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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** ASARCO INCORPORATED, ET AL., Petitioners V.  
FRANK KADISH, ET UX., ET AL.

**CASE NO:** 87-1661

**PLACE:** WASHINGTON, D.C.

**DATE:** February 27, 1989

**PAGES:** 1 - 54

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 ASARCO INCORPORATED, et al., :

4 Petitioners. :

5 v. :

No. 87-1661

6 FRANK KADISH, et ux., et al. :

7 -----x  
8 Washington, D.C.

9 Monday, February 27, 1989

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 11:36 o'clock a.m.

13 APPEARANCES:

14 DANIEL M. GRIBBON, ESQ., Washington, D.C.; on behalf of  
15 the Petitioners.

16 DAVID S. BARON, ESQ., Tucson, Arizona; on behalf of the  
17 Respondents.

18 CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor  
19 General, Department of Justice, Washington, D.C.; as  
20 Amicus Curiae in Support of Respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

DANIEL M. GRIBBON, ESQ.

On behalf of the Petitioners

3

DAVID S. BARON, ESQ.

On behalf of the Respondents

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CHRISTOPHER J. WRIGHT, ESQ.

As Amicus Curiae in Support of Respondents

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

2 (11:36 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 87-1661, Asarco, Incorporated v. Frank  
5 Kadish.

6 You may proceed whenever you're ready.

7 ORAL ARGUMENT OF DANIEL M. GRIBBON

8 ON BEHALF OF THE PETITIONERS

9 MR. GRIBBON: Mr. Chief Justice, and may it  
10 please the Court.

11 We turn in this case from hard rock music to  
12 hard rock metals. At issue is the validity of an  
13 Arizona statute which provides that minerals in  
14 federally granted lands shall be leased upon payable --  
15 upon payment of a royalty of 5 percent on the net value  
16 of the minerals actually extracted. The court below  
17 held that that statute was invalid because it failed to  
18 provide for prior appraisal of the properties and  
19 leasing at appraised value, which procedures the court  
20 below held were required by the Enabling Act of 1910  
21 pursuant to which Arizona was admitted to the Union.

22 The issue is not, I hasten to say, whether  
23 Arizona shall be permitted to give away its minerals or  
24 to lease them on fire sale basis such as is alleged in  
25 some of the briefs, nor is it a matter of invoking basic



1 trust principles in support of the decision below. That  
2 decision, which was made on cross motions for summary  
3 judgment, contain no finding that Arizona had been  
4 profligate or wasteful in its handling of its minerals.  
5 There could have been no finding because there was no  
6 evidence. The court found purely as a matter of  
7 statutory construction that the Enabling Act of 1910  
8 required that mineral leasing be done on the basis of  
9 prior appraisal and leasing at appraised value.

10 The issue arises in these circumstances. In  
11 1910, Congress granted to Arizona substantial acreage of  
12 Federal land when it entered the Union. It provided in  
13 that grant that Arizona and New Mexico, who was party to  
14 the same Act, could not dispose of the federally granted  
15 lands except after advertising, auction and appraisalment.

16 That grant in 1910 excluded mineral lands,  
17 which was the custom of all of the Federal grants with  
18 one exception at that time. No mineral lands were  
19 granted. They were reserved and administered under the  
20 Federal leasing program.

21 Some 17 years later, Congress provided in the  
22 Jones Act that not only Arizona, but the other 11  
23 western states should now receive the numbered mineral  
24 sections that had been withheld from them in the  
25 original 1910 Act. The Jones Act said nothing about

1 dispositional restrictions. It did provide that the  
2 minerals could not be sold, but they could be leased as  
3 the state legislature would direct.

4 In 1936, Congress amended the Enabling Act of  
5 1910 to provide that Arizona could lease the minerals,  
6 the so-called hidden minerals, in lands which were not  
7 known to be mineral at the time of the grant.

8 QUESTION: Strictly speaking, you mean lease  
9 the mineral lands, rather than lease the minerals.

10 MR. GRIBBON: Minerals. Lease the mineral  
11 land, yes, Your Honor, for -- for the use the minerals.

12 And the 1936 Act, as I say, provided that  
13 Arizona could lease the mineral lands which were given  
14 to it somewhat inadvertently by the 1910 Act. These  
15 were lands which were not known to be mineral at the  
16 time and, therefore, were not excluded, but which this  
17 Court in a series of decisions in the 1920s said had  
18 passed to Arizona and New Mexico, nonetheless.

19 Now, Arizona and New Mexico both had adopted  
20 basically the Federal leasing procedures for the hidden  
21 minerals and had not provided for appraisalment,  
22 advertising and auction.

23 In 1941, pursuant to the authorizations that  
24 had been given it by these two earlier Federal Acts,  
25 Arizona enacted the statute that is attacked here which

1 provides for a flat 5 percent royalty on extracted  
2 minerals and does not provide for auction, advertising  
3 and appraisal.

4 This action -- I might say at this point that  
5 that statute passed in 1941 has ever been attacked by  
6 the Attorney General of the United States who has the  
7 duty under the Act to enforce it and has what this Court  
8 has referred to as an ongoing oversight responsibility.

9 This action was brought by three taxpayers in  
10 Arizona and by the Arizona Teachers Association which  
11 consists of -- whose members are 20,000 public school  
12 teachers in Arizona. The claim is that the  
13 dispositional restrictions, at least the appraisal  
14 restriction, in the 1910 Act limit Arizona's authority  
15 to lease minerals since the statute does not provide it  
16 is invalid.

17 It -- they further allege in the complaint  
18 that had Arizona provided for appraisal and appraising  
19 at the -- leasing at the appraised value, more revenues  
20 would have come in from the mineral lands -- from the  
21 leasing of the mineral lands, and that those revenues  
22 would have either or both reduced the taxes that the  
23 taxpayers were paying for the support of the schools, or  
24 improve the quality of education by infusing more money  
25 into the public school system.

1 I shall first address two contentions the  
2 Solicitor General has made as to why the Court should  
3 let the decision below stand and not review it.

4 The first suggestion is that the Respondents,  
5 on whose side the Solicitor General appears, lack  
6 standing in an Article III sense. So far as the  
7 teachers are concerned, there does not seem to be any  
8 real question that these teachers have a particularized  
9 interest in the public school system of which they are  
10 such an integral part, and that if they are right in  
11 their complaint, they have been injured by an improper  
12 failure of the state to put more money into the schools.

13 The claim, as far as the teachers are  
14 concerned, seems to be that they are unable to claim  
15 with the requisite certainty that the redress they ask  
16 -- that is, invalidation of the statute -- will give  
17 them the relief that would take care of the quality of  
18 education.

19 In this respect, we believe that the Solicitor  
20 General misconceives the basic principle which, as was  
21 recently stated in *Bryant v. Yellen*, is not that someone  
22 who has been injured need to established with certainty  
23 that the relief he seeks is going to give him what he  
24 wants, but that there must merely be a reasonable  
25 expectation of that relief. And we would submit that



1 from the teachers' point of view, there is that  
2 reasonable expectation that if they're right and if more  
3 money comes in, the quality of education is going to be  
4 improved in the State of Arizona.

5 QUESTION: Well, that's pretty --

6 QUESTION: Well, right now, does Arizona only  
7 use the -- the amount that comes from these lands? Is  
8 that all that Arizona spends on education, or is there --

9 MR. GRIBBON: No.

10 QUESTION: -- are general tax funds expended  
11 as well?

12 MR. GRIBBON: There is a general tax fund of  
13 substantial proportions which is spent.

14 QUESTION: Well, then I see -- I see no  
15 necessary connection between this at all. You -- you  
16 assume that when more money comes in from the lands, the  
17 state is going to continue to devote the same amount  
18 from general revenues?

