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**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: COTTON PETROLEUM CORPORATION, ET AL., Appellants
V. NEW MEXICO, ET AL.

CASE NO: 87-1327

PLACE: WASHINGTON, D.C.

DATE: November 30, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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COTTON PETROLEUM CORPORATION, :
ET AL., :
Appellants :
v. : No. 87-1327
NEW MEXICO, ET AL. :
-----x

Washington, D.C.

Wednesday, November 30, 1988

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:

DANIEL H. ISRAEL, ESQ., Denver, Colorado: on behalf of
the Appellants.

HAROLD D. STRATTON, ESQ., Attorney General of New Mexico,
Santa Fe, New Mexico; on behalf of the Appellees.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1327, the Cotton Petroleum Corporation v. New Mexico.

Mr. Israel, you may proceed whenever you're ready.

ORAL ARGUMENT OF DANIEL H. ISRAEL

ON BEHALF OF THE APPELLANTS

MR. ISRAEL: Mr. Chief Justice, and may it please the Court:

I would like to begin my argument by just briefly summarizing it in outline form. First, Cotton Petroleum as a result of its decision to be a business partner of the Jicarilla Tribe pays a 75 percent penalty in terms of severance and production taxes by producing trust minerals on the reservation vis-a-vis what its competitors do off the reservation.

Secondly, we believe this Court's preemption and Commerce Clause cases fully support our claim.

Third, we believe the Court should in this decision give the same message it has been giving for 25 years since Warren Trading Post, and that message is to the tribes, go ahead, tribes. Continue to develop the small economies on your reservation. Continue to

1 provide employment. Continue to develop your own powers
2 of tribal self-government, to educate your children, et
3 cetera. And to the states, look, states, stop taxing
4 the reservations as if they did not exist. Stop taxing
5 the economies on those reservations as if there were no
6 federal presence and no tribal government.

7 QUESTION: Mr. Israel, the New Mexico court I
8 believe found that the taxes here did not interfere with
9 the tribe's economic development or its sovereignty. Is
10 that right?

11 MR. ISRAEL: That's their finding.

12 QUESTION: Yes. And do we give any deference
13 to that finding here?

14 MR. ISRAEL: I don't think you should because
15 I think the record contradicts the finding of the New
16 Mexico court.

17 QUESTION: What standard do we apply in
18 reviewing their finding in that regard? No deference to
19 it?

20 MR. ISRAEL: Well, I think the Court has the
21 record to consider side by side with the court of
22 appeals' finding.

23 QUESTION: De novo?

24 MR. ISRAEL: Yes, Your Honor. The fact is
25 that in our appeal to the court of appeals, we

1 challenged many of the district court findings. And the
2 court of appeals never reached those challenges on our
3 part.

4 QUESTION: Well, are either the royalties
5 produced or the production rates significantly affected
6 by the state taxes?

7 MR. ISRAEL: No, Your Honor. The record
8 indicates as follows: that Cotton as a result of these
9 taxes has limited its production to in-field well
10 production only. And that means that on a 15,000 acre
11 lease that there are substantial oil and gas reserves
12 left in the ground because of that decision by Cotton to
13 -- to limit its development to only in-field wells. And
14 the transcript at 67, 68, unrebutted, indicates, Justice
15 O'Connor, that that decision was partly motivated by
16 these taxes.

17 QUESTION: Well, you say transcript, page such
18 and such, unrebutted. I mean, a trial court is free to
19 disbelieve any witness it wants to disbelieve whether
20 he's rebutted or not, isn't it?

21 MR. ISRAEL: Yes, that's true.

22 QUESTION: So, so, how does that bear on it?
23 I mean, that's your version of the facts, but why, why
24 should we accept them?

25 MR. ISRAEL: Well: --

1 QUESTION: The trial court heard the witnesses.

2 MR. ISRAEL: That's true. The fact is that
3 there was no contrary evidence.

4 QUESTION: Well, supposing the trial court
5 chose to disbelieve your witness. You don't need a --
6 you don't need contrary evidence.

7 MR. ISRAEL: Well --

8 QUESTION: What does the tribe -- what does
9 the tribe involved here feel about this tax?

10 MR. ISRAEL: Well, the tribal chairman --

11 QUESTION: Have they taken a position?

12 MR. ISRAEL: Yes. The tribal chairman
13 testified in the trial. He focused on -- that the
14 imbalance between the substantial taxes imposed by New
15 Mexico and the lack of services. And he said if you're
16 going to tax at this level, let's have some
17 significantly greater services.

18 The amicus brief of the Jicarilla Tribe --

19 QUESTION: Yes, but it doesn't -- it didn't --
20 it didn't -- the tribe doesn't claim that their
21 self-government or their economy is being hurt by New
22 Mexico's tax.

23 MR. ISRAEL: Well, the amicus brief of the
24 tribe say it has a chilling effect. It said that
25 because of these overlapping taxes -- this is page 1 and

1 page 2 of the amicus brief. It said we are having --
2 it's complicating and making more difficult new -- new
3 oil and gas deals. It also says on page 2 that it's --
4 it's taking away from the attractiveness of oil and gas
5 deals on the reservation, and it's increasing the
6 expenses of doing business for -- not only for present
7 operators of the tribe, but future operators.

8 QUESTION: Do I understand correctly that from
9 now on -- I mean, after this thing arose -- the tribe
10 took the position that it would be a partner in any oil
11 and gas deals and thereby preclude the state from having
12 any taxes on it? Is that right? Is that what's
13 happening now?

14 MR. ISRAEL: No. And there's a suggestion by
15 the New Mexico brief. It is simply incorrect. And I
16 think your question, Justice O'Connor, is very relevant.

17 In 1982 Congress enacted this joint venture
18 statute, and under that statute tribes can now negotiate
19 deals whereas traditionally they had lease arrangements.

20 QUESTION: Uh-hum.

21 MR. ISRAEL: The fact of the matter is -- and
22 we cited it in our reply brief on page 13 -- that in
23 considering -- and that's House Report 736 -- in
24 considering the Mineral Leasing Act of 1982, Congress
25 rejected the notion of an express authorization for state

1 taxation. And Congress said, no, we are going to stick
2 with the balancing test that the Court has been
3 utilizing, and Congress expressly referenced Crow Tribe
4 v. Montana.

