WILL THE "INCREASING WEIGHT OF HISTORY" CRUSH THE VERMONT ABENAKI'S CHANCES FOR FEDERAL ACKNOWLEDGMENT?

> The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted.[1]

> Long ago, before the English and French and Dutch people brought their dreams and technology, their religions and vices to North America, the Abenaki people dwelled in the forests around Lake Champlain, now the boundary between New York and Vermont.[2]

INTRODUCTION

On June 12, 1992, the Vermont Abenaki tribe suffered a great blow to the twenty-year effort to assert their rights to tribal homelands in the Swanton-Highgate area of northwestern Vermont. In *State v. Elliott*, the Vermont Supreme Court held that the tribe's aboriginal rights to fish and hunt in Vermont were extinguished by "the increasing weight of history."[3] Indian law scholars have widely criticized the *Elliott* holding and the court's use of history to determine that a series of historical events between 1763 and 1791 extinguished the tribe's aboriginal title.[4] Scholars characterized the decision as "flawed" and "arbitrary,"[5] "a grave miscarriage of justice,"[6] and "unsound and dangerous."[7] Despite the perceived weaknesses of the Vermont Supreme Court's reasoning, the United States Supreme Court denied certiorari in early 1993.[8]

The impact of the *Elliott* decision on the continuing efforts of the Vermont Abenaki to achieve federal acknowledgment from the Department of Interior's Bureau of Indian Affairs (BIA) remains to be seen. Although the Vermont Supreme Court's decision, based on the "increasing weight of

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1. Worcester v. Georgia, 31 U.S. (6 Pet.) 512, 576 (1832) (McLean, J., concurring).

2. Abenaki Nation of Vermont, A Petition for Federal Recognition as an American Indian Tribe submitted to the Bureau of Indian Affairs, United States Government (Oct. 1982) [hereinafter Abenaki Petition] (on file with the *Vermont Law Review*).

3. State v. Elliott, 159 Vt. 102, 115, 616 A.2d 210, 218 (1992), *cert. denied*, 507 U.S. 911 (1993).

4. *See infra* Part I.C.

5. Charles P. Lord & William A. Shutkin, *Environmental Justice and the Use of History*, 22 B.C. ENVTL. AFF. L. REV. 1, 13 (1994).

6. Gene Bergman, Note, *Defying Precedent: Can Abenaki Aboriginal Title Be Extinguished by the "Weight of History"?*, 18 AM. INDIAN L. REV. 447, 483 (1993).

7. John P. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, 42 BUFF. L. REV. 77, 78 (1994).

8. *See* Elliott v. Vermont, 507 U.S. 911 (1993).

history" test, should not affect the federal acknowledgment process,[9] the tribe's history is the backbone of the process. This is true because most of the requirements for acknowledgment rely upon a group's ability to establish a continuous historical presence as a tribal entity.[10]

As *Elliott* moved through the Vermont judicial system, the Abenaki requested that the BIA suspend consideration of the tribe's 1982 petition for federal acknowledgment.[11] On January 17, 1996, in response to the *Elliott* decision, the Abenaki returned their fourteen year old petition for federal acknowledgment to active status.[12] The petition is now listed by the Bureau of Indian Affairs Branch of Acknowledgment and Research as "Ready, Waiting for Active Consideration."[13] The Abenaki are currently second in line among the eleven "ready" petitions under consideration.[14]

This Note considers the implications of the *Elliott* decision on the Abenaki petition for federal acknowledgment, and more specifically, the Vermont Supreme Court's use of history to extinguish Abenaki aboriginal rights by 1791. Part I reviews the tribe's history as documented by historians, the district court judge in the original fishing rights dispute, and by legal commentators. Part II describes the federal acknowledgment process that the Abenaki are currently waiting in line for. Part III critically analyzes the court's new "weight of history" test for the finding of extinguishment. Part IV considers the Abenaki petition for federal acknowledgment, suggesting that a more honest interpretation of history weighs in favor of the tribe. Finally,

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9. *See* 25 C.F.R. § 83.7 (1998); *infra* note 26.

10. *See id.*

11. *See* Bureau of Indian Affairs, U.S. Dep't of Interior, *Status of Acknowledgment Cases* (last modified Jan. 11, 1999) <http://www.doi.gov/bia/sum0930stat.htm>. When referring to the process of federal confirmation of tribal political status, "[t]he terms recognize and acknowledge have often been used interchangeably . . . . To be precise, 'recognition' of tribal status usually denotes Congressional/legislative authority while 'acknowledgment' of tribal status usually refers to secretarial/executive designation." N. Bruce Duthu, *The Houma Indians of Louisiana: The Intersection of Law and History in the Federal Acknowledgment Process*, 38 LA. HIST. 409, 409 (1997) (internal citation omitted). Since this Note focuses on the federal process governed by the BIA regulations, "acknowledgment" will be used herein.

12. *See* Bureau of Indian Affairs, *supra* note 11. A tribe returns its petition to active status by filing a letter of intent. *See* 25 C.F.R. § 83.4 (1998).

13. Bureau of Indian Affairs, *supra* note 11.

14. *See id.* In the 1990s, federal acknowledgment of newly acknowledged tribes inevitably includes a discussion of gambling casinos. The Indian Gaming Act, 25 U.S.C. § 2703(5) (1988), only applies to tribes that have formal federal acknowledgment. *See* 25 U.S.C. § 2710(b)(1), (d)(3)(A) (1988). In order to qualify for eligibility to have a casino on reservation lands, a tribe must exercise jurisdiction over its territories. *See id.* § 2710(b)(1), (d)(1). It is also important to point out that gambling is not allowed on tribal lands *located* in states that proscribe Class I and Class II gaming activities altogether, nor on tribal lands where federal law prohibits gambling. *See id.* § 2710(b)(1)(A). Significantly, even if the BIA acknowledges the Vermont Abenaki, the tribe is not guaranteed a reservation of any of the lands over which it holds aboriginal title. *See generally* Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996) (holding that the state of Maine was not subject to the Indian Gaming Regulatory Act because Congress had not made the act specifically applicable within Maine).

the Note concludes that the version of history used in the *Elliott* decision is not only wrong, but also has no place in the federal acknowledgment process.

BACKGROUND

On Thanksgiving Day 1976, Vermont Governor Thomas Salmon issued an executive order formally recognizing the Abenaki Indian tribe.[15] This significant state pronouncement resulted from efforts during the 1970's by the Vermont Abenaki to "[stand] up [and] be counted."[16] Governor Salmon also created a Commission on Indian Affairs to "assist the Abenaki Tribal Council in its dealings with agencies of State and Local government."[17] Salmon's order recognized that the tribe could trace its "lineage in Vermont well into the 19th century"[18] and that "without State recognition, Native Americans residing in Vermont cannot qualify for . . . [federal] programs."[19] The order went so far as to direct the Commission to investigate and make recommendations to the Governor and the Legislature regarding a request by the tribe for unrestricted hunting and fishing rights within the state.[20]

Unfortunately, state recognition of the Abenaki lasted a few short years. After taking office in January 1977, Governor Richard Snelling revoked Salmon's executive order.[21] Governor Snelling continued the Vermont Commission for Indian Affairs, but limited its role to investigating problems facing Indians living in the state, accepting contributions to assist the Commission, and advising the Governor of programs affecting Vermont Indians.[22] Lacking the protection of treaties, statutes, or orders ensuring their rights, the Abenaki were then forced to rely upon the theory of aboriginal rights to support their claim to lands free of state control in the Swanton-Highgate area of northwestern Vermont.

