

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-331
TITLE NEW MEXICO, ET AL., Petitioners
v.
MESCALERO APACHE TRIBE
PLACE Washington, D. C.
DATE April 19, 1983
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NEW MEXICO, ET AL., :

4 Petitioners :

5 v. : No. 82-331

6 MESCALERO APACHE TRIBE .

7 - - - - - :

8 Washington, D.C.

9 Tuesday, April 19, 1983

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:11 a.m.

13 APPEARANCES:

14 THOMAS L. DUNIGAN, ESQ., Special Deputy Attorney General
15 of New Mexico, Santa Fe, New Mexico;
16 on behalf of the Petitioners.

17 GEORGE E. FETTINGER, ESQ., Alamogordo, New Mexico;
18 on behalf of the Respondent.

19 LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor
20 General, Department of Justice, Washington, D.C.;
21 as amicus curiae

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

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in New Mexico, et al against the
4 Mescalero Apache Tribe.

5 Mr. Dunnigan, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF THOMAS L. DUNIGAN, ESQ.

8 ON BEHALF OF THE PETITIONERS

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

11 The issue in this case plainly stated is
12 simply does the State of New Mexico have the authority
13 concurrent with the Mescalero Apache Tribe to regulate
14 hunting and fishing by non-Indians on the Mescalero
15 Apache reservation. The history suggests that it does.

16 Since New Mexico became a state in 1912, it
17 has had fish and game laws in a state-wide wildlife
18 conservation program. It has applied its game and fish
19 laws to non-Indians hunting and fishing within all areas
20 of the state during this period of time.

21 For approximately the last 15 years since the
22 Mescalero Apache Tribe has allowed public hunting on its
23 reservation, the State of New Mexico has applied its
24 game and fish laws to non-Indians who have hunted or
25 fished on that reservation as it has with respect to

1 each of the other 26 Indian reservations or enclaves
2 located in the State of New Mexico. During this period
3 of time the state has not only enforced its wildlife
4 regulations, but the wildlife on Indian lands has
5 benefitted from the full range of conservation
6 programming that the state has provided over time on a
7 state-wide basis.

8 In 1977, however, the Mescalero Apache Tribe
9 passed a hunting and fishing ordinance which specified
10 in part that a state hunting and fishing license would
11 no longer be required of any person hunting or fishing
12 on the Mescalero Apache reservation. Up until that time
13 the Mescalero Tribe had acknowledged in its hunting and
14 fishing brochures that state game and fish licensing
15 regulations and the entire state game and fish wildlife
16 regulation did apply to non-Indians hunting or fishing
17 on the Mescalero Apache reservation.

18 The passage of the new ordinance in 1977
19 followed soon after the opening by the tribe of the Inn
20 of the Mountain Gods on the reservation. The Inn of the
21 Mountain Gods is a deluxe tourist resort featuring a
22 hotel, a lake for fishing, boating and water sports, a
23 golf course, tennis facilities, shooting range, a
24 stable, and various other tourist and convention-related
25 recreational facilities and activities.

1 The Inn was opened by the Mescalero Apache
2 Tribe as part of a tourism program organized by the
3 tribe and intended to attract non-Indians onto the
4 reservation and to the Sierra Blanca ski resort, which
5 is a tribal commercial enterprise located adjacent to
6 the reservation. In connection with the opening of the
7 Inn of the Mountain Gods, the Mescalero Apache Tribe
8 also expanded its hunting and fishing business to
9 include big game animal hunts known as package hunts.

10 Package hunts include hunting fees, lodging at
11 the Inn of the Mountain Gods, guide service and various
12 other hunter needs.

13 QUESTION: Well, would it make any difference,
14 Mr. Dunnigan, how much of the activity the Mescaleros
15 were engaged in, whether it was one resort or a great
16 many, a small amount or a great deal of this hunting?

17 MR. DUNIGAN: No, Your Honor, I don't think
18 that the amount or the size of the commercial enterprise
19 of the tribe has any jurisdictional significance.

20 QUESTION: How do you distinguish it from the
21 logging operations, for example?

22 MR. DUNIGAN: Well, Your Honor, the logging
23 operations were conducted by non-Indian companies
24 together with Indian enterprises.

25 QUESTION: The Indians could have done it all

1 on their own if they wanted, had they had the equipment
2 and the personnel.

3 MR. DUNIGAN: Yes, Your Honor, I presume that
4 is true. In that respect there is no difference between
5 the cases. There is a difference, though, in terms of
6 the federal regulatory scheme that applied in that case,
7 in the White Mountain Apache Tribe v. Bracker case to
8 which you refer as opposed to the one that applies in
9 this case. For that reason, the cases are
10 distinguishable, not because there is a difference in
11 the commercial enterprise at stake.

12 QUESTION: Mr. Dunnigan.

13 MR. DUNIGAN: Yes, Your Honor.

14 QUESTION: The Court in Montana v. United
15 States, of course, recognized that an Indian tribe can
16 prohibit non-members from hunting and fishing on the
17 reservation or can allow them and condition that permit
18 as the tribe determines. Now how do you reconcile what
19 New Mexico is asking for here with that case because it
20 would seem that if the tribe has a right to condition
21 the hunting and fishing as described in Montana, that
22 the right would be meaningless if a state were allowed
23 to apply inconsistent regulations.

24 MR. DUNIGAN: Your Honor, I recognize that the
25 Montana case articulates the principles you have

1 described, and we do not argue that the Mescalero Apache
2 Tribe does not have the right to admit hunters or
3 fisherman if it desires or preclude hunting and fishing
4 if it desires. It can also establish terms and
5 conditions for hunting and fishing if it so decides.

6 The Montana case certainly permits that. But
7 the Montana case did not suggest that when a tribe
8 enjoys this authority over non-Indian visitors on its
9 reservation, that that authority is exclusive of state
10 authority which normally applies to non-Indians.

11 QUESTION: But they could be totally
12 inconsistent. For instance, I do not know what the
13 circumstances are here, but a tribe might develop the
14 game to such an extent that it can offer people a chance
15 to take five elk whereas the New Mexico requirements
16 might permit someone to take only one, and the two would
17 be quite inconsistent.

18 MR. DUNIGAN: Your Honor, you suggest an
19 extreme case, which is not a part of the factual
20 situation here, but I acknowledge that, built in to a
21 system of concurrent jurisdiction is the possibility of
22 conflicts arising between the two sets of laws.

23 Our position is that the State of New Mexico
24 as a sovereign continues to have the authority to apply
25 its laws to non-Indians who are not immune from those

1 laws as Indians are and that a reservation does not
2 provide that immunity to a non-Indian unless that
3 non-Indian can claim that he, too, is excused from
4 obeying state law because there is a federal law that
5 preempts those state laws that he has to abide by
6 instead, or that his relationship with the tribe
7 concerns a matter of the internal governmental relations
8 of the tribe and for that reason tribal law alone
9 controls.

