

## NOTES

### ABORIGINAL TITLE: ABENAKI INDIAN LAND CLAIM IN VERMONT

*So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent.*

—United States Attorney General, 1821<sup>1</sup>

#### INTRODUCTION

In the recent past, a number of Indian tribes in the eastern United States have sued both the federal and state governments for the return of lands pursuant to the doctrine of aboriginal title.<sup>2</sup> These tribes have maintained actions seeking compensation for the taking of these lands as well as for their return.<sup>3</sup> Many of these actions were successful in New York, Florida, and, most recently, Maine.<sup>4</sup>

Presently, the Abenaki Indians of northern Vermont are preparing to make a similar type of claim to a large portion of land in the Swanton-Highgate area. This note discusses the merits of this claim. It begins with a discussion of the history and legal relevance of the aboriginal title doctrine. Next an illustration of how the aboriginal title doctrine has been used in contemporary cases related to Indian land claims is presented. The note then explores Abenaki history in Vermont as it relates to the legal tests involved in an aboriginal title analysis, focusing on the Abenaki claim under the aboriginal title doctrine.

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1. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 213 (1989).

2. *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1967); *see also infra* notes 57-85 and accompanying text.

3. *Id.*

4. *Id.*

Finally, the note provides an overview of two Vermont trial court decisions which have rendered opinions on the question of aboriginal title as a collateral issue in cases involving the Abenaki. One of these decisions held that the Abenakis do indeed hold aboriginal title to a large portion of Vermont.<sup>5</sup> The other held against the existence of aboriginal title.<sup>6</sup> The note evaluates the soundness of each judge's reasoning. It then concludes that the Abenaki do have a valid and justiciable claim to land in Vermont. This conclusion is based on a finding that the history of the Abenaki satisfies all of the requirements of the aboriginal title doctrine. The Abenaki have occupied and used the land in the Swanton-Highgate area continually and exclusively since before the time of European intervention on this continent. They are a viable Indian tribal entity and their rights to this land have never been extinguished officially by the United States government.

#### I. HISTORICAL DEVELOPMENT OF INDIAN LAND OWNERSHIP RIGHTS

Indian land ownership takes many different forms. This note will focus on those doctrines relating only to lands owned by Indian tribes rather than those lands privately owned by individual Indians. Moreover, this note is not concerned with lands characterized as reservations.<sup>7</sup> The sole focus is on those lands to which an Indian nation may have original title based on its original and continual occupation of that land.

Traditionally, title to land is held in fee simple absolute.<sup>8</sup> This gives the owner an absolute holding on the land free from the interests of all others.<sup>9</sup> Indians maintain a title that is different from the fee simple absolute.<sup>10</sup> Consequently, the law governing the existence of and the rights conferred by this title is unique to Indian

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5. *State v. Bellevue*, No. 1862-11-89Fcr (Vt., Frn. Dist. Ct. Aug. 13, 1990).

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

7. Indian land held by reservation falls under a different set of laws and related rights than does land held by aboriginal title. The term "reservation" refers to land set aside by the United States, under federal protection, for the residence of a particular Indian tribe. It is not necessarily land which the Indians had occupied originally, and the Indians are not vested with any title to the land. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 34 (Rennard Strickland et al. eds., 1982).

8. 3 *AMERICAN LAW OF PROPERTY* 3-4 (A. James Casner ed., 1952).

9. *Id.* See also *RESTATEMENT OF PROPERTY* §§ 1-5 cmt. e (1936). "A fee simple absolute is an estate limited absolutely to a man and his heirs and assigns without limitation or condition." *BLACK'S LAW DICTIONARY* 554 (5th ed. 1979).

10. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

lands. Nonetheless, Indians may acquire title to the lands which they have occupied since time immemorial. Such title is not absolute, but it is as legally enforceable as fee simple absolute.<sup>11</sup> In fact, it is this original title concept that many Indian tribes have used to sustain successful land claims.<sup>12</sup>

On some level, even the founding fathers recognized the American Indians' aboriginal rights to the land which they had originally occupied. This is manifested in Article I, Section 8 of the United States Constitution which implicitly recognizes the sovereignty of Indian nations by grouping them with states and foreign nations.<sup>13</sup> The drafters of the Constitution thus recognized the legal rights of Indians as sovereign land holders. It is obvious from American history that this recognition may not have been any more than a token gesture, especially in consideration of the genocide of the American Indian Nations, yet the founders considered the Indians' rights important enough to refer to them in the Constitution.

Congress initially recognized the Indian Nations' rights to land when it passed the first Trade and Intercourse Acts in 1790. These Acts were directed at protecting Indian land.<sup>14</sup> The Acts provided that no Indian lands could be bought, sold, or leased except through the intervention of the United States government.<sup>15</sup> Thus, non-Indians, including state governments, could not acquire Indian land unless the federal government first secured title to the land through a direct transaction with the Indian nation holding original title.<sup>16</sup> The Acts provided some protection for existing Indian lands by limiting the avenues through which the lands could be transferred into private ownership, but they did not attempt to characterize the nature of the Indian interest in the land. That task was left for Chief Justice Marshall and the United States Su-

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11. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

12. See *supra* note 2.

13. Article I, § 8 of the Constitution provides that Congress has the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

14. Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790) (codified in part at 25 U.S.C. § 177 (1988)).

15. Section 177, Purchases or Grants of Lands from Indians provides: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (1988).

16. *Id.*

preme Court.

In *Johnson v. M'Intosh*,<sup>17</sup> the first case to enforce the Trade and Intercourse Act, the Court faced the task of defining the nature and scope of the title to Indian lands. This is the seminal case in the development of the aboriginal title doctrine. The Court held that Indian tribes were incapable of conveying their land directly to private citizens even before the passage of the Trade and Intercourse Acts.<sup>18</sup> Chief Justice Marshall, writing the majority opinion for the Court, explored in great length the legal relationship between the European colonizers of America, the Indians, and the land.<sup>19</sup> Marshall concluded that discovery vested title in the European sovereign against all other European governments, and ultimately that title passed to the United States at the conclusion of the American Revolution.<sup>20</sup>

Significantly, the Court noted that the occupying Indians retained rights in the land as "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it."<sup>21</sup> Thus, the United States holds the sole power to grant Indian lands to others, but the grantee of such land takes title subject to the Indian "right of occupancy."<sup>22</sup> More importantly, from the standpoint of the Indian Nations, the Indian right of occupancy can only be extinguished by an official act of the United States government.<sup>23</sup> This concept of an inherent Indian right of occupancy planted the seed from which the doctrine of aboriginal title has grown.

The relationship between Indian Nations and the United States was further defined eight years later in *Cherokee Nation v. Georgia*.<sup>24</sup> The United States Supreme Court diluted the sovereignty of Indian Nations by holding that their relationship with

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17. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

18. *Id.* at 587.

19. *Id.* at 572-87.

20. *Id.* at 584.

21. *Id.* at 574.

