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Apposition of Recent U.S. Supreme Court Decisions regarding Tribal Sovereignty and International Indigenous Rights Declarations

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COMMENTS

Apposition of Recent U.S. Supreme Court Decisions Regarding Tribal Sovereignty and International Indigenous Rights Declarations

Patrick Cleveland

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I. INTRODUCTION

There is a growing movement in international law to recognize and protect the rights of indigenous peoples.¹ This move-

¹ Although definitions of "indigenous peoples" vary, a 1986 report of U.N. Special Rapporteur Martinez Cobo is informative:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of the society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

José Martinez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, U.N. ESCOR, 13th Sess., Annex 1, Agenda Item 4, paras. 379-80, U.N. Doc. E/CN.4 (1995).

ment is a history of exploitation and colonization of indigenous peoples throughout the world and in response to the resulting deprivation of basic fundamental rights suffered by them.² The indigenous peoples affected by colonization and exploitation are many, and include, but are not limited to, such groups as the indigenous peoples of Australia, the Indian, Inuit, Metis and other indigenous peoples of Canada, the Maori in New Zealand, the Yanomami and other indigenous peoples of Brazil and the Amazon, the indigenous peoples of African nations such as the Ogoni People of Nigeria and the Maasai of Kenya, and the Native Americans of the United States.³ The Native American indigenous peoples are also many, and include such distinct tribes as the Navajo Nation in the southwestern United States, the Cherokee and Seminole Nations in the southeast, the Sioux Nation of the midwest, and the Yakima Nation of the northwest.⁴

The movement of international indigenous rights in the 20th century has culminated in two declarations of change: the United Nations Declaration on the Rights of Indigenous Peoples to the Commission on Human Rights⁵ and the American Declaration on the Rights of Indigenous Peoples.⁶ These declarations broke new ground in addressing indigenous rights including the right to self-determination, the right to internal governance and

² See generally Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999) (reviewing the legacy of conquest in various arenas around the planet and the status of indigenous peoples under domestic law).

³ See *id.*

⁴ "An Indian tribe constitutes a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." 41 AM. JUR. 2D *Indians* § 3 (1995) (citing *Montoya v. United States*, 180 U.S. 261 (1901)) (hereinafter *Indians*). "Congress, in the exercise of its plenary power to limit the right of self-government of an Indian nation, has indicated that certain statutory prerequisites must exist before a group of Indians may be considered a tribe and thereby be eligible for special status in the law, including the requirement that Indians in a tribe must all live on the same reservation, and must have adopted an organizational plan or constitution." *Id.* (citing *Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978)).

⁵ See Erica-Irene A. Daes, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, U.N. ESCOR, Hum. Rts. Comm., 45th Sess., Annex 1, Agenda Item 14, at 50-51, U.N. Doc. E/CN.4 (1993), reprinted in 9 ST. THOMAS L. REV. 212 (1996) [hereinafter U.N. Draft Declaration].

⁶ See Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R. 625 OEA/ser. L./V.II.95, doc. 7 rev. (1996) [hereinafter OAS Draft Declaration].

legal systems, and the right to sovereignty.⁷ These declarations, however, have not been fully adopted by the United Nations and the Organization of American States.⁸ In fact, the United States has not endorsed either, insisting that these declarations infringe on national sovereignty and promote secession and disintegration.⁹

The United States' reluctance to endorse either of the indigenous rights declarations is not surprising in light of the government's continuing treatment of Native Americans.¹⁰ Notwithstanding the lack of enthusiasm on the part of the United States, there are signs of a trend that would at least begin a process of change with respect to tribal sovereignty in the United States.¹¹ This slight indication of change has not, however, been reflected in the Supreme Court, which has failed to uphold tribal sovereignty in recent cases.¹²

⁷ See generally S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 7 (1991).

⁸ See Gustavo Capdevila, *Rights: Delegates Obstruct Work of U.N. Indigenous Groups*, INTER PRESS SERV., Aug. 4, 1999, available at 1999 WL 5949942 (reporting that delegates from several governments employ tactics that prevent approval of United Nations resolutions and declarations that concern indigenous peoples).

⁹ See Dean B. Suagee, *Human Rights of Indigenous People: Will the United States Rise to the Occasion?* 21 AM. INDIAN L. REV. 365, 376 (1997).

¹⁰ See, e.g., FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* (1994) (providing a chronological account of two centuries of treaty making and the subsequent history of the treaties); DAVID E. WILKENS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT* (1997) (providing a historical survey of U.S. Supreme Court cases relating to tribal sovereignty).

¹¹ See 25 U.S.C.A. § 450 (1999) (providing a congressional statement of findings that the "prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities"); see also Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998) (establishing protocol for consultation and collaboration with Indian tribal governments in the development of regulatory practices that affect their communities); and Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (clarifying the "responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes").

¹² See generally *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Burlington N. R. R. Co. v. Red Wolf*, 522 U.S. 801 (1997); *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999). Collectively, these cases may represent a recent change in Supreme Court policy. Before these cases were decided, at least one author believed that the Supreme Court, when compared to the Presidency and Congress, had a better track record of acknowledging tribal sovereignty and upholding treaty rights. See WILKENS, *supra* note 10, at xi.

Part II-A of this comment will provide a background on American Indian Law and discuss the legal relationship of American Indians with the United States. Part II-B will provide a background on developments in international indigenous rights and outline rights proposed in international indigenous rights declarations. Part III will review recent Supreme Court decisions affecting tribal sovereignty and compare them with indigenous rights declarations.

II. BACKGROUND

A. *The Legal Relationship Between the United States and Native Americans*

A cursory view of "Indian" law in the United States does not leave one with the impression that Native American peoples are (or ever have been) independent, sovereign nations with international legal status.¹³ Instead, current law portrays Native American nations as dependent political communities placed under the care and control of the Federal Government and subject to a broad plenary power of Congress.¹⁴

What then provides the foundation for a view that Native Americans have been and should now be treated as independent, sovereign nations? Even before Columbus arrived in the Americas, Native Americans had organized democratic societies.¹⁵ Subsequently, the English, French and Spanish settlers established alliances with Native American nations in order to expand their sphere of commerce and influence.¹⁶ The European nations, however, were at odds with the colonists, who were eager to take over Indian lands without negotiation or

¹³ See generally *Indians*, *supra* note 4, §§ 7-15.

¹⁴ See *United States v. Kagama*, 118 U.S. 375 (1886) (adopting the doctrine that Congress has plenary power over Indian affairs). See also Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996) (providing an overview of the *Kagama* case and criticizing the decision as an "embarrassment of constitutional theory . . . logic . . . and humanity.")

¹⁵ See Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 771 (1999).

¹⁶ See Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 NYU REV. L. & SOC. CHANGE 217, 229 (1993) (citing STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 11-50 (1988)).

compensation.¹⁷ This tension is apparent in a 1763 Royal Proclamation from England that held void treaties and land purchases made by the colonies or individual settlers without approval of the Crown.¹⁸

Some commentators assert that the American political system was fashioned from a combination of Native American and European political theories and is analogous to the Iroquois Confederacy of the five Indian nations of the Mohawk, Seneca, Cayuga, Onondaga, and Oneida clans.¹⁹ In fact, even Benjamin Franklin recognized the Iroquois Confederacy and commented on its political unity.²⁰ Thus, the foundation for viewing Native Americans as independent sovereign nations begins with the recognition that such native political sovereigns existed before America was settled by Europeans; but it does not end there.

