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Treaty-Based Exclusions from the Boundaries and Jurisdiction of the States

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TREATY-BASED EXCLUSIONS FROM THE BOUNDARIES AND JURISDICTION OF THE STATES

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I. INTRODUCTION

The Johnson County, Kansas codes officer, charged with the personal service of citations for the unlawful sale of fireworks on Shawnee Reserve 206, probably should have mailed them, as had been done in the past. On the other hand, Jim Oyler, Jr., who was fortunate to escape prosecution after pushing an official around and breaking his cell phone a year and a half earlier,[1] probably should have shown restraint. Tensions run high on Lot 206, however, and restraint has seldom been the watchword.[2] Jim Oyler, Jr., when confronting the officer on the roadway leading into the 94-acre parcel, asserted the sovereign jurisdiction of the United Tribe of Shawnee Indians (UTOSI) over the area, charged the officer with violating it, and closed the gate to Lot 206, thus preventing the official from leaving. Rattled, the officer radioed for back up. Jim Oyler, Sr., the irascible, but often-realistic principal chief of the UTOSI, came upon the escalating scene, recognized the potential for real trouble, and moved to defuse it. He was starting to open the gate when the back-up unit's speeding squad car crashed into it, sending the seventy-year-old chief flying through the air. Oyler, Sr. was bruised, but unbowed. It was just another day in the political, legal, verbal, and sometimes physical war that has waged for a quarter century between the self-proclaimed little tribe on its restricted Indian land base in the midst of one of the wealthiest urban counties in the United States and the organized entities of local, state, and federal government that are increasingly unamused by Oyler's incessant intransigence.[3]

The Oylers' assertion of sovereignty on Lot 206, and their resistance to the jurisdiction of the state and county have a rich and tangled past.[4] The Kansas land base, at one time comprising nearly 1.6 million acres, was created and guaranteed under the Shawnee treaties of 1825[5] and 1831.[6] The Treaty of 1854, drafted as a prelude to western expansion and to the formation of the Kansas

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[1] *See* John W. Ragsdale, Jr., *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. REV. 311, 328 (2000) [hereinafter, *Recognition*].

[2] *See generally id.*

[3] *See* John W. Ragsdale, Jr., *The United Tribe of Shawnee Indians: Resurrection in the Twentieth Century*, 68 UMKC L. REV. 351 (2000) [hereinafter, *Resurrection*].

[4] *See generally id.*

[5] Treaty with the Shawnees, 7 Stat. 284 (Nov. 7, 1825).

[6] Treaty with the Shawnees, 7 Stat. 355 (Aug. 8, 1831).

Territory, ceded most of this land back to the United States, but confirmed 200,000 acres of allotments to Shawnee individuals primarily in what was to become present-day Johnson County.[7] Neither the treaty nor the ensuing allotments disrupted the continuity of the nation-to-nation relationship between the Shawnee Tribe and the United States.[8] Rather, the earlier treaty guarantees and the restrictive state enabling legislation was deemed unabrogated and unchanged.[9] The attempts by Johnson County to tax the individual lands and to force foreclosures were held preempted and void.

Yet, the Supreme Court of the United States could not protect the Shawnee from the inexorable push of the surrounding civilization. Like the Cherokee of Georgia, who twenty-five years before, had similar treaty, statutory and Supreme Court confirmations of their sovereignty,[10] the Shawnee were vulnerable to extra-legal pressures from the encircling and numerically-dominant white society. Squatters, trespassers, grafters, opportunists, entrepreneurs, and fringe-group zealots from both sides of the Civil War forced abandonments, forged deeds, or secured one-sided sales from the beleaguered Shawnee.[11] The Shawnees' legal hold on their individual allotments, tenuous from the outset, melted away like ice in the Kansas summer sun. By the end of the 1860's, most had left Kansas for the Oklahoma Territory where, pursuant to an agreement, they lived in the Cherokee Nation.[12] All that remained of the once vast reserve was the restricted allotment first granted to Newton and Nancy McNeer and the considerably smaller Blacksnake property, which lay to the north.[13]

One hundred years passed. The title to the core of lot 206 descended by intestacy to scores of Indian and non-Indian beneficiaries and with each passing became more fractioned into common, undivided interests, which were far less

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[7] Treaty with the Shawnees, 10 Stat. 1053 (May 10, 1854). The tribe was referred to, in the preamble, as the "now united tribe of said Shawnee Indians", a reference induced by the facts that Shawnee bands had arrived on the reserve at different times, from different places, including Ohio, and Cape Girardeau, Missouri, and pursuant to different agreements. *Id.* The tribe agreed to amendments to the treaty on August 21, 1854 and referred to itself as the "United Tribe of Shawnee Indians." *See* Amendments, 10 Stat. 1053, 1059 (August 21, 1854). The name "United Tribe of Shawnee Indians," or "UTOSI," is currently used by Jim Oyler in litigation and formal political discourse.

[8] *In re* Kan. Indians, 72 U.S. 737, 755 (1866).

[9] *Id.*

[10] *See* Worcester v. Ga., 31 U.S. 515 (1832).

[11] GEORGE MANYPENNY, OUR INDIAN WARDS, 126-27 (1880) [hereinafter, MANYPENNY]. Manypenny was the Commissioner of Indian Affairs who negotiated numerous treaties with tribes, such as the Shawnee. These treaty tribes held reserves along the line formed generally by the western border of Missouri and Iowa and regarded, somewhat ironically, as the permanent Indian frontier. *See* H. CRAIG MINER & WILLIAM E. UNRAU, THE END OF INDIAN KANSAS, 5 (1978).

[12] *See* ARTICLES OF AGREEMENT BETWEEN THE SHAWNEE AND THE CHEROKEE, (June 7, 1869) reprinted in 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY 717 (1999).

[13] *See* An Act to Provide for the Partitioning of Certain Restricted Indian Land in the State of Kansas, Pub. L. No. 97-344, 96 Stat. 1645 (1982) [hereinafter Partitioning Act].

usable.[14] In 1974, Jim Oyler, Sr., the great-great-great grandson of Newton and Nancy McNeer, moved onto the then-vacant Lot 206[15] and began several decades of struggle to unify the fractured title and simultaneously regenerate the sovereign flame of the Shawnee Tribe in Kansas. The efforts at reunification, which included conveyances, quitclaim deeds, and adverse possession under special federal legislation,[16] were frustrated substantially by a perplexing series of federal court orders and the obstinacy of the Bureau of Indian Affairs (BIA). The BIA, acting inexplicably contrary to its earlier suggestions and assurances, refused to confirm the voluntary conveyances to Oyler of Indian undivided interests.[17] The district court, equally unconvincingly, declined to recognize Oyler's adverse possession of the non-Indian interests under state law.[18] The court's subsequent physical partition of the tract left Oyler in solitary possession of about twenty-five acres and the remainder of the tract as an unwieldy compendium of restricted Indian and unrestricted non-Indian interests.[19]

The quest for recognition of the continuing sovereign status of the UTOSI proved equally fruitless in the Tenth Circuit Court of Appeals.[20] Oyler argued, in the district court and on appeal, that the United States Supreme Court and federal treaties recognized UTOSI.[21] He claimed standing by blood descendency and physical possession of treaty land,[22] urged that Congress never had abrogated the core of the treaties,[23] terminated the tribe, or diminished the reservation.[24] Therefore, he asserted, the Department of the Interior and the BIA were bound by the provisions of Public Law 103-454[25] to add the UTOSI to the list of federally recognized tribes without the necessity of the tribe's successful negotiation of the extended administrative recognition process.[26]

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[14] Lot 206 originally included nearly 400 acres, but conveyances apparently made without the requisite federal approval reduced the tract to less than 100 acres before the turn of the nineteenth century. *See* John T. Dauner, *Heirs in Dispute Over Land, Casino*, KANSAS CITY STAR, Mar. 15, 1993, at B1. It is possible that some of these unapproved transfers might be vulnerable to avoidance under the Non-Intercourse Act, 25 U.S.C. § 177 (1994) or under the common-law principles recognized in County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234-36 (1985).

[15] *See Resurrection*, *supra* note 3.

[16] *See* Partitioning Act, *supra* note 13.

[17] *See* Oyler v. United States, No. 92-2104-JWL, 1993 WL 105119, at *1 (D. Kan. Apr. 2, 1993).

[18] *See* Oyler v. United States, No. 92-2104-JWL, 1993 WL 191573, at **2 -3 (D. Kan. May 6, 1993). Mr. Oyler has not shown by positive, clear, and unequivocal evidence that he has adversely possessed the unrestricted interests of any of his co-tenants . . . . The matter was not "brought home" to his co-tenants "by proof so as to preclude all doubt" of their lack of knowledge of what he intended. *Id. at 3.*

[19] Oyler v. United States, No. 92-2104-JWL, 1995 WL 152736, at *1, **10-12 (D. Kan. Mar. 17, 1995).

[20] United Tribe of Shawnee Indians v. United States, 253 F.3d. 543 (10th Cir. 2001).

[21] *Id.*

[22] Opening Brief for Appellant, United Tribe of Shawnee Indians v. United States, 253 F.3d 543 (10th Cir. 2001) (No. 00-3140) [hereinafter Opening Brief for Appellant].

[23] *Id.* at 30.

[24] *Id.* at 12; *see infra* notes 161-63, 223-28.

[25] *Id.* at 13; *see infra* note 203.

[26] *Id.* at 33-37.

The Tenth Circuit Court of Appeals never proceeded to the substantive merits of recognition or the binding reach of Public Law 103-454; instead it discerned that an unwaived, impenetrate barrier of federal sovereign immunity, coupled with the plaintiff's failure to exhaust administrative remedies, barred the UTOSI claim.[27] In affect, the Tenth Circuit applied a standing limitation on the UTOSI,[28] and imposed it with unusual vigor at the pleadings stage where a litigant generally needs to allege, but not prove, the injury-in-fact, causation, and redressability that would constitutionally entitle a litigant to raise claims before the federal court.[29] The Appellate Court held that the district judge did not have to presume plaintiff's allegations of tribal status as true, because defendant had mounted a factual, rather than a facial challenge to subject matter jurisdiction below.[30] In fact, the UTOSI had been precluded from presenting facts on the

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[27] *UTOSI*, 253 F.3d at 551.

[28] *Id.*

> UTSI argues that because the Shawnee tribe was recognized as a tribal entity by Congress in the 1854 Treaty and by the Supreme Court in *The Kansas Indians*, the BIA acted outside the limits on its authority by refusing to list UTSI as a recognized tribe, which effectively terminated its existing recognition contrary to section 103.
>
> UTSI's argument assumes the very factual issue at the heart of this litigation. UTSI can only prevail on its contention if we accept its bare assertion that it is the present-day embodiment of the Shawnee Tribe. The only evidence even arguably offered by UTSI to support this proposition is the fact that UTSI is based on land patented to Mr. Oyler's ancestor by the Treaty. While this fact may establish that Mr. Oyler's ancestor was a member of the Shawnee tribe and that Mr. Oyler is therefore a descendant of a tribal member, it says nothing about whether UTSI has maintained its identity with the Shawnee tribe and has continued to exercise that tribe's sovereign authority up to the present day. While the 1854 Treaty and *The Kansas Indians* recognized the sovereignty of the Shawnee Tribe in the nineteenth century, those events without more do not speak to the status of UTSI today.

Id. at 548.

The district court approached the ultra vires doctrine by determining that UTSI had no standing to claim the BIA had abridged the treaty rights of the Shawnee tribe because UTSI failed to demonstrate it was a party to that treaty. *See* United Tribe of Shawnee Indians v. United States, 55 F. Supp. 2d 1238, 1243 n.1, 1244 n.2 (D. Kan. 1999). In view of our determination that UTSI has not alleged sufficient facts to show a waiver of sovereign immunity under *Larson*, we need not address UTSI's arguments on appeal directed to standing. We note, however, that standing issues are clearly implicated by UTSI's insufficient factual allegations. *Id.* at 548, n.2.

[29] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990).

[30] *UTOSI*, 253 F.3d at 547. Motions to dismiss under Rule 12(b)(1) may take one of two forms. First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint. In addressing a facial attack, the district court must accept the allegations in the complaint as true. "Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject mater jurisdiction depends." In addressing a factual attack, the court does not "presume the truthfulness of the complaint's factual allegations," but "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)."

It appears from the record on appeal that defendants mounted a factual, rather than a facial challenge to subject matter jurisdiction below. "Accordingly, we review the

modern tribal status because the district court had stopped their testimony, asserting that primary jurisdiction lay in the BIA, and dismissed the case.[31]

The Tenth Circuit's express decision on sovereign immunity and exhaustion, as well as its implicit use of standing, were (or could have been) based on the fact that the Shawnee remnants in Oklahoma were recognized—or re-recognized—by Congress in late 2000.[32] The Oklahoma Shawnee thus became the presumptive legal heirs to the treaty rights, court cases, and statutory enactments that chronicled the Shawnee history in Kansas—and that still bound the physical parameters of Lot 206.[33]

Jim Oyler would not give up. He turned to the political avenue, seeking—however improbably—congressional action that confirmed the enduring—and now parallel — sovereignty of the UTOSI over, at least, the Oyler portion of Lot

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district court's dismissal for lack of subject matter jurisdiction de novo[, and its] findings of jurisdictional facts for clear error." *Id.* (citations omitted).

[31] Judge Van Bebber stated at trial:

> Well, I'm going to put a stop to this because I don't think it's relevant. . . there's nothing before the court to review from the Bureau of Indian Affairs. I'm going to hold right now that this is a matter of primary jurisdiction. They have primary jurisdiction of this case. And so whether or not the United Tribe of Shawnee Indians is a tribe or not is a matter yet to be determined by the Bureau of Indian affairs, not by this court. That is my ruling and that is my ruling on the Government's rule—

See Opening Brief for Appellant, *supra* note 22, at 41; *See also Recognition, supra* note 1, at 353.

[32] The Shawnee Tribe Status Act of 2000, 25 U.S.C .§ 1041, (2000). The Act states in part:

> (3) The Shawnee Tribe and the Cherokee Nation have concluded that it is in the best interests of the Shawnee Tribe and the Cherokee Nation that the Shawnee Tribe be restored to its position as a separate federally recognized Indian tribe and all current and historical responsibilities, jurisdiction, and sovereignty as it relates to the Shawnee Tribe, the Cherokee-Shawnee people, and their properties everywhere, provided that civil and criminal jurisdiction over Shawnee individually owned restricted and trust lands, Shawnee tribal trust lands, dependent Indian communities, and all other forms of Indian country within the jurisdictional territory of the Cherokee Nation and located within the State of Oklahoma shall remain with the Cherokee Nation, unless consent is obtained by the Shawnee Tribe from the Cherokee Nation to assume all or any portion of such jurisdiction.

25 U.S.C .§ 1041(3).

[33] The question of jurisdiction over the undivided interests of the Oklahoma Shawnee in Lot 206 is not directly addressed by the recognition legislation—perhaps because it was not contemplated by Congress, who was aware principally of the Shawnee position *vis a vis* the Cherokee Nation of Oklahoma. The Act states:

> The tribe shall have jurisdiction over trust land and restricted land of the Tribe and its members to the same extent that the Cherokee Nation has jurisdiction over land recognized by the Secretary to be within the Cherokee Nation and its members, but only if such land —
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> (1) is not recognized by the Secretary to be within the jurisdiction of another federally recognized tribe[;][.]

