Catholic University Law Review

Volume 29
Issue 3 *Spring 1980*

Article 6

1980

Tribal Status and the Indian Nonintercourse Act: An Alternative to the Montoya Definition of Tribe

Steven A. Knecht

TRIBAL STATUS AND THE INDIAN NONINTERCOURSE ACT: AN ALTERNATIVE TO THE *MONTOYA* DEFINITION OF TRIBE

In recent years, American Indians have instituted a number of lawsuits to regain lands in the eastern United States[1] allegedly alienated from their possession in violation of the Indian Nonintercourse Act.[2] Probably the most publicized of these cases is the Passamaquoddy tribe's claim to approximately two-thirds of the state of Maine[3] although other suits include the Oneidas' claim to 246,000 acres of New York[4] and the Catawba tribe's attempt to regain 140,000 acres in South Carolina.[5] Since vast expanses of land are at stake, judicial interpretation and application of the Indian Nonintercourse Act have assumed substantial significance in the litigation. Presently, a potentially important aspect of the litigation concerning the Indian Nonintercourse Act is defining what constitutes an Indian "tribe."[6]

If an Indian group fails to prove that it is a "tribe" as contemplated by the Nonintercourse Act, a court will not order the return of land allegedly alienated from the Indians' possession in violation of the Act.[7] Previous recognition as a tribe by the Bureau of Indian Affairs (BIA) is a persuasive

1. *See* Vollmann, *A Survey of Eastern Indian Land Claims: 1970-1979*, 31 ME. L. REV. 5 (1979).

2. 25 U.S.C. § 177 (1976) (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138, *as amended by* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730).

3. *See* Comment, *Resolution of Eastern Indian Land Claims: A Proposal for Negotiated Settlements*, 27 AM. U.L. REV. 695 (1978); *If Indian Tribes Win Legal War to Regain Half of Maine*, U.S. NEWS & WORLD REPORT, April 4, 1977, at 53.

4. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977) (seeking trespass damages for illegal use and occupancy of tribal lands).

5. *See* Vollmann, *supra* note 1, at 12. The land claimed by the Catawba tribe was originally reserved to the tribe in a treaty with the British Crown and later ceded to the state of South Carolina. *Id.*

6. *See* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 100 S. Ct. 138 (1979); Narragansett Tribe v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (N.D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975); note 75 and accompanying text *infra*. *See also* St. Clair & Lee, *Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence*, 31 ME. L. REV. 91 (1979).

7. *See, e.g.*, Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978).

credential in proving tribal status,[8] but not every tribe involved in litigation has this benefit of prior federal recognition. In such cases, the legal definition of Indian "tribe" is of enormous importance as it may essentially determine the legal rights of the parties to the disputed land.

When confronted with the question of tribal existence, courts adjudicating land claims under the Act have employed a definition of tribe developed by the Supreme Court in *Montoya v. United States*,[9] a case not involving the Nonintercourse Act. The definition states that a "tribe" is "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."[10] Unfortunately, this definition, developed in 1901, has never been a realistic description of what constitutes an Indian tribe within the meaning of the Nonintercourse Act. Yet, since 1901 no court has carefully analyzed the definition's appropriateness to the purpose of the Act or the policies of modern Indian law. Consequently, bona fide Indian tribes, particularly ones not federally recognized, are threatened with the possibility of losing potentially large land claims because of an anachronistic concept of tribe.[11] This Comment will analyze relevant areas of Indian law in order to develop a modern definition of "tribe" that is more compatible with contemporary Indian law, the purposes of the Indian Nonintercourse Act, and the historical experience of the Indian tribes.

I. Land Claims Under the Indian Nonintercourse Act

In the early 1800's, the Supreme Court decided that the United States, by virtue of its role as successor to the European nations previously owning American land, holds a fee interest to all Indian territory within its boundaries.[12] The Court held that the Indians had aboriginal title[13] to

8. *See* Oneida Indian Nation v. City of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977); State v. Dana, 404 A.2d 551 (Me. 1979). The Bureau of Indian Affairs issues guidelines for determining tribal status. *See* 43 Fed. Reg. 39,361 (1978).

9. 180 U.S. 261 (1901).

