

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 84-1973

**TITLE** THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION  
Petitioner V. WOLD ENGINEERING, ET AL.

**PLACE** Washington, D. C.

**DATE** March 24, 1986

**PAGES** 1 thru 47



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IN THE SUPREME COURT OF THE UNITED STATES

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 THREE AFFILIATED TRIBES OF THE :  
 FORT BERTHOLD RESERVATION, :  
 :  
 Petitioner :  
 :  
 v. : No. 84-1973  
 :  
 WOLD ENGINEERING, ET AL. :  
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Washington, D.C.

Monday, March 24, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

RAYMOND CROSS, ESQ., Parshall, North Dakota; on behalf of the Petitioner.

GARY H. LEE, ESQ., Minot, North Dakota; on behalf of the Respondent.

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P R O C E E D I N G S

1  
2 CHIEF JUSTICE BURGER: The Court will hear arguments  
3 first this morning in Three Affiliated Tribes against Wold  
4 Engineering Company.

5 Mr. Cross, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF RAYMOND CROSS, ESQ.

7 ON BEHALF OF THE PETITIONER

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

10 This matter is before this Court for the second time  
11 on a Writ of Certiorari to the Supreme Court of North  
12 Dakota.

13 This case squarely presents the issue left undecided  
14 by this Court in its previous decision in this matter. That  
15 issue is whether a state may enact a statute barring tribal  
16 Indians but not non-Indians, from state court for hearing damage  
17 actions against non-Indian defendants in state court.

18 Respondent, Wold Engineering, urges this Court to  
19 uphold the state statute that bars all tribal Indians residing  
20 on the four Reservations in North Dakota from access to state  
21 court for the enforcement of their damages actions against  
22 non-Indians.

23 This Court previously held in this matter that such  
24 a state statute is not required nor authorized by federal law,  
25 particularly Public Law 280, as a measure to protect the tribal

1 Indians in the area of their rights.

2 The facts of this case are simple. This case  
3 involves a breach of contract and negligence action for  
4 damages brought by the Three Affiliated Tribes against Wold  
5 Engineering, a non-Indian firm in North Dakota.

6 This action arose on the Fort Berthold Indian  
7 Reservation. In 1974, the Three Affiliated Tribes contracted  
8 with Wold Engineering to design and build a water supply system  
9 known as the Four Bears Water Supply System on the Fort Berthold  
10 Reservation. However, in 1977, after the project was com-  
11 pleted, the Tribes discovered that the project failed to supply  
12 a safe and continuous water supply to the portion of the  
13 Reservation people it was intended to serve.

14 Despite efforts at correction by Wold Engineering,  
15 the project never functioned properly and in 1980 the Three  
16 Affiliated Tribes commenced this action in the State District  
17 Court for the Northwest Judicial District of North Dakota.

18 The trial court, upon Wold's motion, dismissed the  
19 Tribes' complaint, holding that actions arising on the  
20 Indian reservations in North Dakota brought by tribal members  
21 cannot be enforced against non-Indian defendants.

22 In 1982, the North Dakota Supreme Court affirmed  
23 the trial court's judgment and held that actions arising on  
24 the reservations and brought by tribal Indians against  
25 non-Indians cannot be heard in state court because of a state

1 disclaimer known as the Indian Civil Jurisdiction Act of 1963,  
2 as well as the influence of Public Law 280 ousted the state  
3 court from subject matter jurisdiction.

4 This Court granted the Tribe the first petition for  
5 Certiorari and after hearing reversed -- pardon me, vacated  
6 the judgment of the North Dakota Supreme Court, holding that  
7 Public Law 280 neither authorized nor required such a  
8 jurisdictional bar to tribal Indians' access to state court.

9 Further, the Supreme Court, this Court, remanded  
10 the case for further proceedings in light of the Supreme Court's  
11 holding that this matter should be scrutinized by the court  
12 below for possible constitutional infirmities and further that  
13 Chapter 27-19 was not authorized by Public Law 280 or any other  
14 federal law as a jurisdictional disclaimer of subject matter  
15 jurisdiction in this category of actions.

16 The court below on remand held that the matter of  
17 state law alone, that Indians, tribal Indians, residing on  
18 the reservation were barred from maintaining these actions.  
19 The reason for this barrier arises from the state jurisdictional  
20 statute, known as the Indian Civil Jurisdiction Statute of  
21 1963, and that this state law alone barred the tribal Indians  
22 access to state court in these cases.

23 QUESTION: Unless --

24 MR. CROSS: Unless, Justice, the consent to the full  
25 extension -- that is unless the tribal Indians either

1 collectively as a tribal group or individually consent to the  
2 full extension of state civil jurisdiction over the pertinent  
3 property.

4 The only exception to this extension would be that  
5 the state court's power to levy and execute on tribal property  
6 may be exempted by state or federal law.

7 QUESTION: And, the waiver -- the condition is not  
8 only for this case, but for all cases?

9 MR. CROSS: That is right. The waiver would have  
10 the jurisdictional effect of conferring general judicial jurisdiction  
11 on the court for all cases. That would be true whether the  
12 consenting Indian was a tribal government or whether the Indian  
13 was an individual seeking to pursue a damage action in state  
14 court, Justice.

15 QUESTION: Would you have the same objection if the  
16 state conditioned its consent to use its courts just to the  
17 waiver of any objection to proceedings in connection with that  
18 particular case; for example, a counterclaim and making the  
19 tribe subject to discovery orders and contempt sanctions and  
20 so forth, in connection with the particular case?

21 MR. CROSS: Justice O'Connor, as we conceded in this  
22 Court in the previous hearing in this matter, the Three Affiliated  
23 Tribes would be subject to the counterclaim of the Respondent,  
24 Wold Engineering, up to the extent of jurisdictional --

25 QUESTION: I thought you said as a setoff, but not --

1 MR. CROSS: As a setoff.

2 QUESTION: -- as a counterclaim that would result in  
3 additional liability.

4 MR. CROSS: That is right, Your Honor.

5 QUESTION: How about the discovery procedures and  
6 so forth?

7 MR. CROSS: The Three Affiliated Tribes believe it  
8 would be proper in the interest of justice that they would  
9 be subject to discovery proceedings and to proceedings that  
10 would insure a fair trial to the non-Indian defendants.

11 QUESTION: Well, could the state adopt a statute  
12 just requiring consent by the tribe to jurisdiction for all  
13 purposes in connection with that particular suit? Would that  
14 be valid?

15 MR. CROSS: I think, Your Honor, if the statute had  
16 the purpose of insuring that a fair trial would be provided  
17 to the non-Indian defendant and that if the plaintiff, the  
18 tribe, would not conform to such requirements, then, I think,  
19 yes, the state court would be entitled to institute that suit  
20 in the interest of justice.

