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THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-2161

TITLE MONTANA, ET AL., Petitioners v. BLACKFEET TRIBE OF INDIANS

PLACE Washington, D. C.

DATE January 15, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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MONTANA, ET AL., :
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Petitioners :
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v. : No. 83-2161
:
BLACKFEET TRIBE OF INDIANS :
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Washington, D.C.
Tuesday, January 15, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

MS. DEIRDRE BOGGS, ESQ., Special Assistant Attorney General of Montana, Hamilton, Montana; on behalf of the Petitioners.
MS. JEANNE S. WHITEING, ESQ., Boulder, Colorado; on behalf of the Respondent.
ED I . . . , . . . ssistant to the clicitor General, Department of Justice, Washington, D.C.; as amicus curiae supporting the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in National Railroad -- no, Montana, Montana against Blackfeet Tribe of Indians. And we'll save National Railroad for a little later.

ORAL ARGUMENT OF DEIRDRE BOGGS, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. BOGGS: Thank you, Your Honor, and if it please the Court:

The issue in this case is whether the express tax authorization provision in the 1924 Indian Mineral Leasing Act which would allow Montana to tax the Blackfeet Tribe's mineral royalties has been eradicated.

The 1924 Indian Mineral Leasing Act allowed the Secretary of the Interior to enter into long-term leases for oil and gas on unallotted lands on treaty reservations with the consent of the affected tribe. That Act also allowed for the taxation of all minerals, not just oil and gas, produced on these same allotted lands. No regulations were ever drafted to implement the taxation provision of this Act.

The State of Montana has taxed oil and gas production on the Blackfeet Indian Reservation since 1936 when this Court held in British-American Oil Producing Company that the 1924 Act applied to the

1 Blackfeet oil and gas leases.

2 In 1977 the Solicitor held that the 1938
3 Indian Mineral Leasing Act replaced completely the 1924
4 Indian Mineral Leasing Act, so that the tax
5 authorization that was specifically included in the '24
6 Act was limited to pre-1934 Act leases.

7 This case was filed by the Blackfeet Tribe
8 shortly afterwards. The Blackfeet Tribe alleged and
9 insisted that some of the state's taxes fell under
10 royalties. They alleged that the 1938 Act completely
11 replaced the '24 Act, and that that replacement did away
12 with the taxing provisions in the '24 Act. And they
13 alleged that the language in the 1924 Act which refers
14 to such lands that can be taxed is limited to lands that
15 are leased in fact under the 1924 Act.

16 In Montana the oil and gas producers file all
17 the tax returns with the state, and they are solely
18 responsible for all tax payments. The producers are not
19 parties to this case, and the tribe doesn't challenge
20 the taxes on the producers' share.

21 The predecessor taxes to the Montana taxes
22 challenged here were challenged in 1935 within months of
23 a written opinion that was issued by the Department of
24 Interior stating that Montana's taxes could not be
25 imposed on the production of oil and gas on the

1 Blackfeet Reservation.

2 The taxes on both the producers' share and the
3 royalty owner's share in that case were specifically
4 challenged in British-North American Oil Producing
5 Company. The only difference in the operation of the
6 taxes in that case and this case is that the net
7 proceeds tax in that case had a mandatory pass-on
8 provision where although the producers paid the taxes
9 and filled out the forms, there was a mandatory
10 requirement that a pro rata share of the taxes that
11 would fall on the tribal royalties would be collected
12 from the royalty owners. The taxation authority of the
13 state was upheld on all taxes in that case.

14 Montana has collected all of the taxes since
15 the British-American decision, notwithstanding the
16 passage of the 1938 Indian Mineral Leasing Act.

17 The purposes of the 1938 Indian Mineral
18 Leasing Act were set forth in the reports that
19 accompanied that legislation. The purposes were to cure
20 specific defects that Congress had observed in the
21 Indian mineral leasing statutes. It did not change the
22 taxation authority that was granted in the '24 Act.
23 None of the contemporary commentators of the -- or
24 around the '38 Act suspected that the taxation authority
25 had been eliminated by the passage of the '38 Act.

1 Felix Cohen in his 1942 edition of "Federal
2 Indian Law" on page 328 talks about the intent of the
3 1938 Act. He refers to the letter from the Department
4 of Interior that we've included in the Petitioners'
5 appendix where the defects in the Indian mineral leasing
6 scheme are itemized in detail. And he says that "A
7 reading of that letter throws considerable light on the
8 problems intended to be met by the Act." And again, the
9 letter that's in the report -- this is Senate Report 985
10 -- goes into the most specific details about the defects
11 that Congress sought to cure.

12 QUESTION: Ms. Boggs, what does Professor
13 Cohen say in his current edition?

14 MS. BOGGS: We've referred to that -- of
15 course, that's no longer Professor Cohen. There are
16 three references to the 1977 Solicitor's opinion
17 acknowledging that opinion and accepting it; that is,
18 that the '38 Act wiped out the tax authority. That was
19 not the position in any of the previous editions --
20 either of the two previous editions of the book.

21 QUESTION: Well, Ms. Boggs, didn't the 1924
22 Act by its own terms, isn't it limited to leases issued
23 under the 1891 Act? I mean the taxation authority,
24 along with everything else in the 1924 Act, appears at
25 least to be limited by its own terms to leases issued

1 under the 1891 Act.

2 MS. BOGGS: You're referring to the language
3 "such lands" -- "provided that such lands shall be
4 taxed?" And it's your position, then, that "such lands"
5 refers to the lands that are leased --

6 QUESTION: I'm referring to the entire 1924
7 Act and asking you if it doesn't just apply to leases
8 issued pursuant to the 1891 Act?

9 MS. BOGGS: Justice O'Connor, it can't. The
10 taxation provision can't, I think, because the taxation
11 provision allows for taxation of oil and gas and other
12 minerals on the unallotted treaty reservation lands.
13 The leasing part of that Act only permits the Secretary
14 to enter into long-term leases for oil and gas on those
15 lands.

