Ibid. That question, in turn, requires us to decide whether the word "now under Federal jurisdiction" refers to 1998, when the Secretary accepted the 31-acre parcel into trust, or 1934, when Congress enacted the IRA." 129 S.Ct. 1064.

Since the Narragansett Tribe was not formally recognized until 1983 (129 S.Ct at 1062), the plaintiffs apparently put all their marbles into the contention that "recognized Indian Tribe now

practice.[457] The Court instead felt that "now" included only members of tribes federally recognized as of June 1934, when the IRA was passed, and did not include tribes which might be recognized thereafter. Thus, the Court held that there was no authority under Section 465 to take land into trust for Indians in tribes that gained federal recognition after that date or were unable to show federal jurisdiction before that time.[458]

This was judicial monkey wrenching at its most extreme.[459] Literally hundreds of tribes in the United States have received recognition since 1934, and hold or have applied for land in trust under Section 465. This would include the Oklahoma Wyandotte who were first clearly recognized in 1937 under the Oklahoma Indian Welfare Act, terminated in 1956, and then recognized again

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under Federal jurisdiction applied to 1998, and did not argue that, though unrecognized in 1934, they were still under federal jurisdiction.

> "We hold that the term "now under Federal jurisdiction" in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. None of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. 48 Fed.Reg. 6177. Moreover, the petition for writ of certiorari filed in this case specifically represented that "[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." 129 S. Ct. at 1068.

Thus, the court and the parties ignored the possible argument that the tribe though unrecognized in 1934, was still under federal jurisdiction and an appropriate recipient of trust land under 25 U.S.C. § 465. See supra, note 455. See also Breyer, concurring, at 129 S.Ct. 1069-1070 and Souter and Ginsberg, concurring and dissenting in part at 1071.

[457]Chevion USA Inc. v. Natural Resources Defense Council Inc., 467 US 837, 843 (1984) which authorizes deference by a court to agency construction of ambiguous language, was not applied by the majority, which felt the language of 25 U.S.C. § 479 was clear and unambiguous. See 129 S.Ct. at 1063, 1065-1068.

[458]See supra note 456.

[459]The term is derived from Edward Abbey's iconic novel THE MONKEY WRENCH GANG, (1975), and suggests disingenuous sabotage to force either paralysis or legislative reform.

in 1978. Assuming that the latest recognition, after a termination, is the most significant, the Oklahoma Wyandotte trust lands might seem vulnerable.[460]

The status of such lands and the scope of modern tribal land protection was thrown into further doubt by the Court's follow-up decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.*[461] Patchak lived in Michigan, in the immediate vicinity of land taken into trust for the Pottawatomi Tribe by the Secretary in 2009. He sued, challenging the Secretary's authority in light of the *Carcieri* decision and was met with the argument that he lacked standing as, under the Quiet Title Act,[462] there is no waiver of sovereign immunity for claims

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[460]Though the Court is Salazar seems to leave room for an application of 25 U.S.C. § 465 based on federal jurisdiction alone in 1934, (see supra footnotes 455, 456) many commentators seem to feel that the case, implicity if not explicity, calls for a showing of recognition in 1934 and not just jurisdiction. This may be a misreading of the case or a forboding of its possible interpretations. See e.g. Noah Gillespie, "Preserving Trust: Overruling Carcieri and Patchak while Respecting the Takings Clause" 81 GEO. WASH L. REV. 1707 (2013)

> "Justice Thomas, writing for the Court, found that the word "now" was unambiguous and rejected the need for the First Circuit's application of Chevron deference. The Court reasoned that the word "now" in the definition of "Indian" in § 479 included only members of tribes that were federally recognized as of June 1934, in part because the presence of the phrase "now or hereafter" elsewhere in the statute suggested Congress intended something different when it used only "now" in § 479. Because § 465 of the Act gave the Secretary authority to bring land into trust only "for the purpose of providing land for Indians," the Secretary can do so only for this limited set of tribes. The Secretary therefore had no authority to take land into trust for the Narragansetts because that tribe did not gain federal recognition until 1983. The impact of Carcieri could well be far-reaching, especially because of the many benefits tied to the IRA definition of "Indian." Of the 104 tribes federally recognized since 1934 in the continental United States, as many as 88 may have been grated trust land that, under Carcieri, the Secretary lacked the authority to give. Perhaps even more striking, the decision calls into question the status of more than 200 now-recognized tribes that were admitted in 1959—and therefore after 1934—by virtue of Alaska becoming a state.

Id, at 176.