21 QUESTION: Mr. Cross, in this case, are there any  
22 individual Indians who are plaintiffs or is it just the Three  
23 Affiliated Tribes?

24 MR. CROSS: Just the Three Affiliated Tribes.

25 QUESTION: Then these tribes themselves have refused



1 to consent to state court jurisdiction?

2 MR. CROSS: The consent issue did not finally become  
3 crystallized until the final decision by the North Dakota Supreme  
4 Court. In other words, the presumption had been, and it appeared  
5 under state law prior to the decision in Wold II, that the  
6 consent did not bar tribal Indians, including tribal governments,  
7 from suing non-Indians in state court. It was after the State  
8 Supreme Court took a second look at the jurisdictional effect  
9 of the state statute that they held that the intent was to  
10 completely bar tribal Indians, including suits against non-Indians  
11 for the enforcement of damages.

12 QUESTION: But, at any rate, it is clear that if  
13 Wold Engineering had wanted to sue the Three Affiliated Tribes  
14 in the state court, it could not have done that?

15 MR. CROSS: That is correct.

16 QUESTION: Suppose in this case the tribes comes  
17 into sue for breach of contract, for failure to perform, and  
18 Wold says we didn't fail anything, we performed and now we  
19 are counterclaiming for the amount you promised us for building  
20 this structure or whatever it was. Suppose the court finds  
21 for Wold that they didn't breach the contract and that the  
22 tribe owes them something. I take you wouldn't think the tribe's  
23 consent to the counterclaim would permit that judgment to be  
24 entered against them?

25 MR. CROSS: Justice White, the present law on tribal

1 sovereign immunity should be respected and the --

2 QUESTION: So, your answer is, yes, that judgment  
3 should not be entered?

4 MR. CROSS: The counterclaim can be heard up to the  
5 extent of a recoupment or equitable setoff.

6 QUESTION: Well, there isn't any equitable setoff.  
7 Wold just wins the case supposedly. No breach. Wold doesn't  
8 owe the tribe a thing, but the tribe owes Wold something, but  
9 that judgment could not be entered?

10 MR. CROSS: Not under the law of tribal sovereign  
11 immunity as it now stands, Justice.

12 QUESTION: At least that is your view of tribal  
13 immunity.

14 MR. CROSS: Yes, that is our view of the doctrine  
15 as explained by this Court.

16 QUESTION: And, you would say that even if that is  
17 the case, the state could not dismiss the action in the first  
18 place? You would say the state would not be permitted to say  
19 to the tribe, now, look, if you want to file this complaint  
20 and have us entertain it, you must waive your immunity with  
21 respect to the counterclaim.

22 MR. CROSS: If a state statute was drafted that  
23 narrowly and it had that purpose and intent to make sure that  
24 the tribal governments were subject to counterclaims, then  
25 that would present a different issue. Here the court below --

1 QUESTION: Well, it may present a different issue, but  
2 how would you resolve it?

3 MR. CROSS: I believe that that requirement, requiring  
4 the tribes to waive their tribal sovereign immunity is the  
5 bases for maintaining a damage of action should not be allowed  
6 under the present doctrine of tribal sovereignty.

7 QUESTION: So, in your view, the state could not  
8 dismiss the action for failure to waive the counterclaim?

9 MR. CROSS: That is correct.

10 The statute that we have here --

11 QUESTION: Suppose a state has a provision that any  
12 non-resident must post a bond before filing an action. Would  
13 that apply to your case if they had such a statute?

14 MR. CROSS: If that statute was applied to non-  
15 residents and required such a posting to make sure that the  
16 case could be conducted fairly, then I think they may be able  
17 to do that, Your Honor.

18 QUESTION: They could do that?

19 MR. CROSS: Yes.

20 QUESTION: You would have no objection.

21 MR. CROSS: The statute at issue here bars all tribal  
22 Indians, not just tribal governments, from access to state  
23 court. If there were provisions of that statute which provided  
24 for insurance of fairness to the non-Indian defendant, such  
25 as the doctrine of forum non conveniens, the tribe would have

1 no objection to administration, court administration of justice,  
2 that made sure that the adjudication of the non-Indians' claim  
3 as against tribal Indians and individuals was fair.

4           However, when a state statute completely bars all  
5 of the tribal Indians, regardless of the merits of the claim,  
6 regardless of whether issues of sovereign immunity are  
7 directly presented by the case or not, then such a state  
8 statute, I believe, is overbroad and the reason why it is over-  
9 broad is because it interferes with basic rights of due process,  
10 it interferes with equal protection of the laws.

11           Tribal Indians were recognized in 1957, under the  
12 state decision known as Vermillion v. Spotted Elk, to have  
13 the right of access under the open courts provision of the  
14 state Constitution and under state judicial precedent to sue  
15 for the enforcement of damages action in state court.

16           QUESTION: Mr. Cross, you used the term "overly broad."  
17 That is something we ordinarily use in the First Amendment  
18 context. Is there any reason for this Court to go any further  
19 here than in the particular application of the state statute  
20 of the facts of this case where you are not dealing with any  
21 individual Indians who are trying to sue, you are dealing with  
22 a tribe which is trying to sue and the tribe itself has withheld  
23 its consent?

24           MR. CROSS: The reason, Justice Rehnquist, that I  
25 think this Court should go further and examine the case of

1 individual Indians is because if this statute is allowed to  
2 stand as construed, will bar in the future until the statute  
3 is either amended or rescinded all tribal Indians from access  
4 to state court.

5 QUESTION: We have adopted that approach in the First  
6 Amendment, that overbreadth approach that you say, that if  
7 a state court adopts a very broad construction of a statute,  
8 that interferes with First Amendment rights, a person who could  
9 have gotten it under a narrow construction could still challenge  
10 it. But, I don't believe we have gone outside of the First  
11 Amendment in that area and certainly this is just a straight  
12 Indian law case.

13 MR. CROSS: I believe that this is an equal protection  
14 and due process case as well in that the rights of the tribal  
15 people had to maintain damages actions in state court have  
16 now been taken away from them, not just tribal governments,  
17 not just a reasonable constraint on the exercise of --

18 QUESTION: But, your clients aren't individual Indians.

19 MR. CROSS: I think it is even more compelling in  
20 this case, Justice, because the Indian tribe acts on behalf  
21 of its tribal people.

22 If the access to state court for the reasonable  
23 enforcement of their damages claim is completely taken away,  
24 it is not just the tribe per se that is going to suffer, but  
25 the individuals as well.

1 QUESTION: Do you think your case is stronger if  
2 you can bring in the rights of individual Indians as opposed  
3 to just the right of your own client?

4 MR. CROSS: I think the case is stronger in the sense  
5 that the construction of the state statute bars all tribal  
6 plaintiffs and if the statute stands it will continue to bar  
7 the plaintiffs in the future.

