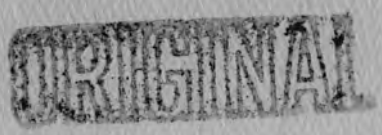
OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES



DKT/CASE NO. 83-2161

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

PLACE Washington, D. C.

DATE April 23, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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MONTANA, ET AL.,

Petitioners

v. : No. 83-2161

BLACKFEET TRIBE OF INDIANS

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Washington, D.C.

Tuesday, April 23, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.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 Respondents.

EDWIN SMILEY KNEEDLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae.

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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: Ms. Boggs, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF MS. DEIRDRE BOGGS, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. BOGGS: Thank you, Mr. Chief Justice. If it please the Court:

In 1924 Congress passed an Indian Mineral Leasing Act providing for longterm leasing of oil and gas on unallotted treaty reservations. In that same act Congress provided and authorized for state taxation, including on the royalty interest, for all minerals that were produced on these lands.

In 1938 Congress passed another Indian Mineral Leasing Act to cover additional Indian lands, again providing for longterm leaning on unallotted reservation lands.

The question presented in this case is whether or not the express taxation authority that was granted in the 1924 Indian Mineral Leasing Act was somehow eradicated by the enactment of the 1938 Act.

The Ninth Circuit Court of Appeals held that that taxation authority had been eliminated by virtue of the 1938 Act and by what appears to have been a sort of overlay of congressional policy as expressed in the

Indian Reorganization Act. This case is here on a writ of certiorari to the Ninth Circuit Court of Appeals.

In order to answer the question of whether or not the express taxation authority of the 1924 Act has been eliminated it's necessary, I think, to look at four different things.

The first is the administrative understanding and practice over the years as it applied to the taxation authority, including after the enactment of the '38 Act; and with that contemporaneous commentary and understanding by commentators in this area, the second thing that needs to be looked at is the language of the statutes themselves; and then the legislative history of the enactments needs to be looked at; and finally, standard canons of statutory construction need to be applied to the view of these statutes.

I mentioned the administrative understanding and contemporaneous commentary first because that seems to be the most compelling thing to look at here. There were years and years of administrative understanding and policy and participation by the United States that both recognized and facilitated the collection of the state taxes in issue here.

Prior to the 1977 Solicitor's opinion that said that the taxation was not authorized, there had

only been one time when the United States had opined previously that the state taxes could not be levied on the production on the Blackfeet Reservation. This was prior to the 1938 Act, in 1935 when Commissioner Collier wrote a letter to the attorney for the British-American Oil Company saying that the oil production on the Blackfeet reservation was governed by the Act of 1919, specifically Section 10, and that the 1924 Act did not apply, so that there was no taxation permitted since the 1919 Act did not provide for taxes on the royalty.

That opinion by Commissioner Collier seems, from reading the petition for cert in the British-American case, to have been part of the impetus for the British-American case. After this Court's opinion in the British-American case in 1936, the U.S. appears from the record to have consistently understood and expressed and again facilitated the collection, and the fact that the state taxes could be collected for the production of oil and gas on the Blackfeet Reservation.

Two things in the record in this case that indicate the United States has facilitated and participated in this collection are the audit reports that are part of the record and the 1978 letter from the U.S.G.S. to the oil producers telling them that no longer will the taxes that they pay or any part of the

taxes that they pay be credited to their royalty payments to the Indian tribes.

The Blackfeet Tribe itself --

QUESTION: What did you say the date of that letter was?

MS. BOGGS: The Collier letter?

QUESTION: No. Was it a more recent letter you were just referring to?

MS. BOGGS: Yes. In 1978 the U.S.G.S. wrote a letter to all of the producers in Montana saying that the former practice of crediting the taxes to the royalty payments would be discontinue.

QUESTION: Who wrote the letter?

MS. BOGGS: I forget the name of the person.

QUESTION: But it's the U.S.G.S.?

MS. BOGGS: Yes.

QUESTION: Thank you. And it is part of the record.

It's not clear in this case, to me at least what the United States' position is on this ongoing, longterm practice and understanding of the authority of the state to tax is. In another case presented this term, the U.S. argued very vigorously that 35 years of agency practice in an area was to be given deference. That's in the Santa Ana-Pueblo case. And as I said,

it's not as clear what their position is on the ongoing practice of authorizing the state taxes in this case is.

The contemporaneous practice in this case appears to be especially significant since in the 1924 Act no regulations were required or enacted relating to the authority of the state to tax. There were regulations drafted about the leasing, the longterm leasing that was authorized under the '24 Act. And so the practice and the opinion of the United States, absent any regulation, seems to take on more significance than it would were there regulations drafted for the taxation authority.

