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L. R. Weatherhead

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I. *Introduction and Background*

One would have thought that the jurisprudential structure of federal Indian law would have at its base an explicit, comprehensive legal definition of "Indian tribe." It does not. In fact, Congress has never provided a broad definition for application in the field of Indian law. The question whether a particular group of Indian people constitutes a tribe for various purposes has been decided in a fashion that seems at times haphazard.

The problem is one of unquestionable significance for Indians of all tribes, but particularly for those tribes that are not "federally recognized." Once any dispute about federal or state obligations under a statute or treaty is resolved, the next case inevitably involves the standing of the claimant to assert rights under the statute or treaty. Battle is then joined on the issue of whether the claimant is an Indian tribe and on the legal issue of what standards should govern in deciding that factual question.

Thus, in the eastern land claims cases, when the question of the applicability of the Nonintercourse Act to "nonrecognized" tribes was settled,[1] the next case involved a dispute over whether a plaintiff, a nonrecognized tribe, was a tribe at all.[2]

Similarly, in the case of suits to enjoin interference with treaty rights, once the duty of the state toward treaty tribes was clarified,[3] the central issue then became the entitlement of various nonrecognized tribes to exercise treaty rights.[4]

A second question, related to the above, has to do with loss of the attributes that entitle an Indian group to the legal status of a "tribe." As a result of social dynamics, tribes increasingly adopt

* Office of the Attorney General, Government of Guam. The opinions expressed herein are solely those of the author.

1. Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

2. Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979).

3. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); Compilation of Major Post-Trial Substantive Orders, 459 F. Supp. 1020 (W.D. Wash. 1978). The decision and order of the district court were affirmed with minor modification in Washington v. Washington Comm'l Passenger Fishing Ass'n, 443 U.S. 658 (1979).

4. United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979).

the incidents of European culture, their ethnic purity declines with miscegenation, and the geographic sovereignty of landed tribes is increasingly riddled by non-Indian homesteads and purchases. Consequently, tribes are more and more likely to be faced with the assertion that they have lost the distinguishing characteristics that entitle them to their special position in the American legal and political system. This possibility is hardly a threat to large, recognized, reservation-based tribes, but it is already a reality to smaller, landless tribes like the Mashpees of Massachusetts.[5]

The courts and agencies of the federal government are charged with responsibility for determining the continuing existence of tribes. They have developed, in case law and regulations, a set of doctrines and standards to aid them in their task that deserve close analysis. Attempting such analysis consists of four main activities: (1) a review of the legal underpinnings of the status of Indian tribes in relation to the federal government; (2) analysis and criticism of the legal standards of tribal existence applied in the context of Congress' special legislative power over Indians; (3) a discussion of standards of tribal existence applied to tribes claiming entitlements under treaties; and (4) a discussion of tribal abandonment, assimilation, and the doctrines relating to the loss of tribal status.

The fundamental, controlling principle of Indian law is that Indian tribes are sovereign political entities.[6] Their sovereignty is sharply limited as a result of conquest or treaty cession, but they have reserved measures of it. These reservations take the forms of property rights and sovereign powers; examples are land,[7] water rights,[8] fishing[9] and hunting[10] rights, legislative, judicial, and police powers over their members,[11] including power to determine who are members,[12] and other incidents of "internal" sovereignty.[13]

5. Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied,* 100 S.Ct. 138 (1979).

6. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

7. United States v. Creek Nation, 295 U.S. 103 (1935).

8. Winters v. United States, 207 U.S. 564 (1908).

9. United States v. Winans, 198 U.S. 371 (1905).

10. Menominee Tribe v. United States, 391 U.S. 404 (1968).

11. United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

12. Cherokee Intermarriage Cases, 203 U.S. 76 (1906).

13. *E.g.*, regulatory authority, United States v. Mazurie, 419 U.S. 544 (1975); sovereign immunity, Atkinson v. Haldane, 569 P.2d 151 (Alas. 1977). Whether tribes

This principle of sovereignty justifies the federal government's special relationship to Indian tribes. The powers over Indians conferred by the United States Constitution on the federal government spring principally from the treaty power[14] and the commerce clause.[15] As such, the power over Indians reaches only Indian tribes or tribal Indians.[16] And, as the Supreme Court said in *Morton v. Mancari*,[17] Congress can legislate as to tribes and their members free from objection based upon the equal protection guarantees of the Constitution because "tribe" is a political, not a racial, classification: "'[T]his [BIA Indian hiring] preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference. . . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities. . . .'"[18]

The converse of this constitutional justification is that Congress may not favor a group of individual Indians with special legislation unless that group is found to constitute an Indian tribe for purposes of federal Indian law.[19] That is one of only two

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have power to zone lands held in fee by non-Indians is still an open question. *See* Comment, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 677 (1978).

14. U.S. Const. art. 2, § 2: "The President shall . . . have Power, by and with the Advice and Consent of the Senate to make Treaties. . . ."

15. U.S. Const. art. 1, § 8: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."

16. Note that the treaty power implies a *political* relationship, and that the commerce power refers expressly to "tribes." *See* F. COHEN, FEDERAL INDIAN LAW 89 n.3 (1942; rep. 1972) [hereinafter cited as COHEN].

Another writer claims that the historic guardian/ward relationship between the federal government and the Indian tribes constitutes another source of federal power. Comment, *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 445 (1970).

The Supreme Court's most classic statement of the basis of the power is found in United States v. Kagama, 118 U.S. 375, 384 (1885), where it said that the power to deal with Indians "must exist in that government, because it has never existed anywhere else. . . ."

17. 417 U.S. 535 (1974).

18. *Id.* at 553-54.

19. *Cf.* Morton v. Ruiz, 415 U.S. 199 (1974). That case involved a member of the Papago Tribe, Ruiz, residing off-reservation, who challenged the BIA policy of restricting certain benefits to on-reservation Indians.

The Court held that Ruiz was within the "on or near reservation" language of the appropriation made by Congress, and did not directly reach the issue of federal power. But the Court took pains to point out that "The Ruizes . . . live . . . only a few miles from their reservation, . . . maintain their close economic and social ties with that reservation, and . . . are unassimilated." *Id.* at 237-38.

The parties agreed in their briefs on the issue of federal power. Interior protested that a literal reading of the Snyder Act [25 U.S.C. § 13, 42 Stat. 208] would provide

significant limitations on the scope of Congress' otherwise plenary[20] power over Indian affairs.

The second limitation is that while Congress enjoys considerable latitude in determining to whom it will apply its powers over Indians,

> it is not meant by this that Congress may bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress. . . .[21]

While both of these limitations appear to be of constitutional dimensions, as a practical matter it appears that Congress has been wont to disregard them. A good example of this is the Snyder Act,[22] which identifies as objects of special benefits "the Indians through the United States." The Department of the Interior originally ruled that the Act authorized the BIA to extend benefits to "any and all Indians, of whatever degree, whether or not members of federally recognized tribes."[23]

In fact there is no case in which a congressional judgment or enactment has been overturned on the basis of the above limitations. The well-entrenched doctrine of judicial respect for individual determinations that groups are tribes[24] makes it unlikely that any challenge to legislation or to legislative treatment of a

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"benefits to fully assimilated Indians, not based on any special relationship with the government and denied to the citizenry at large." Brief of Petitioner at 18.

In answer, respondent Ruiz "concede[d] that the government has a legitimate interest in restricting its limited subsistence Funds to the unassimilated Indian. . . . We have never argued that the government is required to provide subsistence benefits to the full assimilated Indian residing in Manhattan. [But] we have argued and continue to assert that the government's apparent belief that all non-reservation Indians are assimilated is illogical. . . ." Brief of Respondent at 22-23.

20. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The Supreme Court has recently announced another limitation on the exercise (as opposed to the application of congressional power over Indians). In Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), *reh. denied*, 431 U.S. 960 (1977), the Court held that exercises of the power must be rationally related to purposes of the guardian/ward relationship.

21. United States v. Sandoval, 231 U.S. 28, 46 (1913).

22. 25 U.S.C. § 13, 42 Stat. 208.

23. Opinion of Solicitor of Interior, M-36857 (Feb. 22, 1973), *quoted in* Wilkinson, unpub. rev. of COHEN, *supra* note 16, at 22-23.

24. *See, e.g.*, United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865).

specific Indian group would succeed, save in the most flagrant case of abuse of discretion.

Nevertheless, the function of the legal conception "tribe" in the framework of federal Indian law is still of more than mere academic importance. Recent federal court decisions manifest deep concern with the question of whether the Indian litigants before them have standing to assert rights as tribes. More to the point, the increasing practical importance of the limitations of federal power over Indians is indicated by recent regulations promulgated by Interior: "Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes."[25]

It is evident that the concept of "tribe" is a crucial component of the federal-Indian relationship. It follows that the subtantive elements of that concept are of corresponding importance. Before undertaking analysis of those elements, it is necessary to discuss the historical development of the tests for determining tribal existence, and to outline the legal contexts in which those tests are involved.

There is no apparent obstacle preventing Congress, should it so desire, from legislating an explicit blanket definition of "Indian tribe" for application to all its laws relating to Indian affairs. Congress has not chosen to do so, preferring generally to leave the interpretation of "tribe" to the executive and to the courts, and occasionally to adopt specific, narrow definitions for purposes of individual statutes.

There is wisdom in such forebearance, at least as regards adoption of a detailed standard of tribal existence, because no highly specific standard could comprehend all the groups intended.[26] The reason is that the term "tribe" is used to describe a vast assortment of socio-political arrangements.[27] If carefully defined to fit the attributes of one group, the term would constitute the

25. 25 C.F.R. § 54.2 (1980).

26. Mashpee v. New Seabury Corp., 592 F.2d 575, 588 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979).

27. Because the socio-political situations in which indigenous Americans were found were varied and numerous, references in this paper to " 'tribe' in the ethnohistorical sense" refers not to a stock anthropological definition of "tribe" but rather to the peculiar history of each Indian group. Thus, in speaking of reconciling the legal and ethnohistorical meanings of "tribe," we are talking about deriving a legal standard flexible enough to include the different social, political, and cultural arrangements of each American Indian group.

grossest sort of ethnohistorical fallacy as to other groups. From the outset, dealings between European and Indian were complicated by lack of a common cultural ground: for the European, forms of government had remained fundamentally as classified by Aristotle three centuries before Christ, and modern concepts of property and territorial sovereignty had roots deep in the Middle Ages. Among the Indians, the kinds of political and social organizations ranged from that of the great League of the Iroquois, whose structure is said to have influenced the Framers of the Constitution of the United States,[28] to the extended families or clans that were the Northwest coastal tribes. The latter existed without formal political structures, without concepts of territorial sovereignty, and with rudimentary concepts of property.[29]

> The expression "tribe" often has been a tricky one for experts in Indian affairs. The term "nation" was most used in the seventeenth and eighteenth centuries and was a more appropriate designation than tribe because it referred more to a cultural than a political unity. Tribe came to be used generally after the federal government began exclusively handling Indian relations. Indians, said anthropologist A. L. Kroeber, were distinguished as they lived in a "tribal condition" or in a settled "civilized condition." Tribes were treated as sovereign-state tribes, for it made dealings more convenient and practical. "It was we Caucasians," said Kroeber, "who again and again rolled a number of obscure bands or minute villages into the larger package 'tribe,' which we then putatively endowed with sovereign power and territorial ownership which the native nationality had mostly never even claimed."[30]

Thus, Congress' reticence to set a binding standard of tribal existence to be applied to all tribes is laudable, at least to the extent that more flexibility is possible when "tribe" is defined by the courts and the agencies.