10. *Id.* at 266. *See* note 25 and accompanying text *infra*. *See also* United States v. Candelaria, 271 U.S. 432 (1926); Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (N.D. Me. 1975).

11. *See* notes 35-51 and accompanying text *infra*.

12. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). *See generally* Clinton & Hotobb, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17 (1979).

13. 21 U.S. at 592. Indian, or "aboriginal," title is commonly understood as a right of

much of the land claimed by the United States in the last two hundred years. Tribes possessing aboriginal title have a legal right to use and occupy their land, but only the United States government is empowered to purchase aboriginal title from them and thereby gain a fee simple interest in the land.[14] This principle of Indian property law became the letter of federal law in the Indian Nonintercourse Act,[15] originally enacted in 1790, which provides that "[n]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."[16]

It might appear that the Nonintercourse Act is designed only to preserve the government's control over Indian lands, but actually it is settled that the purpose of the Act is also to prevent tribes "from improvidently disposing of their lands and becoming homeless public charges."[17] Although this position is not specifically supported by the Act's legislative history,[18] it is nevertheless compatible with one of the basic tenets of Indian law: statutes concerning Indians should be construed liberally in the Indians' favor.[19]

If a tribe of Indians wants to recover land alienated in violation of the Nonintercourse Act, it must demonstrate that:

---

occupancy good against all but the federal government. It is termed "aboriginal" title because at the time of discovery and colonization of North America, the European nations regarded the Indians as having a communal interest in the lands they occupied and hunted on. Indian use and occupancy of land, moreover, was considered in the context of Indian ways of life. *See* Mitchell v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

14. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974). *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) (fifth amendment does not require payment of consideration when aboriginal land is confiscated by the federal government); Note, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655 (1975).

15. *See* note 2 *supra*.

16. 25 U.S.C. § 177 (1976).

17. United States v. Candelaria, 271 U.S. 432, 441 (1926). *See also* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) (Act intended to prevent the unfair, improvident, or improper disposition by Indians of lands owned or possessed by them); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941) (Act intended to protect Indian rights of occupancy); Tuscarora Nation of Indians v. Power Auth., 257 F.2d 885, 888 (2d Cir. 1958), *vacated as moot sub nom.* McMorran v. Tuscarora Nation of Indians, 362 U.S. 608 (1960) (purpose of Act to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain).

18. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 656 (N.D. Me. 1975).

19. *See* Antoine v. Washington, 420 U.S. 194, 199-201 (1975); Tulee v. Washington, 315 U.S. 681 (1942); United States v. Shoshone Tribe, 304 U.S. 111 (1938); Choate v. Trapp, 224 U.S. 665 (1912).

(1) it is or represents an Indian "tribe" within the meaning of the Act;

(2) the parcels of land at issue are covered by the Act as tribal land;

(3) the United States has never consented to the alienation of the tribal land;

(4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.[20]

If the Indians succeed in proving this *prima facie* case, their claim to the lands cannot be defeated by defenses such as adverse possession, laches, bona fide purchaser for value, or a statute of limitations.[21] However, the first element of the *prima facie* case can be very difficult to prove for Indian groups without federal recognition because the legal definition of "tribe" fails to account for the disintegrating influences the loss of land has had on the tribe.

II. Traditional Judicial Construction of "Tribe" in the Indian Nonintercourse Act

The present judicial definition of "tribe" was first articulated in *Montoya v. United States*,[22] a case involving application of the Indian Depredation Act.[23] The purpose of the Depredation Act was to compensate United States citizens for property loss resulting from acts of violence "committed by individual marauders belonging to a body [of Indians] . . . at peace with the Government."[24] The statute was not applicable to damages re-

20. Narragansett Tribe v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976). In respect to the first element of the *prima facie* case, an alleged tribe must prove tribal status so that it can establish standing to bring suit and to establish a right to recovery. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581 (1st Cir.), *cert. denied*, 100 S. Ct. 138 (1979).

21. *See, e.g.*, United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938) (since the land is not freely alienable by the Indians, title cannot be acquired through adverse possession); Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977) (suit brought by the United States on behalf of the Indians cannot be barred by state laws of adverse possession, laches, or state statutes of limitations); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 785 (D. Conn. 1976) (explaining why laches and adverse possession do not apply).

