



# HIGHLIGHTS

NATIVE AMERICAN RIGHTS FUND

SPRING 1985

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"15 years of access to justice for America's Native Americans."

## INSIDE

**OTHER CASE UPDATES** highlights recent developments in the voting rights matter. It also discusses activities surrounding our Montana water cases and the Sisseton-Wahpeton education complaint in South Dakota. Page 4.

**DO YOU KNOW YOUR RIGHTS?** provides some straightforward information for NARF donors preparing their wills. Page 6.

**Q. AND A.** answers some basic questions about the Native American population, treaties, and other related issues. Page 7 and back cover.

## NARF Indian Cases: 1984-85 Supreme Court Term

The U.S. Supreme Court, today, and during the last few decades is playing a greater role in deciding the rights of Indian people. While the Court has consistently decided important Indian law cases, the number of Indian cases being decided by the Court has significantly increased. Professor Charles Wilkinson, a leading Indian law scholar, says in an upcoming book that the number of Indian law decisions since the 1960's is greater than the number of decisions in fields such as antitrust, securities, and international law. Professor Charles Wilkinson goes on to say that in the 1960's, there were ten Indian cases decided by the Supreme Court, thirty-three cases in the 1970's, and sixteen cases so far in the 1980's (through the 1983-84 term).

*"... the number of Indian law decisions (before the United States Supreme Court) since the 1960's is greater than the number of decisions in fields such as antitrust, securities, and international law."*

The present term of the Supreme Court adds to the developing trend. A total of seven Indian cases are

now pending before the Court — an unprecedented number in one term. If the numbers continue, there could be as many as 45-50 Indian cases decided by the Supreme Court in the 1980's.

Indian people and Indian advocates are concerned about this trend because the make-up of the Court during this time has become more conservative, and it is unclear how Indian cases will be affected. Some of the concerns of Indian advocates have been borne out with devastating decisions in vital cases involving Indian water rights, and in certain cases involving the authority of tribes to regulate activities on reservations. On the other hand, Indians have won some very significant victories in the Supreme Court involving tribal authority to tax, the federal government's trust responsibility to Indians, and jurisdictional conflicts with states.

The issues in the cases in the present term cover nearly every significant area in Indian law — Indian land claims, hunting and fishing rights, tribal court jurisdiction, aboriginal rights to land, state taxation of Indian property, and the authority of tribes to tax reservation activities. Concern is particularly heightened about how the court will decide the cases because in all seven cases the Court will be reviewing decisions which were

*(continued next page)*

favorable to the Indians in the courts below. This term therefore will be watched very closely by Indians and Indian law practitioners.

The Native American Rights Fund will also be monitoring the term closely. Three of the seven cases being heard by the Court are "NARF" cases. Although NARF attorneys have argued cases before the Supreme Court in the past, never before have three NARF cases been before the Court in one term. Recently, the Supreme Court decided two of the seven Indian cases, one of them a NARF case.

## Victory in Oneida Land Claim

On March 4, word of a major victory came in one of NARF's Supreme Court cases. In *County of Oneida v. Oneida Indian Nation*, the Supreme Court in a 5-4 decision upheld the Oneida Indians' 175-year-old claim to land in New York. The land had been transferred in violation of the 1793 Indian Nonintercourse Act. The Court found no applicable statute of limitations to bar the claim and no legal basis to deny the claim.

NARF represents the Wisconsin Oneidas in the case. The New York Oneidas and the Oneida of the Thames Band are represented by separate counsel.

The Oneidas began the case in 1970 as a test case against the Counties of Oneida and Madison to establish legal principles involved in bringing their claim to over 250,000 acres of land in New York. Essentially, the Oneidas had

to establish that 1) they had a common law right of action to bring the claim; 2) they could maintain the claim in their own name; 3) no subsequent laws or legal principles barred the claim; and 4) the passage of time did not bar the claim. At issue in the test case were approximately 861 acres owned by the Counties, to which the Oneidas claimed title and sought damages for the period January 1, 1968 through December 31, 1969.

