SUPREME COURT, U. S.

In the

Supreme Court of the United States

THE MESCALERO APACHE TRIBE,

Petitioners,

vs. No. 71-738

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.,

Respondents.

Washington, D. C.
December 12, 1972

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Washington, D. C.

Tuesday, December 12, 1972

The above-entitled matter came on for argument at 1:50 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:

GEORGE E. FETTINGER, ESQ., Fettinger & Burroughs, P.O. Drawer M, Alamogordo, New Mexico 88310, for the Petitioner.

JOHN C. COOK, ESQ., Bureau of Revenue, Assistant Attorney General, P.O. Box 2246, Santa Fe, New Mexico 87501, for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-738, The Mescalero Apache Tribe against Jones.

Mr. Fettinger.

ORAL ARGUMENT OF GEORGE E. FETTINGER

ON BEHALF OF THE PETITIONER

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

The question presented by this case to this Court is can the State of New Mexico, acting under State law, impose its compensating tax on the use of tangible personal property owned by the Mescalero Apache Tribe and utilized on its private enterprise principally located outside of the boundaries of the Mescalero reservation, and can the State of New Mexico, acting under State law, validly impose its gross receipts tax under the same circumstances?

The essential facts of the case are that the Mescalero Apache Tribe is a treaty tribe. It's present reservation boundaries were established by Executive Order. In 1936 the Tribe adopted its first constitution under 25 U.S.C. 476, which constitution was amended in 1965. Both of these constitutions were duly approved by the Secretary of the Interior.

The Tribe is the exclusive owner and the operator of Sierra Blanca Ski Resort, which is located in Otero and

Lincoln Counties in the State of New Mexico. The ski resort is primarily on lands belonging to the United States Forest Service and leased to the Tribe for a period of 30 years.

QUESTION: But not entirely so?

MR. FETTINGER: Not entirely so, sir, some of the ski runs and ski trails are , in fact, on the reservation.

QUESTION: Do you think the case is basically any different from what it would be if the Tribe was running a taxicab company in San Francisco?

MR. FETTINGER: Yes, sir, I think we can draw many distinctions for that purpose. I wish I could do it now.

QUESTION: The ski trails would be one of the factors?

MR. FETTINGER: A minor one, sir. I think there are more. If you wish me to take up the question now, I will.

QUESTION: No, just take it up on your own time.

MR. FETTINGER: The ski resort in fact is bordered on the south by the reservation itself, and the Ski Enterprise, including the lease with the United States Forest Service, was entered into by the Tribe pursuant to Article XI of the Constitution which Constitution was approved by the Secretary of the Interior.

A feasibility study was prepared and paid for by the United States Government, and the purpose of the operation of the ski resort by the Mescalero Apache Tribe is to raise

revenue in lieu of taxing tribal members, and also the proceeds are used for the educational and social and economic welfare of the Mescalero Apache people.

The ski resort provides job training for the members of the Tribe, and there are 20 to 30 members of the Tribe who are in fact in such a training capacity.

QUESTION: Could you tell us what kind of training is given to them? Are there other people who work there without training?

MR. FETTINGER: Yes, sir. The ski run is operated as a business intending to train members of the Tribe to operate ski lifts. They may be brought into the economic community in a sense of training for leasing ski boots. They may be maintenance personnel. They may be in the soil conservation area, grooming the ski trails, maybe slash removal, maybe timbering. Each of these jobs is in a training capacity for the individual attempting to upgrade the individual Indians.

QUESTION: Then who runs the ski resort?

MR. FETTINGER: The ski resort is run under a plan of operation that has been adopted by the Tribal Council subject to the approval of the Secretary of the Interior. It is run under that plan by a Board of Directors that includes Indians on that Board. Mr. Chino is a member of the Board. They run that enterprise subject to the restrictions set forth

in that plan of operation.

QUESTION: Do I understand from what you have just said that it is not run exclusively by Indians?

MR. FETTINGER: It is run exclusively by Indians in that the plan of operation for the ski run was adopted by the Tribal Council. But under the Constitution of the Tribe, even that plan of operation after adoption by the Tribal Council is subject to approval of the Secretary of the Interior.

QUESTION: What I am trying to get at is, are there non-Indians operating the ski resort?

MR. FETTINGER: There are non-Indians involved in the operation, yes, sir. The manager, for example, is not an Indian.

QUESTION: It is set up so that the Indians that are present there are only in training?

