

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1589

TITLE IOWA MUTUAL INSURANCE COMPANY, Petitioner V.
EDWARD M. LaPLANTE, ET AL

PLACE Washington, D. C.

DATE December 1, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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IOWA MUTUAL INSURANCE COMPANY, :

Petitioner, :

v. : No. 85-1589

EDWARD M. LA PLANTE, ET AL. :

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Washington, D.C.

Monday, December 1, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:02 o'clock a.m.

APPEARANCES:

MAXON R. DAVIS, ESQ., Great Falls, Montana; on behalf
of the petitioner.

JOE R. BOTTOMLY, ESQ., Great Falls, Montana; on behalf
of the respondent.

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

2 CHIEF JUSTICE REHNQUIST: We will hear
3 argument next in No. 85-1598, Iowa Mutual Insurance
4 Company versus Edward M. LaPlante.

5 You may proceed whenever you are ready, Mr.
6 Davis.

7 ORAL ARGUMENT BY MAXON R. DAVIS, ESQ.,
8 ON BEHALF OF THE PETITIONER

9 MR. DAVIS: Mr. Chief Justice, and may it
10 please this Court, we have today another Indian case
11 from Montana. The last time that you had an opportunity
12 to hear a case from our jurisdiction was another Indian
13 case, National Farmers Union Insurance Company versus
14 the Crow Tribe of Indians. That was way back in 1985.

15 At that time Justice Stevens, speaking for a
16 unanimous Court, described the case as a kind of
17 procedural nightmare. Of course, that was a Federal
18 question case under Section 1331 of Title 28. In the
19 intervening 12 or 13 months you have also had an
20 opportunity to decide The Three Affiliated Tribes versus
21 Wold case from North Dakota, which, of course, was a
22 Public Law 280 case, and the interesting feature of that
23 case was that it was kind of a jurisdictional yo-yo.
24 You had it, I believe, two times, and now Iowa Mutual's
25 case comes before this Court, a diversity case involving

1 Indians.

2 It presents the problem of reconciling what we
3 view as an unequivocal grant of Federal jurisdiction
4 under Section 1332, constitutional in origin,
5 reconciling that grant with the perceived limitations of
6 Federal Indian policy. The solution suggested by the
7 Ninth Circuit, go ask the tribal court. We do not feel
8 that it is appropriate to go ask the tribal court the
9 extent of your jurisdiction, nor is it necessary.

10 By placing this particular case, the one that
11 we are arguing about this morning, in this limited
12 historical context, I am simply trying to reinforce a
13 conclusion that I guess I had been dealing with
14 implicitly for the ten odd years that I have been
15 practicing law in Montana, and that this case has served
16 to crystallize, and the conclusion is this, quite
17 simply.

18 Federal Indian law as it exists primarily
19 based on court decisions from this tribunal for the most
20 part it doesn't work.

21 QUESTION: That sounds like bad news.

22 MR. DAVIS: It is bad news. It is bad news
23 for litigants like Iowa Mutual or National Farmers Union
24 Insurance Company but it is also bad news for the
25 reservation Indians to whom the Federal Government and

1 certainly this Court has shown so much solicitude.

2 QUESTION: What is the good news, Mr. Davis?

3 MR. DAVIS: The good news, Justice Scalia, is
4 that you have an opportunity to fix it, and I hope to --
5 we can take some small steps today towards fixing it,
6 and I guess the point I want to stress is that certainly
7 in dealing with theory and with concepts like Federal
8 preemption and the retained sovereignty of Indian tribes
9 with which this Court grapples, it is necessary to keep
10 in mind that we foot soldiers like Mr. Bottomly and I
11 out in the trenches in Great Falls or wherever, in
12 Browning, Montana, have to apply these concepts in a
13 workable framework.

14 QUESTION: Workable framework that you would
15 be able to bring suit in Federal Court if you are an out
16 of state insurance company, but if you are an in-state
17 insurance company you can't bring suit in state court
18 nor in Federal court, of course, because there is no
19 diversity. Is that workable?

20 MR. DAVIS: I don't think so, Justice, and the
21 solution I hasten to characterize is that I stumbled
22 upon and that I have ultimately reached and I have
23 suggested in the reply brief that I have filed with this
24 Court is that it is necessary to avoid these kinds of
25 jurisdiction -- these legalistic gymnastics, it is

1 necessary to go back to the beginning and start
2 rethinking these jurisdictional concepts and rework
3 them, I think, from Williams versus Lee forward.

4 And the conclusion I reached, and it is one I
5 find that certainly isn't foreclosed by any of the
6 decisions from this Court, but certainly may have been
7 assumed to be foreclosed, is that the tribal courts do
8 not have jurisdiction over disputes between reservation
9 members and outsiders, that that is not -- it is a
10 conclusion that I think everyone else has reached, that
11 if a lawsuit involves a reservation Indian and some
12 other party off the reservation, that state court
13 jurisdiction is automatically foreclosed.

14 And I look for the origin of that concept, and
15 it is one that I had assumed existed, and you go back to
16 the Williams case, to the Kennerly case, maybe the Santa
17 Clara Pueblo versus Martinez case, and none of them say
18 that. I guess you have to keep in mind the facts of
19 each particular case. Of course, the Williams case
20 involved, I believe, either Mr. Williams or Mr. Lee was
21 running a trading post on the Navajo reservation, and
22 the other party had a bill they didn't pay, and the
23 proprietor of that trading post wanted to collect it,
24 and he went to Arizona state court, and he was told
25 ultimately no, you proprietor of a trading post on the

1 reservation, you have to go to the tribal court back in
2 1959.

3 And from that principle, which is -- and I am
4 not challenging the inherent equity or rightness of that
5 principle. That the man who was operating the trading
6 post on the reservation has to go to tribal court stems
7 from this whole Indian jurisprudence that any civil
8 litigation involving a reservation Indian must at least
9 in the first instance go to tribal court.

10 QUESTION: Is there any line between this case
11 and allowing the person who opens a trading post on an
12 Indian reservation to sue in state courts?

13 MR. DAVIS: I don't understand your question.

14 QUESTION: You are asserting that so long as
15 one of the parties is a non-Indian it doesn't go to
16 tribal courts. That is the line you want to draw.

17 MR. DAVIS: I think so.

18 QUESTION: Even if the non-Indian -- even in
19 Williams, even if it were a case where the non-Indian is
20 running a trading post on the reservation.