22. Most commentators have characterized this holding as the beginning of a serious erosion of the Indian Nations' status as sovereigns. It leaves the United States-American Indian relationship as one similar to that of landlord-tenant. Christine A. Doremus, Note, *Jurisdiction over Adjudications Involving the Abenaki Indians of Vermont*, 10 VT. L. REV. 417, 418 (1985); Daniel G. Kelly, Jr., Note, *Indian Title: The Rights of American Natives to Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 657-59 (1975); Kimberly Ordon, Note, *Aboriginal Title: The Trials of Aboriginal Indian Title and Rights—An Overview of Recent Case Law*, 13 AM. INDIAN L. REV. 59, 60 (1988).

23. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823).

24. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

the United States was like that of "a ward to his guardian."<sup>25</sup> At the same time, the Court also strengthened the rights Indians held in their ancestral lands by stating that occupancy based on aboriginal title is as "sacred as the fee simple, absolute title of the whites."<sup>26</sup> "[T]he Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy."<sup>27</sup> Thus, although the outcome of the case weakened the sovereign status of Indian Nations, it ultimately strengthened Indian rights to occupy the lands which they had originally controlled.

The doctrine of aboriginal title is deeply rooted in the historical relationship between the United States and the American Indian nations. This doctrine is outlined by specific legal parameters, which are described in both past and present Indian land claim case law. It is one of the few consistent doctrines in the history of American Indian law.

## II. THE DOCTRINE OF ABORIGINAL TITLE

### A. Definition

Aboriginal title, sometimes referred to as original Indian title, confers upon Indian holders the non-treaty possessory right to use and occupy the lands that they have held from time immemorial. It has been defined as "the interests which Indians possess in land within the fifty 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."<sup>28</sup> Aboriginal title is a legally enforceable right of possession.<sup>29</sup> Such title includes the right to use the land for subsistence purposes exercised in a manner consistent with ancient custom and practice.<sup>30</sup> For example, a tribe that has continually occupied an

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25. *Id.* at 17.

26. *Id.*

27. *Id.* See also *Ordon*, *supra* note 22, at 61.

28. Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. FED. 425, 428 & n.2 (1979). "[T]he rights of the aboriginal Indians were not derived from treaties made with the United States; their rights antedated the treaties and continue to exist independently of them . . ." *State v. Quigley*, 324 P.2d 827, 828 (Wash. 1958).

29. *Ordon*, *supra* note 22, at 61.

30. COHEN, *supra* note 7, at 442-43.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoy-

area and used it for hunting, fishing, and agriculture retains the right to engage in those activities on that land. The tribe has aboriginal title that is good against all but the United States.<sup>31</sup> The power to extinguish that title or the rights included with it, rests exclusively with the federal government.<sup>32</sup>

Proof of aboriginal title requires a demonstration of actual, exclusive, and continuous use over an extended period of time.<sup>33</sup> There are three basic requirements: (1) "occupancy" or "use," (2) "time," and (3) "tribal entity."<sup>34</sup> The first two requirements are dependent upon an historical analysis of the tribe's existence on the land and its traditional way of using the land. These requirements may be met by a showing that the lands have been used in accordance with the normal life styles, habits, and customs of the occupying Indians for a reasonably long period of time.<sup>35</sup>

In relatively recent land claims against the United States, a showing that two or more tribes used the same area at the exclusion of others,<sup>36</sup> has satisfied the requirement of exclusive use and occupancy. Conversely, this requirement has not been met if the tribe was one of many tribes using an area in common.<sup>37</sup> Thus, to succeed under this analysis a tribe must show that it has traditionally held a virtual monopoly on the possession of the area in question.

The time requirement usually demands a showing that the Indians have occupied the area continually since before the time of

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ment in their own way and for their own purposes were as much respected, until they abandoned them, made cession to the government, or an authorized sale to individuals.

*Id.* (quoting *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 745 (1835)).

31. *Id.* at 443.

32. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

33. See, e.g., *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872); *United States v. Seminole Indians*, 180 Ct. Cl. 375, 387 (1967); *Confederated Tribes v. United States*, 177 Ct. Cl. 184, 194 (1966) and cases cited therein.

34. James E. Torgerson, Note, *Aboriginal Land Rights in the United States and Canada*, 60 N.D. L. Rev. 107, 113-17 (1984).

35. *Sac & Fox Tribe of Indians v. United States*, 383 F.2d 991 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 900 (1967).

36. See, e.g., *Pueblo of Laguna v. United States*, 17 Ind. Cl. Comm'n 615, 668 (1967); *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1967); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

37. *Six Nations v. United States*, 173 Ct. Cl. 899 (1965).

conquest and into time immemorial.<sup>38</sup> Yet, this requirement was applied loosely in *United States v. Seminole Indians*.<sup>39</sup> In *Seminole Indians*, it was held that a minimum of fifty years or more of continued occupation and use of the land would suffice to meet the time requirement.<sup>40</sup> The Court of Claims further held that proof of continued occupation did not require actual possession "but may derive through intermittent contacts."<sup>41</sup> It stated that physical control or dominion over the land is the dispositive criterion.<sup>42</sup> Therefore, this first prong of the aboriginal title "test" requires only that the tribe maintain a consistent control over the land rather than an absolute and unbroken chain of dominance.

The "tribal entity" requirement is the most difficult to define, and potentially the most important. Only Indian tribes or bands may establish aboriginal title due to the tribes' communal nature.<sup>43</sup> However, no court has ever rendered an opinion which outlines the specific criteria to be used in deciding what a tribal entity is.

Although the Indian tribe is the fundamental unit of Indian law, it has no universal legal definition.<sup>44</sup> The definition varies with the purpose for which the definition is to be used and requires a case by case analysis. For example, the Bureau of Indian Affairs (BIA) has formulated its own definition for use in determining the allotment of federal funds.<sup>45</sup> There are also many different definitions which may be found in reference to various treaties, statutes, and executive orders.<sup>46</sup> Despite their differences, most definitions contain the following elements: (1) continuous identifiability from

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38. *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).

39. *United States v. Seminole Indians*, 180 Ct. Cl. 375, 380 (1967).

40. *Id.* at 387.

41. *Id.* at 385 (citing *Spokane Tribe of Indians v. United States*, 63 Ct. Cl. 58, 66 (1963)).

42. *Id.* The Seminole did not hold absolute control over the land in question, but used it in a regular cycle. When the Seminole were not using the land, other groups did. It was the Seminole, however, who maintained the most constant and dominant use because they returned in a predictable pattern and used the land for consistent purposes. Consequently, a short period of depopulation did not adversely effect the Seminole claim under aboriginal title. *Id.*

43. Doremus, *supra* note 22, at 432. See, e.g., *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).

44. COHEN, *supra* note 7, at 3.

45. See Doremus, *supra* note 22, at 426-27 (for a detailed explanation of the criteria).

46. COHEN, *supra* note 7, at 3.

ancient times to the present; (2) maintenance of group autonomy throughout history until the present; (3) presence of a governing body; (4) a list of membership both past and present; and (5) a lack of express termination by Congress or executive order.<sup>47</sup>

### B. *Extinguishment*

Once aboriginal title is established by an Indian group the rights which flow from that title—full use and enjoyment of the surface and mineral estate, and to the fruits of the land—extend indefinitely and exist until the federal government expressly extinguishes that title through either an act of Congress or an executive order.<sup>48</sup> The process of extinguishing aboriginal title was addressed in *United States v. Santa Fe Pacific Railway*.<sup>49</sup> The United States Supreme Court held that extinguishment of title could occur only through a clear and unambiguous action of the federal government "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise."<sup>50</sup> Further, in *Oneida Indian Nation v. County of Oneida, (Oneida I)*,<sup>51</sup> the Court noted that aboriginal title "was extinguishable only by the United States."<sup>52</sup> Thus, once established, aboriginal title is a durable and permanent bundle of rights that is not subject to private or state intrusion under any doctrine of real property unless the federal government acts first to extinguish the original title of the Indians.