But Congress has not, in its legislation, left the class of subjects of the legislation completely open to determination by courts and agencies. For years, Congress' practice has been to include, in

28. COHEN, THE LEGAL CONSCIENCE 305.

29. United States v. Washington, 384 F. Supp. 312, 350-82 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

30. U.S. Indian Claims Comm'n, Final Report, Sept. 30, 1978, at 10, *quoting from* A.L. Kroeber, *Nature of the Land Holding Group*, 2 ETHNOHISTORY 304 (1955). *See also* United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

statutes aimed at Indians, limiting definitions of "tribe," each definition limited in application to the statute in which it appears. This practice has given rise to the generally accepted belief that there is not one but many legal definitions of "tribe," perhaps as many as there are different statutes or legal contexts in which a definition is involved. Thus, the typical analysis of the definition of "tribe" is splintered; it discusses the issue of tribal existence as it relates to *each* statutory setting.[31] That mode of analysis makes talk of a single standard of tribal existence meaningless, as it is premised on a view that there is no single standard.

The "splintered" approach will not be followed here for two reasons, which will be outlined, then treated in depth. The "splintered" approach errs, first, in that it treats the definition of "tribe" in the case of each statute as one issue when there are really two issues: (a) whether the Indian group to which a statute is to be applied exists as a tribe for purposes of the absolute limitations on federal power; and (b) whether the group fits within the special purposes or express limiting definition of each statute. The first issue is common to all legislation affecting Indians, or rather, to all cases arising under special legislation applying only to Indians. That is, it is true that Congress does not make explicit statements about tribal existence in all its legislation. In applying the legislation to Indians, however, courts, and now Interior, are mindful of the limitations on federal power over Indians. Their concern over federal power is expressed in the resolution of the threshold question of tribal existence. Thus, there is a thread running through the case law, supplying federal Indian jurisprudence with a basic concept of tribal existence not explicit in congressional exercise of its power over Indians.

Second, the "splintered" approach is a less accurate description of the question of tribal existence in the context of special legislation than it was ten years ago. Recent developments in congressional legislation and Interior Department regulations tend to make clearer that a single issue of tribal existence underlies all exercises of federal power. As will be explained in greater detail below, Congress in its most recent legislation has desisted from even providing limiting definitions of "tribe" and has thrown the question of tribal existence to Interior. Interior, in turn, has promulgated new regulations for ascertaining tribal existence, which reflect earlier case law and administrative practice dealing with the matter.

31. *See, e.g.*, Wilkinson, unp. rev. of COHEN, *supra* note 16, ch. 1.

It is necessary to explain the above two points in greater detail. In the course of doing that, a closer look at the nature and meaning of "federal recognition" is appropriate.

The issue of tribal existence for purposes of applying statutes was generally resolved in two ways. If a group is "recognized" by the federal government the courts follow that recognition and hold the group to be a tribe. Recognition is shown by some treaty,[32] agreement,[33] executive order,[34] or course of dealings[35] establishing a relationship between the tribe and the federal government. The group that has a reservation held in trust by the federal government can make the strongest showing.[36] In such cases, the courts essentially accept the judgment of Congress or Interior that an Indian group is a tribe, as they do in other matters involving political questions.[37] When Interior makes a judgment that a tribe is recognized, it basically follows and perpetuates the historic relationship between the tribe and the federal government.

It is apparent that the question of whether a tribe has been recognized is resolved without reference to the factual, ethnological characteristics, at the time of the decision, of the Indian group involved. Once recognition is established, it is not necessary to inquire further. It is clear, therefore, that in the case of recognized tribes the legal label "tribe" when applied to them does not necessarily contain any ethnohistorically valid meaning.

Where there is no recognition, that is, there is no evidence of a federal-tribal relationship, the approach of the courts and agencies is different. Congress or Interior may act to commence a trust relationship with an Indian group, subject always to the limitation that the group must constitute a tribe as a matter of ethnohistorical fact. Thus, for example, Congress has recently acted to extend a trust relationship to the Siletz Tribe of Oregon,

32. *See, e.g.*, Treaty of Medicine Creek, providing for a reservation and other services. 10 Stat. 1132 (1855).

33. *See, e.g.*, An Act Ratifying an Agreement with the Colville Tribe, 27 Stat. 62 (1892).

34. *See, e.g.*, Arizona v. California, 373 U.S. 546, 595-98 (1963). In 1919 Congress terminated the practice of creating reservations by executive order. 43 U.S.C. § 150.

35. *See, e.g.*, United States v. Sandoval, 231 U.S. 28 (1913).

36. Courts have used the existence of tribal land held in trust as a touchstone for determining recognition. *See, e.g.*, United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979).

37. Baker v. Carr, 369 U.S. 186 (1962).

among others.[38] Interior has recently recognized the Grand Traverse Band of Ottawa and Chippewa Indians.[39]

After a trust relationship is established between a tribe and the federal government, legal significance attaches to the existence of the relationship, and not, as we have seen, to the character of the Indian group. The group's continuing status as a tribe in a legal context is not contingent upon its continued existence as a tribe in an ethnohistorical context.[40] This result makes sense, for the guardian-ward relationship was set up with the very purpose of altering Indian life-styles, by "establishing and instructing [the Indians] in agricultural and mechnical pursuits, . . . educating their children, and in any other respect promoting their civilization and Christianization. . . ."[41]

It is for Congress to decide when changes in their life-styles warrant removal of Indian tribes from their special status.[42] Moreover, the Supreme Court has held recently that "long lapse[s] in federal recognition" do not "destroy[] the federal power to deal with" recognized tribes, although historically Interior has taken an opposite view.[43]

At times, however, Congress has legislated as to tribes generally without specifically referring to or recognizing any tribes. An example of this is the Nonintercourse Act,[44] which applied to "any Indian nation or tribe of Indians."

Cases arising under the Nonintercourse Act presented the courts with a new problem. It was clearly Congress' intent to recognize

38. 25 U.S.C. §§ 711 *et seq.*

39. 45 Fed. Reg. 19,321, Mar. 25, 1980. On May 30, 1980, Interior announced its intention to recognize the Jamestown Clallam Tribe. 45 Fed. Reg. 36,525, May 30, 1980.

40. This seems clear from Confederated Salish & Kootenai Tribes v. Moe, 392 F. Supp. 1297, 1315 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976).

41. Treaty with the Blackfeet, 11 Stat. 657 (1855). *See also* Chippewa Indians v. United States, 307 U.S. 1, 4-5 (1939): "Whether or not the tribal relations had been dissolved prior to its adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians."

42. Tiger v. Western Inv. Co., 221 U.S. 286 (1911); United States v. Rickert, 188 U.S. 432 (1903).

43. United States v. John , 437 U.S. 634, 652-53 (1978). But the Solicitor of Interior has said that "the word 'recognized' as used in the Oklahoma Indian Welfare Act involves more than past existence as a tribe and its historical recognition as such. There must be a currently existing group. . . ." Memo. Sol. I.D., Dec. 13, 1938, *quoted in* COHEN, *supra* note 16, at 271-72.

44. 25 U.S.C. 177.

all Indian tribes existing in fact within its jurisdiction, at least for purposes of the Act, whether or not there existed a previously established relationship between the tribe and the federal government.[45] When cases arise under the Act involving nonrecognized tribes, courts find themselves in the position of having to make a judgment on a matter for which they generally rely upon the political arms of the government to make: whether the Indian group is within the scope of federal power; that is, whether it is in fact an Indian tribe. In resolving those questions, the courts have fashioned for themselves a factual test of tribal existence (or definition of tribe).

The cases on this point are few. One of the earliest is *United States v. Candeleria*.[46] That decision could be read as finding that the Laguna Pueblo was in fact recognized—the court adverted to a number of services supplied to the pueblo by the United States. Justice Van Devanter, however, went on to point out that:

> [W]hile there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly . . . within its words, industrious and disposed to peace, *they are Indians in race, customs, and domestic government, [and] always have lived in isolated communities. . . .*[47]

A similar problem of definition was raised concerning the Depredation Act.[48] That conferred jurisdiction upon the Court of Claims over "all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States."

Where the Indian groups were not recognized the courts had to provide a factual test of tribal existence. The issue was less one of federal power—although that figured in[49]—than of statutory construction. The courts had to distinguish between tribes in amity with the United States that could be charged with responsibility, and separate independent "bands."[50] This required a test that

45. Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); State v. Dana, 404 A.2d 551 (Me. 1979).

46. 271 U.S. 432 (1925).

47. *Id.* at 441-42 (emphasis added).

48. 26 Stat. 851 (1891).

49. The issue of federal power was raised by the provision of the Act which gave judgment creditors a right to levy against tribal funds. *Id.* § 6.

50. Montoya v. United States, 180 U.S. 261, 268 (1901). The distinction was mandated by fairness: "The main objects of §§ 5 and 6 would seem to impose upon the tribes the duty of holding their members in check or under control . . . On the other hand, if the

was more refined from an ethnological standpoint. Thus, the Supreme Court in *United States v. Montoya*[51] set down the following test: "By a 'tribe' we understand 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. . . ."[52]

For many years there were no further discussions of factual standards of tribal existence. With respect to the Nonintercourse Act, this was probably because the political climate discouraged nonrecognized tribes from pursuing their claims. Recent cases that have once again brought the issue to the fore, such as *Mashpee v. New Seabury Corp.*,[53] will be discussed in greater detail *infra*.

The second question involved in determining the applicability of a statute to a tribe is whether the tribe fits within the purposes or narrow limitations of the statute. A clear example of this is the definition of tribe in the Klamath Termination Act, which says " 'Tribe' means the Klamath Tribe of Indians."[54]

United States v. Joseph[55] involved a prosecution under an early version of the Nonintercouse Act. The Court held that because the Pueblo Indians were civilized and held fee simple title to their lands, the protections of the Act were not intended to be extended to them. The *Joseph* opinion is understood by some[56] to mean that the Pueblos were found not to be an Indian tribe, and therefore, to be outside the power of Congress. The Supreme Court did not read *Joseph* that way. In *Candeleria*, which found the Pueblos to be within the scope of congressional power and within the terms of the Nonintercourse Act, the Court reiterated a point made in *United States v. Sandoval*[57] that *Joseph* "did not turn upon the power of Congress over them or their property, but up-

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marauders are so numerous and well-organized as to be able to defy the efforts of the tribe to detain them, in other words, to make them a separate and independent band, carrying on hostilities against the United States, it would be obviously unjust to hold the tribe responsible for their acts."

51. *Id.*

52. *Id.* at 266.

53. 592 F.2d 575 (1st Cir.) *cert. denied*, 100 S.Ct. 138 (1979).

54. 25 U.S.C. § 564a(a).

55. 94 U.S. 614 (1876).

56. *E.g.*, Note, *Unilateral Termination of Tribal Status*, 31 ME. L. REV. 153, 166 (1979) [hereinafter cited as Note].

57. 231 U.S. 28 (1913).

on the interpretation and purpose of a statute not nearly so comprehensive as the legislation now before us. . . ."[58]

A special case is posed by the Indian Reorganization Act (IRA). That statute is different principally because in it Congress announced *prospectively* which Indian groups would be recognized as Indian tribes for purposes of the Act.[59] Thus, the issue of tribal existence, which under other statutes is left to the courts and the agencies, was mixed with the limiting definition. The result is a limited definition of tribal existence. It is not, however, the only test of tribal existence. Recognition by other actions of the federal government, and the *Montoya*-type factual test, remain.

That the IRA is not the sole means of establishing tribal existence is shown by two recent cases involving the Mississippi Choctaws. Comparison of the two cases is an object lesson in the confusion that abounds concerning the question of tribal existence. *United States v. Mississippi Tax Commission*[60] was a suit brought by the United States on behalf of the Mississippi Choctaws (hereafter Choctaws) to enjoin state taxation of tribal business. The Choctaws were descendants of those Choctaws who had remained in Mississippi when the rest of the tribe was removed to Indian Territory (now Oklahoma). Under the terms of the treaty of Dancing Rabbit Creek, those remaining were to become citizens of the state of Mississippi.

The Court of Appeals for the Fifth Circuit, reviewing the jurisdictional question, held that the Choctaws were not a tribe of Indians, and that therefore the district court had been without jurisdiction to hear the action. In reaching its conclusion, the court relied upon the treaty provision under which tribal members not removing to Indian Territory were to become citizens of the state.

