

2009

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Not our borders: Indigenous people and the struggle to maintain shared lives and cultures in post-9/11 North America

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Working Paper No. 4
January 2009

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Acknowledgements

Thanks to the Border Policy Research Institute for financial support of the research project that provided the initial impetus for this paper. A special thanks to Director Donald Alper whose thoughtful suggestions and careful editing made a significant contribution. Errors that remain are the responsibility of the author.

I teach and do research in the areas of environmental politics, transboundary environmental problems (Western U.S./Canada), political economy and inequality. My most recent project involves the roles of indigenous people in marine conservation planning initiatives in British Columbia and Washington State.

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“Again and again Blackfeet warriors fleeing northward after a raiding attack watched with growing amazement as the pursuing troops of the United State Army came to a sudden, almost magical stop. Again and again, fleeing southward, they saw the same thing happen as the Canadian Mounties reined to an abrupt halt. The tribes of the Blackfeet Confederacy living along what is now the United States-Canadian border came to refer to that potent but invisible demarcation as the ‘Medicine Line.’ It seemed to them almost a supernatural manifestation.”¹

Nearly two centuries later, borders between the U.S. and its neighbors to the north and south continue to be a source of consternation for indigenous people, although today, they offer fewer compensatory benefits.² Instead, for the more than 40 tribes that live along or near the northern and southern borders of the U.S., as well as a comparable number of Canadian First Nations, tightened security around borders has meant increased difficulty in pursuing intertribal trade and exchange, greater obstacles to delivery of social and health services to tribal members who live across national borders and the attenuation of social and kinship networks. Perhaps most importantly, barriers to border mobility undercut efforts to keep alive or re-create cultural traditions and practices that native leaders claim are critically important to the identities and well-being of their members. In the U.S., tribes have responded by calling for the creation of a separate

border-crossing protocol that would, for example, accept tribal ID cards in lieu of passports. Although under the new Western Hemisphere Travel Initiative (WHTI) the Department of Homeland Security (DHS) has agreed to temporarily accept tribal ID cards, conflicts continue over what tribes would need to do in order to create the “enhanced” tribal ID cards that DHS will be requiring in June 2009, and where the funding for such measures will come from (DHS 2008, Thompson 2008). Similar ID cards have been proposed for Canadian First Nations. Native people would also like to restrict physical searches of members who are crossing borders to participate in traditional ceremonies in order to avoid the de-sanctification of religious objects or regalia that occurs when objects are seen or handled by unauthorized people. In addition, tribes are demanding a greater role in DHS initiatives directed at counter-terrorism and emergency preparedness, including direct access to funding. Currently,

¹ Sharon O'Brien, (1984), *“The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families,”* 53 *Fordham Law Review*, p. 315.

² *More than 260 miles of the U.S. international border is under the jurisdiction of Indian tribal governments (Tribal Amendments to Homeland Security Act of 2002, p. 4, 2004).*

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DHS grants go almost entirely to states, who are supposed to share them with tribes, but according to the tribes, seldom do. This article focuses upon the special problems that recent changes in border policy pose to American Indian Tribes and Canadian First Nations and evaluates arguments for and against the creation of special border protocols for native peoples.

The case of border policy and native people presents interesting challenges for policy makers and social theorists. Post 9/11, federal, state and local governments have embarked on ambitious efforts to strengthen national security, and this has occasioned significant hardening of borders. Whether the strategy adopted by the U.S. government and its allies to respond to security threats has, on balance, been successful, will continue to be debated for some time. For the sake of argument, we will make the assumption that U.S. residents potentially benefit from efforts to increase domestic security. At the same time, we must note that border policy measures generate costs such as increased inconvenience, delays at border crossing points, dampening of trade, etc. (Globerman and Storer 2006). We will assume, once again for the sake of argument, that the aggregate benefits of recent border security policy changes outweigh their costs. Somewhat less controversially, we suggest that in creating policies and procedures aimed at increasing border security,

governments should aim to treat all groups under the same set of rules and procedures unless there is a compelling reason to treat them differently. This reflects a widely-shared belief that good governance requires government to treat groups impartially or with equal concern.

Whatever benefits are to be had from tightened border security take the form of a public good—once available to one, they are available to all. Perhaps more importantly in this context, their value is roughly equal for everyone, since anyone could conceivably be the victim of a terrorist attack. The same cannot be said of the costs of various efforts to increase border security. Some sorts of businesses, those dealing in imports and exports in North America, for example, could be expected to feel the costs of such policies more keenly, as could frequent travelers. And obviously border regions are most directly affected by changes in protocols for border crossing. As a general rule, is government obliged to make special allowances to take account of the distribution of costs in implementing policies? Unless costs are quite large, the answer would seem to be “no,” with the implicit justification that: (1) in a well-governed polity, some sort of rough justice emerges over time and across different policy areas, as groups who are “losers” in one area emerge as “winners” in another; and (2), attempts to fine-tune policies with respect to

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their differential costs and benefits run a significant risk of favoring one group over another, or at least of creating a public perception that fundamental tenets of impartiality are being violated.