5 QUESTION: Where, where is that in the U.S.
6 Code? Is that somewhere in the U.S. Code?

7 MR. ISRAEL: U.S. Code Administrative News.

8 QUESTION: This is not a statute --

9 MR. ISRAEL: (Inaudible).

10 QUESTION: -- you're talking about. This
11 is --

12 MR. ISRAEL: This is the 1982 Mineral Leasing
13 Act.

14 QUESTION: It's in the Leasing Act?

15 MR. ISRAEL: Yes.

16 QUESTION: It says that -- that we shall
17 continue to apply our prior law?

18 MR. ISRAEL: No, it's in the House Report, 736.

19 QUESTION: I see.

20 Congress' inaction is what you're referring
21 to.

22 MR. ISRAEL: No. What I -- well, Justice,
23 what I'm suggesting in trying to answer Justice
24 O'Connor's question is --

25 QUESTION: Congress said something, and

1 Congress hasn't said a thing in fact. It did not enact
2 any statute that provides for this.

3 MR. ISRAEL: In the Mineral Development Act,
4 it simply authorized the tribes to develop joint
5 ventures. It said nothing about taxation. It indicated
6 in a house report that it was staying with the -- with
7 this Court's balancing test, and they expressly
8 referenced Crow Tribe v. Montana. And, therefore, the
9 fact of the matter is that there is no express barrier
10 from taxation in that 1982 Act and, of course, there's
11 no express invitation to tax. So, in that respect it's
12 identical with the 1938 Act.

13 QUESTION: Well, what if it were a joint
14 arrangement here with the tribe? Then presumably no
15 tax, no state tax. Right?

16 MR. ISRAEL: I don't see that there's any
17 difference.

18 QUESTION: You don't.

19 MR. ISRAEL: If it's -- if it's tribally owned
20 production, if it's a 100 percent tribal operation,
21 clearly the ability to resist state taxation is
22 stronger. Under McClanahan, under a long tradition,
23 there's a complete barrier to state taxation of the
24 Indian interest.

25 But the partnership arrangement in these

1 leases is no different than the partnership arrangement
2 in a joint venture. The fact is that if taxation is not
3 justified under either Commerce Clause doctrine or the
4 preemption doctrine, that -- that state taxation reduces
5 the profitability of the operation.

6 QUESTION: Well, is there authority now for --
7 for joint arrangements?

8 MR. ISRAEL: Yes, the 1982 Act.

9 QUESTION: And the tribe is not taking
10 advantage of that?

11 MR. ISRAEL: No. No, I think -- I think
12 tribes typically are utilizing that vehicle although
13 some of them continue to use the 1938 Act because if
14 you'll note in the 1938 Act, there's an option. You can
15 negotiate a lease as well as have a bid and lease. And
16 the answer is they're using both, but the tax issue is
17 the same in both. And this case would not be any
18 different if, if it involved 198- -- '82 joint ventures
19 rather than 1938 Act leases.

20 QUESTION: (Inaudible) joint venture is a
21 separate entity I take it.

22 MR. ISRAEL: Yes. I just -- maybe I'm not --
23 I'm not trying to be difficult. I just don't see that
24 in terms of resisting state taxation, that it matters
25 whether it's a joint venture or a lease. They have

1 common characteristics.

2 QUESTION: But our cases have, as you pointed
3 out in McClanahan and cases -- impose very definite
4 limits on the extent to which the state can tax a tribal
5 activity denominated as a tribal activity. I don't
6 think our case -- our opinions have ever gone so far as
7 you have us say and say that just because the state tax
8 on a producer rather than on the tribe has some effect
9 on the tribe, it's similarly preempted.

10 MR. ISRAEL: Well, Chief Justice, if as a
11 result of a joint venture agreement you had a 100
12 percent Indian-owned operation, I think I have a easier
13 case today.

14 I would say that this -- this case is very
15 similar to Bracker. Bracker -- you had a -- you had a
16 joint venture through a lease arrangement with a -- with
17 a non-Indian company and the White Mountain Apache Tribe
18 case. The fact that you had a non-Indian taxpayer there
19 didn't prevent this Court from saying to Arizona you
20 cannot tax.

21 And, in fact, we have a stronger cases because
22 the comprehensive federal regulatory scheme here covers
23 the very act that's being taxed. Here our regulations
24 cover the severance activity. New Mexico is taxing the
25 severance activity. In Bracker and in Ramah, the state

1 was taxing an activity that was not the subject of
2 federal regulation, and that bothered several members of
3 this Court.

4 In Bracker, the tax being imposed by Arizona
5 was a fuel use tax and a license tax on the trucks, and
6 there was no federal regulation dealing with trucking.
7 The federal regulations there deal with timber.

8 And in Ramah -- again, this caused quite
9 concern on the Court -- the federal regulations there
10 dealt with trying to encourage Indians to build schools
11 on the reservation, and the regulations dealt with
12 encouraging financing. They didn't deal with
13 construction, but New Mexico was trying to impose tax on
14 the construction of a school. And yet, in a divided
15 opinion, the Court sustained the, the effort of the
16 contractor to resist state taxation.

17 QUESTION: Well, what do you -- what do you
18 say about the argument that the, that the old leasing
19 acts really kind of permit tax -- taxing reservation
20 activities like this?

21 MR. ISRAEL: Well, that's -- that's kind of
22 the state's attempt we think to change the rules and
23 kind of revisit Blackfeet. Our answer is that we think
24 Blackfeet represents a fair and sensible compromise.
25 The 1924 and 1927 Acts were enacted by a Congress that

1 was bent on assimilating the Indians, getting rid of the
2 reservation. That was all pre-FDR Indian Reorganization
3 Act. And what this Court said in Blackfeet is we will
4 allow those old statutes which have relatively little
5 production today to be taxable.

6 But for the new era, the Mineral Leasing Act,
7 which is 1938, four years after the Indian
8 Reorganization Act, expressly designed to harmonize with
9 the Indian Reorganization Act, we're not going to read
10 into that 1938 Act a power to tax because Congress
11 didn't read it in.

12 And I, I might add, for example, Congress --
13 QUESTION: Well, Congress didn't read it out
14 either in 1938.

15 MR. ISRAEL: That's clear. But, but, Justice
16 White, Congress -- for example, when it comes to federal
17 production today, in 30 U.S.C. 189, Congress expressly
18 authorizes state taxation. So, Congress has, has been
19 very actively involved in this whole area. It's not as
20 if we have to rely strictly on this Court's teachings or
21 Congress' from years ago. The fact is when it comes to
22 federal production, there's an express authorization
23 permitting state taxation. When it comes to Indian
24 production, after the Indian Reorganization Act, there
25 is no express authorization. And this Court found,

1 again in a divided opinion --

2 QUESTION: What do you mean by federal
3 production?

4 MR. ISRAEL: Federal oil and gas production,
5 enormous amounts of federal oil and gas production.

6 QUESTION: From, from federal lands --

7 MR. ISRAEL: Federal lands, yes, Justice
8 Scalia. And there the states can tax because Congress
9 has given them an express mandate, 30 U.S.C. 189. Now --

10 QUESTION: One might think that an express
11 mandate was more required in the case of federal lands
12 than in the case of Indian lands.