The Constitution provided Congress with the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."²¹ Some have argued that as the Commerce Clause lists "Indian tribes" distinctly from "foreign Nations," it is logical to conclude that Native American tribes were never considered independent nations.²² Others have argued, however, that Indians were distinctly enumerated in order to make clear that the government's regulations and treaties with Indian nations, and not the states, would be supreme.²³ The latter argument is substantiated by the fact that the formal mode of conducting diplomatic relations with the In-

¹⁷ See *McSloy*, *supra* note 16, at 234 (citing Letter from George Washington to James Duane (Sept. 7, 1783), reprinted in *DOCUMENTS OF UNITED STATES INDIAN POLICY* (Francis P. Prucha ed., 2d ed. 1990)).

¹⁸ See *id.* at 235.

¹⁹ See *Sager*, *supra* note 15, at 787, n.164 (citing ROXANNE DUNBAR ORTIZ, *INDIANS OF THE AMERICAS: HUMAN RIGHTS AND SELF-DETERMINATION* 2 (1984)).

²⁰ "It would be a very strange Thing, if Six Nations of Ignorant Savages should be capable of forming a Scheme for such an Union . . . and yet that a like Union should be impracticable for ten or a Dozen English Colonies . . ." *Sager*, *supra* note 15 at 770 (quoting 3 BENJAMIN FRANKLIN, *THE WRITINGS OF BENJAMIN FRANKLIN* 42 (Albert Henry Smyth ed., 1905)).

²¹ U.S. CONST. art. 1, § 8, cl. 3.

²² See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (stating that the Cherokee were not a foreign state in the sense of the constitution).

²³ See *McSloy*, *supra* note 16, at 235, n.132 (noting that the only debate regarding Indian nations during the framing of both the Articles of Confederation and the Constitution concerned the division of power between the state and federal governments).

dian nations was treaty-making.²⁴ The treaties with Indian nations were concluded in the same manner as treaties with foreign nations and were recognized by the Supreme Court as the supreme law of the land, superior to any state constitution or law.²⁵

In the early 19th Century, many treaties were made with Indian nations, and many were ignored in order to feed the appetite of an expansion-hungry nation.²⁶ A good example is the Treaty of 1868 with the Sioux Indians that "set apart for the absolute and undisturbed use and occupation of the Indians" the western Dakotas, eastern Montana and Wyoming.²⁷ Within just a few years of making the Treaty of 1868, the United States Army was carrying out armed attacks against the Sioux, seizing land, and herding them onto reservations.²⁸ In the end, despite the fact that the Treaty of 1868 had never been canceled, the United States seized the Black Hills of South Dakota from the Sioux.²⁹ Eventually, however, Congress recognized the irony in making treaties with Indian nations while at the same time breaking other treaties with them. As a result, in 1871, a rider was attached to an appropriations bill stating that thereafter, "[n]o Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."³⁰ This served as an explicit signal that Native American nations would no longer be recognized as independent nations by the United States government.

Prior to 1871, however, Congress and the Supreme Court recognized Native American nations as independent nations,

²⁴ See *McSloy*, *supra* note 16, at 236.

²⁵ See *id.*

²⁶ See *McSloy*, *supra* note 16, at 239, 240.

²⁷ Treaty with The Sioux — Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, And Santee — And Arapaho, Apr. 29, 1868, art. 2, 15 Stat 635, *available at* 1868 WL 5271, 1 (Trty.) [hereinafter Treaty of 1868].

²⁸ See *Sager*, *supra* note 15, at 775 (citing ALVIN M. JOSEPHY, JR., NOW THAT THE BUFFALO'S GONE 47 (1984)).

²⁹ See *id.* In fact, in 1980, the Supreme Court awarded the Sioux Nation \$17.1 million in damages for the illegal seizure of the Black Hills. See *United States v. Sioux Nation*, 448 U.S. 371 (1980).

³⁰ *McSloy*, *supra* note 16, at 243 (citing Appropriations Act of Mar. 3, 1871, § 1, 25 U.S.C. § 71 (1983)).

the former by its treaties and the latter by its decisions.³¹ For example, in *Worcester v. Georgia*,³² the court addressed an act passed by the Georgia legislature that purported to incorporate certain Cherokee territory into the state and to extend Georgia's laws over the incorporated territory.³³ In addition, this act required non-Indian persons to have a license in order to live in Cherokee territory.³⁴ Chief Justice Marshall held that Georgia's extension of laws over the Cherokee Nation was void as "repugnant to the Constitution, treaties and laws of the United States."³⁵ Although Marshall did find some limitations to tribal sovereignty, namely, that the tribes could not convey their land to anyone other than the United States, and the tribes could not make treaties with foreign nations, he also recognized that "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial"³⁶ In addition, Marshall stated that the "constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."³⁷ Marshall also noted that the United States has applied treaties with Indians as it has applied them with the other nations of the earth, and that "[t]hey are applied to all in the same sense."³⁸ Despite the early support from the Supreme Court, however, the Cherokee were eventually removed from their lands and forced to flee across the Mississippi along what has become known as the "Trail of Tears."³⁹

³¹ See Curtis G. Berkey, *International Law and Domestic Courts Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 66 n.4 (1992) (noting that the precise number of Indian treaties is not known, but estimates put the number at over 800 prior to 1871).

³² *Worcester v. Georgia*, 31 U.S. 515 (1832).

³³ See *id.* at 539.

³⁴ See *id.*

³⁵ *Id.* at 561.

³⁶ *Id.* at 556-60.

³⁷ *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

³⁸ *Id.* at 559-560.

³⁹ See McSloy, *supra* note 16, at 239 (citing FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 213-273 (1962)).

As the United States was expanding west and Congress was revoking the status of Native American tribes as independent nations, the Supreme Court clung to the concept that Indian tribes were independent nations.⁴⁰ For example, in *Ex parte Crow Dog*,⁴¹ a member of the Sioux nation murdered a Sioux Chief on Sioux land.⁴² A district attorney for the Dakota Territory arrested Crow Dog, and he was later found guilty and sentenced to death.⁴³ The Supreme Court overturned the judgment on the grounds that the United States had no jurisdiction over the internal affairs of the Sioux and that Crow Dog need answer only to the laws of his nation.⁴⁴ In upholding the concept of Indian sovereignty, the Supreme Court held true to previous decisions. It would not be long, however, before pressure from Congress and American citizens eroded this judicial foothold.⁴⁵

Just two years after *Crow Dog*, Congress passed the Major Crimes Act, which allowed federal law to be applied to Indians for certain crimes.⁴⁶ The constitutionality of this Act was challenged shortly thereafter in *United States v. Kagama*.⁴⁷ Unlike *Crow Dog*, the Supreme Court held in *Kagama* that despite the lack of constitutional authorization, "[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection."⁴⁸ Thus, in just three years, without any apparent constitutional basis, the Supreme Court went from upholding tribal sovereignty to allowing complete congressional power over Native American Nations. This initial infringement on tribal sovereignty subsequently developed into the plenary power that Congress now holds over Native American nations.⁴⁹

Today, the law regards Native American tribes as domestic dependent nations.⁵⁰ The tribes possess only those aspects of

⁴⁰ See McSloy, *supra* note 16, at 244.

