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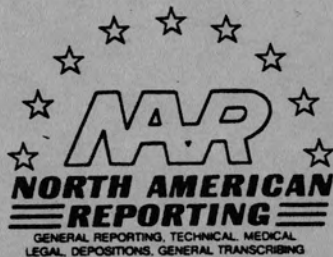
Supreme Court of the United States

J. GREGORY MERRION AND ROBERT L.)	
BAYLESS, ETC., ET AL.,)	
)	
PETITIONERS,)	No. 80-11
V.)	
JICARILLA APACHE TRIBE ET AL.;)	
&)	
AMOCO PRODUCTION COMPANY AND)	
MARATHON OIL COMPANY,)	
)	
PETITIONERS,)	No. 80-15
V.)	
JICARILLA APACHE TRIBE ET AL.)	

Washington, D.C.
March 30, 1981

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

J. GREGORY MERRION AND ROBERT L. BAYLESS, ETC., ET AL.,
v. Petitioners, No. 80-11
JICARILLA APACHE TRIBE ET AL.;
&
AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,
v. Petitioners, No. 80-15
JICARILLA APACHE TRIBE ET AL.

Washington, D. C.

Monday, March 30, 1981

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 11:47 o'clock a.m.

APPEARANCES:

JASON W. KELLAHIN, ESQ., Kellahin & Kellahin, P.O. Box 1769, Santa Fe, New Mexico 87501; on behalf of the Petitioners Merrion and Bayless et al.

JOHN R. COONEY, ESQ., P.O. Box 2168, Albuquerque, New Mexico 87103; on behalf of the Petitioners Amoco Production Company and Marathon Oil Company.

ROBERT J. NORDHAUS, ESQ., 200 Lomas Blvd., N.W., Suite 810, Albuquerque, New Mexico 87102; on behalf of the Respondents.

LOUIS F. CLAIBORNE, ESQ., Deputy Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 next in Merrion & Bayless v. Jicarella Tribe.

4 Mr. Kellahin, you may proceed when you are ready.

5 ORAL ARGUMENT OF JASON W. KELLAHIN, ESQ.,
6 ON BEHALF OF THE PETITIONERS MERRION AND BAYLESS

7 MR. KELLAHIN: Mr. Chief Justice, and may it please
8 the Court:

9 This case is here on certiorari to the 10th Circuit
10 and involves the power of an Indian tribe to tax non-Indians
11 locally on the Indian Reservation.

12 The facts of the case are quite simple. The Jica-
13 rilla Apache Tribe is an Indian tribe occupying an Executive
14 Order Indian reservation located in the northwestern portion
15 of the State of New Mexico. It is organized under the Indian
16 Reorganization Act and in 1968 it adopted a constitution which
17 purported to confer on the Tribal Council authority to impose
18 a tax on non-Indians.

19 It must be remembered that petitioners here were on
20 the Indian Reservation under valid oil and gas leases issued
21 pursuant to federal law, signed on behalf of the Tribe, and
22 approved by the Secretary of the Interior. Some of these
23 leases dated back to the early 1950s, long before the adoption
24 of the Jicarillas' severance tax.

25 The petitioners brought suit in the United States

1 district court and the district court held the tribal ordi-
2 nance imposing a severance tax on oil and gas severed, saved,
3 and removed from tribal lands, which was adopted in 1976, the
4 district court held that ordinance unconstitutional, illegal,
5 invalid, and void, and restrained the Tribe from enforcing it.

6 The court of appeals in a five-to-two decision re-
7 versed, holding that the power to tax was an attribute of
8 inherent tribal sovereignty, since no treaty or Act of Con-
9 gress authorized it. They held that it did not violate the
10 Commerce Clause and that the power to tax had not been pre-
11 empted by the Federal Government.

12 That raises these questions here: did the Jicarilla
13 Apache Tribe retain as an attribute of its inherent sovereign-
14 ty the power to impose a severance tax on oil and gas extracted
15 from trust property on its reservation? Has Congress divested
16 the Tribe of such power by permitting the state to impose a
17 tax on this same production, and by adopting a pervasive sys-
18 tem of federal regulation of oil and gas production and sale
19 on reservation lands?

20 QUESTION: Mr. Kellahin, is the Jicarilla Tribe a
21 treaty tribe?

22 MR. KELLAHIN: No, sir. There is no treaty involved.

23 QUESTION: And it was not within the boundaries of
24 the United States until the Mexican cession?

25 MR. KELLAHIN: That is correct.

1 QUESTION: The Treaty of Guadalupe Hidalgo?

2 MR. KELLAHIN: That is correct. That is discussed
3 at some length in Chief Judge Seth's dissent in the 10th
4 Circuit. The State of New Mexico -- or the Territory of New
5 Mexico, I should say, which included most of Arizona and
6 Southern California, came into the United States under the
7 Treaty of Guadalupe Hidalgo and under the late Corporation of
8 Jesus Christ of Latter-Day Saints case it was held that the
9 only sovereign that existed as of that date was the United
10 States and that all other sovereignty was derived from that
11 source, which -- seriously -- poses a serious question on
12 the doctrine of inherent tribal sovereignty in this particular
13 case. There was never any treaty entered into with the
14 Jicarilla Apache Tribe although several efforts were made to
15 do so; none was ever signed and approved by the Senate.

16 In connection with this situation I would like to
17 discuss the issue of tribal sovereignty and my colleague will
18 discuss federal preemption and the Commerce Clause issues in
19 this case.

20 The 10th Circuit opinion recognized the case pre-
21 sented an issue that had not been passed upon by this Court and
22 pointed out that this case presents the bald issue of an
23 Indian tribe's taxing power without benefit of reservations
24 of authority in a treaty, since no treaty or Act of Congress
25 authorizes the exercise of such taxing power. The court then

1 reached the conclusion that the right to tax was an inherent
2 aspect of the tribal sovereignty, and with that background
3 it is necessary to address the nature of this sovereignty.

4 As I said, these petitioners were already on the
5 reservation under valid oil and gas leases issued pursuant to
6 Act of Congress. The leases stated the conditions under
7 which the petitioners could enter the reservation and the
8 conditions that would permit them to remain. The power to tax
9 was not reserved as a condition of the leases.

10 So what we have here is a unilateral modification
11 of a contract by way of taxation which the 10th Circuit
12 upheld. The concept of Indian sovereignty relied on by the
13 10th Circuit has had a long and somewhat troublesome history
14 and an examination of the cases, especially the most recent,
15 shows that the Court does not recognize the broad definition
16 of inherent sovereignty that was relied on by the 10th Cir-
17 cuit and supported by respondents in this case. Rather,
18 tribal sovereignty has been restricted by the tribes'
19 dependent status, and the most recent case to address this
20 issue was Montana v. United States, which was decided on
21 March 24.

