In the

Supreme Court of the United States

John C. Moe, etc., et al.,

Appellants,

v.

The Confederated Salish And Kootenai Tribes Of The Flathead Reservation, et al.,

Appellees.

No. 74-1656

and

The Confederated Salish And Kootenai Tribes Of The Flathead Reservation, et al.,

Appellants,

v.

John C. Moe, etc., et al.,

Appellees.

No. 75-50

Washington, D. C.
January 20, 1976

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Washington, D. C.,

Tuesday, January 20, 1976.

The above-entitled matters came on for argument at 2:17 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

SAM E. HADDON, ESQ., Special Assistant Attorney General of Montana, First National Bank Building, Missoula, Montana 59801; on behalf of Moe, et al.

RICHARD A. BAENEN, ESQ., Wilkinson, Cragun & Barker, 1735 New York Avenue, N. W., Washington, D. C. 20006; on behalf of The Confederated Salish and Kootenai Tribes of the Flathead Reservation, et al.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-1656 and 75-50, regarding Moe and Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Mr. Haddon, you may proceed when you're ready.

ORAL ARGUMENT OF SAM E. HADDON, ESQ.,

ON BEHALF OF JOHN C. MOE, ET AL.

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

The consolidated appeals arise out of final judgments of a three-judge court of the District of Montana, in two companion cases. Both actions were filed by the Confederated Tribes of the Flathead Reservation, and certain individual tribal members, against the State of Montana and certain of its public officials, seeking, in the so-called cigarette case, to enjoin the State from requiring a cigarette dealer's license tax for Indian retailers, and to enjoin the precollection of State cigarette taxes on cigarettes which were sold by these Indian retail dealers.

The other case, the personal property tax, sought to enjoin the State from the collection of personal property taxes on property owned by tribal members residing within the Flathead Reservation.

The three-judge court was convened under 28 U.S.C. 2284, and the court, by divided vote -- Judge Smith dissenting

in both cases -- held that the Montana cigarette tax, the excise tax on dealers and on the sale of cigarettes themselves were in part invalid. And a final injunction was entered against the State of Montana prohibiting the State from requiring a cigarette dealer's license tax of the dealers on the reservation.

And also enjoining the State of Montana from collecting the tax on sales of cigarettes to Indians.

The court in the cigarette tax case also ruled that the State of Montana could require the pre-collection of the tax on sales of cigarettes made to non-Indians.

In the personal property tax case, the collection of personal property taxes from individual Indian residents of the Flathead Reservation was enjoined.

The State, by these consolidated appeals, has appealed from the portion of the judgment in both cases, which enjoins the collection on the one hand of the cigarette tax, and on the other the personal property tax.

The --

QUESTION: Mr. Haddon, let me ask you something about the Montana personal property tax for licensing vehicles, and perhaps I can best put the question by telling you what I understand to be the Virginia law, which is the jurisdiction I happen to live in. In Virginia we pay a personal property tax on personal property including

automobiles, and then you pay an additional fee to license the vehicle to travel on the road. Now, is that the law in Montana, or are the two combined into one?

MR. HADDON: The tax is paid at one time, Mr. Justice Rehnquist, but there are both a -- there is both a personal property tax on the vehicle itself and a separate fee for registration of the vehicle.

QUESTION: Did the district court enjoin the enforcement of the fee for the registration of the vehicle?

MR. HADDON: No.

The district court did not. The tribes and the individual members of the tribes, who were acting as plaintiffs, had indicated their willingness to pay the registration fee, not the tax.

QUESTION: And that fee is not in issue here?

MR. HADDON: That fee is not in issue, Your Honor.

QUESTION: What is in issue, in addition to the cigarette tax, is simply the personal property tax on the automobile; is that it?

MR. HADDON: Primarily upon automobiles, but also other types of personal property: cattle, farm equipment, items of that sort which are classified under Montana law as personal property.

QUESTION: Right.

MR. HADDON: These appeals raise the core issue to

which this argument will be principally addressed, of whether the immunity from State taxation in favor of Indian citizens on the Flathead Reservation, found by the district court to be available, and this additional immunity from State taxation which the tribes and their members seek with regard to sales of cigarettes to non-Indians, whether this immunity, in its entirety, is invalid and unconstitutional under the due process and equal protection concepts of the Fifth and Fourteenth Amendments.

