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I. INTRODUCTION

Since the Jay Treaty of 1794, indigenous groups in the United States and Canada have both enjoyed the right of "free passage" across the U.S.-Canadian border.[2] The treaty protects and provides a secured means of transportation and travel via the Mississippi River for all citizens of the U.S. and Canada, a former British colony. However, from a Native American development perspective, the rite of passage, trade, and commerce of resident U.S. native groups with Canada and Mexico, respectively as riparian[3] and littoral[4] states to the United States, has been under-utilized by Native Americans. This paper argues that the current United States and international legal framework provides for much more use of connected U.S. watercourses by Native Americans and greater movement and trade across the Canada-U.S. border than the groups are currently utilizing.

A. Background

Native Americans traditionally utilized the internal waterways of North America for travel, trade, and nourishment. Many United States, Canadian, and Mexican Native American groups occupied territories that transcended current day national borders, knowing no international national boundaries in their travels. The internal waterways of America in particular were the life-line for many—if not most or all—non-coastal Native American Tribes. The Mississippi

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[2] Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty; and the United States of America, U.S.-U.K., Nov. 19, 1794, T.S. No. 105 [hereinafter Jay Treaty].

[3] *Riparian*, MERRIAM-WEBSTER DICTIONARY ("relating to or living or located on the bank of a natural watercourse (such as a river) or sometimes of a lake or a tidewater.") *available at* https://www.merriam-webster.com/dictionary/riparian.

[4] *See* Richard M. Lattimer, Jr., *Myopic Federalism: The Public Trust Doctrine and Regulation Of Military Activities*, 150 MIL. L. REV. 79, 79 n.5 (1995) ("Littoral means 'pertaining to the shore of a lake, sea, or ocean. In a military context, littoral can mean within 650 nautical miles of the coastline.") (internal citations omitted).

River's massive web of tributary rivers and lakes spread throughout the continental United States.

The Mississippi River Drainage Basin[5]

As the most historic internal transportation route in the country,[6] the Mississippi River's navigational corridor and its adjoining rivers and lake sub-system that are rich in natural and cultural resources, are of particular importance to the cultural and spiritual traditions of Native Americans.[7] The river network also provides recreational opportunities for millions of people annually and serves as a vital working waterway for commercial transportation, linking

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[5] Kristi Cheramie, *The Scale of Nature: Modeling the Mississippi River*, PLACES JOURNAL (March 2011), https://placesjournal.org/article/the-scale-of-nature-modeling-the-mississippi-river/?cn-reloaded=1.

[6] *Mississippi: National River and Recreation Area Minnesota; Mississippi River Facts,* NAT'L PARK SERV. (Apr. 14, 2021), *https*://www.nps.gov/miss/riverfacts.htm.

[7] *See* Marco Sioli, *When the Mississippi Was an Indian River: Zebulon Pike's Trip from St. Louis to Its Sources 1805-1806,* REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES NO. 98, 9 (2003).

national and international markets[8] through safe, low-cost movement of bulk goods by river barges, sea faring cargo ships, and tankers.[9]

The historic and modern day Native Americans descended from the overarching Mississippian Culture are believed to include: "the Alabama, Apalachee, Caddo, Cherokee, Chickasaw, Choctaw, Muscogee Creek, Guale, Hitchiti, Houma, Kansa, Missouria, Mobilian, Natchez, Osage, Quapaw, Seminole, Tunica-Biloxi, Yamasee, and Yuchi."[10] The Mississippian culture is associated with lifestyle and customs of Native Americans located during the Mississippian Period, circa 800 to 1540 CE[11] in "the middle Mississippi River valley, between St. Louis and Vicksburg. However, there were other Mississippians as the culture spread across modern-day US. There were large Mississippian centers in Missouri, Ohio, and Oklahoma."[12]

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[8] *See The Mighty Mississippi*, HAMLINE UNIV. (2001). http://cgee.hamline.edu/rivers/Resources/river_profiles/mississippi.html.

[9] *See id.*

[10] *Civilizations in the Americas: Mississippian Culture*, OPEN EDU. RES. SERV. https://courses.lumenlearning.com/suny-hccc-worldcivilization/chapter/mississippian-culture/ (last visited Nov. 27, 2021).

[11] *See id.*

[12] *See id.*

Map of Mississippian Cultures: 800 to 1540 CE[13]

Cultural traits characteristic of the Mississippians are:

> The construction of large, truncated earthwork pyramid mounds, or platform mounds. . . . Structures (domestic houses, temples, burial buildings, or other) were usually constructed atop such mounds.
>
> Maize-based agriculture. . . . adoption of comparatively large-scale, intensive maize agriculture, which supported larger populations and craft specialization.

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[13] Herb Roe, *Approximate Areas of Various Mississippian and Related Cultures*, illustration of a map showing the various Mississippian Cultures, *in Mississippian Culture*, Wikipedia (Mar. 1, 2010), https://*en.wikipedia.org/wiki/Mississippian_culture#/media/File:Mississippian_cultures_H Roe_2010.jpg*.

