2000

The United Tribe of Shawnee Indians: Resurrection in The Twentieth Century

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THE UNITED TRIBE OF SHAWNEE INDIANS: THE BATTLE FOR RECOGNITION

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I. INTRODUCTION: THE SUNFLOWER ARMY AMMUNITION PLANT

After the outbreak of World War II, the federal government began to acquire farmlands south of the Kansas River, near the town of DeSoto, Kansas, for use as a munitions manufacturing site.[1] The government assembled over 9,000 acres, and the Sunflower Army Ammunition Plant (SFAAP) became one of the world's largest manufacturers of gunpowder and missile propellants, employing 12,000 workers at its peak.[2] The plant produced munitions for half a century, supplying military operations in World War II, Korea, and Vietnam.[3] By 1993, however, production had ceased, and the United States began to consider various futures for the site – alternatives that were complicated by the extensive pollution problems and the anticipated expenses of rectifying them.[4] The contaminants, lodged in settling ponds, underground storage tanks, drains, pipes, abandoned buildings, groundwater, and subsoil, included asbestos, ammonia, nitrates, sulfuric acid, mercury, arsenic, chromates, PCB's and dioxin.[5] The numerous sites of contaminated soil and water presented myriad problems – severe enough that the Environmental Protection Agency wanted to list Sunflower on the national priority list for Superfund clean-up.[6] The Army, however, fearing that Superfund status would hinder disposal and discourage future redevelopment, resisted the designation.[7] Labeling aside, the contamination and the necessity of remediation represented a problematic reality that would not easily – or cheaply – go away.

The lure of 9,000 undeveloped acres, even contaminated ones, that were located in the strategic growth corridor between affluent, urbanized eastern Johnson County, Kansas and the cozy intellectuality of a university town like Lawrence, was stronger than the dissuasion of the ever-expanding estimates of the clean-up costs.[8] By early 1998, the potential suitors for the federal land included

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[1] *See* Peter Hancock, *The Wizardry of Oz*, 574 PITCH WEEKLY 14, May 13-19, 1999.

[2] *Id.*

[3] *Id.*

[4] *See* Peter Hancock, *The Land of Ooze: Environmental Issues Surrounding the Sunflower Army Ammunition Plant*, 575 PITCH WEEKLY 14, May 20-26, 1999.

[5] *Id.*

[6] Jim Sullinger, *Army Fights to Keep Plant Off EPA's Superfund List*, KANSAS CITY STAR, April 20, 1995, at C2.

[7] *Id.*

[8] The Army estimates that it has spent over $15 million in clean-up costs in Sunflower. *See* Hancock, *supra* note 4, at 14. In 1995, the total clean-up effort was estimated at around $37 million. *See* Sullinger, *supra* note 6, at C2. By September of 1999, some estimates of remediation had risen to as high as $130 million. *See* Grace Hobson & John L. Petterson, *Projected Cleanup*

the Johnson County Parks Department; the City of De Soto; Kansas State University, and a somewhat ephemeral dream merchant called the Oz Entertainment Company ("Oz"). Oz, headed by smooth-talking West Coast entrepreneurs, who had tried earlier to establish entertainment beachheads in neighboring Wyandotte County,[9] desired to invoke the Wizard of Oz name and imagery[10] and to launch a high-tech theme park. They had no track record of achievement and no capital, but in spite of previous area setbacks, they did have substantial political connections in Kansas state and local government.[11] They began to formulate what has been called "one of the most complex and unique development deals ever structured in Kansas."[12]

Paralleling these interests were those of the United Tribe of Shawnee Indians. On August 20, 1997, Jim Oyler, Principal Chief of the Tribe, requested that the Department of Defense transfer the deactivated plant to the United Tribe of Shawnee Indians pursuant to the Federal Property and Administrative Services Act of 1949.[13] Oyler contended that the Sunflower Plant lay, at least partially, within the contours of the nineteenth century Shawnee Reservation, whose juris-

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Cost at Oz Called Low – Kansas Says Price 2 or 3 Times Higher, KANSAS CITY STAR, Sept. 10, 1999, at A1.

[9] Robert Kory, an entertainment lawyer from Los Angeles and President of Oz, and Harold "Skip" Palmer of Encinitas, California, had previously been associated with the failed management of Wyandotte County's Sandstone Theatre, and had later received $500,000 from Wyandotte County to do a feasibility study on locating an Oz theme park in Western Wyandotte County. *See* Hancock, *The Wizardry of Oz*, *supra* note 1, at 14.

[10] The ensuing conflict between Oz and the United Tribe of Shawnee Indians is appropriate in a sense. L. Frank Baum, the author of *The Wonderful Wizard of Oz*, was a racist, and as an editor of a newspaper in South Dakota at the time of the Wounded Knee massacre, wrote editorials calling for the extermination of the entire Sioux Nation. *See* L. Frank Baum, *Editorial*, ABERDEEN SATURDAY PIONEER, (Jan. 3, 1891), *at* http://www.peaknet.net/-aardvark/baum.html and http://www.dickshovel/roeschbaum.html (last visited Nov. 28, 2000).

> The PIONEER has before declared that our only safety depends upon the total extermination of the Indians. Having wronged them for centuries we had better, in order to protect our civilization, follow it up by one more wrong and wipe these untamed and untamable creatures from the face of the earth. In this lies safety for our settlers and the soldiers who are under incompetent commands. Otherwise, we may expect future years to be as full of trouble with the redskins as those have been in the past.

[11] *See* Hancock, *The Wizardry of Oz*, *supra* note 1, at 20. Peter Hancock noted: "[b]ut perhaps more than the qualifications of the Oz Entertainment executives themselves, what appears to have kept the project alive for the last several years has been its ability to maintain connections with many well-heeled political interests in the Kansas City area and the state of Kansas." *Id.* at 20.

[12] *Id.* at 17.

[13] 40 U.S.C. §§ 471-544. An amendment to the Act allows the Secretary of the Interior to acquire excess federal real property which is located within the reservation of any tribe recognized as eligible for services by the Bureau of Indian Affairs. 40 U.S.C. § 483(a)(2); *see* Letter from Nancy Jemison, Director of the Office of Management and Administration, United States Department of the Interior, to Jimmie D. Oyler (August 11, 1998), in Plaintiff's Supplemental Brief in Support of Implementation of a Preliminary Injunction Against the Transfer of Sunflower Ammunition Plant Prior to a Complete Environmental Impact Statement Being Issued, United Tribe of Shawnee Indians v. United States, No. 99-2063-GTV (D. Kan. filed June 2, 1999).

dictional parameters Congress had recognized but never formally abrogated or diminished.[14] The Department of Defense rejected Oyler's request, however, not because of reservational boundary issues, but because the statutory provisions on excess federal property on reservations were limited to tribes "recognized as eligible for services by the Bureau of Indian Affairs," and because the "United Tribe of Shawnee Indians does not meet this criteria."[15]

With Jim Oyler and the United Tribe of Shawnee Indians at least temporarily sidetracked, the Department of Defense and the Government Services Administration turned their attention to the interesting, if ethereal, plans of Oz. The Oz Entertainment Company's proposal intrigued the federal government because it represented an opportunity to shift the multi-million dollar cost of the clean-up, if not the ultimate responsibility for the clean-up itself.[16] More specifically, the plan called for the federal government to make an early transfer of the property – before remediation, but under assurance – first to Kansas and then to Oz, which would manage the clean-up before building the theme park and developing the area around it.[17] Thus, in theory, the United States would get rid of a messy site without further expense, the state would acquire a high-profile attraction to bolster its punchless tourist economy, and the Oz Corporation would rake in money from the flood of visitors, rosily projected at three million per year.[18]

The Oz optimism extended beyond visitor projections to front end financing. The $770 million development price tag was to involve a state-supported

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[14] *See* John W. Ragsdale, *The United Tribe of Shawnee Indians: Resurrection in the Twentieth Century,* 68 UMKC L. REV. 351, 362-64 (2000).

[15] Jemison letter, *supra* note 13.

[16] Under the Comprehensive Environmental Response, Compensation, and Liability Act [CERCLA], federal facilities contemplating land transfer must include within the deed of transfer a covenant that "all remedial action necessary to protect human health and the environment with respect to any [hazardous] substance remaining on the property has been taken before the date of such transfer," 42 U.S.C. § 9620(h)(3)(A)(ii)(I) (1999), or an assurance, with the concurrence of the governor of the state, that all necessary response actions are in place and will be completed, 42 U.S.C. § 9620(h)(3)(C)(i) (1999). The Environmental Assessment on the proposed disposal of the Sunflower Plant, issued on February 8, 1999, acknowledged that the ultimate responsibility of site remediation remains with the United States:

> should a transferee of the property agree to conduct the clean-up, which would otherwise be the responsibility of the United States, the transferee must provide financial assurance that it will complete a clean-up. Notwithstanding the assurance, the United States retains ultimate responsibility to assure that the clean-up is protective of human health and environment.

Environmental Assessment at 1, 9.

[17] Hancock, *The Land of Ooze*, *supra* note 4, at 15.

[18] *See* Hancock, *The Wizardry of Oz*, *supra* note 1, at 16. The visitor projections are based on an anticipated 185-day season, and can be compared to the figures of the nearby Worlds of Fun Amusement Park, which draws about 1.2 million visitors a season, and to the figures of Six Flags Over Atlanta, an amusement park drawing about 2.3 million visitors a year, but with no seasonal limitations. *See id.* Since the theme park would occupy only about one-fifth of the site, some of the remainder was to be parceled out to local government and educational institutions and much of it was to be available for commercial and residential development. Hancock, *The Land of Ooze*, *supra* note 4, at 15.

jump-start through the issuance of $270 million of sales tax and revenue bonds, which could be retired with a special sales tax to be collected from project revenues.[19] The bond sales would provide, hopefully, the critical mass of capital to enable clean-up and development to proceed simultaneously.

Oz had moved quickly and the transfer seemed imminent at the beginning of 1999. In fact, the Department of Defense had issued a draft Environment Assessment on February 8, 1999 which stated that the proposed transfer by the federal government appeared to present "no significant environmental impact" and, therefore, would not require the preparation of a time-consuming, attention-generating environmental impact statement.[20] This conclusion seemed questionable to many, since early disposal not only posed substantial questions about the completion of the federal remediation responsibility, but also facilitated the construction of a massive new leap frog development in a semi-rural area – an event that could spawn a wide variety of ancillary environmental problems, including air, water, and noise pollution, economic impacts, and social disruption.[21] The environmental watch dogs, as well as state and local government, seemed mesmerized into passivity by the audacity and perhaps the breakneck pace of the Oz juggernaut.[22]

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[19] *See* Hancock, *The Wizardry of Oz*, *supra* note 1, at 14-15. The Kansas Legislature approved these provisions. *Id.* at 15.

[20] *See supra* note 12. There is significant authority that disposals of property under 40 U.S.C. § 484 must comply with the environmental impact statement process set out under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d. The GSA did not dispute that the disposal of a 3,200 acre facility –one-third the size of Sunflower – was a major federal action requiring the preparation of an Environmental Impact Survey. *See* Conservation Law Found. of New Eng., Inc. v. GSA, 707 F.2d 626, 633 (1st Cir. 1983).

[21] Craig Volland, an environmental engineer and Sierra Club member, said:

> there are three main problems. . . . They are transferring this property without adequately assessing the extent of contamination. Secondly, the Oz development will be downwind of remediation activities, and also downstream from potential seepage off the site. And third, the Oz development itself will be the nucleus of essentially an all-new city well beyond the urban boundary of Johnson County that will cause additional vehicle-miles traveled and the associated emissions that will worsen the metro area's air quality.

Hancock, *Land of Ooze*, *supra* note 4, at 15. *See also* Marc Mason, *Sunflower 102 – Are We Cleaning Up or Being Cleaned Out?* 24 PLANET KANSAS No. 2, April/May 1999, at 4. The Department of Defense and the Government Service Administration took the initial – and probably indefensible – position that the transfer was an administrative issue that had nothing to do with development. *See* Environmental Assessment Summary, *supra* note 16, at 2. The Supreme Court has held that the foreseeable impacts of new development facilitated by a transfer of or license on federal land must be discussed in the context of a full EIS. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 339-45 (1989); *see also* 40 C.F.R. §§ 1508.8, 1502.16 (1999).

[22] Larry Winn, III, an attorney for Oz, stated that the EPA had been directed not to enforce liability provisions of federal law in connection with the disposal of polluted surplus defense sites. *See* Mike Shields, *Oz Park Breaks Called a Must*, LAWRENCE JOURNAL-WORLD, April 18, 1999, at B1.

Early in 1999, Jim Oyler and his new attorney, Sean Pickett,[23] filed an action in the Federal District Court of Kansas, seeking a variety of responses from a number of defendants.[24] At the core of the complaint was a prayer for a declaration of the recognized status of the United Tribe of Shawnee and for mandatory inclusion of the tribe on the official list of recognized tribes maintained by the Bureau of Indian Affairs. Oyler and Pickett asserted that the United Tribe of Shawnee Indians had been recognized by treaty, by statute, and by Supreme Court opinion in the nineteenth century,[25] that such recognition had not been terminated or abrogated by specific action of the United States Congress,[26] and,

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[23] Sean Pickett is a particular friend of the author. He was an outstanding, memorable student at UMKC Law School and has become a competent, successful practitioner in the Kansas City area. In addition, he is a long-time Ozark river runner, whose previous tribulations on Greer Spring were chronicled in the author's recent article, *Greer Spring*, 67 UMKC L. REV. 3, 11-12 (1998). Sean returned to the Ozark waters in the summer of 1999 in a radical new kayak called the Riot Glide, which is all the rage in recent white-water rodeos, but is somewhat skittish and edgy for a 230-pound former football player like Sean. He navigated a considerable stretch of the North Fork of the White River in an inverted position and, as he had neglected to wear his helmet, left some scalp along stretches of the rocky bottom. Sean survived the North Fork, much the same as he survived Greer Spring several years earlier, and he continues on as the attorney for the United Tribe of Shawnee Indians. He has since resolved to wear his helmet and perfect his Eskimo roll, especially since he and his wife Jennie are the proud parents of newly-arrived Jackson Pickett.

[24] The United Tribe of Shawnee Indians, as plaintiff, sued William Cohen, the Secretary of Defense, Paul Johnson, the Assistant Secretary of the Army, David Barram, Administrator of the General Services Administration, Blaine Hastings, Project Manager for the Disposition of Sunflower, Bruce Babbitt, Secretary of the Interior, and Kevin Gover, Assistant Secretary of the Interior for Indian Affairs.

[25] The United Tribe of Shawnee Indians, headed by Oyler, asserted that the Treaties with the Shawnee, 7 Stat. 284 (1825), 7 Stat. 355 (1831), & 10 Stat. 1053 (1854), confirmed a reservation for the Shawnee, and established a political relationship with the United States, which thus amounted to formal recognition. In addition, the Kansas Statehood Act provided that territory under treaty with the Indians was not to be included within the territorial limits or jurisdiction of the state. 12 Stat. 126, 127 (1861). Finally, the United States Supreme Court declared that there was a continuing political relationship between the Shawnee Tribe and the United States that precluded Kansas and its local governments from taxing the individually held allotments of the tribal members. In re Kansas Indians, 72 U.S. 737, 752-54 (1866).

[26] In *Oyler v. Allenbrand*, the Tenth Circuit stated "[w]e have found no evidence that this treaty [the Treaty of 1831, 7 Stat. 355, which pledged that the Shawnee lands would never be within the bounds of any state or subject to state law] has ever been formally abrogated." 23 F.3d 292, 295 (10th Cir. 1994). In line with this holding, Oyler and Pickett, in effect, contended that although the 1854 Treaty with the Shawnee may have diminished the scope of the 1831 reserve, it did not diminish or abrogate the residual sovereignty, the recognition by the United States, or the exclusion of any exercise of state jurisdiction. The Supreme Court stated:

> it is not necessary to import the guarantees of the treaty of 1831 into that of 1854, in order to save the property of the entire tribe from State taxation. If the necessities of the case required us to do so, we should hesitate to declare that, in the understanding of the parties, the promises under which the treaty of 1831 [was] made, and the guarantees contained in it, were all abandoned when the treaty of 1854 was concluded. If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making

therefore, that the Bureau of Indian Affairs (BIA) had no discretion to refuse the inclusion of the United Tribe of Shawnee Indians on the list of recognized tribes.[27] If Oyler could successfully persuade the court to issue the declaration and the mandate regarding recognition, and if the transfer of the SFAAP had not yet been completed, then the United States could no longer avoid the excess property provision[28] on the ground that the government had not recognized the United Tribe of Shawnee Indians.

Since the Army and the Government Services Administration were moving rapidly – and surreptitiously – toward disposition, Oyler needed a cause of action to hold up the transfer, pending a resolution of his claim for recognized status. Pickett drafted a somewhat novel claim of constructive trust and joined it with a request for a temporary restraining order, barring disposition of the SFAAP before a full hearing. The basis of the constructive trust assertion lay in the storm tide of forces that swept over the Shawnee Nation in the fifteen years following the Treaty of 1854. With incessant pressures from border raiders such as William Quantrill, land-covetous settlers, railroad men, politicians, and even the courts, the Shawnee were forced to sell their allotments.[29] All too often, and far too easily, the United States waived the restraint on alienation and allowed the sales under duress to go forward.[30]

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.[31] These included the reassemblage by the United States 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.[32] 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,[33] a constructive trust for the descendents of the original beneficiaries and for their tribal representative arose.[34]

> treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union.

