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Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Company: When Dependent Indian Communities Fall Within Indian Country

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SPECIAL FEATURES

NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND V. NARRAGANSETT ELECTRIC COMPANY: WHEN DEPENDENT INDIAN COMMUNITIES FALL WITHIN INDIAN COUNTRY

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I. Introduction

One of the most important, although often confusing concepts of Indian law is "Indian country." The concept is important to understand because tribes which lie within recognized Indian country are granted the power to govern themselves[1] and generally[2] exclude the enforcement of state law within the territory.[3] Furthermore, tribal members who reside within Indian country are exempt from state income and property taxes; however, tribal members are still subject to the jurisdiction of the tribe. Tribes have power to adjudicate civil and criminal issues, regulate and tax,[4] and even exercise jurisdiction over nonmembers and non-Indians.[5]

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1. Talton v. Mayes, 163 U.S. 376, 382-84 (1896); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (Univ. Of N.M. photo. reprint 1971) (1942).

2. Public Law 280, 18 U.S.C. § 1162 (1994), is one exception in which state law is not excluded from enforcement in recognized Indian territory. Public Law 280 gives states general civil and limited criminal jurisdiction over causes of action arising within Indian country. Other limitations on tribal jurisdiction include 18 U.S.C. § 1153 (1994) (providing that an Indian accused of an enumerated felony within Indian country is subject to federal court jurisdiction) and 25 U.S.C. § 1302 (1994) (imposing on tribal judicial proceedings the limitations which exist in the Bill of Rights).

3. "[T]hese Acts [of Congress] . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries within which their authority is exclusive . . . ." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832); *see also* Williams v. Lee, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.").

4. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982) (holding tribes may tax lessees of oil and gas located on the reservation); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (holding tribe may tax sales of cigarettes to nontribal members occurring on the reservation).

5. *See* Knight v. Shoshone & Arapaho Indian Tribes, 670 F.2d 900, 902 (10th Cir. 1982) (holding tribes have zoning authority over reservation property, including fee lands owned by non-Indians); Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1472 (9th Cir. 1985) (holding states have no jurisdiction to apply its environmental regulation program in Indian country).

Whether tribal territory is recognized as Indian country directly affects tribal sovereignty. Absent a recognized Indian territory, tribal sovereignty is extinguished. Although assimilation has reduced the size and numbers of Indian territories,[6] Indian culture has thrived and continues on lands that remain Indian country today. Consequently, the value of Indian country to Indian people is immeasurable because it allows tribes to preserve their culture and maintain their power.[7]

The definition of Indian country has been developed by both federal statutes[8] and case law.[9] Any land owned by a tribe,[10] owned by the federal government for the benefit of a tribe or individual Indians,[11] or of a discrete, dependent Indian community, is Indian country.[12] However, Rhode Island recently questioned the status of Indian communities on purchased land. A case of first impression for the First Circuit, *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*,[13] forced the court to determine when an Indian community is a dependent Indian community and, therefore, Indian country.

This note will first discuss the statutes and case law that established the legal definition of Indian country. This note will then review and analyze the opinions of *Narragansett* as the court considered the differences between Indian communities and dependent Indian communities in determining whether the land was Indian country. Finally this note will address the ramifications of creating a distinction between Indian communities and dependent Indian communities.

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6. Assimilation was the policy of the late nineteenth century that intended to make Indians a part of mainstream society. More than 80% of the land value belonging to all Indians was taken in 1887. John Collier, Memorandum, *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong. 16-18 (1934), *reprinted in* DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW 195-97 (2d. ed 1986). Tribal trust lands were reduced by another 3.2% because of the 1950s termination policy. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151-54 (1977), *reprinted in* GETCHES & WILKINSON, *supra*, at 130-36.

7. The reservation system was intended to create tribal lands where culture and power could be maintained without interference by state governments or non-Indians. This idea is known as "measured separatism." CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14 (1987).

