ORIGINAL

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-629

TITLE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Petitioners v. WOLD ENGINEERING, P.C., AL

PLACE Washington, D. C.

DATE November 29, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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THREE AFFILIATED TRIBES OF THE :

FORT BERTHOLD RESERVATION :

Petitioners :

v. : No. 82-629

WOLD ENGINEERING, P.C., ET AL. :

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Washington, D.C.

Tuesday, November 29, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:08 p.m.

APPEARANCES:

RAYMOND CROSS, ESQ., New Town, N. Dak.; on behalf of the Petitioners.

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the U.S. as amicus curiae.

HUGH MC CUTCHEON, ESQ., Minot, N. Dak.; on behalf cf the Respondent.

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C O N T E N T S



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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Cross, you may proceed whenever you are ready.

ORAL ARGUMENT OF RAYMOND CROSS, ESQ.,

ON BEHALF OF PETITIONERS

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

This case raises a unique issue. Does Public Law 280 authorize a state to absolutely bar actions against non-Indians by Indians if they arise on an Indian reservation? This matter is here on certiorari to review a decision of the North Dakota Supreme Court affirming the State District Court's dismissal of Petitioner's negligence and breach of contract action against Respondent Wold Engineering.

The facts of the case are simple. Petitioner, a federally recognized Indian tribe known as the Three Affiliated Tribes, employed Wold Engineering to construct a water supply system on the Fort Berthold Indian Reservation in northwestern North Dakota.

The project known as the Four Bears Water Project was intended to provide a water supply from Lake Sakakawea to a portion of the reservation population. However, after completion of the project in 1977 defects were discovered in that system that prevented the

accomplishment of that objective.

Despite attempts at correction by Wold Engineering of the system Petitioner, Three Tribes, commenced their negligence and breach of contract action in the State District Court for the Northwestern Judicial District of North Dakota. At trial in 1982 Wold moved to dismiss the action on the grounds that the federal law prohibited state jurisdiction over the action.

The trial court agreed on the grounds that the Three Tribes failed to consent to Public Law 280 civil jurisdiction over the reservation in favor of the state and on that ground dismissed Petitioner's action. On appeal to the Supreme Court of North Dakota the State Supreme Court affirmed the dismissal construing a state statute, Chapter 2719, which is included in our appendix to our brief, as evidencing the state legislature's intent to disclaim any jurisdiction over the matter until the Indians consented to Public Law 280 jurisdiction in the civil area.

The court noted in the course of its decision which is in the appendix of the petition for cert that state judicial jurisdiction had extended to these actions against non-Indians by Indians prior to the enactment in 1963 of Chapter 2719. On that basis the

State Supreme Court affirmed the dismissal of the tribe's action against Wold Engineering.

Only two sections of Public Law 280 are involved in this matter, Section 6 and Section 7. Under that jurisdictional classification scheme North Dakota is a so-called optional state and a disclaimer state meaning that under Section 7 it must take appropriate action to amend its state constitution to remove the federal disclaimer imposed in its admitting act, and secondly under Section 7 of Public Law 280 it must enact affirmative legislation assuming jurisdiction under Section 7.

QUESTION: Mr. Cross, I take it since you are appealing from the judgment of the highest court of the State of North Dakota it is your position that there is some federal constitutional principle or federal statute which that decision has violated.

MR. CROSS: That is right, Your Honor. We feel that the state court misconstrued Public Law 280 in holding that it prohibits state court jurisdiction over actions of this sort.

QUESTION: Well, do you think the Supreme Court of North Dakota actually read Public Law 280 to reach that result? I thought its opinion could just as well be construed to mean that the referendum in the

early sixties had represented judgment by the people of South Dakota that they did not want their courts to exercise this kind of jurisdiction.

MR. CROSS: Your Honor Justice Rehnquist, the decision itself indicates plainly that the state court regarded judicial jurisdiction of the state as extending to these actions before the enactment of the state statute involved under the authority of Public Law 280. The sole source of the authority reading it either as an authorization or as compelling the state legislature to take that action is the source of that disclaimer.

So taking a look at the state judicial history under the state constitution and under the course of state judicial declaration the state had judicial jurisdiction over these actions prior to that enactment. That enactment was explicitly taken under Section 7 of Public Law 280 and consequently it concerns the question of federal interpretation.

QUESTION: But up to then it is all questions of state law is it not?

MR. CROSS: That is correct, Justice Rehnquist.