13 MR. ISRAEL: Well, Mr. Chief Justice, I, I
14 guess I would, would resist that a little bit because
15 the -- there is no -- there is no equivalent of an
16 Indian Reorganization Act for federal lands. There's no
17 policy on federal lands to, to strengthen the federal
18 government's, you know, local powers in -- in Wyoming or
19 Colorado, but there is a federal mandate to strengthen
20 the powers of the tribes and the reservations in those
21 states.

22 QUESTION: Well, don't some of our cases hold
23 that federal production on federal lands couldn't be
24 taxed without some sort of congressional approval of it?

25 MR. ISRAEL: Well, that -- that's the -- that

1 is years ago, and then during the -- the '30s the
2 breakdown of that intergovernmental immunity began in
3 this Court's decisions. And that intergovernmental
4 immunity has been reduced so that the answer is that
5 taxation of federal oil and gas, for example, has gone
6 on since the '30s.

7 But my point is even, even in the -- in the
8 presence of a reduced intergovernmental immunity,
9 Congress has played a role here, and Congress has said,
10 yes, there shall be taxation of federal production. But
11 Congress hasn't said that in the Indian area and --

12 QUESTION: Normally, normally when you rely on
13 a preemption argument, don't you look for something
14 Congress said to support the notion Congress intended
15 preemption?

16 MR. ISRAEL: Yes, and I think -- I think --
17 New Mexico complains that the preemption teachings of
18 this Court in the Indian area are kind of -- are askew
19 with preemption elsewhere, and I think in our reply
20 brief we pointed out that there are certain areas of the
21 law, admiralty, sedition, and in the foreign areas where
22 the Court -- including the Indian area, where the Court
23 has said this is presumably and presumptively a subject
24 of federal concern and, therefore, the test for
25 preemption is somewhat different.

1 And, therefore, in the Indian case, for
2 example -- and this is -- we have found this through
3 Warren Trading Post. We've seen this in Bracker. We've
4 seen this in Mescalero Hunting and Fishing -- the notion
5 is if there's going to be a state tax or a state
6 regulation -- and the Court unanimously said this in
7 Mescalero -- there's a burden because there's a
8 responsibility and a service being provided by the
9 state. So, the preemption doctrine has emerged in this
10 area recognizing the significant federal interests here
11 on the reservation vis-a-vis, as the Court said last
12 term in Cabazon, the minimal state interest of taxation.

13 Now, in our supplemental brief -- and I think
14 this is very important -- this Court decided the Cabazon
15 case. And that dealt with a -- a reservation economic
16 activity of, of gambling, gaming, hardly -- hardly akin
17 to oil and gas reserves which are non-renewable
18 resources, which on the Jicarilla reservation and many
19 reservations is their -- is the main economic hope. But
20 even in the context of gaming, the Court upheld the
21 position of the tribes that state laws should not
22 apply.

23 And what did Congress do? Congress passed the
24 Indian Gaming Regulatory Act of 1988 just six weeks ago,
25 and in that -- and in that legislation, which I pointed

1 out in the supplemental brief, the Court again -- excuse
2 me -- Congress once again said we're staying with the
3 teachings of this Court. States cannot tax except in
4 the article 3 gaming area. They said if the states, as
5 a result of negotiation with the tribes, can demonstrate
6 specific responsibility here, we will allow the states
7 to have a cost reimbursement.

8 So, I think Congress knows what's going on and
9 Congress believes that the balancing test that this
10 Court has adopted for 25 years now represents a fair
11 resolution of these issues. And again --

12 QUESTION: Is there room in that balancing
13 test to take into consideration what Congress intended?

14 MR. ISRAEL: Absolutely.

15 QUESTION: And looking at the old leasing
16 acts, there certainly is some room there to indicate or
17 to find that Congress intended the states to still be
18 able to do some taxation of non-Indian producers, isn't
19 there?

20 MR. ISRAEL: If, if the world stopped in 1928,
21 I would absolutely agree with you and we wouldn't be
22 here because we wouldn't be wasting our time.

23 Nineteen twenty-four and nineteen twenty-seven
24 -- it's a three-year period. There were two acts of
25 Congress. But that was during the allotment era. That

1 was when the Indians were dying, and the allotments had
2 taken the millions of acres of reservations in the West
3 and put them into allotments and seeing those allotments
4 -- because every time an Indian received an allotment,
5 he didn't pay his property taxes. There was a
6 foreclosure, and there was a loss of land. And that's
7 the way Congress was going. But in 1934 it all changed.

8 Now, we think we have a stronger case than --
9 than Bracker, getting back to Bracker, simply because
10 our regulations control the activity being taxed. And
11 in Bracker, this Court found that there was a chilling
12 effect on the timber industry even in the face of a
13 minor \$34,000 tax.

14 There were three findings in Bracker by the
15 Court: one, that the federal statutory scheme designed
16 to maximize profits from timber was being interfered
17 with; two, that the tribe and future contractors were
18 simply were in a less attractive economic environment
19 and therefore there would be a chilling effect on, on
20 timber activity; and three, the state tax also deprived
21 the tribe and its business partner of money, expense
22 money, if you will, to comply with a comprehensive
23 scheme.

24 Now, in our brief, we have gone on with, you
25 know, pages of federal regulations, and the Jicarilla

1 brief also has several pages of tribal ordinances. It's
2 an expensive proposition doing business on the
3 reservations. Cotton now has three masters: the state,
4 the tribe, the federal government. We don't think we --
5 by doing business on the reservation, we should be
6 burdened that way. It doesn't seem fair to us and it
7 doesn't seem necessary.

8 Now, I would like to turn for a minute, moving
9 away from Bracker to the Mineral Leasing Act. We
10 focused for a minute on the traditional view, the
11 traditional context of that Act. I just want to remind
12 the Court that in *Crow Tribe v. Montana*, the Court in a
13 summary affirmance saw that Act as being preemptive and
14 struck down off-reservation taxes in Montana. We're
15 talking about on-reservation here.

16 And this Court also in *Kerr-McGee v. Navajo*
17 *Nation* described that statute as a comprehensive statute
18 and recognized that it was critical to many rural
19 reservations. Any hope of having a future homeland
20 would be the extraction of those mineral resources in a,
21 in a fair and balanced environment. And we don't think
22 multiple taxation is a fair and balanced environment.