Kansas Indians, 72 U.S. at 755.

[27] The list is maintained under the directive in 25 U.S.C. § 479a-1(a).

[28] *See supra* note 13.

[29] *See* GEORGE MANYPENNY, OUR INDIAN WARDS 126-27 (1880); Absentee Shawnee Tribe v. United States, 12 Ind. Cl. Comm. 180, 186 (1963).

[30] *See* Ragsdale, *supra* note 14, at 362-68.

[31] Complaint, United Tribe of Shawnee Indians v. United States, No. 99-2063-GTV (D. Kan. filed February 17, 1999).

[32] *Id.*

[33] *Nevada v. United States* indicates that the United States' fiduciary duty to tribal Indians may be offset (and both the beginning of a cause of action and the running of a statute of limitation delayed) while the government "performs another task for another interest that Congress has obligated it by statute to do." 463 U.S. 110, 128 (1983).

[34] *See* Complaint, United Tribe of Shawnee Indians v. United States, No. 99-2063-GTV (D. Kan. filed February 17, 1999).

As originally filed, the complaint of the United Tribe of Shawnee Indians centered on the issue of recognition.[35] The associated claim for a constructive trust did not seem strong enough to slow the inertia of the Sunflower land transfer, let alone permanently derail it. If the transfer went through, then even a subsequent victory on the recognition claims would be somewhat hollow as the Tribe's best hope for an expanded land base would have vanished behind the walls the Eleventh Amendment and the doctrine of bonafide purchase posed.[36]

Pickett then amended the complaint to add the issue that had been discussed in the environmental community, but which, somewhat strangely, no formal protagonist had presented to the court.[37] The amended complaint pointed out the absurdity of the government's issuance of a Finding of No Significant Impact (FONSI) for a transaction as complicated as the one at Sunflower. The federal government planned to transfer fifteen square miles of strategic land in the most explosive growth corridor of the Kansas City metropolitan area; there were plans for billion-dollar development decisions that would fundamentally change not only the natural terrain, but the social and economic functioning of the area. The complexities and externalities of such leap-frog development were not only foreseeable, but inevitable. The capper on this problematic scenario was the extensive presence of hazardous wastes that, under law, required federal remediation.[38] All of this demanded, Pickett charged, that the governmental defendants prepare a full environmental impact statement before proceeding with the transfer.[39]

If the Shawnee suit for declaratory judgment of recognition and constructive trust had seemed a marginal annoyance, unlikely to arouse the federal mule, the demand for a time-consuming, expense-generating, publicity-attracting, deal-threatening EIS was the proverbial two-by-four between the ears. Jim Oyler and the United Tribe of Shawnee Indians now had the United States' full attention. The Department of Defense, the Bureau of Indian Affairs, the Government Services Administration, the State of Kansas, and representatives of the Wonder-

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[35] *Id.*

[36] The Eleventh Amendment generally bars the assertion of federal jurisdiction over suits by an Indian tribe against a state regarding issues of land title. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268-283 (1997). The doctrine of the bonafide purchaser for value states that a private party like Oz can acquire "a good title, notwithstanding an earlier fraudulent transfer." City of Arkansas v. Anderson, 804 P.2d 1026, 1031 (Kan. App. 1991). It should be noted that a suit in constructive trust against the federal government is not beyond procedural questions either. The doctrine of sovereign immunity is a formidable barrier. *Cobell v. Babbitt* states, however, that the provisions of 5 U.S.C. Section 702 are designed to "eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful action by a Federal officer." 52 F. Supp. 2d 11, 21(D.D.C. 1999) (quoting Cobell v. Babbitt, 30 F. Supp. 2d 24, 31 (D.D.C. 1998)).

[37] *See supra* notes 16-18; *see also* Motion for an Amended Complaint, United Tribe of Shawnee Indians v. United States, No. 99-2063-GTV (D. Kan. filed April 1, 1999).

[38] See Hancock, *The Land of Ooze*, supra note 4, at 16.

[39] Motion for Amended Complaint at 1. The amended complaint stated that the environmental assessment and draft FONSI issued on February 8, 1999, were arbitrary and that a formal EIS was warranted in order to fulfill the agency responsibilities under the National Environmental Policy Act (NEPA), 42 U.S.C.A. § § 4321-61 (West 2000), and the regulations of the Council on Environmental Quality, 40 C.F.R. § 1500-08 (2000). *See id.* at 2.

ful World of Oz began to plot a defense against this maverick Indian uprising that, somewhat improbably, threatened to block their way. Pickett and Oyler likewise began to hone the core legal concepts that they hoped would transform Sunflower from its present status as a waste depository, and from its fanciful future as a yellow-brick playground, into a living tissue of land around the still-beating heart of the United Tribe of Shawnee Indians. Ground zero of their endeavor was the recapture, in judicial declaration and mandated administrative notation, of the recognized status of the United Tribe of Shawnee Indians.

II. RECOGNITION OF TRIBES AND PROPERTY

A. Definitions

The word "tribe" is not immediately or inescapably self-defining. Felix Cohen pointed out that, at a minimum, the term can be used in an ethnological sense or in a legal-political context.[40] From the ethnological, sociological or associational perspective, definitions of "tribe" must be considered somewhat indeterminate. There is no precise set of criteria – no numerical minimum, no necessary range of influence, no mandatory continuum, no requisite organizational hierarchy – which neatly and exactly captures tribalness and excludes different or less worthy associations. With a nod to Descartes, it might be said that a tribe exists because its members think it does.[41] Anthropologists, historians and politicians may be more interested in certain types of tribes – large tribes, powerful ones, rich or artistic ones, continuous tribes or compliant tribes – but definitions to serve such interests transcend the associational geneses and relate more to political or scientific taxonomy. In the realm of the political, recognition becomes the critical element of tribal definition.

Recognition is a collective stance taken by one nation or sovereign government toward the political or proprietorial claims of another.[42] In the international context, recognition between self-actuating sovereigns at arms' length can be useful and strategic, but is not usually vital to a nation's basic existence. In the unique case of the relationships between the United States and the enfolded Indian tribes, however, recognition can often play a more critical existential role, due to the judicially-declared dependent nature of Indian sovereignty.[43]

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[40] FELIX COHEN, FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3 (1982).

[41] Rene DesCartes' classic Latin aphorism "Cogito Ergo Sum" – I think, therefore I am – can be found in a Latin version of his MEDITATIONS ON FIRST PHILOSOPHY, *at* http://philos.uright.edu/DesCartes/Meditations.html (last visited Feb. 26, 2000). The Supreme Court has endorsed a definition of "tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . ." Montoya v. United States, 180 U.S. 261, 266 (1901).

[42] *See Montoya*, 180 U.S. at 266.

[43] The language "domestic dependent nations" comes from Justice Marshall's opinion in *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Indian nations, for the most part, became literally as well as figuratively dependent in the late nineteenth century when the United States accelerated its attacks on the tribal land bases, with the intent of deconstructing tribal politics and economy, as well as proprietorial interests. The assimilation and allotment movements dramatically reduced the

With regard to real property, the recognition of Indian title is a necessary predicate to the just compensation provisions of the Fifth Amendment.[44] Aboriginal title, unrecognized by federal treaty or statute, is considered mere possession or license as against the dominant sovereign, and is subject to displacement without constitutional consequence.[45] The jurisprudential ancestry of the distinction between recognized and aboriginal title, keyed to the Eurocentric doctrine of discovery, may be both logically questionable as well as morally flawed.[46] Despite its parentage, however, the distinction has acquired functional legitimacy through longevity and continues to operate in modern, presumably enlightened times, even if steeped in racial and ethnic bias.[47]

Whereas recognition of title in real property relates to the Fifth Amendment, recognition in the political sense relates more to jurisdictional issues and with the reach of trust responsibilities between separate sovereigns.[48] A recognized tribe may exercise jurisdiction or sovereignty[49] over its land base and, with the added veneer of federal supremacy, can preempt conflicting state legislation.[50] If the federal government does not recognize a tribe, and if there is

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spatial scope of the land base, precluded the continuation of subsistence hunting as the central economy, and shattered tribal cohesion. *See* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934 121-25 (1991).

[44] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-78 (1955) ("[w]here the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking").

[45] The Supreme Court stated that:

> possession not specifically recognized as ownership by Congress. . . . [I]t is not a property right but . . . a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

348 U.S. at 279. A modern version of the aboriginal title doctrine is the "paramountcy doctrine" whereby the courts have declared that aboriginal title in the outer-continental shelf is "inconsistent with the sovereignty of the federal government. . . ." *See* Native Village v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1995 (9th Cir. 1998). The federal government has, for political and perhaps moral reasons, generally chosen to extinguish aboriginal title by voluntary means such as treaty or negotiated purchase, *see* Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 35 (1947), or by statutory settlements such as the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-28, and the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70V.

[46] *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST 326 (1990) ("The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principal").

[47] *See, e.g.*, Menominee Indian Tribe v. Thompson, 161 F.3d 449, 462 (7th Cir. 1998).

[48] Certain forms of the trust relationship, such as the one established by the operation of the Non Intercourse acts, and the restraint on the alienation of Indian land, *see* 25 U.S.C.A. § 177, do not depend on the previous establishment of a recognized trust relationship. *See* Joint Tribal Council of the Passama-quoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

[49] Sovereignty may be defined for purposes of federal Indian law as the ability of tribes "to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959).

[50] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); *see* Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 212 (1991).

no federal trust responsibility or restraint on alienation, the property will not be "Indian country,"[51] and a state can exert jurisdiction or sovereignty over the land base.[52]

B. Forms of recognition and withdrawal

Recognition of a tribe's title to land and sovereignty is most clearly accomplished by congressional action – by treaty prior to 1871 and by statute thereafter. The paramount role of Congress stems from its constitutionally delegated control over federal property,[53] its advisory role in the formulation of treaties,[54] and its power "[t]o regulate Commerce . . . with the Indian tribes. . . ."[55] The executive, who plays a concurrent role in the formulation of treaties,[56] has had a diminished primary presence in the political recognition process since 1871, when Congress declared that "hereafter no Indian nation or tribe within the territory of the United

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[51] 18 U.S.C. § 1151 states:

> [e]xcept as otherwise provided in §§ 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (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, 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.

18 U.S.C. § 1151 (2000).

[52] It might well be contended that tribal sovereignty is not itself dependent on federal recognition or federal association; rather, such sovereignty can flow from the very fact of tribal property. Joseph Singer noted that "property is derived from sovereignty but also creates sovereignty." Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 51 (1991). Indeed, the Supreme Court has shown a pronounced tendency to limit the application of tribal sovereignty and jurisdiction to tribal lands and members, and to preclude Indian power over non-members and their property. *See, e.g.,* Montana v. United States, 450 U.S. 544, 564-67 (1981); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 422-23 (1989); Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993). Thus, in the case of the unrecognized tribe, it might be more accurate to say that the sovereignty flowing from tribal property ownership is subject to preemption by the state as well as the federal government. Indeed, Justice Marshall hinted at this concept as early as *Worcester v. Georgia*, where he said of Cherokee sovereignty unallied with federal supremacy: "[i]f 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." 31 U.S. 515, 561 (1832).

[53] U. S. CONST. art. IV, § 3, cl. 2 ("[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

[54] U. S. CONST. art. II, § 2, cl. 2 ("[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .").

[55] U. S. CONST. art. I, § 8, cl. 3.

[56] U. S. CONST. art. IV, § 3, cl. 2.

States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. . . ."[57]

The executive power with respect to the tribes' recognized interests in land was likewise found to be subordinate to congressional intent. Thus, Indian reservations set aside from the public domain by executive order have been presumed to be interests held at the will of Congress and not within the scope of the Fifth Amendment.[58] There have been a few modern murmurings from the lower federal courts or from scholars that the executive might have an inherent constitutional power to set aside land[59] or an independent constitutional power of tribal recognition.[60] The Supreme Court has never confirmed these powers, however, and the executive role in the recognition of Indian tribes, as well as the executive power to create constitutionally protected tribal property interests has been carried out within the parameters of congressional delegation or acquiescence.

If Congress has a dominant role in the conferral of political recognition and recognized title, it would seem a foregone conclusion that Congress would also play the decisive role in the withdrawal of such recognition. Indeed, the power to end recognition by means of treaty abrogation or termination of the federal-tribal relationship has been acknowledged as an exclusive congressional prerogative.[61]

In spite of Congress' raw power to rend its relationships asunder, acts of abrogation or termination do not come without judicial involvement or constitutional consequence. Both abrogation and termination have, under the judicially created canons of construction, required clear evidence of congressional intent.[62] Under the Fifth Amendment, they have also necessitated payment of just compensation for any taking of recognized title.[63]

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[57] 16 Stat. 544, 566 (1871).

[58] *See* Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 177-78 (1947); Sioux Tribe of Indians v. United States, 316 U.S. 317, 330 (1942). Since the executive, as land manager, has the power, if not the independent right to set lands aside from disposition, the reservations had real, physical consequence and attendant reliances. Congress confirmed many of the executive order assertions with subsequent legislation. *See, e.g.*, 48 Stat. 960 (1934) (confirming title to the executive order portion of the Navajo Reservation). *See also* COHEN, *supra* note 40, at 495. Congress also created a compensatory remedy for tribal loss of executive order reservation lands. *See* Indian Claims Commission Act of 1946, 25 U.S.C. § 70a.

[59] Portland General Elec. Co. v. Kleppe, 441 F. Supp. 859, 861 (D. Wyo. 1977).

[60] Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, 166 (1995).

[61] Congress has, according to the Supreme Court, a "plenary authority" to abrogate its treaties or terminate its trust relationships. *See* Lone Wolf v. Hitchcock, 187 U. S. 553, 565-66 (1903). The exclusive power to terminate and abrogate is, agreeably, even more established than an exclusive power to recognize. *See* Federally Recognized Indian Tribe List Act of 1994, Public Law 103-454 §§ 103(3)-(4) (stating that "Indian tribes presently may be recognized by Act of Congress; by . . . administrative procedures . . ., or by a decision of a United States court," and "a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress").

[62] *See, e.g.*, United States v. Dion, 476 U.S. 734, 739-40 (1986); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows or Grass Grows Upon the Earth – How Long a Time is That?*, 63 CAL. L. REV. 601, 655-59 (1975).

[63] Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) ("[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was

Even if the executive power to make reservations from the public domain has been held a power at the sufferance of Congress[64] and ineffective by itself to convey a recognized, compensable property interest to a tribe,[65] and even though the executive has not been found to have an independent constitutional authority to recognize and terminate Indian nations,[66] the frequent use of the executive order to create Indian reservations in the late nineteenth and early twentieth centuries[67] created an obvious political relationship between the United States government and the tribal beneficiaries. Thus, courts have deemed executive orders creating Indian reservations a secondary form of political, if not proprietorial, recognition,[68] albeit an exercise subject to modification by Congress.[69]

It is sometimes said that recognition can flow from court decision, as well as from action by Congress and the Executive.[70] It is more exact, however, to say that courts can confirm a recognition after examining the treaties, statutes and executive orders to determine whether or not a political relationship has been established and maintained.[71] Congress itself has stated that court decision can

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purporting by the Termination Act to settle the Government's financial obligations toward the Indians").

[64] United States v. Midwest Oil Co., 236 U.S. 459, 475-76 (1915).

[65] *See supra* note 58.

[66] *See supra* note 61.

[67] In 1918, Congress stated that, henceforth, "no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress." 43 U.S.C. § 150.

[68] *See* COHEN, *supra* note 40, at 6 ("[n]ormally a group will be treated as . . . a 'recognized' tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order or valid administrative action; and (b) the United States has had some continuing political relationship with the group such as providing services through the Bureau of Indian Affairs").

[69] Congress has confirmed tribal title to several executive order reservations. *Id.* at 495. In addition, Congress has undertaken formal relations with non-treaty tribes such as the Zuni and the Hopi, whose initial recognition was in the form of executive order reservations. *See* E. Richard Hart, *Zuni Relations with the United States and the Zuni Land Claim*, in ZUNI AND THE COURTS 72-85 (E. Richard Hart, ed. 1995); DAVID M. BRUGGE, THE NAVAJO AND HOPI LAND DISPUTE 27-39 (1994).

[70] Jackie J. Kim, *The Indian Federal Recognition Administrative Procedures Act of 1995: A Congressional Solution to an Administrative Morass*, 9 ADMIN. L. J. AM. U. 899, 905 (1995).

[71] See *In re Kansas Indians*, which confirmed that the recognition of the United Tribe of Shawnee Indians of Kansas continued after allotments were made under the Treaty of 1854:

> [i]f the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens,' they enjoy the privilege of total immunity from State taxation.

be the basis for recognition,[72] but this is likely an observation of the courts' interpretive powers rather than a concession that the judiciary has an independent power to establish political relationships for the federal government.

The secondary powers of the Executive with respect to Indian affairs and the plenary, preemptive power of Congress converge with the congressional delegations of duty and authority to the Executive, the Secretary of the Interior and the Commissioner of Indian Affairs. It was pursuant to these broad, rather standardless delegations[73] that in 1978 the Bureau of Indian Affairs promulgated the standards and procedures for recognition.[74] Why were these rules necessary?

