

## ‘Att Hascu ‘Am O ‘I-oi? What Direction Should We Take?: The Desert People’s Approach to the Militarization of the Border

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Tohono O’odham means the people of the desert. For the Tohono O’odham, the Sonoran desert is their *jewedga*, their homeland. It is here that they have lived in peace from time immemorial, where their sacred places are located, where their crops are grown and plants collected, where their people are born and pass away. When the Treaty of Guadalupe-Hidalgo was made, and later when the Gadsden Purchase occurred, the O’odham remained the O’odham, whether born in Mexico or in the United States. But in recent years war has come to the O’odham, not of their own doing, but rather as a result of the ‘drug war,’ the militarization of immigrant interdiction, and 9/11.

Today the land of the Tohono O’odham is under siege, and, as a sovereign nation, they must decide what direction they should take to deal with the problems engendered by the border. The increase of federal law enforcement activity focuses on concerns about increased transportation of drugs, undocumented aliens, and terrorism access across the U.S.-Mexico Border. The Tohono O’odham have responded with attempts at legislation and changes in law and law enforcement strategies. It is these approaches that are the subject of this Article.<sup>1</sup>

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## I. THE HISTORY OF THE PROBLEM

Prior to the setting of the U.S. borders with Canada and Mexico, Indigenous peoples roamed freely. Villages existed where water, agricultural possibilities, and trade made the location reasonable. When, however, the international borders were drawn, there was little, if any, regard given to the separation of native villages, and the native nations were not consulted. The experiences of the Indigenous peoples split by the borders were very different. For some, the cultural ties of the people were maintained. For others, the ties were severed and the impacts on their culture and traditions were horrific.

### A. *Sovereignty of Indian Nations*

American Indian tribes are sovereign and self-governing.<sup>2</sup> They have the right to make and enforce their own laws.<sup>3</sup> Except for express limitations imposed by treaties, by statutes passed by Congress acting under its constitutionally delegated authority in Indian affairs, and by restraints implicit in the protectorate relationship itself, Indian tribes remain independent and self-governing political communities.<sup>4</sup> To fully understand tribal sovereignty, the “Government-to-Government” relationship must be recognized and understood.<sup>5</sup>

Tribes have the power to pass and enforce laws to prevent violence on their reservations. In most situations, tribes retain a broad degree of civil jurisdictional authority over members and non-members on the reservation, particularly where the conduct threatens or has some direct effect on the political integrity, economic security,

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2. Eileen Luna, *Special Issues for Evaluating Projects on Indian Tribal Lands*, in MARTHA R. BURT ET AL., EVALUATION GUIDEBOOK FOR PROJECTS FUNDED BY S.T.O.P. FORMULA GRANTS UNDER THE VIOLENCE AGAINST WOMEN ACT 233–59 (Urban Institute, 1997), available at <http://urban.org/uploadedpdf/guidebook.pdf>.

3. For further discussion of sovereignty see WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL (4th ed. 2004).

4. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

5. This relationship has existed historically. Memorandum from Pres. William J. Clinton to Heads of Exec. Dep'ts and Agencies (Apr. 29, 1994), available at [http://www.cr.nps.gov/nagpra/agencies/clinton\\_memorandum.htm](http://www.cr.nps.gov/nagpra/agencies/clinton_memorandum.htm); U.S. Attorney General Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 27 JUDICATURE 113–17 (Nov.–Dec. 1995).

or the health or welfare of the tribe.<sup>6</sup> But American Indian Nations are unable to exercise criminal jurisdiction over non-Indians. The Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe*,<sup>7</sup> that tribal sovereignty does not extend to the exercise of criminal jurisdiction over non-Indians. However, when the Supreme Court supported this decision again in *Duro v. Reina*<sup>8</sup> by expanding *Oliphant* to preclude criminal jurisdiction over non-member Indians, the case was later specifically overruled by Congress. This action by Congress, called the 'Duro-fix,' gives tribal governments rights of criminal action against non-member Indians.<sup>9</sup> This sovereign authority to criminally prosecute non-member Indians has been recently upheld by the U.S. Supreme Court. In *United States v. Lara*,<sup>10</sup> the Court ruled, in a 7-2 decision, that Congress has the authority to recognize Indian tribes' inherent power to prosecute non-member Indians for certain crimes committed on the reservations.<sup>11</sup>

This criminal authority over tribal members and non-member Indians is essential to preserve and advance tribal self-governance and sovereignty. Tribes also have authority to banish both Indians and non-Indians from their reservations, and to act against trespassers.<sup>12</sup> This authority may be implemented where unauthorized persons are resident upon, or crossing, reservation lands.<sup>13</sup>

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

7. 435 U.S. 191 (1978).

8. 495 U.S. 676 (1990).

9. Criminal Jurisdiction over Indians, Pub. L. No. 102-137, 105 Stat. 646 (1991). This is a one-sentence amendment to the Indian Civil Rights Act which simply maintains tribal criminal jurisdiction over both member and non-member Indians for crimes committed in significant part on tribal lands.

10. 541 U.S. 193 (2004).

11. Ben Welch, *Duro Fix Safe for Now*, AMERICAN INDIAN REPORT, July 2004, at 10.

12. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982).

13. While criminal action may be precluded against non-Indians under *Oliphant*, some tribes have revised their law and order codes to make trespassers on tribal lands civilly liable. See *Trespass*, LAW & ORDER CODE OF FORT MCDERMOTT PAIUTE-SHOSHONE TRIBE OF OREGON & NEVADA, Ch. 7 § 14; FISH & WILDLIFE CODE OF THE BLACKFEET NATION; CANBY, *supra* note 3, at 170-71, 199-202.

