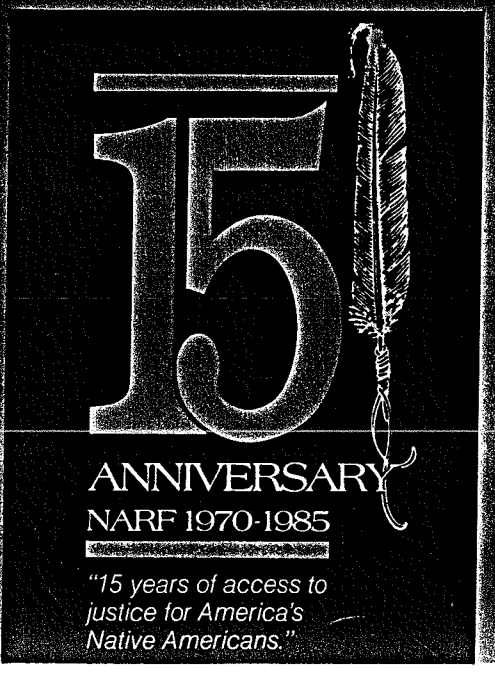
The

NARF LEGAL REVIEW

Native American Rights Fund *Summer 1985*

SPECIAL EDITION



You are invited . . .

to actively be part of the efforts of the Steering Committee, National Support Committee and staff of the Native American Rights Fund. Please join us with your new and increased financial support to help assure our continued presence on behalf of thousands of Native Americans. Together we can help translate our promise of a brighter future for America's first citizens into a reality.

And from all of us at NARF—we thank the thousands of you who have helped to make the successes of these past 15 years possible.

Message From The Executive Director

The Native American Rights Fund has now been in existence for 15 years. To commemorate the occasion, we have commissioned an article on the modern era of Indian law by Professor Charles Wilkinson, a former NARF staff attorney and a nationally-recognized scholar in Indian and natural resources law. The article summarizes the full range of judicial and legislative developments in Indian law and emphasizes the real progress achieved in this era. It should be of great interest to all of our readers.

NARF is very proud to have played an important role in these eventful years that have been so productive for Indian people. Many other Indian organizations and private law firms have contributed to this success as well through their research, court representation, and legislative advocacy. Legal services programs, as they have since the late 1960's, continue to provide direct services in Indian country and are essential to resolving the many legal problems confronted by Indian people. The movement by several tribes toward establishing in-house tribal legal capability — variously referred to as tribal attorney generals or reservation attorneys — has also been very significant.

Arlinda Locklear (Lumbee) Directing attorney of NARF's Washington, D.C. Office, the first Indian woman to argue in the Supreme Court and lead attorney in *Solem v. Bartlett* and *Oneida County v. Oneida Indian Nation.*

In addition to assisting tribes and Indian people on most reservations and Indian communities across the country, NARF has handled many of the major modern cases identified by Mr. Wilkinson in his article. In 1985 our attorneys successfully argued on behalf of tribes in two leading Supreme Court cases, *Oneida County v. Oneida Indian Nation* and *Montana v. Blackfeet Tribe.* NARF acted as lead counsel in the lengthy trial of *United States v. Washington*, the famous 1974 "Boldt decision" upheld by the Supreme Court in 1979, that vindicated Indian fishing rights in the Pacific Northwest. In 1973, our lawyers represented the Menominee Tribe of Wisconsin in the passage of the Menominee Restoration Act, the historic statute that returned the Menominees to federal recognition and brought down the curtain on the termination era.

These are just a few of the major issues on which NARF has been available to provide expert legal representation to Indian tribes. There have been hundreds of other victories, some major and others less sweeping. There have also been instances where we have fought good and necessary fights but have come up short. But Indian people and their lawyers are nothing if not resilient: we are continuing to fight and we expect to prevail.

It would literally take a full volume to detail NARF's achievements during these 15 years, but the overall progress of Indian people during this time as assessed in Mr. Wilkinson's article is more important to convey to you. I do, however, want to highlight a few developments in the five priority areas mandated by NARF's Steering Committee. Several of these matters are mentioned in somewhat more detail in the article.

The Preservation of Tribal Existence. NARF has represented tribes in the Eastern land claims cases from the beginning, and the 1985 *Oneida Nation* Supreme Court decision has now clearly substantiated the claims. We are still in court on behalf of some eastern tribes while we have resolved other claims through congressional settlements, including the 1980 legislation confirming the Passamaquoddy and Penobscot Tribes the return of 300,000 acres of land. Our work on jurisdictional issues — including the *Montana v. Blackfeet Tribe* and *Solem v. Bartlett* Supreme Court cases — has been farreaching. NARF lawyers have represented several tribes regarding successful tribal restoration and recognition efforts. In virtually every such instance, NARF fulfilled the unprecedented role of bringing high-quality legal work to Indian groups wholly ignored by the federal and state governments.

Jeanne Whiteing (Blackfeet-Cahuilla) NARF's Deputy Director and lead attorney in *Montana v. Blackfeet Tribe.*

The Protection of Tribal Natural Resources. Water issues have been, and will be for the foreseeable future, at the heart of reservation resource development. NARF always has had leading Indian water law specialists on its staff representing tribes across the West in protracted water rights litigation. Our litigation of hunting and fishing issues has established the rights not only of tribes in the Puget Sound area, but also of tribes such as the Klamath of Oregon, the Cheyenne-Arapaho of Oklahoma, and the Umatilla of Oregon. NARF's work on land issues has reached far beyond the eastern land claims and has encompassed successful efforts on behalf of dozens of tribes, including the Walker River Paiute Tribe of Nevada, the Winnebago of Nebraska, the Cocopah of Arizona, and the Muckleshoot of Washington.

The Promotion of Human Rights. NARF has worked extensively on Indian rights in the fields of education and religious freedom, two areas where Indian people have always had difficulty obtaining private legal representation. In education cases, NARF has blocked expulsions of Indian children from schools, overturned proposed shut-downs of BIA schools, obtained injunctions requiring bilingual programs and construction of schools, and enforced provisions of the Impact Aid laws to provide for participation by Indian parents. Our lawyers have achieved a battery of favorable decisions on behalf of Indian prisoners to enforce their rights to religious freedom. We represented the Kootenai Bands in their successful effort in the Federal Energy Regulatory Commission to protect an important religious site threatened by a proposed dam.

The Accountability of Governments. The trigger for congressional reform of the administrative processing of land claims litigation was the 1982 injunction in *Covelo Indian Community v. Watt*, directing the government to take action on the many pending Indian claims. The trust relationship has been enforced on behalf of numerous other tribes including the Pyramid Lake Paiute Tribe of Nevada, the Sault St. Marie Chippewa of Michigan, and the Passamaquoddy and Penobscot of Maine. Much of NARF's work in Alaska, on behalf of small Native villages, involves bringing to bear our accumulated experience in establishing and protecting the special federal-tribal relationship.

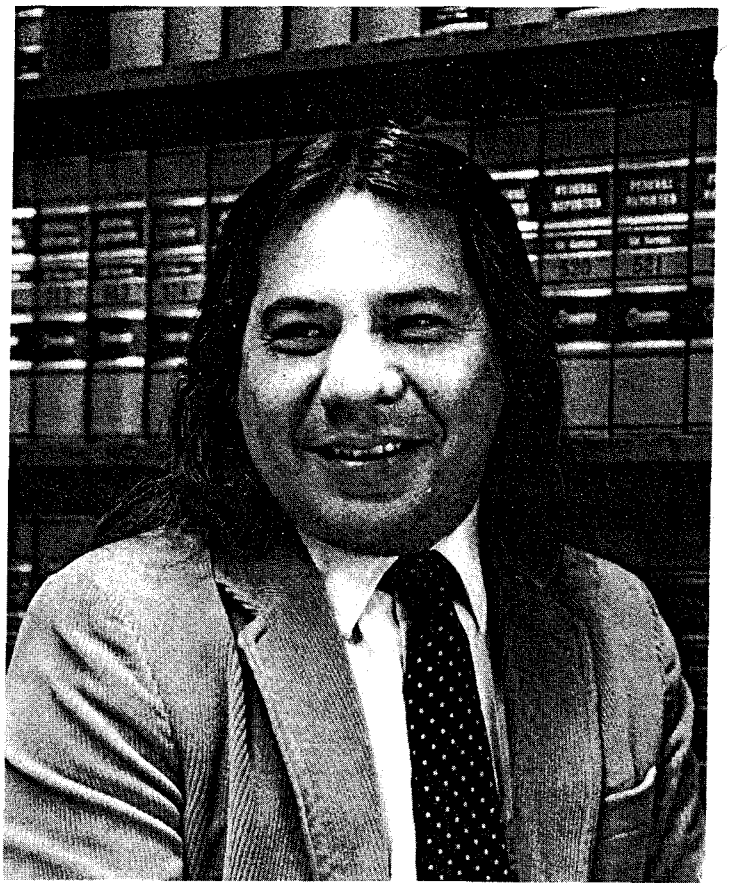
The Development of Indian Law. NARF, the largest firm of lawyers practicing Indian law, has always been a storehouse of ideas and information. Lawyers across the country have benefited from using NARF attorneys as sounding boards or as sources of research on technical issues. There is no question that NARF briefs as *amicus curiae* (friend-of-the-court) have been influential in cases that our lawyers did not actually argue. Since 1972, NARF has operated the Indian Law Support Center, funded by the Legal Services Corporation; through the Support Center, we have vigorously implemented our central goal of providing research and litigation assistance to legal services field programs across the country. The National Indian Law Library, another project of NARF, is an indispensable repository of materials in the field of Indian law. The NILL index allows daily access by lawyers, scholars, and Indian organizations to NILL's collection of more than 5000 holdings, including current court files in pending Indian law cases.

No description of NARF could fully capture the spirit and tradition that pervade our work on behalf of Indian people. NARF operates with the efficient office procedures and high professional standards of an excellent mid-or large-sized private law firm, but it remains a truly Indian organization, administered by Indians according to priorities set by an all-Indian Steering Committee. We are now a permanent organization, owning our office buildings, and widely respected among tribes, the judiciary, government officials, members of Congress, the private bar, and private donors. NARF stretches from Washington, D.C., where we monitor legislative activity and advocate for Indians within the federal bureaucracy, to Anchorage, where our new Alaska office is operating on the frontier of Indian law. In most cases, the first generation of NARF lawyers has moved on to other opportunities, but we have been able to attract new people with the ability, knowledge, diligence, and creativity to meet the challenges and heavy responsibilities of our practice.