The Indian Reorganization Act of 1934,[75] which halted the tribal deconstruction inherent in the allotment process[76] and imposed a protective trust over Indian lands,[77] represented an explicit national commitment to the preservation of American Indian tribal cultures. The federal government's new stewardship wobbled ominously during the termination era,[78] but the United States corrected its course by the late 1960's, restored some of the collateral damage inflicted,[79] and generally pursued a policy of buffered tribal self-determination[80] into the twenty-first century.

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72 U.S. at 755-56. *See also* United States v. Holliday, 70 U.S. 407 (1865) where the Court said "it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." 70 U.S. at 419. Recognition, historically, could be inferred from the creation of a reservation. *See* Western Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1056 (10th Cir. 1993). In addition, courts sometimes inferred that tribes were recognized for some purposes such as protection under the Indian Non-Intercourse Act, 25 U.S.C. § 177, which refers to "any tribe of Indians." *See* 1 F.3d at 1056. In defining tribe for purposes of inclusion within a federal statute, the Supreme Court has endorsed a definition of "tribe" as a "body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . ." Montoya v. United States, 180 U.S. 261, 266 (1901).

[72] *See* Pub. L. 103-454, § 103(3); *supra* note 61.

[73] 25 U.S.C. Section 2 states: "[t]he Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 9 states: "[t]he President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." These provisions were found to be the source of the administrative power to promulgate rules regarding tribal recognition. *See* James v. United States Dep't of Health and Human Servs., 824 F.2d 1132, 1137 (D.C. Cir. 1987). The breadth and lack of standards in delegations to the Department of the Interior with regard to Indian affairs proved problematic in South Dakota v. United States Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U. S. 919 (1996).

[74] 25 C.F.R. § 83.

[75] 25 U.S.C. §§ 461-79.

[76] 25 U.S.C. § 461.

[77] 25 U.S.C. § 462.

[78] *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139 (1977).

[79] *See, e.g.*, The Menominee Restoration Act of 1973, 25 U.S.C.A. §§ 903-903f (1973); The Klamath Restoration Act, 25 U.S.C.A. § 566 (1986).

[80] *See e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. § 450-450n (1975).

Along with this national duty to assure the continuation and enhancement of tribal functioning comes the clear necessity of determining the beneficiaries of federal support. Administrators needed appropriate, consistent, articulated standards to identify the proper recipients of services and income transfers.[81] This need became even clearer in the 1970's when the reviving tribes began to utilize the federal courts in ways paralleling the efforts of environmental protection groups and civil rights activists. A wave of idealistic young lawyers and advocacy arms like the Native American Rights Fund invoked the interpretive powers of the federal judiciary and elicited declarations of substantial rights of property and powers of sovereignty locked within the still-viable contours of nineteenth century treaties and statutes.

The immediate precipitator of the BIA's present administrative recognition process was the fishing rights litigation of the mid-1970s.[82] The United States represented several northwestern tribes in a suit against the State of Washington wherein the plaintiffs asserted fishing rights under treaties made in 1855.[83] The Stillaquamish Tribe was one of the fourteen tribes treatying with the United States at Point Elliot, but it was not one of the original named plaintiffs in the litigation, and federal officials refused to represent it because the BIA did not, at the time, recognize the tribe.[84] The Stillaquamish, however, intervened with their own attorney and secured an ultimate ruling from the Ninth Circuit that "[n]onrecognition of the tribe by the federal government . . . may result in the loss of statutory benefits but can have no impact on vested treaty rights."[85]

After it successfully secured standing to assert rights under the Treaty of Point Elliott, the Stillaquamish Tribe petitioned the Secretary of the Interior seeking to have its name added to the list of recognized tribes eligible to receive federal services. The tribe alleged that it was a treaty tribe in a trust relation with the United States, that Congress had never terminated this relationship, and that an administrative refusal to recognize the tribe was arbitrary.[86] The Secretary

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[81] *See generally* COHEN, *supra* note 40, at 702-38.

[82] *See generally* DANIEL BOXBERGER, TO FISH IN COMMON (1989).

[83] *See, e.g.,* Treaty of Point Elliott, 12 Stat. 927 (1859). Article 5 contains the critical language: "[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory...." *Id.*

[84] DAVID H. GETCHES, ET. AL, FEDERAL INDIAN LAW, 4th Ed. 356 (1998). 25 U.S.C. Section 175 states that, "[w]here there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity." The courts have held that this provision is discretionary, rather than mandatory. *See, e.g.*, Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co., 353 F. Supp. 1098, 1099-1100 (D. Ariz. 1972).

[85] United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The Court of Appeals emphasized that the present-day Stillaquamish had standing to assert the treaty rights created by the original signatory. "Evidence supported the court's findings that the members . . . are descendents of treaty signatories and have maintained tribal organizations." 520 F.2d at 693; *see also* Greene v. Babbitt, 64 F.3d 1266, 1270 (9th Cir. 1995).

[86] *See* GETCHES, *supra* note 84, at 356.

refused to rule on the petition, and the Stillaquamish obtained a mandate from the federal district court in the District of Columbia ordering the Secretary to act.[87]

The BIA responded to the mandate by promulgating a uniform set of administrative requirements designed not only to judge those groups entitled to recognition in the first instance, but also to determine whether previously acknowledged tribes are entitled to its continuation.[88] Recognition now became a quagmire, and as of early 1998, 180 tribes had petitioned for recognition and only forty-one cases had been resolved.[89]

The glacial movement of the process is, in obvious part, a consequence of the overwhelming informational and evaluative components the regulations created. A further, less obvious reason appears for the plodding pace of the BIA and the grudging results that occur. An inherent bias in the system arose because the BIA is predominantly staffed and led by representatives of the recognized tribes.[90] Services for the recognized tribes are provided by a fixed federal budget, and each included tribe will lose a portion of its appropriational pie with each new tribal mouth that it recognizes. Recognizing the Lumbee, for instance, would add 41,000 tribal members to the rolls and would not assure corresponding increases in a minimalist budget that has grown by only modest increments.[91]

Beyond the issues of procedural unevenness, the BIA's informational requirements and substantive prerequisites are perhaps unwarranted, both ethno-

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[87] *See* Stillaquamish Tribe v. Kleppe, No. 75-1718 (D.D.C. filed Aug. 24, 1975), *cited in* GETCHES, *supra* note 75, at 356. *See also* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of A Legal Concept*, 34 AM. J. LEGAL HIST. 331, 363 (1990).

[88] *See* Quinn, *supra* note 87, at 363.

[89] *See* GETCHES, *supra* note 84, at 357. Other estimates of the BIA's inefficiency are more egregious. A Washington D.C. law firm, Pierson Semmes and Bemis L.L.P., made the following evaluations:

> [a]pproximately 220 purported Indian groups have filed petitions or letters with the Department of the Interior requesting Federal acknowledgement of their status as Indian tribes. As of March 2, 1999, approximately 13 petitioning groups had received Federal acknowledgement through the BIA, 13 groups had been denied Federal acknowledgement by the BIA, 7 groups had received Federal acknowledgement through Congressional legislation, 26 petitions were under various stages of consideration, 72 groups had not yet filed all of the information necessary to begin the process of considering their petitions, and over 100 groups had not filed any supporting information.

http://www.ucelandclaim.com/petitions.htm (last visited Nov. 30, 2000).

[90] *See* 25 U.S.C. § 472 (1995); *see also* Morton v. Mancari, 417 U.S. 535 (1974). The fact that, in 1974, the preference in hiring operated only with respect to "federally recognized tribes" was a key reason that Justice Blackmun found the provision to be political in central thrust rather than racial. *See* 417 U.S. at 553-54. Of interest is the fact that the current BIA regulations accord a hiring preference not only to
members of a recognized tribe, but also to "all others of one-half or more Indian blood of tribes indigenous to the United States." 25 C.F.R. § 5.1(c) (1995). The Supreme Court has suggested that laws relating to Indians as individuals, rather than tribes, are "not based on impermissible [racial] classifications. Rather, such regulation is rooted in the unique status of Indians as a 'separate people.'" United States v. Antelope, 430 U.S. 641, 646 (1977).

[91] *See* FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN 65-83 (1996).

logically and institutionally. Critics have pointed out that such requirements are Eurocentric and cut against the fundamental essence of tribalism, which has always resided in self-determination rather than external dictates.[92] The criteria also belie the central nature of recognition, which is a relationship of trust, keyed to the will and commitment of the parties rather than the objective, one-sided indicia paramount in the BIA provisions.[93] Finally, the regulations calling for

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[92] *See* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L. J. 660 (1990). Williams states that "efforts at a formal definition [of indigenous community] have not been generally accepted by indigenous peoples and their advocates who participate in the international human rights standard-setting process. Generally, indigenous peoples have insisted on the right to define themselves." *Id.* at 663 n.4.

> The current criteria embody various unexamined assumptions about the nature of Indian tribes. The central assumption is that Indian tribal identity is innate: that a tribe develops as an organic entity, taking its shape from internal forces rather than from external forces. As a corollary to this assumption, tribal identity is deemed authentic only to the extent that it is shown to predate extensive white influence. The recognition criteria also assume that, before white settlement, Indian tribes were discrete entities inhabiting distinct ranges. As a matter of historical fact, this assumption is clearly more appropriate to European conditions at the time of contact. The criteria also assume that tribal identity ceased to evolve after the general imposition of federal rule.
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> In short, the recognition criteria assume an 'ideal tribe'; moreover, this 'ideal tribe' is premised on the Romantic image of the Indian discussed above. A putative tribe that lacks the attributes of this Romantic image may well fail to earn federal recognition. Thus, certain tribes or bands that may otherwise deserve recognition may be denied it simply because they fail to adhere to the Romantic image of the Indian. But the assumptions behind the criteria are more than merely mistaken; they represent more than the imposition of European conceptions of culture on an alien context. Indeed, the recognition process, as part of the discourse of the Indian, may be understood as a technology of regulation, of disciplinary power that has made possible a more efficient control of American Indians.

Dan Gunter, *The Technology of Tribalism: The Lemhi Indians, Federal Recognition and the Creation of Tribal Identity*, 35 IDAHO L. REV. 85, 88-90 (1998) (citations omitted).

[93] *See* GETCHES, *supra* note 84 at 76-80 (citing ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE (1997)).

> Indians regarded the duty to provide aid and assistance to a treaty partner, like all of the customary bonds of a treaty relationship, as a constitutional obligation. Changes in circumstance or the original bargaining positions of the parties were therefore irrelevant as far as Indians were concerned. Throughout the treaty literature, Indians can be found trying to educate their European-American treaty partners that the duty to provide aid and assistance under the treaty did not change simply because one party became weaker over time in the relationship. If anything, because a treaty connected the two sides together as relatives, the treaty partner who grew stronger over time was under an increased obligation to protect its weaker partner.

Id. at 77.

review of previously acknowledged tribes[94] purport to allow the BIA to review the present status of tribes bound in on-going, promissory political relationships with Congress, to assess which of these groups pass present, objective muster under the administrative criteria and to effectively terminate by Bureau non-recognition those tribes which fail to meet the standards.

In sum, a tribe seeking recognition in the first instance or a declaration of previous, unterminated congressional acknowledgement might have a variety of reasons for being reluctant to proceed before the BIA. The process is, at best, numbingly detailed, exasperatingly slow, and very costly.[95] In addition, the likelihood of success is low. Beyond this, many tribes, especially those who have previously been acknowledged by treaty or statute, feel it is unfair and inappropriate for an agency perceived as less than neutral to pass on the validity of another group's tribal identity and political relationship with the United States.[96] These reasons have prompted a number of tribes to attempt to circumvent the administrative process by litigation.

The United Tribe of Shawnee Indians was to become one of the tribes seeking to avoid the BIA process, and the lawyers needed to identify a reasoned basis for asking the federal district court, rather than the agency, to declare the previous acknowledgement of the tribe and its continuing validity. The efforts of other tribes in similar situations did not make the odds of judicial bypass seem too favorable.

III. CONSTRAINT AND AVOIDANCE OF THE BIA'S RECOGNITION PROCESS

Since the promulgation of the recognition regulations in 1978, tribes have on a number of occasions attempted to secure or affirm rights or recognition without proceeding through the uncertain labyrinth of the BIA's administrative process. One general approach has been to seek a judicial declaration from the federal district court that the tribe has already been recognized by previous legislative, executive or judicial decision, thus, the tribe deserves to be included in the list of recognized tribes[97] without further administrative process.[98] Another approach has been to assert that certain rights such as protection under the Non-Intercourse Act[99] do not depend on formal administrative recognition and can

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[94] *See* 25 C.F.R. § 83.8 (1995).

[95] *See* Mark Mathews, *A Matter of Respect: Unrecognized Tribes Seek Seal of Approval from Federal Government*, INDIAN COUNTRY TODAY, Jan. 20, 1997, at 2.

[96] *Id.*

[97] The Secretary of the Interior must "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1(a)(2000).

[98] *See James*, 824 F.2d at 1135.

[99] The current embodiment of the Non-Intercourse Act states, "[n]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (1999).

flow from a judicial determination of tribal status.[100] Such contentions have involved several procedural and substantive issues.

A. Exhaustion and Primary Jurisdiction

A court's employment of the exhaustion doctrine assumes that both congressional purpose and agency authority would be frustrated by a prior, independent judicial determination.[101] In fact, exhaustion may presume that an agency has exclusive jurisdiction over a question in the first instance.[102] This is contrasted with the doctrine or principle of primary jurisdiction, which is a bit more discretionary and less formulaic.[103] The principle of primary jurisdiction postulates that, in a given situation, a court and an agency exercise concurrent jurisdiction over particular subject matter, but, nonetheless, the court chooses to defer and hold its power in abeyance pending the agency treatment of what are usually factual issues.[104]

When the courts have confronted tribal attempts to bypass the administrative process and to secure instead a judicial declaration of recognition, they have with high predictability invoked either exhaustion[105] or primary jurisdiction.[106] The *James* court stated, generically, that exhaustion discourages the conscious disregard of the administrative process, encourages the exercise of agency exper-

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[100] In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, the Court of Appeals held that the protections of the Non-Intercourse Act covered the Passamaquoddy Tribe, even though the tribe was not federally recognized. 528 F.2d 370, 377 (1st Cir. 1975). *See also* Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51 (2d Cir. 1994). The Second Circuit stated:

> [t]o establish a *prima facie* case based on a violation of the Act, a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned.

39 F.3d at 56 (citing Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1295 (4th Cir. 1983)).

[101] In *James*, the court stated, with regard to the Gay Head Tribe's request for a judicial declaration on tribal recognition:

> the determination whether these documents adequately support the conclusion that the Gay Heads were federally recognized in the middle of the nineteenth century, or whether other factors support federal recognition, should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. (25 U.S.C. § 82.9) The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. (25 U.S.C. § 82.9) That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.

824 F.2d at 1137.

[102] *See* United States v. 43.47 Acres of Land, 45 F. Supp. 2d 187, 191 (D. Conn. 1999).

[103] *Id.*

[104] *See Golden Hill*, 39 F.3d at 58-59.

[105] *James*, 824 F.2d at 1137-39; *see also* Western Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1058 (10th Cir. 1993).

[106] *43.47 Acres*, 45 F. Supp. 2d at 191-94; *Golden Hill*, 39 F.3d at 58-60.

tise, and aids judicial economy with preliminary fact-finding and the possibility of early resolution of the legal claims.[107] Primary jurisdiction facilitates consistency, uniformity, and a proper utilization of agency authority and expertise.[108]

Despite the often-articulated concern with economy of institutional function, the courts' theory and treatment of exhaustion and primary jurisdiction are not monolithic. Courts often declare that in extreme or extraordinary situations they will transcend the initial agency process and proceed directly with the merits. For example, the *James* court stated that if the agency has indicated it does not have jurisdiction or it would be unwilling to consider the issue, resorting to administrative process would be futile and exhaustion will not be required.[109] Courts have also asserted in tribal recognition cases that they will not insist upon primary jurisdiction or exhaustion if the agency does not have the authority to decide the issue,[110] if the issues are primarily ones of law not particular fact,[111] or if deference to agency jurisdiction would involve unacceptable delay.[112]

A related facet of exhaustion and, to some degree, primary jurisdiction, is the issue of finality or ripeness.[113] A plaintiff tribe seeking recognition may not only have to pursue administrative relief before the Bureau of Indian Affairs, but may also have to seek review within the Department of Interior's Board of Indian Appeals before achieving finality.[114] It is additionally noteworthy that, under the decisions of the Tenth Circuit Court of Appeals, a tribal failure to achieve finality in the administrative process not only impedes judicial review under the Admin-

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[107] 824 F.2d at 1137-38.

[108] *Golden Hill*, 39 F.3d at 59. Primary jurisdiction, unlike exhaustion, posits concurrent jurisdiction between the court and the agency. *See id.* Thus, a court's decision to employ the doctrine should not result in dismissal of the action. Rather, as the Supreme Court stated in *Reiter v. Cooper*, primary jurisdiction

> is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.

507 U.S. 258, 268 (1993).

[109] *James*, 824 F.2d at 1139.

[110] *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 n.1 (1st Cir. 1979).

[111] *Golden Hill*, 39 F.3d at 60.

[112] *43.67 Acres*, 45 F. Supp. 2d at 194. In *Western Shoshone Business Council v. Babbitt*, the court refused to bypass the exhaustion doctrine on grounds of delay unless the tribe had first sought to invoke the administrative process and found it unworkable. 1 F.3d at 1058 n.4.