All of this would seem to argue against the position Tribes/First Nations have taken in demanding special consideration in border policy. Yet there are also arguments supporting the tribal perspective. For example, in some cases, when asymmetries are very large or where the circumstances of different groups are markedly dissimilar, we do treat different groups differently, and to do otherwise would strike many people as manifestly unfair. Sometimes it might even be said that equal concern *requires* differential treatment, such as when public health care dollars are channeled to patients undergoing dialysis treatment, rather than being doled out on some other basis—one person/one share, for example. The question then becomes, when are asymmetries great enough to allow or even require that governments treat different groups differently? Do the impacts on tribes in the case of border policy rise to that level? What, if any, additional questions should we be asking in determining when differences between groups should *make* a difference in the way policies are crafted and carried out?

Developing a full-fledged theory of when and why differential treatment is deserved or even required—one that

could stand up against really difficult cases—is beyond the scope of this paper. Nor does the paper dwell on the legal reasoning that has led tribes to argue that under treaty law they are entitled to the right to freely cross borders, trade with other aboriginal people, be exempted from import/export taxes, and in other ways be subject to fewer restrictions than are people who are not the descendents of native treaty signers. A number of law review articles address these issues (O'Brien 1984, Castella 2000, Osburn 2000, Lepsch 2002, Luna-Firebaugh 2005, Tonra 2006, Di Iorio 2007). My goals for this paper are different, and somewhat more modest. By presenting a series of representative cases depicting the problems faced by tribes, my intention is to elucidate some sorts of asymmetries in the distribution of costs and benefits associated with efforts to seek greater security through the hardening of border policies. In addition, I attempt to draw from, and apply, insights from recent academic discussions about multiculturalism, and how governments should proceed in recognizing and responding to the needs of cultural minorities in policy making. Hopefully, this will lead to some rudimentary conclusions about the effects of border policies on indigenous people, while at the same time contributing in some way to a broader discussion of culture and equity in policy-making.

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ALONG THE U.S./MEXICO BORDER

For the many tribes/bands living in and around what are now considered the borderlands of the U.S. and Mexico, the establishment of a boundary that cut through native lands threatened to utterly transform social relations and kinship networks, subsistence patterns and cultural and religious practices.³ Productive resources are spread thinly and unevenly in the arid southwest, and for native people, migration over large territories was a necessary and time-honored way of life. Migration was in some sense intrinsic to native culture. And until recently, the needs of members of the Yaqui, the Kumeyaay, the Cocopah Nation and other tribes living along what is now the U.S./Mexico border were accorded some deference by federal border protection agencies. Often, the usual border-crossing protocols were simply waived for native people—the Tohono O’odham had a number of unofficial crossing places spread throughout their 75-mile border with Mexico, for example, and these were rarely even monitored. In other cases, regular cross border migration of certain tribes was officially recognized and sanctioned. The Texas Band of Kickapoo, for example, has both Mexican and U.S. members and has for decades lived in Nacimiento, Mexico, during the winter and traveled to Eagle Pass, Texas, to work as migrant farm hands for the rest of the year. In 1983, Congress passed the Texas Band

of Kickapoo Act, which ensured that Kickapoo could freely cross the border into Mexico and return at will.

Many tribes had hoped they might be able to make similar political arrangements. Yet growing concerns about drug trafficking, about undocumented immigrants and, post-9/11, fears about terrorism have resulted in a growing inflexibility on the part of the federal government. The situation of the Tohono O’odham Nation is perhaps the most vivid example of the negative, albeit largely unintended, consequences of recent government efforts toward greater border security.

TOHONO O’ODHAM NATION

In 1848, the Treaty of Guadalupe-Hidalgo established the boundary line between the U.S. and Mexico at the Gila River, which meant that the territories of the people known as the Tohono O’odham became part of Mexico. Five years later, the Gadsden Purchase established the southern boundary of the United States at its present location, and in so doing, bisected the territory of the Tohono O’odham. Today, the reservation is comprised of 2.8 million acres (about the size of Connecticut), abutting 75 miles of the Mexican border, and reaches across the border into northern Sonora, Mexico. The Tohono O’odham Nation has about 27,000 members, more than a thousand of whom live across the border in Mexico. About half of the

³ *Between Texas and California, there are eight tribes with communities on both sides of the border: Kumeyaay, Cocopah, Tohono O’odham, Yaqui, Gila River Pima, Yavapai, Ysleta del Sur (Tira) and Kickapoo.*

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remaining tribal members live on the reservation. For the Tohono O’odham, the Yaqui and other native people of the region, the freedom to travel the many paths criss-crossing the border has always been essential—to gather medicinal plants, to collect a type of clay used at childbirth, or to practice the annual round of ceremonies that sustain the traditional religion and culture. While at the time of treaties the Tohono O’odham were not granted dual citizenship nor given explicit permission to move freely across the border, cross-border travel for work, for socializing and for participation in religious ceremonies was an established and accepted practice for more than a century. In the mid-1980s that began to change, and by the mid-1990s, it began to change dramatically.