In addition to this administrative practice I think it's significant that the contemporaneous commentary supported the or recognized the authority of the state to tax, including after 1938.

Commissioner Collier in 1941 in a report looked back at some of the reasons for his view that the I.R.A. policies had failed, and in looking at those what he viewed as failures, he did not attribute any of the failures to taxes, even though it had been his view before that the taxes didn't apply. I think that that's relevant. He looked at other things as causes for the failure, mainly the fact that Congress didn't authorize enough money to implement the I.R.A. policies.

Felix Cohen, who was present at most of the I.R.A. hearings and who is recognized by the United States, and I think most people who deal with Indian law, as being a primary authority on Indian law, in 1942 in his book on Indian law recognized the taxation authority granted in the 1924 Act as the prime example of Congress authorizing state taxation. He did this even though in another section of this 1924 addition he talked about the 1938 Act superseding the provisions of earlier Indian Mineral Leasing Acts. It is clear by his recognition of the tax provision that in his view the thing that was superseded was the leasing part of the '24 Act, as well as the other earlier acts.

And in discussing what the 1938 Act does, Felix Cohen refers to the Senate reports that go through the problems that Congress was trying to deal with in drafting the '38 Act. It was a remedial act where Congress itemized the problems that they saw that needed remedy, and none of those problems dealt in any way with taxation.

The language of the statutes themselves have always been viewed as the starting point for the Court's analysis of what a statute means. Here I think that nobody questions the clarity of the taxation authority that's in the 1924 Act. In the case of British-American

in 1936 this Court defined the lands that were covered by the Act as being lands that were treaty reservation lands that were unallotted. They made it clear that those lands were subject to the taxes, despite the fact that the Act of 1919 appeared to deal with mining on the Blackfeet Reservation.

The language of the 1938 Act makes it clear that there are very specific things that Congress set forth to do, and it itemized, Congress itemized what those things were. And none of the things that they set forth to do in the 1938 Act dealt with taxation. There was no effort at all to change or alter or modify, repeal or replace the taxation authority. And I think this was made additionally clear by the Section 7 repealer in the 1938 Act which repeals all acts or parts of acts that are inconsistent with the '38 Act. It does not repeal provisions that are not inconsistent with that Act.

The legislative history of the statutes indicate that there was no intent to repeal the tax authority, or to replace it, or to get rid of it, however it might be eradicated.

Congress set forth in the 1938 Act to deal with specific problems, and in two Senate reports that we have produced in the Appendix Congress sets forth

what those problems were. One problem was that on some Indian reservations no leasing was allowed. Another was that in some reservations there was no longterm leasing allowed, which essentially prohibited lease and mineral development. And another problem was that in many situations Indian tribes had absolutely nothing to say about whether or not or under what conditions their lands would be leased. And another problem and probably the main problem dealt with by the Congress was that especially for the -- well, only for the metalliferous minerals, the public land laws applied to mining on the reservations, so that there were too many encumberances and burdens that prohibited development of these metals on Indian lands.

In reciting these problems again in specific detail, Congress did not mention taxation as a problem that it sought to cure in the 1938 Act.

One of the -- or the main purpose of the '38 Act was to help encourage economic development through mineral development on Indian reservations. We don't dispute that. That also was a purpose of the 1924 Act. There is nothing in any of the legislative history for any of these acts, nor is there anything in the legislative history of the Indian Reorganization Act that gives a hint that Congress saw taxation by the

state of this mineral production to interfere with that development. That was not something that they wanted to eradicate in order to encourage this development.

One other thing I think that's important in looking at the legislative history of the statutes is in the I.R.A. itself. In a predecessor bill to the I.R.A. there were broad tax immunities written in. Those broad tax immunities were later eliminated in the final I.R.A., and the tax immunity that exists in the I.R.A. exists in Section 465.

In the case of Mescalero v. Jones, this Court held that the elimination of the broad tax immuninities in the predecessor bill indicates that there were no broad tax immunities granted by the Indian Reorganization Act. And again, the Ninth Circuit seemed to indicate in its opinion that the I.R.A. somehow by itself or certainly as an overlay over the 1938 Act got rid of taxation that might have previously existed, even if it was granted by Congress. There's no indication in the I.R.A. history that that was true.

The other thing that I think is important in the I.R.A. legislative history is that again in a predecessor bill, Indian tribes were granted broader authority to mine; they were granted actual authority to mine, and that provision was eliminated in the I.R.A. as

it was written.

