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TRIBAL PROPERTY: DEFINING THE PARAMETERS OF THE FEDERAL TRUST RELATIONSHIP UNDER THE NON-INTERCOURSE ACT: *CATAWBA INDIAN TRIBE V. SOUTH CAROLINA*

Mark Ulmer*

Where today are the Pequot? Where are the Narragansett, the Mohican, the Pokanoket, and many other once powerful Tribes of our people? They have vanished before the avarice and the oppression of the White Man, as snow before a summer sun.

—Tecumseh, of the Shawnee.¹

If a man loses anything and goes back and looks for it, he will find it, and that is what the Indians are doing now when they ask you to give them the things that were promised to them in the past; and I do not consider that they should be treated like beasts, and that is the reason I have grown up with the feelings that I have. . . .

—Tatanka Yotanka (Sitting Bull).²

All I ask is that, we have worked honestly among ourselves to resolve our problems and we have dealt honestly with the State and with the Federal Government. I am not here today seeking something, simply because I am an Indian. I am here because we were mistreated illegally and immorally, and that is what I want corrected. . . . I know if I was a landowner and someone came on my land and told me I had to move off it because of something that happened 200 years before, I would not like it, either. So I understand their [the present property owners'] feelings, [and] I am willing to work in any framework that we can do to reach a fair and equitable settlement.”

—Gilbert Blue, Catawba tribal chief.³

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1. D. BROWN, *BURY MY HEART AT WOUNDED KNEE* 1 (15th ed. 1971).

2. *Id.* at 389.

3. *Settlement of the Catawba Indian Tribe Land Claims: Hearings on H.R. 3274 Before the House Comm. on Interior & Insular Affairs*, 96th Cong., 1st Sess. 33 (1979) (testimony of Chief Gilbert Blue) [hereinafter cited as *Hearings*].

Introduction

The Indian Non-Intercourse Act of 1790 prevents the alienation of lands owned or possessed by an Indian tribe to any other party, except the United States, without the consent of Congress.⁴ It enables the federal government, acting as *parens patriae* for the Indians, to void such a transaction made without its consent.⁵ The statute has provided the legal basis for a veritable explosion of litigation concerning tribal lands along the Eastern Seaboard, with the plaintiff tribes seeking reinstatement of property rights lost long ago.⁶

The Catawba Tribe is the latest of such litigants. In *Catawba Indian Tribe v. South Carolina*,⁷ the Catawba Indians are attempting to invalidate a land transfer made pursuant to an 1840 treaty with the state involving a 144,000-square-acre tract.⁸ The problem the tribe faces in the pending litigation, however, concerns not the merits of the land claim itself, but the tribe's standing to sue.

In 1959 the status of the Catawba Tribe as a federally recognized tribe was terminated pursuant to the Catawba Division of

4. An Act to regulate Trade and Intercourse with the Indian Tribes, ch. 33, § a, 1 Stat. 137, July 22, 1790; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329, May 19, 1796; An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers, ch. 30, § a, 1 Stat. 469 (1796); Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified at 25 U.S.C. § 177 (1982)).

5. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), *reh. denied*, 362 U.S. 956 (1960); United States v. Candelaria, 271 U.S. 432 (1926); Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

6. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), *reh. denied*, 362 U.S. 956 (1960); James v. Watt, 716 F.2d 71 (1st Cir. 1983), *app. docketed* No. 83-623 (1st Cir. Oct. 14, 1983); Mashpee Tribe v. Watt, 707 F.2d 23 (1st Cir. 1983), *cert. denied*, 52 U.S.L.W. 3451 (U.S. Dec. 13, 1983); Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982); Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 450 U.S. 1028 (1981); Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); County of Oneida v. Oneida Indian Nation, 53 U.S.L.W. 4225 (U.S. Mar. 5, 1985); Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976); Narragansett Tribe v. South R.I. Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976).

7. 718 F.2d 1291 (4th Cir. 1983).

8. P. DAMMANN, D. MILLER & D. ISRAEL, A HISTORY OF THE CATAWBA TRIBE AND ITS RESERVATION LANDS 1540-1959, at 46-50 (1978), reprinted in *Settlement of the Intercourse Claims of the Catawba Indian Land Claims: Hearings on H.R. 3274 Before the House Comm. on Interior & Insular Affairs*, 96th Cong., 1st Sess. 181-85 (1979) [hereinafter cited as HISTORY].

Assets Act.⁹ The tribal constitution was effectively revoked with permission from the tribe, but the tribe was allowed to remain on the 630-acre parcel owned by the state. The initial issue centers around the tribe's ability to prove a *prima facie* case of existence under the Non-Intercourse Act, specifically, that the Catawba Nation is still a "tribe" and that the federal trust relationship between it and the United States, existent before the Division of Assets Act, has not been terminated.

The precedent-setting quality of this case is readily apparent. No federal court has yet determined the effect of a "termination" act upon an Indian tribe's right to sue under the Non-Intercourse Act. The Fourth Circuit Court of Appeals originally granted the Catawbans standing under the Non-Intercourse Act.¹⁰ The Fourth Circuit, however, realizing the importance of this issue, subsequently granted the state's motion to rehear the case en banc.¹¹

9. 25 U.S.C. §§ 931-938 (1982).

10. 718 F.2d 1291 (4th Cir. 1983).

11. Petition for Rehearing and Suggestion of Rehearing En Banc, *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983), *granted* Dec. 20, 1983. A "sitting en banc" is a consideration of a case by all of the judges of a United States Court of Appeals. Justice Stewart explained that the en banc procedure was "the exception rather than the rule," the principle purpose being the opportunity for a majority of judges of the circuit "to secure uniformity and continuity in its decisions." *United States v. American-Foreign Steamship Co.*, 363 U.S. 685, 689-90 (1960).

A petition to rehear the case en banc may be filed under one of two Federal Rules of Appellate Procedure. Rule 35(a), "Determination of Causes by the Court En Banc," states as follows:

(a) A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Rule 40(a), the "Petition for Rehearing," however, presents different criteria when it states, in pertinent part:

(a) A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

The local rules of the Fourth Circuit complicate the situation even more. They do not follow the criteria of rule 40(a), but state instead that ordinarily the court will not hear the case on the motion unless one or more of the following situations occur: (1) a material fact or law was overlooked in the earlier decision; (2) a change in the law occurred after the case was submitted, which was overlooked by the panel; or (3) an apparent conflict with another

This note will examine the Fourth Circuit's initial decision and analysis concerning the ramifications of the Catawba "termination" act. The impact of that act is paramount to this case and may well influence future interaction with and among the other "terminated" tribes. In discussing the underlying issue of the federal trust relationship, the court en banc may be required to define its qualities and limits, recognizing specific elements rather than applying the more widely used broad generalizations, within the meaning of the Non-Intercourse Act.

I. *Analysis of American Indian Law*

In General

In any survey of law concerning North American Indians, foremost emphasis is placed on the concepts of tribal sovereignty, federal-state relations, and the nature of the claim asserted by the tribe or individual. The United States Constitution indirectly recognizes the difference between race and tribal sovereignty in

decision of the court occurred, which was not addressed in the opinion. See Notice of Judgment, *Catawba Indian Tribe v. South Carolina*, No. 82-1671 (4th Cir. Oct. 11, 1983).

The "exceptional importance" standard of rule 35 has been interpreted by other circuits to mean issues of legal, rather than political, importance, or extreme social or economic hardship. Issues of "exceptional importance" concerning American Indian tribes, which have led to a rehearing by a court en banc, have included Montana's authority to tax the Blackfeet Tribe's royalty interest from oil and gas production on their reservation (*Blackfeet Tribe v. Groff*, 709 F.2d 521 (9th Cir. 1983)); whether the United States was liable to the Menominee Tribe for a breach of trust for enacting the Menominee Termination Act (*Menominee Tribe of Indians v. United States*, 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 958 (1980)); and whether the Indian General Allotment Act of 1887 authorized the award of money damages against the United States for alleged mismanagement of timber resources located on lands allotted to Indians (*Mitchell v. United States*, 591 F.2d 1300 (Ct. Cl. 1979), *rev'd* 445 U.S. 535 (1980), *reh. denied*, 446 U.S. 992 (1980), *on remand* 664 F.2d 265 (11th Cir. 1981), *cert. denied*, 457 U.S. 1104 (1982)).

The Fourth Circuit has applied its authority under rule 35 liberally in reviewing prior panel decisions. This is illustrated in three recent situations before the court. In the case of *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), for example, the Fourth Circuit set aside strict adherence to the petition by allowing a second panel of three to substitute for an entire sitting of the active judges, in reviewing the earlier panel's decision.

Uzzell v. Friday, 625 F.2d 1117 (4th Cir. 1980), involved three en banc hearings, the third held pursuant to the court's own motion as a result of its violation of a recent Appellate Rules amendment (28 U.S.C. § 46 (1982)). The court en banc, sitting before the U.S. Supreme Court, had a chance to rule on the writ of certiorari before it, recalled the mandate of the second hearing, and remanded the case to the district court.

two separate places. It specifically grants Congress the authority to regulate "Commerce with the Indian Tribes."¹² The Constitution also gives Congress, through the President, the right to enter into treaties with the individual tribes, pursuant to the treaty and supremacy clauses.¹³

The tribe itself is an independent political, rather than racial, entity. The Supreme Court has reiterated many times that Congress cannot deal with Indians solely as a racial group.¹⁴

Commensurate with the American system of jurisprudence, as well as the doctrine of federal preemption, the jurisdiction of individual states upon Indian country is limited. The Indian commerce clause provides plenary power for Congress, in the absence of express delegation or abrogation, to review any action by a state government affecting Indians.¹⁵ The power to deal with and regulate Indian tribes is wholly federal. It does not follow from the commerce clause, however, that a situation of "automatic" preemption arises.¹⁶

Indian treaties stand on essentially the same footing as those made with foreign nations.¹⁷ As they were made pursuant to the Constitution by power vested in the President and Congress, they take precedence over any conflicting state law on the basis of the supremacy clause.¹⁸ More than three hundred treaties were entered into between the United States and the various Indian

12. U.S. CONST. art. I, § 8. The applicable clause states: "The Congress shall have Power To . . . regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

13. *Id.*, art. II, § 2, cl. 2. The treaty-making power is shared between the President and the Senate, which must ratify the treaty by a two-thirds vote.

Under the supremacy clause of article VI, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

14. *United States v. Antelope*, 430 U.S. 641, 645 (1977).

15. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

16. Since Chief Justice Marshall's time, the Supreme Court has rejected this alleged authority of Congress and has tended to expand the areas in which states may act. Where state legislation has been preempted, a balancing test is applied rather than a strict per se approach. For a general discussion of this topic, see *James v. Watt*, 716 F.2d 71, 73-74 (1st Cir. 1983).

17. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 754-55 (1835). Indian tribes are not, however, dealt with under the Constitution on the same level as a foreign country. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

18. U.S. CONST. art. VI.

tribes over approximately a century ending in 1871.¹⁹ To this day, these treaties remain valid and enforceable on the same level as any other federal statute. In accordance with its plenary authority, Congress can abrogate a treaty at any time by appropriate legislation.²⁰

The major premise concerning Indian treaties and treaty rights is that treaties are not a grant of rights and privileges to the tribe or tribes involved, but are rather a relinquishment of such rights by the tribe, with its consent.²¹ The Constitution does not expressly confer plenary power over the Indian nations. Tribal status as a separate political entity is also not expressly guaranteed. Both state and federal courts, however, have consistently recognized that both concepts impliedly exist within the Constitution.²²

The essence of the federal trust relationship with the Indian tribes is another subject around which much of American Indian law revolves. It concerns the series of responsibilities placed upon the United States as "trustee," to protect, defend, and provide federal services to all Indian tribes as "beneficiaries" of the relationship.²³

Care must be exercised in determining whether the federal-Indian relationship is a mere moral obligation, a legally enforceable duty, or a fiduciary relationship.²⁴ The Constitution itself contains no express delineation of a relationship, fiduciary or otherwise, but again it grants authority to the federal government. In addition to the plenary power of Congress and the

19. 25 U.S.C. § 71 (1983).

20. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Confederated Salish & Kootenai Tribes v. Namen*, 534 F.2d 1376 (D. Mont. 1974), *cert. denied*, 429 U.S. 929 (1976). If the tribal organization of any Indian tribe is in actual hostility to the United States, the President also retains statutory power to abrogate treaties. This power has rarely, if ever, been enforced. 25 U.S.C. § 72 (1982).