Today, parts of the formerly quiet, isolated reservation have been

transformed into an area bristling with weapons, new roads, spotlights and military surveillance vehicles. Beginning in the 1990s, a series of strategic decisions were made by federal agencies to clamp down on illegal entry at popular border crossing points—beginning in San Diego, California, with “Operation Gatekeeper” (1994), later spreading eastward with “Operation Safeguard” (1995) in central Arizona, and then “Operation Rio Grande” in the southernmost tip of Texas in 1998.⁴ Various reasons have been suggested for these successive waves of intense border security—to displace drug and human-trafficking from densely populated areas to less visible locations and to change behavior of would-be crossers by re-channeling activity to areas with highly inhospitable conditions. The resulting “funnel effect” relocated vast amounts of illegal border-crossing activity to the Tohono



Tohono O’odham reservation is shown in southern Arizona. Map Courtesy of EPA.

⁴ Between 1994 and 1997, the budget for the Department of Immigration and Naturalization Services doubled, the number of Border Patrol agents nearly doubled and the amount of fencing more than doubled. We do not have precise figures on the number of miles of additional roads or high illumination floodlights that have been installed since then.

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O'odham reservation, where summer temperatures have been known to reach 130 degrees, water is scarce and the terrain difficult. The costs to the Tohono O'odham have been significant.

Testifying at congressional hearings in 2003, then-Chairwoman Vivian Juan-Saunders reported that in 2002 and 2003 nearly 1,500 undocumented immigrants were crossing reservation lands every day.⁵ The figures are roughly the same today. More than 60 bodies are recovered every year (McCombs 2007). The reservation is second only to Nogales, Arizona, in terms of the quantities of drugs being smuggled across the U.S./Mexico border. Residents report that their homes are broken into by desperate migrants in search of food, water, or money. Many also complain of conflicts with Border Patrol officers. Some Tohono O'odham members have themselves been seduced into smuggling of either drugs or immigrants, which, given an official unemployment rate of 42 percent and a per capita income of only \$8,000 per year, is hardly surprising.⁶ The 71-member Tohono O'odham police force spends more than half of its time chasing traffickers, recovering abandoned cars, cleaning up trash and rescuing ill-fated immigrants or recovering their remains. Every year the tribe and the Indian Public Health service spends nearly \$7 million on a combination of law enforcement, health care and related services (Dougherty 2007, Lewin 2005).

The tribe, which in the past had resisted efforts of the Border Patrol to establish itself on the reservation, is internally divided on how best to respond to the myriad problems it is currently facing involving border issues. The tribal leadership has invited the Border Patrol and other federal law enforcement to assist in stemming the flow of drugs and undocumented immigrants and has approved the construction of permanent Border Patrol facilities on Tohono O'odham land. Yet while the tribe has supported the construction of a barrier to vehicles along its border, Tribal Chairman Ned Norris has gone on record as opposing the sort of heavily-fortified wall that he claims is currently being planned by DHS under the "Secure Border Fence Act of 2007" (McCombs 2007).

In addition, tribal officials complain that DHS rarely consults with them and that tribes are not being reimbursed for expenditures made in response to border problems. The tribe contends that DHS has ignored the "government to government" relationship that federal agencies are required by law to adopt toward tribes and has been fundamentally unresponsive to the needs of the Tohono O'odham for additional funding, or with respect to planning or implementation of border security initiatives. Tribal Chairwoman Vivian Juan-Saunders testified before Congress in 2003 in support of legislation that would have allowed greater tribal

⁵ Testimony of Vivian Juan-Saunders, Chairperson, Tohono O'odham Nation of Arizona in Hearing before the Committee on Indian Affairs, U.S. Senate, concerning Tribal Government Amendments to the Homeland Security Act of 2002. July 30, 2003.

⁶ In 2006, average per capita income in the United States was \$25,352 (U.S. Census Bureau, 2007)

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participation in planning and increased funding of tribal initiatives under the DHS, but to no avail.