Certainly the role of NARF has evolved over these 15 years. Numerically, NARF occupies a smaller part of the spectrum of Indian law than we did in the early 1970's: we have managed to maintain our staffing at about 15 lawyers while the total number of lawyers representing Indians has multiplied several times over. We are particularly pleased at this growth because the number of Indians who are lawyers has grown to several hundred, due in important part to the success of the Special Scholarship Program in Law for American Indians, administered since its inception in 1967 by the American Indian Law Center in Albuquerque, New Mexico.

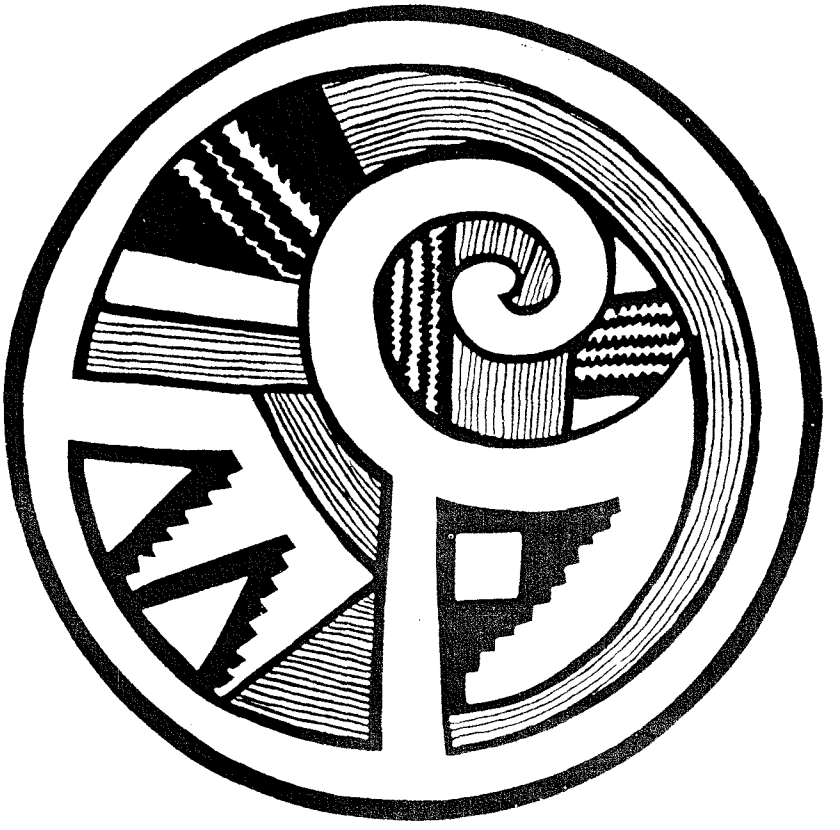
NARF, however, remains a driving force in Indian law. Perhaps NARF's single greatest distinguishing characteristic over the course of 15 years has been its availability to bring excellent, highly ethical representation to dispossessed tribes. The great majority of NARF's clients could not conceivably have hired private counsel. This has been true of even the most major cases. A poor tribe has no ability whatsoever to retain counsel for a recognition, jurisdiction, education, or resource issue. Yet sovereignty slips away if those questions are not resolved diligently and expertly. Even a land claims case holds out little comfort to a private lawyer willing to work for Indians on a contingency basis — the results are too uncertain and too time-consuming to achieve. One of NARF's proudest accomplishments is that it was there to represent tribes like the Passamaquoddy, Siletz, and many others and that, due in significant part to NARF's assistance, many years later those tribes are able to find the resources to retain private counsel.

We hope that you will enjoy Mr. Wilkinson's article on modern Indian law, which follows. For our part, we anticipate a future as rewarding as the past 15 years have been. We can guarantee that Indian people and NARF will



continue to insist that Indians be accorded the sovereignty, natural resources, and human dignity that the laws of the majority society have promised.

John E. Echohawk
Executive Director



THE QUEST TO ENFORCE THE OLD PROMISES: INDIAN LAW IN THE MODERN ERA

Editor's Note: NARF wishes to express its thanks to the Gannett Foundation for its major assistance with this special 15th Anniversary Issue of "The NARF Legal Review." Additionally, we wish to express our gratitude to the "National Committee on Indian Work for the Episcopal Church" for their continuing support of our newsletter.

Modern Indian law and policy began to come to life a quarter of a century ago, in the late 1950's and early 1960's, when a consensus was reached among tribal leaders, young Indian professionals, and traditionalists. There was no formal declaration or stated agenda. Indeed, on one level there was nothing more than a smattering of seemingly unconnected meetings, protests, oratory, and musings on the shores of Puget Sound, in the redrock country of the Southwest, on the high plains of the Dakotas, in the backwoods of Wisconsin, and on the farms of Oklahoma.

These superficially unrelated stirrings, however, were tightly and irrevocably bound together. They were tied by an indelible reverence for the aboriginal past, an educated appreciation of the accelerating consequences of four centuries of contact with Europeans, and an abject desperation concerning the future of Indian societies as discrete units within the larger society.

An implicit oath of blood was made during the shadowy transition. The termination policy — Congress' forced dismemberment of American Indian tribes — must be slowed, halted, and then reversed. In a larger sense, the almost unflagging current of federal Indian policy since the mid-19th century — assimilation of Indians, reduction of the Indian land and resource base, and the phasing out of tribal governments — must be stilled. Even more broadly, the tribes must cease reacting to federal policy. The tribes must grasp the initiative.

The Indian initiatives would be premised on tribalism. Chief Justice John Marshall's old opinion, *Worcester v. Georgia* (U.S. Sup. Ct. 1832), had carved out a special, separate constitutional status for Indian tribes. Within their boundaries, tribes had jurisdiction — governmental and judicial power — and the states could not intrude. Indian tribes were sovereigns. Those doctrines left the tribes with the potential of substantial control over their resources, economies, disputes, families, and values — over their societies.

To outsiders, it has always been astonishing that reservation Indians would know of concepts like sovereignty and jurisdiction. But they do today, and they did in the 1950's and 1960's. On reflection, the reason for this is simple. The chiefs bargained for those things when the treaties were made. Chief Justice Marshall was true to those negotiations. For generation after generation, elders passed down information about the talks at treaty time and about the fact that American law, at least in Marshall's time, had been faithful to those talks.

It was not through choice that modern Indian people have placed so much reliance on federal law, as made by Congress and the courts. They would rather build things internally. But there was no alternative. Outside forces were bent on obtaining Indian land, water, fish and tax revenues, and on assimilating the culture out of Indian people, especially the children. There could be no internal development or harmony until the outside forces were put at rest.

Today, we can see that the program conceived at the end of the termination era has been substantially accomplished. To be sure, there has been nothing like a

"Indian leaders made an implicit oath of blood during the late 1950's and early 1960's. The tribes must cease reaching to federal policy. The tribes must grasp the initiative."

total victory. The Supreme Court cut into tribal control over the reservations when it ruled in *Oliphant v. Suquamish Indian Tribe* (U.S. Sup. Ct. 1978) that tribes cannot try non-Indians in criminal cases. It may well be that the authority of tribal governments to exert authority over non-Indians in civil matters (such as taxation, zoning, business regulation, and many court cases) will prove to be far more important than criminal jurisdiction; nonetheless, to Indian people *Oliphant* is a symbol of the limits, bred largely of distrust and ethnocentrism, tha federal and state institutions so often instinctively place on Indian governments.

Another example of the setbacks is the tandem of three Indian water cases in 1983, when the Supreme Court placed a series of procedural barriers between tribes and their water rights. Most importantly, Indian water litigation will be heard in state courts, where virtually all observers agree that tribes will receive millions of acre feet less than if the cases had been heard in federal court.

In spite of these and other adverse decisions, the Indian offensive of modern times has been successful and it has paid dividends for Indian people in Indian country. Most reservation Indians are still poor and they continue to be plagued by tenacious, century-old problems of health, housing and education. But conditions have improved and progress has been steady, if often tediously slow, on nearly every front.

My goal in this essay is to chart the outlines of Indian law during the last 25 years. These are complex matters and I plead some concern of oversimplification. At the same time, my hope is that an essay of digestible size will be of use in setting the shape of these now-historic developments.

INDIANS AND INDIAN LAW

At the outset, it is necessary to point out a phenomenon at work in any assessment of modern Indian law. It is that law's reach into the lives of Indian people is so deep that legal organizations influence developments that appear to have little relationship to law.

Let me give an example. One of the most heartening accomplishments in all of Indian culture is the dramatic drop in the infant mortality rate, from 62.7 deaths per 1000 births in 1954 to 13.1 per 1000 in 1984. At first blush, this would appear to be due solely to the work of the Indian Health Service and to tribal health officials, who are operating increasing numbers of tribal clinics and hospitals. And, of course, much of the achievement is in fact due to the health professionals.

At the same time, an area such as Indian health must be placed in a larger setting. The Indian Health Care Improvement Act of 1976, which helped spur dramatically increased Indian health funding and allowed tribes to take over from the IHS management of some reservation health facilities, was a centerpiece of the self-determination program, designed and implemented by Indian policymakers, lawyers, and lobbyists. "Self-determination" itself is roughly equal parts symbol, adequate funding, administrative policy goal, and law.

The predicates, in other words, for an Indian doctor in a tribally-run hospital include the doctrine of tribal sovereignty and the legally-established right of Indians to receive special federal services. The latter might include a federal scholarship for the doctor to attend medical school and federal financial support for the patient's medical care. Ultimately, these special programs tie back into the unique trust relationship that led to promises of support at treaty time.

"Law permeates Indian society in ways both resounding and subtle."

The connection of law to Indian progress is, of course, less direct in the case of improved health care than it is in the instances of tribal taxes, water rights, and tribal courts. Nevertheless, law permeates Indian society in ways both resounding and subtle. Indian legal organizations help build a framework so that others can achieve profound results in fields like health care, even though the legal organization might never have worked on an issue relating specifically to mortality among Indian babies.

