American Indian Law Review

Volume 24 | Number 2

1-1-2001

Problems and Solutions Regarding Indigenous Peoples Split by International Borders

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PROBLEMS AND SOLUTIONS REGARDING INDIGENOUS PEOPLES SPLIT BY INTERNATIONAL BORDERS

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I. Introduction

Over the past few centuries, the United States has grown in size due to the addition of various territories. The acquisition of regions where indigenous peoples are present has created problems for those indigenous peoples. Specifically, in the border areas of the United States (Canada, Mexico, and Alaska), indigenous peoples have been split by artificial lines. Where these groups once freely interacted with each other, they are now separated and sometimes face criminal prosecution for keeping traditions practiced for time immemorial. This Note will specifically address the problems facing indigenous peoples along the U.S.-Canadian and the U.S.-Mexican borders and the problems facing Alaskan natives belonging to ethnic groups with members in the U.S. and in Russia.

Part II of this Note addresses issues facing Indians in the United States and their relatives across the border in Canada. Historic legal precedent will be explored to evaluate rights of indigenous peoples along the border. These legal sources consist of treaties with England and federal court cases. Part III will deal with indigenous groups along the border with Mexico. Specific attention will be paid to the legislation giving the Texas Band of Kickapoo Indians special rights regarding citizenship. Part IV will discuss Alaskan natives. Part V will address international law principles regarding rights of indigenous peoples. Part VI will briefly discuss solutions, and some of the concerns raised by those solutions, to the issues facing the native peoples of North America.

II. Canada

Long before the arrival of the first European, the native tribes living along what is now the border of the United States and Canada freely interacted. The idea that an imaginary line could run through their lands and permanently

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*While an intern with the Office of Tribal Justice during the Summer 1999 semester, Richard Osburn was tasked with researching and writing about the issues presented in this note. This note represents the product of that research as submitted to the Director of the Office of Tribal Justice. The opinions expressed in the note are those of the author and do not necessarily reflect the policies and positions of the Office of Tribal Justice or the Department of Justice. Mr. Osburn was a December 1999 graduate of the University of Oklahoma College of Law and is currently serving as a staff attorney with the Office of Law and Justice, Cherokee Nation of Oklahoma.

separate them was unthinkable. With European settlement, this was to change. Colonies arose and eventually, the areas now known as Canada and the United States became distinguishable. The settlement of the New World brought with it the conflicts plaguing Europe. Warfare brought strife and bloodshed to North America. The controlling powers in Europe made frequent demands on the colonists. It was against these demands that the American colonists rebelled.

Native peoples fought on both sides of the conflict. After the war had been won by the Americans, the King of England sought protection for his subjects including the Indians who had fought for England. To this end, the Jay Treaty[1] included specific provisions for the Indians. The treaty stated:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United states, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.[2]

This part of the Jay Treaty allowed Indians to freely pass the borders of the two countries. The Jay Treaty also provided protection for Indians against import duties by stating, "nor shall Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever."[3] In effect, with these two provisions in mind, Indians from both sides of the border were allowed to freely pass the boundary without paying duties as long as the items carried were the Indians' personal goods.

The rights of Indians were reaffirmed after the War of 1812. Once again, American and British forces fought. After the war, the King of England again sought to protect the rights of his Indian subjects. The Treaty of Ghent,[4] which ended the war, included protections for Indians. Specifically, the Treaty of Ghent restored the rights enjoyed by the Indians prior to 1811.[5] Those rights in effect prior to 1811 were the rights protected by the Jay Treaty, the right to freely pass the borders of the United States and Canada and the right to carry personal goods duty free.

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1. Treaty of Amity, Commerce and Navigation (Jay Treaty), Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116.
2. *Id.* art. III, 8 Stat. at 117.
3. *Id.*
4. Treaty of Peace and Amity (Treaty of Ghent), Dec. 24, 1814, U.S.-Gr. Brit., 8 Stat. 218.
5. *Id.* art. IX, 8 Stat. at 222-23.

