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In the

Supreme Court of the United States

LEONARD TONASKET,

Appellant,

v.

THE STATE OF WASHINGTON AND THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellees.

No. 71-1031

Washington, D. C.
December 12, 1972
December 13, 1972

Pages 1 thru 51

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Washington, D.C.
Tuesday, December 12, 1972

The above-entitled matter came on for argument at 2:34 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT L. PIRTLE, ESQ., and ALVIN J. ZIONTZ, ESQ.
3101 Seattle-First National Bank Building
Seattle, Washington 98154 on behalf of Appellant

SLADE GORTON ESQ.
Attorney General of the State of Washington,
Temple of Justice
Olympia, Washington 98504 on behalf of Appellees

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Pirtle, you may proceed.

ORAL ARGUMENT OF ROBERT L. PIRTLE, ESQ.,

ON BEHALF OF THE APPELLANT

MR. PIRTLE: Mr. Chief Justice, and may it please the Court:

I am Robert Pirtle, attorney for the Appellant in this case.

This case comes to the Court on an appeal from the Supreme Court of the State of Washington. Probable jurisdiction was noted on June 12, 1972.

The facts of this case are relatively simple, although complicated somewhat by later enacted legislation, both by the State of Washington, the Colville Confederated Tribes, and by later activities of the State, the Appellant, and the tribes, and the Federal Government.

We begin here with the clear recognition that Washington is a Public Law 73-280 State. That is, pursuant to that Act, it has taken jurisdiction, certain jurisdiction over Indians and Indian reservations.

The reservation here is the Colville Reservation of Eastern Washington, comprising some 1.3 million acres. It is governed by a 15-member tribal council, under a constitution and by-laws approved by the Federal Government.

Leonard Tonasket, the Appellant here, is a full-blooded Indian. He is a direct descendant of Chief Tonasket of the Okanogan Band. In 1964, he borrowed some $6,000 of federally restricted funds, with which to build a store on his trust allotment inside the reservation. That loan was specifically approved by the Federal Government. He made an additional loan of $800 with which to purchase cigarette inventory. That loan was also federally restricted, then approved by the Federal Government.

He operated his store, selling cigarettes and sundries and Indian artifacts and clothing as a trader on the reservation but without a federal trader's license. He did not collect tax for the State of Washington nor for the tribe at that time.

The State of Washington arrested him in 1967 and seized his cigarette inventory, leaving the rest of his inventory intact.

He then began this action in equity, seeking a declaratory judgment as to his rights to make sales in the reservation on his trust land.

QUESTION: Does this case involve a claim by the State of Washington only of the power to collect taxes on sales to non-Indians or does it involve claims generally on all sales? I wasn't sure of that, after reading the briefs.

MR. PIRTLE: I can clarify that for you, your Honor, The State Supreme Court ruled that Public Law 83-280

specifically granted the State complete jurisdiction over Indian trading, with no exceptions.

Now the State of Washington in its briefs in this case, is willing to concede that the State has no jurisdiction over trade with respect to Indians. That's not what the decision says.

QUESTION: Well, that is what is causing my confusion.

MR. PIRTLE: I can understand that, your Honor.

QUESTION: I suppose buying a carton of cigarettes and then selling a carton to another Indian is commerce within the Indian tribe, isn't it?

MR. PIRTLE: It is. That is clearly Indian commerce within the Federal Constitutional definition.

We contend that sales from the Indian to the non-Indian on the reservation also comes within that definition.

QUESTION: Is the tax like that of most other states, in that the tax is regarded as being imposed on the seller, that he can pass it along to the buyer if he wants to, but the incidence of that tax is on him?

MR. PIRTLE: True, it is, your Honor.

QUESTION: Mr. Pirtle,is there any question about the applicability of 280 in Washington having been raised in the state courts? I ask this because one of the amicus briefs suggests that it was not.

MR. PIRTLE: Your Honor, I did not try this case in the Superior Court, so I am somewhat at a disadvantage in that respect. I can assure you that I would have raised the question. It was not raised in the Superior Court nor argued in the Supreme Court, but it is a viable question as pointed out in that brief, and it will be raised in the future.

The Court will want to consider it.

QUESTION: In the Supreme Court of Washington was argument made as to the distinction between the two kinds of sales? Or was it just an all-or-nothing?

MR. PIRTLE: I believe the argument was made with respect to the two kinds of sales, but the Supreme Court decided to go all the way.

QUESTION: Well, then, do I understand that you come here without the 280 suggestion having been made below? I take it that you are conceding this?

MR. PIRTLE: That 280 is in fact effective in the State, your Honor.

QUESTION: That it was raised in the state courts, the applicability of 280?

MR. PIRTLE: No, you have to distinguish between them in a very fine way here. I understood the previous question to mean Public Law 83-280 actually legally approved in the State of Washington ? That is, has the State legally accepted jurisdiction? That is the contention that was not raised below, was

not briefed in the State Supreme Court, and which we will be raising in a later case.

The other part of the question, or as I understand it, the question you are now asking is, how about the application of Public Law 83-280 to the facts of this case? That was raised--

QUESTION: That was raised in the State Courts?

MR. PIRTLE: It was, your Honor, yes, and extensively argued.

QUESTION: Now, the amicus brief, as I read it, takes the other position? Do I misread it?

MR. PIRTLE: The amicus brief for the National Congress of American Indians says there is a substantial question as to whether the State of Washington has complied with the federal requirements in assuming jurisdiction pursuant to Public Law 83-280, and the Court should recognize that fact in consideration of this case.

QUESTION: But that issue was not raised below?

MR. PIRTLE: It was not, and the Court may wish to remand it for the raising and briefing that issue, your Honor, especially in the light of the new legislative history concerning Public Law 83-280 which has just been uncovered in the Archives.

QUESTION: But everybody trying the case in the Washington Courts in effect agreed and conceded that Washington had validly complied with the terms of that law?

MR. PIRTLE: Well, I would not say it was conceded, your Honor. It was not raised by the attorney representing the Appellant below, and I was not in a position to raise it in the Appellate Court, as Appellant Counsel.

QUESTION: Today you are proceeding on the premise or on the hypothesis that 280 is in effect in the State of Washington?

MR. PIRTLE: Yes. I am not conceding--

QUESTION: No, the hypothesis arguendo--you are making the assumption that it is, without conceding anything.

