

ANNOUNCEMENTS

Native American Rights Fund

Spring 1983

A LOOK AT THE WORK OF AN INDISPENSABLE INSTITUTION

Editor's Note:

In 1974 the Ford Foundation conducted an extensive evaluation of the work of the Native American Rights Fund. At that time NARF was in its relative infancy, having been established with Ford funds only four years earlier. Somewhat to their surprise, the Ford Foundation's evaluators discovered that NARF's work was already having a remarkable impact on Indian law and Indian rights development. After having traveled all across the country interviewing clients, co-counsel, opposing counsel, judges, and other key actors about NARF's efforts, the Ford Foundation evaluators concluded that NARF was "a very effective law firm rendering services that are almost indispensable to Indian survival and development in America. As the institution matures and the young lawyers gain more experience, even better results should be forthcoming."

Nine years have now passed since the Ford evaluation. The questions which came to my mind in returning to NARF as a guest editor of *Announcements*, after an almost equally long hiatus, was how has NARF matured as an institution? How do its clients, co-counsel, opposing counsel and the judiciary now judge its efforts? Have even better results been produced?

I set out to try to discover answers to these questions about a month ago. I called several of the sources which the Ford evaluators had contacted, as well as many new ones. Their comments and perspectives were both heartening and stimulating.

All institutions must be judged by their long-run positive payoffs. On this score most present-day observers judge that NARF is a very viable and important organization. From coast to coast and from tribal hall to the courtroom, there is a reservoir of respect for NARF's achievements. Even the institution's most ardent adversaries find it hard to fault the quality and importance of the work NARF has undertaken.

Understanding the texture of that work is not always most easily done through the more technical descriptions of the various legal developments in NARF cases and activities. I have therefore tried to describe how I can see some of NARF's work in a few of the many arenas in which its staff plays their parts. I have done this with the help of the perspectives of others in a position to observe the quality of those efforts and the clients who are so intensely affected by their outcome.

Joan C. Lieberman
Guest Editor, Spring 1983



Every day in different ways and places NARF makes a difference in the future existence of Indian people. Most of us who have been around awhile wonder what it might have been like if NARF had been created 30 years ago, instead of 13. Clearly, we've lost many invaluable rights and opportunities, but we do have an institution now that is looking out for our interests and doing so without politicizing its own role. I recently watched a NARF attorney sit patiently through a twelve hour tribal meeting that went on until 2 in the morning. He said few words, but his presence was felt. We knew he was there and we had both more honor and more hope because of it.

Indian Tribal Elder



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WORKING IN MULTIPLE ARENAS



NARF's work draws its staff into multiple arenas. On any given day it might be possible to find a NARF lawyer driving across the plains of South Dakota in a snow storm to a tribal council meeting, sitting in a judge's chambers in Seattle, conferring with Indian parents before a school board meeting in Oklahoma, testifying before Congress, consulting by telephone with a legal services lawyer in a remote rural office in New Mexico or Minnesota, wading through pages of technical testimony in NARF's library, conferring with the staff of a state legislator in South Carolina, or cross-examining a hostile witness on the 42nd day of a long trial.

In comparison to the diversity of tasks NARF undertakes on a given day, its legal staff is remarkably small. A decision was made very early on to concentrate most of NARF's highly specialized legal talent in one location in the West. Boulder, Colorado was selected because of its relative centrality to Indian country, and its proximity to a law school library, and a major airport (Denver's Stapleton Field)—two key resources for lawyers whose clients are located all across America.

NARF is not a work place for the impatient or the egocentric. Its work is slow, results take years, sometimes decades, and much of it has to be done anonymously so that credit for work done can be given to others . . .

NARF's offices in Boulder are housed in two older fraternity buildings at the edge of the University of Colorado campus. Lawyers, secretaries, law clerks, and the administrative staff work in modest rooms where the men of the Lambda Chi Alpha fraternity used to study, sleep and play. The National Indian Law Library (NILL) collection and NARF's print shop are located in a smaller adjoining building. Because NARF lawyers must travel to confer with their clients and to undertake most of the work they do on their behalf, at any given time about half of NARF's professional staff is away working in other states. Yet, it's rare to pass the building late at night and not find the lights burning in the library or in an upstairs office.

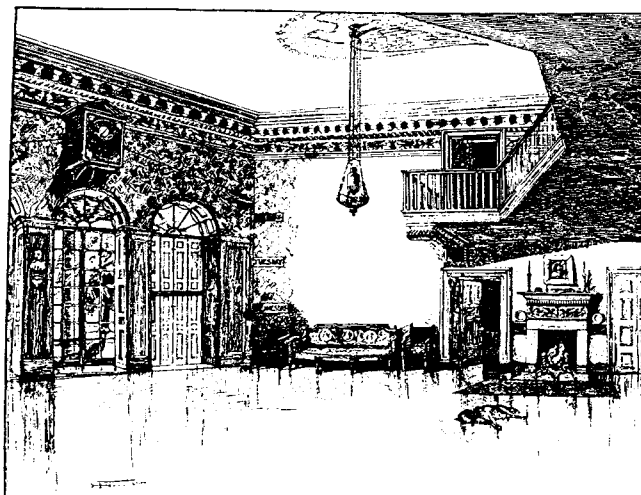
NARF also has offices in Washington, D.C. A small staff of lawyers, legislative liaisons, legal secretaries and volunteer interns operate out of a narrow old townhouse on N Street. Their work serves as the connecting link between Boulder and Eastern tribal clients, as well as between key actors in the Washington milieu.

If writing is among the hardest work in the world, a lot of hard work goes on at NARF. Pages and pages of legal memoranda, opinions, letters, complaints and briefs are turned out each year. Almost all of NARF's legal work is shared with either local counsel in other states, with staff in either the Justice or Interior Departments in Washington, or with lawyers from other firms who are general counsel to tribes. Because of this a great deal of telephone consultation and interaction goes on between NARF and other law and governmental offices across the country.

Many believe that the key aspect of NARF's work is its careful examination of the problems presented by clients, including the formulation of initial strategies which seem to have the potential for a successful resolution. Some judge NARF's thorough attention to these initial contacts as overly cautious. Others see the importance of not raising false hopes in Indian clients whose rights have been systematically denied and distorted for three centuries.

"NARF is an exceptional institution. You feel it from the moment you walk into the place. It's quiet, solid. You can sense its permanency and how essential its work is. Nobody is confused about the work they are doing there. Actually, NARF is a rare example of a non-profit institution with both clarity of purposes and integrity."

**Private Practitioner of Indian Law,
Washington, D.C.**



"What NARF has done is to raise the professional standards of Indian law practice, while redefining the true meaning of the relationship between a trustee and a dependent. The federal government has, and undoubtedly will continue, to fail in its fiduciary role, but NARF's work means that neither the federal government nor the Indians will ever be able to ignore those failures again."

Retired Federal District Court Judge

NARF's work does not arrive in neat packages. The evolution of an inquiry—whether it comes by phone, mail, or in person—into a case or a legal problem may take many months. Sometimes it is presented by a tribal elder who has held onto valuable documents for years which reveal that promises were made by a state or federal government official which were never kept. Establishing the validity of these documents, undertaking the necessary research, and determining what the tribe wishes to do about the issue is a lengthy process in and of itself.

Other times, someone living on a reservation may notice that their well has run dry, which may be the first clue to their realization that pumping by non-Indian users on the edge of the reservation is lowering an irreplaceable water table. In still other instances, a tribe may have come to live with an onerous problem which is apparent to the most casual outside observer, and in the course of an informal visit to the reservation by a NARF attorney, a greater dilemma is revealed.

NARF is not a work place for the impatient or the egocentric. Its work is slow, results take years, sometimes decades, and much of it has to be done anonymously so that credit for work done can be given to others. Above all, a NARF lawyer must be constantly alert to the possibility that an action in one arena will undo or distort progress in another. In fact, the majority of NARF's representation involves working in two or more arenas on the same issue at the same time. One prepares for trial, while one engages in negotiation, and one negotiates while orchestrating a legislative solution. One former NARF law clerk put it this way: "Watching a NARF lawyer work on a major Indian law problem is like watching someone playing football, basketball, and baseball all at the same time. First an initial pass is thrown, while that is in midair, one runs to the home plate and hits a high fly ball, and then one quickly turns around to pick up the rebound. The work requires not only mental agility, but the kind of intellectual stamina that keeps one actively engaged in a game that goes on forever. I felt tired after just one summer, but the guy I was working with had been at it for seven years and the time clock is still running."



