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Cultural and Economic Self-Determination for Tribal Peoples in the United States Supported by the UN Declaration on the Rights of Indigenous Peoples

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SYMPOSIUM

Cultural and Economic Self-Determination for Tribal Peoples in the United States Supported by the UN Declaration on the Rights of Indigenous Peoples

ANGELIQUE EAGLEWOMAN* (*WAMBDI A. WASTEWIN*)**

Owasin cantewasteya nape ciyuzapi ye!¹

Today, I am speaking as a law professor on “Cultural and Economic Self-Determination” for Indigenous peoples.² As a law professor trained in the legal system developed in the United States from the Anglo tradition, it seems starkly apparent that legal trickery has been used against Indigenous peoples in the Western Hemisphere and around the globe to deprive Indigenous peoples of their Cultural and Economic Self-determination.

Here in the United States, building on the European invasion of the 1600 and 1700s, U.S. laws and policies have been imposed upon Native peoples to eradicate Native cultural expression, Native languages, Native ceremonies, and even the hair length of Native people. One of the greatest tragedies inflicted on Native people by the United States was the period of forced assimilation where Native children were kidnapped from their homes and held captive in government and Christian run

* Associate Professor of Law, James E. Rogers Fellow in American Indian Law, University of Idaho College of Law. This article is dedicated to the American Indian and Alaska Native students, alumni and professors of the American Indian Law Center's Pre-Law Summer Institute (PLSI) who will carry the work forward to support a return to a high quality of life for Indigenous Peoples in mid-North America and the world.

** The author's Dakota name.

1. The English translation of this Dakota phrase is: “With a good heart I shake your hands!”

2. Angelique EagleWoman, Address at the Pace University School of Law and the International Council of Environmental Law's Symposium on the U.N. Declaration on the Rights of Indigenous Peoples (May 13, 2010).

boarding schools.³ This type of government policy, aimed at Indigenous children, was enforced in the U.S., Canada, Norway, Australia and in other places where U.S. anti-tribal policies were exported.⁴

When Indigenous peoples speak of Cultural Self-determination, it includes an echo of remembrance of these tragic policies aimed at exterminating Indigenous culture and the identity of humans as part of Indigenous cultures. Cultural genocide is in extreme opposition to cultural self-determination for Indigenous peoples. Cultural self-determination is mentioned throughout the United Nations Declaration on the Rights of Indigenous Peoples⁵ in various ways:

Article 3 upholds the right to self-determination, including the right to freely pursue cultural development;⁶

Article 5 supports the right to maintain and strengthen social and cultural institutions;⁷ Article 8 rejects any form of forced assimilation or destruction of Indigenous culture, with specifics that other countries protect Indigenous peoples from such acts;⁸

Article 11 sets forth the right to practice and revitalize cultural traditions and customs;⁹ Article 12 upholds the right to continue and teach spiritual and religious traditions, protection of sacred sites, protection of cultural items, and the repatriation of human remains;¹⁰ Article 14 centers on the right of Indigenous peoples to establish and control our own educational systems – allowing for the inclusion of cultural teachings;¹¹

3. See Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 53-58 (2006).

4. See Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARV. INT'L L.J. 61, 63 (2009).

5. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. DOC A/RES/61/295 (Oct. 2, 2007), available at http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.

6. *Id.* at art. 3.

7. *Id.* at art. 5.

8. *Id.* at art. 8.

9. *Id.* at art.11.

10. G.A. Res. 61/295, *supra* note 5 at art.12.

11. *Id.* at art.14.

Articles 25 and 26 speak to the land-based nature of Indigenous peoples and the rights to own and protect the lands over which Indigenous peoples exercise cultural-based stewardship;¹² Article 31 emphasizes the right to maintain, control, protect, and develop the cultural heritage, traditional knowledge, arts, and intellectual property of Indigenous peoples.¹³

The laws of the United States offer little to no protection for Indigenous culture. With the U.S. currently leading the way in intellectual property right development and exporting its laws through the General Agreement on Tariffs and Trade (G.A.T.T.) and through the additional agreement known as the Trade-Related Aspects of Intellectual Property Rights (T.R.I.P.S.)—the lack of protection it affords for Indigenous culture is a serious injustice.¹⁴ Under U.S. patent, copyright and trademark law, only the commercial use of items, ideas or symbols are protected; and they are only protected as individual rights. The U.N. Declaration is a major change in the human rights arena because collective rights are being upheld. This same transformation needs to occur in the law for Indigenous peoples to protect their cultural and intellectual property.