Apparently under the impression that the IRA was the only means by which the tribe could be brought within the exclusive realm of federal power, the court said "the matter boils down to whether the Mississippi Choctaws became a tribe and live on a

58. 271 U.S. 432, 440 (1925).

59. Under 25 U.S.C. § 479 (section 19 of the IRA), three types of groups are authorized to organize under the IRA:

"(1) Members of any recognized Indian tribe now under Federal Jurisdiction;

"(2) Descendants of members of such recognized Indian tribe, who resided on any reservation on June 1, 1934;

"(3) Persons of one half or more Indian blood." Unpublished revision at 21.

60. 505 F.2d 633 (5th Cir. 1974), *reh. denied*, 535 F.2d 300 (5th Cir. 1975), *reh. en banc denied*, 541 F.2d 469 (5th Cir. 1976).

reservation as the result of the Wheeler-Howard Act. . . ."[61] The court found that the tribe had elected to organize under the IRA in 1935, at a time when, it said, the lands held by the tribe were not a reservation. Therefore, said the court, the election to accept the benefits of the IRA was invalid.

Thus, the court found that the Choctaws were not a tribe, even though its own recitation of the facts disclosed that Congress had made substantial appropriations for the tribe in 1918; had established an agency for the tribe at the same time; had purchased a large area of land for the tribe between 1921 and 1932; and had declared the land to be trust land in 1939. Further, the facts showed that Interior had in 1944 declared the trust lands a reservation and formally recognized the Choctaws as a tribe.[62]

In 1978 an almost identical question of jurisdiction reached the United States Supreme Court, in *United States v. John*.[63] John was a Mississippi Choctaw accused of murder. He was tried in federal district court under the Major Crimes Act[64] and convicted of simple assault. On appeal, the Fifth Circuit, on its own motion, ruled that the federal courts were without jurisdiction as the lands held by the Choctaws were not "Indian country." Thereafter, John was convicted of aggravated assault in the Mississippi state courts.

On certiorari to the Supreme Court, John argued that federal jurisdiction was exclusive under the Major Crimes Act. This posed the same basic jurisdictional question presented in *Mississippi Tax Commission*: whether the Choctaws were a tribe.

The Supreme Court found that the trust lands constituted a reservation at the time of the tribe's election to accept IRA, thus rejecting the Fifth Circuit's finding that the tribe failed to come within the terms of the IRA. In so holding, the Court was careful to point out that it was "assuming for the moment that the only

61. 505 F.2d at 642.

62. A more grievous error of the same kind as in *Mississippi Choctaw* appeared in a recent Oregon district court opinion. In Wahkiakum Band of Chinook Indians v. Bateman, Civ. No. 79-39 (D. Or. 1980), the court held that "Plaintiffs further assert that they have certain rights as a result of federal recognition of Plaintiff's claimed status. Neither the Plaintiffs nor their antecedents have received recognition under the Federal Acknowledgement Act." *Id.* at 3. There is no "Federal Acknowledgement Act." If the court was referring to the IRA, it would appear to have fallen into the same trap into which the *Mississippi Choctaw* court fell.

63. United States v. John, 437 U.S. 634 (1978).

64. 18 U.S.C. § 1153.

authority for the [1944] proclamation can be found in the [IRA]." The Court's opinion makes clear that that assumption is not a sound one. The Court considered the Choctaws to have been recognized by way of the long history of relations between the federal government and the tribe, which the Court reviewed in detail in the opinion:

> But, particularly in view of the elaborate history, recounted above, of relations between the Mississippi Choctaws and the United States, we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups.[65]

The necessary conclusion is that no matter what statutory context is involved, there is always an issue of tribal existence, as well as an issue of applicability of the statute in question to any particular tribe. While the former issue is resolved in one of two ways, either by reference to recognition or by resort to a factual test of tribal existence, it is the same question. It is therefore rational to speak of a single standard of tribal existence in the context of special legislation, and from that starting point to explore more fully the elements of the factual test applied in *Montoya* and *Mashpee* to nonrecognized tribes.

A new tack has been taken by Congress and Interior with respect to the definition of Indian tribe, or the question of tribal existence. The new approach makes clearer that there is one legal standard of tribal existence.

Though Congress' previous practice may have been to provide discrete limiting definitions of tribe in each of its statutes, in its most recent legislation affecting tribes it has put responsibility for determining the beneficiaries of the legislation in the hands of Interior. Whereas in the Nonintercourse Act it used the unqualified "any tribe of Indians," and in the 1963 Vocational Training Act used the term "adult Indians on or near reservations,"[66] in its most recent legislation Congress has said: " 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[67]

That definition, or a substantially similar one, appears in the

65. United States v. John, 437 U.S. 634 (1978).
66. 25 U.S.C. § 309.
67. *Id.* §§ 450-450n at b(b).

Indian Self-Determination Act,[68] the Indian Civil Rights Act,[69] the Indian Economic Development Act,[70] the Indian Health Care Act,[71] the Tribal Community Colleges Act,[72] and the Indian Child Welfare Act.[73]

The effect of the new definition is to eliminate the limiting definitions of prior legislation. In this fashion, the responsibility of Interior to develop standards of tribal existence, which has always existed, is highlighted. Interior, administering the legislation, must determine which tribes are recognized and which non-recognized tribes ought to be recognized.

Even more startling are changes made by Interior that have promulgated a new set of regulations regarding recognition. These new regulations include a meticulous, yet flexible, factual test of tribal existence. Their purpose is to set up a new procedure governing tribes' petitions for recognition.

Under former practice, a determination of whether a tribe was recognized or a decision to recognize a tribe was made in an ad hoc, case-by-case fashion.[74] As noted earlier, a tribe was considered recognized if Interior determined that there existed a historic relationship between the tribe and the federal government. In each instance, recognition referred to two things. First, it referred to operative legal facts indicating actual recognition of an Indian group as a tribe by the federal government, as in treaties, statutes, etc. Second, the term describes a legal status: a recognized tribe is one toward which the federal government presently acknowledges an obligation. Under its old procedures, it was Interior's policy to provide protection and services only to tribes with reservations.[75] In addition, it was apparently Interior's view that long lapses in governmental supervision over recognized

68. *Id.* § 450b(b).
69. *Id.* § 1301(1).
70. *Id.* § 1452(c).
71. *Id.* § 1603(d).
72. *Id.* § 1801(2).
73. *Id.* § 1903(8).
74. See note 81, *infra. See also* St. Clair & Lee, *Defense of Nonintercourse Act Claims: the Requirement of Tribal Existence*, 31 ME. L. REV. 91, 111 n.140 (1979) [hereinafter cited as St. Clair & Lee]: "Leslie Gay, Chief of the Branch of Tribal Relations of the Bureau of Indian Affairs, testified that federal recognition of a group of persons is a political process not necessarily related to any definable standards. It may be dependent upon nothing more than an historical relationship between the United States and the tribe."
75. Task Force Ten, Report on Terminated and Nonfederally Recognized Tribes, Oct. 1976, at 181 (Comm. Print 1976).

tribes worked to remove previously recognized tribes from the trust relationship, despite legal doctrine to the contrary.[76] The result was that many treaty tribes were edged out of their trust relationships with the federal government, in some cases because the federal government had failed to set up reservations or to discharge other treaty or trust obligations.[77]

In this state of affairs, it is easy to see how confusion might prevail on the question of whether a given tribe was in fact recognized at any given time. In fact, it appears that Interior is not quite sure which tribes are recognized. The first proposed draft of the new regulations on recognition had only the narrow purpose of determining which tribes were recognized. The tribes were to present a petition

> requesting the Secretary to acknowledge that the Indian group has the status of a federally recognized Indian tribe. It shall include . . . [a] statement of facts and arguments which the petitioners believe will establish that their group is a federally recognized Indian tribe which has been and should continue to be dealt with as such by the United States.[78]

Interior drew sharp criticism for its anomalous policies, which seemed to elevate bureaucratic oversight and lack of zeal at the expense of tribes,[79] and at least one lawsuit was filed to compel Interior to recognize (or "re-recognize") a treaty tribe.[80]

Partly in response to this criticism, perhaps, and perhaps partly because of a new appreciation of the great significance of federal recognition to Indian tribes, Interior acted to adopt a rational, consistent policy regarding recognition.[81] The crux of the new regulations is in the provision earlier quoted, to the effect that "acknowledgment of tribal existence by the Department is a

76. See text accompanying notes 42 and 43, *supra*.

77. Task Force Ten, *supra* note 75, at 181.

78. 42 Fed. Reg. 30,647, 30,648 (1977).

79. *See generally* Task Force Ten, *supra* note 75, and AIPRC *Final Report*, at 461-67.

80. Stillaguamish Tribe v. Kleppe, Civ. No. 75-1718, Filed Oct. 17, 1975 (D.D.C.).

81. Interior gave as its reasons that: "Various Indian groups throughout the United States have requested that the Secretary of the Interior officially acknowledge them as Indian tribes. Heretofore, the limited number of such requests permitted an acknowledgment of the group's status on a case-by-case basis at the discretion of the Secretary. The recent increase in the number of such requests before the Department necessitates the development of procedures to enable the Department to take a uniform approach in their evaluation." Supplementary Information accompanying Proposed Rule, 43 Fed. Reg. 23,743 (1978).

prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes."[82] In that provision, Interior appears to have taken account of the limitations on federal power and to have overruled its earlier broad interpretation of the Snyder Act.[83] The Supplementary Information accompanying the final regulations indicates concern on Interior's part with the limits of federal power over Indians, and with the issue of equal protection.

> The Department must be assured of the tribal character of the petitioner before the group is acknowledged. Although petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations—a political relationship—is indispensable.[84]

The new regulations[85] effect a striking change in the manner in which recognition, or "acknowledgment" in the new terminology, of tribes is determined. Instead of an ad hoc judgment for a specific purpose, as in the past, recognition is now treated more fully as a conferral of a legal status. One procedure and decision will be made by Interior, to be relevant to all interactions between a tribe and the federal government. Thus, Interior has published a list of "the tribal entities that have a government-to-government relationship with the United States. The United States recognizes its trust responsibility to those Indian entities and, therefore, acknowledges their eligibility for programs administered by the Bureau of Indian Affairs."[86]

For those tribes not listed, the new regulations provide a means of petitioning for recognition. The regulations set the content of the petitions; the facts required to be shown reveal a standard of tribal existence that, like those in *Montoya* and *Mashpee*, attempts to reconcile the legal definition of "tribe" with the ethnohistorical facts of individual tribal history.

There are, then, two situations in which courts or agencies will be called upon to determine whether a group of Indians not presently recognized is a tribe within the scope of Congress' special legislative powers. The first possibility arises under Interior's new "Procedures for Establishing that an American Indian Group is

82. 25 C.F.R. § 54.2 (1980).
83. See text at note 23, *supra*.
84. 43 Fed. Reg. 39,361, 39,361-62 (1978).
85. 25 C.F.R. § 54 (1980).
86. 45 Fed. Reg. 27,828 (1980).

an Indian Tribe." A decision about a petitioning group's status will be made either by the agency in the course of its proceedings, or conceivably by a court, in a suit seeking review of a negative determination by the agency.[87]

The second possibility arises in the context of a group's efforts to take advantage of protections afforded by statutes not tied to functions of the Interior Department. Suits of this kind have become familiar in the northeastern United States in recent years, where the Oneidas,[88] the Passamaquoddies,[89] and the Mashpees[90] have sued for damages, alleging that their lands were alienated from them in violation of the Nonintercourse Act. The threshold question in all three cases was whether plaintiffs were tribes within the scope of the federal power over Indians, since the Act applied to "any . . . tribe of Indians."

Although the situations outlined above arise in different legal settings, the issue of federal power, and therefore the analysis, is the same. The immediate task is to set rational standards, broad enough to avoid ethnohistorical fallacy, yet narrow enough to provide meaningful guidance to decision makers.

There is one more entirely separate legal context in which a definition of "tribe" is involved: the exercise of treaty rights by tribes. As will be explained in detail in part III, the definition of "tribe" involved in determining rights under a treaty does not involve the issue of federal power posed by cases involving legislation singling out Indians. Therefore, an entirely different standard obtains for defining "tribe" in treaty rights cases.