MR. PIRTLE: True.

Now, after this action was begun, the legislative activity which I referred to occurred. Washington passed a new Act concerning the regulation of cigarettes in 1972. That Act specifically authorized any citizen in the State of Washington to buy, possess and use two cartons of tax-free cigarettes without incurring tax liability.

QUESTION: Two cartons per year?

MR. PIRTLE: Two cartons per person at any one given time. That is a possession matter.

QUESTION: You could go day after day and--

MR. PIRTLE: True. And the Oregon tax is four cents which is 13 cents less than Washington. The Idaho tax is seven cents, which is 10 cents less, and many, many state residents have been going back and forth across the borders, bringing

cigarettes in. THat was the reason for the Act of 1972. Trunks were being searched and the wives of important people in the state were very angry. All this is outside the record, but it is well known in the State of Washington.

Now, after the Act which Governor Evans characterized as legitimatizing Indian sales to the extent of two cartons, the Council of Confederate Tribes enacted the Colville Tobacco Ordinance which makes the handling and sale of all cigarette proceeds on the reservation a tribal enterprise that requires that the outlets be licensed by the tribe. It requires that the operator have a license from the tribe, that the operation be conducted on trust land, that the operator have a Federal trader's license, that levies of tribal tax of every pack of cigarettes sold on the reservation--

QUESTION: I take it now that the Appellant petitioner here does have a Federal trader's license?

MR. PIRTLE: He does, your Honor.

QUESTION: Even though the record may not show that?

MR. PIRTLE: It is in the Appendix. It was not in the case below but of course it occurred after the facts of this case happened. He has a license from the tribe and from the Federal Government as a licensed trader.

QUESTION: Has he moved?

MR. PIRTLE: No, he has not, your Honor, it's still on trust lands in East Omak, which is an Indian Village. It is

a trust allotment under the General Allotment Act.

The law which applies to this case is rather labyrinthine but the central issue emerges very clearly; that is, does Public Law 83-280 constitute a grant of tax jurisdiction to the State? The State Supreme Court says yes, it constitutes a plenary grant of jurisdiction over Indians, with only the exceptions set forth in 2(b) and 4(b) of the Act.

The Court went further. It said it constitutes a complete grant to the state of Indian trading jurisdiction.

Now I would ask the Court to examine the Act, put it in context. In 1953, Congress was considering a number of major cases of Indian legislation falling in four or five separate categories. Public Law 83-280 was merely one piece. It had a narrow legislative purpose. It was a law and order statute. It was specifically for the purpose of furthering law enforcement on the reservation, from the criminal standpoint. It was for the purpose of providing a State fund for the determination of civil litigation from the civil standpoint. If you examine the Act, the language of the Act on page A-10 of my brief, you'll notice it says that the jurisdiction given to the State is jurisdiction over several causes of action, and it provides that civil laws of the State that are of general applicability to private persons or private property shall have the same effect on Indian reservations.

Now the Court has to ask itself, is that language of

plenary grant of jurisdiction? Consider it with respect to taxation. It says nothing about taxation, but when Congress wants state taxes to apply on an Indian reservation, it says so in no uncertain terms. Look at the Klamath Termination Act on page 27 of the brief. It provides that after termination, the property shall be subject to the same taxes, state and federal,as in the case of non-Indians.

Look at the Menominee Termination Bill on page 30, which provides that all statutes of the United States which affect Indinas because of their status as Indians shall no longer be applicable and it provides that the laws of the state shall apply to the tribe and its members.That's plenary jurisdiction grant language.

Now Congress has made one general Act with respect to state taxes on Indian reservations. That's the Buck Act which you referred to in the other cases today. Congress states you may apply your taxes to Federal reservations, both income, use, sales, but you may not apply them to Indian reservations. That has never changed. Frost vs. Wenie says Acts of Congress will not be deemed repealed by implication.

QUESTION: You said that the Buck Act said you may apply your taxes--

MR. PIRTLE: The Federal reservations, not the Indian reservations. That is in 4 USC 109.

Now when Congress wants a state tax to apply on an

Indian reservation., it says it with express language. It provided in 25 USC Section 398 that mineral interests could be taxed. It provided in the Brown-Stevens Bill, Public Law 291, 39 Stat. 865 that taxation could apply with respect to one state.

Congress knew what it was doing when it passed Public Law 83-280, and it said, now, we are going to repeal certain statutes. We are going to repeal 18 USC Section 1152. That is the Act that applies the Federal Criminal Code on reservations. It repealed it. Congress said, we're going to repeal 18 UCS Section 1153. That is the Ten Major Crimes Act. But very significantly, your Honors, Congress did not say we're going to repeal the Trader's Act. Congress did not say we're going to repeal the Buck Act. Congress knew what it was repealing and what it was not repealing.

If you look at the legislative history and especially the hearing which the Federal Government just found in Archives, the hearing of the subcommittee of June 29, 1953, you will find a tax discussion concerning this Bill. The first one, and I am delighted to have found it, because in that, Mr. Sellery, who was Chief Counsel for the BIA,discusses the question of subsidy to the states, assuming jurisdiction under this Act. The Congressmen involved are Congressmen from all of the states with large Indian populations, and they repeatedly say, but what about a Federal subsidy; who will pay for the burden on

the Court system? What about this jurisdiction, this additional law-and-order cost to the states? And Mr. Sellery says that the Government feels this is just a burden that the states have got to assume, if they want it. You all know the history of the Act. Some states refused to assume that burden because they would not have any tax money to pay for it . This is the point in the dialogue at which Congress, if it had ever intended it, would have said, Congressmen, you may now have your states tax the Indians. Arizona, you can tax those hundred thousand Navajos and pay for this jurisdiction, if you assume it. Washington, you may tax those 26,000 Indians, and you may pay for this jurisdiction if you assume it. Congress didn't. Congress left the Buck Act intact. It left the Trader's Statute intact. It made no reference to taxation from Public Law 83-280 in terms of the specific grant that Congress policy dictates.

Now if the Court were to uphold the State Supreme Court in this case, the consequences would be disastrous. It would mean an appeal of all of the tax immunities of Indian tribes which this Court has said is not likely to be attributed to Congress in the Lone Wolf vs. Hitchcock case. It would be rejection of the express language requirement which this Court required in Squire vs. Capoeman case. It would be an implied repeal of the Buck Act. It would be a rejection of your policy in Frost vs. Weine that Federal statutes are not

repealed by implication. It would be a repeal by implication of the Trader Act. It would be a rejection of firm Congressional policy when Congress wants to repeal one of its statutes, it says so.