23 QUESTION: You say a tribe should be treated
24 just like another state then.

25 MR. ISRAEL: Well, I think for purposes -- I

1 think --

2 QUESTION: Have we ever held that?

3 MR. ISRAEL: In a broad sense, no, you have
4 not.

5 And turning to the --

6 QUESTION: So, you're asking us to extend our
7 doctrine then.

8 MR. ISRAEL: In the Commerce Clause question
9 that we -- I have raised and the Court has asked me to
10 consider, in a limited sense only, Mr. Chief Justice, we
11 say, yes, states should be treated -- tribes should be
12 treated as states in a limited sense only.

13 Now, Congress understands that. For example,
14 in recent amendments to the Internal Revenue Code, the
15 Tax Status Act, the tribes now can issue tax-free bonds
16 for purposes of capital improvement on the reservation.
17 Congress has no problem with treating tribe as states
18 for limited purposes.

19 All we are saying is under the Commerce
20 Clause, the Court has traditionally understood the
21 purpose of the Commerce Clause was to preserve a common
22 market and that over the years the threat to that common
23 market, the impediment, if you will, has been parochial
24 taxation by the states. Multiple taxation is a typical
25 example or discriminatory taxation.

1 what's novel in this case, the Court is being
2 asked for the first time to consider whether that common
3 market -- the preservation of that common market would
4 be threatened by multiple taxation by a tribe and a
5 state.

6 QUESTION: A tribe which lies wholly within
7 the geographic boundaries of the state.

8 MR. ISRAEL: Correct, Mr. Chief Justice. So,
9 in the limited sense of whether there's a, a
10 discrimination on interstate commerce, whether there's
11 an economic impact that's, that's unfair and not
12 justified, we say it is appropriate to treat a tribe as
13 a state for that limited purpose only.

14 QUESTION: Well, after you -- after you throw
15 it into, into the Commerce Clause matrix, you still have
16 to decide under the Commerce Clause which -- which of
17 the states, given conflicting state taxations, is the
18 one that has authority to tax or how it should be
19 apportioned. But having thrown it in the matrix, all
20 you do is then assume, well, it's obviously the Indians
21 who can't and the state who can. And I don't know why
22 that's obvious.

23 MR. ISRAEL: Well, Mr. Justice Scalia, I think
24 there's teachings in -- in this Court's recent case law
25 that supports our view: Commonwealth Edison and

1 Jicarilla Tribe v. Merrion. Both times the Court said
2 the act of severance of minerals is a local act, and we
3 are going to allocate under the Commerce Clause to the
4 local government the power to tax that local act.

5 QUESTION: Well, it's local to the state as
6 well as local to the reservation inasmuch as the
7 reservation is in the state. Local doesn't help you
8 there.

9 MR. ISRAEL: Well, and I think that's fair to
10 say. In Merrion, on one hand, the Court said we're
11 going to allocate this, and you -- and you did. We're
12 going to allocate this to the tribe, but then the Court
13 dropped a footnote 26 saying, well, if -- if you've got
14 problems with multiple taxation, go after the state, and
15 that's what we have done. So, our view is that the
16 preferred result is an allocation of that power to the
17 tribe where you have trust resources. If you've got fee
18 oil and gas within a reservation, for example, we would
19 think some allocation might be appropriate.

20 We've -- we've also offered the idea of a
21 credit perhaps as a way of recognizing the primary power
22 of the tribe and yet providing the state with some tax
23 revenues in those limited situations where there is a
24 specific state interest.

25 So, allocation and apportionment are both

1 available. We think in this case allocation is the
2 proper way of resolving it.

3 And the Court could consider the idea of a
4 credit. It had rejected the credit in the Colville
5 case, properly so because the Court pointed out in
6 Colville that the only Indian commerce you had there was
7 an exemption. You're bringing a cigarette tax exemption
8 on the reservation. A credit wouldn't preserve that
9 exemption, and therefore it was rejected.

10 I think I'll reserve my last five minutes.

11 QUESTION: Very well, Mr. Israel.

12 Mr. Stratton, we'll hear from you.

13 ORAL ARGUMENT OF HAROLD D. STRATTON

14 ON BEHALF OF THE APPELLEES

15 MR. STRATTON: Mr. Chief Justice, and may it
16 please the Court:

17 This is a case dealing with whether New Mexico
18 can tax oil companies within its boundaries because
19 those oil companies obtain their income by the purchase
20 from Indian tribes. It is not a case about whether the
21 tribes can tax the oil companies. This Court decided
22 that in 1982 when 21 of the oil companies doing business
23 on this same reservation sued the tribe. And this Court
24 has determined that they can. And New Mexico has no
25 quarrel with that, and New Mexico had no quarrel with

1 that back in 1982.

2 It's also not a case about whether the federal
3 government, I take it, can impose its taxes. We talk
4 about multiple taxation. The federal income tax on
5 Cotton as far as the income it receives and the windfall
6 profits tax is just as much multiple taxation by another
7 concentric sovereign.

8 The two taxes which we deal with here today --
9 and Cotton has waived its claim to three, as I
10 understand their brief -- are first the oil and gas
11 emergency school tax which was originally enacted in
12 1935, and the oil and gas severance tax was a -- which
13 is a tax on the severance and the sale of oil and gas,
14 which was enacted in 1937. Both of these taxes were
15 recodified in 1959.

16 Now, before these taxes are imposed upon the
17 oil company, they are allowed to deduct the royalties
18 they pay the tribe. So, absolutely no economic impact,
19 whether it's incidental or otherwise, falls upon the
20 tribe in this case. The royalties are deducted and they
21 don't bear the brunt of any of the taxes, nor do the oil
22 companies have to pay those taxes.

23 Additionally, there is no agreement in this
24 case, as there were in the other cases beginning with
25 the White Mountain case, the Central Machinery case and

1 the Ramah case, to refund this tax to the tribe. This
2 tax refund would go right back to the oil company and
3 any future savings, if the Court struck the tax down,
4 would go to the oil company.

5 QUESTION: So, does the state's authority to
6 tax or its lack of authority to tax depend upon the
7 particular royalty agreement, or does it depend upon the
8 economic market for oil and gas drilling?

9 MR. STRATTON: Justice Kenney, I believe the
10 state's ability to tax depends upon whose income it is.
11 If it's the income of the Indian tribe, whether it's a
12 joint venture or otherwise or whether it's a royalty
13 arrangement, the State of New Mexico cannot impose any
14 tax on that income. However, if it's income of a
15 non-Indian citizen, then that tax is imposed.

16 QUESTION: What about a joint venture?

17 MR. STRATTON: Justice O'Connor, a joint
18 venture would work the same way. In a joint venture,
19 each party would obtain some benefits from that joint
20 venture. The Indian share would not be taxed under New
21 Mexico law whatever that happened to be, and the oil
22 company share would be subject to the tax, just as in
23 this case.

