IN THE SUPREME COURT OF THE UNITED STATES

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, Petitioner, v. RAMON RUIZ, ET UX., Respondents.	No. 72-1052

Washington, D. C.,
Tuesday, November 6, 1973

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:

HARRY R. SACHSE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Petitioner.

WINTON D. WOODS, JR., ESQ., University of Arizona, College of Law, Tucson, Arizona 85721; 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 resume argument in Morton v. Ruiz.

Mr. Sachse, I think you had the lectern when we closed last night.

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ.,

ON BEHALF OF THE PETITIONER - RESUMED

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

When we closed yesterday, I was about to say that I thought the Snyder Act has been well summed up by Mr. Wolf, who at an earlier stage was counsel in this case, in which he described the act in a Law Review article this way. He said, "The Snyder Act is a familiar and somewhat distressing occurrence in the history of Indian affairs. As in other instances, Congress enacted a very general measure and left the rest up to the Secretary of the Interior and the BIA." I think that is what the Snyder Act did so, except that I would add one other thing. It also left the rest up to future Congresses in their appropriations procedures.

Now, in all the recent years, including the appropriations for fiscal year 1968, which are at issue here, the Secretary of the Interior has submitted to the Congress a request for funds for a welfare program for Indians in this language: "General assistance will be provided to needy

Indians on reservations who are not eligible for public assistance under the Social Security Act." Each year Congress has published that language in its reports in favor of the bill.

Q Mr. Sachse, what is the government's response to the claims that the Secretary really does provide welfare for a lot of non-reservation Indians?

MR. SACHSE: Well --

Q Oklahoma, Alaska --

MR. SACHSE: -- I think there are two problems there. One is Oklahoma and Alska. I think it is just simply correct, that this statement that has been made to the Congress is a compact and too abbreviated statement that, for it to be absolutely accurate, it should say for Indians on reservations and in the jurisdiction of the Bureau of Indian Affairs in Oklahoma and Alaska.

Q Well, why do you provide welfare for non-reservation Indians in Oklahoma?

MR. SACHSE: Well, in Oklahoma, the reason is the following, that a whole section of the State of Oklahoma was once Indian territory and was totally occupied with Indian reservations.

Q I understand that.

MR. SACHSE: The second part of this is what I am getting at. The reservations have been abolished, the tribal organizations have not been abolished. The Indians there live

on trust property and with a good deal of property still managed by the Bureau of Indian Affairs, such as in the Mason case we had last year. And the Bureau's interpretation of that has been that the lands that it administers in Oklahoma are equivalent to reservations.

Q Well, what about Indians -- they call attention to another example, the Turtle Mountain Reservation in North Dakota, the Indians, those Indians can live anywhere they want to and still get welfare. That is what --

MR. SACHSE: The Bureau of Indian Affairs has also made this interpretation of the statute, that where there are Indians living on trust land that is administered by the agency near a reservation, they simply treat that as if it were on the reservation. In other words, they haven't been as rigid in saying that if you are off reservation there is absolutely nothing, as one might hope for a mechanical application of the law.

What they have said in the Turtle Mountain instance, they have simply equated it administratively, people living on trust land, allotted land --

Q Does that go for the Rapid City Indians too?

MR. SACHSE: I don't think that is trust land.

Q I know, but it is said here in the brief that Indians residing in Rapid City, South Dakota get welfare to some extent. That isn't even close to a reservation.

MR. SACHSE: I am not aware of them getting welfare under this program. Now, I should mention that there is another program that does quite openly and under congressional authorization provide welfare for off-reservation Indians. That is what is generally called the relocation program. If an Indian lives on a reservation or near a reservation and can't get a job and he wants to go somewhere else to look for a job, the Bureau will try to find him a job and will provide him with general assistance for several years when he first begins to work.

Q You are suggesting that the Bureau doesn't give welfare to any Oklahoma or Alaska Indians except those living on trust property?

MR. SACHSE: No, I don't want to go that far. I think --

Q I think you would, and you are just saying that you are giving welfare to Indians who are still members of an established tribal organization.

