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

CAPTION: OKLAHOMA TAX COMMISSION, Petitioner V.
JAN CRAHAM, ET AL.

CASE NO: 88-266

PLACE: WASHINGTON, D.C.

DATE: February 21, 1989

PAGES: 1 thru 34

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 OKLAHOMA TAX COMMISSION, :

4 Petitioner, :

5 vs. :

No. 88-266

6 JAN GRAHAM, ET AL., :

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

9 Tuesday, February 21, 1989

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 12:59 p.m.

13 APPEARANCES:

14 DAVID ALLEN MILEY, ESQ., Assistant General Counsel,

15 Oklahoma Tax Commission, Oklahoma City, Oklahoma;
16 on behalf of the Petitioner.

17 BCB RABON, ESQ., Hugo, Oklahoma; on behalf of the
18 Respondents.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 88-266, Oklahoma Tax Commission versus Jan Graham.

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

ORAL ARGUMENT OF DAVID ALLEN MILEY, ESQ.

ON BEHALF OF THE PETITIONER

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

Today this Court is asked to decide whether an Indian tribe is answerable in state court for ignoring its obligation to collect and remit taxes to the State of Oklahoma despite this Court's sanction of state laws imposing such obligations.

The Tax Commission brought this action in state district court to enjoin the Chickasaw Nation from operating a motel business until all taxes were collected and remitted to the state in compliance with state tax laws.

The tribe removed this case to the federal court, and that court denied the state's motion to remand on the basis that a suit against an Indian tribe is a federal matter.

1 After assuming jurisdiction, the federal court
2 then dismissed the state's case holding that an Indian
3 tribe cannot be sued without its consent under the
4 Indian sovereignty doctrine.

5 In affirming these decisions, the Tenth
6 Circuit ruled that an Indian tribe enjoys absolute
7 sovereign immunity within its territory and thereby
8 foreclosed the state's right to have its valid taxes
9 collected.

10 The first question we ask this Court to
11 consider is whether removal jurisdiction exists in this
12 case. The state submits that federal removal
13 jurisdiction does not exist because the state's lawsuit
14 is not based on federal law to any extent, but only
15 alleges violations of state law to which the Tax
16 Commission requests relief provided by state law.

17 The respondent urges that its status as an
18 Indian tribe creates a federal cause of action that is
19 properly removable. However, this Court has held in the
20 Mescalero Apache Tribe opinion in 1973 that the federal
21 government does not have exclusive jurisdiction over an
22 Indian tribe for all purposes and that the encouragement
23 for tribal economic development under the Indian
24 Reorganization Act does not establish a tribal business
25 as an arm of the government and, therefore, off

1 reservation activity is within the reach of state law.

2 But the heart of the matter is that the Tax
3 Commission's complaint properly pleads a cause of action
4 to collect state taxes which is based exclusively on
5 state law, as it must be. The tribe may raise
6 substantial federal questions in defense of the state's
7 claim, but federal questions in a defensive argument
8 cannot serve as a basis for federal removal
9 jurisdiction.

10 Under the well pleaded complaint rule, a
11 federal statute or a substantial question of federal law
12 must be the basis of the plaintiff's claim rather than a
13 basis of the defendant's defense. And, therefore, this
14 case should be remanded to the state district court.

15 But beyond the issue of removal jurisdiction,
16 this case concerns whether the Indian sovereignty
17 doctrine bars the state's lawsuit.

18 QUESTION: I don't think -- If this Court were
19 to conclude that the case had been improperly removed
20 from the state trial court to the Federal District
21 Court, we wouldn't then get to the -- the question of
22 the sovereignty, would we?

23 MR. MILEY: You would not get to that
24 question, and the state would have to decide if that was
25 a proper defense to the state's actions. The state

1 district court would have to determine if that was a
2 valid defense so that once the removal issue is -- is
3 decided in the state's favor, we would not have to
4 determine whether the state's case should be dismissed
5 based on Indian sovereign immunity.

6 QUESTION: Well, the state court might have to
7 make that decision.

8 MR. MILEY: The state court may have to make
9 that decision, but the state court has already made that
10 decision. In other case the state supreme court has
11 ruled in the State ex rel. May versus Seneca-Cayuga
12 Tribe -- the Oklahoma Supreme Court ruled that the
13 Indian sovereignty doctrine does not bar the state's
14 lawsuit.