Finally, in looking at this case and determining whether or not the tax authorization of the '24 Act has been done away with, I think it's important to look at as guides standard canons of statutory construction, especially in relation to the Section 7 repealer in the 1938 Act. Again, that repealer repealed acts or parts of acts inconsistent with the Act, and under all of the case authority that we can find, that indicates that some things remained. Those things that are not inconsistent remained.

The case authority that we've cited is old case authority, but nothing seems to have interfered with it. Those are the Henderson and the Hess cases. Sutherland also says in his book on statutory construction that when you have a repealer like this, it means that something remains; all things are not wiped out.

The only authority that the tribe cites for its proposition that the Section 7 repealer would not leave intact the tax provision is Andrus v. Glover, which as we develop in your reply brief to this Court, the yellow brief, does not stand for the proposition at all that that sort of repealer would wipe out the specific tax provision that was granted in the '24 Act.

One case that we didn't cite to this Court, although we cited in the Ninth Circuit, was Watt v. Alaska, a 1981 case in this Court, where in footnote 13 this Court opined that it would be almost conceivable that Congress would change in that case a specific longstanding formula for distributing funds without comment. I think that it's equally inconceivable in this case that Congress would change without comment a specific longstanding tax authorization which up until 1977 had not been questioned.

The Ninth Circuit avoided using the statutory construction canons for repeals which would insist that the intent to repeal a specific provision must be clear by saying that the earlier statute was replaced. I think that when you have a specific provision in an earlier statute and then you have a later, general statute that repeals only provisions inconsistent with it, that you cannot avoid looking at whether or not there was a repeal unless you avoid looking at Section 7.

I would like just very briefly to talk about a very recent case decided by this Court as it might apply to our case. That's the Kerr-McGee case that was decided in the last couple of weeks. It's not a case that's particularly on point, but I think it's somewhat relevant that in that case the Court seemed to reason

that the 1938 Act, the Indian Mineral Leasing Act, by not requiring or having any regulations that would demand Secretarial approval of tribal ordinances on taxation seems to mean that there is no requirement for that; that is, things that were not written into the 1938 Act might not be there. And also this Court said that Section 16 of the I.R.A. did not say that tribal tax ordinances had to be approved by the Secretary, and that therefore they didn't have to be approved by the Secretary.

I'd like to reserve the remaining time.

CHIEF JUSTICE BURGER: Very well.

Ms. Whiteing.

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

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

We agree with Montana on those things that this Court must look to in deciding this case. However, we disagree perhaps on the appropriate canons of construction that may be applied. And I will address each one of the points that Montana has addressed.

Initially, however, I would like to clarify what is and what is not in the record concerning payment of taxes in 1938 Act leases. This has been a point of

confusion, and I think Montana's argument today adds to that confusion.

What is in the record shows some taxes were paid on some 1938 Act leases between the years 1955 and 1977. The record is silent on whether any taxes were paid on 1938 Act leases before that time.

The tribe has been involved in this case for many years, and we have diligently looked for any evidence to show that taxes have been paid on 1938 Act leases before that time. In fact, it has been as much in the tribe's interest to find that evidence for refund purposes as it is in the state's interest.

What we have found is in the record, and what that is is an audit report which is an audit of the records of the U.S. Geological Survey which shows that some taxes were paid on 1938 Act leases between the years mentioned, 1955 and 1977. This audit examined both 1891 and 1938 Act leases from the period of inception of the leases to the date of the audit, 1977.

In addition in the record there is a 1954 administrative opinion which sheds some light on this question. It shows that prior to that time royalty payments to the Blackfeet Tribe were made directly to the tribe under provisions of Blackfeet leases, and that because there were direct payments to the tribe, the

state looked to the tribe for payment of taxes. It did not look to Interior, and Interior was neither paying nor facilitating payment of those taxes.

Because the state looked to the tribe for payment and because, as that opinion indicates, the tribe in fact was not paying those taxes, the producers were being billed for the taxes, and that was the reason that the matter was brought to the attention of the Associate Solicitor. And the Associate Solicitor as a result approved a procedure of payment whereby producers would pay the taxes and deduct them from royalty payments made to the tribe. This coincides almost precisely with the records of the U.S. Geological Survey that records taxes being paid from 1955 to 1977.