*B. The Border Between the United States and Canada*

While the focus of this Article is on the experiences of the Tohono O'odham Nation, which was split by the U.S.-Mexico border, an examination of the situation for other North American Native peoples may be helpful.<sup>14</sup> The U.S. and England signed over twenty treaties to delineate the northern border. Rights of the Indigenous are mentioned in two: the Treaty of Amity, Commerce and Navigation of 1794,<sup>15</sup> otherwise known as the Jay Treaty; and the Treaty of Peace and Amity,<sup>16</sup> also known as the Treaty of Ghent. The Jay Treaty establishes the right of free passage across the border to "Indians dwelling on either side of said Boundary Line."<sup>17</sup> The Treaty of Ghent restored this right, which had eroded due to the War of 1812. In *United States ex rel. Diabo v. McCandless*,<sup>18</sup> the court held that the right of free passage in traditional Indigenous homelands is an inherent aboriginal right, even where an international border has been created subsequently. The court stated:

[T]he rights of the Indians [are not] in any way affected by the treaty, whether now existent or not. The reference to them was merely the *recognition* of their right, which was wholly unaffected by the treaty, except that the contracting parties agreed with each other that each would recognize it. . . . From the Indian[']s viewpoint, he crosses no boundary line. For him, this [boundary line] does not exist.<sup>19</sup>

Later legislation restricted free passage rights. The Immigration and Nationality Act of 1952,<sup>20</sup> perhaps reflecting the assimilation and termination era of the time, restricted free passage to those Indians who met a fifty percent blood quantum requirement.<sup>21</sup> This has gradually been changed, perhaps now as a result of the era of self-

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14. Luna-Firebaugh, *supra* note 1.

15. Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116.

16. Dec. 24, 1814, U.S.-Gr. Brit., 8 Stat. 218.

17. 8 Stat. at 117.

18. 18 F.2d 282, 289 (E.D. Pa. 1927).

19. *Id.* at 283.

20. Pub. L. No. 82-414, 66 Stat. 163 § 289 (codified as amended at 8 U.S.C. § 1359) (2005)).

21. *Id.*

governance, to allow free passage to any Indian who possesses a tribal membership identification card.<sup>22</sup>

The creation of the U.S.-Canada border affected many tribal communities. To illustrate this, the Blackfeet, Blood, Sissika and Peigan Nations, and the Akwesasne Mohawk will be discussed.

### *C. The Blackfeet Confederacy*

The lands of the Blackfeet Confederacy lie in the Northern Plains. With the creation of the U.S.-Canada border, the lands were split. Six bands, including the Blood, Sissika and Peigan, were on the Canadian side. Only one band, the Blackfeet, remains within the boundaries of the United States. While there were few problems in regard to retaining the right to cross the border at will, problems have arisen in relation to the import and export of certain tariff-free goods, native traditions and religious ceremonies. For instance, Blackfeet ceremonies are conducted with participants from all bands, from both sides of the border. Ceremonies also require the use of special ritual paraphernalia. According to Blackfeet tradition, only men are allowed to touch the sacred bundles used in the ceremonies. When ceremonial bundles are carried across the border, there have been problems with violations of this tradition by female customs officers. In order to resolve the problem of import-export regulations and inspection, in the 1980s the Blood tribe established a border committee, composed of Band members, to negotiate for the passage of legislation in Canada.<sup>23</sup> To date, this effort has been unsuccessful. The efforts of the Confederacy have also included a call by Confederacy leaders from both sides of the border, for an Indian only border crossing between Alberta and Montana.<sup>24</sup> These initiatives are ongoing at this time.

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22. 8 U.S.C. § 1182(a)(7)(A)(I) (2005).

23. Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8:2 ARIZ. J. OF INT'L & COMP. L. 97, 106-07 (1991).

24. Howard May, *Alberta Natives Seek Separate Crossing to U.S.*, OTTAWA CITIZEN, Feb. 24, 2000, at A7.

#### *D. The Akwesasne Mohawk*

The land of the Mohawk of the Saint Regis Indian Nation is split between New York State and Quebec. Even though the Mohawk utilized these lands traditionally, the Canadian government has taken the position in court that they moved into Canada subsequent to the Jay Treaty. The Canadian courts have agreed, holding that the Mohawk may not avail themselves of the protections granted by the treaty.

The Mohawk Indian Nation has no official U.S. Customs Crossing. Mohawks have generally disregarded the imposed borderline and have crossed their traditional lands at will. They have taken the position that the Mohawk Nation is sovereign and undivided. Since 1815, they have asserted that the border is largely irrelevant. The nation states have not functionally opposed nor directly challenged this notion. Since 1927, the Indian Defense League of America has celebrated this assertion of border crossing rights guaranteed by the Jay Treaty of 1794 and reaffirmed by the Treaty of Ghent of 1814.<sup>25</sup>

Prior to the militarization of the U.S. border in the 1990s, citizens of the Mohawk Nation had full access to all Mohawk land on both sides of the U.S.-Canada border. The militarization of the border fueled the flames of the Oka crisis in March 1990.<sup>26</sup> The Immigration and Naturalization Service (INS) has repeatedly entered Mohawk lands in pursuit of undocumented aliens and those who smuggle them across the U.S.-Canada border. This intrusion into Mohawk lands continues today, and is still unresolved.

The Mohawks have also asserted their right under the Jay Treaty to take personal goods across the border without payment of customs duties. They have also engaged in the transportation of cigarettes for sale, without payment of tax,<sup>27</sup> and in the transportation of

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25. Jim Adams, *Activist Roots Still Thrive in Canada Border Crossing*, INDIAN COUNTRY TODAY, July 23, 2004, at A1.

26. Alexander Norris, *Oka Crisis: 10 Years After*, GAZETTE (Montreal), July 8, 2000, at A1.

27. Mark Bonokoski, *Tobacco Smugglers Gas Up the Boats: Taxing a Carton of Cigarettes an Extra \$15 is Like Sucking and Blowing at the Same Time*, TORONTO SUN, May 16, 2000, at 16.

immigrants, in non-compliance with U.S. immigration laws.<sup>28</sup> It was this upping of the economic ante by the Mohawk that resulted in the heightened enforcement and legal response by the nation states in the 1990s. From this case, it appears that the nation states are unconcerned about Indigenous peoples until economic interests are at stake.