8 The reason why I think that the tribal government  
9 should be able to assert those rights and to bring that focus  
10 to the scope of the statute is because the tribal government  
11 is a representative of the Indian people and many times has  
12 the only wherewithall to challenge statutes such as these that  
13 are unfair.

14 QUESTION: Would you explain how the tribe and  
15 non-Indian citizens are similarly situated for purposes of  
16 an equal protection analysis? It just seems to me they are  
17 not the same because the tribe is not subject to the jurisdiction  
18 at all of the state courts under your view, not even subject  
19 to the counterclaim in this case. So, how are they similarly  
20 situated for purposes of equal protection?

21 MR. CROSS: The tribe and Indian individuals, when  
22 they filed in state court, are subject to the procedural  
23 restriction, and, as I mentioned before, the reasonable  
24 procedural restriction that insures a fair trial.

25 Just as the United States, when it sues in state

1 court, if they fail to comply with the restrictions that apply  
2 to everyone bringing the suit and the maintaining of the suit,  
3 that the case can be dismissed for those reasons.

4 The questions as I understand them today center on  
5 whether or not a state court or a state could pass a statute  
6 allowing the enforcement of affirmative relief against --

7 QUESTION: Well, if two non-Indian parties, plaintiff  
8 and defendant, were suing in the state court of North Dakota,  
9 the plaintiff in the case would be subject to a suit for a  
10 counterclaim in that suit by the defendant and you have told  
11 us this morning again that in your view the tribe would not  
12 be subject to a counterclaim --

13 MR. CROSS: The tribe --

14 QUESTION: -- and as a result they are not similarly  
15 situated for purposes of equal protection analysis is how it  
16 appears to me anyway.

17 MR. CROSS: The tribe as a governmental entity is  
18 similarly situated, I believe, in the sense that they are  
19 willing to go into state court and be bound by all the reason-  
20 able procedural restrictions, just as the United States when  
21 they sue in state court will be bound.

22 The only difference between the tribe and the  
23 non-Indian plaintiff that wished to sue is that the tribe,  
24 along with all of the tribal Indians, are barred from that  
25 court, so that we don't reach the further question of what

1 sort of constraints could be placed on the tribe's appearance.  
2 So, it seems to me --

3 QUESTION: Well, but we do have in this case a  
4 defendant wanting to make a counterclaim, don't we?

5 MR. CROSS: Yes. And, if they can maintain that  
6 counterclaim, that counterclaim can be heard to the extent  
7 of a recoupment or equitable --

8 QUESTION: But, not to the extent that would be  
9 available if the defendant were not an Indian tribe.

10 MR. CROSS: That is correct.

11 QUESTION: So, how could they be similarly situated  
12 then?

13 MR. CROSS: For purposes of equal protection, I think  
14 there may be difficulties in comparing Indian tribes to  
15 non-Indian plaintiffs, however, the other facet of the due  
16 process claim requires the court be open on a reasonable basis.

17 The tribes are willing to go into state court and  
18 be bound by all of the procedural restrictions, be bound by  
19 res judicata, be bound by all of those elements that make for  
20 a fair trial.

21 The only difference being is that an Indian tribe  
22 is not a non-Indian plaintiff. It cannot be sued except with  
23 its consent, except to the extent for equitable setoff or  
24 recoupment.

25 QUESTION: Mr. Cross, since the case was here before,



1 has the tribe now altered its laws so that a suit would be  
2 possible in tribal court today against Wold Engineering?

3 MR. CROSS: The tribe has altered its laws and a  
4 suit would be possible in the sense that the tribal code now  
5 recognizes jurisdiction over non-Indians. So that the tribal  
6 government could proceed against Wold Engineering or a party  
7 like Wold Engineering in tribal court.

8 The problem is that the State of North Dakota in  
9 a case entitled Lowe v. Cloud does not recognize the enforce-  
10 ability of tribal court judgments from state courts. Con-  
11 sequently, a situation where a non-Indian defendant is a  
12 non-resident of the reservation, has no assets on the  
13 reservation, there would be serious question about the efficacy  
14 of such a proceeding.

15 QUESTION: Could the tribe have sued Wold in federal  
16 court?

17 MR. CROSS: No, Your Honor. There was a case some-  
18 what similar to this called Chance v. White Lightning and  
19 that involved an effort to sue, first, in federal district  
20 court, in light of this decision, in light of the Wold I decision  
21 in state court.

22 There, the facts involved simply a tort action, as  
23 I recall, and the federal district courts, being courts of  
24 limited jurisdiction, held that there was no subject-matter  
25 jurisdiction.

1 QUESTION: I thought there was a special section  
2 of 28 that said what an Indian tribe is is a plaintiff that  
3 can sue. Am I wrong in that?

4 MR. CROSS: Your Honor, there is a special section  
5 that allows Indian tribes to sue, however, that does not address  
6 the issue of subject-matter jurisdiction. There are still subject  
7 to the federal question and to other limitations on federal  
8 court jurisdiction. Consequently, if a tribe attempted to bring  
9 a contract action of this sort in federal district court or  
10 the appropriate federal court, that they would still be subject  
11 to the limitation that this question must be cognizable under  
12 the judicial power the federal courts have.

13 And, as I understand it, a mere contract action,  
14 a mere breach of contract action, a negligence action, would  
15 not present federal questions. It would be simply a run-of-  
16 the-mill contract action that should be appropriately heard  
17 in state court.

18 QUESTION: Well, what if it was a -- Federal courts  
19 hear state law questions all the time in diversity cases.

20 MR. CROSS: There is no diversity here, Your Honor.

21 QUESTION: Well, there may not be, but there is a  
22 statute that says Indians can come into court. Why isn't that --  
23 It may be the governing law would be state law, but why can't  
24 the Indians come into federal court?

25 MR. CROSS: Based on the decisions that I have read,

1 Your Honor, 28-C 1362, I believe, that allows tribes to sue  
2 in federal court relates only to their personal right to sue  
3 free of some limitations. However, the subject --

4 QUESTION: Free of the problem of diversity.

5 MR. CROSS: I don't believe that is correct, Your  
6 Honor.

7 QUESTION: The provision is completely useless then.

8 MR. CROSS: The provision allows Indian tribes to  
9 come in and sue and --

10 QUESTION: They didn't need that statute to come  
11 into federal court on a federal question.

12 MR. CROSS: I think in a sense that the federal  
13 statute opening the federal courts to the Indian tribes  
14 simply confirms existing law. This Court has previously held  
15 in cases before that statute was enacted that Indian tribes  
16 have the capacity to maintain a legal action in their own  
17 right.

18 QUESTION: So, you say then the statute just wasn't  
19 needed at all.

20 MR. CROSS: I think the statute within the limits  
21 that it functions is important, but I don't think it would  
22 allow the Indian tribes to come and sue in federal district  
23 court on matters of this kind.

