

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-68

TITLE KERR-McGEE CORPORATION, Petitioner V.
NAVAJO TRIBE OF INDIANS, ET AL.

PLACE Washington, D. C.

DATE February 25, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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KERR-MC GEE CORPORATION, :
Petitioner, :
V. : No. 84-68
NAVAJO TRIBE OF INDIANS, :
ET AL. :
- - - - -x

Washington, D.C.
Monday, February 25, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:43 o'clock a.m.

APPEARANCES:

ALVIN H. SHRAGO, ESQ., Phoenix, Arizona; on behalf of
the petitioner.

ELIZABETH BERNSTEIN, ESQ., Window Rock, Arizona; on
behalf of the respondents.

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

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Kerr-McGee against Navajo Tribe of Indians.

Mr. Shrago.

ORAL ARGUMENT OF ALVIN H. SHRAGO, ESQ.,
ON BEHALF OF THE PETITIONER

MR. SHRAGO: Mr. Chief Justice, and may it please the Court, at issue in this case is whether an Indian tribe may unilaterally, without any approval whatsoever from the Secretary of the Interior, impose taxes on non-Indian oil and gas lessees.

This issue arises in this case in the context of the Navajo Tribe of Indians, which has never adopted any constitution at all, and which in fact has twice rejected invitations by the Congress to adopt constitutions, first in Section 16 of the Indian Reorganization Act of 1934, and second in Section 6 of the Navajo Hopi Rehabilitation Act of 1950.

In June of 1982, the United States District Court for the District of Arizona held that the taxes, business activity tax and the possessory interest tax were invalid because they lacked Secretarial approval.

That decision was reversed by the Ninth Circuit Court of Appeals in April of 1984, which held that Secretarial approval was not required. The case

1 appears here today on a writ of certiorari to the Ninth
2 Circuit Court of Appeals.

3 The facts in this case are as follows. The
4 petitioner conducts oil and gas operations on Navajo
5 lands situated in the state of Arizona, lands that were
6 set aside by the Treaty of 1868.

7 These operations are conducted pursuant to
8 leases issued by the tribe and approved by the Secretary
9 of the Interior or, more precisely, by his delegate,
10 pursuant to Sections 396A and 396E of the Mineral
11 Leasing Act of 1938, Title 25, United States Code.

12 From 1967 to 1979, the petitioner has paid
13 over \$7,500,000 in royalties in connection with these
14 operations, and over \$111,300 in rentals. From 1979 to
15 1984, the petitioner has paid over \$6,100,000 in
16 royalties, and over \$104,800 in rentals.

17 These payments are not made to the tribe.
18 They are not made to tribal officials. They are made,
19 rather, to officials of the Bureau of Indian Affairs,
20 who handled these funds in trust for the tribe.

21 There is no question that the rate of royalty
22 in these leases is fair and equitable. It is set at 16
23 and two-thirds percent. It is a one-sixth rate of
24 royalty.

25 The two taxes at issue here, the possessory

1 interest tax and the business activity tax, were enacted
2 in January of 1978 and in April of 1978 by the Navajo
3 Tribal Council. The resolutions implementing these
4 taxes explicitly state that the taxes are to be
5 effective, and I quote, "after approval by the Navajo
6 Tribal Council."

7 The taxes were not approved by the Secretary
8 of the Interior. The taxes purport to enable the Navajo
9 Tax Commission to impose a number of penalties for
10 non-compliance, including the penalty to attach and
11 seize assets of the petitioner on the reservation,
12 including the penalty to suspend or to prominently
13 revoke all rights of the petitioner to engage in
14 productive activity on the reservation, notwithstanding
15 the right that was so granted to the petitioner in the
16 leases themselves.

17 The complaint was filed by the petitioner in
18 this case to challenge the validity of these taxes in
19 May of 1979. It was filed in the United States District
20 Court for the District of New Mexico because petitioner
21 also has operations on Navajo land situated on the New
22 Mexico side of the border.

23 These are uranium mining operations, and are
24 far larger in scope than the oil and gas operations
25 which are situated on Navajo lands in Arizona.

1 The Federal District Judge in New Mexico
2 dismissed petitioner's claims against the tribe and the
3 Tax Commission themselves on the grounds of sovereign
4 immunity, but the remaining claims proceeded against
5 tribal officials on the doctrine of ex parte Young on
6 the allegations that tribal officials were purporting to
7 exceed their lawful authority.

8 In March of 1980, the District Judge in New
9 Mexico transferred that portion of petitioner's
10 challenge to these taxes which dealt with its operations
11 in Arizona to the United States District Court for the
12 District of Arizona.

13 The District Court in New Mexico stayed all
14 further proceedings in New Mexico pending resolution of
15 issues that at that time were pending before the Tenth
16 Circuit, and which subsequently were pending before the
17 United States Supreme Court.

18 I am referring to the Merrion decision. The
19 case in New Mexico has still been stayed. It is still
20 presently under a stay. In Arizona, all proceedings
21 were stayed until this Court had rendered its decision
22 in the Merrion case.

23 When the Court rendered its decision in
24 Merrion, District Judge William Koppel entertained
25 motions for summary judgment that had been filed by all

1 of the litigants. He granted summary judgment in favor
2 of petitioner, holding the taxes to be void and invalid
3 because they lacked Secretarial approval.

4 He based his decision on the collateral
5 estoppel effect of a similar decision that had been
6 rendered in similar litigation in the District of Utah,
7 and in addition he held in any event after Merrion the
8 tribe was required to obtain Secretarial approval before
9 these taxes could become effective.

10 Now, the Ninth Circuit reversed that
11 decision. The Ninth Circuit held, and I quote,
12 "Secretarial approval is required only of those tribes
13 that have chosen to include such a requirement in their
14 constitution bylaws or charters."

15 The Ninth Circuit did not refer to this
16 Court's decision in Merrion in reaching that conclusion,
17 and the Ninth Circuit did not state any basis for that
18 rationale.

19 QUESTION: Did the Tenth Circuit also
20 reverse?

21 MR. SHRAGO: Yes, Justice Blackmun, the Tenth
22 Circuit, before the Ninth Circuit rendered its decision,
23 had rendered a decision in the case of Southland Royalty
24 versus Navajo Tribe of Indians in which it had reversed
25 the decision of the Federal District Judge in Utah, and

1 the Ninth Circuit incorporated by reference the
2 reasoning and the result in the Tenth Circuit's
3 decision.