#### *E. The Border Between the United States and Mexico*

On the southern side of the border, traditional Indigenous homelands became subject to Spanish colonialism. In 1821, as a result of Mexico's independence, these homelands came under the authority of the Mexican government. While the traditional homelands were recognized, the Indigenous peoples were considered citizens of Mexico. No tribal sovereignty was considered or honored. Most of the homelands were then lost, largely through the policy that Mexican citizens were required to apply for land grants. The Indigenous people, probably due to their geographic remoteness, inability to speak Spanish, and migratory nature, either failed to receive notice of the land grant process or had no knowledge of it.

The Treaty of Guadalupe-Hidalgo<sup>29</sup> required that the United States honor the land grants extended by the Mexican government; however, while the Pueblos of New Mexico had received land grant homelands, none existed for the migratory Indigenous. The new border split the traditional homelands of these Indigenous peoples, leaving them without any right of free passage.

#### *F. The Tohono O'odham*

The Treaty of Guadalupe-Hidalgo was signed in 1848, subsequent to the U.S. war with Mexico. This treaty ceded the land south of the Gila River to Mexico, creating what is known as the O'odham land. Articles VIII and IX of the Treaty protect the rights of Mexicans whose lands and property became part of the territory of the United

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28. Gary Dimmock, *Immigrants Head to U.S. Via Akwesasne*, GAZETTE (Montreal), Sept. 18, 1999, at B1.

29. Feb. 2, 1848, art. VIII, U.S.-Mex., 9 Stat. 922, 929.

States due to the newly established border line. They are guaranteed the “free enjoyment of their liberty and property, and . . . the free exercise of their religion without restriction.”<sup>30</sup> The Treaty ensures that their lands be protected, and asserts that they become citizens of the United States automatically after one year, unless they declare their intention to remain citizens of Mexico. There were no such guarantees afforded to those persons who found their land now within the Mexican territory.

Article XI of the Treaty of Guadalupe-Hidalgo concerns itself with the Indigenous population, which it describes as “savage tribes.”<sup>31</sup> This description seems to pertain to the Apache; however, this is not specifically stated. Rather, Article XI states that as the “great part of the territories” will be within the new jurisdiction of the United States, the United States will have “exclusive control” over them. The Article sets forth the punishment of the “savage tribes” for transgressions, whether these occur within either United States or Mexican territory.<sup>32</sup> This section goes a long way to explain the Apache Wars, where the soldiers of Fort Huachuca, Arizona, treated the border with Mexico as if it did not exist.<sup>33</sup> Given the connotation of “savage tribes,” however, it seems that Article XI was directed at the various Apache bands, not the Tohono O’odham, who were then, as now, peaceful farmers.

In an attachment entitled “The Protocols of Queretaro,” the Treaty further establishes that those land grants, and legal title to property, are specifically not annulled. The land grants and legal titles to property made in California and New Mexico (including Arizona) prior to May 13, 1846, and those made in Texas prior to March 2, 1836, remain legally valid.<sup>34</sup> While this assures the Pueblos in New Mexico legal rights to their land (as they had received official land grants from Mexico that recognized their status prior to these dates),

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30. *Id.* at art. IX.

31. *Id.* at art. XI.

32. *Id.*

33. Fort Huachuca, Arizona, [http://discoverseaz.com/Cities/Fort\\_Huachuca.html](http://discoverseaz.com/Cities/Fort_Huachuca.html) (last visited June 3, 2005); The Buffalo Soldiers, <http://discoverseaz.com/History/BufSold.html> (last visited June 3, 2005).

34. Treaty of Guadalupe-Hidalgo, *supra* note 29.



there was no such guarantee for the Tohono O'odham, who had not received such land grants.

This division of the territory became a problem for the United States when it decided that a southern rail route was needed. As a result of the Gadsden Purchase in 1853, the United States purchased almost 30,000 acres from Mexico. This purchase included approximately half of the Tohono O'odham traditional homelands.<sup>35</sup> The rest remained in Sonora, Mexico.

The effect of the Gadsden purchase was devastating for the O'odham culture and people. Contacts between the people were severed and the political history and structure diverged sharply.<sup>36</sup> The land base of the Mexican O'odham was eroded and religious and cultural connections to land on both sides of the border were lost to those on the other side.<sup>37</sup>

## II. THE EXTENT OF THE MODERN BORDER PROBLEM

Tribal governments have become concerned about a number of issues related to the increased militarization of the U.S.-Mexico border. For example, border patrols have stopped and searched tribal members and in some cases returned them to Mexico. Tribes have also been concerned about degradation of tribal land by federal officials, the cutting of roads in sensitive and/or sacred lands, and high speed pursuits over tribal roads, some of which are unpaved, which endanger tribal members and livestock. The tribal governments have attempted to resolve these issues through meetings and conciliations, which to date have not shown much success. The federal officials have not indicated full support of tribal sovereignty, particularly if it would require seriously addressing tribal concerns. Instead, federal officials have generally responded to the concerns as if they were being communicated by a local government, rather than by a sovereign nation.<sup>38</sup>

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35. Ken Ellingwood, *Tribes Are Caught on the Border*, L.A. TIMES, May 8, 2000, at A1; Tim Vanderpool, *A Tribe's Tale of Three Identities*, CHRISTIAN SCI. MONITOR, Apr. 30, 2003, at 2.

