In the

ORIGINAL

Supreme Court of the United States

RAMAH NAVAJO SCHOOL BOARD, INC., ET AL.,	)	
Appellants	)	
v.	)	NO. 80-2162
BUREAU OF REVENUE OF NEW MEXICO	)	

Washington, D. C.

April 28, 1982

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Appellants
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Washington, D. C.

Wednesday, April 28, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

MICHAEL P. GROSS, ESQ., Santa Fe, New Mexico, on behalf of Appellants.

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C., Amicus Curiae.

JAN UNNA, ESQ., Santa Fe, New Mexico, on behalf of Appellees.

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C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Ramah Navajo School Board v. the Bureau of Revenue of New Mexico.

Mr. Gross, you may proceed whenever you're ready.

ORAL ARGUMENT OF MICHAEL P. GROSS, ESQ.

ON BEHALF OF THE APPELLANTS

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

The question in this case is whether the State of New Mexico has the legal power to burden an Indian school construction project on the Ramah Navajo Indian Reservation in New Mexico through means of a sales tax which has deprived the Indian School Board involved of more than $232,000 which was granted by Congress for the express purpose of constructing school facilities for Navajo children.

The facts giving rise to this question are essentially as follows:

In 1968 the State of New Mexico, through its subdivision, the Gallup-McKinely County School District, shut down the only public high school in the vicinity serving the Ramah Navajo community in a remote section of western New Mexico. By closing the school and

failing to provide adequate access to any alternative public school, the state effectively compelled the Navajo high school children from this community to either abandon school at all or attend distant federal Indian boarding schools.

In response, the Navajo community filed a lawsuit in state court against the school district to try to force reopening of the school. The lawsuit failed, and in its aftermath, under the authority of the Navajo Tribe, the Ramah Navajo Chapter created its own school board, the Appellant in this case, the Ramah Navajo School Board, Incorporated, and authorized it to seek funds from the government to open the first Indian school started from scratch in modern times. The school board succeeded and for five years ran a school under contract with the Bureau of Indian Affairs in the abandoned public high school facility in Ramah village.

Meanwhile, the school board approached Congress for funds with which to place a permanent school facility on the reservation in the heart of the community. The school board again succeeded, and through a series of direct, line item appropriations, the Congress of the United States granted, in effect created a partnership with this remote community to construct a school facility. Now, those funds

represented a discrete pool of money, the only funds available for the construction of this school, and were the funds from which the tax in question in this case were drawn.

QUESTION: Mr. Gross, was it true that in making the funding request, that the amount of the tax was in effect calculated as part of the estimate and that Congress appropriated the money for the payment for the payment of that?

MR. GROSS: Madam Justice O'Connor, the answer is a flat no. Congress had no inkling of the tax. The word tax does not appear in the legislative history. The architects who prepared construction estimates never referred to the tax, and until --

QUESTION: But their estimates reflect adding on the amount of the tax?

MR. GROSS: There is no evidence in the record that it did, and if I may step outside the record for a moment, the answer again is a flat no. The architects themselves were from out of state and were not familiar with the New Mexico tax. For that reason, all claims having to do with the architects were dropped in an early stage of the trial of this case, and there is no proof in the record about any taxes paid by the architects at all.

QUESTION: But didn't the bid itself reflect the tax?

MR. GROSS: The bid did, and that was the only, or the first occasion at which the school board became aware of the tax. It then accepted the burden because the New Mexico gross receipts tax operates as a sales tax as this Court held just a few weeks ago in the case of United States v. New Mexico. That is to say that -- and the evidence in the record, the uncontroverted evidence in the record, I might add, on this point is that the construction industry in New Mexico always, universally, passes this tax burden on to consumers of construction services.

QUESTION: What do you suggest is the explanation for including that in the estimates, that they were just playing it safe in case a tax was --

MR. GROSS: Your Honor, at the beginning stages of this construction program, the case law on the subject of taxes imposed indirectly through non-Indians upon Indians on reservations was not as clear as it is today. So one answer, Your Honor, is that all parties concerned, the school board included, Lembke Construction Company, simply did not expect or understand or realize that in fact they were not under an obligation to pay this tax.

Furthermore, the invitation for bids did make mention of state sales, use and other taxes. Now, this is standard language that appears in all AIA form contracts and does not itself specify that the tax must be paid, but in effect means, and has been interpreted -- similar language has been interpreted by this Court as meaning you pay the taxes that are required.

Well, until this case was filed, the contractor and the Ramah School Board did not understand that they were not obligated to pay the tax.

