

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-320

TITLE NATIONAL FARMERS UNION INSURANCE COMPANIES AND  
LODGE GRASS SCHOOL DISTRICT NO. 27, Petitioners V.  
CROW TRIBE OF INDIANS, ET AL.

PLACE Washington, D. C.

DATE April 16, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL FARMERS UNION INSUR- :  
ANCE COMPANIES AND LODGE :  
GRASS SCHCCI DISTRICT NO. 27, :  
Petitioners, :

V. : No. 84-320  
CROW TRIBE OF INDIANS, ET AL. :

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Washington, D.C.

Tuesday, April 16, 1985

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

1 APPEARANCES:

2 CLAY RIGGS SMITH, ESQ., Assistant Attorney General of  
3 Montana, Helena, Montana; on behalf of Montana as  
4 amicus curiae in support of petitioners.

5 RODNEY T. HARTMAN, ESQ., Billings, Montana; on behalf  
6 of petitioners.

7 CLARENCE T. BELUE, ESQ., Hardin, Montana, appointed by  
8 this Court for respondents Leroy Sage and Flora Not  
9 Afraid.

10 LOUIS FENNER CLAIBORNE, ESQ., Deputy Solicitor General,  
11 Department of Justice, Washington, D.C.; on behalf of  
12 the United States as amicus curiae in support of  
13 respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

CLAY RIGGS SMITH, ESQ.,

on behalf of Montana as amicus curiae

in support of petitioners

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RODNEY T. HARTMAN, ESQ.,

on behalf of petitioners

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CLARENCE T. BLUE, ESQ.,

appointed by this Court for respondents

Lercy Sage and Flora Not Afraid

27

LOUIS FENNER CLAIBORNE, ESQ.,

on behalf of the United States as

amicus curiae in support of respondents

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

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in National Farmers Union Insurance  
4 Companies against the Crow Tribe of Indians.

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

7                    ORAL ARGUMENT OF CLAY RIGGS SMITH, ESQ.,  
8                    ON BEHALF OF MONTANA AS AMICUS CURIAE  
9                    IN SUPPORT OF PETITIONERS

10                   MR. SMITH: Mr. Chief Justice, and may it  
11 please the Court, the State of Montana as amicus curiae  
12 has been granted leave to participate in argument today  
13 with respect to the first question as to which  
14 certiorari has been granted.

15                   That question presents the issue of whether a  
16 complaint which alleges that a tribal court has exceeded  
17 its jurisdiction with respect to a non-member states a  
18 federal claim for relief.

19                   The second question presented by this case,  
20 the substantive issue of whether under the facts here  
21 the Crow Tribal Court did exceed its jurisdiction, will  
22 be handled or discussed by petitioners' counsel.

23                   I will briefly outline the facts that are  
24 material to determination of the first issue in this  
25 case. The facts that I will be reciting have been taken

1 from the complaint as initially filed and certain  
2 documents which were appended to the complaint.

3 In May of 1982, respondent Leroy Sage was a  
4 fifth grade student at the Lodge Grass Elementary  
5 School. The Lodge Grass School is located on property  
6 owned by the petitioners' school district but lies  
7 within the exterior boundaries of the Crow Indian  
8 Reservation in southeastern Montana. Sage is a member  
9 of the Crow tribe.

10 In May of 1982, Sage, having just returned  
11 from a school picnic and still on the property of the  
12 school itself, was struck by a motorcyclist and  
13 injured. In September of that year, through his  
14 guardian respondent, Flora Not Afraid, Sage initiated an  
15 action against the school district in Crow Tribal Court.

16 The action alleged that the school district  
17 had been negligent and that the negligence had resulted  
18 in his accident.

19 Although a copy of the complaint in the tribal  
20 action was served on the chairman of the school board,  
21 he apparently notified no one else of the service. No  
22 answer was filed, and in late October of 1982 a default  
23 judgment against the school district was entered in the  
24 amount of \$153,000.

25 Five days later this action was initiated by

1 the petitioners in the United States District Court for  
2 the District of Montana.

3 The District Court eventually issued a  
4 preliminary injunction enjoining enforcement of the  
5 tribal judgment. Appeal has followed, and in July of  
6 last year the Ninth Circuit Court of Appeals reversed in  
7 a two to one decision.

8 The majority decision of the Ninth Circuit  
9 concluded that the complaint as amended did not allege a  
10 federal common law claim cognizable under 28 USC Section  
11 1331.

12 Although the Ninth Circuit panel below  
13 recognized the prior Ninth Circuit decisions had  
14 permitted nonmembers to maintain federal common law  
15 action with respect to alleged excesses of tribes with  
16 respect to their regulatory jurisdiction, the Court  
17 reasoned that because this matter arose from a civil  
18 adjudicatory proceeding, that the Court's 1978 decision  
19 in Santa Clara Pueblo versus Martinez counseled a  
20 different result.

21 My remarks on the first issue will be  
22 relatively brief. Brevity is counseled in this case, we  
23 believe, because as expressly or implicitly admitted by  
24 the Crow respondents in virtually all of the amici  
25 curiae supporting affirmance in this case, the Ninth

1 Circuit's refusal to find a valid federal common law  
2 claim and Section 1331 jurisdiction was erroneous.

3 Montana fully recognizes that federal courts  
4 can and indeed are required to determine independently  
5 in each case the question of whether their jurisdiction  
6 has been properly invoked.

7 Nonetheless, we find it significant that prior  
8 to the Ninth Circuit's decision in this case, none of  
9 the parties had challenged the existence of a federal  
10 common law claim cognizable under Section 1331.

11 The absence of such a challenge is not  
12 remarkable because of the admittedly interrelated nature  
13 of federal law and retained tribal sovereignty rights.  
14 Indeed, the United States in its amicus brief before the  
15 Court in this matter has stated that all limitations on  
16 tribal power necessarily derive from federal law,  
17 whether in the form of constitutional principles,  
18 treaties, statutes, or rudimentary propositions of  
19 Indian law.

20 QUESTION: Mr. Smith, is it your position that  
21 the tribal court never has jurisdiction over a  
22 non-Indian defendant in a civil case?

23 MR. SMITH: Your Honor, the State of Montana  
24 as amicus has taken no position with respect to the  
25 second issue in this case.



1 QUESTION: Well, what is your position on it,  
2 having been asked?

3 MR. SMITH: Our position is that in this case,  
4 under these fact, the Crow Tribal Court did not have  
5 jurisdiction.

6 QUESTION: May I ask, Mr. Smith, suppose we  
7 agree with you that there is a federal cause of action.  
8 We would still then have to decide, would we not,  
9 whether we would have to exhaust tribal remedies before  
10 going to federal court?

