JURISDICTION OVER ADJUDICATIONS INVOLVING THE ABENAKI INDIANS OF VERMONT

INTRODUCTION

At one time "it was clear who had jurisdiction over Indian land and people—Indian people governed themselves, period."[1] This is no longer the case. There has been profound encroachment upon Indian self-government within the last century and a half.[2]

The main focus of this note will be on the jurisdictional issue arising from disputes over the fishing and hunting rights of the Abenaki Indians in Vermont. A brief overview of American Indian law is provided so that the Abenaki situation may be viewed in context. Possible federal and state jurisdiction over the Abenakis will be explored,[3] as will the theory of the Abenakis' aboriginal rights. The note is centered around such jurisdiction in a criminal case, but the analysis applies with equal force to civil cases.[4]

I. GENERAL OVERVIEW OF AMERICAN INDIAN LAW

American Indian law "refers to the body of jurisprudence created by treaties, statutes, executive orders, court decisions, and administrative action defining and implementing the relationship among the United States Indian tribes and individuals and the states."[5] This primarily federal body of law is confusing, inconsistent, and highly unpredictable. The treatment of American Indians has varied depending upon the era in which the particular conflict arose, the determination of jurisdiction, and the degree of autonomy the Indian Nation displayed.[6] As a result, the legal status of American Indians remains unclear.

---

1. Coulter, *A History of Indian Jurisdiction*, in RETHINKING INDIAN LAW 5 (1982).

2. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (1982 ed.).

3. This note does not address the subject of tribal sovereignty—the theory that Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. For a general discussion of that topic see Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C.L. REV. 743 (1984).

4. *See infra* section IV for discussion of jurisdiction.

5. F. COHEN, *supra* note 2, at 1.

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

During the formative period of the American government, Congress recognized the aboriginal rights[7] of Native Americans by dealing with the Indian Nations as sovereigns.[8] The right of the Native Americans to the exclusive use of "Indian territory" or "Indian Country"[9] was acknowledged. This "sovereign to sovereign" relationship was modified by the Supreme Court in *Johnson v. M'Intosh*.[10] The issue in *M'Intosh* was whether individuals could purchase land from Indian groups having aboriginal title to such land, or whether the federal government was the only entity able to purchase aboriginal lands. The Court found that the European nations which sponsored colonization of the land before the United States government had been established possessed the land and had the exclusive right to conduct relations with the Indian Nations.[11] The Court then accorded Native Americans the status of "rightful occupants," in essence making the United States-American Indian relationship into one of landlord-tenant.[12] This was clearly an erosion of the previous "sovereign to sovereign" relationship.

The sovereignty of Indian tribes was further diluted in *Cherokee Nation v. Georgia*.[13] In *Cherokee Nation*, the Indians requested an injunction to prevent the execution of certain acts of the Georgia legislature.[14] In its opinion denying the injunction, the

---

7. Aboriginal rights are those rights which exist once aboriginal title to land has been established. Aboriginal title can be established by meeting specific use and occupancy, time, and tribal entity requirements. For a more comprehensive discussion of aboriginal title and aboriginal rights *see infra* section IV (C).

8. U.S. CONST. art. I, § 8, cl. 3.

9. "Indian Country" is defined in the United States Code as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1984) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 757; May 24, 1949, ch. 139, § 25, 63 Stat. 94). The discussion of "Indian Country" in this note will focus on part (b) of the definition. Parts (a) and (c) are not applicable to the Abenakis' situation.

10. 21 U.S. (8 Wheat.) 543 (1823).

11. *Id.* at 573.

12. *Id.* at 574.

13. 30 U.S. (5 Pet.) 1 (1831).

14. The purposes and effect of the acts were:

> to parcel out the territory of the Cherokees; to extend all the laws of Georgia

Court redefined the relationship between the American Indians and the United States by characterizing it as that of "a ward to his guardian. They look to our government for protection; rely on its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."[15] In *Cherokee Nation,* Chief Justice Marshall defined the respective powers of the state and federal governments over the Indians.

Other Supreme Court opinions have protected Indians against excessive state infringement on Indian rights. *Worcester v. Georgia*[16] was the first case holding that the states may not apply their own laws to Indians on aboriginal lands without the consent of the United States, the Indians, or both. In *Worcester,* the Supreme Court reversed the conviction of a resident of the Cherokee Nation on the grounds that such a conviction violated the Commerce Clause,[17] which gives the United States exclusive power to establish and regulate commerce with the Indian tribes.

Further preservation of Indian rights was attempted through the use of treaties, statutes, and executive orders.[18] However, not all Indian groups or tribes were included under such protective measures. The Abenaki Indians' rights are not protected by treaty, statute, or executive order.

In 1976, Vermont Governor Salmon issued an executive or-

> over the same; to abolish the Cherokee laws, and to deprive the Cherokees of the protection of their laws; to prevent them, as individuals, from enrolling for emigration, under the penalty of indictment before the state courts of Georgia; to make it murder in the officers of the Cherokee government to inflict the sentence of death in conformity with the Cherokee laws, subjecting them all to indictment therefor, and death by hanging; extending the jurisdiction of the justices of the peace of Georgia into the Cherokee territory, and authorising the calling out of the militia of Georgia to enforce the process; and finally, declaring that no Indian, or descendent of any Indian, residing within the Cherokee nation of Indians, shall be deemed a competent witness in any court of the state of Georgia, in which a white person may be a party, except such white person resides within the said nation.