In the United States, using Natives as mascots for public school systems¹⁵ and professional sports teams continues to be protected under U.S. freedom of speech laws and patent laws.¹⁶ While others enjoy legal protections over the use of their images (for example U.S. movie celebrities), Native Americans are exempted from image protection through classification as historical figures. While others enjoy legal protections over the use of their names, cultural ideas, and cultural property, Native Americans face many hurdles to stop others from capitalizing commercially on their millennium-old tribal names, cultural

12. *Id.* at art. 25, 26.

13. *Id.* at art. 31.

14. See Megan Dunagan, *Bioprospection Versus Biopiracy and the United States Versus Brazil: Attempts at Creating an Intellectual Property System Applicable Worldwide When Differing Views are Worlds Apart—And Irreconcilable?*, 15 L. & BUS. REV. AM. 603, 626 (2009).

15. See *Crue v. Aiken*, 370 F.3d 668, 672-74 (7th Cir. 2004).

16. See *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 881 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 631 (Nov. 16, 2009).

symbols, artwork, and ideas.¹⁷ I view this as a form of legal trickery.

As part of cultural self-determination, Indigenous peoples must be proactive and develop their own laws and provide policies for the use of Indigenous ideas, standards and intellectual property.¹⁸ For example, Tribal Nations surrounded by the U.S. must adopt cultural protection laws. These laws will then inform the U.S. legal system when disputes arise in U.S. courts or in other tribunals. As a law professor, I view the written and oral dissemination of the standards for Indigenous cultural usage as absolutely necessary to the protection of Indigenous culture. Indigenous peoples must lead the way on this.

I am also speaking today about Cultural and Economic Self-determination. One of the ideas I frequently write about is what I call "Tribalist Economics."¹⁹ Tribal Economics are the values that Tribal Nations bring to bear on economic development. Tribal values inform Tribal Economics, such as not engaging in industries that destroy bio-diversity or not engaging in industries that let loose radioactive materials. Tribal Nations in their governance must be proactive in putting their stewardship responsibilities first and their need for profit second. We must keep in balance and harmony with tribal values for positive economic benefits to flow back into tribal communities.

In North America prior to the European invasion, Mother Earth was cared for, nurtured and stewarded. Indigenous peoples maintained prosperous lifestyles, engaged in widespread commerce, and engaged in industry mindful of future generations. My people, the Dakota, Lakota, Nakota, share with others the concept of decision-making with the next seven

17. See Angela R. Riley, "Straight Stealing": Towards An Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 79-81 (2005).

18. See Sharon Haensly, *Using Tribal Cultural Resource Codes to Protect the Past and Strengthen Tribal Governments and Communities*, INDIAN L. NEWSL. OF THE WASH. ST. B. (Wash. State Bar Ass'n, Indian Law. Section, Seattle, Wash.), Sept. 2006, at 1, 22, available at http://www.nwiba.org/pdfs/09_06%20Indian%20News.pdf.

19. See generally, Angelique A, EagleWoman & Wambdi A. Wastewin, *Tribal Values of Taxation Within the Tribal Economic Theory*, 18 KAN. J.L. & PUB. POL'Y 1 (2008).

generations in mind, the concept of sustainability, the concepts of generosity, good faith and fairness in dealings with others based on a kinship model.²⁰ When Europeans arrived in these lands, they viewed the abundance and fertility of the lands with an eye to immediate consumption. They did not see that these lands were stewarded as a resource for the current generations and as a storehouse of abundance for the next seven generations. As the United States consumes the resources of these lands, it is stealing the prosperity that is the intended inheritance of future generations of Indigenous peoples here, the prosperity that our ancestors planned for the generations now alive to enjoy. In Tribal Economics, future generations are planned for; their inheritance is the stewarded resources passed on from their ancestors and then they, in turn, pass on stewarded resources to the next generations.²¹