24 QUESTION: Well, if market conditions were
25 such that the Indians could be successful in leasing

1 their lands only if they gave a reduced royalty in order
2 to account for a state tax, would that change the case?

3 MR. STRATTON: I don't believe that it would
4 change the case, Justice Kennedy. As a matter of fact,
5 in regard to these leases, all of which were executed
6 back in 1953, these leases last as long as gas -- oil
7 and gas is produced in paying quantities. So, it
8 certainly wouldn't affect these leases.

9 QUESTION: So, then Dr. Parker's findings, et
10 cetera, are simply irrelevant here?

11 MR. STRATTON: Dr. Parker's findings regarding
12 the production?

13 QUESTION: Yes, and the -- and the fact that
14 the, the ability of the tribes to develop their
15 resources was, was not adversely affected by the tax.
16 That's just irrelevant because of the structure of the
17 transaction?

18 MR. STRATTON: I don't believe it's
19 irrelevant, Your Honor. I think in this case below they
20 were arguing preemption and looking at the various cases
21 that were involved. And under the preemption test as
22 set out in White Mountain, it might be very relevant as
23 to whether the tribes could -- whether the production of
24 the tribes was concerned. In this particular case --

25 QUESTION: So, then -- so, then the fact that

1 there's a royalty arrangement is not necessarily
2 dispositive. It depends upon the economic impact of the
3 particular tax on the particular transaction.

4 MR. STRATTON: Well, Your Honor, that's not
5 our case. We believe it depends upon the intent of
6 Congress and whether Congress intended the State of New
7 Mexico to be able to tax oil companies on reservations.
8 We believe that back when the 1927 Act was passed that
9 Congress made that intention clear and specifically
10 authorized the states to do that.

11 QUESTION: Well, while you're on that point,
12 is it the 1927 Act or the 1938 Act that carries -- that
13 controls the case because if you say the 1938 Act, we
14 have the -- the Crow Tribe case to contend with, don't
15 you?

16 MR. STRATTON: Yes, Your Honor, we do have to
17 contend with the Crow Tribe case. I think, if I may
18 explain how I think the Acts interact and how they work
19 together.

20 The 1938 Act had a repealer clause in it which
21 only repealed acts that were inconsistent with it.
22 There's a long history leading up to the passage of the
23 1938 Act which began back with the 1927 Act.

24 Prior to 1927, there was a great debate in
25 this country between the attorney general, the Indian

1 tribes and the federal government as to whether or who
2 owned the property under executive order reservations.
3 In 1922, this Court held in *Gillespie v. Oklahoma* that
4 states could not tax lessees' interests on Indian
5 reservations.

6 Also, around that same time, at that time
7 Attorney General Stone issued an opinion that said these
8 executive order lands could not be leased under the 1920
9 Land Mineral Leasings Act that leased federal land
10 because the way executive order reservations were set up
11 was that the President would set out a parcel of land
12 for a group of Indians that did not have one and allow
13 them to stay there.

14 Then in 1927, after much debate, consternation
15 by the states, three things were decided. Number one,
16 the Indians receive their land. And the 1927 Act
17 specifically says that they get their executive order
18 land unless Congress says otherwise. There was a debate
19 about whether the states should have a royalty under
20 those lands or whether they should be able to tax. The
21 states argued that the land should be leased under the
22 1920 Act in which case they would receive 37 and a half
23 percent royalty just like they did under the federal
24 leases at that time. The Indian tribes didn't believe
25 that.

1 And finally, in 1927 Congress struck a
2 compromise which allowed the Indians to have their lands
3 and royalties, but allowed the states to go ahead and
4 impose their taxes just like they would on any other
5 lands.

6 Now, in 1938 the Congress passed the Indian
7 Mineral Leasings Act. The Act did nothing to change oil
8 and gas leasing. It had absolutely nothing to do with
9 any changes in that area, but primarily dealt with
10 changes in the area of metalliferous minerals. There is
11 no -- there were no committee hearings at that time
12 regarding the Act. There was no record, quite frankly,
13 except for a letter from the Acting Secretary of
14 Interior to the Congress.

15 And the reasons that Act was passed was,
16 number one, to make sure that the Indians had the
17 authority to consent to the mineral leasing, to allow
18 oil -- or not oil companies, but to allow mining
19 companies when they came on to the leases to follow the
20 ore, which they could not do. And it specifically
21 followed the terms of the 1927 Act as far as oil and gas
22 leasing is concerned. And the repealer clause indicated
23 specifically that it only repealed acts that were
24 inconsistent with it. And the taxing power of the
25 states was not inconsistent.

1 One final point on the history of that Act was
2 that just two months prior to that Act, this Court
3 decided the case of Mountain States -- or excuse me --
4 of Mountain Producers v. Helvering in which case the
5 Court struck down the governmental immunity doctrine and
6 reversed the case of Gillespie v. Oklahoma which meant
7 at that time the case this Court felt that Indian tribes
8 -- or lessees on Indian tribes' reservations could, in
9 fact, be taxed under state law.

10 We think it was highly unlikely that two
11 months later the Court by its silence -- and we think
12 this Court has held that you do not imply immunity by
13 silence -- that this Court would have repealed somehow
14 by implication the provisions of the 1927 Act. So --

15 QUESTION: Do you think the Montana v.
16 Blackfeet is a little inconsistent with your argument or
17 not?

18 MR. STRATTON: Your Honor, Montana against
19 Blackfeet is not inconsistent with my argument for the
20 following reasons. In that particular case, the State
21 of Montana was not taxing oil company interests; the
22 State of Montana was taxing the royalties of the tribe.

23 When the Court decided that particular case,
24 it decided it using two canons of construction which
25 were unique to Indian tribes. And those were set out by

1 Justice Powell in that opinion, and they were, number
2 one, that you construe the language -- or first of all,
3 you cannot tax any Indian interests without specific
4 authorization of Congress --

5 QUESTION: Well, did it talk at all about the
6 1938 Act?

7 MR. STRATTON: Yes, Your Honor, it did.

8 QUESTION: What did it say about it?

9 MR. STRATTON: It said that the 1938 Act was
10 the act under which those particular interests were
11 leased, but that the 1938 Act under liberal canons of
12 construction did not for the purposes of taxing Indians'
13 interests incorporate the provisions of the 1927 Act.
14 We think that -- we believe and the law is that when you
15 apply the law to other citizens that you don't use those
16 liberal canons of construction. And as a matter of
17 fact, the canons of construction, when it comes to oil
18 companies and non-Indian citizens, are exactly the
19 opposite, and that had the Court in that case been
20 looking at the interest of the oil company --

21 QUESTION: So, the 1938 Act did change to some
22 extent what the prior law was with respect to taxation?

23 MR. STRATTON: Your Honor, the 1938 Act said
24 nothing about taxation.

25 QUESTION: Well, I know but what about the

1 Blackfeet case?

2 MR. STRATTON: Well, the Blackfeet case -- In
3 1985 this Court held --

4 QUESTION: That the '38 Act did something.

5 MR. STRATTON: It held that the '38 Act did
6 not incorporate the '37 Act as applied to Indians'
7 interest. It did not hold, for instance, that that Act
8 was repealed. It did not hold -- and the Court
9 specifically said that it was not holding -- that this
10 is the way it would apply to non-Indian interests.