4 It is our position that this holding is
5 fundamentally inconsistent and fundamentally
6 misconstrues the very basic nature of the relationship
7 between the United States and the Indian tribes. This
8 is a holding which effectuates a radical change in some
9 200 years of tradition and custom of federal supervision
10 over relations between Indians and non-Indians.

11 QUESTION: Mr. Shrago, do you think the
12 Merrion decision recognized only a limited sovereign
13 power to tax conditioned on the requirement of the
14 Secretary's approval?

15 MR. SHRAGO: I think, Justice O'Connor, that
16 the Merrion decision recognized that Indian tribes
17 generally have an inherent power to tax. However, I
18 think the decision in Merrion also recognized that the
19 Congress has regulated the manner and extent to which
20 Indian tribes may exercise that power, and that is
21 precisely --

22 QUESTION: Well, your answer to my question is
23 basically no, and if that is the case, why should we
24 distinguish among tribes governed by the Indian
25 Reorganization Act and tribes that aren't?

1 MR. SHRAGO: Because as this Court held in
2 Merrion, the Indian Reorganization Act of 1934 set forth
3 a procedure whereby tribes should adopt constitutions
4 and then if they wish to tax non-Indians, announce their
5 intention to tax non-Indians and have their taxing
6 ordinances approved by the Secretary of the Interior.

7 The Court was explicit in explaining that this
8 was, and I quote, "the administrative process
9 established by Congress to monitor such exercises of
10 tribal authority."

11 The Congress has regulated the manner and
12 extent in which an inherent power may be exercised. In
13 fact, this is a point that Justice Stewart --

14 QUESTION: Well, is there any specific
15 provision of the Indian Reorganization Act that requires
16 Secretarial approval of taxes?

17 MR. SHRAGO: No, Your Honor. In fact, there
18 is no mention of taxes themselves in the Indian
19 Reorganization Act. There is specific mention in the
20 Indian Reorganization Act of the concept of Secretarial
21 approval with respect to the constitution itself.

22 And I might add that in 1954, after the
23 Congress had extended a second invitation to the Navajos
24 to adopt a constitution in Section 6 of the Navajo Hopi
25 Rehabilitation Act of 1950, the solicitor rendered an

1 opinion, and he was referring to the very language in
2 Section 6 of that Act, the existing law language, which
3 was taken almost verbatim from Section 16 of the Indian
4 Reorganization Act of 1934.

5 And the solicitor explained that when a tribe
6 adopts a constitution that allows it to exercise powers
7 vested by existing law, that incorporated within the
8 notion of vested by existing law is that before the
9 exercise can take place, the Secretary must approve the
10 exercise.

11 That was the Secretary's interpretation as
12 late as 1954.

13 QUESTION: But that was of a tribe that had
14 adopted a constitution.

15 MR. SHRAGO: No, Your Honor, this was in
16 connection with a proposed constitution that was being
17 drafted and circulated to the Secretary for his review,
18 the constitution that was being proposed for the Navajos
19 to adopt under Section 6 of the Navaho Hopi
20 Rehabilitation Act. They never adopted it.

21 QUESTION: And what was the Secretary's
22 opinion with respect to that proposed constitution?

23 MR. SHRAGO: The proposed -- the Secretary had
24 a number of opinions with respect to that proposed
25 constitution.

1 QUESTION: But the one you just adverted to.

2 MR. SHRAGO: Yes, he did observe that there
3 were some powers that were articulated in this proposed
4 constitution that should be subject to Secretarial
5 review, and he had some criticisms about the
6 constitution that had at that time been drafted.

7 QUESTION: Well, did he express the view that
8 there was some statute on the books that would require
9 them to be subject to Secretarial review as opposed to
10 simply having it desirable as a matter of choice?

11 MR. SHRAGO: He expressed the view that the
12 language existing law, vesting tribes with authority to
13 exercise powers according to existing law, the same
14 language that had been used in the 1934 Act, necessarily
15 included the understanding that those powers, before
16 they could be exercised, must be approved by the
17 Secretary of the Interior.

18 This, of course, is the understanding that the
19 Bureau of Indian Affairs had at the very outset, from
20 adoption of the Indian Reorganization Act of 1934. It
21 is very clear from the legislative history, and it is
22 very clear from the contemporaneous administrative
23 interpretation.

24 For example, Commissioner John Collier, who
25 was the draftsman of the Wheeler-Howard bill, the Indian

1 Reorganization Act of 1934, explained, and I quote:
2 "The bill provides the machinery for a progressive
3 establishment of home rule by tribes or groups of
4 Indians."

5 It is that machinery, the adoption of a
6 constitution and approval by the Secretary of the
7 Interior which is precisely what the Indian
8 Reorganization Act was designed to accomplish.

9 That is precisely, as this Court recognized in
10 Merrion, the administrative process established by
11 Congress to monitor such exercises of tribal authority.

12 QUESTION: But the Congress didn't require the
13 tribes to adopt constitutions.

14 MR. SHRAGO: That is correct, Justice
15 Rehnquist. This was optional with the tribes. This was
16 true of the original bill. It was true of the bill as
17 it proceeded through the Congress.

18 QUESTION: And the tribes retained, if they
19 didn't adopt a constitution, certain sovereign powers,
20 did they not?

21 MR. SHRAGO: Your Honor, there is a difference
22 between --

23 QUESTION: Did they not?

24 MR. SHRAGO: I would say yes.

25 QUESTION: Okay. And so the question is

1 whether the power to tax is one of those sovereign
2 powers.

3 MR. SHRAGO: I believe that question has been
4 answered in Merrion, and we are not --

5 QUESTION: And the Court said, yes, it
6 includes that.

7 MR. SHRAGO: That's correct, but the Court
8 also went further and said that before the power to tax
9 could be exercised, it had to be approved by the
10 Secretary of the Interior, and in fact Justice Marshall
11 in the opinion in Merrion explicitly made the
12 distinction between the existence of a sovereign power
13 to tax, which he explained, that neither the tribe's
14 constitution, in that case the Jicarilla Apache Tribe,
15 nor the Federal Constitution is the font of any tribal
16 sovereign power to tax.