[113] The Supreme Court has shown a heightened recent interest in ripeness as a tool to limit federal subject matter jurisdiction in areas of difficult social welfare, environmental and public land management issues. *See* Lujan v. National Wildlife Fed., 497 U.S. 871, 891 (1990); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-38 (1998).

[114] The Tenth Circuit Court of Appeals stated that decisions within the Department of Interior are not final for purposes of review under the Administrative Procedure Act if they are subject to appeal within the department. *Western Shoshone Bus. Council*, 1 F.3d at 1055 n.3.

istrative Procedure Act, but may also preclude collateral remedies such as mandamus outside the APA.[115]

B. Standing

When a tribe attempts to bypass the Bureau of Indian Affairs' recognition process and seeks either a declaration of recognized status from the courts or the ability to exercise certain prerogatives of sovereignty, issues of standing can arise, perhaps surprisingly. The law of standing, bifurcated into constitutional and prudential considerations, would demand as a constitutional minimum an allegation of injury in fact to survive a defendant's motion to dismiss and a demonstration of injury in fact to avoid a motion for summary judgment.[116]

The constitutional question of whether there has been a sufficient allegation of injury in fact has arisen in the recognition situation when a tribe, already recognized by the Bureau of Indian Affairs, challenges the recognition that may be accorded to another. The question of why one sovereign would actually (or allegedly) be injured by the recognition of another can be answered by the presentation of several scenarios. In one sense, all tribes participating in the limited benefits and services budgeted by Congress may have an interest in keeping the recognized list from growing and the per capita distributions from shrinking. As noted before, this inherent resistance is a structural reason for the turgidity of the BIA's recognition process.[117]

In another sense, one recognized political unit may resist the splintering and reconstitution of a previously enfolded segment. For example, in *Cherokee Nation of Oklahoma v. Babbitt*,[118] the Cherokees sought judicial review of a BIA decision to recognize the Delaware Tribe, which had entered into an agreement with the Cherokee in 1867 whereby the Delaware bought Oklahoma land from the Cherokee, moved from Kansas and agreed to become members of the Chero-

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[115] In *Western Shoshone Business Council*, the court, barring the Plaintiff's attempt at bypassing the BIA's recognition procedures, cited ripeness, and also noted:

> [p]laintiffs also seek a writ of mandamus under 28 U.S.C. § 1361. Mandamus is a drastic remedy, available only in extraordinary circumstances. . . . Furthermore, the writ is not available when review by other means is possible. . . . Because review is possible under the APA after plaintiffs have followed the procedures of 25 C.F.R. pt. 83, mandamus is not available.

1 F.3d at 1059.

[116] To meet the requirements of "case or controversy" established in Article III of the United States Constitution, a plaintiff must, at a minimum, allege an injury in fact – an invasion of a legally protected interest which is concrete, particularized, actual or imminent. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Plaintiff must also allege a causal connection between the injury and the defendants' conduct, and redressability by a decision from the court. *Id.* at 560-61. When a motion is made for summary judgment under Fed. R. Civ. P. 56, a party must actually demonstrate the constitutional requirements of standing. *See* Lujan v. National Wildlife Fed., 497 U.S. 871, 884-85 (1990).

[117] *See supra* notes 91-93.

[118] 117 F.3d 1489 (D.C. Cir. 1997).

kee Nation.[119] Though thereafter the Cherokee-Delaware were at times regarded as independent,[120] the BIA rejected this position and, from 1979 to 1996, refused to recognize the Cherokee-Delaware as a separate tribe.[121]

In 1996, however, the BIA decided to recognize the Cherokee-Delaware as a "separate sovereign with the same legal rights and responsibilities as other tribes, consistent with federal law, both as to jurisdiction and as to its right to define its membership."[122] The Cherokee Nation filed suit to review the decision and the D.C. Circuit held that the plaintiff had constitutional standing:

> [t]he Cherokee Nation has Article III standing because the Final Decision affects the authority of the Cherokee Nation over the Delawares and may affect its eligibility for certain federal funds. Thus, the Cherokee Nation has suffered an injury-in-fact that is fairly traceable to the Department's action and that can be redressed by an order invalidating the Final Decision.[123]

When a tribe, unrecognized by the BIA, seeks a judicial declaration of recognition stemming from other sources, it might seem that Article III concerns are negligible since the allegation of administrative non-recognition appears clearly one of injury in fact. Despite this allegation of obvious disability, a federal court recently held that an administratively non-recognized tribe seeking a judicial declaration, did not raise sufficient issues of injury in fact to meet the constitutional minimum.[124] This is questionable since the loss or absence of the benefits of administrative recognition is immediate, actual and particularized rather than speculative or general. A better resolution, presented in *Western Shoshone Business Council*, is to find that a failure of recognition can constitute an injury in fact for Article III purposes even if, as a prudential matter, the tribal concern may not fall within the "zone of interests" created by a particular statute or regulation.[125]

A specific form of standing that may have implications for the recognition cases has emerged in Indian treaty litigation. Tribes or tribal members may seek to assert rights under treaty, which may range from guarantees of off-reservation hunting and fishing to recognition of land title and sovereign status. Denial of

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[119] *Id.* at 1493.

[120] In particular, in *Delaware Tribal Business Committee v. Weeks,* the Supreme Court stated that the Cherokee-Delawares "are today a federally recognized tribe." 430 U.S. 73, 77 (1977).

[121] *Cherokee Nation*, 117 F.3d at 1495.

[122] *Id.* (quoting 61 Fed. Reg. 50,862, 50,863 (1996)).

[123] *Id.* at 1496 n.9 (citing Lujon v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

[124] United Tribe of Shawnee Indians v. United States, 55 F. Supp. 2d 1238, 1244 n.2 (D. Kan. 1999).

[125] 1 F.3d at 1056. When a legislature creates entitlements under statute, it can simultaneously limit their scope. A denial or withdrawal of statutory benefits may cause disappointment or injury in fact, but if the denial or withdrawal was contemplated in the very creation of the entitlement, then the injured plaintiff's interests may not fall within the zone of interests created by the statute and may not provide a basis for standing. It should be noted that the zone of interests test is prudential rather than constitutional because the plaintiff has alleged real disadvantage and would otherwise meet the requirements of Article III. *See generally* Bennett v. Spear, 520 U.S. 154, 175-77 (1997); *see also* Sac and Fox Nation v. Pierce, 213 F.3d 566, 573-74 (10th Cir. 2000).

such promise-based rights is clearly injury in fact, but a court may insist that a tribal plaintiff demonstrate its own particular standing to raise the issue of rights under a treaty. Demographical, geographical, sociological, and political changes since the signing of the treaty may have created questions as to whether a certain group is an appropriate one to raise issues of treaty rights and violations, even in cases where the group may be able to claim an actual disadvantage from the alleged breach.

The standing requirements for treaty litigation are prudential in that they go beyond injury in fact and determine whether plaintiffs are within the zone of interested parties a treaty created, and they may vary depending on the specific rights at issue. For example, in the salmon fishing rights cases from the Pacific Northwest,[126] a variety of tribes and groups sought to participate in division of the off-reservation treaty fishing rights Judge Boldt established in *United States v. Washington*.[127] The situation presented the courts with a finite usufructuary resource and numerous contenders. Limitation of splinter groups' claims from the original treaty tribes was essential. The courts employed a prudential standing requirement whereby a tribe must first allege and demonstrate lineal descendency from an original treaty signatory and continuous maintenance of political form to claim a share of the off-reservation fishing harvest.[128]

In situations that do not involve a limited usufruct, such as the off-reservation salmon fishing harvest, the prudential requirements for treaty tribe standing may vary. For example, in *Northern Arapahoe Tribe v. Hodel*,[129] the Arapahoe claimed on-reservation hunting and fishing rights pursuant to a treaty signed by another tribe, the Shoshone.[130] Though the Arapahoe were not descendents of the treaty signatories, they had been placed on the reservation by the United States and were considered "lawful occupants and equals."[131] The Tenth Circuit, rather than using the lineal descendency and continuous political struc-

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[126] *See generally* BOXBERGER, *supra* note 84.

[127] 384 F. Supp. 312 (W.D. Wash. 1974). The court decided that:

> By dictionary definition and as intended and used in the Indian treaties and in this decision 'in common with' means *sharing equally* the opportunity to take fish at 'usual and accustomed grounds and stations'; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above.

Id. at 343.

[128] United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975); Greene v. Babbitt, 64 F.3d 1266, 1270 (9th Cir. 1995).

[129] 808 F.2d 741 (10th Cir. 1987).

[130] The Treaty of Fort Bridger established the Wind River Reservation in Wyoming. 15 Stat. 673 (1868).

[131] *Northern Arapahoe Tribe*, 808 F.2d at 743. The Shoshone were compensated pursuant to the Fifth Amendment for the taking of an undivided one-half of the reservation. *See* United States v. Shoshone Tribe of Indians, 304 U.S. 111, 114-16 (1938).

ture test, instead posited actual residence on the confirmed land base as the prerequisite for standing to raise implicit and explicit treaty rights.[132]

The significance of the treaty tribe prudential standing cases for the recognition situation can emerge when a group seeks a judicial declaration of recognition under prior treaties and is met with the argument that the group has no standing to raise the recognition issue.[133] The Ninth Circuit's political continuity test can prove problematic for standing in such cases, whereas actual residence within unabrogated treaty boundaries may prove more flexible and arguably more relevant.[134]

C. Statute of Limitations

In cases involving an attempted circumvention of the recognition regulations, tribes often seek a declaratory judgment of recognition from the court. This, however, cannot be forthcoming in an advisory context; as a matter of constitutional, Article III necessity, the plaintiff tribe must seek the declaratory judgment as a remedy for wrongful non-recognition by the BIA.[135] If the BIA's act of non-recognition was overt, discrete, self-contained – and more than six years in the past – it is possible for the statute of limitations to emerge as at least a temporary blockage to bypass actions.[136]

The Miami Nation of Indians of Indiana entered a number of nineteenth century accords with the United States, including an 1840 treaty which provided generally for cession of Indian land and removal to the Kansas area, but also provided for certain individual and communal patents to those tribal members who didn't remove.[137] An 1854 treaty dealt with both Kansas and Indiana Miami as tribes,[138] as did subsequent federal legislation.[139] An 1886 federal circuit court case held that the Indiana Miami were a recognized tribe and that even land held by individuals was not subject to state or local real property taxes.[140]

Despite these unequivocal acts of judicial, legislative and executive recognition, the Secretary of the Interior, without authorization or mandate, withdrew the Department's acknowledgment of the Indiana Miami, an action which the

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[132] "The Arapahoe have rights to the reservation derived from their status as occupants of the land confirmed by congressional and executive acts." 808 F.2d at 748.

[133] *See* United Tribe of Shawnee Indians v. United States, 55 F. Supp. 2d at 1244 n.2.

[134] *See infra* at Ch. 4.

[135] *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-40 (1937).

[136] "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) (2000). In *Hopland Band of Pomo Indians v. United States*, the court held "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." 855 F.2d 1573, 1576 (Fed. Cir. 1988).

[137] Treaty of November 28, 1840, 7 Stat. 582. By October of 1846, about half of the Miami had moved to Kansas. Miami Nation of Indians of Indiana, Inc. v. Lujan, 832 F. Supp. 253, 254 (N.D. Ind. 1993).

[138] 10 Stat. 1093.

[139] *Miami Nation*, 832 F. Supp. at 253-54.

[140] Wau-pe-man-qua v. Aldrich, 28 F. 489, 493 (C.C.D. Ind. 1886).

tribe alleged – almost 100 years later – was *ultra vires*.[141] In 1992, the Miami Nation of Indians of Indiana sought a declaratory judgment that the tribe was recognized, that only Congress could derecognize it, that the 1897 action was unauthorized and ineffective, and that the tribe was, therefore, entitled to present administrative acknowledgment.[142] Since the plaintiff was unable to successfully allege a continuing claim, the trial court found that the action was time-barred. The result, though frustrating for the Miami, may not necessarily be permanent as the court indicated that a contemporary refusal of recognition, premised on the earlier withdrawal, would rekindle the claim.[143] The Miami could, for instance, ask the BIA to adhere to the requirements of Public Law 103-454 and add the Miami to the list of recognized tribes.[144] A BIA refusal would be a present basis for a new cause of action.[145]

D. Sovereign Immunity

An assertion of sovereign immunity by the federal government seems a somewhat anomalous or perhaps ironic procedural defense in the recognition cases. A tribe may contend that it has been formally acknowledged by legislative, executive or judicial action, that a nation-to-nation relationship exists, and that the court should declare recognition and order the agencies to interact accordingly. Yet these same agencies have argued successfully that sovereign immunity bars the declaratory action and the mandatory relief.[146]

The sovereign immunity defense should be unavailable for two distinct reasons. Under the holding of the United States Supreme Court in *Larson v. Do-*

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[141] *Miami Nation*, 832 F. Supp. at 255-57.

[142] *Id.*

[143] *Id.*

> The only act . . . identified by the plaintiffs as constituting a refusal of acknowledgment is the Department of Interior's 1897 withdrawal of recognition. That the harm stemming from an 1897 decision continues today is not dispositive; the plaintiffs must link that 1897 decision with a governmental act or action within the limitations period.

Id. at 256.

[144] The Secretary must maintain a list of all tribes recognized as eligible for federal programs and services. 25 U.S.C. 479a-1(a) (2000).

[145] *Supra* note 136; *see also* Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Acts' Declaratory Order Process*, 64 N.C. L. REV. 277 (1986). The declaratory order, pursuant to 5 U.S.C. § 551(7) is:

> an adjudicatory procedure for securing an administratively final, judicially reviewable declaration of the law. Unlike interpretive rules, policies, and guidelines, which indicate how an agency *might* apply the law in some future circumstance, the declaratory order applies the law to a concrete set of facts. Because the declaratory order determines the legal rights of specifically affected individuals, it is immediately ripe for judicial review."

64 N.C. L. REV. at 278-79.

[146] *Western Shoshone Bus. Council*, 1 F.3d at 1059; *United Tribe of Shawnee Indians*, 55 F. Supp. 2d at 1243-44.

mestic & Foreign Commerce Corp., an agency official, acting in an unconstitutional, unauthorized or *ultra vires* fashion, can be deemed outside the veil of sovereign action and protection, and thus vulnerable to an assertion of corrective federal jurisdiction.[147] If a plaintiff can demonstrate that Congress has recognized a tribe and has not delegated a specific power to terminate, then a subordinate agency would presumably have no power to refuse a recognition and no ability to assert a sovereign immunity defense to jurisdiction.

A less fictional[148] and more complete exception to sovereign immunity is available under the Administrative Procedure Act (APA) which posits a right of action in all cases where a plaintiff seeks non-monetary relief against an agency.[149] Courts have consistently construed this provision as a waiver of sovereign immunity in non-monetary actions under the APA,[150] and one court recently regarded the provision as a waiver for non-APA claims as well.[151] The APA waiver should reach the recognition cases as they clearly involve non-monetary claims, and they generally involve agency action or, at least, contestable inaction[152] in the refusal to recognize or to list.

E. Authority

Several tribes have attempted to defuse the administrative option at its source by skirting procedural bars to judicial declaration of recognition such as exhaustion and primary jurisdiction; they have taken a substantive approach and

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[147] 337 U.S. 682, 689-90 (1949).

[148] The *Larson* exception makes the somewhat fictitious suggestion that the official engaged in authorized action is not part of the sovereign federal government. This parallels the fictional avoidance of the Eleventh Amendment bar to the assertion of federal jurisdiction over states demonstrated in *Ex parte Young*, 209 U.S. 123 (1908).

[149] 5 U.S.C. Section 702 (1966) states in part that "an [a]ction in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

[150] *See* Bowen v. Massachusetts, 487 U.S. 879, 891-92 (1988) ("[i]t is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment . . .").

[151] *See* Chamber of Commerce v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996); Cobell v. Babbitt, 30 F. Supp. 2d 24, 33 (D.D.C. 1998). *Cobell* dealt with a claim for an accounting for Indian trust funds the Department of the Interior mismanaged. *Id.* The relief sought had a dollar component, and the cause of action was under federal common law principles rather than under the APA. *Id.* The court, however, construed the equitable accounting claim as fundamentally a non-monetary claim, thus found the APA waiver of sovereign immunity to be applicable:

> [t]he defendants seek from the beginning to constrain the plaintiffs' claims to the APA, but such a characterization simply does not comport with the facts alleged and the allegations set forth in the Complaint. Therefore, to the extent that the plaintiffs state a claim for equitable relief for breach of trust duties, the defendants' motion for judgment on the pleadings must be denied.

30 F. Supp. 2d at 33.

[152] The APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C.A. § 551(13) (1966).

challenged the BIA's authority to promulgate the regulations under which the recognition decisions are made. The first decisions on authority employed a rather tepid analysis that failed to probe congressional intent or to adequately draw a distinction between the application of regulations to tribes the United States previously recognized and the application to tribes that sought acknowledgment for the first time.

The leading early decision sustaining the BIA's general promulgative authority was *James v. United States Department of Health and Human Services*,[153] which found a complete, though virtually standardless delegation to the Department of the Interior within the contours of 25 U.S.C. Sections 2 and 9.[154] The Gay Head Tribe argued that it had previously been acknowledged by executive action and, therefore, the district court should declare this acknowledgment and order the Department of the Interior to add the tribe to the list of federally recognized tribes without further administrative process.[155] The court, however, declined to issue the equitable relief and instead ordered the tribe to exhaust the recognition process established in 25 C.F.R. Part 83 which, the court felt, was within the scope of the agency's authority.[156]

This conclusion avoids hard particulars of the authority issue such as the problem of standards and the constitutionally-nuanced question of whether an agency can, without a detailed mandate, refuse to continue the recognition of a tribe previously acknowledged by treaty, statute, executive order or Supreme Court opinion. Subsequent cases began to explore these elements in more depth, although their conclusions remain incomplete.