⁴¹ *Ex parte Crow Dog*, 109 U.S. 556 (1883).

⁴² See *id.* at 557.

⁴³ See *id.*

⁴⁴ See *id.* at 572.

⁴⁵ See McSloy, *supra* note 16, at 245.

⁴⁶ See Act of Mar. 3, 1885, § 9, 18 U.S.C. § 1153 (1988).

⁴⁷ *United States v. Kagama*, 118 U.S. 375 (1886).

⁴⁸ *Id.* at 384.

⁴⁹ See generally *Indians*, *supra* note 4, at §§ 7-15.

⁵⁰ See *id.* at § 8 (citing *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919)).

sovereignty that are neither withdrawn by treaty or statute nor by implication as a necessary result of their dependent status.⁵¹ Indian tribes do retain the attributes of sovereignty over both their members and their territory.⁵² This tribal sovereignty, however, is dependent upon and subordinate to the federal government.⁵³ The tribes have the power, through their tribal councils, to provide for the punishment of offenses by Indians on the reservation,⁵⁴ to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members unless expressly limited by treaties or congressional legislation.⁵⁵

Supreme Court recognition of tribal court sovereignty is exemplified by *National Farmers Union Insurance Co. v. Crow Tribe of Indians*.⁵⁶ In *National Farmers*, a member of the Crow Tribe was struck by a motorcycle in the parking lot of his elementary school.⁵⁷ A suit was filed in the Crow Tribal Court against the School District that resulted in a default judgment in favor of the plaintiffs.⁵⁸ The School District and its insurer, National Farmers Union Insurance Co., then filed a complaint in Federal District Court seeking an injunction against execution of the Tribal Court judgment.⁵⁹ The District Court granted a permanent injunction against any execution of the Tribal Court judgment on the basis that the Crow Tribal Court lacked subject matter jurisdiction over the tort that was the basis of the default judgment.⁶⁰ The Ninth Circuit Court of Appeals reversed, concluding that the jurisdiction of the District Court

⁵¹ See *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979).

⁵² See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

⁵³ See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

⁵⁴ See *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (1956).

⁵⁵ See *Indians*, *supra* note 4, at §11 (citing *Montana v. United States*, 450 U.S. 544 (1981)).

⁵⁶ *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

⁵⁷ See *id.* at 847. The injured person was a minor returning from a school activity. See *id.* The school was located on land owned by the State within the boundaries of the Crow Indian Reservation. See *id.*

⁵⁸ *Id.* at 847. Although process was served on the Chairman of the School Board, he failed to notify anyone and as a result, default judgment was entered against the School District. See *id.*

⁵⁹ See *id.* at 848.

⁶⁰ See *id.* at 849.

could not be supported on any constitutional, statutory, or common-law ground.⁶¹

In *National Farmers*, the main issue before the Supreme Court was the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians.⁶² The Court ruled that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy . . . and administrative or judicial decisions."⁶³ The Court determined, however, that the examination of such sovereignty "should be conducted in the first instance in the Tribal Court itself."⁶⁴ Noting that Congress is committed to a policy of supporting tribal self-government and self-determination, the Court found that such a policy would be supported by a rule that allows the tribal court the first opportunity to evaluate the factual and legal bases of a challenge against jurisdiction.⁶⁵ Thus, the Court concluded, "[u]ntil petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief."⁶⁶

The policy of tribal sovereignty embodied in the tribal-exhaustion rule of *National Farmers* was subsequently challenged in *Iowa Mutual Insurance Co. v. LaPlante*.⁶⁷ In *Iowa Mutual Insurance*, a member of the Blackfeet Indian Tribe filed a complaint in Blackfeet Tribal Court for injuries sustained in a vehicular accident.⁶⁸ Prior to any Tribal Court ruling on jurisdiction, petitioners brought an action in Federal District Court based on diversity of citizenship, requesting a declaration that it had no duty to defend or indemnify the insured.⁶⁹ The

⁶¹ *National Farmers Union Ins. Co.*, 471 U.S. at 849.

⁶² *See id.* at 848.

⁶³ *Id.* at 855-56.

⁶⁴ *Id.* at 856.

⁶⁵ *See id.*

⁶⁶ *National Farmers Union Ins. Co.*, 471 U.S. at 857.

⁶⁷ *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

⁶⁸ *See id.* at 11. The plaintiff was employed by the Wellman Ranch Company, a Montana corporation insured by Iowa Mutual Insurance Company. *See id.* While driving a cattle truck owned by the Wellman Ranch Company within the boundaries of the Blackfeet Reservation, plaintiff lost control of the vehicle and was injured when the truck "jackknifed." *Id.*

⁶⁹ *See id.* at 12-13.

District Court dismissed for lack of subject matter jurisdiction, and the Ninth Circuit Court of Appeals affirmed.⁷⁰

In *Iowa Mutual Insurance*, the issue before the Supreme Court was whether the statutory grant of diversity jurisdiction supplanted the federal policy of deference to tribal courts.⁷¹ The Court first noted that “tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”⁷² The Court also noted that “[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”⁷³ Reiterating the long-standing policy promoting tribal self-government and self-determination, the Court ruled that the tribal-exhaustion rule announced in *National Farmers* applies to cases based on diversity of citizenship as well.⁷⁴ Thus, the Court concluded, regardless of the basis of federal jurisdiction, “the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal courts a full opportunity to determine its own jurisdiction.”⁷⁵

The policy of tribal sovereignty embodied in the tribal-exhaustion rule of *National Farmers* and reiterated in *Iowa Mutual Insurance Co.* gives tribal courts the opportunity to interpret laws that affect their members and to explain why some decisions of the federal courts are wrongly decided from the tribal court’s understanding of its own law.⁷⁶ In recent decisions, however, the Supreme Court has not sustained even this limited reservation of sovereignty.⁷⁷ Rather, as discussed in Part III, the Supreme Court has charted a course which is “neither constitutionally authorized nor constitutionally lim-

⁷⁰ See *id.* at 13.

⁷¹ See *id.* at 17.

⁷² *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (citing *Montana v. United States*, 450 U.S. 544 (1981)).

⁷³ *Id.*

⁷⁴ See *id.* at 16.

⁷⁵ *Id.*

⁷⁶ See Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L. J. 439, 459 (1999).

⁷⁷ See generally *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Burlington N. R.R. Co. v. Red Wolf*, 522 U.S. 801 (1997); *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999).

ited;⁷⁸ a course which is even less legitimate in light of the growing international movement respecting indigenous rights.