> The adoption and use of riverine (or more rarely marine) shells as tempering agents in their shell tempered pottery.
>
> Widespread trade networks extending as far west as the Rockies, north to the Great Lakes, south to the Gulf of Mexico, and east to the Atlantic Ocean.
>
> The development of the chiefdom or complex chiefdom level of social complexity.
>
> A centralization of control of combined political and religious power in the hands of few or one.
>
> The beginnings of a settlement hierarchy, in which one major center (with mounds) has clear influence or control over a number of lesser communities, which may or may not possess a smaller number of mounds.
>
> The adoption of the paraphernalia of the Southeastern Ceremonial Complex (SECC), also called the Southern Cult. This is the belief system of the Mississippians as we know it. SECC items are found in Mississippian-culture sites from Wisconsin to the Gulf Coast, and from Florida to Arkansas and Oklahoma. The SECC was frequently tied into ritual game-playing.[14]

After the U.S. Congress passed the Indian Removal Act, what is known as the Trail of Tears occurred during 1830s, with "the forced and brutal relocation of approximately 100,000 indigenous people (belonging to Cherokee, Creek, Chickasaw, Choctaw, and Seminole, among other nations) living between Michigan, Louisiana, and Florida to land west of the Mississippi River."[15] And, whence removed from the banks of the Mississippi, Native Americans became and are now subjugated from control of this traditionally aboriginal cultural and economic resource.[16] An essential element of Native American life for

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14 *See Civilizations in the Americas: Mississippian Culture, supra* note 10.

15 *See id.*

16 *See* Sioli, *supra* note 7.

thousands of years before European contact, native custom sees the Mississippi as beyond human dominance.[17] The Native Americans' loss of control over this vital mode of travel, trade, water, and nourishment—a natural resource inextricably linked to their traditional spiritual and cultural well-being—has annexed their sovereign right to utilize their indigenous waterways.

From a socio-economic perspective, the Native Americans' holistic use of North American river systems has been usurped by a western market-based consumptive commercial system that supplanted Native Americans from both control and access to their "Father of Waters."[18] Is it any wonder that these tribes now flounder in cultural isolation, economic disparity and conflict, and face a continuing dissociation with their traditional culture, languages, land, waters and way of life?

II. NORTH AMERICAN RIVER SYSTEMS, NATIVE NAVIGATION, AND TRADE ISSUES

In examining the legal framework of the Mississippi River waterway and its related network of tributaries, it is significant to consider which jurisdictions apply.

Canada is essentially a water basin state for many U.S. waterways and is riparian to the Missouri/Mississippi River system (via, e.g., the Poplar River in Saskatchewan and the Milk River in Alberta) and the adjoining St. Lawrence River/Great Lakes/Illinois/Ohio River systems. Canada has a shared historical use of the Mississippi River system—as a shortcut route to the Gulf of Mexico—and has a riparian right of navigational access founded on geography, history, and usage as expressly identified by Articles 3 and 28 of the 1794 Jay Treaty (further corroborated by the 1814 Treaty of

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[17] *See id.*

[18] ENV'T PROT. AGENCY, NAT'L SERV. CTR. FOR ENV'T PUBL'NS., WATERSHED EVENTS: THE MISSISSIPPI RIVER OR "FATHER OF WATERS" (2001).

Ghent) and by Pinckney's Treaty in 1795.[19] This right is also supported by international law and the inherent rights of Native Americans.[20]

The Mississippi River, which originates in Canada, is the chief river of the United States, rising in the lake region of northern Minnesota and flowing about 2,350 miles southward to the Gulf of Mexico.[21] The river serves as one of the busiest commercial waterways in the world, connecting contiguously with the Missouri, Illinois and Ohio Rivers, the Great Lakes, St. Lawrence River seaway, and to the Gulf of Mexico and the Gulf intra-coastal waterway.[22]

The Mississippi is the largest river in North America and second longest after its tributary Missouri River.[23] From the head waters of the United states and Canadian Rocky Mountains, the Missouri-Mississippi river system is over 3,900 miles long, ranking as the world's third longest river system after the Nile and the Amazon.[24] A watershed of both the Mississippi and the Missouri Rivers,[25] Canada also has a shared history of using the Mississippi River system, which provides a short-cut route to the Gulf of Mexico. Interestingly it has been found that "there are records of human habitation along the Mississippi river that date back more than five thousand years. Four thousand years ago, Native American in the lower Mississippi Valley began establishing communities with large, elaborate earthen architecture."[26] These Native American settlements sprang up along the Mississippi, which used the river for communications and trade.[27] Prior to the arrival of the first Europeans, the Mississippian culture

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19 *See infra* Section III.

20 *See infra* Section III.

21 *See The Mighty Mississippi, supra* note 8.

22 *See id.*

23 *See Mississippi, supra* note 5.

