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Constitutional Law - Federal Indian Law: The Erosion of Tribal Sovereignty as the Protection of the Nonintercourse Act Continues to Be Redefined More Narrowly - Cass County Joint Water Resource District v. 1.43 Acres of Land

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CONSTITUTIONAL LAW—FEDERAL INDIAN LAW: THE EROSION OF TRIBAL SOVEREIGNTY AS THE PROTECTION OF THE NONINTERCOURSE ACT CONTINUES TO BE REDEFINED MORE NARROWLY

Cass County Joint Water Resource District v. 1.43 Acres of Land, 2002 ND 83, 643 N.W.2d 685

I. FACTS

In 1994, Cass County Joint Water Resource District (District) submitted an application to the United States Army Corps of Engineers (USACE) to build a dam on the Maple River for flood control in eastern North Dakota.[1] As part of this project, the District sought to acquire a 1.43-acre tract of land in order to conduct the cultural research necessary to obtain the USACE permit because that piece of land would be subject to frequent and prolonged flooding if the dam was constructed.[2]

The 1.43-acre tract was part of the area obtained by the federal government from the Mdewakanton and Wahpakoota Bands of Indians in 1851, along with the Sisseton and Wahpeton Bands of Santee Sioux Indians in 1867, 1872, and 1873.[3] Near the end of the 19th century, the land was transferred by patent to the Northern Pacific Railroad Company.[4] For almost one hundred years, the land was privately owned.[5] It had not been plowed or planted in the ninety-nine years the Shea family owned it.[6]

The Great Plains Regional Tribal Chairman's Association[7] passed a resolution opposing construction of the dam, concerned that the proposed

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1. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 2, 643 N.W.2d 685.

2. Brief of Appellant at 2, Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, 643 N.W.2d 685 (No. 2001-0217).

3. *Id.* at 3.

4. *1.43 Acres of Land,* ¶ 3, 643 N.W.2d at 688.

5. Brief of Appellees at 4, Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, 643 N.W.2d 685 (No. 2001-0217).

6. *Id.*

7. The Great Plains Tribal Chairman's Association (GPTCA) is composed of the elected chairs and presidents representing seventeen federally recognized tribes within the Great Plains region of the Bureau of Indian Affairs. 66 Fed. Reg. 22255 (May 3, 2001). GPTCA was formed to promote the common interests of the sovereign Tribes and Nations and their members of the Great Plains Region. *See also DLN Issues: Native Child and Family Rights*, DAKOTA-LAKOTA-NAKOTA HUMAN RIGHTS ADVOCACY COALITION *at http://www.dlncoalition.org/dln_issues/2003_icwaresolution.htm* (last visited Mar. 19, 2004);

flooding area is filled with burial mounds as well as individual unmarked graves of ancestors associated with the Turtle Mountain Band of Ojibwa, the Spirit Lake Sioux Tribe, and the Three Affiliated Tribes.[8] Because of the dispute over whether the site for the Maple River Dam Project contained burial mounds, and might be subject to the National Historic Preservation Act (NHPA)[9] requirements, an Environmental Impact Study[10] (EIS) was done.[11] After completion of the EIS, the Turtle Mountain Band of Chippewa Indians (Tribe) submitted comments on the Draft Environmental Impact Statement (DEIS), expressing concern about the status of identified cultural sites and the high probability of additional sites near that location.[12]

On July 28, 2000, Roger Shea conveyed the 1.43-acre tract of land to the Tribe by executing a warranty deed for $500, but reserved the right to graze his livestock on the land.[13] The deed was properly recorded.[14] On February 6, 2001, Shea also conveyed his right to graze livestock by executing a quitclaim deed for $1, but this deed was never recorded.[15]

The Tribe is a federally-recognized Indian tribe with a 43,000-acre reservation in Rolette County, 200 miles from the 1.43-acre tract at issue.[16] The Tribe and individual members acquired additional land over time.[17]

Resolution of the Great Plains Regional Tribal Chairman's Association at http://www.wintercount.org/people/un_support.txt (last visited Mar. 19, 2004).

8. Appellees' Brief at 4, *1.43 Acres of Land* (No. 2001-0217).

9. National Historic Preservation Act (NHPA), 16 U.S.C. § 470 (2000). Under the Act, federal agencies are required to administer cultural properties in a way that preserves, restores, or maintains objects of historical, architectural, or archaeological significance. *Id.* NHPA requires federal agencies to take reasonable steps to identify the area of potential effect, to identify any properties within that area that may be eligible for the National Register of Historic Places, to determine whether there will be any adverse effects, and to outline a plan to mitigate any adverse effects. *Id.*

10. National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1994). NHPA is an extension of NEPA, the act requiring all federal agencies to examine the environmental impact of any action that would significantly affect the quality of the human environment. *Id.* An environmental impact statement (EIS) must be prepared, offering a detailed statement describing the environmental impact of the proposed action, including adverse environmental effects which cannot be avoided; possible alternatives to the proposed action; the relationship between local short-term uses and long-term productivity; and irreversible and irretrievable commitments of resources if the proposed action were implemented. *Id.* § 4332(c). Copies are to be made available to the public. *Id.*

11. Appellees' Brief at 3, *1.43 Acres of Land* (No. 2001-0217).

12. *Id.*

13. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 3, 643 N.W.2d 685.

14. *Id.*

15. *Id.*

16. *Id.* ¶ 4.

17. Brief of Appellees at 2, Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, 643 N.W.2d 685 (No. 2001-0217).

Today, the Tribe and its members hold over 77,000 acres of land on and immediately adjacent to its reservation in Rolette County.[18] In addition, they hold almost 7,000 acres in trust around Trenton, North Dakota, 83,000 acres of land in Montana, and ten acres at the Pembina cemetery site where their ancestors are buried.[19] Although the 1.43-acre tract of land does not lie within the aboriginal homelands of the Tribe, the Tribe contended that its ancestors once occupied the area and that the tract contained a culturally significant village and burial site.[20] The land is not allotted land, nor is it held in trust by the federal government.[21] After the commencement of this lawsuit, the Tribe applied to the United States Bureau of Indian Affairs and requested that the federal government take this 1.43-acre tract of land into trust.[22]

The District offered the Tribe $300 for the tract of land.[23] When the Tribe refused to sell the land, the District brought an action seeking condemnation of the 1.43-acre tract.[24] The Tribe responded with a motion to dismiss, arguing the district court did not have jurisdiction because of Tribal sovereign immunity, preemption by the Federal Nonintercourse Act, lack of a state statutory basis for the condemnation, and the inability to condemn a cemetery.[25] Mr. Shea was also named a defendant.[26] He moved to dismiss the action by claiming he no longer had an interest in the property.[27]

The Court of the East Central Judicial District of North Dakota granted the Tribe's motion to dismiss.[28] It held that both *in rem* jurisdiction over the land and *in personam* jurisdiction over the Tribe were required to entertain a condemnation action.[29] The court concluded that it lacked jurisdiction to hear the condemnation action because tribal sovereign immunity barred its assertion of jurisdiction over the Tribe.[30] The district court also

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18. *Id.*

19. *Id.*

20. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 4, 643 N.W.2d 685, 688.

21. *Id.*

22. Appellant's Brief at 3, *1.43 Acres of Land* (No. 2001-0217).

23. Appellees' Brief at 3, *1.43 Acres of Land* (No. 2001-0217).

24. *1.43 Acres of Land,* ¶ 5, 643 N.W.2d at 688.

25. Appellant's Brief at 4, *1.43 Acres of Land* (No. 20010217). The Indian Trade and Intercourse Act (Nonintercourse Act) was first passed in 1790 and provided that no purchase, grant, lease, or other conveyance of lands from any Indian nation or tribe shall be of any validity in law or equity, unless it is made by treaty. 25 U.S.C. § 177 (2000).

26. *1.43 Acres of Land,* ¶ 5, 643 N.W.2d at 688.

27. *Id.*

28. *Id.*

29. *Id.* ¶ 6.

30. *Id.*

granted Shea's motion to dismiss, holding that he had no interest in the property.[31]

The District appealed both Judgments of Dismissal, which resulted in this case going before the North Dakota Supreme Court.[32] The District argued that *in rem* proceedings do not require the court to have personal jurisdiction over the Tribe.[33] The District claimed that jurisdiction over the land was sufficient in a condemnation action and sovereign immunity did not apply.[34] The District argued that because the quitclaim deed had not been recorded, Shea was a record owner at the time of the condemnation action and he should remain in the lawsuit in order for the District to obtain clear title.[35]

The North Dakota Supreme Court reversed the district court, holding that because the District was acting on behalf of the State, it had broad authority to acquire property for public use.[36] A condemnation action is purely *in rem,* and does not require personal jurisdiction over the Tribe; therefore, the district court could validly exercise jurisdiction because the Tribe's sovereign immunity was not implicated.[37] The court held that the Nonintercourse Act did not apply after the federal government had already removed the restraints on alienation of the land.[38]

The North Dakota Supreme Court also reversed the dismissal of the action naming Shea as a defendant.[39] It reasoned that the inclusion of all record title holders in condemnation judgments gave assurance to the condemnor that it would receive clear title free from future disputes.[40] The court noted that Shea could not be subject to any personal liability since the action was strictly an *in rem* proceeding, and a judgment would have no effect on his interests.[41]

II. LEGAL BACKGROUND

In order to address the issue of the State's power of eminent domain over lands owned by the Tribe, this comment will: (1) explore and define the authority of the state with respect to eminent domain and jurisdiction,

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31. *Id.* ¶ 5.
32. *Id.*
33. *Id.* ¶ 7.
34. *Id.*
35. *Id.* ¶ 34, 643 N.W.2d at 698.
36. *Id.* ¶ 20, 643 N.W.2d at 694.
37. *Id.* ¶¶ 20, 21.
38. *Id.* ¶ 33, 643 N.W.2d at 698.
39. *Id.* ¶ 38, 643 N.W.2d at 699.
40. *Id.* ¶ 37.
41. *Id.* at 698-99.

and (2) provide a background detailing the unique status of tribes in this country, and how that status affects the authority of states with respect to the tribes.

A. STATE'S POWER OF EMINENT DOMAIN

Eminent domain is the power of a sovereign to take private property for public use without obtaining the owner's consent, as long as just compensation is made.[42] This authority springs from the necessity of government, and it is an essential attribute of sovereignty.[43] The authority is based on the superior right of the state over private property.[44] The North Dakota Supreme Court has ruled that the right of eminent domain does not depend upon a constitutional grant or recognition because it is an inherent attribute of sovereignty.[45] The taking of private property for public use is often necessary for the proper performance of governmental functions.[46] This power is essential to the life of a state and cannot be surrendered.[47] "[I]f attempted to be contracted away, it may always be resumed at will."[48] The power of eminent domain extends to all property within the jurisdiction of the state.[49] However, the power has limitations: one of the fundamental principles in the law of eminent domain is that private property may not be condemned unless it is for a recognized public use.[50] In *Square Butte Electric Cooperative v. Hilken*,[51] the North Dakota Supreme Court outlined the elements that must be present in order for a public use to exist.[52] First, the public must receive an actual benefit produced from the regulatory

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42. 1A-3 NICHOLS ON EMINENT DOMAIN, *Source of Power in Sovereign*, § 3.01 (Julius L. Sackman ed., rev. 3d ed. 2003).

