

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-637

TITLE DONALD P. HODEL, SECRETARY OF THE INTERIOR, Appellant
V. MARY IRVING, ET AL.

PLACE Washington, D. C.

DATE October 6, 1986

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(202) 628-9300

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD P. HODEL, SECRETARY OF THE :
INTERIOR, :
Appellant, :
V. : No. 85-637
MARY IRVING, ET AL. :

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Washington, D.C.
Monday, October 6, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:02 o'clock a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the appellant.
YVETTE HALL WAR BONNETT, ESQ., Everett, Washington; on
behalf of the appellees.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning in Number 85-637, Donald P. Hodel versus Mary Irving.

Mr. Kneedler, you may proceed when you are ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on direct appeal from the United States Court of Appeals for the Eighth Circuit. That Court held unconstitutional an Act of Congress that was passed in 1983 to address what Congress perceived to be the serious adverse consequences for Indian reservations resulting from the increasingly fragmented ownership of Indian allotments.

The statutory provision involved, Section 207 of the Indian Land Consolidation Act of 1983, provides for the escheat to the tribe concerned of certain de minimis fractional undivided interests --

QUESTION: Is that a very accurate term, "escheat" to the tribe?

MR. KNEEDLER: Yes, I think escheat is an accurate term. Escheat is typically defined to mean the reversion to the state of interests in property where

1 there is no heir qualified to receive it, and in this
2 instance Congress has determined by reference to the
3 size of the property interest involved that no heir
4 should be qualified to receive the property at the
5 time --

6 QUESTION: Well, is the tribe regarded as the
7 state?

8 MR. KNEEDLER: The tribe is not guardian of
9 the individual Indians' estate. The United States is
10 trustee for the particular property.

11 QUESTION: No, is the tribe for purposes of
12 escheat regarded as the state?

13 MR. KNEEDLER: Oh, I am sorry. That is what
14 the analogy would be, yes, that the tribe is the local
15 unit of government; in addition to being the membership
16 organization is also the local unit of government and
17 the responsible entity on the Indian reservation, and
18 Congress, I am sure, believed that it was better to have
19 the property interest escheat to the tribe, the unit of
20 government closest to the Indian, and the unit of
21 government from which the land first came, and which has
22 the responsibility for the Indian rather than to the
23 United States government in fee.

24 QUESTION: You wouldn't care if we just called
25 it a reversion?

1 MR. KNEEDLER: I don't think the label is
2 important.

3 QUESTION: But the statute calls it escheat?

4 MR. KNEEDLER: The statute does call it
5 escheat. It would also be possible to characterize it
6 as Congress having designated the tribe as the heir, the
7 statutory heir of the interests when the Indian dies.
8 However it is characterized, Congress has chosen to keep
9 the property in Indian hands rather than to have it
10 continue to descend to individual Indians in very small
11 portions. The Court of Appeals --

12 QUESTION: Incidentally, how big are the
13 portions generally?

14 MR. KNEEDLER: Under the Act the only thing
15 that escheats is an interest that represents 2 percent
16 or less of the overall allotment and has earned less
17 than \$100, or in fact under the amended Act is incapable
18 of earning in the next five years more than \$100.

19 QUESTION: Does that suggest that the acreage
20 in each instance is very small?

21 MR. KNEEDLER: Well, the allotments, yes.
22 Well, it depends again how one would define as small.
23 The allotments under the General Allotment Act were
24 typically 160 acres for a head of a family, smaller
25 amounts to others. Under the Sioux Allotment Act at

1 issue here the allotments were 320 acres for heads of
2 families, so 2 percent of a 160 acre allotment would be
3 two or three acres.

4 QUESTION: Are these undivided interests?

5 MR. KNEEDLER: These are undivided interests.
6 These are not interests that have been partitioned.
7 There are provisions under the regulations for partition
8 of Indian allotments in certain circumstances, but the
9 ones we have here are undivided interests.

10 The Court of Appeals held that this escheat
11 provision effects a taking of property in violation of
12 the Fifth Amendment to the Constitution because of the
13 absence of compensation. We submit that it does not,
14 and that Section 207 is in fact an exercise by Congress
15 of the traditional power of the sovereign that has been
16 repeatedly recognized by this Court to regulate the
17 devolution of property upon the death of the owner, and
18 beyond that we submit that it represents a reasonable
19 exercise by Congress of its unique responsibilities on
20 behalf of Indians to prevent a fragmentation policy that
21 has inhibited the economic development of Indian
22 reservations.

23 This problem arose by virtue of provisions in
24 the original allotment Acts, the General Allotment Act
25 having been passed 100 years ago, in 1887, and the Sioux

1 statute in 1889. To prevent improvident alienation of
2 the allotments and to protect its tax-exempt status,
3 Congress provided for the allotments to be retained in
4 trust status by the United States for 25 years subject
5 to extension for ten years by the President, but because
6 of this period of trust status in the beginning Congress
7 provided for the disposition of the property at death,
8 even in the original Acts, by stating that the property
9 would pass to the allottee's heirs in accordance with
10 the laws of the state where the property is situated.

11 This had the effect of incorporating the state
12 law of intestate succession into Federal law. Then in
13 1910 Congress enacted a statute that for the first time
14 authorized allottees to dispose of their property by
15 will.

16 Thereafter the allotment policy was repudiated
17 most profoundly in the Indian Reorganization Act of
18 1934, and for tribes that chose to come under the IRA
19 and the Allalla Sioux tribe in this case was one such
20 tribe, the Act had the effect of extending indefinitely
21 the trust period for Indian allotments, and also
22 preventing further allotment of the lands, although
23 Congress did enact 25 USC 483, which permits an
24 individual who owns an interest in an allotment to apply
25 to get a fee patent to the land and have it partitioned

1 or to sell it, so it has not been frozen in trust status
2 irrevocably.

3 The heirship provisions, though, had the
4 effect of causing the breakup or the fractionation of
5 the interests from generation to generation. Typically
6 what happened either under the heirship statute or the
7 provision for disposition by will is that the original
8 allottee's interests was divided among his heirs or
9 devisees in undivided interests, and then when each of
10 those heirs or devisees died his interest in turn was
11 subdivided, so that over the course of 100 years, with
12 each passing generation these interests become further
13 divided, and that is vividly illustrated by the facts of
14 this case. The interests that escheated by appellee's
15 decedents in this case, in one instance the de minimis
16 interests would subdivide among seven heirs, that is in
17 the case of the named appellee here, Irving, thirteen
18 heirs in the case of appellee Pumpkin Seed.

19 So, this shows that today if -- in the absence
20 of this statute these interests would continue to
21 further subdivide.