22 Montana v. United States clarifies the scope and
23 extent of tribal sovereignty and makes it abundantly clear
24 that sovereignty extends only to the right of Indian tribes
25 to make their own laws and be governed by them,

1 to protect the integrity of their tribal lands from encroach-
2 ment, and to protect their tribal government from outside
3 interference. That is the tenor of all of the cases that
4 have been ruled on by this Court. Tribal sovereignty does
5 not extend to nonmembers of the tribes. In *Montana v. United*
6 *States* it was held that the exercise of tribal power beyond
7 what is necessary to control the internal relations of the
8 tribe is inconsistent with their dependent status, and so
9 cannot survive without the express delegation of authority
10 by Congress. The case clearly holds that the same lack of
11 tribal authority to try non-Indians for criminal offenses as
12 was found in *Oliphant* extends as well to the civil jurisdic-
13 tion, and in discussing the extent of civil jurisdiction re-
14 tained by the tribes, this Court touched on the very issue
15 that is raised in this case.

16 It pointed out that the Indian tribes retained
17 inherent sovereign power to exercise some forms of civil juris-
18 diction over non-Indians. The Court then explained, however,
19 that a tribe may regulate through taxation, licensing, or
20 other means the activities of nonmembers who enter into con-
21 sensual relationships with the tribe or its members through
22 commercial dealings, contracts, leases or other arrangements.

23 In support of this conclusion the Court cited
24 *Williams v. Lee*, *Morris v. Hitchcock*, *Buster v. Wright*, and
25 *Washington v. the Confederated Tribes of the Colville*

1 Indian Reservation. Both Morris v. Hitchcock and Buster v.
2 Wright were relied on by the 10th Circuit in its conclusion
3 that the tribe had inherent sovereignty to impose this tax.
4 However, these were both clearly cases based on the right of
5 the tribes to exclude nonmembers and to attach conditions on
6 their right to enter onto the reservations.

7 This was reasserted in the Court's decision in
8 Colville. In the recent Montana opinion it was pointed out
9 that the tribe can impose conditions on those who might choose
10 to enter the reservation lands, the Indian-owned lands, and
11 hunt and fish by imposing fees or establishing bag limits.
12 The analysis of tribal rights over non-members in the tribe
13 was discussed in Montana v. United States and is applicable
14 to our case. Petitioners entered into a consensual relation-
15 ship with the tribe. A contract which imposed the conditions
16 of their entry and fixed the conditions for them to remain,
17 that the royalties would be paid and provided that the rents
18 and royalties could never be increased.

19 Taxation was no part of that contract, nor did
20 the petitioners ever consent to taxation of that production.
21 In Colville the Court in upholding the right of the tribe to
22 impose a tax on nonmembers coming onto the reservation to
23 purchase cigarettes cited an opinion by Solicitor Marigold in
24 1934 where the Solicitor pointed out that except where
25 Congress has provided otherwise the power of taxation may be

1 exercised over nonmembers so far as such nonmembers may
2 accept privileges of trade, residence, and so forth, to which
3 taxes may be attached as conditions.

4 QUESTION: Colville dealt with a treaty tribe, did
5 it not?

6 MR. KELLAHIN: Yes, sir. That is correct. And the
7 Court found in the Colville case that the treaty did permit
8 the tribe to exclude non-Indians. In an Executive Order
9 Indian reservation, however, under the Indian Reorganization
10 Act, it has the same right to exclude nonmembers from tribal
11 lands so long as they are held in trust for that tribe. They
12 have control over their tribal lands although they do not
13 own them. In Colville this Court also pointed out that
14 those who come onto the reservation to buy cigarettes are
15 free to go elsewhere and avoid the taxation.

16 Here, in this case, we cannot go elsewhere, we can-
17 not pick up our mineral interests and move away. The Court
18 in Colville recognized that the relevant treaties can be
19 read to recognize inherent tribal power to exclude non-Indians
20 and it upheld the tax on that ground. This is wholly consis-
21 tent with the prior cases relating to Indian taxation and
22 relied on in Colville and in Montana v. United States. The
23 result does not require a finding of governmental sovereignty
24 such as is sought to be asserted here. Under the ruling in
25 Colville it is argued here that the tribe has a significant

1 interest -- the language used in the Colville decision --
2 in the subject matter enabling it to impose the tax. We do
3 not deny, of course, that the tribe has a significant interest
4 in its tribal lands and what occurs there.

5 But the tribe's interest, insofar as this case is
6 concerned, has been assigned for the term of the lease and the
7 conditions under which the petitioners are entitled to remain
8 was spelled out in both leases, and the tribe retains no sig-
9 nificant interest which would justify the tax in this case as
10 was the situation in Colville. Any remaining interest would
11 not support that conclusion.

12 Now, in Oliphant, which is discussed at some length
13 in our brief, the pattern for assessment of Indian tribal
14 sovereignty was established. As shown in Wheeler, Montana v.
15 United States, Oliphant, the Indian tribes have lost a portion
16 of their sovereignty by virtue of their dependent status.
17 Under Oliphant the tribes may not try non-Indians in tribal
18 courts. Under Montana tribes cannot exercise civil jurisdic-
19 tion over non-Indians in the same sense as the Oliphant case.
20 And Oliphant reasserts the limitation of Indian sovereignty
21 as applying only to the tribe and its members and not to
22 non-Indians. This was followed in Colville and in Montana.

23 Oliphant, as interpreted in Montana v. United
24 States --

25 MR. CHIEF JUSTICE BURGER: You may resume there,

1 counsel, at one o'clock.

2 (Recess)

3 MR. CHIEF JUSTICE BURGER: Mr. Kellahin, you may
4 continue.

5 MR. KELLAHIN: Mr. Chief Justice, and may it please
6 the Court:

7 In response to questioning I may have left the
8 inference that I considered the Colville Tribe a treaty
9 reservation, as occupying a treaty reservation. That of
10 course is not the case. They reside on an Executive Order
11 Indian reservation. But as I tried to explain, in my opinion
12 that does not affect the right of the tribe to exclude non-
13 members from tribal property and that is the sole right that
14 they have to enforce a tax against non-Indians.

15 Now, very briefly, I would say that after a tribe
16 has negotiated for, obtained, and its guardian has approved
17 oil and gas leases which set forth the rents and the royalties
18 to be paid to the tribe, it cannot rationally be contended
19 that the tribe reserves thereafter the right to retroactively
20 impose a tax on those non-Indians who are there under the
21 provisions of that lease. I say retroactively only in the
22 sense that the contract had already been negotiated and the
23 imposition of the tax is a change in that contract.

24 To allow the tribe to take a captive lessee, one who
25 cannot pick up his mineral interests and move them off the reservation

1 is to allow it to rewrite the terms of entry by imposing
2 potentially prohibitive taxes on that lessee. For that rea-
3 son we submit that the opinion of the court of appeals should
4 be reversed. If I have any remaining time, I would reserve
5 it for rebuttal. Thank you.

