

## Note

# The United States Border: A Barrier to Cultural Survival

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The pain and joy of the borderlands—perhaps no greater or lesser than the emotions stirred by living anywhere contradictions abound, cultures clash and meld, and life is lived on an edge—come from a wound that will not heal and yet is forever healing. These lands have always been here; the river of people has flowed for centuries. It is only the designation “border” that is relatively new, and along with the term comes the life one lives in this “in-between world” that makes us the “other,” the marginalized. . . .<sup>1</sup>

Long before explorers came to the land now called North America, indigenous peoples called it home. For the Native Americans, rivers, mountains and other natural barriers divided the land, not men and women.<sup>2</sup> But the European settlers imposed national boundaries on the lands they conquered. At the conclusion of the Revolutionary War, the United States and Great Britain signed the Treaty of Paris, drawing the boundary of the new United States at the forty-fifth parallel.<sup>3</sup> In the mid-1800’s the Treaty of Guadalupe Hidalgo<sup>4</sup> and the Gadsden Purchase<sup>5</sup> settled the location of the border between the United States and Mexico.<sup>6</sup>

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1. Norma E. Cantu, *Living on the Border: A Wound that Will Not Heal*, MIGRATIONS IN HISTORY, SMITHSONIAN INSTITUTION (visited Aug. 16, 2000) <<http://educate.si.edu/migrations/bord/live.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

2. See Sharon O’Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economics And Families*, 53 FORDHAM L. REV. 315, 315 (1984).

3. *Id.*

4. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

5. The Gadsden Purchase (Treaty of La Mesilla) Dec. 30, 1853.

6. Olivia Cadaval, *United States-Mexico Borderlands/Frontera*, BORDERS & IDENTITY, SMITHSONIAN INSTITUTION (visited Aug. 16, 2000) <<http://educate.si.edu/migrations/bord/intro.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

Both of these borders bisect pre-existing tribal lands, dividing the land and the culture of the Native Americans who call the borderlands home.<sup>7</sup>

In the centuries since these borders were drawn, concerns over illegal immigration, land development, and drug trafficking have increased the difficulties for these border tribes.<sup>8</sup> Now, in what the United Nations has dubbed the "International Decade of the World's Indigenous People,"<sup>9</sup> is the time for the United States to recognize the importance of preserving border communities and to recognize the border crossing rights of Native Americans along its Canadian and Mexican Borders.

The first section of this paper will explore the cultural and economic problems faced by native tribes who live in the lands divided by the U.S. border. The second section will discuss the domestic and international legal obligations that support the recognition of tribal border-crossing rights. The third section will analyze political and legislative actions that could serve to redress the wrongs that have resulted from decades of inaction by the United States government.

## I. The Problems Faced by Native Communities in the "Border Zone"

### A. *The U.S.-Mexico Border*

For many years a three-strand, barbed wire fence and a series of monuments have marked most of Arizona's border with Mexico.<sup>10</sup> This fence does more than just demarcate the territories of the two countries; it also bisects the traditional lands of the Yaqui and the Tohono O'odham (formerly known as the Papago).<sup>11</sup> The border between Texas and Mexico divides the lands of the Texas Band of Kickapoo, who live both in Eagle Pass, Texas and Nacimiento, Mexico.<sup>12</sup> These are only a few of many tribes whose members live in both the United States and Mexico.<sup>13</sup>

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7. See Cantu, *supra* note 1; see also O'Brien *supra* note 2, at 315.

8. *Id.*

9. See INDIAN AND NORTHERN AFFAIRS CANADA, *The International Decade of the World's Indigenous People*, (visited Aug. 16, 2000) <[http://www.inac.gc.ca/pr/info/info123\\_e.html](http://www.inac.gc.ca/pr/info/info123_e.html)>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

10. James S. Griffith, *The Arizona-Sonora Border: Line, Region, Magnet and Filter*, BORDERS & IDENTITY, SMITHSONIAN INSTITUTION (visited Aug. 16, 2000) <<http://educate.si.edu/migrations/bord/azsb.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

11. *Id.*

12. Megan S. Austin, Note, *A Culture Divided by the United State-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT'L & COMP. L. 97, 107 (1991).

13. Demetria Martinez, *Activists Decry Arms, Abuses at U.S. Border; Native Communities on Both Sides of U.S.-Mexican Border Suffer Loss of Civil Rights*, NAT'L CATH. REP. (Feb. 13, 1998).

### 1. *The Yaqui and the Tohono O'odham*

The Yaqui and Tohono O'odham tribes have members who live in both the United States and Mexico.<sup>14</sup> Cutting through the lands of these tribes, the border divides families and imposes boundaries that tribal elders never recognized.<sup>15</sup> The border affects the strength of native peoples by hindering the ability of elders (many of whom reside in Mexico) to pass on sacred traditions to Indians north of the border.<sup>16</sup>

Native communities along the border depend on kinship and traditional ceremonies to preserve and maintain their culture. The Yaqui, for example, greatly prize the "central core" of their culture, and they have preserved it over the course of their "unique and difficult historical experience,"<sup>17</sup> which has included forced relocation and a constant erosion of their sovereignty as a people. The Yaquis' survival is owed in large part to maintaining communal identity, which includes the Yaqui language and religious beliefs.<sup>18</sup> The border interferes with the Yaquis' ability to maintain this identity, since many ritual musicians, dancers and religious figures travel north from Mexico to perform ceremonies in the United States and pass on Yaqui customs and language to future generations.<sup>19</sup>

As the border has become less and less permeable, Yaquis, along with other border tribes, have been subject to increased harassment.<sup>20</sup> Border officials are unfamiliar with the ritual equipment carried by the Yaquis for use in their religious ceremonies, and thus, suspect these articles might be strange drug receptacles.<sup>21</sup> The problems faced by the Yaqui spiritual leaders are not unique. The Tohono O'odham have also had difficulty at the border. Overzealous border agents have confiscated religious articles, including feathers of common birds, pine leaves and sweet grass.<sup>22</sup> According to Angelo Joaquin, a previous Tribal Chairmen of the Tohono O'odham, United States and Mexican immigration law and domestic policies have constrained the "O'odhams' ability to travel

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14. *Id.*

15. Patricia Gonzales & Robert Rodriguez, *Native Peoples Challenge Borders*, COLUMN OF THE AMÉRICAS (visited Aug. 17, 2000) <<http://www.eece.unm.edu/staff/larranag/www/xxx/91198.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights [hereafter Gonzales & Rodriguez].

16. It is difficult for elders to travel across the increasingly militarized border to conduct ceremonies for tribal members living in the United States. *See, e.g.,* Cantu, *supra* note 1; *see also* O'Brien *supra* note 2, at 315.

17. *Pascua Yaqui Tribe Assistance: Hearing on H.R. 734 Before the Senate Select Comm. on Indian Affairs*, 103d Cong. 8 (1994) (testimony of Albert V. Garcia, Chairman of the Pascua Yaqui Tribe of Arizona) (available at WL 1994 213549).