21. *Central Mach. Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980); *United States v. Winans*, 198 U.S. 371 (1905).

22. See *supra* notes 12-21 and accompanying text. See also *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977).

23. This trust relationship was first established in the initial set of American Indian cases before the Supreme Court. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

24. The federal courts use the terms "fiduciary" and "trust" relationship interchangeably, but there appears to be a difference in the degree of obligation placed upon the federal government. An example of the fiduciary obligation is discussed in *United States v. Mitchell*, 445 U.S. 535 (1980), concerning mismanagement of timber resources on the Quinault Indian Reservation.

presidential power to make treaties, support for the federal trust relationship has also been found in the congressional power to make regulations governing the territory belonging to the United States.²⁵ In any event, this assertion of "guardianship" cannot be arbitrary in manner, but must be regarded as both authorized and controlling.²⁶

The initial series of Supreme Court cases dealing with Indian law, arising in the 1830s during the John Marshall era, presents a basic understanding of this peculiar relationship which has withstood legal attack to the present day.²⁷ In *Cherokee Nation v. Georgia*,²⁸ Chief Justice Marshall characterized the Indian tribes as neither states nor foreign countries, but as "domestic, dependent nations," their situation analogous to that of "ward[s] to . . . guardian."²⁹

Fifty years later, in *United States v. Kagama*,³⁰ the Supreme Court relied on the "guardianship" theory as a separate and distinct basis for congressional power.³¹ However, since that time

25. U.S. CONST. art. IV, § 3, cl. 2. The provision states: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territories or other Property belonging to the United States; and nothing in this Constitution shall be so constructed as to Prejudice any claims of the United States, or of any particular State."

Congress alone has the right to determine the manner in which the guardianship of the United States over the Indians shall be carried on, and possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States. See *United States v. Minnesota*, 305 U.S. 382 (1939); *United States v. McGowan*, 302 U.S. 535 (1938).

26. *United States v. Sandoval*, 231 U.S. 28, 47 (1913).

27. See cases cited *supra* note 15. See also *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

28. 30 U.S. (5 Pet.) 1 (1831).

29. *Id.* at 17. Chief Justice Marshall stated that:

[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. . . . It may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps be denominated domestic, dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

30. 118 U.S. 375 (1886).

31. *Id.* at 383-85. In affirming a conviction for murder by an Indian on an Indian reservation, pursuant to the Major Crimes Act (codified at 18 U.S.C. § 1153 (1982)), the Court made it clear that:

These Indians *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political

Congress has assumed a different posture in applying its power pursuant to the trust relationship. This is most evident in the twentieth-century cases involving Indian land claims. A distinction has had to be made between Congress acting as a guardian for the Indians consistent with its plenary power, and exercising its power of eminent domain within the meaning of the fifth amendment.³²

In *Cohen's Handbook of Federal Indian Law*, it is stated that "[i]n addition to the Constitutional limitations on Congress' power to implement its trust responsibility," other limitations seemed to have been imposed.³³

[R]ecent cases have suggested that the trust obligation of the United States is also a limiting standard for judging the constitutional validity of an Indian statute, rather than solely a source of power. . . . Although the Court has never spoken directly to the issue, the requirement of a rational tie between

rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the Executive [branch] and by Congress, and by this court, whenever the question has arisen.

(Emphasis in original).

This argument was reinforced in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), where the Supreme Court upheld a federal statute that allowed for distribution of certain tribal lands to individual tribal members, notwithstanding an earlier treaty provision requiring tribal consent before such lands could be alienated. The Court, basing its reasoning on the federal trust relationship, stated that: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, the power always being deemed a political one. . . ."

32. It is well settled that when Congress acts with respect to Indian property it does so in one of two capacities. Either it acts as a guardian for the benefit of the Indians, exercising its plenary power over them, in their best interest, or it exercises its power of eminent domain, taking the Indian's property within the meaning of the fifth amendment. Congress cannot, however, act in both roles simultaneously.

The *Fort Berthold* test, first established in *Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968), was applied by the Supreme Court in *United States v. Sioux Nation*, 448 U.S. 371, 408-09 (1980). This test provides a guideline for distinguishing the two types of congressional action;

Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change in form and is a traditional function of a trustee.

33. F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221-25 (R. Strickland et al. eds. 1982) [hereinafter cited as COHEN].

an Indian statute and the fulfillment of the trust relationship seems to impose substantive limitations on Congress.³⁴

The Cohen treatise notes that the trust relationship also constrains congressional power in a procedural manner.³⁵ As a direct result of the obligation, courts must presume that Congress' intent toward the Indians is such that treaties and other acts be construed in the manner in which they would naturally be understood by the tribes.³⁶

The Non-Intercourse Act

The legal foundation for the eastern Indian land claims in the last twenty years is the Trade and Intercourse Act of 1790. The Act's current version states as follows:

No purchase, grant, or lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or in equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.³⁷

One purpose of the Act was to protect the rights of Indians to their properties by acknowledging and guaranteeing the Indian tribe's right of occupancy to tribal lands.³⁸ The other purpose was to prevent the "unfair, improvident, or improper disposition

34. *Id.* at 221. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 555 (1974), where the Supreme Court upheld an employment preference for qualified Indians in the Bureau of Indian Affairs, pursuant to the 1934 Indian Reorganization Act. There the Court stated that "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555. See also *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-85 (1977), where the Supreme Court upheld a federal statute that authorized the distribution of funds only to certain Delaware Indians as the result of an Indian Claims Commission decision, to the exclusion of other Delaware Indians.

35. COHEN, *supra* note 33, at 221.

36. *Bryan v. Itasca County*, 426 U.S. 373, 396 (1976); *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), *reh. denied*, 398 U.S. 945 (1970); *Jones v. Meehan*, 175 U.S. 1, 10-12 (1899).

37. Ch. 33, § a, 1 Stat. 137, July 22, 1790.

38. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 668 (1974), *quoting* *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345 (1941); *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975); *Narragansett Tribe v. Southern R.I. Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976). Another justification for the Act at the time it was originally enacted was to prevent Indian uprisings and "preserve peace" along the frontier. *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir. 1980).

of Indian lands owned or possessed by the tribe without the consent of Congress. . . ."³⁹

The practical effect of the Act was to codify existing federal practices toward Indian nations and to remove any doubt as to the limit of federal preemption over the states' ability to negotiate with Indian tribes concerning real estate transactions.

The power of the Non-Intercourse Act to preempt conflicting state statutes has never been seriously questioned. Pursuant to the trust relationship with the federal government, the Indians' "property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose. . . ."⁴⁰ If the land involved is not alienable by the Indians under this act, title cannot be obtained as against them by adverse possession, contract, estoppel, laches, or any other state defense, without the United States' consent.⁴¹ Even the Fourth Circuit has determined that such a transaction is void and cannot be rendered valid by any subsequent act.⁴²

It is well settled that the tribe, in order to establish a prima facie case of existence under the Act, has the burden to prove four elements:

- 1). that it is or it represents an Indian tribe within [the] meaning of the Act; 2). that the land at issue is covered by the Act as tribal land; 3). that the United States has never [approved or] consented to the alienation of the tribal land; and 4). that the trust relationship between the United States and the tribe, [which is] established by coverage of the Act, has never been terminated or abandoned.⁴³

39. *Tuscarora*, 362 U.S. 99, 119 (1960); *Candelaria*, 271 U.S. 432, 441 (1926).

40. *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938).

41. *Ewert v. Bluejacket*, 259 U.S. 129 (1922); *Heckman v. United States*, 224 U.S. 413 (1912); *Schaghticoke Tribe v. Kent School Corp.*, 423 F. Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe v. Southern R.I. Dev. Corp.*, 418 F. Supp. 798, 804-05 (D.R.I. 1976).

42. In *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938), the Fourth Circuit was confronted with an 1875 grant of land in North Carolina, involving a claim under the Non-Intercourse Act. In defining the nature of the Act, the Court stressed that:

This statute protects tribes such as these, as well as the nomadic tribes, and the protection is not affected by reason of the fact that the band has been incorporated under a state charter, and attempts to take action thereunder. . . . Certainly if the land was not alienable by the Indians, title could not be obtained as against them by adverse possession. [Citations omitted.]

Id.

43. *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Oneida Indian Nation v.*

Concerning the first element, the term "tribe" has no exact definition but depends for the most part upon the context and use for which it was intended in the Non-Intercourse Act. The Act provides a federal remedy. However, the remedy is available only to the Indian tribe as a separate entity, not to individual Indian tribal members suing on their own behalf.⁴⁴

Although the scope of congressional power to deal with the Indians is very broad, it is not unlimited. Congress cannot interact with the Indians solely as a racial group,⁴⁵ nor can it arbitrarily bring a group of people under its power by calling them an "Indian tribe."⁴⁶ The tribe must be something more than a private, voluntary organization.⁴⁷

The most frequently used definition was first pronounced by the Supreme Court in *Montoya v. United States*,⁴⁸ where the Court explained: "By a tribe we understand a body of Indians of the same or similar race, united in the community under one leadership or government, and inhabiting a particular, though sometimes ill-defined territory. . . ."⁴⁹ This definition contains several criteria that subsequent courts have used as a guideline concerning the determination of a "tribe," including the Supreme Court.

In *United States v. Candelaria*,⁵⁰ the Supreme Court first applied the *Montoya* analysis to an Indian tribe seeking to prove a prima facie case under the Non-Intercourse Act. In an action by

County of Oneida, 434 F. Supp. 527, 537-38 (N.D. N.Y. 1977); *Narragansett*, 418 F. Supp. 798, 803 (D.R.I. 1976).

44. *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983); *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979).

45. *United States v. Antelope*, 430 U.S. 641, 645 (1977).

46. *Candelaria*, 271 U.S. 432, 439 (1926); *Sandoval*, 231 U.S. 28, 46 (1913).

47. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

48. 180 U.S. 261 (1901).

49. *Id.* at 266. See also *Sandoval*, 231 U.S. 28, 46 (1913), where the Supreme Court upheld a criminal conviction for introducing intoxicating liquor into the Santa Clara Pueblo of New Mexico in violation of federal statute. In determining that the tribe fell within the statutory definition of "Indian tribe" by applying the *Montoya* definition, the Court interpreted Congress' authority to define that term:

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

50. 271 U.S. 432 (1926).

the federal government to quiet title in certain lands held by the Pueblo, the Court found that the Laguna Pueblo came within protection of the Act. It also stated that an "Indian tribe," within the meaning of the Act, included those tribes that did not have a federally recognized form of government.⁵¹

The First Circuit agreed with this reasoning in *Passamaquoddy Tribe v. Morton*.⁵² The *Passamaquoddy* court, in applying the *Montoya* definition, made it clear that federal recognition (by treaty, statute, or otherwise) was not a prerequisite for protection under the Act.⁵³

The *Montoya* definition does have limitations, however, and has served as the basis for denying a tribe recovery, based on lack of standing, under the Non-Intercourse Act. The First Circuit in 1979 was called upon, in *Mashpee Tribe v. New Seabury Corp.*,⁵⁴ to review an earlier jury determination that the plaintiff was not a "tribe," relying on the *Montoya* criterion.⁵⁵ The issue is a factual one, and the court of appeals refused to reverse the jury's verdict, based on the district court's instructions.⁵⁶

Until recently, the major issue concerning the second element

51. In *Candelaria*, the Supreme Court explained that:

While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious, and disposed to peace, they are Indians in race, customs, and domestic government, have always lived in isolated communities, and are a simple uninformed people, ill-prepared to cope with the intelligence and greed of other races.

271 U.S. at 441-42.

52. 528 F.2d 370 (1st Cir. 1975).

53. *Id.* at 377-79. Applying the *Montoya* standard, the First Circuit found that the Passamaquoddy, Penobscot, and Maliseet tribes came within the meaning of "any Tribe of Indians" to gain protection of the Act. This was true even though the federal government had never dealt with these tribes in any way or manner until this litigation.

54. 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979).

55. In *Mashpee*, the district court dismissed the tribe's action to recover possession of tribal lands it allegedly lost between 1834 and 1870, without the required federal consent under the Non-Intercourse Act. The tribe appealed on the grounds that the jury erred as to the interpretation of two elements of the definition of "tribe": (1) the element of a "leadership or government," and (2) the element that the Indians were "united in a community." The First Circuit found the situation particularly difficult because not only was the tribe not federally recognized, but it also had a "long history of intermarriage with non-Indians, and acceptance of non-Indians, and acceptance of non-Indian religion and culture." 592 F.2d 575, 581 (1st Cir. 1979).

