U.S. Law as a Tool of Forced Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain

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U.S. LAW AS A TOOL OF FORCED SOCIAL CHANGE: A CONTEXTUAL EXAMINATION OF THE HUMAN RIGHTS VIOLATIONS BY THE UNITED STATES GOVERNMENT AGAINST NATIVE AMERICANS AT BIG MOUNTAIN

Todd Howland*

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I. INTRODUCTION

“Big Mountain” is the popular name given to the controversy arising out of the passage of Pub. L. No. 93-531, which mandates the removal of Native Americans, specifically the Hopi and the Navajo, from a portion of their traditional homeland.¹ For nearly a century, the Hopi and Navajo have jointly occupied a portion of the 1882 Executive Order Reservation known as the Joint Use Area (JUA). The JUA is believed to have the largest and most accessible deposits of low sulphur coal in North America.² Development of the JUA, however, is not popular among the majority of Hopi and

* The author would especially like to thank Ward Churchill from the International Indian Treaty Council for his encouragement and helpful suggestions on earlier drafts. The author is also indebted to Sandy Schwayer, Ved P. Nanda, Richard Clemmer-Smith, Lucy Hawley, Paul Bloom, William Crazy-Horse Coppola, Rich Garcia, Judith Rhedin, and others who contributed to the University of Denver Human Rights Clinic Big Mountain project, and facilitated the completion of this article.

Navajo. Within each tribe there is an internal conflict of cultural values between the traditionals and the non-traditionals. The traditionals are those Indians who have maintained traditional cultural values, notably their religious bond with the land. The non-traditionals are those tribe members who have assimilated into contemporary society and are generally pro-development. The non-traditionals, however, control the tribal councils, the official Indian government recognized by the U.S. government. Generally, the tribal councils are not supported by the traditionals, and therefore are not representative of the tribe as a whole. Thus, the land dispute which created the perceived need for Pub. L. No. 93-531 does not involve a conflict between the Hopi and Navajo tribes. Instead, the dispute involves a conflict between the pro-development Hopi Tribal Council and the traditional Hopi and Navajo because development of the JUA is contrary to the traditionals' spiritual or religious beliefs.

Pub. L. No. 93-531 mandates a relocation of Hopi and Navajo living in the JUA to result in an equal division of the JUA creating a Hopi sector and a Navajo sector. The burdens of a division of the JUA fall disproportionately on the Navajo because the Navajo continue to live in their traditional ways dispersed throughout the JUA. The majority of traditional and non-traditional Hopi continue to live in the Hopi pueblo villages which are not affected by the relocation. Only a minority of Hopi who have adopted non-traditional ways and moved out of the pueblos will benefit from Pub. L. No. 93-531. Most importantly, the final effect of the relocation will be to free for development the energy rich land once shared by the Hopi and Navajo.

Essentially, the impetus for the passage of Pub. L. No. 93-531 was a wholly fictitious event, dubbed the "Hopi-Navajo Range War." The "war" was the creation of an advertising agency hired by the Hopi Tribal Council to secure passage of a bill that would divide the JUA. Obviously the goal of the "war" was for the U.S. government to infer

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3 For additional discussion see infra notes 36-39 and accompanying text.
4 Many of the Hopi non-traditionals have adopted the Mormon faith. R. CLEMMER-SMITH, CONTINUITIES OF HOPI CULTURAL CHANGE 7 (1978).
5 For additional discussion see infra notes 41-48 and accompanying text.
6 Development is not a new concept to either the Hopi or Navajo Tribal Councils. The only functioning coal facility in the Black Mesa Region was the product of a 1966 agreement primarily developed by attorney John Boyden and his clients, the Hopi Tribal Council and the Peabody Coal Co., of which the Mormon Church is a large stockholder. KAMMER, supra note 2 at 78, 79. See also Churchill, Naivas: No Home on the Range, 21 THE OTHER SIDE 22, 25 (Jan./Feb. 1985). Similarly, the Navajos joined the Kayenta coal lease in 1967, one year after the Hopi Tribal Council had reached an agreement with Peabody Coal Co. KAMMER, supra note 2, at 78.
7 See infra notes 65-67 and accompanying text.
8 A.D. Brugge, Navajo Prehistory and History to 1850, in 10 HAND BOOK OF NORTH AMERICAN INDIANS 489, 490 (A. Ortiz ed. 1983). The JUA is the part of the 1882 Hopi reservation set aside for both Hopi and Navajo use.
9 The major interests supporting the passage of Pub. L. No. 93-531 become clear when the "Hopi" side of the JUA is considered: 1) The Hopi Tribal Council will profit from the development of the JUA; 2) John Boyden, a Bishop in the Mormon Church, will benefit himself and his church through the profits of the Peabody Coal Co.; and 3) Dana Evans and Assoc., an advertising agency which represented WESCO, a consortium of 23 energy companies interested in developing the Black Mesa Region, will also profit. KAMMER, supra note 2, at 162, 122, 136. See also Churchill, Resisting Relocation - Hopis Fight to Keep Their Land, 112 DOLLARS AND SENSE 14 (Dec. 1985). For an extensive discussion on how the energy link fits into the traditional's survival at Big Mountain, see Sills, Relocation Reconsidered: Competing Explanation of the Navajo-Hopi Land Settlement Act of 1947, 14(3) J. ETHNIC STUD. 53 (1986).
10 KAMMER, supra note 2, at 89 (1980). The "Range War" was the product of Dana Evans and
an inter-tribal battle which necessitated segregating the Hopi and Navajo within the JUA in order to end the range war. The true purpose behind the "war" was to enact legislation that would clear title to the land and grant the right to remove the people residing there in order to free the land for development.11 In reality, no dispute existed between the Hopi and Navajo that could have rationalized the passage of Pub. L. No. 93-531.12 Yet the press continues to report the situation as a land dispute between the two tribes.13 This is misleading and only serves to obscure the complex issues.14

However the underlying issue is framed, Pub. L. No. 93-531 will result in the largest removal of an ethnic group from their homes since the Japanese-American incarceration during World War II,15 and the largest removal of Native Americans since the "Long Walk."16 Two factors make the situation at Big Mountain unique. First, while the removal of Native Americans from their traditional homeland is unfortunately not an historical anomaly, forced relocation has not been a part of official U.S. policy for nearly a century.17 Second, the Big Mountain relocation is occurring after the emergence of Native American activism and the reemergence of the concept of tribal sovereignty.18

Assoc., a Salt Lake City advertising agency under the direction of the Hopi Tribal Council and Abbott Sekaquaptewa, a leader of the non-traditional Indians in control of the Hopi Tribal Council at that time.

11 For additional discussion on the effect of the Navajo-Hopi Range War, see Mander, Kit Carson in a Three-Piece Suit, 32 CO- EVOLUTION Q. 52 (Wtr 1981).

12 Id.

13 See, Rocky Mtn. News, June 16, 1986, at 20, col. 1; Denver Post, Jan. 4, 1987, at 6E, col. 1. A notable exception to the typical coverage is the work of John Farrell on the human rights violations against Native Americans reported in an eight-part series, which discusses the Big Mountain situation in a human rights context. See, Denver Post, Nov. 20–27, 1983 at Emp. 11, col. 2; at B1, col. 1; at A1, col. 1; at A1, col. 1; at A1, col. 1; at A1, col. 1; at A1, col. 4; at Emp. 11, col. 2.

14 Coverage of the common purpose and cooperation between traditionalists of the tribes has been limited to the specialized press. For example, see The Guardian, June 18, 1986, at 9, col. 2, for a report that traditionalists of both tribes will be holding a "hands across the fence" action on July 7, 1986 to show their solidarity in opposition to Pub. L. No. 93-531.


16 In 1853, the U.S. Army lead by Kit Carson rounded up over 8,000 Navajos and marched them to a concentration camp in northern New Mexico. Many Navajos died during the march and during their incarceration. See Matthiessen, Battle for Big Mountain, 2 GEO. 9, 23 (March 1980). The exact number of Native Americans that will be forced to relocate under Pub. L. No. 93-531 is uncertain. The federal government claims that 9,525 Navajos and 109 Hopis will be forced to relocate. See Navajo-Hopi Indian Relocation Commission (NHIRC), 1981 Rep. and Plan 3 (April 1981). However, an attorney working with the Big Mountain Legal Offense/Defense Committee estimates the number of affected Native Americans at 12,000–15,000. Phillips, Last Stand at Big Mountain, 9 GUILD NOTES 6 (1985).

17 Previous forced relocations of this magnitude occurred in the 19th century (e.g. the trail of tears and the long walk). See generally C.E. TRAFZER, THE KIT CARSON CAMPAIGN: THE LAST GREAT NAVAJO WAR (1980).

18 The American Indian Movement and its affiliate groups have raised the consciousness of the tribes and the world community to the level where the idea of tribal sovereignty is regaining acceptance in the Indian and international communities. See V. DELORIA & C. LYTLE, THE NATIONS WITHIN, THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984).
This article presents an overview of the international human rights implications of the Big Mountain relocation. This article will discuss the status of the American Indian in international and domestic law through an analysis of the Big Mountain situation. In addition to the analysis of human rights violations, this article will evaluate the courses of action which are available to redress the human rights violations, and the likelihood of their success. The article concludes with suggested policy changes.

II. THE BIG MOUNTAIN DISPUTE

A. A Historical and Social Perspective

The Hopi and Navajo have inhabited what is now the southwestern United States for centuries. The first contact the tribes had with foreigners was with the Spanish missionaries and settlers. From that time, the culture and way of life of the Native Americans has been influenced by European values. Most Europeans believed that their values were the civilized ways; that it would be best for them to show the savages the way to civilization by forcing their way of life on the Indians. Old Tassel, the famous Cherokee leader of the eighteenth century, remarked on the continuous demand by the settlers that the Cherokees accept the European civilization as their own:

Much has been said of the want of what you term "civilization" among the Indians. Many proposals have been made to us to adopt your laws, your religion, your manner and your customs. We do not see the propriety of such a reformation. We should be better pleased with beholding the good effects of these doctrines in your own practices than with hearing you talk about them . . .

The Hopi and the Navajo rejected foreign values and resisted Western culture in different ways. The Hopi resistance was peaceful non-cooperation. The Navajo fought back, and were brutally brought into submission by military force. What the settlers could not understand, and what many Americans have yet to understand, is that the

20 The Hopis are descendants of the Anasazi who inhabited the Southwest from about 7000 to 200 B.C. See D.G. NOBLE, ANCIENT RUINS OF THE SOUTHWEST 25 (1981). The Hopis have inhabited the Black Mesa region since about 600 A.D. The Navajos entered the Southwest between 1000 and 1525 A.D. Contact between the Hopi and Navajo, is evidenced by the fact that the Navajos in the region closest to the Hopis had more developed agricultural skills than their counterparts. Spanish records show trade between the Hopi and Navajo dating 1582–1583, 1630, 1634. See Brugge, supra note 8.
21 See Brugge, supra note 8.
22 CLEMNER-SMITH, supra note 4, at 78.
24 Quoted in V. DELORIA, GOD IS RED 206 (1975).
25 Mander, supra note 11, at 57.
26 Id.
27 For example, the "long walk" was the result of the Navajo resistance. See Trafzer, supra note 17; Matthiessen, supra note 16.
Native Americans could critically analyze the European culture. Most Indians considered the settlers' values, but rejected them as different and undesirable.