II. *Tribal Existence: Standards Defining "Tribe" With Respect to Special Legislation*

For purposes of comparison, the discussion below draws on three different sources that have sought to resolve the factual

87. The regulations contain no provision for judicial review, thus the extent to which agency judgments are reviewable is an open question. Because the issue is one of mixed fact and law, and because the agency procedure is of an adjudicatory nature to which 5 U.S.C. § 554 would apply (even though no opportunity for oral submissions or a hearing appear in the regulations [*see* Patagonia Corp. v. Board of Governors of Federal Reserve System, 517 F.2d 803 (9th Cir. 1975)]) agency decisions should be reviewable, and the review should be of broad scope, at least to the extent that not the facts but their legal significance is in dispute. *See* K. DAVIS, ADMINISTRATIVE LAW §§ 30.0 *et seq.* (1951).

88. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D. N.Y. 1977).

89. Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

90. Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979).

question, "what is an Indian tribe?", for purposes of federal power over Indians.

(1) *Recommendations of the American Indian Policy Review Commission*

The American Indian Policy Review Commission (AIPRC) was charged by Congress to review American Indian policy and to recommend changes.[91] One area in which changes were proposed involved procedures and standards for recognizing tribes. The AIPRC recommended a new set of standards to control federal judgments about whether a group of Indians exist as a tribe for purposes of federal Indian law.[92]

(2) *Case Law*

There is very little case law on the subject of factual standards for determining tribal existence. The most comprehensive statement from the Supreme Court is found in *Montoya*: "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government and inhabiting a particular though sometimes ill-defined territory."[93]

As was earlier observed, the recent effluorescence of Indian rights litigation has encouraged nonrecognized tribes to assert their claims. Thus, the issue has been broached anew by the courts, but as the issue is still relatively novel, there is very little recent case law. Unfortunately, in neither *Passamoquoddy* nor *Mashpee* did the appellate courts have occasion to make definitive statements of the law concerning the issue of tribal existence. The only recent judicial discussions of the standards of tribal existence are the district court opinions in *Mashpee*[94] and *United States v. Washington*.[95]

One writer questions whether courts should be involved at all in the determination of tribal existence.[96] He suggests that the question of whether a group of Indian persons is a tribe is a nonjusticiable issue. Stressing the factual nature of the inquiry, requiring nice judgments and distinctions, and citing the proverbial expertise of the agencies in their respective bailiwicks, the author

91. Pub. L. 93-580, 88 Stat. 1910 (1975).

92. AIPRC, *Final Report*, submitted to Congress May 17, 1977, vol. I at 461-84 [hereinafter cited as AIPRC, *Final Report*].

93. Montoya v. United States, 180 U.S. 261, 266 (1901).

94. 447 F. Supp. 940 (D. Mass. 1978).

95. 476 F. Supp. 1101 (W.D. Wash. 1979).

96. Note, *supra* note 56.

argues that such judgments might properly be considered as exclusively within the province of the political arm of the government. Three considerations militate against acceptance of this argument. First, a finding that Indian groups are not entitled to the protection of the government is a denial, or possibly a divestiture, of valuable statutory benefits. As long as this is a possible result, the agency decision-making process should not be exempt from judicial scrutiny. Second, from a doctrinal standpoint, there is a precedent involving court determination of the fatual issues involved.[97] One court held that had the political departments recognized the plaintiff tribe, that decision would have been respected. In the absence of such a judgment, the court would draw its own conclusions, according weight but not conclusiveness to the views of the agency.[98] Third, the absence of present recognition is not necessarily the result of a considered judgment by Interior. It may well have been no judgment at all, a result of oversight.

More appropriate in these circumstances is the alternative suggested by the same writer, that the doctrine of primary jurisdiction should apply to give Interior the first opportunity to apply its expertise to the questions presented, subject to judicial review.

(3) *Interior's Regulations Regarding Recognition*

The new Interior regulations are paid the most attention in the following discussion because they will doubtless prove the most significant to Indian tribes. Because, by terms of the regulations, all federal benefits are contingent upon recognition, the regulations are likely to be the most frequently applied test of tribal existence.[99]

The standards found in all sources are similar in substance. The points at which they differ highlight a major issue of policy underlying the question of how to deal with presently nonrecognized tribes.

All tribes have undergone a certain degree of assimilation.[100] It

97. *Compare* United States v. Joseph, 94 U.S. 614 (1876) *and* United States v. Sandoval, 231 U.S. 28 (1913). *See also* Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979); United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979), where judge and jury undertook to decide the question of tribal existence.

98. Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

99. As of 1976, there were 133 nonrecognized tribes in the United States, compared to 289 recognized tribes. AIPRC, *Final Report, supra* note 92, at 467.

100. Confederated Salish & Kootenai Tribes v. Moe, 392 F. Supp. 1297 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976).

is at least plausible to suppose that nonrecognized, and thus unprotected, tribes may have undergone more extensive assimilation.[101] The question of what should be done with the people in that situation is hotly contested. On the one hand, it is observed that promises were made to the forebears of these groups in many cases, and argued that the natural consequences of the government's failure to keep its promises should not now justify a claim that its promise is no longer binding.[102] On the other hand, fears are expressed that recognition of assimilated Indians will result in the creation of a special classification,[103] and that newly recognized groups will assert land claims "without warning to innocent purchasers" that will "totally upset the justifiable expectations" of those persons.[104]

This policy issue is revealed in the degree of stringency with which each source would apply its standards of tribal existence. Generally, the AIPRC took the most liberal view and *United States v. Washington* the least liberal view.

It is here suggested that until Congress should act to make a clear statement of policy, the courts and Interior should be liberal in applying their factual tests to nonrecognized Indian groups. Congress has, in various pieces of recent legislation, manifested a

> policy . . . to provide capital on a reimbursible basis, to help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources . . .;[105]
>
> to promote the stability and security of Indian tribes and families by the establishment of minimum standards for the removal of Indian children from their families and the placement of such children in . . . homes which will reflect the unique values of the Indian culture . . .;[106] [and a]

101. There is evidence, however, that even urban Indians do not lose their cultural identity. *See generally* THE AMERICAN INDIAN (S. Levine & N. Lurie, rev. eds. 1968). *See also* AIPRC, *Final Report, supra* note 92, at 434: "The overwhelming majority of Indians in this country continue to be tribal members, regardless of where they live and regardless of whether or not their tribe is recognized by the Federal government. . . ."

102. Task Force Ten, *supra* note 75, at 181-83; AIPRC, *Final Report, supra* note 92, at 461-84.

103. *See* AIPRC, *Final Report, supra* note 92, dissenting views of Commissioner Lloyd Meeds, at 602-605.

104. St. Clair & Lee, *supra* note 74, at 97 n.33.

105. 25 U.S.C. § 1451.

106. *Id.* § 1902.

> commitment to the maintenance of the federal government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy. . . .[107]

In addition to these broad statements of policy,[108] Congress has demonstrated an intent to reach as many Indians as it can, in the definition of "tribe" quoted *supra* at notes 54-58. Taken together, these intimations of congressional intent support the inference that Congress would intend that its power be as broadly construed as possible, and that the term "tribe" be given as broad a meaning as possible.

The tests of tribal existence developed by each of the three sources are composed of a number of factual standards. For ease of analysis, the discussion is organized around the major standards or elements of the tests, which are substantially similar. The basis test is that the petitioning group must be (i) composed of individuals of common ethnic identity, (ii) forming a separate community, (iii) which has been in existence as such continuously since before European contact. The group must also have (iv) a tribal organization with authority over its members. All sources consider (v) recognition by federal or other government to be relevant. As both *Mashpee* and the federal regulations specifically regard the first four elements as essential showings, they are intermittently styled "requirements."

107. *Id.* § 450a.

108. *See also* Ziontz, "Recent Government Attitudes Toward Indian Tribal Autonomy and Separatism in the United States" (unpublished paper prepared for Seminar in Comparative Studies in Ethnicity and Nationality, 1980), at 29: "The most recent comprehensive official statement of United States policy toward Indian autonomy can be found in the United States Status Report on U.S. Compliance with the Helsinki Accords. ['Fulfilling Our Promises: The United States and the Helsinki Final Act, A Status Report, compiled and edited by the staff of the Commission on Security and Cooperation in Europe, Washington D. C., November, 1979']. . . .

"The report claims that the United States is in compliance with the Accords saying, the United States is committed to Indian self-determination as 'articulated in the Indian Self-determination and Evaluation Assistance Act' of 1975. . . .

"The report concedes that under American law Congress has broad powers, presumably including the power to deprive Indians of their governmental existence. But the Report urges the world community to focus not on the existence of that abstract power, but rather to the fact that since 1975 many laws have been enacted pertaining to Indians which, it claims, ' . . . follows a consistent policy line repudiating terminationist and assimilationist policies of the 1950's, removing barriers to Indian self-determination and local level control, and enhancing the basic quality of life of native American peoples.' " [Citations omitted.]

(i) *Ethnic Identity*

The first requirement is that the group be composed of descendants of specific Indian tribes.[109] There can be little argument over this requirement. It involves a showing that the asserted tribe existed before Europeans came, and that the present group is descended from that tribe. The AIPRC recommendations soften the requirement slightly by allowing a single tribe to have fragmented into a plurality of tribes, or a number of tribes to have amalgamated into a single tribe. The federal regulations make a similar allowance for this, requiring "descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity."[110] In fact, the only tribe to have been recognized under the new regulations, as of this writing, was a combination of historically separate bands.[111] Insofar as it was the practice of the United States, on various occasions, to split and combine tribes at will,[112] it is difficult to sustain any objection to recognizing the end products as tribes.

The district court in *United States v. Washington* made repeated references to the blood quantum requirements of the various plaintiffs[113] but did not discuss the relevance of its findings. There is no authority for conditioning a finding of tribal existence on a minimum blood quantum among members. Some Indian persons have expressed concern that such blood quantum requirements would result in a de facto antimiscegenation rule, with serious genetic consequences.[114]

(ii) *"Separate Community"*

All sources are in agreement that there must be some kind of identifiable community of Indian persons. This requirement is at

109. The liberal federal policy is reflected also in Interior regulations. *See* Summary of Regulations on Tribal Managers Corp., 45 Fed. Reg. 40,672 (1980).

110. 25 C.F.R. § 54.7(e) (1980).

111. Grand Traverse Bank of Ottawa & Chippewa Indians. 45 Fed. Reg. 19,321 (1980).

112. In western Washington, for example, the federally acknowledged Muckleshoot and Tulalip tribes are amalgamations of smaller tribes combined by Governor Stevens, and by subsequent co-residence on reservations. They take their names not from any tribe but from a prairie and a bay, respectively. *See* United States v. Washington, 476 F. Supp. 1101, 1107-1108 (W.D. Wash. 1979). The Indian Reorganization Act made it possible for unattached Indians of 1/2 blood or more to organize into tribes without regard to cultural background. *See* 25 U.S.C. § 479, 48 Stat. 988.

113. United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979).

114. Personal Interview, author and Pat Oshie, Chippewa Indian and a law student.

the heart of legal standards of tribal existence with respect both to exercise of treaty rights and to the federal power over the tribe. The sources differ sharply on the rigor with which the standard should be applied. The district court in *United States v. Washington* stated that the Indian community must be "cohesive" and "separate and distinct" from the dominant culture, in both a geographical and an abstract "consciousness" sense.[115] The federal regulations require that the group inhabit "a specific area."[116] Apparently taking into account the fact that many presently nonrecognized tribes are landless, the regulations qualify the requirement: " 'community' or 'specific area' means any people living within such a reasonable proximity as to allow group interaction and maintenance of tribal relations."[117] Thus, a certain amount of scattering will be tolerated, so long as a "distinct community" in a more abstract sense is maintained. The district court in *Mashpee* took the most liberal view of the requirement. The court instructed the jury that "[A]n Indian community is something different from a community of Indians. That is to say, it has some boundary that separates it from the surrounding society. . . ."[118] According to the appellate court's reading of the trial court's instructions:

> The word "boundary" was used during the trial as an anthropological concept. A boundary in this sense is not something tangible like a fence or a border. Rather, it is an attitude or a consciousness of difference from others, a sense of distinction between "we" and "they."[119]

Thus, no geographical exclusivity was required but a community consciousness among the Indians was. The AIPRC recommendations do not contain a direct community requirement; however, it is implied in other standards.[120]

115. 476 F. Supp. 1101 (W.D. Wash. 1979). See findings of fact numbered 18, 27, 36, 47, 55.