30 U.S. (5 Pet.) at 7-8.

15. 30 U.S. (5 Pet.) at 17. The concept of guardianship is important to developing the theory of "dependent Indian communities" within the meaning of 18 U.S.C. § 1151(b).

16. 31 U.S. (6 Pet.) 515 (1832). This concept was reaffirmed in McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1972).

17. U.S. CONST. art. I, § 8, cl. 3.

18. *See, e.g.,* Treaty at Fort M'Intosh, Jan. 21, 1785, 7 Stat. 16; Treaty at Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Act of Mar. 1, 1901, ch. 675, 31 Stat. 848; Act of July 10, 1882, ch. 284, 22 Stat. 157; Exec. Order of May 14, 1855, reprinted in 1 INDIAN AFFAIRS: LAWS AND TREATIES 487 (C. Kappler ed. 1903).

der[19] which recognized the Abenakis as a "tribe."[20] One year later, however, Governor Snelling expressly revoked the previous executive order.[21] The effect of the new Snelling order was simply to recognize that American Indians live in Vermont—it did not refer to the Abenaki Indians specifically. Because the Abenakis are not officially recognized as a "tribe" by the Bureau of Indian Affairs (BIA),[22] and because their rights are not protected by any treaties, statutes, or orders, any claims the Abenakis have concerning their rights to use and occupy land in the Swanton-Highgate area must be based on the theory of aboriginal rights. In other words, the Abenakis must show a virtually unbroken chain of occupation and use of their land from the time of their ancestors to the present day.

II. The Abenaki Experience in Vermont

The ancestral chain of the Abenaki Indians in the Swanton-Highgate area can be traced back thousands of years. According to estimates based on archeological findings, the first Vermont Indians were the so-called Paleoindians who arrived in Vermont around 9300 B.C.[23] Evidence shows that these Paleoindians, although nomadic in nature, stayed in Vermont until around the eighth millenium, B.C., at which time extreme environmental changes, most notably glacial advance, caused an almost complete depopulation of Vermont.[24] The Indians apparently began to reappear when the climate had ameliorated because an abundance of archeological sites and remains have been found which prove that an even greater number of Indians populated Vermont after that period.[25] These findings show that primitive Indians in Vermont lived by hunting, fishing, and gathering,[26] and that their basic way

19. State of Vermont Executive Order Number 36, November 24, 1976, 1977 Vt. Acts 644.

20. Although the order did not specifically refer to or use the standards promulgated by the Bureau of Indian Affairs (BIA) for establishing whether or not an Indian group is a "tribe," the data on which the executive order was based could support a finding that the Abenakis are a "tribe" according to the BIA criteria. The criteria used by the BIA to decide whether or not an Indian group is a "tribe" are analyzed *infra* notes 73-89 and accompanying text.

21. State of Vermont Executive Order Number 3, January 28, 1977, 1977 Vt. Acts 652.

22. *See infra* section VI(B) for BIA analysis.

23. W. Haviland & M. Power, The Original Vermonters 38 (1981).

24. *Id.* at 41.

25. *Id.* at 88.

26. *Id.* at 86.

of life remained unchanged despite the drastic environmental changes.[27]

There have been many studies and reports on Indians living in the eastern part of the United States, yet the "western" Abenakis of Vermont went virtually unnoticed until the 1950's when anthropologist Gordon Day began his extensive research.[28] Day's work has been the basis of most modern studies and historical descriptions of the Abenakis.[29]

The Abenakis continue to be primarily a hunting and fishing society.[30] Due to economic necessity, the Abenakis have requested unlimited fishing rights from the State of Vermont.[31] The Abenakis claim that these fishing rights are inherent in their aboriginal title to the land. In an effort to dramatize their claim, the Abenakis staged a "fish-in" on the west bank of the Missisquoi River in Swanton.[32] State fish and game wardens issued thirty-four citations[33] to "fish-in" participants, either for fishing without licenses,[34] or for failure to exhibit a license.[35] The Abenakis moved to dismiss the case against them on the ground that the federal government, rather than the State of Vermont, had jurisdiction over matters involving the Abenaki Indians.[36] However, the State's Attorney eventually dropped the charges.[37] Therefore, the issue of

---

27. *Id.* at 89.

28. There are Abenakis in the eastern part of Vermont but these groups were almost indistinguishable from the Passamaquoddies, Maliseets, Amarascoggins, Kennebecs, and Penobscots of Maine. *Id.* at 49.

29. *See generally* Day, *Indian Occupation of Vermont* in 33 VERMONT HISTORY 365 (1965); Day, *Western Abenaki*, in 15 HANDBOOK OF NORTH AMERICAN INDIANS 148-59 (B. Trigger ed. 1978); W. HAVILAND & M. POWER, *supra* note 23.