17 But he also explained, however, that in light
18 of the Indian Reorganization Act, amendment of the
19 tribe's constitution to authorize the tax, to announce
20 the intention to tax, was the necessary event or the
21 critical event, as I believe he put it, necessary to
22 effectuate the tax, and the word "effectuate" was
23 highlighted.

24 In short, again we are talking about existence
25 of a power and the manner and extent by which the

1 Congress has regulated that power. At the present time,
2 it is essential that there be this administrative
3 process for review of the tribal taxing power.

4 As the Court mentioned in Merrion, Secretarial
5 approval is a necessary constraint to minimize the
6 potential concern that tribes may exercise the power to
7 tax in an unfair or unprincipled manner, or in any way
8 inconsistent with overriding national interests.

9 Under this Court's interpretation of Santa
10 Clara Pueblo versus Martinez, we cannot challenge the
11 unfairness of this tax under the due process or equal
12 protection clauses of the Indian Civil Rights Act of
13 1968, nor can we challenge the due process and equal
14 protection problems we have with these taxes under the
15 Federal Constitution, since it has been held that those
16 limitations do not apply to Indian tribes.

17 In short, the only relief that we have is if
18 this administrative process established by Congress to
19 monitor such exercises of tribal authority is upheld and
20 respected by the Secretary. That in fact is exactly
21 what the Secretary did in connection with the Hopi
22 Indian Tribe, which of course resides on the land
23 situated within the exterior boundaries of the Navajo
24 Tribe.

25 They attempted to enact a severance tax, and

1 the Secretary of the Interior, actually the Assistant
2 Secretary, disapproved the tax because in his opinion it
3 violated the due process provision of the Indian Civil
4 Rights Act of 1968. Now, the Hopi Tribe has --

5 CHIEF JUSTICE BURGER: We will resume there at
6 1:00 o'clock, counsel.

7 MR. SHRAGO: Thank you.

8 (Whereupon, at 12:00 o'clock p.m., the Court
9 was recessed, to reconvene at 12:59 o'clock p.m. of the
10 same day.)
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1 himself, an intention to deceive the Indian tribes of
2 this country by going around the country and telling
3 them, this Act is for your benefit, this is an Act which
4 is going to strengthen your tribal powers, this is an
5 Act which is going to free you more and more from
6 federal control.

7 QUESTION: Well, the Navajos maybe knew what
8 they were doing.

9 MR. SHRAGO: That is exactly the point I am
10 trying to make, Justice White, that if you adopt the
11 argument that has been made by the Ninth Circuit --

12 QUESTION: Well, they just knew better.

13 MR. SHRAGO: That they knew better than the
14 draftsmen of the legislation and the Congress I think is
15 a remarkable conclusion to reach.

16 QUESTION: May be.

17 MR. SHRAGO: Nevertheless, if that conclusion
18 is reached, then the majority of Indian tribes in this
19 nation that adopted constitutions under the IRA have
20 been frankly tricked by the Congress, by President
21 Roosevelt, by Commissioner Collier, by the federal
22 government for 50 years.

23 And in fact as the Tenth Circuit recognized in
24 the Southland Royalties Company case which is presently
25 pending on a petition for rehearing, if this

1 interpretation is upheld of the Indian Reorganization
2 Act, it will encourage tribes which have adopted
3 constitutions to repudiate their constitutions so that
4 they may exercise these powers without federal
5 supervision and federal control.

6 This would be the remarkable conclusion that
7 the objectives of an Act of Congress can best be
8 furthered by ignoring and repudiating the Act
9 altogether. It simply makes no sense.

10 The need for Secretarial approval, of course,
11 is unquestioned. As the Court observed in Merrion
12 itself, Secretarial approval is one of those constraints
13 that minimizes potential concern that the tribal taxing
14 power may be exercised in an unfair or unprincipled
15 manner, or that it may be exercised in a manner that is
16 inconsistent with overriding national interests.

17 The Secretary under the present state of the
18 law is the only one who can oversee the propriety of
19 these tribal exercises of power. Under the Martinez
20 decision, the violation of the Indian Civil Rights Act
21 by implementation of tribal power in a civil context as
22 opposed to the criminal context simply cannot be
23 reviewed by a federal court.

24 Indeed, as the Secretary has recently
25 invalidated or refused to approve the severance tax

1 enacted by the Hopi Tribe on the grounds that it
2 violated the due process clause of the Indian Civil
3 Rights Act of 1968, we see no reason, no basis, no
4 principle either in logic or in fact by which the
5 Secretary could claim that the identical tax which
6 offends the identical due process clause of the Indian
7 Civil Rights Act of 1968 should somehow be permitted to
8 be implemented merely because the other tribe has not
9 adopted a constitution under the IRA or under similar
10 legislation, and in fact has not adopted a constitution
11 at all.

12 To the contrary, we believe that the need for
13 Secretarial review, federal oversight of tribal
14 exercises of the taxing power is all the more pressing
15 in the case of those tribes which have refused to adopt
16 constitutions than it is in the case of those tribes
17 which have at least followed the Congressional policy
18 and adopted constitutions.

19 After all, the constitutional form of
20 government in this nation is basic, principal, and
21 fundamental.

22 In New Mexico versus Mescalero Apache Tribe, a
23 unanimous decision of this Court involving hunting and
24 fishing rights and regulation of those rights by the
25 state or by the tribe, this Court observed that federal

1 law commits to the Secretary and to the tribe the
2 responsibility to manage the reservation's resources.

3 The Court also unanimously held that federal
4 law requires the Secretary to approve the tribe's
5 hunting and fishing ordinances, which of course the
6 Secretary had done in that case.

7 This, of course, was also a matter on which
8 the Court had remarked in United States versus Wheeler,
9 a case involving the Navajo tribe itself. In Wheeler,
10 the Court distinguished between the existence of an
11 inherent power, and that was the basis on which there
12 was a dispute between the majority and the minority in
13 Merrion, whether as a matter of inherent tribal power,
14 the power existing, not on whether the manner and extent
15 of that power had been regulated by the Congress.

16 The Court in Wheeler, a case involving the
17 Navajo Tribe, explained that Congress has in certain
18 ways regulated the manner and extent of the tribal power
19 of self-government does not mean that Congress is the
20 source of that power.