22 QUESTION: Mr. Kneedler, can I just ask one
23 question about the authority to dispose of property by
24 will? Could an owner of one of these shares or pieces
25 of real estate will it to anyone he chose? Is there any

1 restriction on the --

2 MR. KNEEDLER: There are several
3 restrictions. Under the 1984 amendments to the Indian
4 Land Consolidation Act, one of these de minimis
5 interests may be willed only to another person who owns
6 a fractional interest in the particular allotment. This
7 was designed to be consistent --

8 QUESTION: Before the Act was passed, what was
9 the restriction, if any?

10 MR. KNEEDLER: The principal restriction
11 derived from Section 4 of the Indian Reorganization Act,
12 which has recently been amended, but in general provided
13 for the property to remain in Indian hands. It could
14 descend only to a member of the tribe, to the tribe
15 itself, and it has been amended to provide for heirs
16 under state law.

17 QUESTION: But could an owner, for example,
18 give all of his interest to his oldest child, or
19 something like that, in order to try and prevent the
20 division into very small interests?

21 MR. KNEEDLER: Yes, he could do that. And
22 there also are some special statutes on some
23 reservations. On the Yakima Reservation there was a
24 statute that was involved in Simmons versus Seletze,
25 which was unanimously affirmed by this Court.

1 That was an instance where the Yakima Tribe,
2 there was a special statute to prohibit the passage of
3 any land to anyone with less than one-quarter Yakima
4 blood, and in that case because the heirs at law, the
5 children and grandchildren did not possess that
6 qualification, the land in question escheated to the
7 Yakima Tribe, so the operation of that -- in that
8 particular case was very much like that one here.

9 It escheated pursuant to a statute enacted by
10 Congress back in 1942 that provided where an Indian dies
11 intestate, without heirs, that the property escheats to
12 the tribe, so this is not the first instance in which
13 Congress has chosen that way of disposing of property.
14 Congress identifies --

15 QUESTION: May I ask about that statute,
16 because there is one thing that puzzles me on it. What
17 kind of notice did the members of the tribe get about
18 the impending change in the law that would affect their
19 ability to transfer their --

20 MR. KNEEDLER: In this case?

21 QUESTION: Well, both in this one and the
22 earlier statutes you just referred to.

23 MR. KNEEDLER: The 1942 one?

24 QUESTION: Yes.

25 MR. KNEEDLER: The 1942 one I don't know. It

1 has been on the books for a long time, and people are
2 presumed to know the existence of a statute such as
3 that.

4 QUESTION: Then what about this one? What
5 kind of --

6 MR. KNEEDLER: In this one soon after the Act
7 was passed the Bureau of Indian Affairs sent out to all
8 area supervisors and to all superintendents, there are,
9 I don't know, 12 or 13 BIA areas, and then
10 superintendents are responsible for particular
11 reservations, instructions explaining the way this would
12 work and some of the alternatives that could be pursued
13 by individuals to avoid escheat, and then the
14 instructions encouraged the area superintendents -- or
15 the superintendents and the area directors to notify
16 people on the reservations of the consequences of the
17 Act.

18 QUESTION: If someone died in the interval
19 between the instructions were out, the Act would have
20 become effective immediately?

21 MR. KNEEDLER: Yes, the Act was effective on
22 its effective date, but that is not unusual with respect
23 to laws governing the distribution of property at
24 death. They typically take effect immediately, and the
25 potential heirs of someone have no vested right to

1 receive property and the property passes according to
2 the law that is in effect at the time of death.

3 This is unlike the situation of Texaco versus
4 Short or United States versus Lock, which was not
5 dealing with a situation where there was death and
6 property had to pass. It was dealing with another type
7 of situation where a person or the owner during his
8 lifetime would take some voluntary action and may have
9 needed notice, but the Court has not suggested that the
10 same sort of situation arises with respect to the
11 distribution of property.

12 QUESTION: Mr. Kneedler, are there any limits
13 in your view as to what the government can do or change
14 concerning the descent of property belonging to
15 Indians? Do you think the government has plenary power
16 to really make any kind of a regulation?

17 MR. KNEEDLER: No, our submission does not go
18 nearly that far. The Court has described the power of
19 the legislature over the descent of property in very
20 broad terms, suggesting that the right to pass property
21 and to receive it by descent or by will is creation of
22 statute and not a natural right, it is a privilege that
23 can be conditioned or even abolished, but the Court has
24 never been confronted with a situation where it had to
25 address that, and it isn't here.

1 QUESTION: Well, do you take the position that
2 it can be abolished?

3 MR. KNEEDLER: That is not part of our
4 submission here, no. What we have here is a situation
5 where Congress is really dealing at the margin. The
6 basic allotment that was made under the Allotment Act
7 substantial sort of interest, something approaching 160
8 acres or even something far smaller than that continues
9 to pass, so the original understanding of the Allotment
10 Act remains.

11 This statute deals with consequences that were
12 not contemplated when the Allotment Act passed. The
13 interest had become --

14 QUESTION: May I follow up on the question
15 asked by Justice O'Connor? On Page 17 of your opening
16 brief, Page 17, I think it is the third sentence in the
17 second paragraph, the brief states, "Every sovereign
18 possesses the power to regulate the manner and terms
19 upon which property may be transmitted at death as well
20 as the authority to prescribe who shall and who shall
21 not be capable of taking it."

22 Doesn't that say that the government may
23 disinherit anyone it wishes to disinherit? You do cite
24 Berwin Trust against Day, which seems on its face to go
25 rather far, but I am surprised that the Solicitor

1 General would --

2 MR. KNEEDLER: I don't -- we did not intend
3 for that language to be taken to its full implications.

4 QUESTION: You didn't intend for it to be
5 taken the way it reads?

6 (General laughter.)

7 MR. KNEEDLER: Well, this is -- Congress
8 obviously can -- I think there is an element of
9 reasonableness in anything Congress does in a situation
10 such as this in terms of defining who may be qualified
11 to take property, what sort of property can pass, and
12 within reasonable limitations. The Court has taken the
13 same approach with respect to the taxing of estates, and
14 because the legislatures have typically responded in a
15 reasonable fashion and a responsible fashion, and it is
16 our submission that Congress did here as well, we are
17 not suggesting here that Congress could simply pass a
18 statute providing for all property to escheat to the
19 government after one generation.

20 QUESTION: Mr. Kneedler, does it make some
21 difference in your submission that the statute here did
22 not provide for it to escheat or whatever you want to
23 call it to the United States but to the tribe?

24 MR. KNEEDLER: Yes, we think that is an
25 important element of it. For one thing, that

1 distinguishes this case from, for example, the Sioux
2 Nation case that this Court had four or five years ago
3 where the property was actually taken effectively by the
4 United States. Here the fact that the property passes
5 to the tribe we think serves to show that this is an
6 aspect of the reasonable regulation and adjustment of
7 benefits and burdens on the reservation by having the
8 property pass. It is not as if the United States has
9 invaded the property in some sense and taken it for
10 itself.