MR. FETTINGER: Fundamentally, sir. Some of them actually hold down jobs.

QUESTION: This is what I get from your briefs, that the Indians there are only in training, and other people are there running it. Is this correct?

MR. FETTINGER: This case is here on stipulated facts, your Honor. At the time this controversy arose, that was in fact the case. Since that time, sir, circumstances have changed so that there are employees involved who have

been longer term employees, but training is still a significant part of the operation of the ski run.

The original purchase of this ski run, both the interest in the land, the improvements and the new construction on the ski run was completely financed by loan to the Mescalero Apache Tribe under 25 U.S.C. Section 470. At the ski resort, the United States Government must approve the budget for the fiscal year, the leasing of equipment and other property used by the Tribe, the leasing of facilities at the ski resort to various concessionaires, the plan and design of any additional facilities or improvements to be constructed at the ski resort, the disposal of any property other than expendable items, the form and the content of monthly reports, the form and the content of the annual report and the certified public accountant that in fact prepares such annual report.

The Bureau of Revenue of the State of New Mexico conducted an audit in the year 1968 and as a result assessed compensating tax, which is essentially an excise tax, in the amount of approximately $5,800 plus penalty and interest.

QUESTION: Is that tax in the nature of a use tax, some that was bought out-of-state basically?

MR. FETTINGER: Yes, sir, the compensating tax in New Mexico applies to out-of-state purchases brought into the State and in fact used there. In that sense it can be termed

a use tax, generally referred to as an excise.

QUESTION: What if the Indian organization had not had to go out of State and found a dealer down in Alamogordo that would be able to supply it? I take it they would have gone down and he would have charged them presumably a State sales tax. Would you claim that that was beyond the power of the State to exact under those circumstances?

MR. FETTINGER: If the purchase was made by the Tribe for tribal purposes, we would contend that purchased inside or outside of the State of New Mexico, it would be exempt from such a gross receipts or compensating tax. In this case it was purchased outside the State or it would not be under the compensating tax.

QUESTION: Do you claim if it were purchased under the same circumstances it was in this case from a dealer in Alamogordo and he said, "It's a thousand dollars price plus $40 for the Governor," that he could not add that to the bill he was giving to the Tribe?

MR. FETTINGER: Yes, sir. If I may, the statute since this case has been amended in fact at this time, but under the State statute if the tangible personal property were to be used on the reservation, the State statute presently would permit the Tribe to issue what is termed a non-taxable transaction certificate and thereby avoid the tax if purchased in Alamogordo in this case. It would hinge on whether it was

used "on the reservation."

QUESTION: Was the ski lift in this case, the material it was used for, on or off the reservation?

MR. FETTINGER: It is physically located beyond the present boundaries of the reservation. It is immediately adjacent to, but off the reservation.

QUESTION: It's not on Indian property.

MR. FETTINGER: We would contend that the interest in real estate upon which this ski run is located --

QUESTION: The lease.

MR. FETTINGER: Yes, the lease from the Forest Service and as such is an interest in real estate and is effectively subject to the statute which provides that it's not subject to tax.

At the time that the compensating tax was assessed against the Tribe, as a matter of fact, the improvements had been completed and were in fact permanently attached to the real estate, All of the materials against which the compensating tax was assessed were purchased with money which was borrowed from the United States Government, and all of such purchases were approved by the Bureau of Indian Affairs or the Secretary of the Interior.

Beginning as of the first day of October 1963 and continuing until the end of December of 1966, the Mescalero Apache Tribe has paid the State of New Mexico something in

excess of $26,000 in gross receipts taxes by reason of its operation of the ski resort. We filed a claim for refund. That protest and a claim for refund was heard by the Commissioner of the Bureau of Revenue. We were turned down. We went to the Court of Appeals for the State, we exhausted our remedy. We are presently before this Court on a motion of certiori.

The Court of Appeals of the State of New Mexico held that the Enabling Act of the State of New Mexico, principally Section 2, constituted a specific grant of power to the State of New Mexico to tax"as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian."

It is our contention that the Enabling Act of the State of New Mexico, Section 2, while the quotation is correct, it simply does not apply to an Indian tribe. "Any Indian" is not the same thing as an Indian tribe. And merely reading Section 2 of our Enabling Act would carry this forward with relative strength. The first section of Section 2 refers to an ordinary disclaimer and refers specifically to interest in real estate within its boundaries held by any Indian or Indian tribe that shall have been acquired through the United States, and with the mention of the Indian tribe in the same section, it is very clear that it was not inadvertently left out of the section that is cited by the State of New Mexico

in its efforts to tax the Mescalero Apache Tribe under these particular circumstances.

