ORIGINAL

In the

Supreme Court of the United States

ROY TIBBALS WILSON, ET AL.,

Petitioners

v. No. 78-160

OMAHA INDIAN TRIBE, ET AL.,

Respondent

and

IOWA, ET AL.,

Petitioners

v. No. 78-161

OMAHA INDIAN TRIBE, ET AL.,

Respondent

Washington, D. C.
March 21, 1979

Pages 1 thru 67

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The above-entitled matter came on for argument at 11:19 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGODD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDSON SMITH, ESQ., Omaha, Nebraska
on behalf of Petitioner Roy Tibbals Wilson, et al

(continued)

GEORGE BENNETT CULLISON, JR. ESQ.
Harlan, Iowa, on behalf of
Petitioner Iowa, et. al.
WILLIAM H. VEEDER, ESQ.,
Washington, D. C., on behalf
of Respondent Omaha Indian Tribe

MRS. SARA S. BEALE, Office of the Solicitor
General, Department of Justice, Washington,
D. C., on behalf of Respondent United States

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We are ready, Mr. Smith.

ORAL ARGUMENT OF EDSON SMITH

ON BEHALF OF THE PETITIONERS

MR. SMITH: Mr. Chief Justice, and may it please the Court: This suit amounts to a suit to quiet title to about 2900 acres of land lying on the east bank of the Missouri River, in Iowa, about 30 miles south of Sioux City.

The Plaintiffs are the Omaha Indian Tribe and the United States, as trustee for the Tribe. They are respondents here.

The Defendants are the record title holders of the land. They are counter claimants. They are three individuals a corporation in the State of Iowa, and they are the Petitioners here.

I represent Mr. Wilson and others. Mr. Cullison will speak for the State of Iowa.

Directly west of this area, across the river in Nebraska, is the Omaha Indian Reservation. It was established there pursuant to a Treaty of 1854, with the River as its boundary.

QUESTION: Mr. Smith, I was a little confused just in connection with what you are telling us now about the factual situation, by the State of Iowa Petitioners Reply Brief, here on March 17th, under the Conclusion: "Within living memory the land in issue has always been on

the west bank of the Missouri River within the State of Iowa."

MR. SMITH: It should be east. That's a typographical error.

QUESTION: Shouldn't it?

MR. SMITH: It should be east. It has been on the east bank for 48 years at least, and some of it for 85 years.

When the Reservation was surveyed in 1867 by T. H. Barrett for the General Land Office, this area of latitude and longitude, or under the sky, as I sometimes say, it was occupied by a kind of peninsula extending eastward from Nebraska toward Iowa, between the upper and lower limbs of the Blackbird Bend, and so much of it, at least, as was above the ordinary high water mark--

QUESTION: Is there a helpful drawing in these papers?

MR. SMITH: Yes, on the back of the white Appendix there is a drawing, a map of the area, which shows the present river. It shows the Iowa and Nebraska State boundary which was fixed by compact between the States in 1943. It shows the retracement of the Barrett meander of the Nebraska shore of this peninsula of 1867.

QUESTION: You say that's where? There are several drawings.

MR. SMITH: That's right, but the one I am referring

to is on the back cover -- attached to the back cover.

QUESTION: That is the Appendix of the Petition for a Writ of Certiorari?

MR. SMITH: Yes.

QUESTION: Filed here July 28th?

MR. SMITH: That is correct, Your Honor.

QUESTION: That will be most helpful.

MR. SMITH: Yes. Actually, there are copies of the same map in several other places in briefs and so forth, but that's the one I have referred to.

The irregular line there which is north, east and south of the retracement of the Barrety survey line is the Iowa High Bank. Inside that Barrett survey retracement, bounded on the west by the Iowa and Nebraska State boundary and on the other side by the retracement is what we call in this case the Barrett survey area. And it's part of the larger lowland area, so bounded on the west by the State boundary. The other side by the Iowa high bank, which is Blackbird Bend.

The Plaintiffs in this case, the State -- I mean the United States as Trustee for the Tribe and the Omaha Tribe claim that this land now on the Iowa bank of the River is there by reason of the avulsive actions of the River, and that it's part of the Reservation.

The Defendant State of Iowa claims part of it as sweeping to the bed of the River, the part of the bed owned

by the State, and Iowa and the other Defendants claim the rest of it as accretion to Iowa riparian land. As between Iowa and the Defendants Lakin, Wilson and R. G. P. Incorporated, any conflicting claims were settled by those Defendants giving Iowa quit claim deeds to the land Iowa now claims, and Iowa consenting to decrees--

QUESTION: What part does Iowa claim?

MR. SMITH: It shows on the map I referred to, Your Honor.

QUESTION: You say it claims part of the bed of the old River -- the old bed?

MR. SMITH: Yes, Iowa claims part of this land as accretion to the east half of the bed of the River Iowa owned. And the rest of it is claimed by Iowa and the other Defendants as accretion to Iowa riparian land. Actually, the other Defendants claim through Iowa and Iowa claims through the other Defendants also by reason of quit claim deeds to Iowa and the quiet title action decrees in favor of those other Defendants.

The District Court placed the burden of proof upon the Plaintiffs to prove their complaints and upon the Defendants to prove their counterclaims. The Court found that the Plaintiffs had failed to sustain their burden but that the Defendants had proved that this land is accretion to Iowa riparian land and, accordingly, the District Court quieted title in the Defendants.

QUESTION: Applying what law?

MR. SMITH: Applying -- the District Court held the law of Nebraska is applicable. But I think it should be the law of Iowa.

QUESTION: But the statement was somewhat more favorable to the Tribe than would have been the law of Iowa, correct?

MR. SMITH: Yes.

QUESTION: The presumption is definitely in favor of accretion in Iowa, and Nebraska really hasn't passed on that question.

MR. SMITH: The Eighth Circuit reversed the District Court and said that -- directed a decree quieting title in Plaintiffs in so much of this Barrett survey area as was trust land, the Eighth Circuit held that the evidence did not prove either avulsion or accretion, but that the evidence was conjectural, and the trial court's decree to speculative to sustain the Defendants' burden under Section 194, 25 United States Code, which purports to put the burden of proof on the white person in a trial about the right of property where an Indian is a party on the other side.

The Court's decision in that respect was further influenced by its decision to apply Federal rather than State common law of accretion and avulsion and by its peculiar version of State common law under which there may be an

avulsion without any fast--

QUESTION: You mean a peculiar version of Federal law?

MR. SMITH: Yes. That's right. Did I say State?

QUESTION: Yes.

MR. SMITH: I'm sorry. Federal law, yes. It's a peculiar version of Federal law under which it is not necessary in order to have an avulsion that there be any fast land severed from the bank of the river and becoming attached to the other, and that there may be an avulsion within the bed of the river where the thalweg of the river moves over or around a piece of shore or a sandbar. And that it's not necessary in order to have an avulsion that the river abandon its old bed and seek a new one. It all happens in the bed.

Wilson's Petition for Certiorari listed five questions for review. This Court granted certiorari but limited it to two of those questions. First, whether the Court of Appeals erred in so construing Section 194 to make it applicable in this case and, second, whether the Court of Appeals erred in applying Federal rather than State common law of accretion and avulsion in this case.

I intend to cover the first point of the construction of Section 194 and Mr. Cullison will devote his attention to the question of the State or Federal law.

There are five groups of words--

QUESTION: I take it then if it were decided that, assuming Federal law applies, we don't have an issue here as to whether the Court of Appeals correctly viewed the Federal law of avulsion.

MR. SMITH: You didn't grant certiorari on that point, Your Honor.

QUESTION: Thank you.

MR. SMITH: We wished you would, but we were disappointed.

There are just those two questions, Your Honor.

QUESTION: Yes.

MR. SMITH: In Section 194, you will find five groups of words that are misconstrued, we say. Incidentally, Section 194 is printed on page 2 of the Wilson principal brief. It's part of the 1834 Indian non-intercouse, which is printed in full in the buff-colored Appendix, beginning at page 190, with Section 22, which is the present Section 194, printed at page 199.

The first group of words that calls for construction are "an Indian:, "the Indian and himself", referring to an Indian. The court of Appeals construed "an Indian" to mean an Indian Tribe. But it takes more than one Indian to make a tribe.