11 And we think the only reason the Court held
12 that way in that particular case is that because of the
13 -- and the Court said this right in the case -- the two
14 canons of construction which you apply when you're
15 dealing with Indian tribes. Number one, you have to
16 expressly tax -- the Congress has to expressly indicate
17 that it's going to allow the states to tax Indian
18 interests. The rule is just the opposite when it comes
19 to other citizens. And number two, under any
20 interpretation of statutes, this Court when dealing with
21 Indians uses a liberal interpretation to the benefit of
22 the Indians. And we think that those are not the canons
23 the Court should use in regard to other citizens.

24 In addition -- and I believe I've pretty much
25 completed --

1 QUESTION: So, so, the Act is a repealer in
2 one case and not in the other case?

3 MR. STRATTON: Your Honor, the -- this Court
4 in Blackfeet did not hold it was repealed. They
5 specifically said they were not holding that it was
6 repealed. They said it was not incorporated into the
7 1938 Act under those liberal canons of construction.
8 So, it's still on the books.

9 And as a matter of fact, those acts were in
10 the same title right next to one another, 396, 97 and 98
11 including the 1924 Act. And it seems to me obvious that
12 if Congress had wanted to do something, they would have
13 expressly repealed the taxing authority, particularly
14 after the long battle to strike that compromise in 1927
15 in the Mountain Producers holding.

16 In addition to what we believe is
17 congressional intent by virtue of the 1927 Act, this
18 Court -- or excuse me -- Congress in 1980 passed the
19 Crude Oil Windfall Profits Act, and that Act, of course
20 -- for tax -- and that, of course, taxed the windfall
21 profits of oil companies. In that particular Act,
22 Congress chose to exempt the royalties received by
23 Indians from that particular windfall tax, but they
24 chose in addition not to exempt, specifically not to
25 exempt, the interests of the oil companies. So,

1 Congress at that time felt I believe that there was
2 enough room in there to go ahead and tax the interests
3 of the oil companies, and it did not hinder its policy
4 of helping and allowing the Indian tribes to develop
5 their resources.

6 QUESTION: Well, Mr. Stratton, it does seem
7 clear that the addition of state taxes over and above
8 the tribal taxes on oil and gas production coming off
9 the reservation does burden that production to a greater
10 degree than it would if it were on state land alone and
11 off the reservation. Now, do we have to take that
12 burden into account in determining the preemption
13 question?

14 MR. STRATTON: Your Honor, I think you do not
15 have to take it into account. I think the record shows
16 that it did not burden or hinder any production in this
17 particular case.

18 QUESTION: Well, does the record disclose that
19 it may have hindered further development of production
20 on the reservation?

21 MR. STRATTON: It does not, Your Honor. And,
22 in fact, when the -- when Cotton's expert witness, Mr.
23 Wood, was testifying, as Mr. Israel previously commented
24 to the Court, he specifically stated that a reduction of
25 taxes would do no more for production. At page 77 of

1 the transcript, when he went on to testify after page 66
2 and 67, he specifically said under cross-examination
3 that the lack of taxes would not create any further
4 production, that there were other economic aspects to
5 the production of oil and gas as far as production was
6 concerned. And, in fact, the record shows --

7 QUESTION: Well, just it seems like common
8 sense would tell you that if you had two tracts where
9 you could produce oil and gas, one off the reservation
10 and one on, that the producer would prefer the
11 off-reservation because of the substantially reduced tax
12 burden.

13 MR. STRATTON: Your Honor, I suppose that is
14 correct. I can't deny that you obviously want to make
15 as high a profit as you could. However, that works with
16 states as well. You would certainly rather do business
17 in a state that had, had a lower tax rate. If you were
18 doing -- If you were operating in the State of Utah or
19 some other state that had county taxes, you'd want to do
20 business in a county that had lower taxes.

21 However, in this particular case, the record
22 is clear and the district court found below that the
23 profits are sufficient that the state taxes are
24 insufficient -- or excuse me -- are insignificant as far
25 as production is concerned and that they really make no

1 difference. As a matter of fact, as evidence of that,
2 in 1977 there were 1,353 producing wells on the
3 Jicarilla reservation. In 1985 there was 2,224 wells.

4 Cotton in its testimony by Mr. Wood, their
5 division production manager from Denver, indicated,
6 notwithstanding the economic conditions nor the tax,
7 they were going to continue to drill, were drilling 12
8 new wells in the year following the trial.

9 So, there was no evidence in the record and
10 the court found, that these taxes in no way hindered any
11 economic development, production and certainly not the
12 ability of the tribe to raise its funds as well.

13 I'd like to talk a little bit about that
14 because I think that it's important to note that the
15 tribe is not affected even though I believe Congress has
16 spoken, that the tribe is absolutely not affected by
17 this particular tax and, as a matter of fact, they're
18 doing pretty well with their tax as they should be.

19 They enacted a five percent tax upon -- up on
20 top of their one percent severance tax. When they did
21 that, they have realized a rather significant amount of
22 money, and they're continuing to do that. They have
23 built up a permanent fund of \$50 million that the tribe
24 now owns, and that is higher per capita, per Jicarilla,
25 than is the New Mexico permanent fund.

1 They have no tribal taxes on their members.
2 They have a tax-free environment.

3 In fact, they pay each Jicarilla member out of
4 their royalties and out of their taxes each year \$4,000
5 to \$5,000 to supplement their income. So, I think
6 that's further evidence that this particular tax has no
7 impact on the ability of the Jicarillas to develop their
8 own resources.

9 I want to talk just a little bit about the
10 disagreement between us and the plaintiff or Cotton
11 Petroleum as far as the benefits that New Mexico
12 confers. There have been a couple of statements in this
13 Court's cases that indicate that the states have no more
14 responsibilities as far as Indian tribes are concerned.