MR. SACHSE: I don't think that that is the distinction either, because I am not at all sure that Mr. Ruiz is not a member of the tribal organization.

Q Of course he is. I think he probably is, isn't he?

MR. SACHSE: I think what the Bureau has done, and I think with the knowledge and consent of Congress each year in

making these appropriations is to treat Alaska and Oklahoma in a separate category, and it may be that at various times and in various other places they violated their own regulations in giving welfare to people off reservations in particular instances. I don't think so.

Q What did Mr. Bennett mean when he said "on or near" -- that seems to be his definition -- "these are on or near reservations, with a modern service bureau serving as many as 400,000 Indians and Alaska natives who live on or near reservations, people who find themselves isolated from the mainstream of American life."

MR. SACHSE: If you describe the activities of the Bureau of Indian Affairs as a whole, it clearly is not limited to on-reservation Indians. On or near would be more accurate, but it does things for Indians who are anywhere near a reservation also.

Q These particular Indians in this case are near, aren't they?

MR. SACHSE: They are near a reservation. What I am saying is that in the health program, that quite openly is for Indians who live on or near reservations. In this work relocation program, it is for the benefit of Indians who live on or near reservations, but it is actually put into effect even quite distant from a reservation, in some city where there may be employment.

So I am not arguing that the Bureau of Indian Affairs is precluded or does not in fact give assistance to Indians off reservations. What I am saying is that in their general welfare program, this general assistance program, that year after year they have asked Congress for money for this program for activities on-reservation. Maybe they should have described it a little broader. And Congress has appropriated with that in mind and it appropriates sums of money that only fit that definition.

Q Well, are you saying that the Department of Interior may do this on a discretionary basis from time to time but that the Ninth Circuit Court of Appeals has no such discretion? Is that the essence of -- the Ninth Circuit has no authority to say that this extends to all Indians off reservations?

MR. SACHSE: I think what is really happening is that -- I think you have to isolate the Alaska and Oklahoma situation as special situations. But then apart from that, I think that the Bureau of Indian Affairs will try to make as broad a definition of on-reservation as they can, and that where there has been trust land involved in a few instances -- and I know this is so, people at the Bureau of Indian Affairs told me so just last week, so I assume it is so -- that they have in some instances given welfare to people who live on trust lands near the reservations, in situations where

the reservation was too small for the allotments to have been made on the reservation, and the government found land for people off the reservation. But they have not extended that to people who do not live on trust land and thus are not under the direct supervision of the Bureau in that respect.

Q Do you draw a line then that the Bureau has generally between Indians on trust lands and Indians on allotted lands?

MR. SACHSE: Well, when I say trust land, I am not drawing a distinction between that and allotted land. I mean land in which the federal government is still the trustee, whether it is because the Indian had an allotment and doesn't yet own the land in fee, or for any other reason.

Now, I think it is clear that Congress has not appropriated money for as broad a program as the petitioners ask for. I want to point out also that even -- I mean respondents ask for.

I want to point out also that even respondents say that they don't suggest that the program should be made available to Indians throughout the United States. At page 23 of their brief, they say, "We have never argued that the government is required to provide subsistence benefits to the fully assimilated Indian residing in Manhattan." So if you don't use the boundary, the line that Congress and the Bureau has set up, some other line has to be picked. And I don't think

that the line on or near reservations is going to get any more satisfactory judicial answer to this question than the line that has been drawn now of on reservation and these two special instances of Alaska and Oklahoma.

Now, I want to say a word about the Bureau of Indian Affairs Manual on this. I would feel easier with this case if the Bureau of Indian Affairs had publishes its manual in the Federal Register, because I think what they have done -- I don't think they had a duty to have rulemaking, public notice and open hearings, because this is for benefits and so forth, and there have been cases that have held that it is not necessary there.

But I think to have these be real legislative rules, that they would have had to have been published in the Federal Register. What the BIA actually did is publish in the Federal Register a notice that it has this manual and that it is available to the public at the Washington office and at the regional offices of the BIA, which is something like a substantial compliance, but I don't say that it really is compliance with that statute.