The Supreme Court already had held in 1974 in *Oneida I* that the Oneidas stated a claim under federal law and therefore the federal courts had jurisdiction to hear the case. On remand, the federal District Court in New York found the Counties liable to the Oneidas for wrongful possession of the land and awarded damages in the amount of \$16,694 plus interest.



Arlinda Locklear

The Court of Appeals affirmed these rulings as well as a third ruling that the State of New York was required to indemnify the Counties for the damages owned to the Oneidas. The State and Counties then petitioned for Supreme Court review of the liability and indemnification issues. The Court, "recognizing the importance of the Court of Appeals decision not only for the Oneidas, but potentially for many Eastern Indian land claims," granted certiorari "to determine whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago." In its

March 4 decision, the Supreme Court held that the Oneidas *do* have a live cause of action for a violation of its possessory rights that occurred in 1795. The specific violation is that the State of New York acquired the land from the Oneidas in 1795 without the consent of the federal government which is specifically required by the 1793 Nonintercourse Act.

Four justices dissented from the opinion of the court on the ground that they would hold that the equitable doctrine of laches (undue delay in asserting a legal right) bars the Oneidas from bringing their claim. The justices cited the "common law wisdom that ancient claims are best left in repose."

Oneida establishes legal principles which apply to nearly all pending Eastern Indian land claims and a few claims outside of the East which are based on violations of the Indian Nonintercourse Act. The tribes involved in those cases will be able to maintain their claims in the courts, although the merits of each claim will depend on the specific facts in each case.

The significance of *Oneida* is particularly startling in light of the conservative nature of the Court. An historical claim to land by In-

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*"... the Supreme Court in a 5-4 decision upheld the Oneida Indians' 175-year-old claim to land in New York ... (and) the significance of Oneida is particularly startling in light of the conservative nature of the Court."*

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dians was upheld by the highest court in the country because no federal law could be found which extinguished the claim, and no statute of limitations could be found which barred the claim because of its age. The 1793 law

The NARF Legal Review

## HIGHLIGHTS

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which Congress intended to protect the Indians in their possession of the land, continues to protect the land even today.

The Oneida case was argued by NARF attorney, Arlinda Locklear.

This was her second Supreme Court argument, and her second Supreme Court "win." Arlinda is the first Indian woman to argue before the Supreme Court. ■

math Reservation established in 1864. The Tribe subsequently agreed to cede the land in 1901 to the federal government, and nearly all of the land was placed in national park or national forest status.

The Ninth Circuit Court of Appeals upheld the Tribe's rights to hunt, fish and trap on the ceded lands free from state regulation. The Court said that even though the Klamaths no longer held title to the land, that their rights to hunt, trap, and fish were not abrogated and continue to be viable because the 1901 cession agreement did not specifically extinguish them, and no compensation was provided for the rights. The Court also said that use of the lands for national forests and parks was not diminished by exercise of the Tribe's rights.

## Other Pending NARF Cases

Two other NARF cases are still pending before the Supreme Court. NARF represents the Blackfeet Tribe and the Klamath Tribe respectively in the cases which involve diverse tribal interests.

### *State Taxation of Tribal Oil and Gas Royalties*

In *Montana v. Blackfeet Tribe*, argued on January 19, the Blackfeet Tribe challenges the authority of the State of Montana to impose taxes on the Tribe's royalty share of oil and gas production on the Blackfeet Reservation in Montana. The rule of law is that states cannot tax Indian property. Thus the issue in the case is whether a 1924 Act which authorized state taxation of the Tribe's royalty interest was replaced by a later 1938 comprehensive Indian mineral leasing statute which does not authorize state taxation.

The issue is important to the Tribe because state taxation reduces the Tribe's return from mineral development, and makes it more difficult for the Tribe to achieve economic independence. The Tribe's royalty from leases on its reservation is usually 12.5%. Montana's taxes are about 17-18% of gross oil production and a somewhat lesser amount of gross gas production. Thus Montana receives more income from the tribal leases than does the Tribe.

The Ninth Circuit Court of Appeals held in an *en banc* decision that leases made under the later 1938 act are not taxable by Montana. (In an *en banc* case, an eleven-judge panel hears the case rather than the usual three-judge panel.)