8. The statute defining Indian country is codified at 18 U.S.C. § 1151 (1994).

9. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 27 n.8 (Rennard S. Strickland et al. eds., 1982) [hereinafter COHEN 1982 ED.].

10. *See* Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 976 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (holding that Indian country includes lands owned by the tribe).

11. 18 U.S.C. § 1151(a), (c) (1994).

12. *See id.* § 1151(b).

13. 89 F.3d 908 (1st Cir. 1996).

II. Historical Development of "Indian Country"

A. Early Development

One of the first cases in which the United States Supreme Court considered the meaning of the term "Indian country" arose out of a situation involving the seizure of whiskey in what authorities believed to be Indian country. In *Bates v. Clark*,[14] a United States army captain and a lieutenant seized whiskey which a mercantile business was using on the James River. Under the Act of June 30, 1834,[15] titled "An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontier," wines or spirits were forbidden within Indian country.[16] The merchant sought to recover damages for trespass, claiming the seizure did not occur in Indian country. In awarding damages, the Court held that tribal lands which had been ceded to the federal government ceased to be Indian country.[17] Consequently, the Court effectively removed Indian rights and privileges on these lands.[18] The Court also focused on the issue of lands held in "original Indian title."[19] The Court held that original Indian title lands, unless relinquished by treaty with the federal government or modified by an act of Congress, remained Indian country.[20] Because the *Bates* Court tied the existence of Indian country to original Indian title, *Bates* left unresolved the question of whether land not originally held by the tribe became Indian country when reserved for tribal use.[21]

Not until 1913 did the Court begin to question the status of reserved lands. In *Donnelly v. United States*,[22] Donnelly allegedly murdered an Indian. The evidence tended to show that the Indian was shot while he was in or near the edge of the Klamath River, a place within the reservation's exterior limits. In reaching its conclusion, the Supreme Court held that reservations, whether established by an act of Congress or by executive order, are Indian country.[23] The same year the Supreme Court also considered the status of pueblos. In

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14. 95 U.S. 204 (1877).

15. Ch. 161, 4 Stat. 729.

16. *Id.* § 20, 4 Stat. 732.

17. *Bates*, 95 U.S. at 209.

18. *Id.* at 204.

19. "Original Indian Title" refers to land traditionally used and occupied by Indians that has not been ceded to the federal government. *See generally* COHEN 1982 ED., *supra* note 9, at 486-93.

20. *Bates*, 95 U.S. at 209.

21. There are a variety of tribes who have been removed from original Indian title lands and subsequently placed in lands reserved for them. For example, the Cherokees' original Indian title land was in Georgia, but they were moved to lands reserved in Oklahoma. Another example is the Choctaws. They originated in the area that became Alabama but were likewise removed to lands in Oklahoma. *See generally* COHEN 1982 ED., *supra* note 9, at 770-75.

22. 228 U.S. 243 (1913).

23. *Id.* at 269.

United States v. Sandoval,[24] liquor was brought into the Santa Clara Pueblo of New Mexico in violation of federal statute. Expanding the understanding of what was Indian country, the Supreme Court held that the pueblos were Indian country because they were separate and distinct ethnic communities which have a special dependent relationship with the federal government.[25]

The Court further expanded the *Sandoval* and *Donnelly* definitions of Indian country in *United States v. Chavez*.[26] In *Chavez*, non-Indians were charged with larceny within pueblo limits in New Mexico. Those charged challenged the indictment as not stating an offense against the United States, claiming the pueblo was not Indian country. The Court, in ruling against those charged, expanded *Sandoval* by including "any unceded lands owned or occupied by an Indian nation or tribe of Indians."[27] Consequently, the decision in *Chavez* established that some nonreservation lands occupied by Indians are Indian country.

In 1948, these early judicial definitions of Indian country were incorporated into the Major Crimes Act.[28] Three types of land were recognized as Indian country: (1) reservations, (2) dependent Indian communities, and (3) Indian allotments.