Extinguishment most commonly occurs through the treaty process. A treaty is not the granting of land to Indians; it is a cession of land from Indians to the United States in return for a promise of protection and an allotment of land that will be separate and held absolute by the Indian nation.<sup>53</sup> Although many treaties extinguish or limit aboriginal title rights, they also act to

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47. Doremus, *supra* note 22, at 428-29.

48. COHEN, *supra* note 7, at 491. See, e.g., *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *Shoshone Tribe v. United States*, 299 U.S. 479 (1937).

49. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941).

50. *Id.* at 347 (citing *Beecher v. Wetherby*, 95 U.S. 517 (1877)). See Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Land*, 41 A.L.R. 2d 425 (1979) (for a complete discussion of the extinguishment of aboriginal title).

51. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

52. *Id.* at 667.

53. See COHEN, *supra* note 7, at 62-105 (for a discussion of Indian treaty law).

recognize and preserve aboriginal title.<sup>54</sup>

The existence of aboriginal title, however, is not dependent upon the existence of a treaty.<sup>55</sup> In fact, precisely the opposite is true. Treaty-reserved rights in land can only be exercised if there is first an aboriginal title to serve as a basis.<sup>56</sup> Treaties may limit or extinguish aboriginal title, but they can never create it. The creation of aboriginal title is completely independent from any governmental action by the United States. Aboriginal title is merely a recognition of the rights that Indians hold in the lands that they have occupied and used throughout history. Those rights are protected by law and may not be extinguished except by an explicit action of Congress or the President. Any other infringement of those rights constitutes an illegal taking of land.

The aboriginal title doctrine has been used by many tribes in many different contexts. In order to evaluate an Abenaki claim under this doctrine, it is important to first examine previous land claims based upon aboriginal title. The following section discusses some modern land claims brought under this doctrine.

### III. SUMMARY OF EASTERN LAND CLAIMS BASED ON ABORIGINAL TITLE

In the last thirty years, there have been many successful Indian land claims in the eastern United States.<sup>57</sup> Many of these claims have resulted in compensation, and the majority were brought under the doctrine of aboriginal title. The federal government retains the power to extinguish such title, and thus is not obligated to compensate for the taking of Indian lands.<sup>58</sup> Yet states do not hold that same power. Any land taken by them constitutes an illegal taking, and the lands must either be returned or compensation provided. The same holds true for the intrusion of private citizens into areas in which Indian Nations hold aboriginal title.

In modern times Congress has usually provided compensation

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54. Ordon, *supra* note 22, at 61.

55. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955); *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); Ordon, *supra* note 22, at 62.

56. Ordon, *supra* note 22, at 62.

57. See, e.g., cases cited *supra* note 2.

58. COHEN, *supra* note 7, at 491.

for even the legal extinguishment of aboriginal title.<sup>59</sup> The Indian Claims Commission Act was a congressional response to the need for this kind of compensation.<sup>60</sup> A valid claim for a taking of land based on aboriginal title is likely to end in compensation, no matter who has done the taking. The principle issues to prove are: (1) that valid aboriginal title exists; and (2) that the rights of those holding such title have been intruded upon in some detrimental way.

In 1946, *United States v. Alcea Band of Tillamooks*,<sup>61</sup> the first Indian land claim case based solely on the doctrine of aboriginal title, reached the United States Supreme Court. In his opinion, Chief Justice Vinson "did all but actually say that aboriginal title land was protected from uncompensated taking by the Fifth Amendment."<sup>62</sup> The Court affirmed a lower court decision to compensate the Indians for their loss and held that liability turned on the federal government's abuse of its guardianship duty over Indian lands.<sup>63</sup> Still, the Court avoided basing the holding expressly on the Fifth Amendment and instead chose a nonconstitutional basis of fairness,<sup>64</sup> noting that the government's actions were inherently unfair.

The real basis of the holding was rooted in the law of fiduciary relationships.<sup>65</sup> After the passage of the Trade and Intercourse Acts and the paramount decision in *Cherokee Nation v. Georgia*, it has been recognized that the United States government has a fiduciary responsibility to Indian Nations who hold land by aboriginal title. This responsibility requires that the government protect the land against unlawful intrusions by states and private citizens.<sup>66</sup> The Court's reasoning, that aboriginal title is a valid basis for compensation even absent a treaty, was a solid indication that the Court believed aboriginal title deserved judicial protection.<sup>67</sup> The dicta regarding the Fifth Amendment indicates that some

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59. See, e.g., *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946); *Otoe and Missouri Tribe v. United States*, 131 F. Supp. 265 (Ct. Cl.), cert. denied, 350 U.S. 848 (1955); *Oneida Tribe v. United States*, 165 Ct. Cl. 487, cert. denied, 379 U.S. 946 (1964).

60. 25 U.S.C. §§ 70 to 70v-3 (1988).

61. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946).

62. Kelly, *supra* note 22, at 668.

63. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 51-54 (1946).

64. *Id.* at 49.

65. *Id.*

66. See COHEN, *supra* note 7, at 508-23.

67. Kelly, *supra* note 22, at 669.

members of the Court believed that aboriginal title was also protected constitutionally. The Court stated that a claim under aboriginal title is "more than a merely moral claim for compensation."<sup>68</sup> The importance of the Court's message was that aboriginal title is a very real and protected form of title and furthermore, that the taking of Indian lands is subjected to close judicial scrutiny.

In *United States v. Seminole Indians*, the Seminole Indians successfully proved aboriginal title to the entire peninsula of Florida and received compensation for the unconscionably low purchase price paid by the United States.<sup>69</sup> The court held that the occupancy essential to the recognition of aboriginal title does not require actual possession, but may derive from intermittent contacts with the land as long as a clear dominion over the land was apparent.<sup>70</sup> The Seminoles had used and occupied most of the peninsula, but certain areas only sparingly and not continuously.<sup>71</sup> Furthermore, their use pattern was not totally exclusive.<sup>72</sup> The court determined that even a sparse use of the land would satisfy the requirement as long as that use could be shown to follow some regular pattern and was at the exclusion of other groups.<sup>73</sup> Thus, the court affirmed a lower court decision granting compensation for the taking of the Florida peninsula. The lower court decision was based on an interlocutory order of the Indian Claims Commission, which had determined that the Seminoles held aboriginal title to the entire peninsula.<sup>74</sup>

In *Oneida Indian Nation v. County of Oneida*,<sup>75</sup> the Oneidas asserted a present right to possession of six million acres of land in upstate New York based on aboriginal title. The Indians demanded fair rental value for the deprivation of possession since the eighteenth century.<sup>76</sup> The Oneidas, in a private transaction, ceded the land to the State of New York without the consent or intervention of the federal government. Thus, the Oneidas claimed that under the Trade and Intercourse Acts this was an illegal cession

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68. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 50 (1946).