18. *Id.*

19. Griffith, *supra* note 10.

20. Martinez, *supra* note 13.

21. Griffith, *supra* note 10.

22. 3 U.S. Code Cong. and Admin. News, 95th Cong., 2d Sess. 1262, 1264 (1978).

to sacred sites, teach their children the nomadic ways and maintain their language.”<sup>23</sup>

## 2. *The Cocopah*

The border also affects the Cocopah Indians. Like the Tohono O’odham, the Cocopah were divided by the Gadsden Purchase.<sup>24</sup> For many years, the border had no effect on the Cocopah way of life, but in the late 1930’s the U.S. began enforcing the border in reaction to the anti-immigrant fervor of the Great Depression.<sup>25</sup> Since then, the Cocopah have struggled to preserve their way of life despite the existence of an artificial boundary that divides their community in two. In the last few years, an anti-immigrant fever similar to the one in the 1930’s has caused the United States to engage in a systematic effort to beef up its armed patrol along the 2,000-mile border with Mexico.<sup>26</sup> These security increases have made it even more difficult for Indians living along the border to pass freely back and forth.<sup>27</sup> The Border Patrol, U.S. Customs Service and other law enforcement agencies increasingly harass native communities along the border.<sup>28</sup> Henry José, an elderly member of the Tohono O’odham nation has “been chased, stopped and told ‘you have no land’ and ‘we’ll shoot you in the back.’”<sup>29</sup> Stories like Mr. José’s, combined with other anti-immigration policies in the United States have made tribal members on the border less inclined to travel between their ancestral lands in the United States and Mexico.<sup>30</sup> According to Joe Garcia, the lieutenant governor of the Tohono O’odham in Mexico, this “increased harassment and intimidation at the border comes at a time when the Tohono O’odham are losing their ancestral lands in Mexico as a result of encroachment and land fraud by non-Indians.”<sup>31</sup> The combination of these factors jeopardizes the future of the Tohono O’odham.

Native leaders like José Matus, a Yaqui ceremonial leader and a border rights activist and Maria Garcia, a Tarasca Indian from Mexico, attempt to combat this harassment by escorting tribal members through the hostile border zone in the United States so that the Indians can

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23. K.J. Scott, *O’odham Nation’s Case Winning Outside Support*, THE TUCSON CITIZEN (July 24, 1989).

24. Gonzales & Rodriguez, *supra* note 15.

25. *Id.*

26. Martinez, *supra* note 13.

27. *Id.*

28. *Id.*

29. *Id.*

30. Gonzales & Rodriguez, *supra* note 15.

31. Brenda Norrell, *Native Peoples Seek Safe Passage to, from Mexico*, ARIZ. REPUBLIC, Dec. 16, 1997.

peacefully return to their villages in Mexico.<sup>32</sup> In addition to these individual efforts, Yaqui, Tohono O'odham and community activists from Mexico formed the Indigenous Alliance Without Borders to protect the human and civil rights of indigenous peoples crossing the border.<sup>33</sup> According to Matus, the right of indigenous peoples to freely cross the border is rooted in a history that pre-dates the U.S. takeover of the Southwest,<sup>34</sup> because Indians have roamed the area that is now known as Arizona since pre-Columbian days.<sup>35</sup>

### 3. *A Legal Claim for Border-Crossing Rights*

These tribes not only have a historical claim to their ancestral land, they also possess a legal claim to their land. The Gadsden Purchase in 1853 reaffirmed Articles VIII and IX of the Treaty of Guadalupe Hidalgo, which recognized the right of indigenous peoples living along the border to maintain their land, culture, and religion regardless of the land transfer and new political border.<sup>36</sup> Despite these protections, immigration laws prevent many indigenous peoples from freely crossing the border. Immigration laws allow the United States to exclude immigrants and non-immigrants who do not possess correct documentation (e.g., passport, border identification card). Most indigenous peoples in Mexico are subsistence farmers and cannot meet the documentation requirements of the Immigration and Naturalization

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32. *Id.*

33. *Id.*

34. Martinez, *supra* note 13.

35. *Pascua Yaqui Tribe Assistance: Hearing on H.R. 734 Before the Senate Select Comm. on Indian Affairs*, 103d Cong. 8 (1994) (testimony of Albert V. Garcia, Chairman of the Pascua Yaqui Tribe of Arizona) (available at WL 1994 213549).

36. The treaty itself states that:

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all rights of citizens of the United States according to the principles of the Constitution' and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

Treaty of Guadalupe Hidalgo, art. IX, *supra* note 4. Although the language of the treaty does not explicitly identify the rights of Indians, one commentator argues that the history behind the treaty and several of the treaty articles validate the interpretation that Indians are included in the treaty's references to "Mexicans." See Austin *supra* note 12, at 100.

Service (INS).<sup>37</sup> This situation erects another barrier to the ability of indigenous peoples to freely cross the border.”<sup>38</sup>

The position of native communities regarding the U.S.-Mexico border is clear. The land has always belonged to them, and because their ancestors did not ratify the creation of borders, contemporary indigenous peoples do not recognize them.<sup>39</sup> Notwithstanding, the border is a harsh reality for native people.<sup>40</sup> In the words of one tribal leader “we’ve often said that migration is part of the creation story of a people. Most indigenous creation stories depict migration as part of a sacred journey. And now, the impositions against migration are clearly curtailing the ongoing creation and continuation of Indian peoples.”<sup>41</sup>

### *B. The U.S.-Canada Border*

At the conclusion of the Revolutionary War, the United States and Britain signed the Treaty of Paris, which established the boundary line between Canada and the United States.<sup>42</sup> The line that was drawn passed through the territories of many native communities, including the Micmac, Maliseet, Penobscot, Passamaquoddy, Mohawk, Iroquois, Sioux, and Blackfeet.<sup>43</sup> The border that was drawn between the United States and Canada spans 3,500 miles. In contrast, the border dividing the United States and Mexico is 2,000 miles long.<sup>44</sup> Despite the significant size difference, the border between the United States and Canada is largely un-policed, in stark contrast to the heavily policed U.S.-Mexico border.<sup>45</sup> As a result, individuals in native communities along the U.S.-Canada border do not suffer in the same way as individuals in native communities on the U.S.-Mexican border. Nonetheless, the border still restricts the ability of tribes along the northern border to maintain their culture and preserve their way of life. For these tribes, the border is “an arbitrary barrier to their sovereignty and a surrender of their political institutions, tribal membership, and familial cohesion[,]” which “seriously impedes their political, economic, and social development.”<sup>46</sup>

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37. Brenda Norrell, *Native Peoples Seek Safe Passage to, from Mexico*, ARIZ. REPUBLIC, Dec. 16, 1997.

38. Martinez, *supra* note 13.

39. *Id.*

40. Gonzales & Rodriguez, *supra* note 15.

41. *Id.*

42. O'Brien, *supra* note 2, at 317.

43. *Id.* at 317-18; *Addressing the Unmet Health Care Needs for Native Americans: Hearings Before the Senate Comm. on Indian Affairs*, 105th Cong. 671 (1998) (testimony of Earl Old Person, Chairman of the Blackfeet Tribe of Browning, Montana) (available at 1998 WL 274526); *Terese L. Garret v. Assistant Secretary for Indian Affairs*, 13 IBIA 8, 16 (Aug. 21, 1984).