We think that the essential facts underlying the claims made are these. First, the nature of this tax is that of a sales tax. The State of New Mexico in fact concedes as much in a public brochure that is appended to our reply brief. It says this tax operates as a sales tax on consumers.

Number two, the status of this school board is that of a non-profit, non-proprietary tribal governmental agency. That puts it in a different category from all the other entities that have been before this Court in similar cases such as the Pine Top Forestry Products Enterprise, Central Machinery, even Warren Trading Post. These were all businesses. The school has no place to go to pass on this tax burden.

It doesn't have -- it's not a ski resort. It doesn't have customers. Tourists don't flock to the school and pay money in order to look at the school buildings. All it has are children.

What this tax has done is deprive those children of certain planned facilities. For example, it doesn't have vocational classrooms because space had to be used to put in a cafeteria which was originally planned as a separate building, in part because $232,000 has been taken off the top of the construction funds that Congress made available.

QUESTION: But Mr. Gross, that is true in any number of situations of public contracts where, supposing this were the federal government rather than the Indian tribe that were building a school and it contracted to have it built in the State of -- something, a structure built in the State of New Mexico, and New Mexico applied its gross receipts or sales tax to the private contractor, wouldn't that be permissible under James v. Dravo and Alabama v. King and Boozer?

MR. GROSS: As a matter of fact, Your Honor, the answer that we would submit to that question is no. When the government --

QUESTION: Don't you think that's borne out by our cases?

MR. GROSS: I don't believe so because I think in James v. Dravo Contracting Company, in fact as quoted in United States v. New Mexico just a few weeks ago, the Court made mention of the fact that the legal incidence test applied in that case. It only creates a rebuttal presumption which can be met and thus invalidate a state tax when a duty of the government is breached by the state tax or the tax interferes substantially with the functioning of government.

We maintain in this case that both legs of that test have been met if that were the applicable way to look at the case, which we suggest is not. That is to say, the government, under the Treaty of 1868 with the Navajos, has a duty to provide school facilities. It didn't do so for 100 years at Ramah until the appropriations that we are talking about here.

Secondly, because the BIA has a unique and special obligation to Indian tribes, and because this tax has operated as a substantial burden, unlike the tax, for example, in Central Machinery Company, it has interfered with the functioning of government at Ramah.

If I may carry that out just one more step, Your Honor, what we are talking about here is not just the end product, the school, but we are also talking about the contracting process. Congress, in the Indian

Self-Determination Act, has determined that Indian tribes should have the right to run their own governmental programs. The process is as important as the end product. That process deserves the preemptive protections of the United States Constitution as much as the school facilities themselves do. The extra burden presented by a 4 percent sales tax in other words interferes with the school board's management of its own process of running and operating its own school or building it, as in this case.

QUESTION: Mr. Gross, can I interrupt you right there?

Supposing all the laws and documentation had been exactly the same except the government had appropriated an additional $232,000? What happens to your argument about impairment?

MR. GROSS: Congress has plenary authority over Indian affairs, and if Congress wishes to add monies on for the express purpose of reimbursing the State of New Mexico, that's constitutional, that's fine.

QUESTION: But had it done that in this case, just appropriated another $232,000, then there wouldn't have been the kind of impairment that you describe.

MR. GROSS: Well, if I understand your

question correctly, Your Honor, I think what you're saying is couldn't the school board have gone back to Congress and asked for another pot of money with which to pay the tax? The answer is that while Indians have a special place in the Constitution, they don't control the votes in Congress, and indeed, if I may say so, it seems to me that the special obligations that this Court has recognized repeatedly, at least since Williams v. Lee which says that absent a governing act of Congress states may not burden Indian tribal government, the origin of that rule comes from recognition that Indian tribes cannot ask Congress for certain protections every time they get dollars for a school or dollars for a hospital or dollars for a road.

QUESTION: Well, but what I'm -- I'm not sure you're responding to my question. My question really is does the constitutional issue turn on whether the amount of money appropriated by the federal government is adequate or inadequate? Supposing they had appropriated twice as much money?

MR. GROSS: No, it does not turn on that point, Your Honor.

QUESTION: Well, then, I don't really understand your impairment argument, because if they had given you more money, the school could have done

everything that you say you're unable to do, or the school board could.

MR. GROSS: Your Honor, if I may say so, nobody ever gets enough money to do what he wants to do. The point is that this school board would have had at least 4 percent more to do what it wanted to do except for this tax, and that I think is the only answer one can give.