15 So that if this case was remanded to the state
16 court, the case would be tried on the merits.

17 QUESTION: And the tribe would have a right to
18 appeal again through the state courts and eventually to
19 this court --

20 MR. MILEY: That --

21 QUESTION: -- on that point?

22 MR. MILEY: That is correct. So that the
23 Indian sovereignty doctrine at this point only comes
24 into play if the state loses on the removal jurisdiction
25 argument.

1 And I feel that that is a fairly clear-cut
2 argument in that the Indian tribe is not a part of the
3 federal government. The activity is off-reservation,
4 and I feel that under the Mescalero case and under Moe
5 versus the Confederated Tribes cons -- under the Moe
6 decision and the Colville decision, I believe, whether
7 -- whether the business activity is on or off of a
8 reservation, this court has ruled that the state does
9 have a right to have its -- its valid taxes collected.

10 QUESTION: May I interrupt you? You said that
11 this -- this incident, this business is conducted off
12 the reservation.

13 MR. MILEY: Yes.

14 QUESTION: And the record in the case consists
15 just of the complaint, doesn't it?

16 MR. MILEY: That is correct.

17 QUESTION: And does the complaint allege that
18 the -- that the -- this Murray -- whatever it is --
19 Sulphur, Oklahoma, is -- is or is not within the
20 reservation?

21 I don't think the complaint says one way or
22 another.

23 MR. MILEY: No. It -- it alleges that the
24 state laws were violated by this motel operation and
25 sues the owners and operators of the motel.

1 QUESTION: But what I mean is we cannot tell
2 from the record whether the hotel is on the reservation
3 or off the reservation, can we?

4 MR. MILEY: No, you cannot because -- because
5 that wasn't developed. No evidence was developed in the
6 case.

7 QUESTION: Not -- no allegation even one way
8 or the other? Don't we just have the complaint? That's
9 the whole --

10 MR. MILEY: That alleges that taxes are owed.

11 QUESTION: Yeah.

12 MR. MILEY: Yes.

13 QUESTION: Is there a reservation?

14 MR. MILEY: No, there's no reservations in
15 Oklahoma, so -- I believe that was -- that has been
16 briefed throughout the case because many times it is
17 necessary to --

18 QUESTION: This is one of the assimilated
19 tribes, is it?

20 MR. MILEY: Yes. We contend that is -- that
21 it is -- the tribes in Oklahoma have been assimilated
22 rather than operate under the reservation system.

23 QUESTION: But isn't there any trust property,
24 Indian trust property in Oklahoma?

25 MR. MILEY: Yes. This --

1 QUESTION: well, is this -- Is this -- is this
2 establishment on Indian trust property or not?

3 MR. MILEY: It -- well, it is not on an
4 allotment as defined in Title 18 United States Code
5 1151(c) because the Indian title to this particular
6 piece of land was extinguished, and it did go into
7 non-Indian ownership.

8 This tribe did purchase this particular motel
9 property in 1972 and in 1985 under Title 25 U.S.C.
10 Section 501, which allows transfer of lands acquired by
11 tribes to the United States in trust for the benefit of
12 the tribe, this land was placed in trust with the United
13 States for the tribe's benefit.

14 However, as this Court has ruled in the
15 Mescalero opinion, the transfer in trust does not create
16 Indian country which -- which many of the cases
17 involving the allocation of jurisdiction between the
18 state and a tribe consists of so that -- so that this
19 piece of property, although it is held in trust, that
20 statute did not create any broad exemptions from taxes
21 or regulation that all other businesses throughout the
22 state are subject to.

23 Therefore -- going on with my -- I think I've
24 fairly well said all I can about the -- the removal
25 question which -- which may determine the outcome

1 presently.

2 QUESTION: Let me ask you, counsel, do the
3 tribes have the authority to waive their immunity from
4 suit?

5 MR. MILEY: I believe they do have authority
6 to waive immunity from suit.

7 QUESTION: Have we so held or is there a case
8 that establishes that?

9 MR. MILEY: I am not aware of a case that
10 establishes their ability to waive, but they have not
11 made a waiver in this case.

12 QUESTION: Was there a disposition at that
13 time?

14 QUESTION: Yes.

15 MR. MILEY: However, I don't think the waiver
16 is necessary because their sovereignty does not extend
17 that far, does not extend over the state's lawsuit.