The United States sues in this case as Trustee for the Omaha Tribe, not for its individual members. The

Omaha Tribe is a corporation. It's a legal entity, separate and distinct from its members. It sues for itself, not for its members. It claims this land as tribal land.

That Congress knew how to describe Indians separate from Tribes, where it wanted a section to apply to the Indians and not to the Tribe, to describe Tribes separately from the Indians, where it wanted the section to apply to Tribes and not Indians, then it described both at the same time when it wanted a section to apply to both, it is perfectly apparent from the 30 sections of this 1834 Act. Where it wanted them to apply to both, it used the appropriate language such as, "any Indian or Indian Tribe". It used that expression a number of times.

Section 194 makes its first appearance on the statute books in the 1822 Indian Non-Intercourse Act, but there the difference was that the plural was used "Indians". That was changed to singular in the 1834 Act. If, by any stretch of the imagination "Indians" plural could be construed to include an Indian Tribe, certainly changing that to singular would preclude any such option.

QUESTION: Actually, in the 1822 enactment, in Section 4, when you go back sto statutes-at-large, it's used in the plural in the first sentence, or first clause, and the singular in the second clause.

MR. SMITH: That's correct, Your Honor.

The opposition says that this change was a mere change to correct syntax and make it the same in both places. But, if they wanted to correct the syntax and make it mean plural, they could just as well have changed the later word there from plural to singular, and that would have had the same effect. Congress chose to change the plural to singular rather than change the singular to plural.

QUESTION: Mr. Smith, is it your view that if a husband and wife who are joint tenants of property Indian would not have the benefit of the statute if they both brought suit?

MR. SMITH: No, that's not my view, Your Honor. If there is two individual Indians suing one white person, the statute, on its face, would apply.

QUESTION: What if there are three? How do we distinguish between singular and plural then? That's not too many; is that it? Once you can see that, you can see--

MR. SMITH: If each one is suing for itself; but if it's an organized group--

QUESTION: That's a different point.

MR. SMITH: That's a different point though.

QUESTION: Then I think you really are abandoning the point that the singular is of any significance. You're saying there's a difference between the word "Indians"--

MR. SMITH: I don't think the plural could be

construed to mean a tribe.

QUESTION: But shouldn't we read this, at least, as covering plural Indians, and not place so much emphasis on "an Indian"?

MR. SMITH: Each individual Indian--

QUESTION: I'm not saying you're giving your case away, but I just wonder if the singular is significant, rather than the fact it refers to "Indians" rather than "Indian Tribes"?

MR. SMITH: Well, as I say, I don't think even in the 1822 Act, I don't think that could properly be construed to include a tribe, where the plural is used. But, as I say, if by any stretch of the imagination it could be, certainly when it was changed to the singular it would be even less possible to construe it as a tribe.

QUESTION: What if instead of a tribe suing, one tribal member sued on behalf of the class of Indians who belong to the tribe? How would you handle that?

MR. SMITH: Well, if it's a matter of the individual right, why I would say one could sue for the class. But here, as I pointed out, this is not a suit brought for individual Indians by the tribe, it's a suit brought by the tribe for itself, and involving tribal land, not a lot of Indian lands. And, certainly, "an Indian", as I said, it takes more than one Indian to make a tribe.

In 1834, the Courts were holding that tribes could not sue or be sued in Federal court; and that might be one reason why Congress didn't give the tribes the burden of proof advantage that Section 194 purports to give to individual Indians. Why give a burden of proof advantage to a party that couldn't come into court.

The next group of words that I want to talk about are "white person". According to the dictionary, a white person is a member of the Caucasian race. But the appropriate Defendant here is not a Caucasian; in the State of Iowa he is not a Caucasian. The individual, as to the individuals, there is no evidence in the record as to what their color or what their race is. Here again, the language of the 30 sections of the 1834 Act demonstrates that Congress knew how to describe non-Indians. Incidentally, the Court of Appeals has construed "white person" to mean all non-Indians. But where Congress wanted to describe all "non-Indians", it used such expressions as "any person other than an Indian."

In Section 16 of the 1834 Act, the word "white person" is used. And, with respect to that section, this Court held in United States vs. Perryman, in 1880, that "white person" does not mean all non-Indians, and it does not include a Negro.

The trial judge held that Section 194 would not be applicable in this case because, in

order to trigger its application, the Indian must first make a showing of pre-possession or ownership of the land involved. And that if the Indian could show previous possession or ownership, he would be showing an avulsion, and if he made that proof, he wouldn't have to have Section 194 because he had already proved his case.

The trial judge held that this land was accretion to the Iowa riparian land and, as such, that it was not the same land that the Indian owned or possessed in 1867. It was new and different land, deposited against the Iowa bank by the river by bringing down alluvium from the north and dropping it there.

QUESTION: Isn't that a fundamental reason why the statutory presumption is inequitable to this case even if it otherwise would be? Because in order to invoke it, the Indian or Indians must show against a "white person" previous possession or ownership. And doesn't that assume the answer to the issue in this case?

MR. SMITH: It does. The Court of Appeals simply begged the question. It assumed--

QUESTION: Well, isn't that correct, regardless of your argument as to the meaning of the statutory presumption?

MR. SMITH: Yes, that's right, Your Honor. I have listed here five different groups of words that call for construction.

QUESTION: Um-hum.

MR. SMITH: If the Court of Appeals is wrong in any one of those five, it would return the burden of proof to where the trial court put it on each party to prove his own case.

QUESTION: Um-hum.

MR. SMITH: The final clause of the section is one that calls for construction. It reads, "Whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership," the Court of Appeals construed that to mean that the Indian does make out a presumption of title in himself if he shows previous possession or ownership.

QUESTION: Well, if he shows previous possession or ownership, the under the circumstances of this case, the change must have been an avulsive change, and the Indians win regardless of any presumption. Is that correct?

MR. SMITH: Uh--

QUESTION: Under the law of Nebraska, Iowa--

MR. SMITH: If he shows (inaudible) if it is an avulsion, yes.

QUESTION: Yes, that's the end of it.

MR. SMITH: Yeah.

QUESTION: But doesn't that turn on whether one takes the "under the sky" approach to the land or decide first whether there's accretion and avulsion? You talk about

under the sky, meets and bounds by latitude and longitude--

MR. SMITH: In that case--

QUESTION: You could make out a prima facie case of that, couldn't you?

MR. SMITH: With reference to under the sky--

QUESTION: If you measured it by latitude and longitude, or under the sky, how ever you phrased it, they did demonstrate inland satisfaction that this area was at one time within the Reservation.

MR. SMITH: That the area under the sky--

QUESTION: Yes.

MR. SMITH: --but not the present land.

QUESTION: Isn't that an issue you have to decide in reading this statute -- does it mean presumptionof title to the area under the sky or do you mean to resolve the accretion and avulsion dispute first?

MR. SMITH: It doesn't say "area under the sky." The statute says--

QUESTION: Doesn't say anything.

MR. SMITH: --previous ownership or possession.

QUESTION: Of what?

MR. SMITH: Of the land in controversy.

QUESTION: If it was accreted land, the land didn't exist until the accretion.

MR. SMITH: That's right.

QUESTION: Does the word "land" appear in Section 22? I don't find it.

MR. SMITH: Well, it says "property" -- "all trials with respect to property."

QUESTION: And the implication--

MR. SMITH: This particular area on the surface of the earth at one time did belong to the Indians.

QUESTION: This particular area, yes, but not the property that's in that particular area now.

MR. SMITH: Depending upon how one construes the word "property" within the meaning of Section 22. That's the issue one must decide, as I understand it.

QUESTION: Well, if it's this property then that's one thing, but if it is other property formerly occupying that area under the sky, that's something else again.

MR. SMIHT: But the point I was about to make with regard to that clause is that, even assuming that it's the same property, the Court of Appeals here assumed that the Indian would make out a presumption of present title simply by showing previous possession or ownership. What I am saying is that that doesn't follow because "whenever" doesn't mean "always". And "whenever" calls into application here the presumption of a continuance of the existence of a condition or state of fact. And that is a presumption that is not applied in all cases but only where the circumstances are such

as to show the likelihood of the continuation of that state of facts or condition. And, in this case, the circumstances are such the Indian couldn't possibly make out a presumption of ownership because the land has been on the Iowa side of the river for 48 to 85 years. The Defendants and their predecessors of title have been in possession of it for at least 40 years, and they cultivated it, levelled it. They have cleared it of trees, and they have put in roads and culverts. They have had such possession as to give them title by adverse possession four times over because the Statute of Limitations of Iowa and Nebraska both are 10 years, if those statutes apply. If they don't apply, there is still that strong presumption, which would be the basis of application of those statutes treated thereby. Under those circumstances the Indians could not make out a presumption of title it itself.