It follows from the above that Indian legal issues are fundamentally different than those affecting other minority groups or, indeed, any other subgroup in the country. Traditional civil rights litigation has and will be pursued by Indians in areas such as voting, prisoners' rights, and jury selection but litigation on those fronts, while of continuing importance to the lives of Indian people, tend not to involve Indian law *per se*. Similarly, the provision of federal social programs for urban Indians remains part of the modern Indian program, in part for the poignant reason that many Indians in the cities were drawn off the reservations by the relocation programs of the 1950's and 1960's. At the same time, those programs are based mainly on the same policy goals that apply generally to minorities and poor people.

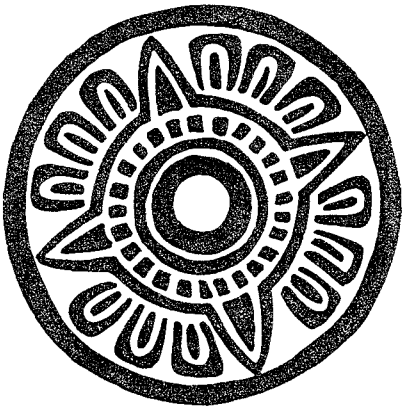
The special characteristics of Indian law, and of the informal Indian consensus, relate to tribal governments and to the reservation system. It may be helpful, before

turning to specific court decisions and statutes, to frame out the philosophical structure of modern Indian law.

The tribes are seeking to increase the amount of power that they possess. For Indians, power can come from three basic sources. First, Indians can receive the benefits of special programs from the United States. From the middle 1800's through the 1960's, the delivery of federal programs was the focal point of both federal and tribal policy.

There is no question that federal support, while much greater in real dollars than it was two decades ago, has become relatively and steadily less important to Indians. This is as it should be: tribes are developing, rapidly in some cases, their own sources of support. At the same time, tribes remain vigilant in opposing any termination of the federal role. And rightly so, for promises of federal support were made at the treaty negotiations, and have been an essential part of 200 years of federal Indian policy. Tribes have been rigorous in defining, enforcing, and assuring the continued fulfillment of the government's trust responsibility.

The second source of tribal power is economic. Indians have retained land — 52 million acres in the Lower 48 and 44 million acres in Alaska, nearly 5% of the United States. They possess valuable stores of natural resources. The distribution of natural resources among tribes is skewed: some tribes possess none, while a few score own sufficient resources to allow them over time to build true homelands for their people. But for most tribes land and resources are key ingredients for future progress.



The matter of tribal resources as an element of tribal power cannot be treated properly without placing great emphasis on the question of water. Most tribes are located west of the 100th meridian, a north-south line running through the middle of the Dakotas. In most regions west of the 100th meridian, farmland cannot be productive unless water is applied by irrigation. Agriculture accounts for 90% of all water use in the American West. Further, the rapidly expanding urban areas of the West require increasing amounts of water. All major forms of energy production are water-intensive.

There is no better way to appreciate the past, present, and future of Indian law and policy than through the lens of federal water development. Congress has provided billions of dollars in water subsidies to agriculture, cities, and industry. One of the greatest determinants in the opening of the American West was federal water policy. Indian tribes, who have first call on western water as a matter of federal law, were simply dealt out. There has never been a more telling comment on Indian policy — or on the development of the American West — than this analysis in the 1973 Report of the National Water Commission, still the most respected study ever conducted on water policy in the United States:

> Following *Winters*, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior — the very office entrusted with protection of all Indian rights — many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects. * * * In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.

For Indians the economic issues can never be made right until water policy is made right.

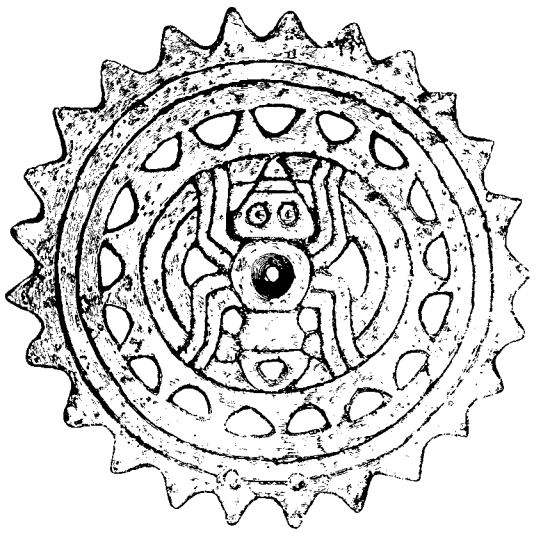
The third source of tribal power is political. The jackhammer reasoning of John Marshall, revived and preserved by Felix Cohen in the 1930's and 1940's,

"The jackhammer reasoning of John Marshall, revived and preserved by Felix Cohen in the 1930's and 1940's, proved that Indian tribes are sovereign governments."

proved that Indian tribes are sovereign governments. Tribes possessed full authority in aboriginal times. Tribal sovereignty was diminished by contact with Europeans and by the treaties but it was not eradicated. Treaties, after all, are agreements between sovereigns. Congress possesses full authority over tribes but it possesses broad authority over states too. There is little Congress cannot accomplish within state lines under the Commerce Clause.

Tribes, then, retain those sovereign powers that have not been overridden by Congress. The States cannot unilaterally override tribal powers at all.

The assertion by the tribes of sovereign powers in modern times has made almost every element of the majority society uncomfortable. Many, perhaps most, segments of the larger society strain to support Indians as a general matter. But they reach their limits when their own most closely-held agendas are affected specifically. Federal administrators oppose tribes who seek to take



over federal programs. State administrators oppose tribal tax prerogatives. State judges oppose tribal judicial authority. Hunters, fishers and water users oppose tribal hunting, fishing, and water rights. Environmentalists oppose tribal economic development. Churches and fraternal organizations oppose tribal bingo games. Social workers oppose the Indian Child Welfare Act.

In each of these cases, and in many another, the combat has been not much short of ferocious. The essential sources of opposition run deep. Every school child learns that there are two layers of government in the United States — federal and state. *Indian* governments? With *power*? Not just with program dollars, but with *power*? With laws? With courts? With laws and courts that ¹ice into the laws and courts of the states and counties? √ith authority over non-Indians?

If opposition to tribal initiatives is beginning to recede in some quarters, it is only because Indians have somehow prevailed and because it is abundantly apparent that they do not intend to relinquish their gains. When one looks at it closely — at the real stress on real people, Indian and non-Indian, at the local level — one can see it for what it is. There has not been a question of life and death, but otherwise the fundamental issues and emotions have been the same as during the Indian wars of the 19th century. Racial distrust and fear on both sides. Land and resources. Political power. The survival of a way of life.

It is worthwhile to make a final pause before turning to the specific legal events. If what I say is correct — if Indian people actually have prevailed during modern times — how did such a thing happen? How was it that ½ of 1% of the population was able to dig in and accomplish these things? Was it the guilt of the majority society? Its sense of history? Was it the rule of law? Was it economics? Was it Indian organizations? Was it the will of Indian people? Was it their sense of something way back that was about to be lost irrevocably?

It is important to understand these sources because of the future. The Indian gains are plainly tenuous. The multi-faceted attacks on special Indian rights will continue. It is only by comprehending the ultimate reasons for the gains that the progress achieved can be maintained and improved. There is no one answer. There are almost innumerable pieces. But we can make a beginning by looking at developments in the law.

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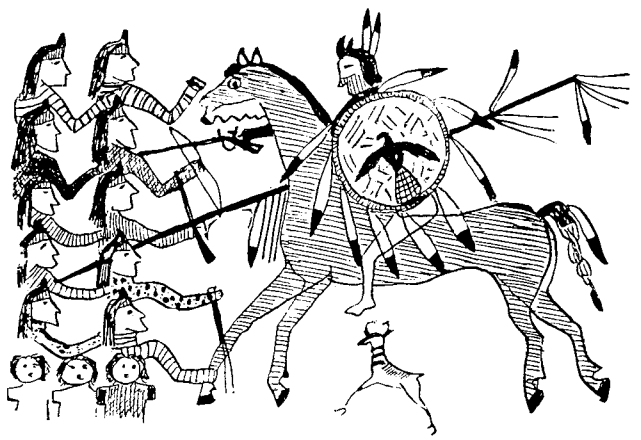
THE MAJOR SUPREME COURT DECISIONS

The appropriate starting point is the decisions of the Supreme Court. This is not just because the Court's statements are the most influential declarations of law. Beyond that, the Supreme Court has been inordinately active in Indian law. Since 1959, the Court has rendered some 75 opinions in the field, more than in areas such as international, pollution, securities, or antitrust law.

Perhaps the most significant decisions in modern Indian law are *Washington v. Passenger Fishing Vessel Association* (U.S. Sup. Ct. 1979) (the Northwest Fishing

Cases), *Oneida County v. Oneida Indian Nation* (U.S. Sup. Ct. 1985), *Merrion v. Jicarilla Apache Tribe* (U.S. Sup. Ct. 1982), and a brace of 1983 opinions on water law, *Arizona v. California II* (U.S. Sup. Ct. 1983), *Nevada v. United States* (U.S. Sup. Ct. 1983), and *Arizona v. San Carlos Apache Tribe* (U.S. Sup. Ct. 1983). These opinions built upon earlier cases, many of which I will discuss below, but these deserve to be treated specially because of their farreaching impact on tribal resource and governmental prerogatives, and, conversely, on the powerful non-Indian interests that opposed the tribes.

The Northwest Fishing Cases, more than any other decision, stand for the integrity of Indian treaty rights. The courts have recognized the existence of aboriginal rights but for most tribes those prerogatives were merged into treaties or, after treaty-making with tribes was discontinued in 1871, into treaty substitutes such as statutes, agreements with tribes confirmed by Congress in the form of statutes, and executive orders. The Indian treaties and treaty substitutes are unique in our law — they recognized the existence of foreign governments within the boundaries of the United States. Even today, most Indian litigation is premised on these old treaties and treaty substitutes and their matrix of rights and responsibilities that are now the Supreme Law of the Land.



The Supreme Court construed the 1855 tribal treaty right to take fish at their historic off-reservation sites "in common with all citizens of the Territory," (Indian treaties usually have very general language, one reason for the great amount of litigation). Affirming the reasoning of District Judge George Boldt, the Court found that the tribes were entitled to take up to 50% of the salmon and steelhead runs, after accounting for escapement for spawning purposes.