11 That is one of the issues here, isn't it?

12 MR. SMITH: Well, you are correct, Mr.  
13 Justice.

14 QUESTION: And what is your view of that?

15 MR. SMITH: Well, the question of whether  
16 tribal remedies need exhaustion in this case will be  
17 discussed by petitioners' counsel. I can only suggest  
18 that in this case the Crow respondents have indicated  
19 their position on that question.

20 Several of the -- all of the Crow judges have  
21 been named as respondents in this case, and presumably  
22 would know the answer to your question.

23 QUESTION: Your position is that -- if your  
24 position is that the tribal court had no jurisdiction,  
25 there are no remedies to exhaust.

1 MR. SMITH: Your Honor, that is the position  
2 that has been taken by the petitioners below.

3 The Solicitor General's position with respect  
4 to the existence of a federal common law claim in this  
5 matter, of course, merely reflects the Court's own  
6 statement in Cliphant versus Suguamish Indian Nation, in  
7 which the Court stated that Indian law generally and the  
8 scope of tribal retained powers specifically must be  
9 determined with reference to the treaties executed by  
10 the executive branch and legislation passed by Congress,  
11 which instruments beyond their actual text form the  
12 backdrop of the intricate web of judicially made Indian  
13 law.

14 Consequently, irrespective of how the second  
15 issue in this case may be decided, the first question  
16 must be determined, we submit, with reference to  
17 applicable and relevant treaties, federal statutes, and  
18 executive branch policies.

19 The Ninth Circuit's reliance on Santa Clara  
20 Pueblo was clearly misplaced. This matter does not  
21 assert a private right of action under the Indian Civil  
22 Rights Act.

23 The effect of the Ninth Circuit's decision is  
24 to make tribal courts the final arbiters of  
25 quintessentially federal rights except in those limited

1 instances where the tribal court judgment is sought to  
2 be enforced through collateral state proceedings.

3 We suggest that Congress in enacting the  
4 Indian Civil Rights Act never intended tribal courts or  
5 state courts in the first instance to make these kinds  
6 of determinations of admittedly federal law. We  
7 therefore suggest that the Ninth Circuit's decision as  
8 to the jurisdictional question was incorrect and should  
9 not be sustained.

10 That concludes my remarks, if there are no  
11 further questions.

12 QUESTION: May I just ask one question? Do  
13 you take a position on the tribe's claim of sovereign  
14 immunity?

15 MR. SMITH: No, we have not. Again, Mr.  
16 Justice, the State of Montana wrote only with respect to  
17 the first issue in this case.

18 Thank you.

19 CHIEF JUSTICE BURGER: Very well.

20 Mr. Hartman.

21 ORAL ARGUMENT OF RODNEY T. HARTMAN, ESQ.,

22 ON BEHALF OF THE PETITIONERS

23 MR. HARTMAN: Mr. Chief Justice, and may it  
24 please the Court, your petitioners stand before you  
25 today prepared to argue on the second issue granted

1 certiorari in this matter. We would like to begin our  
2 argument by characterizing the makeup and constitution  
3 of school districts in the State of Montana.

4 We will then discuss the exhaustion issue,  
5 followed by a discussion of the sovereign immunity  
6 issue. We would propose to conclude our remarks by  
7 discussing the actual merits of the second issue which  
8 is before the Court today.

9 In Montana, there are 47 school districts that  
10 are located within the exterior bounds of Indian  
11 reservations. Lodge Grass School District is but one of  
12 these. School Districts in Montana are created  
13 exclusively by Montana state law.

14 Title 20 of the Montana Codes Annotated  
15 provide for the creation, the governance, and the  
16 regulation of school districts in Montana.

17 In 1972, the state citizens of the State of  
18 Montana enacted a new constitution. Article X of the  
19 constitution is of great importance when we examine the  
20 nature of school districts in Montana.

21 Section 1, Article X of the Montana state  
22 constitution provides that it is the goal and the aim of  
23 the people of the state of Montana to provide equal  
24 educational opportunities to all children in the State  
25 of Montana, regardless of race, religion, and creed.



1 Further in Article X the State of Montana has  
2 recognized the unique cultural heritage of Indian tribes  
3 in the State of Montana. There is a constitutional,  
4 state constitutional provision in Montana that this  
5 unique cultural heritage be abided by, recognized, and  
6 maintained in the public school domain in Montana.

7 In short, the Lodge Grass School District  
8 Number 27, which is a petitioner in this matter, is  
9 exclusively a creature of state law. There has been no  
10 suggestion whatsoever that any Crow tribal ordinance or  
11 enactment is responsible for the creation of Lodge Grass  
12 School District Number 27.

13 QUESTION: Well, how did the school district  
14 get the property?

15 MR. HARTMAN: The school district is situated  
16 on fee land. It is not tribal trust land.

17 QUESTION: Well, it is still within the  
18 reservation.

19 MR. HARTMAN: It is within the exterior --

20 QUESTION: Did they buy it from the tribe?

21 MR. HARTMAN: Your Honor, there has been some  
22 confusion, apparently, about where the property was  
23 first obtained. At the District Court level, Judge  
24 Batten found that the land was obtained pursuant to the  
25 Crow Allotment Act of 1920, particularly Section 16.

1           At the trial court level there was never any  
2       dispute about this fact. That particular fact was never  
3       the subject of the appeal at the Ninth Circuit.  
4       Apparently now respondent Sage claims that the land was  
5       purchased by a private party and was used for a school  
6       for the first time in 1918.

7           We know that the land came from the Crow  
8       tribe. We know that it probably came from the Allotment  
9       Act. And as a result thereof, the 1920 --

10           QUESTION: It is on the reservation?

11           MR. HARTMAN: It is on the reservation.

12           If we may speak to the issue of exhaustion,  
13       your respondents in this matter have alleged that Issue  
14       Number 2 is really not ripe for determination by this  
15       Court because of the fact that the petitioners allegedly  
16       refused to exhaust their tribal remedies below.

17           QUESTION: Do I correctly read Judge Wright,  
18       who apparently thought there ought to be a federal cause  
19       of action, but only if, as I understand him, there is  
20       first invoked the tribal remedies?

21           MR. HARTMAN: Your Honor, I do believe that  
22       Judge Wright held that --

23           QUESTION: Do you agree with that?

24           MR. HARTMAN: Do I agree with Judge Wright's  
25       holding?

1 QUESTION: With Judge Wright, yes.

2 MR. HARTMAN: I believe that you have to take  
3 a look at the existing facts in any case, because as  
4 Judge Wright made note of, the exhaustion doctrine is a  
5 flexible one. I would argue --

6 QUESTION: Yes, but his basic proposition as I  
7 understand it was not that the tribal courts had no  
8 jurisdiction. Even though you had a cause of action, a  
9 federal cause of action, you could not press that cause  
10 of action until after you had exhausted tribal  
11 remedies.