11 QUESTION: Mr. Kneedler, the property goes to
12 the tribe. What can the tribe do with that property
13 without the express permission of the Federal
14 Government?

15 MR. KNEEDLER: The tribe, just as the
16 individual who owned it, would need the consent of the
17 United States to either sell it or to lease it, so that
18 the property remains restricted whether it is in
19 individual hands or tribal hands.

20 QUESTION: Well, it wasn't given to the tribe
21 outright.

22 MR. KNEEDLER: Not outright, no. It remains
23 in trust status.

24 QUESTION: You said a little bit earlier that,
25 and your briefs maintain this position, that the

1 prospective heir has no property right --

2 MR. KNEEDLER: Yes.

3 QUESTION: -- which could form the basis of an
4 action for taking by the United States. Therefore the
5 claims here which are pressed by prospective heirs after
6 the death rest upon the rights of the decedent rather
7 than the heirs themselves. What is the basis on which
8 these heirs are allowed to have standing for assertion
9 of the rights of other individuals?

10 MR. KNEEDLER: Well, this -- there is some
11 question about that. It arose in part because the case
12 was not brought as assertion of the rights of the
13 decedent. It was brought as an assertion of the rights
14 by the appellees to have a vested right. Both the
15 District Court and Court of Appeals rejected that, and
16 the appellees aren't pressing that here, but even though
17 they are asserting the rights of the decedents, it is
18 true that but for the statute or some other action by
19 the decedent, property would pass to the heir.

20 QUESTION: But they are contending that the
21 unconstitutional taking occurred when the statute was
22 passed. If it occurred at all, that is when it
23 occurred, right, and at that time no property was taken
24 from them.

25 MR. KNEEDLER: Well, the taking I think they

1 would say occurred when the property escheated, not
2 because the land might have -- the decedent might have
3 done something between the time of the passage of the
4 Act and the time of death to provide for an alternative
5 disposition of the property.

6 QUESTION: The taking occurred at the time of
7 the escheat?

8 MR. KNEEDLER: Because it could be avoided
9 between the time of the passage of the Act. The Act
10 does not affect the right of the owner of the fractional
11 interest to sell it during his lifetime, to give it
12 away, to purchase other interests that would bring his
13 ownership above the 2 percent level to avoid escheat, so
14 the -- it wasn't until the time of escheat --

15 QUESTION: Well, you are saying then they do
16 have standing in their own capacity.

17 MR. KNEEDLER: No, they are still asserting
18 the rights of the decedent to dispose of the property in
19 the way that he chooses, but their claim is, because the
20 decedent is not alive any longer to assert his interest
21 in doing that that they should be permitted to assert
22 that right on his behalf.

23 QUESTION: And the government accepts that.
24 Is that the general proposition of third party
25 standing? You can always assert the standing of a third

1 party who is now deceased?

2 MR. KNEEDLER: Well, I am not sure that I
3 would -- I am not sure what the full ramifications of
4 that --

5 QUESTION: I'm not either.

6 MR. KNEEDLER: -- but in this case where the
7 property would -- where the person asserting the right
8 would receive the property but for the operation of the
9 statute, it was our view that at least --

10 QUESTION: Why, because that party should have
11 standing? That party has been deprived of something?
12 But you have just said that party hasn't been deprived
13 of anything, that that party had no property right.

14 MR. KNEEDLER: He didn't have a property right
15 but he had an interest. He was injured. He was injured
16 in fact, the argument would be, by the operation of the
17 statute. Now, I acknowledge that there is an additional
18 problem, and that is that the appellee can't be sure
19 that the decedent wasn't content to have his property
20 escheat, and that you can't be sure that it was actually
21 the statute rather than the decedent's choice to abide
22 by the statute that resulted in the loss of the
23 property.

24 QUESTION: I am still trying to find out what
25 it is that distinguishes this case from other third

1 party standing cases which, you know, pose a real
2 problem. It surely is not the fact that there is injury
3 in fact. I mean, there is always, virtually always in
4 these suits some injury in fact.

5 MR. KNEEDLER: But beyond injury in fact there
6 is a nexus between the decedent and the plaintiffs in
7 this case. They are either the heirs at law or the
8 devisees of the decedent, so there is a relationship
9 established by law or will between the decedent and
10 the --

11 QUESTION: That relationship being that some
12 of them would have been the intestate heirs but for the
13 statute.

14 MR. KNEEDLER: Or devisees but for the
15 statute.

16 QUESTION: And some of them would have been
17 devisees but for the statute.

18 MR. KNEEDLER: That's right, but it does --

19 QUESTION: Mr. Kneedler, isn't there some
20 tension between your suggestion that presumably the
21 decedents would have wanted to do something different
22 and your suggestion that the decedents presumably
23 understood the statute, because part of your argument
24 was that if they wanted to do something different they
25 have got every right to do so, but you must be assuming

1 there were a lot of decedents who didn't really have
2 notice of what the statute was going to do to their
3 interests.

4 MR. KNEEDLER: No, I didn't mean to suggest
5 that. It is possible that in the first weeks or months
6 after the statute was passed there were some who didn't
7 know, but this became a widely publicized, widely known
8 provision within several months after --

9 QUESTION: If you presume they knew, and say
10 we are talking about people who wanted to do something
11 six months later, what is the injury then? How are they
12 injured if they just went ahead and let the statute go
13 into effect which is what -- they probably would be
14 happy to have the tribe have their property.

15 MR. KNEEDLER: Well, if not happy, at least
16 not concerned enough to do something about it, yes.
17 That is the contingent element of that may well -- could
18 be viewed as an ingredient of the standing problem or
19 could be viewed as a problem on the merits. I mean, I
20 think it may well go to both. It certainly undermines
21 the suggestion that there is some automatic acquisition
22 of the property or deprivation without any opportunity
23 for the individual landowner to --

24 QUESTION: But your willingness to recognize
25 standing would treat the strongest case as the Indian

1 who did not realize that such a statute had perhaps
2 affected his property rights. He's the one who might
3 well have done something different, and therefore didn't
4 carry out his own desires. That is the one I suppose
5 you have the most difficult time defending the statute
6 on its merits because it might not give him adequate
7 notice of what was happening.

8 MR. KNEEDLER: As we have submitted, we don't
9 believe that notice is an element with respect to a
10 statute of this sort. I think we should acknowledge
11 that this is sort of an awkward position or situation
12 that arose in the Court of Appeals because the Court of
13 Appeals held the statute unconstitutional on grounds
14 that were not -- was not really the subject of
15 litigation.

16 QUESTION: Well, Mr. Kneedler, do you think
17 that the lack of notice problem might somehow enter into
18 the balance that the Court has to employ in determining
19 the validity of this provision?