We would respectfully suggest that since the Attorney General of the State of New Mexico in May of this year citing Mescalero v. Jones as authority stated that these cases clearly establish that Indians on Indian lands can lawfully be subject to taxation by State authorities without necessarily interfering with any right of self-government or impairment of any rights granted or reserved to them by the Federal Government, it makes this case even more important to the Indians, perhaps not only in New Mexico but throughout the whole of the United States.

President Nixon in his Message to Congress in July of 1970 acknowledged that the Federal Government must support and encourage Indian development. He recited at that time facts such as unemployment on reservations which runs as high a 80 percent, that 80 percent of the reservation Indians are below the poverty level, that the average annual income is $1500 on reservations, and suggested that rather than oscillating between a policy of termination on the one hand and paternalism on the other, that the Federal Government should play a complementary role with Indian communities in meeting the clear needs of the Indians in the United States.

QUESTION: The President was addressing those observations to the Congress, was he not?

MR. FETTINGER: Yes, sir, and I think they are significant from the point of view that the Commissioner of Indian Affairs is presumed by case law to speak for the President when exercising a policy towards Indians under 25 U.S.C. 2. Hopefully that policy is as expressed by the President, sir.

Now, interestingly enough, in the case of Mason v. United States, which is a Court of Claims case decided earlier this year, Judge Davis recited that the judicial climate had changed in the last 15 years in the United States and that the Indian tax immunity was no longer directly compared to and correlated with other governmental immunities and that at this time the courts were looking to the particular social goals that Congress had sought to reach through restrictions on Indian properties.

It is suggested to this Court that the instrumentality doctrine that has often been used by this Court and by others in ruling upon taxability of Indian interests when viewed in the light of profitability which in Federal Land Bank v. Board of County Commissioners decided in 1961 was determined to be a worthwhile Federal purpose. When the profitability of the enterprise is considered to be part of the purpose and goal, that any tax that burdens that profitability is inappropriate when assessed by a State absent specific authority to do so.

I would suggest to this Court that the transactions herein taxed by the State of New Mexico, both are purchases by the Tribe and sales by the Mescalero Apache Tribe and are clearly with commerce with the Indians. The treaty with the Mescalero Apache Tribe has subjected the Tribe to all of the regulations and laws of the State of New Mexico, and unlike Kake v. Egan, the treaty also provided that the Tribe was lawfully and exclusively under the laws and jurisdiction of the Government of the United States.

I believe that the termination policy that existed at one time expressed by Congress has been repudiated by the various sections of the Indian Reorganization Act and that in fact Section 25 U.S.C. 476 under which this Tribe is organized specifically provides that in addition to the other powers vested in the Tribe by virtue of the Constitution, there shall be vested the right to prevent the sale or encumbrance of tribal lands or other tribal assets without the consent of the Tribe. The Mescalero Constitution carries forward this language giving the Tribe the right to veto such encumbrances.

If we draw a parallel to the situation where individual Indians were to receive their patent free of any charge or emcumbrance, that a direct parallel exists in this situation without even any congressional intent to terminate and that if we use the word "encumbrance" in the statute, 25 U.S.C. 476, and the Mescalero Apache Constitution in the

same light that this Court in the past has used the phrase "charge or encumbrance" from the General Allotment Act and related Acts, that we arrive at the conclusion that this land also should not be taxed by the State of New Mexico.

The Tribe is a peculiar entity. It is created by Congress under the specific statutes we have cited. It is supervised in all matters by the executive department acting through the Commissioner of Indian Affairs, and the present Indian policy of self-determination without termination necessarily carries with it the intentional withholding of direct control. I do not believe that the test should reasonably include the absence of some element of control over the Mescalero Apache Tribe, because the purpose as expressed by Congress and the executive department is to develop independence on the part of the American Indian. Whether or not termination ultimately takes place is a political matter that should be decided by Congress.