The litigation has had a long and divisive history. Initially, there were sufficient fish for both the tribes and the small non-Indian population. During the 20th century, however, two events began to coincide. Non-Indians began to migrate in great numbers to the Pacific Northwest and they understandably coveted the delicious meat and fighting qualities of these magnificent fish. In addition, habitat degradation, mainly in the form of dams, poor logging practices, and roadbuilding, began to deplete the runs.

"Washington refused to let the Boldt decision rest. As the Supreme Court later put it, 'except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century'."

The states of Washington, Oregon, and Idaho — spurred on by the commercial fishing industry and organized groups of sports-fishers — began to crack down on Indian fishing beginning in roughly the 1940's. The states took the position that Indian fishers had no special rights. Enforcement attempts burgeoned in succeeding decades and so did Indian resistance, sit-ins, and litigation.

The United States filed suit in 1970 against the State of Washington. Twenty-six tribes intervened. In 1974, Judge Boldt rendered his famous decision, considered by Seattle newspapers to have been one of the two or three major news stories in the Pacific Northwest during the decade. The Ninth Circuit Court of Appeals affirmed and in 1976 the Supreme Court denied review.

Washington refused to let the Boldt decision rest. As the Supreme Court later put it, "except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of federal court witnessed in this century." After repeated challenges in federal and state courts, Washington was successful in obtaining Supreme Court review but Judge Boldt's initial ruling was affirmed in 1979 in nearly every respect. One of the core values in John Marshall's opinions had been reaffirmed in modern times: Indian treaties recognize a special class of rights in Indian governments and those rights survive the passage of time.

A second great opinion was the *Oneida Nation* decision of 1985, which gave full force to a law even older than the Pacific Northwest treaties. The case, like Indian land claims litigation in several other eastern states, involved the Nonintercourse Acts, first enacted by the First Congress in 1790. These Acts were part of an early and comprehensive program by which the Congress effectively federalized Indian relations by providing for national control over Indian land dealings, commercial trade, education, liquor sales, and crimes. The Nonintercourse Act, which is still in force, requires that the United States must approve all transfers of Indian land: "no . . . conveyance of lands . . . from any Indian nation or tribe of Indians shall be of any validity . . . unless the same shall be made by treaty or convention entered into pursuant to the Constitution." The measure, which was of real economic and practical importance to the young nation, was enacted to regularize frontier real property transactions and to protect tribes from sharp dealing.

"The remarkable *Oneida* litigation asked the judiciary to cast aside some of the most fundamental precepts of Anglo-American jurisprudence. In doctrine after doctrine and statute after statute, our legal system hews toward stability and toward the continuation of settled expectations, such as those of the long-time non-Indian landowners in upstate New York."

The Oneidas had entered into several treaties with the State of New York, but there had been no federal imprimatur. The specific transaction before the Supreme Court, which had taken place in 1795, involved 100,000 acres in upstate New York.

The Oneidas had structured this test case narrowly: the defendants were two counties and the only requested relief was for trespass damages for the years 1968 and 1969. But the true magnitude of the litigation escaped no one familiar with the issues. The Oneidas' real claim was for the land itself: since the Nonintercourse Act had not been complied with, the tribe argued that it still owned the land. The Oneidas had other land claims pending. So did several other eastern tribes.

The Supreme Court, in a 5-4 decision, ruled that the Oneidas' attack on the 175-year-old transaction was still live. The Court acknowledged "the unquestioned right of the Indians to the exclusive possession of their lands" before contact with whites. The Nonintercourse Acts "put in statutory form what was or came to be the accepted rule — that the extinguishment of Indian title required the consent of the United States." Neither did the passage of 175 years bar the claim. Although New York state law would have prohibited such a lawsuit long ago, Indian land matters are governed by Congress and no federal law limits the Oneidas' right to sue.

The remarkable *Oneida* litigation asked the judiciary to cast aside some of the most fundamental precepts of Anglo-American jurisprudence. In doctrine after doctrine and statute after statute, our legal system hews toward stability and toward the continuation of settled expectations, such as those of the long-time non-Indian landowners in upstate New York. The tribes have not always prevailed in similar settings. But, by the reed of one vote, the tribal position was accepted here and the *Oneida* decision stands tall as a fit monument of the tribes' continuing effort to enforce solemn promises of another age.

A third dominant Supreme Court ruling of the modern era is *Merrion v. Jicarilla Apache Tribe* (U.S. Sup. Ct. 1983). The Jicarillas of New Mexico entered into long-term oil and gas leases with several energy companies. The tribe received royalties from the leases. Years later the tribe adopted a tax ordinance and levied a tax. The companies argued that the Jicarillas had unfairly changed the terms of the bargain and that the tribe was limited to the revenue owing under the leases.

The Court upheld the tribe's taxing authority over non-Indians. An Indian tribe, like a city or state, can act in both a business and governmental capacity. The tribe had limited its right as a property owner to receive the royalties specified in the lease agreements, but the tribe had not waived its right as a sovereign to tax.

The *Merrion* decision is also notable because it directly acknowledged and respected the high responsibilities that tribal governments, like other municipalities, must shoulder in modern times. The Court recognized that "it simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes, or severance taxes." In that context, the Court acknowledged the role of Indian tribes in providing governmental services to all persons, non-Indians and Indians, in Indian country. One of the Court's comments in this regard must be especially delicious to Indian people, who are all too familiar with generations of attempts to "civilize" Indians:

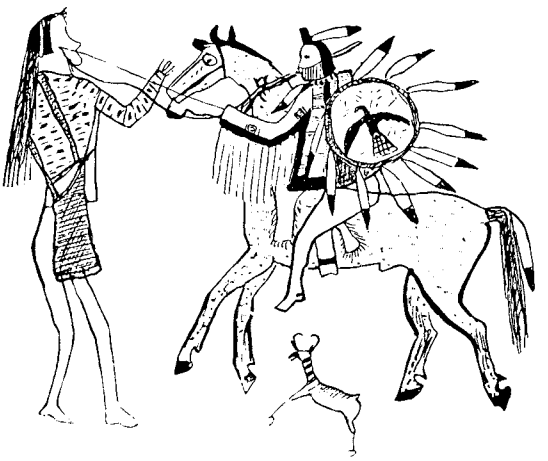
> The petitioners [the energy companies] avail themselves of the "substantial privilege of carrying on business" on the reservation. They benefit from the provision of police protection and other governmental services, as well as from "'the advantages of a civilized society'" that are assured by the existence of tribal government. Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring [the energy companies] to contribute through taxes to the general cost of tribal government.

The final major opinions discussed here are the three 1983 Supreme Court decisions that are considered such significant setbacks in the crucial area of Indian water rights.

"The Supreme Court has finally recognized who is 'civilized' whom: 'The energy companies benefit from the advantages of a civilized society that are assumed by the existence of tribal government'."

Special Indian rights to water were first expressly recognized in *Winters v. United States* (U.S. Sup. Ct. 1908). In *Winters*, the Court ruled that water was impliedly reserved for tribes when reservations were established, if not before. There is no requirement that water actually be put to use. Thus federally-based *Winters* rights override long-accepted principles of western water law, which require that water actually be diverted from a watercourse and put to use before any water right can be acquired. The western states have long relied on the prior appropriation doctrine. The "first in time, first in right" system gives absolute priority to senior users and promotes stability in water allocaton, so crucial to economic development in the West. The *Winters* doctrine was clarified when the Court ruled in *Arizona v. California I* (U.S. Sup. Ct. 1963) that the quantity of Indian reserved rights for agriculture would be measured by the amount of "practicably irrigable acreage" on the reservations, a standard considered highly favorable to the tribes.

The 1983 cases did not alter the rules by which the quantity of *Winters* rights are measured but they placed sufficiently formidable procedural restraints on the tribes that Indians surely will obtain less water. The first of the decisions was *Arizona v. California II* (U.S. Sup. Ct. 1983), which was an attempt by five lower Colorado River tribes to reopen the Supreme Court's 1963 decree. The Court looked to principles of finality in refusing to reopen the 1963 decree in order to award the tribes water for so-called "omitted lands" (lands not included in the 1963 decree but meeting the practicably irrigable acreage standard).



The Court also invoked principles of finality in *Nevada v. United States* (U.S. Sup. Ct. 1983), involving the water rights of the Pyramid Lake Paiute Tribe of Nevada. The tribe's rights were adjudicated in the *Orr Ditch* decree, a federal court proceeding initiated in 1913 and made final in 1944. The *Orr Ditch* decree, however, made no provision for the preservation of Pyramid Lake's fishery, always essential to the tribe's way of life. The decree was suspect because the United States had represented both the tribe and the Newlands Project, a major federal reclamation project that received most of the water in the final decree. Nevertheless, the Court emphasized the importance of certainty in western water law and refused to reopen the proceedings.

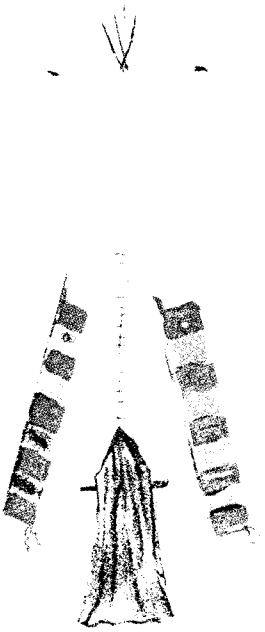
A week later, the Court issued its third Indian water opinion, *Arizona v. San Carlos Apache Tribe* (U.S. Sup. Ct. 1983). *San Carlos* broadened state court jurisdiction under the McCarran Amendment of 1952, which expressly waived the sovereign immunity of the United States in general stream adjudications (proceedings to determine the rights of all water users in a watershed). Statutes are normally read in favor of tribes, but not here: the McCarran Amendment nowhere refers to Indians, but its coverage has been extended wholesale. The Court has found a broad-based Congressional desire to prefer the state general stream adjudication mechanism over federal proceedings in resolving Indian reserved water rights.

"The nation's historic stresses over race, federalism, and natural resources are demonstrated no better than by the extraordinary amount of time and money spent solely on the issue of whether an Indian water case ought to be heard in state or federal court."