116. 25 C.F.R. § 54.7(b)(1980).

117. *Id.* § 54.1(o).

118. Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979).

119. *Id.* at 586 n.5.

120. *E.g.*, the requirements that the group have been a tribe in the past, have held collective rights, have exercised power over its members, etc. AIPRC, *Final Report, supra* note 92, at 482.

(iii) *Continuity*

Temporal continuity is also required by all sources and applies to all other standards in varying degrees. The standard helps establish that the group is essentially the same as that existing at "the time of European contact," and is of significance in considering the issue of abandonment, discussed *infra*.

The standard is not much discussed in any source except the federal regulations, in which it is thrice qualified. The basic statement of the requirement is that "the petitioner has been identified from historical times until the present on a *substantially* continuous basis."[121] A further qualification is added by the definition: " 'continuously' means extending from generation to generation throughout the tribe's history *essentially* without interruption."[122]

These two qualifications make good sense, quite apart from the underlying policy issue, for the reason that many tribes are almost certain not to have documentation of their activities in the years preceding the early 1900s, and may not have it for more recent periods. Fairness dictates that there not be raised a presumption of inactivity in periods for which there are no records.

A third qualification, that "a petitioner shall not fail to satisfy any criteria because of fluctuations of tribal activity during various years,"[123] reflects an apparent policy judgment that lapses due to conditions beyond the control of the tribe should not be held against it.

The *Mashpee* court expressed a similar point of view: "It is, I suppose, possible that by reason of circumstances, tribal existence be so suppressed that it be in limbo for a period, that it not be manifest for a period . . . ."[124]

(iv) *Tribal Organization With Political Authority Over Members*

All sources require some form of organization with authority over its members. As to the organizational form, there is manifest an effort to avoid ethnohistorical fallacy. Thus, the AIPRC recommendations refer to "such governmental structures which the Indian group has determined and defined as its own form of gov-

121. 25 C.F.R. § 54.7(a)(1980)(emphasis added).

122. *Id.* § 54.1(m)(emphasis added).

123. *Id.* § 54.7(a).

124. Mashpee v. New Seabury Corp., 592 F.2d 575, 586 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979).

ernment."[125] The federal regulations look for a "tribal council, internal process, or other organizational mechanism which the tribe has used as its own means of making tribal decisions. . . . [The concept] must be understood in the context of the Indian culture and social organization of that tribe."[126]

The federal regulations also avoid, at the other extreme, a requirement that the tribe have clung absolutely to tribal forms of government. A proposed provision, excised before final publication of the regulations, would have required a clear showing that the "present internal procedure for making decisions which affect the membership as a whole . . . evolved from that of the historical tribe . . . and that the present internal procedures are not an effort to reconstitute a defunct system."[127] The view that prevailed is more consistent with the realities of cultural change. Since the arrival of the Europeans, Indian leadership has had to take on more complex tasks than those that confronted aboriginal leaders, at least among the simpler tribes. The more liberal view is consistent, too, with the suggestion elsewhere in the regulations that the tribes include in their petitions copies of government documents,[128] something few tribes would historically have had.

Most tribes nowadays have governing organizations with some kind of charter, whether or not approved by the Bureau of Indian Affairs. The only real difficulty as to this aspect of the requirement is in documenting the temporal continuity of the governing organization. The federal regulations provide that while continuity is required, no adverse inferences will be drawn from the fact that the charter is recent.[129]

The requirement that the governing organization have demonstrable political authority over its members is likely to be a major stumbling block to nonrecognized tribes. The expectation that tribes outside the protective embrace of the federal government should retain meaningful political authority over their members is of questionable practicality. However, the appearance of the requirement in all of the sources suggests that it is less likely a conservative policy judgment than an effort to remain true to the doctrine that only quasi-sovereign, political entities may be reached by federal power.

125. AIPRC, *Final Report, supra* note 92, at 482.
126. 25 C.F.R. § 54.1(i)(1980).
127. Proposed Regulations, § 54.7(c), 43 Fed. Reg. 23,743, 23,745 (1978).
128. 25 C.F.R. § 54.7(d)(1980).
129. *Id.* § 54.3(c).

In *United States v. Washington*[130] the district court found, in the case of five tribal plaintiffs, that while each had organizations, that each "exercises no attributes of sovereignty over its members or any territory." This, the most narrow statement of the political authority standard, requiring *territorial* sovereignty as well as authority over members, is surely suspect. The territorial sovereignty of all tribes is limited,[131] the more so where jurisdiction over reservations has been ceded to the states under Public Law 280.[132] Worse, a rule requiring territorial sovereignty would exclude all tribes that either have no lands or that have lands which are not held in trust by the United States.

The AIPRC recommendations refer to the exercise of political authority over members in the past tense. This suggests either that the requirement is viewed merely as an element in defining the group, or that doctrines limiting federal power are considered satisfied by a showing that, though a tribe has no present political authority, it did have at one time.[133] The theory might be that federal power can reach otherwise identifiable Indian groups, which through no fault of their own, have lost political authority.

The federal regulations require that the petitioner show that it "has maintained tribal political influence or other authority over its members as an autonomous entity. . . . ."[134] "Autonomous" is said to mean "independent of the control of *any other Indian governing entity*."[135] This means, by negative implication, that the tribe need *not* show independence of the authority of the state or local governments. The *Mashpee* court took the same position, instructing the jury that:

> There has to be a leadership or government. . . . [T]he notion of sovereignty . . . is not an element, a necessary element of tribal existence. What it [*sic*] is is a leadership which has evolved in some respect . . . which has its roots and has evolved from a once sovereign Indian community. Now, it may take different forms. . . . Clearly, whatever kind of leadership or government the tribe has, if it is a tribe, it cannot compete with the duly

130. 476 F. Supp. 1101 (W.D. Wash. 1979). See findings of fact numbered 16, 25, 35, 45, 54. The court also found that the required continuity was lacking as to these governmental organizations. See finding of fact number 12, at 1104.

131. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

132. Pub. L. 93-280, 18 U.S.C. §§ 1162 *et seq.*, 68 Stat. 795.

133. AIPRC, *Final Report, supra* note 92, at 482.

134. 25 C.F.R. § 54.7(c) (1980).

135. *Id.* § 54.1(i) (emphasis added).

> established government of the Commonwealth . . . [I]t would not be legally permissible for a group within a town to have its own courts.[136]

These qualifications as to what a tribe need not have notwithstanding, a tribal organization must still show "political influence or other authority over its members" in the words of the federal regulations. It is not clear how Interior will construe that requirement. In its decision and findings recognizing the Grand Traverse Band of Ottawas and Chippewas,[137] Interior made only the rather vague statement that the band had had "a series of leaders who represented the band in its dealings with outside organizations, and who both responded to and influenced the band in matters of importance."[138] *Grand Traverse* is the only decision thus far under the new regulations.[139] "Influence[] . . . in matters of importance" is susceptible of broad or narrow reading.

> For the leadership to be such as qualifies a group as a tribe, there must be followers. . . . [You must decide] whether it's the [type of] leadership which would be followed, adopted and obeyed in some significant degree by at least a majority of the . . . tribe. . . .[140]

Such a showing could be very difficult to make, particularly among tribes that have undergone greater degrees of geographical assimilation, as it is simply not human nature to accept more

136. Mashpee v. New Seabury Corp., 592 F.2d 575, 582-83 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979). According to the First Circuit's exegesis of the trial court's instructions, neither "formal governmental institutions" nor "coercive or binding" leadership were required to be shown by plaintiff. *Id.* at 584.

After a long excursus on the powers sovereign tribes may hold, St. Clair (who was counsel for defendant in *Mashpee*) asserts that "an alleged tribe [must] demonstrate possession of significant powers of self government which characterize an Indian 'tribe' as defined by Chief Justice Marshall in *Worcester*, . . . Without proof of an independent and distinct political existence [reference here to all the power listed beforehand], a plaintiff cannot establish the requisite tribal existence for purposes of the Nonintercourse Act." St. Clair & Lee, *supra* note 74, at 105-106.

This is simply not correct, at least under Interior's regulations and under the view adopted by the district court in *Mashpee*. As to the latter, St. Clair & Lee suggest that "there may have been error which benefited [*sic*] the plaintiff." *Id.* at 107. [James St. Clair was former President Nixon's attorney in the tapes case. His old adversary, Archibald Cox, was counsel for the tribe in *Passamaquoddy*.)

137. 45 Fed. Reg. 19,321 (1980).

138. *Id.*

139. Interior has published a notice of intent to recognize the Jamestown Clallam Tribe, but has not published its findings. 45 Fed. Reg. 36,525 (1980).

140. Mashpee v. New Seabury Corp., 592 F.2d 575, 583 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979).

authority than one absolutely must. There is also difficulty in store for those tribes that preserved social order by strong adherence to tradition, enforced by ostracism and peer pressure, rather than by political systems and coercion, because the former kind of "political authority," even if it continues to the present day, is markedly less visible and therefore less susceptible of documentation.

(v) *Recognition by Federal, State, and Local Governments, and by Other Indian Tribes*

These cannot be called requirements but are rather significant evidentiary factors. Clearly, recognition by the federal government, or interaction with it sufficient to establish that it undertook a trust responsibility toward the tribe, are important legal facts. Recognition by state and local governments, and by Indian tribes,[141] can provide documentation of the tribe's historical and present existence.

While policy considerations are implicit in the application of all the foregoing standards, they are most obvious in the decision of what mix of factors must be shown and upon whom the burden of showing them will be put. The AIPRC recommended that all claimants be recognized, unless the United States could show that none of the standards were met. It further recommended that in the event of an agency determination adverse to the claimant, the United States should again bear the burden of proof before a three-judge district court.[142] The federal regulations put the burden of production and proof on the petitioner by requiring that the petition have a specified content;[143] however, they provide that the agency will provide limited assistance in preparing petitions[144] and may do research of its own at the agency review stage.[145] It is not clear from the regulations on what grounds a petition will be denied or granted, but ethnic identity,[146] continuity,[147] community,[148] organization,[149] and political authority[150] are

141. *See* COHEN, *supra* note 16, at 271. *See also* Tully v. United States, 32 Ct. Cl. 1 (1896).

142. AIPRC, *Final Report, supra* note 92, at 481-83.

143. 25 C.F.R. § 54.7(a) (1980).

144. 25 C.F.R. § 54.6(d) (1980).

145. 25 C.F.R. § 54.9(a) (1980).

146. 25 C.F.R. § 54.7(e), (f), (g), (1980).

147. 25 C.F.R. § 54.7(a), (c) (1980).

148. 25 C.F.R. § 54.7(b) (1980).

149. 25 C.F.R. § 54.7(d) (1980).

150. 25 C.F.R. § 54.7(c) (1980).

listed as "mandatory criteria,"[151] whereas federal, state, local, and Indian recognition are interchangeable types of evidence.[152]

Mashpee and *United States v. Washington* both put the burden of proof on the tribes.[153] The *Mashpee* court regarded the four elements of the *Montoya* test ("(a) 'same or similar race'; (b) 'united in a community'; (c) 'under one leadership or government'; and (d) 'inhabiting a particular . . . territory' ") as the *sine qua non* of proof of tribal existence.[154] The *United States v. Washington* court, by contrast, listed all the above elements of the standard as "relevant factors to be considered" without specifying which, if any, were entitled to greater weight.