Finally, the words "burden of proof" themselves call for construction. That is an ambiguous term that has two meanings. It may mean burden of going forward with evidence. It may mean risk of non-persuasion.

The Court of Appeals construed it to mean risk of non-persuasion. And that so interpreted, it makes out of Section 194 an invidious racial discrimination, and takes the white person's property and gives it to the Indian solely on the basis of race. Construing it, however, the burden of

going forward with the evidence, it has no such devastating effect on the white person's rights, and such a construction could save the Constitutionality of this statute, for whatever that was worth.

QUESTION: Of course, under your construction of the statute, the presumption statute, its Constitutionality would be very dubious, wouldn't it, because it would be discriminating -- if it were held that discrimination -- fairly new in Indians -- at the expense of non-Indians does not violate the equal protection clause of the Fourteenth Amendment, at least in content.

MR. SMITH: Disfavoring white people at the expense of everybody else, Negroes and everybody else, would raise serious constitutional questions under the equal protection clause of the Fourteenth Amendment, wouldn't it?

MR. SMITH: It certainly does, Your Honor. Of course, we--

QUESTION: As a discrimination, the differentiation between Indians and non-Indians would not.

MR. SMITH: Well, I think discrimination between Indians and non-Indians of this sort would still be an invidious discrimination.

QUESTION: Well, but you say the term "white person" doesn't mean "non-Indian". It means what it says "white person", and that would invoke serious constitutional doubts,

if that were correct, wouldn't it? Because that means you are discriminating against white persons in favor of not only Indians but Colored people, yellow people, young people.

MR. SMITH: That's the point that was raised in the brief.

QUESTION: Yes.

MR. SMITH: I think that might be true, but I disagree that discrimination between white persons and Indians is not an invidious discrimination.

QUESTION: Differentiation to the benefit of Indians between Indians and non-Indians does not violate the equal protection clause, at least in a certain context.

MR. SMITH: I'm not clear on that, Your Honor. And this (inaudible) case--

QUESTION: Well, the Court is.

MR. SMITH: The court held there could be discrimination--

QUESTION: In employment.

MR. SMITH: --in employment in the Bureau of Indian Affairs.

QUESTION: Favoring Indians against whites.

MR. SMITH: Not all Indians, favoring just those Indians that are tribal Indians living on Reservations.

QUESTION: Yes.

MR. SMITH: And our case would be a tribal Indian. And the purpose of that discrimination, according

to this Court was to help Indians develop self-government and so forth. Now, there is no such background for discrimination of that sort in this Section 194. And the Court said it was not, in those circumstances, it was not an invidious discrimination.

MR. SMITH: I think it is an invidious discrimination. I don't think it's comparable.

QUESTION: It would be in reverse if it were discrimination against people who were white in favor of everybody else, wouldn't it? Indians, Black people, brown people, yellow people.

MR. SMITH: I didn't quite follow.

QUESTION: That's your construction of it, that it has to be read meaning only white people, a white person.

If we put the question this way, would you case be any different if some of the claimants were from Nigeria or from China?

MR. SMITH: Well, according to that argument, if they were from Nigeria or China, and they were discriminated against as between them and a white person, that would make the section unconstitutional. What I'm saying is it is equally unconstitutional where it is simply a discrimination of this sort, between an Indian and a white person.

QUESTION: Mr. Smith, following up on Justice Blackmun's point, as I understand it, the record does not tell

us the race of your individual clients.

MR. SMITH: That's right. That's correct, Your Honor.

QUESTION: It is conceivable that two or three of them are from China and the rest are white persons; and I take it if the presumption is decisive, some of your clients will win and some won't. Some of them will be white persons who have the adverse effect of the statute and the others will not be hurt by the statute, and they may want to win.

MR. SMITH: If this was the only point in the construction of the section, yes. That could be possible to go back and prove that some were white and some were other.

QUESTION: So some of your clients--

MR. SMITH: There might be a difference. We made a constitutional argument in our Petition for Certiorari, Your Honor.

QUESTION: But in your brief--

MR. SMITH: In our brief we tried to confine our argument to the--

QUESTION: Construction of the statute.

MR. SMITH: --construction of the statute, yes. Because that was all this Court granted certiorari on.

QUESTION: Yeah.

MR. SMITH: The constitutionality of the statute is one--

QUESTION: We don't really have it before us.

MR. SMITH: --actually, on the constitutionality you have held up the Petition for Certiorari of one of the other Defendants.

QUESTION: Um-hum.

MR. SMITH: Which raises the constitutionality question along with ours. But I will reserve the rest of my time for rebuttal, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Cullison.

ORAL ARGUMENT OF GEORGE BENNETT CULLISON, JR.

ON BEHALF OF PETITIONERS

MR. CULLISON: Mr. Chief Justice, and may it please the Court: If there is anything clear throughout the history of the Federal system is that the Tenth Amendment to the Constitution and the decisions of this Court require application of local law and not Federal common law in property disputes, unless the constitutional laws of the United States otherwise require. This was the rule even under Swift. v. Tyson.

It is the position of the State of Iowa that these basic principles have been violated in this case. Until this controversy arose in 1975, title was settled in the Petitioners in this case.

In 1975, the Solicitor for the United States Department of Interior formed the erroneous belief that the land in this case was cut off from the Omaha Indian Reservation by a re-channelization project by the United States Corps

of Engineers during the 1940's.

Later in 1975, the Tribe, aided by the United States Bureau of Indian Affairs, invaded the land and occupied it. Against this factual backdrop, the United States commenced action to quiet title to the land as Trustee for the Omaha Indian Tribe.

QUESTION: To what use was the land put at the time you described as having been invaded and occupied?

MR. CULLISON: It was a portion of it claimed by the State of Iowa. Your Honor, it was used for a wildlife refuge. The remaining portion of the land was under cultivation by the other Petitioners in the case.

And the Tribe, in its own behalf, the Bureau of Indian Affairs commenced a separate action to quiet title to this same land and an additional 8,000 acres in the same locality. After a trial lasting about six weeks, the State of Iowa and the other Petitioners et pru, without the aid of any presumptions that the Indian land in this locality, which was in the path of the Missouri River, washed away more than a century ago, and that this land is new land formed on the Iowa side of the River.

On the appeal to the Eighth Circuit Court of Appeals, it was held that Federal interest required application of Federal common law of avulsion, drastically different from local law, as well as previously recognized Federal law.

By extrapolating from two Court of Appeals deicions involving interstate boundaries, the Court of Appeals concluded that a sudden, unusual jump of the thalweg within the bed of a river or over as well as around land, whether submerged or not, invokes the doctrine of avulsion. These events would be difficult to prove at the time they occurred. But the Court of Appeals cast the burden upon Iowa and the other Petitioners in this case to prove that they did not occur more than a century ago.

QUESTION: Did you say--

MR. CULLISON: Did that as a matter of Federal boundary law of accretion and avulsion. Your Honor, they used that, the two Court of Appeals cases, involving interstate boundaries to reach this result. And we contend--

QUESTION: I had always read Nebraska against Iowa, the 143 U. S. case to stand for the proposition that there's a presumption that if change occur by accretion rather than avulsion.

MR. CULLISON: I think that's correct, Your Honor.

QUESTION: I think many texts have read it the same.

MR. CULLISON: That's correct, Your Honor. I think so. And I think that identifiable land in place is also a rudimentary important concept in this law of avulsion. It is also found in that case.

The Court of Appeals held that the State of Iowa and

the other Petitioners in this case failed to sustain this impossible burden. And, therefore, it reversed the trial court in order that title to the land be quieted in the Omaha Indian Tribe and in the United States as Trustee.

The Court of Appeals held, and Respondents argue, that as required in this case decision Oneida Indian Nation v. County of Oneida. The issue before this Court in that case was whether there was Federal subject matter jurisdiction under 28 United States Code 1331 and 1332.

It was alleged by the Petitioners in that case that a conveyance of tribal land to the State of New York, without the consent of the United States Government, violated the Federal Non-Intercourse Act. Clearly a violation of the Non-Intercourse Act was alleged and this Court properly held that there was Federal subject matter jurisdiction.