A number of factors narrow the adverse impact to the tribes of the 1983 water cases. The method of quantifying Indian rights was not disturbed. Recourse to finality will wound some tribes severely but, numerically, the impact of the doctrine will be limited because few tribes have ever had their water rights decreed. The Pyramid Lake Paiute Tribe continues to press for a restoration of its wondrous lake and wildlife resource: the Tribe has been successful in litigating several other theories that may prove sufficient to stabilize the lake. Not all states are willing to undergo the time and expense of general stream adjudications; in those instances, the McCarran Amendment will not apply and *Winters* rights will be heard in federal courts. Further, state court rulings are reviewable by the Supreme Court, which said in *San Carlos* that "any state court decree alleged to abridge Indian water rights can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." Still, there can be no fair doubt that the amount of water supplies actually obtained by the tribes will be reduced due to the 1983 cases.

These decisions illustrate many of the essential characteristics of modern Indian litigation. The stakes are high — land, natural resources, tax revenues, and governmental authority. There continue to be disputes with the United States, but that side of Indian law is no longer dominant. The Pyramid Lake Paiute Tribe's grievance, for example, was over federal policy of years past; the United States joined with the Tribe in seeking to set aside the decree. Indeed, the United States took the tribal position in most of the cases just discussed. The main antagonists over the last 15 years have been the states and, to some extent, non-Indians within Indian country. The nation's historic stresses over race, federalism, and natural resources are demonstrated no better than by the extraordinary amount of time and money spent solely on the issue of whether an Indian water case ought to be heard in state or federal court.

The cases are marked, too, simply by their complexity. The Oneida suit, the Pacific Northwest fishing cases, and the Pyramid Lake litigation all trace to the 1960's. In the Puget Sound fishing proceedings alone, literally hundreds of orders have been handed down since Judge Boldt's 1974 decision; at one point, West Publishing Company issued a commemorative volume to collect the major rulings in one place. Indian water cases are, along with antitrust suits, very likely the most complex litigation anywhere in the federal or state judicial systems.



OTHER MAJOR LITIGATION

There has been, or course, a great amount of other litigation. A discussion of additional leading cases will serve to flesh out the doctrines announced in the cases just analyzed.

The Trust Relationship

The Bureau of Indian Affairs, created in 1754 to administer federal Indian policy, has long been a major actor in Indian country. In addition, in recent decades

Congress has assigned important responsibilities to other agencies. Cases in the early 1970's helped define, and limit, the role of the Bureau and other federal offices in order to allow tribal self-determination to proceed.

Morton v. Ruiz (U.S. Sup. Ct. 1973) held that the Bureau could not make an *ad hoc* decision to deny benefits to Indians living near, but not on, reservations. Administrative officials were required to publish notice of the proposed policy and proceed by rulemaking so that administrative policy would be made openly. At about the same time, a district court judge found that the Secretary of Interior could not simply make a "judgment call" in deciding how much water to allocate between a tribe and a reclamation project. *Pyramid Lake Paiute Tribe of Indians v. Morton* (D.C. Dist. Ct. 1973). The ruling (which is not overridden by the finality-based reasoning in *Nevada v. United States*, discussed above, since the administrative decision here was current and had not been merged into a court decree) required the Secretary to "resolve the conflicting claims in a precise manner" that would "justify any diversion of water from the Tribe with precision." In *Joint Council of Passamaquoddy Tribe v. Morton*, (Ct. App., 1st Cir. 1975), the United States was directed to file suit to protect a major eastern Indian land claim.

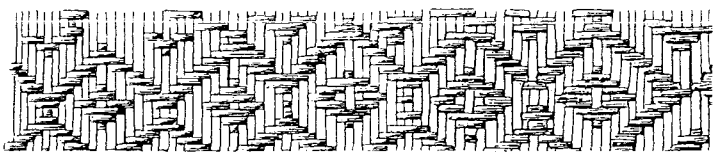
"Special Indian rights are conceptualized, not as being based on race, but as an element of the government-to-government relationship between the United States and the tribes."

These rulings made it clear that, however broad Congress' power might be in Indian affairs, federal agency officials are accountable in court. Thus, for example, *Covelo Indian Community v. Watt* (Dist. Ct. D.C. 1982) ordered the government either to litigate Indian land claim cases or to submit legislative proposals to Congress to resolve them; the litigation led directly to congressional reform of the method by which Indian claims are processed. In *Eric v. HUD* (Dist. Ct. Alaska 1978), federal officials were ordered to provide adequate housing pursuant to the trust responsibility. The Bureau was enjoined from closing certain off-reservation schools in *Omaha Tribe v. Watt* (Dist. Ct. D.C. 1982). There are many other examples of hard-look judicial review in Indian law during the last decade.

Judicial oversight of administrative action probably has had a broad, although intangible, impact. While the Bureau continues to receive its share of criticism, most observers would agree that it has gradually become a more responsive agency, looking to the reasonable goals of its Indian constituents. This process has likely been promoted in part by the realization within the Bureau that judicial oversight is available to Indian people. Thus negotiated in-house results have been made more likely by the existence of an outside remedy.

A somewhat different point was made by another foundational decision of the 1970's. In *Morton v. Mancari* (U.S. Sup. Ct. 1974), the Court ruled that Congress could properly provide for an Indian hiring preference in the Bureau. The unanimous opinion, handed down in an era when affirmative action generally came under increased judicial scrutiny, allowed the preference because of the special trust relationship with Indians and the sovereign status of tribes. The preference was conceptualized, not as being based on race, but rather being an element of the government-to-government relationship between the United States and the tribes.

The *Mancari* decision is central to delineating the status of Indian tribes. It justifies special programs for Indians. In a more transcendent sense, it forces the focus in Indian law and policy on tribalism and on the governmental character of tribes. In later decisions, the courts were then able to explain that seeming racial prerogatives or institutions, whether fishing rights or tribal courts, are in fact premised on tribal governmental authority. In turn, tribal powers over non-members received an essential philosophical justification: all governments exert authority over different races and over non-citizens.



State Jurisdiction

The beginning point for analyzing the powers of any government is a determination of its boundaries. Governments typically possess some authority beyond their borders but such extraterritorial power is much more attenuated. In the case of Indian tribes, governmental authority is measured not by land ownership but by the concept of "Indian country," defined by federal statute, 18 U.S.C. § 1151. Indian country is the area within which tribal law normally applies and state law normally is inapplicable.

The basic definition of Indian country is all land within the boundaries of any federally-recognized Indian reservation. The definition has become the subject of continuing litigation because, as part of the allotment policy of the late 19th century, large segments of many reservations were opened for homesteading by non-Indians. In recent years, tribes have sought to exert authority over such regions, arousing the opposition of non-Indian residents. Disputes have also centered on state regulation of Indian hunting and fishing; if the contested region is Indian country, then tribal law, not state law, applies.

In a series of seemingly inconsistent decisions during the 1960's and 1970's, the Supreme Court first construed difficult cases in favor of tribes, then found that other disputed areas were not Indian country. In a major decision, *Solem v. Bartlett* (U.S. Sup. Ct. 1984), the Court found that a 1.6 million acre area within the Cheyenne River Sioux Reservation was Indian country and attempted to reconcile past decisions with a formulation that appears to be more favorable to the tribes.

It is now settled that state tax laws are normally inapplicable within Indian country but a long line of decisions has been litigated, both to establish the general rule of Indian country exclusion and to refine the general rule in specific circumstances. A leading decision during the modern era was *McClanahan v. Arizona State Tax Comm'n* (U.S. Sup. Ct. 1973), a test case challenging the application of Arizona's income tax to a Navajo tribal member. The Court held that the Navajo Treaty of 1868 excluded the tax even through the treaty did nc specifically refer to taxes. The *McClanahan* Court found that tribal sovereignty is a "tradition" and a "backdrop against which the applicable treaties and federal statutes must be read." The Court made it clear that few, if any, state taxes would be allowed against Indians in Indian country because tribal governments are the primary sovereigns in that context.

"A marginal tax advantage will be an incentive for businesses to locate on reservations and provide services to Indian people."

Three years later, the Court applied the same reasoning to tribes affected by "Public Law 280," enacted in 1953. This statute, an important adjunct of the terminatic policy and bitterly resented by the tribes, extended state law onto some reservations in a vaguely-defined fashion. After repeated skirmishes in the lower courts, the Supreme Court resolved the question of the reach of Public Law 280 by employing classic rules of interpretation requiring that Indian statutes be read strictly in favor of Indians. According to the decision in *Bryan v. Itasca County* (U.S. Sup. Ct. 1976), Public Law 280 did not extend state tax or regulatory laws into Indian country. The 1953 Act only allowed state courts to hear private civil suits and criminal cases not involving regulatory programs.

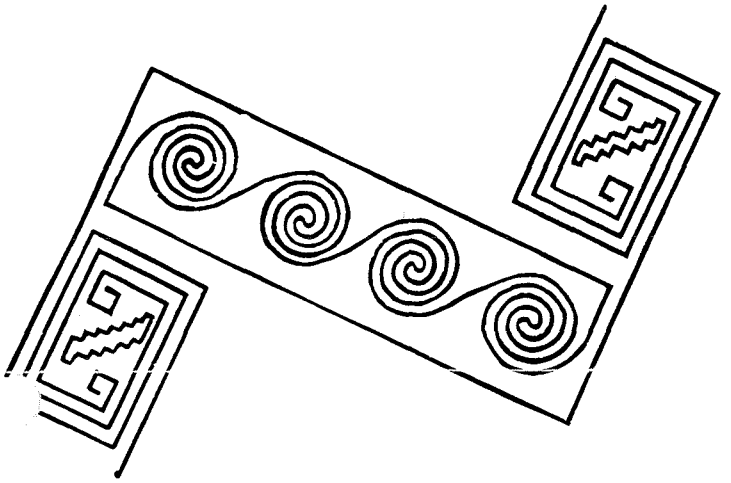
McClanahan and *Bryan* both involved state taxation of reservation Indians. A line of later cases dealt with state taxation of non-Indians. The issue is of considerable importance to tribes. If Indian sellers are not required to pay taxes on sales to non-Indians, their profit margin will be higher. If state laws do not apply to non-Indian sellers, individual Indian customers and tribes will pay lower prices. Further, both situations will leave room for tribal taxes, thus generating revenues for tribal governments. Perhaps even more important in the long run, a marginal tax advantage will be an incentive for businesses to locate on reservations and provide services to Indian people.

