For many years, the Tohono O’odham Nation in Arizona has transported tribal members from Mexico to the United States through traditional border crossings for medical treatment. The nation is the only one in the United States that grants full enrollment to its people who are citizens of Mexico. Thus, Mexican citizens who are enrolled members are legally entitled to access health and other services provided by the tribe to all its members.

Since the recent militarization of the U.S.-Mexico border, these routine visits have become more rare and more dangerous. Frequently now, the tribal employees who provide the transportation for Mexican O’odham Nation members have been stopped and harassed by U.S. Border Patrol agents. These agents, operating on the lands of the O’odham Nation, have made the nation’s elders and others who suffer from tuberculosis, diabetes, and other life-threatening diseases return to Mexico if they lack U.S. documents. This insistence on official U.S. documentation, rather than recognizing Tohono O’odham Nation membership identification, strikes at the heart of Indian sovereignty and is the focus of this article.

While traditionally it is common for nation-states such as Canada, the United States, and Mexico to protect their borders, the requirement that official documentation be proffered for simple, short-term visits has not been required for most citizens of the North American continent.
This enlightened policy has been replicated in Europe with the European Commonwealth. However, with the hysteria that has resulted from the ‘Drug War’ and the widespread fear of “illegal immigrants,” the United States has militarized its northern and southern borders. This militarization has resulted in inconvenience for all border crossers, but has made border crossing by the continent’s indigenous extremely problematic.

Enhanced and restrictive border crossing procedures are an assault on indigenous sovereignty as well as an assault on the cultural integrity of native societies. The laws of Canada, the United States, and Mexico restrict contacts between the indigenous as citizens of their nations, and as members of families, clans, and religious groups that predate the colonization of the North American continent. The new laws (and regulations) also increase the level of danger for the indigenous. Those who continue to use traditional border crossing areas are in danger of being shot by U.S. Border Patrol personnel, U.S. military, or vigilante citizen groups. For a young Texas shepherd named Ezequiel, U.S. military personnel who opened fire while he tended his goatherd along the Texas-Mexico border cut life short. His death, and the deaths of others, is a result of the increased militarization of the U.S.-Mexico border.

The treaties and agreements that set the international boundaries between the nation-states of the North American continent were negotiated and signed only by the colonizers. The indigenous of these border regions, whose lands these borders transect, were not consulted, nor were they signatories to any treaty or agreement. This stands in clear opposition to their rights as nations who were, at that time, fully sovereign, and whose status as sovereign was recognized in later treaties between them and the colonizers. In addition, the fact that some indigenous nations are mentioned in the colonizers’ treaties and some are not, or that some indigenous nations later negotiated separate treaties or agreements to protect their right to access their traditional lands on either side of the borders, has contributed to a patchwork approach to border crossing rights. While in some cases treaties or agreements have largely resolved the problem for some indigenous groups, the general failure of the colonizing governments to allow indigenous input into the resolution of border issues has furthered the assault on the sovereignty of indigenous nations of the North American continent.

The laws that require declaration of citizenship or official documents issued by the colonizing powers are a denigration of the nationhood of indigenous peoples. A declaration of citizenship in the Tohono O’odham, Mohawk, Blackfeet, Yaqui, Kickapoo, Cocopah, Kumeyaay, or other indigenous nations, in response to a question asked by border officials, often results in extended delay and intensive interrogation. Thus all but the most committed indigenous activist is forced to sim-
ply respond “U.S.,” “Mexico,” or “Canada” to a request for identifying citizenship.

The assertion of the right to cross the international border without undue delay is a long-standing problem. The indigenous nations of the Americas have attempted to resolve this problem through treaties, legislation, negotiations, and/or direct action. The problem has different parameters on the northern and southern borders of the United States, largely due to historical legacies. The legislative approach has had varying levels of success, with failure often a result of federal action or lack thereof, and sometimes attributable to tribal inaction or disagreement. Negotiation and direct action have been effective in some ways, particularly in focusing attention on legal, cultural, and historical inequities, although they result in limited agreements affecting indigenous nations on a piecemeal basis. These approaches have focused attention on the inequities. The development of a concerted approach by indigenous nations and peoples is necessary if the problem is to be finally resolved.