Before contact with the settlers, the Native Americans had a non-market, self-sufficient economy. As the Indians were exposed to Western culture the level of economic self-sufficiency declined. Eventually, the relationship between Native American people and the United States became one similar to a colony and colonizer. Accordingly, in 1934 the federal government passed the Indian Reorganization Act (IRA) which mandated that the tribes create a form of government similar to that of the United States. The Bureau of Indian Affairs (BIA) was created to assist the tribes in writing their new constitution, setting up elections, and tribal council governments. The original concept of John Collier, the head of the BIA when the IRA was passed, was to mesh traditional tribal governments with the new system. The tribes which chose to organize under the IRA have found that cooperation did not occur. The federally supported tribal councils wield the majority of the power on the reservations and at times completely disregard the traditional institutions that had previously performed governmental functions. The BIA installed tribal council became the official and only legal entity the U.S. government would recognize.

Unfortunately, the U.S. government did not recognize that the tribal council was supported by a minority of Native Americans who had abandoned their traditional beliefs and assimilated into contemporary culture. Indians supporting the tribal councils are known as the non-traditionals. The majority of Indians known as the traditionals still subscribe to their belief in the religious nature of land. To most traditional Native Americans, there is a special bond between themselves, the earth, and nature.

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28 CLEMMER-SMITH, supra note 4, at 78.
29 For example, see the Indian written, Proposed Standards: Draft Declarations of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere, reprinted in RETHINKING INDIAN LAW 137 (1982). See also Indians are Outcasts in their Own Land, Rocky Mtn News, June 24, 1986, at 33 for a recent letter to the editor by Joe Standing Buffalo, which illustrates the Indian's frustration and indignation for American society and values:

   The American Indian population has been estimated at 13 million at the time of Columbus' arrival in the continental United States. It was murder[ed] into near extinction at 250,000 in 1890. Our population has never replaced itself. Entire tribes have ceased to exist. . . . As I see it, the native population was living in a garden of Eden as described in Genesis of your Bible. Revelations describes this great glittering beautiful heinous beast that devours, murders, steals, cheats and deceives, and says those who don't worship its ways will be killed. From what I can see, this beast is the great American civilized society.
30 CLEMMER-SMITH, supra note 4, at 19.
32 Coulter, A History of Indian Jurisdiction, in RETHINKING INDIAN LAW 12 (1982).
33 See generally DELORIA & LYTLE, supra note 18.
35 For an account of the U.S. Supreme Court's dismissal of a suit between traditional Hopis and the Tribal Council see CLEMMER-SMITH, supra note 4, at 9.
36 Id. at 41. See also Whitson, supra note 15, at 387 (quoting Askie Betsie, a traditional Navajo woman:)

   The White Man does not understand that the Indian is bonded to their land and cannot be treated as parcels to be distributed like the U.S. mail. The chaos has a tremendous psychological effect on the Navajo people and their descendants because
bond between man and earth is embodied in a religion that encompasses every aspect of Native Americans' lives and their relationship with all they encounter. For example, Young Chief, a Cayuse Indian, believed in the unity of creation. He believed that he could not sign a treaty, because the rest of creation that would be affected by the treaty was not represented in the transaction:

I wonder if the ground has anything to say? I wonder if the ground is listening to what is said? ... The ground says, the Great Spirit placed me here to produce all that grows on me, trees and fruit. It was from me that man was made. The Great Spirit, in placing men on earth, desired them to take good care of the ground and to do each other no harm.57

In addition, for most traditionals material wealth is meaningless.

Being is a spiritual proposition. Gaining is a material act. Traditionally, American Indians have attempted to be the best people they could. Part of that spiritual process is to give away wealth, to discard wealth in order not to gain. Material gain is an indication of false status among traditionalist people while it is "proof that the system works" to Europeans. Clearly, there are two completely opposing views here ....58

Thus, the struggle at Big Mountain against relocation is carried out by traditional Native Americans, both Hopi and Navajo, because they understand the significance of the land to their lives, and fear that the property freed by the relocation will be developed: "We know that our old people have warned us against white men who are only looking for material things .... We oppose this coal lease because it violates our Hopi belief .... We don't want the money — we want our land."39 This viewpoint, endorsed by the traditionals, is diametrically opposed to the neglect of the land by non-Indian peoples and those Indians who no longer respect the earth religiously.40

The Hopi Tribal Council is exemplary of the IRA's effect and is a crucial element in the Big Mountain situation. The Hopi Tribal Council was created in 1936 even though 71% of the Hopi eligible to vote demonstrated their disapproval of the Council by

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57 See Deloria, supra note 24, at 2, 95.
40 See Deloria, supra note 24, at 2, 67. Some critics question the Navajo's religious regard for their land by pointing to the traditional Navajo's herding and overgrazing as evidence of their abuse of the earth. This argument fails to consider that overgrazing occurs because property division and constricted use has been imposed on the Navajos. The traditional Navajo have been limited to a piece of land, they are aware of the overgrazing and the problems it creates, but they are forced to overgraze because of a lack of alternatives. See Paul & Dias, Developing Human Rights for Human-Needs-Centered Development, (1985)(available from the International Center for Law Development, 777 United Nations Plaza, New York, NY 10017).
boycotting the election.\textsuperscript{41} The Hopi Tribal Council collapsed between 1943–1952, and the traditional leaders resumed their official roles.\textsuperscript{42} In the late 1940's, minerals were discovered near the Indian reservations, but the traditional leaders were unwilling to exploit those minerals.\textsuperscript{43} In 1952, with the help of John Boyden, who later became the attorney for both the Peabody Coal Co. and the Hopi Tribal Council,\textsuperscript{44} the official Tribal Council was revived.\textsuperscript{45} The 1952 election and all subsequent elections were boycotted by the majority of Hopi.\textsuperscript{46} The Hopi refused to vote in the election because they believed voting would legitimize a system they did not accept.\textsuperscript{47} The traditional Hopi have continually sent letters to Washington informing the federal government that the Hopi did not accept the Tribal Council as their representatives, thus asserting their belief that the Hopi Nation was a sovereign nation not subjugated by the United States.\textsuperscript{48} The IRA's tribal councils are of vital importance because the Hopi Tribal Council is a major force supporting the Big Mountain relocation, and has greatly influenced the laws defining and establishing the boundaries of the Navajo and Hopi reservations.

B. The Reservations

Although the Navajo lived primarily in northwest New Mexico and northeast Arizona prior to the Kit Carson campaign, the first Navajo reservation encompassed only a small part of northwest New Mexico.\textsuperscript{49} Although in 1878, 1880, and 1884, more land was added to the Navajo reservation, it still did not include all the land that the Navajo previously controlled.\textsuperscript{50} In 1882 the first Hopi reservation was created by an Executive Order of President Arthur, which reserved a section of northeastern Arizona "for the use and occupancy of the [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon."\textsuperscript{51} Like the Navajo reservation, the Hopi reservation did

\textsuperscript{41} Whitson, supra note 15, at 376. See also CleMMER-SMITH, supra note 4, at 11. These articles discuss numerous studies which indicate that many Native Americans, like the Hopi, used the boycott to show disapproval. The studies also have shown that although the sociologists and anthropologists working for the Bureau of Indian Affairs (BIA) were aware of those customs, the BIA ignored this information.

\textsuperscript{42} Berkey, Coulter & Tullberg, Violations of the Human Rights of the Hopi People by the United States of America, in RETHINKING INDIAN LAW 161 (1982).

\textsuperscript{43} Id.

\textsuperscript{44} There have been articles written about the connection between John Boyden and Peabody Coal Co. in recreating the Hopi Tribal Council. Both Boyden and Peabody profited extensively from the subsequent coal leases worked out with the Tribal Council. The uncomfortable connection could be construed as a violation of the attorney's Code of Ethics and Professional Responsibility because the code prohibits an attorney to work for two entities when a possible conflict of interest could occur. See ABA Model Rules Of Professional Conduct, rules: 1.6, 1.7, 1.8, 1.9, 3.5, 4.1, 4.4. For a complete discussion of the "Boyden" connection see Mander supra note 11; McLeod, This Land is Sacred . . . It is not for Leasing or Sale, High Country News, May 12, 1987, at 7.

\textsuperscript{45} Berkey, Coulter & Tullberg, supra note 42, at 163.

\textsuperscript{46} Id.; See also Whitson, supra note 15, at 376.

\textsuperscript{47} CleMMER-SMITH, supra note 4, at 40. Traditionally the Hopis did not act by majority vote, but would discuss an issue or decision until arriving at a consensus decision.

\textsuperscript{48} See Berkey, Coulter & Tullberg, supra note 42, at 163.

\textsuperscript{49} TRAFZER, supra note 17, at 240.

\textsuperscript{50} Phillips, supra note 16.

not reflect the previous lands occupied by the Hopi people. The 1882 Executive Order area was a precise rectangle, exactly one degree longitude by one degree latitude, which left an entire Hopi village outside its boundary while encompassing a large number of Navajo who lived near the Hopi mesas. Eventually the Navajo reservation grew to encompass the 1882 executive area, resulting in a situation where some Hopi live on land set aside by the federal government for the Navajo, and some Navajo live on land set aside for the Hopi.

In 1943, an area called District 6, which was a part of the 1882 reservation previously set aside for exclusive Hopi use, was expanded to include the Hopi residing in the 1882 area. This, however, left a sizeable portion of the 1882 reservation open for continued mixed use. This portion of the reservation became known as the “mixed use” area. At that time, the Navajo who lived in the mixed use area of the 1882 reservation were considered to hold rights that were coextensive with the rights of the Hopi. Caselaw and legislation have attempted to clarify whether the 1882 Executive Order actually intended the Navajo and Hopi to have equal rights on the reservation.

In 1958, Congress passed Pub. L. No. 85-547, which authorized the two Tribal Councils to participate in a lawsuit which would officially determine the interest and rights to the 1882 Executive Order area. In Healing v. Jones, the court reaffirmed the Hopi’s exclusive rights to the District 6 area, and awarded the remainder of the 1882 area to both the Hopi and Navajo. That area became known as the Joint Use Area (JUA) where “[t]he Hopi and Navajo Tribes have joint, undivided, and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States.” This decision cleared title to the land, but made the JUA area almost impossible to “develop” because of the ideological differences between the Hopi and Navajo Tribal Councils. The pro-development Hopi Tribal Council was unsatisfied with this decision, and took action to free the land for development.
The first success for the Hopi Tribal Council was the *Hamilton v. Nakai* decision. The *Hamilton* Court interpreted *Healing v. Jones* to mean that half the surface area of the JUA was to be reserved for the Hopi. The *Hamilton* decision reduced Navajo livestock on the JUA by 85% and created a moratorium on new construction that did not have a permit issued by both Tribal Councils. In 1974, the passage of Pub. L. No. 93-531 marked the second success for the Hopi Tribal Council. Essentially, Pub. L. No. 93-531 mandates a 50-50 division of the surface area of the JUA between the Hopi and Navajo, with the Tribal Councils maintaining joint interest in the subsurface of the JUA. The deadline for implementation of the Act was set for July 6, 1986. On that date, the Hopi and Navajo were to be relocated to their appointed sides of the partition. In addition, the Act mandated a further livestock reduction plan for the area, which made it impossible for many of the traditionalists to subsist on the land.