30. W. HAVILAND & M. POWER, *supra* note 23, at 160.

31. Cowperthwait, *Abenakis Plead Innocent to Fishing Charges*, Burlington Free Press, April 23, 1979, at 7A, col. 4.

32. *Id.* The Abenakis have made several attempts to obtain exemption from established Vermont fish and game regulations as a matter of economic necessity. In the summer of 1976, for example, the Abenakis circulated a petition throughout the state requesting such exemptions. W. HAVILAND & M. POWER, *supra* note 23, at 261. They obtained 1300-1400 signatures, many from non-Indians, which they presented to the Vermont Fish and Game Department. *Id.* This effort, however, proved to be unsuccessful.

33. Eley, *Abenakis, Game Wardens Trade Citations*, Burlington Free Press, April 23, 1979, at 7A, col. 4.

34. Violation of VT. STAT. ANN. tit. 10, § 4251 (1984).

35. *Id.*, § 4266.

36. Defendants' Amended Motion to Dismiss for Lack of State Jurisdiction, State v. Homer St. Francis, No. 004-554 (Franklin County filed Apr. 2, 1983). The jurisdiction issue will be fully analyzed *infra*, section IV.

37. Defendants' Motion to Dismiss, State v. Lampman, No. 008-761 (Franklin County

whether or not the State of Vermont has jurisdiction over matters concerning Abenaki hunting and fishing rights was left unresolved.

The Abenakis participated in a second "fish-in" which resulted in thirty-three Abenakis being charged with fishing without licenses and four others being charged with failure to exhibit licenses.[38] The Abenakis have filed a Motion to Dismiss pursuant to Rule 12(b) of the Vermont Rules of Criminal Procedure, on the grounds that the Vermont court lacks both subject matter and personal jurisdiction over the defendants.[39] As of this writing, the District Judge has not ruled on that motion.

III. JURISDICTION

As noted, three entities could conceivably exercise jurisdiction over adjudications of the Abenaki Indians' rights to use and occupy land. The State of Vermont claims jurisdiction over the Abenakis on the grounds that the Abenakis are not a tribe, and the alleged offenses did not occur in "Indian Country." Therefore the State, rather than the federal government, would have jurisdiction. The federal government could claim exclusive jurisdiction based on its power under the Constitution "to regulate Commerce with . . . the Indian Tribes,"[40] or under federal law.[41] The Abenakis could claim that they have jurisdiction over themselves due to the rights inherent in their aboriginal title to the land on which the alleged offenses occurred.

A. *State Jurisdiction*

In general the status of state court jurisdiction over Indian matters can be summarized in two statements: (1) it is generally not applicable in "Indian Country";[42] and (2) it cannot be asserted over Indian tribes[43] without their consent and that of Congress.[44]

---

filed Apr. 9, 1984).

38. Cowperthwait, *37 Abenakis Face Charges After Peaceful "Fish-In"*, Burlington Free Press, July 3, 1983, at 13, col. 1.

39. Defendants' Motion to Dismiss, *supra* note 36. The Abenaki defendants argued that the court lacked subject matter and personal jurisdiction because the alleged offenses took place in "Indian Country." *Id.*

40. U.S. CONST. art. I, § 8, cl. 3.

41. 18 U.S.C.A. § 1152 (West Supp. 1984); § 1153 (West Supp. 1985).

42. 18 U.S.C. § 1151.

43. The issue of the Abenakis' tribal status is discussed *infra* notes 74-89 and accompanying text.

Thus, in order to successfully defend against the state's assertion of jurisdiction, the Abenakis have the burden of proving either that the alleged offenses occurred in "Indian Country" or that the Abenakis are, indeed, a tribe and that neither Congress nor the Abenakis have given Vermont consent to claim jurisdiction over them. These issues were presented in the "fish-in" cases.

Specifically, the Abenakis argue that the case should be dismissed because the "land on which the alleged offense took place constitutes 'Indian Country' within the meaning of federal law and, as such, jurisdiction over the subject matter in this action rests exclusively with the federal courts."[45] The Abenakis claim that under 18 U.S.C. §§ 1151-52 (1982), "[n]o crime committed in 'Indian Country' involving either an Indian offender or an Indian victim can be prosecuted in state court."[46]

Because the statutory definition of "Indian Country"[47] is brief and somewhat vague, several courts have developed guidelines as to what is required under the federal law.[48] These courts were interpreting the same part of the statute which is at issue here: what elements constitute "dependent Indian communities" for purposes of defining "Indian Country."[49] The courts focused on two criteria—the nature of the occupancy in the area where the actions in question occurred, and the relationships the Indians had with both the non-Indian inhabitants of the area, and with the federal government. The courts were looking for evidence which would tend to prove or disprove the following: (1) that the area in question was primarily used and occupied by Indians;[50] (2) that the Indian group was distinct from the rest of the community;[51] and (3) that

---

44. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959).

45. Defendants' Motion to Dismiss, *supra* note 36.

46. *Id.* (citing Note, *The Meaning and Implications of "Indian Country": State v. Dana*, 31 MAINE L. REV. 171, 172 n. 9 (1979)).

47. *See supra* note 9.

48. *See, e.g.*, State v. Dana, ___ Me. ___, 404 A.2d 551 (1979); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971); United States v. Levesque, 681 F.2d 75 (1st Cir. 1982).