6 MR. CHIEF JUSTICE BURGER: Mr. Cooney.

7 ORAL ARGUMENT OF JOHN R. COONEY, ESQ.,
8 ON BEHALF OF THE PETITIONERS AMOCO AND MARATHON

9 MR. COONEY: Mr. Chief Justice, and may it please
10 the Court:

11 I represent the petitioners in No. 80-15. Our argu-
12 ment will be that the Commerce Clause will not permit this
13 new tribal severance tax and that Congress in 1927 by enacting
14 25 United States Code Section 398(c) preempted any power of
15 the tribe to impose the tax.

16 QUESTION: In your Commerce Clause argument, the first
17 part of your argument, counsel, I take it that would apply to
18 a state as well as to a tribe?

19 MR. COONEY: Yes, Your Honor, we submit that the
20 negative implications of the Commerce Clause restrain the
21 powers of Indian tribes who would attempt to impose the powers
22 of taxation or regulation over commerce similar to those cur-
23 rently imposed by states or municipalities.

24 QUESTION: Haven't severance taxes on extraction of
25 minerals from the ground long been a source of income for

1 states?

2 MR. COONEY: Severance taxes have been, and particu-
3 larly with reference to Executive Order Indian reservations
4 and other Indian reservations.

5 QUESTION: Quite apart from Indians -- ?

6 MR. COONEY: Yes. New Mexico, for example, has im-
7 posed severance taxes.

8 QUESTION: Don't most of the western states?

9 MR. COONEY: Most of the western states. Our Com-
10 merce Clause argument, Your Honor, rests not so much on the
11 fact that a severance tax exists but that this Jicarilla
12 severance tax is discriminatory, that it is imposed by the
13 fashion in which it is drafted directly upon commerce, and
14 that it imposes in addition with the tax imposed by the state
15 a multiple burden upon commerce. We do not attack the valid-
16 ity of a severance tax per se, but simply submit that the
17 Jicarilla Tribe may not impose such a tax in this case because
18 Congress has divested that power, and that in addition when
19 added to the state tax it creates a multiple burden.

20 QUESTION: Isn't the tribe the lessor in these cases?

21 MR. COONEY: Yes, Your Honor, it is.

22 QUESTION: And it's collecting the royalty that's
23 reserved?

24 MR. COONEY: The royalty and the bonus and the
25 rental, all of which produce considerable income to the tribe.

1 QUESTION: And does it get paid in money or in kind
2 or both?

3 MR. COONEY: It may take its royalty in kind, it
4 may elect to do that; or it may take the money. To date it
5 has taken the money.

6 QUESTION: When they negotiated the lease, COULD THE
7 tribe have written in the provision for the functional equiva-
8 lent of this tax, in other words, call it whatever you want?

9 MR. COONEY: Mr. Chief Justice, but for the provi-
10 sions of 25 United States Code 398(c), which we say divests
11 the tribe of any power to impose a tax on production, they
12 could.

13 QUESTION: Well, let's say they didn't call it a
14 tax. I didn't make my question very clear. They called it
15 something else: bonus, profit-sharing -- they could have
16 written any provision they wanted in terms of dollars,
17 couldn't they?

18 MR. COONEY: Any provision that they wanted in
19 terms of dollars that would be acceptable in the marketplace
20 to a potential lessee and that would be approvable by the
21 Secretary of Interior. But any tax that is imposed on the
22 production or on the assets or equipment or activities of
23 the lessee would be preempted by Section 398(c).

24 QUESTION: What you're suggesting is, the tribe is trying
25 to collect a royalty and these other factors and then another

1 royalty in the guise or the form of the tax?

2 MR. COONEY: Precisely, Mr. Chief Justice. That
3 is exactly what the tribe is attempting here to do.

4 QUESTION: Well, what's the discriminatory -- give
5 me your discrimination argument, who does it discriminate
6 against?

7 MR. COONEY: It discriminates against any oil and
8 gas production which is not transported or sold off the
9 Jicarilla Reservation.

10 QUESTION: Is there any?

11 MR. COONEY: There is none at the present. There
12 is the announced intention of the tribe to use gas retained
13 on the reservation for industrial and agricultural purposes.

14 QUESTION: You mean, it might take its royalty in
15 kind?

16 MR. COONEY: It might take its --

17 QUESTION: And then use the gas for its own pur-
18 poses, maybe?

19 MR. COONEY: Or it might sell that gas to other
20 industries, such as it plans to do on the reservation. And it
21 might also permit producers to locate on the reservation --

22 QUESTION: But right now there's no discrimination,
23 no actual discrimination that you can identify?

24 MR. COONEY: None at the present time. Under the
25 Nippert case, Your Honor, we believe that the potential for

1 discrimination is certainly to be considered by the Court in
2 passing upon the merits of the tax. We also admit quite
3 freely that the tax ordinance here could be amended easily
4 to apply only to severance of all oil and gas which is pro-
5 duced on the reservation --

6 QUESTION: And I suppose that if the tribe wanted
7 to take its royalty in kind and sell it or use it and it cost
8 any money, they might get some, they could even get congres-
9 sional approval for it, in which event you wouldn't have any
10 case on discrimination.

11 MR. COONEY: None on discrimination.

12 QUESTION: But I agree, maybe on some other ground.

13 MR. COONEY: As it's presently drafted, we have a case
14 on discrimination, and as the tax is presently drafted we have
15 a strong case on the tax being a direct tax on commerce
16 under Michigan, Wisconsin. This tax is not a tax on severance
17 of the oil and gas. It is a tax only on transportation or
18 sale of the gas off the reservation. It is not apportioned
19 according to the length of the pipeline facilities on the
20 nor to the volume of business conducted there. And
21 under the precise test of Michigan, Wisconsin, very clearly
22 this tax taxes directly an integral portion of commerce and
23 therefore cannot be sustained. But that, like the discrimina-
24 tion problem, can be amended away by the ordinance being
25 amended to apply only to the severance of all oil and gas

1 which is severed on the reservation.

2 QUESTION: Then you're saying that in effect the
3 state could not impose this tax either?

4 MR. COONEY: No, Mr. Justice Rehnquist, we're
5 saying that the state has the power granted by Congress to
6 impose the tax that it now imposes, which applies to the
7 severance of all oil and gas within the State of New Mexico
8 and not just to oil and gas within the State of New Mexico
9 that is then transported or sold off the state --

10 QUESTION: What authorization is that that the
11 State of New Mexico must rely on to impose a tax of -- ?

12 MR. COONEY: Your Honor, the state might have that
13 authorization absent specific congressional authorization but
14 by the 1927 Act, 25 United States Code, Section 398(c), the
15 states specifically were granted the authority to tax the
16 entire production of oil and gas on Executive Order reserva-
17 tions, including even the Indians' royalty share.