56. As to the first element, the court determined that the tribal leaders' influence did not have to be "binding," but that the authority must cause the people to "order their lives . . . in some significant way." The people must "follow, adopt, and obey the leader-

needed to prove a prima facie case was whether the Act covered aboriginal (or "Indian") title, as well as recognized title.⁵⁷ The states, defendants in these eastern land claims, consistently asserted that "tribal lands" under the Non-Intercourse Act did not pertain to these claims because most of the holdings were not recognized by treaty, statute, or executive order. The argument was made that the federal government did not have fee title to Indian lands in those states before the Constitution was drafted, thus fee title remained vested in the individual states (giving them a preemptive right to purchase from the Indians).⁵⁸

The issue finally came before the Supreme Court in 1974 in *Oneida Indian Nation v. County of Oneida*,⁵⁹ the most recent case involving an eastern Indian tribe asserting a violation of the Non-Intercourse Act to reach the High Court. In declaring that

ship," and that such leadership must be "controlling . . . of significant elements in the lives of the people." *Id.* at 584-87.

Concerning the second element, it is well settled that a tribe, even if federally recognized, can choose to terminate its own existence. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867). Although some question remained as to the district court's jury instructions, the First Circuit did not know if the verdict was based on a finding of voluntary assimilation, but that such a decision "would not go contrary to law." *Id.*

57. Aboriginal, or "Indian," title is vested in the Indian tribe based on use, occupancy, and possession of the lands since "time immemorial." The title is equivalent to a fee interest, which remains in the United States; the tribe still possesses a possessory right. This right is good against all but the United States and can be extinguished only by express congressional act. *United States v. Santa Fe R.R.*, 314 U.S. 339, 345-46 (1941); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *James v. Watt*, 716 F.2d 71, 74-77 (1st Cir. 1983).

However, when the federal government properly terminates the right of occupancy by purchase, federal statute, or other express act, such act does not give rise to a "taking" under the fifth amendment, requiring just compensation. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

Recognized title, on the other hand, is the Indian right to occupancy based on express federal recognition of an established reservation, whether by treaty, federal statute, or executive order. Although fee title is again vested in the United States, the land is held in trust for the tribe. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-74 (1974); *United States v. Klamath & Modoc Tribes*, 304 U.S. 119 (1938); *United States v. Shoshone Tribe*, 304 U.S. 111, 115-16 (1938).

This strengthens the tribe's position, for unlike aboriginal title, a fifth amendment claim for a taking, requiring fair and just compensation, arises if and when the federal government decides to terminate the tribe's (and the reservation's) existence. *Tee-Hit-Ton Indians*, 348 U.S. 272, 290 (1955).

58. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

59. 414 U.S. 661 (1974).

all matters of Indian title, aboriginal or recognized, are to be settled under federal law, the Court made it clear that the Act applied to all fifty states, including the original thirteen.⁶⁰

The Act also puts the burden upon the tribe to show that the trust relationship between it and the United States, as established by the Act, has never been terminated.⁶¹ Thus, Congress' power to approve land transfers to third parties under the Non-Intercourse Act is subject to the same limitations as any other congressional action dealing with tribal property in that it must be an act of "guardianship."

The Supreme Court, in *United States v. Candelaria*, found that a duty arose under the Act to protect the Indian Pueblo in the ownership of its lands even though title was held only through a grant from Spain, recognition by Mexico, and a confirmation and patent by the United States. This duty came within the meaning of "trust relationship" under the Act.⁶²

Passamaquoddy Tribe v. Morton again provides a fine example of the effect the Act has on an Indian tribe.⁶³ Although the federal government had not engaged in any treaty relations, nor otherwise acted in behalf of the Passamaquoddy, the Penobscot, and the Maliseet tribes, the court held that a trust relationship

60. In *Oneida*, the Supreme Court made it clear that:

The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all of the rest of the continental United States, and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State (citing *Fletcher v. Peck*). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

Id. at 670.

61. See cases cited *supra* note 43.

62. *Candelaria*, 271 U.S. 432, 439. The status of this same Pueblo Indian tribe was considered in *United States v. Sandoval*, 231 U.S. 28 (1913). The *Candelaria* Court, quoting *Sandoval*, stated:

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian Tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all Indian communities. . . . It is for that body (Congress) and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

231 U.S. 28, 45-46 (1913).

63. 528 F.2d 370, 375-76 (1st Cir. 1975).

nonetheless existed. The basis of the trust status was the Act itself, and it vested within every American Indian tribe upon its enactment in 1790. Once this relationship was manifest, only an express act of Congress could abrogate it.⁶⁴

It is the effect of the Catawba Division of Assets Act upon the Catawba Tribe's right to sue under the Non-Intercourse Act that the Fourth Circuit Court must address en banc in the instant case. The tribe's situation is understandably unique, and a review of its history will greatly assist in grasping why the tribe is where it is today.

II. *History of the Catawba Indian Tribe*

Long before Caucasian settlement of North America, the Catawba Tribe occupied its aboriginal territory in what is now North and South Carolina. Although the tribe had boasted of continued governmental relations with the colony of South Carolina, with the exception of the Yamassee War in 1715, the tribe was a loyal ally of the British until the Revolutionary War.⁶⁵

In the early 1700s, English and European encroachment upon the tribe and its lands became more evident and pronounced. The colony of South Carolina, however, desperately needed the Catawba Tribe's lands as a buffer between it and other hostile Indian tribes. The colony thus made attempts to protect the tribe's interests.⁶⁶

In 1760 the Treaty of Pine Hill was entered into between the King's Superintendent for Indian Affairs and the Catawba Na-

64. In *Passamaquoddy*, the First Circuit stated that: "We emphasize what is obvious, that the 'trust relationship' we affirm has as its source the Non-Intercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act." 528 F.2d 370, 379 (1st Cir. 1975).

65. HISTORY, *supra* note 8, at 1-15. A 1715 census conducted by the Colony of South Carolina revealed that the Catawbias at that time were located in the same area the tribe presently occupies and had a population of 1,470 members in seven small villages.

66. *Id.* at 16-21. In 1739 the provincial council of the colony passed an act, similar to the future Non-Intercourse Act, that prohibited the obtaining of title to any Indian lands without the prior consent of the King of England or the governor of the colony. In addition, on March 14, 1754, Governor Glenn recognized Catawba territory as that area within a 30-mile radius of the Catawba towns, for the purpose of expressly excluding whites.

There are accounts that before the American Revolution the Catawbias twice assisted the colony in the defeat of other Indian tribes and that they later helped the British cause, alongside the colony, in the French and Indian War.

tion (represented in part by Tribal Chief Arataswa).⁶⁷ Under this agreement, the tribe relinquished its claim to its aboriginal territory and agreed to settle permanently on a diamond-shaped 144,000-square-acre tract of land along the Catawba River, from which non-Indian settlers were excluded. Thus, the Crown manifested recognition of the Catawba Nation as a "tribe" and a reservation was established.

Despite the guarantees of the 1760 treaty, and the promises included within the King's Proclamation of 1763 (prohibiting the issuance of survey warrants or patents on any lands reserved to Indians, or the purchase of such lands),⁶⁸ the westward movement of the white man continued. The tribe protested that England had failed to carry out the terms of the treaty and consequently reasserted a right to its aboriginal lands.⁶⁹ The King of England, meanwhile, had determined that in order to secure the southwestern frontier of the colonies (to stem the confusion surrounding the end of the French and Indian War), another treaty between the Crown and the five major tribes of the Old Southwest was needed to ensure their allegiance and cooperation.⁷⁰

The result was the Treaty of Augusta, in November of 1763, of which the Catawba Tribe was a signatory.⁷¹ The tribe again agreed to remain on the 144,000-acre reservation in exchange for new promises by the Crown that the 1760 Treaty would be enforced.⁷²

Over the next eighty years, however, settlers continued to acquire land within the Catawba Reservation, mainly through long-term leases with the Indians. By the 1830s, nearly all the reservation land had been leased to non-Indians in violation of state and federal law.⁷³

67. *Id.* at 21-23. The tribe's aboriginal territory at this time was that area covered by the Glenn Proclamation, about 2,826 square miles.

68. *Id.* at 25. The King's proclamation had another major purpose, i.e., to stem the ever-increasing growth of white settlement and keep it east of the imaginary borderline running along the crest of the Appalachian Mountains.

69. *Id.* at 23 n.80. See also *Hearings*, *supra* note 3, at 101.

70. HISTORY, *supra* note 8, at 23-24.

71. *Id.* at 24. The five major tribes of the Old Southwest were the Creeks, the Choc-taws, the Cherokees, the Chickasaws, and the Catawbaws, with whom the king had directed the governors of North and South Carolina, Virginia, and Georgia to negotiate.

72. *Id.* at 26-29. See Treaty of Augusta, *Catawba Tribe*, 718 F.2d at 1293 n.2. Following the treaty, the reservation was surveyed by Samuel Wyly and a fort was built for the Indians' protection.

73. HISTORY, *supra* note 8, at 29-46. These leases were in direct violation of the 1760 and 1763 treaties, the Proclamation of 1763, the 1754 Statement of Recognition, and the

Thus, the stage was set for the signing of the Treaty of Nation Ford, on March 3, 1840, entered into by the state of South Carolina and the tribal council and chief of the Catawbas. The Catawba Nation agreed to cede title to its 144,000 acres, vested under the 1760 and 1763 treaties, to the state.⁷⁴ In return, South Carolina promised to spend \$5,000 to acquire a new reservation in North Carolina, or in "some unpopulated area of South Carolina."⁷⁵ The South Carolina legislature ratified the treaty, but amended it to require that the \$5,000 be used only for the purchase of land that would not be subject to alienation.⁷⁶ It also authorized the issue of patents to the present leaseholders on the reservation, thus "legalizing" their property status.⁷⁷ The United States did not give its consent to, nor did it participate in, the 1840 treaty.⁷⁸

The terms of the Treaty of Nation Ford were never carried out. The state did not purchase a new reservation, and the tribe wandered homeless for more than two years.⁷⁹ Finally, in 1842, South Carolina (through its agent, Joseph White), purchased a 630-acre plot of land located within the original reservation, for \$2,000. This land was, along with sporadic monetary payments from the state, the sole compensation for the loss of the tribe's reservation.⁸⁰ This one-square-mile tract continues to this day to be held in trust for the tribe by the state, and it is where they presently reside.

Throughout the late 1800s and early 1900s, the Catawba Tribe sought to have the federal government assume responsibility for

newly created Trade and Intercourse Act of 1790. Yet the state made only infrequent attempts to protect the tribe and its lands. In fact, in 1808, South Carolina enacted a statute authorizing the leasing of Catawba lands; such a lease would be valid if not more than 99 years in duration and if the lease "was witnessed by the Commissioner." *Id.* at 43.

Another statute, enacted in 1812, declared that a leaseholder for 99 years could qualify as a freeholder!

74. *Id.* at 46-48 (Treaty at Nation Ford, Mar. 3, 1840, art. I).

75. *Id.* at 47-48 (Treaty at Nation Ford, Mar. 3, 1840, art. II). In addition, the state agreed in article II to pay the Indians \$2,500 at the time of removal, and \$1,500 cash per year for nine years thereafter.

76. *Hearings, supra* note 3, at 103.

77. Brief of Appellant, at 8-9, *Catawba Tribe*, 718 F.2d 1291.

78. *HISTORY, supra* note 8, at 50. It is the ratification and subsequent land transaction associated with this treaty that is the subject of the pending litigation. The treaty is (with some argument) in direct violation of the Non-Intercourse Act and satisfies the third element needed to prove a *prima facie* case under the Non-Intercourse Act.

79. *Id.* at 48-49. *See also Hearings, supra* note 3, at 103.

80. *Hearings, supra* note 3, at 104.

its welfare. Severe economic hardship and the motivation of the state to seek a final and permanent settlement became factors.⁸¹ Another effort was initiated in 1940, centering around a joint assistance program involving both governments. In a statement released on March 17, 1941, the state announced that it would condition its participation upon a release, and a quit-claim deed, by the tribe of its claims arising out of the 1840 treaty, in exchange for federal assistance.⁸² The Interior Department refused to agree to extinguish the tribal claim as a condition for bargaining.⁸³ South Carolina eventually backed down on its position, and this led to an agreement signed by the tribe, the Department of the Interior, and the state of South Carolina on December 15, 1943.⁸⁴

The 1943 agreement, known as the "Memorandum of Understanding," defined the responsibilities of all three parties in providing rehabilitative assistance to the tribe. The federal government agreed to provide certain services to the tribe (in the areas of health, education, and economic development opportunities), and the state in turn agreed to provide additional services and to purchase up to \$75,000 worth of land for the benefit of the tribe.⁸⁵ The state then acquired 3,434 acres of farmland in the vicinity of the 630-acre reservation (at a cost of \$70,000) and conveyed title to the Secretary of the Interior. The state did not, however, convey title to the 630 acres.⁸⁶

81. HISTORY, *supra* note 8, at 51-55. In 1904, Chief D.A. Harris retained legal counsel for the tribe in what evolved into a nine-year struggle with the federal and state governments, seeking redress for the loss of its reservation lands. Formal requests were submitted to the Commissioner of Indian Affairs and to the state, all of which resulted in little or no action.