[461]132 S.Ct. 2199 (2012)

[462]28 U.S.C. § 2409a.

against lands in trust for Indians.[463] The Court of Appeals, however, concluded that Patchak did have prudential standing and that the Quiet Title Act did not bar actions contesting agency authority under the APA, in contrast to precluding actions to asserting a competing claim of ownership.[464]

The Supreme Court affirmed the Court of Appeals. It felt that there was a general waiver of sovereign immunity in the APA for suits seeking non-monetary agency conduct,[465] and that Patchak's action sought no title, but only injunctive relief against a trust decision allegedly in violation of federal law.[466] It is noteworthy – and of concern to the Oklahoma Wyandottes – that Patchak's action was based on an allegation that the Secretary was not authorized to take land into trust for a tribe that was not recognized in 1934, but was later recognized in 1999.[467] Furthermore, the Supreme Court overturned one of the cases foundational to the Secretary's arguments that the Quiet Title Act failed to displace sovereign immunity for suits against Indian lands in trust – a case that had been crucial to the result of the *Kansas v. Kempthorne* case[468] which held that the Quiet Title Act's exception for sovereign immunity waivers in the case of Indian trust land prevented the application of the APA and its general waiver of immunity.[469] Is the trust status of the Scottish

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[463]Patchak v. Salazar, 646 F.Supp. 2d 72, 76 (D.D.C. 2009)

[464]632 F.3d. 702, 707-711 (D.C.Cir. 2011).

[465]5 U.S.C. § 702 waives Federal sovereign immunity from an action "seeking relief other than money damages, and stating a claim that an agency or an officer or an employee thereof acted or failed to act in an official capacity or under color of legal authority." Quoted at 132 S.Ct. at 2204.

[466] 132 S.Ct. at 2208-2211

[467]132 S.Ct. at 2204

[468]516 F.3d. 833 (Tenth Cir. 2008) See supra, notes 398-404.

[469]See 516 F.3d at 841, n.4 The case overturned was Neighbors for Rational Development v. Norton, 379 F.3d. 956, 961-962 (Tenth Cir. 2004). It was noted by the Supreme Court as one of three circuit decisions that clashed with the DC Circuit, supra note 464, and held that the United States had immunity from suits like Patchak's, 132 S.Ct. at 2204.

Rite Temple tract – now the operating 7th Street Casino – going to be retigated? This may depend in part on the future of *Carcieri* and its interpretations.

It has been pointed out that there are potential avenues – or alleyways – around the *Carcieri* roadblock.[470] These may be necessary for the Oklahoma Wyandottes who were recognized in 1936 and again in 1978, and for any future recognition of the Kansas Wyandots.

For one thing, the word "now" in the infamous phraseology of Section 465 does *not* modify "recognized," it modifies "under federal jurisdiction"[471]; the Supreme Court graciously accepted the Narragansetts tactical pleading error that the tribe was, in 1934 "neither federally recognized nor under the jurisdiction of the federal government."[472] The proof of the former could thus be deemed, unreasonably, proof of the latter.[473] One could easily postulate authority under Section 465 to take land into trust for tribes that *are* recognized at the time of trust, and were under federal jurisdiction in 1934.[474] It would seem clear that "federal jurisdiction" is broader than "recognition", a concept that was still in evolution in the 1970s.[475] It was not until 1978 that the Department of

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[470]See supra notes 455, 456.

[471]See Tompkins memo, supra note 455, at 24.

> "The Carcieri majority held, rather, that the Secretary was without authority under the IRA to acquire land in trust for the Narragansett Tribe because it was not under federal jurisdiction in 1934, not because the tribe was not federally recognized at that time. The Court's focused discussion on the meaning of "now" never identified a temporal requirement for federal recognition. As Justice Breyer explained in his concurrence, the word "now" modifies "under federal jurisdiction," but does not modify "recognized." As such, he aptly concluded that the IRA "imposes no time limit on recognition." He reasoned that "a tribe may have been 'under federal jurisdiction' in 1934 even though the Federal Government did not" realize it "at the time."

Id.

[472]129 S.Ct at 1068. See supra at note 456.

[473]See supra at note 460.

[474]See Bryer (con) 129 S.Ct., at 1069.

[475]Tompkins Memo, supra note 455, at 24; See also Quinn supra note 315.

the Interiors first promulgated regulations for the demonstration of tribal status sufficient for recognition.[476] The concept of jurisdiction, however, began with the Non Intercourse Act of 1790[477] and expanded to a scope of plenary power by the end of the Nineteenth century.[478] Cohen's Treatise states that

> "The authority of Congress extends to all Indian communities in the United States, including terminated and non-federally recognized tribes. The relationship need not be continuous. The relevant question is whether and to what extent Congress has chosen to exercise its authority with respect to a particular tribe. Congress has exercised its authority to restore the federal-tribal relationship with a number of terminated tribes."[479]

In addition, the non-alienation provisions of the Non Intercourse Act have applied to the land of any Indians who are identifiable as a tribe, even if the tribe is not formally recognized by treaty, statute or administrative action.[480] In sum, these concepts of jurisdiction are clearly broad enough to allow Congress to assert authority, and protection over unrecognized tribes and to acquire land for them after 1934, when recognition is formally accorded.