20 MR. KNEEDLER: It might be an element, yes,
21 and certainly in a case like Lock and Texaco versus
22 Short it was an element, but again, in a situation where
23 you have property passing at death, the ownership of the
24 property passes anyway, and it is a particular
25 transaction that is traditionally the subject of the

1 sovereign's power, and the idea of notice, I think, is a
2 less important element in that setting.

3 QUESTION: Has this Court ever held that lack
4 of notice was a defense on the part of someone
5 challenging the constitutionality of a statute governing
6 the descent of property upon death?

7 MR. KNEEDLER: Not to my -- not to my
8 knowledge.

9 QUESTION: Mr. Kneedler, I hate to come back
10 to the same thing, but I am still hung up on the
11 standing point. You say that the connection between
12 decedent and potential heir is what is different here.
13 Now, we have before us a takings claim. The taking
14 could be rendered -- the problem could be solved either
15 of two ways, striking down the taking or requiring
16 compensation for the taking.

17 MR. KNEEDLER: Right.

18 QUESTION: Now, there are some particular
19 problems in this case as to whether Congress has
20 proscribed compensation, but let's assume that it
21 hasn't. If compensation were awarded for the decedent's
22 injury, I presume that compensation would be awarded to
23 the decedents.

24 MR. KNEEDLER: But then that compensation --

25 QUESTION: To their estate, and not to these

1 plaintiffs.

2 MR. KNEEDLER: But it would pass through the
3 estate.

4 QUESTION: No, it wouldn't, because you
5 validate the statute by awarding compensation for the
6 statute, right?

7 MR. KNEEDLER: Yes.

8 QUESTION: So the compensation would go to the
9 decedent's estate.

10 MR. KNEEDLER: Yes.

11 QUESTION: Whereupon it would pass pursuant to
12 the statute.

13 MR. KNEEDLER: The compensation would pass
14 pursuant to the heirship statutes or pursuant to the
15 will.

16 QUESTION: My point is, the compensation would
17 go to the decedent and would not necessarily reach these
18 plaintiffs, which makes it very --

19 MR. KNEEDLER: It may not necessarily, but the
20 premise of the argument as I understand it is that heirs
21 and devisees they would receive the real property, so I
22 believe it would be part of their claim that they would
23 receive the substitute for the real property in the form
24 of compensation.

25 QUESTION: Yes, if they were asserting their

1 rights, but they are not asserting their rights. They
2 are asserting the rights of the decedent, and to
3 compensate for the rights of the decedent you compensate
4 the decedent's estate.

5 MR. KNEEDLER: Yes.

6 QUESTION: Not these plaintiffs. So you are
7 allowing these plaintiffs to sue to compel the
8 government to give compensation to somebody else, and
9 that does not strike you as strange?

10 MR. KNEEDLER: It is unusual, but then the
11 operation of the statute is unusual, and we are not
12 urging a broad theory of third party standing here, and
13 we have -- Congress enacted a statute whose
14 constitutionality we believe should be sustained by the
15 Court, and it has been our -- the Court of Appeals
16 reached the merits. We have decided to principally
17 address the merits in our submission.

18 If there are no further questions at this
19 time, I would like to reserve the balance of my time for
20 rebuttal.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Kneedler.

23 Ms. War Bonnett, we will hear from you at this
24 time.

25 CRAL ARGUMENT OF YVETTE HALL WAR BONNETT, ESQ.

1 ON BEHALF OF THE APPELLEES

2 MS. WAR BONNETT: Mr. Chief Justice, and may
3 it please the Court, what I first want to place before
4 the Court today is the significance of these property
5 interests in terms of the decedents, Charles Pumpkin
6 Seed, Chester Irving, Edgard Pumpkin Seed, and Geraldine
7 Cross, and then also in terms of the appellees who, but
8 for Section 207 of the Indian Land Consolidation Act,
9 would have inherited these interests.

10 When you translate the percentage figures and
11 the dollar limitations of the Indian Land Consolidation
12 Act into everyday terms and in terms of the values of
13 the decedents, and you take, for example, Charles
14 Pumpkin Seed, who had nine interests which were subject
15 to transfer to the tribe under this Act, those
16 interests, this 2 percent or less interest amounted to
17 one-third of an acre all the way up to, one of his
18 interests was the size of four and a half acres. The
19 other decedents had similar ranges in terms of the size
20 of the interests that they were -- that were subject to
21 transfer to the tribe under this law.

22 QUESTION: Are you saying, then, Ms. War
23 Bonnett, that these were not undivided interests, that
24 they had been partitioned?

25 MS. WAR BONNETT: No, I am not suggesting

1 that. These are undivided interests, but their share of
2 the interest was four and a half acres, and if you look
3 at the history of Indian land policy, the reason that
4 these people had undivided interest was not actually
5 their doing, but actually government policy which set up
6 the allotment scheme and then determined that these
7 interests would pass in an undivided status.

8 So the fact that they did not, could not go,
9 Charles Pumpkin Seed could not go to the John Shot
10 allotment and say this four and a half acres is mine and
11 I have trees and whatever. He still had an interest
12 which translates into four and a half acres of land,
13 which is a significant amount of land, certainly enough
14 land to put a house, certainly enough land to put a
15 garden, and to characterize these interests as
16 insignificant and de minimis is not correct in terms of
17 the Indian people and how they viewed these interests.

18 It is also important to look at the dollar
19 figures. The law provides that if you have not -- if
20 these interests had not earned \$100 within the year
21 preceding death then these interests would go to the
22 tribe. Again, the total -- it is true, Geraldine Cross
23 only received \$135 in the year preceding death for all
24 of her 26 interests, but the factual record below was
25 not really developed in terms of the poverty of the

1 Oglala Sioux Indian Reservation or the clients here, but
2 I think the Court could take judicial notice of the fact
3 that Bureau of Census figures put the Oglala Sioux
4 Indian Reservation as one of the poorest counties --
5 Shannon County, South Dakota, is one of the poorest
6 counties in the nation. To say that to Geraldine Cross
7 or to the other decedents that \$135 did not increase
8 their spending power, did not allow them to buy things
9 for the family, and is insignificant is not correct when
10 you look at the interests of the individuals who had
11 these property interests taken.

12 QUESTION: Is there anything in the record
13 that shows the dollar value of this land?

14 MS. WAR BONNETT: There is. In the joint
15 appendix, beginning at Page 18 of the joint appendix
16 there is listed the inventory for each of the four
17 decedents here, and it shows the dollar value of these
18 property interests as well as the money that they earned
19 in the year preceding and then the land description and
20 so forth. And so there are dollar figures attached in
21 terms of value in the record. The two --

22 QUESTION: The four and a half acres you were
23 talking about, what is the value of that?

24 MS. WAR BONNETT: Okay, that would have been
25 Charles Pumpkin Seed on Page 34, it is the John Shot

1 allotment.