In the Tribal Constitution which is a part of the appendix in this matter, the Tribal Council's powers, all of them, are subject to the regulations of the Secretary of the Interior. Article XI under which this Tribe exercised its purchase of these assets, the plans of operation as adopted, are subject to review of the Secretary of the Interior. Under Article XIII of the Tribal Constitution, and perhaps most important, the Tribal budget is subject to

"such review and approval as the Secretary requires, and no expenditures may be made except in conformity with that budget." Control of the budget in this case constitutes essentially absolute control over the activities of the Mescalero Apache Tribe on or off of the reservation and to whatever extent the Secretary of the Interior desires to exercise such control.

Certainly the Tribe is more closely controlled than any Indian trader or individual Indian allottee and certainly under the Indian Reorganization Act, the revolving loan fund, and other statutes, profitability of the Indian venture is certainly one of the purposes and one of the goals that is foremost in the minds of the Congress.

We have heard a good deal in the briefs about abusing the State of New Mexico in its right to tax. I would like to respectfully suggest to this Court that most States also have benefits flowing to them by reason of the fact that Indians were there before and are still there.

QUESTION: Would you carry this argument to the point of denying New Mexico's right to tax the income of Indians who are earning money working at the ski run, at the ski resort?

MR. FETTINGER: That is really beyond the scope of this case. I do not want to intrude upon McClanahan, but I think --

QUESTION: I think it's relevant to your case.

MR. FETTINGER: To income earned on the ski run, a whole new avenue open. If the income were earned on the reservation, the contention in McClanahan would be that it was not. If these are Indian lands, the statute we refer to is 470 -- excuse me, 465 -- which provides that such interests in real estate acquired in this manner are not subject to the tax. So we are looking to the statute --

QUESTION: You're looking to the real estate.

MR. FETTINGER: -- and the real estate.

QUESTION: Well, this is taxing simply income, not real estate.

MR. FETTINGER: Yes, sir, but in the past this Court has generally held that when you do not permit the direct tax, you do not permit the indirect tax.

QUESTION: So, again, what you say, no tax on the individual income?

MR. FETTINGER: I think it should be treated the same way as income on the reservation proper, sir. I think reservations as such are somewhat archaic and would respectfully suggest that the history of the development of the reservation in this case, if this Court were to take judicial notice of the Executive Orders, you would find that this reservation has been changed many times. In fact, the land that is presently the subject of this controversy, under stipulated fact No. 18

of the appendix, we stipulated that the book The Mescalero Apaches was proper subject for judicial notice. If you were so inclined, on page 211 and 212 are recited the facts and circumstances under which this land was removed from the reservation and placed in the public domain back about 1882.

QUESTION: You were talking about Section 465. Do you see any difference between the possibility of applying the exemption in that section to the use tax on the one hand or applying it to the privilege tax in New Mexico on the other?

MR. FETTINGER: I think in regard to the compensating tax where it's directly equivalent to interstate commerce the arguments might be stronger that it should not apply. In regard to the gross receipts tax, we say the argument is equally as strong. I fail to --

QUESTION: Then you see no difference?

MR. FETTINGER: Except interstate commerce --

QUESTION: The Attorney General does in his approach, does see a difference.

MR. FETTINGER: If the Tribe is to be taxed, I do not think the Court's rulings in the past have established an atmosphere that we play a game to see if the Court can guess some way that has not been prohibitad from taxing as opposed to a general prohibition against tax unless specific authority is given by Congress. Certainly the preferable view

should be that unless authority has been given by Congress to the State to tax, especially with an Indian tribe where exclusive jurisdiction has been granted to the Federal Government and not to the State government by the original treaty.

QUESTION: What's your authority for saying that this Court has held that income from exempt lands is not taxable?

MR. FETTINGER: Income from exempt lands? Well, sir, the holding was that the income from reinvested monies was taxable by this Court. The income from exempt lands such as Squire v. Capoeman, for example --

QUESTION: That was a Federal income tax law.

MR. FETTINGER: Yes, but I think in this case --

QUESTION: It doesn't have anything to do with Indian exemption, it just had to do with the construction of a taxing statute.

MR. FETTINGER: Well, for example, the Revenue Ruling of 1967 provides that the income of tribes generally is not subject to the Federal income tax, for example.

QUESTION: That's just again a construction of a taxing statute.

MR. FETTINGER: Yes, sir, it says --

QUESTION: It says there New Mexico hadn't intended to reach this income.

MR. FETTINGER: Well, they are excluded from it because they are not of the nature that is taxed, I think is the basis of the ruling. They are not a "person" under that statute. And as such they are acknowledged to be something unusual. And I think all Indian tribes fall in that category. Fundamentally, I believe we still have to go back to the basic treaty that recites that it's subject to the exclusive jurisdiction of the Federal Government.