24 *Id.*

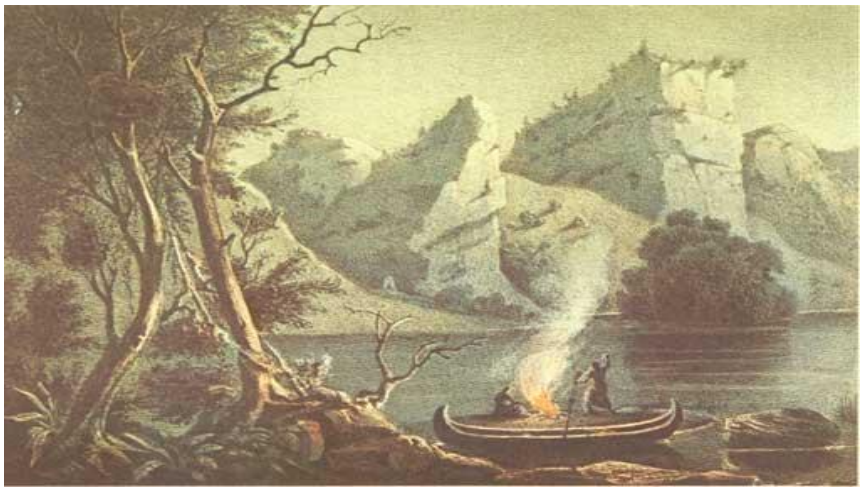
25 *See The Mississippi/Atchafalaya River Basin (MARB),* ENV'T PROT. AGENCY, https://www.epa.gov/ms-htf/mississippiatchafalaya-river-basin-marb (last visited Nov. 27, 2021).

26 *See The Mighty Mississippi, supra* note 8.

27 *See* Richard Moore, *The History of Transportation along the Mississippi River*, CTR. FOR GLOBAL ENV'T EDUC., https://cgee.hamline.edu/rivers/Resources/Voices/transportation1.htm (last visited Nov. 27, 2021).

tribes thrived.[28] With respect to Mexico's adjacency to the United States and its riparian presence on the Gulf of Mexico, accompanied by a long history of trade and migration in the region, the border between the United States and Mexico has changed over time, and much of the territory that now forms the southwestern United States was at one point Mexican.[29] Nevertheless, "the movement of people, goods, money, and ideas has always been a feature of this border."[30]

In the northern reaches of the watercourse, in Northern Minnesota, the Ojibway Indians called the Mississippi River "Messipi," meaning "Big River, or "Mee-zee-see-bee"— Father of Waters.[31] These Mississippi Indians who originally lived near the Mississippi used it for canoe transportation, hunting, fishing, and agriculture, and viewed it as the center of the universe.[32]



Native Americans on the Mississippi[33]

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[28] *See id.*

[29] *See Teacher's Guide, Hispanic and Latino Heritage and History in the United States*, NAT'L ENDOWMENT FOR THE HUMANITIES, https://edsitement.neh.gov/teachers-guides/hispanic-heritage-and-history-united-states (last visited Nov. 27, 2021).

[30] *See id.*

[31] *See The Mighty Mississippi, supra* note 8.

[32] *See id.*

[33] Henry Lewis, *Indians Spearing Fish,* The Valley of the Mississippi, Illustrated. (1846-48) *available at* https://digital.lib.niu.edu/islandora/object/niu-lincoln%3A32684.

III. INDIGENOUS RIGHT OF PASSAGE & TRADE ON NORTH AMERICAN WATERCOURSES

The establishment of the U.S.–Canadian border after the American War of Independence bisected Indian lands where no border had been known.[34] In response to secure the access and navigability of its major watercourses the United States declared by the ordinance of 1787, art. 4, relating to the north-western territory, it is provided that "the navigable waters, leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free."[35] And, in further response in a direct reference to a pre-existing aboriginal rite of passage, Articles 3 and 28 of the Jay Treaty of 1794 between the United States [36] and Great Britain,[37] named the "Treaty of Amity Commerce and Navigation,"[38] provided that Indians on either side of the border would retain a "right of free passage" across the U.S.-Canadian border.[39] The Jay Treaty provisions were subsequently incorporated into Section 289 of the United States Immigration and Naturalization Act.[40] In Canada, because the Jay Treaty was not incorporated into statute, it is

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[34] *See* Bryan Nickels, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival under the United States Statutory Law and Canadian Common Law*, 24 B.C. INT'L & COMP. L. REV. 313, 313-14 (2001).

[35] U.S.C.A. § Ordinance of 1787: The Northwest Territorial Government (West) *available at* www.loc.gov/item/90898154/.

[36] The Jay Treaty is not a treaty that is signed by Native Americans but rather is signed by two exogenous sovereign nations with Great Britain as trustee of the Indian people effectively passing its fiduciary duty on via the Jay Treaty to the United States as the new Trustee of Indians within its borders and/or within Canada.

[37] Canada did not gain independent national status until 1867 under the British North America Act. *See* Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

[38] *See* Jay Treaty, *supra* note 2, at art. 3 (The first major treaty under the United States Constitution, passed by Congress in April 1796.); *see also* Robert W. Scheef, *'Public Citizens' and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent*, 69 FORDHAM L. REV. 2201, 2250 (2001).

[39] *See* Jay Treaty, *supra* note 2, at art. 3

[40] 8 U.S.C. § 1359 (1952) ("Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess 50 per centum of blood of the American Indian race"); *see also* 8 C.F.R. § 289.2 (1964).

administered through common law.[41] The Jay Treaty, Article 3 also protected a secured means of transportation and travel via the Mississippi for all citizens of the United States and Great Britain (Canada),[42] Which is corroborated by reference to Pinckney's Treaty of October 27, 1795.[43]

Jus Cogens, a Latin term representing fundamental international legal principles, suggests that "good neighborliness" is paramount for harmonious international relations.[44] International river law addresses the central issue of how cross-national river resources should be divided and governed. In 1815, the Congress of Vienna supplied the framework for international river law for almost a century,[45] followed by the Barcelona Convention of 1921,[46] which forbid states to

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[41] *See* Nickels, *supra* note 34, at 315, 330 (noting *Watt v. Liebelt* is considered perhaps the most definitive case from Canadian courts regarding the interpretation of free passage rights per the Jay Treaty, and "to claim the free passage right in Canada, a U.S. Indian has to demonstrate a cultural or historical 'nexus' to the specific area in Canada he wishes to visit."); *see also* Watt v. Liebelt, [1998] 236 N.R. 302 (Can. C.A.).