22. 180 U.S. 261 (1901). *Montoya* concerned the question of the applicability of the Depredation Act to a group of several hundred Apache Indians that had fled their reservation to engage in numerous hostile acts. The Court concluded that the Indians were a band not in amity with the United States and that therefore the Depredation Act did not apply.

23. Act of March 3, 1891, ch. 538, § 1, 26 Stat. 851.

24. 180 U.S. at 264-65. If these requirements were satisfied, then the government and the marauding Indian body were jointly liable to the victims. *Id.*

sulting from the violent acts of an independent band or tribe not at peace with the United States. A political relationship between the United States and the Indian tribe accused of the violence was required; if the marauders were an autonomous entity, without any affiliation to a tribe having a peaceful political relationship with the United States, then the government was not liable for their violent acts.

Recognizing tribal status as a threshold issue, the *Montoya* Court defined "tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[25] Despite the apparent significance of tribal status for recovery under the Depredation Act, the Court failed to offer any justification for its definition, simply stating a definition of tribe without any accompanying analysis of the specific issue. Instead, most of the Court's analysis focuses upon the meaning of "band" and upon the distinction between a riot and a war. Notably, the discussion of the meaning of war was centered upon political concepts respecting hostile acts as a method of social change and the nature of combat between organized groups representing separate nations.[26]

This aspect of the *Montoya* decision helps to suggest a reason for the "united in a community under one leadership or government" requirement. If the accused Indian group had an organization fitting this description, it would be easier to characterize its acts as war and therefore enable the government to escape liability. That is to say, the Court was attempting to devise a definition of tribe that would reflect the political nature of war in order to facilitate a determination of whether or not the Depredation Act applied.[27] Consequently, the legal validity of the *Montoya* definition outside of the context of the Depredation Act is questionable.

The first case to apply the *Montoya* definition to the Indian Nonintercourse Act, *United States v. Candelaria*,[28] also lacks an analysis of the definition's legal validity. Confronted with the issue of the Act's applicability to the Pueblo Indians of New Mexico, the *Candelaria* Court merely cited *Montoya* and quickly concluded that the Pueblo Indians were

25. *Id.* at 266.
26. *Id.* at 266-67.
27. *Id.*
28. 271 U.S. 432 (1926). In *Candelaria*, the United States government, on behalf of the Pueblo Indians of New Mexico, brought suit to quiet title to lands allegedly belonging to the Indians. Tribal status was at issue because of disagreement concerning whether the United States government had a guardian-ward relationship with the Pueblos. The Court concluded that a guardian-ward relationship existed, and thus the United States was able to represent the Indians in court.

covered under the Act.[29] *Candelaria* is therefore of little value in ascertaining why the *Montoya* definition has been used for the determination of tribal status under the Indian Nonintercourse Act.

The next case to apply *Montoya* to the Act was *Joint Tribal Council of Passamaquoddy Tribe v. Morton*.[30] The Passamaquoddies of Maine sought a declaratory judgment on the question of whether the Nonintercourse Act entitled them to federal protection in court.[31] Only for purposes of that case did the court view the plaintiffs as a tribe within the meaning of the Act.[32] For two reasons, therefore, the decision is not strong authority for using the *Montoya* definition. First, the parties stipulated that the Passamaquoddies were "a tribe racially and culturally,"[33] and second, the court of appeals did nothing more than footnote *Montoya* and *Candelaria* in summarily concluding that the Passamaquoddies were a

29. The Court simply borrowed the *Montoya* definition without explaining whether there were similar purposes or policies between the Indian Nonintercourse Act and the Indian Depredation Act that would support its decision to use the *Montoya* definition. *See id.* at 442. By holding that the Pueblo Indians were a tribe, the *Candelaria* decision contradicted the earlier case of United States v. Joseph, 94 U.S. 614 (1877). In *Joseph*, the Supreme Court held that the Pueblos were not a tribe within the meaning of the Nonintercourse Act because they had been assimilated into non-Indian society. *Id.* at 617-18. *See* United States v. Cisna, 25 F. Cas. 422 (No. 14,795) (C.C.D. Ohio 1835). Two commentators have recently argued that *Joseph* established assimilation as a primary factor in determining whether tribal existence has terminated for purposes of the Nonintercourse Act and that *Candelaria* left this factor intact. *See* St. Clair & Lee, *supra* note 6, at 108-10.

