Submission of the National Indian Youth Council (U.S.A.)

THE HUMAN RIGHT OF ACCESS TO JUSTICE

EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

Organization and Interest

The National Indian Youth Council (NIYC) was formed in 1961 as a United States of America nation-wide advocacy organization with purposes of "making [American Indian] inherent rights known to all people, opposing termination of federal responsibility at all levels, seeking full participation and consent on jurisdiction matters involving Indians, and staunchly supporting the exercise of those basic rights guaranteed by the statutes of the United States of America." The organization initiated the "Fish-In" movement in the State of Washington to assert treaty rights to fishing and oppose State interference with Indian treaties and in the process it coined the term "Red Power." It is a non-governmental organization that is accredited to the Economic and Social Committee of the United Nations and its purposes and goals encompass the human rights norms that are elaborated in the Declaration on the Rights of Indigenous Peoples and other instruments.

The NIYC actively participated in the development of the Declaration on the Rights of Indigenous Peoples in inter-sessional work in Geneva and sent observers to the 72nd Session of the Committee on the Elimination of Racial Discrimination when it took up the periodic reports of the United States of America under the International Convention on the Elimination of All Forms of Racial Discrimination. The NIYC has been tracking the Committee's findings and recommendations on indigenous issues, and most particularly findings on the epidemic of rape and sexual violence inflicted upon American Indian and Alaska Indian women, extractive industry excesses in areas of spiritual and cultural significance to Native Americans, extractive activities by transnational corporations registered in the United States and resistence to the implementation on the Declaration on the Rights of Indigenous Peoples. The NIYC participated in two sessions of the Expert Mechanism on the Rights of Indigenous Peoples and returned to the United States to actively advocate implementation of the right to participate in state consultations. Most importantly, the NIYC is drawing attention to the fact that the United States considers that it is in compliance with the Declaration only by acknowledging the political leadership of "recognized" American Indian tribes as indigenous rights and ignoring the right of other indigenous peoples and groups within the United States and the "urban Indian population" that constitutes more than 75% of off-reservation Indian populations.

Relevant to this call for submissions is National Indian Youth Council participation in the Expert Seminar on Indigenous Peoples and the Administration of Justice in Madrid on 12-14 November 2003. The NIYC drew the attention of the experts to the problem of discrimination against American Indians in off-reservation courts in the "border towns" of the Southwest and the particular adverse impact of the election of State judges. The seminar report stated that "Mr. James Zion, a member of the National Indian Youth Council of the United States, highlighted the need to

distinguish between the equality proclaimed by the law and its practical application, since in many cases the practical application of the law did not treat indigenous people fairly vis-a-vis non-indigenous people. In this context Mr. Zion said that discrimination against indigenous people in the systems for the administration of justice was often very subtle, which made it difficult to identify the real obstacles." Seminar Report, No. E/CN.4/Sub.2/AC.4/2006 (10 June 2004). Both the Seminar Report and Special Rapporteur Addendum, No. E/CN.4/2004/80/Add.4 (27 January 2004) identified thirteen likely causes for discrimination and racism in the administration of justice. *Id.*, Seminar Report at Par. 44 and Special Rapporteur Addendum Par. 9. The report and addendum drew concrete conclusions and made recommendations that remain relevant to this study.

One of the areas of focus the NIYC advocates is the rights of indigenous peoples in State justice organs and their impact upon the rights of "urban Indians," and the NIYC particularly advocated against predatory commercial practices by Farmington, New Mexico merchants in a consultation by the New Mexico Advisory Committee to the U.S. Commission on Civil Rights, The Farmington Report: Civil Rights for Native Americans 30 Years Later (November 2005) and more recent 2013 hearings of the Navajo Nation Human Rights Commission on consumer abuses by motor vehicle dealerships.

The National Indian Youth Council notes the concerns and recommendations of the Human Rights Council in its discussion of ways and means to promote indigenous peoples' representation in the United Nations, No. A/HRC/21/24 (2 July 2012) and the 10 October 2012 invitation of the Office of the High Commissioner for Human Rights to submit "information related to access to justice in the promotion and protection of human rights" to the Expert Mechanism on the Rights of Indigenous Peoples to carry out its mandate to conduct a study of that issue.