43. *Id.*

44. *Id.*

45. *See* Johnson v. Wells County Water Res. Bd., 410 N.W.2d 525, 527 (N.D. 1987) (ruling a quick take eminent domain provision in the North Dakota Constitution was not self-executing and the Water Board did not have the power to acquire flowage easements without a legislative grant of authority).

46. *See* Georgia v. Chattanooga, 264 U.S. 472, 480 (1924) (holding Tennessee had power of eminent domain to take land owned by a sister state in a private capacity).

47. *Id.*

48. *Id.*

49. *Id.*

50. Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519, 524 (N.D. 1976). An electric cooperative appealed a denial of its right to exercise eminent domain for failure to establish a public use. *Id.* at 520. The North Dakota Supreme Court reversed, holding the lower court erred in finding that a public use had not been established. *Id.* at 541. The dissent stated that grants of power by the government should be strictly construed, especially with respect to the power of eminent domain, because it is more harsh and peremptory than any other. *Id.* at 534 (Sand, J., dissenting).

51. 244 N.W.2d 519 (N.D. 1976).

52. *Square Butte*, 244 N.W.2d at 525.

control or a right to that benefit.[53] Second, the benefit must be something greater than an indirect advantage; the public must derive a substantial and direct benefit.[54] Third, the public benefit need not be confined exclusively to the state authorizing the condemnation, but due to the constraints of the state's sovereignty it must be inextricably attached to the territorial limits of the state.[55]

North Dakota's eminent domain statutes are found in Title 32, Chapter 15, of the North Dakota Century Code.[56] Section 32-15-18 lists the elements that must be contained in the complaint.[57] Section 32-15-20 addresses who may defend against a condemnation action.[58] Section 32-15-04 enumerates what property may be taken.[59] At the time this case was decided, Indian land was not addressed anywhere in the entire chapter.[60]

B. JURISDICTION

If a court's jurisdiction is based on its authority over the defendant, it is defined as *in personam* jurisdiction.[61] When the court exercises *in personam* jurisdiction, it has the power to impose a personal obligation on the defendant.[62] If a court's jurisdiction is based on its power over property within its territory, it is exercising *in rem* jurisdiction.[63] A judgment *in rem* would be limited to the property, and would not impose a personal liability on the property owner.[64]

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53. *Id.*

54. *Id.*

55. *Id.*

56. N.D. CENT. CODE §§ 32-15-01 through 32-15-35 (1996 & Supp. 2003).

57. *Id.* § 32-15-18. The complaint must contain the name of the plaintiff in charge of the public use for which the property is sought, the names of all known owners and claimants of the property styled as defendants, a statement of plaintiff's rights, and a description of the land sought to be taken. *Id.*

58. *Id.* § 32-15-20. All persons claiming an interest in the property may appear, plead, and defend their interest, whether or not they are named in the complaint. *Id.*

59. *Id.* § 32-15-04. Six different classes of property are listed, including a broad range of both private and public property. *Id.* There is a final clause stating that all classes of private property not previously enumerated may be taken for public use when the taking is authorized by law. *Id.* § 32-15-04(7).

60. *Id.* §§ 32-15-01 to 32-15-32. However, § 32-15-01, *Eminent Domain Defined,* and § 32-15-04, *What Property May Be Taken,* were both amended during the 2003 legislative session to include sections addressing Native American lands. *Id.* In the annotations, both sections refer to *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land,* 2002 N.D. 83, 643 N.W.2d 685. *Id.*

61. Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

62. *Id.*

63. *Id.*

64. *Id.*

It has long been settled that condemnation proceedings are *in rem* proceedings.[65] The Oregon Supreme Court noted that even though a condemnation proceeding was against named individuals who held the title, it was still a proceeding *in rem*.[66] In the field of eminent domain, few principles of law are more firmly established than the rule that the court exercises a special statutory jurisdiction.[67] A condemnation judgment *in rem* preempts even state statutory requirements.[68]

The fact that an action involves real property is not always determinative of whether *in personam* or *in rem* jurisdiction is required.[69] However, the general rule is that *in rem* jurisdiction is required when the decision will directly affect real property.[70] A decision *in rem* operates directly on the property in question, whether or not the owner is subject to *in personam* jurisdiction of the court.[71] A proceeding *in rem* is against the property directly and is binding on everyone, even in the absence of personal notice to interested parties or jurisdiction over their persons.[72]

The North Dakota Supreme Court has held that *in rem* jurisdiction was sufficient for dissolution of a marriage as well as a child custody action.[73] In *Smith v. Smith*,[74] the court exerted *in rem* jurisdiction even though one of the parties was from Pennsylvania.[75] An *in rem* action is brought against

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65. *See* United States v. Petty Motor Co., 327 U.S. 372, 376 (1946) (holding a condemnation action by the government to acquire an apartment building was strictly an *in rem* proceeding); *see also* Farley v. State, 350 S.E.2d 263, 264 (Ga. App. 1986) (ruling a condemnation forfeiture was an *in rem* proceeding and jurisdiction was only required over the property); Utilities, Inc. of Maryland v. Washington Suburban Sanitary Comm'n, 763 A.2d 129, 135 (Md. App. 2000) (holding a condemnation action brought by the Commission against a privately owned water and sewage system was strictly a judgment *in rem*); McKenzie County v. Hodel, 467 N.W.2d 701, 705 (N.D. 1991) (determining that a condemnation proceeding against an oil and gas royalty interest was an *in rem* proceeding); *In re* Seattle, 353 P.2d 955, 957 (Wash. 1960) (holding a condemnation action against private property for purpose of building a public park was a proceeding *in rem*).

66. *See* State Highway Comm'n v. Clark, 395 P.2d 146, 148 (Or. 1964) (reversing an award of attorney's fees in an action to condemn 3.4 acres of land for highway purposes).

67. *Utilities, Inc.*, 763 A.2d at 134.

68. *Id.*

69. 20 AM. JUR. 2D *Courts* § 80 (1995 & Supp. 2002).

70. *Id.*

71. *Id.*

72. 1 AM. JUR. 2D *Actions* § 34 (1994).

73. Catlin v. Catlin, 494 N.W.2d 581, 589 (N.D. 1992). "[D]issolution of marriage is an *in rem* proceeding affecting status, and the court need not have personal jurisdiction over both spouses." *Id.* at 588. Although the court also had personal jurisdiction by the long-arm statute in this situation, it noted that child custody actions were proceedings *in rem* affecting status, and personal jurisdiction was not required. *Id.* at 590.

74. 459 N.W.2d 785 (N.D. 1990).

75. *Smith*, 459 N.W.2d at 787-88. The court held that dissolution of marriage was an *in rem* proceeding and personal jurisdiction was not required over both parties. *Id.* at 787. If due process

the property alone; the property itself is the defendant.[76] The only reason the owner is given service of process is to give him notice and the opportunity to be heard regarding the disposition of his property.[77]

States' power to exert *in rem* jurisdiction has not gone unchecked, however.[78] In *Shaffer v. Heitner*,[79] the United States Supreme Court declared that the presence of property in a state does not automatically confer jurisdiction.[80] The Court acknowledged that assertion of *in rem* jurisdiction is ancient and has no substantial modern justification.[81] It declared it was fictional to assume that jurisdiction over property was anything but jurisdiction over the owner of that property.[82] The Court concluded that continued acceptance of this practice would be fundamentally unfair to defendants and required that all future assertions of state court jurisdiction be evaluated according to the standards set forth in *International Shoe Co. v. Washington*.[83]

In *International Shoe*, the United States Supreme Court outlined the "minimum contacts" doctrine.[84] To subject a defendant to a judgment *in personam*, due process requires that the defendant who is not present must have minimum contacts with the forum state, so maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[85] The question of whether due process is satisfied depends upon the relationship between the quality and nature of the activity, and the fair and orderly administration of the laws.[86] Although *Shaffer* was concerned with *in rem* jurisdiction, and *International Shoe* involved *in personam*

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was proper, the court had jurisdiction to terminate the marital status of the parties even when only one party was a North Dakota resident. *Id.* at 788.

76. *See* Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 132 (5th Cir. 1990) (granting an appeal from an order forbidding a foreclosure action).

77. *See* United States v. Dunnington, 146 U.S. 338, 352 (1892) (ruling a proceeding *in rem* was a taking of the property itself, with only a general notice to all persons having claims to it); *see also* Farley v. State, 350 S.E.2d 263, 264 (Ga. App. 1986) (holding a condemnation forfeiture was an *in rem* proceeding requiring only that a copy of the action be served on the owner, if known); United States v. Winn, 83 F. Supp. 172, 174 (W.D.S.D. 1949) (holding notice by publication was sufficient even though defendant claimed he was not served and was unaware of the condemnation of his land for a park); *In re* Seattle, 353 P.2d 955, 958 (Wash. 1960) (determining that the only reason to join a defendant as a party was to give notice and enable him to have a hearing).

78. Shaffer v. Heitner, 433 U.S. 186, 211-12 (1977).

79. 433 U.S. 186 (1977).

80. *Shaffer*, 433 U.S. at 211-12.

81. *Id.* at 212.

82. *Id.*

83. 326 U.S. 310 (1945).

84. *Int'l Shoe*, 326 U.S. at 316.

85. *Id.*

86. Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (quoting *Int'l Shoe*, 326 U.S. at 319).

judgments, the Court in *Shaffer* held that the minimum contacts doctrine should be applied to *in rem* proceedings as well.[87]

In *Shaffer*, the Court declared a Delaware statute unconstitutional because it allowed a Delaware state court to sequester shares of the defendants' stock in a company that was incorporated in Delaware, yet the corporation's principal place of business was in Arizona.[88] None of the defendants were residents of Delaware.[89] The Court held that the sequestration statute, as applied, violated the Due Process Clause of the Fourteenth Amendment because it authorized the deprivation of defendants' property without providing adequate procedural safeguards.[90]

C. FEDERAL INDIAN LAW POLICIES

United States Indian policy has always developed out of tension between two competing forces, autonomy and assimilation.[91] The laws are numerous and conflicting, reflecting the tone during the eras in which they were enacted.[92]

By the 1830's, the United States had determined a set of principles that became the standards for the development of American Indian policy.[93] Some of the basic elements of the federal program were: (1) protection of Indian land rights by restricting whites from entering the area, (2) control of the disposition of Indian lands by denying the right of non-Indians to acquire Indian land, and (3) promotion of Indian civilization and education in the hopes of assimilation into American society.[94]

1. Tribal Sovereign Immunity

The sovereign status of Indian tribes has been recognized since the early 1800's when the United States Supreme Court proclaimed that tribes retain powers of self-government within Indian country.[95] Chief Justice Marshall recognized the Doctrine of Tribal Sovereign Immunity in three

87. *Id.* at 212.

88. *Id.*

89. *Id.* at 191.

90. *Id.* at 212, 216; U.S. CONST. amend. XIV, § 1.

91. Charles F. Wilkinson, *American Indians, Time, and the Law*, *in* CASES AND MATERIALS ON FEDERAL INDIAN LAW 30-31 (David H. Getches, et al., eds. 4th ed. 1998) [hereinafter FEDERAL INDIAN LAW].