36. Jennifer Sterba, *Treaty Separated O'odham*, ARIZ. DAILY STAR, Feb. 12, 2004.

37. *Id.*

38. Philip Burnham, *Interview with Tohono O'odham Nation's Vivian Juan Saunders*,

While the actions of the Border Patrol and federal officials have been a concern for the Tohono O'odham, so have the actions of illegal border crossers and smugglers. The Tohono O'odham tribal police department estimates that approximately 1500 people cross the border on Tohono O'odham lands on a daily basis.<sup>39</sup> Since the militarization of the border in 1999, the number of illegal border crossers has increased exponentially. In 1999 the officers of the Tohono O'odham Nation police assisted federal border officers with 100 undocumented immigrants per month; in 2002 this number had increased to over 800 per month.<sup>40</sup> The police department of the Tohono O'odham Nation spends more than \$3 million per year in border related incidents.<sup>41</sup> During 2003, approximately 300,000 pounds of drugs were seized on O'odham lands.<sup>42</sup>

A 2004 report by the U.S. General Accounting Office, asserted that the narcotics intercepted on the Tohono O'odham Nation included more than 100,000 pounds of marijuana, 144 grams of cocaine and 6600 grams of methamphetamine,<sup>43</sup> an increase from 2002, when 65,000 pounds of narcotics were confiscated.<sup>44</sup>

In addition to the illegal transport of people and narcotics, the report also noted that Tohono O'odham land is adversely affected in other ways. The Tohono O'odham reported that in 2002 trespassers abandoned 4500 vehicles<sup>45</sup> and four million pounds of trash on tribal lands.<sup>46</sup> In a seven-month period from January 2003 to July 2003, the Tohono O'odham Nation police department removed 2675 abandoned vehicles from tribal lands, and recovered 308 stolen vehicles being used for criminal activities en route to Mexico.<sup>47</sup> The

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INDIAN COUNTRY TODAY, Mar. 11, 2004.

39. *Id.*

40. Vivian Juan-Saunders & Ned Norris Jr., *An Open Letter to the UN Regarding the Tohono O'odham Border*, reprinted in INDIAN COUNTRY TODAY, Sept. 1, 2004, at A5.

41. *Id.*

42. Michael Marizco, *O'odham Border Help Can't Come Too Soon*, ARIZ. DAILY STAR, Feb. 18, 2004.

43. U.S. GENERAL ACCOUNTING OFFICE, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS 12 (2004), available at <http://www.gao.gov/new.items/d04590.pdf>.

44. *Id.* at 12–13.

45. *Id.* at 16.

46. *Id.*

47. Juan-Saunders & Norris, *supra* note 40.

Tohono O'odham estimate that the cost of law enforcement to patrol the border and the provision of health care to illegal immigrants exceeds \$5 million annually.<sup>48</sup>

In 2004 the Tohono O'odham Nation joined forces with federal and state officials in the Arizona Border Control Initiative. This Initiative includes representatives of Customs and Border Protection, Immigration and Customs Enforcement, the Transportation Security Administration, the Department of the Interior, the U.S. Attorney's Office, the Arizona Department of Public Safety, and the Tohono O'odham. These agencies will, at a cost in excess of \$10 million, seek to enhance border surveillance of illegal activities, and detect and deter cross-border illegal trafficking of people and drugs. In addition, the Tohono O'odham received \$1.4 million to enhance tribal law enforcement efforts.<sup>49</sup>

A part of the Arizona Border Control Initiative is the building of a border barrier fence along 200 miles of the 350-mile Arizona-Mexico border. The Gu Vo and Chukut Kuk districts of the Tohono O'odham Nation, adjacent to the U.S.-Mexico border, passed a resolution that approved the Border Patrol's request for funding to build a vehicle barrier designed to stop vehicle traffic only.<sup>50</sup> Unfortunately, the relationship between the federal government and the Tohono O'odham Nation has not been easy. In March 2005 a second phase of the Arizona Border Initiative was announced, consisting of a significant increase in Border Patrol Agents, helicopters and airplanes on tribal lands, but Chairwoman Juan-Saunders was not informed prior to the public announcement. Then again in April 2005, the Border Patrol set up a traffic check-point on Federal Route 15, that crosses tribal land, without consultation with the Nation. These incidents lead Chairwoman Juan-Saunders to publicly express her dissatisfaction with the actions of the federal government and the Department of Homeland Security.<sup>51</sup>

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48. Gabriela Rico, *U.S. May Help O'odham with Security*, TUCSON CITIZEN, Feb. 18, 2004, at 1C.

49. Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security Announces Arizona Border Control Initiative (Mar. 16, 2004).

50. Juan-Saunders & Norris, *supra* note 40.

51. Michael Marizco, *Homeland Chief in S. Arizona*, ARIZ. DAILY STAR, May 5, 2005.

The Tohono O'odham Legislative Council and Executive Office passed a resolution during the summer of 2004 to support the attempt to obtain federal funding for the building of the vehicle barrier fence on tribal lands.<sup>52</sup> While some tribal members have expressed opposition to this action, the Tohono O'odham Chairwoman contends that it is necessary to allay the fear of smugglers that grips many tribal members on the western edge of the reservation.<sup>53</sup>

### III. THE TRADITIONAL APPROACH

Over the years, many Indigenous peoples on the southern border have simply ignored the legalisms of border crossing. Informal crossing-gates exist on tribal land and were generally used by Indigenous peoples for tribal purposes. However, the increased militarization of the border region caused the INS, Border Patrol and Customs Service to crack down on the Indigenous. The new agents were unaware of the southwest region's ancient migratory ways and disrupted long-held understandings of the right of mobility across borders, particularly throughout traditional Indigenous homelands.

The Tohono O'odham traditionally move at will across the U.S.-Mexico border for many purposes; to see families and friends, to receive health and other services, and to participate in religious ceremonies. Often these crossings are done at informal crossing gates on the Nation's land. The Nation strongly supports the continued use of these gates and the rights of the Nation's members to cross at will.