B. *Development of International Indigenous Rights*

The concept of international indigenous rights began forming in the post World War II era as a result of horrors born from the Nazi regime, which prompted a rethinking of the unlimited discretion states had regarding the treatment of their own citizens.⁷⁹ Although not specifically related to indigenous peoples, the Universal Declaration of Human Rights enacted in 1948 was the first such declaration to recognize human rights and self-determination for peoples separate from states.⁸⁰ These rights were subsequently codified as legally binding agreements in the 1966 United Nations Covenants.⁸¹ International indigenous rights have subsequently been addressed by the International Labour Organization (ILO),⁸² the United Nations,⁸³ and the Organization of American States (OAS).⁸⁴

The ILO has adopted conventions on a variety of subjects including freedom of association, the right to organize, collective bargaining, abolition of forced labor, and discrimination in employment.⁸⁵ The only international convention that relates specifically to the rights of indigenous peoples is the ILO Convention No. 169.⁸⁶ This Convention acknowledges that "the state of indigenous populations has significantly changed since 1957" and that "indigenous peoples exercise control over their own institutions, ways of life . . . economic development and . . . maintain and develop their identities, languages and religions

⁷⁸ See Pommersheim, *supra* note 76, at 462.

⁷⁹ See Wiessner, *supra* note 2, at 98.

⁸⁰ *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., 67th plen. mtg., U.N. Doc. A/810 (1948).

⁸¹ See Wiessner, *supra* note 2, at 98 (citing International Covenant on Economic, Social and Cultural Rights, entered into force Jan. 3, 1976, 999 U.N.T.S. 3, reprinted in 6 I.L.M. 360).

⁸² See ILO Convention No. 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, available at 28 I.L.M. 1382 (1989) [hereinafter ILO Convention No. 169].

⁸³ See generally U.N. Draft Declaration, *supra* note 5.

⁸⁴ See generally OAS Draft Declaration, *supra* note 6.

⁸⁵ See Suagee, *supra* note 9, at 367.

⁸⁶ See *id.* (citing ILO Convention No. 169, *supra* note 82).

...⁸⁷ As of late 1997, the Convention had been ratified by ten countries, including Norway, Mexico, Bolivia, Columbia, Costa Rica, Denmark, Guatemala, Honduras, Panama, and Peru.⁸⁸ This convention, however, has been criticized by indigenous groups for failing to recognize the right of self-determination.⁸⁹

The United Nations first addressed the issue of indigenous rights in 1971 by creating the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which was to study the problem of discrimination against indigenous peoples.⁹⁰ In 1982, the United Nations Economic and Social Council, the parent body of the human rights organs, established the Working Group on Indigenous Populations (Working Group).⁹¹ The Working Group was charged with the task of reviewing developments affecting indigenous peoples and drawing up a draft declaration on the rights of indigenous peoples for consideration by the UN General Assembly.⁹²

The Working Group subsequently engaged states, indigenous peoples and others in an extended multilateral dialogue on indigenous rights.⁹³ The Working Group has provided a forum for indigenous representatives and government representatives to express their concerns and assert their rights.⁹⁴ Indeed, virtually every State in the Americas has participated in the discussions of the Working Group.⁹⁵ In 1993, after many years of discussion, the Working Group finally agreed on a draft Declaration on the Rights of Indigenous Peoples.⁹⁶ In August 1994, the Sub-Commission approved the Draft and passed it on to the

⁸⁷ See Suagee, *supra* note 9, at 128 n.300, 368 (quoting ILO Convention No. 169, *supra* note 82, at 1384).

⁸⁸ See Wiessner, *supra* note 2, at 100 (citing Lee Swepston, *The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 17, 32-34 (Cynthia Price Cohen ed., 1998)).

⁸⁹ See Suagee, *supra* note 9, at 368, 390 n.15 (citing International Indian Treaty Council Position, OAS, IACHR, Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, <http://www.hawaii-nation.org/iitc/oas-position.html>).

⁹⁰ See *id.* at 368, 390 n.16 (citing The Rights of Indigenous Peoples, Fact Sheet No. 9, at 5-6 (1971)).

⁹¹ See *id.* at 369.

⁹² See *id.* at 370.

⁹³ See Anaya, *supra* note 7, at 10.

⁹⁴ See *id.* at 10, 11.

⁹⁵ See *id.* at 11.

⁹⁶ See generally U.N. Draft Declaration, *supra* note 5.

Human Rights Commission for consideration.⁹⁷ In 1995, the Human Rights Commission established its own Working Group (HRCWG) and set up procedures by which indigenous organizations could apply for participation at the Working Group's meetings.⁹⁸ Although the HRCWG has continued discussions on the adoption of the Declaration,⁹⁹ only two articles have been approved over the five years of deliberations.¹⁰⁰

The U.N. Draft Declaration addresses such issues as human rights, self-determination, territorial and resource rights, economic activities, cultural and spiritual integrity, cultural genocide, environment, health, education, and treaty enforcement.¹⁰¹ The purpose and philosophy of the Declaration are defined in the Preamble, which recognizes that "indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands . . . thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."¹⁰² The Preamble also recognizes that "indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect . . . [c]onsidering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility."¹⁰³

One of the most controversial articles of the Declaration is Article 3, which states that "indigenous peoples have the right of self-determination [and] by virtue of that right they freely determine their political status and freely pursue their eco-

⁹⁷ See Suagee, *supra* note 9, at 370.

⁹⁸ See *id.* at 371 (citing Res. 1995/32, Commission on Human Rights, U.N. Doc. E/CN.4/1996/84 (1996)).

⁹⁹ See *U.N. Rights: U.N. Still at Odds Over Indigenous Rights*, INTER PRESS SERV., Dec. 14, 1998, available at 1998 WL 19901971 (describing the November 30 to December 11th session of 1998, which ended without the approval of a single clause of the 45-point draft Declaration, despite overwhelming endorsement of the draft by indigenous groups).

¹⁰⁰ See Gustavo Capdevila, *Rights: Delegates Obstruct Work of U.N. Indigenous Groups*, INTER PRESS SERV., Aug. 4, 1999, available at 1999 WL 5949942.

¹⁰¹ See U.N. Draft Declaration, *supra* note 5.

¹⁰² U.N. Draft Declaration, *supra* note 5, at Preamble.

¹⁰³ *Id.*

nomic, social and cultural development.”¹⁰⁴ The controversy, at least regarding the United States, is that the U.N. draft seems to recognize collective or group rights in addition to individual rights. The United States has taken the position that characterizing a right as belonging to a community, or collective, rather than an individual, can be and often is construed to limit the exercise of that right and, thus, may open the door to the denial of the right to the individual.¹⁰⁵

The U.N. Draft Declaration contains specific statements regarding the right of indigenous peoples to enjoy legal and judicial independence from the State. First, the Preamble notes that “treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility.”¹⁰⁶ The Draft Declaration also states that “[i]ndigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems”¹⁰⁷ In addition, the Draft Declaration states that indigenous peoples have the right “to maintain and develop their own indigenous decision-making institutions.”¹⁰⁸ These statements reflect the desire of indigenous groups to have independent legal systems, which are free from State usurpation and interference.

The Organization of American States (OAS) began developing their draft declaration on the rights of indigenous peoples in November 1989 by recommending that the Inter-American Commission on Human Rights (IACHR) prepare an instrument to protect such rights.¹⁰⁹ In September 1995, the first draft of this instrument was sent to governments, interested organizations, experts and other entities for comments.¹¹⁰ The IACHR approved the Proposed American Declaration on the Rights of

¹⁰⁴ *Id.* at art. 3.