The various elements of the above test of tribal existence comport well with the controlling doctrines of federal Indian law. They reflect a considered effort to refine the legal definition of "tribe" to better approximate the peculiar ethnohistorical facts concerning individual tribes. Finally, such elements are just, if applied with sufficient elasticity to prevent foreclosure of the rights of those tribes which do not fit into preconceived stereotypes.

III. *Tribal Existence: Definition of "Tribe" for Purposes of Exercise of Treaty Rights*

The second legal context that requires a definition of "tribe" involves treaty rights; there the question is who may hold and exercise them. It is well settled that treaty hunting, fishing, and water rights are the communal property of tribes, whose members may exercise them.

The discussion that follows seeks an explanation of what is meant by the term "tribe" as used in the context of treaty rights. As will become clearer below, the definition is entirely different in the case of treaty rights from that in the context of special legislation in favor of Indians. Essentially, the difference is attributable to the fact that the issue of federal power is not presented in treaty rights cases as it is in the cases involving legislative power over Indians. Some definition of "tribe" is re-

151. 25 C.F.R. § 54.7 (1980).

152. 25 C.F.R. § 54.7(a) (1980).

153. Mashpee v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir.), *cert. denied*, 100 S. Ct. 138 (1979). The district court did not specifically refer to a burden of proof in United States v. Washington, *but see* Brief of Samish et al. Tribes in their appeal, Civ. § 79-4447, filed June 6, 1979.

154. 592 F.2d at 582.

quired, however, in order to describe the community entitled to exercise treaty rights.

The Department of Interior has regulations governing exercise of off-reservation treaty fishing rights by Indians.[155] They will not be further discussed here, as they make no binding law on the rights of any Indians. The regulations leave that to the courts by their savings provisions:

> Nothing in this Part 256 shall be deemed to:
>
> (b) Deprive any Indian tribe, band, or group of any right which may be secured it by any treaty or other law of the United States. . . .
>
> (d) Enlarge the right, privilege, or immunity of any person to engage in any fishing activity beyond that granted or reserved by treaty with the United States.[156]

The following discussion, like that in part II, focuses on the predicament of currently nonrecognized tribes. As to these, it should be borne in mind that treaty signatories that are currently not recognized constitute a special class of tribes, halfway between presently recognized tribes and tribes such as the Mashpees, which have never been recognized. They were recognized at the time they were made parties to the treaties on which they base their claims, but they have since dropped from Interior's purview. It bears remarking that Interior has not heeded the strictures of federal doctrine to the effect that only Congress can terminate the trust relationship once it is begun. If Interior had performed consistently with the doctrine, the question of entitlements of nonrecognized tribes under treaties would never have been posed.

As we have seen, however, Interior's practice has been to lose sight of once-recognized tribes, and this practice has been implicitly accepted by at least one court.[157] Unfortunate as that may be for Indian tribes, it does not affect the fishing and hunting rights secured them in the treaties. Those property rights are contingent only upon meeting the test of tribal existence discussed below.

What is certain, at the outset, is that in determining whether a

155. 25 C.F.R. § 256 (1980).

156. 25 C.F.R. § 256.7 (1980).

157. The district court in United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979), did not discuss or explain the plaintiff's transition from treaty tribe to nonrecognized tribe.

tribe is entitled to exercise treaty rights, present federal recognition is not a decisive factor. It is relevant to the extent that tribes presently recognized by the federal government have fewer theoretical barriers to overcome in vindicating their rights (though substantial practical barriers may remain[158]). That is, in the case of a presently recognized tribe, the tribe's opponents would not get far with a claim that the tribe was not a tribe for any purposes, including the exercise of treaty rights.

The converse is not true, however, in the case of tribes not presently recognized, the absence of such recognition does not mean that the tribe cannot exercise rights guaranteed it by treaty. In *Menominee Tribe v. United States*,[159] the terminated Menominee Tribe sought compensation for the value of treaty hunting and fishing rights which they assumed[160] they had lost as a result of termination. The Supreme Court held that termination did not extinguish the treaty rights, saying: "We 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."[161] The result was followed in *Kimball v. Callahan*,[162] a suit by members of the terminated Klamath Tribe to enjoin the state of Oregon from interference with its treaty hunting and fishing rights. In *Kimball II*,[163] a related case, the Ninth Circuit Court of Appeals explained that while the Termination Act "terminated federal supervision over trust and restricted property of the Klamath Indians, disposed of federally owned property, and terminated federal services to the

158. *See, e.g.*, United States v. Washington, 520 F.2d 676 (9th Cir. 1975), concurring opinion of Judge Burns at 693: "The record in this case, and this history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports-fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten." Later, the Ninth Circuit had further occasion to comment upon "the state's extraordinary machinations in resisting the [district court's] decree. . . . Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

159. 391 U.S. 404 (1968).

160. In fact, three Menominees were prosecuted for violation of Wisconsin hunting and fishing regulations. The convictions were upheld by the state supreme court on the theory that the treaty had been abrogated by the Termination Act.

161. 391 U.S. 404, 413 (1968).

162. 493 F.2d 564 (9th Cir. 1974) (*Kimball I*).

163. 590 F.2d 768 (9th Cir. 1979) (*Kimball II*).

Indians, it specifically contemplated the continuing existence of the Klamath Tribe."[164] Termination, then, amounted to a congressional declaration that it would no longer acknowledge the Klamath and Menominee tribes; in a word, it amounted to "derecognition." Inasmuch as the Menominees and Klamaths kept their treaty hunting and fishing rights, lack of acknowledgment was not a bar to exercise of such rights.

In a case involving two tribes which, while they had not been terminated, were nevertheless not presently recognized, the Ninth Circuit again held in *United States v. Washington*[165] that absence of acknowledgment had no effect on treaty rights. Affirming the district court's determination that the Stillaguamish and Upper Skagit tribes were "each a holder of the right of taking fish secured to Indians by the Treaty of Point Elliot,"[166] the court said: "Non-recognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment . . . can have no effect upon vested treaty rights."[167] The results in *Kimball, Menominee,* and *United States v. Washington* are consistent with the doctrine that, while Indian treaties may be abrogated,[168] only Congress has the power to do so,[169] and then only by express provision:[170] intent to abrogate treaties will not be imputed to ambiguous congressional action.[171] The result is especially appropriate in the case of the Stillaguamish and Upper Skagit, where no congressional action was involved at all. For the court to have held otherwise would have opened the door to the anomalous possibility that although only Congress has the power to abrogate treaties and divest[172] valuable property rights,[173] Interior could accomplish the same result by refusing (or failing) to extend present recognition to treaty tribes;

164. *Id.* at 775-76.

165. 520 F.2d 676 (9th Cir. 1975).

166. 384 F. Supp. 312, 401 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

167. 520 F.2d at 693

168. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

169. *Id.*

170. United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976). *But see* Seneca Nation v. United States, 338 F.2d 55 (2d Cir. 1964), *cert. denied*, 380 U.S. 952 (1965), and Seneca Nation v. Brucker, 262 F.2d 27 (D.C. Cir. 1957)

171. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

172. It seems safe to assume that treaty rights "vest" as of ratification of the treaty.

173. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968) and Washington v. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 681-82 (1979).

that while the executive may not nullify treaties, it may nullify tribes, with the same consequences.[174]

If present federal acknowledgment is not the measure of whether a tribe is a tribe for purposes of exercising treaty rights, the question remains, what is? The *Kimball* and *Menominee* courts left this question open.[175] In *United States v. Washington*, however, the Ninth Circuit set the following standard: "Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure. . . ."[176]

There can be little debate about what is intended by the first element of the standard. It encompasses the source of the asserted rights ("treaty signatory") and requires a demonstration of an anthropological nexus between the present claimant and the tribe that was the original grantee. The second element clearly involves in part a requirement of some kind of continuity ("maintained"). The part referring to that which must have been maintained ("organized tribal structure") is susceptible of at least two interpretations.

One possibility is that by "organized tribal structure" the court meant that a tribe must have a comprehensive tribal government and be in possession of a full set of sovereign powers, at least to the extent possessed by other, presently recognized Indian tribes. The argument might be that absent such sovereign powers and accoutrements, the tribe would be beyond federal power, merely "a

174. It is true that a theoretical distinction may be drawn between declaring that a right no longer exists and that the person or entity that held the right no longer exists. However, in substance, the result is the same. There is no apparent reason why the "superior justice which looks only to the substance of the right, without regard to technical rules" (United States v. Winans, 198 U.S. 371, 380-81 (1905), which is part of the special relationship of the federal government to Indian tribes, should succumb in this instance to nice legalisms.

175. In the *Kimball* cases, the court did not address the issue directly, although the *Kimball II* opinion contains some interesting language suggesting that the standard to be applied would not be too strict. The court held (590 F.2d at 773) that Kimball, who had withdrawn from the tribe, taking his share of tribal assets pursuant to the provisions of the Termination Act, "withdrew from the tribe [solely] for purposes of the Termination Act [which] did not change his relationship with the Tribe as to matters unaffected by the Act, e.g., treaty hunting, fishing and trapping rights." Significantly, the court went on to note that "Congress recognized that local officials would have difficulty in later years identifying those who had hunting and fishing rights." *Id.* at 773.

The *Menominee* court declined to express an opinion on the question of which of two tribal corporations would hold the treaty rights. "We believe it inappropriate, however, to resolve the question of who the beneficiaries of the hunting and fishing rights may be; and we expressly reserve decision on it." 391 U.S. at 409 n.10.

176. 520 F.2d 676, 693 (9th Cir. 1975).

discrete racial group" rather than a "quasi-sovereign tribal entity,"[177] and exercise of treaty rights under those circumstances would be impermissible as in violation of the equal protection guarantees of the fourteenth and fifth amendments.[178] In other words, without the characteristics of a sovereign tribe, the claimant would fall outside the exception to equal protection law enunciated in *Morton v. Mancari*.[179]

This interpretation fails for two reasons. First, as a practical matter, a tribe that could prove it had all the incidents of tribal sovereignty would almost certainly be recognized by the government; without recognition, a tribe is not likely to retain many powers.[180] If it had sufficient proof of tribal existence it would be in as good a position in a lawsuit over treaty rights as if it were recognized by Interior. In either situation, the statement that recognition is not a necessary precondition to the exercise of treaty rights would be completely meaningless.

Second, and more significant, the interpretation fails because it assumes implicitly that treaty rights are "special rights" the exercise of which is unconstitutional unless justified on *Mancari* grounds. Analytically, the error lies in failing to draw the essential distinction between preferential treatment at the hands of the legislature, and the unique rights that ownership of property confers on owners. *Mancari* involved *legislation* granting a hiring preference to Indians within the Bureau of Indian Affairs. As the Supreme Court explained in *Washington v. Confederated Bands & Tribes of the Yakima Nation*,[181] "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government *to enact legislation singling out* tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*. . . ."[182]

177. Morton v. Mancari, 417 U.S. 535, 554 (1974).

178. Equal protection analysis is the same under either amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

179. 417 U.S. 535 (1974).

180. While the sovereignty of Indian tribes does not spring from the federal government, and therefore is not dependent in any theoretical sense upon the latter's acknowledgment (*see, e.g.*, Bottomly v. Passamaquoddy, 599 F.2d 1061 (1st Cir. 1979), without the cognizance and protection of the federal government tribal sovereignty can, realistically, exist only in theory. Modern Indian law has recognized that sovereignty and federal preemption occupy a kind of grey area. *See, e.g.*, McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973), and Confederated Tribes of Colville Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978) (3-judge district court).

181. 439 U.S. 463 (1979).

182. *Id.* at 500-501 (emphasis added).