92. *Id.*

93. Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*, *in* FEDERAL INDIAN LAW, *supra* note 91, at 87-88.

94. *Id.* at 88.

95. FEDERAL INDIAN LAW, *supra* note 91, at 3

decisions regarding the Cherokee Indians, known as the Marshall Trilogy.[96] The Trilogy is generally acknowledged to be the most important group of cases in the history of Federal Indian law and has served as the legal foundation for most of the Indian law cases decided by courts since.[97] Chief Justice Marshall recognized and upheld a theme of tribal sovereignty, stating that the Cherokee nation was a sovereign nation, authorized to govern itself, free from interference from the states.[98] In *Worcester v. Georgia*,[99] the Court held that Georgia had no authority to extend its laws into Cherokee country, even though Cherokee country was encompassed within the state.[100] Justice Marshall held that under the United States Constitution, Congress had the exclusive authority to regulate commerce and all other intercourse with tribes.[101] The Court stated, "The Cherokee Nation is under the protection of the United States of America, and of no other sovereign whatsoever."[102]

The relationship of Indians to the federal government has always been described as "dependent."[103] The tribes rely on the United States for protection through a trust relationship.[104] As long as the tribes have not voluntarily ceded sovereign tribal rights in treaties or other negotiations approved by Congress, or Congress has not extinguished them, the rights remain in existence.[105] Any rights that have not been specifically ceded are considered to be reserved.[106] When rights are extinguished, the legislation is to be construed narrowly, affecting only the matters specifically mentioned.[107]

Since the Trilogy cases, the Supreme Court has classified the tribes as domestic dependent nations with sovereign powers.[108] This sovereign status has been recognized throughout the course of dealings between the United States and the Indian tribes; however, the precise nature of that

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96. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) are the cases that comprise the Marshall Trilogy. George Jackson III, *Chicksaw Nation v. United States and the Potential Demise of the Indian Canon of Construction*, 27 AM. IND. L. REV. 399, 402-03 (2002-2003). These decisions by Justice Marshall are also referred to as the Cherokee cases. *Id.*

97. Jackson, *supra* note 96, at 402-03.

98. *Worcester*, 31 U.S. (6 Pet.) at 530.

99. *Id.* at 515.

100. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 2 (1995).

101. *Worcester*, 31 U.S. (6 Pet.) at 540; U.S. CONST. art. I, § 8, cl. 2.

102. *Worcester*, 31 U.S. (6 Pet.) at 555.

103. FEDERAL INDIAN LAW, *supra* note 91, at 3.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Royster, *supra* note 100, at 2.

sovereignty has been indeterminate and subject to historic revision.[109] Tribes are not sovereign in the international sense because they are not treated as nation-states with the ability to enter into foreign relations.[110] They have always been subject to the overarching authority and jurisdiction of the federal government.[111]

Sovereignty is inextricably tied to territory because control over territory is the most essential element of sovereignty.[112] The reservation is the major territory for most tribes.[113] However, tribal territories are more accurately described as "Indian country," which encompasses not only the reservation, but certain lands outside of the reservation boundaries.[114] As sovereign entities, Indian tribes benefit from immunity to suit in state or federal court.[115] It is well settled that waiver of their sovereign immunity must be unequivocally expressed; it will not be implied.[116]

The recent trend in federal Indian policy is to move away from the "outmoded paternalistic practices and policies" of tribal sovereign immunity.[117] Justice Kennedy stated that Congress may have thought the doctrine of tribal immunity from suit necessary in the past to protect tribal governments from encroachments by the states; however, in our inter-dependent and mobile society, tribal immunity extends beyond what is needed to safeguard tribal self-governance.[118]

There has been a shift in attitude regarding Indian jurisprudence.[119] Since 1986, when William Rehnquist became Chief Justice, Indian tribes have prevailed in only twenty-three percent of their cases, and they lost all but five of the twenty-eight Indian law matters before the Supreme Court between 1991 and 2000.[120]

By the late twentieth century, the Supreme Court was comfortable reasoning that "long ago" the Court had departed from the view that state

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 2-3.

114. *Id.* at 3.

115. Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 386 (Wash. 1996) (quoting McClendon v. United States, 885 F.2d 627, 629 (9th Cir. 1989)).

116. *Id.* (citing North Sea Prods. v. Clipper Seafoods Co., 595 P.2d 938, 941 (Wash. 1979)).

117. Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 554 (1st Cir. 1997).

118. Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 758 (1998). This contract dispute was dismissed due to Tribe's sovereign immunity. *Id.* Justice Kennedy implied that it may be time for Congress to abrogate the doctrine of tribal immunity. *Id.*

119. Jackson, *supra* note 96, at 420.

120. Harold S. Shepard, *State Court Jurisdiction Over Tribal Water Rights: A Call For Rational Thinking*, 17 J. ENVTL. L. & LITIG. 343, 345 (2002).

law had no force within reservation boundaries.[121] In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*,[122] Justice Scalia declared that the "platonic notions of Indian sovereignty" that guided Chief Justice Marshall have, over time, lost their independent sway as the Court's more recent cases have recognized the rights of states.[123] In a more recent case, *Nevada v. Hicks*,[124] Justice Scalia stated that under our system of dual sovereignty, it has always been assumed that state courts are competent to adjudicate federal issues.[125] He observed that this historical and constitutional assumption of concurrent state court jurisdiction over federal law cases has been completely missing with respect to tribal courts.[126]

There have been aggressive actions increasing state jurisdiction, alarming scholars who compare this trend with the disastrous policies of the termination era.[127] Historically, because of the trust relationship, the federal government's duty was to protect tribes and their interests from the actions of state governments.[128] But as federal courts have become much less responsive to tribal rights claims, state courts have followed this lead.[129] Yet state court opinions often fall short of stringent adherence to principles of tribal sovereignty and an understanding of the ability of tribes to govern their land and people.[130] State court decisions often involve a conflict of sovereigns, and an increased federal deference to states in the area of tribal property rights only exacerbates the conflict.[131]

Another long-standing Indian law doctrine came under attack in *Chicksaw Nation v. United States*,[132] where the Supreme Court addressed the Indian law canon of statutory construction favoring Indians.[133] The Court diminished the legal importance of the Indian law canon with its

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121. Royster, *supra* note 100, at 4 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980)).

122. 502 U.S. 251 (1992).

123. *Yakima*, 502 U.S. at 257 (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973)).

124. 533 U.S. 353 (2001).

125. Shepard, *supra* note 120, at 365 (citing Nevada v. Hicks, 533 U.S. 353, 366-77 (2001)).

126. *Id.*

127. *Id.* at 345-46. The termination era refers to the time when the General Allotment Act was passed, *see infra* Part II.C.3.

128. Shepard, *supra* note 120, at 346.

129. *Id.* at 344.

130. *Id.* at 360.

131. *Id.* at 386.

132. 534 U.S. 84 (2001).

133. Graydon Dean Luthey, Jr., *Chicksaw Nation v. United States: The Beginning of the End of the Indian Law Canons in Statutory Cases and the Start of the Judicial Assault on the Trust Relationship*, 27 AM. IND. L. REV. 553, 561 (2002-2003).

opening observation that canons are not mandatory rules.[134] The Court cast doubt on the primacy and vitality of the canon of statutory instruction when it implied its use should be narrowed to interpretation of treaty issues, rather than issues of statutory ambiguity.[135] This shift in policy could leave Indian tribes without one of the doctrines they have depended on and based their social and business activities around for two hundred years.[136]

Scholars claim the current trend toward the erosion of tribal sovereignty reflects poorly on the federal government's obligation to protect tribal health and welfare.[137] They argue that this erosion of tribal sovereignty contributes to the increasing threats to tribal government, economic development, and cultural and environmental protection.[138] Critics contend that in the economic context, tribal sovereign immunity harms those who are unaware of the doctrine, or it harms tribes because it lessens their opportunities for commercial dealings when there is no recourse in the courts for resolving disputes.[139]

2. *Nonintercourse Act*

The Indian Trade and Intercourse Act (Nonintercourse Act) was first passed in 1790, yet even with minor changes in 1802 and 1834, it has remained materially unchanged.[140] The Nonintercourse Act provides that no purchase, grant, lease, or other conveyance of lands from any Indian nation or tribe, shall be of any validity in law or equity, unless it is made by treaty entered into pursuant to the Constitution.[141] When enacting this legislation, the intent of President George Washington and Congress was to protect Indians from the greed of other races.[142] The belief at the time was that only the federal government could ensure Indian lands were settled peacefully and Indians were treated fairly.[143] The purpose of the provision was to prevent unfair or improper disposition of Indian lands to other parties, except the United States, without the consent of Congress.[144]

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134. *Id.* at 555, 562.
135. *Id.* at 563-65.
136. Jackson, *supra* note 96, at 420.
137. Shepard, *supra* note 120, at 385.
138. *Id.* at 386.
139. Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S.751, 758 (1998).
140. 25 U.S.C. § 177 (2000); Prucha, *supra* note 93, at 87.
141. 25 U.S.C. § 177.
142. Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1358 (9th Cir. 1993).
143. *Id.*
144. Bay Mills Indian Cmty. v. State, 626 N.W.2d 169, 174 (Mich. App. 2001) (citing Federal Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960)).

The United States Supreme Court has never directly addressed the issue of whether the Nonintercourse Act applied to land that was rendered alienable by Congress and later reacquired by an Indian tribe.[145] Historically, the Nonintercourse Act was held to apply to Indian land, whether or not the land was held in trust.[146] The trust relationship between the Indian tribes and the United States was honored, even though the lands were held in fee simple.[147]

In *United States v. Candelaria*,[148] the Supreme Court recognized that Indians had a fee simple title to their lands, but held that their lands, like the tribal lands of other Indians owned in fee patent, were "subject to the legislation enacted by Congress in the exercise of the government's guardianship over Indian tribes and their property."[149] At that time, when interpreting the Nonintercourse Act, the Court construed congressional intent for the definition of the term "Indian tribe" to mean a body of Indians inhabiting a particular territory even though that territory was ill-defined.[150]

In *United States v. 7,404.3 Acres of Land in Macon, Swain, and Clay Counties*,[151] the Eastern Band of Cherokee Indians had surrendered the right to their tribal lands, separated themselves from their tribe, and become subject to the laws of the state of North Carolina.[152] Yet the Fourth Circuit Court of Appeals held that this did not destroy the right or the duty of guardianship on the part of the federal government.[153] Even the conferring of citizenship upon the Indians and allotment of their lands in severalty did not place them beyond the reach of congressional regulations adopted for their protection.[154]

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145. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998).

146. *See* United States v. Candelaria, 271 U.S. 432, 440-44 (1926) (holding that the Nonintercourse Act applied to the fee lands of the Pueblo Indians); *see also* United States v. Sandoval, 231 U.S. 28, 45-48 (1913) (finding that Congress could restrict alienation of fee simple lands owned by the Pueblo Indians); Alonzo v. United States, 249 F.2d 189, 196 (10th Cir. 1957) (holding that the United States must be named as a party in an action to divest the Tribe of fee land owned by the Pueblo Nation); United States v. 7,404.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938) (holding that plaintiff could not claim tribal lands by adverse possession even though the statute provided the grant must be registered within two years, and although the land grant had been given to the Cherokee Tribe in 1880, it was not registered until after the suit was commenced in 1936).