44. Douglas Martin, *Smuggled Aliens Now Cross Mohawk Land*, N.Y. TIMES (Oct. 14, 1996).

45. *Id.*

46. O'Brien, *supra* note 2, at 315.

### 1. *The Membership Dilemma*

In 1986, Congress passed legislation, which granted to American Indians born in Canada the right to freely pass the borders of the United States.<sup>47</sup> This legislative right, however, extended only to people who were "at least 50 percent of blood of the American Indian race."<sup>48</sup> After the law was passed, the Indian Task Force of the Federal Regional Council of New England determined that "the law as it now reads is impossible to apply because Canada does not keep blood quantum records."<sup>49</sup> To remedy the problem created by the law, the Task Force determined that an affirmative statement or act from either the Canadian Department of Indian affairs or from the person's tribal organization would be sufficient to meet the statutory requirements.<sup>50</sup>

The problem with the approach taken by the U.S. government is that Canada and the United States define tribal membership in different ways. Indians in the United States are empowered to use tribal law in order to determine tribal membership.<sup>51</sup> The Mohawk, whose lands literally straddle the border, follow the traditional matriarchal system that states that children of enrolled mothers are eligible for membership.<sup>52</sup> On the other hand, in Canada, federal law determines tribal membership, and the law mandates that women assume the status of their mates and children assume the status of their fathers.<sup>53</sup> Under Canadian law, if a non-Indian woman marries an Indian man she would be considered an Indian, but if an Indian woman marries a non-Indian, a non-status Indian, or a non-Canadian Indian, she is no longer considered an Indian under Canadian law.<sup>54</sup> Denied her Indian status, she is prevented from voting in reserve matters, owning property on a reserve, obtaining a free education, claiming Indian-related tax-free exemptions and being buried on the reserve.<sup>55</sup>

The United States has determined that the Canadian disenfranchisement of Indian women who marry non-Indian men does not strip those women of the right to freely cross the U.S. border.<sup>56</sup> In *United States ex rel Goodwin v. Karnuth*, the court held that the term

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47. 8 U.S.C. § 1359 (1982).

48. *Id.*

49. OFFICE OF THE INDIAN TASK FORCE, FEDERAL REGIONAL COUNCIL OF NEW ENGLAND, UNITED STATES LEGAL RIGHTS OF NATIVE AMERICANS BORN IN CANADA 3 (1978) [hereinafter cited as INDIAN TASK FORCE REPORT]; also on file with the Texas Forum on Civil Liberties & Civil Rights.

50. *Id.*

51. O'Brien, *supra* note 2, at 346. This right was affirmed in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (citing *Roff v. Burney*, 168 U.S. 218 (1897)).

52. O'Brien, *supra* note 2, at 322.

53. Indian Act, R.S.C., ch. I-6, § 12(1)(b) (1970).

54. *Id.*

55. O'Brien, *supra* note 2, at 323 n.47. This provision of Canadian law was successfully challenged as a violation of the ICCPR, but the law itself has not yet been changed.

56. *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660, 663 (D.N.Y. 1947).

“American Indian born in Canada” that is used in U.S.C.A. § 226a of the Immigration Act must be given a racial connotation.<sup>57</sup> Therefore, according to the United States, if a person meets the 50% blood quantum as established by U.S. law, then regardless of the racial background of the person to whom she is married, she still possesses the right to freely cross the border. Although this technically and legally addresses the membership dilemma, practically speaking a woman who has been disenfranchised by the Canadian government and stripped of her tribal membership will have great trouble protecting her rights since she will not have any documentation from her tribe stating that she is a tribal member.

The fact that native communities, like the Mohawks, are divided by the border, deprives trans-border tribes of the power to create a unified membership requirement, thereby creating a membership dilemma that has disenfranchised many deserving individuals.<sup>58</sup> Moreover, defining Indians as a racial category allows the United States to ignore their treaty obligations to native peoples, since that characterization transforms the status from a political affiliation to an ethnicity,<sup>59</sup> thus demonstrating the tendency of the United States to undercut the rights of tribal nations while claiming to advance them.

## 2. *Economic Hardships*

The right to pass the border freely includes the right to visit, live and work in the United States, and to obtain social services and public benefits such as unemployment compensation.<sup>60</sup> Unfortunately, this does not include a provision enabling native people to transport goods across the border without being subject to searches and tariffs. Canadian and United States Customs officials both contend that members of native communities living on the border cannot transport goods across the border duty free.<sup>61</sup> This mandate causes a multitude of problems.

First, most tribes with lands split by the border preserve their community identity by maintaining substantial contact through intermarriage and through social, recreational, and religious events.<sup>62</sup> Customs requirements add an unnecessary complication for Indians

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57. *Id.*

58. O'Brien, *supra* note 2, at 322-24 (1984).

59. This classification has serious implications for Native American sovereignty, however, such issues are beyond the scope of this note.

60. INDIAN TASK FORCE, *supra* note 49, at 1.

61. *See Francis v. The Queen*, 3 D.L.R.2d 641, 643 (Can. 1956); *Akins v. United States*, 551 F.2d 1222, 1225-26 (C.C.P.A. 1977); *United States v. Garrow*, 88 F.2d 318, 323 (C.C.P.A.), *cert. denied*, 302 U.S. 695 (1937).

62. O'Brien, *supra* note 2, at 322.



when they travel across the border but within their tribal lands. Second, tribal members trade animals, meat, berries, roots, herbs, handmade goods and medicine bundles at these events, but U.S. and Canadian laws forbid the import and export of certain plants and animals that are important to the ceremonial life of the tribes.<sup>63</sup> Additionally, both U.S. and Canadian customs laws require a search of all goods.<sup>64</sup> Since some items, like the medicine bundles, are extremely sacred, "any mishandling by outsiders destroys its spiritual and ceremonial use."<sup>65</sup> In these ways, border policies restrict the tools that native communities have to preserve their culture.<sup>66</sup>

The border also impedes the ability of a tribal nation to create a cohesive society and to develop a sustainable tribal economy. Native communities on both sides of the border have an extremely low per-capita income.<sup>67</sup> The border adds to this bleak financial picture by imposing tariffs and taxes on any item that they want to transport within their community but across the border.<sup>68</sup> Members of tribal nations on the northern border support themselves by making and selling traditional craft items.<sup>69</sup> Indians must pay a tax on the raw materials for these items, and if they then sell the finished product in a store on tribal lands but across the border, they must pay an additional tariff.<sup>70</sup>

The border inhibits the economic growth of Indian communities in other ways. United States law requires an import tax on any "foreign" items that United States Indians purchase from Canadian Indians.<sup>71</sup> This additional expense makes even ordinary business transactions between members of the same tribe who happen to straddle both sides of the border economically unfeasible.<sup>72</sup>

### 3. *Conflicting Governance*

Since the inception of the United States, the sovereignty of Native Americans has waxed and waned. The presence of the U.S.-Canada border dilutes the sovereignty claims of tribal nations whose lands

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63. Federal Agencies Task Force—Dep't of the Interior, American Indian Religious Freedom Act Report on Pub. L. No. 95-341, at 74 (1979).

64. *Id.*

65. *Id.*; see also O'Brien, *supra* note 2, at 322.

66. O'Brien, *supra* note 2, at 322.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies And Families*, 53 *FORDHAM L. REV.* 315, 331 (1984).

straddle the border, thereby decreasing the ability of those communities to have an effective say in their own future.<sup>73</sup>

The plight of the Mohawk Tribe is instructive. The 7,000 members of the Mohawk tribe are entitled by treaty to govern themselves. Unfortunately, because their lands are in both the United States and Canada, three competing sovereigns govern them.<sup>74</sup> The St. Regis Mohawk Tribal Council administers the United States side, the Band Council governs the Canadian side, and the traditional Council of Chiefs continues to operate.<sup>75</sup> This three-fold governing body makes it difficult for the Mohawk community to effectively engage in long-term planning and to efficiently deliver social services to their members.<sup>76</sup> In addition, the structure creates the illusion that Mohawks enjoy a great deal of autonomy, when in reality they are unable to achieve any of the actual benefits that can accrue from a single, centralized governing body empowered to make decisions in the interests of the entire community.<sup>77</sup> The experience of the Mohawks is not unique. The Kootenay and the Blackfeet Nations have also had to address similar problems because the border also divides their lands and the communities on each side have created separate governing bodies.