12 MR. HARTMAN: That was Judge Wright's  
13 position. Our response to that would be that under the  
14 exigent and emergency situation that was involved in  
15 this case in the first instance, that there was no  
16 meaningful opportunity for exhaustion.

17 What has terrified the school board --

18 QUESTION: Do you mind? Before you get to  
19 that, suppose he was right. Suppose we agreed with  
20 Judge Wright that you had to exhaust. When would your  
21 federal remedy be available, do you think?

22 MR. HARTMAN: I think under Judge Wright's  
23 analysis it would be at that point when after a full  
24 litigation of the jurisdiction issue in tribal court  
25 resulted in a tribal court decision that there was

1 jurisdiction, that the federal right under 1331 would  
2 then attach, but in this case --

3 QUESTION: So in other words there would have  
4 to be some kind of a judgment, is that it --

5 MR. HARTMAN: I think so.

6 QUESTION: -- in the tribal court before you  
7 would be able to pursue your federal court remedy.

8 MR. HARTMAN: That is correct, Your Honor.  
9 And in this case there was a judgment.

10 QUESTION: A default judgment, wasn't it?

11 MR. HARTMAN: Correct. We might have had a  
12 different situation had the school district and its  
13 insurer been notified in timely fashion that there was a  
14 claim that the tribal court could assert jurisdiction in  
15 this matter.

16 QUESTION: Well, Mr. Hartman, did you not  
17 subsequently ask the tribal court to decline to exercise  
18 jurisdiction in this case? Did you file a motion?

19 MR. HARTMAN: You are referring to action  
20 taken again under emergency circumstances in August, and  
21 there was a special appearance made.

22 QUESTION: And a motion was made asking the  
23 tribal courts not to exercise jurisdiction here?

24 MR. HARTMAN: That is correct.

25 QUESTION: And did the tribal court ever rule



1 on that motion?

2 MR. HARTMAN: The tribal court held in  
3 abeyance a ruling according to its own order.

4 QUESTION: That was because you didn't appear  
5 at the hearing on the motion, or counsel for the  
6 petitioner did not appear at the hearing?

7 MR. HARTMAN: As I understand the order, Your  
8 Honor, it was because a stay had been issued by Justice  
9 Rehnquist, and the tribal court uttered its preference  
10 to at that time, in August, await and abide by a  
11 decision of this Court.

12 The reason a supplemental brief has been filed  
13 in this matter, however --

14 QUESTION: Just let me find out, if I can, did  
15 the tribal court rule on the motion? Yes or no?

16 MR. HARTMAN: No.

17 QUESTION: And your reply brief says that the  
18 tribal court held it had jurisdiction in some order  
19 dated October 25th, 1982. Is that order in the record  
20 some place?

21 MR. HARTMAN: It is, Your Honor.

22 QUESTION: Because I couldn't find it.

23 MR. HARTMAN: I am sorry. When this action  
24 was initiated by a verified complaint and required  
25 certificate of counsel, appended to those documents was

1 in fact the Crow tribal court default judgment that is  
2 at the very bedrock of this case.

3 Conclusion of Law Number 1 in that document,  
4 which is a part of the record, is a specific holding by  
5 the tribal court that it does have jurisdiction over the  
6 parties, including Lodge Grass School District Number --

7 QUESTION: We would find that in the appendix  
8 some place?

9 MR. HARTMAN: Your Honor, I believe that  
10 complaint is not in the appendix, it is in the record.

11 QUESTION: Okay. Thank you.

12 MR. HARTMAN: Okay?

13 QUESTION: All right. Thank you.

14 MR. HARTMAN: And if we might develop that  
15 train of thought for just a moment, if there was ever  
16 any doubt that the tribal court would entertain a  
17 jurisdictional challenge, it has been dispelled by the  
18 rather unusual happenings that have taken place in this  
19 case over the last several months.

20 As recently as March 11th, 1985, Judge  
21 Roundface has uttered his order and opinion that the  
22 tribal court has jurisdiction to the exclusion of the  
23 Federal District Court in this matter, and in fact  
24 characterizes his relationship at present with Judge  
25 Batten as one of hopeless impasse.

1           So, we would conclude our remarks on  
2 exhaustion by stating that exhaustion may be an  
3 available remedy when there is a meaningful opportunity  
4 to take advantage of remedies. In this case, there is  
5 no doubt, as has been argued throughout the entire  
6 course of the case, that the tribal court does indeed  
7 believe it has jurisdiction, and that is what brings us  
8 to this Court.

9           QUESTION: May I ask -- I still don't quite  
10 understand your theory on exhaustion. Doesn't the  
11 tribal legal system provide a method for moving to  
12 vacate a default judgment in a timely fashion, and if it  
13 is denied, for appealing?

14          MR. HARTMAN: It does, Your Honor.

15          QUESTION: And why didn't you take advantage  
16 of that procedure?

17          MR. HARTMAN: When the default judgment was  
18 mailed to the school principal, who otherwise had no  
19 information concerning the judgment, and he in turn sent  
20 it to his insurance company, the petitioners contacted  
21 counsel for respondent to find out if there could be  
22 some time for a meaningful decision on what to do.

23          This was done, and this also, Your Honor,  
24 appears in the record in the certification of service of  
25 counsel. It was the position of the respondents at that

1 time that the Crow tribal --

2 QUESTION: Who are you referring to when you  
3 say respondents? Are you talking about --

4 MR. HARTMAN: Sage and Not Afraid.

5 QUESTION: But not the judge?

6 MR. HARTMAN: Not the judge. What made it an  
7 emergency situation was, under the Crow tribal code, on  
8 November 4, respondents Sage and Not Afraid took the  
9 position that they could go execute, actually execute  
10 against physical assets of the school district.

11 This was discussed with the board of trustees,  
12 and the board of trustees are aware that under Montana  
13 law there will be no physical execution against assets  
14 of a school district, and that other procedures must be  
15 followed.

16 The board of trustees was terrified that their  
17 school operation, which was in effect in October of  
18 1982, was in immediate danger of disruption by reason of  
19 execution upon physical assets.

20 QUESTION: Bear in mind, I am not asking you  
21 why you filed your federal case. I think you should run  
22 into federal court as fast as you can.

23 I am asking you why you did not also  
24 simultaneously seek relief before the tribal court.

25 MR. HARTMAN: Your Honor, what happened was,



1 upon application of Judge Batten for a temporary  
2 restraining order, the matter was immediately set for  
3 hearing on November 3rd.