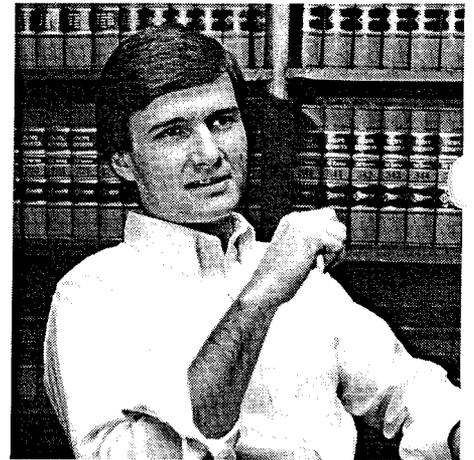
Jeanne Whiteing

The Court did find however, that leases made under the 1924 act are taxable. All but a handful of the Blackfeet Tribe's leases were made before 1938, and thus under the Ninth Circuit's decision, most of the Tribe's leases are not taxable. The case was argued before the Supreme Court by NARF attorney Jeanne Whiteing.

*"... Montana receives more income from the tribal leases than does the Tribe."*

### *Off-Reservation Hunting and Fishing Rights*

The treaty rights of the Klamath Tribe in Oregon to hunt, fish and trap on almost 700,000 acres of off-reservation land are at issue in *Oregon Department of Fish and Wildlife v. Klamath Tribe*, the second NARF case pending before the Supreme Court. The land was erroneously excluded from the Kla-



Don Miller

Hunting, fishing and trapping are vitally important to the Klamath Indians for subsistence. Thus the Tribe will be anxiously awaiting the court's decision. The case was argued before the Supreme Court on February 27 by NARF attorney Don Miller. A decision is expected at any time.

### Conclusion

With seven important Indian cases to be decided by the Supreme Court this term, Indian people will be watching the Court more closely than ever. With the major victory in *Oneida*, we do know that it is still possible, at least in some instances, for Indians to achieve justice in this country. ■



Photo credit: Horst Wachterbarth.

*"Today, America's Indian population is dealing with complicated decisions directly related to defining and upholding Indian legal rights. NARF's legal presence is one of the best assurances that our people will be the ultimate decision makers in planning for ourselves and the lives of our children."*

Chris McNeil, Jr. (Tlingit) Chairman, Steering Committee, Native American Rights Fund.

## Other Case Updates

NARF is currently involved in more than 75 major legal actions. Following are recent updates on a few of them:

### MONTANA SUPREME COURT WILL DECIDE ISSUES IN MONTANA WATER CASE

The Montana Supreme Court recently granted a writ of supervisory control in the Montana water adjudication proceedings to address the issues left open by the U.S. Supreme Court in its June 1983 decision. The U.S. Supreme Court decision held that state courts are the preferred forum for the adjudication of Indian water rights. The issues left open, and which the Montana Supreme Court will address are: 1) whether the state court has jurisdiction over Indian water rights in light of the dis-

claimer of jurisdiction in the state constitution; and 2) whether the state court proceedings are adequate to adjudicate Indian water rights. NARF represents the Northern Cheyenne Tribe in the proceeding which involves all seven Montana Indian tribes. Oral argument was held in the Montana Supreme Court on March 25.

### VOTING RIGHTS CASE DECIDED

The federal district court for South Dakota recently held that the Sisseton at-large school board election process does not violate the 1982 amendments to the Voting Rights Act. Citing no case law and with almost no reference to the record, the court said that the totality of the circumstances do

not show a violation of the Voting Rights Act. However, the Court failed to make the detailed findings necessary under the Act and may have misperceived the intent and purpose of the 1982 amendments to the Voting Rights Act. NARF intends to appeal the decision to the Eighth Circuit Court of Appeals.

### FINAL DECISION ON SISSETON-WAHPETON EDUCATION COMPLAINT

After three years of administrative proceedings, the Department of Education issued a final decision on the Sisseton-Wahpeton Sioux Tribe's Impact Aid complaint. The administrative complaint was filed against the Sisseton School District in 1983 because of the District's unwillingness to allow meaningful input by Indian parents in the basic school program.