21 We have the difference between existence of
22 the power and the manner in which that power can be
23 exercised. The Congress intended that for tribes to
24 exercise the power to tax against non-Indians, at the
25 very least that tax must be approved by the Secretary

1 or, in the words of the Merrion Court, receive specific
2 general approval before it could become valid.

3 This result, of course, is consistent with the
4 legislative history underlying enactment of the Indian
5 Reorganization Act. John Collier explained that the
6 bill provided the machinery for progressive
7 establishment of home rule by tribes or groups of
8 Indians.

9 The Senate report, which was presided over by
10 Senator Wheeler, the sponsor of the bill, the
11 Wheeler-Howard Act, in the Senate, explained that the
12 legislation was intended, and I quote, "to stabilize the
13 tribal organization of Indian tribes by vesting them
14 with real though limited authority and by prescribing
15 conditions which must be met by such tribal
16 organizations."

17 Under the interpretation of the Indian
18 Reorganization Act advocated by the Ninth Circuit, those
19 tribes which rejected the Indian Reorganization Act
20 would be vested with not limited power but with
21 unlimited power, and that interpretation would encourage
22 the majority of tribes in this country who have adopted
23 constitutions in pursuance of the objectives of the
24 Indian Reorganization Act to disband those
25 constitutions, to repudiate them, to revoke them.

1 QUESTION: Has that yet happened with any
2 tribe?

3 MR. SHRAGO: Yes, in fact, Justice Brennan,
4 the United States points out in its brief that it is now
5 engaged in a process of encouraging tribes to eliminate
6 the provisions in tribal constitutions calling for
7 Secretarial review.

8 Apparently the notion is that tribal or
9 Secretarial review is a matter that is required by
10 tribal law and not by federal law. That is the premise
11 of that argument, which I submit is wrong and
12 inconsistent with this Court's holding in Merrion that
13 the IRA and adoption of a tribal constitution and
14 Secretarial approval fulfill the administrative process
15 established by Congress to monitor such exercises of
16 tribal authority.

17 QUESTION: Well, would it be your view that
18 once having adopted a constitution, the tribe may not of
19 itself in any event disband the constitution?

20 MR. SHRAGO: No, Your Honor. I think that
21 that is a process which is provided for in the Act
22 itself. They certainly can, but if they do, then they
23 will not be following the administrative process
24 established by Congress to monitor tribal exercises, at
25 least of the taxing power, in the event they disband

1 their constitutions.

2 In conclusion, the Ninth Circuit decision
3 rejects Merrion's interpretation and holding with
4 respect to the Indian Reorganization Act of 1934. The
5 Ninth Circuit's decision interprets the Indian
6 Reorganization Act of 1934 as an Act of Congressional
7 deceit to trick Indians into contracting away, as the
8 United States has explained it, their powers in the face
9 of representations that the IRA would strengthen their
10 government and free them from federal control.

11 The interpretation will encourage the majority
12 of tribes who have adopted constitutions to repudiate
13 them. The result is that there will be unlimited
14 exercise of absolute governmental power, ironically on
15 lands owned in fee by the United States government
16 itself.

17 We believe that 200 years of traditional
18 federal supervision over Indian/non-Indian relations
19 should be affirmed. We submit that the Ninth Circuit's
20 decision should be reversed.

21 I would like to reserve the remainder of my
22 time for rebuttal.

23 CHIEF JUSTICE BURGER: Ms. Bernstein.

24 ORAL ARGUMENT OF ELIZABETH BERNSTEIN, ESQ.,

25 ON BEHALF OF THE RESPONDENTS

1 MS. BERNSTEIN: Thank you, Mr. Chief Justice,
2 and may it please the Court, the Navajo Tribal Council
3 enacted the broad-based tax laws at issue in this case
4 because it is badly in need of funds to provide
5 essential governmental services, including police, fire
6 protection, roads, health care, clean drinking water, to
7 a reservation of over 25,000 square miles.

8 These laws, like other tribal laws, were
9 submitted in due course to the Department of the
10 Interior, and it was the decision not of the tribe but
11 of the Department of the Interior that there was nothing
12 in federal law, federal regulations, or tribal law which
13 conditioned the effectiveness of those tribal taxes on
14 Secretarial approval.

15 The Secretary has therefore repeatedly and in
16 writing declined to act to either approve or disapprove
17 the laws as he asserts that it would be a gratuitous act
18 of no effect.

19 Two and a half years after the possessory
20 interest tax was enacted by the Navajo Tribal Council,
21 Kerr-McGee amended its complaint to allege that the
22 validity of the taxes depended on Secretarial action.

23 It is important to realize the scope of
24 Kerr-McGee's allegation. There is no question in this
25 case but that Congress, for example, has power to

1 control, divest, limit tribal taxation.

2 But Kerr-McGee is alleging not just that
3 Congress has delegated to the Secretary, for example,
4 the power to regulate tribal taxation, not just that the
5 Secretary in the absence of regulation even could veto a
6 tribal ordinance, but rather, that in the absence of
7 affirmative federal action which the Secretary has
8 declined to take and determined to be unnecessary, a
9 tribe's exercise of its own inherent sovereign powers,
10 powers which this Court has recognized to derive not
11 from the federal government but from the tribe's
12 sovereignty, that the tribe may not exercise those
13 powers, that the exercise remains ineffective, that the
14 Secretary cannot even waive, either deliberately or
15 through lapse of time, such a requirement.

16 One of the ironies of this case is that that
17 was not even the case under the Jicarilla Apache
18 constitution, which, although it does subject certain
19 taxing laws to Secretarial approval, also provides that
20 if the Secretary fails to disapprove a law submitted
21 within 120 days, the law will become effective.

22 Other tribal constitutions under the Indian
23 Reorganization Act specifically allow the Secretary in
24 his sole discretion in writing to waive an approval
25 requirement. The need for that kind of certainty and

1 that kind of closure is a great in tribal government as
2 it is anywhere else. Kerr-McGee's argument would throw
3 tribal government into chaos.

4 It leads to the conclusion that there may be
5 scores of tribal laws which have been on the books for
6 decades now which everyone has believed to be effective
7 but which according to Kerr-McGee would be ineffective
8 because there was an approval requirement that was so
9 subtle and so implicit that the Secretary didn't know
10 that it existed, and that the Secretary's own
11 determination that there was no such requirement has
12 never sufficed to give effect to those laws.