The indigenous nations of the North American continent have been pursuing different avenues. For some, enhanced activism is reaching a boiling point. Other indigenous peoples are asserting the rights of their citizens and of their nations in a formalized, legalistic manner. The manner in which these assertions of rights may best proceed needs to be considered. The critical question is whether it is proper for nation-states to deny indigenous peoples access to their traditional sites, regardless of which side of an international border they are on, or to restrict their family contacts or the continuance of their religions and cultures. These issues for the indigenous of the North American continent must be addressed if indigenous cultures and traditions are to survive.

In this paper I will attempt to describe the the scope and dimensions of the problems of border crossing faced by various indigenous nations through an examination of the patterns of impact and attempted resolution.

**THE HISTORY OF THE PROBLEM**

Prior to the setting of the U.S. borders with Canada and Mexico, indigenous peoples had traditional territories with boundaries that were recognized and honored by their neighbors. Villages and other types of settlements existed where water, agricultural possibilities, and trade made the location reasonable. When, however, the international borders were drawn up, little if any regard was given to the separation of native villages, and native nations were not consulted. The lines imposed by the colonizers ignored traditional hunting lands, areas of resource procurement, and religious sites. This complicates political situations throughout the world today. In Uganda and Rwanda, Serbia
and Croatia, Jerusalem, and Berlin, lines were drawn and lands awarded without regard for the interest and wishes of the peoples of those lands. Not surprisingly, turmoil has resulted.

The fiction of new boundary lines extended even to the renaming of the indigenous peoples; for example, the Blackfeet in the United States were named the Blood in Canada. The lines also created division and divisiveness. While the Blackfeet were originally one people, this artificial division began to erode their self-identity, and they have come to see themselves as separate peoples. The colonizing nations afforded their indigenous groups different rights, which caused further erosion in the continuity of tradition and peoplehood, and also led to factionalism. Indigenous groups have resisted this separation of peoples and have continued their struggle to remain cohesive.

The experiences of some indigenous peoples split by the borders were very different from the Blackfeet. For some the cultural ties of the people were maintained. For others the ties were severed, the impacts on the culture and traditions were horrific, and there were economic consequences. We will examine these experiences and the ways in which some of these nations have tried to resist the assertions of authority by colonizing powers.

The Northern Border

The United States 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 (otherwise known as the Jay Treaty) and the 1814 Treaty of Peace and Amity (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 the border, by either land or inland navigation, into the territories of either Canada or the United States, to navigate all the lakes, rivers, and waters of each country, and to freely engage in trade or commerce with other indigenous nations. No custom duties are to be assessed against the personal property of any Indian exercising their right to cross. The Treaty of Ghent restored the rights set forth in the Jay Treaty, which had eroded due to the War of 1812.

The United States and Canada treat the Jay Treaty differently; the Canadian government recognizes the rights for Indians per se, and the United States interprets the rights within a political context. The rights and the specific meaning and application of the provisions of the treaty have been addressed and readdressed in the courts of these two nations in a number of legal cases. There has also been legislation that has established restrictions of the rights set forth in the treaty.

Subsequent to the Treaty of Ghent, and prior to 1924, Canadian Indians were allowed free passage into the United States without the
production of immigrant visas. However, political winds shifted in the United States during the 1920s, and with the passage of the 1924 Immigration and Naturalization Act, aliens (including Canadian Indians) who were ineligible for citizenship were not permitted as immigrants. This legislation, coupled with the Citizenship Act of 1924, which awarded U.S. citizenship to all Indians born within the boundaries of the United States, was interpreted to mean that Canadian Indians could no longer cross the U.S. border freely, despite the rights guaranteed in the Jay Treaty and the Treaty of Ghent.

The reaffirmation of Jay Treaty rights began again with the U.S. Supreme Court ruling in *U.S. ex rel. Diabo v. McCandless.* In *Diabo,* the plaintiff, a Canadian Mohawk, challenged his deportation under the 1924 Immigration Act, citing the Jay Treaty’s guarantees. 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. In language that emphasized the Court’s holding, the Court stated:

> [T]he rights of 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.