24 QUESTION: On a state law question?

25 MR. CROSS: On solely a state law question except

1 in a diversity situation.

2 This statute, as we have said before, excludes all  
3 tribal Indians on the four reservations in North Dakota from  
4 access to state court. Now, the state court previously, in  
5 a decision entitled Vermillion v. Spotted Elk, had held that  
6 Indian tribes or at least Indian individuals were entitled  
7 to enforce their rights in state court.

8 However, in 1963, the state enacted the Indian Civil  
9 Jurisdiction Act. That statute has been construed by the state  
10 court below of barring tribal Indians from access until they  
11 consent to the extension of the state civil jurisdiction over  
12 their person and property on the reservation.

13 Now, this consent goes far beyond the issue at hand  
14 in the particular case of whether Wold Engineering may or may  
15 not maintain a counterclaim. It would subject the tribe and  
16 the consenting individuals under Section 27-19-05 of the state  
17 statute to general state judicial jurisdiction for all cases  
18 as a condition for maintaining this one damages action against  
19 a non-Indian in state court.

20 It would also confer on the state the authority to  
21 legislate in a variety of subject-matter areas in contract,  
22 in divorce, in guardianships, in other areas not limited to  
23 those subject-matter categories that are now presently  
24 reserved to tribal regulation.

25 So that the design and purpose of the statute, as

1 construed by the court below, is to completely bar tribal Indians  
2 from maintaining these actions unless they consent to the  
3 extension of state civil jurisdiction for virtually all purposes,  
4 the only exception being that the state may not use their  
5 enforcement powers to levy or execute on tribal Indian  
6 property unless it is authorized by federal or state law.

7 We believe -- The tribes believe and have argued  
8 in their brief that such restrictions on the civil rights of  
9 tribal Indians, the restriction on due process rights of tribal  
10 Indians, requires a special justification. It requires special  
11 justification because the matter peaves two issues of Indian  
12 ancestry and Indian identity.

13 There is no other bases for the state statute. This  
14 Court, in its prior decision in this matter, said that the  
15 state statute was not required by federal law to protect the  
16 rights of tribal Indians in the sense of the pre-emption  
17 doctrine; that this statute did not require a governing federal  
18 law under Public Law 280.

19 Consequently, the state statute bars a -- bears a  
20 heavy burden of justification to allow it to stand to restrict  
21 all tribal Indians from maintaining the action in state court.

22 Mr. Chief Justice, I would like to reserve the remaining  
23 time.

24 CHIEF JUSTICE BURGER: Very well.

25 Mr. Lee?

1 ORAL ARGUMENT OF GARY H. LEE, ESQ.

2 ON BEHALF OF THE RESPONDENTS

3 MR. LEE: Mr. Chief Justice, and may it please the  
4 Court:

5 The North Dakota legislative plan, Chapter 27-19  
6 of the North Dakota Century Code, a 1963 jurisdictional act,  
7 which Mr. Cross refers to, and the North Dakota Supreme Court's  
8 decision in this case, and Wold Engineering, all seek precisely  
9 the same thing and that is equal justice for everyone under  
10 the law.

11 The current situation in North Dakota guarantees  
12 to everyone that equal access.

13 Three Tribes and Mr. Cross argues here today that  
14 somehow Indian litigants or tribal litigants is being denied  
15 access to a court in situations where others have that access  
16 and that is simply not so.

17 In the case of an Indian -- In all cases, where the  
18 facts are the same, the access of the litigants is the same.  
19 If you have a situation of an Indian litigant against a  
20 non-Indian litigant or a non-Indian litigant against an Indian  
21 litigant for an off-reservation occurrence, all litigants in  
22 the State of North Dakota have equal access to the state courts  
23 of North Dakota. They all have the same rights, remedies and  
24 procedures.

25 In the situation of an Indian litigant against a

1 non-Indian litigant or a non-Indian litigant against an Indian  
2 litigant, the facts that we have in this case, the state court  
3 of North Dakota would impose the same jurisdictional restraints  
4 and requirements on all litigants and would deny access in  
5 those cases to all litigants. Again, the same rights, procedures,  
6 and privileges would be available to all under North Dakota  
7 law.

8 So, as it now stands, the North Dakota jurisdictional  
9 plan guarantees for everyone equal justice under the law.

10 QUESTION: Mr. Lee, let's take a little easier one.  
11 A used car salesman sells a car to an Indian and to an ordinary  
12 citizen off the reservation and both of them are lemons. The  
13 man can sue, the Indian can't.

14 MR. LEE: In that situation, Your Honor, I believe  
15 both litigants would be allowed to sue. In that situation,  
16 you would have an off-reservation occurrence. The Indian  
17 litigant --

18 QUESTION: No, no, he sold the car on the reservation.

19 MR. LEE: The car was sold on the reservation?

20 QUESTION: Yes.

21 MR. LEE: To a reservation Indian?

22 QUESTION: Yes.

23 MR. LEE: In that situation, Your Honor, yes, that  
24 is correct. There would be no access to the Indian litigant  
25 against the used car dealer in state court. There would,

1       however, be a forum available -- .

2               QUESTION:   Wouldn't somebody at least say oophs,  
3       sorry, or something like that?

4               MR. LEE:   Well, I would hope that somebody would  
5       recognize the problem and that is a problem that has been in  
6       existence in the State of North Dakota for well over 20 years  
7       and everyone has known that that problem has existed, yet,  
8       in that period of time, not one effort has been made to resolve  
9       the problem except this case here today.

10              What Three Tribes here seeks today plain and simple  
11       is unequal access to the courts of North Dakota.  They wish  
12       to be able to use the courts as plaintiffs without ever having  
13       to run the risk of appearing in those same courts as a  
14       defendant and that is an unequal access.

15              Furthermore, the access that they seek, at least  
16       in the state court in the arguments before the North Dakota  
17       Supreme Court was an access which would allow them all  
18       procedural protections and all procedural rights and remedies  
19       and the non-Indian litigant would have none of those same  
20       protections and same privileges accorded to him.

21              This is the first time today that Mr. Cross or the  
22       attorney arguing for the Indian litigant has admitted the  
23       possibility that North Dakota rules of court procedure might  
24       be applicable on the reservation.

25              In the state court below, that position -- a contrary



1 position was taken and that being that North Dakota rules of  
2 court procedure would not apply against the Indian litigant.

3 The North Dakota decision does not deny equal  
4 protection. Equal protection is violated when one group has  
5 a distinct advantage over another group and that is not the  
6 situation that is present here. Everyone, again, given the  
7 same facts and the same situation, has the same access. Again,  
8 what Three Tribes seeks is unequal status and unequal  
9 protection.