The enactment of affirmative "legislation singling out tribal Indians" is a different thing entirely from protecting the rights of any property owner. Treaty rights are property of tribes, "special" only in that they confer rights on their owners not shared by nonowners, a common characteristic of property. They do not constitute some kind of self-renewing exercise of federal power in favor of the treaty tribes. The question of federal power may have been present at the time the treaty was ratified and the reserved rights of the Indians confirmed. The existence of the treaty, however, confirms that the Indians were within Congress' power at that time. Thereafter, the rights vested in the tribes as property. The only federal power thereafter exercised with respect to the treaties is that necessary to protect the property rights conveyed by treaty. The power of the government to secure and protect property rights is not, however, limited to Indian tribes. Disputes over treaty rights are property disputes—there is no difference in principle between affirmation of treaty rights in a court proceeding and an ordinary quiet title action over real estate.[183] It is evident that the court in *United States v. Washington* grasped this distinction between property and special legislative treatment, for it said: "Non-recognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a

183. Clearly the crux of this analysis is that treaty rights are property. They have been explicitly so characterized in *Menominee* (391 U.S. 413). That characterization was a necessary *ratio decidendi* of the opinion: the Court viewed the alternatives as compensation for taking, or no treaty abrogation. Similarly, the *Kimball I* court was aided in its decision by the observation that Congress had considered payment for treaty rights but had elected not to pay: again, the fundamental proposition is that treaty hunting and fishing rights are property, for which compensation must be paid if they are taken. *Id.* at 568-69 n.9.

Congress has in the past condemned treaty fishing rights and paid compensation therefor. When it authorized construction of the Dalles Dam, which was to inundate Celilo Falls, a traditional Indian fishing place on the Columbia, Congress included appropriations to pay for the condemned rights. *See* Pub. L. 153, July 27, 1953, 67 Stat. 198. Payments made under that authorization totaled $26,888,395.32, "which was based upon a capitalization at 3 percent of the total value of the fish caught by the Indians in an average year . . ." Whitefoot v. United States, 111 Ct. Cl. 127, 150-51 (1961).

The *Kimball I* court in its jurisdictional statement put the value of the treaty right at "the value to each plaintiff of the game and fish he would take if completely free of regulation, less the value of the limited amounts of game and fish he could take if regulated by statute." Kimball I, 493 F.2d at 565. *See also* Kimball II, 590 F.2d at 773 (treaty rights communal rights in which individual members have a right of user); United States v. Washington, 520 F.2d at 688 refers to the "communal property right" to fish, in which members hold "stockholder rights."

tribe's enrollment *may result in the loss of statutory benefits, but can have no impact on vested treaty rights.*"[184]

A second, more plausible interpretation of the *United States v. Washington* test of tribal existence for treaty rights cases is that the court was giving expression to a requirement that, as treaty rights are *communally* owned property,[185] there must be some form of community in existence to be the holder of the rights.[186]

It may be questioned what the reason is for requiring a finding that some kind of community exists, if only to satisfy a peculiar doctrine of Indian law. In answer, it may be said that the requirement is sound, in policy and law, for three reasons. First, a standard is provided to decide whether a given individual may exercise treaty rights—he may, if associated with the requisite community. Thus, uncertainty and confusion, which might threaten the states' efforts to regulate their natural resources, will be avoided.

Second, in a world of rapidly disappearing resources, proper and responsible management of such resources is imperative. In the context of treaty hunting, fishing, and water rights, the "community" requirement is a means of assuring that there will be a responsible collective authority for management of resources and regulation of the exercise of treaty rights.[187] This authority

184. 520 F.2d at 692-93 (emphasis added).

185. Mason v. Sams, 5 F.2d 255, 258 (W.D. Wash. 1925). *See also Kimball II* and *United States v. Washington*, quoted at note 183, *supra*.

186. This interpretation is made even more credible by the observation that the State Department of Game, which was the only party to address the issue on appeal, made only two arguments in its brief: (1) that federal recognition was required before the Upper Skagit and Stillaguamish tribes could exercise the right to fish; and (2) that because treaty rights are communal there must exist some "tribal entity to form a basis from which the treaty rights may emanate." Brief of Appellants, Department of Game and State of Washington, in No's. 74-2439 and 74-2440, at 69. Clearly, Game was describing the community requirement of communally held rights.

187. There is no question that the tribes have regulatory powers of fishing rights, even off-reservation. In an old case, New Yorker *ex rel.* Kennedy v. Becker, 241 U.S. 556 (1916), the Supreme Court held that Indians were subject to state regulation when fishing at off-reservation reserved sites.

In Tulee v. Washington, 315 U.S. 681 (1942), the Court limited the *Becker* rule to "restrictions of a purely regulatory nature . . . as are necessary for the conservation of fish . . ." *Id.* at 684.

The district courts in United States v. Washington, 384 F. Supp. 312, 336-37 (W.D. Wash. 1974), and United States v. Michigan, 471 F. Supp 192, 268-69 (W.D. Mich. 1979) read *Kennedy* as a narrow holding limited to its facts. The distinction drawn was that in *Kennedy*, involving a cession of land to a private party, the right to fish was termed a "privilege." In *Washington* and *Michigan* the cessions were to the United States, and the reserved fishing right was considered "a *right* and not a *mere privilege*."

Finally, in Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974), the Ninth Circuit held that

can act to prevent the "tragedy of the commons,"[188] a situation which might arise were individual users, exempt from state regulation, allowed access to the resource without recourse to any authority at all.[189]

Third, the analysis dovetails nicely with the suggestion in *Kimball II* that the Klamath Tribe, although in most respects subject to the sovereignty of the state of Oregon after termination,[190] still retained a narrow form of "sovereign authority . . . to regulate the exercise of those rights."[191]

The nature of the "community" required in *United States v. Washington* is not certain, but it seems clear that its focal point need not be broader than the exercise and regulation of treaty rights. Two inferences support that conclusion. First, *United States v. Washington* made clear that tribes exercising treaty rights do not need to show qualities that would justify application to them of federal power over Indians. The negative inference is that all that is required is a showing of an organized, communal exercise of treaty rights.

Second, *Kimball II* found a narrow form of sovereignty relating solely to power over members in regulating exercise of treaty rights. Further, the *Kimball II* court noted that Congress, when it decided not to buy out Klamath treaty hunting and fishing rights foresaw the possibility "that local officials would have difficulty in later years identifying those who had hunting and

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Kennedy considered only "the question of *state* regulation of off-reservation activities," not the question of tribal power. The court held that the tribes "intended to retain not only their ancient fishing rights but also the power to regulate the exercise of those rights . . . ." On that basis, the Yakima Tribe's arrest of a Yakima Indian at an off-reservation fishing site for a fishing violation was upheld.

188. *Cf.* Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

189. Note that interests of conservation have already transcended treaty rights. Puyallup Tribe v. Department of Game, 443 U.S. 165 (1977) (*Puyallup III*).

The trend toward quantification of treaty rights will provide individual tribes with incentives to prevent their members from taking a disproportionate share of the tribal allocation.

190. According to the *Menominee* analysis, the Termination Acts and Pub. L. 280 were companion measures. Thus, while the courts do not mention the status of the tribes' general sovereignty, after termination, *vis á vis* the states, there is a strong implication that they were intended to lose the lion's share of their sovereignty to the states, except as saved, as in the case of hunting and fishing rights.

191. 590 F.2d at 776. It might be said that the power to regulate is incident to the property right. *Cf.* Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974), where the court held that the power to regulate users was reserved with the right to fish. Again, this is a narrow power: "Our holding . . . is a very narrow one. Off-reservation enforcement is limited strictly to violations of tribal fishing regulations." 507 F.2d at 240.

fishing rights."[192] In Congress' view, then, even considerable disintegration of tribal society, even to a point where it would be difficult to discern who had treaty rights, would not affect the existence of treaty property rights. The courts, aware that treaty rights are communal, limit that broad proposition by adding that there must be a community to hold the rights. That solves the dilemma of the local officials but should not unduly restrict the scope of a property right broadly envisaged by Congress. The logical result, then, is a community composed of descendants of treaty signatories organized around the exercise of treaty rights to resources.

Some light is shed on the problem of describing the "community" in *United States v. Washington* where the test was first applied, although the factual record is somewhat sparse. The trial court's findings of fact recited only that the tribes were composed of descendants of treaty signatories; they had no reservations; they were not presently recognized by the federal government as Indian tribal entities; they had documents of organization (not approved by the BIA); that Congress had appropriated money to pay Indian claims judgments won by the tribes; and that since the treaty-making era fishing has been an important means of subsistence and economic support for the tribes.[193]

If the interpretation of the test submitted above is correct, the significant factors were likely (1) descendancy from treaty signatories, (2) continuous concern with and exercise of treaty fishing rights, and (3) continuous organization, even without a common land base and political authority. The organization could conceivably have been quite informal between the signing of the treaty and the adoption of government documents in the twentieth century.[194]

192. 590 F.2d at 773 n.7.

193. United States v. Washington, 384 F. Supp. 312, 378-79, 400-401 (W.D. Wash. 1974).

194. It is interesting to note that the same district court, in a later decision involving five other tribes, held a substantially similar showing inadequate to support an entitlement to treaty fishing rights. United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979). The district court based its decision that the plaintiffs had no treaty rights on a finding that they were not tribes, which was in turn based on the facts that (1) the plaintiffs were not presently acknowledged: "Only tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights. . . ." *Id.* at 1111; (2) that treaty fishing rights are "held today for the use and benefit of the persons who continue to maintain a tribal structure *exercising governmental or political powers* [emphasis added]"; *Id.* at 110. The court offered no authority or explanation of its addition of the last clause onto the test announced by the Ninth Circuit.

The Stillaguamish and Upper Skagit tribes showed their continuing reliance on the treaty right for cultural and economic purposes. Courts should not necessarily require a related showing of persistent exercise of treaty rights in the face of non-Indian opposition—as the Supreme Court of Washington has said: "A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to use the unnecessarily hard way of determining whether they have immunity from certain fishing regulations."[195]

Thus, compliance at some point with (illegal) state regulations should not necessarily be considered a fatal break in the temporal continuity of the community's exercise of treaty rights. Rather, a court should temper the standard to account for the "impact of illegal regulation and of illegal exclusionary tactics by non-Indians."[196]

The definition of "tribe" in treaty rights cases, then, is of a different order than that applicable in cases involving direct exercise of federal powers over Indians. There are doubtless only a few cases where an Indian group will fail to meet the test of tribal existence relevant to federal power, and yet meet the test relevant to the exercise of treaty rights.[197] There are instances, nevertheless.[198] Nonrecognized tribes should not lose their property rights by reason of their failure to meet an irrelevant test of tribal existence.

IV. *Termination of Tribal Existence—Abandonment and Assimilation*

In litigation involving the above tests of tribal existence, a

195. Department of Game v. Puyallup Tribe, 70 Wash. 2d 245, 248, 422 P.2d 754, 756 (1967).

196. It should be borne in mind that the political climate was not always as hospitable as now for pressing treaty claims. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 358 (W.D. Wash. 1974). In this spirit, the United States Supreme Court held, in setting the amount of proportion of fish to which Treaty fisherman are entitled according to past catches, that "the impact of illegal regulation . . . and of illegal exclusionary tactics by non-Indians . . . in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialling the treaties." Washington v. Washington Passenger Fishing Vessel Ass'n, 443 U.S. 658, 669 n.14 (1979).

197. In fact, both the Stillaguamish and Upper Skagit tribes are now recognized. 45 Fed. Reg. 27,828 (1980).

198. The five tribal plaintiffs in United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979), are examples.

question necessarily implied is what meaning or explanation to give a tribe's failure to make its case. In the easily decided case, a group will fail to prove that it is now or ever was an Indian tribe.[199] Difficult cases are posed by groups that prove they did exist, and that they did have a formal relationship with the federal government, but which fail to prove that they presently bear sufficient indicia of "Indian tribes" to justify present recognition. Some explanation must be found for the change.

Our central concern at this juncture is termination of tribal existence on the part of tribes that are able to demonstrate they did exist at some relevant time in the past (*e.g.*, at the time of the passage of the Nonintercourse Act). Abandonment of tribal existence in the context of treaty rights will not be discussed, except to note in passing that property law of abandonment may be appropriate.

There are, then, two situations that are of interest: (1) the termination of the relationship between the United States and a tribe by way of congressional action or cessation of tribal existence; and (2) termination of tribal existence as a defense against nonrecognized tribes suing under statutes like the Nonintercourse Act or suing for recognition.