This right of free passage for indigenous peoples on the northern border was then codified in changes to the Immigration and Nationality Act. However, later amendments to this act further restricted free passage rights. The 1952 act, perhaps reflecting the assimilation and termination era of the time, restricted free passage to those Indians who met a 50 percent blood quantum requirement. This has gradually been changed, perhaps as a result of the era of self-governance, to now allow free passage to any Indian who possesses a tribal membership identification card.

The treaties that exist between Canada and the United States, with regard to the border crossing rights of affected indigenous, have been tested far more often than those treaties that exist between the governments of Mexico and the United States. While the issues for the U.S.-Mexico border may appear to be less complex, that is an illusion. There is only one treaty, with the Kickapoo Tribe of Texas, that deals with the right of passage for the U.S.-Mexico border. The rest of the border area and the indigenous nations of this region are without any guidelines set forth in treaties or legislation. The result is chaos, a
patchwork of executive and administrative agreements, and failed legislation that is difficult to understand or resolve.

The Southern Border

In the southern border area, traditional indigenous homelands became subject to Spanish colonialism, then in 1821, as a result of Mexico’s independence, they came under the authority of the Mexican government. Although the traditional homelands were recognized, the indigenous peoples were considered citizens of Mexico. No tribal sovereignty was considered or honored. Most of the homelands in Sonora and Chihuahua were then lost, largely through the policy that Mexican citizens were required to apply for land grants. The indigenous, 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 in 1848 split part of the lands off from Mexico. It required that the United States honor the land grants extended by the Mexican government and covered the lands of the Rio Grande, from the Gulf of Mexico to the Pacific. The long-settled Pueblos of New Mexico had received land grant homelands. However, no land grants were created for the Yuman, Apache, O’odham, Kumeyaay, or other indigenous peoples of the region who did not live in villages. The new border split the traditional homelands of these indigenous peoples, and they were left without any right of free passage.

Main Types of Conflict and Attempts at Resolution

While the histories of the northern and southern borders are distinct, indigenous peoples experienced problems in common: economic, cultural, and demographic. These problems are the result of the impact of colonialism/imperialism on peoples and culture, their historic resettlement patterns, migration patterns, individual lives, and on the individual and cultural responses to colonialism. The indigenous communities were seriously affected by the creation of international borders. Dislocation, encroachment on the land, loss of traditional homesteads, inability to control and traverse over traditional lands, colonization, loss of mobility and traditional contacts became the norm. Conflict between indigenous and colonial governments became entrenched. Over time, as many Indian peoples began to think of themselves as Canadian, Mexican, or American first and indigenous second, the traditional relationships among relatives eroded, and distinctions were perceived.

The individual experiences that some groups of indigenous peoples faced illuminate the situation for most, if not all, of the peoples of
the border regions. The nations chosen for this article are ones that have been politically or legally involved in this issue and have undertaken direct action and/or legal and legislative attempts at resolution.

**The Blackfeet, Blood, Sissika, and Piegan Nations**

Members of the Blackfeet Confederacy were split by the creation of the U.S.-Canada border. Six bands were on the Canadian side and only one within the boundaries of the United States. While there were few problems with regard to retaining the right to cross the border at will, most obstacles relate to the import and export of certain tariff-free goods, native traditions, and religious ceremonies. Blackfeet ceremonies are commonly conducted with participants from all bands from both sides of the border and require the use of special ritual paraphernalia. According to their tradition, only men are allowed to touch the sacred bundles used in the ceremonies. When ceremonial bundles are carried across the border, this tradition has sometimes been violated 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.14 To date, this effort has been unsuccessful. The efforts have also included a call by confederacy leaders from both sides of the border for an Indian-only border crossing between Alberta and Montana.15 These initiatives are ongoing at this time.

**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 cases that they moved into Canada subsequent to the Jay Treaty. The Canadian government has thus contended 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 taken direct action by crossing their traditional lands at will and disregarding the imposed borderline. They have taken the position that the Mohawk Nation is sovereign and undivided. Since 1815, they have asserted that the border is largely irrelevant, a notion that was not functionally opposed nor directly challenged by the nation-states.

Prior to the militarization of the U.S. border in the 1990s, citizens of the Mohawk Nation had full access to all Mohawk land whether those lands were within the territories of Canada or the United States. The Oka crisis in March 1990 inflamed a situation that was already
The U.S. 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 to date and is as yet unresolved.