One of the most difficult aspects of following Tribal Economics is that in the United States, the federal government is the self-appointed trustee over all tribal resources.²² Through federal policies executed by the U.S. government as trustee, such as leasing out tribal lands for extractive industries, like coal mining and uranium development, Tribes have had very little say in what happens in resource-rich areas of their homelands.²³ In the last twenty years, Tribal Nations have fought for greater control over what industries will be allowed in tribal

20. See Carrie Dann, *Standing with Dignity: Protecting Indigenous Rights and Traditional Ways in the United States*, 2 INTERCULTURAL HUM. RTS. L. REV. 31, 38 (2006).

21. EagleWoman, *supra* note 19, at 17.

22. See *Welcome to the OST Website*, U.S. DEPARTMENT OF THE INTERIOR, OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS, <http://www.ost.doi.gov/> (last visited Oct. 5, 2010) (“Established by the American Indian Trust Fund Management Reform Act of 1994 (Public Law 103-412), the Office of the Special Trustee for American Indians (OST) was created to improve the accountability and management of Indian funds held in trust by the federal government. As trustee, the Department of the Interior (DOI) has the primary fiduciary responsibility to manage both tribal trust funds and Individual Indian Money (IIM) accounts, as well as resources that generate income for those accounts.”)

23. See Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1074-76 (2008).

communities, but the United States still has ultimate control over trust lands through U.S. laws.²⁴

In discussing "Economic Self-Determination," the first and most basic principle is taking care of the land. As Indigenous peoples, we are land-based cultures on our Mother Earth, Ina Maka.²⁵ Our interaction with nation-state governments has been characterized by resistance to removal from our lands, resistance to destruction of our lands, resistance to desecration of our lands, and resistance to loss of our lands. Every Indigenous community in the world has this shared history of loving Mother Earth, a shared philosophy of living in balance with Mother Earth, and a shared sense of stewardship over Mother Earth. Bolivian President Evo Morales is leading the way to reinstate the global understanding that Mother Earth has rights and to remind us all of the responsibilities we share towards her.²⁶ As Indigenous peoples, we take seriously our relationship with Mother Earth and the ways in which we develop goods, harvests, and industries from her resources.

It is no wonder that the U.N. Declaration speaks thoroughly and throughout on the rights of Indigenous peoples to what is known in law as "property."

Article 25 upholds Indigenous peoples' right to maintain their spiritual relationship with traditionally owned or otherwise occupied and used lands, territories, waters, coastal seas, and other resources and to uphold the responsibilities to future generations in this regard.²⁷

Article 26 contains Indigenous peoples' right to the ownership of those lands and territories.²⁸

From Mother Earth, Indigenous peoples and all peoples obtain their sustenance, their basics and their luxuries. Everything comes from the earth. She is our ultimate resource. Cultural and Economic Self-determination is recognition of our

24. *Id.* at 1075.

25. In the Dakota language, "Ina Maka" is "Mother Earth."

26. *See, e.g.,* Evo Morales, *Climate Change and the Rights of Mother Earth*, INDIAN COUNTRY TODAY, Apr. 16, 2010, available at <http://www.indiancountrytoday.com/opinion/91038604.html>.

27. G.A. Res. 61/295, *supra* note 5, at art. 25.

28. *Id.* at art. 26.

responsibilities and obligations to Mother Earth as we build prosperous, good lives for our people.