18 QUESTION: Well, I recognize you claim, of
19 course, they don't have immunity anyway, but they claim
20 they do.

21 MR. MILEY: Yes.

22 QUESTION: But you also take a position that
23 it can be waived if they do have it?

24 MR. MILEY: I -- I'm assuming that it can be
25 waived. I didn't -- I believe they do have sovereign

1 immunity over their internal relations such that tribal
2 rites, say, a tribal member or a person wanting to
3 establish tribal membership was denied for some reason.
4 The tribe -- that would be a relationship internal to
5 the tribe, but they would have plenary authority over
6 and a suit against the tribe on that issue may not be
7 maintained because of the tribe's sovereign immunity.

8 However, when the tribe operates a business in
9 the -- it -- it steps outside the reach or that -- their
10 internal -- their sphere of internal jurisdiction or
11 internal relations and steps into the reach of state law
12 so that the tribe may properly allege a cause of action
13 against them to collect taxes when the tribe chooses to
14 enter the business community. So that their sovereign
15 immunity is not a question at that point.

16 It is raised in defense, but I contend that
17 it's not a valid defense.

18 QUESTION: Counsel, does the new Indian Gaming
19 Regulatory Act complete foreclose future efforts by
20 Oklahoma to tax Indian bingo games?

21 MR. MILEY: I believe it does. It completely
22 occupies the field, and the Tenth Circuit has also held
23 that the State of Oklahoma cannot tax Indian bingo
24 operations. And, therefore, we are --

25 QUESTION: But it's not retroactive, I take it?

1 MR. MILEY: That it is not retroactive?

2 QUESTION: This new act? Does it cover your
3 case so that this new act precludes this --

4 MR. MILEY: Well, this is a motel. This is a
5 motel business. A bingo operation was -- was operated
6 there, plus a restaurant. However, the state sales tax
7 applies against the rental of motel rooms. It applies
8 against restaurant sales.

9 QUESTION: The state isn't trying to tax any
10 of the bingo operation?

11 MR. MILEY: No, not at this point. We did
12 allege that taxes were owed on the bingo operation.

13 QUESTION: I thought that was part of the
14 complaint.

15 MR. MILEY: That was part of the complaint and
16 now that is foreclosed, so when we do reach the merits
17 of this case, bingo sales will not be a part of the
18 effort to tax in this case.

19 QUESTION: Why is that?

20 MR. MILEY: Because of the new Indian Gaming
21 Regulatory Act.

22 QUESTION: Does that say that it's
23 retroactive, that it applies retroactively?

24 MR. MILEY: No, it doesn't, but we have not
25 collected any taxes from the bingo operations thus far,

1 and the Tenth Circuit In the Creek Nation -- Oklahoma
2 Tax Commission versus the Creek Nation -- held that we
3 could not tax bingo sales. So --

4 QUESTION: We have a line of decision that
5 says you decide the case on the basis of current law,
6 and that's the current law. But we have another line of
7 decision that says that laws are not normally to be
8 interpreted to be retroactive. And I'm just wondering
9 which of the two lines you were using here.

10 MR. MILEY: Well, I -- I suppose I am
11 interpreting the current law as it stands in that now we
12 will not be able to assert that cause.

13 QUESTION: You're not asserting. That's out
14 of this case?

15 MR. MILEY: Yes. Yes, it is out of this case
16 right now.

17 So, the -- as far as the -- these tribes'
18 sovereign immunity, the state does recognize that the
19 tribe does have a tribal government and can tax its own
20 sales. However, these taxes do not displace or preempt
21 the state taxes, but the state and the tribe can tax the
22 same transactions, but that really goes more to the --
23 the merits of the case, but really the -- what the point
24 is is that the Indian sovereignty doctrine does not bar
25 the state's suit because that doctrine has been adjusted

1 to accommodate the state's legitimate interest in taxing
2 its citizens, and I do not feel that this -- the state's
3 interest -- I feel that the state's interest could be
4 fulfilled by the tribe's business enterprise, and the
5 tribe could fulfill their interests in the economic
6 development of their business because the state tax will
7 not prevent the tribe from sustaining their economic
8 development, just as it does not prevent all other
9 businesses from making a profit in the state.