Several cases have dealt with state taxation of non-Indians. See *Washington v. Colville Confederated Tribes*

(U.S. Sup. Ct. 1980); *White Mountain Apache Tribe v. Bracker* (U.S. Sup. Ct. 1980); *Central Machinery Co. v. Arizona State Tax Comm'n* (U.S. Sup. Ct. 1980); *Ramah Navajo School Board v. Bureau of Revenue* (U.S. Sup. Ct. 1982). A rough summary of the rules is this. Reservation sales of goods by non-Indians to Indians or tribes are non-taxable; the federal Indian Traders Statutes, first enacted in the early 1800's, occupy the field in regard to the sale of goods to Indians. The operations of non-Indians providing services to Indians or tribes are non-taxable when subject to federal regulation, examples being timber harvesting and construction of schools. On the other hand, states can require Indian sellers to collect taxes on sales to non-Indians unless there is "value generated on the reservation"; thus non-Indians must pay a tax on cigarettes but the tax is probably inapplicable if the transaction involves Indian crafts, natural resources from the reservation, or for that matter, cigarettes made from reservation-grown tobacco.

The results in the tax cases have not been fully acceptable to either side. The states resent the idea that reservations are islands within their boundaries. The tribes fail to see why any state taxes should apply at all. Certainly there is a principled justification for the general rule excluding state taxes: tax revenues are generated to support governmental services and, at least on most servations, tribes have become the principal providers of services.

In any event, these technical rules hold out a considerable measure of promise for the tribes. Increasingly, businesses are studying the advantages to them of doing business in Indian country. Further, the rules hold out an incentive to the tribes. The greater the tribal activity, the greater is the chance that the state tax will not apply. This should, and in many cases has, encouraged tribes to expand their governmental and entrepreneurial activities.



Tribal Powers

As is apparent from the foregoing, tribalism is the centerpoint of modern Indian law and has implicated most of the court cases and policy in some reasonably direct way.

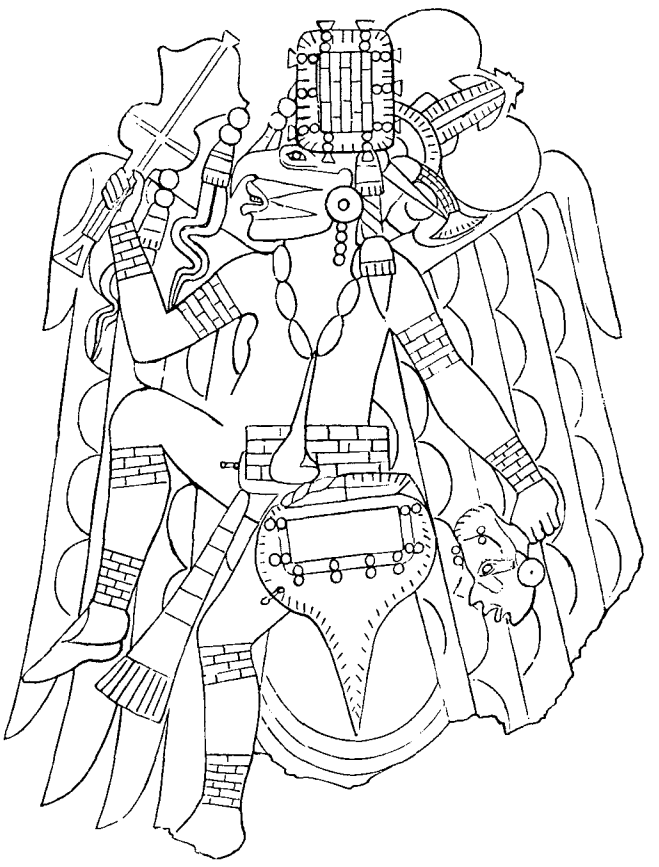
The opinions have almost always upheld tribal jurisdiction over Indians. Thus tribal courts have exclusive jurisdiction in civil lawsuits involving events in Indian country (unless Public Law 280 applies) when all parties are Indians, *Fisher v. District Court* (U.S. Sup. Ct. 1976). Tribal regulatory laws also have broad application to tribal members. *Santa Clara Pueblo v. Martinez.* (U.S. Sup. Ct. 1978).

The analysis is somewhat different when non-Indians are involved. The Court has announced a blanket rule that tribes lack criminal jurisdiction over non-Indians, reasoning in *Oliphant v. Suquamish Indian Tribe* (U.S. Sup. Ct. 1978) that in the treaties the United States implicitly reserved the right to try its own citizens for

"Tribalism is the center-point of modern Indian law and it has implicated most of the court cases and policy in some reasonably direct way."

crimes. In regard to civil matters, tribes do possess some authority to tax and legislate in regard to non-Indians, *Washington v. Colville Confederated Tribes* (U.S. Sup. Ct. 1980), even on non-Indian lands within Indian country, but a balancing test is employed to determine whether the asserted tribal power is appropriate in specific instances. The "tribal interest" test is used: a tribe may tax and regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana v. United States* (U.S. Sup. Ct. 1981).

Although the law is still in flux, the decisions to date on the "tribal interest test" have been generally favorable to the tribes. *Montana* denied to the Crow Tribe the authority to regulate non-Indian fishers on non-Indian land (probably because the facts did not establish that the Crows were a fishing tribe), but in 1982 the *Merrion* court upheld sweeping powers to tax non-Indians on tribal land. The Court later held that Interior Department approval was not necessary if a tribe wishes to impose a tribal tax.



Kerr-McGee v. Navajo Tribe (U.S. Sup. Ct. 1985). In *National Farmers Union Ins. Co. v. Crow Tribe* (U.S. Sup. Ct. 1985), the Court limited the applicability of *Oliphant* to criminal cases and refused to apply its reasoning to cases involving tribal court civil jurisdiction over non-Indians. Lower courts have upheld tribal authority over non-Indians and non-Indian lands in regard to zoning, *Knight v. Shoshone & Arapahoe Indian Tribes* (Ct. App. 10th Cir. 1982); health regulation, *Cardin v. De La Cruz* (Ct. App. 9th Cir. 1982); and regulation of riparian lands, *Confederated Salish & Kootenai Tribes v. Namen* (Ct. App. 9th Cir. 1982).

Tribal Resource Rights

Several of the leading opinions have involved tribal control over natural resources. As already noted, tribes have substantial special rights in regard to water and hunting and fishing. Even terminated tribes have been able to establish their right to hunt and fish under tribal, not state, law. In *Menominee Tribe v. United States* (U.S. Sup. Ct. 1968), the Court sustained the Menominees' position that their rights survived termination. *Menominee Tribe* was the first case in the modern era to emphasize the crucial proposition that all statutes must be read rigorously in favor of Indians. The Klamath Tribe prevailed in its contention that termination did not abrogate its hunting and fishing rights. See, e.g., *Kimball v. Callahan* (Ct. App. 9th Cir. 1979). The Klamaths also established farreaching post-termination water rights. *United States v. Adair* (Ct. App. 9th Cir. 1983). In Oklahoma, where tribes had been seemingly buried under early-20th-century legislation not dissimilar to termination, tribes have established their right to hunt and fish on tribal trust lands and on ceded lands formerly within the reservation. *Cheyenne & Arapahoe Tribes v. Oklahoma* (Ct. App. 10th Cir. 1980).

Many tribes have been active in adopting fish and game management programs regulating all hunters and fishers, including non-Indians. As noted, the Crows were unsuccessful in asserting such jurisdiction but that case involved non-Indian land, a history of state regulation, and a lack of proof that the Crow had traditionally been a fishing tribe. A more important precedent is likely to be the later ruling in *Mescalero Tribe v. New Mexico* (U.S. Sup. Ct. 1983), upholding tribal regulation, and striking down state regulation, over non-Indians on reservation lands.

The result in *Mescalero* is significant for many of the same reasons discussed in regard to state taxation. If state hunting license fees must be paid, tribes may well be forced to lower or eliminate their own fees. Further, if state game regulatory laws are stacked on top of tribal laws, tribal ability to manage wildlife is greatly restricted. *Mescalero* offers protection to the tribes and an incentive for non-Indians to visit Indian country, especially where tribes have adopted substantial wildlife management programs, as many have done.

Civil Rights

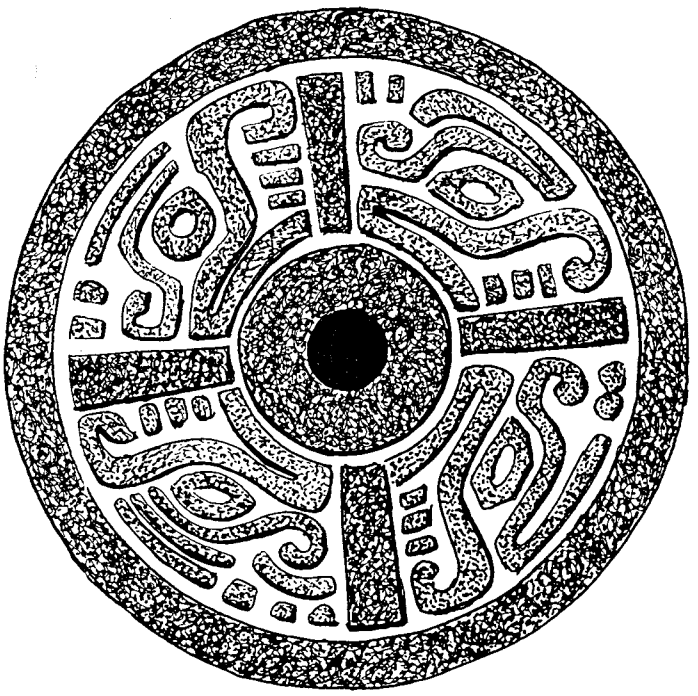
Indian people have also found it necessary to move outside of Indian law *per se* and establish basic civil rights, as United States citizens, to be free of religious and racial discrimination. It repeatedly has proven difficult to mesh Indian religion, foreign to American culture, with American law. Eagle feathers are essential religious attire to medicine men, part of an endangered species to the United States Fish and Wildlife Service. Peyote is a sacrament to members of the Native American Church, an illegal drug to narcotics officers. Long, braided hair is a way of living in harmony with the Creator to many traditional Indians, a violation of a dress code to a school principal.