QUESTION: This case is a curious one, is it not, because here the tribe is asserting jurisdiction in the state court and usually these cases come up here in

just the reverse posture.

MR. CROSS: That is correct, Justice Blackmun. It is a surprising case in the sense that the Indian people here are asserting the right as citizens the rights that they have in common with other members of the state to sue in state court. So the constitutional question that is at stake is that assume that Public Law 280 was lifted out of this context and that this action was taken solely as a matter of state law would that violate equal protection and due process rights of the Indian people involved.

QUESTION: Was your due process argument argued below?

MR. CROSS: Yes, it was, Your Honor.

QUESTION: Mr. Cross, I suppose that it would not be necessary to reach that if in fact we thought that Public Law 280 was the grounds on which the North Dakcta ccurt based its holding and we could I suppose give North Dakota another look at it.

MR. CROSS: That is correct, Justice O'Connor. Our position is this is that the state statute is based on a misconstruction or on a construction of Public Law 280 and that raises a federal law question that is appropriate for resolution by this Court.

QUESTION: Let me ask you another question. If a state court had jurisdiction over the tribe's cause of action here what about Wold's counter claim? Would the court have jurisdiction over that as well?

MR. CROSS: Since the Plaintiff here is a tribe, the tribe according to decisions by this Court has sovereign immunity. It may be provided for in contracts that that can be waived. Of course, to the extent of a set off --

QUESTION: Well, do you think there would be waiver as a matter of law if the tribe decides to sue in the state court?

MR. CROSS: Well, as a matter of law, Justice O'Connor, Wold Engineering can recover to the extent of a set off. They claim a small amount of money is due them under the contract, some $4500. That would be available to them as a set off against the tribe's claim.

The question of an affirmative counter claim or claims that might arise present a tougher question.

QUESTION: Nevertheless, to allow the set off you have to adjudicate their claim.

MR. CROSS: That is correct.

QUESTION: You do concede that that much could be done. On what theory? It is a waiver of soverign

immunity?

MR. CROSS: That is correct, Your Honor, to that limited extent.

QUESTION: Is there any jurisdictional problem of a state court asserting jurisdiction against an Indian tribe over a claim arising on the reservation?

MR. CROSS: Your Honor, based on the state court decision below they did not differentiate between claims by tribal members or claims by tribes. Based on their reading both of the state law and of Public Law 280 they did not make a distinction in that regard.

If there were a distinction to be made I think that would have to be made by the court below on remand, but here in the decision they made no distinction between the rights of the tribe to sue in state court nor am I certain they could but in fact they did not.

The state court decision below established a simple proposition: either the Indian tribes consent to Public Law 280 civil jurisdiction or they are barred from suing non-Indians in state court. Public Law 280 has been enacted for over 30 years now, and the decisions by this Court make clear that there is no legal or factual connection between suits against non-Indians and Public Law 280.

It is possible to give quite a full account of

what the meaning both in the plain terms and the legislative history of Public Law 280 is in the light of recent decisions by this Court most notably Kennerly v. District Court, Washington v. Yakima Indian Nation and Bryan v. Ithasca County.

QUESTION: Mr. Cross, am I correct under the decision of the North Dakota Supreme Court your people have no forum whatsoever?

MR. CROSS: That is correct, Your Honor.

Now in the course of those decisions that I mentioned this Court has construed the application of Public Law 280 in a variety of contexts, in cases of non-P.L. 280 in McClanahan v. Arizona State Tax Commisson, in cases where the states assumed full P.I. 280 jurisdiction in Bryan v. Ithasca County and in cases where the state has assumed partial jurisdiction in Washington v. Yakima Indian Nation.

In each of those cases this Court has construed the plain terms and the legislative intent of Public Law 280 as being remedial in nature, and by this I mean that Congress intended to correct problems on the reservation both in the criminal and in the civil jurisdictions. In Bryan v. Ithasca County this Court provided that the state if they assume civil jurisdiction may adjudicate cases between Indians even

as between Indians and may apply their state law to govern those actions.

Consequently in this Court's decisions construing Public Law 280 there is no indication that preexisting rights of Indians were terminated, and this Court in a course of decisions over the last hundred or more years has indicated that Indians have the right to seek the aid of state courts and state statute in protecting their property against intrusion by non-Indians.