While increased trafficking of humans and drugs across reservation borders has caused a variety of environmental and security problems, as well as shortfalls in resources for law enforcement and medical treatment, many Tohono O'odham consider the larger problem to be the omnipresence of Border Patrol and other federal law enforcement agents. Some are said to fear the Border Patrol and DEA agents as much as, if not more than, than they do the undocumented immigrants. The Border Patrol has been taking increasingly aggressive measures to curtail smuggling, and tribal members report being met with spotlights at night in their own backyards and having officers walk into homes unannounced to interrogate people in the middle of the night. Cars and their occupants are routinely searched. Caught between smugglers and edgy Border Patrol agents, many people are said to be afraid to leave their homes, especially at night. For groups such as Alianza Indigena Sin Fronteras (Indigenous Alliance Without Borders), the situation on the Tohono O'odham reservation simply demonstrates, in a particularly dramatic fashion, what they see as the moral bankruptcy of recent border-tightening initiatives. Members of the organization express a sense of kinship with undocumented migrants, many of

whom are indigenous themselves, who risk their lives for an opportunity to take low-wage work in the U.S. Despite the fact that the Tohono O'odham recently passed a law making it a crime to shelter illegal immigrants, some tribal members have vowed to continue to put out water barrels for thirsty immigrants and to search for the bodies of those who die while making the attempt to cross (McCombs 2008).

TRIBES ALONG THE CANADA/ U.S. BORDER

Tribes that share a border with Canada include the Mohawk (New York and Ontario and Quebec), Blackfeet (Alberta and Montana), Red Lake Band of Chippewa (Minnesota and Canada), Aroostook Band of Micmac (Maine and New Brunswick) and Houlton Band Maliseet (Maine and New Brunswick).⁷ Other tribes, such as the Lummi, or Sto'lo, or any of the dozens of Coast Salish tribes/bands of Western Washington and British Columbia, are close to, but not directly on the border. Nonetheless, the cultural and social links between them are important, and current border policy threatens to undermine these relationships.

THE MOHAWK TRIBE

The boundaries that bisected the Mohawk's traditional territory were fixed by the 1783 Treaty of Paris. A dozen years later, Mohawk bands on the U.S. side of the border ceded most of their lands to the State of New York,

⁷ *Lepsch, Peter D. 2003.*

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and took up residence on the current 14,000-acre reservation around the village of St. Regis. On the Canadian side, which borders the provinces of Ontario and Quebec, as well as New York State, about 12,000 Mohawks live on a reserve of 24,000 acres (O'Brien 1984). Mohawks are governed by the St. Regis Tribal Council, which governs the American side, the Mohawk Council of Akwesasne, which governs the Canadian side, and a parallel system of traditional chiefs on both sides, who lack formal governing powers but retain considerable influence. In addition, Mohawks must deal with both the Canadian and U.S. federal governments and their respective state and/or provincial governments. Planning, economic development projects, and even the delivery of social services is complicated by the network of governments. Widespread poverty on the reservation, in combination with the reservation's strategic location along the St. Lawrence Seaway, make smuggling an extremely attractive proposition to many tribal members. Even the tribal chairman admits that smuggling has been a way of life for the Mohawk reaching back to the days of Al Capone. Today, it seems to be reaching epidemic proportions.

There are 6,000 tribal members on the U.S. side of the Mohawk reservation, and federal investigators estimate that the reservation hosts 10-15 major Indian crime organizations, moving

about \$1 billion of drugs across the border annually (Kershaw 2006). Many tribal members themselves are heavily involved with the drug trade—as users, as “mules,” and increasingly, as large-scale dealers. Illegal immigrants are also being trafficked through the St. Regis reservation. The Mohawk Tribe has an agreement with federal and state officials that prohibits police from patrolling the river's shoreline and the many islands that lie within tribal territory. Especially during the winter, when the river freezes and can be crossed (with difficulty) over the ice, the area becomes what one New York newspaper called an “express lane” for smuggling drugs, cigarettes, people or anything else that yields a profit (N.Y. Post, 2008). Despite spending more than half of its revenues from casinos and other tribal businesses—about \$2 million in all—on border patrol and other law enforcement every year, the tribal police resources are clearly out-matched. There are some indications that corruption within tribal government has contributed to the inability to stem the tide of drugs and violence. To be sure, there are also instances of successful cooperation between tribal and non-tribal law enforcement agencies.⁸ Yet all in all, it would be difficult to dismiss the very real concerns law enforcement officials have about current safeguards against terrorism, drug smuggling and human trafficking within the portion of the Canada/U.S. border that lies within the Mohawk Nation.

⁸ One recent example of cooperative policing involved 300 law enforcement agents, including Mohawk Peacekeepers from the Kahnawake, Kanasatake and Akwesasne communities in Quebec, Ontario and New York; the U.S. Drug Enforcement Agency; the Royal Canadian Mounted Police and provincial police in Quebec and Ontario. Fifteen raids resulted in 30 arrests and the confiscation of drugs, cash and weapons (Toensing 2008).