2 QUESTION: Why don't you come back to the
3 microphone when you reply?

4 MS. WAR BONNETT: Oh, I am sorry, Your Honor.

5 QUESTION: Taxable value was 432 million. I
6 don't consider that very low. That is not what you are
7 talking about.

8 MS. WAR BONNETT: Okay. It is on Page 38, and
9 it says the estimated value is \$266.66. It is the
10 second allotment listed on Page 38. This is the
11 interest that is 1/72nd of 320 acres, which is
12 approximately four and a half acres in size. It is the
13 size of the interest he had, undivided, in this
14 allotment, and it is valued at \$266.66.

15 There are two crucial legal questions
16 presented here. One is whether there are vested property
17 interests here which are protected by the Fifth
18 Amendment, and the second is whether or not these
19 property interests have actually been taken by Section
20 207 of the Indian Land Consolidation Act.

21 The Court of Appeals correctly found that the
22 decedents here had vested property rights and that they
23 included the right to pass, and the Court of Appeals
24 based its holding on the finding of this Court in *Chcate*
25 *v. Trapp* in 1912 which looked at the fact that the

1 Indian people receiving allotments were required to give
2 valuable consideration. Their allotments were
3 conditioned upon them relinquishing title to thousands
4 of acres of land which they formerly had held in common
5 as tribal lands.

6 The only way that the individual allottees
7 under the Sioux Allotment Act received their property
8 interests was if they relinquished title. They gave
9 consideration for the benefits that they received under
10 the Sioux Allotment Act. The Court of Appeals also
11 orrectly found that included in the rights that went to
12 the allottee was the right to pass this property upon
13 death to their children and their children's children.

14 QUESTION: That right didn't arise in 1889.
15 That arose in 1910, didn't it?

16 MS. WAR BONNETT: I think looking at the
17 historical record the decedents -- I mean the allottees
18 were in the process of gaining their approval because
19 this statute, the Sioux Allotment Act of March 2nd,
20 1889, only went into effect if the Sioux agreed to
21 allotment. If you look at the Commission --

22 QUESTION: It went into effect long before
23 1910, didn't it? And there was a period of ten or
24 twenty years when they could not will the property.

25 MS. WAR BONNETT: Right, though talking in

1 terms of the Sioux people and what they understood and
2 what benefit or what the terms of the bargain should be
3 with the Federal Government now, it is clear that the
4 Indian people understood that what they were doing was
5 protecting a land base.

6 They were even chided by the Commissioners who
7 came out that if they did not approve this statute that
8 they were not thinking about their family, they were not
9 thinking about their children, but the Indian people did
10 not understand maybe the technical distinctions between
11 being able to make a will and provide for inheritance or
12 being able to simply pass this property upon death.

13 I think it is an invalid technicality that the
14 Sioux people did not understand in 1889 and shouldn't be
15 held to here now. There also is some --

16 QUESTION: Are you in effect claiming a breach
17 of contract?

18 MS. WAR BONNETT: What I am saying --

19 QUESTION: A breach of the 1889 treaty, in
20 effect?

21 MS. WAR BONNETT: -- is basically not the 1889
22 treaty, but the 1889 statute --

23 QUESTION: Yes.

24 MS. WAR BONNETT: -- in terms of relying on
25 the holding of Choate v. Trapp, which was a similar

1 situation in which the Indians were allotted, and it is
2 true that in the case of Choate v. Wright what was
3 before the Court was a tax exemption for a period of 25
4 years which was only to the allottee, but it is our
5 submission that the same principles apply here where you
6 have individual Indians who, to acquire this allotment,
7 gave consideration.

8 That was what the Eighth Circuit said. There
9 was valuable consideration given here. That is what
10 this Court said in Choate.

11 QUESTION: But, Ms. War Bonnett, there is no
12 question here, is there, that Congress intended the
13 result which it produced in this most recent statute?

14 MS. WAR BONNETT: No. That they intended for
15 these interests --

16 QUESTION: Yes.

17 MS. WAR BONNETT: -- to escheat and not to go
18 to either the heirs or devisees of --

19 QUESTION: Yes, so there is no way by
20 interpretation that we can say that whatever
21 inconsistency there was between this statute and the
22 1889 statute and 1910 statute can be somehow read
23 favorably to the Indians. Your claim has to be a
24 constitutional one.

25 MS. WAR BONNETT: My claim is a constitutional

1 one. My claim is also one that is tied to the Sioux
2 allotment procedure. I don't believe that Congress when
3 they enacted this statute necessarily had before it the
4 historical circumstances and the bargaining that went
5 on. As counsel for the Justice has indicated, the Sioux
6 received for heads of household twice the amount of
7 property that other people did in terms of the General
8 Allotment Act. That was because there was a statute
9 passed the year before in which they could not get the
10 approval of the Sioux people.

11 QUESTION: But I was interested in getting
12 your answer to one of Justice Stevens' questions where
13 he asked you, do you claim a breach of the 1889 statute
14 or treaty, and you said yes. Well, Congress can breach
15 a statute or a treaty by a subsequent statute unless it
16 effects a taking, can't it?

17 MS. WAR BONNETT: Right. In terms of the
18 rights, though, if it effects a taking, then there has
19 to be compensation for the interests --

20 QUESTION: Right.

21 MS. WAR BONNETT: -- and it is our position
22 here today that the interests here taken should be
23 compensated. We do not dispute the fact that the
24 Federal Government has the authority to enact
25 legislation such as this, but what we do contest is that

1 they are able to take these property interests without
2 any compensation to the individual Indians.

3 QUESTION: Ms. War Bonnett, do you ask for
4 compensation as opposed to striking down the statute?

5 MS. WAR BONNETT: We are asking that this be
6 recognized as a Fifth Amendment taking which would hold
7 this provision unconstitutional and that if Congress
8 attempted this type of legislation again, that it would
9 take from --

10 QUESTION: No, but in this case do you want
11 compensation or do you want the statute struck down?

12 MS. WAR BONNETT: We --

13 QUESTION: And my next question is going to
14 be, if you want compensation, who ought to be
15 compensated, because you are asserting before us the
16 rights of the decedents --

17 MS. WAR BONNETT: That's correct.

18 QUESTION: -- not the rights of your
19 clients.

20 MS. WAR BONNETT: But we feel that in terms of
21 the standing analysis, that in looking at the decisions
22 of this Court there is a two-pronged test. One is the
23 ability of the person's constitutional rights to be
24 brought to the Court itself. In this particular case --

25 QUESTION: Well, never mind the standing

1 analysis for the moment. Just answer my narrow
2 question. To whom should the compensation go if we
3 award compensation? Why should it go to your client?