16 I think the only grammatical and logical way
17 to read that taxation provision is that it applies for
18 all mineral productions on those unallotted treaty
19 reservation lands. I think that if nothing else, the
20 inclusion of other minerals in that taxation provision
21 -- that is, minerals other than the ones that the
22 leasing provision allowed for -- would make it so that
23 we have to read the tax provision to apply to more than
24 just lands leased under the Act.

25 The administrative practice, in addition to

1 the Solicitor's opinions up till 1977, was to allow
2 Montana to levy and assess the taxes on the leases on
3 the Blackfeet Reservation. We and the tribe both refer
4 to the variety of Solicitor's opinions and the opinions
5 from the Department of Interior which reaffirm the power
6 of the state to exercise its tax, and in one case in
7 1954 talk about a procedure that would be allowed that
8 Montana statutes implement; that is, the procedure where
9 the producers themselves pay the taxes, fill out the tax
10 forms, and then subtract the tax payments from the
11 royalty payments to the tribes. Then in the Montana
12 situation, the USGS then credited those tax payments to
13 the royalty payments.

14 In 1978, shortly after the Solicitor issued
15 its opinion, the U.S. Geological Survey issued a letter
16 to the producers in Montana warning them that no longer
17 would the tax payments that they were making and
18 deducting from the tribal royalties be credited to their
19 royalty payments.

20 The en banc opinion of the Ninth Circuit held
21 that if you impose the policy of Congress in the Indian
22 Reorganization Act and other acts on a reading of these
23 two acts together that the taxation provision in the
24 1924 Act has disappeared. Congress has not acted since
25 1938 in relation to this issue.

1 The state urges in this case that rather than
2 overlay a policy or a perceived policy of Congress or a
3 changed policy of Congress on the interpretation of the
4 taxation provision or whether it still exists, that the
5 Court look at the statutes using more ordinary analysis
6 for statutory construction.

7 We would urge that the Court look at the
8 Section 7 repealer in the 1938 Act which repeals acts or
9 parts of acts inconsistent with the '38 Act, and read
10 that the way this Court has always read that, which
11 means that those provisions of previous acts, especially
12 specific ones specifying certain things that are not
13 inconsistent with a later act, remain.

14 QUESTION: Of course, the court of appeals
15 said that the 1924 provision wasn't repealed, didn't
16 it? I mean it didn't take the position that it had been
17 repealed.

18 MS. BOGGS: No, Your Honor. They said it had
19 been replaced. They had it disappear without repeal.
20 They didn't apply any of those standards of construction
21 to analyzing the statutes.

22 QUESTION: You feel that the 1924 Act standing
23 by its terms does apply to the leases which are sought
24 to be taxed here?

25 MS. BOGGS: I feel that the part of the 1924

1 Act that provides specifically for state taxation
2 remains; that it's never been eliminated and that it
3 therefore remains. I think that an analysis of whether
4 or not there has been a repeal has to be made when you
5 have a specific provision in an earlier statute, and
6 there's a later statute that's a general statute dealing
7 with the same subject.

8 QUESTION: But I don't think anyone opposes
9 you on that point is what I'm trying to get at. I mean
10 the Ninth Circuit didn't say it was repealed. You
11 obviously don't feel it's been repealed.

12 MS. BOGGS: They -- they --

13 QUESTION: They left it in limbo.

14 MS. BOGGS: They did not deal with -- as I
15 recall, the en banc panel didn't deal at all with the
16 Section 7 provision and what it might mean.

17 QUESTION: Well, you think that the proviso in
18 the 1924 Act that the production of oil and gas and
19 other minerals on such lands may be taxed by the state
20 in which such lands are located includes lands that are
21 leased pursuant to the 1938 Act.

22 MS. BOGGS: It -- yes, Your Honor. I believe
23 that the only reading of that provision as far as the
24 meaning of "such lands" goes is that those are lands
25 that are unallotted lands on treaty reservations; that

1 is, lands that are bought and paid for by Indian tribes
2 on the reservations.

3 QUESTION: Referring back to the first
4 sentence of the Act, that unallotted land on Indian
5 reservations other than the five civilized tribes.

6 MS. BOGGS: As described in the Act of 1891.

7 QUESTION: In your view, the lands on which
8 taxation is -- the leases on which taxation is now
9 sought to be imposed are unallotted lands.

10 QUESTION: As described in the 1891 Act.

11 QUESTION: Yes.

12 MS. BOGGS: Yes, Your Honor. In
13 British-American Oil Producing this Court had to
14 struggle with what "such lands" meant, and one of the
15 challenges in that case was whether or not these were
16 unallotted lands, because in fact -- it's a rather
17 peculiar situation -- in fact, the surface lands that
18 we're talking about here were allotted. The minerals
19 were reserved. And the position taken by the producer
20 in British-American Oil was that Section 10 of the 1919
21 Mineral Leasing Act had to apply to those lands, because
22 you're not dealing really with unallotted lands.

23 This Court held that the reserved mineral
24 rights beneath the surface lands were on allotted
25 lands. That was a specific -- one of the specific

1 holdings of this Court in British-American. Most, if
2 not all, of the surface lands in dispute here were
3 allotted lands with the minerals specifically reserved
4 under Section 10 of the 1919 Act, which this Court held
5 did not limit the application of the '24 Act to the
6 leases.

7 QUESTION: Ms. Boggs, I may have misunderstood
8 you, but I want to be sure what you just -- did you -- I
9 think you used the word "allotted" when you meant
10 "unallotted."

11 MS. BOGGS: Unallotted.

12 QUESTION: The lands on which the '38 leases
13 are located are lands which could have been leased in
14 1892 pursuant to the 1891 Act, is that -- is that true?

15 MS. BOGGS: I'm sorry.

16 QUESTION: The surface land on which the
17 leases in dispute, the 1938 leases, are located are
18 lands which could have given rise to leases pursuant to
19 the 1891 Act.

20 MS. BOGGS: That's right, Your Honor. If --
21 if --

22 QUESTION: So you say "such lands," which is
23 read literally under that provision, covers these
24 leases, covers the lands on which these leases are
25 located.