¹⁰⁵ Suagee, *supra* note 9, at 377 (quoting U.S. Dep’t of State, United States Preliminary Statements: Draft United Nations Declaration on the Rights of Indigenous Peoples (Nov. 1995)) [hereinafter U.S. Preliminary Statements].

¹⁰⁶ U.N. Draft Declaration, *supra* note 5, at Preamble.

¹⁰⁷ *Id.* at art. 4.

¹⁰⁸ *Id.* at art. 19.

¹⁰⁹ See Suagee, *supra* note 9, at 372 (citing Inter-Am. C.H.R., 245-50, OEA/ser.L/V/II.76, doc. 10 (1989)) [hereinafter Inter-Am. C.H.R. 1989].

¹¹⁰ See Wiessner, *supra* note 2, at 104-105 (citing Osvaldo Kreimer, *The Beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 271, 272-73 (1996)).

Indigenous Peoples at its ninety-fifth regular session and submitted it to the General Assembly and to its Permanent Council.¹¹¹ Although the Declaration was expected to be approved by the member countries at the 1998 General Assembly in commemoration of the OAS fiftieth anniversary,¹¹² this did not happen. In its last meeting, however, the General Assembly resolved to renew the mandate of the Working Group so that it may continue to consider the Proposed Declaration.¹¹³

The Preamble of the OAS Draft Declaration recognizes "the deprivation afflicting indigenous peoples . . . the need to develop national juridical systems to consolidate the pluricultural nature of our societies . . . [and] the responsibility of all states and peoples of the Americas to end racism."¹¹⁴ The OAS Draft Declaration consists of twenty-seven articles addressing, in detail, such things as human rights, legal systems, discrimination, cultural integrity, education, religious freedom, health, environmental protection, political rights, self-government, property rights and implementation of the Draft Declaration.¹¹⁵ The OAS Draft Declaration expressly promotes internal self-government, the formulation and application of indigenous law, and self-identification.¹¹⁶ Separatism and secession, however, are expressly rejected.¹¹⁷ Although the OAS Draft Declaration is conservative in that it excludes the option of secession, it nevertheless places a high value on individual choice and relies more on the remedy of empowerment and self-help than on governmental action to remove the plight of the indigenous peoples.¹¹⁸ Overall, the OAS Draft Declaration reflects a growing consensus on the minimum threshold of legally enforceable claims of indigenous communities and "is a major step toward a more effective system of protection of indigenous rights not only in the Western Hemisphere, but beyond."¹¹⁹

¹¹¹ See *id.* at 105 (citing OAS Draft Declaration, *supra* note 6).

¹¹² See *id.* at 105.

¹¹³ See OAS G.A. Res. 1708, 30th Reg. Sess., 1st Plen. Sess., (XXX-O/00) (2000), available at <http://www.oas.org/>.

¹¹⁴ OAS Draft Declaration, *supra* note 6, at Preamble.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at arts. 15-6.

¹¹⁷ See *id.* at art. 25.

¹¹⁸ See Wiessner, *supra* note 2, at 107.

¹¹⁹ *Id.*

Like the U.N. Draft Declaration, the OAS Draft Declaration also has specific statements regarding the right of indigenous peoples to have legal and judicial independence from the State. For example, Article 4 of the Declaration states that "[i]ndigenous peoples have the right to have their legal personality fully recognized by the states within their system."¹²⁰ In addition, Article 16 of the Declaration reiterates that "[i]ndigenous law shall be recognized as a part of the states' legal system" and "[i]ndigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities"¹²¹ These statements make it clear that indigenous peoples desire the States to respect and refrain from interfering with the indigenous legal system and its application to persons within its boundaries.

While full acceptance and adoption of the various international indigenous rights declarations have yet to be realized, these declarations reflect a growing stand against injustice and possibly, a collective cry for help.¹²² For centuries, indigenous peoples around the world have been persecuted, ignored, and assimilated.¹²³ Today, however, indigenous groups are fighting back with these declarations and pressuring national governments to recognize them.¹²⁴ Although it is just the beginning, "[r]ecognition is the first stage of the path to conciliation."¹²⁵

III. APPPOSITION OF RECENT U.S. SUPREME COURT DECISIONS ON TRIBAL SOVEREIGNTY AND INDIGENOUS RIGHTS DECLARATIONS

The policy and laws of the United States relating to tribal sovereignty and specifically, the tribal-exhaustion rule embodied in *National Farmers*¹²⁶ and *Iowa Mutual*,¹²⁷ appear to har-

¹²⁰ OAS Draft Declaration, *supra* note 6, at art. 4.

¹²¹ *Id.* at art. 16.

¹²² See generally Rhona K.M. Smith, *The International Impact of Creative Problem Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411 (1998).

¹²³ See *id.* at 419.

¹²⁴ See *id.*

¹²⁵ *Id.* at 423.

¹²⁶ *National Farmers Union Ins. Co.*, 471 U.S. at 845.

¹²⁷ *Iowa Mut. Ins. Co.*, 480 U.S. at 9.

monize well with the declarations of indigenous peoples regarding the right to enjoy independent legal systems.¹²⁸ New developments regarding Indian law in the United States, however, reflect "a new, almost vicious, historical amnesia and doctrinal incoherence."¹²⁹ Although no judicial policy or doctrine can justify a dismantling of Native American sovereignty and independence, this trend is even less justifiable in light of the development and declarations of international indigenous rights law.

The erosion of tribal sovereignty and the tribal-exhaustion rule began with *Strate v. A-1 Contractors*.¹³⁰ In *Strate*, vehicles driven by petitioner Frederick and respondent Stockert collided on a portion of a North Dakota state highway that runs through the Fort Berthold Indian Reservation.¹³¹ The truck driven by Stockert belonged to his employer, respondent A-1 Contractors, a non-Indian owned enterprise with its principal place of business outside of the reservation.¹³² Fredericks filed a personal injury action in Tribal Court against Stockert and A-1 Contractors, and Fredericks' adult children filed a loss-of-consortium claim in the same lawsuit.¹³³ The Tribal Court ruled that it had jurisdiction over Fredericks' claim and therefore denied respondents' motion to dismiss.¹³⁴ The Northern Plains Intertribal Court of Appeals affirmed the decision.¹³⁵

A-1 Contractors commenced an action in Federal District Court seeking a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate. The complaint also sought an injunction against further Tribal

¹²⁸ But see B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 500 (1998) (noting that the tribal court exhaustion rule is a good news, bad news scenario, representing an opportunity for tribal courts to initially resolve disputes but giving ultimate power to federal courts to review the tribal court decisions).

¹²⁹ Pommersheim, *supra* note 76, at 439.

¹³⁰ *Strate*, 520 U.S. at 438.

¹³¹ *See id.*

¹³² *See id.*

¹³³ *See id.* Neither Stockert nor Fredericks were Indians or members of the Tribal Court. *See id.* Fredericks, however, was the widow of a deceased tribal member and had five adult children who are also members. *See id.*

¹³⁴ *Strate*, 520 U.S. at 438..