49. 18 U.S.C. § 1151(b).

50. *See, e.g.*, United States v. Levesque, 681 F.2d 75 (1st Cir. 1982) (court held that offense occurring within Indian Township, in which all but 6,000 privately owned acres of land belonged to the Passamaquoddy Indians, took place in "Indian Country" within the meaning of 18 U.S.C. § 1151(b)).

51. *See, e.g.*, United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981) in which the court held that the area in question was "Indian Country" within the meaning of 18 U.S.C. § 1151(b), in part on the basis of evidence showing that the Housing Authority Community

the Indian community was dependent upon the federal government for financial resources or general protection.[52]

Applying the courts' criteria of "Indian Country" to the factual situation of the Abenakis, the Swanton-Highgate area where the "fish-in" occurred is within the federal definition of "Indian Country." Abenaki Indians have lived in the area on a permanent basis since before the arrival of Europeans.[53] The Abenaki community in the Swanton area is a very tight-knit one, in which the traditional band organization of large extended family groups is still respected.[54] There is also evidence which supports the contention that the Abenaki Indians are distinct from the rest of the community. Among other things, the Abenakis have their own Tribal Council and an Abenaki Self Help Association, Inc. (ASHAI), which assists them in obtaining the resources they need and which provides other general services.[55] They maintain an Adult Education program through the ASHAI and most recently obtained federal funding to commence an Abenaki kindergarten program.[56] In addition, the Abenakis have interacted with the State of Vermont through their Tribal Council, although with varied success.[57] Finally, the group is dependent upon the federal government for their financial resources. They have received grants on the basis of

---

was required to report regularly to the Tribal Council, and on evidence showing that the Tribe provided social services to the community such as a senior citizens program and a maternal and childcare program.

52. *See, e.g.*, United States v. South Dakota, 665 F.2d 837, in which the court regarded federal concern for the Indian community (including federal provision of water and sewage facilities, a garbage truck, and H.U.D. housing) as partial basis for Indian housing authority community being defined as "Indian Country" within 18 U.S.C. § 1151(b).

53. J. Moody, Missisquoi: Abenaki Survival in their Ancient Homeland (1979) (unpublished manuscript on file with the author, Sharon, Vt.). Today, 900 of the 51,062 residents of the Swanton-Highgate area are Abenakis. Telephone interview with Jim Medor, member of the Abenaki Tribal Council. (Feb. 26, 1985).

54. W. HAVILAND & M. POWER, *supra* note 23, at 88.

55. Interview with Leonard "Blackie" Lampman, Chief of the St. Francis-Sokoki band of the Abenaki Indians, and Jim Medor, member of the Abenaki Tribal Council, in Swanton, Vermont. (Oct. 5, 1984). Other general services include filing a petition with the Bureau of Indian Affairs to obtain Federal tribal status, and trying to acquire a land base for a reserve which would contain, among other things, a community center. *Id.*

56. *Id.*

57. *Id.* While Governor Salmon's Commission on Indian Affairs called for the State of Vermont to assist the Abenaki Tribal Council specifically in its dealings with state and local government, *supra* note 19, Governor Snelling's Commission on Indian Affairs called for the state to assist persons of American Indian heritage who are residents of Vermont, *supra* note 21. The Abenaki Tribal Council is currently "urging Governor Madeline Kunin to resurrect the defunct Vermont Commission for Indian Affairs." Valley News, Feb. 8, 1985, at 3, col. 1.

their status as American Indians[58] to help fund various programs such as adult education, job training, and low-income housing.[59] In an Indian community as economically depressed as that in the Swanton area,[60] the Abenakis would go without some of the basic necessities of life absent federal assistance.

Based on the foregoing analysis, when the Abenakis fished in the Missisquoi River in Swanton they were fishing in "Indian Country." It follows that the State of Vermont does not have jurisdiction over the Abenakis' actions on that land.

Even if the Abenakis were fishing in "Indian Country," the state could still assert jurisdiction over their affairs if it could demonstrate that it had the consent of Congress[61] and of the Indians.[62] Public Law 280[63] is a law enacted by Congress which gave consent to certain states[64] to assume jurisdiction over civil and/or criminal matters involving Indian tribes and Indian activities in "Indian Country." In the original form of the Act, the states were divided into two groups—those which were required to take civil

---

58. It is difficult to distinguish between federal programs which give funding on the basis of general Indian status and BIA funding which is based on tribal status. There are several programs which fund Indian groups. However, each may have its own criteria for approval of the funds, and the funding provided may vary. One thing which is clear, however, is that while several programs fund Indian groups on the basis of race, the BIA gives funding on a political basis. Through the BIA, the federal government deals with tribes on a government to government basis. Telephone interview with John Shapard, Acting Chief for the Branch of Acknowledgement and Research, Bureau of Indian Affairs. (Feb. 26, 1985).

59. The Abenakis have received the following federal grants on the basis of Indian status: an Economic and Social Development Grant from the Department of Health and Human Services, Office of Human Development, Administration of Native Americans; Job Training Grant from the Department of Labor, Job Training and Partnership Assistance; a grant for preschool kindergarten and an adult education project from the Department of Education, Office of Indian Education; and subsidies for a housing development from the Department of Housing and Urban Development. Telephone interview with Miles Jensen, Director of Education for the Abenaki Indians. (Oct. 15, 1984).