21 MR. DAVIS: No, I misunderstood you. No, the
22 line I would draw, Justice Scalia, is if it is between a
23 reservation Indian on a reservation where Public Law 280
24 procedures have not been followed so that the state
25 courts would have jurisdiction anyways, if we are

1 dealing with that situation, such as on the Blackfeet
2 Indian reservation in Montana, if it is a dispute
3 between an Indian resident of that reservation and
4 someone who resides off the reservation, outside the
5 reservation, then no, the tribal court should not have
6 jurisdiction over that matter.

7 If it is a matter that, as Williams versus
8 Lee, involved a dispute between a reservation member on
9 the reservation and someone else who is residing or
10 conducting a business that is located on that
11 reservation, fine, and we haven't gone through the
12 Public Law 280 formalities so the state can assume
13 jurisdiction over that dispute. That is where I would
14 draw the line.

15 QUESTION: What about the school district last
16 year?

17 MR. DAVIS: well, fortunately it wasn't a
18 diversity case so I can't answer that particular --

19 QUESTION: Well, I know, but you would say
20 that state courts have jurisdiction even if the person
21 who resides off the reservation still resides in the
22 state.

23 MR. DAVIS: Yes, the state court would have
24 jurisdiction, Justice White, if --

25 QUESTION: How about the school district?

1 MR. DAVIS: The school district was located on
2 the Crow reservation. I am aware of that. And the
3 question is, and the one that this Court avoided at that
4 time deciding, is whether the --

5 QUESTION: School district resides on a
6 reservation?

7 MR. DAVIS: Well, it is physically located
8 there. It is a public entity in the state of Montana.

9 QUESTION: Well, if the school district exists
10 off the reservation and goes on the reservation to pick
11 up Indian children and there gets to be a dispute about
12 that --

13 MR. DAVIS: I would say that that type of
14 dispute belongs in state court, or if diversity exists
15 it belongs in Federal court, and I am hard pressed to
16 find any decision from this Court that says otherwise,
17 that says -- and I think the important point in the Crow
18 tribe case, you refrained from deciding that very
19 pointedly. You said we will save that one for a later
20 date.

21 But if you go to Williams, to Kennerly, to any
22 of these cases, what this Court has said is that for
23 internal matters affecting the relations of the tribe
24 themselves, the tribal courts have jurisdiction, but
25 this Court has never said in terms of the relationships

1 between tribal members and persons, firms, or
2 corporations located off the reservations, that the
3 tribal court is the appropriate forum for the resolution
4 of those sorts of disputes. It has gone on.

5 QUESTION: It is hard, isn't it, to
6 distinguish some of what we said in the Farmer's Union
7 case two terms ago from something very much like that.
8 There didn't we say that the tribal court should be the
9 first to pass on its own jurisdiction?

10 MR. DAVIS: Oh, I agree, Chief Justice
11 Rehnquist, but I think the first critical distinction is
12 the nature of the case that came before you in the Crow
13 tribe case. The National Farmers case was a direct
14 challenge to the tribal court's jurisdiction, and your
15 determination as to whether that presented a Federal
16 question.

17 Here we are talking about the Federal court's
18 own jurisdiction over a controversy. It is jurisdiction
19 that has been granted to it by Congress, and one can
20 very easily trace its origin back to the United States
21 Constitution, and I think that --

22 QUESTION: Well, but certainly Federal
23 question jurisdiction, although perhaps -- it must be
24 based in the Constitution in some way, though not
25 granted until much later than diversity jurisdiction to

1 the lower Federal courts, but if Federal question
2 jurisdiction such as the jurisdiction of the tribal
3 court, if that sort of a case filed in the District
4 Court must be first referred to the tribal court can't
5 you say that a diversity case should be no different?

6 MR. DAVIS: Yes, I can. I can say exactly
7 that, Chief Justice, because of the nature of the
8 different types of cases. The National Farmers Crow
9 Tribe case was an inquiry into the nature and extent of
10 tribal court jurisdiction, and of course you ultimately
11 said that was a Federal question and we do have the
12 right to determine that. It was the matter of how to go
13 about doing that, but you certainly haven't foreclosed
14 the ultimate review by this tribunal, or go back, start
15 in Judge Batton's court in Billings, and perhaps go back
16 up the line again.

17 You said that is a Federal question, but we
18 want to wait and see what you do with the tribal court.
19 I think that is greatly different from the situation we
20 have here where we have come into Federal court,
21 instituted an action that would appear to me fits all
22 the parameters of the statute, and what the Court of
23 Appeals has said is, first, you, comparable to National
24 Farmers Union, will apply the same procedure, will go to
25 the tribal court and let it determine whether it -- I

1 think the language used by the Court of Appeals is to
2 see if the tribe would manifest any interest in this
3 case.

4 And in effect the tribal court is determining
5 the Federal court's jurisdiction rather than the Federal
6 court determining the tribal court's jurisdiction.

7 QUESTION: You would agree that the tribal
8 court would be the proper forum to try out the argument
9 between the LaPlantes and the Wellmans?

10 MR. DAVIS: I have no argument with that at
11 all, apart from any limitations imposed by the tribe
12 itself on --

13 QUESTION: And it is just that the Wellmans
14 had some insurance.

15 MR. DAVIS: Yes.

16 QUESTION: And that they had gotten through a
17 broker off the reservation.

18 MR. DAVIS: Well, yes.

19 QUESTION: And your client provided the
20 insurance.

21 MR. DAVIS: That is correct, Judge. I am not
22 arguing, Justice White, that the dispute between the
23 LaPlantes and the Wellmans appears on its face to be one
24 that is properly within the jurisdiction of the Black
25 Feet tribal court.

1 QUESTION: Could the tribal court have ever
2 gotten jurisdiction over the insurance company?

3 MR. DAVIS: I suppose if they were going to
4 relocate from Dewitt, Iowa, to Browning, Montana, and
5 set up shop there, I would concede in those
6 circumstances, yes, but short of that state of affairs,
7 that their place of business was on the reservation, no,
8 and I don't think the necessary -- the corollary to that
9 is, we start applying loss --

10 QUESTION: Well, suppose the insurance company
11 has no existence on the reservation but it does have
12 offices off the reservation and within the state. The
13 tribal court still can't get jurisdiction over them, can
14 they?

15 MR. DAVIS: I would agree not, that they
16 should not be allowed to. I think what has happened up
17 to now is that such jurisdiction has been presumed again
18 by the Montana Supreme Court. The most recent example
19 we cited was the Millbank Mutual versus Eagleman case
20 that arose on the Fort Peck Indian reservation, the
21 Federal courts, the Courts of Appeal.