19 MR. GRIBBON: Your Honor, I don't --

20 QUESTION: Why is that a reasonable assumption?

21 MR. GRIBBON: Let me say I don't believe there  
22 has to be a necessary connection. I think there was a

23 --QUESTION: I don't see --

24 MR. GRIBBON: -- reasonable expectation that  
25 if more money comes in from the lands, it is either

1 going to be used for education or it's going to be used  
2 to reduce taxes, or being a political problem --

3 QUESTION: Well, but reducing taxes doesn't  
4 help you. Reducing taxes doesn't help you. I mean, you  
5 --

6 MR. GRIBBON: It doesn't help the teachers.

7 QUESTION: You have to say there's at least a  
8 plausible belief that if you get more money from this  
9 --from these lands, more money will go to education even  
10 though a sizable portion -- most of what now goes to  
11 education is out of general revenues, or how much of it?

12 MR. GRIBBON: I think that the education gets  
13 more from general revenues than --

14 QUESTION: Than from the lands.

15 MR. GRIBBON: -- from the school lands. But  
16 everything that comes from the school lands has to go to  
17 support education. And it seems to me there is a  
18 reasonable expectation that -- that if they can increase  
19 by \$5 million, for example, the amount coming from  
20 school lands, that's going to go to education.

21 QUESTION: Don't you think it is more  
22 reasonable to think that the legislature sets a figure,  
23 we need this much for education, and whatever shortfall  
24 there is in the amount that we get from -- from -- from  
25 the lands, we'll make up out of general revenues. That

1 seems to me almost --

2 QUESTION: Your Honor, I'm not clear that  
3 either of us knows just exactly what the revenue -- what  
4 the legislature does or what it might do in the future.  
5 But if they get more money there, the teachers are going  
6 to be saying put that into the -- into the school  
7 system. We need it for computers, books, et cetera.  
8 Whereas the taxpayers are going to be saying you've met  
9 your burden there. Let's reduce the taxes.

10 I suggest there's a good probability that some  
11 or both of that will happen. They would split the  
12 difference, and that both the teachers would get  
13 something on the quality of education and the taxpayers,  
14 who are the other claimants here, would get something or  
15 have a reasonable expectation of something in the way of  
16 taxes.

17 QUESTION: Well, what if you're right? What  
18 if you're right, Mr. Gribbon, and the money were put  
19 into -- into a better supply of books? Is that a sort  
20 of benefit to the teachers that would give them  
21 standing? I can see how a benefit that would increase  
22 their salaries would give them standing, but just better  
23 books or a better looking campus, do you think those are  
24 the kind of benefits that would confer standing?

25 MR. GRIBBON: I think on the books for certain

1 It would better able the teachers to carry out their  
2 professional duties, give them greater satisfaction and  
3 give them a greater ability to help the students, which  
4 is what they're trying to do anyway.

5 I would say that that kind of a benefit is  
6 --or an injury that they're getting now is certainly  
7 comparable to the students around Washington in the  
8 scrap case who were deprived of the pleasures of walking  
9 in the parks here by too much recyclable material being  
10 present.

11 QUESTION: Well, I fully agree with you about  
12 the scrap case.

13 MR. GRIBBON: It's still, as I understand,  
14 good law, Your Honor. But I do think the teachers have  
15 a keen professional interest here, just as citizens in  
16 the Gladstone, Realtors case had an interest in living  
17 in a segregated area. It may not be strictly a  
18 financial interest. It's a professional, a social, and  
19 a cultural interest.

20 On -- on the taxpayers, it is true that many  
21 taxpayers have been held to lack to standing under  
22 Section 3, but I submit it is where they have brought  
23 what might be called good government or generalized  
24 grievances or have attempted to -- to validate certain  
25 interests that they might have.



1           This I think is the pocketbook case, the  
2 dollars and cents case, that was referred to in Doremus.  
3 There is even a separate tax involved here in these  
4 royalties where these taxpayers can legitimately claim  
5 that they are paying too much because the state is  
6 getting too little.

7           QUESTION: Didn't we say in the Valley Forge  
8 case that the taxpayer standing of -- under Flast v.  
9 Cohen was going to be limited to First Amendment  
10 establishment clause claims?

11           MR. GRIBBON: Your Honor, I didn't think it  
12 went quite that far. In addition to Flast, there was  
13 the Grand Rapids v. Ball recently which -- which did  
14 give standing in -- in Flast. But I would think --

15           QUESTION: Except Grand Rapids was an  
16 establishment clause claim.

17           MR. GRIBBON: Yes.

18           QUESTION: And this isn't.

19           MR. GRIBBON: But these taxpayers are claiming  
20 that the state has violated the specific strictures in  
21 the solemn compact between the United States and the  
22 Federal Government. And I would think that those  
23 strictures would be the substantial equivalent to the  
24 constitutional prohibitions that gave standing in Flast  
25 and in Grand -- Grand Rapids.

1 QUESTION: All you need to win on is one.

2 MR. GRIBBON: I'm sorry, Your Honor?

3 QUESTION: All -- all you need to win on is  
4 either the teachers --

5 MR. GRIBBON: Either one or the other. That's  
6 correct, Your Honor.

7 Finally, on the question of standing, we would  
8 submit that in the event the Court feels there is no  
9 standing which, of course, we think there is, the proper  
10 course of action, as it has done in the case where there  
11 is intervening mootness, would be to -- to remand with  
12 directions to vacate so that these Respondents, who are  
13 the ones lacking the standing who have the defect, would  
14 not get the benefit of what will be a final judgment on  
15 a very important question of Federal law.

16 This is more than just an advisory opinion, an  
17 opinion of the Justices or the Attorney General. This  
18 opinion is binding on the state legislature.

19 QUESTION: But that's true of the opinion in  
20 Doremus too, and we just dismissed certiorari, didn't  
21 we, in Doremus?

22 MR. GRIBBON: In Doremus it was this -- the  
23 --the holding was against the people who lacked  
24 standing. It was not in their favor.

25 We have found no case, despite the suggestions

1 In Doremus -- and none has been cited to us -- where  
2 respondents who lack standing were able to retain a  
3 decision below. What you have suggested in Doremus  
4 might make that possible, but it would seem here where  
5 we're not going to get the second chance to contest  
6 this, which was one of the things that led you where you  
7 were in Doremus that it would not be too much --

8 QUESTION: But I have some difficulty with  
9 that problem. If you assume we have no Jurisdiction  
10 because of a lack of standing, why is it different than  
11 if the case -- say the case was moot at the time it  
12 reached the Arizona Supreme Court. And they said, well,  
13 we realize this is moot, but we don't have to follow the  
14 Article III rules that the Federal courts follow. We  
15 think it would nice to enter a judgment here that will  
16 be binding on our -- our government, and we're going to  
17 do it even though we may not have judicial power in the  
18 Federal sense. Could we vacate such a judgment?

19 MR. GRIBBON: Oh, I don't --

20 QUESTION: And they had no -- no jurisdiction  
21 as a matter of Federal -- I mean, there is no Federal  
22 case or controversy, but they enter some kind of an  
23 order that the state -- that gives benefits to people  
24 like this. How can we vacate that? And what you are  
25 assuming here is that even there is no standing and,

1 therefore, no Jurisdiction, we have -- nevertheless have  
2 the power to vacate that judgment.