QUESTION: What was the basis of Federal jurisdiction in the present case, diversity, or what?

MR. CULLISON: It was United States title in the land in dispute, the Indian title to land in dispute.

QUESTION: The United States was the Plaintiff?

MR. CULLISON: That's correct, Your Honor. There is no dispute in this case concerning the propriety of Federal jurisdiction.

In Oneida this Court went on to discuss the Federal Government's continuing interest in protecting the Aboriginal

title to Indians in their Reservation land.

Whatever the effect of this language is, it is distinguishable from the case at bar.

In this case the question is not whether the State of Iowa and the other Petitioners here seek to extinguish Indian title to their Aboriginal land, in violation of a Federal statute. Because the Indians' possession of the land was extinguished by the physical action of the Missouri River over a century ago. The question here is whether Indian land is affected by the same law of accretion and avulsion that uniformly affects the property rights of the State of Iowa and the other particular owners in this same locality.

United States v. Oklahoma Gas Company is more pertinent. In that case, the question before this Court was whether the Federal authority to construct a highway through tribal land held in trust by the United States Government included the right to erect electrical transmission lines.

This Court held that a conveyance by the United States of land which it owns beneficially for Indians is to be construed according the law of the State where the land lies, unless an express Congressional intention to the contrary is shown.

The Court pointed out application of different Federal law was not necessary to protect the Indians from their own improvidence or from over-reaching by others. The

Court pointed out the same law applied to Indians and non-Indians alike.

The Court continued with the observation that Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying rules differing from those which obtained as to lands of non-Indians. And that the Court believes that if the Congress had intended this, it would have mades its meaning clear.

Exactly that same reasoning is applicable in this case. So the fundamental issue to be decided by this Court is whether any Federal interest requires application of new Federal common law radically different from local law in this case.

The Court of Appeals and the Respondents argue that it is required because the case involves an interstate boundary, and because there is a special interest in the United States Government in protecting Reservation lands.

Both of these contentions are incorrect. There is no interstate boundary involved in this case. The boundary between Iowa and Nebraska was fixed by a compact in 1943.

QUESTION: What if earlier in the century than that Iowa and Nebraska had become involved in a dispute as to their boundary in this same area and they sued each other in this Court, and they got down to the question of whether there

was accretion or avulsion?

MR. CULLISON: Then that would be a question of Federal law to be decided by this Court.

QUESTION: At that time?

MR. CULLISON: At that time. But that's irrelevant in this case because now there is an interstate boundary and for the additional reason that the only issue that the location of the boundary could have any relevance to the case would be in choice of law between Iowa and Nebraska, in case there was a conflict, between the law of Iowa and Nebraska.

QUESTION: But the events that changed the River took place at a time when Federal law would have controlled had there been a dispute between Iowa and Nebraska?

MR. CULLISON: That's very correct, Your Honor. The only relevance of the location of the boundary in this case would be as a choice of law, where there is a conflict between the law of Iowa and the law of Nebraska. In any conflict there is between the law of Iowa and the law of Nebraska was resolved in favor of the Respondents when the Court chose Nebraska law in deciding the case. And, for that reason, the location of the boundary now and the location of the boundary before 1943 has no relevance to this case. And it's our contention that any case -- Federal cases that relate to interstate boundaries have no application here.

Also, there is no special interest in the United

States Government in protecting the aboriginal rights of the Omaha Indian Tribe in this case either, because the Tribe was denied possession of this land a century ago by the physical action of the Missouri River, and not by any action involving the State of Iowa or these Petitioners.

The same law applies to the Omaha Indian Tribe that applies to the other riparian owners in the same locality. There is no need in this case to protect the Tribe from its own improvidence or over-reaching by others, because there is none involved here.

The local law is uniform in its application to Indians and non-Indians alike. And we submit there is no basis and no reason why the interests of the United States Government in the Omaha Indian Tribe and its tribal lands cannot be readily and equally protected according to State property laws.

QUESTION: You say it's really no different than if the same property had simply been public lands, not an Indian Reservation?

MR. CULLISON: That's correct, Your Honor.

QUESTION: The mere ownership of the riparian land by the United States doesn't mean that the law of avulsion or accretion should be Federal law--

MR. CULLISON: Or should be any different law--

QUESTION: In that section of the River?

MR. CULLISON: That's right, Your Honor, unless it is shown that there is some discrimination or some interference with a Federal interest that is important and unless it is required by some Federal need or some Federal policy that local law should apply.

QUESTION: And you say it should be decided just as though this weren't an interstate river at all, if it were just a river inside some State, the riparian ownership of land by the United States wouldn't mean that Federal law would control?

MR. CULLISON: That's right, Your Honor. That's right. We contend that the Court of Appeals judgment should be overruled, reversed and that the trial Court's judgment should be affirmed.

QUESTION: Mr. Cullison, I realize that this question bears on Mr. Smith's side of the case, as argued here--

MR. CULLISON: Yes, Your Honor.

QUESTION: --on yours as between which law applies.

Going back to the statute 194, do you think it would be possible to say that a State is not a white person, whatever might be the situation as to individuals? You're here representing the State of Iowa?

MR. CULLISON: That's correct, Your Honor. And I'm not sure if I understand your question.

QUESTION: Well, Section 194 refers to an Indian may

be party on one side and a white person on the other. Do you think it would be possible for a Court to hold that how ever the term "white person" is interpreted with respect to individuals, it has no application to a sovereign State?

MR. CULLISON: That is our position, Your Honor.

QUESTION: Do you think it's -- well, I believe that one of your positions -- but I take it because you are on this side of the case you might be sympathetic to Mr. Smith's position so far as individuals are concerned, or maybe you are not taking any at all.

MR. CULLISON: I believe the constitutional problem that was raised with respect to different types of people do not apply to the State, that still it does not apply to the State of Iowa, regardless of whether the constitutional problems of distinguishing or making distinctions between Blacks and whites and Caucasian and Orientals, still there are more constitutional problems raised by including the State of Iowa as a white person than there are by avoiding by interpreting the word to mean only non-Indians. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Veeder, we will not ask you to split your argument for three minutes. If you'll be prepared to go on at 1:00 o'clock.

MR. VEEDER: You are very kind, Your Honor. Thank you.

(Whereupon, at 11:57 a.m. a luncheon recess was taken, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION 1:02 pm

MR. CHIEF JUSTICE BURGER: Mr. Veeder, you may proceed whenever you're ready.

ORAL ARGUMENT BY WILLIAM H. VEEDER

ON BEHALF OF RESPONDENTS

MR. VEEDER: Mr. Chief Justice, and may it please the Court: This is a unique case that is here for review for several reasons. We have heard complaints this morning that the Appellate Court 25 USC 194 to them and that they had a burden of proof by reason of that statute.

The fact is that they are complaining about a statute that applied a burden of proof that they voluntarily assumed themselves because they had no other course to pursue. They pleaded and (inaudible) starting to prove that the Blackbird Bend Ox-bow had been washed away by action of Missouri River and that it had been restored by accretion to the Iowa banks, and they failed. They failed totally and completely and entirely in their effort to meet the proof that they are now complaining about.

They pleaded in their answers and they undertood to prove that the only defense that they had to the Omaha Indian Tribe's complaint, the only defense they had was that the River had washed away the land and that they had been restored by accretion.

QUESTION: Mr. Veeder.

MR. VEEDER: Yes.

QUESTION: This litigation began, as I understand it, by a bill to quiet title.

MR. VEEDER: That's right.

QUESTION: Filed by the Tribe and--

MR. VEEDER: The United States of America filed -- and, incidentally, I have a large map here that might be helpful to the Court. I don't know if it would.

QUESTION: If you would please just listen to my question--

MR. VEEDER: Yes.

QUESTION: --and answer it. It began by a bill to quiet title filed by your client and the United States.

MR. VEEDER: The United States filed the first complaint, and it related to this land--

QUESTION: Right. And in order to, I suppose the allegations in that complaint were, or at least depended upon the proposition that this was an avulsive change, didn't it?

MR. VEEDER: Not really, Your Honor. The pleadings were simply that the 2900 acres, or title to the 2900 acres resided in the Omaha Indian Tribe and that land was held in trust by the United States.