To just recapitulate what the situation is, the record shows taxes paid on '38 Act leases between 1955 and 1977. Nothing in the record shows that any taxes have been paid on '38 Act leases prior to that time. And perhapes one thing that is not in the record is the 1978 Interior memorandum filed with this Court by the amicus tribes which shows that as of that date, the only state attempting to tax royalty interest was the state of Montana, and prior to that time only Montana and New Mexico were taxing or attempting to tax royalty interests.

Montana's argument ultimately rests on the idea that the 1924 tax consent is a free-floating provision that applies any time tribal lands are leased for mining purposes. We think that that tax provision applies only to lands subject to lease under the 1891 Act.

Under our view, the 1938 Act is the proper act to focus our attention. Our view of that act is that it is a separate and independent comprehensive leasing authority which prospectively replaces all prior leasing laws. It does not consent to state taxation, and nothing in the Act carries forward the 1924 tax provision. The '38 Act is meant to be the sole authority for future leasing purposes, and in fact, it specifically says in Section 1 that hereafter -- that is, after May 11, 1938 -- leases on tribal lands are to be made under the '38 Act.

The legislative history makes clear that prior laws were considered inadequate for leasing purposes and that the '38 Act was a more satisfactory law for that purpose.

Significantly, all of the terms and conditions of the 1891 and the 1924 Act are addressed in the 1938 Act, but Congress specifically did not mention anything about taxation. They specifically did not include that

term and condition in the 1938 Act. And administratively, leases since 1938 have been made only under the 1938 Act and not under any prior laws, and regulations have also been promulgated only under the 1938 Act.

QUESTION: May I interrupt with just one question? I think you said that Section 1 of the '38 Act expressly says the leases shall be pursuant to this Act, or something like that?

MS. WHITEING: Hereafter that --

QUESTION: The word "hereafter" I find, but that is the word on which you rely for saying it has to be pursuant to that Act?

MS. WHITEING: That after 1938 it must be pursuant to that Act, that's correct.

QUESTION: Of course, there's a slight change in the form of the lease. One of them was by the Secretary with the consent of the tribe, and under the other statute it was by the tribe with the consent of the Secretary. I guess that's --

MS. WHITEING: I think that that is one of the problems that the 1938 Act was meant to correct; that the purpose -- one of the purposes of the Act was to give Indians greater control over their lands, and therefore, the '38 Act makes the tribe the primary

authority for the granting or the entering into leases with the approval of the Secretary rather than the other way around.

QUESTION: Does it really make much difference as long as they both must agree in either event, both the Secretary and the tribe? Isn't that just --

MS. WHITEING: It doesn't make any difference for present purposes, but it may make a difference in terms of bargaining on the lease.

Montana doesn't rely on the 1938 Act or even look to the 1938 Act for its affirmative argument. It focuses almost entirely on the '24 Act and argues that it's a free-floating provision that attaches to any mining lease on tribal lands. Montana tries to bolster this argument by saying that the 1924 Act is a separate and independent law. But this Court in the British-American decision has already said that the 1891 and 1924 Acts are one leasing scheme. The 1924 Act amends the 1891 Act to extend the term of leases, and it also authorizes amendment of 1891 Act leases to extend their terms likewise.

The tax proviso in the '24 Act authorizes taxation of production on such lands. "Such lands" refers to the main part of the '24 Act, and there "such lands" are defined as unallotted lands on Indian

reservations subject to lease for mining purposes under the 1891 Act. Only lands to which -- these are the only lands to which the tax consent applies. And as a proviso, which the 1924 Act is, it can only apply to the statute to which it is attached.

The lands involved in the leases here are not subject to lease under the 1891 Act because the 1938 Act completely replaced it for future leasing purposes, and no leases in fact have been made under the 1891 Act or any prior act since that time.

The 1938 Act was passed at a time when congressional policy favored Indian self-determination and fostered economic revitalization of tribal governments. This policy or these policies are embodied in the 1934 Indian Reorganization Act. The 1938 Act specifically refers to the I.R.A. in its terms, and the legislative history of the '38 Act indicates that one of the stated purposes of the Act was to bring leasing into harmony with the I.R.A.

Part of the I.R.A. policy was to ensure that Indians received the greatest economic benefit from the lands. Congress clearly had this in mind when it enacted the 1938 Act. And only last week in this Court's decision in Kerr-McGee v. Navajo Tribe the Court said that the basic purpose of the 1938 Act was to

maximize tribal revenues from reservation lands.

There is probably nothing more diametrically opposed to this basic purpose than handing over a percentage of the tribe's revenues to the state. This would be the result if the '24 Act was interpreted as a free-floating provision applying to 1938 Act leases. In this case, 18 percent of the tribe's revenues from oil production would go to the state. On the other hand, the tribe's royalty is only 12 1/2 percent; thus, the state's taxes would generate 1 1/2 times the income to the state than the tribe's royalty generates to the tribe.