In *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, the plaintiff tribe argued not that the Secretary lacked *any* authority to promulgate recognition regulations, but that the 1978 regulations, as written, *exceeded* the Secretary's authority and that the court should review this issue as a matter of law, without deference.[157] In particular, the plaintiff contended that with respect to previously unrecognized tribes, the Secretary had no authority to create regulations demanding different or more burdensome requirements for acknowledgment than those requirements imposed before 1978.[158]

In a preliminary conclusion that dictated the result, the court first held that it should give the administrator and the regulations substantial deference in accord with the Supreme Court's *Chevron* test.[159] Operating under the premise of

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[153] 824 F.2d 1132 (D.C. Cir. 1987).
[154] *Id.* at 1137; *see supra* note 71.
[155] 824 F.2d at 1136-37.
[156] *Id.* at 1137.
[157] 887 F. Supp. 1158, 1165 (N.D. Ind. 1995).
[158] *Id.* at 1167-68.
[159] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

mandatory deference, the court was unwilling to conclude that the 1978 regulations for previously unrecognized tribes exceeded the administrator's authority, even though the regulations appeared to require different or more demanding criteria than had been utilized prior to 1978. In light of the *Chevron* standard,

> the court [could not] conclude that the Secretary exceeded his statutory authority in promulgating the 1978 regulations. Congress has not manifested an unambiguous intent to recognize all Indian tribes. Congress has delegated authority to the Secretary to prescribe regulations governing Indian affairs and regulations and pursuant to that authority, the Secretary promulgated the 1978 regulations in an attempt to define what constitutes an Indian tribe. That the Secretary elected to promulgate regulations that allegedly differ from past practices is not enough to render that decision impermissible. The court cannot substitute its own construction of the relevant statutory provisions for a reasonable interpretation made by the Secretary, so the Miamis' claim that the Secretary exceeded his authority simply by changing the standards in 1978 must necessarily fail.[160]

The District Court of the District of Columbia recently added another element to the authority debate in *United Houma Nation v. Babbitt*.[161] Though the court conceded that "Congress ha[d] not spoken directly to the question of the federal acknowledgment process or the criteria relevant thereto,"[162] it felt that the congressional silence was not without import. Rather, the court felt that Congress, though reticent, was aware of the agency's regulations and had, "[d]espite this awareness . . . opted not to express a contrary intent through a statute."[163]

The *Houma* statement that Congress has never directly addressed the regulations or BIA authority and the conclusions that, nonetheless, the BIA has promulgative authority are open to substantial question with respect to the group of tribes that had, prior to the regulations, been acknowledged by Congress, the

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> Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

[160] 887 F. Supp. at 1169.

[161] 1997 WL 403425, at *1 (D.D.C. 1997) (not reptd. in F. Supp.)

[162] *Id.* at *7.

[163] *Id.* at *8. Silent congressional acquiescence has a long, rich tradition in federal jurisprudence as a confirmation of authority of an agency or subordinate political entity such as a state. *See, e.g.*, Sioux Tribe v. United States, 316 U.S. 317 (1942); United States v. Midwest Oil Co., 236 U.S. 459 (1915) (holding that withdrawal of lands by executive agency without express authority was effective when done with the knowing acquiescence of Congress); California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) (holding that federal government by silent acquiescence approved state and local laws, judicial decisions and customs that established the right to acquire water by prior appropriation).

Executive or federal courts. The BIA regulations treat these tribes separately[164] and demand in essence that tribes recognized in the past demonstrate the continuing existence, since recognition, of the tribal characteristics that the BIA demands of previously unrecognized tribes under 25 C.F.R. Section 83.7. These regulations allow BIA scrutiny of tribal continuity since recognition accorded under treaty, statute, executive order or Supreme Court decision, and, in effect, enable administrative termination of those groups the agency feels no longer manifest sufficient cohesiveness or that have suffered a political hiatus.

It is one thing to find implicit authority in the BIA to promulgate regulations and adjudicate with respect to previously unacknowledged tribes; it is quite another to find implicit power in an agency to unilaterally terminate a formally-established, nation-to-nation relationship, to abrogate treaties or to counter Supreme Court opinions. Can *Chevron* deference extend this far, even if augmented by knowing but silent acquiescence?

In *Miami Nation*, the plaintiff partially entered this debate though the authority for 25 C.F.R. Section 83.8 was not literally put into issue. The tribe confined its challenge to the contention that "[t]he Secretary lacks statutory authority to impose any standard other than voluntary abandonment on previously recognized Indian tribes."[165] The plaintiff chose not to make the broader argument that agency termination of nation-to-nation relationships or abrogation of treaty rights are such extraordinary circumstances that they should proceed only on explicit authorization.[166]

The court rejected the Miami Tribe's limited contention, stating that "[t]he tribal abandonment standard is not a legislative creation, and the Secretary was not bound to include it in the regulations unless failure to do so would have been

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[164] 25 C.F.R. § 83.8 (2000).

[165] 887 F. Supp. at 1167-68.

[166] There have been some early examples of agency treaty abrogation pursuant to broad delegations. Most of these featured condemnation of treaty land by a generally-empowered agency such as the Army Corps of Engineers. *See, e.g.,* Seneca Nation of Indians v. United States, 338 F.2d 55, 57 (2d Cir. 1964), *cert. denied* 380 U.S. 952 (1965). The later cases tend to demand clear evidence of congressional intent before inferring agency authority to abrogate through condemnation. *See* United States v. Winnebago Tribe, 542 F.2d 1002, 1005 (8th Cir. 1976). Some commentators urged that "treaty rights of American Indians [should] be abrogated only by an express statement in a subsequent statute or joint resolution. The statute or joint resolution should identify the specific Indian treaty rights which are involved and state that it is the intent of Congress to abrogate such rights." Wilkinson & Volkman, *supra* note 62, at 645. The Supreme Court has not gone quite this far, although it does demand a clear showing of congressional intent before concluding that there has been an abrogation. The current test is set forth in *United States v. Dion*: "[w]hat is essential is clear evidence that Congress 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." 476 U.S. 734, 739-40 (1986). Conceding, as Plaintiff Miami Tribe apparently did, that the BIA had the authority to find that recognition treaties were no longer operative because of "voluntary abandonment" is a generous view of agency authority. It would enable an agency, without specific congressional authorization, to scrutinize the history of a tribe, discern points of apparent discontinuity and retroactively declare abandonment of treaty rights including recognition, even if the tribe is presently asserting sovereign treaty rights and a desire to continue.

unreasonable."[167] The court thus stated that the agency was free to promulgate recognition regulations for previously acknowledged tribes under its general authority and free to utilize these regulations in a manner that effectively terminated a living tribe or abrogated its unabandoned treaty rights until or unless Congress expressly limited the agency authority to cases of voluntary tribal abandonment.[168] The court had literally upended the Supreme Court's *Dion* test – that agency abrogation demands "clear evidence that congress [has] actually considered the conflict...and chose to resolve that conflict by abrogating the treaty."[169] Beyond all this, the court also failed to note that Congress *had* specifically addressed the issue of agency attempts at terminating recognized tribes and that several months before the decision in *Miami*, it had limited the agency authority in this regard with the passage of Public Law No. 103-454.

F. Public Law No. 103-454

The legislative history of the Federal Recognized Indian Tribe List Act of 1994[170] states that recognition of a tribe is critical, not just to the tribe's interests, but to the legitimacy of federal power, as the Constitution empowers Congress to legislate only with respect to Indian *tribes* rather than mere individuals.[171] The legislative history also acknowledges the important role the BIA played and its administrative recognition process with respect to previously unrecognized tribes but, significantly, asserts that this role is limited with respect to previously acknowledged tribes and that this limit has not always been observed.

> While the Department clearly has a role in extending recognition to previously unrecognized tribes, it does not have the authority to 'derecognize' a tribe. However, the Department has shown a disturbing tendency in this direction. Twice this Congress, the Bureau of Indian Affairs (BIA) has capriciously and improperly withdrawn federal recognition from a native group or leader.[172]

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[167] 887 F. Supp. at 1169.

[168] *Id.*

[169] *See* 476 U.S. at 739-40.

[170] Public Law 103-454, Section Four states that "[t]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1(a) (2000). Section Three, discussed *infra* at notes 173-176, is contained in the notes of 25 U.S.C. § 479a. The legislative history is contained in H.R. 781, 103d Cong. (1994).

[171] H.R. Rep. No. 103-781, at 3 (1994), reprinted in 1994 U.S.C.C.A.N. 3768, 3769 (citing U. S. Const., art. I, § 8. cl. 3).

[172] *Id.* The Report noted further that,

> First, the BIA unilaterally withdrew recognition from the chosen leader of the Oneida Nation of New York last year without consulting, notifying or discussing the decision with the Oneida Nation or its leaders, or with this Committee. After active intercession by members of the House, the Department reversed its decision. Then in October, the Bureau unilaterally removed the Central Council of the Tlingit and Haida tribes from its list of recognized tribes. The BIA undertook this action precipitously, and with no more than a cursory post facto notification to the Council. This, despite the fact

This perceived abuse of administrative authority, treaty rights, and nation-to-nation relationships led to the passage of Public Law 103-454. The critical component of this act on agency authority is section 103, which states in part,

> The Congress finds that-
> (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.[173]

Public Law 103-454, section 103 thus appears to drastically and explicitly limit, if not entirely preclude, BIA authority with respect to previously acknowledged tribes. It also appears to reflect a congressional understanding that tribal recognition can occur in a variety of ways, including treaty, statute and Supreme Court decision, as well as through the administrative processes of 25 CFR Part 83. This Act, passed before the *Miami* decision by several months, would seem broad enough and clear enough to have controlled the result in that case[174] and in other cases as well;[175] however, the agency and the courts apparently ignored it.

> the Council was explicitly recognized as a tribal organization in 1975, and has appeared on the BIA's list of recognized tribes every year since 1982. Congress was again required to intervene on behalf of the recognized group to restore federal recognition.

Id.

[173] 29 U.S.C. § 479a(3).

[174] *See supra* notes 165-69 and accompanying text.

[175] The Act was raised but not decisive in *United Tribe of Shawnee Indians v. United States*, 55 F. Supp. 2d. 1238 (D. Kan. 1999). One case that mentioned the Act, somewhat indirectly, was *Native Village of Venetie I.R.A. Council v. Alaska*, which said:

> On November 24, 1993, Congress passed the Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994). In this Act, Congress expressly found that the Central Council of Tlingit and Haida Indian Tribes of Alaska were a federally recognized Indian tribe. Stripped of a lot of technicalities and qualifications, this Act, in substance, chastises the Secretary for not including the Central Council of Tlingit and Haida Indian Tribes of Alaska in the Notice.

1994 WL 730893, at *1 (D. Alaska Dec. 23, 1994), *rev'd on other grounds,* 522 U.S. 520 (1998). Even more to the point which the court would now make, Congress found in this Act that "[t]he

G. Indian Federal Recognition Procedure Act of 1999

The efforts to constrain, transform and avoid the BIA's recognition process approached a crescendo toward the end of the nineties. Tribes increasingly sought out the federal courts' declaratory power as an alternative to the administrative recognition process. The lure of casino gambling profits on federally recognized tribal land increased the stakes, and petitions for recognition in the BIA's Bureau of Acknowledgment and Recognition piled up far faster than the beleaguered administrators could handle them.[176] Proposals began to emerge in Congress that went well beyond Public Law 103-454 – to the point of removing the recognition process from the BIA altogether. At the least, the proposals would make the standards for recognition legislative in nature and representative of the will of Congress, rather than merely regulative and the product of an agency's contestable promulgative authority. The early bills did not pass, but the courts noted them as indicative of a congressional awareness of the scope and operation of the BIA's recognition regulations and of a tacit confirmation of at least a general agency authority.[177]

The most current proposal, sponsored by Senator Ben Nighthorse Campbell, is entitled the "Indian Federal Recognition Administrative Procedures Act of 1999."[178] The bill would establish an independent commission on Indian recognition composed of three members appointed by the President with the advice and consent of the Senate, which would receive petitions on recognition, hold hearings and make determinations which could be reviewed in the United States District Court for the District of Columbia.[179] The legislatively-established criteria for recognition would be similar to those in 25 CFR Part 83: a petition must demonstrate "that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1871."[180] More particularly, the petition

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Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress. . . ." Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994). "It seems highly improbable that Congress would thusly rebuke the Secretary pointing out his lack of authority with respect to terminating congressionally recognized tribes without also taking the Secretary to task for acknowledging tribal status if it were the view of Congress that he did not have that power." 1994 WL 730893, at *9.

[176] *See supra* notes 90-91 and accompanying text.

[177] In *United Houma Nation v. Babbitt*, the court noted that in 1994, the House passed H.R. 4462, The Indian Federal Recognition Procedures Act of 1994, which, though it did not pass, is an indication that "Congress has, in fact, reflected upon the criteria for recognition. Yet, for whatever reason, Congress has so far declined to express a contrary intent." 1997 WL 403425, at *1, *8 (D.D.C. 1997).

[178] S. 611, 106th Cong. (1999).

[179] *Id.* at §§ 4-10.

[180] S. 611 § 5(b)(1). The significance of the date is that in 1871, a rider was added to the Indian Appropriations Act which said:

> [h]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further,* That nothing herein contained shall be construed to invalidate or impair the

must show evidence of community, autonomy, governmental structure and membership.[181] A petition from a group that is able to prove it is a successor in interest to a treaty tribe, a tribe previously recognized by statute, executive order or post-Indian Reorganization Act administrative action, or a tribe with lands in federal trust is required to demonstrate the essential recognition prerequisites only from the date of the action constituting acknowledgment.[182]

The criteria and the process under S. 611 so closely parallel those of 25 CFR Part 83 that one can ask what the advantages of change might be. The answer lies in the benefit of having the imprimatur of Congress stamped on the criteria to be used in forging or confirming a nation-to-nation relationship. In addition, the establishment of an independent commission, more removed from the tribal political milieu, more formal and more final may add some dignity and perhaps stability to the critical tribal issue of recognition.[183]

Kevin Gover, the Assistant Secretary for Indian Affairs in the Department of the Interior, spoke before the Senate Committee on Indian Affairs regarding S. 611 on May 24, 2000.[184] Gover expressed support for certain aspects of S. 611, including the legislatively designated criteria and standards, the sunset rule, finality and assistance.[185] Gover's official statement professed *not* to support the removal of the recognition process from the BIA and the transfer to an independent commission.[186] Aside from his prepared remarks, however, Gover frankly voiced concern over the BIA's capabilities and indicated that the agency might

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> obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

16 Stat. 544, 566 (1871).

[181] S. 611 § 5(b)(2)-(5).

[182] S. 611 § 5(c).

[183] The commission proposed in S. 611 is clearly reminiscent of the Indian Claims Commission, which likewise sought to infuse fairness and finality into the ongoing issue of claims over land dispossession. The comparison with the Indian Claims Commission, established by the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70V, is heightened by the inclusion in S. 611 of a sunset provision, much like the one in the Indian Claims Commission Act, which requires petitions for recognition to be filed within an eight year period. *See* S. 611 § 5(d).

[184] *See* statement of Kevin Gover, *at* http://www.doi.gov/ocl/2000/s611.htm (last visited May 24, 2000).

[185] *See id.*

[186] Gover said:

> We object to the language within S. 611 that would remove the authority of the Department to acknowledge tribes. Historically, the Department has had the authority and has the primary responsibility for maintaining the trust relationship with Indian tribes. The Government's expertise and institutional knowledge are housed within the Department. As I've stated earlier, we have made many improvements in the acknowledgement process. We believe this progress should continue.

Id.

be willing to relinquish the recognition responsibility and concentrate on other tribal priorities such as education and law enforcement.[187]

Gover's willingness to jettison the recognition function may be the factor that will finally spur Congress into action that will reform or transform the recognition process – and alleviate the current intractable burden that recognition has become for the agency, the petitioner and the courts alike. In the meantime, however, while the wheels of reform and transformation grind, Jim Oyler and the United Tribe of Shawnee Indians labor on in the harsh light of the present, trying to confirm, in the court if not the agency, that the recognition accorded to the Kansas Shawnee in the nineteenth century remains viable, unabrogated and assertable by the modern occupants of the remnants of the treaty lands.