3 MR. GRIBBON: I don't see any real difference  
4 between that and the situation where mootness has  
5 intervened between the decision below and what you are  
6 doing now. You no longer -- you don't have any  
7 jurisdiction, but nonetheless you will vacate.

8 QUESTION: No, not in a -- from a state court.

9 QUESTION: Not from a --

10 MR. GRIBBON: Not -- not from a state court.  
11 I think you're right.

12 But I would suggest that what we're suggesting  
13 to you here, while there may not be precedent for it, is  
14 really a very, very minimum -- has a minimum potential  
15 for invasion of the state authority. This doesn't  
16 happen and isn't going to happen very often where  
17 respondents who are lacking, as is alleged here, are  
18 going to prevail below in a definitive way which is  
19 going to prevent the petitioners, who have lost below,  
20 from ever getting a ruling by this Court on an important  
21 Federal question.

22 But I -- I go back to the standing question.  
23 We do think that there is standing for both of these  
24 people and, as Justice White has said, only one of them  
25 needs to have the standing in order to be properly in



1 this Court.

2           The second suggestion of the Solicitor General  
3 is that the decision of the state court lacks finality  
4 to permit this Court to review. In that -- as to that,  
5 we believe that that represents a misconception as to  
6 what was decided below and what remains to be decided  
7 now. The Solicitor General says there remains to be  
8 cited the -- whether the leases that Petitioners have  
9 are void.

10           Now, that was not an issue that was presented  
11 to the court below. Respondents, in bringing their  
12 suit, never asked for any kind of a determination as to  
13 the voidability of these leases. It is not a decision  
14 -- it is not an issue that should come up before the  
15 court below on remand. When the -- when the Arizona  
16 Supreme Court held in Respondents' favor, it gave them  
17 everything they asked for, a declaratory judgment that  
18 the royalty provision was invalid, and said they could  
19 have an injunction against further leases.

20           Now, on remand, the Superior Court has entered  
21 the injunction holding that the leasing statute -- the  
22 royalty provision is bad. It has not gone further and  
23 enjoined further leases presumably because the state has  
24 said they are not going to issue and they have not  
25 issued any new leases. And the state -- and the court

1 has held up action pending a -- an attempt by all the  
2 parties to work out legislation which would take care of  
3 what the Arizona court has done.

4 And the holders of the -- of the present  
5 leases are continuing to operate the mines. They are  
6 continuing to pay money, to pay the royalties of the 5  
7 percent. And there is an agreement with the state that  
8 if and when the legislature acts pursuant to this  
9 Arizona statute, any new financial arrangements will be  
10 made retroactive to January 1, 1988, which is  
11 essentially the date of the decision below.

12 But no proposal was made to the lower court on  
13 remand that the leases be voided. We, therefore, think  
14 that this is within the exceptions spelled out in Cox  
15 Broadcasting where the Court will hear -- review state  
16 court judgments even though some ministerial or  
17 pre-ordained things need to be -- happen such as you  
18 decided in the Duquesne Light case here a couple of  
19 weeks ago.

20 I turn now to the substantive issues. The  
21 validity of this statute depends upon a proper  
22 interpretation of four Federal statutes which were  
23 passed between 1910 and 1951. The first of these is the  
24 Enabling Act to which I have referred. It does not  
25 include a grant of minerals.

1           We believe that there was no occasion for  
2 Congress to consider whether the dispositional  
3 restrictions that it imposed in 1910 were appropriate  
4 and should be applied to minerals simply because  
5 Congress, in accordance with its practice since 1985,  
6 had not granted any minerals and did not have any  
7 occasion to consider what, if any, kind of procedures  
8 should follow the leasing of minerals.

9           QUESTION: The Enabling Act reserved the  
10 mineral rights.

11           MR. GRIBBON: Reserved the mineral rights, as  
12 did practically all of the enabling acts of the other  
13 states in the previous five or six decades.

14           So, we believe that we have to look elsewhere  
15 to the three other Acts, or principally to the Jones  
16 Act, to determine whether these restrictions -- and I  
17 might note that these restrictions were -- were more  
18 rigorous than those imposed on any of the other states  
19 because prior to 1910, some of the states, and New  
20 Mexico when it was a territory, had behaved in a way  
21 that the Congress thought was irresponsible, either  
22 negligent or possibly fraudulent in disposing of  
23 resources. So, they took it out on New Mexico and  
24 Arizona and imposed these three dispositional  
25 restrictions on them in 1910.

1           We come to 1927, the Jones Act, which was a  
2 landmark change on the part of Federal policy. For the  
3 first time, the Federal Government gave up the mineral  
4 wealth in 12 western states and gave it to each state.  
5 And it provided at that time that, first, the states  
6 could not sell the mineral wealth, but they could lease  
7 them as the individual state legislatures would provide.

8           Now, there was in 1927, unlike 1910, no  
9 concern about states' responsibility. The western  
10 states had grown up. They had achieved maturity. They  
11 had political muscle. It was all a question of how  
12 right it was to transfer this mineral wealth to the  
13 western states because the eastern states already had it  
14 right from the beginning.

15           Our opponents take -- take the position that  
16 four or five words in the granting clause of the Jones  
17 Act, these words being these grants "shall be of the  
18 same effect" as the 1910 Act -- that those words  
19 incorporate by reference all of the dispositional  
20 restrictions in the 1910 Act. We believe that that puts  
21 much too great a load on those four or five words.

22           In the first place, this paragraph, Section A  
23 in which these words appear, was not even in the bill  
24 until after both Houses of Congress had agreed on the  
25 substance of the legislation. It was put in at the



1 suggestion of the Secretary of the Interior who was  
2 concerned that there might be a necessity for patents or  
3 some other procedures, and wanted to have it made clear  
4 that the title would pass ipso facto, so to speak, when  
5 the legislation was passed.

6 Furthermore, this is a granting section. It  
7 isn't a restriction section. The restrictions are in  
8 the next section. And if these words mean what the  
9 court below and Respondents say they mean, there will be  
10 a -- a real conflict with the following section which  
11 does contain restrictions. Those restrictions are that  
12 all of the money that is obtained be used for the  
13 support of the public schools.

14 If "shall be of the same effect" means what  
15 the Respondents say it does, that was already taken care  
16 of because that was provided in the 1910 Act. There was  
17 no need to put it in again.

18 Secondly, Subsection A contains a very  
19 important restriction -- restriction that the minerals  
20 may not be sold by the state. Now, that isn't to the  
21 same effect of the 1910 Act because the 1910 Act and all  
22 of the enabling acts permitted sales under various  
23 conditions. So, this is in direct contrast to the same  
24 effect meaning that the Respondents and the court below  
25 would ask for.

1 Now, in addition, we --

2 QUESTION: Subsection A doesn't -- doesn't  
3 have that, does it? You say Subsection A prevents --  
4 that --

5 MR. GRIBBON: Subsection A has the "shall have  
6 the effect." It is Subsection B --

7 QUESTION: That prevents the sale.

8 MR. GRIBBON: -- which has the restrictions.  
9 A being the granting provision, and B being the  
10 provision of restrictions.

11 Secondly --

12 QUESTION: Could -- could you tell me what  
13 --what your interpretation of the effect of "of the same  
14 effect" is? What -- what does "of the same effect" mean?

15 MR. GRIBBON: I think it is confined entirely  
16 to the passage of title, that the title to these lands,  
17 unlike the title to some other lands, mineral lands, for  
18 example, under the mineral law where you did have to go  
19 through patents, would pass automatically just as the  
20 1910 granted lands did pass automatically.