So we are left with the rule simply as interpretations of the acts of Congress. Now, I think they are correct interpretations in the sense that this is all that the Bureau asked money for, and this is all that the appropriations gave the money for. So when the Bureau's regulations say that this

is for welfare of Indians on reservations and in Alaska and Oklahoma, I think it is just saying what the congressional acts have to be read to say anyway.

But if the Court disagrees on that, I think that the congressional acts are so vague and that the discretion left to the Bureau is so large, both in the Snyder Act and in other legislation and in the general language of the appropriation act, which is just general appropriations, that the Bureau does have rulemaking authority here, and that if it did go through the process of publishing these rules they would be faced with the problem then of whether that made the same program valid.

Q Is there any challenge to the rule about the difference between reservation/non-reservation Indians in this context on any ground other than the statutory ground, that it is just inconsistent with the statute?

MR. SACHSE: I think that is the only challenge.

Q At least there was no other one presented below, no other challenge?

MR. SACHSE: They made constitutional challenge to it.

Q That was made below?

MR. SACHSE: Yes, the constitutional challenge was made.

Q The right to travel.

Q Now, that is here?

MR. SACHSE: I think that is before the Court. If the Court agrees with us, that what the Secretary has done here is in accord with the congressional legislation, or with it as legitimately interpreted --

Q Then they have to reach this?

MR. SACHSE: Then I think you have to reach the --

Q Well, what does the government say is the purpose of the regulation, just to save money or --

MR. SACHSE: No. We say that the purpose of the regulation is to -- is so that in areas where there is Indian government or the most direct federal supervision, that the federal government does supply the kind of welfare program that could be supplied on a county basis within a state, but that where people move out of those areas and into the state in general, decision has been made, at least as far as welfare goes, they should be equated with the other people in the state and have whatever benefit is there.

Q But not BIA money?

MR. SACHSE: Not BIA money off the reservations or these particular areas. I think it is a decision -- I don't think it is just an economy measure but I think it is a decision to use available funds in the core area of federal responsibility.

Q Does the government deny that it has an impact

on whether -- on movement?

MR. SACHSE: Yes, we do deny that it has an impact on movement of any legal significance. If you once accept that the reservation or that the situation in Alaska or Oklahoma is a legitimate jurisdictional kind of distinction to make, then the fact that someone leaves the jurisdiction and he gives up certain welfare benefits is not an interference with his right of travel, any more than leaving one county and going to another is if one county has a broader welfare program than another, and on general assistance the welfare programs often break down county by county.

I think what it is, the government is seeing a serious problem of unemployment on reservations where it has the greatest responsibility, and the government reacting properly to that problem in setting up a program, the government simply not setting up a program that goes beyond the heart area of its responsibility.

Now, I think it might have been a wise decision for the Bureau of Indian Affairs to have a broader program. I don't argue for the merits of their decision to try to limit this program. There have been acts presented to Congress that would have provided broader programs, and the Bureau has not afforded them and Congress has not passed them. I don't speak to the merits of that.

I do simply say that I think constitutionally this

is within the area of cases such as Dandridge, but there is no invidious discrimination here. The difference is based on an essential jurisdictional difference, and whatever the wisdom of the decision that Congress and the BIA have made, it is legitimately their decision to make.

I would like to reserve my thirty seconds, if I may.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Woods?

ORAL ARGUMENT OF WINTON D. WOODS, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WOODS: Mr. Chief Justice, and may it please the Court: My name is Winton Woods, counsel for the respondents in this case.

I would at the outset like to clear up what seemed to me yesterday to be an apparent misunderstanding about our basic position in this case.

First, I think we need to be very clear about what it is that we are talking about when we talk about general assistance sponsored by the Bureau of Indian Affairs. It is in fact a supplemental program that is available only to needy Indians who do not qualify for one of the categorical aid programs under the Social Security Act. Those programs are generally run by the states. The GA program is run by the BIA for the benefit of Indians who Congress has determined, by virtue of their very special status in American life, are

worthy of some special consideration.