In the 1920s and 1930s, several efforts were made to bring the Catawba Tribe under the guardianship of the United States through legislation. For example, in 1937 and 1939 legislation was introduced by South Carolina Congressman Richards that would allow for federal services, provided the state purchased the "new" reservation lands. This bill never made it out of committee because of opposition from the Department of the Interior and the Bureau of Indian Affairs, directed at the state's failure to provide agreed-upon services. *Id.*

82. *Id.* at 57.

83. *Id.*

84. *Id.* at 57-58. See also *Hearings, supra* note 3, at 106-07.

85. Notably absent from the memorandum is any provision aimed at extinguishing the Catawba Tribe's land claim. Thus it was apparent, from this and from the earlier negotiations, that none of the parties to the memorandum intended the establishment of the federal relationship to affect in any way the tribe's existing claim arising out of the 1840 treaty.

86. See *Catawba Tribe*, 718 F.2d 1291, 1293 n.4 (4th Cir. 1983).

With the advent of the termination policies of Congress in the early 1950s, the Bureau of Indian Affairs (BIA) appeared ready to designate the Catawba Tribe as a likely candidate for withdrawal of federal services. Minimal aid from the federal government coincided with tribal dissatisfaction over the inability of tribal members to secure financing for farm operations and home improvements and the tribe's subjection to federal restrictions on the alienation of any interest in the reservation lands.⁸⁷ These factors greatly contributed to the resulting unimproved and unproductive condition of the reservation.

In 1958 efforts at securing withdrawal of federal services to the Catawbas began in earnest with the appointment by the state of a legislative commission and another appointment by the BIA of a program officer to facilitate this withdrawal.⁸⁸ On January 3, 1959, the Catawba General Council enacted a resolution, drafted by the BIA, directing South Carolina Congressman Robert Hemphill to request Congress to remove the federal restrictions on their land. The resolution also specifically stated that nothing in the bill should affect the status of any tribal claim against the state of South Carolina.⁸⁹

Congressman Hemphill then asked the Department of the Interior to draft the "termination" act in a manner "that would accomplish the desires set forth within the Tribal Resolution."⁹⁰ Hemphill presented a draft of the bill to the tribe on March 28, 1959; the tribe approved the draft by a 40-17 vote. The bill was subsequently introduced to Congress on April 7, 1959 as H.R. 6128.⁹¹

At the hearings on H.R. 6128 before the House Committee on

87. *Hearings*, *supra* note 3, at 107-09. At this time, the tribal affairs were administered out of the Cherokee Agency in North Carolina, and annual federal expenditures for tribal services and administration amounted to no more than \$5,000 per year.

Chief Gilbert Blue contended, in his testimony before the House Committee on Interior and Insular Affairs in 1979, that the inability to secure financing was the sole factor, *id.* at 108, but many other factors apparently came into play as well.

88. *Id.* at 108. At a meeting of tribal, local, county, and state officials in October of 1958, Associate Commissioner of Indian Affairs Lee outlined to the tribe the mechanics of the federal withdrawal program. Numerous Catawba leaders expressed concern about the tribe's 1840 treaty claim against the state, but were repeatedly assured that "any claim the Catawbas had against the state would not be jeopardized by carrying out a program with the federal government" for the distribution of assets. *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1296 (1983).

89. *Id.* at 108-09.

90. *HISTORY*, *supra* note 8, at 59.

91. H.R. 6128, 86th Cong., 1st Sess. (1959).

Interior and Insular Affairs on July 27, 1959, Associate Commissioner of Indian Affairs Rex Lee testified that the Department of the Interior had drafted "a bill along the lines we thought the Indians had been discussing."⁹²

The bill was passed out of the Committee and on September 29, 1959, Congress enacted the Catawba Division of Assets Act.⁹³ The 1943 federal reservation was liquidated, the land sold or signed over to individual Catawbas, and the proceeds thereof directed to them as well. The 1842 state reservation of 630 acres, having never been incorporated into the federal reservation, remained unchanged, as did the tribe's relationship with the state of South Carolina.⁹⁴

Since that time, the Catawba Tribe has administered a number of programs for the social and economic benefit of its members.⁹⁵ Although the tribal constitution was revoked pursuant to the Division of Assets Act,⁹⁶ the tribal government, centering around the tribal council, the executive committee, and Chief Gilbert Blue, has remained intact.

In 1975 the tribal executive committee, having been advised that their situation was similar to that of the successful Passamaquoddy Tribe, sought legal assistance. After retaining legal counsel in May of 1976, Catawba leaders and counsel met with the Governor of South Carolina and the State Attorney General to discuss a possible out-of-court settlement.⁹⁷

On April 2, 1977, the general council of the tribe authorized its

92. *Hearings*, *supra* note 3, at 109.

93. 25 U.S.C. §§ 931-938 (1982).

94. *Hearings*, *supra* note 3, at 109.

95. *Id.* at 109-11. In 1975 the tribe incorporated under the laws of South Carolina as a nonprofit corporation in order to participate in some of the federal categorical assistance programs that were becoming available to Indian tribes through various agencies. The reservation has been designated by the Economic Development Administration as an "economic development area" and recently opened a new tribal center. Also, for the past few years the tribe has administered a program under the Comprehensive Employment and Training Act (CETA).

96. 25 U.S.C. § 935 (1981).

97. *Hearings*, *supra* note 3, at 111-12. On May 28, 1976, the executive committee retained the Native American Rights Fund of Boulder, Colo., as counsel. The members of the tribe were informed of the history of the claim and its present status, and in July, 1976, the tribe voted unanimously to direct the executive committee to pursue the claim with the state, the state legislature, the U.S. Department of the Interior, and the federal courts, if necessary. The March 2, 1977 meeting with South Carolina officials included negotiations for a new 20,000-acre reservation, a \$10 million tribal development fund, and federal recognition.

executive committee and attorneys by resolution to seek a congressional settlement of the claim, rather than litigate in federal court. The resolution, passed by the tribal members by a 102-2 vote, called for the settlement to establish a substantial reservation, to create a tribal development fund, and to reauthorize federal recognition in return for the tribe's release of its claims to occupied lands.⁹⁸

Within a month, a meeting was held in Washington, D.C., between the tribe, the South Carolina Attorney General, Congressman Holland, representatives of the White House, the Department of the Interior, and the Office of Management and Budget (OMB). The tribe thereafter advised the OMB that its claim was protected by the fifth amendment, in addition to asserting its bargaining position.⁹⁹

On August 30, 1977, after reviewing the tribe's request for more than a year, Interior Department Solicitor Leo Krulitz announced that Interior had requested that the Department of Justice initiate litigation on the tribe's behalf to recover possession of the 144,000 acres constituting the tribe's former reservation.¹⁰⁰ Based upon this, and a land-use planning study authorized by the tribal executive committee,¹⁰¹ the tribe received a commitment from Congressman Holland in December, 1977, to introduce legislation on their behalf.

It is important to note that a growing minority of tribal members were in favor of a strictly cash settlement, foregoing any interest in the creation of a federal reservation.¹⁰² This dissident

98. *Id.* at 112-13.

99. *Id.* at 113-14.

100. *Id.* at 115. A joint letter, drafted by Attorney General McLeod and Catawba attorneys, was then mailed to Congressman Holland, stating that they agreed the Catawba claim should be settled with federal money for a new reservation in York and Lancaster counties. These two parties disagreed on the size of the reservation, however, with the state asking for 4,000 square acres and the tribal attorneys arguing that a larger tract (about 32,000 acres) was necessary. At a tribal meeting soon thereafter, Holland reassured them that the guidelines of the April 2, 1977 resolution would be followed. The tribe voted 184-139 to endorse this.

101. W. SMITH & ASSOCIATES, PROPOSED CATAWBA INDIAN RESERVATION LAND USE ANALYSIS (Nov. 1977), reprinted in *Hearings, supra* note 3, at 251-326 [hereinafter cited as LAND USE ANALYSIS]. The purpose of the report was "to present the results of the analysis of lands within the 1763 Claim Area which are suitable for establishing an adequate land base for the Catawbias and which, therefore, could constitute a basis for reaching the (proposed) settlement." *Id.* at 116. Valuation of the claim was estimated at \$1.2 billion.

102. This group had become increasingly discouraged with the settlement negotiations over the past five years and wanted to opt out.

group, led by David Harris, was the first tribal association to actually use legal avenues to fight their claims, filing suit in the state courts on May 10, 1978.¹⁰³ The action was settled prior to trial in July, 1978, with a compromise that would allow these Catawbas to opt for cash payments in lieu of an interest in tribal property, once an agreement with the state and federal governments was reached.¹⁰⁴

On March 27, 1979, Congressman Holland introduced H.R. 3274. This legislation, according to Chief Blue, was apparently intended to be a vehicle for promoting further negotiations and the development of a specific settlement plan, for it contained few details of an actual settlement.¹⁰⁵

The bill, sent to the House Committee on Interior and Insular Affairs for hearings and a review, failed to reach the floor of Congress and was rejected by both the tribe and the state of South Carolina as being too general to resolve the substantive issues involved.¹⁰⁶

Settlement negotiations continued, however. On July 22, 1980, after a series of private sessions, a study commission headed by State Senator Coleman Poag unveiled another proposal that would authorize the Catawba Tribe to purchase as much as 4,800 acres from willing sellers for a new federal reservation. The settlement also included federal money, limited federal status and ser-

103. *Hearings*, *supra* note 3, at 115-17.

104. *Id.* at 117. The negotiating authority of the tribe for the land claim was expanded from the five-member tribal executive committee to include five representatives of those members desiring individual cash settlements.

105. *Id.* The actual amount of a cash settlement was left entirely to the discretion of the Secretary of the Interior; there was absolutely no mention of a new federal reservation, and no mention of reestablishing federal recognition of the tribe.

106. *Id.* at 125-28. During the course of the hearings before the House Committee on Interior and Insular Affairs on June 12, 1979, Chief Gilbert Blue announced that three reservation "plans" had been drawn up that he was aware of. One proposal was submitted by Wilbur Smith and Associates (*see* LAND USE ANALYSIS, *supra* note 101), one by the State Attorney General, and one by the tribe, calling for a 10,650-square-acre reservation (including the 630-acre reservation presently owned by the state).

A spokesman for the minority of Catawbas seeking cash settlements, Claude W. Ayers, also introduced a proposal favoring the creation of a \$30 million settlement fund, with tribal members on the membership roll allotted the right to elect either to take their pro rata shares of the fund, or to have them applied toward the creation of a new federal reservation. It was Ayers' contention that most of the tribal members would elect to take their pro rata share and avoid the complex and drawn-out legal proceedings that would inevitably result. *Hearings*, *supra* note 3, at 38-42.

vices, and \$1.35 million in state aid.¹⁰⁷ But just as suddenly as it had been announced, the negotiations fell through on October 26, 1980, when the state commission rejected the federal reservation element.¹⁰⁸

The tribe immediately filed suit in U.S. District Court on October 28, 1980, to recover the entire 144,000 acres in the targeted three-county area. The claim was based on violation of the Non-Intercourse Act, contending that the 1840 land transaction pursuant to the Treaty of Nation Ford had been consummated without the consent of the federal government.¹⁰⁹

On June 10, 1982, District Judge Joseph Willson granted the state's motion for summary judgment. He reasoned that the tribe could not make a *prima facie* case under the Non-Intercourse Act because not only were the Catawbias not a "tribe" within the meaning of the Act, but the trust relationship had terminated with the enactment of the Division of Assets Act.¹¹⁰ He also established a second bar to recovery by determining that the state statute of limitations concerning real estate applied.¹¹¹

The Catawba Tribe appealed that decision, and on October 11, 1983, the Fourth Circuit reversed Judge Willson's order granting the summary judgment. The court relied on the intent of Congress in enacting the "termination" legislation, along with judicial scrutiny of the plain language of the federal statute, in concluding that the tribe should not be precluded from attempting to make a *prima facie* case.¹¹²

107. The York Observer, Oct. 23, 1983, at 1, cols. 2-3.

108. *Id.* at 1, col. 3.