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15. *See* WILLIAM A. HAVILAND & MARJORY W. POWER, THE ORIGINAL VERMONTERS: NATIVE INHABITANTS, PAST AND PRESENT 305 app. A (1981) (reprinting Exec. Order No. 36 (1976)). The term "tribe" was first defined by the U.S. Supreme Court in 1901 as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Montoya v. United States, 180 U.S. 261, 266 (1901).

16. COLIN G. CALLOWAY, THE WESTERN ABENAKIS OF VERMONT, 1600-1800, at 248 (1990).

17. HAVILAND & POWER, *supra* note 15, at 306 app. A.

18. *Id.* at 305 app. A.

19. *Id.* at 306 app. A.

20. *Id.* at 307 app. A.

21. *See id.* at 308 app. B (reprinting Exec. Order No. 3 (1977)).

22. *See id.* at 309 app. B. Governor Howard Dean has a Governor's Advisory Committee on Native American Affairs, which in 1994 asked the Governor to "grant limited state recognition" to the tribe to help improve the welfare of Abenaki children. *Vermont Tribe Seeks Recognition*, BOSTON GLOBE, June 25, 1994, at 24. Governor Dean has not done so, instead offering "informal recognition," through gestures such as proclaiming "Abenaki Cultural Heritage Celebration Week." *Vermont Opposes Abenaki Petition*, SUNDAY TELEGRAM (Worcester, Ma.), May 14, 1995, at B13.

The events leading up to Governor Salmon's recognition of the tribe began in 1972 when the tribe resurrected the St. Francis-Sokoki Band of the Abenaki Nation.[23] The Abenaki wrote a constitution that provided for elections and created the posts of tribal council and chief.[24] The tribal council established its offices in Swanton, Vermont and quickly registered over 1,000 tribal members.[25] The Abenaki reassertion of tribalism was a microcosm of a broader national movement during the 1970's among American Indians who sought to restore a greater measure of tribal self-rule.[26]

In October 1982, the Abenaki submitted their "Petition for Federal Recognition as an American Indian Tribe" to the Department of Interior's Bureau of Indian Affairs (BIA).[27] This long and costly procedure requires a tribe to meet seven criteria enumerated in the Code of Federal Regulations.[28] On August 1, 1986, after the Abenaki responded to requests for clarification and further information, the petition was declared "ready for active consideration."[29]

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23. *See* CALLOWAY, *supra* note 16, at 248-49.

24. *See id.*

25. *See id.*

26. *See, e.g.*, PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1973). Among the events occurring as the Abenaki organized in the 1970s were the 1970 takeover of Alcatraz Island, the seizure of the Mayflower Replica at Plymouth, Massachusetts on Thanksgiving Day, 1971, and the occupation of the Bureau of Indian Affairs headquarters in Washington, D.C. on the eve of the 1972 presidential election. *See also* Jimmie Durham, *Cowboys and . . . Notes on Art, Literature, and American Indians in the Modern American Mind, in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 423, 435 (M. Annette Jaimes ed., 1992).

27. *See* Abenaki Petition, *supra* note 2.

28. *See* Mandatory Criteria for Federal Acknowledgment, 25 C.F.R. § 83.7 (1998). The seven criteria are:

> (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.
>
> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
>
> (c) The petitioner has maintained a political influence or authority over its members as an autonomous entity from historical times until the present.
>
> (d) A copy of the group's present governing document including its membership criteria.
>
> (e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.
>
> (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.
>
> (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

Id.

29. Bureau of Indian Affairs, *supra* note 11. A petition is declared "ready for active consideration" by the BIA after the Assistant Secretary conducts a preliminary review of the petition, conducts research, and receives additional requested information from a tribe. 25 C.F.R. § 83.10(a)-(d) (1998).

After awaiting consideration for four years, the Abenaki asked the BIA to remove the petition for federal acknowledgment from "ready" status on September 18, 1990.[30] The decision to stop the acknowledgment process resulted from a Vermont District Court ruling in 1989 which held that the tribe's aboriginal title to lands in the Swanton-Highgate region had not been extinguished.[31] This victory, like that of state recognition, proved short-lived when the Vermont Supreme Court reversed the trial court in 1992.[32]

I. HISTORY OF THE VERMONT ABENAKI

A. Historical Scholarship

"Scholars now generally agree that since the late prehistoric era the Algonquians resident in the Vermont area were Western Abenaki."[33] According to one historian who has written extensively on the history of New England tribes, "Vermont was neither an empty wilderness nor simply a flight path for Indians disappearing into Canada. It was the core of the western Abenaki homeland."[34] Despite the intense research conducted on the Vermont Abenaki, evidence of the tribe's history is scarce due to the evasive tactics adopted by the tribes to avoid contact with whites.[35] It is believed, however, that at least ten thousand Abenaki Indians lived in the area now known as Vermont before contact with Samuel de Champlain in 1609.[36]

When Champlain arrived, he found the eastern shores of the lake later named for him deserted.[37] The lack of native presence was the resulted from war, epidemic, and famine rather than provide evidence that they did not inhabit the area.[38] Because the Abenaki had contact with settlers from Canada, the Hudson River, and the East Coast, their "societies reeled under the impact of war and disease."[39] Many Abenaki also sought refuge in French villages along the St. Lawrence River, embracing the Catholic faith of Jesuit

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30. *See* Bureau of Indian Affairs, *supra* note 11.

31. *See* State v. St. Francis, No. 1171-10-86Fcr (Vt., Frn. Dist. Ct. Aug. 11, 1989).

32. *See* State v. Elliott, 159 Vt. 102, 102, 616 A.2d 210, 210 (1992).

33. James F. Pendergast, *Native Encounters with Europeans in the Sixteenth Century in the Region Now Known as Vermont*, 58 VT. HIST. 99, 99 (1990).

34. CALLOWAY, *supra* note 16, at xvi.

35. *See id.* at xvii.

36. *See id.* at xxiii.

37. *See* Colin Calloway, *Surviving the Dark Ages: Vermont Abenakis During the Contact Period*, 58 VT. HIST. 70, 71 (1990).

38. *See id.*

39. *Id.* "One estimate places the mortality rate among the Abenakis of Vermont and New Hampshire as high as 98 percent." *Id.*

missionaries, and remaining in areas north of the current U.S.-Canadian border.[40]

Despite their periodic retreats northward, the Abenaki continued to live and hunt in the area between northern Vermont and the St. Lawrence Valley well into the late seventeenth century.[41] In 1648, at the end of King George's War, one of many Anglo-French conflicts, history shows that the successful Abenaki attacks on behalf of the French had "virtually cleared Vermont of the English settlements in the Connecticut Valley."[42] Beginning around 1760, English colonists flooded into Vermont from Massachusetts, Connecticut, and New Hampshire.[43] The British Crown attempted to control the rapid settlement of lands west of the Connecticut River to no avail.[44] As English settlers advanced into Abenaki lands, the British government adopted a policy of containing the tribe, attempting to force them north into Canada.[45] Despite these efforts, the Abenaki continued to be a nomadic and independent tribe, living around Lakes Champlain and Memphremagog and the Missisquoi River until the American Revolution.[46]

Although they had typically allied with the French in wars against the British, the Abenaki were ambivalent about the American Revolution.[47] In the end, it did not matter which side they fought for, because the line dividing the United States and Canada was artificially drawn directly through Abenaki territory.[48] In response, some Abenaki retreated and "evaporated into the surrounding countryside."[49] The tribe, however, survived the formation of the State of Vermont, preserving the mobile family bands that still exist in Vermont today.[50]

B. Historical Findings of Fact and Conclusions of Law in State v. St. Francis

In the lower court opinion that gave rise to *Elliott*, District Court Judge Wolchik described the more than one hundred and fifty findings of fact as "a distillate of six days of trial testimony of lay witnesses, police officers and

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40. *See id.* at 71-72.
41. *See id.* at 72-73.
42. *Id.* at 74.
43. *See id.* at 75.
44. *See infra* Part III.
45. *See* Calloway, *supra* note 37, at 75.
46. *See id.* at 75-76.
47. *See id.* at 76.
48. *See id.*
49. *Id.* at 76, 79.
50. *See id.*

experts in anthropology and ethnology."[51] This important historical evidence indicates that the Vermont Abenaki have continually lived on lands in northern Vermont.