In the case of coal production, 30 percent of the tribes's royalty interest would go to the state. In this case not only would the tribe's revenues be reduced, but the tribe's development would likely be limited or in fact prohibited by such a tax.

Given the policies of the I.R.A. of self-determination in economic revitalization, and the purposes and history of the '38 Act to maximize tribal revenues and to harmonize with the I.R.A., it's simply inconceivable that Congress would authorize handing over a good portion of the tribe's revenue to the state without any word in the Act on this subject at all.

On the other hand, given these policies and

purposes, we think that Congress' silence in the 1938 Act must be construed as a deliberate silence, because they did not intend these leases to be taxable. Thus, if silence --

QUESTION: Ms. Whiteing, would you tell me again what states were taxing royalties at the time of the passage of the '38 Act?

MS. WHITEING: There's nothing in the record and I don't know for a fact what states were taxing at the time the '38 Act was passed. What is in the record or what was filed by some of the amicus tribes with this Court is a 1978 letter which indicates that as of that date Montana was the only tribe -- only state taxing royalty interests and that before that New Mexico --

QUESTION: Were there any state tax laws on the books as of 1938 that would reflect the policy of subjecting to tax these royalties of tribes?

MS. WHITEING: There were or was at least one tax law on the books in Montana, but I don't believe that this would reflect a policy of taxing. And, in fact, we believe that one of the reasons why this question did not come before Interior immediately, and it apparently took some 40 years to do so, was because there wasn't a lot of taxation going on. There weren't as many taxes involved, and the taxes were much less

substantial. And in addition, there was much less production, so that basically Interior never focused on this.

QUESTION: Was there any production of oil or gas in Montana as of 1938?

MS. WHITEING: Well, there was --

QUESTION: By the tribes?

MS. WHITEING: -- there was some production. That obviously was the question in the British-American case. There was production under 1891 Act leases, and the tax on that production was in fact challenged in the British-American case. But even then it took some almost ten years for that issue to appear after passage of the 1924 Act.

If Congress' silence on this issue is considered in any way ambiguous as to whether 1938 Act leases are taxable, then the statute must be construed in favor of the tribe. There is probably no more appropriate case for the rule of construction of ambiguous statutes than this one.

The state does not have an overriding interest in this case. In fact, it has really no interest in the tribe's income. We are, however, dealing with a case in which the tribe's interest is overwhelming. Their interest in these revenues for support of the tribal

government and for provisions of services to members is very great.

On a spectrum of cases to which the rule of ambiguous statutes applies this case is all the way on the extreme end as the most appropriate case for application of the rule on ambiguous statutes.

Our position in this case essentially rests on several factors. It rests on the language of the '24 Act, which applies only to lands leased under the 1891 Act. It rests on the intent of Congress to replace prior leasing laws with the 1938 Act. And it rests on the purposes and history of the '38 Act to maximize tribal revenues, to bring uniformity to the area of mineral leasing, and to bring that leasing into harmony with the I.R.A.

It also rests on the tradition of nontaxation of tribal property, and in this regard Montana simply turns Mescalero Apache Tribe v. Jones on its head. That case in fact stands for the proposition that Indian land is not taxable unless Congress expressly says so. Only where personal property not attached to the land is involved and only where that property is located outside the reservation was state taxation approved in the Mescalero case.

Finally, we rely on the rule of construction

of ambiguous statues if in fact any ambiguity exists here.

All of these factors together support the tribe's position that these leases are simply not taxable by the state of Montana.

CHIEF JUSTICE BURGER: Mr. Kneedler.

ORAL ARGUMENT OF EDWIN SMILEY KNEEDLER, ESQ.,

AS AMICUS CURIAE

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

I would like to begin by responding to Ms. Boggs' discussion of what the position of the United States is with respect to the administrative interpretation of the statute.

The first thing I would like to point out is that the first administrative opinion by the Interior Department on the question of whether the 1924 Act taxing authority applies to 1938 Act leases was in 1956 in an informal opinion that is contained in the appendix to the certiorari petition here.

Now, this Court has said with respect to such administrative constructions that a variety of factors must be taken into account in determining the weight to be given such an interpretation. The first is, or one of the first is whether it's a contemporaneous

construction.