The Issue of Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples in the United States of America and its Proper Focus

The first focus of any consideration of indigenous access to justice for the promotion of their rights is the standards and norms set by the Declaration on the Rights of Indigenous Peoples. More particularly, while we obviously point to the provisions in Article 40 of the Declaration as recognizing the rights to access to just and fair procedures to resolve conflicts and disputes and to effective remedies for infringements of individual and collective rights, there are other human rights norms that apply. They include the right to full enjoyment, collectively or individually, of all human rights (Article 1); the right to maintain distinct legal and political institutions to enforce legal rights (Article 5); the right to participate in judicial decision-making by helping frame procedures and being judges or other judicial personnel (Article 18); the right to proper adjudication of land use and tenure and resource uses (Article 27); the right to just, fair and equitable compensation for the taking of lands, territories or resources (Article 28); the right to have and maintain distinct juridical systems or customs (Article 34), and the right to the enforcement of treaties, agreements or other constructive arrangements (Article 37). The Expert Mechanism must stress access, effective remedies and the effectuation of all right-defining decision-making that may fall under the subject of "access to justice."

The overriding consideration in assessing the right of access to justice is the unique situation of indigenous peoples within the United States. Without treating the large literature on the subject here it is sufficient to cite the work of Professor Robert A. Williams, Jr. of the Indigenous Peoples Law and Policy Program of the University of Arizona and the way he addresses the foundations in The American Indian in Western Legal Thought: The Discourses of Conquest (Oxford University Press, 1990). It establishes the baseline approach of European colonizers in the Americas, beginning with the Spanish, of acknowledging the pre-existing legal status and rights of self-determination, law and governance of indigenous peoples that is at the core of the Declaration. Most particularly, the British and Americans recognized, and continue to recognize, the legal principle that when a given Indian nation or group surrenders some of its inherent powers to the United States in treaties or other arrangements, they retain all remaining powers that are not *specifically* surrendered.

That is a principle in the American doctrine of the "canons of construction" of American Indian treaties that are established in federal U.S. judicial decisions, and one widely-recognized summation of the principles of those canons is the Navajo Nation Supreme Court decision in the case of *Means v. District Court*, 7 Navajo Reporter 383, at 389 (Nav. Sup. Ct. 1999). The canons or treaty principles are:

1. A treaty must be considered as the Indians understood it.

2. Doubtful or ambiguous expressions in a treaty must be resolved in favor of the given Indian nation.

3. Treaty provisions which are not clear on their face may be interpreted from the surrounding circumstances and history.

4. A treaty is not a grant of rights to Indian nations but a grant of rights from them, with reservations of all rights which are not granted.

5. Treaties with Indian nations are the law of the land under the treaty clause of the Constitution.

Those principles are at the heart of the right of access to justice and meaningful remedies under Article 40 of the Declaration on the Rights of Indigenous Peoples and the foundation for these comments and observations.

The primary issues are:

1. Meaningful access to judicial and administrative remedies.

2. Effective remedies once access has been achieved.

3. Due recognition of indigenous judicial decision-making.

Meaningful Access

The lack of meaningful access to justice and redress is a problem of epidemic proportions in the United States. The National Coalition of Concerned Legal Professionals, a New York-based advocacy organization, pays special attention to "complex systemic problems in our communities" including disparities in justice systems that prevent most Americans from having meaningful access to courts or remedies. Its conclusions on such inadequacies are confirmed by professionals wuch as Professor Russell G. Pearce of Fordham University Law School in New York City who observes that the economics of the legal profession are such that there can never be sufficient legal representation, and attention must be given to courts re-defining their mission, role and methods. *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L. Rev. 969 (2004). The American judiciary recognizes the problem of both access and popularity and took steps to elaborate national standards for trial-level courts, but they are inadequate to address the real problem of a lack of access. *See*, Bureau of Justice Assistance, Trial Court Performance Standards (July 1997). The American "alternative dispute resolution" movement uses a discourse of popular access, but the actual result is continuing disparities and discrimination against the economically-disadvantaged. *See, e.g.*, Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and the Philanthropic Management of the Social Sciences*, 33(3) Critical Sociology 451 (2007) (Nader is a longstanding critic of the ADR movement because it does not address the larger moral question of "Justice for the masses; the many"). Law should be addressing systemic problems and not simply giving inadequate remedies to maintain the appearance of "justice."

There will likely be many submissions on the point of popular access, legal aid as an aspect of representation of litigants, "alternative" processes and other procedural reforms, but at end it is correct that unless and until disparities in the law itself are corrected, access alone does not address the human rights principles implicated by the Declaration on the Rights of Indigenous Peoples. It is likely that particularized institutions within state judicial systems can be instituted to address the problem of popular access, but there are other problems to address regarding indigenous rights and the canons of treaty construction related above.