Native American Rights Fund

The Native American Rights Fund is a non-profit organization specializing in the protection of Indian rights. The priorities of NARF are: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet the ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued help.

Requests for legal assistance, contributions, or other inquiries regarding NARF's services may be addressed to NARF's main office, 1506 Broadway, Boulder, Colorado 80302. Telephone (303) 447-8760.

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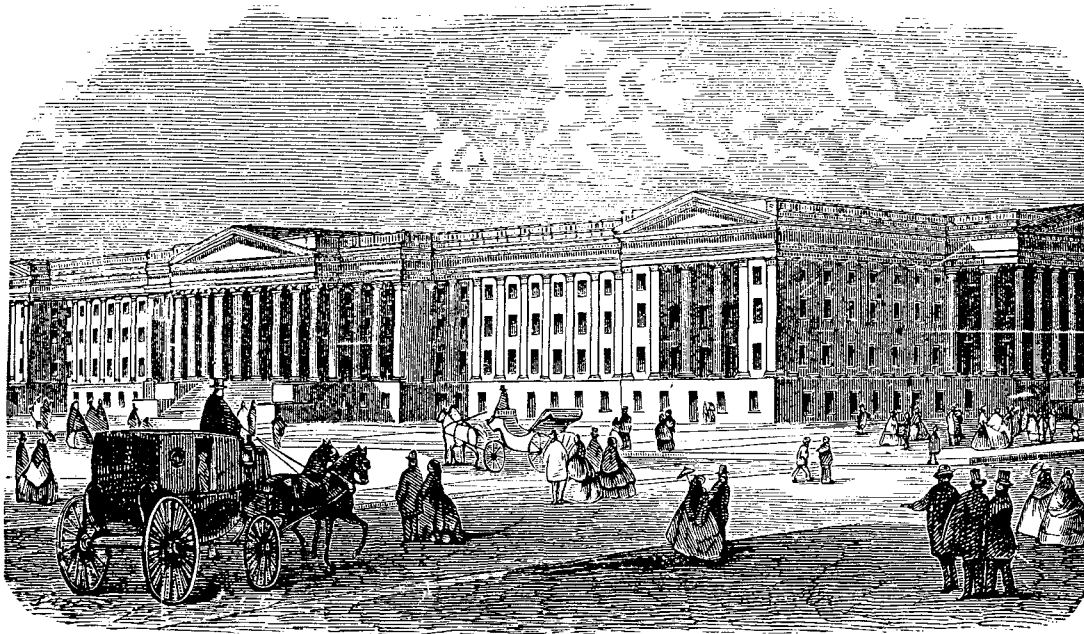
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THE INTRICACIES OF THE FEDERAL BUREAUCRACIES



The Executive Branch of the Federal Government is an arena which demands many hours of NARF's time. The issues which arise there are multifaceted and the most innocuous administrative action can have either a positive or negative effect on NARF's clients. For this reason, every day NARF attorneys and legislative liaisons are either in the offices of the Departments of Justice and Interior or on the phone with staff from those departments. Sometimes they are working side-by-side with these bureaucrats; sometimes they are suing or otherwise pressuring these people to carry out their fiduciary responsibilities to Indians. It is painfully tedious work and it is fragile. Relationships with bureaucrats in these two departments, and other federal agencies, can take years to establish and can vanish overnight after a national election, a new political appointment to a top administrative post, or a shift in Presidential policies.

The "shifting trustees," working in layer upon layer of bureaucracy, is one of the greatest dilemmas facing Indians. NARF's expertise in knowing who and where the key bureaucratic decision makers are and what political forces are currently pushing them in one direction or another is one of NARF's most vital advocacy roles. The texture of this work role on a day-to-day basis is one of waiting for someone to move a key document off one desk to another desk, of nudging issues through seemingly endless decision making processes, of finding an opening, and of looking out for and actively working against unfair political interference from the White House, congressional representatives, and a wide variety of non-Indian interest groups and individuals.

The first two years of the Reagan Administration have presented particularly difficult bureaucratic work tasks for NARF advocates. Not only have the faces of hundreds of key bureaucrats changed, but many suspect the Reagan Administration of "planned termination by appropriation." Massive cuts and

structural changes in programs have left Indians more vulnerable than ever. While Congress has not gone along with the full extent of President Reagan's and Secretary (trustee) Watt's recommendations, each fiscal year has seen budget cuts in most Indian programs and services. More onerous and difficult to monitor have been the changes in the "administrative practices" of the various federal bureaucracies.

The problems for Indians are not just in Interior. They start in the White House with the President and trickle down through every layer of every federal agency. The federal Indian agenda since the end of the termination era in the 1950s has been Indian economic survival, clarification of resource ownership, protection of resource rights and diligent resource management. It is this agenda, never fully carried out by any Administration, either Republican or Democratic, that President Reagan and Secretary Watt are in fact changing and eliminating through the budget and administrative process.

As one senior federal bureaucrat in the Justice Department put it:

"No one, not even the key policy makers at the White House fully understands what this Administration is trying to do to Indians. The process is out of control. Any Republican in the country who gave a \$1,000 to Reagan can get any Indian policy he wants sidetracked. It goes beyond the physical genocide of the 1700s and 1800s and the cultural genocide of the last 80 years. These guys are without scruples. Nothing twinges their conscience. They are probably the most lawless bunch of political actors to ever arrive in Washington. And that's all the Indians have as a defense—the laws."

CONGRESSMEN, SENATORS, AND THEIR INDIAN CONSTITUENTS

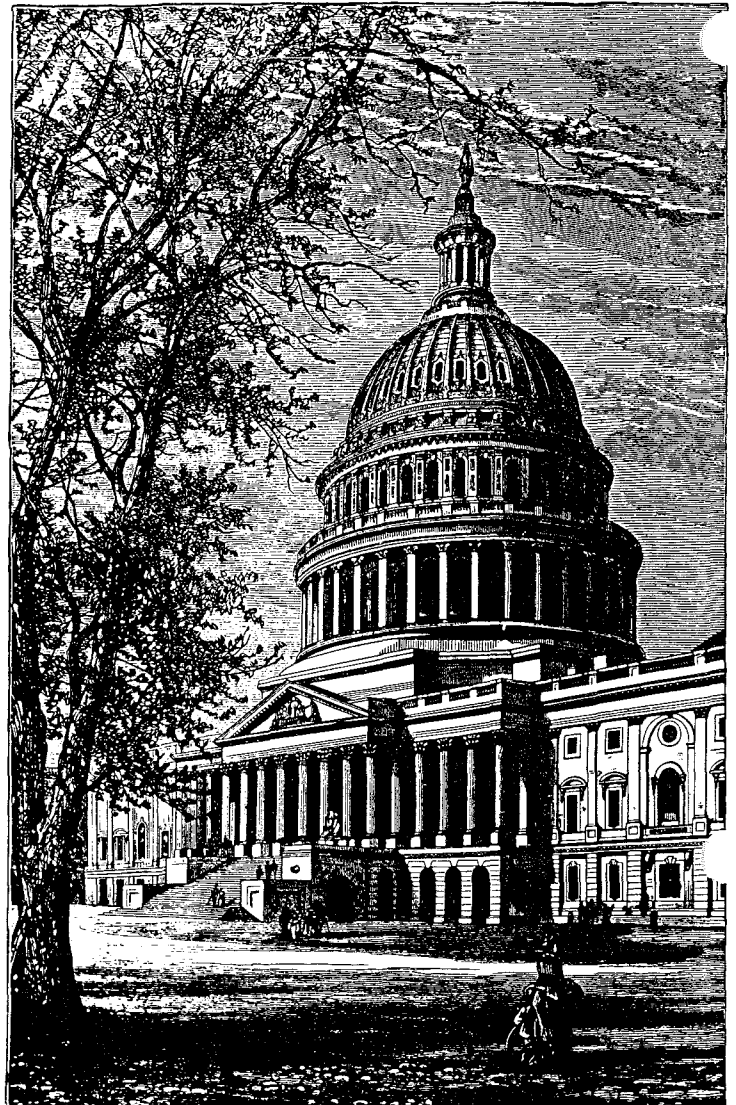
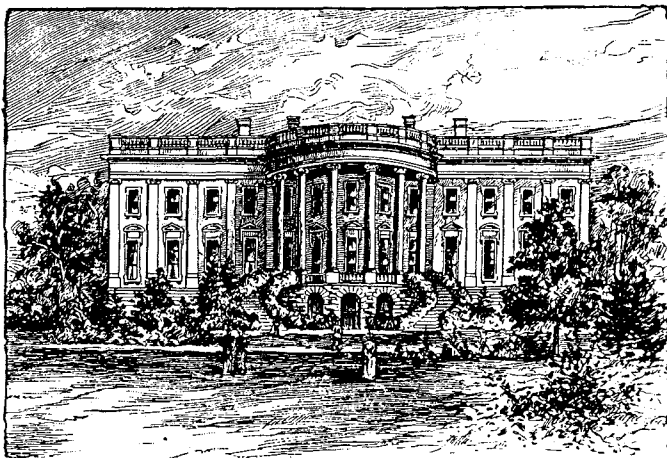
"If it weren't for NARF, most of the remaining Eastern Indian land claims would have been wiped out last fall by Eastern Congressmen who never even knew there were Indians in their district, let alone that they were their constituents."