Justice Lamar in Choit v. Trap at 224 U.S. 665 said that Indians' rights, their private rights, are enforced to the same extent and in the same way as other residents or citizens of the United States. That decision came in the context of Indians enforcing their federal tax exemption in state court.

The power the Indian people have to sue in state court to protect their property rights has been exercised on a number of occasions, first, in a decision in 1857 Fellows v. Blacksmith 19 Howard this Court affirmed a state court order ejecting non-Indians from tribal lands.

This Court likewise indicated that the states may seek the aid of state statute in New York --

QUESTION: Those were cases, were they not,

where the state court had affirmatively said we have jurisdiction. We want jurisdiction. This Court upheld that exercise of jurisdiction.

Here you have a different situation where I do not see those are necessarily relevant because here the state court says our law provides that in the absent of consent by the Indians under the 1968 revisions of the Public Law 280 we are not to exercise jurisdiction.

MR. CROSS: That is correct, Justice Rehnquist. However, that decision turns on an interpretation of Public Law 280. The decision below clearly states that the Court feels that the state legislature was disclaiming jurisdiction under Public Law 280.

Consequently, the question arises does Public Law 280, not state law authorize a bar against these sorts of actions? I think it is clear that in the construction of Public Law 280 this Court has said that state legislations enacted under that authority cannot be construed as termination or abrogation of preexisting rights.

In Bryan v. Ithasca County this Court held that civil jurisdiction granted under statute was for a very limited purpose, and it was not intended to indicate that the state had broader authority beyond the

terms of that act to tax Indian property.

Consequently if there was a negative reading of Public Law 280 so that the state felt compelled to disclaim jurisdiction outside of Public Law 280 that is a matter of federal law and federal construction of the statute.

QUESTION: What you want is to have the North Dakota Supreme Court take another look at the situation disabused of any misapprehension about 280.

MR. CROSS: That is correct, Justice.

In the context of the situation where the state assumes no Public Law 280 jurisdiction this Court has still recognized that the Indians have access to state courts for actions arising on reservations. In McClanahan v. Arizona State Tax Commission this Court in deciding an issue of whether the state of Arizona may tax Indian income said that Indians have access to state courts to sue non-Indians citing the case of Felix v. Patrick which is cited in our briefs.

Secondly, in that same case this Court indicated that the states have a recognized interest in regulating non-Indian conduct citing Surplus Trading Co. v. Cook. Consequently it is clear that the preexisting jurisdictional rules and relationships outside of the plain terms of the act and what the intent of the act

was were not disturbed.

In other words, if the Indians were recognized as having access under state law to state court and if the state took the position they had the authority to regulate non-Indian conduct on reservations as North Dakota did before the enactment of Chapter 2719 under Public Law 280 it would seem that that jurisdictional relationship was not disturbed.

QUESTION: Mr. Cross, may I ask a question because when one reads the North Dakota Supreme Court's opinion one might get the impression -- At least I got it the first time I read it -- that they were just construing their own law and they did not feel compelled to construe it the way they did by Public Law 280. Can I ask if in the briefs and argument before that court did your opponent argue that Public Law 280 required them to deny jurisdiction or did he rely on North Dakota law?

MR. CROSS: As I read the appellate record in the North Dakota Supreme Court the position taken by Respondent was that Public Law 280 authorized the state to enact Chapter 2719 and disclaim jurisdiction that it previously claimed or in the alternative that Public Law 280 was the nature of a preemptive statute which by a negative reading precluded --

QUESTION: That reading would be consistent with yours, but the former reading would just merely authorize if they decided to authorize them to do it. I suppose they could have claimed they had the authority even without Public Law 280.

MR. CROSS: That would raise a different issue. That issue would be raised in the context of a state policy barring Indians. The legal history of North Dakota that is reviewed in our brief indicates and repeated declarations of the Supreme Court that Indians along with other state citizens are entitled to sue in state court.

QUESTION: That was all before 1963.

MR. CROSS: That was before 1963.

QUESTION: Then they say that because of the 1963 enactment of 2719 which is a North Dakota statute everything has changed.

MR. CROSS: Our expectation is that when this issue is clarified by the Supreme Court on the construction of the Public Law 280 or the federal law issue that the prior declarations that was a matter of state constitutional law and federal constitutional rights that the Indians do have access to state courts for actions arising on reservations is the proper policy they would follow.