¹³⁵ *See id.*

Court proceedings.¹³⁶ The District Court dismissed the action upon finding that the Tribal Court did have civil jurisdiction over Fredericks' complaint.¹³⁷ On appeal, a divided panel of the Eighth Circuit Court of Appeals affirmed.¹³⁸ The Eighth Circuit granted rehearing en banc and, in an 8-4 decision, reversed the District Court's judgment.¹³⁹ The en banc Court concluded that under *Montana v. United States*,¹⁴⁰ the Tribal Court lacked subject-matter jurisdiction over the dispute.¹⁴¹

In *Strate*, the Supreme Court boiled the issue down to one question: "When an accident occurs on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?"¹⁴² First, relying heavily on *Montana v. United States*,¹⁴³

¹³⁶ See *id.*

¹³⁷ See *id.* at 444. The District Court relied particularly on the decisions of *National Farmers* and *Iowa Mutual* for precedent to dismiss the case.

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ *Montana v. United States*, 450 U.S. 544 (1981).

¹⁴¹ *Strate*, 520 U.S. at 445. Note that in *Montana*, the Court was concerned with the authority of the Crow Tribe to regulate hunting and fishing by non-Indians on lands within the Tribe's reservation owned in fee simple by non-Indians. See *Montana*, 450 U.S. at 544. The underlying issue in that case was whether the Crow Tribe or Montana retained control over the bed of the Bighorn River. See *id.* at 550-551. In denying the Crow Tribe the authority to regulate fishing on the Bighorn River, the Court first had to determine that despite the First Treaty of Fort Laramie and the Second Treaty of Fort Laramie, which explicitly "set apart [land] for the absolute and undisturbed use and occupation" of the Crow Tribe, the United States retained ownership of the riverbed as public land, which then passed to the State of Montana when it joined the Union. *Id.* at 548, 551. After ignoring the language of the Treaties and the intent of the U.S. Government to recognize Crow ownership of the land, including the Bighorn River, the Court went on to reiterate the general principal that except for a few exceptions, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. The Court also noted, however, that there are two situations in which a Tribe may retain civil jurisdiction over non-Indians on their reservations, even on non-Indian fee land: (1) A Tribe may regulate the activities of nonmembers who enter consensual relationships with the Tribe through commercial dealing, contracts, leases or other arrangements; and (2) A tribe may also retain civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *id.* at 565-566. According to the Court, no such circumstances were involved in the case at hand. See *id.* at 566.

¹⁴² *Strate*, 520 U.S. at 442.

the Court described a general rule that, absent specific congressional direction, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation. This rule was stated to be subject to two exceptions: "The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare."¹⁴³

Thus, despite the petitioners contention that *National Farmers* and *Iowa Mutual* were the guiding precedents, the Court reiterated that those cases enunciate only a "prudential rule" and thus, "do not expand or stand apart from *Montana's* instruction on [Indian tribes' civil authority over non-members]."¹⁴⁵ In reaching this outcome, the Court determined that even though *Montana* involved the issue of regulatory authority and control, its principles applied to adjudicative jurisdiction as well.¹⁴⁶ The Court ruled that civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "does not extend to the activities of nonmembers of the tribe . . . subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*."¹⁴⁷ The Court concluded that neither exception in *Montana* applied to the case at hand.¹⁴⁸ More specifically, with respect to the second exception, the Court found that if it required no more than an interest in the safety of tribal members on a highway, then the exception would severely shrink the rule.¹⁴⁹

¹⁴³ *Montana*, 450 U.S. 544; see also accompanying description in note 141 *supra*.

¹⁴⁴ *Strate*, 520 U.S. at 442.

¹⁴⁵ *Id.* at 453.

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* The Court also considered Petitioners argument that *Montana* did not control because even though the highway was maintained by the State under a federally granted right-of-way, the highway ran across Indian reservation land which was held in trust for the Three Affiliated Tribes of the Fort Berthold Indian Reservation. See *id.* at 454. The Court determined that the right-of-way which was acquired by North Dakota rendered the highway, "for nonmember governance purposes," as non-Indian land. *Id.*

¹⁴⁸ See *id.* at 458.

¹⁴⁹ See *id.* The idea that a Tribe's interest in the safety of their members on a highway does not fall under *Montana's* second exception was subsequently applied to railroad crossings. In *Burlington N. R.R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997), two members of the Crow Tribe were killed when a train collided with their

Even when actions on tribal land appear to substantially affect the health and welfare of Native Americans, tribal sovereignty and the tribal exhaustion rule have not been applied by the Supreme Court.¹⁵⁰ In *El Paso Natural Gas Co. v. Neztosie*,¹⁵¹ members of the Navajo Nation filed two separate actions based on Navajo common law in the Navajo Tribal Court against corporations that conducted uranium mining operations on the Navajo Nation Reservation.¹⁵² The first action involved a suit by Arlinda and Laura Neztosie against Rare Metals Corp. of America, a defunct subsidiary of El Paso Natural Gas Co., alleging personal injury arising from Rare Metal's uranium mining activities.¹⁵³ The second action involved a suit by Zonnie Marie Dandy Richards against Cyprus Foote Mineral Company, successor to Vanadium Corporation of America, alleging personal injury and wrongful death arising from VCA's operation of a uranium mine and concentrator which produced a uranium mine tailings pile on land adjacent to the mine site.¹⁵⁴ In both cases, the defendants subsequently filed suit against the plaintiffs in Federal District Court, seeking a preliminary injunction enjoining the plaintiffs from prosecuting their claims in Navajo Tribal Court and seeking a declaration that the Navajo Tribal Court had no jurisdiction over the claims.¹⁵⁵ In both cases, the

automobile at a railroad grade crossing south of Lodge Grass, Montana. *See id.* at 869. The Estates sued in tribal court and obtained a \$250,000,000 judgment against Burlington Northern. *See id.* Subsequently, the Supreme Court, in light of *Strate*, vacated and remanded the 9th Circuit Court of Appeals decision that the district court could not enjoin tribal court proceedings before tribal remedies had been exhausted. *See id.* at 871.

¹⁵⁰ *See El Paso Natural Gas Co.*, 526 U.S. at 473.

¹⁵¹ *See id.*

¹⁵² *See El Paso Natural Gas Co. v. Neztosie*, 136 F.3d 610 (9th Cir. 1998).

¹⁵³ *See id.* at 613.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* Defendants argued that the Price Anderson Act and its legislative history mandated exclusive federal court jurisdiction for claims arising from nuclear incidents. The Price-Anderson Act, enacted in 1957, amended the Atomic Energy Act by adding 42 U.S.C. § 2210, as well as associated definitions in 42 U.S.C. § 2014. Pub. L. No. 85-256, 71 Stat. 576 (1957). In 1966, Congress added a new subsection, 42 U.S.C. § 2210(n), which provided that a "public liability action" arising out of an extraordinary nuclear occurrence was within the original jurisdiction of the federal courts and, if pending in any State court, might be removed for consolidation in a single district court. Pub. L. No. 89-645, 80 Stat. 891 at 892. *See also El Paso Natural Gas Co.*, 526 U.S. at 473, Respondent's Brief, available at 1999 WL 14509 [hereinafter Respondent's Brief]. Plaintiffs argued that since the Defendants did not have an indemnification agreement with the government, their