10 But if the state cannot rely on the decisions
11 of this Court which I feel recognize the state's right
12 to have its taxes collected from its citizens, then the
13 state's right to have this tribe collect the tax and
14 remit it will be lost forever if the Tenth Circuit
15 decision stands because the tribe has expressed that
16 regardless of the merits of the case, they do not intend
17 to collect the state's taxes, and if they can
18 successfully avoid a lawsuit by asserting sovereign
19 immunity in a federal court, they do not feel compelled
20 to -- to abide by state law and collect the state's
21 taxes. So that in that case, whole areas of state
22 taxation will be put beyond the reach of state
23 jurisdiction, and the state taxing system will
24 necessarily be restructured by the Tenth Circuit's
25 opinion in that regard because we will not be --

1 QUESTION: Well, that's not the issue before
2 us, is it, the merits of whether --

3 MR. MILEY: No, the merits -- but the merits
4 are bound up in the -- the -- the sovereign immunity of
5 tribe, and I feel that if the state has its right -- has
6 a right, it must also have the ability to enforce that
7 right against the tribe.

8 QUESTION: I just don't see why we have to
9 address that at all.

10 MR. MILEY: Well, you wouldn't have to address
11 it if -- if the defense of sovereign immunity is not a
12 valid defense, because it would have to go back down for
13 trial at that point. So that to -- to conclude this
14 argument, I -- I think from reading the cases, the trend
15 in this Court has been away from the idea of inherent
16 Indian sovereignty and toward reliance on -- on federal
17 preemption or on infringement of tribal government.

18 So that when state action is not -- is not
19 preempted or infringed, that the -- the requirements
20 under state tax laws may validly be imposed against the
21 tribe and necessarily since taxes are -- are enforced,
22 are complied with voluntarily, but are enforced
23 principally, the only -- the only avenue we have to
24 enforce is -- is the state courts because, of course,
25 the federal government does not enforce state laws. And

1 without that -- without enforcement we -- we see that we
2 cannot -- if we cannot come to court to -- to have our
3 rights vindicated, then the state will have lost its --
4 lost its rights.

5 If the Court doesn't have any further
6 questions.

7 QUESTION: Thank you, Mr. Miley. We'll hear
8 now from you, Mr. Rabon.

9 ORAL ARGUMENT OF BOB RABON
10 ON BEHALF OF RESPONDENTS

11 MR. RABON: Mr. Chief Justice, and may it
12 please the Court:

13 If I might, I would like to respond to a
14 question that Justice Kennedy asked, I believe,
15 regarding whether or not the tribe had waived its
16 sovereign immunity or whether it can waive its sovereign
17 immunity and whether or not this Court has held whether
18 it can.

19 The tribe here has not waived its sovereign
20 immunity from suit. I know of no decision of this Court
21 that holds that a tribe can waive its sovereign immunity
22 absent some act of Congress.

23 QUESTION: Nor that it can't.

24 MR. RABON: Nor that it can't. I think
25 there's -- I don't recall the citation, but I think

1 there's a Ninth Circuit court case that says that they
2 can. I'm not sure about that, and I don't have the
3 citation.

4 QUESTION: Well, some of the cases are ones in
5 which the tribe brings suit, and it's usually a
6 concomitant of bringing suit that waivers implied to
7 that extent, but if we assume that tribal immunity can
8 be waived, then that issue is particularly speculative
9 at this time, and it would seem to me to be more like a
10 defense than an element of the complaint.

11 MR. RABON: Well, we don't view it in that
12 light. We see the -- the fact that a complaint is filed
13 in state court against an Indian tribe asserting the
14 right to apply state tax laws, asserting coercive state
15 civil jurisdiction, impliedly asserting an abrogation of
16 sovereign immunity, we see those as affirmative matters
17 and not necessarily matters that should be raised on --
18 by defense.

19 QUESTION: Well, what if the suit -- there
20 were a state brought against a state and the state
21 wanted to assert 11th Amendment immunity? That's no
22 more than a defense, isn't it? Wouldn't you have to get
23 into federal court or to be removed into federal court?
24 Wouldn't you have to have some other basis under federal
25 law to get there other than the 11th immunity defense?

1 Why Isn't this exactly the same?

2 MR. RABON: I think that the -- I think that
3 it would be incumbent upon the plaintiff in that case to
4 allege -- when you have a state as a party defendant --

5 QUESTION: Right.

6 MR. RABON: -- to allege the authority to --
7 and that's happening in this case.

8 QUESTION: There's no case for that
9 proposition that I know of. Can you cite me one?

10 MR. RABON: No, Your Honor.

11 QUESTION: The general rule surely is under
12 the well pleaded complaint doctrine that the plaintiff
13 sets forth its basis for recovery. And if that involves
14 only state law, then it's not removable.