The Mohawks have also asserted their rights under the Jay Treaty to take personal goods across the border without payment of customs duties. They have engaged in the transportation of cigarettes for sale, without payment of tax, and in the transportation of immigrants in noncompliance with the immigration laws of the United States. This upping of the economic ante by the Mohawk 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.

The Tohono O’odham

In 1848, subsequent to the U.S. war with Mexico, the Treaty of Guadalupe-Hidalgo was signed. This treaty ceded the land south of the Gila River to Mexico, thus locating all O’odham land in Mexico. This became a problem for the United States when it decided that a southern rail route to California was needed. As a result, in 1853 the United States purchased almost 30,000 acres in Mexico. The Gadsden Purchase included approximately half of the Tohono O’odham traditional homelands. The rest remained in Sonora, Mexico. This division of the O’odham lands resulted in a border area that is longer than that of the state of New Mexico and Chihuahua.

The effect was devastating for Mexican O’odham people and their culture. Contacts between families were severed and the political history and government structure diverged sharply. 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.

In order to rectify this situation, the Tohono O’odham adopted and enrolled the Mexican members in the tribe. The Mexican O’odham vote in tribal elections and receive services provided in the U.S. O’odham health clinic. The O’odham maintain an unofficial border crossing on tribal lands that, while known to U.S. Customs, is not regulated by the U.S. government.

The Cocopah

The culture, history, and traditions of the Cocopah are inextricably linked to the Colorado River. They were a seminomadic people who farmed in the floodplain of the river, with villages extending into what are now California, Arizona, Sonora, and Baja California. Those Cocopah who found themselves on the northern side of the U.S.-
Mexico border were able to retain their lands, while those on the southern side lost control of their lands and were forced to live within the encomienda system.

Cocopah communities and clans were first split by the Gadsden Purchase, with the majority in Mexico and a small group in the United States. The border originally meant little, and the Cocopah moved freely along the river. However, in the late 1930s, the INS cracked down on this free passage and effectively split the people into two nationalities. After the crackdown, the Cocopah developed an unofficial agreement with the INS that allowed for freedom of passage of Mexican Cocopah into the United States.

The Cocopah were impacted by heightened border crossing controls earlier than other border tribes, possibly because their land is adjacent to a primary river-crossing area. Control of the water of the Colorado was crucial for the United States, particularly during the 1930s when there was rampant agricultural and residential development of Southern California. Thus, due to the accident of geographical location, the Cocopah were seriously affected at a much earlier date than other indigenous nations along the borders.

The Yaqui

Due to historic migration patterns, some tribes experience border crossing problems even if the border did not split their traditional lands. The Yaqui, or Yoeme, were one such affected people.

The Yaqui were originally centered in the Yaqui River valley near Guaymas in Sonora with a culture that focused on agriculture. The Yaqui were traders and traveled throughout northern Sonora and southern Arizona. After contact the Yaqui entered into an alliance with the Spanish Jesuits and soldiers against the Apache. This alliance did not ease the relationship between the Yaqui and the new state of Mexico, however. During the late 1800s Mexican expansion forced the relocation of many bands of Yaqui and scattered the people across Mexico and into the United States. Others were pushed into the mountains where they waged a guerrilla war against hacienda families and the Mexican military. Some Yaqui relocated to Arizona, settling in and around Tucson and Phoenix. Cultural and religious ties between the villages and bands on both sides of the border continued, however, even in the face of great difficulty.

The ability to conduct ceremonies is essential for the lands to truly become and remain a homeland. For some ceremonies to be held, it is necessary for participants to travel from one nation-state to the other. The increased militarization of the southern border of the United States has resulted in travel restrictions and cultural and religious disruption.
The Kickapoo

The Kickapoo originated in the Great Lakes region and moved from place to place as a result of broken land treaties and a desire to resist the forces of colonization. Some Kickapoo were forced to live in Kansas and Oklahoma, while others fled to Mexico in the 1800s.