With that in mind, I think, we are talking in this case not about discrimination between Indians and non-Indians but about discrimination between differing groups of Indians, between those Indians who do receive BIA general assistance and those who do not receive BIA general assistance.

Now, the government has sought to characterize the holding of the court below in the very broadest possible manner. In fact, we think that the holding of the court was quite narrow. And if I might quote, the Court of Appeals held, "We hold that under the circumstances of this case, it was improper for the Bureau to deny general assistance on the basis of residency alone." Now, there are two elements of that holding that I think need to be noted if the opinion of the court below is to be properly understood.

First, the special circumstances that exist in this case; and, secondly, the very narrow automatic basis of the administrative decision to deny welfare.

The respondents here, plaintiffs below, are full-blooded Papago Indians who are members of their tribe, they are unassimilated, they speak primarily the Papago language, they reside in a Papago community 15 miles from their reservation, they are in every respect, as the Stucki affidavit, which is in the Appendix at pages 84 and 87, demonstrate, Papago Indians.

Moreover, they reside within the historic boundaries of their aboriginal land, land that the Indians Claims Commission has recently found was illegally taken from them. And, finally, there is no question on the record after the fair hearing in this case that they are needy Indians within the intent of the congressional legislation that is at issue here.

Against that factual background, the Bureau of Indian Affairs automatically determined that the respondents were not entitled to general assistance solely on the basis of the fact of their residency 15 miles from the reservation boundary. The result of that interpretation, which in fact is not unusual, is severe discrimination.

First, as Mr. Justice Blackmun pointed out yesterday, a Papago miner who happened to live on the western edge of the reservation and thus was able to commute to the mines at Ajo would be entitled to general assistance if he needed it, while persons in the situation of the Ruizes, who come from South Komelic, in the far southern part of the reservation, near the Mexican border, and thus are unable to commute, are forced to move in the Indian village of Ajo in order to work if they are to find work.

As we pointed out in our brief, there is very little work available on the Papago reservation. What can be found generally is found in the bordering communities. Secondly -- and the Court has discussed this at some length with Mr. Sachse

-- there are some non-reservation Indians who receive general assistance benefits regardless of the fact that they do not reside on a reservation, and we think that they are indistinguishable from the respondents in this case.

The government has suggested that there is some difference based upon the jurisdiction over the reservation, and yet the government has admitted in their brief and in the petition for certiorari that jurisdiction exists in this case, that the Bureau in fact has jurisdiction to extend benefits to these people.

I think that we cannot assume on the basis of the legislative history that exists in this case that Congress intended that these strange and unusual results would come about when they approved this program. We believe that the results violate the congressional intent and that they also violate the Fifth Amendment.

Our basic case then is this: We believe that when Congress directed the Secretary of the Interior, through the Snyder Act, to expend such monies as they would appropriate in the future for the care and benefit of the Indians throughout the United States, and when they later in 1968, which is the act in issue in this case, appropriated money pursuant to that mandate, that the plain language of those statutes does not allow the automatic or conclusive presumption, if you will, of non-eligibility that is based solely upon the place

of residence.

Now, that is not to say that we believe that the statute mandates the payment of general assistance benefits to Indians throughout the United States, no matter where they may be found, no matter what their percentage of blood may be, no matter what their degree of assimilation may be.

We believe that the Secretary can and should pursuant to the congressional mandate create a carefully drawn regulation that draws the very line Mr. Sachse was talking about, and that line can be drawn by focusing upon the word "Indian" both in the Snyder Act and in the appropriations act. A state that defines or a regulation that defines who is an Indian for purposes of those statutes might very well mean every conceivable objection that the government has to our case.

For example, the Bureau of Indian Affairs might conclude that an Indian -- well, in defining an Indian, that they would look to things such as the degree of assimilation into the dominant culture, that they would look to such things as degree of blood.

Q That series of factors that you just mentioned, Mr. Woods, sounds strikingly like the range of criteria that are used in exercising discretion administratively.

MR. WOODS: Your Honor, I agree, and they are also the range of factors that have been adopted by the Public Health Service to determine their jurisdiction. If I might

speak to the point more directly --

Q Wouldn't that bring you at least close to the Dandridge holding of the Court?