QUESTION: Mr. Pirtle, why should a committee hearing so recent as 1953 be locked up in the Archives? And available only by special commission?

MR. PIRTLE: Your Honor, it was unpublished. It is one of those difficult situations in which I learned to my chagrin too late, almost, that you can only get those unpublished Committee reports and typed up from the transcripts if you get special permission from the Committee itself, and the Government did that in this case because it is urgent that this Court see that there was a discussion concerning subsidy to the states, and that discussion made it clear that Congress never even considered in Committee for a minute imposing any tax liability on the Indian people themselves.

Now Congressional policy in 1953 said we want to fill this hiatus in law enforsement. We want states to be able to take jurisdiction. In 1968 that policy is still intact, except with consent of the Indian people. If there were a tax affreightment here, if there were a tax imposition, no Indian tribe in America would ever consent to any jurisdiction, no matter how much it was lacking in law enforcement.

QUESTION: Would there be a comparable reaction

by the states if they're deprived of tax revenues? Isn't that possible?

MR. PIRTLE: The states knew they were not getting any additional tax revenue, your Honor, and many of them refused to take jurisdiction for that reason.

QUESTION: Mr. Pirtle, doesn't the argument you have drawn from the Congressional colloquy that you have mentioned depend in very large part on the notion that in 1953, the Congressmen from states with large Indian populations would have viewed taxes on Indians as being a very lucrative source of revenue and declined to mention it or failed to come forward with it?

MR. PIRTLE: No, your Honor, you should read that language specifically, which is in my reply brief, the red one, and in there they say, well, wait a minute, Mr. Sellery, if you're going to give jurisdiction to the states, these Indian people are not taxed, are they? We submit they pay certain taxes. On the reservation they pay taxes, he said, but their land is not taxed, they don't pay income tax, and the corporations on the reservations don't pay tax, do they, so who is going to pay for this? That was the general tenor of the conversation. All of the Congressmen recognized there was no tax to be forthcoming from the Indian people, and they demanded that Congress subsidize it in some way, and Congress decided not to, North Dakota, in fact, passed a statute saying we take

jurisdiction as soon as the BIA makes provision for reimbursement for the cost, and it was held that that could not be done.

I think I better save my last few minutes for rebuttal here.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ziontz.

ORAL ARGUMENT OF ALVIN J. ZIONTZ, ESQ.,

ON BEHALF OF THE APPELLANT

MR. ZIONTZ: Mr. Chief Justice, and may it please the Court:

This is a tax case but we see it in a larger context. We see the case and when I say "we," I am speaking for the Colville Confederated Tribes and the amicus tribes as a case involving essential aspects of Indian tribal sovereignty, a concept which we think is long overdue for revitalization by this Court, and I would point out certain basic principles that I think inhere in this case.

First, I think it is necessary to start with the principle that Indians are sui generis because of the special aspects of their position, and I would point out five special aspects that apply here.

We deal with a group of people first of all of specific ancestry, with a special historic relationship to the United States, and a relationship which involves national honor.

Secondly, the people occupy their own land area, an area with established boundaries, reserved from non-Indian encroachment. This was the basic purpose of the United States in establishing the reservation, and guaranteed to the Indians by the United States, a guarantee given before the creation of state government and looking toward the future encirclement of the reservation by state government.

Thirdly, the lands and the income from the lands are held in trust by the United States, a very significant legal factor because it is the foundation for the fiduciary relationship; that is to say, the United States is trustee of lands for its Indian beneficiaries. This does not necessarily depend on any guardian ward principle.

Fourth, a tribal government functioning over that territory, according to a tribal constitution, which was submitted to the United States and given approval by the United States.

And finally, the land, the people and their government are all subject to the plenary power of Congress. They are all under the tutelage of the United States.

Now, given these factors which are present here and I think distinguish away the Oklahoma cases and (inaudible), we have clearly tribal sovereignty aspect. Tribal sovereignty does not derive from Congress. Congress did not grant the tribes their inherent power of self-government. Congress may

restrict it. But unless Congress has done so, that sovereignty prevails, and an essential element of that sovereignty is taxing power.

The Federal policy towards these tribal governments is undeniable. It is to strengthen them, it is to preserve them as institutions. Congress has reached the decision that this is the way for progress to be achieved for the Indian people. The Indian people have accepted that initiative. They have responded to it. They're vitally involved in the affairs of their tribe. Educated Indians are participating in their tribal government. Indians who have served in the military come back to the reservations and have run for office and are participating in tribal affairs. This is a viable, important concept which should not be glossed over in the concern between Congress and the states.

Now, the State of Washington here, although it argues that Public Law 280 gave the jurisdiction to tax this tribe, insists that even without 280 it has some kind of residual jurisdiction, that it could have imposed this tax and in fact does impose the cigarette tax over all tribes in the State of Washington, quite apart from 280.

Now there are identified at least six basic principles in the cases that bar the state, bar any state from imposing state taxes on a tribe which meets all these qualifications.

There is, I say, first of all the concept of tribal sovereignty.

Secondly, in the case of the Colville tribes, tribal pre-emption. The tribe has, subsequent to the arrest of Mr. Tonasket, passed its own statute. That statute is entitled to recognition. In State ex rel, Turtle vs Merrill, the Ninth Circuit recognized that a tribe which validly legislates pre-empts the field and a state may not impair that legislation and it should be noted that Washington law provides and the Attorney General has interpreted the law to mean that wherever the state has jurisdiction, it is exclusive, there is no concurrent tribal jurisdiction; it ousts the tribal jurisdiction entirely and particularly in the field of excise tax, if Washington State law applies in toto, then there is not an inch of room left for tribal law.

A third bar to the extension of state taxes is the so-called infringement test. I suggest that one deserves careful attention because surely there should be some guidelines spelled out as to what kind of factual showing needs to be made at the tribal level before the Court can conclude that there is or is not infringement. This should not be a judicial abstraction.

Fourth is the doctrine of Federal instrumentality. I won't labor on that; that's a familiar doctrine.