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PACIFIC NORTHWEST TRIBES

In the summer of 2007, the Lummi Nation, a Western Washington tribe of about 4,000 people living on a 37-square mile reservation, hosted a weeklong-event entitled “Paddle-to-Lummi.” The overarching purpose of the gathering was cultural renewal of the traditional ties between the many Coastal Salish peoples living along the Georgia Basin/Puget Sound shoreline on either side of the Canada/U.S. border, of the traditional mode of transportation via large, sea-going canoes, and of traditional practices such as the potlatch. Potlatches, which include feasts and gift-giving by the ceremonial host, were once integral to the social system and ordered hierarchy of the Coast Salish. The “Paddle-to-Lummi” event marked the first potlatch since 1937, and 73 canoes and hundreds of paddlers made the journey, some from as far as 400 miles to the north. About 12,000 friends, family and curious spectators made the trip via more conventional means of transportation. In order for the event to take place, thousands of people needed to cross the Canada/U.S. border, some through shared marine waters. Initially, the task of facilitating the border crossings of so many people, including children and others who lacked required documents, looked almost insurmountable to organizers. Fortunately, U.S. Customs and Border Patrol officials were willing to issue group permits for the canoe paddlers. Still, many who otherwise

would have attended may have been deterred because of fears that recent border “hardening” would expose them to unwanted scrutiny or prevent their entry entirely. The problems that presented themselves for the organizers of the event are typical of the sorts of obstacles to cultural preservation posed by tightened border security. For example, it is an ongoing source of tension for traditional tribal members that religious objects or spiritual regalia that are being taken across borders for use in ceremonial gatherings are subject to border searches.

Cultural renewal is a priority goal for the Lummi leadership, as it is for many tribes and First Nations. Native leaders believe that the restoration of cultural traditions is key to addressing problems endemic to many indigenous communities—alcoholism, drug addiction and the array of problems left in their wake. The Lummi and other area tribes have created a variety of initiatives aimed at re-connecting with their “relatives” to the north. These include pow-wows, religious ceremonies and “gatherings” aimed at monitoring the environmental threats that threaten the remaining vestiges of a traditional way of life.

It is obvious why the Lummi and other tribes would prefer a system for border crossing that would allow tribal members to use identification cards issued by their own tribal governments

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instead of passports. Some tribal members (although their numbers diminish every year) do not have birth certificates. There is considerable suspicion of government in many indigenous communities. For example, the practice of removing Indian children from their families and placing them in residential schools where they were often beaten, shamed and mistreated, is still alive in the memories of older Indians on both sides of the Canada/U.S. border. Many native people are simply uneasy about placing themselves in a situation where their lives are open to government scrutiny. Others fear that their applications will fail because of previous entanglements with legal authorities—from DUI charges to failure to pay child support. Canada Border Services Agency agents have been known to prevent entry for those who have been convicted of such offenses. Either individually or in combination, these factors dissuade people from crossing the Canada/U.S. border, even to attend a relative's funeral or participate in a ceremony. In this way, familial and cultural connections are attenuated and become less meaningful.

Recently DHS has given ground on the issue of cross-border travel documents. Under the newly-enacted Western Hemisphere Travel Initiative (WHTI), all travelers to and from Canada, Mexico, the Caribbean and Bermuda must present a passport or other WHTI-compliant document (DHS

2008). DHS has agreed to allow tribes to create “enhanced” tribal ID cards that can be used in lieu of passports. Yet the cost of creating the card system, which, under DHS regulations, would require a computer system that would allow immediate electronic verification at ports of entry, will prohibit most tribes from exercising this option (Thompson 2008). So far, no federal or state funds have been earmarked for this purpose.

Despite the costs imposed on indigenous populations by recent security policy, the concerns of federal agents with respect to the threats posed by drug smuggling, human trafficking and terrorism are not without foundation. Like the Mohawk and many other U.S. tribes, the Lummi Nation struggles to control drug smuggling. A booming reservation trade in OxyContin was worth \$1.5 million in 2003, more than double the profits from the tribe's new casino (NYT 2006). According to one convicted drug dealer, it is common in the course of transporting drugs across the border to hide drugs in objects that are then claimed to be materials associated with religious practices. Smugglers are obviously attempting to take advantage of the fact that customs inspectors have been roundly criticized for cultural insensitivity in the past, and have subsequently become more respectful (and perhaps less rigorous) in their inspection of sacred objects. The federally unrecognized Kaweah Indian

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Nation is currently under investigation in several states for selling tribal identification cards to undocumented aliens after promising that the cards would protect the aliens from deportation (Associated Press 2007).