MR. WOODS: Your Honor, I think that this case is quite distinguishable from the Dandridge case. The government consistently has suggested that this is a Dandridge problem. I read Dandridge at least to say that this Court will not second-guess legislative judgments of relative need between competing classes of welfare recipients. I don't believe that that is this case. If we are to analogize this case to Dandridge v. Williams, or Jefferson v. Hackney, I think we could hypothesize a situation in which the State of Maryland, which has jurisdiction over the entire state, chose to extend AFDC benefits only to mothers who live in Baltimore County. As you well remember, from the facts of that case, there was a discrimination in Dandridge between Baltimore County and the rest of the state to the extent that families in Baltimore County receive slightly more money.

I suspect that this Court, apart from the Social Security Act issue, on constitutional grounds would have seen that case quite differently had Maryland said we are only going to expend money for mothers in Baltimore County without any factual showing, without any determination that that was a rational choice.

Q You don't get to this issue, I take it, unless

we disagree with the Ninth Circuit as to their interpretation of the congressional act?

MR. WOODS: That is perfectly correct, Mr. Justice Rehnquist. We believe that the case can be decided on narrow statutory grounds on the basis of the obviously unclear legislative history, the somewhat unclear language of the two statutes and by application of the standard of construction that this Court has applied since the time of Mr. Chief Justice Marshall and has most recently applied last year in the McClanahan case.

Q If the legislative history is unclear and the statute is unclear, doesn't that give you a fairly strong case for following the administrative construction?

MR. WOODS: Your Honor, it does and it doesn't. As a general proposition, it is quite clear that it does, and if this were an ordinary case I would not be standing here making the argument that I am. The fact is that the government over the course of years has told the Congress that it is expending money for the benefit of the Indians who live on or near reservations. Now, there have been times when various Senators, particularly Senator Bible, in a colloquy that is quoted at length in the Court of Appeals opinion, attempted to find out just exactly what the Bureau meant when it said "on or near." The Bureau has never adequately described to Congress what the "on or near" language meant.

Moreover, they suggest that the existence of this regulation should under the standard rule be taken to be -- well, be taken to be an expression of congressional intent since Congress has not overridden it in any way through the statute.

I would agree again with that as a general proposition, but the fact of this case is that pursuant to the policies established by the Bureau of Indian Affairs Manual itself, that regulation is not for public consumption. It is a regulation designed for internal administration. Those regulations that are designed to inform the public and presumably the Congress are not contained in the Bureau of Indian Affairs Manual alone, but they are put in CFR, through the Federal Register.

This regulation is hidden away in a manual that is used by the Bureau of Indian Affairs in handling its internal programs, and we simply don't believe that the standard and I believe appropriate rule in regard to long-standing administrative regulations is applicable in this case.

Secondly, the government points to the fact that the appropriations request itself has always contained the limitation. We would suggest that the fact that Congress chose not to include the requested limitation in its appropriation is equally an argument for our side. We might well assume, particularly following the Squire v. Capoeman standard of

liberal construction for statutes regarding Indian affairs, we might very well assume that the failure of Congress to enact a regulation requested by the Bureau is in fact a recognition of Congress' intent to not limit the program to the degree that the Bureau sought to do so.

Q Doesn't the long history of the actual application of that provision have some significance?

MR. WOODS: Indeed it does, Your Honor, and again I believe that the actual application of that provision -- I assume that you are talking about the Bureau of Indian Affairs Manual of regulations -- the Court of Appeals found, and we think there is substantial support for that finding, that over the course of years the Bureau has administered their program in a very sloppy way, that they have in fact extended benefits to Indians who don't reside on reservations, even outside of Alaska and Oklahoma. It has never been quite clear, even in the legislative history which is cited in our brief, just how far the Bureau has gone to extend benefits to near reservation Indians. The Court of Appeals found, however, and we think found correctly, that they have done so, so that the in fact practice over the course of years differs greatly from the specific language of the regulations and we believe that it is appropriate for this Court not to look only or to look not only at the specific language of the regulation but to look as well to the practice of the Bureau under that regulation.