QUESTION: In essence, some sort of statutory or other presumptions or inferences that would change the general rules, the general rule would be that the Plaintiff had the

Plaintiff of proof, wouldn't it?

MR. VEEDER: That's correct. We certainly proved the -- we offered our prima facie case and we proved that these lands were originally part of the Omaha Indian Reservation; we offered the treaty. We offered the 1867 Barrett Survey showing concisely and precisely where those 2900 acres were situated and that in 1867 the River flowed around that land. And I submit to Your Honor that that is a prima facie case. But may I--

QUESTION: The so-called under the sky meets and bounds?

MR. VEEDER: That's under the sky. We proved that those lands were part of the Omaha Indian Reservation in 1864. We proved that they were surveyed in 1867. We proved that they were occupied by the Indians until sometime in the 1920's.

QUESTION: As a matter of the meets and bounds?

MR. VEEDER: Yes. Yes.

QUESTION: Under the sky.

MR. VEEDER: That was surveyed by Barrett and it was a United States survey--

QUESTION: Because under ordinary rules, this land would have had to have shifted to the east bank of the River by reason of avulsion for it to be the same land in the Iowa property law, would it not?

MR. VEEDER: Your Honor--

QUESTION: A gradual loss of the land on the west bank and a gradual accretion on the east bank and a gradual erosion on the west bank, and under ordinary property laws it would have belonged to the owners of the east bank, wouldn't it?

MR. VEEDER: Your Honor, we--

QUESTION: The owners on the east. Isn't that generally the property--

MR. VEEDER: Your Honor, I think that's, if I may suggest--

QUESTION: Well, please do.

MR. VEEDER: --that is a very simplified situation that you have described. This is a very large tract of land. It's an oxbow. It's encompassed within. And may I retract for just a moment.

QUESTION: Um-hum.

MR. VEEDER: The Department of Justice case relates to the land that's there in pink that you can see. There's 2900 acres. The Omaha Tribe involves 6,000 acres of land.

QUESTION: That's not directly an issue in this case.

MR. VEEDER: No, it isn't. They just took a line out of it, 2900 acres in the middle.

QUESTION: Right.

MR. VEEDER: But what I am saying to you that it is very simplistic to say that normally the rule is that the

accretions, there is a presumption of accretion--

QUESTION: I'm not talking about a presumption. I'm talking about what historically happened. And what historically happened was the gradual erosion of the west bank and the gradual accretion of land on the east bank, then the original west bank is no longer on the land. Now, you say that's over-simplistic. Do you mean to say that's wrong?

MR. VEEDER: That's not the situation here, Your Honor.

QUESTION: By saying over-simplistic, do you mean to tell me it's wrong?

MR. VEEDER: It is--

QUESTION: And don't hesitate if that's what you mean.

MR. VEEDER: I really think on this River it is wrong. I think on this river there is no way--

QUESTION: Do you mean on this river or--

MR. VEEDER: On the Missouri River.

QUESTION: --or this situation?

MR. VEEDER: On the Missouri River and this situation, the factual situation is very, very simply this: The River from the time of Loos & Clark --

QUESTION: Um-hum.

MR. VEEDER: --was flowing around that oxbow or that bend. The oxbow bend moved eastward by accretion to

1875. In 1879 there was a drastic change in the course of the River. But, Your Honor, the important thing here is that the burden is on these Defendants to prove that the Blackbird Bend was obliterated and entirely washed away and that it was replaced by accretion.

QUESTION: When the Plaintiff files a complaint in a civil case, the general rule is that it's his burden to prove a case, isn't it?

MR. VEEDER: Up to a point where there is an affirmative defense interposed. And this is the point that is controlling here. These people were without a patent. They didn't have a patent. The title they have here and before this Court, including the State of Iowa, stems from a trespass. There is no conflict here about the ownership of the bed of the stream. There is no conflict here in regard to the ownership of Iowan's rising to the bed of the stream. This is a flat out case of a right claim by trespass.

And may I go ahead right on this point in regard to the State of Iowa. We have put into this record -- we have put into the record for this Court two deeds from these Petitioners to the State of Iowa, and that's the only claim of title that the State of Iowa has, is two deeds -- two claim deeds deraigning back to a man named Joe Kirk, who in 1929 trespassed upon these lands and says he acquired title to them.

QUESTION: By prescriptive right, Mr. Veeder?

MR. VEEDER: Yeah, Yeah, but it doesn't apply to the United States nor to the Tribes. They have a very tremendous problem here. They have no patents. And I see why they say they traced the land to 10 patents. That simply is untrue. There is not a patent in the chain of title. We checked it out yesterday again because I didn't want to say it if it wasn't true.

We are here in a situation, and an extremely important situation, where we pleaded ownership -- the Tribe pleaded ownership to this land, and they pleaded back, "Yes, we admit that it at one time belonged to the United States and to the Tribe, but it was all washed away and entirely replaced." That's the lawsuit that's in this Court.

QUESTION: Where is that in their answer?

MR. VEEDER: I have it marked here somewhere. In every one of them, I can show it in my brief a lot simpler, Your Honor.

QUESTION: Okay.

MR. VEEDER: Footnote 50, we go right straight down the line and we trace their entire title showing that they have no title whatever and showing the source of their title--

QUESTION: Give us the page, would you?

MR. VEEDER: I'll get it right now, Your Honor.

QUESTION: Is it 27?

MR. VEEDER: We start on page 25; 25, 26 and 27--

QUESTION: Of what.

MR. VEEDER: Of my brief. The brief for the trial.

QUESTION: My question was: You said that they answered, "Yes, we admit that the Tribe once occupied this land."

MR. VEEDER: That's right.

QUESTION: And I was just wondering where that was.

MR. VEEDER: And their affirmative defenses, Your Honor, if you look on pages in my brief 30, 31, 32, 33. You see allegations in their answers. They admit at top of page 32, Your Honor, they say in April and May they admit the land was there, that it existed in Monona County -- that it existed, and then they say down there -- this is the Wilkinson-Wilson, Petitioner Wilson says, "All of said land east of said Iowa-Nebraska Compact Line between the years 1867 and 1943 was eroded away by the action of the Missouri River and ceased to exist at the described location, having been washed down the river."

And then they go on, ". . .by the process"--

QUESTION: So they don't really say they admit that the land that's in controversy was occupied by the Tribes, do they?

MR. VEEDER: Oh, yes. They admit that the land-- I didn't set out the entire--

QUESTION: They say those lands are gone, eroded away.

MR. VEEDER: They also say that it was originally situated in the State of Nebraska and was under the Treaty. That's the original statement, Your Honor.

QUESTION: Where? Where do they say the lands in question were once occupied by the Indians? You said they admitted that in their answer.

MR. VEEDER: I'll get it, Your Honor. If Your Honor would turn to page 73 in the Appendix.

QUESTION: Okay.

MR. VEEDER: You will find there -- admit that 1867 the Barrett survey was made; they described the land, and said it existed not in Monona County but within the borders of the State of Nebraska. They said lands between 1867 and 1893 were eroded away.

Now, that is reiterated by every one of the Defendants, including the State of Iowa.

QUESTION: That's a little different from saying that the lands in controversy were once occupied. They say the lands once -- that the lands the Indians once occupied no longer exist, that's what they say, they were eroded away.

MR. VEEDER: That's right. And, Your Honor, to go back to the original question, those lands, the only defense they had was that they were eroded away and that they

were replaced.

Now, that is an affirmative pleading under the law, the law of the State of Iowa, where they had to assume that burden of proof, wholly aside from 25 USC 194.

QUESTION: You said a few minutes ago that essentially what this sentence embraces; namely, that the land was washed away. Were you stating that as an affirmative fact or were you quoting this provision.

MR. VEEDER: I was quoting from their defenses. They say the land was all washed away--

QUESTION: You do not concede that it was all washed away?

MR. VEEDER: No, Your Honor. Our affirmative -- our proof was absolutely to the contrary. We proved that that land was never washed away. And in our brief we set out five plates, the only official maps of the United States of America in those five plates, and you will find that those lands were never washed away. And we proved that.

With regard to a question that Justice Rehnquist asked earlier this morning about the matter of accretions, part of our case in chief, Your Honor, was that we put in extensive proof that there were no accretions. Before we finished our case in chief, our prima facie case, we showed that there were no accretions. First we showed the land--

QUESTION: The District Court declined to credit

your evidence.