4 One of the unusual aspects of this case was,  
5 there was a temporary restraining order at that time  
6 entered that basically restrained anybody from doing  
7 anything with regard to the tribal court judgment.

8 QUESTION: You got an order that prevented you  
9 from exhaustion. Is that what you are saying?

10 MR. HARTMAN: What we are saying is that we  
11 believe that Judge Batten has always entered an order --

12 QUESTION: But at your request.

13 MR. HARTMAN: Right.

14 QUESTION: On your motion Judge Batten entered  
15 an order that prevented you from exhausting before Judge  
16 -- the tribal court.

17 MR. HARTMAN: Again upon a showing, we think,  
18 to Judge Batten that we didn't have a meaningful chance  
19 to exhaust.

20 Parenthetically we might add that the  
21 exhaustion argument that was made by Judge Wright in  
22 this matter cited several cases. Those cases upon  
23 careful review will indicate that they all arose under  
24 the Indian Civil Rights Act, and that they involved  
25 intratribal disputes such a voting rights and the

1 undisputed right of a tribe to determine the status of  
2 its own membership.

3 Those cases do not apply to a Section 1331  
4 case such as is present before the Court today.

5 The respondents and several amici have  
6 suggested to the Court that the tribes themselves and  
7 indeed the individual members are clothed with a  
8 sovereign immunity against suit.

9 And for that reason it is the contention once  
10 again of respondents that this Court should not consider  
11 Issue Number 2 a ripe one for determination, but should  
12 in fact remand.

13 We think that there is a quick answer to that  
14 claim. And as a matter of fact we would direct  
15 respectfully your attention to the Santa Clara Pueblo  
16 case decided in 1978.

17 Even though that case arose under and pursuant  
18 to the Indian Civil Rights Act, one of the individual  
19 tribal officers who was sued, Officer Podia, made the  
20 same argument that the individual tribal defendants are  
21 making right now, the argument, of course, being that as  
22 tribal officers they are immune from suit.

23 This Court held, however, in Santa Clara  
24 Pueblo that Mr. Podia was not immune from suit. I  
25 should add that from the very time the Ninth Circuit

1     accepted the briefs in this case until the present, that  
2     your petitioners have conceded that the tribe itself and  
3     the tribal governing bodies are clothed with the  
4     immunity suggested by the respondents.

5             It is our position, however, that under  
6     authority such as Ex Parte Young and indeed the Puyallup  
7     Tribe versus Washington Department of Fish and Game that  
8     the individual tribal officers themselves are amenable  
9     to suit for injunctive and/or declaratory review.

10            Indeed, had they not been joined in this  
11     action they would not have had the opportunity to so  
12     aggressively and thoroughly litigate the issues which  
13     are of importance today before the Court. And that  
14     would have been in our view an unfair situation.

15            So certainly there is no reason to avoid  
16     deciding the ultimate issue in this case under the  
17     doctrine of sovereign immunity as espoused by  
18     respondents.

19            Finally, your petitioners have all along  
20     alleged and believed that the case Montana versus United  
21     States should be the case which most closely focuses the  
22     meritorious disputes in this matter, and I say that for  
23     several reasons.

24            First of all, Montana, which was, I believe,  
25     decided in 1981, examined the very treaties and statutes

1 that are involved in this case, because it was the Crow  
2 tribe as well that was involved in Montana versus U.S.

3 The holding, we suggest, of Montana versus  
4 U.S. is that the exercise of tribal power beyond what is  
5 necessary to protect tribal self-government or to  
6 control internal relations is inconsistent with the  
7 admittedly dependent status of the tribe as a  
8 quasi-sovereign.

9 And the only way to get around that basic  
10 holding is if one can find express Congressional  
11 delegation to the contrary.

12 The analysis used in Montana which led to the  
13 holding that the tribe was without power to regulate  
14 hunting and fishing on non-member land within the  
15 reservation involved basically a three or four stepped  
16 analysis.

17 First of all, Judge Batten quite correctly  
18 conducted a thorough research of any relevant treaties  
19 and/or statutes enacted by the Congress which may have  
20 given the Crow tribal court jurisdiction in this case.  
21 He found none, and indeed we suggest that there are none  
22 that cover the peculiar cases of this case -- peculiar  
23 facts of this case.

24 Therefore, another level of inquiry arose at  
25 that time, and that is, was the school district on the



1 reservation in a consensual type of relationship which  
2 would amount to a voluntary session of jurisdiction to  
3 the Crow tribal court.

4 We believe and Judge Batten believed that that  
5 prong of the Montana case necessarily involves for  
6 profit business people who come onto reservations to  
7 make profit and to avail themselves of the services  
8 provided by tribes, and thereby voluntarily subject  
9 themselves to jurisdiction.

10 This is most certainly not the case with Lodge  
11 Grass School District Number 27. It exists not for  
12 profit. It exists to educate member and non-member  
13 children alike in an equal fashion, and therefore it is  
14 the last prong of what sometimes has been called dicta,  
15 but at other times has been called the holding of  
16 Montana that becomes all important for our case  
17 presently before the bar.

18 And that is, is the denial by the federal  
19 court of Crow tribal jurisdiction in this case, does  
20 that somehow directly and adversely impact the political  
21 integrity or economic wellbeing and health and welfare  
22 of the tribe as a whole?

23 I wish there were easy, concrete calculations  
24 or formulas or holdings that we could all point to to  
25 say this is an easy question. The Court, however, upon

1 being requested several times to develop doctrinaire,  
2 inflexible, black and white rules has quite correctly  
3 held that you cannot do this in this difficult area, and  
4 that every case therefore deserves a fact by fact, case  
5 by case analysis.

6 QUESTION: Judge Wright made an effort to do  
7 just what you suggested, didn't he?

8 MR. HARTMAN: In this particular case, Your  
9 Honor, as I recall his holding --

10 QUESTION: He suggested that there should be  
11 exhaustion of the tribal remedy as a prerequisite to  
12 federal jurisdiction, but that there was federal  
13 jurisdiction.

14 MR. HARTMAN: He did. He suggested that --  
15 again, I think that his holding was that petitioners  
16 were before the Ninth Circuit prematurely, because they  
17 hadn't exhausted, but I don't believe that anyone has  
18 ever on the Ninth Circuit certainly did not examine or  
19 quarrel with the facts that were relied upon by Judge  
20 Batten to issue his ruling on the merits in this case.

21 QUESTION: Mr. Hartman, this may be an unfair  
22 question, but I for one could stand a little education  
23 about tribal courts out in your part of the country.  
24 Are they fully structured? Do they have a clerk, all  
25 the trappings that we have in our general system? Do

1 they vary from tribe to tribe?