18 QUESTION: Well, then we're not talking about taxes
19 levied by states that are not on Indian reservations?

20 MR. COONEY: We're talking about here the validity
21 of the Jicarilla tax that is levied on production on the
22 reservation when added to the state tax that is also imposed
23 on the severance of oil and gas on the reservation.

24 QUESTION: But 398(c) doesn't purport to bear on
25 the simple state-producer relationship independent of its

1 relationship to the Indians, does it?

2 MR. COONEY: Yes, Your Honor, we believe that 398(c)
3 by its express terms gives the states the power to tax the
4 producer on the reservation. That's the purpose of the legis-
5 lation. And when that tax is added to the Jicarilla tax it
6 creates, we believe, an impermissible multiple burden.

7 QUESTION: Well, what if you had no reservation?

8 MR. COONEY: If we had no reservation there would
9 be no case here today, because there would only be one tax.
10 There would be a state tax imposed on the severance of oil
11 and gas --

12 QUESTION: Yes, but if the state tax were in the
13 words of the Jicarilla tax, it would be invalid under your
14 submission. Namely --

15 MR. COONEY: Yes, it would.

16 QUESTION: Taxing only gas and oil that left the
17 state?

18 MR. COONEY: That's correct. Under the most elemen-
19 tary Commerce Clause analysis, this Jicarilla tax ordinance
20 as drafted violates the Commerce Clause.

21 QUESTION: And your argument might be that because
22 a state couldn't do it, neither can the Indian tribe.

23 MR. COONEY: That brings us to the contention of the
24 Jicarillas and the Solicitor here which we believe somewhat
25 astounding, that the negative restraints of the Commerce

1 Clause do not apply to the actions of tribes when they seek
2 to tax or regulate commerce, when they seek to tax or regulate
3 production of oil and gas on Indian reservations. We think
4 that notion is rooted in 19th century concepts of Indian
5 tribes as separate nations wholly removed from the Union and
6 not subject to the restraints which curbed the powers of the
7 lesser sovereigns, the states and the municipalities within
8 the federal system. And we don't think that these assertions
9 can be accepted by this Court. That would allow 287 tribal
10 governments, we submit, to hold commerce hostage by the for-
11 tuitous location of urgently needed energy resources under
12 their reservations.

13 The Solicitor tells us that the answer to this
14 problem is that Congress may act to curb tribal taxing powers
15 if Congress feels they're being unjustly exercised or place a
16 burden on commerce.

17 QUESTION: Well, if the Jicarilla Tribe taxed all
18 the oil and gas extracted, without reference to where it was
19 going, you wouldn't be here arguing the Commerce Clause case,
20 would you?

21 MR. COONEY: Yes, we would, Mr. Chief Justice.

22 QUESTION: On what grounds, then?

23 MR. COONEY: Because if you remove the --

24 QUESTION: You're arguing the discrimination point?

25 MR. COONEY: The discrimination argument would not

1 apply. The direct burden on commerce under Michigan,
2 Wisconsin would not apply, but there would still remain a
3 multiple burden. The state would tax, unapportioned, the
4 entire volume, and does tax unapportioned the entire volume
5 of production on the reservation, and the Jicarilla claim
6 the right to tax unapportioned the entire volume of production
7 on the reservation.

8 We believe that that kind of multiple burden is
9 impermissible under the Commerce Clause and has been precluded
10 by Congress in the 1927 Act. There are two points that are
11 critical to this issue. The first is that the tribe and the
12 state are not hierarchical sovereigns attempting to tax the
13 same event. One cannot control the taxing policy of the other
14 as the United States can that of the states or the states that
15 of the municipalities.

16 A second critical point here is that a severance
17 tax on oil and gas production impacts the amount of production.
18 A tribal severance tax makes the activity of production on
19 the reservation more expensive than it is off the reservation.
20 It affects the ability of the producers to produce in paying
21 quantities and it renders marginally economic wells subject
22 to early abandonment, as found by the district court.

23 The tribal tax, therefore, implicates the state
24 tax by affecting the amount of production on the reservation
25 against which the congressionally permitted state tax is

1 assessed. The multiple burden, we submit, could be solved
2 only in one of two fashions. First, by determining which of
3 those two jurisdictions, the tribe or the state, has the bet-
4 ter claim to tax, or by this Court devising some as yet
5 hitherto unknown method of applying the apportionment test to
6 such taxation of concentric sovereigns both of whom claim that
7 the entire event, the entire local event, as it were, of
8 severance takes place entirely within their borders.

9 QUESTION: Well, ordinarily, the state doesn't need
10 any authority from Congress to impose a severance tax, does
11 it?

12 MR. COONEY: Your Honor, ordinarily I don't think
13 that question is present here. I think that as a matter of
14 fact the --

15 QUESTION: Well, could you answer it, whether it's
16 present or not?

17 MR. COONEY: I don't think the state does need
18 authority to impose a severance tax on an Indian reservation,
19 just as it doesn't need specific authority to impose a tax on
20 other activities of non-Indians on the reservations unless
21 that tax interferes with rights of self-government or is
22 divested by congressional action. But we have here specific
23 congressional grants to the states to tax this production
24 without any apportionment whatsoever. The legislative history
25 of the 1927 Act we think shows quite clearly that Congress

1 intended to give to the tribe the benefits of the royalty,
2 the bonus, and the rental income from leasing for oil and gas
3 these Executive Order reservations, but to give to the
4 states the right to tax the entire production of the oil
5 and gas. This construction of the 1927 Act is reinforced by
6 Congress's own agency, the American Indian Policy Review
7 Commission, which in 1977 recommended that 25 USC Section
8 398(c) and its counterpart, Section 398, be repealed for the
9 specific purpose of allowing tribal severance taxation of
10 production on reservations. We think history enforces this
11 conclusion.

12 QUESTION: Was that repealer ever enacted?

13 MR. COONEY: Pardon?

14 QUESTION: Was that repealer ever enacted?

15 MR. COONEY: It was never enacted. 25 USC Section
16 398(c) is still on the books, still allows unapportioned tax-
17 ation of severance by states on Executive Order reservations,
18 and we think thereby precludes the tribal severance tax.

19 QUESTION: When -- I take it, however, that the
20 first opportunity for an agency, the bureau or the Department
21 of Interior, or the United States, if you want to call it
22 that, to address the question you've just talked about, was
23 the Jicarilla tax, wasn't it?

24 MR. COONEY: To address the question of severance
25 taxes which are a new phenomena?

1 QUESTION: Yes.

2 MR. COONEY: Yes, Your Honor.

3 QUESTION: And that they approved this tax?

4 MR. COONEY: The Secretary Delegate in the field
5 approved the tax with the specific proviso that there would
6 be consent to jurisdiction in the United States district court
7 to determine the validity of the tax.

8 QUESTION: Well, I know, but the official position
9 of the Department of Interior apparently is that this -- that
10 398(c) does not foreclose such a tax.