The protections granted to citizens of the two nations to freely cross the border have been addressed by the United States Supreme Court on at least one instance. In *Karnuth v. United States ex rel. Albro*,[6] the Court decided whether article III of the Jay Treaty was still valid.

In 1927, two British subjects sought admission to the United States.[7] Based on the immigration law at the time,[8] the two were declared ineligible to enter to seek employment.[9] They fought this decision citing article III, mentioned above, of the Jay Treaty.[10]

The Supreme Court heard the case in order to establish doctrine on the subject of immigration status in general. However, they also specifically addressed article III of the Jay Treaty. In the Court's treatment of article III, they applied international treaty interpretation standards. Under those standards, treaties do not necessarily become abrogated by war between the signatory countries.[11] Those provisions creating permanent rights not inconsistent with the goals of the warfare survive the war.[12] The Court held in *Karnuth* that the article III provisions granting free passage across the border were clearly inconsistent with warfare and were therefore abrogated.[13] The Court then quoted international law sources that concluded that rights granted that were inconsistent with warfare and thus abrogated could only be restored by later agreements reviving those rights.[14]

The end result was that the Court held that article III had been abrogated by the War of 1812. Most Canadians were therefore barred from freely passing the borders of the United States and Canada.

Does this ruling affect Indians living in the two countries? The answer is no. As noted above, the rights abrogated by war are not revived unless specifically revived by later acts of the warring nations. In the case of the War of 1812, the parties specifically restored the rights of Indians to cross the border freely.[15] Since the rights of Indians to cross the boundary freely were revived by the Treaty of Ghent, no restrictions, other then those imposed by the Jay Treaty and the Treaty of Ghent, or later legislation, may be used to halt Indian border crossing.

The United States Court of Appeals for the Third Circuit heard a case that specifically dealt with the issue of free passage for Indians across the U.S.-

6. 279 U.S. 231 (1929).
7. *Id.* at 234.
8. Immigration Act of 1924, ch. 190, 43 Stat. 153 (codified at 8 U.S.C. § 203) (repealed 1952).
9. *Karnuth*, 279 U.S. at 234.
10. *Id.* at 235.
11. *Id.* at 238.
12. *Id.*
13. *Id.*
14. *Id.* at 240, 241.
15. Treaty of Ghent art. IX, 8 Stat. at 222-23.

Canadian border. In *Diabo*,[16] the Jay Treaty and the Treaty of Ghent guided the court's decision.

Paul Diabo was a full-blooded member of the Iroquois tribe and was born on that tribe's reservation in Canada.[17] He made numerous trips across the border into the United States for the purpose of working.[18] In 1925, he was arrested for entering the United States without complying with immigration laws.[19]

The court held that the immigration laws did not apply to Diabo.[20] To reach this decision, the court reviewed the treaties ending the American Revolution and the War of 1812 to determine whether they were applicable. The court noted that the Six Nations, of which the Iroquois are a member tribe, resented the international boundary that had been drawn and which separated their lands.[21] It was in response to this that the warring sides inserted the language into the Jay Treaty allowing for free movement of Indians across the border.[22] The court then considered the effects of the War of 1812 on the Jay Treaty. The court concluded, for two possible reasons, that the rights established by the Jay Treaty were not negated.

First, the Six Nations had remained neutral during the war.[23] Since they were a third party beneficiary, as a sovereign nation, they would not have been affected by the war. Their rights under the Jay Treaty were protected.

Second, Diabo's tribe, based in Canada, had assisted the English separately from the Six Nations.[24] This would have abrogated their rights under the Jay Treaty. However, the Treaty of Ghent restored all rights to the Indians that existed prior to 1811.[25] Under both reasonings, the rights of the Indians to freely cross the border were protected.