If I may turn, Your Honors, to --

QUESTION: Well, let me pursue that. As to the legal, constitutional question here, does it make any difference whether the federal government does or does not include in its grant something for the taxes or whether the architect or the school board or anybody else involved believes or does not believe that the tax is due? Are those things relevant to the question whether there is a tax due?

MR. GROSS: Mr. Chief Justice, the answer is no. The practical operation, to use the words of Mr. Justice Rehnquist, apply in the situation. The tax's effects, not the parties' understanding, unless they are expressed by Congress, govern the situation. If this tax represented a substantial burden on Navajo tribal government, as we maintain, then it falls whether or not an extra $232,000 was added on or not. That's the key

point. This tax represented an interference with the most essential, if I may say that, the most essential governmental function of this Indian tribe. That's the main reason why we believe it needs to be invalidated here.

In the remaining time I have I would just like to address some of the arguments that were raised in the briefs. The State's maintained that the legal incidence rule ought to be applied to cases of this sort. We suggest, Your Honors, that that sort of a rule would first of all be improper for this Court to adopt because Congress, not the Court, has plenary authority over Indian affairs and it is up to Congress to change these sorts of rules of long standing.

Number two, the legal incidence rule is simply not the case. We haven't breached or we are not claiming an exception to the legal incidence rules. It's simply that the legal incidence rule does not apply or never has been applied to situations involving a triangular relationship between the Congress, an Indian tribe and the states. The legal incidence rule arose and evolved from a different set of considerations, considerations that have to do with federal-state comities. For that reason, Your Honor, because federal-state relations do not turn in the straight line

situation on questions having to do with obligations to third sovereigns, the legal incidence rule should not be adopted in this case.

Finally, Your Honors, there is a panoply of federal law, the Indian Self-Determination Act, to be sure, is the most importtant in our view, but the Navajo Treaty, the disclaimer clause in the New Mexico Constitution, the Buck Act, the Indian trader statutes, they all form a panoply of rules that express Congress' will that Indian tribes exercising powers of government such as this should not be burdened through taxes imposed directly on them, whatever the labels involved.

If I may reserve five minutes for rebuttal, I would appreciate it.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Claiborne?

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.
AS AMICUS CURIAE

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

Without in any way dissenting from what has been said, I hope to look at the case from a somewhat broader perspective, and I would invite the Court to return to the starting point which seems to have been

followed in Indian cases since the beginning and to date, that is that presumptively at least within the territory of defined, recognized Indian reservations, of which this is one, state law is off limits except as invited by Congress. That has been the pattern since the first Trade and Intecourse Acts in which federal, not state, licenses were required to trade with the Indians, in which federal criminal law, not state law, was made applicable within Indian country. It was the rule announced in Worcester v. Georgia --

QUESTION: Well, we have certainly departed from it a number of times recently, in the Confederated Colville Tribe case.

MR. CLAIBORNE: Justice Rehnquist, certainly there have been exceptions carved to the rule. I suggest that the rule, however, as the normal presumptive rule remains alive and well.

It is not simply a rule that was abandoned after Worcester was decided. It was the rule, the premise of the Kagama case in which the authority of the United States to promulgate criminal law for Indian country was in part the absence of authority of the state to do so. It is the premise of all legislation of Congress, including the General Allotment Act. The General Allotment Act looked to suggesting the

reservations to state law, but did so only after allotments were removed from restriction on the presumption that that was a necessary step to the importation of state law.

It is the premise of Public Law 280 which would be unnecessary if state law could otherwise enter reservations. Congress felt it necessary to cede, to transfer to the states this authority. It is the premise of recent cases in this Court dealing with disestablishment and diminishment of reservations. The primary relevance of those decisions is whether or not state law applies within the area; presumptively no if the reservation has neither been disestablished nor diminished.

QUESTION: Mr. Claiborne, do we really have to apply that kind of a presumption to resolve this case?

MR. CLAIBORNE: Perhaps not, Justice O'Connor.

QUESTION: To what extent would you say the federal government has regulated the field of education of Indian children compared to the extent of government regulation of logging, for instance, in the White Mountian Apache case?

MR. CLAIBORNE: Justice O'Connor, I would answer that historically and in this case, the United

States has taken on the obligation of educating Indian and establishing the schools and regulating all aspects of it, including here the very construction of this school with specifically allocated federal monies, and that applying the reasoning of the White Mountain Apache and Pine Top case as well as Central Machinery, we would be entitled to find here too a sufficient federal umbrella to occupy the field and leave no room for state taxation.

QUESTION: Would you say that if the federal government, if the Congress had appropriated a line item appropriation for the payment of this tax that we could look at that to say that Congress did not intend to preempt it?