Fifth is the doctrine of Federal pre-emption and the

Trader Statute has been held to be a Federal pre-emption of Indian commerce.

And finally is the doctrine of Federal policy. State laws cannot invade an area which is contrary to or impedes a Congressional policy.

280 has been urged by the state as giving it carte blanche to assert this tax liability on the Indians of the Colville reservation. I submi tthat 280 does not assist the state in its position. 280 clearly reserves out from state jurisdiction the traditional tax immunity of Indians. I submit that the exclusion section must be read as preserving all prior law. See Kirkwood vs. Arenas which held to that effect.

In summary, I would say to the Court that in 1953, Congress was attempting to achieve several inconsistent goals and the lack of hearings perhaps attest to the fact the statute was not drawn with the care that it should have been drawn with. On the one hand, it wanted to replace the jurisdictional tangle with a uniform system of state law, and on the other hand, it also wanted to preserve Indian tribes on their territorial base. A careful examination of the statute shows an unmistakable Congressional intent to keep the state out of areas involving the use of trust property. There is clearly no more direct example of use of trust property than an Indian conducting a grocery store on his allotment, on the reservation.

The Federal policy looks toward Indians developing

their lands in non-agricultural, non-natural resource ways, in getting into business.

I believe that on behalf of the tribes, the doctrine of tribal sovereignty deserves careful examination. It is a third factor in this three-way fight between the tribes, the Federal Government, and the states.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

We'll resume in the morning.

(Whereupon, at 3:01 o'clock, p.m., the argument was adjourned to be resumed the following day, Wednesday, December 13, 1972.)

IN THE SUPREME COURT OF THE UNITED STATES

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LEONARD TONASKET, :

Appellant, :

v. : No. 71-1031

THE STATE OF WASHINGTON AND THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, :

Appellees. :

- x

Washington, D.C.
Wednesday, December 13, 1972

The above-entitled matter came on for further argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT L. PIRTLE and ALVIN J. ZIONTZ, ESQ.
3101 Seattle-First National Bank Building
Seattle, Washington 98154 on behalf of Appellant

SLADE GORTON, ESQ.
Attorney General of the State of Washington,
Temple of Justice
Olympia, Washington 98504 on behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 71-1031.

You may proceed.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE APPELLEES

MR. GORTON: Mr. Chief Justice, and may it please the Court:

This case involves the first assertion in this Court that an individual Indian citizen may engage in a private commercial venture, literally any private commercial venture, in direct competition with other citizens of the state, or for that matter, even with other Indians so unfortunate as to have been declared competent or to have moved off the reservation, without paying or collecting any of the excise taxes applicable to all such businesses on an equal basis conducted by other citizens of the state.

It involves a claim of a right literally to destroy those other competing businesses, a claim which is asserted again by a citizen entitled by the Constitution to every right and privilege extended by the state to every other citizen.

The factual setting in which this claim arises is this: The Colville reservation is not an isolated tract in the State of Washington occupied only by Indians, nor, for that matter, are the amicus reservations. They lie close to Tacoma,

to Olympia, to Seattle, and various other major metropolitan areas of the State of Washington.

QUESTION: Are those amicus near the Colville?

MR. GORTON: The amicus are here, here, here and here, (indicating.)

QUESTION: Are there any big cities near the Colville?

MR. GORTON: I am getting to the city which is partly on the Colville reservation, right now.

The Colville reservation, under the 1970 census figures, has 1,779 Indian inhabitants and 2,429 or 58 percent non-Indian inhabitants on the reservation. This is a BIA map (indicating.) The upper right hand corner shows the entire reservation which is in yellow on the other map. This section (indicating) is the northwest corner of the map. The City of Omak, Washington--incidentally, both our briefs and the other briefs are in error in speaking of the city called East Omak. There is simply in Washington a city of Omak, Washington, which lies on both sides of the Okanogan River which is the boundar of the Colville reservation, and roughly this portion (indicating) of the reservation is inside the City of Omak.

White areas on this map are all on the Indian lands. The part outlined in red is where the particular cigarette sales of Mr. Tonasket take place. Green are tribal lands. Both white and green are therefore restricted, in the terms that have been used here for the last two days. The yellow lands are

those lands on this part of the Indian reservation only which has been patented, and which are therefore subject to taxation, most of which have probably been sold to non-Indians, but even if they are still retained by Indians, those yellow lands on the reservation do not support the peculiar claims for their owners which the Appellant makes here for his land, which is still restricted as far as alienation and taxation are concerned.

This portion, which is the upper part of this Section A (indicating) is in the City of Omak, some tribal land, some allotted land, a larger amount of patented land.

QUESTION: How big a city is it?

MR. GORTON: Just over 4,000 people and it is the largest city on the reservation. The City of Okanogan, which is the county seat, has about half that number. There are several other incorporated towns on or immediately adjacent to that reservation. It's not until you get to the amicus tribes that you get to the extremely large cities of the State of Washington or their immediate area.

QUESTION: The yellow section does not concern us here then?

MR. GORTON: The yellow section does not concern you here. This is just as if it were off the reservation. The point, Mr. Justice Douglas, is that on reservations in the State of Washington, not just the Colville Reservation, this is

a very typical pattern. We are not dealing with the situation that the Navajos described yesterday where Indian country--

QUESTION: I happen to know that in some reservations in Washington, it is not true.

MR. GORTON: There may be a few of the --

QUESTION: For instance, the Yakima, they don't have any such--

MR. GORTON: Oh, yes, they do, Mr. Justice Douglas. The City of Toppenish is entirely located within the exterior boundaries of the Yakima.

That's under leases from the Indian Tribal Council. Patented land.

QUESTION: Well, maybe the town of Toppenish, but not the land around it.

MR. GORTON: Much land on the Yakima Reservation has been patented, not the upper part of the reservation and the rural areas.

QUESTION: That's where the big California canners have their--

MR. GORTON: Wapato, Toppenish, that area is mostly patented land. Again, there's a mixture as there is here. There is land retained by Indians even down there.