11 MR. COONEY: Apparently so, Your Honor, but it is
12 up to this Court and the federal judiciary --

13 QUESTION: I agree with that. I'm just asking whe-
14 ther the Executive Branch has taken a position on it.

15 MR. COONEY: They have taken that position which
16 reversed a 50-year-long position that states could tax
17 severance of minerals on Indian reservations and that Indians
18 did not.

19 QUESTION: How was that prior construction evi-
20 denced with respect to the lack of power of the Indian tribe?

21 MR. COONEY: Your Honor, there is evidence --

22 QUESTION: Was it ever made express?

23 MR. COONEY: No, sir. There is no --

24 QUESTION: Why do you say that it was for 50 years
25 the policy was to the contrary?

1 MR. COONEY: The 50-year policy was to permit state
2 taxation and recognized the taxation --

3 QUESTION: But it wasn't a 50-year policy to forbid
4 Indian taxation?

5 MR. COONEY: Your Honor, I think that is best ex-
6 plained by the fact that the Indian severance taxes were never
7 heard of or thought of by the Indian tribes until the late
8 '70s. And similarly, in the Montana case, last week,
9 where the Court said that the Crows' long accommodation to
10 game and fish regulation by the State of Montana on that
11 reservation foreclosed any contention that that sort of tribal
12 regulation was essential to the functioning of tribal self-
13 government. We think it's highly dubious that the Jicarilla
14 self-government suddenly requires in the midst of the energy
15 crisis this new tribal severance tax.

16 QUESTION: Let me ask a question about the breadth
17 of the power of the tribe. Could the tribe here have said
18 that we're going to extract all of these valuables ourselves
19 and so we'll make a contract with Amoco to do the work, and
20 could they then in your view write any ticket they wanted in
21 an arm's-length negotiation? And it might amount to the
22 same number of dollars as they're getting by royalty plus tax
23 plus other things here?

24 MR. COONEY: Yes, Your Honor, but for -- if they
25 attempted to impose a tax, we think it's preempted by 398(c).

1 QUESTION: It would be just like, this would be
2 getting the same amount of dollars but by a negotiated con-
3 tract?

4 MR. COONEY: Yes, Your Honor, as to new contracts,
5 I believe they could, instead of exacting a 12-1/2 percent
6 royalty, demand a 20 percent royalty and thereby increase
7 the take. But all of these --

8 QUESTION: I suppose they could demand a 90 percent
9 royalty but they just wouldn't -- no one would contract with
10 them.

11 MR. COONEY: That's the point, Your Honor.

12 QUESTION: So there would be a marketplace.

13 MR. COONEY: And we think the Congress intended the
14 royalty to be received by the tribe to be determined by the
15 marketplace, by the auction and bidding proposals, and appro-
16 val of the royalty rate set forth in the statute, and that
17 they intended the rates of taxation to be applied by the
18 states to that production.

19 QUESTION: Would that contract require the approval
20 of the Department of Interior?

21 MR. COONEY: Yes, it would, Your Honor.

22 QUESTION: Very well.

23 MR. COONEY: Thank you, Mr. Chief Justice.

24 MR. CHIEF JUSTICE BURGER: Mr. Nordhaus.

25 ORAL ARGUMENT OF ROBERT J. NORDHAUS, ESQ.,

ON BEHALF OF THE RESPONDENTS

1 MR. NORDHAUS: Mr. Chief Justice, and may it please
2 the Court:

3 We believe that this tribal tax is within the doc-
4 trine of this Court in the Colville case, Washington v.
5 Confederated Tribes of the Colville Reservation. We think
6 that it falls within the statements made that tribal taxes
7 are valid where a tribe has a significant interest in the
8 subject matter and that the interest is the strongest where
9 revenues are derived from values generated on the reservation
10 by activities involving the tribes and the taxpayer is the
11 recipient of the tribal services.

12 QUESTION: The Colville case did not involve
13 minerals extracted from the --

14 MR. NORDHAUS: No, Your Honor, but it pertains to
15 the general sovereign power of the tribes to tax, which is --

16 QUESTION: Dealing with what kind of -- what was
17 the subject of the tax?

18 MR. NORDHAUS: That was a tax on cigarette sales;
19 yes, Your Honor.

20 QUESTION: You don't draw any distinction between
21 treaty Indian reservations and Executive Order reservations?

22 MR. NORDHAUS: No, Your Honor, I think this Court
23 has never drawn the distinction between the powers and rights
24 of tribes on Executive Order reservations -- on reservations
25 which are created by Act of Congress, or by Executive Order

1 reservations. There has never been a distinction except in
2 debates in the Congress before the enactment of the '27 Act;
3 and I'll go into this.

4 But this tax pertains only to production on tribal
5 lands. It does not pertain to any production on non-Indian
6 fee lands or -- in fact, there are essentially no non-Indian
7 fee lands on the Jicarilla Apache Reservation. There can be
8 no question that the tribe is deeply involved in this activity.
9 The reservation contains approximately three-quarter million
10 acres. Over 500,000 acres are leased for oil and gas, many
11 of these leases essentially negotiated by the Bureau of Indian
12 Affairs at a time when the tribe did not really understand
13 oil and gas matters.

14 These leases last for as long as 30, 40, 50 years.
15 The leases in this case were issued in 1953 when conditions
16 were quite different from the conditions prevailing at this
17 time. The impact of the activity related to oil and gas im-
18 pacts the tribe on a daily basis. There are 1,400 wells;
19 there are more than 400 of them drilled in the last five years.
20 The companies lay pipelines. They denude the surface of the
21 ground for roads.

22 QUESTION: Well, Mr. Nordhaus, 398(c) itself con-
23 fines itself to Executive Order reservations, does it not?

24 MR. NORDHAUS: That's right. But our contention is,
25 Mr. Justice Rehnquist, that 398(c) does not apply to these

1 leases. They were issued under the 1938 act, which is
2 25 USC 396(a) to (e). And that was an act to bring, that was
3 a comprehensive leasing act whose express purpose was to
4 bring Indian leasing into conformity with the Indian Reorgani-
5 zation Act. That Act made no mention of state taxes; there
6 was no authorization for state taxes.

7 QUESTION: Would you say 398(c) then was repealed
8 by implication?

9 MR. NORDHAUS: We say that 398(c), the taxing
10 provision of 398(c), was repealed by implication with respect
11 to taxes to leases issued after the effective date of the
12 1938 act. But we don't make an issue of the power of the
13 states to tax non-Indian production on Indian lands. I think
14 that's not at issue in this case. What we do say, that there
15 was no divestiture or no preemption by this act of the Indian
16 right to tax. There was nothing mentioned in the 1927 act
17 as to the Indian right to tax.

18 QUESTION: Well, is the argument that Congress com-
19 promised, in effect, and said the Indians would get the
20 royalties and the state would get the taxes?