The court concluded by stating:

> So far as we are advised, neither Great Britain nor the Dominion of Canada have denied to the Indians of the Six Nations resident in the United States passage across the boundary line, and if the Jay Treaty is in force, as we find it to be, good faith and the observance of the treaty calls for the same course of conduct by the United States.[26]

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16. McCandless v. United States *ex rel.* Diabo, 25 F.2d 71 (3rd Cir. 1928).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 73.
21. *Id.* at 72.
22. *Id.*
23. *Id.*
24. *Id.* at 73.
25. *Id.*
26. *Id.*

With that statement, the court affirmed the lower court decision ordering the release of Diabo.[27]

In other courts, the validity of article III of the Jay Treaty has come under attack. The court in *Garrow*, a non-article III court, reviewed the evidence concerning whether the treaties in question were still in force.[28]

Annie Garrow was a full-blooded member of the Canadian St. Regis Tribe of Iroquois Indians.[29] She routinely crossed the border in order to sell her handcrafted baskets.[30] When she entered the U.S. with twenty-four baskets bundled together, an import duty was levied.[31] She refused to pay, citing article III of the Jay Treaty.[32]

The appeals court incorrectly ruled against Garrow. The court held that article III of the Jay Treaty was abrogated by the War of 1812.[33] As is clear from the Treaty of Ghent, the third article of the Jay Treaty was revived. In addition, the appeals court incorrectly cites the reasoning from the Supreme Court Case of *Karnuth v. United States ex rel. Albro*.[34] Clearly, the Supreme Court in that case, dealing with non-Indians, stated that treaty provisions abrogated by war can be revived.[35] In the case of article III of the Jay Treaty, the provisions were revived by article IX of the Treaty of Ghent.

However, the appeals court in *Garrow* could have cited a valid reason why the tax exemptions of the Jay Treaty have been abrogated. The court noted that the tax exemption contained in the Jay Treaty was codified in later tariff acts until 1897.[36] At that time, the exemption was deleted from the tariff act and the act repealed all inconsistent earlier provisions.[37]

If the court had then cited judicial doctrine of treaty interpretation, its reason for finding that Garrow was subject to import duties would have been correct. This doctrine states that, if a statute is inconsistent with a treaty provision, the latter passed instrument controls.[38] Under this reasoning, the statute removing the tax exemption guaranteed by the Jay Treaty would control and thus, Indians would be subject to paying duties on goods and personal belongings as are any other persons crossing the border.

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27. *Id.*
28. United States v. Garrow, 88 F.2d 318 (C.C.P.A. 1937).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 323.
34. 279 U.S. 231 (1929).
35. *Id.* at 237.
36. *Garrow*, 88 F.2d at 321.
37. *Id.* at 319.
38. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870) (reciting a list of authority stating that a later act of Congress may supersede a prior treaty).

The appeals court failed to do this, and their flawed basis for their decision cannot stand. The Presiding Judge Graham focused too much, and incorrectly, on the Jay Treaty while ignoring the Treaty of Ghent. When the appellee contended that Indians should be distinguished in regards to the abrogation of the Jay Treaty, Judge Graham responded by saying that he knew of no authority that would allow for such a distinction (and thereby ignored decades of federal Indian law).[39] He lumped Canadian Indians together with other subjects of the King[40] as listed in the Jay Treaty even though Indians are clearly treated separately by the treaty. With better reasoning, the Court of Customs and Patent Appeals could have reached this same result correctly instead of incorrectly as is clearly demonstrated in the record.

Just one decade later, another article III court ruled on the issue of the validity of article III of the Jay Treaty. In *United States ex rel. Goodwin v. Karnuth*,[41] the court followed the lead of the *McCandless* court and chose to ignore the faulty decision in the *Garrow* case.