District Court denied in part, and granted in part, the defendants' request for a preliminary injunction.¹⁵⁶ On appeal, the Ninth Circuit Court of Appeals affirmed each of the District Court decisions declining to enjoin the plaintiffs from pursuing non-Price Anderson Act claims, as well as the decisions to allow the Tribal Courts to decide in the first instance whether the plaintiffs' claims fell within the Price Anderson Act.¹⁵⁷ In addition, the Court of Appeals *sua sponte* addressed and reversed the District Court's partial injunctions, ruling that the Price Anderson Act contained no express jurisdictional prohibition, which would bar the tribal court from determining its jurisdiction over Price Anderson Act claims.¹⁵⁸ The United States Supreme Court subsequently granted certiorari, vacated the judgment of the Court of Appeals, and remanded with instructions to remand the case to the District Court.¹⁵⁹

The main issue addressed by the Supreme Court was whether the doctrine of tribal court exhaustion "should apply in this case, which if brought in a state court would be subject to removal."¹⁶⁰ The Court found that the Price Anderson Act gives federal courts original jurisdiction over any public liability action arising out of or resulting from a nuclear incident and provides for removal to a federal court if a Price Anderson action is brought in a state court.¹⁶¹ The Court then pondered the pur-

claims did not arise under the Price-Anderson Act. *See* Respondent's Brief at *24. In addition, Plaintiffs argued that the removal provision added to the Price-Anderson Act applied only where the original case was in State court and there was nothing in the Act to indicate that Congress intended that term to cover tribal courts. *See id.* at *27.

¹⁵⁶ *See El Paso Natural Gas*, 136 F.3d at 613. The District Court denied El Paso's request for a preliminary injunction "to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court . . . except to the extent that [the Plaintiffs] seek relief based upon the Price-Anderson Act in tribal court." *Id.* The consequences of those injunctions "were left in the air, however, since the District Court declined to decide whether the Act applied to the claims brought by the Neztosies and Richards, leaving those determinations to the Tribal Courts in the first instance." *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 478 (1999). 119 S. Ct. 1430, 1434

¹⁵⁷ *See El Paso Natural Gas Co.*, 136 F.3d 610.

¹⁵⁸ *See id.* at 615. The Court addressed this issue *sua sponte* because neither the Neztosies nor Richards had appealed the partial injunctions, which would have prohibited the Tribal Court from hearing Price Anderson Act claims. *See id.*

¹⁵⁹ *See El Paso Natural Gas Co.*, 526 U.S. at 488.

¹⁶⁰ *Id.* at 476.

¹⁶¹ *See id.* at 484.

pose and goals of the Price Anderson Act and stated that it could not "think of any reason that Congress would have favored tribal exhaustion."¹⁶² When faced with the language of the specific provision of the Price Anderson Act allowing removal from state courts only, the Court determined that Congress' failure to provide for tribal-court removal must have been inadvertent.¹⁶³ The Court justified this determination by noting that "Congress probably would never have expected an occasion for asserting tribal jurisdiction over claims like these."¹⁶⁴ In conclusion, the Court ruled that instead of applying the tribal exhaustion rule, "the District Court should have decided whether respondents' claims constituted 'public liability actions' arising out of or resulting from a nuclear incident."¹⁶⁵

The decisions in *Strate v. A-1 Contractors* and *El Paso Natural Gas Co. v. Neztosie* represent at the very least, an infringement upon tribal sovereignty and jurisdiction.¹⁶⁶ Navajo Nation Council Speaker Edward T. Begay, for example, described the *Neztosie* decision as "another infringement upon the sovereignty of the Navajo Nation."¹⁶⁷ Similarly, Earl Tulley, Vice President of Din Citizens Against Ruining the Environment, termed the *Neztosie* decision "a classic example of judicial and corporate racism and arrogance."¹⁶⁸ Council Speaker Begay further stated that "if this trend continues, there will be so much diminishment of tribal authorities that tribal courts are going to be rendered ineffective."¹⁶⁹ Irrespective of their effect on existing law, however, these decisions do not harmonize well with rights recently declared by indigenous groups.¹⁷⁰

The U.N. Draft Declaration specifically states that "[i]ndigenous peoples have the right to maintain and strengthen

¹⁶² *Id.* at 485.

¹⁶³ *See id.* at 487.

¹⁶⁴ *El Paso Natural Gas Co.*, 526 U.S. at 487.

¹⁶⁵ *Id.* at 488.

¹⁶⁶ *See* Pommersheim, *supra* note 76, at 463. *See also* Brenda Norrell, *Supreme Court Rules on Court Venue for Uranium Mining Cases in Indian Country*, INDIAN COUNTRY TODAY, May 10, 1999, available at 1999 WL 17338561.

¹⁶⁷ *See* Norrell, *supra* note 166.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (quoting Navajo Nation Speaker Edward T. Begay) quoting Navajo Nation Speaker Edward T. Begay.

¹⁷⁰ *See* U.N. Draft Declaration, *supra* note 5; OAS Draft Declaration, *supra* note 6.

their distinct political, economic, social and cultural characteristics, *as well as their legal systems . . .*”¹⁷¹ The OAS Draft Declaration more specifically states that “indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities . . .”¹⁷² While the importance of an independent indigenous legal system, or tribal sovereignty, is not obvious to everyone,¹⁷³ indigenous peoples of the world are nevertheless “[c]onvinced that control [by them] over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions . . .”¹⁷⁴ Indigenous peoples of the United States are no different.¹⁷⁵ Independent legal systems are important to indigenous peoples, including Native Americans because their culture, way of life, and control and ownership of land is unique and “does not necessarily coincide with the systems protected by the domestic laws of the states in which they live.”¹⁷⁶ Thus, the importance of sovereignty is that it bestows legitimacy on the exercise of the indigenous political unit.¹⁷⁷

In many tribal communities, dual justice systems exist.¹⁷⁸ One is based on an American paradigm of justice, with its roots in European law, and the other is based on an indigenous paradigm.¹⁷⁹ In the American paradigm, a hostile, adversarial system declares winners and losers, guilt and innocence.¹⁸⁰ The

¹⁷¹ U.N. Draft Declaration, *supra* note 5, art. 4 (emphasis added).

¹⁷² OAS Draft Declaration, *supra* note 6.

¹⁷³ See S. 1691, 105th Cong. (1998) (sponsored by Senator Slade Gorton and abolishing tribal immunity from suit and making Indian tribal governments subject to judicial review). See also *El Paso Natural Gas Co.*, 526 U.S. at 485 (stating that “[w]e are at a loss to think of any reason that Congress would have favored tribal exhaustion”).

¹⁷⁴ U.N. Draft Declaration, *supra* note 5, at Preamble.

¹⁷⁵ See Albert A. Hale, *Lessons in Sovereignty for All*, INDIAN COUNTRY TODAY, July 28, 1998, available at 1998 WL 18037722 (in which Mr. Hale states that “[w]e understand our sovereignty is upheld or diminished by the manner in which our courts resolve disputes. For that reason, we must give priority to protect and support our legal system.”).

¹⁷⁶ OAS Draft Declaration, *supra* note 6, at Preamble.

¹⁷⁷ See Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487, 488 (1998/1999).

¹⁷⁸ See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995).

¹⁷⁹ See *id.* at 126.