25 U.S.C.A .§ 1041f (2000).

206.[34] Kansas Representative Dennis Moore was unable to muster the requisite political will, individual or collective, and urged Oyler to complete the administrative recognition process, however futile.[35]

As the Oylers contemplated these unfulfilling options with growing despair, they continued to assert the prerogatives of a restricted Indian land base. They sold cigarettes untaxed by the State of Kansas, refused to pay local property taxes, and dispensed fireworks declared unlawful within the confines of Johnson County. With regard to these non-governmental, revenue-generating activities and the predictable hostile response, the Oylers began the assertion of a somewhat singular defense that had floated through some of the earlier cases. That defense was based on the lack of civil jurisdiction within Johnson County, and did not depend on the presence of a preemptive sovereignty within them.

II. WHEN SOVEREIGNS COLLIDE: JUDICIAL RESOLUTION OF CONFLICT

Sovereignty, like love, Paris, or perhaps obscenity, has artistic contours and probably must be perceived rather than defined or explained. The world of law is practical, however, and necessitates at least efforts at precision. A functional description of Indian sovereignty comes from *Williams v. Lee,*[36] where the Court viewed it as "the right of reservation Indians to make their own laws and be ruled by them."[37] In another sense, sovereignty is the power to initiate and insulate the internal laws.

If sovereigns of generally similar dignity, arguably including tribes and states, collide in a state of nature without an overarching, authoritative voice, resolution would depend on force or negotiation rather than legal principle. However, if the contending parties are overseen by a sanction-wielding sovereign of a higher order, such as the federal government, or if a lesser sovereign conflicts with a dominant one, then a resolution can be based on the intent of the superior sovereign. Thus, if an authorized adjudicative body, such as the Supreme Court, discerns an intent on the part of a superior sovereign to prevail in the event of—and to the extent of—conflict with concurrent jurisdictions, then as a matter of legal principle, the lesser jurisdiction must give way at least to the extent of the conflict. For a general example, when New Mexico, with a concurrent but subordinate jurisdiction over federal public lands, passed a livestock law that purported to allow state control over wild horses and burros that federal legislation had committed to the exclusive protective jurisdiction of the federal land managers,[38] the Supreme Court easily found the state law to be preempted, under principles of supremacy, to the extent of the conflict.[39]

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[34] Letter from Dennis Moore, Representative from the Third District, of Kansas to Jimmie D. Oyler, (November 6, 2001) (on file with author).

[35] *Id.*

[36] 358 U.S. 217 (1959).

[37] *Id.* at 220.

[38] The Wild, Free-roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-1340 (2000). Section 3(a) of the Act, 16 U.S.C., § 1333(a) provides that all unbranded and unclaimed horses and

The Supreme Court sometimes appears to engage in an independent, substantive balancing of state, Indian, and federal interests in order to resolve the jurisdictional conflicts and decide the preemption issues that arise between the federal government and tribes on one hand and the states on the other. Its efforts are, however, more properly seen as an attempt to determine or hypothesize the likely wishes of Congress in a situation such as that before the Court, in which the legislature has not made an express statement.[40] Congress can, when authorized by the Constitution and backed by the Supremacy Clause,[41] thus prevail in a case of conflict between the tribes and the states, either when it makes its intent clear or when the Court, after balancing the variables, postulates a preemptive desire.

In the general sweep of preemption law that includes, but extends beyond, Indian and state conflicts, the Court may, in resolving the issue of Congress' presumptive intent to preempt, consider a variety of factors including: express statutory or treaty language, legislative history, the nature of the subject matter, the pervasiveness of the legislation, the need for uniformity, and the frustration by conflict of the dominant federal purposes.[42] The Supreme Court may, however, short circuit the balancing process and the hypothesizing of intent by finding that one of the parties did not have the basic legal or constitutional authority to even enter the jurisdictional arena, much less to prevail in the event

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burros on the public lands are committed to the respective jurisdictions of the Secretary of the Interior and the Secretary of Agriculture to be protected and managed as components of the public lands.

[39] Kleppe v. New Mexico, 426 U.S. 529 (1976).

> The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those state laws conflict with the . . . Property Clause, the law is clear: The state laws must recede.

Id. at 543. The federal government can preempt the tribes under the doctrine of plenary power. *See* United States v. Kagama, 118 U.S. 375, 384-85 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). For a compelling argument that there is no supreme federal power over Indian tribes, see Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002) [hereinafter, Clinton]. *See infra*, note 47, 49.

[40] DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, Jr., FEDERAL INDIAN LAW, 437 (4th ed. 1998) [hereinafter, FEDERAL INDIAN LAW].

> There is no "balancing" for a court to do in a preemption analysis. The court's job is to inquire into congressional intent. A consideration of the different governmental interests is relevant to the inquiry since Congress typically engages in balancing in its legislative role. A court merely asks how Congress intended to accommodate these interests. By contrast, courts in other areas of law balance interests themselves to determine what the outcome ought to be, such as in nuisance cases or in fashioning injunctions.

[41] U.S. CONST. art. IV, cl. 2.

[42] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973). In cases of conflict between the states and tribes, the court may consider similar variables, but may reverse the presumption from one favoring the state to one favoring the tribes. *See* FEDERAL INDIAN LAW, *supra* note 40, at 435. *See infra* note 87.

of conflict. For another general example, if the Court determines that the federal government lacks the basic constitutional authority under the Interstate Commerce Clause[43] to pass a statute regulating the use of guns in the proximity of schools, then the issues of conflict with the local legislation and the discernment of preemptive intent never arise.[44] Rather, the issue is clearly and completely settled by the judicial determination of the lack of constitutional legislative initiative on the part of the federal government.[45]

In the long history of the federal Indian law, the issue of congressional authority over Indian affairs has been largely uncontested.[46] The constitutional empowerment of Congress to regulate commerce with the Indian tribes[47] and to participate in the forming of nation-to-nation treaty agreements has long convinced the Supreme Court that Congress not only has the initiative in Indian affairs, but the absolute power to abrogate tribal sovereignty[48] or preempt in favor of the tribes in the event that treaties or statutes clash with state law.[49]

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[43] U.S. CONST. art. I, § 8, cl. 3.

[44] United States v. Lopez, 514 U.S. 549, 561 (1995).

[45] *Id.*

[46] *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984).

> The mystique of plenary power has pervaded federal regulation of Indian affairs from the beginning. While the Articles of Confederation contained a general power over Indian affairs, the Constitution enumerates only one power specific to these affairs, the power "[t]o regulate Commerce ... with the Indian tribes." The Plenary Power Doctrine, a fixture of American Indian law since John Marshall provided its first justification in 1832, can be traced not only to this commerce power, but also to the treaty, war, and other foreign affairs powers, as well as the property power. Each has been characterized, historically, as vesting Congress (or the President) with almost unlimited power in contexts not involving Indians.

Id, at 199; *see supra* note 40.

[47] U.S. CONST. art. I, § 9. cl. 3 states: "The Congress shall have power . . . [t]o regulate Commerce . . . with the Indian Tribes." *See generally* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995).

[48] *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued by dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, the legislative power might pass laws in conflict with treaties made with the Indians.
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> ....
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> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into

Preemption issues were relatively simple in the years before allotment. The tribal land bases were areas of uniform federal and Indian interests and were generally uncomplicated by the inclusion within the reservation boundaries of state, local or private non-Indian interests. Indeed, one might have said that the unbreached blocks of treaty-protected Indian country[50] generally amounted to

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> between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

Lone Wolf, 187 U.S. at 5, 65-66 (citations omitted).

[49]*See* Worcester v. Georgia, 31 U.S. 515 (1832).

> If the objection to the system of legislation, lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.
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> They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.
>
> They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.
>
> They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

Id. at 561-62.

It has been suggested that, in *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court announced that *Worcester* is no longer good law. Justice Scalia stated:

> 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" entities, it was "long ago" that "[sic] the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries.

523 U.S. at 361.

Justice Scalia's observation is, however, tempered by footnote four, which states:

> Our holding in Worcester must be considered in light of the fact that '[t]he 1828 treaty with the Cherokee nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory.'

523 U.S. at 361, n.4. *See infra* notes 73-86, 130.

[50]The term "Indian Country" was subsequently employed in a federal jurisdictional statute that recognized supreme federal jurisdiction over all lands within Indian reservations, allotments, and dependent Indian communities. Indian country was defined in 18 U.S.C. § 1151 (2000) as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and,

federal preemption of a field or precluded the assertion of any state legislative initiative within such areas, regardless of conflict.[51] This monolithic stance was to change dramatically with the passage of the Dawes Act in 1887,[52] and with the ensuing use of allotment in severalty as a technique to break down tribalism and force assimilation.[53]

Allotment to Indian individuals of parcels comparable in size to those available under the various federal land dispositions acts, such as the Homestead Act,[54] created "surplus" lands within the reservations that were sold to non-Indians, purportedly (and uncontestedly) for tribal benefit.[55] With non-Indians

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> including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

[51]A line of cases typified by *United States v. McBratney*, 104 U.S. 621 (1881), found some states to have criminal jurisdiction over non-Indians for crimes on a reservation. Such results, however, stemmed purely from interpretation of treaties and federal status rather than from typical preemption balancing. In *McBratney*, the Court noted:

> The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original states in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remains in force.

McBratbey, 104 U.S. at 624.
Such results are consistent with modern preemption in that they focus on the intent of Congress, express or implied, as the determinative factor.

[52]The Indian General Allotment Act of 1887 (Dawes Act) Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331-384, 339, 341, 342, 348, 349, 354, 388 (1887)).

[53]*See generally* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934, 6-25 (1991).

[54]12 Stat. 413 (1862). *See generally* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 387-434 (1968).

[55]Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

*Id.*at 568.

having both constitutionally protected private property within reservation jurisdictional boundaries and legal rights of access to it, it was no longer possible to argue that state or local governments, as protectors of private, non-Indian citizens, had no legitimate interests within reservation boundaries. Perhaps the federal and tribal interests would still predominate in a judicial balancing to determine preemptive legislative intent, but the contest would now be closer.

It was still too early to tell how preemption would play out in fact rather than theory. Between 1887 and 1934, the tribes, rocked by allotment and assimilative efforts, were rendered almost inert as political entities. This was to change with the passage of the Indian Reorganization Act in 1934,[56] and even more so when the draconian, post-war threat of termination of the successful tribes abated in the late 1950's.[57] As the 1960's dawned, the tribes, protected against further allotment,[58] retrofitted politically for a more proactive and interactive future,[59] and generally (though not literally) assured against further terminations,[60]

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[56]Ch. 576, 48 Stat. 984 (codified and amended at 25 U.S.C. §§ 461-79 (1934)).

[57]*See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977); *see also* DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1986).

[58]25 U.S.C. § 461 (2000) states, "[o]n and after June 18, 1934, 'no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.'"

[59] 25 U.S.C. § 476(a) (2000) provides in part that, "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto." 25 U.S.C. § 477 (2000) authorizes incorporation for business purposes:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor[e] interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law;but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

[60] House Concurrent Resolution 108 (H. R. CON. RES. 108, 83rd Cong. 67 Stat. B132 (1943)), which announced the United States policy of ending federal supervision of Indians "as rapidly as possible" was abandoned in practice by the early 1960s (*see* FEDERAL INDIAN LAWS, *supra* note 40, at 226), but was not formally repudiated by Congress until decades later. *See* 25 USC § 2502(F). The current policy of the United States is expressed in 25 U.S.C. § 450a(b) (1988):

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to

became much more aggressive. The states responded with efforts to increase their control of activities within the jurisdictional boundaries of Indian country.[61]

Critical Supreme Court preemption cases from the next several decades, such as *Williams,*[62] *McClanahan,*[63] and *White Mountain Apache Tribe*[64] resulted in on-balance protection of federal and tribal interests, but still recognized the fundamental legitimacy of the state camel thrusting its jurisdictional nose within the confines of the reservation tent.[65] It seemed, however, that the preemptive capacity of state jurisdiction was practically limited to non-Indians and non-Indian land.[66] Indeed, this racial and proprietary divide seemed fairly definite as not only a way of limiting state jurisdictional power, but a measure of tribal reach as well—at least if the Indian legislation was not preceded by a delegation or limitation of authority under federal treaty or statute.[67] Cases beginning with *Oliphant,*[68] and extending through *Montana*[69] and *Strate,*[70] employed a judicially

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> supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economics of their respective communities.

[61] FEDERAL INDIAN LAW, *supra* note 40, at 419.

[62] *Supra*, note 37.

[63] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

[64] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[65] *Id.* at 144-45. The Court stated:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty . . . on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. (citations omitted).

[66] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 n.18 (1987).

[67] In United Sates v. Mazurie, 419 U.S. 544 (1975), Justice Rehnquist stated:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'

Id. at 556-57 (citations omitted).

[68] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding Indian tribes do not have criminal jurisdiction over non-Indians absent an affirmative delegation of power from Congress).

[69] Montana v. United States, 450 U.S. 544 (1981) (holding tribal regulating jurisdiction over the conduct of non-members on non-Indian land within the reservation exists only in limited circumstances relating to consent or impact on tribal governance).

created concept of "implicit divestiture"[71] to strip the tribes of the legal initiative to legislate or adjudicate regarding the civil and criminal affairs of non-tribal members and their property. It thus appeared within the fractured, tortured interior of the post-allotment reservations that only the federal government among the various representative sovereigns could deal comprehensively with all the variables of person and property. But then came *Nevada v. Hicks*.[72]

Floyd Hicks, a member of the Fallon-Paiute Shoshone, a federally recognized tribe, lived on tribal land within the undiminished borders of the reservation. Nevada state officials suspected Hicks of illegal hunting off the reservation, and taking a protected species of mountain sheep. State officers searched his trailer on several occasions—unsuccessfully and allegedly unconstitutionally. Hicks wanted recourse for the searches and damage to his property, and he brought an action in tribal court. The state and the various officials sought a declaratory judgment in federal district court that the tribal court lacked subject matter jurisdiction over the various claims. The Ninth Circuit Court of Appeals felt that the tribal court had jurisdiction and based its decision primarily on the fact that the conduct complained of had occurred on tribal land, even though that of a non-tribal member.[73] The court felt that tribal sovereignty flowed from such ownership of the land and that the attempt to enforce state criminal laws against a tribal member on tribal land interfered with essential sovereign rights of self-government.[74]

The Supreme Court not only reversed the Ninth Circuit on the issue of a tribe's jurisdiction over non-members for actions on tribal land[75] but, in seemingly gratuitous fashion, went beyond and held that the state had an inherent jurisdiction, concurrent with the federal government that would permit search

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[70] Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding a tribe's adjudicative jurisdiction as to non-members does not exceed its legislative jurisdiction).

[71] The language of "implicit divestiture" was used descriptively rather than prescriptively in United States v. Wheeler, 435 U.S. 313 (1978) where the Court noted that, "[t]he areas in which. . . implicit divestiture of sovereignty has been held to have occurred are those involving relations between an Indian tribe and non-members . . . . " *Id.* at 326. The idea that the court can determine that tribes are "implicitly divested" of powers that are inconsistent with their status as diminished, dependant sovereigns (*see Oliphant*, 435 U.S. at 209-10) has been hotly contested. *See* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994).