The Institutionalized Illusion of Justice

The problem this section addresses is framed well by using a listing of "significant Indian cases" published by the Native American litigation section of the United States Department of Justice, the Environment and Natural Resources Division. That department staffs the lawyers who litigate against Indian nations and individual Indians. United States Department of Justice, Significant Indian Cases, http://www.justice.gov/enrd/3104.htm (visited on February 3, 2013). There are 41 case decisions on the list and most are rulings that deny the treaty and inherent rights that flow from the canons of treaty construction. For example, many Indian legal scholars have criticized the holding in the 1963 decision in *Tee-Hit-Ton Indians v. United States*, that ruled that indigenous land occupation is not "property" for purposes of compensation for takings, and there are ongoing problems with denying claims for the return of illegally taken land or compensation, as illustrated

by the case listings of litigation involving the Sioux Tribe of Indians, the Menominee Tribe and the Navajo Tribe. Of particular concern is the fact that while the so-called "Indian Tucker Act," 28 U.S.C. § 1505, gives the Court of Federal Claims jurisdiction to hear claims by Indian tribes, bands or "other identifiable group of American Indians," the substantive rules for the assertion of such claims are such that there are so few clearly-identified duties the Government of the United States has under statutes enacted by Congress that recovery is seldom had. While American jurisprudence recognizes an historic "trust responsibility" by the United States that is owed to both Indian tribes and individual Indians, the responsibility does not generally run to all indigenous groups within the United States (based on the same historic considerations) and although it is a legal rule, it is not one that supports legal remedies.

A prominent legal case that illustrates that principle is the case of *Cobell v. Salazar* (Circuit Court of Appeals for the District of Columbia 2008); $3.4 billion settlement announced on December 8, 2009. While the case decision and settlement are trumpeted as a victory for American Indians under American law, the fact remains that the decision is a classic illustration of an instance of injustice. That is, in a nutshell, the United States made a policy decision in 1887 that the best means to "civilize" American Indians would be to break up lands reserved in Indian treaties, called "reservations," allot them to adult male Indians, and distribute the remainder to non-Indians. That was permitted under the American doctrine that the U.S. Congress can unilaterally breach an Indian treaty at any time, without consequence. American Indian nations and individual Indians lost two-thirds of their land base under the 1887 law. The U.S. Congress did not formally recognize the failure until 1934, when the allotment program was halted. In the meantime, however, a policy that lands would be managed by a federal bureaucracy, the Bureau of Indian Affairs, and leased to others for use, often non-Indians, assured non-Indian control of lands. They were most often leased at less than market rate, there was poor collection and accounting, and the *Cobell* litigation was limited to attacking two departments of United States government for an incorrect accounting of income from trust assets. The suit did not reach claims for the mismanagement of trust assets and it did little for the ongoing scandal of the inadequacy of U.S. land policy.

The two primary principles of the relationship between Indians and the United States are the obligation to honor Indian treaties using the "treaty canons of construction" and the "trust responsibility" concept that, given invasion and encroachment on Indian lands and governmental rights, the federal government has an obligation to promote the health and well-being of Indians and to protect them from exploitation or discrimination. The disconnect comes in treaty litigation or the litigation of claims when treaty claims are trivialized or rejected using technical principles. Returning to the list of "significant Indian cases" put forward by the U.S. Department of Justice, there are several cases where the Sioux Tribe of Indians was unable to get lands in what is now South Dakota returned when they were taken in violation of treaty and the failed attempts of the Navajo Nation to get compensation for a corrupt decision of the U.S. Department of the Interior to deny relief to compel a large coal company to pay fair value of coal extracted from Indian lands.

The illusion can also be found in individual Indian rights litigation. A complaint by a civil society and reservation-based group, Dooda ("No!") Desert Rock, against the U.S. Environmental Protection

Agency on the ground that it had failed to note and respond to scientific reports of injury to Navajos from coal-fired power plants was rejected on the ground that the Agency has no obligation to observe civil rights under landmark U.S. civil rights legislation. Claims against state officials are denied using principles of "absolute immunity" or "qualified immunity," or "good faith," under the pretext that the given official did not know that what was done was illegal or a violation of civil rights or that there must be a showing of specific intent to violate civil rights, an element that cannot readily be proved.

While there are some federal civil rights or consumer statues that provide for awards of attorney fees to successful claimants, many lawyers will not take cases on a court-award basis because fees are often not awarded on technical grounds or they are inadequate.

Cross-Cutting Obligations

We must continuously recall that the Declaration on the Rights of Indigenous Peoples is not an isolated document and it does mirror other elaborations of specific human rights that are declared in the Universal Declaration of Human Rights (1948). There is a United Nations process of elaborating human rights norms in international law, including human rights conventions. One such convention is the International Convention on the Elimination of all Forms of Racial Discrimination, the United States ratified it, and the United States last submitted its reports on compliance with the Convention in 2008. The Committee on the Elimination of Racial Discrimination squarely addressed the rights of indigenous peoples in its 8 May 2008 observations, CERD/C/USA/CO/6, and made recommendations on observation of the Declaration, violence and abuse against American Indian and Alaska Native women, damage caused by extractive industries, economic activities related to the exploitation of natural resources carried out by U.S. transnational corporations, and other matters of general interest that also impact the indigenous peoples within the United States.