INTERGOVERNMENTAL RELATIONSHIPS BETWEEN TRIBES AND DHS

In the U.S., relations between federal agencies and Indian tribes are supposed to take place in the context of what is called a “government-to-government relationship.” Essentially, this means that planning, implementation and funding of federal programs occurs through a collaborative process between a given tribe and the federal agency(ies). The relationship between the federal government and tribes is supposed to be direct—tribes are similar to states in that respect, and very different from local governments, who are subservient to state governments, and must rely on them for funding. In 2000, Executive Order 13175 formalized this relationship and made consultation and coordination with tribal governments a requirement for all federal agencies (Federal Register 2001). Yet until quite recently, DHS’s record of consultation and cooperation with tribes has been “very bad,” according to Heather Thompson of the National Congress of Indian Tribes (Thompson 2008). Thompson attributes this to the new agency’s lack of historical relationships with tribes, as well as to the fact that

DHS does not have a formal institutional structure for tribal consultation or even a permanent Native American policy staff position.

The lack of direct DHS funding-programs for building tribal capacities in law enforcement and domestic security is a very serious ongoing problem. Nearly all DHS grant funding goes to states, and tribes are forced to compete with local governments for the resources they need to maintain border security. In 2003, legislation was introduced that would have acknowledged the distinct status of tribes and would have made them eligible to compete for federal funding associated with homeland security initiatives, but it failed to make it out of committee. During legislative hearings before the Senate Committee on Indian Affairs, then-president of the National Congress of American Indians (NCAI) Tex Hall reported that his own reservation, Fort Berthold Indian Reservation in North Dakota—the site of 18 Minuteman missile silos—received no funds from either DHS or the U.S. military. Hall added that in the previous year, the State of North Dakota received just over \$13.2 million for homeland security, of which \$73,000 was to go to tribes. And since that money was to be spent to hire a Homeland Security Liaison to work with Indian tribes, none of the funds were actually going to be spent on direct law enforcement or training of tribal personnel (U.S. Senate Hearings on Tribal Government

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Amendments to Homeland Security Act of 2002, p. 47).

During recent congressional negotiations over the allocation of DHS grant funds for the 2008 fiscal year, Congress established a very small program that tribes could apply to directly. But unlike similar (but much larger) state programs, funding mechanisms were implemented in such a way as to create a ceiling beyond which funds could not grow. The program also contains a series of restrictions that will prevent the majority of tribes from obtaining funding (Thompson 2008). For the great bulk of federal grant money, tribes must still petition the states, which, in the context of internal conflicts over how to allocate scarce funds, have little reason to award money to tribes rather than local governments. Nor is the problem limited to funds for grants for infrastructure, law enforcement or capacity building. Under the rules governing the Federal Emergency Management Agency (FEMA), tribes suffering the effects of a natural disaster must appeal first to their state governments, which must then petition on their behalf before a disaster declaration can be made. The injury to tribes is two-fold: first, as the result of the history of land dispossession and subsequent reallocation, reservations are generally in poorer areas, which are often those most vulnerable to flooding, wildfires or other natural catastrophes; second, since states have

little responsibility or taxation authority on Indian reservations, their incentives are fundamentally incompatible with the best interests of tribes.

DISCUSSION AND CONCLUSIONS

At this point we return to the questions set out in the introduction. Now that we have some sense of current conditions facing a representative group of indigenous peoples living on or near areas where the U.S. borders Canada and Mexico, what should we conclude? Are tribes bearing an unfair portion of the costs of border security? If so, do such asymmetries justify the creation of a separate protocol for Native Americans and First Nations? Do current debates in the literature about multiculturalism provide useful guidance in this and similar dilemmas, where the interests of the minority populations and those of the general public appear to be in conflict?

First, a brief explanation of the positions taken in debates over how governments should accommodate the social reality of multiculturalism. The traditional, liberal position⁹ argues for individual rights and equal treatment of all citizens in the public sphere, and grants significant autonomy to individuals in their private lives and to the formation and internal workings of groups and communities, as long as these do not threaten individual rights or those of other groups and

⁹ The term "liberal" in this context refers not to everyday usage of "liberal" and "conservative," but rather to an ideology or set of principles upon which modern democracies have historically been premised. Individual freedom, a full complement of civil rights and political equality are among those values closely associated with traditional "liberal" ideology.

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communities. This set of arguments is consistent with the high value liberals place on freedom, but also, many would argue, represents the principles best suited to achieve mutual toleration in countries that are increasingly diverse—ethnically, racially and culturally. Liberal egalitarians have generally envisioned this emancipatory project being accompanied by collective action aimed at bringing about conditions of greater social and economic equality (Barry 2001).