21 QUESTION: I see.

22 MR. GRIBBON: Now, we believe that the -- the  
23 proponents of the decision below also err in giving --

24 QUESTION: Excuse me. Then, in other words,  
25 it's just a redundancy because the last half of the

1 clause says that, " and titles to such numbered minerals  
2 shall vest in the states at the time and in the manner."

3 MR. GRIBBON: It may be a redundancy. The  
4 Secretary of Interior put in the entire Section A. And  
5 his only concern, as near as could be (inaudible), had  
6 to do with the passage of title.

7 QUESTION: Whether you need a patent.

8 MR. GRIBBON: It's entirely possible he might  
9 have done it in two sentences instead of one, which  
10 would have been a more careful way. But this was not  
11 legislation. This was -- it -- it was his -- his  
12 reasoning as to why this ought to go in. But there was  
13 no suggestion by him or anybody else that those words  
14 would carry with it an incorporation by reference not  
15 only of the restrictions in Arizona-New Mexico, but all  
16 other 12 states.

17 QUESTION: Thank you.

18 MR. GRIBBON: The -- the Respondents also give  
19 insufficient meaning to this specific grant to the  
20 states to lease the minerals. They say that all that it  
21 means is that the states will establish leasing forms  
22 and procedures, sort of a ministerial thing.

23 We submit that that was unnecessary. Leases  
24 were provided for in the 1910 Act. There was no  
25 specific reference to the state governing leasing forms

1 or doing anything. So, it must have been assumed, quite  
2 naturally, that the legislature would have, through its  
3 sovereign powers, the inherent power to take care of  
4 these minor details which, the Respondents say, is all  
5 that is covered by the specific leasing authority  
6 granted in the 1927 Act.

7           In summary, we submit that it is the Jones Act  
8 that is the principal act that should be looked to. And  
9 that's an Act which gets very little attention in the  
10 brief of Respondents. But it was the Act wherein the  
11 Congress finally showed confidence in the states and a  
12 willingness to give them very substantial authority over  
13 leasing and showed no disposition to limit that  
14 authority by reiterating anything about the  
15 dispositional restrictions that had been imposed many  
16 years later under quite different circumstances.

17           QUESTION: Did they ever remove the  
18 restrictions on non-mineral lands?

19           MR. GRIBBON: They removed them on -- on  
20 grazing -- grazing lands and on mineral, both types of  
21 mineral lands, but they have not been removed on the  
22 others.

23           QUESTION: That is sort of strange, isn't it,  
24 if they have confidence in the states about minerals  
25 which are so much more valuable?



1 MR. GRIBBON: Well, it may have been that the  
2 other was working all right. The -- the land law  
3 legislation, as you can see here, has not been entirely  
4 logical on a year-to-year basis. It goes in fits and  
5 starts. And all of these acts aren't congruent. It  
6 just may be that nobody from Arizona or any other state  
7 ever came and said these are burdensome. They were able  
8 to live with them.

9 They didn't need to do that on the minerals  
10 because Congress from the beginning recognized, largely  
11 on its own experience, that the minerals did deserve a  
12 certain kind of treatment, a different kind of treatment.

13 The next act that one would look to is the  
14 1936 amendment to the Enabling Act. The Jones Act was  
15 not an amendment to the Enabling Act. It was a  
16 freestanding Act.

17 In 1936 it was brought to the attention of  
18 Congress, Justice White, that the leasing of minerals,  
19 so-called hidden minerals, on lands which were not known  
20 to be mineral at the time of the grant, but were later  
21 discovered in minerals, was not covered by any kind of  
22 legislation. The Jones Act didn't cover them. The  
23 Jones Act was limited to the numbered mineral sections.  
24 And nothing covered the states of -- the -- Arizona's  
25 authority to lease these hidden minerals.

1 Now, Arizona and New Mexico had, ever since  
2 the time of the 1910 Act, been leasing these hidden  
3 minerals, and they had been doing it without appraisal,  
4 without advertising, without auction, basically in  
5 accordance with established Federal procedures.

6 QUESTION: These were the non-school land  
7 sections?

8 MR. GRIBBON: Yes. These were not covered by  
9 the Jones Act and were held by decisions of this Court  
10 to have passed under the 1910 Act.

11 QUESTION: Mr. Gribbon, may I ask? Did -- the  
12 Arizona Supreme Court, I think, said that both the  
13 Enabling Act and the state constitution were violated by  
14 -- by the -- the statute.

15 MR. GRIBBON: Yes, Your Honor.

16 QUESTION: And I noticed the states abandoned  
17 the statute, but it supports the brief for the  
18 Respondents and argues that that's a independent state  
19 ground.

20 MR. GRIBBON: Your Honor, I don't understand  
21 that either the Solicitor General or the Attorney  
22 General of Arizona, who has come in as amicus, argues  
23 that there is an existing, independent and adequate  
24 state ground to support this decision.

25 What they suggest rather is that the Arizona

1 constitution has been interpreted in a subsequent case  
2 down in Arizona, Deer Valley, which doesn't involve  
3 minerals and doesn't involve leasing, as going further  
4 than the enabling acts. Now, that is somewhat contrary  
5 to the perceived learning which was the Enabling Act  
6 which was -- which required the constitution provisions  
7 meant the same thing.

8 But what they're saying is not that this  
9 decision has an adequate state ground, but maybe  
10 sometime in the future, if the Arizona court ever gets  
11 around to this, they might apply in the mineral leasing  
12 situation the kind of reasoning they did in Deer  
13 Valley. But that is sheer speculation as to what they  
14 are going to apply.

15 QUESTION: Well, in any event, do you think  
16 they've satisfied the requirement of Michigan and Long  
17 and --

18 MR. GRIBBON: No, they have not, and I don't  
19 think -- I'm sure the Solicitor General even does not  
20 assert that they have done that. And the reason for it  
21 I think is plain. There is no statement in here. The  
22 court -- the Arizona court reasoned entirely from the  
23 legislative history and the Federal legislation as to  
24 what the meaning of both the Enabling Acts and the  
25 Arizona constitution was.

1 I mention it with respect to the 1936 Act.  
2 New Mexico's right to lease minerals in such manner as  
3 its legislature has seen fit had been confirmed by the  
4 Congress way back in 1928 at about the time Congress was  
5 passing the Jones Act. A case had been decided in -- in  
6 the New Mexico Supreme Court, Neel v. Barker, which said  
7 that the dispositional restrictions of the 1910 Act did  
8 not affect mineral leasing on the hidden lands.

9 And the Congress of 1928 passed a resolution  
10 saying, yes, that's all right. We'll send it back and  
11 let New Mexico decide by a plebiscite whether it wants  
12 to have its legislature do that. So, New Mexico had  
13 been freed since 1928 from any of these restrictions in  
14 the -- in the Mineral Leasing Act -- in so -- in the  
15 1910 Act insofar as mineral leasing was concerned. The  
16 1936 Act was directed only at freeing Arizona in the  
17 same way -- not in the same way, but to the same extent  
18 that Arizona had already been freed.

19 QUESTION: Mr. Gribbon, you -- you -- you  
20 assert, if I -- if I understand your analysis correctly,  
21 a dual regime for mineral lands then in Arizona.

22 MR. GRIBBON: (Inaudible).

23 QUESTION: Some, those that contained unknown  
24 minerals in 1910, are -- continue to be subject to the  
25 regime of the 1910 Act, and the other ones that were



1 granted in 1927 are not.