The problem with stressing assimilation as a method of demonstrating the absence of tribal existence is that such an approach unduly restricts the meaning of "tribe" under the Act. There is little possibility of furthering the protective purposes of the Act and the liberal tenets of Indian law if assimilation is viewed as the primary factor in determining tribal status because assimilation is likely to be a symptom of the original injury, loss of land. Additionally, it is unclear from the *Joseph* and *Candelaria* cases what weight the Supreme Court was attaching to the factor of assimilation. That is not to say, however, that assimilation is irrelevant in the context of the Nonintercourse Act. Total assimilation into non-Indian society would necessarily demonstrate the lack of tribal status. But, short of total assimilation, cultural factors and the Indian viewpoint ought to be stressed more heavily than assimilation when determining tribal status under the Act if the purpose of the Act is to be furthered. One way to ensure that those factors will be given greater weight than assimilation is to require a tribe to demonstrate some evidence of political cohesion but not necessarily effective political control over its members.

30. 388 F. Supp. 649 (N.D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

31. Specifically, the Passamaquoddies argued that the federal government owed a duty to them to sue the state of Maine on their behalf. The Passamaquoddies alleged that the state of Maine had, among other things, divested the tribe of much of its aboriginal land in violation of the Nonintercourse Act. 388 F. Supp. at 653.

32. 528 F.2d at 376-77.

33. *Id. See* Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1062 n.3 (1st Cir. 1979) (since tribal status had been stipulated in *Passamaquoddy*, the issue is still open); State v. Dana, 404 A.2d 551 (Me. 1979) (recent attempt by state of Maine to relitigate question of Passamaquoddies tribal status).

tribe.[34] Consequently, *Passamaquoddy* suffers from the same dearth of unreasoned analysis as *Candelaria*.

Although the unsupported *Montoya* definition has been in existence since 1901, it was not until *Mashpee Tribe v. New Seabury Corp.*[35] in 1979 that a court first questioned its appropriateness. The Mashpee Indians of Massachusetts alleged that various land sales to non-Indians from 1870 until the present were in violation of the Indian Nonintercourse Act.[36] The unique history of the Mashpees made it more difficult to prove the alleged violation, as frequent intermarriage with non-Indians,[37] a susceptibility to foreign culture and religion,[38] and the twentieth-century influx of non-Indians into the town[39] made the threshold issue of tribal status a complicated factual question for the court to resolve. In an attempt to prove tribal status, the Mashpees argued that they had a chief, a medicine man, a tribal council for a time, and that in 1974 they formed the Mashpee-Wampanoag Indian Tribal Council.[40] However, the degree of leadership and influence exercised by these officials and organizations over the Mashpees was contested extensively.[41] After being instructed on the *Montoya* elements of "tribe," the jury concluded that the Mashpees were a

34. 528 F.2d at 377 n.8.

35. 592 F.2d 575 (1st Cir.), *cert. denied*, 100 S. Ct. 138 (1979). During the time between the *Passamaquoddy* and *Mashpee* decisions, only one case cited the *Montoya* definition. Narragansett Tribe v. Southern R.I. Land Dev. Corp. 418 F. Supp. 798 (D.R.I. 1977). However, the issue of tribal existence was not specifically litigated in the case, and thus the opinion adds nothing beyond *Passamaquoddy* to an understanding of the definition's utility. *See id.* at 807-09.

36. The land in question is located around Cape Cod and the town of Mashpee, Massachusetts. Two acts of the General Court (legislature) of Massachusetts were alleged to have violated the Act. First, in 1869, the General Court granted citizenship to the Mashpees and gave them authority to sell their lands. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 946 (D. Mass. 1978). Second, in 1870, Mashpee was incorporated as a town and the administrative machinery for the sale of land within the town limits was created. *Id.* These two acts by the General Court did not immediately cause a substantial amount of sales by Indians to non-Indians. But, from the 1930's through the 1970's, a substantial amount of Indian land was transferred to non-Indians. This change of circumstances prompted the *Mashpee* case. *Id.*

37. Many Mashpee males were killed in the American revolution, and their widows subsequently married non-Indians who came to the area. The non-Indians were mostly blacks, but the group included a Portuguese sailor and a few escaped Hessians. *Id.* at 944.