Conversely, the multiculturalism model argues that simply protecting basic legal and political rights is insufficient—that in order to fulfill its obligation to demonstrate “equal concern” for all people, government must provide support for and in some sense endorse the distinct cultures of minority groups. In what to some people, at least, is its most persuasive version, the multiculturalist model is linked to freedom and autonomy. The basic argument is that freedom involves individuals making choices about the sort of lives they wish to lead, and that their ability to make meaningful choices presupposes an array of choices that arise from, and are made intelligible by, the societal culture within which one identifies (Kymlicka 1995). Thus it is governments’ obligation to provide some level of public recognition and support for minority cultures, and, in some circumstances, to waive certain legal requirement and/or grant

categorical exceptions to policies that run counter to cultural practices and beliefs.

Proponents of the multiculturalist position argue that failing to undertake such measures is both wrong (in the sense that it violates the obligations that governments have toward their citizens); and furthermore would likely lead to the continuing erasure of distinct minority cultures. Opponents claim that multiculturalist policies may exacerbate existing tensions between groups in society while at the same time misdirecting efforts away from the more important project of greater economic and social equality between all people (Barry 2001).¹⁰

With that abbreviated background to the debate, we can now reconsider the cases. Several questions are being posed: is the securitization of borders resulting in disproportionate costs being imposed on indigenous people to an extent that governments are obligated to make changes in policy? And if policy changes are called for, then could appropriate policy changes be made within the current liberal framework of governance, e.g. a single set of laws applicable to everyone; or, as multiculturalists have argued in other cases, must government respond by creating a separate set of laws and regulations, in this case separate border protocols for indigenous people? Before tackling these questions, it may

¹⁰ In addition to academic critics of multiculturalism, the latter criticism has been voiced by aboriginal leader Noel Pearson in Australia (Banting 2005). Attempts to empirically test the claim that multiculturalism undermines public support and generosity for welfare states have produced ambiguous results (Banting 2005). Yet casual observation—through electronic blogs and letters to the editor in response to articles about “special” rights for indigenous people for border crossing and other activities—suggests there is considerable resentment of such policies, what are perceived as favoritism by government.

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be useful to divide the damages/costs experienced by indigenous people into two categories: those that we will call *culture-neutral*—costs that could be expected to be felt by any group of people in a similar situation; and what we will term *culture-sensitive* costs, by which we mean costs that are particular to a group's culture and identity, or at least for which cultural identity could be expected to have the effect of increasing the injury. In the first instance, there is no need to rely on the arguments or prescriptions of multiculturalists, while in the case of culture-sensitive costs, there may be, although this is not necessarily the case.

TOHONO O'ODHAM, A CASE OF LARGELY CULTURE- NEUTRAL COSTS

It seems clear that the Tohono O'odham are being saddled with a hugely disproportionate share of costs associated with efforts to safeguard society from terrorism and to reduce illegal activities associated with drugs and human trafficking. It is hard to see how this is fair or just, particularly when some of the worst aspects of the situation facing tribal members result from a deliberate effort to choke off trafficking in other areas of the country and funnel it into the Sonoran Desert, when the spillover effects of such a policy on local people were clearly predictable. The underlying structure of the Tohono O'odham case is analogous to the many situations

termed "environmental (in)justice," where industrial facilities, landfills, or other locally undesirable land uses (LULUs) are sited next to people who are poor, nonwhite, or both, with the result that relatively powerless people are exposed to toxic substances more frequently and more intensely than are affluent, relatively powerful people. With respect to environmental policies, U.S. federal requirements were changed in the early 1990s and now mandate that government officials consider the effects of projects and policies on minority or low-income populations. The same logic that resulted in such changes in policy should apply here. Furthermore, it is difficult to see how public policy that concentrates costs so heavily on any group of people, regardless of the cultural or ethnic identities, can withstand scrutiny. With respect to many of the problems faced by the Tohono O'odham—risks posed by high levels of criminal activity, sustained government surveillance, including frequent searches and other invasions of privacy, damage to the natural environment, and so on—culturally specific arguments are not required since it is enough simply to look at basic tenants of good governance with respect to how burdens are (or should be) shared.

CULTURE-SENSITIVE COSTS—A PLACE FOR MULTICULTURALIST POLICIES?

Yet not all of the costs faced by the

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Tohono O’odham or other tribes fall into this category. Here the argument for differential treatment—for example, border protocols that would allow tribal members to travel freely (or at least with fewer encumbrances) across borders—must rest on cultural arguments, e.g. the damage that will be done to tribal members, either individually or collectively, and *tribal culture*. For example, for a variety of reasons, native people may be more likely to encounter difficulties with meeting the requirements of border officials. In addition, many tribes are engaged in deliberate, concerted efforts to restore and revitalize cultural traditions as a key component in a larger effort to address the myriad social, health-related and other problems that are endemic to reservations. There is every reason to believe that such approaches are more likely to succeed than conventional methods. A large, longitudinal study comparing economic development levels on a number of Indian reservations concludes that the “closeness of fit” between traditional culture and political/economic institutions is a powerful influence on success (Cornell & Kalt, undated). Cultural renewal efforts are clearly being hampered by border controls that discourage people from crossing borders. For these reasons, tribes could contend that culture-specific costs are sufficient to require exceptions be made.