First, these facts illustrate that the tribe has existed continuously since before Europeans settled in Vermont. The sixth finding of fact, for example, states that "[a]rcheaologists have traced an essentially unbroken chain of evidence documenting Missisquoi presence in northwestern Vermont, back to 9300 B.C."[52] Physical evidence of a Native American presence in Vermont is provided by petroglyphs in Bellows Falls, Vermont, dated to around 1000 A.D.[53]

Other evidence shows that the Abenaki have maintained a continuous presence in northern Vermont since before Europeans arrived. One example is the court's finding that "[t]he Missisquoi never voluntarily abandoned any portion of their homeland."[54] Despite the Abenaki survival techniques of mobility and retreat, the tribe never left northern Vermont permanently.

Finally, and most importantly, neither the British Crown nor the United States ever expressly extinguished Abenaki aboriginal title to lands in Vermont. The one hundred thirteenth finding of fact describes the Royal Proclamation of 1763, which established the Green Mountains as a boundary, but failed to expressly extinguish the tribe's ownership of land.[55] It was instead intended merely to create procedures for acquiring Indian lands east of the boundary, and to reserve land west of the line for Indians, including the Missisquoi region.[56]

The exhaustive evidence cited in the district court's findings of fact in *St. Francis* clearly shows that the Abenaki have maintained a continual presence in Vermont since before the settlement and colonization of the state.[57] The evidence sufficiently defeats the contention that Abenaki aboriginal title was extinguished, even by applying the legitimate legal test that the *Elliot* court chose to ignore.

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51. State v. St. Francis, No. 1171-10-86Fcr at 3 (Vt., Frn. Dist. Ct. Aug. 11, 1989).

52. *Id.* at 4.

53. *See* William A. Haviland & Marjory W. Power, *A New Look at Vermont's Oldest Art: Understanding the Bellows Falls Petroglyphs*, 62 VT. HIST. 197, 197 (1994).

54. *St. Francis*, slip op. at 12.

55. *See id.* at 23.

56. *See id.*

57. *See id.*

C. Legal Commentary

Many legal commentators believe that this historical evidence compels the conclusion that the Abenaki have a right to lands in northern Vermont. For example, Robert Lucido argues that the Vermont Abenaki have a "strong claim that they hold aboriginal title to the Swanton-Highgate area."[58] Building on the holding in *State v. St. Francis,* the district court decision appealed to the Vermont Supreme Court in the *Elliott* case, Lucido argues that Vermont should pay the tribe for the loss of its homelands.[59] The author correctly forecast that the Vermont Supreme Court would hold in favor of the Abenaki on the issue of establishing a tribal identity.[60] On the subject of extinguishment, Lucido applied the traditional test requiring that Congress must clearly evince its intent to extinguish aboriginal title, and, unlike the court, reasoned that because no official act had taken place, Abenaki title was not extinguished.[61]

The historical evidence and legal analysis used by many legal scholars supports the Abenaki in their quest to regain control of their native homelands. Lucido and the authors of many other law review articles[62] are unanimous in their belief that the Vermont Supreme Court should have held that the Abenaki still have aboriginal rights to lands in the Swanton-Highgate area.[63]

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58. Robert O. Lucido II, Note, *Aboriginal Title: Abenaki Indian Land Claim in Vermont*, 16 VT. L. REV. 611, 637 (1992). This Note was written while the Abenaki were waiting for a decision in the *Elliott* case. Using the history analyzed in *State v. St. Francis*, Lucido reasoned that the Vermont Supreme Court should uphold *St. Francis*. *See id.* He predicted that the "biggest and most difficult obstacle is proving tribal identity." *Id.* While the *Elliot* court did not explicitly base its holding on a lack of tribal status, Lucido identified that as the underlying theme of their finding of extinguishment. *See id.* He wrote: "The Abenaki must contend with the fact that . . . they do not have a separate area to call their own." *Id.* Instead of using the weak links in Abenaki history to attack tribal status, however, the court instead found that aboriginal title had been extinguished through history. *See* State v. Elliott, 159 Vt. 102, 109, 616 A.2d 210, 214. Lucido called on the federal government to "make good on its trust responsibility over Abenaki lands in Vermont and force the State of Vermont to award the Abenaki a fair settlement for their loss," much as the Passamaquoddy of Maine realized in the 1989 Maine Indian Claims Settlement Act. Lucido, *supra*, at 638.

Obviously, after *Elliot* the Abenaki's situation changed dramatically. But Lucido's analysis of the tribe's history and his prediction that the Abenaki would win "even if the court were to use a standard as rigid as the BIA regulations" is still relevant for the tribe's last hope: the federal acknowledgment process. *Id.* at 629.

59. *See* Lucido, *supra* note 58, at 638. *St. Francis* is the lower court opinion that was appealed to the Vermont Supreme Court in the *Elliott* case.

60. *See Elliott*, 159 Vt. at 109, 616 A2d at 214.

61. *See* Lucido, *supra* note 58, at 634.

62. *See generally* Bergman, *supra* note 6; Lowndes, *supra* note 7; Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994). Each of these authors reaches the conclusion that the historical evidence of the Abenaki tribe's existence requires a finding of retained aboriginal title, despite the holding in *Elliott*.

63. *See* Christine A. Doremus, Note, *Jurisdiction Over Adjudications Involving the Abenaki*

According to one analysis of the *Elliott* decision, the Vermont Supreme Court created the "weight of history" test to avoid the only conclusion that an "honest account of history" would support: that aboriginal title was not extinguished during the period from 1763 to 1791.[64] By creating this new test, the court changed from "an examination of intent/purpose to a review of cumulative effects."[65] This "undermines the entire framework of aboriginal title law" by removing the crucial element that requires a sovereign to expressly intend to extinguish aboriginal title, and also violates the canon of federal Indian law that forbids courts from "lightly imputing extinguishment."[66]

The cases cited by the court in *Elliott* do not support the creation of the new cumulative impact test.[67] Instead, *Elliott* turned the traditional legal standard on its head to fit the desired result.[68] By manipulating long-standing rules of federal Indian law, the court "undermined the 'guardianship' responsibility" of the federal government and breached its duty to Indians to "evidence implicit consent to extinguish" aboriginal title.[69] Furthermore, as another commentator points out, "[i]f it is assumed that Congress intended to extinguish aboriginal title by the mere act of admitting a state, no aboriginal title would survive in the United States."[70]

Another analysis of *Elliott* criticizes the court for not clearly holding that one particular event resulted in extinguishment of aboriginal title.[71] By relying on the cumulative impacts of events instead of the express intent required by the traditional canons of Indian law construction, the court entirely avoided the issue of intent.[72] In fact, according to Singer, extinguishment did not occur between 1763 and 1791 at all—instead the responsibility "rest[s] with the Vermont Supreme Court itself" in 1992.[73]

Indians of Vermont, 10 VT. L. REV. 417, 433 (1985).