10 QUESTION: Or the same non-access?

11 MR. LEE: Or the same non-access, that is correct.

12 QUESTION: Do you think non-access to this tribe  
13 to the state courts is a denial of federal policy?

14 MR. LEE: No, I do not, Your Honor.

15 QUESTION: Why not?

16 MR. LEE: Federal policy has long recognized access  
17 by Indian courts to state courts, but it has never been required  
18 of a state court to take that jurisdiction. And --

19 QUESTION: Yes, but you end up with a situation where  
20 there is no forum available for the resolution of this dispute.

21 MR. LEE: That is not correct. I believe that there  
22 is a forum available in this case.

23 QUESTION: What is the forum?

24 MR. LEE: It would be either a state court, if the  
25 Indian people chose to follow the rules laid out in Chapter

1 27-19 and agreed to have their case brought. An order of the  
2 district court which dismissed this case left the action open.  
3 The Indians are free to reinstitute their action at any time  
4 following compliance with the rules of the North Dakota court  
5 set down in 27-19.

6 QUESTION: What about the statute of limitations?

7 MR. LEE: There may be a statute of limitations  
8 question, however, given the nature of the litigation here  
9 today, and the fact that this has been going through the  
10 procedure, those limitations, statute of limitation problems  
11 may be tolled.

12 QUESTION: Well, maybe. Will they be tolled? Let's  
13 not speculate.

14 MR. LEE: It would be speculation for me to try and  
15 guess either way, sir.

16 QUESTION: Do you have another suggestion for a forum?

17 MR. LEE: Yes, Your Honor, tribal court. Indian  
18 people as a sovereign nation have the power, I believe, to  
19 provide a forum for the protection of their own people and  
20 they --

21 QUESTION: Can they enforce it outside of the  
22 reservation?

23 MR. LEE: If the people of the State of North Dakota  
24 are going to refuse to entertain this type of case --

25 QUESTION: I am talking about what you have now in

1 North Dakota. You can't enforce a tribal rule outside the  
2 reservation, right?

3 MR. LEE: That is the rule right now, but I would  
4 submit that that rule is incorrect.

5 QUESTION: Well, that is what we are talking about  
6 right now.

7 MR. LEE: That rule is incorrect, sir, and I would  
8 say that if the courts of North Dakota are not going to  
9 recognize jurisdiction on the reservation and there is a forum  
10 which is set up to fill that void, that the decisions that  
11 come from the forum that has been created to fill that void,  
12 would have to be recognized off the reservation.

13 QUESTION: Well, is Wold subject to service by a  
14 tribal court?

15 MR. LEE: Yes, I would submit that they would be.

16 QUESTION: The tribal court can serve a summons state-  
17 wide?

18 MR. LEE: Perhaps not at the time this action arose,  
19 but at the current time I would -- If they have taken  
20 affirmative steps to create a forum to fill the void and they  
21 provide reasonable rules of procedure which guarantee that  
22 reasonable fairness and equity is available to all litigants  
23 coming into a tribal forum, I would submit that those processes  
24 and services off the reservation would have to be honored by  
25 Wold Engineering and any other non-Indian litigant.

1 QUESTION: Well, is it in existence today? It is  
2 not.

3 MR. LEE: The forum is --

4 QUESTION: How is it going to help this case if it  
5 is not in existence?

6 MR. LEE: The forum -- I will plead ignorance on  
7 this. I don't know what the current status of the Indian forum  
8 is. What I am submitting is that the Indian people, as a sovereign  
9 do have the power to protect themselves and to create a forum  
10 and if the --

11 QUESTION: To enforce?

12 MR. LEE: To enforce on the reservation.

13 QUESTION: Off the reservation.

14 MR. LEE: Off the reservation. If the people of  
15 the State of North Dakota --

16 QUESTION: How can the Indian enforce off the  
17 reservation, how?

18 MR. LEE: The State of North Dakota, if it is going  
19 to refuse to entertain this type of jurisdiction in its own  
20 courts must recognize that the jurisdictional void has to be  
21 filled somehow.

22 QUESTION: Has it done so?

23 MR. LEE: Not at this point.

24 QUESTION: Is it thinking about doing so?

25 MR. LEE: Not that I am aware of.

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QUESTION: Well, why not forget it?

QUESTION: Mr. Lee, may I ask the other side of the coin? If you client has -- I guess there is a balance due on the contract that is unpaid. How do you go about collecting that money?

MR. LEE: At the present time, I don't believe that there is a mechanism for collecting it. The North Dakota Supreme Court in its decision stated that if the Indian people were to somehow consent to state court jurisdiction, that to the extent that it is allowed under federal or state policy, the North Dakota court would have to -- the North Dakota decision could be enforced on the reservation. That mechanism has not yet been fully explored.

At the current time, I don't believe that there is a mechanism for enforcing a judgment received against the Indian tribe outside of perhaps their own courts recognizing under some principle of comity the decision of the North Dakota court.

And, I am saying that the concomitant relationship would have to exist between the state courts and the people on the Indian reservation. If the state court of North Dakota is going to refuse to entertain jurisdiction on the reservation, and principles of comity would require it to recognize those decisions which come from the reservation and give them force and effect off the reservation.

1 The jurisdictional void has to be filled somehow.

2 Mr. Cross is here today arguing that the North Dakota  
3 decision denied equal protection of the laws. Even if the  
4 Court is to somehow believe that a classification is here being  
5 made, I would submit that the North Dakota jurisdictional  
6 plan could still survive.

7 The goal of equal protection is to end a caste-based  
8 society where classification based upon race or other  
9 immutable characteristics are perpetrated and continued.

10 It also involves, I believe, a bit of overreaching,  
11 a substantial amount of overreaching, by the group with the  
12 political power to control and to keep in a subservient position  
13 that group without political power.

14 When those facts jell and the pot is churned, then  
15 you have a situation where overreaching occurs and equal  
16 protection is denied to certain people.

17 The North Dakota law does not create a caste-based  
18 society. As it currently stands, everyone is treated the same,  
19 everyone similarly situated.

20 Three Tribes' position in this case will, however,  
21 create a caste-based society. It will have a situation where  
22 Indian litigants will be allowed to use the state forum in  
23 North Dakota without ever having to appear as defendants.  
24 They will also have all rules of procedure available to them,  
25 while the non-Indian litigant will have none. This is a

1 caste-based society and this would be greatly unfair and would  
2 violate the due process of the laws.

3 Secondly, the North Dakota jurisdictional plan draws  
4 no distinction based upon race or other immutable  
5 characteristics.

6 The disability of the Indian litigant in this case  
7 comes from his tribal status and being located on the  
8 reservation and those are political concerns and political  
9 considerations, not necessarily racial.

10 Furthermore, if they are racial, they are not  
11 immutable, because they can be removed. The classic equal  
12 protection case is a situation where no matter what one does  
13 to try and better himself, to try to improve himself, to try  
14 to change his position, he cannot do it, because the  
15 legislation refuses to allow him that chance.