147. *Candelaria*, 271 U.S. at 440-44; *Sandoval*, 231 U.S. at 45-48; *Alonzo*, 249 F.2d at 196.

148. 271 U.S. 432 (1926).

149. *Candelaria*, 271 U.S. at 440.

150. *Id.* at 442 (quoting Montoya v. United States, 180 U.S. 261, 266 (1901)) (indicating the protection of the Nonintercourse Act was afforded to tribes whose land was held in fee patent as well as trust land).

151. 97 F.2d 417 (4th Cir. 1938).

152. *7,404.3 Acres*, 97 F.2d at 421.

153. *Id.*

154. *Id.*

The First Circuit Court of Appeals observed that several courts have found the Nonintercourse Act applicable to lands that Indian tribes have purchased in fee simple.[155] The court reasoned that at the time the Nonintercourse Act was passed, Congress presumably did not distinguish between Indian trust lands and Indian fee lands because it did not contemplate that Indian tribes could hold land in fee simple.[156] In *Tonkawa Tribe of Oklahoma v. Richards*,[157] the Fifth Circuit Court of Appeals stated that the Nonintercourse Act was very general and comprehensive.[158] The Act's operation did not depend on the nature of the title of the land.[159] The court held that the tribe's interest in land was protected under the Nonintercourse Act whether the tribal interest was based on aboriginal right, purchase, or transfer from a state.[160] The court stated that the Act not only reached conveyances by a tribe, but also any state action that purported to divest a tribe of an interest in land.[161]

Over the last fifteen years, the trend has been to make a distinction between Indian trust or tribal lands and lands that Indian tribes hold in fee simple.[162] Indian trust lands constitute real property, which the United States holds title in trust for the tribe.[163] There is a great deal of authority indicating that the protection of the Nonintercourse Act no longer applies to land that Indian tribes have purchased in fee simple after Congress has terminated its trust obligation.[164] Federal law recognizes that Indian tribes may hold lands in fee simple that may not be subject to the trust relationship.[165] Many cases have held that the Nonintercourse Act does not protect tribal fee land from being subjected to taxation.[166] In *Bay Mills*

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155. Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 553 n.18 (5th Cir. 1997).

156. *Id.* at 549.

157. 75 F.3d 1039 (5th Cir. 1996).

158. *See Tonkawa Tribe*, 75 F.3d at 1045 (adjudicating the Tribe's attempt to compel Texas to donate former aboriginal lands to the Tribe under 1866 treaty and the Nonintercourse Act).

159. *Id.*

160. *Id.*

161. *Id.* at 1046.

162. Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 546 (5th Cir. 1997).

163. *Id.* at 554.

164. *Id.*

165. *Id.* at 546; 25 U.S.C. § 1466 (2000) (allowing title to land purchased by a tribe or individual Indian outside reservation boundaries to be taken into trust or in the name of the purchasers with no restrictions on alienation, control, or use).

166. *See* Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1359 (9th Cir. 1993) (holding that lands approved for alienation by the federal government and then reacquired by Tribe did not then become inalienable by operation of the Nonintercourse Act); *see also* Bay Mills Indian Cmty. v. State, 626 N.W.2d 169, 174 (Mich. App. 2001) (holding tax sale of property was not a violation of Nonintercourse Act); Mashpee Tribe v. Watt, 542 F. Supp. 797, 803 (D. Mass. 1982) (concluding it was clear that the Nonintercourse Act applied only to land held under aboriginal title); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 387

Indian Community v. State,[167] the Michigan Court of Appeals held that the Nonintercourse Act applied only to voluntary conveyances by the tribes themselves and not to involuntary conveyances by the state for nonpayment of taxes.[168] The court stated that once Congress removed the restraints on alienation of land, the protections of the Nonintercourse Act no longer applied.[169] Even reacquisition of fee-patented lands by an Indian tribe did not reinstate the former restriction on alienation.[170]

3. *General Allotment Act*

In the late 19th century, national policy changed from the segregation of lands for the exclusive control of the tribes to a policy of allotting Indian land to tribe members individually.[171] For the history and background information of the General Allotment Act (GAA), Justice Scalia was frequently cited in his opinion in *Yakima*.[172] Justice Scalia stated that the objectives of the GAA were simple and clear cut; the intent was to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians."[173]

The General Allotment Act of 1887 bestowed citizenship upon all Indians receiving allotments, but only after the expiration of a twenty-five year trust.[174] Under this Act, the President was empowered to allot most tribal lands nationwide without obtaining consent of the Indian nations involved.[175] Immediate alienation or encumbrance was restricted by providing that each piece of allotted land would be held by the United States in trust for twenty-five years or longer; the fee patent would not be issued to the Indian allottee until that time expired.[176] When the trust period expired,

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(Wash. 1996) (holding the Nonintercourse Act applied only to land acquired *from* Indian tribes, and not acquired *by* Indian tribes).

167. 626 N.W.2d 169 (Mich. App. 2001).

168. *Bay Mills*, 626 N.W.2d at 174.

169. *Id.* (citing *Lummi Indian Tribe*, 5 F.3d at 1359).

170. *Quinault*, 929 P.2d at 383 (citing *Lummi Indian Tribe*, 5 F.3d at 1358-59).

171. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 253-54 (1992).

172. *Id.* at 253-55.

173. *Id.* at 254.

174. Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (2000) (§§ 331-333 repealed by Act Nov. 7, 2000, Pub. L. 106-462, Title I, § 106(a)(1))); Delos Sacket Otis, *History of the Allotment Policy, in* FEDERAL INDIAN LAW, *supra* note 91, at 166.

175. *Yakima*, 502 U.S. at 254.

176. *Id.*

a fee patent was issued that removed all restrictions as to sale, encumbrance, or taxation of the land.[177]

In the first two years after enactment, Congress ratified thirteen agreements for sale of "surplus" lands.[178] The Board of Indian Commissioners estimated that the 104,314,349 acres of Indian reservation land in 1889 was reduced by 12,000,000 acres in 1890 and another 8,000,000 acres in the first nine months of 1891.[179] By the end of the allotment era in 1934, Indian land holdings were cut from 138,000,000 acres to 48,000,000 acres.[180] More than eighty percent of the land belonging to Indians, and more than eighty-five percent of the land allotted to Indians, had been taken away.[181]

Congress eventually halted the allotment program, yet it did not restore fee patented or homestead lands to tribal ownership.[182] The Secretary of the Interior was authorized to purchase fee lands and return them to the tribes in trust, but the provisions affected only a fraction of the millions of acres lost to fee ownership.[183] The vast majority of land that passed into fee during the allotment period remains as fee land today.[184] This legacy of allotment continues to be reflected in the modern court decisions that divest tribes of both territory and sovereignty.[185]

In *Yakima*, the Court noted that Congress authorized reacquisition of allotted lands into trust but made no attempt to undo the dramatic effects the allotment years had on the ownership of former Indian lands that had become fee patented lands.[186] There were no restraints imposed on the ability of Indian allottees to alienate or encumber their fee patented lands, nor were any restrictions placed on non-Indians who had acquired title to over two-thirds of Indian lands allotted under the Act.[187]

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177. Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 382 (Wash. 1996).

178. Otis, *supra* note 174, at 169.

179. *Id.*

180. *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Hearings on H.R. 7902 Before the Senate and House Comm. on Indian Affairs*, 73rd Cong. 15-18 (1934) (memorandum by John Collier), *in* FEDERAL INDIAN LAW, *supra* note 91, at 171.

181. *Id.* at 172.

182. Royster, *supra* note 100, at 17.

183. *Id.*

184. *Id.* at 17-18.

185. *Id.* at 18.

186. Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 383 (1996) (quoting County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 255-56 (1992)).

187. *Id.* (quoting *Yakima*, 502 U.S. at 255-56).

4. Indian Reorganization Act

The policy of allotting tribal lands proved to be "disastrous for the Indians," and was "administratively unworkable as well as economically wasteful."[188] In response to this failed policy, Congress passed The Indian Reorganization (Wheeler-Howard) Act of 1934 (IRA), reversing governmental policy toward Indian affairs.[189] The purpose of the IRA was primarily to give federal support in the re-establishment of tribal governments.[190] First, all further allotment was stopped.[191] Second, the trust period for allotted land was extended indefinitely.[192] Third, it limited the sale or transfer of Indian land and authorized the Secretary of the Interior to restore tribal ownership to any reservation lands that had not been allotted.[193] Finally, the statute allowed the Secretary of the Interior to take land into trust for Indians.[194] A ten million dollar revolving loan fund was established for the repurchase of land that had been taken out of trust and the return of "surplus" lands not homesteaded by non-Indians.[195]

The Bureau of Indian Affairs (BIA) was initially aggressive in seeking funds to implement the purchase program, but appropriations steadily declined.[196] Between 1936 and 1974, almost 600,000 acres were restored to tribal ownership.[197] However, more than three times that amount, a total of 1,811,010 acres of existing tribal lands, were condemned for other purposes.[198] Federal water projects comprised almost half a million of the acres that were taken.[199] Even since the passage of the IRA, more land has been taken from the Indians than has been returned, due to inadequate resources and the continual taking of Indian lands under eminent domain.[200]

It was not until the legal relationship between Indian tribes and the federal government evolved dramatically in the twentieth century that courts and Congress began distinguishing between restricted and

188. *Id.* at 382 (quoting Hodel v. Irving, 481 U.S. 704, 707 (1987)).
189. *Id.*; 25 U.S.C. §§ 461-479 (1934).
190. Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem,* 2003 WIS. L. REV. 729, 744 (2003).
191. 25 U.S.C. § 461.
192. *Id.* § 462.
193. *Id.* §§ 463-64.
194. *Id.* § 465.
195. Shoemaker, *supra* note 190, at 744.
196. Royster, *supra* note 100, at 17 n.90.
197. *Id.*
198. *Id.*
199. *Id.*
200. Shoemaker, *supra* note 190, at 744-45.

unrestricted tribal lands.[201] A legacy of the congressional fluctuation in Indian policy is a "checkerboard layout" of land ownership within the borders of many reservations.[202] It has become difficult to determine which private land holdings inside or bordering a reservation retain Indian Country status.[203] The common practice was to reference the geographic extent of a reservation by relying on the original treaty boundaries.[204] Land was often removed from the reservation during the Allotment Period and later restored or replaced, creating uncertainty as to a reservation's jurisdictional boundaries.[205] Reservations that used to be exclusively owned by tribes now include considerable areas of non-tribal private holdings.[206]

Although the allotment policy was officially terminated in 1934, it continues to influence the Supreme Court's Indian law policy today.[207] In some respects, the adverse impact of the allotment program has grown over the past fifteen years as courts place greater significance on the ownership status of land when determining tribal sovereignty.[208]

D. CONFLICT BETWEEN SOVEREIGNS

Sovereign immunity has been asserted in actions between states in many instances.[209] In *Hoagland v. Streeper*,[210] the Illinois Supreme Court held that the jurisdiction of a state may extend through its boundaries.[211] The court stated it knew of no principle that prevented a state court from

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201. Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 549 (5th Cir. 1997).