21 MR. NORDHAUS: That isn't a valid argument, Your
22 Honor. The compromise pertained to permits that had been
23 issued on Indian reservations under the 1920 leasing act, at
24 a time when there was no authority, according to the Attorney
25 General, to lease Executive Order lands for minerals or oil

1 and gas. So Secretary Fall issued about some 475 permits
2 under the 1920 act.

3 QUESTION: Any of them to himself?

4 MR. NORDHAUS: Pardon?

5 QUESTION: Any of them to himself?

6 MR. NORDHAUS: That doesn't appear in the record,
7 but when Attorney General Stone took office he issued an
8 opinion which invalidated these leases. In the 1927 act
9 the compromise which petitioners make a great deal of to-do
10 about was a compromise which validated permits where the
11 permittees had expended considerable sums. There was again
12 no question of state versus Indian taxes. There was really
13 no argument about state taxes because from 1919 until 1938
14 all of Indian leasing acts had permitted state taxation.

15 In respect to the tribal power to tax these activi-
16 ties, we maintain -- and it is clear from the record that we
17 tried to make in the district court and succeeded to some
18 extent -- although the district court held that the tribal
19 services furnished to these petitioners were irrelevant,
20 nevertheless, it is clear that the Jicarilla Apache Tribal
21 Government, which is an Indian Reorganization Act government,
22 and a very strong government, is the only effective area
23 covering this three-quarters of a million acres.

24 The tribal government furnishes police, it furnishes
25 fire protection, it has a road department, it expends for

1 governmental services ten times what the State of New Mexico
2 spends in that area. In other words, it is clear from the
3 record that we tried to make and were successful in some
4 respects that the tribe was the only effective government.

5 It is clear that these companies demand and receive
6 tribal services. The companies' argument is that the tribe
7 should provide these government services out of the royalties,
8 which is the tribe's compensation for the resource which the
9 energy companies are extracting, and they say, we should have
10 the revenues from these royalties used for our benefit and
11 government services should be provided from these royalties,
12 not from taxes.

13 QUESTION: What's the source of that definition
14 of the severance tax? That there's compensation to a sove-
15 reign for the extraction of a mineral? That's on the
16 assumption that --

17 MR. NORDHAUS: Well, that's their definition. Our --

18 QUESTION: Who? Whose definition?

19 MR. NORDHAUS: I think a royalty is -- I don't say
20 the severance tax is the compensation, I say that --

21 QUESTION: I see.

22 MR. NORDHAUS: -- the royalty is the compensation.
23 I'm saying that their argument is that the royalties should
24 be used --

25 QUESTION: What's the severance tax?

1 MR. NORDHAUS: That the tribe does not have the
2 power to tax them because they were there for 30 years under
3 a contract which is frozen, which is inflexible, which
4 can't be changed. And they may be there for 50 years. They
5 say the tribe has no power to regulate their activities for
6 the entire period of the lease. They say that the tribe's
7 compensation is fixed, which is correct. But it is not cor-
8 rect to say that the tribe cannot tax them to provide essen-
9 tial government services which these people, which benefit
10 these people.

11 The companies acknowledged at oral argument in the
12 court of appeals, and the court of appeals mentioned that,
13 that a state receives royalties from its state lands,
14 there is no argument that they will make that a state cannot
15 add a tax to production on state lands.

16 QUESTION: Well, you're saying that Amoco, the
17 lessee, should have known under Colville that in addition to
18 paying a royalty and all other charges they were going to be
19 subject to an Indian tax as well?

20 MR. NORDHAUS: Well, I think from the old cases of
21 this Court and of the courts since 1902, they could anticipate
22 that Indian governments that were required to furnish govern-
23 ment services would have to tax, otherwise Indian governments
24 can't survive.

25 QUESTION: Well, the Indian government in negotiating

1 the contract could certainly have taken that into account in
2 fixing the royalty, could it not?

3 MR. NORDHAUS: On that argument, Your Honor, that is
4 premised on the point that taxes are consensual, that taxes
5 may not be levied by a sovereign government unless the tax-
6 payer consents to the imposition of the tax and the rate of
7 the tax, and that would indicate that a sovereign government
8 -- and I'm saying that the tribes have this sovereignty --
9 that a sovereign government needs the consent of each taxpayer
10 to levy a tax. And that is not what this Court and other
11 courts have held with respect to Indian taxes.

12 In Buster v. Wright, a tax was imposed on business
13 lots where the owners already had a fee interest. In Morris
14 v. Hitchcock there were cattle on the reservation prior to
15 the imposition of the tax. This Court upheld the tax.

16 QUESTION: But this Court has in recent years re-
17 treated from the notion that Indians are independent sove-
18 reigns, has it not?

19 MR. NORDHAUS: Your Honor, that again is, doesn't
20 really reach the question of the sovereign power to tax.
21 I am saying that until that power is divested, and unless that
22 power to tax is inconsistent with the status of the tribe --
23 which we say it is not, because it has been recognized over a
24 long period of years -- then the tribe has this power. And
25 then from here we get on to the point that the question

1 whether Congress has divested the tribe of the power to tax.
2 Mr. Claiborne will go into the question of the 1927 act, but
3 I do want to mention Section 110 of the Natural Gas
4 Policy Act of 1978. Congress in that act specifically recog-
5 nized tribal severance taxes by permitting them to be added
6 to the ceiling price. And secondly, it recognized the possi-
7 bility, and apparently accepted the possibility of the coex-
8 istence of state and tribal taxes.

9 QUESTION: You mean, just because all the states
10 had them, so they must have known about it?

11 MR. NORDHAUS: Yes, Your Honor, and also I cannot
12 believe that it could be said that Congress divested the
13 tribes of the power to tax and levy these severance taxes, or
14 that these are inconsistent with any federal policy or energy
15 policy if Congress permitted these taxes to be passed on to
16 the consumer by legislation enacted in 1978.

17 QUESTION: Mr. Nordhaus, before you sit down, just
18 as a matter of history, is your opponent correct in saying
19 that this particular tax was never imposed by the Indians
20 until a few years ago?

21 MR. NORDHAUS: This particular tax?

22 QUESTION: Kind of tax; the severance.

23 MR. NORDHAUS: This particular tax has not been
24 imposed.

25 QUESTION: How do you explain that, as a matter

1 of history? Why did it take the Indians so long to realize
2 that they had this power?

3 MR. NORDHAUS: I think that you have to go back to
4 the history of the development of Indian tribes in the last
5 few years. Congress has expressed policy to effect self-de-
6 termination and the tribes' desire to --

7 QUESTION: Do you rely on the change of policy
8 since 1927 then?

9 MR. NORDHAUS: In the Federal Government, abso-
10 lutely. The Indian Reorganization Act, the Self-Determination
11 Act, the Indian Financing Act, all of which -- the expressed
12 policy of all of these acts was to strengthen tribal govern-
13 ments, to make them self-sufficient.