13 Over 100 years ago the Senate Judiciary
14 Committee upheld the validity of Chickasaw revenue
15 ordinances which fell on non-Indians and which had been
16 approved by no agent of the federal government.

17 In the Attorney General opinion cited in the
18 United States' brief in 18 Opinions of the Attorney
19 General, it was -- that earlier Senate Judiciary
20 Committee determination was not only reaffirmed, but the
21 Attorney General went on to answer specifically the
22 question, not only were these laws valid, but were they
23 subject to revision or control by any department or
24 officer of the United States, and concluded that they
25 were not because Congress had not delegated that power

1 to any agent or officer of the United States.

2 The argument about tribes having been tricked
3 into reorganizing under the Indian Reorganization Act
4 rests on a fundamentally incorrect assumption, which is
5 that if the tribe organized under the Indian
6 Reorganization Act, it was required to condition its
7 laws in that constitution on Secretarial approval.

8 That has never been the case. It has never
9 been the Secretary's interpretation of the law, nor did
10 Congress say anything of the sort in the Indian
11 Reorganization Act.

12 In fact, while the Act referred to Secretarial
13 approval with respect to certain additional powers which
14 were enumerated in the Indian Reorganization Act, with
15 respect to the vesting of existing tribal powers in the
16 tribes pursuant to their constitutions, there was no
17 mention by Congress whatsoever of Secretarial approval.

18 QUESTION: What is the explanation or the
19 speculation as to why the tribes, some tribes or perhaps
20 all of them who adopted constitutions put in this
21 requirement of Secretarial approval?

22 MS. BERNSTEIN: Well, first of all, Your
23 Honor, it was not the case that all tribes did so. The
24 United States cites examples of constitutions going all
25 the way back to 1937 which did not contain such

1 requirements.

2 I believe, though, that the explanation is
3 that the Indian Reorganization Act was enacted because
4 there were many, although not all, tribes which had
5 essentially lost their tribal governments entirely
6 during the allotment era.

7 And those tribes had very little experience at
8 that point, anyway, in operating a government. Those
9 tribes were specifically in need of additional guidance
10 by the Secretary, and as well the approach of the
11 Secretary and the Bureau of Indian Affairs to tribal
12 government at that point was one of exerting a great
13 deal of power over Indian tribes.

14 It may be that the Secretary carried that
15 further than Congress wanted it to even in the Indian
16 Reorganization Act.

17 QUESTION: What authority would the Secretary
18 have under federal law to approve or disapprove a taxing
19 ordinance even though the tribal constitution required
20 it to do? Could the tribe confer power on the
21 Secretary?

22 MS. BERNSTEIN: The Secretary's --

23 QUESTION: I would think the Secretary would
24 say, I don't see any federal statute that gives me any
25 power to approve or disapprove of a taxing ordinance of

1 any tribe.

2 MS. BERNSTEIN: The Secretary's position
3 appears to be that as part of its duties with respect to
4 the Indian tribes it is willing to review tribal
5 ordinances in the event that that is the tribe's wish.
6 The Secretary takes the position that if the tribe
7 specifically conditions its laws on Secretarial
8 approval, that the Secretary will review.

9 QUESTION: Well, then, what do you make out of
10 the statement in Merrion that the Secretary's, at least
11 in connection with that tribe, the Jicarillas -- it
12 sounded from reading that opinion as though the
13 Secretary had legal authority to turn down a taxing
14 ordinance with respect to the Jicarillas.

15 MS. BERNSTEIN: Well, because there was a
16 provision in the Jicarilla constitution --

17 QUESTION: Why would that give the Secretary
18 authority?

19 MS. BERNSTEIN: The tribe in that case, by
20 adopting that constitution, was voluntarily conditioning
21 its own powers on Secretarial approval.

22 QUESTION: I know, but how could the Secretary
23 -- why would the Secretary purport to approve or
24 disapprove in the absence of some statute?

25 MS. BERNSTEIN: I suppose it could be

1 questioned whether the Secretary ought to be doing so
2 even in those cases. However, that is a practice which
3 the Secretary has developed over a long period of time
4 where the tribe voluntarily conditions --

5 QUESTION: What standard does the Secretary
6 use in that situation?

7 MS. BERNSTEIN: Well, the Secretary has
8 recently issued guidelines which state what standards
9 the Secretary will use, and the standard is essentially
10 one of seeing whether or not the tribal law violates any
11 other law, the tribal law -- the tax law in question --

12 QUESTION: Well, if the Secretary is
13 purporting then to exercise its authority, I just again
14 wonder where he thinks he gets it. And if he has it
15 there, I don't know, maybe you can find it in that same
16 source whether the tribe has a constitution or not.

17 MS. BERNSTEIN: But the Secretary's authority
18 is a very different question. The question of what the
19 Secretary is authorized to do is very different from the
20 question of what the Secretary is required to do. Even
21 if one assumes that Congress has authorized the
22 Secretary in certain situations to approve or disapprove
23 tribal law, that is a far cry --

24 QUESTION: Do you think Congress has
25 authorized the Secretary to approve or disapprove any

1 Indian taxing ordinance?

2 MS. BERNSTEIN: I think that the question
3 obviously doesn't arise, at least as between a tribe and
4 the Secretary, if the tribe is willingly saying --

5 QUESTION: It has now arisen, the question
6 has.

7 MS. BERNSTEIN: In other words, even if a
8 tribe has a constitution which requires Secretarial
9 approval, I think that given --

10 QUESTION: Well, is there some authority --

11 MS. BERNSTEIN: I don't mean the question
12 doesn't arise. I mean the dispute doesn't arise if the
13 tribe is willingly conditioning its laws on Secretarial
14 approval.

15 QUESTION: Well, the question arises whether
16 the Secretary has Congressional authority to perform
17 that function. That is my question to you. Does he or
18 doesn't he?

19 MS. BERNSTEIN: We are not questioning the
20 Secretary's authority to act --

21 QUESTION: I know you aren't, but where is the
22 Congressional authority that you say is necessary for
23 the Secretary to perform that function?