2 MR. GRIBBON: That is right, Your Honor.

3 Now, the Arizona legislature has accommodated  
4 those two rather modest differences by providing in its  
5 statute that -- that all Federal lands, however they  
6 came about, shall be leased in a way that would take  
7 care of the requirements of the Jones Act and the  
8 Enabling Act. They cannot be sold, and the leases are  
9 limited to 20 years. But there are those two regimes.

10 I will mention finally the 1951 Act on which  
11 the Respondents rely importantly. The important thing  
12 about that Act is that it did not impose any  
13 dispositional restrictions either on hard rock minerals,  
14 which are what we're talking about here, or on  
15 hydrocarbon minerals which, for the first time, were set  
16 up as a separate regime. And, therefore, it is improper  
17 to make any kind of an inference from that act of  
18 legislation.

19 QUESTION: Thank you, Mr. Gribbon.

20 (A lunch recess was taken.)

21 QUESTION: Mr. Baron, we'll hear from you now.

22 ORAL ARGUMENT OF DAVID S. BARON

23 ON BEHALF OF THE RESPONDENTS

24 MR. BARON: Mr. Chief Justice, and may it  
25 please the Court.

1           Before I address the merits, I'd like to turn  
2 to a jurisdictional issue that was raised before the  
3 recess, namely, the presence of an independent and  
4 adequate state law grounds for the decision below.

5           As was noted, the Arizona Supreme Court based  
6 its decision not only on the Federal Enabling Act, but  
7 also on the Arizona constitution. And while we realize  
8 that under Michigan v. Long, there is a presumption that  
9 the Federal ground is controlling, presumptions can be  
10 rebutted. And there are several factors that we think  
11 do rebut that presumption in this case.

12           First of all, the decision below by the  
13 Arizona Supreme Court refers to the Arizona constitution  
14 on at least nine separate occasions. The remand order  
15 states specifically that the trial court shall enter a  
16 judgment declaring the statute "unconstitutional and  
17 invalid."

18           And we then have the subsequent decision that  
19 was mentioned by Mr. Gribbon, the Deer Valley decision,  
20 by the Arizona Supreme Court where that court declared  
21 that in its view the Arizona constitution imposes trust  
22 restrictions independent of and more stringent than  
23 those in the Enabling Act.

24           And finally, we have the amicus brief now from  
25 the State of Arizona itself taking the position that

1 they believe -- the State of Arizona now believes that  
2 the Arizona constitution prohibits this royalty statute  
3 and -- as an independent basis, and that any decision by  
4 this Court under the Enabling Act on this statute would,  
5 in the state's words, be "purely academic."

6 QUESTION: Well, sometimes when something has  
7 happened between the time we've granted or noted  
8 Jurisdiction that indicates the decision might be  
9 different, we vacate and remand for reconsideration in  
10 light of some -- that subsequent event. And you think  
11 the subsequent event is the decision in another case?

12 MR. BARON: Well, Your Honor, in Michigan v.  
13 Long, the Court --

14 QUESTION: Is that -- how about my question?  
15 Is there something that has happened since we -- since  
16 the decision in this case that indicates that there's a  
17 state ground?

18 MR. BARON: Yes, Your Honor. We feel --

19 QUESTION: What is it?

20 MR. BARON: The Supreme Court -- Arizona  
21 Supreme Court decision in the Deer Valley case where --

22 QUESTION: Why shouldn't we remand for  
23 reconsideration in light of that decision?

24 MR. BARON: Well, Your Honor, if -- if that  
25 decision -- that is certainly one option, but if that

1 decision does, indeed, indicate, as we think it does,  
2 that there's an independent and adequate state law  
3 grounds, then under this Court's precedent, this Court  
4 would not have jurisdiction to -- to address the issue  
5 at all. And, therefore --

6 QUESTION: Excuse me. When you say that  
7 --that there is an independent state law ground, that  
8 isn't our law. It -- our law is that the -- the  
9 decision below must have been rested upon an independent  
10 state law ground --

11 QUESTION: Right.

12 QUESTION: -- not that an independent one  
13 existed in the abstract which might have been used but  
14 was not. Do you have any case of ours that -- that even  
15 suggests that?

16 MR. BARON: No, Your Honor. There have been  
17 no cases since Michigan v. Long that we have been able  
18 to find suggesting this --

19 QUESTION: Or before, or in Michigan v. Long.

20 MR. BARON: Well, Your Honor, in Michigan v.  
21 Long, this Court did indicate that the determination of  
22 whether an independent ground existed was generally  
23 going to be presumed against such a finding, but it left  
24 open the possibility specifically that the Court might  
25 find in specific circumstances that it would be more



1 prudent and -- and wise to -- to defer to the state  
2 ground.

3 QUESTION: Yes, but the inquiry was always  
4 whether this state court rested its decision on the  
5 ground, not whether it might have --

6 MR. BARON: That's --

7 QUESTION: -- not whether such a ground was  
8 available, but whether it was used. Isn't that --

9 MR. BARON: That's -- that's true, Your Honor,  
10 and I guess what --

11 QUESTION: And was it used here? Is there any  
12 -- any suggestion at all that it was used here, any  
13 basis for thinking it was used by the lower court here,  
14 by the Arizona Supreme Court, in this case?

15 MR. BARON: Well, as I mentioned, Your Honor,  
16 the Arizona constitution was mentioned nine times in the  
17 opinion, and this court relied on both state law  
18 precedent as well as Federal law precedent.

19 QUESTION: But, Mr. Baron, it seemed to me the  
20 -- almost 98 percent of the discussion in the opinion of  
21 Justice Feldman was of the Enabling Act and the other  
22 statutes, and there's just almost no discussion of the  
23 Arizona constitution.

24 MR. BARON: That's true, Your Honor. And I  
25 guess what we're arguing for is something of a

1 modification or -- or a -- or a clarification of  
2 Michigan v. Long to suggest that subsequent developments  
3 prior to the time this Court decides a case might make  
4 clear to the Court that the jurisprudence of the state  
5 has established an independent state ground.

6 QUESTION: Well, that would be a change, I  
7 think as Justice Scalia suggests. It would be a change  
8 from saying did the opinion in this case rest on an  
9 adequate state ground to could it have rested on an  
10 independent state ground.

11 MR. BARON: Well, Your Honor, I -- I suppose  
12 you could characterize it as a change or simply as a  
13 --as a clarification of what Michigan v. Long meant when  
14 it said that other factors might be considered.

15 QUESTION: Do you care whether you prevail on  
16 the Federal ground or the state ground?

17 MR. BARON: Well, Your Honor, I suppose we  
18 would prefer to prevail on both, but --

19 QUESTION: Yes, you would like the benefit of  
20 this decision below without having it reviewed here.

21 MR. BARON: Well, that's -- that's certainly  
22 true.

23 QUESTION: That's like an independent state  
24 ground is I suppose.

25 MR. BARON: Yes, that's certainly --

1 QUESTION: Except that it wasn't used in this  
2 case.

3 QUESTION: Well, Mr. Baron, suppose we -- we  
4 disagreed with you and thought that Michigan and Long  
5 had not been satisfied here and that when it hadn't  
6 decided the Federal grounds. And then we sent it back  
7 under our usual form of remand for further proceedings  
8 not inconsistent with our opinion.

9 Would the state court be free then to say, all  
10 right, if we can't have -- we're not going to look at  
11 the state ground and say that we'll reinstate our  
12 judgment on the basis of the holding of  
13 unconstitutionality under the state constitution? Could  
14 that be done?