The Canadian Immigration Act also poses serious problems for the sovereignty of native peoples on the border. The Canadian government does not recognize traditional marriage ceremonies, thus if two people from the same tribe but living on separate sides of the border are married in the traditional Indian way, Canada insists that they be remarried or face deportation.<sup>78</sup> "Families have been torn asunder because one or more family members were born outside of 'canada' [sic] (in the 'united states') [sic], resulting in deportation orders for husbands, wives and/or children."<sup>79</sup>

The sovereignty of Indian nations divided by the northern border is further complicated by complex trade regulations that make the Indians subject to U.S. and Canadian trade law when they attempt to do business or travel over the border. These regulations inhibit tribes from performing basic religious ceremonies. What is more troubling is that despite the fact that historically, indigenous nations on this continent were highly developed with sophisticated governing bodies, both the United States and Canada refuse to recognize that these tribes have a fundamental, sovereign right to govern their own affairs. Legislation

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73. See, e.g., *id.* at 348.

74. *Id.* at 321.

75. *Id.*

76. *Id.* at 322.

77. *Id.* at 323-25.

78. *Immigration Policy Review: Remarks Regarding Immigration Legislative Review Report*, NATIVE AMERICAN POLITICAL ISSUES WEBPAGE (visited Aug. 17, 2000) <<http://www7.geocities.com/CapitolHill/91118/gkis13.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

79. *Id.*

recognizing that Indians still have a basic right to self-determination and sovereignty should allow trans-border tribes to negotiate multinational arrangements that would abrogate the current legal regime that inhibits cross-border tribes from developing.

### *C. Conclusion*

The difference in the relationship that the United States has with Canada and Mexico translates into a difference in the day-to-day problems faced by border tribes along the U.S.-Mexico border and the U.S.-Canada border. Despite these differences, the core issue for both groups of Indians is the presence of the border as an obstacle to their cultural survival and development. The next section of this note discusses the rights of trans-border tribes under both international and domestic law.

## II. The Legal Rationale for Border Crossing Rights

### *A. International Legal Obligations*

The United Nations Charter stresses the importance of the protection of fundamental freedoms for every human being, regardless of race, gender, religion or language and it sets as a goal the protection of self-determination.<sup>80</sup> Although the UN Charter does not explicitly recognize rights of indigenous populations, the principles embodied within this document laid the groundwork for the self-determination era and the subsequent emergence of indigenous rights.<sup>81</sup> In 1948, the UN Universal Declaration of Human Rights (UNDHR) set forth more general fundamental rights that also apply to native peoples. The UNDHR served as a milestone in the internationalization of human rights and consequently was a milestone for indigenous rights.<sup>82</sup> Both of these documents impose upon the United States an obligation to act in a fashion that protects the human rights of indigenous peoples.

In addition to the general commitments embodied in the UN Charter and the UNDHR, there are a number of more specific international documents that expressly protect the rights of indigenous

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80. U.N. CHARTER art. 1, para. 2, 3.

81. José Paulo Kastrop, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT'L L.J. 97, 98 (1997).

82. *Id.* at 109.

peoples. The International Labor Organization Convention on indigenous and tribal peoples recognizes the “aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of States in which they live.”<sup>83</sup> The Convention includes provisions that advance indigenous cultural integrity, land and resource rights, and nondiscrimination in social spheres.<sup>84</sup> Most importantly, it enjoins states to respect indigenous peoples’ aspirations in all decisions affecting them.<sup>85</sup>

These provisions of the ILO Convention have a clear implication for border tribes. The law requires signatories to take affirmative steps assisting indigenous peoples in preserving their culture and to guarantee indigenous peoples the right to control their own institutions and ways of life. However, in order for border tribes to achieve this level of control, they must have the right to freely travel within their tribal lands on either side of the border and to trade amongst their tribal members. Therefore, in order for the United States to abide by its responsibilities under this convention, it must take steps to guarantee border rights.

While the ILO Convention serves as one treaty obligation to protect the rights of indigenous peoples, there are also new customary international norms, which reinforce the assertion that international law requires the U.S. to protect the cultural integrity of border tribes. These customary norms are reflected in the United Nations Draft Declaration on the Rights of Indigenous Peoples.<sup>86</sup> The Draft Declaration recognizes that if indigenous cultures are to survive, it is important to protect *group rights*.<sup>87</sup> Included within these group rights are the rights to occupy traditional territories.<sup>88</sup> The Draft explicitly recognizes the “collective” right of indigenous peoples to “ownership, possession, and uses of the lands and resources[,] which they have traditionally occupied or used.”<sup>89</sup> In addition, the Draft requires States to provide “special measures” to ensure indigenous peoples’ ownership and control over surface resources of their traditionally occupied territories.<sup>90</sup> By taking affirmative steps toward protecting border-crossing rights, the United States could illustrate its commitment to these principles and simultaneously affirm its commitment to the international trend toward protection of indigenous peoples.

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83. ILO Convention, *supra* note 85.

84. *Id.*

85. *Id.*

86. *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.1994/56 (1994).

87. *Id.* (emphasis added).

88. *Id.*

89. *Id.*

90. *Id.*

These are only a few of the many international legal documents requiring the United States to protect indigenous culture. The Genocide Convention<sup>91</sup> and the UNESCO Declaration of Principles of Cultural Cooperation<sup>92</sup> recognize an emergent human right of cultural survival. Self-determination and sovereignty are critical pre-conditions for the cultural survival of indigenous peoples. The 1972 resolution of the Inter-American Commission on Human Rights states, “[S]pecial protection for indigenous populations constitutes a sacred commitment of the States.”<sup>93</sup> The Helsinki Document adopted by the Conference on Security and Cooperation in Europe includes a provision “noting that persons belong[ing] to indigenous populations may have special problems in exercising their rights.”<sup>94</sup> Finally, the Vienna Declaration and Program of Action, adopted by the 1993 United Nations Conference on Human Rights, demands a greater focus on indigenous peoples’ concerns within the UN system.<sup>95</sup> Recognition of border-crossing rights and the creation of a comprehensive policy to ensure the ability to exercise that right are two significant ways the United States can fulfill these international obligations and signal its commitment to the international legal system.

### *B. Treaty and Legislative Obligations*

The first and most significant international obligation that the United States has is to interpret treaties in a manner consistent with international law. One of the most basic policies of international law is *pacta sunt servanda* . . . or agreements must be kept.<sup>96</sup> This provision applies to the Treaty of Guadalupe Hidalgo, the Gadsden Purchase, the Jay Treaty, and the Treaty of Ghent. Consequently, the failure of the United States to protect the border-crossing rights of native communities along the border violates its international obligation to uphold treaties.

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91. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, January 12, 1961, (defining, at art. II, genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such . . .”).

92. *Declaration of the Principles of International Cultural Cooperation, Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization*, 14th Sess., reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS at 409, U.N. Doc. ST/HR/1/REV.3 (1988)(affirming a right and duty of all peoples to protect and develop the cultures throughout humankind).

93. *Resolution on Special Protection for Indigenous Populations, Inter-American Commission on Human Rights*, Dec. 28, 1972, O.A.S. Doc. OEA/Ser.P, AG/doc.305/73, rev.1, at 90-91 (1973).

94. *Helsinki Document 1992—The Challenges of Change*, July 10, 1992, ¶ 6(29), U.N. GAOR, 47th Sess., at 65, U.N. Doc. A/47/361 (1992).

95. *Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna*, June 25, 1993, pt.1, ¶ 20; pt. 2, ¶¶ 28-32, U.N. Doc. A/CONF.157/23 (1993).

96. 1969 Vienna Convention on the Law of Treaties, Article 26 states that, “Every treaty in force is binding upon the parties to it and must be performed in good faith.”