Moreover, there is one other point. Far from all of the Indians in the Colville Tribe live on the reservation. The record in this case indicates that between half and

three-quarters of them live off the reservation. Add to that number those Indians living on patented lands on the reservation and it is clear that the extraordinary privileges claimed by Appellant are likely to be available only to a capriciously fortunate minority of Colville or other Indians, and it is this integration in these reservations which gives rise to the importance of this case, indeed I think to its very existence and presence before you. It is this integration, I believe, which accounts for the fact that until the last-ditch effort to shore up Appellant's claim to tax exemption last spring, the Federal Indian Trader Act was simply unused in the State of Washington, except on two isolated coastal reservations. Altogether, they shopped in the same stores whether they were Indians or non-Indians.

Now the approach of Congress to Indian tax exemptions has been to set out those exemptions explicitly by statute. Mr. Cohen's treatise written for the Bureau of Indian Affairs which was quoted here yesterday says, "Indeed such exemptions as applied to specific federal or state taxes on the income of Indians or other property must be found in or derived from statutes and treaties or agreements with Indian tribes." The approach of this Court for many years has been identical. It has based successful exemption claims only on specific Acts of Congress and not since the demise of implied governmental immunity 34 years ago in the Helvern case on general

philosophical concepts.

Now, Appellant's first and chief claim to a statutory exemption is based on the Indian Trader Act and this Court's decision in Warren Trading Post. The exemption which this Court found there was limited specifically and cautiously and by its express terms to sales by a licensed Indian trader to Indians, a class of sales of cigarettes which Washington statutes themselves exempt at the present time.

The Indian Trader Act, the first section of which is 25 USC 261, speaks directly of sales to Indians. In fact, should the Act be construed to apply to sales by Indians to non-Indians, sections 262 and 264 clearly require each non-Indian purchaser to obtain an Indian trader's license to go in and buy these cigarettes. The absurdity of this result indicates the absurdity of Appellant's claim that he is exempted by the Indian Trader Act in a general, non-discriminatory excise tax on his sales to non-Indians.

QUESTION: General Gorton, I had understood the opinion of your State Court to hold that the tax was applicable, whether the sales were to Indians or non-Indians.

MR. GORTON: I will certainly get to that, what I consider to be a philosophical point, because we will claim that Warren Trading Post is not applicable to the State of Washington because of PL 83-280. The point I am making now is that those cigarettes which we are actually attempting to tax,

I think that exemption may have come into existence since--this case has gone on along time--since it came into existence, but the point we are arguing for here is solely the proposition of sales to non-Indians. We are not now trying to impose a ciagrette tax on Indians; we would claim under PL 280 that we could, if we wished, but we are not trying to do that now in this case.

QUESTION: But your State Court understood that the issue involved sales to Indians or non-Indians?

MR. GORTON: I did not argue the case in the State Supreme Court. I think Mr. Pirtle's statement yesterday was right, that the distinction was made in the Supreme Court argument. It was not made by our State Supreme Court. In any event, it is conscious of our state statutes in the exemption which they provide, not just for sales by licensed Indian traders, but simply sales to non-Indians by any Indian tribe or through any Indian tribe.

QUESTION: Are you taking account of the Washington law passed February of this year?

MR. GORTON: Yes, your Honor, I am. To the contrary of the position of even the Solicitor, much less the Appellant, that Act was designed to close the cigarette loopholes against the Indians. The same legislature that passed that statute passed a conditional appropriations Act of $8 million based on the usefulness of that Act in closing off these Indian

cigarette sales. In October of this year, for example, the loss to the state from Indian cigarette sales, in taxes alone, was well over $600,000. That Act by its terms simply says that the state will no longer engage in useless acts. This of course is recognized, the Court has recognized that a state can't collect an excise tax from the purchaser after he has made a purchase and distributed it himself to his home. An excise tax like this has got to be collected through the seller to be collected at all. There was an error in fact in the argument yesterday about competing cigarette taxes. Our tax is 16 cents, Oregon's tax is 9 cents, Idaho's tax is 9.1 cents, but this does mean that people will try to get away from taxes when they can. That's why these people are selling cigarettes.

QUESTION: This law this year as I understand it allows sales to non-Indians of two cartons?

MR. GORTON: No, sir, it does not. It allows the possession by anyone for use of two cartons of cigarettes.

QUESTION: Well, it's the same thing.

MR. GORTON: No, sir, it does not exempt any sale.

QUESTION: Well, it releases the Indian seller from being a reporter or collector.

MR. GORTON: It does not, Mr. Justice Douglas. It says solely and only that possession of two cartons of cigarettes at a time is not subject to a tax. It does not allow anyone to sell cigarettes, even two cartons, much less to possess

It is designed solely to prevent the theoretical application of the law to someone who buys two cartons.

QUESTION: The General has misread the Act, then.

MR. GORTON: The Act is clear, that portion of the Act is absolutely clear that the exemption applies only to possession and never to sale. Not to the sale of a single cigarette.

QUESTION: Possession by the Indian seller?

MR. GORTON: Possession by any person for purposes other than resale. This is what the statute says, if acquired and possessed for purposes other than resale, 400 or less cigarettes at any single time.

Now, this Appellant is out of that for two reasons: First, of course he obviously has more than 400 cigarettes at a time,and secondly, he holds them for resale. That's what he is doing. That's what this case is all about.

QUESTION: Isn't it in effect an exemption from a use tax?

MR. GORTON: An exemption from a use tax which we just couldn't collect, and which no state can collect. This kind of exemption I am sure exists in many state excise tax statutes, where it is impractical to try to make a criminal out of the purchaser. You must collect these taxes from the seller, or you can't collect them at all.

Now, Appellant's next claim to a statutory exemption

from these particular excise taxes is based on Section 6 of the General Allotment Act as applied by this Court in Squire vs. Capoeman. In that case, Chief Justice Warren stated that income from a timber sale from Mr. Capoeman's allotment, a sale over which he had no control, was exempt from the federal tax on capital gains. This Court found the sale to be the equivalent of a sale of the land itself.

The finding was obviously correct and equally obviously inapplicable here. Timber can be cut from lands such as Mr. Capoeman's, literally once in a lifetime or less, and the land was found by the Court to have little if any additional value, so that the proceeds from the timber sale constituted the only income, in all probability, which the allotment would provide for Mr. Capoeman in his lifetime and amounted, as far as his purposes were concerned, to sale of the whole property. He had no control over either the fact nor the timing of the sale. Mr. Tonasket's income here, however, is continuing. It is neither based on the fruits of the land nor on its exhaustion. It is simple business income.