22 But again, it is one that I find lacking in
23 any substance from the decisions of this Court to say
24 that those type of disputes necessarily have to go to
25 tribal court. There doesn't seem to be any

1 justification for it, and one can only go back to the
2 rationale that the tribal court itself has espoused in
3 this case, and that opinion and the underlying LaPlante
4 versus Wellman and Iowa Mutual lawsuit appears in the
5 joint appendix, and the tribal judge there went on at
6 some length, he wrote a very lengthy opinion explaining
7 why Iowa Mutual and Midland Claims, the adjusting firm,
8 should not be dismissed from the case even though there
9 was no bad faith insurance law in the Blackfeet Indian
10 reservation or any comparable type of substantive law
11 that would apply to the LaPlantes' claims.

12 The rationale espoused was that people like
13 the Wellmans, Blackfeet Indians who reside on the
14 reservation, do purchase insurance and have an interest
15 in having those disputes adjudicated. And therefore
16 there is an interest in the Blackfeet tribal court
17 system to have those type of disputes litigated in
18 Blackfeet tribal court.

19 That is an invitation for general jurisdiction
20 over just about any sort of claim. You could that if a
21 Blackfeet Indian has purchased an IBM typewriter and
22 thinks he has been overcharged, the Blackfeet tribal
23 court has an interest in pursuing antitrust claims
24 against International Business Machines Corporation. It
25 becomes kind of a bootstrapping argument, and that is, I

1 think, one of the major defects in the Ninth Circuit's
2 approach when they did say, and I have found the
3 quotation, that the parties are to find out whether the
4 tribe has not itself manifested an interest in
5 adjudicating the dispute.

6 QUESTION: The Ninth Circuit dismissed the
7 case, ordered the case dismissed, completely dismissed.
8 Isn't that right?

9 MR. DAVIS: Well, it is a dismissal -- I have
10 to read it as comparable to National Farmers, a
11 dismissal without prejudice.

12 QUESTION: I thought it held that since the
13 state courts wouldn't have jurisdiction, that there
14 wasn't any diversity jurisdiction either.

15 MR. DAVIS: That's correct. I'm sorry, you're
16 correct, Justice White.

17 QUESTION: And they ordered the case
18 dismissed.

19 MR. DAVIS: Well, they have, but you go back
20 to the R.J. Williams case and I guess there is that
21 ultimate question, to see -- if, as I understand their
22 rationale, if we ultimately determined that the
23 Blackfeet tribal court doesn't have jurisdiction over
24 this type of controversy, ipso facto the state court
25 would be vested with jurisdiction perhaps and therefore

1 the diversity jurisdiction would exist because we then
2 get over the Woods versus Interstate Realty hurdle.

3 As I have suggested, I think the more logical
4 way over the Woods versus Interstate Realty hurdle, and
5 I think this case does boil down as the government in
6 its amicus brief suggested, it boils down to an Erie
7 Railroad-Tompkins problem of reconciling this, is to
8 redefine or I should say more precisely define the
9 limits of tribal court jurisdiction, and if one does
10 define those limits in the manner I have suggested, that
11 internal tribal disputes, matters arising on the
12 reservation between persons residing there go to tribal
13 court, and matters between tribal members on the
14 reservation and those persons, firms, or corporations
15 located off the reservation don't belong in tribal court
16 but rather in state or Federal court, depending upon the
17 existence of diversity or such other matters such as a
18 Federal question that would grant jurisdiction, then the
19 Erie Railroad versus Tompkins problem and the woods
20 versus Interstate Realty doorclosing type problem
21 evaporates.

22 QUESTION: Mr. Davis, let's assume we don't
23 accept that broad invitation of yours, and we adhere to
24 the proposition that the tribal court would have
25 jurisdiction or at least arguably would have

1 jurisdiction here. You have another string to your bow,
2 I gather. You would say even in that event the mere
3 fact that they might have jurisdiction does not preclude
4 our accepting jurisdiction under the Federal diversity
5 provision.

6 MR. DAVIS: Yes. That is the way I originally
7 approached the case, Justice Scalia.

8 QUESTION: Right. Now, tell me why that ought
9 to be so, not just in light of the National Farmers Home
10 case, but also in light of the fact that Federal courts
11 will often refrain from exercising diversity
12 jurisdiction when state courts are entertaining the same
13 suit. Even with respect to state courts we will
14 sometimes stay our hand, although we technically have
15 diversity jurisdiction. Why should we treat tribal
16 courts in a more unfavorable fashion than we would treat
17 state courts?

18 MR. DAVIS: First of all because they aren't
19 state courts. And I think we do an injustice to the
20 litigants when we treat them as the equal of state
21 courts.

22 QUESTION: I mean, it is one thing to say that
23 we should have accepted this case if it had walked in
24 without any prior proceeding in the tribal courts, but
25 here you have a proceeding already there.

1 MR. DAVIS: We have a different -- we have the
2 underlying tort claims proceeding in tribal court.

3 QUESTION: That's right.

4 MR. DAVIS: To that extent it is no different
5 from any other, a typical declaratory judgment action
6 for which, of course, there is an express grant of
7 Federal jurisdiction.

8 QUESTION: Suppose that suit had been in state
9 court and then this same diversity suit were attempted.
10 Do you think the Federal court would go ahead with a
11 separate diversity action duplicating the state court
12 action.

13 MR. DAVIS: Well, I hope so. I have done it a
14 number of times myself, Justice. Yes, if there is an
15 underlying tort claim in state district court, it is
16 something that is frequently done, at least out in the
17 district of Montana, if there is a legitimate coverage
18 question, to institute a separate action either in state
19 or Federal court to determine those coverage questions,
20 and I think it is a type of procedure that is frequently
21 employed throughout the country, so I don't have any
22 problem with that.

23 I think you do ultimately, if you are not
24 going to buy my argument to redraw or more precisely to
25 find the jurisdictional arguments, we do get back to

1 that Erie Railroad versus Tompkins problem as alluded
2 to, that if it is a nondiverse party they be precluded
3 from going into state court perhaps, and that action
4 would have to proceed in tribal court, and gosh, the
5 tribal court is going to be applying tribal customs and
6 practices, or it has the right to, whereas in Federal
7 court, the Federal court, at least, if we go by the
8 Rules of Decision Act and Erie Railroad versus Tompkins,
9 that Federal court will be applying state law, or should
10 be, and so we have the prospect of different rules being
11 applied to adjudicate basically the same controversy.

12 QUESTION: Mr. Davis, just to clarify, maybe
13 it is covered in your briefs, but in your view what
14 jurisdiction's substantive law governs the decision of
15 the coverage question?

16 MR. DAVIS: I don't think there is any
17 practical dispute that it is Montana law.

18 QUESTION: It would be Montana. Your opponent
19 presumably would agree. And what substantive rule of
20 law governs the negligence action?