Well, here it obviously was not. It was construction 18 years after the 1938 Act was passed. This distinguishes this case significantly from the Pueblo-Santa Ana case in which the petitioner refers to our submission. There, the administrative interpretation involved was from the very outset of the implementation of that statute. What is more, in the Pueblo-Santa Ana case, that particular construction was brought to the attention of Congress. And third, the construction there required affirmative approval, formal approval of the particular transactions involved. So it would repeatedly have been brought to the attention of the Interior Department in those early years. We do not have those situations here.

QUESTION: Except, Mr. Kneedler, in the '24 Act the proviso does state that the Secretary of the Interior was authorized and directed to cause the taxes to be paid; so he's presumably had responsibility in connection with the payment of taxes.

MR. KNEEDLER: Well, it says cause to be paid, and there's another opinion in the record in 1954 in which the Solicitor concluded that that obligation could be met, for example, by having the producer pay the tax and then deduct it from the royalty to be paid to the

tribe. The Act was not construed to require the Secretary to actually pay it.

And as Ms. Whiteing pointed out, it appears that for the Blackfeet, the royalty payments were paid directly to the Tribe, at least for some period prior to the early '50s, so that there would not have been an occasion for the Interior Department under that regime to be involved in the particular decision whether to pay the tax or not.

The other factors that this Court has identified in Skidmore, for example, in determining the weight to be given an administrative interpretation are the thoroughness evident in its consideration. Well, here, the whole question of the application of the tax to the '38 Act leases received about a page and a half or paragraph and a half of attention without any consideration of the purposes and background of the '38 Act and how it interacted with the '24 Act.

The validity of its reasoning is another factor to be taken into account, and as our submissions in this case show, the administrative interpretation was quite incorrect. I think it may also be worth noting that that administrative interpretation in the mid-'50s was at the peak of the termination era when again Congress was focusing on the possibility that Indian

tribes would become subject to state jurisdiction.

The last is consistency with earlier and later pronouncements, and here the thrust of this '56 opinion is obviously inconsistent with the Solicitor's more thorough consideration of the matter in 1977, and also is inconsistent with Mr. Cohen's characterization of the Act in 1942 as a comprehensive leasing statute that superseded prior leasing laws.

Ms. Boggs also referred to two prior documents which she says reflects an administrative interpretation. The first was a report by Commissioner Collier which she concedes does not even mention taxation. I don't see how a report that doesn't mention taxation can be read to reflect an understanding that such taxation applied. I don't think the Court can look for the dog that did not bark in that fashion.

The other is the Cohen 1942 treatise on Indian law. There, as I mentioned, Mr. Cohen twice refers, at pages 87 and 328, to the 1938 Act as a comprehensive statute that supersedes prior acts.

QUESTION: Has he taken a different position in his '82 edition?

MR. KNEEDLER: No. That positon with respect to superseding prior leasing has been consistent throughout.

With respect to taxation, at page 257 the Cohen treatise discusses the proposition that in order for a state to tax tribal property on a reservation there must be express congressional authorization. Then he cites as an example the 1924 Act. He doesn't say it's the prime example. He doesn't say that the '24 Act applies to 1938 Act leases. And in fact, as I pointed out, he had previously said the '38 Act superseded the '24 Act.

The last --

QUESTION: You feel that you're looking a little bit for the dog that didn't bark?

MR. KNEEDLER: Well, I'm saying that it's not an interpretation of the '38 Act that supports -- it was being relied upon as affirmatively supporting the proposition, which in my view it does not.

And the last point I wanted to make about it is what Mr. Cohen says is, "Thus, the act of May 29th, 1924 provided that," using the past tense, again suggesting that while it's an example of an express authorization --

QUESTION: What was his rationale for concluding that the '38 Act completely replaced or in effect repealed the '24 Act?

MR. KNEEDLER: He doesn't go on at great

length. He describes the background of the Act.

QUESTION: Well, what's your rationale?

MR. KNEEDLER: It seems --

QUESTION: What's your rationale, then?

MR. KNEEDLER: It seems self-evident, frankly, from the face of the Act because it specifically addresses all the aspects of issuing leases: the terms of the leases, the public auction requirement, the questions of approval, the authority for the Secretary to issue lease regulations governing them. It's a comprehensive statute, and immediately after the '38 Act was passed, the regulations implementing the 1938 Act characterized the new regulations as superseding prior laws. And I don't take the state to be contesting that.

QUESTION: Well, to the extent that it had terms specifying what should be in the lease or how it's to be done, that would certainly be true. But that doesn't necessarily mean that the Congress intended to do away with the consent to tax, does it?