## TAXES?



## Proposed Tax Law Changes Would Cause Gifts to Plummet

Charitable giving would decline \$12 billion a year if the Treasury Department's recommended changes in the tax laws affecting the charitable deduction are passed by Congress, according to a study commissioned by Independent Sector, a coalition of charities.

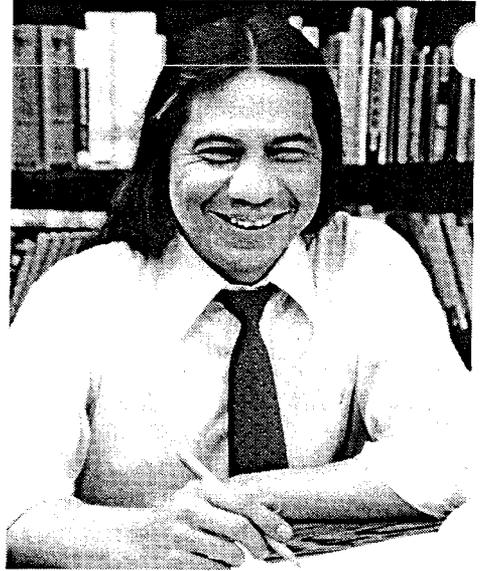
The Treasury proposals are part of a large package of reforms that would fundamentally change the tax system, eliminating many deductions and lowering tax rates. While the package as a whole has been extremely controversial, it has generated support from many

people, including some liberal Democrats.

The projected \$12 billion decline in giving caused by the Treasury proposals would amount to 20% of all charitable giving. In addition, giving would probably decline still more because of the lower tax rates included in the Treasury Department proposals. Lower tax rates decrease the value of deductions.

Another study done for the Association of American Universities said there would be a 30% decline in charitable gifts by those who itemize their

## From the Director



John Echohawk

Dear NARF Friends:

This first edition of the NARF Legal Review "Highlights" marks a very special occasion for us.

With this first mailing, we are now reaching almost 10,000 of our NARF donors — double the amount we previously sent to. We've also changed the format to make our work more easily understood by our donor audience.

1985 marks 15 years since we started as a three-attorney project back in 1970. One grant for \$150,000 kept our small operation going. Today, it is quite a challenge to raise the almost \$3 million it takes each year to help the 84 tribal groups we are presently representing in legal matters.

But you, the individual, make quite a difference for us. On behalf of all of us here at the Native American Rights Fund, thank you for so generously supporting our efforts over the years. We could not have done it without you. Please stay with us.

John E. Echohawk  
Executive Director

deductions (itemizers make 70% of all gifts). The AAU study said higher education would be hit hardest, losing 27% of its gifts, while religion would be hurt the least, losing 18%.

Brian O'Connell, president of Independent Sector, sharply denounced the proposed changes. "It is grossly unfair and inappropriate that such massive cuts would come at the very time President Reagan is calling on nonprofit organizations to carry a far larger share of services to people."

Three of the Treasury Department's proposed changes would cause giving to decline, according to O'Connell. First, gifts could be deducted only to the extent to which they exceed 2% of a taxpayer's adjusted gross income. At present, 61% of taxpayers donate less than 2% of their income.

Second, the deduction for gifts of appreciated property would be limited to actual cost plus a factor for inflation, or to actual market value, whichever is less. Currently, the market value can be deducted. Many large gifts are gifts of properties that have dramatically increased in value.

Finally, the Treasury Department would do away with the charitable deduction for nonitemizers, which was implemented slowly beginning in 1981 after a long lobbying struggle by charities. Under present law, in 1985, people can deduct the full amount of their gifts even if they use the standard deduction.

Three other proposed changes would stimulate more giving, though even the Treasury Department acknowledges that all three would be outweighed 25 to 1 by the reductions in incentives. The changes would eliminate the ceilings on the total amount of gifts individuals or corporations can deduct from their income each year.

The effects that the tax laws have on charitable giving was shown dramatically after 1981, when taxes on the wealthy were significantly reduced. The average gift by the wealthy went down dramatically, decreasing 31.2% for those making between \$500,000 and \$1 million.