[72] 533 U.S. 353 (2001).

[73] Nevada v. Hicks, 196 F. 3d. 1020 (9th Cir. 2000).

> In this case, the Tribe clearly had the power to exclude state officers from its land and to regulate the behavior of state officials present on its land pursuant to limited tribal permission. There was no general cession of jurisdiction by the Tribe; instead there was a controlled, limited permission for state officials to come onto tribal land and comport themselves within the parameters of that permission. Disputes regarding the officials' behavior under this permission are within the jurisdiction of the Tribe.

Id. at 1029.

[74] *Id.*

[75] 533 U.S. at 359-60.

and seizure of tribal members on tribal land.[76] Prior to this case most observers assumed that the course of Supreme Court jurisprudence was tending toward a confinement—but confirmation—of tribal sovereign initiative and superior civil regulatory jurisdiction within the boundaries of tribal property.[77] The operative premise was that land ownership, even by a diminished sovereign, necessarily contained the power to exclude, and the less-extreme power to regulate.[78] Correspondingly, it was assumed that, under *Montana* and *Strate*[79], a tribe was implicitly divested from the exercise of civil jurisdiction and a state empowered only in the cases of non-member actions on non-tribal land.[80]

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[76] *Id.* at 361-65.

[77] *See, e.g.*, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW, 72-78, 128-41 (3d. ed., 1998); Allison C. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Courts' Changing Vision*, 55 U. PITT. L. REV. 1 (1994) (cited in *Nevada v. Hicks*, *supra* note 74, at 1026.

[78] *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679 (1993).

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others. In taking tribal trust lands and other reservation lands for the Oahe Dam and Reservoir Project, and broadly opening up those lands for public use, Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.

Id. at 689.

Certainly,the power to regulate is of diminished practical use if it does not include the power to exclude: Regulatory authority goes hand in hand with the power to exclude. *Id.* at 691 n.11. (citations omitted).

[79] *See supra*, notes 70-71.

[80] The Ninth Circuit in *Nevada v. Hicks*, 196 F.3d. 1020, (1999) said the following:

> We find that the *Montana* presumption against tribal court jurisdiction does not apply in this case. Instead, in line with *Strate* . . . we look to the tribe's power to exclude state officers from the land at issue. The Tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land. *See Strate*, 520 U.S. at 456, 117 S. Ct. 1404 (land treated as non-Indian fee land because Tribe "cannot assert a landowner's right to occupy and exclude"); South Dakota v. Bourland, 508 U.S. 679, 692, 113 S. Ct. 2309, 124 L. Ed.2d. 606 (1993) ("when Congress has broadly opened up such land to non-Indians [i.e., abrogated the tribe's power to exclude], the effect . . . is the destruction of *pre-existing* Indian rights to regulatory control") (emphasis added); Brendale v. Confederated Tribes, 492 U.S. 408, 433-448, 109 S. Ct. 2994, 106 L. Ed.2d. 343 (1989) (opinion of Stevens and O'Connor, JJ.) (tribe can zone non-member fee land as long as tribe retains power to control access to the land); Confederated Salish Salish and Kootenai Tribes v. Namen, 665 F. 2d. 951 (9th Cir. 1982) (tribe has power to regulate structures built by non-members which extend over the lake bed held in trust for tribe).

Id. at 1028-29.

Justice Scalia, focusing first on the issue of tribal court jurisdiction, and wielding his judicial pruning shears with palpable relish, made the cut a full level deeper.

> Respondents and the United States argue that since Hicks's home and yard are on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry. Not necessarily. While it is certainly true that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*, the reason that was so was not that Indian ownership suspends the "general proposition" derived from *Oliphant* that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except to the extent "necessary to protect tribal self-government or to control internal relations." *Oliphant* itself drew no distinctions based on the status of land. And *Montana*, after announcing the general rule of no jurisdiction over nonmembers, cautioned that "to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," -- clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations." It may sometimes be a dispositive factor. . . . But the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.[81]

Scalia was not through. Turning more or less *sua sponte* to the issue of the states' concurrent jurisdiction, he avoided the vacuum emergent after *Duro v. Reina*[82] where an implicit divestiture of tribal criminal jurisdiction over non-member Indians did not immediately result in the expansion of state power, but only in the residuum of an unexercised federal prerogative.[83] After first disempowering the tribe, Scalia magnanimously invited the state in, for this and other situations in the future. His conclusion was that the state's on-reservation exercise of criminal process for off-reservation crimes was not an impairment of tribal self-government or internal relationships,[84] even in cases of tribally owned land, and his language seemed to sweep beyond into the civil realm.[85] Indeed, it

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[81] *Nevada*, 533 U.S. at 359-60 (citations omitted).

[82] 495 U.S. 676 (1990).

[83] The result in *Duro* forced Congress to enact 25 U.S.C. § 1301(a), which affirmed the power of tribes to exercise a criminal jurisdiction over non-member Indians on the reservation. *See* FEDERAL INDIAN LAW, *supra* note 40, at 540-41.

[84] *Nevada*, 533 U.S. at 364.

[85] *Id.* at 361-62.

> 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 the reservation's border. Though tribes are often referred to as "sovereign" entities, 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."

seemed to imperil the presumption against state jurisdiction within reservation boundaries, clearly stated from the Marshall era through *Cabazon Band*.[86]

The rising tide of implicit divestiture and state jurisdiction had, however, seemingly left an island, and on this foothold, Jim Oyler and the United Tribe of Shawnee Indians were prepared to make a legal stand, which could have considerable future implications for Johnson County, Kansas, and beyond.

III. THE UNBROKEN EXCLUSIVENESS OF THE REMOVAL TREATIES

The Supreme Court's shifting of the preemption presumption in *Hicks* did not affect Lot 206, Oyler concluded. Rather, Lot 206 was, by virtue of language in the Shawnee Treaty of 1831[87], and the subsequent federal confirmation in the Kansas Admission Act of 1861[88], a virtual hiatus within the jurisdictional and political range of the state. The treaty stated: "And the United States guarantee that said lands shall never be within the bounds of any State or territory, nor subject to the laws thereof . . . ."[89]

. . . .

> 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. ". . .When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land.

Id. (citations omitted).

[86]California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 n.18. Justice White, writing for the majority in *Cabazon Band* held that state and local efforts to regulate gambling within reservation boundaries were preempted (480 U.S. at 221-22) and stated that some court members were confused on the presumptions about preemption:

> Justice Stevens appears to embrace the opposite presumption—that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in White Mountain Apache Tribe v. Bracker, in the context of an assertion of state authority over the activities of non-Indians within a reservation, "[t]hat is simply not the law." It is even less correct when applied to the activities of tribes and tribal members within reservations.

480 U.S. at 216 n.18 (citation omitted).

David Getches, Charles Wilkinson and Robert Williams concluded, in 1998, see FEDERAL INDIAN LAW, *supra* note 40, that there is a presumption in favor of state regulation which may include federal land, *see, e.g.*, Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), but that "Indian preemption law stands for precisely the opposite proposition: the Court has applied a strong presumption against the validity of state regulations in Indian country." FEDERAL INDIAN LAW at 435. *Hicks* goes a considerable way toward the elimination of the presumption against state regulatory capability on tribal lands.

[87] *See* Treaty with the Shawnees, 7 Stat. 355 (Aug. 8, 1831).

[88]Kansas Admission Act, Ch. 20 § 1, 12 Stat. 126, 127 (1861).

[89] Treaty with the Shawnees, art. 10, 7 Stat. 355, 357.

The United States Congress had confirmed this promise, and conditioned Kansas' entrance into the union in 1861 with an admission act that provided:

> That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas.[90]

It was clear to the Supreme Court in 1866, furthermore, that the Treaty and Admission Act guarantees survived the impacts of allotment in severalty and precluded the efforts of Johnson County to tax individually held parcels such as Lot 206.[91] Congress could, of course, abrogate this treaty wall against state legislative initiative,[92] but, with the singular exception made for state criminal jurisdiction over Indian country in Kansas,[93] this had not happened. In fact, in a critical case dealing with state criminal jurisdiction over Kansas Indian country, Lot 206, and Jim Oyler himself,[94] the Tenth Circuit was careful to state that the Treaty of 1831 was *not* otherwise abrogated.[95]

The State of Kansas had not exercised its criminal jurisdiction with respect to the class "C" fireworks sold on Lot 206 by the Oylers, nor had it made a delegation of its Kansas Act criminal jurisdiction to Johnson County.[96] The

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[90] 12 Stat. at 127.

[91] The Kansas Indians, 72 U.S. 737, 755 (1866).

[92] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) ("When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress...). 187 U.S. at 566. *See supra*, note 48.

[93] *See* The Kansas Act, 18 U.S.C. § 3243 (1994). The Act, passed originally in 1940, provides:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the state in accordance with the laws of the state.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Id.

In 1953, Congress utilized the approach of the Kansas Act on a broader scale in Public Law 280. This Act, as amended, conferred mandatory criminal jurisdiction over Indian country in six states — Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *See* Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162(a) (1994)).

[94] Oyler v. Allenbrand, 23 F.3d 292 (10th Cir. 1994).

[95] The court "found no evidence that this treaty had ever been formally abrogated." *Id.* at 295.

[96] The State of Kansas has specifically declined to criminalize the sale of class "C" fireworks. K.S.A. § 21-3731, KAN. ADMIN. Reg. 22-6-7. Kansas does state that its fire prevention code, which excludes coverage of the sale of class "C" fireworks, is not intended to preempt local home rule action. K.S.A. § 31-134(b). However, the Kansas Attorney General has stated this is not a

Oylers thus contended that both Johnson County and the State of Kansas were precluded from any civil jurisdiction on Lot 206, including non-prohibitory regulations with criminal sanctions,[97] and that the county was barred from criminal jurisdiction over fireworks as well since the Kansas Act operated only in favor of the state, which had chosen not to exercise or delegate its power.[98]

The lynch-pin of Oyler's arguments was the fact that Lot 206 was covered by the 1831 treaty language stating, "said lands shall never be within the bounds of any State or Territory, nor subject to the laws thereof. . . ,"[99] and the fact that, under the Kansas Admission Act, Congress had reaffirmed that the treaty islands "constitute[d] no part of the State of Kansas" unless or until the signatory tribe so desired.[100]

This language was not some content-neutral or platitudinous boilerplate inserted casually in all federal Indian treaties and new state admission acts. Rather, the guarantee was a bargained-for exchange found in a relatively small group of post-1830 removal treaties. Prior to this date, numerous southeastern and northeastern tribes had forged treaty protection for the core of their traditional homelands.[101] The pace and direction of non-Indian westward expansion, however, produced conflicts with these tribal holdings. The Indian Removal Act of 1830[102] authorized the executive to renegotiate these early treaties and remove the tribes to lands in the Trans-Mississippi region that were beyond the reach of foreseeable expansion.[103] Negotiators had some convincing to do. They spoke chiefly of the federal inability to protect the tribes in their present location, and underscored the completeness of the legal and jurisdictional

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delegation of state criminal jurisdiction or authorization of any particular municipal action. *See* Kansas Attny. Gen. Opinion 91-48 (May 2, 1991). Class "C" fireworks, also known as "consumer fireworks", are generally legal in the majority of states, including Kansas. *See* Consumer Product Safety Commission "Fireworks" CPSE Document #012, *available at* http://www.cpsc.gov/ cpscpub/ pubs/012.html. Consumer fireworks contain less than 50 milligrams of powder and are contrasted with Class "B" fireworks, which are used in professional displays and are generally prohibited to consumers. *Id.*

[97] The distinction between regulatory and prohibitory measures, and the conclusion that only the latter falls within a delegation of criminal jurisdiction to a state or local entity was established by the Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209-210 (1987).

[98] *See* Board of County Commissioners of Johnson County Kansas v. Oyler, Case Nos. 01CC120, et al, District Court of Johnson County, Kansas, County Codes Division, Defendants' Reply Brief (filed April 1, 2002).

[99] Treaty with the Shawnees, art. 10, 7 Stat. 355, 357 (Aug. 8, 1831).

[100] *See supra* note 88. The possibility of tribal waiver was not discussed by the Tenth Circuit in *Oyler v. Allenbrand*, 23 F.3d 292 (10th Cir. 1994), nor is it likely to occur—especially since the Shawnee Tribe of Oklahoma, *see supra* notes 33-34, and its gambling associate, the Butler National Corporation, have designs on the portions of Lot 206 not controlled by the Oylers. *See* Butler National Corporation IGRA Gaming website *available at* http://www.butlernational.com/html/ igra_gaming.html

[101] FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 62-78 (Rennard Strickland, Charles F. Wilkinson, Eds. (1982)) [hereinafter COHEN].

[102] Ch. 148, 4 Stat. 411 (May 28, 1830).

[103] COHEN, *supra* note 101, at 80-81; *see also* FRANCIS PAUL PRUCHA, THE GREAT FATHER, VOL I, 183-213 (1984) [hereinafter PRUCHA] .

protection promised with regard to the substitute lands.[104] Thus, the Cherokee, Choctaw, and Ohio Shawnee were promised, as consideration for removal from the southeast and the Ohio Valley, new lands in the west that would never be within the bounds of any state or territory.[105]

What had been unforeseeable expansion in 1830 became an obvious torrent within several decades. New states and territories emerged around the removal lands and the impact of these extraordinary guarantees inevitably raised issues of jurisdiction. As proven repeatedly in federal Indian law, any congressional promise to Indian tribes was subject to unilateral, essentially unchallengeable abrogation.[106] Since the land-based sovereignty of Indian tribes has never been successfully lodged within the guarantees of the Constitution,[107] tribes cannot secure specific performance of broken treaty promises, but are left with, at best, compensatory remedies for the taking of property.[108] Thus, substantial parts of the promises against inclusion within state or territorial boundaries have been eroded without recourse since 1890 by legislative provisions conferring jurisdiction over certain activities on tribal lands to the surrounding entities.[109]

But this much still remains: the guarantees against inclusion and against state or territorial legislative initiative within tribal boundaries apply until or unless they are abrogated—and they work with a special completeness that transcends the ordinary and shifting balancing of preemption analysis. An early example of treaty-based exclusion of jurisdictional initiative came in a negligence action for a railroad accident occurring within the Indian Territory in 1882. The defendant pleaded the federal territorial statute of limitation. The court held, however, that the treaty guarantee against state or territorial jurisdiction was operative in 1882—despite a subsequent abrogation in 1889—and thus precluded the application of the statute of limitations.[110]

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[104] *Id.* at 214-269.

[105] *See* MANYPENNY, *supra* note 11, at 111-14 (1880).

[106] *See supra* notes 49, 93.

[107] *See* John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503, 527-34 (1991).

> Though termination effectively ended over thirty years ago and Congress has formally (if belatedly) renounced the policy, the residual, and not unrealistic, fear is that the federal mood could shift again, and another threat to the Indian lands could lurch forth from Washington. Does the Constitution present any possibilities for preemptive derailment of this congressional course? Historically, the answer was no, and the Supreme Court casually legitimized the shifting will of Congress with the backhanded, non-qualitative apology that congressional power over the tribes is plenary, political and beyond judicial review. However, modern scholars have persevered.