2 MR. HARTMAN: Your Honor -- I think they vary  
3 from tribe to tribe, and I can tell you what the Crow  
4 tribal codes itself provide as far as its sum and  
5 substance. It was created in 1976, so it is not yet ten  
6 years old. The Crow tribal judges, if I recollect, are  
7 appointed or elected for four-year terms.

8 QUESTION: By whom?

9 MR. HARTMAN: By the tribal members. There is  
10 no requirement that a tribal judge be a member of a  
11 state bar or indeed that he go to law school or anything  
12 of that nature. The tribal codes themselves provide --  
13 I believe that the red light has come on.

14 QUESTION: Go ahead and finish.

15 MR. HARTMAN: Provide that the Crow tribe  
16 through its judges will enunciate tribal law not based  
17 on what state law is all about but what it will develop  
18 as a case by case evolution will later provide. Some of  
19 the cultural traditions and customs will necessarily  
20 tell or lead the tribal court in how it is going to  
21 develop its substantive law.

22 QUESTION: Have you ever practiced in a tribal  
23 court?

24 MR. HARTMAN: I have not, Your Honor, but I  
25 have two partners who have.

1 QUESTION: Counsel, you say you quarrel about  
2 the fact that there is no requirement that they be  
3 lawyers, that they go to law school.

4 MR. HARTMAN: I don't quarrel with that.

5 QUESTION: There is no requirement that we go  
6 there either.

7 (General laughter.)

8 MR. HARTMAN: Your Honor, I didn't know that.  
9 Thank you so much for your time.

10 CHIEF JUSTICE BURGER: Mr. Belue.

11 Mr. Belue, if it is more convenient, you may  
12 elevate the lecturn.

13 ORAL ARGUMENT OF CLARENCE T. BELUE, ESQ.,

14 APPOINTED BY THIS COURT FOR

15 RESPONDENTS LERCY SAGE AND FLORA NOT AFRAID

16 MR. BELUE: Mr. Chief Justice, may it please  
17 the Court, Mr. Justice Blackmun, if I could respond to  
18 that question for just a moment before I begin my  
19 remarks, ten years ago on the Crow reservation there  
20 were no licensed attorneys within the Crow tribe. Today  
21 there are over four.

22 The Crow court, although it does not have  
23 attorneys as judges, it does have a licensed attorney as  
24 an advisor to the court. The appellate portion of the  
25 court system renders reasoned opinions which are



1 catalogued and available for the attorneys who are  
2 licensed by the court to practice before that court.

3 QUESTION: Who assists the reviewing court?

4 MR. BELUE: Pardon?

5 QUESTION: Who assists the reviewing court?  
6 Do they have separate counsel or a separate advisor?

7 MR. BELUE: Yes, and they very often, Your  
8 Honor, hire attorneys to act as substitute appellate  
9 judges. The respondent Flora Not Afraid is a part of  
10 the Not Afraid family of Indians. She is raising her  
11 sister's daughter -- her sister's daughter's son, who is  
12 also a respondent in this action, Leroy Sage.

13 And she sent Leroy Sage to the petitioner,  
14 Lodge Grass School, for his education. That school is  
15 85 percent Indian children. Four of the five trustees  
16 of that school are also Indians. The school is  
17 patrolled regularly by tribal, not state policemen.

18 QUESTION: Mr. Belue, is the school located in  
19 or near the town of Lodge Grass?

20 MR. BELUE: Yes, a part of the town of Lodge  
21 Grass, although the entire town and the entire district  
22 are located within the exterior boundaries of the  
23 reservation. As I was about to say, fire protection,  
24 enforcement of state truancy laws, and juvenile problems  
25 with students are handled by Crow truancy and

1 delinquency officers rather than state officers.

2 As I already mentioned in response to Justice  
3 Rehnquist, the school is in the heart of the  
4 reservation. It is considered an Indian community and  
5 an Indian school, although it is administered and  
6 organized under state law.

7 On May 27th, 1982, Leroy Sage was injured at  
8 the school, as has already been mentioned, and Flora  
9 sought compensation for his injuries in the way,  
10 seemingly natural to her, to go to the tribal court and  
11 seek compensation.

12 She filed her complaint in the tribal court,  
13 and the chairman of the school board was duly served  
14 with a summons which commanded the school to appear in  
15 15 days under the Crow Code of Civil Procedure.

16 QUESTION: May I ask two factual questions?

17 MR. BELUE: Yes, Your Honor.

18 QUESTION: How big is the school? How many  
19 pupils?

20 MR. BELUE: Approximately 500 students. There  
21 are about 300 in the high school portion.

22 QUESTION: I see.

23 MR. BELUE: There are two districts, but they  
24 are on the same ground.

25 QUESTION: And where do the revenues that

1 support the school come from?

2 MR. BELUE: Of course, they indirectly, I  
3 would like to point out, come from approximately 40,000  
4 acres of Crow land that was given to the state of  
5 Montana under the Allotment Act. There is state aid.  
6 There is also 874 money from the federal government in  
7 lieu of Indian taxation and other funding for the  
8 school.

9 QUESTION: Mr. Belue, does the record show why  
10 the school board chairman did not notify the insurance  
11 company of the filing of the suit?

12 MR. BELUE: Of course, the only real record in  
13 this case, because it was a default matter, is the  
14 complaint of the petitioners in the federal court.  
15 Beyond that, there are facts that are known to myself  
16 and the parties as to what happened, but that is not  
17 part of the record.

18 I don't know what you are asking. If you  
19 would like me to elaborate, it would go beyond the  
20 record.

21 QUESTION: Is it possible that the tribal  
22 court could have set aside that default judgment?

23 MR. BELUE: I was just getting to that.

24 QUESTION: Were there grounds available which  
25 would have led it to set aside --

1 MR. BELUE: Yes, in the joint appendix given  
2 to you there is an excerpt -- in fact, a complete set of  
3 the Crow Code of Civil Procedures that pertains to this  
4 action, and Rule 17 of the code -- incidentally, I might  
5 add that the Crow Code of Civil Procedure is generally  
6 patterned after the federal rules.

7 Rule 17 affords a defendant in any action a  
8 second notice after the summons, a second opportunity to  
9 come to the Crow court and move to set aside a default  
10 within 30 days of the entry of that default, and that  
11 notice is given, according to Rule 17, by certified mail  
12 to this defaulting party.

13 QUESTION: Well, of course, it is too late for  
14 that, isn't it?

15 MR. BELUE: It is too late now, but it was not  
16 too late at the time that the petitioners herein decided  
17 to ignore that provision and go to the federal court  
18 instead.