14 QUESTION: But if I understand your argument, none of
15 those were really necessary to justify this tax.

16 MR. NORDHAUS: None of these -- ?

17 QUESTION: None of these subsequent congressional
18 holdings -- they've all existed since 1930 --

19 MR. NORDHAUS: No, Your Honor. All they do is reaf-
20 firm the existence of the power and reaffirm the fact that
21 Congress did not intend to divest the tribes of this power.

22 QUESTION: Did the energy crisis have something to
23 do with this too?

24 MR. NORDHAUS: Possibly, possibly, but --

25 QUESTION: An economic impact.

1 MR. NORDHAUS: Right.

2 MR. CHIEF JUSTICE BURGER: Very well. Mr. Claiborne.

3 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

4 ON BEHALF OF THE RESPONDENTS

5 MR. CLAIBORNE: Mr. Chief Justice, and may it please
6 the Court:

7 If I may begin at the end, and by the end I mean
8 last week's decision in the Montana Crow Tribe case, the
9 teaching of that case, as we understand it, is that the
10 territorial sovereignty of Indian tribes is somewhat more
11 limited than that of states, that Indian tribes cannot regu-
12 late the activities of non-Indians on non-Indian land when
13 there is no involvement of Indians and when there is no sub-
14 stantial effect on vital tribal interests.

15 But the Court was at pains to point out that on the
16 other hand, so much is left of the inherent sovereignty of
17 Indian tribes that they may regulate through taxation and
18 other means those activities of non-Indians even on non-Indian
19 land, the Court expressly pointed out, when there is a rela-
20 tionship with the Indians through contract or commercial
21 dealings or in other ways; or when, independently of such
22 consensual dealings between Indians and non-Indians, the
23 activity of the non-Indians on the non-Indian land substan-
24 tially affects vital tribal interests.

25 This case, it seems to us, squarely falls under both

1 of these principles, indicating what still survives of Indian
2 sovereignty. Here we're dealing with a continuing relation-
3 ship between non-Indians and the tribe itself, leases for a
4 long term, and operations which continue over a long term.

5 The operations take place on tribal lands. The
6 activities there affect that land, in a permanent way, as
7 well, obviously, as surrounding land through environmental
8 effects. The operations are conducted under leases which re-
9 quire, and which in practice do involve a local work force,
10 so there is a direct involvement of tribal members with the
11 operations of the lessees. The operations involve the use of
12 tribal roads and the activities of the lessees implicate
13 tribal services not only for the maintenance of such roads but
14 also police and fire protection and all the other benefits
15 of an established government within the reservation within
16 which these activities take place.

17 QUESTION: Have you ever been in Rio Arriba County?

18 MR. CLAIBORNE: I have not, Your Honor.

19 QUESTION: I daresay there are probably more
20 Jicarilla Indians than non-Jicarilla Indians in the County.

21 MR. CLAIBORNE: I am unaware of the figures with
22 respect to the number of members who live within this reser-
23 vation, Mr. Justice.

24 QUESTION: But only Indian land's involved, isn't it?

25 MR. CLAIBORNE: Only -- all of the land, as I

1 appreciate it, within the Jicarilla Reservation, is tribal --

2 QUESTION: So your reference to the Montana case
3 about non-Indian land just isn't implicated in this case?

4 MR. CLAIBORNE: No, but it does indicate a very
5 important fact which is that the power to impose the taxes
6 which were mentioned in that case are sovereign powers and
7 not landowners' powers or a power to forbid entry or to con-
8 dition entry. Because obviously -- I'm sorry, Mr. Justice
9 White?

10 QUESTION: That wasn't the holding of the case?

11 MR. CLAIBORNE: No, but I take it it was a considered
12 dictum in the case. It very plainly holds that even on non-
13 Indian land, on fee-owned land, there in proper circumstances
14 is the tribal power of taxation. That can only be a sove-
15 reign power since by definition the tribe is not the landlord
16 and by definition the tribe cannot prevent access to a man's
17 privately owned land even though within the reservation.
18 Any power of taxation with respect to activities there must be
19 a sovereign power. Being a sovereign power it is not without
20 express words contracted away when the tribe, who happened
21 to be also the landlord in this case, makes an arrangement
22 with the lessees. Sovereigns do not commonly agree that they
23 will waive any right in future to impose regulations or taxes,
24 which rights they hold as sovereigns, even though they have
25 contracted for a specific royalty or other price with the

1 person with whom they deal. And that principle surely is
2 applicable here to the Jicarillas.

3 QUESTION: Do you think that 398(c) was impliedly
4 repealed by later Indian legislation by Congress?

5 MR. CLAIBORNE: Mr. Justice Rehnquist, we have taken
6 no position with respect to the argument that the 1938 Act
7 impliedly repealed the state power to tax under the '27 Act.
8 The court of appeal expressly avoided any decision on that
9 issue and it is not presented to this Court. It is fair to
10 say that the Government has argued for implied repeal in
11 other cases in other courts but we have no occasion to take
12 a firm position on that matter here. We certainly do not rely
13 in our argument today on any implied repeal of the '27 Act.
14 On the contrary, we concede for the purposes of the case that
15 the State of New Mexico does have power pursuant to this
16 '27 Act to impose its own severance tax, but it hardly follows
17 that the '27 Act sub silentio withdrew any power which the
18 tribe had as a matter of its own sovereignty to impose a
19 like tax on activities which are plainly sufficiently con-
20 nected with its interest to be justified.

21 I might say in passing that the '27 Act does not in-
22 dicate a congressional intent to treat Executive Orders
23 reservations differently; quite the contrary. The 1927 Act
24 is the Act which forbids the President henceforth to diminish
25 or abolish Executive Order reservations, thereby putting them

1 on the same permanent and secure footing of treaty and congres-
2 sionally recognized reservations, and it is also the Act
3 which places vis-a-vis royalty in oil and gas the Executive
4 Order reservation Indians on exactly the same footing as an
5 act passed in 1924 had done for those who held their lands by
6 treaty. The purpose of the 1927 Act was to fill a gap, the
7 '24 Act having dealt only with treaty reservations, or so it
8 had been construed. Congress now said it is only right and
9 proper that the same rule should apply on Executive
10 Order reservations and we make that clear by imposing the
11 identical scheme.

12 No one could reasonably argue that Indians on
13 treaty reservations had no power to impose this sort of tax,
14 and yet the '27 Act is in every relevant respect identical
15 to the '24 Act. There is, of course, no anomaly in having
16 a right to exact royalty from your own land, and if you're a
17 sovereign also to impose a severance tax. New Mexico, Louisi-
18 ana, and every other state does that without question.