However, the possibility of establishing eligibility for Section 465 trust acquisition soldly on the basis of federal jurisdiction in 1934, does not assuage the increased complexity and uncertainty. It was noted by the United Southern and Eastern Tribes, Inc., that,

> "Carcieri has significantly slowed DOI's processing of trust land applications – even for those Tribes who may not have a "Carcieri problem." The uncertainty and delay that accompanies the "under federal jurisdiction" analysis, which is determined on a Tribe-by-Tribe basis, can jeopardize potential economic development opportunities as well as core governmental functions including but

[476] 25 CFR Part 83 (1978).

[477] 25 U.S.C. § 177

[478] Lone Wolf v. Hitchcock, 187 U.S. 553, 567-568 (1903); See United States v. Lara, 541 U.S. 193, 200 (2004).

[479] See COHEN'S, supra note 41, at 167.

[480] Joint Council of the Pasamaquocly Tribe v. Morton, 528 F.2d 370, 376-377 (1st Cir. 1975); See COHEN'S, supra note 41, at 1033.

> not limited to health care provision, housing, and education for all Tribes. Until Congress restores the Secretary's authority to acquire land in trust for all Tribes, Tribal opponents can use Carcieri to bring litigation challenges on proposed acquisitions and even some lands that are already in trust. Even for those Tribes that believe they were "under federal jurisdiction" in 1934, the prospect of costly, drawn out litigation may frighten away potential partners and investors for economic development projects. The negative consequences of the Carcieri decision impact **ALL** of Indian Country.[481]

The Indian world, including the Wyandottes of Oklahoma and the Wyandots of Kansas await the passage of a bill, perhaps that of Senator Jon Tester of Montana, S. 732, which would amend the Indian Reorganization Act and allow the Secretary of the Interior to take land into trust for, simply and appropriately, all recognized tribes.[482]

B. Indians

When tribes assert a legal claim to measured sovereignty, federal services and immunity from state and local regulatory jurisdiction, they often face the backlash argument that the insulation of Indian interest from laws, taxation and competition is a form of odious redistribution, special privilege or reverse racism.

> "The modern anti-Indian movement was created out of a white 'backlash' against gains made by the modern Indian movement since the 1960's. At least five major factors motivate anti-Indian groups. The first is the call for 'equal rights for whites' – that the increased legal powers of the tribes infringes on the liberties of the individual white American taxpayer… The second factor is access to natural resources. These resources can be fish or game, land or water, but the case is the same: no citizens should have 'special rights' to use the resources… The third factor is the issue of economic dependency and sovereignty. In a rural reflection of the 'Welfare Cadillac' myths used against urban African Americans, all reservations Indians are said to wallow in welfare, food stamps, free housing and medical care, affirmative action programs, and gargantuan federal cash payments – all tax-free,

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481 See "Should I Care About the Carcieri Fix?" accessed at www.usetinc.org/. . ./Should%201%20Care%20About%20the%20Carcieri (4/12/2015).

482 See Matt Sharp, "Senate Bill Would Restore DOI Power Over Tribal Lands" accessed at http://www.law360.com/articles/631284/senate-bill-would-restore-doi-power-over-tribal-lands (4/12/2015).

of course… The fourth factor is the attitude of cultural superiority . . .and The fifth factor is simple racism."[483]

Under this argument, government should focus on individual freedom, private property rights, and common law protections, and deemphasize special subsidies, redistributions and central regulation of economy, environment and society.[484]

Implicit in this free market decentralized paradigm is the classless, raceless society of equal opportunity, and, by necessity. The incompatibility of the special, protected Indian status that has been observed since before the nation founding.[485] The lynchpin for the unique, separate status of

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[483]Zoltan Grossman, "Treaty Rights and Responding to Anti-Indian Activity", The Fourth world Documentation Project at the Center for World Indigenous Studies. http://www.halcyon.com/FWDP/fwdp.html accessed at http://www.dickshovel.com /anti.html (4/16/2015).

[484]See, in general, Sam Brownback, "Road Map for Kansas, 2.0" (Hereinafter, Sam Brownback Roadmap) http://brownback.com/roadmap-kansas/ accessed (12/14/2014); see also Chris Edwards, "What Do American Indians Deserve: Name Changes or Policy Changes?" (April 13, 2014), posted in Cato Institute: Downsizing the Federal Government, at http://www.downsizinggovernment.org/print/what-do-american-indians-deserve-name-change (4/16/2015).