10 But under normal circumstances as the cases
11 that this Court has decided suggests that the normal
12 circumstance is concurrent jurisdiction in those
13 situations when a tribe does enjoy jurisdiction over
14 non-Indians, which is not always the case.

15 The importance of the Montana case to this
16 case, in fact, is the statement in that case that as a
17 general proposition, and those are the words of this
18 Court, as a general proposition the inherent sovereign
19 authority of an Indian tribe does not extend to
20 non-Indians. That is the normal proposition.

21 The Court did articulate and identify
22 circumstances in which an Indian tribe may regulate
23 activities of non-members. In fact, the Court said that
24 a tribe may regulate through taxation, licensing and
25 other means the activities of non-members who enter into

1 consensual relationships with the tribe through
2 commercial dealings, contracts, leases, and the like.
3 And that may very well be the case here. But --

4 QUESTION: Mr. Dunnigan, perhaps I am
5 mistaken, but I thought the record does disclose
6 conflicts between the state system and the tribal system
7 particularly as to the taking of deer, that does may not
8 be taken under the state regulations, but under the
9 tribal ones a buck and a doe could be taken. Am I
10 mistaken?

11 MR. DUNIGAN: Your Honor, no, you are quite
12 correct.

13 QUESTION: So we do have some very definite
14 conflicts as Justice O'Connor indicated?

15 MR. DUNIGAN: Your Honor, we do have
16 conflicts. We do not have the particular one that
17 Justice O'Connor identified or any one quite that
18 dramatic, but we do have conflicts in the regulations.
19 There is no question about that. If we had not, perhaps
20 this case would not have arisen.

21 But I am not suggesting, Your Honor, and I did
22 not mean to leave the impression that there are no
23 conflicts in those laws. We recognize that and we
24 recognize the potential for others. What we are saying,
25 however, is that the state nevertheless enjoys the right

1 it has as a sovereign to apply its laws to non-members
2 of an Indian tribe unless, again, those laws under the
3 decisions of this Court have been preempted by a federal
4 regulatory scheme or that the sovereign powers of the
5 tribe with reference to the governing of its own members
6 and their internal affairs would be disrupted and
7 frustrated in a given instance.

8 QUESTION: Well, as I understand your
9 position, you want the state regulation uniformly
10 applied to non-Indians all across the state.

11 MR. DUNIGAN: That is correct, Your Honor.
12 That is our position.

13 QUESTION: And that there should not be an
14 exception of a cuna so to speak for the Mescalero
15 reservation?

16 MR. DUNIGAN: That is correct, Your Honor, or
17 for any one of the other 26 Indian reservations or
18 enclaves located in New Mexico which together comprise
19 over 7 million acres of land and 11,000 square miles,
20 approximately 10 percent of the land area of the State
21 of New Mexico and located in virtually every region or
22 part of the state.

23 QUESTION: Mr. Dunnigan, it seems to me there
24 might be two different types of problems. One is the
25 substantive regulation as to how many animals of

1 different kinds you can kill and the like and another
2 the licensing restriction. What is the state interest
3 in having the right to license people to hunt within the
4 reservation?

5 MR. DUNIGAN: Your Honor, that is in our
6 statement --

7 QUESTION: If they had their own licensing
8 system, which I guess they do.

9 MR. DUNIGAN: I am sorry, Your Honor?

10 QUESTION: Assuming the Indians have their own
11 licensing system which I guess they do.

12 MR. DUNIGAN: Yes, Your Honor, they do. The
13 interest of the state in licensing per se is that the
14 licensing permit system is an essential part of the
15 overall conservation program of the state. Through the
16 licensing mechanism, the state is able to control the
17 harvest, is able to ascertain also the success ratio of
18 particular hunting seasons and in particular areas, and
19 for that reason, the licensing system in the judgment of
20 the Department of Game and Fish of the state is an
21 essential ingredient in the overall conservation program
22 of the state as well as are the substantive regulations
23 pertaining to the season dates, bag limits, and the like.
24 QUESTION: Am I in error that it is agreed
25 that the Indian licensing procedure is a good one?

1 Isn't that admitted?

2 MR. DUNIGAN: Your Honor, we recognize that
3 the tribe has a licensing permit system and have no
4 quarrel with their right to impose one. The record does
5 indicate that at the present time the ordinances of the
6 tribe maintain a sufficient wildlife population on the
7 reservation to be consistent with wholesome conservation
8 circumstances.

9 QUESTION: So, where does the state get this
10 additional interest?

11 MR. DUNIGAN: Well, the state's interest, Your
12 Honor, is --

13 QUESTION: Its interest is that they do it --
14 Their signatures on there are better than the Indian's
15 signature on the license?

16 MR. DUNIGAN: No, Your Honor, it has nothing
17 to do with whether one licensing system is better than
18 another. It has to do with the authority of the state
19 to apply its laws to non-Indians anywhere within its
20 borders --

21 QUESTION: You never applied for that under
22 the federal law, did you, the right to jurisdiction over
23 the Indian reservation, did you?

24 MR. DUNIGAN: The --

25 QUESTION: New Mexico did not. Is that right?

1 MR. DUNIGAN: New Mexico is not a Public Law
2 280 state, no, Your Honor.

3 QUESTION: That is what I mean.

4 MR. DUNIGAN: But in our view --

5 QUESTION: Where did they get it from?

6 MR. DUNIGAN: I am sorry, Your Honor?

7 QUESTION: Where does New Mexico get it from?

8 MR. DUNIGAN: Well, Your Honor, in our view
9 the Public Law 280 is not the only source of authority
10 for a state to exercise jurisdiction over non-Indians
11 within its borders.

12 QUESTION: My question was where did you get
13 it?

14 MR. DUNIGAN: Our authority over non-Indians,
15 Your Honor, stems from the fact that New Mexico is one
16 of the 50 sovereign states of the union and was admitted
17 to the union on equal protection with other states who
18 have the authority within their borders even on Indian
19 land to apply their laws to non-Indians unless, again,
20 those laws have been preempted by a superior
21 congressional enactment and scheme of regulation or
22 unless in a particular situation the non-Indian is
23 acting in relationship to the tribe so that the internal
24 governmental affairs and social relations of the tribe
25 are intimately involved in that situation.

1 QUESTION: Like in Montana v. United States?

2 MR. DUNIGAN: Yes, Your Honor, and

3 Confederated Tribes of the Coville Indian Reservation v.
4 Washington, and Thomas v. Gay, and Mescalero v. Jones.

5 QUESTION: This case was sent back on Montana
6 and not on any other case.

7 MR. DUNIGAN: That is correct, Your Honor.

8 This case was here once before pursuant to a petition
9 for certiorari which the state filed after the original
10 decision of the Tenth Circuit. On its first visit this
11 Court summarily remanded the case to the Tenth Circuit.
12 This Court vacated the judgment of the Tenth Circuit,
13 remanded the case for reconsideration in light of this
14 Court's decision in the Montana case.