16 The North Dakota law gives the Indian people a  
17 chance to remove the impediment to the state court in this  
18 case and all they have to do to receive that protection is  
19 simply agree to follow and obey the reasonable rules of court  
20 set out in North Dakota and to obey and agree to follow the  
21 reasonable rules of substantive law which have been laid out  
22 in the State of North Dakota.

23 So, there is no immutable characteristic which cannot  
24 be removed.

25 If that is the case, it would seem to me that the

1 proper standard for review on this case would be the rational  
2 basis standard and if you apply the rational basis test to  
3 this case, you can see that the North Dakota Supreme Court  
4 enacted its legislation pursuant to authority granted by Con-  
5 gress in Public Law 280.

6 Further, the people of the State of North Dakota,  
7 at the time they enacted the Indian Civil Rights Act in --  
8 The Indian Civil Jurisdiction Act in 1963 could have unilaterally  
9 imposed all jurisdiction on the Indian people without listening  
10 to them, without paying them any attention whatsoever.  
11 Instead of doing that, they held legislative hearings around  
12 the state and the Indian people came to those legislative  
13 hearings and told the State of North Dakota stay out, we want  
14 all or nothing at all jurisdiction until we ask for it.  
15 And, that, I think, also destroys traditional equal protection  
16 problem here in that we do not have the overreaching by the  
17 group with political power.

18 In fact, we have a situation where the group that  
19 had the ultimate political power was leaning backwards to try  
20 and give the Indian people some self-determination and a voice  
21 in their own destiny.

22 A compact or compromise was reached, if you will,  
23 between the people of the State of North Dakota and the Indians  
24 residing on their reservations in the State of North Dakota.  
25 This subject-matter jurisdictional plan, this compact and



1 compromise existing between the Indian people and between the  
2 State of North Dakota is now over 20 years old.

3 The Indian people in the State of North Dakota asked  
4 for this jurisdictional plan and in that period of time, since  
5 this jurisdictional plan was enacted, the North Dakota Supreme  
6 Court has had a number of occasions to rule on the issues that  
7 are before this Court today and in 1963, only about two or  
8 three months after the jurisdictional plan went into effect,  
9 the first case came down and in that first case the North Dakota  
10 Supreme Court held that the North Dakota courts would have  
11 no subject-matter jurisdiction on the Indian reservation in  
12 matters involving Indian litigant.

13 So, for 20 years this jurisdictional setting has  
14 been known to the Indian people. They knew or should have  
15 known that for 20 years that there would be this problem that  
16 would present itself some day, yet in that 20-year period of  
17 time, not once did the Indian people come to the North Dakota  
18 legislature and try to rework or renegotiate a jurisdictional  
19 plan that would be workable and agreeable to everyone. Not  
20 once in that 20-year period of time did the Indian people set  
21 up an election or try to poll the tribal election to see if  
22 they would want to take this jurisdictional plan and not once  
23 in that 20-year period of time, not until this case apparently,  
24 did the Indian people act to create their own forum which would,  
25 in the future, be able to control these sorts of situations.

1           So, now, 20 years after it has been known to them,  
2 they try to come through the backdoor of the courthouse, while  
3 at the same time denying all other litigants access to the  
4 front door of the courthouse.

5           The solution to this case exists in the North Dakota  
6 law and it is a political solution that should be worked out  
7 through political compromise between the Indian people and  
8 the State of North Dakota.       That was the situation that  
9 Congress envisioned in Public Law 280. It is the situation  
10 that Congress envisioned and still exists by the Indian Civil  
11 Rights Act of 1968.

12           The jurisdictional plan that should go into effect  
13 should result not in some forced, crammed-down jurisdiction  
14 by the Indian people in the State of North Dakota, but through  
15 a negotiated political process. If people would get together  
16 and act reasonably on a situation like this, reasonable results  
17 could be obtained; a reasonable plan for either enforcing the  
18 Indian forum could be reached or a reasonable plan for bringing  
19 about the orderly assumption of state court jurisdiction on  
20 the Indian reservations could be obtained. There has been  
21 no denial of equal protection in this case and should the Indian  
22 plan -- should Three Tribes jurisdictional plan be adopted,  
23 in fact, we will have unequal protection and it will be the  
24 unequal protection of having the class of super plaintiffs  
25 holding down the class of hapless defendants and that will

1 be a situation which will continue indefinitely.

2 Further, there has been no denial of due process,  
3 the goal of due process, as I understand it, is to preserve  
4 the fundamental rights guaranteed to people under the  
5 Constitution and that is a -- one of those rights is a guarantee  
6 of access to a forum. There has been a guaranteed forum.  
7 As explained before, a forum existed. Either tribally the  
8 Indian people had the power to create this forum and they had  
9 it for 20 years but failed to act upon that power and now they  
10 seek, again, like I say, backdoor their way in --

11 QUESTION: Well, Mr. Lee, it is certainly  
12 understandable, I suppose, why the Indian tribes wouldn't want  
13 to submit themselves to jurisdiction of state courts for all  
14 purposes, isn't it, because they might well not want to have  
15 the state court handling domestic relation matters of tribal  
16 Indians and things of that kind? I think it is entirely  
17 understandable that the tribe has not opted to subject itself  
18 to the jurisdiction of the state courts and state laws generally.

19 MR. LEE: If the fears are that the people of the  
20 State of North Dakota are going to ignore the wishes of the  
21 Indian people, that would be a factual problem that would develop  
22 on a case-by-case basis, but the law, as it is written, would  
23 solve that problem.

24 The law, as it is currently written in North Dakota,  
25 Chapter 27-19, follows the framework set out by the language

1 in Public Law 280 and it states that the law as between private  
2 persons shall apply.

3 Therefore, those matters which are intrinsically  
4 tribal, which are inherently tribal, such as tribal elections,  
5 membership in the tribe, distribution of tribal benefits, those  
6 will remain always tribal and the state court of North Dakota  
7 can never assume jurisdiction over --

8 QUESTION: How about matters of adoption or child  
9 custody or marital dissolution, inheritance, things of that  
10 kind?

11 MR. LEE: I believe inheritance is specifically carved  
12 out, but in those other areas which could be included, the  
13 North Dakota law also includes a provision which answers that  
14 question, Justice O'Connor, and it states that the tribal  
15 customs and tribal traditions of the Indian people should first  
16 be examined by the North Dakota courts and where possible that  
17 those customs and traditions should be given credence, should  
18 be given effect. I believe it is specifically Provision 27-19-11  
19 and in that particular section the North Dakota court is directed  
20 to, if a conflict situation arises, resolve that conflict in  
21 the favor of the Indian people.