202. O. Wes J. Layton, *The Thorny Gift: Analysis of EPA's Intent to Empower Indian Tribal Governments with Clean Air Act Regulatory Authority over Non-Tribal Lands and Immunize Tribal Governments from CAA Citizen Suits*, 7 ENVTL. L. 225, 237 (2001) (quoting Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1013 (8th Cir. 1999)).

203. *Id.* at 239.

204. *Id.*

205. *Id.*

206. *Id.*

207. Royster, *supra* note 100, at 7.

208. Kevin. J. Worthen, *State and Local Authority to Tax Tribally Owned Land: If a Tribe Can Sell It, Can State and Local Governments Tax It?* 5 PREVIEW U.S. SUP. CT. CAS. 316 (Feb. 12, 1998), LEXIS, 5 PREVIEW 316 at *6.

209. *See* Paulus v. South Dakota (Paulus I), 201 N.W. 867, 870 (N.D. 1924) (declining jurisdiction in a suit against sister state that arose from an accident in a coal mine owned by South Dakota but located in North Dakota); *see also* Paulus v. South Dakota (Paulus II), 227 N.W. 52, 54 (N.D. 1929) (holding South Dakota had immunity from suit as a sovereign because operation of a coal mine in North Dakota was for a public purpose); *but see* Georgia v. Chattanooga, 264 U.S. 472, 479-80 (1924) (prohibiting Georgia from asserting a defense of sovereign immunity in Tennessee's condemnation action of land that was owned by Georgia but located within Tennessee borders); Hoagland v. Streeper, 145 N.E.2d 625, 629 (Ill. 1957) (holding Missouri could not assert defense of sovereign immunity against Illinois regarding a bridge owned by Missouri but located in Illinois).

210. 145 N.E.2d 625 (Ill. 1957).

211. *Hoagland*, 145 N.E.2d at 629.

exercising jurisdiction over land within its boundaries because of the existence of an interest beyond its jurisdiction.[212] The court held that the sovereignty of one state does not extend into the territory of another to create immunity from suit.[213] Land acquired by one state in another state remains subject to the laws of the latter state; it is treated as if it is privately owned and the owner cannot maintain its sovereign privileges or immunities.[214] The court stated that: "If it were otherwise, the acquisition of land in Illinois by another state would effect a separate island of sovereignty within our boundaries."[215]

In *Georgia v. Chattanooga*,[216] Georgia received permission to build a railroad from its state boundary to the city of Chattanooga, Tennessee.[217] The Supreme Court held that Georgia's sovereign immunity did not extend into Tennessee.[218] When Tennessee brought an action to condemn a portion of the land to build a street, the Court held that it was not impaired by the fact that a sister state owned the land.[219] The Court stated that Georgia could not claim a sovereign or immunity privilege when it acquired land in another state for the purpose of using it in a private capacity.[220] The power of a state to condemn did not depend upon the consent of the owner, even when that owner was a sister sovereign.[221]

Conversely, in *Paulus v. South Dakota (Paulus I)*,[222] Paulus was a South Dakota resident working in a coal mine located in North Dakota, but owned by South Dakota.[223] When Paulus was injured at work, he brought suit in a North Dakota court against the State of South Dakota, alleging that South Dakota was acting as a private corporation rather than a sovereign state when it engaged in the mining business.[224] The North Dakota Supreme Court said "[i]t is so well settled that an action cannot be maintained against a state without its consent that the citation of authorities . . . would be a fruitless labor."[225] The court refused to take

212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 630.
216. 264 U.S. 472 (1924).
217. *Georgia*, 264 U.S. at 480-81.
218. *Id.* at 481.
219. *Id.* at 479.
220. *Id.* at 479-80.
221. *Id.* at 482.
222. 201 N.W. 867 (N.D. 1924).
223. *Paulus I*, 201 N.W. at 867.
224. *Id.*
225. *Id.* at 869.

jurisdiction on principles of comity.[226] When the same plaintiff brought the suit again, but now as a resident of North Dakota, the court dismissed the case the second time based on South Dakota's sovereign immunity.[227]

In *Blatchford v. Native Village of Noatak*,[228] the United States Supreme Court held that the immunity possessed by Indian tribes is not coextensive with that of the states.[229] The Court stated that the states may have surrendered their immunity from suit due to mutuality of concession, but it would be absurd to suggest the tribes surrendered their immunity in the Constitutional Convention at which they were not even a party.[230] The Court reasoned that if the Convention did not surrender the tribes' immunity for the benefit of the states, it also did not surrender the states' immunity for the benefit of the tribes.[231]

In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*,[232] the Washington Supreme Court stated that the Allotment Act provision that removed all restrictions to sale, encumbrance, or taxation of fee patented reservation land described a state's range of "jurisdiction to tax" allotted land, not the entire range of a state's *in rem* jurisdiction over the property.[233] The court held that the sale of an interest in property to an entity enjoying sovereign immunity was of no consequence because *in personam* jurisdiction was not required.[234] When the property is inalienable and encumberable under a federally issued fee patent, it is subject to a state court *in rem* action.[235] Reacquisition by a federally recognized Indian tribe did not alter the result.[236] The court cited the *Yakima* decision, stating the Supreme Court held that there was a broad statutory grant of *in rem* state jurisdiction over tribal fee patented lands.[237]

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226. *See id.* (holding that plaintiff was required to seek relief from the court in his own state). Judicial comity is the courtesy a court from one state shows a court from another state by recognizing its judicial decisions, not as a matter of obligation, but out of deference and respect for the other. 16 AM. JUR. 2D *Conflicts of Laws* § 16 (1998).

227. Paulus v. South Dakota (Paulus II), 227 N.W. 52, 54 (N.D. 1929).

228. 501 U.S. 775 (1991).

229. *Blatchford*, 501 U.S. at 782.

230. *Id.*

231. *Id.*

232. 929 P.2d 379 (Wash. 1996) (en banc).

233. *Quinault*, 929 P.2d at 385.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 386.

III. ANALYSIS

The decision in *Cass County Joint Water Resource District v. 1.43 Acres of Land*,[238] written by Justice Neumann, unanimously reversed the district court.[239] Three issues were addressed by the court.[240] The primary issue was whether the district court could exercise jurisdiction over a condemnation action against fee land owned by the Turtle Mountain Band of Chippewa Indians.[241] The second issue was whether the Federal Non-intercourse Act prohibited the condemnation of land belonging to the Tribe.[242] These first two issues regarding a state's power to condemn land owned by an Indian tribe are the focus of this comment.

The third issue quickly dispensed of by the court was whether Shea, the original conveyor, needed to be included as a defendant in the action.[243] The court cited North Dakota statutory authority to demonstrate the need for the inclusion of Shea as a defendant in the suit.[244] The court reasoned that including all record title holders in a final condemnation judgment would assure that the condemnor received clear title to the property.[245] The court stated that there would be little practical difference between retaining Shea as a defendant and dismissing him in an *in rem* condemnation action.[246] He could not be subjected to any personal liability, and if he claimed no interest in the property, he did not have to participate.[247]

A. JURISDICTION

The court presented the primary issue as one of first impression nationally: "May a state condemn land within its territorial boundaries which has been purchased in fee by an Indian tribe, but which is not reservation land, aboriginal land, allotted land, or trust land?"[248]

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238. 2002 ND 83, 643 N.W.2d 685.

239. *1.43 Acres of Land*, ¶ 40, 643 N.W.2d at 699.

240. *Id.* ¶¶ 6, 39, 643 N.W.2d at 688, 699.

241. *Id.* ¶ 6, 643 N.W.2d at 688.

242. *Id.* ¶ 27, 643 N.W.2d at 696.

243. *Id.* ¶ 36, 643 N.W.2d at 698.

244. *Id.* ¶ 35 (quoting N.D. CENT. CODE § 32-15-18(2) (1994)). The complaint in a condemnation action should contain the names of all owners and claimants of the property at the time of commencement of the action. N.D. CENT. CODE § 32-15-18(2).

245. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 37, 643 N.W.2d 685, 699.

246. *Id.* at 698.

247. *Id.*

248. *Id.* ¶ 6, 643 N.W.2d at 688.

First the court addressed what type of jurisdiction is required for a condemnation action.[249] The court examined case law and determined it had been well settled that a condemnation action was strictly *in rem*.[250] The court agreed with the authorities it examined, holding that *in personam* jurisdiction was not necessary because a proceeding *in rem* was an action against the property itself.[251]

The court noted the general rule for *in rem* jurisdiction: a decision *in rem* does not impose liability directly on a person, it operates directly against the property, whether or not the owner is subject to the court's jurisdiction.[252] The court held that a proceeding *in rem* takes no cognizance of an owner with a beneficial interest because it is only against the property itself.[253] The decision is binding, even in the absence of personal jurisdiction or notice to the parties.[254]

The court addressed the minimum contacts doctrine described in *Shaffer*.[255] There, the United States Supreme Court acknowledged that *in rem* jurisdiction can be exercised without acquiring *in personam* jurisdiction over a party, but required that there be minimum contacts between the party and the forum state in order to accomplish due process.[256] The North Dakota Supreme Court stated there was no due process problem in *1.43 Acres of Land*.[257] It held that the Tribe had sufficient contacts with the state to satisfy due process through its ownership of the subject property and other activities within the state.[258]

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249. *Id.* ¶ 7.

250. *See id.* ¶ 8, 643 N.W.2d at 688-89 (listing several citations stating a condemnation action requires only *in rem* jurisdiction); *see, e.g.*, United States v. Petty Motor Co., 327 U.S. 372, 376 (1946); Farley v. State, 350 S.E.2d 263, 264 (Ga. App. 1986); Utilities, Inc. v. Washington Suburban Sanitary Comm'n, 763 A.2d 129, 135 (Md. App. 2000); McKenzie County v. Hodel, 467 N.W.2d 701, 705 (N.D. 1991); State Highway Comm'n v. Clark, 395 P.2d 146, 148 (Or. 1964); *In re* Seattle, 353 P.2d 955, 957 (Wash. 1960).

251. *See* Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 8, 643 N.W.2d 685, 689 (citing divorce and custody actions as well as condemnation proceedings); *see, e.g.*, Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 132 (5th Cir. 1990); *Farley*, 350 S.E.2d at 264; Caitlin v. Caitlin, 494 N.W.2d 581, 588 (N.D. 1992); Smith v. Smith, 459 N.W.2d 785, 787-88 (N.D. 1990); *Seattle*, 353 P.2d at 957-58.

252. *1.43 Acres of Land*, ¶ 9, 643 N.W.2d at 689 (quoting 20 AM. JUR. 2D *Courts* § 80 (1995)).

253. *Id.* (quoting 1 AM. JUR. 2D *Actions* § 34 (1994)).

254. *Id.*

255. *Id.* ¶ 10 (citing Shaffer v. Heitner, 433 U.S. 186, 199 (1977)).

256. *Id.* (quoting *Shaffer*, 433 U.S. at 199).

257. *Id.* at 689.

258. *Id.* at 690.