### IV. THE LEGISLATIVE APPROACH

Congressional approaches to resolve the issues facing the tribes on the southwest border have been spotty at best. The success of the legislative approach has depended upon the willingness of Congress to seriously address the problem, the willingness of the individual tribes to pursue a legislative strategy, and the cooperation of executive agencies. For some tribes, the legislative approach has

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52. *Id.*

53. Associated Press, *Mexico Border Barriers Considered by Feds*, July 20, 2004, available at <http://freenewmexican.com/news/2090.html>.

worked well; legal rights have been established and protected.<sup>54</sup> For others, the approach has been problematic; legislators have been unwilling to support Indigenous rights, or the tribes have faltered in their attempts to convince their own people or legislators of the wisdom of such a strategy.<sup>55</sup>

The Tohono O'odham Nation has pursued a legislative approach for a number of years. On May 21, 1987, Representative Morris Udall (D-AZ) introduced House Bill 2506.<sup>56</sup> This bill would have "provide[d] for establishment of a roll of the Tohono O'odham Indian people and clarif[ied] certain of their rights."<sup>57</sup> The bill empowered those on the new roll of the Tohono O'odham to pass freely across the U.S.-Mexico border and to live and work in the United States. The Reagan administration had serious misgivings about this bill. They wanted border-crossing privileges extended only to tribal members who were citizens of the United States, and a restriction of what services would be provided to Mexican O'odham while in the United States. The tribe agreed to compromise on these two clauses. A third clause became the sticking point. The federal government wanted the O'odham to cross only at official border crossings.<sup>58</sup>

While this may seem to be a minor point, for the O'odham it was an attack on who they are as a people and as a sovereign nation. The O'odham have been in the area since time immemorial. They have ancient migratory patterns and settlement sites that are important culturally and traditionally. Further, given the size of the Tohono O'odham reservation (roughly the size of Connecticut) this would require many Tohono O'odham to travel great distances to cross the border. The tribe is unwilling to give up these traditional crossing places on tribal land. When this dispute could not be resolved, the tribe requested that the sponsor of the bill pull it from consideration.<sup>59</sup> This assertion of tribal sovereignty and commitment to tradition was to become a signpost of the struggle.

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54. Ellingwood, *supra* note 35.

55. *Id.*

56. H.R. 2506, 100th Cong. (1987).

57. *Id.* (official title).

58. Conversations with negotiation participants.

59. *Id.*

The Tohono O'odham pursued legislation for a second time. The Tohono O'odham Nation prepared an initial draft<sup>60</sup> of a bill to be introduced by U.S. Congressman Ed Pastor (D-AZ). The final version, House Bill 4119,<sup>61</sup> was introduced on June 23, 1998. Unfortunately it did not include much of what had been originally proposed by the Tohono O'odham Nation. Instead it dealt mainly with "the restoration of certain Federal land of religious and cultural significance to the Tohono O'odham Nation of Arizona."<sup>62</sup> The initial draft of the bill addressed many of the issues left unresolved in the previous legislative attempt. It included the right of passage at any gate on traditional Indigenous lands, allowed the tribe to monitor these traditional gates, directed that federal officials ensure that their practices do not conflict with religious rights, culture, customs or traditions of the O'odham, required that federal officials negotiate with the tribe over policies and procedures to be followed on tribal lands, and held federal officials liable for damages under 42 U.S.C. §§ 1983 and 1988 for violation of the right of free passage for the Indigenous.<sup>63</sup> This original draft also suggested an amendment to 8 U.S.C. § 1359, adding Indigenous peoples on the southern border to those on the northern border who have the legal right to free passage under the Jay Treaty.<sup>64</sup>

Unfortunately, the revised bill also failed to become law. The Mexican and United States governments failed to support it due to concerns regarding the traditional ports of entry.<sup>65</sup> The Tohono O'odham also had misgivings as the need to compromise arose, and their interest lapsed.

On February 12, 2003 the Tohono O'odham tried again. Newly-elected U.S. Representative Raul Grijalva (D-AZ), with 119 co-sponsors, introduced House Bill 731.<sup>66</sup> This bill sought "[t]o render all enrolled members of the Tohono O'odham Nation citizens of the United States as of the date of their enrollment and to recognize the

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60. On file with author.

61. H.R. 4119, 105th Cong. (1998).

62. *Id.* (official title).

63. Initial draft of bill (on file with author).

64. *Id.*

65. Conversations with participants.

66. H.R. 731, 108th Cong. (2003).

valid membership credential of the Tohono O'odham Nation as the legal equivalent of a certificate of citizenship or a State-issued birth certificate for all Federal purposes."<sup>67</sup> The purpose of this legislation was to validate the rights of Tohono O'odham Nation citizens to cross the border at will.

Then, on March 18, 2003, Frank Pallone, Jr. (D-NJ) introduced House Bill 1333.<sup>68</sup> This bill extended the right of citizenship to all members of the Tohono O'odham Nation living in either Arizona or Mexico, upon application within a three-year period.<sup>69</sup> It further guaranteed the right of free passage across United States borders to all members of the Tohono O'odham Nation.<sup>70</sup> The bills differed as House Bill 731 granted citizenship automatically to all members of the Tohono O'odham Nation,<sup>71</sup> while House Bill 1333 required a citizenship application by the individual member of the Tohono O'odham Nation, and set a three-year window for such application.<sup>72</sup> House Bill 1333 was withdrawn on March 20, 2003.

House Bill 731 was referred to the House Committee on the Judiciary, then to the Subcommittee on Immigration, Border Security, and Claims, where it died.

## V. THE NEGOTIATION APPROACH

Efforts have been made by the Tohono O'odham to resolve border-crossing issues through the negotiation process as well. Like the legislative efforts, these efforts have not been entirely successful.<sup>73</sup>

In addition to the new legislative proposal, the Tohono O'odham Nation has initiated a different approach that attempts to avoid the difficulties inherent in the earlier pieces of legislation. The Tohono O'odham is the only Indian Nation on the Southern border of the

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67. *Id.* (official title).

68. H.R. 1333, 108th Cong. (2003).

69. *Id.* § 1(a).

70. *Id.* § 1(b).