B. Modern Definition of Indian Country

"Dependent Indian communities" are not as easily identified as reservations or allotments. Therefore, federal courts have developed criteria for identifying "dependent Indian communities." Several cases from the last twenty-five years were essential in developing the criteria for identifying "dependent Indian communities."

In *United States v. Martine*,[29] a Navajo Indian, under the influence of alcohol, was involved in a single car accident in which the passenger, also a Navajo, was killed. The accident occurred outside the boundaries of the Indian reservation, but on land owned by the Navajo Tribe. The community, consisting almost entirely of Navajos, occupied these lands purchased with tribal funds. However, the federal government held the lands in trust.[30] The Tenth Circuit sustained federal jurisdiction, explicitly recognizing that the area in question was Indian country under 18 U.S.C. § 1151(b).[31] The *Martine* decision established that the determination of Indian country involves three factors: (1) the nature of the area, (2) the relationship of the inhabitants to the tribe and the federal

24. 231 U.S. 28 (1913).
25. *Id.* at 48-49.
26. 290 U.S. 357 (1933).
27. *Id.* at 364.
28. 18 U.S.C. § 1151 (1994).
29. 442 F.2d 1022 (10th Cir. 1971).
30. *Id.*
31. *Id.* at 1023.

government, and (3) the established practice of government agencies toward the inhabitants of the area.[32]

Ten years after *Martine*, in *United States v. South Dakota*,[33] the court found that a housing project within a city, lived in by only a small number of Indians and funded by the Federal Department of Housing and Urban Development, was Indian country.[34] In reaching its decision, the Eighth Circuit concluded that four standards are to be considered when identifying Indian country. First, the *Martine* standard should be considered, which examines "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area."[35] Second, one should examine a land ownership and jurisdiction standard, which turns on whether the United States retained both "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory."[36] Third, a use standard should be considered, which determines whether "such lands have been set apart for the use, occupancy, and protection of dependent Indian peoples."[37] Finally, one should consider a cohesiveness standard, which is "manifested either by economic pursuits in the area, common interests, or needs of inhabitants as supplied by that locality."[38] Thus, the *South Dakota* standards place additional emphasis on the existence of a federal-tribal relationship.

The Supreme Court eventually set the standard for defining Indian country in *United States v. McGowan*,[39] reaffirmed it in *United States v. John*,[40] and recently refined it in *Oklahoma Tax Commission v. Potawatomi Tribe*.[41] The Court in *Potawatomi* held that Indian country was land that has been "validly set apart for the use of the Indians as such, under the superintendence of the [g]overnment."[42] In *Potawatomi*, the tribe owned and operated a convenience store on land held in trust by the government.[43] For years, the tribe sold cigarettes without collecting state tax. The state tax commission eventually

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32. *Id.*

33. 665 F.2d 837 (8th Cir. 1981).

34. *Id.* at 842.

35. *Id.* at 839 (quoting Weddell v. Meierhenry, 636 F.2d 211, 212 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981) (citing *Martine*, 442 F.2d at 1023)).

36. *Id.* (quoting *Weddell*, 636 F.2d at 212 (citing United States v. McGowan, 302 U.S. 535, 538-39 (1938))).

37. *Id.* (quoting *Weddell*, 636 F.2d at 213 (citing United States v. Mound, 477 F. Supp. 156, 158 (D.S.D. 1979) (citing Youngbear v. Brewer, 415 F. Supp. 807, 809 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977)))).

38. *Id.* at 842 (quoting *Weddell*, 636 F.2d at 212-13 (citing United States v. Morgan, 614 F.2d 166, 170 (8th Cir. 1980))).

39. 302 U.S. 535 (1938).

40. 437 U.S. 634 (1978).

41. 498 U.S. 505 (1991).

42. *Id.* at 511 (citing United States v. John, 437 U.S. 634, 649 (1978)).