### 1. *The U.S.-Mexico Border*

In 1853, the Gadsden Purchase significantly expanded the territory of the United States by moving the U.S.-Mexico border further south.<sup>97</sup> Many Indians were affected by this alteration, but the provisions of the Gadsden Purchase reaffirmed Articles VIII and IX of the Treaty of Guadalupe Hidalgo, which protected the right of affected Mexican citizens, including Indians, to continue living their lives as they had prior to the Gadsden Purchase.<sup>98</sup>

The two treaties between the United States and Mexico protected the rights of Indians living along the new border to freely enjoy their liberty and property, and to be secure in the free exercise of their religion, without restriction.<sup>99</sup> Native communities on the border had a right to maintain their land, culture, and religion despite the transfer of land and the existence of a new political border.<sup>100</sup> Unfortunately, shortly after the Treaty was negotiated, the United States began to disregard it. In California, the State constitutional convention refused to guarantee Indians the protections of the treaty as specified in Article VIII.<sup>101</sup> In New Mexico, the territorial government did not give Indians citizenship.<sup>102</sup> It was not until 1953 that the New Mexican constitution was changed to allow Indians to vote.<sup>103</sup>

Today, United States federal immigration law violates provisions of the Treaty by impeding the ability of Indians to maintain their culture and religion. In *United States v. Abeyat*,<sup>104</sup> a U.S. District Court affirmed the authority of the Treaty of Guadalupe Hidalgo to protect the religious freedom of Indians.<sup>105</sup> The court held that the Bald and Golden Eagle Protection Act did not apply to José Abeyat, an Isleta Pueblo Indian, since the feather from the bald eagle was used in the exercise of Mr. Abeyat's religion, and the Treaty of Guadalupe Hidalgo protected the religious liberty of Indian peoples.<sup>106</sup>

U.S. immigration law requires Indians to possess certain types of identification and empowers border officials to detain and deport Indians who lack these forms of identification. As discussed in Section I *supra*, such a policy impedes the ability of native communities to freely exercise their religion, as many elders do not have the necessary documentation to procure an identification card. Lack of documentation

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97. The Gadsden Purchase (Treaty of La Mesilla) Dec. 30, 1853, U.S.-Mex. 10 Stat. 1031.

98. *Id.*

99. Treaty of Guadalupe Hidalgo Art. IX, Feb. 2, 1848.

100. Austin *supra* note 12, at 107.

101. GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO 69 (1990).

102. *Id.*

103. *Id.*

104. *United States v. Abeyat*, 632 F. Supp. 1301 (D.N.M. 1986).

105. *Id.* at 1304.

106. *Id.* at 1304.

makes it impossible for the elders, who often preside over religious ceremonies, to travel to communities on the other side of the border. There is no provision in the Immigration Act that exempts Indians from the documentation requirements. Similarly, there has been little effort to accommodate the unique circumstances of Native Americans by permitting, for example, the use of tribal identification cards, signifying bona fide tribe membership. Without this exception, Indians are unable to freely travel across the border. Consequently, the United States' immigration laws hamper the ability of native communities in the border zone to maintain their way of life and violate the Treaty of Guadalupe Hidalgo and the Gadsden Purchase.

One tribe, The Texas Band of Kickapoo, has managed to obtain legislation guaranteeing their right to freely cross the border. The experience of the Kickapoo is unique, even in Native America. For hundreds of years the Kickapoo have steadfastly resisted all attempts to become assimilated into the dominant culture.<sup>107</sup> For the Kickapoo, the White man's ways were "no better than those of the coyote."<sup>108</sup> The Texas Band of Kickapoo originally migrated from Algonquin territory in New York. On their journey south, they moved through Wisconsin, Illinois, Kansas, Oklahoma, and Texas constantly resisting any attempt to convert to Christianity.<sup>109</sup> Finally, in the late 1800's they migrated to Nacimiento, Mexico to avoid "[w]hite settlers and reservations."<sup>110</sup> In the early 1980's, the Texas Band of Kickapoo moved back to Texas, though they still preserved land of religious significance in Mexico.<sup>111</sup>

At the same time, the U.S. Congress passed legislation that gave them membership in a recognized Indian tribe and preserved their right to freely cross the border to visit their religious sites in Nacimiento.<sup>112</sup> This legislation recognized that, "[A]lthough many of the members of the band meet the requirement for U.S. Citizenship, some of them cannot prove it."<sup>113</sup> In recognition of these facts, the legislation declared that members of the Texas Band of Kickapoo should be granted the right to pass and re-pass the borders of the United States.<sup>114</sup> The legislation further permits Kickapoo tribal leaders to issue I.D. cards to members of the Kickapoo band, which jointly serve as a border-crossing card.<sup>115</sup>

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107. David Maraniss, *A New Age for the Kickapoo Mexican Tribe Edges Into Modern America*, WASH. POST, May 12, 1986.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. David Maraniss, *A New Age for the Kickapoo Mexican Tribe Edges Into Modern America*, WASH. POST, May 12, 1986.

114. *Id.*

115. Texas Band of Kickapoo Indians Act; 25 U.S.C.A. § 1300b-13(d). Regarding border crossing, living and working rights, the provision expressly states: "Notwithstanding the Immigration and Nationality Act, all members of the Band shall be entitled to freely pass and repass [sic] the borders of the United States and to live and work in the United States."

This legislation exempts the Texas Band of Kickapoo from the provisions of the Immigration Act. In doing so, it recognizes the unique dilemmas that trans-border tribes face.

The legal position of the Kickapoo is also unique. Unlike the Cocopah, the Yaqui, or the Tohono O'odham, the Kickapoo do not have a treaty basis for their right to cross the border. There were no Kickapoo in the border region when the Treaty of Guadalupe Hidalgo and the Gadsden Purchase were signed. Consequently, recognition of their right to visit their sacred sites in Nacimiento does not require the United States to implicitly recognize an international obligation to guarantee border crossing rights for native communities, whose tenure to ancestral lands pre-dates contemporary political boundaries. However, the fact that the legislation was passed does indicate, at least, some willingness despite strict immigration laws, to protect border-crossing rights of Natives. Significantly, this legislation extends an affirmative legal right to the Texas Band of Kickapoo. It also illustrates congressional recognition that the United States has some responsibility to facilitate the cultural preservation of native peoples. Furthermore, the Kickapoo legislation demonstrates the administrability and feasibility of the United States government to accommodate its immigration laws for indigenous peoples living on the border.

## 2. *The U.S.-Canada Border*

The legal position of tribes along the U.S.-Canada border is more complex than that of their indigenous counterparts along the U.S.-Mexico border, largely due to two centuries of inconsistent case law on U.S. treaty obligations. During the Revolutionary War, both the British and the United States actively recruited allegiance and assistance from the Indian nations. Despite the instrumental role of the Indian nations in the Revolutionary War, their rights were not expressly protected in the Treaty of Paris, signed at the conclusion of the war.<sup>116</sup> The Indian nations were irate, and in 1794 when the Jay Treaty was signed, the tribes made sure that the Treaty expressly provided that the border would

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116. J. COMBS, *THE JAY TREATY* 4 (1970).



be non-existent for the Indian nations.<sup>117</sup> In 1812, war again broke out between the United States and Britain and as during the Revolutionary War, both sides depended heavily on the assistance of the Indian nations.<sup>118</sup> At the conclusion of the war, England strongly advocated for a separate Indian nation that would act as a buffer between the territories of the United States and the United Kingdom.<sup>119</sup> England was not able to secure such an agreement, however, the final version of the Treaty of Ghent was signed only after all sides agreed that tribal rights would be reinstated to their pre-war status.<sup>120</sup>