71. H.R. 731, § 2(a).

72. H.R. 1333, § 1(a).

73. Luna-Firebaugh, *supra* note 1.

United States that has full enrollment for its members in Mexico.<sup>74</sup> Throughout 1999 and 2000, the Nation held public meetings and confidential negotiation sessions with the U.S. and Mexican Counsels and the U.S. Immigration Service in an attempt to administratively resolve the border crossing issues for its people.<sup>75</sup>

Through negotiations, the U.S. and Mexican governmental agencies agreed to accept a birth or baptismal certificate or an identification document issued by the Tohono O'odham in lieu of the normally stringent paperwork required to cross the U.S.-Mexico border.<sup>76</sup> Citizens of the Nation who are given priority for border crossing rights, due to chronic medical conditions which require them to travel from their homes in Mexico to the Nation's Health Center in the United States, were identified, and the necessary paperwork was produced by the Nation. Some 104 persons were so identified.<sup>77</sup> By August of 1999, the U.S. Immigration and Naturalization Service approved eighty-eight Nation members for American "laser" visas.<sup>78</sup> The U.S. and Mexican agencies have also agreed to provide visas for the rest of the Nation's members residing in Mexico, approximately 1238 people, once the Nation submits the necessary paperwork.<sup>79</sup> One difficulty with this approach is that the Nation is forced to shoulder the cost of establishing the identity of these tribal members, projected to be in excess of \$100,000, the allocation of which is under consideration by the Nation at this time.<sup>80</sup>

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74. The Tohono O'odham, because they consider themselves a single tribe, on whichever side of the border they are resident, enroll all Tohono O'odham as tribal members, and take the position that all are entitled to the basic tribal services, including health services provided at the tribe's health clinic. Ellingwood, *supra* note 35.

75. Edward D. Manuel & Henry A. Ramon, Memorandum to District Chairpersons Association of the Tohono O'odham Nation (Nov. 9, 1999) (unpublished paper, on file with author).

76. Conversations with negotiation participants.

77. Manuel & Ramon, *supra* note 75.

78. *Id.*

79. *Id.*

80. Press Release, We Didn't Cross the Border, the Border Crossed Us, Office of the Chairman and Vice Chairman of the Tohono O'odham Nation (May 15, 2000) (on file with author).



There is a further issue for many O'odham. Many activists, some of whom are members of the Council of the Nation, reject the idea that citizens of the Nation should have to carry tribal identification papers to cross over their own lands.<sup>81</sup> If this is approved, the O'odham would become the only people in the United States or Mexico required to do so.

## VI. THE LITIGATION APPROACH

As previously discussed, some cases have been brought by Indian nations and tribal members seeking to enforce the provisions of the Jay Treaty and the Treaty of Ghent, and to extend those rights to all Indian peoples of the Americas without undue restriction or restraint.<sup>82</sup> Recent cases sought to clarify that the right of free passage for North American Indigenous set forth in the Jay Treaty included the right to purchase and transport goods across the border. Under the treaty, such goods were to be exempt from duty or taxes, so long as they were for personal use.<sup>83</sup> This has changed somewhat, and now the right to transport goods, duty-free, has been restricted by statute and case law.<sup>84</sup>

In a number of Canadian cases, Canadian Indians were required to pay duty on items for personal use being brought into Canada from the United States. The courts upheld the custom duty because the items being transported (a washing machine, a refrigerator, and an oil heater) were not unusual or unique to Indians. The duty was further upheld since there was no local or municipal ordinance that incorporated the provisions of the Jay Treaty.<sup>85</sup>

In a more recent Canadian case the former Grand Chief of the Akwesasne Mohawks challenged the Canadian Minister of National Revenue over the interpretation of the Jay Treaty.<sup>86</sup> The former Grand Chief asserted that the treaties guaranteed Mohawks duty free

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81. Conversations with Tohono O'odham members.

82. Manuel & Ramon, *supra* note 75.

83. Treaty of Amity, *supra* note 15, at 118.

84. United States v. Garrow, 88 F.2d 318 (C.C.P.A. 1937); Akins v. United States, 551 F.2d 1222 (C.C.P.A. 1937).

85. Louis Francis and Her Majesty the Queen, [1956] S.C.R. 618, 621.

86. Mitchell v. M.N.R., [2001] S.C.R. 911.

access across the U.S.-Canada border. The Canadian government argued that the Mohawks immigrated to Canada in 1755 and thus could not claim aboriginal rights pursuant to the Jay Treaty. The Canadian government also asserted that, as the Iroquoian peoples traditionally charged each other duties to cross their lands, this same right could be asserted by Canada.<sup>87</sup>

The U.S. courts have made similar interpretations of the rights contained in the Jay Treaty. One court held that the right to import depends on statutory authority, not the Jay Treaty, and attached duties to Indian-made baskets being brought from Canada into the United States.<sup>88</sup> In 1974, the Court of Customs and Patent Appeals held that a duty applied to goods that were brought into the United States for personal use and not for resale.<sup>89</sup> However, this case further asserted that Indians had the right to pass the border without undue restriction or restraint.<sup>90</sup>

On June 21, 2004, the right of Canadian Indians to work in the U.S. was supported by the Arizona Police Officers Standards and Training Board.<sup>91</sup> In this instance, the Tohono O'odham police department had hired a Canadian Mohawk as a police officer. The Arizona Peace Officer Standards and Training Board (POST), which certifies officers, declared that he was not eligible to be a state-certified peace officer, as he was not born in the United States.

The tribe challenged this decision pursuant to the Jay Treaty, which allows natives of the Saint Regis Mohawk Nation to travel between Canada and the United States and to live and work where they choose. While the Jay Treaty was referred to as "old" and "obscure," Arizona POST decided to honor its provisions and granted state certification to this officer.<sup>92</sup>

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87. Janice Tibbetts, *Supreme Court Reserves Judgment on First Nations' Border Tax Fight*, OTTAWA CITIZEN, June 17, 2000, at A7.

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

89. *Akins v. United States*, 551 F.2d 1222, 1228-30 (C.C.P.A. 1977).

90. *Id.* at 1226-27.