109. Catawba Indian Tribe v. South Carolina, No. 90-2050-0 (D.S.C., filed Oct. 28, 1980).

110. S.C. CODE ANN. § 15-3-340 (Law Co-op. 1962).

111. Judge Willson determined that pursuant to the language of the Division of Assets Act, the laws of South Carolina applied to the tribe as well as to its individual members. The state statute of limitations (with a ten-year limit) was thus tolled as of 1962, eighteen years before the filing of the instant litigation.

112. Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983). Said Judge Butzner for the court:

We conclude that the Catawba Indian Tribe Division of Assets Act of 1959 did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Non-Intercourse Act, or make the state statute of limitations applicable to the Tribe's claim. In short, the 1959 Act is neutral with respect to the Tribe's reservation claim. It neither confirms the claim nor extinguishes it.

Id. at 1300-01.

The case then took an interesting turn. The state, instead of appealing that decision, filed a petition for a rehearing en banc under rule 40 of the Federal Rules of Appellate Procedure. On December 20, 1983, the Fourth Circuit granted the motion and scheduled oral arguments to be heard before the eleven active court of appeals' judges for the first week of June, 1984.¹¹³

III. *Effect of the Division of Assets Act On the Catawba Tribe's Right to Sue Under the Non-Intercourse Act*

The termination policies adopted by Congress gained momentum in the early 1950s, with the express aim to "as rapidly as possible, make the Indians within the territorial limits of the United States, subject to the same privileges and responsibilities as are applicable to other U.S. citizens, and to end their status as wards of the United States."¹¹⁴ This program was viewed by the federal government as the most beneficial way to educate and "civilize" the Indians, by assimilation rather than by autonomous independence.

Federal courts have upheld Congress' general authority to enact termination legislation as an extension of its plenary power under the Constitution.¹¹⁵ The effect of termination on tribal status is explained in Cohen's treatise this way:

Termination legislation did not literally terminate the existence of the affected tribes. Further, its effect was not necessarily to

113. *Id.*, Petition for Rehearing and Suggestion of Rehearing En Banc, granted Dec. 20, 1983. The state of South Carolina asserts that the Fourth Circuit panel misinterpreted the plain language of the 1959 Catawba "termination act" with reference to prior legislative history and subsequent administrative construction. It contends also that the tribe does not now participate in a trust relationship with the federal government for purposes of the Non-Intercourse Act.

However, the state's petition for rehearing emphasizes greatly the status of the 27,000 to 40,000 property owners presently residing within the disputed tri-county area and the effects an adverse decision will have upon these people. See Brief for Appellee, *id.* at 1-2.

The "exceptional importance" standard of rule 35 contemplates cases of exceptional legal importance, rather than the present situation of the Tri-County Landowners' Association. Thus the court should focus upon the effect of the termination act, although equitable measures may be imposed.

The two court of appeals judges from South Carolina, Robert Chapman and Donald Russell, are likely to disqualify themselves, while the senior judge, Clement Haynsworth, Jr., is ineligible due to an amendment to the Appellate Rules. 28 U.S.C. § 46 (1982).

114. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1952).

115. *Otradovel v. First Wisconsin Trust Co.*, 454 F.2d 1258 (7th Cir. 1972); *Crain v. First Nat'l Bank*, 324 F.2d 532 (9th Cir. 1963). See cases cited *supra* notes 12-22, concerning Congress' general plenary power over Indians and Indian tribes.

terminate all of the Federal Government's relationship with those tribes. Tribal powers can be extinguished only by clear and specific Congressional action. Indian tribes can be recognized by the United States for some purposes but not for others.¹¹⁶

This simply follows a basic principle of American Indian law, that only an express act of Congress can abrogate inherent tribal rights.

Thus the issue arises as to the effect of termination legislation upon the tribes it was designed to terminate. Congress enacted a total of twelve "termination" statutes during the approximately fifteen-year period that these policies were advocated.¹¹⁷ The statutes varied in their terms, organizational aspects, and manner of application. The courts have had few opportunities to interpret the effects upon the tribes involved.

In examining the few litigated cases that have involved the above maxim, it is evident that certain Indian rights, implied or vested pursuant to an applicable treaty, will survive termination in the absence of express congressional action.

The benchmark for determining the effects of a termination act is the U.S. Supreme Court case of *Menominee Tribe v. United States*.¹¹⁸ Plaintiff tribe contended that even though hunting and fishing rights on the terminated reservation lands were not expressed in the treaty that originally created the reservation, these rights nonetheless survived the Menominee Termination Act of 1961.¹¹⁹ The Court agreed with this argument; relying on the fact that the word "treaty" did not appear in the Act, the Court refused to adopt a "backhanded" approach to terminating such rights, so inherently a part of the Indian culture.¹²⁰

116. COHEN, *supra* note 33, at 815.

117. 25 U.S.C. §§ 564-565g (1982); 25 U.S.C. §§ 677-677aa (1982); 25 U.S.C. §§ 691-708 (1982); 25 U.S.C. §§ 721-728 (1982); 25 U.S.C. §§ 741-760 (1982); Act of Aug. 1, 1956, ch. 843, 70 Stat. 893-96, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, § 1(b) (1), 92 Stat. 246; Act of Aug. 2, 1956, ch. 881, 70 Stat. 937-38, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, § 1(b) (2), 92 Stat. 246; Act of Aug. 3, 1956, ch. 909, 70 Stat. 963-65, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, § 1(b) (3), 92 Stat. 246; Act of June 17, 1954, ch. 303, 68 Stat. 250-52, *repealed by* Act of Dec. 22, 1973, Pub. L. No. 93-197, § 3(b), 87 Stat. 770; 25 U.S.C. §§ 931-938 (1982); 25 U.S.C. §§ 971-980 (1982); 72 Stat. 619.

118. 391 U.S. 404 (1967).

119. Act of June 17, 1954, ch. 303, 68 Stat. 250-2, *repealed by* Act of Dec. 22, 1973, Pub. L. No. 93-197, § 3(b), 87 Stat. 770.

120. 391 U.S. 404 (1967). The Supreme Court refused to imply any circumstances or intent of Congress, when it stated:

The Ninth Circuit, following this reasoning, has had two opportunities to interpret the effects of the Klamath Termination Act.¹²¹ In *Kimball v. Callahan (Kimball I)*,¹²² individual Klamath Indian tribal members sought a declaratory judgment as to their treaty rights to hunt, trap, and fish on their ancestral reservation. Years before, these plaintiffs had elected to withdraw from the tribe pursuant to the Act, exchanging their interest in tribal property for a cash settlement. The court held that the individuals retained these rights, notwithstanding their election to leave the tribe, free from any state game regulations, on former Indian land terminated by congressional act.¹²³

The Klamath Termination Act itself contained a provision that excepted fishing rights and privileges from enforcement of the Act;¹²⁴ however, the *Kimball I* court felt itself "compelled" by the conclusion of the *Menominee* Court to enforce their rights absent adverse congressional mandate and regardless of the excepting provision.¹²⁵

The Oregon Federal District Court buttressed this argument in 1979 in *United States v. Adair*¹²⁶ by interpreting the same termination act to have no effect on the treaty water rights necessary to carry on the activities dealt with in *Kimball I*.¹²⁷

The provision of the Termination Act (25 U.S.C. § 899) that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe" plainly refers to the termination of federal supervision. The use of the word "statutes" is potent evidence that no *treaty* was in mind.

We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists (see *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67), "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."

391 U.S. at 412-13.

The Court also noted that not only had the tribe been allowed to keep and enforce its tribal constitution, it had retained its original land base as well.

121. 25 U.S.C. §§ 564-565g (1982).

122. 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974).

123. 493 F.2d at 568-69.

124. 25 U.S.C. § 564m(b) (1982).

125. Defendants in *Kimball* argued that *Menominee* was distinguishable in two respects; the *Menominee* Termination Act gave no option to individuals to withdraw from the tribe and receive a cash settlement; and, although title to the reservation changed hands in *Menominee*, that tribe continued to occupy the same land before and after the termination act took effect. The Ninth Circuit rejected these arguments as inconsistent with the Supreme Court's requirement that Congress must clearly indicate when it intends to abrogate treaty rights. 493 F.2d 564 (9th Cir. 1974).

126. 478 F. Supp. 336 (D. Or. 1979).

127. The *Adair* court placed reliance on the 1864 treaty with the Klamath and Modoc

As recently as 1982, a termination statute was the subject of litigation. In *United States v. Felter*,¹²⁸ the Utah Federal District Court was faced with the effect of the Ute Termination Act¹²⁹ upon an individual tribal member's hunting and fishing rights. The court upheld the Indian's right to hunt and fish on former reservation grounds, in violation of state law, despite the absence of any express provision in the Act to this effect. The court found these rights to be personal in nature, neither "alienable, assignable, transferrable, or descendible."¹³⁰ More important, the *Felter* court coupled the issue of termination of the federal trust relationship with the recognition of tribal status, rather than mere eligibility for federal services.¹³¹ In addition, the *Felter* court cited *United States v. Heath* for the proposition that a termination act may sever the relationship between Indians and the federal government, but will not affect their anthropological status.¹³²

Indians, in which, when the government withdraws "land from the public domain and reserves it for a federal purpose, the government impliedly reserves appurtenant unappropriated water to the extent needed to fulfill the purposes of the reservation." *Id.* at 345. The termination act did not abrogate the Indians' water rights, and they are still entitled to "as much water on the Reservation lands as they need to protect their hunting and fishing rights."

128. 546 F. Supp. 1002 (D. Utah 1982).

129. 25 U.S.C. §§ 677-677aa (1982).

130. 546 F. Supp. 1002, 1023 (D. Utah 1982).

131. *Id.* at 1004. Said the Oregon Federal District Court:

It is important to note that "termination" does not mean that someone's identity as an Indian is ended [citations omitted]. Rather, what is terminated is (1) eligibility for federal services made available to those recognized as "Indian", and (2) the duties and powers vested in the United States regarding the management of their affairs, or their property. Termination legislation ends a relationship between the federal government and specific persons. It is a question of non-recognition or recognition at law of a status, not a denial of one's personal history or heritage.

See also *id.* at 1004 n.3:

Nor is "termination" necessarily the end of tribal existence. Even when Congress has enacted legislation calling for the dissolution of specific tribes, something not done by the termination acts, the continued existence of the tribes in spite of the legislation has led to a continuation of the federal-tribal relationship. See *F. Cohen, Handbook of Federal Indian Law* 272-273 (1942 ed.) If tribal existence is to end, it is for the Indians to end it.

132. 509 F.2d 16, 19 (9th Cir. 1974). In *Health* the Ninth Circuit dealt with the transfer of jurisdiction over the territory from the federal government to the state. The court, in affirming a district court conviction for voluntary manslaughter under state law, said:

The Klamath Termination Act . . . was intended to end the special relationship that had historically existed between the federal government and the Klamath Tribe. While anthropologically a Klamath Indian even after termination obviously remains an Indian, his unique status vis-a-vis the federal government no longer exists. Pursuant to

In reviewing these federal court decisions, it appears manifest that certain Indian rights, whether mentioned within an applicable treaty or simply implied (because their basic nature is so intertwined within the Indian culture), will survive even termination. Unless specific and direct federal action dictates otherwise, rights such as hunting and fishing will forever attach to the tribe and its members.

The federal trust relationship seems to encompass enforcement of these rights and involves a legal duty (although not as pronounced as before termination) to protect them. The federal trust relationship, therefore, is more complex than it may seem at first glance; it entails more than the mere providing of federal services and funds.

The First Circuit in *Passamaquoddy*, although not faced with a termination situation, declined to enumerate the specific contours of the federal trust relationship under the Non-Intercourse Act.¹³³ In Cohen's book, the point is made, however, that although the question has never been litigated, "the federal trust responsibility to protect these [tribal] resources, seems to continue, like the [treaty] rights themselves, despite the termination legislation."¹³⁴ Tribal existence appears to survive termination as well. In each of the previous cases, the standing of the tribe or individuals involved was never at issue.¹³⁵

Another factor that has attained prominence in this area of American Indian law is the doctrine of statutory interpretation known as *in pari materia*. In the situation concerning termination legislation, Public Law 280 achieves great significance as a "meaningful backdrop" against any ambiguous provisions of the

25 U.S.C. § 564g, Klamath Indians are subjected to state laws and are to be dealt with by the law no differently than any other citizen of a state.