Indians have made progress through this maze of ambiguities but the protections for Indian religions remain imperfect. One federal appeals court found no freedom of religion in an Indian's wearing long hair, with one of the judges calling the Pawnees "near-pantheists" and their desire to use a traditional hair style "understandable but not a constitutionally protected right." *New Rider v. Board of Education* (Ct. App. 10th Cir. 1973). Another court concluded that the wearing of long braided hair,

even in prisons, was "a tenet of the Indian religion" and protected by the First Amendment. *Teterud v. Burns* (Ct. App. 8th Cir. 1975). The courts have also split on various issues relating to eagle feathers and peyote.

The American Indian Religious Freedom Act of 1978 declared it "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise [their] traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." Early cases under the Act are inconclusive. AIRFA has assisted traditionalists in the Pacific Northwest in preventing a dam at Kootenai Falls in Montana and in blocking a Forest Service road near a sacred site in California, but was ineffective for Indians in the Southwest seeking to halt development at two sacred areas in Arizona, Rainbow Bridge and San Francisco Peaks.

The 1978 Act is a stout march forward from past policy the massacre at Wounded Knee was an attempt to quell the Ghost Dance and as recently as 1921 the BIA issued an official policy statement declaring the Sun Dance an "Indian offense" punishable by federal regulations. In the main, however, our legal system remains unwilling fully to



accept the simple truths set out so vividly by the California Supreme Court:

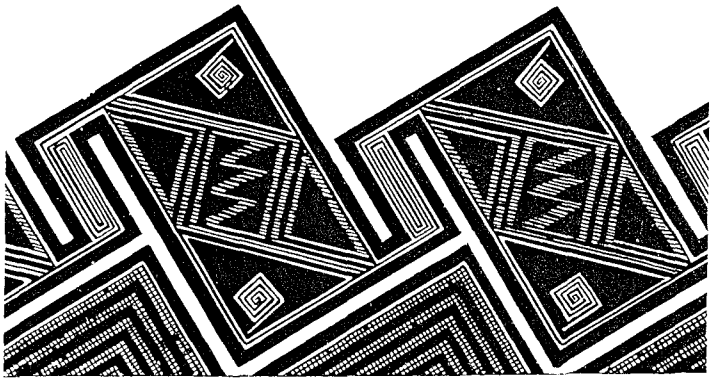
> In a mass society which passes at every point toward conformity, the protection of self-expression, however unique, of the individual and group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion one night at a meeting in a desert hogan. *People v. Woody* (Calif. Sup. Ct. 1964)

The civil rights of Indian prisoners have been the subject of continuing litigation. In addition to recognizing the right to wear traditional hairstyles, courts have ordered comprehensive decrees regarding access to prisoners by medicine men, the construction of sweat lodges by prisoners, and the formation of Indian studies classes. See, e.g., *Crowe v. Erickson* (Dis. Ct. S. Dak. 1977). Living conditions of Indians in jails have been ordered to be improved. See, e.g., *White Eagle v. Storie* (Dist. Ct. Neb. 1982).

"In a mass society which passes at every point toward conformity, the protection of self-expression, however unique, of the individual and group becomes even more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion one night at a meeting in a desert Hogan. *People v. Woody* (Calif. Sup. Ct. 1964)"

Education has been a main concern of Indian leaders in contemporary times. BIA schools had long been a mechanism of assimilationist policies and various steps have been taken to improve them or transfer them to tribal control. Now, however, a majority of reservation Indian children are educated in state schools, due in part to termination-era policies transferring Indian children to state systems. Facilities in state school districts often were inadequate to house reservation children and, in a series of major cases, states and local school districts were ordered to construct new schools to correct the inadequacies. See, e.g., *Hootch v. Alaska State-Operated School System* (Alaska Sup. Ct. 1975); *Natonabah v. Board of Education* (Dis. Ct. N. Mex. 1973); *Sinajini v. Board of Education* (Dist. Ct. Utah 1979). In another

case, a bilingual program was required in order to meet the special language needs of Navajo-speaking children. *Denetclarence v. Board of Education* (Dist. Ct. N. Mex. 1975).



LEGISLATION

American courts have always recognized a broad congressional power in Indian affairs. Until recently such authority had been referred to as "plenary" (absolute), but recent decisions have found that there are constitutional limits on Congress. Statutes must have a "rational basis." See, e.g., *Sioux Nation v. United States* (U.S. Sup. Ct. 1980). In real terms, however, even under the modern test courts will be extraordinarily reluctant to strike down any congressional action (the Supreme Court has never voided an act of Congress in Indian affairs). All who operate in Indian law, therefore, fully appreciate that Congress has the final say in this field, for good or for ill.

Two major statutes stand astride the termination and self-determination eras, embodying policy themes of both. The Indian Civil Rights Act of 1968 was initiated in the early 1960's by Senator Sam Ervin, a civil libertarian opposed to the idea that the Bill of Rights did not limit Indian tribes. The Constitution requires the federal government and the states, but not tribal governments, to guarantee civil liberties such as free speech, freedom of religion, due process, and equal protection to persons within their jurisdiction. *Talton v. Mayes* (U.S. Sup. Ct. 1896); *Native American Church v. Navajo Tribal Council* (Ct. App. 10th Cir. 1959).

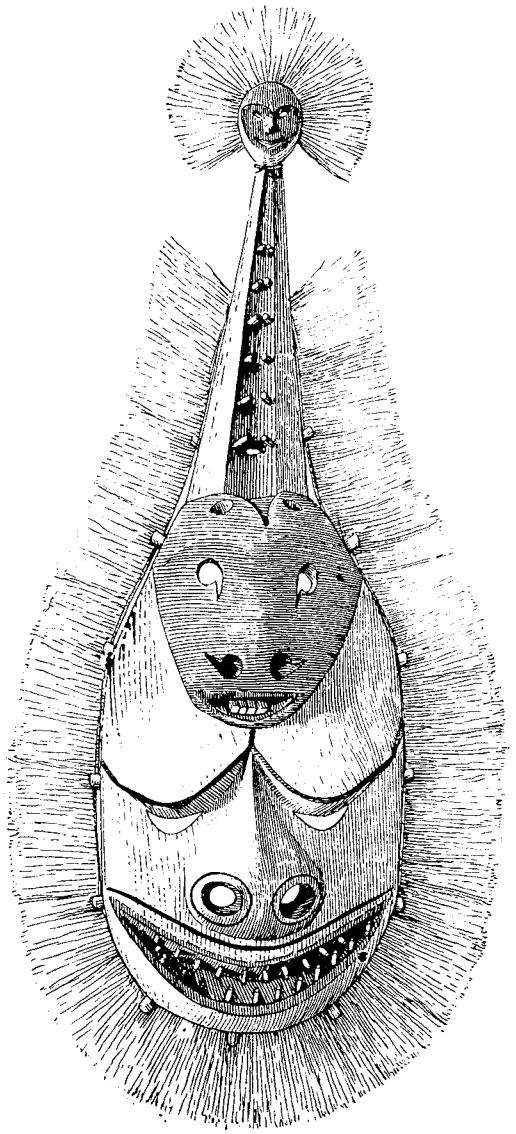
The ICRA applied most constitutional civil rights provisions to tribes as a matter of statutory law. There are exceptions: for example, the establishment of religion clause does not apply to tribes (they are the only governments in the United States allowed to be theocracies), nor does the republican form of government guarantee (Indian tribes may choose government officials by religious position or by heredity, rather than by election). Otherwise, the 1968 Act was a substantial incursion on tribal sovereignty and in that sense was consistent with the termination philosophy. Further, the ICRA embodied the termination era because tribal opposition to the limitations on tribal powers was disorganized and ineffectual. Tribes have since developed a substantial legislative capability, especially in defending against hostile measures.

But the developing tribal awareness and effectiveness was also evident in 1968. Although no substantial inroads were made on the civil rights provisions of the ICRA, Indian leaders were able to tack on sections that sharply limited the scope of Public Law 280, passed in 1953 to extend State jurisdiction onto certain reservations. After the 1968 amendments to Public Law 280, no state can unilaterally assume jurisdiction, as the 1953 Act had allowed; tribal consent is now required. Further, the 1968 Act allowed retrocession, that is, it allowed states to cede back to the tribes the power they had obtained under Public Law 280. Thus some provisions of the ICRA — which shut off, and reversed, the flow of power from the tribes to the states — were bold testimonial to the manner in which Indians often have been able to seize the initiative in the modern era.

"There was much good in the Alaska Native Claims Settlement Act, but there was also danger imposed upon Natives by public officials still imbued with terminationist ideals."

The Alaska Native Claims Settlement Act of 1971 was the other piece of legislation borne of two eras. In the mid-1960's Alaska state officials were selecting federal land pursuant to the 1959 Statehood Act and energy companies were making plans for a trans-Alaska pipeline to transport the huge oil deposits confirmed at Prudhoe Bay. Alaska Natives objected, claiming their prior ownership of most lands in Alaska. The stalemate was finally broken by the passage of ANCSA, in which Alaska Natives ceded away aboriginal title to most of the State but received absolute ownership to 44 million acres (about 12% of all land in Alaska and 2% of all land in the United States) and a fund of almost $1 billion.

By any standard, Alaska Native Leaders pursued a brilliant legislative strategy in achieving such a substantial amount of land, far beyond the amount any federal, state, or industry representatives were willing to discuss at the



beginning of the legislative campaign. In the sense, ANCSA is self-determination at its zenith.

But powerful interests opposed to tribal sovereignty exacted a stiff price. The land would be held by state corporations, not tribal governments. Thus, although a definitive opinion has not yet been rendered, Alaska Natives have had little success establishing sovereign prerogatives. Further, Alaska Native shareholders will be allowed to transfer their corporate stock in 1991. Native leaders fear takeover of the corporations, and a final loss of native land, if the stock goes on the market.

None of this is to second-guess the decisions made by Native leaders in 1971. In hindsight, the advantages of sovereign authority are clear. ANCSA, however, was passed relatively early in the modern era, before the Supreme Court had announced the contemporary extent of tribal powers. There was much good in ANCSA, but there was also danger imposed upon Natives by public officials still imbued with terminationist ideals.