38. Mashpee Tribe v. New Seabury Corp., 592 F.2d at 581.

39. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. at 946. Urban growth brought land developers and many non-Indians to the town. *Id.*

40. *Id.* at 947. In fact, the Mashpees, starting in the 1920's, had practiced the dances and songs of certain Plains Indians because their own had been lost. This loss of customs is true for other east coast Indians as well. *Id.*

41. *Id.* The district court in its opinion, however, did not examine the specific arguments raised in the dispute.

tribe for a short time during the nineteenth century, but had not continued to be a tribe up to the time that suit was brought.[42] Based upon the jury's conclusion, the district court ruled that the disputed land transactions were not violations of the Nonintercourse Act and therefore could not be declared null and void.[43]

On appeal, the plaintiffs argued that the district court erred in its instructions to the jury respecting the "leadership or government" and "united in a community" elements of the *Montoya* definition.[44] Although the First Circuit affirmed the district court decision, it nevertheless noted that the *Montoya* definition was "far from satisfactory."[45] An analysis of the district court jury instructions and the First Circuit opinion reveals why this is so.

Regarding the "leadership or government" element of *Montoya*, the jury was instructed "to decide whether . . . [there is] a leadership that is governing the conduct, the lives of the people in some significant way, that people order their lives in response to these leaders' requirements in some significant way . . . ."[46] Similarly, the jury was asked to decide whether the leadership "would be followed, adopted and obeyed in some significant degree by at least a majority of the people who are going to be a tribe in 1976."[47] Political cohesion and the ability of the tribal leadership to

42. *Id.* at 943. The parties agreed that tribal existence at the time of the suit was necessary. The opinion is silent as to the reason for this agreement, but the probable explanation is that if the Indians seeking redress at the time of suit are not a tribe, any award they might receive would be a windfall to individuals. Thus, the tribal entity that the Act is intended to protect would not be protected, and the purposes of the Act would not be furthered.

43. *Id.* at 949-50.

44. 592 F.2d at 582.

45. *Id.* It is noteworthy that the court of appeals in *Mashpee* stressed that their holding was narrow and that the case did not stand for the proposition that the district court's instructions to the jury were correct as a matter of law. Rather, it held that the instructions conformed to the plaintiff's view of the law. *Id.* at 587. Judge Bownes, in his concurring opinion, on the other hand, argued that the district court instructions should be held correct as a matter of law. *Id.* at 595 (Bownes, J., concurring).

46. 592 F.2d at 584. Judge Skinner, in a similar vein, also told the jury:

> Now, the existence of 30, 40, 50, 60 people, who are concerned with the existence of a chief, who pay attention to what the chief is doing, expect various things from the chief of the tribe or the leaders of the tribe, or the leaders of the group, rather, is not enough. You've got to find that the leadership, whatever it is, has a significant effect upon at least a majority of the claimed group.

Id. at 583.

47. *Id.* at 584. In this regard, the court of appeals stated:

> [T]he court instructed the jury to consider the claims that the asserted leaders "are leaders with respect to a way of life." Such leadership is certainly not expected to be coercive or binding. Plaintiff was allowed to show leadership, at least in part, by demonstrating that the alleged leaders were role-models to whom a majority of the asserted tribe responded on questions of tribal or ethnic significance.

influence the conduct of individual Mashpees was therefore stressed by the trial judge as indicative of the *Montoya* leadership element.

These same factors of political cohesion and independent tribal authority are reflected in the instructions to the jury respecting the "united in a community" element. For instance, the *Mashpee* jury was instructed to look for a boundary distinguishing the Indians as a group from the rest of society.[48] Discrimination against the Mashpees by non-Indians was deemed a permissible basis for inferring the existence of the boundary,[49] but the jury was also told that assimilation would indicate the absence of a community.[50] In other words, the instructions directed the jury's attention towards tribal unity and emphasized group independence from non-Indian society.