The court also addressed notice.[259] It held that the purpose of serving a summons and complaint was only to provide an opportunity to be heard.[260] To comport with due process, property owners are given notice and an opportunity to be heard so they may appear and defend in the condemnation action.[261]

B. SOVEREIGN IMMUNITY

The court addressed whether tribal immunity bars the condemnation action.[262] The court declared that it did not question the continued validity of the doctrine of tribal immunity, just whether or not it applied in this case.[263] The court described the issue presented in this case as a novel question of whether tribal sovereign immunity barred a purely *in rem* action against land held by the Tribe in fee that was not reservation land, allotted land, aboriginal land, or trust land.[264] The court observed that the Tribe relied heavily on cases that stressed the continued validity of tribal sovereign immunity.[265] However, the court stated the continued validity of the doctrine of tribal sovereign immunity was not in question, and the Tribe did not cite any cases holding that this doctrine of immunity barred a purely *in rem* condemnation action in state court.[266]

The court recognized that other jurisdictions had established distinctions when applying the doctrine of tribal sovereign immunity based on whether the proceeding is *in rem* or *in personam* jurisdiction.[267] The court observed that the United States Supreme Court indicated the states may exercise broader jurisdiction in an *in rem* proceeding over tribal lands.[268] The court reviewed the Supreme Court's interpretation of the Burke Act of 1906, an amendment to the Indian General Allotment Act.[269] The court

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259. *Id.* ¶ 11.

260. *See id.* (citing case law supporting the rule that the property owner is only named as a party to enable him to have a hearing about the disposition of the res); *see, e.g.*, United States v. Dunnington, 146 U.S. 338, 352 (1892); United States v. Winn, 83 F. Supp. 172, 174-75 (W.D.S.C. 1949); Farley v. State, 350 S.E.2d 263, 264 (Ga. App. 1986); *In re* Seattle, 353 P.2d 955, 957-58 (Wash. 1960).

261. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 N.D. 83, ¶ 11, 643 N.W.2d 685, 690 (citing N.D. CENT. CODE §§ 32-15-18, 32-15-20) (1994)).

262. *Id.* ¶ 12, 643 N.W.2d at 690-91.

263. *Id.* at 691.

264. *Id.*

265. *Id.* at 690-91.

266. *Id.* at 691.

267. *Id.* ¶ 13.

268. *Id.* (citing County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 257-58 (1992)).

269. *Id.* ¶ 14 (citing *Yakima*, 502 U.S. at 254).

noted that the Supreme Court had addressed a state's authority over tribal land based on the jurisdictional nature of the proceedings.[270] The court concluded that jurisdiction over fee patented lands located on the reservation was permissible if it was *in rem* rather than *in personam*.[271] The court noted that the Supreme Court affirmed an *ad valorem* property tax in *Yakima* because it was an *in rem* tax on the property itself; whereas the excise tax was impermissible because it was transactional, implicating *in personam* jurisdiction.[272]

The North Dakota Supreme Court then analyzed *Quinault*, which involved a quiet title action brought by a lumber company against property located on an Indian reservation.[273] The court noted that *Quinault* relied on the reasoning in *Yakima* to determine that the trial court had proper jurisdiction.[274] The court agreed with the conclusion of *Quinault*, that sale of property to a sovereign is irrelevant because it is an *in rem* proceeding.[275] The court recognized that even reacquisition of a portion of land by a tribe does not change the result because reacquisition of fee land has no effect on the land's alienable status.[276] The court agreed with the consistency in the reasoning of *Quinault* and *Yakima*.[277]

Because this was a question of first impression, the North Dakota Supreme Court examined other analogous situations, such as the question of whether a state's sovereign immunity barred a condemnation action in the courts of other states.[278] The court first looked to *Georgia v. Chattanooga* where the state of Georgia purchased land in Tennessee for a railroad, which was later sought to be condemned as a right of way for a street.[279] The court noted that the United States Supreme Court held Tennessee's right to condemn overruled Georgia's claim of sovereign immunity, because the right to condemn does not depend on the consent of the owner.[280]

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270. *Id.* ¶ 15 (quoting *Yakima*, 502 U.S. at 264-65).

271. *Id.* (quoting *Yakima*, 502 U.S. at 264-65).

272. *Id.* The Court in *Yakima* acknowledged the narrow interpretation of the Burke Act, addressing only the range of *jurisdiction to tax*, not the entire range of *in rem* jurisdiction states may exercise over fee patented reservation land. *Yakima*, 502 U.S. at 265-66, 268.

273. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 16, 643 N.W.2d 685, 692 (citing Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 385 (Wash. 1996)).

274. *Id.* ¶ 17 (quoting *Quinault*, 929 P.2d at 385).

275. *Id.* (quoting *Quinault*, 929 P.2d at 385).

276. *Id.*

277. *Id.*

278. *Id.* ¶ 19, 643 N.W.2d at 693.

279. *Id.* (citing Georgia v. Chattanooga, 264 U.S. 472, 479-82 (1924)).

280. *Id.* (quoting *Georgia*, 264 U.S. at 479-82).

The court agreed with the authorities it examined and concluded that the district court could validly exercise jurisdiction over the condemnation action.[281] The court determined that the Tribe's sovereign immunity was not implicated because the action was an *in rem* condemnation action.[282] Moreover, the land was essentially private land that had been purchased by the Tribe, and was not located on a reservation or part of the Tribe's aboriginal land.[283] Furthermore, the land was neither allotted land nor trust land.[284]

The North Dakota Supreme Court found that *1.43 Acres of Land* presented competing claims of sovereignty—the Tribe's sovereign immunity from suit in a state court and the state's power of eminent domain.[285] The court focused on public policy when it addressed how important the state's power of eminent domain was for the proper performance of governmental functions.[286] The court concluded that if the decision of the district court was affirmed, it would have far-reaching effects on the eminent domain authority of the states.[287] The court reasoned that if it ruled in favor of the Tribe, then tribes would have veto power over any public works project just by purchasing a small tract of land within the project's boundaries.[288] The court stated it did not question the sincerity of the Tribe's motives in purchasing the 1.43 acres, but the potential ramifications of the issue were important.[289] The North Dakota Supreme Court agreed with the lower court's observation that the common sense result that would arise if tribal immunity barred condemnation proceedings was that any non-Indian could convey property to an Indian Tribe that was not even located in North Dakota strictly for purposes of stalling any public improvement project.[290] The court concluded that such a result was too great an infringement upon the state's sovereign immunity.[291]

C. FEDERAL NONINTERCOURSE ACT

The second issue addressed by the North Dakota Supreme Court was whether the restraints of the Nonintercourse Act automatically attached to

281. *Id.* ¶ 20, 643 N.W.2d at 694.
282. *Id.* ¶ 21.
283. *Id.*
284. *Id.*
285. *Id.* ¶ 22.
286. *Id.* ¶¶ 23-24.
287. *Id.* ¶ 24.
288. *Id.*
289. *Id.* ¶ 25, 643 N.W.2d at 695.
290. *Id.* ¶ 24.
291. *Id.*

property an Indian tribe purchased from a private landowner, when the property had been made freely alienable by the federal government when it issued a fee patent.[292] The court disagreed with the Tribe's argument that even if the condemnation action was not barred by tribal sovereign immunity, condemnation of the property would be a violation of the Federal Nonintercourse Act.[293] The court found that the question presented was whether the Nonintercourse Act protected fee land the Tribe purchased from a private landowner.[294]

The North Dakota Supreme Court agreed with the Ninth Circuit's holding in *Lummi Indian Tribe v. Whatcom County*,[295] where the court concluded that no court had ever held that alienable land automatically became inalienable when it was repurchased by a tribe.[296] The court accepted the Washington Supreme Court's reasoning in *Quinault*, where the court held that even though the Nonintercourse Act preempted state law affecting ownership of Indian trust land, the protections of the Act did not apply to lands made alienable under a federally issued fee patent.[297] The court agreed that even a subsequent reacquisition by a tribe did not change the result.[298] After analyzing *Bay Mills,* the court determined that the Michigan Court of Appeals holding was similar as well, and agreed that the protections of the Nonintercourse Act did not apply to land after the restraints on alienation had been removed.[299]

The court concluded that this result was even clearer in *1.43 Acres of Land* because the Tribe's interest in the land was far more tenuous than in many of the other cases where the land in dispute was located on a reservation, or the land had previously been in trust and was reacquired by a tribe.[300] This piece of land had never been held in trust for the Turtle Mountain Band, nor any other tribe.[301] The land was fee-patented land that

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292. *Id.* ¶ 27, 643 N.W.2d at 696.

293. *Id.* ¶ 26, 643 N.W.2d at 695. The Act provides, in pertinent part, "[n]o purchase, grant, lease, or other conveyance of lands . . . from any Indian nation . . . shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (2001).

294. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 27, 643 N.W.2d 685, 696.

295. 5 F.3d 1355 (9th Cir. 1993).

296. *1.43 Acres of Land,* ¶ 29, 643 N.W.2d at 696 (quoting *Lummi*, 5 F.3d at 1359).

297. *Id.* ¶ 30, 643 N.W.2d at 697 (quoting Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 387 (Wash. 1996)).

298. *Id.* (quoting *Quinault*, 929 P.2d at 388).

299. *Id.* ¶ 31 (citing Bay Mills Indian Cmty. v. State, 626 N.W.2d 169, 172, 174 (Mich. App. 2001)).

300. *Id.* ¶ 31-32.

301. *Id.* ¶ 32.

had been held in private ownership for over one hundred years.[302] The court held that the Nonintercourse Act did not preclude the condemnation action, because the protections of the Act did not apply to this piece of land that had been purchased by the Tribe from a private landowner.[303]

D. SUMMARY OF COURT'S HOLDING

Reversing the district court, the North Dakota Supreme Court held that the district court did have valid jurisdiction in the condemnation action by the District of the 1.43 acres of land owned by the Turtle Mountain Band of Chippewa Indians.[304] The Tribe's defense of tribal sovereign immunity, while a valid doctrine, was not applicable in this situation because the condemnation action was strictly an *in rem* proceeding.[305] The court also held that the Nonintercourse Act was not a valid defense when the land at issue was fee patented land, because once it had been made alienable by Congress, it did not become inalienable simply because of reacquisition by an Indian tribe.[306]

IV. IMPACT

The Maple River Dam would be a seventy-foot high earthen embankment dry dam capable of retaining 60,000 acre-feet of floodwater.[307] The total cost of the project was originally estimated to be $13.8 million.[308] The dam's purpose is to reduce the duration and peak of floodwaters on over 100,000 acres between Durbin and Argusville.[309] The District estimates that the average annual benefit from the dam would be over $4,000,000.[310] The dam is the last phase of a four-pronged approach to flood protection designed in 1985, which is the result of studies that began in the 1950's.[311] Fargo's newspaper, *The Forum*, reported that the dam would completely or

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302. *Id.*

303. *Id.* ¶ 33, 643 N.W.2d at 698.

304. *Id.* ¶ 20, 643 N.W.2d at 694.

305. *Id.* ¶¶ 12, 20, 643 N.W.2d at 691, 694.

306. *Id.* ¶ 32, 643 N.W.2d at 697.

