Response: Stepping Out of the Sovereignty Framework?

I would like to follow up on a number of issues that Richard Monette raises. One is whether or not Native Americans can appropriate ownership of laws not of their own making and turn them to their own use, when those laws reflect constructs that correspond to Native American ones. He affirms that in fact, they can. I agree, but I suggest that sometimes it might be laws that were not enacted with Native Americans in mind that could prove the most useful. A second issue is the “swing of the political pendulum” that can make the law one way on one day and the opposite on the next. Indeed, such pendulum swings can work just as much in favor as against Native American interests. A third concerns the challenges and constraints that Native Americans face when trying to construct legal systems that reflect their own cultures, traditions and heritages yet must not risk them getting torpedoed by making sure they are still within “the most logical interpretation of the law in light of the history involved.” In this regard, I wonder if in fact using law in creative and useful ways might require stepping out of what is commonly regarded as the “sovereignty” framework of U.S. “Indian Tribes.” I would like to discuss each of these issues by reviewing several cases that seem to argue for an alternative to the sovereignty model resting on “federal recognition”; for seizing upon laws that were not enacted with Native Americans in mind yet address some of their concerns; and for hanging onto the pendulum, so to speak, and waiting for it to swing in the opposite direction.

Sovereignty: Stepping Outside the System and Considering Alternative Models

The Penobscot and Passamaquoddy fell outside the venue of “federal recognition” because they had a Treaty with the State of Maine. They had state recognition but not federal. That lack of federal recognition must have seemed, for many years like a “dirty deal.” Here were all of those other tribes benefitting from the Indian Reorganization Act during the 1930s and ‘40s. Then along came the Indian Claims Commission in the 1950s and again, it was only those federally recognized tribes that could file claims with the ICC. A dirty deal again, it seemed – the Penobscot and Passamaquoddy were barred from doing so. And then in the 1970s one of those quirks of the law that was perhaps wholly unpredictable resulted in the Penobscot and Passamaquoddy being able to sue for not only monetary damages, but also restoration of considerable territory because the State of Main had forgotten to get permission from the U.S. Government to negotiate that Treaty, thus violating the Indian Non-Intercourse Act of 1790.
Equally, it must have seemed to the Native peoples of British Columbia that they were unfairly left out when it came to having treaties with the Crown. Canada negotiated treaties with First Nations between the 1880s and 1920s in all provinces except BC and Prince Edward Island and the Northwest and Yukon Territories. But it is precisely those tribes that have treaties that have not been able to press land claims. Why? Because they are regarded as having relinquished land claims by signing the treaties! So the First Nations of British Columbia, not having treaties, have had no legal impediment to filing claims for large tracts of their territories, and have done so. I am reminded of Mohawk scholar Taiaiake Alfred’s suggestion that “‘Aboriginal Rights’” … are benefits accrued by indigenous peoples who have agreed to abandon their autonomy …” and thus get defined “within the legal and political framework of the state” and in relation to its “‘demands and interests’” (Ivison 2002:3), rather than those of indigenous peoples.

“Sovereignty”, then, being a foreign, Eurocentric concept has “effectively stilled any potential resolution of the issue that respects Indigenous values and perspectives” (Alfred 2004:119). Working outside the system, then, and not necessarily going along with what the dominant legal system sets up paid off.

**Taking Ownership of the Nation-State’s Laws**

Returning to issues of land and resources here in Native North America, I note that the National Environmental Policy Act (“NEPA”), (42 U.S.C. §§ 4321 et seq.) may prove more useful in protecting Western Shoshone land and sacred sites than the much-ignored Treaty. On December 03, 2009, the Ninth Circuit Court of Appeals reversed the lower court’s refusal to issue an injunction against the Bureau of Land Management’s lease to Barrick Gold for an open-pit mine on Mount Tenabo. ¹ Ironically, the Appeals Court agreed with the lower court that the Western Shoshone plaintiffs ² had failed to demonstrate that Barrick’s expansion of the Cortez mine would impede Tribal access and ceremonial use of sacred sites and to avoid physical damage to them. Rather, the Appeals Court cited the Supreme Court’s recent opinion in Winter v. Natural Res. Def. Council, 129 S. Ct. 365 (2008) and ruled that the Environmental Impact statement had not sufficiently considered the air quality impacts associated with transport and off-site processing of a projected five million tons of refractory ore.

The Court issued an injunction against the district manager of the Bureau of Land Management’s Battle Mountain Field Office ordering suspension of the lease until the air quality impacts are considered. So as Monette points out, if the law is not working for you, wait a day or two. And also forget about sovereignty, treaties, protection of religion, tribal government-to-government relations with the U.S. etcetera. To paraphrase a hackneyed ditty, “it’s the environment, stupid.”