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MS. BOGGS: It covers the lands under which --

QUESTION: I understand the problem about British-American, but forgetting that for the moment.

MS. BOGGS: Okay. Not even referring to that case, though, "such lands" I believe means lands that can be leased under the 1891 Act. Those are lands bought and paid for. They're unallotted lands that are bought and paid for on the Indian reservation.

In addition to urging an analysis of these statutes under standard canons of statutory construction, and specifically referring to the case of Hess v. Reynolds as it applies to an interpretation of the repealer language that we have here, it's our position that even if the Court were to overlay Indian Reorganization Act policies on its interpretation of what the 1938 Act does and doesn't do in relation to these taxes that the conclusion does not have to be that these taxes were wiped out.

The IRA policies that the Ninth Circuit looked at were the policies to undo the Allotment Act policies. They were concerned there with the land losses that had taken place under those policies, and that was what they wanted to reverse. And in doing that, they made a specific provision exempting from taxation lands that were purchased under the IRA. That

1 is the only tax exemption provision in the Indian
2 Reorganization Act. And this Court has held in the
3 Mescalero v. Jones case that even when you're dealing
4 with the specific lands referred to that were to be tax
5 exempt that that reference doesn't mean that any income
6 received from those lands are to be tax-exempt.

7 There's absolutely no mention in any of the
8 materials relating to the Indian Reorganization Act in
9 any of the reports or voluminous hearings related to
10 that Act where Congress gave any suggestion at all that
11 they wanted to undo the previously authorized tax
12 provisions in any of these mineral leasing acts.

13 The result and the conclusion that the Ninth
14 Circuit reached here, the way they reached it I think is
15 quite extraordinary; that is, they read the various
16 congressional policies as they say them to eradicate
17 something that Congress had never eradicated. In Hess
18 v. Reynolds this Court said that when there's a repealer
19 such as the one in the 1938 Act that repeals acts or
20 parts of acts inconsistent with the Act, that that in
21 itself means that there remains -- there remains the
22 specific provisions in previous acts so long as they're
23 not contrary to the later general act. And it's that
24 sort of analysis that I think this issue presents to the
25 Court. I think that if that sort of analysis is given

1 to these statutes, even if the Court were to look at the
2 Indian reorganization policy, that the tax provision
3 that was written specifically in the 1924 Act would be
4 found to stand.

5 CHIEF JUSTICE BURGER: Ms. Whiteing.

6 ORAL ARGUMENT OF JEANNE S. WHITEING, ESQ.,
7 ON BEHALF OF THE RESPONDENT

8 MS. WHITEING: Mr. Chief Justice, and may it
9 please the Court:

10 This case turns on a question of statutory
11 construction: the meaning of the 1938 Mineral Leasing
12 Act. It is our position that the '38 Act is a
13 prospective replacement for prior leasing laws, and that
14 it is a comprehensive statute which governs all terms
15 and conditions for the leasing of tribal lands for
16 mineral purposes. References to other statutes are
17 therefore unnecessary and are neither -- and are not
18 required.

19 Nothing in the --

20 QUESTION: Well, are you saying that the '38
21 Act completely replaced the '24 Act?

22 MS. WHITEING: I think -- yes, we are saying
23 that. And in fact, the Sections 1 and 2 of the 1938 Act
24 essentially track the language in the 1924 Act. In
25 effect, they incorporate and carry forward that

1 language; but significantly, they do not -- or Sections
2 1 and 2 do not, and nothing else in the 1938 Act carries
3 forward or incorporates the tax.

4 QUESTION: So nothing at all was left of the
5 '24 Act provisions.

6 MS. WHITEING: After 1938.

7 QUESTION: That's what I mean.

8 MS. WHITEING: We do recognize that that Act
9 continues to exist to govern leases which were made
10 before the 1938 Act -- before the 1938 Act, and that is
11 our position in this case here.

12 QUESTION: Well, doesn't the Act say on its
13 face that this repeals acts that are inconsistent with
14 the '38 Act?

15 MS. WHITEING: Our position --

16 QUESTION: Well, doesn't it? Isn't that what
17 it says?

18 MS. WHITEING: It does say that it repeals --

19 QUESTION: And yet you say it repeals every
20 act whether it's inconsistent with it or not?

21 MS. WHITEING: I've said that it -- I didn't
22 say that it repealed the '24 Act. I said it --

23 QUESTION: It replaced it.

24 MS. WHITEING: -- replaced it for future
25 leasing purposes. And even under the --

1 QUESTION: Well, may I see if I fully
2 understand it. What you're saying, I gather, is the
3 1924 Act to the extent necessary still applies to leases
4 before 1938; is that it?

5 MS. WHITEING: That's correct.

6 QUESTION: But the 1938 Act applies to leases
7 after 1938, is that --

8 MS. WHITEING: That's -- that is our position.

9 QUESTION: And the 1938 Act has no authority
10 to the state tax.

11 MS. WHITEING: That's -- that is our position
12 here.

13 QUESTION: Well, you don't contend, do you,
14 that the 1938 Act repealed the 1924 Act?

15 MS. WHITEING: No. We don't contend that it
16 repealed it.

17 QUESTION: So the 1924 Act is then still on
18 the books.

19 MS. WHITEING: It is still on the books. It
20 was not wiped off the books by the 1938 Act.

21 QUESTION: Okay. Now, here's -- I want to
22 read you some language from the 1924 Act, and you tell
23 me what it means. "Unallotted land on Indian
24 Reservations" is the very first five or six words of
25 that. It's quoted at page 37 of the appendix of the

1 Petitioners. It's the Ninth Circuit's rendition.

2 It starts out saying, "Unallotted land on
3 Indian Reservations," with an exception. Then you go to
4 the proviso: "that the production of oil and gas and
5 other minerals on such lands" -- parenthetically, I take
6 that to mean unallotted lands -- "may be taxed by the
7 state in which said lands are located."