15 MR. RABON: That is one test.

16 QUESTION: Well, what other test is there?

17 MR. RABON: Well, in the case of Gulley versus
18 First National Bank, the Court, Justice Cardoza, said
19 that there were other criteria, standards for removal of
20 jurisdiction that you look to, such as the probable
21 course of the trial, the real substance of the case. He
22 said that while a suit to enforce a right or rights with
23 origins under -- with their origins in federal law may
24 not necessarily be federal unless it really and
25 substantially involves a dispute or controversy

1 respecting the validity, construction or effect of such
2 law upon which the determination of which the result
3 depends.

4 QUESTION: Well, Gulley was decided in 1936,
5 and in cases as recently as our Caterpillar, which are
6 maybe one or two years old, certainly we've talked and
7 talked only really about the well pleaded complaint
8 doctrine.

9 MR. RABON: That assumes that the state can
10 create a cause of action against an Indian tribe, and we
11 don't think that they can. In Caterpillar --

12 QUESTION: Well, but the -- under the well
13 pleaded complaint doctrine, you don't decide on how good
14 a cause of action a complaint states. That's for the
15 court in which the plaintiff sues to decide.

16 All you decide under the well pleaded
17 complaint doctrine is whether there's something in the
18 complaint that shows you that the plaintiff is relying
19 on federal law to establish his case. And you -- you're
20 -- this just doesn't meet that.

21 You agree that if the well pleaded complaint
22 rule governs here the Tenth Circuit was wrong, don't you?

23 MR. RABON: If the well pleaded complaint rule
24 governs and -- and the well pleaded complaint does not
25 raise or present substantial federal questions, and I

1 believe that's what the Court said in Franchise Tax
2 Board and Caterpillar versus Williams.

3 QUESTION: Well, are you saying that the
4 state's complaint here rested on federal law?

5 MR. RABON: Yes. I say -- I say that -- I say
6 that the state's -- the very right to assert the claims
7 that the state asserts are vested in -- are bottomed in
8 federal law.

9 QUESTION: And what federal law is that?

10 MR. RABON: Federal common law.

11 QUESTION: But what is the substance of the
12 federal law? What does the federal law that you're
13 talking about say?

14 MR. RABON: Well, in Oneida in the --

15 QUESTION: I mean tell me just what the --
16 summarize what the federal law say that you're talking
17 about.

18 MR. RABON: Well, the power of Congress with
19 regard to -- with regard to whether or not an Indian
20 tribe may be sued in the first instance is plenary.

21 QUESTION: Well, the power of Congress to
22 legislate in that area undoubtedly is plenary, but this
23 doesn't mean that whenever -- whenever someone sues an
24 Indian tribe in the state court and simply sets forth a
25 state ground of action, the Oklahoma tax law that says

1 you're liable for sales tax, it -- it becomes removable
2 to federal court.

3 MR. RABON: Well, if the well pleaded
4 complaint rule were to -- were to apply in this
5 particular case, we still submit that the case is
6 completely preempted by -- by federal law and the areas
7 that are raised by -- inherently in the complaint are
8 completely preempted by federal law.

9 We --

10 QUESTION: The problem is --

11 MR. RABON: -- as I recall --

12 QUESTION: The problem is that it -- that it
13 isn't just the areas raised in the complaint that have
14 to be preempted. I mean, the complaint may on its face
15 suggest a particular defense.

16 It has to be the claim that has to be a
17 federal claim. And that's what I find it hard to see in
18 this complaint. How is there a federal claim?

19 The only federal claim you're suggesting is
20 that well, the state claim would not exist if the
21 federal congress chose to eliminate it. But, gee, you
22 could say that about almost any state complaint.
23 Congress could preempt almost any state action in the
24 world.

25 So, in a way, it's a condition to any state

1 cause of action that Congress has chosen not to preempt
2 it. But we don't say that every state cause of action
3 is thereby a federal cause of action because it's only
4 by the good will of Congress that the state action
5 continues to exist.

6 Why is that different from what you're arguing
7 here?

8 MR. RABON: We think that when you name an
9 Indian tribe a federally recognized and protected Indian
10 tribe and a state asserts the right to apply its -- its
11 laws and to -- to assert coercive state civil
12 jurisdiction over it, that the complaint inherently
13 presents federal questions, substantial federal
14 questions.