24 MS. BERNSTEIN: I have not said that express
25 Congressional statement is necessary in order to empower

1 the Secretary to act in those situations. I do say that
2 an express direction of Congress is necessary in order
3 to require the Secretary to act, that is, in order to
4 render a tribal law ineffective until the Secretary
5 acts.

6 I think that Congress has the power to
7 condition or limit tribal powers over and against the
8 desires of the tribe. The situation of the tribal
9 constitution presents a very different situation where
10 the Secretary's approval-disapproval authority is not
11 over and against the desires of the tribe. It is, in
12 fact, with the cooperation, with, in fact, the tribe's
13 request to the Secretary for assistance.

14 QUESTION: I take it your bottom line, then,
15 would be that if the Secretary turns it down, the tribe
16 may put it into effect anyway.

17 MS. BERNSTEIN: I would --

18 QUESTION: Insofar as federal law is
19 concerned.

20 MS. BERNSTEIN: I would question the authority
21 of the Secretary in the absense of a Congressional
22 delegation to veto a tribal ordinance where Congress had
23 not said that tribal exercise of that kind of power was
24 conditioned on Secretarial approval or disapproval.

25 QUESTION: So the provisions in these

1 constitutions is just, we want to submit the ordinance
2 and approve it if you want to but you are not authorized
3 to disapprove it.

4 MS. BERNSTEIN: No, that is not the provision
5 in the constitution. If a tribe says in its own
6 constitution, which is tribal law, we are commissioning
7 the effectiveness of our laws on Secretarial approval or
8 disapproval, then that tribe is saying that they will
9 accept either approval or disapproval.

10 They are giving the Secretary the power with
11 respect to their own laws.

12 QUESTION: This is a delegated power from the
13 tribe to the Secretary, isn't it? They didn't have to
14 give it to them in the first place, did they?

15 MS. BERNSTEIN: No, they do not have to do so,
16 and they do not have to do so under the Indian
17 Reorganization Act.

18 QUESTION: Then it is a delegated power in
19 effect like appointing an agent, is it not, appointing
20 the Secretary as agent for the tribe for certain
21 purposes. Would you agree with that?

22 MS. BERNSTEIN: I think that the Secretary is
23 still functioning as an agent of the United States, that
24 Congress has delegated to the Secretary the power to --

25 QUESTION: Well, have they delegated -- has

1 Congress delegated any power with respect to this
2 particular transfer of authority from the tribe to the
3 Secretary?

4 MS. BERNSTEIN: Congress has not -- has never
5 expressly stated that, so far as I know, that the
6 Secretary is to act on tribal taxing ordinances in any
7 particular situation.

8 On the other hand, the Secretary does have --
9 it is in the Secretary that Congress has placed the
10 management of Indian affairs, but the tribe's point here
11 is that even if that were to go so -- even if that
12 general -- that general authority, the fact that
13 Congress has placed in the Secretary the management of
14 Indian affairs, may well be enough to support the
15 Secretary's action as a federal agent when a tribe
16 specifically says, we want the Secretary's action on
17 this law, we will condition its effectiveness on
18 Secretarial action, but it is --

19 QUESTION: Can the tribe withdraw that
20 delegated authority any time it wants to?

21 MS. BERNSTEIN: Well, it depends on how the
22 tribe has stated that authority. If it is stated in an
23 Indian Reorganization Act constitution, then it cannot
24 withdraw it by itself for the simple reason that
25 Congress has stated that those constitutions can't be

1 amended without Secretarial approval.

2 On the other hand, the Secretary is willingly
3 encouraging tribes to remove those kinds of restraints
4 which are not necessary under federal law. If a tribe
5 places that condition in some other way, then, that is,
6 if it is not in the tribe's constitution, then it may be
7 possible for the tribe to eliminate that condition as
8 well without further Secretarial involvement.

9 QUESTION: Ms. Bernstein, are these leases,
10 tribal leases to Kerr-McGee or other private -- are they
11 subject to approval by the Secretary?

12 MS. BERNSTEIN: The leases are subject to
13 approval by the Secretary, and I want to specifically
14 address the argument that has been made by Kerr-McGee
15 that when Congress says to the Secretary, you should
16 approve tribal leases of land, and of course -- excuse
17 me, that when it says that, that it means that the
18 Secretary must approve or disapprove anything that the
19 tribe does that bears on those lessees.

20 Of course, this is -- Congress's direction to
21 the Secretary to approve those kinds of leases first of
22 all is not limited to mineral leases. It applies to
23 other leases which Congress has enumerated, for example,
24 residential, religious, recreational leases.

25 Second of all, so that there is no -- it is

1 incorrect to read the direction to the Secretary to
2 approve mineral leases as meaning you, the Secretary,
3 must make sure that tribal policy does not contravene
4 federal energy or mineral policy any more than Congress
5 intends to subject other sorts of tribal leases to
6 federal recreational, religious, or residential policy.

7 QUESTION: Normally in administering these
8 mineral leases or oil and gas leases, if Kerr-McGee or
9 the lessee refused to live up to one of the terms of the
10 lease, what happens? Does the tribe give notice that
11 the lease is terminated, or does it take the Secretary's
12 approval?

13 MS. BERNSTEIN: The Secretary's regulations
14 specifically provide that the Secretary is to be
15 involved in termination of leases, but the Secretary's
16 role under these kinds of leasing statutes is limited
17 and directed to proprietary matters.

18 First of all, it is not the case that these
19 laws --

20 QUESTION: I suppose if this tribal ordinance
21 is as valid as you suggest it is, and Kerr-McGee refused
22 to pay it, to pay the tax, I suppose the tribe would
23 think it should be able to cancel the lease.

24 MS. BERNSTEIN: There is no cancellation of
25 lease provision asserted in the tax laws. There are

1 other penalties, other enforcement mechanisms of various
2 sorts, none of which have been imposed yet.

3 QUESTION: And none of which would require the
4 Secretary's approval.

5 MS. BERNSTEIN: I am not sure of that, Your
6 Honor. There are many different kinds of lessees, well,
7 not only lessees, just businesses that are subject to
8 these laws. We concede, for example, we cannot
9 imprison, you know, Kerr-McGee's non-Indian employees
10 while we may be able to imprison a Navajo employee for
11 tax fraud.