Id. at 528.

[108] *See* United States v. Sioux Nation of Indians, 448 U.S. 371, (1980). The compensatory remedy is exclusive. *See* Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

[109] F. Browning Pipestem, G. William Rice, *The Mythology of Oklahoma Indians: A Survey of The Legal Status of Indian Tribes in Oklahoma*, 6 AM. INDIAN L. REV. 259, 319 (1978).

[110] St. Louis & S. F. Ry. v. O'Loughlin, 49 F. 440 (8th Cir. 1892).

The treaty language of exclusion from state or territorial boundaries played a significant role in the Supreme Court's Oklahoma riverbed cases.[111] The resident tribes were able to use the language to help establish their title to the bed of the Arkansas River and overcome the ordinary presumption of title in favor of the state. The presumption sometimes called the navigability for title doctrine,[112] stems from several conceptually separate, but still interrelated principles. The state sovereign ownership principle, as an English common-law rule of property, posited bed ownership of navigable waters in the Crown, which was succeeded, following the Revolution, by the original thirteen states.[113] The equal footing doctrine holds that new states enter the union on the same political footing as their original predecessors,[114] and this equality of sovereignty can extend to ownership of the beds of navigable waters.[115] Finally, the court has discerned a fiduciary relationship, whereby the federal government holds the bed lands in trust for the emerging states.[116]

> More than 60 years ago the country now known as the "Indian Territory" was granted by the United States, by treaty, to the Cherokee and other nations of Indians now in that territory. The preamble to the treaty made with the Cherokee Nation on the 6th of May, 1828, declares that, it "being the anxious desire of the government of the United States to secure to the Cherokee Nation of Indians *** a permanent home, and which shall under the most solemn guaranty of the United States be and remain theirs forever,--a home that shall never in all future time be embarrassed by having extended around it the lines, or placed over it the jurisdiction, of a territory or state, nor be pressed upon by the extension in any way of any of the limits of any existing territory or state," etc. The terms of the treaty gave effect to these expressed desires of the government. The treaty with the Choctaw Nation of September 27, 1830, is of similar import. These treaties convey the lands described in them to the Indian nations named, in fee-simple, and under their provisions the only local laws and governments that were to obtain or have any force in that country, aside from the laws of the United States, were the laws and governments of the Indian nations inhabiting it. The government bound itself in the most solemn manner to exclude white people from the territory, and never permit the laws of any state or territory to be extended over it.

Id. at 442.

[111] Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

[112] *See* A. DAN TARLOCK, JAMES W. CORBRIDGE, JR., DAVID H. GETCHES, WATER RESOURCE MANAGEMENT, 5th Ed. 392 (2002) [hereinafter TARLOCK].

[113] Martin v. Waddell Lessee, 41 U.S. 367 (1842).

> For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable water and soils under them for their own common use, subject only to rights since surrendered by the Constitution to the general government.

Id. at 410 (cited in TARLOCK, *supra* note 112 at §8.02(3) (1996)).

[114] Coyle v. Smith, 221 U.S. 559, 566-67 (1911).

[115] Shively v. Bowlby, 152 U.S. 1, 48-50 (1894).

[116] *Id.; see also* Pollard v. Hagan, 44 U.S. 212, 223 (1845); TARLOCK, *supra* note 112, at §8.02(4). *Pollard's* supplemental theory that the trust stems in part from the federal inability to exercise its own "municipal sovereignty" (44 U.S. at 2) was finally refuted in *Kleppe v. New Mexico*, 426 U.S. 529 (1976) and *United States v. Gardner*, 107 F.3d. 1314, *cert. denied,* 118 U.S. 264 (1997).

The presumption, which assumes that title to the bed of navigable waterways passes automatically to new states at the time of their entrance into the union,[117] is a strong one, but is still a rebuttable issue of fact rather than an absolute rule of law.[118] The federal government was, at the least, a trustee with alienable title prior to statehood, and it could defeat the expectancy of the future state either by reserving the bed for its own uses inconsistent with state ownership,[119] or by passing bed title to a non-state entity such as an Indian tribe.[120] To rebut the presumption, however, requires strong evidence. The United States must be shown to have made a reservation or conveyance with definite language,[121] or to have known of special needs of the tribe in bed lands that would be clearly inconsistent with subsequent state ownership.[122] The presumption will continue un-rebutted in favor of the state if the language of the treaty is indeterminate with regard to bed title,[123] or if the unique needs of the tribe or federal government are not shown to be incompatible with subsequent state ownership.[124]

How, then, did the Cherokee and the Choctaw, whose treaties did not definitely reserve the bed of the Arkansas, and whose economy and life-ways were not distinctively based on fishing, prevail against Oklahoma on the issue of

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[117] Ralph Johnson and Russell Austin, summarizing Supreme Court jurisprudence, conclude that the test of navigability for title demands: 1) waters navigable in their ordinary and natural condition, for 2) commerce in the customary mode, 3) at the time of statehood. *See* Ralph W. Johnson and Russell A. Austin, Jr., *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1, 24-25 (1967), cited in TARLOCK, *supra* note 112, at 393.

[118] It was established by the end of the nineteenth century that Congress could convey the beds underlying navigable waters and defeat the title of future states, "in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively*, 152 U.S. at 48.

[119] *See* United States v. Alaska, 521 U.S. 1, 39-40 (1997) (holding that submerged lands of the National Petroleum Reserve with the Arctic National Wildlife Refuge did not pass to Alaska when it entered the union in 1959) (cited in TARLOCK, *supra* note 112, at 401).

[120] Idaho v. United States, 533 U.S. 262 (2001) (discerning clear Congressional intent to defeat state title and to confirm Executive's establishment of Coeur D'Alene tribal jurisdiction over bed of navigable lake).

[121] Montana v. United States, 450 U.S. 544, 552-54 (1981).

[122] *See* Puyallup Tribe of Indians v. Port of Tacoma, 717 F.2d. 1251 (9th Cir. 1983), *cert. denied,* 465 U.S. 1049 (1984) (stating that, "the grant must be construed to include the submerged lands if the government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant."). *Id.* at 1258.

[123] *See Montana*, 450 U.S. at 554 ("Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed.").

[124] *See* Utah Division of State Lands v. United States, 482 U.S. 193, 208 (1987) ("The transfer of title of the bed of Utah Lake to Utah, moreover would not necessarily prevent the Federal Government from subsequently developing a reservoir or water reclamation project at the lake . . . .").

Utah stands for the proposition that defeat of a anew state's title to the beds of navigable waters by prior federal reservation requires application of a two-part test. It first must be shown that the Federal Government meant to include the beds within a reservation and, second, it must be additionally shown that the federal government meant to defeat the new state's title. Idaho v. United States, 533 U.S. 262, 273 (2001).

title? The answer, in significant part, was the language of state or territorial jurisdictional exclusion, which convinced the court that the needs of the Indian tribes were the central and overriding concern of the treaty entities, and the future prerogatives of any state were not within the plans of the parties.[125] The Supreme Court has used the Choctaw and Cherokee cases and the treaty promises of exclusion to distinguish other situations where the non-decisive treaty language or expression of federal intent was deemed insufficient to overcome the normal presumption in favor of state title.[126]

The use of exclusionary treaty language as a counterpoint has also emerged in recent cases such as *Hicks*,[127] where the court seeks to expand the states' jurisdictional range in Indian country and rebalance the preemption scales. The court justifies its departure from the absolutism of *Worcester v. Georgia*[128] by pointing out that the Cherokee treaties, held impervious to state assertions of

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[125] *See Choctaw Nation*, 397 U.S. 620.

> The treaties with the present Indians solemnly assured them that these new homelands would never be made part of a State or Territory. So it is reasonable to infer that the United States did not have a plan to hold this riverbed in trust for a future state. As the United States says, we would have to indulge "a cynical fiction without any basis in fact" to attribute such a purpose to the parties. Sixty years later, however, Congress was intent on creating a State out of these lands.
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> ....
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> A commission was created to negotiate an agreement with these tribes superseding the earlier treaties... An agreement was in time reached whereby tribal lands were allotted to individual members of the tribe, with any remaining tribal land passing to the United States as trustees for the Indians. The bed of the Arkansas was not allotted. The next year—1907—Oklahoma was admitted to the Union on an equal footing with the original states. Certainly this cession by the tribes of their interest in the riverbed of the Arkansas to the United States in trust for their members was no possible vehicle for transferring that title to Oklahoma.

Id. at 639-42 (citations omitted).

[126] In *Montana*, the court stated:

> In concluding that the United States had intended to convey the riverbed to the Tribes before the admission of Oklahoma to the Union, *the Choctaw* Court relied on these circumstances surrounding the treaties and placed special emphasis on the Government's promise that the reserved lands would never become part of any state. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

450 U.S. at 555 n.5 (citations omitted).

[127] *See supra* notes 73-87.

[128] 31 U.S. 515 (1832). "[T]he acts of Georgia are repugnant to the constitution, laws and treaties of the United States. . . . They are in direct hostility with treaties . . . which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary . . . ." *Id.* at 561-62.

jurisdiction, contained a guarantee against future inclusion of Indian country within state boundaries.[129]

The Shawnee Treaty of 1831 and its protections against inclusion within a future states' borders and jurisdiction, have been affirmed in the case law for almost 140 years, although the treaty's role has been exemplary rather than controlling of facts and persons arguing before the court. The courts have referred to the Shawnee Treaty, in the aftermath of the Kansas Statehood Act, as an example of an unabrogated isolation and insulation of Shawnee treaty lands from inclusion in and regulation by the State of Kansas. The various opinions hypothesize that, had the events before the court occurred on Shawnee lands,

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[129] *Id.; see also* Nevada v. Hicks, 533 U.S. at 362 n.4, which states, "[o]ur holding in *Worcester* must be considered in light of the fact that '[t]he 1828 treaty with the Cherokee nation...guaranteed the Indians their lands would never be subjected to the jurisdiction of any state or Territory.'"

Robert Clinton devastates Scalia's interpretation of *Worcester* by pointing out that the treaty signed in 1828, which does indeed include the promise of "a home that shall never, in all future time, be embarrassed by having extended around it the lines or placed over it the jurisdiction of, a Territory or State," (7 Stat. 311 (1828)) was *not* the treaty at issue in *Worcester* and was *not* the basis for Marshall's decision of absolute preemption. *See* Robert N. Clinton, *There Is No Federal Supremacy* Clause *for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002).

> Even more startling, in footnote four of his opinion, Justice Scalia seeks to limit Chief Justice Marshall's *Worcester* opinion to its facts, suggesting that it was based on, or at least must be read as based on, a "1828 treaty with the Cherokee nation...guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory". This statement is simply historically false! There is no reference whatsoever to any 1828 Treaty with the Cherokee Nation in *the Worcester* opinion because the Cherokee Nation had never signed the 1828 treaty with the United States that contained the referenced language. Rather, as its express text demonstrates, the 1828 treaty was signed by the so-called Old Settlers Faction of Cherokees who had separated from the Cherokee Nation and voluntarily removed to new lands west of the Mississippi River. The Cherokees who signed the 1828 treaty therefore were not part of the remaining eastern Cherokee Nation involved in *the Worcester* case that resisted removal, in part, through that case. Apparently for Justice Scalia if you have seen one Cherokee, you have seen them all!

Id. at 232-33.

The Treaty with the Western Cherokee, 7 Stat. 311 (May 6, 1828), and its promise of exclusivity, although not at issue in the *Worcester* case, and not legally or factually relevant to Scalia's position in *Hicks*, were subsequently foundational to a treaty with the Eastern Cherokee. The Treaty of New Echota, 7 Stat 478 (Dec. 29, 1835), was reluctantly and angrily signed by the Eastern Cherokee when, in the aftermath of its legal triumph in *Worcester*, the tribe was subjected to the continuation of intense state and local pressure and was afforded little federal support. *See* GRANT FOREMAN, INDIAN REMOVAL, 229-312 (1972). [hereinafter FOREMAN]. The tribe, after signing, left for the Oklahoma region along the infamous Trail of Tears. *Id.* at 294-312. The Treaty of New Echota, like the earlier treaty with Western Cherokee, promised exclusivity to the displaced Indians. "The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits of jurisdiction of any State or Territory." Article 5, 7 Stat. 478.

It is the contention of this article that Scalia's diminishment of *Worcester* as a bastion for sovereignty was, simultaneously, an affirmation and entrenchment of a state's absolute jurisdictional disability in the circumstance of an unabrogated treaty provision promising that described lands will remain excluded from state boundaries or jurisdiction. *See infra,* Part VI.

there would have been no state jurisdictional initiative. However, the courts conclude, since the actions did *not* occur in Shawnee country and since they actually took place on lands *not* covered by federal guarantees as complete as those in the Shawnee Treaty, the normal assumptions or presumptions of state jurisdiction will prevail.

In *United States v. Ward*[130] a white man was tried in federal court for the murder of another white man. The crime occurred on the reservation of the Kansas Tribe of Indians, and federal jurisdiction was asserted under an 1834 statute which extended federal criminal jurisdiction into Indian country for crimes between whites and excepting jurisdiction for crimes committed by one Indian against the person or property of another Indian.[131] The statute would have covered the case at bar if the land involved in the crime remained under federal jurisdiction.[132] The defendant argued, however, that federal jurisdiction could not continue to extend over the reservation because the continued assertion of such jurisdiction after the admission of Kansas to the Union would violate the principles of state entrance on an equal footing.[133] The court agreed that, in the absence of other provisions or qualifications, the Act admitting Kansas into the Union[134] operates as a repeal of the federal jurisdictional provisions.[135]

The federal government asserted in opposition that the Indian lands at issue were not part of the State of Kansas nor subject to Kansas' jurisdiction and that the lands remained under federal laws and were not controlled by the principles of equal footing. The court, in response, acknowledged that the Shawnee Treaty of 1831 could produce this result on Shawnee land—a complete exclusion from the boundaries and jurisdiction of Kansas. The court further observed that the Kansas Statehood Act had not abrogated such protection, but instead had promised its continuance.[136] The court concluded, however, that such omissions from state jurisdiction were confined to cases with precise treaty exclusionary language. This was existent in the Shawnee Treaty—but not in the treaty before the court.[137]

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[130] 28 F. Cas. 397 (D. Kansas 1863).

[131] 4 Stat. 729 (June 30, 1834). The 25th section provides:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided,* the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Id. See United States v. Ward, 28 F. Cas. at 398.

[132] *Id.*

[133] *Id.*

[134] 12 Stat. 126 (1861).

[135] Ward, 28 F. Cas. at 399.