MR. CLAIBORNE: It might be possible, Justice O'Connor, though applying the presumption which I suggest is applicable, one ought not read, one ought not imply congressional consent to state interference in reservation affairs. But perhaps if Congress had expressly said so much extra for taxes, one would be entitled to say Congress has thereby given leave to the state to impose this tax. Of course, there is no such record here.

Now, it may be that this case can be decided on the narrow ground suggested. The Court may, however,

feel it appropriate to consider whether some somewhat broader principle is not applicable to resolve this and the inevitable sequel of cases that will follow.

QUESTION: Mr. Claiborne, could I ask about the scope of the presumption you would apply? Is that just for tax cases, or would it apply to torts and regulation of the construction work and everything, or just taxes?

MR. CLAIBORNE: Justice Stephens, it would apply to regulation, and indeed --

QUESTION: Would state law governing the terms and conditions of employment be displaced, too?

MR. CLAIBORNE: Our basic premise being that the Indian Commerce Clause assigns to the national and not the state governments the exclusive, presumptively exclusive responsibility for regulation of trade with Indians, that is to say, primarily the regulation of the non-Indian in his dealings with Indians, though only on the reservation. The states have for the most part not presumed to regulate those transactions. Here New Mexico does not purport to apply its zoning law, its building code, its contract law to this construction. It does claim the right to tax. We say the two go hand in hand.

QUESTION: But say there was a dispute over

whether the contract had been properly performed, a breach of contract suit of some kind. What law would you apply to that suit?

MR. CLAIBORNE: Well, in following Williams v. Lee, the appropriate forum would be the tribal court in which, though it is true to say that the tribe would be free to invoke the State Courts under an earlier decision of this court, but the contractor would be required to repair to tribal court.

QUESTION: Mr. Claiborne, in your view does the State of New Mexico have an obligation to provide public school education on the reservation to the children?

MR. CLAIBORNE: I think that is so, Justice O'Connor, to the extent that it is not otherwise provided, and of course because the United States has a treaty obligation, because it has in other respects assumed the obligation, the state as a practical matter has here and usually is excused from performing its obligation.

What is more, when under the Johnson-O'Malley Act the state does perform the educational function, it is in large measure, if not entirely, reimbursed by federal funds, and in those circumstances it is peculiarly inappropriate for the state to be claiming

the right to tax without having in this instance any of the obligation or --

QUESTION: But if the state were providing these services, then they would still not be allowed to tax, is that right?

MR. CLAIBORNE: Though it is unnecessary to reach that point here, it is arguable --

QUESTION: Yes, but of course, it is a concern perhaps in other states.

MR. CLAIBORNE: Justice O'Connor, it may be possible to say that when Congress has invited the state to perform a role in education or in any other field, with the power to regulate that activity, it has impliedly also removed the shield from taxation. But where the area is one which the state is not entering by any door of invitation which Congress has provided, it can no more tax than it can regulate that activity which it's not provided and in which it has no interest except as a source of revenue.

QUESTION: Mr. Claiborne, suppose the issue here was a gasoline, state gasoline tax on gasoline used by the contractor, purchased off the reservation, and just hauling materials back and forth from -- would that tax fall in the same -- it certainly would increase the price to the tribe.

MR. CLAIBORNE: Justice White, I would not make the same argument with respect to gasoline tax imposed off the reservation with respect to gasoline bought off the reservation any more than I would claim that the Indians themselves were immune from such a tax if they purchased their gasoline off the reservation.

QUESTION: Well, what is this tax? Suppose the contractor needs X pounds of nails and he goes to the hardware store in Santa Fe and buys X pounds of nails and he has to pay the sales tax? Does he say I'm going to use this on the reservation, and therefore I'm exempt?

MR. CLAIBORNE: Well, as a practical matter, as I understand it, if the main contractor has a certificate of exemption, he is entitled to purchase his materials tax-free.

QUESTION: Yes, but what if New Mexico says, look, you're just a contractor; you're building something on a reservation, I'm going to apply our sales tax? We won't give you an exemption?

MR. CLAIBORNE: Well, our argument goes no further than to claim exemption with respect to a tax which is directly measured and tied to on-reservation activity, not purchases made elsewhere, but the very activity which occurs on the reservation.

QUESTION: Well, how is this tax -- I thought this was a sales tax.

MR. CLAIBORNE: It is a sales tax. Well, it's a gross receipts tax because the receipts are paid by the tribe to the contractor on the reservation in respect of the construction which of course necessarily takes place on the reservation.

QUESTION: So if New Mexico wanted to collect a tax from the contractor, put a sales tax on all the purchases the contractor made off the reservation, you would not be arguing about that.