A recent decision by the Eighth Circuit Court of Appeals entitled Poitra v. Demarrias indicates that is how the Eighth Circuit Court of Appeals viewed the repeated declarations of the state supreme court. In that context they were called on to decide whether a substantial state policy would be infringed if diversity jurisdiction was allowed in the Indian case that arose on a reservation. They found that the declarations of the state supreme court indicated no such policy.

QUESTION: I am just wondering if one possible thing we should consider is perhaps sending the case back to that court and asking them the basis of their decision because if it is one basis then it presents a federal constitutional question. If it is another basis it presents a statutory question. I do not think it is as clear as you tell us to be honest with you.

MR. CROSS: That is correct, Justice. That would be one option to clarify the underlying basis of the decision. I do feel that based on the prior decisions of the State Supreme Court the Eigth Circuit Court of Appeals' decision in Poitra that it is quite clear that the sole basis for decision was federal law.

I do admit that there could be some ambiguity, but I do not see it either in the record or in the state court's decision below.

QUESTION: Well, Mr. Cross, how about the statement at page 7A of the petition which is part of the opinion of the Supreme Court of North Dakota where they say that In re White Shield they are quoting from and they say "The people and the legislature of the state have taken affirmative action which amounts to a complete disclaimer of jurisdiction over civil causes of action which arise on an Indian reservation except upon acceptance by the Indian citizens of the reservation the manner provided by the legislative enactment."

They are not saying this is how we judicially decide something. They are saying this is what the legislature meant. Are you saying that the legislature enacted the law under a misapprehension of what Public Law 280 meant?

MR. CROSS: Justice Rehnquist, that action was taken under Section 7 of Public Law 280 and the action that was taken by the state legislature and embodied in the state statute was construed by the Supreme Court as being affirmatively authorized legislation under Section 7 of Public Law 280. The question then becomes as a matter of federal law is that the sort of legislation that was contemplated by Public Law 280 and the Congress that enacted it?

I do not see any indication that there is an

independent policy or basis for that decision.

QUESTION: Do you think anything we would say about Public Law 280 would make the Supreme Court of North Dakota feel differently about what the legislature meant by enacting a statute?

MR. CROSS: I think that if the legislature and the construction of the statute by the State Supreme Court conflicts with Public Law 280 that they would take what this Court has to say very seriously indeed.

QUESTION: You are saying it would take a new act of the legislature, not just a new decision of the Supreme Court of North Dakota?

MR. CROSS: No, I am saying, Justice Rehnquist, that the statute as construed by this Court since it is under the authority of a federal law and a function of the delegated power would take on a new aspect to that court.

Thank you, Mr. Chief Justice.

QUESTION: You are also relying on decisions of the North Dakota court subsequent to White Shield or whatever it is as far as 280 is concerned?

MR. CROSS: That is correct. There were decisions subsequent to that statute and that decision that indicated that Indians do have access to state courts for certain purposes. That is the case of White

Eagle v. Dorgan, the tax case involving the authority of the state to tax certain income on reservations.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,
ON BEHALF OF UNITED STATES AS AMICUS CURIAE

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

I perhaps most usefully could begin by addressing Justice Stevens' concern, that is, the exact basis on which to the extent that we can discern it from its opinion the North Dakota Supreme Court rested its judgment. I draw the Court's attention to the end of that opinion which is at page 10A of the petition appendix.

The court is here addressing and very conscious of the constitutional problem both under the state constitution and under the federal constitution. It would arise if the state courts were closed to Indians in this discriminatory way absent special authorization by the Congress for that closure.

The court concludes its opinion by saying after discussing this constitutional problem and saying that it does not stand as an impediment to their result. Quoting from this Court's opinion in the Yakima

case and in the words of the North Dakota court, "Likewise the people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our constitution was amended and Chapter 2719 of the North Dakota Code was enacted. We, therefore, find no equal protection violation of the Constitution of either the state or the United States, and for the reasons stated we affirm the judgment of the District Court."

It seems to us plain that the North Dakota Supreme Court was resting its judgment that no constitutional violation either of its own or of the federal constitution was involved only because they construed Public Law 280 as having authorized not as Public Law 280 does authorize an assumption of new jurisdiction but a disclaimer, a repudiation of preexisting jurisdiction.

If the North Dakota Supreme Court were disabused of that misreading of Public Law 280 every indication is that the court would then find that there was no justification under either its own constitution or under the federal constitution for uniquely closing the courts of the state to Indian plaintiffs whether the tribe or individual members. For that reason we suggest that the appropriate disposition is to remand the case

to the North Dakota Supreme Court with a construction of Public Law 280 which we have argued.