Goodwin was a full-blooded member of the Upper Cayuga Tribe in Canada.[42] After crossing into the United States without inspection, she was ordered deported for lack of a passport and immigration visa.[43] She then sued for a writ of habeas corpus.[44] Her basis for the writ was that her entrance into the United States was protected by the Jay Treaty. The district court agreed and added that her entry was also protected by U.S. immigration laws. The court ordered her discharged from custody.[45]

Prior to reaching its decision, the court had to decide two important issues. First, the court had to decide whether Goodwin was an Indian. Under Canadian law, an Indian woman who married a non-Indian or a non-treaty Indian ceases to be an Indian.[46] To address this, the court reviewed previous court cases and statutes which defined Indian status. The court concluded that "Indian" was a racial characteristic based on blood and not a political distinction in regards to the issue in the case at bar.[47]

After deciding that Goodwin was and Indian, the court next had to decide whether existing law exempted her from immigration requirements. In doing this, the court reviewed the Jay Treaty and the Treaty of Ghent to determine the treaties' breadth. These treaties exempted tribal members or Indian nations. The court felt this would go back to the above argument of whether Goodwin ceased being Indian with her marriage. To avoid reopening the

39. *Garrow*, 88 F.2d at 323.
40. *Id.*
41. 74 F. Supp. 660 (W.D.N.Y. 1947).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 663.
46. *Id.* at 661 (quoting the Indian Act of Canada, R.S.C. ch. 98, § 14 (1927) (Can.)).
47. *Id.* at 661-62.

conflict, the court cited the most recent immigration act.[48] Its terms (citing American Indians born in Canada) were broader than those of the treaties (Indians living on either side of the boundary).[49] Since the statute came after the treaty, the statute controlled.[50] The court concluded that Goodwin was an Indian and subject to exemptions of 8 U.S.C. § 226a. The court ordered Goodwin discharged.[51]

Three decades later, the issue of free passage of Indians across the U.S.-Canadian border and the taxation of their property would arise again. The court in *Akins v. Saxbe*[52] had to decide how the taxation and immigration laws of the United States would apply.

In *Akins*, the United States argued that the customs court had decided the taxation issue and the federal district court did not have subject matter jurisdiction to hear which part of the case.[53] The United States also argued that Indians could, under immigration laws, enter the country without registering or obtaining visas, but their exemption did not include stays beyond thirty days and, if staying beyond thirty days, they would thus be required to register as immigrants and obtain visas.[54]

The *Akins* court agreed with the United States on the first point by holding taxation was an area over which the court did not have subject matter jurisdiction as jurisdiction had been placed with the customs court.[55] The court discussed the Jay Treaty but did not consider whether article III would still apply.

However, the court disagreed with the United States on immigration by holding that Indians had been exempted by law from requirements to obtain visas.[56] The court stated that Canadian Indians were exempt from the requirement to register or obtain visas prior to entry into the United States or obtaining visas or registering after being in the United States over thirty days.[57] The court based this decision on the language of the statute in question.

Just three years later, the Court of Customs and Patent Appeals rejoined the fray. In *Akins v. United States*,[58] the court revisited its earlier, incorrect, interpretation of *Karnuth* and, again, rendered a judgement contradictory to article III courts.

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48. *Id.* at 662 (citing 8 U.S.C. § 226a (1946) (repealed 1952)).
49. 8 U.S.C. § 226a (1946) (repealed 1952).
50. *Goodwin*, 74 F. Supp. at 662.
51. *Id.* at 663.
52. 380 F. Supp. 1210 (D. Me. 1974).
53. *Id.* at 1214.
54. *Id.* at 1212.
55. *Id.*
56. *Id.* at 1221.
57. *Id.*
58. 551 F.2d 1222 (C.C.P.A. 1977).

In July 1974, Akins, a Penobscot Indian, entered the United States with a pair of boots purchased in Canada.[59] He claimed an exemption under article III of the Jay Treaty.[60] The court held that the Jay Treaty had been abrogated by the War of 1812[61] and Indians were subject to duties by statute.[62]

To reach the first holding, the court, as it did in 1937, claimed that article IX of the Treaty of Ghent was never executed, and rights guaranteed in the Jay Treaty were never restored.[63] This is a minor issue as, unlike its predecessor, this court included reasoning that correctly indicates why Indian tax exemptions are no longer in effect.