8 Now, don't you think that literally applies to
9 the leases in this case?

10 MS. WHITEING: '38 Act leases you mean, Your
11 Honor.

12 QUESTION: Yes.

13 MS. WHITEING: I don't think so.

14 QUESTION: You say that those leases are not
15 on unallotted lands?

16 MS. WHITEING: We are saying that they are
17 unallotted lands, but they are not subject to lease
18 under the 1891 Act, and that is the full --

19 QUESTION: Well, but where does the 1938 Act
20 say anything about lands subject to lease under the 1891
21 Act?

22 MS. WHITEING: The 1938 Act does not say
23 anything --

24 QUESTION: It's totally silent on the subject,
25 isn't it?

1 MS. WHITEING: It is silent on the issue of
2 taxation. It does say unallotted lands on Indian
3 reservations are subject to lease for mining purposes
4 under the '38 Act.

5 QUESTION: But this proviso for taxation in
6 the 1924 Act doesn't say that leases executed under the
7 1891 Act shall be subject to taxation. It says that
8 leases on unallotted land shall be subject to taxation.

9 MS. WHITEING: It says leases on unallotted
10 lands or unallotted lands subject to lease under the
11 1891 Act. And our position is that after 1938 --

12 QUESTION: Well, where does it say subject to
13 the 1891 Act in the 1924 provision?

14 MS. WHITEING: The first part of the 1924 Act,
15 Your Honor, says "unallotted land on Indian
16 reservations, with some exceptions, subject to lease for
17 mining purposes for a period of ten years under the
18 proviso to Section 3 of the Act of February 28, 1891."

19 QUESTION: And you say that makes -- makes it
20 applicable only to lands under those -- leased under
21 that particular section?

22 MS. WHITEING: Only to lands leased under the
23 1891 Act. And after 1938 our position is that
24 unallotted lands are not subject to lease under the 1891
25 Act because the 1938 Act completely replaced prior

1 leasing laws for prospective leases.

2 QUESTION: But, no, the Ninth Circuit held
3 that some of these leases are taxable, didn't it?

4 MS. WHITEING: They -- they held that the
5 leases that were executed prior to 1938 under the 1891
6 Act were taxable.

7 QUESTION: And you don't dispute that holding.

8 MS. WHITEING: We don't dispute that here.

9 QUESTION: Well, do you dispute it anywhere?

10 MS. WHITEING: We did certainly argue
11 differently before the Ninth Circuit. They did not
12 agree with us.

13 QUESTION: May I follow up with one question?
14 Again focusing on the language, "unallotted lands" --
15 I'm referring to the '24 Act -- "subject to lease under
16 the 1891 Act."

17 Apart from the fact that the leases may not
18 have been granted, would you agree that the lands on
19 which the 1938 and thereafter leases are located would
20 have given -- could have given rise to leases under the
21 1891 Act if they had been -- people had acted promptly
22 in 1892 or '93 as a matter of geography?

23 MS. WHITEING: I'm not sure I understand your
24 question.

25 QUESTION: Well, the -- the leases subject to

1 the 1938 Act which are in dispute here are on unallotted
2 lands.

3 MS. WHITEING: That's correct.

4 QUESTION: That everybody agrees on. Is it
5 also true that they are located on such lands -- that
6 is, unallotted lands -- that could have been leased in
7 1892?

8 MS. WHITEING: They could have been leased in
9 1892 under the Act of 1891, that's correct.

10 QUESTION: Or in 1925.

11 QUESTION: But in fact they were not.

12 MS. WHITEING: Or in 1925. But after 1938
13 we're saying that they are not subject to lease under
14 the 1891 Act.

15 QUESTION: Although they had at one time been
16 subject to lease under the 1891 Act.

17 MS. WHITEING: That's correct. That's correct.

18 Now, Montana makes the point that the oil --
19 the taxing consent in the 1924 Act cannot just apply to
20 1891 Act leases because it authorizes taxation of not
21 just oil and gas but other minerals as well. But the
22 1891 Act as a whole certainly authorized leases for
23 mining purposes and not just oil and gas mining. And
24 after all, the 1924 Act is an amendment to the 1891 Act,
25 so the tax consent is consistent with those lands that

1 were subject or those purposes for which the 1891 Act
2 was a leasing authorization.

3 Basically, it is our position that the terms
4 of the 1924 Act in themselves make clear that the tax
5 consent applies only to lands leased under the 1891 Act,
6 and that these lands at issue here or the leases at
7 issue were not subject to lease under the 1891 Act after
8 1938.

9 QUESTION: Ms. Whiteing, if -- if the Ninth
10 Circuit is correct in this case, what are the
11 implications for state taxation of the producers of the
12 oil and gas leases, the non-Indians?

13 MS. WHITEING: Well, of course the Ninth
14 Circuit did not address that question, and it's not in
15 issue here. States still can argue and do argue that
16 they can tax producers' interests and the --

17 QUESTION: Well, I'm asking what you think the
18 implications are for that in the event the Ninth Circuit
19 is correct.

20 MS. WHITEING: Well, the implication, I think,
21 is that certainly there would be no specific statute to
22 which a state could point that authorizes such taxation,
23 but they still could argue that nevertheless taxation
24 would be possible, and whether that taxation would be
25 upheld depends on application of the principles and

1 tasks set out in cases -- in opinions of this Court such
2 as White Mountain Apache v. --

3 QUESTION: Yes. I'm asking what you think the
4 implications are, not what somebody else might argue.

5 MS. WHITEING: Well, if those -- if those
6 tests were applied, I think that it certainly is
7 possible to find that state taxation of producers is
8 invalid. After all, this is a tax on an important
9 resource of the tribe that's tied to the land and is
10 intimately related to their ability to become
11 self-sufficient. And under the test in White Mountain
12 Apache, even things like gasoline taxes and other more
13 minor taxes were found not to be applicable. So I think
14 it's very possible for a court to find that these taxes
15 are not applicable either under that test.