> "Historically, one reason why the federal government variously exploited, coddled, and micromanaged Indians was the belief that they were primitive socialists with no understanding of market institutions. But research has found that stereotype to be false. Many indigenous peoples had systems of property rights and private ownership, and many tribes were entrepreneurial and had extensive trading networks. Reforms to property rights and the rule of law on reservations would make Indian lands much more fertile for investment."

Id.

[485]See DONALD FIXICO, TERMINATION AND RELOCATION, 93 (1986)

> "Arthur V. Watkins, a sixty-six year old Republican senator from Utah, had lived most of his life in that state as a farmer, a lawyer, a devout member of the Mormon Church, and a local political figure. After winning a seat in the Senate in 1946, Watkins established a reputation as an old guard conservative of the Republican Party. Watkins believed that everyone should achieve their goals without government assistance, regardless of circumstances. From his struggle-to-success viewpoint, he failed to understand the controlling influences of cultural values and background, which persisted in guiding the course of Indian lives as Native Americans attempted to adapt to a white American life-style. His paternal approach in negotiating with the Menominees and other native groups exemplified

Indian tribes is the case of *Morton v. Mancari*,[486] which has, thus, become the target for free market proponents who desire at least the illusion of a level playing field.[487]

Morton, dealt with a provision of the IRA which authorized the Secretary of the Interior to afford a hiring preference to "qualified Indians",[488] which, under BIA regulations, required one fourth or more Indian blood and membership in a Federally recognized Tribe.[489] The provision was challenged by non-Indian plaintiffs as "invidious racial discrimination"[490], and the issue in part, was the level of review. A strict judicial scrutiny presumes burdened racial classification invalid unless the government can demonstrate a compelling interest and narrowly tailored

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> Republican thinking in congress during the early Eisenhower years: Indians needed firm supervision in preparing for termination and financial independence. The senator's Mormon tradition of industry and hard work, combined with Republican ideas about free-enterprise, convinced him that Indians had it too easy. Whatever his specific reasons, the impetuous Watkins sought to eliminate federal services to Indians in order to put them on a competitive basis with other Americans."

Id.

[486]417 U.S. 535 (1974)

[487]See Carol Goldberg "American Indians and Preferential Treatment" 49 UCLA L.REV. 943 (2002)(hereinafter, GOLDBERG)

> "Preferences and benefits for American Indians predate the American policy of affirmative action and flow from different rationales. Nonetheless, Indian preferences are the latest targets in the battle against affirmative action. Opponents of Indian preferences and benefits have long deployed the rhetoric of equal rights to attack treaty rights and other manifestations of the special legal status that Indians enjoy under federal law. Today, however, anti-tribal groups have joined forces with anti-affirmative action forces to produce the most intensive challenge yet to Indian rights."

Id, at 943.

[488]25 U.S.C. § 272.

[489]See 44 BIAM 335, 3.1 cited at 417 U.S. 535 n. 24. Since this time the regulation has been changed to reach members of "any recognized tribe now under federal jurisdiction" who are of "Indian descent" and "All others of one-half or more Indian blood of tribes indigenous to the United States" 25 C.F.R. § 5.1.

[490]417 U.S. at 551.

means,[491] while non-racial classes might be judged by either a rational basis review – a legitimate objective and debatably reasonable means[492] – or by an intermediate scrutiny approach assuring substantially reasonable means to an important end.[493]

In *Morton*, the Court chose to use a less demanding scrutiny, one that would sustain the use of classifications keyed to "Indians" or "Indian blood" if the classification was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians"[494] – an objective that had been described as important and perhaps compelling but achievable with means accorded substantial flexibility.[495]

The court indicated a variety of reasons for the more lenient test, including Congressional plenary power under the Indian commerce clause, a provision that literally singles out Indians as a proper subject for legislature classification.[496] The Court also pointed to the long history of the "Indian" classification in treaties, statutes, cases and administrative regulations such as those of the BIA.[497] Finally, the Court asserted, somewhat reticently, in a footnote, that the classification

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[491]Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) " . . . all racial classifications imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Id. at 227

[492]U.S. v. Carolene Products Co. 304 U.S. 144, 152-154 (1938).

[493]Craig v. Boren, 429 U.S. 190, 197 (1976)

[494]417 U.S. at 555.

[495]417 U.S. at 552-554.

[496]417 U.S. at 551-552. The court noted "Article II, s 2, cl.2, gives the President the power, by and with the advice and consent of the Senate, to make treaties." Id, at 552; See Robert Clinton, "Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government" 33 STANFORD L. REV. 979, 1011-1012 (1981).