In the U.S., Tribal Nations are caught under a web of legal trickery that restrains the relationship between the Tribes and Mother Earth. The U.S. government imposed itself as the trustee over all tribal lands beginning in treaty negotiations and culminating in the 1887 General Allotment Act.²⁹ In the treaties signed with Tribal Nations across mid-North America, the U.S. government recognized that the Tribes reserved to themselves part of their homelands making way for U.S. settlement.³⁰

After these treaties were signed, the U.S. reneged and through the U.S. Congress passed the General Allotment Act. Under the Allotment Act, the U.S. President was authorized to declare the reserved homeland of a Tribe subject to allotment, where the lands were parceled out to tribal members and afterwards, the remaining lands were deemed “surplus” for the U.S. to purchase at the price the U.S. set and sold to settlers to enter into the reserved homelands of the Tribes.³¹

The allotments were placed into a trust status imposed by the U.S. government. In 1934 with the passage of the Indian Reorganization Act,³² the trust status over tribal lands was extended indefinitely.³³ This gave the U.S. government the authority to manage tribal lands held in trust status and deprive Native peoples of the use of their primary resource – the land, Mother Earth. This continues to this day. Forces are at work within the components of the U.S. government, the state and local governments to continue the land loss for Tribes.³⁴ The U.S.

29. Indian General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (repealed 2000) (The act is commonly referred to as the “Dawes Act” due to its sponsorship by Senator Henry Dawes).

30. See, e.g., Michelle Smith & Janet C. Neuman, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions Over Off-Reservation Treaty Fishing Rights*, 31 U. HAW. L. REV. 475, 486-87 (2009).

31. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 16.03[2][b] (Neil Newton et al. eds. Lexis Nexis 2005).

32. See generally 25 U.S.C. §§ 461-479 (2006).

33. *Id.* at § 461.

34. See Gale Courey Toensing, *Oneida Nation Dispossessed of Right to Reclaim Land or Compensation*, INDIAN COUNTRY TODAY, Aug. 12, 2010, available at

courts have made technical rules to deprive Tribes of reclaiming their reserved lands within reservation boundaries.³⁵ The trust status continues to hamper the ability of Tribes to engage in economic development in line with tribal values.³⁶

And the majority of tribal peoples live in abject intergenerational poverty under the guardianship of the U.S. government due to the imposed trust status.³⁷ As land-based cultures, Tribal Nations surrounded by the United States have been subjected to legal trickery since the formation of the U.S. and are in resistance to the on-going attempt to destroy the connection between tribal peoples and Mother Earth.

The U.N. Declaration is a starting point to re-align the relationship between the Tribal Nations and the U.S. and to reassert tribal stewardship over mid-North America. Again, tribal peoples must be proactive and make economic decisions based on tribal values to bring us back in balance and harmony. Indigenous peoples throughout the world are beginning to bring the U.N. Declaration to life by linking their daily realities to the principles of basic human rights set forth in the Declaration. The theme this year for the 9th Session of the United Nations Permanent Forum on Indigenous Issues has been Indigenous Peoples Development with Culture and Identity.³⁸

Cultural and Economic Self-determination for Indigenous peoples is strongly supported in the Declaration. To overcome the

<http://www.indiancountrytoday.com/national/Oneida-Nation-dispossessed-of-right-to-reclaim-land-or-compensation-100547094.html>.

35. Through U.S. Supreme Court cases, the doctrines of reservation disestablishment and reservation diminishment have been applied to the Indigenous landholdings in mid-North America. *See, e.g.*, *DeCoteau v. Dist. Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 442-43 (1975); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343-44 (1998).

36. *See* Angelique EagleWoman & Wambdi A. Wastewin, *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 *WASHBURN L.J.* 805, 819-22 (2010).

37. *See generally* U.S. COMM'N ON CIVIL RIGHTS, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* 117 (2003), *available at* <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

38. *See generally* Permanent Forum on Indigenous Issues, Apr. 19-30, 2010, *Report on the Ninth Session*, U.N. Doc. E/2010/43-E/C.19/2010/15 (2010), *available at* http://www.un.org/esa/socdev/unpfii/documents/E_2010_43_EN.pdf.

legal trickery of the past two hundred plus years will require law-trained advocates, culturally knowledgeable leadership, and value-based economics.³⁹ Together we can return Indigenous peoples to lives of prosperity and abundance that will provide a storehouse once again for our future generations.

39. See EagleWoman, *supra* note 36, at 835.

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