4 MS. WAR BONNETT: To the decedents' estates,
5 and then based upon the procedure that is in place
6 through the Bureau of Indian Affairs, the estate, that
7 will be another element of the estate, just as these
8 particular --

9 QUESTION: To be distributed under the valid
10 statute.

11 MS. WAR BONNETT: No, to be distributed under
12 the terms of either the will, as Geraldine Cross had, or
13 under the intestate succession scheme which is the laws
14 of the State of South Dakota for Sioux Indians.

15 QUESTION: Well, you can't have both. You
16 can't both strike down the statute and get compensation
17 for the taking that the statute effects. Surely you
18 can't do both. If you get compensation, you have to let
19 the statute stay in effect.

20 MS. WAR BONNETT: That's correct, but if you
21 get compensation then the Court is recognizing that the
22 statute as it was originally enacted was
23 unconstitutional because it took an interest without
24 paying compensation.

25 QUESTION: But the tribe would get the

1 property.

2 MS. WAR BONNETT: Right, but the tribe --

3 QUESTION: And the heirs would get the money.

4 MS. WAR BONNETT: Right. It would go to the
5 estates, and then the heirs or devisees --

6 QUESTION: But the property would --

7 MS. WAR BONNETT: Would escheat --

8 QUESTION: -- escheat to the tribe.

9 MS. WAR BONNETT: Right. That's correct.

10 QUESTION: Like the statute says.

11 MS. WAR BONNETT: And that is one of --

12 QUESTION: Like the statute says.

13 MS. WAR BONNETT: Right, and that is one of
14 the -- I mean, obviously one of the goals of this
15 legislation was to reduce a fractionated heirship
16 problem which does exist on Indian lands today. But to
17 do it at the expense of individual Indians and making
18 them bear the cost of undoing Federal Indian land policy
19 which has resulted in the fractionated heirship problem
20 is to unfairly place the burden and not to fairly
21 distribute the benefits and burdens on the Indian
22 reservation.

23 QUESTION: Ms. War Bonnett, may I ask, prior
24 to this Act, I think it's agreed that the heirs had the
25 right to sell these fractional interests. Does the

1 record show whether in fact there was any selling of the
2 interest actually occurring?

3 MS. WAR BONNETT: One of the problems of
4 selling interests is, as we have discussed, is that
5 these are undivided interests.

6 QUESTION: Yes.

7 MS. WAR BONNETT: And it is difficult to
8 interest probably anyone but other people holding
9 interests in the allotment or the tribe. Now, the
10 amicus brief for the Yakima Nation has explained that
11 their tribe has developed a fund system so that they are
12 purchasing these types of interests. The other tribes
13 have had to rely on a Farmers Home Administration loan
14 program where the tribes get loans and then purchase.

15 There is nothing in the record here because
16 this case went through the District Court on a request
17 for preliminary relief which was consolidated on a
18 permanent relief, and there is not really a factual
19 record here in terms of what happened with these
20 individuals, but I think the Court can note that with
21 undivided interests on the middle of an Indian
22 reservation in trust status that this is not the normal
23 type of property that would have been easy to sell.

24 QUESTION: So there is nothing in the record
25 that tells us whether in fact these interests could be

1 sold?

2 MS. WAR BONNETT: Certainly they could be
3 sold, but the question would be where the buyer would
4 come from.

5 QUESTION: Yes, in theory, but economically I
6 suppose the record is simply silent with respect to
7 whether or not they could in fact be sold as you find
8 buyers who were willing to buy fractional interests.

9 MS. WAR BONNETT: Right. Certainly the tribe
10 is the most logical buyer of those types of interests,
11 and it depends upon whether the tribes have the funds to
12 do it.

13 QUESTION: May I ask if the tribe has ever
14 participated in this litigation and taken a position on
15 this issue?

16 MS. WAR BONNETT: The Cglala Sicux Tribe filed
17 an amicus brief in the Eighth Circuit, and they did not
18 participate at this level. Their --

19 QUESTION: What position did they take in the
20 Eighth Circuit? Were they in favor of getting the
21 property or against it?

22 MS. WAR BONNETT: They were -- I don't think
23 that they are against getting the property, but they are
24 against this matter, the way that this statute does it
25 because they view it as inherently unfair in terms of

1 taking property from individual Indians without any
2 compensation. Clearly, and it has not been disputed
3 here, Indian individual property has the same
4 protections under the Fifth Amendment.

5 QUESTION: Well, if they don't want the
6 property why couldn't they just reallocate it in
7 accordance with the desires of the former owners then?

8 MS. WAR BONNETT: There is a statute which
9 requires the Secretary of Interior and regulations which
10 require the Secretary of Interior to approve transfers
11 of the tribe -- of tribal property, so you would get
12 back to the --

13 QUESTION: I know, but if there are transfers
14 that would produce property interests of more than 2
15 percent the Secretary presumably would approve --

16 MS. WAR BONNETT: But the tribe and what they
17 would propose to do and indicated at the Eight Circuit
18 was to basically give these people their property back
19 so that they would not be consolidating, and I doubt
20 seriously that they would have gotten the approval of
21 the Secretary of Interior to transfer back to exactly
22 where they were --

23 QUESTION: I see.

24 MS. WAR BONNETT: -- ahead of time.

25 QUESTION: Of disposing of this undivided

1 property before death?

2 MS. WAR BONNETT: Excuse me, Your Honor?

3 QUESTION: Before death.

4 MS. WAR BONNETT: Uh-huh.

5 QUESTION: What did you do with the undivided
6 interests?

7 MS. WAR BONNETT: Before death what did these
8 individuals do?

9 QUESTION: Yes.

10 MS. WAR BONNETT: They basically held them as
11 undivided interests and got lease income each month --
12 each year from them.

13 QUESTION: Could they be disposed of?

14 MS. WAR BONNETT: There are -- the government
15 has repeatedly indicated in terms of the named decedents
16 here that they had the opportunity to sell, they had the
17 opportunity to partition their land, they had the
18 opportunity to do gift conveyances. It is important to
19 realize they couldn't have done any of that without
20 going through BIA procedures in terms of doing that and
21 getting approval of the superintendent or the Secretary
22 to do it.

23 It is also important to note factually here
24 that this statute was passed January 12th, 1983. The
25 memorandum which went out to the agencies telling them

1 that this Act had to be implemented was not received in
2 the Pine Ridge Agency until March 7th.