Republican Congressional Aide

On Capitol Hill when Congress is in session, Indian rights are increasingly at risk. After a decade of extraordinarily successful litigation by Indians to enforce and reestablish by court order the rights and obligations promised to them in treaties with the United States, some congressmen, senators and many of their constituents are learning that there is another way to circumvent this progress—to best the Indians at yet another version of the white man's game. And that is to undo those promises through new legislation which bypasses the courts and abrogates earlier treaties, promises and obligations.

A review of the new laws passed in the lame duck session of the 97th Congress last fall, reveals that of the 68 pieces of legislation introduced and passed during that session, 15% of them affected Indian interests, even though Indians are less than 1% of the United States population. Every day, NARF attorneys and legislative liaisons are seeing Indian opponents attempt to bypass the courts and go to Congress in order to achieve objectives that they have discovered are otherwise unobtainable.

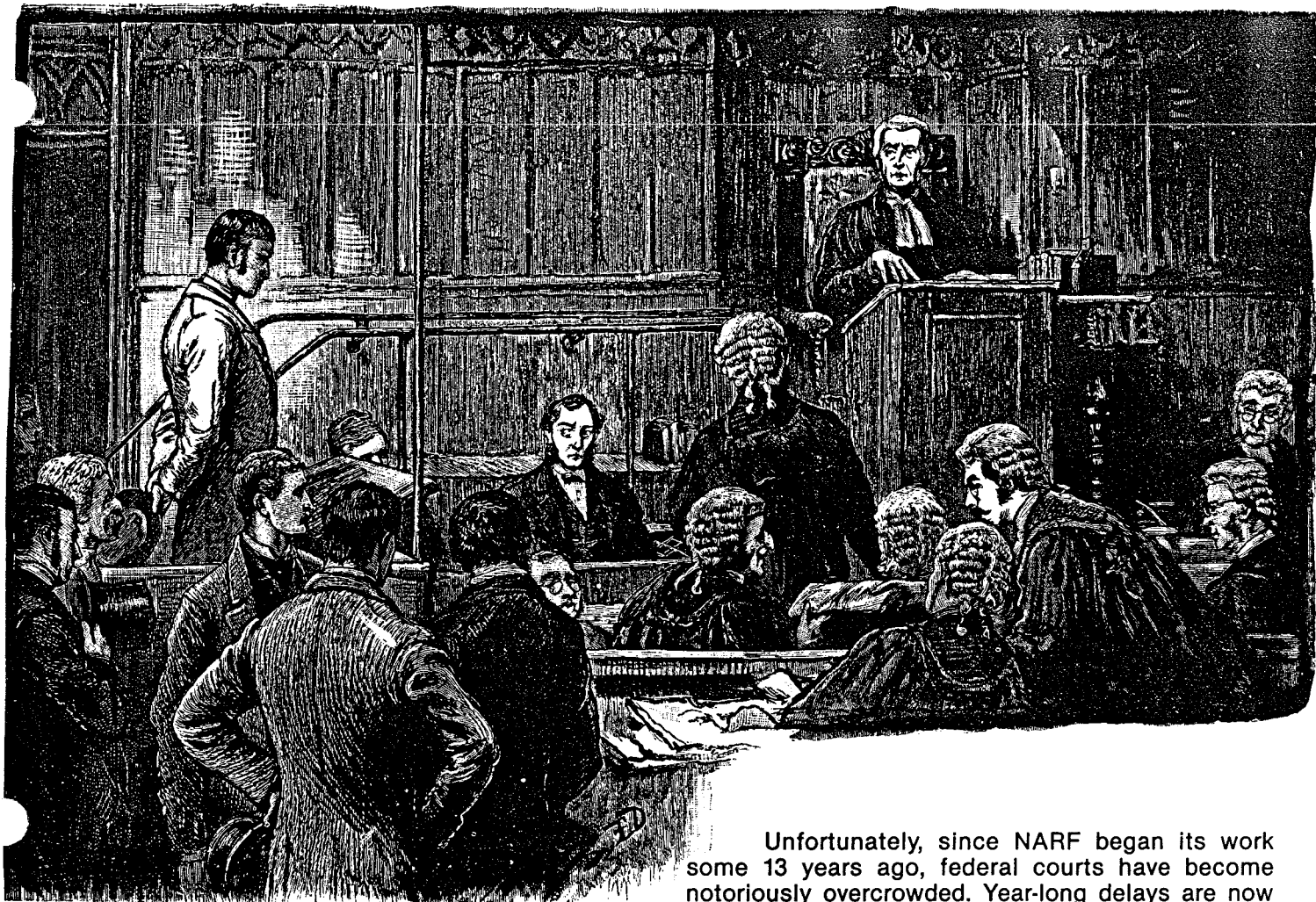
Clearly, the legislative arena is a key arena for NARF now and in the future. Not only must NARF attorneys and legislative liaisons monitor the activities of the Executive and Congressional branches, but they must be able to develop legislative solutions that will preserve Indian rights before they are stolen from them by their more powerful and numerous opponents. This work requires constant alertness to issues which are developing in local jurisdictions where Indian lands and resources exist, and mental cataloging of all the possible permutations which a conflict between Indian and non-Indian interests might produce.



The ability of NARF's staff to keep track of the legislative activities going on at any one moment on Capitol Hill is remarkable in and of itself. What is astounding is that they have the creativity and guts to select the key issues and make certain that Indian interests are well represented and that if Congress overrides those interests it does so deliberately, and not out of its own ignorance or the silence of Indian tribes."

Congressional Aide to Senator
Edward Kennedy





GOING TO FEDERAL COURT

"Laws not enforced cease to be laws, and rights not defended may wither away."

Thomas Moriarty

More than any other of the white man's institutions, Indians have some measure of trust in his courts. Indians have had big losses at the hands of all American institutions. Nonetheless, compared to the other arenas in which their interests are publicly measured against those of the dominant society, the courts, particularly the federal courts, have provided Indians with the greatest measure of justice and equity.

Most of the litigation which NARF undertakes on behalf of Indians begins in the federal district courts. They are the preferred forums when compared to state courts which are considered more hostile to Indians. In state courts, judges are more likely to be unfamiliar with the intricacies of Indian law, and because they are elected to office, more reluctant to rule against majority interests.

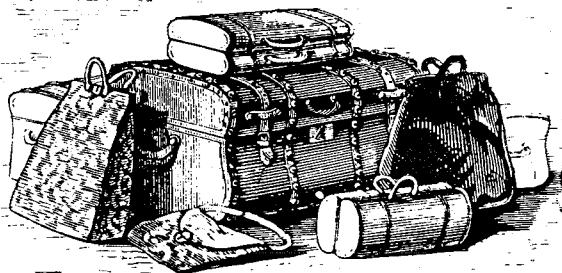
Unfortunately, since NARF began its work some 13 years ago, federal courts have become notoriously overcrowded. Year-long delays are now the rule, rather than the exception. This makes NARF's litigation work especially difficult since, in most instances, NARF clients are the plaintiffs in the litigation and they are suing because something which belongs to them (e.g., land, water, minerals, religious freedom) has been taken by a more powerful adversary. As plaintiffs, both the technical procedural delays available to defendants in the federal judicial system, and the clogged court calendars, work against Indian interests.

The development of a NARF case may be years in the making or only a few short weeks, but once the initial complaint has been filed, an expensive, all-consuming commitment has been made. There are answers to complaints to be drafted, opening briefs and responses to briefs, not to mention the painstaking tedium of discovery. The latter involves long days of finding, preparing, and deposing witnesses, and of both formulating and answering endless interrogatories. Then there is the mind-stretching work of developing new expertise in the areas in which technical testimony will shape the facts and circumstances of the case. It is not enough to hire an expert anthropologist, geologist, or hydrologist, NARF lawyers must know the profession of an expert almost as well as the expert, if they are able to mount an effective case.