15 The record indicates here that the Jicarillas
16 spend 85 percent of their money off the reservation.
17 They have to go off the reservation to obtain 85 percent
18 of their services. One hundred percent of Jicarilla
19 children attend the New Mexico state school, the
20 state-funded school, public school, in Dulce, New
21 Mexico. Ninety percent of the enrollment --

22 QUESTION: In where New Mexico?

23 MR. STRATTON: Dulce. D-u-l --

24 QUESTION: D-u-l-c-e?

25 MR. STRATTON: D-u-l -- yes, Your Honor.

1 Pronounced Dulce.

2 QUESTION: That's off the reservation?

3 MR. STRATTON: That is on the reservation.

4 QUESTION: That's on?

5 How many members of the tribe are there?

6 MR. STRATTON: There are some discrepancies in
7 the record, record, Your Honor, but according to the
8 1980 Census, there's about 700 -- 1,750 tribal members.
9 There's slightly less than 2,000 people according to the
10 census living on the reservation.

11 In addition to the schools, the State of New
12 Mexico maintains four state roads on the reservation and
13 one United States highway on the reservation. But I
14 don't want to minimize the fact and the importance of
15 all of the roads off the reservation. When these
16 Jicarillas and other members living on the reservation
17 are going places, they have to utilize state roads. The
18 testimony was they get most of their services from
19 Farmington, Albuquerque and Santa Fe. And to get there,
20 they have to use state roads.

21 And each Jicarilla Apache tribal member is
22 just as much a citizen of the State of New Mexico as is
23 any other citizen. They're entitled to all of the
24 privileges, immunities and services. So, to distinguish
25 between the services provided by the state as to whether

1 they're provided on the reservation or off is clearly
2 not the test.

3 They attend universities. We have
4 state-subsidized universities. In-state students have
5 an ability to go there, and have their tuition reduced
6 because they're in-state. Jicarillas, being citizens of
7 the state, benefit from that.

8 We have police protection, and we have
9 cross-deputization with the Jicarillas as well. We have
10 a court system to which all of its citizens, including
11 the Jicarillas and Cotton, are allowed to participate or
12 allowed to utilize.

13 And finally, they're entitled to all of the
14 health care benefits that is provided by the State of
15 New Mexico to all of its citizens.

16 I'd like to turn to the Commerce Clause, if I
17 might, just briefly and talk about it. There is one
18 thing with which we and the Indian amici are in
19 unanimity on and that is whether Indian tribes or Indian
20 reservations should be treated as states.

21 I have a hard time coming up here and
22 conceptualizing how that would actually work. We are
23 concentric sovereigns. Reservations vary widely. There
24 are different numbers of tribal members on one
25 reservation as on other reservations, and they are

1 technically concentric sovereigns. Indians have
2 citizenship, they vote, they hold office. The land
3 occupied by the Jicarilla Reservation is a part of New
4 Mexico.

5 How we treat the tribe as a reservation -- 250
6 tribes -- or how we treat the tribe as a state with 250
7 of them around the country, puzzles me as to how we
8 would deal with it. In fact, I think the U.S.
9 Constitution treats them separately. This Court, Mr.
10 Chief Justice has repeatedly held as recently as the
11 Ramah case that they are not states and that they are
12 not going to be treated as states.

13 As far as apportionment is concerned, the --
14 Cotton has suggested an apportionment formula whereby
15 you apportion the tax based on the benefits received by
16 the taxpayers. That particular doctrine or theory has
17 been rejected as far back as Thomas v. Gay by this
18 Court, and we see no reason or no way that can happen.
19 Taxes are not an assessment of benefits. Taxes are a
20 way of apportioning the benefits of living in an
21 organized society to various members.

22 I'd like to say just one last thing at this
23 point and that is that this particular case is a case
24 brought by one oil company against a state involving one
25 reservation. We have 26 Indian reservations in the

1 State of New Mexico. There are over 250 different
2 reservations across the country. They are all
3 different. Many of them do not produce resources. Some
4 of them do. Some have fee land in them. A lot of
5 non-members live in them --

6 QUESTION: Mr. Attorney General, you keep
7 emphasizing how large the Indian group is in this
8 country. Is it not true that every year it's going down?

9 MR. STRATTON: Your Honor, I'm sorry. I do
10 not know the answer to that question.

11 QUESTION: Isn't it going down -- the Indian
12 population?

13 MR. STRATTON: Your honor, I'm sorry. I do
14 not know the answer to that. It is not going down in
15 the State of New Mexico. I do not know what's happening
16 in the rest of the country.

17 QUESTION: Well, isn't the rest of the country
18 -- isn't it going down?

19 MR. STRATTON: I'm sorry, Your Honor.

20 QUESTION: The population?

21 MR. STRATTON: I do not know the answer to
22 that question.

23 QUESTION: Well, I mean, you keep emphasizing
24 how big it is. For what reason do you emphasize that?

25 MR. STRATTON: Well, Your Honor, I do not

1 emphasize how big the Indian population is, but rather
2 the fact that there are 250 separate independent
3 sovereign nations, and they all have different
4 governmental aspects to them just like many other
5 different nations do. And to apply blanket rules, such
6 as the one that is proposed by Cotton in this particular
7 case, may very well do more harm to those reservations,
8 particularly the ones in Utah, as the amici of the
9 counties indicate, than help.

10 QUESTION: So, you're really doing this in
11 favor -- to help the Indians.

12 MR. STRATTON: Your Honor, I think the --
13 upholding this tax will, in fact, help the Indians
14 because the Indians are citizens of our state just like
15 they are citizens of the other states that they live in,
16 and it will allow Cotton to participate in providing the
17 benefits of an organized society not only to themselves
18 and the employees of Cotton, but also to the Jicarillas
19 and other Indian people in our state.

20 QUESTION: Mr. Attorney General, what was --
21 under what statute were these leases executed?

22 MR. STRATTON: They -- the leases indicate I
23 believe, Your Honor, that they were executed under the
24 1938 Indian Mineral Leasing Act.

25 QUESTION: So, that Act did have something to

1 do with oil and gas leases.

2 MR. STRATTON: Yes, Your Honor. The Act does
3 have something to do with oil and gas leases. The, the
4 point I wanted to make is that when that Act was
5 enacted, it was not for the purpose of providing oil and
6 gas terms. They are almost identical, and they are
7 effectively identical with the terms of the 1927 Act.
8 That Act was primarily enacted to deal with
9 metalliferous minerals as opposed to oil and gas, but it
10 does include leasing provisions for oil and gas.