43. *Id.* at 507.

served an assessment letter demanding $2.7 million for taxes on cigarettes sold in the previous four years.[44] The tribe sued to enjoin the assessment, placing the question of tribal sovereignty at the center of the dispute. Recognizing tribal sovereignty, the Court held that the tribe did not have to collect taxes from tribal members, but the Court required the tribe to collect taxes from sales to nonmembers of the tribe. The distinction between tribal members and nonmembers makes the *Potawatomi* standard easier to apply than the *Martine* and *South Dakota* standards. The *Potawatomi* standard asks two questions. The first question asks whether there has been a valid withdrawal of public lands for Indian uses. The second question is whether the United States continues to supervise the tribe. Like previous decisions, the Potawatomi test focuses on the federal-tribal trust relationship.

III. Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.

A. Facts

In 1991, the Wetuomuck Housing Authority (WHA) purchased land from a private developer. The WHA intended for the Tribe to build a housing complex on the purchased land. The land was adjacent to the Tribe's other lands, yet there was a town road that separated them. The Tribe's church, the Tribal Assembly, and the tribal offices were all established in close proximity to the purchased land. In addition, the Tribe had proposed the construction of a tribal community center and tribal health center on the settlement lands.

The purchased land was located within the coastal zone designated in Rhode Island's Coastal Resources Management Program (CRMP). The city had also zoned the location of the purchased land to require at least two acres of land per residential unit. The Tribe intended for elderly and low-income members of the Tribe to use the proposed housing and had fifty units on only thirty-two acres. Therefore, the proposal failed to meet the zoning requirement.

The United States Department of Housing and Urban Development (HUD) provided the financing for the purchase of the housing site and construction of the buildings. HUD was also planning to provide money both for managing the project and for subsidizing the occupants' rent.

After the WHA bought the land, the WHA conveyed the land to the tribe. A deed restriction required that the land be placed in trust with the federal government. The Tribe had applied for trust status, but the government had not yet granted the application. The land had, however, been leased to WHA with approval from the Bureau of Indian Affairs (BIA).

The WHA began construction without a building permit from the town and without state approval of the individual sewage disposal systems (ISDS). Furthermore, the WHA did not obtain any determination that the project was

44. *Id.*

consistent with CRMP regulations designed to preserve and protect historically or archaeologically significant property. The district court found the excavation prior to construction infringed on the town's drainage easement and threatened to alter drainage patterns to the detriment of coastal and groundwater resources. The ISDS systems, however, did meet the Indian Health Service (IHS) regulations.

Further complicating the picture, the building site was close to the Ninigret Pond, a fragile salt water estuary that was a spawning ground for several species of commercially important fish. The district court found that the possibility existed that nitrates from the WHA's ISDS systems could reach the pond and "ecologically stress" the waters.

The district court held that the housing site was a "dependent Indian community" and thus Indian country under 18 U.S.C. § 1151. The court, noting that "tribal sovereignty is no longer an absolute bar to the assertion of state authority in Indian country,"[45] carried out a preemption analysis. It concluded that the State's building and zoning regulations were preempted, as was its jurisdiction to regulate. However, the CRMP was not preempted. Consequently, the WHA was enjoined from occupying buildings on the housing site unless CRMP requirements were satisfied. The United States Court of Appeals for the First Circuit heard the appeal of the tribe on January 9, 1996, to review the grant of a permanent injunction.[46]

B. Holding

The issue presented to the court of appeals was whether the land in question was "Indian country" as defined in 18 U.S.C. § 1151(b).[47] The court held that the site, although an Indian community, was not a "dependent Indian community" and was thus not Indian country to the presumed exclusion of state laws.

C. Decision

Chief Judge Torruella, delivering the opinion for the court of appeals, began his analysis with a discussion of the Rhode Island Indian Claims Settlement Act of 1978 (Settlement Act).[48] In addressing the background of the relationship between the Tribe and State as established in the Settlement Act, Torruella chose simply to outline the essential structure of the historical underpinnings of the State's argument. This court, Torruella stated, has held that although the Settlement Act allows State civil and criminal jurisdiction over the settlement

45. Narragansett Indian Tribe v. Narragansett Elec., 878 F. Supp. 349, 359 (D.R.I. 1995), *aff'd in part, rev'd in part*, 89 F.3d 908 (1st Cir. 1996).