According to Independent Sector, the charitable deduction causes a 31% increase in giving. ■

*Reprinted with permission, National Committee for Responsive Philanthropy Newsletter, Winter, 1985.*

Such input is required by the Impact Aid law and regulations.

The recent decision represents the culmination of the proceedings, and upholds the right of the Tribe and Indian parents to obtain objective data from the school district showing the educational level of Indian children as a group. This data is vital to the development of a school program which will meet the needs of Indian children.

As the proceeding progressed, the right to objective data on the educational achievement of Indian children emerged as the key issue. A series of five decisions issued prior to the final decision directed the school district to revise its policies and procedures to facilitate Indian input, and established a method of providing information to the Indian parents. ■

## ARY GLOSSARY GLOS SSARY GLOSSARY GL ARY GLOSSARY GLOS

*Nonintercourse Act: The 1793 Act which basically states that Indian land cannot be purchased without the consent of the federal government.*

*Certiorari: In essence, obtaining review of a case to a higher court.*

*Statute of Limitations: A statute assigning a certain time after which rights cannot be enforced by legal action.*

*Indemnify: To save harmless, to secure against loss or damage, such as Oneida and Madison counties seeking New York State to indemnify them against tribal suit.*

*Cause of Action: The right which a party has to institute a judicial proceeding.* ■

# Planned Giving

## *Do You Know Your Rights?*

One of the many freedoms we as individuals enjoy in this country is the right of private ownership. We have the right to work and earn money to whatever extent possible, and to use that money to accumulate other personal property.

We are also able to dispose of that property in any legal manner we choose, however:

### *I. If you don't make plans now, the state will do it for you.*

Everyone has the opportunity to plan his or her own personal will, yet few people take advantage of it. The majority of people in this country die without wills. If you fail to make a will, the state will decide what becomes of the property you have spent your life earning and accumulating.

Each state has a set of guidelines (laws of descent and distribution) to follow when property must be distributed without the benefit of a will. These laws have to be generally and overly protective because they must apply to all kinds of people. The result can be unnecessary delays, taxes, and legal expenses, causing confusion for your family at a time when they are least able to cope.

Your will gives you the opportunity to make decisions about the care of minor children in case something happens to you and your spouse. You can recommend who will raise them. Without a will, the court will have to make this important decision for you, without really knowing any of the people involved. No one can know as well as you what is best for your

children. You may want to make a reciprocal agreement with another couple, each agreeing to care for the other's children in case the need should arise. No one is more qualified than you to plan your own will.

### *II. You can use your will to bequeath special items.*

You can continue a family tradition, or start a new one by giving items of sentimental value to relatives and friends who will cherish them as you have. You may own jewelry, silver, antiques, collections of value, or other items that have been a part of your family for years. Include these in your will to insure the continuation of the family's tradition.

Or, start a new tradition by including something in your will that will be treasured by future generations. If you don't leave a will designating specific bequests, something that is very dear to you may end up in someone's attic.

### *III. Without a will, you can leave nothing to anyone outside your family.*

Unless you have a will, or some other kind of legal agreement, none of your property can be left to friends or good causes you may want to help. Your possessions will be divided among the closest relatives, according to a formula prescribed by law. Even though you have given regularly during your lifetime to a cause such as the Native American Rights Fund, the law makes no allowance for charitable gifts that have not been designated in a will or other legal agreement.

### *IV. Don't make your will, then forget it.*

Once you have had your will made, review it every few years, or when a major change occurs in your life. Many times, an attorney can make a change quite simply, with little cost in time or fees.

### *V. The opportunity is here to request more information about your will.*

To friends of the Native American Rights Fund, we are happy to provide information needed to plan a will. If, after your family's needs are met, you find you can include a gift to help us strengthen the rights of Indians, it will be greatly appreciated.

Complete and return the coupon below, and we will send you a free booklet entitled, "How to Protect Your Rights With a Will," or write or call Marilyn Pourier at our Planned Giving Office, (303) 447-8760.

NARF has recently received a substantial bequest from the estate of Elizabeth French Babbott (Mrs. Frank L.). Mrs. Babbott was a long-time supporter of the Native American Rights Fund — both financial and otherwise.