QUESTION: Mr. Claiborne, would not our normal practice be if we agreed with you that the Supreme Court of North Dakota was wrong in saying that Section 280 had affirmatively authorized this to go on and decide for ourselves whether we thought there was a constitutional violation resulting from the Supreme Court of North Dakota? I mean we do not ordinarily remand in a situation like that I do not believe.

MR. CLAIBORNE: Justice Rehnquist, we do not oppose the suggestion that if the federal constitutional question is as plain as we think it is that it would be appropriate for this Court to go ahead and decide it and accordingly to reverse the judgment without need for any further proceedings except for trial of the contract claim in the District Court of North Dakota.

Our suggestion is simply that as a matter of deference to the state court this Court might think it more appropriate to afford the highest court of the state an opportunity to correct its own error without the misapprehension which led it into that error rather than a simple reversal, but it is really not for us as a mere amicus in the case to be suggesting in any strong way what the appropriate disposition is.

We ourselves have no doubt that in the absence of any federal authorization for discriminating against Indian plaintiffs the federal constitution would require North Dakota to admit them to its courts. We likewise assume from what the North Dakota Supreme Court itself has said that the state constitution would require that result, and if there is a state constitutional ground it might be appropriate tc afford that court an opportunity to revoke it.

QUESTION: How about Section 1981? Do you think that is applicable if this Court goes ahead and tries to solve the problem?

MR. CLAIBORNE: It dces seem to us that Section 1981 may well be applicable. However, it is fair tc say that as far as I am aware that ground was not argued below, and accordingly it might be particularly inappropriate for this court to reach that question.

We simply mention it as one more indication of the prcblem that is created by this misreading of Public Law 280. As to that it seems to us quite clear that Public Law 280 was intended in its own words under Section 6 to remove impediments to the assumption of jurisdiction, not to erect new impediments -- No license is given for that -- and to the assumption of

jurisdiction, not a disclaimer of jurisdiction.

Likewise Section 7 is clear in that it gives federal permission to states not having jurisdiction over certain categories of claims involving Indians to assume jurisdiction, not to repudiate previously existing jurisdiction.

I may say that the North Dakota amendment to its constitution itself suggests no direction to the legislature of the state to repudiate any previously existing jurisdiction. On the contary, all that happened in 1958 is that the people of that state in response to Public Law 280 and with in a way that on its face seems unobjectionable said, "We retain our disclaimer of jurisdiction over Indian lands provided, however, that the legislature may accept such jurisdiction as is delegated by act of Congress."

That in no way to us suggests any repudiation of preexisting jurisdiction, and indeed the 1963 act of the state legislature speaks of jurisdiction being extended to cases involving Indians, nothing about disclaiming or repudiating older jurisdiction. Because those statutes and constitutional amendments read in that way it is and must be inviting to the Supreme Court of North Dakota to reconstrue those statutes which are perfectly able to be read as consistent with Public Law

280 in that way once this Court has indicated that Public Law 280 did not authorize any repudiation of old jurisdiction.

Of course, it is possible to argue that notwithstanding Public Law 280 the states might be free to disclaim quite independently of any federal authorization of jurisdiction over Indians, but the decisions of this Court made it clear that there is no federal obstacle to the assumption of jurisdiction over a claim by an Indian against non-Indians within the state at least in the absence of any tribal court which has asserted that jurisdiction and certainly not when the tribe itself is the plaintiff. There can be no arguable conclusion into the tribal self-government when the tribe is the plaintiff as is here.

The irony of this case is that the claim of tribal self-government and infringement is made by the non-Indian defendant, not by the tribe itself. It is a case where the defendant is being more Roman than the Romans.

The preexisting law before Public Law 280 in this Court and in the state courts was quite clear that states could assume jurisdiction over this sort of claim by an Indian. In the absence of any federal impediment to the assumption of that jurisdiction we as we have

suggested see a serious equal protection constitutional obstacle to declining to exercise that.

CHIEF JUSTICE BURGER: Mr. McCutcheon.

ORAL ARGUMENT OF HUGH MC CUTCHEON, ESQ.,

ON BEHALF OF RESPONDENT

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

May I take a moment to restate the question which I thought was today before this Court. In Petitioners' petition for a writ of certiorari the question presented was did the state trial court have jurisdiction to hear and decide a cause of action brought by a federally recognized Indian tribe against a non-Indian defendant regarding a matter arising within the exterior boundaries of the Indian reservation.