MR. VEEDER: Well, for whatever he said, the District Court simply copied Petitioners' Findings verbatim, with no mistakes in them, and the Court of Appeals reversed. The Court of Appeals with great care went through this transcript in detail and on the crucial point evoked the question of whether the lands were washed away and in regard to the matter of accretions, the Court of Appeals said with great specificity that those findings were clearly erroneous.

QUESTION: Do you think the Court of Appeals treatment of that issue is consistent with this Court's decision in Nebraska against Iowa?

MR. VEEDER: Which one now? 143?

QUESTION: 143, yes.

MR. VEEDER: I certainly do, Your Honor. I certainly think there was no departure in regard to the issue of accretions nor would I want to be a party to it. We knew the obligation -- and may I say this: We tried this case on the predicate of State of Iowa law. Idon't say that it's applicable. I say Federa law is applicable, but I knew very well the burden of proof, under the circumstances, and we proved that there were no accretions. We proved by extensive geology and soil tests that there were no accretions. I didn't want to come in here facing a presumption that we hadn't overcome. And that was the first thing we did, we overcame that presumption of the State law.

QUESTION: Are you suggesting that it would make no difference in this case whether Federal or State law applied?

MR. VEEDER: Your Honor, that's an extremely difficult case because, from our standpoint, we believe the primacy of Federal law was applicable. But I'll say this, we won the case both under Federal and State law.

QUESTION: What should we do though if we decide the Court of Appeals was wrong on the applicable law, and that the law was State law?

MR. VEEDER: I hope it never occurs.

QUESTION: What if we disagree with you?

MR. VEEDER: I think the only thing you can do then is send it back to the Eighth Circuit and say, "Hey, did they win on the basis of State law?"

QUESTION: And you say you did.

MR. VEEDER: And we certainly did. There's no question. From the standpoint of the proof that we offered, using -- and in our briefs we were very explicit on that, Your Honor -- we took case after case in the State of Iowa where the burden of proof rested with these people and we proved that we had complied with State law. We didn't have to. We didn't have to comply with State law, but we did show that there were no accretions, either under Federal law -- and I don't believe there's a great deal of difference in the matter of accretions between the two. It's a little more

difficult. In the State of Iowa accretions have to attach at the ordinary high water mark. That is the problem. He applied the laws of Nebraska for reasons which I do not comprehend, that's the trial court. But our problem was made very simple, we never had to get the question of avulsion that Your Honor raised the point about, because they failed to show that the lands were ever obliterated. This is why we were prepared -- and the fact is we put in some evidence on the issue of avulsion, where it was manifest when their witnesses could only say they would prefer to have the laws of accretions as to the State of Iowa, or that they said this is educated guesses.

Well, I'm not going to have to do any more work than that. We just went right on down the line and said, yeah, we proved the land was never washed away.

QUESTION: What if the Court of Appeals was correct in saying, "We are now reviewing our" -- "we are now exercising our reviewing function, and we find this evidence as to whether there was accretion or avulsion to be evenly balanced?" Let's assume--

MR. VEEDER: Assume the answer--

QUESTION: Isn't that what they said?

MR. VEEDER: No. No, Your Honor.

QUESTION: Assume they had, who loses then?

MR. VEEDER: I think we would win, because we put

on our prima facie case and they have to overcome it. We put in the case with the lands being situated where they were. We put in the evidence--

QUESTION: Maybe you put in a prima facie case, but when the Defendants get through with their case, a Court says, "Now the evidence is evenly balanced."

MR. VEEDER: But, Your Honor, if they--

QUESTION: Who wins then?

MR. VEEDER: We do, because they had the burden of proof. Your Honor, they couldn't win on the strength of their case for the very simple reason they had no patents, remember this, they'll tell you differently, but they didn't. We checked it out thoroughly. They had no strength to their claims. We were in possession. We were in possession, remember that. And we were pleading ownership--

QUESTION: But 100 years ago.

MR. VEEDER: No, no.

QUESTION: Oh, yes, yes, you weren't in possession when you started the lawsuit.

MR. VEEDER: Indeed we were, Your Honor. We were careful about that.

QUESTION: You had the fires burning.

MR. VEEDER: Yes, the law is very clear on that, Your Honor. And what I was saying was this, we were Plaintiffs in possession, claiming title predicated upon a Treaty and we

made our prima facie case and the only way they could win is if they had the affirmative proof that that land was washed away and replaced by accretion.

QUESTION: Well, this is wholly independent of 194?

MR. VEEDER: Wholly independent of 194.

I used 194 and relied upon it, there's no question about it. But I do say that you cannot extract 25 USC 194 from this lawsuit. You can't take it out of the context of what really occurred and the history of it. And I don't think we should do that.

QUESTION: Mr. Veeder, a State law or a Federal law that you responded to Mr. Justice White, as I understood you, that when the evidence is evenly balanced, the Plaintiff prevails.

MR. VEEDER: If we're in possession. I think we were in possession under a claim of title--

QUESTION: Isn't the general proposition that if the evidence is evenly balanced, the Plaintiff hasn't carried the necessary arguments and, therefore, the Plaintiff fails.

MR. VEEDER: Your Honor, under this circumstance -- and we have to look at the circumstance -- we were there claiming under a Treaty. They had no patent. They had nothing.

QUESTION: We are not here analyzing the proof. The assumption of his question I think--

MR. VEEDER: You have to win on the strength of your title.

QUESTION: But if the evidence is evenly balanced, I know it was thought for a number of years the Defendant prevails.

MR. VEEDER: I assume that if they were in possession that might be the situation, Your Honor. But they weren't, Your Honor.

QUESTION: Mr. Veeder, do you understand that anything that you have argued is something we're supposed to decide on the two questions they granted certiorari?

MR. VEEDER: May I hear that again, Your Honor?

QUESTION: We grant certiorari, as I understand it, to decide whether Section 194 applies or whether State or Federal law applies. I don't understand the relevance of your argument to either of those questions.

MR. VEEDER: Well, Your Honor, my argument is very explicit on that point. I don't believe this case should go off strictly on interpretation of 25 USC 194. I think it has to go on the broader elements of the treatments that were presented here and the fact that we went ahead and proved that we were in possession; that we proved there were no accretions and that the title would reside with us in the circumstances. We do rely upon the primacy of Federal law. We did rely on 25 USC 194. But what we're saying is that

these Petitioners -- these Petitioners assumed the burden of proof placed upon them by 25 USC 194 and the Court of Appeals said, "You failed because your testimony was conjectural."

QUESTION: As I understand your argument, what you're saying is you don't really care how we answer the two questions.

MR. VEEDER: I do care very much, Your Honor. As a lawyer representing Indian people, we believe in the primacy of Federal law, and I think 25 USC 194 is extremely important. But I'm also -- is my time up?

QUESTION: Yes.

MR. VEEDER: Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Beale.

ORAL ARGUMENT BY SARA S. BEALE

ON BEHALF OF RESPONDENT UNITED STATES

MRS. BEALE: Mr. Chief Justice and may it please the Court: I would like to cover both the statutory question and the choice of law question during the course of my argument, and I would propose to turn first to the statutory question since they do provide a backdrop for the consideration of the choice of law question.

This morning's question raised one point that I'd like to clear up immediately in terms of the application of Section 194 to this case. That is a threshhold question of is this the kind of case where the United States and the Tribe could have shown previous possession or ownership in order to

invoke the presumption of Section 194. And a suggestion was made, or the question was raised: If it's the kind of case where the allegations are that the lands that the United States and the Tribe are claiming was destroyed, does that mean that the showing initially made were required in order to invoke the presumption is the same showing that's required to prevail in the case as a whole, and in that particular we have not made out our initial burden of claiming the applicability of the statutes. We think not. We think that when the Tribe and the United States showed that the land at these meets and bounds under the sky, how ever one would want to describe it, property at that location was part of the Reservation where legal title was held by the United States and the beneficial ownership was in the Omaha Indian Tribe; that we have shown previous possession or ownership as of 1867.'

QUESTION: Mrs. Beale, what about the admission on page 75 of the Appendix, which, I gather, is the answer of the Respondents: "Admit that the lands described in paragraph 2 of plaintiff's complaint were in 1867 a part of the Omaha Indian Reservation to which the United States held title for the use and benefit of the Omaha Tribe of Indians".

Is that enough to trigger the presumption?