[136] *Id.*

> [137] It remains now to inquire whether the reservation here in question is within the provison; whether the Kansas tribe of Indians, upon whose reservation this homicide was committed, had such a treaty with the United States, as the Shawnees have been shown to have had, in which it was guaranteed to them by

Ward's discussion of the impact of the Shawnee Treaty, although probably dicta at the time, was elevated, arguably, to the status of an authoritative holding, first by the Kansas federal courts,[138] and ultimately by the Supreme Court. In *Langford v. Monteith*[139] the Supreme Court, dealing with jurisdictional issues on the Nez Perce Reservation in Idaho, restated the thesis of exclusion from state boundaries, and referred to the Shawnee Treaty lands as a primary example of lands within a state, but outside its boundaries and beyond its jurisdiction.[140] The court said:

> The applicability of this doctrine to the jurisdiction of places in which the United States have constructed permanent forts, arsenals, etc., before such governments are organized, will be seen at once. Congress has also acted on this principle on the admission of new states into the Union. The act for the admission of Kansas, after describing its exterior boundaries, and declaring that the new State is admitted into the Union on an equal footing with the original States, in all respects whatever, adds, that nothing contained in the Constitution of the State shall be construed "to include any territory which by treaty with such Indian tribe is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State." Between the United States and the Shawnees a treaty then existed by

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> the United States that their reservation should not be brought within any state, nor subjected to its laws. If it had been a treaty with such a clause, then the reservation was not in the state, and is subject to federal jurisdiction. On the other hand, if it had not a treaty with such a clause, then the reservation was within the state, and is subject to the state jurisdiction. This question is to be determined by an examination of the treaty with this tribe, in order to see whether or not it contains such a clause.
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> . . . .
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> We have carefully examined it, and find that it does not contain the guarantee mentioned. It is conceded by the counsel for the government, that none exists in any former treaty with this tribe. It therefore results that the State of Kansas has jurisdiction to try and punish the defendant for the offence set forth in this indictment . . . .

Id.

[138] United States v. Stahl, 27 F. Cas. 1288 (D. Kan. 1868).

> In the case of *U.S. v. Ward*, decided at the May term, A.D. 1863, this court held that the jurisdiction of the state over the crime of murder was exclusive of that of the federal government, although the offence was committed on soil to which the Indian title had not been extinguished, unless it was soil occupied by one of the tribes which had treaties with the United States of the character above described. We held that the state had no jurisdiction in such territory, because it was no part of the state.

Id. at 1289.

[139] 102 U.S. 145 (1880).

[140] *Id.*

> which the United States guaranteed that their lands should never be brought within the bounds of any State or Territory, or subject to the laws thereof. In *United States v. Ward*, the Circuit Court held that the State courts had no jurisdiction in the lands of the Shawnees, and this was repeated in *United States v. Stahl*.[141]

In *United States v. McBratney*[142], decided a year after *Langford*, the court again considered the issue of jurisdiction over white-on-white crime, this time occurring on the Ute Reservation in Colorado.[143] Justice Gray reemphasized the holding that the Shawnee Treaty of 1831 guaranteed that the tribal land would remain beyond the law and boundaries of any future state. The court stressed that the statehood acts, as subsequent expressions of the intent of Congress, *could* abrogate the most solemnly made provisions according insulation against future state inclusion, but found that, in the case of the Shawnee, Congress had explicitly chosen to continue the extraordinary protections.[144] In the case of Colorado, however, no such exceptions were provided in the State Enabling Act and, thus, jurisdiction over crime on reservations by whites against whites passed to the state.[145]

The insular provisions of the Shawnee Treaty were, as noted, partially abrogated by the passage of the Kansas Act, which conferred criminal jurisdiction on the state over all Indian country in Kansas, including Shawnee treaty lands.[146] The continuing viability of the treaty provisions as a hedge against state civil regulations and taxing measures was not discussed until almost sixty years after the passage of the Kansas Act. In the case of *Sac & Fox Nation of Missouri v. LaFaver*[147] several Kansas Indian tribes[148] brought on an action against the Kansas Department of Revenue and challenged the imposition of the

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[141] *Id.* at 146 (citations omitted).
[142] 104 U.S. 621 (1881).
[143] *Id.*
[144] *Id.* at 622-23.
[145]

> The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original states in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.

Id. at 622-23 (citations omitted).
[146] *See supra* notes 94-96.
[147] 31 F. Supp. 2d 1298 (D. Kan. 1998).
[148] The Sac and Fox Nation was joined by the Kickapoo Tribe of the Kickapoo Reservation in Kansas and the Iowa tribe of Kansas and Nebraska. All of the tribes are federally recognized and have reservation lands in Kansas.

state's motor vehicle fuel tax on distributors of fuel to tribal retailers. The plaintiffs claimed that under a restrictive Kansas statute[149] no tax is to be imposed on any transaction involving the sale or delivery of motor vehicle fuel from Kansas to any other state, territory or foreign country. The plaintiffs further argued—and the district court agreed—that under the Kansas Admission Act[150] and Organization Act,[151] Indian reservations are not to be considered part of the State of Kansas and, therefore, no tax can be statutorily imposed on distributions of fuel to tribal retailers.[152]

The Tenth Circuit Court of Appeals reversed,[153] but in doing so gave affirmance to the special situation of the Shawnee Tribe and to the continuing authority of the *Ward* case.[154] The Tenth Circuit felt that the district court had misconstrued the 1861 Admission Act and erroneously applied the exclusion from Kansas' jurisdiction to all of Indian country.[155] The reach of the exclusion was considerably narrower, the court felt, and, under *Ward*, applied only to lands which tribes—such as the Shawnee—had "reserved unto themselves 'by treaty' with the United States"—and this did not include the lands of the plaintiffs before the court.[156]

In sum, treaty provisions excluding tribal lands from the boundaries and laws of the state have been accorded their special import by the courts. Such provisions can, of course, be abrogated in whole or part by the clear action of Congress, leaving the tribe with, at best, a constitutional claim for the property right taken[157]—but no right to remain free from state legislative initiative. In the case of the Shawnee Treaty of 1831, abrogation of tribal exclusivity in favor of state criminal jurisdiction, does not empower state or local government with respect to civil jurisdiction, nor does it seem to sustain local exercises of criminal jurisdiction unless some linkage with the federal conferral of jurisdiction to the

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[149] KAN. STAT. ANN. § 79-3408(d)(1) (1997) states, "[t]hat no tax is imposed upon transactions involving '[t]he sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.'" 31. F. Supp. 2d at 1304.

[150] An Act for the Admission of Kansas into the Union, ch. 20, § 1, 12 Stat. 126 (1861).

[151] An Act to Organize the Territories of Nebraska and Kansas, ch. 59 § 19, 10 Stat. 277, 283 (1854). The Organization Act established the Territory of Kansas and used identical language to the Admission Act regarding exclusions from the boundaries of Kansas.

[152] 31 F. Supp. 2d at 1304.

[153] Sac & Fox Nation v. Pierce, 213 F.3d 566 (10th Cir. 2000).

[154] *Id.* at 576-77.

[155] *Id.* at 576.

[156]

> We agree with Justice Miller's able construction of the 1861 Act [in *the Ward* case] for it is consistent with the Act's plain language. The Act for Admission excludes from the boundaries of the State of Kansas only those lands which Indian tribes reserved unto themselves "by treaty" with the United States. The Tribes fail to identify any language in any of the treaties provided us which we might construe as excluding their lands from the boundaries of the State.

Id. at 577.

[157] *See* Menominee Tribe of Indians v. U.S., 391 U.S. 404, 413 (1968).

state is established. The local government would have to show either that the state delegated some of the criminal jurisdiction conferred under the Kansas Act or that the local government was exercising essential state powers.[158]

IV. SCOPE AND STANDING

The continuing viability of the unabrogated Shawnee Treaty provisions on exclusion from state boundaries and jurisdiction, and the scope of their application depend on several independent, but still interrelated issues. One central concern is the particular land still embraced by the treaty guarantees. It is possible to argue that all the lands originally under the Treaty of 1831[159] continue to be shielded from the state despite the fact that most of the lands have long

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[158] It is questionable whether the Johnson County fireworks ordinance can be considered an exercise of the criminal jurisdiction conferred on the State of Kansas under 18 U.S.C. § 3243 (2003). Kansas has specifically declined to criminalize the sale of class "C" fireworks. *See* KAN. STAT. ANN. § 21-3731 (1994), and KAN. ADMIN. REGS. 22-6-7, thus, the sale of class "C" fireworks cannot be deemed a crime *under state law*. KAN. STAT. ANN. § 21-3102(1) (2001) provides: "No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state." Furthermore, Kan. Stat. Ann. § 31-134(b) (2001) cannot be taken as a delegation of criminal jurisdiction or authority to the county. It is, instead, merely a statement by the State of Kansas that its fire prevention code—which excludes coverage and criminalization of the sale of class "C" fireworks, is not intended to preempt local action under home rule powers. *See* 91 KS Op. Att'y Gen. 48 (1991), which said:

> K.S.A. 1990 Supp. 31-134(b) authorizes the state fire marshal to adopt the Kansas fire prevention code, and further provides that "nothing in this act shall be construed to impair the power of any municipality...to prohibit or regulate the sale, handling, use or storage of fireworks within its boundaries." This proviso does not "authorize" any action by a municipality; it merely clarifies that the enactment of the statute, and the adoption of the Kansas fire prevention code, is not intended to preempt city action under the home rule amendment (KAN. CONST., art. 12 § 5) to prohibit or regulate the sale, handling, use or storage of fireworks.

Not only is the Johnson County Ordinance not to be considered within a specific delegation from the state, it may also not be considered as within the specific delegation from the federal government. In particular, the exercise of police power by Johnson County, made under Home Rule powers and not as an arm of the state, cannot be considered as included within the delegation of criminal jurisdiction made specifically to the state by the federal government under the Kansas Act, 18 U.S.C. § 3243. *See* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 661 (9th Cir. 1975). *See also* Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 906-912 (9th Cir. 2002). As to such local exercises of police power, the immunity provided to Lot 206 by the exclusionary language of the Shawnee Treaty of 1831, Article X, arguably continues unabated and unabrogated. *See* Santa Rosa, *supra; see also* Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390 (9th Cir. 1987); United States v. County of Humboldt, 615 F.2d 1260, 1261 (9th Cir. 1980); Zachary v. Wilk, 219 Cal. Rptr. 122, 125-27 (1985).

[159] The treaty applied literally to 100,000 acres that the Ohio Shawnee were entitled to select in fee simple within the 1.6 million acre Shawnee Reserve established by the Treaty with the Shawnees, 7 Stat. 284 (Nov. 7, 1825). *See* Treaty with the Shawnee, art. 2, 7 Stat. 355 (Aug. 8, 1831). The Treaty with the Shawnees of 1854, 10 Stat. 1053 provided for the receding of 200,000 acres to the Shawnee, within the original reserve, and failed to either abrogate the Treaty of 1831 or limit the scope of its application. The Supreme Court stated that all the Shawnee lands were withdrawn from the operation of Kansas law. The Kansas Indians, 72 U.S. 737, 756-57 (1867).

since passed out of Indian ownership or federal restrictions on alienation.[160] The argument is premised on the idea that the formal boundaries of reservations are political and jurisdictional matters rather than proprietary, and that tribal sovereign jurisdiction could continue, unless specifically abrogated, even though Shawnee ownership may have passed to non-Indian interests. The Supreme Court, however, has begun to employ a doctrine of implied partial abrogation or de facto diminishment of spatial jurisdictional scope that is more liberal and less demanding than the strong presumption against the abrogation of substantive treaty content. Indeed, in recent cases like *Hagen v. Utah*[161] and *South Dakota v. Yankton Sioux Tribe*,[162] the Court seems more concerned with demographic transition within the opened reservation borders than it does with actual expressions of congressional intent.[163] The result is that extensive sales of tribal "surplus" lands after allotment to tribal individuals in severalty, or the divestiture of allotments to outsiders, will result not only in the loss of property, but the subsequent loss of jurisdiction. The courts, with an eye to the predominance of non-Indian ownership, at least within portions of the original reservation, will presume a congressional intent to not only sell the lands, but also shrink the reservation borders.

The application of treaty guarantees of exclusivity would seem then, at best, limited to the contours of Indian-held property interests. The continued application of the substantive guarantees with regard to these properties is, as the Tenth Circuit Court of Appeals recognizes, governed by the more demanding *Dion*[164] test, which would require very clear, if not literal, expressions of congressional intent to defeat a promise before abrogation is found.[165]

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[160] Allotted land under restraint on alienation may descend by intestacy to non-Indians who hold undivided fractions within the restricted whole. *Resurrection, supra* note 3, at 365. Federal restraints on alienability, which stem from common and statutory law, may be lifted by the conferral of consent to transfer. *See* Oneida v. Oneida Indian Nation, 470 U.S. 226, 234-36 (2d Cir. 1985). Consent to Shawnee transfers was often given to transactions decidedly unfavorable to the Indians. *Resurrection, supra* note 3 at 360.

[161] 510 U.S. 399, 420-21 (1994).

[162] 522 U.S. 329, 356-57 (1998). *See also* Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), which found diminishment on the basis of private land sales. *Id.* at 1030.

[163] Justice Blackmun, in writing the dissent in *Hagan*, noted "the majority . . . resolv[es] every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation." 510 U.S. at 424.

[164] United States v. Dion, 476 U.S. 734 (1986).

[165] In Oyler v. Allenbrand, 23 F.3d 292 (10th Cir. 1994), which dealt with the partial abrogation of the Shawnee Treaty with respect to state criminal jurisdiction under The Kansas Act, 18 U.S.C. § 3243, the court found "no evidence that [the remainder of] this treaty has ever been formally abrogated." *Id.* at 295. With respect to abrogation the court said:

> Before we will conclude that Congress, in the absence of explicit statement, intended to abrogate a treaty right, we must have "clear evidence that [it] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 740; 106 S. Ct. 2216, 2220, 90 L. Ed. 2d 767 (1986). Congressional intent to abrogate treaty

Lot 206, as restricted Indian country,[166] owned and physically occupied by blood descendants of treaty signatories,[167] would seem clearly bound and protected by the state exclusionary provisions of the Treaty of 1831. But who can raise the issue? Indeed, this has been Jim Oyler's most difficult hurdle in recent litigation. The federal district court and the court of appeals have held on separate occasions that Oyler's assertions of blood descendency and physical possession of the restricted treaty land are insufficient bases to either raise the treaty provisions or invoke federal statutes in order to compel administrative acknowledgement of previous unabrogated congressional recognition.[168] Both the district court and the court of appeals seemed determined to force Oyler and the UTOSI to successfully negotiate the administrative process before according him standing to raise the issue of the applicability of treaty rights on his restricted allotment.

> rights will not be lightly inferred; such purpose must be "clear and plain." *Id.* at 738, 106 S. Ct. at 2220. Where, however, "the evidence of congressional intent to abrogate is sufficiently compelling, 'the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.'" *Id.* at 739, 106 S. Ct. 16 2220 (quoting COHEN, *supra* note 96, at 449 (1982)).

Id. at 296.

[166] *See* 18 U.S.C. § 1151 (2003).

[167] The Treaty of 1831 was signed by, among others, "McNeer," a relation to Newton McNeer, the original allottee of Lot 206. *See* United Tribe of Shawnee Indians v. United States, 55 F. Supp. 2d 1238, 1241 (D. Kan. 1999); *see also Resurrection*, *supra* note 3, at 363.

[168] *See* United Tribe of Shawnee Indians, 55 F.Supp.2d at 1243 n. 1, 1244 n.2; United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 548 n.2 (10th Cir. 2001). Oyler had sought to invoke the provisions of Section 103 of Pub. L. 103-455 (codified at 25 U.S.C. § 479a (2000)) which states:

> (1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian affairs;
>
> (2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
>
> (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe'; or by a decision of a United States court;
>
> (4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
>
> (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated . . . .

Oyler claimed that this statute required the Department of the Interior and the Bureau of Indian Affairs to administratively acknowledge that the Shawnee Tribe of Kansas has been recognized by treaty and Supreme Court case, that Congress had never abrogated this recognition, that the tribe should be placed on the administrator's list of recognized tribes without further administrative process, and that Oyler's present tribe, the United Tribe of Shawnee Indians was, by virtue of blood descendency and physical possession, the only logical entity to raise this issue. The court's failure to find standing blocked the entire chain of arguments. *See supra* notes 21-32 and accompanying text.

Could present-day administrative recognition be the singular, solitary basis for the standing to assert treaty rights? Despite the results in the UTOSI cases, the case law from the Tenth Circuit Court of Appeals suggests otherwise. One case, ignored by the courts in UTOSI, would seem relevant to the situation. *Northern Arapahoe Tribe v. Hodel*,[169] dealt with efforts by the plaintiff tribe to challenge the legality of the Secretary of the Interior's hunting regulations on the Wind River Indian Reservation.[170] A treaty established the reservation with the Shoshone in 1868,[171] and the plaintiff tribe, the Northern Arapahoe, was placed on the reservation ten years later by the United States military.[172] The two tribes have co-inhabited the reservation with considerable tension ever since.[173] In 1989 a game code, endorsed by the Shoshone and the BIA, was resisted by the Northern Arapahoe, who claimed that the code was inconsistent with implied hunting and fishing rights under the Treaty of 1868—to which they were not a signatory.[174] The Shoshone and the Bureau of Indian Affairs (BIA) contended that the Arapahoe did not have standing to assert treaty rights to hunt and fish merely by virtue of their possessory interests on the reservation.[175] The Tenth Circuit disagreed. It found that the Arapahoe had standing to raise the treaty rights solely on the basis of their occupancy of land confirmed by congressional and executive action.[176]

Jim Oyler and the UTOSI clearly meet this test. They are of blood descent from original treaty signatories. They are in physical occupation of the land, and the land is under the confirmation of judicial, executive, and congressional action. If standing was not afforded Oyler after Northern Arapahoe, it was because the courts perceived another critical prerequisite—exhaustion of the administrative process.

In truth, such an argument is *Kafkaesque*. Oyler and the UTOSI claim that they are recognized by treaty and a Supreme Court case and should be added to the list of recognized tribes without the necessity of additionally completing the labyrinthian administrative process.[177] The BIA and the courts state that Oyler cannot have standing to raise the claim of a treaty right to avoid the administrative process until and unless he first goes through it.[178] Are the courts correct that exhaustion of and recognition in the administrative process are

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[169] 808 F. 2d. 741 (10th Cir. 1987).
[170] *Id.* at 743.
[171] 15 Stat. 673 (July 3, 1868).
[172] 808 F.2d at 743.
[173] The Shoshone were later awarded just compensation for what was deemed a taking of one-half the value of their treaty reservation. United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938).
[174] 808 F.2d at 746-748.
[175] *Id.* at 748.
[176] The very principles of Indian law which dictate that the Shoshone have hunting and fishing rights notwithstanding the lack of an express treaty provision dictate that the Arapahoe have equivalent rights. The Arapahoe have rights to the reservation derived from their status as occupants of the land confirmed by congressional and executive acts. *Id.* at 748.
[177] United Tribe of Shawnee Indians, 253 F.3d at 546.
[178] *Id.* at 550-51.

necessary preludes for standing to raise treaty rights—either those of recognition or, in the present case, those of exclusion from state boundaries and jurisdiction? A recent Tenth Circuit case builds a bridge back to *Northern Arapahoe* and isolates the *UTOSI* cases as aberrations.

The Tenth Circuit's new decision in *Timpanogos Tribe v. Conway*,[179] conclusively establishes that members of non-recognized tribes can assert land-based hunting and fishing rights, purportedly created under an 1861 executive order and ensuing statute.[180] The defendants had contended that the tribe had no right to raise a federal claim because it was not an administratively recognized tribe.[181] The court responded, however, that a "'tribe's recognition or lack of recognition by the Secretary of the Interior does not determine whether the tribe has vested treaty rights.'"[182]

It would seem settled, then, after *Timpanagos*, that the UTOSI could not be denied standing to raise the issue of treaty rights on Lot 206 solely on the basis of its administratively-unrecognized status. Since other prudential standing requirements such as blood descendency from treaty signatories, physical occupation of treaty land, and ongoing tribal organization[183] are also met, it would appear that the UTOSI have a solid claim for standing to raise the treaty right to state exclusion.

A related question is whether Jim Oyler could raise the treaty rights as an individual. Some treaty rights may, by terms or logical necessity, be collective in nature and this may be assertable only by the tribe.[184] Other guarantees such as hunting and fishing rights, or jurisdiction over a particular, individually held tract may be intrinsically personal. As to those, there may be an individual assertion

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[179] 286 F.3d. 1195 (10th Cir. 2002).
[180] *Id.* at 1199.
[181] *Id.* at 1201-03.
[182] *Id.* at 1203 (citations omitted).
[183] *See* Northern Arapahoe Tribe, 808 F.2d 741; *see also* Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995).

> Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine.
>
> Once a tribe is determined to be a party to a treaty, its rights under such a treaty may be lost only by unequivocal action of Congress. Thus, the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights.

Id. at 1270 (citations omitted).
[184] *See, e.g.*, Conley v. Ballinger, 216 U.S. 84, 90-91 (1910) which held that only tribal rights were retained by the Wyandotte Tribe under treaty reference to an Indian cemetery, and an individual descendant of the Wyandotte Indians had no standing to assert a treaty right to continued use of the tract as a cemetery. *Id.*

of treaty rights, even in the aftermath of a withdrawal of tribal recognition.[185] The exclusion of Shawnee treaty lands from the boundaries and jurisdiction of Kansas necessarily became an individual issue after the Treaty of 1854[186] provided for allotments in severalty, among which was Lot 206. Thereafter, each individual owner of a tract, when threatened with state jurisdiction or inclusion within Kansas would seemingly have standing to object—especially if there was, in addition, continuity with respect to blood and possession.[187]

Jim Oyler and the UTOSI should, in short, be able to allege and demonstrate a standing basis to raise the issue of treaty-guaranteed exclusivity. The federal courts' basis for intransigence on the issue of standing seems qualified and perhaps compromised by the recent *Timpanagos* case. Moreover, this case, in addition to local law and past precedent, would seem to surmount any local objections to standing under state law.[188]

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[185] *See, e.g.,* Kimball v. Callahan, 493 F.2d. 564 (9th Cir. 1974) which held that a termination act for the Klamath Tribe did not purport to abrogate treaty fishing rights and, therefore, an individual Indian possessing such rights before termination, had continued standing to assert them. The court said:

> Since the Act provides that nothing in it shall abrogate any treaty fishing rights, we conclude that a Klamath Indian possessing such rights on the former reservation at the time of its enactment retains them even though he relinquishes his tribal membership or the reservation shrinks pursuant to the Act. Otherwise, the Act would in fact have resulted in the abrogation of treaty rights.

Id. at 569. *See also* United States v. Adair, 723 F.2d. 1394, 1415 (9th Cir. 1983); Kimball v. Callahan, 590 F.2d. 768, 773 (9th Cir. 1979); Mason v. Sams, 5 F.2d. 255, 258 (D.C. Wash. 1925).

[186] Art. 2, 10 Stat. 1053 (May 10, 1854).

[187] *See supra* notes 177-84 and accompanying text.

[188] In his brief before the District Court of Johnson County regarding the jurisdiction to regulate the sale of fireworks, Oyler argued:

> It is contended that, under Kansas precedent, Jim Oyler has "sufficient interest in a justiciable controversy to obtain judicial resolution of that controversy," Joe Self Chevrolet, Inc. v. Bd. of County Comm'r, 802 F. 2d. 1231, 1235 (Kan. 1990). Kansas has determined conclusively, in past litigation, factors that clearly establish "a sufficient interest": Oyler is a Shawnee Indian; his ancestors were original allottees of Shawnee Reservation land under the Treaty of 1854; Oyler has been a member of a federally-recognized tribe; and he resides on a restricted allotment which is deemed "Indian Country" under federal statute and case law. *See, e.g.,* In the Matter of Oyler, 887 F.2d. 81, 82-86 (Kan. 1994). In addition, Oyler is eligible for membership in the Cherokee Shawnees who were newly recognized in the Shawnee Tribe Status Act of 2000, Pub. L. 106-568, 25 U.S.C.A. § 1041, and who have jurisdiction over the restricted portions of Lot 206 not owned by Oyler, 25 U.S.C.A. § 1041(F). It is noteworthy that because of the Oklahoma Shawnees' congressionally-recognized status and jurisdiction over its members' restricted property in Lot 206, and because of Oyler's ability to join such tribe on the basis of his lineal descendency, 25 U.S.C.A. § 1041(C), i.e. *the issue of the exclusionary provisions of the Treaty of 1831 will not be avoided by a decision at present to deny Oyler standing.* Beyond this, (and in the nature of stare decisis or estoppel), it is significant that Kansas courts and federal courts, though not always upholding Oyler on the merits, have generally

V. SUNFLOWER

The Fourth of July, 2002 came and passed without noticeable incident on Lot 206. Class "C" fireworks[189] were sold in large quantities to eager families who, in rather gleeful and brazen disregard of the law, proceeded to ignite sparklers, pinwheels, and smoke bombs in driveways all across Johnson County. No citations were issued, no arrests made, and no contraband was seized. Perhaps the officials of Johnson County were awaiting the outcome of the jurisdictional dispute working its way up through the state judicial system. Perhaps they were made hesitant by the Oylers' insistent assertions of tribal sovereignty, backed up by large caliber handguns strapped to their waists. Perhaps the heavy summer heat, economic woes, or pervasive background threat of terrorism dimmed the enthusiasm for other concerns. In any event, the next scenes would seem to be those found in courtrooms.

Yet all was not quiet on the Johnson County Indian frontier. The Oklahoma Shawnee, following the course of Oylers' earlier, ultimately futile efforts of 1998 and 1999, filed a lawsuit in the Federal District Court of the District of Columbia that demanded the federal transfer of previously-held Shawnee lands located within the recently decommissioned Sunflower Army Ammunition Plant (SFAAP).[190]

> sustained his ability to raise the issues surrounding the continuing application of unabrogated treaties to his restricted Indian land. *See e.g.* Oyler, *supra,* 887 F.2d. at 86-87.
>
> It is, of course, inconvenient for Johnson County not to have criminal or civil jurisdictional initiative over a tract within its midst. This is, however, the harsh and uncontestable reality. Rather than attempt to bludgeon a 70-year-old Indian man who is proud, defiant, and—to the chagrin of the County—correct on the law, the County would be better served by efforts to see legislative adjustments from the state or federal government or, perhaps more appropriately, to seek a workable compromise with Jim Oyler and the Cherokee Shawnee of Oklahoma. Perhaps after almost a century and a half of legal wars against the Shawnee in their solemnly promised homeland, the County can make peace and learn to appreciate and accommodate this surviving remnant of diversity.

Bd. of County Comm'r v. Jim Oyler, Sr. and Jim Oyler, Jr., District Court of Johnson County, Kansas, County Codes Division, Case Nos. 01CC120, et al. (April 1, 2002).

[189] *See supra* notes 97 and 159.

[190] *Shawnee Tribe Claims It's Entitled to Sunflower Ammunition Plant Site*, ASSOC. PRESS NEWSWIRES, July 4, 2002, *available at* http: //www.kctv.com/global/story.asp?s=849553 ~nav=puza144. The tribe had previously requested that the Secretary of the Interior take SFAAP into trust, but the administrators from the Government Services Administration said that the Shawnee claim was too late. *See* Elvyn J. Jones, *Shawnees Make Request For Sunflower Property*, DESOTO EXPLORER, September 27, 2001, *available at* http: //www.desotoexplorer.com /section/news/story/1527 [hereinafter Elvyn Jones]. *See* 40 U.S.C. §§ 4741-544. An amendment to the Act allows the Secretary of the Interior to acquire excess federal real property, located within the reservation of any tribe recognized as eligible for services by the Bureau of Indian Affairs.

After the initial filing, the Oklahoma Shawnee began negotiations with the federal government, the state and local entities. The negotiations and search for a compromise broke down in late summer of 2002 and the suit was reactivated. *See* Finn Buller, *Negotiations Over Old Sunflower Plant Falter*, KAN. CITY STAR, Sept. 12, 2002, at B1.

In 1998, the boys in the federal government's smoke-filled back rooms quietly—without real public input or even awareness—concocted a whiz-bang proposal for the disposition of SFAAP. The fifteen square mile, strategically located munitions reserve, lying athwart the Kansas City-Lawrence growth corridor, with its pockets of severe contamination and looming clean-up costs, was to be transferred, first to Kansas, then to an ephemeral, uncapitalized development corporation called the Wonderful World of Oz.[191] Oz voiced plans to create a world-class theme park, (though residential and commercial development seemed a likely and more feasible accompaniment) and promised concurrently to clean and restore the polluted areas.[192]

The proposed transfer, to take place under the federal excess property laws[193] and without the publicity-generating impact of a full environmental impact review,[194] did not escape the wary eyes of Jim Oyler. SFAAP had long been in his consciousness as a centerpiece for the rebirth of Shawnee sovereign jurisdiction in Kansas. The plant, located along the main highway between Lawrence and Kansas City and only a few miles from Lot 206, contained within it nearly 6,000 acres of former Shawnee allotments which stemmed from the Treaty of 1854.[195] These restricted allotments in severalty had been lost by their Shawnee holders following the Civil War when great pressure emanated from state, local, and private sources.[196] The federal government, nominally a trustee for the Shawnee with a power to protect holdings and prevent alienation, turned a blind eye to the force, the fraud, and the unconscionable terms of transfer.[197]

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[191] *See Recognition*, *supra* note 1, at 311-12.

[192] *Id.* at 311-18.

[193] *See supra* note 185.

[194] *See* The National Environmental Policy Act (NEPA), 41 U.S.C. §§ 4321-61 (2000) and the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.1-1501.8 (2000).

[195] On May 10, 1854, the Shawnees, now proclaimed as "the United Tribe of Shawnee Indians," entered a treaty of cession with the United States, and less than three weeks later, on May 30, 1854, before this or any other of the cession treaties had been ratified, President Franklin Pierce signed the Kansas-Nebraska Act which repealed the Missouri Compromise and opened the areas in which Indian rights had been surrendered to settlement and transportational utilization under the public land laws. Under the treaty, the Shawnee agreed to cede to the United States all of the 1.6 million acres that had been conferred under the Treaty of 1825; and the United States promised in return to give back 200,000 acres, along with compensation totaling $829,000. The 200,000 acres were to be located within thirty miles of the Missouri border, with the exception of improved Shawnee land already located to the west of this. The receded lands were not initially definite in location, but were to be fixed within the selection area of approximately 419,000 acres by individual and group choices. The allotment provisions under the treaty were apparently voluntary. Each single adult could pick 200 acres and family heads could select an additional 200 acres for each member. The treaty further provided that the 200 acres per person could be set aside in a compact form for those, such as the Black Bob and Long Tail bands, who desired to continue the holding of land in common. *Resurrection*, *supra* note 3, at 356.