IV. THE UNITED TRIBE OF SHAWNEE INDIANS VERSUS THE UNITED STATES – THE DISTRICT COURT CASE

The United Tribe of Shawnee Indians' (UTS) claim for a declaration of federal recognition, as noted, predictably annoyed the United States' judges, attorneys, and administrators who had previously dealt with Jimmie Oyler.[188] He had been a constant, litigious presence in the Kansas and federal court systems for almost a decade, waging legal wars with the forceful persistence of nineteenth century Indian guerillas such as Geronimo. In his battles over partition, cigarette and property taxes, and rights under treaty and statute,[189] Oyler had, directly and individually, confronted and insulted a substantial portion of the federal bench, bar, and administration, and earned a reputation as a thorn in the governmental paw. Smart, profane, relentless, and with just enough puckish humor to cut the tension of his persistent onslaughts, Oyler was a character – but not one that could be dismissed out of hand. His claims for recognition and trust contained a considerable number of sound legal concepts, surrounding what most non-Indian outsiders perceived to be a strained example of contemporary tribal society. The idea of a formal, federal recognition for a tribe consisting primarily of Jimmie Oyler and his extended family, living on a ninety-four acre plot of federally restricted Indian country in the middle of affluent Johnson County, Kansas, seemed highly dubious, if not downright ludicrous. As the revival, statutory acknowledgment, and economic transformation of Connecticut's tiny Pequot reservation demonstrated, however, successful establishment of federal recognition on facts less compelling than those of the United Tribe of Shawnee was not unprecedented.[190]

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[187] *See* William Claiborne, *Tribes and Tribulations: BIA Seeks to Lose a Duty*, WASH. POST, June 2, 2000, *at* http://www.citizenalliance.org/links/pages/news/National%20News/Washington_dc.htm (last visited November 30, 2000).

[188] *See* Ragsdale, *supra* note 14, at 368-385.

[189] *Id.*

[190] *See generally* JEFF BENEDICT, WITHOUT RESERVATION: THE MAKING OF AMERICA'S MOST POWERFUL INDIAN TRIBE AND FOXWOODS, THE WORLD'S LARGEST CASINO (2000); *see* Connecticut ex rel Blumenthal v. Babbitt, 2000 WL 1375578, at *1 (2d Cir. Sept. 25, 2000).

Oyler's claim for a declaration of recognition was lodged in the nineteenth century history of Indian removal and relocation, whereby the United States induced, cajoled, or forced the eastern and southern tribes to move out of the way of the rapidly expanding white society.[191] The United States generally chose to remove inconveniently located tribes pursuant to negotiated treaties. There was, however, within the ostensible legal trappings of consideration-backed, bargained-for exchanges, the inevitable presence of coercion, duress, and overreaching.[192]

In the early nineteenth century, the Shawnee, who had split apart under the pressure of the post-Revolutionary wave of white settlers moving into the trans-Appalachian region, had located in the Ohio Valley and in the Cape Girardeau area of Missouri.[193] In 1825, the Missouri Shawnee agreed to vacate Cape Girardeau and relocate beyond Missouri's western border in the vast plains region[194] that white America had assumed was both undesired for its future use and, therefore, suitable for displaced tribes.[195] In 1831, the Ohio Shawnee joined the Kansas branch under a treaty that guaranteed that there would never be any future state jurisdiction within the reserved territory.[196] The United States' inclination toward generosity, made possible by the supposed worthlessness of their concession, was transformed by the rapid fire, containment spanning events of the 1840's – war with Mexico and huge cessions of land, the addition of the Pacific Northwest, and the discovery of gold in California. The Shawnee, once

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[191] *See* FRANCES PRUCHA, THE GREAT FATHER, VOL. I 179-315 (1984); GRANT FOREMAN, INDIAN REMOVAL (1932).

[192] ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 117-127 (1983); ANGIE DEBO, AND STILL THE WATERS RUN (1966). "By a combination of bribery, trickery, and intimidation the Federal agents induced all five tribes during the 1830's to cede the remainder of their Eastern lands to the United States and to agree to migrate beyond the Mississippi." ANGIE DEBO, AND STILL THE WATERS RUN at 5.

[193] ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES, *supra* note 192 at 118.

[194] Treaty with the Shawnee (Nov. 7, 1825), 7 Stat. 284. The treaty and subsequent removal were prompted in large part by the urgings of Missouri Senator Thomas Hart Benton, who was a relentless proponent of white expansion and Indian withdrawal. *See* H. CRAIG MINER & WILLIAM E. UNRAU, THE END OF INDIAN KANSAS 6 (1978).

[195] *See* PRUCHA, *supra* note 195, at 183-213; MINER & UNRAU, *supra* note 198, at 5.

[196] Treaty with the Shawnee (Aug. 8, 1831), 7 Stat. 355.

> The lands granted by this agreement and convention to the said band or tribe of Shawnees, shall not be sold nor ceded by them, except to the United States. 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; and further, that the President of the United States will cause said tribe to be protected at their intended residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever, and he shall have the same care and superintendence over them, in the country to which they are to remove, that he has heretofore had over them at their present place of residence.

Id. at 357. Not all treaties of the emigrating tribes were as protective of Indian sovereignty and as preclusive of the subsequent intrusions of state jurisdiction. *See* Sac and Fox Nation v. Pierce, 213 F.3d 566 (10th Cir. 2000).

thought safely beyond the range of white desire, were now in the middle of it or, at least, in the middle of the road to its fulfillment. The railroads, the frontier yeomen, the miners, the expansionists, the adjacent Missouri racists – all wanted the Shawnee to move again – or at least give up enough of their 1.6 million acre reserve so that free passage to the west was assured and the land hunger of the frontiersmen was at least temporarily satisfied.[197]

So the wordsmiths came again. In 1854, the ubiquitous George Manypenny, one of the busiest commissioners of Indian Affairs, as well as one of the most significant, forged treaties with the tribes up and down the permanent Indian frontier, with the majority of the tribes agreeing to relocation in Oklahoma – again, presumably, out of the way of the white man's foreseeable future.[198] The Shawnee Treaty, in contrast, did not call for removal, but opted instead for compression. It provided for the Shawnee to cede their 2,500 square mile reserve to the United States and receive, in return, a receded 200,000 acre reservation,[199] along with implicit assumptions of protection and a cash equivalent later found to

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[197] MINER & UNRAU, *supra* note 198, at 5.

[198] MANYPENNY, *supra* note 29, at 111-50.

[199] Treaty with the Shawnee (May 10, 1854), 10 Stat. 1053. Article 2 provided in part:

> The two hundred thousand acres of land reserved by the Shawnees, shall be selected between the Missouri State line, and a line parallel thereto, and west of the same, thirty miles distant; which parallel line shall be drawn from the Kansas River, to the southern boundary line of the country herein ceded; provided, however, that the few families of Shawnees who now reside on their own improvements in the ceded country west of said parallel line, may, if they desire to remain, select there, the same quantity of land for each individual of such family, which is hereinafter provided for those Shawnees residing east of said parallel line—the said selection, in every case, being so made as to include the present improvement of each family or individual....
>
> All Shawnees residing east of said parallel line shall be entitled to, out of the residue of said two hundred thousand acres, if a single person, two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family – to include, in every case, the improvement on which such person or family now resides; and....
>
> In the settlement known as Black Bob's settlement, in which he has an improvement, whereon he resides; and in that known as Long Tail's Settlement, in which he has an improvement whereon he resides, there are a number of Shawnees who desire to hold their lands in common; it is, therefore, agreed, that all Shawnees, including the persons adopted as aforesaid, and incompetent persons, and minor orphan children, who reside in said settlements respectively, and all who shall, within sixty days after the approval of the surveys hereinafter provided for, signify to the United States Agent their election to join either of said communities and reside with them, shall have a quantity of land assigned and set off to them, in a compact body, at each of the settlements aforesaid, equal to two hundred acres to every individual in each of said communities.

Id. at 353-54.

be unconscionably insufficient.[200] The 200,000 receded acres were not all to be contiguous; they were to be contained in 200-acre allotments which would be picked and held individually and scattered or checkerboarded within the eastern quadrant of the original reserve.[201] Some individuals, such as those in the Black Bob Band, were able to choose and hold their individual allotments in a contiguous, collective fashion;[202] other allotments were contiguous, but held individually, and some were isolated.

The allotments chosen immediately south of the Kansas River included both the lands at issue within the SFAAP and Lot 206.[203] These allotments, held individually within a tribal context, and others lying further south and west, composed the post-1854 continuation of the Shawnee reservation.[204]

Thus, the United States dealt repeatedly with the Shawnee tribe on a nation-to-nation basis – three treaties within a 30-year span – all acknowledging the Shawnee tribe as a sovereign entity, all confirming the United States' relationship with this tribe, and all securing a permanent land base as the foundation of the Shawnee society. The Treaty of 1831 had gone further and assured the tribe that no future state would encompass its lands or dilute its sovereignty – a promise to be repeated in the subsequent admission act for the State of Kansas.[205]

The treaties recognized a reservation for the Shawnee tribe, despite the fact that the agreement of 1854 individualized much of the land title. Kansas thought otherwise for awhile and its subdivision, Johnson County, attempted to tax the

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[200] In 1958, over a century after the treaty, the Indian Claims Commission found that, in 1854, the fair market value of the land ceded by the Shawnee was $1,938,464 and the $829,000 received by the Shawnee in exchange was an unconscionable amount. Absentee Shawnee Tribe v. United States, 6 Ind.Cl. Comm. 377; 394 (1958). The United States was ordered to pay $1,109,464 to the Shawnee Tribe. *Id* at 394. The Treaty's implicit assumptions of protection were noted and enforced by the Supreme Court in *In re Kansas Indians*, 72 U.S. 737, 753-55 (1866).

[201] *See supra* note 199.

[202] *See id.*. *See also* John W. Ragsdale, Jr., *The Dispossession of the Kansas Shawnee*, 58 UMKC L. REV. 209, 237 (1990).

[203] *See* Appellant's Opening Brief at 5, United Tribe of Shawnee Indians v. United States (10th Cir. 2000).

[204] The 1854 Treaty with the Shawnee referred to the "two hundred thousand acres reserved by the Shawnees." 10 Stat 1053, 1054. A later case held that not all of the 200,000 acres was within the reservation. *See* Absentee Shawnee Tribe of Indians v. State of Kansas. 862 F.2d 1415, 1419-21 (10th Cir. 1988). An exemption by implication was made for several sections of the reservation that were to pass by sale to religious missions. *Id.*

[205] The 1861 Act for Admission of Kansas into the Union provides:

> nothing contained in the said constitution respecting the boundary of said 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. . . .

Act for Admission of Kansas to the Union (signed Jan. 29, 1861),12 Stat. 127. This provision was recently held not to apply to all the Indian tribes in Kansas, but only to those which, like the Shawnee, had included provisions in their treaties preclusive of subsequent state jurisdiction. *See* Sac and Fox Nation v. Pierce, 213 F.3d 566, 576-77 (10th Cir. 2000); *see supra* note 190.

allotments under the theory that the treaty provisions calling for individual allotments had, in effect, destroyed the Shawnee tribe's sovereignty over the land. The United States Supreme Court disagreed. In the *Kansas Indians* case,[206] the Court held that the Shawnee sovereignty persisted into the indefinite future, in a joint and several fashion, surrounding the allotments, individually and collectively, with the preemptive power of the tribe and its contracting partner, the United States.[207]

In effect, Jim Oyler contended that, under the treaties and the Supreme Court decision, the Shawnee Tribe's sovereignty and reservation existed in a holographic form; each allotment was not only a protected individual holding, each was also a repository of undiluted tribal sovereignty.[208] Lot 206 was and is a portion of this hologram – a land base protected against alienation without federal consent, and a separate, but equal, source and beneficiary of the continuing Shawnee sovereignty.

The government's primary counter thrust to Jim Oyler and his claims was that the bulk of the Shawnee Tribe had, one by one, alienated or lost its allotments and moved until only Lot 206 and the Blacksnake tract remained in the former Johnson County reservation.[209] The government essentially argued that the Shawnee Tribe had left the land and abandoned its sovereignty and it was too late for Oyler and the United Tribe of Shawnee Indians to reassert it.[210] In another sense, and in line with the treaty fishing rights cases from the Pacific Northwest and the recognition criteria of the BIA, the government argued that the United Tribe of Shawnee Indians could not show the sovereign continuity necessary for present acknowledgment.[211]

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[206] 72 U.S. 737 (1866).

[207] "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." *Id.* at 757.

[208] *See* John R. Stein & Stephen H. Lekson, *Anasazi Ritual Landscapes*, *in* CHACO CANYON: A CENTER AND ITS WORLD 45 (Mary Peck, ed. 1994).

> If the total built environment of a traditional society (and perhaps any society) consists of a basic pattern (the icon) repeated in a hierarchy of forms, the cosmogony will be encapsulated in the most basic manifestation of the pattern as well as in the most grandiose. For example, the entire Anasazi concept of cosmos may be symbolically encapsulated in the architectural features of a single kiva. The same symbolism may be repeated in the expanded architectural relationships among the kiva, surface rooms, and midden of the common dwelling. It may unfold again among dwellings or groups of dwellings within the context of a "community" and yet again in relationships among distant communities, provinces, and the significant topography that together shape the landscape of the nation.

Id. at 50. *See also* John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. IND. L. REV. 393, 418-27 (1998).

[209] *See* Ragsdale, *supra* note 14, at 363-64.

[210] *See* Defendants' Post-Preliminary Hearing Brief at 28-30, United Tribe of Shawnee Indians v. United States, No. 9-2063-GTV (D. Kan. filed June 18, 1999).

[211] *Id.* at 5; *see also* Defendants' Opposition to Plaintiff's Motion to Alter the Judgment at 3, 5-6, United Tribe of Shawnee Indians v. United States, No. 9-2063-GTV (D. Kan. filed July 21, 1999).

Jim Oyler responded to the charge of abandonment by insisting that those who left the Kansas reservation went as individuals and the recognized sovereignty of the Shawnee Tribe remained with the residual Kansas land base.[212] Sovereignty may have diminished in spatial scope, but not in quality.

The federal government countered by arguing not only that the bulk of the tribe left Kansas, but also that the remaining Shawnee, including Newton and Nancy McNeer, the original patentees of Lot 206, and their descendants, held no view of themselves as the remaining holders of the sovereignty of the United Tribe of Shawnee Indians until Jim Oyler returned to the land in 1975 and began the restoration of the concept.[213]

The response to this involves an inquiry into abandonment. In United States resource law, abandonment is generally a factual concept, meaning the intentional relinquishment of known rights,[214] and is not a rule of law, like statutory forfeiture for nonuse[215] or noncompliance. Abandonment serves to resolve active claims between individual contestants and, accordingly, if there is no contest or hostile claimant, the law will generally allow even a knowing relinquisher to change his mind and reassert his rights.[216] Once the exercise of rights is resumed, the prior abandonment, having not been acted on in a timely fashion, is no longer operative.[217]

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[212] *See* Plaintiff's Supplemental Brief in Support of Implementation of a Preliminary Injunction Against the Transfer of Sunflower Ammunition Plant Prior to a Complete Environmental Impact Statement Being Issued at 24-25, United Tribe of Shawnee Indians v. United States, No. 99-2063-GTV (D. Kan. filed June 2, 1990), which stated:

> In the aftermath of the fraud, duress and the United States' failure to fulfill its protective trust, the United Tribe of Shawnee Indians lost population. Many landless Shawnee left for Oklahoma and negotiated an association with the Cherokee. (*Articles of Agreement between the Shawnee and the Cherokee*, June 7, 1869). These departures, agreements and the subsequent recognition of the Absentee Shawnee did not compromise the continuing sovereign presence of the United Tribe of Shawnee Indians in Kansas, its recognition under treaty, statute and Supreme Court case law, and its rights under treaty and the Constitution. Individual departures for the Indian Territory in Oklahoma had preceded the Treaty of 1854, were acknowledged and provided for in the Treaty, and were known by the Supreme Court at the time of the Kansas Indians case. The core of sovereignty continued to reside with the Kansas Tribe, the United Tribe of Shawnee Indians, and was not compromised or affected by the agreement of individuals to 'abandon their tribal organization,' (*Articles of Agreement between the Shawnee and Cherokee*, June 7, 1869). The movement of individual members of a treaty tribe to another tribe's reservation and the enrollment of such individuals in that second tribe does not result in the transfer or extinguishment of the rights of the treaty tribe. United States v. Oregon, 787 F. Supp. 1557, 1565, 1565-71 (D. Ore. 1972).

[213] *See* Defendants' Opposition to Plaintiff's Motion to Alter the Judgment, *supra* note 215, at 4.

[214] *See, e.g.*, JAMES N. CORBRIDGE, JR. & TERESA A. RICE, VRANESH'S COLORADO WATER LAW 252-54 (1999).

[215] *See, e.g.*, United States v. Locke, 471 U.S. 84 (1985), *discussed in* GEORGE COGGINS & ROBERT GLICKSMAN, PUBLIC NATURAL RESOURCES LAW 23-25 (2000).

[216] *See* COGGINS & GLICKSMAN, *supra* note 219, at 23-25.

[217] *See id.*

This was the heart of Jim Oyler's argument. He did not contend that there had been a continuous tribal government in Kansas between the mid-1870's and the 1990's. What he did argue was that there had been a reservation under treaty and decision, and a protected, recognized sovereign land base, that this land base may have eroded, but it never vanished, that Congress had never retracted the treaty recognition, and that, therefore, the sovereign mantel, unused but not disavowed, could be reclaimed and reasserted at any time prior to the explicit abrogation of the treaty or termination of the recognition by Congress.[218] Since abrogation and termination had never occurred, since abandonment had never been raised in a timely way, and since Oyler and the United Tribe of Shawnee Indians presently claim the rights of recognition, there had been, then, a *legal* continuity of tribalness in Kansas, even if detractors can point to a governmental hiatus in fact that extended over a century.