133. 528 F.2d 370, 379 (1st Cir. 1975).

134. COHEN, *supra* note 33, at 812 n.11.

135. Pursuant to the trust responsibilities of the federal government, the tribe and its members have the right to file an action in federal court to have that government enforce rights not specifically abrogated by Congress. In *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979), defendants argued that the Klamath Tribe lacked standing to assert hunting and fishing rights on behalf of its members. The district court disagreed, stressing that since the tribe has the same treaty rights as the individual members, the tribe still maintains an interest even if it didn't have hunting and fishing rights of its own. See also *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979), *reh. denied*, 448 U.S. 911 (1979); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

termination act.¹³⁶ When this doctrine is applied, courts will not construe the two statutes independently but will interpret each with reference to the other (giving effect to the provisions of both acts).¹³⁷

Public Law 280 is a federal statute conferring on states extensive civil and criminal jurisdiction over Indian country, thus radically shifting the balance of jurisdictional power from the federal government to the states.¹³⁸ Originally, five (later six) states were named in the statute,¹³⁹ and any additional state may also adopt it with the consent of the tribes involved. It does not, however, alter or terminate the trust status of the tribes with the federal government, and it also does not per se end their sovereign immunity.¹⁴⁰

In *Menominee Tribe v. United States*, the Supreme Court determined that because the Menominee Reservation was still Indian country when Public Law 280 went into effect, the Law must be considered *in pari materia* with the Termination Act.¹⁴¹ Thus, taking the applicable sections of Public Law 280 into account, although federal supervision of the tribe was to cease and all tribal property was to change hands, the implied hunting and fishing rights "granted or preserved" by treaty survived termination.¹⁴² That Wisconsin was one of the states that had accepted Public Law 280 had no bearing on the outcome.

136. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, amended by 18 U.S.C. § 1162 (1982), 25 U.S.C. §§ 1321-26 (1982), and 28 U.S.C. § 1360 (1982).

137. *Menominee*, 391 U.S. at 410-12; *Kimball I*, 493 F.2d at 568-69; *Felter*, 546 F. Supp. at 1014-17. See also Reply Brief of Appellant at 11-12, *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983).

138. There are, however, significant areas not delegated to the states by the statute, particularly in the regulatory and tax fields. See COHEN, *supra* note 33, at 363.

139. These states are California (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation). 18 U.S.C. § 1162(a) (1982) and 28 U.S.C. § 1360(a) (1982). Jurisdiction was later conferred upon the Menominee Reservation, Act of Aug. 24, 1954, ch. 910, § 2, 68 Stat. 795, and the Alaska Territory, now the state of Alaska, 18 U.S.C. § 1162(a) and 28 U.S.C. § 1369(a) (1982).

Under 25 U.S.C. § 1326 (1982) (part of the Indian Civil Rights Act), enrolled tribal members within the affected area of Indian country must accept state jurisdiction by a majority vote of adults voting at a special election called by the Secretary of the Interior, the tribal council, or 20 percent of the enrolled adults.

140. See *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977) (involving county regulation in the form of civil laws of mobile homes on a reservation).

141. 391 U.S. 404, 410-12 (1967).

142. *Id.* at 411. The Supreme Court reasoned that:

Other cases involving termination legislation have applied the doctrine of *in pari materia* favorably to the Indians, stating that Public Law 280 is simply additional evidence that Congress did not intend to extinguish treaty or statutory rights "in the process of transferring supervision to the states in the first place."¹⁴³

Effect of the Non-Intercourse Act on the Catawba Nation's "Tribal Existence"

In its initial hearing of the case, the Fourth Circuit had no difficulty in finding that the Catawba Nation was still considered a "tribe" under the Non-Intercourse Act, notwithstanding the Division of Assets Act. Applying the *Montoya* definition, the court determined that:

Despite revocation of the Tribal Constitution, the Catawba Tribe continued as a body of Indians, united in a community under one leadership, and inhabiting a particular territory. Indeed, South Carolina to this date recognizes the Tribe's existence by continuing to hold a 630 acre reservation in trust for it.¹⁴⁴

Presently, the tribe continues to reside on the one-square-mile of land, about four miles south and east of Rock Hill, South Carolina, maintaining the land base that was a crucial factor in *Menominee Tribe*.¹⁴⁵ The tribal government, composed of the tribal council and the executive committee, continues to exercise sovereign authority over and to represent the 1,200 tribal members. The tribal chief, Gilbert Blue, has maintained that position since 1973. Racial intermarriage was once considered a problem (in reducing the number of fullblood Catawbas left on the reservation), but not nearly to the extent that the jury found in *Mashpee Tribe*.¹⁴⁶

Public Law 280 must therefore be considered *in pari materia* with the Termination Act. The two Acts read together mean to us that, although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954.

143. *Kimball I*, 493 F.2d at 567-69; *Felter*, 546 F. Supp. at 1014-17.

144. *Catawba Tribe*, 718 F.2d at 1298. See also *Montoya v. United States*, 180 U.S. 261 (1901).

145. 391 U.S. at 411-12 n.12.

146. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979). See *Charlotte Observer*, Jan. 17, 1982, at 48, cols. 1-2.

Revocation of the tribal constitution was pointed out by the dissenting justice in the Fourth Circuit panel decision as the deciding factor in his denying the Catawba Nation tribal status.¹⁴⁷ Indeed, this was considered by the courts in both *Menominee* and *Kimball I*, where the retention of plaintiff tribes' constitutions was relied on in declaring that tribal existence continued.¹⁴⁸ However, the *Montoya* definition makes no mention of a tribal constitution as a criterion; the closest analogy that can be made is "being united in one form of leadership or government," which the Catawbas have otherwise maintained.¹⁴⁹

The Fourth Circuit majority states that the federal government refused to include, within the 1943 Memorandum of Understanding (under which the tribal constitution was ratified), any clause that would effectively extinguish any claims the tribe might later have pursuant to the 1760 and 1763 treaties. Consequently, says the Court, "[I]t would be illogical, and indeed ironic, to hold, as South Carolina urges, that Congress intended revocation of the Constitution to defeat the same treaty claims that the parties to the Memorandum of Understanding had refused to extinguish."¹⁵⁰

The Fourth Circuit cannot deny the realization that in each case where a federal court has considered the effect of termination legislation on tribal existence, it was concluded that there was no impact.¹⁵¹ The Court also cannot deny that a "tribe" of Indians under the Non-Intercourse Act may include those that do not have a federally recognized form of government (pursuant to treaty, statute, or executive order).¹⁵² Hence, the Catawba Tribe should not be denied access to the courts based on a failure to fulfill the first element under the Non-Intercourse Act.

147. *Catawba Tribe*, 718 F.2d at 1301-02. The sole dissenting judge (Judge Hall), made his position clear:

In my view, the revocation of the Tribe's constitution unequivocally ended the Catawbas' existence as a political or governmental entity under federal law and prevents it from having the necessary standing to bring this action under the Nonintercourse [sic] Act. . . . One of these requirements [under the Act] is that plaintiff show that it is or represents an Indian tribe. In my view, the revocation of the Tribe's Constitution makes it impossible for plaintiff to establish this necessary element of a prima facie case.

148. See *supra* notes 120, 123 and accompanying text.

149. See generally *supra* notes 95-108, 146 and accompanying text.

150. *Catawba Tribe*, 718 F.2d at 1298.

151. See *supra* notes 131-135 and accompanying text. It goes without dispute that many factors will be looked at in the case of "tribal existence"; however, courts have been lenient in allowing the "terminated" tribes to come forward with their claims.

152. See *supra* notes 50-53 and accompanying text.

Effect of the Non-Intercourse Act Upon the Federal Trust Relationship

The issue of whether a trust relationship, within the meaning of the Non-Intercourse Act, still exists today between the federal government and the Catawba Tribe is a much more serious one. There is no dispute that the Non-Intercourse Act, by its mere enactment, created a trust relationship with the tribe.¹⁵³ In 1959, however, the Catawba Division of Assets Act was passed. The pertinent section of that Act reads as follows:

The constitution of the tribe, adopted pursuant to Sections 461, 462, 463, 464, 465, 466, 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to *them*, and the laws of the several States shall apply to *them* in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.¹⁵⁴

The Fourth Circuit relied on two factors in ruling that the trust relationship still exists. First, it reasoned that the *res* of the trust, the 630-acre plot, was still intact and currently occupied by the tribe, and this "right of occupancy" was honored by the United States when it took over all claims formerly held under the Crown. Thus, it could be abrogated only by express congressional action (which the Division of Assets Act did not do).¹⁵⁵

Second, the court looked to statements made by the Bureau of Indian Affairs when negotiations for the termination act were still in progress. The Bureau had assured tribal members that any pro-

153. *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). Although the federal government had not otherwise dealt with plaintiff tribes before that litigation, the First Circuit clarified the position of the tribes:

[O]nly the Non-Intercourse Act is the source of a "trust relationship", and neither the decision below, nor our own is to be read as requiring the Department of the Interior to look to objects outside the Act in defining its fiduciary obligations to the Tribe . . . A fiduciary relationship in this context must indeed be based upon a specific statute, treaty or agreement which helps define, and, in some cases, limit the relevant duties; but, as we have held, the Non-Intercourse Act is such a statute.

154. 25 U.S.C. § 935 (1982) (emphasis added).

155. *Catawba Tribe*, 718 F.2d at 1298.

gram carried out by the federal government concerning the distribution of assets would not affect any claim the tribe might later have against the state involving the "original" reservation.¹⁵⁶

It is not at issue in this situation that the "special services," formerly provided by the federal government, were to be terminated both as to the tribe and as to its individual members.¹⁵⁷ But, as seen in prior case law involving termination acts, this is only one facet of the trust relationship.

One purpose of the Non-Intercourse Act was to assert the preemptive effect of federal law concerning land transactions and to acknowledge and guarantee each tribe's right to the occupancy of their lands. A duty is thus vested with the federal government to acknowledge and protect this right.¹⁵⁸

The Fourth Circuit stresses the Catawbas' "right to occupancy" to the 630 acres, upon which the tribe has resided for the past 141 years, as evidence of the continuing relationship.¹⁵⁹ The state itself openly declared in 1975 that it has owned this land uninterruptedly during this entire period, so there is no dispute as to who has retained continuous fee title.¹⁶⁰

If the court en banc upholds the panel court's decision and reasoning, a new dimension will have been added to further define the quality of the federal trust relationship. The previous cases dealing with termination all relied to some degree on treaty rights (implied or expressed). Does the "right of occupancy" under federal law fall within this same category?

The issue presented, then, is whether the Division of Assets Act is the "express act of Congress" needed to extinguish this right to occupancy, and if not, is this "right" valid evidence of a continuing trust relationship within meaning of the Non-Intercourse Act? Indeed, what was the intent of Congress in enacting the Catawba termination act?

It should be noted at this juncture that although Congress ratified the termination acts with a basic objective in mind,¹⁶¹ each act was tailored to fit the particular circumstances surround-

156. *Id.* at 1299-1300. See also *id.* at 1296 n.9, concerning a memorandum from a BIA program officer involving these statements.

157. See 25 U.S.C. § 935, cl. 1 (1982).

158. See cases cited *supra* notes 38-39, 57.

159. *Catawba Tribe*, 718 F.2d at 1298-1301.

160. 156 Op. Att'y Gen. S.C. 3988 (1975). See also *Catawba Tribe*, 718 F.2d at 1293 n.3.

161. See H.R. Con. Res. 108, 83d Cong., 1st Sess. (1952).

ing the tribe affected. Legislative history supports this theory but, in addition, scrutiny of the section of each act where termination of the federal trust relationship was involved reveals that Congress utilized the same pattern of statutory language to enforce termination of the relationship. This was in the form of three clauses; the first clause pertained to termination of the "special services," the second related to the inapplicability of federal law, and the third discussed the substituted applicability of "the laws of the several states."¹⁶² These three clauses varied greatly in their application to the tribe, the individual tribal members, or both, and should be taken as additional evidence that Congress took into consideration each tribe's specific social and economic situation.