Generally, the NHIRC has been ineffective. The program's costs have skyrocketed, and the NHIRC has not met its July 6, 1986 relocation deadline. The NHIRC originally projected its annual costs at $500,000, but expenses are expected to reach two billion dollars. These cost overruns can be attributed to the Indian's unwillingness to move, and the inability of the government to keep its commitments under the Act.

For the traditionalists, the relocation represents a destruction of their homeland and spiritual lifestyle. Navajos are being forced to move from their spiritual center. Both traditional Navajo and Hopi have special religious attachment to the earth which may eventually be disturbed by strip mining associated with the development of the region.
The traditional Navajo who are dependent on herding have been forced to give up their only means to self-sufficiency because they are generally relocated to neighboring towns where herding is impossible.\textsuperscript{76} Lacking skills, the Indians become dependent on welfare.\textsuperscript{77} One third of those relocated have already lost their government-provided housing.\textsuperscript{78} These effects, in turn, have produced a high rate of alcoholism\textsuperscript{79} and suicide among the Indians.\textsuperscript{80} Most importantly, the depressed economic and social conditions which characterize the Indian reservations warrant increased attention to the Big Mountain relocation because the traditional Hopi and Navajo affected by Pub. L. No. 93-531 may be the largest group of self-sufficient Indians left in the United States.\textsuperscript{81} However, the fate of most Native Americans is similar to the Navajo:

On paper, the Navajo should be one of the wealthiest peoples on the earth. In fact, . . . the average per capita income is about $1,300 a year, largely because of the ludicrous terms of the leases signed on behalf of the Navajo by the Tribal Council, with the encouragement and approval by the Bureau of Indian Affairs.\textsuperscript{82}

Accordingly, the Navajo reservation was characterized in 1975 by the United States Commission on Civil Rights as an "American Colony" with problems endemic to poverty.\textsuperscript{83} Scholars have placed blame on the difficulties of a forced transition of values and the exploitation of the Native Americans.\textsuperscript{84} Their lives have been severely impacted by the quest for economic growth and mineral exploration. The Native Americans have been forced into an economic situation under which their self-sufficient ways were destroyed to the point that their economy must be supported by the government.\textsuperscript{85}

C. Current Legal Actions

In 1980 Congress passed compromise legislation, Pub. L. No. 96-305, which amended Pub. L. No. 93-531.\textsuperscript{86} The amendment involved two major provisions. First, anyone over the age of 49 in 1974, who was living on the "wrong side" of the JUA, was entitled to a 120 acre life estate. Second, the amendment mandated the transfer of 250,000 acres under the administration of the Bureau of Land Management and the purchase by the Navajo tribe of an additional 150,000 acres.\textsuperscript{87} The amendment did not address the root of the problems involved in Pub. L. No. 93-531, and other members of

\textsuperscript{76} Shifter & West, supra note 56, at 78.
\textsuperscript{77} Id. at 83.
\textsuperscript{78} Whitson, supra note 15, at 388.
\textsuperscript{79} Clemmer-Smith, supra note 4, at 22.
\textsuperscript{80} See T. Scudder, No Place To Go (1982) for statistics which reflect how traditional Navajos reacted to their forced relocation from District 6 following the Healing v. Jones decision. See also, Big Mountain Notes, supra note 71, Spr. 1986, at 5, col. 1.
\textsuperscript{81} Mander, supra note 11, at 52.
\textsuperscript{82} Matthiessen, supra note 16, at 9, 19.
\textsuperscript{83} Infant death rates on the reservations are twice as high as compared to other Americans, and the incidence of tuberculosis and rheumatic fever are 10 times more prevalent on the reservations. See Clemmer-Smith, supra note 4, at 18.
\textsuperscript{84} See generally id.
\textsuperscript{85} Ninety percent of all tribal economies are supported by federal funds. See Barsh, When Will Tribes Have a Choice, in RETHINKING INDIAN LAW 48 (1982).
\textsuperscript{87} Id.
Congress and traditional Native Americans considered the relocation Act even as amended to be "harsh, inhumane, and in need of repeal."88

Since the 1980 amendment there has been additional legislative activity concerning Pub. L. No. 93-531. A compromise bill introduced by Rep. Udall was withdrawn when it came to Udall's attention that Sen. Goldwater and the Reagan administration opposed it.89 Before the 1987 term, Sen. Goldwater retired and now compromise legislation appears more likely. Arizona's Sen. McCain, has shown interest, as has Sen. DeConcini, in introducing a bill that would prevent some relocations and would change the configuration of the JUA. This compromise will reflect the Tribal Council's interests, which may be defined differently since Peter MacDonald, the current Navajo Tribal Council Chairman, was elected based on his promise to stop the relocations.90 Similarly, in 1986, Sen. Cranston introduced a one year moratorium and will introduce an expanded version in 1987 which calls for a moratorium on the relocation of people and the development of the "new lands" that are being acquired according to the 1974 legislation. The purpose of the development moratorium is to prevent the argument that "too many resources have been spent on the 'new lands' to stop relocation." A bill to repeal Pub. L. No. 93-531 is likely to be introduced during the 1987 Congressional session which will present a viable alternative to relocation mandated by the 1974 Act or the proposed compromise legislation.91

As of February 1987, three major court actions have been brought and a fourth is pending. All cases have been or will be brought on behalf of the relocatees by the Big Mountain Legal Offense/Defense Committee (BMLODC). One action seeks money damages in the U.S. Court of Claims for some relocatees because they were not provided "decent, safe, and sanitary housing," which the government has a statutory, fiduciary, and contractual obligation to provide.92 Another action, argues that the Act did not provide the relocatees with adequate counselling and assistance to make the adjustment from a non-market to a cash economy.93 The last of the current litigation is a criminal case involving the arrest of four traditionals who removed a fence from an area considered to be a Navajo religious shrine.94 Currently, a constitutional and international legal challenge to Pub. L. No. 93-531 is being planned for April/May 1987, arguing that the Act infringes on the traditional American's constitutional right to religious freedom.95

Actions challenging the provisions of Pub. L. No. 93-531 have not been restricted to domestic forums. In 1980 and 1982 the traditional Hopi and the Indian Law Resource

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88 Kammer, supra note 2, at 213 (quoting Senator DeConcini).
90 The Navajo-Hopi Land Dispute, Denver Post, Jan. 4, 1987, at 6E, col. 1; Big Mountain Notes, supra note 71, Spr. 1986, at 1, col. 1.
91 Telephone interview with Matt Strassburg, attorney for the Big Mountain Legal Offense/Defense Committee (Jan. 21, 1987) [hereinafter Strassburg interview]. See also Big Mountain Notes, supra note 71, Sum. 1986, at 1, col. 2.
92 Strassburg interview, supra note 91.
93 Id.
94 Id. Defendants are asserting a necessity defense to the charge of destruction of public property on the grounds that they had to remove the fence to prevent imminent harm to the religious shrines.
95 This challenge is being prepared in conjunction with the Center for Constitutional Rights. Id. See also "The Yellow Thunder Case" United States v. Means, 627 F. Supp. 247 (D.S.D. 1985).

Petition in international fora is appropriate because Indian rights may be appropriately addressed through international law. International law protects Indian rights in two ways: Indian nations under international law are sovereign nations and Indians are protected by international human rights law.

III. LEGAL STATUS OF AMERICAN INDIANS

Under international law, Indian nations are sovereign nations because they satisfy the requirements for nationhood. To be considered a sovereign nation under international law a nation must have: 1) a population; 2) a territory; 3) a structure of governance; and 4) the capacity to conduct relations with other nations. In light of these prerequisites American Indians are sovereign nations as defined by international law. Indian tribes have identifiable populations as evidenced in their tribal heritage. The territories of Indian tribes are defined by their reservations. The tribal councils are the institutionalized governing bodies of their territories. Finally, Indians negotiate with the U.S. government through their tribal councils.

Once an area meets the qualifications for nationhood, however, its status as a nation may be revoked under international law through discovery, conquest, merger or annexation by another nation. The concept of discovery is often used as a rationale to dispute the sovereignty of native Americans. When an uninhabited land is discovered by a nation, that land cannot be considered sovereign if the discovering nation exercises dominion over it. Although America was not uninhabited when it was discovered, international law scholars argue that the concept of discovery applied to North America because the Indians were "wanderers." Discovery would not apply if the inhabitants of the discovered

96 See Berkey, Coulter & Tullberg, supra note 42, at 161.
97 The arguments presented in this action are discussed in Churchill, supra note 19, and were reiterated during an interview with Ward Churchill, member of the International Indian Treaty Council, in Denver, CO, July 8, 1986 [hereinafter Churchill Interview].
98 Id. See also Telephone interview with Antonio Gonzales, member of the International Treaty Council, June 20, 1986; See also Mander, supra note 11, at 53.
103 Hayton, The Nations and Antarctica, 10 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 368, 390 (1960). Actual settlement on the land is required to confer title by discovery.
104 F. Jennings, Invasion of America: Indians, Colonialism, and the Cant of Conquest 60 (1975).
land are "stable." However, these scholars incorrectly characterized the civilization of Native Americans. American Indians were not wanderers, but had an established society and economy. Consequently, the sovereignty of Indian nations was not extinguished when America was discovered.

In domestic courts, John Marshall, the first Chief Justice of the United States Supreme Court, continually attempted to clarify the relationship of Indian nations to the United States. Justice Marshall recognized the civilization of American Indians and he properly questioned the applicability of discovery to determine the legal status of American Indians. Justice Marshall was also hesitant to conclude that Indian nations had been legally or voluntarily merged into the United States. Thus, to characterize the legal status of American Indians, Justice Marshall created the domestic dependent nation concept. Under this concept, "[A] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state." The domestic dependent nation concept indicates that the U.S. and the Indian nations were initially viewed as a part of a defense pact, rather than two nations merging into one. Justice Marshall's domestic dependent nation concept indicates that early judicial interpretation of the legal status of American Indians did not strip American Indians of their sovereignty.

Secondly, scholars argue that Indian nations are not sovereign because they have been merged into or annexed by the United States. These scholars base their argument on the fact that Native Americans are U.S. citizens. However, while the 1924 Native American Citizenship Act unilaterally imposed U.S. citizenship on all Native Americans who lived in territory claimed by the United States, it explicitly allows Indians to have concurrent citizenship in their respective tribes. Yet, the Citizenship Act is incongruent with international law because nations may confer citizenship only upon individuals requesting it. Governments cannot impose citizenship unilaterally. Hence, the Citizenship Act did not destroy tribal sovereignty by a unilateral bestowal of U.S. citizenship on Native Americans. Furthermore, the U.S. government implicitly recognized the sovereignty of Native Americans in the Citizenship Act because the Act preserves Native Americans' right to citizenship in their own tribes.

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105 Id. The Mayas and the Aztecs were considered "stable" Indians entitled to recognition by the international community.