QUESTION: You do not quite state the question the same way in your brief do you?

MR. MC CUTCHEON: I am trying to point the distinction, Your Honor.

QUESTION: Which question do you think is before the Court, yours or the Petitioners?

MR. MC CUTCHEON: I think our question and this question are fairly close and are before the Court, but what has happened that I think that this question has galloped around in the various briefs. I was and

possibly I should not do it -- I thought I would try and bring it back to the question as it existed on the application for writ of certiorari by showing the distinction, but it is easy to find the distinction if the Court will simply recognize that in the government's brief on the certiorari application they stated the question.

There are some extraneous words in it that should be stricken, but when that is done it comes basically back to the Petitioners' question, and in our brief on the same point the certiorari the question there then comes very close to what I have outlined. Then it begins to deviate, and in the Petitioners' brief on the merits the questions presented which presumptively to me mean the issues there are now three different questions set out.

Number one is not in this proceeding at all in my judgment. Number two should be carved of extraneous language to bring it somewhat within the question upon which we think the writ of certiorari was granted, and number three should be also reworked because we now get into equal protection and due process clauses. Let me say this that those clauses were argued in the North Dakota Supreme Court, and the North Dakota Supreme Court did reach those issues.

Then that issue, however, was not an issue in the case. So we do feel that the question should be restated, and finally in connection with the final brief served upon us which is the Petitioners' reply brief we do not agree with the statement made in the first sentence that we are in agreement with the Petitioners that there is only a sole issue.

QUESTION: Mr. Mc Cutcheon.

MR. MC CUTCHEON: Yes, sir.

QUESTION: You feel then that the question presented for review in the petition, the one sentence thing, does not include the equal protection argument that they now advance in their brief?

MR. MC CUTCHEON: Your Honor, that is correct. However, in all fairness it was raised in the North Dakota Supreme Court. The North Dakota Supreme Court did go to it --

QUESTION: There are two requirements for us to consider something. One is that it be passed upon by the court below and the other that it be presented in the petition for certiorari or fairly subsumed by the question.

MR. MC CUTCHEON: It was reached by the court below, but I believe that there has been extraneous or extra material now brought into this argument.

Let us turn for a moment to some of the argument advanced by both counsel for the Petitioner and counsel for the government. The argument seems to be made that the North Dakota Supreme Court was incorrect in its conclusion and specifically that the North Dakota Supreme Court should have recognized that it had prior jurisdiction.

What counsel for the Petitioners is arguing today is that 280 did not bar a prior exercise of jurisdiction by a court, but that presumes something. This Court has stated many times in these cases that the jurisdiction must be conferred by an act of Congress.

Now until 280 which this Court has said in several recent cases -- I believe you said it just a couple of months ago in the New Mexico v. Mescalero Apache case -- that 280 was the first, not the second, but was the first grant of power of general applicability with respect to this type of a matter.

Now if you said it it must be so. You have said it in other cases, and we certainly accept that and why? For one reason. We do not find that North Dakota has ever been given outside of an Indian act in the middle forties any grant of power by the Congress of the United States for our courts to assume jurisdiction.

So it is not a question of the old

jurisdiction because if they didn't have jurisdiction because it was not conferred upon them then there would be no prior jurisdiction that could spring back into existence or if not springing back into existence would have remained in existence. It was never there in the first instance.

QUESTION: Well, North Dakota certainly thought it was, did it not?

MR. MC CUTCHEON: Yes, but North Dakota was wrong and North Dakota, the Supreme Court of North Dakota and they were wrong under the test in Williams v. Lee.

Now, let's if we may go to North Dakota. A few moments ago the matter of the White Shield case was raised. I'm sorry let's go -- Let me change my argument just a moment.

Public Law 280, 1953. Five years later, 1958, North Dakota through its people amended its constitution pursuant to the authority granted by 280. That is the legislative history.

Five years after that in 1963 North Dakota adopted the legislation through its legislature to further implement the matters and that is now found as 27-19 of the North Dakota Century Code. Five years after that Congress enacted the Indian Civil Rights Act,

1953, 1958, 1963, 1968.

Now what North Dakota did because the Indians asked for it when North Dakota in 1963 adopted Chapter 27-19 of the Century Code they did what? They put in a consent clause.