64. Bergman, *supra* note 6, at 458.

65. *Id.*

66. *Id.* at 459, 483.

67. *See id.* at 459.

68. *See id.* (citing United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976) (holding that extinguishment of Indian title cannot be lightly implied in the absence of clear federal action such as payment for the lands)); Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386 (Ct. Cl.), *cert. denied*, 419 U.S. 1021 (1974) (holding that the act of surveying an area or preparing it for settlement is not enough to extinguish aboriginal title); United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975) (requiring more than evidence of white settlement to show that aboriginal title was extinguished)).

69. Bergman, *supra* note 6, at 483.

70. Lowndes, *supra* note 7, at 113.

71. *See* Singer, *supra* note 62, at 512-13.

72. *See id.*

73. *Id.* at 508.

Another commentator focuses on the broader implications of the "abuse of history" by judges.[74] The criticism for judges who "blithely remain[] blind to the crucial understandings at the confluence of memory, meaning, and historical accuracy" is aimed directly at courts that misuse history in Native American cases.[75] More specific criticism describes the *Elliott* court's use of history as "an even more abstract concept of implicit, cumulative, and undifferentiated past encumbering."[76] Rather than an honest historical analyis under the traditional test, the holding simply implies that "[p]rogress, or at least a long line of dubious white land grabs and unsubstantiated legal maneuverings, obliterated clear, longstanding aboriginal rights."[77]

The common theme running through analyses and criticisms of the *Elliott* decision is that it is, as one commentator puts it, "an unsound and dangerous departure from aboriginal title doctrine."[78] Nonetheless, after denial of certiorari by the United States Supreme Court, the *Elliott* decision represents the Abenaki's current legal status as they await a determination on their petition for federal recognition process.

II. THE FEDERAL ACKNOWLEDGMENT PROCESS

The Department of Interior's Bureau of Indian Affairs (BIA), today responsible for implementing programs for American Indians, was established in 1832 under the Department of War.[79] In 1849 the Department of Interior became a separate department, with the BIA continuing to administer federal programs for Indians under the new agency.[80] Most of the services administered to tribes until 1875 were seen as a sort of exchange for land or cession of other aboriginal rights.[81] In that year, Congress began to impose conditions on the delivery of federal services due to pressures from those who believed that the tribes should provide something in exchange for federal benefits.[82] Many of these conditions for services altered treaty obligations of the United States because services included in long-standing treaties suddenly became reimbursable government programs.[83]

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74. Aviam Soifer, *Objects in Mirror Are Closer Than They Appear*, 28 GA. L. REV. 533, 534 (1994).

75. *Id.*

76. *Id.* at 535.

77. *Id.* at 544.

78. Lowndes, *supra* note 7, at 78.

79. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 673 (Rennard Strickland et al. eds., 1982).

80. *See id.*

81. *See id.* at 673-74.

82. *See id.* at 674.

83. *See id.* For example, the Appropriations Act of Feb. 14, 1920 charged fees to cover costs of

During the "Great Society" of the 1930's, Indians benefitted from the explosion in federal assistance programs.[84] Many new programs providing services to Indians were not limited to the BIA, allowing non-recognized tribes to benefit even without the federal government's "imprimatur of recognition."[85] During this same period, tribal services increased due in large part to the passage of the Indian Reorganization Act, which transferred control of many tribal services to tribes organized under the law.[86]

Determining tribal status during this time was based upon the "Cohen criteria," developed by the first solicitor of the BIA, Felix Cohen.[87] The Cohen criteria focused on tribal relations with the federal government, including treaty relations, legislation, and designation as a tribe by the government or by other tribes.[88] Exercises of political autonomy, such as the creation of a tribal council or other governing body, could also serve as evidence of government-to-government relations with the United States.[89] Cohen's determination process also allowed for considerations of ethnology, history, sociological factors, and continuity.[90] The major weakness of the Cohen criteria was the lack of consistency in applying the factors to determine tribal eligibility for BIA services.[91]

The interpretational problems and resulting inconsistencies of the Cohen criteria, coupled with a growing recognition of the social and economic pressures of landless and unrecognized tribes, prompted Congress to create the American Indian Policy Review Commission in 1975.[92] The Commission's findings led to the introduction of a bill to create procedures for a formal federal acknowledgment process.[93] Rather than waiting for congressional action on the bill, the BIA promulgated regulations to create the Branch of

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work done for the tribes by the government agencies charged with the duty of fulfilling the trustee relationship. *See id.* at 674 n.10.

84. *Id.* at 674.

85. *See id.*

86. *See id.* at 675.

87. Rachael Paschal, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 210-11 (1991).

88. *See id.*

89. *See id.* at 211.

90. *See id.*

91. *See id.* Litigation during the 1970's also helped illustrate the problems with the Cohen criteria and showed the need for a uniform process for tribes to seek formal federal acknowledgment and the benefits it affords. *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (suggesting that Indians sought federal acknowledgment due to ineligibility for protections of Trade and Intercourse Act); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (holding that federal government must protect unrecognized tribe from state intrusions on tribal lands).

92. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER 1162-70 (1984).

93. *See* Paschal, *supra* note 87, at 212 (citing *Recognition of Certain Indian Tribes: Hearing on S. 2375 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. 5-14 (1978)).

Acknowledgment and Research (BAR) and established procedures that tribes must follow to receive federal acknowledgment.[94]

Since 1978, the BIA has received 175 new petitions for federal acknowledgment.[95] At the end of 1998, the BIA had resolved only twenty-eight petitions, an average of slightly more than one petition per year.[96] Of the resolved petitions, thirteen tribes were acknowledged, twelve were denied acknowledgment, one petitioning tribe's status was resolved by legislation, and two were "clarified by other means."[97] Thirteen other petitions were resolved through legislation, merging with another tribe, or withdrawal from the acknowledgment process.[98] The BIA currently has fifteen petitions on "active" status and twelve petitions on "ready for active status."[99]

The BIA's acknowledgment process puts the burden of satisfying the seven criteria on the petitioner.[100] After receiving a petition, the BAR reviews it for deficiencies and allows the petitioning tribe to provide additional materials.[101] The BAR often contacts a tribe several times for more information, allowing tribes more time to complete their petition than is allowed in the BIA process.[102] After resolving problems with petitions, the BIA notifies the tribe when its petition is under active consideration.[103] If the process is not interrupted by either the BIA or the tribe, the agency must publish proposed findings in the Federal Register within one year of the date the petition reached active consideration status.[104]

The BIA employs historians, anthropologists, and genealogists who analyze petitions to determine tribal status.[105] Since the burden rests on the petitioning tribe, they provide most of the required information, but BAR staff often conducts additional research during the evaluation process.[106] After completing individual analyses, the experts combine their reports and issue proposed findings.[107] The BIA then begins a notice and comment period,