If Jim Oyler could circumvent the abandonment contention, he faced another, related issue. Even assuming that the UTS had not unretractably abandoned its Kansas sovereignty and that the UTS could, since there had been no termination by the United States, reassert its recognized tribal status, could one also assume that the Oyler family and Lot 206 were the appropriate living embodiment of the UTS? In another sense, could one contend that Jim Oyler had standing to reassert the unterminated sovereignty of UTS over the remnants of its former Kansas land base? Oyler's opposition pointed to the Northwest fishing cases where modern splinter groups of the nineteenth century treaty signatories sought a share of the yearly salmon harvest.[219] An obvious need to limit the claimants of a finite resource prompted the court to employ a prudential limitation whereby claimants had to allege and ultimately demonstrate lineal descendency and governmental continuity for standing. This, they would analogize, precluded Oyler's standing to raise any unabrogated treaty rights of the UTS.[220]

Oyler's response was that the opposition's analogy was inappropriate. His standing issues were not in the context of a multi-party contest for a share or division of a finite resource; rather, he sought only to have the court declare the ongoing validity of the treaty and recognition of the tribe until or unless Congress acted in avoidance.[221] Furthermore, Oyler asserted, not only did he have standing to raise these claims, he was the *only* party who could make them.[222] Jim Oyler and his family were the only lineal Shawnee descendants actually living on the

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[218] The Tenth Circuit Court of Appeals has adhered to this principle in another case involving the Shawnee reservation established under the Treaty of 1854. In *The Absentee Shawnee Tribe of Indians v. Kansas*, the court said, "As a general rule, '[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.'" 862 F.2d 1415, 1418 (10th Cir. 1988) (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)).

[219] *See supra* notes 126-134 and accompanying text.

[220] *Id.*

[221] *See* Plaintiff's Motion Pursuant to Rule 59(e) For the Court to Alter the Judgment Entered on June 29, 1999 at 6-8, United Tribe of Shawnee Indians v. United States, No. 2063-GTV (D. Kan. filed July 9, 1999).

[222] *See id.*

remnants of the treaty-protected Kansas land base; and, thus, Oyler alone could meet the treaty right standing test of the Tenth Circuit, which demands occupation of lands confirmed by treaty or statute.[223]

It is, perhaps, easy to underestimate the claims of Jim Oyler and the UTS as exaggerated and inflated. After all, one might say, sovereignty is the stuff of nations, not the prerogative of an extended family adhering to a ninety-four acre tract of fields and woodlands in the center of one of the nation's wealthiest counties. Yet to dismiss Oyler quickly is to ignore the sweep of history in general and the course of treaties in particular. Before 1854, the Shawnee were clearly a sovereign people on a reserve nearly half the size of New Jersey. When they were forced to sign the Treaty of 1854 and to cede seven-eighths of their land, they received at least implicit promises of protection and the recognition of their sovereignty. Oyler sought to enforce the promise of recognition – a bare fragment of the tribe's former bundle of rights, but a real commitment nonetheless – that Congress had never disavowed. The federal administration wanted not only to avoid this congressional commitment and ignore the history, but also to bypass the fiduciary responsibilities inherent in the canons of treaty construction. These canons would command the interpretation of treaties as Indians would have understood them at the time of signing, and the resolution of language ambiguities in favor of the Indians.[224] Ambiguities of standing and of the continued recognition of tribal sovereignty should seemingly be resolved in favor of Oyler, a lineal descendant living on a portion of the treaty land base.

The federal trust responsibility, involved with the canons of construction, also figured in the UTS claims beyond recognition for a constructive trust over 5,000 acres within the SFAAP.[225] Oyler realized from the outset that this was a highly problematic cause of action for several reasons, not the least of which was that the financial interests of the federal government, the state, and the powerful private entrepreneurs stood in opposition. History repeatedly shows that, when Indian rights are inconsistent with the white man's business interests, the results of the law will follow the money.

Yet Oyler's constructive trust argument had sufficient cogency to resist a cavalier rejection. When the United States made the allotments under the Treaty of 1854 alienable, it did so subject to federal approval.[226] The restraint on alienability has been held to manifest a trust responsibility on the part of the United States, a fiduciary duty existent regardless of a tribe's federally recognized status.[227] The United States utterly failed to protect Shawnee possession, allowing allotments to pass from Shawnee ownership through fraud, duress, and un-

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[223] *See id.* The Tenth Circuit has held that treaty rights to a reservation are "derived from their status as occupants of the land confirmed by congressional and executive acts." Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 748 (10th Cir. 1987).

[224] WILKINSON & VOLKMAN, *supra* note 62, at 608-19.

[225] *See supra* notes 30-33 and accompanying text.

[226] Civil Expenses Appropriations Act, 11 Stat. 425, 430-31 (1859).

[227] Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379-80 (1st Cir. 1975).

conscionably insufficient consideration.[228] The reacquisition of these lands by the failed federal fiduciary, the subsequent termination of conflicting responsibilities of national security and the indication of a dispositional intent formed the arguable core of a claim in constructive trust.[229] There were, of course, daunting complexities, including the necessity of title searches for all the allotments included within the SFAAP, the contacting and organization of all the descendants of the allotment transferors, and the establishment and validation of Jim Oyler

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[228] *See* PAUL WALLACE GATES, FIFTY MILLION ACRES: CONFLICTS OVER KANSAS LAND POLICY, 1854-1890 36-39, 45-46 (1997); GEORGE MANYPENNY, OUR INDIAN WARDS 133 (1880); GRANT FOREMAN, THE LAST TREK OF THE INDIANS 174 (1946). In *Absentee Shawnee Tribe v. United States*, the court noted "Congress, by the Act of March 3, 1859 (11 Stat. 430) authorized the Shawnee Indians to sell portions of land set aside for them in severalty under the Treaty of 1854. Soon thereafter, 148 sales were confirmed covering 11,500 acres at an average of 6 cents per acre." 12 Ind. Cl. Comm. 180, 185 (1963).

[229] The argument of a violation of federal fiduciary duty had been raised in the Indian Claims Commission, but it was rejected on a standing basis rather than on the merits. The United States was successful with a ploy often used in the Indian reparation cases: if an individual brought a claim, the court could say that the tribe must bring the claim, even if meritorious. *See, e.g.*, Johnson Blackfeather v. United States, 37 Ct. Cl. 233 (1902). If the tribe brought a claim, as in the Shawnee case, the court would say that the claim, if meritorious, must be brought by the individuals. *See* Absentee Shawnee Tribe v. United States, 12 Ind. Cl. Comm. 161, 179 (1963). The third alternative would be for the tribe to sue for the individuals in a representative capacity, but the court was unwilling to allow this, at least if legal damages were at issue. *See* Blackfeather, 37 Ct. Cl. at 233. Oyler hoped to avoid these precedental traps by basing his claim for land in equity. His strongest case was probably *Seneca Nation of Indians, Tonawanda Band of Seneca Indians v. United States*, which found that the United States could "be liable, as a fiduciary with special responsibility, for the failure of the vendee to make a conscionable and just exchange." 173 Ct. Cl. 917, 926 (1965). Militating against this was language in the earlier Shawnee Court of Claims proceedings which suggested that a post-Civil War federal administration was so beleaguered as not to be responsible for all the overreaching on the Shawnee Indian frontier.

> It is clear that nothing less than heavy military assistance could have saved the band's property. In view of the awesome conditions bedeviling, and the manifold pressures weighing on the United States during the war, we would be presumptuous to hold that it broke an obligation to the Black Bobs by failing to divert the necessary troops in order to offer constant protection to their area against Quantrell's raiders and the other marauders in Kansas. . . . The wartime eviction of the Black Bobs was one of the many collateral disasters of the great struggle; on the record made below, it was not a breach of faith or a culpable failure of federal responsibility. After the war, the Government did not move at once to displace the settlers effectively, but here too we see no breach in obligation during the short period from Appomattox to the latter months of 1866 (when the first Black Bob selections were made). Some leeway must be allowed for the re-gathering and re-direction of the nation's depleted resources. In addition, negotiations were taking place at that time between the Shawnees (including the Black Bobs) and the Federal government for the disposal of the Indians' remaining lands in Kansas to settlers and others, so that the whole Shawnee Tribe could move to live with the Cherokees in Indian Territory. This treaty, made March 1, 1866, was ultimately rejected by the Senate in February 1869, but while it was pending the Government acted reasonably in preserving the status quo.

Absentee Shawnee Tribe v. United States, 165 Ct. Cl. 510, 517-18 (1964).

and the UTS as legitimate trustees of any property interests reacquired. Yet these complexities bedeviled the defendants as well as the plaintiff and made the constructive trust argument one that the United States wanted no part of.

The constructive trust claim was, as stated above, paralleled by a statutory one: the excess property legislation requires the United States to prioritize its disposition of excess property within a tribal reservation in favor of the tribe.[230] As noted earlier, Oyler claimed that the parts of SFAAP composed of original Shawnee allotments were by necessity within the undiminished boundaries of the 1854 reservation.[231] His contention, rejected by the BIA on the ground his tribe was not recognized, was as complicated as the constructive trust assertion with the additional conundrum of whether and to what extent there had been a diminishment of the reservation boundaries as an accompaniment to land title transfers.

The realistic core, then, of Oyler's case was the assertion of a prior, unrecanted federal recognition – made by treaty, acknowledged under statute, and confirmed by Supreme Court decision – which compelled the BIA to add the UTS to the list of recognized tribes without further administrative process and which obligated the other branches of the federal government, including the Department of Defense and General Services Administration, to deal with the UTS as a tribe, eligible for the disposition of excess property. The engine that powered these contentions, Oyler stressed, was Public Law 103-454, a 1994 congressional confirmation of the multiple paths of recognition, and a stern admonition to the BIA that only Congress could undo recognition, once accorded.[232] The

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[230] 40 USCA § 483(a)(2) states:

> The Administrator shall prescribe such procedures as may be necessary in order to transfer without compensation to the Secretary of the Interior excess real property located within the reservation of any group, band, or tribe of Indians which is recognized as eligible for services by the Bureau of Indian Affairs. Such excess real property shall be held in trust by the Secretary for the benefit and use of the group, band, or tribe of Indians, within whose reservation such excess real property is located....

[231] *See supra* note 199. The issue of diminishment is a complex one of particular facts and congressional intent. A decision begins with the premise that only Congress can diminish a reservation through either treaty abrogation or termination. *See* Pub. L. 103-454. The court must then determine whether, in making reservation land alienable, Congress also sought to diminish the boundaries of the reservation and the extent of tribal sovereignty. It is possible that Congress, in fostering alienability, may have contemplated that some non-tribalists might purchase property within the still-existent political contours of the original reservation, though the Supreme Court has shown a recent tendency to find diminishment as an implied intent. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v. Utah, 510 U.S. 399 (1994). The case of *Solem v. Bartlett*, 465 U.S. 463 (1984), remains good law and has been cited by the Tenth Circuit as controlling in the Shawnee situation. *See* Absentee Shawnee Tribe of Indians v. Kansas, 862 F.2d 1415, 1418 (10th Cir. 1988).

[232] Pub. L. 103-454 § 103, 108 Stat. 4791 (1994). See supra notes 170-175. Courts have not interpreted Pub. L. 103-454, although it was mentioned in *Native Village of Venetie I.R.A. Council v. State of Alaska.* 1994 WL 730893, at *1, *10 (D. Alaska, Dec. 23, 1994), *rev'd. on other grounds*, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998). The statute forms a core component of Oyler's arguments on appeal in the Tenth Circuit. Oyler repeatedly presented the statute to the District Court, but the court avoided it and only hinted at it in its opinion. *See*

Treaties of 1825, 1831, and 1854, the *Kansas Indians* case, and Public Law 103-454 made this case essentially one of law – for the court rather than the administrator, Oyler claimed – and one that should favor the UTS.[233]

The hearing on the plaintiff's motion for a preliminary injunction against the disposition of SFAAP prior to the resolution of the recognition issue, and the defendant's simultaneous motion to dismiss, was held on May 18 and 19, 1999 in the Kansas City, Kansas, Federal Courthouse. One side of the courtroom contained a veritable crowd of defendants and their attorneys. The Department of Defense, the Department of the Army, the Department of the Interior, and the BIA all had representatives, some in full military dress. Spokesmen from the State of Kansas and the Wonderful World of Oz were also in attendance. Heading the United States' team was United States Attorney Janice Karlin, who had previously crossed swords with Oyler during his federal actions over partition.[234] On the other side of the aisle, conspicuously contrasting with the array of uniforms and suits, were Jim Oyler and Sean Pickett.

The trial strategies were clear. Pickett attempted to induce the court to acknowledge the unabrogated law of treaties, statutes, and cases, Oyler's lineal descendency from the Shawnee, his occupancy of a still-restricted portion of the original treaty land base, and the present-day organization of the United Tribe of Shawnee Indians.[235] Karlin countered with federal evidence of the disconnection between the nineteenth century Shawnee Tribe and Oyler's re-emerging presence in the 1990's, of the familial nature of the United Tribe of Shawnee Indians, and of Oyler's incomplete efforts to employ the BIA's administrative recognition process.[236]

Finally, Judge Van Bebber, who seemed irritated from the beginning, grew exasperated. In the midst of Pickett's cross-examination of a BIA official, he pulled the plug on the entire UTS recognition claim, stating that the issues were ones within the primary jurisdiction of the federal agency; they must be resolved preliminarily by the BIA and not the court.[237] The recognition claim was dis-

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United Tribe of Shawnee Indians v. United States, 55 F. Supp. 2d 1238, 1243 n.1 (D. Kan. 1999) (suggesting that Oyler does not have standing to argue the statute).

[233] *See* Plaintiff's Motion Pursuant to Rule 59(e) for the court to Alter the Judgment Entered on June 29, 1999 at 12-13, United Tribe of Shawnee Indians v. United States, No. 99-2063-GTV (D. Kan. filed July 9, 1999).

[234] *See* Ragsdale, *supra* note 14, at 366-69.

[235] *See* Preliminary Injunction Hearing, United Tribe of Shawnee Indians v. United States, No. 99-2063-GTV (D. Kan. May 18 & 19, 1999).

[236] *Id.*

[237] *Id.* Judge Van Bebber interjected:

> Well, I'm going to put a stop to this because I don't think it's relevant. The court can read 83.8. What 83.8 requires is unambiguous previous federal acknowledgment. And secondly, 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.

Id. at 233.

missed and, later, the claim for an EIS on the transfer of the SFAAP was also dismissed.[238] Van Bebber asserted that the EIS claim was unripe because the defendant's indication that they regarded the transfer of the SFAAP as a federal action of no significant environmental impact was still in draft form rather than final.[239]

The highly questionable notion that the transfer of a fifteen square mile parcel highly contaminated with hazardous waste, but strategically located in the explosive growth corridor between Kansas City and Lawrence, would produce no significant environmental effects, either with regard to the completion of waste remediation or to the facilitation of high impact construction by an unproven developer, was now visible to the public. A citizen's coalition called the Taxpayers Opposed to Oz (TOTO) picked up the EIS claim that Oyler had been advancing primarily as a means of delaying the transfer of SFAAP and thereby keeping viable his central quest to reconstitute the tribal land base. When, early in 2000, the government did release a final Finding of No Significant Impact, TOTO pounced and filed a suit for an injunction pending the completion of a satisfactory EIS.[240] With the transfer still in abeyance, Oyler's hopes now rested with the Tenth Circuit Court of Appeals, and the slim chance that it would reverse the dismissal and reinstate the UTS claim.

V. THE APPEAL

The formal written dismissal of the UTS claims embraced several procedural squibs in addition to the primary jurisdictional ground asserted at the hearing. Judge Van Bebber opined that Article III standing, prudential standing, ripeness and sovereign immunity independently operated to bar the plaintiff's requests for a declaration of recognition, a constructive trust, a mandated inclusion on the BIA list, and full preparation of an environmental impact statement.[241] The opinion, intriguingly, appeared to follow, in thrust, form, and citation, a recent Tenth Circuit Court of Appeals case called *Western Shoshone Business Council v. Babbitt*[242], although the relatedness and indebtedness were not acknowledged. The plaintiff therein had sought a judicial declaration that the Western Shoshone Tribe was recognized in spite of non-inclusion on the official list, and had requested a mandate ordering the BIA to review the tribe's contracts. The district court, however, dismissed the claims on grounds of failure to exhaust administrative remedies within the Department of the Interior, and the Court of Appeals affirmed, adding as additional grounds for dismissal the bars of

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[238] *See* United Tribe of Shawnee Indians v. United States, 55 F. Supp. 2d 1238 (D. Kan. 1999). The court based its decision of dismissal on the multiple grounds of sovereign immunity, standing and ripeness, as well as primary jurisdiction.

[239] 55 F. Supp. 2d at 1246.

[240] *See* Taxpayers Opposed to Oz, Inc. v. David Barram, No. 00-2136-GTV (D. Kan. filed March 30, 2000); *see also* Grace Hobson, *Suit Urges Environmental Study at Oz Site*, KANSAS CITY STAR, March 31, 2000 at B3.

[241] *United Tribe of Shawnee Indians*, 55 F. Supp. 2d at 1243-46.

[242] 1 F.3d 1052 (10th Cir. 1993).

standing, ripeness and sovereign immunity.[243] There are some specific factual and legal distinctions between the Western Shoshone Tribe and the UTS;[244] however, the similarity of the cases as to situations, claims, dispositional theory, and cited precedents made the failure of Judge Van Bebber to use or cite *Western Shoshone*, a leading circuit precedent, seem rather curious. Perhaps Judge Van Bebber was tempting Oyler to appeal and was silently laying the basis for a swift and total appellate rejection of any arguments Oyler might be inclined to make.