[42] *See* Jay Treaty, *supra* note 2, at art. 3 ("And it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner as any . . . All goods and merchandize whose importation into the United States . . . may freely, for the purposes of commerce, be carried into the same, in the manner aforesaid, by His Majesty's subjects and such goods and merchandize shall be subject to no higher or other duties than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said States.").

[43] *See* Treaty of Friendship, Limits and Navigation art. XXI, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138, 150.

[44] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES: JUS COGENS AND OBLIGATIO ERGA OMNES, 59 LAW & CONTEMP. PROBS. 63, 63 (1996).

[45] *See generally* Ralph W. Johnson, *Freedom of Navigation for International Rivers: What Does It Mean?*, 62 MICH. L. REV. 465 (1964).

[46] *See* Convention and Statute on the Regime of Navigable Waterways of International Concern, Barcelona, Apr. 20, 1921, League of Nations, Treaty Series, Vol. VII, at 37. Which recognized "a fresh confirmation of the principle of 'Freedom of Navigation' in a Statute elaborated by forty-one States belonging to the different portions of the world constitut[ing] a new and significant stage toward the establishment of co-operation among States, without in any way prejudicing their rights of sovereignty or authority." The United States is not signatory to this Convention.

construct navigational obstacles and was quickly supplemented by a Geneva Convention of 1923.[47] Later, the Pan American Declaration concerning the Industrial and Agricultural use of International Rivers of 1933[48] allowed countries to develop hydropower as long as it did not affect the activities of another river-sharing state. Where international river status is not recognized, ignored or denied domestically and where international jurisdiction will be disputed, international law is insufficient to rectify disputes.[49]

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), Part X, Right of Access of Land-Locked States to and from the Sea and Freedom of Transit per Article 124 provides:

> (a) that a "land-locked State" means a State which has no sea-coast, under subsection (b) that "transit state" means a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes, and under subsection (c) that "traffic in transit" means

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[47] *See* Statute on the International Regime of Maritime Ports, Geneva, Dec. 9, 1923, 28 L.N.T.S. 115 *available at,* https://www.ssatp.org/sites/ssatp/files/publications/HTML/legal_review/Annexes/Annexes%20II/Annex%20II-13.pdf; *see also* Convention relating to the Development of Hydraulic Power affecting more than one State and Protocol of Signature, Dec. 9, 1923, *available* at http://www.cawater-info.net/library/eng/conv_1923.pdf.

[48] *See* Declaration of the Seventh Pan-American Conference on the Industrial and Agricultural Use of International Rivers (Dec. 24, 1933).

[49] Joseph W. Dellapenna, *The customary international law of transboundary fresh waters,* INT. J. GLOBAL ENV'T ISSUES, Vol. 1, Nos. 3/4, 264 (2001) ("In disputes over international water sharing, the lack of the elaborate federal institutional arrangements found in the USA would ultimately lead back to the law of the vendetta. International law is simply too primitive to solve the continuing management problems in a timely fashion. While uncertainty of legal right can induce cooperation among those sharing a resource, it can also promote severe conflict. Relying alone upon an informal legal system to legitimate and limit claims to use shared water resources is inherently unstable. It becomes unsettled either when one or more states consider that it is so militarily dominant that it can disregard the interests of its neighbours, or when one or more states consider that their interests are so compromised by the existing situation that even the risk of military defeat is more tolerable than continuing the present situation without challenge.").

> transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or other change in the mode of transport, is only a portion of a complete journey which belongs or terminates within the territory of the land-locked State.[50]

UNCLOS, Article 125, Right of Access to and from the sea and freedom of transit states:

> 1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.
>
> 2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked State and transit States concerned through bilateral, sub-regional or regional agreements.
>
> 3. Transit States, in the exercise of their full sovereignty over the territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.[51]

Article 127 Customs Duties, Taxes and Other Charges states:

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[50] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 at art. 124 [hereinafter Law of the Sea Treaty]. The United States is a signatory to the Law of the Sea Treaty but has not ratified the Treaty. The United States has agreed, however, to apply the Treaty provisionally. *See Dep't of State Dispatch Supplement*, Feb. 1995, vol. 6, no.1.

[51] Law of the Sea Treaty, *supra* note 50, at art. 125

> 1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.
>
> 2. Means of transport in transit and other facilities provided for and used by land-locked States shall not be subject to taxes or charges higher than those levies for the use of means of transport of the transit State.[52]

Finally, Article 129 titled, 'Cooperation in the construction and improvement of means of transport,' states: "Where there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installation and equipment, are inadequate in any respect, the transit States and land-locked States concerned may cooperate in constructing or improving them."[53]

These UNCLOS articles described above in combination with the sovereignty of Native American tribes recognizing them as akin to sovereign states (albeit sovereign tribal states within the imposed national and state boundaries of the United States) arguably provide Native Americans with both an inherent and express right of access as land-locked nation state within the United States, to and from the sea and freedom of transit. And, including rights with respect to customs duties, taxes and other charges, and cooperation by the United States in the Native American construction and improvement of means of transport and the connected trans-national waterways of the United States.