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94. *See* 25 C.F.R. § 83.7 (1998).
95. *See* Bureau of Indian Affairs, *supra* note 11.
96. *See id.*
97. *Id.*
98. *See id.*
99. *Id.*
100. *See* 25 C.F.R. § 83.6(c) (1998).
101. *See id.* § 83.10(a).
102. *See id.* § 83.10(b)(2).
103. *See id.* § 83.10(f).
104. *See id.* § 83.10(h).
105. *See* Paschal, *supra* note 87, at 216.
106. *See* 25 C.F.R. § 83.10(a).
107. *See id.* § 83.10(h). The Assistant Secretary of Indian Affairs can extend the review period up to 180 days for good cause. *See id.*

followed by the Assistant Secretary of Indian Affairs either acknowledging or declining to acknowledge the tribe.[108]

Criticism of the BIA acknowledgment process includes complaints of subjectivity, inconsistency, and being prohibitively expensive, long, and unfair.[109] "The BIA is using evidence inconsistently and employing vague, unquantified standards to arrive at unreviewable conclusions."[110] Other practical problems with the process include the fact that information can change and issues can become obsolete before the BAR acts on a tribe's petition.

The Vermont Abenaki originally submitted their petition for federal acknowledgment to the BIA in October 1982.[111] The BIA listed the Abenaki petition as ready for active consideration on August 1, 1986.[112] The Abenaki removed their petition from active status after the Vermont District Court resolved a fishing rights case in their favor, recognizing that the tribe's aboriginal title had not been extinguished.[113] After their victory, the tribe announced that the next step was to pursue a land claim that would cover "millions of acres" in northern Vermont.[114] The tribe's chief, Homer St. Francis, also indicated that the tribe planned to appear before the United Nations rather than continue to wait for a determination on federal acknowledgment from the BAR.[115]

The Abenaki plans to capitalize on their newly recognized aboriginal rights never materialized. In 1992, after the Vermont Supreme Court took away their victory in *Elliott*, the United States Supreme Court denied certiorari in the case.[116] The tribe then began work to reinstate their petition for federal acknowledgment, which reached "ready" status on January 17, 1996.[117] As of September 30, 1998, the petition of the St. Francis/Sokoki

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108. *See id.* § 83.10(m).

109. *See* Paschal, *supra* note 87, at 219.

110. *Id.* at 227.

111. *See* Abenaki Petition, *supra* note 2.

112. *See* Bureau of Indian Affairs, *supra* note 11. The BAR website defines the "Ready, Waiting for Active Consideration" status as follows: "Petitioners have corrected deficiencies and/or stated their petition should be considered 'ready' for active consideration." *Id.* "Priority among 'ready' petitions is based on the date the petition is determined 'ready' by the [BAR]." *Id.* After notifying a tribe that its petition is under active consideration, the Assistant Secretary must publish proposed findings in the Federal Register within one year. *See* 25 C.F.R. § 83.10(h). The BAR must also "prepare a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision." *See id.*

113. *See* State v. St. Francis, No. 1171-10-86Fcr, slip op. at 47 (Vt., Frn. Dist. Ct. Aug. 11, 1989).

114. Yvonne Daley, *Abenaki Victory on Fishing Rights*, RUTLAND HERALD (Rutland, Vt.), Aug. 15, 1989, at 1.

115. *See* Scott Fletcher, *Indians Vow to Continue Rights Fight*, ST. ALBANS MESSENGER (St. Albans, Vt.), Aug. 15, 1989, at 1.

116. *See* Elliott v. Vermont, 507 U.S. 911 (1993).

117. Bureau of Indian Affairs, *supra* note 11.

Band of Abenaki of Vermont was complete and ready for consideration by the BAR, waiting behind only one other petition.[118]

III. THE ELLIOTT DECISION

A. Creation of the "Increasing Weight of History" Test

The *Elliott* case arose from a "fish-in" demonstration held on October 18, 1987 to draw attention to the Abenaki belief that tribal members possessed aboriginal rights to fish and hunt without a state license on lands occupied by the tribe before contact with white settlers.[119] The district court dismissed the charges of fishing without a state license on the theory that the Abenaki retained aboriginal rights in northern Vermont.[120]

Aboriginal title "confers upon Indian holders the non-treaty possessory right to use and occupy the lands that they have held from time immemorial."[121] In order to prove that a tribe possesses aboriginal title, it must show that it exclusively and continually used lands over a period of time.[122] After a successful showing that a tribe possessed aboriginal title to land, "no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign,"[123] or until the sovereign has extinguished the title.[124] Extinguishment, according to well-settled law, is the exclusive right of the sovereign, and can only occur through an express action by Congress or an executive order.[125] Tribes create and maintain aboriginal title, so it is not dependent upon action by the sovereign.[126] Therefore, the lack of formal treaty relations between a tribe and the federal government, as is the case with the Abenaki, is not fatal to an assertion of aboriginal title.

In *Elliott*, the Vermont Supreme Court chose not to follow the body of legal precedent in extinguishment cases.[127] The Vermont Supreme Court did

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118. *See id.*

119. *See* Yvonne Daley, *Vermont Judge Rules Indians Hold Fishing, Hunting Rights*, BOSTON GLOBE, Aug. 15, 1989, at 15.

120. *See* State v. St. Francis, No. 1171-10-86Fcr, slip op. at 96 (Vt., Frn. Dist. Ct. Aug. 11, 1989).

121. Lucido, *supra* note 58, at 615.

122. *See* Bergman, *supra* note 6, at 450.

123. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985).

124. *See* United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 354 (1941).

125. *See id.*

126. *See* Lucido, *supra* note 58, at 636.

127. *See* State v. Elliott, 159 Vt. 102, 115, 616 A.2d 210, 218 (1992), *cert. denied*, 507 U.S. 911 (1993). In a footnote, the court seems to justify its creation of a new rule by calling into question the long-standing doctrine of extinguishment: "Observers have regarded the rule of law permitting extinguishment of aboriginal rights with skepticism. In legal discourse the act of extinguishment requires no standard to justify it, and methods used to extinguish aboriginal rights are not justiciable." *See id.* The court cites to *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941), to support this

not dispute the exhaustive findings of fact in the district court's opinion that showed that the federal government never expressly extinguished Abenaki aboriginal title. Instead, the court "differ[ed] with the trial court principally in its application of the test for extinguishment to discrete events in Vermont's history, rather than to the *cumulative effect* of many historical events."[128] The court erroneously explained that the legal standard for extinguishment "does not require that extinguishment spring full blown from a single telling event."[129] Instead, the court created its own new standard under which "[e]xtinguishment may be established by the *increasing weight of history*."[130]

The "Marshall Trilogy" established the basic rule of law for extinguishment.[131] These cases stated that Indians "have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."[132] Federal Indian legal jurisprudence also recognizes special canons of construction that apply when a court considers whether Indian rights to land have been diminished or extinguished. The first canon is that only the federal government, usually Congress, has the power to extinguish Indian title in land, and it must clearly and unambiguously express its intent to do so.[133] The second canon requires that any ambiguities regarding congressional intent must be resolved in favor of the Indians.[134]

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assertion. *See id.* However, the court was referring to the fact that because extinguishment typically results from an act of Congress, "the justness [of a particular act of extinguishment] is not open to inquiry." *Id.* at 107, 616 A.2d at 213. The United States Supreme Court's statement regarding justiciability therefore does not support the Vermont Supreme Court's attempt to cast doubt upon the ability of the Abenaki to challenge whether their aboriginal title was ever properly extinguished. Instead, it merely limits the ability of a tribe to challenge the fairness of a particular express act of the U. S. government that extinguished aboriginal title.