Moreover, Mr. Capoeman's tax exemption had not adverse effects on timber sales by non-exempt land owners. Mr. Tonasket's claim, on the other hand, if upheld, can and will destroy the businesses of competing sellers of cigarettes or of any other commodity which Mr. Tonasket chooses to sell at retail.

Finally, it seems doubtful that Mr. Tonasket's inevitable claim to a federal income tax exemption on the profits of his sales is likely to have much appeal to this Court, yet it is the logical corollary of the extension of Squire vs. Capoeman to a situation now before you, which was certainly not in the mind of the Court at the time at which that case was decided.

Appellant's final claim to statutory exemption is based on Section 4 of P.L. 83-280 itself, a statute designed to authorize the extension of state jurisdiction over Indian reservations. The statute itself provides that it shall not, and I quote, "authorize the encumbrance or taxation of any real or personal property belonging to any Indian that is subject to a restriction against alienation imposed by the United States."

First, of course, that statute doesn't grant any tax exemption; it simply preserves those granted by other statutes from encroachment by the state. Moreover, it, like all of those other statutes, except perhaps the Indian Trader Act, deals solely with property taxation. Nothing can be more clear from the decisions of this Court and, for that matter, practically every other court in the land, the distinction between property and non-property taxes.

This Court in U.S. vs. Detroit even allowed the taxation on the leasehold interest on federal lands leased to

private persons.

The cigarette taxes and the sales taxes here in question are in no way property taxes. In addition, these excise taxes have two distinguishing features not shared by inheritance taxes involved in the Oklahoma cases, or for that matter, even by net income taxes.

First of course, the ultimate burden of these taxes does not normally rest on the business charged with paying or collecting them; they are passed on to the ultimate purchaser of the cigarettes or other items offered for sale by the retailer. In fact, Mr. Justice Rehnquist, Washington State law requires that the sales tax be passed on. It does not permit it to be absorbed by the retailer.

Second of course, Appellant's claim involves the right to destroy all of his competition in the sale of cigarettes. Appellant asserts in his brief that the 3-cent taxed by the Colville tribe on each pack, if added to the State 16-cent tax will wipe out his ability to sell cigarettes. How many cigarettes, then, will a competitor in the City of Omak, without Appellant's claim to exemption, sell, subject to a 16-cent tax in competition with Appellant's 3-cent tax ? For that matter, how many appliances can a non-Indian businessman in Omak sell on which he must charge a 5 percent sales tax in competition with Appellant who claims the right to sell the same article free from taxes?

For that matter, referring back to one of yesterday's cases, can a similar businessman in Seattle sell cigarettes or appliances in competition with an Indian seller, for whom the BIA acquires property in Seattle under the claim of right asserted here yesterday by the Appellant in Mescalero?

Please remember that this Appellant is a citizen of the State of Washington, entitled to the rights of every other citizen, including police protection, schools and every other state and local governmental service, nor is this a theoretical entitlement. All state and local governmental services are actually extended to Indians by Washington State, often at a per capita cost to the state in excess of that to the average non-Indians. In point of fact, we can at least ask the rhetorical question whether Congress could, consistent with the equal protection clause of the Constitution, require us first in 1924 to have all Indians as citizens and then say that they should pay no taxes at all, and this arises in these cases, not in income tax cases or inheritance tax cases which affect only the state, but in this case which affects other citizens of the state and their ability to do business.

Now at this point, except in passing, I haven't mentioned PL 83-280, for what I consider to be good reason. I do not believe that it extended the jurisdiction of the state to impose cigarette taxes and sales taxes on the Colville

reservation, because the state already had that right. But[36] if there is any doubt about that jurisdiction, it is surely dispelled by PL 83-280 and that statute is relevant in connection with the one point in this case in which the Solicitor General asserts a position, sales of cigarettes to Indians which are tax exempt under the doctrine of Warren Trading Post in the absence of PL 83-280.

Now Appellant has belabored long in the murky legislative history of PL 83-280 without, I submit, producing a shred of evidence that it was intended to bar these taxes. He asserts that the law does nothing more than to extend state court jurisdiction.

QUESTION: Governor Evans' veto message indicates that this law legitimatizes, to use his words "individual possession of two cartons or less of unstamped cigarettes if held for personal use, thus legitimatizing to that extent non-Indian purchasers from Indian sellers."

MR. GORTON: Mr. Justice Douglas, Governor Evans is a good personal friend of mine, but he is not a lawyer, and he is clearly in error in that statement. That tax statute is clear on its face, and it just simply does not legitimize such sales.

QUESTION: Well, apparently it was not as clear to the Solicitor General as you indicated nor to Governor Evans.

MR. GORTON: It is from reading the statute, which is

the place where one will normally go to--

QUESTION: It says that the Indians are exempt if they have a permit from the state.

MR. GORTON: To sell to Indians, your Honor. If you will read Titles 82.24 and 28. This is what my answer was here. This has been the case, this was the case before 1972. The 1972 statute did not extend any right to sell by Indians to Indians which didn't previously exist in our statute. That was already there. The 1972 Act added the provision in this particular respect, not with a person--this is any person--may acquire and physically possess, if acquired and possessed for purposes other than resale--for purposes other than resale, 400 or less cigarettes at any single time, without incurring tax liability, and that was the only addition which was made by this statute which is relevant to this particular question.

QUESTION: When was the statute passed?

MR. GORTON: In the 1972 session of the state legislature.

QUESTION: This was after the decision of the Supreme Court?

MR. GORTON: Yes.

QUESTION: Do you suppose the Supreme Court would have had any different view of this case, had it had the new statute before it?

MR. GORTON: No way, your Honor. As I say, there is

other legislative history in this Act which indicates that the legislature felt that it was closing an $8 million per biennium loophole by passing this Act and imposing the cigarette tax the moment that the cigarettes came into the state and before they even arrived on an Indian reservation.

QUESTION: Let's assume that the Act was construable. You say it isn't, but suppose it was construable and to say that the Indians could sell some exempt sales, and the Supreme Court of your state construed the Act that way?

MR. GORTON: That would govern.

QUESTION: So there would have been quite a different result in this case?

MR. GORTON: It would if your view is correct, but my position is that it is not construable, it is clear on its face.

QUESTION: You have one view of it, and apparently the Solicitor General and others have a different view of it.