60. The Abenakis' 1983 Needs Assessment showed that out of 185 Abenaki families surveyed, only 15.7 reported incomes above H.E.W. low income guidelines. Medor interview, *supra* note 53.

61. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959).

62. Act of April 11, 1968, Pub. L. No. 90-284 § 406 82 Stat. 73, 80. *See also* Ahboah v. Housing Auth. of Kiowa Tribe, 660 P.2d 625, 630 (Okla. 1983).

63. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1982)) (additional jurisdictional statutes over Indian claims may be found in 25 U.S.C. §§ 1321-26 (1982); 28 U.S.C. §1360 (1982)).

64. Those states were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C. § 1162.

and criminal jurisdiction,[65] and those which had the option to assume jurisdiction through affirmative legislative action.[66] In 1968, the law was amended in two important ways: the requirement of affirmative legislative action was removed,[67] and a new requirement, consent by tribal referendum prior to state assumption of jurisdiction, was added.[68]

Under the original version of Public Law 280, Vermont was not one of the states expressly granted jurisdiction.[69] Nor has Vermont ever taken the option of assuming jurisdiction through affirmative legislative action. It has also failed to obtain the required tribal consent. Under these circumstances, Vermont does not come within the purview of Public Law 280, and therefore may not exercise jurisdiction over the Abenakis.

It is important to note that Vermont need only comply with Public Law 280 if the Abenakis can prove that the "fish-in" took place in "Indian Country," regardless of whether or not their tribal status is officially recognized. If the Abenakis are a "tribe," however, and Public Law 280 does not apply, then the federal government clearly has jurisdiction over the actions of the Abenakis.[70]

B. *Federal Jurisdiction*

The only Constitutional authorization of power over Indian matters is the power given Congress "to regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."[71] The United States also has statutory jurisdiction over offenses committed in "Indian Country."[72] Therefore, if the Abenaki Indians constitute a tribe, or if the alleged offenses occurred in "Indian Country," the federal government has jurisdiction over the matter to the exclusion of the state.

The Bureau of Indian Affairs (BIA) has promulgated regulations for establishing whether or not an American Indian group ex-

---

65. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a).

66. 25 U.S.C. §§ 1321-22, 1326.

67. Act of April 11, 1968, Pub. L. No. 90-284 § 403(b), 82 Stat. 73, 79 (amending 18 U.S.C. § 1162).

68. *Id.* § 406, 82 Stat. at 80.

69. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a).

70. U.S. CONST. art I, § 8, cl. 3.

71. U.S. CONST. art. I, § 8, cl. 3.

72. 18 U.S.C. §§ 1152-53.

ists as an Indian tribe.[73] Briefly, the criteria are as follows:

a) Evidence which establishes that the petitioning group has been continuously identifiable as an Indian entity from ancient times until the present;[74]
b) Evidence that a large part of the Indian group inhabits a specific area, or that the group is distinct from the rest of the community in a specific area, and that the members of the group descend from an Indian group which also had inhabited a specific area;
c) Facts establishing that the group in question has maintained autonomy throughout history until the present;
d) Evidence of a governing document or a statement of the procedures used in creating and maintaining a governing body;
e) A list of past and present members of the Indian group based on that group's own membership criteria, which members must have descended from an autonomous Indian tribe;[75]

---

73. 25 C.F.R. §§ 83.1-83.11 (1985).

74. Evidence to be relied on in determining the group's substantially continuous Indian identity shall include one or more of the following:

(1) Repeated identification by Federal authorities;
(2) Longstanding relationships with State governments based on identification of the group as Indian;
(3) Repeated dealings with a county, parish, or other local government in a relationship based on the group's Indian identity;
(4) Identification as an Indian entity by records in courthouses, churches, or schools;
(5) Identification as an Indian entity by anthropologists, historians, or other scholars;
(6) Repeated identification as an Indian entity in newspapers and books;
(7) Repeated identifications and dealings as an Indian entity with recognized Indian tribes or national Indian organizations.

25 C.F.R. § 83.7(a) (1985).

75. Evidence acceptable to the Secretary of tribal membership for this purpose includes but is not limited to:

(1) Descendency rolls prepared by the Secretary for the petitioner for purposes of distributing claims money, providing allotments, or other purposes;
(2) State, Federal or other official records or evidence identifying present members as being an Indian descendant and a member of the petitioning group;
(3) Church, school, and other similar enrollment records indicating the person as being a member of the petitioning entity;
(4) Affidavits of recognition by tribal elders, leaders, or the tribal governing body, identifying the person as being an Indian descendent of the tribe and a member of the petitioning entity;
(5) Other records or evidence identifying the person as a member of the petitioning entity.