16 QUESTION: But in any event, you haven't taken
17 a position on that formally.

18 MS. WHITEING: No, we have not. That is not
19 an issue in our case.

20 QUESTION: Maybe that's for tomorrow when you
21 can think it through.

22 MS. WHITEING: It's possible that that would
23 be an issue in a future --

24 QUESTION: Is it an issue in the case when it
25 goes back to the court below in this case?

1 MS. WHITEING: There is an issue yet to be
2 resolved, and that is the case of tax incidence; whether
3 the burden of the -- whether the incidence of the tax is
4 actually on the tribe or on the producer.

5 QUESTION: Wasn't that -- yes, wasn't the
6 remand specifically for that determination?

7 MS. WHITEING: That's correct.

8 So our argument that the 1938 Act is a
9 prospective replacement for prior leasing laws rests on
10 several premises: first, the wording of the statute,
11 which we've talked about; second, its legislative
12 history and purposes; historic Indian policies and
13 administrative treatment in practice.

14 One other point about the wording of this 1938
15 Act is that Sections 1 and 2 do essentially incorporate
16 and refer to the words of the 1924 Act. Congress was
17 obviously looking at that act when it enacted the 1938
18 Act, and it chose to incorporate the most important
19 provisions of that Act governing leasing, but
20 significantly, it did not carry forward and incorporate
21 the tax provision of the '24 Act.

22 Montana insists that the tax consent is
23 ambulatory and that it attaches to other provisions, but
24 -- unless it is specifically repealed. But our argument
25 does not raise any specific issue of repeal, although we

1 do recognize that the '24 Act may still continue to
2 exist to govern prior leases.

3 The second premise of our argument is that the
4 legislative history and purposes make clear that the '38
5 Act is a replacement statute. The legislative history
6 is clear that prior laws were considered inadequate;
7 that the '38 Act was proposed as a more satisfactory law
8 for leasing of Indian lands for mining purposes; and it
9 was proposed as an act to regulate mining on Indian land
10 and not to amend prior laws.

11 There were three major purposes of the 1938
12 Act: to bring uniformity to the area of Indian law or
13 Indian mining; to bring mining leases into harmony with
14 the Indian Reorganization Act; and to ensure that the
15 Indians received the greatest economic return from their
16 land.

17 Each of these purposes would be thwarted --

18 QUESTION: On that last point, if everybody in
19 1939 had understood what the Solicitor in 1977
20 understood the statute to mean, would that not have
21 required a holding that even the -- there could be no
22 tax, even on the non-Indian interest in the lease,
23 because it would have affected the bargaining between
24 the parties?

25 MS. WHITTING: I think it's a question of when

1 tax -- how much the tax may impact, and it may be that
2 under that policy some tax -- some taxation would be
3 possible but not --

4 QUESTION: Well, wouldn't -- I mean if the oil
5 companies knew they had to bear the whole burden of the
6 tax, wouldn't they have adjusted the Indians' royalty
7 rate accordingly?

8 MS. WHITEING: I think that's right, and
9 actually that is our point in referring to the policy of
10 both the IRA and the '38 Act, to ensure that the tribes
11 were economically revitalized. But the 1934 policy, IRA
12 policy, and the 1938 Act obviously were not in effect in
13 1891 or 1924. They represent a significant change in
14 Indian policy, and the 1938 Act was specifically meant
15 to comport with that significant change in policy.

16 QUESTION: Well, Ms. Whiteing, I would think
17 that if you put that much in the '34 Act, I would think
18 state taxation any time after 1934 would have been bad,
19 and if you say the '34 Act has that much force, that it
20 would have implicitly repealed any consent to taxation
21 before that.

22 MS. WHITEING: Well, I -- I don't want to
23 indicate that the IRA had so much force in the overall
24 scheme of things. It's one --

25 QUESTION: Well, if it didn't by itself -- if

1 it wouldn't have prevented taxes in 1935, I don't know
2 why if would have in 1938.

3 MS. WHITEING: I'm saying that it is one
4 indication that Congress was looking to --

5 QUESTION: Well, not much of a one if it
6 wouldn't have affected the state's tax power in 1935.

7 MS. WHITEING: I think that it -- I think that
8 it would have.

9 QUESTION: So you change your mind.

10 MS. WHITEING: No, I'm not changing my mind.
11 I'm just saying that it's only one indication that --

12 QUESTION: Well, how would it have affected
13 state tax power in 1935, as you just said it would?

14 MS. WHITEING: Well, a specific policy of the
15 IRA was state tax exemption.

16 QUESTION: Do you think that if Congress had
17 never passed the 1938 Leasing Act that the '24 proviso
18 authorizing taxation would have been rendered nugatory
19 by the 1934 Act alone?

20 MS. WHITEING: Not in itself.

21 QUESTION: Well, then how -- but you said that
22 Act would affect taxation in 1935. How would it?

23 MS. WHITEING: I don't think it would have
24 affected it specifically. It would certainly be --

25 QUESTION: Oh, how would it have affected --

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MS. WHITEING: -- something to look to.

QUESTION: How would it have affected it generally?

MS. WHITEING: It was a -- in terms of trying to interpret a particular act that may have purported to authorize taxation, it is a policy which could be looked to to determine what the meaning of that act is; and that is essentially the way we're looking at it here.

QUESTION: Well, then, you have to have another act in addition to the '34 Act before your --

MS. WHITEING: I don't think the IRA in itself changes any tax authority that may have existed in any --

QUESTION: Well, I thought a moment ago you said it did.

MS. WHITEING: I did -- I didn't mean to indicate that. I only meant that it is certainly a policy to look to to determine whether taxation is authorized in any particular --

QUESTION: Well, if the '34 Act didn't do the trick and you must rely on the '38 Act, and up until '38 there was an express policy of permitting state taxation, I would think that there would have -- you would expect to find some mention of that in the legislative history if Congress intended to dispense with taxation.

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MS. WHITEING: I think that --

QUESTION: I mean even if you're right on how the act should be construed, I would think there'd be some support for that construction in the legislative history; but I don't see that you cite any to that effect.

MS. WHITEING: Well, neither is there support for the opposite --

QUESTION: Well, I know.

MS. WHITEING: -- side of that question.