MR. CLAIBORNE: To the extent that they could be identified as purchases which go into this building, perhaps the rule should be extended there.

QUESTION: Perhaps? Perhaps? Well, what about the gasoline tax?

MR. CLAIBORNE: New Mexico -- well, part of that gasoline is presumably consumed off the reservation in going from the home office to the site. I don't know. But New Mexico itself ties the purchases of the materials to the construction and excuses us from tracing it further.

QUESTION: Okay.

CHIEF JUSTICE BURGER: Mr. Unna?

ORAL ARGUMENT OF JAN UNNA, ESQ.

ON BEHALF OF APPELLEEES

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

As we see it, this case boils down to two fundamental issues, and the first is what I call the legal incidence economic burden question, and the second question is the preemption by virtue of the Indian Self-Determination Act allegedly, and the Indian traders license question.

On the first issue, that is, the legal incidence economic burden question, as we see it, we have the question given that the legal incidence of the tax is on the non-Indian contractor. Does the additional fact that the economic burden is passed on to the school board in this case vitiate New Mexico's tax, and here the argument of the school board is, well, there's a burden being imposed on the school board. It deprives them of money that they could use. But that argument is too broad. It says too much because consider for a moment pencils manufactured in New York State and the manufacturing tax on pencils, a tax, agricultural taxes in Florida and California. They all carry an economic burden that is passed on in the price of the good or in this case the service that the school board buys and consumers. So that --

QUESTION: Of course, are you suggesting that because some taxes are attached that therefore all taxes must attach?

MR. UNNA: No. What I am suggesting is that --

QUESTION: In our economy there are so many hidden taxes that it couldn't conceivably, even with all the defined exemptions, you couldn't really eliminate all the tax burdens everywhere, could you?

MR. UNNA: No, I agree with you.

QUESTION: Even if you tried to.

MR. UNNA: No, I agree entirely with you.

QUESTION: Computation would be more difficult than it was worth, perhaps, in some cases, wouldn't it?

MR. UNNA: Perhaps. The point that I wanted to make in this is that simply because there's an economic burden being passed on to an Indian group doesn't vitiate a tax. If that's the rationale, all these taxes outside the State of New Mexico in the chain of distribution of goods would fall. And so the argument must be that the only tax allegedly to fall is a visible tax at the end of the line. And I don't see that that's a good distinction to make as far as the state's taxing powers, whether it's a visible tax or hidden.

QUESTION: Well, we've got a good many tax exemptions to churches, for esample, among others. That doesn't mean that all the taxes that are a burden on all of the services and all of the materials, goods that the church may buy can be eliminated, does it?

MR. UNNA: No, it doesn't, not at all.

QUESTION: You exempt the church from real estate taxes, you exempt them from income taxes and a few, but one way or another, churches in the acquisition of property are going to pay some taxes.

MR. UNNA: There are all sorts of costs that are passed on in the consumption of purchase of any goods or services, and New Mexico's tax in this case is simply another economic burden in the chain. And the legal incidence rule that you have enunciated a month ago in the United States of America v. New Mexico case solves this case as well, and in fact, that what I think has happened is that the Court has been applying the legal incidence rule in the case of Indian groups, Indian tribes. This is made clear in the Colville case, in the Moe case where there is explicit reference to the legal incidence falling on non-Indian purchasers, and the Court in Footnote 15 in the White Mountain Apache Tribe case stated the fact that the economic burden of the tax falls on the tribe does not by itself mean the

tax is preempted as the Hoe case makes clear.

The secondary point that I would make about the taxes in this case is that in response to your question, Justice O'Connor, that I think it's very clear that in the budget estimates of construction to Congress over the period 1974 to 1979, that in fact one can infer that the gross receipts tax was included in the budgets.

QUESTION: There is no specific item, is that correct?

MR. UNNA: There's no specific line item, and I don't think there need be one to infer that in fact it was included. First of all, the architects and engineers who prepared the bid specifications themselves paid about $24,000 in gross receipts tax on their own services. They apparently then had a fee of about $600,000, and they paid their tax regularly. That is an admission at the Joint Appendix page 27.

Those same architects and engineers prepared the bid documents. The bid documents required that New Mexico gross receipts tax be included in the bids of what turned out to be two competing contractors, Lembke as well, and we know that from the testimony of the bidder Lembke's financial comptroller who testified at the trial. His testimony is set forth at Joint Appendix

58-59, and he says very clearly the bid specifications required the gross receipts tax to be included. So this all is occurring in 1973 and 1974.