128. *Id.* at 115, 616 A.2d at 218 (emphasis added).

129. *Id.*

130. *Id.* (emphasis added).

131. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 84 (3d ed. 1993).

> The broad principles derived from the Marshall 'trilogy,' *Johnson v. McIntosh* . . . and *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* . . . are: that Congress exercises plenary power over Indian affairs; that Indian tribes still retain sovereign, though diminished inherent powers over their internal affairs and reservation territory; and that the United States possesses a trust responsibility toward Indian tribes.

Id. at 84.

132. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

133. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Worcester v. Georgia, 31 U.S. (6 Pet.) 512 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

134. *See Hualpai Indians*, 314 U.S. at 354 (stating "extinguishment cannot be lightly implied in view of the avowed solicitude of the United States for the welfare of its Indian wards"); *see also Worcester*, 31 U.S. (6 Pet.) at 582 (stating "[t]he language used in treaties with the Indians should never be construed to their prejudice").

In *Elliott*, the Vermont Supreme Court discussed the law of extinguishment of aboriginal title to lands, and acknowledged that Indian title cannot be extinguished "without the act or consent of the sovereign."[135] But rather than follow these special canons of Indian law, the court created its own test to determine that the Abenaki aboriginal title had been extinguished, and more importantly, shifted the burden of proof from the state to the tribe.[136]

The court did not look to specific actions by the United States government as precedent requires. Instead, it concluded that a "series of historical events" that took place in the late eighteenth century resulted in extinguishment.[137] The court looked to the history of Vermont and found that Abenaki title was extinguished over the course of events beginning with the Wentworth land grants in 1763 and concluding with Vermont's admission to the Union in 1791.[138] The court made a significant departure from the traditional test requiring clear Congressional intent—rather than historical events—to extinguish aboriginal title.

Tribal reaction to the *Elliott* decision was swift and uncompromising. Chief Homer St. Francis and tribal judge Michael Delaney condemned the ruling in a tribal statement.[139] "What the ruling does . . . is justify the theft and continuing occupation of Abenaki land. The members of the Supreme Court are heirs to the political structure put in place by the founders of Vermont. Could this defense of the legitimacy of their title be politically motivated?"[140]

The state's reaction to the decision reflected strong support for the court's new approach to the traditional test for extinguishment. Governor Howard Dean praised the court for clearing up problems with title insurance caused by the Abenaki claims.[141] In an ironic statement that exposes the sheer injustice of the ruling, the Vermont State Attorney for Franklin County, who has jurisdiction over the disputed land, said "[w]e think this affirms our position all along . . . that all Vermonters are equal before the law."[142] In contrast, the *Burlington Free Press* characterized the case as one in which the court had "to determine whether the Abenaki were robbed 200 years ago—and if so, to make sure they stay robbed. They were, and the Court did."[143] This dichotomy of responses reflects the importance of this issue for Vermont.

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135. *Elliott*, 159 Vt. at 106, 616 A.2d at 213 (citing Cohen, *supra* note 79, at 487).

136. *See generally Elliott*, 159 Vt. at 115, 616 A.2d at 218.

137. *Id.* at 107, 616 A.2d at 214.

138. *See id.*

139. *See Vermont Court Says History Voids Land Claims of Abenaki Indians*, N.Y. TIMES, June 18, 1992, at D23.

140. *Id.*

141. *See* Yvonne Daley, *Court Ruling Against Abenakis Debated*, SUNDAY RUTLAND HERALD & SUNDAY TIMES ARGUS (Rutland, Vt.), June 21, 1992, at 1D.

142. *Vermont Court Says History Voids Land Claims of Abenaki Indians*, *supra* note 139, at D23.

143. Editorial, *Wronging a Right*, BURLINGTON FREE PRESS, June 18, 1992, at 10A.

This is the legal and political backdrop that frames the Abenaki decision to continue pursuing federal acknowledgment.[144] The tribe, after seeking justice through the state courts and the United States Supreme Court, seems to have reached its last resort—achieving protected status through the federal acknowledgment process.

B. The Use of History in Elliott

In order to create and apply an unprecedented test for extinguishment, the Vermont Supreme Court first had to establish that *its* version of the facts were historically accurate. "In deciding the issue of extinguishment, we first place the pertinent historical facts in context."[145] The court described the historical research as "based on conflicting interpretations of recorded history," and set out to clarify which interpretation was correct by discussing the "political backdrop" of European settlement of Vermont.[146] By allowing themselves to put the facts "in context," the court manipulated the outcome of the historical analysis.

The court acknowledged that the Abenaki "occupied" the area, which is now northwestern Vermont, "long before white presence began in the area in 1609."[147] The court identified the 1763 land grants in the Swanton-Highgate area, made by Royal Governor Benning Wentworth of New Hampshire to European settlers, as the "first significant historical event relevant to the extinguishment of Abenaki aboriginal title."[148]

The court also described British attempts to "maintain peaceful relations" with the Abenaki during this time.[149] These attempts were manifested in two directives to royal governors, which the court dismissed as "paper tigers."[150] The first directive, in 1761, was a "Royal Instruction" prohibiting royal governors from granting Indian lands to settlers without the express

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144. In a 1995 case which consolidated the appeals of nine defendants "claiming membership in the Abenaki Tribe," the court held that its holding in *Elliott* was made as a matter of law rather than merely as a matter of historical fact, therefore making the holding binding in general, and not only on the parties in that case. State v. Cameron, 163 Vt. 626, 626-27, 658 A.2d 939, 940 (1995). The court acknowledged that the *Elliott* decision has been "criticized for relying on a 'controversial interpretation of history,'" but stated that the defendants "have not raised issues of historical fact that cause us to doubt our interpretation or to overrule the decision." *Id.* at 627, 658 A.2d at 940. Did the court provide a way for future Abenaki defendants to bring in more historical evidence to persuade the court to overrule *Elliott*? Perhaps, but it is unlikely that the court would do so lightly.

145. *Elliott*, 159 Vt. at 109, 616 A.2d at 214.

146. *Id.*

147. *Id.* at 110, 616 A.2d at 215.

148. *Id.*

149. *Id.* at 111, 616 A.2d at 215.

150. *Id.* at 117, 616 A.2d at 219.

permission of the Crown, and requiring all non-Indians illegally living on Indian lands to abandon the properties.[151] The instruction was followed in 1763 by the "Royal Proclamation," which the court described as "once again forbidding colonial settlement on Indian-occupied lands and ordering settlers occupying Indian lands to abandon the properties."[152]

Although the court dismissed these proclamations, historians consider them unambiguous and significant legal mandates that white settlers should not settle on "Indian lands."[153] The Royal Proclamation of 1763 established "the Appalachian watershed as the western boundary of settlement in the colonies . . . thereby ostensibly safeguarding Abenaki lands west of the Green Mountains."[154] Rather than a mere directive to settlers to stay off lands unless they were properly granted permission, the 1763 proclamation was a reaffirmation of British policy that only the sovereign could dispose of Indian lands after the tribe had ceded them to the government.[155] The court clearly erred in dismissing these proclamations. These directives provide solid evidence that the sovereign, then still England, required that only it could extinguish aboriginal title. The policy declarations serve as important precursors to the current legal doctrine of extinguishment that it may only be done by the sovereign—in this case first England, then the United States.