15 On remand, however, the Tenth Circuit simply
16 reinstated its original decision and dismissed this
17 Court's decision in the Montana case as essentially
18 irrelevant to a decision in this case. And the Tenth
19 Circuit sought to explain its decision in that regard by
20 suggesting that the Montana case involved non-Indian fee
21 lands within the Crow reservation and the question of
22 whether a tribe, being the Crow tribe in that case,
23 could impose or regulate non-Indian hunting and fishing
24 on those non-Indian fee lands whereas this case involves
25 tribal trust lands within a reservation and the

1 authority of a state to regulate non-Indian hunting and
2 fishing within those tribal trust lands.

3 Now, these differences, of course, do, in
4 fact, exist between these two cases, but that much was
5 evident when this Court originally remanded this case
6 back to the Tenth Circuit in the first place. So
7 despite these factual differences, the Montana case
8 remains crucial to this case because of one of its
9 underlying principles.

10 The Montana case, as I indicated earlier,
11 stated, as had this Court in *Oliphant v. Suquamish*
12 *Indian Tribe* and *Wheeler v. United States*, that as a
13 general proposition the inherent authority of a tribe
14 does not extend to non-Indians. The basis of the
15 Montana case was not that non-Indian fee lands were
16 involved but that non-Indians were involved.

17 The Court did not say that tribal laws do not
18 apply on non-Indian fee lands. It said that tribal laws
19 do not apply to non-Indians as a general rule regardless
20 of whether --

21 QUESTION: But you have a statute here, 18
22 U.S.C. 1165 in which Congress has indicated that there
23 is a right of the tribe to regulate the hunting and
24 fishing on the reservation as to non-members.

25 MR. DUNIGAN: Your Honor, we recognize that

1 1165 provides a criminal trespass penalty, a federal
2 criminal trespass penalty to be imposed upon a person
3 who enters a reservation without the permission of the
4 tribe for purposes of hunting or fishing. It does not
5 regulate the conduct of a person on the reservation in
6 terms of his hunting and fishing activity.

7 It does not recognize, Your Honor, as you
8 suggest that the tribe has the authority to impose
9 regulations that would oust state law if that was the
10 Justice's suggest.

11 QUESTION: Well, certainly the statute unlike,
12 for example, the liquor statute, it does not indicate
13 that the hunting and fishing has to be done in
14 conformity with the laws of the state. That language is
15 absent from this hunting and fishing statute. Isn't
16 that so?

17 MR. DUNIGAN: That is correct, Your Honor.
18 The penalty imposed by that statute does not require
19 that a state law be violated before it is implemented.
20 But again it is only a criminal trespass statute as the
21 legislative history clearly suggests. It does not
22 punish anything other than entry without permission, and
23 for that reason it does not provide the comprehensive
24 regulatory scheme with regard to hunting and fishing
25 that was apparent or present in the Bracker case with

1 reference to the logging and timber operations involved
2 in that case.

3 The problem with the original decision of the
4 Tenth Circuit in this particular case was that it failed
5 to recognize, either in its original decision or on
6 remand, the general proposition which this Court stated
7 in Montana that non-Indians are normally not subject to
8 tribal law. In fact, it inverted that principle and
9 started at the threshold with the observation that in
10 the area of game and fish regulation the inherent
11 sovereign powers of a tribe extend to non-members and
12 they are exclusive, in the judgment of the Tenth Circuit.

13 In that regard, the Tenth Circuit has
14 fashioned essentially a new rule of law which has no
15 judicial authority to support it whatsoever. It is
16 certainly squarely in conflict with this Court's
17 judgment in the Montana case as well as many other cases
18 in this Court, one, for example, being *Washington v.*
19 *Fishing Vessels Association* which clearly held that an
20 Indian tribe does not have complete dominion over the
21 taking of any species even though it may have a treaty
22 right to hunt and fish free of state regulation.

23 So we have here a situation in which the Tenth
24 Circuit has adopted a position in this case which is
25 virtually synonymous with the position advocated by the

1 Solicitor General in Bracker and in the Ramah Navajo
2 case but rejected by this Court to the effect that
3 on-reservation activities affecting a resident tribe
4 should be considered presumptively beyond the reach of
5 state law by operation of the principle of tribal
6 sovereignty.

7 So that in that situation a state would have to
8 establish its jurisdiction over non-Indians by pointing
9 to a specific congressional delegation of authority to
10 exercise its power, or it would have to show an
11 essential need to regulate in support of a vital state
12 interest. But this Court said no to that proposition in
13 Bracker and in Ramah and it should say no to the Tenth
14 Circuit's formulation of the same principle in this case.

15 As we discussed earlier, the Montana case did
16 recognize that there are situations in which tribal
17 ordinances may be applied to Indians, but in those
18 situations as a general proposition state law remains
19 concurrent with tribal law unless again there has been a
20 federal regulatory scheme based upon congressional
21 legislation and implementing regulations which preempt
22 state law and that requires an examination of the
23 particular context to determine if there is such
24 legislation, if there are such regulations and then a
25 particularized inquiry into the nature of the state,

1 federal, and tribal interests is initiated to determine
2 whether or not in the specific context of a particular
3 case the exercise of state authority would violate that
4 particular regulatory scheme.

5 In this case, the Tenth Circuit did embark
6 upon that inquiry eventually, choosing not to rest its
7 decision entirely on its novel formulation respecting
8 the exclusive tribal sovereignty over non-Indians where
9 wildlife is concerned. But the inquiries it made were
10 so distorted by the threshold view that it had adopted
11 that its inquiries really cannot withstand critical
12 examination in light of the authorities articulated by
13 this Court.

14 For example, in conducting its inquiry with
15 regard to preemption, the Tenth Circuit noted that when
16 a state asserts authority over the conduct of
17 non-Indians what is called for is a particularized
18 inquiry into the nature of the various state, federal,
19 and tribal interests at stake. What the court below
20 failed to recognize, however, is that before one engages
21 in a particularized inquiry into the nature of the
22 interests at stake, there must be a point of departure,
23 a frame of reference, a context in which to conduct that
24 inquiry. And that context is the existence of a
25 congressional enactment or set of laws and a set of

1 implementing regulations which establish a comprehensive
2 and pervasive scheme of federal regulation over the
3 activity in question.

4 As this Court said in the Ramah case, it is
5 federal law reflecting the various federal and tribal
6 interests which must be found in order for state law to
7 be preempted. One does not simply view the interests at
8 stake, add them up, or weigh them in the abstract.

9 On the contrary, unless there is federal
10 legislation and implementing regulations, there is no
11 question at all of preemption. For example, in the
12 White Mountain case this Court considered whether or not
13 the State of Arizona may impose certain taxes on
14 non-Indian logging and timber companies, as we have
15 previously described. In finding these laws preemptive,
16 this Court said that in that situation the federal
17 government's regulation of the harvesting of Indian
18 timber is comprehensive.