69. *United States v. Seminole Indians*, 180 Ct. Cl. 375, 385-86 (1967).

70. *Id.* at 385.

71. *Id.*

72. *See supra* notes 39-42 and accompanying text.

73. *Id.*

74. *Id.*

75. *Oneida Indian Nation of v. County of Oneida*, 414 U.S. 661, 664 (1974).

76. *Id.* at 664-65.

and was in fact null and void.

The United States Supreme Court reversed the lower court decision which held that the tribe did not have a federal claim.<sup>77</sup> The Court stated that a claim arising under aboriginal title is unquestionably a valid federal claim. The Court discussed at length the nature of aboriginal title, and decided that the Oneidas had a federal common law right to sue on their claim.<sup>78</sup> This was an extremely important statement validating the right of Indian nations to use the federal courts as an avenue through which to protect their lands held by aboriginal title. This case is also important for its reassertion of the Indians' right to sue the federal government for not complying with its fiduciary obligation to protect Indian lands from such illegal intrusions.<sup>79</sup>

In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*,<sup>80</sup> the Passamaquoddy Tribe brought a land claim action for vast areas of Maine based solely on the doctrine of aboriginal title. The tribe sought compensation for lands that had been given up in a treaty with the State of Maine (then Massachusetts). Once again, the treaty was one in which the federal government had not participated, and did not ratify. Although the Passamaquoddy had a long history of dealing with the state instead of the federal government, the court held that the tribe was entitled to federal trust services in pursuing its claims based on aboriginal title. The case culminated in the passing of the Maine Indian Claims Settlement Act<sup>81</sup> which extinguished all original Indian title in the state, but which also provided federal funds for the purchase of large tracts of land by three Maine tribes.<sup>82</sup>

Each of the eastern land claims were based on the underlying principle of aboriginal title. Aboriginal title is a right to the use and occupancy of land that cannot be conveyed or extinguished except by an official and unambiguous act of the federal government.<sup>83</sup> Conveyances with private parties or states are null and void and the federal government has an obligation to protect the

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77. *Id.* at 682.

78. *Id.*

79. See *supra* note 66 and accompanying text.

80. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

81. 25 U.S.C. §§ 1721-1735 (1989).

82. *Id.*

83. See *supra* notes 28-56 and accompanying text.

aboriginal rights of the Indians as if it were a trust relationship.<sup>84</sup> Valid claims most often end in compensation if the issue of the existence of aboriginal title is decided in favor of the Indians. This has forced Congress to pass many Indian Land Claims Settlement Acts for individual states in order to deal with these kinds of claims.<sup>85</sup> Any Indian nation with a valid claim to aboriginal title to land that has been taken has standing to sue for compensation as long as their title has not been ceded to the federal government or extinguished by a clear and unambiguous act of the federal government.

#### IV. THE ABENAKI CLAIM

The Abenaki are a small group of American Indians living in the Swanton-Highgate area of northern Vermont. They are the direct descendants of the western Abenaki, an Indian tribe that was once the largest tribe in northern New England. The group is much smaller now, but the Indians have preserved their ancient heritage and still live in the same general area as did their ancestors. The Abenaki of today believe that the area surrounding the town of Swanton is Indian land that had belonged to their ancestors and therefore now belongs to them. They have held this claim for over 200 years and, under the direction of Chief Homer Saint Francis, have recently begun to prepare their claim for litigation.<sup>86</sup>

The Abenaki Indians have also fought for their aboriginal rights on the land previously, and have been fairly successful. Six years ago *Vermont Law Review* published a note by Christine Doremus that outlined the Abenaki argument for aboriginal fishing rights in the Swanton area.<sup>87</sup> In August of 1989, the fishing rights issue was decided in a Vermont District Court in favor of the Abenaki.<sup>88</sup> The decision still stands as good law, and the Abenaki now hope that it will aid them in their present land claim.

The Abenaki have never entered into a treaty with any Euro-

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84. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). See also *supra* note 63 and accompanying text.

85. See, e.g., *Maine Indian Claims Settlement Act*, §§ 2-15, 25 U.S.C. §§ 1721-1735 (1989); *Florida Indian Land Claims Settlement Act*, §§ 2-10, 25 U.S.C. §§ 1741-1749 (1989); *Connecticut Indian Land Claims Settlement Act*, §§ 2-11, 25 U.S.C. §§ 1751-1760 (1989).

86. Interview with Homer St. Francis, Chief of the western Abenaki, and Michael Delaney, Abenaki Tribal Judge, in Swanton, Vt. (Sept. 18, 1990) [hereinafter Interview].

87. Doremus, *supra* note 22.

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

pean power, nor with the United States. Thus, their claim to land in Vermont depends solely on the strength of their claim to aboriginal title over that land. Like the cases cited in the previous section, the Abenaki case will depend heavily on the basic underlying principle of aboriginal title: no person or state can obtain Indian lands unless those lands are first acquired by the United States government, or until the United States government officially abolishes all aboriginal title to the land in question. The only claim the Abenakis can make is that they are a tribal entity and have held title to the land since before the first contact with Europeans; that their title was not lost or given up; that the United States government has never abolished that title; and finally that their right to use and occupy the land has been infringed upon by both the State of Vermont and private landowners in the Swanton-Highgate area. If the Abenaki can prove all of these points they may then sue the federal government for acting negligently in their trust responsibilities toward Indian lands under the Trade and Intercourse Acts.<sup>89</sup> They may sue for the return of the land or for monetary compensation for its loss, as did the Passamaquoddy in Maine.

The Abenaki have never been recognized as an Indian tribe by the federal government.<sup>90</sup> Their lack of federal recognition may pose a problem for their claim because it may make it more difficult for them to prove that they are a valid tribal entity. The Passamaquoddy, as well as all of the tribes involved in the cases mentioned in the preceding section, were able to use a federal treaty to establish their existence as a tribal entity. The Abenaki do not have that luxury because they have never signed any treaties whatsoever. The Abenaki case is truly unique and unprecedented.

The United States has in modern times granted compensation for lost aboriginal title, even to tribes that have not been federally recognized.<sup>91</sup> Such cases simply require a preliminary showing of

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89. See *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1975) (analyzing the trust responsibility of the United States over Indian lands). See also COHEN, *supra* note 7, at 491.

90. See Doremus, *supra* note 22, at 426-29.

91. See, e.g., *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946); *Oneida Tribe v. United States*, 165 Ct. Cl. 487, *cert. denied*, 379 U.S. 946 (1964); *Otoe and Missouri Tribe v. United States*, 131 F. Supp. 265 (Ct. Cl.), *cert. denied*, 350 U.S. 848 (1955).

The term "recognized title" simply means that the title to Indian lands has been recognized by a federal treaty or statute. COHEN, *supra* note 7, at 473.

tribal identity.<sup>92</sup> In fact, a tribe that has not been federally recognized may have an advantage over one that has gained recognition because it may be easier to prove that title has not been extinguished. An extinguishment necessarily must be preceded by some form of recognition of title.