The concept of Native American tribal sovereign as it exists in the United States began with the arrival of dominating European imperial powers and colonialization of the new world. The result was a complex and contradictory colonial position of recognizing the pre-existing Native American tribal sovereignty yet subjugating them as inferior under theological based powers of law attributing divine rights

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[52] *Id.* at art. 127.

[53] *Id.* at art. 129.

to the colonizing powers and effectively stripping Native Americans of their independent status.

Significant case law and legislation with respect to Native American sovereignty has evolved over the course of U.S. history. For instance, in the 1823 landmark case of Johnson v. McIntosh, 8 Wheat. 543, the Supreme Court adopted for the U. S. the "right of occupancy" version of colonial sovereignty. "This remains the basic legal position of federal Indian law, despite the fact the concept of 'divine right' is not accepted elsewhere in United States law."[54] Thus, Justice Marshall in his decision and dicta recognized and established the principle of the inalienable right of Native American title which today remains well-established law in the United States and most common law jurisdictions.

Furthermore, the subsequent United States Indian Reorganization Act, 1934, under the New Deal administration of the U.S. federal government provided for the formation of "tribal governments" under federal authority as vehicles for Native American "self-government," which remains today as "an important part of federal Indian law. Tribal councils established under the Indian Reorganization Act are regarded as vehicles of 'tribal sovereignty'; they act as governments."[55]

Felix Cohen, a senior legal counsel with the Interior Department and one of architects of the 'new deal' for Native Americans, "resurrected 'tribal sovereignty' as an organizing principle of the Indian Reorganization Act of 1934, 48 Stat. 984." Furthermore, in his Handbook of Federal Indian Law he wrote: " . . . [T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been

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[54] Peter d'Errico, *Sovereignty,* UNIV. MASSACHUSETTS, https://www.umass.edu/legal/derrico/sovereignty.html, (last visited Nov. 30, 2021).

[55] *Id.*

extinguished."[56] He also recognized the inherent nature of Native American sovereignty and rights, within the U.S. federal laws. As for the limits to Native American sovereignty and associated rights which have been recognized in part as inalienable, it remains questionable and I suggest dubious if such sovereignty should ever not be immutable.

The Indian Reorganization Act 1934 provided for the formation of "tribal governments" under federal authority as vehicles for Indian "self-government." Thus, the concept of Native American sovereignty remains an important part of federal law. "In short, the idea that indigenous nations have at their roots some aspect of their original, pre-colonial status as independent nations operates -- sometimes directly and sometimes by implication -- throughout federal Indian law today."

In 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP) to address self-determination, equality, property, culture and other human rights.[57] The United States, Canada, Australia, and New Zealand, representing over half of the world's indigenous people, voted against the declaration[58] despite President Obama's publicly pledged support.[59] The challenge in implementing UNDRIP in indigenous-based nations is requisite policy and legal reform "as well as structural and conceptual change," which countries must soon address "to begin the process of redress and reconciliation for indigenous peoples in domestic legal

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[56] *General Principles of Federal Indian Law*, UNIV. ALASKA FAIRBANKS, https://www.uaf.edu/tribal/112/unit_4/generalprinciplesoffederalindianlaw.php, (last visited Nov. 30, 2021).

[57] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[58] *See* Veronica Martisius, *Bill C-15 & Implementing UNDRIP: What should this mean for the First Nations, Inuit and the Métis in relationship to Canada?*, BRITISH COLUMBIA CIVIL LIBERTIES ASS'N (May 20, 2021), https://bccla.org/2021/05/bill-c-15-implementing-undrip-what-should-this-mean-for-the-first-nations-inuit-and-the-metis-in-relationship-to-canada/.

[59] *See* Caren Bohan, *Obama backs U.N. indigenous rights declaration,* REUTERS (Dec. 16, 2010, 1:47 PM), https://www.reuters.com/article/us-obama-tribes/obama-backs-u-n-indigenous-rights-declaration-idUSTRE6BF4QJ20101216.

systems."[60] The question then becomes, exactly how binding is UNDRIP on the United States and nations who voted against it? And, more crucially, have those countries, particularly the United States, exempted themselves "through the persistent objector doctrine, from any customary norms that may arise from or be reflected in [UNDRIP]?"[61] Yet, the United States and dissenting nations did vow "to protect the rights of indigenous peoples within their jurisdictions using their different domestic human rights mechanisms which they argued were adequate to protect such rights of indigenous peoples."[62] U.S. law recognizes Indian tribes as political entities with inherent powers of self-determination.[63] In essence, the U.S. government has a government-to-government relationship with Indian tribes.[64]

In recent years the passage of several international conventions and declarations has highlighted the status of indigenous peoples: (1) The Universal Declaration of Human Rights;[65] (2) The International Covenant on Economic, Social and Cultural Rights;[66] and (3) The International Covenant on Civil and Political Rights.[67] These international conventions affirm the fundamental right of self-determination of all peoples, by virtue of which, they freely determine

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[60] *See Implementing the United Nations Declaration on the Rights of Indigenous Peoples in the United States*, UNIV. OF COLORADO L. SCH. (Mar. 15-16, 2019), https://www.colorado.edu/law/implementing-united-nations-declaration-rights-indigenous-peoples-united-states.