19 In the words of the Court, that regulation
20 takes the form of acts of Congress, detailed regulations
21 promulgated by the Secretary of Interior, and day-to-day
22 supervision by the Bureau of Indian Affairs. In the
23 Ramah case similarly, for example, this Court declared
24 New Mexico's gross receipts tax as applied to a
25 non-Indian construction company building a school for

1 Indian school children on the reservation to be
2 preempted. But in that case the Court pointed to the
3 Indian Self-Determination in Education Assistance Act,
4 the Indian Financing Act of 1974 and the regulations
5 promulgated by the Secretary of the Interior thereunder,
6 which among other things gave the BIA wide-ranging
7 authority to monitor the entire construction program.

8 In that context, this Court found that the
9 imposition of additional state burdens on that federal
10 regulatory scheme would not be permissible, the state
11 interest being simply raising revenue. But again the
12 preemption analysis begins with an examination of the
13 context in which it arises to determine if there are
14 congressional enactments, laws of the United States, and
15 regulations of the executive branch which establish a
16 federal regulatory scheme with respect to which the
17 state is not permitted to intrude.

18 Short of that, there is no question of
19 preemption, and state laws prevail with respect to
20 non-Indians on Indian land.

21 With reference to the question of infringement
22 in this case, it is based really upon two points. One
23 being the possible financial impairment to the tribe's
24 revenues as a result of the application of state laws
25 and the claim that implementation of state regulation

1 over non-Indians would create conflicts in the dual
2 regulatory schemes. As we have indicated, that conflict
3 alone as this Court has indicated in the Coville
4 cigarette tax cases is not a basis for a determination
5 of infringement.

6 With reference to the claim of financial
7 impairment, factually that has not happened in the
8 case. In fact, revenue levels have increased both with
9 respect to the hunting and fishing business of the tribe
10 and with respect to the operation of the hunting and
11 fishing program itself.

12 If the Court please, I would like to reserve
13 the rest of my time for rebuttal.

14 CHIEF JUSTICE BURGER: Very well.

15 Mr. Fettinger.

16 ORAL ARGUMENT OF GEORGE F. FETTINGER, ESQ.

17 ON BEHALF OF THE RESPONDENT

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

20 We are discussing here today a value generated
21 on an Indian reservation. The Mescalero Apache Tribe,
22 for example, imported the elk. It nurtured them. It
23 protected them. It abstained from harvesting them for a
24 long period of time, and it now has a herd of elk that
25 can supplement a complete tourism development program on

1 the reservation.

2 The Inn of the Mountain Gods is a fine resort,
3 part of which is there to assist non-Indian hunters,
4 most of whom are from outside the State of New Mexico,
5 in their endeavors to hunt and to fish on that
6 reservation. Why did the tribe do this? They did it to
7 protect the resource, quite obviously.

8 In this particular case we had an additional
9 reason for doing this and that was to maximize the
10 economic yield to the Mescalero Apache Tribe of their
11 whole tourism program, and in order to provide income
12 for governmental and other economic development purposes
13 on the reservation.

14 This is not an attempt to market anything
15 resembling a tax break because we are selling cigarettes
16 on that reservation. Very simply, the quality of the
17 product that is being provided by the tribe in this case
18 far exceeds anything that is available anyplace else in
19 the area. The facility is better than anything else in
20 the state, and there is no contest on that.

21 The reason people pay --

22 QUESTION: Would it make any difference if it
23 were not?

24 MR. FETTINGER: No, sir, but the reason people
25 will pay substantial money for a package hunt on the

1 Mescalero Indian Reservation is because it all fits
2 together. It is a complete package. Even if it were
3 not, the value of the elk on that reservation are a
4 product of the tribe, not a product of any state
5 activity, and it is because we can provide trophy elk
6 hunting on the reservation with guides, circumstances
7 that hunters find better than any place else.

8 It is that reason that this particular
9 enterprise has been economically successful, and in this
10 particular instance we are talking about the elk. That
11 is not the only issue in the case.

12 Back in 1966 we, in fact, had 13 elk in the
13 vicinity of the reservation. It was because of tribal
14 activity that we subsequently imported in 1966-67 about
15 162 elk from Wyoming, and it is true that the State of
16 New Mexico gave us a permit to import those elk into the
17 state. The record does not reflect any substantial
18 additional involvement by the State of New Mexico in the
19 development of that herd.

20 I would like to point out that, on the record,
21 11 years later we had in excess of 1,200 elk on the
22 reservation. I might point out to this Court that we
23 have a herd of cattle in the neighborhood of 6,000 head
24 on the reservation. We have obviously permitted the elk
25 to graze in the same area that could otherwise be

1 occupied by our cattle.

2 Quite obviously, significant range development
3 has occurred. We have not reduced the herd of the tribe
4 during the intervening period, and that is an economic
5 decision. That is forbearance on the part of the tribe
6 in raising cattle on the reservation in order to develop
7 this herd of elk for other purposes to supplement as an
8 economic enterprise on the reservation a total tourism
9 development program.

10 Incidentally, the State of New Mexico in this
11 case benefits from the activities of the tribe. The
12 elks, we cannot keep all of them on the reservation as
13 much as we would like to, and in fact the hunting has
14 been enhanced in the immediate vicinity of the
15 reservation to the benefit of non-Indian hunters who
16 hunt off of the reservation. That, I think, makes us
17 significantly different than essentially any other case
18 than we have had before this Court.

19 One other item I would like to point out --

20 QUESTION: Mr. Fettinger, is the hunter going
21 to run into any problems knowing when he leaves the land
22 that is governed by state licensing and going onto the
23 Indian reservation?

24 MR. FETTINGER: Mr. Justice Rehnquist, the
25 reservation is one, mountainous terrain to begin with.

1 It is not flat. It is essentially fully fenced. There
2 is one area that goes up Sierra Blanca Mountain, that
3 mountain being 12,004 feet high, there is some portion
4 of that because the reservation line runs just a few
5 feet to the side of the peak. But other than that the
6 reservation is essentially fully fenced, and we do have
7 signs that indicate this. We have made a conscientious
8 effort to notify hunters when they are on the
9 reservation and when they leave the reservation.

10 Incidentally, I might --

11 QUESTION: Aren't the elk free to leave the
12 reservation?

13 MR. FETTINGER: Unfortunately, we would have to
14 concede that our elk are perfectly healthy and well able
15 to go over a four strand barbed wire fence in one bound.

16 QUESTION: Or through it?

17 MR. FETTINGER: Hopefully not through it. It
18 tends to damage the merchandise a little bit, Mr.
19 Justice.

20 QUESTION: Well, they do nevertheless.

21 MR. FETTINGER: Yes, sir. They do go through
22 it, and we have seen that unfortunately happen, but, in
23 fact, most of them --

24 QUESTION: Do they roam mostly for food?

25 MR. FETTINGER: No, sir. I think our range

1 conservationists, and I think generally the facts of
2 this case -- although in answering your question I will
3 go beyond the facts of the case -- we do have adequate
4 winter and summer range on the reservation to accomodate
5 this herd. However, the nature of the animal is that
6 the grass is always greener. They do go over the fence,
7 and they are hunted over the fence. There is no
8 question of that.