[497]417 U.S. at 552.

in the hiring preference was "political rather than racial in nature" as "it applies only to members of 'federal recognized tribes"[498]

Morton has held an uneasy position in the surrounding sea of unviable suspect classifications. Cases such as *Cayetano v. Rice*[499] nibbled hard at its flanks. In *Rice* the Court invalidated a Hawaiian statute that limited the franchise in voting for trustees to the Office of Hawaiian Affairs to those of native Hawaiian ancestry.[500] The majority held that "Ancestry can be a proxy for race"[501] and that *Morton v. Mancari* dealt with a preference,

> "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion…The opinion was careful to note, however, that the case was confined to the authority of the BIA, and agency described as 'sue generis.'"[502]

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[498]Id at 553-554, n. 24 "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in natures."
Id.
[499]528 U.S. 495 (2000)

[500]528 U.S. at 509-510

> "OHA is overseen by a nine-member board of trustees, the members of which "shall be Hawaiians" and – presenting the precise issue in this case – shall be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const., Art. XII § 5; see Haw.Rev.Stat.§§ 13D-1, 13D-3(b)(1) (1993). The term "Hawaiian" is defined by statute: 'Hawaiian' means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii § 10-2. The statute defines "native Hawaiian" as follows: 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii'

Id, 509-510.

[501]528 U.S. at 514.

[502]28 U.S. at 520. The Court also stated that "Hawaii would extend the limited exception of Mancari to a new and larger dimension." Id. at 520 (emphasis added).

Marcia Zug wrote, immediately before the Supreme Court came down with its 2013 Indian Child Welfare Act case, called *Adoptive Couple v. Baby Girl* [503]that

> "There is no question that ICWA treats Indian children differently than non-Indian children. Nevertheless, under well-settled law, this distinction is not constitutionally problematic. In *Morton v. Mancari*, the Court explained that 'Indian' is a political affiliation rather than a racial category. It is uncertain whether the Roberts Court would agree with this distinction. The Roberts Court has indicated its strong disapproval of racial preferences, stating 'The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.' The Court could reach a similar conclusion regarding ICWA in *Baby Girl*. But if the Court were to do so, this holding would not only destroy ICWA but it would almost completely eliminate existing Indian law."[504]

The Supreme Court, however, did not touch *Morton v. Mancari*, though Justice Thomas did, in concurrence, lobby for a restrictive view of Articles one's Indian Commerce Clause and limits on the federal power to override state law.[505] Thus, *Morton v. Mancari* carries Indian law and the Indian Trust responsibilities forward into the future, despite the narrowing in *Cayetano* with respect to the Fifteenth Amendment and the Hawaiian situation and despite some overt

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[503]133 S. Ct. 2552 (2013).

[504]Marcia Zug "Adoptive Couple v. Baby Girl: Two and a Half Ways to Destroy Indian Law" 111 Mich L. Rev First Impressions, 46, 49-50 (April, 2013). The quote from Justice Roberts come from Parents Involved in Comty. Sch. v. Seattle Sch. dist. No. 1 551 U.S. 701, 748 (2007), quoted at 111 Mich. L.Rev. First Impressions at 49, 17.19.

[505]See 133 S.Ct. at 2568.

> "Congress is given the power to regulate Commerce "with the Indian tribes." The Clause does not give Congress the power to regulate commerce with all Indian persons any more than the Foreign Commerce Clause gives Congress the power to regulate commerced with all foreign nationals traveling within the United States. A straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions –"commerce" – taking place with established Indian communities –"tribes." That power is far from "plenary."

Id.

discontent in the lower court cases.[506] One of the most recent opinions from the Ninth Circuit stated, in affirmance of Mancari,

> "We recognize that *Mancari* addressed a political classification providing a general Indian hiring preference rater than a tribe-specific preference. But *Mancari*'s logic applies with the equal force where a classification addresses differential treatment between or among particular tribes or groups of Indians. Indeed, based on *Mancari*, the Court has specifically upheld differential treatment among Indians."[507]

Though the United States Supreme Court has not been particularly supportive of American Indian sovereignty in the modern era, there are still at some examples of continuing (though divided) support for sovereignty and treaty rights.[508] In addition, Kansas tribes, including the Oklahoma Wyandotte and the Kansas Wyandots might derive some solace from the attitude of Governor Sam Brownback. Though Brownback is clearly a free market adherent and a firm believer in limited government regulation, taxation and spending,[509] he is still a resolute supporter of Indian rights and treaties. With regard to his anti-federalism, he stated "We will continue our fight against the intrusive reach of the federal government [including] energy regulations …

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[506]See e.g. KG Urban Enterprises LLC v. Patrick 839 F.Supp 2d 388 (D. Mass. 2012)

> "By characterizing tribal distinctions as solely political, the Supreme Court has avoided grappling with complex cconstitutional issues such as the scope of congressional power to regulate Indian affairs and the inherent tension between the Indian Commerce Clause and the Equal Protection Clause. If this Court were addressing the issue as one of first impression, it would treat Indian tribal status as a quasi-political, quasi-racial classification subject to varying levels of scrutiny depending on the authority making it and the interests at stake."