We also have the congressional testimony -- the trial testimony, excuse me, of the Executive Director of the school board who says they knew from the outset of this project that the gross receipts tax was to be a part of it.

QUESTION: Well, is that -- I put that question to your friends before -- suppose they not only said that, as you suggested, they believed it. Does that have anything to do with whether -- what the law is on the subject?

MR. UNNA: I think that it, ultimately it may not make a difference as far as --

QUESTION: It may not.

MR. UNNA: -- in my view as to how the case can be decided, no.

QUESTION: Does it have any more relevance to our case than what the lawyers sitting on either side of the lectern think about it?

MR. UNNA: Yes, it does.

QUESTION: Why.

MR. UNNA: Because I think that in effect the gross receipts tax was passed on, was made part of the

request to Congress, and --

QUESTION: That is your view.

MR. UNNA: The economic burden in fact was passed on in advance in this case.

QUESTION: If you were being cautious, since they find they have a lawsuit that comes all the way to this Court, if they are being cautious, good business judgment would dictate that they anticipate every possible contingency, and then if they are not subject to the tax, they are that much better off.

I just can't understand why what the people believed or hoped or thought has anything to do with the case.

QUESTION: Well, I suppose you might, to the extent the case turns on the Indian Commerce clause and the exclusive authority of the federal government to regulate trade with the Indians, you might argue that Congress accepting the tax item and agreeing to pay it is a consent, is a consent for the state, by -- and certainly Congress could if it wanted to expressly consent to the tax.

MR. UNNA: That's the other point we would make as well, that is, that this tax was in effect made known to Congress and Congress approved the construction project here with the gross receipts tax included in the

price of the whole construction project.

QUESTION: Is there any doubt that if the United States itself had put out bids for this school and accepted the bids and itself built the school, there would be no doubt about the taxability of the gross receipts?

MR. UNNA: None whatsoever. The only difference we have in this case is that under the Indian Self-Determination Act of 1975 we have a new entity in the contracting chain of the school board.

QUESTION: And the argument is although the United States wouldn't be exempt if it had built the school, the Indian tribe is. That's the --

MR. UNNA: You have the same, in effect, the same school being built, the same needs being met, the same monies, but we have the school board as a tribal organization under the Indian Self-Determination Act which is doing the contract.

QUESTION: Well, it is a different entity after all.

MR. UNNA: It is.

QUESTION: And it is construction on the reservation.

MR. UNNA: I'm sorry?

QUESTION: And it is construction on the

reservation.

MR. UNNA: It is construction on the reservation.

QUESTION: And federal projects are built in federal enclaves, too, are they not?

MR. UNNA: Of course.

QUESTION: And probably the state couldn't apply its real property tax.

MR. UNNA: No, not a direct tax, but an indirect tax is perfectly valid, so that an indirect tax where the legal incidence falls on the non-Indian contractor but the economic burden is passed on to the United States, to the BIA, in this instance to the school board, we think that the tax is perfectly valid, and that is sustained by the United States of America case v. New Mexico and all James V. Dravo and the rest of the case.

QUESTION: How do you distinguish the White Mountain Apache case from this?

MR. UNNA: I think that's the heart of -- how you square this case with White Mountain is the heart of -- I think it's the most important issue in the case. White Mountain concerned an almost captive non-Indian trader or logger, that is, he had no business outside of the Apache reservation there.

QUESTION: Well, the school board has no business outside the reservation either.

MR. UNNA: But the proper analog, Justice O'Connor, is Lembke, the contractor that we are taxing. So in White Mountain you had direct regulations regulating the activities of the logger itself. There were the routes that it -- the logging activities itself, the routes that it hauled, the dimensions of its loads, the speeds at which the trucks could travel.

In this instance, if you focus on the activity being taxed by the state, that's construction, and there is certainly no substantive regulation of construction at all. The regulation that there is is the Indian Self-Determination Act, and all that regulates is how a tribal organization gets monies from the BIA to contract with private enterprise, and that is simply a detailing of the application process, how you apply for money and how you get money. That is in no way analogous to the direct regulation of the logging activities. Here construction is the focus.

QUESTION: Counsel, while you are at it, will you get rid of Central Machinery, too?

MR. UNNA: Oh, no, not at all. Central Machinery is Indian traders licensing case, and our position is, and I think it's borne out by the record,

that the Indian traders license statutes apply to sales of goods and merchandise only, and what we have here is the sale of a construction service.

If the Indian traders licensing statutes apply to the sale of a service, then there's --

QUESTION: Wasn't it passed on?

MR. UNNA: Then there's nothing left.