We do not have the Kake argument here. I do not think Kake applies to this.

QUESTION: Would it apply if they organized a bus line to carry passengers from nearby cities where they have airports to this ski resort? Would you say the bus line would be subject to or exempt from taxes?

MR. FETTINGER: Sir, I would suggest to you that the protections that are already built into the system which controls the Indian tribe is very appropriately discussed at this point. First of all, any activity of the tribe in so doing would obviously need the direct approval of the Secretary of the Interior.

QUESTION: Let's assume they got it.

MR. FETTINGER: If it had the authority vested in it from the Secretary --

QUESTION: The same authority they got for entering this enterprise.

MR. FETTINGER: Yes, sir. If the Secretary of the Interior had given its approval, the executive department having approved it, if Congress had provided the wherewithal as they have done here with a loan, I would suggest that that is a political decision that generally this Court has left to the Congress of the United States rather than exercising itself, and the protection should be --

QUESTION: Well, it's a political decision whether they should be taxed by the State?

MR. FETTINGER: Yes, sir, if the purpose of the loan is to permit the economic development of the tribe --

QUESTION: I'm just talking about a bus line now, not a loan, just a commercial bus line like any other bus line.

MR. FETTINGER: Yes, sir, I would suggest that that would perhaps be an abuse if you are going beyond the reasonable boundaries that, for example, this Court might establish. In the first instance, that boundary should be established by the Congress of the United States or by the Secretary of the Interior procedurally. If he authorizes the Tribe to spend money in doing that, then you have that tacit approval within the scope of the Congressional authority to do such act. As I said, this seems to be the political decision and effectively when do you limit the activities of an Indian tribe?

If I may, I would like to reserve my last three minutes for --

QUESTION: Let me ask you a question that was asked in the last case. What does New Mexico provide reservation Indians by way of services?

MR. FETTINGER: By contract with the Secretary of the Interior, certain welfare services are provided. The school system in which the Indians participate is conducted by the State of New Mexico through the local school district. However, on the other side of the coin, Johnson-O'Malley funds are provided to the State of New Mexico to assist in the expense of educating these Indian children. There are other -- Title 815 for the construction of school buildings, Federal impact money does flow to the State in exchange for providing these services to the Indians who in fact live on reservations.

If I have any time left, I would like to reserve three minutes.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Cook.

ORAL ARGUMENT OF JOHN C. COOK, ESQ.

FOR THE RESPONDENTS

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

The respondent considers this case to present two questions: Can the State of New Mexico impose its compensating

tax on the use of tangible personal property which is owned by an Indian tribe and which is used by that tribe outside the boundaries of the tribe's reservation?

The second question presented is whether the State of New Mexico can impose its gross receipts tax upon the receipts of an Indian tribe from the operation of a ski resort exclusively owned by the tribe and located almost entirely outside the boundaries of the tribe's reservation.

The taxes at issue here are not taxes on real or tangible personal property. The gross receipts tax is a privilege tax and the compensating tax is an excise tax. These taxes are measured by the value of the property, the property being a tribe's gross receipts from its off-reservation business activity and the value of the material which the tribe acquired outside of Mexico and used to construct two off-reservation ski lifts.

The incidence of the taxes at issue here are not on real property or tangible personal property. The compensating tax on the use of property is not a tax on the property itself. I think that principle was established in United States v. City of Detroit. The incidence of the gross receipts tax at issue here is not on real property or tangible personal property, but rather it is on the tribe's sale of services at the ski resort. Although the gross receipts tax is imposed on the seller tribe, it is ordinarily passed on

to buyers.

The Enabling Act for New Mexico prpvides in part that"nothing herein shall preclude the State from taxing as other lands and other property are taxed any lands or other property outside an Indian reservation owned or held by any Indian." This language indicates an intention or purpose on the part of Congress to allow the State to tax activities such as those engaged in by the Mescalero Apache Tribe in this case.

The Solicitor General in the brief for the United States as amicus curiae has argued that the use of the phrase "by any Indian" in exclusionary language of the New Mexico Enabling Act indicates that this language should be restricted so as not to include an Indian tribe such as petitioner.

Respondents contend that if the language of the second subparagraph of Section 2 of the Enabling Act is read as a whole, the implication is clear that the phrase "by any Indian" refers to an Indian tribe as well as individual Indians or groups of Indians. However, even if the argument of the United States and petitioner is accepted, the jurisdiction taken by the United States over the Indian tribes under the New Mexico Enabling Act does not extend to the off-reservation activities of the petitioner Mescalero Apache Tribe.