46. *Narragansett*, 89 F.3d at 912.

47. *Id.* at 911.

48. 25 U.S.C. §§ 1701-1716 (1994).

lands, the Tribe nonetheless has concurrent jurisdiction over, and exercise[s] governmental power with respect to those lands.[49]

In introducing the court's opinion, Chief Judge Torruella presented an analysis of "Indian country." Torruella began by first addressing the significance of "Indian country" to this case. If the housing site is not Indian country, Torruella stated, there is no bar to the exercise of the State's jurisdiction. If it is, he continued, the State presumptively lacks jurisdiction to enforce the regulations and ordinances discussed, and a preemption analysis must be carried out.

Torruella noted that, 18 U.S.C. § 1511, on its face, was concerned only with criminal jurisdiction. However, argued Torruella, the Supreme Court has repeatedly said that the definition in § 1511 "applies to questions of both criminal and civil jurisdiction."[50] Thus, Torruella felt there was no reason the Court should not seize on the definition Congress offered and do the same.

Finally, Chief Judge Torruella focused on "dependent Indian communities." Exactly what constitutes a "dependent Indian community," stated Torruella, has not been defined. Instead, he continued, courts addressing the question have conducted a functional inquiry into the nature of the community, weighing a series of factors established by case law. Citing precedents, Torruella reported on how courts have conducted this functional inquiry, and how the current court will conduct its functional inquiry.

Chief Judge Torruella divided his inquiry into two parts. Part One considered whether there was an Indian community. Upon crossing the threshold consideration of Part One, Part Two considered whether the Indian community was a dependent one.

The threshold considerations began by focusing on the *Martine* factors. Chief Judge Torruella considered each of the *Martine* factors — weighing the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and the federal government, and the established practice of government agencies toward the area — and ruled that the housing site was a community. Specifically, Torruella noted that the BIA recognized the housing site as a distinct community and that the federal government had established a relationship through financing by HUD.

Chief Judge Torruella then focused on whether there was cohesiveness "manifested either by economic pursuits in the area, common interest, or needs of the inhabitants as supplied by that locality."[51] Torruella again found that several factors satisfied this consideration. First, the project would help the Tribe supply housing to its elderly and low-income members, and second, the Tribe's church and government offices were close to the project. Nonetheless,

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49. *Narragansett*, 89 F.3d at 913.

50. *Id.* at 915 (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987)).

51. *Id.* at 917 (quoting Weddell v. Meierhenry, 636 F.2d 211, 212 (8th Cir. 1980)).

argued Torruella, "the fact that the housing will be predominantly Indian in character is not enough to establish the presence of a dependent Indian community."[52]

Having crossed the threshold, Chief Judge Torruella then attempted to determine whether the Indian community was a "dependent Indian community." Torruella began by focusing on whether the United States had retained "title to the lands which it permitted the Indians to occupy" and whether the United States had retained "authority to enact regulations and protective laws respecting this territory."[53] Torruella noted that the Tribe, not the government, owned the land and weighed this against the Tribe. Regarding who held the authority to enact regulations on the land, Torruella suggested that this factor weighed neither for nor against the tribe because the outcome of the case would determine who had the authority.

Finally, having a strike against the Tribe, Chief Judge Torruella focused on whether the lands had been "set apart for the use, occupancy and protection of dependent Indian peoples."[54] Torruella began by first determining what constituted setting lands apart. Having surveyed case law, Torruella decided that "land is validly set apart . . . only if the federal government takes some action indicating that the land is designated for use by Indians."[55] Consequently, Torruella held that because the land was not yet placed in trust with the United States, the Tribe had not yet satisfied this factor. Although there was HUD involvement in the WHA project, Torruella found it was not sufficient to establish the housing site was "set apart" by the federal government.