19 QUESTION: Well, do you agree that at this  
20 time, in any event, exhaustion would be futile?

21 MR. BELUE: There is at the present time the  
22 motion that you mentioned earlier that was made on the  
23 22nd day of August, 1984, the only appearance --

24 QUESTION: Was that a timely motion within the  
25 30 days?



1 MR. BELUE: Not Afraid argued that was not,  
2 and the argument was held by the court and submitted to  
3 the court in the absence of the petitioners who did not  
4 come to the hearing, the court issued its order stating  
5 that it had made a decision on the merits of that  
6 motion, but out of deference to the proceedings in this  
7 Court it would withhold its ruling until the order of  
8 the Supreme Court.

9 So, that motion is still pending before the  
10 tribal court.

11 QUESTION: Well, whatever the right is to have  
12 the default judgment set aside, your Rule 17 says that  
13 nothing in this section shall prevent execution of the  
14 judgement pending this action.

15 MR. BELUE: Under that particular provision,  
16 no.

17 QUESTION: So if you were going to avoid an  
18 execution, you would have to go to the federal court, I  
19 take it.

20 MR. BELUE: No, Your Honor, I respectfully say  
21 that is not correct. I don't recall the number of the  
22 rule, but I believe it is 22 on executions, and I might  
23 be wrong about that, but the petitioners in this action  
24 actually obtained relief from the pending execution when  
25 they filed their motion on the 22nd. The court on the

1 22nd --

2 QUESTION: The tribal court?

3 MR. BELUE: The tribal court on the 22nd of  
4 August, in answer to the petitioner's special  
5 appearance, they did impose a temporary bond for staying  
6 the sale and a full bond for staying all further  
7 executions, and they even returned some property  
8 that --

9 QUESTION: Was that because of their stay  
10 issued here, or what?

11 MR. BELUE: No, that was issued the day before  
12 Justice Rehnquist's stay. Justice Rehnquist's stay was  
13 issued the 23rd. Judge Roundface issued his order on  
14 the 22nd.

15 QUESTION: When you say that a bond was  
16 imposed, Mr. Belue, does that mean that the tribal court  
17 in effect stayed the execution conditioned upon the  
18 petitioners putting up a bond in the amount of the  
19 property?

20 MR. BELUE: That August 22nd order stated that  
21 if a bond in the appraised value of the property, which  
22 would approximately by \$50,000, were to be posted that  
23 day, the sale would be stayed. If they wanted to avoid  
24 further executions, they would have to put up a bond for  
25 the amount of judgment plus interest and other costs.

1 QUESTION: What was that amount?

2 MR. BELUE: Well, it ended up being \$200,000.  
3 I think for purposes here it is appropriate to say that  
4 amount.

5 QUESTION: Is that order of the tribal court  
6 in the record?

7 MR. BELUE: I think it is in the record now.  
8 As I understand the record has been supplemented greatly  
9 in the last few days.

10 QUESTION: Oh, it has?

11 MR. BELUE: You won't want to read all that  
12 record.

13 QUESTION: Well, I was hunting for the order,  
14 hunting for the default judgment, and I don't find it in  
15 the initial record that was filed.

16 MR. BELUE: I believe it is there, but I -- in  
17 fact, I know that it is in the record as of -- it may be  
18 in some of the lodgings. As I understand it, some of  
19 the --

20 QUESTION: So it is in some of the  
21 supplementing of the record.

22 MR. BELUE: Yes. Yes. I think the word is  
23 that it is lodged, but maybe it is not circulated to  
24 this Court at this time.

25 QUESTION: It is available to us, however.

1 MR. BELUE: It is certainly available. I  
2 think it is in this building.

3 QUESTION: And this order of the tribal court  
4 you have just been talking about has also been lodged?

5 MR. BELUE: Yes, there was an order issued on  
6 the 22nd, the 23rd, the 27th, then December 20th, and --

7 QUESTION: Do you think there is some,  
8 following up Justice O'Connor's question, do you think  
9 at this time there is any exhaustion to be done?

10 MR. BELUE: Yes, Your Honor, because the  
11 tribal court still hasn't been afforded an opportunity  
12 to rule on these matters after hearing argument from the  
13 petitioners. They still have not appeared. Every order  
14 that the tribal court has entered is uncontested.

15 I have had an easy time persuading the tribal  
16 court to accept my view of the law, because the other  
17 side has never appeared except that one day in which  
18 they were afforded a great deal of relief on the matters  
19 that they were pressing, and the others were reserved  
20 for later judgment, and there are a number of items that  
21 are still pending and still could be ruled on.

22 QUESTION: Mr. Belue, all of this addition to  
23 the record, both sides agree as to what has been going  
24 in the record, or is this being done ex parte?

25 MR. BELUE: It is ex parte. The filings



1       that --

2               QUESTION: Well, how can you increase the  
3 record ex parte?

4               MR. BELUE: I don't know.

5               QUESTION: But it has been done?

6               MR. BELUE: As I understand, it was lodged,  
7 which I think means it is not before you at the present  
8 time, and maybe that is a matter for future  
9 determination.

10              QUESTION: You mean, is lodged an expression  
11 of ours?

12              MR. BELUE: I think so. It is an expression  
13 of you clerk.

14              QUESTION: Well, I have been here only 29  
15 years, and I have never heard it before.

16              (General laughter.)

17              MR. BELUE: Well, I have been here about 15  
18 minutes, so I don't pretend to know.

19              QUESTION: Well, but you have been talking  
20 about things that really aren't part of the record.

21              MR. BELUE: I believe so, Your Honor.

22              I did mention the remedy that the petitioners  
23 could have availed themselves under Rule 17 of the Crow  
24 Code of Civil Procedure. Another remedy that they had  
25 is under Rule 7.

1           They are guaranteed under the rules the right  
2 to appear before the tribal court specially without  
3 waiving any claims they might have objecting to the --  
4 jurisdiction over them, and they did not avail  
5 themselves of that opportunity to press their basic  
6 claim which they now assert, and that is that the tribal  
7 court had no subject matter jurisdiction.

8           As I think might have been mentioned, Flora  
9 Not Afraid and Leroy Sage were not originally parties to  
10 the federal action that the petitioners decided to  
11 pursue rather than exhaust their tribal remedies.

12           Flora and Leroy appeared specially in the  
13 Federal District Court to object to subject matter  
14 jurisdiction in the federal court, and that motion and a  
15 like motion of the Crow tribe was the basis of Judge  
16 Batten's decision.

17           He never held any evidentiary hearings, and  
18 that partially answers some of the questions about the  
19 facts that are in his opinion. They appear without a  
20 hearing to determine those basic facts, and of course on  
21 appeal the Ninth Circuit reversed for the reasons that  
22 have already been stated, and now this case comes before  
23 this Court.