Two of the twelve termination statutes are, in every respect, explicitly directed at both the tribe and its members. The major purpose of the Alabama-Coushatta Termination Act was to follow, as nearly as possible,¹⁶³ the objectives of House Concurrent Resolution 108, concerning federal supervision and control.¹⁶⁴ A resolution adopted by the tribe on February 13, 1953, urged that the Secretary of the Interior be required "to recommend the necessary legislation that would accomplish a complete transfer of trust responsibilities" from the federal government to the state of Texas.¹⁶⁵ This is evident from the plain language of

162. 25 U.S.C. § 564q (1982); 25 U.S.C. § 677v (1982); 25 U.S.C. § 703(a) (1982); 25 U.S.C. §§ 722, 726 (1982); 25 U.S.C. § 757(a) (1982); Act of Aug. 1, 1956, ch. 843, § 13, 70 Stat. 896, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, § 1(b) (1), 92 Stat. 246; Act of Aug. 2, 1956, ch. 881, § 3, 70 Stat. 937, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, § 1(b)(2), 92 Stat. 246; Act of Aug. 3, 1956, ch. 909, § 8, 70 Stat. 964, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, § 1(b) (3), 92 Stat. 246; Act of June 17, 1954, ch. 303, § 10, 68 Stat. 252, *repealed by* Act of Dec. 22, 1973, Pub. L. No. 93-197, § 3(b), 87 Stat. 770; 25 U.S.C. § 935 (1982); 25 U.S.C. § 980 (1982); 72 Stat. 619, § 10(b).

163. 25 U.S.C. § 721-728 (1982).

164. The enactment of S. 2744 would carry out the sense of Congress, as expressed in House Concurrent Resolution 108, concerning the termination of Federal supervision and control over the Indian tribes and individual members thereof located within the state of Texas. This bill is also in accord with the policy of the Department of the Interior for a termination of federal supervision and control over the affairs of the Indian tribe and its members whenever feasible. . . . This bill provides for the issuance of a proclamation at the time of such conveyance, declaring termination of the Federal trust relationship to these Indians, and provides that from that date on they will not be entitled to services from the United States because of their status as Indians. . . .

H.R. REP. No. 2491, 83d Cong., 2d Sess. 3119, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3119-20.

165. *Id.* at 3122.

the resulting statute; the clauses terminating federal services, determining federal law to be inapplicable, and making state law controlling are directed at both the tribe and its individual members.¹⁶⁶

Similar objectives were sought in the enactment of the termination act of the Ponca Tribe of Nebraska.¹⁶⁷ This is manifest, again, by the plain language of the statute, where all three clauses applied to both the tribe and its members.¹⁶⁸

Two more termination statutes, however, depict just the opposite situation. The three clauses contained within the provision of the California Rancheria Act of 1958 pertaining to termination of the federal trust relationship¹⁶⁹ apply only to the individual Indians.¹⁷⁰ This may have been due in part, however, to the great difficulty Congress had in determining actual "tribes" in that situation.¹⁷¹

The termination provision of the Ute Termination Act also applies only to its individual tribal members.¹⁷² This Act was designed to separate and distribute the assets (in the form of stock shares) of the mixed-blood tribal members, and to terminate any relationship those Indians had with the tribe (while leaving the fullblood Utes unaffected).¹⁷³ The Supreme Court made it clear in *Affiliated Ute Citizens of Utah v. United States*¹⁷⁴ that this Act

166. 25 U.S.C. §§ 722, 726 (1982).

167. 25 U.S.C. §§ 971-980 (1982).

168. 25 U.S.C. § 980 (1982).

169. Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619.

170. Pub. L. No. 85-671, § 10(b).

171. S. REP. NO. 85-1874, 85th Cong., 2d Sess. 3 (1958). See also Reply Brief of Appellant at 6 n.6, *Catawba Tribe*, 718 F.2d 1291. The Act, involving forty-one reservations or rancherias located in California, constantly makes reference to Indians, and not one mention of the word "tribe." It did not even deal with tribal assets because the "groups were not well-defined," and the lands had been acquired for the Indians generally rather than for specific groups.

172. 25 U.S.C. §§ 677-677aa, 677v (1982).

173. In *Affiliated Ute Citizens v. United States*, the Court wrote:

After each mixed-blood had received his distributive share, directly or in whole or in part through the device of a corporation or other entity in which he had an interest, federal restrictions were to be removed except as to any remaining interest in Tribal property, that is, the unadjudicated or unliquidated claims against the United States, gas, oil, and mineral rights, and other tribal assets not susceptible of equitable and practical distribution. . . . The Secretary of the Interior then was to issue a proclamation "declaring that the Federal trust relationship to such individual is terminated." [Citations omitted].

406 U.S. 128, 135 (1972). The Act also allowed the mixed-bloods to organize, adopt a constitution and bylaws, and organize in a group.

174. 406 U.S. 128 (1972).

did not purport to terminate the trust status of the undivided assets, which remained tribal property.¹⁷⁵ The district court in *United States v. Felter* confirmed this to be the policy of the Act in rendering its decision.¹⁷⁶

As to seven of the remaining eight termination statutes, the first two clauses apply only to the individual tribal members, while the third clause (applicability of the "laws of the several states") applies to both the tribe and its members.¹⁷⁷ The Menominee and Klamath termination acts fall into this third category.¹⁷⁸ The Supreme Court stated that the purpose of the Menominee act was to "provide for the orderly termination of federal supervision over the property and members of the Tribe." The Secretary of the Interior had in fact transferred the real and personal property of the tribe to Menominee Enterprises, Inc. (the incorporated tribe), and the state integrated the former reservation into its county system of government.¹⁷⁹

The Ninth Circuit, in *Kimball v. Callahan (Kimball II)*,¹⁸⁰ stated that the purpose of the Klamath act was to "terminate federal supervision over the trust and restricted property of the Klamath Tribe of Indians, to dispose of federally owned property acquired or withdrawn for the administration of Indians' affairs, and to terminate federal services furnished the Indians because of their status as Indians."¹⁸¹ Each member of the tribal roll had to elect whether to take his interest in tribal property in cash or to remain in the tribe and "participate in a nongovernmental Tribal management plan."¹⁸²

However, the third clause within these two acts, stating that state law shall apply to both the tribe and its members, seems to

175. *Id.* at 133-39.

176. *Felter*, 546 F. Supp. at 1005-07.

177. See statutes cited *supra* note 162.

178. Act of June 17, 1954, ch. 303, 68 Stat. 250-52, *repealed by* Act of Dec. 22, 1973, Pub. L. No. 93-197, § 3(b), 87 Stat. 770; 25 U.S.C. §§ 564-565g (1982).

179. In *Menominee*, Wisconsin questioned whether the new corporation, to which all the tribal assets were transferred pursuant to the termination act, was the "successor entity" to the tribe and the present holder of the fishing and hunting rights. The Supreme Court declined to answer, and reserved the question of who were the actual "beneficiaries" of the rights. 391 U.S. 404, 408-10 (1968).

180. 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1979).

181. *Id.* at 567.

182. *Id.* See also, 25 U.S.C. § 564e(c) (1982). Of the 2,133 Klamaths on the final tribal roll, 1,660 elected to withdraw from the tribe, take their interest in cash, and for all intents and purposes "sell" their membership.

have no effect at all, at least upon that facet of the trust relationship protecting the treaty hunting and fishing rights of the tribes. In both cases, state game regulations and restrictions did not apply.¹⁸³

The twelfth act is the Catawba Division of Assets Act.¹⁸⁴ A number of sources are available to aid in discerning the intent of Congress in creating this legislation, and all appear to support a common inference: Congress intended to divide the tribal assets among the individual members, without affecting any claim the tribe may later have against the state. The earlier reference to the representations made by the BIA, assuring tribal members that such legislation would have no effect on claims against the state, is one such event that can support this inference.¹⁸⁵ Further, the plain wording of the January 3, 1959 tribal resolution, which appointed Congressman Hemphill to draft legislation for the distribution of tribal assets, specifically conditioned tribal support of such legislation on leaving the treaty reservation claim unaffected.¹⁸⁶ The House of Representatives and the Senate Committee reports both stated that the purpose of H.R. 6128 (the future Division of Assets Act) was only to "provide for the division of assets of the Catawba Tribe of South Carolina, among its enrolled members, in approximately equal shares."¹⁸⁷ The correspondence from then-Assistant Secretary of the Interior Roger Ernst to House Committee on Interior and Insular Affairs Chairman Wayne Aspinall also stated that the major objective of the bill was to divide those assets and to lift all federal restrictions upon the Indians concerning their land.¹⁸⁸

183. See Act of June 17, 1954, ch. 303, 68 Stat. 252, § 10 (in effect at the time the Menominee Tribe filed their lawsuit): "and the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within the jurisdiction." See 25 U.S.C. § 564q (1982) (the Klamath Termination Act): "and the laws of the several States shall apply to the Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."

184. 25 U.S.C. §§ 931-938 (1982).

185. *Catawba Tribe*, 718 F.2d at 1296 n.9.

186. HISTORY, *supra* note 8, at 59 (text of the resolution). The tribe authorized Hemphill to integrate certain provisions within the bill to be put before Congress, including in pertinent part, "to do all things necessary to accomplish the purposes of this legislation at no cost to the Catawba Indians or claim against their assets, and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe."

187. S. REP. NO. 863, 86th Cong., 1st Sess. 1 (1959) reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2671, 2672.

188. H.R. REP. NO. 910, 86th Cong., 1st Sess. 2, reprinted in 1959 U.S. CODE CONG.

In the face of this evidence, the state is hard pressed to contend that the intent of Congress was to effectively terminate all relations with the tribe, end its existence, and sever the trust relationship created by the Non-Intercourse Act.

South Carolina argues that the Division of Assets Act covered the entire reservation occupied by the tribe in 1959 (the 630 acres, plus the 3,434 acres purchased by the state for the federal government, pursuant to the 1943 memorandum).¹⁸⁹ Yet, when the dust cleared and the assets were divided among the individual members, the 630 acres remained intact, owned by the state in trust for the tribe. Although the land is not owned by the United States, it is suggested that a duty seems nevertheless to remain with the federal government to protect the right of occupancy still held by the tribe.¹⁹⁰

The state argues further that state law now applies both to the tribe and its individual members by the terms of the third clause within the provision discussing the federal trust relationship, so that the state statute of limitations concerning real estate transactions precludes the tribe's claim altogether.¹⁹¹ It is evident that no termination statute is worded so poorly as the one involving the Catawba Tribe, with particular attention focused on the second and third clauses.¹⁹² The key seems to be the correct interpretation of the word "them." To whom does "them" refer? Does the term encompass tribal members individually or collectively as a tribal group? Only one other such statute, the California Rancheria Act, utilizes the word "them" in such a manner. In that

& AD. NEWS 2671, 2673. Ernst wrote that:

The bill closes the membership roll, and provides for the distribution of all tribal property among the members in approximately equal shares. Members who have assignments of land from the Tribe, or members of their families, are given the right to select the assignments as parts of their distributive shares. The remainder of the Tribal property will be sold and the proceeds of the sale will be distributed. Any property that is not sold within two years will be conveyed to a trustee for liquidation and distribution. When the program is completed the Catawba Indians will cease to be subject to the Federal Indian laws, *but their status and rights under South Carolina law will not be affected.* [Emphasis added.]

189. See Brief of Appellee at 37-40, *Catawba Tribe*, 718 F.2d 1291.

190. See *supra* text at notes 40-64.

191. See Brief for Appellee at 18-30, *Catawba Tribe*, 718 F.2d 1291. See also the South Carolina statute of limitations, which reads as follows: "No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the Plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of this action." S.C. CODE ANN. § 15-3-34 (Law Co-op 1962).

192. 25 U.S.C. § 935 (1982).

situation, however, there is no doubt "them" referred only to individuals.¹⁹³ From the above investigation of Congress' legislative intent, it would appear that in the Catawba Act, "them" meant that state law applied only to individual Catawbas to preserve their claims against South Carolina.

What if the Fourth Circuit Court sitting en banc finds that state law applies to the tribe as well? It is contended here that the tribe has two strong arguments in support of its theory that the tribe's "right to occupancy" is valid evidence of a continuing federal trust relationship that has survived the Division of Assets Act.

First, the doctrine of *in pari materia* should apply to a tribe's "right to occupancy" in the same manner as it applies to treaty hunting and fishing rights. The applicable section of Public Law 280 states as follows:

Nothing in this section shall authorize the *alienation*, encumbrance, or taxation of *any real or personal property*, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.¹⁹⁴

193. 72 Stat. 619, § 10(b) (1983). The pertinent section states:

After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

Although there has been litigation involving this termination act, the issue was due process in the administration of the Rancheria Act, rather than mere interpretation. *Duncan v. United States*, 597 F.2d 1337 (Ct. Cl. 1979), *vacated* 446 U.S. 903 (1980); *Knight v. Kleppe*, No. C-74-0005 WTS (N.D. Cal. Jan. 23, 1976), *reprinted in part* at 3 INDIAN L. REP. g-50 (1976).