MR. KNEEDLER: No, but it is -- it does seem strange that Congress picked -- addressed everything else that was addressed by prior leasing laws, and in fact patterned the '38 Act after the '24 Act and omitted significantly the tax --

QUESTION: Well, that depends on your view

what looks strange.

MR. KNEEDLER: Well, one --

QUESTION: -- to repeal an item about state taxation, you might have thought they would have said so.

MR. KNEEDLER: Well, one thing I'd like to point out in this regard, on page 3 of the Petitioners' appendix in the case the state reproduces the 1935 version of this act that was passed by the Senate, as is noted on page 3. The equivalent repeal provision there says that "Section 26 of the act of June 30th, 1919 and any other acts inconsistent herewith are hereby repealed."

Section 26 of the 1919 Act is the entire leasing provision, including the taxing proviso. So it's clear from this provision that the taxing proviso in the 1919 Act would have been repealed.

Significantly, moreover, on the date that this was passed, Senator Hayden from Arizona observed that the bill as passed would repeal the 1919 Act, of which he was the sponsor. He raised no objection to that, and in fact on the previous debates on that very bill, the sponsor of the bill said that the Senators from states that had reservations, unlike Oklahoma where he was from, supported this taxing measure -- this repeal measure.

So here we have a situation when in fact the very bill that the Senate was passing would have expressly repealed the provision that contained the taxing provisc. And this is consistent with the fact that this Act was being passed after the Indian Reorganization Act, which was not a new development, as the state tries to argue, but in fact was a Reorganization Act restoring tribes to what they had been before, and therefore restoring tribes to --

QUESTION: Mr. Kneedler, could I interrupt? Are you referring to Section 2 of the --

MR. KNEEDLER: Yes.

QUESTION: It says, "Section 26 of the act of June 30, 1919" -- well, that's not the one -- "as amended by the act of March 3, 1921 and December 16, 1926."

MR. KNEEDLER: No. The -- but what I'm referring to is the 1919 Act was one of a number of prior leasing acts contained --

QUESTION: Yes, but it omits "as amended by the 1924 Act."

MR. KNEEDLER: The '24 Act was not an amendment to the 1919 Act. The '24 Act was an amendment to the 1891 Act which dealt with leases on treaty reservations.

QUESTION: In other words, that '24 Act, then, was not expressly mentioned there.

MR. KNEEDLER: Well, it was included within "any other acts inconsistent herewith."

QUESTION: Well, but in precisely the same way it was included in Section 7 of the final bill, which says, "All acts or parts of acts inconsistent herewith are hereby repealed."

MR. KNEEDLER: Yes, but the point I'm making is that both are repealer clauses, and there's no indication they were intended to have a different effect.

QUESTION: But neither of them specifically mention the '24 Act.

QUESTION: And there certainly is nothing on its face inconsistent with the consent to tax in the '24 Act and anything in the '38 Act except your argument that they intended to occupy the field completely.

MR. KNEEDLER: Well, but it's also inconsistent with Congress' express provision that it wanted to conform the leasing to the provisions of the Indian Reorganization Act, which rehabilitated tribes as sovereigns which states could not be expected to tax. And unlike in Oklahoma, it --

QUESTION: Well, that's an argument that doesn't rest on this repealer clause.

MR. KNEEDLER: Well, it does because -- because to the extent it speaks of acts being inconsistent with the 1938 Act, it would be inconsistent to apply the tax to that sort of reservation.

QUESTION: Would you restate for me what your argument was that you predicated on Section 2 of the '35 bill enacted by the Senate? What was the argument you made based on that?

MR. KNEEDLER: Yes, if I can just take a moment, this Act was intended -- the '35 bill, which is the predecessor of the 1938 Act, was intended to replace all prior Indian leasing statutes except as to reservations that were explicitly exempted.

Now, one of the prior leasing acts that is mentioned here is the act of -- Section 26 of the Act of 1919, which contains an express taxing authorization, and only of the lessee's interest.

QUESTION: I see. But it's not the taxing authorization that's at issue in this case.

MR. KNEEDLER: But the argument that the state is presenting here applies to any pre-existing taxing authorization. And the point I was making is that if Senator Hayden and the others who had Indian reservations affected by this statute were not objecting to the repeal of the state taxing authorization in this

particular statute, then it --

CHIEF JUSTICE BURGER: Your time has expired now, counselor.

Do you have anything further?