106 Id. at 65. For example, many of the tribes were characterized by a predominantly agricultural economy.

107 Justice Marshall did, however, apply the discovery concept in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). Justice Marshall's misgivings concerning the applicability of the discovery concept to Native Americans is apparent in his statement:

It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that discovery of either by [the] other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.


108 Coulter, supra note 99, at 118.


111 Id.

Some Native American nations have always asserted their nationhood. Like the Hopi who have consistently refused to form a formal treaty with the United States, some Indian tribes believe they have never abandoned their sovereignty to any foreign power or nation. Others, including the traditional Navajos at Big Mountain, have recently asserted their nationhood. The official position of the American Indian Movement (AIM) is that Indian peoples are citizens of both their Indian Nation and the United States.

Despite the sovereignty of Indian nations under international law, the U.N. has only granted American Indians consultative status to the International Indian Treaty Council. There are two barriers to recognition of indigenous groups at the U.N. First, current U.N. members are unwilling to recognize indigenous peoples' right to autonomy. Second, the U.N. does not approve of the representation at the General Assembly of segments or internal colonies within member nations. While the repugnance of external colonies has gained wide acceptance in the international community, the idea of internal colonialism has yet to be adequately considered. This has created the ironic result that former external colonies have internal colonies of indigenous peoples. Currently, recognition of Indian tribes in the U.N. is limited to the Working Group on Indigenous Populations by the Sub-Commission on the Prevention of Discrimination of the U.N. Commission on Human Rights.

While the U.N. refuses to recognize the sovereignty of Indian tribes, it is unclear whether the U.S. recognizes that Indian tribes are sovereign nations under international law. In addition, the U.S. continues to vacillate on their position regarding the extent that international law regulates its interactions with Indian tribes. However, an indication of the U.S. position can be inferred from the fact that the U.S. entered into 371 treaties with various indigenous peoples from 1790-1870 despite provisions of the U.S. Constitution which restrict the U.S. government's treaty relationships to those with fully

116 McLeod, This Land is Sacred . . . It is not for Leasing or Sale, supra note 44. The Hopi traditional leaders declared: “Today we are being asked to file our land claims in the Land Claims Commission in Washington D.C. We as Hereditary Chieftains of the Hopi Tribe, cannot and will not file any claims . . . We will not ask a white man, who came to us recently, for a piece of land that is already ours.”
117 On October 28, 1979, a community of traditional Navajo Indians who live around Big Mountain, issued a Declaration of Independence from the United States, the State of Arizona, and their Tribal Council. See Mander, supra note 11.
121 See Indigenous Peoples of the U.S., supra note 100. Cuba's recognition of the Florida Seminole as a sovereign nation is an example of a state recognizing the nationhood of an indigenous group.
123 Implications of Treaty Relationships, supra note 100.
sovereign nations. Thus, by executing treaties with the Indian tribes, the U.S. government has implicitly recognized the sovereignty of Indian nations. Furthermore, the relevance of international law to the U.S. policy toward Native Americans was reiterated in the “Abourezk Commission Report,” the result of a 1978 Congressional study which concluded that: “[t]he relationship of the American Indian tribes to the United States is founded on principles of international law.”

Despite this implicit recognition of tribal sovereignty by Congress, the economic dependence of Native Americans on the United States government, has shifted the status of Indian nations under U.S. law from that of co-equal sovereigns to internal colonies. Despite the delegation of Indian tribes to colonial status, the U.S. government has not respected the sovereignty of Indian nations. Thus, U.S. Indian law as evidenced through major cases and legislation contradicts international law and ignores Congressional mandates. Generally, caselaw determining the legal status of American Indians attempts to rationalize the process of colonization and exploitation of the Indian Nations. Yet, despite any rationalizations, U.S. Indian law, even if contrary to international law, has had a profound effect on Native Americans. For example, Indian law scholars note that:

[Americans have assured themselves that these] national sins were of purely antiquarian significance [by] denying [the Indian's] existence as a people, or by taking refuge in the Myth of the Vanishing Indian, or by blaming our grand[parents] for the wrongs that we commit.

Early judicial interpretation of the legal status of Native Americans had little difficulty rationalizing the gradual destruction of Indian tribal sovereignty. In *Worcester v. Georgia*, the Supreme Court held that although Indian nations were nations as defined in international law, they are not “foreign nations” within the meaning of Article III of the Constitution. These decisions were used by both the courts and Congress to further erode the sovereignty of the Indian nations. In 1846, the Court in *United States v. Rogers* denied that the Indian tribes had ever constituted nations. By 1870, the Court in the *Cherokee Tobacco Case* had decided that Indian territories were a part of the territory of the United States. The Court in 1883 held that an Indian nation was still sovereign over the acts of its citizens against other Indian citizens if the act occurred on Indian territory. Congress reacted to these decisions by passing legislation that further limited Indian sovereignty.

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122 U.S. Const. art. I. It should also be noted that treaties constitute “the supreme law of the land.”
123 Deloria & Lytle, supra note 18, at 228.
124 Id. at 1–27.
125 For an explanation of internal colonialism see Stavenhagen, supra note 31, at 39.
126 Coulter, supra note 99, at 5, 6.
129 31 U.S. (5 Pet.) 8, 19 (1832).
130 45 U.S. (4 How.) 567, 572 (1846).
131 78 U.S. (11 Wall.) 616 (1871).
133 Seven Major Crimes Act, 18 U.S.C. § 1153 (1970). For a comparison of the interference with the internal affairs of Indians to the pattern of colonialism that occurred in Africa see Address
As Indian tribal sovereignty was eroded by United States courts and Congress, the trust concept was created to characterize the relationship between the U.S. government and the Indian tribes. Under the trust concept, Native Americans were regarded as wards of the State and their property was held in a trust by the United States government. Proponents of the trust concept analogize the trust relationship between the United States and Native Americans to the trusteeship system of the United Nations. For example, the United States and South Africa are trustees for Micronesia and Namibia respectively; both trustee nations are mandated to work toward the eventual self-determination of those under trust. However, this analogy is incorrect because while the United States is explicitly committed to self-determination for Namibia and Micronesia, it is not committed to self-determination for the Indian nations.

The trust relationship was developed through a series of cases and statutes. In *Lone Wolf v. Hitchcock*, the Supreme Court upheld Congress' unilateral abrogation of Indian treaties, despite the Indian trust relationship because Congressional power over Indians was "plenary and not subject to limitation by treaty." This plenary power has been applied by the courts since the turn of the century. For example, in *Santa Clara Pueblo v. Martinez*, the Court held that Congress has the plenary authority when it chooses to exercise its authority to limit or eliminate the powers of local self-government which the tribes otherwise possess. The Court in the *Western Shoshones* case implicitly affirmed that an Indian tribe's acceptance of money for property taken by the U.S. government is not needed in order to clear title to Indian land; the mere award of money is sufficient.

These judicial decisions reflect the U.S. government's legislative policy toward Indians in the late 19th century. The 1887 General Allotment Act, which subdivided most reservations into individual 40 or 160 acre tracts, embodied the heart of the government's policy. The allotment scheme was an attempt to break up the "tribal mass" and promote assimilation. However, in 1934, the federal government changed its policy towards the Indians. The Indian Reorganization Act of 1934, (IRA), stopped further allotment of tribal property and allowed tribes to continue communal ownership of their lands. The IRA was intended to revive the tribe, by giving it more authority. Congress'
favorable view towards the Indians prevailed until the 1950's, when Congress adopted its termination policy. Under the termination policy, Congress gave itself the authority to extinguish recognized titles and abrogate treaties without provision for fair compensation as guaranteed by the Fifth Amendment.

Congress' termination policy stimulated\textsuperscript{145} the decision of \textit{Tee-Hit-Ton Indians v. United States}.\textsuperscript{146} In \textit{Tee-Hit-Ton}, the Court decided that title to land previously granted to the Indians by treaty or statute may be unilaterally extinguished by an act of Congress. This decision was based on the erroneous conclusion that Indian titles were derived from the permission of the settlers to occupy the land. Thus, the Indian's right to occupancy may be terminated without any legally enforceable obligation to compensate the Indians.\textsuperscript{147} This rationale is inapplicable because the Indians never lost their right to their land as they were not discovered\textsuperscript{148} or conquered\textsuperscript{149} by the settlers. In effect, the termination policy produced the unilateral termination of Indian nations because nationhood resided in the tribes only so long as they had a defined territory.\textsuperscript{150} Thus, no government body, either federal or international, would recognize Indian tribes as nations.\textsuperscript{151}

The termination policy established in the \textit{Tee-Hit-Ton} decision is questionable precedent. In 1980, the Supreme Court in \textit{Sioux Nation of Indians v. United States},\textsuperscript{152} determined that the United States had violated the 1868 Fort Laramie treaty with the Lakota Indians (Sioux). The Lakota refused to accept the money offered as compensation for the land illegally taken by the federal government. Their refusal effectively blocked a quiet title action with regard to much of the Black Hills region.\textsuperscript{153} While the case is still being litigated, there is a bill before Congress to return a sizeable part of the land illegally taken to the Lakota nation.\textsuperscript{154}

Currently, the United States government has almost complete control over tribal lands. Therefore, it is difficult to determine whether a "trust" relationship exists. The relationship cannot be a fiduciary trust because in \textit{United States v. Mitchell}\textsuperscript{155} the Court held that the federal government is not accountable to the Indians as a trustee. In \textit{Mitchell}, the government acted to protect white settlers who had moved onto land set

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\textsuperscript{145} Berkey, Coulter & Tullberg, \textit{Violations of Human Rights of American Indian Peoples by the United States of America}, in \textit{Rethinking Indian Law} 141, 145 (1982).
\textsuperscript{146} 348 U.S. 272, 278 (1955).
\textsuperscript{147} Id. at 279.
\textsuperscript{148} See supra notes 103–107 and accompanying text. In addition, Native Americans did not exist under the same title system as the Anglo based U.S. system, but the various tribes did have a system of demarcation of land for use. See \textit{Jennings}, supra note 104, at 67. This complete disregard for the indigenous system has been described by one critic as an example of blind eurocentrism: "Indians could adopt the ideology of being the same, but different, whereas with the Europeans something different means something inferior or superior." See \textit{The Great Sioux Nation — Seating in Judgment on America} 68 (R.D. Ortiz ed. 1977).
\textsuperscript{149} Forbes, \textit{The "Public Domain" of Nevada and Its Relationship to Indian Property Rights}, 30 \textit{Nevada State Bar J.} 16, 32 (1965).
\textsuperscript{150} See supra note 102 and accompanying text.
\textsuperscript{151} Termination would be similar to self-determination if complete control was turned over to the tribe. However, the result was forced assimilation, for previous conditions imposed upon the Indians made self-reliance impossible. See generally \textit{Deloria & Lytle}, supra note 18.
\textsuperscript{152} 448 U.S. 371 (1980).
\textsuperscript{153} Id.
\textsuperscript{155} 445 U.S. 535 (1980).
aside for the Pueblo Indians by passing the Pueblo Lands Act which spared the white settlers from the hardship of relocation.\textsuperscript{156} The Court upheld the government's actions even though it acted for the benefit of a third party, the settlers, against the interests of the beneficiaries, the Indians. This action by the U.S. government does not meet the usual duty of a trustee.