9 But we are not talking about owning these
10 animals on that reservation, and frankly we --

11 QUESTION: What damage to the tribal interests
12 would occur if the state regulation were able to be
13 enforced against non-Indians?

14 MR. FETTINGER: Several --

15 QUESTION: That would add another expense, I
16 suppose, to the hunter. He would have to have a state
17 license, which is not cheap, I do not suppose.

18 MR. FETTINGER: No, sir. The state has a
19 habit of raising their licensing fees just like the
20 tribe does, incidentally.

21 QUESTION: Are a lot of your people from out
22 of state?

23 MR. FETTINGER: Yes, sir. Generally
24 speaking --

25 QUESTION: What is the out of state game

1 license in New Mexico for an elk?

2 MR. FETTINGER: It runs about \$200 plus -- no,
3 it went from \$300 to \$500 with the last session of the
4 legislature, I believe, on some of the exotic animals.
5 I have --

6 QUESTION: What about elk?

7 MR. FETTINGER: Elk, I believe, is in the \$250
8 range.

9 QUESTION: What other damage -- I suppose that
10 would be a deterrent. You might get fewer customers.

11 MR. FETTINGER: Mr. Justice White, it is not
12 just a matter of the economics. As Justice O'Connor was
13 pointing out, we have, for example, four different
14 seasons during which you can hunt bull elk. The reason
15 we have four different seasons is because we employ our
16 tribal members as conservation officers, and we wish to
17 use them more efficiently. We employ part-time many of
18 the tribal members to provide access control --

19 QUESTION: I suppose you would want to control
20 the number of elk?

21 MR. FETTINGER: Sir?

22 QUESTION: I suppose you also want to control
23 the number of elk.

24 MR. FETTINGER: We are doing very well at
25 controlling the number of elk. They are multipliyng very

1 rapidly. The herd is very healthy, and we have an
2 adequate stock --

3 QUESTION: If you had only one season a year
4 it might be a little problem.

5 MR. FETTINGER: We could have too many elk, I
6 presume, but they conceive that our game management is
7 workmanlike at worst case, so that we do not have that
8 problem. But to answer your question on the --

9 QUESTION: What would the state do -- how
10 would application of the state law to any individual
11 white hunter interfere with your having more than one
12 season?

13 MR. FETTINGER: They have a season that they
14 suggest to us by their lawsuit that we must --

15 QUESTION: Any white hunter that wanted to
16 hunt in one of your seasons that did not fall within the
17 state season would be subject to arrest, I guess?

18 MR. FETTINGER: Yes, sir. They have enforced
19 their -- when the state says they have enforced their
20 laws and regulations since 1969 as regards the
21 reservation they mean that they have accosted our
22 hunters once they leave the reservation, and they have
23 been --

24 QUESTION: They would arrest people with --
25 who had elk in excess of the bag limits, I suppose.

1 MR. FETTINGER: No, sir. They arrested them
2 when having one elk, on the theory they did not have a
3 New Mexico license at the time, and they have on one
4 occasion stopped a rental vehicle operated by the tribe
5 with elk meat frozen in the back in order to check the
6 names to see that everybody had the appropriate licenses
7 from the state. That is what started this lawsuit.

8 QUESTION: How large is the reservation?

9 MR. FETTINGER: Four hundred sixty thousand
10 acres, which is --

11 QUESTION: How many?

12 MR. FETTINGER: Four hundred sixty thousand
13 acres. It is essentially --

14 QUESTION: What is that? About 1,000 square
15 miles? 800 square miles?

16 MR. FETTINGER: I have never worked it out in
17 terms of square miles, Mr. Justice Rehnquist, but --

18 QUESTION: Six forty into 460, yes.

19 MR. FETTINGER: Can we do our arithmetic later?

20 (Laughter)

21 MR. FETTINGER: The fact is that there is only
22 one tract of 160 acres within that that is privately
23 owned and that is over on the side of the mountain. In
24 addition to that, there is 24 other acres.

25 QUESTION: How many non-Indians live on the

1 reservation?

2 MR. FETTINGER: Not very many. Most of the
3 non-tribal members are themselves Indians because they
4 are employees of the BIA. There is only 14.4 acres that
5 is privately owned within the reservation today, and
6 there are a few non-Indians within that group but not
7 very many. They are not a problem. They are not
8 pertinent to the case. There is no significant number.

9 QUESTION: Mr. Fettinger, I am interested in
10 the legal theory that supports your position. I
11 understand the equities of the case as you describe
12 them, but would the same principle apply if you did a
13 poor job or just an average job of managing your game
14 resources?

15 MR. FETTINGER: No, sir. If I might suggest
16 to the Court that I think that the fact that the state
17 has stipulated that the tribe has a workmanlike program
18 for the protection of game animals is significant to
19 this case. It is something that has been absent in
20 other cases, and I would suggest that perhaps the
21 existence of --

22 QUESTION: What if we had a case in which they
23 agreed you handled the elk well, but you did not handle
24 the antelope very well, say, or something like that,
25 that there were some areas where you were superb and

1 some areas in which they regarded you as deficient.
2 Would the constitutional rule be that you could regulate
3 those where you did a good job but not regulate those
4 where you did a poor job?

5 MR. FETTINGER: I might suggest to the Court
6 that the Court has already said that the species,
7 perhaps, is pertinent, and you cannot chase the last
8 steel head into the net theory might be applicable to
9 this sort of a case dealing with an Indian reservation.
10 If, in fact, you have a comprehensive game program and
11 it is working, then why does the state need to have
12 jurisdiction over the reservation?

13 QUESTION: But lots of times lawsuits are not
14 that easy, you know, the facts are in dispute. I am
15 just wondering is your principle limited to the case in
16 which the state will stipulate that you have a
17 comprehensive and effective --

18 MR. FETTINGER: No, sir. There are many
19 points that have been covered in regard to both
20 preemption and in the interference with tribal
21 government. Both of those series of arguments carry in
22 this particular case because you are talking about the
23 management of the range land on the reservation itself.
24 You are talking about substituting game animals for
25 cattle, for example.

1 applied. QUESTION: Your theory is not limited to a
2 well managed tribe. Is it limited to game resources?
3 Let me ask you, suppose on your resort you wanted to run
4 a gambling table and that is against state law and it
5 was not against tribal law but there was no general
6 harm. It was well regulated and well policed and well
7 accounted for. Would you say the tribe would have the
8 right to do that?

9 MR. FETTINGER: We do not equate this case to
10 the gambling situation for a couple of reasons. There
11 is also a federal statute that makes it, I believe, a
12 federal felony to possess a gaming device in Indian
13 country which is not ordinarily considered to be --

14 QUESTION: Maybe I cannot think of one right
15 away, but some activity that is prohibited by state law,
16 maybe selling liquor on Sunday or after 12 o'clock at
17 night or something like that and the tribe thought,
18 well, they would rather do it differently. Under your
19 theory of Indian tribal sovereignty, would they be
20 permitted to do that?