12 It may also be the case that if it came down
13 to the tribe seizing and selling property, if the tribe
14 seizes and sells someone's pickup truck, it does not
15 need Secretarial approval.

16 If the tribe wants to seize and sell a
17 leasehold, at that point there may be a Secretarial
18 approval requirement if the regulations so provide, but
19 that -- the enforcement mechanisms are not at issue at
20 this point because the tribe has not attempted to
21 enforce them against anybody.

22 And those questions as to what are the federal
23 limitations on any specific enforcement mechanism can
24 only be answered when and if the tribe needs to use
25 those enforcement mechanisms.

1 QUESTION: Your opponent contends that they
2 have no real way of challenging those things because of
3 the Santa Clara case.

4 MS. BERNSTEIN: Well, of course, they are,
5 first of all, ignoring tribal forums entirely, which was
6 exactly the remedy that was suggested in the Santa Clara
7 case, and I think it is significant that it is in the
8 Indian Civil Rights Act, not in the Mineral Leasing Act
9 or in any other law by which the Secretary is supposed
10 to protect tribal property, it is in the Indian Civil
11 Rights Act that Congress has specifically directed
12 itself to what protection should persons, non-Indians or
13 Indian, within tribal jurisdiction have from the Indian
14 tribes.

15 And Congress answered that question in the
16 Indian Civil Rights Act, and that question did not
17 involve Secretarial approval of tribal ordinances as a
18 means of protecting it.

19 QUESTION: So you say that your opponent is
20 right, that they don't have any way of challenging.

21 MS. BERNSTEIN: No, they have tribal forums to
22 go to. The tax laws provide for two levels of appeal
23 within the tribal forums, and of course if there were
24 other kinds of federal laws violated, they have the same
25 forum in the federal courts that they have in this case.

1 They keep referring, for example, to the fact
2 that the Hopi ordinances were held to violate due
3 process. The due process violation was not a procedural
4 one but arose from the fact that the Hopi tribe was
5 asserting taxing jurisdiction beyond its territorial
6 jurisdiction.

7 That is the kind of issue which would readily
8 be heard in the federal courts to determine what the
9 territorial jurisdiction of an Indian tribe is. But
10 there are certain kinds of violations which this Court
11 has held Congress intended to be redressed in tribal
12 forums.

13 Thank you, Your Honor, if there are no further
14 questions.

15 CHIEF JUSTICE BURGER: Mr. Claiborne.

16 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

17 ON BEHALF OF THE UNITED STATES

18 AS AMICUS CURIAE IN SUPPORT OF

19 THE RESPONDENTS

20 MR. CLAIBORNE: Mr. Chief Justice, and may it
21 please the Court, petitioners have, in my view and
22 perhaps in the Court's view, never really explained what
23 their argument is, whether it is that the power of
24 Indian tribes to tax which survived dependent status was
25 conditioned, hobbled, limited for the first time in 1934

1 or 1938, depending upon whether they are relying on the
2 Indian Reorganization Act or the Indian Mineral Leasing
3 Act, or whether their argument is that long before that
4 and independent of those Acts of Congress the power of
5 Indian tribes to tax non-Indians doing business on a
6 reservation was always subject to Secretarial or federal
7 approval.

8 It is not surprising that they do not choose
9 between these two alternatives, because either one leads
10 to a dead end. The first, the one seemingly most
11 emphasized, that is, reliance on the Indian
12 Reorganization Act and the Indian Leasing Act of 1938,
13 obviously founders on the main objective of those two
14 statutes, which were to increase, not decrease, Indian
15 self-government, to maximize, not to hobble the power of
16 Indian tribes to earn their own revenues through
17 taxation and other means.

18 Furthermore, they have difficulties under the
19 text of both of those statutes. As we know, the Indian
20 Reorganization Act, first of all, is optional. It
21 requires no tribe to agree or not to. It requires no
22 tribe that does come under the Act to adopt a
23 constitution. It requires no such constitution to
24 provide that taxing ordinances in particular or any
25 others shall be subject to Secretarial approval.

1 Accordingly, the IRA is simply not a proper
2 source for insisting that Congress imposed Secretarial
3 approval as a precondition to the validity of any taxing
4 ordinance effecting non-Indians.

5 Under the Mineral Leasing Act of 1938, similar
6 problems arise. That Act, to be sure, does give the
7 Secretary pervasive regulation of leasing, the
8 management of Indian property, and area traditionally
9 governed, controlled, supervised pervasively by the
10 government, but that Act has nothing whatever to do with
11 the exercise not of the landlord's right but of the
12 governmental prerogatives of an Indian tribe, including
13 the power of taxation.

14 QUESTION: Mr. Claiborne, in your view, what
15 is the source of the Secretary's authority to approve
16 any tribal tax?

17 MR. CLAIBORNE: Justice O'Connor, in the
18 particular case of provisions in IRA constitutions, it
19 seems to me that the source is the IRA itself insofar as
20 Congress said the constitution adopted pursuant to this
21 Act shall be valid only when approved by the Secretary,
22 and impliedly Congress presumably permitted the
23 Secretary or the tribe or the two together to include
24 within such constitutions further approval requirements
25 with respect to certain kinds of legislation.

1 QUESTION: Is it presently the Secretary's
2 view that tribes with a written constitution under the
3 IRA can amend their constitution and the Secretary will
4 approve it if the amendment is to withdraw Secretarial
5 approval to impose taxes?

6 MR. CLAIBORNE: Exactly so, Justice O'Connor,
7 and as counsel for petitioners correctly stated, our
8 brief recites that it has been the policy of the
9 Department of Interior for some years now not merely to
10 approve amendments to constitutions to remove what as a
11 matter of federal law are unnecessary Secretarial review
12 provisions, but to encourage amendment of tribal
13 constitutions to that end, and a substantial number of
14 tribal constitutions have recently been amended with
15 that in mind.

16 Why don't we turn to the alternative argument
17 that seems to be made in part by the petitioners? That
18 is that from time immemorial, at least since the tribes
19 became subject to the jurisdiction of the United States,
20 their power of taxation has been somehow subjected to
21 federal approval.

22 That is tantamount to saying that the power of
23 taxation did not survive, and it amounts to nothing more
24 than the privilege of asking the Secretary, if you
25 agree, may we tax, and only if he says yes may they do

1 it. So that is hardly a sovereign inherent power that
2 survived dependent status in the sense in which this
3 Court indicated that power both in the Coville and in
4 the Merriam cases.