Even if a trust relationship does exist between the U.S. government and the Indian Tribes, the trust principle has been vehemently criticised. Some scholars have described the Indian trust relationship as "racial discrimination and unfettered United States power disguised as a moral duty."\textsuperscript{157} Others comment that in comparison to the Native Americans trust status: "only infants, incompetents and mentally infirm wards of the state are subjected to similar governmental power over their property under United States law."\textsuperscript{158} Yet, despite such criticism, the trust relationship has been used to deny Indian nations their sovereignty and allows the federal government to avoid the limitations of constitutional and international law in its relationship with Native Americans.\textsuperscript{159}

Under international law, the sovereignty of Indian tribes is clear. Indian tribes satisfy the prerequisites of a sovereign nation because they have an identifiable population and territory with a structure of government that can conduct relations with other nations. Moreover, the civilization of the American Indians precludes the concept of discovery to establish them as a subservient nation nor does history indicate any attempt by the U.S. government to conquer, merge or annex the Indian tribes. Domestic Indian law, however, has used several policies ranging from the domestic dependent nation to the termination policy, finally placing Indian nations in a trust relationship to rationalize the erosion of Indian tribal sovereignty. These policies ignore the U.S. Constitution's mandate that treaty relationships must be between sovereign nations. The fact that the U.S. has entered into numerous treaties with the Indian tribes indicates the government's implicit recognition of the sovereignty of Indian nations. Yet, in situations such as Big Mountain the U.S. government continues to use Indian policy to justify its violations of constitutional and international law in its relations with Native Americans. The violations of international law inherent in the U.S. Indian law and policy are magnified by a consideration of international human rights law.

IV. Overview of Human Rights Violations

A. Contemporary International Human Rights Law

Although international human rights law does not expressly protect indigenous populations,\textsuperscript{160} the preamble to the United Nations Charter proposes to:

\begin{itemize}
  \item \textsuperscript{156} Shifter & West, supra note 56, at 101. Although the government compensated the Indians for their land, this is not the course of action that would have benefitted the Pueblos the most.
  \item \textsuperscript{157} Indian Law Resource Center, supra note 23, at 19.
  \item \textsuperscript{158} Coulter, supra note 99.
  \item \textsuperscript{159} Address & Falkowski, supra note 113.
\end{itemize}
reaffirm faith in fundamental human rights, in the dignity and worth of the human person [and to] promote social progress and better standards of life in larger freedom [and, for these ends,] to employ international machinery for the promotion of the economic and social advancement of all peoples.\textsuperscript{161}

Thus, the United Nations Charter indicates that human rights and international law are designed to assist all people to reach their goals and to advance, without compelling assimilation into Western culture. This is the crucial difference between the protection of fundamental rights by the United States Constitution and the protection of fundamental rights through international human rights law.

Undoubtedly, the greatest protection of human rights available to Americans in general is the federal Constitution, which provides broader rules and more effective implementation mechanisms than international law.\textsuperscript{162} While this view may be correct for certain situations, such as the struggle for full participation in the already existing system by women and minorities, it is not necessarily true for Native Americans. Native Americans are not trying to achieve equal opportunity in a system imposed upon them, but are struggling to maintain their own values and social system. Furthermore, the U.S. Constitution concentrates on protecting the rights of the individual, while international human rights law protects both individual and group rights.\textsuperscript{163} It is widely accepted that this body of human rights law protects individuals and groups from the acts of their own government.\textsuperscript{164} Since the State is potentially a major violator of human rights, an entity other than the State should be entrusted to protect human rights.\textsuperscript{165} Therefore, the international community and international law are entrusted with the protection of basic human rights. Consequently, the rights of Native Americans are better protected by international law than the U.S. Constitution. Indeed, the major obstacle to the advancement of Native Americans' human rights may be the U.S. government. Often, the fundamental difficulty in the application of human rights law is that a State's overzealous adherence to an ideology blinds it to the violations it is committing.\textsuperscript{166} The United States, for example, in its commitment to achieve economic growth may simply overwhelm a society which is struggling to hold onto its own ideology and methods to achieve its goals.

\textsuperscript{161} The U.N. Charter defines a people as human beings which make up a group or assembly linked by a common, usually political, interest. Thus, a nation would constitute a people, and under a liberal interpretation of the Charter, a band or clan of Native Americans should constitute a people.

\textsuperscript{162} Chen, Institutions Specialized to the Protection of Human Rights in the United States, 1 Hum. RTS. ANN. 3 (1983).

\textsuperscript{163} Bassiouni, The Protection of 'Collective Victims' in International Law, 2 Hum. RTS. ANN. 239, 245–250 (1985), acknowledges that the trend in international law has been to increase awareness and protection of group rights. This trend was reflected recently in the Charter of the Organization of African Unity (OAU), which recognizes group/tribal needs and rights. For example, Article 22 of the Charter explicitly recognizes the "right" of "peoples" to realize "economic, political and cultural development." It also imposes the "duty" on "states" to ensure the exercise of this right.


\textsuperscript{165} L. Kruper, Genocide 94 (1985).

This is exemplified by the numerous human rights violations incurred by the U.S. government by support of legislation resulting in the Big Mountain relocation.  

1. Right to Self-Determination  

The forced relocation at Big Mountain violates the Hopi and Navajo's right to self-determination under international law. Principles of international law establish the nationhood status of the traditional Hopi and Navajo. The relationship between the Hopi and Navajo nations and the United States, however, is characteristic of a colonial relationship. The Indian Reorganization Act of 1934, which implemented governmental organizations for the Indian reservation without considering Indian needs or traditions, may have been intended to promote democracy, but in effect it maintained the colonial relationship.  

This colonial status of the Hopi and Navajo, however, entitles them to the right to self-determination. The covenant of self-determination in international law applies only to colonial situations because applying self-determination in a non-colonial context would grant the right of secession to a minority group. Articles 1 and 55 of the United Nations Charter mandate the self-determination of peoples. Article 55 states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Native Americans meet the definition of "peoples" as defined by the International Court of Justice. Therefore, Native Americans are not merely a racial minority, but are nations entitled to self-determination. Similarly, Native Americans may derive their right to self-determination from Article 1 of the International Covenant on Economic, Social, and Cultural Rights which states: "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural...

167 The numerical order in which the violations appear in this paper is the product of my own subjective evaluation of a combination of factors such as the extent the principle is universally accepted, and the application of the principle to this situation.  
168 Coulter, supra note 99, at 117.  
169 Churchill, supra note 19, at 10.  
170 Barsh, supra note 85, at 43.  
171 Sornarajah, Internal Colonialism and Humanitarian Intervention, 11 GA. J. INT’L & COMP. L. 45 (1981). The fear is that states would be subject to disintegration if claims to secession on the basis of ethnicity were permitted. Id. at 50.  
172 U.N. CHARTER art. 55.  
173 See Jones, supra note 163, at 70. Thus, it is improper to argue that Article 2(7) of the United Nations Charter, which states the U.N. should not intervene in situations that are essentially within the jurisdiction of member states, applies when it is an action between sovereign nations. See U.N. CHARTER art. 2(7).
development." The right to self-determination is also recognized in Article 1 of the International Covenant on Civil and Political Rights, and Article II sections (b) and (c) of the International Convention on the Suppression and Punishment of the Crime of "Apartheid," particularly section (c) which prohibits:

Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; Any legislative measures or other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life . . . .

In addition to the mandates of international organizations, within international law is a growing body of indigenous rights law. A scholar who has applied indigenous rights law to the Native American situation has stated:

The rights of the Native American people are derived from neither the Constitution, Congress, the positive State, the theory of republic democracy nor the philosophy of the Enlightenment. Rather these rights are inherent in the existence of the Native American people, as all human rights inhere in the condition of being human.

The right of the Hopi and Navajo to self-determination is premised on their recognition as nations and their right to exist inherent in their "condition of being human."

2. Prohibition of Genocide

"Genocides [are] a continuing phenomenon of our times . . . ." Although most people envision the holocaust at the mention of genocide, genocide covers a broad range of heinous activities. "Genocide is . . . a structural and systematic destruction of innocent people by a state bureaucratic apparatus." Genocide may also be defined as a gradation of destruction: "to what degree [a government] permits the official and arbitrary termination of the lives of its citizens." Genocide is not some incredible aberration but is carried out through strict adherence to the law of the land.

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174 International Covenant on Economic, Social and Cultural Rights U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 360 (1967) [hereinafter Social and Cultural Rights]. While the President of the United States has signed this Covenant, the Senate has not ratified it.

175 International Covenant on Civil and Political Rights U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368, 369 (1967) [hereinafter Civil and Political Rights]. Similarly, the President of the United States has signed the Covenant, but the Senate has yet to ratify it.


178 Kruper, supra note 165, at vii.

179 Churchill, Genocide: Toward a Functional Definition, 11 Alternatives 403, 407-408 (1986). G.A. Res. 96(1) made on December 11, 1946, specifically states that "many instances of such crimes of genocide have occurred wherein racial, religious, political and other groups have been destroyed entirely or in part."

180 Id. at 412 (quoting I.L. Horowitz, Taking Lives: Genocide and State Power (1982)).

181 Id.

182 Id. at 409 (citing H. Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1965)).
In February of 1986, the U.S. Senate ratified the Genocide Convention.\textsuperscript{185} The relevant parts of the treaty state:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such: . . .

b) Causing serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.

The following acts shall be punishable:

a) Genocide;

b) Conspiracy to commit genocide;

c) Direct and public incitement to commit genocide;

d) Attempt to commit genocide;

e) Complicity in genocide.\textsuperscript{184}

However, the legislative history surrounding the ratification of the genocide conventions indicates that the treaty ratified by the United States is limited.\textsuperscript{185} The U.S. Genocide Treaty is limited so that the U.S. does not owe a duty to the entire international community to refrain from perpetrating actions which may constitute genocide.\textsuperscript{186} In comparison, international law encompasses a broader view of the prohibition of genocide.\textsuperscript{187} Under international law victims of genocide are classified as collective victims protected under international criminal law and international human rights law.\textsuperscript{188}

Through the enactment of Pub. L. No. 93-531, the United States government, by definition, may be sanctioning genocide. Pub. L. No. 93-531 has, in effect, caused actual deaths as a result of the relocation.\textsuperscript{189} However, whether the U.S. is committing genocide depends on the government's intent. The "killing" of a group can, but does not necessarily, imply the physical liquidation of individual group members. A group may be destroyed even when its individual members survive.\textsuperscript{190} This leads to the issue of whether the desire to completely "civilize" or assimilate the Native Americans meets the required \textit{mens rea} for genocide. Previously the lack of intent has been used to excuse genocidal practices against indigenous populations. The defense that the racial destruction was the unintended consequences of economic "development" is, however, losing credibility.\textsuperscript{191}

\textsuperscript{183} This Week in Congress, Feb. 21, 1986, at 5. The version finally ratified is less effective than the original international Convention. The Senate's version exempts the United States from compulsory jurisdiction of the World Court in genocide treaty cases. See also Decades-Old Genocide Treaty Finally Wins State Approval, CONG. Q. 458 (Feb. 22, 1986) [hereinafter Decades-Old Genocide Treaty].