QUESTION: Am I correct, the resort is jammed up against the reservation?

MR. COOK: Yes, Justice Marshall,it's right beside the reservation.

QUESTION: On some United States property?

MR. COOK: It's on land leased from the United States Forest Service.

QUESTION: Well, it's United States property, isn't it?

MR. COOK: It's United States property which is leased to the Indian tribe.

QUESTION: Could the United States have made that a part of the reservation?

MR. COOK: I don't know, your Honor, whether they could have or not. They did not.

QUESTION: Do you know any reason they couldn't?

MR. COOK: I don't know why they could not have, but I know that in the facts of this case, they did not.

QUESTION: But if they had, you agree you wouldn't have any case?

MR. COOK: Your Honor, that would be a different case, and I'm not agreeing that we would not have a case if this --

QUESTION: On what basis would you have a case?

MR. COOK: We say that what's being taxed here is not --

QUESTION: Can you put this tax within the reservation?

MR. COOK: Well, we say that that issue isn't before the Court in our case.

QUESTION: All right.

MR. COOK: I'm not speaking for the State of New Mexico, but I would say if the enterprise was located within the boundaries of the reservation, the tax could still apply, but that issue is not presented by this case.

Furthermore, the United States Congress has not immunized or exempted the Tribe from the taxes at issue here by reason of 25 United States Code, Section 465. The last paragraph of Section 465 states in part: "Title to any lands or rights acquired pursuant to," and then it cites certain reference sections, "shall be taken in the name of the United States in trust for the Indian tribe or individual Indians for which the land is acquired, and such lands or right shall be exempt from State and local taxation."

This section does not have any application to this case for two reasons: First, lands or rights in lands are not being taxed.

Second, the United States Forest Service lands which were leased to the petitioner tribe were not acquired by the United States in trust for the tribe. The lands belonged to the United States and were then leased to the tribe. The lands were not acquired in the name of the United States in trust for the Indian tribe as is required for the exemption

under 25 United States Code, Section 465.

The congressional debate on Section 465 indicated that the purpose of the section was to allow for consolidation of badly checkerboarded reservations and supplementation of Indian's stock in grazing in forest lands.

25 United States Code, Section 470 established a $20 million revolving fund and authorized loans to Indian charter corporations for the purpose of promoting economic development of tribes and members of tribes. The clear implication from the stipulated facts in this case is that petitioner tribe was organized as an Indian charter corporation. The tribe acquired a loan under 25 United States Code, Section 470,and loans under that section were to be made to Indian charter corporations.

The respondents contend that it is therefore clear that the petitioner tribe was organized as an Indian charter corporation.

The intent of Congress in separating its appropriations for land acquisitions and its appropriation for loans is clear. Tribal organization and the consolidation of reservations further the Federal policy of preserving Indian customs and management of their affairs. Corporate organization and the loan fund further the Federal policy of integrating the Indians into American economic life. If the purpose of the Federal policy with regard to the loan fund was to integrate

the Indians into the American economic life, entry into that economic life should be and was intended to be on a footing of equal competition.

The New Mexico Bureau of Revenue recognizes that if the imposition of the taxes at issue here interferes with the tribe's right to reservation self-government, the tax must fail. We think this test is clear from the cases of Williams v. Lee and Organized Village of Kake v. Egan. There are no facts present in the instant case to show that there was any interference with the Mescalero Apache Tribe's right to reservation self-government. Due to the absence of such facts, there is no showing that there is any real current or even future danger that the tribe's right to reservation self-government would be interfered with by the imposition of the taxes at issue here. Many businesses in the State of New Mexico thrive and still pay the taxes at issue here. There is nothing in the record to indicate that the ski resort operation of the Mescalero Apache Tribe would suffer any adverse economic consequences as a result of the taxes imposed here. Even if this were the case, such an adverse economic effect does not without more indicate an interference with the tribe's right to reservation self-government. The operation of the ski resort is not a governmental function, we contend. It is clearly a proprietary function. The two functions are separate and distinct. If there was any interference, it would

be only with the proprietary function of the tribe.

Lastly, the Bureau of Revenue contends that the Mescalero Apache Tribe is not an instrumentality of the United States. Arguments that the tribe is a Federal instrumentality seem to be premised on the assumption that the tribe is acting as a virtual ward of the United States Government in engaging in its off-reservation business activities.