... Victories and losses at the district court level are rarely that ... rather they are only temporary gains and setbacks ... indicators of either the opportunities or the difficulties ahead.

The expense of NARF's litigation on behalf of Indians in both human and financial terms cannot be underestimated. It goes beyond the costs of the experts, court reporters, travel expenses, and extensive technical research into areas like fisheries management and mineral extraction. It also includes the invaluable years of professional work life which a NARF lawyer must dedicate to a case.

With few exceptions, going to federal court requires NARF lawyers to pack their bags and fly to other states. And before a NARF case ever goes to trial, a NARF lawyer will likely have made 20 or more trips to court on various procedural and technical motions, as well as to many tribal council meetings, and to the offices of experts where plans for the course of the litigation are discussed and developed.



Preparation for trial means many months of intensive work with witnesses, other counsel, and experts. Then after a year or more of preparation, the time finally comes when the large black salesman briefcases and cartons of files are packed and shipped to the site of the trial. In most of the cases brought by NARF, a trial in federal district court requires a month or more of time because of the complexity of the issues and the interrelationships between various parties. Sometimes a trial happens all at once; sometimes the judge's calendar requires that the trial be broken into shorter segments of a week to ten days.

"NARF has always been good at hiring good people. It has picked and trained the best of the young Indian law graduates, and it has had the good institutional fortune to find experienced non-Indian practitioners to work alongside them. There is no group of lawyers, public or private, practicing any kind of law as well as NARF's lawyers are."

**Former Solicitor General,
U.S. Department of Justice**

Each trial day begins early and ends late, although the actual courtroom time is usually only 9:30 in the morning to 5 in the evening. In the morning, before 9 and in the evening after 5, comes the preparation for that day and the next. The air in the motel room grows stagnant; the wastebasket full of late night snack remnants. It is not until a NARF lawyer has boarded a plane to go home that the extent of the unique fatigue of a long trial can be felt. Acknowledging its presence before then is to put both oneself and one's clients at risk.



When the trial is over there is only a brief respite before the post-trial briefs must be filed. Here the task is to consolidate weeks of testimony into a small, workable whole. It is not an easy task. Then the wait for a decision begins.

It is rare for a federal district court decision to come out before a year after the time the last briefs have been filed. This is particularly true for Indian cases where the laws are more complex and obscure than any other speciality area (including tax), and where judges and their clerks must try to come to grips, often for the first time, with a whole new area of the law.

Because the stakes are always high in NARF's litigation, most of its cases are appealed—either by NARF or the opposing side. Thus, victories and losses at the district court level are rarely that ... rather they are only temporary gains and setbacks ... indicators of either the opportunities or the difficulties ahead. Nonetheless, a favorable decision by a trial court invariably produces shouts and back slapping, jumping in the NARF halls, and congratulatory toasts with cheap champagne in plastic cups.



THE APPELLATE ARENA

"An appeal is when ye ask wan court to show its contempt for another court."

Finley Peter Dunne

The appellate court experience is similar to the district court experience for NARF lawyers in one key respect. Time delays, produced by the current crisis of volume in the federal judiciary, continue to work against Indian interests because while a case is on appeal (whether NARF has won or lost in district court), Indian opponents continue their control over Indian lands, water, minerals, and/or other basic rights.

When a NARF case reaches one of the 12 different circuit courts of appeal, its outcome is determined by a three-judge panel. These three judges may or may not have had any experience with Indian law matters and as a group it is impossible to predict what type of decision their interactive deliberations will produce. Unless it is an "expedited appeal," most appellate circuits rarely hear a case sooner than a year after it is appealed. The long wait requires the irreverence for time which Indian culture has always sustained, but which has not been so well developed in most lawyers.

Filing an appeal and preparing the opening briefs means that NARF lawyers have to select the key issues in their cases and to be constantly alert to the continuous flood of new decisions in the same or other federal courts which may affect their case—either positively or negatively. One lawyer described it as being "like watching out for the other guy late at night on a strip of highway on either side of which are located numerous bars and other public drinking spas." It doesn't pay to take your eyes off the road for a moment.

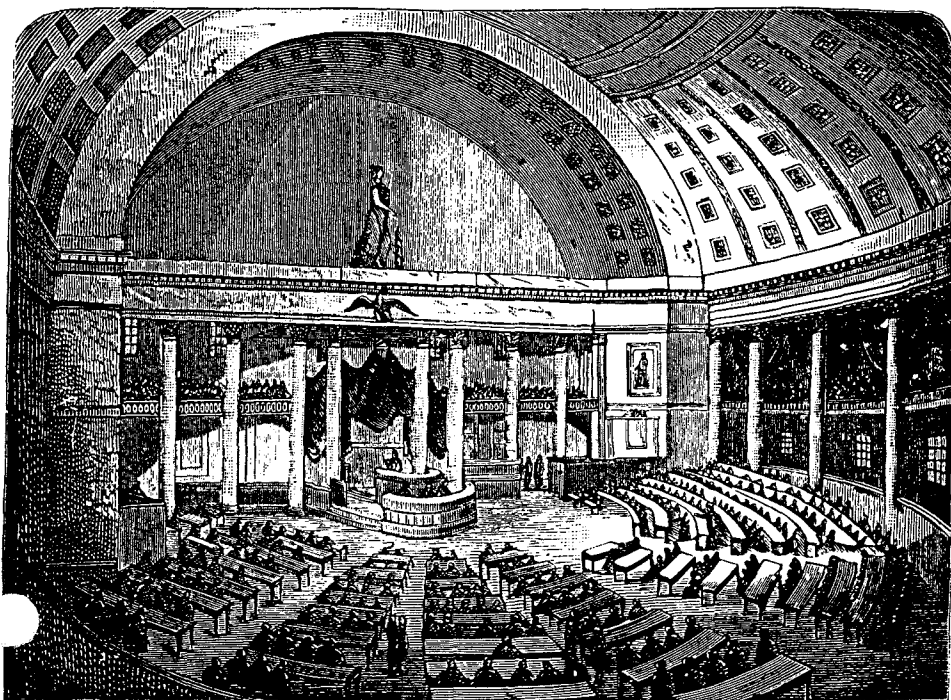
After the briefs have been submitted, the day comes when a NARF lawyer and the three judges meet face to face. This usually occurs in the presence of Indian clients as an appellate argument is a key decision point in their long quest for justice. One of the most remarkable encounters between Indians and the appellate courts took place a few years ago in San Francisco. NARF lawyers came to present arguments on behalf of traditional Hopi leaders who sought an end to the strip mining of Black Mesa, a mountain sacred to the Hopi Tribe.

It had not been easy for the Hopis to place their trust in the courts in the first place, and having lost in the district court, they came cautiously to the steps of the Ninth Circuit Court of Appeals in San Francisco to pray before the argument began inside. As was their custom they sprinkled corn meal on the steps of the courthouse in preparation for the upcoming event. Their colorful dress and their ministrations on the steps produced alarm inside. Extra armed guards were ordered to stand all around the edge of the courtroom as the peaceful Hopi elders, most of whom were 80 or more years of age, entered and took their seats. The only threat they posed was the anxiety their differentness produced in the judges and the court's staff. The argument proceeded as planned. It was all over in an hour and the Hopis left the building to begin the long drive back home to Arizona.

For their part, they were satisfied. They had prayed for a sign from their gods and received it. As they left the court building, it began to snow—a weather-related event which is very rare in San Francisco, which went unpredicted by all the local forecasters.

Most Indian clients find that the appellate process is a two-year waiting process—a year at the beginning and a year at the end. One waits for a hearing and then one waits for a decision. In most instances, NARF's careful advocacy means that the decision is in their favor. The downside of this is that most of NARF's opponents file a petition for rehearing when they lose a appellate court decision. The rehearing process requires another five to nine month wait. The problem for NARF lawyers and their Indian clients is that in the meantime "the mining" goes on.