Q Incidentally, do you believe the Court of Appeals have adopted the "on or near" limitation?

MR. WOODS: Your Honor, I believe that the Court of Appeals adopted precisely the suggestion that I am offering to this Court, it is the suggestion that I offered to them, and that is that it is not the position of the Court of Appeals or of the District Court or of this Court to draft a regulation for the Bureau of Indian Affairs. We have asked for a writ of mandamus directing them to draft a regulation in light of their experience and knowledge. They are the agency supposedly with the expertise in the area. We suggest that they be directed to draft a regulation that incorporates functional standards describing who is an Indian to avoid the discriminations which we see in the program as it is presently run.

Q What I had reference to, Mr. Woods, this is rather broad language in the opinion on page 21 of the petition for certiorari, "In light of the foregoing, we conclude that Congress intended general assistance benefits to be available to all Indians, including those in the position of appellants, at the time the Snyder Act was passed." That seems rather broader than an "at or near" limitation, doesn't it?

MR. WOODS: It is, Your HOnor, it is clearly broader, and the question --

Q You are not defending that?

MR. WOODS: Well, let me say this: I would defend that with the understanding that the word "Indian" is subject to limiting construction. I would not assert that the Bureau must pay general assistance benefits to a Manhattan stockbroker who happens to be one-sixtyfourth Papago.

Q Well, suppose he was full-blooded?

Q What would you do with the Sequoia Indian that gets one of the highest labor prices in the world building those skyscrapers in New York?

MR. WOODS: Your Honor --

Q I understood from the brief that you were cutting back, you said it didn't apply to places like that, I thought.

MR. WOODS: I could make a few suggestions, but I would not purport to stand in front of this Court and draft a regulation without any real expertise in the area of Indian affairs.

Q But you wouldn't --

MR. WOODS: I would suggest, in regard to that specific question, that the Bureau --

Q You couldn't say all Indians under any circumstances?

MR. WOODS: Depending on how you define "Indian," Your Honor. You might define --

Q Well, what about Chief Judge Barefoot, head of the Court of Criminal Appeals of Oklahoma, who is a full Choctaw Indian?

MR. WOODS: I think he is clearly a fully assimilated Indian, and that is precisely the kind of Indian that we think Congress did not intend to --

Q So you don't mean all Indians, right?

MR. WOODS: This is a very difficult point and it bothers --

Q Are you talking about assimilated Indians, reservation Indians -- they are all Indians, aren't they?

MR. WOODS: They are all Indians and all I am suggesting is that for the purposes of the Snyder Act and the appropriations act, that the Bureau may adopt a narrower definition of Indian. It may say that Indian for this purpose means an unassimilated Indian of a certain degree of blood who -- and indeed residence may be a relevant consideration. We don't deny that residence is one factor that the Bureau may consider, in using Mr. Justice Marshall's hypothetical. The Indian who resides in New York might, because of that fact and some other facts --

Q Not be an Indian.

MR. WOODS: -- not be an Indian for the purposes of the program, not for all purposes but simply for the purposes of the program that Congress has created through the Snyder

Act and the appropriations act.

Q Mr. Woods, you said you brought an action for a mandamus. This isn't a mandamus action, is it?

MR. WOODS: This was originally an action for a writ of mandamus in the District Court. It was -- the complaint was on cross motions for summary judgment, a judgment was entered for the defendants, the case was appealed to the Court of Appeals, the Court of Appeals found in favor of respondents and the government appealed to this Court.

Q So this was in this form a mandamus action when you brought it before Judge Walsh?

MR. WOODS: It was an action in the nature of mandamus pursuant to 1361, as well as an action for a declaratory judgment.

We believe that if the Court disagrees with our position regarding the legislative history, that there are then three constitutional issues that it must confront. Two of those we have dealt with to some extent already. First is the discrimination between some non-reservation Indians and other non-reservation Indians. The government has gone to great lengths to attempt to find a rational basis for that discrimination. We simply say that we do not believe that there is a rational basis that is evident in the record.