91. Amanda Halligan, *Old, Obscure Treaty Allows O'odham Cop to be Certified*, ARIZ. DAILY STAR, July 11, 2000, at B5.

92. *Id.*

## VII. THE INTERNATIONAL APPROACH

Article 27 of the International Covenant on Civil and Political Rights affirms the right of persons belonging to “ethnic, religious or linguistic minorities . . . to enjoy their own culture, to profess and practise their own religion [and] to use their own language.”<sup>93</sup> For the Indigenous of the North American continent, the rights guaranteed in this covenant are clearly violated by the restrictions to travel across the U.S.-Mexico and U.S.-Canada borders.<sup>94</sup>

To use the Tohono O’odham as an example, there are religious sites on traditional lands that lie on both sides of the U.S.-Mexico border. On an annual basis, many O’odham make a pilgrimage to Magdalena de Kino, Sonora, Mexico, a tradition of Sonoran Desert Catholicism. At other times, O’odham travel to Boboquivari, a sacred mountain on O’odham lands north of the U.S.-Mexico border.<sup>95</sup> Those O’odham without the legal right to travel into Mexico or into the United States are clearly inhibited in their right to practice their own religion, as established by the International Covenant on Civil and Political Rights.<sup>96</sup>

The U.N. Human Rights Committee and the Inter-American Commission on Human Rights of the Organization of American States have also recognized the need to protect Indigenous rights. These entities have held their ‘cultural integrity’ norm to cover all aspects of an Indigenous group’s survival as a distinct culture, understanding culture to include land use patterns as well as religious practices.<sup>97</sup>

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93. Int’l Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, art. 27.

94. Luna-Firebaugh, *supra* note 1.

95. Ellingwood, *supra* note 35.

96. ICCPR, *supra* note 93.

97. U.N. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Technical Review of the U.N. Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2 (1994), available at <http://cwis.org/fwdp/international/techrevw.txt>; Inter-American Commission on Human Rights of the Organization of American States, *Proposed American Declaration on the Rights of Indigenous Peoples*, June 5, 1997, available at <http://oas.org/juridico/english/ga-res97/eres1479.htm>.

The proposed American Declaration on the Rights of Indigenous Peoples specifically sets forth the following:

Indigenous peoples are entitled to recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, and to the use of those to which they historically have had access for their traditional activities and livelihood.<sup>98</sup>

#### VIII. INTERNATIONAL INDIGENOUS COLLABORATION

The national Indigenous organizations of Canada and the United States have long recognized the problem of border passage; however, little has been done politically to try to resolve this issue. In 1988, a Regional Border Rights Meeting was held in Idaho, attended by a number of U.S. and Canadian tribes. A policy statement was issued that addressed the right of free border passage of the Indigenous, based upon traditional rights of mobility and of the rights guaranteed in the Jay Treaty and the Treaty of Ghent.<sup>99</sup> Certain demands were set forth including:

- I. The right of Indian nations to identify their own nationals.
- II. The right to be in, travel in, work in, reside in, and use the territory of their nations.
- III. The right to transport their possessions with them and to trade freely with other Indian people.
- IV. The right to receive services in each country on the same basis as other people of their nations.<sup>100</sup>

The policy statement included a number of recommendations that revolved around the creation of a U.S.-Canadian International Joint Commission, composed of an equal number of representatives from

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98. Note from the Executive Secretary of the Inter-American Commission on Human Rights on the "Proposed American Declaration on the Rights of Indigenous Peoples," Feb. 10, 1998, art. XVIII.2, <http://oas.org/consejo/CAJP/docs/cp04087e01.doc>.

99. Policy Statement, U.S.-Canadian Tribes Regional Border Rights Meeting, Bonners Ferry, Idaho, Apr. 18-19, 1988 (unpublished paper, on file with author).

100. *Id.*

each country and which would include Native American representation. The Commission would have jurisdiction to resolve border disputes or problems, would oversee border stations, and would develop a "cohesive and consistent border crossing policy"<sup>101</sup> for Canada and the United States. While this policy statement was far-reaching and visionary, it unfortunately did not include representation of the Indigenous along the U.S.-Mexico border.

One Canadian noted for his criticism of Indian Affairs was quoted as saying about the proposed policy, "This is moving in the wrong direction. I can't for the life of me understand why they would need a special border crossing, unless they're beginning to see themselves as people with no borders."<sup>102</sup> But this is precisely how many cross-border native peoples are beginning to see themselves.

While nothing came of this policy statement, the issue did not go away. Border issues for the tribes along the U.S.-Mexico border were a continuous problem that received substantial publicity. There were also continued free mobility issues along the U.S.-Canada border. Culminating this decade of continued problems, joint meetings between Canada's Assembly of First Nations (AFN) and the U.S. National Congress of American Indians (NCAI) began in July 1999. Indigenous representatives from Mexico, Canada, and the United States have begun the process for an international solution to the issue of Indigenous mobility across the imposed borders of their traditional lands.

The Indigenous Nations along the U.S.-Mexico border have, since 1997, been active in Alianza Indígena Sin Fronteras (Indigenous Alliance Without Borders). This organization, supported by the American Friends Service Committee, includes representatives from the Yaqui, Tohono O'odham, Texas Kickapoo, Kumayaay, and Gila River Pima/Maricopa peoples from both sides of the border.<sup>103</sup> It emphasizes the development and maintenance of cultural, religious and personal ties among Indigenous peoples, as well as organizing

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101. *Id.*

102. Derek Konrad, quoted in Howard May, *Alberta Natives Seek Separate Crossing to U.S.*, OTTAWA CITIZEN, Feb. 24, 2000, at A7.