The United States has a poor record of compliance with its international treaty obligations and its most recent report under Article 9 of the Convention on the Elimination of all Forms of Racial Discrimination is far past due.

There may be a new climate in the United States with a general civil society that is genuinely concerned with the protection of various human rights that are being elaborated in many forms, including the Declaration on the Rights of Indigenous Peoples. The fine-tuning of specific human rights principles in United Nations documents such as studies done by the Expert Mechanism is important. If the Expert Mechanism sets more specific standards, they can be advocated within indigenous civil society. We urge special mention of the obligations of the United States to American Indian and Alaska Native women to squarely address violence, to reauthorize the Violence Against Women Act, with proposed Indian provisions, and to comply with the CERD recommendations on the subject.

The Ongoing and Emergent Issue of Violence Against Native Women

As this submission is being finalized there is an effort in the United States Congress to do something effective about violence against women in the United States generally. Attached to this submission is a February 10, 2013 article by Jonathan Weisman in the New York Times, *Measure to Protect Women Stuck on Tribal Land Issue*. It relates resistence to the enactment of new statutory authorizations for programs to assist women who are victims of violence and particularly notes that conservatives are attempting to block the measure over provisions that would give Indian nations the ability to deal with non-Indian abusers.

This article, and the issue, show that the United States does not intend to comply with the recommendations of the United Nations Committee on the Elimination of Racial Discrimination about United States treaty obligations to assure the protection of American Indian and Alaska Native women. Accordingly, the Expert Mechanism should consider a referral of the issue to the Committee on the Elimination of Racial Consideration for urgent measures. The United States has not filed a new report in accordance with a CERD directive and action needs to be taken, given the blatant move to block legislative assistance to victims of violence using Indian nation jurisdiction as the pretext.

Recommendations

This brief summary of barriers to access to justice does not adequately describe the true scope of the problem and it cannot advise on how to remove particular barriers to the assertion of American indigenous rights, either to enforce group rights or to remedy individual injustices. Despite that, it is possible to identify doctrinal and legal barriers that prohibit the assertion of individual and collective rights under Indian treaties and the trust doctrine and to devise procedural reforms so that those rights are in fact meaningful. Despite sincere advocacy of "alternative dispute resolution" procedures for Indians, they are largely a failure because there is no recognition of institutional barriers that require fundamental changes of practice and procedure to better respond to the baseline rules of inherent Indian governmental rights, individual human rights and the substantive and procedural guarantees of the Declaration on the Rights of Indigenous Peoples.

While the Expert Mechanism can attempt to assess how rights under the Declaration can be more meaningful through access reforms, there should be a lot of emphasis on adequate remedies and a call for state-level law and procedure reform to recognize the content of the Declaration and require meaningful procedural reform with the goal of providing adequate, inexpensive and prompt remedies for indigenous individuals and collectives.

There is a glaring omission in United States policy under the Declaration because it limits the application of rights to "recognized" Indian tribes, headed by political figures, when 75% and more of the U.S. Indian population consists of Indians who do not live on Indian reserved lands. American indigenous policy ignores Native Hawaiians, Indian immigrants from Latin Countries and other distinct aggregations of peoples.

All those issues should be addressed in a general way by the Expert Mechanism with the goal of an

all-inclusive approach to the human right of access to justice.

Respectfully submitted,

NATIONAL INDIAN YOUTH COUNCIL

Cecelia Belone, President
Norman Ration, Executive Director

318 Elm Street S.E.
Albuquerque, NM 87102

(505) 247-2251

Prepared by:

James W. Zion, Esq.
International Legal Counsel
3808 Ladera Drive N.W.
Albuquerque, NM 87120

(505) 839-9549

JZion@aol.com

* * *

The New York Times

February 10, 2013

Measure to Protect Women Stuck on Tribal Land Issue

By JONATHAN WEISMAN

WASHINGTON — At 26, Diane Millich fell in love with and married a white man, moving with him in 1998 to a home on her native Southern Ute reservation in southern Colorado where, in short order, her life was consumed by domestic violence.

Her story of beatings and threats, reconciliations and divorce — painfully common among Native American women — had a twist. Because her husband was white, the Southern Ute Tribal Police could not touch him, and because she was a Native American on tribal land, La Plata County sheriff's deputies were powerless as well. She said she tried going to federal law enforcement, which did have jurisdiction, but that went nowhere.