The Flathead Reservation in northwestern Montana, and from which these cases arise, is a unique geographical area, and as an Indian Reservation and as a part of Montana it is unique.

In order to appreciate the factual concept, I would like to go in, in some detail, to the facts which give rise to this case.

The Flathead Reservation is approximately 1,250,000 acres. It comprises four parts -- parts of four Montana counties. Polson, one of the county seats of Montana, is located entirely within the confines of the Reservation.

It was created by the Treaty of Hell Gate in 1855, from lands which were a part of the then Washington Territory, and which, of course, later became the State of Montana.

In 1904, Congress enacted legislation which opened the reservation for allotment to individual Indians, and for

sale of surplus unallotted lands to non-Indians.

As a result of this opening of the reservation, something over 400,000 acres was sold to non-Indians, and an additional 60,000 acres was granted to the State of Montana for school purposes, other acreages were passed to religious institutions, schools, and others.

So, at the present time, the mix on the reservation, insofar as land ownership is concerned, is that over one-half of the land on the reservation is held in fee, principally by non-Indian owners.

The balance of the reservation property, something slightly less than one-half, is held in part by individual Indians in trust title and, in part, by the tribes in tribal statute.

The tribal lands, as the record shows, being principally located in sparsely populated foothill and mountain areas.

The Flathead Reservation at the present time is a well-developed agricultural area. It is an area with farms, ranches, communities scattered all over its inhabited parts. It has an elaborate irrigation system which serves the farm and ranching communities, and farm and ranching areas, which was created under congressional action in part, and by use of State law and through use of the State courts in the State of Montana. And it is not -- and we think this important -- a

place where Indians live alone or in isolation.

They are scattered randomly throughout the reservation, they live in integrated communities, they participate in all of Indian, or all of community activities and services.

QUESTION: But there's no question but that it does remain a reservation; is that right?

MR. HADDON: That is not in -- that is correct, Mr. Justice, there is no issue in this appeal as to the continuation of the status of the reservation.

QUESTION: Yes.

MR. HADDON: There are approximately 13,000 people who live within the confines of this reservation. Less than 20 percent of whom are classified as Indians. The Indians themselves are an ethnically mixed group of individuals. Something less than 4,000 are -- or something over 4,000 are less than one-half Indian blood. Some are as small as one-sixteenth Indian blood.

Families themselves are mixed, with one parent, or one of the members of the family being an Indian or an enrolled tribal member, the other not being so. In some instance, children of a particular family are in part tribal members, and in part non-tribal members.

It remains, however, that the only way that one can claim status as an Indian is to be born as such with an irrequisite amount of Indian blood.

The Indian citizen on the Flathead Reservation participates in all facets of community life. They vote. They hold office. They have access to the courts. They attend schools provided by the State of Montana. In short, they are totally integrated into the society of the area, and they all participate in all aspects of citizen life of the State of Montana.

QUESTION: Mr. Haddon, as to all this, there isn't any dispute, is there? I think we know this background. I am anxious for you to get to the issues.

MR. HADDON: Surely.

The tribes themselves have leased land to the individual Indian plaintiffs on whom the -- on where the smoke shops were erected, and took action to file the instant case after the State of Montana attempted to preclude the sale of the cigarettes with tax stamps affixed.

The personal property tax suit was likewise instituted following refusal of the State of Montana to omit the Indian citizens from collection -- or from payment of the tax.

We suggest that the approach which is taken by the tribes and by the individual Indian citizens in this case seeks to draw what amounts to a line around a portion of the State of Montana, and to say that if a particular individual citizen of the State is a member of a particular ethnic or racial

group, that is, an Indian, and that if he resides within that area, then he must not pay taxes to the State of Montana.

QUESTION: Who drew that line originally, Mr. Haddon?

MR. HADDON: Well, the line, of course, Your Honor, is the direct result of the establishment of the confines of the Flathead Indian Reservation by the Treaty of Hell Gate in 1855.