11 If there are no more questions, I'll waive the
12 rest of my time.

13 QUESTION: Thank you, Mr. Stratton.

14 Now, Mr. Israel, you have six minutes
15 remaining.

16 Let me ask you, if I may, in the New Mexico
17 Court of Appeals' opinion in this case at appendix 4 of
18 your jurisdictional statement, it has this statement,
19 about the middle of the page. "Cotton, on the other
20 hand, contends that this case is not a preemption case
21 because the economic impact on the tribe is minimal and
22 is not a primary consideration." Now, is that a correct
23 statement of the position you took in the New Mexico
24 Court of Appeals?

25 REBUTTAL ARGUMENT OF DANIEL F. ISRAEL

1 MR. ISRAEL: Yes, Mr. Chief Justice. This is
2 a claim for refund. This particular case will result,
3 if we are successful, in some portion of the New Mexico
4 taxes being refunded.

5 QUESTION: So --

6 MR. ISRAEL: The impact on the tribe is not so
7 much in this particular refund action, but really the
8 larger question as the Court has recognized in Bracker,
9 in Ramah, in Mescalero, and as the tribe itself
10 indicates in its amicus brief, the larger question is
11 its ability to make the reservation attractive, to
12 eliminate this penalty.

13 QUESTION: But if you said in the New Mexico
14 Court of Appeals that it is not a preemption case --

15 MR. ISRAEL: I didn't say that, Mr. Chief
16 Justice.

17 QUESTION: Well, but I -- let me read again
18 what the New Mexico Court of Appeals said you said, and
19 I asked you whether that was a correct statement.
20 "Cotton, on the other hand, contends this is not a
21 preemption case because the economic impact on the tribe
22 is minimal and is not a primary consideration." Now, is
23 that a correct statement of the position you took in the
24 New Mexico Court of Appeals?

25 MR. ISRAEL: No, it is not, Mr. Chief Justice.

1 QUESTION: The court was wrong then in saying
2 it.

3 MR. ISRAEL: Yes.

4 We said -- and the next sentence makes it
5 clearer. We said that when you have a Commerce Clause
6 inquiry, you look at the controlling acts of Congress,
7 Congress to see if there are any -- if you see -- to see
8 if there are any, and then you look to the Commerce
9 Clause. We said the preemption concept was a background
10 here. So, we didn't -- we didn't say it wasn't a
11 preemption case. We said the preemption issues were a
12 part and parcel of the Commerce Clause issues.

13 Now, I would like to rebut several, several
14 points.

15 First of all, the Indian tribes -- some of
16 them are doing better today than they have been, and
17 it's partly because of congressional support and because
18 of decisions of this Court. The Jicarillas have more
19 oil and gas reserves than most reservations, but let's
20 -- let's not -- let's not New Mexico overstate the
21 case. The record here indicates in transcript 514 that
22 the average per -- per capita income of these Indians is
23 less than the per capita income of New Mexico citizens,
24 let alone the per capita income of the rest of the
25 citizens of the United States. And I think that's

1 important.

2 The second point is, yes, New Mexico is the
3 provider of a civilized society off the reservation, and
4 the record indicates that the Indians here, Cotton, its
5 employees, its contractors, when they're off the
6 reservation, they pay all of those taxes. And the Court
7 has indicated in Ramah that -- that off-reservation
8 benefits and services simply don't answer the question
9 about what happens on the reservation.

10 And we think the record here indicates there
11 is a deterrence of production. The tribe has indicated
12 there's a chilling effect on terms of how it may develop
13 resources in -- in the future. And Justice O'Connor I
14 think makes it apparently clear that if you have a 14
15 percent of value tax burden on the reservation,
16 inevitably that's less attractive than off the
17 reservation.

18 So, in Bracker, in Ramah, in Mescalero, in
19 Cabazon, these are cases where much smaller intrusions,
20 much smaller levels of taxes were kept off the
21 reservation than here, and we would -- we would say that
22 those teachings suggest that when you have significant
23 taxes here that aren't justified, that they should be
24 kept off the reservation too.

25 The tribes are developing more significant

1 governmental services.

2 QUESTION: You emphasize the 14 percent, but
3 supposing you had a case in which the tribe didn't
4 impose any taxes of its own. It got all its income in
5 the form of royalties. It just negotiated a different
6 arrangement. Would the state tax still be equally
7 preempted?

8 MR. ISRAEL: Yes.

9 QUESTION: So, really the 14 percent isn't
10 relevant to the legal analysis, I don't think.

11 MR. ISRAEL: Well, it gives rise to a Commerce
12 Clause claim, that if you didn't have the taxes, then
13 you have only a controlling acts of Congress, a
14 preemption claim.

15 But from the point of view of the tribe trying
16 to develop a stronger economic base for its members, it
17 doesn't matter whether it, it draws revenues from a
18 nonrenewable trust resource from royalties, rents or
19 from taxes. From its vantage point, it doesn't matter.

20 QUESTION: So, from its vantage point, it
21 would be exactly the same if it had negotiated a more
22 favorable lease instead of added on top of it this --
23 this tax.

24 MR. ISRAEL: And that's what the tribe has
25 said here. With these taxes it, it gets less money

1 because the companies that go to the tribe now, now and
2 put together a joint venture say, well, let's see.
3 we've got to pay all these taxes to the state, plus
4 we've got to pay your taxes, so you get less rent.

5 QUESTION: When -- when were these leases
6 signed again? I can't --

7 MR. ISRAEL: These were early leases in the
8 1950s.

9 QUESTION: And they started taxing them when?
10 The tribe started taxing them when?

11 MR. ISRAEL: In the 1970s.

12 QUESTION: Yes.

13 MR. ISRAEL: Now, the final thing I'd like to
14 say about the effort to revisit Blackfeet -- and it's a
15 little troublesome to the Court because the 1924 and
16 1927 Acts -- they authorized taxation of the Indian
17 share as well as the, the producer share. So, if the
18 Court were to reverse itself in Blackfeet, then it seems
19 to me it's stuck with a -- a rather anomalous situation
20 of saying in this most important area of all for Indian
21 economies, Congress has spoken and taxation can apply to
22 -- across the board, to Indian tribes as well as
23 producers.

24 And so, we would urge the Court not to go
25 backwards, not to upset what we think has been a

1 consistent 25-year line of cases ever since Warren
2 Trading Post that says taxes are a burden on Indian
3 commerce, and they can only be justified by a specific
4 showing of state responsibility and state services.

5 And that's what Congress now agrees to. As I
6 said, in the Mineral Leasing Act, in the Gaming Act,
7 they support the Court's findings.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Israel.

10 The case is submitted.

11 (Whereupon, at 11:57 o'clock a.m., the case in
12 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:
NO. 87-1327 - COTTON PETROLEUM CORPORATION, ET AL., Appellants V.

NEW MEXICO, ET AL.

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

BY Judy Freilicher
(REPORTER)

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