15 The state cannot -- I've said this before, but
16 we just don't see how the state can create the right in
17 itself to assert these claims. And in the Oneida case,
18 the court said that you look to the underlying right,
19 the underlying right asserted.

20 In this case we believe that the petition
21 inherently asserts the right to limit aspects of the
22 Chickasaw Nation's sovereignty.

23 In National Farmers Insurance Company versus
24 Crow Tribe, the court said in that case where the
25 complaint asserts the right to curtail or limit a

1 tribe's or aspects of a tribe's sovereignty, that it
2 arises out of federal law for purposes of 13 -- Section
3 1331. And, of course, the test for 1331 and the removal
4 test under 1441 are the same.

5 But, in any event, we contend that -- that the
6 complete preemption rule applies here because the -- the
7 -- the Congress has completely dominated and indicated
8 its intent to govern the field of tribal sovereign
9 immunity and state civil jurisdiction. With regard to
10 the area of state civil jurisdiction the Congress has
11 allowed the states to have jurisdiction with great care
12 and selectivity.

13 In 1953 the -- and incidentally, the Congress
14 has shown that it knows how to grant the states civil
15 jurisdiction. In 1953 an example would be Public Law
16 280 and its 1968 amendments.

17 In *Wold Engineering versus Three Tribes* the --
18 this Court described Public Law 280 as a comprehensive
19 and detailed scheme, the primary expression of federal
20 policy and that it preempts incompatible state action.

21 Oklahoma is not a Public Law 280 state.
22 Certainly the attempt by the Oklahoma Tax Commission to
23 assert state court civil jurisdiction over an Indian
24 tribe in that -- in that state is incompatible with
25 Public Law 280.

1 Another example of -- when Congress has
2 allowed civil jurisdiction over Indian tribes is the
3 Termination Acts of 1954, making certain tribes subject
4 to the laws of the states at the time they terminated
5 those tribes' federal status.

6 Congress has also exhibited a -- a -- its
7 domination in the area of whether or not tribal
8 sovereign immunity is abrogated. It has shown that it
9 will only abrogate tribal sovereign immunity, again,
10 with great care and very infrequently.

11 As it relates to the Chickasaw Nation, we know
12 of only three times that it specifically has abrogated
13 the Chickasaw Nation's sovereign immunity, and that
14 would be in the Curtis Act of 1898 -- there was a
15 limited abrogation there -- the Five Tribes Act of 1906,
16 where it allowed certain counterclaims and actions that
17 were -- that were pending where the tribes were -- were
18 plaintiffs.

19 In Public law 93-195 in 1975 when the Choctaw
20 and Chickasaw Nations and the Cherokee Nations were
21 allowed to sue each other to determine the respective
22 ownerships of the Arkansas River beds. as related to the
23 Indian tribes generally, the Indian Civil Rights Act of
24 1968 allows for habeas corpus relief only.

25 Recently in the Indian Gaming Regulatory Act

1 of 1988 the Congress allowed certain actions arising out
2 of the compacts that -- that states and tribes might
3 enter into to be the subject of suits against tribes.

4 Moreover, Congress has reemphasized its
5 commitment to tribal sovereign immunity in the Indian
6 Self-determination Act of 1975 where it said that there
7 was nothing in that act should be construed as
8 affecting, modifying, diminishing, or otherwise
9 impairing the sovereign immunity from suit enjoyed by
10 Indian tribes.

11 Another federal area in which state law is
12 completely displaced is the treaties that the United
13 States government has entered into with the Chickasaw
14 Nation.

15 In 1832 the preamble of the -- of that treaty
16 with the Chickasaw Nation showed that the principal
17 consideration for removal was to escape state laws which
18 oppressed the Chickasaw Nation.

19 In 1834 when the Chickasaw Nation finally did
20 agree to remove, the principal consideration that the
21 tribe advanced in that matter was, again, to escape
22 state laws, and the federal government promised to
23 protect them from inroads from the whites.

24 In 1837 the Choc -- the Chickasaws acquired
25 their present reservation from the Choctaws. That

1 treaty provided that the Chickasaws would hold that
2 reservation on the same terms and conditions as the
3 Choctaws held it. The Choctaws acquired that
4 reservation under the Treaty to Dancing Rabbit Creek in
5 1830, and when they acquired those lands, the United
6 States government promised them that they would not
7 allow any state to pass laws for the tribe or its
8 descendants.