In 1832 U.S. Army officials granted tribal members in Mexico the “right of safe conduct” to cross the border into the United States. An 1850 land agreement between the Mexican government and the Kickapoo south of the border granted tribal members the same rights as Mexican citizens and a small reservation in Coahuila. This arrangement has continued to this day. Legislation during the 1990s guaranteed rights of passage for Mexican Kickapoo.²⁰

During the 1940s the Mexican Kickapoo were forced to relocate again. Due to a protracted drought and rapid industrialization in the area of their reservation, Mexican Kickapoos began to work in the United States as migrant laborers. Their right to cross the border encouraged their hire through the Bracero program. Many worked in the agricultural fields of the United States during the harvest season and returned home to their reservation during the winter.

The Kumeyaay

The Kumeyaay reside in scattered villages in Baja California and in rancherias and reservations in Southern California. The Kumeyaay traditionally were coastal people, living along the Pacific Ocean. They were ultimately forced inland into eastern San Diego County and further into Mexico.

Until 1993 Kumeyaay routinely crossed from their homes in Baja California into San Diego County, using inexpensive border crossing cards that they obtained from the Instituto Nacional Indigenista (INI), the Mexican counterpart of the Bureau of Indian Affairs (BIA). Unfortunately, the U.S. Border Patrol apprehended non-Kumeyaay using these passes and subsequently refused to accept them, forcing Kumeyaay to obtain Mexican passports for border crossing. The cost of the passports, and the inability of many Kumeyaay to provide the necessary documentation to obtain them, has resulted in a severe restriction of the ability of the Kumeyaay to cross the border.

THE INDIVIDUAL APPROACH TO BORDER CROSSING

In their attempts to continue or reestablish the traditional religious, cultural, and social connections with their relatives across the borders
of the nation-states, indigenous individuals have faced a number of obstacles. In turn, they have established several means to overcome the nation-state-imposed barriers. Over the years, many indigenous peoples have simply ignored the legalisms of border crossing. Informal crossing gates were opened on tribal land and were generally used by indigenous peoples for tribal purposes. However, the recent increased militarization of the border region by the INS, Border Patrol, and U.S. Customs agents cracking down on undocumented aliens and the drug trade has closed many traditional crossing areas. Along the southern border of the United States, many agents are unaware of the inhabitants’ ancient migratory ways and customary rights. They have disrupted long-held understandings of the right of mobility throughout traditional indigenous homelands.21

Southwest tribal governments have become concerned about the effects related to this increased border militarization, including stopping, searching, and in some cases the forced return to Mexico of tribal members. In San Diego County, for example, U.S. Border Patrol agents have subjected the Kumeyaay to repeated stops and detentions. This is unacceptable and has resulted in discriminatory behavior. As Mike Connolly, Campo Reservation director of environmental programs stated, “This is our land, and we’ve been here for thousands of years. It’s tough when you’re being stopped all the time and asked if you really belong there.”22 Tribes have also been concerned about degradation of tribal land by federal officials, cutting of roads into sensitive and/or sacred lands, and high-speed pursuits over tribal roads, some of which are unpaved, activities that endanger tribal members and livestock.

Indigenous organizations, including the Indian Defense League of America, have taken a confrontational approach to border agents’ activities. Members of this organization have, for seventy-one years, organized annual protests along the U.S.-Canada border. Tribal members from the Iroquois Confederacy engage in direct action, making commemorative crossings of the international border at various sites.23

Tribal governments have attempted to resolve these issues through meetings and conciliations, which to date have not shown much success. Federal officials have not indicated full support of tribal sovereignty, particularly if it would require seriously addressing tribal concerns. Federal officials have generally responded to the concerns as if they were being communicated by a local government rather than by a sovereign nation. This denies each nation their rights to conduct international relations. Meanwhile Indian peoples on both sides of both U.S. borders have had their routine contacts and social interactions restricted, and border crossing for tribal ceremonies, funerals, and other gatherings have been made much more difficult.
Congressional approaches to resolution of the issues facing the tribes on the southwest border have been spotty at best. The success of the legislative approach depends on the willingness of the federal governments to seriously address the problem, the willingness of the individual tribes to pursue a legislative strategy, and the cooperation of governmental agencies to abide by agreements. For some tribes, the legislative approach has worked well. Legal rights have been established and protected. 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.