They said this jurisdiction which we are imposing at this time becomes effective when? Upon consent by the Indians through an election.

We preceded the Indian Civil Rights Act in that respect by five years. Now go to the North Dakota cases. In 1957 there was the case of Vermillion v. Spotted Elk, and our court there held that it had jurisdiction.

In that our court was in error. Our court, however, subsequently in In re White Shield said in effect we were wrong in that case, and In re White Shield our court said this and In re White Shield is in 1963.

Here is what our court said, "However, by the amendment of Section 203 of the North Dakota Constitution and the passage of Chapter 244 of the session laws of 1963" -- which is now 27-29 of the Century Code -- "the people and the legislature have taken affirmative action which amounts to a complete disclaimer of jurisdiction over civil causes of action

which arise on an Indian reservation except upon acceptance by the Indian citizens of the reservation in the manner provided by the legislative enactment."

Then the constitutional amendment is set forth. Following In re White Shield --

QUESTION: Do you agree with the answer given to my question to your opposing counsel that this leaves these Indians without a forum in this case?

MR. MC CUTCHEON: Yes, sir, I do, but I do not believe that that is discriminatory in any manner because it is my belief from the cases that I have read of this Court where this Court says that is not racial discrimination and this Court goes so far in one case -- I don't recall the name of the case right at the moment -- as to answer that precise question and it says "There will be times when there will not be a forum."

This Court has said that, but they said that is not an invidious discrimination. That is simply because of the situation, the circumstances surrounding this particular type of legislation with these particular people who occupy a different status from anyone else.

Furthermore this Court has said --

QUESTION: That is a good way to get rid of a law suit is it not?

MR. MC CUTCHEON: I'm sorry, sir?

QUESTION: It is a good way to get rid of a law suit is it not?

MR. MC CUTCHEON: Sir, jurisdiction can always be accepted. We have all stood ready since 1958 to have jurisdiction of our courts fully extended over the reservations. The keys to the courthouse are in the hands of the Indians at least in North Dakota.

They are right there. All they must do is have an election. Now our statute does have certain provisions on an election.

Those provisions are probably possibly invalid. It is not an issue in this law suit because I think Congress has said how the election shall be conducted, called and so forth so probably to that extent those election provisions of our statute would fall as procedural but the point remains the power and authority is there.

QUESTION: Does that apply to any other group of people in North Dakota?

MR. MC CUTCHEON: No, sir.

QUESTION: Only Indians?

MR. MC CUTCHEON: 280.

QUESTION: Only Indians?

MR. MC CUTCHEON: Yes, sir. Yes, sir.

Then in Gourneau which was a subsequent 1973 case the North Dakota Supreme Court expressly stated they have overruled In re White Shield. The arguments have been probably quite well covered, but we must remember that 280, Public Law 280 itself, is not an act that bars jurisdiction.

QUESTION: Mr. McCutcheon, you said a moment ago that in Gourneau the Supreme Court of North Dakota stated that it had overruled White Shield. Is that what you meant?

MR. MC CUTCHEON: I'm sorry. No, sir. I did make a mistake, Spotted Elk. I'm sorry.

We conclude that Vermillion which is Vermillion v. Spotted Elk no longer states the rule to be applied in determining whether state courts have jurisdiction. Now this Court has indicated as a matter of fact that the preemption doctrine applies. This Court has also stated and it was well stated in New Mexico v. Mescalero Apache that the preemption doctrine is not quite the same as a normal preemption doctrine.

The normal preemption doctrine would simply be that something is supreme and there would be no alternative. This Court has extended that because it has said that there are exceptions and certain of these exceptions, for example, are tax cases. There are

exceptional circumstances where the courts may have some jurisdiction.

It was interesting to note that Petitioners' counsel referred to the case of something versus Dorgan. True, a North Dakota case cited in 1973. It's a tax case, but in that case our court said -- and the facts were stipulated incidentally -- our court said that our courts have no jurisdiction over civil causes of action with respect to the Indian reservations. Our court is now very, very consistent.

This Court has not too long ago in one of the cases stated that tribal -- Yes, Rice v. Rehner -- that tribal sovereignty itself exists at the suffrance or pleasure of the Congress of the United States. This Court has also stated the present policy of Congress which is to try to bring the Indians -- This is the policy of 280 -- to try to bring the Indians into the full mainstream of our society. That is one of the purposes of 280 as I understand it.