After the Jay Treaty was passed, Congress codified Indian exemptions in various tariff laws.[64] In 1897, these exemptions were left out and all contrary provisions were repealed.[65] Under treaty construction, latter statutes supersede earlier treaty provisions. Since Congress removed tax exemptions for Indians by statute, Indians are subject to the same duty schedule as non-Indians.

The cases above illustrate two points in regard to American Indians and immigration law. First, Indians can freely pass borders without registering and without visas (under U.S. law, Canadian Indians must have at least fifty percent blood quantum[66]) and can stay as long as they like without need for registering as immigrants or obtaining visas. Second, tax exemptions of the past are no longer in effect. Immigration and tax issues had their roots in the Jay Treaty and the Treaty of Ghent, but statute law has superseded both treaties. Immigration law now controls border passage and tariff law controls duties.

A side issue of immigration law deals with deportation. Under the *Akins* holding, immigration laws do not apply to Canadian Indians entering the United States.[67] Accepting this reasoning, one would have to conclude that a Canadian Indian with more than fifty percent blood quantum of American Indian blood not only can cross the border freely, but also cannot be deported for any reason. The Board of Immigration Appeals (the Board) applied this reasoning in *In re Yellowquill*.[68]

Jolene Yellowquill, a Canadian citizen who had, according to the record, at least fifty percent American Indian blood quantum, was arrested in Texas

59. *Id.* at 1223.
60. *Id.*
61. *Id.* at 1227-28.
62. *Id.* at 1228.
63. *Id.*
64. *Id.* at 1224.
65. *Id.*
66. Act of June 27, 1952, Title II, ch. 477, § 289, 66 Stat. 175, 234 (codified at 8 U.S.C. § 1359 (1994)).
67. *Akins*, 380 F. Supp. at 1221.
68. 16 I. & N. Dec. 576 (BIA 1978).

for possession of heroin.[69] An immigration judge ordered her deported and she appealed claiming that she was exempt from deportation under immigration laws.[70] The Board cited the Solicitor General's decision not to appeal *Akins*, and, under its own interpretation of the statute, decided that it would be illegal to deport a Canadian of American Indian ancestry (at least fifty percent blood quantum), for any reason, from the United States.[71]

III. Mexico

Canadian citizens of American Indian ancestry of at least fifty percent blood quantum can freely pass the U.S.-Canadian border. This is due to treaties dating back to the founding of the United States. Subsequent legislation has also reinforced this right of passage. Indian interaction between tribes separated by America's northern border is safe. What is the situation with tribes on America's southern border? Do the tribes there have the same right to cross the border freely as their cousins in the north? With one notable exception, the answer is no.

The Tohono O'Odham are typical of the situation facing split peoples. In 1853, their ancestral lands were divided between the United States and Mexico via the Gadsden Purchase.[72] Thus, the people of this indigenous nation were separated by and artificial line created by outside forces. The results of this act are still felt today.

Prior to increased border enforcement, O'Odham people were able to freely interact with their Mexican members.[73] This allowed for a free exchange of cultural and social ideas between members of the tribe on opposite sides of the border. However, the Border Patrol has increased its enforcement of laws regarding border crossings. This forces members of the tribe to travel 120 miles in order to cross the border at the closest legal border crossing point.[74] Effectively, the Tohono O'Odham are prevented from learning of their past from tribal members who have information to share.

Many of the U.S.-Mexico border tribes have expressed desire to freely interact with their foreign cousins. One very important reason for this is culture. Mexican members of border tribes have been less exposed to European culture and, because of that, they have managed to retain their language and culture to an extent unknown north of the border. Tribes on the U.S. side would like to visit their southern relatives who still know the old ways, still know their ancestral language, and still participate in cultural

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69. *Id.*

70. *Id.* at 576-77.

71. *Id.* at 578.