Other historical evidence relied upon by the *Elliott* court includes the ongoing disputes during this period between New Hampshire and New York over the area between Lake Champlain and the Connecticut River.[156] Governor Wentworth of New Hampshire, despite the 1763 proclamation, continued to grant Indian lands to settlers in the race against New York for present-day Vermont.[157] In reaction to Wentworth's refusal to obey the Royal Proclamation, the British government in a 1764 "Privy Council Order" recognized the Connecticut River as the boundary between New York and New Hampshire.[158] This placed the recent Wentworth grants in the territory

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151. *See id.* at 111, 616 A.2d at 215.

152. *Id.*

153. CALLOWAY, *supra* note 16, at 193. *See also* Allan R. Raymond, *Benning Wentworth's Claims in the New Hampshire–New York Border Controversy: A Case of Twenty-Twenty Hindsight, in* IN A STATE OF NATURE: READINGS IN VERMONT HISTORY 43 (H. Nicholas Muller, III & Samuel B. Hand eds., 1982) (questioning the validity of the land grants made in Vermont by Wentworth in light of the royal orders of the 1760s); MATT BUSHNELL JONES, VERMONT IN THE MAKING 97 (1968) ("the conclusion appears irresistible that the Benning Wentworth grants west of the Connecticut River were nullities which left the settlers who claimed title under them with only such equities as attached to squatter occupation . . . .").

154. CALLOWAY, *supra* note 16, at 193.

155. *See id.*

156. *See Elliott*, 159 Vt. at 112, 616 A.2d at 216.

157. *See* CALLOWAY, *supra* note 16, at 193.

158. *See id.* at 193-94.

of New York, making them "of dubious legal validity."[159] The tensions resulting between the colonies of New Hampshire and New York from the Wentworth grants and the subsequent royal proclamation are thought to have created the impetus for the creation of Vermont.[160] The court seemed to support the finding of extinguishment by relying on both the Wentworth grants and the later acts of independence by Vermont's "founders" as examples of sovereign acts.

Supporting the myths of Vermont's birth, the court also placed undue weight on the intent and desire of the founders of the Republic of Vermont.[161] In reasoning that the events leading up to statehood extinguished Abenaki aboriginal rights in the area, the court lauded the "absolute and unyielding defiance" of the Green Mountain Boys, a militia group led by Ethan Allen.[162] The group was created in the early 1770's in response to the on-going conflict between New York and New Hampshire over the area that settlers were attempting to declare as a distinct republic.[163] Perhaps because Ethan Allen and his brother Ira are credited with being the founders of Vermont, the court, in its new test for extinguishment, placed great weight on their efforts to oust royalists from both bordering colonies.[164] However, well established legal principles, applied by courts since the "Marshall trilogy," dictate that only a sovereign can extinguish aboriginal title. Therefore, the "zeal with which the founders of the Republic of Vermont" fought for lands is simply not enough to extinguish Abenaki aboriginal title.[165]

Historical research shows that the Allen family's attitudes toward Indians were extremely negative, due in large part to the fact that the Indians stood in the way of the family's success as land speculators in the new republic.[166] In ongoing efforts to bias settlers against the Abenaki, the Allens "systematically set about portraying the natives as wanderers who did not effectively occupy the land, and so had no legal claim to it."[167] In 1788, Ira Allen allegedly faked an attack by Abenaki Indians on two settlers in Missisquoi.[168] Allen's attempt to depict the tribe as a lawless people backfired when it was discovered that the two men who had allegedly suffered the attack and then swore to it in a

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159. *Id.* at 194.

160. *See generally* Raymond, *supra* note 153.

161. *See, e.g.*, P. Jeffrey Potash, *Deficiencies in Our Past*, 59 VT. HIST. 212 (1991) (discussing the mythology of Vermont's founding fathers).

162. *Elliott*, 159 Vt. at 112-13, 616 A.2d at 216.

163. *See id.*

164. *See id.* at 112-13, 616 A.2d at 216-17.

165. *Id.* at 116, 616 A.2d at 218.

166. *See* WILLIAM A. HAVILAND & MARJORY W. POWER, THE ORIGINAL VERMONTERS: NATIVE INHABITANTS, PAST AND PRESENT 243 (1981).

167. *Id.* at 243-44.

168. *See id.* at 245.

written deposition were both illiterate, and later denied that the attack had ever occurred.[169]

The court also put great weight on a statement by Ethan Allen to New Yorkers in which he refutes the British crown's title to lands in Vermont: "God damn your Governor, Laws, King, Council, and Assembly."[170] Despite these forceful statements, unless the court considers Vermont during its "republic" period to be a successor sovereign to the British crown, any intent to possess the lands that included those held under Abenaki aboriginal title is irrelevant. The law of extinguishment of aboriginal title requires that the sovereign extinguish title by express act.[171] The intent of colonial settlers to occupy Indian lands, expressed over a period of thirty years, does not support the conclusion that Abenaki title was extinguished.

As noted earlier, the United States Supreme Court denied certiorari in the Abenaki case in 1993.[172] As a result, the *Elliott* decision stands as the final word in Vermont on the issue of land rights for the tribe. Therefore, the tribe must now invest all hope for recognition and rights to land in the federal acknowledgment process.

IV. THE VERMONT ABENAKI PETITION FOR FEDERAL ACKNOWLEDGMENT

Under the acknowledgment process, the Bureau of Indian Affairs should not apply the "increasing weight of history" test in their acknowledgment decision. However, even if the Branch of Acknowledgment and Research (BAR) does consider the Vermont Supreme Court's denial of aboriginal rights for the Abenaki, it is not fatal to the petition for federal acknowledgment. In a case involving a petition by a tribe denied aboriginal hunting and fishing rights, the United States Court of Appeals for the Ninth Circuit held that acknowledgment of the Samish Indian Tribe of Washington was not precluded by the earlier extinguishment.[173]

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169. *See id.* When asked about the attack, the two men, John Waggoner and William Tichout, said "[w]e have never mentioned anything of the sort, and it cannot possibly be so, because we can neither read nor write, unless Colonel Allen has played us this trick and without our knowledge." *Id.*

170. *Elliott*, 159 Vt. at 113, 616 A.2d at 217.

171. *See County of Oneida*, 470 U.S. at 234; *Hualpai Indians*, 314 U.S. at 354.

172. *See* Elliot v. Vermont, 507 U.S. 911 (1993).

173. *See* Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1994). After calling the issues of tribal treaty status and federal acknowledgment "fundamentally different," the Ninth Circuit cited its earlier opinion concurring with the Samish tribe: "[E]ach determination serves a different legal purpose and has an independent effect. Federal recognition is not a threshold condition a tribe must establish to fish under [a treaty] . . . . Similarly, the Samish need not assert treaty fishing rights to gain federal recognition." *Id.* at 1270-71 (citing Greene v. United States, 996 F.2d 973, 976-77 (9th Cir. 1993)). The Samish cases, unlike the Abenaki case, involved treaty fishing rights rather than aboriginal title. However, aboriginal title exists prior to "discovery" and treaty rights are dependent upon the "discoverer" giving rights to Native.