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¹ SOUTH FORK BAND COUNCIL OF WESTERN SHOSHONE OF NEVADA; GREAT BASIN RESOURCE WATCH, Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF LAND MANAGEMENT; GERALD M. SMITH, District Manager, Battle Mountain Field Office, Defendants-Appellees, and BARRICK CORTEZ, INC., Defendant-intervenor-Appellee, No. 09-15230 D.C. No. 3:08-cv-00616-LRH-RAM OPINION; see also Great Basin Resource Watch 2010.
² SOUTH FORK BAND COUNCIL OF WESTERN SHOSHONE OF NEVADA; TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; TIMBISHA SHOSHONE TRIBE; and WESTERN SHOSHONE DEFENSE Project—the latter essentially the Dann family who live in the Mountain’s shadow.
Fabiana Li’s article in this same issue of *PoLAR* underscores this point: political action against a proposed expansion of a mine in Peru actually backfired because it was the environmental assessment process that permitted pro-mining advocates within affected communities to affirm that the mine’s social and economic benefits outweigh its environmental costs that permitted the mine expansion to go ahead.

**Swinging on the Pendulum**

In his spillover response, Justin Richland notes that the law can appear as “something of a crabbed institution” and asks pointedly whether it can indeed be “a tool for promotion and securing of indigenous interests,” if it can “keep open the possibility that its categories—for all their misapplication in one moment,” if it “can, at some alter moment deliver justice?” A couple of months ago I would have answered in the negative, despite Monette’s persistence and patience. But I guess the above results and also a recent outcome another long-standing situation gives me pause and also hope that maybe it is indeed worthwhile “hanging onto” the political-legal pendulum, so to speak, and that there is something of a “double vision” of law, as Justin puts it. Last October (2009), in a blog countering what he targeted as biased news released by Tina May, public relations officer for the Hopi Tribal Council, Black Mesa Trust Executive Director Vernon Masayesva accused the “illegally constituted” Hopi Tribal Council of pandering to Peabody Coal Company in not only extending its lease with the Company for the second-largest open pit mine in the world on Hopi and Navajo land but also approving a U.S. Office of Surface Mining’s decision to issue a Life-of-Mine permit to Peabody so they could continue the destructive surface mining for an additional 15 years after the original lease expires in 2011. Forty individual Hopis filed a challenge to the permit as did several other groups. Of special concern was the continuing drawdown of N-aquifer groundwater and the accidental and deliberate destruction of archaeological sites, burial sites, petroglyphs and other cultural resources (Norrell 2009), as well as the failure to adequately address Hopis’ concerns in public forums. (See Clemmer 1995:210–26 for background.)

Then, imagine the surprise when on January 08, 2010 Intercontinental News made this posting:

On January 5, 2010, Judge Robert G. Holt revoked Peabody’s coal mining permit at Black Mesa, because the U.S. Office of Surface Mining (OSM) failed to provide a supplemental Draft Environmental Impact statement (EIS) when it issued the permit in December 2008. “As a result,” Judge Holt states, “the Final EIS did not consider a reasonable range of alternatives to the new proposed action, described the wrong environmental baseline, and did not achieve the informed decision-making and meaningful public comment required by NEPA [National Environmental Protection Act].” Just a few weeks ago, the EPA issued its own decision and withdrew Peabody’s water permit, after the Black Mesa Water Coalition, To’ Nizhoni Ani (“Beautiful Water Speaks”), Diné CARE and several other groups raised concerns the company was violating NEPA, as well as the Clean Water Act and the Endangered Species Act.

The diverse group of defenders, some of whom were recently blacklisted for being “a threat” to the Hopi and Navajo Nations, also alleged the EPA did not fully consider the environmental impacts of Peabody’s waste ponds, and failed to provide opportunities for public involvement in their decision-making process (Ahni 2010).
The environmental assessment process trumped the “sovereign” Hopi Tribal Council and all the weight of approval for its actions provided by the U.S. Bureau of Indian Affairs. Who knows how this and the Mount Tenabo situations will ultimately turn out? It is difficult to believe that Barrick Gold and Peabody Coal will not ultimately prevail, but surely these situations underscore Monette’s point that Native Americans may undertake ownership of laws that they did not create, but which resonate with concepts such as environmental responsibility and sustainability that were in place in at least some Native communities long before Congress thought up NEPA. However, Hopis first tried halting Peabody’s mining activities, especially those resulting in the drawing down of millions of gallons of water from a deep aquifer, in 1971; they have been trying to intervene in the permitting process since 1985. Talk about a swing of the pendulum! What made the legal-administrative bureaucracy respond negatively for nearly thirty years and then suddenly concede Hopis’ points? I wonder if Justin has some take on this that he could share with us, since he has worked among the Hopi more recently than I. At any rate, the outcome also emphasizes Professor Monette’s (2009:317) observation that Native Americans “don’t know what the law is on any given day.” Maybe that is the reason why I have consistently found a greater percentage of “lay scholars” of law in Turtle Island’s Native American communities than I thought I could ever hope to find elsewhere in North America!

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