(1) *Common Law History*

In the earliest cases, when the foundations of federal Indian law were being laid, some Justices expressed the view that there was a point at which a tribe of Indians would become so small in numbers and so altered from its original state that it would no longer be proper to include the tribe within the special trust relationship.[200]

This "assimilationist" argument never caught on in the Supreme Court,[201] which instead consistently took the view, an-

199. *Mashpee* may be read as such a case.

200. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), McLean, J., concurring. *See also* the concurring opinion of Johnson, J., in Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810). "Some [tribes] have totally lost their national fire, and have submitted themselves to the law of the states. . . ."

201. United States v. Joseph, 94 U.S. 614 (1876), is sometimes cited for the proposition that the Supreme Court *has* considered assimilation as a basis for ending the federal-tribal relationship. In *Joseph*, however, there was no tribal-federal relationship between the Pueblo and the United States, other than as might have been established by the Nonintercourse Act, and the question was whether to include the Pueblos within the protection of the Act. The Court decided, on the strength of the factual record, that they should not. The Pueblos were "civilized"and held fee simple title to their land; therefore,

nounced in a series of dicta,[202] that the federal-tribal relationship could be terminated only by act of Congress or by tribes' "voluntary abandonment of their tribal organization."

(2) *Congressional Termination*

In earlier times, Congress directed its efforts at termination of tribal *existence*, but found that "the dissolution of tribal existence is easier to decree than to effect."[203] Cohen described the efforts to terminate the Wyandotte Tribe, which began in 1850 with a treaty agreement that the tribe would disband.

Apparently the extinguishment clause did not work, for

> another treaty containing similar provisions for the extinguishment of tribal existence was entered into by the supposedly nonexistent tribe some 5 years later. In 1935, Congress again provided for the final distribution of the funds belonging to the Wyandotte Tribe. Even this, apparently, did not interfere with the continued functioning of the tribe, and on July 24, 1937, the chief of the tribe certified that the members of the tribe, by unanimous vote, had adopted a tribal constitution under the Oklahoma Indian Welfare Act, perpetuating the traditional tribal organization.[204]

More recent efforts of Congress have been understood by the courts as termination of the federal-tribal relationship, or of recognition, rather than of tribal existence.[205] These efforts have not had lasting effects. While regulations prevent Interior from acknowledging terminated tribes,[206] Congress may reverse itself and has done so with respect to several tribes.[207]

When Congress does act to terminate its relationship with a tribe, it must be explicit. Less direct actions, like allotment of

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said the Court, they didn't fall within the purposes of the Act.

The opposite result was reached as to the Pueblos in United States v. Sandoval, 231 U.S. 28 (1913), on a new record.

"By the time *Sandoval* was handed down in 1913, however, the BIA had compiled enough information of intoxication, debauchery, and 'moral inferiority' (all described in great length in the full Sandoval opinion) to prove that Pueblos were Indians, after all." Getches, Rosenfelt, and Wilkinson, at 179.

202. Beginning with the Kansas Indians, 72 U.S. (5 Wall.) 737, 757, 759 (1867).

203. COHEN, *supra* note 16, at 273.

204. *Id.* (footnotes omitted).

205. Kimball II, 590 F.2d 768 (9th Cir. 1979).

206. 25 C.F.R. § 54.3(e) (1980).

207. Pub. L. 93-197, 87 Stat. 770.

tribal land,[208] extension of citizenship to tribal Indians,[209] or splitting of tribes,[210] do not have the effect of termination.

(3) *"Voluntary Abandonment" and Assimilation*

From a doctrinal standpoint, the concept of voluntary abandonment is a neat way of assuring tribes will not lose their protection until either they or Congress choose. As a practical matter, however, "voluntary abandonment" is a poor description of the actual processes of social transformation.[211]

There is only one case in which a court has found a clear, knowing, and voluntary abandonment by a tribe of its tribal status.[212] Standing Bear was a chief of the Ponca Tribe, which had been removed from Nebraska to a reservation in Indian Territory. The tribe found the climate there was deleterious to its people, fatal to some. The chief led his people back to Nebraska, where they took up residence with a friendly tribe. General Crook seized Standing Bear, with the intent of returning him to the reservation. On habeas, Standing Bear alleged that his people "had withdrawn and severed, for all time, their connection with the tribe to which they belonged. . . . ." The court found for Standing Bear, based on a congressional declaration that the right of expatriation was fundamental to a free society.[213]

A more common problem than "voluntary abandonment" is posed in modern times by the social fact of assimilation—intermarriage, loss of tribal custom, adoption of Western life-styles, "checkerboarding" of reservations. How does assimilation relate to the problem of definition and proof of tribal existence?

Assimilation, even in advanced degree, is not in itself a legal basis for changing the status of presently recognized tribes.[214] In the case of nonrecognized tribes, some writers think that it is,[215]

208. United States v. Rickert, 188 U.S. 432 (1903).

209. United States v. Nice, 241 U.S. 591 (1916).

210. United States v. John, 437 U.S. 634 (1978).

211. *See* Note, *supra* note 56, at 164 n.55.

212. United States *ex rel.* Standing Bear v. Crook, 5 Dill. 453, 25 Fed. Cas. No. 14,891 (C. Neb. 1879).

213. In an era when life on-reservation was highly repressive, Cohen used the *Standing Bear* expatriation argument to make a plea to allow individual Indians to escape "federal oppression." *Indian Rights and Federal Courts*, 24 MINN. L. REV. 145, 185-91 (1940).

214. *See* Note, *supra* note 56, at 161-64. *See also United States v. John, The Kansas Indians, Moe,* cited *supra*.

215. St. Clair & Lee, *supra* note 74, at 108.

or might be.[216] It is difficult to find any reason in law or policy why any such distinction should be made between an acknowledged tribe and a tribe that, but for lack of acknowledgment, could be identical (at least with respect to degree of assimilation). The proponent of the distinction fails to take note of the fact that the only reason recognized tribes have a particular immunity from assimilation is that, as noted earlier, recognition (as a legal status) supplants any factual test of tribal existence. The courts regard recognition as a prior finding by the political departments that the group is a tribe. They find sufficient for purposes of their inquiry and will not question the judgment. This, as was earlier remarked, is just, because Indians were intended by the government to take on non-Indian modes of living. The point is that it is not a valid ground for a rule that nonrecognized tribes should, after some assimilation, be less reachable by the federal power over Indians than recognized tribes. Those Indians were just as subject to non-Indian pressures to assimilate as any others. Thus, the doctrine of abandonment, rather than mere assimilation as a basis for finding a cessation of tribal activity, should apply with as much force to nonrecognized tribes as to recognized tribes. Where cessation of tribal existence is found not to be voluntary, the group should be held still to be within federal power over Indians.[217]

There are two considerations that support the proposition that abandonment, rather than assimilation, should be the test of cessation of tribal activity in cases of nonrecognized as well as recognized tribes. First, it will be recalled that the peculiar history of recognition includes several examples of tribes that were once recognized but in one way or another lost that status without congressional mandate. In a perfect world, these tribes would still be recognized unless they chose not to be. It seems especially signifi-

216. Note, *supra* note 56, at 164.

217. This proposal assumes federal power to recognize or reconstitute nonrecognized Indian tribes. Congress had done this before, in the Indian Reorganization Act, which permitted individual Indians of one-quarter blood residing on one reservation to organize as a tribe.

A plausible theory to support exertion of federal power over Indian groups which have involuntarily ceased tribal activity might go as follows: Absent involuntary cessation of tribal existence, the group would have been entitled to recognition. As we have seen, recognized tribes are not affected by changes in tribal relations until Congress takes some affirmative action to terminate recognition. Because the group ceased tribal relations *involuntarily*, it could be argued that Congress can treat them as though they were recognized from before the involuntary cessation.

cant in the case of such tribes that care be taken in ascertaining the manner in which the asserted cessation of tribal activity took place. Second, even as to those tribes that were never formally recognized, they were likely extant at the time of the Nonintercourse Act, which gave certain protections to all tribes. As one writer has pointed out, there is a certain irony implicit in holding that assimilation puts tribes beyond federal protection in cases where assimilation is in large part because of violations of the Act.[218]

The logical and just conclusion is that in the case of all tribes, nonrecognized and recognized, abandonment should be the standard by which claims that the tribe has ceased to exist are measured. Where assimilation is not absolute, it should not be relevant to the inquiry whether a group is a tribe, any more so than in cases of recognized tribes.

That was apparently the principle applied in *Mashpee*, the only recent decision to deal with the problem.[219] The district court sought to fit the fact of assimilation into the voluntary abandonment doctrine, instructing the jury that there was no abandonment if the "tribe went out of existence through some involuntary process of assimilation . . . [and] that involuntary imposition of conditions could not constitute an abandonment."[220]

The court put the burden of proof of the voluntariness issue on the tribe because requiring defendant to prove absence of coercion would be requiring it to prove a negative.[221] On the other hand, involuntariness might be proved by evidence of some coercive act obliging the tribe to assimilate. By focusing on the converse of voluntary choice, coercion, *Mashpee* brought the standard closer to the realm of the knowable and provable. This is not to say that the test should be used uncritically, however; the concept "coercion" can be just as elusive as "voluntary assimilation."[222] But, it is also more susceptible of proof. The

218. Note, *supra* note 56, at 168.

219. Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979). The district court in United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979) held simply that having failed to meet the requisite standards, the plaintiffs were not tribes. It did not attempt to explain what had happened to the tribes that signed the treaties. The tribes' failure to meet the criteria was in fact due to assimilation, however,

220. 592 F.2d at 587.

221. *Id.* at 590.

222. *Id.* at 588 ("no sure yardsticks by which to measure the court's instructions").

court of appeals suggested, for example, that "historical records would reveal forced migrations, governmental dealings, urban encroachments, the presence of outsiders, or other arguably coercive forces. . . ."[223]

There are two points that should be made about the coercion test of abandonment. The first is that while coercion is doubtless more provable than voluntary abandonment, it is still abstract enough to be difficult to prove. Putting the burden of proof of that issue on the tribes is a judgment that is questionable on policy grounds, especially concerning a tribe that makes a strong prima facie case that it was until recently clearly an Indian tribe. The second objectionable feature of the test is that it requires an implicit admission from the tribe that it is not presently a tribe before the tribe can use the explanation that they were coerced into abandonment. This puts tribal litigants to a hard choice between arguing that their present makeup is sufficient to make them tribes for purposes of federal Indian law, and arguing that while it is insufficient, it is not their fault.

On the whole, the approach of the *Mashpee* court was sound. Even if "voluntary assimilation" is not a realistic view of sociocultural change, as worked out by the *Mashpee* court, it is an attractive standard. The voluntariness aspect of the standard, even if unrealistic, is desirable because it reflects the doctrine that "if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a voluntary decision made by the tribe. . . ."[224]

V. *Conclusion*

As the recent trend toward litigation of Indian rights claims progresses, courts will necessarily be faced with the issue of tribal existence in increasing numbers of cases. In order fully to carry out their part of the federal government's obligations toward Indian tribes, and to protect the valuable property rights reserved by Indians, the courts must be extremely precise in addressing the issue.

First, the legal context in which a definition of "Indian tribe" is required must be identified and the appropriate standard applied. In cases involving the federal power over Indians, the courts would do well to defer to the Department of Interior, even

223. *Id.* at 589.
224. *Id.* at 586.

where Interior has not yet made any judgment. Interior's new procedures equip it with the tools necessary to make fair determinations about individual petitioners. Moreover, Interior's proximity to the policy-making arm of government will enable it to mix the proper degree of liberality or strictness into its judgments.

In cases where the courts must make their own findings, they ought to apply the test of tribal existence found in Interior regulations, as it is the most comprehensive and flexible yet devised.

In treaty rights cases, the courts should recall that the basic rationale of the definition is different in cases of tribal property. It would seem appropriate that the test be liberally applied to give Indians the greatest access to economic necessities reserved by their forebears.

It is hoped that the foregoing discussion of standards of tribal existence will aid clear thinking in an area where clear thinking is crucial.