Despite the fact that the *Elliott* case should not affect the tribe's petition for federal acknowledgment, history does play an integral role in the process. Five of the seven criteria require a tribe to provide historical evidence of its continual existence.[174]

The first criterion requires that a tribe prove that it "has been identified as an American Indian entity on a substantially continual basis since 1900."[175] Inconsistent application of the term "substantially continuous" by the BIA has sometimes allowed large gaps between documented tribal history, and at other times has limited the allowable time to only eight years.[176] The BAR provides six ways that tribes can meet the "substantially continuous" requirement, including "[i]dentification as an Indian entity by anthropologists, historians, and/or other scholars."[177] The exhaustive compilation of hundreds of historical facts in the *St. Francis* decision clearly shows that the Abenaki meet this requirement.[178]

Under the second criterion, a tribe must show that a "predominant portion" of the tribe is a distinct community that has existed "from historical times until the present."[179] The BAR offers nine ways that a tribe can meet this criteria, including marriage rates within the group, social discrimination faced by the tribe, and its cultural, political, and religious patterns.[180] The Abenaki meet this standard because they have maintained cultural patterns such as kinship organization and religious beliefs, visible at their tribal cultural center in Swanton, Vermont. The tribe has also maintained a "collective Indian identity" continuously for more than fifty years.[181]

The third criterion requires that the tribe "has maintained political influence or authority over its members" since historical times.[182] This requirement may be met with a showing that the group can mobilize its members for group purposes[183] or that there are internal conflicts within the group which show controversy over valued group goals, properties, policies,

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Therefore, federal acknowledgment should be even less effected by the Vermont Supreme Court's decision than by a denial of treaty rights.

174. *See* 25 C.F.R. § 83.7 (1998). Two of the seven criteria are procedural in nature. *See id.* The fourth criterion requires a tribe to present a copy of its governing document, including its membership criteria to the BAR. *Id.* § 83.7(d). The seventh criterion requires that neither the tribe nor its members have been terminated by Congress. *Id.* § 83.7(g).

175. *Id.* § 83.7(a).

176. Paschal, *supra* note 87, at 218.

177. 25 C.F.R. § 83.7(a)(4).

178. *See* State v. St. Francis, No. 1171-10-86Fcr (Vt., Frn. Dist. Ct. Aug. 11, 1989).

179. 25 C.F.R. § 83.7(b).

180. *See id.* § 83.7(b)(1)(i)-(ix).

181. *Id.* § 83.7(b)(1)(viii).

182. *Id.* § 83.7(c).

183. *See id.* § 83.7(c)(1)(i).

processes and/or decisions.[184] The Abenaki can easily show that they meet the political requirements of the acknowledgment process because they were able to mobilize the tribe to prepare their petition for recognition,[185] and because they have established tribal leadership through a chief and a tribal council.[186]

The fourth criterion is simply administrative, requiring a tribe to provide a copy of its governing document's provisions on criteria for membership.[187] Under the fifth criterion tribal members must descend from a historical Indian tribe (or a combination of tribes) that "functioned as a single autonomous political entity."[188] Both of these criteria are met by documentation found in the current petition for federal acknowledgment.[189]

The sixth criterion requires a tribe to show that it is not "composed principally" of members of other acknowledged tribes.[190] If many of the members were affiliated with another tribe, the group must show that "it has functioned throughout history until the present as a separate and autonomous Indian tribal identity," its members are no longer politically related to another tribe, and its members have written proof of their membership in the petitioning tribe.[191] The Abenaki do not face extreme difficulties caused by intertribal mixing because they are the only tribe in Vermont.

The Vermont Abenaki's history shows that they meet all of the historical requirements of the BIA criteria. The tribe and its members have existed as a politically autonomous entity since before the arrival of white settlers in Vermont in the eighteenth century.[192] Evidence of the tribe leaving its homelands periodically before Vermont achieved statehood in 1791 does not show that the tribe abandoned its aboriginal title. Rather, it shows that the tribe had to disperse from its lands when threatened by settlers and land speculators, often becoming "all but invisible to the whites."[193]

Today more than 2600 Abenaki live in Vermont.[194] The trial court estimated that in 1989 at least eighty percent of the Abenaki live on their traditional homelands in the Swanton-Highgate area.[195] The tribe continues to meet regularly and operates the Abenaki tribal center in Swanton, which is staffed with tribal personnel and houses the offices of the chief and tribal

184. *See id.* § 83.7(c)(1)(v).
185. *See* Abenaki Petition, *supra* note 2.
186. *See* CALLOWAY, *supra* note 16, at 248-49.
187. *See* 25 C.F.R. § 83.7(d).
188. *Id.* § 83.7(e).
189. *See* Abenaki Petition, *supra* note 2.
190. 25 C.F.R. § 83.7(f).
191. *Id.*
192. *See* HAVILAND & POWER, *supra* note 15, at 149.
193. *Id.* at 246.
194. *See St. Francis*, slip op. at 32.
195. *See id.*

judge.[196] Not only do the Abenaki keep computerized records of the tribal history and deal with internal issues as a tribe, they also keep their traditional beliefs alive for future generations at the tribal center.[197] Therefore, the BAR should recommend that the Abenaki receive federal acknowledgment. The ample evidence, as reflected in the trial court's findings of fact and the tribe's exhaustive documentation in its petition, easily meets the regulatory requirements for federal acknowledgment.

CONCLUSION

"[H]istory deplorably confirms [that] the United States ha[s] not always kept its promises to Indian people."[198] The Vermont Supreme Court, in the *Elliott* case, added to the long list of injustices suffered by Native Americans. As one commentator pointed out, the only good thing about the *Elliott* decision is that because the United States Supreme Court denied certiorari, we can hold out hope that it only applies within the state of Vermont.[199]

This hope does nothing to restore to the Vermont Abenaki tribe the lands taken from them by the founders of the state. However, there is hope in the Abenaki's petition to the BIA for federal acknowledgment. Many Indian scholars would warn against putting hope into the federal acknowledgment process, but at this point it represents the tribe's only prospect for justice.

But the Abenaki petition holds more than hope for the tribe. It contains historical evidence proving that the Vermont Abenaki deserve federal acknowledgment. It requires that the United States government acknowledge the tribe and provide it with the services and protection to which it is entitled. The Abenaki, after nearly twenty years of waiting, should not have to rely only upon hope to have their rights vindicated. They should be able to rest assured that the government will follow its own process honestly and professionally, free from political pressure, to finally give the Vermont Abenaki tribe formal federal acknowledgment.

Federal acknowledgment will not end the challenges facing the Vermont Abenaki. Whether or not the tribe gains federal acknowledgment, it must continue to deal with Vermont's unwillingness to recognize the tribe's status and to respect its desire to govern its members. This may pose the most difficult long-term problem for the tribe, as Vermonters are the people with whom the Abenaki must share their native homelands. Regardless of the BAR's final determination, the state should reach out to the Abenaki and

196. *See* Lucido, *supra* note 58, at 626-27.
197. *See id.* at 627.
198. State v. Greger, 559 N.W.2d 854, 864 (S.D. 1997).
199. *See* Lowndes, *supra* note 7, at 118.

establish a new relationship based on respect for the tribe's long history in the place we call Vermont. In the spirit of Vermont's state motto "Freedom and Unity," the Abenaki should expect nothing less.

Meredith Hatfield[*]

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* The Author dedicates this Note to N. Bruce Duthu—teacher, friend, tireless editor and inspirer—for helping students cope with the pain of Federal Indian Law while finding hope in it all.