\textsuperscript{184} The Genocide Treaty arts. 2, 3 IS521-2.

\textsuperscript{185} Id.

\textsuperscript{186} Id. See also Starkman, Genocide and International Law: Is There a Cause of Action, 8 ASILS INT'L L. J. 1, 23 (1984).

\textsuperscript{187} See generally Kruiper, supra note 165.

\textsuperscript{188} Decades-Old Genocide Treaty, supra note 183.

\textsuperscript{189} Churchill, supra note 19, at 8, 14.

\textsuperscript{190} Churchill, supra note 179, at 409; See also Kruiper, supra note 165, at 7, 9.

\textsuperscript{191} Kruiper, supra note 165; See also Coba, supra note 160.
However, given the atrocities committed by states against their own citizens, many countries accept a broad definition of genocide. Generally, genocide is the denial of the right of existence to an entire human group.

Genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

Thus, genocide has two phases: (1) destruction of the national pattern of the oppressed group; and (2) implementation of the national pattern of the oppressor.

Evidence of both phases of genocide exists in the history of Native Americans. Anthropologists contend there are fewer racially pure Native Americans because of assimilation. "Genocide can take the form of what anthropologists have called deculturation, and it can involve the disintegration of some or all of the following: political and social institutions, culture, language, national feelings, religion, economic stability, personal security, liberty, health and dignity." In other words, genocide need not require the death of individuals, but rather the death of their ethnicity.

Some scholars separate the crimes of genocide and ethnocide into two distinct phenomena:

... short of genocide, ethnocide is also a monstrous crime, as it destroys the cultural dignity, and identity of all the members of a people, and very likely destroys their mental and physical health as well as their unique world views and traditional knowledge....

Regardless of how international legal scholars classify the destruction of the traditional Native American culture and society, the corresponding U.S. Indian policy has been and remains in violation of international law.

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192 See generally Berkey, Coulter & Tullberg, supra note 42. Some scholars have argued that a broad reading and application of the Genocide Convention is the only appropriate approach to the crime of genocide. See Churchill, supra note 179.
193 Churchill, supra note 179, at 9, (citing R. Lemkin, Axis Rule In Occupied Europe 79 (1944)).
194 Id.
195 Clemmer-Smith, supra note 4.
196 Churchill, supra note 179, at 421 (quoting Genocide in Paraguay 137 (R. Arens ed. 1976)).
197 Id.
3. Right to Equality

While a state may not actually commit ethnocide, a state may similarly destroy a culture through racial discrimination. Pub. L. No. 93-531 isolates persons of a certain ethnic origin and thus discriminates against Native Americans. The Big Mountain relocation is the first time in American history that the government has implemented a relocation scheme to resolve an Indian land claim. Generally, when Indian land claims affect non-Indians who have settled on Indian land, some form of compensation is offered to the Indians as "settlement" for their right to the land.

The discrimination inherent in Pub. L. No. 93-531 violates existing international law. Article 1 and Article 55 of the United Nations Charter attempts to promote and preserve equal rights without racial distinction. In addition, Article 7 of the Universal Declaration of Human Rights states:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement of such discrimination.

Article 26 of the International Covenant on Civil and Political Rights details more specifically the right to equal protection and the prohibition against discrimination. However, the most important document indicating the contemporary status of the law prohibiting racial discrimination is contained in the International Convention on the Elimination of All Forms of Racial Discrimination, which states:

Each State Party shall take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; . . . . State parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and freedoms.

Finally, the World Conference to Combat Racism and Racial Discrimination mandated not only that states take action to end racial discrimination, but also resolved that the international community take action to achieve its total elimination. The tenth Inter-American Conference stated that all persons are entitled to a world without discrimi-

199 Churchill, supra note 19, at 9.
201 U.N. CHARTER art. 1(3).
204 Articles 2(1)(c) and 2(2), 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966) [hereinafter Elimination of Racial Discrimination].
nation and equal protection of the law.\textsuperscript{206} Thus, there is ample international law supporting equal protection for Native Americans. To ensure that they will be treated equally and insulated from racial discrimination Native Americans must be afforded participation in the political process.

4. Right to Participation in the Political Process and the Economy

The input into the political process by traditional Native Americans is severely limited and usually non-existent.\textsuperscript{207} For example, more than two thirds of the Hopi still boycott the elections of the Tribal Council, the federally imposed tribal government.\textsuperscript{208} The traditional Hopi and Navajo continue to maintain their own forms of government.\textsuperscript{209}

This lack of political efficacy is contrary to the principles of international law. Article 21(3) of the Universal Declaration of Human Rights provides that the will of the people should be the basis of the authority of government.\textsuperscript{210} This provision is supported by the International Covenant of Civil and Political Rights, Article 1 and the International Covenant on Economic, Social and Cultural Rights, Article 1, which states: "All peoples have the right to . . . freely determine their political status and freely pursue their economic, social and cultural development."\textsuperscript{211} The Universal Declaration of the Rights of Peoples states: "Every people . . . shall determine its political status freely and without foreign interference."\textsuperscript{212} Consequently, under international law the Tribal Council is not a valid governing body because it lacks the support of the majority of Hopi. A government without the support of its people lacks authority. Hence, the Hopi Tribal Council does not have the authority to lobby or initiate legislation such as Pub. L. No. 93-531. Accordingly, the U.S. government, in negotiating with a government that lacks authority, ignores the mandates of international law.

In addition to the federally imposed tribal councils which as governing bodies do not have the support of a majority of their constituency, traditional Native Americans are kept politically powerless because they lack the ability to actively participate in the economy. The Native Americans have been forced into the market economy.\textsuperscript{213} Their resources are held in "trust" by the government,\textsuperscript{214} and their means to subsistence and

\textsuperscript{206} Coba, supra note 160, at 135.

\textsuperscript{207} Tullberg, The Creation and Decline of the Hopi Tribal Council, in RETHINKING INDIAN LAW 29, 30 (1982).

\textsuperscript{208} Clemmer-Smith, supra note 4. While every Hopi over 18 years of age has the right to participate in the elections of the Hopi Tribal Council, and states and federal representatives, they believe that participation would be tantamount to recognizing the fact that the Hopi tribe is no longer a sovereign nation. However, Hopi participation in the American electoral system increased between 40 and 45\% in the last two elections held in 1980 and 1984.

\textsuperscript{209} Id.

\textsuperscript{210} Universal Declaration, supra note 202.

\textsuperscript{211} See supra notes 175, 174.

\textsuperscript{212} Universal Declaration on the Rights of Peoples art. 5. reprinted in 3 ALTERNATIVES 280 [hereinafter Rights of Peoples].

\textsuperscript{213} Clemmer-Smith, supra note 4.

\textsuperscript{214} Berkey, Coulter & Tullberg, supra note 42, at 164. The trust relationship between the federal government and the Indian tribes is "unique." The Native Americans, usually through the tribal councils, are given some authority on who and what part of the land is to be leased for "development." The lease is then subject to approval by the U.S. government. It should be noted that Indians hold tenuous claims to their property. The U.S. adheres to the fiction that most Indian reservations exist because the United States allows the Indians to use a certain parcel of land. Thus,
self-sufficiency have all but been removed because of the livestock reduction mandated by Pub. L. No. 93-531. The result is that Native Americans have nearly the lowest standard of living of any ethnic group in America.

U.S. Indian policy responsible for these results are in violation of international law. Article 55 of the United Nations Charter obligates states to strive to improve economic conditions which disadvantage their people. The International Covenant on Economic, Social and Cultural Rights further states: "In no case may a people be deprived of its own means of subsistence." In addition, the United Nations General Assembly has passed a resolution calling for the complete and permanent sovereignty for peoples over their resources. Article 11 of the Universal Declaration of the Rights of Peoples states: "Every people has the right to choose its own economic and social system and pursue its own path to economic development freely and without any foreign interference." Consequently, the U.S. actions which deprive the Hopi and Navajo of their livestock and land, and hence, their livelihood, in the Big Mountain area violate international law. The loss of their land has a profound effect upon the Indians' culture and religion.

5. Right to Maintain Traditional Culture and Religion

Although Native American culture is considered an artifact, parts of Native American culture have survived. The United States school systems, however, continue to ignore the ancient indigenous cultures. Furthermore, classes taught on the reservations do not incorporate aspects of native culture in educational programs.

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights provide principles of international law that protect Native American culture. These covenants state respectively: "[a]ll peoples have the right to ... freely determine their political status and freely pursue their economic, social and cultural development."

The International Covenant on Civil and Political Rights further specifies in Article 27 that: "persons ... shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Essentially, the right to maintain one's indigenous culture is the right to be free from cultural domination. In many ways, the current movement towards a consumerist homogeneous society has been accelerated by the government's efforts to assimilate the


Kammer, supra note 2.

Clemmer-Smith, supra note 4.

U.N. Charter art. 55.

Social and Cultural Rights, supra note 174.

G.A. Res. 1803 (XXII).

Rights of Peoples, supra note 212.

Deloria & Lytle, supra note 18, at 250.

Id. For example, attempts to fund bilingual education for Native Americans have been generally unsuccessful.

Social and Cultural Rights, supra note 174. The idea of respect for culture can also be found in the World Conference to Combat Racism and Racial Discrimination, and the actions taken by the Organization of American States.

See Civil and Political Rights, supra note 175.

See Coba, supra note 160, at 237.
Indians into contemporary American culture. However, cultural domination, through government policies, foreign education and the mass media which present western culture as the only "civilized" culture, is generally condemned by principles of international law.

The Navajo's spirituality centers on their physical relationship with specific geographic areas. The Hopi place a religious significance on the earth and nature. Thus, both the Hopi and Navajo consider Big Mountain to be Holy Ground. Article 18 of the International Covenant on Civil and Political Rights declares that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

Recently the United Nations affirmed their protection of both theistic and non-theistic religions, by adopting the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religious Belief. Noteworthy are Articles 1(1) and 4(2), which state respectively:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

These provisions are evidence of the international community's support of the right of a peoples to maintain their own beliefs and not to have an alien religion imposed upon them. Therefore, the U.S. actions depriving the Indians at Big Mountain of their Holy Ground would probably be condemned by the international community as inhibiting their freedom of religion and forcing the abandonment of cultural values. Furthermore, the U.S. actions also violate the Indians' right to own property.

6. Right to Own Property

The United States has plenary authority over tribal lands. Thus, the 5th Amendment protection against the government's "taking" of property without due process of law does not apply. Lands "owned" by Native Americans in common are treated and have
always been treated differently from land owned individually by all Native American Indians. Real estate owned personally by a Native American is entitled to 5th Amendment protection.\textsuperscript{234} For tribal land under the U.S. government's plenary authority, courts need only consider whether the expropriation was within the intent to revoke the tribe's right of "occupancy." If the intent is to remove occupancy, the Indians have no recourse in U.S. courts.\textsuperscript{235}

Article 17 of the Universal Declaration of Human Rights states: "\[e\]everyone has the right to own property alone as well as in association with another."\textsuperscript{236} That law is supported by article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination;\textsuperscript{237} and Article 21 of American Convention on Human Rights.\textsuperscript{238} The Declaration of Barbados II, which prohibits any form of physical domination of a peoples states: "Physical domination is reflected first and foremost in the plundering of our land."\textsuperscript{239} The Declaration of Barbados II reflects Article 2 of the International Labor Organization (ILO) Convention which states: "[t]he right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized."\textsuperscript{240} Thus, by denying Native Americans the right to compensation for lands which they have traditionally occupied at Big Mountain, the U.S. government has again ignored fundamental principles of human rights.