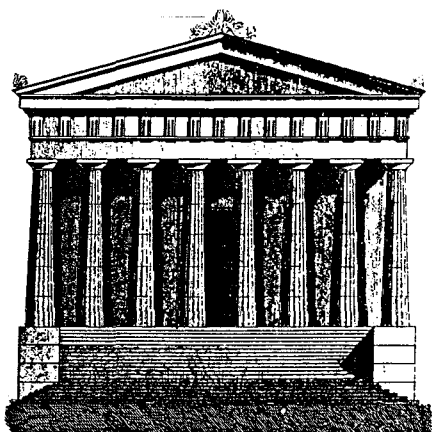
When an appellate decision is handed down the ultimate wait begins. That is, the wait for the Supreme Court to decide whether it will hear the case or not, and, assuming it does, to decide whether the federal district court and appellate courts have decided correctly and, if not, why not.



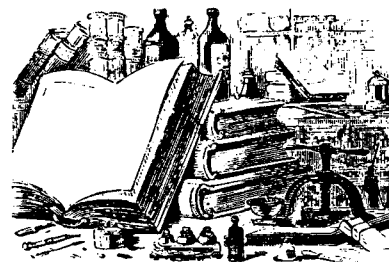
THE ULTIMATE JUDGMENT

"The law itself is on trial in every case, as well as the cause before it."

Justice Harlan F. Stone



An argument before the Supreme Court is the ultimate experience for any lawyer. Only a small fraction of the lawyers admitted to practice in the United States ever make an appearance before the Court. Those practitioners who do reach the top of those marble steps, carry the additional weight of knowing that what they have written (or not written) in their briefs and what they say that day (or don't remember to say) is likely to shape or make law which will affect the lives of not only their clients, but many other Americans. More than any other piece of work that a NARF lawyer may become involved in, those approaching the bench of the Supreme Court know that NARF's institutional reputation, as well as their own professional images are on the line. In every other court or legal arena along the way to this final day, they have realized that there would be another chance or opportunity to plead their client's case. But now they are at the end of the road. They are before the bench of the ultimate court.



During the current term of the Supreme Court, about 5300 lawyers have petitioned the Court asking that their cases be heard. Of these 5300 cases, only 140 have been accepted. One indicator of the importance of NARF's work is the fact that this year, three of its cases are among the 140 being heard . . . a significant percentage for a young 16-lawyer Indian law firm.

When NARF and other lawyers for Indians climb the wide, white granite steps to the Supreme Court to present their final oral arguments, they do so with a sense of awe and its accompanying sense of humility. The lawyers and the Indian clients who accompany them up those steps also feel the special sense of finality, of conclusiveness that the Supreme Court embodies. They have only a few short minutes to summarize ten or more years of legal work.

The external setting of the Supreme Court is grandiose. Like a great marble temple, its scale is august; its appearance one of splendor. Passing the columns and statues of the huge pseudo-classic facade, NARF lawyers and their Indian clients walk a cold marble corridor to the courtroom. Here again, the impression is one of austere pomp—pillars, red velvet hangings, an enormously high ceiling, and friezes carved high on the walls.

The ritual opening of the session adds to the atmosphere of awe. The justices gather in the robing room in back of the red draperies behind the bench. People sitting near the front of the courtroom can hear the hum of their talk. Then a buzzer sounds at the marshal's desk to the right of the bench, the court crier smashes his gavel loudly on the desk, spectators and lawyers rise and the justices file in. As they stand in black ropes at their places, the crier intones the traditional phrases ending: "God save the United States and this honorable court!"

The day for oral argument comes only after the exchange of three rounds of briefs . . . each as carefully crafted as possible—each redrafted and reread as many as ten or eleven times—before being printed and bound in special ways in special colors. Preparation for the argument itself can take weeks or even months.

Then there will have been the ego-painful process of deciding which lawyer of all those involved in a case is best equipped to make the oral argument. Where the cases have been consolidated by the Supreme Court, co-counseled with non-NARF lawyers, or where multiple parties and their lawyers are involved, these decisions take on all the intricacies of a secret tribal ritual. While the Court prefers that only one counsel appear for each side, in Indian cases requests are usually made to divide the time so that at least two lawyers, e.g., one for the federal trustee and one for the tribes, are permitted to speak. Thus, the invaluable minutes before the bench have to be carefully divided among the two or three lawyers who are chosen to make the final arguments. And then argument after argument follows on what exactly should, in fact, be argued.

Other preparations are less taxing. Sometimes new suits are purchased; and some mothers, fathers, spouses, and children, as well as clients, make plans to travel to Washington. Moot courts are staged and terrifying questions are posed by peer lawyers in the last few days before the actual appearance. Certainly, the Supreme Court is the most intellectually challenging arena for a NARF lawyer. Not only are the justices persons of extraordinary talent, intellect and wisdom, but there are nine of them, each capable of approaching the problem being presented from a unique and perhaps unexpected angle.



In more spacious times when the Court heard only a few dozen cases a year, someone like Daniel Webster was allowed to go on for days. And citations of God and country were considered good form. Today, in the midst of the crisis of volume in the federal judiciary, each side is limited to thirty minutes and so a lawyer is well advised to be simple and direct. And, perhaps surprisingly, he or she might well emphasize the facts rather than the law of his or her case. The justices of the Supreme Court, so remote from trials, seem lonesome for concrete details.

Rule thirty-eight (38) (of some fifty-five (55) rules) of the Supreme Court says: "The Court looks with disfavor on any oral argument that is read from a prepared text." Informality, even spontaneity, is preferred, but any lawyer knows that to be effectively spontaneous he or she must be extremely well prepared on his or her case.

Once inside the Court building, the lawyers are ushered to a side hall, past the waiting line of clients, tourists, families, and others holding tickets to observe that day's proceedings. Then the wait for their turn begins. If the other side is presenting its argument first, one has both the advantage and the potentially debilitating disadvantage of seeing the line of questioning being pursued by the various justices. Which ones seem alert and involved? Which ones are reading and ignoring the presenter? What changes should one make to build a better case in response to whatever their opponent or one or another justice has just said?

Then the moment arrives. The podium designed to hold notes and water suddenly seems totally inadequate as a source of comfort and protection. The justices seem taller, more forbidding and the angle from the floor to the bench where they sit seems to pull one's head back at an awkward, pinching angle.

Some lawyers grieve because they are interrupted by a question before they finish their first polished sentence. But others take the interest of a justice as a compliment and are resilient enough to satisfy it. For, as Justice Frankfurter wrote: The Court is "not designed as a dozing audience for the reading of soliloquies, but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view to meeting them."

Thus, it can be expected that one or two minutes into a NARF attorney's carefully crafted and impassioned pleas, will come the first question. After that, any sense of order, of memory, of control is likely to be lost. The argument will then belong to the justices and will be shaped by their inclinations as deciders. Question upon question will fall down from the bench—just as one's mind reaches to respond to a question, another will tumble down. Then the red light will appear. Time will be over.

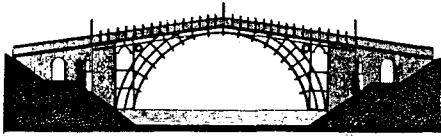
Counsel for both sides will gather their papers, shuffle out. The audience will stir as clients and families move out too. A hushed conference in the hall—"What do you think that question meant?" "It may have signaled his interest in the *res judicata* argument" . . . , etc. There will be furtive glances at the opponents' huddle, then awkward handshakes between members of each side and polite goodbyes. Each group will go off to a more private place to recoup, to a more detailed post-mortem, to pass judgments on themselves, on their opponents, on the justices, and on the future.

When all is said and done, can oral argument really make the difference in a Supreme Court case? Today it is a rare thing for eloquence to win a case, but almost everyone agrees that incompetence can easily lose one. And the justices themselves have said publicly that the shaping of issues in arguments helps to determine the analysis followed by the Court's opinion writer—which for Indians may be as important as the result.

And though oral argument of a case rarely takes more than an hour, those hours come at a critical time. Near the end of each argument week, at their regular conference, the justices cast tentative votes on the cases heard that week. Rarely will they have had much time to study the briefs since the argument. Thus, the oral presentation will be what is freshest in their minds when they decide.



RECENT LEGAL DEVELOPMENTS



Several important Indian law developments have occurred as a result of NARF's work since the last issue of *Announcements* was published. Highlights of some of these developments follow.

Favorable Developments

NEW HOME, HELP, and HOPE for FORGOTTEN KICKAPOOS

The Texas Band of Kickapoo Indians began 1983 with new hope for the future as a result of an act of Congress signed into law on January 8th. The much-awaited legislation means that the Texas Kickapoo, who are among the most traditional of all Indian groups in the country and who suffer some of the worst living conditions, will now be eligible for vital social services available to other federally-recognized Indians.