Perhaps more importantly, however, there is a discrimination between reservation Indians and non-reservation

Indians. I would refer the Court to the affidavit of Mr. Elee Sam, which is in the Appendix at pages 89 and 90, and was part -- an exhibit in support of our motion for summary judgment. Mr. Sam is a Vice Chairman of the Papago Tribe and he describes the situation that occurred when the government came in and built a dam in the northern part of the reservation called Painted Rock Dam. A village that was on the dam location, the dam site, had to be removed. The government built a new village in the town of Gila Bend, which is directly adjacent to the reservation. They purchased the land and treated it as if it were on the reservation. However, some 19 families who had lived on the land where the old village was were not included in the new community that was built by the Bureau of Indian Affairs. They had to go some place, and by the nature of the Papago community they did not feel free to move to far parts of the reservation, they wanted to maintain their kinship ties with their village, and so they moved in to Gila Bend.

The situation now, as described by Vice Chairman Sam, is that those 19 families are denied general assistance benefits even though they reside perhaps a few feet from the reservation boundary and they reside there by virtue of action of the government, while other Indians who have been moved into the new community built by the BIA are given general assistance and new houses and all of the other things that the government

can do for the Indians.

We suggest that discriminations of that kind, discriminations such as the one suggested by Mr. Justice Blackmun yesterday between the miner who lives on the western edge of the reservation and commutes to Ajo, some twelve miles, and the Indian who lives in Indian village, that those discrimination between certain kinds of reservation Indians and certain kinds of non-reservation Indians are simply in defensible. We can find no rational basis to support that classification.

Q This argument, I gather, Mr. Woods, is directed to the particular facts of this case in terms of the location of these two Indian groups, not to some general proposition that somewhere in other states off-reservation Indians are given general assistance benefit.

MR. WOODS: Your Honor, it is directed to both points. I am talking now about the precise facts of this case because I understand them more clearly. The other situations that we have cited in our brief come from statements of Bureau of Indian Affairs officials to various appropriations committees and Congress over the years, and they describe this rather fuzzy way in which they go about administering their programs. I can't --

Q I am addressing, of course, your constitutional argument.

MR. WOODS: Right. And we suggest that the

discrimination created on the reservation in Arizona, as well as those situations described in the brief, in Alaska and Oklahoma, Rapid City, Turtle Mountain, apparently in Reno, we know that there may very well be other situations which we are unaware -- the point is that there are some reservation Indians or non-reservation Indians who are indistinguishable from their brothers who reside a few miles away on the reservation, who are denied general assistance benefits while the class of people from whom they cannot be distinguished are granted general assistance benefits.

Q Well, they are distinguishable on the basis of their residence, and that is what this case is about.

MR. WOODS: That is precisely what it is about, Your Honor --

Q And that is a distinction.

MR. WOODS: That is a distinction, but we would suggest that that distinction bears no rational relationship to the purpose of the legislation which is to help needy Indians.

Q It is a different argument, but you cannot fairly say that they are absolutely indistinguishable because the distinction is their place of residence, and that is what the -- that is a distinction made in this case.

MR. WOODS: That is absolutely right, Your Honor.

Finally, if the Court concludes that the traditional equal protection argument and the legislative history nonetheless

require it, to uphold the Bureau of Indian Affairs regulation in issue in this case, we believe that the appropriate standard for judging the constitutionality of the action of the Bureau and of the Secretary of the Interior is the strict scrutiny test adopted by this Court in Shapiro v. Thompson.

Q But you also I think just suggested that even under the rationality test --

MR. WOODS: That is right, Your Honor. We have three grounds upon which we think this is improper. We think it violates the intent of Congress, we think it violates the traditional equal protection, and we think it infringes upon the right of an Indian to travel throughout his historical aboriginal land.

The facts of this case, I would remind the Court, are that the land upon which the respondents live is land that was illegally taken from the Papago Tribe, as found by the Indian Claims Commission. They reside within their historic aboriginal land, and they have exercised their right -- and I have to admit that it is not a right that this Court has established, but I think that any fair reading of the right to travel cases must conclude that an Indian has a right to travel particularly throughout his historic land.