If the tribe is a virtual ward of the United States Government, then what is the tribal sovereignty and self-government which the petitioner argues are being interfered with? The New Mexico Bureau of Revenue contends that the petitioner cannot be and is not both a sovereign and a Federal instrumentality. Petitioner simply is not a Federal instrumentality. If the tribe was operating as an Indian charter corporation, that corporation was not only for the convenience of the United States. It was for the benefit of the members of the Mescalero Apache Tribe. The corporation was not organized solely to carry out governmental objectives of the United States. The objectives of the tribe and the tribe acting as a corporation in the operation of the ski resort would benefit the Mescalero Apache people. A ski resort certainly is not essential to the performance of governmental functions.

The Government of the United States and the government

of the Mescalero Apache Tribe will continue to function regardless of the existence of the tribe's ski resort. The ski resort cannot be regarded as virtually an arm of the Government. Therefore, under the test set forth in the dissenting opinion in Agricultural National Bank v. Tax Tax Commission and in Department of Employment v. United United States, the tribe is not a Federal instrumentality.

That concludes my argument.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cook.

Do you have anything further, Mr. Fettinger?

REBUTTAL ORAL ARGUMENT OF GEORGE E. FETTINGER

ON BEHALF OF THE PETITIONER

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

In response to the assumption that the tribe is acting in its charter capacity, I would suggest that Section 25 U.S.C. 482 which authorizes the revolving loan funds to be loaned to constitutional entities should answer that question.

I would like to cite to the Court page 16 of the Solicitor General's brief wherein it is stated that, "Early cases considered both the tribes and their lessees exempt from state taxation of Indian land or income produced from such land," citing Indian Oil v. Oklahoma, 257 U.S. 501. And further that, "The immunity from taxation of lessees of the government was overruled in Helvering v. Mountain

Producers Corp., 303 U.S. 376, but the immunity of the government itself, or of an organized Indian tribe, was not overruled."

I would like to respectfully suggest that in this case the income from this ski run, ski resort, goes directly to the tribe. It is controlled in its acquisition, it is controlled in its expenditure far more than anything we have said here today indicates. The Code of Federal Regulations controlling the budget, provisions of the Tribal Constitution clearly indicate that these controls are absolute.

QUESTION: Does the Tribe collect State sales tax at the ski resort?

MR. FETTINGER: I honestly don't know, sir. My recollection is there is a flat rate. Well, they can charge anything for the tickets that the traffic will bear in a sense, but even the prices charged are subject to the control of the Department of Agriculture under 36 C.F.R. 251.2, I think.

QUESTION: How about sales tax, State sales tax?

MR. FETTINGER: I don't believe it is collected. I believe there's sort of an even dollar ticket. I simply do not know.

QUESTION: They must sell food there.

MR. FETTINGER: Yes, sir. I simply don't know if they do or don't.

I would respectfully suggest that the treaty refers to the nationwide nature of the agreement between the United States Government and the Apaches at that time. Kagema? carries with it the idea that the Indians are not geographically limited, or the United States is not geographically limited in regard to its dealings with the Indians.

And we respectfully suggest to the Court that the absolute control over this Indian tribe in this particular operation is within the scope and meaning of the statutes of the Indian Reorganization Act and should by reason of the fact that the purpose of this is economic development of the Indians, and profitability of this venture is significant, and under the cases decided by this Court in that line, therefore should be exempt from State taxes of this sort or generally from State taxes, period.

QUESTION: How about Federal taxes?

MR. FETTINGER: Federal income taxes are covered by a specific regulation with a case citation, Choate -- I've forgotten what it is right now, sir. And the tribal income is not taxable to the tribe, I believe the concept being that when it passes on, if it was taxable to the tribe and goes on to the members at some later time, it would be taxable to the members. But that doctrine is accepted here with the low income of the Indians, quite obviously you can pass along an awful lot of money before you are going to pay

any taxes.

This excise tax and gross receipts tax is more odious than an income tax would be because it goes on gross income regardless of profitability. And that is directly contrary to the policy expressed --

QUESTION: The income of the tribe from this ski resort is not subject to Federal income tax?

MR. FETTINGER: That would be our contention under Revenue Ruling 67-285, I think it is sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:33 o'clock p.m., the case in the above-entitled matter was submitted.]