¹⁸⁰ See *id.*

indigenous justice paradigm, however, is based on a holistic philosophy guided by unwritten customary laws, traditions, and practices whereby the victim is the focal point and the goal is to heal the victim's physical, emotional, and spiritual well-being while at the same time restoring community harmony.¹⁸¹ Another difference between Anglo-American and indigenous systems is that the former relies on a separation of church and state, while the latter invokes spirituality and the cleansing of one's soul.¹⁸²

The Navajo Nation represents a good example of an indigenous population that has a dual system of justice.¹⁸³ The Courts of the Navajo Nation were created in 1959 and reconstituted in 1985.¹⁸⁴ These Courts were modeled after the state adversarial system and, in many ways, reflect Anglo-American law and procedures.¹⁸⁵ In addition, there also exist traditional Navajo law and custom.¹⁸⁶

Traditional Navajo tort law is based on "nalyeeh," which is a demand by a victim to be made whole for an injury.¹⁸⁷ In "nalyeeh," one who is hurt is not concerned with intent, causation, fault, or negligence.¹⁸⁸ Rather, a restorative justice is invoked in which the focus is on compensation, which will restore good relations to the members of the community.¹⁸⁹ In determining compensation, the victim's feelings and the perpetrator's ability to pay are more important than damages determined by using a precise measure of losses.¹⁹⁰ This contrasts the Anglo-American adjudication process, which is preoc-

¹⁸¹ See *id.* at 127.

¹⁸² See *id.*

¹⁸³ See The Honorable Robert Yazzie, "Life Comes From It": Navajo Justice Concepts, 24 N.M. L. REV. 175, 186 (1994).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* Some argue that indigenous groups like the Navajo were forced to adopt such systems in order to gain respect from state and federal judiciary. See B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 91 (1997). The Neztosie case was in this court system and subject to the Navajo rules of civil procedure that were modeled after and reflect Anglo-American procedures.

¹⁸⁶ See The Honorable Robert Yazzie, *supra* note 183.

¹⁸⁷ *Id.* at 184.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at 185.

¹⁹⁰ See *id.*

cupied with the "truth" and strives to make one party the villain and the other party the victim.¹⁹¹

The differences between Anglo-American law and traditional Navajo law are a reflection of the cultures from which they are created. Although each purports to achieve justice, the type of justice and means by which it is sought can be quite different. Such differences may also show why both the U.N. Draft Declaration and OAS Draft Declaration recognize the importance of independent indigenous legal systems. More is at stake, however, than mere legal differences. Cultural factors may also affect the outcome of a case that is taken from the tribal court and adjudicated in federal court.

In *El Paso Natural Gas Co. v. Neztosie*,¹⁹² the lawsuit involved injuries allegedly sustained from ingestion of toxic and radioactive chemicals.¹⁹³ According to the plaintiffs, El Paso operated open-pit uranium mines within the Navajo Nation in the 1950's and 1960's, and upon cessation of mining activities, the mines were left open and eventually collected large quantities of water.¹⁹⁴ The water in the open pits subsequently became polluted with radioactive materials and a host of other toxic materials.¹⁹⁵ In the early 1970s, the Neztosies used the water "for drinking, bathing, swimming, clothes laundering and stock watering."¹⁹⁶ As a result, the Neztosie children suffered from severe neurological disorders, which came to be known as "Navajo Neuropathy."¹⁹⁷

The injuries sustained by the Neztosies and the circumstances from which they arose reflect unique characteristics of a Navajo way of life and culture. A nomadic practice, which involves sustenance from water collected in open pit mines, may not represent a culture with which most Anglo-Americans could readily identify. There is room for concern about whether a fed-

¹⁹¹ See *id.* at 178.

¹⁹² *El Paso Natural Gas Co.*, 526 U.S. at 473.

¹⁹³ *Id.* at 477.

¹⁹⁴ See Plaintiff's Verified Complaint, *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999), available at 1999 WL 14509 at JA *19a (U.S. Resp. Brief, Joint Appendix).

¹⁹⁵ See *id.* at *19a, *23a, *24a.

¹⁹⁶ See *id.* at *19a, *23a.

¹⁹⁷ Respondent's Brief, *supra* note 155, at 11, n.13 (citing Snyder et al., *Infantile Onset and Late Central White Matter Lesions in Navajo Neuropathy*, 24 ANN. NEUROL. 327 (1988)).

eral court and jury could identify with and understand the nomadic existence and cultural ways that took the Neztosies to the watering holes in the first place. In addition, through the course of litigation, it would not be surprising if other aspects of Navajo culture, including traditional customs involving medicine and healing were examined and if a jury was asked to evaluate mitigating or contributing circumstances. If members of a federal jury have never been a part of the Navajo culture and have no knowledge of Navajo medicine and spiritual healing, then how can they be expected to fairly evaluate such factors?

One can only wonder if the cultural and legal differences will affect the outcome of the Neztosie's case as well as other cases that may arise in the future. But whether or not justice is served, the Neztosies will not get it from the Courts of the Navajo Nation.¹⁹⁸ Instead, the Neztosies must trust a federal court and jury to judge their practices, sacred ceremonies, customs, and traditions, and hope that some day the declarations of indigenous people will be heard in Washington.

IV. CONCLUSION

The growing movement in international law to recognize and protect the rights of indigenous peoples has culminated in two declarations of change: the United Nations Declaration on the Rights of Indigenous Peoples to the Commission on Human Rights¹⁹⁹ and the American Declaration on the Rights of Indigenous Peoples.²⁰⁰ Both Declarations contain specific statements regarding the right of indigenous peoples to enjoy legal and judicial independence from the State. Although neither declaration has been fully adopted by member states, each represents the aspirations of indigenous groups throughout the world.²⁰¹

In the United States, the policy of tribal sovereignty, embodied in the tribal-exhaustion rule, appears to harmonize well

¹⁹⁸ See generally *El Paso Natural Gas Co. v. Neztosie*, No. CIV 96-49-PCT-RGS (D. Ariz. Mar. 7, 2000) (on remand from the Supreme Court and 9th Circuit Court of Appeals, order granting permanent injunction against suit in Navajo tribal court).

¹⁹⁹ See generally U.N. Draft Declaration, *supra* note 5.

²⁰⁰ See generally OAS Draft Declaration, *supra* note 6.

²⁰¹ See Hannum, *supra* note 177, at 493.

with the OAS and U.N. Draft Declarations regarding legal independence. Even this limited reservation of sovereignty, however, has not been sustained by the Supreme Court in recent decisions.²⁰² Rather, the Supreme Court has charted a course in *Strate v. A-1 Contractors*²⁰³ and in *El Paso Natural Gas Co. v. Neztosie*²⁰⁴ which is "neither constitutionally authorized nor constitutionally limited;"²⁰⁵ a course which is even less legitimate in light of the growing international movement respecting indigenous rights.

²⁰² See generally *Strate*, 520 U.S. at 438; *Burlington N. R. R. Co.*, 522 U.S. at 801; *El Paso Natural Gas Co.*, 526 U.S. at 473.

²⁰³ *Strate*, 520 U.S. at 438.

²⁰⁴ *El Paso Natural Gas Co.*, 526 U.S. at 473.

²⁰⁵ Pommersheim, *supra* note 76, at 462.