Although the threshold factors supported the Tribe's contention that the housing site was a community of Indians, Torruella held the site was not a "dependent Indian community" because the land had not been set apart. It was "too far a stretch," stated Torruella, "to regard the government agency funding and oversight here as evidencing a federal intent to give the tribe presumptive sovereignty over the housing site by making it Indian country."[56] Torruella concluded by claiming that recognizing the purchased land as "Indian country" would allow a Tribe to purchase land and claim presumptive sovereignty rights over privately held land simply by obtaining financial assistance from the government.

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52. *Id.* at 918.

53. *Id.* at 917 (citing United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981) (quoting *Weddell*, 636 F.2d at 212)).

54. *Id.* (citing *Weddell*, 636 F.2d at 213).

55. *Id.* at 919 (citing Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993)).

56. *Id.* at 922.

IV. Analysis

Before hearing *Narragansett*, the Court of Appeals for the First Circuit had already established a definition for a dependent Indian community. The court had held that a dependent Indian community was one which was "both 'Indian' in character and federally dependent."[57] Clearly, the decision in *Narragansett* did not follow this definition.

The location and use of the purchased land in *Narragansett* was not unusual. The housing site was located in an area the BIA recognized to have had a distinct Indian community since the earliest European contact.[58] Pursuant to a need recognized by both HUD and the Tribe, HUD had also set the purchased land apart for occupancy by elderly and low-income tribal members. The fact that HUD was financing the project pursuant to a program specifically designed for the benefit of tribal Indians demonstrated a close relationship between the community and the federal government. Finally, the housing site was in close proximity to the settlement lands which were the center of tribal government, culture and religious life. Is there any doubt this land was Indian in character and federally dependent? If the court of appeals applied its own definition, this land was a dependent Indian community and thus Indian country.

Why the court quickly discarded these facts is uncertain, but one might propose that the court feared it would expand the power of tribal sovereignty. Tribal sovereignty is not unqualified. Tribes are "regarded as having a semi-independent position . . . as a separate people with the power of regulating their internal and social relations."[59] However, as already noted, tribal sovereignty does not necessarily preclude the exercise of state authority in Indian country.

With the passage of time, the laws regarding the contours of tribal sovereignty have undergone considerable evolution. The law has evolved from the notion that state law has no application in Indian country to the notion that historical conceptions of tribal sovereignty must be adjusted to consider legitimate state interests.[60] Consequently, the governing rules now allow state laws to apply on reservations unless their application would interfere with tribal self-government.

Clearly, the state laws in *Narragansett* interfered with tribal sovereignty. The state laws effectively eliminated the Tribe's ability to develop tribal lands in a way that best benefitted the Tribe. This court may have considered the wrong

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57. United States v. Levesque, 681 F.2d 75, 77 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982).

58. Narragansett Indian Tribe v. Narragansett Elec., 878 F. Supp. 349, 356 (D.R.I. 1995) (citing BIA, U.S. Dep't of the Interior, BIA Internal Memorandum on Acknowledgement of Narragansett Indian Tribe at 9 (July 1982)), *aff'd in part, rev'd in part*, 89 F.3d 908 (1st Cir. 1996).

59. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973).

60. *Id.* at 171.

issue, that of dependent Indian communities as Indian country, and probably should have focused on tribal sovereignty and the preemption of state law.

An analysis of the application of preemption of state law may have yielded a completely different verdict. Consider first the building code and zoning ordinances. Providing adequate housing for low income and elderly tribal members on tribal land is a matter in which both the Tribe and the federal government had a strong interest. The fact that HUD provided the necessary financing pursuant to a program designed to assist tribal Indians underscored the federal interest. The Tribe had a strong interest in ensuring the structures were constructed properly and therefore adopted a building code that was satisfactory to HUD. Comparatively, the State's interest was much weaker. The structures would be located entirely in Indian country and occupied primarily by Indians. Of course the State had an interest in ensuring that the units were safe, however the fact that the units must be constructed within acceptable HUD standards attenuated that interest. Consequently, the State's interest in applying its building code did not weigh heavily on the preemption scale.