Article III of the Jay Treaty explicitly states, "Indians dwelling on either side the said boundary line" possess the right to freely pass and re-pass the border by "land or inland navigation, into the respective territories and countries of the two parties on the continent of America."<sup>121</sup> Additionally, the treaty states that Indians do not have to pay any "impost or duty whatever."<sup>122</sup> Signed twenty years later, the Treaty of Ghent explicitly stated that that the rights and privileges of the Indian nations were to be restored to those that "they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities."<sup>123</sup> These treaties appear dispositive. The Indian nations living along the border have the right to cross the border freely and to trade without paying any tariffs. The right was guaranteed in the Jay

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117. Treaty of Amity, Commerce and Navigation between His Britannick Majesty; and the United States of America., by Their President, with the advice and consent of Their Senate [The Jay Treaty], Nov.19, 1794, U.S.-Eng., 8 Stat. 116, T.S. No. 105. The relevant provisions state:

It is agreed that it shall at all times be free . . . to the Indians dwelling on either side of the said boundary line, freely to pass and re-pass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America . . . and freely to carry on trade and commerce with each other [sic]. . . . [N]or shall the Indians passing or re-passing with their own proper goods and effects of whatever nature, pay for the same any impost duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona-fide to Indians.

[hereinafter Jay Treaty, art. III].

118. O'Brien, *supra* note 2, at 319.

119. *Id.*

120. Treaty of Peace and Amity between His Britannic Majesty and the United States of America [Treaty of Ghent] Dec. 24, 1814, U.S.-Eng., 8 Stat. 1116, T.S. No. 109. The relevant provisions state:

The United States of America engage . . . to restore to such tribes or nations, respectively, all the possessions, rights and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities . . . . And His Britannic majesty engages . . . to restore to such tribes or nations, respectively, all the possessions, rights and privileges, which they may have enjoyed or been entitled, to in one thousand eight hundred and eleven, previous to such hostilities.

[hereinafter Art. IX, Treaty of Ghent].

121. Jay Treaty, Art. III, *supra* note 123.

122. *Id.*

123. Art. IX, Treaty of Ghent, *supra* note 126.

Treaty and reaffirmed in the Treaty of Ghent. Unfortunately, a long and convoluted string of cases has significantly curtailed the protections originally guaranteed by the treaties.

In 1924, the United States passed the Citizenship Act, which extended citizenship to "all non-citizen Indians born within the territorial limits of the United States."<sup>124</sup> At the same time, the Immigration Act of 1924 stated that no alien ineligible for citizenship was to be admitted as an immigrant.<sup>125</sup> The collective effect of the legislation prohibited Canadian-born Indians from entering the United States.

Paul Diabo, a full-blooded Canadian-born Iroquois, challenged the laws as a violation of the Jay Treaty, which preserved the right of Canadian-born Indians belonging to border tribes, to freely cross the border.<sup>126</sup> The Commissioner of Immigration argued the Jay Treaty had been abrogated by the War of 1812, making the current immigration legislation valid.<sup>127</sup> The Third Circuit Court of Appeals heard the case and held "[W]e are not here dealing with the rights and obligations of the two signatories to that treaty to and from each other, but with the rights of a *third party* created by the joint action of the signatories."<sup>128</sup> The court concluded, "[T]reaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as peace, *do not cease* on the occurrence of war, but are, at most, only suspended while it lasts . . . ."<sup>129</sup> In so holding, the court affirmed the force of the Jay Treaty to guarantee the rights of border tribes.

In response to the *McCandless* decision, the United States passed legislation that exempted Canadian-born Indians from the requirements of the Immigration Act. The current version of the legislation provides, "Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States . . . ."<sup>130</sup>

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124. Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)(1982)).

125. The Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162, *repealed by* Immigration and Nationality Act of 1952, Publ. L. No. 82-414, § 403, 66 Stat. 163, 279.

126. *McCandless v. United States ex rel Diabo*, 25 F.2d 71, 72 (3rd Cir. 1928).

127. *Id.*

128. *Id.* (emphasis added).

129. *Id.* at 73 (emphasis added).

130. 8 U.S.C. § 1359 (1982). The commentary to the Act notes that the

[i]ntent of Congress with respect to this section providing that nothing in subchapter dealing with immigration should be construed to affect right of American Indians born in Canada to pass borders of the United States was to preserve the aboriginal right of American Indians to move freely throughout the territories originally occupied by them on either side of the American and Canadian border and thus to exempt Canadian-born Indians from all immigration restrictions imposed on aliens by this chapter.

8 U.S.C.A. § 1359 (1982).

Unlike the United States, Canada has not clearly recognized the rights of American Indians to freely pass its borders. The experience of a member of the First Nation, or Wabanaki, is illustrative of how Canada deals with native peoples trying to cross the border. On February 2, 1996, Gkisedtanamoogk, a member of the Mamac Nation, was prevented from crossing the border and returning to his home on the Burnt Church Reserve in Canada. The immigration official that stopped him refused to allow him entry into Canada since he was not a permanent resident possessing a Canadian visa, and was therefore violating section A9(1) of the Canadian Immigration Act.<sup>131</sup> Gkisedtanamoogk and his family had no intention of becoming Canadian citizens due to their firm conviction that they are, in fact, already citizens of the Mii'gmaq and the Wampanoag Nations.<sup>132</sup> In order to cross the border, however, Canada requires that all persons (including Indians traveling within their native lands) be either a permanent resident or a Canadian citizen.<sup>133</sup> Mere First Nation membership was not sufficient to satisfy the Immigration Act's requirement. As a result, Gkisedtanamoogk was forced to remain in the United States, away from his home and his family.

In truth, such examples are rare. Notwithstanding the fact that Canada has not expressly recognized border-crossing rights, Canada rarely enforces the provisions of its Immigration Act, which would hinder native peoples' passage. However, isolated incidents do occur and serve to illustrate how the Act contravenes Canada's duty under the Jay Treaty and the Treaty of Ghent.

In 1931, when Canada became the self-governing "Province of Canada," it assumed the responsibility and obligation to maintain the treaties with, among other nations, the United States.<sup>134</sup> One such treaty was the Treaty of Ghent. As noted *supra*, this treaty preserved for native peoples the right to freely pass the border.<sup>135</sup> Canada, however, contends its obligations under the Treaty of Ghent are not self-executing, thus in the absence of express implementing legislation, the provisions are not binding.<sup>136</sup> Despite this rhetoric, an opinion issued by the Canadian Department of External Affairs stated the provisions of the Jay Treaty that permit Indians dwelling on either side of the border to pass freely "may still be in force,"<sup>137</sup> suggesting that current Canadian immigration law might be in violation of its treaty obligations.

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131. *How the Matter of "canada's" [sic] Immigration Law is an Aboriginal Issue*, NATIVE AMERICAN POLITICAL ISSUES WEBPAGE (visited Aug. 18, 2000) <<http://www7.geocities.com/CapitolHill/9118/gkis12.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

132. *Id.*

133. *Id.*

134. O'Brien, *supra* note 2, at 343.

135. See *supra* note 126, and accompanying text.

136. *Id.* at 330 (citing *Akins v. United States*, 64 C.C.P.A. 68, 551 F.2d 1222, 1225-26 (C.C.P.A., 1977); *United States v. Garrow*, 24 C.C.P.A. 410, 88 F.2d 318, 323 (C.C.P.A. 1937).