The new law, which specifically recognizes the Texas Kickapoo as an Indian band, also expedites the citizenship process for those Kickapoo Indians wishing to exercise this option. Most importantly, the bill authorizes 100 acres of land in Maverick County, Texas, to be taken in trust as a land base for the Tribe, with the possibility of additional acres to be added. The Tribe has established the Kickapoo Trust Land Acquisition Committee to raise money to buy the land. The Act also provides for formal clarification of the rights of the Kickapoo to pass and re-pass the United States borders.

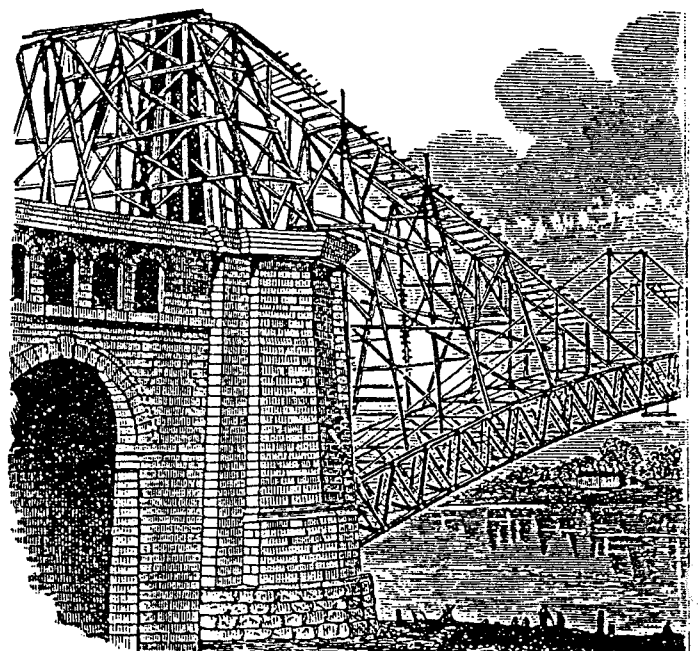
The Kickapoo are a Native American people whose ancestors for centuries farmed, gathered and hunted throughout 18 million acres of present-day Wisconsin, Michigan and Illinois. The Kickapoo were forced to relinquish their homeland in the early 1800's and one band eventually went as far south as Texas and then to Mexico. A part of this Band was later removed to Oklahoma while the remainder of the Band stayed in Mexico. A reservation was established in Oklahoma in 1883 for all Kickapoo, but the reservation was lost in 1893 by an act of Congress that opened surplus tribal lands for settlement despite the Tribe's opposition. As a result, many of the Kickapoo left Oklahoma and those Band members in Mexico continued to remain there. They later migrated back to Texas in the 1940's because of adverse conditions in Mexico and have continued since then to go back and forth across the border.

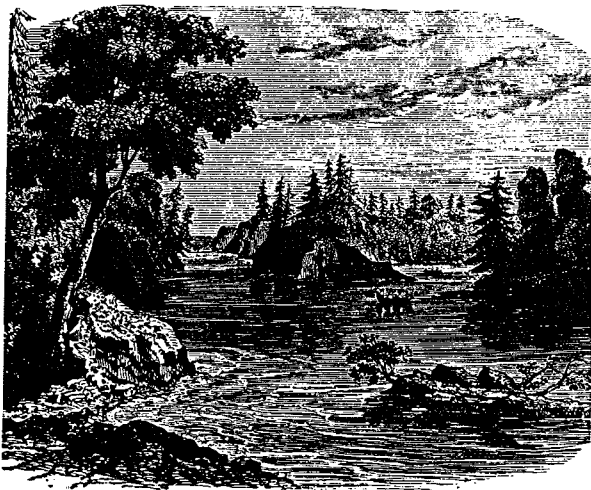
Without any land base, these most traditional of Indian people set up a camp at Eagle Pass, Texas beneath the International Bridge where they live much of the time, returning periodically to Mexico, primarily for religious ceremonies. Until the passage of this Act, some of the members had no legal citizenship either in Mexico or in the United States. Because neither the United States nor Mexico has recognized them or provided them with any assistance, the health and living conditions of the Band declined greatly. The Kickapoo of Texas suffer an extremely high incidence of tuberculosis, diabetes, hypertension and cancer. Many of the children suffer from malnutrition and dehydration.

The Band continues to be profoundly traditional in their adherence to the ancient Kickapoo culture and religion. Most Band members speak no English, relying almost solely on their Algonquin dialect.

NARF provided needed legal expertise and legislative documentation to both the Texas Band of Kickapoo as well as the Oklahoma Kickapoo. NARF then worked for congressional passage of the Kickapoo legislation under the guidance of Congressman Abraham Kazen, who represents the Eagle Pass district, where the Texas Kickapoo reside. Congressmen Morris Udall of Arizona and Douglas Bereuter of Nebraska marshalled the bill through the 97th Congress where it was finally passed in the closing hours of the lame-duck session.

The new law grew out of a complex set of negotiations involving all Bands of Kickapoo, the United States Department of State, the United States Department of the Interior, the Mexican Government and the Inter-American Indian Institute, setting a procedural precedent for resolution of cross-border tribal issues.





HUNTING, FISHING, and TRAPPING RIGHTS PRESERVED FOR KLAMATH TRIBE

The U.S. District Court of Oregon recently upheld claims of the terminated Klamath Indian Tribe that a 1906 cession agreement between the Tribe and the United States did not abrogate their treaty rights to hunt, fish and trap free of state regulation on the 700,000 acres of land ceded in the agreement.

The court, in its opinion, recognized the ongoing use of the ceded area by tribal members and the importance of these treaty rights to the livelihood of the Tribe. The court stated that Congress had neither expressly extinguished the Klamaths' rights, nor had it compensated the Tribe for their loss. Prior to the cession, the 700,000 acres had been excluded from the boundaries of the reservation due to several erroneous government surveys.

This is the first instance of which NARF is aware that a court has upheld tribal rights to continue to hunt, fish and trap on ceded lands.

CONGRESS AND PRESIDENT APPROVE TRIBAL GOVERNMENTAL TAX STATUS ACT

After many years of work by NARF, yet another major piece of Indian legislation was enacted into law during the recent lame duck session of Congress. Known as the "Indian Tribal Governmental Tax Status Act of 1982," the Act generally provides that tribal governments be accorded the same treatment as state and local governments under the Internal Revenue Code. The Act also allows deductions for contributions made to tribes and provides that tribes may issue bonds in certain limited circumstances. The Act is in effect through December 31, 1984.

INDIAN CLAIMS GIVEN REPRIEVE BY CONGRESS UNDER PRESSURE FROM COURTS

"We came to change the agenda . . . We know that we did not have a sufficient enough victory in 1980 to control all dimensions. So, we looked at the situation and we realized that, with the composition of the House of Representatives, there would not be much success. . . . if you're going to be dependent on that crew. . . . We made a determination that we would do it through the budget and the administrative process."

Remarks of Secretary of Interior
James Watt to the 1983 Conservative
Political Action Conference

Congress, acting in the last hour of the 97th Session, has once again extended the deadline for the federal trustee to file pre-1966 damage claims in the courts on behalf of Indians.

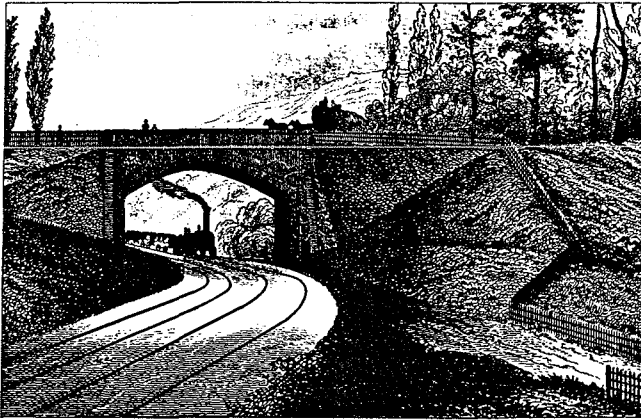
Last fall panic spread among Indians all across the nation as a result of general notices issued in October and November by the Department of the Interior that the federal government would not litigate or propose legislative solutions for the majority of 17,000 Indian claims identified by the Bureau of Indian Affairs. These claims arose from trespasses on Indian land, damages to Indian property and other improper takings of Indian monies and property before 1966.