This emphasis on tribal unity and political cohesion, inherent in the "leadership or government" and "united in a community" elements, is ill-suited for application to the Nonintercourse Act because it diverts the jury's attention from disintegrative outside influences, possibly traceable to the very injury complained of, that can undermine a tribal structure. In short, the elements do not take into account the importance of a land base for Indians to maintain their tribal unity. If significant numbers of tribal members lose their land, as in the *Mashpee* case, it is reasonable to expect a degree of disintegration and dissipation in the group. Moreover, this failure to recognize the causal relationship between the Indians' loss of tribal land and a minimal amount of demonstrable political cohesiveness is antithetical to the protective purposes of the Act and the liberal policies of Indian law.[51] Given these glaring inadequacies in the *Montoya* defini-

---

Id.

48. "Boundary" was used in the anthropological sense. Thus, the jury was told to decide whether the Mashpees had "an attitude or consciousness of difference from others, a sense of distinction between "we" and "they." *Id.* at 586 n.5.

49. *Id.* at 586.

50. *Id.*

51. *See* note 19 and accompanying text *supra*. Judicial recognition of a causal relationship between an injury to legal rights and disintegration of group cohesiveness is not uncommon. In the field of labor law, employers who are shown to have committed unfair labor practices resulting in dissipation of a union's majority, for purposes of a recognition election, can be ordered to bargain with the victimized union, despite the loss of majority employee approval of the union. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944). In the context of Indian law, particularly the protective purposes of the Indian Nonintercourse Act, a similar approach is needed because it recognizes the practical difficulties of maintaining group cohesiveness when legal rights are violated. *See* Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936, 943 (Ct. Cl. 1965) (acknowledging the possible causal connection between loss of land and disintegration of tribal unity.)

tion, a more realistic standard for identifying bona fide Indian tribes must be developed.

III. A Proposed Alternative Definition

Given the dearth of reasoned precedent and legislative history on the definition of tribe under the Nonintercourse Act, only an examination of the meaning of "tribe" in analogous areas of Indian law can provide the necessary basis for formulating the improved definition. An examination of the facets of Indian law analogous to the Indian Nonintercourse Act will reveal the foundations for the following proposed definition:

> A tribe is a body of Indians whose ancestors resided in North America prior to its discovery by the European nations, able to demonstrate that they continuously regarded themselves as a distinct cultural entity capable of self-regulation, though not necessarily always in fact exercising their self-regulatory capabilities, and inhabiting a particular, though sometimes ill-defined, territory.

A. The Indian Claims Commission Act

A substantial portion of the proposed definition is intended to correspond to the concept of tribe as reflected in cases applying the Indian Claims Commission Act.[52] Enacted in 1946, the Claims Act was intended to remedy wrongs committed by the United States against Indians prior to that date.[53] The Act created the Indian Claims Commission and empow-

52. 25 U.S.C. § 70a (1976). The Claims Act provides:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians . . . (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. . . .

Id. *See* Note, *Administrative Law—The Indian Claims Commission's Jurisdiction to Hear Claims Based on Injuries to Tribal Structure*, 20 Wayne L. Rev. 1097 (1974).

53. Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936, 943 (Ct. Cl. 1965).

ered it to adjudicate claims against the United States brought by "any Indian tribe, band, or other identifiable group of American Indians . . . ."[54] The Claims Act allows nontribal groups of Indians, in addition to bona fide tribes, to seek redress. It still provides a useful analogy, however, because, similar to the Nonintercourse Act, it is directed towards remedying group, as opposed to individual, injuries and is protective in character.[55] Thus, an Indian group is enabled to obtain redress for land transactions that involved fraud, duress, mistake, unconscionable consideration, or failure of consideration[56] as well as redress for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."[57] Consequently, the Claims Act provides a remedy for moral wrongs, such as injuries to tribal culture, as well as legal wrongs, such as those sounding in tort.[58]

The proposed definition adopts the analytic method of determining tribal status as reflected in the Claims Act cases in two major respects. First, it deemphasizes the importance of political cohesion and stresses the relevance of the Indians' self-image. Second, it acknowledges the possibility of a causal relationship between the alleged injury and the present condition of the tribal structure.

Confederated Tribes of Warm Springs v. United States [59] illustrates the need and judicial willingness to downgrade political cohesion as a factor in determining tribal status. The case involved a land claim in which more than one group of Indians alleged entitlement to the same general land area.[60] Political cohesion was in issue because there was disagreement on the question of whether various bands had operated as autonomous entities at the time of injury.[61] The *Warm Springs* court looked to factors such as similarity of dialect, culinary preferences, economic freedom of interaction, and religious practices in order to determine whether the various

54. 25 U.S.C. § 70a (1976).

55. Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d at 943. But, unlike the Nonintercourse Act, a formal tribal organization is not necessary at the time of suit. *Id. See also* Thompson v. United States, 122 Ct. Cl. 348, 357-58, *cert. denied*, 344 U.S. 856 (1952) (redress available for claims based upon inheritance alone).

56. 25 U.S.C. § 70a(3), (4) (1976).

57. *Id.* § 70a(5).

58. *See* Note, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D.L. REV. 359, 389-91 (1973).

59. 177 Ct. Cl. 184 (1967). The claimant Indians brought suit under the Claims Act to recover the value of lands located in Oregon. *Id.* at 189.

60. *Id.* at 193-98.

61. There was some evidence that more than one band of Indians had used the land in issue as a common subsistance area. *Id.* at 206.

bands were culturally unified.[62] Concluding that the bands were culturally unified, the court paid very little attention to the cohesiveness of their political structure.[63]

Warm Springs is more realistic than *Mashpee* on the issue of political cohesion because it focuses upon how the Indians actually ordered their lives rather than on how non-Indian society believed they should have been organized. For this reason, the *Warm Springs* perspective is particularly appropriate for interpreting "tribe" in the context of the Nonintercourse Act. Its cultural emphasis permits judges and juries to identify bona fide, albeit confusing, Indian forms of social organization such as the loosely structured *Warm Springs* tribes, without reference to the irrelevant standards associated with non-Indian forms of government. Additionally, the *Warm Springs* approach logically is far preferable to the *Montoya* definition because it was developed in relation to a law dealing with Indian claims to land rather than to a law dealing with claims arising from Indian acts of destruction, such as the Depredation Act.

Another Claims Act case stressing the importance of cultural factors and how Indians view themselves is *Turtle Mountain Band of Chippewa Indians v. United States*.[64] The United States argued in *Turtle Mountain* that the Indian claimants had no right to establish aboriginal title to the land in issue because of widespread Chippewa intermarriage with non-Indians.[65] The *Turtle Mountain* court rejected the argument, however, preferring to go beyond a simple blood analysis to determine which individuals should be counted as Indians for purposes of proving aboriginal title. The court looked to evidence that full-blooded Indians viewed the mixed-bloods as Indians,[66] that the two groups had a history of hunting together, that they had acted together in their negotiations with the United States, and that

---

62. *Id.* at 206-07.

63. *Id. See also* Upper Chehalis Tribe v. United States, 155 F. Supp. 226, 228-29 (Ct. Cl. 1957).

64. 490 F.2d 935 (Ct. Cl. 1974) (involving claims of three different Indian bands all of whom alleged kinship to the same general ancestral group). *See also* Iowa Tribe of Iowa Reservation v. United States, 195 Ct. Cl. 365 (1971), *cert. denied*, 404 U.S. 1017 (1972) (attempt by two tribes to prove joint and amicable possession for purposes of establishing aboriginal title).

65. 490 F.2d at 942. The crux of the government's argument was that mixed-bloods could not be counted as Indians for the purpose of demonstrating the use and occupancy by the Chippewa necessary to prove aboriginal title. *Id.*

66. *Id.* at 942-43. The court rejected biological standards for determining Indian use and occupancy entirely, quoting a definition of "Indian" suggested by Felix Cohen, a leading Indian law scholar. According to Cohen, an Indian should be defined as any person who can demonstrate "(a) [t]hat some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an "Indian" by the community in which he lives." *Id.* at 942-43 (quoting F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 2 (1942)).

some of the mixed-bloods considered the chief of the full-bloods as their own.[67] In concluding that the mixed-bloods were part of the Chippewa tribe, the court also noted that the mixed-bloods conducted themselves as an Indian organization distinct from non-Indian governments.[68] This subjective, rather than objective, determination of "tribe," like the *Warm Springs* focus on tribal culture, is particularly appropriate as a method for determining tribal status under the Nonintercourse Act. Not only does it reflect the protective purposes of the Act, it also implicitly allows for a degree of assimilation and dissipation in the tribe after a loss of tribal land. Once tribal land is lost, it is reasonable to expect Indian assimilation into non-Indian society. The loss of hunting, fishing, and crop lands would necessarily require the Indians to embrace non-Indian society simply to survive. It is impossible for the courts to restore the lost heritage of the Indians, but the detrimental effects resulting from the loss can certainly be taken into consideration when determining the legal existence of a tribe.