QUESTION: So it isn't a new line, is it?

MR. HADDON: Indeed, it is not; it has existed for over 100 years.

Our position is -- notwithstanding the existence of the Flathead Reservation -- is that this treatment of Indian citizens for tax purposes, differently from other citizens of the State of Montana, cannot be carried into practice without creating a conflict between the requirements of equal protection and due process under the Fifth and Fourteenth Amendments and the particular practice.

The practice, as we see it, allows the Indian citizen to have and to continue to receive all of the benefits of citizenship of the State, and yet not be responsible for the fair share of burdens of that citizenship.

We suggest that this Court has already considered the question of benefits versus burdens, or benefits and burdens, as a part of the role of citizenship in the Oklahoma Tax Commission case, and the facts are not unlike the facts which

are before the Court in this case.

And there the Court noted that tax exemptions were not to be granted by implication, and that the tax which was sought to be imposed by the State of Oklahoma was valid.

We suggest that the reasoning and analysis found to be applicable in that case is equally applicable to the case at bar.

We suggest that, constitutional issues aside, that the facts of the Oklahoma Tax Commission case are better suited, are fit more precisely with the facts of the case at bar than do the facts in McClanahan.

In McClanahan, there was little interaction between the Indian community and the non-Indian community. The Navahoes lived apart, on a separate reservation. There was, by Williams vs. Lee, no State responsibility toward those Indian citizens, although the opinion of the Court in McClanahan indicates that there was some extension of State services and some State responsibilities toward those Indian residents of the Flathead -- or of the Navaho Reservation.

In McClanahan there was no opening of the reservation to ownership of land by non-Indians, and no general occupancy of that area by non-Indians.

QUESTION: From your argument, Mr. Haddon, I take it that, at least part of your argument is, that you're asserting Fourteenth Amendment claims, are you, or Fifth

Amendment claims, equal protection claims on behalf of the non-Indian citizens of Montana?

MR. HADDON: That is correct, Your Honor.

We believe that the matter is in fact twofold: that, on the one hand, --

QUESTION: That's a unique basis for a State to collect a tax, isn't it?

MR. HADDON: I acknowledge that I am unaware of any case prior to this case in which this particular argument has been advanced.

We feel, as was found by Judge Smith in his dissent, that if this program is carried into effect, that it has the ultimate result of relieving one racial class of a burden of citizenship, namely taxation, which we suggest is violative of the Fifth Amendment, because it is mandated by the United States.

And that it, on the other hand, imposes upon another class of citizens, namely the non-Indian citizens of the State of Montana, an obligation to provide services to those who are exempt from the taxation.

QUESTION: Mr. Haddon, let me interrupt you further. Does an Indian vendor, who has his place of business on a reservation, have to purchase a Montana license to sell cigarettes?

MR. HADDON: The ruling of the district court was

that he did not. There is a dealer's license tax that is required in the State of Montana, by the State of Montana. One of the issues determined by the lower court was that that dealer's license tax did not have to be paid by the individual Indian dealers.

QUESTION: Is this separate and distinct from the tax on the cigarettes themselves?

MR. HADDON: It is a different kind of tax, and is imposed upon a different individual, Your Honor.

QUESTION: Is it at issue here?

MR. HADDON: Yes, it is.

QUESTION: Next, is there any Montana statute that makes it a criminal offense for anyone to use a cigarette from an unstamped package?

MR. HADDON: It is -- it is a criminal offense to buy untax-paid cigarettes.

I am unaware of a criminal offense directly related to the license tax itself for the dealer.

QUESTION: Well, then, may you argue that the State of Montana has an interest, a distinct interest, in preventing anyone from violating that statute; namely the purchase of an unstamped cigarette package?

MR. HADDON: We certainly do, Your Honor. And we feel that the decision of the district court, to the extent that it upheld the position of the State of Montana, that the

tax could be precollected from non-Indian purchasers is entirely valid. Because to rule to the contrary would have been an invitation for all of those non-Indian purchasers of cigarettes to violate the law.

QUESTION: I guess I didn't get that argument from your brief, focusing on that State interest. But you've satisfied me now.

All right.