21 MR. DAVIS: Well, again, that is an
22 interesting matter, but again it is Montana law. I am
23 amused and I will point you to this, and maybe Mr.
24 Bottomly since he is here can answer this, but if you go
25 back and read the amended complaint that is in -- I

1 think it is at Page 29 of the joint appendix, the
2 amended complaint filed by the LaPlantes in Blackfeet
3 tribal court in that they hold the Wellmans to be liable
4 for Mr. LaPlante's injuries because of the Wellmans'
5 failure to comply with Montana's workers' compensation
6 law and failing to have workers' compensation coverage
7 for him and therefore -- and they cite in the complaint,
8 the amended complaint Section 3971.509 of Montana's
9 workers compensation law and say that because of that it
10 is kind of a strict liability situation.

11 QUESTION: Would it not be possible that the
12 tribe could decide as a matter of its own law that the
13 failure to get workman's compensation somehow
14 establishes liability as a matter of tribal law or
15 something like that?

16 MR. DAVIS: I suppose it could, but again,
17 they are just adopting Montana law.

18 QUESTION: At least their complaint does.
19 Whether the tribal court would do that we still don't
20 know.

21 MR. DAVIS: We don't know at all what the
22 tribal court is going to do. That is one of the great
23 uncertainties that litigants have, and that, I guess,
24 leads me to what I think is the ultimate point and why I
25 believe it is important for this Court to redefine or

1 more precisely define the jurisdictional boundaries,
2 because I think ultimately it defeats the interests of
3 both --

4 QUESTION: Well, on your suggestion that we
5 start from scratch, in effect, and redefine the
6 jurisdictional boundary, are you suggesting that the
7 boundaries are mutually exclusive, that you are in the
8 Indian camp, you can't come in state court, and vice
9 versa?

10 MR. DAVIS: Are you asking what type of
11 litigant? No, I don't think the state courts of Montana
12 or the Federal court in the District of Montana from
13 that point of view has ever been closed to Indian
14 litigants who want to institute litigation there. I
15 read, you know, you go back to whatever analysis you
16 want to --

17 QUESTION: But you would say that if there is
18 jurisdiction in the tribal court under your new
19 definition of the boundary there would be no
20 jurisdiction in either the state court or the federal
21 court?

22 MR. DAVIS: If we have a Williams type Lee
23 dispute, yes, I would say that the tribal court
24 jurisdiction, the matters that belong in tribal court --

25 QUESTION: That is exclusive.

1 MR. DAVIS: Yes. Okay, and matters that --

2 QUESTION: You wouldn't allow the Indian --

3 MR. DAVIS: No, no, I am --

4 QUESTION: -- in Williams to bring that suit
5 in state court if he wanted to?

6 MR. DAVIS: Well, that was the store owner.
7 That was the store owner. But let's switch things
8 around.

9 QUESTION: Right, the Indian.

0 MR. DAVIS: The Indian --

1 QUESTION: Let's assume the Indian was suing
2 the store owners.

3 MR. DAVIS: Yes, and I think that exists now,
4 and I apologize for the confusion. I was trying to make
5 that point with Justice Stevens, that the the Indian
6 litigants, reservation members in Montana, any of the
7 Indian reservations, I believe, have the right and have
8 practiced it, and in my experience come into state
9 district court, into federal district court and pursue
0 their rights, it is a one-way street. We can't turn
1 around or my clients as nonreservation members cannot go
2 into state or federal court and as matters now sit
3 pursue those claims.

4 So that is how -- I guess it is a one-way type
5 operation, but the point that I want to leave you with

1 is, I think it is ultimately to all the litigants' best
2 interests that you redefine this jurisdiction, because I
3 think that both the Indians and the non-Indian parties,
4 citizens are ill-served by the present state of affairs,
5 and it is one I can relate to in my own personal
6 experience, because it happens to me and it happens to
7 me on a frequent basis, that people come in and they
8 want to talk to me about a prospective commercial or
9 business dealing on the Indian reservations in Montana.

10 My experience in dealing with Indians is not
11 limited to this case. And my advice to them is
12 comparable to the advice that many of my colleagues in
13 Montana give to such persons. Don't, because we can't
14 help you, because we don't know what the rules are and
15 the risks involved are too great.

16 You are going to be in tribal court if a
17 dispute arises, and I can't advise you as to what your
18 ultimate rights or remedies are, and the net effect is
19 that all too often those types of commercial and social
20 interactions are discouraged because of the uncertainty
21 over the present state of affairs, and if we take this
22 Court's admonitions or advice at face value in both
23 Williams and in the Wold case, one of the rules of
24 Federal Indian policy is to further the assimilation of
25 reservation Indians into the mainstream of American

1 life.

2 The extension of tribal court jurisdiction I
3 think almost by default ill serves that goal, and I
4 think if commercial and social interaction is to be
5 encouraged it will be much more encouraged if the
6 jurisdictional lines are drawn as I have suggested this
7 morning.

8 I will reserve the balance of my time for
9 rebuttal.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Davis.

12 We will hear now from you, Mr. Bottomly.

13 ORAL ARGUMENT OF JOE R. BOTTOMLY, ESQ.,
14 ON BEHALF OF THE RESPONDENT

15 MR. BOTTOMLY: Mr. Chief Justice, and may it
16 please the Court, the Ninth Circuit and the District
17 Court were correct in the dismissing of this case
18 because to take diversity jurisdiction when there is a
19 pending action in tribal court which involves the
20 identical issues and disputes would contradict the firm
21 federal policy to promote tribal self-government --

22 QUESTION: Mr. Bottomly, let me stop you right
23 there, because is this the identical dispute? In the
24 tribal court you have a negligence claim. Here you have
25 a coverage claim. Aren't they quite different, and

1 isn't your opponent right that that frequently is --
2 those two claims are adjudicated in different courts?

3 MR. BOTTOMLY: They are identical claims
4 because Iowa Mutual as an affirmative defense raised the
5 coverage question.

6 QUESTION: That aspect of it overlaps, but the
7 negligence aspect doesn't overlap.

8 MR. BOTTOMLY: That's right, but the part of
9 the declaratory in federal court that they want
10 determined, that is the insurance contract issues.

11 QUESTION: Correct.

12 MR. BOTTOMLY: They are pending in tribal
13 court in a motion for summary judgment.

14 QUESTION: By whom?

15 MR. BOTTOMLY: We moved for summary judgment
16 on --

17 QUESTION: Was Iowa, the insurance company a
18 party to the tribal court action?

19 MR. BOTTOMLY: Yes. Iowa Mutual -

20 QUESTION: How did you get jurisdiction?

21 MR. BOTTOMLY: There are two actions. There
22 is a negligence auto accident which involves the Indian
23 defendant, Indian plaintiff, and there is a bad faith
24 insurance adjusting action which involves Iowa Mutual
25 and their insurance adjustor, Midland Claims, so there

1 are two counts in tribal court.