As we pointed out in our brief, in our added statement to the statement made by the government, there is very little work available on the reservation, and thus travel around

reservation and off reservation communities becomes a matter of necessity if one is to work. If Mr. Ruiz wanted to work in the mines, he had to move to Ajo and to live in Indian village, since commuting from his village in the southern part of the reservation was impossible. He could have moved back, he could have moved back to the reservation, as evidently many miners did, as Professor Stucki discovered during his study, but he wanted to keep his daughter in school in Ajo so that she would have a better chance than he had, and he did so, thus he was penalized by the Bureau for having exercised a fundamental right by having gone to Ajo a few miles from his reservation to find work.

Moreover, the regulation acts as an inducement for him to come back to the reservation, and there evidently are a number of cases described not only in the various committee hearings but in the affidavits in this case in which Indians have returned to the reservation.

Q Wouldn't that have been true in the Dandridge case if a recipient living in Baltimore had moved over to the Eastern Shore or some place?

MR. WOODS: I am not sure I understand your question, Your Honor.

Q Well, you are saying that by moving, you are talking about the right to travel, but that right was also involved in Dandridge, was it not?

MR. WOODS: You mean if they had moved out of Maryland.

Q Yes.

MR. WOODS: If they had moved to some other state. I quite agree, and I think again this is a different case. We are not suggesting, and the government is not suggesting that the Bureau of Indian Affairs' jurisdiction is limited to a single state. They have traveled throughout the area under the jurisdiction of the governmental agency that creates the welfare program, i.e., the United States government, and we think that that is the distinguishable case from the person who moves, say, from Maryland to Virginia and then seeks benefits from the State of Maryland because they are higher than Virginia. We wouldn't argue for that proposition. We argue only for the proposition that a person who travels within the appropriate governmental jurisdiction has got a right to not be discriminated against because they have exercised that right of movement. Now, I understand that perhaps later today, and at least by tomorrow, another Arizona case, dealing with the right, to some extent to the right of intrastate travel, will be before this Court, and I think to some extent that is relevant to the right to travel argument that we are raising here.

Q The BIA jurisdiction, I take it, extends throughout the fifty states, so that what you are contending for is a right to travel because of the Indians' relationship to the BIA

anywhere in the fifty states different from that of an ordinary citizen.

MR. WOODS: No, we don't suggest that it is any different from the right of an ordinary citizen.

Q Well, then, why does it depend on BIA jurisdiction?

MR. WOODS: Simply because the question raised by Mr. Chief Justice Burger creates a situation in which a welfare recipient moves from one jurisdiction, one relevant governmental jurisdiction into another, from jurisdiction A, which was previously paying welfare assistance to her, to jurisdiction B.

Q I understood his question to you to be about someone who moved from Baltimore County to the Eastern Shore of Maryland, both within Maryland, and I think in Dandridge we sustained a differential between Baltimore County and other parts of Maryland.

MR. WOODS: That's right, Your Honor, you did sustain I think without a great deal of discussion the differential between Baltimore County and the rest of the state.

Q That wasn't an issue in Dandridge.

MR. WOODS: I take it it was not in issue. Moreover, this is not the Dandridge case. There isn't a differential here. This is not a case where the Bureau of Indian Affairs has weighed competing needs among classes of people. It is a case where the Bureau automatically, without any factual basis,

has concluded that off-reservation Indians were not within the recipient population created by Congress, i.e., needy unassimilated Indians, and we think that that is very different from the previous decisions of this Court, quite properly I believe, upholding the right of a state legislature to make judgments about competing needs among competing classes of recipients. We think it is a quite different matter to say that these people are not to be included at all, they are not even to be given a shot at dividing up that limited pie.

My time is up. Thank you very much.

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

Mr. Sachse, do you have anything further?

MR. SACHSE: No, Your Honor. Thank you.

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

[Whereupon, at 10:50 o'clock a.m., the case was submitted.]

- - -