Indian legislation then proceeded apace. The Menominee Restoration Act of 1973 was both symbol and substance of the highest order: it signalled an official end to termination and began the rebuilding process for the most visible casualty of the failed policy. The Self-Determination Act of 1975 allowed tribes to contract with the BIA to administer federal programs; some contracting successes have occurred but a greater contribution may have been the Act's flat statement that tribal self-determination is official congressional policy, providing tribal leaders and attorneys a new and favorable context in litigation and in negotiations with federal and state officials.

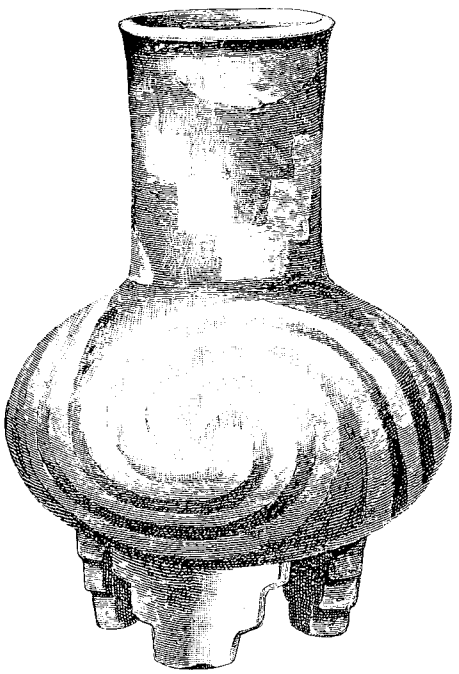
"No modern legislation has been more important to Indian people than the Indian Child Welfare Act of 1978, designed to halt the flood of Indian children from Indian homes — surveys indicated that, as of the 1970's approximately 25-35% of all Indian children were separated from their families and placed in foster homes or other institutions."

Several modern acts have dealt with tribal economies. The Indian Financing Act of 1975 and the Tribal Tax Status Act of 1982 both expanded tribal abilities to finance and operate governmental and business projects. The Indian Land Consolidation Act of 1982 gave tribes some of the tools to deal with the divided pattern of land ownership resulting from the allotment policy of the 19th century. Various acts were passed to deal with Indian health, education, and housing problems. Appropriations to administer those programs dropped significantly during the 1980's, but the funding levels in real dollars remain well above budget allocations of the 1960's.

A great number of initiatives have been enacted to deal with issues raised by individual tribes. A notable example is the 1970 Act returning to the Taos Pueblo of New Mexico its sacred Blue Lake. In 1977, the Siletz Tribe of Oregon became the second terminated tribe to achieve restoration, and restoration acts have been passed regularly since. The Pascua Yaquis of Arizona and the Texas Band of Kickapoos obtained recognition legislation from Congress. Several others have been granted federal status through recognition procedures established by the Bureau of Indian Affairs.

The eastern land claims have also received extensive congressional attention. From the beginning, it has been apparent that Congress would not allow large numbers of good-faith landowners to be evicted. At the same time, there was strong opposition on moral and policy grounds to a wholesale legislative elimination of tribal claims to aboriginal title. The first legislative settlement occurred in 1978, when the claims of the Narragansett Indians of Rhode Island were resolved. The tribe's claim for 3200 acres was settled by a transfer to the tribe of 1800 acres, 900 from the state and 900 from private owners willing to sell at fair market value.

The largest settlement to date is the Maine Indian Claims Settlement Act of 1980, involving the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. In exchange for the tribes' claims to up to 12 million acres of aboriginal title, a fund was established to purchase 300,000 acres of land. The Act also established a $27 million investment fund and provided for federal recognition for the tribes. Settlement also has been reached with the Mashantucket Pequots of Connecticut, and most of the other eastern land claims are in some stage of negotiation even as litigation proceeds.



No modern legislation has been more important to Indian people than the Indian Child Welfare Act of 1978, designed to halt the flood of Indian children from Indian homes — surveys indicated that, as of the 1970's, approximately 25-35% of all Indian children were separated from their families and placed in foster homes or other institutions. This sweeping legislation recognizes exclusive tribal jurisdiction over child custody proceedings involving on-reservation children. For off-reservation children, liberal transfer rules mandate state court judges to shift many cases to tribal courts. These procedures were not immediately available to tribes covered by Public Law 280, but those tribes were allowed to petition the Interior Department so that their tribal courts can handle ICWA cases. Many Public Law 280 tribes have succeeded in obtaining ICWA jurisdiction. For all recognized tribes, Public Law 280 or otherwise, cases heard in state courts rather than tribal courts would be subject to stringent presumptions aimed at protecting the rights of Indian families in adoptions, foster care placement proceedings, and hearings for termination of parental rights.

"No substantive statute in Indian affairs has been passed over Indian opposition since the Indian Civil Rights Act in 1968."

The Indian Child Welfare Act is perhaps the most farreaching legislation ever enacted in favor of Indians. It cuts deeply into a subject matter area always coveted by the States — family law — but it does so to redeem even more powerful values: the rights of tribes and Indian families to shape their own futures by protecting their children. The 1978 Act is a reminder not only of Congress' nearly unlimited power to enact laws beneficial to Indians but also of the manner in which Indian leaders have mobilized in order to define and implement priorities.

Finally, Indians have been successful in defeating legislative proposals to gut Indian rights. Bills to abrogate Indian fishing rights have been regularly introduced during the 1970's and 1980's. Termination-style legislation, and a bill to limit tribal water rights, were advocated in the late 1970's. In 1982, the Ancient Eastern Land Claims Settlement Bill would have extinguished land claims in New York and South Carolina. All of these, and others, were defeated by Indian leaders able to articulate the historical, legal and moral predicates for old laws that are so inconvenient to some but that are based on historic policies and promises that, once understood, provide ample justification for their continuation. No substantive statute in Indian affairs has been passed over Indian opposition since the Indian Civil Rights Act in 1968.

The record in Congress, like that in the courts is no total victory for the tribes. Compromises have been made, even in any of the most successful laws. The budget cuts during the 1980's have been severe and have imperiled the improving economic conditions in Indian country. Congress has refused to act upon numerous proposals by

the tribes. Nevertheless, on balance the legislative record of the tribes during the modern era has been remarkably successful. Termination has been resoundingly beaten back and reversed, and an extensive program of new initiatives is in place. Perhaps most notably, it is a program designed by Indians themselves. For the first time in the history of the Nation, Indians are participants as Indian laws are enacted on Capitol Hill.

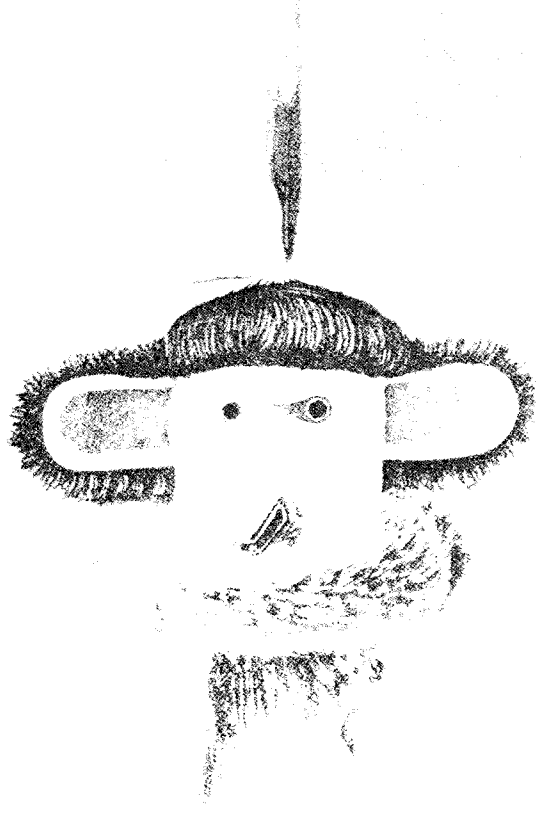
CONCLUSION

A decade ago it was common to hear Indian people say, "just let us make our own mistakes." It is apparent now that the modern era has brought Indian people mainly that — the right to make their own mistakes. The right to make mistakes is, after all, a plainer, more direct way of describing the essential treaty promise — along with the guarantee of sufficient land and resources — that tribes would be sovereign.

The irony, of course, is that these fine things — sovereignty, self-determination, economic viability — can all be turnpikes to termination if a larger national program turns the wrong way. Indian people know that and yet they also know that there can be no going back on the consensus that was reached a quarter of a century ago. It was correct to decide to enforce the old laws. So Indian people march on, sure in themselves but uneasy of the world around them, toward making their reservations homelands.

In the last analysis, little progress would have occurred, and little would be possible in the future, were it not plain that reservation Indians believed in — and would go to the mat for — the principles argued by the lawyers. Thus the accomplishments of the modern era are best understood as having been conceptualized by Indian people in Indian country and then passed along to lawyers and other professionals for execution. The integrity emanating from the felt needs of reservation Indians has been the true firmament of the judicial opinions and the federal statutes.

But the lever for moving the majority society has been, and will be, the law. Indian people have been forced to lodge many of their best dreams with lawyers. The larger things could have been accomplished no other way. For better or worse, the quality of life in Indian country, the continued enforcement of the old laws, and the further realization of the dreams all will continue to be tied symbiotically to the quality of lawyers for Indians.



Charles Wilkinson, a graduate of Stanford Law School, engaged in private practice with firms in Phoenix and San Francisco for five years before serving as a staff attorney at NARF from 1971-1975. He then joined the faculty of the University of Oregon School of Law, where he is Professor of Law. He has been a visiting professor at the Universities of Minnesota and Colorado and in 1986 will visit at the University of Michigan. Wilkinson is co-author of the standard law texts on Indian Law and Federal Public Land Law. He also was Managing Editor of the leading treatise, **Felix S. Cohen's Handbook of Federal Indian Law** (1982 ed.). A noted writer and lecturer on western resources law and policy, Wilkinson has written numerous articles on such diverse topics as Indian treaties, Indian history, Pacific salmon, the United States Forest Service, water law and policy, and the public trust doctrine. In early 1986, Yale University Press will publish his book **Of Time and the Law — Historical American Indian Rights at the Bar of the Supreme Court,** an analysis of the Indian law decisions in the Supreme Court between 1959 and 1985.

Native American Rights Fund, Boulder, Colorado