24           I would like to emphasize that this case of  
25 course is of great concern to Flora Not Afraid and to

1 the Indian people generally, and we believe that it  
2 ought to be controlled by two simple rules.

3 First of all, we believe that it is controlled  
4 by Section 1322 of the Indian Civil Rights Act. This  
5 provision in essence provides that no state such as  
6 Montana is can exercise jurisdiction over a civil cause  
7 of action to which an Indian is a party where that  
8 action arises in Indian country.

9 And under this Court's decision in *Kennerly*  
10 versus District Court, that statute of course was  
11 strictly adhered to, and it was that finding that  
12 Montana could not assume jurisdiction over a reservation  
13 like the Crow reservation, where no affirmative act on  
14 the part of the tribe and the state for state assumption  
15 of jurisdiction.

16 QUESTION: Do you think you and the Solicitor  
17 General see eye to eye on this?

18 MR. BELUE: I don't know. You will hear from  
19 him in a minute. Yes, I think --

20 QUESTION: You have read his brief.

21 MR. BELUE: Yes, I think basically we do.

22 QUESTION: And you think then that just any  
23 isolated tort on fee-owned property is subject to the  
24 tribal court. I mean, if you think --

25 MR. BELUE: I guess you are talking about the

1       tranchant tort. I concede -- I am not sure I would  
2       concede that a tranchant tort is not a matter for  
3       tribal jurisdiction, but I can certainly concede and  
4       readily understand that the Indian nature of such a tort  
5       is a lot less than it is here, where we have a school  
6       which is an integral part of the Indian community, and  
7       tied closely with governmental service to the --

8                QUESTION: Do you agree with the solicitor  
9       general that the test to be applied is the one taken  
10      from the Montana case? It is a question of whether the  
11      issue involves directly the political integrity,  
12      economic security, or health and welfare of the  
13      parties?

14               MR. BELUE: Yes, I do, and I think this case  
15      falls squarely within that rule, because the welfare of  
16      the individual Indian, Leroy Sage, is the welfare of  
17      this tribe. An infected part is part of the whole.

18               QUESTION: Well, you would say any time an  
19      Indian is hurt on fee owned property the tribal entity  
20      is affected?

21               MR. BELUE: I don't think that the status of  
22      the land where the tort is committed makes any  
23      difference.

24               QUESTION: Where the Indian is hurt by a  
25      non-Indian.



1 MR. BELUE: That is correct. It is the  
2 situation where we have conduct inside the reservation  
3 that injures an Indian.

4 QUESTION: Any act of negligence or --

5 MR. BELUE: That is correct. The tribe has an  
6 integral interest in protecting the safety and health --

7 QUESTION: Or any other act. For instance, if  
8 there are some tribal members receiving welfare benefits  
9 in your view because those checks are mailed to the  
10 reservation, then there is a cause of action in the  
11 tribal courts to secure any alleged unpaid welfare  
12 benefits, for example.

13 MR. BELUE: It certainly has the nexus --

14 QUESTION: That would be your view?

15 MR. BELUE: Yes, it has the nexus which ties  
16 it to Indian affairs, something that they are integrally  
17 interested in, and have a legitimate interest in, to  
18 protect their people.

19 QUESTION: Mr. Belue, in your brief I get the  
20 impression that you were defending the Court of Appeals'  
21 holding that there was no jurisdiction in the District  
22 Court. Is that still your position?

23 MR. BELUE: Yes, Your Honor. We still feel  
24 that 1331 is a general, not a specific grant of  
25 jurisdiction, and that it is an original, not an

1 appellate grant of jurisdiction, and that because of  
2 exhaustion especially it was an improper exertion of  
3 federal authority.

4 We are not denying that federal review is not  
5 appropriate at some time. We do not subscribe to the  
6 idea that Indian tribes are the last arbiters of their  
7 own jurisdiction.

8 QUESTION: Then you really don't agree with  
9 the Ninth Circuit's opinion.

10 MR. BELUE: I see the Ninth --

11 QUESTION: It sounds to me more like agreement  
12 with Judge Wright's view.

13 MR. BELUE: With Judge --

14 QUESTION: With Judge Wright's view, which, as  
15 I understood it, was, there was jurisdiction but not  
16 exercisable by the federal court until there has been  
17 exhaustion in the tribal court.

18 MR. BELUE: I view that 1331 is one basis for  
19 jurisdiction, but it is not all basis for federal  
20 review. The petitioners chose to come under 1331, and  
21 they mischose their basis for jurisdiction. That  
22 doesn't speak to the general question of how and when  
23 federal review will be afforded.

24 QUESTION: When do you think it should be?

25 MR. BELUE: My own view is quite novel, and it

1 is in my brief, and I would contend, Your Honor, that it  
2 would be appropriate under this Court's appellate power  
3 under the Constitution to grant certiorari from the  
4 appellate decisions of the Indian courts until Congress  
5 makes a regulation which would do it otherwise.

6 QUESTION: Is that common law certiorari  
7 jurisdiction?

8 MR. BELUE: Well, it is constitutional.

9 Thank you.

10 CHIEF JUSTICE BURGER: Mr. Claiborne.

11 ORAL ARGUMENT OF LOUIS FENNER CLAIBORNE, ESQ.,

12 ON BEHALF OF THE UNITED STATES

13 AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

14 MR. CLAIBORNE: Mr. Chief Justice, may it  
15 please the Court, let me say straightaway that for our  
16 part we do not quarrel with the District Court, the  
17 Federal District Court's entertaining jurisdiction of  
18 the complaint filed before it.

19 We have been somewhat ambivalent as to the  
20 question whether having received that complaint the  
21 District Court ought to have abstained and required the  
22 plaintiffs before it first to exhaust tribal remedies.

23 QUESTION: In other words, to follow Judge  
24 Wright's --

25 MR. CLAIBORNE: Indeed, Mr. Chief Justice.

1 The reason for our ambivalence was identified by Justice  
2 White in that it seems perhaps that if the allegation  
3 is, as Judge Fatten thought it was, and as he found it  
4 to be well founded, that the tribal court wholly lacks  
5 subject matter jurisdiction, it may have been  
6 unnecessary to require the applicants to the federal  
7 court to exhaust remedies before a court that by  
8 definition lacked all jurisdiction of the subject  
9 matter.

10 On the other hand, if it was arguable that  
11 there was jurisdiction in the tribal court, that we  
12 believe that not only was it arguable, but plainly the  
13 tribal court did have jurisdiction, if it was arguable,  
14 then the exhaustion of remedies before that Court was  
15 certainly appropriate. And I want to stress that there  
16 was ample opportunity to exhaust remedies before the  
17 tribal court.