839 F.Supp. 2d at 404

[507]Equal Employment Opportunity Commission v. Peabody Western Coal Company, 753 F. 3d. 977, 987 (2014)(citing Delaware Tribal business Committee v. Weeks 430 U.S. 73 (1977).

[508]See e.g. Michigan v. Bay Mills Indian Community 134 S. Ct. 2024 (2014)(Upholding the application of tribal sovereign immunity in commercial gambling operations on non-Indian land) and Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)(upholding Indian treaty rights to hunt and fish on ceded lands after statehood).

[509]See SAM BROWNBACK, ROADMAP, supra, note 484.

Obamacare … the U.S. Fish and Wildlife Service… and the EPA."[510] However, with regard to relations with the Indian tribes, he said, in 2007 as a senator:

> "For centuries, relations between the United States and the Native peoples of this land have been in disrepair. For too much of our history, Federal-Tribal relations have been marred by broken treaties, mistreatment and dishonorable dealings. I believe it is time we worked to restore these relationships to good health.
>
> Certainly, we cannot erase the record of our past; however, we can acknowledge our past failures, express sincere regrets, and work toward establishing a brighter future for all Americans. To achieve these goals, I have introduced Senate Joint Resolution 4 to extend a formal apology from the United States to tribal governments and Native people nationwide."[511]

The apology passed in 2009 as a part of the Defense Appropriation Act of 2009.[512]

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[510]Id., at 2

[511]See Sam Brownback "RE: Native American Apology Resolution" (S.J. res. 4)(March 16, 2007) accessed at www.USCOB.org/brownback (4/17/2015).

[512]Pub.L. 111-118 Section 8113; Brownback said,

> "What this amendment achieves is recognition, honor, and the importance of Native Americans t this land and to the United States in the past and today and offers an official apology for the poor and painful path the U.S. Government sometimes made in relation to our Native brothers and sisters by disregarding our solemn word to Native peoples. It recognizes the negative impact of numerous destructive Federal acts and policies on Native Americans and their culture, and it begins – begins – the effort of reconciliation."

Accessed at http://firstpeoples.org/wp/tag/the-apology-to-the-native-peoples-of-the-united-states/ (4/17/2015). See also Robert Longley "Did you know the U.S. apologized to Native Americans?" About.Com

> "In 1993, the U.S. congress devoted an entire resolution to apologizing to Native Hawaiians for overthrowing their kingdom in 1893. But a U.S. apology to Native Americans took until 2009 and came stealthily tucked away in an unrelated spending bill. If you just happened to be reading the 67-page Defense Appropriations Act of 2010 (H.R. 3326), tucked away on page 45, in between sections detailing how much of your money the U.S. military would spend on what, you might notice Section 8113: "Apology to Native Peoples of the United States." 'The United States, acting through Congress,' states Sec. 8113, 'apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States;" and 'expresses its regret for the ramifications of former wrongs and its commitment to build on the positive relationships of the past and present to move toward a brighter future where all the people of this land live

C. The Protections of the Sacred

The sacred places of the Indian people and their protection have followed a winding course in the federal courts over the last quarter century.[513] A central pivot point was the Supreme Court's denial of First Amendment, free exercise protection in the *Lyng*[514] case but, simultaneously, its affirmance of a zone of possible religious accommodation presumably within the limits of the establishment clause.[515] The affirmative efforts of the federal land managers – at places like Devil's Tower[516], Rainbow Bridge[517], Cave Rock[518] and the Bighorn Medicine Wheel[519] – were, unsuccessfully attacked by conservative litigators as transgressions of the First Amendment Establishment Clause. The United States and the tribes were repeatedly able to show a secular

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> reconciled as brothers and sisters, and harmoniously steward and protect this land together.' Of course, the apology also makes it clear that it in no way admits liability in any of the dozens of lawsuits still pending against the U.S. government by Native Americans."