9 Here the state is clearly invoking its laws
10 against the tribe.

11 QUESTION: Counsel, there is no reservation
12 today, is there?

13 MR. RABON: We take the position that the
14 reservation boundaries in Oklahoma have, with the
15 exception of two Indian tribes that we know of, have
16 never been abolished by Congress. But even if they had
17 been, Indian country within areas where the reservation
18 boundaries had been abolished or the reservation has
19 been diminished continues to be under federal and tribal
20 jurisdiction.

21 Finally, Oklahoma's Enabling Act conditioned
22 its becoming a state on its disclaiming any jurisdiction
23 to limit the rights of persons or property pertaining to
24 the Indians of said territory.

25 We think that the decisions of this Court, the

1 active involvement of the Congress, and these treaty
2 rights completely preempt the state law cause of action
3 asserted by the State of Oklahoma here, and that this
4 case was properly removed.

5 Of course, the trial court dismissed this case
6 because there was no affirmative showing of a waiver of
7 the tribe's sovereign immunity, but -- and we think that
8 the court was correct.

9 Perhaps it would have been more correctly
10 decided had it determined what the state court's
11 jurisdiction was for purposes of determining whether or
12 not there was derivative jurisdiction that was necessary
13 at the time this case was removed, prior to the 1986
14 amendment of the removal statute.

15 And had it done that, we feel that it would
16 have determined that the state court did not have
17 jurisdiction and that dismissal, as was mandated by
18 Lambert Run Coal Company versus Baltimore & Ohio
19 Railroad mandated dismissal as opposed to remand. We
20 think that under either theory the result was correct.

21 We -- I would like to take issue with -- with
22 one question that counsel -- one statement that counsel
23 made that -- that it is the tribe's assertion that it
24 does not have to collect any cigarette taxes in this
25 case. You only have to look at the complaint. The

1 complaint seeks -- it makes no distinction between
2 tribal members and non-tribal members.

3 Ard as I understand the decision in Colville
4 and Mee and Chamenuevi that this Court has only held
5 that the tribes are required to collect those taxes as
6 they relate to non-tribal members, certainly my client
7 does not believe that it has a right to -- to defy this
8 Court's decision in that regard.

9 But that's not what the state is asking for
10 here. The state is asking for much broader relief. And
11 as you see, as you read into their -- read their --
12 their briefs and the position that they've taken that no
13 Indian tribe in Oklahoma has any immunities left.

14 QUESTION: Well, presumably the Oklahoma
15 courts are competent to deal with that question, at
16 least initially, and subject to ultimately being
17 reviewed here?

18 MR. RABON: Yes, and if this case was
19 improperly removed and it is remanded back to the state
20 court, the state court would get that opportunity. But
21 we feel that -- that because of the complete preemption
22 doctrine that we had the prerogative and that to remove
23 this case to federal court. Quite frankly we removed
24 this case to federal court because of the case cited by
25 the Tax Commission, which was decided only about three

1 months before this case was pass -- was filed, and that
2 is May ex rel. Oklahoma Tax Commission versus
3 Seneca-Cayuga Tribe, where the Oklahoma Supreme Court
4 held that the state courts had the right to regulate
5 bingo gaming on Indian country in Oklahoma --

6 QUESTION: Presumably the federal statute
7 that's been enacted speaks to that question.

8 MR. RABON: The Court also held in that case
9 that the tribe did not have sovereign immunity from suit
10 in spite of the fact that there was nothing in the
11 record that indicated that the tribe had waived
12 sovereign immunity or that Congress has waived the
13 tribe's sovereign immunity from suit.

14 That case subsequently was sent back to the
15 state court for trial and was enjoined by the Federal
16 District Court in the Northern District of Oklahoma from
17 proceeding further.

18 QUESTION: Was there any appeal from that?

19 MR. RABON: That case, I believe, is on appeal
20 to the Tenth Circuit at this time.

21 QUESTION: Well, I can understand why you
22 wanted to be out of the Oklahoma state courts, but just
23 because you see an opinion of the Oklahoma state courts
24 that you don't like and you figure well, it's useless
25 litigating -- useless litigating here, that doesn't

1 necessarily give you a right to go into federal court.