103. Coalición de Derechos Humanos/Alianza Indígena sin Fronteras, About Us, [http://derechoshumanosaz.net/about\\_us.htm](http://derechoshumanosaz.net/about_us.htm) (last visited June 3, 2005); Rachel Hays, *North American Tribes Forge Cross-Border Links*, 17 BORDERLINES, Oct. 1995.

and supporting the approaches to resolution undertaken by their members.<sup>104</sup>

Statements made by Indigenous leaders have been striking in their assertion of traditional passage rights. As former Tohono O'odham Councilman Kenneth Williams stated, "We were here long before other countries were established. . . . We are not immigrants. It just so happened that they put the line between us."<sup>105</sup> Chief Ernie Campbell of the Musqueam Nation stated, "We did not put any line or border anywhere to separate us. There are no borders among our people."<sup>106</sup> This position was supported by the AFN National Chief Phil Fontaine when he declared that the delegates to the joint meeting of NCAI and AFN were "divided by locality but united by common origin and destiny,"<sup>107</sup> and further by H. Ron Allen, past president of NCAI, when he stated, "We are crossing over this international border that we do not know and do not recognize."<sup>108</sup>

## IX. CONCLUSION

The problem of free movement over international borders exists for many of the Indigenous Nations of North America. Many of these Nations have made repeated attempts to resolve the border crossing issues for their people. Unfortunately, few of these attempts at resolution have been wholly successful.<sup>109</sup>

The traditional approach, while expedient, and supportable by many who dislike the necessity of treaties with the colonizers, puts those who use it in legal jeopardy. Often, those Indigenous seeking to exercise their traditional rights have been apprehended by federal agents.<sup>110</sup> Given the enhanced militarization of the U.S. border, particularly in response to the anti-terrorism program initiated subsequent to 9/11, attempts to cross the border without official

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104. *Id.*

105. Brenda Norrell, *Solutions to Border Crossing*, INDIAN COUNTRY TODAY, Southwest Bureau, June 29–July 6, 1998.

106. Policy Statement, *supra* note 99.

107. *Id.*

108. *Canada-U.S. Border Artificial*, OTTAWA CITIZEN, July 21, 1999, at A5.

109. Luna-Firebaugh, *supra* note 1.

110. Vanderpool, *supra* note 35.

documentation, and across geographic areas that are not officially sanctioned, can be extremely problematic. In some instances Indigenous have been detained, arrested, or forcibly returned across the international border. Often ceremonial objects have been disrespectfully mishandled, and ceremonial participants have been subjected to questioning and even ridicule.<sup>111</sup>

The litigation approach relies on the decision of the courts of the colonizer, something that is of concern to many American Indians, who contend that the assertion of their traditional rights do not belong in such a forum. However, federal courts are what we have, they are the courts of competent jurisdiction, and it is possible that favorable results may occur. However, judges or juries who are hostile to the rights and interests of the Indigenous may also render decisions that have a negative impact. When this happens, adverse decisions, case law and other precedents may be set for a significant period of time.

The legislative approach can be highly effective. As American Indian Nations continue to assert an active and politically effective agenda, this approach may be successful. However, the development and passage of legislation can be time consuming, and as it depends upon the political will of elected officials, has a high likelihood of compromise, which may result in unsatisfactory results.

Proceeding through international bodies is a compelling approach for Indigenous Nations. It strengthens the assertion of nationhood for Indigenous Nations, and allows for the utilization of covenants already drafted by International bodies, such as the United Nations and the Organization of American States. Further, the existence of treaties has been of substantial import to the international bodies. One problem however, is that the United States is not a signatory to many of these international covenants and thus can contend that it is not bound. In addition, the United States has also refused to recognize the Indigenous Nations within the United States as fully sovereign, and has resisted their participation in such international organizations as governmental entities.

At further issue is that, given the inherent sovereignty of Indian Nations, they have tended to proceed independently in their attempts

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111. May, *supra* note 24.

at resolution of border-crossing issues. American Indian tribal sovereignty is the foundation of tribal-federal relations. It is the basis for the right of tribal governments to make and enforce their own laws, and to determine what approaches they will take towards the implementation of federal laws and rules. Different approaches have been undertaken, with varying measures of success. Given concerns about tribal sovereignty, collaboration between tribes, where it has occurred, has been limited. However, it is in this area that there is real potential for success.

The joint meeting held by the National Congress of American Indians and the Association of First Nations was a step toward effective action. While NGOs, these two organizations have a recognized status in their respective countries, and to a great extent are considered forces with which the national governments must reckon. The effort made by Alianza Indigena Sin Fronteras to coordinate and support the efforts of U.S. Mexican Indigenous nations is also worthwhile. However, the efforts of Alianza are, to date, not coordinated, nor have their activities been fully supported by the elected tribal governments they seek to represent.

Given the imbalance of power held by the federal governments of Canada, the United States, and Mexico it would be wise for the Indigenous Nations of North America, through their respective organizations, to coordinate their efforts to resolve this issue. A unified approach could focus the world's attention on the issue of the right to maintain traditional contacts and ceremonies. This approach could force the colonizers to give new consideration to the traditional rights of the Indigenous and to the rights guaranteed in laws and treaties. In this way, advancement might be made not only to resolve border crossing issues, but also perhaps to maintain and protect of other rights long ignored or forgotten.

Ultimately, of course, the resolution of the international right of passage across borders for Indigenous peoples requires the political will and commitment of tribal governments as individual sovereigns. The tribes are faced with the issues of unauthorized persons' crossing of Indian lands, the incidents of nuisance and criminal behavior on Indian lands by unauthorized persons, and the actions of law enforcement officers who do not hold themselves accountable to tribal governments. Resolving these issues is a critical challenge to



tribal sovereignty. They will only be resolved through resolute action by tribal governments. The commitment and political will necessary for resolution is reflected in the statement of Tohono O'odham Chairwoman Vivian Juan-Saunders to the United Nations Secretariat of the Permanent Forum on Indigenous Issues:

The Tohono O'odham Nation strongly supports the rights of our people to travel between our communities and is vehemently opposed to any limits placed on this right. We have historically rejected the militarization of our border and will continue to work with all relevant federal and state agencies to seek relief for our members.<sup>112</sup>

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112. Juan-Saunders & Norris, *supra* note 40.