QUESTION: I agree with -- I agree with that. But I would expect to find something about it.

MS. WHITEING: That point is precisely -- the fact that there is silence of the Act I think cuts in favor of the tribe.

QUESTION: Well, it doesn't -- it doesn't unless you win on how you construe the 1924 Act.

MS. WHITEING: Well, I think it depends on the construction of the 1938 Act as a replacement act, if that in fact is the act that authorizes leasing on Indian land.

QUESTION: Suppose we don't agree with you on your replacement theory and that all the '38 Act is repeal any prior act that's inconsistent with it. Suppose that. Then there will have to be some --

1 something pretty express to repeal the '24 permission,
2 wouldn't it?

3 MS. WHITEING: Well, I think Section 7 of the
4 '38 Act in itself is an express repeal. After all, it
5 does say that all acts or parts of acts inconsistent are
6 repealed.

7 QUESTION: Well, what would be inconsistent
8 with the '38 Act?

9 MS. WHITEING: There are a number of
10 inconsistencies. First of all, the uniformity of
11 purpose of the '38 Act would be thwarted by application
12 of the '24 Act. Some lands would be -- would be taxed
13 but not others which are leased under the 1938 Act.

14 QUESTION: May I interrupt, because you made
15 this argument before. I don't understand the uniformity
16 argument, because under your view, the '24 leases are
17 taxable and the '38 leases are not. That's not uniform.

18 MS. WHITEING: We admit that there is some
19 lack of uniformity to that particular --

20 QUESTION: But it seems to me your uniformity
21 argument, it seems to me, would support like treatment
22 for all the leases, and that's the opposite of what
23 you're contending.

24 MS. WHITEING: Well, it does support like
25 treatment, and this is our point for '38 -- from 1938

1 forward. We do recognize that there is some lack of
2 uniformity because post-'38 leases and pre-'38 leases
3 would be treated differently; but that uniformity I
4 think is -- or lack of uniformity is less -- is more
5 acceptable than the lack of uniformity found otherwise.

6 CHIEF JUSTICE BURGER: Do you have anything --
7 oh, excuse me. Oh, excuse me.

8 I think we'll give you some time, Mr. Kneedler.

9 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

10 AS AMICUS CURIAE FOR RESPONDENT

11 MR. KNEEDLER: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 The state concedes in this case that there's
14 nothing in the language or the legislative history of
15 the 1938 Act to authorize state taxation of leases
16 issued under the Act, and that, in our view, is a
17 sufficient answer to the state's claim in this case;
18 because it is well established that in the absence of an
19 express authorization, states have no authority to tax
20 on Indian reservations.

21 There are a number of reasons why that
22 principle is particularly forceful here. First of all,
23 in 1937, just a year earlier, the same Congress that
24 passed the 1938 Act revised the special Kwapaw Taxing
25 Act that we discuss at page 19 of our brief in which

1 Congress, in response to this very concern that states
2 might be viewed to have power to tax absent some express
3 authorization in the statute, put in statutory form the
4 rule that it understood to be applied in such cases; and
5 that is that Indian resources are held without being
6 subject to state taxation in the absence of a waiver.

7 And the Kwapaw tax statute is significant for
8 another reason: because that tax, even though it
9 applied in the special circumstances of Oklahoma that we
10 describe at some length in our brief, induced Congress
11 to authorize taxes. Congress nevertheless narrowed that
12 particular tax to limit the type of tax, to limit the
13 amount of the tax, to limit the minerals that it applied
14 to. And in our view it seems quite unlikely that
15 Congress, having done that for Indians that Congress had
16 believed were appropriately subject to state taxation,
17 would have intended to preserve by mere inference the
18 much broader and open-ended tax authority that had been
19 enacted in 1924. And this is especially so since the
20 '24 Act was specifically patterned after the Kwapaw
21 taxing statute in Oklahoma.

22 QUESTION: Well, then, you feel that even
23 before the 1938 Act there was some limitation on the
24 state power to tax granted by the '24 Act?

25 MR. KNEEDIER: I do not, Justice Rehnquist.

1 What I am suggesting is that the -- is the tool of
2 construction for construing the 1938 Act. I'm not
3 suggesting that the Indian Reorganization Act or this
4 Kwapaw statute of their own force narrowed the prior
5 taxing authority, but for example, when Congress enacted
6 the 1938 Act, it expressly did that to bring the '38
7 leasing schemes into harmony with the policies of the
8 Indian Reorganization Act. It's that fact that makes
9 the Indian Reorganization Act relevant, because Congress
10 decided that the leasing program should be coordinated
11 with the IRA, and for that reason it is appropriate --

12 QUESTION: Where does the Kwapaw Tax Act fit
13 into that?

14 MR. KNEEDLER: Well, the Kwapaw -- the Kwapaw
15 Tax Act, which was passed in 1921, was the model for the
16 1924 Act. Congress when it enacted, the floor statement
17 says, frankly, the only legislative history explaining
18 the origins of the tax provision says it was patterned
19 after the Kwapaw and Osage taxes in Oklahoma. But in
20 fact, as we explain in our brief, the circumstances in
21 Oklahoma were far different. The reservations had been
22 abolished. The tribal governments had been abolished.

23 QUESTION: Well, I thought you started out
24 talking about a 1937 act.

25 MR. KNEEDLER: I did, but the 1921 Kwapaw

1 statute was amended in 1937 to narrow its scope, even in
2 Oklahoma where --

3 QUESTION: But that affected the only
4 Kwapaws.

5 MR. KNEEDLER: It did, but it --

6 QUESTION: The other Indians were all still in
7 1937 subject to the 1924 Act.

8 MR. KNEEDLER: They were, but -- but it -- but
9 Congress put in statutory form in the act itself, in the
10 Kwapaw statute, the rule it understood, that absent an
11 express authorization of the taxing statute --

12 QUESTION: Well, I gather what you're saying,
13 Mr. Kneedler, is that if we want to know what Congress
14 thought about the policy, it was that the Indians, while
15 restricted, the income therefrom was free from state
16 taxation, except as said immunity is expressly waived.