2 QUESTION: But how did you get jurisdiction
3 over the insurance company?

4 MR. BOTTOMLY: The tribal court determined it
5 had jurisdiction because Iowa Mutual came on the
6 reservation and did business with the Wellmans. Now, it
7 is true their office is located off, but their
8 activities include actions on the reservation including
9 coming on and cataloguing this ranching business.

10 QUESTION: So it is sort of a long-arm
11 jurisdiction?

12 MR. BOTTOMLY: That is right.

13 QUESTION: And Iowa and the insurance company
14 came in and didn't object to jurisdiction, I guess. Is
15 that it?

16 MR. BOTTOMLY: They did move their tribal
17 court to dismiss, but the tribal court has determined
18 that it does have jurisdiction. The basis of the --

19 QUESTION: Yes, but they didn't object to
20 personal jurisdiction.

21 MR. BOTTOMLY: I don't believe they did.

22 QUESTION: Subject matter.

23 MR. BOTTOMLY: That's right. The tribal court
24 at the trial level has determined it does have
25 jurisdiction over Iowa Mutual based on the Montana

1 case. Now, the appeals council in the Blackfeet tribe
2 hasn't had an opportunity to look at that yet. And they
3 won't have the opportunity until a final judgment on the
4 merits is reached in the tribal court.

5 QUESTION: Under Montana law, Mr. Bottomly,
6 can a plaintiff sue a defendant and the sue a defendant
7 for personal injury and at the same time before that
8 suit is terminated sue the insurance company for bad
9 faith refusal to settle? The first action doesn't have
10 to be determined before you can sue the insurance
11 company?

12 MR. BOTTOMLY: Well, the way that arose, at
13 the time we filed this action the Montana Supreme Court
14 appeared to say that you could do that, you could bring
15 an action, a bad faith action at the same time. But
16 subsequent to that the Montana Supreme Court has made it
17 clear you can't. So Iowa Mutual has made a motion in
18 Blackfeet tribe to sever, and that is pending in
19 Blackfeet court.

20 QUESTION: Has the Blackfoot tribal court
21 given any indication, does it follow Montana law on
22 these sorts of issues?

23 MR. BOTTOMLY: Well, we don't know exactly.
24 The code says this. The code says it follows the
25 federal government, and then tribal custom and law, and

1 then -- which isn't in conflict with federal law, and
2 then it can look to the state law. It doesn't have to
3 follow the state law but it can look to it.

4 So when we are drafting our complaint we often
5 use state law because we don't find it in the tribal
6 codes or we don't know what the common law of the tribe
7 is at that point. Actually, any reservation or state
8 that has a small population and doesn't have a big
9 common law has the same problem. You don't know exactly
10 what the common law is going to be until they rule.

11 QUESTION: Mr. Bottomly, educate me a little
12 bit about the Blackfeet tribal courts. Do they sit as a
13 single judge?

14 MR. BOTTOMLY: The appeals council or the
15 trial level?

16 QUESTION: Well, the trial court.

17 MR. BOTTOMLY: The trial court acts very much
18 like a state court. It has one judge and then it has a
19 jury.

20 QUESTION: And who appoints him, or is he
21 elected, or what?

22 MR. BOTTOMLY: He is appointed. In this case,
23 he is a special judge coming over from another
24 reservation. He is actually a judge coming from the
25 Cootney Salick tribe.

1 QUESTION: Is he trained in the law?

2 MR. BOTTOMLY: Yes, although he doesn't have
3 to be lawyer.

4 QUESTION: What do you mean then by trained in
5 the law?

6 MR. BOTTOMLY: Well, they take a training
7 course. In the Indian Civil Rights Act, in fact, it
8 provides for the training of judges. But they don't
9 have to be a lawyer. But they do receive some
10 training. In fact, in Montana the Justice of the
11 Peaces --

12 QUESTION: How many are on the appeals
13 council?

14 MR. BOTTOMLY: I believe five.

15 QUESTION: Is the requirement that people who
16 practice before tribal court be lawyers?

17 MR. BOTTOMLY: I am not sure. They have to be
18 members of the bar unless they have an associate who is
19 a member of the bar, and you have to take a bar exam.

20 QUESTION: By the bar, you don't mean the bar
21 of Montana, you mean the tribal bar?

22 MR. BOTTOMLY: That's right.

23 QUESTION: Are you a member of that bar?

24 MR. BOTTOMLY: No, I am not. I was associated
25 because one of the persons on this case is a member of

1 the bar, so I was privileged to be able to practice with
2 her through association.

3 QUESTION: Could you be admitted to it if you
4 wanted to?

5 MR. BOTTOMLY: Yes.

6 QUESTION: How?

7 MR. BOTTOMLY: By taking the bar exam. Mr.
8 Davis is a member.

9 It is important to note the evolution of
10 tribal law has gone beyond the mere recognition of
11 tribal sovereignty, which has been recognized, of
12 course, since the mid-1800s, and has now, both Congress
13 and the common law has actively promoted tribal
14 sovereignty on the one hand and tribal development of
15 institutions, and also offered some measure of
16 protection for these fledgling institutions to develop,
17 and this stems from the realization that tribal
18 institutions have to participate in order to develop, and
19 that there has to be some recognition of the distinct
20 cultural and political situation they are in, they are
21 isolated units.

22 Congress has shown this promotion by a number
23 of statutes like the Indian Jurisdiction Act, the Indian
24 Financing Act, the Indian Self-Determination and
25 Education Act, all of which takes lets the tribes take

1 the lead in developing their own policy and
2 implementing, and have offered some measure of
3 protection by the Indian Civil Rights Act which requires
4 the consent of the tribes before the states can take
5 jurisdiction over actions which arise on the
6 reservation.

7 Now, the courts have followed that and
8 implemented that policy and it has two results. One is
9 a preemption of the states from exercising intrusive
10 jurisdiction in those areas which are properly within
11 the traditional retained sovereignty of the tribes, and
12 secondly, there has been a limitation of federal courts
13 as a matter of common law to exercise intrusive
14 jurisdiction unless Congress has made it clear that it
15 intended that to occur.

16 QUESTION: Mr. Bottomly, do you think that the
17 Federal District Court actually had jurisdiction but
18 just as a matter of comity it should or did dismiss or
19 abstain from hearing it pending the resolution of the
20 issue in the tribal court?

21 MR. BOTTOMLY: Well, that's the -- it is
22 difficult to tell. Certainly the Ninth Circuit talked
23 about jurisdiction.