21 MR. FETTINGER: Unfortunately, I think this
22 Court has generally said that those items are treated
23 independently. I would suggest to this Court that the
24 jurisdiction of a tribe should be related more to its
25 territory when, in fact, that theory can be reasonably

1 applied. I do not suggest it where you have 28 percent
2 trust land and 72 percent non-trust land that that can
3 be applied. But I would suggest that where you have
4 essentially all of the reservation being trust land that
5 the territory of the tribe when it has an operative
6 government operating under, in our case, the Indian
7 Reorganization Act with ordinances, with a
8 superintendent, with a budget approved by the federal
9 government, with an annual ordinance that is approved by
10 the authorized representative of the Secretary of
11 Interior and carries down to the detail of the weight of
12 the bullet, the area in which you will hunt, the price
13 of --

14 QUESTION: I am trying to find out really are
15 you relying primarily on a federal preemption theory or
16 an Indian tribal sovereignty theory?

17 MR. FETTINGER: It is difficult to separate
18 them because the language even of this Court is that
19 you --

20 QUESTION: But analytically they are quite
21 different --

22 MR. FETTINGER: -- will lose against the
23 backdrop of tribal sovereignty. We like the Tenth
24 Circuit opinion, obviously.

25 QUESTION: Obviously that is true, but I am

1 still not clear on what your legal theory is.

2 MR. FETTINGER: In answer to your question, we
3 would tend to say we agree with the Tenth Circuit
4 opinion and that is a simple answer to your question.

5 QUESTION: That is all you have to help me
6 with?

7 MR. FETTINGER: That is not all we have to
8 help you with. We would suggest to you that tribal
9 sovereignty is a basic premise. There are many pitfalls
10 built into the preemption theory, for example, of this
11 Court. How -- are you not to permit an Indian tribe to
12 be successful?

13 Preemption implies that the Indian tribe must
14 of necessity go back to the United States government to
15 have them draft a contract on a timber case, to have
16 them go out and supervise the cutting. How can you
17 reconcile that with the economic development plans of
18 Congress in regard to Indian reservations and
19 self-determination?

20 QUESTION: But one of the questions in a case
21 like this is to what extent can an Indian tribe running
22 a commercial organization like this, attracting business
23 from non-Indians, use its ability to grant exemptions
24 from state laws, for example, sell hunting licenses at
25 cut rate prices. Can it use that as a means of tribal

1 development? Maybe it can, but isn't that part of the
2 question?

3 MR. FETTINGER: Well, one, I would suggest,
4 please, we are not selling hunting licenses at cut rate
5 prices --

6 QUESTION: Well, what do you licenses cost?
7 What are your licenses?

8 MR. FETTINGER: Our license packages run as
9 high today -- on the record in 1967 were under \$2,000
10 per elk with a package hunt, \$800 plus without the
11 package. In today's world, you are talking about
12 substantially more than that.

13 QUESTION: When you talk about package, do you
14 sell the licenses separately?

15 MR. FETTINGER: Well, we have a package hunt
16 that includes the room, the meals --

17 QUESTION: Do you sell the licenses separately?

18 MR. FETTINGER: Yes. We do.

19 QUESTION: What is the cost of a separate
20 license?

21 MR. FETTINGER: Roughly, on the record, it is
22 approximately \$800.

23 QUESTION: Eight hundred dollars?

24 MR. FETTINGER: That is in 1967. It has gone
25 up from there.

1 QUESTION: That is to hunt anything on the
2 reservation?

3 MR. FETTINGER: That is the prime. That is
4 the bull elk.

5 QUESTION: But you can hunt anything else, too?

6 MR. FETTINGER: No. Licenses are per species
7 and there are separate seasons and in backing to the
8 question regarding how does that interfere -- how does
9 state regulation interfere --

10 QUESTION: If you want to come on the
11 reservation, and get one elk, it will cost you \$800?

12 MR. FETTINGER: Yes, sir. Now more,
13 substantially more.

14 QUESTION: Just for one day?

15 MR. FETTINGER: Well, the period of time
16 during which you can hunt is not limited to one day.

17 QUESTION: I know, but if I want to come on
18 even for one day and get one elk, it is \$800?

19 MR. FETTINGER: Yes, sir, and we do not have
20 too much difficulty selling those permits. Now, I
21 assume the state is going to point out that we do not
22 have that difficulty, but that is up to the tribe to
23 manage that.

24 A moment ago the question was asked how does
25 the state regulation interfere with tribal activity, and

1 there are many different ways that they do this. We
2 schedule the hunts over different periods of time to
3 supplement the business at the Inn of the Mountain Gods.

4 We prefer for hunter safety reasons to have
5 fewer hunters on the reservation. We prefer to control
6 the access to the particular area. We hire part time
7 tribal employees for assistance to the conservation
8 officers during the hunt. We prefer to have all of our
9 conservation officers concentrating on one species in
10 one area.

11 That is all good management. We have seven
12 full time conservation officers on 460,000 acres of
13 reservation. That is six tenths of one percent of the
14 area of the State of New Mexico.

15 QUESTION: Mr. Fettinger, your time is running
16 out, and like Justice Stevens, I am a little concerned
17 about your legal theory more than I am about the facts.
18 What in the preemption area are you looking at
19 specifically to constitute the preemption because it is
20 not as comprehensive a regulatory scheme at the federal
21 level as is the case with timber, for example?

22 MR. FETTINGER: Well, in this particular case,
23 our treaty does contain, and this is all covered in our
24 brief beginning at about page roughly 20 or 22, the
25 treaty that the Mescalero Apaches have provides the

1 wording that we are under the exclusive control of the
2 United States government. The enabling act in the
3 constitution of the State New Mexico contains the
4 conventional disclaimer.

5 We also have Public Law 280 that recites that
6 even in a Public Law 280 state you do not have the right
7 to interfere with the rights of the Indians in regard to
8 the control and licensing of wildlife on that
9 reservation. Our tribal constitution under the Indian
10 Reorganization Act provides specifically for the control
11 of wildlife on the reservation.

12 Tribal Ordinance No. 77-1, that is a general
13 hunting and fishing ordinance on the reservation. We
14 also have the annual licensing ordinance on the
15 reservation which spells out in infinite detail, more
16 detail perhaps than the statutes of the State of New
17 Mexico in regard to hunting going down to the weight of
18 the bullet.

19 QUESTION: Was this reservation created before
20 New Mexico was a state?

21 MR. FETTINGER: We have a treaty of 1851. We
22 have an executive order of 1873, and we do predate the
23 state, which is 1912 for statehood. The state first
24 started controlling fish and wildlife in 1895, so we
25 well predate the state.

1 QUESTION: I have the same difficulty that
2 others on the bench have had in discerning your theory.
3 I finally concluded between the lines, at least, you
4 were saying that this reservation, 460,000 acres, is
5 just as independent for the purposes of this case, just
6 as independent of New Mexico as Arizona is independent
7 of New Mexico.