MR. HADDON: Another factor of some importance in connection with this appeal, while not directly related to the issue of constitutional due process and equal protection, is the application of the General Allotment Act to the Flathead Reservation.

QUESTION: The Act of 1877.

MR. HADDON: Yes.

The record shows that the Flathead Reservation was open for settlement -- I beg your pardon -- opened for allotment to individual Indians in severalty under the provisions of the General Allotment Act.

And that General Allotment Act, by its specific terms, recites that upon expiration of the trust patent period the the individual Indian patentee is to be considered as a citizen of the State and to be entitled to all of the benefits of State citizenship and subject to the laws of the State.

QUESTION: Now, was that Act applicable to the

Flathead Reservation in 1877?

MR. HADDON: No, it was not, Your Honor.

QUESTION: And is there any significance in the fact it did not become applicable until -- when? 1904?

MR. HADDON: 1904. I think there is no significance other than the fact that the reservation was not open for general allotment prior to 1904.

We suggest that the specific language of the General Allotment Act is consistent with the position found by this Court in the Oklahoma Tax Commission case, that the burdens of State citizenship go with the benefits of State citizenship. And there are, on the Flathead Reservation at this time, as the record will show, individual Indian citizens who received patents under the terms of the General Allotment Act.

And if this Court should uphold the position of the lower court, we suggest that it creates a very anomalous situation, that the General Allotment Act, having been intended to protect the interest of the individual Indian patentee, and having said that that Indian patentee is to be protected until such time as the patent trust expires, that if that individual is, by the language of the Act, to be subject to the laws of the State and no others are to be subject to the laws of the State, then those who have not received patents are those who benefit from the decision of the lower court.

We suggest that the issue which we present here has not been presented in any case prior to this one. The case of Martin vs. Mancari, which considered the particular and unique relationship of the members of recognized Indian tribes in their employment with the Bureau of Indian Affairs, does not, we think, reach the issue before this Court.

We would point out that the Court, in Martin vs. Mancari, was concerned about whether or not a general rule could be laid down that would apply a special kind of exemption for Indians in all matters of civil service employment. And we think that sets the tone and pattern for the issue here; that while that particular case was justifiable on its facts, because of the unique relationship of the federal government to Indians through the Bureau of Indian Affairs, that its concepts and precepts cannot be applied to the facts of the case at bar.

We feel that there is, in reality, no true conflict between the general regulatory provisions of Article I, Section 8, Clause 3 and the position which we assert here.

Congress remains, we suggest, free to do whatever it deems necessary in carrying out its practices and policies with regard to Indian citizens. In particular, it can continue to control the disposition and use of Indian lands.

But the rights to which we speak rest on a different level, and we think that no additional congressional action

is necessary to make these rights operative, as we feel they should be.

The rights, if they exist, the State may, we suggest, do all that is necessary to carry those rights into implementation, including exercise of whatever jurisdiction is necessary to insure collection of the taxes.

QUESTION: Well, are you -- you're arguing both cigarettes and property.

MR. HADDON: Yes.

QUESTION: Now, how about -- assume an automobile was used solely on a reservation, never went off the reservation, solely on property that had been an Indian reservation for a hundred years.

MR. HADDON: Our basic position, Mr. Justice White, is that it makes no difference whether the particular personal property is used on the reservation entirely --

QUESTION: So you figure on a -- you could put your personal property tax on property owned by soldiers on a military reservation?

MR. HADDON: We suggest that that is not the same proposition. Because --

QUESTION: Well, you say that's different?

MR. HADDON: Yes. We feel that the unique status of the military and the role that it plays is not the same as that of a citizen of this country who, except for the fact

that he is an Indian, is no different from any other citizen.

QUESTION: So your personal property tax could be applied to any personal property that an Indian owned, even though he lived on the reservation, --

MR. HADDON: That is correct.

QUESTION: -- and used it there only.

MR. HADDON: Even though it were used there only. Of course we --

QUESTION: I take it, any authority to that effect you've cited in your brief?

MR. HADDON: We have cited all the authority that we have, and we have no case specifically in point on that subject, obviously.

QUESTION: Yes.