**Legislation Related to the Texas Band of Kickapoo**

The legislative strategy has served the Kickapoo well. During the 1950s the INS granted parole status to the Kickapoo, pursuant to the Immigration and Nationality Act of 1952. Parole status allowed tribal members to cross the border freely with tribal identification cards; however, the cards had to be renewed every year and did not grant them permanent rights to cross the border.

In 1983, the Texas Band of Kickapoo Act was passed, which mandated that tribal membership cards would be sufficient for border passage. It further included that the tribe would be a party to the decision about identification requirements. A tribal roll was established, and members on the roll had five years to apply for U.S. citizenship. Once citizenship was granted, a permanent border crossing card was issued. The Kickapoo who were not U.S. citizens received all citizenship rights other than the right to vote and to hold public office.

The act clarified citizenship for members of the band. However, it did not alter their land status or other rights in Mexico. The act makes band members eligible for Indian services and programs, and provides for consent and cooperation with Mexican officials to ensure the provision of appropriate services for the band. The Texas Band of Kickapoo and a separate Kickapoo tribe are now seeking to expand the rights provided for in the act to tribal members who live in the United States but travel to Mexico each winter for traditional ceremonies.

**Legislative Approaches of the Tohono O’odham**

The Tohono O’odham Nation has pursued legislation for a number of years. In 1987 a bill was introduced by Morris Udall (D. Arizona) to clarify the right of free passage for members of the Tohono O’odham
The bill provided for the establishment of a tribal roll, and it would have empowered all those on the roll 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, however. They wanted border crossing privileges extended only to U.S.-residing tribal members and a restriction of the services that 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. For the O’odham this was absolutely unacceptable.

While the crossing at official federal crossing points had not been a problem for the Kickapoo, for the O’odham it was an attack on who they were as a people and as a sovereign nation. The Kickapoo had been in the border area for approximately 150 years, a relatively short time for indigenous inhabitants. The requirement that they pass through at an official crossing was not a cultural or traditional assault. On the other hand, the O’odham had been in the area since time immemorial. They had ancient migratory routes and settlement sites that were still important culturally. The tribe was unwilling to give up these traditional crossing places on tribal land. When this could not be resolved, the tribe requested that the sponsor of the bill pull it from consideration. This assertion of tribal sovereignty and commitment to tradition has become a signpost of the struggle for the O’odham.

In 1998, the Tohono O’odham pursued legislative relief for a second time. The bill, sponsored by Ed Pastor, 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, 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. This bill also suggested an amendment to Title 8 U.S.C. Sec. 1359, adding indigenous peoples on the southern border to those on the northern border who have the legal right to free passage subsequent to the Jay Treaty.

This bill did not become law. The Mexican and U.S. governments failed to support it due to concerns regarding the traditional ports of entry. The Tohono O’odham also had misgivings, particularly related to the treatment of nation members as immigrant aliens if their residence was in Mexico. These and other concerns caused interest to lapse, resulting in the decision of Congressman Pastor not to pursue this legislative bill further.

The Tohono O’odham Nation has written and Congress is now considering the proposal of a new piece of legislation that will not raise
the same issues of concern as the last. This bill would amend Chapter 2 of Title III of the Immigration and Nationality Act (8 U.S.C. 1421 et seq.) to read:

To 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 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.

Sec. 2. Naturalization for Tohono O’odham

Sec. 323(a) Granting of Citizenship. A person who is listed on the official membership roll of the Tohono O’odham Nation, a federally recognized American Indian Nation located in Arizona, is a citizen of the United States as of the date on which such listing occurs.

Sec. 3. treatment of Tribal Membership Credentials. Notwithstanding any other provision of law, the valid membership credential issued to a person who is listed on the official membership roll of the Tohono O’odham Nation pursuant to the laws of the Tohono O’odham Nation shall be considered, for all purposes subject to federal law, equivalent to

(1) A certificate of citizenship issued under Section 341(a) of the Immigration and Nationality Act (8 U.S.C. 1452(a)) to persons who satisfy the requirements of such section; and

(2) A state-issued birth certificate.