In sum, the Abenakis are an unrecognized Indian tribe who have never signed a treaty with the federal government. Thus, in order to prevail on a land claim, they must establish the following three criteria: (1) that they are a legitimate tribal entity; (2) that they have occupied and used the area in question at the exclusion of others for a substantially long period of time; and (3) that the federal government, or any previous European sovereign, has not acted in an official capacity to extinguish the title.

#### A. Tribal Entity

As stated in part II.A of this note, there is no uniform definition for tribal entity. In fact, there is no case law which specifically outlines this issue. However, most definitions require at least a few core criteria.<sup>93</sup> The first requirement is that the group be able to show a continuous identifiability from ancient times to the present. The tribe must be able to show that they are the direct descendants of the Indians who originally occupied the land, and that the group has been in continual existence up until the present.<sup>94</sup> The BIA has promulgated regulations for use in deciding whether an

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92. See *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946); *Oneida Tribe v. United States*, 165 Ct. Cl. 487, *cert. denied*, 379 U.S. 946 (1964); *Otoe and Missouri Tribe v. United States*, 131 F. Supp. 265 (Ct. Cl.), *cert. denied*, 350 U.S. 848 (1955).

93. Although no court has drafted specific criteria for this requirement—because no case has come down to being dependent on this issue—other government bodies have defined the term for their own use in their relationships with Indian groups. See *supra* note 46 and accompanying text.

94. The Federal Bureau of Indian Affairs requires the showing of one or more of the following to determine a group's continuous Indian identity:

- (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)(1)-(7) (1991), *cited in Doremus, supra* note 22, at 427 n.74.

Indian group meets this requirement.<sup>95</sup> Yet, a court is under no obligation to use this specific test for determining aboriginal title. The BIA test was drafted primarily for BIA purposes. A court has discretion to use all or none of the BIA criteria.

A brief summary of Abenaki history will demonstrate that the group is likely to pass the tribal entity test even under the rigid criteria of the BIA regulations. Both anthropologists and historians have documented the fact that the Abenaki have lived in the Swanton-Highgate area since before the time of first contact with the Europeans.<sup>96</sup> There is also genealogical and historical proof that the Abenaki presently living in the Swanton-Highgate area are direct descendants of those Abenaki who have lived in the area throughout history.<sup>97</sup> There has never been a time when either the state, the town, anthropologists, writers, or newspaper editors have stopped referring to the Abenaki as an Indian entity. Furthermore, the Abenaki still live in the traditional band organization which is made up of a series of large extended family groups.<sup>98</sup>

A recent Vermont District Court opinion recognized the continuous identity of the Abenaki. Judge Joseph Wolchik stated, "[t]he Western Abenaki . . . are a distinct ethnic group, one that is characterized by presumed common descent, common language, a feeling of shared identity, common customs, and a common world view."<sup>99</sup> The Abenaki should not have difficulty proving their continual existence in the area, and therefore, it is not likely to be at issue in a trial on the merits.

The second possible requirement of the tribal entity question is that the group show that they have maintained cultural autonomy throughout history. The Abenaki have continued as a group and have kept their culture alive. They meet regularly as a group for cultural and religious gatherings and maintain a tribal center.<sup>100</sup> The tribal center is a distinctly Abenaki cultural center. It is used to hold tribal meetings and to serve as a planning center for tribal activities. The tribal center is staffed with tribal person-

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95. 25 C.F.R. § 83.7 (1991).

96. Doremus, *supra* note 22, at 424, 428. See also J. MOODY, *MISSISQUOI: ABENAKI SURVIVAL IN THEIR ANCIENT HOMELAND* (1979).

97. Doremus, *supra* note 22, at 428.

98. WILLIAM A. HAVILAND & MARJORY W. POWER, *THE ORIGINAL VERMONTERS: NATIVE INHABITANTS, PAST & PRESENT* 88 (1981).

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

100. Interview, *supra* note 86.

nel and houses the offices of the Chief of the tribe and the tribal judge. Furthermore, the center houses the tribal court and is used by tribal members as a gathering place through which to share their cultural ties and pass their traditions on to their children. The center is equipped with computer terminals and modern office equipment, which are used to keep the official records of the tribe and also for teaching purposes.<sup>101</sup> The center is not merely a curio shop or a museum where one goes to view artifacts of a lost and ancient culture, rather it is a resource center for the tribe that serves to keep the tribe together. The center is the living backbone for a contemporary Indian group that has managed to keep its identity through hundreds of years of infringement by European and American civilization.

The Abenaki do not have a living language to date, but they still keep the traditional mythology and cosmology alive by passing it on from generation to generation.<sup>102</sup> They are not a self proclaimed group reclaiming a lost identity. Abenaki children are taught Abenaki history in the same oral tradition as was used two hundred years ago by their ancestors. The people gather regularly for seasonal picnics and celebrations at which traditional Abenaki foods and practices are shared. Abenaki spiritual leaders still practice their ancient ceremonies, and lead the people in traditional prayer meetings.

The Abenaki truly view themselves as a separate Indian group. Because of this sense of ethnic identity, the Abenaki largely marry now, as they did in the distant past, within their own community. The endogamy (community intermarriage) rate among the Abenaki is at sixty percent or better.<sup>103</sup> The Abenaki are not an assimilated group, but rather a unique and separate Indian group. They have received funding from the federal government in recent years on the basis of their American Indian identity.<sup>104</sup> It appears that the

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101. I have personally visited the Abenaki tribal center and spoken with the Tribal Chief and the judge of the tribal court. I was shown the complete facilities of the building and witnessed a lecture on Abenaki history given by Chief Homer St. Francis. *Id.*

102. *Id.*

103. Record, vol. I at 230, vol. IV at 57, State v. Saint Francis, No. 1171-10-86Fcr (Vt., Frn. Dist. Ct. Aug. 11, 1989).

104. The Abenaki have received federal funds as an Indian nation for such things as adult education, job training, and low income housing. See Doremus, *supra* note 22, at 425. The federal government has also given the Abenaki federal funds for the creation and maintenance of a tribal court on the basis of their status as an Indian tribe. Interview, *supra* note 86.

Abenaki should not have difficulty in showing that they have maintained cultural autonomy throughout history. The Abenaki are the descendants of an Indian nation that has existed in Vermont for hundreds of years, and they still live and act as an Indian tribe.

A third possible requirement needed to establish tribal identity is that the Abenaki show that they have their own governing body. The Abenakis have their own Tribal Chief and a Tribal Council which act as their governing body. The Tribal Council consists of six elected officials who are chosen to serve on the council for two year terms.<sup>105</sup> The Tribal Chief is also elected for a two year term.<sup>106</sup> In addition, the Abenaki have a tribal court and a tribal judge.<sup>107</sup> All of these governing bodies work from the Abenaki tribal center.<sup>108</sup>

A fourth requirement of the tribal entity analysis would likely be that the group must keep an official list of membership including both past and present members.<sup>109</sup> The Abenaki do maintain a list of past and present members in the Abenaki tribal center.<sup>110</sup> They can document the list according to their own membership criteria through church records, birth records, genealogy, interviews with Abenaki elders, and other historical data.<sup>111</sup> The Abenaki have a tribal membership recording system and tribal members are issued official membership cards.<sup>112</sup> Recently, the Abenaki have begun to fashion their own automobile license plates and registration system for all Abenaki Indians to use on their vehicles within the Swanton-Highgate area.<sup>113</sup> Thus, the registration list acts as another form of recording tribal membership.