Accessed at http://usgovinfo.about.com/b/2012/12/27/did-you-know-the-us-apologized-to-native-americans (4/17/2015)

[513]See supra, notes 198-217

[514]See Lyng v. Northwest Indian Cemetery Protective Assc. 485 U.S. 439, 448 (1988)

[515]Though the Court didn't delve into the limits of the Establishment Clause, it did say, "Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen The Governments' right to the use of its own lands, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." 485 U.S. at 453-454.

[516]Bear Lodge Multiple Use Association 2 F.Supp.2d 1948 (D.Wyo 1998).

[517]Natural Arch and Bridge Society v. Alston, 209 F.Supp. 2d 1207 (D. Utah 2002).

[518]Access Fund v. United States Department of Agriculture, 499 F.3d 1036 (9th Cir. 2007).

[519]Wyoming Sawmills, incorporated v. United States Forest Service, 179 F. Supp. 2d 1279 (D. Wyo. 2001)

purpose.[520] There clearly is not a doctrinal purpose in sacred site cases as Indian religion is essentially ceremonial and non-proselytizing.[521] In addition, the United States, had in virtually all cases its own compatible historic and recreational concerns.[522]

> [520]The most complete discussion – and dismissal – of the establishment clause argument was rendered by the Wyoming District Court in the Devils tower case, See Bear Lodge, supra note 516, at 2 F.Supp. 2d 1448, 1453-1458. The court said: "The Establishment Clause of the First Amendment states that "congress shall make no law respecting an establishment of religion . . . " (U.S. const. amend, I) The Courts of this country have long struggled with the type and extent of limitations on government action which these ten words impose. At its most fundamental level the United States Supreme Court has concluded that this provision prohibits laws "which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Defining this prohibition on a case by case basis has proven a difficult endeavor, but the Court has developed a number of useful frame words for conducting the analysis. In Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971), the court established a three part test for delineating between proper and improper government actions. According to this test a governmental action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion.

Id, at 1453-1454.

[521]See Ellen Sewell "The American Indian Religious Freedom Act" 25 ARIZ. L. REV. 430 (1983),

> "The courts' position that protection of Indian religion constitutes religious establishment fails to take into account the peculiar character of Indian religion as compare to religions of faith and doctrine. The government's introduction to the Task Force Report, in a position taken up by the Navajo Medicinemen's Association, has argued in effect that government aid for Indian religion poses no establishment threat because of the unique character of Indian religion. The argument is that because Indian religions are ceremonial, not doctrinal, they are not proselytizing, making no claims to ultimate truths that believers are obligated to spread. Therefore they have no impulse to impose the religion beyond the tribe, and so pose no threat of establishment. By contrast, Christianity has been devoted to conversion of the nonbeliever; the establishment clause was carved out of battles for power among Christians who asserted exclusive claims to truth."

Id at 462.

[522]See eg, supra note 518, "the Establishment Clause does not bar the government from protecting a historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certrain groups. 499 F.3d 1036, at 1046.

The defendants were also able to meet the demand of an absence of coercion because, in most cases, the land management plans were voluntary[523], and in other cases, closures were temporary[524], or non exclusive[525] and not accompanied by controversial imagery.[526] Finally, the plans or laws operated prospectively and did not offend vested rights.[527] Indeed, in some of the cases, the plaintiffs were not even able to argue the establishment clause because they could not show a constitutional basis for standing.[528]

The Supreme Court and Congress have recently rolled out the welcome mat of protection and accommodation for Christian interest in a way that may make the Indian concerns seem almost quaint. The Court was able to find that the Religious Freedom and Restoration Act (RFRA)[529] and standing were available to protect sensitive concerns of corporate employers who feared that their Obamacare tax dollars would go towards forms of employee birth control that operate post-conception and offend the owners religious convictions.[530] This was rather confusing to the Navajo and Hopi.

> "The Supreme Court's decision in Burwell v. Hobby Lobby, which held that the Affordable Care Act's "contraceptive mandate" violated the Religious Freedom Restoration Act when applied to certain closely-held corporations, generated strong reactions from every corner of the political realm. The religious right and anti-abortion camps claimed it as a definitive victory for religious freedom and a blow to governmental interference with core religious beliefs. Advocates for

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[523]Bear Lodge, supra note 516 at 2 F.Supp.2d 1448, 1453-1455.

[524]Id at 1451.

[525]Access Fund, supra note 518, at 499 F.3d. 1036, 1045.

[526]Wyoming Sawmills, supra note 519 at 179 F.Supp.2d 1279, 1294.

[527]Wyoming Sawmills, 383 F.3d 1241, 1249 (Tenth cir. 2011).

[528]Id, see also Natural Arch and Bridge Society v. Alston, 98 Fed. Appx 711, 715 (10th Cir. Utah) and Bear Lodge Multiple Use Association v. Babbitt, 175 F.3d 814, 822 (10th Cir. 1999).