25 C.F.R. § 83.7(e).

f) Members of the petitioning group should not be members of any other North American Tribe;
g) The group may not be one which has been expressly terminated by Congress, nor may the Federal relationship have been forbidden by congressional legislation.[76]

The Abenaki Indians meet the BIA criteria and should be officially recognized as a tribe. The Abenakis have been continuously identifiable as an Indian group from pre-colonial times until the present. This criterion is satisfied by several facts: the State of Vermont has traditionally dealt with the Abenakis as an Indian entity, particularly through the establishment of a Commission on Indian Affairs; anthropologists and historians such as Gordon Day and John Moody have long identified the Abenakis as an Indian entity; and newspapers and books repeatedly have identified the Abenakis as an Indian entity.[77] A recent study provides detailed genealogical and historical proof that the Abenaki Indians have lived in the Swanton-Highgate area—the community in which the "fish-in" took place—on a permanent basis since pre-colonial times, and that all of the members of the group are of Abenaki descent.[78] In *Missisquoi: Abenaki Survival in their Ancient Homeland,* author John Moody pieces together the Abenakis' history through church records, interviews, letters, leases, birth records, and other data.[79]

The Abenakis have also maintained cultural autonomy throughout history until the present. Their governing body consists of a six member Tribal Council whose members are elected for a two-year term.[80] A tribal Chief is also elected for a two-year term on alternate years from the Tribal Council elections.[81] The Abenakis can document the past and present members of their group based on their own membership criteria through church records, birth records, interviews with Abenaki elders, and other data. The Abenakis in the Swanton-Highgate area are descendents of other Abenakis, and they are not members of any other North

76. *Id.* § 83.7. Some of these criteria are also analyzed and discussed in W. HAVILAND & M. POWER, *supra* note 23, at 257-58; however, that discussion does not reflect recent changes in the regulations which are cited here.

77. *See* Cowperthwait, *supra* note 31; Eley, *supra* note 33; Cowperthwait, *supra* note 38; W. HAVILAND & M. POWER, *supra* note 23.

78. J. Moody, *supra* note 53.

79. *Id. See supra* note 74. *See also supra* notes 23-25 and accompanying text.

80. Lampman/Medor interview, *supra* note 55.

81. *Id.*

American tribe. Finally, the Abenakis as a group have not been expressly terminated by Congress, and the relationship between them and the federal government has not been forbidden by congressional legislation.

According to Tribal Council members, the Abenaki Indians applied for federal recognition through the Bureau of Indian Affairs in 1982.[82] They relied heavily on the Moody manuscript[83] to supply the historical and genealogical evidence needed to meet the criteria for tribal status. Due to the large backlog of petitions on file,[84] the small size of the BIA staff,[85] and research considerations,[86] a decision on the Abenakis' application is not expected in the near future.[87] Such recognition, if obtained, would provide the Abenakis with protection, services, and benefits from the Federal Government available to other Indian tribes, as well as tribal privileges and immunities.[88] A land grant is usually donated to each tribe as well.[89]

The Abenakis' argument that the Federal Government should have jurisdiction over matters in which they are involved would be much stronger if the BIA were to recognize their tribal status. Fed-

---

82. Telephone interview with Ken Maskell, genealogist and member of the Abenaki Tribal Council. (Sept. 23, 1985).

83. J. Moody, *supra* note 53.

84. There are presently 78 petitions at the BIA waiting to be processed. It is estimated that the BIA can process 2-4 petitions per year. BIA interview, *supra* note 58.

85. Only 6 BIA employees are involved in the acknowledgement or tribal recognition process. *Id.*

86. The length of time it takes to process a petition depends, in part, upon the amount of research which has been done, or which needs to be done, by the petitioning group. At this point in time the Abenaki petition is at the "obvious deficiency" stage. This means that there is further information which the Abenakis must gather before the BIA will put their petition on "active consideration." Whether or not the Abenakis have the time and resources to acquire the necessary information, whether or not the data is actually available, and the amount of time it takes the Abenakis to gather the information will all be determinative of how long it takes before the Abenaki petition is put on "active consideration." *Id.*

87. Although there are certain time limitations on the processing of petitions by the BIA, these limitations do not take effect until the petitioner has been notified that "active consideration" of the petition has begun. 25 C.F.R. § 83.9. The regulations do not set forth any time limit as to how long the BIA may wait after receiving an application before it begins "active consideration" of that petition, nor do they define what is meant by "active consideration." This failure to regulate such a period of time undermines, and is inconsistent with, the purpose of regulations which are supposed to prevent unnecessary delay, and undue hardship caused by such delay, in the application process.

88. The regulations do not specify exactly what protection, services, benefits, and tribal privileges and immunities are for purposes of BIA tribal recognition. 25 C.F.R. §§ 83.1-83.11.

89. Lampman/Medor interview, *supra* note 55.

eral protection of the Abenakis as a tribe would be constitutionally and statutorily mandated.