Finally, it is important to note that the Abenaki have not been expressly terminated as an Indian group by the United States government. The relationship between the federal government and the

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105. Doremus, *supra* note 22, at 428.

106. *Id.*

107. Interview, *supra* note 86.

108. *Id.*

109. Doremus, *supra* note 22, at 428-29.

110. *Id.*

111. *Id.* at 428.

112. Interview, *supra* note 86.

113. *Id.* This has caused many legal problems for the Abenaki who have used these plates instead of Vermont plates. The Abenaki believe that they are in Abenaki country in the Swanton-Highgate area, and thus, it is not within the jurisdiction of the State of Vermont to decide what kind of vehicle registration should be required.

Abenaki has also never been forbidden by federal legislation. Moreover, the federal government has actually given federal funds to the Abenaki tribe, illustrating that the United States has, at some level, recognized the Abenaki as an Indian tribal entity. The Abenaki have petitioned the BIA for an official statement of recognition. However, seventy-eight other tribes have also filed for such a statement. Because the BIA can only process two or three applications a year, it is highly unlikely that any decision on the Abenaki's application will be made soon.<sup>114</sup>

In conclusion, the Abenaki are likely to prove their case on the question of tribal identity even if the court were to use a standard as rigid as the BIA regulations. In fact, this question has already been decided favorably for the Abenaki by Judge Wolchik in a 1989 case concerning fishing rights.<sup>115</sup> Arguably, the federal government has already acknowledged the existence of Abenaki tribal identity by authorizing federal funding for the tribe. It is difficult to imagine a holding against the Abenaki on the basis of a failure to prove tribal identity.

### B. Occupation and Use Since Time Immemorial

Very few people think of Vermont as "Indian country." Most people, including Vermonters, do not envision northern Vermont as a homeland for Indian people. The traditional view is that the area that became the State of Vermont was uninhabited before the arrival of Europeans. This view was discredited long ago by anthropologists and historians who recognized the western Abenaki as the original inhabitants of Vermont.<sup>116</sup>

Under the case law, the Abenaki must establish that their ancestors occupied and used the land to which they seek title, and that this use and occupation has been continual up to the present time.<sup>117</sup> The western Abenaki inhabited primarily Vermont, New Hampshire, southern Quebec and western Maine.<sup>118</sup> Archaeologists have traced an essentially unbroken chain of evidence docu-

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114. See Doremus, *supra* note 22, at 429.

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

116. COLIN G. CALLOWAY, *THE WESTERN ABENAKI OF VERMONT, 1600-1800*, at xvi (1990) [hereinafter CALLOWAY, *WESTERN ABENAKI*].

117. See *supra* notes 33-42 and accompanying text (discussing the law of use and occupation).

118. CALLOWAY, *WESTERN ABENAKI*, *supra* note 116, at xvi.

menting Abenaki presence in northwestern Vermont, back to as early as 11,000 years ago.<sup>119</sup> The evidence shows that at the time of first contact with the Europeans which occurred around 1600, the Abenaki were a nation of approximately 10,000 individuals who occupied and used the lands of what are now northern Vermont and New Hampshire.<sup>120</sup> The historical data also indicates that the Abenaki were a semisedentary people engaging in hunting, fishing, and small scale agriculture for their subsistence.<sup>121</sup>

The Abenaki were a large group of Indians living in small bands of tightly knit extended families. Their groups fluctuated in size with the changing seasons, and villages were fluid and flexible in their make-up.<sup>122</sup> There is also strong archeological evidence that no other tribe ever used, inhabited, or otherwise occupied the Abenaki homeland until European contact. The Abenaki had exclusive control and dominion over the area.<sup>123</sup>

The evidence illustrates that Abenaki dominion over their land was even greater than that of the Seminoles who were granted compensation in their suit.<sup>124</sup> In *Seminole Indians*,<sup>125</sup> the Court of Claims held that even intermittent contact with land was sufficient and that exclusion did not need to be total but merely significant. When faced with a threat to the security of their lands, the Abenaki engaged in war to protect their holdings and have consistently asserted their right to perpetual dominion over the area.<sup>126</sup>

In 1609, the Abenaki were first contacted by Samuel Champlain who found rich fields of corn and a flourishing people. Shortly after a strong French missionary settlement was established, the French presence grew strong in the area.<sup>127</sup> This presence did not displace the Abenaki, who remained a distinct Native

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119. *Id.* at 6-7. See also Trial transcript, vol. I at 123-24, *State v. Saint Francis*, No. 1171-86Fcr (Vt., Frn. Dist. Ct. Aug. 11, 1989).

120. CALLOWAY, *WESTERN ABENAKI*, *supra* note 116, at 10.

121. *Id.* at 7.

122. *Id.* at 10.

123. Trial transcript, vol. I at 124, vol. IV at 30-31, *State v. Saint Francis*, No. 1171-86Fcr (Vt., Frn. Dist. Ct. Aug. 11, 1989).

124. See *supra* notes 38-42, 69-74 and accompanying text.

125. *United States v. Seminole Indians*, 180 Ct. Cl. 375, 385 (1967).

126. See generally CALLOWAY, *WESTERN ABENAKI*, *supra* note 116 (discussing the many wars that the Abenaki engaged in with other Indian groups and European powers to protect Abenaki lands). See also COLIN G. CALLOWAY, *THE ABENAKI* (1989) [hereinafter CALLOWAY, *THE ABENAKI*].

127. CALLOWAY, *THE ABENAKI*, *supra* note 126, at 41-49.

American community that dealt with the European settlers as a separate and sovereign entity.<sup>128</sup> The Abenaki were viewed as neighbors and allies by the French colonists.<sup>129</sup>

In 1765, James Robertson, a Canadian merchant, negotiated a ninety-one year lease of land with the heads of the Abenaki bands.<sup>130</sup> This land was located on the lower Missisquoi River and encompassed most of what we now know as the village of Swanton and all the remaining land to the mouth of the Missisquoi River.<sup>131</sup> Under the Trade and Intercourse Act and the holding in *Johnson v. M'Intosh*,<sup>132</sup> this lease was invalid because it was not subsequently authorized by the United States. Furthermore, even absent the Act, this land should have been returned to the Abenaki in 1856 when the term of the lease expired.

In the period of 1775 to 1785, English and Dutch settlers moved onto much of the Abenaki's best farmland, and though the Abenaki resisted, they were outnumbered and the settlers slowly took control of the area.<sup>133</sup> There is no evidence that the Abenaki abandoned their homeland at any time. They often dispersed to avoid persecution and disease, but they always emerged again as a sovereign entity and never surrendered their claim to dominion over the territory of northern Vermont.<sup>134</sup>

The historical data compiled by scholars such as Kenneth Morrison, Colin G. Calloway, William A. Haviland, Marjory W. Power, and John Moody indicates that the western Abenaki presence has been significant in Vermont since long before European contact.<sup>135</sup> This data also indicates that it remained significant,

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128. *Id.*

129. *Id.*

130. See Trial transcript, vol. III at 220-21, State v. Saint Francis, No. 1171-86Fcr (Vt., Frn. Dist. Ct. Aug. 11, 1989).