ORAL ARGUMENT OF MS. DEIRDRE BOGGS, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MS. BOGGS: I think that the main difference in the position of the tribe and the state is how you focus on the 1938 Act. The tribe insists that this Court focus on that act as a separate, independent new-blown act of Congress that bears no relation to anything previously, and that therefore, the silence on the issue of taxation has a different significance than we would give it.

In fact, the '38 Act was a remedial act to deal with specific itemized defects in the leasing laws as they affected Indian tribes and Indian lands. It was not an act to deal with problems of taxation. It left intact provisions of earlier acts that were not inconsistent with the '38 Act. There is nothing to indicate that Congress saw taxation as being inconsistent with what it sought to do with the leasing provisions in 1938.

I don't think that the '38 Act can be looked at as a new-blown, unattached statute that bears no

relation to earlier mineral leasing statutes.

QUESTION: Ms. Boggs, may I ask for you to reply to the last argument that Mr. Kneedler made? He quotes -- is it correct that Section 26 of the Act of June 30, 1919 and the other specific provisions were specifically tax exemption provisions or taxing authority provisions?

MS. BOGGS: Not entirely. The Section 26 is the provision of the 1919 Act that allowed for mining of metalliferous minerals under the public land laws of the United States, and it included tax authority not for royalty interest but for the lessee's interest.

This was written at a time when the federal instrumentality doctrine was barring taxation of the lessee's interests.

QUESTION: What's your response to his point that if they did -- maybe they missed this other taxing statute; that if they're willing to repeal a specific taxing authority that presumably they intended to repeal them all?

MS. BOGGS: None of us have developed this in the brief.

QUESTION: I know, but sometimes it happens --

MS. BOGGS: It's real interesting. I guess my thought on that is that the tax exemption for lessee's

interest was written in to counter what had been developing as this Court's position that there was a federal instrumentality doctrine that barred that sort of taxation. That doctrine fell by the wayside. And again, as you said, the place that that's been developed, that's been referred to in any of the briefs are in those 1938 hearings -- I forget the Senate number -- there Congress goes through the federal instrumentality doctrine and what the Congress had done to deal with this Court's development of that doctrine. So I think that that's -- I think that later on there would not have been a court holding that those taxes would have been barred in any event.

At any rate, what they're talking about here is that metalliferous mineral provision in the 1919 Act that applied the public land laws to the mining of those metals, which Congress saw as being an incredible encumberance to development on the Indian reservation, and they go into great detail about that. They say that beyond the outcropping that you see, you can't go down and so forth; and they talk about how this made it so there would be no development, and this was detrimental to the tribes.

In 1924 Congress talked about the fact that absent longterm leasing, which didn't exist prior to

'24, there would be no mineral development on the reservation, which again would be economically detrimental to the tribe. They did not, in extending the lease period so that there would be economic development, they did not see any reason not to have state taxation, and they have never indicated that they have gotten away from that on these lands; that is, these unallotted, bought and paid for lands that we're talking about here.

I guess I'd like real quickly to talk about the two contemporaneous commentaries that I mentioned that indicated that the taxation provision remained in effect as far as these commentators were concerned. As far as the Collier report goes, it was a 1941 report where Collier was agonizing over why the Indian Reorganization Act hadn't revitalized the Indian tribes in the way that he had foreseen.

I think that when his opinion about taxation had been proven wrong six years ago when a new taxation was valid on the Blackfeet Reservation and on similar reservations, and he's searching his mind for why there is a problem here, and he doesn't come up with taxation as something that interferes with this development that he foresaw as happening, I think that is significant when he looked at something else as the cause of the

problem.

And Felix Cohen in 1982, which was not, of course, written by Felix Cohen. The contributing editors are the same -- in many cases the same people have written amici briefs for the tribes. Felix Cohen adopts the 1977 Solicitor's opinion as support, as the authority for his proposition that the 1938 Act is a brand-new, full-blown act that replaces the '24 Act and therefore somehow eradicated the taxing authority. And I think both of those commentators need to be looked at as they spoke in 1941 and 1942.

The final thing I'd like to say quickly is that there's nothing in this record or even in the complaint in this case that the tribe's economic or mineral development is being inhibited or interfered with by the state taxation, or that the state taxation takes 18 percent of the income in this case. There is a very real dispute about whether or not there is taxation on the royalties.

The net proceeds tax, which is the tax that segregates out royalty interests and lessee's interests is different than it was when British-American was written when there was a mandatory passthrough to the tribe, which no longer exists in the state of Montana. The passthrough as far as the state law is concerned is

not mandatory. The producers may or may not pass that tax obligation on to the tribe.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:00 p.m., the case in the 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

(REPORTER)