MRS. BEALE: Well, I think even if they had not admitted that much--

QUESTION: Is that enough to trigger -- you say it

is.

MRS. BEALE: I think it is, surely. I think it is. And, therefore, we think that the question here is: Did some events occur after the time of our possession and ownership, which we have shown, that would be given legal effect to cut off the ownership of the Tribe and the United States on behalf of the Tribe? Just as if we had shown that we had previous possession and ownership in 1867 and there was a conveyance whose validity was disputed, the question would be: Because of those events did we or did we not lose tile?

By the same token, we think we have shown that this property was held by the United States for the Tribe in 1867 and then the question is: Given the presumption that their ownership continued, were there events that occurred which had the legal effect of cutting off that title?

As the Court knows from some of its previous cases, Congress has a series of statutes to regulate trade and interaction between Indian tribes and non-Indians and to protect the peaceful possession of Indian lands in the 1790's and 1800's.

Section 194 was added as an amendment in 1822 to the current version of the Non-Intercourse Act. And we think its clear policy and intent was to play a role in protecting the possession and ownership of these Indian lands against dubious or questionable claims by non-Indians. And we think

that overall intent and purpose, that protective purpose has to be kept in mind in construing the particular questions that the Petitioners have raised.

The first set of questions that they have raised is who may invoke the protection of Section 194? The statute itself says when an Indian is a party -- when "an Indian", and he makes out a presumption of title in himself. Now, we don't think that by using the singular term "an Indian", Congress meant to preclude either one, two or three Indians v. a tribe, which is a group of Indians, or the United States as Trustee for either an individual Indian or for the Tribe to prevent any of those claimants from invoking the protection of 194 when a non-Indian claimant makes a challenge to lands that were originally owned by Indians. We think that consistent with the clear policy, one would give that singular "an Indian" the meaning that would include the United States and the Tribe. And we think that it's consistent with the normal rule of construction in 1 USC 1, which as a general matter, singular words mean the same as plural words. They're used interchangably.

Now the question is whether there's anything in legislative history or in the remainder of the text of the 1834 or 1822 versions of the Non-Intercourse Act that shows some narrower intent by Congress? Is there anything specific that would show that instead of meaning that it should have

this broader application but that instead it should only mean "an Indian".

QUESTION: Can you suggest any statutes in which the term "Indian" has been construed by a Court to mean many Indians or an Indian Tribe?

MRS. BEALE: Actually, I'm not certain of that question.

QUESTION: In that period Congress was legislating quite regularly on Indians' rights, Indian tribes, Indian lands. Are you suggesting that they used the term "Indian" to mean all these things that you've just mentioned? One Indian, many Indians, an Indian Tribe, which is a corporate entity.

MRS. BEALE: I'm really not certain if there is another contemporary statute--

QUESTION: That's what it needs.

MRS. BEALE: That's right, and I'm just not certain if there was another contemporary Act that had that meaning.

QUESTION: Are you addressing yourself now both to the meaning of the words "an Indian" and a "white person", or just "an Indian"?

MRS. BEALE: I was starting with "an Indian", but I also do want to get to "a white person", and my point was merely, as a general rule, one, in looking at a statute such

as this, not only from a policy point of view, but from the rule of general construction, one would assume that the word would be broad enough to include the tribes and the United States when it is representing the interests of a single Indian or a tribe. And we have dealt with in our brief the question of comparing this section to other portions of the 1834 Act in which it was included. There's a suggestion that by comparing this particular provision to either Section 12 or to other provisions, one comes to the conclusion that there was a definite intent to narrow the meaning of Section 194, that was narrowed from the terms that were used in the 1822 Act. As discussed this morning, the 1822 Act used not only the term "an Indian" but, also, the plural term "Indians". Why did Congress change it in 1834?

We think that the only reason they changed it was to make the language of the Section consistent throughout. There is nothing in the legislative history that shows any other intent. And we don't find any of the guesswork very persuasive to suggest that there was some other intent.

We have found one report from that period which was designed as a model of the amendment of all the Indian statutes, and it shows the precise change that Congress made here between 1822 and 1834, indicates that there was no intent to change the meaning of that section. We think it was just to clean up the syntax. And we would caution the Court

against holding Section 194 up against other provisions of the 1834 Act and finding that because the term "Indian tribe" is using some of those other provisions that that would show an intent not to include an Indian tribe here. We think it's pretty clear from looking at that 1822 language that Congress was not very careful and precise, in the same statute it says "an Indian", "Indians", "White persons", "a white person" "himself. It's not a carefully drafted provision. And if one looked at the 1832 Act -- excuse me, the 1834 Act, again the terminology varies very greatly from section to section. These sections were pulled from different enactments -- some in 1796, some in 1822, and they didn't make the language consistent throughout.

So we would say, looking at this provision in 1822, given the fact of the intent of Congress and the general rule of construction that it should be applied to a group of Indians, single Indians and the United States on behalf of--

QUESTION: Mrs. Beale, isn't there -- if you look at the reason for the provision, I suppose it's a protective provision because the Indian might be at a disadvantage in litigation with a white person, does the same disadvantage apply when the United States is litigating for the Indians?

MRS. BEALE: Well, I think it was not only that there might be a disadvantage, but there was a very important

purpose to protecting the tribal Indian so that they wouldn't be lost in a questionable case.

Now, granted the United States as a representative of the tribe, would be more familiar with court rules and court procedures and would have more recourses. But I don't think there should be a rule that would cut against or discourage the United States from helping out an Indian Tribe or a single Indian from enforcing its rights. And I think that thepurpose of protecting Indian lands is the same so that the statute of the United States comes in, a real party in interest is someone entitled to invoke Section 194, to protect those Indian interests, it should not make a difference that the Government has more resources, or is more familiar with courtroom procedures.

QUESTION: Mrs. Beale, following up on Justice Stevens' question, is there any precise date that can be assigned to the time when the United States began to sue on behalf of Indian wards for title to land?

MRS. BEALE: There were some very early cases -- I'm thinking of one early one, but I think there are some even earlier than that -- I guess I cannot put a precise date on that. One thing I would mention in that connection though is the suggestion that the Tribe could not be litigating in 1834 and that Congress was thinking of who would be coming into Court in 1834 and thinking that individual Indians could

and that tribes couldn't. We haven't found anything that would back up that suggestion and, indeed, the Cohen article, excuse me, the Cohen Handbook suggests to the contrary that although Indian tribes were not considered to be a foreign nation in that sense for jurisdictional purposes, they will come into court. And I can't tell you as a certainty that in 1834 there was a case where the United States came in, but there were some very early ones in the 1800's. And I don't know of any suggestion that they couldn't have come in that early.

I would like to turn, unless there are any more questions about the "an Indian" part of the statute, to the white person part of the statute. And, again, we would start from the presumption or from the beginning point that Congress had again a broad protective purpose. And we think when it used the term "white person" it was not thinking solely of individual Caucasians, and we think that in order to give the protective purposes of the statute their full effect that we should assume that what Congress meant was non-Indian claimants to the land. And the constitutional difficulties that were referred to this morning are a good reason for achieving what we believe to be a construction that is one that was intended by Congress and, two, gives effect to the purposes of the statute. We do not think the statute could be upheld if it disginguished between

Caucasian claimants on the one hand who would be disadvantaged, Black claimants, Chinese claimants, and American claimants on the other hand. We think that it could not be upheld on that basis, and so we would urge the Court to give the statute a construction that would not only fulfill Congress' purposes--

QUESTION: I've always heard that it's not Caucasian.

MRS. BEALE: I think Iowa said that it is not a white person and says, number one, that it's not a person at all and, number two, if it is a person, it's not white.

QUESTION: You agree don't you?

MRS. BEALE: No, and the reason being--

QUESTION: As the one Negro out there--

MRS. BEALE: Absolutely -- yes, that's right. And they'll have some of ttheir own hides if we prevail here.

But we think what's intended here, if we're correct in saying that white means non-Indian here, we think the only question is is the State of Iowa a person. We don't think they would ever claim to be an Indian person. We think they would agree they are predominently non-Indian in that sense.

And the Court has previously ruled in a number of contexts that where it promotes Congress' intent, and where it is the intent of Congress, where a word is broad enough--

QUESTION: What if this was the State of Oklahoma

where one might reasonably make an argument that Oklahoma is not a non-Indian State?