After the notices were sent, NARF went into the U.S. District Court in Washington with five legal services programs claiming that the federal trustee had failed to evaluate, prosecute, and resolve the majority of the 17,000 claims. NARF argued that the Department of the Interior had also ignored a congressional mandate to submit proposals for legislative resolution of claims unsuitable for litigation. Instead, the Reagan Administration planned to allow thousands of claims to die a quiet death with the running of the statute of limitations on December 31 without proper notice to potential individual Indian claimants, the majority of whom were without the resources to file claims on their own behalf.

In a strongly-worded ruling, Judge Howard Corcoran wrote:

"The government's wholesale disposition of thousands of claims . . . after more than 10 years and countless dollars have been spent identifying and evaluating pre-1966 Indian claims does not comport with the (federal) statute" (regarding Indian claims).

Judge Corcoran's opinion effectively neutralized the Administration's previously vehement opposition to an extension of the statute of limitations, and both Houses of Congress reached an extension agreement before the Christmas adjournment.



WALKER RIVER TRIBE WINS RIGHT TO CONTROL ITS LAND

The Southern Pacific Railroad cannot maintain its railroad across the Walker River Indian Reservation in Nevada unless the Tribe consents. This is the holding in a recent decision rendered by the federal Ninth Circuit Court of Appeals and reverses an earlier lower court opinion.

Southern Pacific has operated the railroad across the Walker River Indian Reservation for over 100 years. In a 1976 court decision it was ruled that no valid right-of-way for the railway was ever obtained from the Tribe. In order to continue the operation of the railway, Southern Pacific sought a right-of-way from the Bureau of Indian Affairs under an 1899 Act of Congress, but it did not obtain the Tribe's consent. The Court's recent decision establishes that tribal consent is a reasonable requirement to the granting of railroad rights-of-way under the 1899 Act.

Elvin Willie, Chairman of the Walker River Paiute Tribe said:

"This is a significant victory for Indian self-determination and the right of Indian tribes to control their own lands. The Court's decision will allow the Walker River Tribe to decide for itself how the lands involved can best be used for the benefit of the Tribe."

APPELLATE COURT PROTECTS MISSION INDIANS' INTEREST IN WATER PROJECT

The Ninth Circuit Court of Appeals recently reversed a Federal Energy Regulatory Commission (FERC) decision to renew a license for an 87-year-old water project which diverts water around the lands of five Mission Bands of Indians in Southern California.

The project is currently operated by the Escondido Mutual Water Company, the City of Escondido and the Vista Irrigation District of California. Their petition to the Ninth Circuit for a rehearing was denied on March 17.

The Court held that contrary to the Commission's decision, conditions imposed by the Secretary of the Interior for protection of Indian interests had to be recognized by FERC for inclusion in the license.

Most importantly, the Court ruled that the Federal Power Act does not provide authority for locating project works on Indian lands without the consent of affected Indian tribes.

NARF believes this is a major step toward achieving full recognition of the Bands' rights in the operation of this project which has adversely affected their lands for so long. At the present one can drive through the area in which the project operates and immediately tell which are Indian and which are non-Indian lands. Non-Indian land is irrigated and covered with groves of avocado and other fruit trees; the Indian lands remain dry and barren.

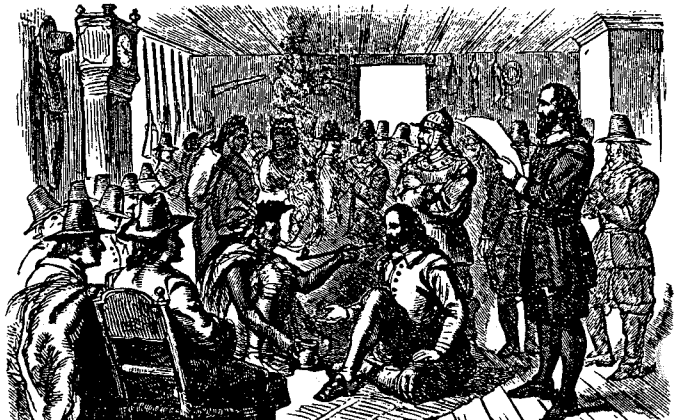
ONEIDAS WIN PERMISSION TO PURSUE LAND CLAIMS IN NEW YORK STATE

The right of Oneida Indians of New York, Wisconsin and Canada to pursue a 5.5 million acre land claim in the State of New York was recently upheld by the Second Circuit Court of Appeals. The Oneidas' suit, which was filed in 1979, challenges the validity of two state treaties under which Indian lands were transferred and subsequently lost.

The case is the first suit to challenge the loss of Indian land prior to the adoption of the Constitution. The State of New York had entered into treaties with the Oneidas in 1785 and 1788 under which New York acquired large amounts of Indian lands, but the Indians thought the treaties were meant to preserve and protect their lands. While over 60,000 individual landowners, as well as the state, trace their land titles to these early treaties, the federal government never consented to the treaties nor the resulting transfer of land. The Articles of Confederation, an early proclamation of the Continental Congress, and a 1784 treaty between the Oneidas and the federal government established a special relationship between them which imposed an obligation on the government to protect Indian lands.

With the recent favorable appellate ruling, the Oneidas are now able to go back to the district court in New York for a trial on the basic land claim.

For the Tribes involved, the decision means that finally there is the opportunity for due process for Indian rights and new hope that this country will live up to its long-standing treaties.



Adverse Developments

BLACKFEET TRIBE'S OIL and GAS ROYALTY INCOME SUBJECT TO STATE TAXATION

The Ninth Circuit Court of Appeals recently ruled that Montana can tax the Blackfeet Tribe's oil and gas royalty interests for leases made pursuant to the 1938 Mineral Leasing Act. The Court held that such taxation is authorized by a 1924 act, which NARF had argued was repealed by the 1938 Act. A petition for rehearing by the Ninth Circuit is pending.

SUPREME COURT RULES 5 to 3 AGAINST ADDITIONAL WATER FOR ARIZONA and CALIFORNIA TRIBES

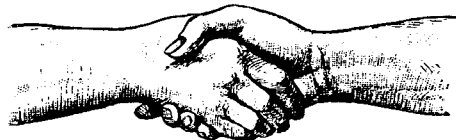
On March 28th, the United States Supreme Court issued its long awaited opinion in *Arizona v. California* and ruled against Indian tribal claims to additional water from the Colorado River. Five tribes, the Ft. Mohave, Colorado River, Chemehuevi, Cocopah and Ft. Yuma, had sought to reopen a 1964 Supreme Court decree in order to claim water for lands which were not considered in the initial proceeding.

The case was originally filed in the Supreme Court because it involved a suit by one state against another. In the proceeding to reopen the decree, a Special Master (Judge Elbert Parr Tuttle) was appointed by the Supreme Court to hear the evidence and arguments of the tribes and to report his findings to the Court so that it could make a final decision. Judge Tuttle had recommended that an additional 200,000 acre feet of Colorado River water be allocated to the tribes for lands not considered in the original decree.

Justice White, writing for the five-member majority, found that the principles of finality precluded the reconsideration of the tribal allocations. The three dissenting justices felt that the "manifest injustice" to the Tribes of an improper allocation fully justified modifying the 1964 decree. Justice Brennan, writing for Justices Blackman and Stevens also argued that the impact on the States of recognizing the additional rights today would be no different than if those rights were recognized in 1964.

Unfortunately, the language of the majority opinion will make it difficult for those tribes with existing water rights decrees to undo the past mistakes of the federal trustee. The Supreme Court, however, did leave open the narrow question of the effect on existing decrees of a demonstrated conflict of interest in which the federal trustee may have sacrificed tribal interests for other federal interests and the affected tribe was not represented. That question will be addressed later in the term when the Court resolves the Pyramid Lake Paiute case, *Nevada v. United States*.

NATIONAL SUPPORT COMMITTEE



The Native American Rights Fund is honored to introduce five new members of our National Support Committee. The Committee was established in 1980 and now has a membership of 23 nationally and internationally known people in the arts, politics, literature, and other areas of public service. Members provide invaluable assistance to NARF in its fund raising and public information efforts. Their support is of increasing importance to NARF in its work to build a stable base of support for the future. Introductory sketches of the five members follow.



Studs Terkel is a nationally acclaimed author, columnist, lecturer and radio interviewer. Mr. Terkel has been heard for over 25 years on Chicago's fine arts radio station, WFMT, where he hosts a nationally-acclaimed, syndicated program, "The Studs Terkel Show." The Peabody-Award program features interviews, discussions and readings as well as musical and dramatic presentations and documentaries. His best selling publications include: *Division Street: America*; *Hard*

Times: An Oral History of the Great Depression in America; *Working*; *Talking to Myself: A Memoir of My Times*; and *American Dreams: Lost and Found*. Mr. Terkel is the recipient of the Illinois Governor's Award for the Arts, the Clarence Darrow Commemorative Award, and has been cited by the Friends of Literature for his "unique contribution to the cultural life of Chicago."