B. The BIA Regulations

The recently adopted BIA regulations for federal recognition[69] of Indian tribes do not acknowledge the possibility of a causal connection between loss of land and disintegration of the tribal structure. The regulations do, however, partly embrace the approach for determining tribal status that is reflected in the Claims Act cases in two particulars. First, the regulations require that an Indian group prove a "substantially continuous tribal existence,"[70] with "repeated identification and dealing as an Indian entity with recognized Indian tribes or national Indian organizations"[71] being considered probative of the issue. Besides favoring reliance on how the Indians view themselves for determining tribal existence, the regulations also adopt the position that tribal organization should be analyzed from the perspective of the Indian culture.[72]

---

67. *Id.* at 943.

68. *Id.* at 944.

69. 43 Fed. Reg. 39,361 (1978). There are basically three ways for a tribe to secure federal recognition. Such recognition can be attained through a continuous policy of administrative conduct, by formal treaty, or by mention of the tribe in federal statutes. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376 (1st Cir. 1975).

70. 43 Fed. Reg. 39,362 (1978). The regulations define continuously as meaning "extending from generation to generation throughout the tribe's history essentially without interruption." *Id.*

71. *Id.* at 39,363.

72. The regulations define autonomous as:

> [H]aving a separate tribal council, internal process, or other organizational mechanism which the tribe has used as its own means of making tribal decisions independent of the control of any other Indian governing entity. Autonomous must

The BIA and the Claims Act cases do not, however, attach equal weight to political cohesion in deciding who is a "tribe." Stressing political cohesion much more heavily, the BIA states in the explanatory introduction to its new regulations that "[m]aintenance of tribal relations—a political relationship—is indispensable" for the existence of a tribe.[73] Yet, it is unclear what degree of political unity is required by the regulations. The source of the ambiguity is the requirement that a petitioning Indian group prove that it "has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present."[74] The phrase "or other authority" suggests that a tribe can exist as a distinct entity, perhaps maintaining its separate character by operation of cultural factors that set it apart from the rest of society, without exercising political influence over its members. On balance, however, it is more reasonable to interpret the regulations as requiring evidence of political cohesion but not as much political cohesion as the *Montoya* definition with its specific requirement of a "leadership or government." In essence, on the issue of political cohesion, the regulations most probably are conceptually somewhere between *Montoya* and the Claims Act approach.

Since the regulations represent an alternative to the *Montoya* definition and are designed to take into account the Indian viewpoint and culture, courts may be inclined to adopt the regulations in place of *Montoya* for purposes of defining "tribe" within the meaning of the Nonintercourse Act. However, the regulations are general in nature and are not specifically designed to further the purposes of the Nonintercourse Act. The requirements for tribal status under the Nonintercourse Act may not be the same requirements for other purposes, such as eligibility for federal benefits.[75] Accordingly, a definition specifically designed to further the purposes of the Nonintercourse Act, such as the one presented herein, is eminently more desirable than a general definition formulated for various unrelated purposes.

IV. Conclusion

Careful analysis of the cases applying the *Montoya* definition to the Nonintercourse Act reveals the definition's inadequacies. Every court applying *Montoya* to the Act has failed to recognize that the definition, which

be understood in the context of the Indian culture and social organization of that tribe.

Id. at 39,362.

73. *Id.* at 39,361-62.

74. *Id.* at 39,363.

75. *See* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. at 950 n.7.

evolved largely by historical accident, does not further the protective purposes of the Act nor the liberal tenets of Indian law. Given the close similarity between the Nonintercourse Act and the Claims Act, analogy to the latter provides a logical basis for improving the definition of "tribe" under the Nonintercourse Act. The definition proposed in this Comment is an improvement over *Montoya* because it embraces the Claims Act approach, the validity of which is bolstered by the new BIA regulations, and rejects the misplaced reliance on political cohesion. Most importantly, the definition acknowledges the always overlooked causal connection between the loss of land and the present condition of a tribe's structure.

Steven A. Knecht