[196] MANYPENNY, *supra* note 11, at 126-27; Absentee Shawnee Tribe v. United States, 12 Ind. Cl. Comm. 180, 186 (1963).

[197] Beginning with the Treaty of 1854, and continuing on into and beyond the Civil War, white soldiers, guerillas, settlers, squatters, speculators, and outright thieves poured into the area, surrounded and besieged the Shawnee, harassed and preyed on them, and relentlessly and inexorably strove to extricate title and possession to their property. The United States, stretched

Soon the Shawnee were in Oklahoma, living among the Cherokee, pursuant to agreement, and non-Indians held the Kansas lands.[198]

Eighty years later the federal government reemerged as a trustee in Kansas, this time for reasons of national security. It reacquired land in Johnson County and sponsored a munitions plant that made wartime explosives, propellants, and pollution for half a century. The government's decision to decommission and dispose of this plant in the late 1990's was prompted, in significant part, by the desire to escape the multi-million dollar clean-up costs.[199] From this wish to pass the contaminated buck emerged the complex scheme of a high-tech, year-round, destination theme park and resort to be called the Wonderful World of Oz.[200] It was also the beginning of Jim Oyler's dogged efforts to reassemble the Shawnee land base around his beachhead on Lot 206.

Before the federal transfer to Oz could take place, Oyler entered the Federal District Court in Kansas and filed a tangled, complex complaint.[201] He claimed standing as the United Tribe of Shawnee Indians, the modern-day successor to the treaty-signing tribes of the 1800's. He claimed that the nineteenth century Shawnee—and the UTOSI—were federally recognized by unabrogated treaties and a Supreme Court case,[202] and that by virtue of this recognition and the force of Public Law 103-454, they should be included on the Secretary of the Interior's list of recognized tribes[203] without the necessity of further administrative process. Oyler noted that the district court had the jurisdiction to declare recognized status and mandate inclusion on the list, that this declaration and listing when made would entitle Oyler to use the parts of the statute which would give a priority on

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thin by the demands of war time, did little to stop them. In fact, the United States often assisted the intruders by facilitating the transfer of title. *Resurrection*, *supra* note 3, at 359.

[198] A delegation of Shawnees signed an agreement with the Cherokees on June 7, 1869 whereby the Shawnee Tribe would pay the Cherokee $50,000 to be received from the future sale of surplus Kansas reservation lands and in return, Shawnee who so elected could relocate within the Cherokee jurisdiction.

> And that the sum of fifty thousand dollars shall be paid to the said Cherokees, as soon as the same shall be received by the United States, for the said Shawnees, from the sale of the lands in the State of Kansas, known as the Absentee Shawnee Lands . . . and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges and immunities of native citizens of said Cherokee Nation; *provided*, that all of said Shawnees who shall elect to avail themselves of the provisions of this agreement, shall register their names, and permanently locate in the Cherokee country, as herein provided, within two years from the date hereof, otherwise they shall forfeit all rights under this agreement.

Articles of Agreement Between the Shawnee and the Cherokee, reprinted in VINE DELORIA, JR. AND RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY, 717-18 (1999).

[199] *Recognition*, *supra* note 1, at 313.

[200] *Id.* at 312-14.

[201] *Id.* at 315-18.

[202] The Kansas Indians, 72 U.S. 737 (1866).

[203] The list is maintained under the directive in 25 U.S.C. § 479a-1(a). The provisions of Public Law 103-454, § 103 contained in the notes of § 479a was noted earlier. *See supra* note 158.

disposal to tribes whose reservation surrounded the excess property,[204] and that there was, outside the statutory route to land return, a common-law constructive trust that equitably bound the federal government as a failed trustee which had since reacquired the lost corpus and now intended to dispose of it.[205] To top it all off—and to maintain the status quo pending completion of the litigation—Oyler asked the court to enjoin any federal transfer from the SFAAP until the National Environmental Policy Act[206] (NEPA) had been fully complied with.

Oyler's claims were eventually dismissed not on their substance, but on the procedural basis of exhaustion, ripeness, primary jurisdiction, and standing.[207] His efforts, however, were not without consequence. This case and the attendant publicity stalled the transfer, brought its questionable particulars out into the light, and attracted other litigants, such as the Taxpayers Opposed To Oz (TOTO), who were able to surmount ripeness defenses and invoke the full disclosure provisions of both NEPA and the National Historic Preservation Act.[208] Before the TOTO litigation progressed to completion, Oz, buffeted by highly aroused public opinion, negative analysis in the media, highly questionable economic projections, and unfavorable local zoning decisions, packed up its smoke and mirrors and departed from the Heartland.

Oyler's efforts also pointed the way for the Oklahoma Shawnee. Rather than chance the uncertainties of the judicial process or undertake the burdens and delays of administrative recognition, the tribe proceeded politically and secured legislative restoration of federal recognition.[209] Armed with a reaffirmed recognized status, with standing to assert the treaty provisions,[210] and with a Kansas land base on the portions of Lot 206 not held by Jim Oyler, the Oklahoma Shawnee began to make noises about development, possible future casinos—and Sunflower.[211]

Could the Oklahoma Shawnee succeed where Oyler failed with regard to the return of the SFAAP? The Oklahoma tribe had the prerequisite of federal recognition but, seemingly, this was only part of the puzzle. The Oklahoma

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[204] *See supra* note 185.

[205] The United Tribe of Shawnee Indians' complaint did not seek specific redress for the nineteenth century dereliction of federal duty; rather, the complaint posited the fiduciary failing as a backdrop to future events. These included the reassemblage by the United Sates of some of the same lands lost through its previous inattention, and, after primary duties of national security were satisfied, the decision by the United States to dispose of the tract. The complaint stated that when the United States manifested an intent to dispose of former trust lands that had been reacquired and successfully used to serve an overarching national defense interest, a constructive trust for the descendants of the original beneficiaries and for their tribal representative arose. *Recognition,* supra note 1, at 316.

[206] *Id.* at 317; *see supra* note 195.

[207] *See* United Tribe of Shawnee Indians v. United States, 253 F.3d 543 (10th Cir. 2001).

[208] *See* Gerald Hay, *Officials Discuss Sunflower's Future*, OLATHE DAILY NEWS, July 10, 2002, *available at* http://www.olathedailyneews.com/ODNNews/5-23-story1.html.

[209] Shawnee Tribe Status Act of 2000, 25 U.S.C. § 1041 (2000).

[210] Under 25 U.S.C.A. § 1041h, "[n]o provision of this subchapter shall be construed to constitute an amendment, modification, or interpretation of any treaty to which a tribe referred to in this subchapter is a party nor to any right secured to such a tribe or to any other tribe by any treaty."

[211] *See* Elvyn Jones, *supra* note 190.

Shawnee had, as noted, abandoned Kansas in the late 1860s. There had been no possession or governmental assertions of jurisdiction in Kansas since 1869—other than those made by Jim Oyler and the UTOSI. The law had not been kind to Oklahoma Indians' assertions of absentee jurisdiction or excess property claims in Kansas. In 1994 the Oklahoma Wyandottes made a claim for two acres of federal land, formerly used as a post office in Kansas City, Kansas, under the excess property law.[212] The tribe asserted that the land was within its former reservation that, prior to 1855, surrounded the Huron Indian Cemetery, a tract that is currently held in trust for the tribe by the United States.[213] The Interior Board of Indian Appeals (IBIA) held that, even if the Huron Cemetery, as trust land, might qualify as a reservation, the excess property sought did not lie within it, and thus was not eligible for transfer as land held by the federal government within a current reservation.[214] In a larger sense, the IBIA held that former reservation lands, no longer under Wyandotte jurisdiction or ownership, were not intended by Congress to be the source of federal duty for excess property transfers; rather, such transfers were limited, the board said, to federal holdings within "current reservations."[215]

Five years later, the Oklahoma Wyandotte Tribe lost another claim dealing with Indian Country. The tribe had argued that the Huron Cemetery was a reservation within the definitions of the Indian Gaming Regulatory Act (IGRA)[216] and that land purchased in Kansas City, Kansas adjacent to the cemetery could be taken into trust by the Secretary of the Interior and qualified

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[212] Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 247 (October 25, 1995).

[213] 28 IBIA at 255-57.

[214]

> [A]ppellant fails to show that the Kansas property is located within its reservation under the definition of "reservation" in that regulation. . . . [t]he question is whether there is a geographic area in Kansas over which appellant "is recognized by the United States as having governmental jurisdiction."
>
> . . . .
>
> The Board concludes that, with the possible exception of the Huron Cemetery, appellant has not shown that it has a reservation in Kansas under that part of 25 CFR 151.2(f) which provides that a reservation is that area of land over which a tribe is recognized as having governmental jurisdiction.

Id. at 256-57.

[215]

> Based on its review of the legislative history of H.R. 8958 and other contemporaneous legislation, the Board concludes that Congress intended the main part of section 483(a)(2) to apply to current reservations. Given the expression of Congressional intent that, except in the State of Oklahoma, section 483(a)(2) was to apply when excess Federal property was located on current reservations, the Board finds that because appellant does not occupy a current reservation in Kansas, it does not have a "reservation" in Kansas within the meaning of section 483(a)(2).

Id. at 262.

[216] 25 U.S.C. § 2701 (2003).

for construction of a gambling casino.[217] The Tenth Circuit Court of Appeals concluded, however, that "reservation" under the IGRA refers to tracts used for residential purposes only, and further suggested that Congress may have envisioned only one reservation for each tribe's gaming purposes.[218] Therefore, the court felt, Huron Cemetery is not a reservation for purposes of the IGRA and adjacent tracts cannot be taken into trust for gaming use either.[219]

The Miami Tribe of Oklahoma tried to qualify a restricted Kansas non-Indian allotment for IGRA purposes by adopting the non-Indian lot owners into the tribe as members and by purporting to exercise sovereignty over the tract.[220] The Tenth Circuit stated that Indian lands, for IGRA purposes, must be restricted lands, and subject to both tribal jurisdiction and the exercise of governmental power.[221] The Miami's could not meet this test with respect to the Maria

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[217] In April 1995, the Wyandottes authorized their chief to purchase four tracts of land in downtown Kansas City, Kansas, all of which abutted the Huron Cemetery. Included among those tracts was a .52 acre tract referred to by the parties as the "Shriner Tract," upon which stands the former Shrine Temple.

> On January 29, 1996, the Wyandottes filed with the Secretary a Fee to Trust Land Acquisition Application for the four tracts of land. The application indicated that the Wyandottes planned "to develop and operate a 50,000 square foot Class II and Class III gaming facility" on the land. . . . On February 13, 1996, the Associate Solicitor for the Division of Indian Affairs at the Department of Interior issued an opinion that the provisions of Pub. L. 98-602 mandated the Secretary to acquire the tracts of land in trust on behalf of the Wyandottes. . . . This opinion further concluded that, because the acquisition was mandated and thus non-discretionary, neither the provisions of the National Environmental Policy Act of 1969 (NEPA), nor the provisions of the National Historic Preservation Act (NHPA) applied. . . . and that the Wyandottes could conduct gaming on the property pursuant to 25 U.S.C. § 2719(a)(1), as long as they met the other applicable requirements of IGRA.

Sac & Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1256 (10th Cir. 2001) (citations omitted).

[218]

> Without deciding which party's view of the established meaning of the term "reservation" is correct, we conclude that the interpretation forwarded by plaintiffs is the one Congress intended to adopt when it enacted IGRA. As noted by plaintiffs, IGRA's use of the phrase "the reservation of the Indian tribe" in 25 U.S.C. § 2719(a)(1), suggests that Congress envisioned that each tribe would have only one reservation for gaming purposes . . . . Further, as pointed out by plaintiffs, IGRA specifically distinguishes between the "reservation" of an Indian tribe and lands held in trust for the tribe by the federal government. . . . Under the Secretary's proposed interpretation of the term "reservation," the line between the two would arguably be muddied. In other words, if the term 'reservation" were to encompass all land held in trust by the government for Indian use (but not necessarily Indian residence), then presumably most, if not all, trust lands would qualify as "reservations." In turn, all of those parcels could be used in the manner in which the Wyandotte Tribe seeks to use the Huron Cemetery and its surrounding tracts.

Id. at 1267 (citations omitted).

[219] *Id.*

[220] *Id.* at 1230.

[221] Kansas v. United States, 249 F.3d 1213, 1218 (10th Cir. 2001).

Christina allotment, even with the adoption of the owners, because Congress had expressly abrogated the tribe's jurisdiction over Kansas' lands in 1873.[222]

In sum, the Oklahoma Shawnees' claims for SFAAP and hopes for future gaming are made difficult by precedent seemingly hostile to the attempts by Oklahoma tribes to acquire lands for gaming purposes in Kansas. The distance from the central reservations and lack of continuous jurisdiction or exercise of governmental power disincline the courts to support Oklahoma tribal claims, especially when they are resisted strongly by resident Kansas tribes anxious to preserve their hard-won gambling advantages. In addition to these problems are the issues of defacto diminishment by demographic transitions,[223] a modern juridical tool of reservation confinement that might well affect the Oklahoma Shawnees' use of the excess property provisions over SFAAP.

Oyler's situation, in some respects, was superior to that of the Oklahoma Shawnee. He had been in uninterrupted possession and residence since 1975, and had been asserting sovereign jurisdiction and governmental authority as the UTOSI at least since mid-1990.[224] Beyond this, Oyler is a blood descendant of treaty signatories and is eligible for membership in the Oklahoma Shawnee.[225] If

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> Because the Tribe did not appeal Miami Tribe I, the district court's findings and conclusions regarding the status of the tract, including its construction of the relevant legislation and treaties, are now res judicata and we need not revisit them here. Notably, none of the Defendants have ever challenged Miami Tribe I's findings and conclusions regarding the status of the tract. Rather, they rely solely on the Tribe's activities subsequent to Miami Tribe I to claim tribal jurisdiction over the tract—namely (1) the Tribe's adoption of the tract's twenty-plus owners into the Tribe, (2) those owners' consent to tribal jurisdiction pursuant to a lease with the Tribe, and (3) the Tribe's recent development of the tract. None of these recent events, however, alters the conclusion that Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the tract. An Indian tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts. We conclude the State of Kansas has a substantial likelihood of success on the merits of this cause.

Id. at 1230-31.

223 *See supra* notes 162-64 and accompanying text.

224 *See Resurrection*, *supra* note 3, at 365-88.

225 25 U.S.C. § 1041c(b) states:

> Base roll eligibility. —An individual is eligible for enrollment on the base memebership roll of the Tribe if that individual—
>
> (1) is on, or eligible to be on, the membership roll of Cherokee Shawnees. . . which is separate from the membership roll of the Cherokee Nation; or
>
> (2) is a lineal descendant of any person—
>
> (A) who was issued a restricted fee patent to land pursuant to Article 2 of the Treaty of May 10, 1854, between the United States and the Tribe (10 Stat. 1053); or
>
> (B) whose name was included on the 1871 Register of names of those members of the Tribe who moved to, and located in, the Cherokee Nation in

Oyler chose to join the Oklahoma Shawnee, then the Indian claim for SFAAP would be strengthened. Lot 206 would be held in total by a recognized tribe, it would be inhabited by tribal members of Shawnee descent, and it would have been subject to the exercise of Indian jurisdiction and governmental function for a substantial length of time. This would leave only the daunting issue of diminishment.