19 Nor is there any anomaly in having two taxes bear
20 on the same activity when one has concentric territorial
21 sovereigns. That is familiar enough in the federal-state
22 context but in the Indian context it's resolved by the Colville
23 case itself in which two taxes, though in that situation they
24 were found to impair the viability of the cigarette business,
25 were nevertheless held to be both sustainable.

1 One final word on the 1927 legislation. It is said
2 that there was a carefully crafted compromise in which the
3 Indians somehow without it being mentioned lost their power
4 of taxation.

5 There is not a word in that history to suggest that
6 that was the intent or result of the legislation. Mr. Justice
7 Stevens wondered why the tribes had not before very recent
8 times imposed such taxes, although their reservations had
9 been mined for some years before. I would answer that the
10 tribes were not alerted to their prerogatives in the '20s and
11 '30s -- and, indeed, in the '40s and '50s -- and only recently
12 have come to recognize what was rightly theirs.

13 The same remark could be made of the cigarette taxes
14 which were sustained in the Colville case. That is also
15 a relatively new idea but it's not a brand new idea, it's a
16 revival of an idea that was prevalent at the turn of the
17 century. One has to recognize that the Cherokee imposed a
18 tax on the exportation of hay whether or not from private or
19 tribal lands. It was sustained by the Attorney General of
20 the United States, and it was cited with approval in this
21 Court's opinion in Morris v. Hitchcock.

22 Morris v. Hitchcock of course itself involved a
23 tribal tax on cattle grazing on an Indian reservation. Buster
24 v. Wright, cited with approval in the two most recent deci-
25 sions of this Court, involved a tax on the privilege of doing

1 business by lot owners in towns who owned their own land and
2 whose town government had expressly been given the power to
3 tax as well, to tax that very privilege. Buster v. Wright,
4 therefore, is a case in which there was a town tax and an
5 Indian tax, and no power to remove, and yet the court of
6 appeal sustained the tax and this Court has in both Colville
7 and Montana cited that decision.

8 QUESTION: Mr. Claiborne, do you think there's any
9 limit to the rate of tax that the tribe can impose?

10 MR. CLAIBORNE: I don't know, Mr. Justice Blackmun,
11 how one calculates that limit. I think there are assurances
12 that that tax will not be oppressive. There is, first of all,
13 economic self-incentive not to drive away potential lessees
14 or to have them cancel their leases as they are free to do in
15 this case.

16 QUESTION: Aren't all tax ordinances like others sub-
17 ject to the approval of the -- ?

18 MR. CLAIBORNE: Well, then, subject to the approval
19 of the Secretary, and that approval is a serious insurance
20 that the tax rate will not be out of all bounds with the
21 benefits conferred with the interests of the tribe and with
22 what the traffic will bear.

23 And finally, of course, there is a congressional
24 oversight over tribal taxation, as we say there is with
25 respect to state severance taxes. We have argued, or filed a

1 brief in the next case in which we suggest that there is no
2 occasion for a court to determine what a maximum rate of a
3 severance tax is, but that Congress is free, and should the
4 privilege be abused, no doubt will intervene to set a limit.
5 So here.

6 QUESTION: Mr. Claiborne, do you know, on whom is
7 this tax placed? Who pays it?

8 MR. CLAIBORNE: Mr. Justice White, I'm told that
9 it's paid on whoever is the owner of the minerals at the
10 moment of severance.

11 QUESTION: And so it's -- and do you know if the
12 gas is sold at the wellhead to the pipeline or not?

13 MR. CLAIBORNE: It is in most instances. Now, let
14 me explain the reason for the wording of the ordinance as
15 construed by the court of appeal, and without any contrary
16 guidance --

17 QUESTION: So they construe it as a severance tax,
18 don't they?

19 MR. CLAIBORNE: They construe it as a severance
20 tax, and they construe the words "sold or transported off
21 the reservation" to mean sold on the reservation, or trans-
22 ported without sale, when the pipeline is also the extractor,
23 or sold by the Indians themselves with respect to any portion
24 they might take in kind. The only exemption is not for the
25 Indian royalty in kind, no matter what happens to it, but

1 only if it is used by them on the reservation. If it's sold
2 by them on the reservation -- they pay the tax.

3 QUESTION: Do you think the court of appeals con-
4 strued the ordinance that way?

5 MR. CLAIBORNE: It's clear that they --

6 QUESTION: At least they didn't think it was paid
7 -- it certainly wasn't paid by a pipeline, and they didn't
8 think it was paid for transportation or for sale?

9 MR. CLAIBORNE: I refer Your Honor to page 155 of
10 the Joint Appendix, which makes clear how the court of appeals
11 construed this act.

12 QUESTION: And that, I take it, is your answer to
13 at least one of the arguments of your opposition?

14 MR. CLAIBORNE: Yes. And I would say that the
15 tribe is in the best position to construe its own ordinance
16 and they have so construed it in all courts.

17 MR. CHIEF JUSTICE BURGER: Do you have anything
18 further, counsel? There is one minute remaining.

19 ORAL ARGUMENT OF JOHN R. COONEY, ESQ., ON BEHALF OF
20 THE PETITIONERS AMOCO AND MARATHON -- REBUTTAL

21 MR. COONEY: Thank you, Mr. Chief Justice, and may
22 it please the Court:

23 Your Honors, we think the significance of Section
24 110 of the Natural Gas Policy Act is merely in recognizing
25 the impact of severance taxes on production, and that if

1 those severance taxes are not allowed to be passed through
2 production is impacted. That's precisely our point of the
3 impact of the tribal tax on the state severance tax.
4 Congress specifically left the question of validity of this
5 tribal severance tax to this Court.

6 There is no record to support Mr. Nordhaus's claims
7 concerning the cost of tribal services to the lessees. As a
8 matter of fact, the record that is before the Court shows
9 that the royalty revenue to the tribe more than supports the
10 entire tribal government.

11 Thirdly, while there was no mention of tribal
12 severance taxation in the debates preceding the '27 Act,
13 likewise there was no mention of tribal authority over pur-
14 chasers of alienated lands in the allotment acts considered
15 by this Court in the Montana case last week. But we think
16 just as that authority could not have survived the allotment
17 acts, likewise tribal severance taxation could not have sur-
18 vived the 1927 statute. Thank you.

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

21 (Whereupon, at 1:52 o'clock p.m. the case in the
22 above-entitled matter was submitted.)
23
24
25

CERTIFICATE

1
2 North American Reporting hereby certifies that the
3 attached pages represent an accurate transcript of electronic
4 sound recording of the oral argument before the Supreme Court
5 of the United States in the matter of:

6 No. 80-11
7 J. GREGORY MERRION AND ROBERT L. BAYLESS,
8 ETC., ET AL.,
9 V.

10 JICARILLA APACHE TRIBE ET AL.;

11 &

12 No. 80-15
13 AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY

14 V.

15 JICARILLA APACHE TRIBE ET AL.

16 and that these pages constitute the original transcript of the
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