Recognition by the BIA is not the only argument the Abenakis could make for assertion of federal jurisdiction. Decisional law has established that the federal government does have the authority to assert jurisdiction and provide protection and care to all "dependent Indian communities,"[90] which need not necessarily be tribes.[91] In *United States v. Sandoval*,[92] for example, the issue before the Court was whether the status of the Pueblo Indians and their lands was such that Congress could prohibit the introduction of intoxicating liquor into those lands. In deciding that question affirmatively, the Court characterized the Pueblo Indians as a "dependent Indian community" which was Indian in race, custom, and government.[93] The Court supported its conclusion that the Pueblo Indians, as well as other Indian communities, needed the protection of the United States by noting the many ways in which the federal government had aided the Indians. Among other things, the government had supplied the Indians with farm equipment, job training, and schools in which the Indians could educate their children.[94]

The Abenakis' situation is very similar to that of the Pueblo Indians. Although the Swanton-Highgate area is inhabited by non-Indians as well as Indians, the Abenakis are distinctly Indian in their race, customs, and government. In addition, as noted earlier,[95] the Abenakis are dependent on the government for funding their basic needs: housing, job training, and education. Therefore, the Abenakis, like the Pueblo Indians, are a dependent Indian community, and are within the exclusive jurisdiction of the United States regardless of whether they are an officially recognized "tribe."

While federal recognition of the Abenakis would resolve the jurisdictional question as between the state and the federal government, there is another possible alternative: that the federal government has exclusive jurisdiction over the Abenakis based on their

---

90. *See supra* notes 47-52 and accompanying text.

91. United States v. Sandoval, 231 U.S. 28, 45-46 (1913); United States v. McGowan, 302 U.S. 535, 538 (1937).

92. 231 U.S. 28.

93. *Id.* at 39.

94. *Id.* at 39-40.

95. *See supra* notes 55-60 and accompanying text.

aboriginal title to the Swanton-Highgate area and the aboriginal rights which flow from that title.

C. *Aboriginal Rights*

"Aboriginal title" can be defined as "the interests which Indians possess in land within the 50 states, based solely upon the rights acquired by them as the original inhabitants of the land, and not upon statute, treaty, or grant by or with the United States or any prior sovereign."[96] There are three basic requirements for establishing aboriginal title: (1) "occupancy" or "use"; (2) time; and (3) "tribal entity."[97]

The first two requirements may be met if an Indian group can document exclusive use and occupancy of a certain area for a "long period of time."[98] The use and occupancy requirement may be established by a showing that such use of the land is in accordance with the normal lifestyles, habits, and customs of the occupying Indians.[99] The case of *United States v. Seminole Indians of Florida*[100] provides an illustration of the kind of factors courts deem material when deciding whether any Indian group meets the use and occupancy requirement.

In the *Seminole* case, the United States appealed an interlocutory order of the Indian Claims Commission, which had determined that the Seminole Indians had aboriginal title to all of the State of Florida prior to their 1823 treaty with the United States. The court was provided with evidence that the Seminole Indians had a "virtual 'monopoly' " on the land in question; that their dominion over the land was never challenged by other aboriginal groups; and that the Indians had farmed, gathered, and hunted on the land in question.[101] On the basis of that evidence, the court concluded that the lower court had had sufficient evidence to declare that the Seminole Indians had aboriginal title to the land in question. The court found this evidence to be sufficient proof that

---

96. Annot., 41 A.L.R. FED. 428, 428 n.2 (1979).

97. Note, *Aboriginal Land Rights in the United States and Canada*, 60 N.D.L. REV. 107, 113-17 (1984).

98. United States v. Santa Fe R.R. Co., 314 U.S. 339, *reh'g. denied*, 314 U.S. 716 (1942); Sac & Fox Tribe of Indians v. United States, 383 F.2d 991 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 900 (1967).

99. *Sac & Fox Tribe of Indians*, 383 F.2d at 998.

100. 180 Ct. Cl. 375 (1967).

101. *Id.*

the Seminole Indians met the "use and occupancy" requirement. The court also noted that a short period of depopulation of the area did not affect the Seminoles' aboriginal claim.[102]

The Abenakis' situation is quite similar to that of the Seminoles. In *Missisquoi: Abenaki Survival in their Ancient Homeland,* author John Moody presents evidence that the Abenakis have used and occupied the Swanton-Highgate area since at least the 1700's.[103] The evidence shows that the Abenakis have, throughout history, farmed, gathered, and hunted on the land in question.[104] The Abenakis, like the Seminoles, had retreated for a short period of time. Applying the *Seminole* analysis, such a brief depopulation is not fatal to the Abenakis' claim of aboriginal title.

The *Seminole* court also held that a period of more than 50 years was sufficient, as a matter of law, to meet the time requirement in a claim of aboriginal title.[105] The Abenakis have lived in the Swanton-Highgate area since pre-colonial times and therefore they meet the time requirement as well as the use and occupancy requirement.

The third requirement of "tribal entity" derives from decisions which indicate that only Indian tribes or bands of Indians may establish aboriginal title due to the communal nature of such title.[106] The land to which a group of Indians claims aboriginal title must be held in common, rather than individually owned, so that any interest acquired in that land accrues to the group as a whole.[107] Membership in an Indian group, as opposed to residence on an officially established reservation, may be a significant factor in the determination.[108]

The Abenaki Indians are a "tribal entity." They have a Tribal Council which governs the group, and grants from the federal government go to the group collectively. The Abenakis as a group, as opposed to individuals, claim aboriginal title to the Swanton-Highgate area. In addition, the Abenakis have their own internal crite-

---

102. *Id.* at 385.