An appeal was, of course, forthcoming and was made with full awareness of both *Western Shoshone Business Council* and of factual distinctions and subsequent legal developments that, plaintiff felt, made the cases distinguishable. Sean Pickett's brief focused almost exclusively on the recognition issue as it was foundational to others, and because the constructive trust and environmental issues were not only secondary, but were much more factually problematic. Pickett argued that the district court's multiple grounds of procedural bar were either generally unwarranted or were justification for suspension of federal jurisdiction only, and not outright dismissal.[245]

Sovereign immunity seemed a strained basis for dismissal, at least with respect to the recognition claim that involved no damages or property transfers. The UTS asserted on appeal that sovereign immunity was avoided under the exception of *Larson v. Domestic & Foreign Commerce Corp.*,[246] whereby an agent outside the scope of statutory authorization was also beyond the veil of immunity. Pickett argued that the dictates of Public Law 103-454 placed a noncompliant BIA within the reach of federal jurisdiction.[247] He additionally contended that the Administrative Procedure Act had waived sovereign immunity for all non-monetary actions against federal officials, including claims outside the APA.[248] Pickett relied on *Cobell v. Babbitt*[249], which interpreted the APA waiver

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[243] *Id.* at 1055-59.

[244] Perhaps the most compelling distinction is that the foundational Shawnee treaties, confirming the land base and the relationship with the United States, are essentially unabrogated. *See* In re Kansas Indians, 72 U.S. 737, 755-57 (1866); Oyler v. Allenbrand, 2 F.3d 292, 294-95 (10th Cir. 1994). In contrast, the Western Shoshone may never have had a treaty-confirmed relationship or recognized land title. *See* Western Shoshone Legal Defense & Educ. Ass'n v. United States, 531 F.2d 495, 496 (Ct. Cl. 1976). In any event, the Western Shoshone's receipt of compensation from the Indian Claims Commission operated to extinguish all aboriginal and treaty rights that might have remained. *See* Western Shoshone National Council v. Molini, 951 F.2d 200, 202-04 (9th Cir. 1991).

[245] Appellants Opening Brief at 9-39, United Tribe of Shawnee Indians v. United States, No. 00-3140 (10th Cir. filed June 21, 2000).

[246] 337 U.S. 682 (1949).

[247] Appellant's Opening Brief, *supra* note 245, at 11-13.

[248] 5 U.S.C. § 702 states in part:

> [a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

[249] 30 F. Supp. 2d 24 (D.D.C. 1998); 91 F. Supp. 2d 1 (D.D.C. 1999).

as extending even to fiduciary accounting claims which contemplated a tangible return.[250] The *Larson* exception and the APA waiver were, thus, expansive enough to defuse sovereign immunity, clearly for the recognition claim and contendedly for the constructive trust claim which, like the one in *Cobell*, contemplated a tangible return in equity rather than legal damages.

Standing also seemed an arbitrary basis for dismissal, at least to the extent that the District Court had invoked Article III considerations and found a "failure to demonstrate that plaintiff has suffered or will suffer injury in fact."[251] *Lujan v. Defenders of Wildlife*[252] made it clear that to escape a motion to dismiss, a plaintiff need only *allege*[253] an injury in fact; factual *demonstration* of damage, causation, and redressability need only be made at trial or in response to a motion for summary judgment.[254] Unarguably, it would seem, Jim Oyler had alleged both injury to the UTS arising from non-recognition and a personal stake stemming from his lineage and his possession of a portion of the treaty-confirmed land base. Prudential standing discussions were more appropriate but, the UTS argued on appeal, the allegations of lineal descendency, and ownership of and residence on a portion of the original Shawnee land base, met the requirements of Tenth Circuit treaty standing, if not the governmental continuity criteria used by the Ninth Circuit in the salmon harvest cases.[255]

Ripeness, a procedural bar of constitutional dimension which often serves as an alternative to the exhaustion doctrine, was countered in the UTS appellate brief by a strong and repeated assertion of the dictates in Public Law 103-454. Under this Act, it was advanced, recognition could be accorded by congressional action and court case, as well as administrative process and, once made, could be undone only by Congress. Therefore, the UTS stressed, there was an immediate duty to add recognized tribes such as the UTS to the official list, and the failure of the BIA to do so was final and complete administrative conduct and was ripe for challenge.[256]

These statutes, treaties, cases and doctrines were essentially matters of law, not fact, and were thus cognizable by the court, Pickett's brief stated.[257] Primary jurisdiction, therefore, was unwarranted and Van Bebber should have retained jurisdiction over the UTS claims. At the very least, the brief said, Van Bebber should not have dismissed the claim, but could have held the federal jurisdiction

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[250] 30 F. Supp. 2d at 31; 91 F. Supp. 2d at 24.
[251] 55 F. Supp. 2d at 1243 n.1.
[252] 504 U.S. 555 (1992).
[253] *Id.* at 561. *See also* Lujan v. National Wildlife Fed., 497 U.S. 871, 889 (1990).
[254] 504 U.S. at 561.
[255] The Ninth Circuit prudential standing test, used to handle treaty claims on the finite annual salmon harvest, required a plaintiff to show, for standing, descendency from the original treaty signatory and the continued maintenance of an organized tribal structure. *See, e.g.*, Greene v. Babbitt, 64 F.3d 1266, 1270 (9th Cir. 1995). The Tenth Circuit prudential standard was set forth in *Northern Arapahoe Tribe v. Hodel* and focused on possession and occupancy of land within the reservation as confirmed by congressional and executive acts. 808 F.2d at 748.
[256] Appellant's Opening Brief, *supra* note 245, at 31-33.
[257] *Id.* at 36.

in abeyance pending reference of the UTS case to the BIA under the mandates of Public Law 103-454.[258]

Thus, the UTS not only asked the Tenth Circuit to remand the recognition issue to the District Court, but it sought to establish Public Law 103-454 as the overarching authority and the parameter for any future actions in either the court or the agency. This would, assuming Jim Oyler could get by the standing issues, clearly load the dice in favor of the UTS – that is, it would unless Congress emerged from the thrall of a presidential election year and saw fit to amend the recognition process. The statutory establishment of an independent commission on recognition, which would operate under legislative standards for both new recognitions and reacknowledgment of previous ones, would cut the ground out from under the UTS appeal and would probably short-circuit Jim Oyler's dream of a sovereign revival for the UTS in Kansas.[259]

While the Tenth Circuit wheels of justice slowly ground, the UTS and the Oyler family remained compulsively confrontational, raising the hackles of state and local government. Jim Oyler reopened his smoke shop, having established himself as both wholesaler and retailer of untaxed cigarettes, and having proclaimed to Kansas officials that taxation within Indian country was a civil matter beyond the jurisdiction of Kansas.[260] The recent decision in *Sac and Fox Nation*

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[258] *Id.* at 38.

[259] *See supra* notes 188-199 and accompanying text.

[260] On March 15, 2000, Jim Oyler wrote a letter to Don Jarett, Chief Counsel of the Johnson County Legal Department, which said in part:

> [t]he Tenth Circuit Court of Appeals has ruled that the 1831 Treaty with the United Tribe of Shawnee Indians, (7 Stat. 355) and its promise of continuing, protected sovereignty, continued forward over 160 years after its creation, thus the State of Kansas, to include Johnson County, Kansas, does not have civil jurisdiction (tax and regulation authority) over any Shawnee Indian tribal member of the United Tribe of Shawnee Indians. *See also*: Authentication of Statutes, with attached Kansas Organic Act and An Act for the Admission of Kansas Into the Union, Enclosure 5-1 to 5-7, which also state the same.

(Letter copy on file with the author). Another letter, written on September 30, 1999, to Kathy Cooper, Supervisor of the Kansas Business Tax Bureau, stated in part:

> [w]e, the United Tribe of Shawnee Indians, hereby request that the Kansas Business Tax Bureau authorize and notify all Kansas Wholesale Cigarette and Tobacco dealers that the United Tribe of Shawnee Indians is authorized to purchase untaxed cigarettes and tobacco products for resale within and upon our reservation. We also request a copy of subject notification.
>
> We are recognized as the United Tribe of Shawnee Indians by United States treaties and United States Supreme Court decisions. Our tribal headquarters and sales office is located on Indian Country reservation land known as Shawnee Reserve Number 206 within the bounds of our reservation. Our reservation was established per our 1825, 1831 and 1854 treaties, treaties that were negotiated with our tribe by the President, Ratified by the Senate, and Confirmed by the United States Supreme Court.

v. Pierce[261] indirectly bolstered the argument that the unabrogated Shawnee Treaty of 1831 had insulated the land base, including Lot 206, from the future jurisdiction of the State of Kansas.[262] Oyler made his arguments in writing and kept on selling, but he nervously anticipated a replay of the nighttime enforcement raids that had been made a decade before.

Jim Oyler's eldest child, Jim, Jr., is bigger than his father, stronger, just as assertive and more inclined toward action than discussion. As Jim, Sr. says, "The boy – he'll fight you." Jim, Jr. had repeatedly waived a flag under the county bull's nose with his unregulated sale of fireworks from a stand on Lot 206. His argument paralleled the cigarette situation and was essentially that firework regulation was a civil matter and neither Kansas nor its subdivisions had civil jurisdiction over Lot 206. When the county contested the distinction and threatened to close the stand down, Jim, Jr. stated to the local paper that, "They're not going to come out here. They're afraid to come out here, because I'll slap a lawsuit on their asses so fast they won't know what hit them."[263]

A county official, undeterred by Oyler, Jr.'s threat of litigation, ventured onto Lot 206 with a clutch of citations for firework violations. Oyler proceeded to slap the official around physically rather than legally and to, allegedly, break his cell phone.[264] What had been arguably a civil issue now became a criminal one. All of Sean Pickett's diplomatic skill was required to mollify the county, point the way to a disposition by diversion, and to convince Jim Oyler, Jr. that the UTS chances on appeal would conceivably benefit from an appearance of stability on the land base that sought recognition of its sovereignty.

Another gleam in Jim Oyler, Sr.'s eye, one with significant actual promise, was reserved water rights to Lot 206. Under the *Winters*[265] doctrine and the measurement of "practicably irrigable acreage," established in *Arizona v. California*[266] and confirmed as binding against appropriation states in the *Bighorn*[267] litigation, Oyler figured he had a reserved water right to something in the neigh-

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> Your office must insure that no Indian tribe, Indian or non-Indian, located within the State of Kansas, shall be allowed to purchase and sell untaxed cigarettes and tobacco products to the general public, when the United Tribe of Shawnee Indians and its tribal members are not allowed the same opportunity.

(Copy of letter on file with author).

[261] 213 F.3d 566 (10th Cir. 2000).

[262] The Tenth Circuit stated that "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." 213 F.3d at 577. Such an exclusion was made by the 1831 Treaty with the Shawnee, Article X, 7 Stat. 355, and the Tenth Circuit had previously held that this provision, in application to Lot 206, had never been formally abrogated. *See* Oyler v. Allenbrand, 23 F.3d 292, 295 (10th Cir. 1994).

[263] *See* Jackie Hosey, *A Territorial Issue Gets Explosive*, DE SOTO EXPLORER, July 22, 2000, at 1A.

[264] *See* Jackie Hosey, *Oyler Charged with Assault as Fireworks Issue Gets Pushy*, DESOTO EXPLORER, July 6, 2000, at 1A.

[265] Winters v. United States, 207 U.S. 564 (1908).

[266] 373 U.S. 546, 600 (1963).

[267] In re General Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, *aff'd sub nom* Wyoming v. United States, 492 U.S. 406 (1989).

borhood of 94 acre feet of water for Lot 206, with a priority ahead of anyone else in Kansas. This amount, though not massive, would give Oyler assurances to summer-time water that had been compromised during the partition proceedings.[268] It would also give him a further basis for tweaking the State of Kansas.

Finally, and as an alternative, Oyler kept a grip on the Fifth Amendment, and assured those who would listen, if not those who would decide, that he would sue the federal government for a taking if it turned out in court that the various Shawnee Treaty rights had come to naught. This claim, indeed, seems viable, if not particularly lucrative. There are Supreme Court precedents that support the idea that just compensation must attend the abrogation of treaty rights[269] and, furthermore, that individuals, standing apart from an ongoing, recognized tribe, may retain a compensable share of the contract and property rights established by the United States' solemn nineteenth century promises.[270]

Such a claim, if upheld, might not amount to much money for Jim Oyler or Sean Pickett – an idealist with a sense of history and a sense of humor, who worked long hours on principle and for occasional produce out of the Oyler garden – but it could be embodied in a comprehensive judicial memorial, a printed public confession and accounting, one lasting in the law books for longer than the numerous formal, but ultimately frail promises made about the Kansas homeland, and one emblematic of the dogged, resilient, often obnoxious, commonly irritating, but still admirable spirit of proud, outnumbered men.

VI. EPILOGUE

Tribal sovereignty is not necessarily a function of land area, population size or competitive significance. The essence lies in the freedom to make or recognize rules and principals of personal conduct and social order. This essential liberty springs from the community between particular people, their past, future and their sacred land base. Sovereignty can thus exist in holographic form and the sovereignty within even a small, but cohesive group is as real, intense, precious and complex as sovereignty for the Leviathan. Though the essence of sovereignty flows from within, the positioning of the sovereign group within the political panorama may depend on mutual acknowledgment. Indeed, the indifference of non-recognition may, in many ways, be more debilitating for tribal functioning than overt, focused hostility. Political marginalization or invisibility can stunt the interactive capabilities of Indian governments already weakened by negative demographics, economy and assimilation. While quantitative elements

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[268] *See* Ragsdale, *supra* note 14, at 366-68.

[269] *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (stating that the United States is subject to a claim for compensation in the event of destroying a property right conferred by treaty).

[270] In *Kimball v. Callahan*, the court held that in line with *Menominee Tribe*, rights created under treaty are vested and "a Klamath Indian possessing such rights on the former reservation at the time of [a termination act] retains them even though he relinquishes his tribal membership or the reservation shrinks pursuant to the Act." 493 F.2d 564, 569 (9th Cir. 1974).

may not be at issue in the determination of sovereignty, they are definitely relevant in the arena of mutual recognition. Put simply, a dominant sovereign can unilaterally confer, withhold or condition its recognition of a smaller nation, without suffering significant consequence. Compounding this imbalance are the procedural gauntlets that a sovereign called on for recognition can arbitrarily employ in its courts and agencies; the putative sovereign must struggle down these corridors and through these mazes, seeking the opportunity to present its substantive case and to receive, perhaps, the existential nod.

The substance of nineteenth century recognition of the Shawnee has long seemed indisputable to Jim Oyler and The United Tribe of Shawnee Indians. There were a trio of foundational treaties, a land base separated forever from state jurisdiction, a Supreme Court confirmation of a post-allotment recognized sovereignty, a 1994 Tenth Circuit confirmation of unabrogated civil jurisdiction, and a 1994 federal legislative directive that tribes recognized by legislative act or court decision must be listed along with those acknowledged by agency process. Jim Oyler and the UTS, Shawnee descendents living on a protected portion of the original reservation, seemed the only logical parties to raise the recognition issues. Yet, Oyler and the UTS were shunted into the procedural briar patch as a resistant agency and a complicit federal district court threw up bulwark issues of prudential standing, sovereign immunity, primary jurisdiction, and ripeness in an effort to avoid the recognition issues, the seemingly compulsory language of Public Law 103-454, and interference with the federal government's efforts to dispose of the SFAAP without waste remediation.

As the fall of 2000 faded into winter with the election that would never end, the Tenth Circuit broke its silence to announce that it would hear oral arguments in the UTS case in January, 2001, thus assuring that a decision would not emerge until the spring. Even then, the opinion would be nowhere near a final resolution; rather, it would merely decide whether Oyler and the UTS could start the recognition quest again in district court or whether they would have to proceed administratively with either the BIA or, perhaps, before a new commission. The future for Oz, however, seemed equally murky, as neither popular opinion nor local government embraced the project as presented. Oz management was forced into some desperate reshaping and face-lifting to try to forge an acceptable public image. Thus, the candidates for the sullied, but strategic lands at SFAAP, with their respective credentials at least temporarily disregarded, were lodged in legal hiatus.

Health and age were becoming issues for the Oylers, and the wisdom and desirability of a protracted recognition fight, in the face of the daunting process and uncertain returns, were legitimate questions. Cynics might suppose that the shimmering vision of a wealthy suburban casino drew them on. Indeed, several suitors emerged – Oklahoma tribes and gambling management companies – desirous of a gaming beachhead in Johnson County, Kansas. Jim Oyler, however, was not interested in their plans if they required parting with any significant interest in the land. What he wanted, transcending all else, was the present federal acknowledgment that there was a validly recognized residuum of Shawnee sov-

ereignty in Kansas, and that the UTS was the legitimate steward. To the UTS, and to numerous other Indian tribes holding on against the relentless forces of homogenization, the sovereign land is the holy center, more compelling than money, comfort or tangible possessions and worth any struggle. Sovereignty, perhaps especially to the little people, represents a timeless trust, emanating out of the past, binding the ancestors – the living and the unborn – with the sacred land, empowering and obligating all, and insuring that the road of the people in the world will continue. Thus, the wrenching, exhausting struggles of groups like the UTS to shield the sovereign flames from the assimilative wind, are not matters of reasoned calculus, but of spiritual obligation. They are, literally and figuratively, fights to the death.