131. *Id.* at 221 (discussing the lease). The Abenaki held their land collectively and thus leased the land as a tribe. The fact that they leased the land and did not sell it, theoretically guaranteeing a reversion, was evidence of an effort by the Abenaki to grapple with European settlement in a way that ensured them long-term sovereignty over the entire area. The lease demonstrates that the Abenaki were planting and harvesting crops on the land, thus, indicating a pattern of traditional sedentary and intensive land use.

132. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). See also *supra* notes 14-23 and the accompanying text.

133. See generally CALLOWAY, WESTERN ABENAKI, *supra* note 116, at 183-204; CALLOWAY, THE ABENAKI, *supra* note 126, at 41-61.

134. See *supra* note 86 and accompanying text.

135. See generally CALLOWAY, WESTERN ABENAKI, *supra* note 116; CALLOWAY, THE ABENAKI, *supra* note 126; HAVILAND & POWER, *supra* note 98; MOODY, *supra* note 96;

and that even though there has been migration, movement, and upheaval in their homeland, there has been a continuing and persistent Abenaki presence from ancient times to the present.

The Abenaki have a strong and justiciable argument concerning their occupation of the disputed area. They at least have as strong a case as the Seminoles and Passamaquoddys had in their claims. The court in *United States v. Seminole Indians* stated that even a claim for aboriginal title did not require actual and complete possession of the land.<sup>136</sup> Title may be derived from intermittent contacts with the land as long as a clear dominion over the land was apparent.<sup>137</sup> The court also suggested that dominion over the land for a mere fifty years may be enough to meet the requirement for establishing aboriginal title.<sup>138</sup>

It is an historical fact that the Abenaki have maintained some dominion over the land in question and that dominion has stretched over some three hundred years. Arguably, their dominion is less apparent today because the non-Indian inhabitants of Swanton have taken control of the area. However, such control should not defeat the Abenaki argument. In fact, it is precisely the reason for the lawsuit. Vermont residents have moved in and taken land to which the Indians hold aboriginal title. This is much the same as what happened to the Passamaquoddy in Maine.<sup>139</sup> Their original lands were slowly taken over by the citizens of Maine until the Passamaquoddy eventually sued for its return under the doctrine of aboriginal title.

Historically, the Abenaki have occupied northern Vermont for the last five hundred years. They have struggled to maintain control over the lands which they and their ancestors have always used. However, because of infringement by the State of Vermont and its sale of their lands to private citizens, the Abenaki have lost control. This loss does not result in the cession of their aboriginal title to the land. To the contrary, it entitles them to compensation for its taking.

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KENNETH MORRISON, ABENAKI INDIANS—HISTORY—COLONIAL PERIOD, CIRCA 1600-1775 (1984).

136. *United States v. Seminole Indians*, 180 Ct. Cl. 375, 385 (1967).

137. *Id.*

138. *Id.* at 375.

139. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

### C. Extinguishment

If the Abenaki can successfully prove tribal identity and continual use and occupation of the land to which they claim title, their title should be recognized unless the government can prove that the title has been extinguished. The law on extinguishment is well established.<sup>140</sup> Only an official act of the United States government can extinguish aboriginal title to land. Absent such an act, the title, once established, is valid indefinitely.

France, Britain, and now the United States have each claimed title to Abenaki lands at different times. However, there are no official documents in existence from any of these nations which show that Abenaki title was ever extinguished. The French lived side by side with the Abenaki and never attempted to extinguish the title to Abenaki lands.<sup>141</sup> The British, through Royal Instruction 671, and later the Royal Proclamation of 1763, actually protected Indian title and reserved the lands west of the Green Mountains in Vermont as protected Indian territory.<sup>142</sup> Likewise, Congress has never extinguished the Abenaki's title to their original lands in Vermont. The Abenaki have not entered into any treaties relinquishing their aboriginal homeland.

Although activities of non-Indians, beginning in the early nineteenth century, prevented the Abenaki from fully exercising their aboriginal rights, there has never been a clear and plain indication of Congressional intent to extinguish Abenaki aboriginal title. In fact, there has never been the slightest hint of such intent. Since the first Nonintercourse Act in 1790, Congress has extended federal protection to all Indian title lands in Vermont and elsewhere in the United States, thus insulating Indian title from infringement by non-Indians.<sup>143</sup>

The only action the federal government has taken toward the Abenaki is to grant them federal funds for their use as an Indian tribe.<sup>144</sup> History is void of any official statements by the federal

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140. See *supra* notes 48-56 and accompanying text (discussing the law of extinguishment).

141. See generally CALLOWAY, *WESTERN ABENAKI*, *supra* note 116, at 3-34.

142. See *State v. Saint Francis*, No. 1171-10-86Fcr at 21-25 (Vt., Frn. Dist. Ct. Aug. 11, 1989) (quoting and explaining the Royal Proclamation of 1763 and Royal Instruction 671).

143. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

144. The Abenaki have received funds for schooling, adult education, low income housing, and a tribal court. Doremus, *supra* note 22, at 424-25, 430; Interview, *supra* note 86.

government regarding Abenaki land. The type of clear and unambiguous action of the federal government, required by case law to extinguish aboriginal title,<sup>145</sup> has never taken place with regard to the Abenaki. Therefore, Abenaki title has never been "extinguished."

#### V. VERMONT DISTRICT COURT DECISIONS ON ABENAKI TITLE IN VERMONT

Recently two Vermont District Court judges faced the question of Abenaki aboriginal title as a collateral issue in cases involving the Abenaki. Each of these judges decided differently, one holding for the existence of aboriginal title, and the other holding against it. The question presented in both cases concerned a jurisdictional issue in a dispute over the right of the Abenaki to fish in the village of Swanton without State of Vermont fishing licenses.

The two cases had similar fact patterns. *State v. Bellevue*<sup>146</sup> decided that the Indians did not have aboriginal title over the area and thus were not free of Vermont police jurisdiction.<sup>147</sup> *State v. Saint Francis*<sup>148</sup> decided that the Indians did have aboriginal title to the area and thus were merely exercising their aboriginal fishing rights, leaving the state with no jurisdiction over the land and no cause of action.<sup>149</sup>

Both of these decisions are of importance to any claim that the Abenaki may make for land under the aboriginal title doctrine. The decisions are likely to be influential to a federal court hearing an Abenaki claim because the state courts are in a better position to understand the local and historical significance of the Abenaki's claim. Both decisions are on appeal to the Vermont Supreme Court, and no opinion has been rendered as of this writing. In *State v. Saint Francis*, Judge Wolchik explored the question of Abenaki aboriginal title in Vermont in great detail. He concluded with three statements of major importance to any future Abenaki land claim under aboriginal title. First, the Abenaki, "as a result of

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145. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); see also *supra* notes 48-56 and accompanying text.

