

Indian Law Resource Center

Indigenous Peoples' Rights

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Public Facing Advocacy Writing

*Commentary by Karla E. General**

The United Nations Declaration on the Rights of Indigenous Peoples presents a unique and timely opportunity for Native nations to redefine or reaffirm their relationships with the United States. Though the federal government ended treaty-making with Native nations in 1871, this should not limit how Native nations relate to the federal government today. The UN Declaration with its extensive statement of indigenous rights -- is a tool that can be used to facilitate a new era of indigenous-State relations, one that includes upholding treaty obligations, fulfilling promises, and creating new legally enforceable government-to-government agreements.

Simply put, a treaty is an agreement between two nations or sovereigns. Article 37 of the UN Declaration explicitly recognizes the right of indigenous peoples to have their treaties, agreements, and other constructive arrangements with States recognized, observed, and enforced. The United States, initially contemplating Native nations as preconstitutional and extraconstitutional international sovereigns, ratified 370 treaties and entered into 45 more with Native nations between 1778 and 1871. Treaties served as the moral and legal compass that was to guide the interactions between the United States and Native nations.



Since the treaty-making period, however, the United States and Native nations have developed very different views of what treaties mean in practice. In 1870, the United States Supreme Court ruled in *The Cherokee Tobacco* case that an act of Congress can supersede treaty provisions. One year later, Congress formally ended treaty-making with Native nations. Since then, the United States has furiously chipped away treaty rights and treaties themselves, turning sacred promises into hollow words. In its 1903 *Lone Wolf v. Hitchcock* decision, the United States Supreme Court even went so far as to hold that Congress has the power to allot a tribes land in violation of a treaty. This interpretation and narrowing of treaty rights clearly conflicts with the international treatment of treaty rights, especially as envisioned in the UN Declaration and the Vienna Convention on the Law of Treaties.

Generally, Native nations that have made treaties view their treaties as the foundation of their relationship with the United States, a nation-to-nation relationship based on mutual respect, equality, and diplomacy. For example, one of the earliest recorded treaties between a Native nation and European nation, the Kaswentah (two row) treaty, made between the Haudenosaunee (People of the Longhouse, or Six Nations) and the Dutch in 1613, acknowledges the two parties as equals who will not interfere with the internal affairs of the other. The United States, as successor to the Dutch and Great Britain, must assume the obligations of the Kaswentah treaty with the Haudenosaunee.

Although the United States made various political and legal commitments to Native nations through treaty-making, Native nations are, unfortunately, no strangers to violations of their treaty rights. Many Native nations continue to battle against encroachments on treaty-guaranteed lands and restrictions on or even complete negation of their treaty-protected hunting and fishing rights both on and off the reservation.

For the 40 Native nations near international borders, restrictions on traveling within their own recognized homelands may implicate treaty rights. Today, at the Akwesasne Mohawk Territory, Akwesasronon (People of Akwesasne) are severely restricted from traveling freely throughout their homeland. The Akwesasne Mohawk Territory predates the formation of the United States and Canada, and, as a result, has been encroached upon by international, state, provincial, and county borders. The movement of Akwesasronon is seriously restricted even though the Jay Treaty of 1794, a treaty signed by the United States and Great Britain, provides that indigenous peoples are guaranteed the right to freely travel across the United States-Canada border. Akwesasronon are faced with exceedingly long wait times at the border, the risk of having vehicles seized for failure to report to Customs, encroachment upon their lands by federal officials, and the seizure of identification documents because they do not conform to new federal requirements. Under the federal requirements, tribes can use an Enhanced Tribal Card as identification so long as it is approved by the Department of Homeland Security; six tribes now have a signed agreement in place for the use of an Enhanced Tribal Card, and six more are awaiting approval. However, the new identification cards require indigenous individuals to declare American or Canadian citizenship which has not been, up until now, a requirement Akwesasronon have had to meet.

The UN Declaration recognizes a number of rights which may be violated by the travel restrictions at Akwesasne, as well as at other Native nations located on the international borders. In the Preamble, the Declaration affirms not only the right of indigenous peoples to equality, but also the right to be different and to be respected as such. The ability of a Native nation to freely determine its political status, not as Americans or Canadians, but as Kanienkehaka (People of the Flint, or Mohawk) or as some other indigenous nation, is recognized in Article 3 of the Declaration (Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status). Article 36(1) recognizes the right of indigenous peoples to maintain relationships across borders, including activities for spiritual, cultural, political, economic, and social purposes, and Article 36(2) provides that States have an obligation to ensure

implementation of the right.

What does this mean for Native nations seeking to exercise treaty rights and to freely move throughout their territories? Though the United States will no longer enter into treaties with Native nations, Native nations can at least work to ensure respect for and enforcement of existing treaty obligations and can try to establish new agreements and ways of working together and moving forward to preserve their existence as indigenous nations. Native nations can work with the United States to renew treaties in light of the UN Declaration through the development of legally enforceable government-to-government agreements. Now is the time for UN Declaration implementation, and it is up to Native nations to call upon the United States to honor existing treaty rights, fulfill promises made, and enter into agreements and other constructive arrangements to move us forward together, as originally envisioned in the Kaswentah treaty 400 years ago.



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