On the opposing side, government

officials might argue that the interests of tribes must be overridden by the even stronger interest the public has in domestic security. Much of the 260 miles of the international border that abuts Indian reservations has been shown to be quite porous, and the result has been a concentration of border-related illegal activity. Many Indian reservations are currently grappling with crime rates that are nearly double those on non-Indian communities, with few obvious signs of success (Perry 2004). While no serious terrorism threats have been discovered on reservations, it seems likely that this is not because such threats have been thwarted, but rather that they have yet to be attempted. If we assume that discouraging terrorism and drug trafficking or diminishing the numbers of immigrants that enter the U.S. illegally are, either individually or in combination, necessary, important public policy goals, then it is not hard to see why the idea of relaxing border crossing requirements to accommodate tribal preferences strikes many people as irrational. This lack of confidence in the tribal law enforcement capacities is no doubt part of what lies behind DHS’s apparent usurpation of the tribal role in ensuring domestic security.

WHAT GOVERNMENT CAN DO: BUILDING CAPACITY AND INSTITUTIONALIZING THE TRIBAL ROLE

Yet it is here that current government policy is most mistaken. As has been

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demonstrated in locations all over the world, the maintenance of social order and law enforcement requires adequate funding—either internally or from higher levels of government—and support from the community. Failing to fund tribal law enforcement agencies and train tribal personnel in the implementation of homeland security initiatives and then using inadequate capacity as a reason to deny tribes' own efforts to balance security with cultural needs clearly is a case of blaming the victim. A more reasonable, equitable and workable approach would first focus on compensating tribes for damages that have occurred as the unintended consequences of new border security regimes, and then on making significant investments in building tribes' own capacities to respond to security threats, cross-border drug trade, etc. Rather than interpreting signs of inefficiency or inadequacy as a mandate to step in and take over, DHS should reflect on the failures of such efforts in the past and attempt to engage tribal communities. A variety of models are already functioning where responsibility for policy in a particular area is shared between federal and tribal governments. In fact, both the U.S. Department of Defense and the U.S. Department of Justice have institutionalized programs that create processes for collaboration and coordination with tribes. Many states have similar programs. There is solid evidence to indicate that heightened responsibility or

sovereignty is a necessary condition of better performance and accountability on Indian reservations (Cornell and Kalt, undated). The justification for such initiatives does not require an endorsement of the entire package of multiculturalist arguments, although it would acknowledge that social identity and indigenous culture are important to people and worthy of protection by government. In this case, (although perhaps not in others) most of what I term *culture-sensitive* costs could be addressed without changing underlying assumptions about impartiality and equal treatment under the law. Government agencies could respect local autonomy and benefit from local knowledge by allowing tribes to devise, by whatever means they chose, a border security regime that would function in such a way as to meet national standards.

A number of specific measures that could advance such an agenda have been endorsed by NCAI (Thompson 2008). First, DHS could come into compliance with current law by institutionalizing a process for consultation and coordination with tribal governments. This could conceivably require the creation of an office of tribal affairs and tribal policy, but in light of the size and scale of resources available to DHS, it is hard to see why this would not be feasible. At the same time, tribes could be better integrated into planning boards and advisory committees. Second, DHS

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should formalize a government-to-government relationship with tribes, which allows tribes to apply directly to DHS for grants that could be used for building tribal infrastructure and capacity. Given the incentive incompatibilities discussed above, neither states nor tribes are being well served by the current set of institutional arrangements. Law enforcement on Indian reservations will no doubt remain a sensitive issue for residents of many local communities and for their representatives in Congress, particularly when it involves tribal policing of non-members, but the notion that such conflicts can be resolved by starving tribes of needed funds is untenable.

It is odd that for more than a decade,

devolution has been the preferred approach for governments grappling with a host of difficult problems—environmental, law enforcement, economic development—while the institutions and practices surrounding border policy have been cast in a rigid, antiquated, top-down structure. Such a model does have the effect of centralizing power, but at a high cost to efficiency, and, in this case, a high cost to peoples who are closest to the areas of impact. Whether there will be a change in the direction of a more equitable, effective set of policies seems far from certain, but without it, international borders abutting Indian reservations will continue to pose a security threat, and some of the most vulnerable people in the U.S. will continue to lose some of the remaining shards of their cultures.

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Working Paper No. 4
January 2009

Border Policy Research Institute
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Bellingham, Washington
www.wwu.edu/bpri