3 Chester Irving died on March 18th. And so I
4 think that it is highly unlikely that -- while we have
5 no factual record here to indicate otherwise, I would
6 submit that it is highly unlikely that Chester Irving
7 had any notice in terms of the statute, and certainly
8 cannot be held to have acquiesced to the goals of the
9 Indian Land Consolidation Act and the idea that his
10 tribe was --

11 QUESTION: Ms. War Bonnett, you didn't make a
12 due process attack on this statute in the courts below,
13 did you?

14 MS. WAR BONNETT: This was initially -- the
15 plaintiffs did not. This was filed -- people came into
16 our Pine Ridge Legal Services Office and they had a
17 hearing --

18 QUESTION: Well, the parties that you now
19 represent made no such claim in the courts below. Isn't
20 that correct?

21 MS. WAR BONNETT: That is correct, and the
22 reason that we have brought this factual record to your
23 attention is to counter the fact that the government has
24 repeatedly said that this statute offers a lot of --
25 given the circumstances here there were a lot of other

1 remedies that people had and they could have --

2 QUESTION: Well, you are not suggesting that
3 this Court should go off on some due process ground, are
4 you?

5 MS. WAR BONNETT: I don't. We have not
6 established the record for that and we have not raised
7 it below.

8 QUESTION: Counsel, may I ask about your
9 assertion earlier that the outcome here should be
10 affected by the fact that in 1889 the Indians weren't
11 given the land for free, but in effect gave compensation
12 for it.

13 But property is normally acquired in such a
14 transaction for compensation. Suppose an individual
15 buys land from the State of New York. Could the State
16 of New York thereafter alter its inheritance laws so
17 that the individual can't dispose of the property which
18 he paid compensation for the way he previously could?

19 MS. WAR BONNETT: I would think that we view
20 this situation as completely unique in terms of the
21 contract and the consideration that was given here.
22 This was more than -- for their 360 acres -- I mean, 320
23 acres or 180 acres, whatever they received, they
24 relinquished title to millions of land, millions of
25 acres of land.

1 I would say that the situation here, the
2 actual bargaining that went on, the unique situation of
3 the Indian people in terms of the Federal Government,
4 makes this a contractual type, bargain type relationship
5 which is unique to anything in terms of everyday
6 property law, and that the Court should -- you know,
7 that the Fifth Amendment taking is narrowed here to the
8 circumstances of the Sioux Allotment Act.

9 QUESTION: How do you distinguish Texaco, or
10 do you? Or do you think it's even relevant, Texaco
11 against Indiana?

12 MS. WAR BONNETT: Justice Stevens, that
13 particular case is different in that it does not deal
14 with a devise situation. In other words, it did not
15 deal with someone who dies and what notice is to be
16 given in terms of heirs protecting interests.

17 But certainly in Texaco versus Short, this
18 Court said that it was all right, you know, to condition
19 property rights and to require that they file these
20 notices, and to fail to do that was basically that these
21 people had abandoned their interests in the mining
22 claims that they had.

23 The point here is that we don't have a factual
24 situation where we could say that these people
25 abandoned, the decedents abandoned, any interest or

1 right that they had in terms of this property. They in
2 all likelihood had no notice and had no opportunity.

3 Even Geraldine Cross, who made a will March
4 26th, before -- or I think it was maybe March --

5 QUESTION: The net effect of the statute, the
6 state statute in Texaco, was that the property interests
7 were lost.

8 MS. WAR BONNETT: That's correct. But there
9 was also a two-year period in which they had to file a
10 claim to preserve those interests. And as I read the
11 case, the Court said that, because the owners had
12 basically abandoned their interest and had not filed the
13 claims as they were required to do, but they did have a
14 two-year grace period in which they were able to take
15 steps, affirmative steps to protect their property.

16 QUESTION: Well, here the property owners
17 could have saved their property by taking some steps.

18 MS. WAR BONNETT: There was no meaningful time
19 period for those particular decedents, I would argue,
20 because of the time period between the time that the
21 statute was passed and the time of their death.

22 QUESTION: That's the only real point of
23 distinction between this case and Texaco?

24 MS. WAR BONNETT: Well, in Texaco I feel that,
25 you know, there was a provision for a grace period, and

1 there was none here in terms of people affirmatively
2 protecting their rights.

3 QUESTION: To the extent --

4 QUESTION: -- to be unconstitutional as
5 applied to these particular decedents, then, but
6 constitutional as to those who have had an adequate time
7 to adjust their affairs?

8 MS. WAR BONNETT: Certainly that's a factor
9 that has to be balanced in determining the situation.
10 To argue that these people had other remedies I don't
11 think is correct, but in terms of the situation at
12 large, we still argue that there are protected interests
13 here which should have been, even if people had notice
14 -- for instance, Geraldine Cross, she made a will, and
15 under the Indian Land Consolidation Act as originally
16 enacted her will was given no effect. That would still
17 be the case today because she would not have been able
18 to pass her interest to her children, her minor children
19 who she wanted to protect and try and provide for,
20 because you have to -- under the amendments, if you
21 devise your property, the property interest must go to
22 someone else who holds an interest in that allotment.

23 QUESTION: But if your claim -- you stress so
24 much the lack of notice. Certainly the government can't
25 decide that it is going to take every tenth person's

1 property and put out a notice to that effect saying we
2 won't do it for a year and have that be sustained just
3 because there was adequate notice of it. A taking is a
4 taking in a certain sense regardless of whether there is
5 notice, and if it is not a taking, it seems to me the
6 fact that you do not now make any due process claim and
7 haven't one in the courts below makes the notice
8 question pretty low on the totem pole. Perhaps this is
9 the wrong case to say that.

10 (General laughter.)

11 MS. WAR BONNETT: I would say that the notice
12 provision is important only in response to the
13 government saying that people could have -- in their
14 reply brief they seem to say that our people acquiesced,
15 the decedents acquiesced in what happened. I don't feel
16 that is appropriate under the facts here.

17 QUESTION: Counsel, the government in its
18 primary brief didn't even cite Texaco.

19 MS. WAR BONNETT: That's correct.

20 QUESTION: So are they relying on it? They
21 did cite it in the reply brief, not in the primary
22 brief.

23 MS. WAR BONNETT: I think they are responding
24 to my factual statement which I put forward in our brief
25 that the circumstances here would prevent -- would have

1 in all likelihood prevented these people from availing
2 themselves of the remedies that the government has
3 always said individuals had under this to avoid the
4 effects of the statute.

5 QUESTION: Maybe I should ask the question of
6 your opponent as to why they didn't cite it if, as
7 Justice White indicates, there may be some precedent
8 there.

9 QUESTION: I had the same reaction. May I
10 just ask this? Supposing this statute had read -- they
11 use the word "escheat" in a rather -- not a very precise
12 way, the Congress did here. Supposing they had used the
13 word "abandoned" instead of "escheat," and they just
14 said that after -- if an owner of one of these interests
15 does not convey it to another member of the tribe within
16 such and such a period of time he shall as a matter of
17 law be deemed to have abandoned it, and then it would
18 come right within Texas against Short, wouldn't it?