17 MR. KNEEDLER: That's correct. That's on page
18 19.

19 QUESTION: And you're saying in the '38 Act
20 there's no express weight.

21 MR. KNEEDLER: Precisely.

22 QUESTION: Well, Mr. Kneedler, if -- if
23 Congress had this vision in 1937 of just what an Indian
24 taxing scheme should look like, it's strange that it
25 chose to put it only in the Kwapaw Act and not in the

1 1938 Act.

2 MR. KNEEDLER: Well, there was -- but the rule
3 that's stated in the Kwapaw statute is that there has to
4 be an express waiver in the act that it was passing, and
5 that since the 1938 Act does not contain any reference
6 to state taxes --

7 QUESTION: But the Kwapaw statute is not a
8 statute that applies beyond the Kwapaws, is it?

9 MR. KNEEDLER: No, but it -- but it -- but it
10 does indicate Congress' view of the -- of the -- of the
11 rule with respect to state taxes. And it's reasonable
12 to assume that the same Congress that enacted it was
13 following that rule in the '38 Act by not authorizing
14 taxes.

15 QUESTION: Mr. Kneedler, may I just ask
16 another question about the Kwapaw? It says "except as
17 said immunity is expressly waived." It doesn't say in
18 the particular act, just as expressly waived.

19 Do you not agree that there was an express
20 waiver in the 1924 Act?

21 MR. KNEEDLER: Well, there -- there was in the
22 1924 Act.

23 QUESTION: And -- and what repealed that?

24 MR. KNEEDLER: Again, I -- I view it not as a
25 question of repeal as such, but --

1 QUESTION: But there was at one time an
2 express waiver covering the lands at issue in this case.

3 MR. KNEEDLER: There was, but what happened in
4 1938 -- and Congress did this rather explicitly -- it
5 said it was adopting a new comprehensive leasing
6 scheme. And in 1942 Professor Cohen described this in
7 the most contemporaneous construction of it as
8 superseding prior leasing laws. That's his description
9 at page 87 of the 1942 treatise. So what Congress did
10 was supersede prior leasing laws.

11 And if you look at the 1924 Act --

12 QUESTION: Then does that mean it repealed
13 those even not inconsistent with the new law?

14 MR. KNEEDLER: It -- well --

15 QUESTION: I mean there was an express waiver
16 on the books. Was it repealed or was it not repealed?

17 MR. KNEEDLER: It was not repealed because it
18 still applied to leases issued under the 1924 Act.

19 QUESTION: So it isn't limited in that
20 language, if it's still on the books and still effective
21 then.

22 MR. KNEEDLER: Well, the 1938 Act is a break
23 with the past. Section 1 of the Act says, "Hereafter,
24 unallotted lands on Indian reservations shall be leased
25 pursuant to the terms of the 1938 Act." That is a break

1 with the past of the prior leasing laws, including the
2 1924 Act. And, in fact, the 1924 Act itself reinforces
3 that because it -- as has been pointed out, the taxing
4 proviso mentioning such lands refers back to unallotted
5 lands that were subject to leasing under the 1891 Act.
6 After 1938, no such lands were subject to leasing under
7 the 1891 Act. And I don't understand Montana to dispute
8 that proposition.

9 QUESTION: Well, they really weren't subject
10 to leasing under the 1891 Act after 1924 either, because
11 they were then subject to leasing under the 1924 Act.

12 MR. KNEEDLER: No. They were subject to
13 leasing under both. This Court's decision in
14 British-American viewed the 1891 and 1924 Acts as a unit
15 and said that there. So they were -- they were -- they
16 were actually subject to leasing under both acts.

17 And there's another reason why the taxing
18 provision can't be thought to be carried forward here,
19 and that's that it's in the form of a proviso. And this
20 Court has established a presumption that a proviso is
21 ordinarily thought to refer simply to the substantive
22 provision to which it's attached. And here, as has been
23 pointed out, all of the substantive provisions dealing
24 with the leasing -- the term of the lease, et cetera --
25 has been entirely superseded by the 1938 Act. If that's

1 the case, then the proviso that was simply appended to
2 the prior substantive leasing authority --

3 QUESTION: Well, you sound as though it were
4 awfully clear, and it took about 50 years to discover
5 it, I gather.

6 MR. KNEEDLER: Well, but --

7 QUESTION: Or 40, 40 years to discover it,
8 because didn't -- weren't states permitted to tax, and
9 didn't they tax for 40 years after '38?

10 MR. KNEEDLER: Well, the record seems --

11 QUESTION: Did they or didn't they?

12 MR. KNEEDLER: The record seems quite unclear
13 in this case exactly -- exactly --

14 QUESTION: Well, don't you know the fact?

15 MR. KNEEDLER: I don't know any more than is
16 in the record in this case and --

17 QUESTION: Well, do you know that the
18 Department of Interior thought that the states were
19 allowed to do that for 40 years?

20 MR. KNEEDLER: Well, they did. There was a --

21 QUESTION: Did they or didn't they?

22 MR. KNEEDLER: There was a Solicitor's opinion
23 in 1956 which is the -- which is the earliest --

24 QUESTION: Well, reading the 1977 opinion, I
25 -- I would -- that certainly acknowledged that the

1 Interior Department had a different view before that.

2 MR. KNEEDLER: In 1956. But as I mentioned,
3 the earliest --

4 QUESTION: Well, continuously since 1938.

5 MR. KNEEDLER: Well, but from 1938 there's no
6 indication that the Interior Department focused on the
7 question at all. In fact, as I mentioned, the most
8 contemporaneous construction of the statute is Professor
9 Cohen's in 1942 saying that the 1938 Act superseded --

10 QUESTION: Well, he's not a -- he's not
11 charged with the administration of the statute, is he?

12 MR. KNEEDLER: Well, no, but he was intimately
13 involved -- I mean not in a formal sense, but he's
14 generally recognized as being intimately involved in a
15 manner in which --