2 I mean some --

3 MR. RABON: No, I'm not -- I'm not contending
4 that. We continue to take the position that -- that the
5 issues presented when the state asserts the rights that
6 it asserted here against an Indian tribe in state court
7 inherently present substantial federal questions and are
8 completely preempted.

9 QUESTION: It's a federal claim, is that what
10 you're contending --

11 MR. RABON: Yes.

12 QUESTION: -- that it is a federal claim, not
13 the issues presented, but it is a federal claim that --

14 MR. RABON: That the right, the --

15 QUESTION: Oklahoma was asserting a federal
16 claim when it sought to collect state taxes is what
17 you're telling us.

18 MR. RABON: It's asserting a federal claim to
19 to assert its tax laws against the tribe is what I'm
20 saying.

21 QUESTION: I mean, what we said in Onelda,
22 which -- which you quote to us, is that it was a federal
23 claim that was being asserted, and that's what you have
24 to establish here, it seems to me, that the attempt to
25 collect state taxes is a federal claim. That's a pretty

1 hard thing to establish, I think.

2 MR. RABON: In Oneida, I believe the Court
3 found that the complaint only alleged a state law cause
4 of action in ejectment, but that the underlying right to
5 assert that -- that cause of action had its origins in
6 federal law.

7 QUESTION: I think what we said is that enough
8 has been said to indicate that the complaint in this
9 case asserts a present right to possession under federal
10 law. We found a federal claim being asserted there.

11 MR. RABON: Perhaps -- perhaps I've
12 misinterpreted what the Court has said there, but the
13 way I interpreted that decision was that in that case,
14 in spite of the fact that the complaint only alleged a
15 state law cause of action -- and that's what the Court
16 said there, that it only alleged a state law cause of
17 action in ejectment -- the underlying right to assert
18 that was based on federal law.

19 QUESTION: We said elsewhere accepting the
20 premise of the Court of Appeals that the case was
21 essentially a possessory action, we are of the view that
22 the complaint asserted a current right to possession
23 conferred by federal law, wholly independent of state
24 law.

25 QUESTION: Is that the case in which the

1 complaint alleged a violation of the Non-Intercourse
2 Act, the federal statute? That was the basis for --

3 QUESTION: I believe that's correct.

4 QUESTION: So, they're affirmatively relying
5 on a federal statute.

6 MR. RABON: Yes.

7 QUESTION: But you don't have a parallel to
8 that here, I don't think?

9 MR. RABON: No, I don't. Except in that case
10 the Court said that there was no federal statute which
11 made New York's statutory or decisional law applicable
12 to an Indian tribe and, therefore, the governing rule of
13 law would be fashioned in the mode of the federal common
14 law, as I understand. I think I have correctly quote
15 that from the decision.

16 But we still submit that -- that anytime the
17 state sues a federally recognized Indian tribe asserting
18 these rights that it -- that's been asserted here, that
19 it -- it raises issues that are completely preempted by
20 federal law.

21 I might -- in closing, I would like to -- to
22 address one other statement that was made by -- counsel
23 cited to -- to Mescalero Apache versus Jones. In that
24 case sovereign immunity from suit was not at issue, and
25 the tribe submitted itself to the jurisdiction of the

1 court.

2 If there are no further questions, I will
3 conclude my argument at this time.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rabon.
5 Mr. Miley, do you have rebuttal?

6 REBUTTAL ARGUMENT OF DAVID A. MILEY

7 ON BEHALF OF THE PETITIONER

8 MR. MILEY: Thank you, Mr. Chief Justice.

9 All I would want to say is to sum up that I
10 believe the Caterpillar case is controlling on the well
11 pleaded complaint rule, and this should dispose of the
12 issues, but in the Mescalero case it was ruled there on
13 -- which was here on cert. from the state court of New
14 Mexico -- that the federal law -- the federal government
15 does not have exclusive jurisdiction over the tribe for
16 all purposes and, therefore, the state's revenue laws
17 can be properly applied against the tribal enterprise
18 which is -- and I believe that that case is controlling
19 because it is indistinguishable in terms of the status
20 of the land involved and the business being operated.

21 And I would -- if the Court has no other
22 questions, I'm through.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Miley.

24 The case is submitted.

25 (Thereupon, at 1:45 p.m., the case in the

1 above-entitled matter was submitted.)

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No. 88-266 - OKLAHOMA TAX COMMISSION, Petitioner V. JAN GRAHAM, ET AL.

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BY alan friedman

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