MR. HADDON: We feel that the position that we assert here is that the case is more basic because of the considerations of due process and equal protection than any of the precedents heretofore in --

QUESTION: But you were permitted to use the -- to have the Indians collect the sales tax on sales to non-Indians?

MR. HADDON: That is correct. And that is the subject --

QUESTION: But not on sales to Indians.

MR. HADDON: That is correct.

QUESTION: And you could not make them get a license.

MR. HADDON: That is correct.

QUESTION: Yes. All right.

MR. HADDON: To elaborate very briefly on one of the questions that you asked, Mr. Justice White:

One of the problems, as we view it in this case, is that the court ruled in the cigarette tax case that the State of Montana could not collect the tax from anyone who was classified as an Indian. That term remains undefined.

QUESTION: And do you think the court ruled that Montana not only could not put the personal property tax on an automobile, but could not put it on the automobile even though it was used off the reservation?

MR. HADDON: That is the effect, as we read the court's -- the lower court's decision.

QUESTION: So you are -- you think the court's already decided that Montana may not say to the Indians: If you want to use your automobile off the reservation, you must pay a tax.

MR. HADDON: That is our understanding of the lower court's decision. It is one of the matters specifically to which Judge Smith's dissenting opinion is addressed.

QUESTION: Yes.

QUESTION: Mr. Haddon, if your argument is valid about the discrimination aspects, I take it the same argument would apply to a reservation which had 100 percent Indian

population and all full-blooded Indians?

I'm just wondering if there is really anything -- I don't quite understand the relevance of your initial description of the unique character of this reservation. How does that relate to the argument you're making?

MR. HADDON: Like all advocates, perhaps, Mr. Justice Stevens, we like to have a position to fall back to. Our basic position is that it makes no difference. If a citizen is a citizen, it makes no difference what his race is, nor where he lives, he has the same obligations as any other citizen. He is --

QUESTION: What is the position to which you're falling back, then? That's what I'd like to know.

[Laughter.]

MR. HADDON: The position to which we fall back is that if the Court should deem it inappropriate to accept that interpretation of the law, that we have, in this particular case, a unique set of factual circumstances akin to the Oklahoma Tax Commission case, which dictate the application of the rule of that case rather than the application of the rule of McClanahan.

QUESTION: The rule being what? Maybe you better state it for me. I'm not as familiar with the case as I should be.

MR. HADDON: As I read the rule of McClanahan --

QUESTION: No, what is the rule of the case on which you rely?

MR. HADDON: That the individual Indian citizens, residents of the State of Oklahoma, were subject to, in that instance, an inheritance tax imposed by the State of Oklahoma.

The Court being concerned with and pointing to the facts that they were essentially amalgamated into the Oklahoma society and were citizens in all respects of the State of Oklahoma.

That being distinguishable from the situation in McClanahan, where the Court points out that the individual Navaho resident of the Navaho Reservation lives largely apart and without influence by or responsibility to or from the State of Arizona.

MR. CHIEF JUSTICE BURGER: You're cutting into your rebuttal time, if you hope to save any. In fact, I think you're used it up.

MR. HADDON: Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Baenen.

ORAL ARGUMENT OF RICHARD A. BAENEN, ESQ.,
ON BEHALF OF THE CONFEDERATED SALISH AND
KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.

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

I think perhaps we can approach this argument by

noting one or two matters at the outset.

The 1970 Census, prepared by the Department of Commerce, shows that there are 115 reservations in the United States, which are recognized by the Secretary of the Interior, pursuant to the congressional authority contained in the Indian Reorganization, or Wheeler-Howard Act, as it is popularly known.

In addition, that in fiscal 1975 the United States spent, through federal appropriations, $766 million pursuant to its federal policy on Indians and Indian affairs.

In 1790, the United States enacted its first statute relating to Indians, the Indian Nonintercourse Act. The United States has been intimately involved in Indian affairs from then down to this date.

We have, on the Flathead Reservation, a situation where, by virtue of the historical development and certain congressional activities, an integrated reservation. We do not have, and counsel for the State has been unable to point to a single case or a single legal ruling or a single federal statute which would say that the Flathead Reservation, and the question of State jurisdiction as it applies to Indians on that reservation, is any different than in the cases involving the Navaho Reservation, such as McClanahan; the Navaho Reservation, such as Williams v. Lee; the Flathead Reservation -- excuse me, the Blackfoot Reservation, such as

we find in Kennerly.