24 QUESTION: What is your view?

25 MR. BOTTOMLY: My view is that they did

1 not --

2 QUESTION: Don't you suppose the District
3 Court actually had jurisdiction?

4 MR. BOTTOMLY: Our view is that they did not
5 have jurisdiction, but if the tribal court is determined
6 not to have jurisdiction, that they would. In other
7 words, we take the view that Woods versus Interstate
8 would preclude the tribal court from -- I mean, the
9 District Court from jurisdiction.

10 QUESTION: Well, that certainly isn't the view
11 expressed by the Solicitor General, is it?

12 MR. BOTTOMLY: No, it isn't. We agree with
13 the Solicitor General's result but for different
14 reasons. We agree with the Solicitor General's result
15 in that we agree that the District Court would have
16 jurisdiction but for different reasons. We would agree
17 with the Ninth Circuit that the interference doctrine
18 would be the doctrine which would come into play, and if
19 the tribal court didn't have jurisdiction probably the
20 state court would at that point and so the District
21 Court, Federal Court would, too.

22 We would part company at that point with the
23 tribal's amici.

24 QUESTION: Do you think that if the state
25 courts don't have jurisdiction there is no diversity

1 jurisdiction. Is that it?

2 MR. BOTTOMLY: That's right. That's our view,
3 because I think that is the only way you can make a
4 symmetrical result between the ability of the citizen of
5 Montana to use -- go into tribal court -- he would have
6 to go into tribal court.

7 QUESTION: So the tribal court decides it has
8 jurisdiction. That decision is reviewable, isn't it, in
9 the federal court somewhere?

10 MR. BOTTOMLY: That's right, there's no
11 question.

12 QUESTION: Where?

13 MR. BOTTOMLY: Well, it is reviewable under
14 28.1331, under National Farmers Union, after the
15 remedies in trial court.

16 QUESTION: In the Federal District Court.

17 MR. BOTTOMLY: That's right.

18 QUESTION: In a diversity case. Or is that a
19 federal question?

20 MR. BOTTOMLY: Federal question.

21 QUESTION: And then if the Federal District
22 Court on that sort of National Farmers Union Review were
23 to decide that the tribal court didn't have
24 jurisdiction, all of a sudden you have kind of a
25 springing use. It turns out that the District Court did

1 have diversity jurisdiction.

2 MR. BOTTOMLY: That's true.

3 QUESTION: That's kind of weird.

4 MR. BOTTOMLY: It is a little strange, but the
5 reason why it would have diversity jurisdiction at that
6 point is because the tribal court didn't.

7 QUESTION: Suppose the tribal court finds that
8 it doesn't have jurisdiction?

9 MR. BOTTOMLY: Does not?

10 QUESTION: Does not. Is that reviewable in
11 federal court?

12 MR. BOTTOMLY: No, I don't believe it is.

13 QUESTION: It is up to the tribal court. They
14 can take jurisdiction. They can just decline
15 jurisdiction where they sort of parcel it out to the
16 federal courts, we don't want this one. It is very
17 strange.

18 MR. BOTTOMLY: I think the review that the
19 federal court would have is the outer boundaries of
20 tribal court jurisdiction. Tribal courts, like state
21 courts, would be the final arbiters within that
22 boundary. They would be able to be the final arbiters
23 of whether or not in fact they had jurisdiction or what
24 their codes say or what their Constitution says, but the
25 federal court can determine the outer boundary, did they

1 exceed their jurisdiction as a tribe.

2 QUESTION: You mean kind of like a long arm
3 statute that the federal Constitution says you can go so
4 far and the federal court can say that with respect to
5 the Indian tribe, but an Indian tribe might say, well,
6 we don't think our own statute authorizes us to go as
7 far as the federal constitution would allow us.

8 MR. BOTTOMLY: Exactly, Justice Rehnquist.

9 QUESTION: Well, it is not quite exactly,
10 because the typical state long arm statute has the
11 effect of extending that state's or restricting that
12 state's jurisdiction but it does not simultaneously
13 affect the jurisdiction of other states, much less of
14 the federal government, but here you are asserting that
15 the tribal court not only can determine its own
16 jurisdiction but in that very act can determine the
17 jurisdiction of the federal government and of other
18 states.

19 MR. BOTTOMLY: To some extent, although it is
20 only the outer boundaries. In other words, if the --

21 QUESTION: I understand but that is a
22 strange -- that is a whole lot of power to give to the
23 tribal courts.

24 MR. BOTTOMLY: The reason why we disagree with
25 the Solicitor General on the reasoning is because if it

1 wasn't so it would have a lot of can of worms in the
2 conflict of law and equal protection area. As a general
3 matter, in other words, if a citizen of Montana has to
4 go into tribal court and apply tribal law, whereas a
5 citizen who isn't a citizen of Montana, like Iowa
6 Mutual, can take advantage of diversity and apparently
7 apply Montana state law.

8 So to have some sort of uniformity the Ninth
9 Circuit's argument seems to us to be the most realistic,
10 and it also brings in the interference doctrine, which
11 we think is the touchstone for the jurisdiction issue.

12 QUESTION: May I just ask you one question
13 that runs through my mind as I listen to your argument?
14 I believe I am correct in assuming that if the basic
15 negligence action were in a state court rather than a
16 tribal court it would be permissible to bring a federal
17 diversity case to decide the coverage question. I don't
18 think you challenge that, do you?

19 MR. BOTTOMLY: I think that's right, although
20 as Justice --

21 QUESTION: So what you are in effect saying is
22 that the tribal court has kind of a greater immunity
23 from interference with its own procedures than a state
24 court would have.

25 MR. BOTTOMLY: It does, because --

1 QUESTION: In a way it has sort of a greater
2 degree of sovereignty, you might say.

3 MR. BOTTOMLY: Not a greater degree of
4 sovereignty, but Congress has intended it to have a
5 greater degree of protection from more developed
6 institutions that might usurp that power. And the
7 reason why is, they wanted them to develop, so it
8 doesn't necessarily have more sovereignty.

9 QUESTION: You are not suggesting Congress has
10 addressed this precise question.

11 MR. BOTTOMLY: No, it hasn't, but its policy
12 and the other statutes has indicated that it doesn't
13 want actions which arise on the reservation to be
14 brought in state court, and here is nothing in the
15 statute or common law or surrounding circumstance which
16 indicates Congress intended for the petitioner to go
17 through federal court and do what it can't do in state
18 court, and that is circumvent the tribal court.

19 QUESTION: Well, they can't do it in -- they
20 may not be able to do it in state court because it
21 doesn't have diversity -- well, there is always
22 distinction in any diversity case. The plaintiff has a
23 right that a resident plaintiff would not have. You
24 have that differential always.