19 MS. WAR BONNETT: That's correct. I mean, if
20 the term was set up that they were going to
21 affirmatively say, if you don't do something your
22 property interest is going to be abandoned, then we
23 really do have a due process type of was there
24 sufficient notice, and then again you would still, I
25 think, in terms of the unique situation of the Sioux

1 here, get into whether or not these property interests
2 could have even been taken under that scheme because
3 there was valuable consideration given for the interest,
4 because, you know, these other property interests were
5 relinquished, the Indians understood they were going to
6 have --

7 QUESTION: Well, they paid for the property in
8 the Texaco case, too. I mean, the fact they paid for
9 the property I don't really think makes much
10 difference.

11 MS. WAR BONNETT: In terms of how they paid
12 for it or what they relinquished, I think that this case
13 presents distinguishable facts from someone who goes to
14 the state of New York and pays the appraised value for a
15 piece of property, but I will leave that decision up to
16 the Court.

17 The government in their briefs has indicated
18 that this is just a regulatory taking. We disagree
19 completely with that. The whole purpose and the whole
20 effect of Section 207 is to transfer ownership of
21 property, it is to take the title of the property from
22 Charles Pumpkin Seed and permanently give it to the
23 Oglala Sioux Tribe.

24 We -- as I previously stated, Indian people
25 have the same protection for their individual property

1 as non-Indians do, and that protection is the Fifth
2 Amendment, and the facts here, the fact that the
3 interests here are small or what the government terms de
4 minimis is not relevant to the fact that if a property
5 interest has been taken then compensation must be made.

6 It is also not relevant that the interest here
7 is going to the tribes rather than to the Federal
8 Government, because you still have individual Indians
9 who are being asked to pay with their own property
10 interest to effect a greater good, to consolidate Indian
11 land. And it is also significant here that these
12 individuals are being asked to correct a failed Federal
13 Government policy with no expense to the government but
14 only to the individual Indians.

15 If there are no further questions, thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Ms. War
17 Bonnett.

18 Mr. Kneedler, do you have anything more? You
19 have about five minutes.

20 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

21 ON BEHALF OF THE APPELLANT - REBUTTAL

22 MR. KNEEDLER: Yes, I do have several points I
23 would like to make.

24 In response to the question about Texaco, in
25 retrospect we certainly should have cited Texaco. The

1 account in our opening brief of the operation of the
2 statute and the alternatives available and the other
3 factors correspond rather closely to Texaco. I would
4 like to --

5 QUESTION: Let me ask, since you have
6 mentioned Texaco, which probably is not one of the most
7 widely read opinions that we have ever issued, by the
8 way, that if your opponent did now rely on a due process
9 rationale, trying to defend the judgment below, would
10 that argument be open to your opponent, do you think?

11 MR. KNEEDLER: I think not. It was not raised
12 below. It was not raised in the motion to affirm. And
13 in fact it is not really raised in the argument section
14 of the brief here. It is described in the statement,
15 but not really in the argument section.

16 QUESTION: Do you think it would be open to
17 the Court to affirm on that ground if the Court thought
18 there were merit to the argument?

19 MR. KNEEDLER: I don't think the Court could
20 affirm on that ground. I think the most that the Court
21 should do would be to remand for proceedings on that
22 particular issue.

23 QUESTION: Isn't the respondent entitled to
24 support the judgment on any ground that is apparent
25 from the record, or not? Or is this apparent from the

1 record?

2 MR. KNEEDLER: I think it would not be
3 apparent from the record, and it does come a bit late at
4 this point. As we have said, we don't --

5 QUESTION: Well, I know. It may be late, but
6 that is the way a lot of these respondent cases are.

7 MR. KNEEDLER: As we say, this is not a
8 situation like Texaco where notice is an important
9 ingredient, we think, because laws regulating the
10 descent of property typically happen automatically at
11 the moment of death, and the legislature does not
12 normally provide a grace period when it changes the
13 rules of descent, even though they might substantially
14 unsettle the decedent's expectations of where his
15 property was going to go.

16 I would like to respond to several points that
17 were made. One is the filing by the tribe in the court
18 below. The tribe wanted or said that these -- it should
19 not receive these properties without compensation.

20 Well, nothing in this statutory scheme prohibits the
21 tribe from making compensation to individual members if
22 it chooses.

23 Another alternative that is open to the tribe
24 under the 1984 amendments is to pass a statute providing
25 for an alternative disposition of these interests rather

1 than having them escheat. One possibility would be to
2 have them descend by intestate succession to other
3 owners of fractional interests in the same parcel, which
4 would prevent the further fragmentation of interest.

5 With respect to Justice Powell's questions
6 about the possible sale of the property to others, there
7 are alternatives other than sale. One is to give it
8 away, to exchange, which would require no monetary
9 investment at all to assemble a more substantial
10 interest, or to purchase ones from others, all of which
11 could cause the interest to rise above the 2 percent
12 level, and if there are obstacles to the sale of the
13 land, for instance, that may well reflect nothing more
14 than the problems created by the very fractionated
15 ownership that this statute was designed to protect
16 against.

17 One of the principal problems that Congress
18 was responding to was the inability to sell these
19 parcels of land and the fragmentation of ownership and
20 the assembly of tracts that could be economically used,
21 just as in Lock and in Texaco versus Short.

22 We think for the reasons stated in our opening
23 brief and reply brief that appellees are quite wrong to
24 say that the Sioux Allotment Act had some unique
25 contractual element that the General Allotment Act,

1 which it really mirrors, did not have. The language was
2 drawn directly from the General Allotment Act. This
3 Court in Jefferson versus Fink said that did not create
4 any contractual rights, and there is no evidence from
5 the background that Congress intended to contract away
6 or that the Sicux understood that Congress was
7 contracting away its right to regulate the descent of
8 Indian property.

9 But it is important to point out that even
10 vested rights, as this Court said in Texaco and Lock,
11 the retention, the permanent retention of private
12 ownership rights, the legislature can condition that
13 retention on the performance of certain affirmative acts
14 which, among other things, would negative any suggestion
15 of abandonment. And one of the characterizations
16 Congress used of the fractionated ownership or
17 fractionated interest when it enacted this statute was
18 that there is an element of abandonment to them.

19 The individual owners don't occupy the land.
20 They receive a check. It is an entirely passive
21 relationship which is not conducive to a personal
22 responsibility or nexus to the land, which is what
23 Congress was hoping for when it passed the Allotment
24 Act.

25 So this statute actually furthers the purpose

1 of the General Allotment Act and the Sioux Allotment
2 Act.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Kneedler. The case is submitted.

5 (Whereupon, at 10:59 o'clock a.m., the case in
6 the above-entitled matter was submitted.)
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#85-637 - DONALD P. HODEL, SECRETARY OF THE INTERIOR, Appellant

vs. MARY IRVING, ET AL.

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BY Paul A. Richardson

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