137. O'Brien, *supra* note 2, at 330 n.91.

In addition to the right to freely cross the border, the Jay Treaty and the Treaty of Ghent preserved for members of U.S.-Canada border tribes the right to pass or re-pass the border with their own property, goods, and effects of whatever nature, without paying any excise tax or duty.<sup>138</sup> As noted in Section I *supra*, the imposition of taxes can significantly hinder the intra-territorial commerce and economic growth of border tribes.

In *United States v. Garrow*,<sup>139</sup> Annie Garrow, an Indian from the Canadian St. Regis Tribe of the Iroquois, challenged as a violation of the Jay Treaty and the Treaty of Ghent, the tariff imposed on 24 hand-made baskets she planned to sell in a gift shop on the American portion of the reservation.<sup>140</sup> The case was heard by the U.S. Court of Customs and Patent Appeals, which held the right to travel duty-free recognized by the Jay Treaty and the Treaty of Ghent, had been abrogated by the War of 1812.<sup>141</sup> Consequently, Ms. Garrow was forced to pay the excise taxes on her baskets.<sup>142</sup>

The *Garrow* court based its decision on *Karnuth v. United States*,<sup>143</sup> a U.S. Supreme Court opinion, which held that the provisions of the Jay Treaty guaranteeing British citizens the right to freely pass and re-pass the border with the United States had been abrogated by the War of 1812.<sup>144</sup> In the facts of *Karnuth*, a British subject and a Canadian national challenged the Immigration Act of 1924, claiming the provision that forbade his entry into the United States, violated the Jay Treaty.<sup>145</sup> The court held that the War of 1812 abrogated those portions of Article III in the Jay Treaty relating to free passing and re-passing of British and

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138 The relevant portions of the Jay Treaty state,

No Duty of Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales, or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

The Jay Treaty, Nov. 19, 1794, U.S.-Eng., art. III, 8 Stat. 116, T.S. No. 105. While the Treaty of Ghent does not specifically mention the right to pass and re-pass borders duty-free, the signatories, the United States and Great Britain, did agree "to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities[ ] . . ." thus by implication affirming rights expressly conferred by the Jay Treaty of 1794. Treaty of Ghent, Dec. 24, 1814, U.S.-Eng., art. IX, 8 Stat. 1116, T.S. No. 109.

139 24 C.C.P.A. 410, 88 F.2d 318 (C.C.P.A. 1937).

140. *United States v. Garrow*, 24 C.C.P.A. 410, 88 F.2d 318 (C.C.P.A. 1937).

141 *Id.* at 323.

142 *Id.* at 324.

143 279 U.S. 231 (1929).

144. *Id.* at 241.

145. *Id.* at 235.

American subjects living along the border, citing as a justification the possibility of “reasonable intercourse” during a time of war.<sup>146</sup>

When the Court of Customs and Patent Appeals in *Garrow* used *Karnuth* as a basis for its holding, it failed to consider a number of critical factors that made *Karnuth* inapplicable to the facts of *Garrow*. First, Indians were not a direct party to the War of 1812. Therefore, preserving their right to freely cross the border would not have risked the reasonable activities considered important in *Karnuth*. Second, the Treaty of Ghent, signed between Britain and the United States at the close of the War of 1812, explicitly provided for the reinstatement of Indian rights to their pre-war status.<sup>147</sup> Such express language strongly suggests that both the United States and Britain believed the Jay Treaty was still in force. Third, the *Garrow* court failed to consider the persuasive reasoning in *McCandless*,<sup>148</sup> which noted that the rights of Indians were third party rights, and not rights of the two signatory parties. Thus, any subsequent hostilities between the two signatories did not abrogate the third party rights of the Indians. Moreover, the distinction between the rights of British subjects and the third party rights of Indian nations under the Jay Treaty was never addressed in *Karnuth*. Therefore, *Karnuth* only abrogated the Jay Treaty with respect to British subjects, not with respect to Indians.

Despite these flaws, *Garrow* is still the law with respect to native tribes along the U.S.-Canada border and it states there is no right to bring goods across without paying tariffs. In 1977, the United States Court of Customs and Patent Appeals re-affirmed the flawed *Garrow* decision in *Akins v. United States*,<sup>149</sup> holding that, “[A]lthough a measure of the equities lies with the Indians, we cannot revive the duty exemption which history and the law have firmly ended.”<sup>150</sup> The *Akins* decision is especially ironic given the historical inaccuracies and the legal mistakes marking the previous decisions regarding U.S. obligations under the treaties.

In Canada, the courts recently addressed the issue of tariffs in *Mitchell v. Minister of National Review*.<sup>151</sup> This case dealt directly with the right of the Mohawks of Akwesasne to cross the Canada-United States border without paying customs duties.<sup>152</sup> The Mohawks asserted the same argument in the Canadian courts that proved so unsuccessful in

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146. *Id.* at 239.

147. See *supra* note 126, and accompanying text.

148. *McCandless v. United States ex rel Diabo*, 25 F.2d 71, 72 (3rd Cir. 1928); see also *supra*, notes 132-35 and accompanying text.

149. *Akins v. United States*, 64 C.C.P.A. 68, 551 F.2d 1222 (C.C.P.A. 1977).

150. *Id.* at 1230.

151. [1998] 1 C.T.C. 63.

152. *Id.*; see also Paul Barnsley, *Border Crossing Decision Appealed*, WINDSPEAKER NEWS; ABORIGINAL MULTI-MEDIA SOCIETY (AMMS) (December 1997). (visited Aug. 18, 2000) <<http://www.ammsa.com/windspeaker/WINDNEWSDEC97.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

the United States—namely that the Treaty of Ghent and the Jay Treaty are still in force guaranteeing the rights of Indians to freely cross the border and transport goods duty free. *Mitchell* argued that Section 35 of the Canadian Constitution Act protects the treaty rights of Canada's aboriginal people, including the rights preserved under the Jay Treaty. *Mitchell* also pointed to an earlier Canadian Supreme Court case, *Dorothy Marie Van der Peet* [sic] v. *Her Majesty the Queen*,<sup>153</sup> which held, "[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by Section 35(1) [of the Constitution Act] because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. . . ."<sup>154</sup> Although the Canadian Federal Court held that the treaty of Ghent was inapplicable to the Mohawks and the First Nations, it agreed that the Mohawks possessed a constitutionally protected aboriginal right to freely pass and re-pass the border and to transfer personal goods across the border duty free.<sup>155</sup> The Canadian government, however, appealed the decision.<sup>156</sup>

On November 2, 1998, the Canadian Federal Court of Appeals upheld the lower court decision, affirming Mohawk's right to cross the Canada-U.S. border and transport personal goods duty free.<sup>157</sup> While the Mohawks expected the decision to be appealed to the Canadian Supreme Court,<sup>158</sup> as of this date, no appeal has been granted.

Under the provisions of the Jay Treaty and the Treaty of Ghent, both the United States and Canada are obligated to allow members of native communities along the border to freely pass between the two countries. Distorted readings of treaty obligations have seriously impeded the ability of Indians to freely travel within their own lands. These limitations are inconsistent with the terms of the Jay Treaty and the Treaty of Ghent, which expressly made the border inapplicable to the Indian nations. In order to fulfill the legal mandate of these treaties, the United States and Canada must implement a consistent policy giving aboriginal border communities complete freedom to move between their lands on either side of the border.

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153 *R. v. Vanderpeet* [1996] 2 S.C.R. 507.

154. *Dorothy Marie Van der Peet v. Her Majesty the Queen*, Canadian Supreme Court, Judgment rendered August 21, 1996 (D.L.R. 1996).

155 *Mitchell v. Minister of National Review* [1998] 1 C.T.C. 63 (citing Constitution Act (1982) §§ 35, 35(1), and 52); Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11 § 35, § 35(1), § 52.