The language of this proposed bill explicitly recognizes the inherent sovereignty of the Tohono O’odham and the members of the nation as citizens of the nation. It further establishes that the documents of the nation are all that is necessary for recognition. The bill implicitly pushes back against the incursions of state law into Indian Country, as state-issued documents (such as a birth certificate issued by the state of Arizona) would no longer be required. This would greatly alleviate the problem for many Tohono O’odham, who were born at home during the early years of the twentieth century and do not possess Arizona birth certificates.

THE NEGOTIATION APPROACH

Efforts have been made by indigenous peoples to resolve border crossing issues through the process of negotiations. Like legislative efforts, these efforts have met with varying levels of success.
In addition to the new legislative proposal, the Tohono O’odham Nation has initiated a different approach, which 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 United States that has full enrollment for its members in Mexico. 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.31

Through negotiations, the U.S. and Mexican government 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. Citizens of the nation who should be given priority for border crossing rights due to chronic medical conditions that required 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. By August of 1999, the U.S. Immigration and Naturalization Service had approved 88 of them for American laser visas. The U.S. and Mexican agencies have also agreed to provide visas for the rest of the nation’s members residing in Mexico, approximately 1,238 people. 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.

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. If this should be approved, the O’odham would become the only people in the United States or Mexico who have to do so.

The Yaqui have made efforts to resolve border crossing issues for their people living in Rio Yaqui, in Sonora, Mexico. The pueblos of the Yaqui Nation of the United States routinely hold religious ceremonies to which ceremonial leaders and participants from Mexico are invited. In many instances, these Yaqui are essential to the ceremonies. While some ceremonial leaders and participants from Mexico occasionally have been allowed to cross, often they have been refused. The right to cross the border and to carry ceremonial objects has sometimes
depended on whether the individual INS officer, or the supervisor on duty, was familiar with the Yaqui and the ceremonial occasion. While the cost for Mexican passports and the inability to produce requisite documents to establish residency and employment are impediments to many Mexican indigenous, the Yaqui face an additional stumbling block. Due to their traditions and their religion, the young men of the Yaqui do not register for the Mexican military. Such registration is required for men under the age of 40 in order to obtain a Mexican passport. These men are thus precluded from crossing the border to participate in ceremonies in the United States. 

In 1997 the Yaqui negotiated an agreement with the INS Regional Administration in Arizona. This agreement allowed the Yaqui ceremonial leaders in the United States to identify persons who were invited to the ceremonies and to sponsor their admission into the United States. A letter of sponsorship was sent to INS on a yearly basis, and the right to cross the border was approved.

Although this agreement has been in place for four years, it has not been universally successful. The right of Mexican Yaqui to cross the U.S.-Mexico border still depends on individual INS officials at the regional and border gate level and, unfortunately, the mood that they are in on any particular day.

**Efforts of the Kumeyaay**

The Kumeyaay have begun to work with Mexican and U.S. officials to provide Mexican passports and U.S. border crossing cards for Mexican Kumeyaay. In this effort the Kumeyaay have followed the approach taken by the Tohono O’odham. The U.S. Kumeyaay began conducting a census in the seven Mexican Kumeyaay communities. This census will serve as the basis for verifying the status of Mexican Kumeyaay as tribal members of the U.S. Kumeyaay Nation. Once citizenship in the Kumeyaay Nation is established, the nation will provide the requisite formal identification of Kumeyaay who seek travel papers into the United States.

**THE LITIGATION APPROACH**

Cases have been brought by indigenous nations and tribal members to seek 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. A recent case 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. This has changed somewhat, and now the right to transport goods duty-free has been restricted by statute and case law.

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 since 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.

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 treaties. The plaintiff, Mike Mitchell, asserted that the treaties guaranteed Mohawks duty-free access across the Canada-U.S. border. The Canadian government argued that the Mohawks were immigrants to Canada in 1755 and thus could not claim aboriginal rights in Canada 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.

The courts of the United States have made similar interpretations of the rights contained in the Jay Treaty. Duties have been attached to Indian-made baskets being brought from Canada into the United States, where the court held that the right to import depends on statutory authority, not the Jay Treaty. In 1977, the U.S. Court confirmed in Akins v. United States that a duty applied to goods that were brought into the United States for personal use and not for resale. However, this case let stand a previous ruling by the U.S. District Court of Maine that Indians had the right to pass the border without undue restriction or restraint.