[61] Kakungulu, Ronald, *The United Nations Declaration on the Rights of Indigenous Peoples: A New Dawn for Indigenous Peoples Rights?* CORNELL L. SCH. INTER-UNIVERSITY GRADUATE STUDENT CONF. PAPERS (2009), http://scholarship.law.cornell.edu/lps_clacp/18.

[62] *Id.*

[63] 25 U.S.C. § 5301.

[64] *See* Kakungulu *supra* note 61, at 12.

[65] G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[66] G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

[67] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

their political status and pursue their economic, social, and cultural development.[68]

IV. ENFORCING ABORIGINAL RIGHTS AND INNOCENT PASSAGE FOR UNITED STATES NEIGHBORING NATIONS

While concern for rights of indigenous people grows, international intervention in indigenous affairs of the United States remains unlikely.[69] First, "The [United States] . . . ha[s] effectively dealt with the issue of international interaction with indigenous peoples. Those wishing to do so may cross into the country of the other side with reasonable requirements in place to ensure orderly travel."[70] Thus, no international action is required. However, Indian sovereignty rights extend to historical use of waterways in the United States, Canada and Mexico for travel, trade, harvesting, and communications. Thus when "Indians" were removed from the banks of the Mississippi and other rivers, their traditional source of livelihood was severed, which led to a devastating socio-economic and cultural legacy.[71]

In asserting their right of access, Native American tribes will undoubtedly encounter resistance by the United States which has historically opposed Native American and international lobbying for

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[68] *See* Richard Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV 471, 483 (1999) ("[I]ndigenous peoples have the right to practice and revitalize their cultural traditions customs,' [and] an indigenous people split by a boundary, and subsequently having its cultural ways destroyed or damaged by that fact, would have a right to restore its culture. An international boundary and a state's laws preventing such interaction would go against international will. Several tribes in the U.S. were split by the U.S.- Mexico border and would fall into this category.").

[69] *See id.* at 485.

[70] *Id.* at 484.

[71] The Federal Indian removal policy between 1816 and 1840 (including the Indian Removal Act 1830) saw tribes located between the original eastern states of the United States and the Mississippi River, including Cherokees (The Cherokee Trail of Tears 1838 – 1839), Chickasaws, Choctaws, Creeks, and Seminoles sign more than 40 treaties ceding their lands to the United States and forcefully relocated to points west of the Mississippi River. *See What Happened on the Trail of Tears,* NAT'L PARK SERV., https://www.nps.gov/trte/learn/historyculture/what-happened-on-the-trail-of-tears.htm (last updated May 26, 2020).

expansion of native sovereignty rights as an attack on U.S. sovereignty.[72] Furthermore, because the United States does not recognize International Court of Justice's (ICJ) jurisdiction, it would likely ignore actions brought before the ICJ by Native Americans on the grounds that the ICJ does not have *locus standi* before the United States.[73] Thus, as Richard Osborn suggests, the best option for indigenous groups seeking international border crossing or right of passage, trade, travel, or development of the internal waterways of the United States "is to petition Congress for exemptions found in immigration law" and for political action to facilitate programs and legislation supporting indigenous commercial development and general waterway access.[74]

In addition to the 1794 Jay Treaty's protection of the Native Americans' right of passage and to carry goods (in 1779, Congress statutorily affirmed that right),[75] O'Brien further asserts that "[t]he rights of Indians to pass and conduct trade across the border is an aboriginal right of prescription or immemorial usage recognized and confirmed in several treaties. Thus, it could not have been extinguished by the war of 1812 or by lack of implementing legislation."[76]

While the United States has not ratified U.N. Human Rights conventions, it did ratify the Jay Treaty, which was reinforced in the

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[72] *See* Osburn, *supra* note 68, at 484 ("The United States has generally refused to allow international human rights laws to be applied to the United States. If taken to task by the international community, the United States, would likely, simply take the position that it has not ratified international human rights law. Therefore, international human rights law has no force in the United States and the country is not bound by them.").

[73] *See id.* at 485.

[74] *See* Osburn, *supra* note 68, at 485.

[75] The Act of March 2, 1799, ch. 22, § 105, 1 Stat. 627, 702 (repealed in part at 42 Stat. 989, 990 (1922)).

[76] Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 341 (1984) ("Congress statutorily affirmed the right of Indians to transport personal goods freely across the border . . . the McCandless decision stated that article three referred to aboriginal and not granted rights, thus making the existence of implementing legislation irrelevant. Legislation concerning article three rights would therefore be an affirmation and not the source of the rights.").