Certainly the states do appear to be working for that. The mandatory states under 280 were, what, granted instant jurisdiction. The disclaimer states were required to remove an impediment to the assumption of that jurisdiction, but again assumption in that sense means exactly what the Act seems to say.

It is the assumption of any jurisdiction. In North Dakota it would be the assumption of jurisdiction in the first instance.

There were acts, for example, in Minnesota which I understand did grant certain jurisdiction, certain congressional acts, but none in North Dakota and in reviewing all of these cases it is necessary to draw the distinctions with respect to certain state situations. For example, Candelaria, a 1926 case, is advanced in the brief of Petitioners and the government, but go back to 1919 and look at the case of Pueblo Santa Rose which is mentioned in Candelaria and it tells you from whence came the power of those courts.

The power of those state courts came from treaties with Mexico and Spain, and they were carried forward into the law and they were carried forward into the state law by act of Congress, by requirement of Congress. The same is true, for example, with some of these states, for example, in the area of Oklahoma, Arkansas and so forth.

North Dakota had a territorial government. Oklahoma, some of those states did not have an organized territorial government. There were certain laws in the unorganized territory that were created by Congress, certain courts that were created by Congress, and in

statehood that followed those were required to be carried forward into the state laws.

We have varying situations, but in North Dakota there has never been a prior grant, a specific prior grant of authority from the Congress of the United States which wails the authority in these instances for a special people who have a different relationship than others.

The test has always been as stated in Williams v. Lee whether there is any infringement upon the basic rights. North Dakota has met all requirements set forth by 280.

We took those step by step. We did it by a vote of the people. We amended our constitution. We acted by our legislature and we have taken the procedural steps required by Public Law 280.

In Yakima, Washington v. Yakima, the matter there was Washington having taken or having set full jurisdiction over eight subject matter areas, and the attack there was made you couldn't do it. You had to take either all or none, and this Court said no, you have the power to take the whole. You may take the lesser, and that does make logic.

There have been challenges to 280, but 280 has withstood those challenges. It now requires that which

we took five years before 1968 the consent of the Indians.

The doctrine of conceptual clarity which existed in the days of 150 years ago in the Winchester v. Georgia case where it simply said that there was no jurisdiction there except that which was granted by Congress, and it was totally exclusive. The state might not enter.

That has been modified. There are some exceptions now to that particular doctrine, and that is rather stated carefully in New Mexico v. Mescalero Apache. It basically comes back to three areas that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status, that under certain circumstances a state may validly assert authority over the activities of nonmembers on a reservation and that in exceptional circumstances a state may assume --

QUESTION: You emphasized dependent status.

MR. MC CUTCHEON: Yes.

QUESTION: How do you ever expect them to get independent status if they are free to be robbed?

MR. MC CUTCHEON: Sir, I do not believe they are free to be robbed. I believe that they must be encouraged to seek the independent status, and I think

that is the thrust of 280. At least that appears to be the congressional intent for them to seek to become or give or provide an opportunity for them to become full fledged members in this society. Perhaps the thrust of Congress is that they are not dependent members.

QUESTION: I hope you do not think my silence means I agree with you.

MR. MC CUTCHEON: Sir, I am used to having judges disagree with me. I did not feel that you were disagreeing, Your Honor.

Oh yes, one thing further with respect to this counter claim. The argument advanced in the Supreme Court by counsel for the Petitioners was in response to sharp questions by our court with respect to the counter claim was that well that could be treated as an offset against the judgment that we are going to get.

Well, now wait. I seem to have remembered in all the years that I have been in and out of the court room that someplace in some book somewhere I read where a plaintiff did not recover on his suit and the defendant did recover on the counter claim. The counter claim in this instance is a meritorius claim. It is not subject to the doctrine of set off.

QUESTION: Why not?

MR. MC CUTCHEON: I'm sorry?

QUESTION: Why not?

MR. MC CUTCHEON: Because it is not yet established that the plaintiff can recover a judgment.

In summation, I would point out only that 280 is an act conferring jurisdiction in the first instance original authority for jurisdiction to be exercised by the states; that North Dakota has properly followed all steps that are strictly required of our state in so doing; that we have placed all of the machinery in existence subject only to the consent of the Indians; that the judgment of the North Dakota Supreme Court should be affirmed.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:08 p.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:

#82-629 - THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION
Petitioners v. WOLD ENGINEERING, P.C., ET AL.

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BY _____

(REPORTER)