103. J. Moody, *supra* note 53.

104. *Id.*

105. *Id.* at 387.

106. Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 308 (1886); Prairie Band of Potawatomi Indians v. United States, 165 F. Supp. 139, 147 (Ct. Cl. 1958).

107. *Cherokee Indians,* 117 U.S. at 311-12; *Prairie Band of Potawatomi Indians,* 165 F. Supp. at 153.

108. *Prairie Band of Potawatomi Indians,* 165 F. Supp. at 153.

ria for determining membership.[109]

Because the Abenakis meet the use and occupancy, time, and tribal entity requirements, they should be recognized as having aboriginal title to the Swanton-Highgate area. Aboriginal rights to the use of that land, flowing from that title, include the right to fish in the Missisquoi River without first obtaining a fishing license from the State of Vermont.

Once it has been established that a group of Indians possesses aboriginal title to land, only Congress may extinguish that title.[110] This may be done by treaty, purchase, force, or the exercise of complete dominion by the federal government over the lands in a manner inconsistent with aboriginal possession.[111] Only clear and unambiguous governmental action can deprive Indians of aboriginal title.[112]

In light of the Abenakis' history, it is apparent that the federal government has never extinguished nor attempted to extinguish the Abenakis' original possession or use of the lands in the Swanton-Highgate area. The Abenakis have no treaty with the United States, nor have they ever had one. Furthermore, the Abenakis and their ancestors have never left the Swanton-Highgate area on a permanent basis, but rather have always lived there with the intent to keep it as their home. Congress has never acted in a way which is inconsistent with the Abenakis' original possession. On the contrary, the federal government has given the Abenakis funding so that they may continue to live on in the Swanton-Highgate area. Therefore, the Abenakis should be recognized as still holding valid title to the land in question.

In addition to the other previously discussed bases for exclusive federal jurisdiction,[113] the aboriginal rights theory provides a viable alternative that the District Judge should consider. That is, absent congressional extinguishment, the Abenakis still have aboriginal title to the lands in the Swanton-Highgate area. They

---

109. The Abenaki criteria follow the federal criteria for defining "Indian." Lampman/Medor interview, *supra* note 55.

110. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Barker v. Harvey, 181 U.S. 481 (1901); *See also* F. COHEN, *supra* note 2, at 489.

111. United States v. Santa Fe. R.R. Co., 314 U.S. 339, 347 (1941) (citing Beecher v. Wetherby, 95 U.S. 517, 525 (1877)).

112. *See Santa Fe R.R. Co.*, 314 U.S. at 346. For a complete discussion of extinguishment of aboriginal title *see* Annot., 41 A.L.R. FED. 425 (1979).

113. *See supra* notes 71-72 and accompanying text.

therefore also have the aboriginal right to fish on that land without interference by the State of Vermont.

In the alternative, the Abenakis may be able to use the proof of their aboriginal title to the lands in the Swanton-Highgate area to show that the area in question is "Indian Country" under federal law. When analyzing an Indian group's circumstances to see whether or not the area they occupy is "Indian Country," there are, as previously discussed,[114] two main criteria to consider: the nature of the occupancy in the area where the actions in question occurred, and the relationship of the Indians to the non-Indian inhabitants and to the federal government. The same evidence which satisfies the use and occupancy and tribal entity requirements needed to establish aboriginal title would, arguably, also satisfy the above criteria for defining a certain area as "Indian Country." In addition, the very same evidence and information supports the argument that the Abenakis are a "tribe" under the BIA standards. Establishing any or all of the Abenakis' claims of "Indian Country," BIA "tribal" status, or aboriginal title strengthens their argument that they may not be prosecuted by the State of Vermont because of the federal government's exclusive jurisdiction over the controversy.

Conclusion

The Abenaki case pending in Franklin County District Court should be dismissed for lack of jurisdiction. The State of Vermont does not have jurisdiction over the Abenaki Indians because the alleged violations took place in "Indian Country" which gives rise to exclusive federal jurisdiction. In addition, the Abenaki Indians constitute a tribe, and Vermont does not have the consent of Congress, nor of the Indians, which is required before a state can assert jurisdiction over a tribe. Vermont had the option, under Public Law 280, to assert jurisdiction over the Abenakis by affirmative legislative action, but failed to do so.

The federal government, on the other hand, has exclusive jurisdiction in matters involving Indian tribes or Indian Country. The Abenakis are a tribe because they meet the criteria set forth in BIA regulations. Furthermore, the area in which the alleged violations occurred is "Indian Country" within the federal definition

---

114. *See supra* notes 47-52 and accompanying text.

because the Abenakis in the Swanton-Highgate area constitute a "dependent Indian community." The federal government therefore has exclusive jurisdiction over the Abenakis in the pending case. The Abenakis also have aboriginal title to the lands in the Swanton-Highgate area, and therefore have the aboriginal right to fish in that area without first obtaining a license from the State of Vermont.

In conclusion, the Abenakis should be free to fish on their land without interference from any governmental body, and the federal government should assert exclusive jurisdiction over any cases in which the Abenakis are a party. In the Abenakis' present situation, the State of Vermont has no legitimate basis on which to assert jurisdiction.

Christine A. Doremus