16 QUESTION: Well, I suppose if we -- I suppose
17 we could take judicial notice as to whether -- whether
18 states were collecting taxes like this in the interim.
19 I don't suppose it'd be very hard to find out --

20 MR. KNEEDLER: Well, it doesn't --

21 QUESTION: Do you know what the fact is or not?

22 MR. KNEEDLER: I do not, but what I do know is
23 from what the record shows, there were only two states
24 that appear to have done it. And we have no indication
25 that this is -- that this is not --

1 QUESTION: Well, only two. Well, what about
2 -- what about the two? Were they collecting all these
3 years or not?

4 MR. KNEEDLER: Montana appears to have been
5 collecting it all these years.

6 QUESTION: Well, that's all I asked you really.

7 MR. KNEEDLER: And -- well, I'm sorry. And
8 New Mexico was -- was -- was also collecting, was also
9 collecting.

10 QUESTION: Isn't it also --

11 QUESTION: So you do know that there are two
12 states --

13 MR. KNEEDLER: Yes. I'm sorry. I thought --
14 I thought you meant was there a general pattern. No.
15 The record certainly shows that Montana and New Mexico
16 were. But it's also --

17 QUESTION: Isn't it also true that the
18 Secretary of the Interior approved all these leases?

19 MR. KNEEDLER: Yes. But the leases themselves
20 did not, to my knowledge --

21 QUESTION: They didn't know how the money --
22 they didn't know how the tax burden was going to be --

23 MR. KNEEDLER: The leases themselves do not
24 reflect the taxing, to my knowledge.

25 I wanted to mention one other thing about the

1 Indian Reorganization Act, and that is that the taxing
2 authority here was part and parcel of the allotment
3 policy, because the tax applied here to lands,
4 unallotted lands that were expected to find their way
5 into the full jurisdiction and taxing authority of the
6 states when they passed into non-Indian hands. And the
7 1934 Act abandoned the allotment policy.

8 QUESTION: Are the views of Department of
9 Interior binding on us, or are they merely straws in the
10 wind?

11 MR. KNEEDLER: Well, they are not -- they are
12 not binding, but this Court has indicated that the --
13 that the persuasive force of the views of an
14 administrative department depends on the factors or
15 various factors, including whether it was
16 contemporaneous. Here it wasn't. The thoroughness with
17 which it was considered. Here there's just a paragraph
18 and a half in the 1956 opinion on the subject.

19 So all of the factors that this Court said and
20 identified in Skidmore and General Electric v. Gilbert
21 point against deferring to the administrative
22 interpretation.

23 CHIEF JUSTICE BURGER: Very well.

24 Ms. Boggs.

25 ORAL ARGUMENT OF DEIRDRE BOGGS, ESQ.,

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ON BEHALF OF THE PETITIONERS -- REBUTTAL

MS. BOGGS: Thank you, Your Honor.

Your Honor, we would agree with Mr. Kneedler that the 1942 edition of Cohen should be looked at here. And Mr. Kneedler cites us to Cohen for the proposition that the '38 Act superseded the '24 Act and that that supersession does away with the tax authority.

Mr. Cohen on another page that none of us have cited in our briefs, page 257, talks about --

QUESTION: 257 of what?

MS. BOGGS: Of his 1942 edition of "Federal Indian Law" -- excuse me -- talks about the authority of states to tax. This was after 1938 that he put out this edition. And there in that section he refers to the 1924 Act as the example of states' authority to tax as granted by Congress.

It's clear that in the earlier page that Mr. Kneedler refers to that Felix Cohen is referring to the leasing provisions, not the taxation provision, in the 1924 Act.

The tribe insists that this is a case involving statutory construction, and it is. And the tribe went through the fact that the '38 Act incorporates and carries forward all parts of the '24 Act except the taxation authority. The reason for this

1 is that Congress had very specific defects in mind with
2 the Indian mineral leasing that it set forth to cure;
3 and it has told us what those defects are.

4 One is that on some reservations no leasing
5 was permitted. A major defect is that in many cases
6 where leasing was permitted -- for example, in the 1919
7 Act -- the tribe had absolutely nothing to say about
8 whether or not there would be leases. They didn't have
9 a thing to say about it. Another defect was that in
10 many cases there could not be long-term leases, which,
11 of course, prohibited production. And, in general, the
12 defects inherent in the 1919 Act for metals where the
13 public land laws applied to minerals -- mineral leasing
14 on Indian reservations were seen as things that needed
15 to be cured. They do not see taxation as a problem that
16 needs to be cured.

17 The replacement theory I think doesn't work,
18 can't work in this case where you have a repealer that
19 repeals only things inconsistent with the act stated,
20 especially when we have Congress telling us what they're
21 doing with the '38 Act. And what they're doing is
22 taking care of specific defects which do not include
23 taxation.

24 I'd just like to quickly say one other thing.
25 I wasn't clear on whether Mr. Kneedler indicated whether

1 or not the U.S. knew or didn't know about the taxation
2 in the state of Montana. Part of the evidence submitted
3 to the district court by the tribe included sheets where
4 the U.S. Geological Survey specifically credited to the
5 tribal royalty the amount of taxes paid by the
6 producers. There are sheets and sheets of this where
7 the United States has given credit to the producers on
8 the royalty payments.

9 And the other thing that again was in the
10 district court record -- it's not part of the printed
11 record here; it's attached to briefs in the district
12 court -- is a letter, 1978, from the Geological Survey,
13 again to the producers, indicating that this past policy
14 of crediting to the royalty payments the taxes or some
15 of the taxes that they paid will no longer happen,
16 indicating again that the practice had been to do that
17 pretty consistently.

18 Thank you.

19 CHIEF JUSTICE BURGER: Thank you, counsel.

20 The case is submitted.

21 We'll hear arguments next in National Railroad
22 Passenger Corporation.

23 (Whereupon, at 1:55 p.m., the case in the
24 above-entitled matter was submitted.)

CERTIFICATION

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

#83-2161 - MONTANA, ET AL., Petitioners v. BLACKFEET TRIBE OF INDIANS

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BY Paul A. Richardson

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