Treaty of Ghent after the war of 1812 with Great Britain.[77] As such, the treaty still stands, and, under *pacta sunt servanda,* must be honored—a fundamental principle of international law.[78] The international legal concept of *jus cogens,* represents a body of higher law premised on long held international principles of law and natural justice.[79] *Jus cogens* was first embodied in the 1969 Vienna Convention on the Law of Treaties,[80] then reiterated by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, though the convention has not been ratified into force.[81]

The 1783 Treaty of Paris fixed the international boundary between the United States and Britain.[82] This border— which cuts through the heart of the Mohawk Nation's homeland, literally divides tribal governments, lands, and families, and impedes free movement

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[77] Treaty of Peace and Amity, Dec. 24, 1814, U.S.-G.B., 8 Stat. 218, T.S. No. 109.

[78] *See* Restatement (Third) of Foreign Relations Law of the United States, § 321(1987).

[79] *See* Restatement (Third) of Foreign Relations Law of the United States, § 321 cmt. K, (1987) ("Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation."); *see also* STEPHEN O'ROURKE, GLOSSARY OF LEGAL TERMS (2004) ("The principles of fairness governing the conduct of courts, arbiters or tribunals in determining any dispute. Natural justice includes the principles that no man can be judge in his own cause, that each party is entitled to be heard and that justice is not only done but also seen to be done.").

[80] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. at Art. 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

[81] *See* Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/Conf. 129/15 (1986) (repeating *verbatim* the corresponding Article of the 1969 Convention.).

[82] The Definitive Treaty of Peace Between the Kingdom of Great Britain and the United States of America, (September 3, 1783) T.I.A.S. 11.

and economic development.[83] Furthermore, the United States also imposes import taxes on Indian goods arriving from an external country, an "odious imposition"[84] both historically and economically for many Indians.[85] For example, when the Blackfeet Nation Tribal Housing Authority (U.S. residency) purchased more than fifty prefabricated houses from the Blood Tribal Enterprise, located in Canada, U.S. import taxes levied on the houses were so high that they rendered future transactions "economically unfeasible."[86]

The historical and logical trading partners of border tribes are other border tribes. The emancipation of indigenous trade through international access to U.S. domestic navigable waters with interconnection to international shipping routes, could change the mosaic of historical native trading patterns by allowing them in an ever increasingly globalized marketplace commercial trade with distant markets (non-natives) external to the United States. After contact with Europeans, Native Americans experienced an explosive growth in trade as native communities bartered with the French *courier de bois*, or "wood runner"[87] during the fur trade and European settlement of North America. Subsequently, the 1830 Indian Removal Act, the imposition of custom duties and tariffs, and physical infrastructure all created barriers to traditional trade.

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[83] *See* O'Brien *supra* note 76, at 321–22 ("Today three competing governments rule over the 7,000 members. The St. Regis Mohawk Tribal Council, established in 1824, administers the American side; the Band Council, organized under the Canadian Act in 1888, controls the Canadian portion; and the traditional Council of Chiefs, through which the Mohawks function as the Keepers of the Eastern Door of the Iroquois Longhouse or the Confederacy of the Houdensaunee, continues to operate.").

[84] *Id.* at 331.

[85] *Id.* at 331.

[86] *See id.*

[87] *Coureur de bois* BRITANNICA, *available at,* https://www.britannica.com/topic/coureur-de-bois.

V. REMEDY AND REFORM FOR SECURING NATIVE TRADE & TRANSIT RIGHTS

Two pathways of redress exist for U.S. Indian tribes with regards to restoring their aboriginal right to free movement of people and goods throughout North America. Foremost, "[t]ribes and representative tribal organizations on both sides of the border could press for comprehensive or piecemeal legislation."[88] Such an agreement "could include provisions for not only border-crossing rights, tariff-free goods, reciprocal agreements concerning eligibility for and payment of medical costs, education, social assistance, legal aid award payments and the exercise of hunting and fishing rights"[89] but additionally redress the traditional right to transit and use the internal U.S. waters for indigenous transportation of goods.

Despite United States control over the free movement of Indians and their goods both within and outside the boundaries of the country, the United States retains obligations espoused in the Jay Treaty. The United States has long recognized that North American natives are a sovereign people.[90] While Native Americans were non-participants and were not signatory to the Jay Treaty, such does not render the treaty unenforceable. Under the legal principle of *jus quaesitum tertio* ("A contractual right of one party, arising out of a contract between X and Y, to which A is not a party"),[91] the right arises as a consequence of the specific stipulation of Article 3 in the Jay Treaty favoring the free movement or Native Americans and their goods between Canada and the United States, including their use of the Mississippi. Customary and tribal law also supports this fundamental right—which Native Americans are denied by United States Customs and Border Protection, Department of Homeland

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88 *Id.* at 349.

89 *Id.*

90 *See generally* DEP'T JUST., Department of Justice, Policy on Indian Sovereignty (1995) ("PURPOSE: To reaffirm the Department's recognition of the sovereign status of federally recognized Indian tribes as domestic dependent nations.").

91 *See* O'ROURKE, *supra* note 79.

Security —imposing a barrier to their free trade and their economic and social isolation within a continent that inherently belongs to them.