QUESTION: In your view, the McClanahan case disposes of all these issues?

MR. BAENEN: In our view, the McClanahan case and the cases that preceded it, Williams v. Lee, Warren Trading Post, Kennerly, Mescalero Apache, dispose of this issue. With the exception for the one decision by the court below, holding that the State of Montana could force tribal members residing on the reservation to precollect the personal property tax that is owed by the non-Indian purchaser when he purchases from a tribal smoke shop, as they are called.

We do not believe -- and we believe the McClanahan v. Arizona settles that question -- that the State cannot force a tribal member to collect a cigarette tax owed by a non-member and for which the non-member is guilty of a State violation should he purchase and have in his property, or in his possession such a cigarette tax; and the State of Montana has criminal jurisdiction over that non-Indian should he violate the State law.

QUESTION: Didn't we have an issue similar to that in the Tonasket case three or four terms ago, that we remanded to the -- back to the Washington, State of Washington court?

MR. BAENEN: You did, Your Honor. In the Tonasket case the issue related to the question of precollection from non-Indians. You remanded the case to the Supreme Court of

the State of Washington for reconsideration of its decision, which held that the State could force the Indian salesman to collect the tax from the non-Indian purchaser in light of a Washington enactment which was passed by the Washington Legislature after the State Supreme Court decision, which held that non-Indians could possess two cartons at any one time of unstamped cigarettes, and there would not be a violation of the Washington law.

The Supreme Court of Montanta -- excuse me, the Supreme Court of Washington, upon remand from this Court, determined that the precollection requirement did not violate the constitutional or statutory rights of the Indians on the Colville Reservation. This case did -- this Court did not review the case on the grounds that there was want of a substantial federal question.

Five months later the State of Washington revoked the law by which non-Indians could possess two cartons of unstamped cigarettes.

That is the present statute, as it relates to Washington --

QUESTION: So, if I understood your correctly, the law of Washington now is the same as the law of Montana now; is that right?

MR. BAENEN: The law of Washington is the same as the three-judge court below; that is correct. The law in --

QUESTION: In other words, the State may collect from Indian sellers the prepayment of taxes on cigarettes sold to non-Indian buyers; is that it?

MR. BAENEN: Well, we get into a very difficult and sticky wicket here. The --

QUESTION: Well, do I understand the law right?

MR. BAENEN: Well, the three-judge court below said that the State may force -- that the Indian must collect this cigarette tax, the sales tax, and admitted, however, that how this would be implemented, how it would be carried out, since the State does not have jurisdiction over the tribal members who are exercising -- who are effectuating the sale. They recognize that this would be an extremely difficult problem.

They suggested in their order that they assumed this Court would perhaps review its decision, and that, based upon whatever guidance it might receive from this Court -- assuming that it was not reversed -- that we would try to work out some type of a procedure.

We submit that the question was raised in McClanahan, and the State had no answer when the question was asked as to how the State could allege and assert that its income taxes were enforcible against Mrs. McClanahan for income earned while residing on the reservation, when the State conceded that it had no jurisdiction over her to compel the collection

of that tax.

QUESTION: How is it done out in the State of Washington, in the wake of the Tonasket litigation?

MR. BAENEN: I have no knowledge, Your Honor; I cannot answer your question. I do not know.

QUESTION: But that is the law out there, that's the State law now, isn't it?

MR. BAENEN: That is the law. I understand, however, that there is a case pending in the Ninth Circuit which involves that issue; and I understand, further, that the Ninth Circuit has stayed consideration of the particular issue until this -- upon granting of jurisdiction in this case, the Ninth Circuit stayed any determination until this case should speak -- until this Court should speak in this case. That is the present status.

We do not believe that the Court need go beyond McClanahan and the cases cited as supportive of it to affirm the decision of the court below as it relates to the inapplicability of the cigarette licensing and the cigarette sales tax on Indians, as far as transactions are concerned on the reservation; nor to reverse the court below on the requirement that an Indian selling to non-Indians on that reservation must precollect and turn over the tax to the State.