Jamake Highwater was born in Montana of Blackfeet-Cherokee descent, raised in California, and now resides in Europe and Africa as well as the United States. The author of numerous award-winning literary pieces, his published works include *Journey to the Sky*; *Anpao: An American Indian Odyssey* (Winner of the 1978 Newbery Honor Award); *Many Smokes, Many Moons: A Chronology of Indian History Through Indian Art*; *The Suns, He Dies*; *Song from the Earth: North American*

Indian Paintings; and *The Sweet Grass Lives On: Fifty Contemporary North American Indian Artists*. Other titles deal with Indian dance, folklore, music, history and fiction. Mr. Highwater's upcoming books include the *Ghost Horse Trilogy*, consisting of *Legend Days*, *I Wear the Morning Star*, and *Kill Hole*. Besides his writing, Mr. Highwater lectures nationwide and is active in numerous literary, civic and welfare organizations throughout the United States.



Ruth Thompson of Connecticut has been at the forefront of issues involving Native Americans for several decades. Her support, financial and otherwise, of NARF's work on major issues such as the Maine Indian Settlement Act, has made a significant difference to our Indian constituents. Miss Thompson's interest in American Indians began with her work on the Navajo Reservation in a literacy program in the 1940s. She also participated as one of the first board members

for the fund raising arm of the National Congress of American Indians. Later she worked in San Carlos and for the Save-the-Children on the Papago Reservation in Arizona. Ruth Thompson's participation with us on behalf of Native Americans throughout the United States is greatly appreciated.



Carole Bourdo is one of our nation's outstanding Indian artists. Of Blackfeet ancestry, she is best known for her compelling illustrations of wildlife, Native Americans, and the pioneers who came West. Miss Bourdo's interest in art began in kindergarten and has been her first love and life's work since that time. Her works have been shown in museums and art galleries throughout the country. She is listed in the 1981-82 Edition of *American Artists of Reknown*.



Congressman Ted Weiss, Democrat, New York, was first elected to the House of Representatives in 1977. He has been reelected by a wide margin three times since then. He is well known for his active work on behalf of liberal reforms and civil rights. Born in Hungary in 1927, Congressman Weiss fled to the United States with his mother and sister in 1938. He served in the United States Army after graduation from high school and then earned his undergraduate and law degrees from Syracuse University of New York. Prior to his election to Congress, he served as Assistant District Attorney of New York County (1955-1959) and as member of the New York City Council (1962-1977).

Staff Changes

Jeanette Wolfley and Kim Jerome Gottschalk recently joined NARF as new staff attorneys. Jeanette, of Navajo/Shoshone-Bannock descent, is a recent graduate of the University of New Mexico Law School and past president of the American Indian Law Students' Association. Kim was formerly with the firm of Fettinger and Bloom in Alamogordo, New Mexico, and worked extensively on behalf of the nearby Mescalero Apache Tribe. Rick Collins has resigned to accept a full-time law professorship at the University of Colorado Law School, but he will continue to be associated with NARF on an of-counsel basis. In the Washington office, Lare Aschenbrenner has departed for a position as Deputy Attorney General with the Navajo Nation.



NARF PUBLICATIONS and RESOURCES

The National Indian Law Library

The National Indian Law Library (NILL) is a repository and clearinghouse for materials on Indian law. It was established by NARF in 1972 in response to a growing demand for materials on Indian law and is a major part of meeting NARF's commitment to the development of Indian law.

The NILL Catalogue. The library disseminates information on its holdings primarily through its *National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources*. The *NILL Catalogue* is designed for those who would like to know what is available in any particular area of Indian law and to be able to request materials. In addition to a comprehensive Subject Index of 400 headings and subheadings, the *Catalogue* includes a Table of Cases, an Author-Title Index, and is supplemented periodically.

Indian Rights Manuals

A Manual For Protecting Indian Natural Resources. Designed for lawyers who represent Indian tribes or tribal members in natural resource protection matters, the focus of this manual is on the protection of fish, game, water, timber, minerals, grazing lands and archeological and religious sites. Part I discusses the application of federal and common law to protect Indian natural resources. Part II consists of practice pointers: questions to ask when analyzing resource protection issues; strategy considerations; and the effective use of lay advocates in resource protection (151 pgs., Price: \$25).

A Manual On Tribal Regulatory Systems. Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which comport with federal and tribal law, this manual provides an introduction to the law of civil regulation and a checklist of general considerations in developing and implementing tribal regulatory schemes. It highlights those laws, legal principles and unsettled issues which should be considered by tribes and their attorneys in developing civil ordinances, irrespective of the particular subject matter to be regulated (110 pgs., Price: \$25).

A Self-Help Manual For Indian Economic Development. This manual is designed to help Indian tribes and organizations on approaches to economic development which can ensure participation, control, ownership and benefits to Indians. Emphasizing the differences between tribal economic development and private business development, the manual discusses the task of developing reservation economies from the Indian perspective. It focuses on some of the major issues that need to be resolved in economic development and identifies options available to tribes. The manual begins with a general economic development perspective for Indian reservations: how to identify opportunities, and how to organize the internal tribal structure to best plan and pursue economic development of the reservation. Other chapters deal with more specific issues that relate to the development of businesses undertaken by tribal government, tribal members and by these groups with outsiders (Approx. 300 pgs., Price: \$35).

Handbook of Federal Indian Education Laws. This handbook discusses provisions of major federal Indian education programs in terms of the legislative history, historic problems in implementation and current issues in this radically-changing field (130 pgs., Price: \$15).

Films and Reports

"Indian Rights, Indian Law." This is a film documentary, produced by the Ford Foundation, focusing on NARF, its staff and certain NARF casework. The hour-long film is rented from: Association Films, Ford Foundation Film, 866 Third Ave., New York, New York 10022 (212/935-4210. (16mm, FF110 - \$50.00.)

ANNUAL REPORT. This is NARF's major report on its program and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations and to others upon request.





Special Thanks for Gift from Pamunkey Tribe

The Native American Rights Fund would like to express special appreciation to the Pamunkey Tribe of Virginia for its recent gift of \$10,000. Pamunkey Chief Tecumseh Cook stated: "NARF's work has had a tremendous impact on Indian rights all over the country and we hope this will continue." The Pamunkey gift, along with recent contributions from the Passamaquoddy and Penobscot tribes of Maine, represents an increasing awareness by tribal governments of the importance of NARF's role in Indian rights and a commitment by these tribes to help assure the continuation of NARF's legal assistance for other tribes.

OTU'HAN

OTU'HAN, a Lakota word meaning "giveaway," describes the age-old Sioux custom of giving gifts in the names of those they wish to honor. The Native American Rights Fund has developed the **OTU'HAN** Memorial Program to encourage our donors to continue this fine tradition by recognizing and honoring friends and loved ones through memorial gifts to NARF.

We have been pleased to receive recent contributions in memory of :

- *Frank Harjo*—from Judge and Mrs. Fred Freedman.
- *Tom Echohawk*—from Lucille Echohawk, Sanky Perlowin, Jane Canning, Jerry Straus, Colleen K. Garnsey, Katrina McCormick Barnes and Ellen Van Ness.
- *Susan Billie Wolf*—from Susan Eppley.

We have also received several contributions from donors who have chosen to honor a friend or relative on a special occasion.

Planned Giving Program

NARF has recently initiated a planned giving program and can offer information and assistance to donors who would like to consider making a substantial contribution to the Native American Rights Fund, especially through a will. Planned gifts often provide substantial tax savings to the donor as well as the personal satisfaction which comes from assuring the financial future of one's favorite charity.

With the generous support of CBS, Inc. and the Norman Foundation, NARF has been able to add to its staff a Planned Giving Coordinator—Marilyn Pourier. She has special training in planned giving and can provide assistance to donors on making wills and major lifetime gifts. Our development staff can also give specific suggestions for major gifts that will not affect one's current income. Transfers of insurance, real estate, appreciated stock and other valuables might all be considered as possibilities for a life-time charitable contribution.

For further information contact Marilyn Pourier at 303/447-8760 or write her for more information at NARF's Boulder offices 1506 Broadway, Boulder, Colorado 80302. All inquiries will be held in strict confidence.