The problems encountered by Native Americans with respect to their right of passage are not unsolvable.[92] The U.S. -Mexico-Canada agreement (USMCA), signed September 2018,[93] also supports the removal of tariffs and trade barriers on most goods produced and sold in North America. Although USMCA promotes trade between neighboring nations, some barriers remain (e.g. "The U.S.-Mexico-Canada Agreement includes tighter North American content rules for autos, new protections for intellectual property, prohibitions against currency manipulation and new rules on digital commerce that did not exist when NAFTA launched in 1994.")[94] However, from an indigenous perspective, under NAFTA and USMCA legal frameworks have begun to shift favorably domestically toward freer trade. The 2001 Canadian Federal Court of Appeal case *Mitchell v. M.N.R.* "affirmed an aboriginal right to bring goods into Canada duty-free, subject to limitations based on the evidence of the traditional range of Mohawk trading"[95] and while overturned in appeal the dicta supporting duty-free aboriginal trade lays ground for future exploration of its application.

The need to promote trade and export opportunities to Native American communities is recognized in a series of statutes under Title

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92 *See* O'Brien, *supra* note 76, at 348 ("Both internationally negotiated and legislative solutions are available. At the international level exists the International Joint Commission (IJC). Established by a 1909 treaty, the IJC's purpose is to settle boundary disputes between Canada and the United States."); *see also* Agreement Relating to Boundary Waters, Jan. 11, 1909, U.S.-Can. (Great Britain), art. VIII, 36 Stat. 2448, 2451, T.S. No. 548 ("[problems] shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.").

93 *See* Heather Innes, *Are you ready for the July 1 implementation of the CANADA-UNITED STATES-MEXICO AGREEMENT (CUSMA/USMCA)?*, CANADA-U.S. BLOG (JUNE 22, 2020), https://www.canada-usblog.com/nafta/.

94 *See* David Lawder et al., *New North American trade deal launches under cloud of disputes, coronavirus*, RUETERS (Jul. 1, 2020), https://www.reuters.com/article/us-usa-trade-usmca-idUSKBN2424E2.

95 Mitchell v. M.N.R., 2001 SCC 33 (CanLII), [2001] 1 SCR 9113.

25.[96] For example, Section 4304 coordinates programs designed to "(1) develop the economies of the Indian Tribes; and (2) stimulate the demand for Indian goods and services that are available from eligible entities."[97] The Section also provides expressly for Indian trade development activities.[98] The legislation also calls for the provision of technical assistance in support of pursuing Native American developmental activities.[99] Whilst the spirit of this legislation is rich, the scope is limited to "Indian goods," which historically consists of traditional market items like trinkets and blankets. However, today Native Americans are immersed daily in an advanced global market and such a narrow definition of Native American goods confined to "trinkets and blankets" is long outdated for Native American market needs.[100]

VI. CONCLUSION

President Franklin D. Roosevelt (FDR) said,

> We cannot be content, no matter how high [our] general standard of living may be, if some fraction of our people—whether it be one-third, or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure . . . true individual freedom cannot exist without economic security and independence . . .

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[96] *See generally* 25 U.S.C. § 4303 (establishing the Office of Native American Business Development to "ensure the coordination of federal programs that provide assistance, including financial and technical assistance, to eligible entities for increased business, the expansion of trade by eligible entities, and economic development of Indian lands.").

[97] 25 U.S.C. § 4304.

[98] *See id.* (including such activities as "(1) Federal programs designed to provide technical or financial assistance to eligible entities; (2) the development of promotional materials; (3) the financing of appropriate trade missions; (4) the marketing of Indian goods and services . . . ").

[99] *See id.*

[100] *See* PROCEEDINGS OF THE ANNUAL MEETING OF THE STATE HISTORICAL SOCIETY OF WISCONSIN, VOL. 61, 125 (Palala Press 2015).

> people who are hungry and out a job are the stuff of which dictatorships are made.[101]

With the human sensitivity and wisdom of FDR seemingly forgotten after the post-war challenges of the 1940s, there remains today an indigenous plight in North America, which is the disassociation of Native Americans from their traditional sources of sustenance. In particular, the Mississippi and its tributary network of waterways was an essential corridor to a way of live for indigenous North Americans. After the Indian Removal Act, they were taken away from their traditional lands along the Mississippi, and rendered culturally, socially, and economically crippled. They were left to struggle for dignity and hope for a re-birth.

In searching for a catalyst to self-resource a Native American renaissance, this paper has examined the role the Mississippi River and its tributary waters historically provided, with the legal rights, opportunities, and challenges present in trying to re-harness the strength of the "Father River." Native American lives were inextricably interwoven with Mississippi trade as much a part of their culture as was travel, communication, fishing, hunting and general nourishment.

An opportunity exists for Native Americans based on their rights under tribal, United States, and international laws to use the Mississippi River network to develop an agency niche as sovereign people who, under their own flags, could develop a modern service akin to their traditional role as ferrymen of goods throughout the interior of North America. Not only would this trade be in keeping with the customs and traditions of Native people of America, but they could potentially use the advantages of sovereignty to advocate a preferential tax regime to move goods domestically on behalf of foreign nations to destinations within the United States, Canada and Mexico. Requisite legal reform or compliance is also required to deploy a favored customs fee structure for indigenous people that would imbue their carriers with a comparative economic advantage to build a diversified activity base into a sustainable economy

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[101] Franklin Delano Roosevelt, President of the United States, State of the Union (Jan. 11, 1944).

The Native Americans' right of passage has long been under-utilized. It is now time to remedy this wrong with a new framework of tribal, United States and international law to initiate and support further development to allow Native Americans to re-establish their "Father River" culture and rebuild their traditional economic engine.