5 It is, moreover, completely at odds with the
6 historic distinction between the supervision of the
7 United States over the property management function and
8 the attributes of Indian sovereignty.

9 In order to protect tribal land, in order to
10 protect the Indians from being taken advantage of by
11 outsiders, by their neighbors, by those who were selling
12 them goods, the government has traditionally since the
13 first Nonintercourse Act in 1790 and in a series of
14 treaties and legislation ever since quite pervasively
15 regulated property transactions so as to protect the
16 Indians from being taken advantage of.

17 There is nothing, nothing at all comparable on
18 the side of the exercise of Indian sovereign
19 prerogatives, including the taxing power.

20 QUESTION: Does the Secretary think there are
21 any other overriding provisions of federal law,
22 constitutional or otherwise, that might impact on the
23 exercise by the tribe of its taxing powers?

24 MR. CLAIBORNE: Justice O'Connor --

25 QUESTION: The commerce clause or anything

1 else?

2 MR. CLAIBORNE: This Court in the Merriam case
3 was somewhat undecided as to whether the commerce clause
4 in a full-fledged way limited the exercise of taxing
5 power by Indian tribes. For present purposes we accept
6 that it would, or that the Indian commerce clause, its
7 analogue, would present a limit on the kind of
8 discriminatory taxation that might be envisaged.

9 Of course, there is a territorial limitation,
10 the basis on which the Hopi ordinance was disapproved,
11 and that is subject to, in our view, to control by
12 federal courts as the challenge in this Court, in this
13 case, it seems to us, is properly a case within federal
14 jurisdiction and properly carried through the federal
15 courts here, leaving aside the question of exhausting
16 tribal remedies which may or may not have --

17 QUESTION: Well, what about taxing half the
18 producers on the reservation and not taxing the other
19 half?

20 MR. CLAIBORNE: Well, that might indeed result
21 in --

22 QUESTION: What would that trigger, if
23 anything?

24 MR. CLAIBORNE: Well, in line with the
25 Martinez decision, it presumably would not trigger a

1 claim under the Indian Civil Rights Act, though it is
2 not clear to us whether the Court in Martinez really
3 meant to bar all challenges under that statute,
4 including those by non-Indians who have no other
5 recourse. It is arguable that that decision left that
6 question for another day, and such a day is, of course,
7 not here. There is no charge here of any
8 discrimination. Indians as well as non-Indians are
9 equally taxed.

10 Let me say one final word, and that is about
11 the administrative construction of the relevant
12 statutory background by the Department of the
13 Interior.

14 It is charged that we have on the one hand
15 said that it is a good idea to subject tribal taxation
16 to federal approval and today take a difference stance.
17 There is a consistent strand, which is this.

18 The Department of Interior has at all times
19 taken the view, correctly, that federal law, Congress
20 has not required it to approve or disapprove any
21 ordinance, but has permitted it to insist through the
22 IRA and the writing of tribal constitutions that for a
23 time in specific circumstances it was a wise idea, not
24 mandated by Congress, but permitted by Congress to the
25 Secretary, to supervise the exercise of tribal taxation,

1 but as was no doubt anticipated, the Indian
2 Reorganization Act succeeded to an extent where it is
3 now felt, quite consistently, that the day has come when
4 that supervision is no longer necessary, and accordingly
5 it is now the policy of the department to remove that
6 superintendence which was once thought more
7 appropriate.

8 I think I have nothing further.

9 CHIEF JUSTICE BURGER: Do you have anything
10 further, Mr. Shrago? You have two minutes remaining.

11 ORAL ARGUMENT OF ALVIN H. SHRAGO, ESQ.,

12 ON BEHALF OF THE PETITIONER

13 MR. SHRAGO: Thank you. The arguments of the
14 respondents reflect a fundamental misunderstanding as to
15 who the Secretary of the Interior is and who gives him
16 authority. He is an officer of the United States
17 government, and he is charged with the responsibility
18 for supervising Indian affairs. He cannot --

19 QUESTION: All Indian affairs?

20 MR. SHRAGO: Especially those affairs that
21 concern relations between Indians and non-Indians. I
22 appreciate that the Court has deferred more to Indian
23 tribes when they attempt or purport to exercise their
24 powers only with respect to internal relations as
25 opposed to matters that affect the rights or interests

1 of non-members.

2 What the respondents are contending for today
3 is a rule of law that somehow Indian tribes, who are
4 domestic dependent nations, can authorize or limit the
5 powers of the Secretary. I submit that that is a
6 fundamental misunderstanding of the role of Indian
7 tribes and the role of the Secretary of the Interior.

8 QUESTION: Well, what is the basis for your
9 position? Mr. Claiborne says it is either this, that,
10 or that. Is it your contention that it has always been
11 necessary for the Secretary to approve an Indian taxing
12 ordinance, always, or do you rest on the IRA?

13 MR. SHRAGO: Your Honor, we rest really on
14 both, and if I may explain that --

15 QUESTION: Well, on both, you don't need the
16 second if you are resting on the first. It has always
17 been true. Is that it?

18 MR. SHRAGO: At the time the IRA was enacted,
19 the only cases, the only Attorney General opinions which
20 had ever considered the Indian taxing powers were those
21 involving four of the five civilized tribes of
22 Oklahoma.

23 Each of these tribes had written languages and
24 written constitutions, and it is our view that the
25 Congress by enacting the Indian Reorganization Act of

1 1934 meant to encourage all Indian tribes, not just the
2 five civilized tribes, to also adopt constitutions, and
3 the Congress also placed into the Indian Reorganization
4 Act of 1934 the standard or the notion of Secretarial
5 review.

6 It is explicitly stated, Secretarial review of
7 the tribal constitutions.

8 CHIEF JUSTICE BURGER: Your time has expired
9 now.

10 MR. SHRAGO: Thank you.

11 CHIEF JUSTICE BURGER: Thank you, counsel.
12 The case is submitted.

13 (Whereupon, at 1:42 o'clock p.m., the case in
14 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:
#84-688 - KERR-McGEE CORPORATION, Petitioner V. NAVAJO TRIBE OF INDIANS, ET

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BY Paul A. Richardson

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