Since your Supreme Court did not have it before it when it decided the case, why ought we not send this back, vacate this judgment and send it back for reconsideration in the light of the new statute? Let your Supreme Court decide, which after all has to finally decide it.

MR. GORTON: Then you won't have to have this argument with the bench.

(Laughter)

QUESTION: Governor Evans is surrounded by very talented lawyers. He doesn't write these things in back rooms.

MR. GORTON: You're asking me to testify in this particular case, your Honor.

QUESTION: No reason for you to do anything other than you have been doing, argue.

MR. GORTON: Not when you ask me what Governor Evans was advised, your Honor.

My point in this particular case, though, is that that is essentially a useless Act. You have this case in all of its panoply before you.

QUESTION: If we send it back, would it be useless?

MR. GORTON: Yes, because you will get an inevitable answer on it.

QUESTION: Your Supreme Court is going to construe this tax the way you view it.

MR. GORTON: The state taxing statute. Now, if you feel in an excess of caution that you wish to do that, you nonetheless have the right, and I believe this is the right time--

QUESTION: Why should we decide a federal question, if this case goes away, if your Supreme Court construes your new statute contrary to the way you look at it?

MR. GORTON: Well, I suppose my answer to that has to be that you are at least as capable of reading a statute as

our Supreme State Court is, and when--

QUESTION: Their view of the statute is what governs us; we can't construe it for ourselves.

MR. GORTON: You had two other cases here in front of you which involve at least some of the same questions, except for the effect of PL 83-280. You were asked yesterday by Appellant to send that back to our Supreme Court to determine whether it was correctly passed. Our Supreme Court has already ruled on that, so has our Federal District Court, so has our Ninth Circuit Court. That too would be a frivolous act. Those cases are already cited in our briefs.

You have a case here on federal law, on federal questions which is ripe and which is before you on those federal questions under which you don't need to get to this. This man by his complaint is engaged in this resale of cigarettes. That's a plain term, that's what his business is--the resale of cigarettes.

QUESTION: Let's assume that you agreed for the moment that this statute was ambiguous. Would you suggest then that we send it back or not?

MR. GORTON: If the state statute is ambiguous and if it controls your decision in the case, you would have to.

QUESTION: So it just really comes down to a matter of whether we agree with you that the statute is so clear on its face that any arguments as to its meaning contrary to yours

are frivolous?

MR. GORTON: I think that that is essentially the case, your Honor, as long as you decide that this case would be governed by a state statute, even if it were construed the other way.

What if it were construed to allow someone to possess and resell two cartons of cigarettes, which is all they claim for? Still we are not dealing with a person here who buys and resells two cartons of cigarettes.

QUESTION: Whatever the construction of the 1972 Act, whichever way it is construed, it would not control the outcome of this particular case.

MR. GORTON: It would not help Mr. Tonasket, who is not a buyer and seller of two cartons of cigarettes under any set of circumstances.

QUESTION: Well, just a while ago I thought you said that it would make quite a difference if the statute had been before your State Supreme Court and the State Supreme Court took a view of the statute contrary to yours?

MR. GORTON: Well, there are many ways in which they could take a view contrary to mine, your Honor. They could say that a person may sell two cartons of cigarettes in an isolated sale without being subject to the statute. That would be contrary to my view, but that wouldn't help Mr. Tonasket. He is a commercial seller of cigarettes. He doesn't buy two

cartons of cigarettes and sell them to a particular friend and then go buy two more and sell them to a friend. He's engaged in a commercial enterprise in competition with---

QUESTION: I know, but I thought the Solicitor General construed the statute to mean that the seller could sell two cartons to anyone person at any one time?

MR. GORTON: The Solicitor General did but the Solicitor General, I will submit in this particular case totally misconstrued--

QUESTION: We're back to the same old thing. How about your Governor? He construed it the same way, didn't he?

MR. GORTON: No, he did not.

QUESTION: He didn't?

MR. GORTON: The best you can say for his construction was the one I have discussed here with Mr. Justice Rehnquist. The sales tax issue is still here with you. The fact that the sales tax is applicable to these sales and that this particular claimant claims the right to sell this article and other articles free from the state sales tax, which includes no such exemption in it, so in any event, you have that matter before you.

QUESTION: When you argued that this case is governed by the federal statute and that we can really lay aside the state statute, were you addressing yourself to the part of Section 280 on that provision that the state has jurisdiction

over everything that applies to all other people in the State of Washington?

MR. GORTON: Yes, your Honor, I was and it was in that connection that this so-called new legislative history was brought up and sent to us about 10 days ago, and we on Monday found something in the file which we were not supplied by the Solicitor General, a letter from the Assistant Secretary of the Interior to the House Committee. The original bill in 1953, H.R. 1063 included only the language jurisdiction over civil causes of action in this particular respect. The Secretary suggested the language in which the bill actually passed, and said this, that it was to extend to those reservations the substantive civil laws of the state insofar as these laws are of general application to private persons or private property, and he went on to call for the preservation of Indian law where not inconsistent with applicable state laws to assure, and I am quoting, "the predominance of state authority."

Now can anyone seriously assert that the state excise tax laws are not substantively laws of general application? To state that question is simply to answer it.

QUESTION: In other words, when they seek to have all the benefits of citizenship and the protection of the substantive law, then they take with that the burden of taxes

except as Congress or the state expressly exempts them?

MR. GORTON: Precisely, and that is what Congress did, Mr. Chief Justice, in P.L. 280. It excepted property taxes on alloted lands. It excepted to a certain extent Indian laws where they were not inconsistent with state law. That's why it was not a Termination Act. The same Congress passed a group of Termination Acts. They wiped out the Indian tribes as entities, the existence of their reservations and property tax exemptions. This was not a Termination Act, but it was an Act which says except where we have said specifically to the contrary, the state has all jurisdiction. It just can't get any clearer.

QUESTION: What about income tax on farm income from alloted lands, after 280?

MR. GORTON: That would be an extension, I think, not as great an extension as this. Squire vs. Capoeman I believe went off on the proposition that you got this income only once in your lifetime, effectively. Cutting timber was not like farming.

QUESTION: Arguably, Squire would govern that?

MR. GORTON: Arguably, Squire would govern that case, but Squire certainly doesn't govern this case. This is the income from land.

QUESTION: From transactions?