QUESTION: Mr. Baenen, are you going to devote some part of your oral argument to the anti-injunction Act?

MR. BAENEN: Most certainly, if the Court would please.

QUESTION: I would like to ask you a question at such time as you get to it. Your opposing counsel didn't devote any of his oral argument to it, and you're certainly not obligated to.

MR. BAENEN: Fine. Well, Your Honor, I am happy to entertain a question, because we believe that McClanahan supports our position down the line, and I don't believe that anything is gained by me reasserting that. So --

QUESTION: Well, but McClanahan came up from the Supreme Court of Arizona, didn't it?

MR. BAENEN: That's correct.

QUESTION: So you don't have any problem with the Anti-injunction Act in McClanahan.

MR. BAENEN: Correct.

QUESTION: So how does McClanahan bear one way or the other on the Anti-injunction Act?

MR. BAENEN: No. I'm sorry, Your Honor. Not on -- I was not addressing your answer to the -- I was not trying to answer your question on the Anti-injunction Act by citing McClanahan. I was on the merits.

QUESTION: I see. Just on the merits.

MR. BAENEN: Correct. On the merits.

QUESTION: Just before, then, you leave the merits

to move onto --

MR. BAENEN: Certainly.

QUESTION: -- my brother Rehnquist's interest in the Anti-injunction Act.

McClanahan or no other case in this Court, so far as I know -- and you can tell me if I'm mistaken; I may well be -- considered this constitutional argument, did it? This --

MR. BAENEN: To my knowledge --

QUESTION: -- equal protection argument is what I'm talking about.

MR. BAENEN: -- it was not addressed as an argument, as such.

Certainly a number of the decisions of this Court, in which Treaty rights have been vindicated by Indians by implication, carry with it the fact that they will be treated in a way different from the way that non-Indians are treated.

I think, for example, in what we call Prealla II?, the second Prealla Fishing? case, --

QUESTION: Yes.

MR. BAENEN: -- where, in concurring opinions, it was pointed out that State money derived from the sale of fishing licenses was used in part to replenish the stock that was involved in the fishing case. There's an implicit recognition there.

QUESTION: Yes.

MR. BAENEN: We have, for example, in the Masari case, where the State is precluded, and a non-Indian on fee land is precluded from having a business under State law relating to the dispensation of liquor within an Indian reservation, he is treated differently than somebody outside the reservation.

There are, in almost every case, I believe, these implications to be found. But you are correct, it has not been raised and addressed as such; which explains, of course, the paucity of citations by the State parties.

QUESTION: We had the case last term, I can't think of the style of it for the moment, or even the precise issue in which Justice Blackmun wrote the opinion for the Court, involving a claim that a preferential hiring policy for Indians on reservations violated -- not -- both their Constitution and their statute.

MR. BAENEN: Right, Your Honor. That was Morton v. Mancari.

QUESTION: That's the case we've just been discussing.

MR. BAENEN: Right, and also cited in our brief.

QUESTION: Right.

QUESTION: Do you think the equal protection claim is one that can be raised by the State, or should that be raised by somone who claims that he or she is being denied equal protection?

MR. BAENEN: Your Honor, we debated within our own office as to whether or not we should raise that as an issue before the Court. We concluded that the State, as the tax-gathering body, perhaps could stand in the position of tax-payer to raise it.

We do believe that it is an open question. But we did not challenge it.

I assume that --

QUESTION: What do you think the source of the Indian immunity is?

MR. BAENEN: It's a jurisdictional source, Your Honor, based upon the fact that Congress historically has exercised jurisdiction pursuant to its authority granted by Article II, Clause 8, Section 3 (sic) of the Constitution --

QUESTION: Well, do you think that -- do you -- I take it, you decided to concede that whatever authority the United States had with respect to Indians, whether it rests in the Constitution or in the statute, ought to be exercised consistent with the Fifth Amendment.

MR. BAENEN: Certainly any authority that the United States has, in terms of Indian affairs, has to be exercised consistently with other constitutional provisions, just as the authority it has to raise and maintain armies must be exercised consistently with other statutory --

QUESTION: And so you didn't raise the issue?