Modern Supreme Court decisions have, as noted, tended to find diminishment in substantial part on the basis of demographics.[226] SFAAP is in an area of nearly total proprietary transition; a reservation of nearly 200,000 acres in 1854 featured no more than around 120 acres in 2002.[227] It would seem logical to conclude, on the basis of demographics and federal facilitation of property divestment in the nineteenth century, that Congress had implicitly diminished the Shawnee Reservation, at least in the vicinity of SFAAP, and that the excess property provisions were no longer operative.

There are, however, several distinctions in the Shawnee case that could make a difference if the issue of diminishment reaches the courts. For one thing, the Shawnee are attempting to assert reservation status over lands held by the federal government, rather than lands held privately or publicly under state or local jurisdiction. This is in decided contrast to the recent diminishment cases which invariably feature tribe and federal jurisdiction against that of state and local entities.[228] In another sense, the federal government is seeking to dispose of lands and the assertions of reservation jurisdiction or tribal excess property claims will not directly affect federal ownership or function. The impact would seem to fall only on unvested state, local or private desires and expectations.

Thirdly, the federal government can be viewed as a failed trustee who has reacquired the corpus previously lost through dereliction. The federal government, holding a restraint on the alienation of Shawnee property, made no real effort, in the nineteenth century, to protect the Shawnee allottees from force, fraud, or overreaching. It allowed the disposals of trust land at unconscionable rates and under questionable circumstances.[229] It then reacquired some of the very land that it had allowed to escape. Since the overriding federal responsibility of national security no longer requires the retention of SFAAP, there would seem to be a strong argument[230] for the judicial imposition of a constructive trust.

Why are the claims to the land of SFAAP — the perhaps quixotic ones of the Oylers and the substantially more realistic ones of the Oklahoma Shawnee — of high importance and soon-to-be growing concern to Johnson County and the Kansas City metropolitan area? The quick response is, of course, the attendant

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Indian Territory pursuant to the Agreement entered into by and between the Tribe and the Cherokee Nation on June 7, 1869.

[226] *See supra* notes 162-64.
[227] *See Resurrection*, *supra* note 3, at 363-64.
[228] *See supra* notes 162-64.
[229] *See supra* note 198.
[230] *See Recognition*, *supra* note 1, at 316.

likelihood of Indian gambling in the heart of the urban area. The quest for land can, however, lead to much more than that. If the Shawnee are successful, they will acquire a land base of up to ten square miles that is seemingly insulated by the exclusionary provision of the Treaty of 1831. This island would be beyond the reach of taxes, assessments, zoning, building codes, non-prohibitory safety regulations, and planning. No state or local interest, no matter how important or weighty on the post-*Hicks* balancing scale, could seemingly overcome the Treaty exclusionary provisions and its total defusing of the civil jurisdictional initiative and the preemption analysis. In short, the significance of the claims to SFAAP is that if successful, they could result in a ten-square mile island in the middle of Johnson County that has an immunity from state or county civil authority that approaches the absolutism of *Worcester.*

VI. CONCLUSION

Justice Scalia, taking dead aim on tribal sovereignty in *Hicks*, and seeking to augment the power of the state in future preemption balancing contests, chose to confine *Worcester* and redefine it as the product of a relatively unique treaty exclusionary provision. His history (or candor) may have been suspect, but the result would seem to revitalize and firmly establish the continuing efficacy of state exclusion provisions such as those in the Shawnee Treaty of 1831. The State of Kansas and the local governments may have to come to terms with this. If the precedents of the Tenth Circuit and the Supreme Court preclude a direct, frontal assault on the provision, they may have to proceed obliquely.

If the Shawnee — the Oklahoma Tribe and/or the UTOSI—are successful in reacquiring lands within SFAAP, the state might contend that such lands come stripped of exclusionary treaty protection and subject to the taxation and civil regulatory power of the state. Indeed, the Supreme Court, in *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*,[231] held that lands made alienable by Congress, sold and then subsequently reacquired by the tribe, remained taxable in the absence of a manifested Congressional intent to reinsulate them.[232] This does not completely address the Shawnee situation,

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[231] 524 U.S. 103 (1998).

[232] "Once Congress has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it nontaxable." *Id.* at 114. *But see* Gobin v. Snohomish, 304 F.3d. 909 (9th Cir. 2002), *cert. denied,* U.S. LEXIS 2011 (U.S. Mar. 10, 2003) which held that, when members of a recognized tribe reacquired fee simple land on the reservation which had previously been made alienable by Congress and transferred without restriction to a non-Indian, the land became subject to tribal jurisdiction and became simultaneously insulated from the surrounding country's land use controls. The Ninth Circuit said:

> Snohomish County . . . asserted land use jurisdiction over a proposed building project located on reservation land owned in fee simple by Kim Gobin and Guy Madison . . . registered members of the Tulalip Tribes of Washington . . . . Gobin sought a declaratory judgment that the County lacked such jurisdiction over her lands.

which features restricted allotments lost, not by congressional intent or directive, but by private forces and administrative inattention. This distinction might, however, not be dispositive for a Supreme Court that seems determined to homogenize any vestiges of legally protected pluralism in American society.[233]

This approach would not, of course, affect continuous treaty-based footholds such as Lot 206, which though limited in scope, retain significant functional—and entrepreneurial—potential, especially if buffered by the impenetrability of the exclusionary provision. To reach, tax, and regulate the Shawnee interests in Lot 206, both those of the Oklahoma Tribe and those of the Oylers and the UTOSI, the state would seem bound to proceed politically. It must either induce Congress to legislate an abrogation backed by just compensation,[234] or forge a détente with the little but impenetrable sovereign within its midst. Practicality and expediency might dictate the former course of abrogation, but justice, morality, and regard for the enduring nature of promise would call for the latter.

On March 14, 2003, Jim Oyler, just released from the hospital following an operation to repair a threatening aneurysm, received welcome news from his attorney, Sean Pickett. He had won the case against Johnson County. The District Court concluded that the county was "without power to criminalize the sale of fireworks on Lot 206."[235] Though the court agreed with Oyler's contention that Johnson County lacked both criminal and civil regulatory initiative over Lot 206, it chose an unexpected, somewhat curious way of reaching this conclusion.[236] Rather than relying on the Treaty of 1831 and the unabrogated preclusion of state jurisdiction within Shawnee treaty lands, the court instead utilized an arcane regulation promulgated by the Department of the Interior in 1965, which read:

. . . .

> We conclude that by making Gobin's fee lands freely alienable and encumberable, Congress did not expressly authorize County jurisdiction over those lands. Neither did exceptional circumstances warrant County jurisdiction in this case.

Id. at 911.

[233] *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

[234] Congress sought to quell the Wyandotte Tribe of Oklahoma's desire to conduct gaming on its Huron Cemetery trust lands in downtown Kansas City, Kansas, by abrogating substantial portions of the tribe's treaty-based property rights, and by limiting the cemetery to burial purposes. *See* Pub. L. No. 105-83, 111 Stat. 1543 (1997) and Pub. L. No. 106-291, 114 Stat. 922 (2000). Congress has sought to address its constitutional liability with settlements that allow gambling on substitute lands in Wyandotte County. These bills have been resisted by the State of Kansas and local tribes, and have not passed. The Tribe's quest for gambling—and perhaps compensation—was blunted by *Sac & Fox Nation v. Norton*, 240 F.3d. 1250 (10th Cir. 2001), which held that the cemetery was not a reservation for gaming purposes under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701-21 (2000).

[235] State v. Oyler, Nos. 02CR1211 and 02CR1215, at 9 (D. Ct. Johnson County, Kan., Mar. 14, 2003) [hereinafter Oyler].

[236] *See id.* at 8-9.

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.[237]

The court drew on precedent for the application of the regulation from *Santa Rosa Band of Indians v. Kings County*,[238] a case that Oyler had advanced for the proposition that a federal delegation of authority to the state, such as that included in Public Law 280, does not contemplate a simultaneous delegation of authority to local government.[239] *Santa Rosa* utilized 25 C.F.R. § 1.4 however, as a secondary rationale for its conclusion that local government lacked regulating jurisdiction within Indian country,[240] and the Johnson County District Court adopted this provision as a categorical hedge against Johnson County's exercise of police power or criminal jurisdiction on Lot 206.[241]

The use of 25 C.F.R. § 1.4, by both the Ninth Circuit and the Johnson County District Court, is somewhat controversial.[242] However, if the regulation was

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[237] 25 C.F.R. § 1.4 (2002). The regulation was, in part, designed to follow the provisions of 28 USC §1360(b) (1994), which reads:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

[238] 532 F.2d. 655 (9th Cir. 1975).

[239] The Ninth Circuit in *Santa Rosa* stated:

> [w]e have little difficulty in concluding, in light both of the immediate burden the County ordinances would place on these plaintiffs, and more generally of the devastating impact the County's construction of the statute would have on tribal self-rule and tribal economic development of reservation resources, that P.L. 280 subjected Indian County only to the civil laws of the state, and not to local regulation.

532 F.2d at 661 (footnote omitted).

[240] 532 F.2d at 665 n. 15 ("[t]he county has no jurisdiction to pre-empt.").

[241] "The regulation, by its terms, appears to be applicable to property such as that of issue here . . . . It is clear that the sale of class "C" fireworks is not a violation of state criminal law." Oyler at 8. The court agreed with Oyler that the state not only had not criminalized the sale of class "C" fireworks, it had not delegated the criminal jurisdiction, received under the Kansas Act, 18 USC § 3243 (1994). *See id.* at 9. *See also supra* note 97.

[242] The Ninth Circuit in *Santa Rosa* noted:

invoked to limit encumbrances on Indian country, or even local zoning, there is some support,[243] but if the regulation is applied beyond that there are real questions. Modern precedent dealing with local police power exercises within Indian county do not generally assert categorical invalidity; however, as long as the exercises are not encumbrances, cases opt instead for a weighted balancing of interests. In the recent case of *Gobin v. Snohomish County*,[244] the Ninth Circuit said:

> Encumbrances with respect to land or encumbrance of the transactions involving land or based on the value of the land, therefore, are not permitted. [However, in]"exceptional circumstances," a State may assert jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional intent to do so. The asserted exceptional circumstances are weighed against traditional notions of Indian sovereignty and the congressional goal of encouraging tribal self-determination, self-sufficiency, and economic development.[245]

The prohibition against the selling of fireworks is neither an encumbrance nor a zoning ordinance. It is instead a police power regulation and instead of categorical preclusion under 25 C.F.R. § 1.4 or 28 U.S.C. § 1360(b), it would

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> We are aware that several commentators have suggested that 25 C.F.R. § 1.4 is invalid because lacking in specific statutory authorization, or because in derogation of the jurisdiction conferred by P.L. 280; and that at least two district courts have refused to apply its provisions for those reasons. We conclude that the regulation is valid.

532 F.2d at 665 (citations omitted); *see also* John v. City of Salamanca, 845 F.2d 37, 2d Cir. 1988), which held that 25 C.F.R. § 1.4 did not overcome specific congressional provisions that authorized the application of municipal law to reservation lands in New York. *Id.* at 42-43. The court stated, "In sum, we find that the 1875 Act extends municipal laws to the leased reservation land within Salamanca's territorial limits." *Id.* at 43. Further, in a footnote, the court indicated:

> Nor do we consider the Secretary of the Interior's regulation, 25 C.F.R. § 1.4, controlling in this case. We are unaware of any authority delegated to the Secretary, and John has cited none, which would empower him effectively to repeal congressional legislation. The 1875 Act must take precedence over the regulation in the absence of a clear expression of congressional intent to the contrary.

Id. at 43 n.5.

[243] 25 C.FR. § 1.4 (2002) tracks the statutory prohibition against encumbrances in 28 U.S.C. § 1360(b) (1994). *Supra* note 238. It has been held that a local zoning ordinance can be a prohibited encumbrance. *See* Snohomish County v. Seattle Disposal Co, 425 P.2d 22, 26 (Wash. 1967). *But see* Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), which felt that the Washington Supreme Court had no basis for its "very broad definition of encumbrance," *Id.* at 376 (stating that, "this court finds no warrant for expanding the definition of encumbrance as that term appears in Public Law 280 beyond its usual application indicating a burden on the land imposed by third persons which may impair alienability of the fee, such as a mortgage, lien, or easement.").

[244] 304 F.3d. 909 (9th Cir. 2002) *cert. denied*, 123 S.Ct. 1488 (2003).

[245] *Id.* at 916-17 (citations omitted).

seemingly be subject to analysis for preemption under the weighted balancing test of *Gobin* and *Cabazon Band.*[246]

The preclusion of local jurisdiction over Lot 206 under the provisions of the Treaty of 1831 would have been a better-reasoned approach. Why then did the district court not choose it? Oyler's argument—that the Treaty of 1831 precluded *any* state or local jurisdiction from exercising on Lot 206, with the exception of state criminal jurisdiction under the Kansas Act,[247] and that Oyler, as an individual in possession of treaty land, had standing to raise the issue—was avoided by the court under the misperception that Oyler was asserting a treaty right to sell firecrackers.[248] This, of course, was not Oyler's assertion; he contended, rather, that the *right to be excluded from the boundaries of the State of Kansas and be free from all state jurisdiction* was accorded by treaty and was assertable by a Shawnee descendant in possession. He further contended that such a right would *include* a prohibition against a local ordinance attempting to restrain the act of selling fireworks.

Though it is undetermined whether the court's avoidance of the Treaty of 1831 was prompted either by a misconception of the claim or by its own wariness of, and inexperience with, the labyrinths of Indian law, it is at least clear that its use of 25 C.F.R. § 1.4 was sufficient to derail Johnson County's fireworks regulations and the prosecution of the Oylers. Future attempts by the county or the state to regulate or tax Lot 206 can now be resisted on two independent bases — the Treaty of 1831 and its preclusion of state jurisdiction, and the prohibitions against encumbrance under 28 USC § 1360(b) and 254 C.F.R. § 1.4, which clearly excludes encumbrances in rem taxation, and may exclude zoning as well.

As the bombs began to fall on Baghdad, Jim Oyler, a Navy pilot with battle experience, felt somewhat conflicted. He is a patriot and a military man and he does not flinch in the unleashing of the dogs of war; yet, in his heart, he is a rebel defender of a separate sovereign and he empathizes with little nations overwhelmed by big ones. He supports the federal and state governments and believes in their laws, yet he asserts a sovereign immunity and defends his little island of Indian country with warrior tenacity. The merging of these passions comes with his continuing belief that great nations, and the local units bound therein by supremacy, should keep their promises.

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[246] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-15 (1987); *Gobin*, 304 F.2d at 917; and *supra* Part II.

[247] *See supra* note 242 and accompanying text.

[248] *Oyler*, Nos. 02CR1211 and 02CR1215, at 7 n. 5.