MRS. BEALE: It would be my understanding that it's not, although it has a sizable number of Indian citizens, that it's by no means predominently or the majority of citizens are non-Indian.

QUESTION: But if a State could prove by some sort of census and bloodline figures that a majority of its citizens were Indians, then it would not be the subject of the statute?

MRS. BEALE: Well, I can't give a definite answer but I would say the same problem could arise if the majority ownership of a corporation -- and we contend a corporation as well as an individual -- a flesh and blood individual -- could also be a non-Indian person. And if we're correct in saying "a person" has this broader meaning beyond individuals, then it seems to me the Court would have to decide is it a question of the predominent, the majority ownership, majority membership, and I think that would be one very reasonable way to draw the line. That so long as this litigating party, this juristic person is now predominently Indian that it can be denominated a non-Indian claimant for that purpose. There may be other ways that you could draw that line, but I think that might be a reasonable way to draw that. And I do not understand here that the State of

Iowa claims to be a predominently Indian person in that sense. I don't think that question is really before us.

QUESTION: Mrs. Beale, do you think Section 16 of the statute, as construed in the Perrymand case, is constitutional?

MRS. BEALE: I would have serious doubts about that. And I also think that, as our brief stated, in retrospect, we think the historical analysis which we promoted at the time is incorrect. And we would think if the statute came before the Court again we would urge that that was not what Congress intended in that section. But, if that was what Congress intended, then I think there would be serious constitutional difficulties.

QUESTION: Having been construed that way years ago, aren't we bound to respect that construction just as much as if Congress had written it?

MRS. BEALE: I guess the position we took in the brief is the same one I would urge here. We pointed out that we think it's absolutely wrong, but we also pointed out that even in terms of construing that section, this Court looked very much to the peculiar legislative history in that provision and said because Congress was attempting to distinguish here between fugitive slaves and white persons, when it said "white person" it meant Caucasian person. And that is certainly some type of legislative history that we do not

have here. So the Perryman decision can be distinguished, as a matter, you know, of our view. But we think number one may be part of number two.

QUESTION: I have some difficulty understanding the rationale that its all right to protect the Indians from robbery by whites but not by fugitive slaves.

MRS. BEALE: Well, I--

QUESTION: It sounds to me like that although they gave the reason, they really read the statute literally. What it boils down to they just said "a white person" means a white person.

MRS. BEALE: I think--

QUESTION: They gave a reason that is most unpersuasive for doing that other than the fact that it says that.

MRS. BEALE: I went back and looked at our brief to see what we had done and we had urged that the history here showed very clearly that the problem with interracial wars and wars between the tribes and the local citizens in Georgia were so serious, Congress reacted to that in drawing Section 16 and changing the language of Section 16 from a broader term which didn't use the word "white". I think it was any citizen or other person. When they put in "white person" we argued to this Court and this Court agreed, they must have meant white person. They must have been thinking about

this problem in Georgia. You know, what we didn't do was to connect up that history, which I assume we were correct about, that there were problems in Georgia at that time with what Congress was intending to do in enacting that particular statute. We didn't show anyone referred to in the debate or that it was mentioned in the Committee reports or anything of that nature, and that's why I'm suggesting that perhaps the line wasn't as clear as the Court thought and as we argued at the time. But the basis of that decision, whether we find it persuasive or not, I would agree with you, it's not compelling, is that particular legislative history. So we think it can clearly be distinguished on that basis.

QUESTION: The time is running. Are you going to get to the choice of law?

MRS. BEALE: I would certainly like to do that right now.

QUESTION: You have about four minutes to go.

MRS. BEALE: We believe that the Oneida decision is the most recent expression by this Court of what we think is the dispositive principle here, and that is that Indian title is the right not only conferred exclusively by Federal law but continuously protected and controlled by Federal law and this is very important, subject only to termination in accordance and by means of Federal law. And for that reason, the Court in Oneida held that a Federal

cause of action was presented and a Tribe contended that land that 100 years ago had been their land and was now settled by many other people, and when they brought action for that land -- and here also we think that when the Omaha Indian Tribe and the United States as Trustee comes in and says, the Indian title to this land has never been terminated and the question is has the title been terminated or not. Federal law must apply. And the history of the Non-Intercourse Act and the reason I wanted to discuss Section 194 first, shows very clearly the Congressional -- the overriding Federal and Congressional interest in the protection of Indian lands and the means by which it may be terminated.

QUESTION: If the Reservation was a newly-created Reservation, and covered land to which the Tribe never had--

MRS. BEALE: Original title?

QUESTION: Original title.

MRS. BEALE: I don't think it would be. Would you agree the other way too, that the two cases should be decided the same way?

MRS. BEALE: I would think they should be, but we have voth points here. Not only do we have a Reservation established by Federal law, but this was the original home of the Omaha Indians so, to the extent that is a necessary ingredient, we have that ingredient here. And we don't find any inconsistency between the decision in Oneida on the one hand the decision in Corvallis, which Petitioners rely upon

on the other hand. Corvallis says only, as we read it, that when there is no Federal interest requiring the displacement of State law, local property law controls the ownership and the incidence of ownership of land along a waterway -- a stream, a river. And what we are saying and what Oneida holds is that there is a continuing Federal interest requiring displacement of State law when it is a question of Indian Reservation title, and original title perhaps also, as well as Federally conferred and protected rights to Indian possessions. And, additionally, I think we would point to the portion of the Corvallis decision which notes that when the question is not what happened after a Federal patent has issued but had title gone from the Federal Government to a patentee or, in this case, to other kinds of claimants. That question where the Federal ownership has passed is always one of Federal law. Wilcox v. Jackson, very early cases established a proposition that one of the questions of termination or not of Federal interest, passing title from the Federal Government that, again, Federal law always governs that question. So we find ourselves very comfortable with the Corvallis decision. It's wholly consistent with the special rule for Indian title and a special rule for considering whether Federal title has been terminated or--

QUESTION: Suppose it is a navigable river inside a State. It is not a boundary river and there's an Indian Reservation on one side of the stream and just to the left

of it is a Federal military installation, and then there is a National forrest on the same side of the stream, all in a row.

MRS. BEALE: Um-hum.

QUESTION: And then there are a series of changes in the river and there's private ownership on the other side and the river changes like it did here. You say Federal law applies in each of those cases as to whether there's avulsion or accretion?

MRS. BEALE: Yes, we do, and we think Federal law applies in the case of the Indian Reservation.

QUESTION: You can't really suggest that that's consistent with Corvallis, can you?

MRS. BEALE: I would think two things. I think in a citation of Wilcox v. Jackson, Corvallis does suggest that a question of whether Federal title has been lost is like the question of Federal law. But even if we're not right on that, even if merely the Federal ownership of public domain lands is not enough, I think Oneida clearly establishes that there is an additional peg to our argument when we're speaking of Federally-protected Indian land where Congress has specifically moved to oust the States of jurisdiction and has specifically claimed for itself the question of when and how Indian rights are to be terminated. So we think it's the easiest case for us, the Indian Reservation.

Now, we would read Wilcox v. Jackson and Corvallis as saying at least when it's Federal ownership, the question whether our title is lost, at least, would also be Federal law.

If there are no further questions--

QUESTION: I have one question, Mrs. Beale, if I might. The last sentence on page 71 of the Government's brief says, "Accordingly, the question whether Indian title to a portion of a Reservation has been lost must be determined by the application of Federal common law which embodies the sum of Federal lawmaking on the issues and interests involved." Am I to understand from that that entirely apart from the Non-Intercourse Act that it may be a heads I win, tails you lose situation when Indians are involved? That is precisely the same historical facts take place by by reason of "Federal common law" the Indians would win in each case?

MRS. BEALE: No. If I understand you you are saying do we choose Federal law or make Federal law in such a way that Indians always win?

QUESTION: Yes.

MRS. BEALE: If Federal law applies. And I think that would be no, that Indians can lose as well as win under Federal law, but that it's important to be applying Federal law not only because Congress manifested its intent and

so forth but in order that if under Federal law the Indians would win, as they do here, and the Reservation purposes could be continued that the Indians have the benefit of that rule. But they don't always win. We don't think you need Federal law to make Indians win in each case.

QUESTION: Thank you, counsel.

The case is submitted.

(Whereupon, at 1:50 p.m. , the case in the above-entitled matter was submitted.)

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