15 MR. BARON: Your Honor, if I understand the  
16 question, if -- if this Court dismissed and remanded for  
17 further consideration --

18 QUESTION: Yes.

19 MR. BARON: -- or vacated and remanded for  
20 further consideration, I -- I believe the state would be  
21 perfectly free to make very clear that it did rely on an  
22 independent and adequate state ground in this case.

23 QUESTION: Even though we -- we here found  
24 that we can't say that Michigan and Long have been  
25 satisfied in respect of a holding that it was -- rested

1 on a state law ground.

2 MR. BARON: Well, if the remand from this  
3 Court was broad enough to allow such a finding, then  
4 certainly they could make such a --

5 QUESTION: Well, it doesn't matter what we  
6 say. They have the power to enforce their own  
7 constitution. We couldn't prevent them. The courts have  
8 done that several times, and this Court has taken  
9 Jurisdiction, reversed on the Federal court. The  
10 Opperman case --there are three or four of those cases  
11 where we managed to write advisory opinions by following  
12 this procedure. But that's perfectly within their power.

13 MR. BARON: That's -- we would certainly agree  
14 with that, Your Honor.

15 QUESTION: Sure.

16 MR. BARON: Now, turning to the merits, this  
17 Court 22 years ago unanimously held that under the  
18 Arizona Enabling Act, the schools of Arizona were to  
19 receive the full benefit and the most substantial  
20 support possible from the school land grant to that  
21 state.

22 And the broad exemption that the mines are  
23 asking for here completely flies in the face of those  
24 goals. It would allow the State of Arizona to continue  
25 to sell off school trust minerals at one of the lowest



1 royalty rates in the Nation and to, in some cases,  
2 literally give them away, and that is -- cannot be what  
3 Congress had in mind when it granted these lands in  
4 express trust to the state for the sole and -- and  
5 exclusive benefit of the public schools.

6           And just to illustrate how this statute  
7 depletes the trust, I'd like to cite an example from the  
8 record -- and -- and this is undisputed. Just south of  
9 Tucson, one of the Petitioners in this case, Asarco,  
10 Incorporated, operates a mine, part of which is on state  
11 school trust land and part of which is on the Tohono  
12 O'Odham Indian Reservation.

13           During one 10-year period recently in the  
14 1970s on the state side of that lease, the state paid  
15 the flat 5 percent royalty on millions of dollars' worth  
16 of minerals they took out of that land. But on the  
17 Indian side, during the same 10-year period, Asarco paid  
18 royalties ranging from 6 to 14 percent for minerals.

19           And beyond that, during one month in 1983,  
20 Asarco paid no royalties whatsoever on \$2 million worth  
21 of trust minerals taken from the school lease because  
22 the net value of the minerals in that month was zero,  
23 and the royalties are calculated as a percentage of net  
24 value.

25           Now, this is just the kind of thing that

1 Congress was trying to prevent when it adopted all of  
2 these trust restrictions.

3 QUESTION: Excuse me. Even -- even without  
4 the specific restrictions contained, wouldn't --  
5 wouldn't there be some action if it were shown that even  
6 though you don't have to establish the value beforehand,  
7 you are not dealing responsibly with these lands?

8 I mean, even -- even under -- even under  
9 Petitioners' theory, it's acknowledged that -- that  
10 these mineral rights have to be used for the benefit of  
11 the schools. Isn't that right?

12 MR. BARON: (Inaudible).

13 QUESTION: So, wouldn't you -- wouldn't you  
14 have a cause of action of some sort against outrageous  
15 giving away of the lands without giving the money to  
16 schools at all?

17 MR. BARON: That's certainly our position,  
18 Your Honor, and it's our position that there are really  
19 two kinds of restrictions in this Enabling Act. There  
20 are the specific requirements for an appraisal in each  
21 case, and there is also the basic fiduciary duties that  
22 the state has as a trustee.

23 And here we have argued -- and we believe the  
24 court below held -- the state has violated both of those  
25 kinds of duties. And we believe that this statute is on

1 its face a violation of both of those kinds of duties  
2 because it limits the ability of the state as a trustee  
3 to obtain the optimal return, and it forces the state to  
4 give away these assets. It's not simply a question of  
5 every once in a while there's a fluke and -- and the  
6 state incorrectly manages the lands. The statute forces  
7 these results.

8 NCW --

9 QUESTION: Does the statute set the royalty  
10 percentage?

11 MR. BARON: Yes. It is flat 5 percent --

12 QUESTION: Five percent.

13 MR. BARON: -- for all leases. And it's the  
14 same regardless of whether it's gold or sandstone or  
15 --or any other mineral or wherever it is in the state.

16 QUESTION: And when did that become a part of  
17 the law?

18 MR. BARON: That was enacted in 1941, Your  
19 Honor.

20 QUESTION: Nineteen forty-one.

21 MR. BARON: Yes.

22 The first mineral royalty statute --

23 QUESTION: It's not clear to me how these  
24 subsequent statutes bear upon the interpretation of the  
25 1926 Act in any event.

1 MR. BARON: Your Honor, it's our position that  
2 we have to read the Arizona Enabling Act as it reads  
3 today. And the most recent amendment to the Arizona --

4 QUESTION: Well, correct me if I'm wrong. I  
5 assume that if the Federal Government grants a certain  
6 ownership and prerogative with respect to its lands, it  
7 can't later make it more restrictive. Or am I in error?

8 You're not saying that the subsequent statutes  
9 made more restrictive the terms on which the states held  
10 the lands, are you?

11 MR. BARON: No, no, Your Honor. It's our  
12 position, as we stated in our brief, that these lands  
13 have always been subject to the trust restrictions, and  
14 that --

15 QUESTION: But if that's true, then it seems  
16 to me that we have to focus on the 1926 and the 1910  
17 statutes.

18 MR. BARON: Well, Your Honor, I -- I know of  
19 no principle that says that Congress cannot modify  
20 Federal law to -- to make it more --

21 QUESTION: Well, you've just conceded it can't  
22 make it more restrictive.

23 MR. BARON: Well, if I did, I misspoke.

24 QUESTION: And --

25 MR. BARON: That -- that is certainly not our



1 position.

2 QUESTION: So, you think that if the states --

3 MR. BARON: But I think --

4 QUESTION: -- If the states -- assuming  
5 arguendo, if the states had the authority to enter these  
6 leases in 1926, could the Federal Government pass  
7 legislation depriving the states of that authority in  
8 1941?

9 MR. BARON: I'm not sure, Your Honor, but I  
10 don't think that's what happened here. I think what  
11 happened here is that subsequent congressional  
12 legislation simply clarified and -- and confirmed what  
13 congressional intent was all along. Congress in 1951  
14 made very clear that it felt minerals had all along been  
15 subject to the trust restrictions.

16 QUESTION: Well, I assume we can give that  
17 weight as congressional reading of its early statute,  
18 but it's not binding, is it?

19 MR. BARON: No, but I think in the context of  
20 the 1951 amendment it is pretty significant. In that  
21 amendment, Congress authorized the state to enter into a  
22 variety of leases all in a manner to be made -- to be  
23 determined by the legislature, grazing leases,  
24 agricultural leases, oil and gas leases, and mineral  
25 leases, all in a manner to be determined by the

1 legislature.