307. N.D. STATE WATER COMM'N, 2003-2005 WATER DEVELOPMENT REPORT: AN UPDATE TO THE 1999 STATE WATER MANAGEMENT PLAN, 15 (2002). A "dry dam" means it would only hold water immediately after a flood event. *Id.*

308. Mike Nowatzki, *Maple River Dam Project Gets Boost,* FORUM (Fargo), Dec. 24, 2002, at A6.

309. Interview with Steven McCullough, Attorney for Cass County Joint Water Resource District, Shareholder, Ohnstad-Twichell, P.C., in West Fargo, N.D. (Jan. 5, 2004).

310. *Id.*

311. *Id.*

partially flood about ten farms along the Maple River near Enderlin.[312] However, the District claims that only two farms would have to be relocated, one of which is presently abandoned.[313]

A. TRADITIONAL CULTURAL PROPERTIES

One issue the North Dakota Supreme Court did not address in *1.43 Acres of Land* was the Tribe's argument that the land subject to condemnation was an ancestral burial ground.[314] The court stated it had considered the remaining issues and arguments raised by the Tribe but found them to be either without merit or unnecessary to the decision.[315] It stated there were factual disputes remaining on the issue of the tribal burial grounds, and it was unnecessary to address the issue on appeal from a judgment dismissing on the basis of tribal sovereign immunity.[316]

Jane Lone Fight of Mandaree, an Ojibwa Indian, is a member of the North Dakota Intertribal Reinternment Committee.[317] Lone Fight said that the Cheyenne, Dakota Sioux, Ojibwa and Hidatsa had all lived in the area at one time and that there were at least five ancient village sites.[318]

Becky Otto, an archeologist for the USACE, stated that American Indians have raised concerns about the 2,800 acres of land that would be flooded when the dam was at full capacity, because the area contains a high number of archeological sites and traditional cultural properties such as burial grounds and sacred sites.[319] In particular, the 1.43-acre tract of land in Highland Township that was sold to the Tribe by Roger Shea, contained human remains and was eligible to be listed on the National Register of Historic Places.[320] Another piece of land owned by Shea in the area was placed on the National Register of Historic Places in 1996.[321] Otto stated the reason for the delays in issuing the permit for the dam was because the Corps was working with the State Historic Preservation Office and tribal

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312. Deneen Gilmour, *Tribal Committee Fears Dam Will Harm Indian Burial Sites*, FORUM (Fargo), May 15, 1999, at A3.

313. Interview with McCullough, *supra* note 309.

314. Cass County Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 39, 643 N.W.2d 685, 699 n.2.

315. *Id.* at 699.

316. *Id.* n.2.

317. Janelle Cole, *Proposed Maple Dam Put on Hold, Likelihood of Indian Artifacts Delays Construction Permit*, FORUM (Fargo), May 19, 1999, at A1.

318. *Id.*

319. Nowatzki, *supra* note 308, at A6.

320. *Id.*

321. Cole, *supra* note 317, at A1.

groups to develop mitigation options for culturally sensitive sites in the dam's holding area.[322]

B. STRONG OPPOSITION DIVIDES THE COMMUNITY

The Forum followed this case from its inception, publishing over fifty articles on the project and the surrounding controversy between 1996 and 2003.[323] Despite the minimal attention given by the North Dakota Supreme Court to the issue regarding the Tribe's claims that the land contained traditional cultural sites, a great deal of the media attention's focus and the press reports were precisely about that issue.[324] *The Forum* reported that this case and its impact were being watched well beyond Cass County and the Maple River Dam area.[325]

Numerous letters to the editor received from citizens were published as well.[326] People either loved or hated the proposed dam idea, depending on

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322. Nowatzki, *supra* note 308, at A6.

323. *See, e.g.*, Deneen Gilmour, *Sinking Feeling, Farmers Say Proposed Dam Leaves Their Future Up in the Air*, FORUM (Fargo), Dec. 22, 1996, at A1; Deneen Gilmour, *Group Seeks to Speed Maple River Dam Work*, FORUM (Fargo), Apr. 29, 1997, at C1; Nichole Aksamit, *Farmers Seek to Stop Dam Project*, FORUM (Fargo), Jun. 11, 1997, at A1; Nichole Aksamit, *Maple River Dam Opponents Run Into Another Deaf Wall*, FORUM (Fargo), Jun. 19, 1997, at A1; Deneen Gilmour, *Proposed Dam Has Farmers Concerned*, FORUM (Fargo), Jun. 28, 1997, at A1; Deneen Gilmour, *Weary from Waiting, Residents Want Answers about Dam – NOW*, FORUM (Fargo), Jul. 26, 1997, at A6; Deneen Gilmour, *Water Board Reassures Cass Residents*, FORUM (Fargo), Jan. 24, 1998, at C1; Patrick Condon, *Permit Process Holds Up Dam Construction*, FORUM (Fargo), Feb. 14, 1998, at C1; Deneen Gilmour, *Water Board Hopes Plan Will Speed Dam Permit*, FORUM (Fargo), Apr. 18, 1998, at A10; Brad Christopher, *Cass Water Board Reviewing Maple River Dam Environmental Impact Study*, FORUM (Fargo), Jul. 25, 1998, at A5; Deneen Gilmour, *Maple River Dam Nearer to Reality*, FORUM (Fargo), Nov. 13, 1998, at A1; Deneen Gilmour, *Maple River Opponents Plan to Petition Corps*, FORUM (Fargo), Jan. 15, 1999, at B1; Deneen Gilmour, *Corps Gets Earful on Maple River Dam*, FORUM (Fargo), Feb. 26, 1999, at A1; Deneen Gilmour, *Residents Want Decision on Dam*, FORUM (Fargo), May 5, 2001, at A1; Forum and Wire Reports, *Water Board Appeals Dam Condemnation*, FORUM (Fargo), Sept. 8, 2001, at A6.

324. *See supra* note 323 and accompanying text.

325. Janelle Cole, *Supreme Court Takes Up Maple River Dam Case, Dispute Questions Whether Indian Band's Rights Can Block Condemnation*, FORUM (Fargo), Jan. 31, 2002, at C5.

326. *See, e.g.*, Roger Shea, Letter to the Editor, *Water Board's Maple River Dam Plan is Flawed and Unfair*, FORUM (Fargo), May 14, 1996, at A4; Steven and Kathy Fleischfresser, Letter to the Editor, *Dam Proponents Ignore Environment, Families*, FORUM (Fargo), Feb. 11, 1999, at A4; Tom Speikermeier, Letter to the Editor, *Dam Threatens Unique Heritage of Communities*, FORUM (Fargo), Feb. 14, 1999, at E5; Timothy Jorgenson, Letter to the Editor, *Proposed Maple River Dam Threatens Enderlin*, FORUM (Fargo), Mar. 23, 1999, at A4; Roger Shea et al., Letter to the Editor, *Editorial was Aggravating, Racist*, FORUM (Fargo), May 30, 1999, at E5; Eugene Johnson, Letter to the Editor, *More Than a Few Oppose Dam Proposal*, FORUM (Fargo), Mar. 17, 2001, at A4; David Nudell, Letter to the Editor, *Benefits of Dam Doubtful*, FORUM (Fargo), May 26, 2001, at A15; Denis Gross, Letter to the Editor, *Maple River Dam is Wrong Way to Go*, FORUM (Fargo), Jun. 9, 2001, at A17; Roger Shea, Letter to the Editor, *Hoeven Misinformed About Sacred Significance of Land*, FORUM (Fargo), Jun. 28, 2001; Donald Ogaard and Robert Thompson, Letter to the Editor, *Editorial was Injustice to Local Water Managers*, FORUM (Fargo), Jun. 28, 2002, at A15; Jeffry Volk, Letter to the Editor, *Dam Will Protect Many More Acres*, FORUM (Fargo), Jul. 17, 2003, at A13.

where they lived.[327] The citizens viewed the Maple River Dam as a source of "salvation or ruination," with little lukewarm emotion in between.[328] Roger Shea is one of the farmers whose land would be flooded if the dam was built.[329] Shea was part of a group that called itself the Maple River Alliance Against the Dam.[330] The group was formed in the 1980's and was joined by the tribes in 1994.[331]

Television stations, as well as the local newspaper, covered a ceremonial transfer of land ownership from Roger Shea to the Tribe.[332] Shea stated he hoped it had a "huge chilling effect" on the plans for the dam.[333] The Tribe said it was a joyous occasion and very significant in extending its tribal sovereignty.[334] Shea was paid in an old-fashioned way—beads and blankets with some of the tribal totems on them.[335] Chippewa tribal member Jane Martin and Shea embraced and "struggled to keep tears from flowing" as they swapped three woolen blankets and three beaded bolo ties for the land deed.[336]

In June, 2001, *The Forum* reported another attempt to block the condemnation proceedings, describing the controversy as a "tangled web of emotion, economics, politics, tribal sovereignty issues, and backtracking."[337] The Tribe applied to the Federal Bureau of Indian Affairs (BIA) to designate the 1.43-acre tract of land as federal Indian trust land.[338] North Dakota Governor Hoeven supported the District by writing a letter to the BIA asking it to deny the Tribe's request for trust land status.[339]

Because of the likelihood of Indian burial sites, artifacts, and remnants of villages, an archaeologist and historian were hired by the District to test the proposed Maple River Dam site at a cost reported variously as $50,000

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327. Deneen Gilmour, *Passion Deep on Both Sides of Proposed Maple River Dam*, FORUM (Fargo), Oct. 10, 1997, at A1.

328. *Id.*

329. Mikkel Pates, *Tribal Representatives Get Look at Proposed Dam Site*, FORUM (Fargo), Nov. 16, 1999, at C1.

330. *Id.*

331. *Id.*

332. Deneen Gilmour, *Maple River Dam Plans in Jeopardy, Enderlin Farmer Sells 1.4 Acres to Turtle Mountain Chippewa*, FORUM (Fargo), Aug. 19, 2000, at A1.

333. *Id.*

334. *Id.*

335. *Id.*

336. Deneen Gilmour, *Farmer Trades Land for Beads and Blankets, Chippewa Take Possession of Burial Site from Dam Opponent*, FORUM (Fargo), Aug. 22, 2000, at B1.

337. Deneen Gilmour, *Maple River Dam Issue Thrown Another Curve*, FORUM (Fargo), June 24, 2001, at A9.

338. *Id.*

339. *Id.*

or $500,000, excluding the legal and engineering costs on any archaeological related issues.[340]

With the permission of all area landowners other than Shea and the Tribe, archaeologists looked at twenty-nine potential cultural sites near the proposed dam area.[341] They determined six of them merited more analysis, but twenty-three were not of interest.[342] The land owned by Shea and the Tribe was not surveyed due to their refusal to allow the archaeologists on the land.[343] Unable to get a permit from USACE until a complete archaeological survey was completed, the District filed a condemnation action with the plan of taking possession of the land and completing the survey.[344]

In district court, the Tribe prevailed in the condemnation proceeding due to the protection of its sovereign immunity.[345] The District continued trying to negotiate a settlement with Shea and the Tribe, while appealing the district court's decision at the same time.[346]

The District originally applied to USACE for a permit for the dam in 1994, but due to all the controversy, the application has been stalled in a "bureaucratic tangle" for years.[347] According to Jeff Volk, the project engineer, the best-case scenario would be for construction to begin in spring 2004, with a projected completion date of fall 2006.[348] In 2000, Water Board Chairman Tom Fischer said the District had already spent $3,000,000 over the last six years trying to get USACE to make a decision about whether to issue the dam permit.[349] Due to all the delays, the dam's projected costs have increased to $20.8 million, more than $7 million since estimates given in 1994.[350]

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340. Deneen Gilmour, *Cass Water Board to Hire Archaeologist, Historian for Maple River Dam Site,* FORUM (Fargo), Aug. 28, 1999, at C1 (reporting costs of approximately $50,000); Interview with McCullough, *supra* note 309 (describing costs of approximately $500,000).