25 MR. BOTTOMLY: That is right. The difference,

1 though, in this case would be at least in diversity
2 cases, Erie versus Tompkins and the Rules of Decision
3 Act would make the state law of the state applicable.
4 There is no analogous statute which would make the
5 tribal court law applicable in Federal District Court,
6 so not only are you interfering with actual proceedings
7 but you may have completely different results because
8 tribal law may be different from the state law and the
9 out of state resident can take advantage of that.

10 QUESTION: Well, except on the coverage
11 question I suppose in the future the insurance companies
12 may write in a clause in their contracts deciding what
13 law applies, and I suppose the tribes would honor it. I
14 am not sure.

15 MR. BOTTOMLY: That may be true.

16 QUESTION: But Congress has expressed its
17 intent pretty clearly with respect to diversity
18 jurisdiction. You say Congress hasn't addressed a
19 specific question but it has in the sense that it has
20 provided for diversity jurisdiction in federal courts.

21 MR. BOTTOMLY: That's true, but the statute
22 was --

23 QUESTION: Why should the tribal courts, as
24 Justice Stevens asked, get more deference than state
25 courts?

1 MR. BOTTOMLY: Well, the diversity statute was
2 written in 1789, long before Indians were citizens of
3 the United States.

4 QUESTION: But if this diversity action --
5 ordinarily a diversity action in a federal court isn't
6 stayed until you exhaust your remedies in a state
7 court.

8 MR. BOTTOMLY: Not necessarily, no. The
9 reason why it would be here is because of the unique
10 relationship between tribal courts or tribes and the
11 federal government, and Congress's intent to provide
12 some measure of protection for the tribal courts to
13 develop, so there is a difference between tribal
14 courts.

15 QUESTION: Where do you find that. You said
16 it hadn't really addressed this question expressly.

17 MR. BOTTOMLY: Well, in the Acts like the
18 Indian Jurisdiction Act, the Self-Determination Act, the
19 Indian Financing Act, they expressly state they want to
20 promote tribal self-government. They expressly indicate
21 they want the tribes to take the lead, and in the Indian
22 Civil Rights Act they expressly prohibit the states from
23 taking those actions, so yes, the diversity statute
24 doesn't address that but the other policy statutes seem
25 to talk about that issue.

1 QUESTION: Self-government doesn't necessarily
2 include the exclusion of jurisdiction by other
3 sovereigns over matters arising there. I mean, states
4 have self-government and yet there are transitory causes
5 of action that are tried in other states.

6 MR. BOTTOMLY: That's true, but Congress in
7 Public Law 280 excluded states from taking causes of
8 action which arise on the reservation.

9 QUESTION: I guess the difference is that the
10 transitory cause of action from one state to another, it
11 is still the first state's law that would continue to
12 follow it, assuming anybody could agree on choice of law
13 rules --

14 MR. BOTTOMLY: Right.

15 QUESTION: -- whereas you say when you oust
16 the tribal council of adjudicative authority you are
17 also ousting the tribe's substantive law.

18 MR. BOTTOMLY: That's right. You don't have
19 the Rules of Decision Act, at least in federal court,
20 although the general conflict of laws would seem to
21 indicate that the tribal laws should apply.

22 QUESTION: What is the magic language that
23 determines whether Mr. Davis's argument about the tribal
24 court should only have jurisdiction between Indians and
25 between an Indian and someone else resident on the

1 reservation? What statutory language governs the scope
2 of jurisdiction of the tribal courts?

3 MR. BOTTOMLY: Well, Public Law 280 talks
4 about causes of action which arise on the reservation.

5 QUESTION: That is just all it says, arise on
6 the reservation?

7 MR. BOTTOMLY: Arise on the reservation. And
8 so it is like a long arm statute. If Iowa Mutual comes
9 on the reservation and has voluntary commercial
10 transactions there or if it does other things that
11 directly affect the tribal council itself or tribal
12 members, then maybe the tribe would have jurisdiction if
13 it arose there.

14 Now, admittedly, though this Court doesn't
15 have to address this here, if the tribal court doesn't
16 have jurisdiction, we would say that the federal court
17 could because there would be no interference, in this
18 case there are some jurisdictional actions which take
19 place off the reservation.

20 QUESTION: Even if there wasn't the second
21 lawsuit pending in the tribal court, that if the
22 insurance company brings this action in the federal
23 court that you should be able to go in and say please
24 dismiss or stay until I can bring a suit and exhaust my
25 remedies before the tribal court.

1 MR. BOTTOMLY: That's right. The federal
2 court at that time would have to --

3 QUESTION: Which you could never get done if
4 it were -- if you were talking about just a state
5 court.

6 MR. BOTTOMLY: That is true. At that point we
7 would have to have the federal court determine where did
8 this action arise, and if it arose on the reservation,
9 then they would stay the proceeding or they would
10 dismiss until that was determined in the tribal court,
11 whether the tribal court had jurisdiction.

12 QUESTION: May I ask just one other question?
13 Am I correct in assuming that if this happens, say the
14 tribal court reviewed the matter and said, we think we
15 have jurisdiction to decide coverage questions like this
16 but we decide as a matter of discretion that we would
17 rather have an experienced federal judge address this
18 complicated question of interpreting insurance policies,
19 so we will decline to exercise our jurisdiction as a
20 matter of discretion.

21 I take it the federal court would then have
22 jurisdiction.

23 MR. BOTTOMLY: In this case I would say yes.
24 Kennerly might indicate and the Fisher cases might
25 indicate that there are some types of issues which are

1 so intrinsically bound up into tribal issues that the
2 state court or the federal court wouldn't take
3 jurisdiction, but in this case --

4 QUESTION: But the springing use, to use the
5 Chief Justice's phrase, for federal jurisdiction would
6 depend on either of two things, one, that the tribal
7 court had no jurisdiction, or secondly, it declined to
8 exercise it as a matter of discretion.

9 MR. BOTTOMLY: Yes, that is at least what the
10 Three Affiliated Tribes case tells me, that if the
11 tribal court doesn't exercise its jurisdiction in that
12 area, there isn't interference with the tribal court to
13 bring it in state or federal court.

14 Even if we assume there is technical diversity
15 jurisdiction, National Farmers Union versus Crow Tribe
16 seems to tell us that we should defer to the tribal
17 court at least in the first instance to determine the
18 issues and its own jurisdiction. Now, Iowa Mutual
19 hasn't directly attacked the tribal court's jurisdiction
20 in this action, although they have in another action.