The same may be said with respect to the zoning ordinances. The city zoning ordinances conflicted with the HUD regulations. The city required a minimum of two acres for each residence while HUD prohibited home sites that exceeded one acre. Presumably, the purpose of the HUD regulation was to insure that funds were not diverted to land acquisition. Consequently, the city zoning ordinance interfered with the accomplishment of HUD's purpose. If the city was unable to demonstrate an interest in applying its regulations that was compelling to justify intruding on federal and tribal interests, which is likely, the zoning regulations would be preempted.

The State's interest in the Rhode Island Coastal Resources Management Program (CRMP) alone might have been enough to preempt tribal sovereignty and produce the result rendered by the *Narragansett* court. The fact that federal agencies were subject to the CRMP makes it difficult to infer that requiring the Tribe to comply would somehow interfere with a federal interest. Any basis for such an inference was further eroded in the Settlement Act, which provided that Rhode Island law was applicable to the settlement lands. Because the housing site had not been set aside, but purchased, it was not part of the settlement lands. This fact alone suggests that the housing site should have been subject to state regulation. Consequently, the CRMP would not be preempted.

While it can be argued that the court might have considered the wrong issue, the same result would have probably applied. Consequently, some might wonder what harm has been done. The problem with justifying the path the court took to reach the same conclusion is that the court established a precedent that may lead to future problems.

V. Ramifications

The effect that *Narragansett* will have on "Indian country" cases remains to be seen. Undoubtedly, courts will continue to struggle in their assessments of

Indian communities, but they now have strong precedents to lead them in their decision making process. The obvious effect of *Narragansett* will be to put tribes on notice that lands they purchase, and subsequently establish communities on, may not be dependent Indian communities. Consequently, these lands are not Indian country and may not be presumptively excluded from state laws.

Chief Judge Torreuella clearly rejects any notion that federal involvement alone sets apart Indian land as Indian country. Torreuella recognizes that to have ruled differently would have allowed a tribe to purchase land and claim presumptive sovereignty rights simply by obtaining government financing. Such freedom would allow tribes to freely expand their borders and powers, at least as long as government financing is available. The decision of *Narragansett* has removed this possibility. Tribes were never able to, and now never will be able to, claim presumptive sovereignty rights simply by claiming Indian land is Indian country.

Although tribes may not claim presumptive sovereignty rights by simply asserting Indian land is Indian country, placing the land in trust with the United States may be sufficient to set the lands apart and claim sovereignty rights. Chief Judge Torruella, in reaching his decision, searched for any indication that the land had been placed in trust with the United States. Finding instead only HUD's involvement, Chief Judge Torruella concluded that HUD's involvement with the Tribe was not sufficient to establish the lands as set apart. Torruella did not present any other acts that would be sufficient to establish Indian land as Indian country, but he did not exclude any acts that could be considered insufficient. Consequently, courts looking at *Narragansett* may reach different conclusions if they believe they may exercise their discretion when considering government involvement. The only fact that appears certain is that land placed in trust is Indian country.

Narragansett has reaffirmed that lands which tribes do not place in trust with the United States are not Indian country. Indian communities that occupy such lands are therefore dependent Indian communities. Consequently, the state will regulate these communities until they are "set apart" by the federal government. Similarly, the federal government maintains its ability to regulate the expansion of Indian country.

VI. Conclusion

While *Narragansett* has not clearly expanded or reduced the concept of Indian country, it did reaffirm the *Martine* test's validity and usefulness. Chief Judge Torruella relied heavily on its logic, standards and principles. Determining when an Indian community is a dependent Indian community is still difficult, but it is now a little easier to determine when an Indian community is not a dependent Indian community. For the court to have ruled any differently would have been to contradict both the *Martine* test and the State's ability to exercise its preemptive rights.