8 MR. FETTINGER: We would love to have that be
9 the ruling of this Court, of course, sir --

10 QUESTION: Subject to the Interior Department
11 control.

12 MR. FETTINGER: Yes, sir. We manage -- I
13 think the touchstone is that, yes, we manage the
14 conservation program on the reservation as well as any
15 of the states do. We have several other items
16 incidentally as a touchstone for our preemption, and
17 they are listed in our brief.

18 Thank you.

19 CHIEF JUSTICE BURGER: Mr. Claiborne, would
20 you mind addressing my last question and those of the
21 others on the theory?

22 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

23 AS AMICUS CURIAE

24 MR. CLAIBORNE: Mr. Chief Justice, certainly.
25 We approach the case on three different bases. The

1 first as we read the injunction of this Court in the
2 White Mountain Apache case, the test this Court has laid
3 down in judging whether the activity of non-Indians
4 within an Indian reservation is or is not exempted from
5 state law depends on a weighing of the respective
6 interests of the federal government, the state
7 government, and the Indian government.

8 We have engaged in our brief in that weighing
9 here and find that what is conspicuously lacking is any
10 serious claim of state interest. There is no allegation
11 that there is a need for state intervention to preserve
12 the species or any other conservation purpose.

13 There is a concession that the tribal activity
14 and the way in which the program is managed is sound and
15 creates no off-reservation harm. The only interest
16 which the state asserts is one to manage the wildlife of
17 the entire state in a unit, but that interest is one
18 which cannot prevail for if the tribe, as it is plainly
19 free to do, were to close the reservation to non-Indians
20 and manage the resources for its own benefit, clearly
21 state regulation would not be applicable there.

22 We cannot appreciate why that management of
23 the same fish and game on the same lands should be a
24 greater interest to the state merely because the hunting
25 and fishing is done by non-Indians rather than by

1 Indians.

2 Now, so much for our initial approach to the
3 case. We do assert what this Court has labeled the two
4 independent barriers to state jurisdiction within an
5 Indian reservation, they being an infringement on the
6 right of tribal self-government or tribal sovereignty.
7 Here we see, particularly with respect to game
8 management, a native resource, a special tribal claim to
9 assert its jurisdiction within what are tribal lands in
10 its territory, the reservation.

11 That interest here is conspicuous because the
12 tribe itself as a government has determined to exploit
13 its resource, to manage it for conservation purposes,
14 but also for the generation of revenues. It has
15 developed a comprehensive, and the state concedes, a
16 wholly satisfactory scheme, one which involves the
17 tribal government, employs tribal members, and generates
18 important income for governmental tribal purposes.

19 Hence, the claim of any infringement with that
20 scheme is a serious one in this case. We also look to
21 the preemption analysis which this Court has
22 traditionally found to be an independent barrier to
23 state regulation and taxation within a reservation.
24 Here, to be sure, we do not have the pervasive federal
25 scheme that was present in White Mountain, but we do

1 have a very clear congressional indication, both in 1165
2 in the exemptions of Public Law 280 in the treaty with
3 the Mescalero and elsewhere of an indication by Congress
4 that the management of wildlife within a reservation is
5 a matter to be left to the tribal authority for the most
6 part. And here we have no vacuum. We have the tribe
7 taking up the invitation which Congress has given and
8 developing in a, as I say, satisfactory way a very
9 comprehensive and very pervasive wildlife management
10 scheme which is partly conservationist and partly a
11 business venture.

12 QUESTION: If it were being mismanaged badly
13 for any reason, lack of direction at the top, what would
14 be the control of the Department of Interior?

15 MR. CLAIBORNE: Mr. Chief Justice, it is
16 important that the Department of Interior yearly,
17 annually, approves each of the ordinances enacted by the
18 tribe and in that way assures itself that the management
19 scheme of the tribe is indeed a sound one. What is
20 more, the BIA and other federal agencies have very
21 importantly collaborated in the beginning of this
22 venture and continue to provide on a daily basis
23 assistance, expertise, and help in overseeing and
24 approving annually the ordinances of the tribe and its
25 program.

1 So there is that assurance in the supervision
2 of the Department of Interior that the tribe, as New
3 Mexico concedes, are managing this venture and this game
4 in a proper way.

5 QUESTION: Mr. Claiborne, are there any other
6 Indian tribes in New Mexico that are regulated in a
7 comparable way to this particular tribe?

8 MR. CLAIBORNE: Justice Powell, I should know
9 the answer, but I don't. I should point --

10 QUESTION: What I am leading up to inquire is
11 whether or not the federal government customarily
12 approves the ordinances of tribes around the United
13 States with respect to the taking of game and fish?

14 MR. CLAIBORNE: Justice Powell, I think it is
15 right to say that the United States or the Department of
16 Interior customarily approves any tribal ordinance which
17 has an effect on non-Indians within that reservation,
18 whether it is hunting or fishing or any other activity.
19 Most tribal constitutions provide that any ordinance
20 that impacts on non-Indians within the reservation must
21 be submitted for approval to the Secretary.

22 So that that is the normal scheme. Now, a
23 tribe which closed its borders to outsiders, its own
24 ordinance if it had one with respect to hunting and
25 fishing by tribal members, might not similarly be

1 subject to --

2 QUESTION: Does the supervision of the federal
3 government go to the extent of ascertaining whether or
4 not their game and fish laws are enforced by the tribe?

5 MR. CLAIBORNE: I don't know that that is so,
6 Justice Powell, but I must say that here there is no
7 suggestion --

8 QUESTION: I understand the facts of this
9 case, but I have the same interest that other Justices
10 have expressed. Your brief states that the ordinances,
11 having been approved by the Secretary, have the force of
12 federal law. If that is so, isn't that a complete
13 answer if you are correct with respect to that? That is
14 preemption 100 percent, isn't it?

15 MR. CLAIBORNE: Well, and that is the aspect
16 in which this case, though different from White Mountain
17 Apache, involves an equally pervasive if not more
18 pervasive scheme of regulation which has the imprimatur
19 of federal approval and continuing federal monitoring.

20 QUESTION: Well, in that case, Mr. Claiborne,
21 it would have been unnecessary for the Court to refer at
22 all in White Mountain Apache to the federal statutory
23 structure if a tribal ordinance which is approved by the
24 Department of the Interior has the force of federal
25 preemptive law.

1 I mean a lot of our discussion of these cases
2 has been quite unnecessary if that is the principle.

3 MR. CLAIBORNE: Justice Rehnquist, in White
4 Mountain Apache so far as I am aware there was no tribal
5 comprehensive scheme. In that instance the regulatory
6 scheme was federal, not tribal, but in other cases as in
7 Fisher and, indeed, as in Mazurie the Court indicated
8 that when a tribal law or ordinance is enacted pursuant
9 to federal authority and with federal approval, it may
10 have the preemptive effect which the federal regulation
11 itself was held to have.