156. *Barnsley*, *supra* note 158.

157. *Mitchell v. Minister of National Review* [1999] 1 F.C. 375; *see also Courts Back Mohawk Right to Cross Border Duty Free*, CANADIAN PRESS, Nov. 5, 1998.

158 *Courts Back Mohawk Right to Cross Border Duty Free*, CANADIAN PRESS, Nov. 5, 1998.

### III. Proposals for the Future of the Borderlands

The fact that the United States has a legal obligation to recognize border-crossing rights presents one means of redress for native people. There are, however, a variety of other tactics that could be used to address the problems experienced by Indians living along the U.S. borders. Options include informal agreements among individual tribes and the Border Patrol; relaxing INS documentation requirements for border tribe members; tribe-specific legislation similar to the Texas Band of Kickapoo Act; and comprehensive national border-crossing legislation. Each of these options would be a positive step in resolving the dilemma faced by indigenous peoples on the border.

Informal agreements, establishing border-crossing rights between native tribes and the Border Patrol, do exist in the status quo. José Matus, the director of the Indigenous Alliance Without Borders, has successfully negotiated an arrangement with INS agents in Arizona, which facilitates tribal members' passage across the U.S.-Mexico border.<sup>159</sup> Despite this arrangement, the lingering memory of past harassment has made many tribal elders hesitant to cross the border.<sup>160</sup> While little can be done to erase this attitudinal barrier, the informal arrangement is a step in the right direction. Such agreements are attractive and easy to implement because they do not require comprehensive action on the part of the United States, the Canadian, or the Mexican governments. In addition, informal arrangements can address the specific needs of the tribe. For example, an arrangement between the Mohawk Council and the Canadian and U.S. Border Patrols could include a provision allowing Indians to transport medicine bundles without having them inspected by Border Patrol agents. Similarly, an arrangement between the Yaqui and the Mexican Border Patrol could include exceptions to certain import and export restrictions so that Yaquis could transport specific feathers and seeds required to conduct religious ceremonies. On the other hand, such agreements may be difficult to enforce because they lack the force of law. Further, because the composition of the Border Patrol is not static, such arrangements may fall victim to changes in INS leadership or philosophy.

Efforts by the Mohawk Council of Akwesasne and the Six Nations to negotiate with the Canadian and the United States governments for a border-crossing rights agreement have been largely unsuccessful and, as a result, they have taken their claims to the Canadian courts.<sup>161</sup> These efforts, however, indicate a willingness on the part of tribes to negotiate

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159. Martinez, *supra* note 13.

160. *Id.*

161. See Mitchell v. M.N.R. [1999] F.C. 375.

with the governments and a commitment to seeing resolution of this issue.

Another possibility is tribe-specific legislation, similar to the Texas Band of Kickapoo Act. The Texas Band of Kickapoo Act gives all eligible individuals a border-crossing card identifying them as tribal members. The border-crossing card can be issued to tribal members even if the members are unable to produce the formal documentation required by the INS. The Tohono O'odham of Arizona attempted to pass similar legislation in 1989, but the bill was tabled.<sup>162</sup> Other tribes, such as the Kickapoo Tribe of Oklahoma, have also sought border-crossing rights for their fellow tribesmen on the other side of the Mexican border.<sup>163</sup> INS officials are exploring the possibility of a comprehensive solution and have been working with members of the House Subcommittee on Immigration.<sup>164</sup>

Positive advancements could also come from administrative agencies such as the INS. Indeed, the INS recently announced a policy shift regarding the border crossing rights of Native Americans along the U.S.-Mexico border.<sup>165</sup> Through cooperation with the Mexican government, the INS is using its discretionary power to relax the standard for acceptable documentation required to obtain a border-crossing identification card.

Although the policy will ultimately be enacted along the entire U.S.-Mexico border, many tribes may not benefit from the new standard. Further, because the new policy is based upon an agreement with the Mexican government, tribes along the U.S.-Canada border will not benefit.<sup>166</sup> Thus, while the new INS policy is a welcome step in the right direction, its ability to improve Native American border-crossing rights has its limitations.

Tribe-specific legislation could also reflect the unique problems of each tribe. In contrast to the informal agreements discussed *supra*, legislation would be a formal, permanent solution, thus giving each tribe standing to enforce the terms of the law. This very formality, however, presents its own share of feasibility problems. To successfully get legislation sponsored and passed, Indians need political and financial capital—both of which are in short supply in Native America. Additionally, a piecemeal resolution of the border problem creates incentives for individual tribes to seek legislation that benefits only their tribe. Ultimately, such efforts stunt the formation of nation-wide

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162 Chet Barfield, *A People Divided: International Border has Cut Tribes in Half; No Remedy is in Sight*, SAN DIEGO UNION-TRIB., Jan. 24, 1999.

163 *Id.*

164 *Id.*

165 David LaGesse, *U.S. Hopes New Border Policy With Mexico Eases Tribes' Passage*, DALLAS MORNING NEWS, March 12, 2000.

166. David LaGesse, *U.S. Hopes New Border Policy With Mexico Eases Tribes' Passage*, DALLAS MORNING NEWS, March 12, 2000.



alliances and strategies to develop a comprehensive solution to a problem, which at its root, is similar for all native communities living along the border. Finally, tribe-specific legislation has not been particularly successful. According to the Kickapoo, Border Patrol agents are unfamiliar with the statute; therefore, the Act has done little to facilitate border crossing or eliminate harassment.<sup>167</sup>

A final option, which addresses many of the problems faced by informal agreements and tribe-specific legislation, is the enactment of comprehensive border-crossing legislation. Such legislation "could include provisions for border-crossing rights, tariff-free goods, reciprocal agreements concerning eligibility for[,] and payment of[,] medical costs, education, social assistance, legal aid award payments[,] and the exercise of hunting and fishing rights."<sup>168</sup> Further, this type of legislation would demonstrate a firm commitment on behalf of the United States to advance indigenous peoples' rights and would bring the United States closer to compliance with the various treaties and international agreements, which require protection of indigenous rights.<sup>169</sup> The passage of comprehensive legislation would impose little to no cost on the United States, yet it would signal a long-overdue recognition of the rights of indigenous peoples.

#### IV. Conclusion

In 1924, Deskaheh, a tribal elder of the Cayuga Iroquois Nation and early advocate for the recognition of indigenous and treaty rights, was unable to return to his home in Canada following appeal for justice to the League of Nations in Switzerland.<sup>170</sup> Due to restrictions imposed by the Immigration Act of 1924,<sup>171</sup> Deskaheh was refused re-entry into Canada and was forced to live his remaining days in western New York.<sup>172</sup> Unable to receive treatment from his traditional Cayuga medicine man, he died. Before taking "the long road home," Deskaheh's final words were to "fight for the line," a reference to the border.<sup>173</sup> For the past fifty years, these words have sounded a battle cry for native peoples. In this Decade of the Indigenous People, it is time for the United States to acknowledge the cultural significance of "the line" and

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167. Gonzales & Rodriguez, *supra* note 15.

168. See O'Brien, *supra* note 2, at 349.

169. See notes 97-102 and accompanying text.

170. Joseph Rickard, *Deskaheh*, INDIAN DEFENSE LEAGUE OF AMERICA WEBPAGE (visited Aug. 18, 2000) <<http://www.tuscaroras.com/IDLA/index.html>>; also on file with the Texas Forum on Civil Liberties & Civil Rights.

171. See *supra* note 131 and accompanying text.

172. *Id.*

173. *Id.*

fully recognize the border-crossing rights of indigenous communities living in our country's borderlands.