B. Developing International Human Rights Law

Currently, new facets of international human rights law are being developed. Included in this new international law is the right to a clean environment, the right to development as a people, and indigenous rights law. Each of these developing facets of human rights law are applicable to the situation of Native Americans at Big Mountain.

The Native American’s right to a clean environment is an important issue because the once pristine air over the four corners area encompassing Big Mountain is polluted. The area has become polluted because of the mining and processing in the Black Mesa region which has caused the region to be classified as an environmental sacrifice area.\textsuperscript{241} Pollution from neighboring lands regularly impinges the quality of the environment of the reservation.\textsuperscript{242}

In the last decade, international environmental law has developed rapidly into an extensive body of law.\textsuperscript{243} Assuming the nationhood of the Hopi and Navajo tribes, protection against environmental destruction would be derived from Article 21 of the Declaration on the Human Environment, which states:

\textsuperscript{234} See generally id.
\textsuperscript{235} Berkey, Coulter & Tullberg, supra note 145 at 143–44.
\textsuperscript{236} Universal Declaration, supra note 202.
\textsuperscript{237} Elimination of Racial Discrimination, supra note 204.
\textsuperscript{238} American Convention, supra note 203.
\textsuperscript{239} Coba, supra note 160, at 237.
\textsuperscript{240} The Protection and Integration of Indigenous and Other Tribal Populations in Independent Countries, 1957 L. L. O. 107, 328 U.N.T.S. 247 (1957).
\textsuperscript{241} Churchill & LaDuke, Radioactive Colonization and the Native American, 15(3) SOCIALIST REV. 95, 110 (1985).
\textsuperscript{242} See generally LEE, supra note 2.
\textsuperscript{243} See II C. Bassiouuni, INTERNATIONAL CRIMES: DIGEST/INDEX OF CONVENTIONS AND RELEVANT PENAL PROVISIONS (1985) for a listing of 22 Conventions concerning environmental protection.
States have in accordance with the Charter of the United Nations and the principles of international law ... responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.\textsuperscript{244}

Some scholars believe that the right to a clean environment should be added to the major human rights documents.\textsuperscript{245} Accordingly, many contemporary human rights documents contain provisions pertaining to the environment. For example, the Cocoyoc Declaration highlights the necessity to prevent environmental degradation.\textsuperscript{246} In addition, most human rights instruments protecting indigenous populations include provisions on the population, safe technology, and wildlife conservation.\textsuperscript{247} Underlying the right to a clean environment, is the basic premise that indigenous people must have the right to develop as a group. Allowing a dominant nation to destroy the environment and land of indigenous peoples hardly contributes to their development as a people. In addition, thrusting Native Americans into an economic and social system incompatible with their traditional culture is not conducive to development.\textsuperscript{248} Native Americans' development has been smothered by commercial values and stagnated by their lack of meaningful participation in the institutions which develop those values.\textsuperscript{249}

The right to development promotes collective self-reliance and requires that new social and economic institutions be formed that allow individuals to fully participate and reach their potential.\textsuperscript{250} Participation in such institutions abolish both old and new forms of domination.\textsuperscript{251} Essentially:

\begin{quote}
[d]evelopment stands for the development of human beings and not for the development of countries, the production of things, their distribution, within social systems or the transformation of social structures. These may be means towards the end but they should not be confused with the end, which is that of developing the entire human being and human beings.\textsuperscript{252}
\end{quote}

Thus, "human needs" development empowers Native Americans to participate in the formation of their society, to avoid political manipulation and the often re-occurring connection between coercive forces (U.S. government and values) and village residents.

\textsuperscript{244} 48/14 U.N. Doc. A/Conf. 21 (1972).
\textsuperscript{245} W. GORMELY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION (1976).
\textsuperscript{246} Reprinted in 1 ALTERNATIVES 369 (1975).
\textsuperscript{247} See, e.g., International Conferences of Indigenous Peoples, reprinted in Coba, supra note 160, at 148, 155.
\textsuperscript{248} CLEMMER-SMITH, supra note 4.
\textsuperscript{249} DELORIA & LYTLE, supra note 18.
\textsuperscript{250} Nanda, Development as an Emerging Human Right Under International Law, 13 DEN. J. INT’L L. POL. 161, 179 (1984). It is argued that the Indian Reorganization Act (IRA) of 1934 was enacted in accordance with the concept of development. This idea is incorrect because the IRA is not a new institution created by oppressed persons, rather the IRA was established by outsiders who desired minimal feedback and suggestions. While the IRA has been partially successful in improving economic conditions on some reservations, the IRA has not spurred development because its scope has not promoted the social aspects of the tribe particularly the tribes' language, culture, and religion. See DELORIA & LYTLE, supra note 18.
\textsuperscript{251} Nanda, supra note 250.
(Native Americans who participate in the Tribal Councils). The right to form one's own society implies the right to self-management of affairs which would increase authentic participation by and impose true accountability on the Native Americans. The right to development requires participation in all phases of decision making because only the Native Americans understand and know how to fulfill their needs. The power to transcend an oppressive government or governmental decision is inherent in the right to develop.

Although the right to development is not explicitly contained in human rights documents that have achieved customary usage, it can be derived from a liberal interpretation of those documents. The following provisions can be read to support the right of development: Articles 2, 4, 6–15 of the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights Articles 4, 6–27.

Indigenous rights law is in the process of adopting many of the concepts implicit in the right to development. For example, the actions of the Inter-American Indian Conferences emphasize the need to create institutions which would ensure the continuity of traditional ways, culture, language, and education. Other facets of developing indigenous rights law entitle indigenous nations and peoples to the permanent control and enjoyment of their aboriginal ancestral-historic territories. This includes surface and sub-surface rights, inland and coastal waters, renewable and non-renewable resources, and the economies based on these resources.

Although the international community, and international law, has only recently recognized the difficulties facing indigenous populations, significant developments in indigenous rights law are evident in the creation of a special forum to hear complaints on violations of the human rights of indigenous people. In 1982 the U.N. Working Group on Indigenous Populations was established under the U.N. Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities. This working group not only examines cases, but gives special attention to the growing body of recognized rights of indigenous populations.

In many respects Pub. L. No. 93-531 violates evolving indigenous law. For example, Article 8 of the Declaration of Principles on the Rights of Indigenous Peoples states "no state shall participate financially or militarily in the involuntary displacement of indige-

255 Paul & Dias, supra note 40, at 1, 2.
254 Id. at 3.
253 Id. at 5.
256 See generally, P. Freire, Pedagogy of the Oppressed (1968). The overgrazing problem in the JUA is used as evidence that traditionalists are unable to satisfy their needs effectively. This claim is incorrect because problems in the JUA, such as overgrazing, occur not out of ignorance, but because of a lack of alternatives. Paul & Dias, supra note 40, at 6.
257 Paul & Dias, supra note 40, at 13.
258 Social and Cultural Rights, supra note 174.
259 Civil and Political Rights, supra note 175.
260 Coba, supra note 160, ¶¶ 38, 42 at 143.
261 See infra note 266, at art. 4.
263 Coba, supra note 160, published in 1986, this paper was the first extensive compilation of international law on indigenous rights.
264 Jones, supra note 163, at 71.
265 Id.
nous populations, or in the subsequent economic exploitation or military use of their
territory ...."266 Clearly, the U.S. government has involuntarily displaced the traditional
Hopi and Navajo for the economic exploitation of their territory at Big Mountain.

Thus, the ramifications of Pub. L. No. 93-531 involve substantial violations of
international human rights law. In order to prevent the Big Mountain relocation man-
dated by Pub. L. No. 93-531, the Indians affected must bring a cause of action in a
domestic or international forum.267

V. LIKELIHOOD OF A SUCCESSFUL CHALLENGE TO PUB. L. NO. 93-531 UNDER
INTERNATIONAL HUMAN RIGHTS LAW

A. Domestic Fora

In many respects, international human rights law is ineffective except for its ability
to sway international public opinion.268 Yet, member states of the U.N. are obligated by
Article 56 of the U.N. Charter to "take joint and separate action to promote human
rights and fundamental freedoms."269 Based on this obligation many cases alleging
human rights violations are brought in U.S. courts.270

In domestic courts obtaining standing to sue has not been a major obstacle for
Native Americans litigating human rights actions. In most jurisdictions, standing depends
on whether an individual's or a group's rights have been violated, rather than on whether
the person bringing suit officially represents the tribe.271 Nonetheless, traditional Native
Americans have been denied standing to sue in some jurisdictions because they are not
the official representatives of the tribe.272

However, courts have avoided the issues regarding human rights violations through
the political question doctrine. Under the political question doctrine courts will refuse
to hear a cause of action which involves purely political questions because a decision by
the judiciary would involve an encroachment on the legislative or executive power.273
Since all judicial decisions redistribute political and economic power to some degree,
invoking the political question doctrine to avoid hearing a case on the Big Mountain
dispute or on issues of Indian sovereignty is irrational.274

The strongest argument to overcome the political question hurdle is simply that
Native Americans are in need of immediate judicial assistance. It has been noted that:

267 For an interesting analogy see Dugard, supra note 112, at 11, 28.
268 Jones, supra note 163, at 70.
269 U.N. CHARTER art. 56.
270 See generally Bazlyer, Litigating the International Law of Human Rights: A 'How to' Approach, 7
271 See Nanda, International Human Rights and International Criminal Law and Procedure: Judicial
Remedies in U.S. Courts For Breaches of Internationally Protected Human Rights (1986) (available from
the University of Denver International Legal Studies Program), the author believes that an increased
awareness that all crimes/human rights violations are committed against humanity establishes the
basis for universal jurisdiction.
272 The Hopi Tribal Council is the official representative of the Hopi people. For examples of
the attempted suits in the 1970's by the traditional Hopi against the federal government and the
Hopi Tribal Council see Berkey, Coulter & Tullberg, supra note 42, at 163.
274 Kruper, supra note 165, at 107.
The fact that conduct leading to collective victimization may have, in whole or in part, its origins in political question should not be a deterrent to the study of victimization impact and the protection of victims. It would be tragic if concern for “collective victims” should be overlooked because of political sensitivities or apprehensions that the study of the question could be politicized.275

Human rights issues raise political questions because:

... human rights cases not only out of federal courts, but the state courts as well, by broad readings of the political question doctrine and other vaguely sketched notions of justiciability, indicates [an] awareness that the primary reason litigants invoke customary human rights law in the courts of the United States is precisely because the international norms are more generous than available domestic law. Unfortunately, the courts of the United States are less accustomed than they used to be to the interpretation and application of international law.276