MR. GORTON: It's from transactions. There is no way

that these taxes can be construed to be property taxes. It is only property taxes or taxes which are construed to be propery taxes which this Court has ever exempted Indians except in Warren Trading, which itself was based on a specific statute.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Pirtle, we will enlarge your time a little bit because we have gone over with a lot of questions. You may proceed.

REBUTTAL ARGUMENT OF ROBERT L. PIRTLE ESQ.,
ON BEHALF OF THE APPELLANT

MR. PIRTLE: Mr. Chief Justice, may it please the Court:

There were several points that do need answering here, and I would take them in order.

First, I am not surprised that the Attorney General came up finally with the bootstrap argument. That argument is the state provides services, therefore it should have the ability to tax. That's a normative argument. It has nothing to do with the statutory problem of acquiring jurisdiction for taxing.

QUESTION: Then what does Section 280 mean when it says as to civil juisdiction, the states, after they have gone under 280, will have jurisdiction over civil cases and to the

same extent--this is the general part--to the same extent that such state has jurisdiction over other civil causes of action and those civil laws of such state as are of general application to private persons and property?

MR. PIRTLE: Your Honor, the answer to that is twofold: First, the language in there is not language of plenary grant, such as you find in the Termination Acts, Klamath and Menominee. It is very concise and it is restricted to private persons and private property.

Now when you get to the cases, and you can find this on page 7, the cases are enumerated on the brief of NCI, you will find that civil law and criminal law are not the entire body of law. There is an additional third class which is that law of sort of interface between sovereignty and the citizen, the sovereignty of the state government or federal government and the citizen. Mostly it comes up in connection with cases of administrative proceedings, but a tax power is a sovereign power. In this case we are discussing the conflict between tribal tax power and state tax power. That is not a law governing private persons and private property, to use that narrow language, and the Attorney General failed to read to you from the last sentence in that letter from Lewis, which by the way was from the published reports, so it is nothing new. He said this should make the laws apply to civil transactions among Indians. Taxing power by either state or the

tribe is not a civil transaction. That clearly is outside the meaning of that narrow language. Then he goes on to say "but with a minimum interference of Indian control of Indian affairs."

Now the Court might say to itself that language is rather broad, perhaps it is overly broad. If the Court feels it is overly broad, the Court can restrict it and I suggest that the Court should restrict it in accordance with the Court's rule in the Holy Trinity Church case in which the church in New York imported a vicar from England for its preacher and they clearly violated a federal statute which said you shall not import people from outside the country to take jobs for you.

This Court said when language can be extended beyond the legislature, it must be restricted to the intent of the legislature, when it says it specifically. We have just broad language over civil laws, true, but then it is narrowed by those modifiers to private persons and private property.

QUESTION: You indicated perhaps there might be some ambiguity in 280 in the passage that I was reading, but the Committee report on that, after some preliminaries about the efforts to draw all Indians into the total culture, goes on to say that it extends to those reservations the substantive civil laws of the respective states. Now do you say that substantive civil laws do not include the tax statutes?

MR. PIRTLE: Well, your Honor, you have to read that in context. It says the substantive civil laws of the states, and it goes on to talk about civil transactions among Indians.

QUESTION: Well, now, read the rest of the sentence: "Substantive civil laws of the respective states insofar as those laws are general applications to the private persons or private property."

MR. PIRTLE: Yes, your Honor.

QUESTION: Well, now, doesn't a tax on sales have something to do with private persons and private property?

MR. PIRTLE: I would say that that has to do with the sovereign ability of a state to tax. The tax may fall in many areas of private property; transactions, excise, et cetera. But I think that that language, when you look at the entire statute, look at the entire legislative history, there's no tax talk, specifically tax talk, except in that one discussion in the Subcommittee hearing and there it is made very clear that Congress does not intend any tax to be levied from the Indian people. It was never discussed, and clearly Congress's express purpose in the 1968 Act would be frustrated if there were a loading on of state taxes prior to the consent by the Indian people to jurisdiction.

Now to answer one of your additional arguments, your Honor, and this is the bootstrap argument, the argument that the state provides services and therefore should have the

power to tax.

QUESTION: Section 2(b) and 4(b) as I read them say that this Section is which is that new law, 280, nothing in this Section shall authorize the taxation of any real or personal property of any Indian or Indian tribe.

MR. PIRTLE: That's true, your Honor. It also says "or regulation of the use of such property inconsistent with federal policies and statutes."

QUESTION: But does that do anything more than preserve the exemptions which Congress has already explicitly extended to Indian lands? It is a saving clause, isn't it?

MR. PIRTLE: I think it is, your Honor, but there are two points to be made here. One is that the language of encumbrance, this Court found in the Squire case to include also the federal income tax problem, and this Court ruled in Rickert , the case that the General Allotment Act which required that at the end of the trust period, there be no prior debt which could attach to the property, said that language extends not only to the land but to the horse, the plow and the barns on that land. That is the personal property needed to use the land.

QUESTION: That's quite a way off from cartons of cigarettes, isn't it?

MR. PIRTLE: I think not, your Honor, because compare Mr. Tonasket with Squire. Squire was lucky enough,

fortunate enough to have growing timber on his land. Mr. Tonasket has nothing but grass. NOw, the purpose of Congress in promulgating the Tobacco Ordinance of the Colville Tribe, for example, is clearly that trust lands be utilized in a modern way. There was no point in expecting the poor Indian to be a farmer on his land in East Omak, which is an Indian village, when he has no timber on it, and where the only really legitimate and sensible method of developing the land is some kind of commercial enterprise.

Now I would say additionally, your Honor, that in the Kansas Indians case, this Court said specifically that conferring rights and privileges on the Indians cannot affect their situation which can only be changed by treaty stipulation or voluntary abandonment of their tribal organization.

In the case which the Attorney General cited, in his opinion as direct precedent, Goudy vs. Meath, the quotations there are from the in re Heff case. Those are the ones in which the Court had earlier said, Mr. Justice Rutledge in a not very well thought our opinion, that the General Allotment Act which conferred citizenship, the right to vote and to participate in government, also made people subject to taxation. This Court specifically overruled Heff in United States vs. Nice(?) in 1916, so the very foundation of the Goudy vs. Meath case had been overruled by this Court.

MR. CHIEF JUSTICE BURGER: I think your time is up,

now.

MR. PIRTLE: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:41 o'clock, a. m., the case was submitted..