After one of his beatings, she said, he even called the county sheriff himself to prove to her that he could not be stopped. Only after he stormed her office at the federal Bureau of Land Management and opened fire, wounding a co-worker, was he arrested. And even then, law enforcement had to use a tape measure to sort out jurisdiction, gauging the distance between the barrel of the gun and the point of bullet impact to persuade the local police to intervene.

Obscure as it might be, the issue of tribal court powers and Ms. Millich's jurisdictional black hole has become the last remaining controversy holding up Congress's broad reauthorization of the landmark Violence Against Women Act. The Senate on Monday is expected to approve the 218-page bill with broad, bipartisan support.

But in the House, Republican negotiators are still struggling over a 10-page section that would, for the first time, allow Native American

police and courts to pursue non-Indians who attack women on tribal land. Supporters and opponents of the language acknowledge the plight of women like Ms. Millich. Native American women are two and a half times more likely to be raped. One in three will be assaulted, and three out of five will encounter domestic violence, said Senator Tom Udall, Democrat of New Mexico.

"It was just crazy, now when I think back on how insane it was," Ms. Millich said in an interview.

If a Native American is raped or assaulted by a non-Indian, she must plead for justice to already overburdened United States attorneys who are often hundreds of miles away.

"Native women should not be abandoned to a jurisdictional loophole," Mr. Udall said.

But conservative opponents say the Senate's language goes too far, empowering courts that are not equipped for the job and depriving defendants of constitutional rights without nearly enough recourse to federal courts and no guaranteed protections like those afforded by the Bill of Rights.

"This is a bill which could do so much good in the battle for victims' rights, but unfortunately it is being held hostage by a single provision that would take away fundamental constitutional rights for certain American citizens," Senator John Cornyn, Republican of Texas, said on the Senate floor on Thursday. "And for what? For what? In order to satisfy the unconstitutional demands of special interests."

The fight is pitting a dry legal position against an emotional and politically potent one. Native American groups and women's rights advocates say they are not special interests. They are voters, however.

"Let's just talk politics here," said Representative Tom Cole, Republican of Oklahoma, who has been leading negotiations to end the impasse. "This will have passed the Senate. The president's for it. And we're holding up a domestic violence bill that should be routine

because you don't want to help Native women who are the most vulnerable over a philosophical point?"

Mr. Cole and another senior Republican, Representative Darrell Issa of California, have met repeatedly with Representative Eric Cantor of Virginia, the House majority leader, to try to get Republicans past the tribal courts issue. They have proposed extending Native American court powers but also offering non-Indian defendants a chance to appeal to federal law enforcement after arrest and after a conviction. Representatives from the National Congress of American Indians met with Cantor staff members last week as well — and they have backed the Issa-Cole compromise.

But with the Senate's action, native groups say they will feel less pressure to water down the provision, not more. Jacqueline Pata, executive director of the National Congress of American Indians, said the tribes have tried to assuage Congressional misgivings, expanding financing and capacity, bolstering indigent legal representation, and changing rules to ensure that non-Indian defendants would face a jury of their peers, Indian and non-Indian alike.

At this point, said Ms. Pata, an Alaska Native, the opposition smacks of bias.

"When you see these amendments that give more rights to perpetrators than Native women, you start to wonder where the balance is," she said. "We would give any other community in this country the resources and tools they need for justice, but we won't give them to the Indians."

Mr. Cole, whose state has one of the largest Indian populations in the country, agreed, to a point. He said some of his colleagues seem to "fear Indians are going to take out 500 years of mistreatment on us through this."

"It's that kind of fear, veiled in constitutional theories," he said.

Republican leaders are eager to tamp down such accusations. Mr. Cantor took to the House floor last week to assure Democratic leaders that he cares "very deeply about women in the abuse situation, that we need to get them the relief that this bill offers," and that he is even enlisting Vice President Joseph R. Biden Jr. in the talks.

But, he warned, "There's been the introduction of some issues that are not directly related to the situation of domestic abuse on tribal lands."

Advocates of the Senate's tribal language — including some Republicans — say they are not giving up. Senator Lisa Murkowski, Republican of Alaska, went to the Senate floor on Thursday to denounce the violence endemic in her state's native communities, and to say she will urge the House to move forward.

"You don't give up when the cause is right," she said.

For Ms. Millich, the issue is very much alive. Her ex-husband is in prison, but she said she still feels the threat.

"It would be really good," she said, "that regardless of where violence takes place, they're able to be prosecuted."