72. Gadsden Treaty, Dec. 30, 1853, U.S.-Mex., 10 Stat. 1031.

73. Sean Scully, *Border Splits Indian Families, Enhanced Enforcement Keeps Arizona Tribe from Visiting*, WASH. TIMES, Apr. 19, 1998, at A2, *available in* 1998 WL 3445537.

74. *Id.*

events.[75] Among the tribes in this situation are: Tohono O'Odham,[76] Pascua Yaqui, Yavapai-Apache Nation, Salt River Pima Maricopa Indian Community, Cocopah Nation, Pai Pai,[77] and Kumai Indian Community.[78]

However, there is one exception to this problem. The Texas Band of Kickapoo Indians may provide an example of how the problem could be resolved for all southern border indigenous groups.

The Kickapoo originally lived in the Great Lakes region of the United States.[79] By treaty, some of the Kickapoo moved but others refused and relocated in Texas.[80] Due to hostilities in Texas, the Kickapoo Band moved south and, in exchange for land, agreed to help Mexico defend its border.[81] This land was later exchanged, in 1852, for land in Nacimiento, Mexico.[82]

In 1883, a reservation for Kickapoo still in the United States was established in Oklahoma.[83] The Kickapoo in Mexico and those in Oklahoma "maintained close relations through inter-marriage and frequent visitation between Oklahoma, . . . and Nacimiento."[84]

During the first part of the twentieth century, the Kickapoo lived in Mexico all year.[85] However, because of a drought in Mexico, the band moved to Eagle Pass, Texas in order to work as migrant farm hands.[86]

Now, the band lives in Nacimiento from November through March.[87] The rest of the year, during farming season, ninety percent of the band moves to Eagle Pass.[88] Because of the immigration issues raised, the Immigration and Naturalization Service (INS) issued cards to the Kickapoo to allow them to cross the border freely.[89] This pass had to be renewed annually.[90]

In 1983, Congress made this status permanent.[91] Congress took special note of the tribe's needs to retain tribal culture, which was based on U.S.,

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75. Brenda Norrell, *Tribes Urge Congressional Bill for Border Crossing: Arizona Tribes Want Anti-Harassment Law for Border*, INDIAN COUNTRY TODAY (LAKOTA TIMES), May 18, 1998, at A1, *available in* 1998 WL 18037573.

76. *See* Scully, *supra* note 73.

77. *See* Norrell, *supra* note 75.

78. Chet Barfield, *A People Divided: International Border Has Cut Tribes in Half: No Remedy Is in Sight*, SAN DIEGO UNION-TRIB., Jan. 24, 1999, at A1, *available in* 1999 WL 4049066.

79. S. REP. NO. 97-684, at 3 (1982).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 4.

88. *Id.*

89. *Id.*

90. *Id.*

91. Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983).

Mexican, and Kickapoo influences.[92] The act was therefore passed to ensure that Kickapoo could "pass and repass the borders of the United States."[93]

This congressional act ensured the Kickapoo could travel freely across the U.S.-Mexican border. The tribal members from each side of the boundary are allowed to interact without worrying about immigration laws. The end result is that Kickapoo members desiring to share their culture and society with each other are not impeded by an international boundary line. The positive results generated by the Kickapoo situation are looked upon by other tribes as an example of how Congress could resolve the problems facing other border tribes.

IV. Alaska

The problems facing native Alaskans in crossing international borders are much more complicated. Whereas Canada and Mexico are considered friendly nations, Alaska natives wanting to cross into Russian territory and native Russians wanting to cross into U.S. territory face the added problem of decades of mistrust. Fortunately, recent efforts by the two countries have reduced the barriers to international visits between indigenous peoples.

Russian and American diplomats have been working on resolving the issues of international visits by indigenous peoples. In 1989, an agreement was reached to allow for visits between certain groups.[94] This agreement delineated the covered indigenous groups (by geographic region), visitation process, and national officials with authority to grant visitation permission.