194. 18 U.S.C. § 1162(b) (1982); 25 U.S.C. §§ 1321(b), 1322(b) (1982); 28 U.S.C. § 1360(b) (1982) (emphasis added).

Within this section is the same policy that is the foundation for the Non-Intercourse Act. The federal courts have consistently construed this section *in pari materia* with the termination statute at issue, and in each situation concerning hunting and fishing rights, the courts have upheld those Indian rights. Alienation of real property is included within this section; therefore, the doctrine should apply to "rights to occupancy" as well.

Second, the Catawba Tribe's "right to occupancy" to both the 630 acres and the 144,000 acres should be equated with treaty hunting and fishing rights as deserving protection under the Non-Intercourse Act. In *Menominee*, the issue was implied treaty rights. In *Kimball*, it was express treaty rights to hunt and fish. In *Adair*, it was implied water rights related to the rights protected in *Kimball*. In each case, the provision in the termination act eliminating the federal trust relationship specifically stated that state law was to apply to the tribe as well as to the individual Indians. Yet, in each case, state regulations were held not to apply.

The Catawba Tribe has resided on the same parcel of state-owned land for 141 years. It has resided in the same area since "time immemorial" and had its "right to occupancy" officially recognized by England in the 1760 and 1763 treaties. The federal government maintains a duty to protect this right stemming from its position as guardian and pursuant to its plenary power over Indian tribes in general. The Division of Assets Act did not explicitly mention or even refer to the 630-acre tract; absent such an express act of Congress, this right to occupancy survives the effects of the termination act.

South Carolina cites the Supreme Court case of *Schrimpscher v. Stockton*¹⁹⁵ and its progeny for the proposition that the state statute of limitations begins to run once the federal restrictions on the alienation of Indian land have been lifted.¹⁹⁶ The state's argument, however, assumes that the federal trust relationship between the tribe and the federal government has been dissolved. The argument also assumes that the 1959 Division of Assets Act impliedly ratifies the 1840 Treaty at Nation Ford, which is the alleged violation of the Non-Intercourse Act—the subject of this litigation.

195. 183 U.S. 290 (1901). In *Schrimpscher*, the Indian heirs of a Wyandotte Indian sued to recover lands their predecessor had conveyed to the defendants. The conveyance had been consummated when there had been a restriction on alienation. A subsequent treaty had been ratified, however, that lifted all restrictions. The Supreme Court held that the plaintiffs were barred by the Kansas statute of limitations.

196. *Catawba Tribe*, 781 F.2d 1291, 1301-03 (1983) (Hall, Circuit Judge, dissenting).

The Fourth Circuit has applied the *Schrimpscher* line of reasoning in *United States v. 7,405.3 Acres of Land*.¹⁹⁷ This case concerned an 1875 grant of land in North Carolina. The court made it clear that not only will state defenses such as adverse possession and a statute of limitations not apply to a valid Non-Intercourse Act claim, but that operation of state law cannot make valid an otherwise void transfer of Indian lands.¹⁹⁸ This reasoning has never been applied to the effects of a termination act, but it would appear that if a trust relationship still exists, once a violation of the Non-Intercourse Act is manifest no subsequent state act will rectify it.

This, of course, creates a circular argument because application of state law will hinge on the Fourth Circuit's en banc determination on the trust relationship issue. If such a relationship is held to exist today, not only will the tribe have proved a prima facie case under the Non-Intercourse Act, but application of the state statute will be precluded as well. From the qualities present within the Catawba Tribe's "right to occupancy," this should be the case.

Assuming a favorable verdict is rendered for the tribe, additional conflicts will still require resolution. Continued litigation to address these issues would seem to be the least beneficial alternative. The tribe needs assistance for its twelve hundred members, who live in severe poverty and economic depression on its one-square-mile of unproductive land; the state is in jeopardy of losing a 225-square-mile resort area to the tribe and the federal government; and the present landowners, through the Tri-County Landowner's Association, are concerned with the current encumbrance on their otherwise marketable land title and are threatened with the possibility of relocation.

The door is not yet closed to the possibility of a legislative settlement, even though H.R. 3274 failed to pass within the House Committee. Appropriate legislation could firmly delineate the duties, responsibilities, and limitations of all parties involved. Congress has codified settlement acts on at least three occasions, with the settlements varying in the amount of control retained by the tribe and the resulting organizational structure.¹⁹⁹

197. 97 F.2d 417 (4th Cir. 1938).

198. *Id.* at 422. See *supra* note 42.

199. See, e.g., Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-1628 (1982). Congress determined that the Alaska natives would receive fee title to more than 40 million acres of land, payments from the United States Treasury of \$460 million over

The Catawba Tribe, with the exception of the faction seeking a strictly cash settlement, has remained firm as to what should be incorporated into any settlement. Reinstatement of federal recognition is one aspect that should be incorporated into the settlement, with powers of self-government over the reservation and its members.²⁰⁰ A second aspect is the complete extinguishment of all land claims by the tribe and the United States. A third is the establishment of a settlement fund in order to cover: (1) purchasing a feasible reservation site (proposed size was 10,650 acres); (2) establishing a tribal development fund of approximately \$5 million; and (3) adequate funds to pay off those Catawbans seeking to exchange their interest in tribal property (and tribal membership) for a cash settlement.²⁰¹

The final condition is a jurisdictional agreement entered into by the tribe, the federal government, and the state of South Carolina, involving both civil and criminal matters and an enforceable regulatory network.²⁰² As it now stands, the Division of Assets Act requires clarification with respect to application of state law to the tribe.

an eleven-year period (1972-1983), and royalties of 2% up to a ceiling of \$500 million, on mineral development. In addition, Congress mandated that the natives involved, organized as groups or eligible through the village they resided in, would have to incorporate under state law before any benefits could be received.

See also Rhode Island Indian Land Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716 (1982), enacted as a direct result of the litigation between the Narragansett Tribe and the state. The tribe was awarded \$3.5 million plus certain lands (not named directly in the Act), and authorized to incorporate under state law, holding their lands in the same manner a corporation would. The settlement lands, according to the Act, are to be subject to state civil and criminal jurisdiction. Concerning the federal trust relationship, the Act states that the United States shall have no further duties or liabilities to the tribe, their corporation, or their lands, other than implementing the settlement legislation.

See also Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1982). The settlement consisted of two sets of legislation, one federal and one state.

The federal statute established two separate trust funds; in addition, the existing holdings of the Passamaquoddy and Penobscot tribes, together with the first 150,000 acres acquired for each tribe with funds from the land acquisition fund, were to be held in trust by the United States. However, the Act abandoned the corporate structure in favor of a modified plan to retain tribal sovereignty.

200. 25 U.S.C. §§ 861-861c (1982); 25 U.S.C. §§ 903-903f (1982). See also *Hearings*, *supra* note 3, at 122-32.

201. *Hearings*, *supra* note 3, at 124.

202. *Id.* at 124, 130-32. Chief Gilbert Blue testified at the 1979 House Committee hearings that the tribe favors a regulatory pattern not unlike that established by Public Law 280. The tribe would reserve the right to regulate the use of reservation lands, to license and to tax reservation businesses, as well as to retain access and riparian rights to the Catawba River, pursuant to state law.

A final option open to the Catawba Tribe is whether to follow the lead of other tribes in adopting a more formal corporate structure,²⁰³ not only as a means of control of their assets but as a means of compromise. The Catawbas presently maintain non-profit corporate status; however, representatives of the Tri-County Landowners' Association have advocated a more rigid, nonfederally recognized structure.²⁰⁴ It has been established many times that the United States cannot deal with an Indian tribe solely on a racial basis, but must view the tribe as a separate political entity. The tribe, in choosing such a corporate form of existence, will be denied that status and will lose many of the advantages enjoyed by retaining it.²⁰⁵

Conclusion

Catawba Indian Tribe v. South Carolina represents a classic case of first impression for the federal courts in determining the effects of a termination act upon an Indian tribe's standing to sue under the Non-Intercourse Act. Each termination act was executed for a particular purpose, focusing on the circumstances of the tribe in question. However, because our system of jurisprudence has not been afforded many opportunities to test the legal effect of these acts, great care must be taken to ensure that the intent of Congress is enforced, particularly where the terms of the statute are highly ambiguous and subject to erroneous interpretation.

203. See 43 U.S.C. §§ 1601-1628 (1982); 25 U.S.C. §§ 1701-1716 (1982); 25 U.S.C. §§ 1721-1735 (1982). See also discussion, *supra* note 199. A comprehensive examination of South Carolina's corporation statutes, including nonprofit status, is not included within this article.

204. The York Observer, Oct. 23, 1983, at 1, col. 1; at 4, col. 1. Lewis Whisonant, president of the Tri-County Landowners' Association, remarked during an interview:

Back in 1980, that's what really brought those talks down, that one word ["federal"]. As far as I'm concerned, if they would drop the word "federal" and be like a corporation, if they could buy land on the open market and be subject to state and federal laws like everyone else and pay taxes, I personally wouldn't have any question about it.

205. For example, tribal governments generally enjoy sovereign immunity from actions by tribal members. The corporation, however, is not always immune from the derivative actions of its shareholders, and the officers and directors may be held liable for breaches of their duties of loyalty, good faith, and reasonable care.

The tribe, more importantly, is a form of governmental entity occupying unique status under the Constitution, with certain inherent powers to act and govern its people, land, and other interests. The corporation, on the other hand, is a creature of state statute, subject to state laws and limitations.

If any duty remains with the federal government to protect the rights of a "terminated" tribe, it will be based on a continuing trust relationship. The Non-Intercourse Act, by its ratification in 1790, created such a legally enforceable relationship. Litigation such as that in *United States v. Candelaria* and *Passamaquoddy Tribe v. Morton* has been instrumental in helping to define this relationship in general. For the most part, however, courts have shied away from actually determining the qualities and limits of the relationship.

The Fourth Circuit is in a unique situation. When the doctrine of statutory interpretation known as *in pari materia* is applied to two acts following the same scheme, both statutes involved are construed with respect to each other, to get a better understanding of both. In this case, however, the situation arises where two statutes with opposite objectives clash, and the Fourth Circuit is thus presented with an opportunity to determine the contours of the trust relationship inherent in both legislative acts. If the court grants the Catawba Tribe standing, it will illustrate the far-reaching effect of the Non-Intercourse Act upon tribal dealings with the individual states.

It can already be seen that, in establishing a *prima facie* case under the Non-Intercourse Act, tribal existence and an identifiable land base are but two elements constituting evidence that a trust relationship exists. However, in determining the residual effect of the federal trust relationship under the Non-Intercourse Act, after attack by another statute, the parameters of the relationship can be better defined for future Non-Intercourse Act claims.

Editor's Note: There have been two recent developments in the continuing litigation discussed in this Note concerning the Catawba Tribe and the Oneida Nation.

On August 17, 1984, the Fourth Circuit Court of Appeals, sitting en banc, adopted the panel decision in *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983). The per curiam and concurring opinions are located at 740 F.2d 305 (4th Cir. 1984). South Carolina then filed a petition for certiorari with the United States Supreme Court. The Court invited the Solicitor General to file a brief expressing the views of the United States on the certiorari decision. *South Carolina v. Catawba Indian Tribe*, 105 S.Ct. 899 (1985). At this writing, the parties are awaiting oral argument before the Court.

In *Oneida Indian Nation v. County of Oneida*, 444 U.S. 661 (1974) (Oneida I), discussed in the Note text accompanying note 59, the Supreme Court decided that the Oneidas stated a claim for possession of the land under federal law and remanded the case to the federal district court for trial. The district court then found the defendant counties liable for damages for wrongful possession of the Oneida lands, and ruled that the state of New York, a third party defendant, must indemnify the counties. 434 F. Supp. 527 (N.D.N.Y. 1977). The Second Circuit Court of Appeals affirmed both the liability and the indemnification. 719 F.2d 525 (2d Cir. 1983). On appeals by both the counties and state, the Supreme Court affirmed in part, holding that the Non-Intercourse Act did not preempt the tribes' right of action under the federal common law. The Court, however, found there was no ancillary jurisdiction in the federal courts over the indemnity question. *County of Oneida v. Oneida Indian Nation*, 105 S.Ct. 1245 (1985).