146. *State v. Bellevue*, No. 1862-11-89Fcr (Vt., Frn. Dist. Ct. Aug. 13, 1990).

147. *Id.* at 17-18.

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

149. *Id.* at 92.

their long use and occupancy of the Missi[s]quoi territory to the exclusion of other tribes, held aboriginal title and aboriginal fishing rights in the Missisquoi territory."<sup>150</sup> Second, the State's case was insufficient "to demonstrate by the preponderance of the evidence the extinguishment of the [Abenaki's] aboriginal rights in the Missisquoi territory."<sup>151</sup> Finally, the State failed "to prove by the preponderance of the evidence that the [Abenaki] abandoned or ceded their Missisquoi homeland or that their aboriginal rights were extinguished by either an express act or an act clearly and unambiguously implying any sovereign's intent to extinguish those rights."<sup>152</sup>

If this decision is affirmed by the Vermont Supreme Court, it will be a strong aid to an Abenaki federal claim. Although state court decisions are not binding on federal land claims, they can be persuasive, especially when the state is involved in the action. Furthermore, Judge Wolchik's detailed opinion will be extremely helpful as documentation of the Abenaki history and the tribe's relationship to the sovereigns who influenced Vermont in the past three hundred years.<sup>153</sup>

Judge Wolchik used an analysis of aboriginal title that paralleled the analysis of the cases cited in this note. He focused on questions of tribal identity, continual use and occupation, and extinguishment. He anchored his analysis in the concept that aboriginal title is completely independent from the existence of any federal treaty between the Indian group and the United States. In light of the above analysis of the aboriginal title doctrine and the factual history of the Abenaki in Vermont, Judge Wolchik's opinion is consistent with the law governing this question.

In *State v. Bellevue*,<sup>154</sup> the issue of aboriginal title was decided on a different basis. The facts of this case were much the same as the facts in the Wolchik decision, and any differences are irrelevant to the issue of aboriginal title. Once again, the court was faced with a determination of whether the Abenaki could claim aboriginal title to land in Swanton as a collateral issue to a fishing rights

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150. *State v. Saint Francis*, No. 1171-10-86Fcr at 53-54 (Vt., Frn. Dist. Ct. Aug. 11, 1989).

151. *Id.* at 91.

152. *Id.* at 92.

153. Judge Wolchik gives a 41 page outline of Abenaki history in Vermont and then follows with a lengthy discussion of the doctrine of aboriginal title. *See id.*

154. *State v. Bellevue*, No. 1862-11-89Fcr (Vt., Frn. Dist. Ct. Aug. 13, 1990).

case. Judge Edward Cashman held that in order for aboriginal title to exist, a federal treaty must evidence such title.<sup>155</sup> Thus, he stated that the existence of aboriginal title is legally dependent upon the existence of a treaty between the Indian group and the United States.<sup>156</sup> Judge Cashman was saying, in effect, that a tribe could not prove that it had a legally recognizable tribal identity unless it had entered into a treaty with the United States government. Although this is one way of determining tribal identity, it is by no means the only way.

Perhaps Judge Cashman believed that the Abenaki had not proven their tribal identity sufficiently to attain aboriginal title. However, his analysis lacked any discussion of how he would have come to that decision. Judge Cashman's opinion demonstrates a misunderstanding of the doctrine of aboriginal title. He omitted any discussion of tribal identity, and instead required that the Abenaki be recognized by the United States government through the existence of a federal treaty. Judge Cashman's approach is completely unsupported in case law or statutory law.<sup>157</sup>

Aboriginal title, as discussed above, is a bundle of rights which Indian groups hold in lands they have used and occupied throughout history. This title is created by the actual use of the land, and not by any action of the United States government. Thus, aboriginal title may be created and perpetuated only through the actions of use and occupation of the land by an Indian group, and is neither dependant on the existence of a treaty, nor on an action of the United States government.<sup>158</sup>

Treaty rights, on the other hand, are an artificially created bundle of rights which the United States government creates and cedes to an Indian group in exchange for land. Some aboriginal title rights may be abolished at the creation of a treaty, but a treaty has nothing to do with the creation of aboriginal title. In arguing that a treaty is necessary for such title to exist, Judge Cashman was incorrect.

Judge Cashman, for all intents and purposes, glossed over the most critical portion of the analysis and substituted it with a mistaken understanding of the relationship between aboriginal title

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155. *Id.* at 17.

156. *Id.*

157. See *supra* notes 55-56 and accompanying text.

158. *Id.*

and federal treaties. His decision is in direct opposition to the earlier mentioned rule governing aboriginal title which states that such title is completely separate and independent of a treaty or treaty rights.<sup>159</sup> If Judge Cashman's opinion is upheld by the Vermont Supreme Court, it could stand as a detriment to an Abenaki land claim under the aboriginal title doctrine. However, the decision is still only a state court decision and will not be binding authority in a federal case.

In sum, Judge Wolchik's decision exemplifies the correct application of the aboriginal title doctrine. His opinion provides an excellent evaluation of the historical data necessary for a decision on aboriginal title and thoroughly explores this area of the law. Judge Cashman's decision, on the other hand, is an inferior analysis of the topic and erroneously ties aboriginal title with treaty rights.

#### CONCLUSION

The Abenaki can assert a strong claim that they hold aboriginal title to the Swanton-Highgate area. First, they meet the criteria of a tribal entity. Second, historians are in agreement that the Abenaki have continually occupied and used the land prior to European arrival. Further, Congress has taken no action to extinguish Abenaki title in Vermont, nor have the Abenaki voluntarily ceded this title by treaty.

Nonetheless, obstacles do remain. The biggest and most difficult obstacle is proving tribal identity. Although other Indian groups and Indian Nations have had the benefit of being recognized by the United States government, the Abenaki have not been recognized in this way. They have never entered into or even negotiated a treaty with the United States. Thus, they must prove their tribal Indian identity through other means.

This is certainly not impossible in light of the facts discussed in this note. However, it does give the Abenaki an added obstacle to overcome and makes their case very different from their contemporaries in Maine, New York, and Florida. The Abenaki must contend with the fact that members of the tribe intermingle with the non-Indian Swanton community and they do not have a separate area to call their own. Still, they may point to their strong

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159. *Id.*

cultural and social identity in order to overcome the opposing arguments.

The rest of the Abenaki case for aboriginal title is strong. Their claim is as valid as those of the Passamaquoddy and the Seminoles. In fact, the Abenaki claim may be stronger because they have never shown the intent to cede their land to the State of Vermont. Vermont did not acquire the land in an illegal sale, as did each of the states in the Passamaquoddy, Seminole, and Oneida cases.<sup>160</sup> Instead, the land was taken from the Abenaki. The Nonintercourse Acts of the United States government should protect against such an infringement. Thus, the United States government must now 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.

The Abenaki claim is more than a moral demand. It is a claim for the return of illegally taken property. The claim calls for compensation to pay for an illegal infringement upon a sovereign nation's lands. Vermont acted contrary to federal law and should now pay for the damages the state has caused, as have the other eastern states who illegally confiscated lands from Indian nations.

*Robert O. Lucido II*

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160. See, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1967). See also *supra* notes 69-82 and accompanying text.