However, any challenge by Native American nations to U.S. authority is generally challenged by the political question doctrine. The result is that U.S. courts have been unable to provide any redress for the claims asserted by Native American nations.277 The Native American nations are caught in a “catch 22” designed by the U.S. government. A commentator has stated:

The United States cannot continue to subject Indian peoples to all the legal disadvantages of foreign nationhood [referring to the political question doctrine] and yet insist that Indian affairs are not a matter for international concern and that Indian nations are not subjects of international law.278

Judge Warren Urbom, in his opinion concluding the 1974 Sioux Sovereignty Hearings, felt that any decision on Indian sovereignty would be a policy decision which he believed the judiciary did not have the authority to make.279 Although Judge Urbom believed that U.S. relations with American Indians were rooted in international law and that the Sioux were once a fully sovereign nation, he did not believe he could undo a history of actions by the federal government without regard to the United States obligations under international law.280

The U.S. Constitution states that “all treaties made or which shall be made under the authority of the United States shall be the Supreme Law of the Land.”281 Although

275 Bassiouni, supra note 163, at 242.
277 For a detailed discussion of the effect of the political question doctrine on Native American group rights, see Coulter, The Denial of Legal Remedies to Indian Nations Under U.S. Law in Rethinking Indian Law 103 (1982).
278 Id. at 107. For example, the court determined that the traditional Hopi leaders could not sue the Hopi Tribal Council because it represented a sovereign state. As an IRA government, the Hopi Tribal Council is an extension of the U.S. government and therefore, has sovereign immunity. See Mander, supra note 11, at 59.
279 Excerpts from the decision, reprinted in The Great Sioux Nation — Sitting in Judgment on America supra note 148, at 198.
280 Id. at 197, 198.
281 U.S. Const. art. VI, sec. 2.
the language of the Constitution plainly mandates the application of international law as it appears in treaties, courts have struggled to avoid that mandate when treaty obligations conflict with legislative or executive policy. One way courts have avoided this obligation is to make a distinction between self-executing treaties, those treaties clear enough to be invoked as binding rules of law in domestic courts, and non-self-executing treaties, those treaties which need additional domestic legislation before they can be invoked as binding rules of law in domestic courts. Scholars believe that courts have been overzealous in their application of the non-self-executing treaty approach, which has resulted in an underzealous application of treaties containing protection of basic human rights and dignities.

The U.S. Supreme Court, however, has declared:

International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.

The Supreme Court was referring to customary law, which is composed of the standards or recognized norms of international law which must be followed by every nation. The application of customary human rights law in domestic courts has met with limited but perhaps growing success. The rationale posited for the lack of complete success in litigating human rights claims in domestic courts is the lack of understanding by members of the judiciary of their obligation to apply customary human rights law. Once courts recognize their obligations, Native Americans may be able to sustain causes of actions based on violations of customary human rights law. Meanwhile, American Indians must seek other forums to litigate their actions.

B. International Fora

In the international fora, the basic standing requirements to sue vary depending on the procedure and the organization under which the claim is brought. The requirement that all domestic remedies must be exhausted before seeking relief at the international level is the only hurdle facing Native Americans in order to establish standing. However, the standing question is essentially moot because traditional Indians are generally unsuccessful in having their claims heard in domestic courts and have previously presented claims to international bodies.

Generally, Native Americans have brought their claims before human rights bodies of the U.N. and regional organizations. In order to bring a claim before the International Court of Justice (ICJ), Native Americans must be found to have international personality.

282 For a complete discussion, see Hartman, supra note 276.
283 Id.
284 Paquette Habana, 175 U.S. 677, 700 (1900).
285 Customary international law is derived from public international law documents such as the U.N. Charter and the Universal Declaration of Human Rights, international conventions, comparative law, judicial opinions, and the writings of scholars. See Bazyler, supra note 270.
286 See generally Nanda, supra note 271; Hartman, supra note 276.
287 See Nanda, supra note 271.
289 Berkey, Coulter & Tullberg, supra note 42, at 163.
290 Id. at 169; Berkey, Coulter & Tullberg, supra note 145, at 149.
However, the ICJ's jurisdiction is generally limited to cases between members of the United Nations.\textsuperscript{291} Thus, since only states can be members of the U.N., if Native Americans obtained standing to sue in the ICJ, the Court would implicitly recognize the nationhood of the tribes. Currently, the ICJ is unwilling to recognize the nationhood of American Indians, particularly when granting international personality to a group would have political ramifications for a member nation.\textsuperscript{292} Thus, while the political question doctrine does not operate at the international level, political considerations are a subtle, yet coercive force.\textsuperscript{293} Although it is unrealistic to think that human rights law can exist in a political vacuum, the ICJ must transcend the limiting western doctrine of international personality before there can be effective human rights protection at the international level.\textsuperscript{294}

Since international organizations are not bound by the international personality doctrine, Native Americans' claims are met at international organizations with greater success than at the ICJ. However, even in international organizations, claims by Native Americans have had limited success. The United Nations Commission on Human Rights has limited effectiveness because of two resolutions passed by the Economic and Social Council.\textsuperscript{295} Resolution 1235 gave the U.N. Commission on Human Rights authority to make thorough studies of situations which reveal a consistent pattern of human rights violations.\textsuperscript{296} Resolution 1503 establishes the Sub-Commission on Prevention of Discrimination which is designed to redress those human rights violations which reveal a consistent pattern of gross and reliably documented violations of human rights and fundamental freedoms.\textsuperscript{297} These two resolutions combined with resolution 1296\textsuperscript{298} complete the basis on which a complaint may be brought before the Commission.\textsuperscript{299}

The Sub-Commission on Prevention of Discrimination has created special working groups in order to more effectively implement human rights law.\textsuperscript{300} For example, in 1981, the Sub-Commission created a Working Group on Indigenous Populations\textsuperscript{301} which meets prior to the annual Sub-Commission meeting with the purpose of developing international standards for the promotion and protection of human rights of indigenous peoples.\textsuperscript{302} Thus far, the U.N. mechanisms for the implementation of human rights law

\textsuperscript{291} U.N. Charter art. 93(1) states: "all members of the United Nations are ipso facto parties to the Statute of the International Court of Justice." Article 93(2) provides for the admission to the Court of a state which is not a member of the United Nations: "A state which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

\textsuperscript{292} R. Falk, Reviving the World Court (1986).

\textsuperscript{293} See generally Kruper, supra note 165.

\textsuperscript{294} Id. at 107, 108.

\textsuperscript{295} Id. at 106.


\textsuperscript{298} The Commission may consider a written statement of no more than 2,000 words submitted by a non-governmental organization having consultative status with the U.N. See Indian Law Resource Center, supra note 288, at 135. See also Tardu, United Nations Responses to Gross Violations of Human Rights: The 1503 Procedure, 20 Santa Clara L. Rev. 559 (1980).

\textsuperscript{299} For a complete discussion on the procedures for bringing an action before the Commission see Indian Law Resource Center, supra note 288, at 134.

\textsuperscript{300} Id.

\textsuperscript{301} Ryan, supra note 120, at 175.

\textsuperscript{302} U.N. Doc. E/Cn.4/Sub.2/495.
have performed poorly mainly due to political gamesmanship.\textsuperscript{303} However, optimism prevails and an overall improvement in the effectiveness of the U.N. mechanisms may be forthcoming.\textsuperscript{304}

Beyond U.N. organizations Native Americans have sought relief in the Organization of American States (OAS). Currently it is difficult to perceive how Native Americans could bring a viable cause of action against the United States in the Organization of American States. The OAS, however, is beginning to use the new mechanisms and procedures which appear in the American Convention on Human Rights.\textsuperscript{305} Currently, these procedures are being implemented through the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.\textsuperscript{306} Interaction between the U.S. and the Inter-American Commission on Human Rights is well-established.\textsuperscript{307} In 1977, the U.S. was instrumental inreactivating the Commission's effectiveness by announcing that the U.S. would allow the Commission free access to its territory for on-site investigations at the Commission's discretion.\textsuperscript{308} Thus, to obtain standing in OAS Native Americans should petition the Commission to investigate the Big Mountain situation for alleged violations of the American Declaration of the Rights and Duties of Man.\textsuperscript{309} However, petitioning the Commission to investigate does not ensure that the Commission will grant the petition and report human rights violations.\textsuperscript{310}

Law exists that can stop the Big Mountain relocation. The question is simply whether the law, if applied, will be effective. Generally, international mechanisms are ineffective and no state is willing to represent the Indians at Big Mountain before the ICJ. Although actions in the international arena may not be able to stop the Big Mountain relocation, these actions are important because they influence international public opinion, which has a corresponding impact on Congress. Furthermore, these actions establish the path the judiciary should follow in causes of action based on international human rights law.

VI. POLICY SUGGESTIONS

The situation at Big Mountain is a result of 200 years of misguided U.S. Indian policy. A new policy dealing specifically with the Big Mountain dispute would be inadequate. While the removal of traditional Native Americans from Big Mountain must be stopped, repeal of Pub. L. No. 93-531 will not suffice as a solution to the problems inherent in U.S. Indian policy.

The traditional Indians want to live according to their laws, not those imposed upon them by the United States. Those Indians who have assimilated into contemporary society should not be allowed to take advantage of the resources owed to the tribe as a whole and entrusted to the tribe for future generations. In both domestic and international

\textsuperscript{303} Kruper, \textit{supra} note 165, at 107.
\textsuperscript{304} Id.
\textsuperscript{305} Norris, \textit{Bringing Human Rights Petitions Before the Inter-American Commission}, 20 Santa Clara L. Rev. 733 (1980). The OAS is implementing these procedures despite the fact that the U.S. government has not ratified the American Convention on Human Rights.
\textsuperscript{307} Id. at 328.
\textsuperscript{309} Id. at 86.
\textsuperscript{310} For more information on the OAS and its procedures see Norris, \textit{supra} notes 305, 308.
fora, Native American tribes must be recognized as sovereign nations. Indian sovereignty is an expression of the traditional Indian community and should be respected. Recognition of Native American sovereignty is essential because the human rights violations incurred in the Big Mountain relocation are related to the fact that the institutions controlling Native Americans have been imposed upon them. They must be allowed to regain control over the institutions that most affect their lives.

In many respects, Pub. L. No. 93-531 is a result of alien values thrust upon Native Americans. The traditional life styles of the Native Americans have been decimated by the policies of the United States government. It is naive to believe that life can return to how it was 300 years ago. It is not naive to believe that if the traditional Native Americans were given control of their futures, they could build an admirable society.

As long as the United States continues to ignore human rights law to the detriment of the traditional Indians, the United States sacrifices its honor and dignity. In some respects, the Big Mountain relocation exemplifies the oppression of a movement which is on the cutting edge of social progress because the movement to protect traditional ways questions contemporary values and exposes the suicidal aspects of our society.

The quality of political life in the United States, as represented by our respect for human rights and dignities has shaped the respect for human rights throughout the world. Unfortunately most people do not understand that everyone's actions affect, change and create contemporary society. It is for this reason that everyone must participate in and understand the long-term ramifications of our decisions. That is the lesson to be learned from the degrading and insensitive treatment of traditional Native Americans.

311 Churchill, supra note 19, at 24.
312 Krauss, supra note 177, at 442, 449.