21 That issue, as Iowa Mutual admits in its
22 brief, is bound up because if the Federal District Court
23 takes the issue it has got to do one of two things.
24 It has either got to take the issue away from the tribal
25 court and in that case undermine its authority by taking

1 the issue away, or it has got to create a risk of
2 conflicting adjudications between the federal court and
3 the tribal court, and that would also tend to undermine
4 the authority of the tribal court because there would be
5 some difficulty in enforcing the judgment.

6 QUESTION: But that is precisely the risk they
7 take if there was a pending state proceeding, the risk
8 of conflicting jurisdictions.

9 MR. BOTTOMLY: Yes. And also to accept
10 diversity jurisdiction would undermine the lawmaking
11 authority of the tribe because you apply state law,
12 unlike state courts, but there is nothing in the statute
13 itself or the surrounding circumstances that say
14 Congress intended that to be so. They have been
15 uniformly silent with regard to their intent on the
16 diversity statute, and the implication from silence can
17 be seen in many cases by this Court, and that is that
18 when Congress is silent the tribal sovereignty or the
19 tribal jurisdiction remains intact, as it said in
20 Merrion versus Jicarilla Apache Tribe.

21 QUESTION: But of course that was tribal
22 sovereignty as opposed to a state, I think. You are in
23 little bit different ball park when you are talking
24 about tribal sovereignty versus a federal court that has
25 also received a grant of jurisdiction from Congress.

1 MR. BOTTOMLY: That's true, but Santa Clara
2 Pueblo versus Martinez tells us that even when there is
3 a statute which talks about Indian civil rights in that
4 case, that federal courts will hesitate to imply an
5 action there. That was a declaratory action for equal
6 protection. And that they will hold back unless it is
7 clear that Congress intended it to be so, but
8 citizenship has never been a factor or criteria by which
9 the extent of sovereignty or the abrogation of
10 sovereignty of tribes has been judged.

11 In fact, in U.S. versus Neece, which was an
12 early case, 1916, that involved U.S. citizenship earlier
13 than the 1924 statute. The Court said, "Citizenship
14 doesn't abrogate the unique relationship between the
15 tribes and the federal government which give rise to the
16 rules of statutory construction involving tribal court
17 jurisdiction."

18 Further evidence of Congress's lack of intent
19 to circumvent the tribal court through diversity is, of
20 course, the conflict of laws problem which we discussed
21 and the equal protection problems between the citizen of
22 Montana and the citizen of another state that we talked
23 about.

24 And finally, of course, while it is not
25 binding on this Court, it should be noted that the basis

1 of the petitioner's writ of certiorari, that is, the
2 conflict between the Eighth and Ninth Circuit, has
3 evaporated if not completely, to a great extent because
4 the Eighth Circuit subsequent to the grant of writ of
5 certiorari has adopted the Ninth Circuit's reasoning in
6 R.J. Williams.

7 That is, the interference doctrine limiting
8 courts, non-Indian courts from intruding on tribal
9 jurisdiction, applies to both federal courts and state
10 courts. And so there does not appear to be a conflict
11 there as there was at least when this cert was granted.

12 That is all I have. If there are no further
13 questions, I will sit down.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Bottomly.

16 Mr. Davis, would you like to say something
17 more? You have three minutes left.

18 ORAL ARGUMENT OF MAXON R. DAVIS, ESQ.,

19 ON BEHALF OF THE PETITIONER - REBUTTAL

20 MR. DAVIS: Yes, Chief Justice. Thank you.

21 Replying directly to the question posed by
22 Justice White, Iowa Mutual did contest the jurisdiction,
23 contested the jurisdiction over the person, over the
24 res, and contested jurisdiction based on insufficiency
25 of service of process in the tribal court proceedings.

1 Interestingly, and I think it bears on this --

2 QUESTION: (Inaudible.)

3 MR. DAVIS: Yes. They were denied, except for
4 the motion for insufficiency of service of process, they
5 were directed to replead and reserve.

6 QUESTION: (Inaudible.)

7 MR. DAVIS: The tribal judge has said so. It
8 has not gone up to this appellate court, that issue, so
9 we are in this Crow Tribe type of framework. We haven't
10 exhausted our tribal court remedies to contest, as was
11 done in the National Farmers case.

12 QUESTION: Well, now, did I understand your
13 opponent to say that this bad faith action cannot go
14 forward in Montana courts any more?

15 MR. DAVIS: In Montana state court. What
16 happened was --

17 QUESTION: Yes, that's what I mean.

18 MR. DAVIS: Well, it can go forward, but it
19 has to await the resolution of the underlying tort
20 claim. In 1982 the Montana Supreme Court decided a case
21 called Clout versus Flink.

22 QUESTION: All right, I understand.

23 MR. DAVIS: All right. There is only one
24 action in tribal court. There are different aspects and
25 different defendants, but there is only that one case

1 there. That should be clarified. Iowa Mutual, Midland
2 Claims, and the Wellmans are all defendants in one
3 proceeding in tribal court. As of yet it has not been
4 bifurcated. I could spend all afternoon talking about
5 that kind of lawsuit but it is not before this Court.

6 About Mr. Bottomly's suggestion that Congress
7 does not want actions like this one brought in state
8 court, I disagree wholeheartedly with that because I
9 think Public Law 280 exists and this Court has
10 recognized Public Law 280 as a procedure, as an
11 expression of Congress's desire that such actions be
12 assumed by state courts.

13 In Kennerly this Court admonished the states
14 that the formalities of Public Law 280 have to be
15 adhered to. However, it didn't abrogate Public Law
16 280. That exists as an expression that the states
17 should ultimately assume jurisdiction over all matter of
18 actions that otherwise would be within the jurisdiction
19 of the tribal courts, and to respond particularly to
20 Justice Scalia's comment, Public Law 280 does not define
21 the nature or extent of that tribal court jurisdiction.
22 It merely says for those types of actions the states can
23 do this to assume it, but it hasn't said that Williams
24 versus Lee is an appropriate expression of tribal court
25 jurisdiction or what the Ninth Circuit views it to be in

1 this case or anyone else's.

2 My understanding of what Public Law 280, it
3 can easily be reconciled to the proposition which I have
4 advanced this morning that for those limited matters the
5 procedure exists for the states to assume jurisdiction
6 over them, but ipso facto it does not mean that all
7 these other matters that in this gray area where tribal
8 courts have assumed jurisdiction by default that those
9 can do so.

10 QUESTION: Your time has expired, Mr. Davis.

11 The case is submitted.

12 (Whereupon, at 11:57 o'clock a.m., the hearing
13 in 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:

#85-1589 - IOWA MUTUAL INSURANCE COMPANY, Petitioner V. EDWARD M.

LaPLANTE, 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)