18 A little chronology may help. The case was  
19 filed in the tribal court on September the 27th by  
20 Lesage and Not Afraid. Service was affected on the  
21 chairman of the school board on the same date.

22 Now, it is said that it went no further, and  
23 for the purposes of the argument in this Court we must  
24 accept that. A default judgment was accordingly entered  
25 under the perfectly normal rules of the tribal court in



1 the absence of any appearance, any answer by the  
2 defendants in that court on October the 25th.

3 Now, we don't know when notice of that default  
4 judgment was actually received by any of the petitioners  
5 in this Court, but we do know that at the latest, they  
6 received notice, according to an affidavit in this  
7 record, filed by counsel for petitioners, on the 29th of  
8 October.

9 Now, there were still several days left before  
10 execution could possibly have occurred, and still 20  
11 days left during which the default judgment under the  
12 rules of the tribal court could have been moved to have  
13 been set aside, instead of which the petitioners in this  
14 Court went racing to the federal court.

15 They made no attempt whatever to obtain relief  
16 from the tribal court by saying, we ought not be subject  
17 to your orders. This is a matter beyond your  
18 jurisdiction.

19 Judge Batten did not require any repairing to  
20 the tribal court even though time was not yet at the  
21 back of the plaintiff's before you, instead of which he  
22 immediately entered a temporary restraining order the  
23 next day. That restraining order, as he recites in his  
24 opinion some months later, expired in ten days by its  
25 own terms and was not renewed.

1           Again there was an opportunity for repair to  
2     the tribal court before Judge Batten had made his order  
3     permanent. Then, much later, when the Court of Appeal  
4     reversed the judgment entering a permanent injunction  
5     against the proceedings in the tribal court, and that  
6     judgment of the Court of Appeals occurred July the 3rd,  
7     the mandate issues on the 25th of July.

8           In that interim there was no effort by the  
9     petitioners to appear before the trial court to set  
10    aside the default judgment. On August the 1st, the  
11    tribal court issued a writ of execution, and the  
12    property of the school board was seized.

13          It was not until August the 17th that the  
14    petitioners applied to the Court of Appeals for a stay,  
15    but still they did not appear in the tribal court. They  
16    finally did make their one and only appearance before  
17    the tribal court on August the 22nd, and they obtained a  
18    form of relief on that day.

19          This was the day before Justice Rehnquist had  
20    issued his stay. I should note that our brief, and in  
21    this respect copying Justice Rehnquist's later opinion,  
22    recites his original order as August 21st. It was in  
23    fact August 23rd.

24          Now, that order of the tribal judge is  
25    reprinted in the appendix to the brief in opposition at

1 Page 1A, and so are the subsequent orders of the tribal  
2 court, all of which indicate the tribal court was at all  
3 times within all allotted time to entertain a motion to  
4 set aside the default judgment, and the last order  
5 concludes -- this is on the 19th of September -- this  
6 court stands ready now to rule on the merits of the  
7 defendant's motion to set aside the default judgment  
8 based on the information received to date.

9 Nevertheless, this Court wishes to give the  
10 defendants every possible opportunity in this case, and  
11 therefore a final ruling will not be entered until this  
12 case has received its final review before the United  
13 States Supreme Court.

14 Accordingly, relief from the tribal court is  
15 not yet beyond the realm of possibility.

16 Now, if the Court determines that it ought to  
17 reach the second question presented, whether or not the  
18 tribal court had jurisdiction of the case, it seems to  
19 us that the answer must be in the affirmative.

20 It is no need, there is no need, I trust, in  
21 this Court to argue that a tribal court has jurisdiction  
22 over non-Indians in some cases with respect to events  
23 that occur on a reservation and that implicate the  
24 interests of the tribe.

25 The only serious question in this case, it

1 seems to us, arises out of the status of the defendant  
2 as a state agency. Now, supposedly that fact is very  
3 little stressed by our opponents. They seem to argue as  
4 though the case were no different than if the defendant  
5 in the tribal court were a private non-Indian.

6 If that is so, it seems to us the answer,  
7 given the facts of this case, is very clearly in favor  
8 of tribal court jurisdiction.

9 QUESTION: Mr. Claiborne, do you think the  
10 tribal court would have jurisdiction if it were just a  
11 tourist driving through the reservation who had an  
12 accident injuring an Indian on the reservation?

13 MR. CLAIBORNE: Justice O'Connor, I hesitate  
14 to give a definitive answer. My inclination is to say  
15 that it would not, probably would not extend to such a  
16 case.

17 QUESTION: Would your answer be different if  
18 the person driving the car drove that route with some  
19 regularity?

20 MR. CLAIBORNE: Well, that might be a repeated  
21 peril to the residents of the reservation, and might add  
22 an ingredient. I would suppose that was probably not a  
23 sufficient additional ingredient.

24 It is difficult to draw a line, but this  
25 Court, as has been said, has chosen to determine these



1 matters not on an absolute basis but under the standards  
2 articulated by the Court in the Montana case, and it is  
3 obviously some difficulty in determining when it is that  
4 the activity of non-Indians within Indian lands  
5 sufficiently impacts all the tribal interests to justify  
6 the assertion of jurisdiction by --

7 QUESTION: In my example of the welfare checks  
8 being mailed to tribal members, do you think then that  
9 questions relating to federal welfare -- social security  
10 benefits are going to be decided then in tribal courts?

11 MR. CLAIBORNE: I think I can be clear on that  
12 one, Justice O'Connor. That would not be a case  
13 properly implicating the interests of the tribes in a  
14 way that would justify the assertion of tribal court  
15 jurisdiction any more than it would justify the  
16 assertion of tribal court -- of tribal jurisdiction in a  
17 regulatory way.

18 It seems to us that the test ought to be in  
19 most instances the same; when the tribe can regulate,  
20 when the tribe can tax non-Indian activity, so also can  
21 it require a non-Indian defendant to appear in its  
22 courts.

23 And I suggest that that has been the  
24 understanding, though implicit, ever since Williams  
25 versus Lee. I cannot suppose that the result in that

1 case would have been different had it been the Indian  
2 who were sued for a refund of his money on the ground  
3 that he delivered defective goods rather than the other  
4 way around.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
6 The case is submitted.

7 (Whereupon, at 11:08 o'clock a.m., the case in  
8 the above-entitled matter was submitted.)  
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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:

#84-320 - NATIONAL FARMERS UNION INSURANCE COMPANIES AND LODGE GRASS

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SCHOOL DISTRICT NO. 27, Petitioners V. CROW TRIBE OF INDIANS, ET AL.

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

BY

*Paul A. Richardson*

(REPORTER)

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