22 And, so, if the state law has a domestic relations  
23 policy which would be contrary to the policy of the Indian  
24 people. The state court should first look to the Indian policy  
25 and try to implement that Indian policy before it embarks

1 upon the implementation of its own state policy.

2 So, that question is also, at least facially in the  
3 statute, answered by the North Dakota law as it currently  
4 exists.

5 QUESTION: Mr. Lee, getting back to your point about  
6 the Indian should have been negotiating all along these 20  
7 years, how many Indians do you have in the state legislature?

8 MR. LEE: There are no Indians that I am aware of  
9 who are members of the state legislature.

10 QUESTION: Well, how could they negotiated.

11 MR. LEE: They could negotiate, sir, I believe, the  
12 same way they negotiated last time. In 1963, when the  
13 people --

14 QUESTION: You mean negotiate and come up with the  
15 same thing they have got now?

16 MR. LEE: Justice Marshall, in 1963, the people of  
17 the State of North Dakota had initially drafted a jurisdictional  
18 plan which would have crammed the state jurisdiction down the  
19 Indian people's throats. The plan was for a unilateral state  
20 court assumption of jurisdiction. The Indian people appeared  
21 en masse before the state legislature and before various  
22 legislative committees. Their tribal chairman as spokesman  
23 got up --

24 QUESTION: But they had no clout. How can you have  
25 clout if you don't have a vote?

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1 MR. LEE: They had clout in 1963. They had enough  
2 clout in 1963 --

3 QUESTION: How many legislators did they have in  
4 1963?

5 MR. LEE: Again, sir, I don't believe they had any,  
6 but in --

7 QUESTION: Have you ever heard of one in South Dakota  
8 ever?

9 MR. LEE: In North Dakota, sir? I am --

10 QUESTION: Ever? Have you ever had an Indian  
11 legislator?

12 MR. LEE: Mr. Cross, has there ever been an Indian  
13 legislator?

14 MR. CROSS: I believe that there has been one or  
15 two in the history of the state legislature.

16 MR. LEE: Thank you.

17 They had, sir, political clout in 1963. They had  
18 enough political clout in 1963 to be able to come in and  
19 derail the North Dakota jurisdictional plan.

20 Given that situation, they have now had 20 years  
21 to again come, again en masse, to ask the state legislature,  
22 let's try and work something out here.

23 It is probably not a one-sided problem also. I would  
24 say that the people of the State of North Dakota should have  
25 had a duty to go to the Indian people and say, look, we have

1 this jurisdictional void, let's try and work out some reasonable  
2 policy where we can solve this dilemma without having to resort  
3 to the judicial process again, again, and again.

4 But, the Indian people did have enough political  
5 clout in --

6 QUESTION: May I ask this question, Mr. Lee? You  
7 suggested a couple of times that maybe they should have set  
8 up their own judicial system and then they could have brought  
9 this action in their own court and might have solved the problem.  
10 But, what if they set up a judicial system without abandoning  
11 their claim of sovereign immunity? Would the case be any  
12 different? Say they got a judgment and so forth and they wanted  
13 to enforce it in state court and said, no, we won't let you  
14 consent to a counterclaim.

15 MR. LEE: I would submit, Your Honor, we have to  
16 concede the issue of sovereign immunity. The rulings that  
17 have been handed down by this Court in the United States F&G  
18 case and in the history of the Indian laws in the United States  
19 and North Dakota's obvious attempts to recognize those rulings,  
20 that we would have to admit that they do have sovereign immunity  
21 from the judgment.

22 But, I believe that is a different question from  
23 whether or not they should be at least required to come into  
24 the court on the same footing as everybody else, to play by  
25 the same rules, to be bound by the same substantive rights

1 and remedies and also to agree to be bound by the same rules  
2 of procedure.

3 Again, in the North Dakota --

4 QUESTION: How can it be the same if they have  
5 sovereign immunity? I am a little puzzled.

6 MR. LEE: If --

7 QUESTION: If not the same rules except they can't  
8 lose.

9 MR. LEE: The people of the State of North Dakota  
10 recognize that its own state has sovereign immunity to the  
11 extent that it hasn't been waived and the State of North Dakota  
12 has not waived its sovereign immunity except in contract actions.

13 So, it is not a foreign situation for the people  
14 of the State of North Dakota to be faced with a sovereign with  
15 asserts its sovereign immunity and to the extent that a tribe  
16 is a sovereign, we would have to concede that they do have  
17 this immunity to pursue.

18 QUESTION: But, the condition that your legislation  
19 imposes, as I understand it, is that they must waive their  
20 sovereign immunity. Don't they have to consent to be subject  
21 to the jurisdiction of state law?

22 MR. LEE: The Indian people have to subject themselves  
23 to the jurisdiction of the State of North Dakota to the same  
24 extent that those rules would be applicable in actions involving  
25 private citizens.



1           If you have a sovereign, a sovereign entity involved,  
2 then the rules are not the same as they are for private persons.  
3 And, in that instance, the state court of North Dakota may  
4 well be forced to recognize the sovereign immunity of the tribe.  
5 And, I would not submit that we could rest or strip the tribe  
6 of that sovereign status. They have the immunity. But that  
7 again is not an immunity from the reasonable rules of court,  
8 from process, from sanctions, from discovery, and the like,  
9 and that is what was asserted below in the North Dakota Supreme  
10 Court.

11           QUESTION: You are not suggesting, are you, that  
12 if this suit were brought by individual Indians rather than  
13 by the tribes that the result would be different in your  
14 opinion? Would individual Indians have any right to sue in  
15 state court?

16           MR. LEE: Not under these facts unless they first  
17 agree, either individually or collectively, to consent to state  
18 court jurisdiction.

19           QUESTION: Well -- I don't quite understand your  
20 answer, but Indians themselves individually can't waive  
21 sovereign immunity, only the state can do that.

22           MR. LEE: The Indian people wouldn't an individual  
23 sovereign immunity and the individual Indian would be subject  
24 to execution levy and the like. To the extent that state laws  
25 of private property and persons apply, they would be applicable

1 on the reservation to the individual Indian litigant. But, there  
2 is a protection for the individual Indian who is dissatisfied  
3 with that, because as an individual he can withdraw his  
4 acceptance and reassert his tribal status. So, that problem  
5 is taken care of in the North Dakota law as well. If the  
6 individual Indian becomes dissatisfied with the North Dakota  
7 jurisdictional plan that he has consented to, he can withdraw  
8 that consent and retreat back into the protections afforded  
9 by tribal status.

10 I am not sure I answered the question sufficiently.

11 QUESTION: Neither am I.

12 (Laughter)

13 QUESTION: Can the tribe itself do that, give a  
14 consent for the purpose of a short period of time and then  
15 withdraw the complaint?