QUESTION: Was it passed on?

MR. UNNA: Was --

QUESTION: In Central Machinery, the tax?

MR. UNNA: Was it? Yes, it was.

QUESTION: Well, it was passed on here.

MR. UNNA: But that case was decided under the preemption doctrine.

QUESTION: Well, it was different, it was named Central Machinery.

MR. UNNA: But as I understand it, in the case you never reached the question of economic burden and legal incidence, and the only expression there was is in Footnote 15 indicating that the fact that the economic burden is passed on to an Indian tribe doesn't deprive the state of its power to tax, so that we think White Mountain in fact supports our argument in this case.

QUESTION: I wasn't talking about White Mountain.

MR. UNNA: About?

QUESTION: I was talking about Central Machinery.

MR. UNNA: As I read Central Machinery, it is another species of the genus.

QUESTION: Oh, it says the footnote to White Mountain.

MR. UNNA: No, of preemption, and it is basically an Indian trade preemption case.

The second point of distinction with White Mountain is that the state, Arizona in that case, was not returning any benefits whatsoever to -- of its tax or services that were -- let me back up more. The two taxes, the motor vehicle excise tax and the motor fuel taxes, none of the benefits of that tax were made available on the reservation whatsoever. In this case there are substantial benefits made available by the state in the form of its gross receipts tax. The benefits are clearly made available to Ramah Navajos, and that's clear in the record, and to the taxpayer Lembke Construction itself.

Lembke was headquarters off reservation, not like Pine Top doing business solely on the reservation. It was receiving municipal and state benefits off the reservation as well, and it was, presumabli its

contracting, its general and administrative functions on this very contract were being performed in Albuquerque, and it was working on another contract at the same time, for example, a multimillion dollar ports facility construction project in downtown Albuquerque. So we have a vast difference in facts between the White Mountain case and this case such as we believe to simply make preemption not apply. And it doesn't apply.

QUESTION: Mr. Unna, would your tax be imposed on a building being constructed for the University of your state?

MR. UNNA: Yes. The construction -- it makes no difference what is being constructed. Construction as an activity is taxed under the Gross Receipts and Compensating Tax Act, so that --

QUESTION: Are there any exceptions with respect to buildings being constructed, either for the state or localities or for charities or churches?

MR. UNNA: No, no.

QUESTION: It is across the board to all of them?

MR. UNNA: It's a non-discriminatory, across-the-board tax so that, for example, a state school constructed for a local school board or a local school district, the same tax is imposed on; if Lembke

had been doing this for the Gallup-McKinley County School District, that same tax would be imposed.

QUESTION: What about churches?

MR. UNNA: The same tax would be imposed.

QUESTION: A federal post office?

MR. UNNA: The same tax would be imposed, and what the school board is arguing here is that don't look at the activity being taxed by New Mexico, look at the use of the product of the service, or look down the line and determine whether if this is a school, then New Mexico is taxing education. If Lembke had been building a church, then I suppose we would be arguably, at least according to the school board, taxing a religious activity, and I think that that kind of a focus on the use of the product of the service is wrong, that White Mountain mandates that you look simply at the activity that the state is taxing and don't go beyond that and get into the thicket of what is the product of the service and decide that on the use of the building, for example, that's being built.

There's an irony in this, in the preemption argument of the school board as well. The Indian Self-Determination Act, as I read it, was intended to free Indian tribes and Indian groups of bureaucratic control, and to deregulate the delivery of services to

Indian groups, and that very legislation of deregulation is being cited as a scheme that somehow preempts New Mexico's tax, and we think that that was unintended by Congress.

The Indian traders licenses in this case, as I have said, it is our position that they apply only to the sale of goods and merchandise, not to the sale of a construction service. The Warren Trading Post rationale has no application in this case, and --

QUESTION: Is there some case law on that, on the applicability of the Indian Trader Act?

MR. UNNA: There, from lower courts, Justice White.

QUESTION: And how about the legislative history, or is there any? Or is there any?

MR. UNNA: On the Indian trader statutes? Yes, it's detailed in the brief, and I think it's very clear that it's been only goods and merchandise sold by merchants, and if it includes service, then there's nothing left to the state taxation of any activity of a non-Indian, because there are only goods and services, and so if the Indian traders license applies to services, then there is nothing at all left for states. There is no jurisdiction or anything else, simply --

QUESTION: Well, what you're saying is that

you'll be precluded from taxing transactions between non-Indians and Indians where the reservation is involved. That's what it would involve.

MR. UNNA: I'm sorry, I didn't understand your question.