About whether the State could raise this question of equal protection.

MR. BAENEN: We didn't raise it, Your Honor. The court below raised it, sua sponti, by Judge Smith writing for a dissent. We believe, frankly, that the State parties are entitled to a hearing on it.

Mr. Justice Rehnquist, --

MR. CHIEF JUSTICE BURGER: Counsel, I don't know how long it will take you to address any other questions, but if you wanted to get back to Montana tonight, and could finish in five minutes, we'll leave it to you and to the other questioners.

MR. BAENEN: Your Honor, I can easily finish in five minutes.

QUESTION: If I'll let you!

[Laughter.]

MR. BAENEN: Yes. If permitted.

[Laughter.]

QUESTION: I have just one question, Mr. Baenen, I will cooperate in every way with the seemingly consentual desire of everybody to get you back to Montana.

MR. BAENEN: Well, that's why, Your Honor, I live here. It's --

QUESTION: Oh, that's right, you live here.

MR. BAENEN: It's my brethren that I want to --

QUESTION: Right.

Is there any doubt that the United States could have brought an action on behalf of the Indian tribes, seeking this same sort of relief in its own courts?

MR. BAENEN: There is no doubt in my mind. It is our opinion that the United States not only could have brought the lawsuit, but that if the Court should determine that Section 1341 was a bar to the court hearing the cases down below, in light of what has transpired, we believe the United States, in fulfilling its trust obligation to these Indians, will have to turn around and file the identical lawsuit.

QUESTION: But that cuts both ways, I suppose. Because clearly the Indian rights could have been vindicated by the United States, and then there'd be no question of the applicability of the Anti-injunction Act.

When the tribe itself sues, it may not be suing with all the mantle that is brought, at least with respect to the Anti-injunction Act, when the suit is brought by the United States.

MR. BAENEN: That is a distinct possibility.

Certainly if we go back and take a look at the cases that have interpreted the Anti-injunction Act, which have canvassed the reason for the enactment of the same, and pay particular attention to, say, the Livingston? case, where the United States was joined in a lawsuit in which the due process

-- the Morris Company was involved, the lower court had no problem in entertaining the suit with both parties, made no effort to say that the due process -- that Morris could not be present, and this Court affirmed, albeit not without -- not with opinion.

However, that case, I think, stands for strong precedent, that the tribes, particularly operating pursuant to 28 U.S.C. Section 1362, the legislative history of which shows Congress was very intent, because it recognizes the United States as trustee, has insufficient resources in terms of personnel and finances to bring all of the lawsuits it ought to bring to vindicate Indian tribal rights, allowed Indian tribes, if recognized by the Secretary of the Interior, to file lawsuits that the United States could have filed.

QUESTION: Then you are relying on 1362, also?

MR. BAENEN: Yes. 1362 is a very --

QUESTION: Do you regard this as providing a specific statutory exception to the Anti-injunction Act?

MR. BAENEN: No, sir, I believe that you have to read Section 1362 in context with the decisions of this Court, such as Oneida?, dealing with the scope and thrust of the jurisdiction that Congress intended to give Indian tribes. We have --

QUESTION: But 1362 was enacted -- when -- in 1966, wasn't it?

MR. BAENEN: In '66 or '68, I'm not sure.

QUESTION: Certainly long after the Anti-injunction Act was on the books?

MR. BAENEN: Correct. I believe it has to be construed, I believe it's an imperium in imperio construction of several statutes, and we have to -- and taking into account some of the judicial decisions that were on the books at that time, this Court has dealt, in the case -- the first name of which I can never pronounce -- Poafpybitty, holding that --

QUESTION: Neither can we!

[Laughter.]

MR. BAENEN: -- holding that an individual Indian can bring a suit, because very often the United States does not want to because of the conflict of interest, or does not have time. And we think that the 1968 jurisdictional ground under 1362 should be construed as fitting into the exception that we find affirmed by lower courts and this Court in Livingston, as it relates to the Anti-injunction Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:04 o'clock, p.m., the case in the above-entitled matter was submitted.

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