Very recently the right of Canadian Indians to work in the United States was supported by the Arizona courts. In this instance, a Canadian Mohawk had been hired by the Tohono O’odham police department as a police officer. The Arizona Peace Officer Standards and Training (POST) board, which certifies officers, declared that he was not eligible to be a state-certified peace officer because he had not been 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,” the Arizona POST board decided to honor its provisions and granted state certification to this officer.
The United Nations

Article 27 of the International Covenant on Civil and Political Rights affirms the right of persons belonging to “ethnic, linguistic or religious minorities . . . to enjoy their own culture, to profess and practice their own religion [and] to use their own language.” 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.

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. 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.

The UN 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.

The proposed American Declaration on the Rights of Indigenous Peoples, adopted on June 5, 1997, at the seventh plenary session of the Inter-American Commission on Human Rights of the Organization of American States, specifically sets forth the following:

Article XVIII. Traditional forms of ownership and cultural survival. Rights to land, territories and resources . . .

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

International Indigenous Collaboration

The national indigenous organizations of Canada and the United States have 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. Certain demands were set forth, including:

1. The right of Indian nations to identify their own nationals
2. The right to be in, travel in, work in, reside in, use the territory of their nations
3. The right to transport their possessions with them and to trade freely with other Indian people
4. The right to receive services in each country on the same basis as other people of their nations

The policy statement contained 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 each country and including 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" 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 in regard to 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 border." This is precisely what began to publicly emerge in the resolve of many cross-border native peoples.

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, a joint meeting between Canada's Assembly of First Nations (AFN) and the U.S. National Congress of American Indians (NCAI) was held in July 1999. Indigenous representatives from Mexico (and indeed, throughout the world) attended the meeting, giving new hope for a concerted effort to resolve 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 Indigena 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, Kumeyaay, and Gila River Pima/Maricopa peoples from both sides of the border. It emphasizes the development and maintenance of cultural, religious, and personal ties among indigenous peoples, as well as organizing and supporting the approaches to resolution undertaken by their members.

Statements made by indigenous leaders have been striking in their assertion of traditional passage rights. As 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.” 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.” 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,” and further by H. Ron Allen, president of NCAI, when he stated, “We are crossing over this international border that we do not know and do not recognize.”

**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.

The traditional approach, while expedient and supportable by many who dislike the necessity of treating 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. 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.

The litigation approach relies on the decision of the courts of the colonizer, something that is of concern to many indigenous, who contend that the assertion of their traditional rights do not belong in such a forum. Taking cases and issues to court may have favorable results. 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 and case law may be set for a significant period of time.

The legislative approach can be highly effective. As indigenous nations become more active and effective politically, this approach
may have a high likelihood of success. 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. 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.

A further issue is that, given the inherent sovereignty of indigenous nations, they have tended to proceed independently in their attempts at resolution of border crossing issues. Different approaches have been undertaken, with varying measures of success. Little collaboration has occurred among affected indigenous nations. 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 is an initial step toward effective action. 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 are, to date, not coordinated.

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 by the indigenous nations of this continent, through their empowered organizations, 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 the resolution of border crossing issues, but also perhaps to the maintenance and protection of other rights long ignored or forgotten.

NOTES

2 8 Stat. 116 (1794).
3 8 Stat. 218 (1814).
5 See, for example, Karnuth v. United States ex rel. Albro, 279 US 231 (1929), wherein the court held
that the rights provided under the Jay Treaty were “promissory and prospective.” The court later ruled in McCandless v. United States ex rel. Diabo, 25 F.2d 71, 73 (3d Cr. 1928), that the right to free passage of the border was retained by those Indians who were enrolled in a federally recognized tribe, but not for Indians as a “racial” category.


10 Ibid. at 283.


17 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, editorial sec., 16.


20 Ibid.


26 Ellingwood, “Tribes Are Caught on the Border.”


28 Ellingwood, “Tribes Are Caught on the Border.”


Ibid.


See, for example, Louis Francis and Her Majesty the Queen, S.C.R. 618; 3 D.L.R. 2d 641 (Canada 1956).


Ellingwood, “Tribes Are Caught on the Border.”