QUESTION: Well, it would just -- it would expand, as you say, it would expand the rule applicable to goods to services.

MR. UNNA: That's right, but there is nothing in the legislative history and nothing in the statutes that indicates that services are covered. The only conceivable argument could be that if a service is sold in conjunction with merchandise, that perhaps the service can be swept up in that.

QUESTION: Well, do you think that if a -- a state may not put a sales tax on the sale of goods on a reservation by a non-Indian.

MR. UNNA: By an Indian trader.

QUESTION: Yes.

MR. UNNA: If it's a licensed Indian trader, Warren Trading Post says, you know, the state may not tax that Indian trader directly, I agree.

QUESTION: And is that because of preemption?

MR. UNNA: Preemption by virtue of the Indian traders licensing statutes.

Thank you

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Gross?

ORAL ARGUMENT OF MICHAEL P. GROSS, ESQ.

ON BEHALF OF APPELLANTS -- REBUTTAL

MR. GROSS: If I may, Your Honor.

There are two threads to my learned colleague's argument, neither of which we believe has any merit. First, New Mexico's argument turns on two fictions. The first is the label legal incidence. The history of gross receipts taxes such as New Mexico's shows that it was intended to be placed by label upon contractors rather than on instrumentalities of the federal government so as to avoid the McCullough v. Maryland rule. That's its purpose. Congress has acquiesced in that historically, though it has the power to overcome it, if it wishes, as it has done in the case of the Atomic Energy Commission in Carson v. Rowen Anderson when it wants to. We believe that Indian law has been premised necessarily on different considerations, as I explained earlier.

The second fiction is that under state law, which Mr. Unna failed to point out, the sale of goods on an Indian reservation to an Indian tribal governing body would be exempt, and we argued that in the lower

courts. However, state law also turns on another fiction; by calling construction a service. The record shows in this case that one-half of the total cost of this $9 million school facility was in the form of materials. Now, how can one escape the logic of Central Machinery Company, not to say Warren Trading Post, by saying, well, state law defines it as a service, therefore we don't have to -- it's not preempted and we can tax the whole thing even though one-half of the cost is on materials.

Furthermore, construction is a unique kind of thing. It involves the putting together of materials. It is like assembling a muffler on a car. If Warren Trading Post had a car service next to it, I presume that the purchase of a muffler and having it installed by the person at Warren Trading Post would not exempt that function from the licensing scheme. How can you turn this whole panoply of commercial regulation established by Congress on such a distinction? There's no line.

QUESTION: But do you agree or not that the contractor here needn't be licensed under the Indian trader laws in order to perform the construction service?

MR. GROSS: We believe that he was required to

be licensed had the Bureau of Indian Affairs enforced those regulations. That was exactly the situation at Central Machinery where the Court held that the laws themselves preempt the state from imposing the tax, and what the BIA happened to do or did not do is irrelevant. As a matter of fact, the record shows that the BIA approved of Lembke operating under this contract to the school board.

QUESTION: Without a license.

MR. GROSS: Without a license under the trading statutes.

QUESTION: But do you think they thought that he needed a license?

MR. GROSS: Yes, I do, Your Honor. The point is that the regulations that govern the Navajo reservation, in 25 C.F.R. Part 252 are substantially different on just this point from the regulations that were involved in the Mescalero v. --

QUESTION: Are there lower court cases contrary to your submission?

MR. GROSS: I know of none other than the fact that in Central Machinery and in Warren Trading Post itself, the trading statutes were held by the lower courts in Arizona as not to apply or be applicable.

QUESTION: I know, but I'm talking about

services. Are there some cases on services and licensing?

MR. GROSS: Your Honor, I believe there is a case from South Dakota which says something about this distinction. However, I suggest that that case, whose name escapes me now, doesn't go to the heart of this problem because involved in that case, as I understood it, was a supermarket which primarily furnishes goods in the form of food, commodities.

Excuse me.

The other point, of course, is that 25 C.F.R. Part 252 does not apply to South Dakota or to Pine Ridge Reservation. The fact is that 25 C.F.R. Part 252 expressly governs services.

So the question on the trading issue in this case is simply did the Secretary of the Interior have the power to do that, to issue a regulation that included services on the Navajo reservation? The answer, of course, is yes. Not only is the penumbra of the trading statutes involved which we maintain applies, but so is the Navajo Treaty of 1868 which excludes all non-Indians who are not authorized by the Secretary of the Interior.

I thank you for your attention.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Ramah Navajo School Board, Inc., Et Al., Appellants v. Bureau of Revenue of New Mexico No. 80-2162

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BY Irene Hammond