2 But critically, it then went on and  
3 specifically exempted only oil and gas leases from the  
4 requirement for an appraisal. No such express exemption  
5 was given for any other kind of leases, including  
6 mineral leases. And the -- the rule of construction, of  
7 course, is that when Congress specifies an exception to  
8 a general rule, other exceptions are not to be implied.  
9 And -- and so -- so, in this event, in the --

10 QUESTION: Well -- well, do you agree that the  
11 most that shows is that Congress interpreted its earlier  
12 statutes as prohibiting these leases? And it's just a  
13 question of whether Congress' interpretation is right.

14 MR. BARON: Well, Your Honor, certainly it  
15 shows that, but I'm not sure that it shows only that  
16 because in 1936 oil and gas leases were treated as a  
17 subset of mineral leases. And, therefore, in order to  
18 exempt oil and gas leases from the appraisal  
19 requirement, Congress had to specifically and  
20 deliberately separate the treatment of those two kinds  
21 of leases. So, I think it says more than simply what  
22 Congress thought all along.

23 Beyond that, what -- what the mines base most  
24 of their argument on in this case is the notion that in  
25 allowing the states to determine the manner of leasing,

1 Arizona was somehow being authorized to -- to have  
2 completely free reign.

3 But this Court in Alamo Land and Cattle  
4 Company -- the Alamo Land and Cattle Company case only  
5 about 12 years ago, applied the true value and appraisal  
6 requirements to grazing leases which, like mineral  
7 leases, are authorized in a manner as to be determined  
8 by the legislature.

9 And, indeed, every other court that has  
10 addressed this question has concluded that congressional  
11 directions to allow the states to determine the method  
12 or manner of leasing is not a waiver of trust  
13 restrictions, but rather an allowance for the state to  
14 set the details of leasing, things like the term and the  
15 method of appraisal and the duration of leases and other  
16 details of which there are many in these leasing  
17 situations.

18 Now, beyond -- beyond the specifics, I think  
19 it's fair to ask, having gone to all of this trouble to  
20 put all of these explicit trust restrictions around  
21 these trust lands so that the schools would get all the  
22 benefit, why would Congress then turn around and exempt  
23 one of the most valuable resources. And the only  
24 explanation the mines have to offer is that mineral  
25 leases are supposedly impossible to appraise.

1 But the simple fact is that this Court ruled  
2 in 1890 that mineral interests were appraisable although  
3 it's somewhat more difficult than other interests. And,  
4 in fact, it used the same language to authorize other  
5 kinds of leases, none of which are claimed to be  
6 difficult to appraise.

7 QUESTION: I thought their explanation was  
8 really quite different; namely, that it was a different  
9 Congress, which your argument doesn't seem to  
10 acknowledge. The Congress -- the 1951 Congress was not  
11 the 1926 Congress which was not the 1910 Congress. And  
12 each of them feels quite differently about whether the  
13 states ought to have these mineral rights and what the  
14 restrictions ought to be. I mean, you speak of Congress  
15 as though it's one continuing body there. It isn't.  
16 It's a different Congress, different people, different  
17 views about what the states ought to have.

18 MR. BARON: Your Honor, I'm not sure that  
19 that's the mines' argument. But, in any event, we think  
20 the legislative history throughout is pretty conclusive  
21 that Congress always intended these lands to be used for  
22 the schools and that -- and that the grant, for example,  
23 under the Jones Act was a grant confirming and by its  
24 own terms extending the prior grants. And the  
25 legislative history talks repeatedly about desiring to



1 effectuate the purposes of the original grants. So --

2 QUESTION: But the mines don't argue that the  
3 proceeds of these grants shouldn't be used for the  
4 schools. It's just a question of a leasing procedure.

5 MR. BARON: That's true, Your Honor. But if  
6 you -- if you adopt the mines' view, then it's okay for  
7 the state to give these -- these assets away on  
8 occasion. And that is inconsistent not only with the  
9 specific appraisal requirement, but also with the basic  
10 trust duty that the state has as a trustee to optimize  
11 revenue and to prevent the loss of trust assets.

12 QUESTION: Well, do you understand the  
13 Petitioners to argue there is no such duty as the one to  
14 which you -- you last referred to?

15 MR. BARON: No, Your Honor. In fact, in their  
16 reply brief now they concede that they have such a duty.  
17 Their only response on that question is that there must  
18 be some sort of a finding below in that kind of case  
19 before you can find a breach of trust. But the cases  
20 are quite numerous in which courts have found these  
21 kinds of statutory limits on trust returns to be  
22 facially a breach of trust because they limit the  
23 ability of the trustee to maximize revenues.

24 And, indeed, no other state has a  
25 non-negotiable, fixed royalty rate. And certainly no

1 private trustee would set a cap on what he or she could  
2 collect in interest on trust investments. That is not  
3 consistent in any way with basic trust responsibilities.

4 In conclusion, as I mentioned before, to say  
5 this statute is allowable is to say that the State of  
6 Arizona can literally give away trust minerals. There  
7 is no question but that is what has happened in this  
8 case. The statutory formula requires the state to give  
9 away minerals where the net value or the costs of  
10 production exceed the value of the minerals. And that  
11 cannot be what Congress had in mind when it provided  
12 these lands for the purpose of benefiting the schools of  
13 Arizona.

14 QUESTION: Thank you, Mr. Baron.

15 Mr. Wright, we'll hear now from you.

16 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

17 AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

18 MR. WRIGHT: Mr. Chief Justice, and may it  
19 please the Court.

20 In our view, all that this Court should decide  
21 is that it lacks jurisdiction under 28 U.S.C. 1257  
22 because there has been no final judgment here.

23 The Arizona Supreme Court remanded this case  
24 to the Superior Court with instructions, which are  
25 reprinted at page 29 of the appendix to the petition.

1 And they state: "It is not possible" on this record --  
2 "It is not possible to tell on this record just what  
3 further relief is appropriate. The trial court is  
4 instructed to hear arguments and, if appropriate, take  
5 evidence on that question and to grant such relief as  
6 may be appropriate and consistent with the principles  
7 announced in this decision."

8 In these circumstances, it would drain Section  
9 1257's finality rule of all meaning to hold that there  
10 has been a final judgment.

11 QUESTION: Well, one can argue that our cases  
12 long ago have drained it of most of its meaning I think.

13 (Laughter.)

14 MR. WRIGHT: This -- this Court has held,  
15 though, that it -- it does have meaning, that -- and the  
16 only possible exception that applies here is that the  
17 proceedings to be conducted on remand are merely  
18 ministerial. However, it is not the case that they are  
19 merely ministerial here. There are very serious  
20 questions to be decided on remand.

21 QUESTION: (Inaudible).

22 QUESTION: How different is this is, Mr.  
23 Wright, from the Duquesne case where I think, in effect,  
24 we said the Pennsylvania Supreme Court decided finally  
25 it wasn't going to change its mind on a question of

1 Federal law? Can't you say the same thing about the  
2 Supreme Court of Arizona here? They're not going to  
3 change their mind about the fact that the Enabling Act  
4 makes the state statute unconstitutional.

5 MR. WRIGHT: What the Court said in Duquesne,  
6 as I understood it, was that -- that proceedings on  
7 remand were simply for the public utility commission to  
8 apply a mathematical formula and -- in determining what  
9 relief was appropriate. Here it's very different.  
10 There is a very live issue as to whether Asarco and the  
11 other mining companies' leases are void.

12 And -- and we expect that there's going to be  
13 significant litigation on remand on that issue which is  
14 an issue of Federal law because the Enabling Act says in  
15 Section -- in paragraph 10 of Section 28 that leases are  
16 void unless there has been substantial conformity with  
17 -- with the terms of this Act. And -- and that is what  
18 is to be decided on remand.