Clip and  
Mail 

## Otu'han

In the journals of Lewis and Clark it is noted that the Sioux had a custom of giving gifts in the names of friends or relatives they wished to honor. This custom is referred to as Otu'han (ō-tū-han)—a Lakota word literally translated as "give-away." Items of value such as shawls, quilts and household items are gathered over a long period of time to be given away during pow-wows or celebrations in honor of births, anniversaries, marriages, birthdays, and other special occasions. The Otu'han is also customary in memory of the deceased. Once the appropriate funeral services and ceremonies are finished, gifts are made to relatives and friends in the name of the deceased. The custom of giving in honor or memory of someone is still very much alive among Indian people today.

In the spirit of the Otu'han the Native American Rights Fund has received recent contributions in memory of:

- Pete Medicine—by *Nona A. Schwartz*
- Antonio Cook—by *Mr. & Mrs. Conrad Schmidt*
- George P. Hussey—by *Lana Hussey Abbott*
- Tom W. Echohawk—by *Lucille Echohawk*
- Kimberly Ann Kingsbury—by *Wm. & Mary Wilcox*
- Gerald I. Feit—by *Eugene Feit*
- Ethel L. Dupuis—by *Delphis J. Dupuis*
- Fairlie Dalton—by *Suzanne Abruzzo, S.C., Sisters of Charity*
- Lois Lockhart—by *Charles D. Ladner*
- Hannah Roundface—by *D. Michael & Jean Eakin*
- Russ Wright—by *Alexander Blain III, M.D.*
- Carolyn E. Stear—by *David R. Stear*

We were pleased to receive a contribution in memory of Mr. Rudolph D'Agostonio from the staff members in the Methods and Procedures and Professional Fee Billing Departments at the Memorial Sloan-Kettering Cancer Center.

NARF has also received gifts in honor of friends or relatives on birthdays and special anniversaries. The gifts are acknowledged with a specially designed Native American greeting card. For more information on the Otu'han program clip and mail the coupon.

## Did You Know?

**Q.** *What state has the highest population of Native Americans?*

**A.** California ranks first with 198,155, Oklahoma is second with 162,292, and Arizona is third having 152,498 Native Americans.

According to 1980 census figures, there are a little under 1,400,000 Native Americans, Alaska Natives and Eskimos in the United States, constituting 1/2 of 1% of the United States population. Approximately 1/2 of those 1,400,000 live on or near reservations.

One million Indians inhabited this country when Europeans first arrived on this continent. In 1900, due to disease and warfare, the Indian population in the United States had been reduced to 300,000.

**Q.** *Has the United States honored its treaty commitments?*

**A.** Generally, no. The United States has broken nearly every one of its 650 Indian treaties. The desire for Indian land is the reason most of them were broken.

**Q.** *Is an Indian treaty a grant of rights to a tribe?*

**A.** No. The Supreme Court has expressly held that an Indian treaty is "not a grant of rights to the Indians, but a grant of rights from them." In fact, any right which is not expressly extinguished by a treaty or federal statute is "reserved to the tribe." This fundamental principle of Indian law is known as the "reserved rights" doctrine.

*(continued next page)*

TO: Marilyn E. Pourier  
Native American Rights Fund  
Planned Giving Coordinator  
1506 Broadway  
Boulder, CO 80302

- Please send a complimentary copy of "How to Protect Your Rights With a Will."  Please send information on the "Otu'han" program.

Name \_\_\_\_\_

Phone ( ) \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State and Zip \_\_\_\_\_

**Q.** *What is the legal status of tribes?*

**A.** Tribes are sovereigns and have recognized government of their own. They are exempt from state jurisdiction except as authorized by federal law.

**Q.** *What types of governments do Indian tribes have?*

**A.** Tribal governments vary considerably. There are over 400 Indian tribes in the United States and probably no two tribal governments are the same. A few tribes, for example, are theocracies in which religious leaders control the government. Some tribes determine their leaders by heredity, but most tribal officials are elected. Most tribes have established written constitutions and tribal codes and enforce their laws in their own courts; however, some tribal governments depend on state or federal agencies to maintain law and order on the reservation. ■



NARF Boulder staff March 1985. Absent from picture are the Alaska and D.C. staff.

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