The agreement between the United States and Russia identifies those who may take advantage of this international visitation policy. These people are permanent U.S. and Russian residents who lived in designated areas. The U.S. areas are the Nome and Kobuk census areas of Alaska. The Russian areas are the Iultinskiy Rayon, Providenskiy Rayon, the Chukotsky Rayon, the eastern part of the Anadyrskiy Rayon (bounded on the south by the Anadyr River and on the west by the Tanyurer River).[95]

In order to visit, inhabitants must notify, via their own chief commissioner, the chief commissioner of the other country.[96] They must present a written invitation from their relative at least ten days in advance of the visit.[97] (The agreement defines a relative as a "blood relative, fellow clan or tribe members, or native inhabitants who share a linguistic or cultural heritage with

92. *Id.* § 2(a), 96 Stat. at 2269.

93. *Id.* § 4(d), 96 Stat. at 2269.

94. Agreement Concerning Mutual Visits by Inhabitants of the Bering Straits Region, Sept. 23, 1989, U.S.-U.S.S.R., Hein's No. KAV 1794, Temp. State Dep't No. 91-167, *available in* 1991 WL 495108 (entered into force July 10, 1991).

95. *Id.* at art. 1.

96. *Id.*

97. *Id.*

native inhabitants of the other territory."[98]) In addition, they must provide their own names, passport numbers, birth information, the names and addresses of their relatives extending the invitation, the date of the visit, the method and manner of travel, and their intended ports of exit and entry.[99] A stay may not exceed ninety days.[100]

This international agreement has greatly aided the indigenous people in the designated areas to visit other members of their groups. It is also in keeping with what seems to be the prevailing point of view of the international community.

V. The International Community and Indigenous Rights

Over the past few years, the status of indigenous peoples has become an important topic in the international community. The focus is so great that the United Nations assembled the Working Group on Indigenous Peoples (Working Group) to draft a resolution on the international legal rights of indigenous peoples.[101] This draft resolution is in existence but has not been formally accepted by the United Nations.

The draft resolution contains several sections that deal directly or indirectly with the issue of indigenous rights to cross international boundaries. Some of the statements made are of a general philosophical nature regarding indigenous rights while others are very specific in detailing what is expected of sovereign states and their treatment of indigenous peoples.

Under the draft resolution, all practices and doctrines advocating the superiority of one people over another based on a nonscientific basis was declared morally and socially unacceptable.[102] The drafters of the resolution also stated that any treaties or agreements between indigenous peoples and sovereign states were properly matters of concern for the international community (by the draft's language, this would include treaties between the United States and sovereign Indian nations).[103] These general concepts put in place by the Working Group established the tone for the drafting of more specific guidelines for behavior of states towards indigenous peoples.

According to the drafters, indigenous peoples have the right to maintain and strengthen their social and cultural characteristics.[104] This would seem to indicate that interaction between members of a group split by an

98. *Id.*

99. *Id.*

100. *Id.* at art. 3.

101. Julian Berger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209 (1996) (discussing the process and results of the work of the United Nations to create the declaration).

102. *Id.* at 212.

103. *Id.* at 213.

104. *Id.* at 214 (quoting part I, art. 4 of the draft).

international boundary is a protected right. It would also seem to indicate that indigenous groups that historically interacted would have the same right. The drafters also stated that any action that has the aim or effect of disrupting the integrity or beliefs of a distinct people would give that people the right to seek redress in the international community.[105] The intent of this provision is to place a state, or states, which acted to prevent interaction of a people across international boundaries, in violation of United Nations' doctrine.

Since "[i]ndigenous peoples have the right to practice and revitalize their cultural traditions and customs,"[106] an indigenous people split by a boundary, and subsequently having its cultural ways destroyed or damaged by that fact, would have a right to restore its culture. An international boundary and a state's laws preventing such interaction would go against international will. Several tribes in the United States were split by the U.S.-Mexico border and would fall into this category.