19 Now, Asarco's sole argument has been that this  
20 is final because the plaintiffs haven't sought to void  
21 the leases. Well, that is wrong. And I'd like to  
22 devote a couple of minutes to that point.

23 QUESTION: The -- the Respondents don't join  
24 you in this argument, do they?

25 MR. WRIGHT: Respondents agree that the



1 mineral leases are void, and they will seek to void  
2 them. Respondents are a little bit uncomfortable with  
3 this argument because they believe it is so clear that  
4 the mining companies' leases are void that they -- that  
5 they don't think that the litigation on remand will be  
6 as substantial as we think it may be. But -- but they --

7 QUESTION: Then the -- your answer to my  
8 question is, no, they do not join you in this argument.

9 MR. WRIGHT: Yes, that is correct for a  
10 totally different reason than the mining companies  
11 believe, I may add. They're both taking extreme  
12 positions: one, that the plaintiffs haven't asked to  
13 void the leases; and the other, that the leases are so  
14 clearly void that it won't take much on remand to hold  
15 that.

16 Now, obviously, they can't --

17 QUESTION: Of course, you -- you may lose on  
18 this -- on this --

19 MR. WRIGHT: Excuse me?

20 QUESTION: -- opposition and you're going to  
21 cover the merits anyway.

22 MR. WRIGHT: I intend to get to the merits,  
23 Justice Blackmun.

24 But I do want to state very quickly that in  
25 the notice to the defendant class, point A under the

1 possible consequences of a judgment in favor of the  
2 plaintiffs is current state mineral leases might be  
3 invalidated.

4 And I would also like to note that in Asarco's  
5 motion to intervene, they said that plaintiffs seek to  
6 have the Arizona mining statute declared  
7 unconstitutional, thereby invalidating all existing  
8 mineral lease agreements. So, it has long been  
9 understood that the plaintiffs seek to have these  
10 --these leases declared void. And there -- there can  
11 really be no argument on that point.

12 And, as I've said, as long as there is a  
13 dispute on this point, we don't think it can be said, as  
14 in Duquesne, that the proceedings to be conducted on  
15 remand are merely ministerial.

16 Turning then to the merits, I think it would  
17 be useful to look at the plain language of the statute,  
18 something that hasn't been done yet. The key paragraph  
19 is paragraph 3 of Section 28 of the Enabling Act which  
20 says -- this is on page 50A of the appendix to the  
21 petition. It says that the leasing of any of said lands  
22 in such manner as the legislature of the State of  
23 Arizona may prescribe for mineral purposes is  
24 permissible. And then right after that, it says the  
25 leasing of any of said lands --

1 QUESTION: Whereabouts on page 50A are you --

2 MR. WRIGHT: If you go down to point 2 --

3 QUESTION: Okay.

4 MR. WRIGHT: -- about two-thirds of the way  
5 down, point 2 says that the leasing of lands for mineral  
6 purposes, other than oil and gas, is permitted in such  
7 manner as the legislature of the State of Arizona may  
8 prescribe.

9 Now, number 3, right under that, the next  
10 clause of the same sentence says, "The leasing of any of  
11 said lands, whether or not also leased for other  
12 purposes, for the exploration, development and  
13 production of oil, gas and other hydrocarbon  
14 substances," et cetera -- I would like to skip down a  
15 little -- "may be made in any manner with or without  
16 advertisement, bidding or appraisement and under such  
17 terms and provisions as the legislature of the State of  
18 Arizona may prescribe."

19 Looking at 2 and 3 together, we don't think it  
20 could be more clear that oil and gas leases may be made  
21 without appraisement, but other mineral leases, such as  
22 those at issue in this case, may not be made without  
23 appraisement.

24 And I would like to note that this 1951 -- the  
25 1951 Act totally revised all of this sentence. It

1 didn't just tack on part 3. It -- it revised the whole  
2 thing. Hydrocarbon and non-hydrocarbon mineral leases  
3 had previously been -- been lumped together.

4 QUESTION: Do you think, Mr. Wright, in  
5 following up Justice Kennedy's question, that the  
6 government can come along many years after the Enabling  
7 Act and impose more arduous conditions on the state's  
8 alienation than it did in the Enabling Act?

9 MR. WRIGHT: Well, we -- we don't think it  
10 can, but we agree, first, that it hasn't and that  
11 Federal law makes that clear.

12 And it is also perfectly clear in this case  
13 that -- that the Jones Act can't mean what -- what  
14 Asarco says it means. What they draw from the Jones Act  
15 is that these lands aren't in the school trust. As we  
16 note in the last paragraph of our -- of our brief, the  
17 Arizona constitution makes absolutely clear that all  
18 lands, no matter how they have been given to the state,  
19 are subject to the school trust. So, it's absolutely  
20 clear that these lands are part of the school trust,  
21 whether the Jones Act means what they say or not. And  
22 we disagree that Congress ever meant to do away with all  
23 these restrictions in the Jones Act as well.

24 QUESTION: I don't -- I don't understand they  
25 are saying that these lands are not subject to the



1 school trust. The Jones Act itself makes them subject  
2 to the school trust. You don't have to go to the state  
3 constitution.

4 MR. WRIGHT: I'm sorry. And the state  
5 constitution also makes clear that they are -- that they  
6 are subject to all the restrictions in -- in the -- in  
7 the school trust.

8 QUESTION: Well, that's very interesting, but  
9 I don't see what that has to do with whether the Federal  
10 Government has made them subject to those -- to those  
11 restrictions.

12 MR. WRIGHT: Well, if in this case, the Court  
13 agreed on that Jones Act point, then the conclusion on  
14 Federal law is that the Enabling Act is -- is really  
15 fairly irrelevant to this -- to this case. But it would  
16 be perfectly clear -- perfectly clear -- under Arizona  
17 law that -- that all of the restrictions which are  
18 reprinted in the Arizona constitution apply, and -- and  
19 that this Act -- and that the opinion below really has  
20 no meaning except under state law. And we think that  
21 the -- the proper conclusion then would be to dismiss  
22 this case as improvidently granted.

23 QUESTION: But leave it -- leave the opinion  
24 in -- intact?

25 MR. WRIGHT: We think you have to leave the

1 opinion intact for two reasons because we think this  
2 Court lacks jurisdiction for two reasons.

3 QUESTION: Well, I know, but suppose we  
4 disagree with you.

5 MR. WRIGHT: If you believe that the Court has  
6 jurisdiction, I would nevertheless think that it was  
7 much the better course than dismiss as improvidently  
8 granted.

9 QUESTION: Well, certainly we have the power  
10 to -- we certainly have the power to reverse it --

11 MR. WRIGHT: If you -- yes, if you have  
12 jurisdiction.

13 QUESTION: -- and have the power to vacate it  
14 for some good reason, like there has been some  
15 development in Arizona law that maybe would make this  
16 constitutional decision unnecessary.

17 MR. WRIGHT: Well, if I may just respond to  
18 that briefly. We think that the recent development in  
19 Deer Valley pins us down, but we think it is also quite  
20 clear from the court's decision below which in its  
21 holding mentions the Arizona constitution that -- that  
22 it would reach this result.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
25 Wright.

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The case is submitted.

(Whereupon, at 1:30 o'clock p.m., the case in  
the above-entitled matter was submitted.)

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. 87-1661 - ASARCO INCORPORATED, ET AL., Petitioners V. FRANK KADISH,  
ET UX., ET AL.

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

BY Judy Freilicher  
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