341. Deneen Gilmour, *Board Gets Tough in Bid for Dam Land,* FORUM (Fargo), Dec. 16, 2000, at C1.

342. *Id.*

343. Deneen Gilmour, *Indian-Owned Land Condemned by Cass Water Board,* FORUM (Fargo), Jan. 27, 2001, at C1.

344. Deneen Gilmour, *Effort to Condemn Land for Maple River Dam Project Stalls in Court,* FORUM (Fargo), Mar. 30, 2001, at B1.

345. Steven P. Wagner, *Maple River Dam Clears Latest Hurdle, Corps' Final Environmental Study Supports the Project,* FORUM (Fargo), Dec. 4, 2001, at A6.

346. *Id.*

347. Deneen Gilmour, *New Comment Period Stalls Maple River Dam,* FORUM (Fargo), Oct. 23, 1999, at C1.

348. Amy Dalrymple, *Landowner Feedback on Dam Cost Sought,* FORUM (Fargo), Sept. 5, 2003, at A12.

349. Gilmour, *Dam Plans in Jeopardy, supra* note 332, at A1.

350. Nowatzki, *supra* note 308, at A6.

After the North Dakota Supreme Court victory for the District, the matter was settled and the land was condemned upon remand.[351] Interestingly, in 1999, Shea reported to *The Forum* that he had been offered $700 for his land.[352] In 2001, the District offered Shea and the Tribe fair market value for the land, which was $500.[353] The condemnation judgment received in district court was for $500: $300 to the Tribe and $200 to Roger Shea.[354] Yet ironically, after court costs were offset, Roger Shea ended up with a judgment against him for $91.40, which he paid to the District.[355] The Tribe only received $55.60 for its land after the offset of court costs.[356]

C. ARCHAEOLOGICAL FINDINGS

After condemnation of the land, extensive testing was done.[357] It was determined that the 1.43 acre tract did not have any human remains.[358] Engineer Amy Ollendorf reported that the condemned piece of land, as well as the surrounding land that would potentially be periodically flooded, were determined not to be eligible for inclusion on the National Register of Historic Places.[359] The Army Corps of Engineers and the North Dakota State Historic Preservation Office agreed that there are no traditional cultural properties in that area of potential effect.[360] Although there were no sacred sites or burial grounds in the area impacted by the dam, some archeological sites were present.[361] However, at the time the North Dakota Supreme Court made its decision, this information was unknown.[362] After making it through the court system, the District has only the permit hurdle remaining, and the Army Corps is the last place where consideration of the traditional cultural sites could be taken into account.[363]

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351. Order of Judgment, District Court, County of Cass, East Central Judicial District at 1, Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, 643 N.W.2d 685 (No. 09-01-C-0665).

352. Pates, *supra* note 329, at C1.

353. Gilmour, *Indian-Owned Land Condemned, supra* note 343, at C1.

354. Order of Judgment, *1.43 Acres of Land*, (No. 09-01-C-0665).

355. *Id.*

356. *Id.*

357. Interview with Steven McCullough, Attorney for Cass County Joint Water Resource District, Shareholder, Ohnstad-Twichell, P.C., in West Fargo, N.D. (Oct. 14, 2003).

358. *Id.* (citing Amy L. Ollendorf, Ph.D., P.G., R.P.A., Director, Cultural Resources Management, *in Testing and Evaluation of 32CS0046, Cass County, North Dakota,* ARCHAEOLOGIST'S REPORT, (Sept. 2003) (Peterson Environmental Consulting, Inc.)).

359. Dave Kolpack, *Cass County Dam Still Being Debated*, FORUM (Fargo), July 6, 2003, at A17.

360. Interview with McCullough, *supra* note 357 (quoting Ollendorf, *supra* note 358).

361. *Id.* (quoting Ollendorf, *supra* note 358).

362. *Id.* (quoting Ollendorf, *supra* note 358).

363. *Id.* (quoting Ollendorf, *supra* note 358).

D. THE RIPPLE EFFECT

In this decision, the North Dakota Supreme Court ruled that Indian land that was not in trust can be condemned by the state, even if the Indian land contained tribal cultural burial grounds.[364] The court continued to keep the window narrow for when the Nonintercourse Act could be used as a defense to protect tribal lands.[365] The *Yakima* tax decision was expanded to encompass condemnation actions against tribal property.[366] It will be precedent for North Dakota law and secondary authority for law in other states until the United States Supreme Court rules differently, which given its history, is unlikely.[367]

The outcome of this case could be significant because it provides some indication of the extent to which courts will allow Indian tribes to use innovative techniques to overcome adverse effects of the allotment program.[368] The trend in Indian law jurisprudence is alarming Indian law scholars, and *1.43 Acres of Land* exacerbated their alarm.[369] The High Country News reported that the North Dakota Supreme Court "disregarded" the Nonintercourse Act, "which protects Indian tribes from state government," when it determined the state could take land belonging to the Tribe to construct a dam for flood control because the state had jurisdiction over all land in North Dakota.[370] The article reported that the implication of the decision, holding that Indian land off the reservation was just like any other private property, could "reverberate across Indian country due in part to the

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364. Cass County Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 39, 643 N.W.2d 643, 699.

365. *Id.* ¶ 33, 643 N.W.2d at 697.

366. *Id.*

367. *See* Shepard, *supra* note 120, at 344-45 (citing statistics of the Rehnquist Court decisions); *see also* NICHOLS, *supra* note 42, at *Capacity to Condemn*, § 3.01 (citing *1.43 Acres of Land* to represent the principle that eminent domain is an inherent attribute of sovereignty and does not depend upon a constitutional grant of power); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 59 (2003) (citing to *1.43 Acres of Land* to demonstrate that tribal sovereign immunity does not bar a court from asserting *in rem* jurisdiction over tribal land in a condemnation action); John J. Delaney, et. al, *Selected Recent Cases Decided in Favor of the Landowner*, LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, (A.L.I.-A.B.A. COURSE OF STUDY, Aug. 22-24, 2002), WL SHO18 ALI-ABA1 (citing *1.43 Acres of Land* to show that neither a Tribe's sovereign immunity nor the Federal Nonintercourse Act could preclude an *in rem* condemnation action brought by the state).

368. Worthen, *supra* note 208, at 316.

369. Shepard, *supra* note 120, at 360 (quoting Jon Waldman, *N.D. Court Ruling Rescinds Tribal Authority*, HIGH COUNTRY NEWS, Aug. 5, 2002, *at* http://www.hcn.org/servlets/hcn.Article?article_id=13350).

370. *Id.* (quoting Jon Waldman, *N.D. Court Ruling Rescinds Tribal Authority*, HIGH COUNTRY NEWS, Aug. 5, 2002, *at* http://www.hcn.org/servlets/hcn.Article?article_id=13350).

fact that the land affected by the dam contains numerous tribal burial sites."[371]

As United States Indian Policy continues to have competing goals of autonomy and assimilation, the law will continually be redefined.[372] Now, as the pendulum is swinging back toward assimilation, it appears more Indian property and rights will again be lost, without having yet restored the damage from the prior period.[373] It can be argued that the federal government certainly has not been performing its fiduciary duties as a trustee to the best of its ability, perhaps having a conflict of interest itself.[374]

The Nonintercourse Act has been held to protect fewer and fewer situations of Indian property rights as the distinction is made between fee land and trust land, even regarding land that is located within the reservation's boundaries.[375] State courts have been given increasingly greater jurisdiction over tribes, which began with allowing taxation of Indian land,[376] then spread to tax condemnation and forfeiture proceedings,[377] and now includes eminent domain condemnation actions.[378] The United States Supreme Court still has not addressed the issue directly, yet when it does, given its history toward Indian affairs, it is not likely to rule in favor of the tribes.[379]

The North Dakota Supreme Court could only reach this decision under the facts presented in the case.[380] The original landowner, Roger Shea, had been in opposition to the dam for years.[381] Just as it appeared the Corps would approve the permit, he sold a small piece of land within the project

371. *Id.* at 360 (quoting Jon Waldman, *N.D. Court Ruling Rescinds Tribal Authority,* HIGH COUNTRY NEWS, Aug. 5, 2002 *at* http://www.hcn.org/servlets/hcn.Article?article_id=13350).

372. Wilkinson, *supra* note 91, at 30.

373. *See* Royster, *supra* note 100, at 6 (discussing how the court undercuts the sovereignty and territorial integrity of the Indian nations by deciding cases in accord with the discredited policies of allotment and assimilation).

374. *See generally* Shepard, *supra* note 120, at 345-46 (discussing federal courts' aggressive actions to increase state jurisdiction).

375. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998); Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1359 (9th Cir. 1993); Bay Mills Indian Cmty. v. State, 626 N.W.2d 169, 174 (Mich. App. 2001); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 388 (Wash. 1996).

376. *Leech Lake*, 524 U.S. 103, 115 (1998); County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 270 (1992).

377. *Bay Mills,* 626 N.W.2d at 174.

378. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 33, 643 N.W.2d 685, 698.

379. Shepard, *supra* note 120, at 344-45.

380. *1.43 Acres of Land,* ¶ 33, 643 N.W.2d at 698.

381. Pates, *supra* note 329, at C1.

area.[382] The tribe that purchased the land had its reservation almost two hundred miles from this site, and the land had never been a part of the Tribe's homeland or reservation area.[383] In addition, the land at issue had never even been allotted land; it had been privately owned by a family for one hundred years, and owned by the railroad prior to that.[384] However, this precedent will be used in other situations with a wide variety of factual circumstances that may not be so clear cut.

V. CONCLUSION

The North Dakota Supreme Court decided, in what it described as an issue of first impression nationally, whether a state may condemn land within its boundaries that has been purchased in fee by an Indian tribe but was not reservation land, aboriginal land, allotted land, or trust land.[385] The court acknowledged that the issue involved competing claims of sovereignty but held that since the action was purely *in rem,* the Tribe's sovereign status was of no consequence.[386] It ruled that states may exercise broader jurisdiction over tribal lands when it is a proceeding *in rem.*[387] In accordance with the reasoning in *Yakima,* which was also followed by several subsequent tax cases, the North Dakota Supreme Court held that the protection and restraints of the Nonintercourse Act did not attach to property an Indian tribe had purchased in fee from a private landowner.[388]

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382. Gilmour, *Dam Plans in Jeopardy, supra* note 332, at A1.
383. *1.43 Acres of Land,* ¶ 33, 643 N.W.2d at 698.
384. *Id.* ¶ 3, 643 N.W.2d at 688.
385. *Id.* ¶ 6.
386. *Id.* ¶ 21, 643 N.W.2d at 694.
387. *Id.* ¶ 12, 643 N.W.2d at 691-92.
388. *Id.* ¶ 27, 643 N.W.2d at 696.