[529]42 U.S.C. § 2000 bb (et. seq), see supra notes 207-213.

[530]See Burwell v. Hobby Lobby, Inc. 134 S. Ct 2751, 2779 (2014), supra at notes 214-217.

women's rights and the ACA decried it as a blatant attack on women's health and family planning.

> While the right cheered and the left wept, advocates for native religious rights were left scratching their heads. After all, Indian tribes and their members have attempted to use RFRA since it was enacted to protect sacred land from desecration, maintain access to religious sites, and otherwise protect their religious freedoms, only to be told over and over again that the challenged government activity did not impose a substantial burden on their free exercise of religion."[531]

The Supreme Court also found only accommodation and no establishment clause problems with the use of federal personnel, land transfers and congressional funding decisions to protect the continued display of a crucifix surrounded by federal land[532]; and the Court found no establishment issues with Christian prayer preceding local legislative council meetings.[533] Congress joined the parade with a recent law allowing the transfers of the Mount Soledad cross and its federal land to private ownership, despite a Ninth Circuit ruling that the cross was an unconstitutional endorsement of religion[534].

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[531]Winter King "Could the Hobby Lobby ruling Have Saved the San Francisco Peaks?" Indian Country Today, (7/15/14) accessed at http://indiancountrytoday medianetwork.com/ 2014/07/15/could-hobby-lobby-ruling-have -saved (4/19/2015) It is note worthy, however, that the Supreme Court denied certiorari in the Navajo Nation case, supra note 212, after the Ninth Circuit failed to find a substantial burden. See Navajo Nation, et al v. United States Forest Service, et al 129 S.Ct 2763 (2009).

[532]Salazar v. Buono, 559 U.S. 700, 715-722 (2010)

[533]Town of Greece N.Y. v. Galloway, 134 S. Ct. 1811, 1824-1828 (2014).

[534]See Kristina Davis "Soledad Cross Land Transfer Approved", (Dec. 12, 2014) accessed at http://www.utsandiego.com/news/2014/dec/12/soledad-cross-transfer-congress-land/all?p (4/19/2015) The Ninth Circuit had previously held that the cross on federal land conveyed a message of governmental endorsement of Christian religion that violated the Establishment Clause. See Trunk v. City of San Diego, 629 F.3d 1099, 1117-1125 (9th Cir. 2011). The Ninth Circuit will revisit the establishment clause soon in the case of Freedom From Religion foundation, Inc. v. Weber 951 F.Supp.2d 1123 (D. Montana 2013) where the district court formed that the statute of "Big Mountain Jesus", located for almost 60 years on leased federal land, surrounded by the Big Mountain Ski Area, had historical value and did not violate the establishment clause. 951 F. Supp.2d at 1134-1136.

In sum, the federal government – Court and Congress – seem, perhaps, more inclined lately to guard the spiritual essence of symbols and places – and this might include Indian sacred sites, at least if there is no expansion of Indian sovereignty, and no interference with the gain seeking that the United States might to make on "what is, after all *its* land."[535]

In the end, Lyda Conley might be partially satisfied – pleased that the tiny cemetery and its mystical aura has survived the full thrust and weight of urbanism. It exists, for the time being, in a web of case law, statutes and history. But, she, and her resolute kinspeople patriots – such as Jan English and Holly Zane – would be still wary that the pendulum of soulless, expedient economic gain seeking might swing back toward the fragile miner's canary[536] in the central city. She would hope, along with her modern relatives, that this sacred heart, still beating in the desultory urban core, could support the Kansas Wyandots in their quest for recognition, and be an alienable, invaluable part of enduring sovereign future.

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[535]See Lyng, supra note 514, 485 U.S. at 453 . . . The proprietary tone of Lyng is, of course, less applicable to situations such as Huron Cemetery, which are under treaty and, one might assume, under the holdings that accord treaty rights the status of full beneficial ownership. See U.S. v. Shoshone Tribe, supra note 346, 304 U.S. at 117. But, then, Senator Brownback's Bill, which preserved the sacredness of Huron Cemetery, also amounted to a Federal usurpation of the Oklahoma Wyandotte's vested economic rights.
[536]Felix Cohen wrote:

> [T]he Indian plays much the same role in our American society that the Jews played in German. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere, and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

Cohen, described as "The Blackstone of American Indian law was quoted by Steven McSloy "The 'Miner's Canary': A Bird's Eye View of American Indian Law and Its Future", 37 NEW ENGLAND L. REV. 733 (2003); see also Rennard Strickland, "Indian Law and the miner's Canary: The Signs of Poison Gas" 39 CLEV. ST. L. REV. 483 (1991)