12 QUESTION: That may be so, but you would still
13 have to reach the conclusion that state law was entirely
14 preempted, either that the tribe has occupied the field,
15 so to speak -- just preemption would not mean anything
16 more than that the state law is preempted to the extent
17 that it is inconsistent with the tribal ordinance. It
18 would not mean that they could not, for example, insist
19 on a license.

20 MR. CLAIBORNE: I invoke the Court's holdings
21 in White Mountain Apache and in Ramah Navajo to the
22 effect that the preemption test with respect to
23 preemption of state law on Indian reservations is a very
24 different one. It is not a matter of preempting only
25 what is inconsistent. It is a rule that state law will

1 be seen to be preempted if the federal authority has
2 either itself or delegated to the tribe sufficient
3 authority. Here the tribe has fully occupied the field,
4 however --

5 QUESTION: You still have to reach the
6 conclusion that the field has been sufficiently occupied
7 to exclude the state entirely?

8 MR. CLAIBORNE: Indeed. That itself --

9 QUESTION: Even to the extent of not being
10 able to control non-Indians?

11 MR. CLAIBORNE: I would submit that there is
12 here plainly no room left for duplicative and
13 conflicting regulation by the State of New Mexico.

14 QUESTION: How about non-conflicting
15 regulations?

16 MR. CLAIBORNE: Well, to the extent that it is
17 wholly consistent, it may be --

18 QUESTION: How about just a license?

19 MR. CLAIBORNE: Well, the licences --

20 QUESTION: And then with the state license
21 they can go on the reservation any time the Indians
22 want --

23 MR. CLAIBORNE: The state license is imposing
24 an additional, an important burden in the same way that
25 the tax in White Mountain Apache --

1 QUESTION: It isn't inconsistent with any
2 federal statute or any Indian regulation.

3 MR. CLAIBORNE: Nor is any tax, as the tax in
4 White Mountain, ever inconsistent. It is simply an
5 additional burden which so disarranges the scheme that
6 it --

7 QUESTION: They are not taxing the tribe.
8 They are not taxing the tribe.

9 MR. CLAIBORNE: I am sorry, sir?

10 QUESTION: They are not taxing the tribe or
11 Indians. They are taxing non-Indians. I mean they are
12 making them buy licenses.

13 MR. CLAIBORNE: Nor was the tax in White
14 Mountain imposed on Indians but on the non-Indian
15 corporation and so in Ramah it was imposed on the
16 construction company and nevertheless was held to be
17 preempted by federal regulation.

18 CHIEF JUSTICE BURGER: Do you have anything
19 further, Mr. Dunigan? You have three minutes remaining.

20 ORAL ARGUMENT OF THOMAS L. DUNIGAN, ESQ.

21 ON BEHALF OF THE PETITIONERS -- REBUTTAL

22 MR. DUNIGAN: Mr. Chief Justice, and may it
23 please the Court.

24 With reference to Justice Powell's inquiry, I
25 should point out that there is no federal involvement

1 whatsoever in the enforcement of tribal regulations in
2 the area of hunting and fishing.
3 Moreover, tribal regulations, tribal
4 ordinances themselves even if they are comprehensive
5 cannot by their own terms oust, or by their own force
6 oust state law applicable to non-Indians, and this Court
7 has so held in *Washington v. the Confederated Tribes of*
8 *the Coville Indian Reservation* where the Court said, we
9 are not going to adopt the far-reaching notion that an
10 Indian tribe has the authority as the United States
11 would have to preempt state law merely by enacting a
12 legislative ordinance that pertains to the same conduct
13 that state law purports to regulate.

14 If this were true, if a tribe were able to do
15 this, then any Indian ordinance passed would -- if a
16 tribe were able to do this simply because the federal
17 government does approve its ordinances, if that alone
18 were enough to give it preemptive effect, then any
19 Indian ordinance of any kind adopted by an Indian tribe
20 applicable to non-Indians at least would be preemptive
21 of any state law that applied to the same situation
22 because as the Solicitor General noted, all Indian
23 ordinances that apply to non-Indians have to be approved
24 by the Secretary of the Interior. If his imprimatur of
25 that regulation is enough to give the Indian ordinance

1 preemptive effect, then we have an open-ended situation
2 that whenever an Indian tribe enacts any ordinance
3 whatsoever state law is preempted.

4 But again, that --

5 QUESTION: That isn't consistent with some of
6 our cases, is it?

7 MR. DUNIGAN: No, the cases of this Court
8 would not permit that at all. In fact, the Court has
9 held the opposite. The question is essentially
10 foreclosed.

11 As this Court said, again in the Coville
12 cigarette tax cases, we are not going to the extreme of
13 adopting a rule of law that would allow Indian
14 ordinances to oust state law as the federal government
15 may do if it enacts this --

16 QUESTION: May I ask you a question --

17 QUESTION: Do you not think there is a little
18 difference between the preemption, if that was what you
19 were suggesting, of sales of cigarettes on a
20 reservation, sales to non-Indians and the control and
21 regulation of the wildlife and game? Don't you think
22 there is quite a difference?

23 MR. DUNIGAN: Well, Your Honor, in terms of
24 the question of whether or not a tribe by its actions
25 can preempt state law, there wouldn't be any difference

1 at all because --

2 QUESTION: You are selling hunting packages --

3 MR. DUNIGAN: We are selling --

4 QUESTION: -- instead of packages of
5 cigarettes?

6 MR. DUNIGAN: That is correct. The tribe is
7 selling the privilege of hunting --

8 QUESTION: In competition with other people
9 who want to sell hunting packages?

10 QUESTION: There is a little difference
11 between a package of cigarettes and a hunting package.
12 You don't kill off elks with packages of cigarettes.

13 QUESTION: It may not be for people who are
14 running competing tourist establishments.

15 QUESTION: May I ask you a question at the
16 other extreme. Am I correct in understanding that you
17 would not challenge the right of the Indians themselves
18 to hunt without a state license or to hunt in off
19 season. What about an Indian himself hunting in a
20 season outside the -- under their own regulations?

21 MR. DUNIGAN: There is absolutely no state
22 restriction applicable to that situation at all. That
23 would be wholly permissible, and we would not exercise
24 jurisdiction to prevent an Indian within his resident
25 reservation from hunting according to the regulations

1 established by the tribe itself.

2 QUESTION: Did you say wouldn't or couldn't?
3 Do you think the state could do that?

4 MR. DUNIGAN: No, Your Honor, I do not think
5 the state could do that. In fact, there is a state law
6 -- even under state law it could not because there is a
7 state law that prevents it, whatever else may prevent it
8 as well.

9 Thank you.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.

11 The case is submitted.

12 (Whereupon, at 11:14 a.m., the case in the
13 above-entitled matter was submitted.)

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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:

New Mexico, et al., Petitioners V. Mescalero Apache Tribe
No. 82-331

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

Pine Hammond

(REPORTER)

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