Where a border has disrupted the integrity and economics of an indigenous people, the Working Group was very specific. "Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."[107] Under this article, state actions that prevent interaction, for social, cultural, economic or other reasons, between split groups would be in violation of international human rights norms. An indigenous group harmed by such action would be able to petition the international community for redress.

Finally, the Working Group specifically addressed the issue of indigenous peoples being split by international boundaries. In its draft resolution, the Working Group wrote, "Indigenous peoples, in particular those divided by international border, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across border."[108] The Working Group further said, "States shall take effective measures to ensure the exercise and implementation of this right."[109]

VI. Problems and Solutions Regarding Indigenous Rights and International Boundaries

Affected indigenous groups could appeal to the international community for assistance in enforcement of their rights. In the United States, there is

105. *Id.* at 215 (quoting part II, art. 7 of the draft).
106. *Id.* at 217 (quoting part III, art. 12 of the draft).
107. *Id.* at 219 (quoting part V, art. 21 of the draft).
108. *Id.* at 223 (quoting part VII, art. 35 of the draft).
109. *Id.*

already precedent for protecting indigenous rights and so, international action would not be warranted at this stage.

Along the U.S.-Canada border, U.S. immigration law already addresses the issue of passage for American Indians across the boundary. (Alaskan natives are defined as Indians and the immigration laws, by implication and in regard to Canada, would also apply to them.) With U.S. immigration law in place and supported by court decisions, indigenous rights are protected.

The situation with the border with Mexico is not as settled. Congress passed a law specifically protecting the Kickapoo. This law could be used as a model to aid other tribes in restoring their ties with their neighbors to the south. With ongoing lobbying efforts, indigenous peoples should probably consider the timing not ripe for requesting international assistance with their situation.

The United States and Russia have effectively dealt with the issue of international interaction with indigenous peoples. Those wishing to do so may cross into the country of the other side with reasonable requirements in place to ensure orderly travel. Once again, no international action is justified.

If the positive situations with Canada and Russia were to change, or, after (hypothetically) fruitless efforts along the Mexican border, could the indigenous peoples of North America expect assistance from the international community anyway? Probably not. There are three main reasons why one would expect the United States to ignore international attempts, if they ever occurred, to enforce indigenous rights.

First, the U.S. Senate has historically resisted international oversight as an attack on American sovereignty.[110] As stated earlier, U.S. Indian treaties would be considered to come under the cognizance of the international community. The U.S. Senate would never allow the international community to act in the realm of domestic affairs. Any attempt by an indigenous group to force the United States, through international means, to honor indigenous rights would be thwarted by U.S. lawmakers.

Second, the United States has generally refused to allow international human rights laws to be applied to the United States.[111] If taken to task by the international community, the United States, most likely, would simply take the position that it has not ratified international human rights law. Therefore, international human rights law have no force in the United States and the country is not bound by them.

Finally, the draft resolution indicates that indigenous peoples would be able to seek redress. The most logical place for an issue to be brought would be

110. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 722 (1986) (discussing the Senate's refusal to consider the Human Rights Convention).

111. Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365 (1998) (exploring the reasons behind the U.S. double standard in the field of human rights law).

in the International Court of Justice (ICJ). The United States does not recognize the jurisdiction of this court over the United States.[112] Any action brought before the ICJ would be ignored by the United States with the U.S. justification being that the ICJ lacks jurisdiction over the U.S.

For these listed reasons, the best option for indigenous groups seeking international border crossing rights is to petition Congress for exemptions found in immigration law such as with Canadian Indians or the Kickapoo or to petition for treaty rights like those enjoyed by Alaska natives. Since the primary area where a problem exists is along the U.S.-Mexico border and with the Kickapoo situation being most on point, southern tribes would be better off pursuing a solution similar to that enjoyed by the Kickapoo.

112. John Kuhn Bleimaier, *Nuclear Weapons and Crimes Against Humanity Under International Law*, 33 CATH. LAW. 161, 171 (1990).