16 MR. LEE: Yes, they can, sir. The North Dakota  
17 jurisdictional plan says that if an individual Indian consents,  
18 and I think the tribe acting as a corporate entity might be  
19 considered like a person in that regard, if they consent, they  
20 can withdraw that consent later on down the road if they become  
21 dissatisfied with North Dakota jurisdictional plans and  
22 rules.

23 QUESTION: Is it your submission -- I want to be  
24 sure I understand you -- that they could give that kind of  
25 consent for the purpose of a short period of time and retain

1 their sovereign immunity?

2 MR. LEE: Their sovereign immunity from liability.

3 QUESTION: And from execution?

4 MR. LEE: And, from execution judgment and the like.

5 QUESTION: It seems to me they have a pretty simple  
6 solution then. They could just consent for this case, have  
7 it litigated, and even if they lose they don't have to pay.  
8 I don't know why they don't do that.

9 QUESTION: Well, now, the consent provisions of the  
10 statute don't authorize consent just for one case.

11 MR. LEE: No.

12 QUESTION: It is my understanding that the consent  
13 has to be for all purposes and can only be removed after going  
14 through certain time requirements and posting and notice and  
15 so forth.

16 MR. LEE: That is correct, but there is the  
17 possibility to remove the consent once -- You know, if --

18 QUESTION: Yes, but the consent has to be given for  
19 all purposes and it is in effect for a certain period of time  
20 until statutory procedures are complied with determining it.

21 MR. LEE: That is correct.

22 The yardstick of any law is not often the yardstick  
23 of the common man, but in this particular case, we are dealing  
24 with something known as a fundamental right, then the layman's  
25 perception is the yardstick to judge whether or not something

1 is fair or fundamentally unfair.

2 I would submit that outside Three Affiliated Tribes,  
3 if you were to propose this particular jurisdictional plan  
4 where one side would have all access to the court for all  
5 purposes and all procedures available for their protection  
6 as Plaintiffs, and the Defendant would have none of the rights  
7 and remedies available and none of the procedural safeguards  
8 available to him, that there would not be a common man or layman  
9 who would say that that is fundamentally fair. In fact, he  
10 would say that that is fundamentally unfair. That is the  
11 situation that the Three Affiliated Tribes is seeking to impose  
12 in the state court of North Dakota.

13 To conclude, I would like to close with a small  
14 analogy of a baseball game. Imagine, if you will, one team  
15 at the plate where the batter has an unlimited number of swings  
16 to make contact with the ball, and, furthermore, the team  
17 at bat has an unlimited number of outs to score as many runs  
18 as they want to for as long as they want to keep scoring, and  
19 the team that is in the outfield cannot even quit the game.

20 Now, that is the jurisdictional plan and scheme that  
21 the Indian people are trying to impose on the people of  
22 North Dakota where the people of North Dakota will be forever  
23 the team that is out in the field shagging balls.

24 CHIEF JUSTICE BURGER: Your time has expired now,  
25 counsel.

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MR. LEE: Thank you, sir.

If it please the Court, I would ask that the decision of the North Dakota Supreme Court be affirmed.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Cross?

ORAL ARGUMENT OF RAYMOND CROSS, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. CROSS: Yes, Mr. Chief Justice, to point out that the tribal courts are open to non-Indian plaintiffs and many non-Indian plaintiffs for debt collection and other purposes take advantage of the tribal courts to maintain actions precisely of the kind that are at stake here.

However, by contrast, the state courts are not open to tribal Indians or tribal governments unless they consent to the extension or virtually complete state civil jurisdiction over the person or property.

The tribes believe that that infringes on their due process and equal protection rights and as well it would interfere with operation of fundamentally important federal policies governing the Indian affairs area.

First of all, it would interfere with the doctrine of the protection of the political independence of the tribes and the economic independence of the tribes.

If such a state statute is allowed to stand, it

1 means that individuals will be compelled to consent to the  
2 extension of state civil jurisdiction, not only for the purpose  
3 of the case at hand, but for extension of state legislative  
4 and judicial jurisdiction generally except as limited by terms  
5 of the statute. That would fundamentally impair how the tribes  
6 operate under federal law.

7 The result of such a state statute would be the  
8 creation of a checkerboard jurisdictional system unknown now  
9 in federal Indian law. Individuals would be compelled --  
10 Individuals tribal members, including governments, would be  
11 compelled to commit themselves to accepting state civil  
12 jurisdiction generally.

13 QUESTION: Can an individual waive Indian sovereignty?

14 MR. CROSS: Under the doctrines of this Court, Justice  
15 Marshall, the individuals have a right known as the Williams  
16 v. Lee right. Our position is that if the state court other-  
17 wise has subject-matter jurisdiction over a tribal member's  
18 complaint, not a tribal government complaint, but a tribal  
19 member's complaint, that there may be the possibility that  
20 the non-Indian can maintain their damages action or the  
21 counterclaim against an individual tribal member but not  
22 against a tribal government.

23 QUESTION: Well, how can an individual waive a state  
24 sovereignty?

25 MR. CROSS: I may not have answered your question

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1 Justice Marshall.

2 QUESTION: No.

3 MR. CROSS: The answer to your question is that the  
4 individual Indian cannot waive the tribal governmental  
5 sovereignty. At most, through the individual consent  
6 procedure 27-19-05, it can submit himself -- the individual  
7 can submit himself to the full scope of state jurisdiction.  
8 What would happen in the usual case, and this has already been  
9 tried in state court, is that the individual would have to  
10 consent, the individual tribal member would have to consent,  
11 perhaps as a basis of extension of credit, on the reservation  
12 by a non-Indian.

13 So, you would have a system in which, as a usual  
14 matter, the non-Indian would become subject to an unclear area  
15 of law. On the one hand, they have submitted themselves under  
16 the state civil jurisdiction. On the other hand, tribal government  
17 would assert that they have the right to --

18 QUESTION: I am talking about under your tribal  
19 government how can an individual waive sovereignty?

20 MR. CROSS: The individual, Justice Marshall, is  
21 that they cannot waive tribal sovereignty. The state statute  
22 appears to force the individual to come in to, if they want  
23 access to state court, to submit themselves individually to  
24 all of the state legislative powers.

25 So, a tribal Indian as he tries for access to state

1 court must say through a written statement, through an  
2 executed statement with the county auditor where he resides,  
3 that he is going to accept state jurisdiction; that he is going  
4 to accept state jurisdiction for virtually all purposes.

5 And, that is why we believe this state statute  
6 interferes not only with the established due process rights  
7 of the tribal members involved, but also would frustrate the  
8 operation of fundamental federal policies.

9 Thank you, Mr. Chief Justice.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.

11 The case is submitted.

12 (Whereupon, at 11:03 a.m., the case in the  
13 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:

#84-1973 - THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,  
Petitioner V. WOLD ENGINEERING, ET AL.

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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